بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

# The Coherence of Sharīʿah

# Legal Maxims and Their Applications in the Ḥanbalī School

# اتساق الشريعة

# القواعد الفقهية وتطبيقاتها في المذهب الحنبلي

Hatem al-Haj

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# Introduction

بسم الله الرحمن الرحيم

In the Name of Allah, the Most Gracious, the Most Merciful

All praise is due to Allah, whom we praise, seek His help, and ask for His forgiveness. We seek refuge in Allah from the evils of our souls. Whoever Allah guides, none can misguide, and whoever He misguides, none can guide. I bear witness that there is no deity worthy of worship except Allah, and I bear witness that Muhammad is His servant and messenger. He conveyed the message from his Lord with utmost clarity and explained to us the tenets of our religion in all aspects of life. May Allah's peace and blessings be upon him, his family, his companions, and those who follow his path until the Day of Judgment.

"قلت لأبي فالفرس؟ قال: "يؤكل لحمه على حديث أسماء بنت أبي بكر: "ذبحنا فرسا على عهد النبي ﷺ فأكلنا."
قلت لأبي بوله نجس؟ قال: "قلت لك الأبوال كلها نجسة إلا ما يؤكل لحمه."

To proceed: It is mentioned in "Masā'il al-Imām Aḥmad Riwāyat Ibnīhi ʿAbdillāh": "I asked my father about the horse, and he said: 'Its meat is permissible to eat based on the ḥadīth of Asmāʾ bint Abī Bakr: We slaughtered a horse during the time of the Prophet ﷺ and ate it.' I asked my father if its urine is impure, and he replied: 'I told you [before] all urine is impure except for that of animals whose meat is permissible to eat.'" [1]

In Imām Aḥmad's statement, may Allah have mercy on him, while teaching his son, "I told you all urine...", there is a clear indication of the importance of establishing legal maxims, abstracting, and formulating universals from the particulars of jurisprudence and the necessity for those pursuing Islamic jurisprudence to give due attention to these universals or maxims.

The Ḥanbalī school became renowned for its attentiveness to transmitted reports. This did not prevent its leading authorities from developing a rigorous comprehensive approach to fiqh (Islamic jurisprudence), grounding subsidiary rulings in unifying principles, and identifying the legal bases of rulings and the connections among them. Legal maxims, universal principles, and juristic controls are found throughout the statements and writings of the school's leading authorities. A number of them also devoted independent works to this discipline or to particular branches of it. The most prominent of these efforts will be introduced in its proper place, in shāʾ Allāh.

Among the considerations that prompted me to write this book was that, among the works I had consulted, I found none that brought together the most important Islamic legal maxims (*al-qawāʿid al-fiqhiyyah*) in a clear pedagogical arrangement while also carefully delineating their applications within the Ḥanbalī madhhab (juristic school) and distinguishing its relied-upon position (*al-muʿtamad*) from the positions transmitted from Imām Aḥmad (*riwāyāt*), the juristic positions formulated within the *madhhab* (*wujūh*), extrapolated positions (*takhrījāt*), and individual scholarly selections (*ikhtiyārāt*). One of my aims from the outset was to teach this discipline to English-speaking students of Islamic knowledge. Its material therefore originated as lessons that I delivered to them in English, which I subsequently

[1] *Masā'il al-Imām Aḥmad Riwāyat Ibnīhi ʿAbdillāh*, ʿAbd Allāh ibn Aḥmad ibn Ḥanbal, 11.

expanded and refined into a book from which readers in both Arabic and English might benefit. I therefore sought to explain the most important legal maxims and to provide enough applications to clarify the meaning of each maxim (*qāʿidah*) and the methods by which the leading authorities of the *madhhab* applied it to particular cases, while also noting disagreements within and beyond the *madhhab* whenever doing so serves a substantive purpose.

If it is said, "What is the need for someone who does not understand Arabic to study such a specialized subject?" then the answer to this is fourfold:

Firstly, translating Islamic sciences into these languages showcases the beauty, wisdom, and harmony within Sharīʿah to both Muslims and non-Muslims. As Muhammad Asad, may Allah have mercy on him, said: " Islam appears to me like a perfect work of architecture. All its parts are harmoniously conceived to complement and support each other: nothing is superfluous and nothing lacking, with the result of an absolute balance and solid composure. Probably this feeling that everything in the teachings and postulates of Islam is "in its proper place," has created the strongest impression on me." [2]

"فالشريعة: عدل الله بين عباده، ورحمته بين خلقه، وظله في أرضه، وحكمته الدالة عليه وعلى صدق رسوله ﷺ أتم دِلالة وأصدقَها"

Imām Ibn al-Qayyim, may Allah have mercy on him, said: “The Sharīʿah is Allah’s justice among His servants, His mercy among His creation, His shade on His earth, and His wisdom that most perfectly and truthfully points to Him and proves the truthfulness of His Messenger ﷺ.”[3]

I found no better subject than Legal Maxims to demonstrate these meanings, which is why I chose it.

Secondly, there is an urgent need to convey this wisdom and beauty to the general public, especially in light of the numerous attacks on Sharīʿah from its enemies, the ignorance of many of its followers, the superficial and even misguided nature of many of its defenders' postulates, and the proliferation of erroneous or repulsive rhetoric on social media, to the point that some have come to believe that Islamic discourse has nothing better or deeper to offer than what they encounter.

Thirdly, studying legal maxims has great benefits in enhancing a Muslim's and a student's understanding and practice of their religion. It also broadens their horizons and develops their skills in comprehension, analysis, and decision-making, which brings significant benefits to all aspects of their life.

Fourthly, some students of Islamic knowledge who have mastered both languages benefit from studying the Islamic sciences in both. Moreover, Islamic legal maxims are among the most beneficial subjects for the *mutafaqqih*—one engaged in developing a deep understanding of *fiqh*—because they gather scattered subsidiary rulings (*furūʿ*), reveal their juristic bases (*maʾākhidh*) and interconnections, assist in mastering and recalling them, and develop the student’s juristic aptitude (*malakah fiqhiyyah*) in understanding analogous cases (*naẓāʾir*) and legal distinctions (*furūq*), and in referring subsidiary rulings to their governing universals (*kulliyyāt*).

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[2] *The Road to Makkah,* Muhammad Asad, 301.

[3] *Iʿlām al-Muwaqqiʿīn*, Ibn al-Qayyim, 3:11.

Plan of the Book

I have structured this book into four chapters.

Chapter One is devoted to preliminaries. It explains the meaning of legal maxims, their development, their status, and the benefits of studying them. It also distinguishes them from principles of Islamic legal theory (al-qawāʿid al-uṣūliyyah), principles concerning the higher objectives of the Sharīʿah (al-qawāʿid al-maqāṣidiyyah), legal distinctions (furūq), juristic controls (ḍawābiṭ), legal bases (madārik), and juristic theories (naẓariyyāt fiqhiyyah), while also clarifying the place of systematic maxim formulation in the Ḥanbalī school and the method of benefiting from maxims in understanding and organizing subsidiary rulings.

Chapter Two is devoted to the five major maxims: matters are judged by their intentions; certainty is not overruled by doubt; no harm and no reciprocation of harm; hardship begets facilitation; and custom is authoritative. In this part, I have given attention to explaining the wording of each maxim, its meaning, its evidences, and its applications in the Ḥanbalī school, while also noting exceptions or qualifications where needed.

Chapter Three is devoted to the minor maxims. These are maxims that are less universal than the major maxims, yet remain highly beneficial and widely applicable. I have arranged them in a way that brings their meanings into clearer view and reveals their connection to the chapters of fiqh, with particular attention to identifying the relied-upon position in the school when applying each maxim to subsidiary rulings.

Chapter Four is devoted to juristic controls (al-ḍawābiṭ al-fiqhiyyah). What is meant here are those formulations that regulate the issues of a particular chapter or type of fiqh, or that define a limit, measure, or legally operative description. I have not intended this part to be exhaustive. Rather, I have selected useful models that help the student grasp the nature of this discipline, the difference between a juristic control and a legal maxim, and its effect in regulating subsidiary rulings and reducing confusion.

In examining each legal maxim (*qāʿidah*), I have proceeded, according to its nature and the material available for its treatment, by presenting its best-known formulations, explaining its meaning and scope, then discussing its foundation or evidentiary basis, and finally its applications. Where feasible, I begin with the examples given in the source from which I have taken the formulation of the maxim, then explain how they fall within its scope. Insofar as the sources pertaining to the relevant chapter permit, I then carefully establish the position that became the relied-upon position (*al-muʿtamad*) among the later Ḥanbalīs by consulting the authoritative works of the *madhhab*, while distinguishing between a position transmitted from Imām Aḥmad (*riwāyah*), a juristic position formulated within the *madhhab* (*wajh*), an extrapolated position (*takhrīj*), and an individual scholarly selection (*ikhtiyār*). I also draw attention to qualifications, exceptions, and comparative juristic disagreement whenever doing so contributes to understanding the maxim or applying it to particular cases.

My purpose has not been to collect everything said concerning each maxim, but rather to present carefully edited instructional material that combines clarity of expression with accuracy of attribution and can serve as an organized introduction to this discipline.

I have relied on the Generous, the Benevolent in this endeavor, seeking His assistance, for He is the Owner of great bounty and abundant generosity. I hope that my sincere intention, if it remains pure, compensates for my weakness.

May Allah's blessings and peace be upon Muhammad. All praise is due to Allah, the Lord of the worlds.

Written by: Hatem al-Ḥaj

# The Preliminary Section on the Ten Introductory Principles of the Science of Legal Maxims

## First: The Definition of Al-Qawāʿid al-Fiqhiyyah (Legal Maxims), Their Subject Matter, and Their Relation to Other Sciences

### First: The Definition

In linguistic terms, *Al-Qawāʿid* (foundations) is the plural of *Al-Qāʿidah* (foundation), which signifies the base or the origin of something, whether it is tangible or intangible.

"والقاعدة: أصل الأس، والقواعد: الإساس، وقواعد البيت إساسه. وفي التنزيل: "وَإِذْ يَرْفَعُ إِبْرَاهِيمُ الْقَوَاعِدَ مِنَ الْبَيْتِ وَإِسْمَاعِيلُ." (...) قال الزجاج: القواعد أساطين البناء التي تعمده."

In "Lisān al-ʿArab": "*Al-Qāʿidah* (foundation) is the base or the basis, and *Al-Qawāʿid* (foundations) are the bases. The foundations of a house are its bases. In the Revelation: 'And [mention] when Ibrāhīm was raising the foundations of the House and [with him] Ismāʿīl.' [Al-Baqarah, 2:127] (…) Al-Zajjāj said: 'The foundations are the pillars of the building that support it.'" [4]

قضية كلية منطبقة على جميع جزئياتها

أمر كلي ينطبق على جزئيات كثيرة تفهم أحكامها منها

This meaning is well suited to the function of a legal maxim *(qāʿidah)* in bringing together and systematizing subsidiary rulings *(furūʿ)*, and the correspondence between it and the technical meaning is evident. The latter is: "A universal proposition that applies to all its particulars,"[5] or "A universal matter that applies to many particulars whose rulings are understood from it." [6]

حكم كلي فقهي ينطبق على جزئيات عديدة من أبواب مختلفة

When specifying the definition to *al-qāʿidah al-fiqhiyyah* (legal maxim), it is: "A universal fiqhī (legal) ruling that applies to numerous particulars from various chapters," as defined by Sheikh Saʿad al-Shithrī. He elaborates on the reasons and exclusions by saying: "It is said 'ruling' because a ruling entails affirming or negating something concerning something. It is said 'universal' to exclude particular rulings concerning individual legal matters. It is said 'legal' to exclude universal principles found in other sciences." [7] As for his saying, "from various chapters," it is to distinguish them from the juristic controls *(ḍawābiṭ)*, as will be explained.

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[4] *Lisān al-ʿArab*, Ibn Manẓūr, 3:361

[5] *Kitāb al-Taʿrīfāt*, al-Jurjānī, 171.

[6] *Sharḥ al-Kawkab al-Munīr*, Ibn al-Najjār, 1:30.

[7] *Sharḥ Manẓūmat al-Qawāʿid al-Fiqhiyyah*, al-Shithrī, 7.

العلم بالأحكام الشرعية العملية المُكتسَب من أدلتها التفصيلية

العلم بالأحكام الشرعية الفرعية عن أدلتها التفصيلية بالاستدلال

In technical terms, fiqh is "the knowledge of practical rulings of the Sharīʿah acquired from their detailed evidences"[8] or, as al-ʿallāmah Ibn al-Laḥḥām (rA) stated, "the knowledge of Sharīʿah particular rulings derived from their detailed evidences through deduction."[9] Hence, a legal maxim is a universal assertion that encompasses numerous practical Sharīʿah rulings and often points to their underlying operative basis (*manāṭ*).

اليقين لا يزول بالشك

لا يرفع يقين بشك

For application, consider the maxim "Certainty is not overruled by doubt," or "Certainty is not displaced by doubt." This maxim is applied in various instances: if someone is certain of their purity and doubts about having broken it, they are considered pure. If someone doubts whether they prayed three or four rakʿahs, they assume three. If someone doubts whether they divorced their wife, the marriage remains intact, and so on. This ruling—"Certainty is not overruled by doubt"—applies to a great number of particular cases and is therefore universal.

The universality of an established maxim is not undermined by the exclusion of certain cases[10] on account of specific evidence, the absence of a condition, the presence of an impediment, or a stronger countervailing consideration. However, the formulations recorded in works on legal maxims do not all have the same status. Some apply consistently within their scope when their conditions are fulfilled and their impediments absent; some apply predominantly; and some bring together particular cases whose ruling may be extended only on the basis of evidence. The generality of a maxim is therefore established according to its evidentiary basis and the inductive examination of its subsidiary cases, rather than merely by the generality of its wording. The coherence of Sharīʿah rulings does not entail the universal applicability of every formulation that jurists have derived from them through ijtihād (independent juristic reasoning).

The definition remains silent on whether the maxim itself is used as evidence, which is appropriate because the issue has details that do not suit definitions.

## Second: Subject Matter of Legal Maxims

Since legal maxims are universal rulings that apply to many (legal) particulars, their subject matter is the subject matter of the science of fiqh, which is "the action of the accountable person from the perspective

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[8] *al-Taʿrīfāt al-Fiqhiyyah*, al-Barkatī, 166.

[9] *al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah*, Ibn al-Laḥḥām, 17.

[10] "الأمر الكلي إذا ثبت كليًّا، فتخلّف بعض الجزئيات عن مقتضى الكلي لا يُخرجه عن كونه كليًّا"

"When a general principle is established as universal, the deviation of some particulars from the requisites of the general principle does not remove its universality." *al-Muwāfaqāt*, al-Shāṭibī, 2:83.

of the Sharīʿah rulings that pertain to it."[11] Thus, when we say "Certainty is not overruled by doubt," we are discussing the doubt of the accountable person after certainty and the resulting Sharīʿah rulings.

## Third: The Relationship of the Science of Legal Maxims to Other Legal Sciences

The science of fiqh is sought for its own sake, as it enables understanding the demands of the Lawgiver (al-Shāriʿ) from accountable individuals in their acts of worship and transactions. There are several sciences related to ʿilm al-fiqh (the science of Islamic jurisprudence), such as al-uṣūl (principles of Islamic jurisprudence), the most important of these. It is the knowledge of the general evidences of fiqh, and through it, the derived rulings are extracted from their evidences. Among its branches are al-maqāṣid (objectives of the Sharīʿah) and ʿulūm al-takhrīj (the sciences of extrapolation), the most famous of which is takhrīj al-furūʿ ʿalā al-uṣūl (extrapolation of the detailed rulings from the pertinent principles). There are also āyāt wa aḥādīth al-aḥkām (verses and ḥadīths of rulings), al-qaḍāʾ (judiciary), al-fatwā (the issuing of nonbinding legal opinions), and al-siyāsah al-sharʿiyyah (governance in accordance with the Sharīʿah). Additionally, there are al-madākhil (introductions), tārīkh al-tashrīʿ (history of legislation), ṭabaqāt al-fuqahāʾ (biographies of jurists), al-qawāʿid al-fiqhiyyah, al-furūq (distinctions), and al-naẓariyyāt (theories). So, what is the relationship between ʿilm al-qawāʿid (the science of legal maxims) and ʿilm al-fiqh and other related sciences?

The science of Islamic legal maxims (*ʿilm al-qawāʿid al-fiqhiyyah*) is among the disciplines that are ancillary and complementary to the science of *fiqh*. It is ancillary to *fiqh* in terms of its subject matter, since most of its maxims are extracted through the inductive examination (*istiqrāʾ*) of legal rulings and subsidiary cases (*furūʿ*). It complements *fiqh* in terms of its function, since it gathers what is dispersed, reveals shared meanings, assists in systematizing subsidiary rulings, and refers analogous cases (*naẓāʾir*) to unifying principles. A maxim may itself consist of a revealed text or a formulation closely derived from one, and, once established, it may in turn become an instrument for understanding *fiqh* and extrapolating rulings for analogous subsidiary cases (*takhrīj naẓāʾir al-furūʿ*), as will be explained in the discussion of the evidentiary authority of legal maxims. Some legal maxims may also prove beneficial in matters of creed (*ʿaqīdah*) and other fields. The maxim “Certainty is not overruled by doubt,” for example, constitutes a method for life.

## Difference Between Legal Maxims and Uṣūl al-Fiqh Principles

Since the primary purpose of definitions is to distinguish things from others, as established by Imām Abū al-ʿAbbās Ibn Taymiyyah (rA) it is appropriate that we do not further separate the discussion of definitions from the discussion of the differences between legal maxims and what resembles them.

The first distinction to be made is between Legal Maxims and Principles of Uṣūl al-Fiqh (uṣūliyyah principles) due to their close relationship and occasional overlap and confusion.

النهي للتحريم

The distinction becomes clear, first, by considering the subject matter and function of each discipline. *Fiqh* examines the practical Sharīʿah rulings pertaining to the acts of legally accountable persons

[11] *Tārīkh al-Tashrīʿ al-Islāmī*, al-Qaṭṭān, 183. And refer to al-Asʾilah wal-Ajwibah al-Fiqhiyyah, al-Salmān.

(*mukallafūn*), while a legal maxim gathers a class of those rulings into a universal formulation, such as the maxim "Certainty is not overruled by doubt." The science of uṣūl al-fiqh, by contrast, examines the general proofs of *fiqh*, the ways in which they signify, and the methods of deriving rulings from them. Al-Mardāwī stated: "The four that are broadly agreed upon are the Qurʾān and the Sunnah (the Prophet's normative teachings and practice)—and there is no dispute concerning these two—consensus (*ijmāʿ*), and analogical reasoning (*qiyās*)." [12] An uṣūl principle thus regulates the process of inference, as in their statement, "A prohibition indicates unlawfulness," when unaccompanied by a contextual indicator. Thus, when the Prophet ﷺ prohibited the eating of domesticated donkeys, the prohibition was not derived from the principle in isolation, but from the revealed text through the signification of prohibition established by that principle. Uṣūl scholars also examine the Sharīʿah ruling in terms of its categorical divisions and related matters, such as the obligation with an ample time window (al-wājib al-muwassaʿ) and the obligation with only enough time for its performance (*al-wājib al-muḍayyaq*).

Reflecting on the differences between uṣūliyyah principles and fiqhiyyah (legal) maxims, we find the following distinctions:

Uṣūliyyah principles generally arise from Arabic linguistic usage and sometimes from rational consideration. They establish general rulings, benefiting the mujtahid (jurist qualified to exercise ijtihād, independent legal reasoning) in how to derive Sharīʿah rulings from their evidences. Legal maxims are derived from the particular rulings of fiqh, although some are established by revealed texts, or are texts themselves. They consolidate similar particulars into a precise formulation, which helps in regulating their specific applications, and they may serve as a basis for similar applications.

Logically and practically, uṣūliyyah principles precede fiqh and its maxims derived from its issues. The latter are the threads organizing the pearls gleaned from detailed evidences through uṣūliyyah principles. These threads were derived by scholars from the inductive study of fiqh and its evidences, and by discovering recurring patterns within it. This is a functional precedence, not an invariably applicable historical judgment, for jurists practiced legal inference and established subsidiary rulings before uṣūl al-fiqh became independently codified as a discipline.

Uṣūliyyah principles are more stable and general, consistently applied, while legal maxims often have many exceptions, forming independent or subsidiary maxims, leading some scholars to consider them predominant principles, not universal.

Now that the distinction between uṣūl principles and Islamic legal maxims has become clear, it should be emphasized that the two may overlap because of the close connection between the sciences of *fiqh* and *uṣūl al-fiqh*. The same formulation may occur in both disciplines, depending on the perspective from which it is considered and the function it performs. Thus, the presumption of continuity (*istiṣḥāb*) is an uṣūl principle, while the maxim "Certainty is not overruled by doubt" is a comprehensive fiqh formulation encompassing many of its applications.

[12] al-Taḥbīr Sharḥ al-Taḥrīr, al-Mardāwī, 3:1229.

الاجتهاد لا ينقض بمثله أو بالاجتهاد

A single maxim may likewise be classified as an uṣūl principle in one respect and as a legal maxim in another. For example, “the maxim "An *ijtihād* is not overturned by another *ijtihād*" (*al-ijtihād lā yunqaḍ bi-mithlih*) is considered by the uṣūl scholar as a proof relied upon to establish that judicial rulings and juristic opinions may not be annulled, once legal consequences have become attached to them, as a matter of general and abstract principle. The jurist, by contrast, considers it insofar as it explains the ruling governing an act of a legally accountable person (*mukallaf*) and determines that ruling through the maxim.” [13]

## The Difference Between the Legal Maxims and the Principles of Maqāṣid

"ومقصود الشرع من الخلق خمسة: وهو أن يحفظ عليهم دينهم ونفسهم وعقلهم ونسلهم ومالهم، فكل ما يتضمن حفظ هذه الأصول الخمسة فهو مصلحة، وكل ما يفوت هذه الأصول فهو مفسدة ودفعها مصلحة."

Imām al-Ghazālī (rA) said: "The objectives of the Sharīʿah for the creation are five: to preserve their religion, their life, their intellect, their progeny, and their wealth. Whatever includes the preservation of these five fundamentals is a benefit (maṣlaḥah), and whatever undermines these fundamentals is a harm (mafsadah), and preventing it is a benefit.”[14]

The interests whose preservation is sought by the Sharīʿah fall into three ranks: necessities (*ḍarūriyyāt*), needs (*ḥājiyyāt*), and enhancements (*taḥsīniyyāt*).

The eminent scholar Ibn ʿĀshūr (rA) defined the general objectives (maqāṣid) by saying:

«المقاصد العامة هي المعاني والحِكم الملحوظة للشارع في جميع أصول التشريع أو معظمها، بحيث لا تختصُّ ملاحظتها بالكون في نوع خاص من أحكام الشريعة، وتدخل في هذا أوصاف الشريعة وغاياتُها العامة، والمعاني التي لا يخلو التشريع عن ملاحظتها، كما تدخل في هذا أيضاً معان من الحِكم ليست ملحوظة في سائر أنواع الأحكام، ولكنها ملحوظة في أنواع كثيرة منها»

"The general objectives (maqāṣid) are the meanings and wisdoms considered by the Lawgiver in all or most of the principles of legislation, such that their observation is not confined to a specific type of Sharīʿah rulings. This includes the characteristics of the Sharīʿah and its general aims, and the concepts that legislation does not lack observing, as well as certain wisdoms that are not considered in all types of rulings but are considered in many of them.” [15]

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[13] *al-Wajīz,* Āl Būrno, 21.

[14] *al-Mustaṣfā*, al-Ghazālī, 174.

[15] Maqāṣid al-Sharīʿah al-Islāmiyyah, Ibn ʿĀshūr, 2:121.

"هي الكيفيات المقصودة للشارع لتحقيق مقاصد الناس النافعة، أو لحفظ مصالحهم العامة في تصرّفاتهم الخاصة، كي لا يعود سعيهم في مصالحهم الخاصة بإبطال ما أسس لهم من تحصيلهم مصالحهم العامة، إبطالاً عن غفلة أو عن استزلال هوى وباطل شهوة"

He defined the specific objectives by saying: "They are the intended ways by the Lawgiver to achieve beneficial objectives for people or to preserve their general interests in their private actions, so that their pursuit of private interests does not nullify the foundations of achieving their general interests, either out of negligence or due to the lure of whims and false desires." [16]

قضية كلية تعبر عن إرادة الشارع من تشريع الأحكام، وتستفاد عن طريق الاستقراء للأحكام الشرعية.

Some contemporary scholars use the term "maqāṣid principles" (al-qawāʿid al-maqāṣidiyyah) for universal propositions that regulate the understanding of the Lawgiver's objectives and the methods by which they are observed. Shaykh Muḥammad ʿUthmān Shubayr defined them as: "A universal proposition that expresses the Lawgiver's intent from legislating rulings, derived through induction (istiqrāʾ) from Sharīʿah rulings." [17]

"إن مقصود الشارع من مشروعية الرخصة الرفق بالمكلف عن تحمل المشاق." "النظر في مآلات الأفعال معتبر مقصود شرعا." "من مقصود الشارع في الأعمال دوام المكلف عليها."

Among the maqāṣid principles is Imām al-Shāṭibī's statement: "The Lawgiver's objective in legislating concessions is to make things easier for the accountable individual and avert hardships." [18] And his statement: "Considering the outcomes of actions is an acknowledged objective of the Sharīʿah." [19] And his statement: "One of the objectives of the Lawgiver in deeds is the consistency of the accountable individual in them." [20]

الضرر يزال

The subject matter of the science of *maqāṣid al-Sharīʿah* is the wisdoms and objectives of the Sharīʿah, whereas the subject matter of *fiqh* is the acts of legally accountable persons insofar as Sharīʿah rulings pertain to them. The perspective from which the governing principles of each discipline are examined therefore differs. Nevertheless, the two clearly overlap. The maxim "Harm must be removed" is a legal maxim insofar as it gathers the rulings governing the removal of harm in subsidiary cases, and a maqāṣid principle insofar as it expresses the Lawgiver's objective of averting harm.

The trend toward distinguishing between sciences has its benefits for beginners and has prevailed for a long time. However, integrating them is of great importance for intermediate and advanced levels, a trend referred to in our times as interdisciplinarity.

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[16] Maqāṣid al-Sharīʿah al-Islāmiyyah, Ibn ʿĀshūr, 2:121.

[17] al-Qawāʿid al-Kulliyyah wa al-Ḍawābiṭ al-Fiqhiyyah fī al-Sharīʿah al-Islāmiyyah, Shubayr, 31.

[18] al-Muwāfaqāt, al-Shāṭibī, 1:521

[19] al-Muwāfaqāt, al-Shāṭibī, 5:177

[20] al-Muwāfaqāt, al-Shāṭibī, 2:404

## The Difference Between Legal Maxims and Theories

Al-Naẓariyyah al-Fiqhiyyah (legal theory) is the philosophy of legislation within a specific area or field. It is a type of theoretical framework for a field with a broad shared concept, such as contracts, ownership, legal capacity, liability, evidence, and jihād (striving in Allah's cause, including armed struggle in its legal context). It discusses its philosophy, principles, objectives, essence, pillars, conditions, divisions, and the implications of faults within it.

However, there are similarities between legal maxims and theories. The latter term is modern and was adopted by contemporary scholars from legal theories in the West. Some of our jurists, like Shaykh Abu Zahra, considered the similarities, stating that "legal maxims can be referred to as the general theories of Islamic jurisprudence."[21]

Others, like Shaykh Mustafa al-Zarqa, focused on the differences, saying, "By legal theories, we mean those major constitutions and concepts, each of which separately forms a substantive legal system, such as the concept of ownership and its causes, the concept of the contract and its consequences … These theories are different from the ninety-nine universal maxims with which the Ottoman Code of Islamic Laws (Mecelle-i Ahkâm-ı Adliye) was started. Those maxims are but guidelines and juristic principles considered in deriving rulings within the limits of those major theories. For example, the maxim 'consideration in contracts is given to objectives and meanings' is merely a guideline in a specific aspect of the domain of the general theory of the contract."[22]

In summary, a legal maxim inherently contains universal juristic rulings that apply to specific rulings falling under it. Many maxims related to customs, for instance, fall under the general theory of customs, which explores the philosophy of this concept, its principles, objectives, essence, pillars, conditions, divisions, and exceptions. Thus, each theory includes a set of legal maxims, among other things. Therefore, it can be said that maxims are "a link between rulings and theories."[23]

On the other hand, a single maxim, unlike a theory, has applications across various fields. For instance, the maxim "Certainty is not overruled by doubt" has applications in the chapters of worship, transactions, marriage, judiciary, and offenses against persons.

## The Difference Between Maxims and Distinctions

"من النظائر ما يخالف نظائره في الحكم لمدرك خاص به، وهو الفن المسمى بالفروق، الذي يذكر فيه الفرق بين النظائر المتحدة تصويرًا ومعنىً، المختلفة حكمًا وعلةً."

Imām Al-Suyūṭī (rA) said: "Among the analogues, there are those that differ in ruling due to a specific reason unique to them. This is the science known as distinctions (al-Furūq), which discusses the difference between analogues that are identical in depiction and meaning but differ in ruling and legal rationale."[24]

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[21] *al-Wajīz,* Āl Būrno, 89.

[22] *al-Wajīz,* Āl Būrno, 89.

[23] al-Qawāʿid al-Fiqhiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arbaʿah, Muḥammad al-Zuḥaylī, 1:26.

[24] al-Ashbāh wa al-Naẓāʾir, al-Suyūṭī, 7.

Legal Distinctions (al-furūq al-fiqhiyyah), therefore, examine the reasons for the divergence between particulars that are similar in certain aspects, and which might initially be thought to share the same ruling. In contrast, legal maxims investigate the common link among branches and particulars that share the same ruling, framing them in a maxim that indicates this link, which is often the basis of the ruling.

For application, here is an example of distinctions from the book al-Furūq by the great Ḥanbalī scholar Ibn Sunayna, the author of "al-Mustawʿib":

"Section: If one is unsure of the qiblah (direction faced in prayer) during travel, it suffices for him to pray once based on his best judgment and he is not required to pray in four directions. However, if his pure garments become indistinguishable from his impure garments, it does not suffice to pray in one of them based on judgment. Rather, he is required to pray in each garment after another according to the number of impure garments and an additional prayer. The distinction between them is that his obligation regarding the Qiblah is exercising best judgment, not the actual facing of the Qiblah. This is evidenced by the fact that if he prays based on judgment in a direction and it turns out he was wrong, he is not required to repeat the prayer. But if he prays without exercising best judgment and happens to face the Qiblah, his prayer is not valid, and he must repeat it... As for the garments, his obligation is to perform the prayer in a garment that is certainly pure when he has the ability to do so. He can do this by repeating the prayer as mentioned, so it is required of him to achieve certainty in performing his obligation, similar to when he owes one of the prayers of a particular day but does not know which prayer it is. He is required to perform all the prayers of that day to achieve certainty in fulfilling his obligation."[25]

Among those Imāms who wrote on Legal Distinctions are: Abū Muḥammad ʿAbd Allāh ibn Yūsuf al-Juwaynī (d. 438 AH), Ibn Sunayna al-Sāmurrī al-Ḥanbalī (d. 616 AH), and al-Qarāfī al-Mālikī (d. 684 AH), whose book is the most famous on Distinctions.

## Maxims, Parallels, and Analogues

"المماثلة تقتضي المساواة من كل وجه، والمشابهة تقتضي الاشتراك في أكثر الوجوه لا كلها، والمناظرة تكفي في بعض الوجوه ولو وجها واحدا، يقال: هذا نظير هذا في كذا، وإن خالفه في سائر جهاته."

Imām Al-Suyūṭī (rA) said: "Al-mumāthalah (similarity) implies equality in every aspect. Al-mushābahah (resemblance) implies sharing most but not all aspects. Al-munāẓarah (correspondence) suffices in some aspects, even if it is just one. It is said: 'This is analogous to that in such-and-such,' even if it differs in all other aspects."[26]

The relationship between these terms and legal maxims is clear. Legal maxims encompass issues that share the same ruling, whether they resemble each other in every aspect or in the aspect(s) that influence the ruling. Therefore, some books on legal maxims are named al-Ashbāh wa al-Naẓāʾir (Parallels and Analogues), such as the books by Imām al-Suyūṭī and Imām Ibn Nujaym.

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[25] *al-Furūq*, Ibn Sunayna, 1:184.

[26] *al-Ḥāwī li-l-Fatāwī*, al-Suyūṭī, 2:328.

However, analogues do not always share the same ruling. The term often applies to things that are similar in one aspect but different in others, including the ruling. For example, in al-Ashbāh wa al-Naẓāʾir by al-Suyūṭī, he states: "Building on the actions of others in acts of worship has analogues. Among them: the adhān (call to prayer), where the sounder view is that it is not permissible to build on another's adhān; the khutbah (sermon), where the sounder view is that it is permissible to build on another's khutbah; [leading] the prayer, where the correct view is that it is permissible, which is called al-istikhlāf (substitution); and Ḥajj, where the sounder view is that it is not permissible. There are two opinions on each of these four issues."[27]

Here, the analogues are closer to distinctions than to maxims. Perhaps this is why these books are named al-Ashbāh wa al-Naẓāʾir, to encompass issues that correspond to one another in one respect but do not share the same ruling.

## The Difference Between a Maxim and a Legal Basis

Imām al-Mardāwī (rA) said:

والقاعدة: هي الأمر الكلي التي تنطبق على جزئيات كثيرة تفهم أحكامها منها. فمنها: ما لا يختص، بباب كقولنا (اليقين لا يرفع بالشك) . ومنها: ما يختص، كقولنا: (كل كفارة سببها معصية فهي على الفور) والغالب فيما يختص بباب وقصد به نظم صور متشابهة يسمى ضابطا.

وإن شئت قلت: ما عم صورا، فإن كان المقصود من ذكر القدر المشترك الذي به اشتركت الصور في الحكم فهو المدرك، وإلا فإن كان القصد ضبط تلك الصور بنوع من أنواع الضبط من غير نظر في مأخذها فهو الضابط وإلا فهو القاعدة.

"A maxim is a universal principle that applies to many particulars, from which their rulings are understood. Some do not belong to a specific chapter, such as 'Certainty is not overruled by doubt,' and some do belong to a specific chapter, such as 'Every expiation caused by a sin is immediate.' Predominantly, those that belong to a specific chapter and are intended to organize similar cases are called "controls". If you wish, you could say: what covers multiple cases. If the purpose of mentioning it is the common factor that causes the cases to share the same ruling, it is called the 'legal basis' (al-mudrak). Otherwise, if the purpose is to regulate those cases without considering their basis, it is called the 'control,' otherwise it is the 'maxim.'"[28]

كل ما جاز بيعه جاز رهنه

The explanation of the aforementioned is that legal bases (madārik al-sharʿ) are "the loci from which legal rulings are sought."[29] A legal maxim (*qāʿidah*) or juristic control (*ḍābiṭ*) may be formulated in a

[27] al-Ashbāh wa al-Naẓāʾir, al-Suyūṭī, 534.

[28] al-Taḥbīr Sharḥ al-Taḥrīr, al-Mardāwī, 1:125.

[29] "Legal bases (madārik al-sharʿ): the sources from which rulings are derived, which are the textual evidence and juristic reasoning. Jurists say in the singular form "madrak" with a short vowel 'a' on the mīm, although there is no basis for this derivation. The scholars have stated that the pattern should be "mufʿal" with a short vowel 'u' on the mīm from "faʿala," except for some words that deviate from this rule and have been accepted based on usage. They did not

manner that expressly states the legal basis (*mudrak*) of the ruling, meaning the common factor by virtue of which the subsidiary cases share that ruling. Alternatively, the formulation may merely collect and regulate the cases without identifying the juristic basis (*maʾkhadh*) of the ruling. An example of the former is the maxim "Matters are judged by their intentions." It establishes the legal relevance of intent in acts of worship and legal dispositions and reveals the common meaning uniting the cases in which intention is legally considered in prayer, fasting, charity, pilgrimage, and ablution. This principle is established by the Sharīʿah proofs, foremost among them the Prophet's ﷺ statement, "Actions are only by intentions"; indeed, the wording of the ḥadīth itself is sometimes adopted as the formulation of the maxim. An example of the latter is the statement, "Whatever may validly be sold may validly be pledged as collateral." This formulation regulates what may validly be pledged, but it is not itself the legal basis or proof of the ruling, although it points to that basis. The juristic basis for the validity of the pledge is that the asset is capable of being sold so that the debt may be satisfied from its price when payment is otherwise unavailable, which is the purpose of the pledge, not that the validity of sale is the effective cause (*ʿillah*) of the validity of the pledge or its proof. Nevertheless, many legal maxims and juristic controls expressly state, or at least indicate, the common meaning linking their subsidiary cases.

## The Difference Between a Legal Maxim (Qāʿidah) and a Juristic Control (Ḍābiṭ)

«والقاعدة في الاصطلاح بمعنى الضابط، وهي الأمر الكلي المنطبق على جميع جزئياته.»

Earlier scholars did not apply a consistent distinction between the two terms, and they frequently used them in closely related senses. The eminent scholar Al-Fayyūmī said: "In terminology, a maxim (qāʿidah) means a control (ḍābiṭ), which is a universal principle that applies to all its particulars."[30]

However, as sciences grow and develop, their terminology increases and becomes distinct. Therefore, later scholars wanted to distinguish between the two by defining a maxim as the control that applies to numerous rulings across various chapters, and a control as the maxim that pertains to a single chapter or field.

Imām al-Mardāwī (rA) said:

"والقاعدة: ... فمنها: ما لا يختص، بباب كقولنا (اليقين لا يرفع بالشك) . ومنها: ما يختص، كقولنا: (كل كفارة سببها معصية فهي على الفور) والغالب فيما يختص بباب وقصد به نظم صور متشابهة يسمى ضابطا."

"A maxim is ... Some do not belong to a specific chapter, such as 'Certainty is not overruled by doubt,' and some do belong to a specific chapter, such as 'Every expiation caused by a sin is immediate.' Predominantly, those that belong to a specific chapter and are intended to organize similar cases are called "controls"."[31]

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mention "madrak" as one of the exceptions to the rule; thus, it is more appropriate to adhere to the regular linguistic principles (qiyās) until there is evidence to the contrary." *al-Miṣbāḥ al-Munīr*, al-Fayūmī, 1:192.

[30] *al-Miṣbāḥ al-Munīr*, al-Fayūmī, 2:510.

[31] al-Taḥbīr Sharḥ al-Taḥrīr, al-Mardāwī, 1:125.

The estimation in distinguishing between them may vary. For example, Imām al-Mardāwī (rA) said: "Some are specific, like our saying 'Every expiation caused by a sin is immediate,'"[32] which is acceptable considering expiations as one chapter. Otherwise, it can be considered a maxim, considering expiations are included in various chapters.

" ضابط ذلك أن ما أبطل عمده كركوع زائد أو سجود سجد لسهوه وما لا كالالتفات والخطوتين لم يسجد لسهوه ولا لعمده لعدم ورود السجود له".

More clearly for a control is the control for the prostration of forgetfulness (sujūd al-sahw). Imām Al-Buhūtī said: "The control for that is whatever invalidates it if done intentionally, like an extra bowing or prostration, necessitates a prostration for forgetfulness. What does not, like turning the head or taking two steps, one does not prostrate for it, whether done forgetfully or intentionally, as there is no evidence for a prostration for it."[33]

"وضابط الإجزاء الذي لا يختلف أن يكون انحناؤه إلى الركوع المعتدل أقرب منه إلى القيام المعتدل."

For the control of sufficient bowing (rukūʿ), al-Mardāwī said: "Al-Majd said: 'The consistent control for sufficient bowing is that his bending is closer to the proper bowing than to standing upright.'"[34]

للأكثر حكم الكل

ما قارب الشيء يعطى حكمه

Is this latter one a universal principle that applies to many particulars and regulates them? It is perhaps closer to a specific ruling termed a control linguistically because it regulates the particular issue for the jurist without detailed evidence on it. This control itself might be a branch of the maxim "The majority assumes the ruling of the whole" or "What approximates something assumes its ruling."

## Sections of Islamic Legal Maxims and Their Topics

### First: Sections of the Science of Legal Maxims

Defining through categorization and exemplification is important and beneficial, especially for beginners. Let us explore the legal maxims by examining their categories and practical examples.

We have previously noted al-Mardāwī's distinction between a legal maxim (*qāʿidah*) and a control (*ḍābiṭ*). It became evident that a *qāʿidah* is more general and encompasses numerous rulings across various chapters, but these maxims differ in their comprehensiveness, consensus on their content, method of utilization, and scope.

The Categories of Legal Maxims in Terms of Comprehensiveness

Maxims are divided based on comprehensiveness into major and minor ones.

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[32] al-Taḥbīr Sharḥ al-Taḥrīr, al-Mardāwī, 1:125.

[33] *Kashshāf al-Qināʿ,* al-Buhūtī, 1:145.

[34] *al-Inṣāf,* al-Mardāwī, 3:480.

The major maxims, of which there are five, pervade the entirety of Islamic jurisprudence:

«الأمور بمقاصدها»، «اليقين لا يزول بالشك»، «الضرر يزال»، «المشقة تجلب التيسير»، «العادة محكمة»، «الإعمال أولى من الإهمال».

“Matters are judged by their intentions”, "Certainty is not overruled by doubt”, "Harm is to be removed", Hardship begets facilitation", "Custom is authoritative". Some scholars add another maxim: "Application is preferred to dismissal".

العبرة في العقود للمقاصد والمعاني لا للألفاظ والمباني

الضرورة تقدر بقدرها

التابع تابع

الاجتهاد لا ينقض بالاجتهاد

Minor maxims, some of which al-Ṭūfī may have collected in his Al-Qawāʿid al-Ṣughrā, are called “non-major maxims” by most scholars. Calling them minor does not diminish their importance: they too are significant universal principles, although they vary among themselves. Examples include: "Consideration in contracts is given to intentions and meanings, not words and forms", "Necessity is judged by its extent", "The subsidiary follows the principal", "Ijtihad is not invalidated by another Ijtihad".

These minor maxims either stand independently, such as "The subsidiary follows the principal" and "Ijtihad is not invalidated by another Ijtihad", or are branches of a major maxim, like "Consideration in contracts is given to intentions and meanings, not words and forms", which is a subsidiary of "Matters are judged by their intentions", and "Necessity is judged by its extent", a subsidiary of "Hardship begets facilitation".

Categories of Legal Maxims Based on Consensus on Their Content

Maxims are also divided based on the consensus on their content:

1. Agreed upon maxims: These are universally accepted across all madhhabs, such as the five major maxims and many others.

الرخص لا تُنَاط بالمعاصي

القسمة؛ هل هي إفراز أو بيع

2. Disputed maxims: For example, "Consideration in contracts is given to intentions and meanings, not words and forms" is agreed upon by the Ḥanafīs and Mālikīs, but has nuances among the Shāfiʿīs and Ḥanbalīs, with the Ḥanbalīs more in agreement with the Ḥanafīs and Mālikīs than the Shāfiʿīs, who generally prioritize forms. Another example is "Concessions are not applicable to sinful actions," common among the Shāfiʿīs and Ḥanbalīs, unlike the Ḥanafīs, with nuances among the Mālikīs. Some maxims are even disputed within a single school, often presented as a

query, such as in the nineteenth issue in the benefits appended to Ibn Rajab's collection of maxims: "Is division an allocation or a sale?" which is a point of contention among Ḥanbalīs.

Categories of Legal Maxims Based on Their Evidence and Source

Maxims are classified based on their evidence and source into:

"الأعمال بالنيات" و "لا ضرر ولا ضرار" و «الخراج بالضمان»

1. Textual: These are directly supported by scriptural texts from the Qurʾān or Sunnah, like "Actions are judged by intentions", "No harm and no reciprocation of harm", and "Profit follows liability". The maxim may be the exact text or a rephrasing of it.
2. Derived: These are inferred by scholars from the evidences of Sharīʿah, such as "Certainty is not overruled by doubt," or extracted from the inductive examination of legal cases, which might be specific to a particular school and expressed as "The principle according to us or according to our Imāms…"

Categories of Legal Maxims Based on Their Field of Application

Maxims may also be classified based on their field of application. Some contemporary scholars dedicate writings to legal maxims specific to a certain field or concept, such as maxims related to financial transactions, medical jurisprudence, or facilitation in Sharīʿah.

## Second: Issues of the Science of Islamic Legal Maxims

The issues of this noble science, as stated by Sheikh Muḥammad al-Zuḥaylī, are: "Its propositions, i.e., the maxims that investigate the conditions of subsidiary cases (furūʿ) in terms of their application and utilization."[35] The majority of this book is dedicated to explaining these maxims, defining their meanings, their evidences, conditions, branches, and exceptions.

"The Damascene Ḥanbalī Sheikh Muḥammad Ḥasan al-Shaṭṭī, who passed away in 1307 AH, states in the introduction to (*Tawfīq al-Mawādd al-Niẓāmiyyah li-Aḥkām al-Sharīʿah al-Muḥammadiyyah*):

"إن المحققين من الفقهاء قد أرجعوا المسائل الفقهية إلى قواعد كلية، كل منها ضابط وجامع لمسائل كثيرة، وقد أوصلها فقهاء الحنابلة إلى نحو ثمان مئة قاعدة"

'The verifying scholars among the jurists have distilled the jurisprudential issues into universal maxims, each of which encompasses and regulates numerous issues. The Ḥanbalī jurists brought their number to approximately eight hundred maxims.'"[36]

Know that the number of legal maxims differs among scholars due to various considerations and perspectives. For example, in the *Maʿlamat Zāyid* they selected 3,000 maxims from among 100,000 they had compiled, while some scholars do not list more than twenty. Others have said seventy, or one hundred, or two hundred. The reason for this divergence lies in their differing views on what deserves to be called a maxim. Comprehensive collection has its place, but excessive expansion may be harmful, as

[35] al-Qawāʿid al-Fiqhiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arbaʿah, Muḥammad al-Zuḥaylī, 1:57.

[36] al-Qawāʿid al-Fiqhiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arbaʿah, Muḥammad al-Zuḥaylī, 1:44.

it can scatter the mind. A maxim whose exceptions exceed its applications is not a maxim at all—and not even one whose exceptions approach its applications. Rather, its applications must vastly outnumber its exceptions, with the latter being justified in a way that does not undermine the maxim itself.

## Third: Sources of Legal Maxims

We mentioned in the classification of maxims that they are divided based on their evidence and source into textual and derived maxims.

The sources of legal maxims are the Qurʾān, the Sunnah, consensus (ijmāʿ), language, reason, the statements of the Companions, and the sayings of mujtahid jurists based on the aforementioned sources.

Examples of maxims that are themselves texts from the Qurʾān and Sunnah or adapted formulations:

"إِنَّمَا الْأَعْمَالُ بِالنِّيَّاتِ" أو "الأمور بمقاصدها"

- "Actions are but by intentions"[37] or "Matters are judged by their intentions"

" لَا ضَرَرَ ولَا ضِرَارَ" أو "الضرر يزال"

- "No harm and no reciprocation of harm"[38] or "Harm is to be removed"

"الخَرَاجُ بالضَّمَانِ" أو "الغنم بالغرم"

- "Profit follows liability"[39] or "Gain is linked to [the risk of] loss"

"البينةُ على المدَّعِي واليمينُ على من أَنكَر"

- "The burden of proof is on the claimant and the oath is on the denier."[40]

Examples of maxims indicated by texts from the Qurʾān and Sunnah or inferred from multiple Sharīʿah evidences:

"المشقة تجلب التيسير" "وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ " [الحج : ٧٨]

- "Hardship begets facilitation": Indicated by "And He has not placed upon you in the religion any difficulty" (Qurʾān 22:78) and many other texts.

"اليقين لا يزول بالشك" "إِنَّ الظَّنَّ لَا يُغْنِي مِنَ الْحَقِّ شَيْئًا" [يونس: 36] "إذا وجَدَ أَحَدُكُمْ في بَطْنِهِ شيئًا، فأشْكَلَ عليه أخَرَجَ منه شيءٌ أمْ لا، فلا يَخْرُجَنَّ مِنَ المَسْجِدِ حتَّى يَسْمع صَوْتًا، أوْ يَجِدَ رِيحًا." (م)

- "Certainty is not overruled by doubt": Indicated by "Indeed, assumption avails not against the truth at all" (Qurʾān 10:36) and ḥadīths, including: "If one of you finds something in his stomach and is unsure whether something has come out of him or not, he should not leave the mosque until he hears a sound or smells an odor." (Muslim)

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[37] Agreed upon.

[38] Narrated by Ibn Mājah with a good chain of narration.

[39] Reported by Abū Dāwūd, al-Tirmidhī, and al-Nasāʾī.

[40] Reported by al-Bayhaqī in "Al-Sunan al-Kubrā".

Maxims Sourced from Consensus (Ijmāʿ):

«الاجتهاد لا ينقض بمثله»

- "An *ijtihād* is not overturned by another *ijtihād.*"

"كل ماء تغير طعمه أو لونه أو ريحه بنجاسة فهو نجس."

- "Any water whose taste, color, or smell changes due to impurity is impure."

Maxims Sourced from Reason:

"إعمال الكلام أولى من إهماله"

- "Application of speech is preferred to its dismissal"

"إذا زال المانع عاد الممنوع"

- "When the restriction is removed, the restricted returns"

"يثبت الحكم بثبوت السبب"

- "A ruling is established by the establishment of its cause"

Maxims Sourced from Language:

"السؤال كالمعاد في الجواب"

- "The question is treated as repeated in the answer"[41]

"المطلق يجري على إطلاقه ما لم يقم دليل التقييد."

- "The unqualified expression is carried upon its unqualified sense unless evidence establishes a qualification"

Most maxims are supported by both transmitted and rational evidences or multiple Sharīʿah evidences, as will be detailed in the discussion of individual maxims.

Maxims Derived from the Statements of the Companions:

"مقاطع الحقوق عند الشروط" "المسلمون عند شروطهم"

- The statement of ʿUmar (rAa): "The settlement of rights is subject to the conditions," though its basis is in the saying of the Prophet ﷺ: "Muslims are bound by their conditions."

Maxims Derived from the Sayings of Mujtahid Jurists:

"كل فُرقة كانت من قِبَل الرجل، فهي طلاق"

- The saying of Ibrāhīm al-Nakhaʿī: "Every separation initiated by the man is a divorce"

[41] *Kashshāf al-Qināʿ*, al-Buhūtī, 12:160.

"الأجر والضمان لا يجتمعان"

- The saying of Muḥammad ibn al-Ḥasan al-Shaybānī: "Hire charges and liability do not coexist"

"لا ينسب إلى ساكت قول" "إذا ضاق الأمر اتسع"

- The saying of al-Shāfiʿī: "No statement is attributed to one who remains silent," and "When circumstances become constraining, legal latitude expands"

"لا يترك حق لباطل" "الفريضة من جميع المال والتطوع من ثلثه" "الأبوال كلها نجسة إلا ما يؤكل لحمه."

- The saying of Aḥmad: "A right is not abandoned for a falsehood," [42] and his statement regarding someone who demands in their will that zakāh (the obligatory alms) be paid or mandatory pilgrimage be performed (on their behalf) and then dies: "The obligatory is taken from the entire estate, while the voluntary is taken from one-third of it,"[43] and "All urine is impure except that of animals whose meat is eaten"[44]

Some maxims are derived by jurists from the extensive study and inductive examination of a large number of legal issues that share a common underlying relationship. They formulated these underlying relationships in precise expressions to encapsulate and regulate them. Here are some examples:

"في العبادات الواقعة على وجه محرَّم: إن كان التَّحريم عائدًا إلى ذات العبادة على وجه مختصٍّ بها، لم يصحَّ. وإن كان عائداً إلى شرطها؛ فإن كان على وجه يختصُّ بها: فكذلك أيضاً، وإن كان لا يختصُّ بها؛ ففي الصِّحَّة روايتان: أشهرهما عدمها"

- Ibn Rajab's ninth maxim: "In acts of worship conducted in a prohibited manner, if the prohibition pertains to the essence of the act specifically, it is invalid. If it pertains to a condition of the act specific to it, it is also invalid. If it pertains to a condition of the act not specific to it,[45] there are two opinions, the more famous being its invalidity."[46]

"كل عبادة أفسدها الوطء أفسدها الإنزال عن مباشرة كالصوم والاعتكاف"

- "Every act of worship invalidated by intercourse is also invalidated by ejaculation from direct contact, such as fasting and iʿtikāf (retreat in the masjid)."[47]

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[42] I said to Ahmad, "I see a man who has torn his garment out of grief for the deceased. Should I console him?" He said, "A right is not abandoned for a falsehood." *Masāʾil al-Imām Aḥmad, as narrated by Abū Dāwūd al-Sijistānī*, Abū Dāwūd al-Sijistānī, 190.

[43] *Masāʾil al-Imām Aḥmad, as narrated by Abī al-Faḍl Ṣāliḥ*, Abū al-Faḍl Ṣāliḥ (203 AH - 266 AH), edited and annotated by Dr. Faḍl al-Raḥmān Dīn Muḥammad, 1st ed. (Delhi, India: al-Dār al-ʿIlmiyyah, 1408 AH / 1988 CE), vol. 2, p. 339.

[44] Masā'il al-Imām Aḥmad, as narrated by his son, ʿAbdullāh, 11.

[45] Example of conditions specific to prayer: Facing other than the Qiblah. Example of conditions not specific to prayer: Performing ablution with usurped water. The use of usurped water is prohibited in ablution and in other uses as well.

[46] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:90.

[47] *Sharḥ ʿUmdat al-Fiqh*, Taqī al-Dīn Ibn Taymiyyah, 4:656.

"وكل دية تحملها العاقلة، تجب مؤجلة؛ وما لا تحمله العاقلة يجب حالا."

- "Every blood-money payment (diyah) borne by the ʿāqilah (the male relatives of the offender responsible for the blood money) is due over time; what is not borne by the ʿāqilah is due immediately."[48]

Ultimately, the validity of these maxims returns to the Sharīʿah evidences upon which they are based.

## The Emergence of the Legal Maxims and their Development

Imām Al-Mardāwī (d. 885) said:

"The eminent scholar Abū Al-Ṭāhir Al-Dabbās Al-Ḥanafī [d. ~ 340], the Imām of the Ḥanafīs beyond the river (Transoxiana), distilled the entire school of Abū Ḥanīfah (rA) into seventeen maxims, which he was reluctant to teach.

When this reached the distinguished Imām, Qāḍī Al-Ḥusayn [d. 462], one of the leading scholars of the Shāfiʿīs, he distilled the entire school of Al-Shāfiʿī into four maxims, which are: “Certainty is not overruled by doubt”, “Harm is to be removed”, “Hardship begets facilitation”, and “Custom is authoritative”.

Abū Al-Maʿālī [d. 478] said: 'It is questionable whether these four are the pillars of jurisprudence, as most of it does not refer back to them except through intermediaries and with considerable effort.'

Ḥāfiẓ Al-ʿAlā’ī [d. 761] said: “I have seen in what I noted down in Cairo, from some scholars, that a fifth maxim was added to the four, which is: “Matters are judged by their intentions”, based on the ḥadīth: "Actions are but by intentions." He said: ‘Islam is built upon five, and jurisprudence upon five,’ and it is a good [opinion].”[49]

This quote briefly summarizes the history of reaching the five major maxims. However, in our previous discussion about the derivation of maxims, we clarified that many of them are texts from revelation and other formulations of it, some taken from the sayings of the Companions, the Successors, and the mujtahid Imāms. Therefore, we must distinguish here, as we do in principles of jurisprudence, between the origin of knowledge and its development, keeping in mind that legal maxims developed more slowly than principles of jurisprudence because they are subsequent to fiqh, not prior.

The eminent scholar Ibn Badrān (d. 1346) has spoken about the knowledge of legal maxims among the Ḥanbalīs, which we present here and then comment on. He (rA) said:

“As for maxims, it is to take the foundational principle and then derive from it the branches (detailed rulings) that relate to it. We have seen a book in the public library in Damascus written by its author, and on its back in the handwriting of Yūsuf Ibn ʿAbd Al-Hādī [d. 909], 'it is said to be by Ibn Qāḍī Al-Jabal [d. 771].' The method of this book is to mention the maxim first. For example, he says: "Al-jāʾiz (the revocable) and al-lāzim (the irrevocable)," and then derives from this principle by saying: "Al-wakālah (agency) is a legal conduct (taṣarruf) by authorization, and it is known that it is not binding... "

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[48] *al-Mughnī*, Ibn Qudāmah, 12:22.

[49] al-Taḥbīr Sharḥ al-Taḥrīr, al-Mardāwī, 8:3921.

Imām Sulaymān Ibn ʿAbd Al-Qawī Al-Ṭūfī Al-Ḥanbalī, who died in the year seven hundred and ten [716], has two books in this type, one called the major maxims and the other the minor maxims.

Ḥāfiẓ Zayn Al-Dīn ʿAbd Al-Raḥmān Ibn Aḥmad Ibn Rajab Al-Baghdādī, then Al-Dimashqī, who died in the year seven hundred and ninety-five [795], has a book on maxims indicating a complete knowledge of the school. The author of Kashf Al-Ẓunūn said: "It is a beneficial book, one of the wonders of the age, to the extent that it was deemed by some too great for him to have written. They claimed that Ibn Rajab found scattered principles of Shaykh Al-Islām Ibn Taymiyyah [d. 728] and compiled them. This is not the case; rather, he was above that." Quote ended.

Among this type are the maxims of ʿAlā' Al-Dīn ʿAlī Ibn ʿAbbās Al-Baʿlī Al-Ḥanbalī, known as Ibn Al-Laḥḥām, who died in the year eight hundred and three [803]. They are concise, very beneficial principles, and at the beginning, there are about nine folios covering the topics of this book arranged according to the chapters of jurisprudence, seen in the public library in Damascus."[50]

I said, the books of Al-Ṭūfī on principles, I have not found any of them in print or manuscript, and the book of Ibn Al-Laḥḥām is mostly on foundational principles.

We add to the books mentioned by Ibn Badrān:

Perhaps 'al-Furūq' (the distinctions) of Imām Ibn Sunayna was the first writing in this direction, even if it is in the field of distinctions (al-Furūq) rather than maxims (al-Qawāʿid).

العقود تنعقد بكل ما دل على مقصودها، من قول أو فعل

الأصل في العقود رضا المتعاقدين

إذا تعذر جمع الواجبين قدم أرجحهما، وسقط الآخر.

There is also the book of legal principles and maxims known as Al-Qawāʿid Al-Nūrāniyyah by Imām Ibn Taymiyyah, which is a precious and unique book on the comprehensive principles of the jurisprudence of the Imāms and their methods in jurisprudential craft in various chapters and issues. However, it is not specifically focused on legal maxims in their well-known technical sense, even though it contains many of them, such as "Contracts are concluded by whatever indicates their purpose, be it word or action"[51] and "The basis in contracts is the consent of the contracting parties"[52] and "If the combination of two obligations is not possible, the greater one is given precedence, and the other is waived."[53]

There are also the "Universal Maxims and Juristic Controls" by Yūsuf Ibn ʿAbd Al-Hādī, which we mention here because of its name, and because some consider it among the books of legal maxims. It is a delightful book on categories, conditions, cases, and states in various issues, and it includes universal formulations that may properly be classified as legal maxims or juristic controls. Most of its contents,

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[50] al-Madkhal ilā Madhhab al-Imām Aḥmad ibn Ḥanbal, Ibn Badrān, 457.

[51] al-Qawāʿid al-Nūrāniyyah al-Fiqhiyyah, Taqī al-Dīn Ibn Taymiyyah, 155.

[52] al-Qawāʿid al-Nūrāniyyah al-Fiqhiyyah, Taqī al-Dīn Ibn Taymiyyah, 280.

[53] al-Qawāʿid al-Nūrāniyyah al-Fiqhiyyah, Taqī al-Dīn Ibn Taymiyyah, 121.

however, are closer to classifications and chapter-specific juristic controls than to universal legal maxims in their established technical sense.

As for notable contemporary scholars, Al-Siʿdī (d. 1376) and Ibn ʿUthaymīn (d. 1421) have beneficial poetic compositions and works in this noble science. There are also several valuable contemporary writings by living Ḥanbalī scholars, from which I have benefited. However, I have not found anything that collects the major and minor subsidiary and independent maxims in one of the customary orders of this science, with mention of applications from the dominant positions in the school, which is needed by the student of knowledge.

## Fifth: The Benefits, Authority, and Ruling on Learning Islamic Legal Maxims

### First: The Benefits and Merits

The eminent scholar al-Siʿdī (rA) said:

فاحرص على فهمك للقواعـــد - جامعة المسائل الشـــوارد

"Strive to understand the comprehensive maxims - which hold together the scattered issues."

We previously mentioned the statement of Imām Ahmad to his son ʿAbd Allāh, quoted in the introduction: "I told you [before] all urine is impure except for that of animals whose meat is permissible to eat." [54]

This benefit of the legal maxims is likely the first thing that comes to mind when contemplating their benefits. The importance of this to the student of fiqh is evident. Those who do not refer the hundreds of thousands of specific legal issues back to overarching universals that govern them will find it impossible to grasp the particulars fully and will fall into confusion and contradiction.

Here are some words by Imām al-Qarāfī that distinguish these maxims from the principles of jurisprudence and highlight their elevated status and significant importance. I disliked summarizing them, so I present them to you in full:

"To proceed: Indeed, the exalted Muhammadan Sharīʿah, may Allah increase its nobility and elevate its status, comprises both principles and branches. Its principles are of two types:

The first is known as the principles of jurisprudence, which primarily consist of the rules governing the legal rulings, derived from Arabic expressions specifically, and whatever applies to them, including issues such as abrogation (naskh), preference (tarjīḥ)[55], like “Commands imply obligation, and prohibitions imply unlawfulness”, the specific terms indicating generality, and the like. Nothing deviates from this pattern except the authority of analogy, solitary reports (akhbār al-āḥād), and the qualifications of mujtahids.

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[54] Masā'il al-Imām Aḥmad Riwāyat Ibnīhi ʿAbdullāh, Aḥmad ibn Ḥanbal, 11.

[55] Tarjīḥ, in Islamic jurisprudence, is the process of evaluating and weighing different pieces of evidence or arguments to determine which is stronger or more valid.

وهذه القواعد مهمة في الفقه عظيمة النفع وبقدر الإحاطة بها يعظم قدر الفقيه، ويشرف ويظهر رونق الفقه ويعرف وتتضح مناهج الفتاوى وتكشف.

The second type consists of numerous and significant comprehensive legal maxims that encompass the secrets and wisdom of the Sharīʿah. Each maxim includes countless applications within the Sharīʿah, and nothing from these maxims is mentioned in the principles of jurisprudence. Even if there is a reference to them, it is only briefly mentioned, with no detailed explanation available. These maxims are critical in fiqh and highly beneficial. The more a jurist comprehends them, the greater their status becomes, the more fiqh shines, and the paths of fatwās become clearer. In it, scholars compete, and the distinguished earn their distinction. The seasoned excel over the novices, and the ones who excel attain the highest honors.

Those who derive detailed rulings from specific analogies without referring to universal maxims will find their rulings contradictory and unstable. Their thoughts will be confused, their spirits constrained, and they will need to memorize innumerable particulars, exhausting their lives without achieving their goals.

"ومن ضبط الفقه بقواعده استغنى عن حفظ أكثر الجزئيات لاندراجها في الكليات، واتحد عنده ما تناقض عند غيره وتناسب، وأجاب الشاسع البعيد وتقارب وحصل طلبته في أقرب الأزمان وانشرح صدره لما أشرق فيه من البيان فبين المقامين شأو بعيد وبين المنزلتين تفاوت شديد."

Whoever masters fiqh with its maxims can dispense with memorizing most of the particulars, as they are subsumed under the universals. For him, what appears contradictory to others becomes consistent and harmonious. He can reconcile distant and disparate points, achieving his objectives in the shortest time. His heart is delighted by the clarity that shines within. Indeed, there is a vast difference between the two stations and a significant disparity between the two levels."[56]

Knowledge of these maxims develops in the student of Islamic knowledge a juristic aptitude (*malakah fiqhiyyah*) that facilitates understanding *fiqh* and its unifying effective causes (*ʿilal*), and mastering one's *madhhab*. It facilitates jurists in deriving rulings within their school and in deducing solutions for new and emerging issues.

It also aids comparative fiqh students in understanding one aspect of the differences between schools and facilitates a general understanding of other schools.

And it assists in understanding the objectives and foundations of Sharīʿah, as well as recognizing its spirit and substance. These principles encompass its major meanings and comprehensive rationales, such as "actions are but by intentions", "harm is to be removed", "profit follows liability", and "the ruler's exercise of authority over the subjects is contingent upon their welfare."

One of its most important benefits is demonstrating the beauty, coherence, and balance of Islamic law to both specialists and others.

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[56] *al-Furūq*, Shihāb al-Dīn Aḥmad ibn Idrīs al-Qarāfī, 1:2.

## Second: The Authority

While the above-mentioned features and importance of the maxims are generally undisputed among jurists, the disagreement lies in whether these maxims can be considered as evidences of the Sharīʿah, allowing jurists to use them to deduce specific rulings.

Imām al-Mardāwī discusses this issue in his work "al-Taḥrīr" when addressing some of these maxims in the later chapters on legal inference. He states in his commentary in "al-Taḥbīr":

«{من أدلة الفقه: لا يرفع يقين بشك، والضرر يزال ولا يزال به، ويبيح المحظور، والمشقة تجلب التيسير، ودفع المفاسد أولى من جلب المصالح، ودفع أعلاها بأدناها، وتحكم العادة، وجعل المعدوم كالموجود احتياطا}... فهذه قواعد تشبه الأدلة وليست بأدلة لكن ثبت مضمونها بالدليل، وصارت يقضى بها في جزئياتها كأنها دليل على ذلك الجزئي.»

"His statement: {Benefit:} {Among the evidences of jurisprudence: certainty is not overruled by doubt, harm is to be removed, and not removed by harm, and it permits the forbidden, hardship begets facilitation, averting harm is of greater priority than securing benefits, averting the greater harm with the lesser harm, custom governs, and considering the nonexistent as existent for caution}... These are maxims that resemble evidences but are not evidences themselves, but their content is established by evidence and they are used to judge particular cases as if they are evidence for that particular case."[57]

Ibn al-Najjār supported this in his commentary "Sharḥ al-Kawkab al-Munīr". So, it appears that our most eminent Imāms consider these maxims to be evidences for the particulars falling under them, and this is widely found in their deductions. The ocean of knowledge and the master of transmitted and rational sciences, Shaykh Taqī al-Dīn, was asked about the siwāk, whether it should be used with the left hand or the right. He said: "Praise be to Allah, the Lord of the worlds. It is preferable to use the siwāk with the left hand; this was explicitly stated by Imām Ahmad in the narration of Ibn Manṣūr al-Kawṣaj ... The principles of the Sharīʿah have established that actions in which both the right and left hand participate, the right is preferred if it is a matter of honor ... while the left hand is given precedence in acts of the opposite kind."[58]

However, there is still disagreement among scholars about using these maxims as evidences. So, what is the nature of this disagreement and cause?

First, we should exclude from the dispute those maxims that are legal texts from the Qurʾān and Sunnah or alternative formulations of them, as they are considered evidence due to being part of revelation. The dispute is thus about the maxims derived from other foundational evidences or inferred from the inductive survey of the detailed rulings.

Second, it should be noted that evidences vary in strength. Even the evidences from the Qurʾān and Sunnah include the general (ʿāmm) and the specific (khāṣṣ), the unqualified (muṭlaq) and the qualified

[57] al-Taḥbīr Sharḥ al-Taḥrīr fī Uṣūl al-Fiqh, al-Mardāwī, 8:3835.

[58] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 21:108.

(muqayyad), and they vary. We exclude fish and locusts from the textual general prohibition of dead animals by a specific text regarding them.

Third, the maxims themselves vary; some are agreed upon, while others are disputed, even within the same school. Thus, they cannot be used as evidence against someone who does not acknowledge them in the first place.

Fourth, as previously discussed regarding the difference between a maxim and a legal basis (mudrak), a maxim often includes the basis of the ruling (its rationale). Thus, mentioning it is akin to mentioning the effective cause and using it to prove the ruling by proving the existence of its cause. If the maxim does not include the basis of the ruling, it indicates a similarity between some applications. In the absence of specific evidence, extending rulings to analogous subsidiary cases is common in the practice of jurists, and this is sound.

Given this, those who prevent using maxims as evidence have two arguments:

First: These maxims are products of the subsidiary rulings and therefore cannot serve as foundations for the very rulings from which they were derived.

لا يجوز الفتوى بما تقتضيه الضوابط لأنها ليست كلية بل أغلبية خصوصا وهي لم تثبت عن الإمام بل استخرجها المشايخ من كلامه

Second: They are predominant principles with many exceptions, so they may be used to judge a specific case that falls under their exceptions. al-Ḥamawī said: "The author [Ibn Nujaym] explicitly stated in "al-Fawāʾid al-Zayniyyah" that it is not permissible to issue a fatwā based on what the controls (al-ḍawābiṭ) imply because they are not universal but predominant, especially since they were not established by the imām but were derived by the scholars from his words."[59]

The response to the first argument is that many principles of knowledge were obtained through induction and then applied to specific cases, like grammar, for example. Indeed, the jurists' method among the Ḥanafīs gave particular attention to formulating many uṣūl principles in light of the inductive examination of the subsidiary rulings transmitted from their Imāms.

The response to the second argument is that the mere existence of exceptions does not preclude reliance on a maxim whose foundation has been established and whose scope has been determined. It does, however, require verifying that the case falls within that scope and considering the maxim's conditions, impediments, and countervailing evidence. As for a formulation whose generality has not been established, its mere inclusion in works on legal maxims does not suffice to justify reliance on the generality of its wording.

لعمر الله لهدم ألف قاعدة لم يؤصلها الله ورسوله أفرض علينا من رد حديث واحد

Just as one proof may be opposed by another, using the maxim as evidence is valid after diligent effort and thorough examination until a stronger counter-argument appears. If one does appear, we say as

[59] Ghamz ʿUyūn al-Baṣāʾir fī Sharḥ al-Ashbāh wa-al-Naẓāʾir, Shihāb al-Dīn al-Ḥamawī, 1:37.

Imām Ibn al-Qayyim (rA) said: "By Allah, dismantling a thousand maxims not established by Allah and His Messenger is more binding on us than rejecting a single ḥadīth."[60]

## Third: The Ruling on Learning the Science of Legal Maxims

Since the great value and benefit of this science has been made clear to you, know that the ruling on learning it is that it is a communal obligation (*farḍ kifāyah*). The portion without which a judge or muftī (jurist who issues nonbinding legal opinions) cannot properly perform the duties of his office becomes individually obligatory upon him.

[60] *Iʿlām al-Muwaqqiʿīn,* Ibn al-Qayyim, 2:252.

# Chapter Two: The Major Universal Legal Maxims

الأمور بمقاصدها

## The First Major Maxim: Matters Are Judged by Their Intentions (al-ʾUmūr bi-Maqāṣidihā)

### Explanation and Alternative Expressions

«المقاصد والاعتقادات معتبرة في التصرفات والعادات، كما هي معتبرة في التقربات والعبادات»

Imām Abu al-ʿAbbās Ibn Taymiyyah expressed it by saying: "Intentions and beliefs (al-maqāṣid wa-al-iʿtiqādāt) are considered in legal conducts and customs (taṣarrufāt wa-al-ʿādāt), just as they are considered in acts of devotion and worship (taqarrubāt wa-al-ʿibādāt)." [61]

«إدارة الأمور في الأحكام على قصدها»

Imām Al-Mardāwī expressed it as "Matters are judged in rulings based on their intentions (ʾidārat al-ʾumūr fī al-ʾaḥkām ʿalā qasdihā)." [62]

"الشريعة مبنية على أصلين: 1 - الإخلاص لله. 2 - المتابعة لرسول الله ﷺ"

This maxim is included in the fifth maxim of al-Qawāʿid al-Siʿdiyyah: "The Sharīʿah is built on two foundations: 1. Sincerity to Allah. 2. Following the Messenger of Allah ﷺ."[63]

جماع الدين أصلان: ألا نعبد إلا الله ولا نعبده إلا بما شرع

This is because sincerity to Allah is the primary objective of intention. Al-Siʿdī's statement includes the second condition for the acceptance of deeds, which is correctness, meaning following the Messenger in what he brought from his Lord. Thus, "the entirety of the religion is based on two principles: “We worship none but Allah, and we do not worship Him except in the manner He has prescribed."[64]

In his poem, Sheikh al-Siʿdī said:

ونيتنا شرط لسائر العمل  بها الصلاح والفساد للعمل

"And our intention is a condition for all actions, by which the deed is rectified or corrupted."

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[61] *Al-Fatāwā al-Kubrā*, Taqī al-Dīn Ibn Taymiyyah, 6:54.

[62] al-Taḥbīr Sharḥ al-Taḥrīr, al-Mardāwī, 8:3858.

[63] Sharḥ al-Qawāʿid al-Saʿdiyyah, al-Zāmil, 62.

[64] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 10:234.

Sheikh Ibn ʿUthaymīn said:

واحكم لكل عامل بنيته ... واسدد على المحتال باب حيلته
فإنما الأعمال بالنيات ... كما أتى في خبر الثقات

Judge each worker by their intention ... and close the door to deceitful tactics (ḥīlah),
For actions are judged by intentions... as stated in the report of the trustworthy.

"تعتبر الأسباب في عقود التمليكات، كما تعتبر في الأيمان."

In Imām Ibn Rajab's 150th maxim: "Causes (asbāb) are considered in contracts of ownership (ʿuqūd al-tamlīkāt), just as they are considered in oaths (ʾaymān)."

"أصول الإسلام ثلاثة أحاديث: ' الأعمال بالنية '، و ' الحلال بين والحرام بين ' و ' من أحدث في أمرنا هذا ما ليس منه فهو رد '"

The honorable Imām Ahmad said: "The fundamentals of Islam are three ḥadīths: 'Actions are but by intentions,' 'The permissible (ḥalāl) is clear and the forbidden (ḥarām) is clear,' and 'Whoever innovates in our matter that which is not from it, it will be rejected.'"[65]

Some prefer to express it as "Actions are but by intentions" (al-ʾaʿmāl bil-niyyāt) to seek blessing from the exact words of the infallible Prophet, who possessed the most perfect speech.

«وهي [أي النية] لغة: القصد، يقال: نواك الله بخير، أي: قصدك به. و (حقيقتها) شرعا: (العزم على فعل الشيء) من عبادة وغيرها. (ويزاد في حد) نية (عبادة تقربا إلى الله تعالى) بأن يقصد بعمله الله تعالى دون شيء آخر، من تصنع لمخلوق، أو اكتساب محمدة عند الناس، أو محبة مدح منهم، أو نحوه.»

The intents (maqāṣid) and intentions (niyyāt), though some scholars distinguish between them, are closely related. The eminent scholar Al-Ruḥaybānī said: 'And (intention) in language means: the intent (al-qaṣd). It is said: May Allah intend good for you (nawāk Allah bi-khayr), meaning: aim it at you. (Its reality) legally is: (the determination to do something), whether an act of worship or otherwise. (Added in the definition of) intention in worship: To seek closeness to Allah (taqarruban ilā Allah), meaning to intend by one's deed Allah alone, and not anything else, such as seeking to show off to people, or earning acceptance and praise from them, or the like.'[66]

The maxim is broader than the requirement of intention in acts of worship. It also means that intentions are considered in judging transactions and all actions and words. In explaining the meaning of "Matters are judged by their intentions", Shaykh al-Zarqā said: "Matters (al-ʾumūr) is a general term for all actions and words, as in Allah's statement: {To Him the matter is returned in its entirety}, {Say: Indeed, the matter belongs entirely to Allah}, {And Pharaoh's matter was not right}, meaning what he was upon in terms of word or deed. (See: al-Rāghib's Mufradāt). The statement implies: The (rulings) on matters (aḥkām al-ʾumūr) are according to their intentions, because the science of jurisprudence examines the

[65] al-Taḥbīr Sharḥ al-Taḥrīr, al-Mardāwī, 8:3839.

[66] *Maṭālib Ūlī al-Nuhā,* al-Ruḥaybānī, 1:394.

rulings on things, not their essences. Hence, the Majalla explained the maxim by saying: 'It means that the ruling resulting from a matter is based on what is intended by that matter.'[67]

The maxim may be summarized as follows: the rulings arising from the verbal and physical conducts of an accountable person (mukallaf) may vary with their intention (niyyah) and purpose (maqṣūd) wherever the Sharīʿah gives intention legal effect.

Examples: Someone who prays four rakʿahs (prayer units) after the call to the ʿAṣr (afternoon) prayer. It may be for Allah or to show off, and it could be for ʿAṣr or a missed Ẓuhr (midday) prayer, depending on their intention.

If someone speaks with ambiguous expressions of divorce (kināyāt al-ṭalāq), their intention governs the ruling on what was said. Similarly, if someone vows something with ambiguous wording.

Also, if someone gives money to another person, whether it is considered a gift, a loan, or a bribe depends on their intention.

'And one does not give zakāh except to someone they believe to be deserving. If they give it to someone they do not think is deserving, but it later turns out that they are, it [still] does not suffice.'[68]

## The Basis of This Maxim

«ودليلها حديث عمر: "الْأَعْمَالُ بِالنِّيَّاتِ"، وربما أخذت من قوله تعالى: {وَمَا أُمِرُوا إِلَّا لِيَعبُدُوا الله مُخْلِصِينَ لَهُ الدّينَ} [البينة: 5] ، ومن قوله تعالى: {إِلَّا ابْتِغَاء وَجه ربه الْأَعْلَى} [الليل: 20] ، ومن هذه المادة أحاديث كثيرة ذكر فيها ابتغاء وجه الله»

Imām al-Mardāwī (rA) said: "Its evidence is the ḥadīth of ʿUmar: 'al-ʾaʿmāl bi-l-niyyāt' (Actions are but by intentions), and it may be derived from Allāh's statement: “And they were not commanded except to worship Allah, [being] sincere to Him in religion” [Al-Bayyinah: 5], and from His statement: “But only seeking the countenance of his Lord, Most High” [Al-Layl: 20], and in the same vein, there are many other ḥadīths that mention seeking the countenance of Allah."[69]

He then said about the meaning of the ḥadīth "al-ʾaʿmāl bi-l-niyyāt": "They differed in its interpretation; some said taqdīr (supplying an implied expression) is needed[70] for the validity of this statement. Those who hold this opinion differed: some said we must presume that the (validity) of actions depends on the intentions or their (consideration) or the like. Some: the (perfection) of actions. Many verifying scholars said there is no need for such taqdīr, as the Sharīʿah-defined reality (al-ḥaqīqah al-sharʿiyyah) is nullified by the absence of its essential element or condition. Thus, if an action lacks intention, it is merely a form of action, not a legally valid action, and therefore negation is correct without the need for taqdīr.” [71]

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[67] Sharḥ al-Qawāʿid al-Fiqhiyyah, Aḥmad al-Zarqā, 47.

[68] *Al-Iqnāʿ*, al-Ḥajjāwī, 1:286.

[69] al-Taḥbīr Sharḥ al-Taḥrīr, al-Mardāwī, 8:3859.

[70] Presuming a required qualifier not stated in the wording.

[71] al-Taḥbīr Sharḥ al-Taḥrīr, al-Mardāwī, 8:3860.

There is abundant evidence that actions are determined by intentions. Imām Ibn al-Qayyim has an eloquent statement about the importance of intention, in which he said:

"وقاعدة الشريعة التي لا يجوز هدمها أن المقاصد والاعتقادات معتبرة في التصرفات والعبارات كما هي معتبرة في التقربات والعبادات؛ فالقصد والنية والاعتقاد يجعل الشيء حلالا أو حراما، وصحيحا أو فاسدا، وطاعة أو معصية، كما أن القصد في العبادة يجعلها واجبة أو مستحبة أو محرمة أو صحيحة أو فاسدة."

"The foundation of the Sharīʿah that cannot be undermined is that intentions (maqāṣid) and beliefs (iʿtiqādāt) are considered in legal conducts (taṣarrufāt) and statements (ʿibārāt), just as they are considered in acts of devotion and worship. Intent (qaṣd), intention (niyyah), and belief (iʿtiqād) make something permissible or impermissible, correct or incorrect, an act of obedience or disobedience, just as intent in worship makes it obligatory, recommended, or prohibited, valid or invalid.

The evidence for this principle is too numerous to count, such as Allah's statement regarding husbands who divorce their wives with a revocable divorce: “And their husbands have more right to take them back in this [period] if they want reconciliation” [Al-Baqarah: 228] and His statement: “And do not keep them, intending harm, to transgress [against them]” [Al-Baqarah: 231]. This is explicit that Allah grants the right of revocation to one who intends reconciliation, not to one who intends harm. And His statement regarding khulʿ [marital dissolution for compensation]: “But if you fear that they will not keep within the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself” [Al-Baqarah: 229] and His statement: “And if he has divorced her, then there is no blame upon either of them if they return to each other, if they think that they can keep [within] the limits of Allah” [Al-Baqarah: 230]. Allah has shown that the permitted khulʿ and marriage are only allowed if they think they can keep within the limits of Allah.” [72]

«فالنية روح العمل ولبه وقوامه، وهو تابع لها يصح بصحتها ويفسد بفسادها»

And he said: "The intention (niyyah) is the spirit (rūḥ) of the action, its core, and its substance. The action is subject to it; it is valid with its validity and invalid with its invalidity.” [73]

ثلاث جدهن جد وهزلهن جد: النكاح والطلاق والرجعة

Imām Taqī al-Dīn Ibn Taymiyyah responded to the argument that uses the ḥadīth of Abū Hurayrah (rAa) that the Messenger of Allah ﷺ said: "There are three matters which, whether in seriousness or in jest, are treated seriously: marriage (nikāḥ), divorce (ṭalāq), and taking the wife back (rajʿah)" to support the view that the consideration in contracts is given to the words, not the intentions, by showing the difference between marriage and divorce on one side and financial and other transactions on the other. He (rA) said:

"The speech that includes a meaning involving a right of Allah [like marriage and divorce] cannot be accepted while denying that right. The servant has no right to jest with his Lord or mock His signs or trifle with His boundaries. Perhaps the ḥadīth of Abū Mūsā about the Prophet ﷺ saying: 'What is wrong

[72] *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, Ibn Qayyim al-Jawziyyah, 3:79.

[73] *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, Ibn Qayyim al-Jawziyyah, 3:91.

with people who trifle with the boundaries of Allah and mock His signs?' applies to those who jest, meaning they say it as a joke without committing to its ruling, but its ruling is binding upon them. This is unlike buying and selling, which is a legal conduct (taṣarruf) concerning wealth that is purely the right of the human being; thus, he can dispose of it for compensation or without compensation. A person may joke with another person and jest with him, so if he speaks in this manner, he is not bound by the ruling of a serious statement; jesting with another person is permissible.

In summary, jesting, joking, and fooling around in matters of Allah's rights are not permissible, so the serious and the jest in His rights are the same, unlike the rights of human beings. Don't you see that the Prophet ﷺ said to a Bedouin he was joking with: 'Who will buy this slave from me?' He said: 'You will find me cheap.' The Prophet ﷺ replied: 'No, you are valuable to Allah.' The Prophet ﷺ intended that he was a servant of Allah, and the phrasing was in the form of a question, so it did no harm as he used to joke and only speak the truth. However, if someone were to say in jest, 'Who will marry my wife?' or similar statements, it would be among the ugliest of speech. Indeed, Allah criticized those who made their wives like their mothers, and ʿUmar (rAa) would beat anyone who called his wife his sister." [74]

## The Guidelines and Benefits

The discussions on intention are extensive and noteworthy, and they have warranted individual treatises. However, we will briefly touch upon the most important aspects, particularly those related to the maxim.

### Benefit of Intention

The sincerity (ikhlāṣ) to Allah is the primary purpose of the niyyah. It has been legislated primarily to direct one's attention toward Allah alone and to distinguish between acts of worship (ʿibādāt) and customary practices (ʿādāt), such as distinguishing between performing wuḍūʾ (ritual ablution) for devotion and for cleanliness or cooling off. It has also been legislated to distinguish between types of worship and what is obligatory (wājib) from what is not obligatory, such as fasting for making up missed fasts (qaḍāʾ), fulfilling a vow (nadhr), or performing voluntary fasts (taṭawwuʿ). Furthermore, it has been legislated for the purpose of attaining rewards, as an action may be elevated from a customary practice to an act of worship with a righteous intention, such as sleeping with the intention to gain strength for night prayer or the dawn prayer. In customary practices (ʿādāt) that vary based on intent, their ruling can be mandatory (wājib), recommended (mandūb), prohibited (ḥarām), disliked (makrūh), permissible (mubāḥ), valid (ṣaḥīḥ), or invalid (fāsid), as their rulings depend on their intents. For example, digging a well for providing water versus digging it to harm a brother, or selling in jest, which is invalid in the madhhab (legal school).

Out of Allah’s mercy, intention is also considered in committing prohibited acts. If someone does them without intending to commit the prohibition, their act is considered a mistake (khaṭāʾ), and the Sharīʿah does not hold one accountable for mistakes or forgetfulness.

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[74] *Al-Fatāwā al-Kubrā*, Aḥmad ibn ʿAbd al-Ḥalīm Ibn Taymiyyah, vol. 6, p. 65.

## Actions That Do Not Require Intention

لا ثواب إلا بنية

As we have discussed, among the variant wordings of the main maxim is: 'There is no reward except by intention,' which is consistent, with further details to be addressed when discussing the maxim. But do all actions require an intention for their validity and for their rulings to be established?

Scholars have exempted certain actions from the requirement of intention for their validity, and these exceptions will be detailed in the exceptions to the maxim. In summary, intention is required to distinguish worship from customary practices and from other acts of worship, so it is not required in:

Customary Practices (ʿĀdāt): Unless one seeks reward from them. However, the rulings of certain customary practices may vary based on intent, as previously mentioned.

Acts of Worship That Are Distinguished by Their Very Nature from Customary Practices: Such as belief in Allah, love, fear, hope, intention, and remembrance (dhikr).

Abstentions (turūk): Intention is not required for the validity of abstention, such as abstaining from prohibitions and avoiding impurities, although the reward for abstention is based on intention.

Clearing the Rights of Others: When the purpose is to fulfill the rights of others, intention is not required for its validity, such as obligatory expenditures (nafaqāt), repaying debts, and forgiveness of debt (ibrāʾ). If one performs these acts as a means of drawing closer to Allah, they would also earn rewards in addition to fulfilling the obligation. However, in the case of zakāh, the element of worship is more prominent than the rights of others.

Destruction (Itlāf): There is no sin for destruction without intention, but liability (ḍamān) is incurred. If a child or an insane person kills intentionally, it is considered a mistake, and expiation (kaffārah) is due from their wealth, and the blood money (diyah) is due from their family (ʿāqilah), although one opinion holds it is due from their wealth. They are also liable for the value of compensable property (al-mutlafāt al-muḥtaramah) they destroy.[75]

## Conditions for the Validity of Intention

The *niyyah* (intention) is not valid from someone whose acts of worship are not valid; therefore, it is a condition that the person be a Muslim and possess reason (*ʿaql*). Since the *niyyah* is valid only when there is a sound intent and purpose, it is also required that the person has *tamyīz* (discernment)—except in the case of Ḥajj (the major pilgrimage) and ʿumrah (the lesser pilgrimage) due to specific evidence. Additionally, knowledge of the intended act is necessary, as intention without knowledge is inconceivable. However, an exception is made for unspecified iḥrām (ritual consecration) in Ḥajj; for instance, if someone enters into *iḥrām* intending whatever *so-and-so* has intended, without knowing it specifically, their *iḥrām* is valid because ʿAlī (rAa) entered into *iḥrām* with the same intention as the

[75] "(The intentional act of a child or an insane person is considered a mistake (khaṭāʾ) with no retaliation (qiṣāṣ) involved) because it is a punishment, and those not legally accountable (ghayr al-mukallaf) are not subject to it. (The blood money (diyah) is due from the family (ʿāqilah) where it is required) in the case of a mistake (khaṭāʾ) (and the expiation (kaffārah) is due from their [perpetrator's] wealth) in the case of a mistake and what is treated as such." *Kashshāf al-Qināʿ*, al-Buhūtī, 13:227.

Prophet ﷺ without knowing the specifics, and the Messenger ﷺ validated it.[76] It is also required that nothing invalidates the *niyyah*. We will discuss these matters briefly.

**Islam**

This is because Islam is a condition for the validity of acts of worship, a principle agreed upon.

In *Maṭālib Ulī al-Nuhā*: "Thus, *[ṣalāh, the ritual prayer]* is not valid without it (*i.e., the niyyah*), (and its validity [*i.e., the niyyah*] is conditioned upon Islam, ʿaql (reason), and tamyīz (discernment)), so it is not valid from a non-believer, an insane person, or a non-discerning person, as has been mentioned. (Additionally), its validity is conditioned upon (knowledge of the intended action), as mentioned in '*al-Ikhtiyārāt'*: '*Niyyah* follows knowledge, so whoever knows what they want to do, their intention follows by necessity.'"[77]

However, there are exceptions to the requirement of Islam for the validity of *niyyah* or the requirement of a valid *niyyah* for the validity of actions in certain cases:

- The *Kitābiyyah* (Christian or Jewish) wife of a Muslim can have her post-menstrual purification (*ghusl*) performed by consensus, and it is required for her to be eligible for intercourse according to Mālik, al-Shāfiʿī, and Aḥmad, without a *niyyah* according to us.[78] However, the Mālikiyyah and Shāfiʿiyyah validate her *niyyah*; if she refuses, she is purified by *ghusl* even without *niyyah*, for the husband's right. According to the Ḥanafiyyah, intercourse with a *Kitābiyyah* is permissible immediately upon cessation of the blood, without requiring *ghusl*, as she is not of those eligible for it; hence, there is no exception to the principle according to their view, nor according to the Ḥanābilah, in not requiring or validating *niyyah*, even if they validate the action without it, as do the Ḥanafiyyah, who validate the *ghusl* without requiring it as the Ḥanābilah do.
- *Zakāh* is waived if taken from an apostate after it became due during their Islam, if we say their ownership of their wealth remains, and the *Imām* intends it as *zakāh* because the apostate has no valid *niyyah* according to us. If they give it without the *Imām* taking it, it does not suffice because of the lack of a valid *niyyah*.[79] However, it suffices according to the Shāfiʿiyyah if given

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[76] "If one makes *iḥrām* without specifying the type of ritual [i.e., they did not specify whether it was for Ḥajj or ʿUmrah], it is valid, and they become in a state of *iḥrām*; because *iḥrām* is valid even with ambiguity, so it is valid when left unqualified." *al-Mughnī*, Ibn Qudāmah, 5:96.

[77] *Maṭālib Ūlī al-Nuhā,* al-Ruḥaybānī, 1:395.

[78] "If it is established that *niyyah* (intention) is a condition for the purification from ritual impurity, there are exceptions to this rule, as indicated by his statement: '(except for the *ghusl* of a *Kitābiyyah*) for a Muslim husband from [her] menstrual impurity,' and '(except for a Muslim woman who refuses) to perform *ghusl* from [her] menstrual impurity for her husband, to the extent that he does not engage in intercourse with her as long as she remains in this state. (She is forced to perform *ghusl*) for the sake of the husband's right, and intercourse becomes permissible for him, (and intention is not required here) due to the excuse.'" *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 1:258.

[79] al-Inṣāf*:* "If *zakāh* becomes obligatory upon him [the apostate], the *Imām* takes it and makes the intention instead of them due to the impossibility, even though it is not an act of *qurbah* (drawing near to Allāh), just like other rights (...) If the person accepts Islam after the *Imām* has taken it, it suffices for them outwardly, but inwardly there are two opinions (...) I say: the correct view is that it suffices (...) It does not suffice if they give it themselves while still in a state of disbelief [i.e., without the *Imām* taking it]." *al-Inṣāf*, al-Mardāwī, 3:13.

during their apostasy,[80] making their view a clearer exception from the principle than the Ḥanābilah's view that it is waived only if taken by the *Imām*.

- *Kaffārah* (expiations) become obligatory upon a non-Muslim when their cause is legally established in his case, such as in their oath[81]—since it is valid according to us—or in mistaken killing,[82] due to the predominance of the punitive aspect in *kaffārāt* over the aspect of drawing closer to Allāh (*qurbah*). He may discharge them through a form of which he is legally capable, such as feeding, but not through fasting, since it is a pure act of worship, nor through emancipation, because the slave must be a believer.

Note that in these exceptions, the jurists considered the rights of the husband in the purification of the *Kitābiyyah* woman, the rights of the poor in taking *zakāh* from an apostate, the rights of society in the validity of non-Muslims' oaths and the obligation of *kaffārah* when violated, and the punitive aspect of *kaffārāt*. However, reward in all cases is only deserved with a valid *niyyah*.

Shaykh Saʿd al-Shithrī objected to the requirement of Islam for the consideration of *niyyah*, due to the numerous exceptions, and mentioned, among other things, its consideration in the divorce, sale, vow, and oath of a non-believer.[83] Perhaps Islam is a condition for *niyyah* in acts of *qurbah* (drawing closer to Allāh) or in the entitlement to reward in the hereafter, or a primary condition for the validity of acts of worship, followed by the conditions of sincerity and adherence. The evidence for this includes many verses and ḥadīths, among them: "If you were to associate others with Allāh, your deeds would surely become worthless" (Sūrat al-Zumar: 65).

**Reason and Tamyīz (Discernment)**

Reason (*ʿaql*) is the basis for legal accountability, and the validity of intention cannot be conceived without reason and *tamyīz* (discernment).

In *Sharḥ al-Muntahā* by Ibn al-Najjār: "The intention (*niyyah*) for washing (*ghusl*) is made for a deceased person and an insane woman who are washed because it is impossible from them."[84]

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[80] Tuḥfat al-Muḥtāj: "It suffices if it is given during their apostasy, and the absence of intention is overlooked." *Tuḥfat al-Muḥtāj*, al-Haytamī, 3:328.

[81] "Expiation (*kaffārah*) applies equally to a slave or free person, man or woman, Muslim or non-Muslim, because Allah – the Exalted – mentioned expiation in general terms for all those addressed, so everyone is included in its generality. However, a non-Muslim cannot perform expiation through fasting, because it is an act of worship, and they are not qualified for it, nor through emancipation (*ʿitq*), because one of its conditions is that the slave must be a believer, and a non-Muslim cannot purchase a Muslim slave." *al-Mughnī*, Ibn Qudāmah, 13:541.

[82] "Expiation (*kaffārah*) is required in full from the wealth of a person who did not commit intentional murder, such as in the case of mistaken killing or quasi-intentional killing (...) This obligation applies even if the killer is a non-Muslim, a slave, a minor, or insane." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 3:328.

[83] Sharḥ al-Manẓūmah al-Saʿdiyyah, al-Shithrī, 45.

[84] *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 1:258.

A person is considered *mumayyiz* (discerning) in the madhhab when they reach the age of seven, although it was said that *tamyīz* varies.[85] The discerning child has their deeds recorded for them but not against them; [86] however, it was also said they are recorded against them.[87]

"أَلِهَذَا حَجٌّ؟" قال: «نَعَمْ وَلَكِ أَجْرٌ»

An exception is made for the validity of acts of worship performed by a person without *tamyīz* and their receiving reward, such as in the case of Ḥajj and ʿUmrah.[88] The ḥadīth of Ibn ʿAbbās (rAa) in Ṣaḥīḥ Muslim narrates that a woman lifted a child to the Prophet ﷺ and asked, "Does this child have Ḥajj?" The Prophet ﷺ replied, "Yes, and you will have a reward."

As for the drunk person, if they have sinned by drinking, then legal consequences of actions are applied against them but not in their favor, as a form of punishment and deterrence.[89] However, in one of the two narrations from Imām Aḥmad, which was chosen by Shaykh Taqī al-Dīn, a person's divorce is not considered valid, nor is their confession accepted, if they do not understand what they are saying. The evidence for this is what has been reported in the story of Māʿiz when he confessed to committing adultery. The Prophet ﷺ asked him: 'Have you consumed khamr?' He replied: 'No.' Then a man stood up and smelled his breath but found no odor of alcohol.' The purpose of smelling his breath was to verify the validity of his confession.

**Absence of Nullifiers**

The *niyyah* is invalidated by several things, including associating others with Allāh (*shirk*), certain types of mixing intentions, hesitation, doubt, making exceptions, interrupting the *niyyah*, changing it, or intending to do something that contradicts it.

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[85] "(And it is valid from a discerning child (*mumayyiz*). This is one who has reached) the age of (seven) years. The author of *al-Riʿāya* preferred the age of six. In *al-Qawāʿid al-Uṣūlīyah*, it is mentioned that some of their statements imply that the age is ten. Ibn Abī al-Fatḥ stated in *al-Muṭliʿ* that a *mumayyiz* is someone who understands speech and can respond appropriately, and this does not correspond to a specific age, but varies according to differences in comprehension." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 1:450.

[86] "[Prayer] is not obligatory upon a child who has not reached puberty, and it is not valid from them except if they are *mumayyiz* (discerning) (...) They receive reward for it, as well as for all acts of righteousness, and that is because their deeds are recorded for them and not against them. The guardian is obligated to command them to perform it and to teach them how to do so." *Al-Iqnāʿ*, al-Ḥajjāwī, 1:73.

[87] "As for the discerning child, the majority hold that he is not legally accountable. A narration from Aḥmad has been reported holding him legally accountable because he understands the address… The correct position in the madhhab is that he is not legally accountable" *Al-Qawāʿid wa al-Fawāʾid al-Uṣūliyyah*, Ibn al-Laḥḥām, 34.

[88] "(Both Ḥajj and ʿUmrah are valid) from a minor, whether male or female, even if the child was born moments ago (...) (And the guardian of the wealth makes *iḥrām* on behalf of one who has not reached discernment), due to the impossibility of intention from them." *Maṭālib Ūlī al-Nuhā,* al-Ruḥaybānī, 2:269.

[89] "A drunken person whose divorce takes effect is held accountable for all their statements and actions, including those that require reason, such as confession, slander, *ẓihār* (declaring one's wife comparable to a permanently prohibited female relative), *īlāʾ* (oath of abstention), theft, zinā, sale, purchase, endowment, loan, taking custody of a trust, embracing Islam, and apostasy … However, actions that benefit them are not valid, such as standing at ʿArafah, performing ṭawāf, *saʿy*, fasting, and prayer..." *Maṭālib Ūlī al-Nuhā,* al-Ruḥaybānī, 5:324.

**1 and 2 Shirk and Mixing Intentions**

Mixing Intentions in Worship: Categories

إِنَّهُ مَنْ يُشْرِكْ بِاللَّهِ فَقَدْ حَرَّمَ اللَّهُ عَلَيْهِ الْجَنَّةَ وَمَأْوَاهُ النَّارُ وَمَا لِلظَّالِمِينَ مِنْ أَنْصَارٍ

First Category: Intending through pure acts of worship, such as prayer or fasting, to draw near to Allāh and someone else. Whoever does this has committed *shirk* and is among those mentioned by Allāh in the verse: "Indeed, whoever associates others with Allāh, Allāh has forbidden them from Paradise, and their refuge is the Fire, and there are no helpers for the wrongdoers" (Sūrat al-Māʾidah: 72).

Second Category: Intending something that is not an act of worship or desiring worldly benefits through worship. And this is an esteemed text that is quoted in full from *Maṭālib Ulī al-Nuhā*:

"(The validity of it [i.e., the prayer] is not invalidated) after performing it with a valid intention (when intending to teach it), such as teaching prayer, as the Prophet ﷺ did on the pulpit, (or) intending (deliverance from an adversary or prolonged wakefulness). ... (And their reward is diminished) for one who intends this, (just as for fasting for the purpose of digesting a meal along with fasting). This was mentioned by Ibn al-Jawzī. (Similarly, touring lands) distant during Ḥajj (or) intending to (trade while performing Ḥajj); for they intended what necessarily accompanies it. (Likewise), intending (refreshment and cleanliness with *wuḍūʾ* (ablution)) as aforementioned. However, (if the act of worship becomes solely intended for that) mentioned above, like teaching or avoiding a dispute, etc., (then the act is invalid, akin to the intention of showing off, and the doer is sinful), as they engaged in an invalid act of worship."

[Al-Ḥāfiẓ Zayn al-Dīn Ibn Rajab said:

"Pure ostentation (riyāʾ) rarely occurs in a believer's obligatory prayer or fasting, though it may occur in acts like charity or Ḥajj. No Muslim doubts that such acts are nullified.

(ولا تترك عبادة خوف) نسبة إلى (رياء) إذا أصلحت نيته؛ لأن تركها لأجل الناس شرك كما أن فعلها لأجلهم رياء.

Sometimes the worship is for Allāh, and ostentation joins in. (If ostentation accompanies the act from its inception, then the authentic texts) indicate (its invalidity), even though some later scholars disputed this. (If the act was initially for Allāh, and then ostentation occurred after beginning it, and the person rejected it, it does not harm) their worship, and it remains valid (without dispute) among the scholars. (If) the thought of ostentation (persists), whether it nullifies the act or not (is a matter of disagreement) among the predecessors, as mentioned by Ibn Jarīr. (Imām Aḥmad preferred that the act is not nullified by this) because the worship was initially built on a sound foundation, so the later occurrence of this thought does not invalidate it. (Others mentioned) other than Imām Aḥmad: (There is no sin in) an act (mixed with ostentation, if the intention to obey dominates), for good deeds erase bad ones. (Conversely,) if the intention to show off dominates, (the person sins) according to the narrations forbidding it. (If the motives are equal, then there is neither) reward (for them) nor sin (upon them), based on the verse: {And there are others who have admitted their sins, they had mixed a righteous deed with another that was bad. Perhaps Allāh will turn to them in forgiveness.} [Sūrat al-Tawbah: 102]. (And an act of worship is not to be abandoned out of fear of) being attributed to (riyā') if the intention is

sincere, because abandoning it for the sake of people is shirk, just as performing it for their sake is (riyā') "][90]

(And we hope for a reward for one who recites) the Qurʾān and does similar acts (without intention) especially in these times when calamities have stunned the minds. (In *al-Mubdiʿ*: there is no reward without intention by consensus) even though some scholars chose otherwise, which is befitting His grace, Glory be to Him, for He promised not to waste the reward of those who do good deeds."[91]

Conclusion: From this, it becomes clear that in the *madhhab*, combining the intention of a permissible act with an act of worship, although it may reduce its reward, does not invalidate it as long as the act of worship is not intended solely for that permissible purpose—especially if the permissible act is inseparable from the act of worship. As for ostentation, if it accompanies the act from its inception, it invalidates it. If it arises after the act has begun and is resisted, it does not harm the act. If one indulges it, Imām Aḥmad preferred that the act is not invalidated; the predominance or equality of the two motives instead affects reward and sin according to the preceding details.

إِنَّ صَلاتِي وَنُسُكِي وَمَحْيايَ وَمَماتِي لِلَّهِ رَبِّ الْعالَمِينَ

As for the discussion about reciting the Qurʾān without intention, if someone has accustomed themselves to acts of worship to the extent that they become second nature, then the Most Generous will grant them the reward even if they perform it without actively intending it, like one who removes harm from the road, guides a blind person, and similar acts of goodness, even if they do not explicitly intend at that moment. The key consideration here is not in the distinction between the act benefiting oneself or others, but in the overall orientation toward Allāh in doing good. The believer's state proclaims: "Indeed, my prayer, my rites, my living, and my dying are for Allāh, the Lord of all worlds" [Sūrat al-Anʿām: 162].

Third Category: Intending with an act of worship another act of worship. There are several scenarios:

1- Combining Two Obligatory Acts:

This is not valid except in the case of combining Ḥajj and ʿUmrah; ʿUmrah is obligatory in the madhhab.[92] Also, in ghusl (ritual bathing) and wuḍūʾ (ritual ablution), they are two acts of worship of the same genus, so the lesser is included in the greater. However, it is not permissible to combine making up a fast and kaffārah (expiation), or ẓuhr and ʿaṣr, or zakāh and fidyah (a prescribed compensatory offering).

There is no objection to this ruling according to our position—contrary to the Shāfiʿīs—that the opening takbīrah (takbīrat al-iḥrām, the declaration "Allah is greatest" that initiates prayer) suffices for the bowing takbīrah for a latecomer (masbūq), while the latter is obligatory in our view. This is because he does not combine his intention for both; rather, the second takbīrah is waived, and the first suffices in its

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[90] "The text within the brackets is from his commentary on the words of al-Ḥāfiẓ Ibn Rajab and not from *Ghayat al-Muntahā*."

[91] *Maṭālib Ūlī al-Nuhā,* al-Ruḥaybānī, 1:396.

[92] "As for the actions of the *qārin* (one performing both Ḥajj and ʿUmrah together), they are the same as those of the *mufrid* (one performing only Ḥajj). This was transmitted by *al-Jamāʿah*." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 4:61.

place. However, if he intended both together, it would invalidate the prayer in the correct view, as the opening takbīrah is a pillar.[93]

2- Combining an Obligatory and Recommended Act:

This is broader in scope when combining an obligatory act with a recommended act that is not intended for its own sake. For example, someone who intends by *ghusl* to remove major ritual impurity (janābah) and also perform the Friday *ghusl*, or someone who intends by their prayer the obligatory prayer and taḥiyyat al-masjid (the prayer of greeting the mosque) or teaching others.[94]

However, combining two acts of worship intended for their own sake is not valid, such as combining making up fasts from Ramaḍān with fasting the six days of Shawwāl or the ten days of Dhū al-Ḥijjah; this is not valid for both in our madhhab.[95]

If someone intends an obligatory act and a recommended act, they usually validate one of them. For instance, if someone intends by their Ḥajj both the obligatory and voluntary Ḥajj, it counts as obligatory according to us[96] and the Shāfiʿiyyah. If someone intends by their zakāh both the obligatory zakāh and a voluntary charity, it counts as charity. However, if someone intends by their prayer both the obligatory prayer and the regular Sunnah, their prayer is invalidated, as failure to specify here is harmful. [97]

3- Combining Two Recommended Acts:

«تداخل العبادات في العبادة الواحدة، وهو من باب عزيز شريف، لا يدخل منه إلا صادق حاذق الطلب، متضلع من العلم، عالي الهمة، بحيث يدخل في عبادة يظفر فيها بعبادات شتى، وذلك فضل الله يؤتيه من يشاء»

Imām Ibn al-Qayyim (rA) says: "The overlapping of acts of worship within a single act of worship is a noble quest, accessible only to those who are sincere, skillful in their pursuit, well-versed in knowledge,

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[93]"(The *takbīrat al-iḥrām* suffices) for the *takbīr* of bowing (*rukūʿ*), but it is better to perform two separate *takbīrs*. If both were intended with one *takbīr*, or if the *takbīr* was intended for bowing, it does not suffice, because the *takbīrat al-iḥrām* is a pillar, and it would not have been fulfilled." *Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 1:339.

[94] "… If one intended both the *ghusl* for removing major ritual impurity and the *ghusl* for Friday, it suffices for both of them [in agreement with the Mālikīs and Shāfiʿīs (وم ش)]. This is based on the saying of the Prophet ﷺ: 'Indeed, a person only gets what they intend,' and because there is no contradiction, just as if someone began a prayer intending both the obligatory prayer and the greeting prayer for the mosque." *Al-Furūʿ* and *Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 3:182.

[95] "… 'It is permissible to make up missed Ramaḍān fasts during the first ten days of Dhū al-Ḥijjah.' However, another report from the Imām states that it is disliked (*makrūh*). The rationale mentioned for the second opinion is that making up fasts during this period deprives one of the additional virtue associated with fasting these days voluntarily … some scholars have argued that the virtue of voluntary fasting can still be attained even when making up missed fasts." *Al-Furūʿ* and *Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 5:114.

[96] If someone performs a voluntary ḥajj before the obligatory ḥajj of Islam, it does not count as a voluntary ḥajj but instead transforms into the obligatory ḥajj of Islam according to the correct position in the madhhab. *Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid*, Ibn Rajab, 1:98.

[97] "… It may be understood that the intended meaning is that neither of the two is valid, just as if one intended both the obligatory and the voluntary prayer in the same prayer." *Al-Furūʿ* and *Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 3:182.

and possess lofty aspirations. Through this, they achieve multiple acts of worship through a single act, and that is the grace of Allāh which He gives to whom He wills."[98]

Examples of this are countless, such as intending to fast on the Day of ʿArafah and a Monday, combining charity with maintaining family ties, traveling for ʿUmrah and seeking knowledge, or reciting the Qurʾān and teaching it, or performing *ghusl* for both Friday and Eid.

This is a summary of the eighteenth maxim from the maxims of Ibn Rajab concerning this topic:

"إذا اجتمعت عبادتان من جنس واحد في وقت واحد، ليست إحداهما مفعولة على وجه القضاء، ولا على طريق التبعية للأخرى في الوقت؛ تداخلت أفعالهما، واكتفي فيهما بفعل واحد."

"If two acts of worship of the same genus coincide at the same time, neither of which is being performed as a makeup, nor as a subordinate to the other in time, then their actions combine, and one act suffices for both.

This principle has two types:

I. The first type: A single act achieves both acts of worship, and it is required to intend both together, according to the well-known view. Examples of this include:

1. Someone who has both minor and major ritual impurity; according to the madhhab, the major ritual purification suffices if they intend both purifications with it...
2. Another example is the one who combines Ḥajj and ʿUmrah; a single ṭawāf (circumambulation of the Kaʿbah) and saʿy (ritual passage between al-Ṣafā and al-Marwah) suffices for both according to the correct madhhab view...
3. Another example is if someone catches the Imām while bowing, and they make the takbīrah intending both the takbīrah of consecration (*takbīrat al-iḥrām*) and the bowing (*takbīrat al-rukūʿ*); whether this suffices is a matter of two opinions...

II. The second type: One act of worship is achieved by its intention, and the other is waived. Examples include:

1. If someone enters the mosque and the prayer is already established, and they pray with the congregation; the greeting of the mosque prayer is waived ...
2. Another example is if someone hears two calls for prostration (*sajdah al-tilāwah*) simultaneously; should they prostrate twice or is one sufficient? The explicit ruling in the narration of al-Barzāṭī is that they should prostrate twice, but an opinion that one suffices can be derived. Fellow Ḥanbalīs (al-Aṣḥāb) have derived a view (wajh) that the prostration in prayer (sajdat al-ṣalāh) can suffice for the prostration of recitation (sajdat al-tilāwah), and here this would be even more applicable.
3. Another example is if a person arrives in Makkah for ʿUmrah; they start with the ṭawāf of ʿUmrah, which suffices instead of the ṭawāf of arrival (*ṭawāf al-qudūm*)...

[98] *Al-Dāʾ wa-l-Dawāʾ*, Ibn Qayyim al-Jawziyyah, 158.

4. Another example is if a person performs a prescribed (obligatory) prayer after *ṭawāf*; whether this suffices for the two units of prayer after *ṭawāf* is a matter of two opinions...
5. Another example is if Friday and Eid occur on the same day; whichever of the two is performed first, suffices for the other...
6. Another example is if a person has a birth sacrifice (*ʿaqīqah*) and an Eid sacrifice (*uḍḥiyah*) to perform; whether the Eid sacrifice suffices for the ʿaqīqah is a matter of two expressly transmitted narrations from Imām Aḥmad.
7. Another example is the combination of reasons that necessitate expiations (*kaffārāt*), which overlap in oaths, Ḥajj, fasting, ẓihār (a prohibited declaration such as likening one's wife to one's mother), and other matters. If a person offers one expiation for one of these reasons specifically, it suffices for the rest of the expiations.

And if it is ambiguous (mubhām), then if they are of the same genus, it suffices according to a single view (wajh) according to the author of al-Muḥarrar. However, according to the author of al-Targhīb, there are two views on this matter. And if they are of two genera, there are two views regarding the necessity of specifying the intention (niyyah).

As for ritual impurities requiring purification, whether they are of the same type or different, if they result in the same requirement (i.e., purification), then they overlap by intention without issue. If a person intends one of them, the well-known view is that all of them are lifted. This can be understood as overlapping, as we have explained in the case of expiations, or as the fact that a single ruling can be justified by multiple independent causes. If a person intends to remove one of the impurities, they have intended their obligation, which is singular and does not multiply. Abū Bakr [Ghulām al-Khallāl] stated that only the impurity intended is lifted. In *Kitāb al-Muqniʿ*, he mentioned: If a woman enters a state of major ritual impurity (janābah) and then menstruates, a single *ghusl* suffices for both if she intends them together."[99]

Fourth Category: Intending Two Non-Worship Actions with Different Rulings, such as divorce and ẓihār, in which case the intention reverts to the one more consistent with the utterance.[100]

3 Hesitation and Doubt

Hesitation in Forming It

"وإذا دخل في الصلاة بنية مترددة بين إتمامها وقطعها، لم تصح؛ لأن النية عزم جازم، ومع التردد لا يحصل الجزم."

Ibn Qudāmah said in *Al-Mughnī*: "If one enters into prayer with hesitation between completing it and breaking it, it is not valid; because intention requires a decisive resolve, and with hesitation, decisiveness is not achieved."[101]

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[99] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:139.

[100] "If he says, 'You are ḥarām to me,' and intends both divorce and ẓihār, it is considered ẓihār and not a divorce, because a single statement cannot simultaneously be both ẓihār and divorce. Given the nature of the phrase, it is more appropriately understood as ẓihār, and thus it is interpreted as such." *al-Mughnī*, Ibn Qudāmah, 11:63.

[101] *al-Mughnī*, Ibn Qudāmah, 2:133.

Hesitation in Breaking It

If one hesitates about breaking the prayer, the relied-upon opinion in the madhhab is that it is akin to breaking it, because the continuous resolve is a condition for its validity[102] (An exception applies to Ḥajj and ʿUmrah, which will be discussed when addressing termination). It is said that it does not break with hesitation after certainty. [103]

Hesitation in Its Condition or Doubt

From the above, it is understood that hesitation in intention nullifies it, as well as hesitation in breaking it according to the relied-upon opinion. They also discussed the validity of intention when there is doubt about the condition for the validity of the act. In the sixty eighth maxim of Ibn Rajab:

"إيقاع العبادات أو العقود أو غيرهما مع الشك في شرط صحتها، وهي نوعان:"

"The performance of acts of worship or contracts, or others, while doubting whether a condition of validity is present is two types:

أحدهما: ما يشترط فيه النية الجازمة، فلا يصح إيقاعه بهذا التردد، ما لم يكن الشك غلبة ظن فيكفي مثله في إيقاع العبادة أو العقد؛ كغلبة الظن بدخول الوقت، وطهارة الماء والثوب ونحو ذلك...

1. What requires a decisive intention; it is not valid with such doubt unless the doubt is a predominant assumption, which suffices for performing the act of worship or contract, such as a predominant assumption about the entrance of the time, and the purity of water, clothing, and so on…

"والنوع الثاني: ما لا يحتاج إلى نية جازمة، فالصحيح فيه الصحة."

2. What does not require a decisive intention; the correct view is that it is valid."[104]

Examples were given by him of what requires a decisive intention and is not valid without it, including:

- "If one is unsure whether they began the period of wiping over the socks during travel or residence, and they wipe for an additional day after the period of residence has ended, and then it is clear they began it during travel, they are required to repeat the prayer due to the doubt."[105]
- And he said: "If one intends on the eve of doubt: "If tomorrow is Ramadan, then it is an obligatory fast, otherwise, it is voluntary," does it suffice for Ramadan if it coincides? It depends

[102] "(If one breaks it), i.e., the intention, (during it), i.e., the prayer, it is invalid; because intention is a condition for the entire prayer, and if it is broken, it resembles the case where one made tasleem intending to leave it. (Or if one resolves to break it), i.e., the intention, it is invalid; because intention is a decisive resolve, and with a resolution to break it, there is no decisiveness, thus no intention. (Or if one hesitates about it), i.e., about breaking it, the prayer is invalid; because continuity of intention is a condition for its validity, and with hesitation, the continuity is nullified." *Kashshāf al-Qināʿ*, al-Buhūtī, 2:248.

[103] "As for hesitation in breaking it, Ibn Ḥāmid said: It does not invalidate the prayer; because one entered it with a certain intention, which is not removed by doubt and hesitation, like other acts of worship. Al-Qāḍī said: It may be invalidated." *al-Mughnī*, Ibn Qudāmah, 2:133.

[104] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:490-492.

[105] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:490.

on whether specifying the intention is required for Ramadan. If specifying the intention is required, as in the well-known view, it does not suffice, as they did not decisively specify."[106] This is the relied-upon view, as he said, unlike if it occurs on the eve of the thirtieth of Ramadan due to the principle of continuity,[107] but it was validated by Imām Taqī al-Dīn and others in both cases."[108]

- And said: "If one performed ablution with questionable water, and it turned out to be pure, their ablution is not valid in the relied-upon view."[109]

This includes cases where one prayed while doubting the entrance of the time, and later it became clear that the time had indeed entered, or prayed toward a direction while doubting it was the Qiblah, and it was confirmed to be the Qiblah; in such cases, the prayer is not valid and requires repetition.[110] Similarly, if one shortened their prayer while doubting its permissibility, it was not performed correctly, even if it later turned out to be permissible.[111] Likewise, if one conditioned their Iḥrām on the Iḥrām of someone else, saying: "If Zayd is in Iḥrām, then I am in Iḥrām," their Iḥrām does not become valid even if the Iḥrām of the other person is established.[112]

Examples Where Decisive Intention Is Not Required Were Given by Him:

- He said: "Reinstatement (rajʿah) in a marriage contract: If there is doubt about the occurrence of divorce, the scholars said that it is a valid rajʿah lifting the doubt. This is the case where Sharīk ruled to divorce and then take her back."[113]

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[106] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:491.

[107] "And this is different from when he intended on the eve of the thirtieth of Ramadan: 'If tomorrow is Ramadan, then I am fasting for it, otherwise I am breaking my fast'; for his fasting is valid according to the most correct of the two opinions. This is because he based his intention on a default assumption (continuity of Ramaḍān) that is not proven to have changed." *Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid*, Ibn Rajab, 1:491.

[108] "If tomorrow is Ramadan, then it is my obligatory fasting (...) However, there is an alternative narration from him that it is sufficient, based on the narration that specifying the intention is not necessary for Ramadan. Shaykh Taqī al-Dīn chose this narration … Furthermore, Ṣāliḥ reported from Aḥmad a third narration that accepts a hesitant or unqualified intention in cases of clouds, but not in clear weather conditions, due to the obligation of fasting." *al-Inṣāf*, al-Mardāwī, 7:399.

[109] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:490.

[110] "(And whoever doubts the entrance of the time should not pray) until their predominant assumption is that the time has indeed entered; because the default assumption is that the time has not entered; (If they prayed) while in doubt (they must repeat the prayer, even if it turns out to be within the time)." *Kashshāf al-Qināʿ*, al-Buhūtī, 2:105.

[111] "If one doubts whether the travel permits shortening the prayer (qaṣr) or not, it does not become permissible for him; because the default is the obligation of completing it, which cannot be overridden by doubt. If he does shorten it, his prayer is not valid, even if it becomes clear afterward that his journey was sufficiently long; because he prayed while in doubt about the validity of his prayer." *al-Mughnī*, Ibn Qudāmah, vol. 3, p. 110.

[112] "(The condition for the validity of Iḥrām is that it must be unconditional; therefore, Iḥrām does not become valid if it is conditional, such as) in the (statement: "If Zaid enters Iḥrām or if Zaid arrives, then I will enter Iḥrām,") due to the lack of certainty in this case. However, this is different from being certain about entering Iḥrām while conditioning a specific type of ritual on what the other person has intended, which is valid." *Maṭālib Ūlī al-Nuhā*, al-Ruḥaybānī, 2:305.

[113] "His point [Sharīk's] is that a reinstatement of marriage (rajʿah) with doubt about the divorce makes it conditional, and that is invalid. Thus, his statement should not be compared to someone who doubts the impurity of their garment,

- And he said, “If a wife of a missing person married before it was permissible for her to remarry [e.g., before four years], and then it was clarified that it was permissible [due to her husband’s death before marriage and the end of the waiting period]; there are two views on its validity.”[114] The relied-upon view is validity.

Exceptions from Nullification Due to Doubt and Uncertainty:

- “If pure clothing is confused with impure or forbidden clothing, and there is no certainty about the purity and permissibility of any, then if the number of impure or forbidden items is known, one should perform a number of prayers equal to that number plus one additional prayer, wearing a different garment for each prayer.”[115]
- “If ṭahūr (purifying) water becomes indistinguishable from ṭāhir (pure), one should perform ablution with each of them.” [116] In this case, it is unclear which of the two ablutions is valid, but the dominant view is that: “If ṭahūr (purifying) water becomes indistinguishable from ṭāhir (pure), whether it can make it ṭahūr or not, one should perform one ablution (wuḍūʾ) by washing each organ twice: first with a handful of water from one vessel, then with a handful from the other.”[117] In this case, the ablution is confirmed, and the additional work is not harmful, even if certainty is not achieved with every handful of water.
- “On the eve of the thirtieth of Ramadan, if one intends: “If tomorrow is Ramadan, then I am fasting for it, otherwise, I am breaking the fast,” their fast is valid according to the most correct of two opinions.”[118]
- “If one performs unspecified Iḥrām, intending only the act of Iḥrām without specifying a ritual, it is valid, and they can direct it to any ritual by intention. The act performed before the intention is not sufficient, and it is preferable to direct it to ʿUmrah.”[119]

**4- Exception (*istithnāʾ*): Conditioning It on God’s will (*mashīʾah*)**

One of the invalidators of intention is conditioning it on *mashīʾah* (God’s will), which nullifies the statement. Thus, if someone takes an oath and adds "In shāʾ Allāh" (if Allah wills), they do not break their oath.[120] This principle applies outside of the contexts of divorce (ṭalāq) and emancipation (ʿitq),

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then orders it to be made impure, and later washes it. Therefore, it was incorrect to include his statement in 'Akhbār al-Mughaffalīn' (‘Reports of the Foolish’)." *Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid*, Ibn Rajab, 1:494.

[114] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:492.

[115] Muntahā al-Irādāt with the marginalia of Ibn Qāʾid, Ibn al-Najjār, 1:29.

[116] *ʿUmdat al-Fiqh*, Ibn Qudāmah al-Maqdisī, 13.

[117] Muntahā al-Irādāt with the marginalia of Ibn Qāʾid, Ibn al-Najjār, 1:29.

[118] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:491.

[119] *Al-Iqnāʿ*, al-Ḥajjāwī, 1:353.

[120] “An exception (*istithnāʾ*) is valid in every oath that requires expiation: such as general oaths, *ẓihār*, and *nadhr* (vow). Thus, if someone swears and adds, "In shāʾ Allāh" (if Allah wills) or "In arāda Allāh" (if Allah wants), intending conditioning it on the divine will (not merely invoking it or seeking affirmation), they do not break their oath.” *Al-Iqnāʿ*, al-Ḥajjāwī, 4:334.

although some, including Imām Taqī al-Dīn and others, hold that it also negates the legal effect of the utterance in those cases.[121]

The majority, which is the relied-upon view in the madhhab, holds that conditioning it on *mashīʾah* does not invalidate the intention except in oaths. Hence, if someone says, "I will pray or I will fast if Allah wills," their intention remains valid according to this view.

It can also be argued that the exception does not negate the intention in any of these cases; rather, it negates the effect of the verbal statement, and the standalone intention in such oaths does not have an effect.

**5- Termination and Resolving to Terminate**

We have stated in our discussion on actions requiring intention that faith (īmān) does not require an intention, as it is not confused with anything else to distinguish it. However, if someone resolves to abandon faith—God forbid—they become an apostate immediately.

The principle is that terminating intention nullifies it and terminates the action. This is generally true for acts of worship. Shaykh Ibn ʿUthaymīn (rA) was asked whether all acts of worship are invalidated by the intention to terminate them. He said, yes, except for ḥajj and ʿumrah. For ḥajj and ʿumrah, the action does not become invalid even if one explicitly states, “O people, bear witness that I have terminated my rites.” This applies even if the acts are voluntary. This is one of the peculiarities of ḥajj and ʿumrah, as they are not invalidated by the termination of intention, in accordance with Allah’s statement: “And complete the ḥajj and ʿumrah for Allah” (Qurʾān 2:196).[122]

However, it is important to distinguish between terminating intention and the intention to do something that contradicts it, such as eating during prayer. This will be clarified further.

Also, it is necessary to differentiate between abandoning intention in acts of worship and other matters. For acts of worship, other than ḥajj and ʿumrah,[123] terminating intention negates it, as previously mentioned. Even hesitation about terminating it also negates it according to the madhhab. In al-Iqnāʿ, it is stated: “One must maintain the intention until the end of the prayer. If the intention is terminated during it, or if one resolves to terminate it, hesitates, doubts whether they formed the intention and performs an act while still doubting, then recalls that they did form it, or doubts about the opening takbīr, or doubts whether they consecrated their prayer with the [intention of] noon or afternoon prayer, and later remembers or intends to terminate it or conditions it on something, it is invalid.”[124]

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[121] “If one says, ‘You are divorced,’ or, ‘My slave is free, if Allah wills’ (...) both pronouncements take effect, because the qualification is intended to confirm the legal effect (...) Another narration holds that they do not take effect; this was chosen by a group of scholars. Our Shaykh said that its meaning is: she is divorced if Allah wills the divorce after this (...).” *Al-Furūʿ wa-Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 9:135. Abū al-ʿAbbās’s choice is the view of the majority.

[122] *Al-Sharḥ al-Mumtiʿ ʿalā Zād al-Mustaqniʿ*, Ibn ʿUthaymīn, 2:298.

[123] “Also, because [ongoing] intention is a condition for the entire prayer, and it was broken by what occurred, the prayer is invalidated due to the loss of its condition. This differs from Ḥajj; for one does not exit Ḥajj by its prohibitions or invalidators, unlike prayer.” *al-Mughnī*, Ibn Qudāmah, 2:133.

[124] *Al-Iqnāʿ*, al-Ḥajjāwī, 1:107.

"Whoever intends to break their fast breaks it, as if they did not intend at all."[125] This applies to obligatory fasts. For voluntary fasts, there is a detailed discussion to follow.

Maintaining the intention, however, does not necessarily mean actively remembering it, although this is preferable, but rather not intending to terminate it.[126]

It is said that hesitation about terminating intention does not invalidate it. [127] This is the ruling that must be given to those who are obsessive to alleviate their doubts, otherwise, they may fall into severe distress and hardship. According to Ghāyat al-Muntahā: "If one invalidates their intention or doubts about it during worship (not after completion of the act, unless they become certain about its abandonment), they should start over. Similarly, if they doubt about washing a limb or wiping the head [they should return to it or start over], except in cases of obsessiveness."[128]

Note that our discussion here concerns the intention in the sense of a firm resolution and its effect on distinguishing actions and the legal rulings that result from them. The basic principle is that intention alone does not have any separate effect from the action. For instance, if someone intends betrayal with respect to a safe deposit, they are not liable according to the correct view, unless an action is connected, such as removing it from its safe place or similar.[129] As for thoughts, internal dialogues, whispers of the heart, and intentions that one will be held accountable for in the Hereafter, including rewards and sins attributed to them, this is a noble and significant subject but is not the focus of our discussion here; it should be sought in its appropriate sources.

**6- Resolving to Commit an Act that Invalidates the Worship**

It has been established that terminating one's intention nullifies worship, and even hesitation in this regard, in the Ḥanbalī school. However, what about resolving to commit an act that nullifies the worship, such as intending to eat during one's fast or during prayer?

The Ḥanbalī scholars differentiate between resolving to commit an act that directly contradicts the essence of the worship, such as intending to eat on a fasting day,[130] and resolving to commit an act that

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[125] *Al-Iqnāʿ*, al-Ḥajjāwī, 1:309.

[126] "(It is required to maintain the ruling of) the intention (until the end of the prayer) by not intending to terminate it, without requiring its active remembrance. Thus, if one forgets about it or if it becomes absent from their mind during the prayer, it does not invalidate the prayer; as it is not possible to guard against this completely (...) However, if one can actively remember it, that is preferable." *Kashshāf al-Qināʿ*, al-Buhūtī, 2:248.

[127] "As for hesitation in breaking it, Ibn Ḥāmid said: It does not invalidate the prayer; because one entered it with a certain intention, which is not removed by doubt and hesitation, like other acts of worship." *al-Mughnī*, Ibn Qudāmah, 2:133.

[128] *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:72.

[129] "If one intends betrayal with respect to a safe deposit, through denial or use, but does not actually do so, they are not liable. This is because no verbal or physical act of betrayal has occurred concerning the deposit, so liability does not arise, just as if no intention had been made." *al-Mughnī*, Ibn Qudāmah, vol. 9, p. 272.

[130] "Whoever intends to break their fast, their fast is broken." *Al-Iqnāʿ*, al-Ḥajjāwī, 1:309. It is also said that it does not invalidate the fast. In al-Furūʿ: 'According to Ibn Ḥāmid, some Mālikīs, and some Shāfiʿīs, the fast is not invalidated, similar to how the pilgrimage is not invalidated, although prayer is considered invalid according to them [by intending termination].'" *Al-Furūʿ* and *Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 4:459.

nullifies but does not fundamentally contradict the worship, such as intending to eat during prayer.[131] In the former case, the worship is invalidated, whereas, in the latter, it is not.[132]

**7- Alteration**

If one transfers a compulsory act (farḍ) to another compulsory act, such as from Ẓuhr to ʿAṣr, neither act is fulfilled. The prayer will be considered voluntary (nafl) if one continues with the intention and action of the prayer,[133] as the specific is not transferable to another specific, but rather to the unqualified. If one transfers a voluntary act to a compulsory act, neither act is fulfilled, because this is a transition from a lower to a higher act. However, if one transfers a compulsory act to a voluntary act, it is valid.[134]

كل ما كان له أصل فلا ينتقل عن أصله بمجرد النية

In the case of altering the intention outside of acts of worship, we consider the default ruling, and the rule is that "everything that has a default does not change from its default merely by intention." Thus, if one intends to use trade property for personal use, the zakāh year (ḥawl) for trade property is interrupted. Conversely, if one intends personal property for trade, it does not become such according to the sounder view until one actually begins trading, as personal use is the default.[135] The opposite is true for jewelry, which is intended for personal use, so if one intends it for trade, it becomes so by intention. This is

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[131] "The intention is not invalidated by resolving to commit an act that is prohibited (maḥẓūr) during prayer; for example, if one resolves to speak during the prayer but does not speak, or to commit an act that would invalidate it, such as breaking wind or otherwise, but does not act on that resolution. This is because the resolve does not contradict the previously established decisive intention. One might commit the prohibited act they intended, or they might not." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 2:81.

[132] "As for what differs between fasting and prayer, if one resolves to commit an act that is prohibited during fasting, such as eating or similar actions, it invalidates the fast. In contrast, if one resolves to commit an act that invalidates prayer, the prayer does not become invalidated unless the act is actually performed." *Ḥāshiyat al-Rawḍ*, Ibn Qāsim, 3:387.

[133] "(If someone transitions from one obligatory prayer) such as Dhuhr (to another obligatory prayer) like ʿAsr (merely by intention without making a new Takbīrat al-Iḥrām) for the second obligatory prayer, (the first obligation) from which they transitioned (becomes invalid) due to the discontinuation of its intention. However, the prayer (will be valid as a voluntary prayer if they continue) with the intention of praying; because they have interrupted their intention of the obligatory prayer with the intention of transitioning from the originally intended obligatory prayer, without interrupting the intention of praying itself, thus it becomes a voluntary prayer." *Kashshāf al-Qināʿ*, al-Buhūtī, 2:250.

[134] "(If someone intended to break their fast) during a voluntary fast and then intended it (as a voluntary act again), it is (valid), as Aḥmad explicitly stated. Similarly, if it was for a vow or expiation, and they interrupted their intention and then intended it (as a voluntary act), it is valid. This is different from when it concerns making up for Ramadan, [as a voluntary fast cannot be performed in the madhhab by someone who has a missed fast to make up]. (If someone changes their intention from a vow) or expiation (to a voluntary fast), it is like transitioning from an obligatory prayer to its voluntary form; it is valid but disliked without a valid reason." *Kashshāf al-Qināʿ*, al-Buhūtī, 5:243.

[135] "If an item of wealth came into his possession without his action, such as through inheritance or the passage of a year on a found object after its announcement, or if he acquired it through his action without the intention of trade, and then he intended it for trade, it does not become subject to zakāh on the stronger opinion. This is because something that is not originally subject to zakāh does not become subject to it merely by intention, similar to a livestock animal that is fed (not being grazed) if he intends to graze it." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 3:265.

because the default for gold and silver is that they are wealth that is potentially subject to growth and thus liable for zakāh.[136]

### Intention Is a Condition, and It Is Said to Be a Pillar

هي قبل الصلاة شرط، وفيها ركن

والتحقيق أنه أصل منفرد بنفسه كما أن الحج عبادة مستقلة بنفسها، وهو يشبه أركان العبادة من وجه، وشروطها من وجه، فإنه ركن مستدام إلى آخر العبادة.

Our madhhab, unlike the Shāfiʿīs, holds that intention is a condition (sharṭ) for worship, though some say it is a pillar (rukn). The difference is that a condition precedes the act and is external to it, while a pillar is part of its essence. It resembles both conditions and pillars to the extent that Imām ʿAbd al-Qādir al-Jīlānī said: "Before the prayer, it is a condition, and during it, it is a pillar."[137] Imām Taqī al-Dīn said about iḥrām in the sense of the intention of Ḥajj: "The accurate view is that it is an independent part just as pilgrimage is an independent act of worship. It resembles the pillars of worship in one respect and its conditions in another, as it is a continuous pillar until the end of the worship."[138]

### The Place of Intention and the Utterance of It

The place of intention is the heart,[139] by unanimous agreement.[140] Is it recommended to utter it secretly along with the intention in the heart? There is a dispute in the madhhab. Some say it is recommended, and this is the view of most later scholars. Others consider it an innovation (bidʿah), supported by prominent scholars such as Ibn Taymiyyah, Ibn al-Qayyim, and al-Ḥajjāwī, who stated in "al-Iqnāʿ": "Uttering the intention and what one intends here and in other acts of worship is an innovation. Many of the later scholars recommended it silently, along with the intention in the heart. However, the explicit statement of Aḥmad and a group of verifying scholars is contrary to this, except in the case of iḥrām, as will be discussed. In "al-Furūʿ" and "al-Tanqīḥ," it is mentioned: "It is recommended to utter it silently," which makes it a Sunnah, but this is an oversight. Uttering it loudly[141] is disliked."[142]

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[136] "And if the jewelry is intended for wearing, and the woman then intends to use it for trade, the zakāh year begins from the time she makes the intention; because the obligation is the default, and it was only diverted due to the temporary use. It returns to the default upon the intention without actual use, just as if he intended personal use for items that were originally meant for trade, they would revert to that status without actual use." *al-Mughnī*, Ibn Qudāmah, 4:223.

[137] Al-Mubdiʿ fī Sharḥ al-Muqniʿ, Ibn Mufliḥ, 1:365.

[138] *Sharḥ ʿUmdat al-Fiqh*, Taqī al-Dīn Ibn Taymiyyah, 5:333.

[139] "Its place is the heart, so a slip of the tongue with the unintended does not harm." *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:72.

[140] "The place of intention is the heart, and uttering it with the tongue is not required without disagreement. Nor does utterance suffice in place of the intention of the heart, without disagreement. However, it is recommended to utter it along with the intention in the heart." *Al-Majmūʿ Sharḥ al-Muhadhdhab*, al-Nawawī, 6:289.

[141] "Rather, the Sheikh said: 'Proclaiming it aloud [not the utterance] is prohibited according to al-Shāfiʿī and the rest of the Muslim Ummah, and the one who does it is in error.'" *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:72.

[142] *Al-Iqnāʿ*, al-Ḥajjāwī, 1:24.

"كان ﷺ إذا قام إلى الصلاة قال "الله أكبر" ولم يقل شيئا قبلها، ولا تلفظ بالنية البتة، ولا قال أصلي لله صلاة كذا مستقبل القبلة أربع ركعات إماما أو مأموما، ولا قال أداء ولا قضاء، ولا فرض الوقت، وهذه عشر بدع لم ينقل عنه أحد قط بإسناد صحيح ولا ضعيف، ولا مسند ولا مرسل، لفظة واحدة منها البتة، بل ولا عن أحد من أصحابه."

Imām Ibn al-Qayyim said: "The Prophet ﷺ would say 'Allahu Akbar' when he stood for prayer, and he would not say anything before it, nor would he utter the intention at all. He did not say 'I am praying to Allah such and such prayer facing the Qiblah, four units, as an Imām or a follower,' nor did he say 'timely performance' or 'make-up' or 'the obligation of the time.' These are ten innovations that have never been reported from him, whether by a sound or weak chain of transmission, nor by a connected or disconnected chain, nor from any of his companions."[143]

Imām Al-Ḥajjāwī said in "Ḥawāshī al-Tanqīḥ": "Al-Nawawī said in 'al-Minhāj': 'Intention is in the heart, and it is recommended to utter it before the Takbīr of Iḥrām.' The commentator of 'al-Minhāj' said: “in 'al-Qurab'[144]: 'There is no recommendation,' rejecting what al-Nawawī mentioned about the utterance."[145]

Among those who consider the utterance of intention an innovation are a group of Ḥanafī scholars. In "Takmīlat al-Ṭūrī": "In 'al-Qunyah,' it is said to be an innovation unless one cannot establish it in the heart except by uttering it with the tongue, in which case it is permissible. He reported from some scholars that the Sunnah is to limit oneself to the intention of the heart, and if one expresses it with the tongue, it is permitted. Some have reported in 'Sharḥ al-Munyah' that it is disliked. It appears in 'Fatḥ al-Qadīr' that it is an innovation; he said: 'Some of the ḥāfiẓ scholars [likely Ibn al-Qayyim] said: It has not been established from the Messenger of Allah ﷺ by a sound or weak chain that he would say at the beginning, "I am praying such and such," nor from any of the companions or followers. Rather, it is reported that he ﷺ "would say 'Allahu Akbar' when he stood for prayer." This is an innovation.'"[146]

لبيك عمرة وحجا

بِسْمِ اللَّهِ، وَاللَّهُ أَكْبَرُ، هَذَا عَنِّي، وَعَمَّنْ لَمْ يُضَحِّ مِنْ أُمَّتِي

As for his saying ﷺ, "Labbayka ʿumratan wa-ḥajjan (Here I am at Your service for ʿUmrah and Ḥajj)," it may be a specific ritual for Ḥajj and ʿUmrah, not an utterance of intention. If it is, then it is specific to them. His saying ﷺ, "Bismillāh wa-Allāhu akbar, this is on my behalf and on behalf of those from my Ummah who did not offer a sacrifice," clearly implies that there is another purpose besides uttering the

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[143] *Zād al-Maʿād*, Ibn Qayyim al-Jawzīyyah, 1:221.

[144] "It may be the book *al-Qūt* or *Qūt al-Muḥtāj* by al-Adhraʿī, as mentioned in *Mughnī al-Muḥtāj*, Shīrbinī, 1:343: '(It is recommended) to utter (the intention) (just before the Takbīr) for the tongue to assist the heart and because it is further from doubt. Al-Adhraʿī said: There is no evidence for this recommendation. This is wrong; some even said that uttering the intention is obligatory for every act of worship.'"

[145] Al-Tanqiḥ al-Mushbiʿ, al-Mardāwī, 53.

[146] Al-Baḥr al-Rāʾiq Sharḥ Kanz al-Daqāʾiq wa Minḥat al-Khāliq wa Takmilat al-ṭūrī, Ibn Nujaym, 1:293.

intention. If it is an utterance of the intention, then it is a second case with Ḥajj and ʿUmrah, where utterance is Sunnah.

And the requirement for utterance for the intention of divorce, vows, and waqf [inalienable endowment] (or action in the case of waqf) is not from this category, but rather because these rulings are based on the utterance, just as prayer has pillars and conditions other than intention. Thus, someone who intends to pray has no prayer until he performs it, and someone who intends divorce has no divorce until he speaks it or expresses it.

And it is not relevant to this topic that buying a sheep for sacrifice (uḍḥiyah) or as an offering (hady) does not make it so until he makes an utterance;[147] rather, it is because it involves transferring ownership as an act of devotion, so mere intention does not fulfill it, not that the intention is invalid without utterance.

### Timing of the Intention

"أحب لكل من عمل عملا من صلاة، أو صيام، أو صدقة، أو نوع من أنواع البر أن تكون النية متقدمة في ذلك قبل الفعل، قال النبي ﷺ: «الأعمال بالنيات»، فهذا يأتي على كل أمر من الأمور."

Imām Aḥmad said in the narration of Ḥanbal: "I prefer for anyone who performs an act of worship, such as prayer, fasting, charity, or any type of good deed, that the intention precedes the act. The Prophet ﷺ said: 'Actions are judged by intentions.' This applies to all matters."[148]

In *Maṭālib Ūlī al-Nuhā*: "(And its time is the beginning of the act or shortly before it) … (except fasting), so the intention for fasting is valid from the beginning of the night."[149]

In *Ghayat al-Muntahā*, regarding the intention for ablution: "… It is invalid if it is advanced by a long time according to custom."[150] However, advancing it by a short time is acceptable, and it does not invalidate the intention if a small act is performed before commencing the act of worship. In *Al-Kashshāf*: "(It is permissible to advance it) i.e., the intention before purification (by a short time, such as for prayer), and zakāh. (And it is not invalidated) i.e., the intention (by a small act) before beginning the purification and so forth. If it is prolonged, it is invalidated, and it requires renewal."[151]

لَا صِيَامَ لِمَنْ لَمْ يَفْرِضْهُ مِنْ اللَّيْلِ

The intention for fasting is permitted to be made before dawn due to the difficulty in observing it. The Prophet ﷺ said: "There is no fasting for one who did not make it binding from the night." [Ibn Mājah]

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[147] "(And) it becomes specified (for a sacrifice by) saying ('this is a sacrifice') due to what was mentioned previously (or) it becomes specified for both the sacrifice and the *hady* by saying: 'this is' (for Allah and the like), such as 'for Allah, I have to slaughter it' (in both) i.e., the *hady* and the uḍḥiyah. Specification is (not achieved) for the *hady* and nor the uḍḥiyah (by intending) it (at the time of purchase) because specification involves divesting ownership as an act of devotion. Thus, mere intention does not affect it, similar to emancipation and endowment." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 3:328.

[148] Jāmiʿ al-ʿUlūm wa-l-Ḥikam, Ibn Rajab, 1:64.

[149] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 1:395.

[150] *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:72.

[151] *Kashshāf al-Qināʿ*, al-Buhūtī, 1:205.

I conclude with a valuable statement from Imām Abū al-ʿAbbās Ibn Taymiyyah in his *Sharḥ al-ʿUmda* which closes the doors to waswās (obsessiveness):

"We do not know of any disagreement in the madhhab that it is permissible for the intention to precede the Takbīr, and it suffices just to maintain its validity in effect because Takbīr is part of the prayer. Therefore, it is permissible for the intention to be considered as having been continued in a legal sense [during the Takbīr] even if it is not actively remembered, just as with other parts of the prayer.

This is also because requiring the intention to be concurrent with the Takbīr would be difficult and burdensome for many people and would open the door to waswās, leading them away from the purpose of prayer to unnecessary talk and idle chatter.

This is also because the purpose of the intention is to distinguish one act from another, and this is achieved by the intention being either concurrent or advanced. The known practice of the Prophet ﷺ and his companions was that they performed Takbīr with ease and simplicity, without undue complexity or hardship. If concurrence were obligatory, they would have needed to adopt that approach. Moreover, the worshiper needs to intend the prayer and specify its type, time, and whether it is obligatory according to those who consider this. These intentions in the heart cannot all be present at the very first letter of the Takbīr. If these intentions are spread over the letters of Takbīr, the beginning of Takbīr would lack the required intention, and the end would have only a part of the intention. It is clear that it is impossible for the considered intention to be simultaneous with Takbīr or part of its components. What is feasible is to perform Takbīr following the valid intention… And since Takbīr is meaningful speech, it is necessary to ponder it, conceptualize it, and understand it."[152]

### The Proper Way of Making Valid Intentions

Jurists expand on the discussion of the intention that suffices for each act of worship. Here, we briefly outline some of these points.

As for *wuḍūʾ*, *niyyah* is required in the madhhab. Any intention of lifting the state of ritual impurity or permitting an action that requires ritual purity suffices. Even if one intended renewal of *wuḍūʾ* while forgetting his state of impurity, it is still lifted. Likewise, if one intended a recommended ghusl, it would suffice for the obligatory ghusl if he had forgotten the state of ritual impurity that necessitated it. If he intended both, both would be attained.

However, if one intended an undefined *wuḍūʾ* or *ghusl*, his state of impurity would not be lifted.[153] If one performs *ghusl* intending to remove the major impurity or to perform an act permitted by its removal, the minor impurity would not be lifted.[154]

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[152] *Sharḥ ʿUmdat al-Fiqh*, Taqī al-Dīn Ibn Taymiyyah, 2:599.

[153] "Intention is to intend lifting the state of ritual impurity or attaining ritual purity for an act that is not permissible without it (...) If one intends renewed or recommended purification while forgetting one's ritual impurity, or intends a particular prayer while restricting the purification to that prayer, the ritual impurity is lifted and the restriction has no effect (...) If one merely intends purification, wuḍūʾ, or ghusl in the abstract (...) the ritual impurity is not lifted." *Al-Iqnāʿ*, al-Ḥajjāwī, 1:24.

[154] "If one intends by ghusl to remove both ritual impurities, or intends ritual impurity without specifying one, or intends an act permissible only with both wuḍūʾ and ghusl, such as ṭawāf, it suffices for both. If one intends one of the

As for tayammum (ritual purification with earth), does one need to intend to permit actions requiring minor or major ritual purity or to lift the state of impurity? It is said that *tayammum* permits but does not lift impurity; others say it does lift it. The former is the relied-upon opinion in the madhhab.[155]

Regarding prayer, it is stipulated that specific prayer be designated, which is the opinion of the vast majority of scholars concerning every obligatory act with a flexible time (one that allows for it and another of its type). However, it is also said that it suffices to intend the obligation of the time.[156]

As for *zakāh*, there is no requirement to specify the wealth for which it is paid. One may intend it for absent wealth while intending that, if it were destroyed, it would apply to present wealth or be a voluntary charity. It suffices for the absent wealth if found intact; otherwise, it applies to the present wealth or is considered voluntary, as intended.[157]

## تعيين المتعين لغو

For obligatory fasting, intention is obligatory for every night. However, some say a single intention at the beginning of the month suffices for the entire month.[158] The intention must be specified during the night, as stated by the Shāfiʿīs. Others hold that specification is not required in Ramaḍān because it is an obligatory fast with a restricted time, distinguished by its specific period. Therefore, if one intends general fasting in Ramaḍān, it is considered for Ramaḍān. Indeed, some say that even if one intended to fast for making up a missed fast or a voluntary one, it would be considered for Ramaḍān, and the mistake would not harm him; this is also the view of the Ḥanafī school, who argue that specifying what is already specified is redundant.[159]

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two, the other is not lifted (...) Thus, if a woman intends to make intercourse permissible, only the ghusl takes effect; the same applies to recitation or remaining in a mosque." *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:95.

[155] "The fifth obligation is to specify the intention to render permissible the act for which tayammum is performed, such as prayer or ṭawāf, whether from major ritual impurity (...), minor ritual impurity (...), or impurity on one's body. If one intends by tayammum to lift ritual impurity, the tayammum is not valid, because it does not lift ritual impurity (...)." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 1:391. A contrary view states: "It is valid with the intention of lifting ritual impurity." *Al-Furūʿ wa-Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 3:182.

[156] "It is necessary to specify the prayer, such as by intending Ẓuhr or ʿAṣr (...) This is the authoritative position in the madhhab. Another narration indicates that a general intention suffices when specification is impossible (...) such as intending the obligatory prayer of the time or an unidentified missed four-unit prayer (...) The first is the authoritative position because each prayer differs in its purpose, name, and time and must therefore be distinguished by intention." *Sharḥ ʿUmdat al-Fiqh*, Taqī al-Dīn Ibn Taymiyyah, 2:591.

[157] "The intention that the payment is obligatory is not required, nor is specification of the property for which zakāh is paid. A contrary view requires specification (...) According to the first view, if one intends zakāh for absent property and, if it has perished, for present property, the payment suffices (...) If one intends it for the absent property if intact and otherwise as voluntary charity, it likewise suffices (...) Abū Bakr held that it does not suffice because the intention was not devoted exclusively to the obligatory payment." *Al-Furūʿ wa-Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 4:250.

[158] "The fast of Ramaḍān, or any other obligatory fast, is not valid without an intention made during the night for each day (...) Another narration holds that an intention formed at the beginning of Ramaḍān suffices for the entire month because it is one act of worship. The first view is the authoritative position in the madhhab." *Al-Kāfī*, Ibn Qudāmah, 1:439.

[159] "An obligatory fast is not valid unless one forms a specified intention during the night. This is the authoritative position in the madhhab (...) Another narration holds that specifying Ramaḍān is unnecessary, according to which a

The intention in Ḥajj is *iḥrām*, which is the intention to enter into the state of ritual consecration for the pilgrimage. It is not required to specify the type of *nusk* (ritual) at the time of *iḥrām*; one may enter into *iḥrām* with a general intention and later designate it as either a Ḥajj of ifrād (Ḥajj alone), qirān (Ḥajj and ʿUmrah combined in one iḥrām), or ʿUmrah before performing any of the acts of Ḥajj or ʿUmrah.[160] A guardian may assume *iḥrām* on behalf of someone who is not discerning.[161]

## Subsidiary Maxims and Applications

The applications of the maxim *"al-Umūr bi-Maqāṣidihā"* (Matters are judged by their intentions) are vast, with many falling under subsidiary maxims derived from this major maxim. We have previously defined this major maxim and given some examples; now, let us list some subsidiary maxims derived from it and provide a few of their applications.

Key Subsidiary Maxims Under "al-Umūr bi-Maqāṣidihā":

لا ثواب ولا عقاب إلا بنية

- No Reward or Punishment Except with Intention

العبرة في العقود بالمقاصد والمعاني لا بالألفاظ والمباني

- Consideration in contracts is given to intentions and meanings, not words and forms

الأسباب والدواعي للعقود والتبرعات معتبرة

  - The causes and motives for contracts and donations are considered.

الوسائل لها أحكام المقاصد

- The Means Take on the Rulings of the Objectives

ما لا يتم الواجب إلا به فهو واجب

  - What is necessary to fulfil an obligation is obligatory

ما حُرّم سدًا للذريعة أبيح للمصلحة الراجحة

  - What is prohibited to block the means to evil may be permitted for a greater benefit

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general intention suffices (...) Al-Majd held that a general intention is valid because it cannot be directed to anything other than Ramaḍān, but that an intention specifically directed to a voluntary fast, vow, or other fast is invalid (...) Shaykh Taqī al-Dīn chose its validity for an ignorant person, but not for one who knows the ruling." *Al-Inṣāf fī Maʿrifat al-Rājiḥ min al-Khilāf*, al-Mardāwī, 7:390.

[160] "If one enters iḥrām without specifying a particular rite, the iḥrām is valid (...) One may then direct it to whichever rite one wishes by intention rather than verbal declaration. Anything performed before directing the iḥrām to a particular rite is disregarded (...) If one enters iḥrām for the same rite as another person and later learns what that person intended, one's iḥrām is established for the same rite (...)." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 4:71.

[161] "(A non-discerning child may have iḥrām initiated on his behalf by his guardian) (...) Thus, the guardian initiates iḥrām for the child, (even if the guardian is in a state of iḥrām) or (if the guardian has not performed ḥajj on their own behalf)." Kashshāf al-Qināʿ, al-Buhūtī, 6:23.

مقاصد اللفظ على نية اللافظ

- The Intended Sense of an Utterance Follows the Speaker's Intention

هل اليمين على نية الحالف أو المستحلف؟

  - Is the oath based on the intention of the swearer or the one requesting the oath?

النية تعمم الخاص، وتخصص العام بغير خلاف فيهما وهل تقيد المطلق

  - The intention generalizes the specific and specifies the general without dispute; does it also qualify the absolute?

دلالة الأحوال تختلف بها دلالة الأقوال

  - The interpretation of statements changes based on the context in which they are made

الكتاب كالخطاب والإشارات المعهودة للأخرس كالبيان باللسان

- Written communication is treated like verbal communication and the established gestures of a mute person are considered equivalent to verbal expression

لا ثواب ولا عقاب إلا بنية

**No Reward or Punishment Except with Intention**

Some consider this expression as one of the formulations of the major maxim "Matters are judged by their intentions", with the Ḥanafīs often employing this phrasing as it aligns more with their principles.

من عمل عمل خير من غير نية كفاه نية اختياره للإسلام على غيره من الأديان.

This is a consistent maxim, and it cannot be objected to merely because some people, due to their profound devotion to God and their care for His pleasure, find that all their righteous actions become second nature. All such actions, if Allah wills, are encompassed by the intention expressed in the verse: "Indeed, my prayer, my rites of sacrifice, my living and my dying are for Allah, Lord of the worlds" (al-Anʿām 6:162). Specifying the intention is also required in some acts of worship but not in others. Ibn Rajab stated: *"The only room for speculation is if the person does a good deed without a sound or corrupt intention. Abū Sulaymān al-Dārānī said, 'Whoever does a good deed without a specific intention, the intention of choosing Islam over other religions suffices for them."*[162]

فهذه الأشياء حيثما فعلت فهي خير، كما دل على ذلك الاستثناء. ولكن كمال الأجر وتمامه بحسب النية والإخلاص

However, it is more complete to consciously intend nearness to Allah in every action. Al-Siʿdī, in his commentary on the verse: "There is no good in most of their secret conversations, except one who enjoins charity or that which is right or reconciliation between people" (an-Nisāʾ 4:114), said: *"These matters, wherever they are performed, are good, as indicated by the exception. But the perfection of*

[162] Jāmiʿ al-ʿUlūm wa-l-Ḥikam, Ibn Rajab, 2:66.

*reward and its full measure depends on the intention and sincerity, which is why Allah said: 'And whoever does that seeking the pleasure of Allah, We shall give them a great reward.'"*[163]

العبرة في العقود بالمقاصد والمعاني لا بالألفاظ والمباني

**Consideration in contracts is given to intentions and meanings, not words and forms**

المقاصد عندنا في العقود معتبرة

العقود تصح بكل ما دل على مقصودها من قول أو فعل

المقاصد والاعتقادات معتبرة في التصرفات والعادات

This expression is favored by the Ḥanafīs and Mālikīs when discussing the maxim, and our madhhab tends to agree with them rather than the Shāfiʿīs. Ibn Mufliḥ mentioned: "Intentions are considered in contracts in our view."[164] Imām Taqī al-Dīn expressed it by saying: "Contracts are valid by anything that indicates their purpose, whether by speech or action."[165] He further expanded upon this by stating: "Intentions and beliefs (al-maqāṣid wa-al-iʿtiqādāt) are considered in legal dispositions and customary practices (taṣarrufāt wa-al-ʿādāt),"[166] thereby encompassing both contracts and other actions.

Now, let us turn to Ibn Rajab's discussion in the tenth maxim regarding the significance of words in acts of worship and transactions. I will provide it here in detail due to its importance:

(Tenth Maxim): The words considered in acts of worship and transactions:

1. (Among them) are those where both wording and meaning are considered, such as the Qurʾān, whose wording and meaning are miraculous. Hence, a translation cannot serve as a substitute for the original.
2. (Among them) are those where only the meaning is considered, not the wording, such as the wording in contracts of sale and others, as well as that of divorce.
3. (Among them) are those where wording is considered if one is able to use it, but not if incapable. This includes several cases, such as saying the takbīr, tasbīḥ (declaring Allah free of imperfection), and supplications in prayer, where it is not allowed to translate these if one is able to say them in Arabic. In the case of incapacity, should these fall under the first category (and thus be waived), or under the second (where one may use their own language)? There are two opinions.[167] Another example is the Friday khuṭbah (sermon), which, on the correct view, must be delivered in Arabic if one is able, but may be delivered in another language if one is not. Similarly, the word for marriage (*nikāḥ*) may be used in a non-Arabic language if one is incapable of using Arabic, and there are two views regarding one who can learn Arabic. Lastly,

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[163] Taysīr al-Karīm al-Raḥmān fī Tafsīr Kalām al-Mannān, al-Siʿdī, 202.

[164] Al-Ādāb al-Sharʿiyyah wa-al-Minaḥ al-Marʿiyyah, Ibn Mufliḥ, 3:286.

[165] al-Qawāʿid al-Nūrāniyyah al-Fiqhiyyah, Taqī al-Dīn Ibn Taymiyyah, 160.

[166] *Al-Fatāwā al-Kubrā*, Taqī al-Dīn Ibn Taymiyyah, 6:54.

[167] The established position in the madhhab is that one who is unable to pronounce the required dhikr in prayer in Arabic may recite it in their own language until they learn, but the *sunna* dhikr should not be translated.

> the wording of *liʿān (mutual imprecatory oaths between spouses)* follows the same rule as *nikāḥ*."[168]

We notice here the distinction between financial transactions and marital contracts, the latter being closer to acts of worship, even though they are still transactions. Thus, wording carries greater weight in them, but it is waived in cases of incapacity. In another view, chosen by Imām Taqī al-Dīn, the meaning is what matters even in the marital contract.

The maxim does not mean that wording is entirely disregarded. Rather, it is understood in light of the intent when possible; otherwise, it is not neglected. Here is an example of how the maxim is applied within the madhhab, along with several important benefits:

In *Sharḥ al-Muntaḥā* concerning a gift (*hibah*):

"Unless the recipient knew that the giver gave out of embarrassment, in which case the gift must be returned ... If a known compensation is stipulated, the gift is valid according to an explicit report and becomes a sale despite the use of the word gift ... If the gift is unqualified, it does not require compensation."[169]

Here, they did not cling to the wording when it contradicted the intended purpose, treating the transaction as a sale despite using the term 'gift.' However, they did adhere to the wording when it was used without any contrary indication, or in cases of dispute.

However, an issue arises with this maxim because the intentions of the two parties in a sale may differ. Thus, the Shāfiʿīs state that if a seller sells an item for a price of one thousand, and the currency in that region does not have one dominant type, and both parties intend a specific type, the sale is invalid according to the sounder opinion unless they explicitly specify it. In our madhhab, however, we resolve this by referring to the dominant interpretation, which is the dominant currency in the region, then, the most widely circulated, then the intermediate type if they are equally current.[170]

Imām Taqī al-Dīn Ibn Taymiyyah presented three juristic views concerning contractual form. The first holds that contracts are valid only through designated formulas and expressions, while allowing gestures in cases of incapacity and writing in cases of need. The second validates acts where customary practice treats them as contractual. The third holds that "contracts are concluded by every word or act indicating their intended meaning and by everything people regard as a sale or lease." He preferred the third view and expressly included marriage, stating: "It is well known that contextual indications in marriage are recognizable: people gather for that purpose and discuss why they have gathered." He therefore referred contractual forms to customary usage and stated the governing methodological distinction: "Human

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[168] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:95-96.

[169] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:430.

[170] "If the two transactors disagree on the form of the price (...) (the currency of the country is taken) as Aḥmad explicitly stated, because it is apparent that they do not make the contract except with that (currency). (Then) if there are multiple currencies in the country, the one (with the highest circulation) is taken (...) (If the currencies) have equal circulation in the country, then the (average) one among them is taken..." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:56.

words and acts are of two kinds: acts of worship ... for which no command is established except by the Sharīʿah, and customary practices ... in which the basic rule is the absence of prohibition."[171]

لا بد من التراضي في جميع العقود والمعاوضات وعقود التبرعات

The conclusion is that in the *madhhab*, specific wording is required for the contract of *nikāḥ* (marriage). However, this does not negate the default principle that contracts are valid as long as there is mutual consent, whether expressed through words or actions, and that the determining factor is mutual satisfaction unless there is a reason for prohibition.[172] As mentioned in the twelfth rule of al-Siʿdī's legal maxims: 'Mutual satisfaction is necessary in all contracts, transactions, and gifts.'"

A note: acts of worship (*ʿibādāt*) are inherently based on divine prescription (*tawqīf*), meaning that adhering to the precise wording as transmitted is obligatory in certain cases, such as in *takbīr*, the *adhān*, and the recitation of the Qurʾān, both within and outside of prayer. At other times, it is only recommended.

For example, when someone said "and in Your Messenger whom You have sent" (*wa-bi-rasūlik alladhī arsalt*), the Prophet ﷺ corrected him by instructing him to say, "and in Your Prophet whom You have sent" (*wa-bi-nabiyyika alladhī arsalt*), as he initially taught him. This correction highlights the virtue of adhering to the precise wording of invocations (*adhkār*) that have been authentically transmitted.

