

# **Min Thimar Al-ilm Wa Al-Hikmah**

Fatwas and Benefits

**2**  
Volume

**Section on Fiqh**  
From The Book of Sales  
to The End

*Authored by*

Al-Sayyid Al-'Allamah Al-Mujtahid

**Muhammad bin Abd Allah Awad**

May Allah preserve him and prolong his life



*Ahl Al-Bayt Library (A.S)*



***Min Thimār al-'Ilm wa al-Hikmah***  
***(Fatāwā wa Fawā'id)***

***From the Prospects of***  
***Knowledge and Wisdom***  
***(Fatwas and Benefits)***

**Part Two**

**Section on Fiqh**

**From the Book of Sales to the End**

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**Written, researched, and edited by**



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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

*In the name of Allah, the Most Gracious, the Most Merciful*

## [Book of Sales and Related Matters]

### The Reality of Sale

A sale is an exchange carried out by mutual consent, and consent is an inward matter known by indicators, among them the offer and the acceptance. These indicators are not confined to those two; rather, consent is realized by anything that conveys it, in whatever wording it may be. Upon this have people's transactions proceeded, in ancient times and modern—except for one who knows the madhhabs and fears that the judge will invalidate the sale; such a person observes offer and acceptance. This is summarized from *Subul al-Salām*.

### The Pillars of Sale

The pillars without which a sale is not complete are four:

1) The seller. 2) The buyer. 3) The merchandise. 4) The price.

It is stipulated of the seller and the buyer that they be of age and sound intellect; the discerning minor who has been permitted to trade is included with them. It is stipulated regarding the merchandise and the price that they both be known.

### On Sale

— The word “sale” encompasses four parts: the seller's offer, the buyer's acceptance, the merchandise sold, and the price given for that merchandise. When these four parts are present, the sale is concluded; if all of them are not present, the sale is not concluded.

— This entails that it is not permissible for a witness to testify that “So-and-so sold such-and-such to So-and-so” unless he has ascertained the occurrence of the four parts mentioned.

— Testimony is permissible and valid regarding a man's acknowledgment that he sold a particular thing to a particular man, even if the price is unknown; because acknowledging and confessing to the sale entails acknowledging those four parts.

— Likewise, the term “lease” comprises four parts: offer and acceptance, a benefit or a work, and a wage in exchange for that benefit or work.

— Leasing is, in meaning, a sale—except that a lease is the sale of benefits, whereas a sale proper is the sale of tangible things.

**[The Meaning of: “Whoever Sells and Buys ... Has Sunk Into Usury”]**

**Question:** The hadith narrated by Zayd ibn ‘Alī (*peace be upon him*):

*“Whoever sells and buys ... up to his saying: has sunk into usury, then sunk into it”*—is this intended of everyone who sells and buys, even a small thing, or not?

**Answer—and Allah grants success:** What appears to me is that what is intended by the hadith is the one who engages in trade; for it is of him, customarily, that such a phrase is said—“he sells and buys” or “he is selling and buying.” Accordingly, it does not include one who sells or buys not by way of trade, but to meet his personal need or his household’s, and the like.

What supports the soundness of what we have mentioned is his words at the end of the hadith: *“has sunk into usury, then sunk into it,”* for that befits those just mentioned, due to their frequent occupation with trade.

Moreover, traders are those who seek gains, profits, and the increase of wealth through buying and selling, so they are often exposed to falling into usury—unlike one who buys some need for his household, for he does not seek growth or profit; likewise one who seldom sells some need—such people rarely fall into usury.

Thus, it seems to me—and Allah knows best—that the phrase *“he sells and buys”* or *“he sold and bought”* is a general customary expression used to mean the one occupied with commerce. On that basis, customary usage takes precedence over purely linguistic usage.

### **[The Prohibition of Trading Without Knowledge]**

It is related from Amīr al-Mu’minīn ‘Alī (*peace be upon him*) that he said: *“Whoever trades without knowledge has sunk into usury, then sunk into it,”* and that he (*peace be upon him*) used to urge: *“(Seek) understanding (in religion), then (engage in) trade.”* And from him also: *“The trader is a flagrant sinner, and the flagrant sinner is in the Fire—except one who takes what is due and gives what is due.”*

**I say:** It is taken from this that ignorance is no excuse in this area, and that taking usury out of ignorance is a sin for which one is punished.

### **Some Rulings of Contracts**

- They require acceptance.
- They can be suspended (pending authorization).
- Ratification (ijāzah) can attach to them.
- Rescission (fash) can attach to them.
- They are not valid when made contingent upon a future (event).

### **[Permitting Taking Another’s Property by Presumed Consent]**

**According to the madhhab:** If a legally responsible person presumes the owner’s consent to his taking something from his property—due to



the report of an upright person, or a trustworthy report, or by reason of a friendship between them—the taking is permissible; but if it becomes clear that there was no permission and no consent, the taker is liable for what he took.

### **[Ruling When One of the Contracting Parties Breaches a Condition]**

Benefit: Allah Most High says: *“So long as they keep straight with you, keep straight with them”* [al-Tawbah:7]. It is taken from this that the breach by either of the contracting parties of any of the agreed conditions invalidates that contract.

### **[The Difference Between Revocation in Contracts and in Conditions]**

Revocation (withdrawal) is valid in contracts before acceptance, by verbal declaration; revocation is not valid in conditions by verbal declaration, but it is valid by action. Thus say the scholars of the madhhab.

### **[Dividing Sales into Valid, Corrupt, and Void]**

**Question:** What is the evidence that indicates dividing sales into valid, corrupt, and void; and (the evidence) for the establishment of “option” (khiyār) in some sales? And what is the difference between that which entails corruption and that which entails an option?

**Answer—and Allah is the One who grants success and aid:** A valid sale is that in which its essentials—its pillars and its conditions—are complete; and that is what is intended by His saying *Most High*: *“Allah has permitted sale”* [al-Baqarah:275], and His saying: *“...unless it be a trade by mutual consent among you”* [al-Nisā’:29].

Sale was known before the revelation of the Qur’an by its reality, its components, its conditions, and its pillars.

A void (bāṭil) sale is a sale in which its four pillars are not complete—seller, buyer, subject of sale, and price—or a sale that falls under what has been prohibited.

A corrupt (fāsid) sale is one in which a condition—other than the four we mentioned—has been deficient; the deficiency of such a condition entails corruption.

That which entails an option is something different from a deficiency of a condition; the options pertain to the mutual consent that is between the two contracting parties, about which He *Most High* said: *“...a trade by mutual consent among you”* [al-Nisā’:29]. For consent may not be realized until after the sale contract.

For example: the sale may meet the conditions of validity and its pillars, but the purchaser has not seen the merchandise, or there is a

defect which he only discovers after the contract: then the purchaser has the option when he sees the merchandise or discovers the defect—either he is pleased and the sale stands, or he returns it and the sale is rescinded. This is what is entailed by His saying *Most High*: “...a trade by *mutual consent among you*” [al-Nisā’:29].

Once you understand that, (you see that) what prompted the division as stated is the divergence of rulings—so that the names distinguish the categories. By what we have stated, the answer is known to what was mentioned in the question. Praise be to Allah in all states, and may Allah bless Muhammad and his family and grant them peace—the best of families.

### **A Benefit Concerning Ratification (Ijāzah)**

In the marginalia: Ratification attaches only to valid contracts—except in ten places, which are:

1. The taking back (raj‘ah) in divorce.
2. Ratification of ratification in sale.
3. Ratification of taking possession—i.e., taking possession of the sold item.
4. Ratification by one of two partners in spending on the partnership when he has spent more than the other.
5. Ratification by the heir concerning what the deceased bequeathed.
6. The loan.
7. The partition (division of jointly held property).
8. Ratification of (a sale involving) disparity (ghabn).
9. Ratification of paying a debt.
10. Ratification by a master of his contract-slave’s manumission.

### **[What Ratification (Ijāzah) Can Attach To Outside of Contracts]**

From *al-Tāj*: Ratification does not attach—outside of a contract—except to: taking back (a wife in) revocable divorce (raj‘ah), paying a debt, partition (of jointly held property), ratification of (a prior) ratification in sale and in loan, ratification of (a sale with) disparity (ghabn), one partner’s ratification for the other when the latter has spent more (on the partnership), an heir’s ratification of what the deceased bequeathed, ratification of taking possession of the sold item, a master’s ratification of his contract-slave’s manumission, and charity. End.

### **[When May One Person Act as Both Sides in a Sale and Purchase?]**

**According to the madhhab**, one person may not undertake both sides in sale and purchase; likewise in every contract that comprises two properties from both sides, such as lease, a gift with a stipulated counter-



value, settlement for money, etc. (from *al-Tāj*)<sup>1</sup>.

**I say:** Considering what they cited as the reason for forbidding it—namely that each of seller and buyer has distinct obligations: the buyer has the right to take delivery of the item sold, and owes the price; he has the right to rescind by the option of inspection and of defect, and the other options. If the item is evicted (by a superior title), he has recourse against the seller. The seller must deliver the thing sold and receive the price, he bears the risk of the item until the buyer takes delivery; and if it is returned to him by an option, he must take it back and return the price, etc.

It does not stand to reason that all those rulings gather in a single person. In view of that, it may be said: there is a case in which the sale is valid, and a case in which it is not.

The case in which the sale is valid: the buyer appoints an agent, gives him the cash, specifies the needed items from a given shop, and the shop owner appoints that same man to sell those items. The man is knowledgeable about the goods and their prices, fully discerning, and both empower him. He enters the shop, takes the requested items, writes an invoice at the customary prices, then delivers the goods to the buyer and the prices to the shop owner.

Another example: A man goes to a shopkeeper known to him for trustworthiness, hands him a roll of cash and a list of groceries; the shopkeeper takes from the roll the prices of the groceries and returns the remainder.

Another example: If the mosque's trustee is trustworthy and honest—likewise the guardian of an orphan—and produce destined for sale (cucumbers, pomegranates, apricots, etc.) is harvested and brought to market, and the market settles on fixed prices for the mosque's produce and its like, and people are selling at those prices; then the mosque trustee says, "Bear witness that I have purchased the mosque's produce for such-and-such"—i.e., the price set that day—and he intends to store it in a cold room, or to gather a quantity and ship it abroad—such a sale appears unimpeachably valid.

**If it be said:** The trustee must seek the best interest of the mosque or the orphan; if he sees the interest in cold-storing the produce or exporting it, that is obligatory for him.

**We say:** The trustee's duty is to do the customary beneficial acts for what he is entrusted with; he is not obliged beyond that. Exporting produce is not customary and entails costs, risks, and dealings; storing in

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1- *al-Tāj* 2/318.

cold rooms is also uncommon and entails fees.

### **[Permissibility of One Person Undertaking Both Sides of a Sale and Purchase]**

The scholars of the madhhab said: One person does not undertake both sides of a sale and purchase, nor of any contract comprising two properties from both sides such as lease, gift with counter-value, or monetary settlement. They added: If, for example, the guardian of an orphan wishes to buy (an item) for the orphan from the orphan's own property, he should first sell the item to another person and then buy it from him.

**I say:** Perhaps what prevents it is the conflict between the rights a sale creates—duty to deliver the subject-matter and duty to receive it, duty to pay the price and duty to receive it, and what follows in being both claimant and obliged party.

In my view, there is no objection to it, absent a prohibiting text or consensus. Indeed, they said regarding “Free your slave to discharge my expiation”: If he complies and frees (the slave), that manumission is valid for the expiation, and his manumission stands in place of sale and agency.

This is the sense of what is in *al-Tāj* for the madhhab; they call it an “implicit sale” (*al-bay‘ al-ḍimnī*) when it includes mention of a counter-value—e.g., “Free your slave to discharge my expiation for a thousand.” This example points to the weakness of the rule “One cannot undertake both sides of a contract,” since they validated the implicit sale in this case though it occurred from only one side.

Nor is it sound to say that the command, “Free your slave on my behalf,” means “Sell him to me,” thus making the sale between two parties;

for they have said in *al-Tāj*: there are no figurative expressions (*kināyāt*) in transactions—only in divorce and the like. And they said: a contract does not conclude by reference to the future, as with an order. So if the buyer said, “Sell this to me for a thousand,” and [the seller] said, “I have sold,” it would not be valid.

### **[Requiring Specification of the Item Sold, Not the Price]**

**Question:** What is the evidence for stipulating that the item sold be specified, without stipulating the same for the price?

**Answer:** It is the nature of the price—gold, silver, and the like—that it is indeterminate, and that the seller has no interest in specifying a particular coin.

It is the nature of the item sold that it is, for the most part, not subject to ignorance, and that the buyer does have an interest in its identity.

Thus the requirement to specify the item rather than the price follows this; and by this stipulation the mutual consent required for trade by the text of the Qurʾān is realized. For the buyer is not pleased with the merchandise unless he knows it in its very identity; whereas the seller is content with payment in the currencies and has no interest in specifying particular pieces.

### **[Ruling on Future (Suspensive) Conditions in Contracts]**

Future conditions invalidate contracts; a marriage, a sale, etc. is not valid if made contingent upon a future condition. For it is of the nature of contracts to conclude immediately; suspending them on future conditions contravenes that.

If, however, conditions are brought in the form of the contract—e.g., “I marry you on condition that you divorce So-and-so”—the contract is valid, because the condition came in contractual phrasing; the contract particles are: *ʿalā* (“on”), *bi-* (“for/with”), and *li-* (“for”).

As for present-tense conditions, contracts are valid with them—e.g., “I sell to you if you are So-and-so’s son”—since there is no incompatibility; and likewise past-tense conditions, since there is no incompatibility even though the condition has already occurred, because the attribute affirmed by the past act is established for the party at the time of contract—e.g., “I sell to you if you have done such-and-such.”

### **[A Note on the Option (Khiyār) “So Long as the Two Sellers Have Not Separated”]**

The hadith, “*If two men conclude a sale, each of them has the option so long as they have not separated,*” is sound—narrated by al-Bukhārī and Muslim; and it is narrated by the Imams of the Zaydis—Zayd b. ʿAlī (*peace be upon him*) in *al-Majmūʿ*, by Aḥmad b. ʿĪsā, in *Sharḥ al-Aḥkām*, and mentioned by al-Hādī (*peace be upon them*), all of them.

There was, however, disagreement about the meaning of “separation.” The Hādawiyya and a great many Zaydī, Ḥanafī, and other scholars said: what is meant is separation by speech; so when the two contracting parties separate by the speech that is offer and acceptance, there is no option except what was stipulated.

Many other imams and scholars said: what is meant is physical separation; thus the option remains after offer and acceptance until the seller and buyer separate physically.

**I say:** What appears to me—and *Allah knows best*—is that what is meant is physical separation. This is because after offer and acceptance one of the two may regret; so the Wise Lawgiver granted them the option of the session (*khiyār al-majlis*) by which he can remedy what he has done. This is the apparent sense of the hadith: his words, “*If two men*

*conclude a sale,*” indicate that offer and acceptance have occurred; and his words, “*then each of them has the option,*” are attached to that with *fa’* (then), and the option pertains to after the sale.

On the first view, there is no evident benefit to the hadith, for they make the option mentioned therein belong to the two contractors before the contract occurs between them; after it occurs, there is no option.

What tilts me to the second view are several points:

1. It widens matters for seller and buyer; for one of them may regret after the contract, and thus he can make good what he regrets.
2. It keeps the hadith on its literal sense, whereas the first view diverts the meaning of “the two who conclude a sale” from its reality to a figurative sense—“the two bargaining.”
3. It yields a coherent sense for the hadith, whereas on the first view no coherent meaning is obtained.

### **[When does cash (the specific money) become “designated”?]**

In the marginalia on *Sharḥ al-Azhar*: “Know that they agree that, once specified, cash becomes designated and may not be substituted in: gifts, charity, settlement, vows, bequests, partnership, silent-partnership (*muḍāraba*), agency, deposit, and usurpation. If he swaps it for something else, he sins; he is not required to return that very item once it leaves his hand, but rather its like (per the *Hādawiyya*).” This was versified:

Cash is fixed in **ṣulḥ** and in a **hiba**

A **waṣiyya**, then **nadh r**, and also **ṣadaqa**

For **muḍārib**, **wadīʿ**, then in **ghaṣb** the same

**Wakāla**, an oath, **sharika**—trust is the aim.

In *al-Baḥr*: it does **not** become designated in agency (*report*) (فرض) End; except if he forbids buying with other cash, or there’s a purpose in specifying it—e.g., it is from a lawful source—then it does become designated (*report*) (فرض). End of the marginalia.<sup>1</sup>

### **Buying from a gas-station attendant “behind the meter”**

**Question:** A man buys fuel at a station; the attendant sometimes sells to some customers “behind the meter.” Later the buyer who purchased that way regrets it and wants to clear his liability. What is due from him?

**Answer:** The attendant bears primary responsibility for negligence

1- Ḥāshiyat *Sharḥ al-Azhar* 2/177–178.

regarding what he was entrusted with. What he sold off-meter is upon him. As for the buyer: as it appears to me, he does not owe compensation; he should seek Allah's forgiveness and avoid such dealings going forward—for one who deals with such a seller shares in sin, not in financial liability. Allah says: "*Cooperate in righteousness and piety, and do not cooperate in sin and aggression*" [al-Mā'idah:2].

Jurists say: an entrusted person who commits a wrongful act or is negligent regarding the trust is liable; they did not assign liability to others—as they do in the case of a usurper.

### [Selling what has not yet been taken into possession]

**According to the madhhab:** a buyer **may** dispose of the purchased item before taking possession—by selling it, gifting it, etc.—except in salam (forward sale) and ṣarf (currency exchange), where this is not permitted or valid. Stated in *al-Tāj*<sup>1</sup>.

**I say:** On this basis, the prohibition of "selling what you have not received" is guidance to what is preferable, not strict forbiddance. This is reinforced by:

1. The permissibility of salam, which is a sale of something non-existent, not guaranteed and not possessed.
2. There is no inherent harm; at worst, delivery may be impeded. If the buyer accepts a delay, so be it; otherwise he retrieves his price and the sale is undone.

### Notes on selling before possession

In the commentaries and *al-Tāj*: selling an inheritance share—known in kind and proportion—before possession is valid. It is said: likewise a gifted or purchased item and the like (cited in *al-Bayān*; also by al-Faqīh Ḥusayn al-Dhawīd in his *Sharḥ al-Azhar*). End from *Sharḥ Fath* (End from *Al-Houashi*).

Elsewhere: selling a purchased or gifted item, etc., before possession is not valid. Ended in meaning.

**I say:** The author who cited "it is said" reported validity of selling the gifted/purchased item before qabḍ, and *al-Tāj* reports similarly for the madhhab; but this appears to conflict with other statements of the jurists that it is invalid—and this is the famous view in the madhhab, supported by evidence: the well-known hadith that the Prophet, *may Allah belss him and his family and grant them peace*, forbade selling what has not been received.

1- *al-Tāj* 2/320–321.

### [Ruling on entering a lottery]

**Question:** Is it permissible to enter a “lottery”?

**Answer:** The apparent ruling is that it is not permissible; it is a form of gambling.

### [Authorizing the seller to take possession on the buyer’s behalf]

In *al-Tāj*: If the buyer says to the seller, “Hold the item,” or “Put it in your house,” that constitutes an agency to take possession.

**I say:** If the buyer says to the seller before taking possession, “Sell it for me,” that implies agency to receive; however, he does not become a possessor by that statement alone—only by a renewed act of possession, e.g., moving the item for the buyer, or transferring it to the market, etc.

### Issue: On selling “rights”

In *al-Azhar*: Selling rights—like preemption (*shuf’a*) or water passage—is invalid. The rationale: it is a sale of non-existent benefits, and selling what does not yet exist is invalid. They also cite the hadith of the Prophet, *may Allah belss him and his family and grant them peace*, forbidding sale of *walā’* (clientage).

**Objection:** *Ijāra* (lease) is valid though it sells non-existent benefits; and the hadith’s rationale is that *walā’* is “a tie like lineage,” so analogizing other rights to it is unsound.

### [Judgments that upheld sales of rights]

**Question:** Prior judges issued rulings concerning quarries; the *madhhab* is known not to validate sales of rights, and quarries are rights. What justifies those rulings? Are they valid?

**Answer:** The sale of rights is a matter of *ijtihād*; thus, one does not denounce a judge who ruled for its validity.

Moreover, judges may have considered custom among people regarding quarries and wild growth, noting that litigants willingly sought judgment according to that ‘urf, content with rulings issued on that basis. By submitting to the judge, they effectively ask to be judged by the prevailing custom;

the judge is thus like an agent for the disputants to resolve their matter by what they agreed to, not otherwise. The parties’ consent to be bound by custom gives the judge warrant to rule accordingly.

**If it is said:** Allah, *Exalted is He*, says, “*Whoever does not judge by what Allah has sent down—they are disbelievers*” [al-Mā’ida:44].

**We say:** in such cases, judgment is by what Allah sent down, because the parties’ consent and commitment to the terms of ‘urf are a legal pathway for adjudication and binding orders: one litigant says, “If my opponent’s document is valid, I accept to hand over the disputed matter,”



or “Let my opponent swear his deed is valid, and I will concede and relinquish my claim,” and the other opponent says like that, and the judge assesses the validity and priority of documents and when to require an oath.

**[What is meant by “selling land with its rights”?]**

**Question:** Parcels are sold today with the deed stating “the land with its rights,” etc. What rights does that oblige the seller to provide?

**Answer:** Parcels today—whether for houses or farms—in our setting do not entail any rights owed by the seller. The buyer is entitled only to the specified plot, unless a right (e.g., an access road) is expressly stipulated in the sale; then the stipulation governs.

**[Sale of Undivided (Common) Land]**

**Question:** A man sold 100 “ḥabala” (measured plots) out of a tract he co-owned with others; the thing sold was an undivided share (mushāʿ), not yet partitioned. He only sold because he needed the cash. The buyer purchased and gave the seller a guarantor for the price; the seller received one-tenth of the price. Then the guarantor and the buyer stalled. More than ten years passed and the seller received nothing further. After those ten years the land had become expensive—its price rose to more than ten times. The seller then disavowed the sale, returned what he had received, and insisted on holding to his land. A dispute arose. The buyer said, “I fulfilled [my duty] by giving you a guarantor,” and produced the guaranty document. The seller replied, “I sold only out of need for the price, and I never got the price.” The buyer said he had already resold that land. The sale had been in “white land” (open, unimproved right) that was later allotted by head-count (al-ḍakīr). How should this case be resolved?

**Answer (and Allah grants success):** Selling white land is invalid in the madhhab, because it is a right, and selling rights is invalid. Accordingly, the cited sale is invalid; the seller may hold to his land and return what he took of the price to the buyer.

However, ruling so broadly would open the door to public discord, since people have already engaged in such transactions and built dealings upon them. So the better course is to leave them as they are:

1. to close the door to strife among people;
2. because selling rights is a probabilistic (ẓannī) issue which a few scholars have allowed.

**Selling Quarries and Set-Backs (right-of-way/yard easements)**

People in our lands and elsewhere have long sold quarries and set-backs/easements without obvious condemnation from scholars, over a long span and with continuous practice. On that basis, it ought to be

deemed permissible; thus the jurists’ maxim “the sale of a right is not permissible” is not absolute.<sup>1</sup>

What I incline to is that rights are of two kinds: public and private. What is forbidden to sell are public rights and some private rights; other private rights may be bought and sold.

Evidence for permissibility: It is narrated that ‘Uthmān bought the well of Ma’ūna and made it for the Muslims.

As for natural ponds (ghudrān) in valleys and open country, they may not be sold or purchased—being public, with people equal in them, none preferred over another. By contrast, wells, cisterns, and the like are private to the one who dug or built them.

Irrigation channels from which orchards and plantings are watered are also of two kinds:

- Some orchards/plots are watered by private channels—either a channel exclusive to a specific plot, or a channel shared by two or more plots without extending beyond them. Such are private rights.
- Other farms are watered by a large flood-channel that waters one tribe, then another, and so on—this is a public right.

Thus, what is a private right here may be sold; what is public may not. This is the people’s practice, as noted.

Among private rights that may be sold: house set-backs (mufāsiḥ), building precincts (aḥrām), and the like; also quarries belonging to specific persons.

**If it is said:** Allah says, *“Do not consume your wealth among yourselves unjustly”* [al-Baqarah:188], and selling rights is of that.

**We reply:** Selling rights is not of that, because the seller is the one most entitled to them; their benefit is exclusive to him. Selling them is like leasing—it is a sale of benefits—so it is not consuming wealth unjustly.

As for pre-emption (shuf’a): though it is a private right, it may not be sold, because it was legislated for the co-owner and the neighbor to ward off harm—something specific to them.

Some also argue against selling rights by the report that the Prophet, *may Allah belss him and his family and grant them peace*, forbade the sale of walā’ (clientage), then analogize other rights to it.

**We say:** the cause of the ban on selling walā’ is that it is a bond like lineage, as in some reports—not, as is claimed, that it is a sale of non-

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1- Sharḥ al-Azhar 3/35.

existent benefits.

**[On Selling an Undivided Share (mushā‘ ghayr maqsūm)]**

**Question:** Disputes are common today over sales of land not yet partitioned among right-holders—what is called selling an undivided share. A seller, out of need for cash, sells 100 ḥabala at 1,000 riyals, because the seller needed 100,000 riyals. The buyer gives the seller 40,000 and stalls on the rest until the co-owners partition their quarry (maḥjar) fifteen years later from the time of sale. Then they quarrel: the buyer wants to take the full 100 ḥabala and pay the remaining 60,000; the seller says, “I’ll give you only in proportion to what you paid—forty ḥabala.” Therefore, disputes, disagreement and conflicts arise, so how should the ruling be between them?

Another case: the seller sells 100 ḥabala as an undivided share and does receive the price, but at partition his share turns out less than what he sold.

Another: he sells thus, then dies before partition; later the quarry is apportioned among right-holders by assessment of tax liability (al-ghārim) or by head-count (al-ḍakīr), and the deceased seller ends up with no share in that quarry. What is the solution?

And if he sold thus, then the quarry was divided by head-count so that the seller’s share was 100 ḥabala while his children’s share was 500 ḥabala, and the seller had sold 200—must he make up the buyer’s shortfall from his children’s shares, since he is the owner and guardian if they are minors, or their liable party if they are adults?

***Answer (and Allah grants success and guidance):***

Selling an undivided share in quarries that are later apportioned by tax liability (al-ghārim) or by head-count (al-ḍakīr) is invalid, due to: the prohibition of selling the khums until it is seized, the prohibition of selling what has not been received, and the prohibition of selling alms before it is received.

Quarries apportioned by ghārim or ḍakīr by mutual consent are public rights, just as khums is a public right. Disposition by sale and the like is not valid until the right is divided among its people and each takes possession of his portion; once divided, sale and the like are valid.

There are distinctions between public rights, private rights, and ownership:

1. By public rights we mean: the grazing of a tribe (or two), or the people of a village (or two); their commons (sāḥa) and their woodlots.
2. By private rights we mean feeder streams whose water flows to specific orchards, each orchard having an assigned measure of

that water.

**Private right:** Its holder is entitled to it in consequence of ownership, and this right is not extinguished by death; rather, it passes by inheritance along with the property.

**Public right:** Each person among the people who share a public right (such as grazing or firewood) is entitled to his share so long as he is alive. When he dies, his right ends and does not pass by inheritance; it remains with the surviving members of the village or tribe.

So, if all those entitled to a public right mutually agree to divide it among themselves—by al-ghārim (tax-liability assessment) or by al-dhakīr (head-count)—and they do in fact divide it, and each takes possession of his portion, then it becomes a private right. Before that, no individual among them has any specific private right.

Accordingly, whoever sells a private right *before it exists and is obtained*—merely on the hope that it will come to be in the future, whether sooner or later—his sale is void, because one of the pillars of sale is missing.

However, since such sales have become widespread, declaring them void would undoubtedly open the door to widespread corruption across the land. A duty is set aside when doing it would lead to a greater harm than the benefit of performing it. Thus a practical resolution is needed.

The remedy is either to strive for conciliation between the disputants—and if reconciliation succeeds, well and good—or else to oblige the seller to give the buyer plots (ḥabala) in proportion to the money actually received, and no more. If the seller has received the entire price, he must deliver the whole thing sold; if he has received nothing, then nothing is due.

We say this by way of reasoned judgment when a formal ruling is blocked, for several reasons:

1. We treat this under the rubric of undertakings. The buyer gave the seller a sum of money; the seller undertook to deliver such-and-such number of plots. If the buyer fulfills his undertaking as agreed, the seller must fulfill his in kind; but if the buyer fails in his undertaking, the seller is not bound to fulfill his. Proof is His saying, *Exalted is He*,: “So long as they are true to you, be true to them” [al-Tawbah:7].
2. Ordinary people have engaged in such sales extensively and believe them valid. The juristic maxim says: “We carry Muslims’ transactions on validity wherever possible.”
3. The seller’s statement, “Give me such-and-such amount of money and I will, after a time, give you such-and-such number of plots,”

is a promise from the seller to the buyer. If the buyer gives the requested money, the seller must keep his promise, due to the stern warning against breaking promises—and this promise is further reinforced by its resemblance to a sale.

**Objection:** Allah said, *“Judge between them by what Allah has sent down”* [al-Mā'idah:49], and *“Judge between people with truth”* [Ṣād:26]. Your proposed resolution departs from that.

**Response:** A formal ruling of invalidity has become infeasible because of the overriding harms it would cause, and the Lawgiver has permitted leaving some obligations in cases of necessity—*“If you fear [danger], then [pray] on foot or mounted”* [al-Baqarah:239].

If judging strictly between the litigants would lead to bloodshed and mischief on earth, it is permissible to leave it. The Messenger of Allah (*May Allah bless him and his family and grant them peace*) left off applying the ḥadd in the slander of 'Abd Allāh b. Ubayy out of public interest.

Where necessity permits leaving the strict rule, the judge should still resolve the dispute and cut off strife in the way closest to right and justice—and what we proposed above is closer to the right, as we have explained.

#### **Second issue:**

If someone sells an undivided share, then the common property is partitioned and the seller's portion turns out to be less than he sold, the buyer is entitled only to the seller's actual portion; he has no claim to compensation from elsewhere, because the sale related to a specific undivided mass.

#### **Third issue:**

If someone sells an undivided share and dies before partition, his right in the quarry ceases. If later the quarry is divided by al-ghārim or al-dhakīr, the buyer gets nothing from it, because it turns out the seller ultimately had no share there. The buyer then has recourse against the heirs for the money he paid.

#### **Fourth issue:**

If the quarry is divided by head-count or tax-liability and the seller's portion is less than what he sold, he is not obliged to make up the buyer's shortfall from the portions of his children, even if he is their liable party or guardian.

### **[Ruling on Printing for Adherents of False Doctrinal Sects]**

**Question:** A man owns a printing press. May he, for a fee, print for people of false sects?

**Answer:** He ought not print, for pay, what he himself judges to be false in creed. He may print works of furū‘ (practical legal branches). That is what the evidences indicate.

**Yes**—selling such works and trading in them for those who will benefit within their own school is permissible, and likewise printing for that purpose.

### **[Selling Paper and Pens to an Oppressor]**

**Question:** Is it permissible to sell writing supplies—paper and pens—to an oppressor? Is that considered assistance [in sin]?

**Answer (and Allah grants success):** There is no impediment. *Al-Azhar* states: “It is permissible to transact with an oppressor—buying and selling—in what one does not presume to be prohibited.” The Prophet (*May Allah bless him and his family and grant them peace*) transacted with the Jews in buying and selling; he (*May Allah bless him and his family and grant them peace*) died while his armor was mortgaged with a Jew for barley, despite their dealing in wine and usury, and likewise did the Companions in his time.

One may also cite by His saying, *Exalted is He*: “*Allah has permitted sale and forbidden usury*” [al-Baqarah:275]. The case in question plainly falls under the generality of sale.

**Objection:** Though sale is permitted, this would be assisting the oppressor, since he will use those pens and papers for falsehood. Allah said: “*Do not cooperate in sin and aggression*” [al-Mā'idah:2].

**Response:** This is not the prohibited cooperation. Proof: the Prophet (*May Allah bless him and his family and grant them peace*) and the Companions bought and sold with Jews who were engaged in usury and wine and in turning people from Allah's path.

To clarify further: Allah has allowed the oppressor, the sinner, the believer, and the disbeliever alike to acquire property—including notebooks and pens—while forbidding oppression. When oppression issues from someone, Allah punishes him for oppression, not for owning or purchasing paper and pens. Thus neither seller nor buyer is sinful for the sale; the sin is in the oppression, not in the transaction—there is no injustice in mere buying and selling.

Another evidence: at Şifīn, when ‘Alī (*Peace be upon him*) men seized the water, he ordered them not to bar Mu‘āwiyah's forces from it. That was not counted as assisting Mu‘āwiyah or strengthening him in aggression.

One may also reason from Allah's creating things and enabling people to benefit from them: that is not aiding those who use creation for sin and transgression leading to injustice and disobedience; were it aiding,

Allah would not do it—He does not do ugly acts, nor will them; all His acts are fair.

**Yes**, scholars exclude selling weapons of war to active belligerents and rebels—that is impermissible. They said, "It is not permissible to sell to them.

In sum, what we have said accords with sound reason. Modern international norms move along these same lines: they forbid selling weapons to an enemy while seeing no objection to other kinds of trade.

### [The Narrowing of Performing the Obligation]

Hadith: "*(O) Jew, we still have the remainder of our day.*" From this it is inferred

- that an obligation's performance does not become constricted except at the end of its time.
- And a month is analogized to a day, and likewise a week and a year.
- That dealing with Jews in buying, selling, and extending credit is permissible, and their consumption of usury does not prevent the permissibility.
- On this branches the permissibility of dealing with oppressors, illicit tax-collectors (*mukkāsīn*), and toll-collectors (*‘ashshārīn*).
- An exception may be made where the transaction concerns the very object wrongfully seized; this is impermissible. Thus, it is not permissible to buy from a thief a car he has stolen or looted, nor to buy from an oppressor land he has usurped, nor to buy from him a garment he has seized, nor to sell him goods in exchange for cash he has usurped.

### [Buying and Selling by Telephone]

**A question** about buying and selling by telephone and taking a deposit (*‘arbūn*)?

**The answer—and Allah grants success:** If the contract of sale is concluded by telephone, it is valid so long as the voice is recognized and there is no mutual denial. If, in such a sale, a deposit (*‘arbūn*) is taken, then the deposit is part of the price; the purchaser is obliged to pay the remainder of the price and then receive the item sold.

Moreover, they have permitted the validity of contracts by written correspondence and letters; therefore, the telephone as a medium is even more deserving of validity.

**Yes**, it is the custom of merchants to transact by telephone while the seller, at the time of concluding the sale, does not own what is the subject of the contract; once the contract is concluded, the seller goes and purchases what was agreed upon. This sale is invalid and one should not



enter into it, due to what has come therein of prohibition from the Prophet—*May Allah bless him and his family and grant them peace.*

**[A Man Sold a House, Then Took the Water Tanks, Doors, Windows, and Electrical Poles/Light Bulbs ]**

**Question:** A man sold a house in a valid sale and received the price in full. Thereafter, he removed the water tank on the rooftop, the tank in the courtyard, and dismantled the doors and windows, as well as the electrical poles and light bulbs. The purchaser objected and demanded that he return them, but the seller refused, arguing that he had sold only the house, not the tanks, light bulbs, doors, or windows. What is the ruling?

**The answer—and success is from Allah:** What is to be followed is the customary practice (‘urf) recognized among the people in the town where the sale occurred. If the custom runs that these items are included in the sale, the seller is ordered to return them. If the custom runs that they are excluded, they are adjudged for the seller in case of dispute. If no custom has developed regarding any of this, then the ruling is for the seller with respect to what is not attached to and fixed in the fabric of the house. Thus say the scholars of the madhhab. They illustrated this with the stone mill: they deemed the lower stone to belong to the purchaser, because it is fixed and attached to the house, and the upper stone to belong to the seller, because it is not attached. As for the doors: if they are installed in the house with fixed installation such that they cannot be removed except by breaking and significant work, they are included in the sale; but if the doors are not fixed such that they can be removed without breaking or technical effort, they are not included in the sale. Likewise for the windows. Accordingly, rooftop water tanks are not included in the sale, because they are not fixed—this being in the absence of a custom either including or excluding them.

**[Ruling on Purchasing Looted Goods]**

**Question:** If war and chaos strike a land, and as a result shops, many homes, and other properties are looted, is it permissible to buy items offered for sale from that looting? And if someone has purchased something from that, what should he do?

**Answer:** It is not permissible to buy looted goods or anything else taken from its owners unjustly. If someone has purchased something from such goods, he must return it to its owners if he can identify them. If he cannot identify them, he must give in charity what he paid for it to the outlets designated for wrongfully appropriated wealth (maẓālīm).

**[Ruling on Purchasing Goods the Buyer Fears May Be Looted]**

**Question:** Goods are sold in the market, and the buyer fears they may be looted or stolen. Is it permissible to buy them nonetheless? And if a

man has bought something of that nature, what is required of him?

**The answer—and by Allah’s enabling:** If the buyer thinks it likely that what is offered for sale is among what looters wrongfully took from its owners, it is not permissible for him to buy it.

- And if he does not think it likely that it is looted, it is permissible for him to buy it. If, after purchasing it, it becomes clear to him that it is looted, then if he knows its owners he must return it to them; but if he cannot identify them and has despaired of doing so, he should dispose of it in the public interest.
- The evidence that the purchaser of a usurped or looted item is in the ruling of the usurper is Allah’s saying: *“And do not consume one another’s wealth unjustly.”* [Al-Baqarah:188] and the hadith, *“The property of a Muslim is unlawful [to take] except with his willing consent.”* Thus, whoever buys an item from a usurper is deemed a usurper; he does not acquire ownership by purchasing from the usurper, and the item remains the property of the one from whom it was usurped; frequent transfers from one buyer to another do not remove it from his ownership.
- If the buyer is in doubt whether the item is usurped or not, and neither possibility outweighs the other, it is better for him to leave it; in leaving it lies safety for his religion and his worldly affairs.
- If it is more likely to him that it is not usurped, it is permissible for him to buy it. The buyer is not required to abandon the item due to a weak possibility that it is usurped or looted. Were one obliged to act on such a weak conjecture, no item could ever be purchased in the market or elsewhere, for every item bears the possibility of being usurped or looted; a man would also refrain from accepting gifts and charity, and would refrain from eating from other people’s food for the same reason.

**If it is said:** The apparent presumption about one whose hand holds a thing is that he owns it, and Muslim judges rule for the possessor in the absence of a disputant—

**We say:** This presumption is shaken and weakened by the indications that what is offered for sale is looted or usurped.

The evidentiary value of possession for ownership is probabilistic, and the indications of usurpation and looting are also probabilistic; when the evidence for permissibility and the evidence for prohibition come together, acting on the prohibition is preferred.

### **[Is It Permissible to Buy a Car from Highway Robbers?]**

**Question:** Is it permissible for a man to buy, for example, a car from

highway robbers, while knowing that they took it by force from its owner... etc.? (This question came from some people of al-Jawf.)

**Answer:** This is not permissible in the religion of Islam and is unlawful. The usurped car remains the property of its owner; whoever buys it from the usurper has squandered his wealth and involved himself in the crime of usurpation, sharing with the usurper in taking others' property without right. Thus the purchaser has lost lawful wealth and exchanged it for unlawful wealth—*"He has lost [this] world and the Hereafter; that is the manifest loss."* [Al-Hajj:11]

Moreover, **an objector may argue:** "There is no harm upon me in what I did, for I purchased the car lawfully; I did not perpetrate the highway robbery nor the usurpation."

We reply to them: There is no doubt that Allah, *Exalted is He*, has forbidden the wealth of Muslims to one another, except what the owner is content to give by sale, gift, vow, charity, etc. In the hadith [of the Farewell Sermon] it came: *"Indeed, your blood and your wealth are sacred to you like the sanctity of this day of yours..."* to the end of the famous sermon. And Allah, *Most High*, said: *"O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent from among you."* [An-Nisā':29] And He, *Most High*, said: *"Indeed, Allah commands you to render trusts to whom they are due..."* [An-Nisā':58].

Therefore, the highwayman who seized the car has sold what he does not own, and the purchaser has bought from other than the owner of the car. Thus the one who buys the car from the usurper has taken and purchased what Allah and His Messenger—*May Allah bless him and his family and grant them peace*—have prohibited in the Book and the Sunnah.

### **[Changing the Outward Appearance of Goods for Fear of Confiscation]**

**Question:** A man imported merchandise from Saudi Arabia to Yemen. This merchandise is exactly like that imported by the official agent; there is no difference between them. The manufacturer is the same, the size is the same, and the composition is the same; the only difference between the two is the agent's name. This importer who brought it from Saudi Arabia fears that, if he displays this merchandise, it will be confiscated. Is it permissible for him to change the packaging/label to avoid that?

**The answer—and Allah is the granter of success:** If that entails no deceit of the purchaser, then there is no impediment. Importing through other than the official agent is permissible, and an agent's preventing all goods not coming through him and seeking the state's backing for that is forbidden in the Sacred Law; in doing so he is transgressing. He has no

right to monopolize the market or to forbid importation except through him; this is a settled matter in the Sharia.

Moreover, importing through other than the agent carries a general benefit for all Muslims in the country, namely the availability of goods and lower prices.

### **[The Ruling on Partnering with a Zakat Official Who Buys a Commodity with Zakat Funds]**

**Question:** An employee in charge of zakat (al-wājibāt) wants to partner with one of his brothers in purchasing a commodity to be shared equally between them. This employee will be the one to provide the price of the commodity, and his brother knows that the money he will provide toward the price comes from zakat. Is it permissible to partner with him in this situation?

**The answer—and Allah is the granter of success and aid**—is that the solution and lawful workaround is: you and your brother purchase the commodity for a price on credit, not specified in particular cash. On that basis, the commodity is lawful for you, even if your brother later pays the price from zakat funds. Your brother alone bears responsibility for his disposition of the zakat and for its misapplication.

As for the seller, what appears to me—and Allah knows best—is that it is permissible for him to take the price even if he suspects it is from zakat funds. That is because when the purchaser disposes of the zakat monies in his possession, by that act he becomes liable for what he has disposed of; when later called to account for the zakat, he will be ruled liable to pay the like of what he consumed, not the seller who received the price.

The jurists of the madhhab have said: He is not obliged to return the very item once it has left his hand, but rather its like. This indicates that the one into whose hand the money has passed (i.e., the seller) is neither liable nor responsible for it; rather, the responsible party is the one who took the zakat out of his possession. What reaches the seller in that case is not zakat, and the one answerable for the zakat is the owner upon whom it was due, or his agent who was entrusted with it.

If the owner knew the dishonesty of the official charged with the zakat, then what he handed over to him does not count as zakat; thus the owner remains one who has not discharged his zakat.

If the owner believed him to be just and trustworthy and that he would place the zakat in its proper outlets, but later discovered the contrary, then the obligation in that case upon the owner is to pay the zakat anew and discharge it a second time.

If nothing becomes apparent to the owner, then perhaps it will suffice

him, for Allah *Most High* has said: *“There is no blame upon you for what you do by mistake, but [only] for what your hearts intended.”* [Al-Ahzāb:5]

The evidence for what we have mentioned is analogy: if a man owes debts and then sends funds with messengers to settle those debts, but the messengers are negligent with the money, dispose of it, and betray the trust, then the man who sent the money remains liable for the debt, and that remittance does not absolve him of the debt in any way.

### **[Placing the Best Fruit or Vegetables on the Top of the Basket]**

**Question:** It has become customary in the produce markets that the seller places the best fruit or best greens on the face of the basket and puts the lesser quality underneath. What is the ruling on that?

**The answer—and Allah is the granter of success:** If the matter has become a custom, there is no impediment to it. However, the buyer retains the option of inspection (khiyār al-ru’yah) and the option due to defect (khiyār al-‘ayb). If he inspects the merchandise and looks at what is underneath, then if he wishes he may take it and if he wishes he may return it. The seller is not permitted to refuse a return, for Allah *Most High* says: *“...except that it be a trade by mutual consent.”* [An-Nisā’:29] Hence the seller is obliged to take it back even if it has no defect. If it does have a defect, he is likewise obliged to take it back.

Accordingly, the purchaser is not obliged to take the commodity unless he has looked at it, seen it, and seen the defect and consented to it. If the buyer’s consent is realized, then the seller is not obliged to take it back and the sale is concluded—unless there is a condition or the like.

### **[Dealing with One Who Engages in Usury]**

**Question:** Is it permissible to deal in buying and selling with one who engages in usury, or is it not permissible?

**The answer—and Allah is the granter of success and aid—**is that it is permissible to deal in buying and selling with the usurer and the oppressor—except in what is known specifically to be unlawful in itself; for example, a thief offers a car for sale and you know it is stolen. In such a case, it is not permissible to purchase it.

### **[He Sold While Knowing of a Defect But Did Not Inform the Buyer]**

**Question:** If the seller of a commodity knows of a defect, is it permissible for him to sell it without informing the buyer of the defect?

**The answer—and Allah is the granter of success—**is that it is not permissible for the seller to sell the commodity while knowing it has a defect, unless he informs the buyer of the defect; then there is no harm. This is because such conduct is a kind of deception, against which warning has come in what is related from the Prophet—*May Allah bless*

him and his family and grant them peace—who said: “Whoever deceives us is not of us.” And because that contradicts what is related from the Prophet—*May Allah bless him and his family and grant them peace*—namely his saying: “A believer is not (truly) a believer until he loves for his brother what he loves for himself, and dislikes for him what he dislikes for himself,” and due also to what is established regarding the obligation of sincere counsel for Allah, His Messenger—*May Allah bless him and his family and grant them peace*—and the elite and the common folk of the Muslims. This agrees as well with what is reported in the books of fiqh from the Prophet—*May Allah bless him and his family and grant them peace*—of prohibiting such a sale as mentioned specifically in the question.

### **A Benefit Regarding Defects**

If the seller knows of a defect in the commodity, he is obliged to inform the buyer of its defect; if he does not, he is sinful. Likewise, those present—if they know of the commodity’s defect—must inform the buyer of the defect; if they do not inform him, they sin.

Despite that, the sale stands, but the buyer has the option upon discovering the defect: if he wishes, he may accept the commodity; if he wishes, he may return it to its owner. Thus say the scholars of the madhhab, as in *al-Bayān* and other works<sup>1</sup>.

One may also adduce for this what has come in the sound report: “A believer is not (truly) a believer until he loves for his brother what he loves for himself, and dislikes for him what he dislikes for himself,” and what is established regarding the duty of sincere counsel for the generality and the elite of the Muslims.

### **[Benefits from *al-Muhadhdhab* Concerning Sales]**

In *al-Muhadhdhab*: “Whoever purchases something, pays the price, and has not yet taken possession of it, then appoints another to sell it—his appointing him to sell it is, by custom, an appointment to take possession of it; transactions in sales do not require intentions.” End quote.

And in *al-Muhadhdhab* also: “Whoever’s wealth accrues from usurious trade and he then purchases estates therewith, the sale does not conclude. And if the purchaser dedicates it as a charitable endowment (waqf), the waqf is not valid.” End quote.

### **[Working with a Merchant Who Sells Imported Chicken]**

**Question:** A man works with a merchant. Is it permissible for this

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1- *Sharḥ al-Azhār*, 3/104.

worker to buy and sell slaughtered chickens that were slaughtered abroad and imported from the land of Christians, upon which is written: ‘Slaughtered according to the Islamic method’?

**The answer—and Allah is the granter of success**—is that the permissibility of the slaughter of the People of the Book is a matter of scholarly disagreement: some scholars deemed it lawful while others deemed it unlawful.

If this worker is buying and selling with a man who deems it lawful, and the people of that land deem it lawful, then the buying and selling are permissible and its price is lawful for the owner of the business; assisting him in what is lawful for him is permissible. What is not permissible is assisting him in what is unlawful to him. This is what appears to me, and Allah knows best.

**If it be said:** If the matter is as you described, then it would be permissible for a Muslim to hire himself out with a dhimmī to sell wine, engage in usury, sell pork, and the like.

**We say:** It is not the same. What we have mentioned is a matter of valid disagreement among Muslim scholars, they said, “every mujtahid is correct”—and thus the permissibility of eating the chicken mentioned in the question and buying and selling it is a recognized position in Islam; whereas selling wine and the like is something forbidden in the religion of the Muslims, and there is no doubt about that among them collectively.

### **[The Ruling on Selling Tape Recorders, Televisions, and the Like]**

**Question:** Is it permissible to buy and sell radios, tape recorders, and televisions, given that many people use them for what is unlawful as well as what is lawful? Or is that impermissible?

**The answer—and Allah is the granter of success:** There is no objection to buying and selling such items, as well as anything that can be used for both lawful and unlawful purposes.

What is impermissible to sell is that which is made specifically for the unlawful—such as flutes, the ‘ūd (lute), and all other instruments of prohibited entertainment and the like. It is also impermissible to sell weapons to those who are at war against the Muslims, whether they are unbelievers or rebellious aggressors.

The evidence for what may not be sold: our statement that it is impermissible to sell what is made specifically for the unlawful, and that selling weapons to those waging war is prohibited, is what the outward sense of the Noble Book indicates. Among that is Allah’s saying: *“And do not cooperate in sin and aggression.”* [Al-Mā’idah:2], and similar passages in the Qur’an.

There is no doubt that providing instruments of entertainment and selling them is a major cause of spreading corruption and the proliferation of wrongdoing; and selling weapons to combatants strengthens their side and reinforces them, leading to increased aggression against the Muslims and harm to them—and that is sufficient to count as aiding aggression.

The evidence for what we stated in the first part of the answer is that there is no definitive impediment to selling such items except the suspicion that they will be used for the unlawful, and that is not a barrier. The proof is what is well known about the Prophet—*May Allah bless him and his family and grant them peace*—that he used to transact in Madinah with the Jews in buying and selling, even though he—*May Allah bless him and his family and grant them peace*—knew that they engaged in usury and invested their wealth in it. Allah did not forbid him—*May Allah bless him and his family and grant them peace*—from dealing with them. Likewise, his Companions during his time—*May Allah bless him and his family and grant them peace*—had many dealings with the Jews, and he—*May Allah bless him and his family and grant them peace*—did not censure them for those dealings; rather, he approved them and himself—*May Allah bless him and his family and grant them peace*—engaged in them, as we have mentioned.

The Prophet—*May Allah bless him and his family and grant them peace*—and the Companions knew, too, how the Jews used their wealth in unlawful ways. Allah, Exalted is He, described them in His Book, saying: “...and [for] their taking of usury while they had been forbidden from it, and their consuming of people’s wealth unjustly.” [An-Nisā’:161], and “...devourers of illicit gain (suḥṭ)...” [Al-Mā’idah:42], and other descriptions Allah gave them—of turning people away from the path of Allah, spreading corruption on earth, etc.

### [The Ruling on Selling the Impure]

Some scholars of the madhhab said—as in *al-Sharḥ* (and he is the jurist Yaḥyā al-Buḥaybīḥ): A man may purchase what is beneficial, such as a dog for hunting, and the dung of animals whose meat is not eaten; for one attains the lawful by lawful means. End quote.

As for selling it, the marginal commentary says: As for the dog—if it is of no benefit, its sale is invalid; if it is beneficial, then Zayd ibn ‘Alī (*Peace Be Upon Him*), al-Qāsim, an-Nāṣir, Abū Ṭālib, (*Peace Be Upon Them All*), and Abū Ḥanīfah said: its sale is valid. And in *al-Aḥkām*, al-Mu’ayyad Billāh, ash-Shāfi’ī, and Mālik said: its sale is not valid, though gifting it, vowing it, bequeathing it, and keeping it—so long as it causes no harm—



are valid. The clarification is complete; end quote.<sup>1</sup>

**I say:** What appears to me is that if the seller benefits from the dog for hunting or guarding, then its sale is valid and lawful for him, and he may eat its price; otherwise, no. The proof is the concession (rukḥṣāh) allowing dogs to be kept for hunting and guarding. If the seller is among those to whom the concession applies, then selling is valid for him as a corollary of valid ownership and possession; the cause for prohibiting consuming its price is removed by the concession. Likewise, one says regarding carrion meat for the one in dire necessity: it is permissible to sell and buy it for the holder of the concession, because the cause preventing that—namely, the prohibition—is lifted with respect to the one availing himself of the concession.

### **[The Ruling on a Person Selling His Kidney to a Patient]**

**Question:** Is it permissible for a Muslim to sell one of his kidneys to a patient? Is it permissible for him to sell his blood to a patient? Likewise, what about selling any other organ of his body? And if the Muslim dies, is it permissible to transplant one of his organs to a patient?

**The answer—and by Allah’s enabling:** Transferring blood and organs from one person to another are newly arising matters for which the Lawgiver has not set down rulings specific to them. However, in our upright religion there are universal principles under which these newly arising issues may be subsumed and from which their rulings may be derived—such as Allah’s saying, after mentioning some prohibitions: “...excepting that to which you are compelled.” [Al-An‘ām:119], and His saying: “*And do not kill yourselves.*” [An-Nisā’:29], and the hadith: “*No harm and no reciprocating harm,*” along with what is known of the sanctity and great dignity of the Muslim, living and dead. On that basis we may say:

It is established that a Muslim may remove surplus blood from his body by cupping (ḥijāmah), and it is well known about the Prophet—*May Allah bless him and his family and grant them peace*—that he used to undergo cupping; there is no disagreement about its permissibility.

Accordingly, it is permissible for a Muslim to remove surplus blood; and, in cases of necessity, it is permissible to benefit from that blood, and for the one compelled to it to purchase it and benefit from it in his body. As for the one who provides the blood, it is not proper for him to take a price for what he has given of blood; however, there is no harm in compensating him for that—not as a sale price, but as an act of kindness.

— It is permissible for a Muslim to donate one of his kidneys to a patient in need of a kidney, on condition that a qualified specialist

1- *Sharḥ al-Azhār*, 3/32.

determines that removing his kidney entails no danger to his health, either presently or in the future.

— A Muslim may receive compensation in return for his donation of a kidney; it is not proper that he take a sale price for it on the basis of buying and selling.

— If taking an organ from a deceased person would save the life of a Muslim, it is permissible with the permission of the heirs—for example, to take the deceased’s heart and give it to the sick Muslim.

### **[The Ruling on Stud Fees (‘Usb al-Fahl)]**

**Question:** A man may have a cow but cannot find a bull for it except for a fee, and he is troubled by that. Is it permissible for him to pay a fee for having his cow inseminated if he cannot find a bull except for a fee, or not?

**The answer—and Allah is the granter of success and aid**—is that what appears to me is permissibility, on the condition that he cannot find a bull except for a fee. This is because the prohibition is directed to the owner of the sire—that he not take a price for his sire’s semen. If the cow’s owner is in necessity, it is permissible for him to pay the fee, while it is prohibited for the sire’s owner to take it and consume it. If the cow’s owner can find a bull without payment, it is not permissible for him to turn to one who takes a price—not because he is forbidden to pay, but because doing so would aid the sire’s owner and affirm him upon the wrongdoing.

**If it is said:** Aiding the sire’s owner and affirming him upon wrongdoing is impermissible in both cases; what is the evidence for permitting it in one case and not the other?

**The answer:** The state of concession (rukḥṣah) differs from the state of strict resolve (‘azīmah). The state of permissibility here is the state of necessity, and the ruling under necessity differs from the ruling by choice.

### **[Taking Some Goods from the Neighboring Shop]**

**Question:** A client comes to me and gives me a list of goods he needs. I gather what he requested, and there may remain one item or more that I do not have. I buy it from my neighbor and issue him a single sales invoice for all of it, knowing that I sell the missing item at the market price. Is that permissible or not—bearing in mind that my neighbor and I have agreed that whoever is missing something may take it from the other?

**The answer—and Allah is the granter of success**—is that what you described is permissible, and it does not fall under what is prohibited in the hadith: “Do not sell what you do not possess,” because you only sold

what you had, as your neighbor had given you permission to take what you lacked.

### **[Forms of Sales and Their Rulings]**

**The first question:** If a man says to another, “Buy me a car in your name on installments, and I will pay you the installments at their due dates, and you will have one thousand riyals for that”—is this permissible?

**The second question:** A man said to another, “Sell me your building and give me a deed to it in a sham sale so that, by means of the sale’s appearance, I can obtain from the state a loan of five hundred thousand; you will have one hundred thousand riyals when I receive the loan.” Is this permissible or not?

#### **Answer to the first question:**

What appears [to be correct] is the permissibility of taking the one thousand riyals in return for that service which the purchaser renders to the man—provided there is no increase in the price on account of the term. In reality, this is a hire (ijārah) to purchase the car on installments and to pay the installments at their due dates; there is nothing in this hiring that prevents its validity or the permissibility of taking a fee for it. The default in transactions is validity.

#### **Answer to the second question:**

Stratagems (ḥiyal), generally speaking, are permissible if they are a means and path to something permissible and lawful.

The stratagem mentioned in the question is intended to obtain a loan from the state, and borrowing from the state or from others is, in principle, permissible across the board. I have not seen anything that prevents the permissibility of the stratagem mentioned in the question.

**If it is said:** Perhaps the state has allocated and designated a sum of money for loans to those in need of housing and not to others. In that case the stratagem would be a means to taking the rights of those in need of housing, which is not permissible, and the stratagem would thus be prohibited.

**The reply:** Even if the state designates and allocates an amount for those in need of housing, the wealthy do not take loans, because their wealth is manifest and well known. As for the rest of the citizens, each one of them has a right due from the state, whether he has a house or not. Thus, by that stratagem he is merely obtaining his right or part of his right.

#### **Benefit (al-Ma‘tūh):**

The Savage (*ma‘tūh*) is one in whom heedlessness and lack of acumen regarding matters predominates, despite his full ability to distinguish.

It is also said: a disturbance of mind such that his speech is confused—at times resembling the speech of the rational, and at times resembling the speech of the insane.

The jurists of the madhhab permitted his buying and selling, but not his divorce. And they reversed the ruling for the drunk person: they said, his buying and selling are invalid, while his divorce is valid.

### [Trading in Intoxicants and Usurped Wealth]

**Question:** A man's trade was in wine and narcotics; then he repented, regretted it, and returned to Allah. He has a large amount of money in his hand; he put it into lawful trade and has continued in that—buying, selling, eating, and spending. How can he find a way out with Allah? What is obligatory upon him?

**Question:** Another man stole wealth and traded with it for a long period; that wealth multiplied and the profits increased. He then wanted to be free of it and to repent. What should he do?

**Answer to the first question:** Whatever was realized from trading in wine is unlawful—filthy gain—and it is not permissible to consume it, as is related in the well-known report from the Prophet—*May Allah bless him and his family and grant them peace*. It also came from the Prophet—*May Allah bless him and his family and grant them peace*: “Indeed Allah, when He forbids a thing, forbids its price [as well],” or as he said. Apparently, this is a matter of agreement among all the scholars.

I do not think that distinguishing here between a specified price and an unspecified one avails anything. The truth is that whatever was obtained by means of trading in wine—selling it and buying it—is unlawful, whether the price was specified or not, due to the apparent generality of the evidences.

As for the wealth he acquired through that trade, some have said that it should be spent in public interests—such as [supporting] scholars and students. This view is more cautious in religion and closer to safety.

It may also be said: If a person repents from that, ceases it, and returns to Allah, then what is in his hand becomes lawful to him.

One may infer this from Allah's saying in the verse on usury: “*So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah.*” [Al-Baqarah:275], and His saying: “*And do not compel your slave girls to prostitution, if they desire chastity, to seek [thereby] the temporary interests of worldly life. And if anyone should compel them—then indeed Allah is to them, after their compulsion, Forgiving and Merciful.*” [An-Nūr:33], and His saying regarding the highway robber: “*Except for those who return [repenting] before you apprehend them—then know that Allah is Forgiving, Merciful.*” [Al-

Mā'idah:34].

**As for the answer to the second question:** The usurper must return the like of what he usurped or its value and seek pardon; as for the profits, their ruling follows what has preceded.

### **[How One Who Gained Wealth from Trading in Narcotics Can Find a Way Out]**

**Question:** A man bought and sold in narcotic pills, profited, and amassed wealth; he married; and when admonition spread and he heard the exhortations, he repented and wished to rid himself [of the ill-gotten gains]. What should he do regarding the monies in his hand? How can he find a way out?

**The answer—and Allah is the granter of success**—is that what is known among the scholars and settled with them is that when Allah has forbidden a thing, He has forbidden its price. Among the evidences for this is what is narrated from the Prophet—*May Allah bless him and his family and grant them peace*—who said: “*Allah cursed the Jews: when Allah forbade their fat, they melted it, sold it, and consumed its price,*” or as he said. There are also narrations on the prohibition of the price of a dog, wine, and other things.

In truth, the proof that indicates a thing's prohibition, by itself, indicates the prohibition of its price. The scholars of legal theory call the proof that indicates this “the general purport (‘umūm al-muqtaḍā).” Thus, in the likes of “*Prohibited to you are dead animals ...*” [Al-Mā'idah:3], they say that this, by the general purport, indicates the prohibition of eating, selling, buying, possessing, and all other forms of benefiting that could occur.

By what we have mentioned, it becomes clear that it is not permissible to consume wealth obtained from the price of what Allah Most High has forbidden, nor to take possession of it, nor to benefit from it.

As for the question of how to rid oneself of its consequences: Know that Allah Most High has made the path of repentance easy for His servants and facilitated it, as a mercy to them. He, *Glorified is He*, said in explaining the repentance of those who consume usury: “*So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah; but whoever returns—those are the companions of the Fire; they will abide therein eternally.*” [Al-Baqarah:275]. Thus Allah, *Exalted is He*, pardoned the usury-eaters for what they had previously taken of usury if they repent and desist from taking usury.

He did not obligate them to give in charity what was in their hands of wealth, nor to return it to its owners; rather, He commanded them to abandon what remains with people of usurious increase and to take only their principals. He, *Exalted*, said: “*O you who have believed, fear Allah*

*and give up what remains [due to you] of usury ...” [Al-Baqarah:278], and “But if you repent, you may have your principal—you do no wrong, nor are you wronged.” [Al-Baqarah:279].*

On that basis we say: This man who was trading in narcotics has, in his repentance, the same ruling as the usury-eaters when they repent. If this man repented when the admonitions of the preachers reached him and he ceased his unlawful trade, then he may keep what is past and his affair is with Allah; he is not obliged to give in charity what he had acquired before repentance, and sincere repentance with remorse is sufficient for his deliverance, if Allah wills. This is what appears to me. And Allah Most High knows best. Praise be to Allah, Lord of the worlds, and may Allah bless Prophet Muhammad and his family, and grant them peace.

### **Clarification**

A man who trades in narcotics and the like among the various prohibitions—sincere repentance and ceasing the act suffice him; he need not return the monies to their owners nor give them in charity. We only say this because he was taking the prices with their owners’ permission and consent; they permitted him to take, consume, dispose of, and take possession of [those monies].

Thus the trader, in that case, has fallen short only with respect to Allah’s right—by partaking of what was forbidden to him. Hence, repentance to Allah Most High concerning what he fell short in regarding His right is sufficient; he need not seek release from the creatures from whom he took those prohibited monies, for they had permitted them to him and authorized him to take them, dispose of them, and take possession of them.

### **[The Ruling on a Drug Trader’s Wealth if He Repents]**

**Question:** About a man who used to trade in narcotics, then he heard the exhortations of the preachers, so he repented from that and returned to Allah Most High. He asked about the monies in his possession that he had acquired through that avenue—what is their ruling?

**The answer—and by Allah’s enabling:** If he repents to Allah Most High and is truthful in his repentance and return to Allah Most High, then what is in his hand of those unlawful gains becomes lawful for him.

The proof for that is what has come regarding the usury-eaters in His saying, *Most High: “So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah ...” [Al-Baqarah:275].*

### **[How One Who Used to Trade in Hashish and Narcotics Should Repent]**

**Question:** A man used to sell and buy in hashish and narcotics. Then destiny led him to a mosque in Ramadan; he heard the exhortations and supplications, kept returning to that mosque on the nights of Ramadan, his heart was illuminated, he desired to repent to Allah, regretted what he had been doing, sought forgiveness, and turned back [to Allah]. He asked: how should he deal with what is in his hand of profits from that trade? And how should he deal with the debts people owe him, and with the debts he owes to people?

**And the answer—and success is from Allah:**

1. What is in his hand of profits earned from the narcotics trade becomes his at the time of repentance; it is lawful for him to own it and benefit from it, with no liability attaching to him for that—because of His saying, *Most High*, regarding the usury-eaters: *“So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah.”* [Al-Baqarah:275].
2. Debts owed to him by people for hashish and narcotics—he must leave them and not take them; they are not lawful for him.
3. A debt he owes to people for narcotics—he is not obligated to repay it as between him and Allah. But the creditors will not necessarily forgo it; he can deal gently with them, inform them that he has repented from trading in narcotics, and invite them to repent to Allah and leave that trade. Allah Most High must surely make a way out for him if he is truthful in his repentance, for He, Most High, says: *“And whoever fears Allah—He will make for him a way out, and will provide for him from where he does not expect.”* [At-Talāq:2–3]. If the penitent finds no way to escape the pressure of the creditors, he may settle with them to be spared pursuit and harassment by paying whatever amount is possible.

**[Purchasing a Commodity and Using a Stratagem with Others to Raise Its Price]**

**Question:** Is it permissible that I buy merchandise from a man, then leave it with him and tell him, “I will bring a man or two; we will buy this merchandise from you, so raise its price,” then I bring two men and I and they buy that merchandise in halves at the raised price; thereafter we go to the market and sell, and I proceed to lower the price greatly, which leads to a loss for that buyer whom I brought—or causes him to be stuck with his goods?

**The answer:** Such conduct is not permissible, and it is not fitting for a Muslim to enter into it. The Messenger of Allah—*May Allah bless him and his family and grant them peace*—prohibited such a thing; it is authentically narrated that he—*May Allah bless him and his family and grant them peace*—forbade *najsh*—and *najsh* is that you bid up the price

of a commodity (or cause another to do so) in order to deceive the purchaser into buying it at that price, or to bewilder the seller.

### [Trading with Stolen Cash]

**Question:** A man bought and sold using stolen cash until it became a large business. Then he repented and wanted to be clear of it—what is required of him?

**The answer—and Allah is the granter of success**—according to the scholars of the madhhab is that if the cash (*fulūs*) is not gold or silver, then nothing is required of him except to return its like, and its profits are lawful for him. But if what was stolen or usurped was gold or silver, then: if he purchased “on liability” (to the debtor’s account) and paid [later] with the usurped gold/silver toward what he had purchased, he owns what he bought and its principal and profit are lawful to him. If, however, he purchased with the very usurped coins—such as saying at purchase, “I have bought this item from you with these coins,” and the seller accepted—then in this case the profit is forbidden to him.