وأولى ما قيل في الحكمة في رده على من قال الرسول بدل النبي أن ألفاظ الأذكار توقيفية ولها خصائص وأسرار لا يدخلها القياس، فتجب المحافظة على اللفظ الذي وردت به، وهذا اختيار المازري.

Imām Ibn Ḥajar said regarding this: "The best explanation given for why the Prophet ﷺ corrected the one who said 'and in Your Messenger whom You have sent' to say instead 'and in Your Prophet whom You have sent,' is that the wordings of invocations (*adhkār*) are divinely ordained (*tawqīfiyyah*) and contain specific qualities and secrets that cannot be subjected to analogy (*qiyās*). Therefore, it is obligatory to preserve the wording exactly as it has been transmitted. This was the view chosen by Al-Māzirī."[173]

الأسباب والدواعي للعقود والتبرعات معتبرة

**The causes and motives for contracts and donations are considered.**

This is the fifty-first maxim of the Siʿdī maxims.

Its meaning is closely related to the overarching maxim, "Matters are judged by their intentions," as well as to the maxim "Consideration in contracts is given to intentions and meanings, not words and forms," as causes and motives indicate intentions and meanings.

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[171] al-Qawāʿid al-Nūrāniyyah al-Fiqhiyyah, Taqī al-Dīn Ibn Taymiyyah, 153.

[172] Refer to the discussion on forced marriage under the section concerning causes for concessions in the maxim "Hardship begets facility".

[173] *Fatḥ al-Bārī*, Ibn Ḥajar, 11:112.

In the one hundred and fiftieth maxim of Ibn Rajab:

«تعتبر الأسباب في عقود التمليكات كما تعتبر في الأيمان»

"Causes are considered in ownership contracts just as they are in oaths."[174]

هَدَايَا الْعُمَّالِ غُلُولٌ

The Prophet ﷺ said: "The gifts given to public officials are ghulūl (embezzlement)." The meaning of this is explained in the ḥadīth of Ibn al-Lutbiyyah, who was an official in charge of collecting zakāh, as found in the agreed-upon collections. This is because, when the motivation behind the gift is to gain an illicit benefit, such as reducing or waiving part of the obligatory zakāh, it is considered a bribe, regardless of what it is called.

This principle also highlights the invalidity of deceptive tricks (*ḥiyal*) designed to achieve an impermissible objective.

One example of this is the impermissibility of gifts from a borrower unless they are customary.[175]

In cases of oaths, when the intention of the one swearing is unclear, we look to the motivating cause behind the oath.[176]

Ibn Rajab listed other examples, such as:

- "Gifts given to the commander of an army by polytheists, which, according to the school, belong to the collective as war booty or *fay'*, based on differences among scholars…
- The gift a wife gives her husband from her ṣadāq (dower) when he requests it, which is based on the desire to maintain the marriage. If he divorces her, she has the right to reclaim it, as Aḥmad explicitly stated in ʿAbd Allāh's transmission…
- And among these is the gift given to someone who has interceded for another before the ruler or someone similar; this is not permissible. This was mentioned by al-Qāḍī, and Imām Aḥmad also alluded to it, as it is akin to taking a fee for intercession, which serves the public welfare and for which no fee may be taken. A clear ḥadīth in the *Sunan* addresses this issue.[177]" [178]

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[174] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:78.

[175] "If he were to do something beneficial before fulfilling his debt, it would not be permissible unless he intended to consider it as part of the repayment or to compensate for it—except if it had been their established custom prior to the loan." *Al-Iqnāʿ*, al-Ḥajjāwī, 2:149.

[176] "If the one swearing an oath had no specific intention in mind, then the oath is determined based on the reason for the oath and what incited it." *Ghāyat al-Muntahā*, Marʿī al-Karmī, 2:535.

[177] "If someone intercedes on behalf of his brother and receives a gift for doing so, and accepts it, he has entered a great door of *ribā* (usury)." Reported by Abū Dāwūd.

[178] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:78.

الوسائل لها أحكام المقاصد

**The Means Take on the Rulings of the Objectives**

This principle is expressed by the distinguished scholar al-Siʿdī (rA) in his poetry:

وسائل الأمور كالمقاصد
واحكم بهذا الحكم للزوائد

*The means to matters are like the objectives,*
*And judge by this same ruling for the complements.*

"وسيلة المقصود تابعة للمقصود"

Ibn al-Qayyim (rA) expressed it as follows:
*"The means to the objective follow the ruling of the objective."*[179]

«وسائل المحرم ممنوعة»

Ibn Rajab (rA) phrased it by saying:
*"The means to a prohibited act are forbidden."*[180]

«ويتفرع عليها: أن توابع العبادات والأعمال حكمها حكمها... ومعنى الوسائل: الطرق التي يسلك منها إلى الشيء، والسبب الذي يوصل إلى الشيء... فالذهاب والمشي إلى الصلاة، ومجالس الذكر... من حين يخرج ويذهب من محله إلى أن يرجع إلى مقره وهو في عبادة؛ لأنها وسائل للعبادة ومتممات لها».

Shaykh al-Siʿdī (rA) said: "It also follows that the subsidiary acts of worship and other deeds share their rulings... Means are the paths taken to reach something and the causes that lead to it... Thus, going and walking to prayer, gatherings of remembrance... from the time a person leaves his dwelling until he returns to it, are part of the worship, because they are means to it and complements of it."[181]

وَمَن سَلَكَ طَرِيقًا يَلْتَمِسُ فيه عِلْمًا، سَهَّلَ اللَّهُ له به طَرِيقًا إلى الجَنَّةِ.

For instance, if prayer is obligatory and purification (wuḍūʾ) is its condition, then traveling to the water source becomes obligatory as well. The Prophet ﷺ said: *"Whoever treads a path seeking knowledge, Allah will make his path to Paradise easy for him."*

Understand that this discussion concerns the means that do not have independent rulings in the Sharīʿah; they take the rulings of their respective ends. This brings out the first distinction between this maxim and the claim attributed to Machiavelli that "the ends justify the means." Regardless of the investigation into the man's intended meaning, the common understanding of that statement is corrupt from two perspectives: firstly, the objectives (maqāṣid) differ between Sharīʿah and most practitioners of that

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[179] Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn, Ibn Qayyim al-Jawziyyah, 3:108.

[180] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:61.

[181] *Al-Qawāʿid wa-al-Uṣūl al-Jāmiʿah wa-al-Furūq wa-al-Taqāsīm al-Badīʿah al-Nāfiʿah*, ʿAbd al-Raḥmān ibn Nāṣir al-Saʿdī, pp. 25–26.

principle, and secondly, the means referenced in the maxim are those to which the Sharīʿah has not assigned specific rulings. For example, theft is not permissible even for charitable purposes. However, there may be conflicts between good and evil acts, which call for other principles such as *choosing the lesser of two evils*. Imām Taqī al-Dīn has an extensive section on the conflict between good and evil acts or both, which should be consulted.[182]

النادر لا عبرة له

Moreover, this discussion pertains to means that predominantly lead to their intended ends, based on the maxim: *"The rare is not considered."* What consistently leads to its intended end falls under the following two maxims:

"ما لا يتم الواجب إلا به فهو واجب". كغسل بعض الشعر لاستيعاب الوجه بالغسل.

1. *"Whatever is necessary for the fulfillment of an obligation is itself obligatory,"* like washing part of the hair to ensure the face is thoroughly washed in wuḍūʾ.

و"ما لا يتم اجتناب الحرام إلا باجتنابه فهو حرام" كما لو اختلطت الأخت بأجنبية حرمتا.

2. *"That which ḥarām cannot be avoided except by avoiding it is itself ḥarām,"* such as in a rare scenario where one's sister is mixed with an unrelated woman, but he cannot be certain which is which, both become prohibited to marry.

These two maxims are widely accepted, even by those who dispute the idea of blocking the means (*sadd al-dharāʾiʿ*) when they predominantly lead to the prohibited.

Imām Ibn al-Qayyim has a detailed investigation on the subject under the section of *sadd al-dharāʾiʿ*. He states:

"Here, there are four categories:

1. A means specifically designed to lead to corruption.
2. A permissible means used with the intent to achieve corruption.
3. A permissible means not intended to achieve corruption but predominantly leads to it, with its harm outweighing its benefit.
4. A permissible means[183] that may lead to corruption but whose benefit outweighs its harm." *[184]*

He then provides examples for each:

1. Drinking intoxicants, which leads to the corruption of intoxication.
2. Someone contracting a marriage with the intent to make a woman permissible for her former husband (taḥlīl), or conducting a sale intending to engage in usury.

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[182] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 20:48.

[183] This fourth category falls under the principle: 'What is prohibited to block the means to evil may be permitted for a greater benefit.' Jāmiʿ al-Masāʾil, Ibn Taymiyyah, 8:292.

[184] Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn, Ibn Qayyim al-Jawziyyah, 3:109.

3. Insulting the gods of the polytheists in front of them or praying to Allah in front of a grave.
4. Looking at a prospective spouse, a woman being sought for purchase, the one being testified against, a patient or trader; speaking the truth in front of a tyrant, and similar actions.

Ibn al-Qayyim concludes:

*"The Sharīʿah has come with the allowance, recommendation, or obligation of this fourth category, depending on the degree of its benefit. It has prohibited the first category either by dislike or outright prohibition, depending on the degree of its harm. The debate remains regarding the second and third categories: has the Sharīʿah permitted them, or has it prohibited them?"*[185]

He ultimately concludes that the Sharīʿah prohibits the second and third categories. He supports this with several pieces of evidence, including:

{وَلا تَسُبُّوا الَّذِينَ يَدْعُونَ مِنْ دُونِ اللَّهِ فَيَسُبُّوا اللَّهَ عَدْوًا بِغَيْرِ عِلْمٍ} [الأنعام: 108]

- Allah's saying: *"And do not insult those they invoke besides Allah, lest they insult Allah in enmity without knowledge"* (al-Anʿām: 108).

{وَلا يَضْرِبْنَ بِأَرْجُلِهِنَّ لِيُعْلَمَ مَا يُخْفِينَ مِنْ زِينَتِهِنَّ} [النور: 31]

- Allah's saying: *"And let them not stamp their feet to make known what they conceal of their adornment"* (al-Nūr: 31).

Know that this issue extends beyond merely blocking the means to the prohibited; it also includes opening the means to the recommended and obligatory. An extension of this principle is the maxim: *"Whatever is necessary for the fulfillment of an obligation is itself obligatory,"* as mentioned above and will be further detailed.

Regarding complements and additional matters, Shaykh Saʿd al-Shithrī states:

*"In terms of reward and punishment, they take the ruling of what they complete. For instance, someone returning home from the mosque is rewarded for this action. But in terms of prohibition, do completions of the prohibited take its ruling? We say this falls into two categories: the first involves completions that are of the same nature as the prohibited act, and they take its ruling in prohibition and sinfulness. The second involves completions that are necessary to avoid the prohibited, and these do not take its ruling. For example, if a person in a state of iḥrām recalls that they are wearing stitched clothing, they remove it. This removal is to avoid the prohibited. There are matters that fall into dispute as to whether they are completions of the prohibited act of the same nature or completions to avoid the prohibited. For instance, if someone is having intercourse with their spouse at night during Ramadan and the call to prayer (adhān) is given, and they withdraw. Is this withdrawal a continuation of intercourse, necessitating expiation and invalidating the fast? Or is it an act of avoiding the prohibited, thus validating the fast and not requiring expiation? This is a point of contention among the jurists, stemming from the determination of whether withdrawal is considered intercourse or avoidance of it."*[186] *The*

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[185] Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn, Ibn Qayyim al-Jawziyyah, 3:110.

[186] Sharḥ Manẓūmat al-Qawāʿid al-Fiqhiyyah, Saʿd ibn Nāṣir al-Shithrī, p. 79.

*relied-upon Ḥanbalī position treats withdrawal as intercourse, invalidating the fast and requiring makeup and expiation.* [187]

Applications:

*"Stratagems that prohibit what is lawful or permit what is prohibited are all prohibited ... They involve outwardly presenting a contract while intending a prohibited end, as a deception and a means of doing what Allah has prohibited, dropping an obligation, or defeating a right. One example is lending something and selling the borrower an item for more than its value ... as a means of taking compensation for the loan."*[188]

*"If a group rebels against the Imām on the basis of a plausible interpretation, the Imām is obligated to communicate with them, asking about their grievances. He is also obligated to remove their misapprehensions so that they may return to the truth, and he is obligated to address any injustice they claim, as this is a means to the reconciliation commanded by the Sharīʿah."*[189]

*"And the fifteenth: A menstruating woman passing through the mosque, if she fears it will be soiled, is prohibited because soiling it with impurity is ḥarām, and the means take the ruling of the ends."*[190]

*"A man's entering a bathhouse with a covering and without fear of falling into something prohibited is permissible ... If such a fear exists, entering is disliked ... If he knows that entering will lead to something prohibited, it is prohibited, because means take the rulings of their ends."*[191]

*"And hunting for mere amusement is disliked because it is frivolous. However, if hunting involves injustice toward others, such as encroaching on their crops or property, then it is ḥarām, because the means take the rulings of the ends."*[192]

*"Legal stratagems used to obtain rightful claims are permissible. Allah mentioned the stratagem of Yūsuf (peace be upon him) to bring his brother to him. In al-Kashshāf:*

*"Ibn al-Jawzī said: '[Lying is permissible for] every praiseworthy and good objective that cannot be attained otherwise.' It is also mentioned in al-Hady that it is permissible for a person to lie about themselves or others if no harm is caused and if the lie is used to attain their right. He said: 'An example of this is when an Imām or judge deceives the opponent into believing something contrary to the truth in order to ascertain the actual truth, as Sulaimān (peace be upon him) deceived one of the two women by proposing to split the child in half, which led to him discovering the true mother.' It concludes: 'In al-Ādāb, it states that whenever it is possible to use ambiguity or equivocation instead of outright lying, lying becomes prohibited. This is evident from the statements of several scholars, while others have*

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[187] Another position within the madhhab validates the fast and requires neither, agreeing with the majority. *Kashshāf al-Qināʿ*, al-Buhūtī, vol. 2, p. 124; *al-Minaḥ al-Shāfiyāt*, al-Buhūtī, vol. 1, pp. 331–32.

[188] *Al-Iqnāʿ*, al-Ḥajjāwī, 2:124.

[189] *Al-Rawḍ al-Nadī Sharḥ Kāfī al-Mubtadī*, Aḥmad ibn ʿAbd Allāh al-Baʿlī, 478.

[190] *Kashshāf al-Qināʿ*, al-Buhūtī, 1:470.

[191] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:89.

[192] *Kashshāf al-Qināʿ*, al-Buhūtī, 14:344.

*explicitly stated the prohibition because there is then no need. However, according to the apparent view of Abū al-Khaṭṭāb, lying is permissible in such cases.'"*[193]

ما لا يتم الواجب إلا به فهو واجب

**What is necessary to fulfil an obligation is obligatory**

This maxim is a branch of the maxim "The Means Take on the Rulings of the Objectives," as previously explained. As a foundational principle in uṣūl al-fiqh, it also serves as one of the general evidences of Sharīʿah.[194]

In applying this maxim, scholars often integrate another related maxim: *"That which ḥarām cannot be avoided except by avoiding it is itself ḥarām*." These two maxims align in meaning, both extending from the overarching principle that the means acquire the rulings of the intended objectives or ends.

Ibn al-Laḥḥām provided the following clarification in defining the intended meaning of the maxim:

"There are two methods scholars use to define those actions:

1. First Method: As presented by scholars like al-Ghazālī and Abū Muḥammad al-Maqdisī; they divide those actions into:
    - Actions not within one's control (ghayr maqdūr): This category includes factors such as physical abilities, body parts, or actions that rely on others, like the imām or the required number of attendees for Jumuʿah. These are not considered obligatory.
    - Actions within one's control (maqdūr): Such as purification and traveling to attend Jumuʿah or Ḥajj. These are obligatory.

Abū al-Barakāt critiques the first category, arguing that no obligation exists there. He also dismisses the second by pointing out inconsistencies, such as acquiring wealth for Ḥajj or expiations, which, while within one's ability, is not obligatory.

2. Second Method:

أن ما لا يتم الوجوب إلا به فليس بواجب كالقسم الأول وكالمال في الحج والكفارات.

    - Necessary for the Obligation's Existence: Whatever is necessary for an obligation to become binding is not itself obligatory, as in the first category and as with wealth for Ḥajj and expiations.

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[193] *Kashshāf al-Qināʿ*, al-Buhūtī, 15:289.

[194] al-dalīl al-tafṣīlī (specific evidence): It refers to a specific textual proof for a particular ruling. For example, the verse *"wa-aqīmū al-ṣalāh"* ("And establish the prayer") serves as the direct or detailed evidence (al-dalīl al-tafṣīlī) for the obligation of prayer.
al-dalīl al-ijmālī (general evidence): It establishes the authority of broader sources of rulings. In this case, the authority of the Qurʾān as a source of law and the principle that a command indicates obligation (i.e., al-amr lil-wujūb) are examples of general evidences (adilla ijmāliyyah). These form the foundation for deriving individual rulings, and they are discussed in the discipline of *uṣūl al-fiqh*.

وما لا يتم الواجب إلا به فهو واجب مطلقا.

- Necessary for the Fulfillment of the Obligation: Whatever is necessary for the fulfillment of an obligation is itself obligatory, without qualification.

And this is the method held by the majority of our fellow [Ḥanbalī scholars] and others."[195]

Then, he mentioned some of its applications:

"Among these questions is whether a fasting person must abstain for a portion of the night... Ibn al-Jawzī said that the sounder of the two positions is that he is not required to do so, while a group of scholars categorically held that he is...

Another is when a man cannot distinguish his wife from a woman unlawful to him; he must then refrain from them both. The same applies when a woman prohibited to him in marriage becomes indistinguishable from a limited group of ten women otherwise eligible for him to marry. May he marry one of them?... One position permits it, treating them like a large tribe, while the other prohibits it when they number fewer than ten...

Another is when pure water becomes indistinguishable from impure water... If the impure water is equal to or greater than the pure water, he may not exercise considered judgment and must refrain from all of it, without disagreement... If the pure water is more numerous... the established position of the madhhab is that he may not exercise considered judgment, although we have another report permitting it...

Another is when pure garments become indistinguishable from impure ones. He must pray one more time than the number of impure garments, intending the obligatory prayer each time. Imam Aḥmad explicitly stated this, and he may not exercise considered judgment. Ibn ʿAqīl held that he may do so when the impure garments are numerous, because of the hardship...

Another concerns an animal slaughtered in a town where Magians and idolaters slaughter animals. It may not be eaten, even though it may have been slaughtered by a Muslim. The same applies if the town contains a mixture of Muslims and Magians, based on the agreed-upon ḥadīth: 'If you release your dog and it mingles with dogs over which you did not pronounce Allah's name, do not eat, for you do not know which of them killed it'... If, however, this occurs in a Muslim town, it is apparently permissible, because Muslims do not allow in their towns something that is outwardly unlawful to sell. This was stated in *al-Mughnī*...

Another is when someone forgets which one of the five prayers he missed... The established position of our madhhab requires him to make up all five, intending the obligatory prayer with each one. According to another report, he must perform Maghrib, Fajr, and one four-rakʿah [four-unit] prayer, based on the position that specifically identifying the prayer in one's intention is not required...

Another is when deceased Muslims become mixed with deceased non-Muslims. All of them are washed, shrouded, and prayed over, whether the Muslims are the majority or the minority, and whether this

[195] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 130.

occurs in enemy territory or elsewhere. The funeral prayer is offered over all of them, with the intention directed toward the Muslims among them."[196]

ما حُرّم سدًا للذريعة أبيح للمصلحة الراجحة

**What is prohibited to block the means to evil may be permitted for a greater benefit**

«ما حرم تحريم الوسائل فإنه يباح للحاجة والمصلحة الراجحة»

This is the expression of Imām Ibn Taymiyyah.[197] Imām Ibn al-Qayyim expressed this maxim by saying, "What is prohibited as a preventative means (*taḥrīm al-wasāʾil*) becomes permissible for a need or an overriding benefit (*maṣlaḥah rājiḥah*)."[198]

ما حُرِّم سدًا للذريعة أبيح للمصلحة الراجحة

This maxim is a derivative of the maxim "The means take on the rulings of the objectives." While at first glance it may appear to be an exception, it is not. This is because a means can result in both benefit and harm. If the benefit outweighs the harm, the action is permitted. Examples include looking at someone for purposes such as marriage, testimony, medical treatment, or financial transactions. Although looking may lead to harm, it is permitted due to the significant need in these contexts. Imām Taqī al-Dīn Ibn Taymiyyah (rA) elaborated on this principle, stating, "What is prohibited to block the means to evil is allowed for an overriding benefit." [199]

Shaykh Ibn ʿUthaymīn also conveyed this meaning in his poem:

١٩ - لكن ما حرم للذريعة  يجوز للـــــحاجة كالعرية

18. But what is prohibited to block the means to evil
    Is permissible for a need, as with the *ʿarīyah*.

وأيضا ربا الفضل إنما حرم لأنه ذريعة إلى ربا النسيئة

The term *ʿarīyah* in the final verse refers to the sale of fresh dates for dried dates, a practice that the Prophet ﷺ permitted due to need. Imām Taqī al-Dīn used this to support his principle and argued that *ribā al-faḍl* (usury involving an exchange of unequal quantities of the same commodity) is prohibited as a preventative measure, not as an end in itself. He said, "Moreover, *ribā al-faḍl* was only prohibited because it serves as a means to *ribā al-nasīʾah* (deferment usury)."[200] He further explained, "Ribā al-faḍl was prohibited because it may lead to usury. This is why it was reported that the Prophet ﷺ said, 'Do not sell one dirham for two dirhams, nor one dinar for two dinars, for I fear that it may lead to *al-ramāʾ* (i.e., usury).' This ḥadīth was reported by Imām Aḥmad." [201]

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[196] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 131-137.

[197] *Jāmiʿ al-Masāʾil*, Ibn Taymiyyah, 8:292.

[198] *Zād al-Maʿād*, Ibn Qayyim al-Jawzīyyah, 2:294.

[199] *Jāmiʿ al-Masāʾil*, Ibn Taymiyyah, 8:292.

[200] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 25:159.

[201] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 6:170.

Applications of the Maxim

Overlooking Gharar (Excessive Contractual Uncertainty) When the Benefit Outweighs the Harm:
Imām Taqī al-Dīn stated, "The prohibition *of gharar* sales is because they are a form of gambling, which leads to unjust consumption of wealth. However, if avoiding the sale causes greater harm, it becomes permissible, as preventing the greater of two harms takes precedence over avoiding the lesser one."[202]
He further explained:
"The harm caused by *gharar* is less severe than that of *ribā*. Therefore, what is needed from *gharar* transactions is permitted, since prohibiting them would cause more harm than their uncertainty. This applies to selling properties in their entirety, without knowing the internal condition of the walls or foundations, as well as selling pregnant or nursing animals without knowing the exact state of the pregnancy or the amount of milk, although selling a fetus alone is forbidden."[203]

Imām Ibn al-Qayyim explained additional applications: "What is prohibited to block the means to evil becomes permissible for an overriding benefit, such as permitting *ʿarāyā* despite it involving *ribā al-faḍl*, allowing certain prayers with specific reasons (*dhawāt al-asbāb*) after Fajr and ʿAṣr, and permitting looking at someone for marriage, testimony, medical treatment, or transactions, even though looking is generally prohibited. Similarly, gold and silk are prohibited for men to prevent resemblance to women, whose imitators are cursed. Yet exceptions are allowed where needed. Likewise, selling lawfully crafted jewelry for more than its weight should be permitted, because there is a need for it."[204]

These examples are consistent with the well-known position of the Ḥanbalī school, except for permitting certain prayers after Fajr and ʿAṣr and allowing jewelry to be sold for more than its weight. Shaykh Taqī al-Dīn (rA) extended the permissibility of *ʿarāyā* to include all fruits and crops, a position also held by the Qāḍī al-Farrāʾ, though it contrasts with the relied-upon view of the madhhab.

We conclude the discussion on this maxim with the statement of Imām Abū al-ʿAbbās:

«ثم إن ما نهى عنه لسد الذريعة يباح للمصلحة الراجحة كما يباح النظر إلى المخطوبة والسفر بها إذا خيف ضياعها كسفرها من دار الحرب مثل سفر أم كلثوم وكسفر عائشة لما تخلفت مع صفوان بن المعطل.»

“Furthermore, what is prohibited to block a means to evil becomes permissible when there is an overriding benefit. For instance, it is permissible to look at a woman one intends to marry or to travel with her if there is a fear of harm—such as escorting her from enemy territory, as in the case of Umm Kulthūm, or the travel of ʿĀʾishah (rAa) when she was left behind with Ṣafwān ibn al-Muʿaṭṭal.”[205]

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[202] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 29:483.

[203] al-Qawāʿid al-Nūrāniyyah al-Fiqhiyyah, Taqī al-Dīn Ibn Taymiyyah, 172.

[204] *Iʿlām al-Muwaqqiʿīn,* Ibn al-Qayyim, 2:108.

[205] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 23:186.

مقاصد اللفظ على نية اللافظ

**The Intended Sense of an Utterance Follows the Speaker's Intention**

يجب حمل كلام الناطقين على مرادهم مهما أمكن في العقود والفسوخ والإقرارات وغيرها.

This expression is used by the Shāfiʿī school and is comprehensive and aligns with our school. In fact, we are among the schools most committed to this principle. Al-Siʿdī expressed it in his fifty-seventh maxim, saying: *"The speech of speakers must be interpreted according to their intention, whenever possible, in contracts, annulments, acknowledgments, and other cases."*

كل لفظ بغير قصد من المتكلم؛ لسهو وسبق لسان وعدم عقل: فإنه لا يترتب عليه حكم.

One of the scholars most committed to this maxim is Imām Abū al-ʿAbbās Ibn Taymiyyah (rA), who said: *"Any speech uttered without intention—due to forgetfulness, a slip of the tongue, or lack of awareness—has no legal consequence."*[206] For this reason, he nullified the divorce pronounced by an intoxicated person, contrary to the relied-upon opinion in the madhhab.

يرجع في الأيمان إلى نية الحالف إذا احتملها اللفظ.

In our madhhab, we also express this principle in oaths by saying: *"The oath is interpreted according to the intention of the one swearing, as long as the wording allows it."* Al-Rawḍ mentions: *"(The oath is interpreted according to the intention of the one swearing, as long as the wording allows it), based on the Prophet's ﷺ saying: 'Each person shall have only what he intended.' If someone swears using the words 'roof' or 'structure' but means the sky, or uses 'bed' or 'rug' but means the earth, the specific intention takes precedence over the general meaning of the wording. Equivocation is also permitted in the speech of someone who is not an oppressor."*[207]

Notably, the text does not differentiate between judicial and non-judicial contexts when discussing equivocation. This is the subject of the following maxim.

هل اليمين على نية الحالف أو المستحلف؟

**Is the oath based on the intention of the swearer or the one requesting the oath?**

The oath, according to us, is based on the intention of the one taking the oath, even in front of a judge, if the one taking the oath is wronged. However, it is based on the intention of the one demanding the oath or the judge if the one taking the oath is unjust.[208]

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[206] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 33:107.

[207] *Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 3:456. He added: "(If the intention is absent, the oath reverts to the cause behind it and what provoked it), as that indicates the intention."

[208] "If the person swearing is acting wrongfully, as in the case of one whom a judge requires to swear concerning a right that he is withholding, his equivocation does not benefit him (...). His oath is construed according to the apparent meaning intended by the person exacting the oath (...). If the person swearing is wronged (...) then in this case he may employ equivocation (...)." Kashshāf al-Qināʿ, al-Buhūtī, 12:368.

Thus, we align with the Ḥanafī school and differ from the Mālikī and Shāfiʿī schools, who, when the oath is taken before someone entitled to demand it, base it on the intention of the one requesting it.

إنما أقضي على نحو ما أسمع.

However, it should be noted that in disputation, when the intention is not clear, the judgment will be according to the apparent wording, as the Prophet ﷺ said: *"I judge based on what I hear."*

*A Benefit Regarding Garbled (Non-standard) Speech*

من رام جعل جميع الناس في لفظ واحد بحسب عادة قوم بعينهم فقد رام ما لا يمكن عقلا ولا يصح شرعا

Al-Iqnāʿ states: "The shaykh [Taqī al-Dīn Ibn Taymiyyah (rA)] said: Legal rulings pertain to what people intend by grammatically faulty expressions, such as saying, 'I swore by Allah,' with the name Allah in the nominative or accusative; 'By Allah, I will fast and I will pray,' using the forms ba-aṣūm and ba-aṣallī, and the like; or a non-Muslim saying, 'I testify that Muḥammad is the Messenger of Allah,' with the first noun in the nominative and the second in the accusative; or saying, 'I bequeathed a hundred to Zayd,' 'I emancipated Sālim,' and the like. He said: Whoever seeks to impose a single expression on all people according to the custom of a particular group seeks what is rationally impossible and invalid under the Sharīʿah. End of quote, and it is as he said."[209]

Among the maxims connected to these rulings is the 125th maxim from *Qawāʿid Ibn Rajab*:

النية تعمم الخاص، وتخصص العام بغير خلاف فيهما وهل تقيد المطلق

**The intention generalizes the specific and specifies the general without dispute; does it also qualify the absolute?**

«النية تعمم الخاص، وتخصص العام بغير خلاف فيهما وهل تقيد المطلق، أو تكون استثناء من النص؟ على وجهين فيهما»

Ibn Rajab (rA) said: *"Intention can generalize a specific statement and specify a general one without dispute. However, can it qualify an unqualified statement or serve as an exception to a text? There are two opinions on the matter."*[210]

He provided examples:

- Generalizing the Specific:
  *"For example, if someone swears not to drink water belonging to another person, intending to abstain from all that the person owns, they will be in breach of the oath by consuming anything the owner possesses."*[211]
- Specifying the General:
  *"... or if he says, 'If you dress, you are divorced,' and then explains that he meant a red garment; or if he states, 'If you enter the house, you are divorced,' and then adds that he intended it only*

[209] *Al-Iqnāʿ*, al-Ḥajjāwī, 4:332.

[210] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:445.

[211] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:446.

*for this year, the majority of our fellows hold that he is left accountable to his conscience before God. However, there are two views on whether his intention is accepted in judicial rulings."*[212]

- Restricting the Unqualified:
  *"For example, if someone vows to give charity but privately intends a specific amount, Aḥmad (rA) stated in a report from Abū Dāwūd that the specified amount is not binding. However, the author of Al-Muḥarrar, in his commentary on Al-Hidāyah, argued that it is binding (...) 'If someone swears to eat meat or fruit, drink water, speak to a man, or enter a house, intending specific items or times, the oath applies only to what they intended. He mentioned no disagreement on this point.'"*[213]

Ibn Rajab (rA) explained: "Disagreement emerged only regarding restricting the unqualified statement through intention, not with specifying the general. Specifying the general reduces its scope to part of its meaning, in accordance with the speaker's intention, and this occurs through both intention and will. In this context, the indicators pointing to specification are called 'specifiers' (mukhaṣṣiṣāt), as they reveal the specific intent. On the other hand, restricting the unqualified entails adding to its meaning, and such an addition cannot be established through intention alone. If it is said: 'Does this not contradict the idea of generalizing a specific statement through intention, which is also an addition to the literal wording?' The response is: 'There is a difference between the two. When a specific statement is intended to be general, it functions as a ruling for a particular case, based on a rationale (ʿillah) that extends to every case where the same rationale applies. This does not hold true when restricting the unqualified statement to some of its components. And Allah knows best.'" [214]

*It must be noted here that these intentions must be accompanied by action for legal rulings to apply. A vow does not take effect by mere intention, nor does divorce. If someone vows to give charity, it suffices to donate any amount, and specifying an amount through intention alone requires verbalization to become binding. However, "...if someone swears to perform an act within a specific timeframe—such as a day, month, or year—the oath is restricted by the intended time because intention redirects the apparent meaning of the wording to something different."*[215] *In this instance, there is no creation of a new obligation or addition that would require verbal expression for the intention to be binding.*

النية فيما خفي، ليس فيما ظهر

Ibn Rajab (rA) also gave examples of using intention to create exceptions within explicit statements: "For example, if someone says, 'You are divorced three times,' but internally excludes one, does the triple divorce take effect inwardly? There are two opinions: It does not apply … It does apply … because intention only directs wording toward a meaning it can bear; an explicit statement allows no such possibility, whereas a general expression does. Aḥmad (rA) expressed this principle in a report from Ṣāliḥ: *'Intention applies to what is concealed, not to what is apparent.'* Another example: If

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[212] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:449.

[213] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:450.

[214] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:452.

[215] *Kashshāf al-Qināʿ*, al-Buhūtī, 14:403.

someone says: ‘My four wives are divorced,’ but internally excludes one of them, the ruling follows the same principle.” [216]

*It seems that intention can be used to create an exception, but it is weaker than explicit statements about numbers. Thus, the divorce applies to all four wives. However, if someone merely says: ‘My wives,’ without specifying a number, the exception is accepted, and they are judged by their intention. This is contrary to the Mālikī and Shāfiʿī madhāhib, which do not accept such exceptions in judicial rulings, though they allow it as a matter of personal conscience.*[217]

دلالة الأحوال تختلف بها دلالة الأقوال

**The interpretation of statements changes based on the context in which they are made**

" وَإِنْ كَانَ قَمِيصُهُ قُدَّ مِنْ دُبُرٍ فَكَذَبَتْ وَهُوَ مِنَ الصَّادِقِينَ"

Allah (the Exalted) said: *"And if his shirt is torn from the back, then she has lied, and he is among the truthful."* (Qurʾān 12:27)

"دلالة الأحوال تختلف بها دلالة الأقوال في قبول دعوى ما يوافقها ورد ما يخالفها، ويترتب عليها الأحكام بمجردها."

“The meaning of speech can be altered by the surrounding circumstances, with claims that agree with those circumstances being accepted and claims that contradict them being rejected, and rulings may be based solely on contextual indications.” [218] This is the 151st maxim from *Qawāʿid Ibn Rajab*.

The essence of this maxim is that conditions such as seriousness, jest, joy, sadness, anger, or contentment indicate the true intention behind speech and actions. The reason for including this maxim, as well as *" The causes and motives for contracts and donations are considered"*—as subsidiary maxims is that both maxims reflect the importance of intent. Cause and circumstance are considered due to their indication of intent.

«دلالة الحال تغني عن السؤال»

Imām Abū al-ʿAbbās Ibn Taymiyyah (rA) stated: *“The indication of context renders questioning unnecessary.”*[219]

Imām Ibn Rajab (rA) mentioned several applications of this maxim:

- “Divorce through implicit expressions:
  In cases of anger and dispute, implicit expressions indicating divorce are not accepted as meaning anything other than divorce.

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[216] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:453.

[217] "If a man with four wives says, ‘My four wives are divorced,’ but internally excludes one of them, all of them are divorced. This is because the mention of a specific number is explicit (naṣṣ) regarding what it encompasses (...) However, if he does not say ‘four’ (...) the one excluded in his heart is not divorced." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 9:408.

[218] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:81.

[219] Minhāj al-Sunnah al-Nabawiyyah, Ibn Taymiyyah, 8:386.

- Indirect expressions of slander (kināyāt al-qadhf):
  It also applies to accusations of zinā (unlawful sexual intercourse) through indirect expressions. According to the correct view, these expressions carry the same ruling. Ibn ʿAqīl even considered them, when supported by contextual indications, to be as explicit as direct accusations.
- Disbelief uttered under duress:
  If a prisoner of war utters a statement of disbelief but claims he was coerced, his claim is accepted because captivity is itself a sign of compulsion and concealment of faith.
- Mocking or quoting the testimony of faith:
  If a non-Muslim recites the testimony of faith, either mockingly or as a quotation, and claims that he did not intend to embrace Islam, and the context indicates the truth of his claim, there are two opinions as to whether his statement is accepted, as reported by al-Qāḍī in his "Riwāyatayn." [220]
- Forced confession:
  "If someone imprisoned or beaten unjustly confesses to something and later claims coercion, his claim of coercion is accepted, as [Ahmad] explicitly stated."[221]
- "Disputes between spouses over household items:
  In disputes over household possessions, items typically used by men belong to the husband, and items typically used by women belong to the wife.
- Disputes between artisans over tools:
  The same applies if two artisans dispute over an implement in their shared shop, or the owner of a house disputes with a tailor in it over a needle or scissors, or the lessor and lessee dispute over a detached shelf or a door leaf with a matching counterpart still installed." [222]
- Implausible claims:
  "If someone makes a claim that is obviously false, such as claiming that the caliph purchased a bundle of vegetables from him and carried it with his own hands, the claim is not heard, without disagreement, as noted by al-Qāḍī in his *Khilāf*." [223]

Based on this maxim, Abū al-ʿAbbās Ibn Taymiyyah (rA) argued—contrary to the dominant opinion in the madhhab—that marriage can be valid even without specific wording. He defended this view by saying: *"It is well known that the contextual indications of marriage are recognized—such as people gathering for that purpose and discussing it openly. If, after such a gathering, someone says, 'I have given her to you for one thousand dirhams,' it becomes necessarily known to those present that the intended meaning is marriage."* [224]

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[220] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:81.

[221] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:82.

[222] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:84.

[223] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:85.

[224] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 11:29.

الكتاب كالخطاب والإشارات المعهودة للأخرس كالبيان باللسان

**"Written communication is treated like verbal communication" and "The established gestures of a mute person are considered equivalent to verbal expression"**

الكتاب كالخطاب

الإشارات المعهودة للأخرس كالبيان باللسان

The maxims of "Written communication is treated like verbal communication"[225] and "The established gestures of a mute person are considered equivalent to verbal expression"[226] relate to acknowledging linguistic conventions and their equivalents in communication, such as writing and gestures, recognized as expressions by custom. Some scholars consider these maxims as branches of the maxim "Custom is Authoritative" (al-ʿādah muḥakkamah), but it is more fitting to align them with the maxim "Actions are Judged by Their Intentions" (al-umūr bi-maqāṣidihā). These maxims also fall under the maxim of Imām Abū al-ʿAbbās: "Contracts are Valid by Whatever Indicates Their Purpose, Whether by Word or Action."[227] However, it should be noted that even those who stipulate specific words in contracts make exceptions for writing in cases of need and for the mute's gestures due to necessity.

" ... ثم هؤلاء يقيمون الإشارة مقام العبارة عند العجز عنها، كما في الأخرس. ويقيمون الكتابة أيضا مقام العبارة عند الحاجة."

Abū al-ʿAbbās (rA) stated: " … These scholars [still] treat gestures as a substitute for verbal expressions when speech is not possible, as in the case of a mute person. They also treat writing as a substitute for verbal expressions when needed."[228]

The pen is one of the two tongues, and the Messenger of Allah ﷺ was commanded to deliver the message to all people. At times, he conveyed it verbally, and at other times, through writing. However, for writing to establish rulings, it must be clear.

Ibn al-Najjār stated: "The basis of written communications is the Qurʾān, the Sunnah, and consensus. As for the Qurʾān, Allah Almighty says: {I have been delivered a noble letter} [al-Naml: 29]. As for the Sunnah, the Prophet ﷺ corresponded with kings, writing to the Negus, Caesar, and Chosroes, inviting them to Islam. He also corresponded with his governors, officials, and zakāh collectors. The ummah has agreed on accepting letters from one judge to another because need dictates it."[229]

Al-Buhūtī stated: "If a man writes an explicit statement of divorce to his wife in a clear manner, it takes effect even if he does not intend it, because writing is explicit in divorce; it consists of letters conveying

[225] Majallat al-Aḥkām al-ʿAdliyyah, 24.

[226] Majallat al-Aḥkām al-ʿAdliyyah, 24.

[227] al-Qawāʿid al-Nūrāniyyah al-Fiqhiyyah, Taqī al-Dīn Ibn Taymiyyah, 160.

[228] al-Qawāʿid al-Nūrāniyyah al-Fiqhiyyah, Taqī al-Dīn Ibn Taymiyyah, 155.

[229] *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 11:317.

meaning, so when he writes divorce and it is understood, it takes effect just like speech, as writing serves as a substitute for the writer's verbal declaration."[230]

«كتاب الإقرار: وهو إظهار مكلف مختار ما عليه لفظا أو كتابة أو إشارة أخرس»

In *al-Iqnāʿ*, it is mentioned: "Chapter on acknowledgment: It is when a legally responsible person willingly declares what is due upon him, whether by speech, writing, or the mute's gestures."[231]

If a mute person's gestures were not recognized, they could not transact with anyone, making this maxim one of necessity. There are also ḥadīths where the Messenger of Allah ﷺ conveyed his intent through gestures, such as the ḥadīth, "The month is like this and this…" (agreed upon). However, the mute's gestures must be clear and customary; otherwise, two trustworthy translators are required. Once interpreted, these gestures are valid for all transactions and dealings.

Al-Buhūtī stated: "Divorce is enacted through a clear gesture by a mute person only, as it stands in for their speech. If this gesture is only understood by some people, it is considered *kināyah*—implicit—for them. The interpretation the mute person offers for an explicit, intelligible gesture is like the interpretation a non-mute person offers for explicit words of divorce. Thus, it is understood from the above that divorce can only take effect through verbal expression, writing, or the gesture of a mute person."[232]

In *al-Iqnāʿ*, it is also stated: "If the mute's gestures or writing are understood, their liʿān (mutual imprecatory oaths between spouses) is valid; otherwise, it is not. If a mute person accuses his wife of zinā (unlawful sexual intercourse) and performs liʿān and later regains speech, denying the accusation and liʿān, the denial of the accusation is not accepted, but his denial of the *liʿān* is accepted with regard to his liabilities, making him subject to the ḥadd (prescribed punishment), and lineage is established."[233]

Scholars differed on accepting the gesture of someone whose tongue is restrained. The relied-upon view in the madhhab is that it is not accepted for his acknowledgments and transactions if there is hope of him regaining speech.[234] However, they accepted it as a substitute for the basmalah.[235] They said: 'Liʿān (mutual cursing) is valid from one whose tongue is restrained—and who has lost hope of regaining speech—through a clear gesture, like that of a naturally mute person. If the return of speech is

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[230] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 3:86. And he added: "If the writer of a divorce statement says, 'I only intended to improve my handwriting' or 'I only intended to distress my wife,' his claim is accepted, because he knows his intention best and intended a plausible purpose other than divorce."

[231] *Al-Iqnāʿ*, al-Ḥajjāwī, 4:456.

[232] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 3:68.

[233] *Al-Iqnāʿ*, al-Ḥajjāwī, 4:97.

[234] "If the testator is (...) mute, by gesture, their bequest is valid (...) However, if he is temporarily unable to speak (muʿtaqal lisānuh), then his bequest by gesture, even if understood, is not valid (...) because he is not without hope of regaining speech (...) It is also said, however, that his bequest by gesture is indeed valid, similar to a mute person." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 7:358.

[235] "According to the established view, the gesture of a mute person or someone similar, such as one temporarily unable to speak (*muʿtaqal lisānuh*), is sufficient, as that is the utmost they can do." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 1:249.

anticipated, according to two trustworthy Muslim physicians, then he is to wait,' meaning until he can speak, which, according to *al-Targhīb*, is a period of three days."[236]

Exceptions:

1. Non-acceptance of a judge's letter in cases of ḥudūd (prescribed punishments).[237]
2. The writing of divorce, although considered explicit by some, is viewed by certain scholars of the school as *kināyah* (implicit). Even for those who consider it explicit, an alternative interpretation other than divorce is accepted from the writer.[238]
3. "The testimony of a mute person is not accepted, even if their gesture is understood, unless given in writing."[239]
4. "A mute person's gesture, whether understood or not, is like an action;"[240] it is not considered speech and therefore does not invalidate the prayer unless excessive. However, in Friday sermons, 'The mute person's clear gesture is like speech.'"[241]

## More Applications of "Actions are Judged by Their Intentions" in Acts of Worship

The greatest purpose of intention is to establish sincerity for Allah. Intention distinguishes between faith and disbelief, such as when someone sacrifices for Allah, for an idol, or associates between them. It also differentiates sincerity from ostentation, as when one gives charity seeking Allah's pleasure versus seeking reputation. Intention distinguishes acts of worship from customary actions; for instance, ablution or bathing may be for ritual purity or simply for cleanliness and cooling off. Refraining from things that nullify fasting might be for devotional purposes or simply for health and treatment. Sitting in the mosque may be for *iʿtikāf* (seclusion for worship) or simply for rest and shade.

Intention also differentiates between ranks and types of worship, as fasting may be obligatory to make up a missed fast, fulfill a vow, or be voluntary; all of these distinctions are based on intention.

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[236] *Kashshāf al-Qināʿ*, al-Buhūtī, 12:520.

[237] "A judge's written communication to another judge is accepted with respect to every private right (...). It is not accepted, however, with respect to a prescribed punishment belonging to Allah Most High, such as the prescribed punishment for unlawful sexual intercourse (zinā) or for drinking intoxicants, according to the sounder view; for the rights of Allah, exalted is He, are founded upon leniency and forbearance, concealment, and the averting of punishment." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 11:317.

[238] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 3:86. And he added: "If the writer of a divorce statement says, 'I only intended to improve my handwriting' or 'I only intended to distress my wife,' his claim is accepted, as he is most knowledgeable of his own intention. Since he intended something possible other than divorce, it is akin to intending a meaning other than enactment when using the term verbally."

[239] Al-Iqnāʿ, al-Ḥajjāwī, 4:436. "There is a difference of opinion in the school, and in al-Muḥarrar it states: 'The mute person's testimony by gesture is not accepted, as he [Ahmad] explicitly stated. However, he hesitated regarding its acceptance if provided in writing. Abū Bakr preferred that it not be accepted, though in my opinion, it should be accepted. It is also said that the testimony by gesture is accepted from one whose gestures are understood, in matters known by sight; Aḥmad also alluded to this. The testimony of a deaf person is permissible concerning things seen and concerning what he heard before becoming deaf." al-Muḥarrar fī al-Fiqh ʿalā Madhhab al-Imām Aḥmad ibn Ḥanbal, 2:287.

[240] *Al-Iqnāʿ*, al-Ḥajjāwī, 1:129.

[241] *Al-Iqnāʿ*, al-Ḥajjāwī, 1:199.

When someone who missed part of the prayer joins the Imām while he is bowing, he makes a single takbīr and bows. This is sufficient if he intended it as the opening takbīr, but it is invalid if he intended it as the takbīr for going into rukūʿ (bowing) or both together.[242]

Wealth may be considered subject to zakāh if intended for trade or not subject to zakāh if intended for personal use.

If a person is prevented from habitual acts like fasting, congregational prayer, or others due to an excuse, their intention to perform them, were it not for the excuse, grants them the reward.

One does not prostrate upon hearing a verse of prostration from a recording, nor does one respond to the call to prayer if it is heard on the radio and was previously recorded, as these acts of worship require intention, and a recorded sound has no intention of its own in repeated broadcast.

## More Applications of "Actions are Judged by Their Intentions" in Transactions

Acts of a Joking Person:

In our madhhab, a sale made by someone joking is invalid, in contrast to the Shāfiʿīs, while their marriage, divorce, and emancipation are valid, in agreement with the majority. [243]

Imām Ibn al-ʿArabī, in his commentary on the verse *"And if you ask them, they will surely say, 'We were only conversing and playing.'"* [al-Tawbah: 65], provides a comprehensive statement on the acts of a joking person. He said: "The second issue: their statements were either serious or in jest, yet either way, it is disbelief, as jesting with disbelief is itself disbelief. There is no disagreement on this among the ummah... Regarding jest in other rulings, such as sale, marriage, and divorce, people have differed in opinion. The summary is three positions: distinguishing between sales and other acts, considering jest as non-binding, and treating jest as binding."[244]

Our established position thus aligns with the direction that distinguishes between sale and marriage. However, is validating marriage or even a sale of a joking person a violation of the maxim "Actions are

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[242] (The *takbīrat al-iḥrām* suffices) for the *takbīr* of bowing (*rukūʿ*), but it is better to perform two separate *takbīrs*. If both were intended with one *takbīr*, or if the *takbīr* was intended for bowing, it does not suffice, because the *takbīrat al-iḥrām* is a pillar, and it would not have been fulfilled." *Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 1:339.

[243] «... وكذا) أي: كبيع التلجئة (بيع الهازل) فهو باطل، لأنه لم ترد حقيقته (ويقبل منه) أي: من البائع أن البيع وقع تلجئة أو هزلا (بقرينة) دالة على ذلك (مع يمينه) لاحتمال كذبه، فإن لم توجد قرينة، لم تقبل دعواه إلا ببينة. (فإن باعه) أي: باع إنسان ماله (خوفا من ظالم، أو خاف) إنسان (ضيعته، أو نهبه، أو سرقته، أو غصبه) فباعه (من غير تواطؤ) مع المشتري على أن البيع تلجئة وأمانة (صح بيعه) لأنه صدر من أهله في محله من غير إكراه.» كشاف القناع، البهوتي، ج ٧ ص ٣٠٤

"Similarly—just as with a *taljiʾah* sale (protective sale)—the sale of a jesting person is invalid, as it was not intended in earnest. The seller's claim that the sale was for protection (*taljiʾah*) or in jest is accepted if there is evidence indicating this, along with his oath due to the possibility of falsehood. However, if there is no supporting evidence, his claim is only accepted with proof. If someone sells their property out of fear of a tyrant, or fearing its loss, looting, theft, or usurpation, and sells it without prior agreement with the buyer to treat the sale as *taljiʾah* or as a trust, then the sale is valid because it was conducted by an eligible person appropriately, voluntarily, and without coercion."

*Kashshāf al-Qināʿ*, al-Buhūtī, 7:304.

[244] *Aḥkām al-Qurʾān*, Ibn al-ʿArabī, 2:543.

Judged by Intentions"? What is the reasoning in validation, and what is the jurisprudential rationale for differentiating between sale and marriage? Imām Taqī al-Dīn addresses these questions, stating:

ثلاث جدهن جد وهزلهن جد النكاح والطلاق والرجعة

“As for one who speaks in jest, the well-known ḥadīth narrated by Abū Hurayrah states that the Messenger of Allah ﷺ said: ‘There are three matters in which seriousness is taken seriously and jest is also taken seriously: marriage, divorce, and taking back a divorced wife.’ It was narrated by Abū Dāwūd and al-Tirmidhī, who said: ‘It is a ḥasan gharīb ḥadīth.’...

A divorce pronounced in jest takes effect according to the general body of jurists, and a marriage contracted in jest is likewise valid... The juristic reasoning is that the person speaking in jest uttered the words without intending to be bound by their legal effect. However, it is the Lawgiver, not the contracting party, who determines the legal effects that follow from their causes. Once a person brings the legal cause into existence, its ruling binds him, whether he wishes it or not...

Those who distinguish between marriage and related matters, on the one hand, and sale and related transactions, on the other, maintain that the ḥadīth and transmitted reports indicate that, in some contracts, seriousness and jest have the same effect, whereas in others they do not... They also distinguish between them on substantive grounds: marriage, divorce, emancipation, taking back a divorced wife, and similar matters involve a right of Allah, Glorified is He... By contrast, sale and similar transactions are dealings involving property, which is purely a human right...

The upshot of both lines of reasoning is that play, jest, and joking in matters involving the rights of Allah are impermissible; therefore, serious and jesting utterances concerning His rights have the same effect. This differs from matters involving the rights of human beings... The marriage contract itself resembles acts of worship...” [245]

Acts of the Coerced Person:

Imām Taqī al-Dīn said:

وإنما المقاصد حقائق الأفعال وقوامها، وإنما الأعمال بالنيات.

"Intentions are the true realities and essence of actions, and actions are indeed judged by intentions. Among the things that demonstrate [this] are the contracts and statements of a person under coercion, such as his sale, loan, mortgage, marriage, divorce, taking back his wife, oath, vow, testimony, judgment, acknowledgment, apostasy, and other statements. All of these are disregarded and void, and most of this is a matter of consensus. The Qurʾān indicates this in verses like *'except for one who is coerced'* [al-Naḥl: 106] and *'unless you guard yourselves against them as a precaution'* [Āl ʿImrān: 28]."[246]

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[245] *Al-Fatāwā al-Kubrā*, Taqī al-Dīn Ibn Taymiyyah, 6:63-66.

[246] *Al-Fatāwā al-Kubrā*, Taqī al-Dīn Ibn Taymiyyah, 6:61.

Of the applications in our school:

The invalidation of protective sham sales (bayʿ al-taljiʾah)[247] in contrast to the Shāfiʿīs.

If someone says, 'Take this money,' then if he intends it as a gift, it is considered a gift; otherwise, it is treated as a loan, provided there is evidence indicating his intent for it to be a loan.[248]

"If a man says to his wife, 'You are to me like my mother,' or 'like my mother for me,' or 'you are with me like my mother,' he is considered to be making *ẓihār*, as he has likened his wife to his mother, similar to if he had likened her to a part of his mother's body. This ruling applies regardless of whether he intended *ẓihār* or left it unspecified, as that is the apparent meaning of the phrase. However, if he says, 'I intended like my mother in respect and honor,' this is accepted judicially, as his words allow for that interpretation."[249]

Among them, according to Imām Taqī al-Dīn and upheld in fatwās by many Ḥanbalīs and others: if a person swears by divorce or emancipation with the intention of deterrence or encouragement, this is considered an oath for which expiation is required.[250]

## Applications of "Actions are Judged by Their Intentions" in Customary Practices

In Maṭālib Ūlī al-Nuhā: "*(A question was asked to the author of al-ʿUbāb)*—Aḥmad ibn ʿUmar al-Yamanī al-Shāfiʿī—about the ruling on coffee, to which he responded: '… Ultimately, the means take on the ruling of their purposes. *(If it is intended as an aid in something meritorious)*, such as staying awake to study beneficial knowledge or discussing complex issues, it becomes meritorious. *(If intended for something permissible)*, like spending time with friends and family, it remains permissible. *(If intended as an aid to something disliked)*, such as extending the evening in idle company after the ʿIshāʾ prayer without it involving family or guests, it is disliked, as are similar cases. *(If intended to support something prohibited)*, like staying up to listen to singing and musical instruments, it becomes prohibited.' This is as he said, for indeed actions are judged by their intentions."[251]

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[247] "It is valid only if not done in jest, nor as a *taljiʾah* (protective sale) or a trust—meaning it is outwardly declared to ward off an oppressor but is not intended internally." *Muntahā al-Irādāt with the marginalia of Ibn Qāʾid*, Ibn al-Najjār, 2:250.

[248] "A loan is valid when expressed with terms such as *salam* (advance payment) or *qarḍ* (loan), as these terms are established in Islamic law, or with any wording that conveys their meaning, such as saying, 'I have given you ownership of this on the condition that you return an equivalent to me,' or if there is evidence indicating such an intention. If no equivalent is mentioned and no evidence is present, it is considered a gift. In case of a dispute, the statement of the recipient is accepted, as the apparent meaning supports him, since transferring ownership without compensation constitutes a gift." *al-Sharḥ al-Kabīr*, Ibn Qudāmah, 4:353.

[249] *Kashshāf al-Qināʿ*, al-Buhūtī, 12:472.

[250]"The third type of phrasing is when divorce, emancipation, or a vow is made conditional upon a certain contingency. (...) In such cases, the intent is considered. If the person's intention is to take an oath, without genuinely intending for these things to occur (...) then it is treated as an oath, and this falls under the category of oaths." Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 33:59.

[251] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 6:216.

## Exceptions

مقاصد اللفظ على نية اللافظ، إلا في موضع واحد، وهو اليمين عند القاضي

Imām Al-Suyūṭī stated: "The intention of the speaker governs the meaning of the words, except in one case: an oath before a judge."[252] This ruling is valid according to our madhhab, except when the one swearing the oath is oppressed.

Previously, we discussed what actions require intention and those that do not. Among the latter is the validity of a *waqf* (endowment) in cases such as: “If someone builds a structure resembling a mosque and grants the public general permission to pray therein, or if they call the adhān and establish prayer in it themselves or through someone they appoint. This call to prayer (*adhān*) and the establishment of prayer (*iqāmah*) therein are akin to granting public permission for performing prayers within it. Shaykh Taqī al-Dīn stated: “Even if the builder intended otherwise,” as recorded by Abū Ṭālib. This means that the builder's intention contrary to their outward actions holds no weight.”[253] The reasoning here is that outward actions, in this case, are more compelling than the builder’s internal intentions, especially given the sanctity of mosques.

Conversely, if someone intends marriage without using its specific words, the marriage is invalid in our madhhab unless the person is unable to pronounce the words *ankaḥtu* (I have married) or *zawwajtu* (I have given in marriage).[254] Imām Abū al-ʿAbbās, however, held that marriage is valid with any form of expression, verbal or otherwise, that conveys the intention.[255] The position of the madhhab is that marriage occupies a middle ground between acts of worship and transactions, and its specific terms are intended but not to the extent of Qurʾānic recitation or prayer words.

Exceptions to the rule also include divorce, marriage, and emancipation by jest. The distinction between these and contracts of sale (which are invalid in jest according to our madhhab) has been elaborated earlier.

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[252] al-Ashbāh wa al-Naẓāʾir, al-Suyūṭī, 44.

[253] *Kashshāf al-Qināʿ*, al-Buhūtī, 10:8.

[254] "The offer and acceptance are valid when expressed using words that convey their specific meanings in any language, for someone unable to articulate them in Arabic. This is because, in their language, such expressions are equivalent to ' *ankaḥtu*' (I marry) or 'zawwajtu' (I have given in marriage) in Arabic, and Allah does not burden a soul beyond its capacity. However, they are not valid when using words that do not convey their specific meanings, such as an Arabic speaker opting for other terms instead of '*ankaḥtu*' or 'zawwajtu.' The person unable to use Arabic is not obligated to learn its terminology in Arabic, as this is a transactional contract like a sale, unlike the *takbīr* in prayer." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:632.

[255] "Ibn ʿAqīl mentioned, narrating from some, that its validity was derived from any expression implying transfer of ownership. He himself deduced this in *ʿUmd al-Adillah* from the permissibility of emancipating one's female slave as her dowry. Our shaykh [Ibn Taymiyyah] stated: 'It is valid with whatever people consider to be a marriage, regardless of the language, words, or actions used.'" *Al-Furūʿ* and *Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 8:202.

لأن النية إنما تصرف اللفظ إلى محتمل، ولا احتمال في النص الصريح، إنما الاحتمال في العموم، ويشهد له قول أحمد في رواية صالح: (النية فيما خفي، ليس فيما ظهر).

Also, "If someone says, 'My four wives are all divorced,' but internally excludes one of them, she is treated like the others [i.e., all are divorced]."[256] This was explained by Ibn Rajab: "Intention serves to limit a statement to what is plausible, but explicit statements (naṣṣ) admit no ambiguity. Ambiguity lies in general terms. This is supported by Aḥmad's statement as recorded by Ṣāliḥ: 'Intention applies to what is unclear, not to what is explicit.'"[257]

"If someone says to his wife, 'You are forbidden to me,' he is considered as making a ẓihār, unless he intends it as a divorce or an oath. The question then arises: Is it considered ẓihār, or does it follow the intention? There are two reported views on this. *Al-Furūʿ* presents both views without preference. When the statement 'You are forbidden to me' is made without specifying intent, the correct view in the madhhab is that it is considered ẓihār."[258]

Finally, requiring an explicit statement for divorce, vows, or *waqf* (or act in waqf) is not an exception from the maxim but rather intrinsic to these rulings. For instance, just as prayer has pillars and conditions beyond intention, and one who intends to pray cannot fulfill the prayer without performing it, similarly, one who intends divorce does not effectuate it until they articulate it or express it in some manner beyond mere intention.

Two subsidiary maxims that serve as exceptions to the overarching maxim will now be discussed.

العبرة في المعاملات بما في نفس الأمر

**Consideration in Transactions Is Given to Reality**

«العبرة في العقود بما في نفس الأمر»

This principle is the 54th maxim of Shaykh al-Siʿdī, and it is articulated in *Kashshāf al-Qināʿ* as: "Consideration is given to reality in contracts."[259]

"العبرة في العقود بالمقاصد والمعاني لا بالألفاظ والمباني" "العبرة في المعاملات بما في نفس الأمر" «الاعتبار في العقود والأفعال بحقائقها ومقاصدها دون ظواهر ألفاظها وأفعالها»

Imām Ibn al-Qayyim combined two related maxims: "Contracts are judged by their intents and meanings, not merely their words or forms" and "Consideration is given to reality in transactions" when he said: "The consideration in contracts and actions is for their realities and intents, not merely their outward wording or forms." [260]

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[256] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:453.

[257] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:453.

[258] al-Inṣāf, al-Mardāwī, 23:240.

[259] *Kashshāf al-Qināʿ*, al-Buhūtī, 8:382.

[260] *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, Ibn Qayyim al-Jawziyyah, 3:79.

Explanation of the Principle: The maxim asserts that legal rulings concerning the validity, invalidity, and effects of transactions are based on their actual reality.

Ibn Rajab highlights this in his 65th principle:

«من تصرف في شيء يظن أنه لا يملكه؛ فتبين أنه كان يملكه، وفيها الخلاف أيضا»

"If someone transacts with an object they believe they do not own, but it later becomes evident they do, there is disagreement on the outcome."[261]

He said regarding its applications:

"Among them: If someone sells their father's property without his permission, and it is later discovered that the father had passed away and the seller is his sole heir, there are two views regarding the validity of the transaction. It is said to be based on two narrations." [262] According to the later scholars of the madhhab, the sale is valid.[263]

"Among them: If a man divorces a woman he assumes to be a stranger, and it is later revealed that she is his wife, there are two opinions regarding whether the divorce takes effect." [264] The established position among later scholars is that the divorce is valid.[265]

Among them is that the validity of an action undertaken by an agent does not require the agent's awareness of the agency. For instance, if someone sells another person's property thinking they are acting as an interloper (without permission), but it later becomes clear that the owner had authorized them to sell it prior to the sale, the transaction is valid.[266]

"And if someone absolves their debtor from a debt, the absolution is valid and nullifies the debt, even if it was done before the debt became due or if the creditor mistakenly believed the debt did not exist—consideration being given to the reality of the matter (as it exists in itself)."[267]

It becomes clear from the meaning of the principle and its exceptions that we have not prioritized wordings and forms over intent. Rather, we have given precedence to the external reality over assumptions in the mind. Thus, it constitutes an exception to the overarching maxim in some aspect, but not entirely.

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[261] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:478.

[262] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:478.

[263] "If the owner was unaware that the item being sold belonged to him (...) but it was later revealed that he had inherited it—or if someone authorized to act was unaware of the authorization (...) and it was later revealed that authorization had indeed been given (...) In both cases, the sale is valid because consideration in transactions is given to reality (what exists in fact) rather than the mistaken assumptions of the individual." Kashshāf al-Qināʿ, al-Buhūtī, 7:321.

[264] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:478.

[265] "(Similarly, the reverse case applies), according to the more correct opinion. This is when a man sees his wife and mistakenly assumes her to be a stranger, then says to her, 'You are divorced,' only to later realize she is indeed his wife. In this case, the divorce is effective because he addressed her with an explicit statement of divorce, and it takes effect." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 9:493.

[266] *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 5:434.

[267] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:433.

من تعجل شيئًا قبل أوانه عوقب بحرمانه

**Whoever hastens to obtain something before its due time is punished by being deprived of it**

This is al-Siʿdī's seventeenth legal maxim. He expressed it in his legal poem as follows:

معاجل المحظور قبل آنه
قد باء بالخسران مع حرمانه

*Hastening toward the prohibited before its time*
*Brings loss along with its denial every time.*

من استعجل شيئًا قبل أوانه عوقب بحرمانه

The phrasing, *"Whoever hastens to obtain something before its due time is punished by being deprived of it,"* has become common among jurists. It was adopted by Shaykh al-Khalwatī and many contemporary Ḥanbalī scholars. Earlier Ḥanbalī scholars used alternate expressions, such as Ibn Rajab's phrasing in his *Qawāʿid*:

«من تعجل حقه، أو ما أبيح له قبل وقته على وجه محرم، عوقب بحرمانه»

*"Whoever hastens their right or something permitted before its due time in an unlawful manner is punished by being deprived of it."*[268]

«من أتى بسبب يفيد الملك أو الحل أو يسقط الواجبات على وجه محرم، وكان مما تدعو النفوس إليه؛ ألغي ذلك السبب، وصار وجوده كالعدم، ولم يترتب عليه أحكامه»

He connected this maxim to his 102nd maxim: *"If someone pursues a cause to acquire ownership, permissibility, or exemption from obligations in an unlawful manner, and it is something toward which human desires incline, that cause is nullified, rendered as if non-existent, and its effects do not materialize."*[269]

Explanation of the Maxim

من ترك شيئًا لله عوضه الله خيرا منه.

The maxim means that anyone using impermissible means to prematurely obtain something lawful will be deprived of it and treated contrary to their intention. Its counterpart is the maxim: *"Whoever forsakes something for the sake of Allah, Allah compensates them with something better."*[270]

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[268] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:293.

[269] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:291.

[270] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 15:420.

الإرادة التي لا تطابق مقصود الشارع غير معتبرة.

وكل حيلة تضمنت إسقاط حق الله، أو الآدمي، فهي تندرج فيما يستحل بها المحارم

Related to this maxim is the maxim: "An intention that does not align with the objectives of the Law-Giver is not considered,"[271] which prohibits deceptive legal stratagems. "Every stratagem that entails extinguishing a right of Allah or of a human being falls among the devices by which prohibited things are treated as lawful."[272]

One of the most well-known applications of this maxim is the deprivation of a killer from inheritance, as expressly stated, if the heir kills the person from whom they would inherit (*muwarrith*), whether or not they are suspected of seeking to hasten the inheritance, according to the majority of Ḥanbalī scholars. Similarly, a person who kills a testator (*mūṣī*).[273]

Additionally, the *ṣaḥāba* (rAa) unanimously agreed that if a man divorces his wife during his death illness with the intent to deprive her of inheritance, she is still entitled to inherit.[274] According to the madhhab, "even if this (divorce) occurred before consummation or if the divorced woman's waiting period (*ʿiddah*) had ended prior to his death, she would still inherit from him—so long as she has not married another husband or apostatized from Islam."[275]

Among its applications: "One who tries to evade paying zakāh before the completion of the *ḥawl* (lunar year) by reducing the minimum threshold (*niṣāb*) or transferring the property out of their ownership is still obligated to pay zakāh."[276]

Among them: "If someone extensively channels their wealth into acquiring assets not subject to *zakāh*, such as real estate and jewelry, would this be considered an attempt to evade *zakāh*? There are two views on the matter.'"[277]

"Among them: 'Transforming wine into vinegar does not render it lawful or pure, according to the sound view in the madhhab.'"[278]

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[271] *Al-Fatāwā al-Kubrā*, Taqī al-Dīn Ibn Taymiyyah, 6:114.

[272] *Al-Fatāwā al-Kubrā*, Taqī al-Dīn Ibn Taymiyyah, 6:106.

[273] "(If a beneficiary of a will kills the testator), and the killing is of a type that incurs liability (*maḍmūn*), even if accidental, the will is nullified. This is because such killing prevents inheritance, which holds greater significance than the will, so it is more deserving of nullification." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:466.

[274] "Tumāḍir bint al-Aṣbaġ al-Kalbiyyah inherited from ʿAbd al-Raḥmān ibn ʿAwf, despite his having irrevocably divorced her during his illness. This case became widely known among the Companions, and no one objected to it, making it an *ijmāʿ* (consensus)."*al-Mughnī*, Ibn Qudāmah, vol. 9, p. 195.

[275] *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 8:276.

[276] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:291.

[277] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:291.

[278] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:292.

Among them: "If someone marries a woman during her waiting period (ʿiddah), she becomes permanently prohibited to him, according to one narration."[279] However, the established position of the madhhab is that 'the second husband may marry her after the completion of both waiting periods.'"[280]

If a husband wrongfully restrains his wife to compel her to ransom herself, the khulʿ is invalid; a revocable divorce nevertheless takes effect if he used the wording of divorce or intended divorce.[281]

"If a man kills another man to marry his wife, she is never permissible for him; this was stated by the Shaykh [Taqī al-Dīn Ibn Taymiyyah] as a punishment for his unlawful intention, similar to denying the killer inheritance. The Shaykh also stated about a man who deceives a woman against her husband until he divorces her: he deserves a severe punishment for committing this sin, and their marriage is null in one of the scholarly opinions in the madhhab of Mālik, Aḥmad, and others, and they must be separated as a punishment, akin to preventing the killer from inheritance."[282]

Exceptions to this include cases such as: 'If a creditor kills their debtor, the debt becomes due, as it would if the debtor had died.' This was explicitly stated by a group of the Ḥanbalī fellows. Another view posits that the debt does not become due, in line with the principle." [283] And the reasoning for the exception, Allah knows best, is that the right had already been established for the creditor prior to the killing.

Imām Taqī al-Dīn (rA) was asked about a nursing woman who experienced a delay in menstruation and took medication to induce it. She experienced three menstrual cycles while being divorced. The question was whether her waiting period (*ʿiddah*) would be considered complete. He replied: "Yes, if the menses occurred in the usual manner, her waiting period is counted. Similarly, if she were to take medication that stopped or delayed her menses, that period would be considered a state of purity (*ṭuhr*)."[284] She would also refrain from performing prayers during the induced menstruation, and there would be no obligation to make them up. Its reasoning lies in the permissibility of medication and the priority here of 'consideration is given to the actual reality,' as the true occurrence of menstruation or purity externally cannot be overlooked.

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[279] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:293.

[280] *Kashshāf al-Qināʿ*, al-Buhūtī, 13:42.

[281] "If he obstructs her *wrongfully* to compel her to ransom herself (*khulʿ*), without it being due to her committing zinā, defiance (*nushūz*), or neglecting an obligation, and she proceeds with it, or if a minor, an insane woman, an incompetent one, or a slave woman seeks *khulʿ* without her master's permission, it does not become a valid *khulʿ*, but a *rajʿī* (revocable) divorce, if expressed through the wording of divorce or with its intention." *Zād al-Mustaqniʿ fī Ikhtiṣār al-Muqniʿ,* al-Ḥajjāwī, 175.

[282] *Kashshāf al-Qināʿ*, al-Buhūtī, 11:323.

[283] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:294.

[284] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 34:23.

اليقين لا يزول بالشك

## The Second Major Legal Maxim: Certainty is Not Overruled by Doubt

### Explanation and Alternative Expressions

This maxim appears in various formulations within the Ḥanbalī school, such as:

«لا يزول اليقين بالشك»

- "Certainty is not removed by doubt" (*lā yazūlu al-yaqīn bi-sh-shakk*).[285]

«ولا يترك يقين لشك»

- "Certainty is not abandoned for doubt" (*lā yutraku al-yaqīn li-sh-shakk*).[286]

Shaykh ʿAbd al-Raḥmān ibn Siʿdī (rA) articulated it in poetic form:

وترجع الأحكام لليقين
فلا يزيل الشكُ لليقين

*And rulings are based on certainty;*
*Doubt does not override certainty.*

«أن الإنسان متى تحقق شيئا، ثم شك: هل زال ذلك الشيء المتحقق أم لا؟ الأصل بقاء المتحقق»

The meaning of the maxim is: "When a person has ascertained something and later doubts whether that established thing has ceased to exist, the presumption is that the established thing remains."[287]

"أنّه إذا ثبت أمر من الأمور ثبوتاً يقينياً قطعيّاً - وجوداً أو عدماً - ثم وقع الشّكّ في وجود ما يزيله، يبقى المتيقّن هو المعتبر إلى أن يتحقّق السّبب المزيل."

Alternatively: *"If a matter is firmly and conclusively established—whether its existence or nonexistence—and doubt arises about the presence of something that would nullify it, the established certainty remains valid until the nullifying cause is definitively proven."*[288]

Definition of Certainty

The term "certainty" (yaqīn) here refers to: *"Knowledge that is free of doubt, implying stability and assurance,"* as cited by Shaykh Muḥammad al-Zuḥaylī from Shaykh Muṣṭafā al-Zarqāʾ. He further clarified: *"This is the intended meaning of the maxim, not what is proposed by scholars of rational sciences as being 'an unwavering conviction aligned with reality.'"*[289] He also added: *"Juristic rulings are based on outward appearances, and what is deemed certain in the view of the Sharīʿah is not*

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[285] *al-Mughnī*, Ibn Qudāmah, vol. 1, p. 430. *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 8:311.

[286] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 1:326.

[287] Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:439.

[288] *Mawsūʿat al-Qawāʿid al-Fiqhiyyah,* Muḥammad Ṣidqī ibn Aḥmad Āl-Būrnu, 12:442.

[289] al-Qawāʿid al-Fiqhiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arbaʿah, Muḥammad al-Zuḥaylī, 1:96.

*overridden by doubt, even if reason allows for the possibility of a different reality. An example of this is a matter established through legally admissible evidence."*[290] *Parentage, for example, is established through the marital bed (al-firāsh), and that determination is treated as certain for purposes of the outward legal ruling.*

"ويراد باليقين في لغة العرب: زوال الشك. وقال بعض الأصوليين: إن اليقين في اللغة مأخوذ من الاستقرار، يقال: يقن الماء بمعنى استقر. واليقين في الاصطلاح: طمأنينة القلب، واستقرار العلم فيه. والشك في اللغة يراد به: التداخل؛ وذلك لأن الشاك يتداخل عنده أمران، لا يستطيع الترجيح بينهما. والشك في الاصطلاح: تجويز أمرين فما زاد، ولا مزية لأحدها على سائرها."

Shaykh Saʿd ibn Nāṣir al-Shithrī, stated in his explanation of *Manẓūmat al-Qawāʿid*: "Certainty, in the Arabic language, refers to the absence of doubt. Some uṣūlī scholars have said that the term *yaqīn* (certainty) is derived from the concept of stability, as it is said, *yaqana al-māʾ* (the water settled). In technical terms, certainty refers to the tranquility of the heart and the firm establishment of knowledge within it. Doubt, in the Arabic language, implies intermingling, as the doubter's mind becomes entangled with two possibilities, unable to favor one over the other. In technical usage, doubt is defined as entertaining two or more possibilities without any being superior to the others."

The certainty intended here refers to what is firmly established and settled, not something the intellect deems impossible to be otherwise. As for the doubt mentioned in the maxim, is it the opposite of certainty, or is it the consideration of two possibilities without either outweighing the other? This will be discussed shortly when addressing the principle: "*Predominant assumption (ghalabat al-ẓann) is generally taken into account."*

To address potential objections:

If you ask, "How can something be considered certainty after doubt has arisen regarding it?" The answer, as explained in the Ḥāshiyah of al-Khalwatī, is: "It is called certainty with consideration to what it was originally."[291]

If you ask, "How can doubt, which is hesitation between two possibilities with no preference for either, be addressed when they consider the other matter—what is established as the default—as certain?" The answer, as stated in *Ḥāshiyat al-Khalwatī*, is: "The intended meaning of doubt here is its linguistic sense, not its technical definition in legal theory. As mentioned in *al-Qāmūs*: 'Doubt is the opposite of certainty.' This was cited by our teacher in his commentary, who then added, 'This is the meaning intended by the jurists.'"[292]

It may be simplest to say that the incidental doubt in the second instance, by its very nature, represents a hesitation between two possibilities without either being favored, and this occurs before preference is given to the established presumption from the first instance.

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[290] al-Qawāʿid al-Fiqhiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arbaʿah, Muḥammad al-Zuḥaylī, 1:96.

[291] *Ḥāshiyat al-Khalwatī ʿalā Muntahā al-Irādāt,* Muḥammad ibn Aḥmad al-Buhūtī al-Khalwatī, 1:116.

[292] *Ḥāshiyat al-Khalwatī ʿalā Muntahā al-Irādāt,* Muḥammad ibn Aḥmad al-Buhūtī al-Khalwatī, 1:116.

Universality of the Maxim

This principle is among the most significant maxims of Islamic law. Imām al-Suyūṭī stated: "Be aware that this principle applies to all chapters of jurisprudence, and the issues derived from it constitute three-quarters of jurisprudence or more."[293] Thus, it has been unanimously agreed upon.[294]

Imām Ibn al-Najjār, preceded by Imām al-Mardāwī, stated:

ولا تختص هذه القاعدة بالفقه، بل الأصل في كل حادث عدمه، حتى يتحقق، كما نقول: الأصل انتفاء الأحكام عن المكلفين، حتى يأتي ما يدل على خلاف ذلك، والأصل في الألفاظ: أنها للحقيقة وفي الأوامر: أنها للوجوب وفي النواهي: أنها للتحريم، والأصل: بقاء العموم حتى يتحقق ورود المخصص. والأصل: بقاء حكم النص حتى يرد الناسخ.

"This principle is not exclusive to jurisprudence; rather, the default in every new matter is its nonexistence until proven otherwise. For instance, we say that the default regarding obligations upon individuals is their nonexistence until evidence indicates otherwise. Similarly, the default in words is their literal meaning, in commands is obligation, in prohibitions is prohibition, in general statements is their universality until a specific exception is proven, and in the rulings of texts is their continuity until abrogation is established. Due to this principle, *istiṣḥāb* (presumption of continuity) is considered valid evidence. One of the implications of this principle is that the one who denies a claim is not required to provide evidence, as they rely on the presumption of continuity. Likewise, in matters of litigation, the defendant is not required to prove their freedom from liability. Instead, their denial is sufficient when coupled with an oath."[295]

The most well-known example of this maxim is: "Whoever *doubts*—meaning hesitates, as defined in *al-Qāmūs* ('doubt' is the opposite of certainty)—about their state of *ṭahārah* (purity) after being certain of *ḥadath* (a state of ritual impurity), or doubts about *ḥadath* after being certain of *ṭahārah*, even if the doubt occurs outside of prayer, they must act based on their certainty."[296]

Some other examples include:

- "If one doubts the advent of *fajr* during Ramadan, they are permitted to continue eating until they are certain that *fajr* has begun."[297]
- "Whoever doubts the number of rakʿahs performed in prayer must act upon certainty, even if the doubter is the *imām*."[298] This is also the position of the madhhab regarding counted acts, such as the rounds of *ṭawāf* or the repetitions of *ghasl (number of washings)*.

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[293] al-Ashbāh wa al-Naẓāʾir, al-Suyūṭī, 51.

[294] *al-Furūq*, Shihāb al-Dīn Aḥmad ibn Idrīs al-Qarāfī, 1:111.

[295] Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:442.

[296] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:75.

This is the position of the majority of scholars. The Mālikīs, however, stated: Certainty is that prayer remains an obligation upon a person, and we do not remove this certainty due to a questionable state of purity.

[297] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:134.

[298] *Kashshāf al-Qināʿ*, al-Buhūtī, 2:489.

- "If one does not know whether they pronounced divorce (*ṭalāq*) or not, the certainty of the marital bond is not overruled by doubt."[299]

## The Basis of This Maxim

This maxim has been unanimously agreed upon by jurists. Its basis is established through numerous evidences from the Qurʾān, the Sunnah, and rational reasoning, including:

"إِنَّ الظَّنَّ لا يُغْنِي مِنَ الْحَقِّ شَيْئاً" [يونس: ٣٦]

- From the Qurʾān: Allah's statement: *"Indeed, assumption avails nothing against the truth."* (Yūnus: 36)

" إِذَا وَجَدَ أَحَدُكُمْ فِي بَطْنِهِ شَيْئًا فَأَشْكَلَ عَلَيْهِ أَخَرَجَ مِنْهُ شَيْءٌ أَمْ لَا؟ فَلَا يَخْرُجَنَّ مِنَ الْمَسْجِدِ حَتَّى يَسْمَعَ صَوْتًا أَوْ يَجِدَ رِيحًا."

- From the Sunnah: The Prophet ﷺ said: *"If one of you feels something in his abdomen and is uncertain whether anything has passed from him, he should not leave the mosque unless he hears a sound or detects an odor."* (Reported by Muslim on the authority of Abū Hurayrah (rAa)).
- From Reason: Rational thought corroborates the validity of this maxim, as reasonable people do not discard certainty on account of doubt.

## Guidelines and Benefits

غلبة الظن معتبرة في الغالب

### Predominant assumption (ghalabat al-ẓann) is generally taken into account.

Doubt (al-shakk) refers to the equal possibility of two outcomes, with no preference for either (50%). Between doubt and certainty in affirmation (100%), there are gradations summarized under the concept of assumption (al-ẓann), where one possibility outweighs the other. This is sometimes termed predominant assumption (ghalabat al-ẓann), ranging from 51% to 99%. Similarly, between doubt and certainty in negation (0%), there are also gradations, summarized under the concept of conjecture (al-wahm), which represents the weaker of the two possible alternatives, ranging from 1% to 49%. This is the terminology of uṣūl scholars; jurists may also use "doubt" for what falls short of certainty, even when one possibility is more likely. These percentages are illustrative. [300]

لا عبرة بالتوهم

If the legal maxim acknowledges doubt (al-shakk) as being dismissed when opposed by certainty (al-yaqīn), then conjecture (al-wahm) is even more deserving of dismissal. In this regard, jurists formulated the principle: *"No consideration is given to conjecture"* (*lā ʿibra bi-l-tawahhum*). For example, the

[299] *al-Mughnī*, Ibn Qudāmah, vol. 10, p. 514.

[300] In *al-Mughnī*, it is stated: "When doubt arises, the two matters are in conflict for the individual, necessitating their dismissal, just as conflicting testimonies cancel each other out. In such cases, one reverts to certainty. It makes no difference whether one assumption outweighs the other or if the two are equally plausible." *al-Mughnī*, Ibn Qudāmah, vol. 1, p. 263.

conjecture that a deceased individual might have an unknown heir does not prevent the distribution of the estate among the known heirs. Similarly, in the most prevalent opinion within our madhhab, it is impermissible to cut open the abdomen of a deceased pregnant woman to extract a fetus whose survival is merely conjectured, as it constitutes a violation of definite sanctity to preserve a merely speculative life.[301]

"فيتفرع على العمل بالظن فروع كثيرة ولم يطرد أصل أصحابنا في ذلك ففي بعض الأماكن قالوا: يعمل بالظن وفي بعضها قالوا: لابد من اليقين وطرد أبو العباس أصله وقال: يعمل بالظن في عامة أمور الشرع والله أعلم."

But what about predominant assumption (ghalabat al-ẓann)? Imām Ibn al-Laḥḥām (rA) states: "Numerous rulings are derived based on acting upon assumption (*ẓann*). However, our jurists have not consistently applied a universal principle regarding this. In some instances, they ruled to act upon assumption, while in others, they required certainty (*yaqīn*). Abū al-ʿAbbās [Ibn Taymiyyah] adhered to his principle, stating that assumption should be acted upon in the vast majority of matters of the Sharīʿah. Allah knows best."[302]

There is indeed some truth in what he said. Scholars, being human, are prone to both correctness and error, and Allah has reserved infallibility solely for His Book, as stated: *"If it had been from other than Allah, they would have found within it much contradiction."* [Al-Nisāʾ: 82]. However, the truth also is that scholars generally did not differentiate arbitrarily between equivalent matters. Thus, it becomes necessary to exert effort in understanding the reasons why they sometimes act upon *ghalabat al-ẓann* and other times refrain from doing so.

Upon examining their rulings, it becomes evident that *ghalabat al-ẓann* (predominant assumption) is, in most cases, treated as akin to certainty. Some even incorporate it into their definition of certainty. In *Durar al-Ḥukkām*, certainty is defined as: *"Technically, it is the attainment of unwavering conviction or predominant assumption regarding the occurrence or non-occurrence of something."*[303] Predominant assumption serves as the basis for practical rulings, and one must act upon it unless there exists a stronger opposing evidence. Failure to act upon it would render the majority of rulings ineffective.

"إيقاع العبادات أو العقود أو غيرهما مع الشك في شرط صحتها؛ هل يجعلها كالمعلقة على تحقق ذلك الشرط أم لا؟ وهي نوعان: أحدهما: ما يشترط فيه النية الجازمة، فلا يصح إيقاعه بهذا التردد، ما لم يكن الشك غلبة ظن فيكفي مثله في إيقاع العبادة أو العقد؛ كغلبة الظن بدخول الوقت، وطهارة الماء والثوب ونحو ذلك."

In the sixty-eighth maxim of Ibn Rajab's *Qawāʿid*, he states: "Performing acts of worship, contracts, or other matters while doubting the fulfillment of a condition for their validity raises the question: should such acts be considered as contingent upon the fulfillment of that condition or not? This is categorized into two types. The first comprises cases requiring firm intention: These acts cannot be validly

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[301] "If a pregnant woman dies, carrying a fetus likely to survive (...) it is prohibited to open her abdomen to extract the fetus. This is because it entails violating her definite sanctity for the sake of preserving a presumed life (...) However, in one view, her abdomen may be opened." Munyat al-Sājid bi-Sharḥ Bidāyat al-ʿĀbid, al-Yatāmā and al-ʿĪdān, 285.

[302] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 18.

[303] Durar al-Ḥukkām fī Sharḥ Majallat al-Aḥkām, ʿAlī Ḥaydar, 1:22.

performed with mere hesitation unless the doubt rises to the level of predominant assumption. In such cases, predominant assumption suffices for carrying out the act of worship or contract. Examples include the predominant assumption that the prayer time has commenced, or that water and clothing are pure, and similar instances."[304]

فَإِن طَلَّقَهَا فَلَا جُنَاحَ عَلَيْهِمَا أَن يَتَرَاجَعَا إِن ظَنَّا أَن يُقِيمَا حُدُودَ اللَّهِ

Shaykh Saʿd al-Shithrī stated: "The Sharīʿah has endorsed reliance on predominant assumption in numerous matters, as evidenced by Allah's saying: *'And if he has divorced her, then there is no blame upon them if they return to each other, provided they assume they can keep within the limits of Allah'* (al-Baqarah: 230)."

The clarification of this issue within the madhhab was detailed by Ibn Rajab in his 159th legal maxim, where he stated:

"إذا تعارض الأصل والظاهر: "

"When the default or original presumption (*al-aṣl*) and apparent evidence (*al-ẓāhir*) are in conflict:

فإن كان الظاهر حجة يجب قبولها شرعا؛ كالشهادة والرواية والإخبار؛ فهو مقدم على الأصل بغير خلاف.

- If the apparent evidence is a proof that must be accepted in Sharīʿah, such as testimony, narration, or a report, it is given precedence over the default/ original presumption without disagreement.

وإن لم يكن كذلك، بل كان مستنده العرف، أو العادة الغالبة، أو القرائن، أو غلبة الظن، ونحو ذلك:

- If, however, the apparent evidence is based on custom, prevalent practice, circumstantial indications, predominant assumption (*ghalabat al-ẓann*), or similar factors:

فتارة يعمل بالأصل، ولا يلتفت إلى هذا الظاهر.

  - At times, the original presumption is upheld without regard to the apparent evidence.

وتارة يعمل بالظاهر، ولا يلتفت إلى الأصل.

  - At other times, the apparent evidence is followed without consideration for the original presumption.

وتارة يخرج في المسألة خلاف.

  - In some cases, disagreement arises regarding the preference of one over the other.

These lead to four categories:

1. Cases where the original presumption is overridden by a Sharīʿah-sanctioned proof, such as a credible statement, and this has numerous examples.

[304] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:489.

2. Cases where the original presumption is upheld without regard to apparent evidence or related indications.
3. Cases where the apparent evidence is followed, disregarding the original presumption.
4. Cases where there is disagreement regarding whether to prefer the apparent evidence or the original presumption."[305]

Ibn Rajab provided numerous examples under each category, some of which are mentioned in a lengthy excerpt from his 159th maxim (*qāʿidah*). Any additions we have made within the excerpt will be enclosed in brackets [ ]:

"The first category pertains to instances where adherence to the original presumption (al-aṣl) is abandoned due to valid Sharīʿah evidence, such as the statement of someone whose words necessitate action. There are several examples:

- The testimony of two upright witnesses affirming an obligation upon the defendant.
- The testimony of two upright witnesses affirming the clearing of a debt known to have been owed.
- The report of a trustworthy and upright person stating that a dog has licked a particular vessel.
- The report of a trustworthy person informing of the entrance of the prayer time.
- The testimony of a single upright individual sighting the crescent of Ramadan, which is accepted according to the apparent position of the madhhab.

Second Category: Instances Where the Original Assumption (al-aṣl) Is Upheld, Ignoring Apparent Indicators or Similar Considerations. Among these are:[306]

- If a wife, after a prolonged period of living with her husband, claims that he failed to provide her with the obligatory maintenance or clothing, the standard ruling among the Ḥanbalī fellows is that her claim is accepted with an oath in her favor, as the original assumption supports her. This is upheld despite the improbability of her claim based on customary norms. However, Shaykh Taqī al-Dīn preferred considering the customary practice in such cases.
- If someone is certain about the presence of purity or impurity in water, clothing, land, or the body, but doubts whether it has changed, they must rely on the original assumption until certainty of change is established. This applies regardless of a predominant assumption or any other basis for doubt. Similarly, if one is certain of a state of ritual impurity (ḥadath) or the

[305] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:131.

[306] Another example is when impure water cannot be distinguished from purifying water; one does not attempt to determine which is which, but leaves both aside and resorts to tayammum according to the madhhab, although there is disagreement. Similarly, it is stated: "The explicit position of the madhhab transmitted from Aḥmad (...) is that the sale of items intended for prohibited uses is invalid, such as grape juice to someone who will make it wine or similar. Several of our fellows said this applies if such knowledge is certain, while another position holds it also applies in cases of assumption. Abū al-ʿAbbās [Ibn Taymiyyah] (...) said: 'If a landlord assumes that the tenant will use the rented property for sinful activities (...) it is impermissible for him to rent it out, and the lease contract is invalid. The same ruling applies to sales since sales and leases are similar. And Allah knows best.'" Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 24.

presence of filth (najāsah) and predominantly assumes they have been removed, the original assumption still prevails.

- In issues concerning marriage, divorce, and related matters, reliance on the original assumption is upheld unless certainty of a change is established.[307]
- Doubt about the onset of Fajr in Ramadan: If a person doubts whether Fajr has begun during Ramadan, they are permitted to continue eating until the onset of Fajr is confirmed. This ruling, explicitly stated by Aḥmad, disregards predominant assumptions based on circumstantial evidence or other indicators, unless a trustworthy person informs them that Fajr has begun.

Third Category: Instances Where Apparent Indicators (ẓāhir) Are Followed, Ignoring the Original Assumption (al-aṣl). Examples include:

- If one doubts after completing a prayer or any other act of worship whether a fundamental element was omitted, they should not pay attention to the doubt. Even though the original assumption would be the non-performance of the act and the absence of exoneration (barāʾat al-dhimmah), the apparent reality is that acts of worship by a responsible individual (mukallaf) are generally performed in their proper and complete manner. This apparent reality takes precedence over the original assumption…
- If someone predominantly assumes that the time for prayer has entered, their prayer is valid, and they are not required to achieve certainty regarding its commencement, according to the apparent position of the madhhab.
- Breaking the fast is permissible based on a predominant assumption that the sun has set, as per the apparent view of the madhhab.
- A missing person's wife remarries after waiting for four years and the widow's waiting period, and his wealth is divided at that point, because the apparent assumption (al-ẓāhir) is that he has died, even though the default ruling (al-aṣl) is that he remains alive.
- If someone raised in the abode of Islam among Muslims commits zinā and claims ignorance of its prohibition, their claim is not accepted because the apparent circumstances contradict it, even though the original presumption is the absence of their knowledge.

"إذا قويت القرائن قدمت على الأصل"

[In *al-Qawāʿid al-Siʿdiyyah*, the fifty-second principle states: "If the apparent indicators (qarāʾin) become strong, they are given precedence over the original assumption (al-aṣl)."]

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[307] "The shakk (doubt) in the terminology of the uṣūl scholars refers to hesitation between two possibilities without one outweighing the other. Here, however, it means any hesitation (muṭlaq al-taraddud) about the occurrence of the doubted matter, such as divorce (...) versus its non-occurrence (...) Divorce does not take effect in the case of doubt about its occurrence or the matter it was contingent upon (...) as the default is the continuity of the marital bond until the nullifier is definitively established." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 3:142. "There is no room for personal judgment (taḥarrī) in matters of emancipation (ʿitq) or divorce (ṭalāq). Thus, if a man divorces one of his wives (...) but then forgets who it was (...) he draws lots among them." Kashshāf al-Qināʿ, al-Buhūtī, 1:85.

The fourth category: Instances where there is a disagreement regarding whether to prioritize the apparent (ẓāhir) over the original presumption (aṣl), and vice versa. This typically occurs when the apparent and the original presumption are equally strong and balanced. It has numerous examples:

1. If water is heated by an impure substance, and it is predominantly assumed that the impurity's smoke has affected the water, there are two views. The more prominent view is that using this water is disliked.
2. If a dog inserts its head into a container of water and there is doubt whether it licked the water or not, while its mouth is moist, does the water become impure due to the apparent likelihood of licking, or does it remain pure based on the original presumption (al-aṣl)?
3. Clothing and Utensils of Non-Muslims: There are three narrations from Aḥmad concerning them:
    - Permissibility: Based on the default ruling of purity. [This is the relied-upon view.][308]
    - Disliked: Due to the likelihood of contamination with impurity, which is the apparent assumption.
    - Impermissibility without Washing: If the apparent likelihood of impurity is strong. This position has further subdivisions:
        - Prohibition of using garments that contact private areas unless washed, but not outer garments.
        - Prohibition of using utensils and garments generally from those whose slaughtered animals are deemed carrion, such as polytheists and Zoroastrians, but not from others. Al-Khiraqī, in his commentary, and Ibn Abī Mūsā said that Christians' cooking pots may not be used because they regard pork as lawful.
4. Clothes of Children or Those Unmindful of Purity: There are three opinions:
    - Disliked: [This is the relied-upon view for prayer.][309]
    - Not Disliked: They are considered pure.
    - Prohibited Until Washed: This is Ibn Abī Mūsā's view.
5. Doubt in the Number of Prayer Units: There are three narrations from Aḥmad:
    - Build on the fewer number, which is certain, as the default is the absence of the higher number.
    - Build on predominant assumption (ghalabat al-ẓann) according to a prophetic narration.

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[308] "(And) the clothing (of the disbelievers) is permissible, even if it has covered their private areas, such as trousers, (if its state is unknown) and no impurity is known, because the default assumption is purity, which is not negated by doubt."Al-Rawḍ al-Murbiʿ, al-Buhūtī, 1:89.

[309] "(Prayer is valid in the clothing of a nursing woman, (the clothing) of a menstruating woman, and (the clothing) of a child, and others like habitual drinkers of alcohol, because the default assumption is their purity (with dislike) as a precaution for the act of worship."Kashshāf al-Qināʿ, al-Buhūtī, 1:94.

- Follow the strong likelihood: If confirmed by others (e.g., the Imām confirmed by followers), one relies on predominant assumption; otherwise, one reverts to certainty. This is the widely accepted view in the school.[310]
- If two of the followers declare the Imām's error through tasbīḥ, he must heed their correction unless he is certain of his own correctness, according to all the narrated opinions.

6. Burial in the Islamic Domain: If a deceased individual in an Islamic region is of unknown religion:
    - If no signs of Islam or disbelief are evident, or if they conflict, the person is prayed over, as explicitly stated by Aḥmad.
    - If only signs of disbelief are present, some scholars argue for offering the funeral prayer, but Aḥmad explicitly stated that the person is buried without the prayer. Here, the apparent assumption (kufr) conflicts with the default (Islam).
    - Conversely, in non-Islamic lands: If the deceased bears a sign of Islam, they are prayed over; otherwise, they are not, as stated explicitly in the narration of ʿAlī ibn Saʿīd. This reflects a preference for the apparent (ẓāhir) over the original presumption (aṣl) in this instance, just as it was preferred in the first scenario. However, the scholars did not prioritize the original presumption here as they did previously because this original presumption was countered by another foundational presumption, namely that every child is born upon the natural disposition (*fiṭrah*).
7. Mixed Halal and Haram Wealth: If permissible and impermissible wealth are mixed, with impermissible wealth prevailing:
    - There are two views: permissibility or prohibition. The default ruling of permissibility conflicts with the apparent preponderance of impermissibility. Aḥmad, in Ḥarb's narration, discouraged using wealth primarily acquired through looting or usury or the likes unless negligible or uncertain.[311]" The excerpt from Ibn Rajab's *Qawāʿid* has concluded.[312]

These examples highlight that scholars weigh evidence differently, sometimes prioritizing the apparent assumption (al-ẓāhir) and other times adhering to the default ruling (al-aṣl). When there is no conflict,

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[310] "Then the established position in the madhhab settled on acting according to certainty: (Whoever doubts the number of rakʿahs they have prayed builds upon certainty, even if the one doubting is the imām)."*Kashshāf al-Qināʿ*, al-Buhūtī, 2:489.

[311] *Al-Furūʿ* contains a broader discussion of mixed wealth, mentioning four positions: prohibition; prohibition when the unlawful portion exceeds one-third; prohibition when the unlawful portion predominates; and no prohibition, but rather reprehensibility that increases or decreases according to the proportion of unlawful wealth. It then states: "The ruling concerning dealing with him (...) and similar matters is based upon this disagreement." It further establishes that "when it is not known that the wealth contains anything unlawful, the default is permissibility, and mere possibility does not establish prohibition." *Al-Furūʿ wa-Taṣḥīḥ al-Furūʿ,* Ibn Mufliḥ and al-Mardāwī, 4:388.

[312] *Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid*, Ibn Rajab, 3:131–151

predominant assumption (*ghalabat al-ẓann*) is often considered. Here is an example illustrating how jurists sometimes disregard doubt or assumption and at other times act upon it:

In *Maṭālib Ūlī al-Nuhā*: “If a woman whose marriage has ended develops grounds for suspecting pregnancy during her waiting period (ʿiddah), or after it, because of an indication such as fetal movement, abdominal swelling, cessation of menstruation, or lactation, a new marriage contract is not valid until the uncertainty is resolved, even if, after the contract, it becomes clear that she was not pregnant. This is because of doubt about the completion of her waiting period and because priority is given to prohibition. Resolving the doubt involves the cessation of movement, disappearance of swelling, return of menstruation, or the passage of sufficient time making pregnancy impossible. If doubt arises after the marriage contract has been concluded, whether the husband consummates the marriage or not, the marriage is not invalidated due to the appearance of doubt, as it is a doubt that has arisen regarding the certainty of the marriage and does not nullify it. However, intercourse is prohibited until the doubt is resolved, given the uncertainty surrounding the validity of the marriage and the possibility of a pregnancy from the prior union."[313]

Here, certainty was set aside—namely, the presumption of no pregnancy—in favor of acting on doubt as a precaution to safeguard lineage. However, once the marriage was established, its certainty overrode doubts about potential pregnancy, though intercourse was still forbidden as a precaution to protect lineage.

There are other examples of their differences in acting upon *al-ẓann* (predominant assumption).

In *al-Qawāʿid wa-al-Fawāʾid*: "Among the cases: The author of *al-Muḥarrar* reported consensus that it is prohibited for a woman to visit graves if she knows it will lead her to commit a prohibited act. However, he stated that it is sinful for her to visit if there is an assumption (*ẓann*) of potential wailing. However, there should be no difference between wailing and other prohibited acts. Either assumptions are always acted upon, or knowledge is the condition, but differentiating between these approaches lacks a clear basis. This is evident since the author and others only prohibited entering bathhouses when the presence of a prohibited activity is known."[314]

Similarly, *al-Talkhīṣ* and *al-Riʿāyah* state that a man may enter a bathhouse if he assumes it is safe. However, Aḥmad advised a man who wished to enter a bathhouse: 'If you know that everyone in the bathhouse is wearing a waistcloth (*izār*), then you may enter. Otherwise, do not.'"[315]

The stronger view is to act on assumptions unless they conflict with a stronger default (or original assumption) or result in undue hardship. The default ruling regarding customary practices is permissibility. This is particularly relevant in our times.

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[313] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 5:564.

[314] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 32.

[315] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 28.

From the foregoing, it becomes clear that the default stance among them is to act upon *ghalabat al-ẓann* (predominant assumption). This is unequivocal when it is based on a Sharīʿah-based proof,[316] such as acting upon the testimony of two upright witnesses—or even one, in some cases, as previously mentioned. It also applies to matters grounded in *ijtihād* (independent reasoning)[317] where certainty is unattainable[318] or acting upon it is difficult.[319] Similarly, *ghalabat al-ẓann* is acted upon when it is supported by another foundational principle or in cases where a decision must be made between two possibilities, one of which is more likely than the other, such as when two parties dispute ownership of an item.[320]

At times, they act upon *ẓann* to ward off doubts, such as resolving hesitation regarding the completion of an act of worship after it has been concluded. Here, the default is non-completion, but they favor the assumption of the validity of a Muslim's worship. However, they sometimes abandon *ẓann* out of caution for acts of worship, building instead on certainty, as in the case of determining the number of prayer units, circumambulations during *ṭawāf*, or other acts quantified by number—a preference often upheld by later scholars. This approach may also be due to the strength of the default assumption,[321] a conflicting principle, or the ease of attaining certainty in such matters.

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[316] In Al-Mughnī: "When doubt arises, the two possibilities conflict (...) and one should revert to certainty. (...) This is because predominant assumption (ghalabat al-ẓann), if not regulated by a Sharīʿah-based proof, is disregarded (...)." Al-Mughnī, Ibn Qudāmah, 1:263.

[317] "(He may pray if he assumes the entry of the time) through evidence such as personal reasoning, estimating time through craftsmanship, reading [such as someone accustomed to completing a specific recitation by the time of prayer or someone whose habitual work in their craft aligns with the timing of prayer], or similar methods, as this is a matter of reasoning, and predominant assumption suffices, as in other cases." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:145.

[318] "It is further stated that the physician's predominant assumption (ghalabat al-ẓann) suffices in such cases, as certainty is difficult to achieve." *Kashshāf al-Qināʿ*, al-Buhūtī, 3:256.

[319] "Among them: If someone possesses both lawful and unlawful wealth and is unaware of the exact amount of the unlawful portion, they should donate the amount they assume to be unlawful. (...) This text indicates that predominant assumption suffices. (...)" Al-Qawāʿid wa al-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 20. "Among them: The communal obligation (farḍ al-kifāyah) is incumbent upon all individuals, according to the predominant opinion, but it is lifted when performed by some. If a group predominantly assumes that others will fulfill the duty, it is no longer binding upon them. (...)" Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 28.

[320] "… If *qāfah* (experts in lineage identification) were unavailable and a judge ruled between them as Sulaymān had done, it would be correct and preferable to drawing lots, as lots are used only when no evidence of preference exists. However, if preference is established by means such as possession, a single witness, clear circumstantial evidence, *lawth* (animosity), refusal to take an oath, or alignment with apparent circumstances—such as a bareheaded individual claiming ownership of a turban held by someone running swiftly with another turban on his head—this would take precedence over drawing lots. Similarly, this principle applies in cases like a dispute between spouses over household furnishings and equipment or between two artisans over their tools of trade." *Al-Furūʿ* and *Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 11:198.

[321] "If one does not know whether they pronounced divorce (ṭalāq) or not, the certainty of the marital bond is not overruled by doubt." Al-Mughnī, Ibn Qudāmah, 10:514. "(Divorce does not occur) based on doubt about its occurrence or (doubt) about the condition upon which it was contingent (...) because the default presumption is the continuity of the marriage bond (ʿiṣmah) until evidence proves its nullification." Daqāʾiq Uwlī al-Nuhā, al-Buhūtī, 3:142. "If a person doubts whether Fajr has begun during Ramadan, they are permitted to continue eating until the onset of Fajr is confirmed. This ruling, explicitly stated by Aḥmad, disregards predominant assumptions based on circumstantial evidence or other indicators (...)." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:143.

Regarding one who acts upon *ghalabat al-ẓann* (predominant assumption), is repetition required if the error becomes evident? It is established among the scholars that acting on *ghalabat al-ẓann* is permissible in matters such as the direction of the *qiblah* and the timing of prayer. However, they distinguish between these two cases when an error is revealed: they mandate repetition for errors in timing[322] but not for errors in the *qiblah*.[323] This is because the obligation in the case of the *qiblah* is tied to striving (ijtihād), not necessarily correctness (*iṣābah*).

لا عبرة بالظن الذي تبين خطؤه

The underlying maxim here appears to be that "*ẓann* proven to be incorrect is invalid." This is reflected in *Kashshāf al-Qināʿ*: '(If one performs ablution with water and then discovers it was impure, he must repeat the obligatory prayer he performed) because it is invalid (until he attains certainty of his absolution) to ensure he fulfills his obligation with certainty.'"[324]

## Subsidiary Maxims and Applications

After these foundational discussions, it becomes clear why the subsidiary rules stemming from the maxim *"Certainty is not overruled by doubt"* are often expressed in terms of *al-aṣl* (the default or original assumption). Examples include: *"The default in things is permissibility," "The default is the continuation of what was previously established,"* and *"The default is freedom from liability"* (*barāʾat al-dhimmah*), among others.

Let us now mention some of its examples, starting with the most comprehensive:

الأصل بقاء ما كان على ما كان

### The Default Is the Continuation of What Was Previously Established

This means *carrying over the past into the present,* that is, transferring a ruling established in the past to the present time until evidence proves otherwise.[325]

"الأصل بقاء ما كان على ما كان، واليقين لا يزول بالشك."

This principle appears in *al-Qawāʿid al-Siʿdiyyah* alongside the maxim *"Certainty is not overruled by doubt,"* where the Shaykh (rA) expressed it as: "The Eleventh Maxim: The default is the continuation of what was previously established, and certainty is not overruled by doubt."

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[322] "… (If he prays) based on ijtihād, and it becomes clear afterward that he (was mistaken) and prayed (before the time), he must repeat the prayer. This is because the initial prayer was considered voluntary, and the obligation to perform the obligatory prayer remains. However, if no error becomes evident to him, he does not need to repeat the prayer." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:145.

[323] "(And whoever prays based on independent judgment [ijtihād]) (...) (and later learns they were mistaken about the direction of the qiblah after completing their prayer, they do not repeat it), because they fulfilled their obligation as required, without negligence (...) (If someone begins their prayer based on ijtihād) (...) (and subsequently doubts [the correctness of the qiblah direction], they do not consider this doubt) (...) (They continue) their prayer as is." Kashshāf al-Qināʿ, al-Buhūtī, 2:238.

[324] *Kashshāf al-Qināʿ*, al-Buhūtī, 1:82.

[325] al-Qawāʿid al-Fiqhiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arbaʿah, Muḥammad al-Zuḥaylī, 1:111.

"القديم يترك على قدمه" "الضرر لا يكون قديمًا".

It is also expressed as: *"What is established of old is left as it is"* (*al-qadīm yutraku ʿalā qidamihi*), a phrase used by the Ḥanafīs. However, this is qualified by the principle: *"Harm cannot be considered old"* (*al-ḍarar lā yakūnu qadīman*), meaning that harm, regardless of its duration, does not justify its continuation.

This maxim aligns with a significant principle of Islamic legal theory known as *istiṣḥāb* (presumption of continuity). Imām al-Mardāwī stated: *"Because of this maxim, istiṣḥāb is considered evidence."*[326]

Ibn Rajab, in his fifteenth principle, remarked:

"إذا استصحبنا أصلا، أو أعملنا ظاهرا في طهارة شيء، أو حله، أو حرمته، وكان لازم ذلك تغير أصل آخر يجب استصحابه، أو ترك العمل بظاهر آخر يجب إعماله، لم يلتفت إلى ذلك اللازم على الصحيح."

*"If we uphold a default/original assumption (aṣl) or apply an apparent indication regarding the purity, permissibility, or impermissibility of something, and this necessarily changes another established default assumption that must be upheld or contradicts another apparent indication that must be applied, then this necessary implication is disregarded, according to the correct opinion.*

Examples include:

- If someone shoots an edible animal with an arrow, but the arrow does not immediately kill it, and it falls into a small body of water where it is found dead, the animal is not permissible to eat due to the possibility that the water contributed to its death. The default assumption (aṣl) is its prohibition until the lawful cause of its death is confirmed. However, this does not render the water impure, as its default assumption of purity remains intact. This was mentioned by Ibn ʿAqīl in *al-Fuṣūl."*[327]

Observe how the firmly established certainty is prioritized in both matters.

Shaykh Saʿd al-Shithrī discussed the types of *istiṣḥāb* in his explanation of this maxim in concise and beneficial words, which we will quote verbatim:

""Istiṣḥāb" (Presumption of Continuity) is of several types:

النوع الأول: استصحاب الإباحة الأصلية، فالأصل في الأفعال أنها مباحة.

1. Presumption of Original Permissibility (*istiṣḥāb al-ibāḥah al-aṣliyyah*): The default ruling regarding [non-devotional] actions is that they are permissible unless proven otherwise.

والنوع الثاني: استصحاب البراءة، فالأصل أن الذمم بريئة، ولا يلحقها شيء من الواجبات حتى يأتي دليل من الشارع.

2. Presumption of non-liability (*istiṣḥāb al-barāʾah*): The default assumption is that individuals' liability (*dhimmah*) is clear of any obligations until a Sharīʿah-based proof establishes otherwise.

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[326] Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:442.

[327] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:123.

والنوع الثالث من الاستصحاب: استصحاب نص الشارع حتى يثبت أنه منسوخ...

3. Presumption of a Text's Validity (*istiṣḥāb naṣṣ al-shāriʿ*): A legal text remains applicable until it is definitively proven to be abrogated (*naskh*)…

والنوع الرابع: استصحاب العموم حتى يأتي دليل يخصصه.

4. Presumption of the Continuity of Generality (*istiṣḥāb al-ʿumūm*): The general application of a legal text remains valid until evidence proves specification (*takhṣīṣ*).

والنوع الخامس: استصحاب الوصف مثل: استصحاب الطهارة الثابتة في الصباح، فنستصحب حكمها في الزمان الثاني.

5. Presumption of the Continuity of an Existing Condition (*istiṣḥāb al-waṣf*): Continuity of a previously established condition, such as maintaining the ruling of *ṭahārah* (ritual purity) established in the morning, remains valid for subsequent times unless proven nullified.

"والنوع السادس: استصحاب الإجماع في محل النزاع، وذلك بأن يكون هناك مسألة أجمع العلماء عليها، ثم تتغير إحدى الصفات، ومن ثَم يقع الاختلاف. مثال ذلك: أجمع العلماء على أن من رأى الماء قبل الصلاة بطل تيممه، ثم اختلفوا فيما إذا رآه في أثناء الصلاة."

6. Presumption of the Continuity of Consensus in Disputed Matters (*istiṣḥāb al-ijmāʿ*): When scholars initially agreed on a ruling, and a subsequent disagreement arises due to changed circumstances, the original consensus is presumed valid. An example is scholars' agreement that finding water before prayer nullifies *tayammum* (dry ablution); however, they differed on whether finding water during the prayer affects it."[328]

Applications of the Maxim:

1. Distinguishing Between Doubt About the Start of Fajr and Sunset: In *al-Rawḍ al-Murbiʿ,* it states:

- *"If someone eats, drinks, or has intercourse while doubting whether Fajr has begun and it is not confirmed, their fast is valid and no make-up fast is required, even if they were uncertain, because the default assumption is that night remains.*"
- *"However, if someone eats while doubting whether the sun has set and it is not confirmed, they must make up the obligatory fast because the default assumption is that day remains."* [329]

[328] Sharḥ Manẓūmat al-Qawāʿid al-Fiqhiyyah, Saʿd ibn Nāṣir al-Shithrī, p. 78.

[329] *Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 2:26.

2. If a man dies and leaves two sons—one Muslim and the other non-Muslim—who both claim he died following their respective religions, the inheritance goes to the non-Muslim unless the Muslim proves otherwise.[330]
3. Possession is presumed to indicate ownership and the *right of exclusive claim* unless proven otherwise.[331]
4. Assuming Continuity of Social Conditions:
   For example, someone known to be wealthy cannot receive *zakāh* if they claim poverty unless three men testify to their condition.[332]

Among the branches of this maxim:

إضافة الحادث إلى أقرب أوقاته

**Attributing an Incident to Its Closest Possible Time**

"الأصل في الصفات أو الأمور العارضة العدم"

This principle is also expressed as: *"The default assumption regarding incidental attributes or occurrences is non-existence."* For instance:

- If someone finds semen on their clothing, they must repeat prayers performed after the last sleep in which they could have experienced a nocturnal emission. They do not need to repeat prayers before that time. Ibn Qundus (rA) explains: *"The difference here is that the original state of semen is non-existence, so during a time of doubt, it is treated as though it does not exist."*[333]
- Scholars differed regarding a case where a seller and buyer each claim that a defect in the sold item occurred while it was in the other party's possession. Ibn Rajab recorded two opinions on

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330 *al-Mughnī*: "In summary, if a man dies and his religion is unknown, leaving behind an estate and two sons who both acknowledge him as their father—one being Muslim and the other a disbeliever—and each claims that the deceased shared his religion and that the inheritance belongs solely to him, the inheritance goes to the disbeliever. This is because the Muslim's claim entails one of two possibilities: either he asserts that the deceased was originally Muslim, which would necessitate that his children are also Muslim (…) Alternatively, the Muslim claims that the father was a disbeliever and then embraced Islam before his death. In this case, he implicitly admits that the disbelieving brother's claim aligns with the default state, while he himself asserts a change and nullification of that state. The maxim is that "the default is the continuation of what was previously established" until evidence proves otherwise." *al-Mughnī*, Ibn Qudāmah, vol. 14, p. 321.

331 "If neither of them has evidence, the one in possession (ṣāḥib al-yad) is given precedence with an oath, because possession indicates ownership and, even more so, establishes the right of exclusive claim." Kashshāf al-Qināʿ, al-Buhūtī, 9:536.

332 "If someone requests to be given a mandatory charity (wājib) (...) claiming poverty despite having been known for wealth previously, their claim will not be accepted without evidence (...) The evidence required in the last case—when someone claims poverty after being known for wealth—is the testimony of three men, based on the saying of the Prophet ﷺ: 'Asking (for charity) is not permissible except for three: a man struck by dire need until three wise men from his people testify that so-and-so has been afflicted by poverty (...).' Reported by Muslim." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 3:336.

333 Kashshāf al-Qināʿ, al-Buhūtī, 1:327.

this matter.[334] The later scholars concluded, as in *al-Muntahā*,[335] that the buyer's claim takes precedence because *"the default assumption is that the missing part was not yet in the buyer's possession."*

However, had they applied the principle *"attributing the incident to its closest possible time,"* they would have favored the seller's claim, as the emergence of a defect, absent evidence or circumstantial indicators, should be attributed to the most recent time.

الأصل براءة الذمة

## The Default Is Clearance from Liability

Clearance of Liability (*barāʾat al-dhimmah*) encompasses both the rights of Allah and the rights of individuals. For the rights of Allah, the default is freedom from obligation except with clear evidence, and for the rights of individuals, the default is freedom from liability unless proven otherwise with valid evidence.

"ومما ينبني على هذه القاعدة: ألا يطالب [النافي] بالدليل؛ لأنه مستند على الاستصحاب، كما أن المدعى عليه في باب الدعاوى لا يطالب بحجة على براءة ذمته، بل القول في الإنكار قوله بيمينه."

In *Sharḥ al-Kawkab al-Munīr*, it is stated: *"Based on this maxim, the negator is not required to produce evidence, as they rely on istiṣḥāb. Similarly, in disputes, the defendant is not required to provide proof of their clearance from liability; rather, their denial is sufficient with an oath."*[336]

Applications of This Principle in Avoiding Liability Due to Doubt:

- *"If a woman miscarries a piece of flesh, and trustworthy midwives testify that there are faint human features, a ghurrah (the prescribed compensation for fetal death) is due. However, if they testify that it is merely the beginning of human formation and would have taken human form had it remained, there are two views; the stronger one is that no compensation is required because it did not yet take human form—similar to a clot of blood. This is because the default is clearance, and liability is not established due to doubt."*[337]

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[334] "Each of the two contracting parties claims that the defect in the item occurred while it was in the other's possession. There are two views: The claim of the seller (the one delivering) is accepted because they assert the soundness of the contract, and the default presumption is in their favor (...) The claim of the buyer (the receiver) is accepted because they deny receiving the item in its intended condition, and the default presumption supports their position." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:270.

[335] "Section: If the seller and buyer dispute over in whose possession the defect arose, when either is possible (...) and there is no evidence for either claim (...) The buyer's claim is accepted upon taking an oath, because the presumption is that the missing part was not yet received (...)." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 5:107.

[336] Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:442.

[337] *al-Mughnī*, Ibn Qudāmah, 12:63.

In *Al-Iqnāʿ*: "Or if a woman miscarried a lump of flesh, and reliable midwives testified that it was the beginning of the creation of a human being, which would have taken human form had it remained, or if the belly of a pregnant woman from among the enemy (*ḥarbiyyah*) or an apostate was struck, and she then accepted Islam and delivered a stillborn child, there is no liability in either case." *Al-Iqnāʿ*, al-Ḥajjāwī, 4:210.

- In *Al-Mughnī*, it states:*"If a man runs his fingers through his hair and a hair falls out, if it is dead hair, no penalty is due; but if it is live hair, there is a penalty. However, if there is doubt, then no penalty is due because the default is clearance unless certainty establishes otherwise."*[338]

ولكن الذمة إذا انشغلت بيقين فلا تبرأ إلا بيقين.

However, once liability is definitively established, it cannot be cleared except through certainty.

It is also worth noting that the *madhhab* takes a precautionary approach concerning acts of worship, where the default is ensuring their completion. An example of this includes scenarios where someone combines the conditions of resident and traveler for *masḥ* (wiping over socks), or recalls a resident prayer during travel, and vice versa.[339]

الأصل في الأشياء والأعيان الإباحة

**The Default Ruling Concerning Things and Objects Is Permissibility**

In *Manẓūmat al-Siʿdī*:

١٩ - الأصل في مياهنا الطهارة والأرض والثياب والحجارة

19 - "The Default Ruling for Our Waters Is Purity,
As It Is for Earth, Clothing, and Stones."

" هُوَ الَّذِى خَلَقَ لَكُم مَا فِي الْأَرْضِ جَمِيعًا ثُمَّ اسْتَوَى إِلَى السَّمَاءِ فَسَوَّاهُنَّ سَبْعَ سَمَوَاتٍ وَهُوَ بِكُلِّ شَيْءٍ عَلِيمٌ"
[البقرة: ٢٩]

The evidence for this principle is abundant. From the Qurʾān:
*"It is He who created for you all of that which is on the earth. Then He directed Himself to the heaven, and made them seven heavens, and He is All-Knowing of everything."* (al-Baqarah: 29)

«مَا أَحَلَّ اللهُ فِي كِتَابِهِ فَهُوَ حَلَالٌ، وَمَا حَرَّمَ فَهوَ حَرَامٌ، وَمَا سَكَتَ عَنهُ فَهُوَ عَفْوٌ، فَاقبَلُوا مِنَ اللهِ عَافِيَتَه»
«وجُعِلَتْ لي الأَرْضُ مَسْجِدًا وطَهُورًا»

From the Sunnah, Abū al-Dardāʾ (rAa) narrated that the Prophet ﷺ said: *"What Allah has made lawful in His Book is ḥalāl, what He has prohibited is ḥarām, and what He has remained silent about is overlooked, so accept Allah's pardon."* Similarly, he ﷺ said: *"The earth has been made for me a place of prostration and a purifier."*

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338 *al-Mughnī*, Ibn Qudāmah, 5:387.

339 "If a person on a ship begins the prayer shortened (qaṣr) and reaches their hometown during the prayer, they are required to complete it as four rakʿahs because this is an act of worship in which the rulings of travel (safar) and residence (ḥaḍar) combine, and the ruling of residence takes precedence, similar to the case of wiping over footwear. (...) The sixth case is indicated by the phrase: 'Or if one recalls a prayer of residence while traveling.' The seventh case, referred to as: 'Or its reverse,' occurs when someone remembers, while resident, a prayer missed during travel. They must complete the prayer in full. (...) because the default ruling (aṣl) is to pray in full (itmām)." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 2:426.

"الاحتياط بمجرد الشك في أمور المياه ليس مستحبًا ولا مشروعًا، بل ولا يستحب السؤال عن ذلك، بل المشروع أن يبنى الأمر على الاستصحاب فإن قام دليل على النجاسة نجسناه؛ وإلا فلا يستحب أن يجتنب استعماله بمجرد احتمال النجاسة وأما إذا قامت أمارة ظاهرة فذاك مقام آخر."

For this reason, Imām Taqī al-Dīn stated:
*"Precaution based solely on doubt in matters of water is neither recommended nor legislated. In fact, it is not even encouraged to inquire about such matters. Instead, the issue should be based on istiṣḥāb (presumption of continuity). If evidence of impurity emerges, the water is deemed impure; otherwise, mere suspicion of impurity does not justify avoiding its use. However, if clear signs appear, that is a different matter."*[340]

It has been reported from ʿUmar (rAa) that he said: *"O owner of the cistern! Do not inform us."* And also: *"O owner of the gutter! Do not inform him."* While the first narration has some weakness in its chain and the second is transmitted without a chain, both have been relied upon by jurists and serve as points of reference.

The principle that the *default is permissibility* was upheld by Abū al-Ḥasan al-Tamīmī (disciple of *al-Khiraqī*) and Abū al-Khaṭṭāb. This view is the established position of the Ḥanbalī school, the opinion of the majority, and the correct stance. However, this matter was not without dissent. In *Rawḍat al-Nāẓir*, it is stated:
*"Ibn Ḥāmid, al-Qāḍī, and some Muʿtazilites argued that the default is prohibition, because acting without permission in someone else's property is reprehensible. Allah—Exalted be He—is the ultimate owner and has not granted permission. Additionally, engaging in such acts may result in harm, making them risky. On the other hand, Abū al-Ḥasan al-Jazarī (one of the early Ḥanbalīs) and a group of the Wāqifiyya (those with non-committal stance) claimed that there is no default ruling at all, as rulings require divine address, and no address exists before revelation."* [341]

This maxim, as understood by the majority, represents a significant principle of Islam's tolerant and easy nature. Shaykh al-Burnū states:

"Many foods and drinks, such as plants, fruits, and grains imported from distant lands—whose names we do not know and whose harm has not been proven—are based on this principle. It also applies to various types of furniture, furnishings, and newly developed tools, provided they do not fall under any prohibition."[342]

An example of favoring permissibility over prohibition based on this maxim is the allowance of a garment where silk is mixed equally with other materials.[343]

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[340] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 21:56.

[341] Rawḍat al-Nāẓir wa-Junnat al-Manāẓir fī Uṣūl al-Fiqh ʿalā Madhhab al-Imām Aḥmad ibn Ḥanbal, Ibn Qudāmah, 1:133.

[342] *Al-Wajīz,* Āl Būrno, 198.

[343] "And likewise, what is predominantly silk is prohibited for use, as has been previously mentioned, just like pure silk, because the predominant is treated as the whole in most rulings. However, it is not prohibited if the material consists of silk and something else, provided that they are equal in appearance and weight, or if the silk is heavier but

But there is an important exception to the default ruling of permissibility, which is that:

الأصل التحريم في نفس المعصوم وماله وعرضه والأصل التحريم في الأبضاع واللحوم.

The default is prohibition concerning the life, wealth, and honor of an inviolable individual (*maʿṣūm*), as well as in marital relations (*abḍāʿ*) and meats.

While jurists did not explicitly express this complete phrasing, it summarizes exceptions to the previous maxim of permissibility. In Siʿdī's poem:

٢٠ - والأصل في الأبضاع واللحوم والنفس والأموال للمعصوم
٢١ - تحريمها حتى يجيء الحل فافهم هداك الله ما يُملى

20 - The default in marital relations and meats,
The life and wealth of those protected,
21 - Is their prohibition until permission comes;
Understand - may Allah guide you - what is being dictated.

Here, *abḍāʿ* is the plural of *buḍʿ*, referring to the private parts, and in this context, it means marital relations.

مَن قَتَلَ مُعاهَدًا لَمْ يَرِحْ رائِحَةَ الجَنَّةِ.

There is no doubt that the default regarding the life and wealth of an inviolable individual (*maʿṣūm*) is prohibition, and this is a matter of consensus. The use of the term *maʿṣūm* rather than "Muslim" is precise. In *Ṣaḥīḥ al-Bukhārī*, ʿAbd Allāh ibn ʿAmr (rAa) narrated that the Messenger of Allah ﷺ said: *"Whoever kills a covenanted person (muʿāhad) will not smell the fragrance of Paradise."*

Honor (*ʿirḍ*) is also included alongside the sanctity of life and wealth, as the honor of the *maʿṣūm* is equally inviolable. In *Kashshāf al-Qināʿ*: *"Whoever curses a particular dhimmī (non-Muslim under covenant) is to be disciplined because they are inviolable (maʿṣūm), and their honor is protected."*[344] The prohibition against oppressing those under covenant has been established from the Infallible ﷺ and is firmly rooted in the *Sharīʿah*.

وَالَّذِينَ هُمْ لِفُرُوجِهِمْ حَافِظُونَ إِلَّا عَلَى أَزْوَاجِهِمْ أَوْ مَا مَلَكَتْ أَيْمَانُهُمْ فَإِنَّهُمْ غَيْرُ مَلُومِينَ فَمَنِ ابْتَغَى وَرَاءَ ذَلِكَ فَأُولَئِكَ هُمُ الْعَادُونَ

Scholars are also unanimous regarding the prohibition of *abḍāʿ* (marital relations) without a lawful reason that permits it. Allah says: *"And those who guard their private parts, except from their wives or those whom their right hands possess, for then they are not to be blamed. But whoever seeks beyond that – those are the transgressors."* [Al-Muʾminūn: 5-7].

But what does it mean to say that the default ruling for *abḍāʿ* and meat is prohibition?

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the other material is more apparent. Similarly, if they are equal in appearance, then it is not prohibited because silk is not predominant. And when the evidence for prohibition is absent, the default ruling of permissibility remains." *Kashshāf al-Qināʿ*, al-Buhūtī, 2:166.

[344] *Kashshāf al-Qināʿ*, al-Buhūtī, 14:120.

Ibn Rajab said: *"Also included in this principle is what originally falls under permissibility, such as the purity of water, clothing, and land, if its original state is not proven to have changed. Therefore, it is permissible to use them. On the other hand, what is originally prohibited—such as private parts (abḍāʿ) and the meat of animals—cannot be deemed permissible except with certainty of its lawful status through proper slaughtering (tadhkiyah) or a valid contract. If there is doubt due to another apparent cause, the matter reverts to its original ruling. Thus, for what is originally prohibited, the default remains prohibition. For this reason, the Prophet ﷺ forbade eating game when the hunter finds the mark of an arrow other than his own, the bite of a dog other than his own, or finds the game fallen into water. The reasoning is that it is unclear whether the animal died due to a permissible cause or not. Conversely, for what is originally permissible, such as water, land, or clothing, the default ruling of permissibility is maintained, and they are not deemed impure simply due to an assumption of impurity."*[345]

The meaning of this regarding *abḍāʿ* (private parts) is that it is not permissible to have intercourse with a woman if there is doubt about its permissibility. In *Ṣaḥīḥ al-Bukhārī*, ʿUqbah ibn al-Ḥārith reported that he married Umm Yaḥyā bint Abī Ihāb. Then, a black slave woman came and said, *"I nursed both of you."* He mentioned this to the Prophet ﷺ, who turned away from him. ʿUqbah continued, *"So I stepped aside and mentioned it to him again, and he said: 'How can it be, when she claims that she nursed both of you?' So he forbade me from her."* The key point here is that the Prophet ﷺ prohibited him from staying with her due to the possibility of her being unlawful to him.

Therefore, if his sister becomes mixed up with a limited number of women and her identity is unknown, all of them become forbidden to him.[346]

According to the majority opinion, which is a variant view in our school, if a man divorces a particular one of his wives with a triple divorce but forgets which one, they all become forbidden to him until he identifies the divorced one with certainty, as he cannot rely on speculation. However, we offer a resolution for this issue and for cases where a man says to his two wives, "One of you is divorced," without specifying which one. The reliable opinion in our school is that the matter is resolved through *qurʿah* (drawing lots), which designates the divorced wife, and the remaining wives remain permissible. This is because the *qurʿah* serves as a substitute for testimony or report out of necessity.[347]

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[345] Jāmiʿ al-ʿUlūm wa-l-Ḥikam, Ibn Rajab, 1:198.

[346] "And when the forbidden mixes with the lawful, this is of two types:
The first is that which is intrinsically forbidden, such as carrion or a sister through breastfeeding. If this type becomes mixed with what cannot be confined to a limited number, it does not render the whole forbidden. For example, if he knows there is a sister through breastfeeding in a certain town but does not know her specific identity, or if there is someone in town selling carrion, but its exact item is unknown, this does not prohibit him from marrying women or eating the meat. However, if his sister becomes mixed with a non-maḥram woman, or a slaughtered animal becomes mixed with carrion, then both are prohibited." *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 29:276.

[347] "And if he says to his two wives, *'One of you is divorced,'* while intending a specific one of them, then the one he intended is divorced (…) And if he did not intend a specific one, then the divorced one among them is determined by drawing lots. This is based on an explicit report [from Ahmad] (…) just as in the case where a specific wife was divorced but was later forgotten." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 3:143.

The meaning of the principle that the *default ruling for meat is prohibition* lies in favoring the side of caution when the permissible and impermissible aspects coexist.[348] In *Ṣaḥīḥ al-Bukhārī*, ʿAdī ibn Ḥātim reported asking the Messenger of Allah ﷺ about using the *miʿrāḍ* (a hunting tool). The Prophet ﷺ said, *"If you strike the game with its sharp edge, eat it, but if it kills with its flat side, then it is waqīdh (struck and not properly slaughtered), so do not eat it."* ʿAdī asked, *"If I send my trained hunting dog?"* The Prophet ﷺ replied, *"If you send your dog and say the name of Allah, then eat it."* ʿAdī then asked, *"What if the dog eats from the game?"* The Prophet ﷺ responded, *"Do not eat it, for the dog caught it for itself, not for you."* Lastly, ʿAdī asked, *"If I find my dog with another dog?"* The Prophet ﷺ replied, *"Do not eat it, for you mentioned the name of Allah over your dog, not the other one."*

This narration indicates the prohibition of eating in cases of uncertainty, as there is a possibility that the other dog was the one that caught the game.

However, they are lenient in the *madhhab* regarding the pronouncement of *tasmiyah* (mentioning Allah's name) based on the *ḥadīth* of ʿĀʾishah in *al-Bukhārī*, where some people said to the Prophet ﷺ: "People bring us meat, but we do not know whether they mentioned Allah's name over it or not." He replied: *"Say the name of Allah over it yourselves and eat it."* She added: *"They were new to Islam."*

They also show flexibility when there is doubt concerning the slaughterer. In *al-Iqnāʿ*, it is stated: *"A slaughtered animal found abandoned in a place where the slaughter of most of its inhabitants is lawful is permissible to eat, even if the tasmiyah of the slaughterer is unknown."*[349]

Occasionally, they exhibit leniency in determining certainty of slaughter, but this is mentioned concerning the purity of skins, which is a less stringent matter than the permissibility of eating the meat.[350]

In conclusion, the maxim does not mean that the consumption of certain animals is prohibited until proven otherwise; rather, the default is permissibility until evidence establishes prohibition, which is the position of the *madhhab*.

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[348] "(And neither) *ḥaram* (sacred precincts) nor *iḥrām* (state of ritual consecration) has any effect regarding animals forbidden to eat, such as a dog, pig, tiger, lion, wolf, or leopard, (except) for one born from a crossbreed between a domesticated and a wild animal, or between an edible and non-edible animal, such as the *samʿ* (a cross between a wolf and a hyena). Killing it in the state of *iḥrām* or within the *ḥaram* is forbidden due to the prohibition being predominant." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:546.

"(And it is prohibited to consume an animal born from a crossbreed between an edible and a non-edible species, such as a mule) born from a horse and a domestic donkey (...) (and one born between a domesticated and a wild animal), such as a donkey born from a domestic donkey and a wild donkey, due to the prohibition being predominant (*taghlīban li-l-ḥaẓr*)… (And an animal born from a sheep where half of it is a lamb and the other half is a dog) is also prohibited, due to the predominance of prohibition." *Kashshāf al-Qināʿ*, al-Buhūtī, 14:289. I say: This is correct jurisprudentially, but from a biological and practical standpoint, it is impossible for there to exist an animal that is half sheep and half dog. Reproduction between different animal species requires genetic proximity and similarity in genetic structure, which is not present between a sheep and a dog.

[349] *Al-Iqnāʿ*, al-Ḥajjāwī, 4:321.

[350] Al-Saffārīnī said in Ghidhaʾ al-Albāb: "This shows that what is required is the absence of certainty that the animal died naturally, not certainty that it was slaughtered. If we find the skin of an animal that is lawful to eat, then the default assumption is that it is pure unless we know that it died naturally or that it was slaughtered by someone whose slaughtering is not valid." Ghidhaʾ al-Albāb fī Sharḥ Manẓūmat al-Ādāb, al-Saffārīnī, 2:263.

*Now that you have known the established position of the madhhab, understand that the issue is not definitive (qāṭiʿ), and among contemporary Ḥanbalīs, there are those who hold that the default ruling is permissibility (al-aṣl al-ḥill)." Shaykh Saʿd al-Shithrī states:*

*"Some jurists hold that the default for meat is prohibition."* They base this on the *ḥadīth* of ʿAdī, where the Prophet ﷺ said: *"If you release your trained dog and find another dog with it that killed the animal, do not eat, for you do not know which of them killed it."* They argue that if a cause for prohibition and a cause for permissibility coexist in the same meat, prohibition is given precedence, as in the case of a mule or similar situations… However, these proofs do not pertain to the default ruling (*aṣl*) since they deal with cases where two causes—one for prohibition and one for permissibility—exist, such as the issue of a hunting dog versus an unknown dog, or an arrow versus drowning. The *aṣl* applies only in the absence of any evidence—neither for permissibility nor prohibition. Therefore, the more apparent view is that the default regarding meat is permissibility, not prohibition. As we have stated concerning water: its default state is purity. Even if a cause for purity and a cause for impurity coexist in water, it becomes prohibited to use. However, this does not indicate that the default for water is impurity.

The *aṣl* for permissibility is supported by Allah's statement:
*"Say: I do not find in what has been revealed to me anything forbidden for a person to eat unless it be carrion…"* (*al-Anʿām: 145*), which demonstrates that the default is permissibility, while prohibition is an exception. Similarly, Allah says:
*"Why should you not eat of that over which the name of Allah has been pronounced, when He has explained in detail what He has forbidden you, except under compulsion?"* (*al-Anʿām: 119*), indicating that the default for edible meat is *permissibility*, and prohibition is the exception… Furthermore, in the *Sunan*, ʿĀʾishah narrates that the Prophet ﷺ was asked about meat brought to them, and whether the name of Allah had been pronounced over it. He replied: *"Say the name of Allah over it yourselves and eat it."* If the default for meat were prohibition, the instruction would have been to avoid it until proof of permissibility was established. These and other texts affirm that the *aṣl* for meat is *permissibility* unless evidence proves otherwise."[351]

والأصل في الأبضاع واللحوم والنفس والأموال للمعصوم تحريمها حتى يجيء الحل

Knowing this, one should also understand that the default is *clearance of liability* (*barāʾat al-dhimmah*) from obligations and the permissibility of everything until prohibition is proven. The phrase of the jurists, articulated in al-Siʿdī's verse: *"The default for sexual relations, meat, life, and wealth of the protected is prohibition until permissibility is established"* should be understood in light of the above. These matters require greater caution than others.

[351] Sharḥ Manẓūmat al-Qawāʿid al-Fiqhiyyah, Saʿd ibn Nāṣir al-Shithrī, p. 78.

الأصل في العبادات التوقيف، وفي العادات الإباحة

**The Default in Acts of Worship Is Tawqīf (Restricted by Revelation), and in Customs It Is Permissibility**

والأصل في عاداتنا الإباحة - حتى يجيء صارف الإباحة
وليس مشروعا من الأمور - غيرُ الذي في شرعنا مذكور

Shaykh al-Siʿdī stated:
*"The default in our customs is permissibility,*
*Until a factor emerges that restricts it.*
*No practice is sanctioned or approved,*
*Except what is mentioned in our Sharīʿah."*

" الأشمل أن يقال : الأصل في العبادات الحظر وفي غيرها الحل؛ ليدخل فيها العادات والمخلوقات والأشجار والحيوان وغيرها "

Shaykh Ibn ʿUthaymīn elaborated: *"It is more comprehensive to state: the default in acts of worship is prohibition, and in all else, permissibility, which includes customs, created things, trees, animals, and other such matters."* [352]

With this explanation by Shaykh Ibn ʿUthaymīn, one can subsume the earlier maxim regarding objects under this broader rule.

Imām Taqī al-Dīn (Ibn Taymiyyah) justified this maxim by saying:

إن الأصل في العبادات التوقيف

والعادات الأصل فيها العفو فلا يحظر منها إلا ما حرمه

*"Through examining the foundations of the Sharīʿah, we realize that acts of worship, which Allah has commanded or loved, can only be affirmed through revelation. As for customs, they encompass what people commonly practice in their worldly affairs, and their default is non-prohibition unless Allah declares them unlawful. This is because command and prohibition constitute Sharīʿah, and worship must be commanded. What has not been proven to be commanded cannot be judged as an act of worship, and what has not been proven among customary practices to be forbidden cannot be judged as prohibited. For this reason, Aḥmad and other scholars of the People of Ḥadīth stated: "the default in acts of worship is tawqīf," and nothing is legislated unless Allah commands it. Otherwise, we fall into the purview of the verse: 'Or do they have partners who have legislated for them from the religion that which Allah has not authorized?' (Qurʾān 42:21). As for customs, their default is exemption (ʿafw), so nothing is prohibited except what Allah forbids. Otherwise, we would fall under the verse: 'Say: Have*

[352] Al-Qawāʿid al-Fiqhiyyah al-Siʿdiyyah al-Manẓūmah wa-al-Manthūrah, al-Quʿīmī, 179.

*you considered what Allah has sent down as provision for you, and you have made some of it unlawful and some lawful?' (Qurʾān 10:59)."*[353]

فَاسْأَلُوا أَهْلَ الذِّكْرِ إِن كُنتُمْ لَا تَعْلَمُونَ.

This maxim does not mean neglecting to seek Allah's ruling regarding customs, as every action of an accountable person (mukallaf) carries a ruling. According to the majority of scholars, these rulings fall under five categories: permissibility (which is the default here), recommendation, obligation, detestability, and prohibition. The mujtahid must exert his utmost effort to investigate any factor that might shift the ruling from permissibility until he predominantly believes, according to the majority position, that none exists; individual Muslims must consult their scholars. Allah commands: *"Ask the people of knowledge if you do not know."* (Qurʾān 21:7)

Derived Principles:

"الأصل في العقود الحل والإباحة والأصل في الشروط فيها الصحة"

"The Default in Contracts Is Lawfulness and Permissibility and the Default in Their Conditions (Stipulations) Is Soundness"

Scholars of the Ḥanbalī school have not always applied the first principle consistently. However, Imām Taqī al-Dīn (Ibn Taymiyyah) was its strongest proponent.[354] The Ḥanbalī madhhab remains the most accommodating in validating contractual stipulations.

This maxim exemplifies the flexibility and universality of Islam. Shaykh al-Burnū explained: "This principle also applies to new types of contracts and financial transactions, provided they are free from ribā *(usury),* ambiguity *(jahālah),* uncertainty *(gharar), and* harm*."*[355]

The Default Principle Regarding Acts of Worship Is That They Require Divine Authorization (Tawqīfī)

As for this part of the maxim, it is true without any doubt.

﴿أَمْ لَهُمْ شُرَكَاءُ شَرَعُوا لَهُم مِّنَ الدِّينِ مَا لَمْ يَأْذَن بِهِ اللَّهُ﴾

Evidence for it from the Qurʾān includes the verse: "Or have they partners who have ordained for them a religion that Allah has not permitted?" [Al-Shūrā: 21].

"مَن أَحْدَثَ فِي أَمْرِنَا هَذَا مَا لَيْسَ مِنْهُ فَهُوَ رَدٌّ." "مَن عَمِلَ عَمَلًا لَيْسَ عَلَيْهِ أَمْرُنَا فَهُو رَدٌّ."

From the Sunnah, there is the ḥadīth of ʿĀʾishah in *Ṣaḥīḥ al-Bukhārī* and *Ṣaḥīḥ Muslim*: "Whoever introduces something into this matter of ours that is not part of it, it will be rejected." In the narration of Muslim: "Whoever performs an act not in accordance with our command, it will be rejected."

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[353] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 29:16.

[354] There are countless examples: in al-Inṣāf: "His statement: (nor is an animal rented for its milk except in the case of a nursing woman, and the water of a well is included incidentally). This is the madhhab, and it is upheld by the fellows of the school. (...) Shaykh Taqī al-Dīn chose the view permitting the rental of a water canal for a period, the water overflowing from a reservoir that they observed, and an animal for its milk. (...) Furthermore, the default principle in contracts is permissibility and validity." al-Inṣāf, al-Mardāwī, 14:328.

[355] *Al-Wajīz,* Āl Būrno, 198.

" وَإِيَّاكُمْ وَمُحْدَثَاتِ الْأُمُورِ، فَإِنَّ كُلَّ مُحْدَثَةٍ بِدْعَةٌ، وَإِنَّ كُلَّ بِدْعَةٍ ضَلَالَةٌ"

And the saying of the Prophet ﷺ recorded by Ahmad and others with an authentic chain: "Beware of newly invented matters, for every innovation is a bidʿah, and every bidʿah is misguidance."

However, disagreement arises among people in defining and delineating *bidʿah* (innovation). This is not a new phenomenon. It is sufficient to look at the debate between Imām al-ʿIzz and Ibn al-Ṣalāḥ concerning the prayer of al-Raghāʾib to realize this.

The difficulty of the matter is evident in the abundance of their historical and contemporary disagreements over whether various practices constitute innovations.

Before attempting to clarify the ruling on *bidʿah*, let us first define the term and identify those practices unanimously recognized as innovations.

**Definition of *Bidʿah***

As for its linguistic definition, *bidʿah* (innovation) refers to "something done without a precedent."[356]

«البدعة فعل ما لم يعهد في عصر رسول الله ﷺ، وهي منقسمة إلى: بدعة واجبة، وبدعة محرمة، وبدعة مندوبة، وبدعة مكروهة، وبدعة مباحة.»

Imām al-ʿIzz provided the following definition for its technical meaning: "*Bidʿah* is any act not practiced during the time of the Messenger of Allah ﷺ. It is divided into: obligatory, prohibited, recommended, disliked, and permissible innovations."[357]

Notice the broad scope of *bidʿah* in this definition, which necessitated classifying it into rulings ranging from obligation to prohibition. Most scholars adopted a similar approach, as evidenced by the statement of the author of *al-Muṭliʿ*: "*Bidʿah* is divided in accordance with the five legal rulings of taklīf [legal accountability]."[358]

"ومن قال مِن العلماء: البدعة تنقسم إلى حسن وغير حسن، فمورد تقسيمه البدعة اللغوية. ومتى قال: «كل بدعة ضلالة» فمعنى كلامه البدعة الشرعية."

This is what Imām Taqī al-Dīn Ibn Taymiyyah pointed to when he said: "When some scholars speak of *bidʿah* being divided into praiseworthy and blameworthy, they are referring to *bidʿah* in its linguistic sense. Whenever a scholar says, 'Every *bidʿah* is misguidance,' he means *bidʿah* in its legal sense."[359]

It is preferable that the technical definition of bidʿah aligns with the Prophet's ﷺ statement: "Every innovation is misguidance." We will clarify the necessity of adhering to this emphatic generalization.

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[356] Al-Muṭliʿ, Muḥammad ibn Abī al-Fatḥ al-Baʿlī, p. 406.

[357] Qawāʿid al-Aḥkām, Ibn ʿAbd al-Salām, 2:204.

[358] Al-Muṭliʿ, Muḥammad ibn Abī al-Fatḥ al-Baʿlī, p. 406.

[359] Al-Radd ʿalā al-Shādhilī, Ibn Taymiyyah, 1:14.

«ومراد الشافعي رحمه الله ما ذكرناه من قبل: أن البدعة المذمومة ما ليس لها أصل من الشريعة يرجع إليه، وهي البدعة في إطلاق الشرع، وأما البدعة المحمودة فما وافق السنة، يعني: ما كان لها أصل من السنة يرجع إليه، وإنما هي بدعة لغة لا شرعا، لموافقتها السنة.»

Imām Ibn Rajab said: "The intent of Imām al-Shāfiʿī (rA) is what we have mentioned previously: that the blameworthy *bidʿah* is that which has no basis in the Sharīʿah to which it can be referred. This is *bidʿah* in the terminology of the Sharīʿah. As for praiseworthy *bidʿah*, it is that which aligns with the Sunnah, meaning it has a basis in the Sunnah to which it can be referred. It is, therefore, a *bidʿah* linguistically, not in the Sharīʿah, due to its conformity to the Sunnah."[360]

Thus, *bidʿah* in the terminology of the Sharīʿah refers to that which is innovated without any basis in the Sharīʿah to which it can be referred. This definition aligns with the statement of the Prophet ﷺ: "Indeed, every newly introduced matter is a *bidʿah*, and every *bidʿah* is misguidance." This refers to innovations in religion, as indicated by his words: "Whoever introduces into this matter of ours..." Innovations that have a basis in the Sharīʿah are not included in this statement.

However, there should be no dispute over terminology as long as the meanings remain clear. If you say, as we prefer, that every innovation is misguidance and define it narrowly, there is no issue. Similarly, if you define it broadly, categorize it, and deem only that which has no foundation in Sharīʿah as blameworthy, that too is acceptable.

More importantly, there are two types of innovations that all scholars acknowledge as distinct, although Imām al-Shāṭibī (rA) was the first to name them as *true innovation* (al-bidʿah al-ḥaqīqiyyah) and *additive innovation* (al-bidʿah al-iḍāfiyyah). Before delving into his definitions of these two types, let us first consider his general definition of *bidʿah*. He (rA) stated:

"فالبدعة إذن عبارة عن: طريقة في الدين مخترعة، تضاهي الشرعية يقصد بالسلوك عليها المبالغة في التعبد لله سبحانه."

"Thus, *bidʿah* refers to an invented method in religion that mimics the prescribed practices, with the intention of pursuing it as an exaggerated form of worshiping Allah, the Exalted."[361]

Then he distinguishes between two types of innovations, stating:

"إن البدعة الحقيقية: هي التي لم يدل عليها دليل شرعي؛ لا من كتاب، ولا سنة، ولا إجماع، ولا قياس، ولا استدلال معتبر عند أهل العلم؛ لا في الجملة ولا في التفصيل، ولذلك سميت بدعة - كما تقدم ذكره -؛ لأنها شيء مخترع على غير مثال سابق..."

"True innovation (*bidʿah ḥaqīqiyyah*) is that which has no basis in any legal evidence—neither from the Qurʾān, nor the Sunnah, nor consensus, nor analogy, nor any reasoning deemed valid by scholars—

[360] Jāmiʿ al-ʿUlūm wa-al-Ḥikam, Ibn Rajab, 2:131.

[361] Al-Iʿtiṣām, al-Shāṭibī, 1:50.

whether general or specific. For this reason, it is called an innovation, as previously mentioned, because it is something invented without any precedent…

"وأما البدعة الإضافية؛ فهي التي لها شائبتان: إحداهما: لها من الأدلة متعلق، فلا تكون من تلك الجهة بدعة. والأخرى: ليس لها متعلق إلا مثل ما للبدعة الحقيقية. فلما كان العمل الذي له شائبتان لم يتخلص لأحد الطرفين؛ وضعنا له هذه التسمية، وهي " البدعة الإضافية ". أي أنها بالنسبة إلى إحدى الجهتين سنة؛ لأنها مستندة إلى دليل، وبالنسبة إلى الجهة الأخرى بدعة؛ لأنها مستندة إلى شبهة لا إلى دليل، أو غير مستندة إلى شيء."

As for *additive innovation* (*bidʿah iḍāfiyyah*), it is characterized by two aspects: one of them is connected to evidence, and thus, it is not an innovation from that perspective; the other aspect, however, lacks a basis, like true innovation. Because the act encompasses these two aspects and cannot be fully assigned to one or the other, we have designated it with this term, *additive innovation*. This means that with respect to one aspect, it is a *sunnah*, as it is based on evidence; while with respect to the other aspect, it is an innovation, as it is rooted in doubt rather than evidence or has no basis whatsoever."[362]

His intention—may Allah have mercy on him—regarding that which has two aspects refers to what has evidence permitting its generality, such as sending blessings upon the Prophet ﷺ, but is specified by a cause or time without evidence justifying such specification.

True innovation (*bidʿah ḥaqīqiyyah*), therefore, is the invention of a type of worship that has no basis in our religion. It includes numerous examples, such as seeking closeness to Allah through listening to music or dancing, worshiping by standing in the sun, abstaining from permissible speech, abstaining from eating meat or marriage, handling snakes, performing prayers in a manner different from the prescribed form, undertaking a pilgrimage to Mount Sinai, denying divine decree, negating Allah's attributes, or likening Him to the creations (*tashbīh*).

Scholars are in agreement on certain points:

1. They agree that innovation does not apply to customs since the default for customs is permissibility. This holds unless someone adopts or abandons a custom as a form of worship without evidence. Thus, there is no room for discussion about matters like using cars, phones, or any other customs and transactions for which no evidence of prohibition exists.
2. They also agree on the prohibition of true innovations, even though disagreements regarding its application may occasionally occur.
3. They are also unanimously agreed that acts of worship designated with a specific form, cause, time, place, or quantity must not be altered in any aspect. For instance, there is no standing (wuqūf) except at ʿArafah, no circumambulation (ṭawāf) except around the Kaʿbah, no sacrificial offering (uḍḥiyah) during Eid al-Fiṭr, no witr (odd-numbered night prayer) after ẓuhr, no zakāh on personal possessions kept for use, and no addition of a fifth unit to any obligatory prayer.

[362] Al-Iʿtiṣām, al-Shāṭibī, 1:367.

إلا أن الإضافية أولا على ضربين: أحدهما: يقرب من الحقيقية، حتى تكاد البدعة تعد حقيقية. والآخر: يبعد منها حتى (يكاد) يعد سنة محضة.

Their disagreement concerns additive innovations, which have a basis in the Sharīʿah and fall under a general text or an analogous practice, such as prayer, fasting, and remembrance in an unrestricted sense. However, a change is introduced into the form of worship, a cause, place, time, or quantity not prescribed is regularly observed, or a virtue is attributed to one of these without evidence. Here disagreement and divergence arise. Imām al-Shāṭibī himself recognized this, saying: "Additive innovations are initially of two kinds: one approaches true innovation so closely that it may almost be considered true innovation; the other is so far removed from it that it may almost be considered pure Sunnah."[363]

The cause of the disagreement among scholars is explained by Imām Ibn Daqīq al-ʿĪd, who states:

"... والتباين في هذا يرجع إلى الحرف الذي ذكرناه. وهو إدراج الشيء المخصوص تحت العمومات، أو طلب دليل خاص على ذلك الشيء الخاص."

"...The divergence in this matter stems from the point we previously mentioned, which is either including a specific matter under general principles or requiring a specific proof for that particular matter.'"[364]

Whoever holds that the statement of the Prophet ﷺ, *"Every innovation is misguidance,"* is not from the general expressions intended to be specific (*ʿāmm yurādu bihi al-khuṣūṣ*) but rather a general expression subject to specification (*ʿāmm makhṣūṣ*), will be more meticulous in seeking a specifying factor or evidence to justify the legitimacy of an additive innovation based on its cause, description, quantity, time, or place.

Our Imāms have differed regarding the generality of the Prophet's ﷺ statement, *"Every innovation is misguidance,"* and whether it remains entirely general until a specification arises. Imām Ibn Rajab (rA) said:

فكل من أحدث شيئا، ونسبه إلى الدين، ولم يكن له أصل من الدين يرجع إليه، فهو ضلالة، والدين بريء منه، وسواء في ذلك مسائل الاعتقادات، أو الأعمال، أو الأقوال الظاهرة والباطنة.

"The statement of the Prophet ﷺ, *'Every innovation is misguidance,'* is among the comprehensive expressions (*jawāmiʿ al-kalim*) from which nothing is excluded. It is a fundamental principle of the religion, akin to his statement, *'Whoever innovates in this matter of ours what is not of it, it is rejected.'* Thus, whoever introduces something and attributes it to the religion, without having an established basis in the religion to which it refers, it is misguidance, and the religion is free from it. This applies equally to matters of belief, actions, or both outward and inward statements. As for what has been mentioned in the words of the early generations regarding their approval of certain innovations, this refers only to linguistic innovations, not innovations in the religious sense. An example is the statement of ʿUmar

[363] Al-Iʿtiṣām, al-Shāṭibī, 1:368.

[364] Iḥkām al-Aḥkām Sharḥ ʿUmdat al-Aḥkām, Ibn Daqīq al-ʿĪd, 1:201.

(rAa) when he united people in praying behind one Imām during Ramadan. He saw them praying this way and said: *'What an excellent innovation this is.'* … By this, he intended that such an act had not previously been done in this specific manner. However, it has roots in the Sharīʿah to which it returns. For instance, the Prophet ﷺ used to encourage praying during Ramadan and would exhort people to it. During his time, people prayed in the mosque in scattered groups or individually. The Prophet ﷺ led his companions in Ramadan for a few nights but then refrained from continuing, explaining that he feared it might be made obligatory upon them, and they would then be unable to maintain it. This concern no longer existed after him ﷺ."[365]

This is a robust statement, emphasizing that the default stance is the general prohibition of innovations. It is more refined than the statement of Imām Ibn al-Jawzī in the same context:

"His saying, *'What an excellent innovation,'* refers to innovation as the act of doing something without prior precedent. He called it an innovation because it did not exist in the time of the Messenger of Allah ﷺ in that specific form, nor during the time of Abū Bakr. Innovations may pertain to either good or evil, but the reprehensible type of innovation is what contradicts or opposes something that has been legislated."[366]

Imām Ibn al-Jawzī was among the opponents of innovations, yet the preference for the expression of Ibn Rajab lies in its clarity: had an innovation been simply about contradicting or opposing something legislated, it would already be prohibited by that criterion, without necessitating repeated warnings against introducing innovations. Moreover, attributing something to the religion and claiming that a particular act holds virtue without evidence constitutes speaking about Allah without knowledge—a matter of grave severity. After all, who receives revelation following our Prophet Muhammad ﷺ? Likewise, ascribing virtue to a place, time, number, or specific characteristic requires clear proof.

Imām Ibn Rajab's statement aligns with that of Imām Taqī al-Dīn Ibn Taymiyyah, who said:

"I have written elsewhere that adhering to the generality of the Prophet's ﷺ saying, *'Every innovation is misguidance,'* is essential, and acting upon its general meaning is obligatory. Those who classify innovations into good and bad and use this classification as a pretext to not use innovation as evidence for prohibition are mistaken. This is what some among the jurists, theologians, Sufis, and devotees do when they are prohibited from engaging in 'innovative acts of worship' or 'innovative religious practices.' They claim that only those innovations explicitly forbidden are disliked. This leads to the statement: 'Everything forbidden,' or 'Everything prohibited,' or 'Everything contradicting the Prophet's ﷺ guidance is misguidance.' This is self-evident and requires no clarification. However, what is meant here is that anything not legislated within the religion is misguidance.

As for what is termed 'innovation' and deemed praiseworthy based on evidence from the Sharīʿah, one of two things must apply:

1. It is not an innovation within the religion, even if it is termed as such linguistically, as when ʿUmar said, *'What an excellent innovation this is.'*

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[365] Jāmiʿ al-ʿUlūm wa-al-Ḥikam, Ibn Rajab, 2:128.

[366] Kashf al-Mushkil min Ḥadīth al-Ṣaḥīḥayn, Ibn al-Jawzī, 1:116.

The prohibition against innovations is a general rule with specific exceptions due to a stronger counter-evidence, while the general ruling remains applicable to everything else, as is the case with other generalities in the Qurʾān and Sunnah."[367]

**The Intent of Those Who Generalize the Prophet's ﷺ Statement "Every Innovation Is Misguidance"**

With our agreement with Imām Taqī al-Dīn in this position, we generally cannot ascertain the precise and detailed intent of the scholars without examining their applications. Imām Taqī al-Dīn (rA) permitted practices such as collective dhikr (aside from that routinely practiced after the prayers), prompting the dead, the use of prayer beads, and other acts that some adherents of the madhhabs and others consider as innovations. In fact, Imām Ibn al-Qayyim mentioned:

يا حي يا قيوم، لا إله إلا أنت، برحمتك أستغيث

"Among the tried and proven experiences of those traversing the spiritual path is that whoever frequently repeats the invocation: *Yā Ḥayy Yā Qayyūm, Lā Ilāha Illā Anta* (*O Ever-Living, O Sustainer, there is no deity but You*), it instills life in their heart and intellect. Shaykh al-Islām Ibn Taymiyyah was deeply devoted to this invocation, and he once told me: 'These two Names—*al-Ḥayy* and *al-Qayyūm*—have a profound impact on enlivening the heart,' and he hinted that they are the Greatest Name (al-Ism al-Aʿẓam). I heard him say: 'Whoever adheres to reciting forty times every day between the Sunnah of Fajr and the obligatory Fajr prayer: *Yā Ḥayy Yā Qayyūm, Lā Ilāha Illā Anta, bi-Raḥmatika Astaġīth* (*O Ever-Living, O Sustainer, there is no deity but You; by Your mercy, I seek assistance*), will experience a heart alive and free of death.'"[368]

مَنِ اسْتَطَاعَ مِنْكُمْ أَنْ يَنْفَعَ أَخَاهُ فَلْيَفْعَلْ.

This supplication (duʿāʾ), in its origin, is from the teachings of the Prophet ﷺ, but the specification of time and number is not explicitly traceable to him ﷺ. Also, among the practices of Abū al-ʿAbbās was the repetition of *Sūrat al-Fātiḥah* after Ṣalāt al-Ṣubḥ. These are actions that may be classified as additive innovations, yet the domain of dhikr and supplication is vast. The Messenger of Allah ﷺ said regarding protective invocations (ruqā): *"Whoever among you is able to benefit their brother, let them do so."*

Since a person is permitted to praise their Lord with all forms of beauty and call upon Him with any request that involves no sin or severance of family ties, there is no objection to performing such acts or advising others regarding their various forms. However, this should be done without asserting the virtue of any specific act unless it has been clearly established through knowledge from our infallible Messenger, the Seal of the Prophets ﷺ.

Imām Taqī al-Dīn's assertion that this particular dhikr, repeated a specific number of times at a designated time, revives the heart, is subject to acceptance or rejection. This stands in stark contrast to the definitive guidance of the infallible Prophet ﷺ.

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[367] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 10:370.

[368] Madārij al-Sālikīn, Ibn al-Qayyim, 2:78.

Additionally, the awrād (regular devotional litanies) prescribed by the Prophet ﷺ take precedence and are the complete remedy, so other litanies should not be allowed to crowd them out. Undoubtedly, one should begin with them. If someone then supplements these acts with practices grounded in legitimate origins, having personally experienced their benefit, or advises others regarding them—without claiming their status as Sunnah but rather sharing their positive impact as a blessing from Allah—there is no objection to such actions, in shāʾ Allāh.

There are numerous reports from the Companions illustrating their additions to practices not explicitly detailed in the Sunnah. Among these is Ibn ʿUmar's addition to the talbiyah (the pilgrim's response to Allah's call), as recorded in *al-Muwaṭṭaʾ* from Nāfiʿ, and a Companion's addition to the praises (taḥmīd) after rising from bowing. Furthermore, the early generations adhered to specific numbers of dhikr beyond what was transmitted from the Prophet ﷺ, in instances too numerous to enumerate. ʿAbdullāh ibn Aḥmad ibn Ḥanbal said, "My father used to perform 300 units of prayer daily, but when his body weakened due to lashes, he performed 150 units daily."[369]

However, in matters where the Prophet ﷺ specified a particular number, adherence to that specification is preferred.

The wisdom of Imām Mālik in this regard is noteworthy. Sufyān ibn ʿUyaynah narrated:

وأي فتنة أعظم من أن ترى أنك سبقت إلى فضيلة قصر عنها رسول الله

"I heard Mālik ibn Anas approached by a man who asked: 'O Abū ʿAbdullāh, from where should I enter the state of iḥrām?' Mālik replied: 'From Dhū al-Ḥulayfah, where the Messenger of Allah ﷺ entered iḥrām.' The man said: 'But I want to enter iḥrām from the mosque.' Mālik responded: 'Do not do so.' The man persisted: 'But I want to enter iḥrām from the mosque, near the Prophet's ﷺ grave.' Mālik replied: 'Do not do so, for I fear fitnah (tribulation) for you.' The man asked: 'What tribulation is there in this? It is merely a few additional miles!' Mālik said: 'What greater tribulation is there than believing you have attained a virtue which the Messenger of Allah ﷺ fell short of achieving?'"[370]

**The Indication of Abstention**

Does the Prophet's ﷺ abstention from an act make its performance inherently forbidden? Not necessarily. The mere fact that the Prophet ﷺ refrained from doing something is not, in itself, conclusive evidence of its prohibition. Even among those strict in matters of innovation, no one has argued that his abstention from certain customary practices is a basis for prohibition—though there is a broader uṣūlī (principle-based) debate about whether the default ruling on things is permissibility or prohibition.