Thus, if the capital was one hundred and he sold for one hundred and twenty, the hundred is lawful to him and the twenty is unlawful. If he then buys with the one hundred and twenty, the profit on the hundred is lawful to him and the profit on the profit is unlawful to him—so the profit on the twenty, and the profit on its profit, and the profit on the profit of its profit, and so on, are forbidden; while the profit on the hundred and the profit on its profit ... etc., are lawful.

But if the purchase was “on liability,” as when he says, “I have bought this from you for one hundred,” and the seller says, “I have sold,” then the one hundred and its profit, and whatever profit accrues thereafter, are lawful to him. Thus have the scholars of the madhhab set it forth<sup>1</sup>.

What is unlawful to him of the profit as mentioned in the foregoing example—he must give it in charity.

**I say:** The proof for what is mentioned in this chapter is the hadith of the sheep that was slaughtered for the Messenger of Allah—*May Allah bless him and his family and grant them peace*—without the permission of its owners; the Prophet—*May Allah bless him and his family and grant them peace*—ordered them to give it in charity ... etc. This indicates that what is acquired by a prohibited route must be given in charity.

So if the usurper buys with the very usurped cash and he realizes a profit, he must give that profit in charity—and likewise the profit of that profit.

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1- *Sharḥ al-Azhār*, 3/539.



### **[The Ruling on Selling One’s Usage Right over an Endowment (Waqf) Property (Naqlat Qadam)]**

“Selling the *hand*”: that a person holds a waqf property and cedes his occupancy/usage right to another in return for money paid to him by way of sale.

It is said: this sale is unlawful.

And it is said—and this is the madhhab: if there is a genuine expense/liability (*gharāmah*) that has accrued, such that the price is directed in exchange for it, then the sale is valid; otherwise, it is not<sup>1</sup>.

**I say:** The custom and usage have run, in Ṣa’dah, of selling waqf shops, which they call (*naqlat qadam*), without objection from the scholars. Perhaps the absence of objection is because the shopholder is not without some expense that has befallen him in the shop—even if small—such as repairing a door, fixing a lock, whitening the walls with lime, or the like.

### **[The Seller Giving the Buyer Another Plot of Land to Benefit From Instead of His [Disputed] Plot]**

**Question:** A man bought a plot of land in which there is some dispute. The seller said to the buyer: “I will give you another plot of land; benefit from it and plant it. When we finish the partition and the dispute ends, I will take back the sold [plot] and you will return my land.” Is such conduct permissible or not?

**The answer—and Allah is the granter of success**—is that this is permissible, and nothing has appeared to me that would prevent it; for it does not resemble any of the prohibited forms of sale.

Moreover, the scholars of the madhhab have permitted an increase in the sold object after the contract, and what is mentioned in the question is a type of that, or close to it.

The outward sense of the question is that the seller has offered the other land to the buyer willingly, permitting the buyer to benefit from it and cultivate it.

**If it is said:** An increase in price on account of a debt and deferred payment is prohibited, and this [arrangement] resembles that—even if the increase in one case is in the price and in the other is in the sold object.

**We say:** The increase here is not stipulated, nor did it enter into the contract; it is from the seller himself, not at the buyer’s request, nor with

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1- *Sharḥ al-Azhār*, 3/503.

a prior understanding. Rather, the seller offered it, because an impediment arose to delivering the sold item, in order to compensate the buyer for the benefits of the sold item that he is missing.

**If it is said:** Why not liken this to a pledge (*rahn*)?

**We say:** The aim for which the buyer took the [substitute] land is not the aim intended by a pledge.

### **[Purchasing a Commodity Whose Price Increase You Learned of Before the Seller Knew]**

**Question:** It sometimes reaches me that the price of a certain commodity has risen. Is it permissible for me to hasten to buy that commodity from shop owners who have not yet learned of the price increase?

**The answer—and by Allah's enabling:** That is permissible and valid, due to His saying, *"And Allah has permitted trade and forbidden usury,"* [Al-Baqarah:275] and His saying, *"...except that it be trade by mutual consent among you."* [An-Nisā':29]

### **[Hastening to Purchase the Commodity Before the Seller Knows Its Price Has Risen]**

**Question:** A man learned that the price of a commodity had risen, so before the news spread he hastened to buy that commodity from shop owners who did not know of the increase. What is the ruling in such a case?

**The answer—and Allah is the granter of success:** The sale and purchase mentioned are valid—this is what is apparent—because it is a sale arising from mutual consent. However, it is not fitting for a believer to engage in it, in light of what faith entails of sincere counsel and loving good for the believers, and because that may engender rancor in the hearts of the sellers toward the buyer who seized the opportunity of their ignorance of the price increase.

**If it be said:** Why do you not also declare it a prohibited sale?

**We say:** We did not say so because the sale was by the consent and choice of both seller and buyer; thus it is a valid sale. Allah Most High has said: *"And Allah has permitted sale and forbidden usury."* [Al-Baqarah:275] Hence, such a sale is lawful by the explicit text of this verse.

### **[A Shop That Sells Only on Credit]**

**Question:** There is a shop whose owner sells on credit at more than the market price, with set prices for each item. He opened it for the purpose of selling on credit, and he does not sell for cash. Is such an arrangement permissible for the seller and buyer?

**The answer—and Allah is the granter of success:** What appears is

that this is permissible. There is no objection to the seller setting a high price so that only those buying on credit will purchase, rather than cash buyers.

What is prohibited is for an item to have two prices: one for credit and one for cash. If there is only a single price, there is no objection.

## [Chapter: Conditions Concurrent with the Contract]

In the marginalia of *Sharḥ al-Azhār*: from Wārith ibn Saʿīd—he said: I entered Kūfah and found three of its jurists: Abū Ḥanīfah, Ibn Abī Laylā, and Ibn Shubruma. I asked Abū Ḥanīfah about a sale with a condition; he said: “Both are invalid.” Then I asked Ibn Abī Laylā; he said: “The sale is valid, and the condition is invalid.” Then I asked Ibn Shubruma; he said: “Both are valid.” I returned to Abū Ḥanīfah and informed him of what they had said; he replied: “I do not know what they said, but there is a prohibition by the Prophet (*May Allah bless him and his family and grant them peace*) of a sale and a condition.” Then I went in to Ibn Abī Laylā and informed him of what they had said; he replied: “I do not know what they said, but he (*May Allah bless him and his family and grant them peace*) permitted the sale and invalidated the condition in the report of Barīrah.” Then I went in to Ibn Shubruma and informed him of what they had said; he replied: “I do not know what they said, but in what the Prophet—*May Allah bless him and his family and grant them peace*—purchased from Jābir ibn ‘Abd Allāh (*May Allah be pleased with him*) a camel, and Jābir stipulated its back [for his riding] until [they reached] Madinah—he validated both the sale and the condition.” End quote.<sup>1</sup>

**I say:** The jurists of the madhhab have divided the conditions that accompany the sale contract into three categories, in line with what came in those reports. They spoke with the view of Abū Ḥanīfah regarding one category, with the view of Ibn Abī Laylā regarding a second, and with the view of Ibn Shubruma regarding a third:

1. **The first of them** is the view of Abū Ḥanīfah—that both [sale and condition] are invalid—and they applied that to:
  - A) When the condition is future-oriented, such as: “I have sold to you if Zayd comes,” or “if he comes,” or “whenever he comes.” The reason for invalidity is clear: the sale contract does not conclude at once; rather, its occurrence is made contingent on a future condition.
  - B) What entails ambiguity in the sale—such as stipulating, within the sale contract, an option (*khiyār*) of unknown duration; for then the contract is ambiguous, with no knowledge of when it will stabilize and be fixed—or ambiguity in the sold item or in the price.
  - C) What, among conditions, negates the legal effect of the contract—such as [selling] on condition that you do not sell, do not gift, or

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1- *Sharḥ al-Azhār*, 3/56–57.

do not wear.

- D) Or a condition that has no connection to the sale, such as “two conditions in one sale,” or “two sales in one sale.”

**Comment:** It would have been proper for the jurists of the madhhab to classify what appears under item (c) among those cases where the sale is valid while the condition is void, because it is closer to the ḥadīth of Barīrah.

And the jurists of the madhhab distinguished here between “on condition that you do not sell” and “on condition that you sell”: the negative formulation invalidates both the sale and the condition, whereas the affirmative formulation is void (of effect) while the sale remains valid.<sup>1</sup>

2– **The second category:** cases in which both the condition and the sale are valid.

- A) Conditions are valid so long as they do not entail ambiguity (jahālah), such as an option (khiyār) of a known duration.

- B) Or where the condition is intended as a description of the sold item pertaining to an already-existing attribute—for example: “on condition that it is a milch animal,” or “I sold you this land on condition that it yields such-and-such.” Such a condition is valid: if the item is found as described, the sale takes effect; otherwise, it does not.

- C) Or where one stipulates a condition that could be concluded as a separate contract—for example: “on condition that he deliver it to the house,” and what resembles what came in the ḥadīth of Jābir.

3– **The third category:** cases in which the condition is void but the sale is valid; this includes what falls outside the preceding, such as stipulating upon the buyer that he ride the beast, or that he have intercourse with the female slave sold—or that he not have intercourse—or that the clientage (walā’) belongs to the seller, as in the report of Barīrah.

Thus did the jurists of the madhhab classify conditions accompanying the contract, in accordance with the variety of the narrations.

**If it be asked:** What is the ruling of conditions agreed upon beforehand (pre-contract understanding)?

**I say:** The jurists of the madhhab have stated that conditions mutually agreed upon before the contract are like those verbally stated at the time of contract, provided custom runs in that manner, as found in the

1 Ḥāshiyat Sharḥ al-Azhār, 2/61.

marginalia on *Sharḥ al-Azhār*.<sup>1</sup>

Moreover, people have accustomed themselves in their dealings to phrasing conditions in colloquial terms, such as: “I will give you such-and-such, and you will do such-and-such,” to which the other says, “Yes.” What appears is that this has the ruling of a linguistic condition; hence, whether the condition be linguistic, or pre-agreed before the contract, or customary, it stands on the same footing in *khulʿ* and in all transactions. The ḥadīth, “*Believers are bound by their conditions*,” encompasses them all. And the jurists of the madhhab have mentioned that an implicit (unspoken) condition is like an explicit one.

### Conditions of the Sale Contract

The conditions considered in a sale contract are of three types:

1. Conditions with which the sale contract is corrupted: these include future (suspensive) conditions, such as: “I sold you this bull whenever rain falls,” and the like.

Also among them are conditions that cause ambiguity—such as the seller or buyer stipulating an option for an unspecified period, or the buyer stipulating an unspecified increase in the sold item, or the seller, upon selling his farm, stipulating that expenses be upon the buyer for himself.

The sale is corrupted by such conditions, because a sale contract is an enactment that takes effect immediately, and a suspensive future condition contradicts the nature of sale.

A condition that entails ambiguity leads to dispute between seller and buyer regarding the unknown condition—such that the seller will not accept what the buyer claims, and the buyer will not accept what the seller claims. And Allah Most High has said: “*...except that it be trade by mutual consent among you.*” [An-Nisā':29]—and here there is no mutual consent between seller and buyer, hence the sale is corrupted.

Also corrupting it among conditions is a stipulation that negates the legal effect of the sale—such as: “I sold to you on condition that you do not benefit from the sold item,” for such a condition contradicts the sale.

2. There are conditions that are valid and do not corrupt the sale: these include conditions that could be concluded by a separate contract—for example, he sells him a known thing and stipulates conveying it to his house. Here, both the sale and the condition are valid, for the condition could be concluded by a separate contract (it is a sale plus a hire/*ijārah*). Likewise valid are

1- *Sharḥ al-Azhār*, 3/68.

conditions that do not entail ambiguity, such as deferring the price to a specified term.

3. There are conditions that are void while the contract remains valid: these include what falls outside the foregoing—such as, “I sold you this on condition that you give it in charity,” or “on condition that you eat it.” Here, the sale is valid and the condition is void; however, fulfilling it is recommended.

**Yes**—everything previously mentioned is the view of the jurists of the madhhab, as set forth in *al-Sharḥ* and *at-Tāj*.

### **On Conditions that Corrupt a Sale**

1. Explicit suspensive conditions, such as “if/when ...,” etc.
2. And those conditions that entail ambiguity—such as: “on condition that I have the option for a period,” or ambiguity in the party, or in the sold item.
3. Or a condition that negates the legal effect of the contract.
4. Or the sale contract contains a condition that is expressly prohibited.

**I say:** One may adduce for the correctness of their statement that such sales are corrupted the fact that the sale recognized [in the Law] is what Allah Most High mentioned in His saying: “*...except that it be trade by mutual consent among you.*” [An-Nisā’:29]—and a sale of the kind that leads to quarrel and dispute (which signifies lack of consent) is not recognized.

### **On Future (Suspensive) Conditions**

— Future conditions corrupt sale contracts and other contracts.

— The proof is that, generally, the nature of contracts is for the intended legal effect to ensue immediately upon contracting—this is what is known among the scholars—and suspending the contract upon a future condition contradicts that.

### **[The Ruling on a Sale with a Condition of Rescission (Iqālah)]**

**Question:** A man sold to another a plot of farmland (*jirbah*) for a known price, and the seller stipulated that he had the right to rescind (*iqālah*) if he brought the price within a year from the day of sale. What is the ruling of this sale?

**Answer:** The sale in question—if it is as was known formerly, where there is an intention to exploit the land and benefit from its produce—then the sale is invalid; it is not sound and not permissible, because that is a form of usury (*ribā*), whether the term is fixed or not.

— But if there is no intention or purpose relating to the yield, and the term is fixed and known, then the sale is valid, and the mentioned

condition, in ruling, is like an option by stipulation (*khiyār al-shart*)—or we say: it is *khiyār al-shart*.

On this basis, benefits (profits/yields) that arise after the sale—both principal and derivative—belong to the one in whom ownership ultimately settles. If the seller brings the price to the buyer and the buyer returns the sold item, the buyer must return to the seller what benefits arose with him.

— If he stipulated rescission to a time not fixed, then the sale is invalid; yet it is permissible to enter into it if there is no intention or purpose toward the yield in the sale, and the benefits belong to the one in whom ownership ultimately settles.



## [The Chapter of Ribā-Items]

### (Types of Ribā)

- 1- “Postpone me and I will increase you (anzirnī azidka).” This is the usury of the Age of Ignorance (ribā al-jāhiliyyah) which the Messenger of Allah—*May Allah bless him and his family and grant them peace*—meant in his words: “*Lo! the usury of the Age of Ignorance is abolished, and the first usury I abolish is the usury of al-‘Abbās ibn ‘Abd al-Muṭṭalib.*”
- 2- “Reduce [the debt] and hasten [payment] (ḍa‘ wa ta‘ajjal).” This is disputed; the sound view is that it is not ribā, as evidenced by what is related: when the Prophet—*May Allah bless him and his family and grant them peace*—ordered the expulsion of Banū al-Naḍīr, some of them came to him and said: “O Messenger of Allah, you have ordered our expulsion, and we have debts upon the people that have not yet fallen due.” He (*May Allah bless him and his family and grant them peace*) said to them: “*Reduce [the amounts] and collect early.*”
- 3, 4- Ribā of sale (ribā al-bay‘) is of two types: deferment (nasī‘ah) and excess (tafāḍul).  
 Example of ribā al-nasī‘ah: selling wheat for barley—disparity is permitted therein, but deferment is not permitted.  
 Example of ribā al-tafāḍul: gold for gold, silver for silver, wheat for wheat, and the like—these may not be sold except like for like, hand to hand.
- 5- Overreaching a trusting/unsuspecting buyer (ghabn al-mustarsil)<sup>1</sup>, in light of the report: “Overreaching the unsuspecting is ribā.”
- 6- A loan that draws a benefit; as indicated in the Sunnah.
- 7- Selling an item for more than its day’s price on account of deferment.

### [The Ruling on Overreaching the Unsuspecting Buyer When He Is an Oppressor]

**Question:** An oppressor may come to the seller and buy without haggling, then say, “How much is the total?” Is it permissible for the seller to raise the price against this oppressor because he is an oppressor?

**The answer—and Allah is the granter of success**—is that overreaching the unsuspecting is ribā, as in certain reports. One may also

1- The “unsuspecting” in sales: one who trusts the seller due to his own ignorance and lack of experience, and pays the price without checking.

adduce Allah's saying: *"Do not consume one another's wealth unjustly, except that it be trade by mutual consent among you ..."* [An-Nisā':29]. On that basis, it is not permissible to overreach the unsuspecting—absolutely—whether he is an oppressor or not.

There is a situation in which it may be permissible: namely, if this oppressor holds rights that belong to the seller; then it is permissible for the seller to take from the oppressor an amount equivalent to those rights.

The evidence for that is Allah's saying, *Exalted is He: "So whoever has transgressed against you—then transgress against him in a like manner as he transgressed against you."* [Al-Baqarah:194], and His saying: *"The recompense of an evil deed is an evil one like it ..."* [Yūnus:27], and similar passages are many in the Qur'an.

### [On Ribā and Its Types]

**Question:** What is the underlying cause for the prohibition of ribā?

**The answer:** Allah Most High has forbidden ribā because of the injustice it entails. He said, concerning the usury-takers: *"...then you may have your principal—you do no wrong, nor are you wronged."* [Al-Baqarah :279]. Allah Most High willed that dealings between the two parties be upon justice—so that there is not one oppressing and the other oppressed.

### **Ribā is of types:**

- 1- Ribā al-nasī'ah (ribā of debt). The people of the Age of Ignorance used to transact on credit, and the debt would increase as days passed—exactly as is the case now in banks. The injustice in this type is manifest.
- 2- Selling gold for gold with disparity, such as selling ten grams for fifteen; likewise silver for silver, wheat for wheat, barley for barley, raisins for raisins, dates for dates, and corn for corn—permissibility requires equality of the two counter-values, and this is only lawful hand to hand.
- Selling wheat for its like, wheat for wheat, on credit is ribā; it is not permissible due to the hadith: *"Like for like, hand to hand; whoever increases or seeks increase has engaged in ribā."* As for borrowing any one of these items, that is permissible.

The specific reason (‘illah) for the prohibition of selling gold for its like—gold for gold—on credit is not clear; likewise for the other listed categories, the cause is not evident, but Allah Most High is All-Wise.

**We may say:** by comparing the permissibility of borrowing an amount of gold and then returning its like, with the prohibition of purchasing that same amount on credit and then returning its like, a part

of the wisdom may become apparent. By comparing the two cases, one can discern the difference between them; once the difference is known, it must factor into the prohibition. The two are equal in most respects and incidental matters, but they differ in:

1. The name: one is called a loan (qarḍ) and the other a sale (bay‘).
2. In a sale, each party is not a benefactor, nor is he described as one—inasmuch as it is a sale.
3. In a loan, however, the lender is a benefactor, described as bestowing kindness upon the borrower, deserving the borrower’s thanks and a reward from Allah.

These are the differences between the two. It is known that mere naming has no role in legislation. Thus, the reason for the prohibition of sale in that case may be that one of the parties is wronged—namely, the seller. This is clear, for he gives what is in his hand—say, gold—to the other party; once it leaves his hand he is deprived of benefiting from it until the other party repays it, and he has no benefit in that: he merits neither the purchaser’s thanks nor Allah’s reward. All he receives is deprivation of benefitting from what he gave for a period of time.

This is unlike a loan, for the lender deserves multiplied reward from Allah, along with the recipient’s thanks.

That from one angle. From another, we may say: the objective of sale, qua sale, is seeking profit, and that is not present in this sale.

- 3- Selling a commodity for more than its price on account of credit; this type is attached to the first.

### Concerning Ribā-Items

Regarding selling a genus for its own genus, from *at-Tāj*: “If the added separate item predominates—for example, that the qillah exceeds the mudd—then the mudd matches the mudd, and the excess matches the dirham, even if its value differs from a dirham, provided that is agreed and not intended as a stratagem. If a stratagem is intended, it is not permissible unless the value of the excess equals that which it offsets.” End.

And in the chapter of currency exchange (ṣarf): “Know that ṣarf is not validated by an add-on (jarīrah) or the like, unless the add-on—the surplus—equals its counterpart; if the value of the add-on and the value of the increment in the greater amount are equal, the exchange is valid.” End, from *at-Tāj*.

***I say: If it be asked:*** How did the jurists of the madhhab differentiate between the two matters when the Prophet—*May Allah bless him and his family and grant them peace*—combined them, saying: “*Gold for gold—like for like, hand to hand; whoever increases or seeks increase has*

*engaged in ribā; and wheat for wheat—like for like, hand to hand; whoever increases or seeks increase has engaged in ribā*”? How, then, did it accord with them to say in ṣarf: the add-on does not validate it, while in foodstuffs the add-on does validate it?

**The answer can be:** There came concerning ṣarf something specific from the Prophet—*May Allah bless him and his family and grant them peace*—namely, in the report of the necklace (al-qalādah), where he—*May Allah bless him and his family and grant them peace*—forbade its owner from selling it for its own genus until the beads within it were separated; when they were separated, its gold was weighed and then sold for its weight in gold. Had the add-on (jarīrah) validated the sale, the Prophet—*May Allah bless him and his family and grant them peace*—would have ordered them to do that, so he —*May Allah bless him and his family and grant them peace*—said to them: “Sell the gold for an equal weight of gold, and let what is in excess of gold be the price for the beads.”

As for the remaining ribā-genera, nothing like what came concerning ṣarf has come; thus the ruling in them remains upon the original principle—namely, permissibility.

So selling ten measures of wheat in a barrel for fifteen measures of wheat is permissible, because the ten match ten, and the five measures constitute the price for the barrel—this provided no stratagem is intended to arrive at ribā; if a stratagem is intended, then it is not permissible.

### **[The Ruling on Ribā in Hand-to-Hand Exchange (Mu‘āṭāh)]**

In *at-Tāj*: “And know that there is no ribā in *mu‘āṭāh*.” End.

**I say:** Ribā ought to be deemed applicable to every transaction that falls under the designation of sale. So if *mu‘āṭāh* [a sale concluded by mere mutual delivery without a verbal formula] is a type of sale, ribā enters into it; otherwise, it does not.

There is no doubt that it is a type of sale, since the pillars of sale are present in it: the commodity, the price, the seller, and the buyer. The specific verbal formula often cited in this chapter—“I sell” / “I buy”—is not among the pillars of sale; rather, any wording that, in people’s customary usage, denotes buying and selling is valid.

**Yes**—what we have mentioned is the weightier view, because it is more precautionary and farther from ribā.

### **[A Man Deposited His Money in the Bank, Then They Gave Him a Profit]**

**Question:** A man deposited a sum of money in the bank. After a period he went to withdraw his money, and they gave him more than he had

deposited. He objected, and they said to him, “The increase is your profit, which you deserve,” and they would not agree to take it back. What is the ruling on this increase?

**Answer—and by Allah’s enabling:** What is well-known of bank dealings is that they give “interest” to the one who deposits money with them according to the length of time; the longer the term, the greater the interest, and the shorter the term, the smaller the interest. This is only because the bank benefits from the monies deposited with it: it extends loans with interest, and it trades with them by buying, selling, currency exchange, and transfers. There is no doubt that the depositor receives the interest whether the bank profits or loses, because the interest is tied to the length of time. On this basis, the “interest” the depositor takes is prohibited and must be given in charity.

**If it is said:** It is possible that the bank traded with the deposited money, profited in it, and gave the owner of the money his share of the profit—so that the “interest” would be a profit from *muḍārabah* (profit-sharing)?

**It is said:** What is well-known of bank dealings is that they pay “interest” according to time—whether or not they make profits, and whether or not they trade with the deposits.

— And even if we suppose the bank did trade with it and gave the depositor his share, most of the bank’s gains and profits come from loan interest. On that basis, the depositor’s “interest” is prohibited in every case.

**If it is said:** Banking transactions have become today nearly a necessity; what is the way out of *ribā*? And how should an Islamic state act if it wants to correct bank dealings?

**It is said:** The solution is that bank deposits be divided into two categories:

1. *First:* short-term deposits—returned to their owner without interest, as is the case today.
2. *Second:* long-term deposits—the solution is that the bank contract with the depositor on *muḍārabah* in what he deposited for a fixed term: a year, two years, or more.

**If it is said:** Depositors differ in the time of depositing—some at the beginning of the month, some at the end; others at the beginning of the second month, others at its end, and so on to year’s end. Deposits keep coming—so how can the bank conduct *muḍārabah* with these capitals?

**It is said:** The bank can hold in reserve what is deposited in the first and second months, combine all of that, and begin trading with it starting from the third month, without adding any later funds to it, and place it in

a particular line of trade. Then the bank receives the deposits of the third and fourth months, combines them, and places them in another line of trade.

If what is deposited in two months is not enough for trading, the bank adds to it the deposits of a third and fourth month, and begins trading with the total funds from the four months starting from the fifth month. When the term agreed between the depositor and the bank ends, the owner of the deposited money is called: if he wishes, he takes his capital and profit; if he wishes to continue trading, the bank concludes a new contract with him and treats him with a new arrangement—combining his funds with those of new depositors and beginning to trade with them from a specified month.

On this basis, the bank can place announcements for those who wish to partner with the bank in trading real estate, [stating] the last date for receiving depositors will be such-and-such a day, etc.

— I hold that this arrangement will bring great benefits.

— As for the benefit from short-term deposits, the bank will profit from them without paying “interest”—by currency exchange, transferring currencies from country to country, and the like.

— As for alternatives that can replace an interest-bearing loan, they may take the following forms:

1. The bank sells the borrower a commercial commodity at the retail (broken-up) price; the bank benefits by the margin between wholesale and retail. Some jurists of the madhhab have permitted this form.
2. The bank sells the borrower a commodity at the highest price that exists for that commodity in the market; the bank benefits by the margin between the highest and lowest prices in the town or locality. This form has also been permitted by the jurists of the madhhab.
3. The bank sells the client paper currency in exchange for what it is worth in gold or silver, and the debt becomes in gold or silver.
4. The bank advances to the would-be borrower a specified sum of cash against a commodity the bank desires and hopes to profit from, on condition that the commodity be precisely described—by known measure or known weight, known kind, known grade, specified characteristics, and defined composition if it is a manufactured item—for a fixed term. This is called *salām* (forward sale).

Merchants can make use of this if they need funds from the bank, for the merchant can meet his obligation to the bank by having the required

commodity produced to the specified standards.

**[A Man Placed His Money in the Bank, and When He Withdrew It He Gave the Increase in Charity]**

**Question:** A man placed an amount of money in the bank. After a period he requested his money; the bank gave him his money and added extra. He took all of it and gave the extra in charity, since it was ribā. Is his liability cleared if he took the increase from the bank and gave it in charity, or not?

**Answer:** A man may be excused in such a case if he put his money in the bank for the first time, not knowing that the bank pays interest. But if he knows that the bank pays interest to anyone who deposits money with it, then it is not permissible for him to deposit his money there, because:

The bank is, in reality, established to trade with everything deposited with it, in return for a monetary percentage paid to the depositor each month. What is deposited in the bank is not, in truth, a “deposit” (*wadī‘ah*); rather, it is a loan the bank takes to benefit from, for which it pays the lender “interest.” Thus, depositing in the bank is in fact a loan that draws a benefit.

**If it is said:** The depositor’s intention may be merely safeguarding his wealth—he has no intention of receiving interest; another may intend and seek interest and profit. “Actions are by intentions.” Hence, there would be no blame on one who has no intention to seek profit and whose aim is only the safekeeping of his money—unlike the one who intends and seeks profit.

**It is said:** A transaction whose nature and established function is to produce the forbidden benefit is prohibited absolutely—whether one intends that benefit or not. Committing a sin does not require an intention.

### **Banks**

**Question:** Banks have become enmeshed in people’s lives, dealings, and commerce, and the need to transact with them has become pressing; yet what is obviously known is that they are usurious banks. Is there a lawful way by which a Muslim can be safe from the sin of usury and its tremendous warning? Or is there a substitute that can take the place of banks and fulfill their role in this age in accordance with the Islamic Sharia?

**Answer:** Usury (*ribā*) is a major crime in the religion of Islam, and Muslims can be safe from *ribā* as follows:

1. That the bank sells to borrowers paper currency in exchange for gold or silver after agreeing upon the price acceptable to both

parties and upon the term; and the term must be a single fixed term. No increase is permissible if payment is not made at the specified due date.

This was the practice of our shaykh, the erudite scholar ‘Abd al-‘Azīm Ḥasan al-Ḥūthī—*May Allah have mercy on his soul*—one of the vessels of knowledge known for scrupulousness and caution, and among those who were careful to avoid entering into dubious matters.

2. The bank, to be safe from ribā, may take funds from its clients under a *muḍārabah* (silent-partnership) contract, in which the bank trades with the funds for a specified period; after the term ends, the profit is divided between the bank and the owner of the funds according to their agreement.

### [What Is the Islamic Alternative to Usurious Banks?]

**Question:** If usurious dealings with banks are prohibited in Islam, what is the alternative in Islam?

**Answer—and success is from Allah:** Ribā is a plague, a calamity, and corruption; people have no need of it. *“Allah destroys interest and gives increase for charities.”* [Al-Baqarah:276]

**If it is said:** The poor man often needs money—urgently or nearly necessarily—and finds no way to meet his need except by borrowing from usurious banks; thus it appears that there is no dispensing with them.

**It is said:** That is what a needy poor person—or others—may suppose; but in reality and in the outcome, the needy poor person is harmed by borrowing from the bank with additional harm at repayment, or when repayment is delayed—to the extent that, were the poor person to weigh the benefit of borrowing against the harm of borrowing at the time of repayment, he would find the harm greater. Only, he does not feel the harm until it occurs; when it occurs, he realizes his mistake and regrets having ventured to take the loan.

What encourages the poor and the needy to borrow from usurious banks—despite knowing the severe harm entailed—is that human nature tends to take lightly a deferred harm, and inclines to an immediate desire without paying heed to what will result from it later.

If that is the case, then in reality the poor have no need to borrow from usurious banks. All people of sound intellect recognize and judge that when a “benefit” entails or yields a harm equal to or greater than it, it is no benefit at all.

There is no doubt that all reasonable people find objectionable the conduct of a worker who earns five thousand riyals each day but is obliged to pay a tax of five thousand riyals each day; they would deem



him foolish and frivolous, or deficient in intellect—and all the more so if he earns five and must pay ten. All reasonable people would firmly judge that the “benefit” of the five has been entirely nullified.

Ribā is of that kind: even if a poor person supposes there is a benefit for him in a usurious loan, he is mistaken; there is no benefit in it at all—rather, as we have explained, it is harm.

As for the rich, their need for usurious loans is absent, both now and later, since they already have wealth that suffices them. They only enter usurious loans out of excessiveness and greed to multiply their trades, not to meet poverty, lack, or necessity.

From what we have mentioned, it becomes clear that there is absolutely no need for a usurious loan.

### **[The Rationale for Prohibiting Selling Gold for Gold on Credit]**

**Question:** What is the rationale for prohibiting the sale of gold for gold on credit—and likewise silver and grain—while permitting a loan of the same? Are not sale and loan the same?

**Answer—and success is from Allah:** The rationale for permitting the borrowing of gold, silver, grain, dates, and the like, and then returning their equivalents, is that a loan is an act of kindness toward the borrower; the lender thereby deserves praise and commendation, and the borrower owes him thanks—unlike a sale, considered *as sale*, in which the seller does not merit praise or commendation, nor is the buyer obliged to thank him.

— The nature of sale, considered *as sale*, is the hope of benefit and gain resulting from exchange.

— Selling grain for its like on credit, or gold for its like on credit, contains no benefit or gain for the seller; he merits neither praise nor thanks. Rather, by that sale he is a loser, deprived of benefiting from his wealth for a period.

There is no doubt that reason deems ugly any act that yields no benefit or interest—and all the more ugly is the act that yields pure harm with no benefit. The rulings of the Sharia have come in support of the rulings of sound reason.

By what we have mentioned, the difference between sale and loan is known.

— It is permissible to sell gold for its like immediately, and likewise grain for grain, dates for dates, etc., immediately—because each of the seller and buyer may desire what the other has, and that desire impels them to exchange; neither suffers loss in that sale.

— It is permissible to sell wheat for twice its amount of barley, hand-to-hand, because wheat is one genus and barley is another, and one of

them is of higher value than the other.

— That is prohibited on credit, because the buyer who purchases wheat for twice its amount in barley on credit might grow lax in the increase and add more than the value of the wheat on account of the deferment; likewise, the seller might grow lax in extending the term on account of the increase in price. The All-Wise Lawgiver thus forbade that type of sale because of what we have mentioned of the risk of falling into ribā.

— As for selling it hand-to-hand, there is no laxity from the buyer in increasing the price without counter-value; thus it is not a setting in which ribā is likely.

### **[Every Loan That Draws a Benefit]**

Hadith: “*Every loan that draws a benefit is ribā*”—except that if the two benefits are equal, it is permissible. End quote from the marginalia of *Sharḥ al-Azhar*.

### **[Is It Permissible to Borrow from a Usurious Bank for Marriage?]**

**Question:** A young man wishes to marry but has nothing with which to marry, and he fears falling into the unlawful. Is it permissible for him to borrow from a usurious bank, or not?

**Answer:** If celibacy for a youth reaches the point where he fears falling into the prohibited and no means succeeds in suppressing desire, then in this situation it is permissible for him to borrow from a usurious bank. We only said this because:

1. Necessity permits the prohibited.
2. The scholars have said that committing zinā under coercion is not permitted; rather, a person must bear pain so as not to fall into zinā. Here, the one borrowing from the bank may bear the “pain” of the unjust increase so as not to fall into zinā.
3. The evils entailed by zinā are greater than the harms related to one who borrows from a usurious bank. Zinā entails the loss and confusion of lineage, the corruption of a woman against her husband or family, attaching disgrace to the woman and to her family and husband, etc. As for the harms of the one who *pays* ribā, he is wronged by the increase; while the threat mentioned in the Qur’an and Sunnah is directed against the *taker* of ribā.
4. Taking a loan is permissible; what is prohibited is to repay more than what was taken.

### **[One Who Bought a Commodity and Increased the Price on Account of Deferred Payment]**

**Question:** A man reported this evening that he bought a car and paid

approximately half its price; the seller gave him a term for the other half. He has paid what he owed, except that he added about fifteen thousand Saudi riyals on account of the deferment. He asks what is required of him?

**The answer:** He must repent and seek forgiveness, because he entered into a prohibited transaction that the Law does not permit nor approve; nothing else is required of him.

It would have been obligatory upon the seller to return to him the increase he took on account of the deferred payment. As for the questioner, he has been wronged; he should not have entered into wronging himself. The car he purchased is lawful for him; nothing is required of him regarding it, for he bought it for its price. What is in excess is in the seller's liability; the buyer's liability is clear if he repents and turns back to Allah and seeks forgiveness for having entered into what Allah has forbidden.

**If it be said:** If the transaction is prohibited—displeasing to Allah and impermissible in His religion—then the sale is void; and if void, the buyer does not own the car and must rid himself of it.

**We say:** The sale, as you have said, is void and should not be entered. However, Allah Most High mentioned in the verses of ribā in Sūrat al-Baqarah the rulings governing transactions of ribā that have already occurred. He, *Most High*, said: *"So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah."* [Al-Baqarah:275]—thus Allah made what the usury-taker had acquired by usury contracts his property if he repents and turns back to Allah.

And He, *Glorified*, said: *"But if you repent, you may have your principal—you do no wrong, nor are you wronged. And if someone is in hardship, then [let there be] postponement until [a time of] ease."* [Al-Baqarah:280]. Thus He, *Exalted*, validated the contracts of ribā for the repentant and affirmed them, and commanded him to take only his principal, without the increase he added on account of the deferment.

From here we say: The car is lawful for the purchaser; the usury-taker must return the increase in case of dispute. But if the usury-taker repents, regrets, and seeks forgiveness, then the increase becomes lawful for him by His saying, *Most High*: *"So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah."* [Al-Baqarah:275]

— Nowadays there are stratagems by which people seek to obtain ribā. A man comes to a bank to be lent the value of a car, or household furniture, or land, etc. The bank proceeds to purchase the car the man wants, or the requested furniture, or the specified plot, and so on; once

the bank has bought it, it sells it to the man at a markup over what it paid. This stratagem does not justify the transaction, because the bank in reality purchased the car for the man and paid on his behalf; it did not purchase it for itself—this is the fact—and that does not justify the bank taking a profit.

**To clarify:** what the bank does in purchasing the car does not meet the essence of commerce, for the essence of commercial exchange is the swap in which the one who enters it is exposed to both profit and loss. The bank entered this arrangement certain of profit and not allowing for loss at all.

### **[Increasing the Price of a Commodity When You Know the Buyer Wants It on Credit]**

**Question:** A man bargained with another over the purchase of a car. The car's owner knew that the bargainer did not possess the car's price and only wanted to buy it on credit. The sale was concluded between the two parties at a price that included an amount added over the customary market price, and the buyer overlooked the increase on account of the credit. Does this sale and the like of it involve a doubtful matter, or is it a valid sale?

**The answer—and Allah is the granter of success:** In the report narrated by Imām Zayd ibn 'Alī (*Peace be Upon them*), there is a prohibition of "two conditions in a sale." Imām Zayd (*Peace be Upon Him*) explained this with examples such as: a man says regarding a commodity, "If it is for cash, then [the price is] such-and-such; if on credit, then such-and-such," or, "To such-and-such a term, [the price is] such-and-such; to such-and-such a term, [the price is] such-and-such."

**Yes,** what outwardly appears regarding the sale that occurred in the question is validity and permissibility, because those two stated conditions were not mentioned therein—that is what appears.

However, the scholars have said that an implicit condition is like an explicit one. So if the two parties bargaining over the commodity mutually agreed to a price higher than the customary market price—equal to it or to half of it—on account of the credit, while both know the customary price with this seller and with others, but they did not explicitly mention the condition at the time of contract or within the contract, then in reality the sale falls under the transactions that are prohibited.

**The clarification of this:** Allah, *Exalted is He*, only forbade ribā and what is attached to it among the transactions that have been prohibited because of the injustice in them, which is consuming people's wealth wrongfully, as indicated by His saying: "*But if you repent, you may have your principal—you do no wrong, nor are you wronged.*" [Al-Baqarah:279].

The increase that the seller stipulates and adds to the price due to the term is a form of injustice and of consuming people’s wealth wrongfully. The proof for this is that Allah, *Exalted is He*, forbade ribā al-nasī’ah, which is an increase over the principal in exchange for time, and the sale mentioned is, in reality, of that kind.

The evidence that it is impermissible to exchange time for money, along with what we mentioned regarding ribā al-nasī’ah, is His saying: *“And if someone is in hardship, then [let there be] postponement until [a time of] ease.”* [Al-Baqarah:280]. If we recognize that Allah *Most High* decreed that because of the injustice and wrongful consumption of wealth involved, then the prohibition of the sale applies equally whether the two conditions are explicitly mentioned or implicitly intended.

On that basis, the sale mentioned in the question is prohibited due to the injustice in it, which is consuming wealth without right—namely, in exchange for time, and you have learned from what has preceded that increasing [the price] in exchange for time is prohibited.

Accordingly, it is forbidden for both seller and buyer to enter into such a sale. The buyer may be permitted to enter such a sale only if he is compelled to it by necessity—unlike the seller, for whom there is no necessity; thus, it is not permissible for him to enter into it at all. This is due to His saying, after mentioning certain prohibitions: *“Excepting that to which you are compelled.”* [Al-An‘ām:119], and His saying: *“But whoever is compelled by severe hunger, with no inclination to sin—then indeed, Allah is Forgiving, Merciful.”* [Al-Mā‘idah:3]; and in the well-known report: “In cases of necessity, the prohibited becomes permissible.” And He, *Most High*, said: *“He has not placed upon you in the religion any difficulty.”* [Al-Ḥajj:78], and: *“Allah intends for you ease and does not intend for you hardship.”* [Al-Baqarah:185].

**Yes**, the matter is one of scholarly disagreement; however, precaution lies in what we have mentioned, to be certainly safe from falling under the threat directed at the consumer of ribā in the Book and Sunnah. And in the hadith: *“Believers pause at doubtful matters,”* and: *“Leave what makes you doubt for what does not make you doubt.”*

### **[The Wisdom Behind the Prohibition of Selling Deferred-for-Deferred (Kālī’ bi’l-Kālī’)]**

It has come that selling deferred payment for deferred payment—that is, selling a debt for a debt—is prohibited; and perhaps the wisdom in that is that selling debt for debt may be a means to ribā and a stratagem to reach it.

### **[Sale of Deferred-for-Deferred]**

Praise be to Allah alone.

It has come in the hadith a prohibition of selling deferred-for-deferred (debt for debt). On that basis, if a man has a debt of gold upon another man, and the two agree to convert that debt into silver, that is not permissible and not valid. Likewise, if the debt is in Yemeni currency and the two men want to convert it into Saudi currency, for example, it is not valid and not permissible.

Accordingly, it is not valid and not permissible for a man to buy, for example, one hundred thousand Saudi riyals for such-and-such Yemeni—while both amounts are deferred debts. If a day or two pass, they look at the exchange difference and one of them gives the other the exchange differential—such a sale is not permissible or valid, and any resulting profit is unlawful.

— Likewise, it is not valid and not permissible that a man sell one hundred pieces of weapons, for example, when they are not in his possession, obligating himself to procure them after twenty days, for such-and-such amount in riyals as a deferred debt. It is not permissible to enter into such a thing.

Likewise, it is not permissible for you to sell a debt owed to you by people to another man for such-and-such as a deferred debt to a term or without a term. This is haram and impermissible.

As for selling it for present cash in an amount less than it, that is permissible. If you have, for example, one million Yemeni riyals owed to you by people, and a man buys it from you for five hundred thousand riyals in cash, that is permissible. The proof is the understood implication of [the prohibition of] “*deferred-for-deferred*,” which implies the permissibility of selling the deferred [debt] for cash. Supporting this is the hadith: “*Reduce [the amount] and collect early*,” for what we have mentioned entails waiving half the debt in exchange for receiving the other half; this is not ribā.

The man who paid five hundred thousand in exchange for a million only paid five hundred thousand in exchange for five hundred thousand; the other five hundred thousand is his fee for pursuing the debtors, demanding payment from them, and contending with them.

**Issue:** For a sale to be valid, one of the two counter-values must be present—either the commodity or the price. One may infer this from the fact that there is no benefit in a sale when both counter-values are absent, nor any advantage to either party; hence the prohibition of selling deferred-for-deferred.

### **Deferred-for-Deferred (Debt for Debt)**

— Conciliation is not valid where a poor man owes deferred wheat and it is settled for five dirhams, also deferred.

— If, however, it is between two liabilities, it is valid to settle what is owed by one against what is owed by the other, just as sale is valid likewise—since what is in two liabilities is like what is present.

An example: There is owed, in the deceased’s liability, a measure (*qafīz*) of wheat; the heir settles with the creditor for five dirhams in place of what is in the deceased’s liability, and these five dirhams are in the heir’s liability. This is valid if the deceased left an estate; but if he left no estate, the conciliation is invalid. Thus in *at-Tāj al-Mudhhab*.

**I say:** If the deceased left an estate, the debt passes to the heir’s liability, and he is obliged to pay the debt from the estate. If there is no estate, the debt is not binding upon him, and the heir’s liability is clear.

### **[Subscribers Paying a Monthly Sum, One Wins Each Month, and the Company Keeps the Rest]**

**Question:** Is it permissible, in the Law, for a company to say to its customers: “Let each customer pay one hundred riyals this month”—and their customers number in the hundreds of thousands—“in return for which the company, at the end of the month, will give one million riyals as a prize to one person among those who paid, by drawing lots,” bearing in mind that the company will earn multiples of the prize amount?

**Answer:** This is a type of gambling; one should not enter into it. The people of the Age of Ignorance used to do something of this sort: they would apportion a slaughtered camel by drawing lots, so some would receive and others be deprived; Allah forbade them from that.

### **[Depositing in Usurious Banks]**

**Question:** Is it permissible to deposit in usurious banks, knowing that when the depositor wants to take his money, he takes it without increase or decrease, and he deposits it only for safekeeping and nothing else? Is such depositing considered prohibited assistance in *ribā* or not?

**The answer—and Allah is the granter of success:** What appears is that there is no objection to depositing in usurious banks if the matter is as mentioned in the question, and depositing is not considered prohibited assistance.

**The proof:** The Prophet—*May Allah bless him and his family and grant them peace*—used to transact with the Jews in buying and selling, despite knowing that they consumed *ribā* and dealt in it and consumed illicit gain; likewise the Companions. That was not considered assistance in *ribā*.

One may also adduce His saying, *Most High*: *“And among the People of the Scripture is he who, if you entrust him with a great sum, he will return it to you; and among them is he who, if you entrust him with a [single] dinar, he will not return it to you unless you are constantly standing over*

*him.*" [Āl 'Imrān:75]. From this verse is taken the permissibility of depositing with the People of the Scripture, even while knowing that they deal in ribā.

### [Borrowing from a Usurious Bank]

**Question:** Is it permissible for a man to borrow from a usurious bank if he is in need of that, though he is not content with the loan's interest, but necessity has driven him to accept it unwillingly?

**The answer—and Allah is the granter of success:** It has been authentically reported from the Prophet—*May Allah bless him and his family and grant them peace*—[that he pronounced] the curse upon the consumer of usury and the one who pays it. And Allah, *Exalted is He*, forbade cooperation in sin and aggression, for He said: *"And do not cooperate in sin and transgression."* [Al-Mā'idah:2].

On that basis, borrowing from a usurious bank is not permissible in any case, whether the borrowing be for a need or otherwise—except in a case of utmost necessity. "Utmost necessity" is when the necessity reaches the point that a Muslim fears for himself, his children, or his parents death from hunger, or severe cold, or the like, and he finds no way to ward off that necessity except by borrowing from a usurious bank. In that case, it is permissible for him to borrow only what removes that necessity—no more. For it is said: "In necessity, the prohibited becomes permissible," and Allah said: *"... excepting that to which you are compelled."* [Al-An'ām:119].

**Yes**—what indicates the prohibition of what we have mentioned is His saying concerning the one who *pays* usury: *"And whatever you give for interest to increase within the wealth of people will not increase with Allah."* [Ar-Rūm:39].

### [Purchasing from the Agricultural Bank]

**Question:** The agricultural bank sells farming machinery for half the price at which their equivalents are sold in the market, but the bank sells them to farmers only on credit for specified terms and takes "interest" for that. Is it permissible to enter into that or not?

**The answer—and Allah is the granter of success:** What appears regarding that practice is prohibition, for it is the *form* of usury. A believer ought to avoid it and not enter into it. In the report [it is said], *"Believers pause at doubtful matters,"* and, *"Leave what makes you doubt for what does not make you doubt,"* in addition to the safety and precaution gained by refraining from entering into that.

**If it is said:** The cause for the prohibition of usury is that it entails consuming people's wealth wrongfully and involves injustice. Allah said, in the context of the verses of usury: *"But if you repent, you may have*



*your principal—you do no wrong, nor are you wronged.”* [Al-Baqarah:279]. If the matter is as mentioned in the question, then there is no injustice and no excess—unless the “interest” exceeds the item’s true price. If it is less than that, then there is no injustice; accordingly, the sale would be permissible for both buyer and seller.

**We say:** Usury is a grave sin, and its standing with Allah is great. Hence He, *Exalted*, says in His Book, threatening the people of usury: *“But if you do not, then be informed of a war from Allah and His Messenger.”* [Al-Baqarah:279]. A sin of such magnitude must be kept far away from—one must take maximum precautions against it. *“Whoever grazes near the sanctuary is liable to fall into it.”* The form of usury suffices to deter a Muslim from entering into it or approaching it.

**Yes**—seller and buyer can avoid the form of usury by changing the form of the contract: the two parties add the expected “interest” on the item to the item’s price, then conclude the sale on that combined amount and make all of it the item’s price. If they do that, there is no problem in the permissibility of that sale, since it then contains neither the form of usury nor its meaning.

### **[The Merchant’s Paying a Commission to the Bank]**

**Question:** A bank and a merchant agreed—seeking to avoid usury—that the merchant sell to the bank’s customers certain goods at their customary price, with no increase and no decrease; the bank is to settle the price of those goods, and the debt owed by the customers is to the bank. The merchant is to remit to the bank five percent of the value of those sales.

This is with the knowledge that the bank needs employees for this work—for entries, bookkeeping, transfers, and processing. What is the Sharia ruling on this arrangement?

**The answer—and Allah is the granter of success:** What has become clear to me in this question is that the arrangement is valid and permissible, containing nothing of usury. This is not a stratagem by which one arrives at usury: the seller sold at the customary price and received payment by bank transfer; the bank transferred the prices of those goods, on condition that the seller compensate the bank with five percent of the goods’ prices from his own funds.

**If it is said:** The bank paid on behalf of its customer ninety-five percent and recorded one hundred percent as a debt upon him—this is usury (Riba).

**We say:** The bank did not earn the five percent from the customer; rather, it earned it from the merchant in return for

(1) bringing in customers, moving the goods, and paying prices in

full, and

(2) covering its costs in entries, bookkeeping, and transfers.

Usury is an increase taken from the buyer; here there is no increase upon the buyer: he bought the item at its customary cash price, with no markup.

### **[Is It Permissible for One Under Duress to Borrow from a Usurious Bank?]**

**Question:** A man has debts; he is pressed to pay them or be imprisoned. He possesses nothing with which to pay the creditors other than what is indispensable for him and his family and children; if he enters prison, his family is lost. In this situation, is it permissible for him to borrow from a usurious bank or not?

**The answer—and Allah is the granter of success:** Creditors have the right to ask the ruler to imprison the debtor until his insolvency is established. If his insolvency is established, then it is obligatory to grant him respite until Allah makes it easy for him, as He said: *“And if someone is in hardship, then [let there be] postponement until [a time of] ease.”* [Al-Baqarah:280]. If imprisonment is as we have described, it is not permissible to enter into usury, for in what Allah has decreed there is relief for both creditor and debtor.

If, however, the judge will imprison him until he pays—even after his insolvency becomes clear—then in that case he is like one *compelled* to borrow from the usurious bank, and what is lawful for one under compulsion is not lawful for others. The jurists have said: under coercion, every prohibited thing is permitted except zinā, killing a human being, and harming him. Allah has excused the one who uttered a word of disbelief under compulsion, saying: *“Except for one who is forced [to renounce his religion] while his heart is secure in faith.”* [An-Nahl:106]. If he borrows from the bank in this situation to ward off injustice, it is permissible for him to borrow.

As for borrowing in cases other than what we have mentioned and the like—it is not permissible, nor befitting for a Muslim. The Messenger of Allah—*May Allah bless him and his family and grant them peace*—cursed usury, its consumer, its payer, and so on.

### **Depositing in Usurious Banks**

**Question:** What is the ruling on depositing in usurious banks and transferring from them and to them, etc.?

**The answer—and Allah is the granter of success:** If the intent is safeguarding one’s money in the bank, there is no objection. What is prohibited in dealings with banks and others is:

— That you borrow from it on condition that you repay more than

you borrowed.

— Or that you give it money on condition that it pay you “interest.”

If the dealing is free of these two usurious transactions, there is no objection to dealing with it; the Prophet—*May Allah bless him and his family and grant them peace*—used to transact with the Jews in buying and selling and to enter into debts with them, while knowing they were people of usury.

**Yes**—if the increase does not exceed the fee for recording, bookkeeping, safekeeping, and the like, then there is no harm in it.

### **[Ruling on Companies Selling Quantities of Their Shares]**

**Question:** There are companies that announce their desire to sell quantities of their shares, stating the price of each share as such-and-such riyals, knowing that the price of a single share can rise or fall. As with trade goods, the buyer may profit or lose, or break even. What is the ruling on entering into this kind of trade?

**Answer—and Allah is the Guardian who grants success:** Major commercial companies today do not scruple to enter into usury, nor do they refrain from engaging in unlawful gains. If that is the case, it is not permissible for a Muslim to enter into the company. However, if it is known that the company does not enter into usurious dealings, and that it is conscientious in its transactions and refrains from the unlawful in its profits, then entering into it is permissible.

### **[The Ruling on Purchasing a Commodity with the Seller’s Condition That It Not Be Sold Except Back to Him, and That He Will Add to the Price]**

**Question:** A man sold another man a rifle for a known price, and stipulated upon him that he must not sell it, and that he [the seller] would buy it back from him for the same price and add a profit. What is the ruling on this sale?

**Answer—and Allah is the granter of success:** What appears to me regarding this sale is that it is not permissible, due to the stratagem and means it contains to arrive at usury; for although it is in the form of a sale, in meaning it is a loan that draws a benefit.

### **[A Man Gave Another a Sum of Money to Trade With, and Lent Him Half of It]**

**Question:** What is the ruling on the following arrangement: A man gave another a sum of money on the basis that he would trade with it, making half of the sum a loan; the money advanced would be shared equally between them, and any profit or loss would be shared equally in proportion to the capital?

**Answer—and Allah is the granter of success:** It does not appear to

me that this arrangement falls under the heading of a loan that draws a benefit—which is a form of usury—because the benefits that the capital owner obtains are from the profits and returns of his capital, which constitutes half of the amount advanced.

**If it is said:** The loan is conditioned upon the borrower trading with both his portion and the lender’s portion, with half the profit going to the lender.

**We say:** That benefit is shared by both parties, because when the capital increases, profits increase and multiply.

**To clarify:** A man may find a large, profitable lot of goods and desire to purchase it while possessing only half the price. He then seeks someone to provide the other half of the price, who will receive half the profit without doing any work with him. When profits are realized, they are divided in halves. There is no problem with the validity and permissibility of this, and this example illustrates the validity and permissibility of the arrangement we mentioned.

**If it is said:** The one advancing the funds only lent half of them to the worker so that he would trade the other half for him and give him his profit outright, without the worker receiving any commercial benefit in return for his work.

**We say:** Both parties benefit—each has half the profit from the advanced funds; they are equal in benefit. This arrangement is exactly like *muḍārabah* (silent partnership), except that the capital owner lent the worker half of the advanced capital for a benefit returning to both parties—namely, that the worker will be more attentive and careful in his trade and dealings if he knows he will share in any loss.

And the People of the House (*Ahl al-Bayt*) have said—as in *Sharḥ al-Azhār* and its marginalia—that when the two benefits are equal, meaning the benefit to the lender and the benefit to the borrower, the loan is permissible and valid. This is the gist of what is there, and Allah knows best.

### [Similarities and Differences Between Paper Currency and Gold and Silver]

**Question:** Paper currency has become the official currency in all countries. Is it to be governed by the same rulings as gold and silver in every respect, or does it have other rulings?

**Answer—and Allah is the Guardian who grants success:** Between paper currency and gold and silver there are points of similarity and of difference:

1. Paper currency has no value in and of itself, unlike gold and silver.
2. Gold and silver are weighed, unlike banknotes.

3. The state controls the value of its currency, and one state may strike at another state’s currency—unlike gold and silver.
4. Gold and silver serve as currency among all people on earth equally; paper currency is particular to a given state. Some banknotes may gain wide acceptance, but that is incidental, due to the strength of the state’s economy.
5. Paper currency is liable to complete collapse, to the point that it may hardly retain any value, namely upon the collapse of the state.

Outwardly, paper currency is equivalent to gold and silver as a price-measure for goods in sale and purchase and in lease, and in valuation and compensation and all transactions in all countries.

Accordingly, we say: The rulings on paper currency should be detailed, for it is not like gold and silver in every respect such that it should be given all their rulings. Rather, between the two types of currency there is similarity and divergence, as we clarified above; thus its rulings should follow accordingly.

We mention here the rulings that diverge from the rulings on gold and silver, and we say:

1. If a man has a debt denominated in Yemeni or Saudi riyals, and the currency then completely collapses, the debtor must guarantee the value of the currency that collapsed, with the value reckoned according to its worth at the time it was taken. This is the ruling where the currency has collapsed entirely.

As for partial collapse: if it is within the customary range of fluctuation—up or down—or slightly more, that is not guaranteed. But if the depreciation is greater than what is customary with currency—such that it causes widespread anxiety and fear—then the debtor guarantees the shortfall.

We have said this because it is what justice requires.

**If it is said:** That may be usury, due to the increase involved. For if one owes a thousand Yemeni riyals and we require him to pay two thousand, then we have doubled the debt; and it is known that “two for one” is usury.

**We say:** We have already said that paper currency has no value in itself, and that its value is incidental. Dealings with it are, in reality, dealings with its incidental value. In truth, the transaction occurs on the value of the paper currency; thus, the debt is, in reality, the value of the paper currency, not the paper currency itself.

**If it is said:** What would the ruling be were the matter reversed—if the currency’s price increased?

**We say:** The ruling is the same with respect to increase and decrease, because the debt, in reality, is the value of the currency.

**If it is said:** The same would then be required where a man owes a debt denominated in grain—wheat, barley, or corn—and the price falls to half or more; the debtor would then be required to guarantee the shortfall.

**We say:** The two are not the same. Grain has inherent value in itself, unlike paper currency. Its desired utility inheres within it, whether the market price falls or not.

2. It is permissible to sell Saudi currency, for example, for Yemeni currency on credit, and vice versa. Likewise it is permissible to sell paper currency for gold or silver on credit.

And it is permissible to sell Yemeni currency, for example, some of it for some of it—so it is permissible to sell a 1,000 note for 950, with the discount in exchange for the breaking of the denomination, which is the objective sought in this transaction. It is also permissible to sell one hundred notes of the 1,000 denomination for ninety-nine notes of the 1,000 denomination, because these are new and those are worn.

If there is no such objective, then an increase is not permissible, because in that case it would be without counter-value and thus would be usury.

We have only said this in this matter because paper currency is not measured by volume or by weight; thus it is treated as a commodity, and the rulings of commodities apply to it, whereby it differs from gold and silver.

3. If paper currency is hoarded for mere keeping, there is no zakāt on it; but if it is held for trade, then zakāt is due on it like other trade assets.

We have only said this because the original presumption is that zakāt is not due on it.

**If it is said:** Paper currency should be analogized to gold and silver, due to the evident conceptual similarity between them.

**We say:** The similarity between them is insufficient as a legal cause. As evidence: grain has served in place of gold and silver in many lands until recently, yet no one has said that zakāt is obligatory on it for that reason.

**If it is said:** Today, merchants hoard nothing but paper currencies; if we do not say zakāt is due, the poor will be lost and the charity ordained by Allah—by which the rich support the poor—will cease.

**We say:** In what is besides that there is what suffices for the needs of the poor, and what Allah Most High has ordained by way of mutual

support lies in specific forms of wealth designated by the All-Wise Lawgiver.

- It is established as a liability (in the debtor’s obligation) like gold and silver.
- If paper currency is exchanged against gold and silver, it takes the ruling of a commodity; thus it is permissible to sell it for gold and silver for immediate payment and on credit.

[When a Non-Fungible Valued Item (*qīmī*) Becomes Fixed as a Liability — and other benefits]

In *at-Tāj al-Mudhhab*: “Know that a *qīmī* becomes fixed in the liability in fourteen cases, namely:

*Mahr* (dowry), *khul‘* (divorce for compensation), *iqrār* (acknowledgment), and *tazkiyah*;

*Hady* (sacrificial animal for ḥajj) and *uḍḥiyah* (‘Īd sacrifice), *kaffārah* (expiation), and *salam* (advance-payment sale);

*Waṣīyyah* (bequest), then *nadhr* (vow) that entails obligation, *diyah* (blood money);

*Kitābah* (manumission by contract), *jazā’* that is binding, and *dam* (blood-due).”

And in *at-Tāj*: “If [the buyer] says, ‘Sell this to me (*bi‘ hādhā minnī*),’ and the seller says, ‘I have sold (*bi‘tu*),’ it is invalid in other than trifling items. This differs from marriage, which is valid by the imperative formula: if he says, ‘Marry me,’ and [the guardian] says, ‘I have married you,’ the marriage is concluded by that.” End.

And in *at-Tāj*, under the mention of sale: “Sale in the mosque is disliked if one entered incidentally in the wake of an act of obedience; otherwise, it is forbidden.” End.

And also therein: “As for appurtenant rights of the thing sold—such as water-courses and pathways—and what enters the sale as an accessory, ignorance of them does not harm even if they are not mentioned.” End.

And also therein: “If one sold for a cash [currency], then the ruler prohibited transacting with it before receipt, its *value* becomes due; for by its collapse it has become like merchandise. This is the sound opinion in the madhhab.” End.

**[Permissibility of Selling Paper Currency for Paper Currency with a Premium]**

**A question** about the permissibility of selling paper currency one for another with an increase according to denominations: is it permissible, for example, that a man sell a commodity for one hundred thousand if paid in 1,000-notes, or for one hundred five thousand if paid in 100-

notes?

And would it be just, for example, when salaries are paid, that some receive 1,000-notes and others 100-notes? Or must there then be an increment for the holder of the less-preferred denomination and a reduction for the holder of the preferred denomination?

**Answer:** What is meant by permitting the sale of paper currency one for another with an increase is that one of the two lots of notes is new while the other is near disintegration and tearing, or that one is in large denominations and the other in small denominations, and the like; thus the increase on one side is in exchange for the deficiency on the other side.

It is a condition of this exchange that it be hand-to-hand.

There is no doubt you see in the examples mentioned an *added attribute* in one of the two counter-values, and that added attribute is often sought and near-necessary at times—such as for a trader who carries money and travels for commerce: higher-denomination notes are lighter for him to carry, and he can conceal and hide them from covetous eyes, unlike lower denominations.

However, it is a condition that the exchange be hand-to-hand; as credit it is invalid and impermissible, because it is a means to ribā. The usurer would make such a thing a way to take usury—for example, [exchanging] new notes for ragged notes on credit—and say, “The increase is for the increased attribute,” whereas in reality he wants the increase in exchange for deferment.

Even if the seller’s *intention* were that the increase is for the increased attribute, that would still not be permitted, because the buyer typically accepts the increase and is lax about its amount on account of the credit.

**If it is said:** Why was this permitted in paper currency but not in gold and silver?

**We say:**

1. Because paper currency has no intrinsic value; its value is notional. The note, as such, has no value—unlike gold and silver.
2. Paper currency is neither measured by volume nor by weight, and it has no value from that standpoint; whatever is of that kind does not belong to the ribā-bearing categories.
3. The notes in circulation are *qīmiyyāt* (valued by appraisal), not *mithliyyāt* (fungibles); ribā does not attach to *qīmiyyāt*.

From here we said the foregoing transaction is permissible.

However, we have given it the rulings of the two currencies (gold and silver) in sales and debts that entail ribā. On that basis, it is permissible



that you sell the commodity for cash at one hundred five thousand riyals if paid in 100-notes, and at one hundred thousand riyals if paid in 1,000-notes—*all this when the price is paid cash*. It is not permitted as a credit-sale, for the reason we mentioned: the possibility that the increase is in exchange for the term.

There is no objection to an employee consenting, for himself, to a reduction—say five hundred—in order to be paid in 1,000-notes, or to an agreed increase—say five hundred—so that he takes 100-notes.

Likewise, there is no harm if the creditor and debtor mutually agree, at settlement, that the creditor take his due from the debtor in 1,000-notes while reducing—say one thousand—in return; or that he take payment in extremely tattered notes—whose leaves barely hold together in a man’s hand due to their decay—with an agreed increase—say one thousand riyals.

All of this is unobjectionable, since it involves no injustice and is no means to injustice; ribā was only prohibited because of the injustice it inflicts upon one of the two contracting parties.

### **[Cash Remittances and Receipt by Card]**

**A question** about money transfers from country to country, and about receiving funds by [ATM/bank] card?

**Answer:** What appears is that this is permissible, because the increase is slight and added in exchange for the service; the benefit is equal for the sender and the receiver—there is neither oppressor nor oppressed—and none of the recognized forms of ribā is present in it. Even if we supposed it resembles a “loan that draws a benefit,” the lender here lends his money to the money-changer and requests a benefit, for which he pays a counter-value; thus the money has for its counter-value money like it, and the service has for its counter-value a service.

Likewise with the card: the bank is a depositary and a hireling. The bank takes a small amount in exchange for:

1. Safekeeping.
2. Providing automated teller machines in every city.

Even if we supposed that the bank takes what it takes without counter-value, that would still not be ribā, because the payer of funds—the one who lends—may remit to the borrower whatever discount he wishes; there is no harm upon him in that whatsoever, whether conditional or not. Likewise, a creditor may remit to a debtor and reduce whatever he wishes; this does not fall under the headings of ribā.

Ribā is only when the payer of funds—the lender—*demands* an increase; on that came the Qur’an and Sunnah. The Sunnah has also come

with the like of what we mentioned regarding a debt the Banū al-Naḍīr had over the Muslims when the Prophet *May Allah bless him and his family and grant them peace*, commanded their expulsion from al-Madīnah. They said, “We have debts with people whose terms have not yet fallen due.” The Prophet, *May Allah bless him and his family and grant them peace*, said to them: “Reduce [the amount] and collect early.”

And Allah Most High has urged creditors to remit to debtors, saying: *“And if someone is in hardship, then [let there be] postponement until [a time of] ease. And if you remit it as charity, it is better for you.”* [Al-Baqarah:280]

### **[Providing an Invoice to Someone Obtaining a Loan from a Usurious Bank]**

**Question:** The owner of a shop was asked by a person to provide an invoice so that he could obtain a loan from the Agricultural Bank, even though this bank takes an additional charge on the loan. The shop owner is then the one who receives the funds from the bank as the price of the invoiced goods. Is this action by the shop owner permissible or not?

**Answer—and Allah is the granter of success:** If the shop owner does not intend thereby to cooperate in usury, then that sale is permissible and unobjectionable. The Prophet—*May Allah bless him and his family and grant them peace*—used to buy and sell with the Jews despite knowing their dealings in usury.

Scholars of the madhhab have permitted selling raisins to one who will press them into wine, on condition that the seller has no intention toward that. This is what appears correct. Praise be to Allah, Lord of the worlds; and may Allah bless Muhammad and his family and grant them peace.

### **On Fungible Goods (*al-mithliyyāt*)**

**Question:** Two merchants import motor oils, one from Yemen and the other from Saudi Arabia. One sold a quantity of cartons to the other, and they agreed to sell carton for carton, plus an additional five hundred riyals, because one type was better than the other. Is that valid or not, given that the quantity in one carton equals the quantity in the other? And what is the ruling on such sales that have already occurred in the past?

**Answer—and Allah is the granter of success:** Oils are fungible goods, and motor oils are of a single genus. On that basis, both surplus (excess-for-equal) and deferment are prohibited in them.

As for sales of that kind that have already occurred: if they took place out of ignorance of the prohibition, then there is no sin in that, and the transaction is ruled valid. This is because oil is not among the specifically

texted categories upon which the scholars unanimously agreed to prohibit both surplus and deferment; rather, it is from matters *analogized* to the textured categories, and the scholars did not agree upon the prohibition of what is analogized thereto; rather, there is disagreement about it. The scholars have established that if a layperson does something believing it permissible, and his action coincides with the opinion of a qualified mujtahid, the transaction is ruled valid. Allah Most High said: *“So whoever has received an admonition from his Lord and desists may have what is past ...”* [Al-Baqarah:275]. This is when the composition of the two counter-values is the same; but if they differ in composition, then surplus between them is permissible.

### [The Ruling on the Hoarder]

**The scholars of the madhhab said:** The hoarder (*al-muḥtakir*) is compelled to sell the *two staple foods*—that is, the staple of human beings and of animals whose lives are inviolable—but he is not compelled to sell at a fixed price; rather, he may sell at whatever price he wishes, and price-fixing against him is not permissible.

They then said, regarding other goods: price-fixing is permissible therein, in consideration of the public interest, but the owner is not compelled to sell.<sup>1</sup>

**I say:** Perhaps the reason for distinguishing between the two cases is that compelling the hoarder to sell in the matter of staple foods is only permitted—and obligatory—for the preservation of inviolable lives, and preserving life is obligatory. The Sunnah has come prohibiting hoarding; and the Commander of the Faithful burned the hoarder’s goods as punishment for his act.

As for the impermissibility of price-fixing in this case, perhaps the reason is what is narrated: that when people asked the Prophet—*May Allah bless him and his family and grant them peace*—to fix prices, he refrained, saying, in meaning, *“I hope to meet Allah with no injustice against anyone on my record.”* And from him—*May Allah bless him and his family and grant them peace*—also: *“The property of a Muslim is not lawful [to take] except with his good pleasure.”*

There is no doubt that if the hoarder is compelled to sell and forced to it, and a price he does not accept is set for him, and he is prevented from exceeding it—then something is being taken from him without his good pleasure.

As for other goods, price-fixing therein is permitted, because the seller is not compelled to sell his goods: he may sell, or he may refrain. Nothing

1- *Sharḥ al-Azhār*, 3/81.

is taken from his property without his good pleasure: if he accepts the fixed price, he sells; if he objects to it, he withholds the goods. In withholding them, nothing is taken from his property—while the arrangement secures a public interest for all.

This differs from the first case: although price-fixing there also secures a public interest, it is countered by the injustice of taking something from the seller's property without his good pleasure. Thus the two cases differ.

### **[Buying a Cheque for Less Than Its Face Value]**

**Question:** What is the ruling on buying a cheque for less than what it contains, even though its purchaser will withdraw the full amount from the bank? The motive for this arrangement may be that the cheque is post-dated, and so forth. And what is the ruling on money transfers from one country to another with a discount?

**Answer—and Allah is the granter of success:** What appears to me is that it is permissible. This is not from the category of sale and purchase; rather, it is from the category of "*Reduce and take early (ḍa'ū wa ta'ajjālū)*," which is reported in the hadith and whose validity and permissibility scholars of the madhhab have affirmed.

The one who "bought" the cheque has, in effect, taken over the deferred debt guaranteed by the cheque and has advanced to the creditor his due in exchange for a known deduction; this is permissible and not a form of usury.

**If it is said:** A cheque is an instrument that, in banks, carries the ruling of paper currency; selling it for less than its face value is prohibited—either as usury or as currency exchange (*ṣarf*), for which equality is a condition.

**We say:** What we have mentioned is more fitting, for the cheque is nothing but a written remittance from a person to a bank. Moreover, what is incumbent—just as the scholars of the madhhab have stated—is that if a transaction admits of a construction that validates it and a construction that invalidates it, it should be carried upon the valid construction; and they have said that Muslims' transactions must be presumed sound whenever possible.

As for wire transfers, the apparent ruling is permissibility as well. Although they may admit of invalid constructions, they also admit of a valid one—namely, to regard the discount as a form of hire (*ijarah*). It is as though one says: "Carry these funds for me to such-and-such a place, and your fee from them is such-and-such."

**If it is said:** The remitter bears no burden in "carrying" them, because he has funds already on deposit in the countries to which he remits—so

it is as if he is taking what he takes without counter-value.

**We say:** Even if the remitter does not physically travel with the funds, the remitter incurs costs in entries, bookkeeping, and accounting. He thus takes what he takes in exchange for that, while the owner of the funds pays what he pays in exchange for safeguarding his money from the dangers of the road—bandits, thieves—and the anxiety over it. Here there is giving and taking on both sides.

### **[Selling a Commodity for a Cash Price and for a Higher Credit Price]**

**Question:** Is it permissible for a Muslim to sell a commodity for one price in cash and for a higher price on credit? And is it permissible for the buyer to purchase on credit accordingly?

Moreover, we have seen many people transact this way, saying that some scholars have issued them fatwas allowing it. What is your view on that?

**Answer—and Allah is the granter of success:** This issue is a matter of disagreement among the scholars. Some allowed it, and some forbade it. Among those who allowed it are al-Mu’ayyad Billāh (as cited in *al-Sharḥ*), Abū Ḥanīfah, and al-Shāfi‘ī; however, the apparent purport of the evidences supports those who forbid it. It is authentically reported from the Prophet—*May Allah bless him and his family and grant them peace*—in *Majmū‘ al-Imām Zayd ibn ‘Alī* (Peace Be Upon Him) that he forbade “two conditions in one sale.” Imām Zayd explained this as when one says: “I sell you this item—if cash, for such-and-such; and if on credit, for such-and-such,” or, “for a term of such-and-such at such-and-such [price], or for a term of such-and-such at such-and-such [price].”

Those who permit it relied on analogy (*qiyās*). Even if analogy is strong, a textual proof takes precedence over it. Their analogy is: It is authentically established that bringing forward a deferred debt in exchange for remitting part of it is permissible from the Prophet—*May Allah bless him and his family and grant them peace*. In that case, “time” was exchanged for a portion of the price; so they attached the asked-about case to that, saying: there is no objection to increasing the price because of more time, just as there is no objection to reducing the price for less time. They also adduced the generality of Allah, Exalted is He, saying: “*Allah has permitted trade and forbidden usury.*” [Al-Baqarah:275]

This analogy may be answered in several ways:

1. It is established in legal theory that the text outweighs analogy when they conflict.
2. It is also established that, when evidences conflict, the side of prohibition is given preference.

3. Even if the form of the analogy appears sound, Allah Most High has prohibited increase, in the verses of ribā, *on account of deferment*, and He urged reduction, as He said: *“And if someone is in hardship, then [let there be] postponement until [a time of] ease; and if you remit it as charity, it is better for you.”* [Al-Baqarah:280]

Moreover, when you survey the prohibited sales, you will find that they are, in most cases, directed to the seller’s side—so that the buyer is not wronged; thus the seller is not to be analogized to the buyer in this.

As for their adducing the general verse, that does not settle the dispute.

**Yes**, those who forbid also cited the report prohibiting the sale of the desperate (*bay‘ al-muḍṭarr*).

In the marginalia of *al-Sharḥ*: “*Note*: In *Majmū‘* of ‘Alī Khalīl: If an item has one price when sold in bulk and another price when sold retail, then if the difference between them is slight—within what people commonly overlook—it is permissible to sell the bulk on credit at the retail price; otherwise, it is not permissible.”<sup>1</sup> End

### [Increasing a Commodity’s Price on Account of Credit]

**Question:** A merchant sells a sack for seven hundred riyals in cash; if a purchaser wants to buy on credit, he adds fifty riyals to the price. Is that permissible or not?

**Answer—and Allah is the granter of success:** The scholars of the madhhab—foremost among them al-Hādī (*Peace Be Upon Him*)—have forbidden such a sale and prohibited that increase, counting it among the usury that is forbidden and against which there is severe threat for the one who practices it or consumes it.

This madhhab is nearer to precaution and farther from doubt and misgivings. In the hadith: *“Leave what makes you doubt for what does not make you doubt,”* and in the report: *“The believers pause at doubtful matters.”*

Some of the Imams of Ahl al-Bayt (*Peace Be Upon Them*) permitted such a sale. Their proof is analogy with what is soundly established from the Prophet—*May Allah bless him and his family and grant them peace*—of allowing early settlement of a deferred debt in exchange for remitting part of it; they said: since the Prophet—*May Allah bless him and his family and grant them peace*—permitted remitting part of the price in exchange for time in that case, it follows that time may be counter-valued by price in sales and purchases.

1- *Sharḥ al-Azhar* 3/84.

This issue is not decisively settled, as evidenced by the occurrence of disagreement among the Imams of Ahl al-Bayt (*Peace Be Upon Them*) over its permissibility.

Nevertheless, the first madhhab is safer, nearer to precaution, and farther from doubtful matters.

### **[Compromising Cash for a Deferred Debt]**

**Question:** Is it valid to settle cash by converting it into a deferred debt?

**Answer—and Allah is the granter of success:** The scholars of the madhhab have forbidden that, as in *al-Azhar*. Al-Mu’ayyad Billāh (Peace Be Upon Him), however, said it is sound and permissible. The reasoning—as in the marginalia—is that it amounts to remitting part of the debt and deferring part of it. Imām Sharaf al-Dīn upheld this.

**I say:** This is preferable, due to Allah, Exalted is he, saying: *“And if someone is in hardship, then [let there be] postponement until [a time of] ease; and if you remit it as charity, it is better for you.”* [Al-Baqarah:280]. The verse urges both postponement and remission—when the two are of the same kind. As for when they differ—such as settling with gold in place of silver—that is not permissible. Whoever remits part and grants delay on the remainder has done well. Their statement that it is like selling ten for five is unclear. Consider this—and Allah knows best.

## [Chapter of Options (al-Khiyārāt)]

**In options:**

What falls under the heading of deficiency, the option therein is on a deferred basis and is inheritable—such as the option due to inability to deliver the sold item, the option due to loss of a stipulated attribute, the option due to uncertainty (*gharar*), the option due to betrayal in *murābahah*, and so on.

And what falls under the heading of deliberation and judgment is immediate and not inheritable—such as the option of inspection (*khiyār al-ru'yah*) and the option by stipulation (*khiyār al-shart*).<sup>1</sup>

**[Some Rulings on Options]**

In *al-Tāj*: quoting from *al-Baḥr* and *al-Bayān*: The options that fall under deficiency are on a deferred basis and are inheritable; they are: the option for defect, loss of attribute, designation (*ta'yīn*), ignorance of the measure of the sold item, ignorance of the measure of the price, a heap whose measure the seller knows, inability to deliver, and betrayal in *murābahah* and *tawliyah*.

And what falls under deliberation and judgment—such as the options of inspection, stipulation, and opinion—is immediate and not inheritable. End.

Two options remain that are on a deferred basis yet not inheritable: the option for unfair prejudice (*ghabn*), and a suspended contract.

As for the proceeds (benefits) of the sold item: in the option by stipulation, the original and derivative benefits are to be returned—whether by judicial ruling or without it; the original benefits are returned in the options of loss of attribute, betrayal, defect, inspection, and invalidity of contract if rescission is by judicial ruling, but not the derivative benefits; and if rescission is by mutual consent, then neither the original nor the derivative benefits are returned. End—by meaning.

**I say:** The purchaser rightfully keeps the benefits in exchange for his bearing the liability for the sold item if it perishes; and it is narrated about this: “*The yield goes with the liability.*”

**The Option for Defect (*Khiyār al-ʿAyb*)**

— The purchaser has the option if he discovers a defect in what he bought; if he knew of the defect at the time of sale, he has no option.

— A “defect” is only such if its existence in the item causes a decrease in price, and it is necessary that two upright experts testify that such a

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1- *Sharḥ al-Azhār* 3/89.



thing is deemed a defect and that it reduces the price.

- The proof for the purchaser’s option for defect is His saying Most High: “...*except that it be trade by mutual consent among you* ...” [Al-Nisā’ :4]. This verse is a proof for the establishment of all options—reflect on this.

— If the purchaser is content with the defective sale, his option lapses. His contentment is known either by speech that indicates he has accepted it, or by conduct that indicates he has accepted the item.

**[When Is Silence Considered Consent, and Matters That Are Not Valid Except by an Explicit Formula]**

In *al-Maqṣad al-Ḥasan*: Silence counts as consent in ten situations:

The option by stipulation; the option of inspection; when a master sees his slave buying and selling, or marrying, and remains silent; in the case of a minor girl when she reaches maturity and the one who married her off was other than the father; in the case of an adult woman if she was married off, then came to know and remained silent; when a donor gives a gift in return for an implied consideration and the item perishes and he does not reclaim; in the case of the pre-emptor (*al-shafī*) if he learns of the sale and remains silent; and in the case of the pledgee if the pledgor sells after paying him part of his due and he remains silent. End.

**And therein also:** Five matters are not valid except by their explicit wording: suretyship (*kafālah*)—[in the marginal note: thus in the author’s copy; perhaps it is *kitābah* (manumission contract)... etc.]—pre-emption (*shuf’ah*), assignment of debt (*hawālah*), testimony (*shahādah*), and rescission (*iqālah*).

**It is said:** The total of what requires explicit wording—by agreement or disagreement—is eleven, as stated:

“Testimony, pre-emption, and a judge’s decree, their assignment,

Along with rescission, then currency exchange and *salam*;

*Kitābah*, then the *takbīr* and the *talbiyah*,

Then *taqāruḍ* (mutual lending)—in it, explicit wording is required.”

## [Chapter: What Enters into the Sale, Its Perishing, and Its Being Rightfully Claimed]

### [On the Rightful Claim to the Sold Item]

**Question:** A man bought from another a plot of land for a known price. A third man—who had been the seller to this seller—came and took possession of (consumed) that plot. Disputes arose between the (present) seller and the original seller, and also between the (present) seller and the buyer. Four years passed. Finally, the second seller received compensation from the first seller—namely, a plot of land in another town—and he obtained nothing more than that after disputes, contention, and intermediaries. What is due to the last purchaser, noting that he insists on demanding the land he bought, or its equivalent in the same location? Note also that the seller claims he is a partner in the property sold, whereas the purchaser denies this and says it was a private sale to him excluding the seller [as partner].

**Answer—and from Allah is success:** If it is established that the seller and purchaser were partners in the property sold, then the compensation the seller obtained from the first seller is shared between them according to their original shares, and nothing more is due to the purchaser.

If it is established that the seller is not a partner in the property sold and that it is specific to the purchaser, then if the seller is unable to deliver the sold property to the purchaser, and cannot recover it from the first seller after attempting to do so, he must return the price he took; nothing more is due to the purchaser.

If the seller had guaranteed to the purchaser that he would replace what had failed or become void—“*Al-Hablah*<sup>1</sup> by *Al-Hablah* [*the rope by the rope*] and *the cubit by the cubit*”—in the specified location, that does not bind and is not valid according to the madhhab, as in the marginalia of *Sharḥ al-Azhār*.

This may be substantiated by the fact that the contract of sale was concluded for a specific identified item. The stipulation made in that contract—that if the sold item fails, the seller must replace it in the specified or unspecified place, and that the parties’ consent to this counts as another contract for another sold item different from the first—renders that latter contract invalid, because it did not conclude at the time of contracting. The condition for the validity of contracts is that their object take effect immediately; if its taking effect is deferred to the

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1- *Al-Hablah* is an area of five meters by five meters.

future, the contract is not valid. Such is the nature of contracts.

**[Benefit: On the Guarantee for Eviction (*Ḍamān Darak*) of the Sold Item]**

The guarantee for eviction (*ḍamān al-darak*) is to guarantee what will be established as a liability in the debtor’s regard, together with instructing the one on whose behalf the guarantee is made—such as: “Buy, and what becomes due upon you is on me,” or “Marry so-and-so, and what becomes due upon you is on me,” or “Commit the oath-breaking, and the expiation is on me,” or “Divorce, and what becomes due upon you is on me.” All of this and the like is valid and is called the guarantee for eviction (*ḍamān darak*). It is valid for the guarantor to withdraw his guarantee before the obligation falls due, not after it. This is the wording of the scholars of the madhhab, as found in the marginalia on *Sharḥ al-Azhar*.

The guarantee for eviction of the sold item is to guarantee to the purchaser the price if the sold item turns out to be rightfully owned [by someone else]. Some have reported consensus on this.<sup>1</sup>

**[The Ruling on One Who Sold and “Included” His Partners]**

**Question:** A man sold a plot of land and “included” his partners, and on that basis the buyer purchased it. After several years, some of the partners came and demanded their shares from the purchaser, arguing that they did not sell and did not approve the sale. What is required in this case? Please advise.

**Answer—and Allah, the Granter of success and aid:** What is required in this situation is what the prevailing custom dictates. What appears to me, by customary standard, is that one who remains silent in such a case—while knowing of the sale—is deemed consenting. When custom recognizes silence as consent, that custom is acted upon, as is the madhhab, so long as it does not clash with a textual proof; and here, as it appears to me, it does not clash with any text. Indeed, it is related in the books of *sīrah* that the Prophet—*May Allah bless him and his family and grant them peace*—wrote a document among the people of Medina even though only a few from each group were present, and those present undertook the commitment on behalf of those behind them.

It is also related in the *sīrah* that the Prophet—*May Allah bless him and his family and grant them peace*—did likewise with the pilgrims of Medina at the Pledge of al-‘Aqabah: he asked them for twelve chiefs who would pledge on their own behalf and on behalf of those behind them... etc.

1- *Sharḥ al-Azhar* 4/270.

Accordingly, the claim of one who asserts that he neither sold nor approved the sale—while he knew of its occurrence and remained silent for a long period with no impediment preventing him from expressing disapproval—is not to be heard.

What is required is to persuade anyone making such a claim, and the door should not be opened to this; for it would lead to the spread of corruption concerning much of what is in people's hands by way of sales, and then to abundant quarrelling and disputes.

Among the legal maxims is: "It is obligatory to carry Muslims' contracts and transactions upon validity whenever possible," and they said: "The default in transactions is validity."

This maxim is sound. The proof of its soundness is that Allah Most High brought Islam while people were already transacting in sale, purchase, gift, partnership, vows, marriage, etc.; and He affirmed for them these transactions and forbade specific matters and particulars. Based on this, whatever transactions have occurred that the Law has affirmed are valid—so long as there is nothing in the transaction that the Lawgiver forbade. If there is something of that, then it is invalid, for it clashes with the text and contravenes the prohibition.

As for acts of worship, the default in them is invalidity until it is known—where knowledge is required—or thought likely—where likelihood suffices—that the act of worship has included all its conditions, remembrances, and pillars that are obligatory therein.

The proof for what we have stated is that acts of worship are legal acts made obligatory by the Law; thus they are not valid unless they conform to the Lawgiver's command. If they do not conform to the Lawgiver's command, they are un-legal and therefore invalid—such as prayer without purification, or not facing the qiblah, or without bowing, and the like.

## [Chapter: Sales That Are Invalid]

### [Null and Defective Sales]

(1) **A null (*bāṭil*) sale:** a sale is null in the following cases:

1. The seller or buyer is a non-discerning child, or insane, or coerced without right.
2. Omission of either the price or the sold item.
3. The item is something that cannot be lawfully owned, such as carrion meat or wine.
4. The contract wording is not mentioned.
5. What entails usury, such as selling one dirham for two.

(2) **A defective (*fāsid*) sale:** this is where some condition—other than those mentioned above under nullity—is lacking. Entering into a defective sale is permissible, except in the sale of an *umm al-walad* [a slave who has borne her master a child] and a *mudabbbar* [a slave set free upon the master’s death], the sale of meat for a live animal, separating close unmarriageable kin, the sale of fetuses (*muḍāmin*), the sale of fruits before they ripen, the sale of what has been *salaf*-sold before taking possession of it, the sale of wool upon the hide of a living animal, or the sale of one of its limbs before slaughter, and milk before it separates [from the animal], and the sale of a female slave before ensuring she is not pregnant. These—though defective—are not permissible to enter, due to the prohibitions reported concerning them. As for other defective sales, entering into them is permissible.

### [Null and Defective Sale]

Al-Jalāl objected to the madhhab’s distinction between nullity and defectiveness in sales—permitting entry into the second but not the first—and so on; then he said: “But whoever branches rulings from non-principles and fancies the daydreams of imitators, who were unable to contend with the champions, is apt to flounder like a blind camel...” etc.

**We say:** The scholars divided sales into three categories:

1. A *valid* sale: one that gathers the pillars of sale and whose conditions are fulfilled. Among its rulings is that the intended legal effects are entailed by the contract itself.
2. A *null* sale: one in which one of the four pillars of sale is missing—these being: the seller, the buyer, the sold item, and the price. They called it null because a sale can only exist if its four pillars exist. If one of these four pillars is absent, the sale does not exist; applying the name “sale” to it is null. No effects ensue from it, because no “trade” has taken place by means of that sale; and Allah Most High said: *"And do not consume your wealth among*

*yourselves unjustly, except that it be trade by mutual consent among you" [Al-Baqarah:188].* Thus, consumption by means of a sale in which one of its pillars is lacking is consumption by falsehood, which Allah has forbidden in this verse.

From this you know that the scholars' naming of such a sale "null" is a designation attested by the Qur'an and confirmed by reality, and that consuming by means of it is forbidden by the explicit text of the Qur'an—reflect on this.

3. A *defective* sale: a sale in which all four pillars are present, but some of the conditions required for the validity of a sale are lacking.

Such a sale is permissible to enter, and some effects ensue from it—because the pillars of sale are present: seller, buyer, sold item, and price. The designation "trade" is realized in this sale. The defect arises due to the presence of something that corrupts the sale, such as an unknown term for the price. If the two contracting parties accept that and enter into the sale, they are not prevented, and they validly enter it.

However, there are types of defective sales that have come with explicit prohibition; entering into them is not permissible—such as selling one dirham for two, and the like.

### **Defective Sale (*al-Bay' al-Fāsid*)**

The jurists of the madhhab said: It is permissible to enter into a defective sale. Among its rulings is this:

What is due therein is the *value* (market value), not the price mutually agreed upon. If the value is higher than the price, the excess must be returned; and if it is lower, one fulfills up to that value.

What is obligatory upon both seller and buyer is that each return to the other what is his. As for any increase, its ruling is the ruling of a debt: it becomes immediately due upon demand if the one entitled to it is known; if unknown, its ruling is that of usurpation. End—by meaning.<sup>1</sup>

**I say:** What appears to me is that neither returning the excess over the value nor "topping up" to the value is obligatory, because:

1. The seller and buyer both consented to what they entered into by way of sale and purchase. The seller consented to the price in exchange for his merchandise, and the buyer consented to the merchandise for what he paid as price. Allah Most High said: *"except that it be trade by mutual consent among you" [Al-Nisā':29].*
2. Muslims have been dealing in defective sales throughout history

1- *Sharḥ al-Azhār* 3/146.

without the seller or the buyer returning any excess, and scholars have not condemned that.

### **A Note on the Sign by Which a Defective Sale Is Recognized**

They said that the approximate hallmark by which a defective sale is recognized is: a stipulation whose nature is to lead to dispute between seller and buyer—such as the term for the price being unknown and not fixed at a time both know, for such a thing tends to cause disagreement between them; or, for example, that the sale of a cow is concluded on the basis that it has “abundant milk,” for this tends to produce dispute as to what counts as “abundant.”

### **[A Loan in the Form of a Sale]**

**Question:** Two men agree that one of them will pay a specified sum of money to the other, and the latter will import from abroad a specified consignment of goods, of which the payer will receive, say, one half. The payer then stipulates upon the importer that, upon the goods’ arrival, he (the payer) will sell his entire share of what was imported to the importer at a profit of ten percent, for example. Is this permissible?

**Answer (and Allah grants success):** Entering into this “sale” is not permissible; in reality it is not a sale at all, nor is it *muḍārabah* (silent partnership). It is a loan with a specified, guaranteed profit.

### **[“Two Sales in One Sale”]**

**Question:** Two men agree that one of them will import goods from abroad and sell them to the other for a known price. They then stipulate in this agreement that the importer must buy back half of what he sold to the other, at a known price and a known profit. Is it permissible to enter into this sale or not—bearing in mind that the price of the goods will be paid by a usurious bank, to which the goods do not belong; it merely stands as guarantor and undertakes the payment?

**Answer (and Allah grants success):** This sale resembles the type prohibited by the Prophet—*May Allah bless him and his family and grant them peace*—for it is authentically reported that he, *May Allah bless him and his family and grant them peace* forbade, “two sales in one sale,” and [forbade] “a sale with a condition [that is impermissible],” and the like. Believers are those who halt at doubtful matters; and in the hadith: “*Leave what makes you doubt for what does not make you doubt.*”

### **The Judge’s Ruling Concerning Defective Contracts**

**Question:** Most of what occurs in people’s transactions—in trade, lease, *muḍārabah*, partnership, and the like—comes by contracts deemed defective according to the jurists. What, then, should the judge do if they litigate before him regarding any of these transactions? Should he rule the transaction defective and let the necessary rulings of defect

follow? Or should his ruling be confined to the specific point in dispute?

**Answer:** The judge does not rule a transaction defective unless the dispute is about its validity or defectiveness. If the dispute is about something else, he rules on that without addressing its validity or defectiveness, and the judgment proceeds as if the transaction were valid. We say this because the default in transactions is validity.

**Yes**, if the dispute centers on validity versus defectiveness, then it is obligatory to construe transactions as valid wherever possible, and one does not rule them defective except after the defect is made clear and manifest.

### **The Nullity of Legal Stratagems (*hiyal*) Used to Reach the Prohibited**

*"May Allah fight the Jews! When Allah forbade them [the consumption of] its fat, they melted it down, then sold it and ate its price."* From this is understood: the nullity of the legal stratagem by which one seeks to render the prohibited permissible; the prohibition of selling what Allah Most High has prohibited; and the prohibition of its price.

It is also understood therefrom that when Allah Most High prohibits a thing, He prohibits benefiting from it in general. Thus His saying Most High: *"Forbidden to you is carrion (dead meat)"* [Al-Mā'idah:3] indicates the prohibition of eating it and selling it, and that it is not permissible to benefit from anything of it. This is what the scholars of legal theory call "the generality of the operative cause (*ʿumūm al-muqtaḍī*)."

### **[Ruling on Sale by Mutual Transfer (*muʿāṭāh*) in Non-Trifling Items]**

**Question:** The buyer says to the seller, "How much is this item?" The seller says, "Such-and-such." The buyer says, "Give it to me," so he gives it to him, and the buyer gives him the price. Is this sale valid, bearing in mind that it occurs in significant, non-trifling items?

**Answer—and Allah is the One who grants success:** What appears to me is that such a sale is valid. The proof is Allah Most High's saying, *"except that it be trade by mutual consent among you"* [Al-Nisā':29]. Just as they say that consent is an inward matter that must be indicated by wording, here an indicator of the seller's consent and the buyer's consent has occurred; and the verse stipulates nothing beyond consent.

Supporting its validity as well is that Muslims have in practice operated this way; and whatever the Muslims deem good is, with Allah, good.

Moreover, what we have said is the view of Imām al-Muʿayyad Billāh



and Imām al-Manṣūr Billāh (*peace be upon them*), as in *Sharḥ al-Azhar*<sup>1</sup>. And I have seen from Imām al-Mahdī Muḥammad b. al-Qāsim al-Ḥūthī (*peace be upon him*) that the familiar contract formulas are not a condition for the validity of a sale; rather, anything that indicates consent—such as “Take it,” “Carry it off,” and the like that indicate consent—suffices.

This may also be supported by the well-known maxim: “It is obligatory to construe Muslims’ dealings and contracts as valid wherever possible.”

### **Issue: Original Profits (*al-fawā'id al-aṣliyya*)**

Original profits are held in trust in a defective sale, and they become lawful for the buyer if the sold item perishes before they do, and by rescission through mutual consent.<sup>2</sup>

**Comment:** What the hadith from the Prophet—*May Allah bless him and his family and grant them peace*—requires, namely, “*al-kharāj bi-l-ḍamān* (the yield goes in return for liability),” is that the profits belong to the buyer—whether original or accessory. And in *al-Azhar* it is stated that the sold item in a defective sale is owned by taking possession with permission; accordingly, the original profits are owned, since they are profits arising from what is owned. There is thus no basis for saying they are a trust... etc.

Profits in the option of stipulation belong to whomever ownership ultimately settles upon; in the option of inspection, accessory profits belong to the buyer; and in the case of defect, accessory profits belong to the buyer and original profits to the seller.

Regarding the option for defect, there is the ḥadīth of the *muṣarrāh* (milked-up animal), related in *al-Majmūʿ*.

And in the option for defect there is the report, “*Whoever buys what he has not seen has the option when he sees it*,” which is in *al-Majmūʿ*; but it is not raised to the Prophet—*May Allah bless him and his family and grant them peace*—rather, it is halted (*mawqūf*) at Imām Zayd (*Peace be Upon Him*).

And in the option of stipulation there is the ḥadīth of Ḥabbān b. Munqidh, which is in *al-Majmūʿ*, but the man is not named therein.

### **[Selling What One Does Not (Yet) Own]**

The madhhab holds that selling what one does not own is among the defective sales into which entering is permissible; this is stated in *Sharḥ*

1- *Sharḥ al-Azhar* 3/142.

2- *Sharḥ al-Azhar* 3/147.

*al-Azhar*. What complicates this, however, is what is related in the ḥadīth from the Prophet—*May Allah bless him and his family and grant them peace*—prohibiting “selling what is not with you.”

It may be said that if the sold item is known by its attributes and is not specified by its very individual, its sale is valid by analogy with *salam*; thus the prohibition related from the Prophet—*May Allah bless him and his family and grant them peace*—is specific, intending other than what we have mentioned of *salam* and what is analogized to it—namely, where the sold item is not known by its attributes, or is a specific individual.

On that basis, if the sold item is known by its attributes and is not individually specified, the sale is valid—so long as the conditions for a valid sale are met.

### [On Selling What Is Not With You]

It is authentically reported from the Prophet—*May Allah bless him and his family and grant them peace*—prohibiting “selling what is not with you,” as in *al-Amālī* and *al-Majmūʿ*, and al-Tirmidhī and others among the ḥadīth scholars authenticated it.

**I say:** *Salam* is, to near-consensus, legislated, and it is that the seller sells what is not (yet) with him... etc. Therefore, what appears to me is that the effective cause in prohibiting “selling what is not with you” is not the non-existence of the item in the seller’s ownership, but rather—as it seems to me—the inability to deliver the sold item to the buyer. That is because an on-the-spot sale entails that the buyer deliver the price and the seller deliver the sold item immediately. Thus the seller is entitled, immediately, to receive the price from the buyer, and the buyer is entitled, immediately, to receive the sold item from the seller.

The buyer’s norm is not to be content to pay the price unless he receives the sold item; and the sold item is absent from the seller’s ownership. It is as though the contract of sale entailed a stipulation of immediate delivery of both price and sold item; the absence of the item from the seller’s ownership contradicts that stipulation, and the contract is corrupted.

**If it be said:** By what you have stated, it would follow that the sale is invalid if the price is absent from the buyer’s ownership.

**We say:** The sale is invalid if the seller does not consent to deferral.

All of this is indicated by His saying *Most High*, “*except that it be trade by mutual consent among you*” [Al-Nisā’:29].

Accordingly, if the seller and buyer mutually consent that the buyer will pay the price, and that the seller will defer delivery of the sold item to the buyer for a specified period, then there is no objection—due to His

saying *Most High*, “*except that it be trade by mutual consent...*”.

### [Selling the Goods Back to the Seller]

**Question:** A man bought goods from another man, paid their full price, took possession of the goods, and left them with the seller. Later the buyer came and offered those goods to the seller to buy back at less than he had purchased them for. Is that valid and permissible or not?

**Answer—and Allah grants success:** What appears to me—and Allah knows best—is that this is permissible and valid. The proof is His saying *Most High*, “*And Allah has permitted sale and forbidden usury*” [Al-Baqarah:275]. What is prohibited and invalid is that a man purchases a good on credit, then sells it back to the seller for less than he bought it for—the two of them doing so as a stratagem to reach usury. This issue is called “*al-‘īnah*.”<sup>1</sup>

### A Benefit Concerning Legal Stratagems (*ḥiyal shar‘iyyah*)

In *al-Masā’il al-Nāfi‘ah*: Know that whatever the Law has permitted in general but has prohibited a particular pathway to it due to a specific cause—then it is permissible to employ a stratagem to remove that cause in order to attain what is, in general, permitted—such as interposing a counter-consideration when selling one *sā’* in exchange for two *sā’*s. And whatever stratagem is to escape a predicament is permissible; its proof is the “bundle verse”: “*And take in your hand a bundle of twigs, then strike with it and do not break your oath*” [Ṣād:44].

But whatever stratagem aims at rendering lawful what the Law has prohibited in its very essence is forbidden—such as deliberately turning wine into vinegar. Its proof is the Prophet’s—*May Allah bless him and his family and grant them peace*—prohibition of doing so, and his cursing of the Jews when they melted down the fat and sold it. End, in summary.

1- *Al-‘īnah* is a modal of commodity or the like, representing it with its characteristics and attributes.

**[Chapter: Murābaḥah (Cost-Plus Sale)]****[Rebate (*ḥaṭṭ*) after a Murābaḥah sale]**

**Question:** I sold a car on murābaḥah, then I asked the one I bought it from to grant me a rebate. Am I required to grant a comparable rebate to the person to whom I sold on murābaḥah, or not?

**Answer—and Allah grants success:** If the rebate occurs after the buyer has taken possession of the item and the seller has received the price, the murābaḥah seller is not obliged to pass any rebate along. This is what the jurists stated under the chapter of pre-emption (*shuḥḥah*) when they discussed what a purchaser must remit to the pre-emptor.

But if the rebate occurs before the foregoing [i.e., prior to the buyer's taking possession and the seller's receipt of price], then the seller must grant the buyer a like rebate.

**Yes**, they also stated in *shuḥḥah* that if the “rebate” was couched in the wording of a gift, transfer of ownership, vow, or charity, then the purchaser is not required to reduce the price for the pre-emptor—even if it is a stratagem—whether before or after possession; by analogy, the ruling in murābaḥah is the same.<sup>1</sup>

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1- *Sharḥ al-Azhar* 3/161.

## [Chapter: Loans]

**Question:** A civil servant has funds placed in his custody by the state to execute a project. He wishes to perform ḥajj. May he borrow from those funds to cover his ḥajj expenses, to be repaid after his return—bearing in mind that this borrowing will not diminish, delay, or harm the project?

**Answer—and Allah grants success:** That is permissible. We have already cited the proofs for permissibility in the case of the guardian of a waqf and of an orphan.

One can be nearly certain that the state would be content with such an act and would not regard it as a betrayal; the scholars say that presumed consent functions like explicit permission.

**If it is asked:** “Why do you not treat these funds like a deposit (wadī‘ah)—in which case use would not be permitted?”

**We reply:** There is a difference. A deposit is placed with someone for safekeeping, which is what its very wording implies. These state funds are not of that nature: they are placed with the employee to execute a project. The aim is to realize the project per the required specifications, whether with those very banknotes or with their equivalent. All this assumes presumed consent.

However, if borrowing would delay or diminish the project, or the borrower fears he may be unable to repay, then borrowing is impermissible; that would be a breach of trust in office.

### [Borrowing from the Agricultural Bank]

**Question:** Is it permissible to borrow from the agricultural bank to build greenhouses for oneself and one’s family, knowing the bank takes interest?

**Answer:** It is related that “every loan that draws a benefit is usury (ribā)”. If the bank lends to the farmer and takes anything over principal, it is not permissible for the farmer to borrow and pay such increment.

**If it is said,** “Those charges cover the wages of the bank’s staff,”

**We say:** Banks, as a rule, take in more via interest than staff wages—though agricultural banks often charge less than others. Banks are, at base, commercial, and it is highly unlikely that the founders do not take interest.

### On borrowing

If a Muslim borrows money from a ḥarbī [a non-Muslim at war with Muslims] he must repay it, and likewise a deposit must be returned—per Prophet Muhammad’s – *May Allah Bless him and his family and grant them peace* - saying, “Render the trust to the one who entrusted you, and

do not betray one who betrayed you,” and Allah’s saying, *“Allah commands you to render trusts to their owners”* [Al-Nisā’:58].

This is the view of al-Hādī (peace be upon him). Al-Nāṣir (peace be upon him) said: It is permissible to take it, and this is the adopted position in the madhhab. End of the citation from the marginalia.<sup>1</sup>

### [Debt (dayn)]

1. It is permissible for a Muslim to incur debt for his needs, his children’s needs, and dependents’ needs—whether essential or non-essential—whether or not he has an income from which it will be repaid. Proof, His-Most High-Syaing: *“O you who believe, when you contract a debt for a stated term, write it down ...”* [Al-Baqarah:282].
2. When the debt falls due and the Muslim cannot pay, the creditor must grant delay until ease returns, per His Most High saying: *“And if he is in hardship, then a deferment until ease.”* [Al-Baqarah:280].

### [Repaying a debt by bank-to-bank transfer and related matters]

**Question:** A man has a bank balance and owes a debt to another man who also has a bank balance. The creditor phones the debtor asking him to settle by bank transfer from the debtor’s account to the creditor’s account. The debtor contacts the bank and the transfer is executed. Is this method valid? Is the liability discharged? What if the bank collapses?

**Answer—and Allah grants success:** The bank in this scenario functions as an agent (wakīl) to pay the debtor’s liability and to receive on behalf of the creditor. The method is valid and the debtor’s liability is discharged. If the bank later becomes insolvent after completion of the transfer, the creditor has no recourse against the debtor.

**Question:** If there is dispute about whether the transfer occurred, and bank employees testify that they executed the transfer from account to account, what is the status of such testimony?

**Answer:** If bank employees testify to what they themselves did, their testimony is not admissible—for one who says, “I testify that I did such-and-such,” combines claim and testimony. Reflect on this.

**Question:** If there is no physical taking and giving in the bank, and it is merely names and numbers recorded in a computer, what is the ruling?

**Answer:** Computer posting and transfer in the bank counts as possession and delivery (qabḍ/iqbāḍ). The evidence:

1- Sharḥ al-Azhar 4/551.

1. When a man goes to the bank and withdraws his balance, he finds the remittance included in his balance; and the other party finds his balance reduced by the amount remitted.
2. The person who transferred cannot reverse the transfer back into his account unless the recipient sends it back—evidence of the latter’s possession and control.
3. Computer posting is deemed possession because the legal effects that follow possession do follow from it.
4. The prevailing custom in banks and financial houses deems account-to-account transfer to be possession.

**[A man sent payment with a trusted messenger; both the messenger and the payee later died]**

**Question:** A man owed another man a debt. He sent the amount due with a trusted, reliable messenger. He then lost contact with both the messenger and the creditor. Much later he asked about the messenger and the sender, then he learned that both had died—long after the remittance was sent. Is the sender’s liability discharged, or not? He found no trace of the payment with the heirs of the creditor nor with the heirs of the messenger

**Answer—and Allah grants success:** If the messenger was trustworthy and just, and a long period elapsed between dispatch and their deaths, then the preponderant presumption is that the messenger delivered the payment. A faithful, upright person does not neglect a trust; if prevented from delivering it, he would typically leave instructions and emphatic directions so it reaches its owner. The absence of any such indications supports that the payment reached its owner.

**If it is objected:** “The debt is certain; one’s liability is not lifted by mere presumption,”

**We reply:** The Sacred Law obliges acceptance of the report of a trustworthy just person in transactions. The Prophet (*May Allah bless him and his family and grant them peace*) would dispatch individuals to collect zakāt and distribute it to the poor; Allah’s Messenger also sent ‘Alī (‘alayhi al-salām) with funds to Banū Juḍaymah to compensate for those Khalid b. al-Walīd had killed; he distributed compensation among them, compensated them for what they missed, and what was taken from them, even down to the value of a dog’s bowl—and thereby the Prophet’s (*May Allah bless him and his family and grant them peace*) and the Muslims’ liabilities were cleared.

**If it is said:** “The Prophet (*May Allah bless him and his family and grant them peace*) knew ‘Alī (*peace be upon him*) would fulfill the task

due to what Allah Almighty revealed to him of his protection”.

**We say:** The Prophet (*May Allah bless him and his family and grant them peace*) legislated by word and deed as Allah, *Exalted is He*, said “*You have in them an excellent example*” [al-Mumtaḥanah:6]—and there is no proof from the Prophet, *May Allah bless him and his family and grant them peace*, that indicate that his reliance on ‘Alī (*Peace be Upon Him*) in distributing of what was allocated to the Banū Juḍaymah was due to a special privilege given exclusively to Ali (*peace be upon him*) and not to anyone else; therefore, it became obligatory to follow the Prophet, *May Allah bless him and his family and grant them peace*, in that matter.

**Cases where the sender’s liability is *not* cleared:**

1. It later emerges the messenger was not just/trustworthy—or the sender already knew that the messenger was unjust from the beginning.
2. The sender has credible reason to suspect the payment did **not** reach the creditor.

**[Paying a Saudi-riyal debt in Yemeni currency]**

**Question:** A man owed Saudi riyals and repaid in Yemeni rials in installments. Long afterward the creditor asked to settle accounts. The debtor says, “I repaid you with Yemeni currency I delivered.” What is due now?

**Answer—and Allah grants success:** The closest to truth and justice is that the Yemeni payments should be valued at the exchange rate on each day of delivery. That is because he did not hand it over except in exchange for the debt, and the creditor did not take it except on that condition. This aligns with common mercantile practice.

**[Debtor owes money but owns shops and property]**

**Question:** A creditor seeks immediate payment from a debtor who has no cash but owns goods, land, buildings, and shops. The creditor wants to compel him to sell shops to the creditor at their value against the debt. Is the debtor obliged, and what is proper?

**Answer—and Allah grants success:** The debtor is not obliged to sell his shops to the creditor. What is due to the creditor is cash of like kind to the loaned currency. So, the creditor came demanding the payment of his debt, and when he learned the debtor's situation, the creditor must allow the debtor a reasonable period to sell what he chooses and find a buyer; the judge should fix a time that avoids harm to either party.

**[They compromised over an unknown debt; later the debtor learns it was larger]**

**Question:** Two parties compromised over a debt of unknown amount for a known sum and mutually agreed. Later the debtor discovered the



actual debt was larger than both had reckoned at the time. Must he pay the excess, or was the compromise sufficient?

**Answer—and Allah grants success:** This form of settlement is valid in the madhhab (per *Sharḥ al-Azhar*). Accordingly, the portion of the unknown debt that both parties had in mind at the time of settlement is extinguished. If it later becomes clear that the debt was much larger, the earlier settlement does not cover the excess; rather the debtor must pay the remainder, or obtain the creditor’s release/waiver, that is because it is not permissible to take a Muslim’s money except with his willing consent. Allah, *Exalted is He*, said, “*Do not consume one another’s wealth wrongfully*” [al-Baqarah:188].

### **[Assigning a state loan to another for a price]**

**Question:** A man was granted a state loan. Another said, “Assign your loan to me in exchange for a sum of money.” Is this permissible or not? bearing in mind the state is lenient with long terms and may forgive ~20%?

**Answer:** What is apparent from the question is that the loan mentioned is not actually a loan, rather it is assistance and a grant, because it involves waiving part of the loan and extending the term. The state grants it to some of its citizens either as a reward for their long service, or for their loyalty and success at work, or something similar.

On that basis, there is no harm in the beneficiary assigning his right to another for an amount of money.

**Evidence:** It is related that Amīr al-Mu’minīn Ali (*Peace Be Upon Him*) purchased a married slave-girl, and then bought her conjugal right (*farjuhā*) from her husband for five hundred dirhams—a sale of rights. This report supports the permissibility of selling rights.

### **Note on Salaf (Advance Sale)**

In the marginalia of *Sharḥ al-Azhar*, citing *Shams al-‘Ulūm*: A severe famine struck Yemen; grain disappeared and was not sown for a long time. People had been importing from Egypt in the years of Yūsuf (‘alayhi al-salām). When grain was cut off, a noble woman of Ḥimyar asked a neighboring noblewoman for food as a loan (*salaf*), promising to return its like when her provisions arrived. She did so; people learned of it and followed suit. The practice spread in Yemen and then to Iraq, and they named it *salaf*. Before that, they did not know *salaf*: when someone’s supplies ran out, he would shut himself in his house until death, out of pride from asking—this was called al-ighṭilāq (“self-seclusion”).

## [Chapter of Salam]

Salam is a type of sale; it consists of advancing the price and deferring delivery of the sold item, subject to conditions set out in the books of jurisprudence. It is among the sales that merchants need today, and they transact in it frequently.

Some, however, have doubted the permissibility of dealing in it, based on the prohibition of selling what does not yet exist, selling what has not been taken into possession, and selling what one does not own.

**We say:** the Sunnah has established the permissibility of salam, and the Messenger Muhammad (*May Allah bless him and his family and grant them peace*) practiced it. Ibn ‘Abbās (*May Allah be pleased with him*) used to say: “I bear witness that an advance sale guaranteed to a specified term has been made lawful by Allah and permitted in His Book,” then he recited this verse: *"O you who have believed, when you contract a debt for a specified term, write it down..."* [Al-Baqarah:282], and on this basis salam is an exception to the prohibition.

### [On the Conditions of Salam]

Hadith: *“Whoever enters into a salam should do so for a specified measure or a specified weight, to a specified term.”* The hadith indicates:

- 1- That the price in salam must be paid immediately; otherwise it is invalid by debt—derived from his words: “then let him [stipulate/pay] (falyuslim)...”
- 2- That the subject matter of salam must be of what is sold by measure or by weight; it is not valid in other than that, and items sold by count and by length have been analogized to these.
- 3- That the subject matter of salam must be precisely determined by measure or weight.
- 4- And that it must be known with respect to type, attributes, quality, and the like.
- 5- That the term must be a time precisely known, so that no dispute arises—such as “on such-and-such a day of such-and-such a month of such-and-such a year.”
- 6- That deferment is a condition for the validity of salam; a salam without deferment is invalid.

### [Istisnā‘ (Manufacturing Order Contract)]

This is when a trader asks a manufacturing company or the like to sell him a quantity of its products, and the two agree upon that.

For the agreement to be valid, the following conditions must be met:

- 1- Stating the type to be manufactured.

- 2- Stating its quantity.
- 3- Stating the weight of each piece.
- 4- Stating its physical specifications, the proportion of each material, the shape and aspect of fineness, and everything required for the completeness of workmanship and the intended quality.
- 5- Stating the price for each piece.
- 6- Determining a known time for receiving the goods.
- 7- The trader pays the agreed price in the session of the contract.

If these conditions are present and the two parties contract upon them, the agreement is valid in the Sharī‘ah.

We say this because *istisnā‘* is a type of *salam*, as the jurists of the school have mentioned with regard to bricks (*al-labin*).

If the trader does not trust the company and fears the loss of his money were he to pay in advance, it may be deposited with a third party acceptable to both sides; the company takes it from his hand when the trader takes delivery of what is required; and the third party’s possession is deemed the company’s possession.

— And if the two parties trust one another and agree upon the required goods without paying any money, then this agreement is invalid and non-binding; indeed, it is impermissible to enter into it, because it is a sale of debt for debt (*al-kālī bi’l-kālī*).

In sum, it is neither valid nor permissible for both the commodity and the price to be nonexistent at the time of sale—neither in *salam* nor in other sales.

— What often happens in our lands is that a man says to another: “Make for me such-and-such of mud bricks or fired bricks, or the like, at a fixed price,” without paying the price; the man then produces the required quantity. We say: although that agreement is invalid and impermissible, it is nevertheless obligatory upon the buyer to satisfy the craftsman—either by purchasing that quantity, or purchasing part of it, or otherwise compensating him—because fulfilling a promise is obligatory, and because he caused the incurrence of costs and effort.

As for when the requested item does not conform to the specifications agreed upon by the two parties, the buyer is not obliged to take it.

## [Book of Pre-emption (Shuf'ah)]

## [Shuf'ah]

The right of shuf'ah is established for whoever possesses a cause of shuf'ah, and these causes are one of four: co-ownership (khalṭah), co-ownership in the (irrigation) water-share, co-ownership in the right of way, and immediate adjoining neighborhood; however, this right is established only for one who hastens to seek shuf'ah upon learning of the sale—otherwise the right of shuf'ah departs and is nullified.

In the hadith: *"Shuf'ah belongs to the one who leaps to it, and it is like untying the hobble."* And when the hobble of a camel is loosened, it rises and goes away—unless its owner is present when its hobble is untied, in which case he hastens to tie it again; therefore shuf'ah becomes void upon the occurrence of any of the following:

- 1 - That the pre-emptor delays in exercising shuf'ah, even slightly.
- 2 - That he turns away from it and does not want it, and there is no disagreement about that.
- 3 - That there issues from the pre-emptor what indicates his turning away from it—whether by word, deed, or acquiescence. As for word, it is like his saying to the buyer, "May Allah bless it for you," or "Rent it to me," or "Sell it to me," or "Lend it to me." And as for deed, it is like the pre-emptor working together with the buyer on the thing sold, or reconciling between him and one who litigates with him regarding the sold property. And as for acquiescence, it is like seeing him working in the sold property while the pre-emptor remains silent, or learning of the sale and remaining silent.
- 4 - Among what nullifies shuf'ah is that the claimant goes to someone other than the buyer and seeks shuf'ah from him, and tenders the shuf'ah token coin (qirsh al-shafā'). The reason shuf'ah is void in this case is that he left off asserting shuf'ah against the one against whom it is due and went to seek it from someone else; thus he neither hastened to it nor leapt to it, and shuf'ah is established only for the one who hastens and leaps to it, as in the hadith.
- 5 - Also among what nullifies it is that the pre-emptor refrains from bringing the buyer before the judge when the buyer disputes the pre-emptor's claim, for that indicates turning away.

What we have cited from the hadith indicates that the right of the pre-emptor attached to the subject-matter purchased by the buyer is a weak right that is forfeited for the slightest cause, and that it is a contingent, unstable right: if the pre-emptor meets it at the moment it arises for him, otherwise his right goes away.

***If it is said:*** If the buyer defies delivering shuf’ah to the pre-emptor, and there is no one to secure the pre-emptor’s right from him, and then the pre-emptor leaves shuf’ah on that account and turns away from it—what ruling thereafter applies to the defiant buyer?

***It is said in answer:*** the buyer sins if he knows of the pre-emptor’s entitlement to shuf’ah in what he has purchased; and the property subject to shuf’ah remains the buyer’s ownership, for the shuf’ah-property does not exit the buyer’s ownership into the pre-emptor’s ownership except by one of two matters:

*First:* that the buyer voluntarily delivers the property to the pre-emptor.

*Second:* that the judge rules the property for the pre-emptor. If neither of those two matters occurs, the pre-emptor does not own the property; and when the pre-emptor inwardly turns away from shuf’ah and relinquishes it in himself because of the buyer’s defiance in delivering it, then it lapses as between him and Allah Most High, and the buyer must repent and seek forgiveness.

Among what nullifies shuf’ah in my view is that the pre-emptor learns of the sale but does not learn the price, yet he remains silent and turns away while being able to ask about the price, and nothing prevents him from asking and inquiring about it—but he neither asks nor inquires while seeing the buyer exploiting and investing in the land for several years; in that case shuf’ah is void, due to the evident turning away on the part of the pre-emptor and his evident acquiescence to the buyer.

This issue can be branched upon the statement of the jurists of the school: that if the pre-emptor says to the buyer, “Sell it to me,” or “Rent it (to me),” or “May Allah bless the sale for you,” his shuf’ah is void; and they reasoned that this signifies acquiescing to the buyer’s ownership.

It follows from the position of the jurists of the school—that shuf’ah does not lapse for the pre-emptor by mere delay until he knows the price—that, with the passage of a long time, this entails harm to the buyer.

And so too is the ruling regarding the pre-emptor’s delaying shuf’ah until he learns who the buyer is, or until he learns whether the contract is sound or void: I am of the view that delaying shuf’ah, while the pre-emptor is able to ask who the buyer is, and to ask about the validity of the contract and the genus of the price, nullifies shuf’ah—because that constitutes turning away from shuf’ah and lack of desire for it, and because it is acquiescing to the buyer’s ownership.

If the seller and the buyer collude to conceal the real price of the sold property and lead the pre-emptor and others to think the price is high, so the pre-emptor leaves shuf’ah because of the high price, then shuf’ah

does not lapse; but if the real price later becomes known to the pre-emptor after a long period and he then seeks shuf'ah, he is entitled to shuf'ah—unless he had already turned away from it and relinquished it whether the price be high or low, in which case shuf'ah lapses.

And among the rulings of shuf'ah, as appears to me, is that it falls and is void if the pre-emptor turns away from it in his heart, leaves it in his intention, and drops it in his inner resolve, and it is not permissible for him thereafter to demand it.

The proof of that is that shuf'ah is a contingent, unstable right: if the pre-emptor hastens to it when it arises, otherwise his right goes away; so when the pre-emptor drops it after it has arisen, leaves it, and relinquishes it in his heart and intention, it falls—because he did not hasten to it.

In the well-known hadith from the Prophet (*May Allah bless him and his family and grant them peace*): “No harm and no reciprocating harm,” there is an indication that:

1- The pre-emptor (shāfi‘) is not ruled entitled to shuf'ah unless he pays the price to the buyer within specific days as the judge sees fit.

2- Shuf'ah is nullified by the pre-emptor's absence after he has asserted it; al-Hādī (*Peace be Upon Him*) set its period at one month.

It is the current custom of the people of our lands that when someone wants to claim shuf'ah, he goes to a just man, deposits with him the shuf'ah token coin (qirsh al-shafā‘), and has him bear witness that he is claiming shuf'ah for so-and-so son of so-and-so regarding what so-and-so purchased. He then leaves off demanding anything from the buyer, thinking that by doing so he has recorded the shuf'ah; afterwards he brings a claim against the buyer before the judge and alleges shuf'ah against him. **I say:** whoever does that has had his shuf'ah invalidated, because he neither hastened to it nor leapt to it; and shuf'ah is like untying the hobble—if one leaps to it and hastens to it, otherwise it departs from him. It is known that shuf'ah is nullified by delay, and whoever does as aforesaid has delayed his shuf'ah, busied himself with something else, and remained silent about it.

**If it is said:** he did hasten to shuf'ah, but he was ignorant and mistaken when he “recorded” the shuf'ah and called witnesses to it with someone other than the buyer—how then does his shuf'ah lapse due to ignorance and error?

**We say:** it is established that shuf'ah is like untying the hobble—none attains it save one who hastens and leaps to it; thus has the Sunnah come from the Prophet (*May Allah bless him and his family and grant them peace*). One who did not hasten to it and leap to it—out of ignorance, error, or forgetfulness—has lost his right; the Prophet (*May Allah bless*

*him and his family and grant them peace*) only ruled shuf'ah for the one who leapt to it, and the ignorant person did not leap to it.

**If it is said:** the jurists of the school have stated that one who is ignorant that delay nullifies shuf'ah does not have his shuf'ah nullified—

**We say:** they have said regarding that that the meaning is: it is an excuse in the case of a man new to Islam; as for others, his claim is not accepted.

Moreover, in my view, delay nullifies shuf'ah absolutely—whether out of ignorance or otherwise—because the evidence is unrestricted.

The jurists of the school said: if the pre-emptor goes to claim shuf'ah before the judge instead of before the buyer, his shuf'ah is valid and is not nullified, given the judge's authority and his charge over people's interests.

— If the pre-emptor learned of the sale and the price, but did not know who the buyer was, his shuf'ah is not nullified by delay until he learns who the buyer is; then, if once he knows him he delays, his shuf'ah is nullified.

**What I see** is that if the pre-emptor does not know the buyer while he is able to find that out, yet he does not inquire and delays, then his shuf'ah is nullified.

— If the pre-emptor says to the buyer, "I am claiming shuf'ah for half the property," or "for a third of it," or the like, his shuf'ah is nullified. This can be reasoned by noting that the pre-emptor's statement "I am claiming shuf'ah for half the property" entails his renouncing shuf'ah for the other half; and renouncing shuf'ah for half the property entails renouncing it for all of it, since the entire property was conveyed by one contract and in a single transaction.

— If the pre-emptor says to the buyer, "Make me a partner in what you purchased," and the buyer refuses to partner with him, and then the pre-emptor wishes at that point to claim shuf'ah against the buyer, his shuf'ah is not valid. That is because the pre-emptor's saying to the buyer "make me a partner in what you purchased" entails affirming the buyer's ownership; and affirming the buyer's ownership is a turning away from the falling-due of shuf'ah and a renunciation of it; besides, that is a delay.

— The jurists of the school said: shuf'ah is invalidated by regard to the pre-emptor's circumstances; so if an insolvent person claimed shuf'ah and then was absent until he became solvent, then he returned and demanded, he is not ruled entitled to shuf'ah ... etc.

Some of our scholars said: he is ruled entitled to shuf'ah, and a term is set for him like the term of the solvent, conditionally—if he pays within it, otherwise his shuf'ah is nullified; and this is the doctrine of al-

Mutawakkil 'alā Allāh Ismā'īl ibn al-Qāsim (*Peace be Upon Him*).

— The right of shuf'ah is weak, and this right is established for both the solvent and the insolvent due to the unqualified and general nature of the proofs. Thus, if either a solvent or insolvent person claims shuf'ah, the right of shuf'ah is established for him—but on the condition of payment and providing the price to the buyer, either immediately or at the due date set by the judge. If the pre-emptor pays the price at the due date set by the judge, then so be it; otherwise shuf'ah is nullified and the pre-emptor's right is lost—whether or not the judge explicitly stipulated payment by that fixed deadline, he has no shuf'ah—because of the harm that would befall the buyer of the property subject to shuf'ah were shuf'ah ruled valid while the price is lost. And in the hadith: “*No harm and no reciprocating harm.*” The loss of both the property and the price to the buyer is a grave harm, and whatever is of that nature ought not to be [i.e., ought not to be allowed]—unless the buyer himself consents to that, or the judge imposes upon him a limited deadline.

Moreover, if it is a right that the pre-emptor take the property subject to shuf'ah from the buyer's hand against his will and without his good pleasure, then upon the pre-emptor lies the corresponding right: to provide the price immediately; he is not to be granted a delay except the time it takes him to go to his house to bring the price and come with it to the buyer. The estimation of this grace period is at the judge's discretion. If the pre-emptor goes away and is absent, and does not keep the appointment set for him by the judge, then his shuf'ah is void and falls—because he did not fulfill what was due from him as a right to the buyer; at that point he does not deserve a right of shuf'ah against the buyer.

It is not valid to excuse the pre-emptor's absence and procrastination in paying the price for the property subject to shuf'ah with pretexts; he is not excused for illness, imprisonment, or the like of such excuses. That is because the right of shuf'ah is only established for the pre-emptor in return for the pre-emptor's fulfilling an obligation upon him; if the pre-emptor does not render what is due from him as a right to the buyer of the property subject to shuf'ah, then his right falls—otherwise we would be introducing harm and injustice upon the buyer. And there is no right that runs for someone except that there runs against him [a corresponding duty]. What is well-known from the conduct of our Imams, *Peace Be Upon Them*, is that they do not enforce the rulings of their state and the penal laws of their sovereignty except upon one who sleeps under the canopy of their justice.

If the seller and the buyer display the price of the sold property as high so that the property will not be claimed by shuf'ah, so the pre-emptor leaves shuf'ah until a long time passes; then the pre-emptor



discovers the true price, and it is low; so he hastens at that point to claim shuf'ah, but the buyer refuses to grant him shuf'ah; they then bring the matter before the judge. The buyer pleads before the judge that there was delay and a long period elapsed, while the pre-emptor pleads fraudulent misrepresentation with respect to the price, and that he hastened to claim shuf'ah when he learned the true price and did not delay. It is said: the pre-emptor's leaving shuf'ah and delaying it until he learned the real price admits of one of two possibilities:

- 1- That he left it due to the high price.
- 2- That he left it out of disinclination, not because of the high price nor for any other reason. In that case, the pre-emptor is required to swear an oath that he left shuf'ah only because of the high price, and that he did not leave it out of disinclination toward it.

### **[Shuf'ah Belongs to Whoever Leaps to It]**

It has been related from the Prophet (*May Allah bless him and his family and grant them peace*) that he granted shuf'ah to whoever leaps to it, and he (*May Allah bless him and his family and grant them peace*) likened the pre-emptor's right, in how swiftly it slips away, to the slipping of a camel's hobble. It is plain that when the hobble of a she-camel is untied, she ordinarily rises and goes; if the owner leaps up at the moment the hobble is untied and seizes her, she will remain for him and he will control her, but if he delays even a little, she escapes him.

Accordingly, the shuf'ah of one who leaves off claiming it after knowing of the sale is void—whether he knew the price or not, and whether he left it because he thought the buyer was 'Amr then it turned out to be Zayd, or because he thought the price high then it turned out low. This is what the aforementioned reports indicate.

It is also related that the pre-emptor has a stronger claim to the item sold than the buyer—unless he willingly foregoes it.

*From that it is understood that:*

- 1- Shuf'ah is a weak right.
- 2- Delay nullifies this weak right.
- 3- Any act or statement that indicates the entitled person's willing renunciation nullifies shuf'ah—such as saying to the buyer, "May Allah bless what you purchased," or remaining silent about demanding shuf'ah, whether he was present at the session of the sale contract or absent from it, or saying to the buyer, "Sell to me," or "Partner with me in the purchase."

### **[Rulings Concerning the Price of the Property Claimed by Shuf'ah]**

**According to the school:** if the seller admits that the price is less than

what the buyer claims:

- If his admission is before receiving the price, the pre-emptor is liable only for what the seller admitted.
- If his admission is after receiving the price, his admission is not accepted and the buyer's claim stands.
- If the seller remits part of the price for the buyer before receiving it, the pre-emptor is liable only for what is actually paid.
- If the remission is after receipt of the price, the pre-emptor is liable for the whole.
- If the seller gives, vows, donates, or otherwise transfers to the buyer some of the price, the pre-emptor remains liable for the entire price and nothing falls from him, even if the intent was legal stratagem—whether that was before or after receiving the price.

**[No Shuf'ah in What Is Bequeathed for (the Expenses of) Hajj]**

**According to the school**, as in *al-Tāj*: whoever bequeaths a specified plot to cover the Hajj of Islam, and the executor hires a pilgrim on behalf of that deceased person using that specified plot, the co-owner has no shuf'ah in that, nor anyone else. *End*.

And there it also states: shuf'ah is established in an exchange of land for land (*munāqalah*) if the exchange is phrased with the wording of sale or if customary usage treats it as a transfer of ownership; the liability is for the value—i.e., the value of what corresponds to it. *End*.

**I say**: the Sunnah has established shuf'ah in sale; and the sale in which shuf'ah is established, as in *al-Azhār*, is: “every tangible property acquired by a valid contract for a manifest, known consideration that is (legally) property (māl).”

Accordingly, a hired pilgrim who acquires land as compensation incurs no shuf'ah, because he acquired the land for a consideration that is not property but services/benefits; on this basis they said: whoever rents out a house or the like in exchange for specified land—there is no shuf'ah regarding the land—because benefits (*manāfi'*) are not (counted as) property. This is the school's position.

**[Validity of Shuf'ah for One Who Personally Does Not Desire It]**

If it is known from the pre-emptor's intent that he has no personal desire for the property by shuf'ah, but only wants to take it and then give it to someone else, that does not prevent the validity of shuf'ah. *End of citation from al-Tāj*.

**[Does Shuf'ah Lapse Due to Insolvency?]**

In *al-Tāj*: shuf'ah lapses due to the pre-emptor's insolvency. *End*.

**I say:** the sounder view is to differentiate:

if an insolvent person asserts shuf'ah, the judge should grant him a day or two—perhaps he will find someone to lend him the price. If he brings the price, he is ruled entitled to shuf'ah; if he is unable to find the price, his shuf'ah is nullified.

We say this because shuf'ah was legislated to repel harm; if the insolvent can remove the harm by borrowing the price, there is no reason to deprive him of this right.

**[Does Shuf'ah Apply When the Price Is Qīmī (Non-Fungible /Value-Based)?]**

**Question:** A man owns a share in a plot (*jirbah*). He sold his share to another man for a particular rope [a specific non-fungible item] located elsewhere. The seller's partners in the plot then sought shuf'ah. Do they have shuf'ah or not?

**Answer—and Allah grants success:** shuf'ah is established here. The only conceivable impediment is that the price is *qīmī* (non-fungible), and some have stated that a condition for validity is that the price be *mithlī* (fungible).

**We reply:** assessed value stands in the place of a like-for-like; the price is appraised by two upright valuers, and that value is paid to the buyer. This is the position of the school, as in *al-Azhār* and its commentary<sup>1</sup>.

The proof for what we have stated is that the rationale warranting the obligation of shuf'ah is present in this and similar cases—namely, repelling harm from the neighbor. The evidences obligating shuf'ah are unrestricted; they are not conditioned on the price being fungible. Nothing indicates that a value-based (*qīmī*) price blocks shuf'ah, and the default is the continued establishment of shuf'ah.

### **A Stratagem to Nullify Shuf'ah**

The stratagem is that the landowner makes a vow (*nadhr*) in favor of the buyer of an undivided share of the land he intends to sell before the sale, then sells it to him thereafter; the buyer thus becomes a co-owner (*khalīṭ*), and the co-owner has priority over others in shuf'ah.

### **Benefit (On Shar'ī Legal Stratagems)**

In a marginal note it is written: our shaykh and our blessing, the erudite Ṣafī al-Dīn—who outshone his peers—Aḥmad ibn Qāsim al-Shamaṭ, said: I have seen a criterion regarding legal stratagems (*ḥiyal*) distinguishing what is permissible among them and what is not. After

1- *Sharḥ al-Azhār* 3/233.

some discussion and commentary about the indications that outwardly point to the permissibility of stratagems, and the indications that outwardly point to their prohibition, he said:

1- Every stratagem by which one can carry out an obligation that cannot be fulfilled without it is permissible. There is no difference between what Allah Most High has made obligatory and what a person has made obligatory upon himself.

This is like: traveling in the case of one who has obligated upon himself (by oath) to have intercourse with his wife during the daytime in Ramadan; and like (for hadd) by 'uthkul [*a bouch of dates*] on behalf of a sick person upon whom Allah has made it obligatory; and like zakāh—when a person has been negligent in paying it until he has become poor, then he repents and uses a stratagem by giving it to a poor person who returns it to him.

Then he said: We said, “an obligation that cannot be fulfilled without it,” to exclude the wealthy person able to pay zakāh—for a stratagem does not avail him.