The critical issue concerns his consistent abstention from practices later claimed to be acts of devotion. Imām Taqī al-Dīn Ibn Taymiyyah, a moderate voice in this regard, elaborates on abstention as a deterrent from subsequent claims of religious validity for omitted practices:

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[369] Ḥilyat al-Awliyāʾ, Abū Nuʿaym, 9:181.

[370] Aḥkām al-Qurʾān, Ibn al-ʿArabī, 3:432.

والترك الراتب: سنة كما أن الفعل الراتب: سنة بخلاف ما كان تركه لعدم مقتض أو فوات شرط أو وجود مانع

"Consistent abstention is a Sunnah, just as consistent performance is a Sunnah, except in cases where his abstention was due to the absence of a reason, the lack of a condition, or the presence of an obstacle. If later circumstances arose where the necessary conditions were met or the obstacle was removed, then what the sharīʿah indicates in such cases should be done—like the compilation of the Qurʾān into a single volume, organizing the people in the Tarāwīḥ prayer under one imām, learning Arabic, or identifying the narrators of knowledge. These are actions necessitated by the requirements of religion, without which religious obligations or recommended acts cannot be fulfilled. The Prophet ﷺ only refrained due to the absence of such conditions or the presence of an obstacle.

However, if his abstention concerns acts of worship—where, if such acts had been legitimate, he would have performed them or at least permitted them, and where his successors and Companions would have done the same—then it is necessary to assert that performing such acts constitutes innovation and misguidance. Analogical reasoning cannot justify such innovations, unlike other categories. An example is attempting to analogize the call to prayer (*adhān*) for the ʿĪds the prayer for rain (*ṣalāt al-istisqāʾ*), or the eclipse prayer to the five daily prayers by instituting an *adhān* or *iqāmah* for them, as some of the Marwanids did for the ʿĪds."[371]

He further states elsewhere:

"... ومعنى ذلك أنه إذا كان المقتضي التام موجودًا في حياته كوجوده بعد مماته. فما ترَكَه كان تركُه سنةً وفِعله بدعة."

"The meaning is that when the complete reason for an act existed during his life as it does after his death, refraining from what he left undone is Sunnah, and doing it is innovation."[372]

Note his statement: "When the complete reason for an act existed during his life as it does after his death," which provides a precise criterion. Circumstances may change, making the rationale for an act more evident after his passing.

Addressing Those Who Deny Evidence in Abstention

Those who reject using abstention as evidence in acts of worship argue, in cases of consensus, such as the absence of an *adhān* for the ʿĪdayn (the two Eid festivals), that this was an omission in the context of clarification (*maqām al-bayān*), which implies exclusivity. They may also assert that abstention was accompanied by contextual indicators suggesting its lack of legitimacy.

This perspective invites questions: Can it be imagined that the Prophet ﷺ persistently refrained from actions of virtue without guiding his community to them? What, then, is the essence of condemned innovation if his consistent abstention from a supposed act of devotion, despite the presence of its rationale and prerequisites and the absence of an impediment, conveys nothing more than the permissibility of refraining?

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[371] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 26:172.

[372] Al-Radd ʿalā al-Shādhilī, Ibn Taymiyyah, 1:14.

The salaf and scholars frequently cited his and his Companions' non-performance of certain acts as evidence against their religious validity. Consider the statement of Abū Bakr and Zayd ibn Thābit:

"How can we do something the Messenger of Allah ﷺ did not do?"

And do not let yourself be distracted from reflecting on their statement by the fact that they accepted the existence of a reason for it after his ﷺ death that did not exist during his life.

Similarly, Muslim narrates from ʿUmārah ibn Ruwaybah, who saw Bishr ibn Marwān raising his hands while delivering a sermon and said:

"May Allah disfigure these two hands! I saw the Messenger of Allah ﷺ doing no more than gesturing with his hand like this." He pointed with his index finger.

**Reconciling the Evidence**

The question remains: how then do we distinguish between praiseworthy and blameworthy aspects of what may be considered *additive innovations* that involve attaching a cause, attribute, quantity, time, or place to an act of worship without specific evidence? This is especially pertinent given examples like the Companions adding phrases in *dhikr*, the pious predecessors adhering to additional litanies beyond what is established in the *Sunnah*, and Bilāl's (rAa) commitment to performing two units of prayer after *wuḍūʾ*. Bilāl practiced this before it was affirmed by the Prophet ﷺ, although it only became a *Sunnah* after his approval.

It appears that a person imposing upon themselves specific litanies—whether prayers, acts of charity, recitations, or supplications—does not fall under the blameworthy category of innovation. This includes specifying a number or time and adding expressions of praise and supplication, provided it is done as a means of self-discipline and organization. Also, advising loved ones about it after personal experience is permissible, provided there is no assertion of virtue that can only be known through revelation. Even collective gatherings for *dhikr* or supplication at certain agreed-upon times may be acceptable. All of this seems permissible, as long as there is no contradiction to or competition with the prescribed acts (mashrūʿ), or other factors that warrant prohibition, and as long as two major pitfalls are avoided:

1. Attributing something to the religion without evidence – It is critical to avoid declaring such practices as religious obligations or virtues unless supported by explicit proof.
2. Mimicking prescribed practices or competing with them and creating new symbols of religiosity or communal practices that deviate from the way of the early generations.

As for the first, it is clearer than the sun at midday: whoever asserts the virtue of a particular form of worship, location, time, or number—beyond telling of what they have personally experienced—must undoubtedly provide evidence to substantiate their claim.

It is also imperative not to engage in practices that could be construed as affirming their status as sunnah. Regularly performing an act publicly, especially in mosques, during specific seasons, or by scholars, can easily mislead people. Sultan al-ʿUlamāʾ said:

أحدهما: أن العالم إذا صلاها [صلاة الرغائب المبتدعة] كان موهما للعامة أنها من السنن فيكون كاذبا على رسول الله بلسان الحال. ولسان الحال قد يقدم على لسان المقال.

"First: If a scholar performs it [the innovated Ṣalāh al-Raghāʾib], it gives the general public the impression that it is among the sunnah acts, thereby falsely attributing it to the Messenger of Allah ﷺ through one's actions. Such implicit indications can sometimes outweigh explicit statements.'"[373]

As for the second pitfall: mimicking the sunnah, competing with it, or introducing rituals into the public domain that were unknown to the early generations is unanimously condemned by the scholars. The matter of innovation becomes particularly severe when such practices are publicized, encouraged for the general masses, or established as communal gatherings. For this reason, the Companions disapproved of introducing an adhān for the two ʿĪds.

Imām Al-Shāṭibī (rA) said:

"لأن التزام الأمور غير اللازمة شرعًا شأنها أن تفهم التشريع، وخصوصًا مع من يقتدى به في مجامع الناس - كالمساجد- فإنها إذا ظهرت هذا الإظهار، ووضعت في المساجد كسائر الشعائر التي وضعها رسول الله ﷺ في المساجد وما أشبهها -كالأذان، وصلاة العيدين، والاستسقاء، والكسوف-؛ فهم منها بلا شك أنها سنن، إذا لم تفهم منها الفرضية، فأحرى أن لا يتناولها الدليل المستدل به، فصارت من هذه الجهة بدعًا محدثة بذلك. "

"Adhering to matters that are not legislatively binding gives the impression of being part of the religion—especially when undertaken by figures of authority or in public spaces such as mosques. If these practices are displayed prominently—similar to the rituals instituted by the Messenger of Allah ﷺ in mosques, such as the adhān, and the ṣalāh of the two ʿĪds, rain prayers, and eclipse prayers—they will undoubtedly be understood as sunnah, if not as obligations. This makes them less likely to be covered by any general evidence. From this perspective, they become reprehensible innovations."[374]

"يكره أن يجتمع القوم يدعون الله سبحانه وتعالى ويرفعون أيديهم؟" قال: "ما أكرهه للإخوان إذا لم يجتمعوا [على] عمد، إلا أن يكثروا. قال إسحاق: كما قال. وإنما معنى أن [لا] يكثروا: يقول: أن لا يتخذوها عادة حتى يعرفوا به."

Imām Aḥmad (rA) was asked: "Is it disliked for a group of people to gather, supplicate to Allah, and raise their hands?" He replied: "I do not dislike it for the brothers if they do not gather intentionally, unless it becomes frequent." Isḥāq said: "As he said. The meaning of 'unless it becomes frequent' is that they should not make it a habit such that they become associated with it."[375]

The reports regarding Aḥmad's stance vary. In *al-Furūʿ*, it is mentioned: "If people gather for recitation, supplication, and remembrance, one report says, 'What could be better?' … Another says, 'There is no harm in it.' Yet another says, 'It is an innovation.' Ibn Manṣūr narrated: 'I do not dislike it if they do not gather intentionally unless it becomes frequent.' Ibn Manṣūr explained: 'This means they should not make it a habit.' (+M) and he disliked it (+M) In *al-Funūn*, it is stated: 'I dissociate myself before Allah

[373] Al-Madkhal, Ibn al-Ḥājj, 4:278.

[374] Al-Iʿtiṣām, al-Shāṭibī, 1:318.

[375] Masāʾil al-Imām Aḥmad wa-Isḥāq ibn Rāhawayh, al-Kawsaj, 9:4879.

from the gatherings of our time in mosques and sacred sites during nights they call *Iḥyāʾ* (revival).'"[376] These differing accounts can be understood as referring to different contexts and conditions.

Imām Taqī al-Dīn Ibn Taymiyyah said:

«الاجتماع لذكر الله واستماع كتابه والدعاء عمل صالح وهو من أفضل القربات والعبادات في الأوقات ... لكن ينبغي أن يكون هذا أحيانا في بعض الأوقات والأمكنة فلا يجعل سنة راتبة يحافظ عليها إلا ما سن رسول الله ﷺ المداومة عليه في الجماعات، من الصلوات الخمس في الجماعات ومن الجمعات والأعياد ونحو ذلك.»

"Gathering for the remembrance of Allah, listening to His Book, and supplicating are righteous acts and among the most virtuous forms of drawing closer to Allah. However, such gatherings should occur occasionally at certain times and places. They should not be made into a regular practice unless it is something the Messenger of Allah ﷺ specifically legislated as a continuous act for groups, such as the five daily prayers in congregation, Friday prayers, Eids, and similar acts."[377]

He also stated:

"Group recitation in sequence (*al-idārah*) is considered good by most scholars. One form of group recitation is for a group to read together in unison. The Mālikīs have two views regarding its dislike, and Mālik disapproved of it. However, the practice of one person reading while others listen attentively is unanimously not disliked and is considered commendable. This was the practice of the Companions, such as Abū Mūsā and others."[378]

Group *dhikr* and recitation, while validated by Imām Taqī al-Dīn Ibn Taymiyyah and recognized within our madhhab, remain subjects of well-known scholarly disagreement. In *al-Madkhal* by Ibn al-Ḥājj and other Mālikī works, it is stated: "There is no difference in Mālik's opinion (rA) that group recitation and group *dhikr* are among the disliked innovations."[379]

The Ḥanafīs express a similar stance. In *Barīqah Maḥmūdiyyah*, it is noted: "It is disliked to recite the Qurʾān collectively because it entails neglecting the command to listen and pay attention. However, it is also said there is no harm in it."[380]

Thus, there is no blame on those who avoid such practices or feel uncomfortable with them, provided they do not denounce those who engage in them, as the majority opinion supports their perspective. However, dedicating specific times in mosques for regular group remembrance—such as after Friday prayers every week or before Maghrib every Thursday—such that it becomes a consistent practice and a symbol akin to established *sunan* is the very scenario to which the prohibition of Imām Aḥmad and others applies.

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[376] *Al-Furūʿ* and *Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 2:385.

[377] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 22:520.

[378] *Al-Fatāwā al-Kubrā,* Ibn Taymiyyah, 5:344.

[379] *Al-Madkhal,* Ibn al-Ḥājj, 1:96.

[380] *Barīqah Maḥmūdiyyah,* al-Khādimī, 3:269.

From this category arises the widespread denunciation by the majority of scholars of those who perform the *Ṣalāt al-Raghāʾib* in mosques. They did not argue, as some have, that it falls under the general commands encouraging prayer and voluntary acts.

Sulṭān al-ʿUlamāʾ (ʿIzz al-Dīn) highlighted the distinction between *Ṣalāt al-Raghāʾib* and other prayers performed by the Prophet ﷺ occasionally in congregation:

"*The distinction lies in the fact that following an Imām in Ṣalāt al-Raghāʾib gives the public the impression that it is a Sunnah and a religious hallmark. This contrasts with the incidents mentioned in the ḥadīths of Anas and ʿItbān (may Allah be pleased with them both), where such congregational prayers were rare occurrences and did not lead the public to believe they were Sunnah. Instead, they indicated permissibility, which is a matter of consensus.*"[381]

It is thus correct to assert that innovation (ibtidāʿ) does not pertain to customs and transactions, as the default ruling in these matters is permissibility unless one seeks to worship Allah through a particular act or abstention without evidence or proof. Similarly, innovation does not apply to means, such as adding diacritical marks to the Qurʾān, using pebbles to count tasbīḥ, or drawing lines on the ground to align rows in prayer. It is well-established that the realm of supplications, remembrances, and invocations is broad, as long as they do not involve transgressions or violations.

Innovation is also excluded in cases where the intent pertains to purposes other than pure worship, such as structured educational curricula or different methodologies for documenting and developing knowledge. Nor does it include personal commitments to acts or litanies aimed at disciplining oneself or optimizing one's time. Advising others about beneficial practices that have been personally experienced carries no issue, provided it is devoid of assertions about religious merit that can only be known through the revelation.

However, inventing an act of worship that the Messenger ﷺ did not bring is undoubtedly an innovation that is rejected and falls under the category of condemned innovations. This also applies to altering the defined characteristics of acts prescribed in the Sharīʿah or substituting their designated places or times without Allah's permission. Additionally, affirming, with certainty, the virtue of a specific characteristic, quantity, time, or place—or inviting the general public to it—without substantiation is objectionable, especially when it becomes an emblem competing with established Sunnah practices.

لا ينسب إلى ساكت قول ولكن السكوت في معرض الحاجة إلى البيان بيان

## No Statement or Position Is to Be Attributed to Someone Who Remains Silent, but Silence When Clarification Is Needed Constitutes a Statement

The foundational principle is that silence alone does not constitute a declaration, as it does not explicitly convey the intent or opinion of the silent party. However, when silence occurs in situations where clarification is required, it is deemed an implicit statement, provided the individual is not under duress.

[381] Musājala ʿIlmiyya Ḥawla Ṣalāt al-Raghāʾib, al-Albānī and al-Shāwīsh, 1:37.

For example:

- If a suitor remains silent after the guardian makes the contractual offer (ījāb), the marriage contract does not take effect.
- If a previously married woman (thayyib) is silent when asked for her consent to remarry, her silence is not considered consent.
  - However, the silence of a virgin (bikr) in the same situation is taken as consent, as she would be shy, and she would not remain silent if she objected.[382]

Exceptions also include:

- An agent (wakīl) accepting agency (wakālah) through silence followed by actions indicating acceptance.[383]
- A student's recitation to a Shaykh who listens silently is treated, according to the stronger view, as the Shaykh's own transmission.

لا عبرة للدلالة في مقابلة التصريح

A related maxim is: "Implicit indications hold no weight against explicit declarations."

الشك بعد الفعل لا يؤثر

**Doubt After Completion Does Not Affect Validity**

Shaykh Ibn ʿUthaymīn summarized this principle poetically:

والشك بعد الفعل لا يؤثر
وهكذا إذا الشكوك تكثر

"Doubt after the act does not affect,
And so it remains when doubts abound."

Ibn Rajab wrote in his legal maxims:

«إذا شك بعد الفراغ من الصلاة أو غيرها من العبادات في ترك ركن منها؛ فإنه لا يلتفت إلى الشك، وإن كان الأصل عدم الإتيان به وعدم براءة الذمة؛ لكن الظاهر من أفعال المكلفين للعبادات: أن تقع على وجه الكمال؛ فرجح هذا الظاهر على الأصل. ولا فرق في ذلك بين الوضوء وغيره على المنصوص عن أحمد»

"If one doubts after completing a prayer or any other act of worship whether a fundamental element (rukn) was omitted, they should not pay attention to the doubt. Even though the original assumption would be the non-performance of the act and the absence of exoneration (barāʾat al-dhimmah), the

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[382] Sharḥ al-Qawāʿid al-Siʿdiyyah, al-Zāmil, 126.

[383] "(And) the acceptance of agency is valid (with any statement or action) from the agent (indicating it); meaning, acceptance. This is because the agents of the Prophet ﷺ were not reported to have done anything other than carrying out his orders, and because he permitted the agency, so it is accepted through actions, such as eating food. (Even) if the acceptance (was delayed) after the permission was granted." Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 3:429.

apparent reality is that acts of worship by a responsible individual (mukallaf) are generally performed in their proper and complete manner. This apparent reality takes precedence over the original assumption. This applies equally to ablution and other acts, as affirmed by the statements of Imām Aḥmad."[384]

However, doubts arising during the act of prayer or concerning whether the prayer was initially performed are treated differently:

- If one doubts whether they prayed at all, they must repeat the prayer to clear their obligation with certainty.[385]
- Some scholars argue that repetition is required only if the prayer time has not yet elapsed, which is the sounder view for those prone to obsessive doubts (waswasah).[386]

لا عبرة بالتوهم

The second part of this maxim pertains to dismissing doubts for those afflicted by frequent uncertainty. Here, doubt refers to a lack of certainty. Ignoring these two principles—dismissing doubts post-act and habitual doubts—can open the door to obsessive scrupulosity. Adherence to these principles, coupled with the maxim "No regard is given to mere suspicions" (discussed earlier regarding predominant assumptions), safeguards against such tendencies. From these three principles, it is concluded that baseless doubts (wahm) should be entirely dismissed, as well as doubts that contradict certainty after completing an act of worship and in cases where the responsible individual frequently experiences doubts.

الأصل أن الشيء إذا غلب عليه وجوده يجعل كالموجود حقيقة

**The Default Is That a Predominantly Expected Occurrence Is Treated as an Actual One**

المتوقع كالواقع

This principle aligns closely with "What Is Expected Is Treated as Existing," although the latter is often applied to future scenarios.

The application of the principle that "a thing, when predominantly expected, is treated as if it exists in reality" is notably frequent in the methodology of Abū Ḥanīfah. The Ḥanbalīs also consider it to some extent. Among their applications are:

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[384] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:135.

[385] "And he acts based on certainty if he doubts the omission of a pillar, such as if he is uncertain whether he performed it or not (...) because the default assumption is the absence of what is doubted. Similarly, if he doubts the very occurrence of the prayer or the number of units prayed (...) he acts based on certainty." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 2:231.

[386] "Al-Ḥasan said concerning a man who doubts whether he prayed or not: 'He repeats it if he is still within the time of that prayer, but if the time has elapsed, then he does not repeat it.' ʿAbd al-Razzāq mentioned this with his chain of transmission from him." Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī, Ibn Rajab, 8:405.

- Relying on prevailing patterns in determining the age of menopause[387]
- The presumed life of a missing person.[388]

The Shāfiʿīs present the maxim *ʻal-mutawaqqaʿ kal-wāqiʿ* "What Is Expected Is Treated as Existing" in the form of a question. Among its applications in the Ḥanbalī madhhab are:

- Considering a mere threat from someone capable as coercion[389]
- Forbidding kissing for a fasting person if they strongly believe it will lead to ejaculation[390]
- Allowing a sick person to break their fast if they fear harm[391]

"ويعذر في ترك الجمعة والجماعة، المريض. بلا نزاع، ويعذر أيضا في تركهما لخوف حدوث المرض."

- "And a sick person is excused from attending Jumuʿah and congregational prayer—without dispute. He is also excused from them out of fear of falling ill."[392]

These maxims are not suitable for deriving further rulings (takhrīj) without understanding the details of when they are applied, as their application based solely on their apparent wording is not consistent, neither within the madhhab nor outside it.

لا عبرة بالظن البيّن خطؤه

## No Consideration Is Given to an Evidently Erroneous Assumption

An example is someone who assumed the prayer time had begun and prayed, only to later discover they were mistaken, or someone who assumed the sun had set and broke their fast, only to later learn they were wrong. The former must repeat the prayer, while the latter must make up the fast. However, this is not the case for someone who, while traveling, mistakenly determined the direction of the qiblah and

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[387] "(The limit for menopause is fifty years) based on ʿĀʾishah's statement: 'She will not bear a child after fifty years.' (Shaykh Taqī al-Dīn preferred: there is no limit for the maximum age of menopause)." *Kashshāf al-Qināʿ*, al-Buhūtī, 13:24.

[388] "(As for one), meaning the missing person, (whose whereabouts are unknown due to an absence that outwardly suggests safety, such as a merchant traveling in non-dangerous conditions (...) or similar reasons), his wife must wait until the completion of ninety years from the day he was born, as the apparent assumption is that he will not live beyond this age." Kashshāf al-Qināʿ, al-Buhūtī, 13:34.

[389] "The coerced individual whose statements and actions have no consequences—does it require that he endure some form of torment, or is the mere threat of beating, imprisonment, or the harmful confiscation of property by someone capable of executing the threat, and whose execution is likely, sufficient to consider him coerced? In this matter, there are two narrations, the more correct of which is the likelihood (of harm occurring). Abū al-ʿAbbās said: Even if he merely suspects that he will be harmed without an explicit threat, whether to himself, his property, or his family, he is considered coerced." Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 25

[390] "Among these is the fasting person: if he predominantly assumes that kissing will lead to ejaculation, it becomes prohibited for him to kiss. This was mentioned by our fellows as a point of consensus." Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 26.

[391] "If a sick person fears harm from an increase in their illness or its prolongation, even based on the statement of a trustworthy Muslim, or if they are healthy but fall ill during the day, or fear illness due to thirst or another cause—then breaking their fast is recommended, and it is disliked for them to fast or complete it." *Al-Iqnāʿ*, al-Ḥajjāwī, 1:306.

[392] Al-Inṣāf, al-Mirdāwī, 4:464.

later discovered their error. According to the madhhab, they are not required to repeat the prayer, as the mistake occurred without negligence, and the obligation in determining the qiblah is limited to striving (ijtihād) to the best of one's ability.

إذا تعارض أصلان؛ عمل بالأرجح منهما

**When Two Defaults Conflict, the Stronger Takes Precedence**

"إذا تعارض معنا أصلان؛ عمل بالأرجح منهما؛ لاعتضاده بما يرجحه. فإن تساويا؛ خرج في المسألة وجهان غالبا. ومن صور ذلك:"

Ibn Rajab mentions in his *Qawāʿid*:
*"When two defaults (or original assumptions) conflict, the stronger of the two is acted upon due to its supporting evidence. If they are equal, the matter often leads to two opinions in the ruling.* Examples include:

If impurity falls into water, and there is doubt whether it has reached the threshold of two qullahs (the traditional two-vessel volume threshold), should the water be deemed impure or pure? There are two opinions:

1. The first opinion is that the water is deemed impure, which is the preferred view of the authors of *al-Mughnī* and *al-Muḥarrar*, as the presumption is that the water has not reached the threshold of two qullahs.
2. The second opinion, which is stronger, holds that the water remains pure, as the default ruling on water is purity..."[393]

## Exceptions

If a custodian claims they returned the deposit (*wadīʿah*), but the owner denies this, the statement of the custodian is upheld. This is despite the default assumption (*aṣl*) that the deposit remains in their possession. This ruling is because the custodian is a trustee (*amīn*), benefits nothing from keeping the deposit, and the default presumption is the clearance of their liability.[394]

You may have noticed that some legal maxims appear to function as exceptions to others. For instance, the exclusion of matters like marital relations and meats from the original presumption of permissibility (*aṣl al-ibāḥah*). Similarly, if you revisit the discussion on the predominant presumption (*ghalabat al-ẓann*) being typically valid, you will find in Ibn Rajab's classification of the third category—where actions are based on apparent realities without regard to original assumptions—a host of examples that effectively serve as exceptions to the broader maxim.

In general, the exception of a branch from a legal maxim occurs when it falls under another maxim, principle, or apparent reality strengthened by the rulings of the Sharīʿah or other grounds for preference.

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[393] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:120.

[394] "The statement of the trustee (al-mūdaʿ) is accepted regarding returning the deposit to its owner or to another with the owner's permission, as well as concerning its loss and the absence of negligence." Zād al-Mustaqniʿ fī Ikhtiṣār al-Muqniʿ, al-Ḥajjāwī, 136.

لا ضرر ولا ضرار

## The Third Major Legal Maxim: No Harm and No Reciprocation of Harm

### Explanation and Alternative Expressions

Al-Būrnū states:
"Most works on legal maxims express this maxim as: 'Harm is to be removed.' They cite what we have expressed—namely, the ḥadīth—as evidence and a foundation for the maxim. However, phrasing the maxim in the form of the ḥadīth is broader and more inclusive, as it encompasses harm both initially and reciprocally. Moreover, this gives the maxim greater strength, as it establishes it as a legitimate sharʿī evidence upon which rulings can be built, considering it is a direct statement from the noble Prophetic tradition. In contrast, the phrase 'Harm is to be removed' lacks the same authoritative force as the Prophetic text."[395]

زوال الضرر بلا ضرر

Among the expressions of the Ḥanbalī scholars is what is mentioned in *Sharḥ al-Kawkab al-Munīr*:
"'Removing harm without causing harm' is also among the evidences of fiqh, meaning that harm must be eliminated in such a way that its removal does not lead to other harm."[396]

This maxim is the fifteenth in al-Siʿdī's collection of maxims, where he expressed it as *'No harm and no reciprocation of harm*.' In his didactic poem, he said:

الدين مبني على المصالح في جلبها والدرء للقبائح

*The religion is built on attaining benefits,*
*and repelling harms.*

Ibn ʿUthaymīn also stated:

الدين جاء لسعادة البشر ... ولانتفاء الشر عنهم والضرر

*The religion came for human happiness,*
*To eliminate evil and harm.*

The Ḥadīth 'No Harm and No Reciprocation of Harm' is the thirty-second ḥadīth in *al-Arbaʿīn al-Nawawiyyah*. Imām al-Nawawī (rA) commented:
"On the authority of Abū Saʿīd al-Khudrī (rAa), the Prophet ﷺ said: *'No harm and no reciprocation of harm.'* Ḥasan, reported by Ibn Mājah, al-Dāraquṭnī, and others with a connected chain."[397]

Imām Ibn Rajab remarked:
"The shaykh (rA) mentioned that its various chains strengthen one another, and this is correct. … Imām

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[395] *Al-Wajīz,* Āl Būrno, 251.

[396] Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:442.

[397] Jāmiʿ al-ʿUlūm wa-l-Ḥikam, Ibn Rajab, 2:207.

Aḥmad used this ḥadīth as evidence, stating that the Prophet ﷺ said: *'No harm and no reciprocation of harm.'"*[398]

The Meaning of Harm and Reciprocation of Harm in the Ḥadīth

Then Imām Ibn Rajab discussed the meaning of ḍarar and ḍirār in the ḥadīth: "There is a disagreement: Is there a difference between the two terms—meaning ḍarar and ḍirār—or not?

Some say they have the same meaning as a form of emphasis.

However, it is widely known that there is a difference between them.

- It is said that ḍarar is the noun, and ḍirār is the act, meaning that ḍarar itself is negated in the Sharīʿah, as is imposing ḍarar without right.
- It is also said: ḍarar is to inflict harm on another for one's benefit, and ḍirār is to inflict harm on another without benefit, such as preventing what does not harm him but harms the one deprived.
- And it is said: ḍarar is to harm someone who has not harmed you, and ḍirār is to inflict harm impermissibly on someone who has harmed you.

In any case, the Prophet ﷺ only negated ḍarar and ḍirār without right. As for imposing ḍarar on someone with right, either because he transgressed the boundaries of Allah and is punished equally to his crime, or because he wronged another and the wronged seeks justice—this is certainly not intended. What is intended is inflicting ḍarar without right."[399]

"الفقه يدور على خمسة أحاديث: "الحلال بين والحرام بين" و "الأعمال بالنيات" و "ما نهيتكم عنه فاجتنبوه، وما أمرتكم به فأتوا منه ما استطعتم" و "لا ضرر ولا ضرار" و "الدين النصيحة""

This principle is one of the greatest principles of Sharīʿah. Imām Abū Dāwūd, a student of Imām Aḥmad, said: "Jurisprudence revolves around five ḥadīths: 'The permissible is clear and the forbidden is clear,' 'Actions are by intentions,' 'What I have forbidden you, avoid it, and what I have commanded you, do as much of it as you can,' 'There is no harm and no reciprocation of harm,' and 'Religion is goodwill.'" [400]

"وهذه القاعدة فيها من الفقه ما لا حصر له ولعلها تتضمن نصفه. فإن الأحكام إما لجلب المنافع، أو لدفع المضار."

Regarding the importance of the rule, Ibn al-Najjār said: "This rule contains immeasurable fiqh and perhaps encompasses half of it, as rulings are either to bring benefits or to ward off harms."[401]

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[398] Jāmiʿ al-ʿUlūm wa-l-Ḥikam, Ibn Rajab, 2:210.

[399] Jāmiʿ al-ʿUlūm wa-l-Ḥikam, Ibn Rajab, 2:212.

[400] *Al-Taḥbīr Sharḥ al-Taḥrīr*, Al-Mardāwī, 8:3840.

[401] Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:442.

You find the completion of this rule in the words of Imām Abī al-ʿAbbās when he said:

«الشريعة مبناها على تحصيل المصالح وتكميلها وتعطيل المفاسد وتقليلها»

"Al-Sharīʿa is based on acquiring and perfecting benefits and disabling and minimizing harms."[402]

﴿ إِنَّ اللهَ يَأْمُرُ بِالْعَدْلِ وَالإِحْسَانِ وَإِيتَاء ذِي الْقُرْبَى وَيَنْهَى عَنِ الْفَحْشَاءِ وَالْمُنكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ 90 ﴾

This is because emphasis should be placed on bringing benefits while warding off harms. Allah says: "Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will be reminded"] Al-Naḥl: 90] starting with commands and then prohibitions.

Therefore, the first rule that Al-ʿAllāmah Al-Siʿdī started with is the principle:

"الشارع لا يأمر إلا بما مصلحته خالصة أو راجحة، ولا ينهى إلا عما مفسدته خالصة أو راجحة."

"The lawgiver only commands what has pure or predominant benefit and forbids only what has pure or predominant harm."

For a detailed discussion, see the principle: "Warding off harms is prioritized over bringing benefits when they are equal."

## The Basis of This Maxim

The text of the principle is its origin, as it comes from the words of the Messenger protected from error (al-Maʿṣūm) ﷺ.

وَإِذَا طَلَّقْتُمْ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ سَرِّحُوهُنَّ بِمَعْرُوفٍ وَلا تُمْسِكُوهُنَّ ضِرَاراً لِتَعْتَدُوا

It is supported by the Qurʾān, in the verse: "And when you divorce women and they approach the end of their waiting period, either retain them according to acceptable terms or release them according to acceptable terms. But do not retain them, intending harm, to transgress." (Al-Baqarah: 231).

لا تُضَارَّ وَالِدَة بِوَلَدِهَا وَلا مَوْلُودٌ لَهُ بِوَلَدِهِ

And Allah also says: "No mother should be harmed through her child, and no father through his child." (Al-Baqarah: 233).

## Guidelines and Benefits

Types of Harm

Ibn Rajab said:

"... What is meant is inflicting harm without right, and this is of two types:

1. The first is that there is no other purpose than to harm another; there is no doubt about its ugliness and prohibition. The Qurʾān forbids inflicting harm in several contexts, including in wills. Allah says: {after

[402] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 10:512.

any will made or debt incurred, without intent of harm} [Al-Nisāʾ: 12]. In the ḥadīth narrated by Abu Hurayrah, the Prophet ﷺ said: 'A servant may work in obedience to Allah for sixty years, but when death comes, he harms in the will and enters the Fire.' Then he recited: {These are the limits of Allah} up to: {And whoever disobeys Allah and His Messenger and transgresses His limits will be admitted by Him to a Fire, to abide eternally therein, and he will have a humiliating punishment} [Al-Nisāʾ: 13-14]. Tirmidhī and others have narrated it with this meaning. Ibn ʿAbbās (rAa) said: Harm in wills is one of the major sins, then he recited this verse.

إنَّ الله قد أعطى كُلَّ ذي حقٍّ حقّه، فلا وصيةَ لوارث

Harm in wills sometimes occurs by allocating more to some heirs than their rightful share ordained by Allah, thus harming the rest of the heirs by their designation. Hence, the Prophet ﷺ said: 'Indeed, Allah has given every right holder their right, so there is no bequest for an heir.'

الثلث والثلث كثير

Other times it occurs by bequeathing more than a third to a non-heir, thus reducing the rights of the heirs. For this reason, the Prophet ﷺ said: 'A third, and a third is much.'

Among other examples is the revocation in marriage; Allah says: {Retain them according to acceptable terms or release them according to acceptable terms. And do not retain them, intending harm, to transgress. And whoever does that has certainly wronged himself} [Al-Baqarah: 231]. And He says: {And their husbands have more right to take them back in this, if they wish for reconciliation} [Al-Baqarah: 228], indicating that if the intention of revocation is to cause harm, then it is sinful…

2. The second type is when there is another legitimate purpose, such as exercising one's rights in a way that benefits them, but includes causing harm to others, or preventing others from benefiting from one's property, thus harming the prevented individual.

1. As for the first type, which is acting within one's ownership in a way that causes harm to others, if it is done in an unusual manner, such as kindling a fire on his land on a windy day, causing nearby properties to burn, then he has transgressed and is liable (ḍāmin) to compensate. If it is in a customary manner, scholars have two well-known opinions:

I. The first is that one should not be prevented, as said by Al-Shāfiʿī, Abu Ḥanīfa, and others.

II. The second view is prohibition, which is the opinion of Imām Aḥmad and is supported by Mālik in certain instances. An example is opening a window in a tall building that overlooks a neighbor or constructing a high structure that overlooks a neighbor without providing a screen. Imām Aḥmad stipulated that screening is obligatory, and he is supported by some of al-Shāfiʿī's followers. Al-Ruyānī noted in his book "Al-Ḥilyah" that a judge should strive in these matters and prohibit them if malice or intent to harm is evident. The same applies to raising a building's height and blocking sunlight or moonlight [or his view of them]....

2. As for the second issue—preventing neighbors from benefiting from or making use of his own property—if it would harm the owner, such as when he has a weak wall that cannot support added timber, then he is allowed to prohibit such use. However, if it does not harm him, is he obliged to permit it and forbidden from refusing? Those who argue in the first issue that an owner is not prevented from

using his property even if it harms his neighbors say here that the neighbors can be prevented from using his property without permission. Conversely, those who support prevention in the first issue are divided here into two opinions.

I. The first opinion: the owner may prevent such use, which is the view of Mālik.

II. The second opinion: that the owner may not prevent such use, which is Imām Aḥmad's stance regarding placing timber on a neighbor's wall. Al-Shāfiʿī, in his earlier opinion, agreed with this, as did Isḥāq, Abū Thawr, Dāwūd, Ibn al-Mundhir, and ʿAbd al-Malik ibn Ḥabīb al-Mālikī. Mālik also reported this from some judges of Madinah.

لا يمنعن أحدكم جاره أن يغرز خشبة على جداره

In both Bukhārī and Muslim, Abu Hurayrah (rAa) narrated from the Prophet ﷺ: "None of you should prevent his neighbor from placing a beam in his wall." Abu Hurayrah said: "Why do I see you turning away from it?"[403]

## Subsidiary Maxims and Applications

There is no doubt that this maxim encompasses the various branches of Islamic jurisprudence. Among these are retribution (qiṣāṣ) and fixed legal penalties (ḥudūd) to avert harm from societies. It also includes guaranteeing compensations for damages, returning items due to defects, exercising the option in transactions, annulling marriages due to defects, repelling an aggressor, and pre-emption (shufʿah) to prevent harm to neighbors and partners. Interdiction (ḥajr) is applied to prevent harm to creditors and heirs, and jihād is utilized to deter harm to the religion and worldly affairs of people. Furthermore, they stipulate the absence of harm in permissible actions, such as taking medication to halt or induce menstruation.[404]

Ibn Rajab mentioned applications of "no harm and no reciprocation of harm":

لا تَضارُّوا في الحفر، وذلك أن يحفرَ الرَّجلُ إلى جنبِ الرَّجل ليذهبَ بمائِه

"Digging a well next to a neighbor's well, causing its water to dry up, requires the new well to be filled, according to the apparent view of Mālik and Aḥmad. Abū Dāwūd in 'al-Marāsīl' narrated from Abū Qilābah, who said: The Messenger of Allah ﷺ said: 'Do not harm each other in digging, and harming here means that a person digs next to another to drain their water.'

Among these is causing harm to a neighbor's property by creating disturbances such as shaking or pounding within one's own property. This is prohibited according to the apparent position of Mālik and Aḥmad, and it is one of the opinions within the Shāfiʿī school as well.

Similarly, if it causes harm to the residents, such as emitting a foul odor or similar nuisances.

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[403] Jāmiʿ al-ʿUlūm wa-l-Ḥikam, Ibn Rajab, 2:212.

[404] "(It is permissible to take lawful medication to halt menstruation if no harm is feared, as explicitly stated). (...) (It is also permissible) for a woman (to take lawful medication to induce menstruation, except near Ramadan in order to break the fast) (...)." Kashshāf al-Qināʿ, al-Buhūtī, 1:510.

Among these is if someone owns property on another's land, and the landowner is harmed by the owner accessing their property. The owner can be compelled to remove it to prevent the harm of entry. Abū Dāwūd recorded in his "Sunan" a ḥadīth from Abū Jaʿfar Muḥammad ibn ʿAlī, who narrated from Samurah ibn Jundub, that he had palm trees in the garden of a man from the Anṣār who lived there with his family. Samurah used to enter to tend to his palm trees, causing distress and hardship for the Anṣārī. The Anṣārī requested Samurah to exchange the property with him, but he refused. The issue was brought to the Prophet ﷺ, who asked Samurah to sell the trees or trade them for others, but he refused. The Prophet ﷺ encouraged him to gift them for a certain reward, but he still refused. The Prophet ﷺ then said, "You are causing harm," and instructed the Anṣārī to uproot Samurah's trees. This has been narrated by Abū Jaʿfar as a mursal (disconnected) report. Aḥmad, in the narration by Ḥanbal, commented after this ḥadīth was mentioned to him: In all similar cases where harm is caused, he should be prevented from it. If he complies, fine; otherwise, the ruler should compel him, ensuring no harm to his brother, providing relief for him."[405]

As previously mentioned, the entire Sharīʿah is either for procuring benefits or averting harms. The prohibition of ribā (usury), gharar (contractual uncertainty), and iḥtikār (hoarding) falls under this category. Likewise, regarding ghabn (unfair pricing), the correct view is that market sellers should not sell to a haggler who negotiates prices at one rate, while selling to a non-negotiator or someone ignorant of the prevailing price at a higher rate, due to the harm caused to buyers.[406]

الشركاء في الأملاك والحقوق والمنافع يلزم الممتنع بما يعود على المشترك من الأمور الضرورية والمصارف والتعميرات وغيرها، ويشتركون في زيادتها ونقصانها بحسب أملاكهم، ومع الجهل بمقدار ما لكل منهم يتساوون.

In al-Qawāʿid al-Siʿdīyah, there is a maxim based on averting harm, which is the thirtieth maxim: "Partners in properties, rights, and benefits are obligated to bear the necessary expenses, maintenance, and other related costs that affect the shared entity. They share in its increase and decrease according to their ownership stakes, and in the absence of clear knowledge about each person's share, they are considered equal."

In Ibn Rajab's Qawāʿid, the seventy-sixth principle:

"الشريكان في عين مال أو منفعة، إذا كانا محتاجين إلى دفع مضرة أو إبقاء منفعة؛ أجبر أحدهما على موافقة الآخر على الصحيح من المذهب. وفيه رواية أخرى: إن أمكن أحدهما أن يستقل بدفع الضرر؛ فعله، ولم يجبر الآخر معه، لكن إن أراد الآخر الانتفاع بما فعله شريكه؛ فله منعه حتى يعطيه حصة ملكه من النفقة. وإن احتاجا إلى تجديد منفعة؛ فلا إجبار."

"Co-owners of a specific property or benefit, if they need to avert harm or maintain a benefit, one is compelled to agree with the other according to the correct view of the madhhab. Another narration

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[405] Jāmiʿ al-ʿUlūm wa-l-Ḥikam, Ibn Rajab, 2:218.

[406] "The establishment of the option to annul a sale due to unfair pricing for the mustarsil, the one who does not bargain, is the view of Mālik, Aḥmad, and others. It is not for market traders to sell to the bargainer at one price and then sell to the mustarsil, or to one ignorant of the price, at a higher price. This is something for which the sellers should be admonished." Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 28:75.

states: if one can independently avert the harm, they should do so without compelling the other. However, if the other wishes to benefit from what their partner has done, they can be prevented until they pay their share of the expenses. If they need to create a new benefit, there is no compulsion.

This encompasses various scenarios, such as: if a shared wall collapses, the madhhab states that the party refusing to rebuild is compelled to do so with the other. This is explicitly stated in several narrations. Compulsion here is akin to exchange; exchange in jointly owned properties is obligatory to prevent harm, whether through preemption rights or selling indivisible items."[407]

Among the most important maxims derived from this overarching principle are:

الضرر يدفع بقدر الإمكان

1. Harm Is to Be Repelled as Much as Possible

الضرر يُزال

2. Harm Must Be Removed

الضرر لا يزال بمثله

3. Harm Is Not Removed by an Equal Harm

الضرر الأشد يُزال بالضرر الأخف

4. Greater Harm Is Removed by Lesser Harm

يُختار أهون الشَّرين

5. The Lesser of Two Evils Is Chosen

إذا تعارضت مفسدتان رُوعي أعظمها ضررًا بارتكاب أخفها

6. When Two Harms Conflict, the Greater Harm Is Mitigated by Committing the Lesser

يُتحمل الضرر الخاص لدفع الضرر العام

7. Private Harm Is Endured to Avert Public Harm

درء المفاسد أولى من جلب المنافع

8. Repelling Harm Takes Precedence Over Bringing Benefits

إذا تعارض المانع والمقتضي يُقدَّم المانع إلا إذا كان المقتضي أعظم

9. When a Cause for Action and a Cause for Abstention Conflict, the Cause for Abstention Takes Precedence Unless the Cause for Action Is of Greater Significance

[407] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:5.

مَن أتلف شيئًا لينتفع به ضمنه، ومن أتلفه دفعًا لمضرته فلا ضمان عليه

10. Whoever Destroys Something for Personal Benefit Is Liable, but Whoever Destroys It to Avert Its Harm Is Not Liable

Note: You may observe that these maxims share common elements in varying degrees. This is expected in maxims derived from a single overarching principle. However, an effort is made here to distinguish the unique features of each maxim.

الضرر يدفع بقدر الإمكان

## Harm Is to Be Repelled as Much as Possible

From the statements of jurists, it is observed that "as much as possible" here refers both to the harm itself and the means of repelling it. All harm must be completely repelled if possible; otherwise, it should be minimized to the extent possible. It is also necessary to repel harm before it occurs, as prevention is easier and better than removal. Furthermore, harm must be repelled by any lawful means possible.

Examples of Repelling Harm as Much as Possible:

- *Jihād*, retribution (*qiṣāṣ*), and prescribed punishments (*ḥudūd*) were legislated as deterrents.
- A physical aggressor (*ṣāʾil*) is repelled with whatever means are sufficient, starting from the least severe and escalating as necessary.[408]
- The right of preemption (*shufʿah*) was legislated to prevent harm before it occurs, protecting the rights of partners.
- Zakāh is an obligation that must be fulfilled immediately, but its payment may be delayed if there is a risk of harm.[409]
- Ṣadaqah (voluntary charity) is a testament to one's faith, yet giving it is sinful if it results in neglecting the sustenance of one's dependents, harming oneself, one's creditor, or guarantor.[410]

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[408] "If the aggressor can be repelled by words, it is not permissible to strike him. If he cannot be repelled by words, he may be struck with the least force likely to repel him. (...) If the aggressor cannot be repelled except by killing, then killing him is permitted, and there is no liability upon the defender, as the killing was done to avert his harm." Al-Rawḍ al-Nadī Sharḥ Kāfī al-Mubtadī, Aḥmad ibn ʿAbd Allāh al-Baʿlī, 477.

[409] "(Discharging zakāh) (...) is immediately required (...) if possible (...) and if discharging it immediately would not result in harm (to oneself, one's wealth, or similar necessities). (...) This is based on the ḥadīth: 'There should be no harm or reciprocation of harm,' and because deferring a debt owed to a human for such reasons is permissible, so deferring zakāh is even more so." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:444.

[410] "If someone gives in charity from what diminishes the provisions they are obligated to provide," such as for a wife or a dependent relative, "they are sinful," based on the ḥadīth: "It is sufficient for a person to be sinful that they neglect those they are responsible to provide for." However, if their dependents consent to the act of selflessness, then it is considered superior (…) Or if they harm themselves, their creditor, or their guarantor" due to their charity, then they are sinful." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:466.

- "It is disliked for someone who cannot endure hardship or is unaccustomed to it to reduce their provisions below what is sufficient for their needs."[411]
- It is also disliked for a pregnant or nursing woman to fast if they fear harm to themselves or their child. In such cases, they must make up the missed fasts (qaḍāʾ).[412]
- A person in dire need (muḍṭar) is permitted to consume someone else's property to preserve their life, but they must compensate for it, as harm is repelled as much as possible.[413]
- It is impermissible for the ruler to appoint a corrupt individual to manage the wealth of an orphan. As for a supervisor appointed by the founder of a waqf, "if the endower (wāqif) appointed a corrupt person, or if a previously upright manager became corrupt, a trustworthy overseer is added alongside them to safeguard the endowment, without removing him from office, because both rights can be accommodated." [414] This approach balances repelling harm from the orphan as much as possible while upholding the rights of the endower.

الضرر يُزال

## Harm Must Be Removed

If harm cannot be prevented and it occurs, efforts must be directed toward removing it.

Applications of this maxim include compensating for destroyed property and ensuring options (*khiyārāt*) in sales contracts to address harm.

Obligations to remove harmful structures, such as gutters or canopies,[415] that inconvenience or harm pedestrians also fall under this principle.[416]

If a person begins a prayer and their Imām prolongs it to the extent that it causes harm, they are permitted to separate from the congregation, and their prayer is not invalidated as a result.[417]

If someone borrows coins (*fulūs*) and the ruler later prohibits their circulation, the borrower is obligated to repay their equivalent value to prevent harm to the lender. However, if the coins were actively circulating but later became devalued (*kasadat*), the borrower is only required to repay an equivalent in

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[411] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 3:354.

[412]Muntahā al-Irādāt with the marginalia of Ibn Qāʾid, Ibn al-Najjār, 2:15.

[413] "Unlike the case of a person in dire necessity (muḍṭar), who consumes what they must, by choice, and is held liable for it."Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 4:71.

[414] *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 7:218.

[415] Al-Sābāṭ refers to a canopy or structure spanning between two walls, with a passageway running underneath. The plural form is sawābiṭ.

[416] "(The Shaykh said: 'A sābāṭ (canopy) that harms passersby (...) may not be constructed over a public pathway, according to the consensus of Muslims. Rather, its owner is obligated to remove it. If the owner does not comply, those in authority must compel its removal until the harm is eliminated (...)')." Kashshāf al-Qināʿ, al-Buhūtī, 8:306.

[417] *"If the follower (muʾtamm) separates,"* meaning they intend to separate from the congregation, *"without a valid excuse,"* such as illness, overwhelming sleepiness, or the Imām excessively prolonging the prayer, *"their prayer is invalidated,"* because they abandoned following the imām. However, if the separation is due to a valid excuse, their prayer remains valid. For example, if they separate during the second unit of Friday prayer (*jumuʿah*) due to an excuse, they may complete it as *jumuʿah*. *Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 1:237.

kind.[418] According to the two students of Abū Ḥanīfah, however, the borrower must repay the equivalent value.

الضرر لا يزال بمثله

## Harm Is Not Removed by an Equal Harm

If it is established that harm must be removed, is it to be removed without restriction or condition? No, this maxim serves as a limitation to the previous one, as it is not permissible to remove harm by causing harm of an equal magnitude, nor a fortiori by causing greater harm.

Applications of This Maxim:

- It is impermissible for a person to prevent flooding of their land by flooding someone else's. Similarly, one cannot protect their property by destroying another's.
- A person in dire necessity (*muḍṭar*) cannot consume the food of another person in the same condition.[419]
- Someone compelled to kill cannot save their life by sacrificing their brother's.[420]

ليس للمظلوم أن يظلم غيره

Sub-Maxim: "The Oppressed Cannot Oppress Others"

This principle has been explicitly affirmed by the Ḥanafī madhhab and is upheld by jurists generally.

An example from our madhhab is the case where a misappropriator (*ghāṣib*) plants crops on someone else's land. "If a *ghāṣib* plants crops on someone else's land, the rightful owner, after the harvest, is entitled only to rent. Before the harvest, however, the owner—or if they hold the right to benefit from the land—has the choice to either leave the crops with the *ghāṣib* in exchange for rent or take ownership of the crops by reimbursing their expenses."[421] Notice how the rights of the misappropriator (ghāṣib) are safeguarded.

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[418] "It is obligatory to accept repayment of a fungible loan by returning the very property lent, provided it (...) does not consist of coins or broken currency prohibited by the ruler. In such cases, the lender is entitled to its value at the time of the loan. (...) It is obligatory to repay the equivalent of borrowed coins or broken currency if their value has increased or decreased, or if the currency has ceased to circulate." Ghāyat al-Muntahā, Marʿī al-Karmī, 1:592.

[419] "If someone finds no means to satisfy their hunger except by consuming another person's food, and the owner of the food is themselves in a state of dire necessity or fears they will fall into necessity if they give it up, then the owner—who is in a state of necessity or, according to the soundest opinion, fearing necessity—is more entitled to it than the other person. This is because they are equal in their necessity, but the owner is distinguished by their ownership of the food." *(Muʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 11:25)

[420] "If someone is coerced into killing an inviolable person, it is not permissible for them to carry out the killing. If they do kill, there is a difference of opinion regarding retribution (qiṣāṣ). Most scholars, including Mālik, Aḥmad, and al-Shāfiʿī in one of his two opinions, hold that retribution is obligatory on both the coercer and the coerced, as they both share responsibility for the killing." (*Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 8:503)

[421] *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:761.

وَكَتَبْنَا عَلَيْهِمْ فِيهَا أَنَّ النَّفْسَ بِالنَّفْسِ وَالْعَيْنَ بِالْعَيْنِ وَالْأَنفَ بِالْأَنفِ وَالْأُذُنَ بِالْأُذُنِ وَالسِّنَّ بِالسِّنِّ وَالْجُرُوحَ قِصَاصٌ

Since justice is the objective in retribution (*qiṣāṣ*), this principle is observed even in the case of the offender, so that no excess is committed in carrying out the punishment. For instance, if someone severs a hand at the wrist, it is not permissible to cut their hand from the elbow, and so on. Complete justice must be upheld, as Allah says: *"And We ordained for them in it: a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and wounds equal for equal."* (Sūrat al-Māʾidah: 45)

وَإِنْ عَاقَبْتُمْ فَعَاقِبُوا بِمِثْلِ مَا عُوقِبْتُم بِهِ ۖ وَلَئِن صَبَرْتُمْ لَهُوَ خَيْرٌ لِّلصَّابِرِينَ

*And: "And if you punish, then punish with an equivalent of that with which you were harmed. But if you are patient, it is better for those who are patient."* (Sūrat al-Naḥl: 126)

وَجَزَاءُ سَيِّئَةٍ سَيِّئَةٌ مِّثْلُهَا ۖ فَمَنْ عَفَا وَأَصْلَحَ فَأَجْرُهُ عَلَى اللَّهِ ۚ إِنَّهُ لَا يُحِبُّ الظَّالِمِينَ

*And: "The retribution for an evil act is an equivalent evil one. But whoever pardons and makes reconciliation, their reward is with Allah. Indeed, He does not like wrongdoers."* (Sūrat al-Shūrā: 40)

For this reason, the jurists stipulated that ensuring the absence of injustice (*ḥayf*) is a condition for carrying out retribution (*qiṣāṣ*), along with other conditions, such as equivalence in the name and location of the body part, as well as equality in its health and integrity.[422]

بلغني أن الرجل، ليظلم بمظلمة، فلا يزال المظلوم يشتم الظالم وينتقصه، حتى يستوفي حقه، ويكون للظالم الفضل عليه.

This maxim is one of the most profound principles, with applications vast enough to fill volumes. ʿUmar ibn ʿAbd al-ʿAzīz said: "It has reached me that when a man is wronged, he continues to curse and degrade the oppressor until he has taken back his right, and the oppressor then ends up having a right over him."[423]

Exceptions to the Maxim:

ليس لعرقٍ ظالمٍ حقٌّ

Exceptions to this maxim are made only when there is a specific justification. For instance, if someone unlawfully seizes land (*ghāṣib*) and plants trees (not crops)[424] on it or builds structures, the rightful owner has the right to demand the removal of the trees or structures, regardless of their value, even if

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[422] "If the hand was severed from the shoulder, and experts stated that retribution (*qiṣāṣ*) can be carried out without causing a wound penetrating a body cavity (*jāʾifah*), then retribution may be taken because the shoulder is a joint. He may not take retribution at a point below it. However, if they said they fear a wound penetrating a body cavity, then retribution is not permissible because of the risk of escalation (...) A healthy limb is not to be taken in retribution for a paralyzed one, as it exceeds what is rightfully due." (*Al-Kāfī*, Ibn Qudāmah, 3:266)

[423] Mukhtaṣar fī Muʿāmalat al-Ẓālim al-Sāriq, Ibn Rajab al-Ḥanbalī, 2:642.

[424] This is distinct from crops, which are usually treated differently due to their temporary nature.

this results in greater harm to the misappropriator.[425] This ruling is based on the saying of the Prophet ﷺ: *"There is no right for unjust roots."*

الضرر الأشد يُزال بالضرر الأخف

## Greater Harm Is Removed by Lesser Harm

Some jurists consider this maxim and the two related maxims, *'The lesser of two evils is chosen'* and *'When two harms conflict, the greater harm is mitigated by committing the lesser,'* to share the same meaning. However, this maxim may be specifically applied to a harm that has already occurred and cannot be removed except by introducing another harm. As previously established, harm is not to be removed by an equal or greater harm. But can it be removed by a lesser harm? This maxim answers in the affirmative.

وَالْفِتْنَةُ أَشَدُّ مِنَ الْقَتْلِ

All these maxims take into account that harm is not uniform in degree; rather, it varies in its nature and its effects. Allah Almighty says: *'And fitnah is worse than killing.'* (Al-Baqarah: 2: 191)

Applications of this maxim include the obligation to remove water spouts and sābāṭs (canopies between walls) that cause harm to pedestrians, as previously mentioned.

In divorce, there is inherent harm, yet it is carried out when necessary to remove the greater harm of a failed marriage. Similarly, the annulment of a marriage is permitted due to the husband's financial incapacity, to alleviate the wife's harm.[426]

Another application is fighting a rebellious group (*ṭāʾifah bāghiyah*) to eliminate their harm.

Likewise, turning off a phone during prayer to prevent disruption to the congregation is permissible, as minor actions during prayer do not invalidate it, and such actions serve its benefit.

Closely related to this maxim and the two maxims *'The lesser of two evils is chosen'* and *'When two harms conflict, the greater harm is mitigated ...'* is another maxim that will be discussed shortly: *'Private harm is endured to avert public harm.'*"

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[425] "If someone builds on or plants trees in usurped land, they are obligated to remove it if the owner demands it." (*Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 2:412)

[426] "If the husband is unable to provide for her maintenance (nafaqah)—whether entirely or partially, such as being unable to provide even the minimum level of maintenance—then she has the right to annul the marriage." (*Kashshāf al-Qināʿ*, al-Buhūtī, 13:144)

يُختار أهون الشَّرين وإذا تعارضت مفسدتان رُوعي أعظمها ضررًا بارتكاب أخفها

**The Lesser of Two Evils Is Chosen**

**When Two Harms Conflict, the Greater Harm Is Mitigated by Committing the Lesser**

Al-Siʿdī expressed this maxim as follows:

إذا تزاحمت المصالح قُدّم الأعلى منها، فيقدم الواجب على المستحب، والراجح مصلحة على المرجوح؛ وإذا تزاحمت المفاسد، واضطر إلى فعل أحدها، قُدِّم الأخف منها.

"The thirty-third maxim: If interests (maṣāliḥ) conflict, the higher one is prioritized, so an obligatory act is preferred over a recommended one, and a more significant benefit is prioritized over a lesser one. If harms (mafāsid) conflict, and one must be committed, the lesser of the two is chosen."

١٢ - فإن تزاحم عدد المصالح يقدم الأعلى من المصالح

١٣ - وضده تزاحم المفاسد يرتكب الأدنى من المفاسد

He also articulated it in verse:

12. *If interests conflict, the higher interest takes precedence.*
13. *And the opposite applies when harms conflict—choose the lesser of two evils.*

"إذا اجتمع للمضطر محرمان، كل واحد منهما لا يباح بدون الضرورة، وجب تقديم أخفهما مفسدة وأقلها ضررا، لأن الزيادة لا ضرورة إليها، فلا تباح"

Ibn Rajab said:

*"The one hundred and twelfth maxim: If a person in dire necessity faces two prohibited matters, neither of which is permissible without necessity, they must prioritize the one with the lesser harm, as the additional harm is unnecessary and thus impermissible."*[427]

درء المفاسد أولى من جلب المصالح، ودفع أعلاها (أي أعلى المفاسد) بأدناها

Ibn al-Najjār stated:

"Another legal proof is the jurists' statement: 'Repelling harms takes precedence over bringing benefits, and the most severe harm is repelled by the least severe.'"[428]

الواجب تحصيل المصالح وتكميلها؛ وتعطيل المفاسد وتقليلها فإذا تعارضت كان تحصيل أعظم المصلحتين بتفويت أدناهما ودفع أعظم المفسدتين مع احتمال أدناها هو المشروع.

This maxim acknowledges that life is a realm of trials, where benefits often conflict, making it impossible to achieve some without sacrificing others. Similarly, harms may not always be completely avoidable without tolerating some. This principle offers a framework for resolving such conflicts: when two goods conflict and it is impossible to attain both, the greater good is pursued; when two harms

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[427] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:343.

[428] Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:447.

conflict, the lesser harm is endured. As Imām Taqī al-Dīn Ibn Taymiyyah explained: "The obligation is to secure benefits and perfect them while averting harms and minimizing them. If they conflict, the greater benefit is attained by sacrificing the lesser, and the greater harm is averted by tolerating the lesser. This is the prescribed approach."[429]

This is often referred to as the fiqh of balances and priorities (*fiqh al-muwāzanāt wa al-awlawiyyāt*)

Imām Taqī al-Dīn Ibn Taymiyyah dedicated a chapter titled: *"A Comprehensive Chapter on the Conflict of Good Deeds, Bad Deeds, or Both Together,"*[430] in which he explained the proper course of action when two virtuous acts or two harmful acts conflict, or when a virtuous act and a harmful act coincide, making it impossible to separate them. The conflict between two virtuous or harmful acts is addressed under this maxim, while the case of a virtuous act coinciding with a harmful act, where separating them is not possible, is discussed under the maxim: *"Averting harm takes precedence over acquiring benefits when they are equal."*

يَسْأَلُونَكَ عَنِ الشَّهْرِ الْحَرَامِ قِتَالٍ فِيهِ قُلْ قِتَالٌ فِيهِ كَبِيرٌ وَصَدٌّ عَنْ سَبِيلِ اللَّهِ وَكُفْرٌ بِهِ وَالْمَسْجِدِ الْحَرَامِ وَإِخْرَاجُ أَهْلِهِ مِنْهُ أَكْبَرُ عِنْدَ اللَّهِ وَالْفِتْنَةُ أَكْبَرُ مِنَ الْقَتْلِ

The legal evidence for this maxim is abundant in the Qurʾān and Sunnah. Allah says: ″They ask you about fighting in the sacred month. Say, 'Fighting therein is grave, but averting people from the way of Allah and disbelief in Him, and [preventing access to] al-Masjid al-Ḥarām and expelling its people from it are greater in the sight of Allah. And fitnah is worse than killing.'" (Al-Baqarah: 217)

الإيمانُ بضْعٌ وسَبْعُونَ، أوْ بضْعٌ وسِتُّونَ، شُعْبَةً، فأفْضَلُها قَوْلُ لا إلَهَ إلَّا اللَّهُ، وأَدْناها إماطَةُ الأذَى عَنِ الطَّرِيقِ

The Prophet ﷺ explained the gradation of virtues, saying:
"Faith has over seventy branches or sixty-odd branches, the most excellent of which is the declaration 'There is no god but Allah,' and the least of which is removing a harmful object from the road." (Agreed upon)

يا عائِشَةُ، لَوْلا أنَّ قَوْمَكِ حَديثُو عَهْدٍ بشِرْكٍ، لَهَدَمْتُ الكَعْبَةَ، فألْزَقْتُها بالأرْضِ، وجَعَلْتُ لها بابَيْنِ: بابًا شَرْقِيًّا، وبابًا غَرْبِيًّا، وزِدْتُ فيها سِتَّةَ أذْرُعٍ مِنَ الحِجْرِ، فإنَّ قُرَيْشًا اقْتَصَرَتْها حَيْثُ بَنَتِ الكَعْبَةَ.

In another narration in the *Ṣaḥīḥayn*, the Prophet ﷺ said:
"O ʿĀʾishah, had your people not been so recently in a state of polytheism, I would have demolished the Kaʿbah, made it level with the ground, and given it two doors—one on the east and one on the west—and expanded it by six cubits from the Ḥijr, for the Quraysh had shortened it when they built it." He refrained from pursuing the more ideal course of action to avoid causing discord among Quraysh.

Similarly, in the case of the Bedouin urinating in the mosque, the lesser of the two harms was to avoid interrupting him.

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[429] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 28:284.

[430] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 20:48.

Imām Taqī al-Dīn Ibn Taymiyyah explained the principles of prioritization as follows:

"The first type relates to prioritizing between obligatory and recommended acts, such as preferring the repayment of a demanded debt over giving voluntary charity.

The second includes prioritizing individual obligations (farḍ ʿayn) over communal ones (farḍ kifāyah), such as providing for one's family before contributing to jihād that is not specifically mandated for that individual. Likewise, jihad takes precedence over *ḥajj* when both are obligatory or recommended, as evidenced in the Qurʾān and Sunnah. And prioritizing the recitation of the Qurʾān over dhikr when both equally engage the heart and tongue, and prayer over them when it involves similar engagement of the heart. Otherwise, dhikr that is accompanied by understanding and reverence may take precedence over recitation that does not extend beyond the tongue. This is a vast domain.

The third is like prioritizing a woman's migration without a maḥram (permanently unmarriageable male relative) over remaining in a land of war."[431]

This maxim has countless applications, including the legislation of jihad to repel the harm of disbelievers' domination over Muslims and the allowance of some uncertainty (gharar) or even ribā al-faḍl (prohibited quantitative excess in exchanging specified commodities) in sales transactions when needed.[432]

Among its applications is refraining from condemning wrongdoing if it causes greater harm.

Among the applications of this principle is the endurance of the oppression and injustice of rulers, as rebellion against them often leads to greater harm and corruption than their tyranny.[433]

According to the principle, if their oppression causes greater harm than rebellion, rebellion may be permitted because harm is to be removed. However, the matter is detailed in texts that cannot be fully addressed here. It should be noted that the "rebellion" referred to here is an armed uprising by a group against the Muslim ruler to depose him and seize power. This does not refer to dismissal by qualified authorities (*ahl al-ḥall wa al-ʿaqd*), nor does it negate the permissibility of censuring him for wrongdoing.

Among the applications is accepting positions of authority where some degree of injustice exists, to prevent greater injustice. For example, Imām Taqī al-Dīn permitted serving as a judge under the rule of

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[431] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 20:51.

[432] "People are in need of these transactions, and the Law-Giver does not prohibit sales that people need merely because they involve some gharar (...) It also permits the sale of ʿarāyā by estimation, substituting estimation for exact measurement when needed, even though this enters the category of ribā, which is graver than a sale involving gharar. This is a principle of the Sharīʿah: attaining the greater of two benefits by foregoing the lesser and warding off the greater of two harms by enduring the lesser." Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 29:227.

[433] "It is a matter of the prescribed knowledge and justice to endure the oppression and injustice of rulers, as established among the principles of Ahl al-Sunnah wa-al-Jamāʿah. (...) As for their oppression and injustice, whether based on a valid interpretation or otherwise, it may not be removed through further oppression and injustice, as people frequently remove one evil by means of something worse. (...) Rebellion against rulers results in greater injustice and corruption than their tyranny, so patience is enjoined." Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 28:179.

the Tatars.[434] Similarly, ʿUmar ibn ʿAbd al-ʿAzīz accepted the governorship of Medina under al-Walīd ibn ʿAbd al-Malik, despite encountering situations he disliked.

If the disbelievers gain dominance over the Muslims and the Muslims are unable to repel them, it becomes permissible to pay them money.[435]

Among its applications is the permissibility of masturbation by hand if one is unable to marry and fears zinā.[436]

It is permissible, according to a weaker opinion within the madhhab, to open the abdomen of a deceased woman to extract the fetus if there is hope for its survival.[437] The less favored opinion may become the preferred one, as fatwās may change.

Whoever misappropriates a thread to bind the wound of an inviolable being must return it if doing so does not cause harm; otherwise, they are liable for its value.[438]

When punishment can be confined to the offender, it must be so confined. If the aggression of an offender or enemy combatant cannot be repelled except through a lawful action directed against him, and unintended harm consequently affects someone else, the action is permitted only to the extent required by necessity, while avoiding harm to others as far as possible.[439]

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[434] "Frequently, a man assumes a position as a judge or even an Imām among Muslims and the Tatars, harboring intentions of implementing justice. Yet, he finds himself unable to do so, as there are forces that prevent him. Allah does not burden a soul beyond its capacity." *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 19:218.

[435] "A truce is valid only where delaying jihad is permissible due to a benefit. (...) This includes paying them money when necessity requires it, such as fearing destruction or captivity for the Muslims (...) Although this entails some humiliation, it is less severe than the humiliation of death, captivity, or the enslavement of children that may lead to their disbelief." Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 2:586.

[436] "His statement: "Whoever engages in masturbation with his hand without need deserves discretionary punishment (*taʿzīr*)." This is the established position (*madhhab*) and is upheld by our fellows, as it constitutes a prohibited act. (…) Another narration holds that it is disliked (*makrūh*). (…) His statement: "If one does so out of fear of zinā, then there is no sin upon him." This is the established position (*madhhab*) and is supported by the majority of our fellows, as it becomes permissible in such circumstances." (*al-Inṣāf*, al-Mardāwī, 26:465)

[437] "If a pregnant woman dies while carrying a fetus expected to be viable (...) it is prohibited to open her abdomen to extract the fetus because this violates a definite sanctity to preserve a presumed life. (...) According to one view, however, her abdomen may be opened if it is predominantly believed that the fetus will survive, because the two rights conflict and the right of the living is given precedence." Munyat al-Sājid bi-Sharḥ Bidāyat al-ʿĀbid wa-Kifāyat al-Zāhid, al-Yatāmā and al-ʿĪdān, 285.

[438] "If someone misappropriates material used to sew the wound of an inviolable being, and removing it would harm a human being or destroy another being, they are liable for its value." Ghāyat al-Muntahā, Marʿī al-Karmī, 1:763.

[439] "There is no doubt that when it is possible to confine punishment to the perpetrator alone, this is obligatory. However, if the corruption resulting from refraining from punishing the perpetrator is greater than the corruption caused by punishing someone not guilty, then the greater corruption is warded off by tolerating the lesser one. This is akin to the Prophet ﷺ bombarding the people of Tāʾif with a catapult, even though the catapult could harm women and children." *Minhāj al-Sunnah al-Nabawiyyah,* Ibn Taymiyyah, 6:43.

If it is customary among people to honor someone arriving by standing for them, and if refraining from doing so would lead them to believe their right has been denied—while they are unaware of the custom aligning with the Sunnah—then it is more appropriate to stand for them.[440]

Among these is performing the Friday and Eid prayers behind immoral individuals, people of misguided inclinations, or innovators if there is no alternative to praying behind them.[441]

Know that prioritizing matters requires knowledge and fairness. Obligatory acts take precedence over recommended ones, and individually binding duties come before collective ones. This concerns the demand to perform them. The superior is prioritized over the less significant, and matters specific to a particular time or place are given precedence in their context. Public benefit is prioritized over private benefit, immediate obligations take precedence over those that can be delayed, and necessities (ḍarūriyyāt) are prioritized over needs (ḥājiyyāt), which in turn come before enhancements, and so on.

يُتحمل الضرر الخاص لدفع الضرر العام

## Private Harm Is Endured to Avert Public Harm

This maxim is more specific than the previous ones, though it branches from them. Public harm is more severe than private harm, and bearing private harm to avert public harm is a choice of the lesser of two evils. For this reason, legal punishments and disciplinary measures were legislated. Societal order cannot be maintained without them, and no civilization can thrive if criminals, mobs, and influential individuals, such as the powerful and wealthy, are left unchecked and unaccountable.

Applications of the Maxim:

- If a community relies on a certain profession—such as farming, weaving, or construction—the practitioners of that trade are obligated to fulfill this need. The ruler may compel them to perform such work for fair compensation if they refuse, ensuring justice by preventing exploitation or unfair wages.[442]
- Forcing hoarders to sell their stock at fair market value when people are in urgent need of it.[443]

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[440] "It was not the practice of the predecessors during the time of the Prophet ﷺ and his rightly guided caliphs to stand for him routinely whenever they saw him. (...) However, if it is customary among people to honor someone arriving by standing, and refraining from doing so would be understood as denying his right or intending to demean him (...) then it is more appropriate to stand for him, as this better preserves harmony and removes resentment and discord. (...) If refraining from customary respect causes a greater harm, the lesser harm is tolerated to avert the greater." Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 1:374.

[441] "Imāmah by a fāsiq is not valid under any circumstances, except in Jumuʿah and ʿEid prayers if performing them behind someone else is not possible." Muntahā al-Irādāt with the marginalia of Ibn Qāʾid, Ibn al-Najjār, 1:299.

[442] "Actions that are communal obligations become individual obligations when no one else fulfills them, particularly when others are incapable of doing so. Thus, if people need a group's farming, weaving, or construction, that work becomes obligatory. The ruler may compel them to perform it for fair compensation if they refuse. They may not demand more than fair compensation, nor may others oppress them by paying less than their due." Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 28:82.

[443] "(The hoarder is compelled to sell as others sell) to prevent harm. (If he refuses to sell what he has hoarded) of food (and there is a fear of harm) from withholding it from the people, (the ruler distributes it) among those in need (and

- Targeting disbelievers who use Muslim captives, children, or women as human shields.
- Banning corrupt muftīs, ignorant physicians, or bankrupt transporters to safeguard people's religion, lives, and wealth.

In certain cases, though not the relied-upon opinion in the madhhab, imposing price controls when essential goods are being sold at exorbitant and unjust rates.[444]

مَن أتلف شيئًا لينتفع به ضمنه، ومن أتلفه دفعًا لمضرته فلا ضمان عليه

**Whoever Destroys Something for Personal Benefit Is Liable, but Whoever Destroys It to Avert Its Harm Is Not Liable**

This is how al-Siʿdī expressed it in the thirty-sixth principle.

He articulated it in poetry:

"ومتلف مؤذيه ليس يضمن بعد الدفاع بالتي هي أحسن."

“Whoever destroys what harms him is not liable,
after attempting to repel it by the better means.”

Its evidence includes the permissibility of killing an assailant without liability, as in the ḥadīth narrated by Abū Hurayrah:

جاءَ رجلٌ، فقال: يا رسول الله، أرأيتَ إن جاء رجلٌ يُريدُ أخذَ مالي؟ قال: لا تُعْطِهِ. قال: أرأيتَ إن قاتَلَني؟ قال: قاتِلْهُ، قال: أرأيتَ إن قتَلَني؟ قال: فأنتَ شهيدٌ. قال: أرأيتَ إنْ قَتَلْتُهُ؟ قال: في النارِ

"A man came and said, ‘O Messenger of Allah, what if a man comes to take my wealth?’ The Prophet ﷺ replied, ‘Do not give it to him.’ The man asked, ‘What if he fights me?’ The Prophet ﷺ said, ‘Then fight him.’ He further asked, ‘What if he kills me?’ The Prophet ﷺ said, ‘Then you are a martyr.’ The man asked again, ‘What if I kill him?’ The Prophet ﷺ replied, ‘Then he is in the Fire.’" (Narrated by Aḥmad and Muslim).

Ibn Rajab’s expression of the principle in his twenty-sixth principle:

"مَن أتلف شيئًا لدفع أذاه له لم يضمنه، وإن أتلفه لدفع أذاه به ضمنه"

"Whoever destroys something to repel its harm from himself bears no liability. However, if he destroys something to repel harm through it, he is liable."

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they return its equivalent) when the need subsides. (Similarly, weapons) are handled if needed by the people." *Kashshāf al-Qināʿ*, al-Buhūtī, 7:387.

444 "Price fixing is prohibited when the ruler sets a price for people and compels them to transact at it. (...) The Shaykh, however, deemed it obligatory to compel merchants to transact at the fair market price. This is a sound view where the price is well known and does not vary among people, as with standard-weight items." Ghāyat al-Muntahā, Marʿī al-Karmī, 1:517. The Shaykh is Imām Taqī al-Dīn, and his position accords with that of the Ḥanafīs and some Mālikīs when prices become excessive.

He then elaborated:

“Derived from this principle are the following rulings:

If a human or animal attacked someone, and he repelled it by killing it, he bears no liability. However, if someone killed another person’s animal during a time of famine to save his own life, he is liable for compensation.

Similarly, if a pilgrim killed game that attacked him while in the state of iḥrām, he bears no liability, according to the stronger of the two opinions. However, if he killed the game out of necessity during a famine to save his life, he is liable for compensation.

Among these: If a pilgrim (in a state of iḥrām) shaves his head due to harm caused by lice or filth, he must offer expiation because the harm was not caused by the hair itself. However, if a hair grew in his eye and he plucked it, or if hair fell over his eyes and he removed it, no expiation is required.

Among these: If a ship was about to sink and someone threw another person’s belongings overboard to lighten it, he would be liable. However, if someone else’s belongings fell on him and he feared they would harm or kill him, so he pushed them into the water, he would not be liable…

Among these: If someone removed thorns in the sanctuary (ḥaram), he would not be liable, due to its harm. However, if he needed to burn a branch of a tree, he would be liable, as mentioned by Abū al-Khaṭṭāb and others. The author of *al-Mughnī* disagreed, prohibiting the cutting of thorns based on the text.”[445] The prohibition of cutting thorns became the predominant position (al-madhhab).

"من أتلف نفسا أو أفسد عبادة لنفع يعود إلى نفسه؛ فلا ضمان عليه، وإن كان النفع يعود إلى غيره؛ فعليه الضمان."

In the twenty-seventh maxim, he states: “If someone destroys a life or invalidates an act of worship for a benefit that returns to himself, he is not liable. However, if the benefit is for someone else, then he is liable.

For example, if a pregnant or nursing woman breaks her fast out of fear for herself, no fidyah (compensatory feeding) is required of her. However, if she breaks her fast out of fear for her child, she must provide the fidyah according to the well-known opinion among our fellows.

Among its examples: If someone saved a drowning person during Ramadan, and water entered their throat, and we said their fast is broken, they must provide the fidyah (compensatory feeding). However, if they broke their fast due to the weakness caused by the rescue effort, no fidyah is required…

Among its examples: If someone repelled an assailant threatening them and killed them, they would not be liable. However, if they repelled the assailant to protect someone else and killed them, they would be liable, as noted by al-Qāḍī. However, in *al-Fatāwā al-Raḥabiyyāt*, it is reported from Ibn ʿAqīl and Ibn al-Zāghūnī that there would also be no liability.

Among its examples: If someone was coerced into taking an oath to protect their own right and swore to ward off oppression, their oath would not be binding. However, if they were coerced into taking an oath to protect someone else's right and swore, their oath would be binding, as noted by al-Qāḍī in *Sharḥ al-*

[445] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:194.

*Madhhab*. In *al-Fatāwā al-Raḥabiyyāt*, Abū al-Khaṭṭāb stated that the oath would not be binding in this case either, which is more apparent."[446]

درء المفاسد أولى من جلب المنافع عند التساوي

**Repelling Harm Takes Precedence Over Bringing Benefits When They Are Equal**

إذا تعارضت المصلحة والمفسدة قُدِّم أرجحها

This expression is more appropriate than limiting oneself to the statement: "Repelling harm takes precedence over bringing benefits,"[447] as some misunderstand it and sacrifice a significant benefit to avoid a minor harm. Therefore, this rule should be combined with another that states: "When benefit and harm conflict, the preponderant of the two is prioritized."

The esteemed scholar Ibn ʿUthaymīn (rA) said:

ومع تساوي ضرر ومنفعه ... يكون ممنوعا لدرء المفسده

"When harm and benefit are equal, the act is prohibited in order to avert the harm."

فَإِذَا نَهَيْتُكُمْ عن شيءٍ فَاجْتَنِبُوهُ، وإِذَا أَمَرْتُكُمْ بِأَمْرٍ فَأْتُوا منه ما اسْتَطَعْتُمْ.

And if indeed avoiding prohibitions is emphasized more strongly than performing commanded acts, as indicated in the ḥadīth narrated by Abū Hurayrah in the two Ṣaḥīḥs: *"If I forbid you from something, avoid it, and if I command you to do something, then do as much of it as you can,"* this is because avoidance is generally easier than action. However, action often requires capability, making it distinct in its demands.

أن جنس فعل المأمور به أعظم من جنس ترك المنهي عنه وأن جنس ترك المأمور به أعظم من جنس فعل المنهي عنه

However, to claim that the category of avoiding prohibitions is inherently superior to the category of performing commanded acts is incorrect. Imām Taqī al-Dīn Ibn Taymiyyah dedicated a chapter to the principle: *'The category of performing commanded acts is greater than the category of avoiding prohibitions, and the category of neglecting commanded acts is graver than the category of committing prohibitions.'*[448] He supported this with over thirty evidences, including:

The greatest of good deeds is belief in Allah and His Messenger, and belief is a positive, affirmative act.

The five pillars of Islam are of the category of obligations, and there has been disagreement regarding the disbelief of one who abandons them. However, none of the scholars from Ahl al-Sunnah have declared disbelief for committing prohibitions unless such acts contradict faith.

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[446] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:196.

[447] Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:447.

[448] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 20:85.

The sin of Iblīs was abandoning an obligation, which was the prostration, while the sin of Ādam was committing a prohibition, which was eating from the tree. Thus, the sin of Iblīs was greater and preceded that of Ādam.

Good deeds, which consist of performing commanded acts, erase the punishment of sins and misdeeds that involve committing prohibitions. As for good deeds, bad deeds do not erase their reward at all.

Performing good deeds necessitates abandoning sinful acts, whereas merely refraining from sinful acts does not necessitate performing good deeds. Thus, performing good deeds encompasses both aspects, making it more virtuous and superior.

{يَسْأَلُونَكَ عَنِ الْخَمْرِ وَالْمَيْسِرِ قُلْ فِيهِمَا إِثْمٌ كَبِيرٌ وَمَنَافِعُ لِلنَّاسِ وَإِثْمُهُمَا أَكْبَرُ مِنْ نَفْعِهِمَا}

In summary, a bad deed may sometimes be greater in magnitude, and there is no doubt that the good deed should be forgone to avert it, as indicated in the verse: "{They ask you about wine and gambling. Say, 'In them is great sin and [yet, some] benefit for people. But their sin is greater than their benefit.}'" (Sūrat al-Baqarah, 2:219).

At times, the benefit may be greater, making it permissible to tolerate a harm while striving to minimize it. For example, in the ḥadīth of Abū Saʿīd al-Khudrī in the two Ṣaḥīḥs, the Prophet ﷺ said: "Beware of sitting on the roads." They replied: "O Messenger of Allah, we have no choice but to sit in our gatherings there and talk." He said: "If you insist on sitting, then give the road its rights." They asked: "And what are the rights of the road, O Messenger of Allah?" He said: "Lowering the gaze, refraining from causing harm, returning greetings, enjoining what is right, and forbidding what is wrong." The Prophet ﷺ thus permitted them to sit on the roads, provided they adhered to its etiquettes, because the benefit outweighed the harm.

وَقَدْ نَزَّلَ عَلَيْكُمْ فِي الْكِتَابِ أَنْ إِذَا سَمِعْتُمْ آيَاتِ اللَّهِ يُكْفَرُ بِهَا وَيُسْتَهْزَأُ بِهَا فَلَا تَقْعُدُوا مَعَهُمْ حَتَّىٰ يَخُوضُوا فِي حَدِيثٍ غَيْرِهِ

Similarly, Allah says: "And it has already been revealed to you in the Book that when you hear the verses of Allah denied and ridiculed, do not sit with them until they enter into another conversation." (Sūrat al-Nisāʾ, 4:140). He permitted them to sit with them after their disbelief and mockery due to people's need for coexistence and fulfilling mutual needs, as humans are, by nature, social beings.

And can they be equal in external reality? Ibn al-Qayyim rejected this notion.[449] Whether or not we accept its occurrence externally, it does arise in the evaluation of the obligated individual. In such cases, does achieving a benefit take precedence over avoiding harm? The rule prevents this and instead obligates the opposite. Some scholars have advocated for discretion, while others have opted for suspension of judgment. Imām Taqī al-Dīn's statements on prioritizing the performance of obligations over avoiding prohibitions might appear contrary to this principle, but he did not explicitly state such a stance, nor did he deviate in matters of the coexistence of permissibility and prohibition, as in rulings

[449] "If benefit and harm, profit and detriment, or pleasure and pain come into conflict, one must inevitably outweigh the other, and the ruling is based on what predominates. As for them neutralizing or counteracting each other without one prevailing over the other, this does not occur in reality at all." *Miftāḥ Dār al-Saʿāda wa-Manshūr Wilāyat al-ʿIlm wa-l-Irāda,* Ibn Qayyim al-Jawzīyah, 2:897.

regarding mules or a sister being indistinguishable among a limited group of unrelated women. My understanding is that his intent was to overcome hesitancy and incapacity within the community and the type of caution that paralyzes efforts to achieve noble objectives and fulfill religious and worldly interests.

Among the applications of this maxim are:

ولا تَسُبُوا الَّذِينَ يَدْعُونَ من دوُنِ اللهِ فَيَسُبُّوا اللهَ عَدْواً بِغَيْرِ عِلْمٍ

The prohibition of cursing the false gods of the disbelievers, as stated in Allah's words: *"And do not insult those they invoke besides Allah, lest they insult Allah in enmity without knowledge."* (Sūrat al-Anʿām: 108).

The owner is not permitted to use their property in a way that harms others, as previously discussed.

Among the applications of prioritizing the greater benefit over the lesser harm are:

The Imām praying Witr in the form of Maghrib despite disliking it, to align with the congregation.[450]

Appointing the most suitable person for each role, such as prioritizing a strong but wicked individual in military leadership over a weak but righteous one.[451]

Permitting a Muslim to plunge into enemy ranks, even if he will most likely be killed, if it benefits the Muslim community.[452]

Allowing lying for reconciliation.

Earning income from wealth involving some doubt is better than abstaining from it out of scrupulousness while neglecting obligations owed or remaining dependent on others.[453]

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[450] "If the Imām held the view that they should be separated, but the congregation chose to perform the witr prayer like maghrib, and he complied with them to reconcile their hearts, he would have done well." *Majmūʿ al-Fatāwā,* Taqī al-Dīn Ibn Taymiyyah, 22:268.

[451] "The combination of strength and trustworthiness in individuals is rare. (...) In every position of authority, the most suitable person must therefore be appointed according to the nature of that position. If one candidate possesses greater trustworthiness and another greater strength, the one more beneficial and less harmful for that office is appointed. Thus, in military command, a strong and courageous man, even if morally corrupt, is preferred over a weak and incapable but trustworthy man. (...) Aḥmad said: 'The strength of the morally corrupt but strong man benefits the Muslims, while his corruption harms himself. The righteousness of the weak man benefits himself, while his weakness harms the Muslims. They should therefore fight under the strong but morally corrupt commander.'" Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 28:254.

[452] "For this reason, the four Imāms permitted a Muslim to plunge into the ranks of the disbelievers, even if he predominantly assumes that they will kill him, provided that there is a benefit for the Muslims in doing so." *Majmūʿ al-Fatāwā,* Taqī al-Dīn Ibn Taymiyyah, 28:540.

[453] "And likewise, all people have obligations: such as spending on themselves and their relatives, paying off their debts, and other responsibilities. If they neglect these, they are committing clear oppression. However, if they fulfill these obligations under some doubt, their oppression is not definitive. So how can a Muslim avoid a potential wrongdoing by committing a definite one? For this reason, Saʿīd ibn al-Musayyab said: 'There is no good in someone who does not love wealth: with it, he worships his Lord, fulfills his trust, preserves himself, and becomes independent of others.'" *Majmūʿ al-Fatāwā,* Taqī al-Dīn Ibn Taymiyyah, 29:280.

## إذا تعارض المانع والمقتضي يُقدَّم المانع إلا إذا كان المقتضي أعظم

When a Cause for Action and a Cause for Abstention Conflict, the Cause for Abstention Takes Precedence Unless the Cause for Action Is of Greater Significance

Giving precedence to prohibition over permission is a subset of prioritizing the avoidance of harm over the attainment of benefit. What is commanded is only commanded due to its associated benefit, and what is prohibited is only prohibited due to its associated harm. Therefore, when both the rationale for action or permissibility and the rationale for abstention or prohibition converge on the same matter and are equal, we give precedence to abstention and prohibition.

This principle can be substantiated by the statement of the Prophet ﷺ in the ḥadīth narrated by Abū Hurayrah in the two Ṣaḥīḥs: *"If I forbid you from something, then avoid it; and if I command you to do something, then do as much of it as you can."*

Among the applications and derivatives of this principle are the following:

If the discrediting (jarḥ) of a witness conflicts with their endorsement (taʿdīl), the discrediting takes precedence.[454]

*"If one's sister is indistinguishable from an unrelated woman, or a properly slaughtered animal from carrion, both are prohibited."*[455]

If one of an animal's parents is lawful to eat and the other is not, such as in the case of a mule, it is impermissible to consume it according to the soundest opinion.[456]

If a trained hunting dog is sent but is joined by an untrained dog in the hunt, consuming the game hunted by both is prohibited.

Among the related issues is the permissibility of performing voluntary prayers during prohibited times. Some scholars prioritize the command to pray, while others prioritize the prohibition. According to our madhhab, performing voluntary prayers during prohibited times is not permitted, favoring the prohibition, in agreement with the Ḥanafīs and Mālikīs, except for the two rakʿahs of ṭawāf. However, there is a report permitting it, aligning with the Shāfiʿīs, preferred by Imām Taqī al-Dīn Ibn Taymiyyah. Does this preference reflect prioritizing action over abstention? Perhaps. Nonetheless, he also justified it with two reasons:

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[454] "(Testimony proving discredit takes precedence) over testimony attesting reliability." *Daqāʾiq Ūlī al-Nuhā,* al-Buhūtī, 3:520.

[455] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 29:276.

[456] "Section: Mules are prohibited according to everyone who forbids domesticated donkeys because they are born from them, and the offspring takes the ruling of its origin in terms of prohibition. Similarly, if offspring is born from a domesticated and a wild donkey, it is prohibited, with prohibition being predominant. Likewise, the offspring of a wolf and a hyena is prohibited." *Al-Mughnī,* Ibn Qudāmah, 13:319. He is likely referring to the African wild dog (*Lycaon pictus*), which is highly unlikely to be the outcome of mating between a wolf and a hyena, because they belong to entirely different families within the order *Carnivora*.

1. On the side of the command, he noted that acts with specific reasons (dhawāt al-asbāb) would be missed if not performed during prohibited times.[457]
2. On the side of the prohibition, he explained: “As for matters prohibited as a preventive measure (sadd al-dharīʿah), if that preventive cause is absent, there is no inherent harm. For instance, the prohibition of prayer during prohibited times, such as just before sunrise or sunset, is because such actions could lead to resembling the practices of the polytheists.”[458]

Exceptions to this include certain cases, as noted by Ibn al-Laḥḥām:

“If a man's wife becomes indistinguishable from an unrelated woman, he must refrain from all of them. Similarly, if a woman prohibited to him is mixed with a limited group of unrelated women, such as ten, is it permissible for him to marry one of them? There are two views on this:

1. Permissibility, similar to a large tribe.
2. Prohibition, akin to fewer than ten.

If permission is granted, is he required to investigate and discern, or not? There are also two views on this. Some later scholars of our madhhab suggest applying this same reasoning to the case where slaughtered and dead animals are mixed. Imām Aḥmad, may Allah be pleased with him, was asked about two sheep, and he said, “It is not permissible.” However, if the number increases, the matter changes. Al-Athram narrated that Imām Aḥmad was asked about three, and he replied, “I do not know.”[459]

Some consider dealing with someone whose wealth is mixed between lawful and unlawful as an exception to the rule. This applies to those who believe that the prohibition extends to all such wealth. However, those who hold that the prohibition does not extend beyond the specific ownership, as established in the Ḥanafī school, do not view it as prohibited. This is also indicated in some statements of Aḥmad, which suggest dislike (karāhah) rather than outright prohibition, as previously discussed under the topic of 'predominant assumption is generally valid.'

Among its examples is: "It is permissible [for someone without ritual purity] to touch a book of tafsīr or similar works, according to the correct view in the madhhab."[460]

Whenever the factor necessitating action is an obligation, rather than merely permissible or recommended, the exception arises more often as a result of considering the benefit of fulfilling the obligation. Examples include:

The obligation and validity of prayer for one detained in a usurped or impure land.[461]

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[457] "As non-obligatory prayers that have no specific cause are not permitted during prohibited times, unlike those with a specific cause. The stronger view based on evidence among the scholars is that such prayers are permissible due to the individual's need for them, as failing to perform them would result in missing their benefit, unlike purely voluntary prayers which do not result in such a loss." *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 26:189.

[458] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 29:288.

[459] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 131.

[460] al-Inṣāf, al-Mardāwī, 2:75.

[461] "The prayer is valid for one confined to a usurped place. It is likewise valid for one confined to an impure place, who bows and prostrates on a dry spot. (...) One confined to a wet, impure spot gestures to the extent possible and sits

Exhuming graves, though a prohibited act involving the violation of the deceased's sanctity, becomes obligatory if the deceased was buried without being washed,[462] as the benefit of washing and orienting them toward the qiblah is greater.

Migration from non-Muslim lands is obligatory for a woman who cannot manifest her religion and is able to migrate, even if she cannot find a maḥram to accompany her. This case is an exception to the prohibition against a woman traveling without a maḥram.[463]

If the deceased among Muslims and non-Muslims are mixed, it is obligatory to wash all of them and perform the funeral prayer over all, intending the prayer for the Muslims among them, despite the prohibition of praying over a non-Muslim.[464]

If both a prohibitive factor and a permitting factor apply to two separate matters, each is judged according to its own ruling, as in the case of splitting a transaction. This is the apparent position of the madhhab.[465]

## Exceptions

In truth, if we understand the principle and its applications, we cannot find any true exceptions to it, for there is no harm in the Sharīʿah except that it has been prescribed to bring about a benefit or to ward off a greater harm. Punishing criminals, despite the harm it may cause them, serves to prevent a broader and greater harm. The same applies to jihād and expiations, which are legislated to purify individuals from sins and misdeeds. Whoever recognizes that there is something beyond the material—more significant and honorable—understands the benefits of expiations. However, one may mistakenly perceive a harm to be greater than another, in which case the Sharīʿah comes to correct such assumptions. Several examples of what we referred to as "exceptions" have already been mentioned.

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upon his feet to minimize contact with the impurity. (...) His prayer is valid because he is unable to fulfill its condition concerning the permissibility and purity of the location." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:153.

[462] "If it was possible to wash the deceased but they were buried before being washed, it becomes obligatory to exhume and wash them." *Al-Iqnāʿ,* Al-Ḥajjāwī, 1:234.

[463] "The third example is prioritizing a woman's migration for the purpose of hijrah without a maḥram over her remaining in the land of war, as was done by Umm Kulthūm" *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 20:51.

[464] "(If someone to be prayed upon is mixed) with others or (someone to be prayed upon is confused with others), such as when Muslim and non-Muslim deceased individuals are mixed together and cannot be distinguished due to the collapse of a roof or similar circumstances, (the prayer is offered over all of them, intending with the prayer those who are to be prayed upon), namely the Muslims, as the prayer for them is obligatory, and there is no other way to fulfill it. (They are all washed and shrouded)." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:366.

[465] "The third scenario is when someone sells his slave together with another person's slave without permission, a slave together with a free person, or vinegar together with wine. There are two reported views. (...) The first is that the transaction is invalid (...) because it combines what is lawful and unlawful, so prohibition predominates. (...) The other view is that it is valid regarding his own slave and the vinegar, according to the apparent position of the madhhab, because each item has an independent ruling and retains that ruling when combined with the other." Al-Mubdiʿ fī Sharḥ al-Muqniʿ, Ibn Mufliḥ, 4:37.

## The Fourth Major Legal Maxim: Hardship Begets Facilitation

### Explanation and Alternative Expressions

Al-Siʿdī expressed this maxim as follows: "The third maxim: Hardship Begets Facilitation."

He also conveyed it in verse:

"١٥ - ومن قواعد الشريعة التيسير  في كل أمر نابه تعسير"

“15 - Among the maxims of the Sharīʿah is ease, in every matter where hardship occurs.”

"وكل ما كلفه قد يسرا ... من أصله وعند عارض طرا
فاجلب لتيسير بكل ذي شطط ... فليس في الدين الحنيف من شطط"

Ibn ʿUthaymīn said:
“All that one is obligated to do has been made easy, in its essence and when unforeseen hardship arises. So embrace ease in all excessive hardship, for there is no excessiveness in this upright religion.”

The technical meaning of this maxim is: "Whenever the application of legal rulings results in undue hardship upon the obligated individual—whether in their person or wealth—the Sharīʿah provides alleviation in a manner that remains within their capacity, without difficulty or distress."[466]

الشريعة مبناها وأساسها على الحكم ومصالح العباد في المعاش والمعاد، وهي عدل كلها، ورحمة كلها، ومصالح كلها، وحكمة كلها

These alleviations take the form of dispensations (rukhaṣ) that apply when valid excuses or circumstantial impediments arise. However, we must also recognize the inherent mitigations found in original unmitigated rulings (ʿazāʾim). While these rulings require effort and patience, they do not impose undue hardship or harm. In fact, they bring immense benefits in this life before the Hereafter, for Allah is not in need of our suffering and "the foundation and structure of the Sharīʿah rest upon wisdom and the best interests of people in this life and the Hereafter. It is entirely justice, entirely mercy, entirely benefits, and entirely wisdom." [467]

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[466] *Al-Wajīz,* Āl Būrno, 218.

[467] *Iʿlām al-Muwaqqiʿīn,* Ibn al-Qayyim, 3:11.

The alleviations embedded within the original unmitigated rulings (ʿazāʾim) due to hardship are innumerable. For instance, lightening the congregational prayers[468] and excusing minor dozing off (light sleep) while seated due to its frequent occurrence among workers waiting for ʿIshāʾ prayer.[469]

Some dispensations apply universally when their causes exist, such as shortening prayers while traveling. Others arise due to specific individual or communal circumstances and require the ijtihād of qualified scholars to alleviate undue hardship, as exemplified in the sub-maxim "When circumstances become constraining, legal latitude expands."

Examples of this maxim are vast and encompass various fields of Islamic law. *Sharḥ al-Kawkab al-Munīr* states: "Many rulings fall under this maxim, including: in acts of worship—tayammum when using water is difficult, according to its detailed rulings in fiqh, sitting in prayer when standing is difficult (and always permissible in voluntary prayers), shortening prayers during travel, combining two prayers, and similar rulings. Among these are travel dispensations and others. Additional mitigations include exemptions from attending Friday and congregational prayers, the advancement of zakāh payment, and various alleviations in acts of worship, transactions, marriages, and criminal penalties. It also encompasses collective obligations and their recommended acts, as well as acting on assumptions when certainty is impractical."[470]

Some further examples include:

- The permissibility of deputizing another for ḥajj and for stoning the jamarāt, as well as the allowance of iḥrām prohibitions with the obligation of offering expiation.
- The permissibility of the more distant guardian marrying off his ward when the suitable match would not wait for the arrival of the closer, traveling relative.[471]
- When witnesses are scarce and reliability is weak among people, the most suitable available witnesses are accepted. One specific text-based concession is the acceptance of two men from the People of the Book as witnesses to the bequest of a person overtaken by death while traveling, when two Muslim witnesses cannot be found.[472]

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[468] "(It is recommended for the Imām to keep the prayer light while completing it in full)" based on the saying of the Prophet ﷺ: *"When one of you leads the people in prayer, let him lighten it."* Al-Mubdiʿ states: *"Its meaning is that he should limit himself to the minimum level of perfection in glorification and other components of the prayer." Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 1:342.

[469] "Except for (slight sleep, as conventionally defined, while seated), based on the ḥadīth of Anas: 'During the time of the Messenger of Allah ﷺ, his companions would wait for the late-night prayer until their heads would nod off, then they would pray without performing ablution.' Narrated by Abū Dāwūd. This is because it frequently occurs among those waiting for prayer, so it was pardoned due to the hardship it would cause." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:71.

[470] *Sharḥ al-Kawkab al-Munīr*, Ibn al-Najjār, 4:445.

[471] "(If the closest guardian obstructs [the marriage], or is unfit) for guardianship—such as being morally corrupt and the like—(or is traveling beyond) the distance permitting shortening the prayer, but not within it, (then a more distant guardian) may perform the marriage of a free woman." *Al-Fawāʾid al-Muntakhabāt fī Sharḥ Akhṣar al-Mukhtaṣarāt,* ʿUthmān ibn ʿAbd Allāh ibn Jāmiʿ, 3:293.

[472] "Except that the testimony of the People of the Book is accepted in the case of a will during travel if no one else is available, and the witness is made to swear an oath along with his testimony after ʿAṣr." *Al-Kāfī*, Ibn Qudāmah, 4:271.

**The Basis of This Maxim**

{وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ}

{الآنَ خَفَّفَ اللَّهُ عَنْكُمْ وَعَلِمَ أَنَّ فِيكُمْ ضَعْفًا}

In *Sharḥ al-Kawkab al-Munīr*: "(And) among the evidences of jurisprudence is also the statement of the jurists: (*Hardship begets facilitation*). The evidence for this is the statement of Allah, Exalted be He: *"And He has not laid upon you in religion any hardship"* (al-Ḥajj 78), indicating the alleviation granted to this ummah compared to the severity imposed on others, such as burdens and restrictions. Additionally, there are numerous other concessions to mitigate hardship, as Allah, Exalted be He, says: *"Now Allah has lightened your burden, for He knows that there is weakness in you"* (al-Anfāl 66), as well as the reduction of fifty prayers in the Night of Ascension to five.

{يُرِيدُ اللَّهُ بِكُمْ الْيُسْرَ}

{ يُرِيدُ اللَّهُ أَنْ يُخَفِّفَ عَنْكُمْ }

{وَيَضَعُ عَنْهُمْ إِصْرَهُمْ وَالأَغْلالَ الَّتِي كَانَتْ عَلَيْهِمْ}

{لا يُكَلِّفُ اللَّهُ نَفْسًا إِلَاّ وُسْعَهَا}

بُعِثْتُ بِالْحَنِيفِيَّةِ السَّمْحَةِ.

Allah also says: *"Allah intends for you ease"* (al-Baqarah 185) and *"Allah wants to lighten your burden"* (al-Nisāʾ 28). Regarding our Prophet ﷺ, Allah states: *"And relieves them of their burden and the shackles that were upon them"* (al-Aʿrāf 157). Moreover, He says: *"Allah does not burden a soul beyond its capacity"* (al-Baqarah 286). The Prophet ﷺ said: *"I was sent with the easy and lenient ḥanīfiyyah (uprightness)."*[473]

ما خُيِّرَ رَسولُ اللَّهِ بيْنَ أمْرَيْنِ قَطُّ إلَّا أخَذَ أيْسَرَهُما، ما لَمْ يَكُنْ إثْمًا.

Mother of the Believers ʿĀʾishah (rAa) said: "The Messenger of Allah ﷺ was never given a choice between two matters except that he chose the easier of the two, as long as it was not sinful." (Agreed upon)

يَسِّرُوا ولا تُعَسِّرُوا، وبَشِّرُوا، ولا تُنَفِّرُوا.

The Messenger of Allah ﷺ also said: *"Make things easy, do not make them difficult; give glad tidings, do not drive people away."* (Agreed upon, narrated by Anas)

[473] Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:445.

إنَّ الله لا يَصْنَعُ بشقاءِ أختِكَ شيئًا، فلْتَحُجَّ راكِبَةً وتُكَفِّرَ يمينَها.

فإنَّ اللهَ عن تعذيبِ أُخْتِكَ نَفْسَها لَغَنِيٌّ.

مَا يَفْعَلُ اللَّهُ بِعَذَابِكُمْ إِنْ شَكَرْتُمْ وَآمَنْتُمْ وَكَانَ اللَّهُ شَاكِرًا عَلِيمًا

When the sister of ʿUqbah ibn ʿĀmir vowed to perform ḥajj on foot, the Prophet ﷺ told him: *"Allah does not benefit from your sister's hardship in any way; let her perform ḥajj riding and expiate her oath."* In another narration: *"Indeed, Allah has no need for your sister to torture herself."* (Narrated by Abū Dāwūd from ʿUqbah ibn ʿĀmir) This is in line with the verse: *"What would Allah do with your punishment if you are grateful and believe? And Allah is ever Appreciative, All-Knowing."* (al-Nisāʾ 147)

أجرُك على قدر نَصَبِك،

As for his ﷺ statement to ʿĀʾishah: *"Your reward is proportional to your effort,"* this refers to hardship that occurs naturally in worship without being deliberately sought.

ديارَكم بني سَلَمَة دِيارَكم، تُكْتَب آثارُكم،

As for the ḥadīth: *"Stay in your homes, Banū Salamah, stay in your homes; your footsteps will be recorded."* The Prophet ﷺ intended by this that no part of Madīnah should become deserted and that people should not be put in hardship due to everyone wanting to move closer to the mosques.

The evidences for this maxim and the leniency of Islamic law are too numerous to enumerate.

## Guidelines and Benefits

### The First Benefit: The Concession (Rukhṣah)

Definition of Rukhsah (Concession)

In *Rawḍat al-Nāẓir*

*"Chapter on ʿAzīmah and Rukhṣah:*
*'ʿAzīmah'* in linguistic usage means a firm resolution, as seen in His saying: {And We did not find in him determination (ʿazman)} (Ṭā Hā 20:115) and {When you have decided (ʿazamta), then rely upon Allah} (Āl ʿImrān 3: 159).

As for *rukhṣah*, it refers to ease and leniency, similar to the phrase 'the price became *rakhīṣ* (cheap),' which indicates a decrease in cost and ease of purchase.

In the terminology of the scholars:

فالعزيمة: الحكم الثابت من غير مخالفة دليل شرعي. وقيل: ما لزم العباد بإيجاب الله تعالى.

- ʿAzīmah (the original, unmitigated ruling) is a ruling that is established without opposing any legal evidence. Some define it as that which has been made obligatory upon individuals by Allah, the Exalted.

والرخصة: استباحة المحظور، مع قيام الحاظر. وقيل: ما ثبت على خلاف دليل شرعي لمعارض راجح.

- Rukhṣah (a legal dispensation) is the permissibility of a prohibited act while the prohibition remains in principle. Another definition states that it is a ruling that contradicts an established legal proof due to a stronger counteracting sharʿī factor.

A ruling is not called a *rukhṣah* if it does not contradict any legal evidence, even if it involves ease—such as the non-obligation of fasting in Shawwāl or the permissibility of neutral acts (*mubāḥāt*). However, the exemptions granted to this Ummah from the burdens imposed on previous nations may metaphorically be called *rukhṣah*, since they were obligatory upon others. If we compare our situation to theirs, this usage becomes appropriate.

As for *tayammum*, if it is permitted despite the availability of water due to illness or excessive cost, it is called a *rukhṣah*. However, if water is entirely unavailable, then *tayammum* is simply a necessity due to incapacity, not a *rukhṣah*."[474]

Types of Concessions:

In *Qawāʿid al-Aḥkām fī Maṣāliḥ al-Anām*:

*"Chapter on the Legal Concessions (Takhfīfāt) of Sharʿī Rulings," which are of various types:*

1. Among them is *alleviation by exemption (Takhfīf al-Isqāṭ)*, such as exempting individuals from attending Friday prayers, fasting, Ḥajj, and ʿUmrah due to known excuses.
2. Another is *concessional diminishment (Takhfīf al-Tanqīṣ)*, such as shortening the prayer (Qaṣr al-Ṣalāh) and reducing what an ill person is unable to perform in acts of prayer, such as minimizing bowing (Rukūʿ) and prostration (Sujūd) to whatever is feasible.
3. Another is *concessional substitution (Takhfīf al-Ibdāl)*, such as replacing Wuḍūʾ and Ghusl with Tayammum, substituting standing in prayer with sitting, sitting with reclining, reclining with gestures, substituting emancipation (ʿItq) with fasting, and replacing certain obligations of Ḥajj and ʿUmrah with expiations in case of valid excuses.
4. Another is *concessional advancement (Takhfīf al-Taqdīm)*, such as advancing ʿAṣr to Ẓuhr and ʿIshāʾ to Maghrib, as well as advancing Zakāh before its due period and expiation before the occurrence of an oath violation.
5. Another is *concessional postponement (Takhfīf al-Taʾkhīr)*, such as delaying Ẓuhr to ʿAṣr, Maghrib to ʿIshāʾ, and fasting Ramaḍān to a later time.
6. Another is *concessional permission (Takhfīf al- Tarkhīṣ)*, such as the prayer of one who has performed tayammum despite the continuing state of ritual impurity, or one who has purified using stones despite some residual impurity, permitting the consumption of impure substances for medical treatment [according to his school (rA), but not the Ḥanbalī school], drinking alcohol to relieve choking, and uttering words of disbelief under duress."[475]

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[474] Rawḍat al-Nāẓir wa-Junnat al-Manāẓir fī Uṣūl al-Fiqh ʿalā Madhhab al-Imām Aḥmad ibn Ḥanbal, Ibn Qudāmah, 1:188.

[475] *Qawāʿid al-Aḥkām*, Ibn ʿAbd al-Salām, 2:8.

It has also been amended to include:

7. *Concessional modification (Takhfīf or Rukhṣat al-Taghyīr)*, such as altering the form of prayer due to fear.

Rulings on Exemptions

1. Obligatory: Such as consuming carrion for one in dire necessity who predominantly assumes perishing. This is an exemption (*rukhṣah*) in one respect and a binding ruling (*ʿazīmah*) in another.[476] Likewise, breaking the fast in Ramaḍān when fearing for one's life.[477]
2. Recommended: Such as shortening prayers and breaking the fast during travel,[478] as well as looking at a prospective spouse before marriage.
3. Permissible: Such as the sale of ʿarāyā (the concessionary exchange of fresh dates on the palms for an estimated equivalent of dried dates).[479]
4. Preferable to Avoid: Such as combining prayers during travel[480] and uttering a statement of disbelief under coercion.[481]

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[476] "It is permissible to say that tayammum and eating carrion are both concessions (*rukhṣah*) and firm obligations (*ʿazīmah*), each from a different perspective." *Sharḥ Mukhtaṣar al-Rawḍah, al-Ṭūfī, 1:465.* "The second is his statement: 'It is permissible for him to consume from it what wards off starvation.' That is, it is also obligatory for him to eat it—according to the correct position in the *madhhab*. This was explicitly stated." *Al-Inṣāf*, al-Mardāwī, 27:239.

[477] "Among them: One who fears perishing due to fasting is obligated to break the fast." Al-Qawāʿid wa-al-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 160.

[478] "Breaking the fast while traveling, in a journey that permits shortening the prayer, is preferable to fasting. (...)" Al-Minaḥ al-Shāfiyāt bi-Sharḥ Mufradāt al-Imām Aḥmad, al-Buhūtī, 1:324. "Among them is what is recommended, such as shortening the prayer and breaking the fast during travel, according to the explicit statement of Aḥmad and the position of the majority of the aṣḥāb. There is, however, another view that completing the prayer and fasting is preferable." Al-Qawāʿid wa al-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 160.

[479] "Among the dispensations are those that are merely permissible, such as ʿarāyā (selling unharvested fruit for dry ones by estimation), *musāqāh* (watering trees for part of the yield), *muzāraʿah* (sharecropping), *kitābah* (a contract for a slave to purchase his freedom in installments), *shufʿah* (the preemptive right of a partner), and other contracts that are established contrary to *qiyās* (analogical reasoning). This is how our scholars and others have described them. However, Abū al-ʿAbbās [Ibn Taymiyyah] stated that none of the established and settled rulings of contracts or other matters contradict *qiyās*, and he explained and demonstrated this in the most precise and eloquent manner." *Al-Qawāʿid wa al-Fawāʾid al-Uṣūlīyah, Ibn al-Laḥḥām, 163.*

[480] "Among them is the combining of two prayers, if we consider it permissible, whether it is preferable to do so or to refrain from it, there are two reported opinions on the matter, with the more apparent of the two being the latter." *Al-Qawāʿid wa al-Fawāʾid al-Uṣūlīyah, Ibn al-Laḥḥām, 160.*

[481] "For example, when one is coerced into uttering a statement of disbelief, one may utter it to preserve one's life while remaining secure in faith internally, or refrain from doing so to defy the coercer and uphold the honor of the religion. There is room for disagreement regarding which is preferable. (...) Aḥmad explicitly stated concerning a captive given the choice between death and drinking wine: 'If he endures, it is an honor for him; and if he does not, he has the concession.' Al-Qāḍī Abū Yaʿlā stated (...) that it is preferable not to resort to dissimulation or outwardly manifest disbelief, even if one is killed. (...)" Sharḥ Mukhtaṣar al-Rawḍah, al-Ṭūfī, 1:465. al-Ṭūfī then said: "I find it astonishing that our fellows tend to favor taking the dispensation in cases such as breaking the fast or shortening prayers during travel—despite their relative ease—while they prefer adherence to the stricter ruling in matters of life and death, such as coercion to disbelief or drinking alcohol under duress …"

There are also matters in which there is extensive disagreement over whether acting upon the exemption or refraining from it is superior, such as wiping over footwear (*khuffayn*)[482] and advancing the payment of *zakāh* upon reaching the minimum threshold (*niṣāb*).[483]

Finally, it is preferable to refrain from using exemptions when they are difficult to differentiate from the prohibited, out of caution against grazing near the sanctuary (i.e., what is impermissible).

## The Second Benefit: Hardships (Mashāqq)

Hardship begets facilitation, as the maxim states, because it entails difficulty for the legally accountable individual (*mukallaf*), and hardship (*ḥaraj*) is explicitly lifted. However, are there not various forms of hardship within acts of worship and legal obligations, such as forsaking one's bed for the dawn prayer, performing ablution, fasting, pilgrimage, and striving in *jihād*? What, then, is the type of hardship that necessitates facilitation (*taysīr*)?

Ibn Qudāmah stated in *Al-Mughnī*:

"Some of the *Salaf* reportedly permitted breaking the fast for any illness, even for pain in a finger or a tooth, based on the generality of the verse and the fact that a traveler is permitted to break the fast even if he does not need to, so the same should apply to the sick.

However, our stance is that if a person witnesses the month and fasting does not harm him, then it remains obligatory for him, just like a healthy person. Moreover, the verse is qualified in both the case of the traveler and the sick, as evidenced by the fact that a traveler is not permitted to break the fast for short-distance travel.

The difference between a traveler and a sick person is that travel is assessed based on a presumption (*maẓinnah*)—that is, long-distance travel—because the underlying reason (*ḥikmah*) itself cannot be directly considered. This is because slight hardship does not justify a concession, and severe hardship has no clear standard in itself. Thus, it was assessed based on its presumption, which is long-distance travel, and the ruling is linked to that presumption both in existence and absence.

As for sickness, there is no fixed standard, for illnesses vary—fasting harms the sufferer in some illnesses, while in others fasting has no effect, such as toothache, a cut on the finger, a minor boil or ulcer, scabies, and similar illnesses. Therefore, illness was not deemed a sufficient standard. Instead, the underlying reason—fear of harm—was considered, and thus, the ruling is based on that."[484]

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[482] "Among them is wiping over leather socks. It is reported from Aḥmad that wiping is preferable. (...) It is also reported from him that washing is preferable, and in another report that the two are equal. (...) Abū al-ʿAbbās Ibn Taymiyyah (rA) stated: 'The decisive answer is that what is preferable for each person accords with the state of their feet. If one is wearing leather socks, it is preferable to wipe over them without removing them; and if one's feet are uncovered, it is preferable to wash them without deliberately wearing leather socks merely to wipe over them. (...)'" Al-Qawāʿid wa al-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 160.

[483] "Among these issues is whether it is preferable to advance the payment of zakāh once the niṣāb is complete. The explicit position of Aḥmad, as transmitted by the group, is that there is no harm in advancing it. (...) The apparent purport of the aṣḥāb's statements, however, is that refraining from advance payment is preferable. Some later scholars suggested that the relevant benefit should be considered." Al-Qawāʿid wa al-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 161.

[484] *al-Mughnī*, Ibn Qudāmah, vol. 4, p. 404.

You may have noticed from his words that he acknowledges the difficulty of defining hardship (mashaqqah) precisely. For this reason, scholars have determined that the type of illness permitting one to break the fast is that which causes harm, which is the established position of the madhhab.[485]

If legal rulings were based on vague and indeterminate qualities, obligations would be abandoned, and the *Sharīʿah* would be lost. If we were to say that a sick person may break the fast in Ramaḍān due to hardship alone, this would extend the ruling to many others, including laborers and workers. On the other hand, if we sufficed with sickness (*maraḍ*), just as we do with travel, then every illness would be included, even something as minor as a sore finger. Thus, we found it necessary to combine both sickness and hardship as the legal cause (*ʿillah*).

Despite the challenge of defining the level of hardship that warrants concession, jurists have made every effort to delineate it as precisely as possible.

Al-Suyūṭī said:

"Hardships (mashāqq) fall into two categories:

1. Hardships that are inherent to acts of worship and generally unavoidable, such as the discomfort of performing ablution (*wuḍūʾ*) or ritual bathing (*ghusl*) in cold weather, the difficulty of fasting during intense heat or long days, and the hardship of travel, which is inseparable from ḥajj and jihād. Similarly, the pain of legal punishments, the stoning of adulterers, and the execution of criminals—these hardships do not justify the annulment of acts of worship in all circumstances.

Those who argue that the fear of extreme cold alone permits *tayammum* are incorrect. The valid excuse is the fear that exposure to severe cold will cause an illness that justifies *tayammum*—a situation that is usually avoidable. However, mere discomfort from cold without the risk of such illness does not justify *tayammum* in any way and does not permit transitioning to it.

2. As for hardships that are generally avoidable in acts of worship, they fall into different levels:
    1- The first: severe and immense hardship – Such as the risk of harm to life, limbs, or essential bodily functions. These undoubtedly necessitate concessions and dispensations, as preserving life and bodily integrity to maintain religious obligations takes precedence over jeopardizing them for the sake of a single act of worship or multiple acts whose performance would cause the loss of comparable acts.
    2- The second: minor and insignificant hardship – Such as slight pain in a finger, a mild headache, or a slight bodily indisposition. These have no legal bearing and are disregarded, as the fulfillment of religious obligations takes precedence over avoiding such negligible inconveniences.

[485] "Breaking the fast is permitted for fear of illness due to thirst or another cause, and for one who is already ill—or becomes ill that day—who fears harm through the illness worsening or becoming prolonged, even based on the statement of a trustworthy person. It is not permitted, however, for one who will not be harmed, such as a person suffering from (...) a toothache, pain in a finger, a boil, or a similar minor affliction." Ghāyat al-Muntahā, Marʿī al-Karmī, 1:348.

3- The third: intermediate hardship – Falling between the two extremes. If it leans toward the first category, it warrants concessions; if it is closer to the second, it does not. Examples include mild fever or slight toothache. Cases that waver between these two categories are subject to scholarly disagreement, and the distinction between them is determined only by approximation.

"وقد أشار الشيخ عز الدين إلى أن الأولى في ضبط مشاق العبادات: أن تضبط مشقة كل عبادة بأدنى المشاق المعتبرة في تخفيف تلك العبادة فإن كانت مثلها، أو أزيد، ثبتت الرخصة، ولذلك اعتبر في مشقة المرض المبيح للفطر في الصوم: أن يكون كزيادة مشقة الصوم في السفر عليه في الحضر وفي إباحة محظورات الإحرام: أن يحصل بتركها، مثل مشقة القمل الوارد فيه الرخصة."

Shaykh ʿIzz al-Dīn pointed out that the best way to define hardships in acts of worship is to measure each act by the least amount of hardship that has been considered valid for permitting concessions in that particular act. If the hardship reaches or exceeds that level, the concession applies. For example, in determining the illness that permits breaking the fast, it should be at least as burdensome as the added difficulty of fasting while traveling. Similarly, in permitting the prohibited acts of *iḥrām*, the hardship must be at least equivalent to the discomfort caused by lice, for which a concession has been explicitly granted."[486]

I have not found a better criterion than that established by al-ʿIzz. Upon examining Ḥanbalī rulings, it is evident that they take this principle into account when granting concessions for hardships. They neither permit breaking the fast for a mere toothache nor require a fear of imminent death. A credible fear of substantial harm, such as aggravation of the illness or delay in recovery, is sufficient when based upon an apparent indication, prior experience, or the assessment of a trustworthy physician, as previously mentioned.

Given the aforementioned considerations, it can be said that the types of hardship that hold no legal weight are: those that contradict an explicit text, such as exempting people from obligatory jihād due to hardship; those that are inherently tied to acts of worship, such as the discomfort of performing ablution in cold weather; and those that are minor, for the like of which no legal concession from the Sharīʿah is known.

### The Third Benefit: Causes of Facilitation (Asbāb al-Takhfīf)

Alleviation (takhfīf) applies when there is a condition in a person that causes a deficiency, such as childhood or insanity; or to an incidental factor affecting legal capacity, such as coercion, ignorance, error, or forgetfulness; or to a circumstance that necessitates alleviation, such as travel or illness; or to an external matter specific to the obligation itself, such as difficulty or widespread affliction.

These constitute seven well-established and recognized causes. Shaykh al-Quʿaymī provided an insightful elaboration on them in his commentary on al-Siʿdī's maxims, from which I have benefited.

[486] al-Ashbāh wa al-Naẓāʾir, al-Suyūṭī, 80.

Here, I add three more: necessity (iḍṭirār), obsessive thoughts (waswasah), and encouragement toward Islam. This brings the total number of alleviation causes to ten.

**The First Cause of Alleviation: Necessity (Iḍṭirār)**

وَقَدْ فَصَّلَ لَكُم مَّا حَرَّمَ عَلَيْكُمْ إِلَّا مَا اضْطُرِرْتُمْ إِلَيْهِ.

Allah ﷻ says: *"And He has already explained to you in detail what He has forbidden to you—except when compelled by necessity."* (Al-Anʿām 6:119)

Necessity is the most emphatic, evident, and broadest of these causes with respect to individual legally accountable persons. It includes cases such as consuming carrion when driven by extreme hunger and drinking a sip of alcohol in the case of choking. Further clarification on the concept of necessity and its examples will follow under the maxim: *"Necessities permit prohibitions."*

**The Second Cause of Alleviation: Widespread Trial and Difficulty in Avoidance**

Trial (*balwā*) refers to a test, whether through hardship or ease. *ʿUmūm al-balwā* (widespread trial) is a type of hardship that a person has no ability to avoid. This is one of the most general causes of dispensations, as much of the Sharīʿah is structured around alleviation in response to it.

«كَانَتِ الكِلاَبُ تَبُولُ، وَتُقْبِلُ وَتُدْبِرُ فِي المَسْجِدِ، فِي زَمَانِ رَسُولِ اللهِ ﷺ، فَلَمْ يَكُونُوا يَرُشُّونَ شَيْئًا مِنْ ذَلِكَ»

Al-Bukhārī narrates from Ibn ʿUmar (rAa) that he said: *"Dogs would urinate, come, and go in the mosque during the time of the Messenger of Allah ﷺ, and they would not sprinkle water over any of that."*

One of the most significant applications of this maxim is the exemption regarding impurities that are difficult to avoid.[487] Imām Abū al-ʿAbbās (rA) chose to excuse small amounts of all impurities that are difficult to avoid and regarded it as an opinion within the *madhhab*.[488] This aligns with Abū Ḥanīfah's position on excusing small amounts of impurities in general.

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[487] "No impurity is excused in small amounts except for blood and what originates from it, such as pus, purulent discharge, and residual traces from purification. (...) It is also reported from Aḥmad that (...) these are treated like blood." Al-Inṣāf, al-Mardāwī, 2:317. Al-Mardāwī then stated: "(...) Blood from bedbugs, lice, fleas, flies, and similar creatures is excused according to the opinion that considers it impure, without dispute. (...) A small amount of impure smoke, dust, or vapor is excused, provided that no discernible property appears, according to the correct position in the madhhab. (...) Abū al-Maʿālī granted a general exemption for impure dust without restricting it to a small amount, because it cannot be avoided. Al-Furūʿ deemed this position tenable." Al-Inṣāf, al-Mardāwī, 2:332.

[488] "Small amounts of impurity are excused, even including mouse droppings and the like, whether in food or elsewhere. This is an opinion within the Ḥanbalī madhhab. If the impurity of street mud were confirmed, a small amount of it would still be excused due to the difficulty of avoiding it, as mentioned by our fellows (...) If we say that a small amount of *nabīdh* (fermented beverage), over which there is scholarly disagreement, is excused due to the existence of differing opinions, then the difference of opinion regarding the impurity of dogs is even more evident and stronger." *Al-Fatāwā al-Kubrā,* Taqī al-Dīn Ibn Taymiyyah, 5:313.

Other examples include:

Leniency regarding the leftover liquid (*suʾr*) of those who consume impurities.[489]

The non-nullification of prayer due to prolonged thoughts or prolonged gazing, even at a book.[490]

*"If one performs tayammum due to spotting a dark figure at night, assuming it to be an enemy, and later discovers otherwise after prayer, there is no need to repeat it due to the widespread nature of such situations in travel."*[491]

*"If a small portion of the ʿawrah [the parts of the body that must be covered], not customarily regarded as excessive to the eye, is uncovered unintentionally, even for a long time, or a large portion is uncovered for a short time, the prayer is not invalidated. If the wind completely uncovers one's ʿawrah but they quickly cover it without excessive movement, the prayer remains valid."*[492] This ruling incorporates multiple maxims: the first, *Matters are judged by their intentions*, as indicated by the phrase *"not intentionally"*; the second, as certainty establishes the validity of the prayer, it is not nullified by doubt; the third and fourth, in removing harm and alleviating hardship, as slight exposure of the *ʿawrah* is a widespread trial (*ʿumūm al-balwā*); and the fifth, as customary practice (*ʿurf*) is used to determine what constitutes a minor exposure of the *ʿawrah*.

"(It is valid) for one to say: (Give me half a dirham in return for half of this dirham, and coins in return for the other half) ... This is indispensable for people due to the widespread trial (*ʿumūm al-balwā*) and the need for such transactions."[493]

The permissibility of looking at a prospective spouse, for education, in legal testimony, and in business transactions.

**The Third Cause of Alleviation: Deficiency (*Naqṣ*)**

There are several conditions referred to as *naqṣ* (deficiency), including minority (ṣighar), insanity (junūn), and slavery (riqq). Some scholars also included womanhood (ʾunūthah), but the correct view is that legal obligations for men and women differ based on their respective roles and capacities. The obligation for a wife to obey her husband has no direct counterpart for men, and it is significant. However, if what is meant is that many obligations apply to men but not to women, and that certain things are permitted for women but not for men, then this is correct.

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[489] "(The leftover water of a cat and any animal smaller than it in size is pure) and not disliked, except for a free-range chicken. (...) If a cat, a child, or the like consumes impurity and then drinks from a liquid—even before it has been out of sight—it does not affect the purity of the liquid, due to the widespread trial (*ʿumūm al-balwā*)." *Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 1:176.

[490] "(The prayer is not invalidated) by mental activity (*ʿamal al-qalb*), even if prolonged, due to the widespread trial (*ʿumūm al-balwā*). (Nor is it invalidated by prolonged gazing at) something, whether (a book) or otherwise, even (if one reads) its contents (in their mind without pronouncing it with their tongue,). It is reported that Aḥmad did this. (though this is disliked)." *Kashshāf al-Qināʿ*, al-Buhūtī, 2:427.

[491] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:94.

[492] *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:141.

[493] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 3:168.

The three conditions mentioned fall under the category of deficiency in legal capacity (*ahliyyah*), which is a person's qualification for having rights and duties and for the validity of their legal actions. It is of two types:

أهلية أداء، وهي صلاحية الإنسان لأن تكون أفعاله وتصرفاته معتبرة شرعًا، ومناطها العقل.

1. Capacity for Performance (*Ahliyyat al-Adāʾ*) – This refers to a person's ability to have their actions and transactions legally recognized, and it is contingent on reason (*ʿaql*).

وأهلية وجوب، وهي صلاحيته لوجوب الحقوق المشروعة له أو عليه، ومناطها الإنسانية، ولا يشترط لها عقل ولا تمييز فالمجنون والصغير يرثان، ويجب في مالهما ضمان المتلفات، لكن لا تجب عليهما أنواع التكاليف الأخرى كالعبادات، وإن صحت من المميز.

2. Capacity for Assignment of Rights and Liabilities (*Ahliyyat al-Wujūb*) – This refers to a person's qualification for having legal rights and obligations, and it is based on humanity (*insāniyyah*). It does not require reason or discernment. For example, an insane person (*majnūn*) and a minor (*ṣaghīr*) inherit, and compensation for damages (*ḍamān al-mutlafāt*) is required from their wealth, yet they are not subject to other legal obligations such as acts of worship, even though a discerning child (*mumayyiz*) may perform them validly.

Alleviation based on *naqṣ* affects prescriptive rulings (*khiṭāb al-taklīf*), but not declaratory rulings (*khiṭāb al-waḍʿ*).

**First: Insanity (*Junūn*)**

رُفِعَ القَلَمُ عن ثلاثة: عن النَّائِمِ حتَّى يَسْتَيْقِظَ، وعن الصَّغِيرِ حتَّى يَحْتَلِمَ، وعن المجنون حتَّى يَعْقِلَ.

The Messenger of Allah ﷺ said: *"The pen has been lifted from three: from the sleeper until he wakes, from the child until he reaches puberty, and from the insane person until he regains sanity."*

Reason (*ʿaql*) is the basis of legal accountability (*taklīf*), and its absence prevents one from being held accountable. The insane person (*majnūn*) is not addressed with any legal obligations. Insanity may either be continuous (*muṭbiq*), with no intervals of consciousness, or intermittent (*mutaqaṭṭiʿ*), where a person alternates between periods of sanity and insanity.

A person with insanity (majnūn) is not legally accountable during periods of insanity. However, zakāh is obligatory upon his wealth, and he is liable for damages (*ḍamān al-mutlafāt*), just like a minor. Al-Tahbīr states:

"His statement: 'The obligation of zakāh, financial support (*nafaqah*), and liability (*ḍamān*) arises from linking the ruling to its cause (*sabab*).' That is, according to the correct opinion that a minor is not legally accountable (*mukallaf*), these obligations are due to the linkage of rulings to their causes—whether due to their wealth or their inherent human liability (*dhimmah insāniyyah*), which qualifies them for intellectual capacity later on—similar to the case of the *majnūn* (insane person), but unlike animals (*bahīmah*)."[494]

[494] Al-Taḥbīr Sharḥ al-Taḥrīr, al-Mardāwī, 3:1182.

A person who alternates between sanity and insanity possesses both types of legal capacity (*ahliyyah*) during their periods of sanity.

**Mental Impairment (*ʿAtah*)**

Among the cases related to *junūn* (insanity), though with some differences, is *ʿatah*—a condition of cognitive deficiency accompanied by mental instability.

- If discernment (*tamyīz*) is entirely absent, the person is treated as an insane individual (*majnūn*).
- If some level of discernment is present, they are treated like a discerning minor.[495]

**Fainting (or Coma)**

Among the conditions akin to insanity is al-ighmāʾ (fainting or coma), and according to the madhhab, a person in a state of fainting (or coma) is not legally accountable (mukallaf) during that time, and no acts are expected of him while unconscious. However, the question remains whether he is legally addressed (mukhāṭab) like the sleeper—thus obligations remain upon him, but his inability only prevents performance, making it incumbent upon him to make up missed duties—or whether he is not legally addressed at all, like the insane person, in which case no obligations fall upon him and no make-up (qaḍāʾ) is required.

Ibn al-Laḥḥām said:

"I say: the one who has fainted (or fallen into a coma) vacillates between the status of the sleeper and the insane. If one considers that his intellect has not vanished but is rather veiled by the fainting, then he resembles the sleeper—for it is said that if he were made to smell banj, he would regain consciousness. But if one considers that, when prompted, he does not awaken, then he resembles the insane. Hence, they differed in the rulings that pertain to him: sometimes they attach him to the sleeper, and at other times to the insane. What is more apparent is attaching him to the sleeper—and Allah knows best."[496]

Their disagreement regarding his ruling manifests in many legal branches.

They likened him to the sleeper in that they obligated him to make up missed prayers. However, there is an opinion within the madhhab that he is not required to make them up, in agreement with the Shāfiʿī position—an opinion preferred by Shaykh Muḥammad ibn ʿUthaymīn.[497]

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[495] "The first condition is puberty. Testimony is not accepted from a minor, whether male or female (...) based on Allah's statement: 'And bring two witnesses from among your men.' (...) A minor is not called a 'man.' (...) Moreover, the minor does not possess complete reasoning and is therefore comparable to a person with cognitive deficiency." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 11:427.

[496] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 57.

[497] "As for the unconscious person, the correct position in the madhhab is that prayer remains obligatory upon him in all cases (...) as with a sleeping person. The majority of the aṣḥāb hold this view, and it is among the mufradāt. Another opinion states that it is not obligatory upon him, likening him to the insane. (...) The author and those who followed him stated in al-Mughnī: 'If a person consumes medication that removes his intellect, then if the loss does not persist for long, he is treated like the unconscious person; but if it is prolonged, he is treated like the insane.'" Al-Inṣāf, al-Mardāwī, 3:10.

The Ḥanafīs hold a middle ground: if he missed more than five prayers, he is likened to the insane, and if five or fewer, he is likened to the sleeper.[498] This has its own merit, since it is uncommon for a person to sleep for more than a day. The words of Imām al-Muwaffaq (Ibn Qudāmah) regarding someone who loses consciousness after taking medicine—"If the loss is not prolonged, then it is like fainting; but if it is prolonged, then it is like insanity"—are similar to the Ḥanafī view on the fainted or comatose person, and the rulings for both conditions are quite similar.[499]

They likened him to the insane in that they did not validate his fast if the fainting lasted the entire day, unlike the sleeper, whose fast is valid. However, they differed from the insane by still obligating him to make up the fast.[500] Likewise, they did not validate his standing at ʿArafah in the state of fainting.[501]

It is likely that, had the leading scholars of the school seen that coma today can last for weeks, even months or years, they would have revisited this unique ruling of the school. Indeed, their rationale for obligating make-up was that “fainting” is not usually prolonged. Ibn Qudāmah said: "Whenever fasting is invalidated due to fainting, then the one who fainted must make it up, without any known disagreement—because its duration is not typically prolonged."[502] For this reason, some contemporary scholars of the madhhab give fatwā according to the Shāfiʿī or Mālikī view, or the Ḥanafī view. The Ḥanafī position here is closer to the Ḥanbalī school and its underlying rationale.

**Secondly: Minority (Childhood)**

A minor possesses legal capacity for the assignment of rights and liabilities (*ahliyyat al-wujūb*), which means he is eligible to have rights and liabilities established for or against him. Thus, he owns what is purchased or gifted to him, and his guardian concludes on his behalf those contracts that the Sharīʿah authorizes the guardian to conclude for the minor’s benefit. All liabilities arising from valid legal causes—such as zakāh, compensation for damages, maintenance, and indemnities for injuries—are also applicable to him.

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[498] Al-Mughnī states: "Abū Ḥanīfah said: If a person remains unconscious for five prayers, they must make them up; but if the period exceeds that, the obligation to make up all of them is waived, because this falls under repetition, and thus making them up is dropped—similar to al-junūn (insanity)." al-Mughnī, Ibn Qudāmah, vol. 2, p. 51.

[499] “His statement is: ‘It is obligatory upon the sleeper and one whose intellect is removed through intoxication, unconsciousness, or medication.’ (...) As for one whose intellect is removed through intoxication, the correct position in the madhhab is that prayer remains obligatory upon him in all cases. (...) The same ruling applies when his intellect is removed through something prohibited. Shaykh Taqī al-Dīn chose that it is not obligatory in any of these cases, though in al-Fatāwā al-Miṣriyyah he stated that making it up is obligatory without dispute.” Al-Inṣāf, al-Mardāwī, 3:8.

[500] “Fasting is valid for one who regains consciousness during part of the day (...) whether the person had been insane or unconscious. (...) It is also valid for one who sleeps throughout the entire day. (...) An unconscious person must make up the day during which unconsciousness encompassed the entire day, unlike the insane person. (...) This is because unconsciousness is not ordinarily prolonged, and therefore legal accountability is not removed, as with sleep. Insanity differs because it removes legal accountability. (...)” Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 3:386.

[501] "Standing at ʿArafah is not valid for (one who is insane, unconscious, or intoxicated) due to the absence of intellect, (unless they regain consciousness while still at ʿArafah before the time for standing ends)." *Kashshāf al-Qināʿ*, al-Buhūtī, 6:287.

[502] *al-Mughnī*, Ibn Qudāmah, vol. 4, p. 344.

As for capacity for performance (*ahliyyat al-adāʾ*):

A discerning child (mumayyiz) can validly perform bodily acts of worship, even if they are not obligatory for him. Pilgrimage (ḥajj) is valid from all children, whether discerning or not.

Regarding legal conducts, a discerning child has incomplete legal capacity:

- Transactions that are purely detrimental to his wealth, such as gifts or lending, are invalid—neither he nor his guardian may execute them.
- Transactions that are of mixed benefit and harm, such as buying and selling, are valid with the permission of his guardian.
- Transactions that are purely beneficial are also valid with his guardian's permission—though one opinion permits them without his permission, and another permits this in minor matters.[503]

As for divorce, according to the Ḥanbalī school, the divorce pronounced by a discerning child who understands it is valid.[504]

**The Fourth Cause of Alleviation: Mistake and Forgetfulness**

After having discussed a set of causes referred to as "deficiencies," we now turn to those incidental states from which no human being is free, due to their inherent weakness. The mercy of the Sharīʿah has deemed these among the valid causes of alleviation: namely, mistake (khaṭaʾ), forgetfulness (nisyān), ignorance, and coercion (ikrāh).

الإتلاف يستوي فيه المتعمد والجاهل والناسي.

Al-Siʿdī said in the thirteenth legal maxim: "When destruction occurs, it makes no difference whether it was caused intentionally, ignorantly, or forgetfully."

He expressed the same in his poetic rendering:

"والخطأ الإكراه والنسيان -- أسقطه معبودنا الرحمن"

"Mistake, coercion, and forgetfulness—our Lord, the Most Merciful, has pardoned them.

"لكن مع الإتلاف يثبت البدل -- وينتفي التأثيم عنه والزلل"

Yet when there is destruction, a substitute is due—while sin and blame are lifted."

The mistake referred to here is to oppose what is correct without intending to do so. It is of two types:

1. A mistake in action, such as one who aims at game and accidentally strikes a person.
2. A mistake in intention, such as one who strives to identify the qiblah and errs, or shoots an inviolable person thinking he is not.

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[503] "The second condition is that the contracting party (...) must be legally competent to conduct transactions. (...) Thus, the transaction of a minor or a person of unsound financial judgment is not valid without the guardian's permission. If permission is granted, the transaction is valid. (...) Their transactions in insignificant matters, however, are valid without prior permission." Al-Rawḍ al-Murbiʿ, al-Buhūtī, 2:195.

[504] "The divorce of a discerning, rational minor (*mumayyiz ʿāqil*) is valid, according to the correct view in the *madhhab*.'" al-Inṣāf, al-Mardāwī, 22:134.

﴿رَبَّنَا لَا تُؤَاخِذْنَا إِن نَّسِينَا أَوْ أَخْطَأْنَا﴾

Allah says: “Our Lord, do not take us to account if we forget or make a mistake” [al-Baqarah 2:286], and He did so, as the Prophet ﷺ informed us.

And from Ibn ʿAbbās: the Messenger of Allah ﷺ said:

إن الله تَجَاوزَ لِي عن أمتي الخطأَ والنِّسْيانَ وما اسْتُكْرِهُوا عليه.

“Indeed, Allah has pardoned for me my Ummah’s mistakes, forgetfulness, and what they are compelled to do.”[505] In another narration: “Raised from my Ummah…”—and the madhhab is that what is lifted is sin.[506]

According to the madhhab, the consequences of forgetfulness vary depending on what was forgotten:

مَن نَسِيَ صَلَاةً فَلْيُصَلِّ إِذَا ذَكَرَهَا، لا كَفَّارَةَ لَهَا إِلَّا ذلكَ.

- If a required act is forgotten, it must be made up. In the agreed-upon ḥadīth from Anas, the Prophet ﷺ said: “Whoever forgets a prayer, let him pray it when he remembers it; there is no expiation for it except that.”
- If one forgets a condition (sharṭ) or an integral pillar (rukn) of worship, it must be corrected or the act repeated—such as omitting a rakʿah or a prostration. Similarly, if one realizes he had an impurity on him but prays forgetting it, he must repeat the prayer.[507] Also, if he forgets his state of ritual impurity and prays, the prayer is invalid. The same applies if he prays before the time has entered out of forgetfulness. If a hunter forgets to invoke Allah’s name (tasmiyah) at the time of the shot, the game is not lawful. However, they permitted the slaughtered animal even when tasmiyah is forgotten—perhaps due to specific texts and other reasons they mentioned.[508]
- As for obligatory acts (wājibāt), they are waived in cases of forgetfulness. So, if one forgets the tasmiyah (invocation of Allah’s name) when making wuḍūʾ, or forgets some obligations in ṣalāh, his ablution and prayer are still valid.[509]

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[505] Imām Aḥmad and others deemed it weak, while some strengthened it due to its multiple chains. As for its meaning, it is agreed upon among them.

[506] "The more apparent view—and Allah knows best—is that the forgetful (*nāsī*) and the mistaken (*mukhṭiʾ*) are excused in the sense that sin is lifted from them, because sin is contingent upon intentions and objectives, and neither the forgetful nor the mistaken has intention in their actions, so they bear no sin. However, the removal of legal rulings from them is not the intended meaning of these texts; thus, establishing or negating such rulings requires separate evidence." Jāmiʿ al-ʿUlūm wa-l-Ḥikam, Ibn Rajab, 2:369.

[507] "Avoiding impurity is a condition for prayer, so it is not waived due to ignorance or forgetfulness, just like purification from *ḥadath*." Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 1:363.

[508] "(However, it is not waived here)," meaning in *ṣayd* (hunting), "(due to forgetfulness)" or ignorance, based on specific texts and because slaughtering is frequent, making forgetfulness in it more common. A distinction is made between *dhabīḥah* (ritual slaughter) and *ṣayd* (hunting) in that slaughter occurs in its proper place, so leniency is permitted in it, unlike in hunting.” Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 6:356.

[509] "Its place is the tongue, and its time is after the intention. Its wording is 'Bismillah.' (It is waived in case of forgetfulness) explicitly narrated from Ahmad, based on the ḥadīth: *'My ummah has been pardoned for mistakes and forgetfulness.'* Just like the obligations of prayer." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:49.

مَنْ أَكَلَ نَاسِيًا، وَهُوَ صَائِمٌ، فليتمَّ صَوْمَهُ، فَإِنَّمَا أَطْعَمَهُ الله وسقاه.

- If someone forgets and commits a forbidden act that does not involve destruction, there is no penalty, even if it would otherwise invalidate the act of worship—such as eating during Ramadan. Abū Hurayrah (rA) narrated that the Prophet ﷺ said: "Whoever forgets and eats while fasting, let him complete his fast, for it is Allah who fed him and gave him drink." An exception was made for sexual intercourse—where forgetfulness is not an excuse for the fasting person (contrary to the Ḥanafīs and Shāfiʿīs), nor for the pilgrim (contrary to the Shāfiʿīs), if they engage in intercourse forgetfully. They may have excluded it because they could not imagine it or because of the gravity of such an act in invalidating these rituals.[510] Likewise, if a pilgrim (muḥrim) does something prohibited that involves no destruction, there is no penalty. If one prays in a usurped area or while wearing usurped clothes, forgetting that they are usurped, his prayer is valid.[511]
- However, if one forgetfully commits a prohibited act that involves destruction (itlāf), he is liable. So, if a muḥrim shaves, trims nails, or kills game while forgetting, he must offer compensation (kaffārah).[512]

Upon careful examination, their rulings can largely be traced to two underlying principles:

النسيان إنما يؤثر في جعل الموجود كالمعدوم. لا في جعل المعدوم كالموجود

1. "Forgetfulness only renders the existing as though it were non-existent. It does not make the non-existent into something that exists."[513]
2. Forgetfulness does not affect the legal consequences tied to declaratory rulings (khiṭāb al-waḍʿ), so destruction must be compensated.[514]

Shaykh Ibn ʿUthaymīn said:

وكل متلف فمضمون إذا ... لم يكن الاتلاف من دفع الأذى

"All destruction is liable unless… It was done to repel harm,

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[510] "(Or) if he was (coerced or forgetful), according to the more correct opinion, because fasting is an act of worship that is invalidated by intercourse. Thus, it is nullified by it in all cases, just like prayer and ḥajj." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 3:401.

[511] "From what has been mentioned, it is understood that if one was ignorant or forgetful that it was usurped property, silk, or otherwise prohibited, it remains valid." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 2:15.

[512] "Ibn Hāniʾ said: "I heard Abū ʿAbd Allāh say that Ibn ʿUyaynah said: 'There are three matters in which forgetfulness is not excused: killing game, intercourse, and plucking hair; in these, intentional and mistaken acts are the same.'" Al-Jāmiʿ li-ʿUlūm al-Imām Aḥmad – al-Fiqh, 8:307. It may be supported, with some distinction, by the case of Kaʿb ibn ʿUjrah, who suffered harm to the extent that lice fell from his hair, yet the expiation was not waived for him.

[513] *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 4:212.

[514] "His statement, 'What has been established of their rulings,' refers to the rulings concerning the sleeper, the forgetful person, and the intoxicated person. 'Such as financial liability and the validity of divorce, these are based on causation.' (...) This includes financial liability arising from injuries (...) and the validity of divorce. (...) The response is that these consequences do not belong to legal accountability but to connecting a ruling with its cause. (...)" Sharḥ Mukhtaṣar al-Rawḍah, al-Ṭūfī, 1:189.

أويك مأذونا به من مالك ... أو ربنا ذي الملك خير مالك

Or done with the owner's permission, Or the permission of the Lord, the Best of owners."

However, forgetfulness has no impact in the madhhab on the validity of divorce[515] or breaking conditional oaths such as those that cause divorce or emancipation, unlike breaking oaths that require expiation (yamīn mukaffarah). [516]

Imām Taqī al-Dīn Ibn Taymiyyah followed the first principle fully, not obligating anything on one who forgetfully does something prohibited—except for compensation for the property of humans, and for game, because these are substitutions, unlike other rights of Allah.[517]

Shaykh Ibn ʿUthaymīn chose the view that liability is lifted in all cases due to forgetfulness—except in the rights of other human beings. He said:

٥٥ - والإثم والضمان يسقطان .. بالجهل والإكراه والنسيان

55 – Sin and liability are both lifted .. By ignorance, coercion, and forgetfulness—

٥٦ - إن كان ذا في حق مولانا .. ولا تُسقط ضمانًا في حقوق للملا

56 – If it concerns the right of our Master— But not for the rights of the people at large.

This is another narration from the Imām. Allah says:

وَمَنْ قَتَلَهُ مِنْكُمْ مُتَعَمِّدًا فَجَزَاءٌ مِثْلِ مَا قَتَلَ مِنَ النَّعَمِ

"And whoever among you kills it intentionally, the penalty is an offering of a livestock animal equivalent to what he killed." [al-Māʾidah 5:95]

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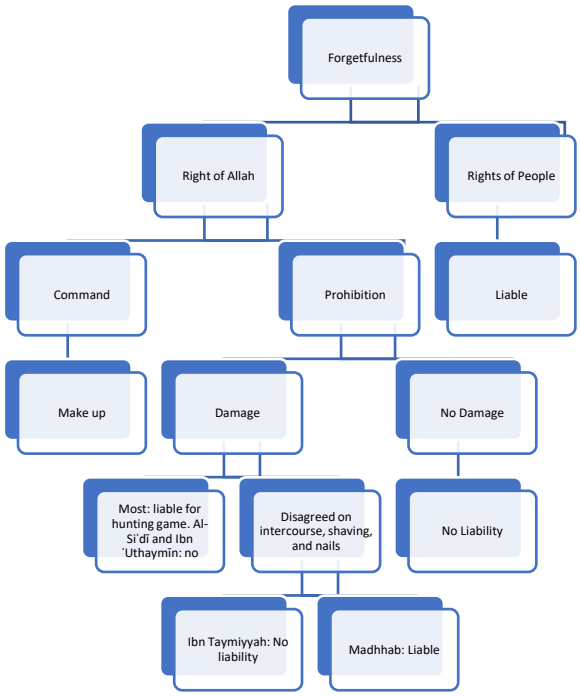
[515] "(...) Divorce does not take effect when pronounced by a sleeper because its validity requires the intention to effect it, and a sleeper has no such intention. (...) As for the forgetful and intoxicated persons, scholars have disagreed regarding their divorce. Two positions are reported from Aḥmad concerning the forgetful person and several concerning the intoxicated person. (...) The well-known position among the aṣḥāb is that divorce takes effect in both cases, though the more consistent position is that it does not." Sharḥ Mukhtaṣar al-Rawḍah, al-Ṭūfī, 1:189.

[516] "If a person swears not to do something but then does it forgetfully or ignorantly, he breaks the oath in matters of divorce and emancipation (...) because these involve a private right, and therefore the ruling applies despite forgetfulness or ignorance. (...) He does not break an expiatory oath through forgetfulness or ignorance, because expiation is imposed to remove sin, and neither bears sin. Another report holds that he does not break the oath in any of these cases and that his oath remains in effect; this was chosen by the Shaykh and others. (...) Shaykh Taqī al-Dīn stated that this also includes one who acts on the basis of an interpretation. (...)" Kashshāf al-Qināʿ, al-Buhūtī, 12:358.

[517] "It has been established through the indications of the Qurʾān and Sunnah that one who commits a prohibited act mistakenly or forgetfully is not held accountable by Allah for it. (...) Such an act does not invalidate one's worship. (...) Expiation and compensatory penalties, however, are imposed as substitutes for what has been destroyed, just as destroyed property must be compensated with its equivalent. (...) The penalty for hunting, when imposed upon the forgetful or mistaken person, belongs to this category. (...) The most apparent position is that one who commits a prohibited act mistakenly or forgetfully is liable only for hunting. (...) Following this reasoning, a fasting person who eats, drinks, or engages in intercourse forgetfully or mistakenly is not required to make up the fast. (...)" Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 25:226.

{وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَى أَهْلِهِ}

As for the rights of human beings, Allah says: “Whoever kills a believer by mistake must free a believing slave and pay blood money to the victim’s family.” [al-Nisāʾ 4:92]




**The Fifth Cause of Alleviation: Ignorance (*Jahl*)**

الإتلاف يستوي فيه المتعمد والجاهل والناسي.

In *al-Qāʿidah al-Saʿdiyyah* (Maxim 13), it is stated:
"In cases of destruction, the intentional, the ignorant, and the forgetful are treated the same."

16 - والشرع لا يلزم قبل العلم .. دليله فعل المسيء فافتهم

١٧ - لكن إذا فرط في التعلم .. فذا محل نظر فلتعلم

Shaykh Ibn ʿUthaymīn said:
16 – The Sharīʿah does not obligate before knowledge… its proof lies in the action of the man who prayed incorrectly, so understand.
17 – But if he was negligent in seeking knowledge, then this is a matter of consideration, so learn it."

Here important questions arise, such as: Is the ignorant person addressed?

Ibn al-Laḥḥām stated in *the eighth maxim*: "For the validity of legal accountability (*taklīf*), it is conditioned that the person is aware of what he is obligated to do. This is referred to as ‘obligation upon the unaware.’ There is a difference of opinion regarding this issue, and it is built upon the debate over whether it is valid to impose legal responsibility for what is impossible. If we deny the imposition of impossibilities, then denying accountability upon this follows even more strongly. If we allow it, then according to al-Ashʿarī there are two opinions, as transmitted by Ibn al-Tilimsānī and others. They said:

The distinction lies in the fact that imposing responsibility for what is impossible serves the purpose of testing and trying the individual."[518]

Is the Negligent Person Excused?

" إذا تقرر هذا فههنا مسائل تتعلق بجاهل الحكم، هل هو معذور أم لا، ترتبت على هذه القاعدة. فإذا قلنا يعذر فإنما محله إذا لم يقصر ويفرط في تعلم الحكم أما إذا قصر أو فرط فلا يعذر جزما."

Ibn al-Laḥḥām said: "Once this is established, there are related matters concerning the ignorant person—whether he is excused or not—which are built upon this foundation. If we say that he is excused, then it is only if he did not neglect or fall short in seeking knowledge. However, if he was negligent or careless, then he is not excused—definitively."[519]

However, the lack of excuse for ignorance in the case of negligence is not absolute, as the layperson is not expected to learn fine or intricate matters. Thus, scholars explicitly permitted excusing the delay in requesting *shufʿah* (preemption rights) in the case of someone whose ignorance of its forfeiture due to delay is considered acceptable for someone like him.[520]

Similarly, if someone ate or drank slightly during prayer, ignorant of the prohibition, his prayer was not invalidated.

Ibn al-Laḥḥām said: "Among the examples: If a child was born on a man's bedding (*firāsh*), and he delayed disavowing paternity without a valid excuse, claiming he did not know he had the right to disavow, or did not know it had to be done immediately—and he was newly converted to Islam—it would be accepted from him. Otherwise, it would not be accepted, whether he was raised among scholars or was among the common travelers or tradesmen who do not mix with scholars. This was mentioned by al-Qāḍī in *al-Mujarrad*. Abū Muḥammad said: If he was among the general populace, his excuse would be accepted, because such matters are hidden from them, and thus he is excused by ignorance."[521]

Thus, the ignorant person bears no sin if he was not negligent. However, what is the effect of ignorance and when is the ignorant person excused in the *madhhab*?

Ibn al-Laḥḥām states in *the eighth maxim*:
"Based on the above, several issues arise regarding the ignorant person's excuse, including:"

1. Speaking during prayer out of ignorance of the prohibition: Some of our fellows said: *The newly converted Muslim*. Al-Qāḍī said in *al-Jāmiʿ*: No narration from Aḥmad is known; an *iḥtimāl* (possibility) of no invalidation was proposed. *[Later scholars: prayer is invalidated.]*[522]

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[518] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 87.

[519] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 87.

[520] "(Or) he delayed the demand (out of ignorance that delay causes forfeiture) of preemption, (and someone like him would be ignorant of this), it is not forfeited, because ignorance is an excuse, analogous to his failure to demand it because he was unaware of it." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:337.

[521] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 87.

[522] "Speaking during prayer falls into two categories. If it is intentional, the prayer is invalidated by consensus. (...) If it occurs through forgetfulness, ignorance, or the assumption that the prayer has ended, it is also invalidated. (...) Another

2. Among the cases: If one eats or drinks a small amount during prayer out of ignorance of its prohibition, does his prayer become invalid? There are two narrations on this issue. [Later fellows: it does not invalidate the prayer.] However, if the eating or drinking is excessive, the prayer is invalidated according to the one existing narration. And if we say that it does invalidate the prayer, then there is no distinction between voluntary (nafl) and obligatory (farḍ) prayers, according to the correct view.[523]
3. Among the cases: If, according to the more apparent of the two narrations, we obligate expiation (*kaffārah*) for intercourse with a menstruating woman upon the knowledgeable one, is it obligatory upon the ignorant one? Two narrations: *[Later scholars: it is obligatory.]*
4. Among the cases: If we hold, according to the correct of the two narrations, that eating camel meat invalidates *wuḍūʾ*, and the person was ignorant of the ḥadīth, then there are two narrations. Al-Khallāl and others preferred that it does not invalidate *wuḍūʾ*. Al-Khallāl said: "This became his settled position due to the subtlety of the evidence." [later fellows: it invalidates, and perhaps because eating it is a cause linked to the resulting invalidation, and due to the generality of the ḥadīth][524]
5. Among the cases: If we hold, according to the correct of the two narrations, that a man's prayer is not valid if he prays alone behind the row, and he was unaware of the ḥadīth, then there are two narrations on whether his prayer is valid. [later fellows: it is invalidated, and its evidence is obscure like the previous case, but perhaps they ruled it invalid due to the generality of the prohibition, and a prohibition implies invalidity].
6. Among the cases: If a fasting person eats, drinks, or undergoes cupping while ignorant of its prohibition, his fast is invalidated; this was explicitly stated by Imām Aḥmad regarding cupping.[525] [here they distinguished between ignorance and forgetfulness].

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narration, chosen by Shaykh al-Islām [Ibn Taymiyyah], holds that it is not invalidated, based on the incident of Dhū al-Yadayn, in which the Prophet ﷺ spoke without repeating the prayer. The forgetful person is analogous, because what is excused through ignorance is likewise excused through forgetfulness." Munyat al-Sājid bi-Sharḥ Bidāyat al-ʿĀbid wa-Kifāyat al-Zāhid, al-Yatāmā and al-ʿĪdān, 121.

[523] "If it is done forgetfully, the prayer is not invalidated if it is slight. This is the position of the madhhab in both obligatory and voluntary prayer, and it is upheld by most of the aṣḥāb. Another narration holds that it is invalidated. (...) Eating or drinking forgetfully does invalidate the prayer if excessive, according to the position of the madhhab. (...) Ignorance of this ruling is treated like forgetfulness, according to the correct position in the madhhab. (...)" Al-Inṣāf, al-Mardāwī, 4:21.

[524] "Based on this, there is no difference between a small or large amount, whether it is (raw or cooked), nor between the one eating being aware of the ruling or ignorant of it." *Kashshāf al-Qināʿ*, al-Buhūtī, 1:303.

[525] "One only breaks the fast through the aforementioned acts when they are done deliberately, while remembering the fast and acting voluntarily. (...) A person ignorant of the prohibition also breaks the fast, as was explicitly stated regarding cupping. (...) Al-Hidāyah and al-Tabṣirah, however, state that the fast is not broken because the person did not deliberately commit the invalidating act, just like the forgetful person. Al-Kāfī reconciled the two by holding that the ignorant person incurs no sin." Al-Furūʿ wa-Taṣḥīḥ al-Furūʿ, Ibn Mufliḥ and al-Mardāwī, 5:12.

7. Among them: If a person engages in intercourse while in a state of *iḥrām*, ignorant of its prohibition, his ruling is the same as that of the knowledgeable person. This is the position transmitted by al-jamāʿah from Aḥmad.[526]
8. Among them: If a person wears stitched clothing, applies perfume, or covers his head while in a state of *iḥrām*, being ignorant of its prohibition, some of the later fellows said: it may be probable that he should be treated like the case of fasting. Al-Qāḍī said to his opponent: he must affirm this view. [later fellows: he is not required to offer expiation, and this differs from the case of omitting an obligatory act in ḥajj, for which a *fidyah* is due].
9. As for the ḥudūd (prescribed punishments), they are not imposed except upon one who is knowledgeable of the prohibition. As for one who is ignorant of the requirement of the ḥadd punishment, it is not waived due to his ignorance [one who knows the ruling but is ignorant of the prescribed punishment is not excused]. This was mentioned by more than one of the fellows... [if he was raised among Muslims and claimed ignorance of the prohibition, his claim is not accepted].
10. Among the cases: If we hold, according to the correct position in the madhhab, that prayer is not valid in a garment made of silk or usurped property, then if the person was ignorant of the prohibition, there are two narrations regarding this. [later fellows: it is valid, perhaps because it involves a material doubt (*shubhah mawḍūʿiyyah*), and both matters may be obscure].
11. Among the cases: The obligations of prayer that are waived due to forgetfulness and cause the invalidation of the prayer if deliberately abandoned: The author of *al-Riʿāyah* stated that if they are abandoned out of ignorance of their obligation, the ruling is the same as that of forgetfulness. He attributed this to an explicit statement (*naṣṣ*) of Aḥmad.
12. Among the cases: If the Imām stands for an extra rakʿah and two people glorify (say *subḥān Allāh*) to alert him, he must return as long as he is not certain of his own correctness. If he does not return, his prayer becomes invalid, and the prayer of the one who knowingly follows him also becomes invalid, but not that of the ignorant follower, according to the sounder view in both cases."[527]

Exceptions

There is disagreement within the madhhab regarding whether a small amount of speech or other invalidating actions during prayer, done out of ignorance of the ruling, nullify the prayer. The madhhab

[526] The expression "narrated by the group" (*naqalahu al-jamāʿah ʿan Aḥmad*) in Ḥanbalī usage refers to a group of the major fellows of Imām Aḥmad who transmitted rulings from him. The primary individuals intended are: ʿAbd Allāh and Ṣāliḥ, his sons; Ḥanbal ibn Isḥāq, his cousin; Abū Bakr al-Marrūdhī; Ḥarb al-Kirmānī; Ibrāhīm al-Ḥarbī; Abū Ṭālib Aḥmad ibn Ḥumayd al-Mushkānī; and ʿAbd al-Malik ibn ʿAbd al-Ḥamīd al-Maymūnī. There is minor disagreement regarding the inclusion of certain narrators. The purpose of this designation is to highlight the widespread acceptance and strong attribution of the narration to Imām Aḥmad.

[527] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 87.

holds that the prayer is invalidated, while Imām Taqī al-Dīn chose the narration that it is not invalidated.[528]

There is also disagreement within the madhhab regarding the dismissal of an agent (*wakīl*) and whether his actions before being informed of his dismissal are invalid and whether he is liable. The madhhab holds that the agent is dismissed and his transactions are invalid even before knowledge of dismissal, but Imām Taqī al-Dīn preferred the narration that requires knowledge for invalidation.[529]

Thus, they do not excuse ignorance in matters of liability for destroyed property (*ḍamān al-mutlafāt*), the rights of others, contracts and transactions, conditions and pillars of acts of worship, nullifiers of fasting, intercourse during menstruation, fasting, and ḥajj,[530] nor in the obligatory acts of ḥajj (in which a compensatory sacrifice *fidyah* is required). However, they do excuse ignorance regarding obligations of prayer, prohibitions of *iḥrām*, and ḥudūd (prescribed punishments) — in cases where it is conceivable that a person of similar background could be ignorant of the prohibition.

There is no doubt that in their differentiation between these similar cases, they considered various meanings and factors. Yet despite that, it remains difficult to establish a fully consistent, universal rule for the madhhab in this area.

As for Imām Taqī al-Dīn, he consistently maintained his principle regarding the ignorant: He excused ignorance in prohibitions when there was no destruction (*itlāf*), but he obligated performance of positive commands if the time for their performance remained. If the time had passed, he did not obligate making them up (*qaḍāʾ*). He supported his view with robust evidence, and we will present his full discussion for those seeking further benefit.

"If someone converts to Islam without knowing that Allah has obligated prayer, or is unaware of the obligation of some of its pillars—such as praying without *wuḍūʾ* because they do not know that purification is required, or praying while in a state of major ritual impurity without knowing that *ghusl* is

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[528] "His statement, 'If one speaks during the prayer, it is invalidated,' applies when the speech is intentional and the person knows the ruling. If it is done forgetfully, the author also held that the prayer is invalidated, and this is the position of the madhhab. (...) Another narration holds that forgetful speech does not invalidate it, and this was chosen by (...) Shaykh Taqī al-Dīn. (...) Regarding one who is ignorant that speech is prohibited or invalidates the prayer, the author treats him like the forgetful person. (...) This is the correct position in the madhhab. (...) A second narration holds that the ignorant person's speech does not invalidate the prayer, even if the forgetful person's speech does." Al-Inṣāf, al-Mardāwī, 4:32.