2- Every stratagem that serves as a means to a prohibited matter is forbidden and invalid—such as stratagems that lead to usury, bribery, nullifying the right of an heir or of a pre-emptor (shafi'), and the like.

Likewise, what is used to escape an obligation while one is able to perform it [is forbidden]; for it was only permitted in cases of inability due to the evidence—namely, the Prophet (*May Allah bless him and his family and grant them peace*) said: “*When you are commanded to do something, do of it what you are able.*” End quote

**I say:** What appears to me—*Allah knows best*—is that a stratagem used to avert an obligation whose obligation is merely expected (but has not yet become due) is permissible, provided that the stratagem itself is permissible. Accordingly, his citing as an example under the prohibitive criterion “nullifying the right of the pre-emptor (shafi')” is not correct; for the pre-emptor’s right had not yet become due at the time of the stratagem—it was only anticipated. The stratagem served only to prevent that right from becoming due, and thus no established right was invalidated by it.

The proof for what we have stated—that a stratagem to avert an obligation merely expected to become due is permissible—is that when Allah Most High permits something, He permits all that follows from it. Thus, when He permitted travel, He thereby permitted—by its cause—breaking the fast during the day in Ramadan, shortening the prayer, combining it, and performing dry ablution (tayammum).

Likewise, Allah *Most High* permitted gifts and charity—indeed, He encouraged them. So if a man gives as a gift or charity to another an

undivided share of his land, then sells the remainder of the land to him, there is no harm in that; for he has not done anything prohibited by the Law, nor has he prevented anyone from a right.

***If it is said:*** a pure act of obedience, when it becomes a cause of killing a believer or violating his honor, becomes forbidden; for example, a tyrant asks you about a certain believing man and you know he intends to kill him—then telling the truth in that case by informing about him is forbidden. Likewise, if a Muslim fears death from using water, then using it is haram.

***We say:*** the acts that are sins absolutely and in all circumstances make whatever leads to them a sin.

Moreover, what appears to me is that resorting to stratagems to leave an obligation or to commit a prohibition conflicts with the interests for which the Shar‘ī rulings were instituted; in this, it contradicts the objective of the All-Wise Lawgiver.

Accordingly, we say: no stratagems are permissible except those that have been specifically reported from the Lawgiver, or what can be analogized to one of them by a sound common rationale, or what necessity compels. Travel, for example, is a stratagem in the case of one who swore that he would have intercourse with his wife during the daytime in Ramadan—as has been reported from ‘Alī (*Peace be Upon Him*)—and what shares its cause is analogized to this, and so on.

### **[Places Where There Is No Shuf‘ah, and Places Where Shuf‘ah Does Not Fall]**

According to the school: There is no shuf‘ah between a building and the land, nor between trees and the land, when the building is without the courtyard-plot (‘arṣah) or the trees are without the land—this is due to the absence of contiguity. Likewise, there is no shuf‘ah, by reason of mere adjacency, between an upper storey and a lower storey in buildings—except with respect to the access way that is the staircase; so if the upper floor’s access is other than the lower floor’s access, there is no shuf‘ah.

Furthermore, if a man sells the fruit to one person, then sells the tree to another, the first buyer (of the fruit) may claim shuf‘ah in the tree by virtue of that. End.

And if the water is a mere trickle that irrigates the upper plot and then those beneath it, there is no shuf‘ah, due to the absence of shared channel.

The type of adjacency that establishes shuf‘ah is like the contiguity of the ground-plots of houses that adjoin at the base (even if the buildings themselves do not touch), and like the contiguous boundaries of owned

lands—not the mere connection of open yards in which there is only an easement-right; in the latter there is no shuf'ah. All of the foregoing is from *al-Tāj* according to the school<sup>1</sup>.

Ignorance does not affect the validity of waiving rights; waiving them is valid even in a state of ignorance—such as waiving shuf'ah.

Among that is what is in the *Majmū'* of Imām Zayd (*Peace be Upon Him*): “Divorce her, O enemy of Allah.” So ‘Alī (*Peace be Upon Him*) said: “As for now, either retain (your wife), O slave, or divorce,” or as he said.

If the pre-emptor leaves shuf'ah for a certain reason and then it becomes clear that the reality is otherwise, he remains entitled to his shuf'ah; his word is accepted with an oath. That is like when he is informed that the price is one hundred, or that the contract is invalid; or he thought no one would grant the buyer shuf'ah, then someone did; or the buyer was (thought to be) his father or his brother, then another pre-emptor arose; or it was said the purchaser was Zayd so he relinquished, then it turned out to be ‘Amr; or that the price was of one genus, then it turned out to be of another; or he was informed that half was sold, then it turned out the whole (was sold)—or the reverse. In such examples, shuf'ah is not nullified by acquiescence or by leaving it—likewise for what resembles these examples.

### [Ruling on Compensation in Shuf'ah]

If the pre-emptor (shafi') transfers his shuf'ah to another in return for compensation, his shuf'ah is nullified, and that compensation is not binding—because it is a (mere) right, and the sale of rights is invalid. The compensation remains in the pre-emptor's hand, and—if the payer knew the pre-emptor was not entitled to it—it is like usurpation, except in four cases; for he empowered him over his property through ignorance—like usurpation in all its aspects. *End from al-Tāj*<sup>2</sup>.

**I say:** What appears to me is the permissibility and validity of compensation with respect to rights, because:

1- It is narrated that the Commander of the Faithful, ‘Alī (*Peace be Upon Him*), purchased a slave-girl who was married; then he (*Peace be Upon Him*) purchased her sexual access for five hundred dirhams, so the husband divorced her—or as narrated. This is a sale of rights, for the husband had no ownership in the slave-girl; he only had the right of intercourse.

**If it is said:** the husband of the slave-girl paid wealth in exchange for

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1- *al-Tāj* 3/9.

2- *al-Tāj* 3/26.

her intercourse—

**We reply:** the husband has already taken his enjoyment by intercourse; what remains to him is (only) a right.

2- There is no reason to prohibit compensation from the one who receives it when the giver tenders it willingly and with consent; at the very least, it is permissible for him.

### [Rulings Related to Shuf'ah]

If the pre-emptor demands shuf'ah, it is not a condition that he litigate before the judge after the demand; rather, demanding it suffices to establish and record it, without litigation. *End from al-Tāj*<sup>1</sup>.

If the pre-emptor delays demanding shuf'ah after learning of the sale, while ignorant of (the price's) genus or amount, or of who the buyer is, his shuf'ah is not nullified. *End*<sup>2</sup>.

Shuf'ah is fixed, and there is no disagreement about it in general. It has been related from the Prophet (*May Allah bless him and his family and grant them peace*): “*The neighbor of the house has the strongest claim to it if (his claim) is made at the price,*” or as he said, and similar reports.

And it is narrated that it must be exercised immediately: if the pre-emptor records it (without delay), otherwise it departs.

The wisdom in legislating it for the co-owner and the neighbor is the repelling of harm;

and the wisdom in requiring immediacy is the repelling of harm from the buyer.

### [Further Rulings of Shuf'ah]

1- If the pre-emptor asks the buyer to sell to him, or to gift to him, or to lease to him, or to lend him the property subject to shuf'ah, his shuf'ah is nullified—because that affirms the buyer's ownership—even if he was ignorant that such a request nullifies shuf'ah. *Paraphrased from al-Bayān*.

2- And in *al-Bayān* also, in meaning: Abū al-‘Abbās, Abū Ṭālib, and al-Faqīh Yaḥyā mentioned that the pre-emptor's refraining—one time—from litigating the buyer before the judge when the buyer disputes him nullifies shuf'ah; while the school's position is that shuf'ah is not nullified by leaving litigation.

3- And in *al-Bayān* also: if the pre-emptor requests <sup>his</sup> shuf'ah from the buyer, then is absent for a period and delays, his shuf'ah is not

1- *al-Tāj* 3/27.

2- *al-Tāj* 3/27.

nullified—contrary to *al-Funūn*. It is said, according to *al-Funūn*: if his absence is a month or more. *End (in meaning)*.

**I say:** the stronger view is that of *al-Funūn*, because it repels harm from the buyer; and in the hadith: “*No harm and no reciprocating harm.*” When the pre-emptor leaves off litigating before the judge, after demanding shuf'ah, for a long period, that indicates his turning away from shuf'ah and abandoning it. The “long period” is assessed as a month or more—like (the rule for) absence—and this is supported by the preceding evidence.

Shuf'ah is nullified by anything that indicates the pre-emptor has turned away from it and abandoned it, and the evidence is what has come in the report that it is like the slipping of a hobble... etc. The jurists of the school said: shuf'ah is inherited.

### **[When Does Shuf'ah Lapse?]**

What appears to me—*Allah knows best*—is that shuf'ah lapses by whatever issues from the pre-emptor that indicates his turning away from shuf'ah, or his affirming the buyer's ownership—whether that occurs by word, action, or omission.

What has come in the Sunnah regarding shuf'ah is that shuf'ah belongs to whoever leaps to it, and that it is like the slipping of a hobble, and that the neighbor and the like have a stronger claim to the item sold than the buyer by shuf'ah—unless he willingly foregoes it. And there has come, as a general principle covering shuf'ah and other matters, the hadith: “*No harm and no reciprocating harm.*”

On that basis, the pre-emptor's shuf'ah is nullified by matters including:

- 1- That he leaves off shuf'ah after learning of the sale, for that indicates his lack of desire for shuf'ah.
- 2- That he demands shuf'ah from the buyer, the buyer then disputes him, and thereafter the pre-emptor refrains—without excuse—from pursuing his claim before the judge; for that indicates his disinclination.

### **[What Is Priority-Based Repossession (Shuf'ah bi'l-Awlawiyyah)?]**

Priority-based repossession is when an heir takes back what the executor sold from the estate of his bequeather to settle a debt; the heir may annul (the sale) and take it back by right of priority, not by the right of shuf'ah—unless the judge has ruled the sale (valid).

Among its rulings: its right among the heirs is according to their shares of inheritance, not by headcount, if all of them demand it; but if some demand it, he is entitled only to his portion.



Among its rulings: it is on a deferred (non-immediate) basis so long as there is no permission or consent. *End.*

**I say:** attached to this is what occurs in our lands regarding sales of farm-plots: a farmer sells his plot (*jirbah*) or his plantings (*gharā’is*) to a merchant, and the plot remains with the seller, who delivers to the buyer a portion of its yield; when the seller becomes able (financially), he pays the buyer the price encompassed by the sale and returns his property to him, without resistance—as though it were a foregone conclusion.

**Yes,** if the seller dies, the right to reclaim the sold item is established for his heirs. If some of the heirs reclaim the property—by analogy with what they have stated regarding priority-based repossession—the right belongs to all the heirs; whoever demands his right in the property is entitled to it, and it is not fitting that some heirs take exclusive control of it to the exclusion of others. That entitlement is on a deferred basis and is not nullified by silence.

**Yes,** if some of the heirs purchase it and exploit it for a long time, then another heir requests his share of the plot (*jirbah*) and also demands the proceeds (*ghallah/produce*), he is entitled to his share of the plot; as for the proceeds, he is entitled to nothing of them—because the plot belongs to the heir who purchased it; the other heir only has the right to purchase his share.

Does he become entitled to the proceeds from the time of his demand until the time he is ruled entitled to purchase his share of the plot?

What appears to me is that he is not entitled to any proceeds during this period—just as in (ordinary) shuf’ah.

**[Is It Permissible for the Judge to Coach the Buyer in What Nullifies the Pre-emptor’s Shuf’ah?]**

**Question:** If the pre-emptor (al-shafi‘) delayed claiming shuf’ah for several years, then later did so and alleged that he did not know the price until the time he claimed it, and he and the buyer brought the case before the judge—and the judge formed a strong, prevailing presumption that what prompted the pre-emptor to seek shuf’ah was vengeance against the buyer for a word the buyer had said to him, not an actual desire for shuf’ah, but rather a wish to harm the buyer on account of that word—then may the judge alert the buyer, whether through an intermediary or directly, to what would nullify the shuf’ah? Can this scenario be excepted from the prohibition upon a judge’s coaching (taqlīn), or not?

**Answer—and from Allah is success and right guidance:** if the pre-emptor adduces the causes, conditions, and proofs (bayyina) by which he is entitled to shuf’ah, and the buyer is unable to present anything that rebuts any of that, then at that point the pre-emptor deserves shuf’ah; what motivated him to seek it, and what drove him to it, has no effect. It

is not permissible for the judge to coach the buyer with arguments to defeat the shuf'ah for the reason just mentioned.

It is not considered prohibited coaching, however, for the judge to ask the pre-emptor or the party against whom shuf'ah is claimed questions such as: "Did you go to seek shuf'ah from the buyer or from someone else? Why, when you learned the price, did you go to a man who has no connection or relation to the property or to the buyer to claim shuf'ah?"

Likewise, it is permissible for the judge to say to the buyer: "Did the pre-emptor come to you, once he learned the price, to seek shuf'ah from you? What did he say to you? Did he give you the shuf'ah token coin, or did he give it to someone else?"

We say this is not the prohibited kind of coaching, because the judge is obliged to be certain concerning the rulings he issues; careful fact-finding by the judge is obligatory. If that certitude comes by questioning and examining the litigants—or either of them—then that is incumbent upon him.

— If the buyer possessed a cause of shuf'ah regarding what he purchased, then his purchase is deemed an exercise of shuf'ah (istishfā').

— The pre-emptor becomes entitled to shuf'ah by one of four (causes):

- 1- That the pre-emptor is a co-owner (khalīṭ)—meaning he owns an undivided share, whether a third or less or more, of land, a house, a shop, equipment, and the like; the share must be undivided (mushā').
- 2- That the pre-emptor is a partner in the watercourse (ṭarīq al-mā') that descends along this channel both to his land and to the sold land; and the watercourse must be privately owned.
- 3- Shared access ways to houses; it is a condition that the access way be privately owned by the residents of those houses. As for a road that is not specific to particular persons, it is not a cause of shuf'ah.
- 4- That the pre-emptor is an immediately adjoining neighbor; in that case he is entitled to shuf'ah in what adjoins him.

— Shuf'ah is inheritable; if one entitled to shuf'ah dies, the right passes to his heirs.

— If those entitled to shuf'ah are two or more, the shuf'ah is divided equally among them—the one with a larger undivided share and the one with a smaller share are equal in it.

— It is permissible to employ stratagems (ḥiyal) to nullify shuf'ah. Among such stratagems are:

- 1- That the seller, before the sale, gifts the buyer an undivided

percentage of what he intends to sell—say, one-tenth—then sells him the remainder, i.e., the other nine-tenths.

- 2- That the seller excepts (from the conveyance) a strip a handspan wide, for example, of the land, separating the sold plot from the neighbor who would otherwise seek shuf‘ah.

— The jurists of the school and others said:

The pre-emptor deserves shuf‘ah even if he had renounced it before the sale. Their proof is that he only becomes entitled to shuf‘ah by the contract of sale; before the sale he does not deserve it, and a renunciation of what one does not (yet) deserve is invalid.

It may be said in reply: what you have stated is built on the premise that the effective cause (‘illah) of the pre-emptor’s entitlement to shuf‘ah is the sale.

— Closer to the truth is to say: neighborhood (jiwār), co-ownership (khalṭah), and the like are the cause of shuf‘ah, while the sale contract is a condition.

The proof for what we have stated is what has come in the reports from the Prophet Muhammad (*May Allah bless him and his family and grant them peace*) and from ‘Alī (*Peace be Upon Him*) and others—that he ruled shuf‘ah for the neighbor. Thus, this serves as a reminder that the effective cause (‘illah) is neighborhood.

In the report whose meaning is: “*The neighbor has the strongest claim to the goods if (the claim) is made at the price,*” there is evidence for what we have mentioned regarding the cause; and that the sale is only a condition. On that basis, shuf‘ah falls by renunciation before the sale, because the cause—neighborhood and the like—is present.

— Analogous to what we have stated is what the jurists of the school say regarding validating a bequest by a deathly-ill person in excess of one-third: they deemed it sound. The reasoning for its soundness is that the heirs have a right in the estate of the testator by virtue of being his heirs and kin; this right does not materialize and become established for the heirs except upon the death of the testator.

— And likewise what they said: that the presence of the zakāt-threshold (niṣāb) in one’s ownership is the cause of zakāt’s obligation, while the lapse of a lunar year (ḥawl) is the condition for the obligation’s realization and establishment.

## [Book of Lease (Ijārah)]

**[Dispute Between the Worker and the Employer Over the Amount of Wage]**

**Question:** A man asked another to transport crushed concrete and gravel for him, and he asked him to fix a price. He said: the price per load (truckload) is “fifteen—twenty.” He then transported what was required. At settlement, they differed: the requester said, “I will give you fifteen,” while the transporter said, “Twenty.” What is the ruling?

**Answer:** The transporter’s statement “fifteen—twenty” bears two possibilities:

- 1- That the lowest price per load is fifteen thousand riyals and the highest is twenty; this indicates he is content with a price of 15 and above up to 20.
- 2- That he intends a choice between the two prices.

On the first understanding, the transaction is valid, and the purchaser is only obligated to pay fifteen; if he adds more, it is from himself. A close parallel is: *“...on the condition that you hire yourself to me for eight years; but if you complete ten, it will be from you.”* [Al-Qasas:27]

On the second understanding, the transaction is deemed invalid, because choice between two prices entails ignorance regarding the consideration and leads to dispute.

If a transaction admits two constructions—validity and invalidity—it is carried upon validity. Accordingly, this transaction is valid.

**[Wages for Performing an Obligation or a Prohibited Act]**

The jurists of the school, as in *al-Azhār* and its commentary, summarized: it is obligatory to return the wage taken in exchange for performing an obligatory act or a prohibited act to the payer—whether the wage was stipulated or tacit at the time of the *ijārah* contract. If there was no *ijārah* contract, it must be given in charity.

**I say:** there is no doubt that taking a wage for performing an obligation or a prohibited act is forbidden. As for performing the obligation, then on account of His saying Most High: *“And they were not commanded except to worship Allah, [being] sincere to Him in religion...”* [Al-Bayyina:5]—and performing an obligation for a wage negates sincerity.

And as for performing a prohibited act, then on account of His saying, regarding the scholars of the Children of Israel who took money in return for distortion: *“So woe to them for what their hands have written, and woe to them for what they earn.”* [Al-Baqarah:79]

What appears to me is that one who has taken a wage for any such

matter—if he repents and turns back to Allah—does not have to return it, because:

- 1- Payment of the wage to the man constitutes permitting and authorizing him to consume that money; in that case, he does not owe liability, even if he sinned by consuming it.
- 2- And because Allah Most High says: *“So whoever has received an admonition from his Lord and desists—then for him is what is past.”* [Al-Baqarah:275] On this basis: if the payer demands back the money he paid—if the money is still present, he must return it; but if it has been consumed, he owes nothing, because he had prior permission to consume it.

The jurists of the school, as in *al-Azhār* and its commentary, said: it is forbidden to take a wage for an obligatory act, such as passing judgment or teaching the Qur’an and the like; and likewise it is forbidden for a prohibited act, such as the wage of a soothsayer or a female singer. This is when the wage is stipulated or tacit.

But if a man performs the obligation not in exchange for a reward (ju‘ālah) but because it is obligatory, then he is given something afterwards on account of his act, it is permissible for him to take it—because it is an act of benevolence—even if it is understood to be for that act, so long as it does not bring upon him suspicion (of selling the duty), in which case he sins, though the reward is lawful to him; this is due to the duty to ward off suspicions from oneself.<sup>1</sup>

### **[Ruling on Delivering a Trust (Amānah) to One Who Will Use It to Wage War on Religion]**

**Question:** If a man carries a trust to deliver it to another man, and it becomes clear to the carrier that the trust he is carrying has been sent to wage war against faith and religion, to show enmity to the believers, and to strengthen falsehood and its people—what is incumbent upon him? What should he do?

**Answer—and from Allah is success:** it is not permissible for the carrier of the trust mentioned in the question to deliver it to a party that wars against faith and religion, for that strengthens falsehood and its people, and due to His saying Most High: *“And cooperate in righteousness and piety, but do not cooperate in sin and aggression.”* [Al-Mā’idah:2]. One of two courses is incumbent upon the carrier of the trust:

- 1- Either to return it to its owner who gave it to him.
- 2- Or to hold it with him until its owner who gave it to him

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1- *Sharḥ al-Azhār* 3/302–303.

comes, and then return it to him.

**If it is said:** Why did you not say that he may give it toward the benefit of religion—to strengthen its side and to honor truth and its people? For when Allah Most High forbade cooperation upon sin and aggression, He commanded cooperation upon righteousness and piety—and strengthening and honoring religion are among the greatest forms of righteousness and piety.

**We say:** Allah has emphasized the matter of trusts; He said, *Exalted is He: “Indeed, Allah commands you to render trusts to whom they are due.”* [Al-Nisā’:58]. And in the hadith: “Trusts are to be rendered to the righteous and the wicked.” And what is well known in the Sīrah: when the Prophet (May Allah bless him and his family and grant them peace) emigrated from Mecca to Medina, he left ‘Alī (Peace be Upon Him) in Mecca to return the trusts that were with the Prophet (May Allah bless him and his family and grant them peace) to their owners, and the people of those trusts at that time were polytheists.

— Allah Most High has forbidden treachery and condemned its people in the Noble Qur’an. Indeed, it is not permissible to betray a trust even if it belongs to a hostile unbeliever at war, because your carrying the trust of the hostile unbeliever and your agreeing to carry it for him constitutes granting security to his property.

It has been established among the scholars of the Muslims since the time of the Companions that if any one of the Muslims signals to a hostile unbeliever at war and he approaches by that signal, that signal counts as granting him security—together with whatever he has of wealth, weapons, or the like. None may assault him or what is with him; then they must escort him back to a place of safety. In this there is proof for what we have mentioned of the inviolability of trusts—even if they belong to a hostile unbeliever at war.

**If it is said:** Is it permissible for the ruler or for other Muslims to seize the trust from its carrier because it belongs to those at war?

**We say:** rather, it is obligatory upon the ruler and others among the Muslims to assist the carrier of the trust in safeguarding it, due to the hadith: “The least of the Muslims grants protection on behalf of all of them, and they are one hand against others.” Thus, if the granting of security to the one at war issues from a single Muslim, it is as though it were security from all the Muslims.

If the trust the Muslim is carrying is wine, or an explosive device sent with the Muslim to a man ordered to blow up a mosque, or the house of a believer, or the like—and this does not become clear to the carrier until after he has taken it—then as for the wine, he pours it out or burns it; and as for the explosive device, he returns it to its owner, or he holds it

with him until its owner comes, and then he returns it to him.

We distinguished between the two because the very substance of wine is prohibited; no use of it is permissible for us. As for an explosive device, its very substance is not prohibited; it may be used in multiple domains. What is prohibited for us is using it for sin and aggression.

### [Leasing Rights]

The school holds that leasing rights is invalid; in a marginal notation: that leasing them is valid—thus in the marginalia of *Sharḥ al-Azhār*.

**I say:** what weighs stronger to me is that leasing some private rights is valid—such as house courtyards and their protected setbacks (ḥarīm), village stone quarries, farm field outlets (spillways), and the like—due to need, and because most tribes customarily lease grazing rights and the like.

Moreover, there is no evidence proving its prohibition except what they say: that sale is only valid in (full) ownership—because selling what a person does not own and taking a price for it is impermissible; it is consuming people’s wealth unjustly, and Allah Most High has forbidden that.

**We say:** a private right is the sibling of ownership—its holder enjoys it to the exclusion of others and disposes of it as he wishes; no one may dispose of it except with his permission. They [the jurists] have said: gifting it, vowing it, and giving it in charity are valid; they have also said: selling it in conjunction with something else is valid.

Therefore we say: selling it and taking a price for it is not consuming people’s wealth unjustly; rather, the price is taken in exchange for an asset the buyer has accepted and for which his soul is content to tender payment. Thus it does not fall under the Qur’anic prohibition.

### A Benefit Regarding Leasing of Rights

The jurists of the school said—as in *al-Tāj*: “Leasing the right of passage (*ḥaqq al-istitrāq*) and (the right of) water flow is also invalid, because the benefit is not owned.” End.

**I say:** The upshot of what the jurists of the school say is that selling rights and leasing them are invalid. They reason, as here, that rights are not owned by the seller or lessor, and selling or leasing what a person does not own is invalid.

This may be supported by His saying, *Most High*: “**Do not consume one another’s wealth unjustly—except that it be trade by mutual consent.**” [An-Nisā’:29]

Afterwards, I am of the view that when people need to exchange such rights, it should be on the basis of settlement (*ṣulḥ*). Whatever is on the basis of settlement and mutual consent, it is permissible to take money

for it; or it may be on the basis of a gift with consideration.

**[Ruling on “Naql al-Qadam” (Transfer of Tenancy/Goodwill)]**

**Question:** What is your view regarding what a current tenant receives of money in exchange for vacating the premises for a new tenant—what is called “*naql al-qadam*” (transfer of standing)? Is it lawful for him to take it or not?

**Answer—and Allah grants success:** There is no impediment to taking it.

**If it is said:** The scholars have said that selling rights is not permissible, and this is among rights.

**We say:** Even if it is among rights, the scholars have permitted selling them in the chapter of lease, since lease is, in reality, the sale of rights; and this tenant has sold his right to remain in the premises.

Hence, the scholars in our lands have not objected to this sale, numerous as they are, nor despite the frequency of its occurrence.

**[A Taxi Driver Handing Over His Passengers to Another for a Fee]**

**Question:** A taxi driver gathered several passengers to transport them from one town to another. Another taxi driver came and said: “Give me your passengers so I may transport them in my car for the same fare, and I will give you, in return, a sum of money.” Is that permissible or not?

**Answer:** What appears to me is that it is permissible. The first driver is lawfully entitled to the amount paid to him in exchange for handing the passengers over to the other car; in reality, that amount is a consideration for his having gathered the passengers.

**If it is said:** Gathering the passengers may only be through great effort, yet sometimes they assemble for him without any effort—Is the ruling the same?

**We say:** The norm for one who gathers passengers is that it requires toil and added expense; at times they may assemble for the car without any expense. Monetary compensation is permissible for what ordinarily requires cost and effort—whether in a given instance it required cost or not.

**If it is said:** Why do you not say that what is mentioned in the question is a sale of rights, and the sale of rights is invalid?

**We say:** We have said what preceded because it is necessary to construe Muslims’ contracts and transactions as valid whenever possible. If a transaction admits an aspect of validity and an aspect of invalidity, it is carried upon the valid aspect. Thus they have laid down in their legal maxims.

Among their maxims in this area: the default in transactions is



validity.

### **[Leasing a Farm for Specified Years]**

**Question:** A man leased another man’s farm for specified years. In that farm are fruit-bearing trees, and areas without trees. Is that valid or not?

**Answer—and Allah grants success:** What appears to me—*Allah knows best*—is that the lease is valid:

1- By analogy with hiring a woman for breastfeeding; the scholars have held that valid, based on what has come in the Qur’an. It is known that suckling involves two things: first, tending to the infant’s care; second, nursing him with the nurse’s milk. The nurse’s milk is non-existent at the time of hiring, yet that is not a ground preventing the validity of the lease.

Likewise here: the lease’s including the (eventual) sale of non-existent fruit is not a bar to the validity of leasing the land.

2- Because the scholars state we must carry Muslims’ contracts upon validity whenever possible.

Moreover, in *al-Muhadhdhab* there is what indicates the validity of renting trees for a specified period, where he said: “Purchasing dates on the palm is not valid unless the buyer cuts them at once, or he rents the palm for a specified term for a specified rent.”

### **[Residing in a House Without Stating the Rent]**

**Question:** A man lived in another man’s house for several months; then the owner came and demanded rent for the house, bearing in mind that there was no agreement between the two men regarding rent—indeed, it was not mentioned. Is the resident liable for rent or not?

**Answer—and Allah grants success:** The man from whom rent is demanded—if his custom is leasing (his property)—then the resident owes the rent; but if that man has no custom of leasing, then he has no rent (due to him).

Hence the jurists of the school said: “The default ruling for benefits is permissibility.” We depart from this default in the case of one whose custom is leasing, following the general custom—namely, what Muslims practice in hotels, apartments, and houses prepared for rent in cities and markets and the like. Whoever resides in a hotel apartment or a (rented) room is held liable for rent, even if there was no mention between the parties of rent or of leasing; no one is excused for leaving off rent on the pretext that rent was not mentioned and that the default for benefits is permissibility.

The evidence for their statement “the default for benefits is permissibility” is that permission to enjoy a benefit is a permissive

pathway that suffices for the lawfulness of enjoying it, without anything further. This is a matter well known among people, about which they scarcely differ.

Custom (*ʿurf*) is a Sharʿī pathway in the domain of transactions so long as texts do not contradict it—thus have the scholars set it forth.

The evidence for the soundness of what they have said is that Islam came while people engaged in buying and selling, leasing, profit-sharing, gifts, vows, lending for use, and so on; it approved them upon what they were doing, and only forbade specific particulars and matters, remaining silent about the rest.

### [Ruling on a Reward (Juʿālah) for Standing Surety for the Price of a Sale]

**Question:** A man stood surety for another regarding the price of a sold item, and he was promised a reward (*juʿālah*) for that. Is it lawful for him to take this reward or not?

**Answer—and Allah grants success:** What appears to me—*Allah knows best*—is that there is no impediment<sup>1</sup> to the surety taking the reward absolutely—whether from the seller or from the buyer, whether it was stipulated or not, by contract or without a contract.

The proof is that the default in transactions is validity and permissibility until evidence of prohibition appears—except in limited issues such as usurious matters and what is attached to them, taking wages for performing an obligation or a prohibited act, the wage of a songstress or a prostitute, the price of a dog, and so forth.

The matter asked about resembles none of those; thus we said: the wage or reward is lawful for the surety.

**If it is said:** What is the evidence that the default in transactions is validity and permissibility?

**We say:** The evidence is that Allah, *Exalted is He*, brought Islam while people were engaging in various types of transactions; He, Exalted is He, forbade some of what they practiced and approved the rest.

This is unlike acts of worship: prayer, for example, was only known by Allah's defining it. The default in it is invalidity until it accords with the command of the All-Wise Lawgiver; it is not ruled valid until evidence of its validity is established—likewise fasting, ḥajj, zakāh, and the other acts of worship.

And from this it is that Allah, *Exalted is He*, said: "*Or have they partners*

1- The jurists of the school have mentioned that it is lawful if such a service customarily commands a wage; *Sharḥ al-Azhār* 9/529.

*who have ordained for them a religion to which Allah has not consented?"* [Ash-Shūrā:21], and in the hadith: "Pray as you have seen me pray," and: "Take your rites from me." And He, Exalted, said: "*For every nation We have appointed religious rites which they are to observe.*" [Al-Hajj:67].

**If it is said:** The surety (kaḥīl) takes a wage or a reward (ju‘ālah) without a counter-value, so his consuming it is among what Allah has forbidden in His saying: "*Do not consume one another's wealth unjustly,*" [An-Nisa:29].

**We say:** The surety here has not taken a wage without a counter-value; rather, he has taken it in exchange for the guarantee and commitment, on account of which much toil and hardship may befall him, and in the end he may have to pay what he guaranteed. Hence there is the hadith reported from the Prophet (*May Allah bless him and his family and grant them peace*): "*Revenue follows liability (al-kharāj bi'l-damān).*"

The meaning of the hadith—Allah knows best—is that if a buyer returns the sold item to the seller due to a defect that appears, for example, and he had benefited from some usufructs before returning it, those benefits are lawful for him and he is not obliged to return them, and that is in exchange for his having borne the liability for the sold item; for had it perished in his hand before he returned it to the seller, it would have perished from his wealth, not the seller's. In this hadith is evidence that liability may be met with (i.e., warrants) money.

On the basis of what has preceded, the hire (ijārah) may be valid or invalid: it is valid if the wage is only for the bare guarantee and commitment without regard to pursuing and monitoring the one for whom the surety stands; and it is invalid if it is for the guarantee together with pursuing and monitoring the principal.

The reason for its invalidity in the latter case is the ignorance (indeterminacy) of the extent of that pursuit and monitoring.

**If it is said:** If the ijārah is invalid, then the surety may rescind; and if he rescinds, the suretyship is void—entailing obvious harm to the creditor, through procrastination over his money or its loss, or the loss of some of it—

**We say:** If the ijārah is invalid here, the guarantee does not become invalid. What is meant is that, if the ijārah is invalid and a dispute arises, the surety is not entitled to the wage named in the contract; rather, he is entitled in proportion to his work—*ujrat al-mithl* (the customary wage).

By our saying "the guarantee does not become invalid," we mean: it is obligatory upon the surety to stand by and carry through with what he guaranteed, even if the ijārah is invalid; because:

1- Fulfilling promises is obligatory in the religion of Islam, and a Muslim is not excused for abandoning it except by a clear excuse. For this reason, the Messenger of Allah (*May Allah bless him and his family and grant them peace*) counted breaking promises among the signs of the hypocrites.

2- Because abandoning the suretyship may result in the debtor's procrastination or the loss of the creditor's money, or the loss of part of it.

Now, our judging the ijārah invalid in what we mentioned pertains to when the ijārah is as described, and that is according to what the jurists of the school indicate. Otherwise, what appears to me—*Allah knows best*—is that the aforementioned indeterminacy is pardoned when the intended purpose of pursuit and monitoring is known.

This applies to what cannot be precisely quantified at all—such as the work of the *muṣaddiq* (the collector of zakāh for the Imām), and such as the overseers of endowments, and the custodians of mosques and sanctuaries, and the like. The preferable view is that ijārah in their case is valid, not as some jurists of the school have said.

#### [What Car Showrooms Take]

**Question:** A man owns a car showroom. Car owners bring their cars and place them in the showroom; another comes, then another—each placing his car there to be offered for sale. A car may sell after a day, a week, or a month. When it is sold, the showroom owner demands a “showroom fee,” proportional to the car's value, which he takes from both seller and buyer.

Is there any objection to what the showroom owner takes from the seller and the buyer, given that both buyer and seller knew of this in advance?

**Answer—and Allah grants success and aid:** There is no objection to what the showroom owner takes on the sold car, as compensation for the showroom—this with respect to the car's seller, who is its owner. As for the buyer: if he purchases the car, then the showroom owner says to him after the sale contract, “Pay the showroom fee,” and the buyer refuses, saying, “I did not know that the showroom requires a fee from the buyer, and you did not stipulate anything upon me,”—then in that case there is no recourse against him, and it is not permissible to harass him.

But if he knows the established custom that the buyer owes half of the showroom's fee, and he buys the car knowing that, then the fee is binding upon him. In reality it is not a fee as such; rather, for him it is part of the car's total price.

**If it is said:** How do you bind him to half the showroom fee while he is

a purchaser, not a renter; only the seller is the renter—

**We say:** This is the custom in car showrooms, and the people engaged in buying and selling cars have proceeded upon this custom. The scholars have said: custom is given the force of a condition in such matters; so if the buyer purchases the car at a stated price, it is as though, at the time of contract, that price was implicitly conditioned with an added amount for the showroom.

**Yes,** what appears to me is that the *ijārah* is invalid:

- 1- Due to ignorance of the term of display.
- 2- Due to ignorance of the fee.

On that basis, the showroom owner is not lawfully entitled to more than what the seller and buyer willingly consent to. If that is not achieved, then what is incumbent for him is the customary fee (*ujrat al-mithl*): two upright appraisers assess what the showroom owner deserves; whatever they determine is imposed upon the seller and the buyer, even if they are not content.

This is what has become apparent—Allah knows best. All praise is due to Allah, Lord of the worlds, and may Allah bless our master Muhammad and his family and grant them peace.

### **[Ruling on the Money Given to the Intermediary Between Seller and Buyer]**

**Question:** If a man says to another: “Find me a buyer for my car and you will have such-and-such if the sale goes through,” or says: “Find me a car of such-and-such and bring me together with its owner, and you will have such-and-such,”—is it permissible for the intermediary between the two parties to take that money?

**Answer:** What appears to me is that it is permissible for the intermediary between seller and buyer to take what is stipulated for him, because he takes it in exchange for a service and work for the seller or the buyer, or for both, with the giver’s willing consent.

However, the intermediary must avoid in his mediation and brokering lies, deceit, stratagems, and trickery; for that is impermissible.

### **[A Passenger Switching to Another Car After Booking]**

**Question:** The owner of a saloon car agreed with a group of men to take them for Ḥajj and visitation for an agreed fare. When the time of travel came, some of them said: “We have agreed with another driver.” Do these individuals have the right to ride with another driver, given that the first driver had reserved places for them, and were it not for this passenger, he would have found another?

**Answer—and Allah grants success:** Fulfillment is obligatory upon

both contracting parties—the car owner on one side and the passengers on the other—and neither party may breach what he has undertaken except for an excuse, due to His saying, *Exalted is He: "O you who have believed, fulfill [all] contracts."* [Al-Mā'idah:1].

### **[Ruling on a Driver Taking the Full Fare from Passengers Without Delivering Them to the Intended Destination]**

**Question:** A man works with his car transporting passengers from one area to another for a known fare per passenger. The driver asks them upon boarding: "Do you have passports?" They say: "Yes." Then, along the way, it becomes clear that some of them do not have a passport, while in fact one cannot reach the intended area except with a passport. Partway along the route, the passengers who lack passports disembark. What is incumbent upon the driver, given that he has received the full fare from every passenger? Must he return part of the fare so that he only takes what he deserves? Or is the entire fare lawful for him?

**Answer:** The jurists of Fiqh have said: the lessee has the right to rescind the lease if the intended purpose becomes void. In the question at hand, reaching the purpose proved impossible. At that point, the lessee may rescind the lease; the driver takes the portion corresponding only to the distance traveled, and returns the remainder.

If the driver wishes to be entitled to the entire fare, he must stipulate to the passengers that each passenger pays the stated amount in full whether he reaches the intended place or disembarks before reaching it—whether with an excuse or without.

### **A Note on Wages**

Leasing trees for their fruit, pastures for the grass that grows there, and animals for wool and milk, and the like—such leases are invalid, because in meaning they are a sale of something non-existent, and selling what does not yet exist is invalid. *End, in meaning, from al-Tāj.*

**I say:** The rule is that one may enter into invalid sales except where there has come a specific prohibition from the Prophet (*May Allah bless him and his family and grant them peace*); and it has come from the Prophet (*May Allah bless him and his family and grant them peace*) the prohibition of selling what the seller does not possess.

Accordingly, we can say: leasing trees for fruit and pastures for grazing—if there is, in the trees or pasture, something present to which the lease can attach of (existing) fruit or grazing—then entering into the lease is permissible; if there is nothing present to which the lease can attach, one ought not to enter into it.

### **[Leasing Houses and Hotels While Knowing That Sins Occur Therein]**

**Question:** Is it permissible to lease a house to a man to live in with his family, while the preponderant assumption is that they will not refrain from listening to music?

And is it permissible to lease a hotel while knowing they place in every room a television with many channels, some of which contain indecency?

**Answer—and Allah grants success:** It is permissible to lease the house and the hotel in the cases mentioned in the question; this is not cooperation upon a prohibited matter.

There are two cases in which leasing is not permissible:

- 1- That it be stated in the contract: “I lease the house for singing and dancing.”
- 2- That singing is the very purpose of the lease—for example, he leases the house knowing that he only took it to sell wine therein, or to make it a hall for singing and music.

What is mentioned in the question appears to be that leasing the house is for the purpose of residing in it, not for singing; and the purpose of leasing the hotel is the profits realized; what occurs therein of music, neglect of prayer, and the like is not intended.

As for what is intended by leasing it for a prohibited purpose, that is not permissible. It is not permissible to lease a hotel room to two fornicators, and the like, or for drinking wine therein, or the like. This accords with the jurists of the school.

Similar to what we have mentioned is selling radios, tape recorders, and televisions.

### **[Is It Permissible for a Contractor to Build Facilities for the Army, and the Like?]**

**Question:** Is it permissible for a contractor to undertake building facilities and centers for the army—or for traffic police or guards—knowing the unjust conduct that commonly occurs by many individuals and officials in such places?

**Answer—with Allah is success:** The apparent ruling is that it is permissible:

— Because building structures and centers neither increases nor decreases injustice; buildings are not the cause of injustice.

— An exception is made for structures built specifically for injustice—such as fortifications built for highwaymen and the like.

### **[Is It Permissible for a Contractor to Build a Mosque or School for**

## Those Who Differ in Madhhab?]

**Question:** Is it permissible for a contractor to undertake building a mosque for those who differ in madhhab, or to build a school specific to them?

**Answer:** If the mosque is a congregational mosque for daily congregational prayers and Friday prayer, the contractor ought not to enter into building it; for such a mosque would then be a center for propagating false doctrines and a center of invitation.

— If the intended mosque is for performing prayer without aiming at congregational and Friday prayers—such as small mosques built along roadways, and small neighborhood mosques—then there is no harm in building them, and no blame upon the contractor.

### Benefits in [the Law of] Lease

(1) It is not valid to insert one contract into another: if, for instance, a house is already leased for a specified term, it is not valid to lease it immediately with a new contract for a term beyond that—whether to the same person or to another.

As for services, inserting one contract into another is valid: for example, you hire a person to perform Ḥajj this year, then hire him with a new contract to perform Ḥajj next year for another Ḥajj—this is permissible.

(2) A lease is not valid, nor is a wage permissible, for an act that is obligatory upon the hired person, nor for an act that is prohibited upon him.

The proof for the first is His saying, *Exalted is He: "[Being] sincere to Him in religion,"* [Al-Bayyina:5] and many similar texts.

The proof for the second is His saying, *Exalted is He: "So woe to them for what their hands have written, and woe to them for what they earn,"* [Al-Baqarah:79] and the like.

Obligations include: the call to prayer (adhān), bearing witness (shahādah), jihad, and teaching an adult the Qur'an.

It is permissible to take wages for teaching a child the Qur'an, for digging a grave, carrying the deceased, circumcision, and a witness's wage for preliminaries—such as traveling to a specific place.

Prohibited are such as hiring a singer, (hiring) musical instruments, and the like.

(3) A physician is not liable under three conditions:

- 1- The injury is through after-effect (sarāyah).
- 2- He performs the customary procedure.
- 3- He is competent (experienced).



If the injury is by direct action (mubāsharah), he is liable—for example, cutting off the glans of a boy—whether deliberate or accidental, because he exceeded the customary action—unless he was absolved of liability for error before the procedure and he is competent; in that case he is not liable. Thus in *al-Tāj*.

**I say:** As for deliberate harm, absolution does not benefit, for absolution pertains only to error. Indeed, even if absolution is given for both deliberate and accidental harm together, it does not remove liability for deliberate harm, because the body of a Muslim is inviolable and is not made lawful by permission.

(4) A hired person may not appoint a substitute in tasks that vary by the individual—those whose performance leaves no discernible trace afterward—such as recitation, Ḥajj and its circumambulations, childcare, and the like; likewise, if the substitute’s work is inferior to the hired person’s. It is permissible in cases:

- 1- Where the hired person stipulates for himself the right to appoint a substitute.
- 2- Where custom establishes delegation in such matters.
- 3- Where he appoints a substitute due to an excuse—such as in Ḥajj.

Thus said the jurists of the school, as in *al-Tāj*.

**Yes:** if a Muslim vows the recitation of several complete readings (khatmas) [Qur’an] within his capacity, but doing so will cause deficiency in his livelihood, his studies, or the like, then it is permissible for him to appoint a substitute to recite some of them on his behalf.

Likewise, if the vow is for recitation on Friday, or in the Prophet’s Mosque in Medina or the Sacred Mosque in Mecca, and the time does not allow reciting the vowed amount at that time or in that place, then it is permissible for him to appoint a substitute to recite some of it on his behalf—all this in line with their statement permitting deputation due to an excuse.

If a Muslim fears death while he owes a Qur’an recitation (by vow), it is incumbent upon him to appoint a substitute to recite on his behalf—this when he had vowed it and was capable of reciting it, but then delayed. As for one who vowed but was unable to recite due to illness or the like until death, then it is not incumbent upon him; for a person is not obliged by a vow to what he does not have power over. Allah Most High has said: "*Allah does not burden a soul beyond its capacity.*" [Al-Baqarah :286] And what a person makes obligatory upon himself is not greater than what Allah has made obligatory. The jurists of the school have said: deputation in recitation is valid; and they said: for obligations for which no make-up has been legislated and for which there is no substitute—if

performing them becomes impossible—expiation becomes due. *End.*<sup>1</sup>

**[Transfer of the Leased Property to Another Heir]**

**Question:** Some of the heirs leased out a shop for a fixed term. Then the heirs divided the estate, and that shop fell to the share of an heir other than the one who had leased it out. May the one in whose share it fell rescind the lease or not?

**Answer—and Allah grants success:** The jurists of the school have said that a lease is dissolved by a sale when the sale is due to pressing need, even if the seller could otherwise earn. On that basis, the lease is dissolved by partition when the lessor becomes a different heir, as in the question; that constitutes an excuse to rescind it—indeed, this excuse is even stronger than the need mentioned by the jurists in the case of sale.

**[No Wage Is Deserved by One Who Performs the Work Without an Intention (to Hire)]**

**Question:** A man has a muḍārabah capital that realized profit. The owner then told the managing partner to build a structure from the profit, and he did so. Later, a dispute arose between them at the time of division. May the managing partner count a wage for supervising the construction, knowing that he had no intention of hire except at the time of division; at the time of construction, he had no intention of being hired?

**Answer—and Allah grants success:** What appears to me—*Allah knows best*—is that he does not deserve a wage. The default, as the jurists of the school say, is that usufructs are permissible (without charge); he did not intend hire at the time of the work; and he was acting in a matter of shared interest between himself and the owner.

**[If One Orders Another to Do Something and Promises to Pay Without Stating the Amount]**

**Question:** A man said to another, “Do such-and-such, and I will pay you,” without mentioning how much he would pay. The requested act was done, and the man gave him some money; he was displeased, and a quarrel arose. What is required?

**Answer:** If the two men did not come to an agreement or settlement on a specified amount, then the man must pay the other the customary wage (ujrat al-mithl): one looks at what work was done and pays according to it. This wage is defective [invalid], because the amount is unknown.

**[Taking a Fee in Exchange for (Using One's) Name]**

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1- *Sharḥ al-Azhar* 4/55.

**Question:** A man is barred from trading. He asked another man, who is licensed to trade, to conduct the trade under his (licensed) name. The licensed man consented on condition that he receive 40% of the profit. Is it lawful for him to take that, bearing in mind that he does no work and bears no hardship—he only takes it in exchange for the name?

**Answer—and Allah grants success:** The name-holder ought not, by stipulation, to take anything—due to Allah’s prohibition of consuming people’s wealth unjustly; the one asked about seeks to take some of his partner’s wealth without right.

**Yes,** if the giver’s soul is content and he gives it willingly, then it is lawful for the recipient—provided there is no contracting or stipulation. As for taking it by contracting and stipulation, that is invalid and impermissible.

The reason is that sale and lease only attach to property (māl), and a name is not property.

**Yes,** if the name-holder incurred expenses or hardship in obtaining a license to operate, then in such a case it is permissible for him to take compensation for the name.

#### **[Leasing Land to One Who Will Use It as a Market Where Sins May Occur]**

**Question:** A man wishes to lease land to someone who will use it as a market, and he fears that sins may occur in that market. Is it permissible for him to lease it nonetheless? knowing he is resolved to prevent sins if they occur and is able to prevent them.

**Answer—and Allah grants success:** I see no impediment to permitting that. What is impermissible is to lease it to someone who will use it specifically for selling wine, or as a venue for dancing and singing. As for what is mentioned in the question, there is no barrier—even if it is certain that some sins will occur, as is customary in markets (such as fraud, lying in sales, false oaths, theft, and obscene speech).

**In sum:** if the leasing is for the purpose of a sinful act, it is impermissible; if it is for some other lawful purpose, it is permissible—even if sin later occurs incidentally, that does not harm (the ruling).

#### **[Ruling on Leasing to (or Working for) One Who Trades in Narcotics]**

**Question:** A man—described as a usurer person—who trades in narcotics asked me to carry money from someone to him, offering me a wage. What is the ruling?

**Answer—with Allah is success:** What appears to me is that it is permissible. This is indicated by the jurists’ statement that it is permissible to transact with an oppressor, buying and selling, except in

what one knows to be the very object of injustice. If it is permissible to take his money in sales and purchases, then a fortiori it is permissible to carry it.

This is also indicated by the well-known dealings of the Prophet (*May Allah bless him and his family and grant them peace*) and the Muslims with the Jews in Medina—buying, selling, lending, and hiring; the Prophet (*May Allah bless him and his family and grant them peace*) died while his shield was pawned to a Jew for thirty ṣāʿs of barley.

### [Ruling on Wages for an Obligatory or Prohibited Act]

**According to the madhab**, as in *al-Tāj*: wages for an obligatory or prohibited act are of two types:

1- If they explicitly state, in a contract or condition, that the wage is for the obligatory or prohibited act, that wage is forbidden, and what is in the hand of the recipient is like a usurpation—except with respect to four matters: his profit is lawful; the usurper is cleared once he returns it; the obligation to return does not become constricted except upon demand or his death; and there is no rent due if no use was made.

2- If the wage is implicit and unexpressed—whether both parties intended it, or the payer alone—then it must be given in charity, and its yields are for the poor, even (if the recipient) is of his ascendants or descendants, or a Hāshimī; because it has become a wrongfully held amount. It is not returned to the owner; and if the recipient returns it to the owner, he remains liable for it to the poor. *End*.

**I say:** What appears to me is that a wage for performing a prohibited act is not to be returned to the giver in either case; rather, the recipient must give it in charity in both cases.

Because Allah Most High called it an “earning” of the recipient in His saying: *"So woe to them for what their hands have written, and woe to them for what they earn."* [Al-Baqarah:79].

### [Wages for Selling a Merchandise]

It is permissible to hire a man to display a commodity in the market for one day on condition that, “If you sell it that day for such-and-such, then you get such-and-such; otherwise, you get nothing.” Suspending the wage upon this condition is valid, and the contract is valid.

If one hires him on condition that, “You must sell the item for such-and-such, otherwise you get nothing,” then the condition is valid but the contract is invalid—due to the unknown duration of display—though the condition must be fulfilled. All of this is stated in *al-Tāj* according to the school.

### [Subleasing for More Than the Original Rent]

According to the school: the lessee may not sublease what he leased

for a higher rent except with the lessor's permission, or with an added improvement that induces acceptance. *End.*

**I say:** To this is attached the case where custom runs that the lessee subleases for more; that stands in the place of permission.

**[Leasing a Grocery (or the Like) Including Its Inventory for a Monthly Fee]**

**Question:** A man has a grocery or a pharmacy containing inventory worth one million riyals. He and another man agree that the latter will operate that shop and pay him twenty-five thousand riyals per month from the profits. When the agreed term ends, the shop is to be returned with inventory worth one million riyals, as on the day he entered. Is this partnership valid?

**Answer:** If both parties knew and expected that the monthly profit would cover what the owner demanded and leave a surplus acceptable to the worker each month—and events unfolded as expected, and, for example, the profits each month were forty thousand or more, or a little less—then there is no harm in entering into such an arrangement.

**[A Lease That Ends With Ownership]**

**Question:** A man leased a new car for three thousand Saudi riyals per month. The car's price is ninety thousand Saudi riyals. The contract states that if the lessee pays three thousand each month until the total of rents paid equals the price of the car, the car becomes his property. What is the ruling on this lease?

**Answer—**and Allah grants success: If this lease is not a stratagem for reaching usury (ribā), then there is no objection to it; it is a valid lease.

But if this lease is a screen for usury and a stratagem to reach it—such as when the car's real price is sixty thousand, and the seller wishes to sell it for ninety, so they cast the sale in a different form—then such a thing is impermissible.

## [Chapter: Hiring of Persons]

### [Categories of the Hired Worker]

- 1- The *ajīr khāṣṣ* (exclusive hireling): this is when the period is stated before the work; for example, "I have hired you for this day on condition that you sew a garment for me during it."
- 2- The *khāṣṣ al-khāṣṣ*: this is when only the period is stated; for example, "I have hired you for this day."
- 3- The *mushtarak* (shared hireling): this is when the work is stated before the period; for example, "I have hired you to sew a garment for me today."
- 4- The *khāṣṣ al-mushtarak*: this is when the work is stated without mentioning the period.

The rulings for the first two categories are the same, and the rulings for the last two categories are the same.

### Hiring for a Hajj

**Question:** If a hireling is engaged to perform an *ifrād* Hajj [a stand-alone Hajj] to be followed by an ‘umrah after the Days of Tashrīq, for an agreed wage—does this hiring contract remain valid even if the end of the hiring period is not precisely determined?

**Answer — and Allah grants success:** The hiring is valid, because the rites of Hajj are limited and well-known. What is so defined does not require mentioning or specifying a duration; the element of uncertainty is thereby removed in this and what resembles it.

### [The Difference Between Transfer of Ownership and Leasing]

**Question:** A disabled woman owns a plot of land, and she has a granddaughter who is compassionate toward her—serving her needs, cleanliness, and provisions, hardly ever leaving her. The woman summoned a scribe and witnesses and testified before them that she had transferred ownership of her specified land to that granddaughter who serves her, in exchange for her past service and for what she will continue to render until the woman dies—even if only an hour of life remained. The granddaughter was made to hear this and she accepted—even if her grandmother’s life were to reach its utmost length, the granddaughter is content to serve her as long as life lasts. The grandmother is likewise content to give her granddaughter this, as recompense for what has passed and for what is to come. Is this transfer of ownership valid or not?

**Answer:** What appears from the question is that the transfer of ownership from the grandmother to her granddaughter is a recompense, not a lease. The granddaughter, as it seems, had been serving her

grandmother without compensation and did not demand wages from her; rather, the grandmother wished to give of her own accord without the granddaughter requesting it. On that basis, the transfer issued from a willing soul, without intending thereby to procure any particular work—known or unknown—and what is of this nature is not vitiated. The muftī and the judge must therefore distinguish this from leasing (hire).

As for the case where a woman or man is disabled yet has wealth and no one to serve them, and they hire someone to serve them until they die, in exchange for a specified plot of land, or an apartment unit, or a specified sum of money, with a written contract attested by witnesses; then the woman or man lives for as long as Allah wills and dies, and the heirs come to dispute with the hireling: the judge does not rule the hiring valid; rather, he rules it invalid. With its invalidity, the hireling is entitled only to the customary equivalent wage (*ujrat al-mithl*) as assessed by two just persons.

However, if none of the heirs dispute the hireling and he has already taken possession of the land, the apartment, or the money, then it is lawfully his and no sin or liability attaches to him on that account. In a void (invalid) contract, the wage is owned upon receipt, though it remains liable to rescission upon dispute and litigation. Likewise in a void sale, the sold item is owned by taking possession. As for a valid lease and a valid sale, the wage and the sold item are owned by the contract itself.

**[A Private Hireling May Only Act in What Both He and the Employer Deem Permissible]**

**Question:** A man works for a merchant. The merchant deems it permissible to sell an item for more than its current day's cash price due to deferment of payment (i.e., on credit), while the worker believes that to be prohibited. In this case, may the man work in this business or not?

**Answer — and Allah is the One who grants success:** The jurists of the school have said that an agent may not act except in matters deemed permissible by both himself and the principal<sup>1</sup>. The person mentioned in the question is a private hireling, and a private hireling in sales and purchases resembles an agent.

The proof that what is mentioned is impermissible is what is known in Islam: that a Muslim is obliged to refrain from what Allah has forbidden him. However, the hireling may work in sales other than that kind, and he is not required to forbid it; it is also permissible for him to be present when it occurs.

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1- *Sharḥ al-Azhar*, 4/246.

### [Ruling on Hiring Someone Who Makes Minor Errors in Recitation to Read a Complete Khatmah]

**Question:** Is it permissible to pay someone who makes minor mistakes in recitation to read a complete khatmah (full recitation of the Qur'an)?

**Answer:** What appears to me is that it is permissible. As for the reciter, it is permissible for him to recite and to accept payment; and as for the payer, it is permissible for him to pay one who makes small mistakes. The wage is not for corrupting the recitation but for correct recitation, and the error occurred unintentionally. Allah Most High has said: *"And there is no blame upon you for that in which you have erred, but [only] for what your hearts intended."* [Al-Ahzab:5]

**One might say:** The difficulty concerns someone entrusted with money to distribute to those who will recite the Qur'an—namely, to complete a full khatmah. Is his liability cleared if he distributes it to those who make some mistakes in their recitation?

**We reply:** Minor mistakes are overlooked, because Qur'an reciters fall into categories:

- 1 – Meticulous *ḥuffāẓ* (memorizers) whose recitation is precise; these are very few.
- 2 – Reciters of the second degree, whose reading of the Qur'an is mostly correct and whose mistakes are rare—on the order of one or two slips within an eighth of a *juz'*, in matters like *ikhfā'* and *idghām*, without deficiency.
- 3 – Reciters of the third degree, who err about once in every verse in passages like those of Sūrat al-Baqarah.

**Thus we say:** An agent entrusted to distribute funds for a complete khatmah should distribute them to believers who are poor from the first and second degrees, not the third.

We say this because prevailing custom associates the second degree with the first; the original donor's intent regarding the Qur'an reciters is the first and second degrees, for they are the ones known to him and to others as the *ḥuffāẓ* of the Qur'an, not those of the third degree.

### [An Employee in a Pharmacy Given Gifts by Drug Distributors from the Company]

**Question:** An employee in a pharmacy receives a gift from a company's distributor who says, "This is a gift for you from the company," with the aim of encouraging the employee to give care to selling its products. Is this gift for the employee or for the owner of the pharmacy?

**Answer:** What appears—based on what the questioner mentioned—is



that the gift is for the employee, not the owner of the pharmacy. The company gave what it gave to secure a benefit particular to the company, and this benefit does not conflict with the work for which the pharmacy owner hired the employee, nor does it harm or diminish that work. Indeed, the benefit intended by the company is, at the same time, a benefit for the owner of the pharmacy.

### **[Ruling on Hiring Maidservants]**

**Question:** Is it permissible for me to hire a maidservant instead of a male servant, since I fear for my family and children from having a male servant in the house, and I am in need of this?

**Answer:** It is permissible to hire a maidservant on the condition that her work and lodging are arranged so as to avoid mixing with men, such that the men of the household are safe from temptation. If she is not trustworthy, she must not be allowed to mix with believing women and sit with them. Nor is it appropriate that she be entrusted with raising the boys and girls, lest they take on her character traits. Allah, *exalted is He*, has forbidden believing women to display their adornment except to their women—believers.

### **(Taking from the Father’s Wealth)**

**Question:** An adult son works with his father on the father’s farms; he sells and buys. He is married, but his father does not give him what he needs. Is it permissible for this son to take what he needs from his father’s wealth without his father’s permission? And is it permissible for him to give a small gift to a friend who visits him—such as a bundle of *qāt*—in accordance with what is customary among friends?

**Answer — and Allah is the One who grants success:** An adult son who works with his father in his father’s wealth may take what he and his wife need, according to what is customary. Included in this is reciprocating a friend in the customary manner among friends. This is based on the report from the Prophet (*May Allah bless him and his family and grant them peace*), who said to Hind: “*Take what suffices you and your children, according to what is customary.*” And because this son has a right in his father’s wealth earned by his work and effort. Allah Most High also said regarding the guardian of the orphan: “*And whoever is rich should abstain, and whoever is poor may eat [from it] in a reasonable manner.*” [Al-Nisa:6] Thus, the working son who is reforming his father’s wealth may be analogized to the poor guardian of the orphan. And it is related from some of the eminent Imams of the Prophet’s family (*Peace be upon them*) words to the effect: “I have placed myself with respect to the wealth of the Muslims in the position of the guardian of the orphan: if he is self-sufficient, he refrains; and if he is in need, he eats in a reasonable manner.” So this son working with his father may be

analogized to the Imam of the Muslims—if he is self-sufficient, he refrains; and if he is in need, he eats in a reasonable manner.

### **In Employment**

**Question:** What do you say regarding employment with the state?

**Answer — and Allah is the One who grants success:** Employment with the state—any state, whether just or unjust—is permissible with two conditions:

*First:* that one does not wrong anyone in his post or his work.

*Second:* that one does not assist or cooperate in wronging anyone, nor strengthen the hand of the oppressor. If the matter is as such, then there is no impediment to such employment, so far as I know—though keeping away from it is safer. For we have often seen those who enter state employment become entangled in perils such as bribery, injustice, and the like. For some reason, the Messenger (*May Allah bless him and his family and grant them peace*) warned against assuming judgeship and adjudicating between people.

If a person must be employed, let him choose for himself among posts those closest to safety and farthest from injustice—such as teaching, or working in electricity or telephone services, and the like of matters devoid of what we have mentioned.

**Question:** A man is employed in a place where a plaque is hung that states “Affirmation of the Vision. We cannot change it, for the premises belong to those who hold that doctrine, and power lies with them. Is it permissible for us to remain in that job? Must we resign? What is the solution?

**Answer - and Allah is the One who grants success:** It is permissible to remain and continue in the job, on condition of attempting and contriving to have the plaque removed.

**Yes:** if what is written on the plaque are ḥadīths transmitted from the Prophet (*May Allah bless him and his family and grant them peace*), or a Qur’anic verse, then it can be interpreted; and once interpreted, it is not an evil that must be denounced. The same applies to other ambiguous verses and ambiguous ḥadīths.

### **[A Man Working in a Shop That Displays the Emblem of Those Who Differ in Doctrine]**

**Question:** A man works in the shop of one of the *al-Makārimah*, and the shop owner insists on hanging a picture of the master of the *Makārimah* in the shop. Is it permissible for that worker to remain in the shop while the aforementioned picture is displayed?

**Answer—and Allah is the One who grants success:** There is no objection to working under the stated circumstances. However, if the

worker fears suspicion, he should ward it off—for example, by praising al-Hādī (*Peace be Upon Him*) or al-Manṣūr (*Peace be Upon Him*), or the Zaydīs in general.

### [Receiving a Salary Without Work]

**Question:** I am a student of knowledge and I receive a stipend from the state which I use to assist me in seeking knowledge. Is it lawful for me to take and consume it even though I do not perform any work, or not?

**Answer — and Allah is the One who grants success:** If the matter is as mentioned in the question, then it is permissible to take the stipend, for several reasons:

1. Every poor person has a right in state funds, at least what will satisfy his hunger and cover his nakedness—his and those he supports. It is related from the Prophet (*May Allah bless him and his family and grant them peace*): “*I have been commanded to take zakah from your rich and return it to your poor.*” The early caliphs had public treasuries in which public monies were gathered and then distributed to the subjects of the state.
2. The state is fully aware that innumerable monthly salaries are paid to men who do not work, yet it overlooks them and is lenient with them; therefore, taking a salary without work is not treachery against the state.
3. Because so much has been taken in salaries without work, with the knowledge of the state and its lenience, this has effectively become like law for it; thus, the recipient of the aforementioned stipend is not transgressing the state’s regulations.
4. A poor student of knowledge has a greater right than an ordinary poor person. If the poor person is entitled to one share, then the poor student of knowledge is entitled to two: a share for his poverty, and a share for his pursuit of knowledge. It is incumbent upon the ruler of the Muslims to take such matters into consideration.

**If it be said:** A Muslim is obliged to fulfill contracts and covenants.

**We reply:** There has been overlooking and leniency on the part of the state in the matter mentioned; that is tantamount to waiving its right. Consequently, fulfillment is not obligatory from the other party.

**Yes:** if the state becomes strict regarding salaries, then—even though the poor have a right upon the state—it is not proper for him to take a salary without work, because doing so would expose him to punishment, humiliation, and the accusation of treachery. In the report: “*Whoever stands in places of suspicion, let him blame no one but himself,*” or as it is

said; and: “*Whoever believes in Allah and the Last Day, let him not stand in places of suspicion.*”

Accordingly, we only permitted the poor person to take a salary without work in what we have first mentioned because—at present—this is not generally considered treachery; rather, it is deemed good policy, astuteness, and prudence.

### **[The Wage of the Worker over Zakah (Alms)]**

In *al-Azhar* and its marginalia it is stated: “The worker appointed over the zakah does not become entitled to what the Imam has assigned him merely by that assignment; rather, he is entitled according to the work actually performed—that is, he has nothing beyond the customary equivalent wage. So if the Imam assigns him more than the wage of one in a similar position, it is not permissible for him to take the excess. The same was said by the jurists of the school regarding custodians of mosques, sanctuaries, and endowments: they deserve of the wage only in proportion to their work, not what has been assigned or stipulated for them.

And they justified this and explained that the lease (hiring) here is invalid with intrinsic invalidity, the cause of invalidity being the unknown nature of the work and its duration.” End quote.

**I say:** Unknown work and duration are excused in matters where knowing them is not possible at all, and knowing the objective (purpose) suffices. In such a case the lease is ruled valid and the hireling takes what was agreed upon. This can be supported by several points:

1. The saying of Allah Most High: “*O you who have believed, fulfill [all] contracts.*” [Al-Ma'idah:1]
2. The settled practice of Muslims in transactions upon what we have mentioned; and what the Muslims deem good is good in the sight of Allah.
3. The objective (purpose) may be deemed to stand in place of the (specified) work and duration, as in marriage and entering the bathhouse, and as the jurists of the school say concerning one hired to travel to a certain town while the distance is unknown.

### **[The Ruling of Custom in Contracts and Transactions]**

In the marginalia: “The prevailing custom is as if stipulated in the contract in transactions<sup>1</sup>” Completed.

### **[The Ruling on Ju'alah (Contingent Reward)]**

**Question:** What is said regarding the *ju'alah* (gratuity/contingent

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1- *Sharḥ al-Azhar*, 51/3.

reward) given to a reconciler between disputants, and that which is given to a reconciler between a seller and a buyer?

**Answer — and Allah is the One who grants success:** It is permissible for the reconciler to take what the giver’s soul willingly grants, as a recompense for his beneficence and a return of good with good. Allah Most High said: *“Is the reward for good [anything] but good?”* [Ar-Rahman:60]

It is not the right of the reconciler between the two disputants, nor between the seller and buyer, to demand a *ju‘ālah* and take it without the giver’s willing consent. In the hadith: *“The wealth of a Muslim is not lawful except with the willing consent of his soul.”*

**Yes:** a wage for reconciliation between disputants is permissible if the reconciliation requires going and coming and (notable) time. If there is not, in the going, coming, and time, that for which a wage is customarily due, then it is not permissible—except if it is given as a charitable gratuity with the giver’s willing consent.