[529] "An agent is dismissed upon the death of the principal or the principal's dismissal of him, even if the agent has not learned of it. (...) Terminating agency does not require the other party's consent and therefore does not require the agent's knowledge, just like divorce. The agent is consequently liable for transactions conducted afterward. (...) The principal's claim that the agent was dismissed before acting is not accepted without evidence, because the default is the continuation of the agency and the agent's freedom from liability for what had been authorized." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:193.

[530] "If one engages in intercourse during the daytime of Ramaḍān without a valid excuse (...) he must make up the fast and offer expiation, whether the act was intentional, forgetful, ignorant, mistaken, voluntary, or coerced, as explicitly stated. This includes whether he was coerced into performing it or it was performed upon him while asleep. (...) The forgetful person is treated like the intentional one, the coerced like the willing, and the sleeping like the awake because the Prophet ﷺ did not request further clarification from the Bedouin; had the ruling differed, he would have done so. (...) Moreover, fasting is an act of worship in which intercourse is prohibited, so its intentional and unintentional forms are treated alike, as in ḥajj." Kashshāf al-Qināʿ, al-Buhūtī, 5:268.

obligatory, then such a person is not considered a disbeliever due to their ignorance. However, once they become aware of the obligation, must they make up the missed prayers? There are two opinions among scholars in the *madhhab* of Aḥmad, Mālik, and others.

1. Some say making up the prayers is obligatory, which is the well-known position of the jurists of al-Shāfiʿī's school (aṣḥāb al-Shāfiʿī) and many among the jurists of Aḥmad's school (aṣḥāb Aḥmad).
2. Others say it is not obligatory, which is the stronger view. There are two explicit narrations from Aḥmad regarding someone who prayed in camel resting places without knowing it was prohibited, then later learned of the ruling—whether they must repeat the prayer is disputed in two narrations. Similarly, if someone prayed without performing wuḍūʾ after eating camel meat, being *unaware* of the prohibition, and then learned of it, there are two explicit narrations as to whether he must repeat the prayer.
3. Another opinion holds that one who neglected prayer due to ignorance of its obligation must make it up if they were in *Dār al-Islām*, but not if they were in *Dār al-Ḥarb*; this is the well-known view of Abū Ḥanīfah.

A similar issue arises in fasting: if a person unknowingly commits an act that invalidates the fast, must they make it up? There are two opinions within the *madhhab* of Aḥmad. The same applies to someone who commits a *maḥẓūr* (prohibited act) in *ḥajj* out of ignorance.

The foundational question is whether a legal obligation (*ḥukm al-khiṭāb*) applies to a legally accountable person (*mukallaf*) before the ruling reaches them. There are three opinions within the *madhhab* of Aḥmad and others: Some say it applies. Others say it does not apply. A third view holds that the initial command applies, but abrogation (*naskh*) does not.

والأظهر أنه لا يجب قضاء شيء من ذلك، ولا يثبت الخطاب إلا بعد البلاغ

لِأُنذِرَكُم بِهِ وَمَن بَلَغَ

وَمَا كُنَّا مُعَذِّبِينَ حَتَّى نَبْعَثَ رَسُولًا

لئلا يَكُونَ لِلنَّاسِ عَلَى اللهِ حُجَّةٌ بَعْدَ الرُّسُل

The strongest view is that making up the missed acts of worship is not required, and that legal rulings do not apply until they have been conveyed. This is supported by Allah's statement: *"That I may warn you with it and whomever it reaches."* (Al-Anʿām: 19) and His statement: *"And We do not punish until We have sent a messenger."* (Al-Isrāʾ: 15) and His statement: *"So that people will have no argument against Allah after the messengers."* (Al-Nisāʾ: 165)

There are numerous similar verses, in which Allah makes it clear that He does not punish anyone until they have received the message.

If a person acknowledges that Muhammad ﷺ is the Messenger of Allah and believes in him but is unaware of many aspects of his teachings, Allah does not punish them for what has not reached them. If He does not punish them for failing to believe before the message reaches them, then He would be even

less likely to punish them for neglecting certain conditions of faith before those conditions were conveyed to them.

This is also evident in the widespread *sunnah* of the Prophet ﷺ regarding such matters.

- It is established in the *authentic collections that* some of his companions misunderstood the words *"the white thread from the black thread"* (Al-Baqarah: 187), thinking it referred to literal threads of string. One of them would tie a black and white thread to his leg and continue eating until he could distinguish between them. The Prophet ﷺ clarified that the verse referred to the brightness of dawn against the darkness of night, yet he did not command them to make up their fasts.
- ʿUmar ibn al-Khaṭṭāb and ʿAmmār once became ritually impure (*junub*). ʿUmar refrained from praying until he found water, while ʿAmmār thought that *tayammum* should reach the entire body as water does, so he rolled in the sand like an animal. The Prophet ﷺ did not command either of them to repeat their prayers.
- Abū Dharr remained in a state of major impurity for a prolonged period without praying, and the Prophet ﷺ did not instruct him to make up missed prayers but simply told him to perform *tayammum* moving forward.
- A woman who experienced prolonged bleeding (*istiḥāḍah*) once told the Prophet ﷺ: *"I experience a severe flow that prevents me from praying and fasting."* The Prophet ﷺ instructed her to continue praying during her abnormal bleeding, but he did not order her to make up past prayers.

إن صلاتنا هذه لا يصلح فيها شيء من كلام الآدميين

- After speaking became prohibited in prayer, Muʿāwiyah ibn al-Ḥakam al-Sulamī unknowingly spoke during prayer. The Prophet ﷺ simply informed him: *"This prayer is not suitable for any human speech,"* but did not command him to repeat his prayer.
- When the number of resident prayer units was increased upon the Prophet's migration to Madīnah, people in distant places like Makkah and Abyssinia continued praying only two units of prayer. The Prophet ﷺ did not order them to repeat the prayers …

انزع عنك جبتك، واغسل عنك أثر الخلوق، واصنع في عمرتك ما كنت صانعا في حجك.

- And it is authentically reported in the *Ṣaḥīḥayn* that while the Prophet ﷺ was at al-Jiʿrānah, he was asked about a man who had entered *iḥrām* for ʿumrah while wearing a jubba (a long coat) and covered in khalūq (a scented dye). When revelation came to him, the Prophet ﷺ said: "Remove your jubba, wash off the traces of khalūq, and perform your ʿumrah as you would your ḥajj." This man had committed a prohibited act in *iḥrām* by wearing a jubba, yet the Prophet ﷺ did not instruct him to offer a sacrificial penalty (*dam*). Had he done so knowingly, he would have been required to offer *dam*.
- It is authentically reported in the *Ṣaḥīḥayn* that the Prophet ﷺ said to the Bedouin who performed his prayer incorrectly: *'Pray, for you have not prayed,'* repeating it two or three times. The man

responded: *'By the One who sent you with the truth, I do not know any better than this, so teach me what suffices for my prayer.'* The Prophet ﷺ then taught him the proper way to pray but did not command him to repeat the prayers he had performed before that. Despite the man's statement, *'I do not know any better than this,'* the Prophet ﷺ only ordered him to repeat the prayer he had just performed, because its time had not yet expired, making him still obligated to perform it correctly. The prayer he had already performed was not valid in fulfilling his obligation, while the time for the prayer remained. It is well known that if a child reaches puberty, a disbeliever embraces Islam, a menstruating woman becomes pure, or an insane person regains consciousness while the prayer time remains, they are obligated to perform the prayer as an *adāʾ* (within its prescribed time) and not as a *qaḍāʾ* (makeup prayer). However, if the time has already elapsed, they bear no sin for missing it. Likewise, the one who performed prayer incorrectly due to ignorance (*jahl*), upon learning the obligation of *ṭumaʾnīnah* (calmness and thoroughness in prayer) within the prayer time, becomes required to observe it from that point forward, but it was not required of them before. Thus, the Prophet ﷺ commanded him to practice *ṭumaʾnīnah* in the prayer of that time, but not to repeat previous ones. Similarly, the Prophet ﷺ instructed one who prayed alone behind the row (*ṣaff*) to repeat the prayer, and ordered one who left a dry spot on his foot while performing ablution to redo both his *wuḍūʾ* and *ṣalāh*.

These are the explicit texts from the Prophet ﷺ regarding the prohibitions related to prayer, fasting, and ḥajj when done out of ignorance, as well as for those who omitted obligatory acts due to ignorance."[531]

**The Sixth Cause of Alleviation: Coercion (*al-Ikrāh*)**

In the poetic summary by al-Siʿdī:

والخطأ الإكراه والنسيان -- أسقطه معبودنا الرحمن

لكن مع الإتلاف يثبت البدل -- وينتفي التأثيم عنه والزلل

"Error, coercion, and forgetfulness — the Merciful Lord has lifted them from us.
But in cases of destruction, compensation remains — while sin and blame are lifted."

«المكره المحمول كالآلة غير مكلف وهو تكليف بما لا يطاق ولو أكره وباشر بنفسه فمكلف.»

Ibn al-Laḥḥām said in the Sixth Maxim: "The one who is coerced and physically forced—like an instrument—is not held legally accountable. Imposing obligation upon him is to impose what is beyond capacity. However, if he is coerced yet carries out the act himself, then he is accountable."[532]

﴿ مَن كَفَرَ بِاللَّهِ مِن بَعْدِ إِيمَانِهِ إِلَّا مَنْ أُكْرِهَ وَقَلْبُهُ مُطْمَئِنٌّ بِالإِيمَانِ ﴾

Allah the Exalted said: *"Whoever disbelieves in Allah after having believed — except one who is coerced while his heart is at peace with faith"* [Al-Naḥl: 106]

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[531] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 22:40.

[532] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 64.

إن الله تَجَاوزَ لِي عن أمتي الخطأَ والنِّسْيانَ وما اسْتُكْرِهُوا عليه

And from Abū Dharr al-Ghifārī (rA), the Messenger of Allah ﷺ said: "Verily Allah has pardoned for my ummah error, forgetfulness, and what they are coerced into."[533]

Coercion (*ikrāh*) is of two types:

- Justified coercion (*bi-ḥaqq*), in which case the legal consequences of the act remain.[534]
- Unjustified coercion (*bi-ghayr ḥaqq*), which the Ḥanbalī school divides further into two categories:
    1. Compelling coercion (*ikrāh mulji'*), which eliminates legal accountability due to the total absence of choice.
    2. Non-compelling coercion (ikrāh ghayr mulji'), which has further detail and nuance.

Ibn Rajab said:

"The second section: the ruling concerning the coerced person.
It is of two types:

The first is one who has absolutely no choice or ability to resist — like one who is physically forced and carried into a place he had sworn not to enter, or is carried and used to strike another until that person dies, without any power to resist. Or a woman who is laid down and raped, unable to resist. Such a person bears no sin by consensus, and is not deemed to have broken his oath according to the majority of scholars." "It is narrated from al-Awzā'ī regarding a woman who was forced to act against an oath by her husband: that the expiation falls on the husband. And from Aḥmad a similar report exists — that if a man coerces his wife into intercourse during her fasting or *iḥrām*, then the expiation is on him. The well-known view from him, however, is that her fast or ḥajj becomes invalid through this.

والنوع الثاني: من أُكره بضرب أو غيره حتى فعل، فهذا الفعل يتعلق به التكليف، فإنه يمكنه ألا يفعل فهو مختار للفعل، لكن ليس غرضه نفس الفعل، بل دفع الضرر عنه، فهو مختار من وجه، غير مختار من وجه، ولهذا اختلف الناس: هل هو مكلف أم لا.

The second type: one who is coerced through beating or other means until he commits the act. In this case, legal accountability remains, because he still has the ability not to act — therefore he is considered as choosing to act. However, his motive is not the act itself, but to repel harm from himself. So he is partly choosing and partly not. This is why scholars differed: is he legally accountable or not?

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[533] Imām Aḥmad and others deemed it weak, while some strengthened it due to its multiple chains. As for its meaning, it is agreed upon among them.

[534] "Justified coercion does not prevent the binding legal consequences of what one was coerced to do. (...) Thus, if a judge compels someone to sell property to satisfy a debt (...) or compels someone who swore not to repay a debt to repay it, the latter breaks his oath because he actually performed what he had sworn not to do in circumstances in which he is not excused." Jāmi' al-'Ulūm wa-l-Ḥikam, Ibn Rajab, 2:375.

There is consensus among scholars that if one is coerced to kill an inviolable person (*maʿṣūm*), it is not permitted for him to do so. Because by doing so, he chooses to kill another in order to save himself — and this is a consensus among the jurists worthy of consideration …

If he is coerced by beating or the like to destroy the property of an inviolable person, is this permissible? There are two opinions among our fellows:

- If we say it is permitted [which is the madhhab], and the owner holds him liable, then he (the coerced) may seek compensation from the coercer.[535]
- If we say it is not permitted, then both are liable — just as in *qiṣāṣ* (retribution).
- It was said: liability falls solely on the coerced person who directly carried out the act—but this is a weak view.

If someone is coerced to drink wine or commit another forbidden act, is it then permitted for him to do so? There are two opinions:

1. Yes, it is permitted under coercion based on the statement of Allah Most High: *("Do not compel your slave girls into prostitution ... and Allah is Forgiving, Merciful after their coercion.")* [Al-Nūr: 33] This was revealed concerning ʿAbdullāh ibn Ubayy ibn Salūl, who forced two of his slave girls into zinā while they refused. This is the view of the majority, including al-Shāfiʿī, Abū Ḥanīfah, and the well-known view of Aḥmad …

The scholars who permit this differ on whether a man may be coerced into zinā. Some said: It is valid coercion, and he bears no sin. This is the view of al-Shāfiʿī and Ibn ʿAqīl among our fellows. Others said: Coercion is not valid in this case; he is sinful and the ḥadd punishment applies. This is the view of Abū Ḥanīfah, and the explicit position (manṣūṣ) of Aḥmad. It was also narrated from al-Ḥasan. [The madhhab: A coerced woman is not punished, but the man is punished if erection occurred.[536]]

2. The second view holds that taqiyyah (concealment of belief in the face of danger) applies only to verbal statements; it does not apply to actions, nor is coercion recognized in them. This was reported from Ibn ʿAbbās, Abū al-ʿĀliyah, Abū al-Shaʿthāʾ, al-Rabīʿ ibn Anas, and al-Ḍaḥḥāk. It is also one narration from Aḥmad, and was reported from Sahnūn as well…

As for coercion in speech, the scholars are in agreement about its validity. Whoever is coerced into making a forbidden statement under recognized coercion is permitted to utter it to save himself, and bears no sin. This is supported by the verse: (*"Except one who is coerced while his heart is at peace with*

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[535] "(If a person is coerced) into destroying (property that is subject to liability), the one who coerced them (*mukrih*) is liable, even if the property belonged to the coerced person (*mukrah*), because the act of destruction is attributed to the coercer, while the coerced person is merely an instrument." *Kashshāf al-Qināʿ*, al-Buhūtī, 9:302.

[536] "If a woman is coerced into zinā, no ḥadd applies (...) because coercion constitutes a legal ambiguity, and ḥudūd are averted by legal ambiguities. If a man is coerced into zinā and commits it, the ḥadd applies because intercourse requires an erection produced through volition, unlike the case of a woman. Another narration holds that the coerced man is not subject to the ḥadd, like the coerced woman. This was chosen by al-Muwaffaq and a group of scholars (...) based on the generality of the relevant report and because coercion constitutes a legal ambiguity. (...)" Kashshāf al-Qināʿ, al-Buhūtī, 14:57.

*faith"*) [Al-Naḥl: 106]. And the Prophet ﷺ said to ʿAmmār: "If they return, then return [to doing the same]."[537]

Among excuses in speech due to coercion is: If someone is coerced into taking an oath or breaking it, it is not binding, nor is he accountable for breaching it.[538]

Ibn al-Laḥḥām summarized: "This maxim yields different rulings in various branches of the madhhab depending on whether it relates to speech or action. The guiding principle in the madhhab is that coercion does not render actions permissible; rather, it only permits speech — though there is disagreement regarding some actions."[539]

And he said regarding the definition of coercion that prevents legal consequences from applying:

*"When we say that no legal consequence results from the act or statement of the coerced person—then what is the definition of the coercion that prevents such consequence?*

There is a difference in narration from Imām Aḥmad (may Allah be pleased with him) on this matter: The report transmitted by the group from him is that coercion is constituted by beating, imprisonment, or the taking of wealth...

Another narration from him states that threatening with those things also counts as coercion, if the person fears that the threat will be carried out. This was explicitly stated by him in the narration of Ibn Manṣūr, where he said: *"The threshold of coercion is when one fears being killed or severely beaten." ...*

إذا غلب على ظنه أنه يضره في نفسه أو أهله أو ماله فإنه يكون مكرها.

Abū al-ʿAbbās Ibn Taymiyyah (may Allah be pleased with him) said: *"If a person strongly believes that he will be harmed—whether in his person, his family, or his property—then he is considered coerced."*

And there is no difference whether the coercion comes from a ruler, or a thief, or a usurper. This was explicitly stated by Aḥmad in the narration of al-Marrūdhī regarding the usurper, and in the narration of al-Ḥasan ibn Thawwāb regarding the ruler.

It was also reported from Aḥmad in another narration that coercion does not apply if the coercer is not a ruler.

And another narration from him states: If the threat was of killing or cutting off a limb, then it is coercion; otherwise, it is not.

As for verbal abuse and insults, al-Qāḍī said in *al-Jāmiʿ al-Kabīr*: *"It is not coercion, according to a single narration, for anyone—whether they are affected by the abuse or not."*

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[537] Jāmiʿ al-ʿUlūm wa-l-Ḥikam, Ibn Rajab, 2:370.

[538] "Third: The oath-taker must be acting voluntarily; thus, an oath made under coercion does not take effect. Fourth: Breaking the oath (*ḥinth*) occurs by doing what one swore to abstain from or by neglecting what one swore to do, even if they are prohibited, except in cases of coercion, ignorance, or forgetfulness." *Ghāyat al-Muntahā*, Marʿī al-Karmī, 2:528.

[539] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 64.

And in *al-Mughnī*, it was said: *"As for insults and verbal abuse, they do not constitute coercion. However, if they are directed at a person of dignity in a manner that humiliates him and causes public shame, it is like excessive beating in the case of others."...*

If one is coerced by threatening to torture his child, some scholars said: This is not coercion. But the correct position in the madhhab is that it does count as coercion, and it applies when the threat involves someone whose suffering causes the person great distress—such as a parent, wife, or friend."[540]

Shaykh al-Shithrī articulated a useful principle regarding what is permitted under coercion. He said:

" والصواب في هذه المسألة: أن الإنسان يقارن بين موجب الإكراه، وبين الفعل الذي أُكره عليه، فيفعل أدناهما مفسدة. مثال ذلك: من قيل له: ادخل بيت غيرك، وإلا قتلناك. هنا أيهما أقل مفسدة؟ الدخول أقل مفسدة، فيدخل البيت. ولو قيل له: اقتل فلانا وفلانا، وإلا قتلناك. فحينئذ موجب الإكراه أقل مفسدة، فلا يقدم على فعل ما أكره عليه."

"The correct view in this matter is that a person should weigh between the harm threatened by the coercion and the act he is being coerced to perform, and then do the one that results in the lesser harm. For example, if someone is told: 'Enter someone else's house, or we will kill you,' then which is the lesser harm? Entering the house is the lesser harm, so he should enter.
But if he is told: 'Kill so-and-so and so-and-so, or we will kill you,' then the threat of coercion itself is the lesser harm, and so he should not commit the act he is coerced into."[541]

Ibn al-Laḥḥām listed several other applications. We mention them here for their benefit, adding a brief comment in brackets where necessary:

"If someone is coerced to perform wuḍūʾ and he intends it and does it himself, then it is valid without hesitation. Abū Muḥammad and others said the same: If someone is coerced to perform an act of worship and does it with the intention of complying with the Sharīʿah rather than the coercion, then it is valid …

Among the cases: If we say that expiation (*kaffārah*) is required for intercourse with a menstruating woman when done willingly, is it also required when done under coercion? There are two narrations. [Later fellows: It is required due to the generality of the ḥadīth.]

Among them: If someone refuses to pay the obligatory zakāh, the ruler may seize it from him by force, and the ruler's intention takes the place of the person's. This is what was mentioned by more than one of the fellows. Abū al-Khaṭṭāb and Ibn ʿAqīl said: It only suffices outwardly, not inwardly, just like prayer under compulsion. I say: this is more correct …

Among them: If the fasting person is coerced into eating or drinking or doing other nullifiers besides intercourse, then his fast is not invalidated …

Among them: If the person observing iʿtikāf (devotional retreat in a mosque) is forced to leave the mosque, then his *iʿtikāf* is not invalidated, even if he exits by himself …

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[540] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 73.

[541] Sharḥ Manẓūmat al-Qawāʿid al-Fiqhiyyah, Saʿd ibn Nāṣir al-Shithrī, 82.

Among them: If someone is coerced into intercourse and engages in it, then both qaḍāʾ (making up the act) and kaffārah (expiation) are required—this is the apparent position of the madhhab. Ibn al-Qāsim reported: "Whatever overwhelms the fasting person does not require *qaḍāʾ* or *kaffārah*." The fellows said: This indicates that both are waived in cases of coercion …

Among them: If a pilgrim is coerced into intercourse before the first release from iḥrām (al-taḥallul al-awwal), then his ḥajj is invalidated. This is the view explicitly narrated from Aḥmad by the group. It was also narrated from Aḥmad that it is not invalidated, and this view was chosen by Abū al-ʿAbbās [Ibn Taymiyyah].

As for the woman who is coerced into intercourse during ḥajj or fasting: If we say her ḥajj or fast is invalidated, then:

1. Is she obligated to offer the *kaffārah* from her own wealth?
2. Or is she not obligated to do anything?
3. Or must the husband bear the expiation on her behalf?

There are three narrations. [Later fellows: the woman is only obligated to make up the act of worship (*qaḍāʾ*)].

The distinction between intercourse and other nullifiers lies in the fact that intercourse is treated like destruction (*itlāf*), which is why intention and forgetfulness are treated the same—unlike other acts. This issue is subject to investigation.

In *al-Rawḍah*, it was said: "The woman who is coerced into intercourse—her fast is invalidated, but no *kaffārah* is required. Her ḥajj is not invalidated, but she must offer a *badanah* (a sacrificial camel)." And what was said here is a distinction between two like cases—and Allah knows best.

[Comment:

1- He is right about the similarity of fasting and ḥajj.

2- They distinguish between man and woman in cases of intercourse in multiple contexts, since intercourse can occur from the woman even without volition. The relied-upon view is that when her fast is invalidated, no expiation is due.[542] The relied-upon view is also that the coerced woman's ḥajj is invalidated, but no *sacrificial offering (hady*) is required from her. The one who coerced her bears the cost of the compensatory ritual.[543]]

Among them: All contracts and acknowledgements made under coercion are invalid…."[544]

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[542] "If a woman willingly consents while neither ignorant of the ruling nor forgetful of her fast, she is treated like the man regarding the obligation of making up the fast and offering expiation. (...) If she was forgetful, ignorant, or coerced, no expiation is required from her. If coerced, she must resist by the least forceful means available, escalating as necessary, even if this results in killing the aggressor." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:485.

[543] "The cost of performing the compensatory pilgrimage ritual for a woman who willingly consented to intercourse falls upon her (...) because she willingly invalidated her ritual and is therefore treated like the man. The cost of the compensatory ritual for a coerced woman falls upon the one who coerced her." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:550.

[544] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 64.

Conclusion:

«وسائر الأقوال يتصور عليها الإكراه، فإذا أكره بغير حق على قول من الأقوال، لم يترتب عليه حكم من الأحكام، وكان لغوا، فإن كلام المكره صدر منه وهو غير راض به، فلذلك عفي عنه، ولم يؤاخذ به في أحكام الدنيا والآخرة. وبهذا فارق الناسي والجاهل، وسواء في ذلك العقود: كالبيع والنكاح، أو الفسوخ: كالخلع والطلاق والعتاق، وكذلك الأيمان والنذور، وهذا قول جمهور العلماء، وهو قول مالك والشافعي وأحمد»

"All forms of speech are conceivable under coercion. So, if a person is unjustly coerced into making a statement, no legal consequence results from that statement; it is null and void. This is because the coerced person's words issued from him unwillingly—so he is pardoned, and is not held accountable for them in either this life or the next. In this way, the coerced person differs from the forgetful or ignorant one. This applies equally to contracts, such as sales and marriage, as well as to dissolutions such as khulʿ, divorce, and manumission, and also to oaths and vows. This is the opinion of the majority of scholars—and it is the view of Mālik, al-Shāfiʿī, and Aḥmad."[545]

Among such cases is the utterance of a word of disbelief (*kalimat al-kufr*); it is permitted for a person to utter it with his tongue while his heart remains firm in faith.

Know that, according to our view, the marriage of a coerced person is invalid[546]—contrary to the Ḥanafīs. The validity of a marriage contracted for protection (nikāḥ al-taljiʾah)[547] does not undermine this ruling, for there is a distinction between the two. The latter more closely resembles the marriage of one who is jesting, which is valid according to our school.

Prohibited acts that are permitted in cases of necessity, such as destroying another's property or drinking alcohol, are lawful for the coerced person, and the liability for the destroyed property falls on the coercer.

Prohibited acts that are not permitted even under necessity—namely, those that involve aggression against others—such as murder, are not permitted, even for the coerced person, and he remains liable for punishment.[548]

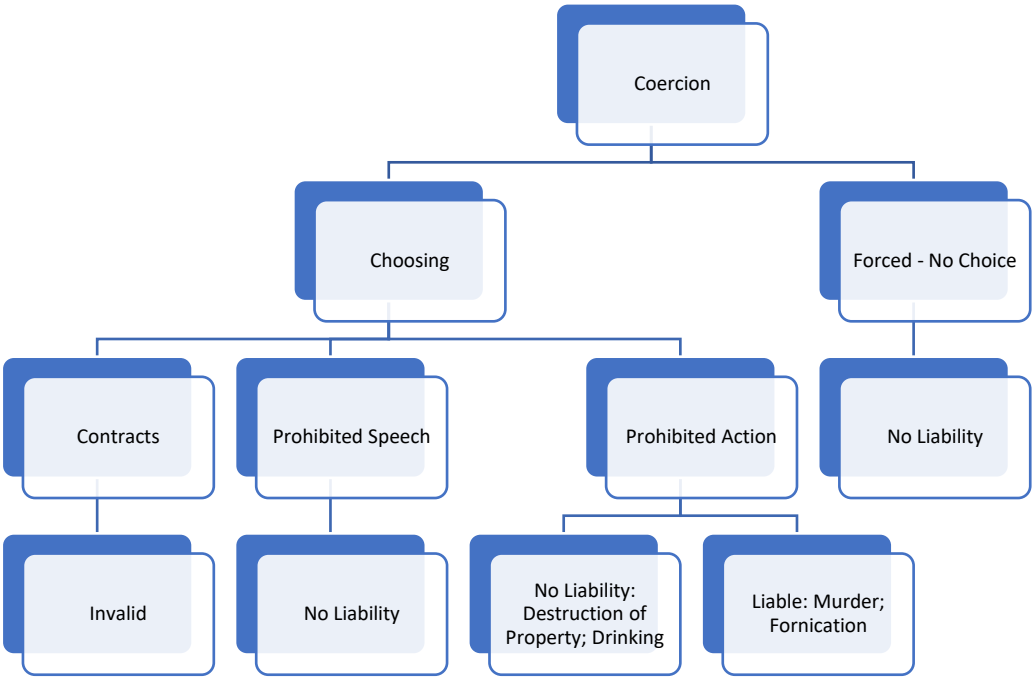
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[545] Jāmiʿ al-ʿUlūm wa-l-Ḥikam, Ibn Rajab, 2:374

[546] "Section: Its conditions are five (...) The second: Their mutual consent or that of their representative." *Al-Iqnāʿ*, al-Ḥajjāwī, 3:169.

[547] Nikāḥ al-taljiʾah refers to a marriage contract concluded not under genuine coercion, but as a protective measure for the woman (...) without intending actual marital life. Al-Furūʿ states: "Marriage is only concluded through an offer and acceptance using the words 'I have married,' 'I have given in marriage,' 'I have married her,' 'I accept this marriage,' or 'I am pleased with it,' even if expressed in jest or as taljiʾah." Al-Furūʿ wa-Taṣḥīḥ al-Furūʿ, Ibn Mufliḥ and al-Mardāwī, 8:202.

[548] "If a legally accountable person (*mukallaf*) is coerced into killing a specific individual or into coercing someone else to do so, and he carries it out, then *qiṣāṣ* (retribution) applies to all involved." *Muntahā al-Irādāt with the marginalia of Ibn Qāʾid*, Ibn al-Najjār, 5:16.




## The Seventh Cause of Legal Alleviation: Illness

﴿ فَمَن كَانَ منكُم مَّرِيضًا أَوْ عَلَى سَفَرٍ فَعِدَّةٌ مِّنْ أَيَّامٍ أُخَرَ ﴾

Allah says: *"So whoever among you is ill or on a journey, then [let them fast] a number of other days."* [al-Baqarah: 184]

The concessions (*rukhaṣ*) granted on account of illness are numerous. These include: performing *tayammum* when there is fear of harm from using water, wiping over a cast or bandage, and refraining from removing it if it was applied without prior purification and its removal is feared to cause harm;[549] sitting during obligatory prayer, lying down, or signaling with gestures instead of performing physical movements; and even performing excessive movements during prayer for someone suffering from itching.[550] Further concessions include: combining between two prayers (*jamʿ*), exemption from congregational prayer (*jamāʿah*) and *jihād*, breaking the fast during Ramaḍān, deputing another to perform the stoning ritual (*ramy al-jamarāt*) during ḥajj, committing some otherwise forbidden acts while in *iḥrām*, and allowing a physician to look at parts of the body normally covered.

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[549] "It is understood from his statement that a splint (*jabīrah*) is treated like any other covering in the aforementioned rulings. Thus, if it is applied without prior full purification with water, it must be removed. (However, it suffices for one who fears) death or harm from (removing a splint that was not preceded by purification) with water to perform *tayammum*." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:64.

[550] "If an action unrelated to the prayer is prolonged according to customary standards and performed continuously, it invalidates the prayer (...) whether done intentionally, forgetfully, or ignorantly. (...) This does not apply when necessity exists, such as fear, fleeing from an enemy, a flood, a wild animal, or fire, in which case the prayer is not invalidated. (...) Ibn al-Jawzī included within necessity the case of a person suffering from itching that he cannot endure." Kashshāf al-Qināʿ, al-Buhūtī, 2:462.

«... والمرض لا ضابط له؛ فإن الأمراض تختلف، منها ما يضر صاحبه الصوم، ومنها ما لا أثر للصوم فيه، كوجع الضرس وجرح في الإصبع والدمل والقرحة اليسيرة والجرب وأشباه ذلك، فلم يصلح المرض ضابطا، وأمكن اعتبار الحكمة، وهو ما يخاف منه الضرر، فوجب اعتباره بذلك.»

Ibn Qudāmah states in *al-Mughnī* the necessity of defining the type of illness that qualifies for legal alleviation. He says: *"There is no fixed standard for illness, for illnesses vary. In some, fasting harms the sufferer, while in others fasting has no effect, such as a toothache,*[551] *a wound in a finger, a boil, a small ulcer, scabies, and similar conditions. Therefore, illness itself is not a reliable standard. What can be relied upon is the underlying rationale: the fear of harm. Thus, it must be assessed based on that."*[552]

The criterion (*ḍābiṭ*) for illness, then, is that performing the act of worship would cause harm—either by worsening the illness, delaying recovery, or by requiring the harmful abandonment of treatment to perform the act.[553] The same applies if the act of worship itself would induce illness, such as fear of becoming sick due to cold water in ablution,[554] or skipping Jumuʿah and congregational prayer out of concern for falling ill.[555]

At times, jurists are more expansive in granting concessions to the sick in order to avert hardship, as in allowing the combination of prayers for one who is ill.[556]

This criterion is to be determined either through a recognizable sign, personal experience, or the statement of a trustworthy physician.[557]

Exceptions

Among the exceptions is the non-postponement of carrying out legal punishments (*ḥudūd*) for the sick, according to the sound view among later jurists, though scholarly disagreement on this point is well known.[558]

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[551] Considering such cases as grounds for alleviation is the view of Ibn Sīrīn and the Ẓāhirī school.

[552] *al-Mughnī*, Ibn Qudāmah, 4:404.

[553] "Likewise, breaking the fast is permitted for a sick person who is physically able to fast if abstaining from treatment would harm them and they are unable to receive treatment while fasting." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 3:379.

[554] "(Even if) his fear of harm from the cold is (while residing at home), he may perform *tayammum* to prevent harm, just as in travel. The intended meaning of fearing harm is not restricted to fearing death; rather, it suffices that he (fears developing a cold, an illness, or something similar), such as an increase in illness or its prolongation. Thus, he may perform *tayammum* (after washing what he is able to) without harm." *Kashshāf al-Qināʿ*, al-Buhūtī, 1:390.

[555] "His statement: 'The sick person is excused from attending Friday and congregational prayers'—this is without dispute. He is also excused from them due to the fear of falling ill." al-Inṣāf, al-Mardāwī, 4:464.

[556] "It is permissible to combine prayers (for a sick person who experiences) hardship (by not combining). Another opinion adds: and weakness. In *Al-Inṣāf*, it is stated: 'The correct view in the *madhhab* is that combining prayers due to illness is permitted under its conditions, and this is the position upheld by the *aṣḥāb* (fellow Ḥanbalīs).'" *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 2:436.

[557] "Or if he fears that using (water) will delay his recovery or leave a severe disfigurement on his body, even if internal, provided that a trustworthy Muslim physician informs him of this. It may be probable that he may also determine this based on his own knowledge." *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:99.

[558] "The execution of a ḥadd punishment is not delayed because of illness, even when recovery is expected (...) because its execution is immediately obligatory, and what Allah has made obligatory is not postponed without valid

Also included is the validity of *khalwah* (seclusion with one's spouse) despite an illness that prevents consummation.[559]

**The Eighth Cause of Legal Alleviation: Obsessive Whispers (Waswasah)**

The one afflicted with *waswasah*—that is, one who is overwhelmed by excessive doubt—is treated differently from others. The legal principle remains that what is doubted is presumed not to have occurred, and actions are built upon certainty. However, in the case of the *muwaswis* (one suffering from *waswasah*), such doubts are to be dismissed altogether, and he should proceed based on what most likely occurred in his mind, in order to remove hardship and sever the cycle of obsessive thoughts.

والاحتياط حسن ما لم يُفْضِ بصاحبه إلى مخالفة السنة، فإذا أفضى إلى ذلك فالاحتياط ترك هذا الاحتياط

In *Ighāthat al-Lahfān fī Maṣāyid al-Shayṭān*, it is stated: "Our shaykh [Ibn Taymiyyah] said: *Precaution is commendable as long as it does not lead a person to contradict the Sunnah. If it does, then [true] precaution lies in abandoning that [unreasonable] precaution.*"[560]

For this reason, "it is recommended (*sunnah*) to sprinkle water on the area of the garment that faces the private part—such as trousers worn by one who has performed *istinjāʾ*—afterward, meaning after cleansing oneself, in order to cut off obsessive whispers (*waswasah*)."[561]

Likewise, "if one doubts their intention during purification, they must restart it—unless the doubt is merely a delusion, like *waswasah*, in which case it is not to be considered."[562]

"And prostration for forgetfulness (*sujūd al-sahw*) is not legislated when doubt becomes excessive to the point of resembling obsessive whispers (*waswasah*), for in such a case, it would lead to a form of obstinacy—where one repeats additional parts of the prayer despite being certain of having completed it. Therefore, he is required to dismiss such doubt and pay it no mind."[563]

Indeed, *waswasah* has at times been treated as a form of madness (*junūn*), to the extent that contracts have been annulled on its basis. As it is stated: "If one of the two parties in a *muḍārabah* (investment partnership) dies, or becomes insane, or suffers from obsessive whispers (*waswasah*), or is legally interdicted due to foolishness, the partnership is nullified."[564] A muḍārabah is not terminated merely by ordinary obsessive doubts. Rather, their expression "or suffers waswasah" is to be understood in this

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justification." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 10:403. "If a sick person is expected to recover, the punishment is postponed until recovery. (...) If recovery is not expected and the whip is feared to cause death, the person is struck once with a bundle containing the required number of twigs." ʿUmdat al-Fiqh, Ibn Qudāmah al-Maqdisī, 135.

[559] "If he was in seclusion (*khalwah*) with her with her consent, then she must observe the waiting period (*ʿiddah*), whether or not there was an impediment to intercourse for both or either of them, such as being in a state of *iḥrām*, fasting, menstruation, postnatal bleeding, illness, complete severance of the male organ (al-jabb), or impotence. However, if he was unaware of her presence, such as in the case of a blind man or a child, then she is not required to observe *ʿiddah*." al-Inṣāf, al-Mardāwī, 7:24.

[560] Ighāthat al-Lahfān fī Maṣāyid al-Shayṭān, Ibn al-Qayyim, 1:301.

[561] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 1:73.

[562] *Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 1:124.

[563] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:221.

[564] al-Inṣāf, al-Mardāwī, 14:135.

context as a disturbance affecting legal capacity to transact, not merely recurring doubts concerning purification, prayer, and similar matters.

In *al-Fawākih al-ʿAdīdah fī al-Masāʾil al-Mufīdah*, it is recorded:

الأولى لمن بلي بالوسواس؛ الأخذ بالأخف والرخص، لئلا يزداد فيخرج عن الشرع

*"Ibn Ḥajar said in al-Tuḥfah, when discussing taqlīd (legal following—i.e., accepting the rulings of a qualified jurist without requiring evidence): It is preferable for one afflicted with waswasah to adopt the lighter and more lenient opinions, so that he does not spiral into further excess and deviate from the Sharīʿah."*[565]

Indeed, taking the lighter rulings in the case of the muwaswis (person afflicted with obsessive doubts) is among the greatest forms of legal alleviation and one of the most effective ways to prevent harm. Those afflicted with *waswasah* often suffer extreme, sometimes ruinous, hardship.

**The Ninth Cause of Legal Alleviation: Travel (*Safar*)**

Travel (*safar*) is among the established causes of legal alleviation (*takhfīf*), even in the absence of hardship for the traveler.

The criterion (*ḍābiṭ*) for travel that qualifies for concession is that it be a long journey, which has been classically defined as sixteen farsakhs (parasangs).[566] However, according to Imām Taqī al-Dīn Ibn Taymiyyah, the standard is what people customarily regard as travel.[567]

The ruling of travel ceases if the traveler intends to reside in the destination for more than twenty prayers (i.e., four days).[568] However, according to Imām Taqī al-Dīn, the ruling of travel only ceases if one intends an open-ended residence.[569]

Among the conditions stipulated by jurists for availing travel concessions is that the travel be permissible (*mubāḥ*). This will be addressed further under the principle that "concessions are not granted

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[565] Al-Fawākih al-ʿAdīdah fī al-Masāʾil al-Mufīdah, Aḥmad ibn Muḥammad al-Manqūr, 2:148.

[566] "A journey qualifies as travel if its one-way distance reaches approximately, rather than precisely, sixteen farsakhs, as affirmed in al-Inṣāf. The ruling is the same whether the journey is by land or sea. Sixteen farsakhs amount to two days of travel (...) under moderate conditions. (...)" Kashshāf al-Qināʿ, al-Buhūtī, 3:262.

[567] "وهذا مما يعرفه الناس بعاداتهم ليس له حد في الشرع ولا اللغة بل ما سموه سفرا فهو سفر." مجموع الفتاوى، تقي الدين ابن تيمية، ج ٢٤ ص ١٣٥

"This is something people recognize according to their customs; it has no fixed definition in the Sharīʿah or the language. Rather, whatever they call 'travel' (*safar*), is deemed travel." *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 24:135.

[568] "And from him [i.e., Imām Aḥmad], it is reported: If one intends to stay [in a location] for more than twenty prayers, he must perform the full prayer; otherwise, he shortens it. This narration is the adopted position (*al-madhhab*)." al-Inṣāf, al-Mardāwī, 5:70.

[569] "Moreover, whoever assigns a fixed number of days for residence—whether three, four, ten, twelve, or fifteen—has spoken without any evidence from the Sharīʿah. These are merely conflicting estimations, unsupported by proof." *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 24:137.

for acts of disobedience." Yet, according to Imām Taqī al-Dīn—and in agreement with the Ḥanafīs—concessions apply to all types of travel.[570]

Four legal rulings are associated with travel:

1. Shortening the prayer (*qaṣr*),
2. Combining prayers (*jamʿ*),
3. Wiping over footwear for three days (*masḥ thalāthatan*),
4. And breaking the fast during Ramaḍān (*al-fiṭr*).[571]

**The Tenth Cause of Legal Alleviation: Encouragement Toward Embracing Islam**

Islam wipes away what came before it. Thus, one who enters Islam is not held accountable for past acts of worship or other duties owed to God—this applies even according to the opinion that non-Muslims are legally addressed with the subsidiary rulings of the Sharīʿah (*furūʿ al-sharīʿah*). After accepting Islam, a person may be excused due to ignorance of prohibitions; such ignorance serves as a legal doubt (*shubhah*) that prevents the implementation of ḥudūd penalties.[572]

Included under this category is the permissibility of giving zakāh to a non-Muslim whose conversion to Islam is hoped for, as a means of encouraging him to embrace the faith—this is the position of our school and the Mālikīs.

Also included is the inheriting of a Muslim by his non-Muslim relative, if the latter embraces Islam before the estate is distributed—a position unique to the Ḥanbalī school (*mufradāt al-madhhab*).[573]

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[570] "As for prohibited travel, the view of the three Imāms—Mālik, al-Shāfiʿī, and Aḥmad—is that one does not shorten the prayer during it. Abū Ḥanīfah and groups among the early and later scholars, however, held that one shortens the prayer in all types of travel. (...) Ibn ʿAqīl, in some places, preferred shortening the prayer and breaking the fast during prohibited travel. The stronger argument lies with those who hold that shortening the prayer and breaking the fast are legislated for travel generally, without distinguishing one journey from another. This is the correct view, for the Qurʾān and Sunnah speak of travel in unrestricted terms." Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 24:108.

[571] "Our fellows—including Ibn ʿAqīl—stated that the legal rulings associated with long-distance travel are four: shortening the prayer (*qaṣr*), combining the prayers (*jamʿ*), wiping over footwear for three days (*masḥ thalāthan*), and breaking the fast (*fiṭr*)." *Al-Furūʿ* and *Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 3:101.

[572] "As for one who drinks it without knowing that it is prohibited, no ḥadd punishment is imposed upon him. (...) If someone claims ignorance of its prohibition, the claim is examined: if he was raised in Muslim lands among Muslims, his claim is not accepted, because such a ruling is hardly hidden from someone like him. (...) If, however, he recently embraced Islam or was raised in a remote desert region far from settled lands, his claim is accepted, because what he says is plausible." al-Mughnī, Ibn Qudāmah, 12:501.

[573] "Except when a non-Muslim embraces Islam before the estate of his Muslim relative is distributed—then he inherits from him, as explicitly stated in the madhhab—even if the heir was a murtadd (apostate) at the time of the deceased's death but embraced Islam before the division of the estate, whether through repentance or, in the case of a wife, if she embraces Islam during her waiting period (*ʿiddah*) before the division of the inheritance. This is established by explicit textual evidence within the school." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:552.

Another example is the validity of a person's Islam despite a corrupt condition—such as someone who embraces Islam while stipulating that they will only perform two of the five daily prayers. This too is among the positions unique to our school.[574]

## Subsidiary Maxims and Applications

Shaykh ʿAbd al-Raḥmān ibn Ṣāliḥ al-ʿAbd al-Laṭīf compiled in his book *Al-Qawāʿid wa al-Ḍawābiṭ al-Fiqhiyyah al-Mutaḍamminah li-al-Taysīr*[575] fifty-six legal maxims—excluding subsidiary doctrinal rules (*ḍawābiṭ*). Among them are major universal maxims, such as "Certainty is not overruled by doubt," along with maxims derived from them and independent universal maxims. Here, we will focus on the most important maxims that fall directly under the overarching rule: "Hardship begets facilitation."

التكليف مشروط بالقدرة

### First Subsidiary Maxim: Obligation Is Conditional Upon Ability

فَاتَّقُوا اللَّهَ مَا اسْتَطَعْتُمْ

لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا

Allah says: "So fear Allah as much as you are able." [al-Taghābun: 16] and: "Allah does not burden a soul beyond its capacity." [al-Baqarah: 286]

كل ما أمر الله به أو نهى عنه فإن طاعته فيه بحسب الإمكان

التكليف مشروط بالتمكن من العلم والقدرة على الفعل

والمجهول كالمعدوم

Although overlap among subsidiary legal maxims is expected, I have not found another maxim that fully captures the principle conveyed here. The formulation "Obligation is conditional upon ability" is from the expressions of Imām Abū al-ʿAbbās Ibn Taymiyyah,[576] who articulated the same idea through other expressions as well such as: *"Everything Allah has commanded or prohibited is to be fulfilled according*

[574] "It is also reported therein—from Naṣr ibn ʿĀṣim al-Laythī, from a man among them—that he came to the Prophet ﷺ and embraced Islam on the condition that he would perform only two prayers, and the Prophet ﷺ accepted it from him. Imām Aḥmad acted upon these reports and stated: Islam is valid even if entered upon with a corrupt condition (*sharṭ fāsid*), and thereafter the convert is held to all the rulings of Islam. He also cited as evidence the narration from Ḥakīm ibn Ḥizām (rAa), who said: *"I pledged allegiance to the Prophet ﷺ on the condition that I would not fall into prostration except from a standing position."* Imām Aḥmad interpreted this to mean: *that he would perform prostration without bowing*." Jāmiʿ al-ʿUlūm wa-l-Ḥikam, Ibn Rajab, 1:228.

[575] Al-Qawāʿid wa al-Ḍawābiṭ al-Fiqhiyyah al-Mutaḍamminah li-al-Taysīr, ʿAbd al-Raḥmān ibn Ṣāliḥ al-ʿAbd al-Laṭīf, 1st ed., 2003.

[576] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 19:124.

*to one's ability,"*[577] *and "Obligation is conditional upon the ability to know and the ability to act,"*[578] *and "What is unknown is tantamount to what is non-existent."*[579]

«"الأمر والنهي" الذي يسميه بعض العلماء "التكليف الشرعي" هو مشروط بالممكن من العلم والقدرة»

He also stated: *"Command and prohibition—which some scholars call legal obligation (taklīf sharʿī)—are conditional upon what is possible in terms of knowledge and action."*[580]

The eminent scholar Ibn ʿUthaymīn said:

وما استطعت افعل من المأمور ... واجتنب الكل من المحظور

والشرع لا يلزم قبل العلم ... دليله فعل المسي فافتهم

*"Do whatever of the obligations you are able, and avoid entirely what is prohibited.*
*The Sharīʿah does not bind prior to knowledge—its proof lies in the man who erred, so understand."*

The intended meaning of *ability* here is practical possibility—even if accompanied by ordinary hardship such as that commonly found in acts of worship. However, if the burden exceeds normal hardship, then it is not included in the "ability" referenced in this maxim. A survey of the jurists' discourse confirms this interpretation. You may consult the discussion of hardship under the benefits and guidelines of the mother maxim.

This maxim finds widespread application across the madhhab and beyond, as it governs every command and prohibition:

For instance: We wash whatever parts of the limbs we are able to in wuḍūʾ (ritual ablution).

We carry water while traveling when possible.[581]

We pray standing, sitting, or lying down—according to what is possible.

One who enters Islam must learn al-Fātiḥah when able, and must use it in prayer when able.[582]

In the context of congregational prayer:

- *"If he finds no gap or finds the row tightly packed, he should stand to the right of the Imām if he is able."*[583]

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[577] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 31:39.

[578] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 21:634.

[579] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 30:336.

[580] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 10:344.

[581] "Whoever goes out from a city (*miṣr*) to a land under his use—for agriculture, hunting, or the like, such as collecting firewood—it is required of him, according to the explicit position narrated from the Imām [Aḥmad], to carry water with him if he is able to." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 1:384.

[582] "It is obligatory to delay [the prayer] until the time becomes tight for someone who does not know Sūrat al-Fātiḥah or any obligatory remembrance—so that he may learn al-Fātiḥah or another obligatory remembrance—provided he is able to learn it." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 1:499.

[583] "If he does not find a gap in the row, or finds the row tightly packed, then he should stand to the right of the imām—if he is able—because that is the position for a lone follower. If he is not able to stand to the right of the imām, then he

- In *al-Inṣāf*, it states: *"If he is unable, he may signal to someone to step back and join him.* The sound position in the madhhab: if no space is found and the row is sealed, he may break through the row to reach the Imām's right side—this was affirmed by Ibn Tamīm. Others held he should pull someone back from the row, and still others (such as Shaykh Taqī al-Dīn) held that he may pray alone. He said in *al-Nukat*: *"This is strong, based on the principle that standing in line is only required when possible."*[584]

The standard Ḥanbalī view is that "followers stand behind the Imām, but that it is also valid to stand at his right or on both sides—but not in front."[585] Yet, Taqī al-Dīn said: *"As for a follower praying in front of the Imām, there are three scholarly views… The third is that it is valid when there is an excuse, but not otherwise, such as extreme crowding, when he cannot pray Jumuʿah or the funeral prayer except in front of the Imām. In that case, praying in front is better than missing the prayer altogether. This view is held by a group of scholars, and it is an opinion within the school of Aḥmad and other schools. It is also the most just and strongest opinion."*[586]

In ḥajj and ʿumrah, it is agreed without dispute that one should touch the Black Stone whenever possible. [587]

Likewise, ḥajj and jihād are not obligatory except with ability.

إن أمكن أن ترد إلى أصحابها وإلا صرفت في مصالح المسلمين؛ والمجهول كالمعدوم

Imām Taqī al-Dīn [Ibn Taymiyyah] said regarding usurped properties whose specific owners are unknown: *"If it is possible to return them to their rightful owners, then that must be done; otherwise, they are to be spent in the interests of the Muslims—for the unknown is treated as nonexistent."*[588]

{لِيُنْفِقْ ذُو سَعَةٍ مِنْ سَعَتِهِ وَمَنْ قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ لا يُكَلِّفُ اللَّهُ نَفْسًا إِلا مَا آتَاهَا}

Allah says: "Let the one who has wealth spend according to his means. As for the one whose provision is restricted, let him spend from what Allah has given him. Allah does not burden a soul beyond what He has given it." [al-Ṭalāq: 7]

Among the scholars who most consistently applied this principle—treating the unknown as equivalent to the nonexistent—was Imām Taqī al-Dīn. For example, he based on it the ruling that whatever a Muslim acquires or earns through mistaken interpretation or ignorance, he may keep what has already passed.[589]

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may alert others with a slight cough (*naḥnaḥah*) or with speech, such as saying: 'Let someone move back so that I and he may form a row.'" *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 2:395.

[584] al-Inṣāf, al-Mardāwī, 4:436.

[585] Zād al-Mustaqniʿ fī Ikhtiṣār al-Muqniʿ, al-Ḥajjāwī, 55.

[586] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 23:404.

[587] al-Inṣāf, al-Mardāwī, 9:96.

[588] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 30:336.

[589] "As for what is beyond doubt in my view, it is this: whatever a person acquired through mistaken interpretation (taʾwīl) or ignorance, he may undoubtedly retain what has passed, as indicated by the Qurʾān, Sunnah, and sound reasoning. (...)" Jāmiʿ al-Masāʾil, Ibn Taymiyyah, 8:279.

One of the most beneficial applications of this principle I have read in the field of daʿwah and religious communication is the statement of Imām Abū al-ʿAbbās (rA):

إذا أردت أن تطاع فأمر بما يستطاع.

لأن الوجوب والتحريم مشروط بإمكان العلم والعمل

*"It is known that the Messenger would only convey what could be known and acted upon. The Sharīʿah did not come all at once. As it is said: 'If you wish to be obeyed, command only what can be carried out.' Likewise, the one who revives the religion and the one who restores the Sunnah does not convey except that which is possible to teach and act upon—just as one entering Islam cannot be taught all its rulings at once, nor can he be obligated with them all immediately. The same applies to the penitent, the learner, and the seeker of guidance: they cannot be charged at the outset with the entirety of the religion or be informed of all knowledge, for they are unable. And if they are unable, then it is not obligatory upon them at that stage. If something is not obligatory, then neither the scholar nor the authority may impose it upon them at the start. Rather, he must defer commands and prohibitions that the individual cannot know or act upon until a later time when it becomes possible—just as the Prophet deferred certain rulings until their time came. This is not a case of tolerating what is forbidden or neglecting what is obligatory, for obligation and prohibition are themselves conditional upon the possibility of knowledge and action. If that condition is absent, the ruling does not apply. Reflect on this principle—it is profoundly beneficial."*[590]

What one is incapable of may sometimes be replaced with a substitute—such as wuḍūʾ being replaced by tayammum—or it may be waived entirely without substitute, as with certain pillars of the prayer in cases of incapacity: standing or reciting al-Fātiḥah, for example, may be dropped, and the prayer remains valid. As for the pillars of ḥajj, the ḥajj is not valid without them, because one is able to appoint someone to perform them on his behalf. However, if he is unable even to appoint a proxy, there is no sin upon him, because ability is a condition for the obligation of ḥajj in the first place.[591]

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[590] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 20:60.

[591] "In summary: the pillars (*arkān*) of ḥajj are its essential components without which it is not complete. Whoever omits one of them, their ḥajj is invalid—whether the omission is due to an excuse or without one. These pillars must be performed. This differs from the pillars of prayer (*ṣalāh*), which are obligatory when one is able but are waived in the case of inability. The reason for this distinction is that when someone is unable to perform a pillar of ḥajj, it is possible for someone else to deputize for him in performing it, whether during his life or after his death. This is unlike the prescribed prayers, in which no deputation (*niyābah*) is permitted." *Sharḥ ʿUmdat al-Fiqh*, Taqī al-Dīn Ibn Taymiyyah, 5:301.

الضرورات تبيح المحظورات

**Second Subsidiary Maxim: Necessities Permit Prohibitions**

Imām Ibn al-Qayyim stated:

«لا واجب مع عجز، ولا حرام مع ضرورة»

*"There is no obligation in the presence of incapacity, nor prohibition in the presence of necessity."*[592]

And al-Siʿdī said in his poetic rendition:

وليس واجب بلا اقتدار .. ولا مُحَرَّم مع اضطرارِ

*There is no obligation without capacity ... Nor is anything forbidden in the face of necessity.*

وقد فصَّل لَكُم ما حَرَّم عليكُم إلا ما اضطررتُم إليهِ .

فَمَن اضطرَّ غير باغٍ ولا عادٍ فلا إثم عَلَيهِ إن اللهَ غفورٌ رحيمٌ .

Allah said: *"He has explained to you what He has made unlawful for you, except under compulsion of necessity."* (Sūrat al-Anʿām, 6:119) And He said: *"But if one is forced by necessity, without willful disobedience or transgressing limits—then there is no sin upon him. Indeed, Allah is Forgiving and Merciful."* (Sūrat al-Baqarah, 2:173)

"The expressions *bāghin* (باغٍ) and *ʿādin* (عادٍ) describe the manner of consumption—i.e., one is not seeking the prohibited item out of desire, nor exceeding the bounds of necessity."[593]

This legal maxim was classified by al-Suyūṭī and Ibn Nujaym under the broader principle *"Harm is to be eliminated"* (*al-ḍarar yuzāl*), and likewise by Ibn al-Najjār in *Sharḥ al-Kawkab al-Munīr*.[594] However, most contemporary scholars classify it under the maxim *"Hardship begets facilitation"* (*al-mashaqqah tajlib al-taysīr*), and the connection between the two is quite apparent. Hence, I preferred the approach of the contemporaries.

As for *ḍarūrah* (necessity), Shaykh ʿAbd al-Raḥmān ibn Ṣāliḥ al-ʿAbd al-Laṭīf defined it as follows:

المصالح التي لابد منها في قيام مصالح الدين والدنيا، بحيث إذا فقدت لم تجر مصالح الدنيا على استقامة، بل على فساد، وتهارج، وفوت حياة، وفي الأخرى فوت النجاة، والنعيم، والرجوع بالخسران المبين

"Linguistically, *ḍarūrah* is derived from *ḍarar* (harm), the opposite of benefit. In legal terminology, it may be understood through the scholars' definition of the *ḍarūriyyāt* (essential interests), which al-Shāṭibī defined as: *'The interests essential to the preservation of religion and worldly life. If lost, worldly*

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[592] *Iʿlām al-Muwaqqiʿīn,* Ibn al-Qayyim, 2:17.

[593] Al-Sharḥ al-Mumtiʿ ʿalā Zād al-Mustaqniʿ, Ibn ʿUthaymīn, 15:36.

[594] "There is to be no harm and no reciprocating harm" (*Lā ḍarar wa-lā ḍirār*)—and among the legal principles that fall under this overarching maxim is: "Necessities permit prohibitions" (*Al-ḍarūrāt tubīḥ al-maḥẓūrāt*). Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:443.

*affairs would become disordered, corrupted, and lives would be lost; and in the Hereafter, salvation and eternal bliss would be forfeited, replaced with utter loss.'*

إنها حالة من الخطر تطرأ على الإنسان يخاف معها فوت شيء من المصالح التي لابد منها في قيام مصالح الدين والدنيا، بحيث لا تندفع هذه الضرورة إلا بارتكاب المحرّم، أو ترك الواجب، أو تأخيره عن وقته

He further said: *'The ḍarūriyyāt are: preservation of religion, life, progeny, wealth, and intellect.'* Hence, *ḍarūrah* has been defined as: 'A circumstance of risk afflicting a person who fears the loss of one of these essential interests—such that it cannot be repelled except by committing a prohibited act, omitting an obligation, or delaying its performance.'"[595]

Some have defined it in a way that confines it to the fear of perishing, but this was objected to on the grounds that it is not all-inclusive—and this objection is well-founded. For through surveying the jurists' methods in applying the concept, it becomes evident that they do not restrict it to such cases.

«والضرورة هي بلوغ الحد الذي إذا لم يتناول معه الممنوع حصل الهلاك للمضطر أو قريب منه، كفقد عضو أو حاسة من الحواس، فهذه هي الضرورة الشرعية»

Our Shaykh Muḥammad al-Zuḥaylī defined it as follows: *"Ḍarūrah is the situation in which, if the forbidden is not resorted to, destruction or near-destruction occurs—such as loss of a limb or a sensory faculty. This is what constitutes legal necessity."*[596]

These definitions seem to address the kind of necessity that permits the most serious prohibitions—such as eating carrion, pork, or drinking wine to avoid suffocation. For example, *al-Inṣāf* states clearly that the necessity recognized in the sound view of the Ḥanbalī school is one that entails fear of perishing.[597]

However, a closer look at various legal rulings shows that jurists also invoked *ḍarūrah* in the broader sense of *ḍarar* (harm) to permit less severe violations. For instance, in *Sharḥ al-Muntahā* it is stated:

لأن حراسة النفس وأطرافها واجب وأهم من رعاية شرط الصلاة ولهذا لا يلزمه شراء ماء ولا سترة بزيادة كثيرة على ثمن المثل، وإذا جاز ترك شرط مجمع عليه لحفظ ماله، فترك شرط مختلف فيه لحفظ بدنه أولى.

*"If a wound is stitched or a bone is set in a human being using impure thread or an impure bone, and the wound or bone heals, then removal of the impure material is not obligatory if harm is feared—whether to life, to a limb, or due to the onset of illness. This is because preserving life and limbs is an obligation and takes precedence over fulfilling the conditions of prayer. For this reason, one is not required to purchase water or a garment covering the ʿawrah at a price significantly higher than the*

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[595] Al-Qawāʿid wa al-Ḍawābiṭ al-Fiqhiyyah al-Mutaḍamminah li-al-Taysīr, al-ʿAbd al-Laṭīf, 1:243.

[596] al-Qawāʿid al-Fiqhiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arbaʿah, Muḥammad al-Zuḥaylī, 1:276.

[597] "The state of necessity (ḍarūrah) here refers specifically to fear of perishing, according to the soundest view in the madhhab. (...) It has also been said that fear of harm suffices. In al-Muntakhab it states: illness or separation from the traveling party. Al-Furūʿ explains that the latter means becoming separated and consequently perishing. (...) Abū Yaʿlā al-Ṣaghīr also included an increase in illness." al-Inṣāf, al-Mardāwī, 27:237.

*usual rate. And if omitting a unanimously agreed-upon condition is allowed to protect one's wealth, then omitting a disputed condition to protect one's body is even more appropriate."*[598]

Those jurists who were strict in defining *ḍarūrah* eventually had to broaden its application to include *ḥājah* (need) when they considered the actions of the Prophet ﷺ and his companions. We will discuss this further under the maxim: *"Needs are treated like necessities"* (*al-ḥājah tanzilu manzilat al-ḍarūrah*), where it will become clear that there are gradations of both harm and prohibition, and not every harm permits every prohibition.

Some might cite the report in Abū Dāwūd (with no comment from him) from Jābir ibn Samurah (rAa), in which: A man who had settled in al-Ḥarrah with his family was told by another man, "If you find my lost she-camel, hold onto it." When he did not find its owner and the camel fell ill, his wife told him to slaughter it. He refused, and the camel died. She then said, "Skin it so we can dry its fat and meat and eat it." He replied, "Not until I ask the Messenger of Allah ﷺ." He went and asked the Prophet ﷺ, who said: "Do you have enough sustenance?" He replied, "No." The Prophet ﷺ said: "Then eat it." Later, when the owner arrived and was told what happened, he said: "Why didn't you slaughter it?" The man replied: "I was shy in front of you."

Al-Shawkānī said in *Nayl al-Awṭār*: *"There is no flaw in its chain of transmission."* Shuʿayb al-Arnāʾūṭ and others graded it ḥasan (good). This ḥadīth broadens the understanding of *ḍarūrah* (necessity) that permits the consumption of carrion, yet it must be considered alongside other evidences in order to arrive at a just and balanced conclusion in this critical matter.

The term *maḥẓūrāt* is the plural of *maḥẓūrah*, and what is meant by it here is that which is forbidden to do.
Thus, the meaning of the maxim is that a prohibited act becomes permissible in the presence of intense need and the fear of harm—that is, *ḍarūrah* (necessity).

Among the most well-known applications of this maxim are: consuming carrion when one is in dire need to prevent death, eating pork, and swallowing a morsel with wine to relieve choking or under coercion (*ikrāh*). As for drinking wine to quench thirst, it is not permitted[599]—not because thirst is not a valid *ḍarūrah* (necessity), but because the Imāms of the Ḥanbalī school explained that *Intoxicants*: *"do not truly quench thirst due to the heat they generate, which in fact increases it… but if the intoxicant is mixed with a liquid that does alleviate thirst, then it becomes permissible in that case."*[600]

Just as necessity (*ḍarūrah*) is realized in cases of starvation, it is also realized under coercion (*ikrāh*). One should refer to the discussion on *ikrāh* as a cause of legal alleviation (*takhfīf*), for it details which prohibited acts become permissible due to necessity and which remain impermissible. It also outlines the

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[598] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:163.

[599] "Every drink whose large amount intoxicates is prohibited even in a small amount. (...) It may not be consumed for pleasure, medical treatment, or thirst (...) except by someone coerced or compelled to use it to dislodge a morsel upon which he is choking when nothing else is available. (...) In al-Mughnī and other works it states: if it is consumed because of thirst and is mixed with enough liquid to quench the thirst, it is permitted when necessity requires it. If consumed unmixed, or mixed with an amount insufficient to quench thirst, it remains impermissible and the ḥadd punishment applies." al-Iqnāʿ, al-Ḥajjāwī, 4:266.

[600] *Kashshāf al-Qināʿ*, al-Buhūtī, 14:97.

balance that must be struck between the necessity and the prohibition—applying the legal maxim *"Choosing the lesser of two harms."* In *Sharḥ al-Kawkab al-Munīr*, it is stated: "Among what falls under this maxim—*"Necessities permit prohibitions"*—is what is referred to in the phrase *"permitting the prohibited,"* which means that the presence of harm justifies committing the *maḥẓūr* (prohibited act), provided that committing it is less harmful than enduring the harm. Accordingly, eating carrion during severe hunger (*makhmaṣah*) is not only allowed but obligatory, and the same applies to swallowing a choking morsel using wine or urine. Similarly, if someone in a state of *iḥrām* kills game in self-defense when it attacks him, he bears no liability. Included as well are dispensations such as overlooking trace impurities left after *istijmār* (stone-cleaning), among many other cases too numerous to list."[601]

I say: In *al-Muntahā*, it states: *"It is valid, due to a valid excuse that permits missing the congregational prayer, for both Imām and follower to separate and pray individually."*[602] *Here, an act that would otherwise constitute a maḥẓūr (prohibited act) invalidating the prayer*[603] *is rendered valid due to an excuse—though this excuse does not reach the level of necessity that permits the consumption of carrion. Thus, it becomes necessary to weigh the harm against the prohibition.*

Because the Ḥanbalīs consider congregational prayer to be obligatory, they have applied this legal maxim more extensively than others in excusing the omission of Jumuʿah and congregational prayers.[604] Shaykh Ibn ʿUthaymīn said:

والمشقات متعددة، فحاصل القاعدة فيه أنه كلما لحق الإنسان مشقة بترك الجمع جاز له الجمع حضراً وسفرًا.

*"Hardships are of various kinds, and the conclusion of the matter is that whenever a person endures hardship by not combining the prayers, it becomes permissible for him to combine them—whether at home or while traveling."*[605]

It is likewise permitted for a physician to uncover a patient's private parts (*ʿawrah*) if doing so is necessary for treatment.

It is also permissible to destroy the trees and buildings of the disbelievers when required for military purposes or to gain victory, as well as to destroy animals they use in combat. Employing heavy

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[601] Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:443.

[602] Muntahā al-Irādāt with the marginalia of Ibn Qāʾid, Ibn al-Najjār, 1: 202.

[603] "If there is no excuse, his prayer is invalidated by his separation [from the congregation]." *Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:180.*

[604] "It is permissible to combine ẓuhr and ʿaṣr and the two evening prayers at the time of either (...) during travel permitting shortened prayer, for a sick person who would otherwise suffer hardship (...) and for an excuse or occupation permitting absence from Jumuʿah and congregational prayer. (...) The preferable course is whichever of advancing or delaying the prayers is easier. (...)" Muntahā al-Irādāt with the marginalia of Ibn Qāʾid, Ibn al-Najjār, 1:334. "Chapter on Excuses Exempting One from Jumuʿah and Congregational Prayer: A sick person is excused (...) as is one who fears becoming ill, one resisting the urge to relieve himself, one in the presence of needed food, one fearing the loss of or damage to property (...) one fearing personal harm (...) or one harmed by rain and mud. (...) If an excuse arises during the prayer, he completes it briefly if possible; otherwise, he leaves it. (...) A follower may separate from his imām or leave the prayer." al-Rawḍ al-Murbiʿ, al-Buhūtī, 1:367.

[605] Al-Sharḥ al-Mumtiʿ ʿalā Zād al-Mustaqniʿ, Ibn ʿUthaymīn, 4:391

weaponry against them is also allowed if necessitated by military need or war-time exigency. Ibn Taymiyyah limited this permissibility to obligatory *jihād*.[606]

Exhuming the deceased after burial is permitted in cases of necessity—such as when the body was buried without being washed, or facing a direction other than the qiblah.[607]

Likewise, extensive movement during prayer is allowed out of necessity and does not invalidate it.[608]

Is It Permissible to Use Impure Substances for Medical Treatment in Cases of Necessity?

Despite the fact that the Ḥanbalīs have at times applied the legal maxim *"Necessities permit prohibitions"* (*al-ḍarūrāt tubīḥ al-maḥẓūrāt*) with greater latitude, they did not extend such permissibility to the use of prohibited substances for medical treatment as broadly as one might expect. Let us, then, examine this issue in some detail.

The jurists agreed in principle that it is not permissible to seek treatment using something impure (*najis*) or unlawful (*muḥarram*) when there exists a permissible alternative.[609] They are also nearly unanimous in forbidding the use of undiluted wine (*khamr ṣirfah*) as treatment under any circumstance.[610]

However, they differed in the finer details of using prohibited substances for treatment. The Ḥanafīs permitted the use of impure or forbidden substances if it is known to be effective and no lawful substitute is available. They interpreted the reports prohibiting such treatment as referring only to cases where a lawful alternative existed, or they suggested that the prohibition is lifted in the presence of need.[611]

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[606] "For this reason, what is not permitted elsewhere is permitted in obligatory jihad—even to the extent that it is allowed to strike the enemy with a catapult (*manjanīq*), even if that may lead to the killing of women and children. However, intentionally targeting them remains prohibited." *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 24:269.

[607] Our school is the most lenient among the madhhabs regarding moving the deceased before and after burial, whereas the Ḥanafī school is the strictest. Kashshāf al-Qināʿ states: "There is no harm in relocating the deceased to a distant place for a valid purpose (...) provided there is no fear of bodily deterioration. (...) The exception is a martyr who has been buried where he fell; he is not relocated. (...) It is permissible to exhume the deceased for a valid purpose, such as improving his shroud (...) or to move him to a better burial place, including exhuming him to separate him from someone buried with him. (...)" Kashshāf al-Qināʿ, al-Buhūtī, 4:222.

[608] "If an action foreign to the prayer is prolonged according to customary standards and is continuous rather than scattered, it invalidates the prayer (...) unless necessitated by circumstances. If it occurs because of fear, flight from an enemy, or something similar—such as a flood, wild animal, or fire—it does not invalidate the prayer. (...) Abū al-Faraj ʿAbd al-Raḥmān ibn al-Jawzī included unbearable itching among cases of necessity." Kashshāf al-Qināʿ, al-Buhūtī, 2:426.

[609] "See: *al-Majmūʿ Sharḥ al-Muhadhdhab*, al-Nawawī (Beirut: Dār al-Fikr), vol. 9, p. 45; *Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq*, al-Zaylaʿī (Cairo: Dār al-Kitāb al-Islāmī), vol. 6, p. 33."

[610] See: *Ikhtilāf al-Aʾimmah al-ʿUlamāʾ*, Yaḥyā ibn Hubayrah (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2002), vol. 2, p. 29; *al-Mabsūṭ*, al-Sarakhsī (Beirut: Dār al-Maʿrifah), vol. 14, p. 56; *al-Majmūʿ Sharḥ al-Muhadhdhab*, al-Nawawī, vol. 9, p. 45; *al-Muḥallā bi-al-Āthār*, Abū Muḥammad ʿAlī ibn Aḥmad ibn Saʿīd ibn Ḥazm al-Andalusī (Beirut: Dār al-Fikr), vol. 6, p. 225; *Ḥāshiyat Iʿānatu al-Ṭālibīn*, al-Dimyāṭī (Beirut: Dār al-Fikr), vol. 4, p. 156.

[611] *Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq*, al-Zaylaʿī, vol. 6, p. 33; *Majmaʿ al-Anhur*, Shaykhīzādah (Beirut: Dār al-Kutub al-ʿIlmiyyah), vol. 4, p. 224; *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*, ʿAlī Ḥaydar (Beirut: Dār al-Kutub al-ʿIlmiyyah), vol. 4, p. 7.

The Mālikīs held a stricter position, generally forbidding the use of anything impure or prohibited—whether used alone or in mixtures, whether ingested or applied—except in cases of topical application whose abandonment would lead to death.[612]

The Shāfiʿī madhhab prohibits treatment with intoxicants. It permits treatment with other impure or prohibited substances in unmixed form (*ṣirf*),[613] provided there was no alternative. As for a prohibited or impure substance that has been subsumed[614] into a medicinal compound, using it is permitted by agreement within the school when no lawful substitute exists. [615]

As for the Ḥanbalīs, they forbade the use of all prohibited or repugnant (*mustakhbath*) substances—such as the urine of edible animals—except for the urine of camels. They allowed, however, the use of poisonous drugs if safety is predominant (*ghalabat al-salāmah*), and they permitted treatment using prohibited or impure substances so long as it is not by ingestion or drinking.[616] Unlike the Shāfiʿīs,[617] they explicitly prohibited treatment through listening to unlawful music, due to the generality of the Prophet's ﷺ prohibition.[618]

Some jurists explicitly stated that medical treatment constitutes a necessity (*ḍarūrah*), and thus they permit the patient to use whatever benefits him—even khamr. However, this view runs contrary to the apparent meaning of the Prophetic traditions that prohibit such substances, so the necessity must be verifiable.[619]

إِنَّ اللَّهَ أَنْزَلَ الدَّاءَ وَالدَّوَاءَ، وَجَعَلَ لِكُلِّ دَاءٍ دَوَاءً، فَتَدَاوَوْا، وَلا تَدَاوَوْا بِحَرَامٍ

The Ḥanbalīs support their position with the report narrated by Abū Dāwūd from Abū al-Dardāʾ (rA), who said that the Messenger of Allah ﷺ stated: *"Indeed, Allah has sent down the disease and the cure,*

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[612] *Ḥāshiyat al-ʿAdawī ʿalā Sharḥ Kifāyat al-Ṭālib al-Rabbānī*, ʿAlī al-Ṣaʿīdī al-ʿAdawī (Beirut: Dār al-Fikr), vol. 2, p. 642; *Sharḥ Mukhtaṣar Khalīl*, Muḥammad ibn ʿAbd Allāh al-Khurashī (Beirut: Dār al-Fikr li-al-Ṭibāʿah), vol. 8, p. 109.

[613] *Mughnī al-Muḥtāj ilā Maʿrifat Maʿānī Alfāẓ al-Minhāj*, Muḥammad al-Khaṭīb al-Shirbīnī (Beirut: Dār al-Fikr), vol. 5, p. 518.

[614] Subsumption (istihlāk): the assimilation of a smaller substance into a dominant substance such that it no longer retains an independent perceptible identity (taste, color, smell, or distinguishable existence), though its legal ruling may or may not be affected depending on the context.

[615] *Asnā al-Maṭālib fī Sharḥ Rawḍ al-Ṭālib*, Zakariyyā al-Anṣārī (Cairo: Dār al-Kitāb al-Islāmī), vol. 4, p. 159.

[616] *al-Furūʿ wa-Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī (Beirut: Dār al-Kutub al-ʿIlmiyyah), vol. 2, p. 132.

[617] "Yes, if two trustworthy physicians inform [the patient] that nothing will benefit him in his illness except music (*ʿūd*), then their report is acted upon, and it becomes permissible for him to listen to it—just like treating oneself with something impure that contains wine." *Tuḥfat al-Muḥtāj*, al-Haytamī, 10:219.

[618] "It is forbidden to seek treatment through anything unlawful, whether by eating, drinking, or otherwise—such as listening to prohibited songs and the like—based on the general statement of the Prophet ﷺ: *'Do not seek treatment through what is unlawful.'" Kashshāf al-Qināʿ*, al-Buhūtī, 4:9.

[619] "We have already mentioned in the book *'What Is Permissible and Forbidden to Eat'* from this compilation the permissibility of wine for one who is compelled to it, based on the verse of Allah the Exalted: *'He has explained to you in detail what He has forbidden you—except under compulsion'* [al-Anʿām: 119], so there is no need to repeat it here." — *al-Muḥallā bi-al-Āthār*, Abū Muḥammad ʿAlī ibn Aḥmad ibn Saʿīd Ibn Ḥazm al-Andalusī (Beirut: Dār al-Fikr), vol. 6, p. 225.

*and He has made for every disease a remedy. So seek treatment—but do not seek treatment through what is unlawful."*

In response to those who expanded the scope of permissibility based on necessity—such as Imām Ibn Ḥazm, the Ḥanafīs, and the Shāfiʿīs, as previously mentioned—Imām Ibn Taymiyyah (rḥ) offered the Ḥanbalī reply, stating:

"التحقيق أن من التداوي ما هو محرم، ومنه ما هو مكروه، ومنه ما هو مباح، ومنه ما هو مستحب، ومنه ما هو واجب، وهو ما يعلم أنه يحصل به بقاء النفس لا بغيره."

*"Upon closer examination, some forms of medical treatment are prohibited, some disliked, some permissible, some recommended, and some obligatory—namely, when it is known that life will be preserved through it and not by any other means."*[620]

He also said: *"This [i.e., medical treatment using prohibited substances] is not comparable to the case of a person forced to eat carrion, for the latter certainly brings about the intended effect, has no substitute, and consumption becomes obligatory. If someone is compelled to eat carrion and refrains until they die, they enter the Fire. In contrast, the achievement of healing in the case of treatment is uncertain, and the particular medicine in question is not definitively required. Indeed, Allah grants healing through various means. Treatment is not obligatory according to the majority of scholars, and this cannot be analogized to that. And Allah knows best."*[621]

However, medical treatment in our time is not comparable to what it was in previous eras—a fact acknowledged by the majority of rational observers. The effectiveness of medicine in treating disease now reaches, in some cases, a level of predominant probability (*ghalabat al-ẓann*) that is very close to certainty. The earlier scholars did not place the same degree of trust in medicine as people do today, due to the vast disparity between the state of medical science then and now.

What Shaykh al-Islām said may well have been accurate in his time, but such is no longer the case in ours. This is why Shaykh Ibn ʿĀshūr (rḥ), when commenting on the verse: *"But whoever is compelled by necessity, neither desiring it nor transgressing its limits—there is no sin upon him. Indeed, Allah is Forgiving and Merciful."* (Sūrat al-Baqarah, 2:173) said:

وعندي أنه إذا وقع قوة ظن الأطباء الثقات بنفع الدواء المحرم من مرض عظيم وتعينه أو غلب ذلك في التجربة فالجواز قياسًا على أكل المضطر وإلا فلا.

*"Among the debated analogies is whether the necessity of medical treatment is comparable to the necessity of hunger. Some scholars held that treatment using these prohibited substances—including khamr—is not permissible. This was the view of Mālik and the majority. Yet people have long struggled with this position, given that the underlying rationale is the same: the preservation of life. In my view, the rationale for permissibility on the basis of necessity (ḍarūrah) is invalidated if knowledge of the properties of the medicines does not reach the level of predominant assumption of benefit for all of them—except those that have been verified through experience. Medical history is full of errors in*

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620 *Majmūʿ al-Fatāwā,* Ibn Taymiyyah, 18:12.

621 *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 24:266.

*identifying the properties of drugs. Fakhr al-Dīn al-Rāzī reported that some scholars permitted the use of prohibited substances in medication. In my own view, if there is strong likelihood—based on the judgment of trustworthy physicians—that a prohibited medicine is beneficial for a serious illness, and its use is either necessary or proven effective through experience, then its use is permissible by analogy with the consumption of carrion in necessity. Otherwise, it remains impermissible."*[622]

Shaykh Muḥammad ibn Ṣāliḥ al-ʿUthaymīn (rḥ) was asked about
connecting an artery of the human heart to an artery from a pig. He replied:

*"There is no harm in that—meaning, it is permissible for a person's heart artery to be connected to the artery of another creature, and one should consider which option is better suited for the patient's heart. This is not consumption. What Allah has prohibited is the eating of swine, and this is not eating. If we know that no other option will benefit the patient, then this falls under the category of necessity. And Allah said regarding the direct consumption of pork: 'He has explained to you what He has made unlawful for you—except for what you are compelled to by necessity.' (Sūrat al-Anʿām, 6:119)"*[623]

What I conclude is that the difference between the earlier Ḥanbalī scholars and their later counterparts, such as Ibn ʿUthaymīn, and likewise between the earlier Mālikīs and their later scholars like Ibn ʿĀshūr, ultimately stems from the stage of *taḥqīq al-manāṭ* (verification of the operative basis) in the process of issuing fatwā—that is, the jurist's task of determining whether the legal cause (*ʿillah*) applies in a given case.

The legal cause for the permissibility of consuming carrion in cases of necessity is the preservation of life. So the question arises: Does treatment with a prohibited substance prescribed by a physician achieve preservation of life? The earlier scholars generally did not affirm this, due to the frequency of medical errors and the limited capabilities of medicine in their times. In contrast, later scholars, informed by the new realities of modern medical science, observed that medical treatment prescribed by qualified physicians often preserves life to a degree that reaches predominant probability.

الحكم بغلبة الظن أصل في الأحكام

The benefit derived from medicine in our time is not merely speculative; rather, in some cases it is certain, and in others it is supported by predominant probability (*ghalabat al-ẓann*). Al-Shāṭibī stated in *al-Iʿtiṣām* that ruling by predominant probability is a foundational principle in Islamic legal judgments. You may also refer to the discussion under the principle *"Predominant probability is generally considered binding"* in the section on Benefits and Guidelines related to the second major legal maxim.

Among the clearest examples of certainty regarding the benefit of contemporary medications—despite being prohibited in principle—are: general anesthesia in surgical procedures and porcine-derived insulin for diabetic patients when no alternative is available. Nonetheless, necessity is judged by its extent, and whatever is permitted due to an excuse becomes impermissible once that excuse no longer applies.

Exceptions? No—Regulatory Conditions

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[622] al-Taḥrīr wa al-Tanwīr, Ibn ʿĀshūr, 2:104.

[623] *al-Islām Suʾāl wa-Jawāb*, fatwā no. 93212 (30 October 2006)

In reality, this legal maxim does not have true *exceptions*, but rather regulatory conditions that govern its application. As previously stated, one of these is that the necessity must not be outweighed by the harm of the prohibited act itself. Additional conditions are found in related maxims that follow, such as:

الضرورات تَقَدَّر بقَدْرِها

- *Necessities are judged according to their extent* (*al-ḍarūrāt tuqaddar bi-qadrihā*),

والرخص لا تناط بالمعاصي

- *Concessions are not tied to sinful acts* (*al-rukhaṣ lā tunāṭu bi-l-maʿāṣī*),

والاضطرار لا يبطل حق الغير

- *Necessity does not nullify the rights of others* (*al-iḍṭirār lā yubṭilu ḥaqq al-ghayr*), and

وما جاز لعذر بطل بزواله.

- *What is permitted due to an excuse ceases with its absence* (*mā jāza li-ʿudhrin yabṭulu bi-zawālih*).

However, we mention here a subsidiary maxim that both stems from and regulates the original:

"كل رخصة أبيحت للضرورة والحاجة لم تستبح قبل وجودها."

*"Every concession permitted due to necessity or need is not permitted before the necessity or need arises."*

Its meaning is that the necessities or needs that render prohibitions permissible only do so once they have actually arisen and become operative. Before that, permissibility does not apply.[624] One application of this maxim is the requirement that the prayer time begin before tayammum for that prayer is valid, according to the relied-upon Ḥanbalī position. Another report from Aḥmad permits tayammum before the prayer time, as do the Ḥanafīs.

In *al-Inṣāf* it states: *"The state of necessity (ḍarūrah) here refers specifically to the fear of perishing—according to the soundest view in the madhhab. Ḥanbal narrated: 'If it is known that the person is on the verge of death.' This was favored in al-Furūʿ and affirmed decisively by al-Zarkashī and others. It has also been said: or if one fears harm. And in al-Muntakhab it is stated: or illness, or separation from the group (i.e., the travel party). In al-Furūʿ it is clarified: His intent is that one becomes cut off and perishes, as mentioned in al-Riʿāyah. Abū Yaʿlā al-Ṣaghīr also mentioned: or an increase in illness."*[625]

As for the condition that necessity must already be present and not merely speculative or anticipated—this too is not absolute. The jurists' allowance for someone to avoid congregational prayer out of fear of illness, or due to concern over worsening a condition, reflects not an established reality but a predicted one. ʿAmr ibn al-ʿĀṣ did not have certainty that washing would harm him, yet he refrained. The point,

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[624] "(Its conditions)—that is, the conditions of *tayammum* without which it is not valid—are three. The first: (the entrance of the prayer time) for the one performing *tayammum* for that specific prayer." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 1:376.

[625] al-Inṣāf, al-Mardāwī, 27:237.

then, is not to act on mere conjecture or baseless suspicion, but when harm is predominantly expected (*ghalabat al-ẓann*), it is to be averted before it occurs—since prevention is easier than removal.

إذا ضاق الأمر اتسع وإذا اتسع الأمر ضاق

**Third Subsidiary Maxim: When Circumstances Become Constraining, Legal Latitude Expands; When They Ease, That Latitude Contracts (lit. When the matter becomes constrained, it expands; and when spacious, it tightens)**

These are two complementary and interrelated maxims. Their meaning is that when a necessity arises—whether for an individual or a group—and fulfilling the original ruling would cause hardship or severe constraint, the ruling is eased until relief is attained and the excessive burden is lifted. Then, once the hardship is gone and ease has returned, and the necessity has ended, the matter reverts to its original ruling. This is the meaning of the saying: *"and when spacious, it tightens,"* and it closely parallels another legal maxim: *"Necessity is judged by its extent."*

Both maxims are supported by the verses in Sūrat al-Nisāʾ:

"وَإِذا ضَرَبْتُمْ فِي الْأَرْضِ فَلَيْسَ عَلَيْكُمْ جُناحٌ أَن تَقْصُرُوا مِنَ الصَّلاةِ إِنْ خِفْتُمْ أَن يَفْتِنَكُمُ الَّذِينَ كَفَرُوا، إِنَّ الْكافِرِينَ كانُوا لَكُمْ عَدُوًّا مُبِينًا.

وَإِذا كُنتَ فِيهِمْ فَأَقَمْتَ لَهُمُ الصَّلاةَ فَلْتَقُمْ طائِفَةٌ مِنْهُم مَعَكَ وَلْيَأْخُذُوا أَسْلِحَتَهُمْ فَإِذا سَجَدُوا فَلْيَكُونُوا مِن وَرائِكُمْ وَلْتَأْتِ طائِفَةٌ أُخْرى لَمْ يُصَلُّوا فَلْيُصَلُّوا مَعَكَ وَلْيَأْخُذُوا حِذْرَهُمْ وَأَسْلِحَتَهُمْ وَدَّ الَّذِينَ كَفَرُوا لَوْ تَغْفُلُونَ عَنْ أَسْلِحَتِكُمْ وَأَمْتِعَتِكُمْ فَيَمِيلُونَ عَلَيْكُم مَيْلَةً واحِدَةً، وَلا جُناحَ عَلَيْكُمْ إِن كانَ بِكُمْ أَذًى مِن مَطَرٍ أَوْ كُنتُم مَرْضى أَن تَضَعُوا أَسْلِحَتَكُمْ؛ وَخُذُوا حِذْرَكُمْ إِنَّ اللَّهَ أَعَدَّ لِلْكافِرِينَ عَذابًا مُهِينًا.

فَإِذا قَضَيْتُمُ الصَّلاةَ فاذْكُرُوا اللَّهَ قِيامًا وَقُعُودًا وَعَلى جُنُوبِكُمْ، فَإِذا اطْمَأْنَنتُمْ فَأَقِيمُوا الصَّلاةَ، إِنَّ الصَّلاةَ كانَتْ عَلى الْمُؤْمِنِينَ كِتابًا مَوْقُوتًا"

*"And when you travel throughout the land, there is no blame upon you for shortening the prayer—if you fear that those who disbelieve may harm you. Indeed, the disbelievers are ever to you a clear enemy. And when you are among them and lead them in prayer, let a group of them stand with you and carry their weapons. Then when they have prostrated, let them fall to the rear and let another group come forward who have not yet prayed, and let them pray with you, taking precaution and carrying their weapons. Those who disbelieve wish you would neglect your weapons and your baggage so they could come down upon you in one assault. But there is no blame upon you if you are troubled by rain or are ill, for putting down your weapons. But take precaution. Indeed, Allah has prepared for the disbelievers a humiliating punishment.*

*And when you have finished the prayer, remember Allah standing, sitting, or lying on your sides. But when you feel secure, then establish [the prayer] in full. Indeed, prayer has been decreed upon the believers at prescribed times."*

[al-Nisāʾ: 101–103]

Shaykh Al-Būrnū comments: *"The first two verses serve as evidence for the first maxim: that Allah lightened the burden upon believers during fear, allowing them to shorten the prayer and modify its performance, and legislated the 'Prayer of Fear.' The third verse serves as evidence for the second maxim, wherein He commands them—once they are at ease and the state of fear has passed—to resume full performance of prayer in its original form."*[626]

إِنَّا كُنَّا نَهَيْنَاكُمْ عَنْ لُحُومِ الْأَضَاحِيِّ أَنْ تَأْكُلُوهَا فَوْقَ ثَلَاثَةِ أَيَّامٍ كَيْ تَسَعَكُمْ فَقَدْ جَاءَ اللَّهُ بِالسَّعَةِ فَكُلُوا وَادَّخِرُوا وَاتَّجِرُوا.

He also cited the statement of the Messenger of Allah ﷺ, in the narration of Nubayshah: *"I had previously forbidden you from eating the meat of sacrificial animals beyond three days so that it would suffice for everyone. But now Allah has brought ease, so eat, store, and seek reward."* He deduced from this that: *"It is permissible to impose certain restrictions on some people for the benefit of others in situations of genuine need; but once that need is lifted, matters return to their original ruling."*[627]

The applications of the first maxim are essentially those of the overarching maxim itself, while the applications of the second are like those of maxims such as: "What is permitted due to an excuse becomes impermissible once the excuse is gone," and "Necessity is assessed according to its extent."

One of the most significant applications is the permissibility of contracting wage-based agreements (ijārah) for religious acts, such as teaching the Qurʾān or calling the adhān, in order to preserve religious rites and protect those who uphold them from neglect and ruin. If it is said that the [dominant] position in the madhhab is that this is impermissible, it may be answered: they permitted jaʿālah (contingent reward contracts), and perhaps this too is a practical application of the maxim. In fact, there is another explicit narration from Imām Aḥmad permitting ijārah in such cases.[628]

وأصول الشريعة كلها مبنية على هذا الأصل أنه يفرق في المنهيات بين المحتاج وغيره كما في المأمورات.

In support of linking this issue more directly to the maxim under discussion, Imām Taqī al-Dīn (Ibn Taymiyyah) chose the view that strengthens the connection between the ruling and the legal principle. He said (rA): *"There are three views in the school of Imām Aḥmad and others. The most just of them is that it is permitted for the one in need. Aḥmad said: 'Wages for teaching are better than gifts from rulers, and gifts from rulers are better than financial assistance from peers. The entire foundation of the Sharīʿah is built upon this principle—that a distinction is made in prohibitions between the one in need and the one who is not, just as it is made in obligations."*[629]

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[626] *Al-Wajīz,* Āl Būrno, 231.

[627] *Al-Wajīz,* Āl Būrno, 232.

[628] "It is also stipulated that the contracted work not be an act whose performer must be eligible to perform it devotionally by being Muslim (...) such as the adhān (...) or teaching the Qurʾān. (...) Taking a wage for such work is prohibited. Another narration permits it, while a third regards it as disliked. (...) It is not prohibited, however, to take a contingent reward (juʿālah) for such work, because juʿālah is broader than ijārah. (...)" Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 6:153.

[629] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 30:193.

الضرورات تقَدَّر بقَدْرِها

**Subsidiary Maxim 4:** ***Necessities Are Judged According to Their Extent***

This was expressed by al-Siʿdī in his didactic poem when he said:

وكل محظور مع الضرورة  بقدر ما تحتاجه الضرورة

*"Every prohibited matter, in the case of necessity,*
*Is allowed only to the extent that the necessity requires."*

Other expressions of this rule include:

"ما أبيح للضرورة يقدر بقدرها"

"What is permitted due to necessity is limited to the extent of that necessity"

This maxim qualifies the maxim, *"Necessities permit prohibitions."* That which necessity permits from among the prohibited matters is only permitted to the extent required to relieve the necessity—no more. This reflects the principle: *"when ease returns, it is tightened."*

Applications:

The one in necessity may eat from carrion only what is sufficient to ward off starvation, and not to fullness according to the madhhab. It has also been said, however, that he may eat to satiety—especially if the state of necessity is ongoing.[630]

One repelling an assailant may not use a more severe means if a lesser one would suffice.[631]

A physician may uncover only the part of the body necessary for treatment.[632]

*"It is permissible to wipe over a splint…—provided it does not exceed the area of necessity, meaning only what is needed to wrap it properly ... If, however, it exceeds it, or was placed without prior purification, then it must be removed in order to wash what lies beneath it. But if removing it is feared to cause harm, then dry ablution (tayammum) is performed for whatever extends beyond the area of actual need."*[633]

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[630] "Whoever is compelled to eat carrion may consume only what protects him from death. (...) By consensus, he may eat enough to ward off starvation and secure his survival, while consuming beyond satiety is prohibited. Concerning eating to satiety, there are two narrations: the stronger is that it is not permitted (...) while the second permits it. (...) A distinction may be drawn between an ongoing necessity and one expected to end: when the necessity is ongoing, eating to satiety is permitted (...) unlike a temporary necessity, in which lawful relief is expected." al-Mughnī, Ibn Qudāmah, 13:330.

[631] "If the assailant can be repelled by speech, it is not permissible to strike him. If speech does not repel him, he may be struck using the lightest means likely to stop him. (...) If striking him with a stick would suffice, killing him is impermissible. (...) If he has already been disabled, it is impermissible to finish him off. If, however, the assailant cannot be repelled except by killing, killing him is permitted and no liability results, because it was done to repel his harm." al-Rawḍ al-Nadī Sharḥ Kāfī al-Mubtadī, Aḥmad ibn ʿAbd Allāh al-Baʿlī, 477.

[632] "And it is permitted for a physician—and the like—to look and touch when there is a need for it." *Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 3:78.

[633] Al-Fawāʾid al-Muntakhabāt fī Sharḥ Akhṣar al-Mukhtaṣarāt, ʿUthmān ibn ʿAbd Allāh ibn Jāmiʿ, 1:57.

Remaining in the posture of relieving oneself longer than necessary is forbidden due to exposure of the private parts[634]—some consider it only disliked.[635]

When multiple Friday congregations are permitted due to necessity (e.g., crowding), only as many are allowed as needed to relieve the hardship; if two suffice, a third is not permitted.

A suitor may look at his prospective spouse only to the extent needed to assess compatibility.[636]

*"If one finds two dead animals—one unanimously prohibited and the other subject to scholarly disagreement—he should eat from the one that is disputed."*[637]

It might be claimed that the permission for 'ʿarāyā' sales is an exception to this maxim; however, it is more accurate to say it was allowed due to *ḥājah* (need) rather than *ḍarūrah* (necessity), according to those who distinguish between the two. The permissibility of certain forms of ribā to relieve need will be discussed more thoroughly under the maxim: *"Need is treated like necessity."*

Related Issue: One Who Can Perform Part of an Act of Worship

ما لا يدرك كله لا يترك جله.

This maxim relates to the meaning of *"necessity is judged according to its extent"* and to the rule that *obligation is conditioned upon capability*. It also aligns with the principle: *"If the whole cannot be attained, most of it should not be abandoned."* The default ruling is that the obligation remains, based on the ḥadīth: *'Then do of it what you are able,'* which aligns with the statement of Allah, the Exalted: *"So fear Allah as much as you are able."* (al-Taghābun 64:16)

Shaykh Saʿd al-Shithrī said:

"Does incapacity to perform part of an obligation nullify the obligation entirely? This depends on the nature of the obligation itself, for obligations fall into two categories:

ما لا يتبعَّض فاختيار بعضه كاختيار كله، أو قالوا: فسقوط بعضه كسقوط كله.

The first type consists of obligations that cannot be divided and are considered a single indivisible unit. In such cases, if a person is unable to perform part of it, the entire obligation is lifted. An example of this

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634 "It is forbidden to remain [in the position of relieving oneself] longer than the time needed—that is, while one is actually urinating or defecating, not merely remaining in the restroom after finishing. The reasoning given is that it involves exposing one's private parts without necessity. It has also been said that doing so harms the liver and causes hemorrhoids." *Sharḥ Dalīl al-Ṭālib, al-Maqdisī, 1:80.*

635 "The prohibition of remaining [in that position] is based on reasoning, and there is no direct report from the Prophet ﷺ on the matter. For this reason, Imām Aḥmad said in one of his narrations: it is disliked (*makrūh*), not forbidden." Al-Sharḥ al-Mumtiʿ ʿalā Zād al-Mustaqniʿ, Ibn ʿUthaymīn, 1:126

636 "There is no disagreement among the scholars regarding the permissibility of looking at her face, because it is not ʿawrah and is the center of beauty and attention. It is not permissible, however, to look at what is not customarily visible. (...) Looking is ordinarily prohibited and was permitted because of need; it is therefore limited to what that need requires. (...) As for what is commonly visible besides the face—such as the hands, feet, and similar parts—there are two narrations: the first does not permit looking at them (...) while the second permits it. Aḥmad stated (...) that there is no harm in looking at what may induce him to marry her, such as a hand, part of the body, or the like." al-Mughnī, Ibn Qudāmah, 9:490.

637 al-Inṣāf, al-Mardāwī, 27:247.

is the ṣāʿ (a measure of capacity equal to four mudds) of zakāt al-fiṭr (the obligatory charity at the end of Ramadan): if one is unable to provide the full measure, the obligation is waived entirely.[638] Another example is if a person is required to free a slave but only affords half a slave (e.g., half-ownership of one), the obligation is likewise waived. Jurists refer to this by saying: *"What cannot be divided, choosing part of it is like choosing the whole,"* or *"If part of it falls away, all of it falls away."*

الميسور لا يسقط بالمعسور.

The second type includes obligations that can be divided, with each part standing independently of the others. In such cases, if a person is unable to fulfill part of the obligation, the remainder is still required. An example is covering the *ʿawrah* in prayer: if one is unable to cover some of it, one is still obligated to cover what remains. Jurists express this principle with the maxim: *"What is attainable is not nullified by what is unattainable."* (*al-maysūr lā yasquṭ bi-l-maʿsūr*)

There also exist obligations that fall between the two, and scholars differ regarding them—whether they are to be treated as indivisible wholes or as divisible components. An example of this is *wuḍūʾ*: if a person is unable to wash all the limbs but is capable of washing some, is he required to wash the parts he can? The question becomes: *Is wuḍūʾ divisible or not?*

- If it is considered divisible, then he must wash whatever he is able to. [This is the madhhab]
- If not, then washing is not required at all."[639]

Imām Ibn Rajab, in his eighth legal maxim, said:

"من قدر على بعض العبادة وعجز عن باقيها؛ هل يلزمه الإتيان بما قدر عليه منها أم لا؟"

"*If one is able to perform part of an act of worship but is incapable of completing the rest—does he remain obligated to perform what he is able to or not?*

This is divided into categories:

1. The first category: When the part one is capable of performing is not intended as an act of worship in itself, but is merely a means to it—such as the movement of the tongue in recitation, or the passing of the razor over the head in shaving, or over the site of circumcision (in the case of someone born already circumcised). In such cases, the act is not obligatory, because it was only required as a necessary means to the primary act (recitation, shaving, or cutting), and since the primary act has been waived, so too is what was required as its means. Al-Qāḍī held that the movement of the tongue remains obligatory specifically, but this view is very weak.
2. The second category: That which is obligatory as a subsidiary to something else, and this itself is of two types:
    (i) The first type: That which is made obligatory as a precautionary measure to ensure the validity of the act of worship—such as washing the top of the elbow in *wuḍūʾ*. If a person's arm has been amputated at the elbow, is he still

[638] The official position of the madhhab is that one is obligated to give whatever amount he is able to, as will be explained.

[639] Sharḥ al-Manẓūmah al-Siʿdiyyah, al-Shithrī, 54.

required to wash the top of the remaining elbow or not? There are two views on this: the more well-known among the Ḥanbalī scholars is that it remains obligatory, and this is the apparent position of Imām Aḥmad. However, al-Qāḍī, in the *Kitāb al-Ḥajj* of his *al-Khilāf*, held that it is merely recommended (*mustaḥabb*), interpreting Aḥmad's statement as referring to recommendation.

This applies when some part of the act of worship remains, such as in the ablution (*wuḍūʾ*) of someone with an amputated limb. But if nothing at all remains, then the subsidiary ruling falls away—such as fasting part of the night in preparation for fasting. In such a case, it is not required of one who is permitted to break the fast, by agreement.

(ii) The second type: That which is obligatory as a complement or an ancillary to something else—such as stoning the *jamarāt* and spending the night in *Minā* for one who did not perform the standing at *ʿArafah*. The well-known position is that such acts are not required of him, because they are all considered consequential to the standing at ʿArafah, and one who missed that pillar is not held to its subsidiary rites. Ibn Abī Mūsā, however, narrated another view that these acts are still binding, since they are independent acts of worship in themselves.

An example of this category is the case of a sick person who, in prayer, is unable to place his face on the ground for prostration, but is able to place the other limbs of prostration. According to the soundest opinion, he is not required to place those other limbs, because prostration on them is only required in a complementary sense, as a follow-up to prostration on the face.

3. The third category: That which is a part of the act of worship but is not an act of worship in itself, or that which is not required due to the harm it entails:

   (i) The first case: For example, fasting part of the day for one who is able to begin but incapable of completing it—he is not obligated to do so, and this is agreed upon without dispute.

   (ii) The second case: Such as freeing part of a slave in expiation (*kaffārah*); it is not required of someone who is able to do so if he is unable to complete the full manumission—because the Lawgiver intended full emancipation whenever possible…

4. The fourth category: That which is a component of the act of worship and is also, in and of itself, a legislated act of worship. In such cases, performing it becomes obligatory when the entirety of the act cannot be fulfilled—without disagreement. Numerous legal issues branch from this principle.

   - Among them: One who is unable to recite still remains obligated to stand in prayer, because although the primary objective of standing is recitation, standing itself is also independently legislated and a distinct act of worship.
   - And among them: One who is unable to recite part of Sūrat al-Fātiḥah is required to recite whatever he is able to of it.

- And among them: One who is unable to perform a full ritual bath (*ghusl*) for major impurity (*janābah*) is obligated to wash whatever parts he is able to, because reducing major impurity is itself legislated—even if it is only through washing the limbs of *wuḍūʾ*—just as it is prescribed for the one in a state of *janābah* who intends to sleep, eat, or have intercourse, and according to our madhhab, also to stay in the mosque.

There are other debated cases, such as:

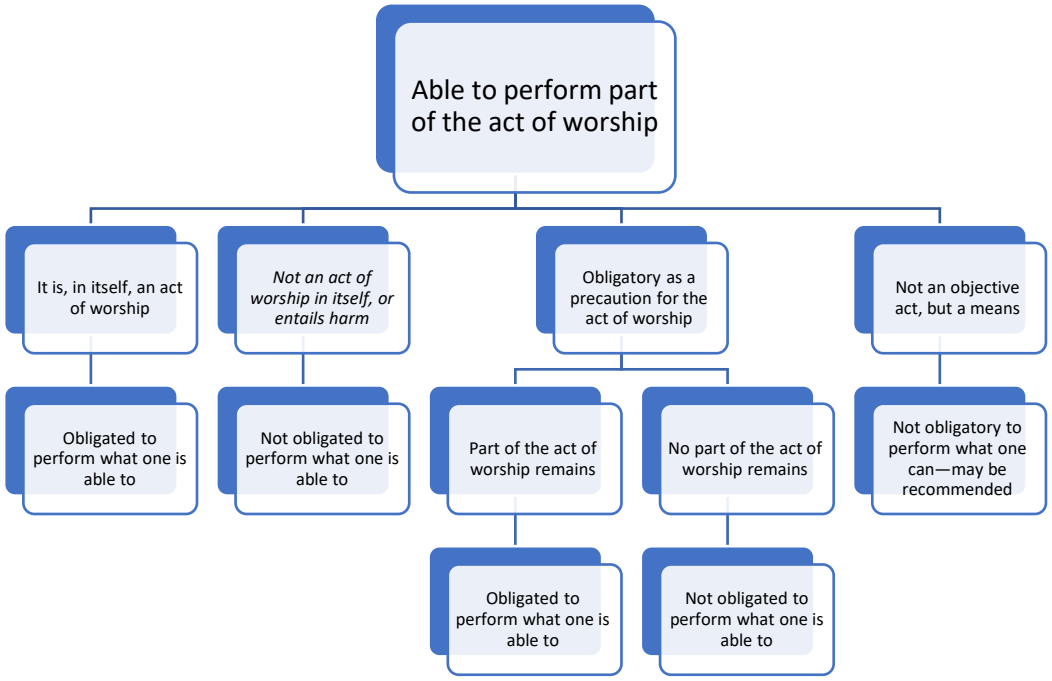
- Among them: The case of someone in a state of minor impurity (*ḥadath aṣghar*) who finds only enough water to wash some of his limbs. There are two views regarding whether he is obligated to use it. The reasoning of those who hold that it is not obligatory includes: either that the lifting of minor impurity is indivisible, so partial washing does not fulfill the objective; or that it is divisible but invalidated by failing to maintain continuity (*muwālāh*), rendering it ineffective; or that washing some limbs of someone in minor impurity is not legislated—unlike washing part of the body in a state of major impurity, as previously discussed.[640]
- Another case: If one possesses less than a full ṣāʿ (a traditional dry-volume measure) for zakāt al-fiṭr, is he required to give what he has? There are two reported views. The reasoning behind non-obligation is that it is a form of monetary expiation (*kaffārah*), and such obligations are not divisible—just as one who can only feed some of the required number of poor individuals is not held liable. However, the correct view is that he is obligated to give what he possesses,[641] and the distinction between this and kaffārah lies in two points: In kaffārah, the obligation can shift to an alternative (i.e., fasting), unlike zakāt al-fiṭr. In kaffārah, it is essential that the full act be completed, as its purpose is to fulfill one of three objectives (freeing a slave, feeding, or clothing), and piecing together parts fails to achieve any of them. Thus, the obligation is not discharged except by fully completing one of the prescribed acts or by fasting. In contrast, the obligation of zakāt al-fiṭr is not discharged without giving whatever is available."[642]

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[640] The favorable position in the madhhab: "Or if the amount is small, he uses it [for part of his purification], then performs *tayammum* for what remains." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:100.

[641] "If one liable for zakāt al-fiṭr possesses nothing beyond his needs except part of a *ṣāʿ*, he is still obligated to give that portion." *Kashshāf al-Qināʿ*, al-Buhūtī, 5:57.

[642] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:85.




ما جاز لعذر بطل بزواله

**Fifth Subsidiary Maxim: What is permitted by excuse lapses when it ends**

This maxim is closely related to the one before it. It is another qualifier of the maxim *"Necessities permit prohibitions."* Among its most well-known applications is the legal maxim that has become proverbial:

"إذا حضر الماء بطل التيمم."

*"When water becomes available, dry ablution (tayammum) is invalidated."*

Likewise, if someone regains the ability to recite Sūrat al-Fātiḥah after having been previously unable, he may no longer replace it with general remembrances.

Concessions granted due to illness come to an end upon recovery.

Concessions granted due to travel come to an end upon settlement.

The maxim is exceedingly clear, and for this reason, we will not multiply examples. However, scholars may differ regarding matters that fall outside its direct application, such as their disagreement on the case of someone who sees water after having begun prayer with *tayammum*—does his *tayammum* become invalid? The established view in the Ḥanbalī school is that it does.[643]

643 "*Tayammum* is invalidated by whatever invalidates purification with water, by the end of the prayer time, and by gaining the ability to use water—even if this occurs during the prayer." *ʿUmdat al-Fiqh*, Ibn Qudāmah al-Maqdisī, 18.

Ibn Rajab, in his seventh legal maxim, said:

"من تلبس بعبادة، ثم وجد قبل فراغها ما لو كان واجدا له قبل الشروع لكان هو الواجب دون ما تلبس به؛ هل يلزمه الانتقال إليه، أم يمضي ويجزئه؟"

Maxim: *If one begins an act of worship, then before completing it gains access to something that—had he possessed it prior to beginning—would have been the actual obligation instead of what he is currently doing, is he required to shift to that obligation, or may he proceed with what he began and be considered to have fulfilled his duty?*

This scenario divides into two categories:

First category: When the act of worship that he began is based on a general concession, legislated to make matters easier for the *mukallaf* (accountable individual), even though it is possible—though with hardship—for him to perform the original act. In this case, he is not required to switch to the original once it becomes available. Example: a *mutamattiʿ* who lacks a sacrificial animal is granted a general concession to fast instead. Even if he is able to purchase the animal by taking on debt, while being financially capable in his hometown, he is still not required to do so.

Second category: When the act of worship he began was only legislated due to necessity—namely, complete inability to perform the original act. In this case, he is required to switch to the original as soon as he becomes capable, even in the middle of performing the substitute. Example: a waiting period (*ʿiddah*) calculated in months is not valid when the woman becomes able to calculate her waiting period based on menstruation. This is why a woman whose menstruation ceased due to a known cause is required to wait for it to return, even if the wait is prolonged.

The only reason a woman whose menstruation stopped for unknown reasons is permitted to calculate *ʿiddah* by months is that her menstruation is neither known nor expected to return.

*This applies whether the woman had previously been required to calculate her ʿiddah by menstruation—such as one whose period ceased for unknown reasons, so she began calculating by months and then resumed menstruation during that period—or whether she was not previously obligated to do so—such as a young girl who begins menstruating in the midst of a monthly ʿiddah.*

There are other issues that are debated and lie between these two categories:

Example 1: One who begins fasting as an expiation (*kaffārah*) for ẓihār (a prohibited declaration such as likening one's wife to one's mother) or for an oath, and then finds a slave to free:

The established view is that he is not required to switch, since the fast is a concession, similar to the fast of the mutamattiʿ (pilgrim who combines ʿumrah and ḥajj with a release from iḥrām between them).

However, there is another view that he is required to switch, because expiations are legislated to serve a disciplinary and deterrent purpose (*zajr wa-radʿ*), and this is incompatible with an unrestricted concession. For this reason, he would be required to purchase a slave on credit if his wealth is currently unavailable…

Example 2: One who begins prayer with *tayammum* and then finds water—there are two opinions as to whether his prayer is invalidated. From the perspective that *tayammum* is a general concession, it is

comparable to the fast of the *mutamattiʿ*. But from the perspective that *tayammum* is a necessity, it resembles the *ʿiddah* by months.

The clarification of its status as a necessity lies in the fact that *tayammum* merely permits prayer while one remains in a state of ritual impurity—it does not lift that impurity, according to the madhhab. Therefore, it is impermissible to complete prayer in a state of impurity when water, which actually removes impurity, becomes available."[644]

"يقوم البدل مقام المبدل" و"المصير إلى البدل إنما يجوز عند عدم الأصل" "فإذا وجد المبدل بطل حكم البدل" "ولا يصح الجمع بين البدل والمبدل"

**Sixth Subsidiary Maxim: "The Substitute Takes the Place of the Original."[645] & "Recourse to the substitute is permitted only when the original is unavailable."[646] & "When the original is found, the ruling of the substitute is nullified."[647] & "It is not valid to combine the substitute and the original."[648]**

This is articulated in al-Siʿdī's 28th legal maxim:

يقوم البدل مقام المبدل ولكن لا يصار إليه إلا إذا تعذر الأصل.

*"The substitute takes the place of the original, but one only resorts to it when the original becomes unattainable."*

Everything that has a substitute is subject to this rule: when the original is unattainable, the substitute is used. Allah said:

فَلَمْ تَجِدُوا ماءً فَتَيَمَّمُوا.

*"If you do not find water, then perform tayammum."* (Sūrat al-Nisāʾ 4:43)

فَعِدَّةٌ مِنْ أَيّامٍ أُخَرَ، وَعَلى الَّذِينَ يُطِيقُونَهُ فِدْيَةٌ طَعامُ مِسْكِينٍ

And He said: *"Then a number of days [as make-up], and upon those who are able [to fast] but with hardship—a ransom: feeding a poor person."* (Sūrat al-Baqarah 2:184)

These are two substitutes: one for the person capable of making up the act, and the other for the one incapable.

فَإِنْ خِفْتُمْ فَرِجالاً أَوْ رُكْبانًا

He also said: *"Then [pray] on foot or riding [if you are in fear]."* (Sūrat al-Baqarah 2:239)

This refers to the prayer of fear (*ṣalāt al-khawf*), which substitutes the prayer of security.

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[644] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:82–83.

[645] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:52.

[646] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:55.

[647] *al-Mughnī*, Ibn Qudāmah, vol. 11, p. 220.

[648] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:107.

Thus, the rule holds across all areas where a substitute has been legislated: the original is used when available; otherwise, recourse is made to its substitute. Because of this flexibility, the rule of substitution is rightly placed under the higher maxim: *"Hardship begets facilitation."*

إذا تعذر الأصل يصار إلى البدل

The maxim *"If the original is unattainable, recourse is made to the substitute"* has many applications:

For example, if a person unlawfully seizes something and returning it becomes impossible—such as a stray animal that has escaped— "… the owner is entitled to demand its value, because the original cannot be restored, and so its substitute becomes obligatory."[649]

Likewise, if it is not possible to carry out *qiṣāṣ* (equal retribution) without transgression or injustice, recourse is made to its substitute: blood money (*diyah*).

When the original becomes available, the ruling of the substitute is nullified—for example: *"If a young girl begins menstruating during her waiting period (ʿiddah), she must switch to counting by menstrual cycles (qurūʾ), because the months were merely a substitute for them."*[650]

ولا يصح الجمع بين البدل والمبدل

"It is not valid to combine the substitute and the original"—so we do not combine both *qiṣāṣ* and *diyah* against a killer, nor do we require both fasting and a sacrificial offering from someone who has committed a violation while in a state of *iḥrām*. And so it is in similar cases.

In Ibn Rajab's 143rd legal maxim, he states:

"يقوم البدل مقام المبدل، ويسد مسده، ويبنى حكمه على حكمه في مواضع كثيرة ... ومنها:"

*"The substitute takes the place of the original, fulfills its function, and its ruling is based on that of the original in many cases…* Among them:

- If one wipes over leather socks (*khuff*) and then removes them, it is sufficient for him to wash his feet afterward—according to one of the two reported views—even if continuity (*muwālāh*) is interrupted. This is because the wiping completed and perfected the *wuḍūʾ*, and stood in place of washing the feet until the socks were removed. So, if removal is followed by foot washing, the ablution is treated as continuous[651] …
- If forty individuals obligated to attend Jumuʿah are present, and during the sermon or the prayer they are replaced by another group of forty with the same qualifications, the Friday prayer remains valid and complete with them.
- If a zakātable niṣāb (minimum zakātable amount) is exchanged for another of the same category, the zakāh year (*ḥawl*) continues based on the original—according to the official view of the madhhab.

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649 *al-Kāfī*, Ibn Qudāmah, 2:224.

650 Al-Mubdiʿ fī Sharḥ al-Muqniʿ, Ibn Mufliḥ, 7:85.

651 "The well-known position in the madhhab is that ablution is invalidated by removing the khuffayn (leather socks), while Imām Taqī al-Dīn [Ibn Taymiyyah] preferred the view that it remains valid."

If it is exchanged for a different category, the cycle is reset—except in the case of exchanging one form of currency (*naqd*) for another, where two views exist.[652]

- If the skins of sacrificial animals are exchanged for useful household items, it is permitted, as explicitly stated by Imām Aḥmad—because such items fulfill the same purpose as benefiting from the skins themselves in the home.
- The same applies to the replacement of a waqf if it falls into disrepair, or a mosque whose people have disappeared.
  There are two opinions regarding replacing a waqf while it is still standing, if it can be exchanged for something better.[653]" [654]

المعصية لا تكون سببًا للنعمة

## Seventh Subsidiary Maxim: Sin Is Not a Cause for Blessing[655]

Other expressions:

"الرخص لا تناط بالمعاصي"

*"Concessions are not attached to acts of disobedience"*

The meaning of this maxim requires little explanation: sin is a cause for Allah's punishment, not for His favor in the form of ease or legal concession.

Applications:

- Wine does not become pure by transformation into vinegar (*takhallul*) if it was intentionally stored for that purpose.[656]

According to the madhhab: *"A person in a state of necessity during a journey of disobedience is not permitted to eat from carrion."*[657]

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[652] The madhhab holds that the two (i.e., gold and silver) are treated as a single category. In Kashshāf al-Qināʿ it states: "(Except in the case of exchanging gold for silver and vice versa), such as exchanging silver for gold, or trade goods exchanged for currencies, or trade goods exchanged for other trade goods. And also (except in the case of money held by currency dealers), for in such cases the ḥawl (zakāh year) is not interrupted by the exchange, because all of it is treated as a single category in terms of combining amounts for zakāh purposes." Kashshāf al-Qināʿ, al-Buhūtī, 4:333.

[653] The official position of the madhhab is prohibition, while Imām Taqī al-Dīn [Ibn Taymiyyah] chose permissibility when it serves a valid interest (maṣlaḥah). In Sharḥ al-Muntahā by Ibn al-Najjār, it states: "(...) If the intended benefits of the waqf are not disrupted, it is categorically impermissible to sell or exchange it. This was explicitly stated. (...) As for replacing a functioning waqf with something better, there are two narrations. (...) In al-Furūʿ it states: 'Our Shaykh permitted both when they serve a valid interest.'" Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 7:255.

[654] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:52.

[655] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 21:481.

[656] "The scholars are agreed that if wine turns into vinegar by the act of Allah, without any intention on the part of its owner, it becomes pure. There is disagreement and further detail, however, when the owner intends to cause the transformation. The correct view is that if he intends to turn it into vinegar, it does not become pure under any circumstance. (...) This is because storing it is an act of disobedience, purity is a blessing, and disobedience cannot be the cause of a blessing." Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 21:481.

[657] al-Inṣāf, al-Mardāwī, 27:243.

And if one pays money to obtain a prohibited compensation—such as the wage of a prostitute, the fee of a soothsayer, or the price of wine—it is not returned to him even though, in principle, it remains his property due to the invalidity of the contract. Instead, it is spent for the public benefit.[658]

Disagreement may arise in how this maxim is applied. For example, the majority—including Ḥanbalīs—hold that a threefold pronouncement of divorce counts as three separate divorces. The rationale is that the sin (for those who view it as such) cannot be a cause for *blessing*, meaning that it should not result in a lenient ruling by reducing its legal effect. However, Imām Taqī al-Dīn responded: *"The correct analogy is that it does not count as three, because it is a prohibited act, and the general principle is that what is prohibited is invalid—meaning that the objective of the one committing it is not realized. In this case, the one who utters the impermissible divorce intends its legal effect; its invalidity means his intention is not fulfilled."*[659]

This maxim aligns with the legal-epistemological rule: *"A prohibition entails invalidity"* (*al-nahy yaqtaḍī al-fasād*)—
meaning that contracts and transactions which are prohibited cannot be a cause for blessing, namely the legal validity of the transaction, and that is when the prohibition relates to the contract itself, an inseparable attribute of it, or a condition affecting its validity.

الاضطرار لا يبطل حق الغير

**Eighth Subsidiary Maxim: Necessity Does Not Nullify the Right of Others**

This is another Restriction on the Maxim: "Necessities permit prohibitions"

If a person is forced by necessity to destroy someone else's property or harm their body, the question arises: is he sinful, and is he liable for compensation?

If the necessity originated from the other person or his property, then there is neither sin nor liability—such as when someone attacks and cannot be repelled except by injuring or killing him; or when an animal attacks a person, forcing him to wound or kill it; or if someone's possessions fell on him, so he pushed it away and it was damaged or fell into a well.

But if the necessity arises from another cause, and the person is forced to consume another's property, then he is liable. For instance, if someone is on the verge of death from starvation and finds another person's food—while that person is not in a state of necessity—then he may take the food, and may even fight for it if prevented, yet he must compensate its value.

Likewise, if a ship is about to sink and he throws someone else's belongings overboard to lighten the load, he is liable for its value.

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[658] "Whoever sells wine to Muslims does not own its price. (...) What is taken from him is directed to the public interests of the Muslims, as has been said regarding the prostitute's wage, the soothsayer's fee, and similar cases (...) when the wrongdoer has already received the countervalue." This was stated by the Shaykh so that the wrongdoer does not retain both the compensation and that for which it was paid. I say: the principles of the madhhab entail that the compensation remains the property of the one who paid it because the contract is invalid. (...) Kashshāf al-Qināʿ, al-Buhūtī, 7:265.

[659] *Jāmiʿ al-Masāʾil*, Ibn Taymiyyah, 1:316.

However, if one is told: *"Kill someone else or be killed,"* this is not a necessity that lifts sin or liability. It is not permissible for him to save himself by sacrificing another. If he does so, both the coerced killer and the coercer are jointly liable for *qiṣāṣ* (equal retribution) and financial compensation.

In Ibn Rajab's 77th Legal Maxim:

"من اتصل بملكه ملك غيره متميزا عنه وهو تابع له، ولم يمكن فصله منه بدون ضرر يلحقه، وفي إبقائه على الشركة ضرر، ولم يفصله مالكه، فلمالك الأصل أن يتملكه بالقيمة من مالكه، ويجبر المالك على القبول. وإن كان يمكن فصله بدون ضرر يلحق مالك الأصل، فالمشهور أنه ليس له تملكه قهرا، لزوال ضرره بالفصل."

*"If another person's distinct property becomes attached to one's own property as an accessory to it, and separating it would cause harm to the original owner—while retaining it would cause harm as well—and the other party refuses to remove it, then the owner of the original has the right to claim ownership of the attached property for its value, and the other party is compelled to accept. But if it can be removed without harm to the original owner, then according to the well-known view, the original owner does not have the right to seize it by force, because his harm is resolved through removal.*

Numerous issues arise from this maxim:

One example: if a tenant plants trees or constructs a building on rented land, and the rental period ends, yet the owner does not remove what was planted or built, the landlord may claim ownership of the structures or trees at their value, because he cannot remove them without compensating for the diminution in their value, which would cause him harm. This was mentioned by al-Qāḍī, Ibn ʿAqīl, and most scholars. Abū al-Khaṭṭāb did not require that the owner of the structures first refuse to remove them; perhaps he considered the choice to rest with the landowner rather than the one who planted or built."[660]

It should be noted that the harm endured by the landowner does not nullify the right of the owner of the secondary property (such as crops or buildings) to compensation. Even more revealing of the spirit of this maxim is the jurists' treatment of a land usurper (*ghāṣib*) who plants on someone else's land: the landowner is given the choice between leaving the crop for the usurper in exchange for rent at fair market value or taking ownership of the crop—but only after reimbursing the usurper for his expenses.[661]

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[660] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:20.

[661] "The owner who recovers land from a usurper before the harvest may choose either to leave the crop until harvest in return for the customary rent or to take possession of the crop upon paying its expenses, namely the equivalent of the seed and compensation for associated work such as plowing and irrigation." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:298.

"ما حرم تحريم الوسائل جاز للحاجة - والحاجة العامة قد تنزل منزلة الضرورة الخاصة"

**Ninth Subsidiary Maxim: What Is Prohibited as a Preventive Means May Be Permitted in Cases of Need — and a General Need May Take the Ruling of a Specific Necessity**

الحاجة تنزل منزلة الضرورة عامة كانت أو خاصة

Other expressions have been used by jurists such as al-Suyūṭī and Ibn Nujaym, including: *"Need takes the ruling of necessity, whether general or specific."*

It appears that what they intended by saying that need takes the ruling of necessity is that it establishes legal effect, not that it is to be treated in every respect as necessity.

This specific formulation does not appear in the writings of the earlier Ḥanbalīs. Some of them—such as Imām Ibn Qudāmah—explicitly stated that legal rulings may not be built upon needs (*ḥājiyyāt*) unless there is a basis or precedent supporting this.[662] Some later Ḥanbalīs, such as Ibn ʿUthaymīn, also stated that the absolute phrasing of this maxim is incorrect as it stands.[663]

As we clarify later, it may be said that no concession is granted for needs whose general category has no precedent for concession in the Sharīʿah.

Thus, the maxim as stated by Imāms al-Suyūṭī and Ibn Nujaym requires reformulation to resolve the ambiguity caused by its unqualified wording. One might instead say:

"الحاجة سبب للتيسير، عامة كانت أو خاصة."

ما حرم تحريم الوسائل جاز للحاجة

*"Need—whether general or specific—is a cause for legal facilitation,"*
or: *"What is prohibited as a preventive means may be permitted in cases of need."*[664]

The eminent scholar Ibn ʿUthaymīn said in his versified work:

"لكن ما حرم للذريعة ... يجوز للحاجة كالعرية"

*"That which is prohibited as a preventative means (li-l-dharīʿah) may be permitted in cases of need—such as the case of ʿarāyā transactions."*

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[662] "His statement, 'It is not valid to rely solely on these two' (...) refers to the embellishing and need-based interests 'without a foundational precedent' affirming their consideration. That is, the mujtahid may not (...) derive rulings from them until he finds a precedent of the same genus validating their consideration. (...)" Sharḥ Mukhtaṣar al-Rawḍah, al-Ṭūfī, 3:206.

[663] Student: "(…) According to the same maxim: 'Need takes the ruling of necessity,' whether it is general or specific."
Shaykh (Ibn ʿUthaymīn): "No, that is not correct. It does not take the same ruling. Rather, a need (ḥājah) may permit something prohibited—if the prohibition is due to it being a means to something else (taḥrīm wasāʾil)—like the case of the ʿarāyā transaction, for example." al-Sharḥ al-Ṣawtī li-Zād al-Mustaqniʿ, Ibn ʿUthaymīn, 1:2386 (Shāmilah numbering).

[664] Madārij al-Sālikīn, Ibn al-Qayyim, 1:572.
Iʿlām al-Muwaqqiʿīn, Ibn al-Qayyim, 3:123.

One of the causes of confusion is that jurists were strict in defining *necessity* (*ḍarūrah*), yet later encountered cases that fell outside that definition but were still recognized by the Sharīʿah as grounds for legal alleviation—and jurists have continued to take such cases into account in their rulings. (See the discussion on the definition of necessity under the maxim *"Necessities permit prohibitions.")*

They have cited several pieces of evidence in support of this maxim, including: the concession permitting ʿarāyā sales, the allowance of harvesting *idhkhir* (a type of grass) as an exception to the prohibition of removing plants from the Ḥaram, the permissibility of wearing silk for one afflicted with itching, and the use of silver solder and golden nose prosthetics.

To properly understand this maxim, one must grasp the distinction between *necessities* and *needs*, or more broadly, the full spectrum of interests (*maṣāliḥ*), as well as the different levels of prohibitions.

As for the levels of interests (maṣāliḥ), it has been said that they are five: necessity (*ḍarūrah*), need (*ḥājah*), benefit (*manfaʿah*), adornment (*zīnah*), and excess (*fuḍūl*).

- "Necessity (ḍarūrah): Reaching a point where, if the prohibited is not consumed, the person will perish or come close to it. This level permits that which is ordinarily prohibited, such as the one in dire need of food or clothing, such that if he abstains, he would die or lose a limb or a faculty.
- Need (ḥājah): A situation where, if the prohibited is not taken, the person will not die but will suffer hardship and difficulty—like someone hungry who will not die without food but will endure distress. This does not permit the unlawful, though it may justify breaking the fast in Ramadan.
- Benefit (manfaʿah): That which is merely desirable, such as someone who craves wheat bread, lamb meat, or rich foods.
- Adornment (zīnah): That which is sought for pleasure and enjoyment, such as craving sweets made from almonds and sugar, or wearing a garment woven from silk and linen.
- Excess (fuḍūl): Refers to indulgence in what is prohibited or doubtful—such as one who desires to use gold and silver utensils."[665]

This is a sound classification; however, the three-tiered division is more widely known and easier to apply. In that model, interests (*maṣāliḥ*) are divided into:

1. Necessities (*ḍarūriyyāt*),
2. Needs (*ḥājiyyāt*), and
3. Enhancements (*taḥsīniyyāt*): The last category encompasses the final three levels from the five-tiered scheme (benefit, adornment, and excess), though it only includes excess (*fuḍūl*) that is not prohibited.

[665] Adapted from al-Qawāʿid al-Fiqhiyyah wa-Taṭbīqātuhā fī al-Madhāhib al-Arbaʿah, Muḥammad al-Zuḥaylī, 1:285.

وأما الحاجيات، فمعناها أنها مفتقر إليها من حيث التوسعة ورفع الضيق المؤدي في الغالب إلى الحرج والمشقة اللاحقة بفوت المطلوب، فإذا لم تراع دخل على المكلفين - على الجملة - الحرج والمشقة، ولكنه لا يبلغ مبلغ الفساد العادي المتوقع في المصالح العامة.

Among the accepted definitions of need (*ḥājah*) is that of al-Shāṭibī, who said: *"As for needs, their meaning is that they are sought for the sake of ease and removing hardship that, if not addressed, would typically lead to distress and difficulty due to the loss of what is sought. If they are not considered, hardship and burden fall upon the legally responsible in general—but not to the extent of widespread corruption in public interests."*[666]

It is not only needs (*ḥājāt*) that vary in levels—prohibitions and the prohibited also come in categories: among them is what is prohibited in and of itself (*taḥrīm maqāṣid*) and what is prohibited due to what it leads to (*taḥrīm wasāʾil*). [667] It is in reference to the latter that the maxim applies: *"What is prohibited as a preventive means may be permitted in cases of need."*[668]

There is also a distinction between what is prohibited due to its very essence, such as carrion (*maytah*), and what is prohibited due to the way it was acquired, such as usury (*ribā*) and wrongfully seized property (*maghṣūb*).[669] That which is prohibited in its essence is never permissible, whereas the other may become permissible for someone other than the usurper.

Among these prohibitions are those that are never permitted under any circumstance—such as killing an innocent soul, pure injustice. Then there are those that are only permitted in cases of necessity, such as uttering words of disbelief, eating pork, or drinking wine. Then there is a third category: prohibited acts that the Sharīʿah has permitted in specific contexts. These fall under the maxim: *"What is prohibited as a preventive means may be permitted in cases of need."* Examples include: wearing silk, certain forms of *ribā* and *gharar*, and certain prohibited transactions.

The question of considering *need* (*ḥājah*) as a basis for legal alleviation is tied to the broader issue of unrestricted public interest (*maṣlaḥah mursalah*), regarding which there is a well-known disagreement within the madhhab. Al-Ṭūfī said:

"Mālik and some of the Shāfiʿīs said: It is a valid proof, because we know that it falls under the objectives of the Sharīʿah based on numerous evidences. They referred to it as *maṣlaḥah mursalah*—not *qiyās*—because *qiyās* is based on a specific original case to which the new case is connected through a shared effective cause, whereas *maṣlaḥah mursalah* has no such case to refer back to.

Some of our fellows said: It is not a valid proof, because we do not know that the Sharīʿah has preserved such interests. For that reason, it did not prescribe more severe deterrents than those already legislated—

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[666] *Al-Muwāfaqāt*, al-Shāṭibī, 2:21.

[667] Madārij al-Sālikīn, Ibn al-Qayyim, 1:572.

Iʿlām al-Muwaqqiʿīn, Ibn al-Qayyim, 3:123.

[668] Al-Sharḥ al-Mumtiʿ ʿalā Zād al-Mustaqniʿ, Ibn ʿUthaymīn, 8:420

[669] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 14:44.

such as execution for theft.[670] To establish *maṣlaḥah mursalah* as a legal proof, then, would be to legislate in religion based on opinion—just as Mālik is reported to have said: *"It is permissible to kill a third of the population to reform the remaining two-thirds."* Yet we do not know that the Sharīʿah has preserved interests through such means…

*Some of our fellows said it is not a valid proof"—this is a reference to Shaykh Abū Muḥammad. He said in al-Rawḍah: 'The correct view is that it is not a valid proof.'*

*I used the phrase 'some of our fellows said' and not 'our fellows said' because, from what I've seen of their writings—including that of Shaykh Abū Muḥammad himself—when they engage deeply in explaining rulings, they often rely on interest-based considerations (munāsabāt maṣlaḥiyyah) that one can almost be certain were not intended by the Lawgiver. Relying on such reasoning resembles grasping at the "cords of the moon." I therefore refrained from categorically attributing denial of maṣlaḥah mursalah to all of them, fearing that some among them may have actually affirmed it, and I would then be misrepresenting their views. … I say: "As for me, the preferred and sound view is that unrestricted public interests (maṣāliḥ mursalah) are to be recognized."*[671]

He then said: "Al-Qarāfī stated that interests (*maṣāliḥ*), in relation to whether the Sharīʿah affirms or denies their relevance, fall into three categories:

1. That which the Sharīʿah has affirmed—this is *qiyās*.
2. That which the Sharīʿah has rejected—such as forbidding the cultivation of grapes out of fear they may be used to produce wine, or prohibiting cohabitation in shared housing out of fear of zinā.
3. That for which the Sharīʿah has neither affirmed nor denied its consideration—this is *maṣlaḥah mursalah*, which, according to Imām Mālik, is a valid legal proof."[672] This concludes al-Ṭūfī's remarks.

In reality, the *maṣlaḥah mursalah* has indeed been acknowledged by the Sharīʿah—but it has done so by affirming the consideration of its general category in the generality of rulings, not by affirming its specific instance in a specific ruling. The suitability (*munāsabah*) of attributes (*awṣāf*) as a basis for legal rulings exists in five levels. This is an approximate arrangement explaining the degrees of legal attestation for interests, allowing for differences among legal theorists in the names and boundaries of the categories:

1. Effective attribute (*al-waṣf al-muʾaththir*):
   This is an attribute for which the Sharīʿah has affirmed its effect in a specific ruling—such as the specific quality of minority in the ruling of guardianship over wealth, or intoxication as the cause for the prohibition of all wines.

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[670] It is clear from the examples that there is a fear of the consequences of recognizing such interests—namely, that rulers may exploit them under the banner of "policy" (*siyāsah*) without remaining bound by the Sharīʿah.

[671] Sharḥ Mukhtaṣar al-Rawḍah, al-Ṭūfī, 3:209.

[672] Sharḥ Mukhtaṣar al-Rawḍah, al-Ṭūfī, 3:211.

2. Well-suited attribute (*al-waṣf al-mulāʾim*):
   This is an attribute for which the Sharīʿah has affirmed its specific effect in a general category of rulings, or its general type in a specific ruling—such as minority in the general category of guardianship (e.g., analogy between guardianship over wealth and over marriage), or unusual hardship as a basis for combining prayers.
3. Appropriate but unrestricted (*al-waṣf al-munāsib al-mursal*):
   This refers to *maṣlaḥah mursalah* itself: an attribute whose remote genus has been considered by the Sharīʿah in general categories of rulings—such as the protection of life and property as a basis for rules governing public roads, and by extension, the obligation to observe traffic signals.
4. Uncorroborated unattested attribute (*al-waṣf al-mursal al-gharīb*):
   This is an attribute the Sharīʿah has neither affirmed nor invalidated.
5. Disregarded attribute (*al-waṣf al-mulghā*):
   This is an attribute the Sharīʿah has explicitly invalidated.

If *maṣlaḥah mursalah* were of the fourth or fifth type, it would not be a valid legal proof, for the Sharīʿah has already indicated the categories of valid interests, even if it has not specified every individual instance. Ibn al-Najjār, when discussing the case of two partners in a slave who enter into a *kitābah* (manumission contract) with him, and one of them later annuls the contract, said:

*"As for the harm caused to the partner who annulled the [manumission contract], the Sharīʿah has not recognized it as legally significant in any context, and no parallel case is known. It therefore falls into the category of maṣlaḥah mursalah that has been unanimously rejected. By contrast, the harm done to his partner through the annulment of the contract is recognized—such as in sale, gift, pledge, and the like. Therefore, this case is even more deserving of recognition."*[673]

Imām Abū al-ʿAbbās said:

*"This is a profoundly important topic and deserves careful attention. Much confusion has entered the religion through it. Many rulers, scholars, and worshipers have seen what they believed to be beneficial interests (maṣāliḥ), and acted upon them based on this principle. Yet some of these interests may in fact be prohibited by the Sharīʿah—and they were unaware of that. Others prioritized statements concerning maṣlaḥah mursalah in ways that contradicted clear texts. And many have neglected interests that the Sharīʿah does, in fact, require consideration of—merely because they found no explicit text addressing them—thus neglecting obligations and recommended acts, or falling into prohibitions and disliked matters. In some cases, the Sharīʿah may have addressed those matters, but they were unaware of it.*

*Those who affirm unrestricted interests argue: this is a valid interest, and the Sharīʿah does not neglect interests. In fact, the Qurʾān, Sunnah, and consensus all affirm their consideration.*

*The opposing view argues: this is a matter for which the Sharīʿah provides neither textual proof nor analogical reasoning. Legislating on the basis of maṣlaḥah mursalah often introduces into the religion something for which Allah has not granted permission.*

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[673] *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 8:421.

*This issue closely resembles—at least in some respects—the debates surrounding istiḥsān (juristic preference), rational determination of goodness (taḥsīn ʿaqlī), and personal reasoning. For istiḥsān is the search for what is good or better, akin to istikhrāj (extraction); it means perceiving something as good, just as istiqbāḥ is the perception of something as repugnant. And goodness is nothing other than maṣlaḥah, so istiḥsān and istiṣlāḥ (appeal to public interest) are closely related. Rational determination of goodness (taḥsīn ʿaqlī) asserts that the intellect can discern what is good, but there are distinctions among these.*

والقول الجامع: أن الشريعة لا تُهمل مصلحة قط

لكن ما اعتقده العقل مصلحة، وإن لم يرد به الشرع، فأحد أمرين لازم له: إما أن الشرع دلّ عليه من حيث لم يعلم هذا الناظر، أو أنه ليس بمصلحة، وإن اعتقده مصلحة؛

*The synthesis is this: the Sharīʿah neglects no true interest whatsoever. Allah, exalted be He, has perfected the religion and completed the favor. There is nothing that draws one closer to Paradise but that the Prophet ﷺ has informed us of it. He left us upon a radiant clarity—its night as bright as its day—none will deviate from it after him except one who is doomed. As for what the intellect may perceive as an interest, yet the Sharīʿah has not spoken on it—then one of two things must be true: either the Sharīʿah has in fact pointed to it, but the observer is unaware of that indication; or it is not truly an interest, even if it is thought to be so. Because an interest is defined as the benefit that is realized or predominates over harm. And how often do people presume that something is beneficial—whether in religion or worldly affairs—when in fact its harm outweighs its benefit, just as Allah said concerning wine and gambling."*[674]

*What the Imām has affirmed is what we uphold: the Sharīʿah has indeed borne witness to these maṣāliḥ mursalah, as previously explained—but its testimony is not to specific instances within specific rulings, but rather to their general category within the generalities of rulings. Thus, maṣlaḥah mursalah is, in general, weaker than analogy (qiyās) in evidentiary strength—though in some cases, it may surpass certain applications of analogy.*

Among the examples of how *needs* (*ḥājāt*) are recognized and have legal effect in Sharīʿah rulings is what Ibn Rajab mentioned in his 130th legal maxim, where he said:

"المسكن والخادم والمركب المحتاج إليه ليس بمال فاضل يمنع أخذ الزكوات، ولا يجب به الحج والكفارات، ولا يوفى منه الديون والنفقات. نص على ذلك أحمد في مسائل:"

*"The dwelling, servant, and means of transportation that one needs are not considered surplus wealth that prevents eligibility to receive zakāh, nor are they items by which ḥajj and expiations become obligatory, nor from which debts or maintenance are fulfilled.* This was explicitly stated by Imām Aḥmad in several issues:

Among them is Zakāh: Abū Dāwūd said: Aḥmad was asked about a man who owns a house—does he qualify to receive zakāh? He replied: "Yes." I asked, "What if it is a spacious house?" He said: "I hope

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[674] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 11:344.

there is no harm in that." It was said to him, "And if he has a servant?" He said: "I hope [that's permissible]." It was said: "A horse?" He said: "If he uses it for fighting in the path of Allah, I hope there is no harm." …

He was asked about the house. He replied: "If it is not significantly beyond what he needs, he may be given."
In the narration of Ibn al-Ḥakam, it is stated: "A person may receive zakāh even if he owns a house that exceeds his needs…"

Among them is Ḥajj: In al-Maimūnī's narration, Aḥmad said: "If a person owns one or two houses and a servant, or something that he depends on to support his dependents, then these are not to be sold so long as they suffice his household. Some homes may be rented, but they are his provision and that of his family. However, if they exceed his needs and those of his dependents, they should be sold. The same applies to farmland—if it exceeds what is needed, it should be sold." In the narration of Ibn al-Ḥakam, Aḥmad said: "If a man owns land, I do not think he should sell it to perform ḥajj. It is not obligatory upon him in my view—unless he wishes to."

Our fellows said:

"There is no difference in this ruling between someone who already owns a house or servant and someone who possesses cash with the intent to purchase them."

Among them is the case of the bankrupt person (*muflis*), concerning which Imām Aḥmad has many explicit statements: that the home is not to be sold unless there is surplus in it; in that case, only the surplus is sold, and the rest is left for him in proportion to his need. This was explicitly stated in the narrations of Abū al-Ḥārith and Abū Ṭālib.

As for the servant: He is not to be sold if the person needs him due to old age, illness, or similar needs. This was stated in the narrations of ʿAbd Allāh, Abū Ṭālib, and others. In the narration of Ismāʿīl ibn Saʿīd, Aḥmad said: "If the house is luxurious or the servant of high value, then something more modest may be bought for him, and the remainder used to pay creditors." This was also reported from him by Mūsā ibn Saʿīd …

Among them is the matter of supporting relatives: Abū Ṭālib reported that Aḥmad was asked, "If a man owns a house, should he sell it in order to support his father?" He replied: "He must have a place to live. If he has surplus beyond his housing and beyond what he needs to support his dependents, then he should spend on them. But if he has no surplus and no financial ease, then he is not obligated to support them."

The author of *al-Targhīb* explicitly stated: "One is not obligated to sell property to support relatives except in the same cases where a bankrupt person is required to sell it to repay debts." This should likewise apply to jizyah (the poll tax), kharāj (the land tax), and obligations of the ʿāqilah (the group sharing liability for blood money)."[675]

Thus, ḥājiyyah-level interests (*maṣāliḥ ḥājiyyah*) are to be regarded as valid so long as the Sharīʿah has acknowledged the validity of their general category within the generality of rulings.

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[675] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:495.

Among their applications are:

- The permissibility of entering bathhouses for a fee, despite the contractual ambiguity involved.
- The permissibility of entering the mosque for someone in a state of major ritual impurity (janābah) or menstruation, when there is a need to do so.

Among the rulings said to be established in the Sharīʿah despite being contrary to strict analogy (though this is contested) are:

- The legitimacy of lease contracts (ijārah), even though they involve a usufruct not yet in existence at the time of contract.
- Jaʿālah (contingent reward contracts), despite the vagueness involved.
- Ḥawālah (debt transfer), it has been said that it is a sale of one debt for another permitted because of need. The sound position in the madhhab, however, is that it is an independent contract of accommodation rather than a sale.
- Salam contracts (advance-payment sales), which entail the sale of an item that does not yet exist.
- The permission for various forms of contractual options (khiyārāt), even though the default rule in contracts is binding finality.

These rulings are firmly established in every age.

Among them are dispensations explicitly established in the texts due to need, such as the permissibility of ʿarāyā sales, repairing vessels with silver patches, and looking at one's prospective spouse.

فإن أردت بقولك " لا سياسة إلا ما وافق الشرع " أي لم يخالف ما نطق به الشرع فصحيح، وإن أردت ما نطق به الشرع فغلط وتغليط للصحابة.

The establishment of bureaucratic registries (dawāwīn) and the minting of dirhams and dinars are likewise rooted in recognized public interest. And Imām Ibn ʿAqīl (rA) was right when he said: *"If by your statement, 'There is no policy (siyāsah) except what accords with the Sharīʿah,' you mean that it does not contradict what has been explicitly stated in the Sharīʿah, then that is correct. But if you mean that it must be explicitly stated in the Sharīʿah, then that is mistaken—and entails attributing error to the Companions."*[676]

Imām Abū al-ʿAbbās (Ibn Taymiyyah) has numerous applications of this maxim in commercial jurisprudence, among them:

*"As for the sale of cultivated produce such as melons, cucumbers, gourds, and the like—some scholars from the schools of Abū Ḥanīfah, al-Shāfiʿī, and Aḥmad held that they may only be sold one harvest at a time, treating this as analogous to the sale of fruit before its ripeness appears. However, the correct view*

[676] *Iʿlām al-Muwaqqiʿīn,* Ibn al-Qayyim, 4:283.

*is that such produce may be sold in bulk along with its roots, as held by some scholars from the Shāfiʿī and Ḥanbalī schools, and this is also the position of Mālik and others."*

*"This ruling has two legal justifications:*

*First, that the roots are like the trunks of fruit-bearing trees—so selling vegetables along with their roots before ripeness is akin to selling trees along with their unripe fruit, which is permitted by way of attachment (tabaʿ). This is a line of reasoning taken by a group of the followers of al-Shāfiʿī and Aḥmad, even though it is contrary to his principles."*

*"The second—and sounder—justification is that such produce was not included in the Prophet's ﷺ prohibition. Rather, its sale is valid, involving both present and future items: the crop that is visible and the crop that will emerge until the patch dries out. Even if some of it has not yet appeared, because there is a need to sell it in that form, and it cannot be sold otherwise—since, due to the indistinguishability of the items, selling it unit by unit is either impossible or excessively difficult—and both are negated in the Sharīʿah. And the Sharīʿah has settled on the principle that whatever there is a need to sell is permitted to be sold—even if it does not yet exist—such as usufructs (manāfiʿ), or the value for fruit that has not yet ripened when sold along with the tree, and for fruit that has ripened when sold on its own."*[677]

Now that it is clear that ḥājiyyah-level interests (*maṣāliḥ ḥājiyyah*) are recognized and have legal effect in rulings, the question arises: when do they permit what is ordinarily prohibited? Shaykh ʿAbd al-Raḥmān ibn Ṣāliḥ al-ʿAbd al-Laṭīf compiled the most important related principles in his work *Al-Qawāʿid wa-al-Ḍawābiṭ al-Fiqhiyyah al-Mutadamminah li-l-Taysīr* as follows:

"The scholars have stipulated several key conditions for a need to permit what is otherwise prohibited, the most important of which are as follows:

1. That the hardship motivating the departure from the original Sharʿī ruling reaches the level of extraordinary difficulty.
2. That the standard for assessing such a need be based on the condition of the average individual—whether in the general population (for public need) or among the specific group to whom the need pertains (in cases of individual or specific need).
3. That the need be definite and unavoidable—that is, that there be no other viable means of achieving the intended purpose except through the breach of the general ruling.
4. That the need be proportionate and judged according to its extent—just as with cases of necessity.
5. That the ruling based on need not contradict an explicit text from the Qurʾān or the Sunnah specific to the issue, nor oppose a sound and stronger legal analogy; that it align with the objectives (*maqāṣid*) of the Sharīʿah; and that it not result in the loss of a greater interest."[678]

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[677] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 29:484.

[678] Al-Qawāʿid wa al-Ḍawābiṭ al-Fiqhiyyah al-Mutaḍamminah li-al-Taysīr, al-ʿAbd al-Laṭīf, 1:247

One may further add that the prohibited matter is often of the type prohibited as a preventive means (*maḥẓūr li-ghayrihi*); in that case, the preferred formulation of the maxim becomes:

«ما حرم تحريم الوسائل جاز للحاجة»

"What is prohibited as a preventive means may be permitted in cases of need."[679]

Is general need the same as specific need in this regard?

The correct view is that a general need (*ḥājah ʿāmmah*) may in fact take the ruling of a specific necessity (*ḍarūrah khāṣṣah*), for the corruption that results from an entire community enduring hardship may be equal to—or even worse than—that which befalls individuals enduring necessity. This was articulated by Imām al-Ḥaramayn in *al-Ghiyāthī*, in a powerful discussion that deserves to be quoted in full; we will cite here only the portion most relevant to our subject:

*"If livelihoods become wholly corrupted, and the land is filled entirely with unlawful gain in food, clothing, and possessions—and our own era is not far from such a state—then if the situation we described were to occur, there would be no way to compel people, under such conditions, to abstain from their daily sustenance and strip themselves of what clothing they can afford…*

*For if people were to wait, in what they eat, until reaching a state of necessity before consuming food, that would result in physical collapse, loss of resilience, and the breakdown of bodily function—especially if such desperation were to become habitual. This would lead to craftsmen abandoning their trades and professions, to the collapse of farming, cultivation, and all means of earning a living by which human society is sustained. The end result would be the destruction of the entire population—including the capable and strong, as well as the soldiers guarding the frontiers of the Muslim lands. And when they falter, weaken, and give up, the disbelievers would become emboldened, infiltrating Muslim territories, tearing apart the fabric and dismantling the order of society…*

بل الحاجة في حق الناس كافة تنزل منزلة الضرورة، في حق الواحد المضطر

*The general principle to be drawn from this—before we enter into its details—is that if unlawful means overtake the people of a time such that they have no way to seek out the lawful, they may take from the unlawful that which meets their need. The level of necessity that we typically require for the consumption of carrion by an individual is not required here. Rather, the need of the collective assumes the status of necessity for the individual. For if a single person, in a state of necessity, were to endure without eating carrion, he would perish. Likewise, if the general public were to endure their unmet needs until they reached the level of necessity, all of them would perish. The threat posed by widespread*

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[679] "Prohibited matters are of two types: that which is intrinsically prohibited and is never permitted under any circumstance, and that which is prohibited incidentally—restricted to certain times but not others." Madārij al-Sālikīn, Ibn al-Qayyim, 1:572.

"The prohibition of usury (*ribā*) is of two types: one type is prohibited due to the harm it contains—this is *ribā al-nasīʾah* (usury involving delay); and the other type is prohibited as a preventive measure and as a means of blocking the avenues that lead to harm." *Iʿlām al-Muwaqiʿīn,* Ibn al-Qayyim, 3:123.

*unmet need to the entire community is like that posed by necessity to an individual. So understand this, and you will be rightly guided."*[680]

Exceptions

The juristic controls (*ḍawābiṭ*) mentioned earlier serve to identify the exceptions. Not every need permits what is otherwise prohibited. This can be applied, for instance, to the practice of *Bayʿ al-Wafāʾ* or *Bayʿ al-Amānah*—a sale in which it is agreed that the seller may repurchase the item upon returning the price.

Some later Ḥanafī scholars permitted this form of transaction out of need in Bukhara, due to the prevalence of debt among its people. However, the majority of scholars maintained its prohibition, because the buyer benefits from the item while awaiting repayment—rendering it effectively a loan that yields a benefit, which constitutes usury (ribā).

"A loan that brings a benefit has been explicitly prohibited by more than one Companion—such as ʿAbd Allāh ibn Salām and Anas ibn Mālik—and it has also been attributed in a raised report (*marfūʿ*) to the Prophet ﷺ, as narrated by Ibn Mājah and others."[681]

Although several scholars have graded the ḥadīth weak, it is nevertheless acted upon by the scholars, and has become a recognized legal maxim in the Sharīʿah. Thus, violating this well-established principle in such a grave and sensitive matter cannot be justified simply by invoking the alleviation of hardship for some individuals.

## Exceptions

Hardship is undoubtedly lifted in Islamic law, yet not every difficulty warrants a concession. We have already encountered numerous exceptions to this general maxim and its subsidiary applications. For example, not every need permits what is ordinarily prohibited. Even the maxim *"Necessities permit prohibitions"* (*al-ḍarūrāt tubīḥ al-maḥẓūrāt*) is itself governed by several other legal criteria. Likewise, the maxim *"Concessions are not granted in the case of sin"* (*al-rukhaṣ lā tunāṭu bi'l-maʿāṣī*) excludes many scenarios. We have encountered several cases over which the scholars differed—such as the issue of not delaying the implementation of ḥadd punishment for a sick person until recovery, not excusing one who engages in intercourse forgetfully during ḥajj or fasting, along with other examples.

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[680] Ghiyāth al-Umam fī Iltiyāth al-Ẓulam, al-Juwaynī, 476.

[681] Taqrīb Fatāwā Ibn Taymiyyah, ed. Aḥmad al-Ṭayyār, 4:155.

# The Fifth Major Legal Maxim: Custom Is Authoritative

## Explanation and Alternative Expressions

Among its alternative expressions:

إعمال العرف

- *Applying custom* (*iʿmāl al-ʿurf*)

استعمال الناس حجَّة يجب العمل بها

- *The practice of the people is a proof that must be acted upon*

Its meaning is that custom has legal effect in establishing Sharʿī rulings.

Ibn al-Najjār has a valuable statement in *al-Kawkab al-Munīr* in which he clarifies the meaning of the maxim and provides evidence for it. I quote it verbatim:

*"Among the evidences in fiqh as well is the authority of custom, which is the meaning of the jurists' saying: 'Custom is authoritative,' meaning it is acted upon legally.*

مَا رَآهُ الْمُؤْمِنُونَ حَسَنًا فَهُوَ عِنْدَ اللَّهِ حَسَنٌ

- *Based on a report attributed to ʿAbd Allāh ibn Masʿūd (rA), traceable only to him: "What the believers deem good is good in the sight of Allah."*

{خُذْ الْعَفْوَ وَأْمُرْ بِالْعُرْفِ}

- *And on the statement of Ibn ʿAṭiyyah regarding the verse: {Take what is given freely, and command what is customary}—he said: the meaning of 'custom' is everything the souls recognize as good and which is not rejected by the Sharīʿah.*

ما عرفه العقلاء بأنه حسن، وأقرهم الشارع عليه.

- *Ibn Ẓafar said in al-Yanbūʿ: "'Custom' is what reasonable people deem good, and which the Lawgiver has approved of or tacitly accepted."*

{ وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ}

*And every occurrence of the word "maʿrūf" in the Qurʾān, such as His saying {And live with them in accordance with what is customary "maʿrūf "}, refers to what the people at that time recognized in matters of that kind.*

*Among these:*

{يَا أَيُّهَا الَّذِينَ آمَنُوا لِيَسْتَأْذِنْكُمُ الَّذِينَ مَلَكَتْ أَيْمَانُكُمْ وَالَّذِينَ لَمْ يَبْلُغُوا الْحُلُمَ مِنْكُمْ ثَلاثَ مَرَّاتٍ مِنْ قَبْلِ صَلاةِ الْفَجْرِ وَحِينَ تَضَعُونَ ثِيَابَكُمْ مِنَ الظَّهِيرَةِ وَمِنْ بَعْدِ صَلاةِ الْعِشَاءِ ثَلاثُ عَوْرَاتٍ لَكُمْ لَيْسَ عَلَيْكُمْ وَلا عَلَيْهِمْ جُنَاحٌ بَعْدَهُنَّ طَوَّافُونَ عَلَيْكُمْ بَعْضُكُمْ عَلَى بَعْضٍ كَذَلِكَ يُبَيِّنُ اللَّهُ لَكُمُ الآيَاتِ وَاللَّهُ عَلِيمٌ حَكِيمٌ}

- *His saying, the Exalted: {O you who believe, let those whom your right hands possess, and those who have not reached puberty among you, ask your permission three times: before the dawn prayer, and when you remove your garments in the afternoon, and after the night prayer—[these] are three times of privacy for you. There is no blame upon you or upon them beyond that, for they continually circulate among you—some of you among others. Thus does Allah make clear to you the verses. And Allah is Knowing and Wise}—He commanded seeking permission at the times when people customarily remove their clothes and uncover themselves, and so the legal ruling was based on what they were accustomed to.*

خُذِي مَا يَكْفِيك وَوَلَدِك بِالْمَعْرُوفِ

- *Among them: the Prophet ﷺ said to Hind, "Take what suffices you and your child according to what is customary (or reasonable)."*

تَحِيضِي فِي عِلْمِ اللَّهِ تَعَالَى سِتًّا أَوْ سَبْعًا، كَمَا تَحِيضُ النِّسَاءُ وَكَمَا يَطْهُرْنَ لِمِيقَاتِ حَيْضِهِنَّ وَطُهْرِهِنَّ

- *And his ﷺ statement to Ḥamnah bint Jahsh: "Consider it menstruation in the knowledge of Allah for six or seven [days], as other women menstruate and purify at the times of their menstruation and purification."*
  *Narrated by al-Tirmidhī and authenticated by al-Ḥākim.*

لِتَنْظُرْ عَدَدَ اللَّيَالِي وَالأَيَّامِ الَّتِي كَانَتْ تَحِيضُهُنَّ مِنَ الشَّهْرِ قَبْلَ أَنْ يُصِيبَهَا ذَلِكَ فَلْتَتْرُكْ الصَّلاةَ

- *And the ḥadīth of Umm Salamah: A woman used to bleed profusely during the time of the Prophet ﷺ, and Umm Salamah asked the Prophet ﷺ on her behalf. He said: "Let her observe the number of nights and days she used to menstruate each month before that happened to her, and she should refrain from prayer during that time." Narrated by Abū Dāwūd, al-Nasāʾī, Ibn Khuzaymah, and Ibn Ḥibbān in their Ṣaḥīḥs.*

- *Among them is the ḥadīth of Ḥarām ibn Muḥayyiṣah al-Anṣārī, from al-Barāʾ ibn ʿĀzib: A camel belonging to al-Barāʾ entered a garden and caused damage. The Prophet ﷺ ruled that garden owners are responsible for protecting their gardens by day, and livestock owners are responsible for guarding their livestock by night. Narrated by Abū Dāwūd and authenticated by several scholars. This is among the clearest evidences for the consideration of custom in legal rulings, as the Prophet ﷺ based liability on what was customary.*

وضابطه كل فعل رتب عليه الحكم، ولا ضابط له في الشرع ولا في اللغة، كإحياء الموات، والحرز في السرقة، والأكل من بيت الصديق. وما يعد قبضا وإيداعا وإعطاء وهدية وغصبا، والمعروف في المعاشرة [بين الزوجين] وانتفاع المستأجر بما جرت به العادة. وأمثال هذه كثيرة لا تنحصر.

*Its criterion: every action upon which a ruling is dependent, and which has no clear definition in either the Sharīʿah or the language, is returned to custom—such as: reviving dead land (iḥyāʾ al-mawāt), determining what is a secure place in cases of theft, eating from a friend's house, what constitutes possession, deposit, giving, gift, usurpation, what is considered reasonable interaction in marriage, and the kinds of benefit the lessee enjoys according to custom. There are many such examples that cannot be counted.*

الوصف المعلل به قد يكون عرفيا

*The basis of this maxim in uṣūl al-fiqh lies in their statement: "The effective attribute may be customary," meaning: it arises from custom. And in the chapter on takhṣīṣ (specification), they speak of general rulings being specified by custom."*[682]

Among its applications:

«ما لم يرد الشرع بتقديره يرد إلى العرف، كالكثير من العمل في الصلاة، والتفرق والإحراز» .

*"Whatever has not been specified by the Sharīʿah is referred to custom,"* such as what constitutes excessive movement in prayer, what qualifies as dispersal, and what counts as securing possession."[683]

And: *"If one swears not to eat shiwāʾ (roast), he breaks his oath by eating roasted meat, but not by eating roasted eggs or anything else besides meat.* Likewise, if someone swears using terms like *animal*, *roof*, *lamp*, or *peg*, it applies only to what is customarily known by those names—not to a human (for animal), the sky (for roof), the sun (for lamp), or a mountain (for peg)."[684]

## The Basis of This Maxim

وللعادات والأعراف سلطان على النفوس، وتحكم في العقول، لهذا اعتبرت من ضروريات الحياة، ولهذا قالوا: "العادة طبيعة ثانية" وفي نزع الناس من عاداتهم حرج شديد

We have already cited Ibn al-Najjār's evidence for the maxim. The Qurʾānic and Prophetic references to custom are too numerous to count. Its validity is a matter of consensus among Muslims. Shaykh Muḥammad al-Zuḥaylī said: *"Customs and conventions have authority over people's minds and govern their behavior. For this reason, they are considered among life's necessities. Hence it has been said: 'Custom is a second nature.' Uprooting people from their customs causes severe hardship."*[685]

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682 Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:448–452.

683 *al-Mughnī*, Ibn Qudāmah, vol. 2, p. 288.

684 Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:426.

685 al-Qawāʿid al-Fiqhiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arbaʿah, Muḥammad al-Zuḥaylī, 1:301.

## Guidelines and Benefits

### The Meaning of ʿĀdah and ʿUrf, the Difference Between Them, and Which Takes Precedence

ʿĀdah (habit) is so named because a person continuously returns to it.[686] It is repetition without a rational connection[687]—such as that between cause and effect—that makes something a ʿādah (habit), one toward which souls naturally incline.

The minimum number of times for something to be considered a *ʿādah* is generally three consecutive occurrences, as seen in rulings related to menstruation[688] and repeated apostasy.[689]

As for practices like evaluating the skill of an experienced physiognomist (*qāʾif*), they did not specify a number, unlike the Shāfiʿīs; rather, they were content with consistent accuracy.[690]

As for *ʿurf* (custom) in the Arabic language, Ibn Fāris says:

"ʿ(ʿayn–rāʾ–fāʾ) is based on two genuine Arabic roots. One refers to something occurring in connected succession, and the other to stillness and tranquility.

The first appears in *ʿurf*, as in *ʿurf al-faras* (the crest of a horse), so called due to the continuous layering of hair upon it…

And *ʿurf* also means what is commonly known and accepted (*al-maʿrūf*), so named because the soul finds ease and repose in it. Al-Nābighah said:

"أَبَى اللَّهُ إِلَّا عَدْلَهُ وَوَفَاءَهُ ... فَلَا النُّكْرُ مَعْرُوفٌ وَلَا الْعُرْفُ ضَائِعُ"

God has willed nothing but his justice and fidelity—So evil is never recognized as virtue, and *ʿurf* (good) is never lost."[691]

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[686] Mujmal al-Lughah, Ibn Fāris, 635.

[687] "(The issue of ʿādah): it refers to something that occurs repeatedly without a rational connection." al-Taqrīr wa al-Taḥbīr ʿalā Kitāb al-Taḥrīr, Ibn Amīr al-Ḥājj, 1:282.

[688] "A woman experiencing menstrual bleeding for the first time—whether blood, yellowish discharge, or brownish discharge—refrains from prayer and fasting for the minimum duration as soon as she sees it. (...) She then performs ghusl and resumes prayer and similar acts. (...) She repeats this three times, for no menstrual habit is established without such repetition. If the pattern does not vary, it becomes her established habit." Ghāyat al-Muntahā, Marʿī al-Karmī, 1:117.

[689] "The minimum by which repeated apostasy is established is three times—similar to how a menstrual habit (*ʿādah*) is established through three occurrences." Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 6:292.

[690] "His statement, 'tested for accuracy,' means frequently accurate. (...) This testing when he is presented as a qāʾif is a precaution to verify his accuracy. If, however, he is already known for consistent accuracy and sound judgment in many cases, his testimony may be accepted without testing." Kashshāf al-Qināʿ, al-Buhūtī, 9:553.

[691] Muʿjam Maqāyīs al-Lughah, Ibn Fāris, 4:281

Al-Jurjānī, in his definition of ʿurf and ʿādah, says:

«العرف: ما استقرت النفوس عليه بشهادة العقول، وتلقته الطبائع بالقبول، وهو حجة أيضًا، لكنه أسرع إلى الفهم، وكذا العادة، هي ما استمر الناس عليه على حكم العقول وعادوا إليه مرة بعد أخرى.»

"ʿUrf is what the souls have settled upon, attested to by sound reason, and embraced by natural dispositions. It is also a source of authority, though it is more readily understood. Likewise, ʿādah is what people have consistently practiced, in accordance with reason, and returned to time and again."[692]

Do ʿĀdah and ʿUrf Have the Same Meaning?

Jurists have often used *ʿādah* and *ʿurf* interchangeably. Among the examples is the statement of Ibn al-Najjār regarding what determines a secure place (*ḥirz*): "(ʿĀdatan), meaning: customarily. For *ḥirz* means protection, as in the phrase: *iḥtariz*, meaning 'protect yourself.' Since the Sharīʿah considers *ḥirz* relevant in certain rulings without defining it or specifying its characteristics—and since there is no linguistic definition firmly established—it is known that the point of reference is the *ʿurf* among people. Just as *ʿurf* is the reference in identifying possession and separation in sales and the like."[693]

However, they coincide when it comes to collective practice: the habit (ʿādah) of a group is called *ʿurf*, whereas the habit of an individual is not. Yet both have legal weight in rulings.
A *ʿādah* may pertain to an individual—such as a woman accustomed to menstruating for five days—or to a small group, like the habitual exchange of gifts between a borrower and lender. *ʿUrf*, on the other hand, refers to a practice widely recognized by the public—such as conventional meanings, technical terms, what constitutes a secure place for storing wealth, or customary amounts of financial maintenance.
Thus, the relationship between *ʿādah* and *ʿurf* is one of absolute generality and specificity.

This distinction in usage is also indicated by the statement of Ibn al-Najjār:

"If the stipulation of the endower (*wāqif*) is unknown, and there is evidence for the endowment but not its conditions, then recourse is made to an established *ʿādah*, then to *ʿurf*; for a continuous habit and a stable custom in endowment matters indicate the intent of the endower more strongly than merely widespread attribution."[694]

You find that he gives precedence to *ʿādah* over *ʿurf*, as it is more specific.

Conflict between *ʿādah* and *ʿurf* is rare, but when it occurs, jurists give precedence to *ʿādah* in rulings related to the individual—such as determining the intent of a *wāqif* (endower), as mentioned above, or in the case of a woman with a menstrual habit, where her personal habit is preferred over the general custom among women.[695]

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[692] *Kitāb al-Taʿrīfāt*, al-Jurjānī, 149.

[693] *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 10:486.

[694] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:412.

[695] "If a woman with a known menstrual habit experiences istiḥāḍah, she follows that habit if she remembers it. (...)
She does so even if her current blood has distinguishing features. (...)
Whenever she remembers her habit, she returns to it and makes up the obligatory acts missed during its time." Thus, custom here takes precedence over the usual duration of menstruation or the general pattern among women.

However, in disputes and litigation, they give precedence to *ʿurf*, since it is broader—such as when one hires a porter or the like: he is entitled to the standard wage even if he is not personally accustomed to taking payment.[696]

*ʿUrf*, in terms of its scope, is divided into two categories: general and specific.

1. The specific is what is limited to a particular region or a certain group of people—such as the custom of merchants or that of cuppers.
2. The general is what is widespread among the people—such as delaying part of the bridal dower, or paying rent in advance before the benefit is received in a lease.

The scholars agreed on applying the general *ʿurf*, but differed regarding the specific *ʿurf*. The correct view is that it should be applied among its people if it is consistent and predominant among them.

*ʿUrf*, in terms of its nature, is divided into two types: verbal custom (ʿurf qawlī) and practical custom (ʿurf ʿamalī).

1. The verbal is a term whose usage has become widespread in a meaning other than its original linguistic sense—whether among all people or among a particular group, such as the terminology of grammarians or logicians.
2. The practical is when people become accustomed to a particular method in transactions—such as how possession (*qabḍ*) is effected, or their agreement to enter shops without seeking permission, and other similar practices. This type may also be general or specific.

## The Relationship Between Customary, Legal, and Linguistic Designation

What if the legal, linguistic, and customary meanings conflict?

As previously noted, recourse is made to ʿurf when neither the Sharīʿah nor the language has defined a term. For instance, the Sharīʿah has mentioned prayer (ṣalāh) and almsgiving (zakāh) and assigned to them meanings distinct from their linguistic sense, but also provided comprehensive definitions for them — so there is no need to refer to ʿurf in these cases.

If, however, the Sharīʿah mentions a matter and attaches a ruling to it without defining it, then we refer to the language — for the clear Book was revealed in it, and the purified Sunnah was spoken in it. Thus, we understand the meaning of "thief" (sāriq), whose hand is to be cut, through the language.

﴿ وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ ﴾

But if something is not fully understood by language alone — such as a ḥirz (secure location) from which theft incurs the ḥadd punishment, or a person entrusted with a deposit would be liable if he did

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Ghāyat al-Muntahā, Marʿī al-Karmī, 1:119.

[696] "Whoever gives an item to a craftsman to work on, such as a garment to dye or sew, (...) and the craftsman does so, is liable for the customary wage. Likewise, one who employs a porter or the like (...) without a contract owes the customary wage for the work, (...) even if that worker does not customarily charge, because he performed, with permission and without intending a gift, work for which compensation is ordinarily paid. (...) This applies to one who holds himself out for such work; otherwise, nothing is owed without a contract, condition, or indication." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:246.

not safeguard the trust in it — then we return to ʿurf. The Sharīʿah may even explicitly instruct us to do so, as in His saying: “Live with them in accordance with what is customary.” [al-Nisāʾ: 19]

This governs our understanding of the divine address — but what about our understanding of human speech when legal, linguistic, and customary meanings diverge?

If the expression is one upon which a legal ruling depends, then the sharʿī designation takes precedence over customary usage. For instance, if someone swears an oath that he will not “pray,” he is not deemed perjurious unless he performs ṣalāh as defined in the Sharīʿah — that is, the act involving rukūʿ and sujūd.

But if the expression is not tied to a legal ruling, then Ibn Rajab has outlined two legal maxims regarding the specification of general terms by means of ʿurf and ʿādah. We shall mention them here in brief.[697]

He said in the one hundred twenty-first principle:

"في تخصيص العموم بالعرف، ولها صورتان:

إحداهما: أن يكون قد غلب استعمال الاسم العام في بعض أفراده حتى صار حقيقة عرفية؛ فهذا يخص به العموم بغير خلاف."

“On the specification of general terms by custom (ʿurf), which has two scenarios:
First: That the general term has come to be predominantly used for only some of its referents, such that it becomes a customary designation (ḥaqīqah ʿurfiyyah). In such cases, the general term is specified accordingly — and this is undisputed.

So, for example, if someone swears not to eat ‘roast’ (shawāʾ), his oath applies specifically to roasted meat, excluding roasted eggs and other items that may technically be roasted.

Likewise, if one swears concerning words like ‘beast of burden’ (dābbah), ‘roof’ (saqf), ‘lamp’ (sirāj), or ‘peg’ (watad), the oath only includes that which is customarily referred to by those terms — not a human being, the sky, the sun, or a mountain. These usages have lapsed into metaphor.
[Note: this entails prioritizing customary usage over revelatory usage.]

Second: That the term has not become a customary designation in that way — and this divides into two types:

1. That which is never referred to by the general term without qualification, and never independently: such things are not included within the general term — and this is, to our knowledge, undisputed. For example, Indian tamarind (tamr hindī) or senna pods (khiyār shanbar) are not included under the unqualified terms ‘tamr’ (dates) or ‘khiyār’ (cucumbers). This is mentioned by al-Qāḍī in *his Khilāf*.
   Likewise, rosewater is not encompassed by the term ‘water’ in its absolute sense.

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[697] وانظر كذلك القاعدة التاسعة والخمسين بعد المائة في تعارض الأصل والظاهر.

“See also Legal Maxim No. 159 concerning the conflict between the original assumption (*aṣl*) and the apparent indication (*ẓāhir*).”

2. That which is included under the general term, but typically only when accompanied by a qualifier or contextual clue, and whose inclusion is not commonly understood when the term is used without such: in this case, there are two views.

This gives rise to subsidiary issues, including:

If someone swears not to eat 'heads' (ruʾūs), al-Qāḍī said: he violates the oath by eating anything referred to as a 'head,' whether of a bird or a fish. In one place he reports this from Aḥmad. Elsewhere he says: "Custom is to be considered in generalizing a specific term, not in specifying a general one." Abū al-Khaṭṭāb said: he only violates the oath by eating a head that is customarily eaten on its own. Al-Qāḍī also stated in one place in *his Khilāf* that the oath is limited to what is customarily called a 'head.' ...

In *al-Targhīb*, the second view is mentioned: that the oath is only violated by eating a head that is commonly sold separately as food. He said: if a people have the custom of selling gazelle heads individually, then in that region the oath would be violated by eating one. [Note the application of *local* custom.]

Elsewhere, there are two views — their basis being: is the standard that of general custom, or that of the oath-taker?" …

Among them: If someone swears not to eat *meat* (laḥm), and then eats fish meat — there are two views. Aḥmad said, in the narration of Ṣāliḥ: "It is according to his intention."

Al-Qāḍī explained this to mean: if he intended a specific type of meat, then he is not in violation of his oath by eating something else under the unqualified term — and this is also the view of al-Khiraqī.

Ibn Abī Mūsā said: he is not in violation of the oath when the term is unqualified; he only breaks the oath if the item falls under his intended meaning — and this appears to be the meaning of Aḥmad's words..."[698]

He said in the one hundred twenty-second legal maxim:

"يخص العموم بالعادة على المنصوص. وذلك في مسائل:"

"The general (ʿāmm) is specified by custom (ʿādah), as explicitly stated by Aḥmad. This applies in several issues:

Among them: If one bequeaths something to 'his relatives' (aqārib) or 'his household' (ahl baytihi), Aḥmad said in the narration of Ibn al-Qāsim: If he says 'to my household' or 'to my kin,' the designation follows what is known of the man's customary conduct — for instance, if he used to maintain ties with his paternal aunt and maternal aunt. Similarly, Sindī transmitted a comparable view. And in the narration of Ṣāliḥ regarding a bequest to his household, Aḥmad said: One should examine whom he used to maintain ties with — whether from his father's side or mother's side. If he did not customarily maintain ties with his maternal kin, then his 'household' refers to those from his father's side.

[698] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:426 - 432.

Our fellows differed in interpreting this narration along two paths:

1. That it is a third distinct opinion — that maternal relatives are not included unless he maintained ties with them during his lifetime. This is the method of al-Qāḍī in *al-Mujarrad*.
2. That it reflects the correct position (madhhab): that consideration is given to those he used to maintain ties with during his lifetime, regardless. If he had no customary ties, then it is limited to paternal kin — and this is al-Qāḍī's position in *al-Khilāf*.

A different view is also attributed to Aḥmad: that consideration is not given to past ties at all. In the narration of Ibn Manṣūr: If a man bequeaths to the poor among his household, and he has kin in Baghdad and others in his homeland — and he used to support the ones in Baghdad — he said: *"Those present and those in his homeland are all given,"* and this was also narrated by ʿAbd Allāh.

Abū Ḥafṣ al-Barmakī said: This is another opinion — that no regard is given to whom he used to support during his life.

I say: It may be said that his failure to support those outside Baghdad had a known cause — the difficulty of doing so due to distance. The relevant case here is one in which he deliberately omitted support despite the ability to give it..."[699]

Know that intention (niyyah) is taken into account in oaths according to our madhhab; thus, it qualifies the wording. However, at times it may be unknown, or there may be a dispute — in which case, one must weigh between the competing meanings.

Upon examining their rulings, two guiding principles emerge:

1. Giving precedence to the dominant meaning — thus, legal terms in the Sharīʿah (such as ṣalāh, zakāh, and ṣawm) are given priority over others; and the linguistic meaning is given precedence over erratic customary usage — unless the customary meaning becomes so prevalent that the linguistic one is effectively abandoned.
2. Distinguishing between fatwā (a nonbinding legal opinion) and judicial rulings (qaḍāʾ) in disputes — there is a difference between issuing a ruling in a legal dispute (qaḍāʾ) and offering a legal opinion (fatwā). In the context of disputes and the interpretation of contracts, general custom (ʿurf ʿāmm) is prioritized — and it is preferred over linguistic usage if it is consistent and dominant. But if the issue concerns understanding the intent of the one who swore an oath, or made a vow, waqf, or bequest — then his personal habit is prioritized over the general custom.

## Conditions for Applying ʿĀdah and ʿUrf

It was previously established that customs which contradict textual evidence are not to be considered. Are there then other conditions for the admissibility of ʿādah (habit) and ʿurf (custom)?
These conditions were compiled in a resolution issued by the International Islamic Fiqh Academy, which aligns with our madhhab and with the majority. I will cite it in full:

"Resolution No. 9 concerning ʿUrf

[699] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:434.

The Council of the Islamic Fiqh Academy, in its fifth session held in Kuwait from 1 to 6 Jumādā al-Ūlā 1409 AH / 10 to 15 December 1988 CE,
Having reviewed the research papers submitted by the members and experts on the subject of ʿurf (custom), and after listening to the discussions thereon,

Resolved the following:

يراد بالعرف ما اعتاده الناس وساروا عليه من قول أو فعل أو ترك، وقد يكون معتبرًا شرعًا أو غير معتبر.

1. What is meant by ʿurf is what people are accustomed to and regularly practice in speech, action, or omission. It may be either recognized by the Sharīʿah or not.
2. If the ʿurf is specific, it is binding upon those to whom it applies. If it is general, it is binding upon all.
3. The ʿurf recognized by the Sharīʿah is that which fulfills the following conditions:
   (a) It must not contradict the Sharīʿah. If it conflicts with a textual provision or a legal maxim of the Sharīʿah, it is deemed invalid.
   (b) It must be continuous (persistent) or predominant.
   (c) The ʿurf must be in effect at the time the legal act is concluded.
   (d) It must not be explicitly negated by the contracting parties; if they stipulate otherwise, it is not considered.

"ليس للفقيه – مفتيًا كان أو قاضيا- الجمود على المنقول في كتب الفقهاء من غير مراعاة تبدل الأعراف"

4. A jurist — whether acting as a muftī or a judge — must not adhere rigidly to what is transmitted in the books of the jurists without taking into account the changing customs."

These four conditions were cited by Shaykh Saʿd al-Shithrī in his commentary on *al-Qawāʿid al-Siʿdiyyah*, and are generally agreed upon by the majority of scholars within and outside the madhhab.

إنما تعتبر العادة إذا اطَّردت

العرف الذي تحمل عليه الألفاظ إنما هو المقارن السابق دون المتأخر اللاحق

The second condition corresponds to the maxim: "A custom is only valid if it is continuous."
The third corresponds to the maxim: "The ʿurf that determines the meaning of expressions is that which is concurrent and prior — not subsequent."

This principle applies to understanding both the divine address and human speech and transactions.

## Operative Domains of the Maxim

The areas in which this maxim applies will become clear through its examples, but before going into detail, we may summarize them as follows:

1. Understanding the general statements of the Sharīʿah and regulating what it has not explicitly defined.
2. Interpreting, qualifying, and validating people's speech and transactions.

3. Altering legal rulings that are based on custom and whose bases are tied to it.

**First: Understanding the General Statements of the Sharīʿah and Regulating What It Has Not Explicitly Defined**

Al-Siʿdī said:

والعرف معمول به إذا ورد -- حكم من الشرع الشريف لم يحد

"Custom is acted upon when a ruling
from the noble Sharīʿah is not precisely defined."

ما لم يُقدِّرْه الشارع، فإنه يُرجَع فيه إلى العُرف .

Imām Ibn Taymiyyah expressed this meaning, saying: "What the Lawgiver has not specified is referred back to custom (*ʿurf*)."[700]

«ولأنَّ ما لم يَرِدِ الشَّرْعُ بتقديرِهِ يُرَدُّ إلى العُرْفِ، كالكثيرِ مِن العملِ في الصَّلاةِ، والتَّفَرُّق والإِحْراز»

And Imām Ibn Qudāmah said: "Whatever the Sharīʿah has not defined is referred to *ʿurf*—such as excessive movements in prayer, and matters of *tafarruq* (separation) and *iḥrāz* (safeguarding)."[701]

The Sharīʿah mentioned *ṣalāh* and *zakāh*, assigning to them meanings distinct from their original linguistic usage, yet it defined them with complete and sufficient boundaries—so there is certainly no need to refer to *ʿurf* in this context.

If the Lawgiver mentions a matter and attaches a ruling to it without defining it, we refer back to the language—since the Clear Book was revealed in it, and the purified Sunnah was spoken in it. Through it, we know the meaning of *sāriq* (thief), whose hand is to be cut off.

If the matter cannot be known through language alone—such as *ḥirz* (a secure place), from which the thief's hand is not cut unless he stole from it, or in which the person entrusted (*mustaʾman*) is held liable if he fails to safeguard the money—then we return to *ʿurf* (custom).
At times, the Lawgiver even directs us explicitly to do so, as in His saying: {And live with them in accordance with what is customary} [al-Nisāʾ: 19], and in other verses and ḥadīths that command accordingly.

There are many matters the Sharīʿah did not explicitly define because they are already known through common understanding. Among them are:

• The minimum age for menstruation and puberty
• The age of menopause
• The minimum and maximum durations of menstruation and postpartum bleeding
• What constitutes a secure place (*ḥirz*) for stolen property
• Excessive movement that invalidates prayer
• Financial maintenance for wives and relatives
• Separation in a sale that terminates the option of the session (*khiyār al-majlis*)

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[700] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 35:350.

[701] *al-Mughnī*, Ibn Qudāmah, vol. 2, p. 288.

• Possession (*qabḍ*) in contracts
• Reviving dead land (*iḥyāʾ al-mawāt*)
• Public announcement (*taʿrīf*) of lost property (*luqaṭah*)

**Second: Interpreting, Qualifying, and Rectifying People's Speech and Transactions**

الإطلاق يحمل على المعتاد

Ibn Qudāmah said: "It is permissible to rent a shirt to wear… but the benefit must be specified by duration. And if it is the custom of the people in his town to remove their clothing when sleeping at night, then he must remove it in that case—because unqualified terms are interpreted according to what is customary (muʿtād)."[702]

وَمَنْ كَانَ فَقِيرًا فَلْيَأْكُلْ بِالْمَعْرُوف

Imām al-Bukhārī devoted a chapter in the Book of Sales to: "'Whoever enacted the practices of townspeople based on what they customarily agree upon in sales, leases, measures, weights, and their recognized intentions and prevailing norms.'
Shurayḥ said to the weavers: 'Your practice among yourselves 'as profit'[703] [is binding].'
ʿAbd al-Wahhāb reported from Ayyūb from Muḥammad: 'There is no harm in [selling] ten for eleven, and taking a profit for personal expenses.'
The Prophet ﷺ said to Hind: *"Take what suffices you and your child, according to what is customary (bi-l-maʿrūf)."*
And Allah the Exalted said: *{And whoever is poor—let him eat according to what is customary}* [al-Nisāʾ: 6].
Al-Ḥasan rented a donkey from ʿAbd Allāh ibn Mirdās and asked: 'For how much?' He replied: 'For two daniqs.' So he rode it. Then he came another time and said: 'The donkey, the donkey!'—and rode it again without agreeing on a new price. So he sent him half a dirham."[704] That is, he generously added one dāniq to the previous rent.

مقصوده بهذه الترجمة إثبات الاعتماد على العرف وأنه يقضى به على ظواهر الألفاظ

Ibn Ḥajar, commenting on this chapter heading, said: "Ibn al-Munayyir and others stated that the intent of this chapter title is to affirm the authority of *ʿurf* (custom), and that it overrides the apparent meanings of words in legal judgment."[705]

It appears that the chapter heading indicates this applies to both expressions and actions. Among its examples are:

The most commonly cited example is that if someone swears not to eat meat, he is not considered to have broken his oath by eating fish—because in customary usage, fish is not called meat, even though it

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[702] al-Mughnī, Ibn Qudāmah, 8:58

[703] Ibn Ḥajar: "His statement: '(as profit)' has no meaning here; its proper place is at the end of the next report." Fatḥ al-Bārī, Ibn Ḥajar, 4:406

[704] *Ṣaḥīḥ al-Bukhārī*, al-Bukhārī, 3:79

[705] Fatḥ al-Bārī, Ibn Ḥajar, 4:406.

is referred to as such in the Qurʾān. However, this example is not useful for Ḥanbalī applications, since the correct view in the madhhab is that he is considered to have broken his oath.[706]

But Ḥanbalī jurists said: "(The term *dābbah* applies to both male and female of horses, mules, and donkeys), so the oath of one who swears not to ride a *dābbah* is restricted to these, because the term—according to ʿurf (customary usage)—applies only to them."[707]

"If one swears not to eat *shiwāʾ* (roast), he breaks his oath by eating roasted meat, but not by eating roasted eggs or anything else besides meat."[708]

They may, however, differ in these issues. In *al-Mubdiʿ*, it states:
"(If one swears not to eat a *raʾs* [head] or *bayḍ* [egg], he breaks his oath by eating the heads of birds and fish, fish eggs, and eggs of locusts), and similar items—(*according to al-Qāḍī)* ... (Whereas according to Abū al-Khaṭṭāb: he does not break his oath except by eating a head that is customarily eaten independently, or eggs that separate from the layer while still alive)—because the term, according to ʿurf (customary usage), does not apply to such things [aforementioned]. Therefore, he does not break his oath—just as if he had sworn not to eat *shiwāʾ* (grilled meat) and then ate eggs instead. This was transmitted in the *Sharḥ* from him, and it is the opinion of most scholars, and it is the correct view."[709]

It is understood from the foregoing that people's words are interpreted according to what is established by ʿurf (customary usage)—but what about their actions? The same applies, as in cases of *qabḍ* (taking possession), *tafarruq* (mutual separation), and *bayʿ al-muʿāṭāh* (transaction by mutual exchange without formal verbal offer and acceptance), which is valid in our school, contrary to the Shāfiʿīs.

Imām Ibn Qudāmah explains the reliance on ʿurf in people's transactions:

"The second type is *muʿāṭāh*—such as when one says: 'Give me bread for this dīnār,' and the other gives him what satisfies him; or says: 'Take this garment for a dīnār,' and the buyer takes it. This is a valid sale. Aḥmad explicitly stated this… The school of al-Shāfiʿī (rA) holds that a sale is not valid except with a formal offer and acceptance. Some of his companions agreed with our view.

أن الله أحل البيع، ولم يبين كيفيته، فوجب الرجوع فيه إلى العرف

Our evidence is that Allah permitted sale, without specifying its manner, so it must be referred to ʿurf—just as we refer to it in matters like *qabḍ*, *iḥrāz* (securing possession), and *tafarruq*. Muslims conduct their markets and sales in this way… Also, people have engaged in *muʿāṭāh* transactions in their markets in every era, and there is no record of any opposition to it before our opponents, so that constitutes ijmāʿ (consensus). The same ruling applies to the requirement of offer and acceptance in *hibah* (gifts), *hadiyyah* (presents), and *ṣadaqah* (charity)."[710]

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[706] "Whoever swears not to eat meat breaks his oath by eating fish or unlawful meat—but not by consuming meat broth, bone marrow, liver, or kidney." Muntahā al-Irādāt with the marginalia of Ibn Qāʾid, Ibn al-Najjār, 5:236.

[707] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:474.

[708] *al-Mughnī*, Ibn Qudāmah, vol. 13, p. 604.

[709] Al-Mubdiʿ fī Sharḥ al-Muqniʿ, Ibn Mufliḥ, 8:107.

[710] *al-Mughnī*, Ibn Qudāmah, vol. 6, p. 7.

He also said: "It is permissible to lease a *qamīṣ* (tunic) for wearing, because it is possible to benefit from it while its substance remains, and it is something that may be sold—so its lease is valid, like real estate. The benefit must be defined by a fixed period. And if it is the ʿurf of the people of his town to remove their garments when sleeping at night, then he must remove it at that time—because unrestricted terms are interpreted according to what is customary."[711]

Qualification (*taqyīd*) and specification (*takhṣīṣ*) of the speech of people—according to our school and the Ḥanafīs—are established through *ʿurf ʿamalī* (practical custom) just as they are through verbal custom. For example: "If he says: 'I sold it to you for ten *ṣiḥāḥ* (full coins), or eleven *mukassarah* (clipped coins),' and there are currencies in the town, then the situation does not lack one of two cases: either there is a predominant currency (*naqd ghālib*) in that town, or there is not. If there is a predominant currency, then the apparent meaning of the author's statement is that the sale is not valid if stated unqualifiedly. This is one of the two opinions, and it is the apparent view affirmed by the commentator and given preference in *al-Furūʿ*. The second opinion is that the sale is valid and is interpreted as referring to that predominant currency. And this is the madhhab."[712]

If you understand what has preceded, then know that recourse to *aʿrāf* (customs) and *ʿādāt* (practices) is one of the major legal maxims in fiqh and one of the foundational principles relied upon by judges of all schools in interpreting actions and the meanings of words across innumerable applications—such as contracts, oaths, *waqf* (endowments), *waṣiyyah* (bequests), measurements, *mahr al-mithl* (customary dower based on comparable cases), *kafāʾah* (suitability in marriage), and in disputes where no evidence is available or when evidences are equal—such as determining the orientation of walls in construction, the tying of ropes, or disputes over household furnishings between spouses, and so forth. To the extent that the Mālikī jurists themselves differed regarding whether a prevailing *ʿādah* (custom) that supports one of the disputants should be treated like the testimony of a single witness—thus not warranting judgment without an accompanying oath—or like the testimony of two witnesses—thus warranting judgment without an oath. And the apparent view in our madhhab is that when custom or the apparent circumstances support one party, that party's claim is accepted upon oath in the absence of evidence.[713]

**Third: The Change of Rulings Based on Customs**

This subject will be discussed in detail under the maxim: *"Change of legal rulings due to the change of times is not denied."* Here, we state in summary that rulings which are justified by specific *manāṭāt* (operative bases) tied to custom will differ when the customs themselves change, because the *manāṭāt* have changed.

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[711] *al-Mughnī*, Ibn Qudāmah, 8:58.

[712] al-Inṣāf, al-Mardāwī, 11:134.

[713] "Aḥmad said—according to the narration of the group, including Yaʿqūb ibn Bakhtān—regarding a man who divorces his wife or dies, and the woman claims ownership of the household items: whatever is typically used by men belongs to the man, and whatever is from women's belongings belongs to the women; and what is commonly used by both men and women is to be divided between them." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 11:366.

For this reason, Imām Ibn al-Najjār, in his discussion of examples under the maxim *al-ʿādah muḥakkamah* ("custom is authoritative"), said:

"Among them is the ḥadīth of Ḥarām ibn Muḥayṣah al-Anṣārī, from al-Barāʾ ibn ʿĀzib, that al-Barāʾ's she-camel entered an orchard and caused damage therein. The Prophet ﷺ ruled that the owners of orchards are responsible for guarding them by day, and the owners of livestock are responsible for guarding them by night." Narrated by Abū Dāwūd and authenticated by a group of scholars. This is the clearest proof that custom is taken into account in legal rulings, for the Prophet ﷺ based liability on what custom had established."[714]

So, whenever people's customs change, the ruling changes—not because of a change in God's revealed address, but as Imām al-Shāṭibī said in *al-Muwāfaqāt*:

«إن اختلاف الأحكام عند اختلاف العوائد ليس في الحقيقة باختلافٍ في أصل الخطاب، لأن الشرع موضوعٌ على أنه دائمٌ أبديٌّ لو فُرِض بقاءُ الدنيا إلى ما لانهاية، والتكليف كذلك، لم يُحتَج في الشرع إلى مزيد. ومعنى الاختلافِ أن العوائدَ إذا اختلفت رجَعَت كل عادةٍ إلى أصل شرعي يحكم بها... فالأحكام ثابتة تتبع أسبابها حيث كانت بإطلاق».

"The variation of rulings with the variation of customs is not, in reality, a variation in the original address of the law. For the Sharīʿah is established as something permanent and eternal. If the world were imagined to continue without end, and legal responsibility likewise, the Sharīʿah would need no addition.
The meaning of variation is that, when customs change, each custom returns to its corresponding legal principle that governs it... Thus, rulings are fixed, and follow their causes wherever they are, absolutely." [715]

**The Relationship Between Sharīʿah and ʿUrf (Custom)**

What do we mean by the maxim *"al-ʿādah muḥakkamah"* (custom is authoritative)? And what if most people become accustomed to immodesty among women, drinking alcohol, or consuming usury—something not far-fetched in corrupt times?

إخراج المكلف عن داعية هواه، حتى يكون عبدا لله اختيارا، كما هو عبد لله اضطرارا.

When discussing the relationship between legal (sharʿī), linguistic, and customary (ʿurfī) designations, we mentioned various cases of conflict. However, we must clarify here that the domain in which this legal maxim applies is *only where no explicit text exists*. If there is a text, no custom that contradicts it is to be considered—whether the custom is general or specific—because the objective of the Sharīʿah is: *"To remove the mukallaf (morally responsible person) from the pull of his own whims, so that he becomes a servant of God by choice, just as he is a servant of God by necessity."*[716]

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[714] Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:448 - 452.

[715] *al-Muwāfaqāt*, al-Shāṭibī, 2:217.

[716] *al-Muwāfaqāt*, al-Shāṭibī, 2:289.

But what if the text is general—can custom qualify (*takhṣīṣ*) it?
And what if *ʿurf* contradicts *qiyās* (analogical reasoning), or earlier juristic opinions that were based on the customs of their own time? What if even revealed texts themselves were addressing a *ʿurf* particular to the time of revelation?

As for the conflict between *ʿurf* and juristic reasoning (*ijtihād*) that was based on the customs of earlier times, there is no doubt that *the newly arisen custom* is to be taken into account.

The same applies when the text that *ʿurf* now contradicts was itself based on the prevailing custom of the time in which it was revealed—as in the case of holding livestock owners liable for damage caused by their animals at night but not during the day. The correct view is that the ruling changes with the change of custom, due to the clarity of its *manāṭ* (legal determinant), as we discuss under the maxim: *"Change of legal rulings due to the change of times is not denied."*

Some cases may cause confusion—for example, the sale of a commodity that was customarily sold by volume (makīl) during the Prophet's ﷺ time, in exchange for the same genus, but by weight instead of volume. The madhhab holds that such a sale is invalid. However, Shaykh Taqī al-Dīn held it to be valid due to the change in *ʿurf* and the prevalence of the new practice.[717]

Custom and need may warrant departing from analogy, as in the Ḥanafīs' validation of the istiṣnāʿ contract (commissioned manufacturing) through juristic preference and the jurists' permission to enter a public bath (ḥammām) for a fee. According to Ḥanafī analogy, the former would be prohibited because its subject matter does not yet exist, but they nevertheless validated it on the basis of juristic preference and custom. The latter was permitted despite uncertainty concerning the amount of water used and the duration of the stay, on account of need and custom.

The correct view in the madhhab is that the *istiṣnāʿ* contract is not valid.[718] However, Ḥanbalīs have validated the transaction by construing it as a *jaʿālah* (contingent compensation contract) on the condition that the raw material comes from the buyer. However, many contemporary Ḥanbalī jurists consider it permissible in its well-known form today.[719]

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[717] "His statement: 'It is not permitted to sell that which is originally sold by measure (i.e., by volume) for something of its kind by weight, nor that which is originally sold by weight for something of its kind by measure'—this is the official position of the madhhab, and it is the view adopted by the leading scholars. In al-Fāʾiq, it is mentioned: 'Our Shaykh'—referring to Shaykh Taqī al-Dīn [Ibn Taymiyyah], may Allah have mercy on him—'said that the sale of items usually sold by measure for their like by weight has become widespread.'" al-Inṣāf, al-Mardāwī, 12:22.

[718] "(And it is not valid to contract an *istisnāʿ* [manufacturing sale] for a product)—that is, for someone to sell an item which he will later produce for the buyer—(because he has sold something he does not possess, and not in the form of a *salam* contract). This was stated by al-Qāḍī and his companions." *Kashshāf al-Qināʿ*, al-Buhūtī, 7:338.

[719] "His statement, 'and sewing,' refers to sewing a garment (...) when the garment belongs to the customer rather than the worker; this is permissible. If the fabric belongs to the worker, the scholars call this istiṣnāʿ al-silʿah, concerning which there is disagreement. (...) The correct view, however, is that it is permissible because the item can be adequately defined by description and people have practiced it in the past and present." Al-Sharḥ al-Mumtiʿ ʿalā Zād al-Mustaqniʿ, Ibn ʿUthaymīn, 10:346.

As for entry into a *ḥammām* (bathhouse) for a fee, it is valid in the madhhab. [720]

Generally, *ʿurf*—even if newly arisen—is preferred over extending *qiyās* (analogical reasoning), and this is the practice of the majority of scholars. Shaykh Wahbah al-Zuḥaylī (rA) stated:

"If there is a conflict between *qiyās* and *ʿurf*, then by agreement the analogical ruling is set aside in favor of *ʿurf*—even if the custom is newly arisen—as long as it is a general custom. For *ʿurf* in such a case is usually a sign of need (*ḥājah*), and it is therefore stronger than *qiyās*, and observing it aligns with *maṣlaḥah* (public welfare)."[721]

Scholars cite examples of conflict between general wording and *ʿurf*, such as the report from Imām Mālik that a mother is not obligated to breastfeed her child if the custom is that someone of her status does not nurse due to her social rank. This represents a *specification* (*takhṣīṣ*) of the general wording in the verse: "Mothers shall breastfeed their children for two complete years." (Qurʾān 2:233)[722]

Likewise, Imām Aḥmad—according to one narration—*excluded the case of the ṭarīdah (game cut into pieces by a group striking it while it is still alive)* from the general statement, *"Whatever is severed from a living animal is carrion,"* due to the statement of al-Ḥasan al-Baṣrī: *"People have always done that."*[723]

One may say this is due to the practice of the Companions or the tacit approval of the Prophet ﷺ, and this would be *ʿurf muqārin lil-khiṭāb* (custom concurrent with the time of revelation). The foundational rule is that Islam affirmed what they were upon, unless a prohibition was established. Therefore, what remained of their customs is excluded from the generality of textual rulings.

Imām Taqī al-Dīn states in *al-Musawwada*, quoting Imām Abū al-Khaṭṭāb:
"It is not permissible, according to us, to specify a general expression based on customary practice."
He then explains that the matter requires detail. He notes that the agreed-upon principle within the madhhab is:
"If it were people's custom to consume certain types of blood, and then a general prohibition of blood

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[720] "(...) This is something people need; requiring it to be weighed would be burdensome, and customary leniency applies. It is therefore permissible, like entering a public bath without a predetermined fee, riding in a ferryman's boat, and similar cases." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 5:221.

[721] *Uṣūl al-Fiqh al-Islāmī*, Wahbah al-Zuḥaylī, 2:856.

[722] "Mālik said: Every mother is obligated to breastfeed her child according to the ruling Allah has stated in the Sharīʿah. Mālik alone among the jurists of the regions, however, excepted the noblewoman and held that she is not obligated to breastfeed. He excluded her from the verse on the basis of a principle of legal theory: consideration of maṣlaḥah. (...) The distinctive basis of this ruling is that it was the practice among people of noble lineage before Islam, and Islam did not alter it. (...)" Aḥkām al-Qurʾān, Ibn al-ʿArabī, 1:278.

[723] "If a person strikes a game animal and severs one of its limbs while stable life remains, the severed limb is forbidden because the Prophet ﷺ said: 'Whatever is cut off from a living being is carrion.' (...) Abū ʿAbd Allāh approved al-Ḥasan's statement that there is no harm in the ṭarīdah. Abū ʿAbd Allāh explained that the ṭarīdah is a gazelle passing through an army encampment that the men strike with their swords. (...) Al-Ḥasan said that people continued to do this during their campaigns. It is also reported from Abū ʿAbd Allāh that whatever was severed while the animal was alive is not eaten, while the remainder is eaten, in accordance with the report." Al-Kāfī, Ibn Qudāmah, 1:556.

was revealed, such a custom may not specify the general ruling — and this is what Abū al-Khaṭṭāb intended."[724]

He clarifies further that some cases do not involve true specification. For example:
"If eating dawābb (moving creatures) is prohibited, and the word *dawābb* in Arabic linguistically applies to all that walks, but people commonly use it to refer to horses in particular, then we interpret the word as referring to horses." He said: "This is not true specification, but specification relative to linguistic usage."[725]

He also mentions a case of specification reported from Aḥmad:
"If someone bequeaths to 'his relatives,' Aḥmad stated — in the better-known of the two narrations — that this refers to those he used to support in his lifetime." Ibn Taymiyyah explains: "This is specification of a general expression by customary action, not by customary speech — but he said that only when it is known that the generality was not intended."[726]

He further acknowledges: "Specification of a general expression by customary practice is valid when it means limiting the ruling to what was commonly acted upon and widely beneficial, or to the particular objects to which the action customarily applied at the time of speaking." He cites as an example Aḥmad's limitation of the Prophet's ﷺ prohibition on urinating in stagnant water to waters other than reservoirs constructed after his time. He adds: "This is somewhat akin to specification by cause."[727]

It appears to me that such specification applies when the new case differs from the original in a legally relevant way, even if it falls under the general linguistic term — as in the case of photographic images. Likewise, customary practices concurrent with the time of revelation, which specify a general text by the actions of the Companions, are valid if approved by the Prophet ﷺ or agreed upon by the Companions — or if some practiced them and others did not object. The summary is: People's speech should have its generality specified by their custom and usage, unless an intent to generalize is evident. As for the address of the Lawgiver, it is to be carried upon its general wording—unless the specification arises from linguistic convention concurrent with the address, or from customary practice that bears on the legal ruling.

[724] al-Musawwada fī Uṣūl al-Fiqh, Āl Taymiyyah, 123
[725] al-Musawwada fī Uṣūl al-Fiqh, Āl Taymiyyah, 123
[726] al-Musawwada fī Uṣūl al-Fiqh, Āl Taymiyyah, 124

[727] al-Musawwada fī Uṣūl al-Fiqh, Āl Taymiyyah, 125

**Subsidiary Maxims and Applications**

الأصل في العبادات الحظر، فلا يشرع إلا ما شرعه الله ورسوله ﷺ والأصل في العادات الإباحة، فلا يحرم منها إلا ما حرمه الله ورسوله ﷺ

**"The default ruling concerning acts of worship is prohibition — nothing is legislated except what has been prescribed by Allah and His Messenger ﷺ; whereas the default ruling concerning customary practices is permissibility — nothing is forbidden except what Allah and His Messenger ﷺ have forbidden."**

الأصل في العبادات التوقيف، وفي العادات الإباحة

This is the sixth principle from al-Qawāʿid al-Siʿdiyyah, previously discussed under the heading: *"The Default Principle Regarding Acts of Worship Is That They Require Divine Authorization (Tawqīfī), and in Customary Matters, Permissibility"*, as one of the branches of the maxim: *"Certainty is Not Overruled by Doubt."*

However, we mention it again here as the first subsidiary maxim under the main maxim of this chapter, due to its foundational importance and its strong connection to the subject.

The evidences that the default ruling in matters outside of worship is permissibility are numerous. Among them are:

﴿هُوَ الَّذِى خَلَقَ لَكُم مَا فِي الْأَرْضِ جَمِيعًا ﴾

Allah's statement: *"It is He who created for you all that is on the earth." [al-Baqarah: 29]*

﴿ قُلْ مَنْ حَرَّمَ زِينَةَ اللَّهِ الَّتِي أَخْرَجَ لِعِبَادِهِ، وَالطَّيِّبَتِ مِنَ الرِّزْقِ قُلْ هِيَ لِلَّذِينَ ءَامَنُوا فِي الْحَيَاةِ الدُّنْيَا خَالِصَةً يَوْمَ الْقِيَمَةِ كَذَلِكَ نُفَصِّلُ الْآيَاتِ لِقَوْمٍ يَعْلَمُونَ ﴾

And His saying: *"Say: Who has forbidden the adornment of Allah which He has produced for His servants, and the good things of provision? Say: They are for those who believe during the worldly life, exclusively for them on the Day of Resurrection. Thus do We explain the verses in detail for a people who know." [al-Aʿrāf: 32]*

﴿وَمَا لَكُمْ أَلَّا تَأْكُلُوا مِمَّا ذُكِرَ اسْمُ اللَّهِ عَلَيْهِ وَقَدْ فَصَّلَ لَكُم مَّا حَرَّمَ عَلَيْكُمْ إِلَّا مَا اضْطُرِرْتُمْ إِلَيْهِ ﴾

And: *"Why should you not eat of that over which the name of Allah has been mentioned, while He has explained to you in detail what is forbidden to you, except that to which you are compelled?" [al-Anʿām: 119]*

الْحَلَالُ مَا أَحَلَّ اللَّهُ فِي كِتَابِهِ، وَالْحَرَامُ مَا حَرَّمَ اللَّهُ فِي كِتَابِهِ، وَمَا سَكَتَ عَنْهُ فَهُوَ مِمَّا عَفَا عَنْهُ

And the ḥadīth of the Prophet ﷺ: *"What is ḥalāl is what Allah has made ḥalāl in His Book, and what is ḥarām is what Allah has made ḥarām in His Book, and what He has remained silent about is from what He has pardoned."*[728]

[728] Reported by al-Tirmidhī and Ibn Mājah; al-Arnaʾūṭ graded it ḥasan with its supporting chains.

إِنَّ أَعْظَمَ الْمُسْلِمِينَ جُرْمًا مَنْ سَأَلَ عَنْ شَيْءٍ لَمْ يُحَرَّمْ، فَحُرِّمَ مِنْ أَجْلِ مَسْأَلَتِهِ

And his saying ﷺ: *"The gravest sinner among Muslims is the one who asks about something not prohibited, and then it becomes prohibited because of his question."* (Agreed upon)

The Sharīʿah was not revealed to arbitrarily uproot people from what they are accustomed to, but rather to complete noble character traits. What is good, it affirms and commands or recommends; what is evil, it condemns and forbids or discourages.
As for matters that are neither inherently good nor evil, it leaves them to people's discretion and tastes — such as their foods, clothing, architecture, and everyday affairs — except where a known and clear boundary has been drawn.

Because custom (ʿādah) has influence and familiarity, the Sharīʿah discourages violating prevailing customs; indeed, the default is to conform to the people of one's locality. In *Kashshāf al-Qināʿ*:

"It is disliked to wear garments of notoriety (thawb al-shuhrah), meaning those by which one becomes conspicuous, pointed out among the people — lest this leads them to backbite him, and he then shares in their sin. This includes wearing clothing that contradicts the norm — such as wearing garments inside-out or reversed, as done by certain uncouth or foolish people.

On the authority of Abū Hurayrah (rAa), it is reported that the Messenger of Allah ﷺ forbade the two forms of notoriety (al-shuhratayn). It was said: "O Messenger of Allah, what are the two forms of notoriety?" He said:
"The thinness of garments and their thickness, their softness and roughness, their length and shortness — rather, one should observe moderation and balance between these."

من لبس ثوب شهرة ألبسه الله ثوب مذلة يوم القيامة

And on the authority of Ibn ʿUmar (rAa), the Prophet ﷺ said:
"Whoever wears a garment of notoriety, Allah will clothe him with a garment of humiliation on the Day of Resurrection."
This ḥadīth is ḥasan, reported by Aḥmad, Abū Dāwūd, and Ibn Mājah.

إن قوما جعلوا خشوعهم في لباسهم، وشهروا أنفسهم بلباس الصوف، حتى إن أحدهم بما يلبس من الصوف، أعظم كبرا من صاحب المطرف بمطرفه

And al-Ḥasan al-Baṣrī would say: "Some people have made their humility about their clothing, drawing attention to themselves with woolen garments — so that one of them, in what he wears of wool, is more arrogant than the man in his brocade."

كان العلم في صدور الرجال، فانتقل إلى جلود الضأن.

Ibn Rushd al-Mālikī said: *"Knowledge was once in the hearts of men — then it was transferred to sheepskin."*
I say: *"And now to the skins of sables."*[729]

[729] "Al-sammūr is an animal whose pelt is used to make high-quality fur garments."

ومن راءى راءى الله به، ومن سمع سمع الله به

It is also disliked to wear clothes that contradict the style of one's people, or garments deemed base — because it falls under notoriety. If the aim is to appear elevated or humble, it becomes ḥarām as a form of *riyāʾ* (showing off), for: *"Whoever shows off, Allah will expose him; and whoever seeks to be heard, Allah will expose him."*[730]

الأصل في العقود الحل والإباحة والأصل في الشروط فيها الصحة

Finally, among the realms most governed by custom are commercial dealings. For more, see the discussion under the maxim:
"The default in contracts is permissibility, and the default in their conditions is validity", a branch of the maxim: *"Certainty is Not Overruled by Doubt."*

ما لم يُقدِّرْه الشارع، فإنه يُرجَع فيه إلى العُرف

**Whatever the Sharīʿah has not specified is referred back to custom (ʿurf)**

This is the phrasing of Imām Taqī al-Dīn (rA).[731]

Other expressions include:

"العرف والعادة يرجع إليه في كل حُكم حَكَمَ به الشارع ولم يحده."

al-Siʿdī in his ninth maxim said: *"Custom and habit are referred to in every ruling instituted by the Sharīʿah which has not been defined." In his didactic poem:*

والعرف معمول به إذا ورد —
حكم من الشرع الشريف لم يحد

- *"Custom is applied when a noble Sharīʿah ruling occurs without being defined."*

«إذا لم يكن له حد في الشرع ولا في اللغة كان المرجع فيه إلى عرف الناس وعاداتهم»

It is also expressed as: *"If something has no definition in the Sharīʿah or in language, then the reference is to the people's custom and practice."*[732]

For further detail, see the discussion on understanding unqualified Sharīʿah terms and specifying what the Sharīʿah has left undefined under the topic of the operative domains of this maxim.

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730 *Kashshāf al-Qināʿ*, al-Buhūtī, 2:158.

731 *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 35:350.

732 *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 29:16.

Imām Taqī al-Dīn said:

"Section: A comprehensive and beneficial summary: The names to which Allah has attached legal rulings in the Qurʾān and Sunnah fall into three categories:

1. Those whose meaning and definition are known through the Sharīʿah — and Allah and His Messenger have clarified them — such as the terms: *ṣalāh, zakāh, ṣawm, ḥajj, īmān, islām, kufr, and nifāq*.
2. Those whose definition is known through the Arabic language — such as *the sun* (al-shams), *the moon* (al-qamar), *the sky* (al-samāʾ), *the earth* (al-arḍ), *land* (al-barr), and *sea* (al-baḥr).
3. Those whose definition returns to people's habits and customs, and thus varies according to their norms — such as the terms: *bayʿ* (sale), *nikāḥ* (marriage), *qabḍ* (possession), *dirham*, *dīnār*, and the like — terms which the Lawgiver has not defined with a fixed boundary, nor do they have a singular definition common to all Arabic speakers; rather, their measure and description differ according to the customs of people."[733]

We add here a number of applied examples:

- The reference in determining a minor solder (ḍabbah yasīrah) — which is permitted — is to custom.[734]
- The reference in identifying light sleep, which does not invalidate wuḍūʾ, is to custom.[735]
- The reference in what constitutes excessive bodily movement that invalidates ṣalāh is to custom.[736]
- The reference in determining non-liable striking, in which a person who is permitted to strike would not be liable, is custom.[737]

وأجرة المثل ليست شيئا محدودا وإنما هي ما تساوي الشيء في نفوس أهل الرغبة

- The reference in wages and prices is to custom. And "Ujrat al-mithl (standard wage) is not a fixed amount — it is whatever the item is worth in the eyes of those who desire it."[738]

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[733] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 19:235.

[734] "Except for a small silver patch, customarily acceptable, for a need—such as mending of a cup." *Al-Iqnāʿ*, al-Ḥajjāwī, 1:13.

[735] "Except for the sleep of the Prophet ﷺ, even if lengthy and in any position, and [except for] what is customarily regarded as slight sleep from one who is seated or standing." These are excluded from the type of sleep that nullifies wuḍūʾ. *Al-Iqnāʿ*, al-Ḥajjāwī, 1:38.

[736] "A small amount is not fixed at three actions or any other number; it is determined by custom, and whatever resembles the Prophet's ﷺ action is slight. (...) If an act extraneous to the prayer is prolonged according to custom, without being dispersed, it invalidates the prayer whether deliberate or inadvertent, unless required by necessity, such as fear or flight from an enemy or the like." Al-Iqnāʿ, al-Ḥajjāwī, 1:129.

[737] "If a lessee or animal trainer strikes an animal in the customary manner (...) and it dies, he is not liable. The same applies when a teacher strikes a child. (...) Aḥmad explicitly stated that one who disciplines his child (...) with customary striking (...) bears no liability. (...)" Al-Qawāʿid wa al-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 110.

[738] *Al-Fatāwā al-Kubrā*, Ibn Taymiyyah, 5:410

- The reference in what counts as separation (tafarruq) that nullifies the *khiyār al-majlis* (option to cancel a contract while still in session) is to custom.[739]
- A delay between offer and acceptance in marriage does not affect validity, even if lengthy, so long as the parties neither separate nor become occupied with something that customarily interrupts the transaction.[740]
- "The wealthy among them [the People of the Book] is the one whom people regard as wealthy — according to the apparent view in the madhhab."[741]

"وإذا لم يكن للسب حد معروف في اللغة ولا في الشرع، فالمرجع فيه إلى عرف الناس."

- "If verbal abuse (sabb) has no known limit in language or in the Sharīʿah, then the reference is to people's custom."[742]
- "The general or specific scope of official appointments, and what the appointee is entitled to by virtue of the appointment, is derived from wording, circumstances, and custom — for there is no fixed limit in the Sharīʿah for this. Thus, in some places and times, the jurisdiction of judges may include matters that elsewhere fall under military authority, and vice versa. The same applies to ḥisbah—moral oversight and public accountability — and fiscal governance (wilāyat al-māl). All these positions are originally Sharʿī offices and religious posts: Whoever governs them with justice and knowledge, and obeys Allah and His Messenger to the extent possible, is among the righteous and pious; and whoever acts unjustly and governs with ignorance is among the wicked and oppressors."[743]

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[739] "(The option of the session) remains, where established, (until they separate), due to the ḥadīth—by what people customarily consider a separation (ʿurfan); due to the legislator's use of the term separation without elaboration. This indicates that what is meant is what people recognize—such as possession and securing (the item)." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:36

[740] "If acceptance is delayed after the offer until the parties separate or become occupied with something that customarily interrupts the transaction, the offer lapses. (...)

If the interval between offer and acceptance is long but they neither become occupied with something interrupting it nor separate,

the contract is valid." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 9:41.

[741] Al-Mubdiʿ fī Sharḥ al-Muqniʿ, Ibn Mufliḥ, 3:370

[742] al-Ṣārim al-Maslūl ʿalā Shātim al-Rasūl, Ibn Taymiyyah, p. 540

[743] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 28:68

And among the Ḥanbalī jurists, the one most firmly committed to this maxim and most foundational in applying it is Imām Abū al-ʿAbbās [Ibn Taymiyyah]. He said:

«وأهل المدينة جعلوا المرجع في العقود إلى عرف الناس وعادتهم، فما عده الناس بيعا فهو بيع، وما عدوه إجارة فهو إجارة، وما عدوه هبة فهو هبة. وهذا أشبه بالكتاب والسنة وأعدل.»

"The people of Madīnah made custom and societal usage the reference point in contracts: what people regard as a sale is a sale; what they regard as a lease is a lease; what they regard as a gift is a gift. This is closer to the Book and the Sunnah and more just."[744]

أن الإذن العرفي في الإباحة أو التمليك أو التصرف بطريق الوكالة: كالإذن اللفظي.

He also said: "If the reference in *qabḍ* (taking possession) is to the people's custom and practice — without a fixed standard that applies equally to all people, in all situations, and at all times — then the same applies to contracts. And if one refines the expression, it may be said: this pertains to one of two categories of transactions, so the reference in it is to people's custom, just like in the other category. Among what falls under this principle: that customary permission — whether for use, transfer of ownership, or acting as an agent — is like verbal permission. Thus, both agency (wakālah) and permitting use (ibāḥah) are established by whatever indicates them, whether through word or action. And knowledge of the owner's consent suffices in place of its outward expression."[745]

And he said, in the commentary on the verse {of the average of that with which you feed your own families or clothe them} [al-Māʾidah: 89]: "The preferred view is that this should be referred back to people's custom and usage — for in one region what Abū Ḥanīfah required may suffice, in another what Aḥmad required, and in yet another something between the two, according to local custom."[746]

Al-ʿAllāmah al-Mardāwī said: "Third: The apparent meaning of the author's words is that a sale is not valid except through offer and acceptance using the previously mentioned formulas with their conditions, or through exchange by mutual action (muʿāṭāh). This view is correct and is the madhhab. It is the position of al-Qāḍī and our fellows. Shaykh Taqī al-Dīn [Ibn Taymiyyah], however, held that a sale is valid by anything that people customarily regard as a sale — whether immediate or delayed, whether by word or by deed."[747]

Ibn Mufliḥ, the author of *al-Mubdiʿ*, said regarding the pillars of marriage: "(And acceptance) from the groom or his agent — for example, saying: 'I accept this marriage,' or its equivalent, such as 'I am content with it,' (is valid) in the case of one who does not know the prescribed wording — even if said in jest or as part of a sham transaction (taljiʾah), just like the offer. It is also said: by writing. Ibn ʿAqīl reported from some that its validity extends to any wording that implies transfer of ownership. He himself mentioned in *ʿUmad al-Adillah* the case of one who emancipates his slave girl and makes that her dowry. Shaykh Taqī al-Dīn [Ibn Taymiyyah] said: A marriage contract is valid through whatever

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[744] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 20:345

[745] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 29:20

[746] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 35:352

[747] al-Inṣāf fī Maʿrifat al-Rājiḥ min al-Khilāf, al-Mardāwī, 11:14

people customarily regard as constituting a marriage — by any language, wording, or action — and the same applies to every contract. Conditions among people are determined by what they regard as conditions. Names are sometimes defined by the Sharīʿah, sometimes by language, and sometimes by custom. The same applies to contracts."[748]

المشروط عُرفًا كالمشروط لفظًا

**What Is Stipulated by ʿUrf (Custom) Is Like What Is Stipulated Verbally**

This is the wording of Imām Ibn al-Qayyim (rA).[749]

Other Formulations of the Maxim Include:

«إطلاق العقد إذا كان له عرف وعادة تحمل عليه صار بمنزلة المشروط في العقد»

- "What is unqualified in a contract, if governed by custom and usage, is treated as if it were stipulated in the contract."[750]

«المشروط عرفا كالمشروط شرعا»

- "What is stipulated by custom is like what is stipulated by the Sharīʿah."[751]

«المعروف عرفًا كالمشروط شرعًا»

- "What is known by custom is like what is stipulated by the Sharīʿah."[752]

«العرف كالشرط»

- "Custom is like a condition." [753]

«التعيين بالعرف كالتعيين بالنص»

- "Designation by custom is like designation by explicit text."[754]

«الإذن العرفي كالإذن اللفظي»

- "Customary permission is like stated permission." [755]

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[748] Al-Mubdiʿ fī Sharḥ al-Muqniʿ, Ibn Mufliḥ, 6:95

[749] *Zād al-Maʿād*, Ibn al-Qayyim, 5:164

[750] Al-Taʿlīqah al-Kabīrah, Abū Yaʿlā, 3:326

[751] Al-Ashbāh wa-l-Naẓāʾir, Ibn Nujaym, p. 85

[752] Al-Ashbāh wa-l-Naẓāʾir, Ibn Nujaym, p. 84

[753] *Al-Bayān wa-l-Taḥṣīl*, Ibn Rushd, 4:247

[754] Majallat al-Aḥkām al-ʿAdliyyah, 21

[755] *Madārij al-Sālikīn*, Ibn al-Qayyim, 1:595

«الثابت بدلالة العرف كالثابت بدلالة النص»

- "What is established by the indication of custom is like what is established by the indication of text." [756]

«الثابت عرفا كالثابت شرطا»

- "What is established by custom is like what is established by condition."[757]

«المعروف بين التجار كالمشروط بينهم»

- "What is known among merchants is like what is stipulated among them." [758]

If you return to the operative domains of the parent maxim, you will find that the previous sub-maxim pertains to the first domain—namely, defining what the Sharʿ has not itself defined. This maxim, along with the two following it, pertains to the second domain, which is the interpretation, qualification, and validation of people's speech and transactions. For what is commonly known and customary among people, even if not explicitly stated, holds the status of explicit stipulation due to the indication of ʿurf, because custom is authoritative.

As for the criteria governing the maxim, they have already been addressed in our discussion of 'the relationship between the Sharʿ and ʿurf' and 'when custom is deemed authoritative.'

Some of its applications were previously encountered in the discussion on the operative domains of the parent maxim. I will now cite, in full, the words of the eminent scholar Ibn Mufliḥ, due to their strong relevance to the subject of this chapter. He said, may Allah have mercy on him:

"He said in *al-Hady* [*Zād al-Maʿād*], in the story of the Banū Hishām ibn al-Mughīrah when they sought permission to marry ʿAlī ibn Abī Ṭālib to the daughter of Abū Jahl: he stated that this narrative entails the issue of stipulation, for the Prophet ﷺ informed that this would cause harm and distress to Fāṭimah (rAa), and that it would in turn harm and distress him ﷺ. It is known that he ﷺ gave her in marriage on the basis that this would not occur, and that ʿAlī only entered into the marriage agreement on that basis—even if it was not explicitly stipulated in the contract. His ﷺ mention of his other son-in-law, whom he described as having spoken to him truthfully, and promised him and kept his promise, is an implicit allusion to ʿAlī (rAa), suggesting that a similar promise had been made and urging him to honor it. From this, it is derived that what is stipulated by custom is like what is stipulated verbally, and its absence entitles the party to annulment. So, a people who do not allow their women to be taken out of their neighborhoods, or a woman from a household where it is customary that a man does not take a co-wife alongside their women, and they prevent husbands from doing so—or it is commonly known that the woman would not permit a co-wife to be introduced upon her—such matters are considered as if they were explicitly stipulated. This is consistent with the principles of the people of Madīnah and of Aḥmad: that a customary stipulation is equivalent to a stated one. For this reason, they obligate compensation on one who gives his garment to a fuller (qaṣṣār)—the well-known case.

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[756] *Al-Mabsūṭ*, al-Sarakhsī, 4:227

[757] Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq wa-Ḥāshiyat al-Shalabī, al-Zaylaʿī, 2:156

[758] Majallat al-Aḥkām al-ʿAdliyyah, 21

He also said: Mālik stated, ‘I found people saying: if a man does not provide for his wife, they are separated.’ He was told: but the Companions (rAa) used to face hardship and poverty. He replied: ‘People today are not like that. A woman only marries in hope of worldly provision’—meaning that the women of the Companions (rAa) sought the Hereafter, whereas women today seek the world. Thus, this custom becomes like an explicit stipulation. And in the foundational view of his madhhab, a customary stipulation is like a verbal one.”[759]

Among the applications of the maxim in our school is the ruling that: “It is incumbent upon the lessor to provide all items customarily or commonly included according to ʿurf, such as equipment for the rented animal—like a rein, saddle, and girth—or to perform acts if it was stipulated that he accompany the camel on the journey; such acts include leading, driving, tying, lifting, unloading, holding the animal when the rider dismounts for a need, an obligation but not a regular Sunnah prayer, or a communal obligation (farḍ kifāyah), and making a camel kneel (tabrīk) for an elderly person, a woman, a sick person, or anyone incapable.”[760]

It is obligatory to safeguard a deposit in the manner customarily used for its safekeeping.[761]

Among contemporary applications is that one who checks into a hotel is obliged to pay the fee and comply with all customary practices applicable to hotel guests, even in the absence of an explicit verbal agreement. The same applies to one who rides in a taxi, loads goods onto it, or boards a bus. Likewise, one who sells a car—or anything similar—is obliged to deliver all that is customarily included in such a sale.

As for the specific application of the maxim “What is customary among merchants is as if it were stipulated between them,” this is due to the frequency of customary practices among them in matters of sale, purchase, payment, receipt, shipping, delivery, credit instruments, money transfers, promissory notes, and checks. When there is established familiarity and usage among them regarding a matter that does not conflict with the revealed texts, it is to be followed and presumed as the intended meaning in cases of general or unspecified terms.

There are occasions in which exceptions are made to the maxim due to considerations external to it. Among such cases is when a people are known for their generous repayment habits: is it disliked (makrūh) to lend to them? It has been said that it is disliked, as it resembles a stipulated condition. The correct view, however, is that it is not disliked.[762]

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[759] *Al-Furūʿ and Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 8:262

[760] *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:731

[761] “(It is obligatory upon him) — meaning the custodian — (to safeguard it), that is, the deposit, (himself or through his agent, or someone who typically guards his own wealth, such as a wife or a slave), (just as he would safeguard) his own wealth, in a place of safekeeping appropriate to its kind according to ʿurf, such as the safekeeping required in cases of theft — based on the verse: {Indeed, Allāh commands you to render trusts to whom they are due}. This cannot be fulfilled except through such safeguarding as described.” *Kashshāf al-Qināʿ*, al-Buhūtī, 9:406

[762] “If it is known that the borrower will add something to the loan, it is tantamount to stipulating the increase. (...) It is also said that this is permissible, a view chosen by the author and the commentator. (...) The Prophet ﷺ was known for excellent repayment; could anyone therefore say that lending to him was disliked? (...) I say: this is the correct view.” Al-Inṣāf fī Maʿrifat al-Rājiḥ min al-Khilāf, al-Mardāwī, 12:347.

العقد العرفي كالعقد اللفظي

## A Contract Based on ʿUrf Is Like a Verbal Contract

This is the wording of Imām Taqī al-Dīn (rA).[763]

العبرة في العقود بالمقاصد والمعاني لا بالألفاظ والمباني

تنعقد العقود بكل ما دل على مقصودها من قول أو فعل

This maxim is a branch of the broader legal maxim: "Consideration in contracts is given to intentions and meanings, not words and forms," which Imām Taqī al-Dīn expressed with the following statement: "Contracts are concluded by anything that indicates their intended purpose, whether in word or deed." For a detailed discussion of this principle within the Ḥanbalī school, refer to the relevant section there.

المعروف عرفًا كالمشروط شرطًا

This maxim also closely aligns with the principle: "What is customary is like a stipulated condition."

Shaykh Ibn ʿUthaymīn said:

واجعل كلفظ كل عرف مطرد ... فشرطنا العرفي كاللفظيْ يَرِدْ

"Treat every consistent customary usage like an explicit wording … our customary stipulation is valid like the verbal one."

The wording of the chapter title is from Imām Taqī al-Dīn, who is the most reliant among the Ḥanbalīs on the foundational maxim and its derived applications. However, this maxim is not neglected in the school. Imām Ibn Qudāmah said:

"It is permissible to lease a shirt to wear, because benefit can be derived from it while its substance remains, and it is permissible to sell it, so its lease is permissible, like real estate. The benefit must be defined by a set duration. If the custom of the people in his town is to remove their clothes at night for sleep, he must remove it then, because unqualified terms are interpreted according to what is customary; and he may wear it outside of that."[764]

This means that an unqualified lease is interpreted according to the customary benefit.

The established position in the madhhab is that "if a gift is given without qualification, it does not imply compensation—whether given to someone of equal, lower, or higher status."[765]

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[763] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 30:109

[764] al-Mughnī, Ibn Qudāmah, vol. 8, p. 58

[765] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:430

Abū al-ʿAbbās held that "if prevailing custom involves compensation, and the gift was given on that basis,[766] then the giver is entitled to one of two outcomes: either compensation or the return of the gift."[767]

لأن المقاصد عندنا في العقود معتبرة.

This view of Abū al-ʿAbbās aligns with the statement: "Except when the recipient knows that the giver gave it out of embarrassment, in which case the gift must be returned to him." This was stated by Ibn al-Jawzī. In *al-Ādāb*, Ibn Mufliḥ described it as a sound opinion, "because intentions (maqāṣid) are considered in contracts according to us."[768] Although this later position follows Ibn al-Jawzī, Ibn Mufliḥ noted in *al-Ādāb*: "I have not found anyone else who stated this explicitly. It is a sound opinion, because intentions (maqāṣid) are considered in contracts according to us. The general wording of others contradicts this—Allah knows best."[769]

يحمل كلام الناس على ما جرت به عادتهم في خطابهم

## Speech Is Interpreted According to What People Customarily Intend in Their Communication

This is the wording of Imām Taqī al-Dīn.[770]

«الحقيقة تترك بدلالة العادة»

«تخصيص العموم بالعرف»

«يخص العموم بالعادة».

Other related expressions include:
– "Literal meanings are abandoned due to the indication of custom."[771]
– "General expressions are specified by ʿurf."[772]
– "General terms are restricted by custom."[773]

Scholars, through this maxim, point out that ʿurf (custom) and ʿādah (habitual practice) are given precedence over literal meanings—linguistic, and at times even revelatory. As will be explained later, the default presumption in speech is that words carry their literal meanings, and each term must be

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[766] "It is not permissible to suspend a [gift] upon a condition — this is the madhhab, and it is held by the fellows, except for what is excluded, which most of them affirmed. Al-Ḥārithī mentioned the permissibility of suspending it upon a condition. I say: Shaykh Taqī al-Dīn [Ibn Taymiyyah] also held this view." *Al-Inṣāf fī Maʿrifat al-Rājiḥ min al-Khilāf*, al-Mardāwī, 17:44

[767] al-Fatāwā al-Kubrā, Ibn Taymiyyah, 4:183

[768] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:430

[769] al-Ādāb al-Sharʿiyyah wa-l-Minaḥ al-Marʿiyyah, Ibn Mufliḥ, 3:286

[770] *Majmūʿ al-Fatāwā*, Ibn Taymiyyah, 31:18

[771] al-Ashbāh wa-l-Naẓāʾir, Ibn Nujaym, 84

[772] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:426

[773] *Qawāʿid Ibn Rajab*, Ibn Rajab, 2:434

understood in its original sense. Thus, abandoning the literal meaning is only justified when the real meaning has been abandoned in customary usage or social convention, in which case the customary meaning predominates.

For applications of this maxim, see the section on the conflict between customary, revelatory, and linguistic meanings under the relevant principles and benefits.

الممتنع عادة كالممتنع حقيقة

## What Is Customarily Impossible Is Treated as Truly Impossible

What is deemed impossible or *mumtaniʿ* by custom refers to that which does not occur in ordinary practice, even though it is rationally conceivable. As for what is truly impossible, it is that which reason declares utterly impossible in all circumstances— such as the conjunction of two contradictories. For example, a person claiming to have touched the surface of the sun and returned is judged to be making a claim that is customarily impossible, even if not logically impossible. Likewise, for thousands of years, walking on the moon was considered customarily impossible, though not rationally or absolutely impossible.

This maxim operates according to the principle of acting on the predominant assumption (*ghalabat al-ẓann*). In cases of what is customarily impossible, that assumption approaches near certainty. There is thus no doubt that legal rulings should be based on it.

Among its applications:

"A child is affiliated with the husband only if it is possible that he had intercourse with his wife. So, if the woman is in Shīrāz—a town in the land of the Persians—and her husband is in the Ḥijāz, the child is not attributed to him unless a sufficient period has elapsed after the contract for him to have traveled to her, in addition to the minimum duration of pregnancy, which is six months. If she gives birth before that, the child is not affiliated with him."[774]

إنما تُعتبر العادة إذا اطردت أو غَلَبت

## Custom Is Only Taken Into Account When It Is Consistent (Muṭṭarid) or Predominant (Ghālib)

«الأصل إلحاق الفرد بالأعمِّ الأغلب، دون النادر»

And "the default is to attribute individual cases to what is general and predominant, not to rare exceptions."[775]

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[774] al-Minaḥ al-Shāfiyāt bi-Sharḥ Mufradāt al-Imām Aḥmad, al-Buhūtī, 2:655

[775] *Sharḥ ʿUmdat al-Fiqh*, Ibn Taymiyyah, 1:601

«للأكثر حكم الكل»

«الأقل تبع للأكثر»

«الحكم للأغلب»

«النادر لا حكم له»

These two maxims reflect some of the conditions under which *ʿurf* is considered legally valid. Jurists have expressed this meaning in various ways, such as:
– "The majority is treated as the whole."[776]
– "The minority follows the majority."[777]
– "Legal rulings follow what is predominant."[778]
– "What is rare carries no legal weight."[779]

What is meant by the *consistency* (*iṭṭirād*) of ʿurf is that it is observed continuously across all situations, deviating only when there is an explicit indication to the contrary. If deviation from it becomes frequent, it can no longer serve as evidence of the people's intent to uphold it—because their abandonment of it undermines the evidentiary value of their previous adherence.

The consideration of what is predominant and the disregard of what is rare is the established practice of jurists across all madhāhib, and it is also the practice of the Ḥanbalīs. For this reason, when the currency is not specified in a sale contract, the price is interpreted according to the most common currency in that locality.[780]

Refer also to the maxim: "The Default Is That a Predominantly Expected Occurrence Is Treated as an Actual One."

Most legal estimations made by jurists in matters not explicitly defined by revelation—such as the age of menopause, maximum menstruation, and pregnancy—are based on reliance upon what is predominant.

Among the applications of this maxim:

"If illicit wealth becomes mixed with lawful wealth, and the illicit portion predominates—may one partake of it or not? There are two opinions. This is because the default ruling regarding tangible property is permissibility, but here the predominant element is unlawful. Aḥmad said, in the narration of

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[776] *al-Furūʿ wa-Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 2:143

[777] *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 3:389

[778] *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 10:144

[779] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 3:183

[780] "If the buyer and seller differ regarding the specification of the price, though they agreed to have mentioned it in the sale, (the currency of the land) is taken, as Aḥmad explicitly stated; because it is presumed that they only conclude the contract using it. (Then), if there are multiple currencies in the land, the one (most commonly circulated) is taken, since it is most likely that the contract was concluded with it, as it is the one most commonly used in transactions. (If the currencies of the land are equal) in circulation, then (the median one) is taken..." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:56

Ḥarb: ‘If most of a man’s wealth is from looting, usury, or the like, then he should avoid it out of scrupulousness—unless it is a small amount or something indistinct.’” [781]

“Likewise, any item whose visible composition is predominantly silk is prohibited to use, as previously mentioned, just like pure silk—because the majority is treated as equivalent to the whole in most legal rulings. However, it is not prohibited if it consists of both silk and other materials and they are equal in appearance and weight, or if the silk is heavier but the visible portion belongs to the other material. The same applies if they are equal in appearance—because silk is not predominant. And when the indicator of prohibition is absent, the default ruling of permissibility remains.”[782]

As for instances in which jurists act upon what is rare, this is only done on the basis that it represents the legal default. For example, in the case of a woman claiming—after some time—that her husband failed to provide for her, the madhhab (contrary to the majority view) holds that her word is accepted upon oath.[783]

Refer to Maxim 159 in Ibn Rajab’s *Qawāʿid*, Section Two: “Cases in which the legal default is followed, and apparent circumstantial indicators are disregarded.”

Rare occurrences may also be acted upon as a matter of precaution in worship,[784] to facilitate ease for people, to preserve their interests and rights, or to protect their dignity and lineage.

Among these exceptions in our madhhab is excusing the presence of street mud despite the likelihood of impurity therein; likewise, permitting the carrying of infants in prayer, though impurity is commonly found on their clothes; permitting consumption of the food of the People of the Book and the use of their utensils, though they are not generally careful to avoid impurities; and setting the pregnancy duration at four years, even though such cases are rare (and the correct view is that they are actually impossible). Also included is not establishing the ḥadd for zinā (unlawful sexual intercourse) with the testimony of only three upright witnesses.

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[781] *al-Furūʿ wa-Taṣḥīḥ al-Furūʿ*, Ibn Mufliḥ and al-Mardāwī, 4:388

[782] *Kashshāf al-Qināʿ*, al-Buhūtī, 2:166

[783] “If a wife, after residing with her husband for a long time, claims that he did not provide her obligatory maintenance or clothing, our fellows said that her statement is accepted with an oath because the presumption supports her, even though custom makes the claim extremely unlikely. Shaykh Taqī al-Dīn chose to refer to custom in this case.” Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:134.

[784] “A woman experiencing blood, yellowish discharge, or brownish discharge for the first time refrains from prayer and fasting for the minimum duration as soon as she sees it. (...)

She then performs ghusl and prays and performs similar acts. (...) She does this three times, for no habit is established without such repetition.” Ghāyat al-Muntahā, Marʿī al-Karmī, 1:117.

This is a precaution concerning acts of worship before the habit is established. “After the habit is established, she repeats any obligatory fast, ṭawāf, iʿtikāf, or similar act performed during the excess period.” *Al-Iqnāʿ, al-Ḥajjāwī, 1:66.*

"الاشتغال بالعلم مأمور به مع أن الغالب على الناس الرياء، وعدم الإخلاص، والنادر الإخلاص، ومقتضى الغالب النهي عن الاشتغال بالعلم لأنه وسيلة للرياء، ووسيلة المعصية معصية فلم يعتبره الشارع، وأثبت حكمه النادر"

Al-Qarāfī said: "Engaging in the pursuit of knowledge is commanded, even though ostentation and lack of sincerity are predominant among people, and sincerity is rare. If rulings were based on what is predominant, the pursuit of knowledge would be prohibited—since it would become a means to ostentation, and any means to sin is itself sinful. Yet the Lawgiver did not treat it this way; rather, He affirmed the ruling based on the rare case."[785]

لا يُنكر تغيُّر الفتوى بتغير الأزمنة والأمكنة والأحوال والنيات والعوائد

**The Changing of a Fatwā Due to a Change in Times, Places, Circumstances, Intentions, or Customs Is Not to Be Rejected**

Other expressions include:

«لا ينكر تغير الأحكام بتغير الأزمان»

"The change of legal rulings with changing times is not to be denied."[786]

"فَصْلٌ في تغير الفتوى واختلافها بحسَب تغير الأزمنة والأمكنة والأحوال والنيات والعوائد؛ والشريعة مبنية على مصالح العباد."

Imām Ibn al-Qayyim (rA) said:
"A section on the change and variation of fatwās due to changes in times, places, circumstances, intentions, and customs. The Sharīʿah is founded upon the welfare (*maṣāliḥ*) of human beings.

هذا فَصْلٌ عظيم النفع جدًّا، وقع بسبب الجهل به غلط عظيم على الشريعة أوجب من الحرج والمشقة وتكليف ما لا سبيل إليه ما يُعلم أن الشريعة الباهرة التي في أعلى رتب المصالح لا تأتي به.

This is a section of immense benefit, and ignorance of it has led to grave errors in understanding the Sharīʿah. Such ignorance has brought about hardship, difficulty, and the imposition of what cannot be fulfilled—matters we know that the radiant Sharīʿah, which occupies the highest rank in achieving benefit, does not entail.

فإن الشريعة مبناها وأساسها على الحِكَم ومصالح العباد في المعاش والمعاد، وهي عدل كلها ورحمة كلها ومصالح كلها وحكمة كلها. فكل مسألة خرجت عن العدل إلى الجَوْر، وعن الرحمة إلى ضدها، وعن المصلحة إلى المفسدة، وعن الحكمة إلى العبث، فليست من الشريعة وإن أُدخِلت فيها بالتأويل.

For the foundation and basis of the Sharīʿah is wisdom (*ḥikmah*) and the welfare of humanity in both this world and the Hereafter. It is entirely justice, entirely mercy, entirely benefit, and entirely wisdom. So any issue that departs from justice into injustice, from mercy into harshness, from benefit into harm,

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[785] Al-Furūq, al-Qarāfī, 4:106.

[786] Majallat al-Aḥkām al-ʿAdliyyah, 20

or from wisdom into futility—is not part of the Sharīʿah, even if introduced into it through interpretive reasoning (*taʾwīl*).

"فالشريعة: عدل الله بين عباده، ورحمته بين خلقه، وظله في أرضه، وحكمته الدالة عليه وعلى صدق رسوله ﷺ أتم دِلالة وأصدقَها."

For the Sharīʿah is: the justice of Allah among His servants, His mercy among His creation, His shadow on His earth, and His wisdom which points to Him and to the truthfulness of His Messenger ﷺ with the clearest and most truthful evidence."[787]

This maxim is among the most complex and consequential of the legal maxims. As with others, it has been subject to both excess and negligence. Some have taken it beyond its bounds, seizing upon it as a pretext to alter the religion—or rather, to distort it. On the other hand, another group, wary of the transgressions committed in its name, viewed it with suspicion and therefore rejected and dismissed it.

However, denying this maxim out of fear of public reaction would have a profoundly negative impact on the vitality and standing of the Sharīʿah.

Imām Ibn al-Qayyim (rA) said:

«ومن أفتى الناس بمجرد المنقول في الكتب على اختلاف عرفهم وعوائدهم وأزمنتهم وأمكنتهم وأحوالهم وقرائن أحوالهم فقد ضل وأضل، وكانت جنايته على الدين أعظم من جناية من طبب الناس كلهم على اختلاف بلادهم وعوائدهم وأزمنتهم وطبائعهم بما في كتاب من كتب الطب على أبدانهم، بل هذا الطبيب الجاهل وهذا المفتي الجاهل أضر ما على أديان الناس وأبدانهم والله المستعان»

"Whoever issues fatwās to people based solely on what is transmitted in books—without regard for their differing customs, practices, time periods, locations, circumstances, and contextual indicators—has gone astray and misled others. His offense against the religion is greater than that of a physician who treats all people, across different lands, customs, times, and temperaments, solely according to what is written in a medical manual. In fact, such an ignorant doctor and such an ignorant muftī are among the most harmful to people's religion and bodies. And Allah's help is sought."[788]

Similar statements have been transmitted from Imām al-Qarāfī and other erudite scholars.

What is intended is the fatwā, not the divine ruling (*ḥukm sharʿī*)

هو خطاب الله المتعلق بأفعال المكلفين اقتضاءً أو تخييرًا أو وضعًا.

أثر خطاب الله المتعلق بأفعال المكلفين اقتضاءً أو تخييرًا أو وضعًا.

Some of our scholars have affirmed the immutability of rulings and the impossibility of their change, while others have allowed for the change of rulings. In the following pages, we will clarify that the disagreement between them lies in terminology, not in substance. We also emphasize that what we mean by *change* pertains to fatwā, not to the *ḥukm sharʿī* as defined by the uṣūlīs. This is because, according

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[787] *Iʿlām al-Muwaqqiʿīn*, Ibn al-Qayyim, 3:11

[788] Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn, Ibn al-Qayyim, 3:66

to their definition, the *ḥukm sharʿī* is: "The address of Allah relating to the actions of the morally responsible, whether in the form of demand, option, or declaration (waḍʿ)."[789] Whereas the fuqahāʾ define it as: "The effect of Allah's address relating to the actions of the morally responsible, whether by way of demand, option, or legal declaration."[790]

According to the uṣūlī definition, it is inconceivable for the *ḥukm sharʿī* to change after the cessation of revelation.

As for the *fatwā*, it is the muftī's report regarding what he believes to be the ruling of Allah in a specific issue or circumstance.[791]

Sharīʿah rulings—especially in matters of transactions—are contingent upon well-defined attributes that are suitable for the rulings to be legally predicated upon. These attributes are referred to as *ʿilal* (legal causes) or *manāṭāt* (bases).

الحكم يدور مع علته وجودا وعدما.
وكل حكم دائر مع علته
وهي التي قد أوجبت لشرعيته

In the fifty-eighth maxim of al-Siʿdī's *al-Qawāʿid al-Fiqhiyyah*:
"A ruling revolves around its legal cause—existing when it exists, and vanishing when it vanishes." And in his verse formulation:
Every ruling revolves with its cause,
That cause being the basis for its legislation.

This maxim is considered one of the foundational principles of *qiyās* (analogy) and *ijtihād* in Islamic jurisprudence. Its meaning is that a legal ruling is established with the presence of its legal cause (*ʿillah*) and ceases with its absence.

والعلة هي الوصف الظاهر المنضبط الذي رُتّب عليه الحكم لمصلحة راجحة.

The ʿillah (operative legal cause) is the apparent, well-defined attribute upon which the ruling is predicated for a preponderant benefit.

To identify the *ʿillah*, the jurist proceeds through three progressive levels.

Determination of the operative basis (*takhrīj al-manāṭ*) is the first stage of *ijtihād*. It refers to deriving the legal cause (*ʿillah*) from a text in which it is not explicitly mentioned. The jurist selects a suitable attribute for the ruling—one not stated in the text—but which he deems fit to serve as a legal cause.

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[789] See al-Maḥṣūl, al-Rāzī, 1:107; Sharḥ al-Talwīḥ ʿalā al-Tawḍīḥ, al-Taftāzānī, 1:25; al-Mawsūʿah al-Fiqhiyyah, 18:66

[790] See Sharḥ al-Talwīḥ ʿalā al-Tawḍīḥ, al-Taftāzānī, 1:25; al-Taḥbīr Sharḥ al-Taḥrīr, al-Mardāwī, 2:790; al-Mawsūʿah al-Fiqhiyyah, 18:66

[791] See *al-Furūq*, al-Qarāfī, 4:117

An example is the ḥadīth of the Prophet ﷺ: "Gold for gold is usury, except when it is hand to hand." The *ʿillah* is not explicitly mentioned, so scholars deduced "being a medium of exchange (thamaniyyah)" or "being measured by weight" as the legal cause of the prohibition.

Refinement of the operative basis (*tanqīḥ al-manāṭ*) is the second stage. It refers to selecting one of the attributes mentioned in the text as the legal cause (*ʿillah*), after excluding those that are irrelevant or legally inconsequential.

An example is the ḥadīth of the Bedouin urinating in the mosque: scholars excluded the attribute of his being a Bedouin, as it is not suitable for the ruling to be predicated upon it.

Verification of the Manāṭ (*taḥqīq al-manāṭ*) is the final stage. It refers to applying the agreed-upon *ʿillah* to specific cases and verifying whether it is present or absent in each instance.

For example: theft is the basis (*manāṭ*) for the ḥadd punishment of amputation, so the jurist exercises judgment to determine whether it applies to a grave-robber (*nabbāsh*). Or he applies a general principle to a specific case—such as determining the appropriate amount of maintenance for a child or a wife. Likewise, since integrity (*ʿadālah*) is a condition for accepting testimony, the jurist must verify the witness's integrity in each instance.[792]

The first example concerns *taḥqīq al-manāṭ* in categories (*anwāʿ*), while the latter two examples concern its application to specific individuals (*aʿyān*). Imām Abū al-ʿAbbās said:

فأما تحقيق المناط فهو متفق عليه بين المسلمين، وهو أن ينص الله على تعليق الحكم بمعنى عام كلي، فينظر في ثبوته في آحاد الصور أو أنواع ذلك العام.

"As for *taḥqīq al-manāṭ*, it is unanimously agreed upon among the Muslims. It is when Allah mentions that a ruling is suspended upon a general, universal meaning, and then one examines whether that meaning is realized in particular instances or subcategories of that generality."[793]

In fact, there is a type of taḥqīq al-manāṭ performed by the mukallaf (legally accountable person) himself, since the *mukallaf* is the person most knowledgeable of his own particularities. He is the one who verifies the *manāṭ* of preference, as Shaykh al-Islām Ibn Taymiyyah (rA) said:

ومعرفة حال كل شخص وبيان الأفضل له لا يمكن ذكره في كتاب، بل لا بد من هداية يهدي الله بها عبده إلى ما هو أصلح. وما صدق اللهَ عبدٌ إلا صنع له.

"Some people benefit more from recitation than from prayer; others benefit more from remembrance than from recitation; and some, due to the intensity of their need and dependence, find exertion in supplication better for them than remembrance in which they are heedless. For one and the same person, sometimes this is better and at other times that is better. Knowing each individual's condition and clarifying what is best for him cannot be set out in a book. Rather, it requires divine guidance through

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[792] See Mudhakkirah fī Uṣūl al-Fiqh ʿalā Rawḍat al-Nāẓir, Muḥammad al-Amīn al-Shinqīṭī, 292–293

[793] Minhāj al-Sunnah al-Nabawiyyah, Ibn Taymiyyah, 2:474

which Allah directs His servant to what is most beneficial. No servant is truly sincere to Allah except that Allah grants him what is best."[794]

The work of the *mujtahid* therefore includes: determination, refinement, and verification of the *manāṭ*. The last of these—*taḥqīq al-manāṭ*—is the most common function of the *muftī*. It involves applying a specific ruling to the particular context that suits it. For example, ʿUmar (rAa) knew that part of Allah's ruling was to grant to those whose hearts are to be reconciled (*al-muʾallafah qulūbuhum*) from the designated zakāh share. Yet he withheld this share from people who had previously received it—because he judged that the Muslims no longer needed to win over those individuals, given how Allah had honored and elevated the religion. Thus, he did not change the ruling, but rather determined that its *operative basis* (*manāṭ*) was no longer realized in the new context. As a result, the fatwā changed: the person who received this share yesterday no longer receives it today. However, if the Muslims once again needed the reconciliation of hearts, Allah's ruling would remain unchanged.

The issue, then, is that the layperson sees legal rulings as detached from their operative bases, while the jurist always considers the *manāṭ*. When changes in reality affect the *manāṭ*, the ruling differs accordingly.

Imām Ibn al-Najjār said: "Among such cases is the ḥadīth of Ḥarām ibn Muḥayyiṣah al-Anṣārī, from al-Barāʾ ibn ʿĀzib: that al-Barāʾ's she-camel entered an orchard and caused damage therein, so the Prophet ﷺ ruled that the owners of orchards must safeguard them by day, and the owners of livestock must safeguard them by night. Narrated by Abū Dāwūd, and authenticated by a group of scholars. This is the clearest proof that custom is taken into account in legal rulings, for the Prophet ﷺ based liability upon prevailing custom."[795]

The jurist understands that the operative basis (*manāṭ*) for liability (*taḍmīn*) is transgression or negligence. If people's customs change—such that, in a given time or place, livestock owners typically safeguard their animals both day and night—then legal consideration is given to whoever is negligent, regardless of whether he is the owner of crops or of livestock.

Shaykh al-Burnū explains the intended meaning of the change in legal rulings as follows:

"As for the foundational ruling established by textual evidence, it does not change. For example, the Sharīʿah affirms the option of rescission upon viewing (*khiyār al-ruʾyah*) for someone who purchases an item without having seen it. This is established by the ḥadīth of the Messenger of Allah ﷺ: *'Whoever buys something he has not seen has the option [to cancel] once he sees it.'*[796]

Based on this ḥadīth, the early jurists observed that in their time people commonly constructed homes according to a uniform pattern, with no significant variation between rooms. Accordingly, they held that viewing one room of the house sufficed to waive the right of rescission for the entire property.

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[794] *Majmūʿ al-Fatāwā*, Ibn Taymiyyah, 22:309

[795] *Sharḥ al-Kawkab al-Munīr*, Ibn al-Najjār, 4:448–452

[796] A weak ḥadīth. Al-Dāraquṭnī transmitted connected and mursal [disconnected] versions, judging the connected version "invalid and unauthentic" and stating of the other: "This is mursal, and Abū Bakr ibn Abī Maryam is weak."

But when architectural styles changed, and houses began to differ from room to room in line with contemporary custom, the later jurists ruled that each part must be viewed individually. This is not a difference in *evidence or proof*, but a difference in *era and context*."[797]

The operative basis (*manāṭ*) of *khiyār al-ruʾyah* is the prevention of dispute. If viewing a model unit suffices to eliminate dispute, then the *manāṭ* is realized—thus altering the fatwā once again.

As for the claim that legal rulings (*aḥkām sharʿiyyah*)—in their technical sense as defined by the *uṣūlīs*—can change, it has no basis and no supporting evidence. Though some have used the expression intending by it the change of *fatwā*, as mentioned in the *Majallat al-Aḥkām al-ʿAdliyyah*, which states: "The change of legal rulings with changing times is not to be denied."[798]

When it becomes clear that those who speak of the "changing of rulings" actually mean the change of *fatwā*, or the *ḥukm* in the usage of some jurists—albeit with some looseness in terminology—which the *uṣūlīs* refer to as the *effect* of the ruling (*athar al-ḥukm*), or as the *ḥukm* in its linguistic sense (which includes the jurist's ruling—that is, his fatwā) and those rulings derived from custom, social practice, or public interest, or the judgment concerning specific events when the surrounding circumstances differ—then, I say, once that is made clear, it may be said: "There is no dispute over terminology" (*lā mushāḥḥah fī al-iṣṭilāḥ*), especially given that this usage has been adopted by leading scholars such as al-Shāṭibī and others.[799] The proper understanding of their intent when referring to the "legal ruling" (*ḥukm sharʿī*) is thus the comprehensive notion: the divine address along with its contingent conditions and contextual attachments.

We are certain that the legal ruling (*ḥukm*) in its *uṣūlī* sense does not change. How could the address of Allah change[800]—and who possesses the authority to change it? Would this not amount to *naskh* (abrogation)? And does anyone have the right to abrogate anything that Muḥammad ﷺ brought? Would this not constitute a distortion akin to the distortion committed by the People of the Book, who claimed that their rabbis and monks could alter the rulings of their religion as they saw fit, while being supported in that by the Holy Spirit?

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[797] *al-Wajīz*, Āl Būrno, 310

[798] See *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*, ʿAlī Ḥaydar, 1:47, Article no. 39

[799] "Uncovering the head, for example, varies by region. (...) Among Easterners it compromises probity, while among Westerners it does not. (...) What has been mentioned concerning the variation of rulings with changing customs does not, in reality, amount to a change in the essence of the divine address. (...) Rather, when customs differ, each custom is referred to a legal basis upon which it is judged." Al-Muwāfaqāt, al-Shāṭibī, 2:284–286.

[800] al-ʿAṭṭār said: "The alteration of a ruling is impossible, because it is the divine address — that is, His eternal, internal speech." *Ḥāshiyat al-ʿAṭṭār ʿalā Sharḥ Jalāl al-Dīn al-Maḥallī*, 1:161
This is sound — except for his statement "that is, His eternal, internal speech" — because God's address in the Qurʾān is His speech in both word and meaning, and rulings are altered by God through abrogation. But after the cessation of revelation, who has the authority to do so?

﴿ اتَّخَذُوا أَحْبَارَهُمْ وَرُهْبَانَهُمْ أَرْبَابًا مِّن دُونِ اللَّهِ﴾

Did not Allah ﷻ censure them for this, as He said: "They took their rabbis and monks as lords besides Allah" [al-Tawbah: 31]? The Messenger of Allah ﷺ clarified to ʿAdiyy ibn Ḥātim (rAa) that this was due to their following them in permitting what Allah had forbidden and forbidding what He had permitted.[801]

من أَحْدَثَ في أَمْرِنا هذا ما ليس مِنْه فَهُو رَدٌّ.

And is this not precisely what the Messenger of Allah ﷺ forbade when he said—as reported in both Ṣaḥīḥ al-Bukhārī and Ṣaḥīḥ Muslim: "Whoever introduces into this matter of ours something that is not from it, it is rejected"?

We have thus come to know that Sharīʿah rulings do not change or transform. However, the *fatwā* of the *muftī*—which involves selecting the most appropriate ruling for a particular case—*may* change. This is because *taḥqīq al-manāṭ* (verification of the operative basis) is a form of *ijtihād* that does not cease until the end of the world, as al-Shāṭibī clearly stated:

«الاجتهاد على ضربين: أحدهما لا يمكن أن ينقطع حتى ينقطع التكليف وذلك عند قيام الساعة، والثاني يمكن أن ينقطع قبل فناء الدنيا. فأما الأول فهو الاجتهاد المتعلق بتحقيق المناط، وهذا الذي لا خلاف فيه بين الأمة في قبوله، ومعناه أن يثبت الحكم بمدرَكه الشرعي لكن يبقى النظر في تعيين محَله»

"*Ijtihād* is of two kinds: one of them cannot possibly cease until legal responsibility itself comes to an end—which is at the arrival of the Hour; the other may cease before the end of the world. As for the first, it is the *ijtihād* related to verifying the *manāṭ*—and this is unanimously accepted by the Ummah. Its meaning is that the ruling has been established by its Sharʿī basis, but scrutiny remains regarding the identification of the specific case to which it applies."[802]

A particular case in reality may be suitable for multiple rulings from different angles, and the *mujtahid* selects the one most appropriate to it. The case may also be subject to two competing principles, in which case the judge affiliates it with the one that is closer to it in meaning and form. However, when there is a conflict, consideration of meaning (*maʿnā*) takes precedence—by way of *istiḥsān* (juridical preference).

To illustrate this, some scholars understood from the ḥadīth of Ibn ʿAbbās regarding ʿUmar's (rAa) enforcement of the triple divorce as three separate divorces, that ʿUmar (rAa) had observed how people had begun to excessively and unlawfully pronounce triple divorce. Being the ruler, he intended to discipline them by enforcing all three as binding.

History does not report that any major harm resulted from this policy during his time. However, as time passed, people changed, and the problem of *taḥlīl* (legal circumvention through temporary marriages) became widespread—due to people's recklessness, impulsiveness, and haste in uttering divorce. Imāms Ibn Taymiyyah and Ibn al-Qayyim—may Allah have mercy on them both—examined this new reality

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[801] *Sunan al-Bayhaqī al-Kubrā*, Kitāb Ādāb al-Qāḍī, Bāb mā yaqḍī bihi al-Qāḍī, 10:116

[802] *al-Muwāfaqāt*, al-Shāṭibī, 4:64–65

and concluded that the more suitable course for people's condition was to return to the original ruling: counting the triple pronouncement as a single divorce. Ibn al-Qayyim said, regarding that context:

"[Section: The Basis for Changing Fatwā Due to Changing Times and Circumstances]

Once this is understood, the issue of whether triple divorce counts as three separate divorces is among those rulings whose fatwā changed over time, as you have seen—based on what the Companions perceived to be in the public interest. They observed that people had begun to hastily pronounce triple divorce, and that this harm could not be prevented except by enforcing it as three. So they judged that the benefit of enforcing it outweighed the harm of its occurrence.

At that time, the door to *taḥlīl*, whose practitioners the Prophet ﷺ cursed, had not been opened in any way. Rather, they were the most severe of people in prohibiting it. ʿUmar (rAa) even threatened to stone anyone who engaged in it. They were also fully aware of the difference between lawful divorce and what went beyond it.

But in our own time—when women's private parts have complained to their Lord of the corruption caused by *taḥlīl*, and of the depravity committed by those who perform it—something that is not merely a blemish, but a blindness in the eye of the religion, and a choking affliction in the throats of the believers— these abominations have brought disgrace to the religion in the eyes of its enemies, and have turned away many would-be converts because of its abuse. Its details are beyond the scope of description or containment in any book. All believers see it as among the vilest abominations and most humiliating scandals. It has erased the very form of religion, changed its very name, and the *borrowed goat* smeared the divorced woman with the filth of *taḥlīl*."[803]

Our purpose in citing this passage is not to address the question of whether a triple pronouncement of divorce counts as one or three—for determining the stronger view on that issue alone would require the filling of volumes.[804] Nor do we intend to present this specific issue as the most suitable example for our discussion, for it is itself a matter of dispute. Rather, what the fair-minded reader will discern in the words of Imām Ibn al-Qayyim (rA) is the perspective of a jurist who understands that the Sharīʿah of Allah is founded upon *maṣlaḥah* (benefit), while also taking into account the view of non-Muslims toward Islam and the fact that some are deterred from embracing the religion due to the widespread problem of *taḥlīl* among Muslims.

Of the same nature in our own times is what non-Muslims or secularists criticize regarding the contemporary Islamic judicial system—namely, its neglect, in some applications, of forensic medicine, no matter how strong its evidentiary indications may be. Relying on such evidence is not a distortion of the Sharīʿah's procedures of proof; rather, it is a matter of returning prevailing custom, established practice, and the new circumstances to the Sharʿī principle that best accords with them all—namely, that

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[803] *Iʿlām al-Muwaqqiʿīn*, Ibn al-Qayyim, 3:40

[804] For further detail, see Ibn al-Qayyim's discussion in *Zād al-Maʿād*, chapter on the ruling of the Prophet ﷺ concerning one who issued three divorces in a single statement, 5:241. To examine the view of those who disagreed, see Muḥammad al-Amīn al-Shinqīṭī's commentary in *Aḍwāʾ al-Bayān* under the verse: "Divorce is twice…" [al-Baqarah 2:229], 1:104.

certainty is not to be discarded in favor of conjecture, and that applying evidence is preferable to neglecting it, especially when the objective is to establish justice and ascertain the truth.

Changing a Fatwā Is Not a Novel Matter

إنما نَهَيْتُكُمْ من أَجْلِ الدَّافَّةِ التي دَفَّتْ فَكُلُوا وَادَّخِرُوا وَتَصَدَّقُوا

The change of a *fatwā* is not something newly introduced. Indeed, it was the Messenger of Allah ﷺ—who taught us *qiyās* and other principles—who himself guided us to this matter through his words and actions ﷺ. In Ṣaḥīḥ Muslim, from ʿAbd Allāh ibn Wāqid, who said: "The Messenger of Allah ﷺ forbade eating the meat of sacrificial animals after three days. ʿAbd Allāh ibn Abī Bakr said: I mentioned this to ʿAmrah, and she said: He has spoken the truth; I heard ʿĀʾishah say: 'Some poor desert dwellers arrived at the time of sacrifice during the lifetime of the Messenger of Allah ﷺ, so the Messenger of Allah ﷺ said: Store for three days, then give away in charity what remains.' Later on, they said: 'O Messenger of Allah, people are making water-skins from the hides of their sacrificial animals and rendering fat from them.' He asked: 'And what is that?' They replied: 'You forbade eating the meat of sacrificial animals after three days.' He said: 'I only forbade you because of the needy incomers who had arrived. Now eat, store, and give in charity.'"

May my father and mother be sacrificed for him ﷺ—he left no good without guiding us to it, whether by his words, his actions, or both together.

The caliphs and the forbears followed his ﷺ example. Among the instances of fatwā changing among the early scholars are:

- The Commander of the Faithful, ʿUmar (rAa), assigning the payment of blood-money (*diyah*) to the members of the military register (*ahl al-dīwān*) instead of the agnates (*ʿaṣabah*), due to the dispersal of people across different lands.
- ʿUmar (rAa) withholding the share of *al-muʾallafah qulūbuhum* (those whose hearts are to be reconciled) when he saw the strength of the religion and Allah's empowerment of the Muslims during his blessed caliphate.
- "It is reported that ʿUmar (rAa) said, 'I will not banish a Muslim after him,' after he banished Rabīʿah ibn Umayyah for drinking wine, whereupon Rabīʿah joined Heraclius and became a Christian. A number of jurists interpreted his statement as concerning discretionary banishment for drinking wine and similar offenses, while Ḥanafī jurists cited it as evidence that banishment for zinā is not a mandatory fixed punishment."
- The Commander of the Faithful, ʿUthmān (rAa), ordered that stray camels be collected, sold, and their price safeguarded for their owner—whereas the original ruling was the prohibition of taking them—because he observed the corruption of integrity and the change in people's character.
- The Commander of the Faithful, ʿAlī (rAa), held craftsmen liable for loss or damage after previously being considered mere trustees, in order to protect those commissioning work from the transgression of certain craftsmen and because people's affairs could not be rectified except through this measure.

- Among such examples are: Abū Bakr's (rAa) nomination of ʿUmar (rAa) as his successor; ʿUmar's (rAa) leaving the caliphate as a matter of consultation among six men; the compilation of state registers (dawāwīn); the minting of currency; the establishment of prisons; and many other measures necessitated by changing circumstances and times. These were not matters for which there was prior instruction from the Sharīʿah, nor was there an exact precedent to which they could be analogically attached. Rather, they were instituted in view of a specific public interest for which the Sharīʿah had not provided specific evidence, even though it had affirmed the general category of such interests.
- The Sunnah prescribed giving a ṣāʿ of dates, barley, raisins, or dried curd (aqiṭ) as ṣadaqat al-fiṭr. Later, many scholars stated that it is permissible to give it in corn, rice, or other staples if these are the predominant foods of the land. They reasoned that the items mentioned in the ḥadīth were specified only because they were the predominant staple foods of the people of Madīnah at the time.

Shaykh Aḥmad al-Zarqā (rA) said regarding the Ḥanafī madhhab:

"Likewise, the early scholars said that a creditor is not entitled to recover his debt from the debtor's property in his absence except if it is of the same kind as what is owed. They also said that a wife must accompany her husband wherever he wishes after paying her the prompt portion of her dowry—this being due to the prevailing obedience of people to their obligations in their time. Then, when people's custom shifted toward neglecting rights, the jurists said that the creditor may recover his debt even from property not of the same kind as what is owed. The later scholars also said that the wife is not compelled to accompany her husband outside the town where he married her, even if he has paid her prompt dowry in full—due to the change in people's behavior toward neglecting obligations."[805]

Sometimes an earlier scholar may disregard custom, yet it later asserts its authority once it becomes firmly established for those who come after. Shaykh Muḥammad al-Zuḥaylī said:

"Al-Zarkashī al-Shāfiʿī (rA) said: Al-Shāfiʿī did not consider custom in two cases:
First: commissioning craftsmen whose custom was that they do not work except for payment. Al-Shāfiʿī said: If no hiring contract was concluded for them, they are not entitled to anything. (*al-Laḥjī*, p. 46).
Second: the invalidity of sale by mere exchange of possession (*muʿāṭāh*) according to the stated opinion, even if the custom after al-Shāfiʿī became the practice of concluding sales by *muʿāṭāh*—although the preferred view in both cases is contrary to this."[806]

The later Shāfiʿī scholars held that a craftsman is entitled to payment even without an explicit agreement, and that a sale by mere exchange of possession (*muʿāṭāh*) is valid—due to the widespread custom of both—despite these being contrary to the statement of the Imām.

The examples of this matter are many, far too numerous to be encompassed here.

Statements of Scholars on the Change of Fatwā

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[805] Sharḥ al-Qawāʿid al-Fiqhiyyah, Aḥmad al-Zarqā, 227

[806] al-Qawāʿid al-Fiqhiyyah wa-Taṭbīqātuhā fī al-Madhāhib al-Arbaʿah, Muḥammad al-Zuḥaylī, 1:306

Here now are some quotations from the scholars that demonstrate their agreement—despite the diversity of their madhhabs—on the principle of changing the *fatwā*.

Shaykh ʿAlāʾ al-Dīn al-Ḥaṣkafī said at the beginning of his commentary on *al-Tanwīr*:

"As for us [meaning the later Ḥanafīs], it is incumbent upon us to follow what they [the earlier scholars] preferred and deemed correct, just as if they had issued those fatwās in their lifetimes. If you say: 'They sometimes transmit statements without preference, and they may differ in what they deem correct!' I reply: One should act as they acted—by taking into account the change of custom, the conditions of people, what is more accommodating, what has become prevalent in practice, and what has stronger reasoning behind it. There is never an absence of those who can truly discern this (in reality, not merely in conjecture). Whoever is unable to discern it must refer to one who can, so that his liability is discharged."[807]

In *Durar al-Ḥukkām* it is stated:

﴿هَلْ جَزَاءُ الْإِحْسَانِ إِلَّا الْإِحْسَانُ﴾

"The later jurists permitted hiring for acts of devotion—such as teaching the Qurʾān—whereas the earlier scholars had said it was impermissible. This is because, in earlier times, students would reward their teachers without stipulation or condition, acting upon the noble verse: *'Is there any reward for good other than good?'* [al-Raḥmān: 60].

Today, however, that practice has ceased; Qurʾān memorizers have become occupied with their livelihoods, and few teach purely for Allah's sake, nor can they devote themselves to it, as their needs prevent them from doing so. If the door were not opened for them to teach for payment, the Qurʾān would be lost. Thus, they issued fatwās allowing it, deemed it good, and said: 'Rulings may vary with the change of times.'

Al-Zaylaʿī said: The transmissions from our three Imāms—Abū Ḥanīfah, Abū Yūsuf, and Muḥammad—agree that hiring for acts of devotion is invalid. However, later mujtahids among the scholars of *takhrīj* and preference issued fatwās validating it for teaching the Qurʾān due to necessity. In earlier times, teachers had stipends from the public treasury, but these have ceased. If hiring and taking payment were not permitted, the Qurʾān would be lost, and with it the religion, due to teachers' need to earn a living.

Those who came after them—of similar scholarly rank—also issued fatwās validating it for the adhān and imāmah, as they are from the symbols of the religion, and they permitted hiring for them as well due to necessity. This is what the later scholars issued fatwās upon, knowing that if Abū Ḥanīfah and his companions had lived in their time, they would have said the same and retracted their earlier position."[808]

Ibn ʿĀbidīn authored his work *Nashr al-ʿArf fī Bināʾ Baʿḍ al-Aḥkām ʿalā al-ʿUrf* to clarify the issues in which the later scholars differed from the earlier ones due to changes in circumstances and time.

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[807] al-Baḥr al-Rāʾiq Sharḥ Kanz al-Daqāʾiq wa-Minḥat al-Khāliq wa-Takmilat al-Ṭūrī, Ibn Nujaym, 6:293

[808] Durar al-Ḥukkām fī Sharḥ Majallat al-Aḥkām, ʿAlī Ḥaydar, 1:463

Ibn Farḥūn (rA) said:

إن جري هذه الأحكام التي مدرَكها العوائد، مع تغير تلك العوائد خلاف الإجماع وجهالة في الدين، بل كل ما هو في الشريعة يتبع العوائد يتغير الحكم فيه عند تغير العادة إلى ما تقتضيه العادة المتجددة، وليس ذلك تجديدا للاجتهاد من المقلدين حتى يشترط فيه أهلية الاجتهاد، بل هي قاعدة اجتهد فيها العلماء وأجمعوا عليها، فنحن نتبعهم فيها من غير استئناف اجتهاد

"The application of rulings whose basis is custom, while those customs have changed, is contrary to consensus and constitutes ignorance of the religion. Rather, everything in the Sharīʿah that is contingent upon custom changes in its ruling when the custom changes, to whatever the new custom requires. This is not a renewal of *ijtihād* by those who perform *taqlīd* such that the conditions of *ijtihād* must be met in them. Rather, it is a principle upon which the scholars have already exercised *ijtihād* and reached consensus. We merely follow them in it without initiating fresh *ijtihād*."[809]

Imām al-Qarāfī (rA) said:

فإن الأحكام المُرَتَّبة على العوائد تتبع العوائد وتتغير عند تغيرها فتأمل ذلك

"Rulings that are based upon custom follow that custom and change when it changes. So reflect upon this."[810]

It is related from Imām Ibn Abī Zayd al-Qayrawānī (rA) the author of the well-known *al-Risālah* in Mālikī fiqh, that a wall of his house collapsed and he feared for his safety from certain groups. He therefore acquired a dog for protection and tied it inside his house. When someone said to him, "Mālik disliked that," he replied to the one who spoke to him: "If Mālik had lived in your time, he would have kept a fierce lion!"

The later Shāfiʿī scholars considered the customary intent (*al-maqṣid al-ʿurfī*) in oaths and transactions, unlike the earlier scholars who relied upon the implications of language. Their fatwās in Khurāsān differed from those of others due to the difference in custom, and the fatwās of the earlier scholars differed from those of the later ones. It may also be said that the difference in customs and circumstances among the Muslim lands was among the reasons for al-Shāfiʿī's renewal of his madhhab.

Ibn al-Qayyim (rA) said:

"I say: The same applies to the sinful person (*fāsiq*), unless he is openly proclaiming his sin and calling to his innovation—in which case, the ruling on seeking his fatwā is like the ruling on following him in prayer or accepting his testimony. This varies with differences in place, time, capability, and incapacity; what is obligatory is one thing, and what actually occurs is another.

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[809] *Tabṣirat al-Ḥukkām*, Ibn Farḥūn, 2:75

[810] *al-Furūq*, al-Qarāfī, 3:27

والفقيه من يطبق بين الواقع والواجب وينفذ الواجب بحسَب استطاعته، لا من يلقي العداوة بين الواجب والواقع، فلكل زمان حكم، والناس بزمانهم أشبه منهم بآبائهم.

The jurist is the one who reconciles between reality and obligation, implementing the obligation to the extent of his ability—not the one who sets enmity between the two. For every time has its ruling, and people in their own time resemble one another more than they resemble their forefathers.

When sin becomes widespread and predominates among the people of the earth, if the imāmate, testimony, judgments, fatwās, and positions of authority of the sinful were to be rejected entirely, legal rulings would be suspended, the order of creation would be corrupted, and most rights would be nullified. Yet, even so, it remains obligatory to consider what is most beneficial, and then what is next most beneficial—this being when one has the ability and choice. But in a situation of necessity and dominance of falsehood, there is nothing except patience and the fulfillment of the lowest degree of enjoining the right and forbidding the wrong."[811]

I say: The matter of testimony is one of the means of realizing justice, which is the supreme objective of the judiciary—and for which Allah sent the messengers and revealed the scriptures. Allah the Exalted said:

﴿لَقَدْ أَرْسَلْنَا رُسُلَنَا بِالْبَيِّنَاتِ وَأَنزَلْنَا مَعَهُمُ الْكِتَابَ وَالْمِيزَانَ لِيَقُومَ النَّاسُ بِالْقِسْطِ﴾

"We have certainly sent Our messengers with clear proofs, and We sent down with them the Book and the balance so that mankind may uphold justice" [al-Ḥadīd: 25].

This supreme objective is to be pursued by every means that does not contradict the Sharīʿah, even if it was not explicitly stated by it or practiced by the early generations.

The Change of Fatwā in the Ḥanbalī Madhhab

There is no doubt that the past two centuries of human history have witnessed transformations in human reality unparalleled in thousands of years. It is therefore necessary that the divinely revealed Sharīʿah—sent to guide mankind until the Day of Resurrection—encompass these changes.

Here, we will present some examples from the fatwās of contemporary Ḥanbalī scholars. Although we have previously mentioned, alongside their fatwās related to this chapter, the fatwās of scholars from other madhhabs, we now return to the main purpose of this book: to highlight Ḥanbalī applications in particular.

One may say that contemporary scholars are not to be relied upon. This is ill opinion toward the Ummah of Muḥammad ﷺ, which is the blessed and mercy-endowed nation whose goodness never ceases—like the rain, one never knows whether its beginning or its end is better.

Another may say that most contemporary Ḥanbalīs do not adhere strictly to the preferred positions of the madhhab, so we should not attribute their fatwās to it. Even if that was true, it is not a flaw—for leading scholars of the past and present have adopted positions from other madhhabs. Yes, it is necessary to distinguish their fatwās if they conflict with the settled position of the madhhab and avoid attributing

[811] *Iʿlām al-Muwaqqiʿīn*, Ibn al-Qayyim, 4:170

them to it. But what they have chosen from within the madhhab's opinions, or deduced upon some of its principles, should not be ignored. After all, in every generation there have been scholars whose choices differed from those before them; al-Ḥajjāwī and Ibn al-Najjār are no more entitled to represent the madhhab than al-Muwaffaq and al-Majd, and these two are no more entitled than Abū al-Khaṭṭāb and Ibn ʿAqīl.

Even if, at some stage, there was excess in rejecting taqlīd (following a juristic authority without independently assessing the evidence), it arose as a reaction to excess in clinging to it. The time has now come to reconcile the thesis and the antithesis in a balanced synthesis, as would be expected of the wise.

One may also say that these choices are selective. Let it be known that the purpose here is to illustrate the topic of this chapter, not to advocate for any particular fatwā.

We will cite here some fatwās of contemporary scholars, but let us begin by preparing the way with some fatwās of later (but not contemporary) scholars—starting with the most prominent verifier of the madhhab among the later generations, Imām al-Mardāwī. He (rA) said regarding looking at the face of a non-maḥram woman:

وهذا الذي لا يسع الناس غيره، خصوصا للجيران والأقارب غير المحارم، الذي نشأ بينهم

"Ibn ʿAqīl said: *"It is not prohibited to look at the face of a non-maḥram woman if one is safe from temptation."* End quote. I say: This is the position that people cannot but act upon—especially in the case of neighbors and non-maḥram relatives who have grown up together."[812]

There is no doubt that this fatwā—contrary to the view of most of the earlier Ḥanbalīs—is a good example for the subject of this chapter, as the motive behind it is the difference in people's circumstances and urban life between the earlier and later Ḥanbalīs.

And this notion—*"people cannot but act upon it"*—has been repeated in our madhhab just as it has in other madhhabs. The scholars have various expressions indicating a change in fatwā, such as *"ʿalayhi al-fatwā"* ("this is the view upon which fatwā is given"), *"ʿalayhi al-ʿamal"* ("this is the view upon which practice is based"), and *"jarayān al-ʿamal"* ("the practice has proceeded upon this"), among others. Here is what the erudite scholar al-Ruḥaybānī (rA) says:

وهذا الاتجاه لا يسع الناس العمل بغيره، فلله در مستنبطه على نظره الدقيق، واستخراجه الأنيق

"(And) it is reasonable to hold (that what invalidated) the contract (in the aforementioned cases) (becomes valid)—that is, it turns valid—(if the price is received); (due to the presence of *muʿāṭāh*)—meaning, at the time of receipt. This is because most people purchase from the grocer, cloth-seller, and butcher item by item, sometimes personally and sometimes through an agent, without bargaining or fixing a price; then, after some time has passed, they settle accounts with him and pay the price. If possession (*qabḍ*) in *muʿāṭāh* were to be considered separately for each individual transaction, matters would become difficult, leading to the invalidation of most contracts and to liabilities arising from the

[812] al-Inṣāf fī Maʿrifat al-Rājiḥ min al-Khilāf, al-Mardāwī, 20:56

invalidity of the transactions. This view is one that people cannot but act upon. So all praise is due to the one who derived it for his keen insight and elegant deduction."[813]

So observe the consideration given to newly arisen customs, the intent to validate people's transactions, and the aim of making matters easy for them.

Shaykh Ibn ʿUthaymīn (rA) said regarding the Imāmate of the sinful (*fussāq*):

وهذا القول لا يسع الناس اليوم إلا هو؛ لأننا لو طبقنا القول الأول على الناس؛ ما وجدنا إماما يصلح للإمامة إلا نادرا

"However, if he commits a sin related to the prayer—such that this imām, upon entering the prayer, does something that invalidates it—then it is not valid to pray behind him, because his own prayer is invalid due to his committing a prohibited act within it. But if his sin is outside the prayer, then it is upon him alone. This view is the only one people can act upon today, because if we applied the first opinion to people, we would hardly find an imām fit to lead the prayer except rarely."[814]

Preceding him in this approach was al-Ruḥaybānī(rA) who said:

"(Section) (The Imāmate of a fāsiq is not valid in any case), meaning whether his sin is in belief or in prohibited actions, even if he is outwardly discreet about it… (It is reasonable) to affirm the validity of prayer behind one whose outward state is righteousness, because (the presumption here), i.e., in the Imāmate, is uprightness—acting upon the outward appearance and maintaining good opinion of the people of the qiblah. This is something people cannot but act upon, for if we required uprightness both outwardly and inwardly, our scope would be too narrow, and it would be impossible for us to know who truly possesses this quality. This is the reasonable position."[815]

However, Ibn ʿUthaymīn advanced one step further, affirming the validity of the Imāmate of one who openly displays sinfulness—provided that his sin is unrelated to the prayer itself or its actions.

And here is a strong statement from Shaykh Ibn ʿUthaymīn (rA) regarding the zakāh of paper currency and the occurrence of ribā therein. I cite it here in full due to its importance and relevance to the subject of this chapter, for the change of fatwā does not always move in the direction of permissibility and ease; otherwise, the intent would not be to observe the purposes of the Lawgiver and the objectives of the Sharīʿah, but rather the desires of people. He (rA) said:

"What is meant by the two currencies (*al-naqdān*) is gold and silver. Based on this, *fulūs* (base-metal coins) are not considered currency in the terminology of the jurists, as they are neither gold nor silver. Consequently, scholars have differed: is ribā applicable to them or not? Is zakāh obligatory on them absolutely, or are they to be treated as trade goods—so that zakāh is due if they are intended for trade, but not otherwise? Here we have two major issues that require deep analysis.

It is known that paper currency is considered a type of *fulūs*, since it is a substitute for the two currencies and is exchanged for them—gold and silver. Some scholars have said that *fulūs* are trade goods, and thus

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[813] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 3:7

[814] al-Sharḥ al-Mumtiʿ ʿalā Zād al-Mustaqniʿ, Ibn ʿUthaymīn, 4:218

[815] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 1:652

zakāh is not obligatory on them unless they are intended for trade. On this view, if a person had a million *qurūsh*, no zakāh would be due on them. Likewise, if he exchanged ten for twenty of these *fulūs*, it would be permissible, whether the exchange took place in the contract session or its receipt was delayed—just as if one exchanged one garment for two garments, which is permissible even with delayed receipt.

But if we were to adopt this opinion, it would follow that most traders today, who hold cash in *dirhams*, would not owe any zakāh; and that banks would not be considered usurious, since they mostly deal with this paper currency. I even read a treatise entitled, *'Convincing the Souls of the Equivalence of the Banknote Currency to the Currency of Fulūs'.* (*al-anwāṭ*: paper currency).

However, I do not think that the footing of any scholar can firmly stand upon this view, due to the invalid consequence that it would imply there is no ribā among people today—since most transactions are in paper currency—and that no zakāh is due on one who possesses millions of these notes unless they are intended for trade.

The second opinion is that paper currency is equivalent to the currency (*naqd*) in terms of the obligation of zakāh, falling under the generality of Allah's saying: {Take from their wealth a charity} [al-Tawbah: 103]. The recognized wealth in use today is this money. And in the statement of the Prophet ﷺ to Muʿādh ibn Jabal (rAa): *'Inform them that Allah has made obligatory upon them charity in their wealth'*, this is wealth, and people regard it in the position of currency. Therefore, zakāh is obligatory on it without doubt, and the standard for its niṣāb is that of silver, since it is a substitute for the Saudi silver riyāl—this being the case for Saudi riyāls, while each country has its own ruling."[816]

People's established custom today is that these banknotes serve as a substitute for gold and silver, which were the prices of goods in the past. They are the wealth by which a person becomes rich or poor. Therefore, despite differing from gold and silver in some respects, and despite the difference among the madhhabs regarding the cause (*ʿillah*) of ribā, there is no avoiding the conclusion that ribā and zakāh apply to them.

And after discussing prayer and zakāh, I will present a fatwā from the Shaykh on fasting—specifically on the matter of sighting the crescent moon. He (rA) said: "There is no harm in using binoculars or observatories to sight the crescent. As for airplanes and satellites, then no—because airplanes and satellites are elevated above the earth, which is the location designated for crescent sighting."[817]

## افعل ولا حرج

The leniency of contemporary Ḥanbalī scholars in matters of ḥajj is too extensive to enumerate, and their recourse to the broad expanse of Islamic jurisprudence is frequent. This reflects the tolerance and ease of Islam, for to impose hardship upon the Guests of the Most Merciful—those who come from every distant path to visit His Ancient House—is not from the way of the one who conveyed the Sharīʿah ﷺ, who continually repeated: *"Do it, and there is no harm."*

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[816] al-Sharḥ al-Mumtiʿ ʿalā Zād al-Mustaqniʿ, Ibn ʿUthaymīn, 6:92.

[817] Majmūʿ Fatāwā wa-Rasāʾil Ibn ʿUthaymīn, 19:62.

How much more so in our own times, when millions gather in these limited spaces? If you say that this is by the direction of those in authority, then the response is: even if that is the case, not every aim of those in authority should be resisted. Rather, the default is cooperation and mutual compliance between rulers and scholars. Scholars are presumed not to violate the definitive principles of the religion for the sake of obeying rulers, nor to assist them in wronging the subjects or depriving them of their rights. If some among them do so, then such conduct should be condemned on the part of both parties.

As for when rulers seek to make matters easier for the people, then welcome indeed—we aid them in this and call upon them to ensure that their governance of the people is always tied to the public interest, that they act as trustees on behalf of the Ummah, that they remain bound by the covenant they have with it, and that they acknowledge that authority belongs to the Ummah, not to them—according to what suits the circumstances and the times, as was affirmed by Shaykh al-Islām and other great imāms, and as is indicated by the maxim of this chapter and its foundational principle.

In the chapters on social customs, Shaykh ʿAbd Allāh ibn ʿAbd al-Raḥmān al-Jibrīn (rA) was asked:

Is it permissible for a Muslim woman to travel without a maḥram from her country in order to work in another country—for example, to travel from Egypt or India to work in the Kingdom of Saudi Arabia? And what is the ruling on one who assists her in doing so?

He replied: "A severe prohibition has been reported against a woman traveling without a maḥram, as in the saying of the Prophet ﷺ: *'It is not permissible for a woman who believes in Allah and the Last Day to travel the distance of two days except with a maḥram.'* This is out of fear for her being exposed to the unlawful, for traveling alone in the desert could cause her to be preyed upon by the wicked, and incidents of rape and immoral acts could occur.

However, in these times distances have shortened and dangers have diminished with the presence of airplanes, sea vessels, and buses, in which large numbers of people—both men and women—travel together. The danger in these cases may be no greater than within one's own country, and there is no seclusion with the woman.

Thus, I hold that it is permissible, in cases of need, for a woman to travel on such conveyances when the journey is less than two days, and there is no fear for her of assault or immoral acts—provided her maḥram escorts her to the airport, ship, or bus, and her maḥram or guardian receives her in the other country, with no fear or danger involved. And Allah knows best."[818]

The relevance of this fatwā to the topic of this chapter—whether one agrees with him or not—requires no elaboration.

Guidelines for the Change of Fatwā

1. First Guideline: As stated earlier before establishing the principle, what is meant is the change of the *sharʿī fatwā*, not the ruling of Allah Himself.
2. Second Guideline: Not everything is subject to change.

[818] Shaykh Abdullah bin Abdulrahman Al-Jebreen, "Is it Permissible for a Muslim Woman to Travel Without a Mahram from Her Country to Work in Another Country," Shaykh Abdullah bin Jebreen's Website, Fatwa No. 10012, accessed June 18, 2024.

Ibn al-Qayyim (rA) said: “Rulings are of two types: one type does not change from the state it is upon, regardless of time, place, or the *ijtihād* of the imāms—such as the obligation of obligations, the prohibition of prohibitions, the fixed *ḥadd* punishments prescribed by the Sharʿ for crimes, and the like. This type is not open to alteration, nor to *ijtihād* that contradicts its established form.

The second type is that which changes according to what the public interest requires in a given time, place, and circumstance—such as the measure, types, and forms of discretionary punishments (*taʿzīrāt*), for the Lawgiver varies these in accordance with the interest.”[819]

3. Third Guideline: The change of fatwā due to time and place is not simply because of the passage of time or the change of location; otherwise, this would undermine the universality of the final Sharīʿah for all times and places until the Day of Judgment. Rather, the point is that time and place are vessels for the events, incidents, circumstances, customs, and conventions within them—whose change impacts the fatwā at the stage of *taḥqīq al-manāṭ* (verification of the operative basis).

فالأحكام ثابتة تتبع أسبابها حيث كانت بإطلاق

Imām al-Shāṭibī said in *al-Muwāfaqāt*:
“The variation of rulings with the variation of customs is not, in reality, a variation in the original divine address. The Sharīʿah is established as being permanent and eternal—were the world to remain without end, and legal responsibility likewise, the law would need no addition. The meaning of variation is that when customs differ, each returns to the Sharʿī principle that governs it… thus the rulings are fixed, absolutely following their causes wherever they may be.”[820]

4. Fourth Guideline: Fatwā changes when there is a valid cause (*muqtaḍī*) and no preventing factor (*māniʿ*), not out of whim or mere desire for ease. Examples include:

a. The emergence of a new cause influencing the fatwā:

The Messenger of Allah ﷺ did not compile the Qurʾān into a single codex, but when many Qurʾān reciters were killed during the wars of apostasy in the time of Abū Bakr (rAa), ʿUmar (rAa) and the other Companions feared its loss and compiled it.

Similarly, the advancement of forensic science has enabled the judiciary to establish rights and achieve justice in many cases. While such forensic methods in their modern form did not exist in the Prophet’s ﷺ time—and thus were not considered among the means of proof in the courts—and revelation did not explicitly designate them as evidence, the Islamic judiciary today should utilize them to uphold justice, especially when their accuracy may approach ordinary empirical certainty in some cases, which even the testimony of upright witnesses cannot guarantee. These methods, while falling short of establishing *ḥudūd* (which are warded off by doubts) outside of what was practiced by the Companions, should at least be used for discretionary punishments, removing injustices, and establishing justice among people.

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[819] Ighāthat al-Lahfān min Maṣāyid al-Shayṭān, Ibn al-Qayyim, 1:330

[820] *al-Muwāfaqāt*, al-Shāṭibī, 2:217

b. The presence or absence of a circumstance (*ʿāriḍ*):

The Prophet ﷺ refrained from demolishing the Kaʿbah and including the Ḥijr within it due to the Quraysh's recentness to Islam. ʿAbd Allāh ibn al-Zubayr (rAa) later did so during his caliphate when Islam had become firmly established.

c. Change in tools and means:

In the sphere of transactions, the Sharīʿah generally provided broad principles and did not go into exhaustive detail about means, so that it would remain flexible and applicable to every time and place. In contemporary life, means have changed greatly: we must prepare tanks and aircraft to deter the enemy instead of swords and spears; we must use DNA profiling, when possible, to establish paternity instead of *qiyāfah* (physiognomy), or at least give it precedence; and we must redefine "possession" (*qabḍ*) and "holding" (*ḥiyāzah*) in sales and purchases in light of modern communication revolutions and the spread of financial transactions conducted via modern means, including the internet.

d. The concurrence of multiple commands or prohibitions upon a single case:

Early Ḥanafīs prohibited taking payment for teaching the Qurʾān when volunteers were available, wishing for this work to be done purely for Allah's sake as an honor to His Book. Later, when volunteers diminished and stipends from the public treasury ceased, and scholars feared for the preservation of the Qurʾān, they permitted what they had previously prohibited—both the earlier prohibition and the later permission being for the protection of the Qurʾān.

e. Change of customs and conventions:

This applies to rulings that are dependent on such customs, as mentioned earlier in the reports from Ibn Farḥūn, al-Qarāfī, and others. This is most needed in matters of oaths, vows, and transactions to understand people's words and contracts, as previously discussed.

f. The discovery of error in a previous fatwā:

Here, we give preference to another fatwā from followed imāms whose verdict accords with what is correct—such as when it became clear that pregnancy cannot last for four or six years, or that liquid cannot reach the real interior that digests food through the ear or the brain.

## Exceptions

The maxim is consistent in its application, like the other major maxims, but it remains consistent with the conditions already mentioned in the discussion of *"When custom (ʿādah) is to be considered"* in the section on guidelines.

This consistency means that it does not fail in itself, but it may be set aside due to another overriding consideration, as explained in the discussion of *"The default is to attribute the individual case to what is predominant"*—such as precaution in worship, guarding against obsessive misgivings (*waswasah*), facilitation, concealment, preservation of dignity, protection of lineage, avoidance of applying ḥudūd punishments, and other values prioritized by the Lawgiver.

# Chapter Three: The Minor Legal Maxims

Among these maxims are some upon which the madhhabs are in agreement, some upon which they differ, and some in which there is disagreement even within a single madhhab. These are often phrased in the form of interrogatives.

Upon these maxims are built countless particular cases. Subsidiary maxims may also branch from them, and in this respect they resemble the major maxims—especially those agreed upon among the madhhabs. Yet they are less extensive than the major maxims in their scope, number of branches, and applications, and thus it is appropriate, according to the majority, to distinguish them from them.

Since the purpose of this book is to illustrate specifically Ḥanbalī applications, we will limit ourselves to the maxims operative within the madhhab, whether they are agreed upon internally or disputed, and we will clarify this in each case.

Here, then, are fifty maxims with their branches. If you add these to the five major maxims and their branches, this book will contain a little over one hundred maxims in total. Afterward, in the fourth section of this work, we will present examples of *ḍawābiṭ fiqhiyyah* (legal principles).

# First: General Maxims of Broad Application

الإعمال أولى من الإهمال

## 1. Application Is Preferred to Neglect

Among its branches are:

الأصل في الكلام الحقيقة

1. The default in speech is literal meaning.

إذا تعذَّرت الحقيقة يُصار إلى المجاز

2. If the literal meaning is impossible, figurative meaning is adopted.

المطلق يجري على إطلاقه ما لم يقم دليل التقييد نصا أو دلالة

3. The unqualified expression is carried upon its unqualified sense unless evidence establishes a qualification, either by text or by indication.

التأسيس أولى من التأكيد

4. Establishing a new meaning takes precedence over mere emphasis.

ذكر بعض ما لا يتجزأ كذكر كله

5. Mentioning part of something indivisible is like mentioning the whole of it.

السؤال مُعاد في الجواب

6. The question is treated as repeated in the answer.

المرء مؤاخذ بإقراره - ولا عذر لمن أقرّ ولو ادعى غلطا

7. A person is bound by his own admission—there is no excuse for one who confesses, even if he claims error.

البينة حجة متعدية والإقرار حجة قاصرة

8. Evidence (bayyinah) is a proof that extends to others, whereas admission (iqrār) is a proof limited to the one who makes it.

إذا تعذر إعمال الكلام يُهمل

9. If applying speech is impossible, it is to be set aside.

Some jurists made the principal maxim the sixth of the major maxims. Without doubt, it is of great significance, with numerous branches and applications, and it is agreed upon by all scholars. For this reason, we begin this chapter with it.

## Explanation

The speech of the Creator is never to be set aside, nor may it be diverted to figurative meaning (or a meaning not immediately apparent to the mind) if it can be carried upon its literal sense (or the meaning immediately apparent to the mind). Nor may it be qualified or specified without evidence.

Likewise, the speech of human beings is not to be neglected; rather, it is to be carried upon its apparent meaning, as far as possible, with attention to context and the principle that establishing a new meaning takes precedence over mere emphasis. If, however, their words cannot be given effect, they are set aside, and no practical consequence is attached to them.

## Applications

If a man dedicates a *waqf* to his children, or makes a bequest to his children, and he has no immediate children (from his own loins), it includes his grandchildren by agreement within the madhhab—so that the wording is not rendered void.[821]

If a man says to his wife and to a woman who is not his wife, *"One of you is divorced,"* then his wife is divorced.[822]

## exceptions

At times, applying the words is impossible due to ambiguity—for example, if the woman's guardian says: *"I have married you to Fāṭimah or to the tall one."*[823]

"Likewise, if a man says to his wife who is older than him, *"This is my daughter,"* or says to her while he is older than her, *"This is my mother,"* she is not divorced"—because it is rationally impossible to carry the words upon their literal sense.[824]

إذا تعذر إعمال الكلام يُهمل

This is the meaning of the maxim: "If applying the speech is impossible, it is set aside."

Sometimes application is impossible because the words cannot be carried upon any valid meaning—Sharʿan, rationally, sensorially, or customarily. For example, if a man admits to cutting off another's hand, yet the hand is intact—then sense perception prevents application.

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[821] "It is reported from Aḥmad that the waqf extends to his children and the children of his sons unless a contextual indicator diverts it from that meaning. (...) When an indication points to one of the two possible meanings, it is applied accordingly without disagreement. (...) The same applies if he says, 'for my children' or 'my offspring,' while he has no direct child." Al-Mughnī, Ibn Qudāmah, 8:195.

[822] "(...) This is because the one who died or the one over whom ownership ceased before the effective time is not a valid subject of divorce or emancipation. It resembles saying to one's wife and a woman who is not his wife, 'One of you is divorced,' or to one's bondwoman and a woman whom he does not own, 'One of you is free.'" Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 3:144.

[823] "If the guardian names her—by saying, for example, 'I have married you to Fāṭimah,' without saying 'my daughter'—the marriage is not valid. Likewise, if he says, 'I have married you to the elder one' or 'the tall one,' and similar descriptions, the marriage is not valid. This is because the name or description could apply to others who share the same name Fāṭimah, or others who are also tall." *Kashshāf al-Qināʿ*, al-Buhūtī, 11:244.

[824] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:579.

Sometimes it is the Sharīʿah itself that prevents application: for instance, if an heir acknowledges a debt owed by his deceased father, the admission is binding upon him but not upon the other heirs. Thus, if there are two brothers, each entitled to half of the estate, and one acknowledges a debt against their father, his share is reduced by half the debt.[825]

Sometimes application is impossible due to linguistic invalidity in the statement. For example: "If he says: 'You are divorced three times, except for three,' then three divorces take place—because the exception negates the whole, and that is invalid. Or if he says: 'You are divorced three times, except for two,' then three divorces take place—because an exception of more than half is invalid." [826]

الأصل في الكلام الحقيقة

## The Default in Speech Is Literal Meaning

### Explanation and Alternative Expressions

«الأصل في كلامه الحقيقة، ومدعي المجاز يحتاج إلى دليل»

"The default in his speech is the literal meaning, and whoever claims figurative meaning requires evidence."[827]

الحقيقة في الاصطلاح هي اللفظ المستعمل فيما وضع له، أي تعين له بحيث يدل عليه بغير قرينة، ويقابلها المجاز، وهو الكلمة المستعملة في غير ما وضعت له لعلاقة مع قرينة مانعة عن إرادة المعنى الموضوعة له.

In technical usage, ḥaqīqah (literal meaning) is a word employed for that for which it was originally designated, such that it denotes it without any contextual indicator. Its counterpart is majāz (figurative usage), which is a word used for something other than that for which it was designated, due to a relation, along with a contextual indicator preventing its literal sense from being intended.

Imām Taqī al-Dīn Ibn Taymiyyah rejected *majāz* as one of the attributes of meanings, while accepting it as one of the attributes of expressions. He argued that there is no proof that a word was ever fixed with a primary designation for a particular meaning, and that even if some meanings are more readily apparent to the mind, the context itself reveals the intended sense. We need not dwell at length on this dispute, for the imāms of the madhhab—including Abū al-ʿAbbās—agree that there is a meaning most immediately apparent to the mind, along with other possible meanings, and that a word is not to be diverted from its apparent sense except by contextual evidence.

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[825] "If only one of the heirs acknowledges the debt, he is liable in proportion to his share of the inheritance. (...) If there are two heirs, he owes half; if three, one-third. (...) The Ḥanafī scholars said that he is liable for the entire debt or for his entire inheritance. (...) Our position is that because he is not entitled to more than half the estate, he is not liable for more than half the debt. (...)" Al-Mughnī, Ibn Qudāmah, 7:328.

[826] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 3:102.

[827] al-Taʿlīqah al-Kabīrah, Abū Yaʿlā, 1:258.

## Applications

If a man dedicates a *waqf* to his children, or makes a bequest for them, this does not include grandchildren according to al-Qāḍī, contrary to the well-known position, provided that he has a child of his own loins—for the literal meaning of *walad* is the direct, immediate child.[828]

"A gift does not entail compensation, even if customarily expected—such as when an inferior gives to one superior to him in anticipation of reciprocation or to have a need fulfilled—so long as this was not explicitly stipulated. This is because the meaning of the word (gift) is the absence of compensation, and the circumstantial indicator does not equal the wording in force, so it cannot be given effect. For this reason, we have not treated it as a stipulation."[829]

This is the well-known position, even though Ḥanbal transmitted a report requiring reciprocation.[830]

## Exceptions

And even if we were to concede to the Shāfiʿīs' argument that the unqualified attribution of an action to a person implies his direct performance of it, the following would be an exception:

"… Whoever swears not to do something, and then authorizes an agent to do it, has broken his oath—unless he intended by his oath direct performance himself."[831]

This is because we regard the act of the agent as the act of the principal himself. For this reason, we distinguish between delegating an act to an agent and merely commanding another to do it. Thus we say in the latter case:

"If one swears not to sell or not to strike, and then commands someone else to do it—if it is of the sort of thing he ordinarily carries out himself, his oath is not broken. But if it is something he does not ordinarily do himself, such as enforcement by the ruler, there are two opinions. And if one swears not to shave his head, and then commands another to shave it, there are two opinions; and it has also been said: he breaks his oath, according to one opinion only [in the madhhab]."[832]

The later scholars, however, treated the person issuing the command as the principal: "Likewise, if he swears, 'I will not strike my slave,' and then the slave is struck by his order, he perjures himself — as previously mentioned, the act is attributed to the principal who appointed the agent, and likewise to the person who commanded it. Thus it is said: 'The ruler killed so-and-so,' even though the actual killing was carried out by the ruler's servant, for the same reason."[833]

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[828] "Al-Qāḍī and his companions said that grandchildren are never included, whether children of sons or daughters, because 'child' literally and customarily means one's direct offspring; a grandchild is called a child only figuratively. (...) The disagreement concerns an unqualified expression. When an indication points to one of the two possible meanings, it is applied accordingly without disagreement." Al-Mughnī, Ibn Qudāmah, 8:195.

[829] *Kashshāf al-Qināʿ*, al-Buhūtī, 10:121.

[830] "Among them is: a gift intended for compensation, as indicated by the donor's condition or context, even if no condition is stipulated. Ḥanbal transmitted what suggests that compensation is obligatory, though the well-known position is to the contrary." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:84.

[831] *al-Mughnī*, Ibn Qudāmah, 13:495.

[832] *al-Mughnī*, Ibn Qudāmah, 13:495.

[833] Sharḥ al-Muntahā, Ibn al-Najjār, 11:154.

The reason for this distinction is, on the one hand, to uphold the literal sense of words; and on the other, to recognize that causation is not the same as direct performance. Consideration is also given to purpose and to custom—for by custom, a person does not shave his own head.

إذا تعذَّرت الحقيقة (المعنى المتبادر) يُصار إلى المجاز

## If the Literal Meaning Is Impossible, Figurative Meaning Is Adopted

For shifting to an alternate meaning becomes necessary in order to give effect to the wording.

Among its applications:
If a man dedicates a *waqf* to his children, or makes a bequest to his children, and he has no immediate children of his own loins, then it extends to his grandchildren by agreement in the madhhab—so that the wording is not rendered void.[834] This follows the maxim according to al-Qāḍī, who considered "children" a figurative expression regarding grandchildren.

Custom, or conventional meaning (*ḥaqīqah ʿurfiyyah*), takes precedence over linguistic meaning, as was explained previously under the maxim *"al-ʿādah muḥakkamah" (custom is authoritative).* "Among them: If a man swears not to eat from a particular tree, his oath is qualified by what is customarily eaten from it—namely, the fruit—not what is not customarily eaten, such as the leaves and the wood."[835]

There is no disagreement that figurative usage is to be preferred when the literal meaning has become obsolete.[836] Moreover, figurative usage may become predominant in actual usage while the literal meaning still exists, and in that case the figurative sense is also preferred in our madhhab.[837]

Connected to the matter of turning speech to figurative sense is the issue of needing to choose between figurative usage and ellipsis (*iḍmār*). On this Ibn al-Laḥḥām says in his twenty-seventh maxim:

"When figurative usage and ellipsis are in conflict, the author of *al-Maḥṣūl* said—in it and in *al-Muntakhab*: the two are equal, and thus the wording is ambiguous, such that neither is given preference without evidence—since both require an indicator, and both may be obscure. Each requires a contextual marker to divert the addressee from the apparent meaning. Abū al-Maʿālī asserted that figurative usage is preferable due to its prevalence, though he later stated in explaining the tenth issue that they are equal.

Based on this, one application is: if a man says to his slave, who is older than him, *"You are my son,"* is the slave outwardly adjudged free thereby? For it is possible that he has used the term "sonship" as a

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[834] "Al-Qāḍī and his companions said that grandchildren are never included. (...) A grandchild is called a child only figuratively. (...) When an indication points to one of the two possible meanings, it is applied accordingly without disagreement. (...) The same applies if he says, 'for my children' or 'my offspring,' while he has no direct child." Al-Mughnī, Ibn Qudāmah, 8:195.

[835] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:483.

[836] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 168.

[837] "The fourth case is when the figurative meaning is stronger while the literal meaning is occasionally intended. This is the point of disagreement, as when someone says, 'I will surely drink from this river.' (...) If he swears not to drink from the Tigris or Euphrates, those who give precedence to the stronger figurative meaning hold that he breaks his oath by scooping water from it in a vessel and drinking. (...) This is the view of our fellows. (...) Those who give precedence to the weaker literal meaning hold that he does not break the oath unless he drinks directly from the river. (...)" Al-Qawāʿid wa al-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 168.

figurative expression for emancipation, in which case the slave is freed; and it is also possible that it is an ellipsis, meaning *"you are like a son to me in affection and other qualities"*—in which case he is not freed.

The scholars differ on this issue, and there is no direct report from Imām Aḥmad (rA). Abū al-Khaṭṭāb said so. What al-Qāḍī and his companions stated is that the slave is not freed, while Abū al-Khaṭṭāb suggested the possibility of emancipation, a view followed by the authors of *al-Mughnī* and *al-Muḥarrar*."[838]

المطلق يجري على إطلاقه ما لم يقم دليل التقييد نصا أو دلالة

## The Unqualified Expression Is Carried Upon Its Unqualified Sense Unless Evidence Establishes a Qualification, Either by Text or by Indication

المطلق: هو ما دل على شائعٍ في جنسه، أو اللفظ الشائع في جنسه بلا شمول ولا تعيين، مثل" : أَنْ تَذْبَحُوا بَقَرَةً "فيصدق على أي بقرة، فإن أضفنا صفراء إلى البقرة، قيدت الماهية بهذا الوصف، وقد يكون التقييد بغير ذلك من الألفاظ، أو بساط الحال، أو النية، أو العرف والعادة.

The Unqualified (al-muṭlaq): It is that which denotes an unspecified member of its genus, or an expression denoting such a member without comprehensiveness or individual designation—for example: *"slaughter a cow"* [Q. 2:67]. This applies to any cow whatsoever. But if we add the description "yellow" to the cow, then the essence is restricted by that description. Restriction may also occur through other words, through the context of the situation, through intention, or through custom and practice.

This is a principle of uṣūl al-fiqh within which the legal evidence is understood. Thus, when a text is revealed in an unqualified form, it is carried upon its unqualified sense; and when it is revealed in a qualified form, it is carried upon its qualification. If it appears unqualified in one place and qualified in another, this falls into various categories discussed in uṣūl al-fiqh. However, the maxim is also applicable to all other speech, including that of people—so the default is to carry the unqualified upon its unqualified sense.

Among its applications:
"...If a man bequeaths 'a portion,' or 'a share,' or 'a part,' or 'something' of his wealth, the heirs may give whatever they wish. I know of no disagreement in this... Likewise, if he says: 'Give so-and-so from my wealth,' or 'provide for him,' since this has no fixed limit in language or in Sharīʿah, it is carried upon its unqualified sense."[839]

And in the conditions of the *salam* contract: "The second condition is that the commodity must be described in a way that affects its price ... If he specifies only 'aged' dates in an unqualified sense, it is

[838] Al-Qawāʿid wal-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 172.

[839] *al-Mughnī*, Ibn Qudāmah, 8:426.

valid with any aged dates—provided they are not worm-eaten, dried out, or altered. But if he stipulates aged of one year or two years, then it is restricted to what he stipulated."[840]

As for the case of a *waqf*: "...If he expresses it in unqualified terms concerning the beneficiaries, and does not stipulate any description, then the wealthy and the male, as well as their opposites—the poor and the female—are all equal in entitlement, since there is nothing to require restriction."[841]

التأسيس أولى من التأكيد

## Establishing a New Meaning Takes Precedence Over Mere Emphasis

In the absence of a contextual indicator, a repeated expression is carried upon establishment (*taʾsīs*) or initiation, not mere emphasis—so as to give it effect, since establishing a new ruling is more beneficial than repeating one.

«إذا دار الأمر بين التأسيس والتأكيد؛ فالتأسيس أولى»

Other formulations:
"When the matter lies between establishment and emphasis, establishment is preferable."[842]

Among its applications:
"...If a man says to his wife, with whom consummation has occurred: *'You are divorced, you are divorced,'* and he did not intend the second as emphasis nor explicitly as a second pronouncement, but left the intention unspecified—then the Ḥanbalī scholars said: two divorces take effect, because the expression is designated for enactment just like the first wording. Hence the rule: *'When the matter lies between establishment and emphasis, establishment is preferable.'*"[843]

Yet this same issue may, on another narration, be excepted by the maxim "certainty is not overruled by doubt"—since the default is the continuation of the marriage. Ibn Rajab said in this very context:

"It is possible to derive another narration that only one divorce occurs when the intention is left unspecified—because that is the certain outcome. This is supported by what Ṣāliḥ narrated from his father, who said: *'If a man says: You are divorced, you are divorced, after consummation, then it is according to his intention. If he intended merely to inform her, then that is his intention; and if he intended otherwise, then it is as he intended.'* Thus, he did not count the second as effective without intent."[844]

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[840] *Al-Iqnāʿ*, al-Ḥajjāwī, 2:135.

[841] *Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 2:478.

[842] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:152.

[843] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:152.

[844] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:152.

Carrying the wording upon emphasis may also be preferred, on the basis of presumption of freedom of liability (*barāʾat al-dhimmah*). For example, if one says: *'I owe a dirham, a dirham,'* it is treated as emphasis.[845]

ذكر بعض ما لا يتجزأ كذكر كله

## Mentioning Part of Something Indivisible Is Like Mentioning the Whole of It

This applies in matters that do not admit of division, such as divorce: mentioning part of it is like mentioning all of it.[846]

The same applies to life, which cannot be divided. Thus: "If some of the heirs entitled to retribution pardon [the killer], the retribution (*qiṣāṣ*) is annulled" [847] —for if we were to execute him, we would be disregarding the pardon of those who forgave.

السؤال مُعاد في الجواب

## The question is treated as repeated in the answer

The answer to a detailed question contains within it the detail mentioned in the question.

يا رسول الله، هل على المرأة من غسل إذا هي احتلمت؟ قال: "نَعَمْ، إذا رَأَتِ الماءَ".

Umm Sulaym said: *"O Messenger of Allah, is it obligatory for a woman to perform ghusl (a full ritual bath) if she experiences a wet dream?"* He replied: "Yes, if she sees fluid." Agreed upon. The word *"yes"* sufficed without repeating *"it is obligatory upon a woman to perform ghusl."*

Among its applications:

"If someone is asked: 'Did you divorce your wife?' and he replied: 'Yes'—or he is asked: 'Is your wife divorced?' and he replied: 'Yes'—then if he intended to lie, she is still divorced, even if he did not intend divorce. This is because 'yes' is an explicit affirmation in response, and an explicit affirmation in reply to an explicit wording is itself explicit. For example, if one were asked: 'Do you owe Zayd one thousand?' and he said: 'Yes,' this would count as an admission."[848]

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[845] "If he repeats it three times using wāw, faʾ, or thumma, or says, 'a dirham, a dirham, a dirham,' intending the third only to emphasize the second, that intention is not accepted in the first case but is accepted in the second." Muntahā al-Irādāt with the marginalia of Ibn Qāʾid, Ibn al-Najjār, 5:415.

"If the acknowledging party says, 'I owe him a dirham; I owe him a dirham,' and nothing indicates multiplicity, only one dirham is binding (...) because an acknowledgment reports what is owed (...) and the default is freedom from liability." Al-Qawāʿid wa al-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 241.

[846] "So if a man says to his wife, 'You are divorced by half a ṭalāq,' then it counts as one full ṭalāq. Or if he says, 'You are divorced by a third of a ṭalāq,' or 'by a sixth of a ṭalāq,' it is likewise counted as one full ṭalāq—because mentioning a portion of something indivisible, in the context of divorce, is treated as a mention of the whole." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 3:96.

[847] *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 10:264.

[848] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 3:84.

المرء مؤاخذ بإقراره - ولا عذر لمن أقرّ ولو ادعى غلطا

## A Person Is Bound by His Own Admission—There Is No Excuse for One Who Confesses, Even if He Claims Error

والبينة حجة متعدية والإقرار حجة قاصرة

## Evidence (Bayyinah) Is a Proof That Extends to Others, Whereas Admission (Iqrār) Is a Proof Limited to the One Who Makes It

من سعى في نقض ما تم من جهته فسعيه مردود عليه

A person is bound by his own admission,[849] and there is no excuse for one who confesses, even if he claims error—this is the fifty-fifth maxim in al-Siʿdī's *al-Qawāʿid*, and close to it is Article 100 of the *Majallat al-Aḥkām*: "Whoever seeks to nullify what has been concluded through his own action, his attempt is rejected against him."[850]

Placing the rules of admission (*iqrār*) under the maxim "application is preferable to neglect" is sound, since they are among its branches.

The meaning of the first two maxims is that a person is bound by his own admission. Thus, if a morally responsible person, acting by choice, admits to something, it is binding upon him and he is held to it. If he then claims that he confessed in error, his claim is not accepted. A ḥadīth has been reported: *"There is no excuse for one who confesses."* Ibn Ḥajar said: it has no basis.[851] But the issue is a matter of consensus, and authentic reports confirm that the Prophet ﷺ implemented legal punishments on the basis of admissions, and reason dictates this as well. For this reason they said: "Confession is the master of evidences."

Among their applications:

- *"If the pledger (rāhin) admits to handing over the pledged item, then later denies it, saying: I admitted to that but had not actually handed anything over—or if the pledgee (murtahin) admits to having received it and then denies it—the word is accepted from the one to whom it was confessed. If the denier requests an oath from him, then he has that right."*[852]
- *"If someone says to his debtor: 'Acknowledge my debt and I will give you one hundred of it,' or: 'Acknowledge my debt and take one hundred of it,' and he does so—that is, he acknowledges—then his acknowledgment is binding upon him, for there is no excuse for one who confesses."*[853]

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[849] "Each individual is held accountable for his own acknowledgment." *al-Mughnī*, Ibn Qudāmah, 14:252.

[850] Durar al-Ḥukkām fī Sharḥ Majallat al-Aḥkām, ʿAlī Ḥaydar, 1:99.

[851] "Ḥadīth: 'There is no excuse for one who has acknowledged [something].' Our shaykh said: *It has no basis.*" *Al-Maqāṣid al-Ḥasanah*, al-Sakhāwī, 727.

[852] *Al-Iqnāʿ*, al-Ḥajjāwī, 2:157.

[853] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:141.

- *"If a person is accused of something and confesses to something else, then he is bound by what he confessed—if the one to whom it was confessed confirms it—as an application of the ḥadīth: 'There is no excuse for one who confesses.'"*[854]
- *"If someone is brought before the ruler and confesses, then later claims he was confused and did not realize what he had confessed to, his claim is not accepted—this was also explicitly stated by Aḥmad."*[855]

هَلَّا تَرَكْتُمُوهُ، يَتُوبُ فَيَتُوبُ اللهُ عَلَيْهِ

All of this applies when a person confesses to a right owed to another human being. As for the *ḥudūd* of Allah, if a person confesses and then retracts his confession, the ḥadd is not enforced. The Messenger of Allah ﷺ said concerning Māʿiz:
"Why did you not leave him, so that he might repent, and Allah would accept his repentance?"

As for the maxim: "Evidence (*bayyinah*) is a proof that extends to others, while confession (*iqrār*) is a proof limited to the one who makes it," its meaning is that confession is binding only on the confessor, not on anyone else. So if a person confesses regarding himself and another, his confession regarding the other is treated as testimony, and the one for whom it was made requires completion of evidence against the other.

Among its applications:

- If one of two heirs acknowledges the existence of a third heir while the other denies it, the third shares in the inheritance with the one who acknowledged him, but not with the one who denied him.[856]
- Similarly, if one heir admits a debt upon their father while the remaining heirs deny it, then he alone is liable for a proportion of the debt corresponding to his share of the inheritance.[857]

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[854] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 6:521.

[855] "However, if a person detained or beaten unjustly makes an acknowledgment, then later claims coercion, his claim is accepted. Imām Aḥmad explicitly stated this." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:82.

[856] "If a man dies leaving two sons and one acknowledges a brother or sister, he must give the acknowledged person the excess in his possession. (...) Lineage is not established by consensus. (...)

Nevertheless, according to most scholars, the acknowledged person shares in the inheritance of the one who acknowledged him." Al-Mughnī, Ibn Qudāmah, 7:314.

[857] "Likewise, if an heir acknowledges a debt owed by his father, he is liable for a portion of the debt proportionate to his inheritance share. (...)

If the deceased left no estate, the heir owes nothing. (...) If one heir acknowledges the debt, he is liable in proportion to his inheritance share. (...)

If there are two heirs, he owes half; if three, one-third. (...) The Ḥanafī scholars said that he is liable for the entire debt or for his entire inheritance." Al-Mughnī, Ibn Qudāmah, 7:328.

التابع تابع

## al-Tābiʿ Tābiʿ – The Dependent Follows

### Explanation

The meaning of this maxim is that whatever exists as a subsidiary to something else, as long as it is not independent, follows it in ruling as well. It does not precede it, it lapses when it lapses, and dispensations are granted in it that are not granted in its principal.

From the Branches of This Maxim:

يثبت تبعًا ما لا يثبت استقلالًا

1. What cannot be established independently may be established as a subsidiary.

يغتفر في التابع ما لا يغتفر في المتبوع

2. What is not tolerated in the principal may be tolerated in the subsidiary.

قد يُغتفر في البقاء ما لا يغتفر في الابتداء

3. In continuation, what would not be allowed at initiation may be tolerated.

التابع يسقط بسقوط المتبوع

4. The subsidiary lapses with the lapse of the principal.

قد يثبت الفرع دون الأصل

   - The branch may exist without the principal.

من ملك شيئًا ملك ما هو من ضروراته

5. Whoever owns a thing, owns also what is necessary for it.

التابع لا يتقدم على المتبوع

6. The subsidiary does not precede the principal.

ما بني على الباطل فهو باطل

7. What is built upon falsehood is itself false.

مَنْ ابتاعَ نخلًا بعد أَنْ تُؤبَّرَ، فثمرتُها للذي باعَها، إلا أنْ يشترطَ المُبتاعُ

In al-Ṣaḥīḥayn, the Prophet ﷺ said: “Whoever purchases a palm tree after it has been pollinated, its fruit belongs to the seller—unless the buyer stipulates otherwise.”

The basic rule is that it is not permissible to sell pollinated fruit before its ripeness becomes evident. Yet here it was permitted, because the fruit is a subsidiary of the tree.

## Applications

One of the clearest examples of this maxim is the sale of a fetus in the womb. The fetus of a ewe is unknown and thus may not be sold independently. However, if the ewe is sold together with its fetus, the sale is valid, as the fetus is a subsidiary of the mother. The ruling on selling the fetus differs in the two cases because, in the latter, it is a subsidiary that falls under the ruling of the principal, and concessions are allowed in it that are not allowed in the principal. But if it is independent, it is judged independently.

لأن الهواء تابع للقرار

Among the applications is the invalidity of prayer on the roofs of places where prayer itself is not valid—because "the airspace follows the ground beneath it."[858]

"(The prayer of a follower is invalidated by the invalidation of his imām's prayer absolutely)—whether due to excuse or otherwise. Thus, if the imām is overtaken by ritual impurity, there is no succession (*istikhlāf*). (But not vice versa)—the imām's prayer is not invalidated by the invalidation of a follower's prayer."[859]

And in the matter of *sujūd al-tilāwah* (prostration of recitation), the listener follows the reciter: "(The listener does not prostrate) if the reciter does not prostrate."[860] How much more so, then, is it invalid to prostrate behind recordings.

"The follower has no prostration of forgetfulness (*sujūd al-sahw*) except if his imām forgets, in which case he prostrates with him."[861]

"(And he performs the two rakʿahs of ṭawāf) —meaning, even during the times of prohibition... This is because the two rakʿahs of ṭawāf are subsidiary to the ṭawāf itself; so if the principal is permitted, the subsidiary ought to be permitted."[862]

And whoever holds that trees follow the land in the establishment of ownership—this is his basis.[863]

And the growth of the pledged property (*rahn*) that is separate from it is considered a subsidiary to it, and thus remains included in the pledge.[864]

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[858] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:165.

[859] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:181.

[860] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:252.

[861] *Al-Iqnāʿ*, al-Ḥajjāwī, 1:142.

[862] *al-Mughnī*, Ibn Qudāmah, 2:517.

[863] "If ownership of land in another's possession is established by testimony or acknowledgment and trees stand upon it, do the trees follow the land or not? (...) Shaykh Taqī al-Dīn issued a fatwā that trees connected to the land are established as being in the possession of the landholder unless evidence overrides the presumption of possession, such as proof that the planter planted them with his own wealth. (...)" Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:188.

[864] "Among them is: the mortgaged item (*al-marhūn*); all of its separated increase is included with it in the mortgage—whether that increase is generated directly from the item itself, such as fruits or offspring, or from its earnings, such as rent, or as compensation for it, such as indemnity (*al-arsh*). All of that is included with it in the mortgage contract. Therefore, the agent (*wakīl*) appointed to sell the mortgaged item is authorized to sell its increase along with it, even if

"…And his admission of trees, or of a single tree, is not an admission of its land; thus he does not own the right to replant in its place if it perishes, nor does the landowner have the right to uproot it… Likewise, if he admits of an orchard, it includes the trees; and if he admits to a tree, it includes its branches."[865] Here they distinguished between admission of the land and admission of the tree: they granted the tree the ruling of the land, but they did not extend the ruling of the tree back to the land.

It may be useful to review Ibn Rajab's eighty-second maxim concerning separated growth (al-namāʾ al-munfaṣil), due to its connection with this maxim.[866]

The Ḥanbalī fellows based their position in *uṣūl*—that Allah's address to the Prophet ﷺ extends to his Ummah—on the principle that they are his followers.[867]

And in our own time—applying this maxim—everything that custom regards as included with the sold item is considered part of the sale without explicit mention, such as car keys.

## Exceptions

The following is to be excepted:

The followers' prayer is valid if both they and their imām were unaware of his ritual impurity until the prayer ended.[868]

And: "If a man admits to another regarding something contained within a container—such as dates in a bag, a sword in a sheath, a gem in a ring, the head and shanks of a sheep, or pits within dates—then there are two opinions. The more famous is that he is admitting only to the contents, not to the container. This is the view of Ibn Ḥāmid, al-Qāḍī, and their companions, because the container is not admitted, but only described, just like saying: 'a riding animal in a stable.' The second opinion is that he admits to both; otherwise, mentioning the container would serve no purpose. Some of the later scholars distinguished between what is ordinarily or naturally connected to its container—in which case admission extends to both—and what is not ordinarily connected, in which case it does not. Another possibility is to distinguish between when the second is a subsidiary to the first—in which case it is

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that increase occurred after the contract and the agency authorization." *Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid*, Ibn Rajab, 2:84

865 *Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 3:530.

866 Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:72.

867 "A directive addressed specifically to the Prophet ﷺ (...) is presumed, according to Aḥmad and most of his followers, to apply to the entire ummah unless evidence specifies it for him alone. (...)

The first group argued from linguistic convention that a command to a leader to mount against the enemy and the like is understood as a command to his followers with him." Uṣūl al-Fiqh, Ibn Mufliḥ, 2:859.