**[A Man Who Pursued Compensation for a House He Lives In, in Which Other Heirs Have a Right]**

**Question:** A man lives in an old house in which he owns a share, with the remainder belonging to the other heirs of his father. The house suffered war damage. Compensation was later issued for the damage to houses. The man living in that house went to register the damaged house and persisted in follow-ups for many days, until after great effort he received a sum of money. The committee, as with others, conditioned upon him that he repair the damage; he carried out the required repairs. Then his partners in the damaged house came and said, “We want our share of the compensation.” He refused, and they disputed before me and requested the legal ruling required.

A reconciliation was reached between them, so we did not need to resort to the legal ruling required. Had there been no reconciliation, the legal ruling would have been: that whatever remains from the compensation after repairing the house belongs to the man who pursued and followed up; upon him is the obligation to repair the house as stipulated. If he fails to repair it, then he must pay the heirs from the compensation in the amount necessary to effect the repairs—no more—and the remainder is his, because he pursued and followed up personally, for himself.

**[Ruling on a Man Who Pursued Aid for the People of a Village Generally]**

**Issue:** If a man pursues, before a governmental or charitable body, aid on behalf of the people of his village generally, or on behalf of certain named persons he presented in his petition, and he continues until he

receives for them a quantity of foodstuffs or other items—then what he received is for the villagers or for the named persons in whose names the aid was issued, not for the man who pursued it.

This is because the granting body gave what it gave so that it might be for the people of the village, or for those specific named persons, as assistance to them and to meet some of their needs; and the man only received it from the granting body on that basis. The man is nothing but an intermediary on behalf of others. Therefore, it is not permissible for him to take that aid, and he has no right in it. If he must take something, let him take an amount commensurate with his effort—like the share of one of those in whose names the petition was filed.

***We say this because:***

– We have seen that Allah Most High has assigned a share of zakah to “those employed to collect it,” even though it is, in reality, for the poor, the needy, etc.

– And there is no doubt that the man who pursued the matter omits registering his own name in order for his petition to be accepted; since that is the case, it is just that he receive the like of one person’s share among them.

**[A Contractor Assigning the Work to a Particular Person in Return for a Portion of the Wage]**

**Question:** An employee was tasked by the state to put out a tender for a school or the like. This employee went to some contractors and agreed with one of them to carry out the project for a certain amount, on condition that the employee receive a known portion of that amount. Is it permissible for the employee to do that? And is it permissible for the contractor as well?

**Answer — and Allah is the One who grants success:** It is obligatory upon the employee to exert himself in the task entrusted to him. If he offers the tender to the contractors considered competent for such work and strives in negotiating the prices, then he must award it to the one who offers the highest price [i.e., the best value to the state under the prevailing procurement rule intended here]. It is not permissible for him to award it to the lower bidder for the sake of getting back a specified portion.

**Yes:** it may be permissible for the employee to receive a portion from the contractor if, after diligent negotiation, the contractors’ bids are equal. In such a case, it is permissible for him to take a gratuity from the one who receives the contract.

We said it is impermissible as in the question because the employee is an agent; the agent is a trustee, and the trust must be rendered to both

the righteous and the wicked. In the hadith: “*Do not betray the one who betrays you.*” And Allah Most High said: “*Indeed, Allah does not like traitors.*” [Al-Anfal:58] There are many verses in this chapter.

As for the contractor, it is permissible for him to give the employee something in return for being awarded the contract; the contractor is taking what he takes in exchange for his work.

### **[Regarding Driving Cars for Hire or Renting Them]**

1- If a driver operates a car for a wage paid by the owner of the car—meaning the driver is a private hireling—and then an accident occurs in which the car overturns and suffers damage and ruin, is the driver liable or not?

2- And if a man owns a large vehicle with which he transports merchants’ goods for a fee—being a shared hireling—and then an accident occurs whereby his lorry overturns and the goods are destroyed; or it does not overturn but the border guards arrest him and confiscate the load because it is prohibited—does the driver bear liability for what occurred due to the overturning or the state soldiers’ confiscation, or not?

3- Or he works on someone else’s car on the basis that what is earned is split half-and-half between them, and then the car overturns—does the driver bear liability, or not?

***Answer — and from Allah is success:***

***As for the first question:*** the driver is not liable unless he committed fault in his driving. Fault takes forms, such as:

- a) Exceeding the customary speed for that type of vehicle on the kind of road where the accident occurred—unless the owner of the car had permitted him to do so, in which case he is not liable.
- b) Taking the car along a route that such a vehicle does not ordinarily take due to its danger.
- c) A defect occurs in the car that by its nature exposes it to overturning, and he knows of it, yet he drives without repairing it, and the car overturns.

***The answer to the second question:*** the driver is liable in two cases:

- a) If the owner of the goods stipulated liability upon the hireling, then he is liable for what perished, was lost, looted, or confiscated.
- b) The hireling is liable for the goods if the overturning or confiscation occurred due to the driver’s negligence or wrongful act.

***The answer to the third question:*** he is not liable unless negligence or a wrongful act issued from the driver. Examples of negligence or wrongful act include:

– Descending, during rain, by the car along winding mountain roads so that it skids and overturns.

– Forcing the car into a large torrent so that the car overturns.

– An example of a case with no liability is that the car overturns due to a defect that had not previously become apparent to the driver.

**Question:** If a man gives another a car to work on, with one-third of what is earned for the worker, one-third for the car, and one-third for the car's owner—what is the ruling on this transaction?

**Answer:** This is a transaction commonly practiced in our land, yet it is invalid according to the school; it is neither a valid lease nor a valid *muḍārabah*. For a condition of a valid leasing of an asset is mentioning the term (duration), and a condition of a valid *muḍārabah* is that the capital be cash.

**I say:** Since this transaction has become widespread with cars, mills, and other machines, there is a case for deeming it valid on the following bases:

- 1- The frequent practice of Muslims with this transaction; the established rule is to construe their transactions as valid whenever possible. And in the report: *“What the Muslims deem good is good with Allah.”*
- 2- This transaction is analogized to *mukhābarah* (sharecropping). A great many of the scholars of the Ummah held it valid, adducing as proof the Prophet's (*May Allah bless him and his family and grant them peace*) practice with the Jews of Khaybar, where he left the land to them to maintain and allotted to them one-half of what it produced; and the Prophet said to them (*May Allah bless him and his family and grant them peace*): *“We will keep you so long as we wish.”* This suffices as evidence, and this form of dealing is near-mutawātir (mass-transmitted).

### **[One Who Handed His Beast to Another to Carry Firewood for Half the Proceeds, and It Perished]**

In *Sharḥ al-Azhar*: “Notice: If someone handed his beast to another to gather firewood upon it, with the firewood to be half-and-half, and the beast perished without an overpowering cause, is he to be deemed a hireling—so he is liable—or a lessee—so he is not liable? He (Peace Be Upon Him) said: The second is closer (to correct), and Allah knows best.” End.

Such dealings are numerous in our time: a man gives another a car to work on, and what is obtained is split in halves or thirds. The ruling for the car's perishing without an overpowering cause is the same as the



beast’s ruling mentioned in the notice.

### **[Benefits regarding transactional arrangements]**

In al-Bukhārī, from Ibn ‘Abbās: “There is no harm if one says, ‘Sell this garment, and whatever exceeds such-and-such is for you.’”

And likewise is related from Ibn Sīrīn, ‘Aṭā’, Ibrāhīm, and al-Ḥasan: they saw no harm in the broker’s wage. (Meaning conveyed.)

**I say:** This ought to be called a *mu‘āmalah* (profit-sharing arrangement), not an *ijārah* (lease); it is valid as a *mu‘āmalah*. Were it an *ijārah*, it would be invalid. In a *mu‘āmalah*, realization of the intended benefit or profit is not a condition.

**An example of *mu‘āmalah*:** you agree with a person to operate your mill, and whatever rental from milling is obtained is shared between you and him; or that he drives your car and rents it out; or that he works with your plow or water-lifting pump, or the like; and what is obtained is shared half-and-half or according to what you two agree.

A *mu‘āmalah* is likewise valid whether or not the sought benefit is realized, and Muslims have proceeded upon this in all lands without objection. Brokerage (*simsārah*) is of this kind and not of the kind of *ijārah*, because for the validity of *ijārah* the wage amount must be specified at the time of contract.

Whoever wishes to take it out of this category and make it an *ijārah* must stipulate, at agreement, that the broker will exhibit the merchandise for a defined time for a defined fee; then the broker deserves the wage upon the expiry of the period—whether the goods sell or not.

In my view, whoever rules the arrangement we mentioned at the beginning invalid, while ruling the later arrangement valid, ought to classify the former within the chapter of *mu‘āmalah*.

Matters supporting our stating that it is a valid *mu‘āmalah*:

- 1 - The Muslims’ acknowledgment and practice of it.
- 2- The established principle that Muslims’ transactions are to be construed as valid whenever possible.
- 3- What has been related from the Prophet (*May Allah bless him and his family and grant them peace*), and become well known, that he dealt with the Jews of Khaybar on the basis of one-half of what its yield produced.
- 4- Its strong resemblance to *muḍārabah* (commenda/working partnership).

### **Liabilities**

Assault (injury) against a trust, a borrowed item, a leased item, a

pledged item, or anything else in one's hand entails liability for the harm caused—whether the assault occurred intentionally or by mistake.

The proof is what sound human reason settles upon: that a person must bear the consequence of his own wrongdoing, whether against life or property. Allah, *exalted is He*, said: "*And if you punish, punish with an equivalent of that with which you were harmed ...*" [Al-Nahl:126]. And He, *Glorified is He*, said: "*And the retribution for an evil deed is an evil one like it.*" [Ash-Shūrā:40]. And He, *Exalted is He*, said: "*So whoever has assaulted you, then assault him in the same way that he has assaulted you ...*" [Al-Baqarah:194]. And He, *Glorified is He*, said: "*A life for a life ...*" [Al-Mā'idah:45].

### Negligence

It is obligatory upon a Muslim to safeguard any wealth of another that is in his hand. It is not permissible for him to be negligent in safeguarding it, for "the Muslim is the brother of the Muslim ... until he loves for his brother what he loves for himself." And Allah, *exalted is He*, said: "*Indeed, Allah commands you to render trusts to whom they are due ...*" [Al-Nisā': 58]. And He, *Glorified is He*, said: "*And if one of you entrusts another, then let him who is entrusted discharge his trust.*" [Al-Baqarah: 283].

- Know that the borrower and the lessee may use the borrowed item and the leased item for the benefits for which they were borrowed or leased; likewise the prospective buyer (*al-mustām*).

- An item that is used for the benefits mutually agreed upon between the user and its owner does not take the ruling of a trust while it is being used for those benefits, because a trust—as a trust—may not be used at all: the duty of one who holds it is to preserve and care for it.

- However, with respect to benefits other than the agreed-upon one, the item in the hand of the borrower, lessee, or prospective buyer does take the ruling of a trust; thus, he may not use it for anything else.

- He must keep it in a place where such items are customarily kept, and it is not permissible for him to be negligent in that.

- If the borrower, lessee, or prospective buyer uses it for something other than that which was agreed upon, the following consequences ensue:

- 1– The user must pay a rental for that (unauthorized) use.

- 2– If the item suffers deficiency, damage, or destruction during such use, he is liable—whether that occurred by an overpowering cause or not—because he is, in that case, in the position of a usurper, and a usurper is liable in all cases.

- Likewise is the ruling if deficiency, destruction, or damage occurs

due to negligence in safeguarding it: he is liable in all cases.

– If the two parties—the lessor and lessee, or the lender and borrower—agree that the item is to be at the user’s guarantee, then the user is liable in all cases, except for loss or the like due to an overpowering cause for which he has no means to avert or escape.

– If he had a way to avert the overpowering cause or to escape it, yet he was negligent and did not do so, then he is liable.

### **[Upon Whom Does Liability Fall in Contracting (Construction) Projects?]**

**Question:** If a man contracts to build a house, a school, or the like, and then the building suffers ruin due to war, a flood, or similar causes before the sub-contractor (*al-mutaqāwil*) delivers it to its owners—who is liable: the sub-contractor or the main contractor?

**Answer — and with Allah is success:** The matter is detailed as follows:

- 1– If the contract between the two parties specifies who bears liability—whether the sub-contractor or the contractor—then liability is according to that specification.
- 2– If there is an established custom among professionals in this trade, then liability follows that custom.
- 3– If there is an established custom for the contracting authority (such as the state), then liability follows that custom.

If none of the above apply, then by analogy the sub-contractor is liable: if the materials are supplied by the contractor, he is a shared hireling; and if the materials are supplied by the sub-contractor, he is a seller or like a seller. Both the shared hireling and the seller remain liable until they deliver what the contract was concluded upon.

What we have mentioned accords with the school’s analogy.

**Yes**, if the two parties reconcile in such a case, that is better and preferable.

### **[What Is Due from a Man Who Works on Another’s Car on a Half-Share and It Overturns]**

**Question:** If a man and the owner of a car agree that he will work with it and what is earned will be split half-and-half, then the car overturns and suffers damage; afterwards the driver leaves it where it overturned and returns home, refusing to bring it back to its owner—must the driver tow it back and return it to its owner or not?

And who bears the cost of repairing the car: the owner or the driver?

**Answer — and Allah is the One who grants success:** What appears to me—*Allah granting success*—is that in such matters the operative

reference is the custom practiced among the people of the region. If the custom is that when the car breaks down the driver is obliged to tow it to a mechanic's workshop or to the owner, then the man is obliged to tow it, for custom rules.

– As for repair costs, they vary with the nature of the damage.

Traditionally, one-third of the income is allocated to the car, one-third to the driver, and one-third to the owner; and what the car needs—repairs, fuel, oil—is taken from the portion allocated to it.

As for when the damage results from an overturning, there are scenarios:

*First scenario:* The overturning is due to poor driving by the driver—such as exceeding the traffic rules known among drivers for such a vehicle. In that case, the driver bears responsibility for what occurred due to that conduct.

*Second scenario:* The driver loads the car beyond what is customary for such a vehicle—such that other drivers, upon seeing the load, denounce it and deem it to endanger the car on the road it will travel with that load—and this loading was without the owner's permission. In that case, the driver is responsible for whatever damage, defect, or overturning occurred due to that loading.

*Third scenario:* The overturning is due to a cause inherent in the car—such as the stabilizer bar breaking, the air chamber (air system) malfunctioning, or the like—leading to an overturn or collision. In such a case, the driver does not bear responsibility.

*Fourth scenario:* The overturning or collision is due neither to the driver nor to the car, but to an external factor—such as another car obstructing the road. The responsible party then is the owner of the obstructing car, if he was at fault in that obstruction according to traffic regulations.

– If the driver was at fault, not the owner of the obstructing car, then the driver is responsible for what occurred to both cars.

– If the car overturns and breaks down far from its owner, the towing cost is taken from the revenues for two reasons:

1- Established custom and usage.

2- By analogy to losses in a *muḍārabah* (profit-sharing partnership), which are covered from the profit.

– The driver must tow the car and is entitled to the towing expense from the revenues—provided the accident was not due to his fault. If the driver caused the accident, then he is responsible for both towing and repairs.

If the car is in a secure place where there is no fear for it, and the driver had no role in its damage other than driving, he is not obliged to tow it.

– If the owner and driver dispute about the cause of the overturning, the matter is ambiguous, there is no evidence, and there is nothing in the car indicating the cause—such as the tires being intact, the axle intact, and the air chamber intact—then in that case the owner’s word is accepted; otherwise, the driver’s word is accepted.

And Allah is the Guardian of guidance and success. All praise is due to Allah, Lord of the worlds. And may Allah bless our master Muhammad and his pure family.

### **[A Man Who Rented Gas Cylinders and They Were Burned]**

**Question:** A man rented gas cylinders in order to transport gas in them from Ma’rib to Ṣa’dah during wartime, and the owner of the cylinders was aware of the dangers that occur along the route. The rented cylinders then came under gunfire on the road; the cylinders were burned, and the transport truck with its contents was also burned. What is due from the lessee with respect to the cylinders?

**Answer — and Allah is the Guardian of success:** The lessee does not bear liability for what he rented except in two cases:

- 1– That the lessor stipulates liability upon the lessee; if he stipulates liability, then the lessee is liable.
- 2– That the prevailing custom is that the lessee guarantees what he rented; this functions as a stipulation.

This applies so long as there was no negligence or wrongful act by the lessee. If any negligence or wrongful act occurred from him, he is liable in all cases, whether or not liability was stipulated upon him.

Traveling with the cylinders along the mentioned route is not deemed a wrongful act or negligence, given that the owner knew of the danger on that route and consented to his cylinders traveling along it; for the lessee rented them specifically to travel by that route.

### **[Ruling on Cars Destroyed in a Showroom Due to War]**

**Question:** A war broke out in a region where there are car showrooms; owners display their cars in those markets and pay the market owner a rental for that. Due to the severity and continuation of the war, the showroom owner was unable to escape with all those cars, and some were destroyed. Is the showroom owner liable?

**Answer:** What appears is that the market owner is not liable if he was unable to escape with the cars. If he was able to escape with them without exposing himself to danger, then he is liable.

**[On Sharecropping for One-Third]**

**Question:** An agreement and contract were concluded between two men that one of them would work in the other's land: he would dig, purchase equipment, seeds, and trees, plow, clear the land, and irrigate—on the basis that whatever benefits result would be divided in thirds: one-third to the landowner and two-thirds to the worker, for a period of twenty years. When the term ends, the worker would leave the land and hand it over to its owner together with what it contains of the well, the engine, the pipes, and the equipment. After six years, the two men fell into dispute, accusations arose, trust collapsed, and the worker wanted to leave the farm and requested to rescind the contract and agreement, while the landowner insisted on his remaining until the end of the term. What is the legal ruling?

**Answer — and from Allah is success:** The legal ruling, were the two litigants to refer to the judge, is to rule the contract described in the question invalid. If that is the case, then the worker owns everything he put into the land: the house is the worker's; the engine is the worker's; the pipes are also the worker's; the young plants likewise belong to the worker; and whatever produce has been obtained is the worker's. If the worker performed work on the land until it became suitable for cultivation, he is entitled to the value of his work, and likewise for the labor of digging the well. This is what the worker deserves and what is his.

As for the landowner, he is entitled to the rent of the land—namely, its customary rental value as assessed by two just men.

If the landowner wants the trees planted on the land, he may take them, but he must pay their value—the intent being that the trees be appraised as if they were in a nursery where trees are sold.

Likewise, if he wants the engine and its accessories, he must pay their value; and likewise, if he wants the *makhzaq* [the well] and the house, then he must pay the value for them.

If he does not want them, he is not permitted to use them; and if he does not want the trees, then the worker must remove his trees.

We say this because the engine and its accessories and the planted trees are the property of the worker; he has not effected any sale of them to the landowner, nor any gift. It is not hidden that a just ruling requires what we have mentioned.

This is supported by what the scholars say regarding a usurper who seizes land and cultivates it: he is not obligated beyond the rent of the land.

## [Chapter: Revival of Dead Land and Demarcation]

### [On Revival and Demarcation]

In *al-Tāj*: Except for ‘Arafah, Muzdalifah, and Minā, it is not permissible to revive (dead land) there, due to the right of standing (at ‘Arafah) in the first, and the right of overnight stay in the latter two. End.

### [Roads that pass through demarcated plots before their revival]

**Question:** A frequently recurring incident is that people in these lands have hastened to revive tracts of land and to sell and buy them, and there are roads that pass through these demarcated plots which people habitually use to go to markets and to villages, etc. What is required concerning these roads?

**Answer:** Rights may concur in a single place. The right of pasture may belong to the people of one village, the right of water to the people of another village, and the right of passage and thoroughfare to people other than those mentioned. If those (holders of one right) wish to revive land, sell it, build on it, or demarcate it, that must be done in a manner that does not harm the people holding the other rights, because of what the Prophet (*May Allah bless Him and His Family and grant them peace*) stated in the well-known ḥadīth: “No harm and no reciprocating harm.” ... ḥadīth.

### [Does a man own the place from which he extracted stones by blasting?]

**Question:** Does a man own the place from which he extracted stones by blasting?

**Answer—and success is from Allah:** The jurists of the madhhab have mentioned that digging is among the causes of ownership. Accordingly, a man owns the stones extracted from the site of blasting and owns its place. They said: he owns the pit whether he intended ownership or did not intend it.

They also said: that and the like exit his ownership by abandoning it.

—What appears to me—and Allah knows best—is that what is to be followed in the matter mentioned in the question is custom. If the people of those lands have mutually recognized that each of them may cut stones for building or for sale from any place in their mountains, whether from where some have already cut or from elsewhere, then such cutting does not entail ownership of the place.

—Likewise, if the villagers have a common land around their village from which they dig earth to whitewash their houses or to build them, and they are mutually agreed among themselves that each may take from that—whether from where some have taken or from where none

has taken—then that does not entail ownership nor is judgment given for it; for custom is a path recognized by the Sharī‘ah so long as it does not contradict a text—thus has the madhhab stated.

—Therefore, if custom has come to be that digging entails ownership, or if there is no custom—neither for ownership nor against it—then digging entails ownership.

### [Ruling on Naturally-Grown Trees]

Imām al-Mu‘ayyad bi-llāh (*Peace be upon him*) said: Trees that grow in a *ḥaqq* (a right/claim) are part of that right; the owner of the site has priority regarding them—whether the trees are of what is normally planted or of what is not planted. In private ownership, they belong to the owner of the site. In a dedicated (endowed/set-aside) site, they follow (the site): if it is for a mosque, the trees are for it; if it is for something else, then they are for it, according to the case. In other than these, they are pasture; whoever reaches them first has priority over them.

And the madhhab stated is that all of that is alike—whether in private ownership, right/claim, endowment, or otherwise. End from *al-Tāj* with adaptation.

**I say:** I am pleased with the statement of al-Mu‘ayyad bi-llāh (*peace be upon him*) for the following matters:

1. That trees are created from the earth and emerge within it; thus they belong to it like a mother, and a mother’s child follows the mother, and her rulings apply to it.
2. That those we know among the people in our lands have had custom run among them according to the statement of al-Mu‘ayyad bi-llāh; and custom is a Sharī‘ path so long as it does not contravene a text. If a ruler or a scholar came to them with something else, they would find it strange and censure it, etc.
3. That the jurists of the madhhab have said regarding the one who has demarcated (*al-mutaḥajjir*)<sup>1</sup>: he has what he has enclosed of trees and the like that existed at the time of demarcation. It follows from that (rationale) that what grows after demarcation also belongs (to him) due to the persistence of the cause, and demarcation is setting up markers along the sides; the markers remain, or their legal effect remains.

### [Overlapping Rights]

**Question:** If a man has trees in a piece of land, and the water of that

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1- See *Sharḥ al-Azhar*, 3/324–325.



land flows to another man’s farm, and all of that has been acknowledged; then a third man comes and claims that he is entitled to the land—what we call in our custom *al-ṣalb* or *al-maḥjar* (the demarcated claim). The owner of the trees claims that the *ṣalb* is his, and the owner of the water says it is his to the exclusion of the others. If each of the three produces documents to support his claim—or none of them produces any proof—whose statement is to be accepted?

**Answer—and Allah is the Guardian of success:** Rights can concur in a single place. According to what is mentioned in the question, the statement of the owner of the trees is accepted regarding entitlement to the trees, and the statement of the owner of the outflow (*al-ṣabb*) is accepted regarding the outflow; for the accepted statement is that of the one with apparent indication in his favor. As for the three claims regarding the demarcated right (*al-ṣalb*), they are equal—none of them, outwardly, has what gives his claim precedence. Accordingly, they are all claimants; judgment of entitlement is given to whoever establishes proof.

If they all establish proof, it is divided among them in thirds. If they all swear oaths, it is also divided in thirds. If some swear and some refuse, it goes to those who swore, and so on.

**If it is said:** Is not the apparent [evidence] with the owner of the outflow, or with the owner of the trees, or with both?

**We say:** They have stated that rights can concur in a single place. The apparent [evidence] for the owner of the outflow indicates no more than his entitlement to the water; and the apparent [evidence] for the owner of the trees indicates no more than (his entitlement to) the trees. As for the demarcated right, they are all claimants, and none of them has (possession of) it.

### **Al-Fuṣḥah (Concession of Space)**

**Question:** Does the *fuṣḥah* (concession of space) practiced by the people of our lands entail ownership?

**Answer—and Allah grants success:** What appears to me regarding *al-fuṣḥah* is that it is of two kinds:

1. *A temporary concession:* when its time ends, the owner of the land takes back his land and what is built on it, and pays the builder the indemnity for his construction.
2. *An absolute concession:* and the prevailing custom, as it appears to me, is that the builder is not asked to vacate the building except in cases such as when harm comes from the concession holder—like it becoming a refuge for thieves or drunkards, or the like.

Thus has the understanding of *al-fuṣḥah* appeared to me according to

the custom among the tribes. The first kind, on this understanding, resembles a loan for use (*ʿāriyah*), and a loan for use does not entail ownership. The second kind resembles a gift in one respect and a loan for use in another. Its resemblance to a loan for use is in that the builder has no right to sell except to the one who granted him the plot (*al-ʿarṣah*), nor may he remove it from his ownership except after obtaining his permission; and the owner of the plot has the right to remove the builder from the house when there occurs from him something like what we mentioned earlier, and he pays him the indemnity for his building.

Its resemblance to a gift is in that the owner of the plot has no right to remove the builder from the plot for other than the cause we mentioned, nor to retract the concession, nor to demand rent for the plot.

#### [A Man Who Took from the Debtor's *Maḥjar*]

**Question:** A man took from the debtor's *maḥjar* the shares of four liable parties—namely his own share and the shares of three of his sons. After some time, the man wanted to divide those four portions among his three sons and others, but the three objected, saying that the three portions belong to them to the exclusion of the father; while the father said that he is entitled to all of them to the exclusion of his three sons. What is required?

**Answer:** What is required is that the four portions belong to the father if he is the one who pays the fines, litigates, bears (the encounters), ... etc., rather than his sons. If the three sons pay the fines on their own behalf and litigate, ... etc., then their shares belong to them to the exclusion of their father. This is what I have seen to be the face of the truth.

That is because the father takes the four portions in exchange for what he pays of fines alongside the tribe: he pays as (the equivalent of) four liable persons, and assumes the responsibility of four liable persons in every obligation, bearing every obligation on behalf of his sons. Therefore he deserves all four portions in return for that. Members of a household brought a dispute of this kind before me, and I decided between them as just mentioned. Praise be to Allah, Lord of the worlds.

#### [When Liability Attaches to *Maḥājir* and When It Does Not]

**Question:** A group lodged a claim against a man's heirs that their ancestor had consumed from the *maḥājir* that were shared between him and them more than his portion; he had been the agent for all of them in litigation and sale, and it became clear after his death that he had been taking more than his share. This is while knowing that the *maḥājir* had been built upon, developed, and planted by the purchasers. What is the ruling regarding that? Are the heirs required to pay on behalf of their ancestor and indemnify for him?

**Answer—and Allah grants success:** *Maḥājir* have two states: a state in which liability attaches, and a state in which it does not attach. As for the state in which liability attaches, it is when they are owned; and ownership occurs by building upon them or the like—such as enclosing with fencing. If that is the case, and then the agent sold them and betrayed his partners in some matter, and that became evident, then he is liable; and if he dies leaving property, the heirs must pay the partners their due.

As for the state in which liability does not attach to the *maḥjar*, it is when the agent sells the *maḥjar* before building upon it, tilling it, or the like. What he sells in that state—and then betrayal becomes evident—he is not liable for it, nor are his heirs. That is because *maḥājir* are (mere) rights, and rights are not sold; what is taken as a “price” in exchange for them is not deemed a price, but rather a permission placed in the seller’s hand. If the *maḥjar* contains trees owned by the partners, such as acacia and the like, that does not confer ownership of the *maḥjar* itself; only the trees are owned. The seller then owes his partners what they are entitled to from the price of the trees. All that we have mentioned is the implication of the statements of the jurists of the madhhab.

The proof for that is that the default with respect to land is non-ownership; it is owned by cultivation and reclamation—like fallow tracts (*al-jarb*)—or by building upon it or the like. Selling and buying what is of that kind is valid and permissible.

As for *maḥājir* of grazing and the runoffs of water and the like, they are not owned by the people of pasture nor by the people of water; rather, they have the right of grazing and the right to water. Grazing in a place is not among the causes of ownership, and likewise the flow of water from a tract of land to a man’s property is not a cause for ownership of that land.

### **[Ruling on Preferential Entitlement to Maḥājir Between Two Neighboring Villages]**

**Question:** There may be two neighboring villages. The people of one of them have wide, far-stretching *maḥājir*, while the people of the other village have no *maḥājir*; indeed they are very constrained, and the people of the first village permit them to build but not to expand—since the land is theirs. From the traces of house construction and the cemeteries in the two villages, the antiquity of habitation in those lands is apparent. Is it permissible for the people of the (constrained) village to demand from the other village a share of the broad *maḥājir*, or not?

**Answer—and Allah is the Guardian of success and of guiding to the most upright path:** People’s customs have long established that whoever precedes to what is permissible is most entitled to it, and that

whoever has something in his hand of *maḥājir*, watercourses, or trees is more entitled to it. Thus have the customs of the people in our lands proceeded, generation after generation. Therefore we say: the tribe that has many *maḥājir* under its hand are the ones who are rooted and established in those lands, to the exclusion of the other tribe.

According to these customs, the tribe that does not have *maḥājir* under its hand has no right to demand from the tribe that does; for it has, by custom, no right in those *maḥājir*. One should not open up matters that people have come to agree upon, because that leads to strife, disputes, ... etc.

This is when people are in a time of (political) interregnum. But if people are under a legitimate authority, then the Sultan of the Muslims—by virtue of his general guardianship—looks to what rectifies the affairs of the Muslims. He may confirm the *maḥājir* for their holders, or take from them what he wishes and place it where he wishes, according to what he sees to be in the public interest.

### [Chapter: Muḍārabah (Silent Partnership)]

**Question:** A man handed money to another to trade with—buying and selling—on the basis of *muḍārabah* between them. He sold and bought for cash and on credit. One of his clients went bankrupt, so he took from him a promissory note for that debt. When the owner of the capital learned of it, he demanded that money from the *muḍārib* (working partner) and claimed against him that he had lent it to him; the *muḍārib* denied this. What is the ruling? And what is required of the *muḍārib*?

**Answer—and Allah is the One who grants success:** If the *muḍārabah* is unrestricted, it is permissible for the *muḍārib* to sell and buy for cash and on credit—except with one who is not reliable; it is not permissible for him to transact with such a person on credit. This is what the unqualified wording of the *muḍārabah* contract entails.

On that basis, the *muḍārib* is not liable for what he is unable to recover of the debt encompassed by the *muḍārabah* contract, because—as we mentioned—the unqualified wording of the *muḍārabah* contract includes permission to buy and sell for cash and on credit.

If the owner claims that the *muḍārib* loaned out the money as a loan, and the *muḍārib* denies it, then the burden of proof is upon the claimant, and the one who denies must swear an oath.

#### On Muḍārabah

The customary margin of undervaluation (*al-ghabn al-mu‘tād*)—as in *al-Tāj* according to the madhhab—is one quarter of one tenth of the value. End.

*And in it:* If they divide while on a journey, and its capital is a debt upon another, then he must collect it and spend from the profit during the period of claim, not during the period of return. End.

*And in it:* As for when it is certain that there is no profit in it—i.e., in the *muḍārabah* capital—the owner has the right to dismiss him, i.e., to dismiss the worker. But he does not have the right to compel him to sell immediately; rather he is to be granted time until the goods find a market, whether the period is long or short, so long as the delay does not harm the owner. End.

*And in it:* *Muḍārabah*, deposit (*wadī‘ah*), agency (*wakālah*), partnership, and unrestricted loan for use (*‘āriyah*) are invalidated by the death of the owner of that property, or his insanity, or his falling unconscious. End.

#### Benefits Concerning Undervaluation, Muḍārabah, and Coercion

— The customary margin of undervaluation, as mentioned by the jurists of the madhhab, is one quarter of one tenth of the value.

— *Muḍārabah* and partnership are nullified by the death of either of the two partners or the two contracting parties in the *muḍārabah*.

— All contracts and legal enactments do not take effect and are not valid under coercion—except if the coerced party inwardly accepts them and intends them; then they are valid. The proof is His saying, “*Except for one who is compelled while his heart is secure in faith.*” [al-Nahl:106]

### [Ruling on the Muḍārabah Agent Purchasing Half the Merchandise]

**Question:** A man gave another a sum for *muḍārabah*. He sold and bought for a period of time. Then the owner of the capital came and said to the worker: “Buy from me half of the merchandise for such-and-such so that we will be partners in the merchandise; and give me a promissory note for that.” They agreed upon that. Is this sale valid or not?

**Answer—and Allah is the One who grants success and aid:** The words of the jurists of the madhhab—as in *Sharḥ al-Azhār* and its marginalia—indicate that the sale is valid if there is no profit; but if there is profit in the *muḍārabah* goods, then the sale is not valid, ... etc.

Then the marginal note comments with the following wording: “(This wording is general and needs detail. It is to be said: If he sold all of it to the worker, it is not valid with respect to the whole; for he has purchased his own property and the property of another, and that is not valid. As for if he purchased other than his own share of the profit, that is clear—namely, that it is valid ... and (establishment)(قرينة) where he purchased only the owner’s share.” End (establishment)(قرينة).

“So, if he purchased all of it, it is not valid, because he purchased his own property and the property of another, because ignorance (of shares) accompanies the contract, and ratification is inconceivable here—unless the prices are distinguished.” End. “The preferred view is that it is not valid whether or not the prices are distinguished, because he purchased his own property and the property of another.” End (establishment).<sup>1</sup>(قرينة)

**I say:** On this basis, if the sale mentioned in the question pertains to *muḍārabah* goods while they are free of profit, then the sale is valid; but if profit has already accrued in them, then the sale is invalid.

**Yes,** the rationale they connected to the invalidity of the sale is that the worker purchased his own property and the property of another.

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1- *Sharḥ al-Azhār*, 3/238–239.

The proof for the soundness of this rationale is His saying, “*Do not consume one another’s wealth unjustly, except it be a trade ...*” to the end of the verse. [al-Nisā’:29] There is no doubt that a person’s buying his own property from another entails consuming wealth unjustly, which is forbidden by His saying, “*Do not consume.*” On that basis, it is not permissible for the seller to take the price from the buyer.

**If it is said:** The sale is valid with respect to what the seller owns and invalid with respect to what the buyer owns—so there is no reason for its invalidity in its entirety.

**We say:** A single contract is not divisible; it is not valid to rule some of the goods validly sold and some invalidly sold while the wording is one, the contract is one, and the thing sold is a single thing—namely, half of the merchandise in the question.

### [Ruling on Borrowing for the Muḍārabah Capital]

**Question:** A man took from another a *muḍārabah* fund to buy and sell with. Is it permissible, thereafter, for him to take from him some of the money as a loan—to borrow from him to purchase goods for the *muḍārabah* fund? Some learners cast doubt for us that this is not permissible, because it entails usury (*ribā*), or because it is a loan that brings about a benefit.

**Answer—and Allah is the One who grants success and aid:** The scenario mentioned in the question is not as some have cast doubt; rather, it is a loan that does not bring about a benefit. As for profits that accrue from the loan—if anything accrues—they do not accrue to the lender by virtue of the loan; rather they accrue to him by another cause, namely, the *muḍārabah*. Thus the lender has not realized any profit by means of the loan, nor has his loan brought him any benefit; whatever profit arises from the loan follows the *muḍārabah* capital, not the loaned funds.

### [How to Divide the Muḍārabah Capital]

**Question:** A man has a *muḍārabah* fund with which he has traded for a period, and profits accrued. He withdrew an amount from it, and the owner of the capital withdrew an amount, then the trading continued. After that the owner of the capital requested an accounting and a division. The *muḍārib* said that most of the principal is a debt upon a man who is on the verge of bankruptcy, and the remainder is merchandise. What is required then?

**Answer—and Allah is the One who grants success:** What is required is that the *muḍārib* return what he had withdrawn from the profit and hand it over to the owner of the capital, and it is to be added to what the owner had withdrawn and counted as part of the principal. Then the *muḍārib* must pursue the debt and demand its repayment. When he

recovers the debt, he completes the owner's principal for him, and they divide what remains. If thereafter they wish to divide the merchandise, they may divide it; otherwise, the *muḍārib* sells it and they divide its proceeds.

### [Paying a Fixed Sum in Exchange for Profit]

**Question:** There are two partners who own shops and a shared station between them, and they have capital. They agreed that one of them would work in that shared enterprise, with a third of the profit for him in exchange for the work, and the remainder divided between them equally. After a while, the one who does not work said to the one who does: "Hand over to me such-and-such—a specified amount—each month in exchange for the profit." Is that permissible or not?

**Answer—and Allah is the One who grants success:** The jurists of the madhhab mentioned, as in the marginalia on *Sharḥ al-Azhār*, that if the capital owner gives the *muḍārib* money by way of *muḍārabah* on condition that he produce a known, fixed sum every month, then the *muḍārabah* is invalid. If he then gives him, each month, what was stipulated, it is permissible if it equals the profit, or is less or more than it—provided it is of a different kind; if it is of the same kind, any excess is not lawful. End.<sup>1</sup>

**I say:** On that basis, usury (*ribā*) would be the case where he gave him the money as a loan and stipulated a fixed amount each month; in that case it would be *ribā*. Thus, what is mentioned in the question is permissible.

It may be adduced for this by His saying: "*except that it be trade by mutual consent among you.*" [al-Nisā':29]

Here, the capital owner has not consumed any wealth unjustly; rather, what he takes from the *muḍārib* he takes in exchange for his profit. If that is the case, it is permissible for him to take less than his profit or an amount equal to it; and it is permissible for him to take more than his profit on condition that what the owner takes be of a different kind from the profit.

There is, however, a scenario in which it is not permissible for the owner to take anything from the *muḍārib*: namely, when there is no profit.

**Yes**, what is preferable is to avoid entering into such a partnership and such a *muḍārabah*, for several reasons:

1. Because the one who enters into it may be exposed to the

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1- *Sharḥ al-Azhār*, 3/344.



suspicion of *ribā*. In the report: “Leave that which people denounce, even if you have an excuse for it.”

2. Some people may confuse what we have mentioned with *ribā* and fall into *ribā*. In the report: “Whoever buys and sells and then does not ask about what is lawful or unlawful has plunged into usury, then plunged.”
3. Such arrangements may be taken as a pretext and means to *ribā*. If he is told (it is *ribā*), he says: “It is only *muḍārabah*.”
4. Many people do not know the conditions for the permissibility of such an invalid *muḍārabah*, and thus fall into *ribā*—by taking more than his profit of the same kind, or by taking “profit” when no profit has occurred.
5. Such a *muḍārabah* is judged invalid; thus it is exposed to annulment, quarrels, and dispute.

### [Requesting a Sum of Money in Exchange for Profit]

**Question:** A man owns, for example, a pharmacy. He hands it over to someone as *muḍārabah* after inventorying it, and he asks him for twenty thousand riyals per month, for example, as profit. What is the ruling?

**Answer—and Allah is the One who grants success:** This *muḍārabah* is an invalid *muḍārabah*. Whatever profit occurs in it belongs to the owner, and the worker is due wages for his work—whether profit is realized or not. This is what is required when a dispute arises.

If he has been giving him twenty thousand per month, then if that amount is less than or equal to the profit, it is permissible; but if it exceeds the profit, the excess beyond the profit is not permissible, because it is *ribā*. Thus said the jurists of the madhhab, as in the marginalia on *Sharḥ al-Azhār*.

### [Invalid Muḍārabah]

**Question:** A man gave another money to buy and sell with, with the profit between them half-and-half and the loss half-and-half. What is the ruling?

**Answer—and Allah is the One who grants success:** The *muḍārabah* is invalid. The ruling in that, if they dispute, is that the capital and the profit belong to the owner of the capital, and the *muḍārib* is due the wage of one of equal service (*ujrat al-mithl*). The worker is not liable for loss, if there is loss. In legal effect he is like a shared wage-earner (*ajīr mushtarak*): he guarantees what perishes under his hand, except for market loss—he does not guarantee that. If the two parties do not dispute and proceed upon what they agreed, they are not to be opposed.

It may be said: the transaction is valid and the trade is joint between them, as we have previously mentioned in a similar case.

### [Termination of Muḍārabah While It Has Outstanding Debt]

**Issue:** In the marginalia on the commentary: “<sup>أ</sup> branch: If they terminate it and its capital is a debt upon another, then he must collect it and spend from it during the period of claim; if he does not collect it, he is liable to its owner.” End.

**I say:** If the debtor is insolvent, he is to be granted time until ease.

— If the debtor is not insolvent, but procrastinates and resists paying the debt, the *muḍārib* must bring him before the governor, judge, shaykh, or whomever such matters are brought to. What is required of him in this regard is what is customary in pursuing such a claim.

— If the debtor is oppressive and his harm is feared when pressing him, then he should pursue him in a manner appropriate to his condition.

### [May One Take a Similar Pair of Shoes if They Become Mixed Up?]

**Question:** Is it permissible for a person to take a pair similar to his shoes when the shoes have become mixed and confused—as happens in some large mosques and public gatherings, and as in the Sacred Mosque? Or is one required to refrain?

**Answer—and Allah is the One who grants success:** What appears to me is that when the shoes are mixed up and confused and distinguishing between them is impossible, they may be taken by reasonable estimation. If estimation is not possible, then let each person take what is similar to his shoes in newness and wear.

The jurists of the madhhab have said: A thing exits its owner’s ownership if it becomes mixed with another’s property such that distinguishing it is impossible. On that basis, we can say: the shoes, by virtue of mixing and confusion, have become unowned by any specific person; their proper disposition then is to the poor and to public interests.

## [Book of Partnership]

### [Chapter: Partnership in Earnings and What Relates to It]

#### [Recognized Means of Lawful Gain in Islam]

1. Agriculture.
2. Sharecropping (*muzāra‘ah*).
3. Buying and selling, *muḍārabah* (silent partnership), exclusive hire (*ijārah khāṣṣah*) and shared hire (*ijārah mushtarakah*).
4. Gift, charity, bequest, and inheritance.
5. Consideration in marriage (the bridal due/mahr), consideration in divorce (*khul’*), blood-compensation (*diyāt*) and indemnities, and compensation for offenses against property.
6. Vows, endowments (*waqf*), and expiations.
7. Revival of dead land, demarcation, and hunting; and everything a person takes from the surface or the interior of the earth, on condition that no one else has ownership or a right therein.
8. What is taken from the wealth of belligerents.
9. What is found among the buried hoards of polytheists.

#### Customary Partnership

In *al-Azhār*: “The authorized agent (*al-ma’dhūn*) may carry out every transaction for which custom has established that its like is done with its like.”

And in its commentary: ‘Alī b. al-‘Abbās related from the Family of the Messenger of Allah (*May Allah bless him and his family and grant them peace*) that he—i.e., the authorized agent—may add to what custom has established.

Imām al-Mahdī said: “It has been the practice of people of substantial wealth that the slaves working their trade carry out such matters as hospitality and guarantees; thus there is no disagreement—rather, custom is to be followed.” End of citation from *al-Azhār* and its commentary.<sup>1</sup>

**Yes**, there branches from that a matter that is widespread in many regions:

1. Namely, customary partnership. Very often the members of a single household—brothers, paternal uncles, and sons of paternal uncles—are partners. Each one works on his own: he sells and buys, hosts guests, stands surety, gives charity, and gives to the

1- *Sharḥ al-Azhār*, 3/151.

petitioner—all of that while the partnership exists.

2. Sometimes one of them is the one who undertakes the transactions and holds the reins of making and unmaking decisions, and none of the partners shares with him any action regarding what pertains to the property. The usual practice in such a case is that this manager disposes of the property in buying and selling, hospitality, giving to the petitioner, almsgiving,.. etc. These are two scenarios of what I have known of customary partnership.

On the basis of what has preceded in *al-Azhār* and its commentary, such dispositions are valid and permissible.

There is another matter akin to what we have mentioned that has become customary: namely, when some partners are minors or mentally incompetent. The custom is that the adult partners set right the common property and increase it through trade and agriculture. Along with that, they give to the petitioner, host guests and relatives according to their custom and what is recognized among them, and they give charity, bestow gifts, etc.

What appears to me is that these dispositions are valid and sound, for several reasons:

1. This practice is a customary practice; and as noted, custom is to be followed.
2. Preventing such dispositions may lead the elder brothers to set aside the shares of the minors and leave them without improvement.

However, it is a condition for the permissibility of such dispositions that they not exceed the bounds of what is commonly recognized among people.

Moreover, what supports the foregoing is His saying: *“Allah intends for you ease and does not intend for you hardship”* [al-Baqarah:185], and His saying: *“And He has not placed upon you in the religion any difficulty.”* [al-Hajj:78]

3. Custom, in the view of the scholars, runs the course of authorization. Thus they said: custom applies with respect to the minor, the mosque, and so forth.

*Yes, Allah Most High said: “And they ask you about orphans. Say, ‘Improvement for them is best. And if you mix your affairs with theirs, then they are your brothers. And Allah knows the corrupter from the amender. And if Allah had willed, He could have put you in difficulty...”* [al-Baqarah:220]

What may further support this is that Allah Most High permitted the

poor guardian of orphans to eat [from their property] according to what is acceptable, legislated mixing with them and partnership with them, and lifted hardship and burden from righteous guardians.

Furthermore, what indicates—in general—that custom is operative in the Law is His saying: *“He commands them to what is right and forbids them from what is wrong”* [al-A‘rāf:157], and the like; and His saying: *“And whoever is poor—let him eat (from it) according to what is acceptable”* [al-Nisā’:6]; *“And live with them in kindness”* [al-Nisā’:19]; *“if they mutually consent among themselves according to what is acceptable”* [al-Baqarah:37]; and the like of that is abundant in the Qur’ān.

Accordingly, the custom prevailing among people—generally or specifically—such as lenience in taking some fruit, or eating from the food of brothers and sisters and the like—runs the course of authorization, and there is no harm in it. Customs may differ with the differing of lands and according to poverty and affluence: the poor have their custom, the rich have their custom, people of the towns have their custom, people of the deserts have their custom,... etc.

### **Customary Partnership**

In the name of Allah, and by Allah, and praise be to Allah. And may Allah bless the Prophet of Allah and his family and grant them peace:

Customary partnership is what we see today in our lands: members of a single household—such as a father and his grown sons, brothers, sons of paternal uncles, and the like among one household—work and earn, each in a different avenue: some in trade, some in agriculture, etc. What each one acquires belongs to all. The father manages the matter; everything is in his hand and in his name. If there is no father, then the eldest brother undertakes management and direction. Then their children grow up and work with their fathers in agriculture, trade, and travel. Among the rulings of this partnership is that one with greater income is not given preference over the one with lesser income.

### **[Customary Partnership Between a Father and His Sons, and One of Them Claims Exclusive Ownership of a Car]**

**Question:** A man has grown sons who work with their father in agriculture and trade, and their father is the authority over them and the one who disposes (of affairs). They acquired assets during their joint venture, then they disagreed and this led to division. After the division, one of the sons claimed a car and said it belongs to him. He adduced the sale papers stating that he purchased the car and paid the price, and these have witnesses. What is the ruling? This is while the father denies his son’s claim and says it belongs to him, and that he paid the price from his own private funds, and that his son was only a messenger.

**Answer—and Allah is the One who grants success and guidance:**

What appears—and *Allah knows best*—is that the evidence of the son who claims exclusive ownership of the car is not sufficient, for he purchased it while in partnership with his father and brothers. What customary partnership entails is that whatever any of the partners acquires is common among them—whether it is recorded in his name or in the name of all; and whether the car is in his possession or in his father's.

The father's claim of exclusive ownership of the car requires something to verify it—even if it is in his hand. Each of the son and his father must present proof of the truth of his claim. However, the father has some apparent presumption in his favor, by which his statement is accepted along with his oath. In this area, the evidence must be definitive, because the apparent presumption is joint ownership.

### [On the Obligation of Equality Among Children]

**Question:** If a man has several children—some of them grown and self-sufficient through their earnings, and some of them young and not earning—does the father have the right to give to the younger ones and not to the older ones? Or must he maintain equality between the older and the younger?

**Answer:** If the younger children are in need and the older ones are not in need, then it is permissible for the father to give to the younger ones, to meet their needs and remedy their poverty, in what is customary of maintenance and what attaches to it. Beyond that, he must maintain equality among all the children.

What appears to me concerning equality is that, when he gives to his children, he gives each what befits him. Thus, if he gives his son clothing, a *jambiyyah* (dagger), and a rifle, he gives the daughter what befits her of clothing and jewelry.

### In Customary Partnership

I saw—by way of amicable settlement—that when a father and his children have acquired assets and, in the end, wish to divide them, the acquisitions should be apportioned among them according to years; and a child does not enter the partnership until he reaches puberty, so his share is calculated from the time of his puberty. Thus the partnership between the father and his son begins from the son's puberty, then another son joins it when he reaches puberty... and so on.

So if the father has (15) years, one son (15) years, a second son (13) years, a third son (10) years, and a fourth (8) years—one totals the years and then divides the acquisitions by them, then multiplies the result by

the years of each one of them; what comes out is his share.<sup>1</sup>

This is if all agree—especially the father and his original partners. I presented this to some disputants before me; they were satisfied with it and implemented it.

**There is another form**, also by way of amicable settlement: If the father had a business, then his sons began to work with him one after another, and after some years they wished to divide. The business is inventoried, then the father sets aside the *jawzah*—that is, the money that was in the father’s hand when the partnership between him and his sons came into being. What remains is the partnership property between him and his sons: half of it is the father’s and is set aside with the *jawzah*, and the other half is divided between the father and his sons according to years. It is as though the wealth, for all of them, were *muḍārabah* capital.

**A third form** that can be implemented by way of amicable settlement is this: When the father or a brother is a merchant, and then his sons or brothers work with him in trade for years and they gain profits and acquisitions, the years and periods of work of each worker among them are calculated; then the intermediary or the trusted arbiters (*al-‘udūl*) estimate for each of the sons or brothers his wage for that period. In this scenario, it is as though they were wage-earners.

### [How to Divide Acquisitions in a Customary Partnership]

If those sharing in a customary partnership disagree about how to divide the acquisitions, there are several forms for dividing them among them.

*The first form*: The partners all entered the partnership and work at the same time; then the acquisitions are divided equally by heads, without preferring some over others.

*The second form*: Two brothers, for example, started working at the same time; after four years their third brother joined the work; after two years the fourth joined; after two more years their fifth brother joined; then they all continued working for ten years and wished to divide. In such a case, the duration of the partnership from its beginning to its end is eighteen years, and the acquisitions may be divided according to years of work:

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1- For example, if the wealth is (3,000,000), we total the years:  $15 + 15 + 13 + 10 + 8 = 61$ , then divide:  $3,000,000 \div 61 \approx 49,180$ . We multiply it by the years of each one; thus:  $15 \times 49,180 = 737,700$ ; and multiply it by 15: 737,700; and by 13 = 639,340; and by 10 = 491,800; and by 8 = 393,440. We proceed similarly in the next case, in which the total of the years is (72), and by it analogies are drawn. (Verified)

The first two—each one's work is 18 years.

The third—his period of work is 14 years.

The fourth—his period of work is 12 years.

The fifth—his period of work is 10 years.

$(10 + 12 + 14 + 18 + 18) = 72$  years.

**[Invalidity of Demanding a Debt After One Partner Has Granted Remission in a Customary Partnership]**

**Question:** A man forgave another man the remainder of a debt. They remained for a period thereafter, and a dispute arose. The man [who had forgiven] said: "It is true I forgave you, but I am claiming my brother's share of the debt, because my brother is in straitened circumstances." This is with the knowledge that these two brothers are partners in everything, small and great, and they have extensive businesses—each of them transacts as he wishes without the other's permission. And his forgiving the man the remainder of the debt is something this man customarily does with his clients. Is it valid for him to demand his brother and partner's share, or not?

**Answer—and Allah is the One who grants success:** If the matter is as stated in the question, then it is not valid to demand his brother's share of the debt if he forgave all of it. That is because, in his trading and transactions, he disposes on his own behalf and on behalf of his brother in every sale and purchase; if remission of the debt were not valid, then neither sale nor purchase would be valid for either of them.

Moreover, the prevailing custom validates what one of the partners does in such a customary partnership. If we did not affirm its validity, many transactions would be disrupted, and a great door of dispute and contention would be opened upon the people.

**[Partners: One Sold and Included Them, Then One of Them Claimed After a Long Time]**

**Question:** A man sold land and included his partners, and the sale was concluded on that basis. Then, after a long time—after houses had been built on that land and the land had been revived with trees—some of the partners came to demand from the seller their shares, arguing that they had neither sold nor ratified. What is required in that case?

**Answer—and Allah is the One who grants success:** The custom has run that a single member of a household stands in for all in such matters. If the partners knew of the sale and remained silent and did not object, their claim is not to be heard thereafter—especially if years have passed since the sale. Apparently this is an established custom among the people in these lands.

There has come in the Sunnah what supports this custom. In the



books of *sīrah* it is related that the Prophet (*May Allah bless him and his family and grant them peace*) said to the people of Ṭāʾif—when they asked him to return to them the spoils of Ḥunayn, He said (*May Allah bless him and his family and grant them peace*): “As for what belongs to me and to Banū Hāshim, it is yours.” Then men from the Companions stood up, each one saying: “And I—what belongs to me and to the sons of so-and-so—is yours.”

It is also related in the *sīrah* that the Prophet (*May Allah bless him and his family and grant them peace*) wrote a document among the people of Madīnah when he arrived there, and in that document it was (stipulated) that a single man from a tribe binds himself and those behind him from his tribe. In what we have mentioned from the Sunnah is evidence that silence in such a case constitutes consent.

As for one who openly expresses aversion upon learning of the sale or the like, then the sale does not bind him. This is what has appeared to me, and Allah knows best.

### **[Partners Bound by Their Conditions]**

**Question:** Two partners in a business agreed and mutually consented that one of them would carry out some work that required incurring financial loss, and they stipulated conditions between them in this agreement. Then the one who undertook the work and incurred some financial loss in the project did not fulfill the conditions for the other partner. What is required in such a case, if they dispute and one of them demands that the project be dismantled while the other demands compensation for the loss?

**Answer – and Allah is the One who grants success** – is that what is obligatory is to give effect to what the two partners agreed upon of conditions in the agreement. This is what is required because of His saying, *the Exalted*: “*O you who have believed, fulfill [all] contracts.*” [Al-Mā'idah:1], and because of what has come in the transmitted report: “The believers are bound by their conditions.”

As for when one of the two parties deliberately fails to uphold some of the conditions of the agreement, then the other party is not required in that case to fulfill (those conditions). The evidence for this is what is mentioned in the books of *Sīrah* concerning the peace treaties between the Messenger, May Allah bless him and his family and grant them peace, and the polytheists: He (*May Allah bless him and his family and grant them peace*) committed himself to grant fulfillment on the part of whoever fulfilled (the treaty) with him, but not from those who did not fulfill him (*May Allah bless him and his family and grant them peace*) Allah, *the Exalted*, has said: “... *except for those with whom you made a treaty at al-Masjid al-Haram. So as long as they are upright toward you, be*

*upright toward them. Indeed, Allah loves the righteous."* [At-Tawbah:7].

And when the polytheists from among the people of Mecca failed to uphold some of the conditions of the truce that had been concluded at al-Hudaybiyyah between the Prophet, (*May Allah bless him and his family and grant them peace*), and the polytheists, he (*May Allah bless him and his family and grant them peace*) marched against the polytheists in Mecca, conquered it by force, paid no regard to the conditions of the truce and did not give them any consideration. Abu Sufyan – who was the chief of the Quraysh polytheists – had come to Madinah to apologize to the Messenger of Allah, (*May Allah bless him and his family and grant them peace*), and to the Muslims for breaching the conditions, but the Messenger of Allah (*May Allah bless him and his family and grant them peace*) did not accept his excuse.

**Yes;** what is derived from this story is that when one of the two parties fails to uphold some of the conditions of an agreement, the contract of agreement is thereby nullified.

On this basis, the other party is not obliged to fulfill any of the conditions after the first party has failed to uphold some of them. This is what is indicated by the apparent meaning of the Book and the Sunnah, and praise belongs to Allah, Lord of the worlds.

#### **[Sale in Customary Partnership without Prior Permission]**

**Question:** It sometimes happens in a customary partnership that one of the two partners sells something without asking his partner's permission. Is that sale valid for the entirety (of the property)? Or is it valid only for the seller's share?

This is with the understanding that he sold for a benefit whose advantage returns to all.

**Answer—and Allah is the One who grants success:** If the situation is as described in the question, then the sale is valid for the whole, and the partner's permission or approval is not a condition. That is because the customary partnership is like a *mufāwadah* partnership, in that each one of the two (or more) partners is authorized by the other to sell, buy, and dispose according to what the interest requires.

They have said, concerning *mufāwadah* (partnership): each of the two partners has what his fellow has and bears what he bears—absolutely; that is, whether or not one of them knows of the other's disposition.

And in the marginalia of *Sharḥ al-Azhār* regarding the customary partnership: what one of the partners acquires is for all of them and upon all of them—even if he attributes it to himself. And in it: This is what the fatwas of our master al-Mutawakkil 'alā Allāh ran upon; it is what the later scholars acted upon; and it is what custom established.

And in another marginal note after this: As for what custom has established, upon which the fatwa and practice ran: what one partner acquires for himself is [nonetheless] for all of them and upon all of them. End of dictation by our master Ḥasan al-Shabībī. End (established). (فرو)<sup>1</sup>

**I say:** The rulings of the customary partnership are built upon custom. Customs have run that what one of the two partners purchases is for all of them, and what he sells is binding upon all of them.

**[Two Partners in a Farm: One Consumes Its Produce While the Other Is Silent, then Later Demands Payment]**

**Question:** Two partners have a jointly owned farm. One of them consumes from its fruits and benefits, while his partner remains silent and says nothing about it. After a time, the partner comes and demands from his fellow the value of what he consumed of the fruits. What is required of the one who benefited in this situation?

**Answer—and Allah is the One who grants success and aid:** Based on what the jurists of the madhhab mentioned—that the default in such a case is liability (unlike what preceded in the prior question<sup>2</sup>)—they distinguished between consuming *usufructs* and consuming *corporeal things*: they made the default in the first [usufructs] permissibility, unlike the second [corporeal things].

On the basis of what they established, the partner who benefited from the farm is liable for the value of what he consumed of the fruits from his partner’s share; silence is not considered consent nor permission.

This may be supported by His saying, *“Indeed, Allah commands you to render trusts to whom they are due.”* [al-Nisā’:58] and His saying, *“So whoever transgresses against you, then transgress against him in the like of what he transgressed against you.”* [al-Baqarah:194], and by what is related in the report: *“The hand is liable for what it takes until it returns it.”*

As for what the beneficiary himself sowed or planted in the land, he owes his partner nothing for that; he did not consume from his partner any corporeal property—rather, he benefited from shared benefits, and—as noted—the default regarding benefits is permissibility.

**[One Partner’s Disposal in a Customary Partnership without Prior Agreement]**

1- *Sharḥ al-Azhār*, 3/361.

2- It is mentioned that the default concerning *benefits* is permissibility in the Book of Lease (*Kitāb al-ljārah*), under the heading: “Living in a house without mention of rent.” (Editor).

**Question:** Several brothers are joined in a customary partnership. One of them undertakes the expenses. Among them is their younger brother, newly married. Is it permissible for him to purchase, item after item, for his wife without seeking his brothers' agreement? And may he take something for himself without permission—such as fruit juice—or offer something like that as a gift to a friend if he is put in such a situation? Please advise us, and peace.

**Answer—and Allah is the One who grants success:** Each of those sharing in a customary partnership may do what custom runs upon among those sharing in such a partnership. As for what custom has not established, it is not permissible except after obtaining permission.

Therefore, if the custom runs according to what occurred in the question, he does not need permission from the partners—for custom runs the course of authorization.

There may also be a specific custom for a particular household; in that case, acting according to it is required. What is closer to safety is that no one single out something for himself except after permission—or by way of a loan with the intention to repay, then let him repay if his partners do not absolve him. This is closer to the continuity of the partnership, mutual harmony, and safety from discord. In the hadith reported from Prophet (*May Allah bless him and his family and grant them peace*): “Allah’s hand is with two partners as long as they do not betray one another,” or as he (*May Allah bless him and his family and grant them peace*) said.

### [A Case Affiliated to a ‘Inān Partnership<sup>1</sup>]

**Question:** Two men entered into partnership on the basis that one of them would provide all the capital, and that both of them would work with that capital by buying and selling, and that the profit would be shared half-and-half and the loss half-and-half. They worked several years on the basis of this agreement. Thereafter the capital owner said: “The money is mine and the profit is mine alone.” What do you say regarding that?

**Answer—and Allah is the One who grants success and aid:** Each of the two men must fulfill for his fellow what he bound himself to—by His saying, “*O you who believe, fulfill (all) contracts.*” [al-Mā'idah:1] In the Qur'ān there are many verses in which Allah Most High emphasized the obligation to fulfill covenants and contracts. In the Sunnah there is much

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1- 'Inān Partnership: It is a partnership where two or more partners contribute a known capital, trade with it, and share the profit according to agreed conditions, while the loss is borne in proportion to each partner's share of capital.

of this as well, such as what is related from Prophet (*May Allah bless him and his family and grant them peace*): “*Believers abide by their conditions.*”

Allah has condemned, in the Qur’ān, those who betray, and praised those who fulfill. Among the legal maxims is: “It is obligatory to construe Muslims’ contracts as valid wherever possible.” This partnership can be affiliated to the ‘*Inān* partnership mentioned in the Book of Partnership.

***If it is said:*** How do you affiliate it to ‘*Inān* partnership while the capital here is from one side only?

***We say:*** Because the contract described in the question necessarily includes the capital provider’s lending the other man half of the capital—inasmuch as he made him bear half the loss. From that we know that he has lent him half the capital, for loss follows (the proportion of) the capitals. Therefore we say: this partnership is valid and must be fulfilled.

**[Ruling on a Partner’s Sale of What He Is Authorized to Dispose Of]**

***Question:*** A man sold a plot of land to another man. Then these two men—the seller and the buyer—became partners in that land. They built on it and exploited it for more than fifteen years. Then these two partners disagreed and disputed. The seller wanted to rescind the sale of that shared land, and ordered his partners to demand from the buyer their shares—on the grounds that they had not sold, but rather their partner (the seller) had sold.

It is further known that the seller is the one who manages everything—he sells and buys—and what is gained is for all. In addition, he had included his partners in what he sold of the land.

Then he instructed other partners—namely, the women—to make a claim, even though their shares in the land at that location had not been determined, and he had not sold more than his share.

What is required of the buyer with respect to these claimants?

***Answer—and Allah is the One who grants success:*** Nothing is required of the buyer toward these claimants; his purchase of what he purchased stands. That is because a valid sale by a partner of what he is authorized to dispose of is a valid and permissible sale—both in his share and in his partners’ shares. This is with respect to the seller’s partners in the customary partnership and the like.

As for the women, if the seller sold only the amount of his share or less, they have no recourse against the buyer. The buyer purchased from the one who owned the land and the land has been consumed by building; there is more than their shares elsewhere from which they can take their portions. This is along with their long silence while their

brother was disposing and consuming part of the land. The hadith states: *“There is to be no harm and no reciprocating harm in Islam.”*

If we were to declare the sale void because of the women’s shares, the buyer would suffer enormous harm. In what we have mentioned, no party suffers harm. This is closer to justice and fairness. Allah Most High said, *“And when you judge between people, judge with justice.”* [al-Nisā’:58]

Moreover, what appears to me is that a partner’s long silence regarding his partner’s dispositions—such as selling and building—within (the scope of) his share of the land for an extended period (about fifteen years, as in the question) counts as a division. In that case, that portion becomes determined for that partner alone. On this basis, there is no recourse against the seller or the buyer.

**If it is said:** It is known that the owner’s consent is a condition for the validity of a sale, and likewise for the validity of a partition—consent of the co-owners is required.

**We say:** What we mentioned first—namely, the partner’s long silence—counts as consent to the partition and authorization of it, especially in uniformly level land in which no side is superior to another. It is most akin to what is measured or weighed. The jurists have said regarding that: divisions that are *ifrāz* (by allotment) do not require the partner’s presence, consent, or permission.

### **[Ruling on One Who Bought from One Partner, Then the Other Demanded the Price of His Share]**

**Question:** A man sold the fruit of an orchard while he has a partner, and he took the entire price. The buyer knows that he has a partner. The partner then came and demanded from the buyer the delivery of the price of his share. The buyer said: “I have delivered it to your partner.” They disputed and disagreed; what is required in this situation?

**Answer—and Allah is the One who grants success:** If the partner had given his fellow permission to sell the fruit, then that permission is an agency, and the agent has the right to receive the price. If the agent receives the whole price of the fruit, then there is no recourse against the buyer.

And if the partner had not given his fellow permission, nor appointed him to sell his share, nor—when he learned of the sale—did he ratify it, then the seller has no right to receive the price of his partner’s share, and the buyer has no right to pay it to him; for the partner in that case is an interloper (*fuḍūlī*), and the right to receive the price does not attach to an interloper. At that point, the partner has the right to demand from the buyer the delivery of the price.

This is when the buyer knows that the seller has a partner; if he did

not know that, then let the buyer deliver to the demanding partner his share, and then seek recourse against the seller who took the whole price.

**[Partnering in a Commodity Even Though One of Them Furnished the Full Price]**

**Question:** A man brought a commodity and said to another man: “I will partner with you in this commodity, but you furnish the price.” The man agreed and furnished the money, and the two men became partners in the commodity on the basis that profit is half-and-half and loss half-and-half. What is the ruling on this partnership?

**Answer—and Allah is the One who grants success:** What appears to me is that the partnership is valid.

**If it is said:** This partnership comprises a loan from the payer and brings a benefit, since he did not lend his fellow except on condition that they both share in the commodity and then in the profit.

**We say:** There is no objection to stipulating such a benefit; for it is a benefit not at the borrower’s expense, but rather it is shared equally between them. The borrower takes his profit and the lender takes his profit.

**[A Man Bought a Truck and Gave It to Another on the Basis That, After Reimbursing the Price, It Would Be Shared Between Them Half-and-Half]**

**Question:** A man purchased a large transport vehicle and gave it to a man to work on it until he covers its price for the purchaser; thereafter it will be between the two men half-and-half. Is this agreement permissible or not?

**Answer—and Allah is the One who grants success:** What appears to me is that the transaction is permissible. That is because the truck driver is entitled to half of the truck’s yield; when he has fully reimbursed its price to the purchaser, he becomes entitled to half of the truck—since by his work he is entitled to half of the income.

**If it is said:** The contract is invalid because the partnership in the vehicle between the two men entailed transferring to the driver half of the vehicle in the future, and that is among what vitiates contracts.