868 "One who is in a state of minor ritual impurity (*muḥdith*) or is ritually impure (*najis*) may not lead the prayer if he is aware of his condition. But if he is unaware, along with all the congregants—contrary to some of them—and the prayer is completed, then it is valid only for the followers. This applies even if the follower was not reciting Sūrat al-Fātiḥah. However, if one among them alone knew (of the imām's impurity), and he claimed to have known, his statement is not grounds for requiring the rest to repeat the prayer—unless the prayer was a Friday or Eid prayer, and the required forty are reached only by including that imām or follower. In that case, all must repeat the prayer." *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:220.

included in the admission, such as dates in a bag or a sword in a sheath—and when it is a principal to the first, in which case it is not admitted, such as pits in dates or the head of a sheep."[869]

Thus, the first opinion constitutes an exception from the maxim. Yet all of them, in their discussion of what is established by such admissions, are clearly mindful of the maxim. And the final distinction of Ibn Rajab—though differing from the well-known opinion[870]—was in fact an application of the maxim.

يثبت تبعًا ما لا يثبت استقلالًا

## What Cannot Be Established Independently May Be Established as a Subsidiary

Al-Siʿdī's Fiftieth Maxim: *What Cannot Be Established Independently May Be Established as a Subsidiary.*

The author mentioned it in his verse:

ومن مسائل الأحكام في التبع
يثبت لا إذا استقل فوقع

"Among the issues of rulings regarding subsidiaries,
It is established, but not if it stands alone."

Ibn Rajab mentioned in his 133rd maxim: "What cannot be established independently may be established as a subsidiary," in various cases, such as:

- Among them: the testimony of women regarding childbirth establishes lineage (*nasab*), but lineage is not established by their testimony to it independently.
- Among them: the testimony of women regarding the miscarriage of a fetus due to a blow entails *ghurrah* (compensatory slave) if the fetus is stillborn, and full *diyah* (blood money) if born alive.
- Among them: the testimony of a single woman regarding *raḍāʿ* (nursing) is accepted according to the *madhhab*, and this results in the annulment of the marriage.
- Among them: if one person testifies to sighting the crescent of Ramaḍān, and then the full thirty days are completed without sighting the crescent—do they break the fast or not? There are two views: the more well-known is that they do not break the fast, to avoid allowing breaking the fast based on the statement of a single person. The second view: yes, and breaking the fast follows the established fast. Some of our fellows said: if the sky was overcast, they break the fast; otherwise, they do not.
- If one person informs of sunset, breaking the fast is permitted. The expression of some of our fellows indicates that this is a matter of consensus, since the time of iftār follows the time of Maghrib prayer.

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[869] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:191.

[870] "If the acknowledging party says, 'I owe him dates in a sack,' 'a knife in a sheath,' or 'a gemstone in a ring,' (...) he is deemed to have acknowledged the first item but not the second. (...) If he says, 'a ring with a gemstone' or 'a sword with a sheath,' it counts as an acknowledgment of both." Al-Rawḍ al-Murbiʿ, al-Buhūtī, 3:529.

- If someone makes a *waqf* contingent on his death, it is valid according to the transmitted view [from Aḥmad], narrated by al-Maimūnī and mentioned by al-Khiraqī. Al-Qāḍī said: it is invalid. The first position is stronger, for it is considered a bequest, and bequests may be contingent.
- The two rakʿahs of ṭawāf performed by one undertaking ḥajj on behalf of another are included within that ḥajj, even though prayer does not accept deputation independently.
- The agent and the guardian of an orphan may purchase something at a price slightly above the usual value, if this is an amount over which people normally overlook, though they may not give that excess away outright. Al-Qāḍī and others mentioned this. The reasoning is that such favorable allowance (*muḥābāh*) is not an explicit gift, but carries some meaning of concession; thus, classifying it under this maxim is more appropriate."[871]

We have already mentioned the validation of selling a fetus along with its mother, as a subsidiary, and the validity of the two rakʿahs of ṭawāf during times of prohibition, as a subsidiary of ṭawāf.

Among its applications is the permissibility of selling fruit once some of the same type has ripened (and in one opinion, if some of the genus has ripened). "There is no disagreement in the madhhab that the ripening of some of the fruit on a tree counts as ripening for all of it, but the ripening of some of a genus does not count as ripening for another genus."[872] Imām Taqī al-Dīn reported al-Layth's opinion permitting the latter, so that what has not ripened is treated as a subsidiary of what has.[873]

"(It is not valid to sell one ribawī item (commodity subject to the rules of ribā) for its like, with one or both of them combined with something of another kind—such as one mudd [one quarter of a ṣāʿ] of ʿajwah dates[874] and a dirham for their equivalent...) or (for two mudds) of ʿajwah (or for two dirhams)—this was explicitly stated by Aḥmad."[875] Yet if one of the additional items is negligible, or not intended,

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[871] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:504.

[872] *al-Kāfī*, Ibn Qudāmah, 2:44.

[873] "There are two reports from Aḥmad concerning a garden in which some fruit has ripened:
may the whole garden be sold, or only the part that has ripened?
The better-known report permits selling only what has ripened. (...)
The second treats ripening in part as ripening for the whole. (...)" "Aḥmad's explicit statement under
this report is that when some fruit in a garden has ripened and some has not,
it may be sold if ripeness predominates. (...)" "They also disagreed whether
ripening in one variety counts as ripening for all varieties of dates;
there are two views. (...)" "Al-Layth went further and treated ripening in one genus,
such as apples or almonds, as ripening for the other genera of fruit. (...)
*Those who permitted this relied on practical need,*
since selling part but not the rest leads to troubled co-ownership and conflicting possession." Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 29:37.

[874] "One mudd is the amount held in two cupped hands of an average adult, approximately 0.51–0.75 liters; four mudds make one ṣāʿ."

[875] *Kashshāf al-Qināʿ*, al-Buhūtī, 8:26.

whether small or large, but included for the sake of the main intended item, then it is permitted as a subsidiary.[876]

An example of this is the permissibility of buying and selling company shares, part of whose value may be cash—because this part is not independently intended, but follows the rest.

As for the ruling of the madhhab, which is the view of most scholars, it is that palm trees may not be leased. The Prophet ﷺ forbade selling fruits before their ripeness appears, and leasing them is even more so, for this occurs before they even emerge, involving uncertainty. But Imām Taqī al-Dīn permitted it, making the leasing of orchard trees analogous to leasing their land. He said: this is established from ʿUmar (rAa). Shaykh al-Islām Ibn Taymiyyah answered their use of the ḥadīth forbidding the sale of fruits before ripeness appears by saying: "What cannot be established independently may be established as a subsidiary."[877]

يغتفر في التابع ما لا يغتفر في المتبوع

## Dispensations Are Allowed in the Subsidiary That Are Not Allowed in the Principal

ويغتفر فيما دخل ضمنا وتبعا ما لا يغتفر في الأصول والمتبوعات

Imām Ibn al-Qayyim said: "Concessions are granted in what enters incidentally and as a subsidiary that are not granted in the principals and independents."[878]

That is, leniency is shown in the subsidiary—that which is not intended in the contract or is secondary—whether it is one of the rights attached to the principal, or among its necessary concomitants, or that which is inseparable from it in most cases. Thus, the Sharīʿah requirements demanded of it are relaxed in a way that would not be relaxed in the principal itself. This maxim is closely related to *"What cannot be established independently may be established as a subsidiary,"* so refer to it.

فظهر أنه يجوز من الغرر اليسير ضمنا وتبعا ما لا يجوز من غيره

Imām Abū al-ʿAbbās Ibn Taymiyyah said: "The Prophet ﷺ permitted, when selling pollinated date palms, that the buyer stipulate ownership of their fruit. This meant that he purchased fruit before its ripeness had become evident, but as part of the sale of the principal. It is thus clear that a small amount of uncertainty (gharar) is permitted incidentally and as a subsidiary in a way that is not permitted independently."[879]

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[876] "What is not ordinarily intended or sold separately, such as gold used to gild a house's ceiling, is treated as nonexistent; a house so gilded may therefore be sold for gold. (...) The same applies to a negligible substance that does not affect measure or weight when an item is sold for its own kind, such as salt in a prepared food. (...)

Likewise, even when the unintended substance is substantial, it does not prevent an equal exchange if it serves the intended substance, such as water in date or raisin vinegar and date syrup. (...) This is because it is not independently intended." Kashshāf al-Qināʿ, al-Buhūtī, 8:29.

[877] Al-Sharḥ al-Mumtiʿ ʿalā Zād al-Mustaqniʿ, Ibn ʿUthaymīn, 6:83.

[878] *Zād al-Maʿād*, Ibn Qayyim al-Jawzīyyah, 6:518.

[879]al-Qawāʿid al-Nūrāniyyah al-Fiqhiyyah, Taqī al-Dīn Ibn Taymiyyah, 172.

ومفسدة الغرر أقل من الربا، فلذلك رخص فيما تدعو إليه الحاجة منه، فإن تحريمه أشد ضررا من ضرر كونه غررا

He also said: "The harm of *gharar* is less than that of ribā. For this reason, a concession is granted in cases where there is need, since prohibiting it would cause greater harm than the harm entailed by the uncertainty itself—such as selling a property as a whole even if one does not know the interiors of the walls and the foundation, or selling an animal that is pregnant or nursing even if the exact measure of its pregnancy or milk is unknown, though the sale of a fetus alone has been prohibited. Similarly, milk (in the udder) according to most scholars, and likewise the sale of fruit after the onset of ripeness is valid, and the buyer has the right to keep it until full ripeness, as established by the Sunnah. This was the view of the majority, including Mālik, al-Shāfiʿī, and Aḥmad—even though the parts that complete its ripening have not yet come into existence."[880]

The correct position in the madhhab is that the endowment (*waqf*) of movables is valid, in agreement with the majority. Another narration from Aḥmad holds it invalid, in agreement with the Ḥanafīs. According to this latter view, if one endowed real estate along with the movables in it, we would validate the endowment of the movables incidentally—and this is the practice of the Ḥanafīs.[881]

"(As for the object of a lease) five conditions are required… The second: (that the contract is concluded on its benefit) that can be utilized (not on its substance), since leasing is the sale of benefits, not of the substance. (Thus, it is not valid to lease food for eating, nor candles for burning)."[882] But: "(The water collected in a well) and (the water of the land enter incidentally), just as ink with a scribe, thread with a tailor, kohl with a kohl-applier, ointment with a physician, and the like." [883] These are included in the lease contract as subsidiaries. "And invalidity is likely if the contract is made jointly on both the principal and the subsidiary."[884]

It is permissible to strike those whom the enemy uses as human shields incidentally, but it is prohibited to target them.[885]

In contemporary contracts, some jurists classify insurance on a commodity attached to a sales contract as a subsidiary tolerated as part of the contract, though it would not be tolerated if concluded independently afterwards.

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[880]al-Qawāʿid al-Nūrāniyyah al-Fiqhiyyah, Taqī al-Dīn Ibn Taymiyyah, 172.

[881] "As for the endowment (*waqf*) of movable property—such as animals, furnishings, weapons, and the like—the correct view in the madhhab is that it is valid. This is the position adopted by the fellows, and it was explicitly stated by Aḥmad. However, there is another report from him that states: endowment is not valid except for real estate." al-Inṣāf, al-Mardāwī, 16:370.

[882] *Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 2:386.

[883] *Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 2:386.

[884] *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:719.

[885] "Nor is it permitted to kill a child, a woman, a hermaphrodite (khunthā), a monk, a decrepit old man, a chronically ill person, or a blind person—so long as they have no opinion [in combat affairs] and did not fight or incite others to fight. If the enemy uses them as human shields (*tatarros*), they may be fired upon while aiming at the combatants—but not if the shield includes a Muslim—unless harm to us is feared and the disbelievers are intentionally targeted." *Ḥāshiyat al-Khalwatī ʿalā Muntahā al-Irādāt*, Muḥammad ibn Aḥmad al-Buhūtī al-Khalwatī, 2:462.

قد يُغتفر في البقاء ما لا يغتفر في الابتداء

## In Continuation, What Would Not Be Allowed at Initiation May Be Tolerated

That which is impermissible at the outset may be tolerated if it occurs as a continuation or incidentally, for continuation is lighter than initiation. Hence, in matters of persistence, what would not be accepted at the point of initiation may be accepted.

In Ibn Rajab's seventh maxim, he states:

"من تلبس بعبادة، ثم وجد قبل فراغها ما لو كان واجدا له قبل الشروع لكان هو الواجب دون ما تلبس به؛ هل يلزمه الانتقال إليه، أم يمضي ويجزئه؟"

"If one engages in an act of worship, then before completing it encounters something that—had he found it before beginning—would have been obligatory instead of what he is performing: is he required to transition to it, or may he continue and suffice with what he began?"

Ibn Rajab (rA) detailed its parameters, explaining that the ruling differs depending on whether the substitute is legislated as a general concession or as a necessity:

- If it was permitted as a general concession (such as fasting in lieu of the *hady* for the *mutamattiʿ* when unable to sacrifice), one is not required to transition back to the original act, even if he becomes able during the performance.
- But if it was legislated only due to absolute necessity, then one must return to the original act upon being able to, even if already engaged in the substitute (such as a woman counting months in her waiting period, who must return to counting menstruation if it resumes).

He then said:

"There are cases wavering between these two categories.
Among them: one who begins fasting for an expiation (*kaffārah*), such as for *ẓihār* or an oath, and then finds a slave to emancipate. The established view is that he is not required to switch, for this is a concession, akin to the fasting of the *mutamattiʿ*. Yet another opinion is that he must switch, for expiations are legislated for deterrence and discipline, and they contain a severity inconsistent with an unrestricted concession. This is why he is required to purchase a slave on credit if his wealth is absent.

Also among them: if one begins prayer with *tayammum* and then finds water. There are two narrations concerning whether his prayer is invalidated [the relied-upon view is that it is invalidated]. For insofar as *tayammum* is a general concession, it resembles the fasting of the *mutamattiʿ*; but insofar as it is a matter of necessity, it resembles the waiting period of months. The indication of necessity is that prayer is permitted with a state of ritual impurity, for it does not lift the state of impurity according to the madhhab; thus, one may not complete the prayer while in a state of impurity when purifying water is available."[886]

[886] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:82–84

You have noticed that the last example is an exception to the maxim according to the preponderant view in the madhhab—namely, the invalidation of prayer upon finding water after beginning with *tayammum*.

Among the exceptions in the madhhab is: if a man embraces Islam while married to a Magian woman, he must separate from her, since in this case continuity is treated like initiation. Likewise, if his wife was originally a scriptural woman and then became a Magian, she is not kept, for a Muslim is not permitted to marry a Magian woman.

The exceptions are numerous, so the wording of the maxim only conveys that continuity is lighter than initiation, and does not imply that everything is excused in continuity or subsistence. Some scholars have even criticized including in legal maxims matters that are introduced with "may" (*qad*). Yet you have understood what lies behind this formulation and recognized the intended meaning.

التابع يسقط بسقوط المتبوع

## The Subsidiary Lapses with the Lapse of the Principal

إذا سقط الأصل سقط التبع

Imām Ibn Qudāmah said: "When the principal is nullified, its dependent is likewise nullified ."[887]

The clarification of this is that whenever the dependent or subsidiary cannot stand on its own with a ruling, then it necessarily falls when the principal or foundation falls — for one cannot imagine branches without trunks.

One application of this maxim is the invalidity of an act of worship during which apostasy occurs, because the condition of Islam has ceased to exist. An act of worship completed before apostasy, however, is not invalidated merely by that apostasy according to the madhhab if the person returns to Islam. Comprehensive nullification occurs if the person dies in disbelief.

Among its applications: "The prayer of a follower is invalidated by the invalidation of his Imām's prayer in all cases, whether due to excuse or otherwise, and no succession (istikhlāf) is considered if the Imām is overtaken by ritual impurity — unlike the reverse, for the prayer of the Imām is not invalidated by the invalidation of his follower's prayer."[888]

Another example: "If one is incapable of prostrating with the forehead, he gestures as best he can, and the obligation of the other limbs is dropped; for the forehead is the principal in prostration, and the others are its dependents."[889]

Also: "Whoever has been granted custody and then abandons it, his right to it falls. Does the right of those related to him through it also fall? There are two views: one, that it does fall, for it is a branch of his right; thus, when the principal falls, the dependent falls. The second view is that it does not fall, for the relative's right falls due to a cause specific to him, so the fall is restricted to him alone."[890] The first

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[887] *al-Mughnī*, Ibn Qudāmah, 2:196.

[888] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:181.

[889] *Kashshāf al-Qināʿ*, al-Buhūtī, 2:343.

[890] *al-Kāfī*, Ibn Qudāmah, 3:246.

juristic interpretation accords with the maxim, while the second — being the position of the madhhab[891] — is an exception to it.

Similarly: "If the liability of the one on whose behalf a guarantor stands is cleared, then the guarantor is cleared; but if the guarantor himself is cleared or his discharge is acknowledged, this does not clear the original debtor."[892]

In Ibn Rajab's eighth maxim: "If a person is able to perform part of an act of worship but unable to perform the rest, is he obliged to perform what he is able of it, or not?"

He said: "This has several categories:

If the part one is able to perform is not intended in the act of worship itself, but is a mere means to it — such as moving the tongue in recitation, or passing the razor in shaving or circumcision — then it is not obligatory.[893] This is because it was only required by necessity of recitation, shaving, and cutting, and when the principal has fallen, its necessity falls with it.

What has been made obligatory as a dependent of another obligation, and this is of two types:

(a) That which is required as a precaution to ensure the act of worship is realized, such as washing the tips of the elbows in wuḍūʾ. If the hand is severed at the elbow, is it obligatory to wash the remainder of the elbow? There are two views, the more well-known among the Ḥanbalīs being that it is obligatory, and this is apparent from the words of Aḥmad.

(b) That which has been required as a dependent for the sake of completion and supplementation, such as the stoning of the jamarāt and spending the nights in Minā for one who did not perform ḥajj. The well-known view is that this is not obligatory, for all of it is among the dependents of standing at ʿArafah, and thus not binding upon one who did not stand there. Another example is the sick person who is incapable in prayer of placing his face on the ground but can place the other limbs of prostration; according to the sound view, he is not obliged to do so, for prostrating with the other limbs was only required as a dependent and completion of prostration with the face."[894]

قد يثبت الفرع دون الأصل

## The Branch May Exist Without the Principal

This maxim is an exception to the preceding one, and some of the earlier applications excluded from it are in fact encompassed within this maxim. Among its applications is: *the validity of the congregants' prayer despite the invalidity of the Imām's prayer if they were all unaware of his state of minor ritual*

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[891] "If the person entitled to custody refuses to take it, or is unfit, it transfers to the next eligible person." Zād al-Mustaqniʿ fī Ikhtiṣār al-Muqniʿ, al-Ḥajjāwī, 206.

[892] *al-Muqniʿ*, Ibn Qudāmah, 180.

[893] However, they chose that it is Sunnah: *"Passing the razor over one who has no hair is recommended"*, as was reported from Ibn ʿUmar. It was not made obligatory, because the place for shaving is the hair itself, so the obligation falls away in its absence, just as washing a limb is waived when the limb is absent." Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 2:426.

[894] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:87.

*impurity (ḥadath)*.[895] Ibn Rajab has noted distinctions regarding which dependent matters (tawābiʿ) and branches (furūʿ) lapse and which do not."

التابع لا يتقدم على المتبوع

## The Subsidiary Does Not Precede the Principal

«التابع لشيء بأن يكون جزءًا منه، أو كالجزء منه كالصوف، لا يتقدم على متبوعه الأصلي في الحكم.»

"The subsidiary of a thing, insofar as it is a part of it, or like a part of it—such as wool—may not precede its principal in ruling."[896]

و«المشروط لا يتقدم على شرطه»

"And that which is conditional may not precede its condition."[897]

«والمسبب لا يتقدم على السبب»

"And the effect may not precede the cause."[898]

This is the implication of subordination; just as it applies in existence, it likewise applies in rulings. Hence, they have said that it is forbidden for the follower (maʾmūm) to precede the Imām, whether in time[899] or in place[900] by standing in front of him. Yet, there is a position in the madhhab—championed by Imām Taqī al-Dīn—that permits, with an excuse, the prayer in front of the Imām.[901]

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[895] "One who is in a state of minor ritual impurity (*muḥdith*) or is physically impure (*najis*) may not lead the prayer if he is aware of his condition. But if he is unaware, along with all the congregants— unlike the case when some among them are aware —and the prayer is completed, then it is valid only for the followers. This applies even if the follower was not reciting Sūrat al-Fātiḥah. However, if one among them alone knew (of the imām's impurity), and he claimed to have known, his statement is not grounds for requiring the rest to repeat the prayer—unless the prayer was a Friday or Eid prayer, and the required forty are reached only by including that imām or follower. In that case, all must repeat the prayer." *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:220.

[896] al-Qawāʿid al-Fiqhiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arbaʿah, Muḥammad al-Zuḥaylī, 1:466.

[897] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:71.

[898] *Sharḥ al-Zarkashī*, al-Zarkashī, 5:486.

[899] "This is because the follower in prayer is following the imām and taking him as a guide, and the one who follows and emulates does not precede the one he follows and emulates." *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 23:337.

[900] "The followers stand behind the imām, and it is valid for them to stand at his right or on both his sides, but not in front of him." *Zād al-Mustaqniʿ fī Ikhtiṣār al-Muqniʿ*, al-Ḥajjāwī, 55.

[901] "There are three views concerning a follower praying in front of the imām: that it is valid unconditionally; (...)
that it is invalid unconditionally, which is the well-known position in Aḥmad's madhhab; (...)
and that it is valid with an excuse but not otherwise, as when overcrowding prevents one from performing Jumuʿah or the funeral prayer except in front of the imām. (...)
This is a view within Aḥmad's madhhab and is the most balanced and preferable position." Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 23:404.

من ملك شيئًا ملك ما هو من ضروراته

## Whoever Owns a Thing, Owns Also What Is Necessary for It

It is not required to mention the necessary adjuncts of the sold property, whether rationally or customarily, in the contract for them to be included therein. Thus: "*(if he sells a house), or gifts it, or pledges it, or endows it, or acknowledges it, or bequeaths it; (the contract includes) the land thereof*—that is, if the land is valid to be sold; if it is not, such as the Sawād of Iraq, then it does not. *(And it includes its building and its roof)*, for these are encompassed within the designation of 'house.' *(And it includes the installed door and its ring, the nailed ladder and shelf, the buried jar, and the fixed millstone)*, for these are attached to it for its benefit, similar to walls. Likewise, solid minerals and what it contains of trees and trellises. *(Excluding what is deposited therein of treasure)*, meaning money that is buried, *(or a buried stone, or what is detached from it, such as a rope, a bucket, a pulley, a lock, furnishings, and a key)*."[902]

"And if a group possesses the established right of irrigation from a non-owned river or from a flood, and another person comes to revive dead land closer to the head of the river than their land, he is not permitted to water before them, because they preceded him to the river. For whoever owns land, owns it with its rights and appurtenances, and no one else has the right to nullify its rights; and this is among its rights."[903]

ما بني على باطل فهو باطل

## What Is Built upon Falsehood Is Itself False

إذا تبين فساد العقد بطل ما بني عليه، وإن فسخ فسخًا اختياريًّا لم تبطل العقود الطارئة قبل الفسخ

In al-Siʿdī's fifty-third maxim: *'If the invalidity of a contract becomes clear, what was built upon it is nullified. Yet if it is annulled voluntarily, then incidental contracts that occurred before the annulment are not invalidated.'*

Although the wording of al-Siʿdī's maxim is more useful in its immediate context, the wording of the maxim in the title is more general. It is an important maxim, for the nullification of deeds due to the absence of faith is built upon it, and upon it are constructed innumerable major and minor issues.

The meaning of the maxim is close to the maxim: *the subsidiary falls with the fall of the principal.* Shaykh Saʿd al-Shithrī said: *'They exemplify this with a settlement concluded upon something unlawful: such a settlement is invalid and void, because it is built upon what is unlawful. In the ḥadīth of the ʿasīf (hired worker), the laborer committed zinā with a woman, and his father made a settlement with a hundred sheep and a slave girl in place of the ḥadd punishment. The Prophet ﷺ nullified this settlement and enforced the ḥadd upon him.'*

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[902] *Al-Rawḍ al-Murbiʿ*, al-Buhūtī, 2:270.

[903] *al-Mughnī*, Ibn Qudāmah, 8:170.

In *al-Mughnī*: “In the event that we judge the contract to be invalid, ownership is not acquired thereby, whether delivery took place or not. The buyer’s disposition of it through sale, gift, manumission, or otherwise does not take effect.”[904]

In *al-Kashshāf*: “And if the buyer refers the seller to a third party for payment of the price, and the sale turns out to be void, the ḥawālah (transfer of debt) is void. Or if the seller refers a creditor to him, meaning the buyer, for it, meaning the price, and the sale turns out to be void, such as when the slave sold is discovered to be free or owned by another—if the voidness appears by proof, then the ḥawālah is void. This is because with the voidness of the sale it becomes clear that no price is due upon the buyer, and the ḥawālah is subsidiary to the price; thus the subsidiary is void by the voidness of its principal.”[905]

Among the exceptions to this maxim is the establishment of lineage in the case of intercourse under a mistaken belief of lawfulness (waṭʾ al-shubhah), due to the Sharīʿah’s great concern for affirming it.[906]

Another example is their statement: “*If the [usurper] plants the land, then its owner, after the harvest, is entitled only to rent; and prior to that he has a choice—even if he owns only the usufruct—between leaving it to him for rent, or taking possession of it for its expenses.”*[907]

Notice how they deemed the usurper to own his crop here; we have mentioned this under the maxim *‘It is not permitted for the oppressed to wrong another.’* Perhaps this is because usurpation often occurs by way of mistaken interpretation or doubtful justification. As for contracts founded upon usurpation, there are detailed rulings to be consulted in their proper places, in which the jurists sought reform as far as possible.

The conclusion from the second half of al-Siʿdī’s maxim is that the correct position of the madhhab is that annulment which occurs voluntarily—such as by an option of choice or mutual rescission, and not due to the contract’s invalidity itself—constitutes a dissolution of the contract from the time of annulment, not retroactively from its inception. [908] Thus, the transactions that took place between the contract and the annulment are upheld; thereafter, the first buyer, after disposing of the commodity, must pay the first seller the like in fungibles and the value in non-fungibles, and he recovers his payment.

And the remainder of what appears in *al-Kashshāf* regarding the nullification of ḥawālah by annulment of the contract shows the distinction between annulment due to the contract’s invalidity and annulment by choice: *“And if the sale is annulled after the buyer has referred the seller to a third party for payment of the price, or the seller has referred a creditor to the buyer for it—whether due to a defect, deception,*

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[904] *al-Mughnī*, Ibn Qudāmah, 6:327.

[905] *Kashshāf al-Qināʿ*, al-Buhūtī, 8:271.

[906] "Thus, intercourse in his case was considered *intercourse by shubhah* (doubtful legitimacy), and that does not prevent the establishment of lineage." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 5:48.

[907] *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:761.

[908] “The well-known position of the madhhab is that the lease does not terminate thereby [the termination of the lessor’s ownership]; because annulment of the contract is a dissolution from the time of annulment, not retroactively from its inception.” Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:236

*mutual rescission, an option…, the ḥawālah is not invalidated. This is because the contract of sale was not lifted from its inception."* [909]

الميسور لا يسقط بالمعسور

## The attainable is not nullified by the unattainable

ما لا يدرك كله لا يترك كله.

And among wisdom is: what cannot be attained in full is not to be abandoned in full.

ويفعل البعض من المأمور - إن شق فعل سائر المأمور

Shaykh ʿAbd al-Raḥmān al-Siʿdī (rA) said in his *Manẓūmah*:
*One performs part of what is commanded - If performing the entirety of what is commanded proves difficult.*

فَاتَّقُوا اللَّهَ مَا اسْتَطَعْتُمْ

إِذَا أَمَرتُكُمْ بِشَيءٍ، فَأْتُوا مِنْهُ مَا اسْتَطَعْتُمْ

The evidence for this is the saying of Allah ﷻ: *"So fear Allah as much as you are able"* (Sūrat al-Taghābun 64:16), and the saying of the Prophet ﷺ: *"When I command you with something, then do of it what you are able."*

We have discussed under the maxim *"What is permitted by necessity is limited to its extent"* the eighth maxim of Ibn Rajab: *"Whoever is able to perform part of an act of worship and is incapable of the rest—is he required to perform what he is able of it, or not?"* Refer back to it there.

This maxim serves as a methodology for life, and it has innumerable applications. For example:

- Whoever is incapable of part of the washing of major ritual impurity (ghusl) is required to perform what he can of it. Likewise in minor ritual impurity, according to the well-known view.[910]
- Whoever finds part of a covering must cover what he is able of his nakedness.
- Whoever is incapable of some of the pillars of prayer must perform the remainder.
- And whoever is able to pay part of what he owes to his creditor, and whoever is obliged to provide maintenance, must pay what he is able.

إمكان الأداء ليس بشرط في استقرار الواجبات بالشرع في الذمة على ظاهر المذهب.

Close in meaning, though with some difference, is what appears in Ibn Rajab's nineteenth maxim: "*Possibility of performance is not a condition for the establishment of obligations in the Sharīʿah as binding in the liability (dhimmah), according to the apparent position of the madhhab."*

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[909] *Kashshāf al-Qināʿ*, al-Buhūtī, 8:271.

[910] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:88.

So: “if the time of prayer enters, sufficient only for the opening takbīrah, then a hindrance occurs such as insanity or menstruation, and thereafter it ceases, that prayer whose time was entered is to be made up, because it became obligatory upon a mukallaf at the entrance of its time, without any impediment to obligation. When an impediment then occurred thereafter, it did not nullify it; thus, making it up is obligatory when it ceases.”[911]

An exception to this is that which is indivisible—if part of it falls, all of it falls. Thus, whoever is incapable of fasting the entirety of a day is not required to fast part of it, because it is not an act of worship in itself. The attainable part may also fall if it is not an intended act of worship but merely a means to it—such as the movement of the tongue in recitation.[912] It may also fall if it is subsidiary to something else, serving only as completion or adjunct, such as: *“If a sick person is incapable in prayer of placing his face upon the ground, but is able to place the rest of the limbs of prostration, then he is not required to do so, according to the sound view. This is because prostration with the rest of the limbs was only obligatory as a subsidiary to prostration with the face, and as its completion.”*[913]

حقوق الله مبناها على المسامحة وحقوق العباد مبناها على المشاححة

## The rights of Allah are founded upon lenience, whereas the rights of human beings are upheld with rigorous demand

«حقوق الله مبنية على المسامحة، بخلاف حقوق الآدميين»

Ibn Rajab said:
“God’s rights are founded upon lenience, unlike the rights of human beings.”[914]

حق الله مبني على المسامحة والمساهلة، بخلاف حق الآدمي، فإنه مبني على الشح والضيق

In *al-Mubdiʿ Sharḥ al-Muqniʿ*:
“God’s right is founded upon lenience and ease, unlike the right of a human being, which is founded upon insistence and narrowness.”[915]

God’s right is greater and more binding than the rights of creation; indeed, through it every right is established. As for the maxim, it is correct, but its meaning is not that the right of creatures is greater; rather, the intended meaning is that God is free of need from us, so He grants lenience in His right and makes things easier for the one in hardship or need. Poverty and need, however, are intrinsic to human beings, and for this reason their rights are given precedence, due to their need, the seriousness with which God has emphasized them, and His giving them precedence.

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[911] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:145.

[912] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:85.

[913] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:87.

[914] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:502.

[915] Al-Mubdiʿ fī Sharḥ al-Muqniʿ, Ibn Mufliḥ, 9:744.

بابانِ مُعجَّلانِ عُقوبتُهما في الدنيا: البَغْيُ والعقُوقُ

وَما كانَ رَبُّكَ لِيُهْلِكَ الْقُرى بِظُلْمٍ وَأَهْلُها مُصْلِحُونَ

It is well known that the Prophet ﷺ refrained from praying over one who died while in debt, and he said: *"Two sins for which the punishment is hastened in this world: oppression and disobedience to parents."*[916] It was said in explanation of His saying: *"And your Lord would not destroy the towns for wrongdoing while their people were reformers"* (Hūd 11:117): "And your Lord would not destroy the towns merely for their associating partners with Him if they treated one another with righteousness and fairness. What is meant by destruction here is annihilating punishment in this world."[917]

Among its applications is that a person is compelled to earn wages in order to repay his debt, but he is not compelled to do so in order to acquire wealth with which to perform ḥajj.[918]

Regarding the bearing and delivering of testimony in people's rights, they said: "Bearing and delivering testimony are obligatory when one is called upon to do so…"[919] But they excluded testimony concerning ḥudūd, saying: "And it is permitted for one who holds testimony concerning a ḥadd of God—such as zinā or drinking wine—to establish it or to withhold it, because God's rights are founded upon lenience, and there is no harm upon anyone in leaving them."[920]

Among its applications is that if one "finds food whose owner is unknown along with carrion, or finds live game while in a state of iḥrām along with carrion, he eats the carrion."[921] Notice how they gave precedence to the right of the food's owner here, permitting the needy person to eat carrion, despite its prohibition, rather than eat the food. But due to the strict prohibition on a person in iḥrām hunting game, they gave it precedence in the well-known opinion, permitting the eating of food with an unknown owner so that the sanctity of game would not be violated. They said: "And if he finds game and food whose owner is unknown, but no carrion, while in a state of iḥrām, he eats the food."[922] This is thus an exception to the maxim, though some scholars maintained its application.[923]

But they returned and said: "And if he finds the meat of game slaughtered by a muḥrim along with carrion, he eats the meat of the game."[924] The rationale for the distinction is that when the sanctity of

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[916] Reported by al-Ḥākim (7350) in extended form, and the wording is his, and al-Bukhārī in *al-Adab al-Mufrad* (895).

[917] Lubāb al-Taʾwīl fī Maʿānī al-Tanzīl, al-Khāzin, 2:507.

[918] "Concerning the obligation of ḥajj upon one who is physically able and capable of earning: if he is far from Makkah, the position of the madhhab is that ḥajj is not obligatory. (...) A distinction may be drawn because the rights of Allah are founded upon leniency, unlike human rights. Thus, he is not obligated to earn money with which to perform ḥajj or emancipate a slave in expiation." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:502.

[919] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 3:576.

[920] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 3:577.

[921] *Al-Iqnāʿ*, al-Ḥajjāwī, 4:312.

[922] *Al-Iqnāʿ*, al-Ḥajjāwī, 4:312.

[923] "Second: If a muḥrim encounters game and food whose owner is unknown, and he does not find any carrion, then he eats the food—according to the correct view in the madhhab. It has also been said that he has a choice... I say: it may be argued that he should eat the game, because the rights of Allah are founded on leniency, unlike the rights of human beings." al-Inṣāf, al-Mardāwī, 27:245.

[924] *Al-Iqnāʿ*, al-Ḥajjāwī, 4:312.

eating game is lessened—since he did not directly kill it—they permitted him to eat it before carrion, which is not the case with hunting or the food with an unknown owner.

They also used this reasoning to permit a neighbor of the mosque to place his wooden beams upon the wall of the mosque, saying: when this was permitted with respect to the wall of a human neighbor, then with respect to the right of God it is even more appropriate. [925]

In *al-Sharḥ al-Mumtiʿ* there is an instructive detail concerning the disagreement within the madhhab about the precedence between God's rights and human rights in the estate of the deceased, and I will cite it unchanged due to its benefit:

"If debts owed to God and debts owed to human beings come together, do we give precedence to the debt owed to the human, or the debt owed to God, or do they share proportionately?

An example of this is a man who dies while owing five thousand riyals in zakāh, and also owing Zayd five thousand. When he died, only five thousand were found, so his debt exceeded his estate. Do we spend the five thousand in zakāh? Or in the human debt? Or do they share proportionately?

There are three positions among the scholars:

Some said: the debt of the human is paid. Thus we give the five thousand—the estate—to the human creditor. They reasoned that God's right is founded upon lenience, and He, exalted is He, is free of need from us, while the right of the human is founded upon insistence, and he is in need of his right, so his is given precedence.

اقضوا الله، فالله أحق بالقضاء

Some said: God's right is given precedence, based on the Prophet's ﷺ statement: *'Repay God, for God is more deserving of repayment.'* The term 'more deserving' is a comparative, meaning His right is given precedence over that with which it is compared. According to this view, the five thousand of the estate are given out to those entitled to zakāh.

Some said: they share proportionately, because both are debts upon the deceased, so one is not given precedence over the other. This is the position of the madhhab according to the aṣḥāb, may God have mercy on them, and it is the correct view.

If it is said: what is the response to the Prophet's ﷺ statement: *'Repay God, for God is more deserving of repayment'?

The answer: the meaning of the ḥadīth is: if the debt of the human must be repaid, then God's debt is more deserving of repayment. For the Prophet ﷺ said: *'Do you see if your mother had a debt and you repaid it, would it suffice for her?'* She said: yes. He said: *'Repay God, for God is more deserving of repayment.'* The matter was not concerning two rights, one for God and one for a human, such that we

[925] "The wall of a mosque is like that of a private house—and more deserving of this ruling—as explicitly stated by Aḥmad. If such use is permitted in a neighbor's property, although his right is founded upon restrictiveness, it is all the more appropriate regarding the rights of Allah, which are founded upon leniency and facilitation." Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 3:359.

could say that the Prophet ﷺ judged God's right to be given precedence. Rather, the Prophet ﷺ intended analogy: if the debt of a human must be repaid, then God's debt is more deserving of repayment.

And we answer the other view—that the human's right is founded upon insistence and need—by saying that God's right is, in reality, for the benefit of His servants. Zakāh, for example, is for the creation and not for God, meaning that He does not benefit from it. It is in reality God's right, but at the same time it is the right of His servants. The same applies to expiations and other obligations owed to God.

Thus, the view that they share proportionately is the preponderant view."[926]

We have seen that there are exceptions to this maxim in which God's right is given precedence in the madhhab, such as permitting the eating of food with an unknown owner over killing game. In this disagreement a third approach appears, namely, apportionment (muḥāṣṣaṣah). This would be an exception to the maxim, although it appears more correct here that the maxim be applied consistently, and God knows best.

At the conclusion of this discussion, I note that the intent of the maxim is that God is free of need from us, so He grants concessions to those in necessity and need in His rights, while He places restrictions concerning the rights of His servants due to their poverty and their need. These are the words of Imām Ibn al-Qayyim, rebuking those who misunderstood the maxim and misapplied it. He said, may God have mercy on him:

ولا نضرب سنته بعضها ببعض، ولا نأخذ منها ما سهل، ونترك منها ما شق علينا؛ لكسل وضعف عزيمة واشتغال بدنيا قد ملأت القلوب، وملكت الجوارح، وقرت بها العيون، بدل قرتها بالصلاة

"And we do not set one part of his Sunnah against another, nor do we take from it what is easy and leave from it what is hard upon us—out of laziness, weakness of resolve, and preoccupation with a worldly life that has filled the hearts, seized the limbs, and delighted the eyes, rather than their delight being in prayer. Thus the ḥadīths of concession have, with respect to it, become a pretext that meets a desire, a slackening of resolve, and little inclination to exert effort in sincere service. God's right was treated as something easy, and His generosity and freedom of need were made into one of the greatest pretexts for negligence of it, for wasting it, and for performing it with indifference merely to absolve an oath. Such a person became fond of saying: '*A noble one never exacts his right fully,*' and: 'God's right is founded upon lenience, ease, and pardon, while the right of the servants is founded upon miserliness, narrowness, and exactingness.' Thus, he exerted himself in serving the creation as though upon luxurious bedding and comfortable mounts, while in serving his Lord and Creator he stood as though upon burning coals. He gave God the leftovers of his strength and his time, while he reserved for himself the full share of enjoyment. And he remembered from the Sunnah only: *'Are you a cause of trials, O Muʿādh?'* and *'Indeed among you are those who drive people away!'* He placed the ḥadīth in the wrong place, without reflecting upon what preceded it or what followed it.

Whoever does not find the delight of his eyes in prayer, his joy and bliss and pleasure in it, the life of his heart and the expansion of his breast, then he will not be suited for anything but such a ḥadīth and the

[926] Al-Sharḥ al-Mumtiʿ ʿalā Zād al-Mustaqniʿ, Ibn ʿUthaymīn, 11:161.

like of it. Rather, nothing will suit him but the prayer of thieves and peckers; the pecking of a crow is more fitting for him than expending his full effort in serving the Lord of lords."[927]

فرض الكفاية هل يتعين بالشروع؟

## Does a communal obligation (farḍ al-kifāyah) become individually binding once undertaken?

Clarification:

فرض الكفاية هو ما طلب الشارع فعله طلبًا جازمًا من مجموع المكلّفين، بحيث إذا قام به البعض سقط الإثم عن الباقين، وإذا تركه الجميع أثموا جميعًا.

A communal obligation (farḍ kifāyah) is that which the Lawgiver has demanded be performed in a binding manner by the collective of those legally responsible, such that if some perform it, the sin falls from the rest, and if all leave it, they all incur sin.

It has been said in its meaning and examples: *"It is that which is intended to be realized without specification of a particular person. If it is not found except from one person, it becomes incumbent upon him—such as covering a naked person and feeding a hungry one when the public treasury is unavailable; crafts that are permissible and generally needed, like tailoring, blacksmithing, building, farming, and planting; repelling misconceptions with proof and sword; enjoining right with its condition; constructing aqueducts, bridges, [fortification] walls, and mosques; issuing fatwā and teaching…"*[928]

And: *"It is not a condition, in discharging the duty of a communal obligation, that its occurrence be ascertained from some group; rather, if any group predominantly assumes that others have carried it out, it falls from them."*[929]

The issue arises as to whether a communal obligation becomes individually binding upon one who begins it. Does it thereby transform into an individual obligation such that completion becomes required and abandonment impermissible? Or does it remain upon its original ruling?

Some scholars, including Imām al-Ṭūfī in his *Sharḥ al-Rawḍah*, gave preference to the position that *farḍ kifāyah* becomes individually binding upon initiation. He said, in explaining this and listing some of its applications:

"Fourth: Does *farḍ kifāyah* become individually binding (*taʿayyana*) and require completion by the one who undertakes it, or not? What is more likely is that it does become so—like the combatant who arrives at the battlefield, or the seeker of knowledge who begins engaging in it, and other similar cases. The reasoning is that by initiating the action, the right of others becomes attached to it—namely, the cause for their exoneration from the responsibility of the *farḍ kifāyah* is now tied to this person. Therefore, it is

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[927] Al-Ṣalāh, Ibn al-Qayyim, 328.

[928] *Ghāyat al-Muntahā*, Marʿī al-Karmī, 1:453.

[929] Sharḥ Mukhtaṣar al-Rawḍah, al-Ṭūfī, 2:409.

impermissible for him to nullify what is connected to the right of others—just as when one acknowledges a right, it is not permissible for him to retract it.

The argument for the opposing view is that whatever is not obligatory to begin is not obligatory to complete—except in ḥajj—such as voluntary fasting and prayer. Also, if it were to become individually binding upon initiation, a judge would not be permitted to remove himself from office, whereas this is unanimously allowed.

I say: This may be answered by noting that *farḍ kifāyah* has an element of obligation in general—in fact, it is genuinely obligatory, as has been established—whereas supererogatory fasting has no aspect of obligation at all. Despite that, some scholars hold that its completion is obligatory; so one may adhere to that position, and thus the analogy is invalid.

As for the judge: if no one else can take his place, it is impermissible for him to remove himself, due to the harm caused to the people. But if someone else is available, it is permitted for him to step down—not because he is engaged in a *farḍ kifāyah*, but because he is the agent of the imām and his deputy, and an agent is permitted to remove himself. And God knows best what is correct."[930]

It is likely that the ruling varies depending on the obligations and circumstances: whoever is sufficiently replaced by others is indeed relieved. But whoever is present on the battlefield, there is no doubt that it is impermissible for him to abandon combat; and whoever is in a village where no one else gives legal responses, while he is qualified, is certainly obligated to do so. Likewise, one who is near qualification must complete the conditions of such eligibility. However, is everyone who begins the pursuit of knowledge—amidst the scarcity of scholars—obligated to complete what he has begun? It is difficult to assert that categorically, for each issue among the issues of knowledge stands independently on its own. If the obligatory knowledge is attained and supplemented by some good, then nothing more is required—except in cases of scarcity of scholars, and where the person has the mental and psychological aptitude, the ability to dedicate himself, and is close to acquiring the conditions of issuing fatwā.

So, the criterion for *farḍ kifāyah* becoming individually obligatory upon one who has begun it is the absence of others to fulfill it, along with the individual's qualification, readiness, proximity to fulfilling its conditions, and ability to secure its means—such as the capacity to dedicate time, if needed.

النهي يقتضي الفساد

## Prohibition Implies Invalidity

مَن أحْدَثَ في أمْرِنا هذا ما ليسَ منه فَهو رَدٌّ.

مَن عَمِلَ عَمَلًا ليسَ عليه أمْرُنا فَهو رَدٌّ.

كُلُّ شَرْطٍ لَيسَ فِي كِتَابِ اللهِ فَهُوَ بَاطِلٌ.

Know that we, among the legal schools, are the most expansive in applying this legal-foundational maxim: that prohibition, when it pertains to the essence of an act of worship or transaction—or to its

[930] Sharḥ Mukhtaṣar al-Rawḍah, al-Ṭūfī, 2:410.

conditions—entails invalidity (*al-fasād*). However, if it pertains to something extraneous to the act, it does not entail invalidity. This is supported by the ḥadīth of ʿĀʾishah in the two Ṣaḥīḥs: "Whoever introduces into this affair of ours that which is not from it, it is rejected." And in Muslim's version: "Whoever performs an act not in accordance with our matter, it is rejected." And also in the two Ṣaḥīḥs: "Every condition not found in the Book of God is void."

Know also that *fasād* (invalidity) and *buṭlān* (nullity), in our view—contrary to the Ḥanafīs—are synonymous: both mean that the act does not produce its intended legal effects, whether in acts of worship or contractual transactions. Some Ḥanbalīs, however, distinguish between them: *fāsid* is that which has not been universally agreed upon as prohibited and invalid—such as marriage without a guardian; *bāṭil* is that which has unanimous consensus regarding its prohibition, such as mutʿah (fixed-term) marriage.[931]

In the ninth legal maxim of Ibn Rajab:

"In acts of worship performed in a prohibited manner:

1. If the prohibition returns to the essence of the act in a way specific to it: it is invalid.
2. If it returns to a condition of the act, and in a way specific to it: it is also invalid.
3. If it returns to a condition, but not in a way specific to it: there are two narrations, the more well-known of which is that it is invalid.
4. If it returns to something that is neither a condition nor essential to the act: there are two views. Abū Bakr preferred invalidity; most others disagreed."[932]

Shaykh Ibn ʿUthaymīn said in his didactic poetry:

٢٠ - وما نُهِي عَنهُ من التَّعَبُّدِ ... أوْ غَيرِهِ أفْسِدْه لا تَرَدَّدِ

٢١ - فكلُّ نَهيٍ عادَ للذَّوات ... أو للشُروطِ مفْسِدًا سَيَاتِي

٢٢ - وإنْ يَعُدْ لِخَارِجٍ كالعِمّهْ ... فَلنْ يَضِيرَ فافْهَمَنَّ العِلَّهْ

20 – Whatever is prohibited, whether in worship or not, deem it invalid—no hesitation.
21 – Every prohibition that pertains to the essence or conditions—its invalidity will be made clear.
22 – But if it pertains to something external, like a turban—it causes no harm; so understand the reasoning.[933]

We may now reclassify these categories and include certain types of transactions.

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[931] Al-ʿAqd al-Thamīn fī Sharḥ Manẓūmat al-Shaykh Ibn ʿUthaymīn, Khālid ibn ʿAlī al-Mushayqiḥ, 87.

[932] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:90.

[933] Al-ʿAqd al-Thamīn fī Sharḥ Manẓūmat al-Shaykh Ibn ʿUthaymīn, Khālid ibn ʿAlī al-Mushayqiḥ, 86

Categories Relating to Prohibition:

First Category: Prohibition pertaining to the *essence* of the act—worship or transaction—entails invalidity. Examples include:

- Fasting on the day of Eid[934] and performing prayer during prohibited times: due to the Prophet's ﷺ prohibition against fasting on the two Eids, and his saying in the two Ṣaḥīḥs: *"There is no prayer after the morning prayer until the sun rises, and none after the ʿaṣr prayer until the sun sets."*
- Among them: prayer in prohibited locations; it is invalid according to the view that this prohibition indicates *taḥrīm*, which is the official position of the *madhhab*.[935]
- Among them: fasting the Days of Tashrīq; it is never valid as a supererogatory fast, but it is valid when performed in lieu of the sacrificial offering for tamattuʿ (ʿumrah followed by Ḥajj in the same season, with release from iḥrām between them) or qirān (Ḥajj and ʿumrah combined in one iḥrām).[936]

﴿وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ﴾

- Marrying prohibited kin (*maḥārim*), such as one's father's wife or son's wife—as in the verse: *"Do not marry those women whom your fathers married."* [al-Nisāʾ: 22]
- Sale of prohibited items.

Second Category: Prohibition pertaining to something *external* to the act of worship or transaction does *not* entail invalidity. Examples:

- Fasting while backbiting: backbiting does not invalidate the fast, as it does not pertain to its essence or condition.
- Performing ablution from a prohibited vessel.[937]

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[934] "(And it is not) valid to fast (on the day of Eid in any form)—neither as an obligatory nor a supererogatory fast—(and it is prohibited) to fast on it." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:495.

[935] "As an act of devotion, prayer is not valid in a graveyard, (...) bathhouse, (...) camel enclosure, (...) slaughterhouse, refuse dump, public road, (...) or usurped place. (...) It is valid in all of them when an excuse exists." Muntahā al-Irādāt with the marginalia of Ibn Qāʾid, Ibn al-Najjār, 1:181.

[936] "(Fasting on the Days of Tashrīq is not valid) due to the ḥadīth: 'The Days of Minā are days of eating and drinking,' narrated in abridged form by Muslim—(except in compensation for the sacrificial blood of tamattuʿ or qirān), for one who is unable to offer it, in which case fasting on those days is valid. This is based on the statement of Ibn ʿUmar and ʿĀʾishah: 'No concession was granted for fasting on the Days of Tashrīq except for one who could not find a sacrificial animal,' narrated by al-Bukhārī." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:495.

[937] "Purification is valid using a prohibited or usurped vessel. (...) The distinction is that standing, sitting, bowing, and prostrating in a prohibited place use that place, whereas washing and wiping in wuḍūʾ use the water rather than the vessel. (...) The prohibition on wuḍūʾ from a prohibited vessel concerns an external matter, since the vessel is neither an integral part nor a condition of wuḍūʾ, unlike the location and garment in prayer." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:28.

- "Among them: the prayer of one wearing a usurped turban, a silk turban, or a gold ring—there are two views regarding all of this. Abū Bakr's position is that the prayer is invalid," [938] but the *madhhab* holds it valid.[939]

Third Category: prohibition that pertains to a condition of the act of worship or transaction, and this is of two types:

First type: prohibition that pertains to a condition of worship or transaction and is specific to it—this entails invalidity. Examples include:

- Sales involving excessive uncertainty (*gharar*), ignorance of price, or selling what one does not own entail invalidity—because the prohibition here pertains to a condition of the transaction in a manner specific to it.
- Prayer in a garment bearing impurity: invalid, as the prohibition relates specifically to the condition of purity in prayer.

Second type: prohibition that pertains to a condition of worship or transaction but is not specific to it—the madhhab holds that it entails invalidity, though many leading scholars have preferred the contrary view. Examples include:

- Ablution using usurped water.[940]
- Pilgrimage funded by usurped wealth: two narrations exist; the *madhhab* holds it invalid, since wealth is a condition for obligation, and a condition for obligation functions like a condition for validity.[941]
- Prayer in a usurped or silk garment: two narrations concerning validity. On the view of invalidity, the reasoning may be either:
    - Committing a prohibited act in a condition of worship.
    - Or failing to fulfill a commanded condition.

If the latter, then one who has only a usurped garment and prays in it would have a valid prayer—since he lacked the means to fulfill the commanded condition. If the former, his prayer would be invalid.

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[938] Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid, Ibn Rajab, 1:93.

[939] "Wearing a prohibited turban or ring, such as a silk turban or a gold or usurped ring, does not invalidate the prayer, (...) because the prohibition does not relate to a condition of the prayer and therefore does not affect it." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:153.

[940] "(And) the third [condition is] that its use is permissible. Thus, ablution or ritual washing is not valid with usurped water or the like, due to the ḥadīth: 'Whoever performs an act not in accordance with our matter, it is rejected.'" *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:52.

"(Even if it is not permitted), so impurity may still be removed with something usurped, because removing impurity is among the acts of omission (*tark*), unlike lifting the state of ritual impurity (*ḥadath*)." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:14.

[941] "(Or if he performed ḥajj using something usurped)—meaning with usurped wealth or upon a usurped animal—while being aware that what he prayed in or used for ḥajj was impermissible, and mindful of it at the time of worship, then his action is invalid." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:152.

As for someone with only a silk garment, the prayer is valid without disagreement according to the more correct of the two ways of reporting the school's positions, as its use is permitted in such cases.[942]

As for one who wears two garments, one of them usurped: it was said that this is based on the two aforementioned views. And it was said: rather, he is like one who has nothing but the usurped garment, because the permissible one was not solely designated for covering; rather, covering was achieved by one unspecified garment."[943] And the position of the madhhab is that the prayer is invalid.[944]

- "Among these is prayer in a usurped place, and concerning it there is disagreement. There are two bases for invalidity as well: the first is that the place is a condition for prayer—hence prayer is not valid in a swing, nor upon a carpet suspended in the air. The second is that the movements and stillness of the worshiper in the usurped property are themselves the very act prohibited; thus the prohibition returns to the very prayer itself, even if not specific to it. It is like giving zakāh or an offering from usurped wealth."[945] And the position of the madhhab is that it is invalid.

Perspectives may differ regarding much of what has preceded. Some may view a separation of consideration between the act of prayer itself and its performance on usurped land. Our madhhab, as mentioned earlier, is broader than others in applying the maxim, to the extent that they ruled invalid the prayer of one who prays alone behind the row, though they do have a basis in the Prophet's instruction to repeat the prayer.[946]

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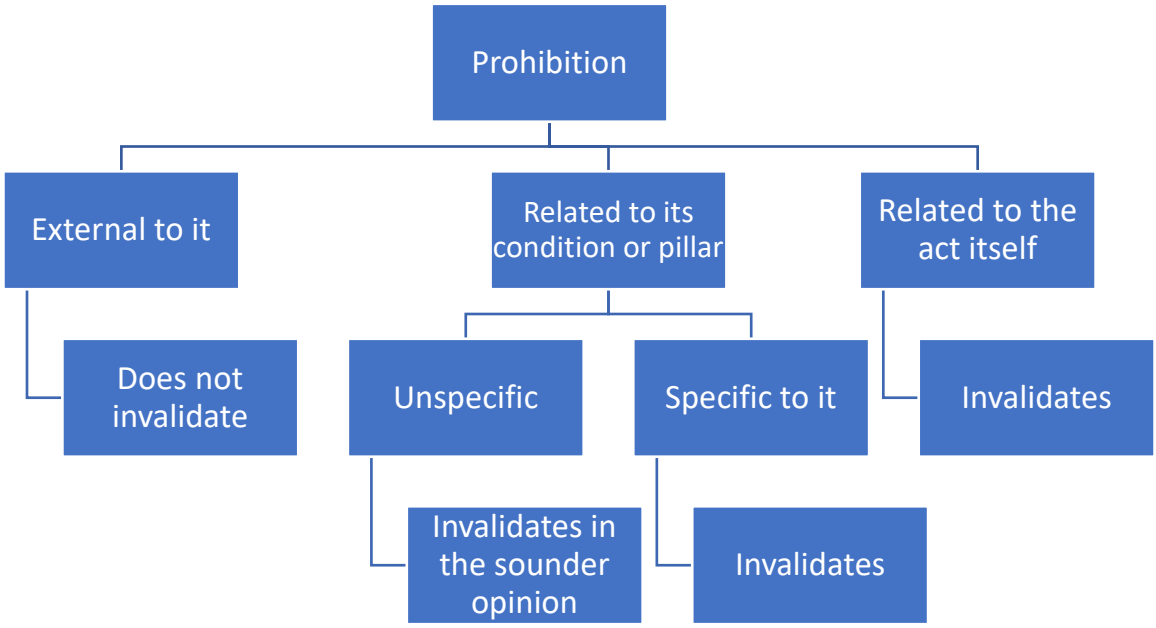
[942] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:92.

[943] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:93.

[944] "If he is wearing two garments, one of which is impermissible, then his prayer is also invalid—because the permissible one is not definitively the one serving as the covering, whether it is worn underneath or over the other. Since if either of them were absent, the other would suffice as a covering." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:152.

[945] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:92.

[946] "Or if one prays alone behind a row, even if it is a woman praying behind another woman, for a single rakʿah, his prayer is invalid—whether knowingly or unknowingly, forgetfully or deliberately—due to the ḥadīth of Wābiṣah ibn Maʿbad, that the Prophet ﷺ saw a man praying alone behind the row and commanded him to repeat the prayer." Narrated by Aḥmad and al-Tirmidhī (who graded it ḥasan), and by Ibn Mājah." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 1:282.




المنع أسهل من الرفع

## Prevention is easier than removal

This is Ibn Rajab's maxim no. 134.

Explanation of the Maxim:

الدفع أقوى من الرفع

This maxim establishes that preventing the occurrence of a ruling from the outset is easier than removing it after it has taken effect. This meaning is close to what the Shāfiʿīs stated in their expression: *"Repelling is stronger than removing"*, and it also resembles the well-known medical principle: *"Prevention is better than cure."*

The reason for this is that some rulings can be prevented at the beginning with ease, whereas their removal after occurrence becomes complex and bound by legal constraints and subsequent rulings. Therefore, caution and taking preventative measures is preferable to later being forced to deal with legal consequences and complications.

This maxim reflects the importance of precaution and prevention in Islamic law, since avoiding falling into legal difficulties from the outset is easier than seeking solutions after their occurrence. This applies both in matters of worship and transactions, affirming the firm grounding of the principle *"Prevention is easier than removal"* in Islamic jurisprudence.

Applications:

- In worship:

"Among them: that the presence of water after tayammum and before commencing prayer prevents entering it with tayammum. But if one entered into it with tayammum and then found water—does the prayer become invalid or not? There are two reports."[947] The madhhab position is invalidity.[948]

"Among them: that a man possesses the right to prevent his wife from a vowed or supererogatory ḥajj; if she begins it without his permission, then regarding whether he may dissolve it there are two reports."[949] The madhhab position is that he may dissolve it.[950]

You may have noticed in the two preceding examples that the relied-upon position of the madhhab did not distinguish between prevention and removal; however, consideration of the maxim led to disagreement regarding the ruling *after* commencement, though not regarding the ruling *before* it.

- In food and drink:

*"Preventing vinegar from fermenting initially—by placing vinegar in juice to prevent its fermentation—is permitted; converting it into vinegar after it has fermented is prohibited."*[951]

And perhaps there is in the example a certain latitude, for there is no cause for prohibition if fermentation has not occurred.

- In personal status and marriage:

"Among them: the difference of religion that prevents marriage prevents it at the outset, but it does not dissolve it if already contracted, according to the more well-known opinion; rather, the matter is suspended until the end of the waiting period."[952]

"And if she prevents herself (refuses intimacy) before consummation until she receives her prompt dowry, then she has that right and her maintenance becomes obligatory; but she does not have the right to prevent herself after consummation until she receives it."[953]

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[947] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:6.

[948] "If one finds water while in ṣalāh, the prayer becomes invalid; but if it ends before water is found, repetition is not obligatory." Dalīl al-Ṭālib li-Nayl al-Maṭālib, al-Karmī, 21.

[949] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:6.

[950] "A slave may not enter into ritual consecration (*iḥrām*) except with his master's permission, nor may a woman undertake a supererogatory pilgrimage except with her husband's permission. If either of them does so without permission, the act is still valid, but the master or husband has the right to terminate it, and they are then treated like one prevented from completing the rites (*muḥṣar*)." *Al-Iqnāʿ*, al-Ḥajjāwī, 1:337.

[951] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:5.

[952] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:7.

[953] *Al-Iqnāʿ*, al-Ḥajjāwī, 4:143. Ibn Rajab mentioned two views concerning withholding intimacy after consummation. Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:6.

"Among them: Islam prevents slavery initially but does not remove it after it has occurred. The child of a slave woman who is Muslim is enslaved because he is part of her; this is considered a continuation of slavery for a Muslim."[954]

البدل يقوم مقام المبدل

## The Substitute Takes the Place of the Original

This is the expression used by Imām Ibn Qudāmah in *al-Rawḍah*.[955]

الأصل إذا لم يحصل به المقصود قام بدله مقامه.

Imām Ibn Taymiyyah said: "The original, if it does not fulfill the intended purpose, its substitute takes its place."[956]

يقوم البدل مقام المبدل، ويسدُّ مسدَّه، ويبنى حكمه على حكمه في مواضع كثيرة

Imām Ibn Rajab stated: "The substitute takes the place of the original, fulfills its function, and its ruling is built upon the ruling of the original in many cases."[957]

Explanation of the Maxim:

الحاجة توجب الانتقال إلى البدل عند تعذر الأصل.

This legal maxim is based on the principle that if the original is unattainable or fails to achieve its intended purpose, it is permissible to resort to its substitute, which takes its place, fulfills its function, and is subject to the same legal ruling. The maxim is rooted in the objectives of the Sharīʿah, which aim to remove hardship, avert difficulty, secure benefits, and establish legitimate alternatives when the original is inaccessible or when the substitute achieves a greater benefit. As the scholars have stated: "Need necessitates resorting to a substitute when the original is inaccessible."[958]

Among the examples of this are: resorting to *tayammum* when water is unavailable; replacing the *hady* with one that is better; substituting a ruined *waqf* property with one that is more beneficial; and relocating a mosque to another site when there is a need for it.

Evidences for the Maxim:

The Sharīʿah has established many cases in which substitutes replace their originals. Among them:

﴿فَلَمْ تَجِدُوا مَاءً فَتَيَمَّمُوا﴾

1. Allāh says: "If you do not find water, then perform *tayammum*." [al-Māʾidah: 6] This makes *tayammum* a substitute for ablution (wuḍūʾ) in the absence of water or when its use is difficult.

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954 Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:7.

955 Rawḍat al-Nāẓir wa-Junnat al-Manāẓir, Ibn Qudāmah, 1:575.

956 *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 31:252.

957 Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:52.

958 *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 22:333.

2. Allah arranged the expiations (*kaffārāt*) for unintentional killing and ẓihār: whoever does not find a slave to free must fast instead. Likewise, in the expiation for oaths, if one is unable to free a slave, feed or clothe ten people, then fasting becomes the substitute. The same applies to the *hady* of *tamattuʿ* for one who cannot afford it.
3. "ʿUmar ibn al-Khaṭṭāb demolished the first mosque—the congregational mosque of the people of Kūfah—and made its substitute a mosque in another part of the city. The former site of the mosque became the *sūq al-tammārīn* (market of the date-sellers)."[959]

Conditions for Applying the Maxim:

1. There must be a need or overriding benefit justifying the shift to a substitute, when the obligation follows a sequential order.
2. The substitute must fulfill the same objective as the original.
3. If resorting to the substitute results in the loss of a legitimate right, it is impermissible.

Fiqh Applications of the Maxim:

Ibn Rajab states:
"Among them:

- If a person wipes over his khuff (leather foot covering), then removes it, it suffices to wash the feet according to one narration—even if *muwālāh* (succession) is broken—because the wiping had completed and perfected the wuḍūʾ and took the place of washing the feet until the moment of removal. Once removed and the feet washed thereafter, the wuḍūʾ is considered continuous. [The relied-upon position is that removing the khuffs invalidates ablution.]
- If forty eligible individuals attend the Friday prayer and are later replaced during the khuṭbah or prayer by an equal number of similarly eligible individuals, the Jumuʿah is valid and complete with them.
- If a zakāh-payer substitutes a full niṣāb (minimum zakāh threshold) of one kind of zakāh-eligible wealth with another of the same type, the new niṣāb is calculated from the start date of the original, according to the madhhab. But if it is replaced with a different type, the *ḥawl* (lunar year) is restarted—except in the case of exchanging gold for silver or vice versa, regarding which there are two narrations. [The school's position is that this exchange does not interrupt the zakāh year.]
- If a muṣḥaf is exchanged for another muṣḥaf, it is permissible—explicitly stated by Aḥmad. This differs from selling it for money...
- If the skins of sacrificial animals are replaced with beneficial household items, it is allowed—explicitly stated by Aḥmad—since such benefit substitutes for using the skins directly in the home.

[959] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 31:222.

- Substituting *hady (pilgrimage offering) and uḍḥiyah (ʿĪd sacrifice) animals* with better ones is permissible—explicitly stated by Aḥmad.
- Similarly, replacing a ruined *waqf* or mosque whose people have disappeared is permitted. As for replacing a still-useable *waqf* with a better one, there are two narrations. [The school's position prohibits this, while Imām Taqī al-Dīn favored permitting it when it serves a benefit.]
- If the owner of capital dies while the wealth is with a muḍārib (working partner in a profit-sharing investment) or ʿinān partner (partner in a jointly funded enterprise), and the heir authorizes the partner to continue, it is valid. But is this a new contract or continuation? There are two views, mentioned in *al-Talkhīṣ* and elsewhere, and indicated by al-Qāḍī and Ibn ʿAqīl. If the capital is in the form of merchandise (*ʿaraḍ*), and we hold that *muḍārabah* over merchandise is valid, then there is no issue. But if we hold it is invalid, al-Qāḍī derived two views. In *al-Talkhīṣ*, it is stated: if it is deemed a new contract, it is invalid; but if it is considered a continuation (*taqrīr*), it is valid—because it is merchandise that was purchased, and the type of capital had already been specified earlier, so it reverts to that. This contrasts with initiating a new contract.
- If the working partner (*ʿāmil*) dies and the owner wishes to appoint the heir, and the capital is merchandise, this is considered a new contract without dispute, as stated by al-Qāḍī and most scholars. They distinguish between the death of the capital owner and the working partner: the former leaves behind a tangible base (the capital) to build upon; hence the contract continuation is valid. But the working partner leaves behind only his labor, which ends with his death, and thus no base remains for his heir to inherit and continue."[960]

Substituting monetary value (qīmah) when an exact equivalent is unavailable is one of the applications of this maxim.

Among its applications according to Imām Taqī al-Dīn is the permissibility of giving the monetary value in zakāh in cases of need. For example, if one owes a sheep as zakāh on five camels, but does not have one, it suffices to pay its value, and he is not required to travel to purchase a sheep. Giving the value is also permitted when it better serves the interests of the recipients.

ينزل المجهول منزلة المعدوم

## The Unknown Is Treated as Non-Existent

This is Ibn Rajab's 106th legal maxim. Were the word *"qad"* added to it, the wording of the maxim would be more precise—even though we have previously mentioned the disagreement over maxims that include the term *"qad."*

Explanation:

If something is unknown, or becomes so, it is treated as non-existent whenever access to it is impossible or its investigation entails excessive hardship—this being in order to lift hardship from people. The

[960] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:52–55.

default is that it remains, but whenever certainty about it or its identification is unattainable, the ruling is based on its non-existence.

Applications:

The period beyond that observed as menstruation by the woman with irregular bleeding, up to the maximum duration of menstruation:

“What exceeds what the woman with istiḥāḍah (non-menstrual uterine bleeding) sits out—the minimum menstruation or its norm until its maximum—is treated as non-existent, as we assign to the woman all the rulings of those in a state of purity. For the duration of *istiḥāḍah* is long and has no awaited limit—unlike what exceeds the minimum in the case of a beginner, according to the apparent view of the madhhab, where she must make up the fasts that fall within it before a habit is confirmed through repetition, since the matter will become clear through repetition soon. Likewise, doubtful nifās [postpartum bleeding] requires her to make up the fasts, as it does not recur.”[961]

Purity of street mud:

“It is ruled pure according to the correct view explicitly stated by Aḥmad.”[962]

Lost property after one year:

“The luqaṭah (found property) after one year is to be taken into ownership due to the unknown identity of its owner; and what cannot be owned from it—namely, property other than currency and *luqaṭah* of the Ḥaram, according to a narration concerning both—should be given in charity on his behalf, according to the correct view.”[963]

Wealth of one with no known heir:

“The wealth of one who has no known heir is to be placed in the public treasury—like lost property—even though there will inevitably be distant paternal cousins, since all people are descendants of Ādam. Whoever has a nearer meeting point with the deceased through a father of his fathers is his ʿaṣabah. But he is unknown, and so no ruling is established for him.”[964]

Wife of a missing person:

“Among them: the wife of the missing person, whose absence indicates probable death—after four years and the widow’s waiting period, she becomes lawful for marriage. Likewise, his wealth is distributed among the heirs, as with the deceased.”[965]

In cases of confusion:

“If his sister becomes confused among the women of a town, it is permissible for him to proceed with marriage from among its women, and investigation is not required, according to the sounder of the two opinions.

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[961] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:315.

[962] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:318.

[963] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:315.

[964] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:316.

[965] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:316.

Likewise, if a carcass is confused with the meat of the town's people or a village.
Or a small amount of the forbidden becomes mixed with a large amount of the permissible, and the like—except if the forbidden predominates and overcomes."[966]

جعل المعدوم كالموجود احتياطًا

## Treating the Non-Existent as Existing by Way of Precaution

In some cases, the Sharīʿah establishes rulings for non-existent matters and assigns legal consequences to them, by way of precaution.

Imām Ibn al-Najjār said:

«"و" من أدلة الفقه أيضا "جعل المعدوم كالموجود احتياطا" كالمقتول تورث عنه الدية، وإنما تجب بموته ولا تورث عنه، إلا إذا دخلت في ملكه، فيقدر دخولها قبل موته.»

"Among the evidences used in jurisprudence is also: 'Treating the non-existent as existing by way of precaution'—such as the one killed, for whom blood money (*diyah*) is inherited, even though it becomes obligatory only upon his death and is not inherited from him unless it enters his ownership. So it is presumed to have entered his ownership before his death."[967]

Based on this, the *diyah* is treated like inheritance in terms of being subject to debt payments and bequests.[968]

And ownership is established for the fetus (*janīn*), even before the soul is breathed into it.[969]

الفعل الواحد يبنى بعضه على بعض مع الاتصال المعتاد، ولا ينقطع بالتفرق اليسير

## A Single Act Is Built Upon Itself When Customary Continuity Is Maintained, and Is Not Invalidated by Minor Separation

This is the 103rd maxim in Ibn Rajab's enumeration[970] and the 48th in al-Siʿdī's.

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[966] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:317.

[967] Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 4:453.

[968] "If the person who had made a bequest for a portion of his estate or had an outstanding debt was killed—whether intentionally or unintentionally—and his blood money (*diyah*) was collected, then the blood money is treated as his estate. It thus becomes part of the inheritance. It is stated in *al-Inṣāf* that this is the established position (*al-madhhab*). Imām Aḥmad said, "The Prophet ﷺ ruled that the *diyah* is inheritance." Based on this, the *diyah* is included in any bequest and is used to settle the deceased's debts." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 7:457.

[969] "A fetus inherits in general without disagreement. There is disagreement, however, whether ownership vests upon the decedent's death and is confirmed when the fetus is born alive, or does not vest until live birth. (...) The implication of Imām Aḥmad's explicit statement permitting expenditure on the mother from the fetus's share is that ownership by inheritance vests from the father's death." Al-Inṣāf, al-Mardāwī, 18:205.

[970] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:295.

Explanation:

When the Sharīʿah requires an act that takes time to complete, a minor interruption—so long as it remains within what is customary—is not considered a separating factor that invalidates the act. Rather, the parts are treated as continuous and are built upon one another. In determining the acceptable length of interruption, reference is made either to legal or general custom.

Examples cited by Ibn Rajab:

- "Among them: wuḍūʾ—if *muwālāh* (succession) is required, a slight interruption does not invalidate it. Is the criterion custom or the drying of limbs? There are two narrations. [The madhhab adopts drying as the standard.]"
- Among them: if a person ends the prayer out of forgetfulness, then resumes shortly after, the prayer may be continued and is not invalidated thereby…
- Among them: if work in a mine is halted in the customary manner or due to an excuse, without intent of neglect, and one returns to extraction, the latter is joined to the former in calculating the *niṣāb*.
- Among them: if ṭawāf is interrupted by an obligatory prayer or a funeral prayer, it is resumed—from the point it stopped—whether one holds that *muwālāh* in ṭawāf is sunnah or a condition, according to the more common of the two views among the fellows…
- Among them: if a thief removes part of the *niṣāb* from its legally recognized secure custody (ḥirz), then re-enters and removes the rest, and neither part on its own reaches the *niṣāb*, if the time between them is short, the ḥadd is enacted…
- Among them: if the infant detaches from the breast unintentionally, then returns before a long interruption, it is one nursing according to Ibn Ḥāmid. Similarly, al-Āmidī stated: if the child stops by choice to breathe or due to fatigue, then resumes without a long break, it is counted as one nursing."[971]

[971] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:295-297.

# Second: Maxims Mostly Related to Ijtihād, Legal Ruling, and Judiciary

لا اجتهاد في مورد النص

## No Ijtihād Where There Is a Text

There is no scope for *ijtihād* in the presence of explicit textual proof (*naṣṣ*) from the Qurʾān or authentic Sunnah, because if a legal ruling is established by a text, there is no need to exert effort in deriving it. This differs from the type of *ijtihād* involved in assessing the applicability of a ruling to real-world circumstances (*taḥqīq al-manāṭ*), which is part of the process of issuing fatwā and remains ongoing.[972]

It should be noted that the "text" (*naṣṣ*) in the above expression refers to what does not admit interpretation. It is what the Ḥanafīs classify as *muḥkam (definitive wording admitting neither interpretation nor abrogation) and mufassar (fully elucidated wording),* and what the majority considers counterpart to what is *ẓāhir (wording with an apparent meaning that admits interpretation) and mujmal (wording requiring further clarification).*[973][974]

For this reason, they did not deem it a valid or excusable disagreement to claim the permissibility of *mutʿah* marriage, *ribā al-faḍl*, or policies that contravene explicit texts.

They also sometimes invoke this principle to negate illegitimate disagreement. For example:

وهذا نص قاطع فى محل النزاع، فلا يعول على ما خالفه

Imām Ibn Qudāmah, referring to the ḥadīth, "Grant him permission, for he is your uncle. May your right hand be cleaved to dust"—which affirms the prohibition through the milk of the husband whose act

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[972] "The first issue: *Ijtihād* is of two types. One of them cannot cease until the very foundation of legal responsibility (*taklīf*) itself ends, which will occur at the coming of the Hour. The second type may come to an end before the world itself perishes. As for the first, it is the form of *ijtihād* related to verification of the operative basis (*taḥqīq al-manāṭ*), and there is no disagreement among the ummah regarding its validity. Its meaning is that the ruling has already been established through a recognized Sharīʿah-based proof, but the task remains to determine the precise subject to which this ruling applies." *Al-Muwāfaqāt*, al-Shāṭibī, 5:11.

[973] "For the majority, the distinction between ẓāhir and naṣṣ rests on whether another interpretation is possible: ẓāhir admits another possibility and its indication is probabilistic, whereas naṣṣ does not and its indication is definitive. (...) Thus, the majority's ẓāhir corresponds to both ẓāhir and naṣṣ in Ḥanafī terminology, while the majority's naṣṣ corresponds to the Ḥanafīs' mufassar and muḥkam." Al-Wajīz fī Uṣūl al-Fiqh al-Islāmī, al-Zuḥaylī, 2:96.

[974] «والكلام: نص وظاهر ومجمل (...) والنص اصطلاحا: الصريح في معناه، وقيل: ما أفاد بنفسه من غير احتمال (...) وقد يطلق على ما تطرق إليه احتمال يعضده دليل وعلى الظاهر.» شرح مختصر الروضة، الطوفي، ج ١ ص ٥٥٣

"Speech is classified as naṣṣ, ẓāhir, and mujmal. (...) In technical usage, naṣṣ is a statement unequivocal in its meaning; it is also defined as that which conveys meaning on its own without admitting another possibility. (...) The term may also be applied to wording that admits a possibility supported by evidence and to ẓāhir wording." *Sharḥ Mukhtaṣar al-Rawḍah, al-Ṭūfī, 1:553.*

caused the lactation (*labn al-faḥl*), as held by all four madhhabs—said: "This is a decisive text on the point of dispute; no weight is given to anything that contradicts it."[975]

He also stated: "If a traveler intends to fast while on a journey, then later decides to break it, he may do so."[976] Then he said: "Our evidence is the ḥadīth of Ibn ʿAbbās, which is an authentic ḥadīth agreed upon. Jābir reported that the Messenger of Allāh ﷺ set out in the year of the Conquest and fasted until he reached Kurāʿ al-Ghamīm. The people fasted with him. Then it was said to him: 'Fasting has become difficult for the people, and they are watching what you will do.' So he called for a cup of water after ʿaṣr and drank while the people were looking. Some of them broke their fast, and some continued fasting. It reached him that some people had continued fasting, and he said: 'They are the disobedient ones.'" This was narrated by Muslim. "This is a clear text; no attention is paid to those who oppose it."[977]

صلاة الوسطى صلاة العصر

He also said: "The Messenger of Allāh ﷺ said: *'The middle prayer is the ʿaṣr prayer.'* And from Samurah something similar. Al-Tirmidhī said of each of them: 'This is a ḥasan ṣaḥīḥ ḥadīth.' This is a *naṣṣ*; it is not permitted to give consideration to anything that contradicts it."[978]

It is well known to anyone engaged in this science that a scholar's claim that his evidence is a *naṣṣ* does not, by itself, invalidate the opposing view—until he establishes that claim and refutes what contradicts it.

ما ثبت على خلاف القياس فغيره عليه قد يقاس

## What Has Been Established Contrary to Qiyās—Other Cases May Be Analogized to It

*Qiyās* is the extension of the ruling of the original case (*aṣl*) to the new case (*farʿ*) due to their sharing the same effective cause (*ʿillah*). It is a valid proof according to the majority of jurists and the four madhhabs. A condition for its application is the absence of a textual proof concerning the *farʿ* (new case), for *qiyās* is only resorted to when necessity demands it—specifically, when no ruling for the *farʿ* has been established by a text from the Qurʾān, Sunnah, or consensus (*ijmāʿ*).

ما ثبت على خلاف القياس فغيره عليه لا يقاس

What is well known among the jurists is the saying: "Whatever has been established contrary to analogy (qiyās), nothing else is analogized to it." Its meaning is that if a legal ruling is established by a text of the Qurʾān, the Sunnah, or consensus, in a manner that departs from the course of analogy, it is not permissible to make analogy to it for other cases—due to particular considerations specific to it that prevent making it an original precedent for others.

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[975] Al-Mughnī, Ibn Qudāmah, 9:522.

[976] *Al-Mughnī*, Ibn Qudāmah, 4:347.

[977] Al-Mughnī, Ibn Qudāmah, 4:348.

[978] *Al-Mughnī*, Ibn Qudāmah, 2:22.

The maxim "Whatever has been established contrary to analogy, nothing else is analogized to it" is among the maxims of *Majallat al-Aḥkām*, and it is acted upon by the Ḥanafīs. Some contemporary Shāfiʿīs have attributed it to their madhhab, but Imām Taqī al-Dīn—as will follow—stated otherwise. I found support for his statement in *Qawāṭiʿ al-Adillah* by Imām al-Samʿānī (rA), wherein it says: "Issue: It is permissible to make analogy upon a basis that, in itself, runs contrary to the principles, once that basis has been established by the Sharʿ and indicated by evidence. What is reported from the companions of Abū Ḥanīfah is that they did not permit this analogy, and al-Karkhī mentioned it and forbade its permissibility except under one of three conditions…".[979]

In any case, this maxim is neither mentioned in our madhhab nor found on the tongues of its Imāms.

Before we proceed to the detailing, let us establish the foundation; thus we ask: has anything been established by a text of the Qurʾān, the Sunnah, or consensus contrary to analogy (*qiyās*)?

Al-ʿAllāmah al-Buhūtī (rA) answers: "A judgment is not annulled for contravening analogy, for among the rulings of the Sharīʿah are those that have been established contrary to analogy."[980]

The proponents of the maxim cite examples of matters established contrary to analogy, including: the testimony of Khuzaymah (rAa), for the Messenger of Allah ﷺ made it a proof (*bayyinah*) although its legal quota is the testimony of two; the expiation of the Bedouin in the case of intercourse, to whom he ﷺ said, "Feed it to your family"; *bayʿ al-salam*—which is the sale of what is not in one's possession; *ijārah*—which is the sale of usufructs that are non-existent at the time of contract; and *muzāraʿah*—which is hiring the cultivator for a share of the produce; and many others.

However, Imām Taqī al-Dīn offers a precise clarification that answers both questions together; I cite it verbatim due to its importance. He said (rA):

إنما ينظر إلى شروط القياس فما علمت علته ألحقنا به ما شاركه في العلة سواء قيل: إنه على خلاف القياس أو لم يقل

"The rulings that are said to be contrary to analogy are of two kinds: one upon which there is consensus, and one about which there is disagreement. As for that whose ruling is undisputed, it becomes clear that it accords with sound analogy. Upon this is built the question: may such a case be used for analogy or not? A group of jurists held that whatever has been established contrary to analogy is not analogized to, and this is reported from the companions of Abū Ḥanīfah. The majority say that analogy is made to it, and this is what is mentioned by the companions of al-Shāfiʿī and Aḥmad and others. They said: one looks only to the conditions of analogy; whatever's effective cause (*ʿillah*) is known, we attach to it whatever shares it in that cause—whether it is said to be contrary to analogy or not. Likewise, where the absence of a distinguishing factor between the original and the branch is known, uniting them by proof of the cause is like uniting them by the cause. But if no proof establishes that the branch is like the original, analogy is not permissible therein—whether it is said to accord with analogy or to be contrary to it. For this reason, the correct view is that to the *ʿarāyā* there is attached whatever is in their purport.

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[979] Qawāṭiʿ al-Adillah fī al-Uṣūl, al-Samʿānī, 2:119.

[980] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 3:509.

وحقيقة الأمر أنه لم يشرع شيء على خلاف القياس الصحيح، بل ما قيل: إنه على خلاف القياس فلا بد من اتصافه بوصف امتاز به عن الأمور التي خالفها واقتضى مفارقته لها في الحكم وإذا كان كذلك فذلك الوصف إن شاركه غيره فيه فحكمه كحكمه وإلا كان من الأمور المفارقة له.

In truth, nothing has been legislated contrary to sound analogy; rather, whatever is said to be contrary to analogy must necessarily possess a quality that distinguishes it from the matters it differs from and necessitated its divergence from them in ruling. When this is so, then if another shares that quality with it, its ruling is like its ruling; otherwise, it is among the matters that are different from it. As for the disputed matters, they are like when a ḥadīth comes contrary to a matter, and some say: 'This is contrary to analogy,' or 'contrary to the analogy of the principles.' This has examples, among the most famous of which is the *muṣarrāh* (an animal whose udder has been bound) …"[981]

Imām Ibn al-Qayyim said: "... then this nullifies the very foundation of *qiyās*; for if it were admissible that the Sharīʿah should come contrary to *qiyās*, it would be known that *qiyās* is not of the truth, but sheer falsehood—for the Sharīʿah does not come contrary to the truth at all."[982]

«واعلم أن قول الفقهاء هذا الحكم مستثنى عن قاعدة القياس أو خارج عن القياس أو ثبت على خلاف القياس ليس المراد به أنه تجرد عن مراعاة المصلحة حتى خالف القياس وإنما المراد به أنه عدل به عن نظائره لمصلحة أكمل وأخص من مصالح نظائره على جهة الاستحسان الشرعي فمن ذلك أن القياس يقتضي عدم بيع المعدوم وجاز ذلك في السلم والإجارة توسعة وتيسيرا على المكلفين»

Al-ʿAllāmah Ibn Badrān (rA) clarifies the grounds of both the affirmers and the deniers of rulings established by text contrary to analogy, saying:
"Know that when the jurists say, 'This ruling is excepted from the rule of analogy,' or 'outside analogy,' or 'established contrary to analogy,' the intent is not that it has been stripped of consideration of maṣlaḥah (benefit or welfare) so as to oppose analogy; rather, the intent is that it has been diverted from its analogues for an interest more complete and more specific than the interests of its analogues, by way of Sharʿī istiḥsān (juridical preference grounded in the Sharīʿah). Of this is that analogy entails the non-permissibility of selling what is non-existent, yet this was permitted in salam (advance-payment sale) and ijārah (lease or hire) as an expansion and facilitation for those legally responsible."[983]

The correct view, then, is that what is said to have departed from analogy may be among the fatāwā of the Messenger ﷺ and among particularized incidents (*waqāʾiʿ al-aʿyān*) that are not generalized, being specific to some of his Companions or to certain circumstances. It may also be among disputed rulings, such as the *muṣarrāh*, concerning which there is contention as to whether it in fact departs from analogy. And it may be among agreed-upon rulings, such as *ijārah* and *salam*; these—though departing from one principle—enter under another. Accordingly, whenever the cause for their departure from the first and their inclusion under the second is known, analogy may be made to their likes.

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[981] *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 20:555.

[982] *Iʿlām al-Muwaqqiʿīn,* Ibn al-Qayyim, 2:205.

[983] al-Madkhal ilā Madhhab al-Imām Aḥmad ibn Ḥanbal, Ibn Badrān, 313.

Among the examples of this in our madhhab is extending the ruling of *ʿarāyā* by analogy—this being the choice of Imām Taqī al-Dīn—though there are two positions in the madhhab, and the authoritative one does not accept it; however, they did not justify the non-acceptance on the ground that the original is contrary to analogy, but rather because what is other than palm dates "does not equal it in the frequency of being used as sustenance."[984]

They analogized mughārasah—the tree-planting share contract—to musāqāh, sharecropping of existing trees, with a stipulated share of the fruit.[985]

They analogized wiping over the jawrab (sock) to wiping over the khuff (leather foot covering)—contrary to those who said there is no analogy in concessions—although the stronger evidence is the practice of the Companions.[986]

They analogized combining the two evening prayers due to snow, hail, ice, mud, and a severe cold wind to rain.[987]

And they granted to the purchaser of the muṣarrāh (an animal whose milk has been withheld to exaggerate its yield) the right to return it along with the value of one *ṣāʿ* of dates if he does not find dates; whereas Imām Taqī al-Dīn—not the authoritative view of the madhhab—held that he must give one *ṣāʿ* of the predominant staple of his land.[988]

الاجتهاد لا ينقض بالاجتهاد

## Ijtihād Is Not Annulled by Ijtihād

"This is al-Qāḍī's wording in *al-ʿUdda*."[989]

تلك على ما قضينا يومئذ، وهذه على ما قضينا

"And ʿUmar ibn al-Khaṭṭāb adjudicated in the case of a woman who died leaving her husband, her mother, her uterine siblings, and her full siblings: ʿUmar made the uterine siblings and the full siblings share in the one-third. A man said to him: 'You did not make them share in the year such-and-such.' So ʿUmar said: 'That [judgment remains] upon what we adjudicated that day, and this [judgment is] upon

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[984] See *al-Mubdiʿ fī Sharḥ al-Muqniʿ*, Ibn Mufliḥ, 4:140.

[985] "It is valid if he undertakes a *musāqāh* on trees to be planted and tended until they bear fruit, for a specified share of the fruit, or of the trees, or of both—this is *mughārasah and al-munāṣabah [tree-planting partnership]*." *al-Iqnāʿ fī Fiqh al-Imām Aḥmad ibn Ḥanbal*, al-Ḥajjāwī, 2:275

[986] "The sock (jawrab) is in the legal meaning of the khuff, for it covers the area of obligation, and one can continue walking in it; thus it resembles the khuff." Kashshāf al-Qināʿ, al-Buhūtī, 1:260.

[987] "It is permissible between the two evening prayers, not the two midday prayers, due to rain that wets the clothes—(some add: 'or the sandals or the body')—and with which there is hardship; not for dew, but for snow, hail, ice, mud, or a severe cold wind." *al-Iqnāʿ fī Fiqh al-Imām Aḥmad ibn Ḥanbal*, al-Ḥajjāwī, 1:184

[988] "(The purchaser returns) with the *muṣarrāh*—that is, of the beasts of livestock—(a substitute for the milk present at the time of the contract), which (multiplies) with the number of *muṣarrāhs*: (one *ṣāʿ* of dates). … (If the purchaser does not find) dates, then (he owes) (their value at the place of contract), for it is as if he had destroyed it. (Shaykh) Taqī al-Dīn (chose): (in every land there is to be considered one *ṣāʿ* of its predominant staple), because dates were the predominant staple of the Ḥijāz at that time." Kashshāf al-Qināʿ, al-Buhūtī, 7:440 (Ministry of Justice ed.)

[989] Al-ʿUddah fī Uṣūl al-Fiqh, al-Farrāʾ, 5:1577.

what we adjudicate [now].'"[990] Nor has it been established that the Rightly-Guided Caliphs annulled the judgments of those before them, despite their differing on various issues.

Here, *ijtihād* is not confined to its well-known technical sense; rather, it includes the *ijtihād* of the legally responsible person (*mukallaf*), as in matters of *taḥarrī*—ascertaining the purity of water, the direction of the qiblah, the deserving recipients of zakāh, and the like.[991]

Before speaking about what accompanies *ijtihād* and what follows from it, let us first clarify what is meant by the *ijtihād* that is not annulled by its like. Imām al-Khiraqī says: "(And he does not annul the judgment of another if it is brought before him, except what contravenes a text of the Book, or the Sunnah, or consensus.)"[992] And the two imāms Ibn al-Najjār and al-Buhūtī set out the details of this; in *Sharḥ al-Muntahā*:

"(It is forbidden to annul anything of the judgment of) a judge (fit for the judiciary), lest it lead to annulling a judgment by its like and to no judgment being established at all, (other than that) i.e., a judgment (which contravenes a text of the Book of Allah, Exalted, or) contravenes a text (of mutawātir [mass-transmitted] Sunnah, or) contravenes a text of (āḥād [non-mass-transmitted] Sunnah, such as) the judgment (to kill a Muslim for [killing] a disbeliever, and) such as the judgment (to make one who finds his very property with one under interdiction for insolvency) equal with the other creditors; such a judgment is annulled because it did not meet its condition, since the condition of *ijtihād* is the absence of text—per the report of Muʿādh ibn Jabal; and because he is negligent in leaving the Book and the Sunnah—(or) it contravenes (definitive consensus), so it is annulled, for that which is agreed upon is not a place for *ijtihād*, contrary to tacit consensus—(or) it contravenes (what he himself believes), in that he judged by what he does not believe to be valid, (so it must be annulled) due to his believing it to be invalid. If he believed it to be valid at the time of judgment, then his *ijtihād* changed, and there is no text or consensus, it is not annulled …

(And no judgment is annulled concerning a woman's) i.e., a woman (contracting her own marriage), even with her guardian present, due to the disagreement of the imāms about its validity, and the ḥadīth, 'There is no marriage except with a guardian,' regarding which what pertains to it has preceded.

(And) a judgment is not annulled (for contravening analogy), for among the rulings of the Sharīʿah are those established contrary to analogy.

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[990] It was narrated by al-Bukhārī in *al-Tārīkh al-Kabīr*, al-Dārimī in *his Sunan*, ʿAbd al-Razzāq in *al-Muṣannaf*, Ibn Abī Shaybah in *al-Muṣannaf*, al-Dāraqutnī in *his Sunan*, and al-Bayhaqī in *al-Sunan al-Kubrā*.

[991] "One mujtahid does not follow another whose conclusion differs from his own. (...) A mujtahid in this context is one who knows the evidences for the qiblah even if he does not know the rulings of the Sharīʿah. (...) If his error becomes apparent, he turns toward the direction indicated by his revised judgment and completes rather than restarts the prayer." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:173.

"The directions of the qiblah are established by ijtihād (...) and one ijtihād is not nullified by another. Poverty and wealth are likewise established by ijtihād; requiring repetition would therefore nullify one ijtihād by another." Al-ʿUddah fī Uṣūl al-Fiqh, al-Farrāʾ, 5:1577.

[992] *al-Mughnī*, Ibn Qudāmah, 14:34.

(And) a judgment is not annulled (due to his) i.e., the judge's (not knowing) of (disagreement in the issue) in which he judged, for his knowledge of that has no effect on the soundness of the judgment so long as it accords with the Sharʿ.

A judge's ruling is not annulled if he ruled on evidence presented by a claimant out of possession and it is unknown whether he knew of opposing evidence, or ruled on evidence presented by the party in possession and it is unknown whether he knew of the basis of the opposing evidence, so long as the judgment accords with the Sharīʿah.

(And that which we have said is to be annulled—its annuller is its issuing judge, if he is) present; (the cause) warranting its annulment (is established) before him, and (he annuls it) obligatorily; and (the petition of the right-holder) is not considered (for the validity of its annulment), for it is a right of Allah, Exalted.

(And its issuing judge annuls it) i.e., the judgment (if it becomes apparent that one who testified before him possessed something) i.e., a quality (with which) the judge (does not deem testimony acceptable), such as the witness being of the ascending or descending lines of the one testified for.

Likewise, in every case where what he judged upon is a matter of dispute: if the judge holds an opinion by which he does not deem such a judgment valid, and later there becomes known to him something that—according to his adopted view—invalidates his ruling, he must annul it. An example is the sale of a slave later found to have been vowed for emancipation as an act of devotion; the judge did not know this at the time of his ruling, so when it is established before him, he annuls it.

(And the judgments of one) i.e., a judge who judged (while unfit) for judgment due to lacking some condition (are annulled, even if they coincide with what is correct), because his judgment is invalid; its existence is like its non-existence. This is other than the judges appointed out of necessity; the judgments of such are not annulled insofar as they coincide, as chosen by Shaykh Taqī al-Dīn, for it is a legitimate appointment; otherwise, judgments would be disrupted."[993]

According to our madhhab, a judge's ruling is annulled if:

1. It contravenes:
   a. a text of the Book of Allah, Exalted;
   b. or mutawātir (mass-transmitted) Sunnah;
   c. or an āḥād (non-mass-transmitted) report whose authenticity is not disputed;
   d. or definitive consensus;
   e. or what the judge himself believes at the time of judgment;
2. or it was founded upon testimony later shown to be invalid;
3. or an error in an attribute or state upon which it depended becomes clear;
4. or it was issued by one unqualified—except in a case of necessity.

[993] *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 3:508.

And it is not annulled if:

1. it contravenes analogy (*qiyās*) (contrary to the majority, who annul for contravening *clear* analogy);
2. or its evidence is a matter of disagreement in its authenticity or meaning;
3. it was issued while the judge was ignorant of disagreement in the issue, or of opposing testimony—so long as these do not affect the judgment.

To these points, which we have summarized from the foregoing *Sharḥ al-Muntahā*, there is added what is also in *Sharḥ al-Muntahā* concerning ongoing rulings wherein alteration is acting upon a second *ijtihād*, not annulling the first—as in matters like maintenance and hire. For it is mentioned that these do not change, "because *ijtihād* is not annulled by *ijtihād* (so long as the cause has not changed), such as affluence and hardship in maintenance and clothing, and dearness and cheapness in the rent of the like; if something changes, then it is acting upon the second *ijtihād* and not an annulment of the first."[994]

This is our madhhab. Imām Ibn Qudāmah said: "… If the error is due to contravening a text of the Book, or the Sunnah, or consensus, his judgment is annulled. Al-Shāfiʿī said likewise, and added: if it contravenes clear analogy, it is annulled. Mālik and Abū Ḥanīfah said: a judgment is not annulled except if it contravenes consensus. Then they contradicted this: Mālik said, 'If he judges the right of pre-emption for the neighbor, his judgment is annulled.' And Abū Ḥanīfah said, 'If he judges the sale of an animal slaughtered without mentioning Allah's name, or judges among slaves by drawing lots, his judgment is annulled.'"[995]

Having learned what of judges' rulings is annulled, know that *ijtihād* is broader than that, and judgments are more resistant to annulment than other matters. *Ijtihād* may be undertaken by a person for himself; it may be accompanied by a judge's ruling or a muftī's fatwā, or not; it may be acted upon or not; and it may concern a grave matter such as marriage and the like. The detail is as follows:

- If one exercises *ijtihād* for himself, then his *ijtihād* changes, he must annul it by the later contrary *ijtihād*.[996] However, he is not obliged to redo what he did according to the first *ijtihād*.[997] This is in acts of worship, for the right of Allah is built upon leniency; but if the rights of others are implicated thereby, he must return them.[998]

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[994] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 3:26.

[995] *al-Mughnī*, Ibn Qudāmah, 14:34.

[996] If someone performed *ijtihād* and, based on it, married without a guardian (*walī*), then later changed his opinion, the sounder view is that his wife becomes unlawful to him. However, al-Qāḍī, al-Muwaffaq, Ibn Ḥamdān, al-Ṭūfī, and al-Āmidī held that she becomes unlawful to him only if no judge (*ḥākim*) had already ruled on the validity of the marriage. al-Madkhal ilā Madhhab al-Imām Aḥmad ibn Ḥanbal, Ibn Badrān, 385.

[997] "If one of them performed ijtihād, or their directions coincided, and one followed the other in prayer, then later discovered his own error," he must turn toward the direction that his new reasoning points to—whether he is the imām or the maʾmūm—since that direction has now become more likely in his judgment. He should continue and complete his prayer, and need not restart it, because the first ijtihād does not invalidate the second." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:173.

[998] "Among the examples is the case where a traveler prays based on *ijtihād* regarding the qiblah direction, then later discovers he had erred; in the sounder view, he is not required to repeat the prayer. [Ibn Qudāmah said in *al-Mughnī*

- If a judge exercises *ijtihād*, then his *ijtihād* changes, the first *ijtihād* is not annulled by a second *ijtihād*, out of fear that judgments would not remain stable—except if the first is among what is annulled, as detailed earlier from *Sharḥ al-Muntahā*.[999]

- Between these two: if one exercises *ijtihād* and gives a fatwā, then his *ijtihād* changes, is he obliged to inform the mustaftī? Is the mustaftī obliged to revert to his second *ijtihād*? What if the mustaftī has already acted upon the first? And what if he married upon it? The answer:
  (a) If the first *ijtihād* is of the sort whose judgment is annulled, then annulling the fatwā is more fitting.
  (b) The muftī must inform the mustaftī of the change in his fatwā before he acts upon it, not after.[1000]
  (c) It is not lawful for the mustaftī, prior to acting, to imitate the muftī in that wherein his fatwā has changed.[1001]
  (d) As for after acting upon the fatwā, the mustaftī is not obliged to revert; and if he married by the fatwā of a muftī, then the muftī's *ijtihād* changed, his wife does not become unlawful to him, according to Abū al-Khaṭṭāb, al-Muwaffaq, and al-Ṭūfī.[1002] Al-Ṭūfī mentioned a possibility of

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(14:34): "Prayer is among the rights of Allah, and such rights admit leniency."] Another case is when a judge (*ḥākim*) issues a ruling based on the outward testimony of two upright witnesses, and they are later discovered to be fāsiq. On whether the ruling is nullified, there are two opinions. Ibn ʿAqīl, in his *Funūn*, favored that it is not nullified, and this was also affirmed by al-Qāḍī in the chapter on hunting in his *al-Khilāf*, and by al-Āmidī—so that *ijtihād* is not overturned by another *ijtihād*. However, the more well-known view is that the ruling is nullified, because it involves the rights of others." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:80.

[999] "The *ijtihād* of a *mujtahid* may either be unaccompanied by a ruling or fatwā, or it may not be.

If it is unaccompanied by either, then it must be overturned by a subsequent *ijtihād* that contradicts it.

If it is accompanied by a judicial ruling (*ḥukm*), then it is not overturned; rather, implementation proceeds from that point forward based on the second *ijtihād*.

If it is accompanied by a fatwā and action has already been taken based on it, then there are two possibilities:

– One is that it is not overturned at all, in marriage and other cases, on the basis that action taken on a fatwā is treated as equivalent to the ruling of a judge.

– The other is that it may be overturned in all matters except marriage, as stated in *al-Mukhtaṣar*, distinguishing marriage from other contracts due to its unique features and the Sharīʿah's strong encouragement to facilitate and multiply it. And Allah, the Most High, knows best." *Sharḥ Mukhtaṣar al-Rawḍah, al-Ṭūfī, 3:649.*

[1000] "If he issues a fatwā based on his *ijtihād*, and then his *ijtihād* changes, then:
– If the questioner (*mustaftī*) has already acted upon the fatwā, the *muftī* is not required to inform him of the change, and the *mustaftī* is not required to undo what he has already done.
– However, if the *mustaftī* has not yet acted upon the fatwā, then the *muftī* must inform him of the change—if doing so is possible." *Al-Tamhīd fī Uṣūl al-Fiqh*, al-Kalwadhānī, 4:394.

[1001] "If a muqallid has not acted upon the fatwā before the muftī's ijtihād changes, the muftī must inform him of the change. If the muftī dies before informing the layperson, the sounder view is that the layperson continues to follow the original fatwā. (...) This is the relied-upon view." Al-Madkhal ilā Madhhab al-Imām Aḥmad ibn Ḥanbal, Ibn Badrān, 385.

[1002] "As for the muqallid, Abū al-Khaṭṭāb, al-Muwaffaq, and al-Ṭūfī held that his wife does not become unlawful to him when the ijtihād of the scholar he followed changes." Al-Madkhal ilā Madhhab al-Imām Aḥmad ibn Ḥanbal, Ibn Badrān, 385.

> distinguishing between marriage and other matters: one does not revert in marriage, and reverts in other than it.[1003]

Furthermore, what we have mentioned regarding the non-annulment of judgment holds likewise in *aḥkām sulṭāniyyah* (governmental rulings). In *al-Kashshāf*: "(It is not for the Imām to annul their covenant)—i.e., that of Banū Taghlib—(and to renew the jizyah upon them; for the covenant of dhimmah is perpetual, and ʿUmar (rAa) concluded it thus, so none changes it to jizyah) anyone (even if they ask for it), because *ijtihād* is not annulled by *ijtihād* …"[1004]

الخروج من الخلاف مستحب

## Exiting from Disagreement Is Recommended

It means taking the more precautionary course, whether by acting or abstaining, to avoid disagreement, and our Imāms acted upon this. Al-Muwaffaq said: "It is recommended to perform *ghusl* for everything concerning which we have negated the obligation of *ghusl*; due to the presence of what indicates it from the Prophet's ﷺ own practice, and in order to exit from disagreement."[1005] He also said regarding the woman with non-menstrual bleeding *(istiḥāḍah)*: "... and bathing for every prayer is superior, because it entails exiting from disagreement, adopting certitude, and taking precaution."[1006] And regarding prostration upon the turban: "What is recommended is that the worshiper place his forehead and hands directly [on the ground] so as to exit from disagreement and to take the strict course (*ʿazīmah*)."[1007]

The examples of this in our madhhab—as in others—are innumerable; indeed, university theses have been written on observing disagreement within the madhhab.

ويسوغ أيضا أن يترك الإنسان الأفضل لتأليف القلوب واجتماع الكلمة خوفا من التنفير.

Nor is the matter confined to taking precautions; rather, at times the more virtuous is left and the less virtuous—or even the disliked—is done to unite the word and reconcile hearts. Imām Taqī al-Dīn said: "It is also permissible for a person to leave what is best in order to reconcile hearts and unite the word, out of fear of alienation."[1008]

He also said: "If the imām holds the view of separation, while the congregants choose that he pray *witr* like *maghrib*, and he agrees with them to reconcile their hearts, he has done well—just as the Prophet ﷺ said to ʿĀʾishah: 'Were it not that your people are recently removed from Jāhiliyyah, I would demolish the Kaʿbah, bring it down to the ground, and make for it two doors: a door by which the people enter

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[1003] "If the first ijtihād was accompanied by a fatwā upon which action was taken, two possibilities arise: the action is not overturned in marriage or otherwise, because acting upon a fatwā is treated like a judicial ruling; or it is overturned in matters other than marriage, distinguishing marriage because of its special characteristics and the Sharīʿah's concern to facilitate it." *Sharḥ Mukhtaṣar al-Rawḍah, al-Ṭūfī, 3:649.*

[1004] *Kashshāf al-Qināʿ*, al-Buhūtī, 7:231.

[1005] *al-Mughnī*, Ibn Qudāmah, 1:280.

[1006] *al-Mughnī*, Ibn Qudāmah, 1:448.

[1007] *al-Mughnī*, Ibn Qudāmah, 2:199.

[1008] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 22:436.

and a door by which they exit.' Thus he left what was, in his view, more excellent, so that the people would not be repelled."[1009]

There is no doubt that the maxim is not without exception; rather, it applies where it is possible to combine matters by acting upon the more precautionary view, provided that the basis of the opposing view is not extremely weak, and that acting upon it does not entail abandoning what is preponderant in the madhhab, and it does not entail contravening an established Sunnah or falling into another legally significant disagreement.

التصرف على الرعية منوط بالمصلحة

## The Ruler's Exercise of Authority over the Subjects Is Contingent upon Their Welfare

Alternative Expressions:

«تصرف الولي منوط بالمصلحة»

- *"The acts of the guardian are bound to the interest (of those under his care)."*[1010]

«اجتهاد الأئمة وولاة الأمور، بحسب المصلحة في كل زمان ومكان»

- *"The ijtihād of rulers and those in authority varies according to the interest in every time and place."*[1011]

Explanation:
*al-Raʿiyyah* in language refers to the general populace under the care of a ruler. *Manūṭ* is a passive participle, meaning 'suspended' or 'linked/attached.' The meaning of the maxim is that the conduct of the ruler—or of anyone entrusted with the affairs of the Muslims—must be founded upon the realization of the public interest (*maṣlaḥah ʿāmmah*), such that the decisions aim at the welfare and benefit of the community; otherwise, they are invalid.

Al-Zarkashī's wording includes everyone entrusted with responsibility—such as a parent, a guardian of an orphan, or others. Authority (*wilāyah*) may be general or specific, and specific authority may pertain either to the person or to property.

This maxim defines the limits of the actions of those charged with public affairs—such as the ruler, the governor, the judge, and likewise all persons holding power or managing people's interests, including public officials, parents, and guardians of orphans, and even the imām of a local congregation. Their actions must be based on the welfare of those under their charge. If the authority is general, he must ensure justice for the community, protect rights, and combat corruption; it is impermissible to use authority for favoritism or personal gain.

Evidences of the Maxim

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[1009] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 22:268.

[1010] Sharḥ al-Zarkashī, al-Zarkashī, 3:664.

[1011] Iʿlām al-Muwaqqiʿīn, Ibn al-Qayyim, 2:84.

"إِنَّ اللَّهَ يَأْمُرُكُمْ أَن تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُم بَيْنَ النَّاسِ أَن تَحْكُمُوا بِالْعَدْلِ ۚ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُم بِهِ ۗ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا."

1. Allah, Exalted, says: “Indeed, Allah commands you to render trusts to whom they are due, and when you judge between people to judge with justice. Excellent indeed is that with which Allah instructs you; truly, Allah is All-Hearing, All-Seeing.” (al-Nisāʾ: 58)

"وَلَا تَقْرَبُوا مَالَ الْيَتِيمِ إِلَّا بِالَّتِي هِيَ أَحْسَنُ"

2. “Do not approach the property of the orphan except in the manner that is best.” (al-Anʿām: 152)

"مَا مِنْ عَبْدٍ يَسْتَرْعِيهِ اللَّهُ رَعِيَّةً فيمُوتُ وَهُوَ غَاشٌّ الرعيَّةَ، إلا حَرَّمَ اللَّهُ عَلَيْهِ الجَنَّة."

3. The Prophet ﷺ said:
“No servant to whom Allah entrusts a flock of people dies while cheating them, but Allah will forbid Paradise to him.” (Agreed upon)

"مَا مِنْ أَمِيرٍ يَلِي أَمْرَ الْمُسْلِمِينَ ثُمَّ لَا يَجْهَدُ لَهُمْ وَيَنْصَحُ إِلَّا لَمْ يَدْخُلْ مَعَهُمْ الْجَنَّةَ."

4. The Prophet ﷺ also said:
“No ruler who governs the affairs of the Muslims and does not strive for them and sincerely advise them will enter Paradise with them.” (Muslim)

«إِنِّي أَنْزَلْتُ نَفْسِي مِنْ مَالِ اللَّهِ عز وجل بِمَنْزِلَةِ وَلِيِّ اليَتِيم، إِنِ احْتَجْتُ أَخَذْتُ مِنْهُ، فَإِذَا أَيْسَرْتُ رَدَدْتُه، وَإِنِ اسْتَغْنَيْتُ اسْتَعْفَفْتُ»

5. ʿUmar ibn al-Khaṭṭāb (rAa) said:
“I have likened myself in regard to the property of Allah to the guardian of an orphan: if I am in need, I take from it; when I am able, I repay it; and if I am rich, I abstain from it.” (Reported by Saʿīd ibn Manṣūr, al-Bayhaqī, and al-Dārimī)

فإن وصي اليتيم، وناظر الوقف، ووكيل الرجل في ماله؛ عليه أن يتصرف له بالأصلح فالأصلح، كما قال الله تعالى: {ولا تقربوا مال اليتيم إلا بالتي هي أحسن} [الإسراء: 34]. ولم يقل إلا بالتي هي حسنة.

6. The principle itself is one of scholarly consensus. Imām Taqī al-Dīn Ibn Taymiyyah said:
“The Muslims have unanimously agreed upon the meaning of this: for the guardian of an orphan, the supervisor of a *waqf*, and an agent appointed over a man’s property—it is incumbent upon them to act for his best and most beneficial interest, as Allah said: {Do not approach the property of the orphan except in the manner that is best} (al-Isrāʾ: 34). He did not say, ‘in a manner that is good.’ For the ruler is a shepherd over the people, like a shepherd over his flock.”[1012]

Applications

- It is obligatory to choose what is best for the Muslims in appointing rulers and everyone who manages their affairs. In this sound meaning—though transmitted through a weak chain—it is

[1012] Al-Siyāsah al-Sharʿiyyah fī Iṣlāḥ al-Rāʿī wa-l-Raʿiyyah, Ibn Taymiyyah, 10.

narrated from Ibn ʿAbbās that the Messenger of Allah ﷺ said:
"Whoever appoints a man from a group while among them there is one more pleasing to Allah than him has betrayed Allah, His Messenger, and the believers." (al-Ṭabarānī)

- It is impermissible for a ruler to appoint a corrupt person over the property of an orphan. As for a supervisor appointed by the founder of a waqf, "if the *waqif* appointed him while he was corrupt, or appointed him while upright and he later became corrupt, an honest person is joined with him to safeguard the *waqf*, but his hand is not removed, since this allows for the reconciliation of both rights."[1013]
- "It is not for the imām to dismiss a judge without any change in his state, and the judge is not dismissed if the imām dismisses him; unlike the deputy of a judge, whose appointment is tied to the judge himself, and thus the judge may remove him."[1014]
- It is not for the imām to grant permission for what harms the Muslims; and if he does so, he is liable for what perishes thereby, for his having transgressed.[1015]
- "It is not appropriate for the imām to grant any part of unowned land (*al-mawāt*) except what the grantee can cultivate, because granting more than that would restrict the people in a common right among them."[1016]
- "He (the imām) may grant the right to sit for trade or sale in a wide street or in an open courtyard of a mosque that is not enclosed, provided it does not harm the people; for the imām has no right to permit what is devoid of benefit, much less what entails harm."[1017]
- The ruler may institute regulations and administrative systems required by the interests and needs of the Muslims. ʿUmar established the state registers (*dawāwīn*), founded cities, refrained from dividing conquered lands and made them subject to *kharāj*, and the Companions built prisons. Imām Taqī al-Dīn Ibn Taymiyyah said:
"The general and specific offices of authority, and what the holder of authority acquires by virtue of it, are derived from language, circumstances, and custom; and there is no fixed limit for that in the Sharʿ. In some times and places the duties of judges may include those of military command, and vice versa. Likewise for the *ḥisbah* and the administration of public funds."[1018]

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[1013] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 7:218.

[1014] al-Mughnī, Ibn Qudāmah, 14:84.

[1015] "Likewise, if someone places a stone, or sets a trap, a net, or a sickle in order to hunt with it, and he does so in a narrow passageway, then he is liable (ḍāmin) for anything that is destroyed as a result—because he is considered transgressive (mutaʿaddī). This ruling applies regardless of whether the ruler (imām) authorized it or not, for the imām has no authority to permit what harms the Muslims. Even if the imām himself were to do such a thing, he would be liable for what is damaged by it—because he too would be transgressing." al-Mughnī, Ibn Qudāmah, 12:89.

[1016] al-Mughnī, Ibn Qudāmah, 8:165.

[1017] Al-Rawḍ al-Murbiʿ, al-Buhūtī, 2:451.

[1018] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 28:68.

- The ruler may conclude truces or agreements with non-Muslims when this achieves the public interest.[1019]
- "It is not for the imām to delay the prayer beyond its recommended time and after most of the congregation has gathered, waiting for someone; rather, he is forbidden to do so if it causes hardship, and he must give consideration to the congregation."[1020]
- If the *nāẓir* (trustee) of a *waqf* leases it for less than the customary rent: "He is liable for the difference that is not usually overlooked, if the beneficiary is other than himself, for he acts in another's property in a manner requiring diligence in benefit."[1021]
- The guardianship of the nearest guardian is removed if he prevents the woman under his care from marriage (*ʿaḍl*).[1022]

فعلى كل من الراعي والرعية للآخر حقوق يجب عليه أداؤها كما ذكر بعضه في "كتاب الجهاد والقضاء" وعليه أن يصبر للآخر ويحلم عنه في أمور؛ فلا بد من السماحة والصبر في كل منهما

We conclude with a precious statement of Imām Abū al-ʿAbbās (Ibn Taymiyyah) concerning *governance according to the Sharīʿah*:

"Just as it is obligatory upon rulers to be patient with the harm and injustice of the subjects when the public interest cannot be achieved except thereby—since abandoning such patience would lead to greater corruption—so too it is obligatory upon the subjects to be patient with the tyranny and injustice of the rulers, if abandoning patience would result in greater corruption. Thus, each of the ruler and the ruled owes the other rights which he must fulfill, as mentioned in the *Book of Jihād and Judiciary*. Each must also be patient and forbearing toward the other in certain matters; there must be generosity and patience on both sides, as Allah, Exalted, said: {and enjoined one another to patience, and enjoined one another to mercy} (al-Balad: 17). And in the ḥadīth: 'The best of faith is generosity and patience.' Among the Names of Allah are al-Ghafūr and al-Raḥīm. By his forbearance he pardons their sins, and by his generosity he brings them benefits—thus combining the bringing of benefit and the repelling of harm. As for refraining from wronging them and maintaining justice toward them, the obligation of that is even more manifest, and requires no elaboration. And Allah knows best."[1023]

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[1019] "They are to be prohibited from bearing arms, and from establishing new churches, chapels, gathering places for communal worship, or monastic cells for monks— unless it was stipulated as a condition in territory opened by treaty (ṣulḥ)." Muntahā al-Irādāt with the marginalia of Ibn Qāʾid, Ibn al-Najjār, 2:244.

[1020] Al-Mustadrak ʿalā Majmūʿ Fatāwā Shaykh al-Islām, Ibn Taymiyyah, 3:120.

[1021] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:416.

[1022] "If the closest relative with guardianship (wilāyah) obstructs marriage (ʿaḍala), or is unfit to serve as a guardian—such as being openly sinful (fāsiq) or similar—or if he is traveling beyond the distance that permits shortening the prayer (masāfat al-qaṣr), but not if he is traveling less than that, then a more distant guardian may arrange the marriage of a free woman." Al-Fawāʾid al-Muntakhabāt fī Sharḥ Akhṣar al-Mukhtaṣarāt, ʿUthmān ibn ʿAbd Allāh ibn Jāmiʿ, 3:293.

[1023] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 21:108.

## A Presumed Guarantee of Safety Is Treated as Its Reality

This is the explicit statement of Imām Abū al-ʿAbbās Ibn Taymiyyah (rA).[1024]

Imām Ibn Rajab said:
"Among its examples: if we grant safety (*amān*) to one person from a fortress, or if one of them embraces Islam, and the rest claim it, it becomes prohibited to kill them by consensus. As for enslaving them, there are two views: the first—which is the explicit one—is that it is prohibited along with their joint claim; the second is that one of them is selected by lot, and the rest are enslaved."[1025]

Regarding the security, the one granting it, and its formulations, Imām Abū al-Khaṭṭāb (rA) said: "The grant of safety (*amān*) by any sane Muslim is valid, whether male or female, free or enslaved. Our companions differ concerning the discerning minor (*ṣabī mumayyiz*): some say his grant of safety is valid by a single narration, while Ibn Ḥāmid held that there are two narrations on the matter. The *amān* of a prisoner in enemy territory is also valid if he grants it without coercion. And whoever says to a polytheist: 'Stop and lay down your weapon,' or, 'There is no harm upon you,' or says *matras* (in Persian), that counts as *amān*, just like saying, 'I grant you safety' or 'You are secure.'
If the imām grants safety to one person from among the people of a fortress, and when the fortress is opened each of them claims that the *amān* was for him, and the matter is unclear to the imām, it becomes prohibited for him to kill or enslave them."[1026]

## Evidence is required of the claimant, and the oath is upon the one who denies, in all rights, claims, and similar matters

البينة على المدعي واليمين على من أنكر في جميع الحقوق والدعاوى ونحوها

This is the tenth of al-Siʿdī's maxims, and its meaning is clear: whoever claims an entitlement or something in the possession of another must establish proof for it—that is, *al-bayyinah*. And *bayyinah* "in the discourse of God, His Messenger ﷺ, and the Companions (rAa) is a term for anything that clarifies the truth."[1027]

The wording of the maxim encompasses rights and all types of claims, which makes it an epistemic maxim as well. It is not confined to adjudication and rules of evidence, but extends to the broader methodology of inquiry, weighing proofs, and managing disagreement.

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[1024] Al-Ṣārim al-Maslūl ʿalā Shātim al-Rasūl, Ibn Taymiyyah, 287.

[1025] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:327.

[1026] Al-Hidāyah ʿalā Madhhab al-Imām Abī ʿAbd Allāh Aḥmad ibn Muḥammad ibn Ḥanbal al-Shaybānī, Abū al-Khaṭṭāb al-Kulūdhānī, 213.

[1027] Iʿlām al-Muwaqqiʿīn, Ibn al-Qayyim, 1:71.

الْبَيِّنَةُ عَلَى الْمُدَّعِي، وَالْيَمِينُ عَلَى مَنْ أَنْكَرَ

This maxim is a matter of consensus due to the clarity of its evidence. Among them:
The Prophet ﷺ said: "Evidence is upon the claimant, and the oath is upon the one who denies."[1028]

لَوْ يُعْطَى النَّاسُ بِدَعْوَاهُمْ لَادَّعَى نَاسٌ دِمَاءَ رِجَالٍ وَأَمْوَالَهُمْ، وَلَكِنَّ الْيَمِينَ عَلَى الْمُدَّعَى عَلَيْهِ

And he ﷺ said, as narrated in both Ṣaḥīḥs from Ibn ʿAbbās: "If people were granted [claims] merely by what they allege, some would claim the blood and wealth of others. But the oath is upon the one who is being claimed against."

Also in the two Ṣaḥīḥs from al-Ashʿath ibn Qays: "There was a dispute between me and another man concerning a well. We brought it before the Messenger of Allah ﷺ, and he said: (Your two witnesses or his oath). I said: 'Then he will swear and not care.' So the Messenger of Allah ﷺ said: (Whoever swears an oath in order to unjustly take wealth, while lying, will meet Allah while He is angry with him)."

And from Ibn ʿAbbās, reported by al-Bukhārī: "Hilāl ibn Umayyah accused his wife before the Prophet ﷺ of adultery with Sharīk ibn Saḥmāʾ. The Prophet ﷺ said: '[Bring] the evidence, or [face] the ḥadd on your back.' He said: 'O Messenger of Allah, if one of us sees a man upon his wife, should he go seeking evidence?' And the Prophet kept repeating: 'The evidence, or the ḥadd on your back.'

Their explanation of "evidence is upon the claimant":

Know that the Ḥanbalī madhhab—indeed the majority—is of the view that *bayyinah* (valid evidence) is limited to specified cases they enumerated, though there is disagreement in some of them.

Some scholars of the madhhab listed seven categories of what is testified to, and what kind of testimony is accepted therein. Ibn al-Najjār said in *al-Muntahā*:

"Chapter: Categories of what may be testified to—and they are seven:
First: Zinā and what necessitates its ḥadd; four male witnesses are required...

Second: If one known to be wealthy claims to be poor, then three male witnesses are required.

Third: Equal retribution, insolvency, intercourse necessitating taʿzīr [discretionary punishment only], and other ḥudūd—two male witnesses are required …

Fourth: What is neither a punishment nor financial in nature but is commonly observed by men, such as marriage, return [in ṭalāq], khulʿ, lineage, walāʾ (allegiance due to manumission), and likewise agency and appointment of an executor in non-financial matters—same as the previous one.

Fifth: Wealth and what relates to wealth, such as loans, pledges, deposits, usurpation, lease, partnership, transfer of debt, settlements, gifts, manumission, kitābah [contractual manumission for payment], tadbīr [manumission stipulated to take effect upon the owner's death], dowry and its specification, the slave

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[1028] It was narrated by al-Bayhaqī in his Sunan from Ibn ʿAbbās (rAa), who said: "The Messenger of Allah ﷺ said: 'If people were given [claims] merely on the basis of their statements, men would claim the wealth and blood of others. Rather, the burden of proof is upon the claimant, and the oath is upon the one who denies.'"
And in Jāmiʿ al-ʿUlūm wa-l-Ḥikam it states: "Imām Aḥmad and Abū ʿUbayd used as evidence the statement of the Prophet ﷺ: 'The burden of proof is upon the claimant, and the oath is upon the one who denies.' This indicates that, according to them, the wording is authentic and legally reliable." Jāmiʿ al-ʿUlūm wa-l-Ḥikam, Ibn Rajab, 2:227.

status of a person whose status is unknown, borrowing, preemption, destruction of wealth, liability, agency and appointment of an executor concerning it, bequest to a specific person, waqf for them, sale, its deferred terms, options therein, and accidental or intentional injuries not amounting to equal retribution (qiṣāṣ). These are established by:

[1] Two male witnesses,

[2] Or one man and two women,

[3] Or one man and an oath—but not two women and an oath. The testimony must be presented first. If the one bringing a single witness refuses to swear, the defendant swears and the claim falls. But:

[4] If the defendant refuses to swear, judgment is passed against him. And if a group has a right supported by a single witness whom they present, then whoever among them swears takes his share, and he is not joined by the one who does not swear, nor are the heirs of one who refused to swear themselves made to swear.

Sixth: illness in an animal, bone-exposing wound, and similar cases—accepted is the testimony of one physician or veterinarian, due to the lack of others qualified in that knowledge. If not difficult, then two are required. If they differ, the one affirming is preferred over the one negating.

Seventh: What men typically do not witness, such as defects in women beneath their clothing, nursing, signs of life at birth, virginity, defloration, menstruation, and the like—also wounds and other things in baths, weddings, and similar gatherings not attended by men. In such cases, one upright woman suffices, though two are safer. If one man testifies, it is even better due to his completeness."[1029]

Also recognized in the madhhab are: judgment based on possession, *qasāmah (a legal procedure involving multiple oaths to establish guilt in murder cases when no direct evidence is available)*, description in claiming lost property, *qiyāfah* (physiognomy) in cases of disputed parentage.

They sometimes ruled based on circumstantial evidence (*qarāʾin*) and customary practice (*ʿādah*),[1030] although their predominant practice was not to judge by circumstantial indicators.[1031]

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[1029] Muntahā al-Irādāt with the marginalia of Ibn Qāʾid, Ibn al-Najjār, 5:372.

[1030] "If a husband and wife—or their heirs, or one of them and the heirs of the other, even if one of them is a slave—dispute over household goods and the like, or over part of them, then:

Items typically used by men, such as turbans and swords, are allocated to the man;

Items typically used by women, such as their jewelry and garments, are allocated to the woman;

The muṣḥaf is given to the man if she does not read;

And items commonly used by both, such as bedding and utensils…, are to be divided between them." Al-Iqnāʿ, al-Ḥajjāwī, 4:422.

[1031] "No preference is given on account of a wooden beam placed on the disputed wall, because neighbors customarily tolerate such things. (...) Nor is preference given based on the face of bricks or stones, ornamental plasterwork, plastering, or fastening loops in a thatched enclosure, because of the general principle in the Prophet's ﷺ statement: 'The burden of proof is upon the claimant, and the oath is upon the one who denies.'" Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 11:359.

البَيِّنَةُ هي كل ما يُبَيِّن الحقّ.

Now that we have established the authoritative view in the madhhab according to the conventional formulation, know that the two imāms, Taqī al-Dīn Ibn Taymiyyah and Shams al-Dīn Ibn al-Qayyim—and many contemporary scholars—opted not to restrict *bayyināt* to the customary evidentiary means mentioned above. They said: "*Bayyinah* is anything that clarifies the truth."[1032]

فقوله ﷺ: "البَيِّنَة على المُدَّعِي" أي: عليه أن يُظهر ما يُبيِّن صحَّة دعواه، فإذا ظهر صدقه بطريق من الطرق، حُكم له.

Ibn al-Qayyim said: "The Prophet's ﷺ statement: 'Evidence is upon the claimant' means that he must present something that shows the validity of his claim. If his truthfulness appears through any means, judgment is given in his favor."[1033]

فطرق الحكم شيء، وطرق حفظ الحقوق شيءٌ آخر..

He also said: "There is nothing in the Qurʾān indicating that judgment is limited to two witnesses, or one witness and two women. Allah, exalted is He, merely instructed right-holders to safeguard their rights through such means. He did not instruct judges to rule on that basis—much less to rule exclusively by it. This is why the judge may rule based on refusal to swear, a returned oath, a single woman, women testifying alone with no men, *maʿāqid al-qumuṭ* (knots of straps used to fasten the huts made of reeds), *wujūh al-ājurr* (the surfaces of bricks), and other forms of adjudication not mentioned in the Qurʾān... Thus, the methods of judgment are one thing, and the means of safeguarding rights are another..."[1034]

They both cited numerous evidences, which I presented—following the evidences of the majority—in the section on the probative value of material evidence from the book *The Impact of the Advancement of Medical Knowledge on the Evolution of Fatwā and Judicial Rulings*. [1035]
And since this is not the place to fully present their proofs and those of their opponents with due fairness, we wish to clarify a few points.

First: the two imāms were not alone in espousing this view. Although they were the most expansive in applying circumstantial evidence, Ibn Farḥūn also held this view,[1036] followed by the rest of the Mālikīs—albeit with varying degrees—then Ibn al-Ghars from the Ḥanafīs,[1037] and some Ḥanbalīs. There is even a narration from Aḥmad allowing reliance upon it in some ḥudūd cases. The Shāfiʿīs come after the Mālikīs and Ḥanbalīs in their application of such evidence, followed by the Ḥanafīs, also with variance among them.
Indeed, Shaykh Shaltūt (rA) said: "One must hasten to recognize that a review of the works of the imāms shows consensus on the principle of relying on circumstantial evidence in adjudication. The

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[1032] Ighāthat al-Lahfān fī Maṣāyid al-Shayṭān, Ibn al-Qayyim, 2:748.

[1033] Al-Ṭuruq al-Ḥukmiyyah fī al-Siyāsah al-Sharʿiyyah, Ibn al-Qayyim, 1:64.

[1034] Al-Ṭuruq al-Ḥukmiyyah fī al-Siyāsah al-Sharʿiyyah, Ibn al-Qayyim, 1:359.

[1035] Athar Taṭawwur al-Maʿārif al-Ṭibbiyyah, Hatem al-Haj, 583.

[1036] Tabṣirat al-Ḥukkām fī Uṣūl al-Aqḍiyah wa-Manāhij al-Aḥkām, Ibn Farḥūn, part two, on the types of evidence.

[1037] Ḥāshiyat Ibn ʿĀbidīn (Radd al-Muḥtār ʿalā al-Durr al-Mukhtār), Ibn ʿĀbidīn, 5:354.

school most expansive in accepting it is the Mālikī madhhab, followed by the Ḥanbalī, then the Shāfiʿī, then the Ḥanafī. In fact, there is scarcely a single Islamic school of law that is devoid of some application of circumstantial indicators, even among those who have verbally denied them."[1038]

والمرأة العدل كالرجل في الصدق والأمانة والدِّيانة، إلَّا أنَّها لما خيف عليها السهو والنسيان قُوِّيت بمثلها، وذلك قد يجعلها أقوى من الرجل الواحد أو مثله، ولا ريبَ أنَّ الظنَّ المستفاد من شهادة أم الدرداء وأم عطية أقوى من الظن المستفاد من رجلٍ واحدٍ دونهما ودون أمثالهما.

Second: Allah commanded that two women testify in place of one man in financial matters for a reason unrelated to their religiosity or trustworthiness. Rather, Imām Ibn al-Qayyim (rA) said: "A just woman is like a man in truthfulness, trust, and religiosity. But because she may be prone to forgetfulness or error, she is reinforced with another of her kind. This may make her testimony stronger than that of a single man or equal to it. There is no doubt that the probable judgment derived from the testimony of Umm al-Dardāʾ and Umm ʿAṭiyyah is stronger than that derived from a single man who is below them and their likes."[1039]

Third: As crimes have come to take on multiple methods and forms, it has been by Allah's grace upon humanity—for the sake of establishing justice and spreading security—that forensic and evidentiary tools in the judiciary have advanced.
Failure to recognize these beneficial tools in implementing justice within the Islamic judiciary will bring harm upon our societies, due to the inability to deter criminals whose schemes and methods have increased and diversified.
Among the resulting harms that must not be overlooked are: the gloating of Islam's enemies and their vilification of the Islamic judiciary.
And among the gravest of harms—indeed the gravest—is the alienation of rulers and statesmen from the Islamic judiciary when they see that it does not engage with new realities, nor meet the people's needs for justice and the deterrence of criminals. This may lead them to govern by their own policies without referring to the noble sharīʿah.

Their statement regarding "the oath is upon the one who denies":

Know that they place the oath upon the defendant and judge against him if he refuses to swear. However, they exclude certain matters, as mentioned by the author of *al-Muntahā*, who said:

"The defendant is made to swear in every right of another person, except in the case of marriage, return from revocable divorce, divorce itself, *īlāʾ* (a husband's oath to abstain from marital relations), the original establishment of slave status, such as a claim that a foundling is enslaved, *walāʾ* (allegiance due to manumission), *istīlād* (establishing that an enslaved woman bore her owner's child), lineage, qadhf (false accusation of zinā or adultery), and equal retribution (*qiṣāṣ*)—except in *qasāmah* (a murder oath procedure). Judgment is issued in financial matters and those related to them if the defendant refuses to

[1038] *Majallat Majmaʿ al-Fiqh al-Islāmī*, "al-Ṭuruq al-Ḥukmiyyah fī al-Qarāʾin ka-Wasīlah Ithbāt Sharʿiyyah," Ḥasan ibn Muḥammad Safar, 3:350.

[1039] Al-Ṭuruq al-Ḥukmiyyah fī al-Siyāsah al-Sharʿiyyah, Ibn al-Qayyim, 1:429.

swear. No oath is administered in rights pertaining to Allah, such as ḥudūd (fixed legal punishments), acts of worship, charity, expiation, or vows …"[1040]

What he mentioned is the [Ḥanbalī] madhhab, and it is the agreed-upon position regarding acts of worship and ḥudūd. However, in matters other than these, it has been said that the defendant is made to swear, and if he refuses, the oath is then transferred to the claimant; if the claimant swears, judgment is passed in his favor.

## Whoever is first to unowned and unassigned things has the stronger claim to them

من سبق إلى المباحات فهو أحق بها

This is the twenty-fourth of al-Siʿdī's maxims.

Explanation of the maxim:

This maxim is, in general, agreed upon. It means that things unowned and unassigned to anyone whose property is inviolable—whether Muslim or dhimmī—and whose taking entails no harm or infringement of others' rights, belong to whoever reaches them first. Thus, whoever is first to make use of a permissible thing, such as grazing land, water, or dead land, has a stronger claim to it than anyone else.

Proofs for the maxim:

مَن سبَقَ إلى ما لَم يَسبِقْ إليه مُسلِمٌ فهو أحقُّ بِهِ.

1. What Abū Dāwūd narrated from Asmar ibn Muḍarris from the Messenger of Allah ﷺ: "Whoever is first to something to which no Muslim has yet laid claim, he has a stronger right to it." Though the ḥadīth is weak, it is acted upon.

مَنْ أَعْمَرَ أَرْضاً لَيْسَتْ لأحَدٍ فَهُوَ أَحَقُّ.

2. Al-Bukhārī narrated from ʿĀʾishah (rAa) that the Prophet ﷺ said: "Whoever revives land that belongs to no one has a stronger claim to it."

الْمُسْلِمُونَ شُرَكَاءُ فِي ثَلَاثٍ: الْمَاءِ، وَالْكَلَإِ، وَالنَّارِ

لا تَمْنَعُوا فَضْلَ الماءِ لِتَمْنَعُوا به فَضْلَ الكَلَإِ.

3. It is also narrated from Ibn ʿAbbās and Ibn ʿUmar that the Prophet ﷺ said: "Muslims are partners in three things: water, grazing land, and fire." In the narration of Ibn ʿAbbās: "Its sale is unlawful." The most balanced view concerning these reports is that of al-Shawkānī, who said: "The ḥadīths on this topic are strengthened collectively."
   These narrations show that when such resources are found in unowned land, priority is given to the one who reaches them first. If they are on owned land, the owner has the right of precedence, but he should not prevent others from its surplus so long as there is no harm, based on the marfūʿ

[1040] Muntahā al-Irādāt with the marginalia of Ibn Qāʾid, Ibn al-Najjār, 5:384.

ḥadīth of Abū Hurayrah: “Do not withhold surplus water in order to withhold surplus grazing,” agreed upon.

Applications of the Maxim:

1. Revival of dead land (iḥyāʾ al-mawāt): This refers to “land free from any form of assignment or ownership by someone whose property is inviolable.”[1041] Whoever revives it becomes its owner.[1042] Revival is established by “enclosing it with a wall that customarily provides protection, whether intended for building, cultivation, or a livestock enclosure; or channeling water without which it cannot be cultivated; or keeping out what prevents its cultivation; or removing rocks or trees that prevent its cultivation; or digging a well; or planting trees therein.”[1043]
2. Priority in shared spaces: Such as sitting in mosques, participating in study circles, or occupying public places for buying and selling—whoever arrives first at a permissible location has a stronger claim to it, so long as he does not vacate it.
3. Priority in using river water: When people dispute over the use of water from a river or public stream, priority is given to the one irrigating land first at the river’s head, after which the water flows to his neighbor.
4. Priority in land or sea hunting: Whoever is first to a permissible hunt has a stronger claim to it, so long as he does not infringe upon others’ rights.
5. Use of shared resources: Such as water, grazing land, and fire, as mentioned in the ḥadīth above, and also flowing minerals “from which, when something is taken, more replaces it, like oil or tar.”[1044] If these are found in unowned land, people are partners in them, and priority is given to the first user. If located in owned land, the landowner has a stronger claim—but he may not prevent others from benefiting from any surplus beyond his need, provided it causes no harm.[1045]

In his commentary on *al-Qawāʿid al-Siʿdiyyah*, Shaykh al-Quʿaymī offers a useful summary regarding shared resources, stating:

“These matters fall into three categories in the madhhab:

First: If they are in unowned land, whoever reaches them first has a stronger claim.

Second: If one collects them in vessels or containers—such as water in jars, or grass in sacks or boxes—then he owns them by virtue of that action and may lawfully sell them.

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[1041] Ghāyat al-Muntahā, Marʿī al-Karmī, 1:803.

[1042] Ghāyat al-Muntahā, Marʿī al-Karmī, 1:803.

[1043] Ghāyat al-Muntahā, Marʿī al-Karmī, 1:805.

[1044] Kashshāf al-Qināʿ, al-Buhūtī, 9:445.

[1045] “Whatever remains of a person’s water that lies settled at the bottom of a spring or well, he is obligated to offer it to the livestock of others—if no other permissible water is available and he would suffer no harm from doing so—regardless of whether the pasture is nearby or distant. He is also obligated to give it for irrigating the crops of others so long as allowing access does not harm him, such as by their entering his land. However, if such access would harm him, or if he possesses rainwater stored on his property and fears becoming thirsty, then there is no harm in withholding it. The same applies if he has already collected the water in a container.” Al-Iqnāʿ, al-Ḥajjāwī, 2:387.

Third: If they are on his property, he does not automatically own them, but he has priority over others. If some surplus remains—[he adds:] and perhaps the intended time frame is that same day, such as watering a field and finishing on the same day—then it is forbidden to withhold it from one who seeks permission without causing harm. In that case, it may not be sold, and whoever takes it owns it under two conditions:

1. That he does not enter except with the owner's permission, and the owner is not harmed thereby.
2. That the owner is not in need of it.
   Included under these three categories are spring and well water on one's land, rainwater gathered on private property, flowing minerals such as oil or salt, and even birds nesting on his land—he does not own them merely by their presence, and it is not lawful to sell them."[1046]

## Whoever has a right over another, and the basis of that right is manifest, may take from his wealth an amount equal to his due

من له الحق على الغير وكان سبب الحق ظاهرًا فله الأخذ من ماله بقدر حقه

من له الحق على الغير وكان سبب الحق ظاهرًا فله الأخذ من ماله بقدر حقه إذا امتنع أو تعذر استئذانه وإن كان السبب خفيا فليس له ذلك

The wording of the forty-sixth of al-Siʿdī's maxims states:
"Whoever has a right over another, and the basis of that right is manifest, may take from his wealth an amount equal to his due if the other refuses or it is not possible to seek his permission. But if the basis is hidden, then he may not do so."

ومنها: أنَّه يجوز استيفاء الحقِّ من مال الغريم إذا كان ثَمَّ سبب ظاهر يحال الأخذ عليه، ولا يجوز إذا كان السَّبب خفيًّا، هذا ظاهر المذهب.

Ibn Rajab stated under the thirteenth maxim: "Among them is that it is permissible to recover one's right from the debtor's wealth when there is a manifest basis upon which to act, but it is not permissible if the basis is hidden. This is the apparent position of the madhhab."[1047]

Clarification:

This maxim establishes that if one has a right over another, and the basis of that right is manifest and well-known, it is permissible for him to take from the other's wealth an amount equal to his due without permission—if the latter refuses to pay or it is not possible to seek his permission. However, if the basis of the right is hidden and not apparent, it is not permissible to take from his wealth without his knowledge, for such an act would appear as treachery.

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[1046] Sharḥ al-Qawāʿid al-Siʿdiyyah, al-Quʿaymī, 301.

[1047] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:115.

Proofs:

خُذي ما يكفيكِ وولدَكِ بالمعروفِ

• The ḥadīth of Hind bint ʿUtbah (rAa), reported in both Ṣaḥīḥ al-Bukhārī and Ṣaḥīḥ Muslim. She said to the Prophet ﷺ: "Abū Sufyān is a miserly man—do I incur sin if I take from his wealth secretly?" The Prophet ﷺ replied: "Take what is sufficient for you and your children, in fairness." Since the obligation of maintenance was based on a manifest reason, she was permitted to take without his consent.

أَدِّ الْأَمَانَةَ إِلَى مَنْ ائْتَمَنَكَ وَلَا تَخُنْ مَنْ خَانَكَ

• And the saying of the Prophet ﷺ: "Render back the trust to the one who entrusted you, and do not betray the one who betrays you" (narrated by Abū Dāwūd and al-Tirmidhī). This is cited as evidence for the prohibition of taking without permission when the basis of entitlement is hidden.

Applications of the Maxim:

1. Manifest Rights:

- Maintenance (nafaqah): A wife may take from her husband's wealth without his permission if he withholds maintenance or does not provide sufficiently in accordance with customary standards. This is permitted without a judicial ruling, because "the right of spousal support is continuous and ever-present, and resorting to the courts at every moment is burdensome—unlike the case of a creditor."[1048]
- The right of the guest: "If a guest is unable to obtain the amount due to him as obligatory hospitality through a judge, then he may take it by force."[1049]
- Openly usurped property: One may take back the usurped item or its equivalent by force, provided that doing so does not lead to strife.[1050]

2. Hidden Rights:

- Debt: If someone is owed a debt—such as a loan or the price of a sold item—it is not permissible for him to take from the debtor's wealth without his knowledge.[1051]
- Set-off between differing debts: "If each of the two parties owes the other a debt of a different kind, and one of them denies the other's claim, it is not permitted for the other to deny his own debt." As stated in *al-Targhīb*: this is akin to exchanging one debt for another, which is

[1048] Kashshāf al-Qināʿ, al-Buhūtī, 15:166.

[1049] Kashshāf al-Qināʿ, al-Buhūtī, 15:166.

[1050] "However, if his property was usurped openly, or the exact item that was taken is present with the usurper, then he may take an equivalent amount openly"—this was stated by Shaykh Taqī al-Dīn and others. "Or he may take back the exact item, even by force." It is added in al-Targhīb that this is permitted so long as it does not lead to civil strife (fitnah)." Kashshāf al-Qināʿ, al-Buhūtī, 15:166.

[1051] "If someone is owed a right by another person and is unable to obtain it through a judge, and he finds property belonging to the debtor, it is not permissible for him"—that is, it is prohibited "religiously to take an amount equivalent to his right." Kashshāf al-Qināʿ, al-Buhūtī, 4:333.

impermissible even if both parties agree. However, if both debts are of the same kind, set-off is allowed with conditions."[1052]

- Wage of a hired worker: If someone hires a worker and fails to pay his wage, the worker may not take from his employer's wealth without permission.

Ibn Rajab said: "It is permissible for a woman to take her maintenance and that of her child from her husband's wealth in accordance with customary standards, and for a guest who arrives at a people and is not hosted to take from their wealth the amount of his due hospitality in fairness—because when the cause is manifest, the one who takes is not regarded as treacherous; rather, his taking is attributed to the manifest cause. But if the cause is hidden, then taking is deemed an act of betrayal."[1053]

Ibn ʿUthaymīn distinguished between rights established by explicit Sharʿī texts—such as the wife's maintenance and the guest's due—where taking without permission is permissible, and rights established through transactional dealings—such as the wage of a hired worker—where taking without the knowledge of the one liable is not permissible.

One who examines the settled position of the later scholars in the madhhab will observe their concern for the manifestness of the cause, so that the one taking is not accused of betrayal, and their condition that the right be established through Sharʿī authority—as in the wife's maintenance and openly usurped property—as opposed to entitlements arising from transactions such as sale, loan, or lease. They also take into consideration the need to avert strife.

## Reconciliation/settlement is permissible among Muslims, except for a reconciliation that prohibits what is lawful or permits what is unlawful. And Muslims are bound by their conditions, except for a condition that prohibits what is lawful or permits what is unlawful.

"الصُّلْحُ جَائِزٌ بَيْنَ الْمُسْلِمِينَ، إِلاَّ صُلْحًا حَرَّمَ حَلاَلاً، أَوْ أَحَلَّ حَرَامًا،
وَالْمُسْلِمُونَ عَلَى شُرُوطِهِمْ، إِلاَّ شَرْطًا حَرَّمَ حَلاَلاً، أَوْ أَحَلَّ حَرَامًا"

In al-Siʿdī's maxims twenty-two and twenty-three:

الصلح جائز بين المسلمين إلا صلحًا أحلّ حرامًا أو بالعكس

- *Reconciliation is permissible among Muslims, except for a reconciliation that permits what is unlawful or the reverse*

والمسلمون على شروطهم إلا شرطًا أحلّ حرامًا أو بالعكس

- *And Muslims are bound by their conditions, except for a condition that permits what is unlawful or the reverse*

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[1052] Kashshāf al-Qināʿ, al-Buhūtī, 15:168.

[1053] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:115.

The phrasing of the chapter title is the exact wording of a ḥadīth of the Messenger of Allah ﷺ.[1054]

There is a strong connection between the two maxims—or rather, the two halves of the ḥadīth—so it is fitting to consider them together.

Al-Bukhārī narrated that Kaʿb ibn Mālik demanded repayment of a debt owed to him by Ibn Abī Ḥadrad during the time of the Messenger of Allah ﷺ, and they raised their voices in the mosque until the Prophet ﷺ heard them from his room. He came out, drew back the curtain of his chamber, and called out: "O Kaʿb!" He replied: "At your service, O Messenger of Allah." The Prophet ﷺ gestured with his hand, indicating: "Forgive half." So Kaʿb said: "I have done so, O Messenger of Allah." The Prophet ﷺ then said: *"Get up and repay him."*

رُدُّوا الْخُصُومَ حَتَّى يَصْطَلِحُوا، فَإِنَّ فَصْلَ الْقَضَاءِ يُورِثُ بَيْنَ الْقَوْمِ الضَّغَائِنَ

ʿUmar (rAa) said: *"Send the disputants back until they reconcile, for the finality of judgment breeds resentment among people."*[1055]

This remark of ʿUmar is well-known to anyone who has judged between people, for the ruling may rest on a disputed matter—such as ownership of a gift after acceptance but before possession—or similar transactional issues subject to multiple principles.

In reconciliation based on acknowledgment (ṣulḥ ʿan iqrār), the defendant admits to the plaintiff's claim and they settle. Out of strong concern to promote reconciliation, the majority of jurists even permitted reconciliation based on denial—and this is the adopted view of the madhhab.[1056] If one of the parties is lying, the settlement does not erase the sin of his lie, for the aim of reconciliation is to end disputes that usually arise from confusion. If the dispute stems from denial or obstinacy, the conflict is ended in this world, but the reckoning remains in the Hereafter.

Ending disputes in this life is an intended Sharʿī objective, and peace and harmony among people is a noble goal. Many honorable people willingly relinquish part of their rights, and it has even been said: *"No generous person has ever fully claimed his due."*

This, however, does not mean encouraging oppressors to encroach on people's wealth or steal their rights—for Islam neither promotes nor tolerates such behavior—but disputes may arise from ambiguity, and the greater interest may lie in ending them, even if the other party is wrongful or stubborn.

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[1054] It was narrated by al-Tirmidhī and Ibn Mājah from ʿAmr ibn ʿAwf, and al-Tirmidhī said, "ḥadīth ḥasan ṣaḥīḥ." Others also graded it ḥasan due to its corroborating reports. It was also narrated by Abū Dāwūd and Ibn Ḥibbān from Abū Hurayrah. There is no disagreement among the scholars concerning the soundness of its meaning.

[1055] Narrated by Muḥārib ibn Dithār, and reported by al-Bayhaqī in al-Sunan al-Kubrā through a disconnected chain. It was also narrated by ʿAbd al-Razzāq in his Muṣannaf with this wording, by Ibn Abī Shaybah with slight variation.

[1056] "The second category of the two types of ṣulḥ (settlement) involving wealth is settlement in the case of denial. This occurs when a person claims ownership of a specific item or debt from another, and the defendant either denies the claim or remains silent while being unaware of the item in question. The two parties then agree to settle the dispute for an immediate or deferred payment, because the claimant is effectively compelled to accept a delay due to the delay of the opposing party. The settlement is valid, according to the majority of scholars, due to the general statement of the Prophet ﷺ: 'Settlement between Muslims is permissible.'" Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 5:320.

٣٩- وكل شرط لازم للعاقد في البيع والنكاح والمقاصد

٤٠ - إلا شروطا حلّلت محرما أو عكسه فباطلات فاعلما

The second half of the ḥadīth, "Muslims are bound by their conditions," was expressed by Shaykh al-Siʿdī in his verse as follows:

39 – Every condition is binding on the contracting party in
sales, marriage, and all intended purposes.

40 – Except for conditions that render something forbidden lawful, or the reverse, so know that such are null and void.

﴿ يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓا۟ أَوْفُوا۟ بِٱلْعُقُودِ ﴾

أحق الشروط أن توفوا به ما استحللتم به الفروج

The default ruling in contracts and the conditions they contain is validity and binding force. Allah the Exalted says: "O you who believe, fulfill [all] contracts" (al-Māʾidah: 1), and the Messenger of Allah ﷺ said: "Muslims are bound by their conditions." This is not limited to financial transactions, for the Messenger of Allah ﷺ also said, as narrated by al-Bukhārī: "The conditions most deserving of being fulfilled are those by which you made the private parts lawful for yourselves." There is even stipulation in acts of worship, such as in iḥrām, and likewise in iʿtikāf, where, according to the madhhab, one may stipulate visiting the sick and attending funerals.[1057]

إِلَّآ أَن تَكُونَ تِجَٰرَةً عَن تَرَاضٍ مِّنكُمْ

Contracts and conditions fall under customary matters, and the default ruling concerning them is non-prohibition until evidence indicates prohibition. Fulfilling a condition is obligatory by both revelation and reason, especially after the contracting party has accepted it by choice. Allah says: "except when it is a trade conducted by mutual consent among you." In the ḥadīth of Jābir, he sold a camel to the Prophet ﷺ and stipulated that he could ride it to Madīnah, and the Messenger of Allah ﷺ forbade *thunyā* (stipulated exception from a sale) except when clearly specified. They said: conditions are a form of *thunyā*, so whenever conditions are known and specified, they are permissible. Nāfiʿ purchased a house in Makkah from Ṣafwān to use as a prison and stipulated ʿUmar's approval, thus suspending the contract on ʿUmar's consent.

Among the maxims related to this principle and clarifying its intent are:

«الأصل في العقود والشروط: الجواز والصحة ولا يحرم منها ويبطل إلا ما دل الشرع على تحريمه وإبطاله»

1. "The default ruling in contracts and conditions is permissibility and validity, and nothing is prohibited or invalidated except what the Sharʿ has indicated as prohibited or invalid."[1058]

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[1057] "He does not visit the sick or attend a funeral unless he stipulated that in advance. (...) Aḥmad was asked, 'Do you permit stipulation in iʿtikāf?' He replied, 'Yes.' (...) Mālik said, 'No stipulation is valid in iʿtikāf.' Our proof is that iʿtikāf becomes binding by undertaking it, so stipulation regarding it is left to the person, as with an endowment." Al-Mughnī, Ibn Qudāmah, 4:469.

[1058] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 29:132.

يلزم مراعاة الشرط بقدر الإمكان

2. A condition must be observed to the extent possible.

الأصل في الشروط الصحة واللزوم

3. The default ruling in conditions is validity and binding force.

ما ثبت بالشرع مقدم على ما ثبت بالشرط

4. What is established by Sharʿ takes precedence over what is established by stipulation.

كل شرط لا يرضي الرب ولا ينتفع به المخلوق فهو باطل في جميع العقود

5. Every condition that does not please the Lord and from which the creature derives no benefit is invalid in all contracts.

"كل شرط ليس في كتاب الله فهو باطل"

6. "Every condition not found in the Book of Allah is invalid."[1059]

We have gathered them here without separating them due to the strong connection among them and because the ḥadīth used as the heading indicates all of them. The evidence for "a condition must be observed to the extent possible" lies in the general Sharʿī principles that obligations are contingent upon capability.

Our Ḥanbalī school is regarded as the most expansive of the madhāhib in validating conditions within contracts, especially after what Imām Abū al-ʿAbbās Ibn Taymiyyah contributed in terms of flexible and facilitative approaches needed by jurists to regularize people's transactions, thereby preserving the vitality of the Sharīʿah and its suitability for all times. Shaykh Muḥammad al-Zuḥaylī—may Allah preserve him—related to me from his teacher Muṣṭafā al-Zarqā—may Allah have mercy on him—that he used to say: had the Ottoman state adopted the Ḥanbalī expansions, its commerce would not have been harmed, nor would it have needed to borrow from European laws.

And even before the ijtihādāt (independent juristic determinations) of Abū al-ʿAbbās, both the Mālikī and Ḥanbalī schools were expansive in validating conditions, and did not adhere to the principle of the "unity (indivisibility) of the transaction." They permitted conditions that confer benefit upon one of the contracting parties so long as they do not contradict the essence of the contract or oppose the Sharʿ. Our

[1059] Agreed upon, from the ḥadīth of ʿĀʾishah (rAa).

Imām also rejected the authenticity of the ḥadīth that prohibits a "sale combined with a condition."[10601061]

Valid conditions in the Ḥanbalī school fall into three categories:

1. A condition required by the contract or constituting part of it. This type is valid according to all four madhāhib. An example is the buyer stipulating that the seller tender the sold item (allow possession by the buyer) or that mutual possession occur immediately.[1062]
2. A condition that provides a benefit to the one who stipulates it, while also conforming to the contract and serving its purpose. This type is likewise valid according to all four madhāhib. Examples include a pledge (rahn), a guarantor (ḍamīn), or witnesses.[1063]
3. A condition that contains a benefit for one of the contracting parties, is neither required by the contract nor part of its inherent purpose, yet does not contradict the essence of the contract or the rulings of the Sharʿ. Examples include stipulating a characteristic in the sold item or in the price,[1064] the seller stipulating residence in the house for a set period, the buyer stipulating that the garment be sewn, or that the item be transported to his home,[1065] or a down-payment sale

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[1060] «الأصل في العقود والشروط: الجواز والصحة، ولا يُحَرَّم منها ويُبطل إلا ما دل الشرع على تحريمه وإبطاله نصًا أو قياسًا عند من يقول به. وأصول أحمد المنصوصة عنه: أكثرها يجري على هذا القول. ومالك قريب منه؛ لكن أحمد أكثر تصحيحًا للشروط. فليس في الفقهاء الأربعة أكثر تصحيحًا للشروط منه» مجموع الفتاوى، تقي الدين ابن تيمية، ج ٢٩ ص ١٣٢

"The default ruling regarding contracts and stipulations is permissibility and validity. Nothing among them is deemed prohibited or invalid except that which the Sharīʿah has indicated to be forbidden or void—whether by explicit text or by analogy, according to those who consider analogy (*qiyās*) authoritative here. The foundational positions explicitly transmitted from Aḥmad mostly align with this view. Mālik's approach is close to it; however, Aḥmad is more inclined toward affirming the validity of stipulations. Among the four jurists, none is more affirming of stipulations than he is." *Majmūʿ al-Fatāwā*, Taqī al-Dīn Ibn Taymiyyah, 29:132.

[1061] "قال أحمد: إنما النهي عن شرطين في بيع." دقائق أولي النهى، البهوتي، ج ٢ ص ٣٠

"Aḥmad said: 'The prohibition pertains only to two conditions in one sale.'" *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:30.

[1062] "A valid condition in a sale is of three types. The first is what the sale itself entails, such as mutual possession, immediate payment, and each party's right to dispose of what he receives. (...) A condition that merely states what the sale entails has no independent effect; its presence is like its absence because the matter is already established by the Sharīʿah." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:27.

[1063] "The second type is what serves the interest of the party making the stipulation, such as deferring the price (...) or stipulating specific collateral or a guarantor for the price. (...) This is valid as explicitly stated by Aḥmad." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:27.

[1064] "The second type is what serves the interest of the party making the stipulation, (...) such as requiring an animal to produce milk or be pregnant, or a cheetah or falcon to be trained for hunting. (...) These qualities serve a legitimate purpose, and preferences differ according to them. Were such stipulations invalid, the purpose for which sales were legislated would be lost." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:27.

[1065] "The third type is when the seller stipulates a known benefit in the sold item, such as residing in the house for a month or using the camel to carry goods to a specified place. (...) The same applies when the buyer stipulates a benefit to be supplied by the seller in the item sold, such as carrying firewood, sewing a garment, or tailoring it, (...) provided that the benefit is known." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:28.

(bayʿ al-ʿurbūn);[1066] or a woman stipulating in marriage that he not remove her from her home or town, not travel with her, or not take another wife.[1067]

It is in this category that the Ḥanbalī school is especially expansive in validating conditions.

According to the Ḥanbalīs, an invalid condition arises from two causes:

1. Conditions that contradict the essence of the contract. Examples include: the seller stipulating that the buyer not sell or gift the purchased item;[1068] a husband stipulating that she have no dowry; that he not provide maintenance; her stipulating that he not have intercourse with her, or that he practice coitus interruptus; that he give her fewer nights than her co-wife or more; that he stay with her only one night a week; or that she have the day while another has the night; or stipulating that the wife spend on him or give him something.[1069] There is, however, a report in the madhhab affirming the validity of many such conditions—chosen by Imām Taqī al-Dīn—if they contain a benefit for one of the parties.
2. Conditions that contravene the Sharʿ. Examples include: combining a sale with a loan, or two sales in a single transaction,[1070] or combining two conditions in one sale that are neither required by the contract nor in its interest,[1071] such as purchasing a garment and stipulating upon the seller both sewing and fulling it; and likewise temporary marriage (mutʿah), *shighār (reciprocal*

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[1066] "And the earnest money sale (ʿurbūn, also called ʾurbūn) is valid, and likewise, its rental is valid. Aḥmad and Muḥammad ibn Sīrīn said: 'There is no harm in it,' and ʿUmar practiced it; it is also reported that Ibn ʿUmar approved of it. What is meant by bayʿ al-ʿarbūn is that a portion of the price is paid after the contract is concluded. Similarly, ijārat al-ʿarbūn involves paying part of the rental fee after finalizing the lease. The buyer or lessee says: 'If I go through with it'—meaning taking possession of the item purchased or leased—'then this amount will count toward the price or rent; otherwise, it is yours.'" Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:33.

[1067] "If he marries her and stipulates that he will not remove her from her home or her town, then she is entitled to that condition; … and if he marries her and stipulates that he will not take another wife over her, then she has the right to separation if he does marry another." al-Mughnī, Ibn Qudāmah, 9:483.

[1068] "The second category is that in which the sale remains valid, despite the presence of a condition that contradicts its implications—such as a buyer stipulating that he should not incur a loss on the item purchased, or that if the item does not sell, he may return it to the seller. Or the seller stipulates upon the buyer that he may not place the item in endowment (waqf), nor sell it, nor gift it..." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:31.

[1069] "The second category consists of conditions that are invalid while the marriage remains valid, such as stipulating that the woman will have no dowry or maintenance, or her stipulating that he not have intercourse with her or that he practice withdrawal. (...) These conditions are invalid because they contradict the implications of the contract and waive, before its conclusion, rights that arise through it." Al-Mughnī, Ibn Qudāmah, 9:486.

[1070] "Invalid conditions are of three types. The first invalidates the contract from its foundation, such as stipulating another sale, a salaf or loan, or a lease. (...) The Prophet ﷺ prohibited two sales in one, which Aḥmad explained as this type, and prohibition entails invalidity. (...) It is also a contract stipulated within another contract and is therefore invalid, like shighār marriage." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:31.

[1071] "Combining two conditions invalidates the sale even if each condition would be valid alone, such as requiring both the transport and splitting of firewood or both sewing and tailoring a garment. (...)

This does not apply when both are entailed by the sale, such as immediate payment, or serve its interests, such as specific collateral and a guarantor for the price; in those cases the sale is valid." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:30.

*marriage arrangement)*, conditional marriage,[1072] the seller stipulating absolution from all defects,[1073] or a woman stipulating the divorce of her co-wife.[1074]

Invalid conditions fall into two categories:

That which invalidates the contract
Such as suspending the sale itself upon a condition.[1075] Imām Taqī al-Dīn preferred the report validating both suspended sales and suspended marriages.[1076] Also included are combining a sale with a loan, or two sales in a single transaction,[1077] or combining two conditions in one sale that are neither required by the contract nor in its interest[1078]—such as purchasing a garment and stipulating upon the seller both sewing and fulling it—and likewise temporary marriage (mutʿah), *shighār (reciprocal marriage arrangement)*, conditional marriage,[1079] and marriage to a muḥallil (one who marries a thrice-divorced woman to make her lawful again for her former husband).[1080]

That which is nullified but does not invalidate the contract
Such as the seller stipulating that the buyer not sell or gift the item, or the buyer stipulating freedom

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[1072] "The third category consists of conditions that nullify the marriage itself, such as fixing a term for the marriage, which is mutʿah, or attaching the marriage to a condition. (...) The same applies when her dowry is the marriage of another woman, which is shighār." Al-Mughnī, Ibn Qudāmah, 9:488.

[1073] "If a seller stipulates upon the buyer that he is absolved of liability for every defect in what he has sold to him, he is not absolved.

And if the seller stipulates that he is absolved of a specific defect, should it exist in the sold item, he is still not absolved thereby.

Thus, the buyer retains the right to annul the sale if he discovers a defect he was unaware of at the time of the contract..." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:34.

[1074] "Section: If she stipulates that he must divorce his other wife, the condition is not valid." al-Mughnī, Ibn Qudāmah, 9:486.

[1075] "The third category refers to a condition upon which the sale itself does not come into effect—such as saying, 'I sell you this if you come to me,' or 'if Zayd agrees to it,' or 'I buy it if you come to me,' or 'if Zayd agrees to it.' This is because it is a transactional contract that requires the transfer of ownership at the time of the contract, and the condition prevents that. However, it is valid to say, 'I sell [this], God willing,' or 'I accept, God willing,' because the intent in such cases is usually seeking blessing, not expressing hesitation." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:33.

[1076] "If the seller says, 'I sell to you if you bring me such-and-such,' or, 'if Zayd agrees,' then the sale and the condition are valid. This is one of the two narrations from Aḥmad. And conditions that do not contradict the Sharīʿah are valid in all contracts." al-Fatāwā al-Kubrā, Ibn Taymiyyah, 5:389.

[1077] "Invalid conditions are of three types. The first invalidates the contract from its foundation, such as stipulating another sale, a salaf or loan, or a lease. (...) The Prophet ﷺ prohibited two sales in one, which Aḥmad explained as this type, and prohibition entails invalidity. (...) It is also a contract stipulated within another contract and is therefore invalid, like shighār marriage." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:31.

[1078] "Combining two conditions invalidates the sale even if each condition would be valid alone, such as requiring both the transport and splitting of firewood or both sewing and tailoring a garment. (...)

This does not apply when both are entailed by the sale, such as immediate payment, or serve its interests, such as specific collateral and a guarantor for the price; in those cases the sale is valid." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:30.

[1079] "The third category consists of conditions that nullify the marriage itself, such as fixing a term for the marriage, which is mutʿah, or attaching the marriage to a condition. (...) The same applies when her dowry is the marriage of another woman, which is shighār." Al-Mughnī, Ibn Qudāmah, 9:488.

[1080] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:667

from loss, or that the item must be marketable;[1081] or the husband stipulating that she have no dowry, or that he not provide maintenance, or that if he gives a dowry he may reclaim it; or her stipulating that he not have intercourse with her or that he practice coitus interruptus; or that he allot her fewer nights than her co-wife or more; or that he be with her only one night each week; or that she have the day while another has the night; or stipulating upon the woman that she spend on him or give him something. If such conditions are stipulated, they validate the contract and nullify the condition.[1082] Some have held—regarding certain cases such as her stipulating the absence of intercourse—that the contract is invalid, and this view is strong.

The Expansion of Imām Taqī al-Dīn Ibn Taymiyyah

Imām Taqī al-Dīn Ibn Taymiyyah broadened the concept of valid conditions, affirming that the default ruling in contracts and conditions is permissibility and validity unless a text or analogy indicates their prohibition or invalidation, and that the decisive factor thereafter is mutual consent. Conditions are not invalid unless they contradict the Sharʿ or the essential purpose of the contract;[1083] conditions that do not contradict either are valid and binding, even if they are numerous.

Imām Shams al-Dīn Ibn al-Qayyim responded to the argument based on the prohibition of "two conditions in a sale" with a fine answer—worth reviewing in full—in which he explained the prohibition as referring to "two transactions in one," such as saying: "Take this item for ten in cash, and I will take it back from you for twenty on credit," which is precisely the transaction of ʿīnah (a sale and buyback used to obtain cash against a larger deferred payment).[1084]

Both imāms permitted stipulating a contract other than a loan within a sale contract, so long as it is not a device for usury. This is a recognized view in the madhhab and among the Mālikīs. In this, they

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[1081] "The second category is that in which the sale remains valid, despite the presence of a condition that contradicts its implications—such as a buyer stipulating that he should not incur a loss on the item purchased, or that if the item does not sell, he may return it to the seller. Or the seller stipulates upon the buyer that he may not place the item in endowment (waqf), nor sell it, nor gift it..." *Daqāʾiq Ūlī al-Nuhā*, al-Buhūtī, 2:31.

[1082] "The third type of invalid condition is one under which the marriage remains valid, such as stipulating that the woman have no dowry or maintenance, (...) that there be no intercourse or that the husband practice withdrawal, (...) or that the woman maintain him. (...)

In all these cases the marriage is valid but the condition is void, because it contradicts the implications of the contract and waives rights before they arise through the contract. The contract itself remains valid because these conditions concern a meaning additional to it." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:669.

[1083] "If a condition contradicts the purpose of the contract, the contract is void; if it contradicts the Lawgiver's purpose, it is contrary to Allah and His Messenger. If it contains neither, (...) there is no basis for prohibiting it. Rather, it must be lawful, because it is a purposeful act that people need (...) and its prohibition has not been established." Majmūʿ al-Fatāwā, Ibn Taymiyyah, 29:156.

"The stipulating party may neither permit what Allah has prohibited nor prohibit what Allah has permitted. (...) He may only make binding by stipulation what was not binding without it. (...) Whatever is forbidden without the condition cannot be made lawful by it, such as ribā; what is permissible without it may be made binding by it, such as an increase in the dowry or price, collateral, or delayed fulfillment." Al-Qawāʿid al-Nūrāniyyah al-Fiqhiyyah, Taqī al-Dīn Ibn Taymiyyah, 1:274.

[1084] "This resembles the prohibition of two transactions in one and two sales in one contract. (...) It was explained as saying, 'Take this item for ten in cash, and I will buy it back from you for twenty deferred,' which is the transaction of ʿīnah. (...) Two conditions in a sale are like two transactions in one. (...) The underlying reason is that both arrangements lead to ribā and serve as a means to it." Tahdhīb Sunan Abī Dāwūd, Ibn al-Qayyim, 2:519.

effectively moved beyond the principle of the unity (indivisibility) of the transaction altogether,[1085] and such an approach is indispensable today, while remaining in harmony with the objectives and principles of the Sharīʿah.

## Drawing lots is legislated when the entitled party is unknown and designation is impossible

تشرع القرعة إذا جهل المستحق وتعذرت التسمية

This is al-Siʿdī's twenty-fifth maxim, expressed in his verse:

تستعمل القرعة عند المبهم  من الحقوق أو لدى التزاحم

Lots are employed when entitlement is unclear - in rights or in situations of competition.

Explanation of the maxim:

Drawing lots is a method used to resolve disputes or assign rights in a fair and impartial manner when there is ambiguity or conflict regarding who is entitled, and when entitlement cannot be determined decisively through evidence. It ensures that no biased human element influences the decision, thereby preventing injustice or favoritism, relying instead on a random procedure.
The Sharīʿah does not prescribe a specific method for drawing lots; whatever method people customarily use is acceptable. In the *Masāʾil* of Imām Aḥmad as narrated by Abū Dāwūd: "I said to Aḥmad regarding drawing lots: 'Do they write slips?' He replied: 'If they wish, slips; and if they wish, rings.'"[1086]

Proofs for the maxim:

إِذْ يُلْقُونَ أَقْلَامَهُمْ أَيُّهُمْ يَكْفُلُ مَرْيَمَ

فَسَاهَمَ فَكَانَ مِنَ الْمُدْحَضِينَ

1. Qurʾānic texts:
   The Qurʾān mentions drawing lots in several places as a legitimate means for resolving competing claims. Among the clearest is Allah's saying: *"When they cast their pens [to decide] which of them should have charge of Mary"* (Āl ʿImrān: 44)
   Another is the story of Yūnus (pbuh): *"So he drew lots and was among the losers"* (al-Ṣāffāt: 141), referring to the casting of lots aboard the ship to decide who would be thrown overboard to lighten the load.

[1085] "Suppose one says, 'I sell you my garment for one hundred on condition that you sell me your garment for one hundred.' (...) What is the evidence that this is invalid? (...) Prohibiting it requires a text or consensus before analogy can validly be applied." Al-ʿUqūd, Ibn Taymiyyah, 1:189. "There is no prohibition in combining two contracts that are each independently valid, as when one sells an item and leases a house for a month for one hundred dirhams." Iʿlām al-Muwaqqiʿīn, Ibn al-Qayyim, 3:265.

[1086] Masāʾil al-Imām Aḥmad, as narrated by Abū Dāwūd al-Sijistānī, 1:293

لَوْ يَعْلَمُ النّاسُ ما في النِّداءِ والصَّفِّ الأوَّل، ثُمَّ لَمْ يَجِدُوا إلّا أنْ يَسْتَهِمُوا عليه لاسْتَهَمُوا.

كانَ رَسولُ اللَّهِ ﷺ إذا أرادَ أنْ يَخْرُجَ سَفَرًا أقْرَعَ بيْنَ أزْواجِهِ، فأيَّتُهُنَّ خَرَجَ سَهْمُها، خَرَجَ بها معهُ.

2. Prophetic Sunnah:
   In the two Ṣaḥīḥs, from Abū Hurayrah (rAa), the Prophet ﷺ said: *"If people knew what there is in the call to prayer and the first row, then had no way to obtain them except by drawing lots, they would draw lots."*
   And in the two Ṣaḥīḥs from ʿĀʾishah (rAa): *"When the Messenger of Allah ﷺ intended to travel, he would draw lots among his wives, and whichever of them had her lot drawn, he would take her with him."*
3. Consensus:
   The scholars have agreed, in general, on the legitimacy of using lots.
4. Reason:
   This maxim accords with the principles of justice in Islamic law, ensuring fairness when other means of resolution are unavailable, while avoiding bias and wrongdoing.

Applications

The rule of drawing lots is the one-hundred-sixtieth and final maxim in Ibn Rajab's *Qawāʿid*. He (rA) said:

"Lots are used to distinguish the entitled recipient when entitlement is originally established for someone unknown and undetermined, when those entitled are equal.

They are also used to distinguish the actual entitled party when he is determinable in reality but unknown due to confusion and the inability to ascertain him—whether in matters of wealth or marital relations—according to the apparent position of the madhhab. Concerning marital relations, another view holds that lots do not effect the actual permissibility in reality.

Lots are not used to establish lineage when identity is unclear, according to the apparent madhhab.

They are used in rights of priority, authority, and similar matters.

They are not used initially to identify an unspecified obligatory act of worship.

There is also a weak view in expiation that lots may distinguish a forgotten oath."[1087]

He then elaborated extensively on its applications across various chapters; we mention some of them here in abridged form from his words:

"Among them: when individuals vie for the call to prayer while being equal in all qualities that merit preference, lots are drawn between them…

Among them: when two are equal in all qualities of preference for leading prayer and vie for it, lots are drawn between them; likewise, if two rightful relatives for leading the funeral prayer are equal and dispute, lots are drawn.

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[1087] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:157

Among them: if two deceased persons are brought simultaneously to a spot in a public cemetery, and neither has any special merit there—such as relatives buried in that location—then lots are drawn between them…

Among them: if two persons claim a deposited item, and the one with whom it was deposited says, "I do not know which of you it belongs to," then lots are drawn between them. Whoever's lot prevails swears an oath and takes it…

Among them: if two persons hasten to sit in unowned and unassigned public spaces—such as wide pathways, mosque courtyards, and the like—for livelihood or other purposes, then according to the madhhab one of them is given precedence by drawing lots…

Among them: if two persons hasten to an unowned and unassigned mine—or to other things—and the space accommodates only one, then there are two views. One is that they draw lots, which is the choice of the author of *al-Mughnī*. The second, stated by al-Qāḍī, is that if their aim is trade, the ruler apportions time between them by the day or the hour as he sees fit… As for when both of their hands simultaneously fall upon the unowned resource, then it is shared between them without disagreement …

Among them: when a man dies leaving wives and has divorced one of them with a divorce that severs inheritance, she is identified by lot…

Among them: co-equal guardians in marriage, if they dispute, lots are drawn…

Among them: if two invite him to a wedding feast and are equal in factors of preference, lots decide…

Among them: when he wishes to travel with one of his wives or begin with one, he may not do so without drawing lots unless the others consent…

Among them: if he divorces one of his wives in an indeterminate manner—saying to two wives, 'One of you is divorced,' without intending a specific one—lots determine the divorced wife… likewise if he divorced a specific wife then forgot which…

Among them: if lineage cannot be established through *qāfah* (physiognomy)—due to absence, inability, confusion, or disagreement—then the well-known view is that lineage is not assigned by lot [this being an exception]…[1088]

Among them: when a boy reaches seven years of age, he is given the choice between his father and his mother regarding custody, according to the apparent position of the madhhab. If he chooses neither of them, or chooses both, then lots are drawn between the two according to the well-known view. Another view holds that he is given to his mother. As for before the age of seven, if two men—such as two brothers—or two women—such as two sisters—are equal in entitlement to his custody, then one of them is chosen by drawing lots as well…

Among them: if two persons dispute the supreme Imāmate and are equal in all merits, one is chosen by lot; al-Qāḍī said: this follows by analogy from the madhhab, as in the call to prayer…"[1089]

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[1088] "(There is no drawing of lots in matters of lineage), and this is the correct position in the madhhab." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 8:237

[1089] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:158

A contemporary application found in some countries is the use of lotteries to select those permitted to perform ḥajj or ʿumrah in a given year due to the large number of applicants and official limitations. This modern use reflects the continued relevance of drawing lots in ensuring fairness.

## When cause and direct action coincide, the direct action takes precedence

إذا اجتمع السبب والمباشرة قدمت المباشرة

A single harmful act may involve more than one person—some acting directly, others by causation—so to whom is liability assigned? Imām Ibn Rajab provides the detailed answer in his 127th maxim, but the general wording of the rule remains correct, because the direct act is the final effective cause, and thus it is the primary locus of liability.

Here is Ibn Rajab's explanation:

"إذا استند إتلاف أموال الآدميين ونفوسهم إلى مباشرة وسبب؛ تعلق الضمان بالمباشرة دون السبب، إلا أن تكون المباشرة مبنية على السبب وناشئة عنه، سواء كانت [السببية] ملجئة إليه أو غير ملجئة."

"If the destruction of another's property or life results from both direct action and causation, liability attaches to the direct action rather than the cause—unless the direct action is built upon and generated by the cause, whether that causal pressure is compelling or non-compelling.

ثم إن كانت المباشرة والحالة هذه لا عدوان فيها بالكلية؛ استقل السبب وحده بالضمان.

If, in such a case, the direct action contains no element of aggression, the cause alone bears liability.

"وإن كان فيها عدوان؛ شاركت السبب في الضمان. فالأقسام ثلاثة."

If it does contain aggression, liability is shared between the direct action and the cause. Thus, the cases fall into three categories."[1090]

And in Sharḥ Tuḥfat Ahl al-Ṭalab fī Tajrīd Uṣūl Qawāʿid Ibn Rajab:

"This maxim comprises three rules:

إذا اجتمعت المباشرة والسبب، ولم تكن المباشرة مبنية على السبب وناشئة عنه تعلقت المسؤولية بالمباشرة دون السبب.

1. First rule: If direct action and causation occur together, and the direct action is not built upon or generated by the cause, liability attaches to the direct action rather than the cause.

[1090] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:462

إذا اجتمعت المباشرة والسبب، وكانت المباشرة مبنية على السبب وناشئة عنه، ولم يكن من المباشرة عدوان تعلقت المسؤولية بالسبب، دون المباشرة.

2. Second rule: If direct action and causation occur together, and the direct action is built upon and generated by the cause, and there is no aggression in the direct action, liability attaches to the cause rather than the direct action.

"إذا اجتمعت المباشرة والسبب وكانت المباشرة مبنية على السبب وناشئة عنه، وكان من المباشرة عدوان، كانت المسؤولية مشتركة، بينها وبين السبب."

3. Third rule: If direct action and causation occur together, the direct action is built upon and generated by the cause, and there is aggression in the direct action, liability is shared between the direct action and the cause."[1091]

Among the examples of the first category (when direct action and causation occur together, and the direct action is not built upon or generated by the cause, liability attaches to the direct action rather than the cause):

1. "Among them: if one person digs a pit wrongfully, and another pushes into it an inviolable person or the property of an inviolable person, causing him or it to fall and perish, liability is upon the one who pushed alone.
2. Among them: if someone opens a cage containing a bird and it settles after that, then another comes and frightens it away, liability is upon the one who frightened it.
3. And among them: if one throws an inviolable person from a height and another intercepts him with a sword and cleaves him in two, the killer is the second, not the first.
4. As for when someone strikes a woman's abdomen causing her to miscarry a fetus with unstable life, and another strikes it and it dies, the killer is the first, and he must pay the *ghurra (a compensation equivalent to the value of a slave)*, while the second is disciplined; for the striker is not a mere cause but a direct agent of killing, and thus liability attaches to him." And this is not an exception to the maxim, since the second striker found the fetus possessing only unstable life.[1092]

Among the examples of the second category (when direct action and causation occur together, the direct action is built upon and generated by the cause, and there is no aggression in the direct action, liability attaches to the cause rather than the direct actor):

Among them: if someone knowingly presents poisoned food to another, and the latter eats it unaware of its condition, then the killer is the one who presented it, and he bears retribution or the blood money.

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[1091] Sharḥ Tuḥfat Ahl al-Ṭalab, ʿAbd al-Karīm al-Lāḥim, 1:405

[1092] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:463

And among them: if a judge executes someone as a ḥadd or qiṣāṣ punishment based on testimony, and the witnesses later admit that they intentionally lied, then liability and retribution are upon the witnesses, not the judge."[1093]

Although the eater and the judge both acted directly, there was no aggression in their action.

He also includes in this category the one coerced into destroying another's property, saying:

"There are two views regarding liability:

One is that it lies upon the one who coerced, but the entitled party may seek compensation from the one who carried out the destruction, who may then seek reimbursement from the coercer; for he is excused in that act and thus liability does not attach to him—unlike the one coerced into killing, who is not excused, and therefore shares liability…

The second view is that liability is upon both, as in blood money… This explicitly shows that coercion does not permit the destruction of another's property."[1094] The first view is the position of the madhhab.

Among the examples of the third category (when direct action and causation occur together, the direct action is built upon and generated by the cause, and there is aggression in the direct action, liability is shared between the direct actor and the cause):

"Among them: the one coerced into killing; and according to the madhhab, the coercer and the coerced share in retribution and liability, for coercion is not an excuse in killing."[1095]

And in the eighty-ninth Rajabī maxim, he addresses causation in destruction when discussing the bases of liability. He said:

إذا لم يمكن إحالة الضمان على المباشر أحيل على المتسبب

"Liability arises from three causes: contract, possession, and destruction. As for contracts of liability, they have already been mentioned, as have the liable forms of possession.
As for destruction, it refers to directly carrying out the destructive act through a cause that brings it about—such as killing or burning—or establishing a cause unjustly by which destruction occurs, such as digging a pit wrongfully on land one does not own…" He then states in the detailed discussion of the maxim: "If it is not possible to assign liability to the direct actor, it is assigned to the one who caused it."[1096]
This may be considered an alternative formulation of the maxim under discussion.[1097]

[1093]Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:464

[1094] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:468

[1095] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:471

[1096] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:208

[1097]Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:209

## The prohibited acts that the nafs desires carry a prescribed punishment (ḥadd)

ما تشتهيه النفوس من المحرمات ففيه الحد

وقاعدة الشريعة أن ما تشتهيه النفوس من المحرمات كالخمر والزنا ففيه الحد وما لا تشتهيه كالميتة ففيه التعزير

Imām Taqī al-Dīn said: "The principle of the Sharīʿah is that those prohibited acts which the nafs (self) desires, such as alcohol and zinā, carry a prescribed punishment (ḥadd), whereas those that are not desired, like carrion, carry a discretionary punishment (taʿzīr)."[1098]

والوازع الطبعي عن العصيان كالوازع الشرعي بلا نكران

Al-ʿAllāmah al-Siʿdī said:
"Natural deterrence from disobedience
Is like the Sharīʿah's deterrence, with no rejection."

Explanation of the Maxim:
This maxim means that the penalties in the Sharīʿah differ based on the nature of the actions and what the nafs desires. If the act is among the prohibitions that the nafs is inclined toward, such as drinking alcohol or zinā, then the Sharīʿah imposes a ḥadd punishment, as well as for actions driven by anger, such as slander (qadhf), as a means of restraining the nafs and protecting both the individual and society. However, if the act involves prohibitions that the nafs does not desire, like eating carrion, then no ḥadd is imposed. In some cases, taʿzīr punishments may be applied in proportion to the act. This explains the legislative wisdom underlying a number of punishments; it is not a universal criterion for establishing prescribed punishments. They are established by their evidence and implemented subject to their conditions, while discretionary punishment may be legislated for acts carrying no prescribed punishment.

Types of Deterrents (Wāziʿāt):

1. Natural Deterrence (al-wāziʿ al-ṭabʿī):
    - This refers to what Allāh has instilled in human nature as a natural aversion toward certain actions, such as an aversion to impurities. This natural instinct serves as a form of protection against disobedience.
2. Sharīʿah-based Deterrence (al-wāziʿ al-sharʿī):
    - This refers to the punishment imposed by the Sharīʿah on the doer of the act. When the act does not involve a natural aversion, the Sharīʿah prescribes a more severe punishment for it.

Evidence for the Maxim:

The maxim is based on a comprehensive review (istiqrāʾ) of the punishments in the Sharīʿah.

[1098] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 34:214

Applications of the Maxim:

- In the case of permissible actions, the Sharīʿah relies on natural inclinations. For instance, actions like sleep, eating, and drinking, and to some extent marriage and earning money, are not heavily emphasized by the Sharīʿah, nor is their omission threatened with punishment, because people are naturally inclined toward them.
- The same applies to virtues. For example, honoring parents and children is obligatory, but since the natural inclination toward the latter is strong, the Sharīʿah does not stress it as much as the former.
- Moral uprightness (ʿadālah) is not required in self-confession as it is in witnesses, nor is it required in the guardian of marriage (walī) according to the majority, which is also a position in our school, though not the dominant one. The argument for this position is that fathers and other guardians are naturally inclined to protect their female proteges, though there are differences between fathers and other guardians.
- When an action does not have a natural deterrence, a taʿzīr (discretionary) punishment can be imposed to deter the doer. An example of this is harm caused by cybercrimes in our times.

## Whoever has the legal punishment waived from him due to a valid cause, the financial liability upon him is doubled

مَن سقطت عنه العقوبة لموجب ضوعف عليه الضمان

من سقطت عنه العقوبة بإتلاف نفس أو طرف، مع قيام المقتضي له، لمانع؛ فإنه يتضاعف عليه الغرم

This is al-Siʿdī's thirty-fifth maxim, and it is also one of the Rajabi maxims, being the one-hundred-fortieth among them. Imām Ibn Rajab expressed it as follows:
"Whoever has the legal punishment waived from him for destroying a life or a limb—despite the presence of what necessitates that punishment, but due to a preventing factor—the financial liability upon him is doubled."[1099]

Explanation of the maxim:

This maxim establishes increased liability in certain cases in which a prescribed punishment or retaliation falls away because of an impediment despite the presence of its legal cause, as established by a text or a valid derivation from it. The mere waiver of a prescribed punishment or retaliation does not suffice to require aggravated liability; the ground for such aggravation must be established in the particular case. This formulation brings together cases that have their own evidentiary basis; it does not independently establish the ruling for every case encompassed by its apparent wording. Increased liability may also coexist with discretionary punishment, as in some of the following cases.

[1099] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:42

Sharīʿah evidence for the maxim:

مَنْ أَصَابَ بِفِيهِ مِنْ ذِي حَاجَةٍ غَيْرَ مُتَّخِذٍ خُبْنَةً فَلَا شَيْءَ عَلَيْهِ، وَمَنْ خَرَجَ بِشَيْءٍ مِنْهُ، فَعَلَيْهِ غَرَامَةُ مِثْلَيْهِ وَالْعُقُوبَةُ، وَمَنْ سَرَقَ مِنْهُ شَيْئًا بَعْدَ أَنْ يُؤْوِيَهُ الْجَرِينُ فَبَلَغَ ثَمَنَ الْمِجَنِّ فَعَلَيْهِ الْقَطْعُ

From the ḥadīth of ʿAbd Allāh ibn ʿAmr (rAa): "Whoever eats from it with his mouth out of need, without concealing anything in his garment, incurs no liability, but whoever carries anything away from it must pay twice its value and receive the punishment. And whoever steals anything from it after it has been gathered in the threshing place and reaches the value of a shield must have his hand cut."[1100]

Explanation of the ḥadīth: One who eats from hanging fruit out of need without carrying any of it away incurs no liability. One who carries some away before it has been secured must pay twice its value and is subject to discretionary punishment. As for one who steals it after it has been secured in the drying yard, the prescribed punishment for theft applies if the stolen property reaches the minimum threshold and all other conditions for amputation are fulfilled and its impediments are absent.

Examples illustrating the maxim:

Ibn Rajab said:

"The following issues branch out from this principle:

– If a Muslim intentionally kills a dhimmī (non-Muslim protected by a covenant of residence), he must pay the blood money of a Muslim.

– Whoever steals from property that is not in a secure place, his financial liability is doubled; this was explicitly stated by Aḥmad. Some restrict this to fruit and palm pith.[1101]

– A concealed stray animal is guaranteed at twice its value, as Aḥmad stated in the narration of Ibn Manṣūr, explaining that the doubling of liability serves to avert the ḥadd, consistent with his foundational position regarding cutting the hand of one who denies a borrowed item.

– If a one-eyed person gouges out an eye of a person with sound sight in both eyes, retribution is not applied, and he must pay a full diyah, as explicitly stated by Aḥmad.

– If a minor intentionally kills, and we hold that minors can commit valid intentional killing, then double diyah is taken from his property…

However, this maxim does not include the increased diyah for intentionally killing a blood relative within the prohibited degrees (maḥram), since qiṣāṣ may still apply in cases other than killing the son.

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[1100] Narrated by Abū Dāwūd, Kitāb al-Luqṭah, and graded ḥasan (good) by al-Albānī.

[1101] "Whoever steals fruit or livestock from an unsecured place (...)

is not subject to amputation (...)

but owes twice its value—that is, twice the value of what was stolen. (...)

This is based on the ḥadīth: 'Whoever carries any of it away must repay twice its value and receive punishment.' (...)

Aḥmad said, 'I know of nothing that overrides this.' Most scholars, however, held that no more than the item's value is owed. (...)" Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 10:490.

Rather, the increased compensation is due to the greater sanctity of the offense—similar to doubling liability for killing in the ḥaram or while in iḥrām.»[1102]

[1102] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:42

# Third: Maxims Mostly Related to Acts of Worship

النفل أوسع من الفرض

## Supererogatory acts allow greater legal latitude than obligatory acts

Accordingly, supererogatory prayer is permitted on a riding mount, whichever direction it faces. They have shown leniency regarding slight drinking in it.[1103] Supererogatory prayer is also valid when performed sitting, even without an excuse.

“Intention is required for that on account of which dry ablution (tayammum) is performed, whether ritual impurity or otherwise. If one intends one of them, it does not suffice for the other. If he intends a supererogatory act or leaves the intention unrestricted, he may not perform an obligatory prayer with it. But if he intends an obligatory prayer, he may perform obligatory and supererogatory prayers throughout its time.”[1104]

“If he leaves it unrestricted—that is, he leaves the intention of permissibility for prayer or circumambulation without specifying whether it is obligatory or supererogatory—then he may not perform with that dry ablution except their supererogatory forms.”[1105]

“A supererogatory fast is valid with an intention formed during the daytime, even if it is after the zenith, as explicitly stated by Aḥmad.”[1106]

“It is recommended for one who is invited, when food is presented, to eat from it, even if he is fasting voluntarily.”[1107]

“Whoever enters into an obligatory act whose time is expansive is forbidden to discontinue it. Completion is not required in supererogatory acts, nor is making up what is invalidated, except for ḥajj.”[1108]

At times, the scope of supererogatory acts becomes more restricted than that of obligatory acts. This returns to the maxim: “What is permitted due to necessity is limited to the extent of that necessity.” “If one lacks both water and clean earth, or is unable to use either of them, meaning water and earth, due to an impediment such as wounds that prevent contact with the skin for ablution or dry ablution, he performs only the obligatory prayer…”[1109]

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[1103] “The prayer is not invalidated by a small amount of eating or drinking according to custom when done forgetfully or unknowingly, (...)

nor is a supererogatory prayer invalidated by a small amount of intentional drinking.” Muntahā al-Irādāt with Ḥāshiyat Ibn Qāʾid, Ibn al-Najjār, 1:245.

[1104] Zād al-Mustaqniʿ fī Ikhtiṣār al-Muqniʿ, al-Ḥajjāwī, 34

[1105] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 1:392

[1106] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:480

[1107] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 9:244

[1108] Zād al-Mustaqniʿ fī Ikhtiṣār al-Muqniʿ, al-Ḥajjāwī, 84

[1109] Kashshāf al-Qināʿ, al-Buhūtī, 1:404

إذا اجتمعت عبادات من جنس واحد تداخلت أفعالها واكتفي عنها بفعل واحد إذا كان مقصودها واحدًا

## When acts of worship of the same type coincide, their actions overlap, and a single act suffices for them when their purpose is one

This is al-Sʿdī's forty-first maxim, corresponding to the eighteenth of the Rajabiyyah maxims. Imām Ibn Rajab expressed it as follows:

«إذا اجتمعت عبادتان من جنس واحد في وقت واحد، ليست إحداهما مفعولة على وجه القضاء، ولا على طريق التبعية للأخرى في الوقت؛ تداخلت أفعالهما، واكتفي فيهما بفعل واحد.»

"When two acts of worship of the same type coincide at the same time, neither being performed as a make-up nor as a subsidiary to the other within that time, their actions overlap, and a single act suffices for both."[1110]

You may also find it useful to review the discussions on association and combining intentions when we addressed the conditions for the validity of intention under the parameters of the maxim *Actions are judged by their purposes*, where the issue is treated in greater detail.

Explanation of the maxim:

When two or more acts of worship of the same type coincide at the same time, and they share a single purpose while not being independently intended for their own sake, one act suffices for all of them. If, however, each act of worship has an independent objective, performing one does not suffice for the other, and each act must be performed separately.

Overlap (tadākhul) is divided into two types:

1. Both acts are fulfilled by a single act with a joint intention.
2. One act is fulfilled by intention, and the other falls away without being intended.

Sharʿī evidence:

إِنَّمَا الأَعْمَالُ بِالنِّيَّةِ، وَإِنَّمَا لامْرِئٍ مَا نَوَى

1. The ḥadīth, "Actions are only by intentions, and each person has only what he intended," indicates that reward and merit are tied to intention. If one intends both acts of worship, he attains the reward for both; otherwise, he is rewarded only for what he intended.

طَوَافُكِ بِالْبَيْتِ وَسَعْيُكِ بَيْنَ الصَّفَا وَالْمَرْوَةِ، يَكْفِيكِ لِحَجَّتِكِ وَعُمْرَتِكِ

2. The ḥadīth of ʿĀʾishah (rAa): "Your circumambulation of the House and your saʿy between Ṣafā and Marwah suffice for your ḥajj and your ʿumrah" (narrated by Abū Dāwūd). This is explicit evidence for overlap.

[1110] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:139

Practical applications of overlap:

First: "Both acts are fulfilled by a single act, on the condition—according to the well-known view—that one intends them together"[1111]:

1. Major and minor purification:
   "Whoever is in both minor and major ritual impurity, the position of the madhhab is that the actions of major purification suffice for him if he intends both purifications thereby."[1112]
2. Ḥajj and ʿumrah:
   "For a qārin (pilgrim combining ḥajj and ʿumrah in one iḥrām) who intends both ḥajj and ʿumrah, a single circumambulation and a single saʿy suffice for both, according to the sound position."[1113]
3. Friday bath and bath for major impurity or menstruation:
   If the Friday bath coincides with a bath for major impurity, a single bath suffices for both.[1114]
4. Combining the uḍḥiyah (ʿĪd sacrifice) and the ʿaqīqah (sacrifice for a newborn):
   If the day of the ʿaqīqah coincides with the days of sacrifice, and one animal is slaughtered with the intention of both the uḍḥiyah and the ʿaqīqah, it suffices for both.[1115]

Second: "One of the two acts of worship is fulfilled by its intention, and the other falls away"[1116]:

1- Greeting the mosque (taḥiyyat al-masjid) and congregational prayer:

"If one enters the mosque after the prayer has been established and prays with the congregation, the greeting of the mosque falls away."[1117]

2- Arrival circumambulation and ʿumrah circumambulation:

"When the pilgrim performing ʿumrah arrives in Mecca, he begins with the circumambulation of ʿumrah, and the arrival circumambulation falls away."[1118]

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[1111] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:139

[1112] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:139

[1113] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:140

[1114] "If one intends both the greeting (of the masjid) and the obligatory prayer, then the apparent view in their words is that both are achieved (Shāfiʿīs agree). A group of scholars stated: If one intends the ghusl for janābah along with that of Jumuʿah, it suffices for both (Mālik and Shāfiʿī agree), due to the statement of the Prophet ﷺ: 'Each person will have only what he intended,' and because there is no contradiction—just like when one begins a prayer intending both the obligatory prayer and the greeting of the mosque." al-Furūʿ wa-Taṣḥīḥ al-Furūʿ, Ibn Mufliḥ and al-Mardāwī, 3:182

[1115] "If ʿaqīqah and uḍḥiyah coincide and one intends the uḍḥiyah for both, it suffices for both, as explicitly stated by Aḥmad. (...) This resembles praying two rakʿahs with the intention of both greeting the mosque and the regular Sunnah prayer. (...) The same applies when hady and uḍḥiyah coincide." Al-Iqnāʿ, al-Ḥajjāwī, 1:411.

[1116] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:146

[1117] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:147

[1118] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:147

3- Friday prayer and ʿĪd prayer:

“When Friday and ʿĪd coincide on the same day, whichever is performed first suffices for the other, and attendance with the Imām is not required.”[1119]

Conditions governing overlap:

1. Unity of type:

The two acts must be of the same type. If they are of different types, they do not overlap. Likewise, expiations do not overlap when their causes differ, such as the expiation for an oath and the expiation for ẓihār.[1120]

2. Neither act being independently intended for its own sake:

If each act of worship is independently intended for its own sake, performing one does not suffice for the other. For example, combining make-up fasts of Ramaḍān with the six days of Shawwāl or the first ten days of Dhū al-Ḥijjah does not suffice according to our madhhab.[1121]

3. Requirement of a joint intention where applicable:

Intention is always required to attain reward, and in some cases it is also required for legal sufficiency for both acts, such as combining major and minor purification, which necessitates intending the removal of both states of impurity. In other cases, one act falls away by the intention of the other without the need for a joint intention, such as the greeting of the mosque when an obligatory prayer is performed.

من عليه فرض هل له أن يتنفّل قبل أدائه بجنسه؟

## If a person is obligated to perform an obligatory act, is he permitted to perform a supererogatory act of the same type before fulfilling it?

This is the eleventh of the Rajabiyyah maxims.

Explanation of the maxim:

This maxim addresses the question of whether one who is obligated with an act of worship may perform a supererogatory act of the same type before fulfilling the obligation. This issue is divided into two categories.

The first category concerns pure acts of worship, which themselves are divided into two types: those whose time is unconstrained and those whose time is constrained.

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[1119] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:150

[1120] "And if their cause differs—such as ẓihār and an oath by Allah—both are binding and not merged into one another." Zād al-Mustaqniʿ fī Ikhtiṣār al-Muqniʿ, al-Ḥajjāwī, 230

[1121] "It is stated in al-Riʿāyatayn and al-Ḥāwiyayn that making up missed fasts of Ramaḍān is permissible during the first ten days of Dhū al-Ḥijjah, and another report from him [i.e., Aḥmad] says: it is disliked. End quote. The second report deems it disliked, and it was justified by the fact that making up missed fasts during that time causes one to miss out on the virtue of fasting it as a supererogatory act. This reasoning was given by Imām Aḥmad and others, as cited by Ibn Rajab in al-Laṭāʾif. He added: Some have said that the virtue of supererogatory fasting can still be attained through it." al-Furūʿ wa-Taṣḥīḥ al-Furūʿ, Ibn Mufliḥ and al-Mardāwī, 5:114

1. "If the obligation is unconstrained in time, performing supererogatory acts before fulfilling it is permitted."[1122]
   An example is prayer within its unconstrained time: one may perform as many supererogatory prayers as he wishes before ẓuhr so long as its time does not become constrained. Likewise, performing voluntary fasts before making up missed Ramaḍān fasts is permitted according to one view, which Ibn Rajab considered "the sounder view,"[1123] though it is contrary to what the later scholars adopted.[1124]

If it is time-constrained, it is not valid according to the sound view.[1125] Examples:
• "If the time of the obligatory prayer becomes constrained, does a supererogatory prayer then take effect? There are two views."[1126] The sound view is that it does not.
• "If one has a missed obligatory prayer, is unrestricted supererogatory prayer valid before making it up? There are two views."[1127] The sound view is that it is not valid. This applies to non-designated voluntary prayer, as opposed to designated supererogatory prayers such as the regular sunnahs and witr.
• "During Ramaḍān, it is not valid to fast for a purpose other than Ramaḍān. If one does so, it is not valid as a supererogatory fast. Does it then convert to an obligatory fast? This depends on whether specifying the intention is obligatory."[1128] The correct position of the madhhab is that specification is obligatory.
• "If one performs a voluntary ḥajj before the Ḥajj of Islam, it does not count as a voluntary ḥajj but converts to the Ḥajj of Islam, according to the sound position of the madhhab."[1129]
• If one performs ḥajj for a vow or as a voluntary act while owing the make-up of an invalid ḥajj, it counts toward the make-up, not toward what he intended.[1130]

Zakah is excepted from this. The fellows of the school stated that it is valid to give voluntary charity before paying it, even though it is due immediately.[1131] However, Shaykh Taqī al-Dīn held that this is not valid.[1132]

The second category concerns financial dispositions, such as manumission, endowment, and gifts.

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[1122] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:97

[1123] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:97

[1124] "It is prohibited to observe a voluntary fast before making up missed Ramaḍān fasts, and such a fast is invalid, as explicitly stated by Aḥmad." Kashshāf al-Qināʿ, al-Buhūtī, 5:299.
The ḥadīth cited in support of this ruling is weak. Accordingly, several verifying scholars, including al-Mardāwī in al-Inṣāf, held that the six days may be fasted before making up the missed days; this is the majority view.

[1125] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:97

[1126] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:97

[1127] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:97

[1128] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:98

[1129] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:98

[1130] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:98

[1131] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:98

[1132] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:98

“If one undertakes such dispositions while owing a debt, and no legal restriction (ḥajr, interdiction) has been placed upon him, the position of the madhhab is that his disposition is valid even if it exhausts his entire property. Shaykh Taqī al-Dīn, however, held that none of these dispositions take effect when creditors are demanding payment, and he reported this as a view within the madhhab.”[1133]

لا يجوز تقديم العبادات أو الكفارات على سبب الوجوب ويجوز تقديمها بعد وجود السبب وقبل شرط الوجوب

## Acts of worship and expiations may not precede the cause of obligation, but they may be performed after the cause exists and before the condition of obligation is met.

This is al-Siʿdī’s thirty-ninth maxim, and it corresponds to the fourth of the Rajabiyyah maxims. Imām Ibn Rajab expressed it as follows:

«العبادات كلها - سواء كانت بدنية، أو مالية، أو مركبة منهما - لا يجوز تقديمها على سبب وجوبها، ويجوز تقديمها بعد سبب الوجوب وقبل الوجوب، أو قبل شرط الوجوب.»

“All acts of worship—whether bodily, financial, or a combination of the two—may not be performed prior to the cause of their obligation. They may, however, be performed after the cause of obligation exists and before the obligation itself, or before the condition of obligation.”[1134]

Explanation of the maxim:

This maxim clarifies that acts of worship and expiations may not be performed before the cause of obligation (sabab al-wujūb) that renders them obligatory exists. However, they may be performed after the cause has occurred and before the condition of obligation is fulfilled. This is because some acts of worship and expiations are linked to a cause that establishes their obligation, but they do not become binding until a specific condition is met. In such cases, performing the act after the cause exists but before the condition is met is valid, whereas performing it before the cause exists is not.

Sharʿī evidence for the maxim:

إِنِّي وَاللهِ إِنْ شَاءَ اللهُ لَا أَحْلِفُ عَلَى يَمِينٍ فَأَرَى غَيْرَهَا خَيْرًا مِنْهَا إِلَّا أَتَيْتُ الَّذِي هُوَ خَيْرٌ وَتَحَلَّلْتُهَا

1. The ḥadīth of Abū Mūsā al-Ashʿarī (rAa):
   The Messenger of Allah ﷺ said: “By Allah, Allah willing, if I swear an oath and then see something else that is better than it, I do what is better and absolve myself of the oath,” or “I expiate for my oath and do what is better” (agreed upon).

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[1133] Ibn Rajab justified the position of Abū al-ʿAbbās, saying: ‘This can be derived within the madhhab on the basis of two principles. The first is what Aḥmad explicitly stated in Ḥanbal’s narration regarding someone who donates his wealth—by way of endowment or charity—while his parents are in need: they have the right to annul it. He supported this with the transmitted ḥadīth on the matter.

The second is that Aḥmad, in another narration, stated that if someone bequeaths to outsiders while he has needy relatives, the bequest is to be redirected to them.’” Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:99

[1134] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:70

This ḥadīth shows that expiation for an oath may be offered after the oath is sworn and before the breach occurs.

Examples illustrating the maxim:

1. Purification from ritual impurity:

- Cause of obligation: the occurrence of ritual impurity.
- Condition of obligation (sharṭ al-wujūb): performing an act of worship that requires purification.
- It is permissible to perform ablution after impurity occurs even if the time of the act of worship is not imminent.[1135]

2. Zakāh:

- "It is permissible to advance payment of zakāh on wealth from the beginning of the year once the minimum threshold (niṣāb) has been completed." [1136]

3. Expiations related to iḥrām:

- "If expiations related to iḥrām are needed due to an excuse, the excuse is their cause, so they may be performed after the excuse exists and before committing the prohibited act."[1137]

4. Fasting for tamattuʿ (ʿumrah followed by ḥajj with release from iḥrām between them) and qirān (combining ḥajj and ʿumrah in one iḥrām):

- "Among them is the fasting of tamattuʿ and qirān, whose cause is the ʿumrah preceding ḥajj within its months. Once one enters the state of iḥrām for ʿumrah, the cause exists, so fasting is permissible thereafter, even though its obligation comes later."[1138]

5. Expiation for an oath:

- Cause of obligation: swearing the oath.
- Condition of obligation: breaking it.
- "Expiation for an oath may be offered before the breach, after the oath is sworn, whether financial or bodily."[1139] It may also be delayed. As for ẓihār, expiation must precede intercourse.

6. Conditional vows:

- For example: "If Allah cures my patient, then it is upon me to give such-and-such in charity. He may give the charity immediately."[1140]

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[1135] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:70

[1136] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:71

[1137] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:71

[1138] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:71

[1139] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:72

[1140] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:72.

7. Waiver of blood money between injury and death:

- It is valid, in the more dominant position, for the injured party to waive blood money from the offender at this stage, though it is taken from one-third of the estate.[1141]

Exceptions to the maxim:

- The sacrificial offering for tamattuʿ:

Advancing fasting has already been mentioned. “As for the sacrificial animal, Abū al-Khaṭṭāb committed to it in *al-Intiṣār*. We also have a report that it is permissible to slaughter it for one who enters before the first ten days due to the difficulty of keeping it until the Day of Sacrifice. According to the well-known view, slaughtering is not permitted outside the days of sacrifice, since the Sharīʿah has specifically designated them for slaughter.” [1142]

- Waiving pre-emption before sale:

“Waiving the right of pre-emption before the sale has two reports, since the cause of pre-emption is ownership and its condition is sale.”[1143] The correct view is that the right does not fall away.

- Heirs waiving their right concerning a bequest during the testator’s illness:

“Heirs waiving their right concerning a bequest during the testator’s illness: It is explicitly stated from Aḥmad that this is not valid. He likened it in one place to waiving pre-emption. Shaykh Majd al-Dīn derived two reports on this in his *Commentary on al-Hidāyah*.[1144]” The position of the madhhab is that their right does not fall away. In the questions of Imām Aḥmad and Isḥāq ibn Rāhawayh: “I said: a man seeks permission from his heirs at death to bequeath more than one-third?” He replied: “They may retract.” ʿAbd Allāh ibn Masʿūd said: “That coerced consent is not valid.”[1145]

إمكان الأداء ليس بشرط في استقرار الواجبات بالشرع في الذمة على ظاهر المذهب

## The ability to perform is not a condition for the obligation to become firmly established in one’s legal liability (dhimmah) according to the apparent position of the madhhab

This is the nineteenth of the Rajabiyyah maxims.

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[1141] "If the victim pardons the perpetrator from paying the blood money (diyah), or bequeaths it to him, it is a bequest to a killer, and it is valid—because it comes after the crime. This differs from the case where he first made the bequest and then was killed by the same person. This is discussed in detail under the rulings on recipients of bequests. Such a pardon or bequest is counted from one-third of the estate, like all other gifts given during illness or formal bequests." Kashshāf al-Qināʿ, al-Buhūtī, 13:295

[1142] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:72

[1143] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:73

[1144] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:73

[1145] Masāʾil al-Imām Aḥmad wa-Isḥāq ibn Rāhawayh, al-Kawsaj, 8:4287

Explanation of the maxim:

The basic principle in the Sharīʿah is that obligations become established in one's legal liability as soon as their causes are realized, and their establishment does not depend on the ability to perform them. When the cause exists, the obligation follows. This is what is understood from the apparent position of the madhhab: inability to perform prevents the act itself, but it does not prevent the obligation from being firmly established in liability.

«(ولا يعتبر) لوجوب الزكاة (إمكان أداء) على الأصح. فيجب على مالك نصاب بحولان الحول، وإن لم يتمكن من أدائها، ... ولأنها عبادة. فلا يشترط لها إمكان الأداء، كبقيه العبادات. فإن الصوم يجب على المريض والعاجز عن أدائه وعلى الحائض. والصلاة تجب على المغمى عليه والنائم، ومن أدرك من أول الوقت جزءاً لا يمكنه الأداء فيه ثم جن أو حاضت المرأة...»

Ibn al-Najjār clarified this principle with examples, stating:
"Ability to perform is not considered a condition for the obligation of zakāh according to the sound view. Thus, zakāh becomes obligatory upon the owner of a niṣāb (minimum zakāh threshold) with the completion of the year even if he is unable to pay it. This is because it is an act of worship, and ability to perform is not a condition for acts of worship in general. Fasting is obligatory upon the sick person and one unable to perform it, and upon the menstruating woman. Prayer is obligatory upon the unconscious and the sleeping person, and upon one who reaches part of the beginning of the prayer time during which he cannot perform it, then becomes insane, or a woman menstruates…"[1146]

Nevertheless, the issue is disputed within the madhhab, and Ibn Rajab's qualification "according to the apparent position of the madhhab" reflects scholarly fairness and precision. In *al-Inṣāf* it states:

"اعلم أن الصحيح من المذهب؛ أن الأحكام تترتب بإدراك شيء من الوقت ولو قدر تكبيرة. وأطلقه الإمام أحمد. وعليه جماهير الأصحاب، وقطع به كثير منهم، وهو من المفردات. وعنه، لابد أن يمكنه الأداء. اختارها جماعة؛ منهم ابن بطة، وابن أبي موسى، والشيخ تقى الدين."

"Know that the correct position of the madhhab is that rulings attach upon attaining any portion of the time, even the amount of a single takbīrah (pronouncement of "Allāhu akbar," "Allah is greatest"). This was stated generally by Imām Aḥmad. This is the position of the majority of the companions, and many stated it decisively, and it is among the madhhab's distinctive views. Another report holds that the ability to perform is required. This was chosen by a number of scholars, including Ibn Baṭṭah, Ibn Abī Mūsā, and Shaykh Taqī al-Dīn."[1147]

[1146] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 3:175

[1147] al-Inṣāf, al-Mardāwī, 3:177

Applications:

Ibn Rajab said:

“The following cases fall under this principle:

Among them is purification. If a person lacking water reaches water when the prayer time has become constrained, he must purify himself and pray after the time has ended. This was stated by the author of *al-Mughnī*. The author of *al-Muḥarrar* disagreed and held that he prays with dry ablution (tayammum), which is the apparent meaning of Aḥmad’s statement in the narration of Ṣāliḥ. [This is the school’s position for a traveler.][1148]

Among them is prayer. If something that removes legal accountability befalls the legally responsible person after the time has begun but before he is able to perform the act, then according to the well-known view he must make it up. Ibn Baṭṭah and Ibn Abī Mūsā held that no make-up is required.[1149]

Among them is zakāh. If the niṣāb is destroyed before one is able to perform payment, he must still pay its zakāh according to the well-known view.[1150]

Among them is fasting. If a child reaches puberty while not fasting during a day of Ramaḍān, or a disbeliever embraces Islam during it, or a menstruating woman becomes pure, then according to the soundest of the two reports they are required to make up the fast.[1151]

Among them is ḥajj. Ability to perform is not a condition for the obligation to be established in liability according to the more apparent of the two reports; rather, it is a condition for being required to perform it personally. [The relied-upon position requires sufficient time and a safe route for ḥajj to become obligatory.][1152]

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[1148] "Tayammum is not valid due to fear of missing a funeral, ʿĪd, or obligatory prayer—unless a traveler reaches water but the time is too short, or he knows that his turn to access it will not come until after the time has expired." al-Iqnāʿ, al-Ḥajjāwī, 1:57

[1149] “The correct position in the madhhab is that legal consequences arise upon catching any part of the prayer time, even enough for a single takbīrah. (...) Another report requires sufficient time to perform the prayer; Ibn Baṭṭah, Ibn Abī Mūsā, and Shaykh Taqī al-Dīn chose this. Shaykh Taqī al-Dīn also held that the consequences arise only if the time becomes too constrained to perform the prayer and the impediment then occurs.” Al-Inṣāf, al-Mardāwī, 3:177.

[1150] “According to the sounder view, ability to pay is not a condition for zakāh to become obligatory, (...) nor is the continued existence of the wealth upon which it became due. (...)

Because zakāh is a human right or includes one, it does not lapse after becoming obligatory, like a debt owed to a person, except when crops or fruit perish in a calamity before harvest.” Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 3:175. “Al-Shīrāzī and others derived a view that the obligation lapses unconditionally.” Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:155.

[1151] “If testimony of moon-sighting is established during the day, the person must abstain and make up the fast. The same applies if a disbeliever accepts Islam, or a mad person regains sanity, or a child reaches puberty. Another report from Aḥmad states: nothing is required of them. The weaker view has strength, because fasting was not obligatory upon them at the time its period began.” al-Mubdiʿ fī Sharḥ al-Muqniʿ, Ibn Mufliḥ, 3:10

[1152] “Among the components of ability are sufficient time and a safe route. (...) Another report treats these as conditions for obligatory performance and undertaking the journey; under that report, if a person dies before they exist, ḥajj remains due from his estate. (...) The first view is the correct position in the madhhab.” Ghāyat al-Muntahā, Marʿī al-Karmī, 1:378.

As for making up acts of worship, the companions considered the ability to perform a condition. They said regarding one who delayed making up Ramaḍān fasts due to an excuse and then died before the excuse ceased that no feeding is given on his behalf. If he died after the excuse ceased and he had the ability to make them up, then feeding is given on his behalf.[1153]

As for vows, there are two views regarding whether ability to perform is a condition. If someone vowed to fast or perform ḥajj and then died before being able to perform it, is it made up on his behalf? There are two views.[1154]" [1155]

It should be noted that the exceptions at the end of his discussion relate specifically to making up acts on behalf of the deceased.

A practical application of this maxim concerns a woman who has no maḥram (husband or male relative whom she is permanently forbidden to marry). If we hold that having a maḥram is a condition for the obligation to be performed but not a condition for the obligation to arise, according to one report,[1156] then a financially able woman must appoint a proxy. If, however, we hold that it is a condition for the obligation itself, according to the predominant, explicitly stated report, then she is not required to do so unless it becomes possible for her and she then negligently delays until the maḥram is lost and she despairs of finding one, in which case she must appoint a proxy.[1157]

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"The distinction is that if a condition of obligation is absent when the person dies, ḥajj is not due from his estate; if a condition of performance is absent, the conditions of obligation are nevertheless complete and ḥajj remains due from his estate. (...)" Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 2:282.

[1153] "Nothing is due from one who delayed making up the fast for an excuse and then died, because it is a right of Allah and he died before being able to perform it; it therefore lapses without substitute, like ḥajj." Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 2:210.

"If one dies owing a vowed fast (...) that he did not perform, provided he had been capable in obligations other than ḥajj, (...) it is recommended for his guardian to perform it. (...)" Ghāyat al-Muntahā, Marʿī al-Karmī, 1:358.

"The qualification 'other than ḥajj' means that ability is not required for ḥajj, because deputization in it is generally permitted during life." Ḥāshiyat al-Khalwatī ʿalā Muntahā al-Irādāt, Muḥammad ibn Aḥmad al-Buhūtī al-Khalwatī, 2:236.

[1154] "One who dies owing a vowed fast, ḥajj, ʿumrah, ṭawāf, prayer, or iʿtikāf that he did not perform, provided he had been capable in obligations other than ḥajj, (...) may have it performed by his guardian as a recommended act. (...)" Ghāyat al-Muntahā, Marʿī al-Karmī, 1:358.

"The qualification 'other than ḥajj' means that ability is not required for ḥajj, because deputization in it is generally permitted during life." Ḥāshiyat al-Khalwatī ʿalā Muntahā al-Irādāt, Muḥammad ibn Aḥmad al-Buhūtī al-Khalwatī, 2:236.

[1155] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:154–156

[1156] "A maḥram is a condition for a woman's ḥajj. Is it a condition of obligation (wujūb) or of performance (adāʾ)? There are two narrations." al-Hidāyah ʿalā Madhhab al-Imām Abī ʿAbd Allāh Aḥmad ibn Muḥammad ibn Ḥanbal al-Shaybānī, Abū al-Khaṭṭāb al-Kalwadhānī, 201.

[1157] "The presence of a maḥram is also a condition for ḥajj and ʿumrah to be obligatory upon a woman. (...) If she had a maḥram but negligently delayed until he was lost and then despaired of finding one, she appoints a proxy. (...) A woman who never had a maḥram is not obligated to perform ḥajj either personally or through a proxy." Al-Rawḍ al-Nadī Sharḥ Kāfī al-Mubtadī, Aḥmad ibn ʿAbd Allāh al-Baʿlī, 172.

الواجب بالنَّذر هل يلحق بالواجب بالشَّرع أو بالمندوب؟

## An obligation arising from a vow: does it take the ruling of an obligation imposed by the Sharʿ, or that of a supererogatory act?

This is the one-hundredth maxim of Ibn Rajab.[1158]

Clarification:

الواجب بالنذر يلحق بالشرع.

If a servant obligates himself to an act of worship through a vow (nadhr), is that act to be performed in the same manner as an obligation imposed by the Sharʿ, or is it treated like a supererogatory act that the legally responsible person has committed himself to? The predominant answer in the madhhab is the former. For this reason, al-Siʿdī formulated the forty-seventh maxim in the affirmative: "An obligation arising from a vow takes the ruling of an obligation imposed by the Sharʿ."

Applications of the maxim:

1. Eating from a vowed sacrifice:
   There are two views. Some permitted eating from it, likening it to a voluntary sacrifice, while others prohibited it because it is binding by virtue of the vow. The madhhab adopts prohibition.[1159]
2. Performing a vowed prayer during times of prohibition:
   There are two views: prohibition, treating it as a voluntary prayer; and permissibility, because a vowed prayer is obligatory and is therefore performed during prohibited times like an obligatory prayer. The madhhab adopts permissibility.[1160]
3. Vowing to fast the Days of Tashrīq:
   Unlike the fasting required for tamattuʿ (performing ʿumrah and then ḥajj with separate entries into iḥrām), the relied-upon view in the madhhab is that: "Whoever vows to fast the Days of Tashrīq must make up three days and does not fast the day of ʿĪd nor the Days of Tashrīq. His vow is binding, the act of devotion is valid, but the specific designation is void because it entails disobedience—like the vow of a sick person to fast on a day in which he fears harm; the vow is binding while fasting is prohibited."[1161]

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[1158] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:286

[1159] "Abū Bakr, al-Qāḍī, the author [ibn Qudāmah], the commentator, and the author of al-Fāʾiq all held that it is permissible to eat from a vowed sacrificial animal (al-uḍḥiyah al-mandhūrah), just as it is from a regular uḍḥiyah, according to the narration that renders it obligatory—the more correct of the two views. However, the majority of the fellows held the contrary." al-Inṣāf, al-Mardāwī, 9:417.

[1160] "(It is permissible to perform) a (vowed) prayer—if one vowed to pray without specifying. And it is also permissible (to vow it), i.e., to vow to pray during a prohibited time (waqt al-nahy), because it is obligatory and thus resembles the prescribed prayers." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:257.

[1161] Nayl al-Maʾārib bi-Sharḥ Dalīl al-Ṭālib, ʿAbd al-Qādir ibn ʿUmar al-Taghlibī, 2:440.

4. Number of units in a vowed prayer:
   If one vows an unspecified prayer, he is obligated to perform two units according to the madhhab, as that is the minimum number in a Sharʿī obligation. It is also said that one unit suffices.[1162]

5. Vowing to fast the day a person arrives:
   There are two views. In *al-Iqnāʿ* it states:
   "If he vows to fast the day so-and-so arrives, and he arrives at night, nothing is required, though fasting the following morning is recommended. If he arrives during the day, or arrives while one is not fasting, or arrives on a day of ʿĪd, or during menstruation or postnatal bleeding, then one must make it up and offer expiation."[1163]

Exceptions:

6. Vowed prayer inside the Kaʿbah:
   It is permissible to perform a vowed prayer inside the Kaʿbah, even though an obligatory prayer is not valid there.[1164]

7. Fulfilling vowed acts on behalf of the deceased:
   It is permissible to fulfill vowed prayer, fasting, and devotional retreat (iʿtikāf) on behalf of the deceased, unlike original Sharʿī obligations such as prayer and fasting, which are not made up on behalf of the deceased—except for ḥajj and ʿumrah.

## Quantity or Nobility

الكثرة أم الشرف

«إذا تقابل عملان: أحدهما ذو شرف في نفسه ورفعة وهو واحد، والآخر ذو تعدد في نفسه وكثرة، فأيهما يرجح؟ ظاهر كلام أحمد: ترجيح الكثرة.»

In his seventeenth maxim, Ibn Rajab states: "When two acts come into opposition—one possessing inherent nobility and rank but being singular, and the other possessing multiplicity and abundance—which is to be preferred? The apparent wording of Aḥmad indicates preference for quantity."

Explanation of the maxim:

When two acts conflict, one distinguished by intrinsic nobility and elevation but singular, and the other by multiplicity and abundance, the preference between them varies according to circumstances and the objectives of the Sharīʿah. Ibn Rajab notes that the apparent indications of Imām Aḥmad's positions

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[1162] "If one vowed to perform a prayer and did not specify [its form], then it is two rakʿahs while standing—for one able to stand—because a single rakʿah is not sufficient in an obligatory prayer." Kashshāf al-Qināʿ, al-Buhūtī, 14:492.

[1163] al-Iqnāʿ, al-Ḥajjāwī, 4:360

[1164] "(An obligatory prayer is not valid inside the Kaʿbah or above it), and al-Ḥijr is part of it. However, if one stood at its edge such that nothing of it remained behind him, or stood outside and prostrated inside it, it is valid—since he is not turning his back to any part of it. (But a supererogatory prayer is valid) as is a vowed prayer, inside or upon it." al-Rawḍ al-Murbiʿ, al-Buhūtī, 1:228.

favor abundance, though this is not absolute; in some cases, nobility is preferred depending on the intended meaning of the act.

Detail and examples:

1. Prayer:

«إذا تعارض صلاة ركعتين طويلتين، وصلاة أربع ركعات في زمن واحد؛ فالمشهور: أن الكثرة أفضل. وحكي عن أحمد رواية أخرى: بالعكس. وحكي عنه رواية ثالثة: بالتسوية.».

"When two long units of prayer conflict with four shorter units within the same time, the well-known view is that greater number is superior. Another narration from Aḥmad prefers the opposite, and a third holds them equal."[1165]

2. Sacrificial offering:

"قلت لأحمد: بدنتان سمينتان بتسعة وبدنة بعشرة، قال: ثنتان أعجب إلي. ورجح الشيخ تقي الدين تفضيل البدنة السمينة"

"Ibn Manṣūr reported: I asked Aḥmad about two well-fed camels worth nine versus one camel worth ten. He said: "Two are more pleasing to me." Shaykh Taqī al-Dīn, however, preferred the single well-fed camel."[1166]

3. Recitation in prayer:

"One man recited a single sūrah with deliberation and reflection, while another recited several sūrahs rapidly within the same time. Aḥmad said—according to the narration of Jaʿfar ibn Aḥmad ibn Abī Qaymaz—when asked, 'Which do you prefer: measured recitation or speed?' He replied: 'Is it not reported that for every letter there is such-and-such a reward?' They said to him: 'Even with speed?!' He said: 'If he articulates the letter with his tongue and does not omit it from his utterance.' This clearly indicates a preference for quantity over reflection.
Harb transmitted from him that he disliked speed, except for one whose tongue is such that he is unable to recite slowly. The Qāḍī interpreted this dislike as applying to cases where the letters are not clearly articulated.
Muthannā ibn Jāmiʿ also transmitted from him concerning two men: one who ate to satiety and increased prayer and fasting, and another who ate little, had fewer voluntary acts, but engaged more in reflection—'Which is better?' He cited what is reported regarding reflection: 'An hour of reflection is better than a night of standing in prayer.' He said: 'I saw that this weighed more with him,' meaning reflection. This indicates a preference for reflective recitation over speed. This was the choice of Shaykh Taqī al-Dīn, and it is explicitly reported from the Companions and the Successors."[1167]

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[1165] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:132

[1166] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:132

[1167] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:133

4. Prayer while sitting or standing:

من صلى قائمًا فهو أفضل. ومن صلى قاعدا فله أجر نصف القائم

"The reward of prayer performed while sitting is half its reward performed while standing," based on the ḥadīth: "Whoever prays standing, it is superior; and whoever prays sitting has half the reward of one who prays standing," agreed upon. This applies except to one who has an excuse, for in his case the reward of praying while sitting is equal to that of praying while standing."[1168] If one prays more than double the amount while sitting, it may then be superior.

5. Worship performed willingly or with struggle:

فمثلهما كمثل رجلين: أحدهما مقيم بمكة يشتغل بالطواف، والآخر يقطع المفاوز والقفار في السير إلى مكة؛ فعمله أشق، والأول أفضل، والله أعلم.

Ibn Rajab included this discussion within the chapter by way of extension, and we have mentioned it due to its importance. He said:

"Two men: one whose soul has been trained upon obedience, finding ease, expansion, and delight in it, hastening to it willingly and lovingly; and another who struggles against his soul in those acts of obedience and compels it to perform them— which of the two is superior? Al-Khallāl said: Yūsuf ibn ʿAbd Allāh al-Iskāfī wrote to me, narrating from al-Ḥasan ibn ʿAlī ibn al-Ḥasan that he asked Abū ʿAbd Allāh about a man to whom a path of righteousness presents itself and he forces himself upon it with aversion, and another to whom it presents itself and he rejoices in it— which of the two is superior? He replied: 'Have you not heard the Prophet ﷺ say: "Whoever learns the Qurʾān while advanced in age and finds it difficult receives two rewards"?'" This clearly indicates a preference for the one who compels himself, because he performs two acts: striving against the soul and obedience itself, and thus he receives two rewards. This is the view of Ibn ʿAṭāʾ and a group of the Sufis among the companions of Abū Sulaymān al-Dārānī. According to al-Junayd and a group of the ascetics of Baṣrah, however, the one who offers obedience willingly and lovingly is superior. This is the choice of Shaykh Taqī al-Dīn, because his station of inner tranquility is superior to multiple acts, and because he belongs to the people of stations and realized ranks, whereas the other belongs to those at the level of spiritual wayfaring and its beginnings. Their likeness is that of two men: one residing in Mecca occupied with circumambulation, and another traversing deserts and wastelands on the journey to Mecca— the latter's effort is harder, yet the former is superior. And Allah knows best."[1169]

This concludes Ibn Rajab's words. The truth lies in what al-Junayd stated if we are speaking of two men: one who stands in night prayer delighting in intimate supplication, to whom it has become beloved, and another who is still striving against himself to reach that noble station. As for a person who turns only to the acts that he finds pleasing and neglects those that are difficult, this may at times be sound spiritual discipline, and at other times negligence—especially if it leads him to abandon obligations—and at other times deficiency, if he gives precedence to his own comfort and ease over the right of his Lord and His pleasure, thereby occupying himself with what is lesser while neglecting what is superior. The truth also

[1168] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:248

[1169] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:135

is that a distinction should be made between one who was raised in an environment that facilitates obedience and good deeds, and another who struggles against himself in an environment that discourages them. The latter may be superior to the former, for worship during times of turmoil is like migration to him ﷺ. The decisive factor lies in the hearts and intentions, and Allah alone is fully aware of what they contain.

لَنْ يَنَالَ اللَّهَ لُحُومُهَا وَلَا دِمَاؤُهَا وَلَكِنْ يَنَالُهُ التَّقْوَى مِنْكُمْ

Conclusion:

The reports from Imām Aḥmad differ regarding preference between quantity and nobility, though most of them, in Ibn Rajab's assessment, incline toward preferring quantity. A synthesis of the reports shows that preferring quantity or nobility depends on the type of worship, its objectives, the surrounding circumstances, and the degree of nobility involved. At times, greater quantity is preferable due to increased reward, such as when one is able to perform six units while sitting versus two while standing. At other times, nobility is preferable to realize the intended meaning of the act of worship, as in reflective recitation. Seeking His pleasure is the true criterion in all of this, for Allah says: "Neither their flesh nor their blood reaches Allah, but what reaches Him is piety from you" (al-Ḥajj 22:37).

# Fourth: Maxims Primarily Related to Transactions and Dispositions

الخَرَاجُ بِالضَّمَانِ

## Profit follows liability

الغنم بالغرم

This is the wording of a ḥadīth of the Messenger of Allah ﷺ, narrated by the Five, and authenticated by al-Tirmidhī and others.
Among the maxim's wordings is: *"al-ghunm bi-l-ghurm"* ('Gain is tied to loss,' that is, to the assumption of liability and exposure to potential loss).

The Messenger of Allah ﷺ also forbade profiting from what one has not assumed liability for. This was narrated by al-Ṭabarānī from Ḥakīm ibn Ḥizām (rAa).

معنى الخراج في هذا الحديث غلة العبد يشتريه الرجل فيستغله زمانا، ثم يعثر منه على عيب دلسه البائع ولم يطلعه عليه، فله رد العبد على البائع والرجوع عليه بجميع الثمن، والغلة التي استغلها المشتري من العبد طيبة له لأنه كان في ضمانه، ولو هلك هلك من ماله

The meaning of the maxim is that whoever bears liability for an item if it were to perish is entitled to its yield, in the form of benefits and rent. "Abū ʿUbayd and others among the scholars said: "The meaning of *kharāj* in this ḥadīth is the yield of a slave whom a man purchases and derives benefit from for a period of time, then discovers in him a defect that the seller had deceptively concealed and did not disclose to him. He is entitled to return the slave to the seller and recover the full price, and the yield that the buyer derived from the slave is lawful for him, because the slave was under his liability; had he perished, he would have perished from the buyer's wealth." [1170]

Among its applications:

Whoever purchases something and then returns it due to a defect, the benefits he enjoyed and the rent he obtained from it, such as a house or a riding animal, belong to him, because the sold item was under his liability had it perished.[1171]

And "if the purchaser derived benefit from the share (*shiqṣ*) before the pre-emptor exercised the right of pre-emption (shufʿah)—by taking its produce or its rent—then it belongs to the purchaser, and the pre-emptor has no right to demand its return, based on the ḥadīth: *"al-kharāj bi-l-ḍamān."*[1172]

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[1170] Lisān al-ʿArab, Ibn Manẓūr, 2:251.

[1171] "(And the profit of a defective sold item), from the time of contract until it is returned, (belongs to the buyer), based on the ḥadīth: 'Profit follows liability (al-kharāj bi-l-ḍamān),' for if the item had perished, it would have been at his risk." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:46.

[1172] Kashshāf al-Qināʿ, al-Buhūtī, 9:384

A specified dowry becomes owned by the wife from the moment of the contract, so its increase belongs to her, and its liability is upon her unless the husband prevents her from taking possession of it; if he does so, then liability is upon him.[1173]

In Resolution of the International Islamic Fiqh Academy No. 133 (7/14): "… As for muḍārabah (a partnership in which one party supplies capital and the other labor), it is participation in profit and bearing loss if it occurs, due to his ﷺ saying: *'al-kharāj bi-l-ḍamān'* … The jurists have reached consensus over the centuries and across all schools that it is not permissible to fix the profit of investment in *muḍārabah* and other partnerships as a lump sum or as a percentage of the invested amount (capital), because that entails guaranteeing the principal, which contradicts sound Sharʿī evidence and leads to severing participation in profit and loss, which is the requirement of partnership and *muḍārabah*."

Contemporary applications:

The contemporary applications of this maxim are numerous, and it is among the most important maxims that must be observed in Islamic finance and banking transactions. Every lawful profit must correspond to a recognized liability or Sharʿī risk within a valid commutative contract (ʿaqd muʿāwaḍah). If the element of Sharʿī risk is eliminated by conditions that effectively guarantee the capital together with a fixed profit, the maxim is undermined and the contracts become invalid.

*Murābaḥah for the purchase-orderer (a disclosed cost-plus sale)*: it is not lawful for the bank to take the profit of *murābaḥah* unless the commodity enters into its liability, such that it bears the consequence of its perishing before delivery. Only then is it entitled to the yield, namely the profit of sale.

A lease ending in ownership (*ijārah muntahiyah bi-l-tamlīk*): if all liabilities relating to the asset are transferred to the lessee while the rent remains for the bank, such that the bank no longer truly bears liability for the asset, the meaning of "gain for liability" is undermined.

Diminishing partnership (*mushārakah mutanāqiṣah*): if the bank is assigned a fixed return unaffected by loss, or if its capital is guaranteed in all circumstances, the meaning of "gain for liability" is undermined and the arrangement becomes akin to a loan with an increment.

Exceptions:

وَلَا تُصَرُّوا الْإِبِلَ وَالْغَنَمَ، فَمَنِ ابْتَاعَهَا بَعْدَ ذَلِكَ فَهُوَ بِخَيْرِ النَّظَرَيْنِ، بَعْدَ أَنْ يَحْلُبَهَا، فَإِنْ رَضِيَهَا أَمْسَكَهَا، وَإِنْ سَخِطَهَا رَدَّهَا، وَصَاعًا مِنْ تَمْرٍ.

An exception to items returned due to defect is the case of the muṣarrāh animal—whose milk has been deliberately retained by withholding milking (or by tying the udder). In such a case, the buyer may return the animal because of the defect, but must return it together with a ṣāʿ (a classical measure of capacity) of dates based on the Prophet's ﷺ statement: "Do not artificially retain the milk of camels and

[1173] "The wife is entitled to the increase of a specified dower from the conclusion of the marriage contract. (...) She may dispose of it. (...) Its liability and diminution rest upon the husband if he prevents her from taking possession, because by doing so he resembles a usurper; otherwise, they rest upon her because her ownership is complete." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 3:16.

sheep. Whoever purchases such an animal thereafter has the choice, after milking it: if he is satisfied with it, he keeps it; and if he is dissatisfied with it, he returns it along with a ṣāʿ of dates."

Another exception in the item returned due to defect is when it has developed an attached increase, such as fattening. In one report, the increase belongs to the buyer, in accordance with the maxim, while the well-known view in the madhhab is that the increase belongs to the seller as a consequence of the principal. This is an exception to the maxim.[1174]

The usurper (*ghāṣib*) is also excepted from the maxim. He is liable for what he usurps, yet he is not entitled to its yield.[1175] This is appropriate, because the liability here arises from wrongdoing. Ibn Rajab said regarding validating his transactions:
"Here is a difficult issue under the principle of the madhhab: when someone usurps cash and trades with it and profits. The texts from Aḥmad agree that the profit belongs to the owner. Some of the companions based this on the view that the usurper's transactions are suspended pending ratification, such as Ibn ʿAqīl and the author of *al-Mughnī*. Others based it on the view that the usurper's transactions are valid without ratification, because their duration may be long and undoing them would be difficult, and ruling them invalid would harm him, and would harm the owner by depriving him of profit."[1176]

المشغول لا يُشغل

## What is already occupied cannot be occupied (again).

This is al-Siʿdī's sixty-first maxim.

Clarification:

The maxim indicates that if something is already occupied by a particular right or Sharʿī ruling, it may not be subjected to another ruling that conflicts with the first until that occupation ends. If the second occurs before the first becomes binding, the first is void and the second is concluded. If it occurs after that, then the second is void.

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[1174] "If a defective item is returned and it had undergone an attached increase—such as fattening or being trained in a craft—the well-known view among the fellows is that the increase belongs to the seller as an extension of the original item, and the buyer is entitled to nothing for it. Ibn ʿAqīl stated explicitly that the increase belongs to the buyer. This was also the view of al-Shīrāzī, who added that the buyer may claim the value of the increase from the seller. Shaykh Taqī al-Dīn [Ibn Taymiyyah] likewise held this view, deriving it from Aḥmad's general statement in the narration of Abū Ṭālib: if one buys sheep and they grow, then another party's ownership of them is established, the growth belongs to the buyer." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:56.

[1175] "Whatever may validly be leased among usurped property or property possessed under a void contract (...) entails the customary rental upon the possessor or usurper for the entire period it remains in his possession, whether he uses the benefits or allows them to expire. (...) The ḥadīth 'profit follows liability' concerns sales and does not include the usurper and the like." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:320.

[1176] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:264

Proofs for the maxim:

لَا يُبَاعُ وَلَا يُوهَبُ وَلَا يُورَثُ

1. The ḥadīth of ʿUmar ibn al-Khaṭṭāb (rAa), when he acquired land at Khaybar and consulted the Prophet ﷺ, who directed him to retain its principal and give its yield in charity. In the ḥadīth: "It is not to be sold, nor gifted, nor inherited." (al-Bukhārī)

لَا يَبِعْ بَعْضُكُمْ عَلَى بَيْعِ بَعْضٍ

2. The ḥadīth of Abū Hurayrah (rAa): the Messenger of Allah ﷺ said, "None of you is to sell over the sale of another." (al-Bukhārī) This indicates the prohibition of selling over another person's sale, as when someone says to the purchaser during the option period: "Rescind the sale, and I will sell you an equivalent item for less, or a better item for the same price."

Controls of the maxim:

1. Unity of the Sharʿī ruling: if the new ruling conflicts with the existing ruling, it is not permissible to conclude the new contract. Thus, what is pledged cannot be pledged (again), and what is endowed cannot be sold. However, a leased asset may be sold because the two rulings do not conflict.
2. Unity of subject matter and time: if the two contracts concern different subject matters or occur at different times, there is no conflict between them.
3. That the second occupation removes the first: Shaykh Muḥammad ibn ʿUthaymīn divided "occupation" into two types, one that removes the first occupation and one that does not. An example is increasing the debt under the same prior pledge: for instance, if the pledged property is worth three hundred, and the pledgor pledged it for a loan of one hundred, then borrowed a second one hundred from the same pledgee, the pledge covers both two hundred. Thus there is no reason to prohibit pledging it for the second one hundred, even though this is contrary to the madhhab.[1177]

Examples of the maxim:

1. Pledge: pledged property may not be sold, gifted, or pledged again unless the first pledge is released or the pledgee gives permission.[1178]

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[1177] "They say: 'What is already encumbered cannot be re-encumbered'—and this holds true when the second encumbrancer is a third party. But if the second encumbrancer is the same as the first and consents, then what prevents it? Accordingly, people have come to accept the permissibility of adding to a debt—though this contravenes the madhhab. For example, a farmer may come to a merchant, borrow money, and say: 'I place my farm as collateral for this debt.' Then he borrows a second time and says: 'This debt is included under the same collateral.' And the judges rule this as valid." al-Sharḥ al-Mumtiʿ ʿalā Zād al-Mustaqniʿ, Ibn ʿUthaymīn, 9:150.

[1178] "So if one places an item as collateral for a debt of one hundred, then borrows another one hundred from the same person and makes that same item collateral for the second debt as well—it is not valid, because it is pledging what is already pledged. What is encumbered cannot be re-encumbered (al-mashghūl lā yushghal)." Ḥāshiyat al-Khalwatī ʿalā Muntahā al-Irādāt, 3:70.

2. Endowment (waqf): endowed property may not be sold, pledged, or disposed of in a manner that conflicts with its endowment.
3. Selling after a sale: once a commodity is sold, it is not permissible to sell it again because it is occupied by the first sale.
4. Sale after lease: If someone leases out property and then sells it, the sale is valid because a lease (which transfers ownership of the usufruct) is compatible with a sale (which transfers ownership of the property itself), whether the buyer is the lessee or someone else. According to the relied-upon position in the madhhab, the sale does not terminate the lease. If the lessee purchases the property, both the purchase price and the rent remain payable by him.[1179]
5. If, however, he sells and leases a single asset to a single person, a conflict arises, because sale transfers the corpus together with its usufructs, while leasing transfers the usufruct itself that has already passed to the buyer. It is therefore impermissible for it to be occupied by two contracts whose rulings differ: the sold item is under the buyer's liability with respect to its corpus and usufructs, whereas the leased asset remains under the lessor's liability.
6. Exclusive employee (ajīr khāṣṣ): if a person is hired for a specified term, he may not be hired for other work during that term except with the permission of the first hirer.
7. Prohibiting the combination of leasing and muḍārabah: the madhhab, contrary to the majority, permits hiring for a share of profit, but it does not permit combining the percentage with a fixed amount of money. Another view permits it, and it is more accommodating for people in our times.[1180]

Exceptions to the maxim:

- ʿArbūn sale (a sale with a deposit forfeited if the purchaser withdraws): if the sale period ends and payment is not completed, the ʿarbūn becomes a gift.[1181]

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[1179] قال المرداوي في شراء المستأجر العين المؤجرة: «إحداهما: لا تنفسخ وهو المذهب». وذكر القول بالانفساخ رواية أخرى. الإنصاف، المرداوي، ج ٦ ص ٦٩؛ وانظر: كشاف القناع، البهوتي، ج ٩ ص ١٢٧–١٢٨.

Concerning the lessee's purchase of the leased property, al-Mardāwī states: "One position is that it does not terminate, and this is the madhhab's adopted position." He records termination as another reported position. Al-Mardāwī, al-Inṣāf, 6:69; see also al-Buhūtī, Kashshāf al-qināʿ, 9:127–128, Ministry of Justice edition.

[1180] "If one gives his garment to a tailor to make it into a shirt for sale, granting him half the profit for his work, it is permissible, as explicitly stated by Aḥmad. (...) Giving yarn to a weaver to make into cloth for one-third or one-fourth of its price is likewise permissible. (...) If a fixed number of dirhams is added, it is impermissible, as explicitly stated by Aḥmad; another report permits it. (...) Aḥmad was asked about giving the cloth for one-third plus one or two dirhams and replied, 'I dislike it.' (...) If the weaver will not accept without a dirham in addition to one-third, Aḥmad said to make his share one-third and one-tenth. (...)" Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 6:58.

[1181] «يصح بيع العربون وإجارته (...) وهو دفع بعض ثمن في بيع أو بعض أجرة في إجارة، ويقول: إن أخذت العين احتسبت بما أقبضته من الثمن أو الأجرة، وإن لم آخذها فما قبضته مني فلك.» معونة أولي النُهَى، ابن النجار، ج ٥ ص ٦٦

"The sale and lease of ʿurbūn are valid. (...) It consists of paying part of the price in a sale or part of the rent in a lease and saying: 'If I take the item, what I have paid will be counted toward the price or rent; if I do not take it, what you have received from me is yours.'" Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 5:66.

- The same may be said regarding a lease ending in ownership, if we adhere to the rulings of lease in the first period and sale in the second; and making the sale contract contingent upon a future condition is permissible and valid according to Shaykh al-Islām Ibn Taymiyyah, even though this is contrary to the madhhab.

إذا حرّم الله الانتفاع بشيء حرم الاعتياض عن تلك المنفعة

## If Allah has prohibited benefiting from something, then it is prohibited to take compensation in exchange for that benefit

This is Imām Ibn Taymiyyah's formulation of the maxim.[1182]

Explanation of the maxim:
If Allah the Exalted has prohibited benefiting from something—whether from its very substance or from its usufruct—then it is likewise prohibited to take compensation for it through any form of commutative transaction, whether by sale, lease, or otherwise. This is because the substitute takes the place of the substituted item, and benefiting from the substitute is, in reality, benefiting from the prohibited thing itself.

Items whose benefit is prohibited fall into two categories:

1. That whose benefit is absolutely prohibited:
   Such as idols, wine, and pork. It is categorically impermissible to take their price, because their predominant use is unlawful.
2. That whose benefit is prohibited only in certain cases:
   Such as silk, which is prohibited for men but permitted for women; and birds of prey, which may be sold to one who uses them for lawful hunting, but not to one who uses them for unlawful hunting.

Sharʿī evidence for the maxim:

لعن الله اليهود - ثلاثًا - إن الله حرم عليهم الشحوم، فباعوها وأكلوا ثمنها، وإن الله إذا حرَّم على قوم أكل شيء حرم عليهم ثمنه.

1. The ḥadīth of Ibn ʿAbbās (rAa), who said:
   "The Messenger of Allah ﷺ said: 'May Allah curse the Jews—three times. Allah forbade them animal fats, so they sold them and consumed their price. And when Allah forbids a people from consuming something, He forbids them its price.'"[1183]

يقوم البدل مقام المبدل، ويسدُّ مسدَّه، ويبنى حكمه على حكمه في مواضع كثيرة.

2. The legal principle:
   "The substitute takes the place of the substituted item, fulfills its role, and its ruling is built upon

[1182] al-Fatāwā al-Kubrā, Ibn Taymiyyah, 6:36

[1183] Narrated by Abū Dāwūd and Aḥmad.

the ruling of the original in many contexts." Accordingly, if benefiting from the prohibited item itself is unlawful, then benefiting from its price or compensation is judged the same.

Juristic applications of the maxim:

First: In sales and financial transactions

1. Selling juice to one who will turn it into wine: It is not permissible to sell it to someone whom it is known—or reasonably presumed[1184]—will make wine from it. Likewise, selling silk to be worn by men is impermissible, even though selling it for other uses may be permitted.
2. Selling idols and crosses: It is not permissible to manufacture or sell a cross, nor to sell or manufacture idols.

Second: In leasing and labor

3. The prohibition of wages for unlawful acts:
   It is not permissible for a person to hire himself or another for unlawful acts, such as zinā, prohibited singing, or carrying wine.

ومن أخذ عوضا عن عين محرمة أو نفع استوفاه مثل أجرة حمال الخمر وأجرة صانع الصليب وأجرة البغي ونحو ذلك فليتصدق بها وليتب من ذلك العمل المحرم وتكون صدقته بالعوض كفارة لما فعله؛ فإن هذا العوض لا يجوز الانتفاع به؛ لأنه عوض خبيث ولا يعاد إلى صاحبه لأنه قد استوفى العوض ويتصدق به. كما نص على ذلك من نص من العلماء. كما نص عليه الإمام أحمد في مثل حامل الخمر ونص عليه أصحاب مالك وغيرهم.

A related benefit regarding what is done with unlawful compensation: Imām Abū al-ʿAbbās (Ibn Taymiyyah) said:
"Whoever takes compensation for a prohibited substance or for an unlawful benefit that he has rendered—such as the wage of one who carries wine, the wage of a maker of crosses, the earnings of a prostitute, and the like—should give it in charity and repent from that unlawful act. His giving the compensation in charity serves as an expiation for what he did. This compensation is not permissible for him to benefit from, because it is corrupt compensation, and it is not returned to the one who paid it, since he has already received the counter-performance. Rather, it is given in charity. This is stated by those scholars who addressed the issue, as explicitly stated by Imām Aḥmad regarding the carrier of wine, and likewise by the companions of Mālik and others."[1185] *He also has another opinion transmitted by Ibn Mufliḥ: "And in a case of need, he may take what suffices him (his basic sufficiency).'"*[1186]

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[1184] "The position explicitly stated by Aḥmad and transmitted by the fellows is that a sale is invalid when the item is intended for a prohibited use, such as selling juice to one who will make it into wine. (...) Several fellows applied this when the intent is known; another position applies it when it is predominantly assumed. (...) If a lessor predominantly assumes that the lessee will use the property for a sinful purpose, (...) he may not lease it to him and the lease is invalid. Leases and sales are alike in this respect." Al-Qawāʿid wa al-Fawāʾid al-Uṣūliyyah, Ibn al-Laḥḥām, 24, 172.

[1185] Majmūʿ al-Fatāwā, Ibn Taymiyyah, 22:142

[1186] al-Furūʿ, Ibn Mufliḥ, 11:141.

ما حرم أخذه حرم إعطاؤه

## What is prohibited to take is prohibited to give

ما حرم فعله حرم طلبه

## What is prohibited to do is prohibited to request

ما حرم استعماله حرم اتخاذه على هيئة الاستعمال

## What is prohibited to use is prohibited to acquire in a form intended for its use

The last formulation is that of Imām al-Muwaffaq.[1187]

«ما حرم أخذه حرم كل شيء منه»

"And *what is prohibited to be taken is prohibited in all that derives from it*,"[1188]

"إن الله إذا حرم شيئًا حرم ثمنه"

and the Messenger of Allah ﷺ said: "*When Allah forbids something, He forbids its price*."[1189]

These maxims are not identical, as is apparent, but they are closely related, so we have chosen to treat them together. The second is stronger than the first, and the third is of lesser scope than both.

Proofs:

"لَعَنَ رَسولُ اللهِ ﷺ آكِلَ الرِّبَا وَمُؤْكِلَهُ.".

"لَعَنَ رسولُ اللهِ ﷺ الراشِيَ والمُرْتَشِيَ." و"نَهَى ﷺ عن ثَمَنِ الكَلْبِ، ومَهْرِ البَغِيّ، وحُلْوَانِ الكَاهِنِ."

"The Messenger of Allah ﷺ cursed the consumer of usury (ribā) and the one who pays it,"[1190]
"The Messenger of Allah ﷺ cursed the briber and the one who accepts a bribe,"[1191]
and "He ﷺ forbade the price of a dog, the dowry of a prostitute, and the fee of a soothsayer."[1192]

"لُعِنتِ الخمرُ على عشرةِ أوجُهٍ: بعينِها وعاصرِها ومعتَصرِها وبائعِها ومُبتاعِها وحاملِها والمحمولةِ إليهِ وآكِلِ ثمنِها وشاربِها وساقيها"

And the Messenger of Allah ﷺ said:
"Wine has been cursed in ten ways: its substance, the one who presses it, the one for whom it is pressed,

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[1187] al-Mughnī, Ibn Qudāmah, 12:520

[1188] al-Mughnī, Ibn Qudāmah, 5:187

[1189] A portion of a noble ḥadīth narrated by Abū Dāwūd and reported in this wording by al-Dāraqūṭnī.

[1190] Narrated by Muslim.

[1191] Narrated by Aḥmad, al-Tirmidhī, and Ibn Ḥibbān.

[1192] Narrated by al-Bukhārī.

its seller, its buyer, its carrier, the one to whom it is carried, the consumer of its price, its drinker, and the one who serves it."[1193]

{وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَى وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ}

Allah the Exalted said: "And cooperate in righteousness and piety, and do not cooperate in sin and transgression." (al-Māʾidah 5:2).

The meaning of these maxims is that what is unlawful for you to take is unlawful for you to give, such as the dowry of a prostitute, the fee of a soothsayer, usury, and bribery. An exception is giving a bribe to ward off injustice or to recover a legitimate right,[1194] and likewise paying usury in a case of necessity.

What is unlawful to perform—such as killing, theft, or false oath—is likewise unlawful to request, although a claimant may, as an exception, require the defendant to swear an oath while knowing that he is lying.

What is unlawful to use—such as vessels of gold and silver—is likewise unlawful to acquire in the form intended for use (hayʾat al-istiʿmāl), which is the relied-upon position in our madhhab.[1195]

What is unlawful to take is unlawful in all its derivatives, such as the leaves of the trees of the Sacred Precinct and the feathers of its birds.[1196]

And when Allah forbids something, He forbids its price. Accordingly, in our school, the sale of prohibited items is unlawful, with no distinction between Muslim and non-Muslim,[1197] and likewise no distinction—according to the relied-upon position—between lands of Islam and others, whether or not there is a covenant of security (amān) between them.[1198]

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[1193] Narrated by Abū Dāwūd, Ibn Mājah—who provided this specific wording—and Aḥmad.

[1194] "(It is prohibited) for a judge (to accept a bribe) due to the ḥadīth of Ibn ʿUmar [ʿAmr]: 'The Messenger of Allah ﷺ cursed the briber and the one who takes the bribe.' … A bribe is something given after it is demanded. It is also prohibited (to offer it) from the giver if it is to secure a false ruling or to deny someone's rightful claim. However, if he pays it (to avert the judge's oppression) and [perhaps: compel him] to perform his duty, there is no blame on the payer." Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 6:479.

[1195] "(Except for vessels of gold and silver, and those inlaid with them) or with either of the two, (then it is prohibited)—i.e., both possession and use are prohibited. As for the prohibition of possession: anything whose use is absolutely forbidden is also forbidden to possess in a form intended for use—such as musical instruments." Kashshāf al-Qināʿ, al-Buhūtī, 1:89.

[1196] "It is not permitted to take the leaves of trees. (...) Our proof is the Prophet's ﷺ statement: 'Do not strike its thorns or cut its trees.' (...) Whatever is prohibited to take includes every part of it, like a bird's feathers. (...)" Al-Mughnī, Ibn Qudāmah, 5:187.

[1197] "It is not permissible to sell instruments of amusement or wine—even if both parties are dhimmīs." al-Rawḍ al-Murbiʿ, al-Buhūtī, 2:196.

[1198] "Ribā is prohibited between Muslims, and between a Muslim and a ḥarbī (non-Muslim at war with the Islamic polity) both in the abode of Islam and in the abode of war—even if there is no treaty of security between them." al-Iqnāʿ, al-Ḥajjāwī, 2:123.

ما تدعو الحاجة إلى الانتفاع به من الأعيان ولا ضرر في بذله؛ لتيسره وكثرة وجوده، أو المنافع المحتاج إليها؛ يجب بذله مجانا بغير عوض

This principle is not restricted to prohibited items. Rather, in the ninety-ninth Rajabī maxim: "What need calls for benefiting from among tangible items, where there is no harm in giving them due to their availability and abundance, or from necessary benefits, must be given freely without compensation."[1199] This includes the cat, contrary to the relied-upon position permitting its sale, and surplus water and pasture.[1200] It is known, however, that a needy person may purchase such items if they are not given freely. Among the contemporary issues related to this chapter is the International Islamic Fiqh Academy's ruling that human organs may never be subjected to sale, while it expressly held that payment by the beneficiary to obtain a needed organ in a case of necessity "remains a matter for juristic deliberation."[1201]

Imām Taqī al-Dīn, however, distinguishes between different categories of prohibited items with respect to the prohibition of selling them or gifting them to non-Muslims. His foundational view is agreement with the majority that non-Muslims are addressed by the detailed practical rulings of the Sharīʿah, but he holds that this address entails accountability in the Hereafter rather than legal enforcement in this world. Thus, he adopts an intermediate position, permitting some transactions with them and prohibiting others. His evidence for their being addressed by these rulings is that of the majority, and he adduces numerous proofs for allowing certain transactions with them that are not permissible with Muslims.

Among his evidences is the ḥadīth in the two Ṣaḥīḥs from ʿAbd Allāh ibn ʿUmar, that ʿUmar ibn al-Khaṭṭāb saw a silk garment at the door of the mosque and said: "O Messenger of Allah, if only you would buy this and wear it on Friday and when delegations come to you." The Messenger of Allah ﷺ said: "Only one who has no share in the Hereafter wears this." Then some such garments later came to the Messenger of Allah ﷺ, and he gave one of them to ʿUmar. ʿUmar said: "O Messenger of Allah, you have clothed me with it, even though you said what you said about the garment of ʿUṭārid [name of the seller]." He replied: "I did not give it to you for you to wear." So ʿUmar gave it to a brother of his in Mecca who was a polytheist.

Many who hold that non-Muslims are addressed by the law differentiate in specific rulings. Our Imām Aḥmad said, in the narration of Abū al-Naḍr, regarding one who carries wine, pork, or carrion for a Christian: "I dislike his wage, but judgment is given for the carrier to receive his pay. If it is for a Muslim, then it is more severely disliked."[1202]

For this reason, Imām Abū al-ʿAbbās holds that some transactions with them are permissible and does not restrict this merely to silk garments on the basis of the text, but extends it by analogy. Ibn Mufliḥ said: "Shaykh Taqī al-Dīn said: It is permissible to sell silk to a non-Muslim and for him to wear it, because ʿUmar sent to his polytheist brother what the Prophet ﷺ had given him, as narrated by Aḥmad,

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[1199] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:280

[1200] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:280

[1201] *"Use of the Organs of Another Human Being, Living or Deceased,"* International Islamic Fiqh Academy, Resolution no. 26 (4/1), paragraph seven.

[1202] Taqrīb Fatāwā Ibn Taymiyyah, ed. Aḥmad al-Ṭayyār, 4:164

al-Bukhārī, and Muslim. Shaykh Taqī al-Dīn said: By the same analogy, it is permissible to sell vessels of gold and silver to non-Muslims. If it is permissible to sell them to them, then it is permissible to manufacture them for sale to them, and to work on them for them for a wage."[1203]

فإن الرجل لا يجوز له أن يعين أحدا على معصية الله، وإن كان المعان لا يعتقدها معصية، كإعانة الكافرين على الخمر.

However, he prohibits the sale of wine, and even the sale of grapes to those who will make wine from them, saying:
"He (meaning Imām Aḥmad) also explicitly stated that it is not permissible to sell grapes, juice, dādī, and the like to one who will use them to produce wine— even wine whose prohibition is disputed— because it is not permissible for a person to assist anyone in disobedience to Allah, even if the one assisted does not believe it to be disobedience, such as assisting non-Muslims in wine."[1204]

He further clarifies the basis of permissibility and prohibition, saying: "The permissibility of selling silk to non-Muslims is established by the ḥadīth of ʿUmar, unlike the sale of wine, for silk is not prohibited absolutely. The same analogy applies to the sale of vessels of gold and silver to them. And if it is permissible to sell them to them, then it is permissible to manufacture them for sale to them, and to work on them for them for a wage."[1205]

Thus, according to him, the operative distinction is that what is prohibited in itself (muḥarram li-dhātihi), such as wine, may not be sold, carried, or even have its raw material sold—even if that raw material is otherwise lawful—by way of blocking the means (sadd al-dharāʾiʿ) and cutting off the avenue to sin. By contrast, he allows leniency in matters such as silk and gold for men, and likewise in matters whose prohibition is due to an external consideration rather than their essence.

التلف في يد الأمين غير مضمون إذا لم يتعد أو يفرّط، وفي يد الظالم مضمون مطلقًا

## Loss occurring in the possession of a trustee is not subject to liability if he has neither transgressed nor been negligent, whereas loss in the possession of a wrongdoer is subject to liability in all cases.

ما ترتب على المأذون فهو غير مضمون والعكس بالعكس.

It may also be expressed as: whatever results from authorized action is not subject to liability, and the converse likewise applies.

This is the fourteenth of al-Siʿdī's maxims.

Explanation of the maxim:
This maxim is based on the distinction between a trustee (amīn) and a wrongdoer (ẓālim). A trustee is one who holds another's property with the consent of the owner, the consent of the Sharʿ, or the consent

[1203] al-Mustadrak ʿalā Majmūʿ Fatāwā Shaykh al-Islām, Ibn Taymiyyah, 3:120

[1204] al-Fatāwā al-Kubrā, Ibn Taymiyyah, 3:368

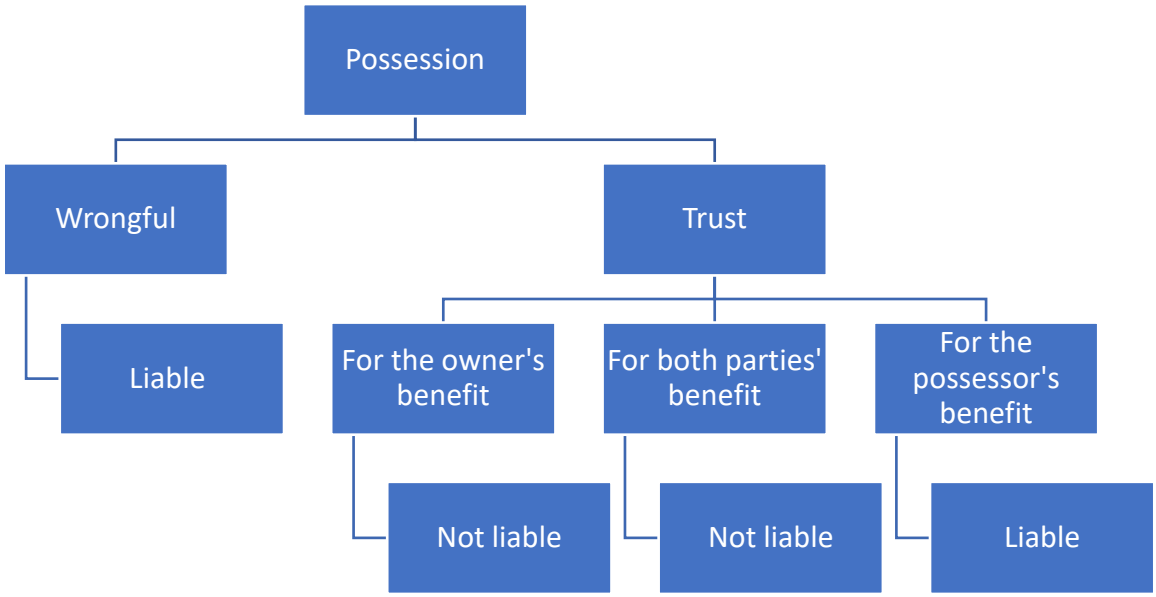
[1205] al-Mustadrak ʿalā Majmūʿ Fatāwā Shaykh al-Islām, Ibn Taymiyyah, 4:5

of one who has legal authority over it. Such a person is not liable for the property if it perishes, so long as he has neither transgressed nor been negligent, and so long as his possession of the property was not purely for his own exclusive benefit, as in the case of a borrower.
By contrast, the hand of a wrongdoer—such as a usurper, a betrayer of trust, or a wrongful denier—is a hand of absolute liability (yad ḍamān). He is liable whether he destroys the property himself or it perishes without any transgression on his part.

Categories of possession held in trust:

1. Possession taken solely for the possessor's benefit includes that of a borrower who benefits from the borrowed property. Under the madhhab, the borrower is liable if the property is destroyed even without transgression or negligence, except for destruction or depreciation caused by authorized use or the passage of time, for which no liability attaches. It is also said that liability arises only by stipulation, but the first is the position of the madhhab.
2. Possession taken solely for the benefit of the owner:
   Such as a deposit (*wadīʿah*) and lost property (*luqaṭah*) before the lapse of a year. This is pure trust. If the property perishes in the trustee's possession without transgression or negligence, he is not liable. His statement is accepted regarding the occurrence of loss, and likewise regarding return. Thus, if the owner of the deposit demands it and the trustee says that he has returned it to him, his statement is accepted concerning the return upon his oath.
3. Possession taken for the benefit of both parties:
   Such as a pledge (*rahn*), a *muḍārabah*, and a leased asset. In these cases, the possessor's hand is a hand of trust (yad amānah) according to the madhhab, so long as he has not transgressed or been negligent. His statement is likewise accepted, according to the madhhab, regarding loss, [1206] but not regarding return.

[1206] "The working partner is a trustee in the muḍārabah capital because he transacts with it by its owner's permission in a manner not exclusively for his own benefit. (...) He is therefore not liable for loss without misconduct or negligence. (...) His statement is accepted concerning the amount of capital and profit and his claims of destruction or loss. (...) If he claims destruction through an apparent event, he must produce evidence of that event and then swear that the property was destroyed by it." Kashshāf al-Qināʿ, al-Buhūtī, 8:524.




Conditions for accepting the statement of a trustee when he has no proof

In al-Siʿdī's twenty-sixth maxim it is stated:

يقبل قول الأمناء في الذي تحت أيديهم من التصرفات والإتلافات وغيرها إلا ما خالف الحس والعادة.

"The statement of trustees is accepted regarding the dealings, losses, and the like that concern what is under their control, except where it contradicts perception or customary practice."

Ibn Rajab elaborated on the acceptance of the trustee's statement in his forty-fourth maxim, saying:

"أما التلف؛ فيقبل فيه قول كل أمين؛ إذ لا معنى للأمانة إلا انتفاء الضمان، ومن لوازمه قبول قوله في التلف، وإلا للزم الضمان باحتمال التلف، وهو لا يلزمه الضمان مع تحققه. ويستثنى من ذلك: الوديعة إذا هلكت دون مال المودَع..."

"With respect to accepting the statement of trustees concerning loss and return:
As for loss, the statement of every trustee is accepted, because the very meaning of trusteeship is the absence of liability, and one of its necessary implications is accepting his statement regarding loss. Otherwise, liability would be imposed merely on the possibility of loss, whereas liability is not imposed even when loss is certain.
An exception to this is the deposited property (*wadīʿah*) if it perishes while the trustee's other property remains intact…"[1207]

And know that the position of the madhhab is that a deposited item is not subject to liability even if it perishes among the trustee's own property.[1208] The trustee's statement is accepted regarding loss even if

[1207] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:289

[1208] "Liability (ḍamān) is incompatible with trust (amānah), so the custodian (mūdaʿ) is not liable—even if it perished among his own property—regardless of whether some of his wealth was lost with it or not. This is based on the report

he received the trust for compensation, provided that he claims loss by a hidden cause such as theft or the like. In *al-Rawḍ* it states: "The statement of the agent is accepted regarding denial of negligence and the like, and regarding destruction together with his oath, because the basic presumption is the freedom of his liability. However, if he claims destruction by an apparent cause such as a widespread fire or an army's plunder, he is required to produce evidence for it, and only then is his statement accepted."[1209]

Ibn Rajab then addressed the acceptance of the trustee's statement regarding return, saying:

"As for return, trustees fall into three categories:

The first: those who received the property solely for the benefit of its owner. The position of the madhhab is that their statement regarding return is accepted. Abū Ṭālib and Ibn Manṣūr transmitted from Aḥmad that if a deposit is established by evidence, a claim of return is not accepted without evidence. Ibn ʿAqīl derived this on the basis that witnessing the discharge of rights established by evidence is obligatory, so failing to do so constitutes negligence and entails liability.
A group of the companions derived a similar ruling for the guardian of an orphan: that his statement regarding return is not accepted without evidence… This follows from the same rationale, because witnessing delivery to the orphan is commanded by an explicit Qurʾānic text…

The second: those who received the property for their own benefit, such as the pledgee. The well-known view is that their statement regarding return is not accepted, due to their resemblance to a borrower. Abū al-Khaṭṭāb and Abū al-Ḥusayn derived another view… The same disagreement applies to the lessee.

The third: those who received the property for a shared benefit between themselves and the owner, such as the muḍārib (working partner in a muḍārabah), the partner, the compensated agent, and likewise the compensated executor. Regarding acceptance of their statement concerning return, there are two well-known views, due to the presence of both considerations in their case:

1. Non-acceptance, as explicitly stated by Aḥmad regarding the muḍārib in the narration of Ibn Manṣūr, that he must produce evidence for returning the capital.
2. Acceptance of their statement… and I found this also explicitly stated from Aḥmad in another narration of Ibn Manṣūr regarding the muḍārib, concerning a man who gave another one thousand dirhams as a muḍārabah, and he returned with one thousand saying: 'This is profit, and I have already returned your capital.' He said: 'He is believed in what he says.'"[1210]

The adopted position of the madhhab regarding acceptance of the statement concerning return is that trustees fall into two categories:

1. One who received the property solely for the benefit of its owner.
2. One who received it for his own benefit, or for a shared benefit between himself and the owner.

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of ʿAmr ibn Shuʿayb from his father from his grandfather, that the Prophet ﷺ said: 'Whoever is entrusted with a property bears no liability.' Narrated by Ibn Mājah." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 6:440.

[1209] al-Rawḍ al-Murbiʿ, al-Buhūtī, 2:361

[1210] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:290

This is reinforced by al-Siʿdī's forty-third maxim:

من قبض العين لحظ نفسه لم يقبل قوله في الرد، فإن قبضه لحظ مالكه قبل.

"Whoever takes possession of property for his own benefit, his statement regarding return is not accepted; but if he takes possession for the benefit of its owner, his statement is accepted."

Thus, the ruling for the third category in Ibn Rajab's discussion was treated as equivalent to the second category. If the trust was received for the possessor's own benefit, his statement is not accepted except with evidence. In *al-Rawḍ* it states: "If they dispute over the return of the property or its price to the principal, the statement of a voluntary agent is accepted; but if the agency was for compensation, then the statement of the principal is accepted."[1211] Shaykh Manṣūr said: "If they dispute over the return of a pledge, such that the pledgee claims return and the pledgor denies it, then the pledgor's statement is accepted, because the basic presumption is non-return. The pledgee received the pledge for his own benefit, so his statement regarding return is not accepted, like that of a borrower or a lessee."[1212]

Transgression and negligence

Transgression (*taʿaddī*) or negligence (*tafrīṭ*)—that is, failing to safeguard a trust in the customary manner—immediately converts a hand of trust into a hand of liability. As to whether the underlying transaction is thereby rescinded: the position of the madhhab is that it is rescinded in the case of a deposit (*wadīʿah*), because it is a pure trust,[1213] but it is not rescinded in the case of a pledge (*rahn*)[1214] or an agency (*wakālah*).[1215]

"الجواز الشرعي ينافي الضمان"

"Sharʿī permissibility precludes liability."

Their statement, "What results from authorized action is not subject to liability," is another formulation of the maxim "Sharʿī permissibility precludes liability." Examples include: one who is attacked by an animal and kills it; and the authorized, skilled physician, provided his hand does not transgress and he is not negligent; if he is not known to possess medical competence, then he is liable; one who hires an animal and loads it with a customary load and it perishes is not liable; and a judge is not liable if the

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[1211] al-Rawḍ al-Murbiʿ, al-Buhūtī, 2:362

[1212] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:117

[1213] "If transgression, denial, or mixing with indistinguishable property occurs with one of two deposited items, (...) the trust is nullified for that item but not the other, and it must be returned immediately. It was a pure trust that ceased through transgression and does not become a deposit again without a renewed contract." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:357.

[1214] "Collateral in the creditor's possession is a trust. If it perishes without misconduct or negligence, nothing is owed; misconduct or negligence makes him liable, as with other trusts. The pledge does not become invalid merely because liability arises, because the contract combines trust and security; if one aspect ceases, the other remains." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:112.

[1215] "Agency is not nullified by transgression. Thus, if a garment is given to an agent to sell and he transgresses by wearing or pledging it, his agency remains while the item exists, because the arrangement combines permission to transact and trust; the loss of one does not eliminate the other. (...) The agent is liable for his transgression or negligence, but if he acts as instructed, the transaction is valid because the authorization remains." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:192.

person upon whom a legal punishment is carried out dies.
You will have observed, however, that the borrower (*mustaʿīr*) is liable, and likewise one who is permitted out of necessity to eat another's food is liable—because in both cases the loss occurred through them or in their possession for their exclusive benefit.

"ليس لعرق ظالم حق"

"No right accrues from a wrong," or, more literally, "a wrongdoer's root has no right."

As for the wrongdoer, the rule applies that "no right accrues from a wrong." This is both a juristic maxim and the wording of a Prophetic ḥadīth. Thus, "if a usurper plants trees on land he has seized or builds upon it, he is compelled to remove his planting or building, based on the ḥadīth, "No right accrues from a wrong," narrated by al-Tirmidhī and deemed sound. He is also required to level the land and pay compensation for any diminution in value caused by his transgression, as well as rent for the period until the land is returned, because its usufruct was lost while under his wrongful control. Likewise, even if he did not benefit from it, he remains liable for its rent, and for any diminution in value if it decreased due to his leaving it uncultivated during that year."[1216]

كل عقد يجب الضمان في صحيحه يجب الضمان في فاسده؛ وكل عقد لا يجب الضمان في صحيحه لا يجب في فاسده

## Every contract whose valid form entails liability also entails liability in its invalid form; and every contract whose valid form does not entail liability does not entail liability in its invalid form

This is the forty-seventh Rajabiyyah maxim.

Clarification:

This maxim means that if a contract, when valid, entails liability, then its invalid form likewise entails liability. If a contract, when valid, does not entail liability, then its invalid form likewise does not entail liability.

Thus, contracts that inherently entail liability, such as commutative contracts (ʿuqūd al-muʿāwaḍāt) (sale, lease, marriage), continue to entail liability even when defective. If the sold item perishes in the buyer's possession, even without transgression or negligence, he is liable for it. By contrast, contracts that do not entail liability, such as trust-based contracts (muḍārabah, partnership, agency, deposit) and gratuitous contracts (gift, charity), do not entail liability whether they are valid or invalid.[1217]

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[1216] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:299

[1217] "(Every) binding contract (for which liability applies in its valid form, likewise entails liability in its invalid form)—such as sale, lease, marriage, and similar contracts like a loan. The meaning is: if the valid form of a contract does not entail liability, then the invalid form of the same category likewise does not; and if liability applies when the contract is valid, then it also applies when it is invalid." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 6:25.

Nevertheless, there is disagreement within the madhhab regarding how liability is assessed in an invalid contract: is it assessed by what was stipulated in the contract, or by fair-market equivalent? The madhhab adopts the second, while Imām Taqī al-Dīn chose the first.[1218]

Applications:

First: sales and financial exchanges

1. Liability for the sold item in an invalid sale

In a valid sale, liability for the sold item is by the stipulated price if it perishes in the buyer's possession. In an invalid sale, liability likewise applies.[1219] The madhhab holds that it is assessed by value, not by the stipulated price, while another view, chosen by Imām Taqī al-Dīn, assesses it by the stipulated price.

2. Liability for game acquired by a pilgrim in iḥrām through an invalid contract

If a pilgrim in iḥrām purchases game and it perishes in his possession, he is liable for its value, because it is acquired by an invalid sale, and thus liability follows as it does in the valid form.[1220]

3. Liability in an invalid lease

In a valid lease, rent becomes due once the leased property is delivered, whether or not the lessee benefits from it.

In an invalid lease, there are two reports:

The first: rent becomes due upon taking possession of the leased subject matter, whether or not the lessee benefits. This is the madhhab.[1221] The madhhab holds that liability is assessed by rent at market rate (*ujrat al-mithl*), and it is also said by the stipulated rent.

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[1218] "Al-Qāḍī and Ibn ʿAqīl reported from Abū Bakr ʿAbd al-ʿAzīz that property received through a void sale is guaranteed at the named price. Shaykh Taqī al-Dīn chose this and said it accords with the madhhab's analogy, (...) because the owner permitted its consumption for the named compensation. (...) It may be answered that the named amount was compensation for ownership rather than destruction; because ownership did not transfer, that compensation is not established, and liability arose only through a subsequent cause." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:311.

[1219] "Property received through a void sale is not acquired thereby. (...) The possessor guarantees it as in usurpation and must return all separable and attached increase and pay the customary rent for the period it remained in his possession, whether he used it or not." Kashshāf al-Qināʿ, al-Buhūtī, 7:408.

"If the object is delivered under a void lease, (...) the possessor owes the customary rent for the period it remained with him even if he did not use it, because its benefits were consumed under his control for compensation that did not reach the lessor." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 6:203.

[1220] "If the game animal was sold and perished while in the possession of the pilgrim who purchased it, then he must pay its value to the owner, because it was acquired through a void sale, and he is liable for it just as he would be in a valid sale. And he is also required to offer expiation for the poor of the Ḥaram, due to the generality of the verse: 'And whoever among you kills it intentionally…'" Kashshāf al-Qināʿ, al-Buhūtī, 6:151

[1221] "If he receives the leased object in a void lease until the term ends, he must pay the rent-equivalent (ujrat al-mithl), whether he resided in it or not. But if he does not receive it, no rent is due from him, even if the owner offered it." Al-Iqnāʿ, al-Ḥajjāwī, 2:320

The second: rent becomes due only upon actual use, because usufruct is not subject to liability except through use.[1222]

Second: marriage and dowry

4. Dowry liability in an invalid marriage

In a valid marriage, the dowry becomes fixed by valid seclusion (*khalwah*), even without intercourse.

ومتى بطل المسمى وجب مهر المثل.

An irregular marriage (*nikāḥ fāsid*) is one whose invalidity is disputed among scholars. Most marital rulings apply to it, including divorce and the waiting period (*ʿiddah*). There are two transmitted positions on whether seclusion alone establishes full entitlement to the dowry; the madhhab holds that it does, making the stipulated dowry due. As for a marriage unanimously deemed void, when the woman is unaware of its prohibition, and intercourse under a mistaken belief of lawfulness or under coercion, intercourse entitles her to the customary dowry (*mahr al-mithl*), rather than the stipulated dowry,[1223] and "whenever the stipulated dowry is void, the fair equivalent dowry becomes obligatory."[1224] This also applies in a valid marriage where the compensation is invalid, such as wine or pork.[1225]

Third: partnerships and muḍārabah

5. No liability in invalid partnership-type contracts

«(ولا ضمان عليه) أي: العامل (فيها) أي: في المضاربة الفاسدة؛ لما تقدم من أن: ما لا ضمان في صحيحه لا ضمان في فاسده»

"The worker is not liable therein, meaning in an invalid muḍārabah, based on what preceded: what entails no liability in its valid form entails no liability in its invalid form."[1226]

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[1222] "In a valid lease, rent becomes due upon delivery of the leased object, whether the lessee benefits from it or not. As for a void lease, there are two reports: one is the same ruling; the other is that rent is not due unless there is actual benefit. This latter view likely relates to the principle that usufruct is not guaranteed in cases like usurpation except through actual use — and this is the more sound opinion." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:309

[1223] "No mahr is due upon separation before consummation in a nikāḥ fāsid (irregular marriage), even if by divorce or death. However, if intercourse occurs or lawful seclusion takes place, the named mahr becomes binding. This differs from a bayʿ fāsid, in which the value is owed, not the agreed price. Mahr al-mithl (customary dower based on comparable cases) is required upon intercourse — even from someone insane — in a nikāḥ bāṭil (invalid marriage by consensus), for a woman ignorant of the prohibition, or in cases involving shubha (doubtful circumstances), or coercion into zinā through the front, not the rear, nor in liwāṭ (sodomy), without compensation for the loss of virginity (arsh al-bakārah)." Gāyat al-Muntahā, Marʿī al-Karmī, 2:229

[1224] Zād al-Mustaqniʿ fī Ikhtiṣār al-Muqniʿ, al-Ḥajjāwī, 168

[1225] "If he marries her in exchange for wine, swine, or usurped property, the *nikāḥ* is valid" — this was explicitly stated [by Aḥmad], and the majority of the fellows hold this view, as do most jurists in general… "and the mahr al-mithl (customary dower based on comparable cases) is due to her from him, regardless of its amount." *Maʿūnat Ūlī al-Nuhā*, Ibn al-Najjār, 9:191

[1226] Kashshāf al-Qināʿ, al-Buhūtī, 8:506

If the muḍārabah is invalid, does the worker receive his agreed share of profit or market-rate wages? There are two views,[1227] and the madhhab holds that he receives market-rate wages (*ujrat al-mithl*).[1228]

من أدى عن غيره دينًا بنية الرجوع عليه رجع - وهل يرجع في غير الدين؟

## Whoever pays off another's debt with the intention of seeking reimbursement may recover it from him—does this also apply in matters other than debt?

"من أدى عن غيره واجبًا بنية الرجوع عليه رجع وإلا فلا."

al-Siʿdī's thirty-second maxim: "Whoever performs an obligation on behalf of another, with the intention of reimbursement may recover it; otherwise, he may not."

"فيمن يرجع بما أنفق على مال غيره بغير إذنه وهو نوعان :

أحدهما : من أدى واجبًا عن غيره.

والثاني : من أنفق على ما تعلق به حقه من مال غيره."

And the seventy-fifth Rajabī maxim: "Concerning one who seeks recourse for what he spent on another's property without his permission, it is of two types:
(1) one who fulfills an obligation on behalf of another;
(2) one who spends on something in another's property to which his own right is attached."

" من أدى عن غيره واجبا رجع عليه"

The formulation of Imām Taqī al-Dīn is: "Whoever fulfills an obligation on behalf of another may recover it from him."[1229]

The selected wording is more concise than Ibn Rajab's formulation and more consistent with the madhhab than al-Siʿdī's formulation.

Explanation of the maxim:

A person's legal liability may become occupied, whether toward Allah or toward other people, by financial obligations such as zakāh dues, expiations (kaffārāt), maintenance obligations (nafaqāt), and debts. Is one who discharges them on behalf of others, then, entitled to reimbursement from them for what he has paid?

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[1227] "As for partnership contracts, when they are void — such as sharikah (partnership) or muḍārabah (investment partnership) — whether the named compensation is due or the wage-equivalent (ujrat al-mithl) is a matter of disagreement among the fellows. But that is not what concerns us here, since our discussion pertains to liability (ḍamān) of the recipient under a void contract, whereas these contracts do not impose liability on the recipient. Rather, what is due to him is compensation for his labor — either the named amount or the wage-equivalent, depending on the difference of opinion." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:315

[1228] "If the muḍārabah (investment partnership) becomes void, it is treated like a void lease (ijārah fāsidah), because the agent (ʿāmil) is entitled to ujrat al-mithl (the wage-equivalent) for his labor involving the capital, and the entire profit belongs to the investor (rabb al-māl)." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 6:28

[1229] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 34:134

A detailed answer will follow, but the basic principle governing the property of legally responsible persons is inviolability, and a person has exclusive authority over his property and his legal liability; thus no one may bind him to compensate for what another has discharged on his behalf without his permission except on the basis of proof that removes the matter from this basic principle. Hence the reason the jurists restricted the right of reimbursement in the absence of permission becomes clear, for merely benefiting another is not sufficient to impose liability upon him unless it is joined by permission, authority, or an evident legal cause that prevents the act from being construed as a donation.

The possible situations are numerous: performance may occur with the permission of the one upon whom the right is due or without his permission, with the intention of reimbursement or without it; and among these rights are those that require an intention and those that do not. The latter category includes debts and other obligations, such as maintenance expenditures, and these in turn may or may not involve a right connected to the performer.

Proofs for the maxim:

هَلْ جَزَاءُ الْإِحْسَانِ إِلَّا الْإِحْسَانُ

1. Allah the Exalted says: “Is the reward for excellence anything but excellence?” (al-Raḥmān 55:60).
   This indicates that one who confers a benefit upon others, such as paying a debt on their behalf, is entitled to a corresponding return, which supports the permissibility of recourse when intended.

فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ

2. Allah the Exalted says: “If they breastfeed for you, then give them their wages” (al-Ṭalāq 65:6). The verse obligates payment to the wet nurse merely upon her performing the act of breastfeeding, without requiring the father’s prior permission. This indicates that a person may claim compensation for what he has expended when there is an intention of recourse.

العائد في هبته كالكلبِ يَقيءُ ثم يعودُ في قيئِه.

3. The ḥadīth of Ibn ʿAbbās (rAa), in al-Bukhārī, that the Prophet ﷺ said: “The one who takes back his gift is like a dog that vomits and then returns to its vomit [and eats it].”
   This indicates that one who gives something as a voluntary gift has no right to reclaim it. Thus, if there was no intention of recourse when the payment was made, it is treated as a gift, and no claim may be made for it.

Applications of the Maxim

Section One: Obligations That Require an Intention

This includes zakāh, expiations, ḥajj, and other obligations that require an intention at the time of their performance. Among them are those that do not admit of deputization, such as prayer, and among them are those that do admit of deputization, such as zakāh and ḥajj. The latter is divided into the following two cases:

1. If he was given permission to perform them:
   If a person undertakes these obligations on behalf of another with his permission, then he has the right to seek reimbursement and claim what he spent.
2. If he was not given permission to perform them:
   If a person performs these obligations without the permission of the one upon whom they are due, then he has no right to seek reimbursement, because these acts of worship require the intention of the person upon whom they are due, and they are not valid due to the absence of this intention from the one on whose behalf they were performed.[1230]

Section Two: Obligations That Do Not Require an Intention from the One on Whose Behalf the Performance Is Made

These obligations include debts and expenditures that must be discharged in favor of others, and they are divided into the following cases:

1. Performance of the obligation with the permission of the one on whose behalf it is performed:
   If a person discharges a right from among rights on behalf of another with his permission, then he has the right to seek reimbursement and claim what he spent by agreement, because this performance took place with the consent of the one upon whom the right is due, and it is thereby regarded as a debt.
2. Performance of the obligation without the intention of seeking reimbursement, or without specifying an intention:
   If a person discharges an obligation on behalf of another and does not intend to seek reimbursement from him, then he has no right to claim what he spent, and that is regarded as a voluntary donation or gift. Likewise, if the performer had no clear intention, then he has no right to reimbursement.[1231]
3. Performance of the obligation without permission, together with the intention of seeking reimbursement:
   The madhhab is that reimbursement is allowed in most cases, and Ibn Rajab divides them into that with which the right of the performer is connected, such as partners and the mortgagee, and that with which it is not connected, such as expenditure on the relatives of the one on whose behalf the performance is made and the deposited animal. Here, however, we divide them according to permission:

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[1230] "As for the dues owed to God, Exalted is He, such as zakāh and kaffārah, one who pays them on behalf of the person liable for them may not seek reimbursement. Al-Qāḍī explained this by stating that their discharge is invalid without the liable person's permission, because their validity depends on his intention." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:544

[1231] "If someone settles a financial debt on behalf of another without his permission, he may seek reimbursement from him… but if he intended it as a gift, or left his intention unspecified, then he has no right of recourse." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:543

1. He has the right to reimbursement, even without permission:

- If the obligation is a debt, then he has the right to reimbursement: "If he settles on his behalf a debt that is obligatory, without his permission, then he is entitled to reimbursement from him according to the sounder of the two narrations, and this is the madhhab according to al-Khiraqī, Abū Bakr, al-Qāḍī, and most of the scholars of the school. Al-Qāḍī stipulated that he must intend reimbursement, and that he should have witnesses to his intention at the time of performance."[1232]
- He also has the right to reimbursement in ransoming a captive: "Among these cases is where he purchases a free Muslim captive from the people of Dār al-Ḥarb (territory outside Muslim legal authority in the classical juristic classification), then releases him, or brings him out to Dār al-Islām (territory under Muslim legal authority); he has the right to reimbursement from him for what he purchased him for, whether he gave him permission or did not give him permission ... Al-Qāḍī mentioned in *Kitāb al-Riwāyatayn* another narration: that reimbursement depends upon permission. Is his intention of reimbursement considered here, or is unrestricted intention sufficient? There are two views: one of them is that the intention of reimbursement is considered, as in the payment of debts, and this is the apparent purport of the position of al-Qāḍī [and it is the madhhab]. The second is that he is entitled to reimbursement so long as he did not intend donation." [1233] And: "Whoever saves property from brigands, or a tyrannical army, or an oppressive official, and he does not save it except by paying on his behalf, then he is entitled to reimbursement for that, and by that he is a benefactor toward him, even if he was not entrusted with that property and was not compelled to pay on his behalf; rather, by that he is a benefactor toward him. And is the recompense of beneficence anything but beneficence?"[1234]
- Likewise, expenditure on lost property (luqaṭah)[1235] and on the foundling (laqīṭ).[1236] And: "If the ruler borrows what he expended upon him [the foundling], then it later becomes clear that he was a slave, or that he had a solvent father, he may seek reimbursement from him."[1237]

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[1232] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:543; This is the position of the later authorities, with the conditions stipulated by al-Qāḍī.

[1233] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:544

[1234] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 30:354

[1235] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:546; in Al-Inṣāf: "He may seek reimbursement if he intended to do so — and this is the *madhhab*." *Al-Inṣāf*, al-Mardāwī, 16:221

[1236] "Among such cases is the maintenance of the laqīṭ (foundling). Some of the fellows treated it according to two narrations. Others held that reimbursement is allowed here without disagreement — and this is the inclination of the author of al-Mughnī — because the caretaker has legal authority over the foundling. Aḥmad explicitly stated that he may recover what he spent from the public treasury (bayt al-māl)." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:547

[1237] al-Iqnāʿ, al-Ḥajjāwī, 2:405

2. He has the right to reimbursement only when seeking permission is impossible, or when permission is withheld, in the following cases:

"ومنها: نفقة الرقيق والزوجات والأقارب والبهائم إذا امتنع من تجب عليه النفقة، فأنفق عليهم غيره بنية الرجوع؛ فله الرجوع."

- "Among these cases is expenditure on slaves, wives, relatives, and beasts, when the one upon whom maintenance is due refuses, and another expends upon them with the intention of reimbursement; then he has the right to reimbursement."[1238]
- Thus, if the child is in the custody of his mother, and she expends upon him while intending thereby to seek reimbursement from the father, then she may seek reimbursement.[1239]
- "(If a husband is absent, and) a wife incurs debt (for herself and for her minor children, she is entitled to reimbursement), expressly stated. ... This was given precedence in *al-Furūʿ*. (And if a husband or relative refuses) that is, refuses maintenance for his wife or his relative, then (the one who expends) on his wife or his relative (with the intention of reimbursement) is entitled to reimbursement from him for the equivalent of what he expended."[1240]
- Likewise, expenditure on pledged property [animal], and on the loaned, leased, and deposited animal.[1241]
- And: "Among these cases is where one of the two partners expends on jointly owned property while the other is absent or refuses ... If they have between them a jointly owned wall or roof, and it collapses, and one of them asks the other to rebuild with him: the madhhab is that he is compelled to do so. There is another narration: he is not compelled; in that case, the requesting

[1238] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:545; in al-Kashshāf: "As for the maintenance of wives, relatives, slaves, and animals: if the person upon whom the obligation falls refuses to provide it — or if it is not possible to obtain his permission, as mentioned earlier in the context of collaterals — and someone else steps in and provides it with the intention of seeking reimbursement, then he may seek it. This is because he has fulfilled a duty on behalf of another, which resembles the repayment of a debt." Kashshāf al-Qināʿ, al-Buhūtī, 13:151

[1239] "If the child is under the custody of his mother, and she spends on him intending to seek reimbursement from the father, then she is entitled to do so according to the more apparent of the two scholarly opinions. This is the view of Mālik and of Aḥmad according to the apparent position of his school." Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 34:134 and "If the woman who performed liʿān (mutual imprecation) spent on the child, and then the man who had denied paternity later acknowledged him, she is entitled to seek reimbursement from him for the maintenance. This was stated by the author, who explained: She had only spent on the child under the assumption that he had no father." al-Inṣāf, al-Mardāwī, 23:464

[1240] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 10:195

[1241] "If one spends on a deposited animal intending reimbursement and the owner's permission could not be obtained, he may seek reimbursement. If permission could have been obtained, (...) he may not do so, without disagreement; this is the method of the madhhab." Al-Inṣāf, al-Mardāwī, 12:499.

"If a pledgeholder spends on the pledged animal intending reimbursement without the pledgor's permission when permission could have been obtained, he is treated as a volunteer. (...) If permission could not be obtained and he spent intending reimbursement, he recovers the lesser of what he spent and the customary expense. (...) The same applies to a borrowed, leased, or deposited animal." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:119.

party builds alone and prevents the partner from benefiting until he takes from him that which corresponds to his share of the expenditure."[1242]

3. He has no right to reimbursement except with permission:

- "(If the mortgagee repairs) the pledged property, such as a house that has collapsed, (the one repairing may recover) only his materials, because they are his property; and he does (not) recover (what preserves the financial value of the house), such as the price of water, ashes, clay, lime, gypsum, and the wages of repairers, (except with the permission of) its owner, because repairing it is not obligatory upon him, unlike expenditure on an animal, due to its inviolability and because it cannot remain without that."[1243]
- "Among these cases also is that repairs made by the tenant in the leased house are not recoverable; Aḥmad explicitly stated this regarding the door-bolt of the house when the occupant made it. It is possible, however, that reimbursement may be allowed."[1244] But if the two agree that the lessee will undertake the obligatory repairs of the leased property, then he has the right to seek reimbursement from the lessor for what he spent.[1245]

We observe here that they distinguished between debt and other than it. Thus, they gave preference to his right of reimbursement in the payment of a debt, even without permission, and they added to it the ransoming of captives, because the Lawgiver looks favorably upon it and urges it. They also added expenditure on lost property and the foundling, due to the impossibility of seeking permission, and because the finder has a form of authority over the foundling.

As for the other expenditures mentioned here, if one spends without seeking permission, despite being able to do so, he is not entitled to reimbursement.

But if seeking permission is impossible, or the one on whose behalf the performance is made refuses, then he is not entitled to reimbursement only in a few cases, such as repairing the mortgaged house and the leased house, according to the sounder view; whereas he is entitled to reimbursement, if he intended it, in more numerous cases, including those in which his own right is connected to the matter and harm would affect him, such as partners and the mortgagee, and those in which the right of another is connected to it, such as the maintenance of the wife, relatives, and the loaned, deposited, and leased animal.

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[1242] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:549

[1243] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:120; However, Ibn Rajab said: "If it were said that — if the property, after partial ruin, still secures the value of the debt it was pledged for — then the pledgeholder may not seek reimbursement [for repairs], because there is no need for reconstruction in that case; but if its value is below or equal to the amount of the debt, and there is a risk that it may deteriorate further over time such that it falls below the debt amount, then allowing him to repair it and seek reimbursement would be justifiable." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:551 And he stated in al-Inṣāf: "And this is strong."

[1244] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:551

[1245] "If the lessee undertook the repairs under this condition [the necessary cost for maintaining the leased property], or if he repaired it with the lessor's permission, then he may seek reimbursement. But if there is disagreement over how much the lessee spent, the statement of the lessor is accepted, as he is the one denying the greater claim... However, if the lessee spent without the lessor's permission, he may not seek reimbursement, as he is considered to have donated it. But he may reclaim the physical items (e.g., tools or materials) he used." Kashshāf al-Qināʿ, al-Buhūtī, 9:110

Imām Taqī al-Dīn chose not to differentiate between debt and other forms of obligatory expenditure, and he did not stipulate permission. He said—may Allah have mercy on him:

«فمذهب مالك وأحمد بن حنبل المشهور عنه وغيرهما: أن كل من أدى عن غيره واجبا فله أن يرجع به عليه إذا لم يكن متبرعا بذلك، وإن أداه بغير إذنه؛ مثل من قضى دين غيره بغير إذنه. سواء كان قد ضمنه بغير إذنه وأداه بغير إذنه أو أداه عنه بلا ضمان.»

"Thus, the well-known position narrated from Mālik and Aḥmad ibn Ḥanbal, and others besides them, is that everyone who discharges on behalf of another an obligation has the right to reimbursement from him for it, so long as he did not do so as a volunteer, even if he discharged it without his permission; such as one who settles the debt of another without his permission, whether he had guaranteed it without his permission and then paid it without his permission, or paid it on his behalf without any guarantee."[1246]

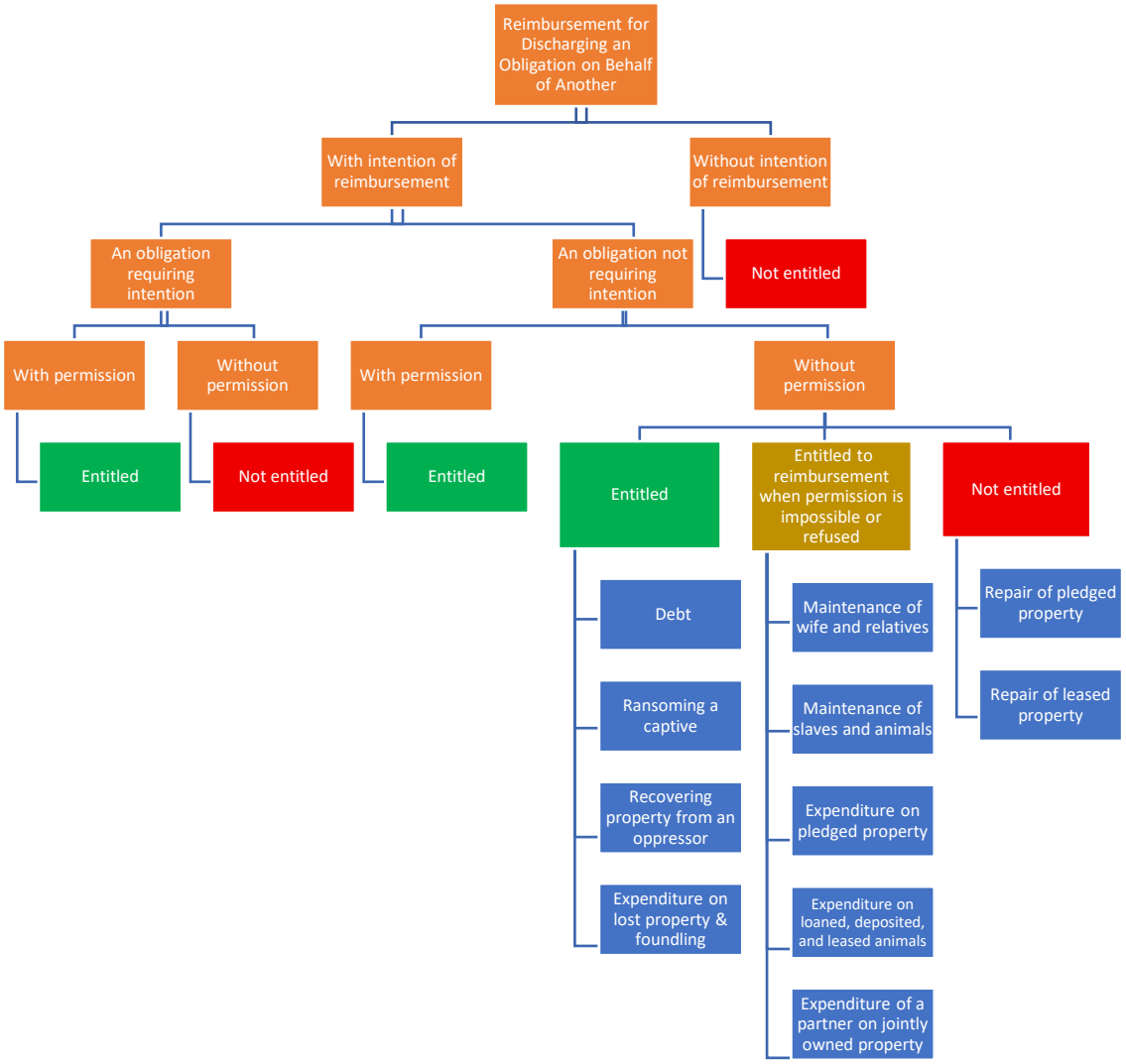
And he said: "The jurists have disputed concerning one who discharges on behalf of another an obligation without his permission, such as a debt. The well-known position of Mālik and Aḥmad is that he has the right to reimbursement from him for it, whereas the position of Abū Ḥanīfah and al-Shāfiʿī is that he does not have that right. And if he spends an expenditure that is obligatory upon him, such as spending on his minor child or his slave, then some of Aḥmad's companions said: he is not entitled to reimbursement; and they distinguished between maintenance and debt. But the verifying scholars among his companions treated them equally and said: all of it is obligatory, and if he were to ransom him from captivity, he would have the right to demand reimbursement for the ransom, even though it is not a debt. And the Qurʾān indicates this position, for Allah said, {If they suckle for you, then give them their wages} [al-Ṭalāq: 6]. Thus He commanded the giving of compensation merely upon suckling, and did not stipulate a contract or the father's permission."[1247]

So perhaps we may summarize the position of Imām Taqī al-Dīn by saying that the performer has the right to reimbursement subject to only three conditions:

1. That the matter performed be obligatory upon the other person.
2. That, when discharging the obligation on behalf of the other, the performer not intend donation.
3. That the obligation be worldly in nature, such that its performance does not require an intention, such as the payment of a debt and expenditure on an animal.

[1246] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 30:348

[1247] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 20:561




تضمن المثليات بمثلها والمتقومات بقيمتها

## Fungible goods are indemnified by their equivalent, and non-fungible goods by their value

This is al-Siʿdī's eighteenth maxim.

Explanation of the maxim:

The maxim states that whenever a person becomes liable for a fungible item—whether through its destruction or through a cause that gives rise to liability without destruction—he must compensate for it with its equivalent, that is, with something of the same kind that serves as its substitute. As for a non-fungible item—namely, one for which no precise equivalent exists—it must be compensated according to its value.

Definition of the fungible and the non-fungible:

The fungible:

كل مكيل أو موزون لا صناعة فيه مباحة يصح السلم فيه

The fungible (mithlī) is "every item measured by volume or weight, in which there is no lawful manufacture, and for which a salam contract (advance payment for specified goods delivered later) is valid."[1248] Thus, it is that whose parts are homogeneous, such that one part may be substituted for another, and whose equivalent may be found in an equal quantity and with regulated and approximately matching attributes, such that salam is valid with respect to it. Excluded from this are items that are neither measured by volume nor by weight, such as countable items and items measured by length, and also items into which lawful manufacture has entered, such as metals that are made into ploughing tools, for these then become value-assessed. As for prohibited manufacture, such as metals made into instruments of amusement, no value is assigned to the manufacture in that case; rather, they are indemnified according to their original fungible substance.

Examples of the fungible:

1. Among grains and foodstuffs: wheat, barley, dried curds, flour, parched grain meal, and all other grains. All of these are sold by volume.[1249] Also meat, fat, bread, cheese, grapes, and butter; these are sold by weight. All of them are therefore regarded as fungibles, because they are uniform in kind and one part of them may be substituted for another with the same specifications.
2. Metals: gold, silver, copper, iron, lead, and mercury. [1250]
3. Among raw materials sold by weight: "linen, cotton, silk, silk floss, hair, animal down, wool, spun yarn."[1251]
4. Standardized liquids: such as oil and fuel. These liquids are measured by volume or weight, and they may easily be compensated by their equivalent due to their homogeneity and the similarity of their parts.

The non-fungible:

The non-fungible (mutaqawwam, also termed qīmī here) is every item for which no precise equivalent can readily be found, and it is characterized by the fact that its parts differ from one another in a manner that makes it difficult to compensate for it with its equivalent. In the madhhab, everything that is not fungible is value-assessed. Thus, everything that is not sold by volume or by weight, or is sold by volume or weight but into which lawful manufacture has entered, or with respect to which salam is not valid, such as jewels, is value-assessed and requires compensation according to its market value in order to indemnify the harmed party.

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[1248] Gāyat al-Muntahā, Marʿī al-Karmī, 1:774

[1249] Kashshāf al-Qināʿ, al-Buhūtī, 8:33

[1250] Kashshāf al-Qināʿ, al-Buhūtī, 8:34.

[1251] Kashshāf al-Qināʿ, al-Buhūtī, 8:34

Examples of the non-fungible:

1. Manufactured vessels: although they may be made from substances that can be sold by weight, such as copper, the manufacture added to them makes it difficult to regard them as fungibles, and therefore they are compensated according to their value.
2. Furniture and clothing: pieces of furniture and clothing differ according to their type, manufacture, and use, and are therefore regarded as non-fungible and compensated according to their value. [1252]
3. Food that is not sold by volume or by weight. In *Kashshāf al-Qināʿ*: "What is neither measured by volume nor by weight, such as garments, animals, walnuts, eggs, pomegranates, snake-cucumbers, cucumbers, all vegetables, legumes, quinces, apples, pears, peaches, and the like, such as plums, and every fresh fruit, as stated by al-Qāḍī."[1253]
4. Cars and other manufactured machines: because they are not among items sold by volume or by weight, a car cannot be compensated by another car in accordance with the maxim of the madhhab.

The evidence of the madhhab for the distinction it adopted between the fungible and the value-assessed

The parts of goods measured by volume and by weight are generally alike, and one part may be substituted for another, and its equivalent may be found in an equal quantity and with regulated attributes. This is unlike countable items, items measured by length, and those into which manufacture has entered.

مَنْ أَعْتَقَ شِرْكًا لَهُ فِي عَبْدٍ، قُوِّمَ عَلَيْهِ قِيمَةَ الْعَدْلِ

And in the ḥadīth agreed upon by al-Bukhārī and Muslim: "Whoever emancipates a share belonging to him in a slave, the equitable value is assessed against him." Thus, he ordered valuation with respect to the partner's share, because it was destroyed by emancipation, and he did not instruct him to provide an equivalent. Yet it is evident that obtaining an equivalent here is difficult.

واعلم أن المماثل من كل وجه متعذر حتى في المكيلات، فضلا عن غيرها...

المثل يجب في كل مضمون بحسب الإمكان

Now that the relied-upon position in the madhhab has become clear to you, you may perhaps have noticed that some fungible items do vary among themselves. Indeed, Imām Taqī al-Dīn spoke truly when he said: "Know that a counterpart identical in every respect is unattainable even in goods measured by volume, let alone in others ..."[1254] And some of what has been mentioned here as value-assessed, such as cars and new machines in our own times, may be easier to obtain in an exact equivalent than an equivalent for a particular measure of dates or a weight of animal down or wool. Know, then, that within the madhhab there is another view, chosen by Imām Abū al-ʿAbbās, which broadens the meaning of the

[1252] Kashshāf al-Qināʿ, al-Buhūtī, 8:34

[1253] Kashshāf al-Qināʿ, al-Buhūtī, 8:34

[1254] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 20:565

fungible, such that fungible items are those that have an exact equivalent or an approximate counterpart. Thus, his maxim is: “An equivalent is due in every indemnifiable item to the extent possible.”[1255] This is a statement of the Shaykh (rA) which I summarize for you:

وما كان أمثل فهو أعدل فيجب الحكم به إذا تعذر المثل من كل وجه.

“The second foundational principle is that all destroyed items are indemnified by something of the same kind, to the extent possible, while taking value into account, even animals, just as in a loan the return of an equivalent is required, and if one borrows an animal he returns its equivalent, just as the Prophet ﷺ borrowed a young camel and returned one better than it ... This is one of the two views in the madhhab of Aḥmad and others.[1256] The story of Dāwūd and Sulaymān, peace be upon them, falls under this heading, for the livestock had destroyed the people’s cultivated property, which was their orchard. They said: it was a vineyard,[1257] and al-ḥarth is a term for trees and crops. So Dāwūd awarded the sheep to the owners of the cultivated property, as though he indemnified them according to value, and they had no property other than the sheep, so he gave them the sheep according to value. As for Sulaymān, he ruled that the owners of the livestock were to restore the cultivated property until it returned to what it had been. Thus he indemnified them with an equivalent, and he gave them the livestock so that they might take their usufruct in compensation for the usufruct that had been lost from the time the cultivated property was destroyed until it returned. And al-Zuhrī gave this fatwā to ʿUmar ibn ʿAbd al-ʿAzīz concerning one whose trees had been destroyed, saying: he should replant them until they return to what they were. And it was said that Rabīʿah and Abū al-Zinād said: he owes the value, and al-Zuhrī spoke severely against them. This is what the evidence requires, for what is obligatory is to indemnify the destroyed item with an equivalent to the extent possible. Allah Most High said: {The recompense of an evil is an evil like it}. And He said: {Whoever transgresses against you, then transgress against him in the like of that with which he transgressed against you}. And He said: {If you punish, then punish with the like of that with which you were afflicted}. And He said: {And sacred things are subject to retaliation in kind}. So, if one destroys cash, grains, and the like, it is possible to indemnify them with an equivalent. But if the destroyed item is garments, vessels, or an animal, then an equivalent identical in every respect may be difficult to obtain. The matter therefore turns between two things: either he indemnifies it by value, which is dirhams differing from the destroyed item in kind and attribute but equal to it in monetary worth, or he indemnifies it with garments of the same kind as the destroyed garment, vessels of the same kind as the destroyed vessel, or an animal of the same kind as the destroyed animal, while taking value into account to the extent possible. And with its value corresponding to its value, the monetary worth here is equal, just as in cash; but this option is distinguished by sharing in kind and attribute, and so it is closer to the equivalent than the former. Whatever is closer to the

[1255] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 20:566

[1256] “There is a report from [Aḥmad] regarding garments, staffs, bowls, and similar items: that they are to be compensated by an equivalent item (bi-mithlihā), with due consideration of their value. This was the view chosen by Shaykh Taqī al-Dīn.” al-Inṣāf, al-Mardāwī, 15:259

[1257] “The printed edition reads ‘ʿaynan’; this appears to be a textual corruption of ‘ʿinaban’ (grapes).”

equivalent is more just, and judgment must therefore be made accordingly when an equivalent in every respect is impossible."[1258]

طَعَامٌ بِطَعَامٍ، وَإِنَاءٌ بِإِنَاءٍ

Among the proofs cited for the Shaykh's chosen view is what al-Bukhārī narrated from Anas (rAa), who said: "The Prophet ﷺ was with one of his wives, and one of the Mothers of the Believers sent a dish containing food. Then the one in whose house the Prophet ﷺ was struck the hand of the servant, and the dish fell and broke. The Prophet ﷺ gathered the broken pieces of the dish, then began gathering into it the food that had been in the dish, and said: 'Your mother has become jealous.' Then he detained the servant until a dish was brought from the house of the one in whose house he was, and he gave the sound dish to the one whose dish had been broken, and kept the broken dish in the house of the one who had broken it." And in the narration of al-Tirmidhī: "Food for food, and vessel for vessel." A vessel is not among fungible items according to the relied-upon narration in the madhhab, yet the Prophet ﷺ compensated its owner with an equivalent. And the established wording in al-Tirmidhī indicates that this is a general principle.

The practical applications of the maxim:

If we turn to application, then whoever destroys a door, a phone, a garment, a sheep, or food that is neither measured by volume nor by weight, such as an egg, is charged with its value in dirhams according to the madhhab, and with its equivalent according to the view chosen by Abū al-ʿAbbās. Thus, if the object of the loan or the destroyed item has an equivalent, without restriction to something measured by volume or weight, it is returned to the lender or the owner; otherwise, the value is returned. And in allowing both of these there is latitude for both parties to the dispute where there is mutual consent, and for judges where there is litigation.

These are practical applications according to the authoritative position in the madhhab:

"(وكذا) أي: كالمغصوب فيما سبق تفصيله (متلف بلا غصب ومقبوض بعقد فاسد) يجب الضمان في صحيحه كبيع لا نحو هبة (وما أجري مجراه) أي: مجرى المقبوض بعقد فاسد كالمقبوض على وجه السوم (مما لم يدخل في ملكه) أي: ملك المتلف له، فيضمن مثلي بمثله ومتقوم بقيمته."

In *Sharḥ al-Muntahā*: "(And likewise), that is, like the usurped property whose detail has previously passed, (property destroyed without usurpation, and what is received under an invalid contract), in the valid counterpart of which liability is required, such as sale, not something like a gift, (and what is treated like it), that is, like what is received under an invalid contract, such as what is received on approval, (provided it has not entered his ownership), that is, the ownership of the one who destroyed it, then a fungible is indemnified by its equivalent and a value-assessed item by its value."[1259]

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[1258] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 20:563

[1259] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:318

“But whatever entered the ownership of the one who destroyed it through a valid sale in which the price was not specified, then what is due as compensation is its price on the day he took possession of it (i.e., the customary market price).”

“(So if the destroyed thing entered) the ownership of the one who destroyed it, by his taking from another something (known by measure or weight, or) his taking (goods) that are value-assessed, such as fruits, vegetables, and the like, (from a grocer or the like), such as a butcher or an oil seller, (over a number of days and then settling the account) for what he took after that, then (he) is not required to provide the equivalent in the case of the fungible, nor the value in the case of the value-assessed item; rather, (he gives him according to the price on the day he took it), because the two of them mutually agreed on that. Its implication is the validity of sale at the equivalent price.”[1260]

And from this is: “(And if a sold item perishes) before receipt of a price, and the contract is rescinded, and the two contracting parties disagree over the amount of its price: (they swear oaths against each other), just as if it were still extant, and (the buyer is liable for its value), that is, the sold item, if rescission is found. (And his statement is accepted), that is, the buyer’s, (regarding it), that is, regarding its amount. This was explicitly stated in the narration of Muḥammad ibn al-ʿAbbās, because he is the liable party.”[1261] Here they build the ruling on value and do not distinguish between fungible and value-assessed.

They also exclude from indemnifying the fungible by its equivalent water in the desert, for it is indemnified by its value in the wilderness.[1262] And what differs in value according to varying circumstances may be analogized to it.

In their application of the maxim that the manufactured item exits the category of fungibles, Ibn al-Najjār says:

“((And the value is assessed) against the party liable for destruction when there perishes in his possession (a lawfully fashioned article), such as women’s jewelry made (of gold or silver), where its value exceeds the equivalent of its weight because of its workmanship.”[1263]

But the usurper indemnifies a lawfully fashioned article by whichever is greater of its value or its weight, and prohibited workmanship is not taken into account: “And he [the usurper] indemnifies a lawfully fashioned article of gold or silver by whichever is greater of its value or its weight; and the prohibited [article] by its weight.”[1264]

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[1260] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:318

[1261] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 5:117

[1262] “Note: An exception should be made to the rule that fungible items are guaranteed by their like (bi-mithlih), namely: water in the wilderness (mafāzah), which is to be guaranteed by its value when in the desert. This was mentioned in al-Mubdiʿ and affirmed by al-Ḥārithī. I [al-Buhūtī] say: This is supported by what has been stated in relation to tayammum — that if the owner of water dies, and his companion refrains from using that water to wash his body due to his own thirst, he must perform tayammum (dry purification) for the deceased and pay the deceased’s heirs the value of the water at that location.” Kashshāf al-Qināʿ, al-Buhūtī, 9:284

[1263] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 6:336

[1264] Dalīl al-Ṭālib li-Nayl al-Maṭālib, al-Karmī, 169

And restoration by equivalent does not differ from one day to another, which strengthens the case for broadening its use. As for value, it does differ.

Thus, in a borrowed item and in usurped property, the relevant value is the value on the day of destruction.[1265]

As for lost property, he is not liable for it before the year has passed because it is a trust; after that, it is indemnified by its equivalent in fungible items and by its value on the day its owner was identified.[1266] But the equivalent may become unavailable, and so they said: "Or if the equivalent becomes unavailable due to absence, distance, or high price, then he owes the value of its equivalent on the day it became unavailable in his town. So if he became able to obtain the equivalent before paying the value, though not after paying it, the equivalent became binding upon him."[1267]

The madhhab regarding fulūs—base-metal coinage—is that, if they ceased to circulate readily, their equivalent is returned if it is found, and if the equivalent becomes unavailable, then its value on the day it became unavailable. Ibn al-Najjār said:

«(ويجب رد مثل فلوس غلت أو رخصت أو كسدت، ومثل مكيل أو موزون)، لأنهما يضمنان في الغصب والإتلاف بمثلهما. فكذا هنا، مع أن المثل أقرب شبها بالقرض من القيمة. (فإن أعوز) المثل (ف) عليه (قيمته يوم إعوازه)، لأنها حينئذ ثبتت في الذمة.»

"(And the return of the equivalent of fulūs whose value has risen, fallen, or cease to circulate readily is obligatory, and likewise the equivalent of what is measured by volume or weight), because both are indemnified in usurpation and destruction by their equivalent. So the same applies here, especially since the equivalent bears a closer resemblance to the loan than value does. (And if) the equivalent (becomes unavailable), then (he owes) its value on the day it became unavailable, because it was then established in the liability."[1268]

"This is unlike the case where the ruler forbids their circulation. For if "…the dirhams in which the loan was contracted were mukassarah (broken/clipped dirhams), or the loan was in fulūs (copper coinage), and the ruler prohibited transacting with them' that is, with those mukassarah dirhams or fulūs 'then he,' meaning the lender, 'is entitled to their value at the time the loan was made.'"[1269]

This is the position of the madhhab. However, there is another view that requires returning the value in cases of *kasād*—meaning a collapse in value without any official prohibition by the ruler. This is the view of Imām Abū Yūsuf, the companion of Imām Abū Ḥanīfah; it is the fatwā position in the Ḥanafī

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[1265] "A borrowed item in the borrower's possession is liable to be compensated for by its value on the day it perishes." al-Iqnāʿ, al-Ḥajjāwī, 2:335 "And if the item is not fungible, he is liable for its value on the day it perished, in the town where it was usurped." al-Iqnāʿ, al-Ḥajjāwī, 2:351

[1266] "… and if it perished, diminished, or was lost before the year passed, he is not liable unless negligent — for it is in his hand as a trust. But after the year, he is liable even without negligence: with its like if it is fungible, otherwise with its value on the day its owner becomes known." al-Iqnāʿ, al-Ḥajjāwī, 2:402

[1267] al-Iqnāʿ, al-Ḥajjāwī, 2:350

[1268] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 5:220

[1269] Ḥāshiyat al-Rawḍ al-Murbiʿ, Ibn Qāsim, 5:41

madhhab; and it was chosen by the two Imāms, Taqī al-Dīn and Ibn al-Qayyim. Shaykh Ibn Qāsim says in *Ḥāshiyat al-Rawḍ*:

"And this is with the continuance of dealing in them, and without the ruler forbidding them, according to most of the companions, because an increase or decrease in value does not remove the obligation of the equivalent from the liability of the borrower, and so it does not require a claim for value. And the Shaykh and Ibn al-Qayyim chose the return of value, just as if the ruler forbade them, and the Shaykh stated it decisively in *Sharḥ al-Muḥarrar*, saying: 'If he loaned him food and its value decreased, that is a diminishment in kind, so he is not compelled to accept it in a diminished state, and the matter therefore reverts to value, and this is justice.' ʿAbd Allāh, son of Shaykh Muḥammad, said: It is stronger. So when something like that is brought before us, we mediate by way of settlement as much as possible, out of reluctance to state that decisively. The Shaykh also attached the rest of debts to loan, and many of the fellows followed him. And the Shaykh stated that this is the explicit text of Aḥmad, and that he was asked about a man who had against another broken dirhams or fulūs, and the broken currency fell out of circulation. He said: he is entitled to their value in gold."[1270]

Clarifying Shaykh Taqī al-Dīn's Position Regarding Repayment of Fulūs According to Value in the Event of Diminution

Know that the jurists differed in their usage of the term *kasād*. Some of them meant by it the complete cessation of value or the ruler's prohibition, while others meant by it severe diminution, and this is the meaning that accords with the language, and it is the usage of *Kashshāf al-Qināʿ*: "It is understood from this that, if the ruler has not prohibited the fulūs, then the return of their equivalent is obligatory, whether they have appreciated, depreciated, or kasadat (ceased to circulate readily)."[1271]

This is not found only in our school; rather, I found that in the other madhhabs as well. At times they use it to indicate that no value at all remains, as in the case of the ruler's prohibition, and at times they distinguish between it and the ruler's prohibition, as was done in *Kashshāf al-Qināʿ*. The view closer to the lexical meaning is that *kasād* is distinct from the ruler's prohibition; rather, what is kāsid (sluggish in circulation) is the opposite of nāfiq (readily circulating), and so it refers to a gross change in price.

Accordingly, we have three situations:

1. The ruler's prohibition
2. *Kasād* and severe diminution
3. Mere diminution

"And the position of the madhhab is to return the value in the first case, and the equivalent (like-for-like) in the second and third."

And know that Shaykh Taqī al-Dīn does not hold that fulūs are to be repaid according to value upon any diminution whatsoever, as the wording of *Sharḥ al-Muḥarrar* may suggest. No jurist could firmly

[1270] Ḥāshiyat al-Rawḍ al-Murbiʿ, Ibn Qāsim, 5:43

[1271] Kashshāf al-Qināʿ, al-Buhūtī, 8:137.

maintain such a position, let alone the most accomplished of jurists who held that repayment by equivalent is required wherever possible.

But what the Shaykh intended by this was diminution amounting to *kasād*. The versifier of *al-Mufradāt* said:

والنص بالقيمة في بطلانهالا في ازدياد القدر أو نقصانها

1. "The transmitted text requiring repayment by value applies when the coinage has been nullified, not when its rate merely increases or decreases.

بل إن غلت فالمثل فيها أحرى
كدانق عشرين صار عشرًا

2. Rather, if its price rises, repayment by like-kind equivalent is more fitting, as when the rate changes from twenty copper coins for one dāniq to ten.

والشيخ في زيادة أو نقص
مثلًا كقرض في الغلا والرخص

3. And al-Shaykh [al-Muwaffaq] held that whether there is increase or decrease, the like-kind equivalent is due, just as in a loan when prices rise or fall.

وشيخ الإسلام فتى تيمية
قال: قياس القرض عن جلية

4. And Shaykh al-Islam Ibn Taymiyyah said: the analogy from the loan case is clear;

الطرد في الديون كالصداق
وعوض في الخلع والإعتاق

5. it extends throughout debts, such as the dower, and compensation in khulʿ (divorce for compensation) and manumission,

والغصب والصلح عن القصاص
ونحو ذا طرًّا بلا اختصاص

6. and usurpation, and settlement in lieu of qiṣāṣ (retaliation), and the like, all of it without restriction.

قال وجا في الدين نص مطلق
حرره الأثرم إذ يحقق

7. He also said: there is a general text regarding debts, which al-Athram carefully transmitted and verified.

وقولهم: إن الكساد نقصًا
فذاك نقص النوع عابت رخصًا

8. And as for their statement that *kasād*

(the currency's becoming non-circulating, effectively demonetized) is a deficiency, that means a deficiency in the kind itself, whose defect appears through depreciation.

قال: ونقص النوع ليس يعقل
فيما سوى القيمة ذا لا يجعل

9. He said: a deficiency in the kind is not intelligible except through value, so this matter is not assigned to anything other than value.

وخرج القيمة في المثلي
بنقص نوع ليس بالخفي

10. From that he derived recourse to value even in the fungible item, because of a deficiency in the kind, and that is not obscure.

واختاره وقال: عدل ماضخوف انتظار السعر بالتقاضي

11. And he preferred this and said: it is a decisive form of justice, so that one does not remain waiting in litigation for the price to recover."[1272]

Thus, the *kasād* mentioned here refers to the ruler's prohibition; however, Shaykh Taqī al-Dīn extended from it what is close to it, namely severe diminution, which constitutes a defect in the type (*ʿayb al-nawʿ*) due to a drastic change in its value.

The more appropriate course in such situations is to refer the matter to arbitration (*taḥkīm*), and this is the position adopted in the resolution of the Assembly of Muslim Jurists of America.

إذا تعذر المسمى رجع إلى القيمة

## *If the specified consideration becomes impossible (to determine or deliver), recourse is made to its value.*

This is the nineteenth maxim among al-Siʿdī's legal maxims.

Explanation of the Maxim:
This maxim states that the specified consideration (*musammā*) in contracts of sale, lease, and marriage—whether a price, wage, or dowry—if it cannot be determined or delivered, then compensation reverts to fair value (*qīmah*), or to the equivalent standard: the customary wage (*ujrat al-mithl*) or the customary dowry (*mahr al-mithl*).

[1272] al-Minaḥ al-Shāfiyāt, al-Buhūtī, 1:440-443.

Example: If a specified price or wage was agreed upon, and then it was forgotten or its delivery became impossible because it does not exist or is invalid, or the contract was rescinded after the sold item or the benefit has been consumed, then recourse is made to the value of the item, the customary wage, or the customary dowry in the case of marriage.

This maxim applies to contracts of exchange (*ʿuqūd al-muʿāwaḍāt*) and differs from the chapter of liability (*ḍamān*). Liability is based on replacement by equivalent in fungible items (*mithliyyāt*) and by value in non-fungible items (*mutaqawwimāt*). Thus, if someone borrows, takes a loan, or usurps property and it is destroyed, then in such a case the fungible item is guaranteed— as mentioned earlier— by its equivalent, and the non-fungible item by its value.

Proofs of the Maxim:

{اتَّقُوا اللَّهَ مَا اسْتَطَعْتُمْ} و {اعْدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَى}.

From the foundational principles of the Sharīʿah:
*"Fear Allah as much as you are able." (al-Taghābun 64:16)*
*"Be just; that is closer to piety." (al-Māʾidah 5:8)*

Applications of the Maxim:

"يجب في البيع والإجارة الفاسدة ثمن المثل وأجرة المثل."

"It is required in invalid sales and leases to return to the price of equivalence and the wage of equivalence."[1273]

ومتى بطل المسمى وجب مهر المثل.

"And whenever the specified dowry becomes invalid, the dowry of equivalence becomes obligatory."[1274]

"For if he marries her upon wine, pork, or usurped property, the marriage is valid—this was explicitly stated by Aḥmad, and it is the position of the majority of the companions, and the generality of jurists concurred—and she is entitled to the dowry of equivalence, regardless of its amount."[1275]

"And if the lessee says: 'You leased it to me for one year for one dīnār,' and the lessor says: 'Rather, for two dīnārs,' they mutually swear… and if they rescind the contract—or one of them does—after the lapse of the term or part of it, the specified amount falls, and the wage of equivalence becomes obligatory, due to the impossibility of returning the benefit, just as if they differed regarding the sold item after its destruction."[1276]

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[1273] Majmūʿ al-Fatāwā, Taqī al-Dīn Ibn Taymiyyah, 30:85

[1274] Zād al-Mustaqniʿ fī Ikhtiṣār al-Muqniʿ, al-Ḥajjāwī, 168

[1275] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 9:191

[1276] Kashshāf al-Qināʿ, al-Buhūtī, 9:143

الإبراء إسقاط في الأصح وقيل تمليك

## Al-ibrāʾ (release) is, according to the sounder view, a waiver (isqāṭ), and it is also said to be a transfer of ownership (tamlīk).