**We say:** The settled principle is to construe Muslims’ contracts as valid wherever possible; and here validity is possible. We say: the contract is to be construed as intending the transfer to the driver of half the truck from the moment of contract, in exchange for a benefit that is the price—namely, that he works as its driver until he reimburses its price to the purchaser. If the contract is carried upon this (construction), there is nothing in it that vitiates it. This is what has appeared, and Allah

knows best. Praise be to Allah, Lord of the worlds.

***If it is said:***

1. What is the ruling if the driver worked for a period of time, then something befell him that prevented him from continuing, leading to the rescission of the contract?
2. What is the ruling if the truck suffers an accident that disables it completely?
3. What is the ruling regarding the fuel, oils, tires, spare parts, and so on that the truck requires?

***We say:***

1. If something occurs to the driver that prevents him from continuing the work and the two parties mutually rescind, then the driver is entitled to the wage of one of equal service (*ujrat al-mithl*). This is what custom has established for truck drivers: either he is given, for his work, monthly salaries of a certain amount for each month, or he is given a specified share of the income obtained, according to what custom has established.
2. If the truck is completely disabled, then the driver is entitled—as we mentioned first—either to monthly salaries or to a share of the income obtained.
3. Everything the vehicle needs of fuel, oils, maintenance, and spare parts and other than that is to be from the truck's income, whether or not that is mentioned in the contract; for custom and usage run upon that.

If the two parties reached an agreement contrary to what custom has established, then what is obligatory is to act upon that agreement and be bound by it.

***If it is said:*** What does the driver guarantee of defect, fault, or damage that occurs to the truck?

***We say:*** The driver guarantees what occurs to the truck due to his negligence or his transgression against the vehicle—such as parking it in a place where he knows or suspects that there is danger, yet he parks it there. If it is exposed to what is feared in that place, then liability falls upon it (the vehicle) and upon the driver; he guarantees that from his personal funds.

— If something happens to it in that place from a cause not feared in that place, then the driver does not guarantee it.

— We have said that because the truck is in the driver's hand as a trust; the driver is a trustee, and the trustee is not liable for what occurs to the trust except what is due to his negligence or his transgression—



for that he is liable. Allah *Most High* said, “*There is no blame upon the doers of good.*” [al-Tawbah:91]

### **(A Note in Partnership)**

In the marginalia of *Sharḥ al-Azhār* for the madhhab: If a group has a fortress or the like—such as fields that need guarding from birds and *ribāḥ* (i.e., monkeys)—and it requires stationing there for guarding, then its wage is upon them in proportion to their ownership therein. Whoever among them refuses is compelled to it, or to guard it in proportion to his share. If the guarding is for what it contains of wealth, then it is according to the amount of wealth therein; or according to heads if it is for the sake of their safety. (*Established*) (عُزِّمَ). End of citation from the marginalia.<sup>1</sup>

***I say:*** Custom in guarding commercial premises is according to the number of shops, and the owner of a shop is not compelled if he guards his shop himself; likewise, he is not compelled if security predominates.

### **Benefits in Partnership**

#### ***For the madhhab:***

— It is not valid to share in what is obtained by way of a gift or charity and the receiving of *zakāh*.<sup>2</sup>

— Nor is it valid to share in what is obtained by gathering firewood or fodder, nor in revival of dead land or demarcation and the like.<sup>3</sup>

— If one of the two partners requests that a well be dug to increase its water, he is not obliged to be answered—unless it is known that if it is not dug, its water will diminish.

— Likewise, if there is between them a wall, or a roof, or a support pillar, or a staircase, or the like, and one of them requests demolishing it and rebuilding it stronger, he is not obliged—unless there is fear of its collapse; then demolishing and rebuilding it is obligatory.<sup>4</sup>

— Harm caused by one of two co-owners in an upper and lower storey is to be prevented, whether there has been a partition or not; thus neither of them may construct what harms the other, nor sell (a unit) to a blacksmith or the like whose presence would harm the partner; and whatever causes offensive, noxious odors is to be prevented.

— If the two partners own land or something else, either of them may

1- *Sharḥ al-Azhār*, 3/367.

2- *Sharḥ al-Azhār*, 3/360.

3- *Sharḥ al-Azhār*, 3/323.

4- *Sharḥ al-Azhār*, 3/367.

sell his share—even if that harms his partner. Causing harm to the partner is not permissible in other than sale; but through sale, he may do so.

Thus they stated, as in *al-Tāj*.<sup>1</sup>

— If the roots extend into another's land, the owner of the tree is not obliged to uproot them—even if they spoil his neighbor's trees and crops—because the depths of the earth are not owned. The landowner may cut them from his land, even if the cutting damages his neighbor's trees.

This is when there has not been a partition; but if it is after partition and cutting would harm the tree, he may not cut them. However, if one of them, after partition, planted saplings in his land and their roots entered his neighbor's land, then the neighbor may cut them. End of citation from *al-Tāj*.

If a tree grows high into the air such that its shade harms the neighbor, removing that harm is not obligatory. End.<sup>2</sup>

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1- *al-Tāj*, 3/217.

2- *Sharḥ al-Azhār*, 3/393.

## [Chapter: Partnership in (Co-owned) Property]

### [Dispute Between Two Co-owners Over Lower and Upper Stories]

In *al-Tāj*: If they dispute (i.e., the owner of the upper floor and the owner of the lower floor) over the site/ground plot (*al-‘arṣah*), the preferred view is that it belongs to the owner of the lower floor. End.

### [Ruling on a Partner Doing What Harms His Partner]

#### *According to the madhhab:*

1. Two co-owners in upper and lower stories—neither of them may do, in his property, what harms his partner.
2. As for adjacent houses and adjacent properties, each may do in his property what he wishes, even if it harms his neighbor.
3. If houses and properties were jointly owned and then divided, none of the recipients of a share may do, in his property, what harms his (former) co-owner. If one of them sells his share, the buyer may do what he wishes, even if it harms his neighbor—and likewise his neighbor. Thus said the jurists of the madhhab.

**I say:** The rationale for the first may be stated thus: doing what harms the partner is prohibited because of the strong connectedness between the two co-owners, such that the partner cannot do, on his side, what repels the harm; for example, if the lower owner causes foul odors in his premises, the upper owner cannot, in his premises, do anything to ward them off.

The jurists of the madhhab explained the third by saying: partition (*qismah*) was legislated to remove harm; therefore each (new owner) is bound by the rulings for which partition was instituted—namely, that none of them harm his (former) partner.

### [Permissibility for Each to Do in His Property What He Wishes Even If It Harms His Neighbor]

The jurists of the madhhab said: Each person may do in his property what he wishes—even if it harms his neighbor—so long as the neighboring relationship did not arise from a partition; if it did arise from a partition, it is not permissible. End.

### [Ruling on Opening House Windows Toward the Neighbor]

**Question:** When constructing the second floor, a neighbor opened large windows that fully overlook his neighbor’s house. Between the two houses there is a separating strip estimated at a meter and a half. The one with the windows claims that he exclusively owns it, while his neighbor claims it is jointly owned between them; each has a door opening onto it. What is the ruling regarding opening windows that

overlook the neighbor's house?

**Answer:** It is permissible for the owner of the second floor to open windows toward the separating strip between him and his neighbor—even if those windows overlook his neighbor's house. That is because the separator between the two houses is, at the very least, a joint separator, as his neighbor claims—unless there is an agreement between the two neighbors that neither of them will open any window onto the separator. However, neighborliness requires the neighbor to withhold harm; and that is the lowest degree of kindness with which Allah Most High has commanded us toward the neighbor.

Thus the neighbor must be keen not to cause any harm to his neighbor by opening overlooking windows. If opening windows toward him is unavoidable, then let him raise them such that the neighbor's private areas are not exposed, or select locations from which the neighbor's private areas are not revealed, and open the windows there.

### [Benefit Concerning Water Rights]

In the section on Rights: In *al-Tāj*: “Neither of the two may do, within the shared right, anything unusual in a manner that harms the other.”<sup>1</sup>

- The upper and the lower (landholders) share in the runoff water if the revival (*iḥyāʾ*) of both the upper and the lower occurred at the same time.
- If one of them preceded the other in revival, he has priority to the runoff water; the other has only what exceeds his need—whether the one who preceded is the upper or the lower.

If they disagree, each claiming that he preceded in revival, the statement is accepted from the upper, and the lower must bring evidence. Whoever's word is accepted owes only an oath. This is the meaning of the jurists' words, as in *al-Tāj*.

**I say:** Custom in our land (Ṣaʿdah) has run as follows:

1. In the major valleys, the upper party has the stronger right to the floodflow; once he has sufficed, he releases it into the valley, and so on.
2. Outside the valleys, water is apportioned among the older farms according to size—larger and smaller. The forefathers apportioned it thus. Whoever establishes a farm today has no right to any of the runoff; rather it is specific to what was upon (the usage of) the forefathers, and precedence or lateness is not

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1- *al-Tāj*, 3/194.

considered therein.

### **[Applying Custom in Water Channels]**

There is a *jurbah* (plot) that has a channel from which it drinks. When it fills, the water is sent to an adjacent *jurbah* through a particular outlet (*nafas*), so that the other plot drinks from it—bearing in mind that this other plot has another channel besides this outlet. The two owners disputed before me over the channel of the first plot, and I deferred the resolution.

It became clear to me—after inquiry—that the prevailing custom in our land is: if the owner of the other plot, which drinks from the surplus of the first plot, shares with the owner of the first plot in repairing the channel when repair is needed, and pays the money due from him for its repair, then he is, at that point, a partner in the channel; otherwise, he has no right in the channel.

Thus it appeared to me after investigating and asking about the custom in this regard. The madhhab holds that custom is a Shar‘ī path by which the judge must rule, so long as it does not clash with a revealed text. Praise be to Allah, Lord of the worlds, and may Allah bless Prophet Muḥammad (May Allah bless him and his family and grant them peace) and his pure, noble household.

### **A Benefit Concerning Rights**

**According to the madhhab:** rights, whether in another’s property or in a public right, are not established by mere possession (*yad*), as in *Sharḥ al-Azhār* and its marginalia.

### **[When Rights Are Established]**

Rights are established either by acknowledgment—such as when the landowner acknowledges that his neighbor has a right of passage or a right for water to pass—or by bequest or vow—such as bequeathing to his neighbor the right of passage or water flow—or by reservation/exclusion, as when one sells the land and reserves a right of passage through it, and the like.

Rights are not established by possession or by custom unless supported by one of the foregoing. Witnesses may not testify to a right unless they know it to be established by something other than possession.

### **[Non-Establishment of Right by Possession]**

According to the madhhab: a right is not established for its claimant by possession; thus, one who claims a right of passage in a place does not have it established for him by his habitual passage there, father to son; nor is a right of water passage established for him by his habitual use of it, generation after generation.

The path to establishing a right for its claimant is:

- Either acknowledgment of the right to the claimant: if the defendant acknowledges the claimant's right of passage or right of water flow from his property, the right is established;
- Or that a man sell land and reserve a right of passage or a right of water flow: by that, the right is established and adjudged to him.
- This may be argued on the basis that people's practice runs upon lenience in allowing others to pass through and traverse their property so long as there is no manifest harm—likewise in allowing water to run through one's property, seeking shade under his tree or the shadow of his house, tethering an animal to his tree, parking a car at his house or on his land or under his tree, and the like. This custom runs in villages, towns, cities, and deserts—known to young and old, male and female. Because of this widespread, well-known custom, mere de facto use (*thubūt*) of a right is not evidence of entitlement to it.
- By way of further clarification we say: two evidences may conflict—evidence of *thubūt* (de facto use), which outwardly indicates the entitlement of the one whose use is established, and the evidence of people's custom, which indicates that entitlement is not established by mere *thubūt*.

In this area, reliance upon the evidence of *thubūt* is set aside, because it contradicts the evidence of custom. Custom is, without doubt, established among people; if it is established, the ruling effect of *thubūt* falls away.

Concerning this matter, al-Mu'ayyad bi-llāh (*Peace be upon him*) has two opinions, as in the commentary: one, that no right is established by possession; the second, that a right is established by possession—on the grounds that this enters under the evidence of *thubūt*.

#### **[Detail Regarding Establishing a Right by Possession]**

In the commentary, in meaning: According to the madhhab: no right is established by possession, in our view—whether in another's property or in a public right. Al-Manṣūr bi-llāh, and one of the two opinions of al-Mu'ayyad bi-llāh, said: rights are established by possession—so the (accepted) statement is that of its holder. End.

*I say:*

- If possession is established regarding a public right, then the stronger view is that of al-Manṣūr bi-llāh, due to what there is agreement upon: whoever precedes to what is permissible (*mubāḥ*) has the stronger claim to it.
- If possession is established over a right in another's property,

then consider:

1. If the right is of a kind commonly tolerated, then no right is established therein by possession; for example, a man's habit of seeking shade in a place owned by another man, or his habit of tethering his animal there, and the like. Neighbors and acquaintances overlook and tolerate such things. Similar to this is what farmers tolerate of a water conduit (*qaṣabah*) passing through their properties to their neighbors' properties.

### **Thubūt (Establishment)**

Whoever's possession is established over a thing—it is his, outwardly; he is adjudged to have it, according to the apparent, in the absence of a disputant and in the absence of something stronger than the apparent. If something stronger—such as upright testimony—arises, judgment is given to the one with the proof; for the first judgment is only an affirmation of possession, whose meaning is that the word is that of its holder, with his oath.

#### **[Explanation of the ḥadīth: “People are partners in three”]**

It is related in the ḥadīth: “*People are partners in three: water, pasture, and firewood.*” End.

**I say:** excluded from that is whatever a man gathers into his own property; he then has exclusive claim to it, and it becomes his private ownership which none shares with him.

We say this because the Shar‘ī law has decreed that taking possession (*ḥiyāzah*) of things that are permissible (*mubāḥ*) is a cause of ownership. There is no contradiction between what we have stated and the ḥadīth.

The ḥadīth indicates that each person has the right to take of the water, the pasture, and the firewood as he wishes. When he takes of that what he wishes, he deserves it, it enters his ownership, and becomes his exclusive property.

The benefit of the ḥadīth is to inform that people are equal with respect to those three, and that everyone has the right to take from them what he wishes, and that it is not permissible for anyone to prevent people from that.

Indeed, one may even infer from the ḥadīth that whoever takes something and possesses it has thereby owned it, because ruling that those things are shared implies that each person may acquire from them whatever he wishes; otherwise, informing (of the sharing) would have no benefit.

On that basis, the water in a well belongs to the owner of the well; the water in a cistern belongs to the owner of the cistern; and what is in a

vessel belongs to the owner of the vessel. It is not permissible to take from the water of the well, the cistern, the vessel, and the like except with the owner's permission. Accordingly, it is permissible to sell it, buy it, give it away, etc., like other properties. The same applies for firewood and pasture.

However, it is not permissible for anyone to expand excessively in acquisition to the point that his expansion harms people—whether in water, firewood, or grazing.

The proof for this is what is related about the dispute between al-Zubayr and the Anṣārī before the Prophet (*May Allah bless him and his family and grant them peace*) regarding the watercourse of Mahzūr<sup>1</sup>, wherein the Prophet did not permit al-Zubayr to retain of the water except a limited amount, and ordered him to release it thereafter to the Anṣārī. And it is related in the report: “No harm and no reciprocating harm.”

**[Two partners in a well: one requests digging it deeper, the other refuses]**

**Question:** Two men are partners in a well. One of them requested from the other that it be dug and deepened; the other refused. What is the ruling?

**Answer—and Allah is the One who grants success:** According to the madhhab—as in the marginalia of *Sharḥ al-Azhar*—if one of the two partners requests digging the well to increase its water, his request need not be answered—unless it is known that, if it is not dug, its water will diminish. End (*Established*). (قرى)<sup>2</sup>

I say: If there was a stipulation between the two partners—agreed upon before digging—that, for example, if the well needs deepening or the like, it is upon both partners, then the partner must fulfill it, and the judge rules accordingly; for Allah Most High said, “*O you who believe, fulfill (all) contracts.*” [al-Mā'idah:1] And in the report: “Muslims are bound by their conditions.”

But if he requests deepening and there had been no prior agreement by the two partners to that effect at the time of need, then—so far as appears to me—there is no basis to compel the one who refuses to deepen it, unless there is a custom current among partners in wells; in that case it is binding, because if custom has run upon such a matter, it

1- Mahzūr—with zāy before rā'—is the name of a valley of Banū Qurayẓah in al-Ḥijāz; it is (a place) with rā' then zāy, a location by the market of al-Madīnah.

2- *Sharḥ al-Azhar*, 3/367.



takes the place of a stipulation. Otherwise, there is no obligation upon the one who refuses.

The proof for that is the ḥadīth: *“The property of a Muslim is not lawful (to take) except with the cheerful consent of his soul.”* However, if the partner wishes to deepen a well that needs deepening due to scarcity of water, then he may deepen it, and his partner may not prevent him. Thereafter, if the one who refused deepening wishes to take his share of the well’s water, let him take from the water what he had been taking before the deepening; so if he had been irrigating one hundred rope-lengths in his allotted days, let him take what irrigates that amount—even if in some of (the other’s) days. Or the increase due to deepening may be assessed and allotted to the digger. If, for example, the water increases by a third, that additional third is exclusively for the digger, and the remainder is divided between the two partners. If the refuser later wishes to share with his partner—the digger—in the water as it was originally, then let him share with him in the expense (loss) as well.

What we have stated is nearer to conformity with foundational principles, such as His saying, *“It will have (the consequence of) what it has earned, and it will bear (the consequence of) what it has committed.”* [al-Baqarah:286]; and His saying, *“And you will not wrong (others), nor will you be wronged.”* [al-Baqarah:279]; and His saying, *“Do not consume one another’s wealth unjustly—except it be a trade by mutual consent among you.”* [al-Nisā’:29]; and (the report), *“The property of a Muslim is not lawful (to take) except with the cheerful consent of his soul.”*

**[A partner is not obligated to buy his co-partner’s share]**

**Question:** Three men are partners in a well and a machine. One of them sold his share to one partner. The other partner said to the buyer: “You must buy my share too; if you cannot, I will buy your share.” What is binding? The claimant dislikes partnering with the one addressed.

**Answer—and Allah is the One who grants success:** None of the partners is obliged to buy his co-partner’s share, nor to sell his share to him. However, any one of them may sell his share to someone other than his partners—even to an oppressor. If one of them has no further need of the well and machine, and his partners do not agree to buy his share from him, he is not permitted to shut down the machine, for that would harm them.

What I see is that they may use the well and the machine, and guarantee to their partner what diminishes due to use—because machines and pipes are affected by use. If they wish, they may lease his share from him for whatever they mutually agree upon; in this case they do not guarantee what diminishes through use, and he must contribute, like any one of them, to necessary repairs to the machine and the pipes—

excluding diesel and oil.

**[Ruling on relocating a public or private road]**

**Question:** Is it permissible for a man to move the road from one side of his land to the other without causing harm to the holder of the right of way? And does this differ between a public road and a private one?

**Answer—and by Allah is success:** What appears to me—and Allah knows best—is a detailed ruling: It is permissible for the landowner to move the road from one side of his land to the other on two conditions:

1. That moving it from one side to the other does not harm the holder of the right of way.
2. That the existing road causes harm to the landowner—for example, it passes by his doorway and he fears his children being struck (by traffic), or the road exposes the private areas of his home. With such harms, it is permissible for the landowner to move the road to another side of his land.

— If moving the road harms the holder of the right of way, it is not permissible for him to move it. Likewise, if there is no harm upon the landowner from the road remaining where it is on his land, it is not permissible for him to move it.

— If the landowner is harmed by the road, and the holder of the right of way would be harmed by its relocation to another place, then the two harms are weighed: which is greater? If the landowner's harm in its remaining is greater, the harm to the holder of the right of way is not considered; and if the harm to the holder of the right is greater, the landowner's harm is not considered.

— This may be supported by two points:

1. The ḥadīth: “*No harm and no reciprocating harm in Islam,*” whose general wording indicates the obligation to remove the harm of the road from the landowner.
2. If moving the road entails no harm upon the holder of the right of way, then there is no cause to object to the relocation, because none of his right has been lost.

**[Ruling on a Landowner Relocating a Right that Lies within His Property]**

**According to the madhhab:** If there is in the land a right of way (*ḥaqq ṭarīq*) or a right of water passage (*ḥaqq murūr al-māʾ*), it is not permissible for the landowner to relocate the road from its place to another place in the land.

**I say:** The matter is as such—except if the rights-holders permit it; without their permission, it is not permissible.

There is, however, a situation in which—so I see—the judge may move the road from one place to another: namely, if the landowner claims harm from the road’s remaining in its current place and requests to move it to another place in his land where there will be no harm upon him, indeed nor upon the road’s users. If the judge sees the landowner’s claim to be valid—for example, the road passes by his doorway, it is a vehicular road, and he has small children he fears may be struck, while diverting the road away from the doorway would not harm the motorists—then, upon litigation being brought to him, the judge may oblige the diversion of the road from the doorway; for among the judge’s functions is to remove people’s harms from one another.

Another example: an irrigation channel passes near his house, and the house is built of mud. The owner fears structural damage and requests distancing the channel slightly from his house, and distancing it would not harm the channel’s beneficiaries. If the judge sees that to be valid, he may move it.

**Yes:** upon the judge and the governor charged with looking after the Muslims’ interests—if he sees benefit in moving roads from one place to another that is more suitable and more beneficial, or in widening the road in one place and narrowing it in another—it is incumbent on him to do so even without a case being brought before him, by right of his custodial authority.

## [Chapter: Division (Qismah)]

**[On Division]**

— If division was carried out among adult brothers, and they were present, and they consented to it, and they summoned witnesses to that, and mutual quittance (*musādara*) occurred from them, then a later claim by any one of them—of the division's invalidity—shall not be accepted, on the grounds that there was no inventorying, appraisal, measurement, and the like of pretexts.

— If the brothers divided, for example, an estate, and each was content and consented and executed quittance—yet they have sisters and paternal aunts who are partners in what they divided—then the division is not valid except with their presence or the presence of their agents.

— If the sister consents and authorizes that her share be with her two brothers and that they divide it between them until she asks for it, then there is no problem; the division between the two brothers is valid.

**[When Is Consent to Division Obligatory?]**

**Question:** Two people are partners in land, buildings, and trade. One of them requested division, but the other refused. Must the one who refuses accept the division, or not?

**Answer—and Allah is the One who grants success and aid:** The jurists of the madhhab have mentioned seven conditions—five for the validity of division, and two for compelling the one who refuses to divide—namely:

1. Delivery in kind of each share (*tawfiyat al-naṣīb min al-jins*), except in alternation (*muhāyāh*)<sup>1</sup>.
2. That the division not entail a further division ... etc.

If these conditions are met, the partner must comply with the judge's order; if he does not comply, the judge compels him to divide.

The proofs for the obligation of division when a partner requests it and the conditions are fulfilled are several:

1. Every owner has the greater claim to his property and is most entitled to what he has acquired.
2. No proof has come requiring partnership or its continuation—except what enters under (binding) contracts, or what the Law has required to be shared, such as pasture, water, etc.

1- *Al-muhāyāh* is a division of benefits in the tangible assets among the partners by succession and rotation.

3. Allah Most High has made obligatory, in the verses of inheritance, for every heir an apportioned share—an eighth, a third, a sixth, etc.—and each heir’s receipt and beneficial use of his portion cannot be realized except by division. Therefore division is obligatory, for whatever is necessary to fulfill an obligation becomes obligatory like it.
4. What is established in the well-known ḥadīth: *“There is to be no harm and no reciprocating harm in Islam.”* Thus, if one partner’s withholding of his fellow’s share harms his fellow, that is unlawful, as this ḥadīth indicates.

Moreover, Islam came—with its legislation—for people’s public and private interests; among that is the legislation of division. Allah, *the Exalted*, said: *“And when the division is made, those who are closest in kinship shall be present”* [An-Nisa:8]. It is related from the Prophet of Allah (*May Allah bless him and his family and grant them peace*) that he apportioned the spoils of Khaybar into eighteen shares—one share for every hundred of the Muslims, and they were eighteen hundred; likewise [he apportioned] the spoils of Badr. The Prophet (*May Allah bless him and his family and grant them peace*) had apportioners (*qussām*), and ‘Alī (*Peace be Upon Him*) was an apportioner; likewise the rest of the Imams, and so on.

On the basis of the foregoing, the partner mentioned in the question must obey the judge’s order to divide.

If, however, this partner who refuses division does so because he expects harm to result from the division, then it is incumbent upon the judge to consider his claim of harm from division and thereafter act upon what he deems sound after due consideration.

### **[Disagreement among Partners on How to Divide the Land]**

**Question:** If the partners disagree over how to divide a tract of land—some saying it should be divided lengthwise, and some saying widthwise—and then they draw lots between them, what should the judge or the conciliator do in such a case?

**Answer:** What the conciliator or arbitrator should do is first to consider the objectives sought by dividing it lengthwise and by dividing it widthwise. When he understands the objectives and the interests that follow from dividing it lengthwise and widthwise, it becomes incumbent upon him to divide it in the manner by which the parties’ objectives are equalized—whether that be by dividing lengthwise, or by dividing widthwise, or by dividing it in another manner distinct from those two. This is the justice Allah Most High has commanded us to uphold when judging between people.

**Benefit:** [Concerning one who developed or planted within his

### share while the division was invalid]

If the partners carried out an invalid division, and one of them developed (built upon) or planted (in his allotted portion), the judge may assign his share in what he has developed or planted. Likewise, if he has private property, the judge may assign his share adjacent to his property. End (*Established*) (قرئ).<sup>1</sup>

### [Division of Runoff Waters]

**Question:** Is one who refuses to divide runoff waters and the like of rights to be compelled, or not?

**Answer—and Allah is the One who grants success:** The madhhab holds that a right, on its own, may validly be divided<sup>2</sup>, because division is not, in every respect, like a sale. On that basis, the refuser is compelled—unless the division would cause harm to one of the partners, in which case compulsion is not permissible.

We said that division is obligatory here because they [the jurists] allowed its division as a follower of the (underlying) property; therefore we allow its division when it stands alone, by analogy with the division of property; and because the interest requires that, so long as no partner is harmed.

### [Division of Wilderness and Mountains]

**Question:** Tribes have mutually recognized the division of wilderness and mountains. If they disagree and take their case to a judge, should he judge between them according to what they have mutually recognized? Or according to what the Law decrees—even if that leads to strife and problems?

**Answer—and Allah is the One who grants success:** The judge must decide between them according to what they have mutually recognized and according to the title-deeds (*baṣā'ir*) in their possession to that effect. We say this for several reasons:

1. Ruling otherwise would lead to rejection of the judgment, lack of acceptance of it, and accusing the judge of injustice, and the like.
2. What we have said does not contravene what has come from the Prophet (*May Allah bless him and his family and grant them peace*) that people share in that; for even though they share in it, there is no objection to the partners agreeing to divide what they share if division preserves them from dispute, disagreement, and strife. When they divide and consent, each side has relinquished what

1- *Sharḥ al-Azhār*, 4/386.

2- *Sharḥ al-Azhār*, 3/391.

lies in the other side’s hand.

3. Apparently, scholars and judges have affirmed the tribes upon that.

Moreover, tribes do not dispute except over what special rights have been established for them—such as flowing watercourses to their fields, or a tribe’s wood-gathering ground and pasture. The title-deeds and documents in their hands typically record what was agreed between the tribes—that such-and-such a defined location is woodlot and pasture for the people of that quarter, and such-and-such a place is for the people of another quarter. In that case, the people of one quarter are partners in what has been designated for them, and the people of the other quarter are partners in what has been designated for them. Thus, the ḥadīth, “*People are partners in three ...*,” is to be understood as: the people of each quarter are partners—not the entirety of humankind. Therefore, there is no explicit contradiction of what the Law has brought.

#### [Custom Concerning the Runoff of Plots and Plantings]

**Question:** Custom in our lands has run, regarding the runoff attached to plots and plantings, that when they wish to divide it, the holder of the runoff right takes half, and the holder of the grazing right takes the other half. If both trees and pasture are included within the runoff area, the half is shared between them. Are these customs to be affirmed, or do they conflict with the Law?

**Answer—and Allah is the One who grants success:** It is appropriate to affirm them upon that custom and to judge accordingly, because their consent to it—absent any opponent—permits the judge to rule by it.

**If it is said:** Trees and land are among the public rights in which people share; therefore none should have exclusive claim to them.

**We say:** Those who divide that are from the people possessing the public right; each one of them has precedence to a right. It is mutually acknowledged that whoever precedes to a right has the stronger claim to it: the one with trees has the stronger claim to the trees; the one with pasture has the stronger claim to the pasture; the one with water has the stronger claim to the water.

Accordingly, those we have mentioned have priority over other people. There is no contradiction between what we have said and the ḥadīth, “*People are partners in three ...*,” for the upshot of this ḥadīth is that each person may take his need from those three.

#### [Do Women Have a Share in Commons and Water Channels?]

**Question:** There are grazing commons (*maḥājir*) and irrigation **channels** (*masāqī*). The people of a land may agree to divide those tracts among themselves. Is it obligatory, in such cases, to allocate women’s

shares, or not?

**Answer—and Allah is the One who grants success:** As for the *masāqī* that water the (owners') properties, their legal path is the path of property; they are divided among all heirs, women and men—because they are rights attaching to properties.

As for the *maḥājir* in which livestock graze, they need not be distributed according to the law of inheritance, because they are public rights and thus do not enter inheritance—unlike the former, namely the *masāqī*, which are private rights.



## [Book of Pledge (Rahn)]

### [Ruling on Selling the Pledged Item]

**Question:** A man pledged an item to another as security for a debt until a fixed term. When the term fell due, the owner of the pledged item did not come. Is it permissible for the pledgee to sell the pledged item in order to recover his debt, or not?

**Answer—and Allah is the One who grants success:** The jurists of the madhhab did not permit the pledgee to sell the pledge unless the pledger authorizes him to sell it or empowers him to do so.

The solution is that, if the pledgee has not been authorized to sell the pledge, he should go to the judge and request a ruling to sell the pledge. The judge then deposes someone on his behalf to sell it. When the judge sells it, the pledgee takes the price, satisfies his due from the debt, and the remainder is preserved for its owner.

In sum: the pledgee may sell the pledge in two cases:

*First:* the pledger authorizes him or empowers him to sell it.

*Second:* the judge orders him to sell it.

He is not permitted to sell it in other than these two cases. The proof for what we have mentioned is His saying: *“Do not consume one another’s wealth unjustly—unless it be a trade by mutual consent among you.”* [al-Nisā’:29] and [the report] of the Prophet (May Allah bless him and his family and grant them peace), *“The property of a Muslim is not lawful (to take) except with the cheerful consent of his soul.”*

Thus, if there is no consent from the pledger for the sale, nor anything indicating the cheerful consent of his soul to it, the pledgee may not sell.

We only said that the judge may sell the pledge—or appoint one to sell it—even without the pledger’s permission, due to His saying: *“And when you judge between people, judge with justice.”* [al-Nisā’:58] and *“O David, We have made you a successor on earth, so judge between people in truth.”* [Ṣād:26]

There is no doubt that among justice and truth is that some people be given redress against others, and that every rightful claimant receive his due, whether they like it or not. This is the very benefit and intended purpose of appointing judges.

### [Stipulating the Pledgee’s Right to Benefit from the Pledged Property]

**Question:** If the pledgee stipulates upon the pledger that he (the pledgee) will benefit from the pledged property until he is paid what he is owed from the debt—does that stipulation stand?

**Answer—and Allah is the One who grants success:** That does not

stand and is not permissible; for it is a loan that brings a benefit, and that is *ribā*. They have said: every loan that brings a benefit is *ribā*, and what they said is correct. Allah Most High said: *“Allah has permitted trade and forbidden usury.”* [al-Baqarah:275] This verse was revealed among several at the end of Sūrat al-Baqarah clarifying the prohibition of *ribā* by which the people of Jāhiliyyah used to transact—namely, *ribā al-nasī’ah* (usury of deferred debts). They would take an increase upon the debt in return for granting time; Allah forbade that, then said: *“But if you repent, you may have your principal—neither harming others, nor being harmed.”* [al-Baqarah:279]

#### [Rulings Related to Rahn]

— It is valid for one person to undertake both sides of a pledge contract; thus the pledgee may appoint the pledger to conclude the pledge and to take receipt of it.

— It is valid for the pledger to say: “If I do not come to you by such-and-such a day, I have vowed (that) the pledge is yours”; or to say: “If—within Allah’s knowledge—I do not come to you by such-and-such a day, then I have sold it to you now, or vowed it to you, or given it in charity, or granted it.”

### [Book of ‘Āriyah (Borrowed Use)]

**Question:** A man lent his house to another to live in. The borrower lived in it and incurred some expense on it—on paints and the like. After several months the owner reclaimed his house and took it back. Does the borrower have a right to be compensated for the expense, or not?

**Answer—and Allah is the One who grants success:** If the expense was on something without which residence is not realized—such as plumbing, drainage channels, repairs of exterior doors, roofs, and the like of what is essential or near-essential for the house—then the borrower has a right to be compensated for the expense. But if the expense was on embellishments that are not essential, and the owner did not authorize them, then he has no right to any compensation, for he is effectively a volunteer.

**If it is said:** What is the difference between the two cases?

**We say:** In the first case, the owner knows that proper residence cannot be realized without repairing what was mentioned, and that such repair requires expense. Thus, his permitting residence is tantamount to instructing those repairs.

In the second case, there is no need or necessity for whitening (repainting) and improving (cosmetics); there was no authorization for that. Hence, we said he is, in that case, a volunteer and not entitled to reimbursement.

**Yes:** the borrower may take what can be removed without causing damage—such as water pipes, electrical fixtures, doors, tiles, washbasins, and the like—and he must repair whatever damage results from removing those items.

If the loan for use (‘*āriyah*) was time-limited: if (the owner) took back the house before the term ended, the owner pays the expense; but if he did not take it back until after the agreed term ended, he is not obliged to pay any of the expense.

What we have stated accords with prevailing custom among people as we know it, and we have not strayed far from what the jurists of the madhhab said. They said: in the case of one who lends an empty plot (‘*arṣah*) for digging a well or for a vault, if the owner retracts before the term ends, he must pay the cost.

They said: one who retracts in an ‘*āriyah*—whether open-ended or time-limited—before the term ends, owes the borrower (who built or planted) two options: if he wishes, he may demand from the lender the value of the building, planting, and the like; and if he wishes, he may remove his building and planting.

They said: whoever lends land for cultivation or planting, and (the

borrower) ploughs and irrigates, then the lender retracts—he (the lender) must pay the value of that (work), because it has been consumed for the borrower and cannot be detached.

They said: permission to reside on an empty plot is permission to build, not to plant.

## [Book of Hiba (Gifting)]

### [(Benefit)]

It is not a condition for the validity of a gift (*hiba*) that it be received in hand; rather, the offer and acceptance are required, etc. Likewise, receipt is not a condition for the validity of charity (*ṣadaqah*); it is like a gift, except that, in charity, taking possession stands in place of verbal acceptance—whereas for a gift, acceptance is indispensable and mere possession does not suffice. *Zakāt* follows the ruling of *ṣadaqah* in this regard.

### Contracts of Exchange

In the marginalia: All contracts of exchange (*mu‘āwaḍāt*) and of gratuitous transfer (*tabarru‘āt*) are invalidated by conditions suspended on a future contingency, without exception. This principle is explicitly stated in *Sharḥ al-Faṭḥ*.

**I say**—this is the author of *al-Maqṣad al-Ḥasan*: The thrust of this rule is that an act of transfer of ownership (*tamlīk*) may not be made conditional upon a future event—except for vows (*nadhṛ*) and bequests (*waṣīyyah*). End (*Established*) (فرو).<sup>1</sup>

### [A Gift or Present Given to Achieve a Purpose]

**Question:** What is the ruling on someone who gives a present or a gift to a person for a purpose—namely, that the recipient will buy automobile spare parts from him—given that the recipient is an engineer who often needs parts?

**Answer—and Allah is the One who grants success:** What appears to me is that this is

permissible. A merchant may market his goods, entice customers, and honor them—offering hospitality, a gift, a present, a prize, drinks, and the like that draw them to him. Jurists of the madhhab have discussed gifts given for a purpose or for an implicit or explicit consideration. Among their rulings is that the donor may revoke the gift if the intended purpose has not materialized.

### [Gifting a Right to Someone Other than the One Upon Whom It Lies]

In *al-Tāj*: As for gifting a right to someone other than the person upon whom it lies—such as a person gifting another a right in his land like a right of way (*istiṭrāq*) or a watercourse (*masīl*)—this counts as permission (*ibāḥah*) like gifting of usufruct; it requires acceptance, and

1- *Sharḥ al-Azhār*, 3/438.

the donor may revoke it whenever he wishes. End.

**I say:** Revocation is established for the donor in gifting a right such as *istiṭrāq* or *masīl*, unlike gifting of corporeal property; for the donee does not own the right through the gift. As a rule, rights are not themselves owned nor do they enter ownership by gift, sale, etc.—this is their inherent nature.

Accordingly, one who “gifts” or “sells” a right is, by that gift or sale, licensing its use rather than transferring ownership; thus revocation remains with the donor, for the donee did not acquire ownership of what was “gifted.”

### [The Difference Between Charity and Gift Regarding Acceptance]

The jurists of the madhhab stated that for *ṣadaqah* mere taking possession suffices in lieu of verbal acceptance, whereas for a *hiba* mere possession does not suffice; verbal acceptance is necessary.

**I say:** Nowadays, formal *hiba* is scarcely used among people. What circulates among them in such contexts is of several types:

1. Obligatorily and voluntarily given *ṣadaqah*.
2. “Salām-gift”: what a companion gives his companion, or a brother to his brother, etc., upon greeting.
3. Assistance: what friends and brethren give to someone in need—e.g., for building, marriage, or costly medical treatment.
4. Gifts of courtesy (*murūʿah*): what a friend covers for a friend—meals, qat, and the like.
5. Reward gifts, or gifts intended to elicit a counter-value.

In these four types (and any other similar giving), custom has established that possession suffices even without a spoken acceptance; people treat it as binding and do not deem a verbal “refusal” meaningful once possession has occurred—such are prevailing customs.

- Gifts do not depart from this practice; therefore, a spoken acceptance should not be required in light of custom and analogy with *ṣadaqah*. On this basis, ownership by gift is completed either by taking possession or by verbal acceptance.

### [Equity Between Children in Gifts]

It is related from al-Nuʿmān ibn Bashīr that his father (Bashīr) brought him to the Prophet (*May Allah bless him and his family and grant them peace*) and said, “I have granted this son of mine a slave I owned.” He, *May Allah bless him and his family and grant them peace*, said, “Have you granted the like of this to all your children?” He replied, “No.” He said, “Fear Allah and be just among your children.” This ḥadīth is well known and its meaning is sound, as affirmed in the Qurʾān in general and in

detail:

— In general: *“Allah commands justice and excellence and generosity to relatives, and He forbids indecency, wrongdoing, and oppression. He instructs you so that you may take heed.”* [al-Nahl:90].

— In detail: *“Allah instructs you concerning your children: for the male, the equivalent of the share of two females...”* [al-Nisā’:11].

Furthermore, human nature favors fairness among children, is attracted to it, finds injustice repugnant, and is repelled by it.

This ḥadīth is recorded by the Imams of the Zaydī school (such as in *Majmū‘ Zayd* and *Aḥkām al-Hādī*) and is also in al-Bukhārī and Muslim.

## [Book of Waqf]

**[The waqf concerning which there is consensus on its validity]**

The waqf concerning which there is consensus on its validity is that it be immovable (not movable) and not an undivided common share; that the avenue of disbursement (beneficiaries/purpose) be designated; that the disbursement be perpetual; that the founder remove it from his own possession; that he not endow it upon himself; that he not make it in the form of a bequest; that a judge rule upon it; that he intend it as an act of drawing near to Allah; that it be by explicit wording of waqf; and that it be up to one-third or less. End of quotation from the Marginalia on al-Azhar.

From the Marginalia: It is permissible to sell a mosque if its benefit for the intended purpose has ceased. End. (*Established*) (قرينة).<sup>1</sup>

In al-Azhar: Whoever endowed something and appended [its effect] to after his death—he may retract before that. And he may retract by word or by deed.

**[Rulings Related to Waqf]**

1 - It is not valid to make waqf of food and the like—meaning anything from which benefit cannot be obtained except by consuming/destroying it—nor of dirhams and dinars; whoever endows something of that sort, it remains in his ownership.

2 - It is valid to make waqf of an undivided share, whether the property is divisible or not, and whether its parts are uniform or not. The executor may distinguish (segregate) the waqf from what is not waqf; if there is no executor, the heirs may distinguish it.

3 - It is not valid to make waqf of what is merely a debt owed by another, for waqf is to withhold a tangible corpus, and a debt is not a tangible corpus.

4 - Whoever says: “I have made it incumbent upon myself, a waqf,” or “It is upon me, by Allah, to make my land a waqf”—nothing is binding upon him, because waqf does not take effect as a liability in one’s dhimmah.

5 - It is not valid for the waqf to be unknown, such as saying: “I endowed a house” or “land” without specifying which.

6 - The ḥadīth: “If you wish, keep its corpus intact and give it in charity—so ‘Umar endowed it on the condition that it neither be sold, gifted, nor inherited ...” (ḥadīth continues). From this ḥadīth is taken the

1- Sharḥ al-Azhar 3/509.



proof for waqf and an explanation of its meaning, and therein is evidence for what we mentioned in no. (1), for it would not be possible in that case to withhold the corpus and then derive benefit from what proceeds from it; and from it is also derived evidence for nos. (2) and (3).

7 - If he said: “If I drink wine, then such-and-such a place is a waqf for Allah,” the waqf does not become valid, for that indicates absence of a devotional intention. (From al-Tāj.)

8 - The waqf of one whose wealth is engulfed by injustices—such as tyrants, their soldiery, usurers, and the like—is valid if they intend devotion, and it is not permissible to annul it; this is the preferred view. (End from al-Tāj.)

9 - The waqf of a sick person whose entire wealth is consumed by debt does not take effect; rather, it remains suspended pending the fall of the debt by any means or the creditors’ authorization, while their claim remains in his liability. (End from al-Tāj.)

### **[Ruling on the Waqf of a “Disbeliever by Interpretation”]**

The jurists of the madhhab said: The waqf of a “disbeliever by (mis)interpretation,” such as the anthropomorphists (al-Mushabbihah) and the predestinarians (al-Jabriyyah), is not valid.<sup>1</sup>

And Imām al-Manṣūr Billāh (*Peace be Upon Him*) said: the mosques of the anthropomorphists, the Muṭrafiyyah, and the predestinarians have no legal status nor sanctity, and he (*Peace be Upon Him*) demolished many of them. They reasoned that waqf is a devotional act (qurbah), and a devotional act is not valid from a disbeliever.

***If it be asked:*** Is prayer valid therein or not?

***We say:*** It can be said that prayer therein is valid, due to his saying (May Allah bless him and his family and grant them peace): “The earth has been made for me a place of prostration and a means of purification.”

And it can also be said that prayer therein is not valid, due to His saying, regarding the Mosque of Harm (Masjid al-Ḍirār): ***“Do not stand [for prayer] within it—ever.”*** [At-Tawbah:108].

What is more persuasive is to say: If it is known that the construction of the mosque was for harm, then prayer therein is invalid; but if it was built for other than that, there is no impediment to praying therein, due to his saying (May Allah bless him and his family and grant them peace): *“The earth has been made for me a place of prostration and a means of purification.”*

### **[On the Founder Retracting His Waqf]**

1- Sharḥ al-Azhar 3/459.

In al-Bayān: *Ān* issue—It is not valid for the waqf (founder) to retract his waqf absolutely, whether or not he has removed it from his hand, and whether or not a judge has ruled regarding it. End.

**And Abū Ḥanīfah said:** He may retract so long as a judge has not ruled upon it; and Mālik and al-Nāṣir said: He may retract so long as he has not removed it from his hand. End<sup>1</sup>.

[**And therein also:** *Ān* issue: If someone endowed something upon Zayd, then endowed it a second time upon someone else, and a judge ruled that the later waqf was valid, then another judge ruled that the first waqf was valid—then the first ruling is preferable, because it accords with the view of one of the jurists. End<sup>2</sup>.]

**I say:** If the founder removes the waqf from his own hand into the hand of the beneficiary, or a judge rules the waqf [to be valid], then there is no doubt that retraction is invalid—because of what has come in the ḥadīth regarding disposal of charity once received, and because it is known that the judge’s ruling must be acted upon. As for when there has been neither delivery nor judicial ruling, the view of Abū Ḥanīfah, Mālik, and al-Nāṣir is to be given preference.

The analogy is to gifts, charities, and bequests, for retraction therein is valid if the thing has not been removed from the hand of the donor or almsgiver.

### [Ruling on retracting from a waqf]

In the Commentary: As for when the founder made the waqf conditional—such as saying, “I have endowed such-and-such if Zayd arrives,” and the like—the apparent view is that with respect to such conditions, retraction is not valid by mere wording *but* only by an act, like a sale and its likes.

And in the marginalia of the jurist ‘Alī: he made it a point of disagreement between al-Mu’ayyad Billāh and al-Qāḍī Zayd: al-Mu’ayyad Billāh says he may retract by act or by word, while al-Qāḍī Zayd [allows retraction] by act [only].

And in al-Azhar: “Whoever endowed [it to take effect] after his death, then before that he has the right to retract.”

And in the Commentary upon this: The outward purport of his words

1- *al-Bayān al-Shāfi* 2/77.

2- *al-Bayān al-Shāfi* 2/68.

entails that he may retract by act or by word.

And they said regarding one who emancipated his slave to take effect after his death: that before death he may retract by act, not by word.

**I say:** In this is an indication that it is valid to remedy (undo) juridical acts suspended upon conditions, whether by act or by word, according to the view of al-Muʿaḥḥad Billāh; and the adherents of the madhhab are obliged to uphold this—because of their statement that whoever endowed [something to take effect] after his death has, before that, the right to retract by word and by act.

**[When is retraction from a waqf valid?]**

Whoever endowed something [to take effect] after his death, then before that he has the right to retract by act—such as by sale and its likes—and by word—such as saying: “I have retracted the waqf.” And similarly, if he said, “I have endowed this after a year,” he has the right to retract by act or by word.

As for a waqf that is suspended upon a condition—such as, “If Zayd arrives, then I have endowed such-and-such”—retraction from it is not valid except by act, not by word.

**[Ruling on the waqf of an undivided share (al-mushāʿ)]**

**Issue:** They said that the waqf of an undivided share is not valid unless the co-owner permits it, because partition entails a sale, and a waqf may not be sold.

**I say:** I incline to the validity of the waqf of an undivided share even if the co-owner does not permit it; for when the founder endows an undivided share, he intends that the beneficiary will make use of the waqf after partition. It is as though the waqf were suspended upon partition, since he knows that no benefit is possible except after partition.

And their statement that partition is a sale is not conceded; for each party to the partition receives his full share. The kind of sale that is prohibited is that which removes the waqf and its benefits from the beneficiary’s hand; whereas in partition nothing at all is removed from the beneficiary’s hand.

And moreover, ‘Umar ibn al-Khaṭṭāb, in his well-known ḥadīth, endowed his share of [the land of] Khaybar, and it is not reported that he sought his partners’ permission.

**[Devotional intent in the disbursement (maṣraf) of a waqf]**

His statement in *al-Azhar*, “And it is a condition in the maṣraf”—i.e., the disbursement of the waqf—“that it be a devotional act (qurbah) actually, such as [to] the poor person and the mosque, or constructively,

such as a specified wealthy person and a dhimmī... etc.”

**I say:** The maṣraf that entails qurbah is that which Allah Most High has mentioned in His Book and commanded that kindness be shown toward: namely, parents, relatives, neighbors, the poor and the needy, orphans, wayfarers, the companion at one’s side, and the captive. As for the dhimmī and the openly sinful person, there is no qurbah in [endowing] for them.

**If it is said:** But Allah Most High has said, *“Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes—from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly.”* [Al-Mumtahanah:8].

**We say:** What appears to me—and Allah knows best—is that the Companions used to be cautious about showing kindness to the disbelievers in an absolute sense, even if they were their fathers, their brothers, their spouses, or their clan. So Allah, *exalted is He*, informed [them] that they are not prevented from kindness toward their polytheist relatives who have neither fought them nor expelled them from their homes.

**If it is said:** Allah has commanded kindness in an unqualified manner when He said, *“And do good; indeed, Allah loves the doers of good.”* [Al-Baqarah:195]; and it has come in the report: “Do good to those worthy of it and to those unworthy of it; if they are worthy of it—that is it; and if not, then you are its people.” [This is the meaning of the report.]

**We say:** Kindness (iḥsān) is of two types:

*First:* Particular kindness.

*Second:* General kindness.

As for particular kindness, it is that to which the Lawgiver gave special attention and urged expenditure in specifically—such as in His saying: *“Worship Allah and associate nothing with Him, and to parents do good, and to relatives, orphans, the needy, the near neighbor, the neighbor farther away, the companion at your side, the traveler, and those whom your right hands possess. Indeed, Allah does not like those who are self-deluding and boastful.”* [An-Nisā’:36]; and such as spending in the path of Allah in His saying: *“The example of those who spend their wealth in the way of Allah is like a seed [of grain] which grows seven ears; in every ear a hundred grains. And Allah multiplies [the reward] for whom He wills; and Allah is All-Encompassing, All-Knowing.”* [Al-Baqarah:261]; and in His saying: *“[It is for] the poor emigrants who were expelled from their homes and their properties, seeking bounty from Allah and [His] pleasure and supporting Allah and His Messenger. Those—they are the truthful.”* [Al-Ḥashr:8]; and in His saying: *“And what can make you know what is the difficult pass? It is the freeing of a slave—or feeding on a day of severe*

*hunger an orphan near of kin, or a needy person in misery.” [Al-Balad:12-16]; and His saying: “No! But you do not honor the orphan, and you do not encourage one another to feed the poor.” [Al-Fajr:17-18].*

**[Invalidity of a waqf upon a deceased person]**

They said: A waqf in favor of a deceased person is not valid—except when that is incidental to the living, as in the case of the shrines of the Imāms (*Peace be Upon Them*) and the virtuous—because there is no devotional act (qurbah) in endowing for the dead; it is like endowing for inanimate objects, in which there is no qurbah. End.

**I say:** There are many endowments for al-Hādī (*Peace be Upon Him*). If what is intended thereby is a waqf for the Mosque of al-Hādī, it is to be spent on its needs; if what is intended is a waqf for the people of the dome (the custodians/attendants), it is to be spent on them; if what is intended is a waqf for the seekers of knowledge in his mosque, it is to be spent on them; but if what is intended is “a waqf for al-Hādī (*Peace be Upon Him*)” as such, the waqf is invalid.

And in *Sharḥ al-Azhar* the meaning is as follows: Whoever says, “I have made my wealth a waqf for Allah Most High upon such-and-such church,” the mention of the church is void, and the wealth becomes a waqf for the poor and needy.<sup>1</sup>

This being so, the apparent case is that the waqf which the founder designates “for al-Hādī (*Peace be Upon Him*)” is what people call *al-turab* (grave-endowments), and it is to be disbursed to the weak and the needy—or the state takes it on the basis that it is for the weak and the needy—whereas what ought to happen is that the founder or his heir undertakes the disbursement of the proceeds to the weak and the needy; for the scholars of the Zaydī Hādawī madhhab have determined that the authority (wilāyah) over a waqf lies with its founder or his heir, etc.

And thus were the endowments of Amīr al-Mu’minīn ‘Alī (*Peace be Upon Him*): they were for his children and their children ... etc.; and likewise the endowments of ‘Umar ibn al-Khaṭṭāb and others.

**[The difference between waqf and vow (nadhr): do those already in existence share with those who will come to exist?]**

The scholars of the madhhab said: If the founder says, “I have endowed such-and-such place for my children,” or “for the children of so-and-so,” then the children presently in existence enter into the waqf, and those who are born later share with them.

And they said: If a man makes a vow (nadhr) for the children of so-

1- *Sharḥ al-Azhar*, 3/462.

and-so, then only those who exist at the time of the vow are included; those who come into existence later are not included.

And perhaps the difference—*Allah knows best*—is what has been established and well-known in the narration of the waqf of Amīr al-Mu'minīn 'Alī (*Peace be Upon Him*) and the waqf of 'Umar of his share in Khaybar; for both of them endowed for those present and for those who would come to exist “until Allah inherits the earth and whoever is upon it.”

And they said: A bequest (*waṣiyyah*) of usufructs and yields is like a waqf—those presently in existence and others (who come later) enter into it.

As for a bequest of the *corpus* itself, only those presently in existence enter into it.

They barred the latter on the grounds that it is a transfer of ownership of a tangible thing, which cannot validly be made to one who does not yet exist; and the ruling on vows can be analogized to that rationale.

### [Invalidity of a Written Waqf]

In the marginalia on *Sharḥ al-Azhar* the purport is: It is not permissible to rule the validity of a waqf which we find written in a will or the like and witnessed—unless the witnesses testify that the endower (*wāqif*) uttered [words of] devotional intent (*qurbah*). But if they did not testify to an utterance expressing *qurbah*, it is not permissible to rule the waqf valid. End of the purport<sup>1</sup>.

**I say:** The reason for this is that they have said that writing “I endow ...” is an allusive expression (*kināyah*), not an explicit formula of waqf; and in a written waqf one must explicitly state devotional intent, otherwise the waqf is not valid.

### [Ruling on One Who Swore to Make His Wealth a Waqf]

**Question:** A man said, “If I do such-and-such, then my wealth is [a] waqf,” and then he did what he had sworn about; what is binding upon him?

**Answer—and Allah is the One who grants success:** The scholars of the madhhab have said<sup>2</sup>: If all that issues from the *wāqif* is the bare wording of “waqf,” and it is not known that he intended *qurbah*, then his waqf is not valid.

This can be supported by saying: The default is that wealth remains the property of its owner, and it does not leave his ownership except by a

1- *Sharḥ al-Azhar*, 3/466.

2- *Sharḥ al-Azhar*, 3/464.

[sound] indication. In the Law, the indication that removes property from ownership by way of waqf is that, together with the wording, it be seeking the Face of Allah and the Hereafter—as occurred in the waqf of the Commander of the Faithful—or that there be wording to that effect, as in: “As for Khālīd, he has held his armor and horses in the path of Allah,” or [designations] for the Muslims, or for kin, or for parents, as appears in other narrations.

**[Ruling on Waqf (and similar acts) by one who left nothing for his family]**

**Ḥadīth:** A man from the Anṣār emancipated a slave of his as *tadbīr* [to be freed upon his death], and he had no wealth other than him. The Prophet (*May Allah bless him and his family and grant them peace*) sent for the slave and said, “*Who will buy this slave from me?*” So Nu‘aym ibn ‘Abdullāh bought him for eighty hundred, and the Prophet (*May Allah bless him and his family and grant them peace*) handed him over, then said: “*If one of you is poor, let him begin with himself.*” End.

**I say:** It is inferred from this that whoever designates his wealth for Allah by waqf, vow, charity, or in the path of Allah, yet leaves nothing for himself and his family—his act is not valid. This rebuts those who say: “It is valid from [up to] one-third.”

And what we have mentioned is supported by:

1. In this ḥadīth occurs: “*Let him begin with himself,*” and in other ḥadīths with a similar purport: that one begins with himself, then his wife, then his children, then ... etc. It is not permissible, nor valid, to act in a manner that contradicts the import of such a command.
2. The ḥadīth: “*It is sufficient sin for a man to neglect those he maintains or to become a burden on others.*” If charity with one’s wealth results in neglecting those under one’s care or in making them dependent upon other people, then such charity is neither permissible nor appropriate. And it is reported that the Messenger of Allah (*May Allah bless him and his family and grant them peace*) rejected the charity of a man who gave a piece of gold, saying that he had nothing else... etc.
3. Allah Most High says: “*And do not make your hand [as] chained to your neck, nor extend it completely, [and thereby] become blamed and insolvent.*” [Al-Isrā’:29]. Whoever gives away all his wealth has spread his hand wide, so it is not permissible or correct to forbid him on the basis of this verse.

**[Ruling on the mingling of a waqf with other property]**

The jurists of the madhhab said—as in *al-Azhar*—that when owned

property becomes mixed with a waqf so that what belongs to each cannot be distinguished, the two funds are not to be intermingled such that they cannot be told apart; rather, both funds become for public interests ... etc<sup>1</sup>.

**I say:** This issue rests upon a legal maxim, namely, that mixing (khalt) is [treated as] consumption; and when consumption occurs, the mixer owes the value and, by the mixing, acquires the mixed property.

But in the matter we mentioned—owned property mingling with waqf—the mixing occurred without any agent doing the mixing; therefore, by the mixing, the two funds are [legally] consumed, exit the ownership of their respective owners, and become the property of the public interest, due to the absence of an owner for them.

They have adduced as proof the ḥadīth of the sheep that was slaughtered for the Messenger of Allah (*May Allah bless him and his family and grant them peace*) without its owner's permission, so he (*May Allah bless him and his family and grant them peace*) did not eat of it and said to them: "*It is usurped,*" then ordered: "Feed it to the captives." (This is the gist of the report.)

**Yes,** what is preferable in the matter we have set out is other than what the jurists of the madhhab said—namely, that the two funds should be divided; then whoever claims an excess proves it and takes it.

This is, in fact, what the jurists of the madhhab say regarding two privately owned properties that were mixed by an agent. And we say that this view is preferable for several reasons:

1. It is closer to justice.
2. It avoids depriving both the owner and the waqf beneficiary of their entire wealth.
3. It avoids nullifying both the waqf and private ownership.

**If it be said:** Partition (qismah) is a sale, and the waqf may not be sold—moreover, partition requires mutual consent between the parties, and such consent cannot be obtained in the case of a waqf, for the owner of the corpus is Allah *Most High*.

**We reply:** Selling a waqf has been allowed in certain cases, among them when its benefit for the intended purpose has ceased, and among them that part of it may be sold to repair the remainder.

Therefore partition is permissible even if it is deemed a sale, given that this preserves the waqf from complete loss.

As for the impossibility of ascertaining consent from the waqf, those

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1- *Sharḥ al-Azhar* 3/351.



who stand in its place—public authorities or the waqf’s guardians—stand in for such consent, just as with the property of a minor or one mentally incapacitated.

**[Ruling on one who neglected the cultivation of a waqf]**

**Question:** There are endowments whose guardians have neglected to cultivate them—what is binding upon them?

**Answer—and Allah is the One who grants success:** What is binding upon the guardian of the waqf is to plant (cultivate) the endowed property and maintain it, exactly as farmers do; he is not permitted to be remiss or neglectful. If he does not do so, he must hand it over to one who will cultivate and maintain it.

Thereafter he must monitor the new partner, reckon with him, take the waqf’s share from him, and then deliver it to the designated beneficiaries, and so on—and after that, nothing else is binding upon him. If he had previously fallen short and neglected the cultivation of the endowed property, then no compensation is binding upon him to the beneficiaries; rather, on him is the sin of negligence and neglect—so he should seek forgiveness and repent to Allah.

This is how the jurists of the madhhab have determined the matter, as in the Commentary and its marginalia; and this is so long as he has not prevented others from cultivating it—if he prevented others, then he is a usurper in possession<sup>1</sup>.

**Yes:** If the guardian of the waqf wishes to lease out the property, he may do so; however, he should not lease it for a long period that might jeopardize the waqf due to its length. Rather, he should lease it for a year or two; when the term ends, he leases it again for a year or two, and so on. If the guardian of the waqf does none of what we have mentioned—neither cultivation, nor partnership, nor leasing—then it is binding upon the judge to remove it from his hands and place it with one who will undertake its cultivation and maintenance.

**[What the guardian of a waqf is permitted to do]**

**Question:** Is it permissible for the guardian to borrow from the waqf’s funds, or to lend them to someone else until the mosque is in need of them?

**Answer—and Allah is the One who grants success:** What is obligatory upon the mutawallī (guardian) is to preserve the mosques’ funds from loss. So if in that there is an interest for the mosque—such as when borrowing them or lending them to another is more conducive to

1- *Sharḥ al-Azhar* 3/499.

preserving them from loss—then there is no harm in that. This is what the scholars of the madhhab and others have stated.

**And I say:** It is permissible for the guardian to borrow for himself in case of need and to repay the mosque when it needs [the funds]; for there is no treachery in that and no harm to the mosque, provided he is confident in himself about repayment.

The proof for this is that the Messenger of Allah (*May Allah bless him and his family and grant them peace*) built his mosque in Madinah on a site that belonged to orphans; their guardian undertook to satisfy them from it, as is mentioned in the books of *sīrah*.

In this is evidence that the guardian—by virtue of his guardianship—may take something from the orphan's wealth for himself and consume it, then replace it and make it good; wealth of mosques and the like falls under the same heading. Thus it becomes clear that what is forbidden of consumptions and dispositions is only that which is in the manner of treachery and corruption.

And what supports this is what is reported that 'Alī (*Peace be Upon Him*) found a dinar and informed the Messenger of Allah (*May Allah bless him and his family and grant them peace*)—and 'Alī (*Peace be Upon Him*) was in need—so the Prophet (*May Allah bless him and his family and grant them peace*) permitted him to use it; then the owner of the dinar later came seeking it, and the Prophet (*May Allah bless him and his family and grant them peace*) gave him a dinar in place of his. The purport of its indication for what we have mentioned is not hidden.

As for lending it to someone else, that is not permissible except on the basis that the guardian himself guarantees [repayment] should the borrower procrastinate or deny [the debt]; otherwise it is not permissible.

This is also indicated by what is narrated regarding the *murbad* (date-drying yard) which the Messenger of Allah (*May Allah bless him and his family and grant them peace*) made into a mosque in Madinah.

Yes: What is taken from the *murbad* story is that it is permissible for the guardian to gift from the orphan's wealth—on the condition that the orphan is later satisfied about that and that it is replaced with its like or better. The Messenger of Allah (*May Allah bless him and his family and grant them peace*) accepted the *murbad* from Abū Ayyūb al-Anṣārī; Abū Ayyūb informed him that it belonged to orphans and that he would satisfy them about it, so the Messenger of Allah (*May Allah bless him and his family and grant them peace*) accepted the *murbad* from him, approved his action, and made it a mosque for Allah. This story is well-known in the books of *sīrah* and histories when speaking about the Prophet's (*May Allah bless him and his family and grant them peace*)

Migration.

And in the Noble Qur’an is that which supports what this story indicates; Allah Most High says: *“And they ask you concerning the orphans. Say: ‘Improvement for them is best. And if you mix with them, then they are your brothers. And Allah knows the corrupter from the reformer. And if Allah had willed, He could have put you into difficulty. Indeed, Allah is All-Mighty, All-Wise.’”* [Al-Baqarah:220]. So the verse indicates that there is no blame upon guardians for disposing of part of the orphans’ wealth by way of mixing and the like, and that reform and corruption are the pivot of reward and punishment; thus, if there is nothing of corruption in the disposition, there is no blame—even if there be no [additional] reform therein.

And in *al-Bayān*: “It is disliked for him (i.e., the guardian of the waqf) to borrow it for himself due to [the appearance of] accusation (tuhmah).” End.

And in the marginal note: “This accusation does not entail prohibition.” End. (Affirmed) (فرض) End.<sup>1</sup>

### [Ruling on the ministry reducing the yields of a waqf]

**Question:** The contributors to the mosques’ funds in some localities complained to the ministry about the abundance of agricultural levies and requested relief regarding what they are required to deliver to the mosques. The ministry decided that the farmers must deliver to the mosques only one-eighth of the yields; previously they had been obligated to deliver one-fifth. Then after some time, some of the contributors became doubtful and resolved to deliver the one-fifth as before. Is this man who is doubtful required to pay the mosque the difference between the one-fifth and the one-eighth for the past twenty years, or is it sufficient for him to deliver the one-fifth from now on, with no blame upon him for what has passed? And peace.

**Answer—and Allah is the One who grants success and assistance:** What the ministry decided—if it was for the sake of the waqf’s and the mosques’ interests—then nothing is due from the questioner in respect of the shortfall for what has passed, and the mosque is to be reckoned from now on by the one-fifth.

But if what the ministry decided—namely, delivery of only one-eighth—was without consideration of the interests of the waqf and the mosques, then what the farmer took in shortfall over the past twenty years must be returned, and the ministry’s decision is unjustified.

1- And this was mentioned in the marginal note on *Sharḥ al-Azhar*, 3/494.

The proof that the ministry's decision is unjustified and does not permit the farmers to consume what was remitted to them is His saying, *Most High: "And do not consume one another's wealth unjustly, nor deliberately bribe the authorities so that you may devour a portion of other people's wealth sinfully while you know."* [Al-Baqarah:188]. For Allah, *Mighty and Majestic*, did not make in this verse the judge's ruling a justification or a permissibility for consuming what they ruled. And in the ḥadīth: *"It may be that one of you is more eloquent in his plea than another ... up to his saying: so I allot for him a portion from the Fire (of Hell)."* (or as he (May Allah bless him and his family and grant them peace) said).

Accordingly, the ministry's decision—or a judge's ruling—is not a justification for a Muslim to consume what he has no right to.

However, if the ministry's decision arose from consideration of the waqf's interest, the mosques' interest, and the contributor's interest, then there is no blame upon the contributor with respect to what he took because of that decision.

**[Permissibility of building a mosque in the runoff channel of a grape-vine waqf]**

**Question:** There is a waqf of grapevines for a mosque, and for this waqf there is a channel into which the rainwater flows to the vines. Is it permissible to build a mosque in that runoff channel, in the event that this mosque does not harm the vines and does not diminish the channel's capacity, since the water from its roofs, facilities, and courtyard all drains toward the vineyards?

**Answer—and Allah is the One who grants success:** So long as the matter is as mentioned in the question, that is permissible—but the permissibility is conditioned on the oversight of one with proper authority; if he deems it suitable, there is no harm, otherwise there is not.

**[Permissibility of building a public watering-place (s.qāyah) from the yields of a cistern (birka)]**

**Question:** We have a cistern with its own waqf whose proceeds exceed its needs, and we have a surplus from its yields which the cistern does not require. Is it permissible to build from that surplus a public watering-place from which the townspeople and others will benefit?

**Answer—and Allah is the One who grants success:** If the matter is as described, then there is no objection to building a public watering-place from the surplus yields of the cistern which it does not need and is not expected to need in the future.

There is in this no contravention of the founder's purpose; for the

founder's aim has been fully and completely realized—namely, the soundness and maintenance of the cistern—and, in addition to the cistern's upkeep, there comes another benefit and interest of the same kind as the cistern's, namely the watering-place. Both the cistern and the watering-place have a single aim: providing water to people and animals—an aim intended by the founder.

**Yes:** If the cistern's yield decreases such that the proceeds do not exceed its needs, nothing of it should be diverted to the watering-place, even if the watering-place falls into disuse; for the founder specified the repair and maintenance of the cistern, and so it has priority for the yields and for maintenance.

**[Ruling on a son whose father consumes the waqf's yields]**

**Question:** Someone asked: my father consumes the yields of the waqf under his hand and has been doing so—does the son have to guarantee (compensate for) what was eaten in his father's household?

Does he have to avoid eating [there]? And is it permissible for him to work with his father on that waqf?

**Answer—and Allah is the One who grants success and aid:** The son does not have to guarantee what has been eaten:

1. Because the father is the liable party due to consumption; milling and baking are juridical consumption. They have said that by consumption the item becomes the property of the consumer; at that point the liability transfers to the consumer's obligation: fungible goods are guaranteed with their like, and non-fungibles with their value.

On this basis, it is permissible for the son to eat with his father. They have adduced as support the report that a man slaughtered a sheep as an honor for the Prophet (*May Allah bless him and his family and grant them peace*); then it became clear to the Prophet (*May Allah bless him and his family and grant them peace*) that the sheep was stolen, so he did not eat from it and ordered that it be given as food to some of the needy—this is the purport of the narration.

2. The son may deem that he is eating from his father's share which the father takes in return for his labor.
3. And since the questioner is a poor seeker of knowledge, he falls among the disbursement categories of that waqf; for the said waqf is, as appears to me, dedicated to the weak and the needy. And Allah knows best.

Accordingly, let the son eat with the intention that this is a disbursement upon himself, and he need not avoid eating in his father's house.

As for helping his father with ploughing and cultivating the waqf, there is no harm upon him in that and no sin—if Allah wills—since this is not assistance in sin and transgression; sin and transgression lie in withholding the poor's and needy's share, preventing them from it, and consuming it; cultivation and tillage are not of that.

**If it be said:** The guardianship has lapsed here due to betrayal, so cultivation and tillage would be transgression, and assistance would then be impermissible—

**We say:** Dismissing such a person requires a judge appointed by the Muslim ruler, or a muhtasib, or a competent authority, or an appointee of the Five. If none of that exists, guardianship remains presumed. And if this guardian does not step down and remove himself from the waqf, his guardianship remains as we have said.

The proof for what we have said is what is reported from the Commander of the Faithful 'Alī (*Peace be Upon Him*) in *Nahj al-Balāghah*: he used to threaten some of his governors who showed signs of treachery and warn them with removal and stern punishment. It is not reported that he renewed the appointment for those from whom treachery had appeared; rather he would call them to abandon treachery and repent from what they had committed. If treachery itself constituted dismissal, a new appointment would have been necessary; since nothing of that appears, we know that treachery is not, by itself, a dismissal.

And this, it appears, is the practice with the Muslim authorities in former and latter times.

**[Ruling on moving the soil of a waqf *jarbah* (agricultural plot) to another place]**

**Question:** We have a waqf *jarbah* (field). We have moved soil from it to form an equivalent *jarbah* next to it, and that place had been a hill. Is what has been formed considered waqf or not?

**Answer—and Allah is the One who grants success:** What I have seen in a case like this, from the jurists of the madhhab as in the *Commentary*, is that if a branch is cut from a waqf tree and then planted, it is a waqf so long as it does not spoil.<sup>1</sup>

**I say:** If the hill into which the *jarbah's* soil was placed was a sanctuary/appendage of the original *jarbah* and its rightful adjunct, then the *jarbah* formed from the removed soil is waqf as a follower of the first waqf. Accordingly, it is not permissible to sell it; and this is the more precautionary view.

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1- *Sharḥ al-Azhar* 3/502.

### [Ruling on selling the soil of a waqf *jarbah*]

**Question:** Is it permissible for me to purchase some of the soil of a waqf *jarbah*?

**Answer:** That is permissible, because the flood-runoffs replace the soil with soil even better—this applies to *jarab* (fields) that drink from torrents or from rain-runoff streams. As for fields that are not replenished by torrents and runoffs, it is not permissible to sell their soil, and it is not permissible for the buyer to purchase it; for selling their soil is corruption, and selling is not permissible except in cases in which selling a waqf itself is permissible.

### [Ruling on one who sold a waqf and is unable to recover it]

**Question:** A man sold a waqf *jarbah*; after some time he regretted it and wished to be rid of what he had done. The *jarbah* is now in the hand of a man who has built upon it and is unwilling to return it for little or much. What should this man, who wants to free himself from this deed, do?

**Answer—and Allah is the One who grants success:** In such a case the man who squandered the waqf and sold it must pay its value today to the beneficiaries; *“Allah does not charge a soul except [with that within] its capacity.”* [Al-Baqarah:286].

We have said this on the basis of what the jurists of the madhhab have said: that building on land or planting it is juridical consumption; and when a thing is consumed, it is guaranteed by its value if it is a non-fungible, and by its like if it is a fungible. And what we have mentioned is the madhhab, as in *al-Azhar* and its *Commentary*; for it says therein that where redemption is impossible, the seller must pay its value and hand it to the beneficiaries, or purchase something with it and make it a waqf in place of the original waqf.<sup>1</sup>

### [Permissibility of selling a waqf]

**Question:** A mosque has endowments, and the mosque needs major repairs, but those funds have no yield due to lack of rainfall or insufficient harvest. Is it permissible to sell something from those endowed properties in order to repair the mosque?

**Answer—and Allah is the One who grants success:** I have seen in the words of Imām al-Mahdī Muḥammad b. al-Qāsim al-Ḥusaynī al-Hūthī—*may Allah have mercy on him*—that this is permissible; and the jurists of the madhhab said: It is permissible to sell [part of] a waqf to repair another part of it.

1- *Sharḥ al-Azhar* 3/504–505.

**Yes:** Evidence for this may be drawn from the established principle that necessity has exceptional rulings. If leaving the mosque unrepaired would lead worshippers to abandon it, or if leaving it unrepaired would lead to successive ruin and collapse such that it would later require multiples in cost to repair—and the guardian is unable to arrange a loan on behalf of the mosque or to pledge (mortgage) a waqf asset, and none of that is feasible—then there is no harm in selling some of the waqf in that circumstance.

Also, in the waqf of the Commander of the Faithful ‘Alī (*Peace be Upon Him*) is that which indicates the permissibility of selling part of a waqf to repair another part.

And the Messenger of Allah (*May Allah bless him and his family and grant them peace*) ordered, in some narrations, the sale of a *mudabbar* slave due to his master’s need for the price.

#### [Permissibility of selling endowed manuscript books]

**Question:** We have endowed books, all of them manuscript volumes weakened by age. They were originally endowed upon a learned person from the progeny (al-dhurriyyah) and upon a righteous seeker of knowledge. In our time, all those endowed books have been printed and are readily available, which has led to diminished use of the manuscripts and to reliance on the printed editions instead.

Moreover, among the progeny there are few—perhaps no—seekers of knowledge. For roughly twenty years these books have been shut away in boxes, with no one benefiting from them; we fear for them from decay and bookworm damage. What is required, and what is the solution—bearing in mind the weakness and deterioration that have overtaken them over time?

**Answer—and Allah is the One who grants success:** If the matter is as described, the solution is that those manuscripts be sold and their value used to purchase printed books. Then a righteous person from the progeny should undertake to preserve them, lending to students of knowledge what they need and then reclaiming the books, stipulating upon them care, preservation, and liability.

This is the solution I see, for several reasons:

1. It multiplies the benefit intended by the founder; the value of the manuscripts will build a large library, given the present-day market for manuscripts.
2. It preserves the waqf from loss.
3. If the manuscripts have been printed, the printed editions replace the manuscripts; it is as though the founder’s endowment has not been altered or changed. Nothing of the founder’s aim is



diminished; rather, what he intended is augmented by facilitating researchers and readers.

4. The school's established doctrine permits selling a waqf in three—or four—cases mentioned in the Commentary and its marginal notes, among them when the waqf's benefit for its intended purpose has ceased. The benefit of these manuscripts for the intended purpose has virtually ceased, due to sufficiency with the printed books.
5. It is established that the guardian of a waqf is obliged to protect it from loss and corruption, and to grow, maintain, and keep investing it. Storing books in boxes exposes them to deterioration while yielding none of the intended benefit; taking them out to those who would use them will damage them due to the fragility caused by long years.

What we have proposed is fitting for such a case—indeed, it is the only path that restores freshness to the waqf and brings forth its fruits.

**Yes:** If the sale price of the manuscripts is very large—such that, after purchasing a substantial library containing all that a scholar and learner need, there remains a surplus—then the guardian may trade with that surplus, or give it as a muḍārabah to someone who will trade with it; the profits from that surplus can then be used to assist students of knowledge.

We say this because it increases the benefit intended by the founder: he endowed the books for the sake of benefiting from the knowledge in them, and assisting a student of knowledge with some funds helps to realize and expand that benefit.

This is what sound consideration requires; in saying so we have not departed from the school's principles nor from what the evidences entail.

**If it is said:** It is established that selling a waqf is impermissible—

**We reply:** Yes, selling a waqf is not valid nor permissible as a rule. But there are exceptional cases in which selling a waqf is permitted, among them when its benefit for the intended purpose has ceased, and among them selling part of it to repair another part—so the jurists of the school have determined in *Sharḥ al-Azhar*. And there is no doubt that it is permissible to sell a mosque's doors, fixtures, and salvage in order to replace them with better. The jurists have also permitted selling a sacrificial animal (hady) for fear of its perishing, and to purchase another hady with its price.

**[Sale of land endowed for the “Pigeons of Mecca”]**

**Question:** A pious, poor man with weak eyesight and dependents

purchased a plot of land, developed it, and built a house on it to live in with his family. Many years later, he was informed that the land he had built on was endowed to the pigeons of Mecca. He seeks to know a way out; he is now in extreme poverty. What is the ruling?

**Answer—and Allah is the One who grants success:**

1. The seller in this case is treacherous; his guardianship over the waqf is void due to his treachery. His sale of the waqf is also regarded as a relinquishment of his guardianship.
2. In the jurists' words is an indication that such a waqf is invalid, for they have stated that a condition of the disbursement category (maṣraf) is that it be among those who can own; a pigeons cannot own.
3. The jurists state that a waqf of this type becomes a waqf for the poor. They say: Whoever said, "This wealth of mine is a waqf for Allah Most High upon the church," the mention of the church is null and void, and the waqf becomes for the poor.

Accordingly, it is permissible for this man to remain on that land due to his poverty, need, and hardship; he is among the beneficiaries of the aforementioned waqf, with an additional special consideration in that he paid the price and built the house—matters for which he is excused due to ignorance and being misled.

**If it is said:** He should seek recourse against the one who deceived him.

**We reply:** The man is weak, and the authority to enforce the right is absent.

In *al-Masā'il al-Nāfi'ah* it is stated: "The guardian may hand land to a poor person to exploit it—by consensus." End

And in *al-Minḥah*, the commentator on *al-Athmār* said: "A waqf upon what cannot own—like 'the house of so-and-so' or his riding animal—is invalid, as is [a waqf] upon the pigeons of Mecca (contrary to al-Manṣūr). Likewise all beasts and birds, whether owned or unowned."

And *al-Bayān* mentions—within and at the end of the discussion on selling a waqf—the following: "Sayyid Yaḥyā b. al-Ḥusayn, author of *al-Yāqūtah*, and Abū Muḍar said: Rather, it is corrupt (fāsid); because there is disagreement over it—like a mudabbar slave—so the buyer owns it by taking possession, owes no rent for it, and it is not rescinded except by mutual consent or judicial ruling. If the buyer sells it, his sale is valid and the waqf is void." End.<sup>1</sup>

1- *al-Bayān al-Shāfi* 2/78.

This applies when the seller is the founder or his heir—and our case is of that nature.

**[A note on the circumstances permitting the sale of a waqf]**

**A school benefit**—as in the marginalia on *Sharḥ al-Azhar*: Selling a waqf is permissible in three situations:

1. When its benefit for the intended purpose has ceased.
2. When part of it is sold to repair the remainder.
3. When it is sold to repair the beneficiary—such as a mosque, not a human being. End.

**I say:** If there is a *jarbah* (field) endowed to a mosque or the like, irrigated by rain only, and the guardian wishes to exchange it for a similar *jarbah* near water, that is permissible; for the benefit is then multiplied by the availability of water. In our lands, cultivation of such rain-fed plots is scarcely beneficial for the intended purpose due to the scarcity of rain.

**[Ruling on one who used a waqf without the guardian's permission]**

**According to the school:** Whoever uses a waqf without the guardian's permission owes its rental value, which is to be disbursed to its rightful recipients; he is not required to hand it to the guardian, for this is a grievance (*mazlamah*), and the authority over grievances belongs to their proprietors—except when the beneficiary is a mosque or the like, in which case it is paid to the guardian; or when the yield is a due right, in which case the authority over its disbursement is with the appointed official, not with the usurper. End of the adapted text from *al-Tāj*.

**[Ruling on transferring a waqf by selling the “hand” (possession right) over it]**

**Question:** What is the ruling on transferring a waqf from one man to another by sale—not a sale of the waqf corpus itself, but a sale of the *yad* (hand/possession right)?

**Answer—and Allah is the One who grants success:** If the first man has expenses and losses for which the price is intended as compensation, then the sale is valid; otherwise it is not permissible, and the price is unlawful—because the sale is conducted by one who is merely a participant/possessor, not an owner, and he takes the price without a countervalue. Allah Most High says: *“Do not consume one another's wealth unjustly.”* [An-Nisā':29].

Thus have the jurists of the school said regarding transferring testamentary trusts from one hand to another, as in the marginalia on *Sharḥ al-Azhar*.

That said, it may be said: There is no impediment to this.

And one may answer the proof they cited by saying: The seller has sold usufructs he is entitled to in the waqf, which are his property; accordingly, receiving the price is in exchange for those usufructs, and selling usufructs is permissible—as evidenced by lease (*ijārah*), which is the sale of usufruct.

### [Ruling on transferring waqf funds]

**Question:** There is a mosque in a ruined village where no one prays, and it has money. What should the guardian do with the waqf funds that have piled up?

**Answer—and Allah is the One who grants success:** What appears to me—*Allah knows best*—is that it is permissible for the waqf’s guardian to transfer those funds to another mosque.

It is stated in *Sharḥ al-Azhar* in a similar case: In *al-Intiṣār* it says: “Its doors and timbers are to be taken for another mosque; if there is no other mosque, they are sold and their price is spent on public interests; as for the courtyard (*‘arṣah*), it remains, and a fence is erected around it for fear it be polluted.” He said: Because leaving the wood and doors [in place] leads to their ruin by sun and wind, and the Prophet (*May Allah bless him and his family and grant them peace*) forbade squandering wealth. End.

And also in the Commentary: According to al-Qāsim and *al-Wāfi*: “If a mosque ends up in a desolate place, it is permissible to transfer its fittings to a mosque near the inhabited quarter.” End.

### [Transferring a waqf endowed to the Meccan pigeons to a mosque]

**Question:** There is a *jarbah* (field) endowed to the pigeons of Mecca. We have observed that the pigeons of Mecca are well-provided for by the grain pilgrims and visitors throw them throughout the year. Is it valid and permissible to transfer the waqf’s benefits to the village mosque when it is in need?

**Answer—and Allah is the One who grants success:** That is permissible for several reasons:

1. The jurists of the school allow transferring a mosque’s surplus to another mosque or a general public interest; what is mentioned in the question is analogous and close to that.
2. A waqf for animals is invalid according to the school’s established doctrine; on that basis, with the beneficiary being in no need, the case for transferring to the mosque is stronger.
3. Many scholars permit transferring a benefit to what is more beneficial. Here, the needy mosque is worthier and more

beneficial than the Meccan pigeons—especially if the mosque is frequented by many worshippers.

**[Disbursing yields endowed to the Meccan pigeons to the poor]**

**Question:** A man holds yields endowed for the Meccan pigeons amounting to about five hundred Saudi riyals. He does not trust handing them to the waqf officials in Mecca or to anyone else, and the Meccan pigeonry is, in general, already well supplied by the abundance of scattered grain everywhere. He wants to rid himself of these funds—what is the solution?

**Answer—and Allah is the One who grants success:** The stronger view to me, after consideration, is that these funds be disbursed to the poor and needy in Mecca, for the following reasons:

1. It is impermissible to hand them to officials who are not trustworthy; whoever gives to them is liable for what he gave—so the jurists of the school have stated.
2. It is impermissible to scatter grain in Mecca for the pigeons when they are already well supplied by the abundance of grain scattered everywhere.
3. Many imams and scholars allow transferring a benefit to what is more beneficial.
4. The pigeons do not own what is endowed to them from the yields; if they are sufficiently provided for, the waqf is to be disbursed to other avenues of piety that draw one near to Allah.

**[Permissibility of transferring a cistern’s waqf to a mosque]**

**Question:** We have a cistern from which the townspeople draw water and perform ablution, and it has a waqf whose yields exceed the cistern’s needs. We also have a needy mosque requiring repair. Is it permissible to disburse the surplus to this mosque given the cistern’s independence of need?

**Answer—and Allah is the One who grants success:** That is permissible given the cistern’s independence of need—namely, from what exceeds its needs and the needs of its other yields; whatever exceeds that may be disbursed to the mosque. Imām al-Mahdī Muḥammad b. al-Qāsim al-Ḥusaynī al-Hūthī—*may Allah have mercy on him*—issued a similar fatwa, saying this is the school’s position.

**[Transferring a waqf]**

**Question:** Is it permissible to transfer a mosque’s waqf to another mosque?

**Answer—and Allah is the One who grants success:** It is permissible to transfer something of the waqf to another mosque when the originally

endowed mosque is not in need; if it is in need, transfer is not permissible.

### On transferring the designated disbursement (*maṣraf*)

Al-Qāḍī, the erudite al-Ḥusayn b. Aḥmad al-Siyāghī—commentator on *al-Majmūʿ*—authored a treatise on this topic, cited in the marginalia of *al-Tāj al-Mudhhab*, in which he set out the evidences for the two positions—permission and prohibition.

He began with permission, saying it is the stronger view, supported by clear proof. The gist of his evidences:

1. The practice of the Companions: when the mosque in Kūfah was stolen [i.e., had its materials taken], they moved it near the Treasury (*Bayt al-Māl*), and no one objected; this story is well known.
2. The Prophet's (*May Allah bless him and his family and grant them peace*) redirecting of 'Abdullāh b. Zayd's waqf when he had made it for the Prophet (*May Allah bless him and his family and grant them peace*); he instructed him to make it for his mother.
3. The Prophet's (*May Allah bless him and his family and grant them peace*) including Ali (*peace be upon him*) in his sacrificial offering.
4. Unrestricted analogy: that this matter proceeds in accordance with recognized public interests (*maṣāliḥ mursalah*)—as considered by our imams (*Peace be Upon Them*) and the majority besides them.

He then said: This is the madhhab of Imām al-Qāsim b. Ibrāhīm (*Peace be Upon them*), the author of *al-Wāfi*; it was chosen by Imām Yaḥyā b. Ḥamzah, Imām al-Mutawakkil 'alā-llāh Sharaf al-Dīn (*Peace be Upon Him*), and it was championed by al-Jalāl in *Ḍaw' al-Nahār*; and from the school's shaykhs it was affirmed by al-Qāḍī Ṣārim al-Dīn Ibrāhīm Ḥathīth and al-Salāmī.

Ibn Ḥābis said in *al-Maqṣid al-Ḥasan*: The correct view in the school, in general, is permissibility; this is also the view of many scholars: among them Imām al-Mahdī Aḥmad b. al-Ḥusayn, al-Amīr al-Ḥusayn the author of *al-Shifā'*, Imām al-Muṭahhar b. Yaḥyā, Imām Yaḥyā b. Ḥamzah, Imām al-Mahdī 'Alī b. Muḥammad, Imām al-Mahdī Aḥmad b. Yaḥyā al-Murtaḍā, the virtuous sayyid Muḥammad b. Ja'far b. al-Qāsim al-'Iyānī; and 'Alī Khalīl expounded it for the madhhab of al-Qāsim (*Peace be Upon Him*); and it was chosen by Imām al-Muṭahhar b. Muḥammad b. Sulaymān.

He then mentioned the second madhhab: some of our imams and jurists prohibited it, arguing on two grounds:

1. The devotional purpose (*qurbah*) has attached to the site ('arṣah), so it is impermissible to transfer it.

2. The Commander of the Faithful ‘Alī (*Peace be Upon Him*) forbade ‘Umar b. al-Khaṭṭāb from taking the adornments of the Ka‘bah. He then set out the replies to both arguments.

**I say:** I, for my part, strengthen the first view—namely, the permissibility of transfer—and I consider it to be that which must be acted upon: it is permissible to transfer a waqf from a deserted mosque in a desolate place to a mosque frequented by worshippers and remembrance.

In addition to what has been mentioned above, I say: By transferring we are not departing from the founder’s intended purpose. His purpose is to furnish what encourages obedience to Allah and His worship—such as carpeting the mosque, providing water and light, and the like. If the mosque has become deserted in a desolate place where no one prays, then the testator has no intent at that point for any of those things to be done in that mosque; it is therefore necessary to transfer that to a mosque frequented by worshippers, so as to realize the testator’s aim and intent. All mosques belong to Allah, and the waqf is for Allah.

And in *al-Tāj*: “There is disagreement over transferring a benefit to what is more beneficial. The school’s [apparent] view is that it is not permissible; but Shaykh ‘Alī Khalīl, Imām al-Muṭahhar b. Yaḥyā, and al-Amīr al-Ḥusayn said that it is permissible; and among the later shaykhs of the school it was strengthened by al-Shāmī, al-Habl, ‘Āmir, al-Saḥūlī, and Ḥathīth; and it was the chosen view in *al-Fath*.”

### **[Permissibility of transferring an endowed interest (maṣlaḥah)]**

It is stated in *al-Masā’il al-Nāfi‘ah*: “It is permissible to transfer a religious interest (maṣlaḥah dīniyyah) to what is more beneficial (aṣlaḥ),” citing Imām Yaḥyā’s words: “What is known of the Prophet (*May Allah bless him and his family and grant them peace*), of the Companions, the Successors, and the eminent among the Muslims is seeking out what is most beneficial in every matter.” End.

**I say:** There are many deserted mosques—especially those atop the mountains in Yemen—and many of those mosques have endowments. Their endowments should be transferred to mosques frequented by worshippers, in light of what Imām Yaḥyā (*Peace be Upon Him*) mentioned about seeking out what is most beneficial.

**Yes:** If, at some time, those mosques are restored to use by worshippers—even a little—then the waqf returns to their needs in proportion to those needs; whatever exceeds that is spent on other needy mosques.

**Yes:** I found for Imām al-Mahdī Muḥammad b. al-Qāsim al-Ḥūthī (*Peace be upon him*) an answer to a question, the purport of which is: It is permissible to disburse what exceeds a mosque’s needs to other causes;

he clarified: one takes for it from its yields what it needs until the next yield, and whatever exceeds that is spent elsewhere.

He said: This is the view of the madhhab; otherwise, there would be no meaning to their statement that “the surplus of mosques is spent *fi sabīl Allāh*,” for were we not to say this, there would be no “surplus.” (This is the sense of his words, not their exact phrasing.)

If the mosques are completely deserted, then they have no need of funds—except what preserves them from ruin; beyond that, the money should be disbursed to the mosques in need.

**Yes:** What we have said may be supported by narrations—such as that the Prophet (*May Allah bless him and his family and grant them peace*) included ‘Alī (*Peace be Upon Him*) in his sacrificial offering; by his (*May Allah bless him and his family and grant them peace*) redirecting the waqf of ‘Abdullāh b. Zayd when he made it for the Prophet (*May Allah bless him and his family and grant them peace*), who instructed him to make it for his parents; by the Companions’ transferring the mosque to a location near the Treasury (*Bayt al-Māl*) to preserve it; by his saying to ‘Ā’ishah: “*Were it not that your people have only recently left the Age of Ignorance, I would have expended the treasure of the Ka’bah*,” and by what is narrated from Anas: that the Messenger of Allah (*May Allah bless him and his family and grant them peace*) often considered spending the surplus of the Ka’bah’s wealth in the path of Allah, *Most High*. These narrations are mentioned in *al-Masā’il al-Nāfi’ah*.

Transferring a religious interest is among the responsibilities of the rulers, for they are charged with considering and safeguarding public interests. If, in a given era, there is no ruler, the jurists of the madhhab said: “Whoever is qualified for a matter, when there is no Imam, may undertake it” End. So that public rights and interests are not lost. This comes under *hisbah* (*public accountability*), whether specific or general. Allah *Most High* says: “*Cooperate in righteousness and piety.*” [Al-Mā’idah:2]. And He *Most High* says: “*Whoever does righteous deeds while he is a believer—there will be no denial of his effort; and We are recording it.*” [Al-Anbiyā’:94].

**Yes:** One may not transfer an interest to a “more beneficial” one except in the sort of situation we have described regarding deserted mosques. Where the preferability of a given interest varies with persons’ opinions, it is obligatory to remain with what the founder designated, even if something else seems preferable to someone else.

Thus the jurists of the madhhab expressed some hesitation here; in *al-Azhar* it says: “And regarding transferring an interest to what is more beneficial—there is disagreement.”

**[Ruling on exchanging a mosque’s field (*jarbah*) for another]**



**Question:** May the waqf-guardian exchange the mosque’s field, taking another field in its place for the sake of benefit?

**Answer—and Allah is the One who grants success:** If the benefit returns to the mosque—such as proximity to water, or proximity to the mosque’s guardian so he can preserve it more easily, and the like—then there is no objection. It is narrated that the Companions moved the mosque itself from one location to another for the sake of preserving it, as related in *al-Baḥr* and its derivation.

**[A questioner who wishes to be rid of land that includes a waqf share]**

**Question:** I own a large, sprawling tract of land in which there is a fixed percentage for the waqf. I took charge of it because I saw many covetous people fixing their eyes on the waqf’s land to seize it. I want to be rid of it, and I do not like it to remain among my property for fear of the liabilities upon me and those after me. How do I rid myself of it?

**Answer—with Allah’s enabling:** The endowed land has come into your custody and guarantee. If you abandon it and remove your hand from it, and the covetous then seize it, you are liable for what they seize, and you are responsible before Allah. If you hand it to an authority you know to be negligent about the waqf’s beneficiaries, you are remiss regarding the waqf and will be obliged before Allah to redeem and guarantee it.

In reality, you have been tested with a waqf. What I see for you is to sell part of the waqf and with the price build dwellings that serve the interests of the beneficiaries. If the land is for mosques, you disburse the yields for mosque repairs. If it is for shrines (*turab*), you disburse to scholars and learners. If it is for something similar, you spend it on public interests—consulting in this those scholars you trust. You may not remove the waqf from your oversight except to someone whose religion and trustworthiness you are confident in.

It is also obligatory to formalize documents identifying and delimiting what waqf assets are in your custody and specifying their disbursement categories—so the waqf is not lost.

The man who undertakes to improve the waqf is entitled to a wage. Two upright men are to estimate his wage—i.e., the fee deserved for overseeing the sale, then the building and repair until it becomes fit for exploitation—and he may then be allotted a percentage of the rental income in return for carrying out the leasing and following up with tenants. The rate is determined by customary practice in such matters. All praise is due to Allah, Lord of the worlds.

**[Selling mosque furnishings or part of its endowment to repair it]**

**Question:** Our mosque needs funds for repairs. The mosque has many endowments and far more carpeting than it needs, which may spoil in storage. Some neighbors of the mosque's endowment wish to buy from the waqf a strip of land as a passageway for many times its price. Is it permissible to sell the carpets and to sell something of the waqf, or to sell a path to some neighbors of the waqf, in order to complete the mosque's repair and maintenance?

**Answer—and Allah is the One who grants success and aid:** It is permissible to sell the surplus carpeting from which the mosque has no need—especially if it is exposed to damage in storage. Indeed, in such a case, selling may even be obligatory.

As for selling land endowed to the mosque, it is not permissible—nor is it permissible to sell any portion to neighbors as a right-of-way.

**Yes:** If the neighbors of the waqf need a passage, they may lease from the waqf the land needed as their way for as many years as they wish—fifty or fewer or more—and a document is to be written for the guardians of the waqf to prevent the mosque's endowment from being lost, forgotten, or denied by the tenants. It is likewise permissible for the waqf-guardian to lease waqf lands when the mosque is in need, receiving advance rentals to complete the mosque's repair. All this returns to the guardian's judgment; he must seek the mosque's best interest. Allah *Most High* has said regarding orphans' guardians: *"Say: Improvement for them is best; and if you mix with them, they are your brothers. And Allah knows the corrupter from the reformer."* [Al-Baqarah:220].

#### [On bequeathing a waqf]

**Question:** A man bequeathed to another man a waqf for him and for his progeny after him. The legatee then wrote a will that the yields be split in half: half of the yields to his heirs, and the other half to a man unrelated to him. What is the ruling?

**Answer:** The waqf belongs to Allah. The man who was bequeathed it, then his progeny, is entitled only to the usufruct and the yields from the waqf during his lifetime. When he dies, his right ceases and the heirs deserve the yields. If he then bequeaths the yields to his heirs and to another unrelated man, his bequest has no legal effect—because his heirs already deserve all of it by the first founder's bequest; he has bequeathed what he did not own.

#### [Ruling on giving females from a waqf inherited for Qur'ān recitation]

**Question:** In a waqf inherited for the recitation of the Book of Allah *Most High*, are females given from it, given that the custom has been not to give them—because in most cases they are not Qur'ān reciters? What do you say? And if some of them recite well, do they receive from it?

**Answer:** If the founder endowed something for reciting the Book of Allah upon his heirs or others, then if his intention is known, one proceeds accordingly; if his intention is unknown, then according to what is predominant in customary practice. If the custom in such a waqf is that it is only for men, not women, then they have no share of it—even if they recite well. If there is no recognized custom in the matter, then the general wording includes both male and female—among those proficient in recitation of the Qur’ān.

As for the permissibility of giving them for recitation of the Qur’ān: it is permissible, since the testator’s intent is recitation to his soul. If it is known that his intent was for males and not females, then they are not to be given.

**In sum:** Wills and endowments are to be carried according to the known intention of the testator and founder. If the intention is not known, the wording of the founder and testator is carried to what is known of it in the founder’s and testator’s local usage; then to the local linguistic usage; then to the general usage of the language; then to the root sense of the language.

## [Book of Deposit (al-Wadī'ah)]

**The ruling on a deposit taken from a person who is insane**

**Question:** If a man who is completely insane deposits with another man a sum of coins that he begs from people, and the man knows the insane person by the name “Alī Ḥijūrī,” and that his town is Ḥajūr; then the insane person disappeared from our area and more than ten years have passed—what is incumbent upon the custodian in this case? Before his insanity, the insane person loved the custodian and trusted him greatly, and the custodian thinks with near-certainty that if the insane man were to return to his previous state he would pardon the custodian and even ask him to accept his pardon.

**Answer:** The money in the custodian’s hand is a trust. It appears that the custodian is not obliged to search and inquire as with a stray or found item, nor is he obliged to travel to Ḥajūr. Rather, what is incumbent is that he preserve the money until its owner or his heir appears.

The name “Alī Ḥijūrī” from the town of Ḥajūr is not sufficient to identify him; in that case, searching will yield no benefit. If the custodian fully despairs of identifying him, he gives the money in charity; if he later comes to know him, he guarantees (repays) it to him.

**If it be said:** The seizure by an insane person of the coins he takes is not a valid seizure; only his guardian may validly receive on his behalf; therefore, the insane person does not own what he took, and it would be property without an owner, which—being such—belongs to public interests.

**We reply:** It is customary for minors and the insane to be permitted to receive tips and coins, and for their guardians to allow them to dispose of that; this has been the practice of commoners and elites alike. In that case, the receipt by the insane person or the minor is valid, and he owns what he received. If what the insane person or the child receives becomes abundant, the guardian must safeguard it.

**If it is asked:** When the insane person returns, may the custodian return the deposit to him?

**We say:** If there is no guardian for the insane person, it is permissible to give him from the deposit what someone like him customarily needs—e.g., the cost of breakfast or lunch, the price of tobacco, the price of qāt—just as guardians do for their charges among the insane. In this case, the custodian stands in place of the guardian in the absence of one, if he is upright, and no formal appointment is required.

**[Ruling when the owner of a deposit is absent]**

**According to the madhhab:** If the owner of a deposit is absent, the

deposit remains as it is until one despairs of the owner's return; it is not obligatory to announce it if its owner is absent or unknown. End of *al-Tāj*.

**[Ruling on one who holds a deposit which was lost or stolen]**

**Question:** A man has a deposit; and Allah knows best whether it was stolen or lost—what is incumbent upon him? Please give us a ruling, may Allah reward you with goodness.

**Answer—and Allah grants success:** If the deposit was stolen from a place in which such a deposit is customarily kept for safekeeping, it is not guaranteed (no liability). If it was stolen from a place not customarily used for safekeeping, then it is guaranteed. If he forgot it somewhere until it was stolen, it is likewise guaranteed.

As for if it was simply lost, it is guaranteed.

**In sum:** If there was negligence in safeguarding on the part of the custodian, it is guaranteed; if there was no negligence, there is no liability. The jurists of the madhhab deemed loss and forgetfulness to be negligence.

The evidence is what is known in the Sacred Law of the obligation to safeguard trusts and then render them to their owners.

**[On borrowing from the deposit]**

**Benefit:** The <sup>2</sup>custodian has no right to borrow the deposit or any part of it—unless he knows the owner's approval, in which case it is permitted. Completed (*affirmed*) (قُرِئَ). End of *al-Bayān* and its marginalia.

**I say:** The proof is the statement of the Prophet (*May Allah bless him and his family and grant them peace*): “It is not lawful to take the property of a Muslim except with his willing consent.”

**[May a trustee borrow from property in his hands?]**

**Question:** Is it permissible for a trustee to borrow from the trusts in his hand when in need, then repay them?

**Answer:** It is not permissible for a trustee to transact with the property in his hand from among the trusts in any manner whatsoever; that is the very nature of trusts.

It may be permissible for the trustee to transact with the trust if the owner authorizes the trustee, or if it is the trustee's known custom to transact—such as with banks and money-changers—since the established custom is that they transact with what is deposited with them, and the owner knows that; placing it with them with knowledge of their custom counts as authorization to transact.

**[Ruling on depositing money in interest-based banks without taking interest]**

**Question:** Is it permissible to deposit funds in interest-based banks without taking interest and without paying the bank anything? And is it permissible to transfer funds through them?

**Answer:** No objection appears to transacting with interest-based banks in lawful ways by depositing in them and transferring funds through them; for it is well-known that the Prophet (*May Allah bless him and his family and grant them peace*) and the Companions transacted with Jews by buying and selling and lending—despite Allah Most High’s describing the Jews as consuming usury and illicit gain in many Qur’ānic verses.

- The followers of this school of thought have said: It is permissible to deal with the oppressor in buying and selling.

**[One who withdrew his money from the bank and found it greater than what he deposited]**

**Question:** A man deposited with a bank a sum of money; after a time he withdrew his money and found it increased—about double, or a little less. What is incumbent upon him?

**Answer:** It appears that it was entered into his account by mistake. He must search for its owner if possible; after despairing of finding the owner, he gives it in charity.

**Benefit: [If a man dies and it is found in his handwriting that “the bag belongs to so-and-so”]**

In *al-Tāj* according to the madhhab: Imām Yaḥyā said: If a man dies and it is found in his handwriting that such-and-such bag belongs to Zayd, or a man’s name is found written on the bag—no judgment is to be made on that basis; for he might have deposited something with him and then gifted it to him, or he might have purchased a bag on which a man’s name was written. End.

**I say:** Indeed, no ruling is made on that basis; but the executor and the like must return deposits to their owners, and he may recognize that items are deposits by writing on the property that “this is a deposit for so-and-so,” or the testator may say, “Whatever is in such-and-such place is a deposit for so-and-so.”

**[Taking part of a remittance because of a debt]**

**Question:** A man sent money with me for another man, and that other man owes me a debt. Is it permissible for me to take from the remitted funds what he owes me, or not?

**Answer—and Allah grants success:** That is not permissible,

—because the man to whom the money is remitted does not deserve it nor own it until it reaches his hand; so long as it is in the messenger’s hand, it is the sender’s property, and the messenger is merely his trustee and agent.

—The messenger is a trustee, and the trust must be rendered to both the righteous and the wicked. Allah Most High has said: *“Indeed, Allah commands you to render trusts to whom they are due.”* [An-Nisā’:58].

**Benefit: When does a person become liable for a trust that has been placed on his property without his choice?**

This trust becomes guaranteed (liable) upon the occurrence of one of three things:

1. That he appropriates it to himself, not intending to return it.
2. That he commits an actionable harm against it.
3. That he is able to return it, then delays returning it—even without being asked.

**[Ruling on Delivering a Trust to Someone Who Will Use It to Wage War Against Religion]**

**Question:** If a man carries a trust to deliver it to another person, and it becomes clear to the carrier of the trust that the trust he is carrying was sent to wage war against faith and religion, to show enmity toward the believers, and to strengthen falsehood and its proponents—what is incumbent upon him? What should he do?

**Answer—with success from Allah:** It is not permissible for the carrier of the trust mentioned in the question to deliver it to the party that is at war with faith and religion; that would strengthen falsehood and its people. Allah Most High says, *“Cooperate with one another in goodness and righteousness, and do not cooperate in sin and transgression.”* [Al-Mā’idah:2]. In this case, the carrier of the trust must do one of two things:

- 1- Either return it to the one who gave it to him.
- 2- Or hold it with him until the one who gave it to him comes back.

**If it is said:** Why do you not say, “He may give it in the interest of the religion, to strengthen its side and to honor the truth and its people,” since when Allah forbade cooperating in sin and aggression, He commanded cooperating in righteousness and piety; and strengthening the religion and honoring it is among the greatest kinds of righteousness and piety?

**We say:** Allah has emphasized the matter of trusts, saying, *“Indeed, Allah commands you to return trusts to their rightful owners.”* [An-Nisā’:58]. And in the ḥadīth: *“Fulfill the trust for the one who entrusted you, and do*

*not betray the one who betrayed you."*

The well-known report in the Sirah is that when the Prophet (*May Allah bless him and his family and grant them peace*) emigrated from Makkah to Madīnah, he left 'Alī (*Peace be Upon Him*) in Makkah to return the trusts that were with the Prophet (*May Allah bless him and his family and grant them peace*) to their owners—even though the people of those trusts were, at that time, idolaters.

- Allah has forbidden treachery and condemned its people in the Noble Qur'an. It is not permissible to betray a trust—even if it belongs to a belligerent non-Muslim—because your carrying the trust of a belligerent and agreeing to carry it for him counts as granting safety to his property.

It has been established among the scholars of the Muslims since the time of the Companions that if any Muslim signals to a belligerent non-Muslim so that he comes to him at his signal, that counts as granting him security—for his person and for what is with him of wealth, weapons, or the like. It is then not permissible for anyone to assault him or what is with him; rather, they must return him to a place of safety.

This is proof of what we have mentioned: that a trust is inviolable—even if it belongs to a belligerent non-Muslim.

***If it is said:*** May the ruler or other Muslims seize the trust from its carrier because it is the wealth of belligerents?

***We say:*** Rather, it is obligatory on the ruler and other Muslims to assist the carrier of the trust in safeguarding it; for in the ḥadīth: "*The protection granted by the lowest (in status) among the Muslims is binding upon them all, and they stand united against others.*" Thus, if a non-Muslim combatant is granted security (a man) by a single Muslim, it is as if the security were granted by all Muslims.

If the trust the Muslim carries is wine, or an explosive charge sent with him to a man commanded to blow up a mosque or a believer's house, or the like—and this does not become clear to the carrier of the trust until after he has already taken possession—then as for the wine, he pours it out or destroys it by burning; and as for the explosive, he returns it to the one who gave it to him or keeps it until that person comes, then returns it to him.

We only distinguished between the two because the very substance of wine is unlawful; we are not permitted any use of it. As for the explosive charge, its very substance is not unlawful; it has many permissible uses. What is unlawful for us is using it for sin and aggression.

### **Liability (Ḍamān):**

***Question:*** Two men hold the tribe's pooled funds: one is entrusted for



such-and-such a clan, and the other is entrusted for such-and-such a clan. Then one of them comes to the other and says, “Give me the money to spend on such-and-such”—something other than the purpose for which the tribe apportioned it. He gave him that money; who is liable for it?

**Answer—with success from Allah:** The money in the hand of each is a trust; he is not permitted to be negligent with it. As for the other “trustee” who asked for the money to spend it on something other than its rightful purpose, he is no trustee in that moment, because his treachery is manifest. If he took the money by the consent, authorization, and empowering of the first, then the first is liable for the money—because he was negligent with what he was entrusted with.

## [Book of Usurpation (al-Ghaṣb)]

### (Definition of ghaṣb)

In *al-Azhar*: It is seizing another's property wrongfully—even if he did not intend (wrongdoing). End.

**I say:** This includes theft, denying a deposit, and anything similar that Allah has forbidden of taking others' wealth and rights—so let no one imagine that the rulings mentioned in *al-Azhar* in the Book of Usurpation apply only to overpowering someone and taking his property by force.

### **Among the rulings of this chapter:**

1. The usurper is discharged (of liability) when the usurped item (or its value) reaches its owner by any means—such as if he lends it to him, feeds it to him, gives it to him as a gift, or the like.
2. It is obligatory to return the very thing that was usurped; paying its value does not suffice while the item is still in existence.

### **[When does a Muslim's wealth become lawful for another to take or use?]**

**Question:** When does a Muslim's wealth become lawful for another to take or use?

**Answer:** A Muslim's wealth is not lawful (for another) except by his willing consent. Allah Most High says, *"O believers! Do not devour one another's wealth illegally, but rather trade by mutual consent."* [An-Nisā':29]. And in the well-known ḥadīth: *"Indeed, your blood, your honor, and your wealth are inviolable for you—like the sanctity of this day of yours ..."* ḥadīth.

- Scholars have allowed the ruler to take from people's wealth what he uses to repel an enemy marching upon them. They permitted this because if that enemy is not repelled, he will take their wealth and commit atrocities; thus, it is permissible for the ruler to ward off that great evil and widespread harm by taking some of their wealth. Although that entails harm to them, it is a lesser harm compared to the harm of the enemy; and repelling a greater harm by means of a lesser harm is something whose soundness is firmly recognized by reason.

There is another situation in which it is permissible to eat from a Muslim's wealth without his permission: when hunger reaches a person to the point that he fears death or serious illness harmful to his health. In that case, if he finds no other option, he may eat from a Muslim's wealth without permission—but only what suffices to remove the necessity.

### **[Clarifying what is permissible of fruits from enclosed orchards]**

In *al-Jāmi' al-Kāfī*: al-Ḥasan b. Yahyā narrated with his chain from 'Alī (Peace be Upon Him) that the Messenger of Allah (May Allah bless him

and his family and grant them peace) was asked about what is permissible of the fruits of orchards without the owners' permission. He said: *"(It is permissible to eat) what has fallen (to the ground), without taking anything from what is on the branches, and without putting anything in one's garment."*

And al-Ḥasan said regarding a man in need: He may go out to these fruits and others and eat to fill his stomach, but he is not to carry anything away. End.

**I say:** What appears to me is that the fatwā in this chapter is built upon custom (*‘urf*). Whatever custom treats with forbearance is permissible to eat; whatever it does not, then not—because the baseline ruling is the prohibition of consuming people's wealth, as in His saying Most High, *"Do not devour one another's wealth illegally, but rather trade by mutual consent ..."* [An-Nisā':29], and the ḥadīth of the Prophet (May Allah bless him and his family and grant them peace): *"A person's wealth is not lawful except by his willing consent."*

The Prophet's (May Allah bless him and his family and grant them peace) fatwā thus came in line with customary forbearance regarding what falls from the fruit;

And the fatwā of al-Ḥasan b. Yahyā likewise accords with custom. It is also possible his statement was from the angle of warding off starvation; one in desperate hunger may take from others' fruit what suffices to alleviate his hunger—without carrying anything away.

#### **[A man eating from the fruit of his companion's orchard]**

**Question:** If a person has a strong presumption that his brother or friend is content for him to eat from the fruit of his orchard, or to eat from his food, or to take from his water, or to wear some of his clothes, and the like—may he act upon that presumption?

**Answer—and Allah is the One who grants success and aid:** That is permissible when there is a presumption of consent. Such a presumption arises when the orchard owner (and the like) is known by habit to overlook and be content with people eating some of his fruit, taking from his water or food, and the like.

Custom may be one of lenience and consent for relatives and friends but not for others; it may apply to a certain amount but not more; it may apply to some kinds of fruit but not others. The established custom regarding any of these matters is a way to forming a sound presumption of the owner's consent. If there is no particular custom about the person nor any general custom in the town, one should not proceed.

**Question:** If a man has eaten from one man's orchard, and from another's orchard, and from other orchards—and this has recurred from

him over many years—and when he grows older he wants to clear himself of liability, what is required of him? He strongly presumes that, were he to inform them, they would pardon him.

**Answer:** If the custom among the people of that land is that they do not condone others—young or old—eating each other’s fruit, but that when someone does eat from another’s fruit they do not demand payment nor take it, and they have no custom of asking for compensation nor demanding it, and they are satisfied that the taker simply desist; and the taker only ate to satisfy his hunger; and he strongly presumes that they would pardon him if informed—then in such a case repentance and desisting suffice; he does not need to inform them and seek their pardon.

There is another case in which one need not seek absolution from the orchard owner: when it is the local custom that whoever takes a trifling amount of his companion’s fruit does not seek pardon nor is pardon sought of him—because the matter is minor by their standard, and they would not presume to demand pardon for it.

In sum, this issue is referred back to custom, and custom suffices therein.

He does not need to seek absolution from the orchard owner—indeed, he should not—lest he expose himself to people’s talk, as if to say: “Look at so-and-so, putting on airs of meticulousness and piety,” and so on—making himself a laughingstock.

**Yes:** The customary practice in our land is that if the orchard owner sees someone eating from his fruit, he contents himself with driving them away; he does not take what is in their hands nor demand that they return it, but leaves it to them.

### **[Ruling on what a child eats stealthily from people’s fruit]**

**Question:** Children often eat from other people’s fruit stealthily—taking from this orchard an apple, from that one a bunch [of grapes], eating other things—just as is the habit of children in most towns. What should he do when he comes of age? Is he obliged to pay the value of what he took, or what?

**Answer—and Allah is the One who grants success:** What is required in such a case is that the legally responsible person consider the owners from whom he took:

1. If he knows a person to be magnanimous, easy-going, such that—were he to know—he would pardon of his own good will, then actual, explicit pardon is not required.
2. If he knows a person to be tight-fisted and not good-natured in this regard, then he must seek pardon; if the owner pardons, fine;

otherwise, the now-responsible person should reach a settlement with him for an amount they both agree upon.

3. If he is unsure to which of the two categories a person belongs, then he must seek pardon, and so forth.

**Yes:** it may be said: If the local custom runs in favor of overlooking such past matters, then seeking pardon is not required. This is what is known in our land: the owner does not demand compensation from the children’s guardians nor hold them liable; if an owner is particular, he complains to the guardians so they prevent and discipline the children; even were the guardians to offer payment, he would refuse it out of pride. If matters are thus, the now-responsible person is not obliged to seek pardon nor to pay for what he took in childhood.

**Yes:** It is narrated—as in the marginalia on *al-Baḥr al-Zakḥkhār*—that the Prophet (*May Allah bless him and his family and grant them peace*) said: “*If you come upon a garden wall not enclosed by a building, call its owner three times; if he answers you, [seek his leave]; otherwise, eat—so long as you do not cause damage.*” This ḥadīth lends some support to what we have said; nevertheless, it remains obligatory to avoid eating people’s wealth, their fruit, and the yield of their orchards, given the well-known Islamic prohibition against consuming people’s wealth: “*O believers! Do not consume one another’s wealth unjustly, but only [in lawful] business by mutual consent ...*” [An-Nisā’:29]. And in the famous ḥadīth: “*The property of a Muslim is not lawful except with his willing consent.*”

**Yes:** Eating fruit without the owners’ permission is permissible when their custom runs that way—such as with eating from the ‘*ilb* (jujube) trees without their owners’ leave—or when the matter is very slight, as is the case in many of the Bedouin areas of Ṣa‘dah.

#### [A miller who shorted the sacks and sold it for himself]

**Question:** A man works at a mill, grinding grain sacks and selling them. He would take two ṣā‘’s from each sack for himself, then sell each sack at the prevailing price in the country. The shortage in each sack was not noticeable to the buyer or anyone else. He persisted in this for a long time, accumulating from it half a million riyals or more; he built himself a house and married. Later, preachers came to his village; he sat with them, listened to their exhortations and lessons, awoke from his heedlessness, and now wants to clear himself of liability. Today he is a poor seeker of knowledge. What should he do?

**Answer—and Allah is the Patron who grants success and aid:** What is required for his liability to be cleared is that he disburse what he took in public interests, such as to scholars and students of knowledge. In the school, the poor are among the lawful recipients for ill-gotten wealth

(*mazālim*).

If the man seeking to clear himself is a poor student of knowledge, then he is among the recipients of *mazālim*; he may disburse it upon himself when able to do so, or he may disburse it to a scholar or a student of knowledge—who then returns it to him. There is no harm in that given the penury of the penitent.

**[Ruling on taking from another's property what is customarily overlooked]**

In *al-Tāj*: If the amount is something customarily overlooked, then there is no obligation to return its equivalent. If he later destroys a similar amount such that the first and the last together would no longer be customarily overlooked—the preferred view is that there is still no liability, whether this occurred in one sitting or two, connected or separate, even if he intended to take it all; for when he destroyed the first portion, nothing became due in his liability, and likewise for the second and the third. End of the Book of Usurpation.

**I say:** An example is that a person stands beneath a grapevine at a cluster of grapes and picks one berry and eats it, then picks another and eats it, and so on until he finishes what is in the cluster. Then he takes a berry from another cluster and does as he first did... until he is satisfied, without cutting the cluster off and then eating it.

But if he cuts the cluster, he is liable for it, because he has taken the whole cluster. If, however, he takes it berry by berry, then—according to the jurists of the madhhab—he is not liable; though even with their statement of non-liability, such conduct is, in their view, sinful.

Similar to this is a man who stands at a raisin seller's stall, for example, taking a berry from a sack of raisins and eating it, then another berry which he eats, and so on until he is satisfied—he is not liable.

What I deem correct—and my soul inclines to it—is that whoever does this is liable, and there is no difference between one who takes a whole cluster berry by berry and one who takes it all at once. What is customarily overlooked is a berry or two or three. Even if the jurists of the madhhab were lenient about eating a cluster or two, or more, berry by berry, the owner of the grapes or raisins is not lenient; and there is no farmers' or merchants' custom to overlook such conduct. If they overlook one, two, or three berries, they do not overlook many—even if the taker takes them berry by berry.

**[Ruling on one who directs an oppressor to another's wealth]**

In *al-Tāj*: As for one who directs an oppressor to another's property so that he takes it, or throws to him something that causes another to be fined—the informer and the thrower are not liable for what the

oppressor took or for the fine caused. Rather, they are only to be disciplined, if it is established that they had no just cause in their report. End.

**I say:** The one who points out another’s property for an oppressor to seize should be disciplined with a monetary penalty equal to what the oppressor took. The jurists of the madhhab said something similar regarding a spy who caused the killing of a Muslim: they said he is to be executed, but not as *qiṣāṣ* (retaliation).

**[What the usurper is liable for]**

And in *al-Tāj*: The usurper is not liable for what he prevents the owner (or the like) from by shouting away, imprisoning, or shackling, etc.

**I say:** This case is like the one at the top of this page<sup>1</sup>: the usurper is disciplined with a fine equal to what he caused to be lost.

**[Ruling on one who wishes to clear a liability, but its owner refuses to take it]**

If a man wishes to free himself from a wrong (*maẓlīma*) or the like, and its owner refuses to take it without excuse—then, in such a case, it may be said:

1. If it appears from the man’s state that his refusal is due to indifference because of the smallness or triviality of the amount in his eyes—even if, in the giver’s eyes, it is not small—then the giver’s liability is discharged.
2. If the one refusing is a friend who declines to take the debt for the sake of friendship and in return for a past favor from the giver, and he utters words indicating pardon, and it becomes clear to the giver that he avoided explicitly stating pardon out of consideration for the giver’s feelings—then, in such a case, the giver’s liability is discharged, unless the creditor later demands payment, in which case payment is due.
3. If the refusal to take it is out of condescension—as when the refuser is wealthy and the giver poor—and he refused out of pity for the giver’s poverty and shabby state; if this becomes apparent, then the poor man’s liability is discharged and nothing is due from him—unless he is later asked, in which case payment is due.

**[On a stolen car when the thief no longer knows its owner]**

**Question:** Three men stole a car from Ṣan‘ā’, then sold it to the father

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1- (1) I.e., the preceding case: “As for one who directs an oppressor to another’s property so that he takes it ...”

of one of them. The father then died, and his son—the thief who was one of the three—together with his brothers, sisters, and mother, inherited the car. Later, when the son heard admonitions and guidance, he regretted it and wanted to clear himself and repent. What should he do, and what is incumbent upon him, given that he does not know the car's owner?

**Answer—and Allah is the One who grants success and aid:** Even though the car was sold, it still belongs to the one from whom it was stolen. The father who bought the car—his purchase is invalid. When he died, it was not part of his estate, and no division of it is valid, for—as we said—it remains the property of its owner.

As for liability: everyone in whose hand it came is liable for it—the three thieves are liable for it; indeed each one of them is liable for it, and its purchaser is liable for it. What is incumbent upon everyone in whose hand it came is to return it to its owner, for He Most High says: "*Indeed, Allah commands you to render trusts to whom they are due ...*" [An-Nisā':58].

As for ignorance of the owner: he can be identified via the customs office, since the car was registered with customs, as you mentioned. You have no excuse when identification is possible. Nor are you excused by fear of being apprehended by the authorities, for there are ways to contrive delivery of the car to its owner by whatever means possible. He Most High has said: "*And whoever is mindful of Allah—He will make for him a way out*" [At-Ṭalāq:2], and "*Indeed, Allah is with those who fear Him and those who are doers of good.*" [An-Naḥl:128].

Therefore, what is obligatory upon this man who wishes to repent is to return the car to its owner. Thereafter, he may seek from the co-thieves the price they took from his father, if he wishes—since they took it unlawfully.

#### **[Ruling on taking soil or gravel from private irrigation channels]**

**Question:** Is it permissible for a man to take soil or gravel from a private right-of-way, such as an irrigation channel for saplings or the like? And if he has taken, what is incumbent upon him?

**Answer:** The criterion is custom. If the custom among the people of that town is to be lenient about taking gravel or soil from their private rights, or about taking a certain amount thereof, then taking soil or gravel is permissible according to the custom. If the custom is that such lenience is not granted, then it is not permissible to take anything except with the right-holder's permission.

If the man took without permission, then what is incumbent upon him is to seek their pardon and good pleasure. The apparent position of the madhhab is that he need not pay the value of what he took—because



what was taken is a *right*, not full ownership, and *rights* are not bought and sold. If the taker removed soil in a way that caused harm, he must repair what he damaged.

### [Ruling on Taking Usurped Cash]

In the marginal notes on *Sharḥ al-Azhār* according to the school: cash (i.e., coins) becomes *lāwful* (*ṭayyib*) for the one to whom it is delivered—even if he knows it was usurped—so long as he takes it with the usurper’s consent. End (and affirmed) (قرئ).

And the apparent sense of the Hādawīyah’s wording is that cash becomes *lāwful* for the one to whom it has passed, because it is not individuated. End.

This discussion—regarding its being lawful or not—concerns the state after it has been received.

As for the permissibility of receiving it in the first place: it is not permissible if the cash belongs to a specific owner; nor is it permissible if it belongs to an unspecified owner and the recipient is someone for whom taking it is not lawful. If, however, it is to be disbursed in the channels of wrongfully-held property (*maẓālim*), then it is permissible. End of our master Ḥasan (and affirmed) (قرئ).<sup>1</sup>

### [How to Dispose of Wrongfully-Held Property When One Fears Defamation of His Honor]

**Question:** If a man possesses something taken wrongfully, then repents to Allah, but he fears that if he returns it to its owner his reputation will be exposed—or that the owner will demand customary penalties, such as “purposes/claims” (*maqāṣid*) and other fines—or that the owner will claim from him other wrongs which are not actually with him—or the like; if that is the case, what should he do?

**Answer—and Allah is the One who grants success and aid:** The man in question must return the wrongfully-held item to its owner if it still exists; and if it no longer exists, he must return its value. He must contrive a way to return it to its owner by any stratagem, such as placing it inside his house or his car; or presenting it to him in the guise of a gift, charity, or donation; or sending it to him as the price of *qāt* or the like.

If he does this, his liability is cleared; he is not obliged to incriminate himself in a way that would expose him. The jurists of the school have said, as in *al-Azhār* and its commentary: the usurper is discharged from

1- *Sharḥ al-Azhār* 3/526.

the usurped item—likewise from rental-value and from value—once it reaches the owner by any means, such as feeding it to him ... etc. End.<sup>1</sup>

One may also adduce as evidence the saying of the Exalted: *“Indeed, Allah commands you to return trusts to whom they are due ...”* [An-Nisā’:58]. Whoever does what we have described has complied with what Allah commanded in this verse.

### [How to Dispose of Wrongfully-Held Property When It Is Impossible to Reach Its Owners]

**Question:** A man used to work in Saudi Arabia and was lax regarding other people’s rights, taking what did not belong to him by way of theft and betrayal. He has now repented and regretted it. How can he rid himself of this? At present he cannot travel back to that country due to his straitened means; and even if he traveled, he overwhelmingly presumes he will not identify them, and in some cases he is certain he cannot identify them.

**Answer—and Allah is the One who grants success:** He must resolve firmly to render to every person his due whenever he becomes able to do so. If he comes into ease and is able to discharge what is upon him—whether by means of a messenger or personally—he must do that. If he is unable, then when he despairs of finding them, it suffices that he give the amounts in charity to the lawful recipients of *mazālim*.

I have seen a statement in *al-Bayān* from one of the eminent imams, *peace be upon them*, its purport is: if a Muslim repents while he has *mazālim* but is unable to discharge them due to poverty and does not know their owners, then Allah Most High will pay them on his behalf, and nothing is due from him thereafter.

I regarded this opinion with the highest approval and was greatly impressed by it,

1. because of the facilitation it provides for the path of repentance,
2. and because it accords with Allah’s saying: *“Allah does not burden any soul except with what He has given it.”* [At-Ṭalāq:7]. The import of this is that a poor person who has repented yet bears *mazālim* which he cannot discharge due to poverty is not tasked with doing so.

**If it be said:** This entails the falling away of debts when one is unable to pay them.

**We reply:** Debts also fall away if a debtor dies before he is able to discharge them.

1- *Sharḥ al-Azhār* 3/528.

Moreover, this is indicated by:

1. the analogy to the repentance of the brigand: when he repents, the claims of the people whose property he took by banditry fall away;
2. the outward sense of his (*May Allah bless him and his family and grant them peace*) saying: “*Repentance erases what came before it.*”

**Question:** A man worked with the Chinese on the Ṣan‘ā’-Ṣa‘dah line for a salary, and he used to steal items like mines and the like. Now he wants to clear himself—what should he do?

**Answer—and Allah is the One who grants success:** He must return what he took—or its value—if he can do so by any stratagem. If he cannot identify its owner, the obligation is to disburse it in the channels of *mazālim*.

#### [Ruling on Disposing of Trivial Items]

**Question:** I was in Saudi Arabia seven years ago and I took an old, worn blanket from a child and ran off with it; I only took it to keep warm. I am now back home and I regret what I did. How do I clear myself of this problem? I know the house the child came out of, but I fear that if I go to them to settle the matter they will have me imprisoned; and traveling there is risky for one evading [the law], and I am not able to obtain a pilgrimage visa. What should I do?

**Answer—and Allah is the One who grants success:** If the matter is as described, then the taker of the blanket should form the intention that he will return it—or return its value—when he is able and secure in himself; “*Allah does not burden a soul beyond its capacity.*” [Al-Baqara:286]. If he dies before he is able, then there is no sin upon him, if Allah wills.

It may be said: If the item taken is trivial, and the taker has repented, and the circumstances are as described in the question, then remorse suffices. The triviality of an item differs according to time and place; and an old blanket in Saudi Arabia is a trivial item.

A workable gauge for what counts as “trivial” in this context is: an item such that, if a person went to unusual lengths to return it or to seek pardon for it, people would blame or criticize him for doing so.

There is no doubt that if a person went to such lengths to return something worth one riyal—or three, or five, or twenty—the very person owed twenty would be the first to reproach him, if he learned the person came only for that, saying: “This item does not warrant what you have done,” and might accuse him of feeble intellect or religious extremism—this, assuming the situation is as in the question.

That said, it is not proper that, should one someday pass by the owner

of such a trivial wrong, he be lax about explicitly seeking pardon or paying the value; that is safer and more cautious.

**Yes**, if the item taken is trivial, and the taker has a strong presumption that its owners are magnanimous and would be happy to pardon what he took were they to know, then he is not obliged to seek pardon. Nor is mutual settlement or pardon required in matters that customarily incur no claim—such as eating a cucumber, an apple, an orange, or the like. Likewise, a child is not obliged—upon coming of age—to seek pardon for what local custom accepts of children’s eating fruit, so long as he did not exceed what is customary for children.

We say this because people do not feel constrained in such matters and, if they learn of them, they do not demand payment.

### **In Matters of Wrongfully-Held Property (al-Maẓālīm)**

From the marginalia: If the wealth of oppressors does not suffice to cover what they owe, then al-Qāsim, al-Mu’ayyad billāh (*Peace be Upon Him*), and Muḥammad ibn ‘Abd Allāh (*Peace be Upon Him*) said: the excess beyond (what can be recovered) falls from them after seizing all their wealth. Abū Ṭālib said: it does not fall; rather, it remains a debt upon them, and whenever they become able to make restitution, it is obligatory. End.<sup>1</sup>

What supports the first view: Allah’s saying, “*Allah does not burden a soul beyond its capacity*” [Al-Baqarah:286], and “*(Allah does not burden any soul) except with what He has given it*” [At-Ṭalāq:7]; and what has come in the ḥadīth of “the bankrupt,” when he (the Prophet—*May Allah bless him and his family and grant them peace*) said to his creditors: “*You have nothing but that,*” or, “*You have nothing except what you find,*” or as he said.

What supports the second view: the default is the obligation to return wrongfully-held property and clear one’s liability of it, and the cited proofs do not indicate that it is annulled.

### **[Do Two Value-Based Wrongful Claims Offset One Another if Equal?]**

**Question:** Two men each has against the other a monetary wrong that is *qīmī* (value-based, not fungible). If the two wrongful claims are equal in value, do they offset one another? Or must each deliver to the other what he owes?

**Answer:** If it is known that the two values are equal according to both men and in reality, then the two wrongful claims offset one another.

1- *Sharḥ al-Azhar* 4/557.

But if one or both of the claims are of things whose value varies from person to person and from time to time, then both parties must mutually agree to set them off; one-sided offset does not suffice—unless it is known that what he owes is more than what the other owes, by the valuation current among people at all times.

### [The Fall of Wrongful Claims from the Poor]

In *al-Bayān*: Issue—Whoever has wrongful claims against him (*mazālim*) whose owners he does not know, then becomes poor—these claims do not fall from him; if it is later possible for him to settle them, it is obligatory.

**It is said:** rather, they do fall—this is the apparent, unqualified wording of al-Qāsim and Muḥammad ibn ‘Abd Allāh, *peace be upon him*. End.<sup>1</sup>

**I say:** The apparent, unqualified wording of Imām al-Qāsim (*Peace be Upon Him*) and Imām Muḥammad ibn ‘Abd Allāh (*Peace be Upon Him*) is supported by several considerations:

1. The outward generality of Allah’s saying, “*Allah does not burden any soul except with what He has given it*” [At-Ṭalāq:7], and “(*Allah does not burden*) *beyond its capacity*” [Al-Baqarah:286].
2. The poor person is among the channels for disbursing *mazālim*; it is as if what is in his liability were a debt he owes to himself.
3. There is in it facilitation and easing of the path of repentance for the poor.

### [Is Killing Permissible Against a Usurper?]

**Question:** A man owns a plot of land. Another man seizes it, claiming it is his. The owner offers fair recourse—litigation before any scholar the usurper chooses, any reputable arbiter he selects, or an oath—but the usurper refuses all of this and insists on going only to judges who are not acceptable, who care only for bribes. In such a case, may the owner repel this aggressor by force, even if it leads to killing?

**Answer—and Allah is the One who grants success:** What is preferable and closer to God-consciousness is patience. Defending property by killing is not permissible—except in the single case where a person knows with certainty that the property is his, and knows that the one who has seized it is an aggressor with no doubtful claim or pretext—nothing but injustice and aggression.

That said, what predominates in our lands is that none lays claim or seizes anything except that he has some *shubha* (colorable claim) by

1- *al-Bayān al-Shāfi*, 2/107 (manuscript).

which he imagines justification. It is exceedingly rare that someone takes land from another in our lands with no *shubha* and no pretext beyond sheer might, aggression, and tyranny. Therefore, a person should not—and is not permitted to—defend his land by killing.

Moreover, a rebel's refusal to litigate before a judge of truth is not a justification for killing him; disciplining the rebel belongs to rulers and authorities, not to adversaries.

### **[Channels for Disbursing Wrongfully-Held Property]**

The channels for *maẓālim* are: scholars, students, muftis, and the poor—especially when these are Hāshimites—as well as mosques, roads, watering places, and the like of what benefits the generality of Muslims.

It is permissible to disburse the *maẓlima* upon oneself if one is among those mentioned—whether the very item or its value—as well as upon those whose maintenance is obligatory upon him, among ascendants and descendants, if they are eligible channels.

It is not permissible to disburse the *maẓlima* except after despairing of identifying its owner—whether the time be long or short.

### **[Paying Money to Be Advanced over Others]**

**Question:** Suppose there is a place for distributing flour, gas, petrol, or the like, such as treating patients in a hospital, and the custom in those places is “first come, first served”—the first is treated first. Is it permissible for someone who comes late to pay a bribe to be put ahead of everyone, or to use a friend's intercession to be advanced ahead of all?

**Answer—and Allah is the One who grants success:** Jurists have stated that a judge must give precedence to “first come, first served,” to the weak, to women, and to those who have travelled from faraway regions. Based on this, precedence should be given to “first come, first served.”