Explanation

*Al-ibrāʾ (release from a debt) is* the creditor's relinquishment of his right to a debt owed by the debtor. The jurists have differed regarding its legal characterization: is it a pure waiver (*isqāṭ*), or is it a transfer of ownership (*tamlīk*) that entails the rulings of ownership transfer?

If *al-ibrāʾ* is treated as a waiver, then it does not require the debtor's acceptance, since it is merely the removal of an obligation. However, if it is treated as a transfer of ownership, then it requires acceptance, because transfer presumes conveyance of a right from one party to another. The relied-upon position in the madhhab is that it is a waiver.[1277]

Applications

Based on treating *al-ibrāʾ* as a waiver:

"It is not valid to grant release from a debt before it becomes binding."[1278] For this reason, Ibn Naṣr Allāh issued a fatwā that a divorce contingent upon release from marital rights and maintenance of the waiting period (*ʿiddah*) does not take effect, because "release from such rights is not valid except after they become obligatory, and the waiting period does not become obligatory except through divorce."[1279] However, release from a debt before its due date is valid.[1280]

«لا يفتقر إلى القبول كالعتق والطلاق، بخلاف هبة العين لأنها تمليك»

"And it does not require acceptance, like manumission and divorce, unlike the gifting of a tangible item, for that is a transfer of ownership."[1281]

It is valid even with ignorance of the amount or description of the debt on the part of the releaser, the one released, or one of them. It is also valid even if the releaser mistakenly believes that no debt exists.[1282]

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[1277] "Because al-ibrāʾ is a waiver (isqāṭ), not a transfer of ownership (tamlīk)." Maṭālib Ūlī al-Nuhā, al-Raḥībānī, 4:409.

[1278] Maṭālib Ūlī al-Nuhā, al-Raḥībānī, 4:393

[1279] Ghāyat al-Muntahā, Marʿī al-Karmī, 2:257.

[1280] "Discharge from a debt is valid using the aforementioned phrases, even if that occurs before the debt falls due." Maṭālib Ūlī al-Nuhā, al-Raḥībānī, 4:392

[1281] Maṭālib Ūlī al-Nuhā, al-Raḥībānī, 4:393

[1282] "Or if the debt from which discharge is granted is unknown to both parties or to either of them — whether they are unaware of its amount, or its description, or both — or if the creditor (the one relinquishing the debt) believes that it does not exist, such as when he says, 'I release you from a hundred' while assuming it does not exist, and it later becomes clear that it was in fact owed, then the discharge is valid, based on the actual reality of the matter." Maṭālib Ūlī al-Nuhā, al-Raḥībānī, 4:393

«وظاهر كلام الأصحاب عموم صحة البراءة من المجهول في جميع الحقوق المجهولة.»

“The apparent purport of the fellows’ statements indicates the general validity of release from unknown liabilities in all types of unknown rights.”[1283]

Gifting a debt to someone other than the debtor is not permitted.[1284]

«وامتنع إجزاؤه عن الزكاة؛ لانتفاء حقيقة الملك»

“It does not suffice for zakāh, due to the absence of the reality of ownership.”[1285]

A father may not retract his release, because it is a waiver, not a gift.[1286]

However:

“It is not valid if the creditor conditions the release upon a stipulation—this was explicitly stated. Thus, if he says to the debtor: ‘If you die, then you are released’ (with fatḥ on the tāʾ, indicating suspension), he is not released; and if he says, ‘If I die’ (with ḍammah on the tāʾ), meaning ‘upon my death you are released,’ then this is a bequest (*waṣiyyah*) of the debt to the debtor, because it is a gratuitous disposition contingent upon death.”[1287]

يقوم الوارث مقام مورثه

## The heir stands in the place of the deceased

"فيما يقوم فيه الورثة مقام موروثهم من الحقوق، وهي نوعان، حق له، وحق عليه."

Ibn Rajab (rA) said in the one hundred forty-fourth maxim:
“Concerning the cases in which the heirs stand in the place of their deceased with respect to rights, and these are of two types: a right in his favor, and a right against him.”

"يقوم الوارث مقام مورثه في كل شيء يتعلق بتركته إلا ما يستثنى من خيار الشرط والشفعة إذا لم يطالب المورث في قول ضعيف"

And in al-Siʿdī’s fifty-sixth maxim: “The heir stands in the place of the deceased in everything connected to his estate, except what is excluded, such as the option of stipulation (*khiyār al-sharṭ*) and preemption (*shufʿah*) if the deceased did not claim them—according to a weak opinion.”

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[1283] Maṭālib Ūlī al-Nuhā, al-Raḥībānī, 4:393

[1284] “For this reason, if he [the creditor] were to give his debt to him [the debtor] as a (true) gift, it would not be valid — because the meaning of discharge is absent, as is the condition required for a valid gift. Hence, gifting a debt to anyone other than the one who owes it is impermissible.” Maṭālib Ūlī al-Nuhā, al-Raḥībānī, 4:392

[1285] Maṭālib Ūlī al-Nuhā, al-Raḥībānī, 4:392

[1286] “And his statement, ‘in binding gifts — except for the father,’ implies that if a man discharges his son’s debt, he may not later retract it, because ibrāʾ (discharge) is not a gift (hibah) but rather a relinquishment (isqāṭ). His statement ‘except for the father’ excludes the grandfather, so he may not retract what he gave to his son’s son or daughter’s son. It also excludes the mother — she likewise may not retract what she gave to her son.” al-Sharḥ al-Mumtiʿ ʿalā Zād al-Mustaqniʿ, Ibn ʿUthaymīn, 11:91

[1287] Maṭālib Ūlī al-Nuhā, al-Raḥībānī, 4:393

Clarification of the Meaning of the Maxim

This maxim indicates that the heir takes the place of the deceased in all matters related to the estate, whether tangible assets, debts, or rights—whether owed to the deceased or owed by him—subject to specific exceptions. This occurs without burdening the heir with obligations beyond what he inherits.

1. General Rule:
   The heir stands in the place of the deceased in rights and property. The estate is not limited to wealth and tangible assets; rather, it also includes rights such as preemption (*shufʿah*), options in sale, pledges, guarantees, liability, the right of retaliation (*qiṣāṣ*), and similar matters.
2. Exceptions in the Madhhab:
   The option of stipulation (*khiyār al-sharṭ*), preemption (*shufʿah*), the ḥadd of false accusation (*ḥadd al-qadhf*), and retaliation in cases less than life (e.g., injuries) are not inherited unless the deceased had claimed them before death.
   A second position within the madhhab does not distinguish between rights and includes all of these among inheritable rights, and this is the view chosen by the eminent al-Siʿdī.

Ibn Rajab's Classification of Rights Related to the Deceased

First Type: Rights belonging to the deceased

(I) Rights that arise upon the death of the deceased:

- Blood money (*diyah*)
- Retaliation in cases of life (*qiṣāṣ fī al-nafs*), which the heirs may enforce or pardon. However, if the deceased had demanded retaliation before his death, then according to Imām Abū al-ʿAbbās Ibn Taymiyyah, it becomes binding and the heirs may not pardon it.[1288]

(II) Rights that were established for him during his lifetime:

1. If the deceased claimed them before death, they transfer entirely to the heirs.
2. If he did not claim them, they are of two types:

(a) Rights that are not inherited without prior claim by the deceased:

- The ḥadd of false accusation (*ḥadd al-qadhf*): not inherited unless claimed before death.[1289]
- Retaliation in cases less than life (e.g., injuries): if the deceased claimed it, the heir takes his place; otherwise, it is not inherited.[1290]
- The right of preemption (*shufʿah*): not inherited unless claimed before death.[1291]

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[1288] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:56

[1289] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:57

"Aḥmad said: Death invalidates three things — pre-emption, the ḥadd punishment if the slandered person dies, and the khiyār (option) if the person who stipulated it dies and had not demanded it. These three are contingent upon active request — if not requested, they are not established." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 5:86

[1290] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:57

[1291] "If the shafīʿ (pre-emptor) dies before making the demand, the right is nullified; but if he dies after the demand, it passes to his heir." Zād al-Mustaqniʿ fī Ikhtiṣār al-Muqniʿ, al-Ḥajjāwī, 135

- The option of stipulation (*khiyār al-sharṭ*): not inherited unless claimed before death.[1292] This differs from other options,[1293] which are inherited unconditionally, such as the option for defect (*khiyār al-ʿayb*) and misrepresentation (*tadlīs*). As for the option of the session (*khiyār al-majlis*), it is nullified by death by its very nature.[1294]

(b) Rights that are inherited:

- The remainder, such as pledge (*rahn*), guarantee (*kafālah*), liability (*ḍamān*), and deferment (*ajal*),[1295] if the heirs—or others—secure the debt with collateral or a solvent guarantor up to the lesser of the estate's value or the debt,[1296] as well as revocation of a gift[1297] before it becomes binding through possession and acceptance of a bequest.[1298]

Second Type: Rights owed by the deceased

1. "If they are binding (lāzim): The heir takes his place in fulfilling them from the estate, [and is not liable beyond the estate.]

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[1292] "The khiyār al-sharṭ (stipulated option) is inherited if the deceased demanded it before his death — meaning the death of the original right-holder — because it is a right established by contract, and thus it is not extinguished by death after being demanded, similar to the right of pre-emption (shufʿah). But if he had not demanded it before death, then it is not inherited, since it is a right of annulment not based on the loss of a contract portion, and so it is not inherited..." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 5:86

[1293] "The khiyār al-sharṭ (stipulated option) is inherited if the deceased demanded it before his death, but this condition is not required for the inheritance of other types of options." Muntahā al-Irādāt, with Ḥāshiyat Ibn Qāʾid, Ibn al-Najjār, 2:305

[1294] "The khiyār al-majlīs (option of session) is nullified by the death of either of the two contracting parties, because death is the greater of the two types of separation." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:37

[1295] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:61

[1296] "If the principal debtor or the guarantor dies, the debt does not become due — because deferment is among the rights of the deceased and is not nullified by death, just like the rest of his rights. And if both die — the guarantor and the principal — then likewise the debt does not become due, as previously mentioned, so long as the heirs provide adequate security: either a pledge that secures payment or a solvent guarantor covering the lesser of the debt or the estate. Otherwise — if the heirs do not provide such security — the debt becomes due, as will be discussed in the chapter on interdiction (ḥajr)." Kashshāf al-Qināʿ, al-Buhūtī, 8:246

[1297] "A donor's permission to take possession of a gift becomes void upon the death of either party. (...) If the donor dies after authorizing possession but before possession occurs, his heir takes his place both in authorizing possession and in revoking the gift. (...)" Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:431.

"If the donor dies before the gift becomes binding through possession, there are two views: one holds that his heir takes his place; (...) the second holds that the gift is void, which is the explicit report. (...)" Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:63.

[1298] "If the legatee (al-mūṣā lahu) dies before the testator (al-mūṣī), the bequest is void — unless it was for the payment of his debt. If he rejects the bequest after the testator's death, and that rejection occurred after accepting it, then the rejection is invalid in all cases. If the rejection was before acceptance, the bequest is void. If he refuses both acceptance and rejection, judgment is rendered against him with rejection, and his right lapses. If he dies after the testator and before acceptance or rejection, his heir assumes his position." Muntahā al-Irādāt, with Ḥāshiyat Ibn Qāʾid, Ibn al-Najjār, 3:445

2. If they are non-binding (jāʾiz): If they are nullified by death, then there is nothing further to discuss. If they are not nullified, then the heir stands in his place in either executing or rescinding them."[1299]

This applies to rights. As for non-binding contracts (*ʿuqūd jāʾizah*), such as partnership, they are terminated by death.[1300]

النماء المتولد من العين حكمه حكم الجزء، والمتولد من الكسب بخلافه على الصحيح

## Increase generated from the corpus takes the ruling of a part thereof, whereas that which is generated through earning is otherwise, according to the sounder view.

This is Ibn Rajab's twentieth maxim.

Explanation of the maxim:
The basic rule regarding increase is that it follows its source in legal ruling. If it is generated from the very substance of the thing, then it is part of it and takes its ruling, such as the offspring of livestock and the fruit of trees. But if it is generated through earning and labor, then it has an independent ruling and is not treated as following the principal, such as wages earned through work.

Ibn Rajab has a statement in which he clarifies the difference between the offspring of livestock and commercial gain. He says:

"If a person had less than a niṣāb and it became a full niṣāb through its offspring, is its ḥawl (zakāh year) to be reckoned from the time it became complete, as if the increase had come from elsewhere, or from the time he acquired the mothers, since the offspring is a part of the mothers and exists in them potentially from the beginning of the ḥawl? ... And if he had one hundred and fifty dirhams and traded with them until they became two hundred, then their ḥawl is reckoned from the time they became complete, without disagreement, because gain is generated from something external, namely people's demand, not from the very substance of the property."[1301]

What we have mentioned here is only by way of clarification. However, the authoritative position in the madhhab is that the ḥawl of the niṣāb is reckoned from the time it becomes complete in both cases. Likewise, newly acquired wealth is not subject to zakāh until a ḥawl passes over it, except for the offspring of grazing livestock and the profit of trade, for their ḥawl is the ḥawl of their principal, provided the principal itself is a niṣāb.

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[1299] "If a person dies owing debts or having made bequests without appointing an executor, the heirs may carry them out. If he dies owing an act of worship that may be performed for him after death, (...) the heirs perform it, and they must do so if he left wealth. (...) If a pledgor dies before delivering collateral whose pledge is not binding without delivery, his heir takes his place in choosing whether to deliver or withhold it. (...) This is because it is a contract tending toward binding effect and is therefore not nullified by death." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:63.

[1300] "Partnership (sharikah) is a non-binding contract that is nullified by the death of either partner." al-Iqnāʿ, al-Ḥajjāwī, 2:258

[1301] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:157

So, if someone had thirty sheep in Muḥarram, or trade goods worth seventeen mithqāls of gold, and the sheep became forty in Jumādā al-Ūlā and the goods became twenty mithqāls, then zakāh would not become due on either of them until Jumādā al-Ūlā of the following year. At that point, he counts whatever he has of sheep and trade goods and pays zakāh on all of it, not only on what completed its ḥawl from what he had possessed in Jumādā al-Ūlā of the previous year. The reason for this is that they are an increase of the property itself, namely the sheep and the trade goods, and so they were attached to it.

In explanation of this, it says in *Kashshāf al-Qināʿ*: "(If he acquires wealth, even if) the wealth is (of a kind different from what he owns, then no zakāh is due on it until a ḥawl passes over it), because of what has preceded, (except the offspring of grazing livestock) and except (the profit of trade, for its ḥawl), that is, the ḥawl of the profit and the offspring just mentioned, (is the ḥawl of its principal), so they are joined to it (provided its principal is a niṣāb), on account of the statement of ʿUmar: 'Count the young among them, but do not take them from them,' as narrated by Mālik. And on account of the statement of ʿAlī: 'Count the young and the old among them.' No dissent from them is known among the Companions. Also, because grazing livestock differ in the times at which they give birth, so singling out each one would be difficult; therefore they were made to follow their mothers. And because they follow them in ownership, they also follow them in the ḥawl. The profit of trade is likewise so in meaning, and therefore it must be the same in ruling."[1302]

This maxim is not invariable, because there are other considerations that also affect the ruling of increase.

Other applications:

Advance payment of zakāh:
If a person pays zakāh in advance on increase that has not yet materialized, there are three views:

1. The first: it does not count, because it did not yet exist at the time of advance payment, and this is the madhhab.[1303]
2. The second: it does count, because the increase follows the principal. This is a consistent extension of the rule of this chapter.
3. The third: a distinction is drawn between the case where the increase constitutes an independent niṣāb, in which case it does not count, and the case where it is below the niṣāb, in which case it does count, because it follows the principal. [1304]

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[1302] Kashshāf al-Qināʿ, al-Buhūtī, 4:330. And it would have been more appropriate for him to say: even if it is of the same type as what he owns, because if it is of a different type, then it is even more deserving of having its own independent ḥawl.

[1303] "It is not permissible to advance payment [of zakāh] from the niṣāb (minimum threshold) for two years if that would cause the amount to fall below the threshold, nor concerning increase derived from the niṣāb, as explicitly stated." Maṭālib Ūlī al-Nuhā, al-Raḥībānī, 2:130.

[1304] "Among these [issues] is the case where one pays zakāh in advance on the anticipated increase from the niṣāb before it actually comes into existence: does that fulfill the obligation? There are three views. The third view distinguishes: if the increase itself reaches the level of a niṣāb, then prepayment is not valid, because it is independently

Returning the sold item together with its increase:

If a person buys an item, makes productive use of it, and it increases while in his possession, then he wishes to return it because of a defect, then if its increase is generated from its very substance, such as offspring, milk, wool, and the fruit of trees, there are two narrations,[1305] and the sounder view is that the detached increase belongs to the buyer.[1306] This is unlike an increase in weight, for that is connected to the sold item both in substance and in legal ruling, because it cannot be separated.

But if its increase is acquired, such as the wage earned from operating it, then it is not returned with the sold item according to a single view,[1307] because "entitlement to yield follows liability."

You will note here that we have given precedence to the maxim "entitlement to yield follows liability."

Contracts, lease, and muḍārabah partnership

Rescission before profit appears:

"ومنها: لو فسخ المالك المضاربة قبل ظهور الربح؛ لم يستحق المضارب شيئا، ولو فسخ المساقاة قبل ظهور الثمرة؛ استحق العامل أجرة المثل؛ لأن الربح لا يتولد من المال بنفسه، وإنما يتولد من العمل، ولم يحصل بعمله ربح، والثمر يتولد من عين الشجر، وقد عمل على الشجر عملا مؤثرا في الثمر؛ فكان لعمله تأثير في حصول الثمر وظهوره بعد الفسخ."

Ibn Rajab said: "Among its applications: if the owner rescinds the muḍārabah before profit appears, the muḍārib is entitled to nothing.[1308] But if the owner rescinds the musāqāh orchard-tending contract before the fruit appears, the worker is entitled to the customary wage,[1309] because profit is not generated by the capital itself; rather, it is generated by labor, and no profit resulted from his labor. Fruit, however, is

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liable; but if it is less than a niṣāb, then prepayment is valid, since it follows the original niṣāb in its liability." Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:158

[1305] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:158

[1306] "Whatever the sold item earns before being returned, belongs to the buyer — as does its separable increase only, such as fruit or milk — based on the statement of the Prophet ﷺ: 'Profit follows liability (al-kharāj bi-l-ḍamān).'" Kashshāf al-Qināʿ, al-Buhūtī, 7:450

[1307] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:158

[1308] "If the owner refuses to sell after the muḍārabah (investment partnership) is terminated and the capital has taken the form of merchandise, and the agent (ʿāmil) requests the sale, then the capital owner is compelled to sell — if there is profit — as explicitly stated [by Aḥmad]. This is because the agent's right to profit does not become apparent except through sale, so the owner is compelled to fulfill that right like other entitlements. But if no profit is evident, the owner is not compelled to sell, since the agent has no right to it, and the owner accepted to retain the capital in its current (non-liquid) form." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:224

[1309] "Musāqāh (fruit sharecropping) and muzāraʿah (crop sharecropping) are both non-binding contracts (ʿuqūd jāʾizah), and are nullified by whatever nullifies agency. They do not require verbal acceptance nor specification of a period sufficient for completion. Each party has the right to terminate the contract. If it is terminated after the appearance of the fruit, it is divided between them according to what was stipulated. But if the worker terminates the contract or flees before the fruit appears, he receives nothing; and if the landowner terminates it, he must pay the worker a wage for his labor." al-Iqnāʿ, al-Ḥajjāwī, 2:277

generated from the very substance of the trees, and he worked upon the trees in a way that affected the fruit; thus his labor had an effect in bringing about the fruit and its appearance after rescission."[1310]

Partnerships and sharing in increase:
Ibn Rajab said:

"Among its applications is that if two people share, with the capital belonging to one of them and the labor of the other, and the sharing concerns that which is arising from labor, such as profit, then it is permissible, as in muḍārabah, and like the case of one who gives his animal or his slave to someone who works with it in return for a share of its earnings, for that is permissible according to the sounder view.

But if the sharing concerns that which arises from the very substance of the property, such as the milk of the animal and its offspring, then there are two narrations, and many of the authorities of the school prefer prohibition in this case, because the worker does not establish any right in the very corpus of the property, and that which is generated from the corpus takes its ruling.[1311] But this is contested by those who permit hiring someone to reap a crop for a portion of it, or to weave a garment for part of it, and that too is explicitly stated by Aḥmad ...

الأعيان التي تستخلف شيئا فشيئا حكمها حكم المنافع، فيجوز استيفاؤها بعقد الإجارة، كما يستوفى بالوقف والوصية.

As for pure lease, it is permissible in things whose benefit is obtained by exploiting them and leasing them out, such as real estate and the like. It is not permissible in things whose benefit is obtained from their very substances, except in what has been exempted on account of need, such as a wet nurse and the like. According to Shaykh Taqī al-Dīn, tangible things whose substance is replaced little by little take the ruling of benefits, so it is permissible to take them by means of a lease contract, just as they may be taken by way of endowment and bequest."[1312]

من لا يعتبر رضاه بفسخ عقد أو حَلِّه؛ لا يعتبر علمه به

## Whoever's consent is not considered in the rescission or dissolution of a contract, his knowledge of it is likewise not considered.

This is Ibn Rajab's sixty-third maxim.

Clarification
If a person's consent is not required with respect to a contract or its rescission, then it is not required that

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[1310] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:159

[1311] "Having an animal grazed in exchange for a share of its yield is invalid, as explicitly stated. (...) This resembles hiring someone to tend sheep for one-third of their milk, offspring, and wool, because the compensation is unknown and may never arise. (...)

Giving an animal to someone to work with for a share of its profit, however, is permissible by analogy to muḍārabah, because it is an asset that grows through labor. (...) The increase of sheep, by contrast, does not depend upon the worker's labor." Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 6:114.

[1312] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:160

he be aware of it before its conclusion or rescission. The reason for this is that, if his objection has no legal effect, then his knowledge is not required.

Applications of the maxim

Among the cases Ibn Rajab (rA) mentions as not requiring the knowledge of the other party are the following:

"Among them: divorce.

Among them: khulʿ,[1313] for according to the madhhab it is valid with a third party, whether it is said to be a rescission or a divorce ...

Among them: manumission,[1314] even if it is for compensation, such as saying: 'Emancipate your slave, and his price is upon me' ...

Among them: rescission of a sale on account of defect or fraudulent misrepresentation, and likewise lease.

Among them: rescission of non-binding contracts without the knowledge of the other party ...

Among them: rescission by option; it may be exercised by the one who possesses the option without the knowledge of the other party."[1315]

He then explained that some rescissions depend on the ruling of a judge, whereas others do not. He said:

"These rescissions are of two kinds:

أحدهما: ما هو مجمع على ثبوت أصل الفسخ به؛ فلا يتوقف الفسخ به على حاكم؛ كسائر ما ذكرنا.

1. That with respect to which the basis of rescission is agreed upon. In such cases, rescission does not depend on a judge, like all that we have mentioned.

والثَّاني: ما هو مختلف فيه؛ كالفسخ بالعنَّة والعيوب وغيبة الزَّوج ونحو ذلك؛ فيفتقر إلى حكم حاكم؛ لأنَّها أمور اجتهاديَّة، فإن كان الخلاف ضعيفاً يسوغ نقض الحكم به؛ لم يفتقر الفسخ به إلى حاكم.

2. The second is that with respect to which there is disagreement, such as rescission on account of impotence, defects, the husband's absence, and the like. In such cases, recourse to a judge is required, because these are matters of ijtihād. But if the disagreement is weak, such that a contrary ruling may be set aside on account of it, then rescission on that basis does not require a judge.

A subsidiary issue branching from this is the seller reclaiming his goods from an insolvent buyer if he finds them intact. On this there are two views, based on whether a contrary ruling may be set aside.

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[1313] "A khulʿ is valid with a third party, even without the wife's permission — such as when the third party says to the husband: 'Divorce your wife in exchange for one thousand on me.' This is the view of most scholars. Abū Thawr disagreed, arguing that it is foolishness (safah)… And if the third party says: 'Divorce your wife for her mahr, and I will guarantee it,' it is valid, and he is liable to pay her mahr." al-Mughnī, Ibn Qudāmah, 10:309

[1314] "Likewise, a waqf (endowment) designated for a specific person does not require that person's knowledge — unlike a gift (hibah), which requires both acceptance and physical possession (qabḍ)."

[1315] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:473

What is explicitly reported from Aḥmad (rA), in the narration of Ismāʿīl ibn Saʿīd, is that he has that right. Likewise, the remarriage of the missing man's wife: regarding whether dissolution of her marriage depends on a judge there are two narrations. In the narration of Ibn Manṣūr, he said: 'She may marry even if she has not gone to the ruler, though it is preferable to me that she do so.' Perhaps he regarded a contrary ruling as impermissible, because it was the consensus of ʿUmar (rAa) and the Companions (rAa). Shaykh Taqī al-Dīn (rA) preferred the view that no rescissions depend on a judge."[1316]

It is understood that, in the event of a dispute, the two parties will seek adjudication. Thus, Imām Taqī al-Dīn's view that rescission does not require a judicial ruling applies only when the parties mutually agree.[1317]

يصح عندنا استثناء منفعة العين المنتقل ملكها من ناقلها مدة معلومة

## According to us, it is valid to reserve the usufruct of a corporeal object whose ownership has passed from its transferor for a specified period.

This is the wording of Ibn Rajab's thirty-second maxim.[1318]

The meaning is that whoever transfers ownership of his property to another, whether through a contract of exchange or by way of gratuitous transfer, may reserve for himself the right to benefit from it for a specified period, such as residing in a house, using a riding animal, or the like.

We adduce the following in support of this maxim:

«قلت: إذا قال: أنت حر على أن تخدمني كذا وكذا؟ قال أحمد: جيد، أليس قد أعتقت أم سلمة رضي الله عنها سفينة على أن يخدم النبي ﷺ«؟

In *Masāʾil al-Imām Aḥmad wa-Isḥāq ibn Rāhawayh*: "I said: If he says, 'You are free on condition that you serve me for such-and-such'? Aḥmad said: 'Good. Did not Umm Salamah (rAa) emancipate Safīnah on condition that he serve the Prophet ﷺ?'"[1319]

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[1316] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:474

[1317] Shaykh Mashhūr, the editor of Ibn Rajab's *al-Qawāʿid*, quoted Shaykh Ibn ʿUthaymīn as saying: "Shaykh al-Islām's position is conditional upon both parties agreeing to it. If they disagree, with one saying to the other, 'You have no right to rescind,' they must refer the matter to a judge… Accordingly, we have three positions here: First, where the right to rescind is established by scholarly consensus, no judge is required… Second, where the disagreement is so weak that a ruling based on it would be overturned, there is disagreement, but the stronger view is that no judicial ruling is required. Third, no rescission requires a judge, provided both parties agree to it. If a dispute arises, however, a judge must adjudicate between them." *Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid*, Ibn Rajab, edited by Mashhūr ibn Ḥasan Āl Salmān, 1:519.

[1318] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:213

[1319] Masāʾil al-Imām Aḥmad wa-Isḥāq ibn Rāhawayh, al-Kawsaj, 8:4493

«ولنا، أنه استثنى بعض ما وقع عليه العقد وهو معلوم، فصح، كما لو باع حائطا، واستثنى نخلة بعينها. ولأن النبي ﷺ نهى عن الثنيا، إلا أن تعلم»

And in *al-Mughnī*: “Our proof is that he reserved part of what the contract attached to, and it was known, so it was valid, just as if he sold an orchard and reserved one specific palm tree. Also, because the Prophet ﷺ forbade exception, unless it is specified.”[1320]

"أما كون اشتراط البائع نفعاً معلوماً في المبيع كما مثل المصنف رحمه الله وشبهه يصح؛ فـ «لأن جابراً باع بعيراً لرسول الله ﷺ واستثنى حملانه إلى المدينة، ولأن اشتراط ذلك أكثر ما فيه أنه يتأخر التسليم مدة معلومة فصح اشتراطه كما لو باع أمة مزوجة أو داراً مؤجرة أو شجرة مؤبرة.»"

And in *al-Mumtiʿ fī Sharḥ al-Muqniʿ*: “As for the validity of the seller’s stipulating a known benefit in the sold property, as the author (rA) exemplified and the like, that is because Jābir sold a camel to the Messenger of Allah ﷺ and reserved its carrying him to Madinah. Also, because the most that such a stipulation entails is that delivery is deferred for a specified period, so stipulating it is valid, just as if he sold a married slave woman, a leased house, or a pollinated tree.”[1321]

Ibn Rajab (rA) mentioned among its applications:

“Among them: if the seller reserves the usufruct of the sold property for a specified period, it is valid. Another narration has been related that it is invalid.

Among them: endowment. It is valid for a person to create an endowment and reserve its usufruct for a specified period or for the duration of his life, because uncertainty in the term here is of no effect, since it does not exceed the uncertainty in the duration of each generation, relative to those after it.

Among them: bequest. It is valid for a person to bequeath the corpus of a specific object to one person and its usufruct to another, whether absolutely or for a specified period, or leave it to the heirs.

Among them: gift. It is valid for a person to gift something while reserving its usufruct for a specified period, and Shaykh Muwaffaq al-Dīn (rA) gave this answer.

And among them are the property given as the dower, the compensation in khulʿ, and settlement in exchange for property. According to the madhhab’s analogical reasoning, it is valid to reserve the usufruct in these cases.”[1322]

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[1320] al-Mughnī, Ibn Qudāmah, 6:131

[1321] al-Mumtiʿ fī Sharḥ al-Muqniʿ, Ibn al-Munajjā, 2:418

[1322] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:213

ما تدعو الحاجة إلى الانتفاع به من الأعيان ولا ضرر في بذله، لتيسره وكثرة وجوده، أو المنافع المحتاج إليها، يجب بذله مجانا بغير عوض

## That which people need to benefit from among tangible assets, and whose provision involves no harm—due to its ease and abundance—as well as needed benefits, must be provided gratuitously, without compensation

This is the ninety-ninth maxim from Ibn Rajab's maxims.

Explanation of the Maxim

Whatever need calls for benefiting from among tangible things whose provision entails no harm, due to their availability and abundance, or from benefits that people need, must be provided free of charge and without compensation.

This maxim affirms that the Sharīʿah takes account of people's needs and the public interest in things and benefits whose provision to those in need entails no harm.

Evidences for the Maxim

"فَوَيْلٌ لِلْمُصَلِّينَ * الَّذِينَ هُمْ عَنْ صَلَاتِهِمْ سَاهُونَ * الَّذِينَ هُمْ يُرَاءُونَ * وَيَمْنَعُونَ الْمَاعُونَ."

Allah Most High says: "Woe, then, to those who pray, those who are heedless of their prayer, those who show off, and withhold small assistance." al-Māʿūn 107:4–7.

"سَأَلْتُ جَابِرًا عَنْ ثَمَنِ الْكَلْبِ وَالسِّنَّوْرِ قَالَ: زَجَرَ النَّبِيُّ ﷺ عَنْ ذَلِكَ."

Muslim narrated from Abū al-Zubayr: "I asked Jābir about the price of a dog and a feral cat. He said: The Prophet ﷺ forbade that."

"لاَ تَمْنَعُوا فَضْلَ المَاءِ لِتَمْنَعُوا بِهِ فَضْلَ الكَلَأ."

And in the two Ṣaḥīḥ collections, from Abū Hurayrah (rAa), that the Messenger of Allah ﷺ said: "Do not withhold surplus water, thereby preventing surplus pasture."

Applications of the Maxim

Ibn Rajab (rA) said:

"Under this are included several issues:

- Among them: a cat may not be sold, according to the sounder of the two narrations...[1323]
- Among them: running water and pasture. One must provide the surplus of them to one who needs it for drinking and for watering his animals...
- Among them: placing timber upon a neighbor's wall when it does not harm him,

[1323] However, the madhhab, according to the later scholars, holds that the sale of a cat is valid, as stated: "(And likewise a cat), its sale is valid, because it is reported in the Ṣaḥīḥ: 'A woman entered the Fire because of a cat belonging to her which she confined,' and the default implication of the lām is ownership." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:8.

- and likewise running water through his land, according to one of the two narrations.[1324]
- Among them: lending jewelry. The apparent purport of Aḥmad's statement and of a group of the Ḥanbalī jurists is that it is obligatory, and some later jurists explicitly stated this.[1325]
- Some of them chose the obligation of providing small useful items, [1326] namely things of slight value and easy provision, such as a bucket, axe, pot, and sieve, and lending a male animal for breeding.[1327] This is the choice of al-Ḥārithī, and Shaykh Taqī al-Dīn inclined toward it.
- Among them: a copy of the Qurʾān. It is obligatory to lend it to one who needs to read from it and does not find another copy…
- And among them: hospitality for travelers passing through; the madhhab is that it is obligatory.

"وأما إطعام المضطرين؛ فواجب، لكن لا يجب بذله مجانا، بل بالعوض... واختار الشيخ تقي الدين أن المضطر إلى الطعام إن كان فقيرا؛ وجب بذله له مجانا؛ لأن إطعامه فرض كفاية؛ فلا يجوز أخذ العوض عنه، بخلاف الغني؛ فإن الواجب معاوضته فقط، وهذا حسن..."

- As for feeding those in dire necessity, that is obligatory, but it is not obligatory to provide it free of charge; rather, it is due in exchange for compensation... Shaykh Taqī al-Dīn chose the view that if one in dire need of food is poor, it must be provided to him free of charge, because feeding him is a communal obligation, and it is therefore impermissible to take compensation for it. This differs from the wealthy person, for what is obligatory in his case is only to transact with him. This is sound..."[1328]

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[1324] "It is prohibited to cause water to flow through another person's land or over his roof without his permission, even if no harm results from that and even if the one causing it is in need. However, it is valid to reach a settlement for that in return for compensation while ownership remains with him—in which case it is a lease; otherwise, it is a sale." Ghāyat al-Muntahā, Marʿī al-Karmī, 1:634.

[1325] It is not obligatory according to the later muʿtamad, and this is supported by the fact that they only obligate lending maʿūn in cases of necessity, where the item remains intact and the owner has no need for it; thus, lending jewelry is even less likely to be obligatory. Rather, the muʿtamad is that no zakah is due on lawful jewelry prepared for use or lending, even if it is not actually lent. Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 2:89.

[1326] The madhhab, according to later scholars, holds that such property must be provided gratuitously to one in dire need, as stated: "Whoever is compelled to make use of another person's property, while its substance remains, to ward off cold or heat, or to draw water and the like, the owner must provide it to the one in need without compensation." Kashshāf al-Qināʿ, al-Buhūtī, 9:68.

[1327] Later scholars do not explicitly state an absolute obligation of lending, but they do prohibit taking payment: "It is not permissible to hire out a male animal for breeding due to the Prophet's ﷺ prohibition of taking payment for stud service… If someone is in need and does not find one who will provide it for free, it is permissible for him to offer payment, but it is unlawful for the owner of the male animal to take it." Kashshāf al-Qināʿ, al-Buhūtī, 14:305

[1328] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:281

## Essential Needs Are Not Counted as Surplus Wealth

This is the forty-ninth maxim from al-Siʿdī's maxims, and it is Ibn Rajab's one hundred thirtieth maxim. Ibn Rajab expressed it as follows:

«المسكن والخادم والمركب المحتاج إليه ليس بمال فاضل يمنع أخذ الزكوات، ولا يجب به الحج والكفارات، ولا يوفى منه الديون والنفقات.»

"A dwelling, servant, and mount that one needs are not surplus wealth that prevents one from taking zakāh funds; nor do they make ḥajj or expiations obligatory; nor are debts and maintenance paid from them."[1329]

Explanation of the Maxim

What is meant by essential needs (al-ḥawāʾij al-aṣliyyah) are those things connected to a person's basic necessities, such as the home in which he lives, the mount or vehicle he uses, household furnishings and utensils, necessary clothing, and they also mentioned a servant when one needs one, especially since in their times the need for servants was often greater. These things are not treated as surplus wealth for which a person is required to dispose of them or sell them in order to fulfill obligations. This is because legal ability, in the chapters of zakāh, ḥajj, expiations, debts, and maintenance, is considered with respect to what exceeds one's essential needs. Thus, one is not told: "Sell your house in order to perform ḥajj." The same applies even with respect to a debtor.

﴿وَإِن كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ﴾

Allah Most High says: "And if he is in hardship, then there is postponement until ease." al-Baqarah 2:280.

Related to this maxim is the need to distinguish between the wealthy and the poor, between those to whom zakāh is lawful and those upon whom it is obligatory, and between those for whom asking is lawful and those for whom it is not.

Let us begin by establishing that the operative criterion is sufficiency (kifāyah). Thus, whoever owns wealth that does not suffice him remains entitled to zakāh. As in *Sharḥ al-Muntahā*:

"Even if what he owns is of monetary assets, that is, an amount that does not meet his sufficiency and the sufficiency of his dependents, even if it is more than a niṣāb, then he is not wealthy. Zakāh is therefore not forbidden for him, because wealth is that by which sufficiency is attained. Thus, if he is not in need, zakāh is forbidden for him, even if he owns nothing; and if he is in need, asking for it is lawful for him. Al-Maymūnī said: I discussed this with Aḥmad and said: A man may have camels and sheep on which zakāh is due, while he is poor; and he may have forty sheep, and he may have an estate that does not suffice him. May he be given from charity? He said: Yes. And he mentioned the statement of ʿUmar: 'Give to them, even if such-and-such camels return to them.' I said: Is there a set number or time for

[1329] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 2:495

this? He said: I have not heard of one. And he said: If he has real estate and an estate from which he receives ten thousand every year, but it does not maintain him, that is, does not suffice him, he may take from zakāh."[1330]

Thus, there is one form of wealth that makes zakāh obligatory, namely ownership of the niṣāb, and another form of wealth that prevents entitlement to zakāh, namely sufficiency. In *Kashshāf al-Qināʿ*:

"فالغنى في باب الزكاة نوعان: نوع يوجبها، ونوع يمنعها . والغنى هنا: ما تحصل به الكفاية، فإذا لم يكن محتاجا، حرمت عليه الزكاة، وإن لم يملك شيئا، وإن كان محتاجا، حلت له، ولو ملك نصابا فأكثر؛ لقوله ﷺ في حديث قبيصة: "فحلت له المسألة حتى يصيب قواما من عيش، أو سدادا من عيش" رواه مسلم. والسداد: الكفاية."

"Wealth in the chapter of zakāh is of two kinds: one kind makes zakāh obligatory, and another kind prevents taking it. Wealth here is that by which sufficiency is attained. Thus, if he is not in need, zakāh is forbidden for him, even if he owns nothing; and if he is in need, it is lawful for him, even if he owns a niṣāb or more, because of the Prophet's ﷺ statement in the ḥadīth of Qabīṣah: 'Asking becomes lawful for him until he obtains a livelihood sufficient to sustain him (*sidād*).' Muslim narrated it. And (*sidād*) here means sufficiency."[1331]

As for the level of wealth that makes asking unlawful, there are two reports from Aḥmad:

1. First: that it is whatever achieves sufficiency. In *Sharḥ al-Muntahā* by Ibn al-Najjār:

"Whoever is permitted to take something from zakāh or otherwise is permitted to ask for it. This was explicitly stated, in agreement with Mālik and al-Shāfiʿī, due to the apparent meaning of the Messenger of Allah's ﷺ statement: 'The asker has a right, even if he comes riding on a horse.'"[1332] The madhhab is that the poor person and the needy person are to be given from zakāh "the completion of their sufficiency, together with their dependents, for one year."[1333]

2. Second: that it is whoever has the food of his day. In *Sharḥ al-Muntahā* by Ibn al-Najjār:

"And from him is another report: asking is forbidden, though taking is not, for one who has the food of his day, lunch and dinner. Ibn ʿAqīl mentioned that a group chose this view, in agreement with Abū Ḥanīfah. It would then be a third kind of wealth that prevents asking ... The group transmitted from Aḥmad regarding a man who has a full brother and sees something with him that he likes, so he says, 'Give this to me,' and that used to occur between them, and perhaps the one asked even likes that his brother ask him for it. He said: I dislike all asking. He did not allow it, except that between father and child it is easier."[1334]

The first view is the madhhab. They responded to the marfūʿ ḥadīth of Ibn Masʿūd: "Whoever asks while possessing what suffices him, his asking will come on the Day of Resurrection as scratches or wounds on his face." They said: O Messenger of Allah, what suffices him? He said: "Fifty dirhams, or

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[1330] Sharḥ Muntahā al-Irādāt, al-Buhūtī, 1:453

[1331] Kashshāf al-Qināʿ, al-Buhūtī, 5:118.

[1332] Sharḥ Muntahā al-Irādāt, Ibn al-Najjār, 3:331.

[1333] Kashshāf al-Qināʿ, al-Bahūtī, 10:102.

[1334] Sharḥ Muntahā al-Irādāt, Ibn al-Najjār, 3:331.

their equivalent in gold." They answered this by weakening the report. Al-Majd understood it to mean that the Prophet ﷺ said this at a time when ordinary sufficiency was usually achieved with fifty dirhams. For this reason, other estimates are reported from him: forty dirhams, and five awāq, meaning two hundred dirhams.[1335]

Essential needs are distinct from wealth. What is meant by them is the dwelling, servant, mount, furnishings, and clothing that one needs. If there is no surplus in them beyond his need, they are not treated as surplus wealth from which zakāh, maintenance, expiations, or debts are taken, nor is one required to sell them in order to perform ḥajj.

Applications

Zakāh: Owning essential needs does not make a person wealthy in the sense that prevents taking zakāh. Whoever has a dwelling that he needs, even if spacious, or a servant he needs, or a mount or vehicle he needs, may take zakāh so long as he does not possess surplus beyond his sufficiency.[1336]

Ḥajj: Ḥajj is not obligatory upon one who owns only what sustains his sufficiency, such as a dwelling, servant, and the like. He is not required to sell what he needs for himself and his dependents. However, if he has a dwelling beyond his need, or an expensive servant who can be replaced with one who suffices him while leaving surplus with which he can perform ḥajj, then ḥajj becomes obligatory upon him. Likewise, if he has real estate or an estate that does not exceed his maintenance and the maintenance of his dependents, he is not required to sell it; but if it exceeds his expenses, the surplus is sold. [1337]

The insolvent debtor: The judge leaves for him from his wealth what repels his essential need: a dwelling suitable for someone like him, a servant he needs if someone like him is served, clothing, and maintenance according to sufficiency. These are not sold for his debt. If the dwelling is spacious or luxurious beyond the need of someone like him, or if the servant is expensive, the surplus is sold, something sufficient is purchased for him, and the remainder is returned to the creditors. He is also left what he trades with if he is a merchant, or the tools of his craft if he is a craftsman. An exception is made for property that is the very item belonging to a creditor; in that case, the creditor may take it.[1338]

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[1335] Kashshāf al-Qināʿ, al-Buhūtī, 5:118.

[1336] "Aḥmad was asked whether a man who owns a house may receive zakāh and replied, 'Yes.' When told that it was spacious, he said, 'I hope there is no harm in that.' (...) Asked about a house, he said, 'If it is not substantially beyond what he needs, he may be given zakāh.'" Qawāʿid Ibn Rajab, Ibn Rajab, 2:495.

[1337] "If a dwelling, servant, or property by which one supports his dependents suffices his household, it is not sold. (...)

Landed property is the same; if it exceeds his expenses, it is sold. (...)" Qawāʿid Ibn Rajab, Ibn Rajab, 2:496.

"If the dwelling exceeds his need, or the servant is valuable and can be sold to purchase what suffices him while leaving enough for ḥajj,

he must do so because he is able." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:517–518.

[1338] "The judge must leave the insolvent debtor the dwelling and servant suitable for someone like him that he needs, (...) unless they are the very property of a creditor. (...)" "A superior dwelling or servant is exchanged for one suitable for someone like him. (...)

A merchant is left what he needs to trade and a craftsman the tools of his craft." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:166–167.

"Likewise, if his clothes are so fine that someone like him would not wear them, they are sold, suitable clothes are bought, and the surplus is returned to the creditors." Kashshāf al-Qināʿ, al-Buhūtī, 8:359–360.

Expiation by wealth: “The dwelling and the servant are not sold for it, as mentioned by al-Qāḍī and the Ḥanbalī jurists. They said that what exceeds this is sold, to the extent that if he has a valuable slave whose price could purchase two slaves, so that he could be served by one and emancipate the other, he must do so. The same applies to the house and clothing.”[1339] The wording of *Kashshāf al-Qināʿ* is: “Likewise, if he has fine clothing exceeding the clothing of someone like him, and he is able to sell it and purchase what suffices him in clothing.”[1340]

Maintenance of relatives: A person is not required to sell his dwelling and essential needs in order to spend on his relatives. But if he has surplus beyond them and beyond the maintenance of his dependents, maintenance becomes obligatory from the surplus. Nothing is sold for a relative’s maintenance except what would be sold from the insolvent debtor for his debt. Maintenance according to custom is obligatory for those whose maintenance is obligatory when they are poor, provided that the one obligated to spend possesses it as surplus beyond his own maintenance, the maintenance of his wife and dependents for his day and night, their clothing and dwelling, his business capital, and his tools of work.[1341]

Jizyah (the poll tax on eligible non-Muslim subjects) and kharāj (land tax): The jurists applied the same standard to the people under covenant, and more generally to public financial rights. They said: “The same should be the ruling of jizyah and kharāj.”[1342]

Blood money: Likewise, the members of the ʿāqilah (male agnatic kin group responsible for contributing to blood money) are not required to sell their essential needs in order to pay the blood money.[1343]

Is a Person Compelled to Earn in Order to Fulfill What He Owes?

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[1339] Qawāʿid Ibn Rajab, Ibn Rajab, 2:498. “If he has a servant who can be sold to purchase two slaves, allowing him to retain the service of one and emancipate the other, he must do so.

The same applies to luxurious clothing beyond what is suitable for him or a house beyond his need when it can be sold to purchase what suffices him and a slave with the remainder, because emancipation is possible without harm.” Kashshāf al-Qināʿ, al-Buhūtī, 12:490.

“The relevant property must exceed the minimum dwelling suitable for someone like him and a servant for one who is customarily served. (...) If he has property superior to what is suitable for him and can sell it to purchase a suitable substitute and a slave with the surplus, he must do so.” Ghāyat al-Muntahā, Marʿī al-Karmī, 2:341.

[1340] Kashshāf al-Qināʿ, al-Buhūtī, 12:490.

[1341] “Aḥmad was asked whether a man should sell his house to maintain his father. He replied, ‘He must have a dwelling. If he has a surplus beyond his dwelling and his dependents’ maintenance, let him spend on them; if he has no surplus, then not.’ (...) Nothing is sold for a relative’s maintenance except what would be sold from an insolvent debtor for his debt.” Qawāʿid Ibn Rajab, Ibn Rajab, 2:499.

“Maintenance is due from what exceeds the daily needs, clothing, and housing of the person, his wife, and his slaves. (...) It is not due from the principal of his merchandise, the value of his property, or the tools of his trade because that would cause harm.” Kashshāf al-Qināʿ, al-Buhūtī, 13:153.

[1342] Qawāʿid Ibn Rajab, Ibn Rajab, 2:499.

[1343] Qawāʿid Ibn Rajab, Ibn Rajab, 2:499.

In Ibn Rajab's one hundred thirty-second maxim:

"القدرة على اكتساب المال بالصناعات غنى بالنسبة إلى نفقة النفس، ومن يلزم نفقته من زوجة وخادم. وهل هو غنى فاضل عن ذلك؟ على روايتين."

"The ability to acquire wealth through crafts is wealth with respect to one's own maintenance and the maintenance of those whose maintenance is obligatory upon him, such as a wife and servant. But is it wealth surplus to that? There are two narrations."[1344]

This means that everyone capable of earning is required to do so in order to spend on himself and those whose maintenance is obligatory upon him, such as his wife and dependents. But whether this capacity is considered wealth that prevents zakāh, makes ḥajj obligatory, and obligates him to fulfill what is upon him of maintenance, expiations, jizyah, blood money, and the like is a matter requiring detail, but in most cases it is treated as such.

Zakāh: The strong person capable of earning is not given zakāh on account of poverty, because he is wealthy by virtue of earning. But if he has a debt, then even if he is compelled to earn in order to pay it, he may be given zakāh under the category of an indebted person, according to the relied-upon position.[1345]

Ḥajj: One who can earn on the road is not obligated to perform ḥajj merely by virtue of being able to work, unless he owns what secures provisions and transport. If he is near Makkah, there are two views regarding obligation.[1346] The relied-upon position is that it is not obligatory except by possessing that through which legal ability is attained. He is not required to earn in order to obtain the expenses of ḥajj, but "it is recommended for one who can walk and earn through a craft, and disliked for one whose occupation is begging."[1347]

The debtor: "There are two well-known narrations concerning compelling the insolvent debtor to earn in order to pay."[1348] The madhhab is: "If, after distributing his property, a remainder of debt remains upon the insolvent person, then the craftsman is compelled to earn, and to hire himself out in work suitable for someone like him, in order to pay what remains upon him of the debts."[1349]

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[1344] Qawāʿid Ibn Rajab, Ibn Rajab, 2:501.

[1345] "A strong person capable of earning may not receive zakāh on the basis of poverty. (...) Whether he may receive it as a debtor is subject to two views; the first is the apparent wording of Aḥmad. (...) One whose debt obligates him to earn for its repayment is even more entitled to receive it." Qawāʿid Ibn Rajab, Ibn Rajab, 2:501.

"One who incurred debt for himself in a permissible matter—or in a prohibited matter from which he repented—and became insolvent is given enough to discharge it, like a mukātab." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:457.

[1346] "Concerning the obligation of ḥajj upon a strong person capable of earning: if he is far from Makkah, the madhhab holds that the obligation does not apply; if he is near, there are two views. (...) A distinction may be drawn because the rights of Allah are founded upon leniency, unlike human rights. For this reason, he is not required to earn money with which to perform ḥajj." Qawāʿid Ibn Rajab, Ibn Rajab, 2:502.

[1347] Sharḥ Muntahā al-Irādāt, al-Buhūtī, 1:517.

[1348] Qawāʿid Ibn Rajab, Ibn Rajab, 2:502.

[1349] Kashshāf al-Qināʿ, al-Buhūtī, 8:368.

Maintenance:

- Maintenance of ascendants and descendants is not obligatory unless they are poor. If they are wealthy, their maintenance is not obligatory.[1350]
- Whoever is capable of earning is compelled to earn, and maintenance for him is not then obligatory.[1351] However, "the craft must produce his sufficiency; otherwise, completion remains obligatory."[1352]
- As for one who has no craft, even if healthy and legally accountable, his maintenance is obligatory according to the relied-upon position, even if he is not one of the parents.[1353] Al-Mardāwī clarified that the issue has two narrations, and that the narration of obligation is the madhhab.[1354] He also noted that if the parents are healthy, legally accountable, and have no craft, one path within the madhhab holds that their maintenance is obligatory without disagreement, while other paths mention two narrations.[1355]
- The maintenance of these persons is due from earnings, rent from owned property, and the like, not from essential needs. This is after his own sufficiency, and that of his wife and children, for a day and night, as well as their clothing and dwelling.[1356]
- As for compelling the destitute person to earn for the maintenance of his relative, there are two narrations, and al-Mardāwī transmitted that a group decisively affirmed obligation.[1357]

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[1350] "Maintenance is obligatory for those mentioned (in a reasonable manner), meaning according to what befits them, (from lawful sources), not unlawful, as previously stated regarding the wife, (if they are poor); if they are wealthy, their maintenance is not obligatory upon him." Kashshāf al-Qināʿ, al-Buhūtī, 13:154.

[1351] "Among them is that the ability to earn through a trade prevents the obligation of maintenance upon his relatives." Qawāʿid Ibn Rajab, Ibn Rajab, 2:503.

"The ability to earn through a trade prevents the obligation of maintenance upon his relatives." Al-Inṣāf, al-Mardāwī, 24:407–409.

"One who is capable of earning among his direct ascendants and descendants is compelled to earn, and his maintenance is not then obligatory, because his earnings by which he becomes self-sufficient are like wealth." Kashshāf al-Qināʿ, al-Buhūtī, 13:154, 158.

[1352] Kashshāf al-Qināʿ, al-Buhūtī, 13:154, 158.

[1353] "And maintenance is obligatory for one who has no trade, even if he is physically sound and legally responsible, even if he is other than the parents, due to his ﷺ statement to Hind: 'Take what suffices you and your child in a reasonable manner.' He did not exclude from them one who is adult or physically sound. And because he is poor, he is entitled to maintenance from his relative, like the chronically ill. If he has a trade, then his maintenance is not obligatory." Kashshāf al-Qināʿ, al-Buhūtī, 13:158.

[1354] Al-Inṣāf, al-Mardāwī, 24:407–408.

[1355] Al-Inṣāf, al-Mardāwī, 24:408.

[1356] "… The one who spends must have what he spends upon them as surplus beyond himself, his wife, and his slave(s) for his day and night, and beyond their clothing and housing, from his wealth and the income of his property and the like, such as his trade, or from his earnings ..." Kashshāf al-Qināʿ, al-Buhūtī, 13:153.

[1357] "Is the indigent person required to earn in order to provide maintenance for his relative? This follows the two narrations in the first issue. … The majority held that it is obligatory. Al-Qāḍī said in al-Khilāf: The apparent wording of Imām Aḥmad, may Allah have mercy on him, indicates that there is no distinction in this matter between parents, children, and other relatives." Al-Inṣāf, al-Mardāwī, 24:409.

Blood money: “Among its applications: whether the poor person who is capable of earning bears blood money together with the ʿāqilah. There are two narrations.”[1358] The madhhab is: “A poor person does not contribute to blood money, meaning one who does not own a niṣāb when the ḥawl becomes due, surplus beyond him, as in ḥajj and the expiation of ẓihār, even if he is working, because he is not among those expected to share financially (*ahl al-muwāsāh*), as in zakāh.”[1359]

Jizyah: “Whether jizyah is obligatory upon the poor person who is capable of earning has two narrations, the more well-known of which is obligation,”[1360] and that is the madhhab.[1361]

In Ibn Rajab’s one hundred thirty-first maxim:

"القدرة على اكتساب المال بالبضع ليس بغنى معتبر"

“The ability to acquire wealth through marriage is not legally recognized as wealth.”[1362]

Ibn Rajab said: “Al-Qāḍī explicitly stated this in his *Khilāf*, and he derived from it several issues:

1. Among them: if a woman becomes insolvent, while she is someone sought after in marriage, she is not compelled to marry in order to obtain the dower, without disagreement.
2. Among them: she is not obligated to provide maintenance for relatives by virtue of her ability to marry and obtain the dower.
3. Among them: she is not prevented from taking zakāh on that basis either.”[1363]

[1358] Qawāʿid Ibn Rajab, Ibn Rajab, 2:503.

[1359] Sharḥ Muntahā al-Irādāt, al-Buhūtī, 3:325.

[1360] Qawāʿid Ibn Rajab, Ibn Rajab, 2:503.

[1361] “Jizyah is not obligatory upon a poor person who is unable to pay it and does not work, because ʿUmar divided the jizyah into three tiers, placing the lowest upon the poor who work, which indicates that one who does not work owes nothing. And due to the statement of Allah: ‘Allah does not burden a soul beyond its capacity.’ If, however, the poor person is one who works, then the jizyah is obligatory upon him, as previously mentioned.” Kashshāf al-Qināʿ, al-Buhūtī, 7:235.

[1362] Qawāʿid Ibn Rajab, Ibn Rajab, 2:500.

[1363] Qawāʿid Ibn Rajab, Ibn Rajab, 2:500.

# Chapter Four: Juristic Controls

This chapter aims to bring out the discipline of juristic controls, to clarify its true nature and boundaries, and to distinguish it from the legal maxims with which it may be confused. It then presents selected applied examples drawn from the chapters of fiqh, arranged according to the order of chapters in the Ḥanbalī school.

The purpose of this chapter, therefore, is not to restate what has already been presented in the introduction to the book regarding the distinction between a legal maxim and a juristic control, but rather to clarify what is specifically meant by a juristic control, to show the breadth of its usage in juristic discourse, and to explain the need for it in regulating subsidiary rulings and in defining measures and descriptions with precision. This is because the term ḍābiṭ ("juristic control") in the books of fiqh does not operate with a single meaning. Rather, it is used at times for a rule that gathers together some of the issues of a given chapter, at times for clarifying a limit, measure, or description, and at times for restricting an unqualified expression and elucidating what is stated in summary form.

## First: The Nature of Juristic Controls

Lexical Definition

The term ḍābiṭ ("juristic control") is the active participle of ḍabaṭa. Among the meanings of ضبط (ḍabṭ) in the Arabic language are "adhering to a thing and restricting it."[1364] It also carries the meaning of preservation and precision. One says that he ḍabaṭa a thing when he "preserved it with exacting care; and from this it is said: 'I administered (ḍabaṭt) the lands and other matters by managing them in a way free of deficiency.'"[1365]

From this it becomes clear that the root conveys the ideas of gathering, preserving, and restricting. This is well suited to the function of the juristic control in its familiar technical usage, for it gathers dispersed cases and issues, preserves them for the jurist, and prevents the inclusion within them of what does not belong to them. There is also a correspondence between this and the technical definition proposed by some contemporary scholars, which relates to regulating "expressions," "quantities," and "limits" in fiqh, since distinction is a form of precision and of properly managing a matter without excess or deficiency.

Technical Definition

والقاعدة في الاصطلاح بمعنى الضابط، وهي الأمر الكلي المنطبق على جميع جزئياته

Some of the early scholars used the terms قاعدة (qāʿidah, "legal maxim") and ضابط (ḍābiṭ, "juristic control") interchangeably. Among their statements is that of al-Fayyūmī: "In technical usage, the maxim is synonymous with the ḍābiṭ; it is a universal proposition that applies to all of its particulars."[1366]

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[1364] Lisān al-ʿArab, Ibn Manẓūr, 7:340.

[1365] Al-Miṣbāḥ al-Munīr, al-Fayyūmī, 2:357.

[1366] al-Miṣbāḥ al-Munīr, al-Fayūmī, 2:510.

ومنها ما يختص، كقولنا "كل كفارة سببها معصية، فهي على الفور." والغالب فيما يختص بباب، وقصد به نظم صور متشابهة يسمى "ضابطا"

Yet the sciences develop, their terminology multiplies, and their usages become more differentiated. Thus later scholars sought to distinguish between the two by making the legal maxim that rule which applies to numerous rulings across different chapters, while the juristic control is the rule confined to a single chapter. Al-Mardāwī, may God have mercy on him, said: "Among them are those that are particular, such as our statement: 'Every expiation whose cause is an act of disobedience is due immediately.' What is commonly confined to a single chapter, and is intended to organize similar cases, is called a ḍābiṭ."[1367]

ضابط ذلك أن ما أبطل عمده كركوع زائد أو سجود سجد لسهوه وما لا كالالتفات والخطوتين لم يسجد لسهوه ولا لعمده لعدم ورود السجود له

The estimation involved in distinguishing between the two may itself vary. For example, al-Mardāwī's treating the statement, "Every expiation whose cause is an act of disobedience is due immediately," as a juristic control is acceptable if expiations are treated as a single chapter. Otherwise, it could be regarded as a legal maxim, insofar as expiations occur across multiple chapters. Clearer than this, as an example of the ḍābiṭ in the sense of a rule confined to one chapter, is the control governing the prostration of forgetfulness. Al-Buhūtī said: "Its governing principle is that whatever, if done deliberately, would invalidate the prayer, such as an additional bowing or prostration, requires a prostration for forgetfulness when done inadvertently; but what would not invalidate it, such as turning one's head or taking two steps, does not require a prostration for forgetfulness, whether done inadvertently or deliberately, because no prostration has been transmitted for it."[1368]

وضابط الإجزاء الذي لا يختلف أن يكون انحناؤه إلى الركوع المعتدل أقرب منه إلى القيام المعتدل.

للأكثر حكم الكل

ما قارب الشيء يعطى حكمه

All of these are universal rulings that apply to particulars. For this reason, it became common in usage to define the ḍābiṭ as a universal ruling applicable to its particulars.[1369] But this definition does not exclude the legal maxim, and it is perhaps not comprehensive of everything that the jurists called a ḍābiṭ. For example, in the discussion of the minimum valid bowing, al-Majd said: "The invariant governing criterion of valid bowing is that a person's bending be closer to a moderate bowing posture than to an upright standing posture."[1370] This latter is closer to a particular ruling called a ḍābiṭ in the linguistic sense, because it regulates this specific issue for the jurist even though no detailed scriptural proof is

[1367] Sharḥ al-Kawkab al-Munīr, Ibn al-Najjār, 1:30.

[1368] Kashshāf al-Qināʿ, al-Buhūtī, 1:145.

[1369] Kashshāf Iṣṭilāḥāt al-Funūn wa-al-ʿUlūm, al-Tahānawī, 2:1110.

[1370] Al-Inṣāf, al-Mardāwī, 3:480.

reported concerning it. Perhaps this very ḍābiṭ is itself a branch of the maxim, “The greater part takes the ruling of the whole,” or, “What closely approximates a thing is given its ruling.”

تقييد اللفظ المطلق أو بيان المجمل أو توضيح اللفظ المشكل أو بيان مقداره أو تمييزه عن غيره، ويندرج تحته مسائل جزئية أو صور بأشخاصها.

Thus, in the language of the jurists, the juristic control may at times be intended in a sense altogether different from the legal maxim. Examples include the governing criterion of abundant water, the hardship that justifies legal concession, the wealth that obligates zakāh and bars one from asking others, the onset of ripeness, reviving barren land, and what warrants discretionary punishment. This is what led some contemporary scholars, such as Shaykh ʿAbd Allāh ibn Mubārak Āl Sayf, to call for treating juristic controls as an independent discipline distinct from legal maxims, and to propose for them another definition: “Restricting an unqualified expression, clarifying what is stated summarily, elucidating an ambiguous expression, specifying its quantity, or distinguishing it from what is other than it; and under this fall particular issues or concrete cases.”[1371]

### The Method of Selection and Presentation in This Chapter

This part is not intended to exhaust everything that has been termed a ḍābiṭ (“juristic control”) in the books of fiqh, nor to gather everything that could be classified under that designation. Rather, the aim is to select Ḥanbalī examples that reveal the function of the juristic control in juristic organization, while observing the order of chapters followed by the Ḥanbalīs.

Accordingly, in presenting examples of juristic controls in the second chapter, we will include examples of juristic controls in both senses: the sense of the juristic control that gathers together the cases of a chapter, and the sense of the juristic control that clarifies what is stated in summary form and precisely defines the measure and the operative description. We do this so that the basis for including these examples under the designation of juristic controls may become clear, despite the variation in their formulations and functions.

## Second: Examples of Juristic Controls

## From the Chapters of Purification

الماء الجاري هل هو كالراكد أو كل جرية منه لها حكم الماء المنفرد؟

### Is running water treated like standing water, or does each successive flow have the ruling of a separate body of water?

This is Ibn Rajab’s first “maxim”.[1372]

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[1371] Taʾṣīl ʿIlm al-Ḍawābiṭ al-Fiqhiyyah wa-Taṭbīqātuhu ʿinda al-Ḥanābilah, ʿAbdullāh ibn Mubārak ibn ʿAbdullāh Āl Sayf, Majallat al-Jamʿiyyah al-Fiqhiyyah al-Saʿūdiyyah, no. 28, p. 171.

[1372] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:57. Imām Ibn Rajab’s book combines legal maxims and juristic controls, and he did not arrange it according to the familiar structure of works on legal maxims. He also favored elaborating and clarifying the meaning over concision and elegance of expression.

Explanation

Running water, such as a river or irrigation channel, if an impurity falls into it, what is its ruling? Is all of it rendered impure like standing water, or is each successive flow (jaryah), that is, each passing portion of the water, treated as a new and separate body of water?

There is disagreement over this within the Ḥanbalī school. The relied-upon position found in the later manuals and commentaries is that running water is treated like standing water, in the sense that each successive flow is not treated as an independent body of water.

Applications

First: "If an impurity falls into it, is the water considered as a whole? If it is abundant, it is not rendered impure unless it changes; otherwise, it is rendered impure. Or is each successive flow considered independently, such that if it reaches two qullahs it is not rendered impure, and if it does not, it is rendered impure? There are two narrations concerning this, reported by al-Shīrāzī and others; the second is the position of the madhhab according to al-Qāḍī."[1373]

"كل جرية من الماء الجاري معتبرة بنفسها."

"Al-Qāḍī and his companions said: Each successive flow of running water is considered independently.

1. If the impurity is moving along with the water, then what is in front of it is pure, because the impurity has not reached it, and what is behind it is pure, because it has not reached the impurity. The flow in which the impurity is present: if it reaches two qullahs, it is pure unless it is changed by the impurity; but if it is less than two qullahs, it is impure.
2. If the impurity is stationary at the side of the river, at its bottom, or in a depression within it, then each successive flow that passes over it: if it is less than two qullahs, it is impure; and if it reaches two qullahs, it is pure unless it changes."[1374]

الماء الذي فيه النجاسة، وما قرب منها من خلفها وأمامها، مما العادة انتشارها إليه إن كانت مما ينتشر، مع ما يحاذى ذلك كله مما بين طرفى النهر.

But the successive flow is defined as: "the water in which the impurity is present, together with what is near it from behind and in front, to the extent that it would ordinarily spread to it if it is the kind of impurity that spreads, along with all the water lying parallel to that stretch between the two banks of the river."[1375]

This leads to the following difficulty in al-Qāḍī's statement: "If we suppose a dog on one side of a river, and a hair from it on the other side, then the water aligned with the hair would not reach two qullahs, because little water is aligned with it, while the water aligned with the dog would amount to many

[1373] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:57

[1374] Al-Mughnī, Ibn Qudāmah, 1:48.

[1375] Al-Mughnī, Ibn Qudāmah, 1:48.

qullahs."[1376] Thus, the successive flow aligned with the dog would be pure because of its abundance, while the successive flow aligned with the hair would be impure.

For this reason, Ibn Qudāmah said: “If the impurity is extended, then each part of it has the equivalent of the successive flow considered for a small impurity. All that is aligned with it is not treated as one single successive flow, lest that lead to declaring a large amount of water impure because of a small impurity, while negating impurity from a large amount.”[1377] He is therefore establishing that, in the case of an extended impurity, what is considered for the successive flow is not what is aligned with the impurity as a whole, but rather what is aligned with each part of it. Thus, the successive flow aligned with the dog would be impure, just like the successive flow aligned with the hair.

It should be known that this difficulty does not arise according to the other view: that running water is treated like standing water, and is considered as a whole. This is the position adopted by the later authorities: “If it reaches two qullahs, it is not rendered impure except by change, even if the successive flow itself is less than that.”[1378]

Second: “If an impure vessel is immersed in running water, and seven successive flows pass over it, is that one washing or seven washings?”[1379] The madhhab position is: "It is one washing."[1380]

Third: "If a person in a state of minor ritual impurity immerses himself in running water for ablution, and four successive flows pass over him consecutively, is his ritual impurity removed or not? There are two views."[1381] What is meant by the four successive flows is that each of the four limbs of ablution would have been washed in one of them, while also observing the required order. The transmitted madhhab position is that "if he immerses himself in the Tigris, his ritual impurity is not removed until he comes out in order."[1382]

Fourth: "If he swore not to stand in this water, and it was running, he would not break his oath according to Abū al-Khaṭṭāb and others, because running water is replaced and renewed little by little, so standing in it cannot be conceived. But the implication of the transmitted text is that he does break his oath, especially since customary usage supports that."[1383]

Among the later authorities there is disagreement over the relied-upon position in this issue. In Kashshāf al-Qināʿ: "(... If) the water is (running, he does not break his oath), whether he remains or exits, (if he intended that very water itself). This is stated in al-Muqniʿ and elsewhere, because the water concerning which the oath was made has flowed away, and he is now in different water, by necessity of its being running water, so no violation has occurred with respect to the object of the oath. In al-Muntahā: “he does not break his oath except by intent or cause. End quote. Thus, according to the author’s statement

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[1376] Al-Mughnī, Ibn Qudāmah, 1:49.

[1377] Al-Mughnī, Ibn Qudāmah, 1:48.

[1378] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:21.

[1379] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:58.

[1380] Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, al-Buhūtī, 1:67.

[1381] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:58.

[1382] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:58.

[1383] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:59.

(al-Muqniʿ), he breaks his oath when the wording is unrestricted; while according to the author of al-Muntahā, he does not break it."[1384]

And in Maṭālib Ūlī al-Nuhā: "(And) if a person in water swears: ‘I will not remain in this water, nor will I leave it,’ and it is running water, he does not break his oath, whether he remains in it or leaves it, because he is only standing in or leaving water other than it; (except when there is a cause) that entails that meaning, in which case he breaks his oath, such as if he intended not to remain in, or not to leave, water in general, in which case he breaks his oath."[1385]

The Juristic Control in the Sense of Elucidating What Is Stated in Summary Form

You will notice from the preceding discussion that the juristic control which Ibn Rajab made the first “maxim” in his book can be described as a universal ruling that applies to its particulars. Yet within the very same discussion, we find another juristic control to which that description does not apply. It is therefore a juristic control in the second sense to which we referred: namely, the control governing the meaning of "the successive flow" (al-jaryah) in the wording of the rule.

"(والجرية ما أحاط بالنجاسة) من الماء يمنة ويسرة وعلوا وسفلا إلى قرار النهر. قال الموفق: وما انتشرت إليه عادة أمامها ووراءها (سوى ما وراءها) أي النجاسة من الماء، لأنه لم يصل إليها. (و) سوى ما (أمامها) لأنها لم تصل إليه "

“The successive flow (al-jaryah) is the water surrounding the impurity on its right and left, above and below, down to the riverbed. Al-Muwaffaq added: it includes the nearby water in front of and behind the impurity to which it would ordinarily spread. Excluded, however, is the water farther behind it, because that water has not reached the impurity, and the water farther ahead of it, because the impurity has not reached that water.”[1386]

This, however, applies when the impurity is moving along with the water. If the impurity is stationary, then: "each successive flow that passes over it: if it is less than two qullahs, it is impure; and if it reaches two qullahs, it is pure unless it changes..."[1387]

العين المنغمرة في غيرها إذا لم يظهر أثرها: هل هي كالمعدومة حكما أو لا؟

## The Substance Submerged in Another, When No Trace of It Appears: Is It Legally Treated as Nonexistent or Not?

This is Ibn Rajab’s twenty-second rule.

Explanation

Ibn Rajab formulated this principle as a universal question and made it one of the bases for deriving rulings in many dispersed branches across different chapters. A recurring case arises when a substance

[1384] Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ, al-Buhūtī, 12:375.

[1385] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 5:460.

[1386] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:21.

[1387] Al-Mughnī, Ibn Qudāmah, 1:48.

mixes with another until its qualities disappear and no trace of it remains apparent. The question then becomes: is its physical existence legally assimilated to nonexistence, or do its rulings remain despite the disappearance of its trace?

In the later Ḥanbalī formulations, it may be observed that this principle is not usually stated with this theoretical rationale. Rather, it is applied in each chapter according to its own controlling criterion. At times, the criterion is the appearance of taste, color, or smell; at times, it is the name and customary usage; and at times, it is the criterion of abundance or small quantity in the chapter of waters. For this reason, we did not include this control in the previous chapters of maxims, because what we have here is not a universal ruling applying to its particulars across many chapters in a simple and uniform manner.

Applications

Water in Which an Impurity Has Been Subsumed[1388]

Ibn Rajab said:

"Among them is water in which an impurity has been subsumed (istihlāk). If it is abundant, the ruling of the impurity falls away without disagreement. If it is small in quantity, there are two narrations. Some of the companions say: its ruling has fallen away, though it remains present. Others say: rather, the water has transformed it, because water has the power of transformation; thus it no longer exists, and what exists is something other than it, namely a pure substance. This is the method of Abū al-Khaṭṭāb."[1389]

The relied-upon position among the later authorities regarding abundant water is that it is not rendered impure except by change. This agrees with the opening portion of Ibn Rajab's statement. As for a small amount of water, the relied-upon position among them is that it becomes impure merely by contact, even if no trace appears.[1390]

They also state explicitly that purification does not occur through transformation (istiḥālah). In *al-Muntahā*: "It is not purified ... nor is impurity purified by fire, so its ashes remain impure; nor by transformation. Thus, what is generated from it, such as worms of a wound and cockroaches of latrines, is impure, except for a blood clot from which a pure being is created, and wine that becomes vinegar by itself, or by being moved without the intention of making it vinegar."[1391]

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[1388] Subsumption (istihlāk): the assimilation of a smaller substance into a dominant substance such that it no longer retains an independent perceptible identity (taste, color, smell, or distinguishable existence), though its legal ruling may or may not be affected depending on the context.

[1389] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:164.

[1390] "The same applies to a small amount that comes into contact with it," that is, with impurity, without undergoing change, "even if" that small amount "is running," or even if the impurity that contacted it "is not perceived by the eye," that is, by the sight of the one looking at it, because of its smallness, "or" even if "no time has passed in which it could spread." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:20.

[1391] *Muntahā al-Irādāt with the marginalia of Ibn Qāʾid*, Ibn al-Najjār, 1:112.

لا تنجس إذا استحالت النجاسة فيها ولم يبق لها فيها أثر؛ فإنها حينئذ من الطيبات لا من الخبائث.

Imām Taqī al-Dīn chose that the correct position regarding liquids, whether small or abundant, is that they: "are not rendered impure if the impurity is transformed within them and no trace of it remains in them; for at that point they are among the wholesome things, not the filthy things."[1392]

Milk Mixed with Water and Submerged in It: Does It Establish the Marriage Prohibition Arising from Nursing?

Ibn Rajab said: "Among them is milk mixed with water and submerged in it: does it establish the marriage prohibition arising from nursing? There are two views. The first, reported from al-Qāḍī, is that it does establish it. The second is that it does not, and this was chosen by the author of *al-Mughnī*. According to the first view, it only prohibits if he drinks all the water, even in separate portions, and it counts as a single nursing."[1393]

The relied-upon position among the later authorities ties the ruling to the remaining qualities of the milk or the predominance of the admixture. If the qualities of milk remain, it is treated as pure milk. If something else predominates over it such that its qualities disappear, the prohibition is not established.[1394]

Mixing Wine with Water and Then Drinking It: Is the Prescribed Punishment Due?

Ibn Rajab said: "Among them: if one mixes wine with water, it is subsumed in it, and he then drinks it, he is not subject to the prescribed punishment. This is the well-known position, whether it is said that the water is impure or not. In *al-Tanbīh* by Abū Bakr ʿAbd al-ʿAzīz: whoever moistens roasted flour with wine, or pours it into milk or hot water and then drinks it, is subject to the prescribed punishment. He did not distinguish between whether it was subsumed or not."[1395]

The relied-upon position among the later authorities regulates the issue by the very criterion of subsumption. If some trace of the intoxicant remains such that it has not been subsumed, the prescribed punishment remains. If it is subsumed in the water such that it does not remove the name "water" from it, then there is no prescribed punishment.[1396]

Oaths: Eating Something One Swore Not to Eat After It Has Been Subsumed in Something Else

Ibn Rajab said: "Among them: if one swears not to eat a thing, and it is subsumed in something else, then he eats it, the companions said: he does not break his oath. They did not mention any disagreement

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[1392] Majmūʿ al-Fatāwā, Ibn Taymiyyah, 20:518.

[1393] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:164.

[1394] "Or it is mixed," that is, mixed with something else, "while its qualities," meaning its color, taste, and smell, "remain; then it establishes prohibition like pure milk, because the ruling belongs to what predominates, and because its name and meaning remain. But if what was mixed with it predominates over it, then no prohibition is established by it." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 3:216.

[1395] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:165.

[1396] "If he drinks it," that is, the intoxicant, "or drinks that with which it was mixed," namely the intoxicant, "while the intoxicant has not been subsumed" in it, that is, in the water, he is subject to the prescribed punishment. "But if it has been subsumed in the water, then there is no prescribed punishment, because it has not stripped the water of its name." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 3:361.

on this, because oaths are based on customary usage, and he did not intend to refrain from something like that. A view of breaking the oath may be derived, and Abū al-Khaṭṭāb alluded to it."[1397]

The relied-upon position among the later authorities states an explicit controlling criterion: he does not break the oath when the thing is subsumed, unless the trace of the object sworn about appears. If its taste appears, he breaks the oath.[1398]

Is Mixing in Non-Liquids Like Mixing in Liquids?

Ibn Rajab said: "As for grains, dirhams, and the like, some of the fellows said that their ruling is the same as the ruling of liquids in what has preceded, and they derived branches from that."[1399]

Among these branches are the following:

The Purchased Item Mixing with Something Indistinguishable Before Taking Possession

Ibn Rajab said: "Among them: if he purchased fruit and did not take possession of it until it mixed with other fruit and could no longer be distinguished, does the sale become rescinded? There are two views."[1400]

The relied-upon position among the later authorities is that the sale is not rescinded. Rather, co-ownership is established in the mixed item, and the purchaser receives an option because of the resulting co-ownership.[1401]

Oaths Concerning Grains and the Appearance of Distinction

Ibn Rajab said: "Among them: if one swears not to eat wheat, then eats barley containing grains of wheat, there are two views as to whether he breaks his oath, mentioned by Abū al-Khaṭṭāb. The author of *al-Targhīb* declared him mistaken and said: he breaks his oath without disagreement, because the grain remains distinct and has not been subsumed, unlike the case in which the wheat was ground together with what it contained and was thereby subsumed; in that case, he does not break his oath."[1402]

The relied-upon position among the later authorities, in their treatment of this chapter, proceeds according to the criterion of name, customary usage, and the appearance of trace. They therefore

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[1397] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:168.

[1398] "Whoever eats something that he swore not to eat after it has been subsumed within something else — such as fat eaten in a sweet dish, or eggs eaten in a custard-like preparation, or if he swore not to eat barley and then ate wheat containing grains of barley — does not break his oath unless the taste of something from that which he swore against becomes apparent." Muntahā al-Irādāt with the marginalia of Ibn Qāʾid, Ibn al-Najjār, 5:239.

[1399] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:168.

[1400] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:168.

[1401] "If merchandise sold by measure, weight, count, or length is mixed before possession with something indistinguishable from it — such as wheat with wheat, or oil with its like — the sale is not rescinded by the mixing, because its substance remains. The purchaser and the owner of the other property become partners in proportion to their ownership shares in it, and the purchaser has the option because of the defect of partnership." Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:59.

[1402] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:169.

distinguish between that which leaves no apparent trace and that which remains distinct or whose trace appears.[1403]

Mixing Lawful Dirhams with Usurped or Unlawful Dirhams

"Among them: if his dirhams mix with usurped dirhams, the explicit statement from Aḥmad in the narration of al-Marrūdhī is that if the dirhams are few, such as three dirhams among which is one unlawful dirham, one must refrain from them until one knows. But if they are many, such as thirty dirhams among which is one unlawful dirham, then he removes one dirham from them and may dispose of the remainder. He has many explicit statements to this effect. He explained this by saying that removing the whole when the amount is large would be ruinous to his wealth. He strongly rejected the view of one who said that the amount of the unlawful should be removed even from a small number, such as three. As for al-Qāḍī, he interpreted Aḥmad's statement as recommending caution, because the greater the amount of lawful wealth, the farther one is from consuming the unlawful, and abstaining from all of it becomes difficult, unlike the case of a small amount. He said: the obligation in all cases is to remove the amount of the unlawful."[1404]

The relied-upon position among the later authorities regarding the mixing of usurped property with the usurper's property is that they are: "partners in the mixed property in proportion to their values, just as if they had mixed without usurpation ... and it is prohibited for the usurper to dispose of the amount that belongs to him within it ... but if the owner of the usurped property gives him permission, it is allowed, because the right belongs only to the two of them."[1405]

لأنه لم يحرم لعينه، وإنما حرم لتعلق حق غيره به، فإذا أخرج عوضه زال التحريم عنه

When the owner of the wealth is unknown, he: "gives it in charity on his behalf, and what remains is lawful."[1406] This is the correct position: "because it was not unlawful in itself; rather, it was unlawful because of the attachment of another's right to it. Once its substitute is removed, the prohibition is removed from it."[1407]

تصدق بما يعلم أنه أكثر منه

When there is uncertainty regarding the amount of the unlawful wealth, he: "gives in charity what he knows is more than it."[1408]

Mixing a Deposit with One's Own Wealth So That It Can No Longer Be Distinguished

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[1403] "Or if he swore not to eat barley, then ate wheat containing grains of barley, he does not break his oath, because what he ate is not called barley, and wheat containing barley is not called barley, unless the taste of something from that which he swore against becomes apparent." Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 6:401.

[1404] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:169.

[1405] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:308.

[1406] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:308.

[1407] al-Furūʿ wa-Taṣḥīḥ al-Furūʿ, Ibn Mufliḥ, 4:396.

[1408] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:308.

Ibn Rajab said: “Among them: if he mixes a deposit, consisting of dirhams, with his own wealth, and it can no longer be distinguished, the well-known position is liability, because he acted wrongfully by eliminating the ability to separate it.

There is another narration from him: he is not liable, because with money, the object of concern is not the particular coins themselves, but the amount, and perhaps mixing it with his own wealth was better for preserving it. According to this narration, if part of the mixed property is destroyed without wrongful conduct, all of the destroyed portion is deemed to be from his own wealth, while the remainder is deemed to be the deposit. Aḥmad explicitly stated this, because the default regarding this trust is that it remains and must be delivered, and its disappearance has not been established with certainty...

If the deposit mixed with his wealth without his action, and then part of it was lost, it is deemed to be from the wealth of the depositary according to the apparent purport of Aḥmad’s statement, as Abū al-Barakāt mentioned in *Sharḥ al-Hidāyah*. It has already been noted that al-Qāḍī mentioned in *al-Khilāf* that the two become partners. Abū al-Barakāt said: and based on this, it is not far-fetched that the loss would be borne by both of them.”[1409]

The relied-upon position among the later authorities is that he is liable for all of it if he mixes it with something from which it cannot be distinguished.[1410] They also state: “If the deposit becomes mixed without his action, and then part is lost, it is deemed to be from the wealth of the depositary.”[1411]

## From the Chapters of Prayer

ما يدركه المسبوق في الصلاة هل هو آخر صلاته أو أولها

### What the Latecomer Catches in Prayer: Is It the Last Part of His Prayer or the First Part?

Explanation

This is the first issue Ibn Rajab mentioned after completing his one hundred and sixty maxims. He said:

ما يدركه المسبوق في الصلاة هل هو آخر صلاته أو أولها.

“These are benefits that are appended to the rules. They are benefits concerning well-known issues over which there is disagreement within the madhhab, and upon that disagreement many subsidiary benefits are built. Among them is…” He then mentioned this issue, saying: “What the latecomer catches in prayer: is it the last part of his prayer or the first part?”[1412]

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[1409] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 1:170.

[1410] “Or if he mixes it,” that is, the deposit, “with something from which it cannot be distinguished, he becomes liable for it, because he has rendered it equivalent to destroyed property and has forfeited his ability to return it, similar to if he had cast it into the depths of the sea. It makes no difference whether the mixing was with the property of another, nor whether it was mixed with something similar to it, superior to it, or inferior to it.” Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:357.

[1411] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:357.

[1412] Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid, Ibn Rajab, 3:216.

The summary of his discussion is that there are two reported views from Imām Aḥmad on this issue:

- The first is that what the latecomer (masbūq) catches with his Imām is the last part of his prayer, and what he makes up after his Imām's salutation is the first part of it. This is the apparent position of the madhhab.
- The second is the reverse.

Evidences

(وما أدرك) مسبوق من صلاة مع إمامه فهو (آخرها) أي: آخر صلاته (وما يقضي) مما فاته (أولها)

فما أدركتم فصلوا وما فاتكم فاقضوا

The relied-upon position among the later Ḥanbalīs is the first reported view, as Ibn Rajab mentioned. Al-Buhūtī explicitly stated this in *Daqāʾiq Ūlī al-Nuhā*: "What the latecomer catches of the prayer with his Imām is its last part," meaning the last part of his own prayer, "and what he makes up" of what he missed "is its first part," because of the ḥadīth of Abū Hurayrah, in which it says: "Whatever you catch, pray; and whatever you miss, make up," narrated by Aḥmad and al-Nasāʾī. In a wording of Muslim: "Pray what you catch, and make up what preceded you." That which is made up is the missed portion."[1413] They answered the agreed-upon ḥadīth, "And whatever you miss, complete," by saying that its meaning is: "Complete it by way of making it up, in order to reconcile the two reports."[1414]

Applications

The Opening Supplication and Seeking Refuge

Ibn Rajab mentioned that the fruit of the disagreement appears in the time of the opening supplication (istiftāḥ) and seeking refuge (taʿawwudh). According to the first reported view, he recites the opening supplication and seeks refuge in what he makes up, because that is the first part of his prayer. According to the second view, he does so in the first portion that he catches with his Imām.

The relied-upon position is what is stated in *Kashshāf al-Qināʿ*: "If he catches him after the first rakʿah," such as in the second or third, "he does not recite the opening supplication and does not seek refuge; and what the latecomer makes up is its first part," meaning the first part of his prayer, "so he recites the opening supplication for it, seeks refuge, and recites the sūrah." Thus, if he catches one rakʿah of Fajr, for example, he makes its recitation longer than the one he caught, and he observes the order of the sūrahs."[1415]

Audible and Silent Recitation

Ibn Rajab mentioned that if a person misses the first two rakʿahs of Maghrib or ʿIshāʾ, he recites audibly when making them up according to the first reported view. This is the relied-upon position: "If he misses

[1413] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:263.

[1414] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 1:625.

[1415] Kashshāf al-Qināʿ, al-Buhūtī, 3:161.

two rakʿahs of Maghrib or ʿIshāʾ, he recites audibly when making them up."[1416] There is also a view that he has a choice.[1417]

The Amount of Recitation

Ibn Rajab mentioned that there are two methods concerning the amount of recitation. One is built on the two reported views, while the other holds that he recites al-Fātiḥah and another sūrah in the two rakʿahs he makes up according to both views. He then alluded to a third basis, namely precaution. The relied-upon position among the later authorities is that what he makes up is the first part of his prayer. Therefore, *Kashshāf al-Qināʿ* states: "…and he recites the sūrah. Thus, if he catches one rakʿah of Fajr, for example, he makes its recitation longer than the one he caught, and he observes the order of the sūrahs."[1418]

The Qunūt (Standing Supplication) of Witr

Ibn Rajab mentioned that if the latecomer catches the qunūt (supplication while standing) of Witr (the odd-numbered night prayer) with his Imām, he does not repeat it according to the first reported view, because what he caught with his Imām is the last part of his prayer, so the qunūt occurred in its proper place. Likewise, one who catches the second rakʿah of the Eid prayer builds the takbīrs of the rakʿah he makes up upon this same principle. According to the stronger view, he pronounces seven takbīrs in the rakʿah he makes up. This is the relied-upon position in both issues.[1419]

Funeral Prayer

Ibn Rajab mentioned that if a person was preceded in some of the takbīrs of the funeral prayer: "If we say that what he catches is the last part of his prayer, then he follows the Imām in the remembrance that the Imām is currently reciting, and then recites in the first takbīr that he makes up."[1420] This is also the relied-upon position, because what he makes up is the first part of his prayer.

Exceptions

The Discussion of the Tashahhud (Seated Testimony in Prayer) and Its Form

Ibn Rajab mentioned that if a person catches one rakʿah of Maghrib or of a four-rakʿah prayer, there are two reported views from Aḥmad. According to one, he recites the tashahhud (the testimony recited while seated in prayer) after making up one rakʿah; al-Khallāl mentioned that the transmitted reports settled on this view. According to the second, he recites the tashahhud after making up two rakʿahs.

The companions differed over how to derive these two reported views. It was said that they are built upon the original issue: if we say that what the latecomer makes up is the first part of his prayer, then he does not sit except after two rakʿahs; but if we say it is the last part of his prayer, then he recites the

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[1416] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 1:627.

[1417] "The latecomer, when making up what he missed, is given the choice regarding audible recitation in an audible prayer, other than Jumuʿah, after separating from his imām..." Kashshāf al-Qināʿ, al-Buhūtī, 3:163.

[1418] Kashshāf al-Qināʿ, al-Buhūtī, 3:161.

[1419] "On this basis also are derived the additional takbīrs of Eid and the qunūt: thus, one who performed qunūt with his Imām does not perform qunūt again, because it was the last part of his prayer." Kashshāf al-Qināʿ, al-Buhūtī, 3:163.

[1420] Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid, Ibn Rajab, 3:219.

tashahhud after one rakʿah, because that would be his second. It was also said that both views proceed on the position that what he catches with the Imām is the last part of his prayer. Aḥmad explicitly stated this and distinguished between recitation and the tashahhud. In the narration of ʿAbd Allāh, he explained this as a precaution that combines the position of Ibn Masʿūd, who held that one sits after one rakʿah, with the position of Ibn ʿUmar concerning recitation in the two rakʿahs. It is authentically reported from Ibn Masʿūd that he would sit after one rakʿah while also holding that what one catches with the Imām is the last part of his prayer.

The reported view that he recites the tashahhud after making up one rakʿah is the madhhab position according to the later authorities. They explained this by saying: "We say that one who caught one rakʿah recites the tashahhud after another rakʿah so that the form of the prayer will not be altered. For if he were to recite the tashahhud after two rakʿahs, that would require ending a four-rakʿah prayer on an odd number and a three-rakʿah prayer on an even number. Preserving the form of the prayer is possible, and there is no necessity that requires abandoning it; therefore, it must be observed."[1421]

In sum, this issue, as treated by Ibn Rajab, is one of the comprehensive issues from which many applications branch out. The relied-upon position among the later Ḥanbalīs agrees with what he identified as the apparent position of the madhhab: what the latecomer catches with his Imām is the last part of his prayer, and what he makes up after the Imām's salutation is the first part of it. Upon this, they built the generality of the subsidiary rulings in this issue.

ضابط الإجزاء في الركوع الانحناء بحيث يمكنه مس ركبتيه بيديه

The Governing Criterion for the Minimum Valid Bowing: Bending Such That One Could Touch His Knees with His Hands

Explanation

وضابط الإجزاء الذي لا يختلف: أن يكون انحناؤه إلى الركوع المعتدل أقرب منه إلى القيام المعتدل

This is a juristic control in the sense of specifying a measure and defining a limit, not in the sense of a universal legal maxim, because it clarifies the minimum that suffices for a specific pillar of prayer. It appears in the statement of al-Majd: "The invariant governing criterion of sufficiency is that one's bending be closer to a moderate bowing posture than to a moderate standing posture."[1422]

However, the later Ḥanbalīs most often expressed the relied-upon position in a clearer formulation for teaching and fatwā: the minimum that suffices in bowing is that one bend "such that he could touch his knees with his hands," provided he is of average build, neither long-armed nor short-armed. Al-Mardāwī stated decisively that this is the madhhab position, and that the majority decisively adopted it.[1423]

[1421] Kashshāf al-Qināʿ, al-Buhūtī, 3:162.

[1422] Al-Inṣāf, al-Mardāwī, 3:480.

[1423] Al-Inṣāf, al-Mardāwī, 3:480.

والواجب من ذلك الانحناء، بحيث يمكنه مس ركبتيه بيديه

لا يلزمه وضعهما، وإنما ذلك مستحب

What is meant is not that placing the hands on the knees is a condition for the basic validity of bowing. Rather, it is enough to bend to the extent that one would be able to touch his knees if he wished. For this reason, Ibn Qudāmah said: "What is obligatory of that is bending such that he could touch his knees with his hands," and then explicitly stated that "placing them there is not obligatory; rather, it is recommended."[1424] Thus, the operative basis (manāṭ) for sufficiency is the degree of bending itself, not the complete recommended posture of bowing.

## From the Chapters of Zakāh

الزكاة هل تجب في عين النصاب أو ذمة مالكه؟

### Does Zakāh Become Obligatory in the Corpus of the Niṣāb or in the Owner's Legal Liability?

This is one of the benefits appended to the rules in Ibn Rajab's work; it is not one of the numbered maxims in the body of the book.[1425]

Explanation

وجبت الزكاة في عين المال، ولها تعلق بالذمة.

The disagreement here is over the locus of its attachment: does the right attach to the corpus of the zakatable property itself, or is it a debt owed in the owner's legal liability, or does it combine both? Ibn Rajab reported the disagreement of the fellows of the madhhab on this issue. The position that later became settled among the later authorities is that the primary locus of attachment is the corpus of the property, while the demand for payment remains attached to the owner's legal liability. The wording of *al-Zād* is: "Zakāh becomes obligatory in the corpus of the property, and it has attachment to the legal liability."[1426]

They then explained the nature of this attachment, saying: "Its attachment," that is, the attachment of zakāh to that in which it is obligatory, "is like the attachment of compensation for injury to the person of the [enslaved] offender ... Thus, he," meaning the owner, "may pay it," meaning the zakāh, "from other than it," meaning other than the niṣāb ... "and he," meaning the owner, "may dispose of" the property in which zakāh has become obligatory "by sale and the like..."[1427]

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[1424] Al-Mughnī, Ibn Qudāmah, 2:176.

[1425] *Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid*, Ibn Rajab, 3:223.

[1426] *Zād al-Mustaqniʿ fī Ikhtiṣār al-Muqniʿ*, al-Ḥajjāwī, p. 73.

[1427] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:397.

ولا يجب إخراج الزكاة من عينه ... فيجوز إخراجها من غيره، وذلك لا يمنع تعلقها بالعين.

And in *Kashshāf al-Qināʿ*: "It is not obligatory to pay zakāh from the very property itself ... Thus, it is permissible to pay it from other than it, and that does not prevent its attachment to the corpus."[1428]

This indicates that the attachment of zakāh to the corpus of the property is not like the attachment of a pledge or of partnership. Rather, it is a special kind of attachment that does not prevent disposal of the property, nor does it require payment from that very property. It establishes, in general, the right of the poor, while the owner's authority over the property remains, and while payment may be transferred to other property.

Evidences

لأن الزكاة تختلف باختلاف أجناس المال وصفاته، حتى وجب في الجيد والوسط والرديء ما يليق به، فعلم أنها متعلقة بعينه لا بالذمة؛ تحقيقًا لمعنى المواساة فيها.

The basis for the later authorities' preference appears in their own argumentation. In *Daqāʾiq Ūlī al-Nuhā*, it states: "Zakāh becomes obligatory in the corpus of the property ... because of His statement, exalted is He: "And those in whose wealth is a known right for the petitioner and the deprived",[1429] and because of his statement ﷺ: 'In what is watered by the sky, one-tenth,' and his statement: 'In forty sheep, one sheep.'"[1430] And in *Kashshāf al-Qināʿ*: "Because zakāh differs according to the kinds and qualities of wealth, such that what is suitable is required from the good, the average, and the inferior. This shows that it is attached to the corpus itself, not merely to the legal liability, in order to realize the meaning of assistance within it."[1431]

Applications

If several years pass over a single niṣāb and its zakāh has not been paid, the fruit of saying that zakāh attaches to the corpus appears in the fact that it generally does not repeat. In *Kashshāf al-Qināʿ*: "If two years or more pass over only one niṣāb and he has not paid its zakāh, then only one zakāh is due for the first year."[1432] The reason is that once the amount of zakāh attached to the corpus in the first year, the niṣāb no longer remained complete in the second year.

If the niṣāb is absent, usurped, or lost, payment is not required until the owner is able to access it. In *Daqāʾiq Ūlī al-Nuhā*: "He pays its zakāh when he is able to access it ... because zakāh is a form of assistance, so it is not obligatory before that, since it is not then a proper subject for it."[1433] It may be said that this is among the clearest places in which the effect of considering the locus of attachment appears. It may also be said that it is built on the permissibility of delay in that circumstance. It may also

[1428] Kashshāf al-Qināʿ, al-Buhūtī, 4:337.

[1429] The source reads: "And in their wealth is a known right for the petitioner and the deprived." We have corrected the Qurʾānic quotation here to match the wording of Sūrat al-Maʿārij (70:24–25).

[1430] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:397.

[1431] *Kashshāf al-Qināʿ*, al-Buhūtī, 4:337.

[1432] Kashshāf al-Qināʿ, al-Buhūtī, 4:338.

[1433] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:389.

be said that upon its return we know it to have been zakatable, while upon its non-return we know it not to have been zakatable.

If the niṣāb is pledged as collateral, zakāh remains obligatory in it, and the pledgor pays it from that property when no other property is available. In *Daqāʾiq Ūlī al-Nuhā*: "Or if the niṣāb is pledged, zakāh is obligatory in it like other property, and the pledgor pays it from it without the pledgee's permission if no other property is available ... because it attaches to its corpus and takes precedence over the right of its owner, so likewise over the right of its pledgee."[1434]

Exceptions

An exception to the non-repetition of zakāh in a niṣāb is when its zakāh is due from something other than its own genus. In *Daqāʾiq Ūlī al-Nuhā*: "Except that whose zakāh is sheep from camels," such as fewer than twenty-five camels, if several years pass over them and he does not pay their zakāh, "then for each year he owes zakāh, because the zakāh attaches to his legal liability, not to the property, since it is not paid from it."[1435]

The issue of destruction also appears to me to be among the exceptions. Ibn Rajab said: "If the niṣāb or part of it is destroyed before the ability to pay zakāh and after the completion of the year, the well-known position of the madhhab is that the zakāh does not fall away because of that, except for the zakāh of crops and fruits if they are destroyed by a calamity before cutting; in that case, their zakāh falls away by agreement."[1436] As for the position that it does not fall away, some explained it on the basis that it had become fixed in the legal liability, while they also mentioned another view that it does not fall away even if one says that it attaches to the corpus. In *al-Qawāʿid*: "Because its obligation was in gratitude for a blessing whose cause had been completed, namely the growing niṣāb, and whose condition had been completed, namely the year; thus, its obligation became settled."[1437] Yet this reasoning does not, by itself, settle the dispute, because the completion of the cause and condition does not remove the disagreement over the locus of attachment, nor over the effect of destruction before the ability to perform.

Likewise, the pro rata sharing between zakāh and an unsecured debt. In *Daqāʾiq Ūlī al-Nuhā*: "Zakāh together with an unsecured debt, when the estate of a deceased person is insufficient for both zakāh and debt, are shared pro rata."[1438] If zakāh attached to the corpus of the property in the full sense, it would have the force of one who found his very property, or of a debt secured by pledge, and we would give it priority over an unsecured debt. In *Daqāʾiq Ūlī al-Nuhā*: "The implication of its attachment to the corpus of the property is that it would be given priority over an unsecured debt."[1439] Giving it priority is another view within the madhhab; thus, that is an application, not an exception. In *al-Qawāʿid*: "As for

[1434] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:390.

[1435] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:397.

[1436] Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid, Ibn Rajab, 3:227.

[1437] Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid, Ibn Rajab, 3:227.

[1438] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:398.

[1439] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:398.

the position that it attaches to the niṣāb, zakāh is given priority because it attaches to the corpus, like the debt secured by pledge."[1440]

## From the Chapters of Fasting

يفسد الصوم بوصول كل ما يصل إلى جوف الصائم باختياره مع ذكره لصومه

### The Fast Is Invalidated by the Arrival of Anything That Reaches the Fasting Person's Internal Cavity, If Done Voluntarily, While He Remembers His Fast

لأنه شيء واصل إلى جوفه باختياره، فأشبه الأكل.

This juristic control is adapted from al-Sāmurrī's wording in al-Mustawʿib, which includes the additional condition "and his knowledge that this is prohibited."[1441] This condition does not accord with the relied-upon position of the later Ḥanbalī jurists, who do not require knowledge of the prohibition for the fast to be invalidated in these cases. Al-Buhūtī expressly states in Kashshāf al-Qināʿ: "His fast is invalidated even if he is unaware of the prohibition."[1442] We have therefore omitted this condition from our formulation of the rule. Their reasoning nevertheless recognizes the voluntary entry of a substance into the bodily cavity as grounds for invalidating the fast. In *al-Maʿūnah*: "because it is something that reached his internal cavity voluntarily, so it resembled eating."[1443]

Explanation

This is one of the clearest practical controls in the chapter of fasting according to the Ḥanbalīs, because it gathers the forms of breaking the fast that fall under eating and drinking, and what is attached to them. Al-Sāmurrī made this even clearer when he said:

"قليلاً كان أو كثيرًا، سواء كان مما له طعم ويتغذى به كالمأكولات والمشروبات، أو غير ذلك، كالحصى ونحوه، وسواء وصل من منفذ معتاد كالفم، أو غير معتاد مثل: إن استعط، أو اكتحل بما يصل إلى جوفه؛ كالصَّبِرِ والقطور وَالذَّرُورِ والإثمد ونحوه أو قطر في أذنه فوصل إلى دماغه، أو داوى المأمومة أو الجائفة."

"whether little or much, whether it is something that has taste and provides nourishment, such as foods and drinks, or something else, such as pebbles and the like; and whether it reaches through a customary opening, such as the mouth, or through an uncustomary opening, such as if he uses nasal medicine, or applies kohl that reaches his internal cavity, such as aloe, eye-drops, powders, antimony, and the like; or if he places drops in his ear and they reach his brain; or if he treats a maʾmūmah wound, meaning a head wound that reaches the cranial membrane, or a jāʾifah wound, meaning a penetrating wound that reaches the body cavity."[1444]

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[1440] Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid, Ibn Rajab, 3:229.

[1441] Al-Mustawʿib, al-Sāmirī, 1:408.

[1442] *Kashshāf al-Qināʿ*, al-Buhūtī, 2:320.

[1443] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 3:392.

[1444] Al-Mustawʿib, al-Sāmirī, 1:408.

This juristic control is not intended to establish the original agreed-upon invalidators of fasting, for eating, drinking, and intercourse are known from the texts. Rather, it is intended to regulate what the jurists attached to eating and drinking among tangible substances that reach the internal cavity. Accordingly, most of the disagreement in this chapter returns to three questions:

1. What is the intended internal cavity (jawf)?
2. What are the openings that lead to it?
3. And is the operative consideration mere arrival, or the fact that what enters is nourishing, or in the meaning of nourishment?

Evidences

﴿وَكُلُوا وَاشْرَبُوا حَتَّى يَتَبَيَّنَ لَكُمُ الْخَيْطُ الْأَبْيَضُ مِنَ الْخَيْطِ الْأَسْوَدِ مِنَ الْفَجْرِ﴾

The foundation of this chapter is the statement of Allah, exalted is He: {And eat and drink until the white thread becomes distinct to you from the black thread of dawn} [al-Baqarah: 187]. This indicates that what contradicts abstention, such as eating and drinking, invalidates the fast.

وبالغ في الاستنشاق إلا أن تكون صائمًا

It is also established in the ḥadīth of Laqīṭ ibn Ṣabirah (rAa): “Exaggerate in rinsing the nose, unless you are fasting.” This indicates that something entering through the nose and reaching the interior voluntarily has an effect in this chapter.

As for most of what is added to eating and drinking, it was attached to them by analogy. This is because the jurists did not find the term *jawf* (“internal cavity”) used in the scriptural texts on fasting with this specific technical meaning. They therefore exercised juristic reasoning in defining it, and then derived the scattered cases on that basis. For this reason, this chapter is among the chapters most in need of sound conceptualization.

Applications

The Ḥanbalī criterion for the internal cavity is not only what digests food. Rather, they said: “Likewise, the fast is invalidated by everything that reaches what may be called an internal cavity, such as the brain, throat, anus ... because the brain is an internal cavity, and what reaches it nourishes it, so it breaks the fast like the internal cavity of the body.”[1445]

According to them, the opening to the internal cavity is not only the customary opening, namely the mouth, but every opening to every internal cavity. They used as evidence the ḥadīth prohibiting exaggeration in rinsing the nose for the fasting person. Ibn al-Najjār said: “because the eye is an opening ... and there is no effect to the fact that the eye is not a customary opening.”[1446]

For them, it makes no difference whether what enters is nourishing, such as food and drink, or not nourishing. In *al-Daqāʾiq*: “or if he introduces something into his internal cavity from any place that

[1445] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 2:191.

[1446] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 3:391.

leads to his stomach, absolutely, meaning whether it dissolves and nourishes or not, such as a pebble, a piece of iron, lead, and the like..."[1447]

Here is a valuable text on applications from *al-Maṭālib*: "One breaks the fast by eating or drinking, even saliva that he brought out between his lips (...) or by taking nasal medicine through his nose, whether oil or something else, if it reaches his throat or brain (...) or by using an enema through his anus (...) or by treating a *jāʾifah* wound, if it reaches his internal cavity (...) or by applying kohl when he knows it reached his throat (...) or by introducing into his internal cavity something liquid or otherwise, whether nourishing or not, such as a pebble, the tip of a knife, a piece of iron or lead, whether by his own action or by the action of another with his permission; his fast is invalidated. Or if he places drops in his ear of something that reaches his brain, his fast is invalidated (...) Likewise, if phlegm reaches his mouth absolutely, whether from his brain, throat, or chest, and he swallows it, his fast is invalidated (...)."[1448]

Observe his phrase, "the tip of a knife," for it illustrates the Ḥanbalī conceptualization of the issue.

Exceptions

The Ḥanbalīs except the urethra and the female front passage, and do not treat them as internal cavities whose entry by something invalidates the fast. Ibn al-Najjār said: "As for the anus, it has the ruling of the interior ... unlike the front passage, for it is equivalent to the mouth. Even stronger than this: if he were to place drops in his urethra, or insert something into it, and it reached the bladder, his fast would not be invalidated ... If it does not break the fast through that, even though the bladder has the ruling of the interior, then the passage of the male organ through the woman's front passage, which has the ruling of the exterior as we have explained, is even more clearly so."[1449]

Note

The discussion here proceeds according to the Ḥanbalī conceptualization, not according to modern medical description. The Ḥanbalīs may sometimes attach the ruling merely to the arrival of a substance into the internal cavity according to their legal construction, and they may build some cases upon what was thought to be an opening, an internal cavity, or a place of nourishment. Modern medical knowledge may therefore remove the disagreement in some places, when the point on which the ruling turns is the affirmation or denial of an opening, or an anatomical or functional conception whose error has become clear. But it may not remove the disagreement entirely in other places, where the basis was expanding the concept of the internal cavity, or attaching the case to eating and drinking by way of form or meaning.[1450]

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[1447] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:481.

[1448] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 2:191-192.

[1449] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 3:396.

[1450] Athar Taṭawwur al-Maʿārif al-Ṭibbiyyah ʿalā Taghayyur al-Fatwā wa-al-Qaḍāʾ, Hatem al-Haj, p. 305 ff.

## From the Chapters of Ḥajj

كل هدي أو إطعام تعلق بحرم أو إحرام فهو لمساكين الحرم

### Every Sacrificial Offering or Feeding Connected to the Sacred Precinct or to Iḥrām Is for the Poor of the Sacred Precinct

وكل هدي أو إطعام فهو لمساكين الحرم إلا فدية الأذى...

This is an explicit juristic control in the chapter of fidyah (compensation for a ritual violation). Its wording in *ʿUmdat al-Fiqh* is: "Every sacrificial offering or feeding is for the poor of the Sacred Precinct, except for the fidyah of harm..."[1451]

وكل هدي أو إطعام تعلق بحرم أو إحرام ... فهو لمساكين الحرم

The later authorities then refined the formulation more precisely by qualifying it with what "is connected to the Sacred Precinct or to iḥrām." Thus, in *al-Daqāʾiq*: "Every sacrificial offering or feeding connected to the Sacred Precinct or to iḥrām ... is for the poor of the Sacred Precinct."[1452] He then added: "It is obligatory to slaughter it," meaning the sacrificial offering, "within the Sacred Precinct."[1453]

وكل هدي أو إطعام لمساكين الحرم، وفدية الأذى واللبس ونحوهما ودم الإحصار حيث وجد سببه

In *al-Zād*: "Every sacrificial offering or feeding is for the poor of the Sacred Precinct; and the fidyah of harm, clothing, and the like, and the blood of being prevented, are offered where their cause occurs."[1454]

Explanation

The purpose of this juristic control is to clarify the recipient and location of sacrificial offerings and feeding in the hady (sacrificial offering) and fidyah (compensation for a ritual violation) of Ḥajj and ʿUmrah, whether due to leaving an obligatory rite or committing a prohibited act: where is it to be slaughtered, and to whom is it to be distributed? For this reason, the formulation of the later authorities is more precise than the shorter wording. They returned the matter to everything connected to the Sacred Precinct or to iḥrām. Thus, it includes what is caused by a reason related to the Sacred Precinct itself, or to iḥrām, and the sacrificial offerings analogized to them that are obligatory in the rite.

Evidences

For the Ḥanbalīs, this juristic control turns on Divine text, reports, and analogy.

{ ثُمَّ مَحِلُّهَا إِلَى الْبَيْتِ الْعَتِيقِ}، و { هَدْيًا بَالِغَ الْكَعْبَةِ}.

As for the text, there is the statement of Allah, exalted is He: {Then their place of sacrifice is at the Ancient House}, and His statement concerning the compensation for hunting: {as an offering reaching the Kaʿbah}.

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[1451] ʿUmdat al-Fiqh, Ibn Qudāmah, p. 47.

[1452] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:558.

[1453] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:558.

[1454] Zād al-Mustaqniʿ, al-Ḥajjāwī, p. 89.

"الهدي والإطعام بمكة".

As for the report, there is the statement of Ibn ʿAbbās: “The sacrificial offering and feeding are in Makkah.”

As for analogy, whatever becomes obligatory due to leaving an obligation, missing Ḥajj, or a cause connected to the rite is attached to the sacrificial offering whose restriction to the Sacred Precinct is established by text.

كُلُّ فِجَاجِ مَكَّةَ طَرِيقٌ وَمَنْحَرٌ
مِنًى كُلُّهَا مَنْحَرٌ

They also used as evidence the marfūʿ ḥadīth of Jābir: “All the valleys of Makkah are a path and a place of sacrifice,” and the wording in Muslim: “All of Minā is a place of sacrifice.” They understood this as referring to the Sacred Precinct, because the intended matter is that the slaughter occur within the Sacred Precinct, not in one specific spot within it.[1455] Offerings of tamattuʿ and qirān and voluntary offerings are given in charity to the poor of the Sacred Precinct. They are also unlike fidyah in that one may eat from them, give some of them as a gift, and transport some of them. In the two Ṣaḥīḥs, Jābir said: “We used not to eat from the meat of our sacrificial camels beyond three days in Minā. Then the Prophet ﷺ permitted us and said: ‘Eat and take provisions.’ So we ate and took provisions.”

Applications

First, the compensation for hunting falls under this juristic control, because it is connected to the Sacred Precinct or to iḥrām. Also included are the hady of tamattuʿ (ʿumrah followed by ḥajj with separate entries into iḥrām) and qirān (combining ḥajj and ʿumrah in one entry into iḥrām), the vowed hady, what becomes obligatory due to leaving one of the obligatory rites, what becomes obligatory due to missing Ḥajj, and what becomes obligatory due to committing a prohibited act within the Sacred Precinct. These are the major cases stated by the later authorities when formulating this control.[1456]

Another application is that mere slaughter is not sufficient in the case of this hady. Rather, its meat must also be distributed to the poor of the Sacred Precinct. In *al-Maṭālib*: “It is obligatory to distribute its meat ... to its poor.” It also mentions the permissibility of handing it over to them alive so that they may slaughter it within the Sacred Precinct. If they slaughter it there, it suffices; otherwise, he must take it back, slaughter it, and distribute its meat. Thus, the purpose is not merely the spilling of blood, but the realization of benefit for the poor of the Sacred Precinct.[1457]

Another application is that slaughter is not restricted to Makkah itself. Rather, it suffices anywhere within the Sacred Precinct and its sides. In *al-Maṭālib*: “It is obligatory to slaughter it ... within the Sacred Precinct and its sides.” On this basis, their statement regarding Minā, that it is a place of

[1455] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:558; Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 2:365.

[1456] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:558; Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 2:365.

[1457] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 2:365.

sacrifice, is understood: what they mean is that the entire Sacred Precinct is a place of slaughter, even though some places within it may be superior to others.[1458]

Exceptions

Excluded from this juristic control is that for which the Lawgiver did not make the recipient or location the Sacred Precinct. The first of these is the fidyah of harm. The text in *al-ʿUmdah* states: "except for the fidyah of harm..."[1459] The author of *al-Zād* then expanded this exception, saying: "the fidyah of harm, clothing, and the like, and the blood of being prevented, are offered where their cause occurs."[1460] These therefore do not fall under the original juristic control unrestrictedly. Rather, they are generally distributed where the cause occurs, and the blood of being prevented is offered where the person was prevented. However, what is permissible to do outside the Sacred Precinct is also permissible within it.[1461] Thus, the exception here is from the obligation of distributing it in the Sacred Precinct, not from the permissibility of distributing it there.

وأما الصيام فيجزئه بكل مكان

This is not an exception to the juristic control, but it should be noted, as a useful point, that fasting as a substitute is not restricted to the Sacred Precinct. For this reason, Ibn Qudāmah concluded the chapter by saying: "As for fasting, it suffices in every place."[1462] And in *al-Zād*: "Fasting suffices in every place."[1463] The reason given is that: "its benefit does not extend to anyone else, so there is no benefit in restricting it to the Sacred Precinct."[1464] This concerns restriction by place. As for time, the fasting that substitutes for the hady, as stated in the verses, is three days during Ḥajj and seven when one returns.

## From the Chapters of Financial Transactions

كل شرط يعتبر في معاملة المسلمين يعتبر في معاملة ذمي ومستأمن

### Every Condition Considered in Transactions among Muslims Is Considered in Transactions with a Dhimmī or Mustaʾman

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This is not one of Ibn Rajab's juristic controls. Rather, it is among the formulations used by later Ḥanbalīs in deriving rulings for transactions with non-Muslims. Its wording is: "Every condition considered in transactions among Muslims is considered in a transaction with a dhimmī or mustaʾman."[1465]

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[1458] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 2:365; Kashshāf al-Qināʿ, al-Buhūtī, 2:460-461.

[1459] ʿUmdat al-Fiqh, Ibn Qudāmah, p. 47.

[1460] Zād al-Mustaqniʿ, al-Ḥajjāwī, p. 89.

[1461] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 2:367.

[1462] ʿUmdat al-Fiqh, Ibn Qudāmah, p. 47.

[1463] Zād al-Mustaqniʿ, al-Ḥajjāwī, p. 89.

[1464] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 1:559.

[1465] Al-Furūʿ wa-Taṣḥīḥ al-Furūʿ, Ibn Mufliḥ, 6:292.

Explanation

The meaning is that the dhimmī, that is, a non-Muslim subject under Muslim protection, and the mustaʾman, that is, a non-Muslim granted safe-conduct, do not fall outside the conditions considered in contracts, nor the rulings of validity, invalidity, and prohibition, merely because of their difference in religion.

There was disagreement among the Ḥanbalīs over the foundational question of whether non-Muslims are addressed by the subsidiary rulings of the Sharīʿah. The relied-upon position is that they are addressed by them, and the settled derivation of the school in this chapter proceeds on that basis, even though Imām Taqī al-Dīn adopts an intermediate approach, permitting some transactions with them and not others.

It is important to note here that the later authorities do not frequently repeat the wording of this juristic control itself, but they establish its meaning through its subsidiary cases. They affirm this principle in various issues, such as the sale of wine, the sale of grapes to one who will make wine from them, partnership with a person of the Book, and assisting another in what is prohibited in our religion, or even in his own religion[1466] if its prohibition for him is established according to us.

Evidences

{ذَٰلِكَ بِأَنَّهُمْ قَالُوا لَيْسَ عَلَيْنَا فِي الْأُمِّيِّينَ سَبِيلٌ}

The Qurʾān, the Sunnah, and legal reasoning all testify to this principle. From the Qurʾān is the statement of Allah, exalted is He, censuring the People of the Book: {That is because they said, “There is no blame upon us concerning the unlettered people”}. The point of inference is that Allah censured them for treating difference in religion as a justification for abandoning trustworthiness and justice and for consuming wealth unlawfully.

When some texts restrict the prohibition of deception or prohibited transactions to a Muslim, this does not imply a contrary meaning (mafhūm al-mukhālafah) that would permit such conduct with others. Either the wording reflects the usual case, because most interaction at the time was among Muslims, or the mention of the Muslim serves to emphasize the gravity of the matter, not to restrict the basis of the prohibition. On either assumption, this restriction cannot be made a means to permit deceiving non-Muslims, especially in light of the many general evidences prohibiting injustice, treachery, and consuming wealth unlawfully, as well as the specific evidences prohibiting injustice against dhimmīs.

Difference in religion, therefore, is not a cause that permits deception or treachery, nor does it remove the prohibition of injustice in transactions. This much is agreed upon among Muslims. The disagreement concerns other issues, such as certain forms of assistance when the act is one that the non-Muslim is permitted to practice or considers lawful, and the permissibility of certain defective contracts with a belligerent non-Muslim in his own territory according to those who allow them, provided that the transaction is consensual and free of treachery and deception. This juristic control also prevents that.

[1466] “Feeding them from it, that is, from the fat, is inducing them to commit disobedience, just as feeding a Muslim something unlawful for him would be.” Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 3:423.

Applications

Among the clearest applications is that the Ḥanbalīs do not permit selling something intended for unlawful use, even if the purchaser is a dhimmī. In *Kashshāf al-Qināʿ*: "The sale of something intended for unlawful use is not valid, such as grapes or juice to one who will make wine from them ... even if that sale is to a dhimmī who will make wine from them, because they are addressed by the subsidiary rulings of the Sharīʿah."[1467]

Indeed, they do not validate the sale of wine even if both contracting parties are dhimmīs: "Nor is the sale of wine valid, even if both parties are dhimmīs."[1468] Thus, difference in religion does not alter the ruling of the contract itself.

Another application is partnership with a person of the Book. The relied-upon position does not prohibit the partnership itself, but it deems it disliked unless the buying and selling are in the hands of the Muslim; in that case, there is no dislike.[1469] If the partnership is formed, the partner is bound by the rulings of the Sharīʿah: "Whatever a non-Muslim purchases, such as wine, with the property of the partnership or muḍārabah is invalid, and he is liable for it."[1470]

Exceptions

This is not truly an exception, but there is an important distinction between directly undertaking a prohibited contract and accepting what has already come into their possession from the prices of things that they are allowed to retain. In *Kashshāf al-Qināʿ*: "It is permissible to take the price of wine and swine in payment of jizyah and kharāj if they themselves undertook their sale and received the price."[1471] This is not a validation of a Muslim selling such things to them. Rather, it is acceptance of what is in their hands from what they are allowed to retain.

A Note on the Foundational Uṣūlī Issue

This juristic control is built on the disagreement over whether non-Muslims are addressed by the subsidiary rulings of the Sharīʿah. The majority of Ḥanbalīs hold that they are addressed by them, and upon that they built a restrictive approach to assisting in sins. There is another view in the school that they are not addressed by them, and on the basis of that view some subsidiary rulings are lightened.

فإن الرجل لا يجوز له أن يعين أحدًا على معصية الله، وإن كان المعان لا يعتقدها معصية، كإعانة الكافرين على الخمر

As for Shaykh Taqī al-Dīn, he has an intermediate approach: they are addressed, but by way of punishment in the Hereafter, not demand in this world. Many may in fact agree with him on that. Yet he built upon this, and upon the ḥadīth of ʿUmar giving a silk garment to his brother, a certain degree of expansion in some transactions. He said: "The sale of silk to non-Muslims is indicated as permissible by the ḥadīth of ʿUmar, unlike the sale of wine; for silk is not absolutely prohibited. By analogy, the same applies to selling vessels of gold and silver to them. If it is permissible to sell them to them, it is

[1467] Kashshāf al-Qināʿ, al-Buhūtī, 7:373.

[1468] Kashshāf al-Qināʿ, al-Buhūtī, 7:313.

[1469] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:207.

[1470] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:207.

[1471] Kashshāf al-Qināʿ, al-Buhūtī, 7:238.

permissible to manufacture them for sale to them, and to make them for them for wages."[1472] Yet he nevertheless was strict concerning what is intended for what is unlawful in itself. He said: "A man may not assist anyone in disobeying Allah, even if the one assisted does not believe it to be an act of disobedience, such as assisting non-Muslims with wine."[1473] Thus, his statement does not contain an unrestricted permission; rather, he distinguished between types of prohibited matters.

The Chapter of Dār al-Ḥarb: Another Qualification That Must Not Be Confused with This Juristic Control

The issue of defective contracts in dār al-ḥarb, that is, territory outside Muslim legal authority in the classical juristic classification, is a separate chapter. Its basis is disagreement over the legal effect of territory, safe-conduct, and the authority of legal rule, not merely the religion of the other contracting party.

The relied-upon position in the Ḥanbalī school is that the rulings do not change. For this reason, *al-Maʿūnah* states: "Ribā is prohibited in dār al-ḥarb," and then says: "even between a Muslim and a ḥarbī [a non-Muslim belonging to a polity outside covenantal protection]."[1474] The relied-upon position of the school among the later authorities is therefore that ribā remains prohibited, and that the mere fact that the transaction occurs in dār al-ḥarb does not make it lawful.

Within the school, however, there is another narration, and upon it rests a known derivation. *Al-Maʿūnah* itself states: "And from him is another report: it is not prohibited between a Muslim and a ḥarbī when there is no safe-conduct between them."[1475] In *al-Furūʿ*, the distinction is not made on the basis of safe-conduct according to Imām Taqī al-Dīn: "In *al-Mūjaz* there is a narration: it is not prohibited in dār al-ḥarb, and our Shaykh affirmed it according to its apparent purport."[1476] This is the point at which some Ḥanbalī derivation converges with the Ḥanafī principle regarding ribā and some defective contracts in dār al-ḥarb.

Even so, even according to this view that differs from the relied-upon position, the discussion should not be extended to selling wine, owning gambling halls, or other activities built upon manifest prohibition or clear harm. Such cases are not merely defective contracts entered into by mutual consent. In many instances, they involve directly undertaking the prohibited matter or visibly assisting it. This is apart from the harm such activities cause in the context of Muslim minorities to the public image of Islam and its call. What appears to me is that this disagreement, if considered at all, belongs to the sphere of easing certain disputed transactions and matters prohibited for external reasons for Muslims living under non-Islamic laws, so that strictness does not lead to the destruction of their interests and economic capacity in the absence of a financial and social environment aligned with the rulings of the Sharīʿah.

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[1472] Al-Mustadrak ʿalā Majmūʿ al-Fatāwā, Ibn Taymiyyah, 4:5.

[1473] Al-Fatāwā al-Kubrā, Ibn Taymiyyah, 3:368.

[1474] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 5:170.

[1475] Maʿūnat Ūlī al-Nuhā, Ibn al-Najjār, 5:170.

[1476] Al-Furūʿ wa-Taṣḥīḥ al-Furūʿ, Ibn Mufliḥ, 6:292.

الإقالة: هل هي فسخ أو بيع؟

## Rescission by Mutual Consent: Is It a Rescission or a Sale?

الإقالة هل هي فسخ أو بيع؟ في المسألة روايتان منصوصتان. واختيار الخرقي، والقاضي، والأكثرين: أنها فسخ...

This is one of the benefits appended to the maxims in Ibn Rajab's work. His wording is: "Rescission by mutual consent: is it a rescission or a sale? There are two explicitly transmitted narrations on the issue. The choice of al-Khiraqī, al-Qāḍī, and the majority is that it is a rescission..."[1477]

Explanation

والإقالة فسخ لا بيع

*Iqālah* is the undoing of a previous contract by mutual agreement. The disagreement over its legal characterization is well known within the Ḥanbalī school, but the position that became settled among the later authorities is that it is a rescission (faskh), not a sale. In *Daqāʾiq Ūlī al-Nuhā*: "*Iqālah* is a rescission, not a sale."[1478]

Evidences

In *Kashshāf al-Qināʿ*: "It," meaning *Iqālah*, "is a rescission" of the contract, not a sale, "because it denotes removal and elimination. It is said: 'May Allah *aqāla* your stumble,' meaning: may He remove it. Also, because it is permissible in a *salam* (advance payment) sale, despite their consensus that it is prohibited to sell it before taking possession."[1479]

Applications

One of the strongest fruits of the disagreement is the permissibility of rescission before possession in cases where the item may not be sold before possession. Ibn Rajab said: "If they mutually rescind before possession in something that may not be sold before possession, it is permissible according to the position that it is a rescission..."[1480] This is the relied-upon position. *Daqāʾiq Ūlī al-Nuhā* states: "Rescission is valid before possession of the sold item…"[1481]

Another application is that if the two parties agree upon an increase over the price, a reduction from it, or a substitute of a different genus, this is not rescission according to the madhhab; rather, it requires a new sale. Ibn Rajab said: "If they mutually rescind with an increase over the price, or a reduction from it, or with something of a different genus from the price: if we say that it is a rescission, it is not valid, because rescission is the undoing of the contract, so the two countervalues are returned as they were, like return because of defect and the like. But if we say that it is a sale, then there are two views."[1482] The later authorities settled on invalidity in such a case. In *Kashshāf al-Qināʿ*: "It is also not valid with

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[1477] Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid, Ibn Rajab, 3:251.

[1478] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:63.

[1479] Kashshāf al-Qināʿ, al-Buhūtī, 7:506.

[1480] Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid, Ibn Rajab, 3:251.

[1481] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:63.

[1482] Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid, Ibn Rajab, 3:252.

an increase over the contracted price, or with a reduction from it, or with something of a different genus."[1483]

"والإقالة فسخ تصح قبل قبض وبعد نداء جمعة ومن مضارب وشريك ولو بلا إذن، ومن مفلس بعد حجر لمصلحة، وبلا شروط بيع، وبلفظ صلح وبيع، وبما يدل على معاطاة. ولا خيار فيها ولا شفعة، ولا يحنث بها من حلف لا يبيع"

"*Iqālah* is a rescission. It is valid before possession, after the Friday call to prayer, from a muḍārib, meaning the working partner in a profit-sharing partnership, and from a partner, even without permission; from an insolvent person after interdiction, if there is benefit; without the conditions of sale; by the wording of settlement and sale; and by conduct indicating mutual exchange. There is no option in it, no pre-emption, and one who swore not to sell does not break his oath by it."[1484]

Qualifications

This is qualified by the fact that rescission is not valid when the sold item has perished, unlike the case where the price has perished: "It is not valid when the sold item has perished, whether it required fulfillment of a right or not, because the object of rescission has been lost. It is valid, however, when the price has perished."[1485]

It is also noted: "It appears that it is not permissible for a contracting party to intend, through rescission, an ʿīnah transaction," meaning a buyback arrangement used as a device to obtain cash through a sale and resale, "but if he does it and intends that specific ʿīnah arrangement, the rescission is valid."[1486]

يملك المضارب الربح بالظهور

## The Working Partner in a Muḍārabah Acquires Ownership of the Profit upon Its Appearance

المضارب؛ هل يملك الربح بالظهور أم لا؟

This is one of the benefits appended to the maxims in Ibn Rajab's work. His wording is: "The working partner in a muḍārabah: does he acquire ownership of the profit upon its appearance or not?"[1487]

Explanation

The Ḥanbalīs distinguished between the initial acquisition of ownership and the settling of that ownership.

Al-Mardāwī said in *al-Inṣāf* concerning the initial acquisition of ownership: "The first of them is that he acquires ownership upon its appearance, and this is the madhhab ... The second narration is that he does not acquire ownership except by division ... And there is a third narration from him: that he acquires

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[1483] Kashshāf al-Qināʿ, al-Buhūtī, 7:509.

[1484] Muntahā al-Irādāt, Ibn al-Najjār, 2:345, with Ibn Qāʾid's marginal notes.

[1485] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 3:155.

[1486] Maṭālib Ūlī al-Nuhā, al-Ruḥaybānī, 3:156.

[1487] Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid, Ibn Rajab, 3:294.

ownership through settlement of accounts, liquidation, and termination before division and taking possession."[1488]

He then said concerning its becoming settled: "Ownership of it becomes settled by division according to al-Qāḍī and his companions, and it does not become settled without it. Some of the companions said: it becomes settled through a full settlement of accounts..."[1489]

(ويملك العامل حصته من الربح بالظهور قبل القسمة ...) ... (ويستقر الملك فيها) ... (بالمقاسمة، وبالمحاسبة التامة) لأنه قبل ذلك عرضة لأن يخرج عن يده لجبران خسران

Al-Buhūtī said in *Kashshāf al-Qināʿ*: "The working partner acquires ownership of his share of the profit upon its appearance before division... Ownership of it becomes settled ... by division and by a full settlement of accounts, because before that it is exposed to being removed from his hand in order to make good a loss."[1490]

Thus, the relied-upon position is not that the working partner acquires ownership only after liquidation (tanḍīḍ) at the outset. Rather, his initial ownership is established by the appearance of profit, but it does not become settled except by division or a full settlement of accounts.

Accordingly, if a loss occurs after the appearance of profit, it is made good from the profit before its division, or before its liquidation together with settlement of accounts. Mere appearance of profit, therefore, is not sufficient for the entitlement to become settled. In *al-Rawḍ al-Murbiʿ*: "Or if he incurs a loss ... that is made good from the profit ... before its division in cash, or before its liquidation together with its accounting."[1491]

(ولا يقسم) الربح (مع بقاء العقد) أي: المضاربة (إلا باتفاقهما) ... لأن الربح وقاية لرأس المال

For this reason, the later authorities did not treat this chapter as though the mere appearance of profit permits the working partner or the owner of the capital to take or divide it whenever either wishes. Rather, they made the profit a protection for the capital so long as the contract remains in force, and therefore it is not divided while the contract remains except by the agreement of both parties. Al-Buhūtī said in *al-Rawḍ al-Murbiʿ*: "The profit is not divided while the contract remains," meaning the muḍārabah contract, "except by their agreement ... because the profit is a protection for the capital." He also said: "Or if he incurs a loss ... that is made good from the profit ... before its division in cash, or before its liquidation together with its accounting."[1492]

This shows that division, or liquidation together with complete settlement of accounts, are all relevant to the settling of the profit and the regulation of the account, not to the initial cause of ownership according to the madhhab.

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[1488] Al-Inṣāf, al-Mardāwī, 14:123.

[1489] Al-Inṣāf, al-Mardāwī, 14:124.

[1490] Kashshāf al-Qināʿ, al-Buhūtī, 8:520.

[1491] Al-Rawḍ al-Murbiʿ, al-Buhūtī, 2:370.

[1492] Al-Rawḍ al-Murbiʿ, al-Buhūtī, 2:370.

Applications

Among the most practical branches of this issue in the chapter of muḍārabah is: “the commencement of the zakāh year on the working partner’s share of the profit before division... As for the owner of the capital, he owes zakāh on his capital together with his share of the profit, and the zakāh year begins for it upon the appearance of profit (...) As for the remainder of the profit, he is not required to pay its zakāh...”[1493]

Another branch is: “If the working partner, after the appearance of profit, purchases someone who would be emancipated from him by ownership (...) he is emancipated from him because of ownership (...) Accordingly, if he purchases his relative after the appearance of profit, that relative is emancipated from him to the extent of his share...”[1494]

Another branch is: “If the working partner purchases for himself from the muḍārabah property: if no profit has appeared, it is valid (...) Likewise, if profit has appeared and we say that he does not acquire ownership of it upon appearance ... But if we say that he does acquire ownership by it, then it is like one partner purchasing from the partnership property. The madhhab position is that it is invalid to the extent of his right, because it is already his property, so his purchase of it is not valid...”[1495]

كل قرض جرَّ نفعًا فهو حرام

## Every Loan That Generates a Benefit Is Prohibited

This juristic control recurs, with slight variation between the Arabic terms نفع (*nafʿ*, benefit) and منفعة (*manfaʿah*, benefit), in the statements of leading authorities of the Ḥanbalī school, such as Ibn Qudāmah, Ibn Taymiyyah, Ibn al-Qayyim, and Ibn Rajab. It is not, however, one of the rules Ibn Rajab included in his book.

Explanation

لأن القرض عقد إرفاق وقربة، فإذا شرط فيه الزيادة أخرجه عن موضوعه

وإنما يمنع من الزيادة المشروطة

What is prohibited in the madhhab is a benefit to the lender that is stipulated, or that functions like a stipulation or prior understanding, or a gift or benefit before repayment that was not customary between the two parties. In *Kashshāf al-Qināʿ*: “Such as the lender stipulating an increase, a gift, or anything that generates a benefit, such as that the borrower let him live in his house for free, or at a reduced rent, or repay him with something better. This is not permissible, because a loan is a contract of assistance and

[1493] Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid, Ibn Rajab, Rakāʾiz ed., 3:295–296.

[1494] Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid, Ibn Rajab, Rakāʾiz ed., 3:296–297.

[1495] Taqrīr al-Qawāʿid wa Taḥrīr al-Fawāʾid, Ibn Rajab, Rakāʾiz ed., 3:297–298.

devotion; if an increase is stipulated in it, that removes it from its proper nature." [1496] Ibn Qudāmah said: "What is prohibited is only the stipulated increase."[1497]

Evidences

هذا إسنادٌ ساقطٌ.

This juristic control has been narrated from the Messenger of Allah ﷺ with a weak chain, and it is mentioned in the books of the madhhab with a non-committal formula of transmission (ṣīghat al-tamrīḍ). Ibn ʿAbd al-Hādī said: "This chain is utterly unsound." [1498]

Ibn Qudāmah said in *al-Mughnī*: "This is because Ibn Mājah narrated in his *Sunan* from Anas, who said: The Messenger of Allah ﷺ said: 'When one of you gives a loan and the borrower gives him a gift or carries him on a riding animal, he should not ride it and should not accept it, unless that had already been customary between them before that.'" [1499] There is also discussion regarding this chain, but the four schools act according to its meaning.

The nature of a loan is assistance and benevolence, so it may not be turned into a means of obtaining an increase over the debt. For this reason, they explained the prohibition by saying: "Because a loan is a contract of assistance and devotion; if an increase is stipulated in it, that removes it from its proper nature." [1500]

خيركم أحسنكم قضاء

ولأنه لم يجعل تلك الزيادة عوضًا في القرض، ولا وسيلة إليه، ولا إلى استيفاء دينه، فحلت ... وإنما يمنع من الزيادة المشروطة

As for an increase that occurs without stipulation, it is permissible, because it is established in Muslim that the Prophet ﷺ borrowed a young camel and repaid with one better than it, and said: "The best of you are those best in repayment." Ibn Qudāmah then said: "Because he did not make that increase compensation in the loan, nor a means to it, nor a means to collecting his debt; therefore it was lawful ... What is prohibited is only the stipulated increase." [1501]

Applications

First: If the lender stipulates an increase in amount or quality, that is prohibited, whether the increase is additional wealth or improved quality in what is repaid. In *Kashshāf al-Qināʿ*: "There is no difference between an increase in amount or in quality, such as if he lends him broken coins and he repays him with sound ones, and the like." [1502]

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[1496] Kashshāf al-Qināʿ, al-Buhūtī, 8:142.

[1497] Al-Mughnī, Ibn Qudāmah, 6:439.

[1498] Tanqīḥ al-Taḥqīq, Ibn ʿAbd al-Hādī, 4:108.

[1499] Al-Mughnī, Ibn Qudāmah, 6:439.

[1500] Kashshāf al-Qināʿ, al-Buhūtī, 8:142.

[1501] Al-Mughnī, Ibn Qudāmah, 6:439.

[1502] Kashshāf al-Qināʿ, al-Buhūtī, 8:142.

Second: If the lender stipulates a benefit returning to him because of the loan, such as the borrower letting him live in his house, performing work for him, or selling him something with preferential pricing, that is not permissible. In *Kashshāf al-Qināʿ*: "Or if the lender stipulates that the borrower perform work for him ... or that the lender lease him real estate for more than its rental value, or sell him something for more than its value ... this is not permissible." [1503]

Third: A gift from the borrower to the lender before repayment falls under the prohibition if there was no prior custom of gift-giving between them. In *Kashshāf al-Qināʿ*: "If the borrower does something that contains a benefit for the lender, such as a gift or the like, before repayment, it is not permissible ... unless the custom between them had already existed before the loan." [1504]

Qualifications

This juristic control is qualified by the fact that an unstipulated increase is permissible. Thus, if the borrower repays him with something better in quality, or gives him a gift after repayment, it is permissible. In *Kashshāf al-Qināʿ*: "Or if he repays him with something better than it ... it is permissible." And it says: "Or if the borrower gives him a gift after repayment, it is permissible, provided there was no stipulation and no prior understanding." [1505] Ibn Qudāmah said: "Because he did not make that increase compensation in the loan ... therefore it was lawful ... What is prohibited is only the stipulated increase." [1506]

Likewise, something given before repayment is outside the prohibition if it had been customary between them before the loan, or if the lender intends to count it toward the debt, or to compensate the borrower for it. [1507]

الصفقة الواحدة: هل تتفرق فيصح بعضها دون بعض أم لا، فإذا بطل بعضها بطل الكل؟

## The Single Transaction: Is It Divisible, Such That Part of It Is Valid and Part of It Is Not, or Not, Such That If Part of It Is Invalid, the Whole Is Invalid?

الصفقة الواحدة؛ هل تتفرق فيصح بعضها دون بعض أم لا فإذا بطل بعضها بطل كلها؟ في المسألة روايتان، أشهرهما أنها تتفرق

This is one of the benefits appended to the rules in Ibn Rajab's work. His wording is: "The single transaction: is it divisible, such that part of it is valid and part of it is not, or not, such that if part of it is invalid, all of it is invalid? There are two narrations concerning the issue, the more well-known of which is that it is divisible." [1508]

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[1503] Kashshāf al-Qināʿ, al-Buhūtī, 8:142.

[1504] Kashshāf al-Qināʿ, al-Buhūtī, 8:145.

[1505] Kashshāf al-Qināʿ, al-Buhūtī, 8:144.

[1506] Al-Mughnī, Ibn Qudāmah, 6:439.

[1507] Kashshāf al-Qināʿ, al-Buhūtī, 8:145.

[1508] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:402.

Explanation

الصفقة المتفرقة: أن يجمع بين ما يصح بيعه وما لا يصح بيعه صفقة واحدة بثمن واحد

صح البيع في المعلوم بقسطه من الثمن

What they mean by this is that a single contract may combine, in one transaction, something whose sale is valid with something whose sale is not valid, or something the seller owns with something he does not own. The question then becomes: is the invalidity confined to its own locus, or does it extend to the entire transaction? The later authorities settled, in general, on divisibility whenever it is possible to know what portion of the price corresponds to the valid part. In *Daqāʾiq Ūlī al-Nuhā*: "A divisible transaction is when one combines, in a single transaction and for one price, something whose sale is valid with something whose sale is not valid." [1509] And in *Kashshāf al-Qināʿ*: "The sale is valid with respect to the known item for its proportionate share of the price." [1510]

What needs clarification here is the meaning of their phrase, "for its proportionate share of the price." This does not mean arbitrary estimation or guesswork. Rather, it means apportioning the price according to the values of the items. For this reason, it says in *Daqāʾiq Ūlī al-Nuhā*: "Knowing its price is possible by apportioning the price between each of them, and that is possible." [1511] It then says about combining a known item and an unknown one that cannot be valued: "There is no way to know it ... because that is only by apportioning the price between the two, and the unknown item cannot be valued." [1512] Thus, whenever each part can be valued, we can know what portion of the price belongs to the valid part. But when valuing the invalid or unknown part is impossible, it is not possible to know the valid part's share of the price, so the entire contract is invalid.

For example: if someone sells two cars for fifty thousand dinars, then it becomes clear that one of the two belongs to someone else, "if he specifies the price of each of them, the sale is valid with respect to the known item for its stated price." [1513] If he did not specify the price, then the values of the two cars are examined. If it is impossible to determine the values of both, the sale is invalid in its entirety. But if valuation is possible, the sale is valid with respect to the car he owns for its proportionate share of the price. Thus, if his car is valued at sixty thousand and the other at forty thousand, the sale is valid with respect to his car for thirty thousand. The purchaser, however, has the option.

Applications

If a person sells a known item together with an unknown item whose knowledge is not impossible, the sale is valid with respect to the known item for its proportionate share of the price, and invalid with respect to the unknown item. In *Daqāʾiq Ūlī al-Nuhā*: "If a person sells a known item and an unknown item whose knowledge is not impossible, such as 'this slave and an unspecified garment,' it is valid with

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[1509] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:20.

[1510] Kashshāf al-Qināʿ, al-Buhūtī, 7:365.

[1511] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:20.

[1512] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:20.

[1513] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:20.

respect to the known item for its proportionate share of the price, and invalid with respect to the unknown item." [1514]

If a person sells what he owns together with what he does not own, or sells something valid together with something whose sale is not valid, the sale is valid with respect to the valid part for its proportionate share, according to the madhhab.

"(ومن باع جميع ما يملك بعضه صح البيع في ملكه بقسطه، وبطل في ملك غيره)"

In *Daqāʾiq Ūlī al-Nuhā*: "If a person sells all of something of which he owns only part, the sale is valid with respect to what he owns for its proportionate share, and invalid with respect to what belongs to someone else." [1515]

It also says: "If he sells, to a Muslim and the like, his slave together with another person's slave without that person's permission, or sells his slave together with a free person, or sells vinegar together with wine, the sale is valid with respect to his slave," when sold together with another person's slave or with a free person, "for its proportionate share; and the sale is valid with respect to the vinegar," when sold together with wine, "for its proportionate share of the price ... Wine is estimated as vinegar, and a free person as a slave, so that it may be valued and the price apportioned." [1516]

Then, if the purchaser did not know the situation, he has the option. In *Daqāʾiq Ūlī al-Nuhā*: "The purchaser has the option between keeping the part of the sale that is valid for its proportionate share, or returning it, because the transaction has been divided against him." [1517]

Qualifications

This juristic control is qualified by the condition that divisibility (tafrīq al-ṣafqah) only applies when it is possible to know the valid part's proportionate share of the price. If that is impossible, and the invalidity of part of the transaction leads to ignorance of the price of the remainder, then the entire sale is invalid. This is not because the principle of divisibility is rejected, but because another impediment has arisen: uncertainty regarding the countervalue. [1518]

[1514] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:20.

[1515] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:20.

[1516] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:21.

[1517] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:21.

[1518] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:20.

التصرفات للغير بدون إذنه، هل تقف على إجازته أم لا؟

## Dispositions on Behalf of Another Without His Permission: Are They Suspended Pending His Ratification or Not?

أن تدعو الحاجة إلى التصرف في مال الغير أو حقه، ويتعذر استئذانه ... فهذا التصرف مباح جائز موقوف على الإجازة

This is the wording of Ibn Rajab, and this is one of the benefits appended to his maxims. [1519] He then expanded the discussion into categories. In the first category, he said: "The first category: when there is a need to dispose of another's property or right, and it is impossible to seek his permission ... This disposition is permissible and valid, but suspended pending ratification." [1520]

التصرف للغير في الذمة دون المال بغير ولاية عليه ... ثم إن أجازه المشترى له ملكه، وإلا لزم من اشتراه، وهو قول الأكثرين

He also mentioned the category of disposing on behalf of another in legal liability, saying: "The fourth category: disposing on behalf of another in legal liability, not in property, without authority over him ... Then, if the person for whom it was purchased ratifies it, he owns it; otherwise, it is binding on the one who purchased it. This is the view of the majority." [1521]

Explanation

The later Ḥanbalīs did not apply this issue broadly to all of its possible forms. Rather, they narrowed it, made the default rule non-validity, and then excepted a specific case.

(فلا يصح تصرف فضولي) ببيع أو شراء أو غيرهما (ولو أجيز) تصرفه (بعد) وقوعه (إلا إن اشترى) الفضولي (في ذمته ونوى) الشراء (لشخص لم يسمه) فيصح سواء نقد الثمن من مال الغير أم لا

In *Daqāʾiq Ūlī al-Nuhā*: "The disposition of an unauthorized actor (fuḍūlī) is not valid," whether by sale, purchase, or otherwise, "even if" his disposition "is ratified after" it occurs, "except if the unauthorized actor purchases" something "in his own legal liability and intends" the purchase "for a person whom he does not name." In that case, it is valid, whether he pays the price from the other person's wealth or not." [1522] It then says: "If the person for whom it was purchased ratifies it, he owns it from the time it was purchased for him ... Otherwise, it falls to the purchaser and is binding upon him." [1523]

This is the clearest practical application that remains in the madhhab, because it shows that the locus of the concession here is an obligation undertaken in the actor's own legal liability, followed by later

[1519] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:386.

[1520] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:386.

[1521] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:407.

[1522] Sharḥ Muntahā al-Irādāt, al-Buhūtī, 2:9.

[1523] Sharḥ Muntahā al-Irādāt, al-Buhūtī, 2:9.

ratification. For this reason, they explained its validity by saying: “because his legal liability is capable of receiving transactions.” [1524]

Thus, the relied-upon position among them is not that every disposition undertaken for another without his permission is suspended pending ratification. Rather, the default is non-validity, except in this particular form and what resembles it, if he purchases something for another in his own legal liability, without permission, and does not name him in the contract.

Applications

If an agent acts contrary to his principal’s instruction in a way that is ordinarily pleasing to the principal, and the actual transaction is preferable or more beneficial than the one authorized, the disposition is valid. Ibn Rajab said: “That the authorization is contradicted in a way that is ordinarily pleasing, in that the actual disposition is more likely to be approved than the authorized one; the correct position is that it is valid, by considering customary authorization.” [1525] For this reason, *Daqāʾiq Ūlī al-Nuhā* says: “If someone says to his agent regarding the sale of something like a garment, ‘Sell it for a dirham,’ and he sells it for that dirham and an additional item,” such as a small coin or a book, “it is valid.” [1526] It also says: “Likewise, if he says to his agent: ‘Sell this for one thousand on deferred payment,’ and he sells it for that amount immediately, it is valid.” [1527] These are not cases of pure unauthorized disposition. Rather, they are cases of a departure from the instruction that is covered by customary authorization, because the agent obtained something better for the principal and did not harm him. But if the agent acts contrary to his principal’s instruction in a way that is not ordinarily acceptable, the disposition is not valid. In *Daqāʾiq Ūlī al-Nuhā*: “Every disposition in which the agent acts contrary to his principal is like the disposition of an unauthorized actor.” [1528]

Qualifications

All of this is qualified by the fact that a case in which need calls for action and seeking permission is impossible is not like a pure unauthorized disposition. For this reason, Ibn Rajab treated it as a separate category. He gave as examples giving in charity lost property that cannot be acquired through announcement, as well as deposits and usurped properties whose owners are unknown or whose whereabouts have become untraceable. [1529] The basis of this category is need and the impossibility of seeking permission, not merely disposing for another without his permission. Still, “it is suspended: if the owner ratifies it, its reward belongs to him; otherwise, the one who disposed of it is liable.” [1530] The later authorities explicitly stated that deposits whose owners are unknown, or whose owner is missing and no information about him is available, may be given in charity or handed over to the judge. In *Kashshāf al-Qināʿ*: “Deposits whose owners are unknown may be given in charity by the depositary

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[1524] Sharḥ Muntahā al-Irādāt, al-Buhūtī, 2:9.

[1525] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:394.

[1526] Sharḥ Muntahā al-Irādāt, al-Buhūtī, 2:196.

[1527] Sharḥ Muntahā al-Irādāt, al-Buhūtī, 2:196.

[1528] Sharḥ Muntahā al-Irādāt, al-Buhūtī, 2:196.

[1529] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:386.

[1530] Taqrīr al-Qawāʿid wa-Taḥrīr al-Fawāʾid, Ibn Rajab, 3:387.

without the permission of a judge...” [1531] They stated the same regarding usurped properties and trusts whose owners are unknown. In *Kashshāf al-Qināʿ*: “If usurped properties remain in his possession and he does not know their owners, then if he hands them over to the judge ... he is discharged of liability for them ... He may also give them in charity on their behalf ... on condition that he guarantee them to their owners if he later comes to know them.” [1532] If the owner appears after the charity has been given: “He is given the choice between accepting the reward and taking compensation from the one who gave it in charity.” [1533]

ضابط بدو صلاح الثمر: أن يطيب أكله ويظهر نضجه

### The Criterion for the Onset of the Fruit’s Fitness for Sale: That It Becomes Palatable and Its Ripeness Is Apparent

«بدو صلاح الثمر: أن يطيب أكله ويظهر نضجه. قال في "الإنصاف": وهذا الضابط أولى»

In *Kashshāf al-Qināʿ*: “The onset of ripeness in fruit (budūw ṣalāḥ al-thamar) is that it becomes pleasant to eat and its ripeness becomes apparent. It says in *al-Inṣāf*: ‘This criterion is preferable.’” [1534]

## From the Chapters of Family Law

كل امرأة حرمت حرمت ابنتها إلا العمة والخالة وحليلة الابن وحليلة الأب وأم الزوجة

### Every Woman Who Is Prohibited Makes Her Daughter Prohibited, Except the Paternal Aunt, the Maternal Aunt, the Son’s Wife, the Father’s Wife, and the Wife’s Mother

Explanation

وكل من ذكرنا من المحرمات من النسب والرضاع، فبناتهن في التحريم كهن إلا بنات العمات والخالات

This is a well-known juristic control and useful for teaching. This is the wording of Imām Ibn al-Qayyim in *Zād al-Maʿād*. [1535] It gathers the prohibited women by lineage, nursing, and marital affinity (muṣāharah). But if one wants a control limited to those prohibited by lineage and nursing only, Ibn Qudāmah says: “Every one of the women we have mentioned who are prohibited by lineage and nursing: their daughters are like them in prohibition, except for the daughters of paternal aunts and maternal aunts.” [1536]

Evidences

The basis of this juristic control is inductive examination of the women prohibited in the Qurʾān and Sunnah.

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[1531] Kashshāf al-Qināʿ, al-Buhūtī, 4:418.

[1532] Kashshāf al-Qināʿ, al-Buhūtī, 9:298.

[1533] al-Iqnāʿ, al-Ḥajjāwī, 2:354.

[1534] Kashshāf al-Qināʿ, al-Buhūtī, 8:82.

[1535] Zād al-Maʿād fī Hady Khayr al-ʿIbād, Ibn al-Qayyim, 5:178.

[1536] al-Mughnī, Ibn Qudāmah, 9:525.

Applications

Among its clearest applications is that when the sister is prohibited, her daughter is prohibited, as are her daughter's daughter and her son's daughter. The same applies to the brother's daughter and her descendants: "The sister from all three directions, and her daughter, or the daughter of her son, or the daughter of her daughter; and the daughter of every brother, her daughter, and the daughter of her son, however far down they descend, are all prohibited." [1537]

Another application is that the paternal aunt and maternal aunt are prohibited, but the daughter of the paternal aunt and the daughter of the maternal aunt are not prohibited. For this reason, they explicitly stated: "Every female relative by lineage is prohibited except the daughter of a paternal uncle, the daughter of a paternal aunt, the daughter of a maternal uncle, and the daughter of a maternal aunt." [1538]

ابنة الربيبة ربيبة، وابنة الحليلة ليست حليلة

Another application in the chapter of marital affinity is that the wife of one's father and the wife of one's son are prohibited, but their daughters and mothers are not prohibited. In *Daqāʾiq Ūlī al-Nuhā*: "The daughters of those women," meaning the daughters of the wives of one's lineal ascendants and descendants, "and their mothers are not prohibited. Thus, the stepdaughter of his father or son is lawful for him, as is the mother of the wife of his father or son." [1539] This is because the prohibition here is attached to the woman's being the lawful spouse of one's father or son, and that legal description does not extend to her daughter or mother. For this reason, Ibn Qudāmah distinguished between the stepdaughter and the wife, saying: "The daughter of a stepdaughter is a stepdaughter, but the daughter of a ḥalīlah (wife of one's father or son) is not a wife." [1540]

Exceptions

The exceptions are already included in the wording of the juristic control itself: the paternal aunt, the maternal aunt, the son's wife, the father's wife, and the wife's mother.

## From the Chapters of Prescribed Punishments and Offenses Against Persons

الحدود تدرأ بالشبهات

### Prescribed Punishments Are Averted by Ambiguities

Explanation

تدرأ الحدود بالشبهات

According to the Ḥanbalīs, the meaning is that a prescribed punishment (ḥadd) is not obligatory unless its cause, its legal locus, and the method by which it is established are free of a legally recognized shubhah (doubt/ambiguity). In *al-Furūʿ*: "Aḥmad said: prescribed punishments are averted by

[1537] Muntahā al-Irādāt, Ibn al-Najjār, 4:82, with Ḥāshiyat Ibn Qāʾid.

[1538] Muntahā al-Irādāt, Ibn al-Najjār, 4:83, with Ḥāshiyat Ibn Qāʾid.

[1539] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 2:653.

[1540] al-Mughnī, Ibn Qudāmah, 9:526.

ambiguities.”[1541] In *al-Rawḍ*, in the discussion of the prescribed punishment for unlawful sexual intercourse: “The second condition is the absence of ambiguity.”[1542] And in *Kashshāf al-Qināʿ*, in the chapter on theft: “The absence of ambiguity is stipulated for amputation in theft.”[1543]

Shubhah varies according to its source and the point to which it attaches. As to its source, it may be legal (*ḥukmiyyah*), such as intercourse under a disputed marriage contract or an invalid contract believed to be valid; or factual (*mawḍūʿiyyah*), such as one who has intercourse with a woman believing her to be his wife, or drinks something not knowing that a large amount of it intoxicates. As to the point to which it attaches, it may relate to the actor, such as a recent convert who did not know the prohibition, or one acting under coercion; to the object/locus (*maḥall*), such as intercourse with an enslaved woman in whom he has partial ownership, or theft of property in which he has a plausible claim of ownership or entitlement; to the cause/offense itself (*sabab*), such as taking property by snatching or usurpation rather than by ḥadd-level theft; or to the method of proof, such as an ambiguous confession, retraction of a confession, or deficient testimony. The common thread is that it must be a doubt that materially affects the realization or judicial establishment of the ḥadd’s cause, not a merely remote possibility.

Evidences

ادرؤوا الحدود عن المسلمين ما استطعتم، فإن كان له مخرج فخلوا سبيله، فإن الإمام أن يخطئ في العفو خير من أن يخطئ في العقوبة

The Ḥanbalīs used as evidence the well-known report: “Avert the prescribed punishments from the Muslims as much as you can. If there is a way out for him, then release him, for it is better for the Imām to err in pardon than to err in punishment.”[1544] They made this a foundational text in the chapter.

Applications

Among its applications in the prescribed punishment for unlawful sexual intercourse is that they do not impose the punishment when there is a doubt relating to ownership, marriage, or mistaken identity. For this reason, *al-Rawḍ* says: “He is not punished for intercourse with a slave woman in whom he has a share.” It then says: “or if he had intercourse with a woman in his house whom he thought was his wife,” and also: “or in an invalid marriage that he believed to be valid.”[1545]

فلا تكفي الكناية لأنها تحتمل ما لا يوجب الحد، وذلك شبهة تدرأ الحد

Among its applications in the method of establishing unlawful sexual intercourse is that they do not suffice with a possible or indirect admission; rather, explicit admission is required. For this reason, *al-*

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[1541] al-Furūʿ wa-Taṣḥīḥ al-Furūʿ, Ibn Mufliḥ, 10:136.

[1542] al-Rawḍ al-Murbiʿ, al-Buhūtī, 3:387.

[1543] Kashshāf al-Qināʿ, al-Buhūtī, 14:155.

[1544] Narrated by al-Tirmidhī, Ibn Mājah, and others through routes that are not free of weakness; however, a number of scholars, such as Ibn Ḥajar and al-Suyūṭī, considered its meaning ḥasan by virtue of its combined routes. It is also strengthened by what is established in mawqūf form from Companions such as ʿUmar ibn al-Khaṭṭāb and ʿAbd Allāh ibn Masʿūd: “Prescribed punishments are averted by doubts.” For this reason, jurists of all madhhabs have acted upon this principle.

[1545] al-Rawḍ al-Murbiʿ, al-Buhūtī, 3:389.

*Rawḍ* says: “An indirect expression is not sufficient, because it may refer to something that does not require the prescribed punishment, and that is a doubt by which the punishment is averted.” [1546] Also from this category is accepting the retraction of one who confessed. It says: “If he retracts his confession, or flees, he is left alone.” [1547] Here, the doubt does not return to the act itself, but to the method by which it is established.

Among its applications in the prescribed punishment for theft is what *Kashshāf al-Qināʿ* explicitly states: “The absence of ambiguity is stipulated for amputation in theft.” [1548] They built many subsidiary rulings upon this, including their statement: “There is no amputation in a year of famine,” [1549] and their statement: “He is not amputated for stealing the property of his child,” [1550] and their statement: “A Muslim is not amputated for stealing from the public treasury.” [1551] And “if he retracts his confession, it is accepted ... and there is no amputation upon him.” [1552] All of these return to the presence of a legally recognized doubt that prevents the prescribed punishment from being carried out.

Among its applications in the prescribed punishment for consuming an intoxicant is that they did not impose the punishment on one who was unaware that a large amount of the drink intoxicates. In *Daqāʾiq Ūlī al-Nuhā*: “knowing that a large amount of it intoxicates; and he is believed if he says: I did not know.” [1553]

Thus, the ambiguity may relate to the legal locus, the actor, or the method of proof itself.

Qualifications

What is meant by doubt/ambiguity here is not every imagined possibility claimed by the offender, nor every remote possibility. Rather, it is a doubt that has a legally recognized basis in ownership, marriage, permission, entitlement, necessity, legally effective ignorance, or the method of proof. The purpose of this juristic control is to avert the prescribed punishment when there is a meaningful ambiguity, not to open the door to baseless possibilities, nor to nullify prescribed punishments whenever a far-fetched claim can be imagined. Thus, the prescribed punishment is not waived “because of ignorance of the punishment if he knew the prohibition.” [1554] Likewise: “If the host did not withhold from him the obligatory hospitality due to him, he is amputated if he steals the niṣāb, because the guest has no shubhah of entitlement in the host’s property.”[1555]

The Ḥanbalīs, therefore, consider ambiguity when it is legally recognized, and they explicitly deny it where they do not regard it as legally effective.

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[1546] al-Rawḍ al-Murbiʿ, al-Buhūtī, 3:390.

[1547] al-Rawḍ al-Murbiʿ, al-Buhūtī, 3:390.

[1548] Kashshāf al-Qināʿ, al-Buhūtī, 14:155.

[1549] Kashshāf al-Qināʿ, al-Buhūtī, 14:154.

[1550] Kashshāf al-Qināʿ, al-Buhūtī, 14:155.

[1551] Kashshāf al-Qināʿ, al-Buhūtī, 14:157.

[1552] Kashshāf al-Qināʿ, al-Buhūtī, 6:165.

[1553] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 3:361.

[1554] Daqāʾiq Ūlī al-Nuhā, al-Buhūtī, 3:362.

[1555] Kashshāf al-Qināʿ, al-Buhūtī, 14:154.

كل شراب أسكر كثيره فقليله حرام من أي شيء كان ويسمى خمرا

**Every Beverage Whose Large Amount Intoxicates: Its Small Amount Is Prohibited, Whatever It Is Made From, and It Is Called Khamr**

«كل شراب أسكر كثيره فقليله حرام من أي شيء كان ويسمى خمرا»

In *al-Iqnāʿ*: "Chapter on the prescribed punishment for intoxication: Every beverage whose large amount intoxicates, its small amount is prohibited, whatever it is made from, and it is called khamr (an intoxicating beverage)."[1556]

كل مسكر حرام

ما أسكر كثيره فقليله حرام

This is a comprehensive juristic control in the chapter of beverages. All types of intoxicants fall under it, and it is not limited to a particular substance. For this reason, the text says: "whatever it is made from." It is derived from the Prophet's statement ﷺ in the two Ṣaḥīḥs: "Every intoxicant is prohibited," and from his statement ﷺ: "Whatever intoxicates in large amounts, its small amount is prohibited." [1557]

This juristic control combines the two senses in which jurists use the term *ḍābiṭ* ("juristic control"). On the one hand, it is a juristic control in the well-known sense, because it gathers the issues of the chapter of beverages under one ruling and returns their different forms to a single governing principle within the chapter: the prohibition of everything whose large amount intoxicates. On the other hand, it is also a juristic control in the sense of elucidating what is stated in summary form and precisely defining the operative description and measure, because it defines khamr, identifies the legally operative description upon which the ruling turns, namely intoxication; treats every intoxicant as khamr; and gives it a regulated criterion through the statement: "Whatever intoxicates in large amounts, its small amount is prohibited." Thus, it becomes both a control for the ruling and a control for the operative description.

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[1556] al-Iqnāʿ, al-Ḥajjāwī, 4:266.

[1557] Sunan Abī Dāwūd, 3681; Sunan al-Tirmidhī, 1865, where he said: "ḥasan gharīb"; Sunan Ibn Mājah, 3392. Shaykh Shuʿayb al-Arnāʾūṭ said in his marginal notes to al-Tirmidhī, Risālah edition: ṣaḥīḥ li-ghayrih.

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