**Yes:** here it may be permissible to give precedence to one who is not first—unlike the judge's court, where it is not proper—lest he be suspected of bias. Observing justice in adjudication, its preliminaries, and what pertains to it is a matter that is strictly emphasized.

As for the case at hand, it is not like that; thus giving precedence to one who is not first is permissible on the condition that this does not harm others, and that is when the distribution concerns something in which people have a right.

### **[It is permissible for the rightful owner to give a bribe in order to obtain his right]**

**Question:** Is it permissible for the rightful owner to give a bribe to the judge in order to obtain his right, or not?

**Answer – and Allah is the One who grants success:** The scholars of the madhhab have forbidden that, as is stated in the marginal notes on *al-Bayān*. However, Imām al-Manṣūr Billāh, Imām Yaḥyā ibn Ḥamzah (*Peace be upon them*), and others allowed it.

What appears to me – *and Allah knows best* – is that if the rightful owner knows that he cannot reach his right except through a bribe, then it is permissible in that case; and that is for two reasons:

1. That His saying, *the Exalted*: “*And do not consume one another's wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].*” [Al-Baqarah:188] does not apply to the one we have mentioned. Rather, it concerns those who bribe the judges in order to consume people's wealth without right, whereas the person in question is merely ransoming his own wealth, not the wealth of other people.
2. Analogy with the prisoner of war: it has been established that it is permissible for him to ransom himself from the oppressor with his own wealth.

**If it is said:** It has come in the ḥadīth that the one who gives the bribe and the one who takes it are cursed.

**We say:** That is general, and it can be specified by the implied meaning (mafhum) of the verse and by analogy.

Furthermore, we do not concede that the one we have mentioned is called “a briber (rāshī)”; perhaps this name is specific to the one mentioned in the verse.

Moreover, what we have mentioned can also be supported by the fact that Allah, *Exalted is He*, has forbidden squandering wealth, and He has permitted for the one in dire necessity what is not permitted for others.

It may also be inferred for what we have said that it has been narrated that the Prophet (*May Allah bless him and his family and grant them peace*) considered giving the polytheists, during the Battle of the Trench, some of the fruits of Madinah so that they would turn back from the Muslims in that expedition; and he gave those whose hearts were to be reconciled (al-mu'allafah qulūbuhum) among the polytheists on the Day of Ḥunayn, in order to incline them towards Islam and to repel thereby their harm. And Allah, *Exalted is He*, has assigned them a share in the zakāh in His Noble Book.

Thus, the utmost that is in the matter is that it is not permissible for the judge to take wealth in order to judge according to the truth; for it has been established that it is not permissible to take a wage for an obligatory duty, as in His saying, *Exalted is He*: “*And they were not commanded except to worship Allah, [being] sincere to Him in religion,*

*inclining to truth, and to establish prayer and to give zakāh. And that is the correct religion.” [Al-Bayyinah:5] and His saying, Exalted is He: “Say, ‘I am only a man like you, to whom has been revealed that your god is one God. So whoever would hope for the meeting with his Lord – let him do righteous work and not associate in the worship of his Lord anyone.” [Al-Kahf:110].*

**Question:** Is it permissible for a Muslim to give a bribe to the judge so that he will rule for him according to the truth?

**Answer – and Allah is the One who grants success:** If the right that is sought to be obtained by means of the bribe is definitive (qaṭʿī), then it is permissible to obtain and ransom it by means of a bribe. By our saying “definitive” we mean that the one giving the bribe knows, with necessary certain knowledge that admits of no doubt, that the disputed right is his property, or he knows that he has a stronger claim to it than anyone else – such as a share of inheritance or the like. For what the deceased left behind is, apparently, what had been his property. This is on condition that there is no one disputing the estate of the deceased or any part of it.

But if the disputed right is not as we have described, then bribery is not permissible, because it is possible that the right belongs to someone else – namely, the other party. And this is due to His saying, *Exalted is He: “And do not consume one another’s wealth unjustly, nor deliberately bribe authorities in order to devour a portion of others’ property, knowing that it is a sin.” [Al-Baqarah:188].* From this verse, the evidence is also derived for the first category, which is the permissibility of bribery to extract a known, established right.

The aspect of the verse’s indication to what we have said is that His saying, *Exalted is He: “and [do not] send it [in bribery] to the rulers”* is conjoined to “do not consume”; thus, it falls within the scope of the prohibition. It has been established among the people of knowledge that the prohibition is directed to the qualifying clause. His saying, *Exalted is He: “in order that you may consume a portion of the wealth of the people in sin”* is a qualifier of the prohibited act, which is: “send it [in bribery].”

On that basis, giving money (to the rulers) is not prohibited except when it occurs in this manner.

### **[The ruling on money paid to expedite a transaction]**

**Question:** Is what people do when dealing with officials – namely, giving some money to the official so that he will complete the transaction – considered among the forbidden forms of bribery?

**Answer:** That is not among the forbidden forms of bribery. The forbidden bribery is what a person pays in money to the judge or the official in order to take the right of someone else.



As for what a person pays in money in order to take a right that belongs to him, or so that the employee will complete his transaction, or in order to gain him as a client, or for similar purposes, then there is no objection upon the one who pays the money and no sin upon him.

## [The Book of Faith, Penance, and Vows]

### [Ruling on swearing by “ḥarām” or by the Divine Name without elongation]

In *at-Tāj* it is stated: If a person says, “Ḥarām (it is forbidden)” in reply to one who says, “Do such-and-such,” or says it initially, or says, “Ḥarām bi-l-ḥarām,” or “Alayya l-ḥarām (on me be ḥarām),” then that is not an oath, even if he intends it as such; for there is no indirect wording (*kināyah*) in declaring something forbidden. End quote.

– And whoever swears by Allah without elongation is not considered to have sworn an oath, because the elongation (the long vowel) is a letter of the Divine Name; so when he omits it, it is not an oath. End of quote from *at-Tāj*.

**I say:** This requires examination. For if omitting the *alif* from the Divine Name is people’s habit and their customary usage in the Name of Allah, *Exalted is He*, such that when they swear they likewise swear with it omitted, it thereby becomes, for them, a (recognized) form of the Name of Allah; and when they swear by it, they have sworn by Allah. But if the one who is aware (of the ruling) omits it in order to escape from the oath, then the matter is as the scholars of the madhhab have stated.

### **A useful note concerning the limit of coercion under which an oath of divorce does not take effect**

The limit of coercion under which an oath of divorce and the like does not become binding is that a person performs the act while fearing that, were he to leave it, he would suffer harm to his honor or the loss of some of his property. Finished. It is said in *al-Baḥr* and *at-Taqrīr*: “ḥarm (ḍarar)”; and in the marginal notes: “mere fear of harm, in an unrestricted sense.” (*Affirmed*) (فرو). End of quotation from the commentary and marginal notes.<sup>1</sup>

I say: What indicates the soundness of this is His, *Exalted is He*, saying: “Allah intends for you ease and does not intend for you hardship” [Al-Baqarah:185], and His, *Exalted is He*, saying: “He has chosen you and has not placed upon you in the religion any difficulty” [Al-Ḥajj:78].

Accordingly, if someone passes through a customs checkpoint such that, if he swears an oath they let him go, but if he does not swear they search his cargo and impose a fine upon him, then it is permissible for him to swear an oath of divorce and the like.

1- *Sharḥ al-Azhār*, 2/418.

Moreover, this is further supported by His, *Exalted is He*, saying: *"Whoever disbelieves in Allah after his belief – except for one who is forced [to renounce his religion] while his heart is secure in faith. But those who [willingly] open their breasts to disbelief – upon them is wrath from Allah, and for them is a great punishment"* [An-Nahl:106]. Thus, He, *Glorified and Exalted*, granted in this verse a concession with respect to uttering the word of disbelief under compulsion. So if it is permissible to utter the word of disbelief under compulsion without the speaker incurring sin or liability, then it is permissible, *a fortiori*, to utter (words of) divorce and the like, which are lighter than disbelief.

### **[The ruling on coercion in oaths]**

**According to the madhhab**, if a wrongdoer forces someone to swear an oath under coercion, his oath is not valid, even if he does not divert his intention, and even if the oath is about refraining from something prohibited or performing something obligatory; for the oath is not binding on him. End of quote<sup>1</sup>.

And by coercion the legal effects of contracts are nullified, so that they become as if they never were, such as divorce, manumission, sale, and endowment, even if he fears nothing but mere harm.

### **[The ruling on the grammatically faulty (misdeclined) oath]**

**Question:** If a person says, "By Allah, I will indeed do (it)" (*wa-llāhi la-afʿalu*, with the verb in the nominative), intending thereby to remove it from being an oath, then what is the ruling of this grammatically faulty oath?

**Answer – and Allah is the One who grants success:**

1. According to the madhhab, no expiation is required from one who swears in this manner, and that is when he intends the grammatical fault in order to be safe from the consequences of the oath.
2. But if he is ignorant of the rules of inflection (*i'rāb*), then expiation is binding on him.
3. Unless the oath concerns the right of another, in which case the grammatically faulty oath does in fact take effect.
4. Thus it is (stated) in the marginal notes on *Sharḥ al-Azhār* ascribed to the madhhab, except in the last issue indicated by the number three, for that is not the (actual) position of the madhhab. For in *al-Kawākib* it is stated that the oath is to be repeated to him, properly inflected. End of quote from the

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1- *Sharḥ al-Azhār*, 4/306.

marginal notes, and this is the madhhab<sup>1</sup>.

### [Ruling on the word “ḥarām”]

**Question:** If it is said to a man, “Do such-and-such,” and he replies, “Ḥarām (forbidden),” what is the ruling of that?

**Answer – and Allah is the One who grants success:** According to the madhhab, that is not an oath; therefore, no expiation is required of him if he breaks it, nor is it even a figurative expression (kināyah) of an oath, for there is no kināyah in (the word) ḥarām. Thus it is stated in the marginal notes on *Sharḥ al-Azhār* according to the madhhab<sup>2</sup>.

And one may argue for this by saying that the word “ḥarām” is a single, unconnected word, not predicated of anything upon which it falls; therefore, none of the rulings of an oath are attached to it. This is like when someone says, “By Allah,” or “I swear by Allah,” without adding anything to it that the oath falls upon; in such a case, it is of no legal consequence.

### A useful note: the oath used to repel harm from oneself

It is said in *al-Bayān*: Sometimes an oath may be obligatory, and that is the oath of litigation (yamīn ad-da‘wā), and (also) the oath by which a person repels from himself or his wealth an oppressor, even if he is lying; however, he must manage it by (righteous) intention, if possible. Finished (*affirmed*) (فرو). (Marginal note). And Ibrāhīm ibn ‘Abd Allāh said: There is nothing (no liability) in it at all, whether he diverts his intention or not. (Marginal note).

And in the marginal note, he (*Peace be upon him*) said: An-Nāṣir (*Peace be upon him*) narrated that Ibrāhīm ibn ‘Abd Allāh fled from Abū Ja‘far ad-Dawānīqī and hid in the house of a man from among the foremost people of virtue and knowledge, out of fear of being killed. It then became known that he was in his house, so Abū Ja‘far sent for that man, frightened him, and demanded that he hand (Ibrāhīm) over to him. The man denied it with the utmost denial, until (Abū Ja‘far) made him swear by (the consequences of) divorce, and manumission, and charity of his properties, and (performing) thirty ḥajj pilgrimages. So he swore, while in his heart he believed that he had destroyed himself. When he returned to his house and related the story to Ibrāhīm, he (Ibrāhīm) said to him: “Rejoice at what you have done. Keep your wife and your wealth, and do not fear anything from Allah. When you meet Allah, then say: ‘Ibrāhīm ibn ‘Abd Allāh commanded me to do that.’”

1- *Sharḥ al-Azhār*, 4/5.

2- *Sharḥ al-Azhār*, 4/5.

Imām al-Mahdī (*Peace be upon him*) said: The rationale is that this is like coercion regarding the oath. Thus it is completed from *Bustan*. End of the quotation from the marginal note on *al-Bayān*<sup>1</sup>.

**[On the ruling of swearing an oath based on conjecture]**

**I say** (and the speaker is the author of *al-Maqṣid al-Ḥasan*): Whoever predominates in his assumption that a right belongs to him, due to an indication, or testimony, or the like, it is permissible for him to swear regarding it, whether as a rebuttal or as a completing oath to render the matter definitive, relying on conjecture... End of quotation from the marginalia on *al-Azhār*<sup>2</sup>.

**I say:** In this there is great benefit, namely, that we regard the common people from whom such conduct issues as being safe (from sin) and correct, since they are in agreement with the statement of a scholar from among the mujtahidūn. It is said in the marginal note: The apparent view of the madhhab is contrary to what he mentioned, namely that swearing such an oath is not permissible. End.

**[The ruling on administering an oath by disavowal from Allah]**

**Question:** Is it permissible to administer an oath by (saying) disavowal from Allah or from Islam? And what is the ruling regarding one who swears by that, whether truthful or breaking his oath?

**Answer – and Allah is the One who grants success:** According to the madhhab, it is not permissible to intensify (an oath) by means of a word of disbelief and disavowal from Allah or from Islam. Thus it is (stated) in the commentary and its marginal notes<sup>3</sup>.

And in the marginal notes: It is narrated from ‘Alī (*Peace be upon him*) and some of the early scholars that it is permissible, and it is narrated from al-Mu’ayyad Billāh (*Peace be upon him*) that he administered such an oath as part of an oath which he strengthened upon someone whom he put on oath, by saying: “If you intended other than this, then you are disavowed of Allah, and ḥajj is binding upon you.” Likewise Yaḥyā ibn ‘Abd Allāh (*Peace be upon him*) made az-Zubayrī swear the well-known oath, which was that he said to him: “Say: *I have disavowed the might and power of Allah, and I have clung to my own might and power; in arrogance toward Allah and deeming myself independent of Him, I did such-and-such.*” When Yaḥyā ibn ‘Abd Allāh (*Peace be upon him*) made him swear this oath, he was swiftly seized (by punishment) – it is said, within two days or three – and he was afflicted with leprosy and died; and he has a

1- *al-Bayān ash-Shāfi*, manuscript, 2/145.

2- *Sharḥ al-Azhār* 4/8.

3- *Sharḥ al-Azhār* 4/10.

long story. End of quotation from the marginal notes on *al-Azhār*<sup>1</sup>.

**I say:** What supports the permissibility is the saying of Allah, *Exalted is He*: *"Say, 'O Prophet,' 'If the Most Compassionate 'really' had offspring, I would be the first worshipper."* [Az-Zukhruf:81]— on the view that "in" is a conditional particle, and that what is joined to the *fa'* is the answer to the condition; and this is what appears to be the case.

**Yes,** the permissibility of administering an oath by this formula ought to be restricted, namely, that the one being put on oath is an oppressor, as in the story of Imām Yaḥyā ibn ‘Abd Allāh (*Peace be upon him*) and az-Zubayrī, and as is narrated from ‘Alī (*Peace be upon him*): "If you wish that the oppressor be hastened with punishment, then make him swear..." and he mentioned this oath, or as he said; or where the dispute and discord will not cease except by means of this oath.

This being so, what appears to me is that the one who swears by it neither becomes a disbeliever nor a flagrant sinner, whether he breaks (the oath) or does not break it, for such a judgment is only given on the basis of decisive proof. This is also because of His saying, *Exalted is He*: *"but those who embrace disbelief wholeheartedly—they will be condemned by Allah and suffer a tremendous punishment."* [An-Naḥl:106] – except if he swears regarding a matter while knowing the contrary, doing so deliberately.

This being said, as for administering such an oath in financial rights and what is connected to them, it is not fitting, due to His saying, *Exalted is He*, in the context of testimony and oaths: *"... 'By Allah! Our testimony is truer than theirs. We have not transgressed. Otherwise, we would surely be wrongdoers.'"* [Al-Mā'idah:107] and His saying, *Exalted is He*, concerning the li‘ān-oath: *"four testimonies [swearing] by Allah that indeed, he is of the truthful."* [An-Nūr:6].

**[One who says: "I am a Jew" or "I am a Christian" if I do such-and-such]**

**Question:** If a man says, "I am a Jew" or "I am a Christian if I do such-and-such," is he judged thereby to have disbelieved and his wife to have been divorced, even if he does not do the act on account of which he swore? Or does he not disbelieve unless that act is actually realized?

**Answer – and Allah is the One who grants success:** It is not appropriate to swear by such expressions, whether he fulfills his oath or not, and whether he is truthful or lying, except if necessity forces him and he is truthful in his oath. They have used as evidence for the permissibility of that His saying, *Exalted is He*: *"Say, 'O Prophet,' 'If the*

1- *Sharḥ al-Azhār* 4/10.

*Most Compassionate ‘really’ had offspring, I would be the first worshipper.”* [Az-Zukhruf:81]. He is not judged to be a disbeliever, nor his marriage to be annulled, if he does not do (the act), because he has suspended disbelief upon the act.

If he does what he swore upon, then his wife does not become separated from him so long as he persists in outwardly manifesting Islam; for it has not been transmitted from the Prophet (*May Allah bless him and his family and grant them peace*) that he ruled that the marriages of the hypocrites were annulled from their wives, although they uttered the word of disbelief and intended what they did not attain, and Allah, *Exalted is He*, has described them with the attributes of the disbelievers in many verses.

This being so, it appears that what you have asked about is lighter than what Allah has mentioned concerning the hypocrites, and Allah knows best.

**[The case of a man who swore to dedicate his wealth as a waqf if he did such-and-such, then did it]**

**Question:** A man swore that he would dedicate his wealth as a waqf if he did such-and-such, and then, after some time, he did what he had sworn about. What is required of him, and how is he to act, etc.?

**Answer – and Allah is the One who grants success and support:** Many of our Imams (*Peace be upon them*) have said that if a vow (nadhr) takes the form of an oath, then its author is given the choice between fulfilling his vow or expiating it with the expiation of an oath. Based on that, we say: The questioner is given the choice between fulfilling the waqf or expiating it with the expiation of an oath.

**Yes**, we have only said this by analogy with what our Imams (*Peace be upon them*) have said regarding the vow, namely that a man is given the choice, upon breaking (his word), between fulfilling the vow or expiating with the expiation of an oath.

Moreover, what we have said may be indicated by His saying, *Exalted is He*: *“Allah has already ordained for you the dissolution of your oaths. And Allah is your Protector, and He is the All-Knowing, All-Wise.”* [At-Taḥrīm:2], and His saying, *Exalted is He*: *“...but He will call you to account for the oaths you have bound yourselves with; so its expiation is to feed ten needy people from what you normally feed your own families, or clothe them, or free a slave...”* [Al-Mā'idah:89].

Furthermore, for a person to dedicate all his wealth as a waqf is an act of disobedience which Allah, *Exalted is He*, has forbidden, for He, *Glorified is He*, says: *“And do not keep your hand fastened to your neck, nor extend it completely, for then you will sit blamed and destitute.”* [Al-Isrā':29]. And in the Sunnah there is that which indicates what we have said; there is no

need to cite it alongside the verse.

So if dedicating all that a person owns as a waqf is an act of disobedience, then such a waqf is invalid; for waqf is an act of obedience, and obedience and disobedience do not come together in a single act. It has been established in the principles [of jurisprudence] that a prohibition indicates the invalidity of the thing prohibited; thus the waqf asked about is in that case null and void.

**Yes**, there is a stratagem to escape from such a waqf, which the scholars have mentioned, as in the commentary and its marginal notes. It is this: If a person swears by vowing his wealth or dedicating it as a waqf, then wishes to free himself from that, he removes his wealth from his ownership by transferring it to the ownership of his wife or his children, then he breaks his oath. They have said that this stratagem is a legitimate, saving legal device. Then, if he wishes, he may take back his wealth from his children. When he does that, his oath is dissolved. Praise be to Allah, Lord of the worlds, and may Allah bless Muhammad and his family and grant them peace.

#### **A useful note: (the oath concerning another person)**

According to the madhhab, it is binding with respect to another person, as in *al-Azhār* and its commentary<sup>1</sup>.

And Imām al-Qāsim ibn Muḥammad (Peace be upon him) has a fine detailed distinction concerning the oath about another person, which he mentioned in the marginal notes to *Sharḥ al-Azhār*, namely:

1. If the one who swears intends thereby to compel the other person to do what he has sworn about, and he is able to do that and to restrain him, then the other goes against (it), expiation is required of the swearer.
2. If he knows that the other person will go against him and he has no power to compel him, then it is an immersion oath (*yameen ghamūs*), for which there is no expiation except repentance.
3. If he knows or thinks that the other person will not go against him, but then he does go against (it), then it is a vain oath, with no expiation upon him, so long as he has no power to compel him; and similarly, that he deals with him in whatever way he can to make him comply (*affirmed*) (فرض), even by means of wealth. Thus it is in the marginal note, and at its end: "Finished (*affirmed*) (فرض)."

And in the marginal note also: As for (an oath regarding) something prohibited, it does not become binding with respect to another person,

1- *Sharḥ al-Azhār* 7/4.



by consensus.

### **[Important benefits relating to oaths]**

In *at-Tāj*: Whoever says, “This thing” or “this act is upon me like wine, or like pork, or like carrion,” or the like of that which is forbidden, that is not an oath. This is related in *al-Bayān* from Abū Ṭālib.

In *at-Tāj*: It is said concerning attaching an oath to marriage, prayer, fasting, ḥajj, ‘umrah, zakāt, and expiation, that one does not break his oath except by the valid performance of these, not by their invalid performance – except in the case of marriage, where he does break it by an invalid marriage if such has become customary. End quote.

And in *at-Tāj* also: If one who is in debt swears that he will pay (his creditor) on a specific day, then the creditor is absent on that day, he does not break his oath, because the time for payment has passed while he was unable to fulfill (his oath). End quote.

### **[Benefit Regarding a Legal Stratagem to Avoid Breaking an Oath]**

His, *Exalted is He*, saying: *“And take in your hand a bunch ‘of grass’, and strike ‘your wife’ with it, and do not break your oath.”* [Ṣād:44] It is understood from this that it is permissible to avoid falling into breaking an oath (ḥinth) by means of a legal stratagem (ḥīlah).

And it is also understood from this, in general, the legitimacy of stratagems (ḥiyal) in principle. However, what has come regarding the stratagem of the People of the Sabbath is problematic in this respect: *“...when their fish came to them on their Sabbath appearing on the surface, but on the day they had no Sabbath they did not come to them...”* [Al-A‘rāf:163]

### **[Stratagems to Avoid Breaking an Oath]**

In *al-Bayān*: If someone swears that he will not eat eggs, then swears that he will eat what is in this container, and finds it to be eggs, the stratagem is that he kneads them with flour and then eats them as bread. That is the end (of his words in meaning).<sup>1</sup>

Whoever swears that he will not have ‘ashā’ (supper) is not considered to have broken his oath by eating a small amount; this is stated in *al-Bayān* according to the school.

*I say*: The reasoning is that ‘ashā’ is a name intended for the customary meal; if he does not partake of the customary amount, then he has not broken his oath.

### **[Benefit: On Breaking an Oath]**

The position of the school, as in *al-Ḥawāshī*, is: If someone who owes a

1- *Sharḥ al-Azhār* 4/17.

debt swears that he will give its due to its owner on a particular day, then the creditor is absent on that day, he is not considered to have broken his oath. End (of quote).

**I say:** The proof for this is His, *Exalted is He*, saying: *“Allah does not burden any soul beyond its capacity.”* [Al-Baqarah:286]

On this is based the following: if he swears in that way and then is not able to fulfill (the payment) because of his insolvency, or because of any other impediment by which he is unable to fulfill.

### **Benefit [Regarding One Who Says “Astaghfirullāh” Immediately After His Oath]**

Al-Manṣūr Billāh, *Peace be upon him*, said: “Whoever says ‘Astaghfirullāh (I seek Allah’s forgiveness)’ immediately after his oath, remorseful, his oath is dissolved—as long as it is not in the right of a human being.” That is the end (of his words) from *Ḥawāshī al-Azhār*.<sup>1</sup>

And this benefit is useful for many of the common people from whom such oaths and seeking forgiveness are issued; they acknowledge it and are not required to give expiation, on the basis of this school attributed to Imām al-Manṣūr Billāh, *Peace be upon him*—and sufficient is he as an example to be followed.

### **[How one fulfills an oath not to part from his creditor, or that his wife will not go out]**

Whoever swears that he will not part from his creditor until he pays him, then he fulfills his oath through *ḥawālah* [transfer of the debt to another liable person] or *ibrā’* [remission of the debt]. And the apparent wording of al-Hādī (*Peace be upon him*) and Abū Ṭālib is that he also fulfills it through *kafālah* (guarantee); so when he takes from him a guarantor, he has fulfilled (his oath). This is stated in *Sharḥ al-Azhār*.<sup>2</sup>

– If a man swears: “My wife shall not go out except with my permission,” then if she goes out while he is pleased with her going out, he is not perjured, because “permission” (*idhn*) means approval, not notification. Thus it is (stated) in *al-Azhār* and its commentary<sup>3</sup>.

– And the legal stratagem to realize the state of permission is that he says to her: “Whenever you want to go out, I have given you permission.” End<sup>4</sup>.

1- *Sharḥ al-Azhār* 4/5.

2- *Sharḥ al-Azhār* 4/24.

3- *Sharḥ al-Azhār* 4/27.

4- *Sharḥ al-Azhār* 4/27.

### **A useful note: (Permission)**

In *al-Azhār* and its commentary it is stated: Permission (*idhn*) is not derived from *īdhān*, which is informing, but rather it is in the sense of approval. So if he is pleased in his heart but does not utter permission, and she goes out, he is not perjured. This is what has been deemed correct, and it is the view of ash-Shāfi‘ī and Abū Yūsuf, and to it al-Mu‘ayyad Billāh inclined. End<sup>1</sup>.

### **[The ruling on swearing by ḥarām and divorce]**

**Question:** In some regions it is very common to swear by these oaths: “(It is) ḥarām and divorce that I will indeed do such-and-such,” or “I did not do such-and-such, (it is) ḥarām and divorce,” and “(It is) ḥarām and divorce from my wife if I do such-and-such, or I will indeed do such-and-such.” What is your view regarding these expressions?

**Answer – and Allah is the One who grants success:** What I hold is that this does not constitute divorce, because divorce is not ruled as having taken place until it is made to fall upon the wife, and in these expressions there is nothing stating that divorce is upon the wife; rather, the import of the second expression revolves between two meanings:

1. *The first:* that divorce and ḥarām are issued by the wife; and the divorce pronounced by the wife upon her husband or upon someone else is of no legal consequence.
2. *The second* – and it is far-fetched – is that the meaning is that he is divorced from his wife, i.e., separated from his wife. This is not sound and carries no legal weight, because divorce applies to women, not to men; thus it is not valid for a man to divorce himself.

**If it is said:** The wording mentioned in the question is an expression by which the people of those regions swear, believing that divorce occurs thereby.

**We say:** No consideration is given to such a thing if it does not conform to the Sacred Law.

**If it is said:** Then let it at least be among the implicit expressions (*kināyāt*) of divorce, so that intention is taken into account in it.

**We say:** The nature of *kināyah* is that it indicates divorce by necessary implication, such as their saying, “Put on your veil,” or “Observe your waiting period,” for veiling on the part of the wife and observing the waiting period only occur due to divorce; whereas here there is nothing that indicates that divorce has fallen upon the wife.

1- *Sharḥ al-Azhār* 4/27.

And in the commentary and its marginal notes it is stated that “‘alayya aṭ-ṭalāq min zawjatī (Divorce from my wife is upon me)” or “yalzamunī aṭ-ṭalāq (Divorce becomes binding upon me)” are among the implicit expressions of divorce.

Sayyid Idrīs at-Tihāmī and Imām Yaḥyā said that these two are neither explicit formulae nor kināyah. Imām al-Mahdī said: And that is, in my view, the closer [to the truth].<sup>1</sup>

**I say:** Among the conditions of kināyah is that both the wording and the meaning are intended. On that basis, the one who swears by these kināyāt does not intend separation from his wife; rather, he intends to compel or convince his opponent.

And this is assuming that what is mentioned in the question is among the kināyāt – which is far-fetched; for the one who pronounces the wording mentioned in the question intends thereby an oath, such that it is as if he said: “I swear by ḥarām and by divorce from my wife that I will do such-and-such.”

The proof of the soundness of this interpretation is that the answer to the oath comes immediately after (the words) “ḥarām and divorce.”

**[The ruling on one who swore by divorce not to sit with his friends, then wanted to please them]**

**Question:** A man swore by the divorce of his wife that he would not sit with his friends who had strongly urged him to sit with them. He is from a distant land, and he uttered this oath while in a state of bewilderment, without any specific intention in directing the oath to a particular matter; rather, the oath of divorce simply issued from his tongue. Is there any stratagem by which he can avoid both things (i.e. divorce and displeasing his friends)?

**Answer – and Allah is the One who grants success:** If the oath is as described in the question, then its meaning must be carried upon the meaning customarily understood in such cases. I am of the view that when this swearer leaves and travels away from the land from which he swore by divorce, he has thereby fulfilled his oath. When he then returns to them after having travelled, the ruling of the oath no longer applies to him. Hence the stratagem is that he travel a *barīd* (a short legal distance of travel), then return.

**[Issues related to vows and oaths]**

In *Daw’ an-Nahār* by al-Ḥasan al-Jallāl it is mentioned that one of the Imāms among the scholars of our time held that whoever swears by

1- *Sharḥ al-Azhār* 2/386.

divorce is liable to the expiation of an oath if he does what he swore about, and his wife is not divorced.

And in *al-Minḥah* by Ibn al-Amīr it is stated: Know that Ibn al-Qayyim mentioned, in *Ighāthat al-Lahfān*, the issue of swearing by divorce and related that the scholars have four paths regarding it, and he chose – as appears from his wording – that nothing at all results from it, neither divorce nor expiation, whatever formula one uses. He spoke on it at length, so whoever wishes may refer to it. End.

**I say:** What appears to me is that the issue is based on whether the compound of a condition and its consequence is called an oath (*yamīn*) or not.

What seems stronger to me is that this is indeed called an oath in the legal usage, as evidenced by what has been narrated: “*The expiation for a vow is the expiation for an oath.*” This was narrated in the *Amālī* of Aḥmad ibn ‘Īsā from Ibn ‘Abbās, and it is said in *Ra’b aṣ-Ṣad’* that Muslim narrated it from Ibn ‘Abbās from the Prophet (*May Allah bless him and his family and grant them peace*).

And in *al-Amālī* from Imām al-Qāsim regarding a man who swore [to perform] ḥajj on foot, or that he would owe thirty ḥajj pilgrimages, or fewer or more, of what he cannot manage and has no power to do: that it is not binding upon him and not obligatory for him.

And therein, with its chain, it is related that Ma‘qil came to ‘Abdullāh ibn Mas‘ūd and said: “I have vowed not to sleep on my bed.” So he said to him: “Sleep on your bed and expiate your oath.”

And therein, with its chain, from ‘Ā’ishah concerning a man who swears [to give] the charity of his wealth; she said: “It is the expiation of an oath.”

And in *Ra’b aṣ-Ṣad’*: A conditional formula, if it contains urging, prohibition, affirmation, or absolution, then – as stated in *al-Baḥr* – it is, by consensus, an oath, because it contains the meaning of swearing and the thing sworn about.

And in *al-Amālī*, with its chain, from Ibn ‘Abbās regarding a man who had devoted his wealth as an offering; he said: “Cover your own need with it, spend on your dependants from it, pay your debt with it, and expiate your oath.”

And therein, with its chain, from the Prophet (*May Allah bless him and his family and grant them peace*): “*There is no vow in an act of disobedience, and its expiation is the expiation of an oath.*”

And in *Ra’b aṣ-Ṣad’* it is said that this ḥadīth was narrated by the Five from ‘Ā’ishah.

And therein, from Ibn ‘Abbās: “*The expiation for a vow is the expiation*

for an oath.”

And therein, with its chain, from ‘Uqbah who said: “My sister vowed to perform ḥajj barefoot and without a headcover. I mentioned that to the Prophet (*May Allah bless him and his family and grant them peace*), and he said: ‘*Command your sister to cover herself, and to ride, and to fast three days.*’” And in Ra’b aṣ-Ṣad‘ he said: It was narrated by the Five.

And therein, from Ibn ‘Abbās: “Whoever vows a vow without specifying it, its expiation is the expiation of an oath; and whoever vows concerning what he cannot do, its expiation is the expiation of an oath; and whoever vows a vow in disobedience to Allah, its expiation is the expiation of an oath.”

And therein, with its chain, from the Prophet (*May Allah bless him and his family and grant them peace*): “*There is no fulfillment of a vow in disobedience to Allah, and no fulfillment of a vow concerning that which the servant does not own.*”

These reports and traditions clearly indicate that the compound of condition and consequence is called an oath in the legal usage; and thus expiation is required upon breaking it, and no vow, divorce, or manumission takes effect – due to His saying, *Exalted is He: “Allah has already ordained for you the dissolution of your oaths”* [At-Taḥrīm:2], and His saying, *Exalted is He: “Allah will not call you to account for thoughtless oaths in your oaths, but He will call you to account for what you have bound yourselves by of oaths; so its expiation is the feeding of ten needy persons from the average of what you feed your families, or clothing them, or the freeing of a slave. And whoever does not find [the means] – then a fast of three days. That is the expiation for your oaths when you have sworn...”* [Al-Mā’idah:89].

And *laghw* (non-binding, inadvertent oaths) enters into this category by virtue of the verse, and this is the madhhab of an-Nāṣir and al-Manṣūr Billāh (*Peace be upon them*), as in *al-Bayān*.

As for the *ghamūs* oath here, it does not occur, and whatever appears outwardly in the form of *ghamūs* – its expiation is the expiation of an oath, due to the ḥadīth: “*The expiation for a vow is the expiation for an oath.*” We only say that *ghamūs* does not occur here because the *yameen ghamūs* plunges its author into the Fire, on account of his taking lightly the tremendous Name of Allah when he swears by Him while lying, and there is in this oath no taking lightly of the tremendous Name of Allah.

According to the madhhab: Whoever says, “This thing is upon me like wine, or like pork, or like carrion, or like my mother,” or the like of that which is forbidden, it is not an oath. End of quote from *at-Tāj*.

**[One who intends to fast if Allah heals his sick relative]**

**Question:** It is very often asked about someone who intended: “If Allah heals my sick relative, I will fast three days,” or something similar. Is that binding?

**Answer:**

1. If he said: “I intended *with* fasting ... etc.,” then what he mentioned is not binding upon him.
2. But if he said: “I intended *for Allah* with fasting ... etc.,” then he is bound to fulfill what he mentioned of fasting or charity.

**We only said that** he is bound to fulfill (it) in this second case because the word *niyyah* (intention) is used among them with the meaning of obligating and binding it upon oneself; so its meaning with them is: “I have made it obligatory upon myself, for Allah, to ...” and so on; and the well-known technical meaning of *niyyah* is not what is meant here.

**And we said that** it is not binding in the first case because he did not mention the word “Allah,” and the Imams, such as Zayd ibn ‘Alī (*Peace be upon him*), have stipulated that (the name of) Allah be mentioned. However, he ought to fulfill what he mentioned and not be negligent about it, for perhaps the healing of his sick relative was on account of that means.

**He vowed to Allah that he would remember Him for three continuous months**

**Question:** A person made a covenant with Allah, *Glorified be He*, that if He healed him from such-and-such illness, he would indeed remember Allah for three continuous months. Then he said: “And if I do not fulfill (this), O Lord, then make me like Tha‘labah ibn Ḥaṭīb.” Then Allah healed him from that illness. Does he have any way out from this covenant? And if he has no way out except by fulfilling it, what is the limit of “continuity” in his remembrance of Allah? The questioner has urged us strongly to give an answer.

**Answer:** What appears to me is that this covenant is in the ruling of an oath; for making a covenant with Allah to do such-and-such is a promise reinforced with the utmost degree of emphasis, which here is the covenant; and likewise an oath is, in such a case, a promise reinforced with the utmost degree of emphasis, which is swearing by Allah, *majestic and exalted*.

A believer ought to fulfill what he has sworn to do of obedience to Allah, *Exalted is He*. If what he has sworn to do becomes difficult for him or causes him hardship, then he should offer the expiation for his oath, in accordance with His saying, Exalted is He: “*Allah has already ordained for you [a way] to dissolve your oaths.*” [At-Taḥrīm:2]

And the verse of expiation in Sūrat al-Mā'idah was revealed regarding

some of the Companions who had sworn that they would fast and never break their fast, and stand in prayer at night and never sleep, and so on.

As for what came in the censure of Tha'labah, that was because he was miserly with the obligatory charity, rebelled against paying it, and did not fulfill his firmly emphasized promise in that regard. He had made a covenant with Allah that if Allah granted him wealth, he would indeed pay Allah's due in it and would be among the righteous who pay the charities due on their wealth and are not miserly with them.

What is mentioned in the question is not of the category of *nadhr* (vow); for an act of worship vowed becomes obligatory by the vow when its genus is already obligatory – unlike when a person swears an oath or makes a covenant with Allah to perform it. In that case, the act of worship does not become obligatory by virtue of that; rather, what becomes obligatory is guarding the oath, either by fulfilling it or by performing the expiation. So the legal responsibility here is attached to the oath, whereas in the vow it is attached to the vowed act itself.

If the one who has sworn wishes to fulfill what he swore to do of remembering Allah, *Exalted is He*, for three continuous months, then if he has a specific intention, the oath is directed by that intention. If he does not have a specific intention, then from the three months there are to be excepted whatever times necessity and need call for – such as the times of sleep, eating, drinking, and the needs of himself and his dependants in seeking a livelihood.

What I see for this person who swore is that he should offer the expiation for his oath, along with fulfilling the following:

- He should perform the five daily prayers together with their regular Sunnah prayers.
- He should glorify Allah, praise Him, and remember Him after the Fajr prayer until sunrise.
- Then he should go to his home and family for breakfast with coffee, according to his habit; and whenever an opportunity arises for him at that time to remember Allah, he should remember Him with praise, glorification, saying “Allāhu akbar,” and the like.
- Then he should go to seek his livelihood, if he is among those who seek a livelihood, and he should seek it as he customarily does, without being heedless of remembrance from time to time as opportunity allows, and without being completely heedless of the remembrance of Allah. When he finishes his work, he should go to the prayer, then to his home for lunch, and do as we mentioned concerning breakfast.

He should go at the end of the day to the gatherings of the seekers of



knowledge until the time of Maghrib. After the two prayers (Maghrib and ‘Ishā’), he should go to his home for dinner, sit with his family, and intend by his sitting with them and conversing with them that which Allah, *Exalted is He*, has commanded of kind treatment toward them. Then he should go to his bed and remember Allah until sleep overcomes him, and so on. The expiation will cover what he may have been heedless of in the remembrance.

**[Directing the oath of divorce according to purpose and intention]**

**Question:** A man swore by the divorce of his wife if she entered the house of so-and-so, and his motive for swearing was that in that house there was a man about whom he had doubts. If that man then leaves that house, does his wife become divorced if she enters it?

**Answer – and Allah is the One who grants success:** The swearer’s intention is what counts for him. So if the intention of the one who swore by divorce if she entered that house was that (divorce would occur) with the presence of that man in the house, and his intention was directed specifically toward him, then the wife does not become divorced if she enters the house after that man has left it.

The scholars of the madhhab have said: If a man swears that his guests will not leave, he fulfills (his oath) if they eat the customary food. End quote.

This is only because the swearer has his own intention and purpose, and the oath is directed toward intention and purpose rather than the outward wording. So even if an oath, in its outward form, appears unrestricted and general, it is restricted by intention and purpose. This is as between him and Allah, *Exalted is He*, not in the outward judicial ruling.

**[Using figurative and indirect expressions in oaths in the presence of those who do not understand them]**

**Question:** Is it permissible to use figurative expressions and metaphors frequently in speech among people who understand only the apparent (literal) meaning? And does one fulfill his oath if he swears, “This is my garment,” while intending (only) “a garment like it”?

**Answer:** There is no objection to using figurative expressions and metaphors frequently in speech, except in certain situations, including:

- When the listener would be harmed because of what he heard.
- When the speaker would incur suspicion concerning his honor or his religion, and likewise any other person.

If the figurative expression or metaphor is free of such things and what resembles them, then there is no objection to using it.

And whoever swears, “This is my garment,” while intending “one like it,” is truthful in his oath. The scholars have said: An oath is according to the intention of the one who swears it, so long as the wording can bear that intention in its literal sense, or in an indirect (kināyah) sense, or a figurative sense – except in matters of legal rights, where it is according to the intention of the one who administers the oath.

## [Chapter of Expiation]

### [The Ruling on One Who Repeats Vows, Oaths, and Breaking Them]

**Question:** A man swore by a vow (nadhr) of such-and-such that he would not do a certain act, then he did it. Then he repeated the vow and then broke it; and he swore by Allah and broke it; then he swore by leaving the religion, and by cursing himself, and all of that was repeated by him many times. He has now repented and feels the utmost remorse, and he now wants to be freed from the consequences. What is required of him? Inform us of how he can find a way out. Then, is it valid for him to lead the people in prayer as an imam, given that the people insist strongly on him doing so? Inform us, and peace.

**Answer – and Allah is the One who grants success:** This man is required to offer an expiation for an oath (kaffārat yamīn) for every vow and for every oath by Allah. Nothing of the expiations is required of him for swearing by leaving the religion or by cursing himself; however, repentance from that is required of him, and it is: remorse, and resolve not to return to it.

Thus, *“the one who repents from sin is like one who has no sin,”* and *“repentance wipes out what came before it.”* On this basis, it is valid for him to lead the people in prayer, and he is not harmed by what has passed of sins from which he has repented, regretted doing, and resolved not to return to. But it is proper for him to repeat repentance and seeking forgiveness in the future and not be heedless of that.

**Yes,** he is required to pay the expiations when he is able. If he is wealthy, he should hasten to pay them; and if he is poor, then when it becomes possible for him to pay them. *“Allah does not charge a soul except [with that within] its capacity.”* [Al-Baqarah:286] and *“except what He has given it.”* [At-Ṭalāq:7]

### [One Who Swears an Oath, Then Sees Something Else Better Than It]

In the *Amālī* of Aḥmad ibn ‘Īsā, with a sound chain, from the Prophet Muhammad, *May Allah bless him and his family and grant them peace:* *“Whoever swears an oath about something, then sees something else that is better than it, let him do it, for that is its expiation.”* Abū Ja‘far said: *“People are not upon that (practice).”*

Aḥmad and Ibn Mājah narrated from Ibn ‘Umar and Aḥmad narrated from Abū Sa‘īd the ḥadīth: *“Whoever swears an oath and then sees something else better than it, let him leave it, for leaving it is its expiation.”* This is the end of the quotation from *Ra’b al-Ṣad’*.

And in *Ra’b al-Ṣad’* it is mentioned that Abū Dāwūd said: “What has

been narrated about that is not to be given weight.”

**I say:** The narrations that command expiation are more sound, more numerous, and more famous, and upon them is the practice of the scholars of the schools of law. And the Qur’an has come with the ruling of expiation for oaths (kafārat al-yamīn), so no reliance is placed on narrations that contradict it.

### [A Question about Expiations for Oaths]

**Question:** A man grew up ignorant among ignorant people, heedless of the religion and its teachings. Then guidance spread, and he listened to the admonitions of the guides and attended their gatherings, so he repented to Allah the Exalted and turned to Him. Then he asked: How is he to act with respect to the many oaths in which he used to break his word, when he does not know how many they were, nor how many of them require an expiation?

**Answer – and success is from Allah:** What is obligatory upon the one who repents to Allah the Exalted, returning to Him after a long period of ignorance and heedlessness, is that he should be mindful of Allah the Exalted in what remains of his lifetime, and that he should increase in seeking forgiveness for the sins that have passed. And I do not see that expiations are due from him for what has passed of his oaths, because he grew up ignorant and heedless of the rulings of his religion; and Allah the Exalted does not call the ignorant, heedless one to account nor punish him until the call of Allah and the call of His Messenger, *May Allah bless him and his family and grant them peace*, reach him, as He the Exalted said: *“That is because your Lord would not destroy the cities for wrongdoing while their people were unaware.”* [al-An’ām:131] And He, Glorified and Exalted, also said: *“So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah.”* [al-Baqarah:275] And it has come in a transmitted ḥadīth: “Repentance wipes out what came before it.”

### [The Ruling on Numerous Oaths in a State of Disobedience]

**Question:** A man, at the beginning of his life, did not care about disobeying Allah, and he used to swear oaths a great deal. Then he repented to Allah and regretted what had issued from him. So what is required of him regarding the many oaths that he used to swear?

**Answer – and Allah is the One who grants success:** Our scholars have said that in such a matter he should make a reasonable estimate, and give in expiations what he thinks, or is certain, has covered what is due from him of expiations.

And what I hold in such a case is that the penitent should make a reasonable estimate of the amount of oaths. So if, for example, he estimates that he has upon him a thousand oaths, then he divides that

thousand oaths into three categories. That is because the oaths he used to swear customarily fall into those three categories: oaths of perjury (yamin ghamūs), idle oaths, and binding oaths; and expiation is only required for the binding ones. Thus it is not obligatory for him to offer expiation except for one third of that thousand oaths – that is, three hundred and thirty-three expiations – and this is when the one who swore does not know which of the three types of oaths predominated.

If he knows that what predominated in his oaths were the oaths of perjury – such that, in his estimation, they were for example two-thirds of his oaths, and the remaining third is shared between the idle and the binding oaths – then he must divide that remaining third between the idle and the binding oaths according to what he thinks most likely. If, in his estimation, they are equal, he divides that third into two halves. This is a detailed explanation of what the adherents of the madhhab intend by “making a reasonable estimate” (al-taḥarrī).

It is also possible for someone to say: If the matter is as stated in the question – that the one who swore did not care about disobeying Allah – then by that he would be a disbeliever; for not caring about disobeying Allah implies taking lightly the prohibition and command of Allah, and that is arrogance toward Allah the Exalted; and whoever is arrogant toward Allah is a disbeliever. The proof of that is what occurred in the story of Iblīs – *may Allah curse him* – when Allah the Exalted commanded him to prostrate to Adam, but he refused, and followed the whim of his own soul and did not care about disobeying Allah, so by that action of his he was among the arrogant disbelievers.

Once you understand that, then whoever is as the questioner has described, no expiations are required of him, and repentance is sufficient, because repentance from disbelief wipes out what came before it.

## [Chapter: Vows (Nadhr)]

### [Benefits regarding Vows]

In *al-Tāj* it says: As for charity (ṣadaqah), whether it is obligatory or supererogatory, if a place is specified for it, what is established in the madhhab is that its place does not become fixed, just as its time does not become fixed, whether it is given out by the one who made the vow, or by the executor (waṣī), or by the heir. That is, unless the intention of the one who made the vow was to spend it upon the people of that locality; in that case, it becomes specified for them and is not spent on others, because they are the ones upon whom the vow was made. They may be given it in that locality or elsewhere.

As for an endowment (waqf), its time and place do become fixed, so long as it is not in discharge of a right that was already obligatory upon the one who created the endowment; in that case it does not become fixed. As for a bequest (waṣīyyah), if it is for something already obligatory, its time and place do not become fixed; otherwise, they do become fixed. This is the end of the quotation from *al-Tāj*.

### A Benefit regarding a Vow when it takes the Form of an Oath

He said in *al-Masā'il al-Nāfi'ah*: If a vow (i.e. nadhr) takes the form of an oath – such as saying, “If I do not do such-and-such, then such-and-such is due from me” – then he is given the choice between fulfilling it or offering the expiation for an oath, because it is related in *al-Sharḥ* and *al-Intiṣār*: “Whoever makes a conditional vow is given the choice: if he wishes, he fulfills it, and if he wishes, he offers the expiation for an oath.” This was strengthened in *al-Baḥr*, and it is related from Imām Zayd, al-Bāqir, al-Ṣādiq, al-Nāṣir, the two Maḥdīs Aḥmad and Ibrāhīm, and Imām Sharaf al-Dīn and al-Mutawakkil ‘alā Allah. Then he mentioned some of the jurists of the madhhab and said at the end: “And the muftī strengthened it.” End of quote.

**I say:** Imām Abū Ṭālib also mentioned it in *al-Taḥrīr*, from al-Qāsim.

**If it is said:** The saying of Allah the Exalted, “*O you who have believed, fulfill [all] contracts*” [al-Mā'idah:1] – and many other texts from the Sunnah – indicate that fulfilling a vow is obligatory, without any choice.

**We say:** What we are dealing with here is a vow that has taken the form of an oath; what is meant by that is that the condition includes restraining the self from something or urging it to do something – such as saying, “If I go back to chewing qāt, then I am a vow-maker of such-and-such.” Any vow of this type is taken out from the general evidences of fulfilling vows; it is excluded from them and specified, by virtue of His saying the Exalted: “*Allah will not call you to account for thoughtless (meaningless) words in your oaths, but He will call you to account for what*

*you intended of oaths. The expiation for it is ...” [al-Mā’idah:89]*

As for a vow that is suspended upon a condition by way of reciprocation for a blessing from Allah the Exalted – such as seeking to bring about some benefit or ward off some affliction – then fulfilling it is obligatory by consensus, as mentioned in *al-Bayān*.

And in *al-Sharḥ*, quoting from Imām al-Muṭahhar ibn Yaḥyā and ‘Alī ibn Muḥammad: that if a vow takes the form of an oath, then nothing is required of him and he does not offer the expiation for an oath. End of quote.

The madhhab, as mentioned in the marginal notes on *al-Sharḥ*, is that whoever makes a vow to perform ḥajj while the conditions of ability (istiṭā‘ah) have not been completed, that vow falls away and no expiation is due from him.<sup>1</sup>

### **[A Discussion of the Ruling on Giving a Fatwā of Expiation for One who Swears by a Vow]**

*In the Name of Allah, the Most Merciful, the Most Compassionate*

All praise is due to Allah, Lord of the Worlds, and may Allah bless our master Muhammad, May Allah bless him and his family and grant them peace, and his pure Household, and grant them peace. To proceed: There has reached me, from the judge, the erudite scholar, the saintly Muḥsin ibn Yaḥyā ibn Muḥammad al-‘Ansī, residing in Jabal Bart, a question containing an objection to the fatwā of those among the Zaydīs who issue a fatwā of expiation regarding one who swears by a vow – while the evidences from the Book and the Sunnah, in his view, establish the obligation of fulfilling vows absolutely, without distinguishing between a vow that is suspended in the form of an oath and other than it. He – *may Allah preserve him* – has cited verses and ḥadīths concerning that.

***We say – and with Allah is success:*** Vows (nadhr) are of three forms:

1. An unrestricted vow.
2. A vow that appears in the form of an oath, or that has taken the form of an oath.
3. A vow suspended upon a condition in a context other than an oath – among them the vow of ‘Alī and Fāṭimah (*Peace be Upon them*) which you mentioned in the question.

The vow that has taken the form of an oath is the one about which the question has been raised. The difficulty can be resolved in several ways:

- 1– That the intention of the one who swears by a vow, and his purpose in that oath, is to convince the person addressed, or to urge him,

1- *Sharḥ al-Azhar* (4/54).

or to deter him, or the like. This is what is apparent in the case of one who swears. One who swears by a vow, or by divorce, or by manumission, only does so while disliking the occurrence of the vow upon his property, or the separation from his wife, or the freeing of his slave; this is what is apparent. And it has been authentically established that there is no statement and no action except with an intention; and there is no disagreement about that.

2- That swearing by a vow, or by manumission, or by divorce falls under the general category of oaths mentioned in the evidences of the Book and the Sunnah. And Allah the Exalted has said: *"Allah has already ordained for you [believers] the dissolution of your oaths."* [at-Taḥrīm:2]

In *al-Baḥr* it says: [Zayd ibn ‘Alī, al-Šādiq, al-Bāqir, al-Nāṣir, al-Manṣūr Billāh, and it is a narration from al-Hādī, and al-Šāfi‘ī]: He is given the choice between fulfilling it and offering the expiation, due to his saying: "If he wishes, he fulfills it, and if he wishes, he offers expiation." End of quote.

And in *al-Taḥrīr* of Abū Ṭālib, as the position of the madhhab: He is given the choice between fulfilling it and offering expiation.

4- The ḥadīth which you mentioned: *"If he wishes, he fulfills it, and if he wishes, he offers expiation"* – even if it has been said about it what has been said – its meaning has been adopted by many of the Imams (*Peace be Upon them*), and it was cited in *al-Taḥrīr* as the madhhab of al-Qāsim, al-Hādī, and their descendants (*Peace be Upon them*). And it is not hidden that the practice of many of our Imams in accordance with the meaning of the ḥadīth strengthens its authenticity, in addition to what it contains of facilitation, ease, and removal of hardship.

As for the evidences that you have mentioned, their general wording can be specified and their absolute wording restricted by what we have mentioned.

And what you have mentioned concerning the vow of ‘Alī and Fāṭimah (*Peace be Upon them*) is not of this category, since it did not come in the form of an oath. And what you have mentioned from Imām Zayd is correct, and the issue is a matter of scholarly disagreement, and his madhhab (*Peace be Upon Him*) is what you have related. In light of what we have set forth, it becomes clear that issuing a fatwā of expiation has a strong and weighty basis.

From a theoretical perspective, it may be said that swearing by a vow has two aspects:

1. From one angle, it is an oath.
2. And from another angle, it is a vow suspended upon a condition.

Thus sound consideration requires that both aspects be taken into



account by way of giving a choice, not by combining them; due to the consensus and agreement that the one who breaks (his oath) is not obliged by both the vow and the expiation together.

The madhhab of giving a choice is preferred, because it is free of arbitrariness: it has taken both aspects into consideration, unlike the other madhhab, which has acted on one aspect and neglected the other.

**If it is said:** The other aspect is not recognized in the Sharī‘ah, because a legally recognized oath is only that which is by Allah or by one of His attributes, and what we are dealing with here contains none of that—

**We say:** Swearing by a vow, or by an endowment, or by manumission, or by divorce is considered an oath according to the scholars of the Muslims. The jurists have devoted chapters to it and have said: The Imām is permitted to swear by it in the oaths of allegiance and the like. There is no disagreement that these are called “oaths”; the disagreement is only over what becomes binding upon the one who breaks them, and there are three opinions:

1. That the vow, or the divorce, or the like, becomes binding.
2. That the one who breaks it is given the choice between expiation and fulfilling the vow.
3. That nothing at all becomes binding upon the one who breaks it. And it appears that my master, the erudite scholar ‘Alī ibn Muḥammad al-‘Ajrī, *may Allah have mercy on him*, inclines to this last opinion in *al-Maqāṣid al-Ṣāliḥah* (printed); because of what has come in the ḥadīth concerning the prohibition of swearing by other than Allah the Exalted.

Once you understand that, then whoever among the Zaydīs issues a fatwā allowing a choice between fulfilling the vow and offering expiation has only looked to the two aspects we have mentioned, and has not relied on the weak ḥadīth that you mentioned.

- **Yes**, the evidences that you cited do not address swearing by a vow; rather, they concern an unrestricted vow or a conditional vow, except for what you mentioned from Imām Zayd ibn ‘Alī (*Peace be Upon Him*), for that does fall under what we are discussing.

And his statement is one of three opinions in the issue, and every mujtahid is correct. It has also been related in *al-Baḥr* that the opposite view is narrated from him. The issue is one of ijtihād, and every scholar who examines it has his own perspective. Imām Zayd (*Peace be Upon Him*) said in his collected epistles, when speaking about the differences among the People of the Household (Ahl al-Bayt) (*Peace be Upon them*): “Our differing is a mercy for you; but if we unite in agreement... etc.”

The prohibition of swearing by other than Allah the Exalted is to be understood as indicating dislikedness (karāḥah), in light of what we have

mentioned from some of our scholars: that it is permissible for the Imām to swear by that type of oath in the pledge of allegiance; and in light of their devoting chapters to it without drawing attention to its being prohibited. For if it had been prohibited, they would not have remained silent. This applies to the oath by vow and the like; as for swearing by idols and the like, that is not something a Muslim does.

**Yes**, it appears to me that the prohibition of swearing by other than Allah is intended for swearing by idols and the like, which they used to swear by as an act of glorification. As for swearing by divorce, by a vow, and the like, where there is no glorification of that by which one swears, this does not fall under the prohibition; because there is in it no glorification of other than Allah. Rather, it is only a matter of suspending one thing upon another by way of a condition.

### [Swearing by Divorce and Vows]

It appears to me – *and Allah knows best* – that swearing by divorce and by a vow is of two types, and the ruling differs between them:

1 – That the one who swears intends, in his oath, what he has made binding upon himself of divorce or of the vow, and that he actually means that and directs his intention toward it, and commits himself to it in his heart.

2 – That the one who swears intends by his oath nothing more than mere emphasis of his statement and corroboration of his claim, without any intention on his part toward what is mentioned in his oath of divorce, vow, and the like.

This latter category does not entail, when it is broken, any divorce, nor any vow, nor ḥajj, nor anything of that sort.

### [Important Rulings Related to Vows]

**According to the madhhab:** Whoever makes a vow that he will cause a person to perform ḥajj with him, or to perform ‘umrah, if that person obeys him, then it is binding; otherwise, nothing is due. And whoever says, “It is due from me to Allah that I dedicate my horse or my slave,” then he purchases with its price sacrificial offering<sup>1</sup>s and spends them where he intended. And whoever makes a vow to slaughter himself, or his child, or his contracted slave, then he slaughters a ram in that place. End of quote.

**I say:** The more correct approach is to distinguish and say:

- If by his vow, in “dedicating a person,” he intended that he cause that person to perform ḥajj with him or ‘umrah, then that is

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1- It is the plural of a sacrificial animal.

binding upon him.

- But if he intended by it to dedicate that person to the House (the Ka‘bah), as camels, cattle, and sheep are dedicated (as sacrificial animals), then the vow is invalid and nothing is due from him; the utmost that is due from him is the expiation for an oath, because he has vowed something that is not permissible.
- And in the case of a vow to dedicate a horse or a slave: If what is meant and intended at the time of the vow is that he dedicate the horse and the slave as sacrificial animals, slaughtering them for the House, then this vow is invalid and impermissible, and the utmost that is due from him is the expiation for an oath, because he has vowed an act of disobedience—except if his madhhab holds the permissibility of eating horse meat; in that case, it is binding on him to slaughter the horse, and he must offer expiation in the case of the slave, because slaughtering him is an act of disobedience.
- But if, by his vow, he intended to assign them to the House inasmuch as they are property, like gold and silver, and not for slaughter, then his vow is valid and binding; he must sell them and buy with the price sacrificial offerings for the House.
- As for one who vows to slaughter himself, or his child, or his contracted slave, this vow is invalid, because there is no vow in an act of disobedience to Allah; and its expiation is the expiation for an oath.

**According to the madhhab:** Whoever declares, “My property is in the way of Allah,” one-third of it is to be spent in acts that draw one near to Allah... and so on.

**I say:** It can be said that making a vow of all that a person owns is an act of disobedience, and there is no vow in an act of disobedience to Allah the Exalted.

The proof that it is an act of disobedience is His saying the Exalted: *“And do not make your hand [as] chained to your neck or extend it completely and [thereby] become blamed and insolvent.”* [al-Isrā’:29] And whoever vows all of his wealth has indeed extended his hand completely. The Prophet, *May Allah bless him and his family and grant them peace*, refused the charity of the man who gave a golden egg in charity when he possessed nothing else; the Prophet, *May Allah bless him and his family and grant them peace*, threw it back at him and disapproved of the one who gives all his wealth in charity and then sits with no wealth, begging from people. This is the meaning of the narration.

And in a ḥadīth: *“Charity is only from surplus (wealth).”* And He, *Glorified be He*, said: *“They ask you what they should spend. Say, ‘The*

*excess [beyond needs].”* [al-Baqarah:219] Thus Allah the Exalted has guided those who give charity, when they wish to give, that they should give from the excess; and the “excess” is what is beyond the need of a person and those he supports.

- If the vow is an act of disobedience, then it is not obligatory to give out one-third of the wealth, and the utmost that is due is the expiation for an oath. The scholars of the madhhab have said, as is mentioned in the marginal notes, that the expiation for an oath is only required for a vow to perform an act; but this is a vow of wealth, and expiation is never required in the case of a vow of wealth. Completed (*as determined*) (فُرِ).
- As for endowment (waqf), in my view it is like a vow: If a person endows all of his wealth and remains with nothing, the endowment is invalid, as has preceded; this is the view I incline to. So if a person endows all his wealth to a mosque or the like, the matter then requires a judge who will rule on the endowment, either as valid or invalid, because the issue is disputed.
- If a person transfers ownership of all his wealth to another man, and that man accepts and takes possession, and they both call witnesses to that, then that witnessing is valid, even if the original owner has sinned. The same applies if he gives it as a gift, or in charity, to him along with acceptance and possession: The recipient of the gift and the recipient of the charity own what they have taken possession of and accepted, even though the giver of the gift and the giver of the charity have sinned. His sin lies in the fact that he has extended his hand completely.

We have only said that such people own what they have been given because the cause of ownership has been realized, namely the offer (ījāb), the acceptance, the taking possession, the calling of witnesses, and the cheerful willingness of the giver.

**If it is said:** Why have you differentiated between endowment and vow, on one side, and between transfer of ownership, gift, and charity, on the other—ruling some to be valid and others invalid—even though the same impediment exists in all of them, namely what you have mentioned of the previous proof?

**We say:** Vow and endowment are acts of obedience to Allah and means of drawing near to Him, whereas disobedience to Allah is contrary to that. So if the endowment and the vow are acts of disobedience, then in the sight of Allah, and in His ruling, they are not a vow and not an endowment. The one who makes the vow and the one who establishes the endowment intend by them to “transfer ownership” to Allah,

*Glorified and Exalted*; but Allah the Exalted has forbidden the complete extension of the hand, and whatever He has forbidden, He will not accept.

As for transfer of ownership, gift, and charity, each of these aims at transferring ownership to the recipient, and the recipient owns what is given by acceptance and taking possession. That is, this is a transaction between the giver and the recipient, through an offer from the giver and an acceptance from the taker, and this is confirmed by calling witnesses. Once all of that has occurred, the transaction is completed, and all the causes of ownership are realized therein: offer, acceptance, taking possession, and witnessing.

The sin and disobedience of the giver do not invalidate the transaction's soundness; they only prevent him from attaining reward.

***If it is said:*** Allah the Exalted has praised the Anṣār for preferring the Muhājirīn with food despite their severe need of it, where He said the Exalted: *"They give them preference over themselves, even though they may be in need."* [al-Hashr:9] And He praised ‘Alī, Fāṭimah and their two sons in His saying the Exalted: *"And they give food in spite of love for it to the needy, the orphan, and the captive."* [al-Insān:8] And it is narrated, as to its meaning, that when he was asked about the best charity, he said: *"The utmost effort of one who has little."* All of that indicates the opposite of what you have said.

***We say:*** What you have mentioned applies in the situation where necessity and hardship encompass both the giver and the recipient, exactly as was the case for the Anṣār and the Muhājirīn in Madīnah at the beginning of Islam. The Muhājirīn migrated with the Prophet, *May Allah bless him and his family and grant them peace*, to Madīnah with their very selves, without wealth and without food, and they became numerous in the city. The souls of the Anṣār were generous in feeding them despite the Anṣār's own urgent need for food; one of them would prefer the Muhājir with his food and spend the night hungry. So Allah praised them for that, and this is a special situation, higher than mere charity.

An example of it is: Your brother is driven by hunger until he comes to you seeking your kindness and your compassion with something that will satisfy some of his hunger. It is befitting for you, if you are truly his brother, that you satisfy some of his hunger with what you have of food, even if you spend the night hungry; and thus were the Companions.

And likewise did ‘Alī, Fāṭimah, and their two sons (*Peace be Upon Them*): They gave their food to the poor person, the orphan, and the captive who were hungry, and they spent the night without food—out of their generosity, magnanimity, compassion, and mercy for the needy petitioners. This is the *"utmost effort of one who has little"* that is

mentioned in the ḥadīth.

- As for what we mentioned at the beginning, that concerns cases other than those of dire necessity.

### **[The Explicit Formulation of Vows, Divorce, and Manumission Does Not Require Intention]**

The explicit formulation of a vow, the explicit formulation of divorce, and the explicit formulation of manumission do not require intention; whereas any allusive expression of any of these requires intention and the intending of the meaning. This is the position of the madhhab.

**I say:** One who utters an explicit wording of anything we have mentioned, and then claims that he did not intend divorce, or a vow, or manumission, is not to be believed; judgment must be passed against him, and his claim is not to be heeded.

**If it is said:** How can that be, when it has been authentically and famously established in the ḥadīth: “*Indeed, deeds are only by intentions,*” and “*There is no deed except with an intention*”?

**I say:** That is because what is apparent from the state of every rational person is that he does not speak except with what he intends; and the rulings of the Sharī‘ah proceed upon what is outwardly apparent. For that reason it has come from the Prophet, *May Allah bless him and his family and grant them peace*: “*We only judge according to what is outward.*” Hence, no attention is given to a claim that contradicts what is outward.

There is, however, a situation, with respect to what we have mentioned, in which intention is taken into account: this is in cases of that sort where there is no disputant. Whatever occurs of that without purpose and intention does not take effect, and is of no consequence; and this is in what is between a person and his Lord.

The concealed aspect in that is that Allah is fully aware of what is in the hearts, and nothing of the hidden secrets is unknown to Him. The proof that such a thing does not take effect is the ḥadīth: “*Indeed, deeds are only by intentions,*” and “*There is no deed except with an intention.*” So if a layperson claims that he did not intend divorce, nor resolve upon it, and his wife does not dispute with him but rather confirms and acknowledges his statement, then he is left to his own affair and his path is not blocked. But if his wife disputes with him and takes him before the judge, the judge rules between them that the divorce is valid.

And if the layperson who has pronounced divorce upon his wife without any intention of divorce, nor any purpose except to frighten her, then seeks a fatwa according to his intention about the ruling of that, he is given a fatwā that his divorce has not taken effect.

Likewise is the ruling regarding divorce that is made part of a compound oath: that which he intended takes effect, and that which he did not intend does not take effect; and this is in what is between a person and his Lord. But if his wife disputes with him and takes him before the judge, the judge rules that the divorce has taken place and gives no weight to the intention.

Thus, in what we have mentioned there is a reconciliation between the two views: the view of those who consider intention, and the view of those who do not consider it.

### **A Benefit Regarding One Who Vows Not to Raise His Head from Prostration**

In *al-Bayān* it says: Al-Mu’ayyad Billāh (*Peace be Upon Him*) said: Whoever makes a vow not to raise his head from prostration, his vow is invalid. This may be because he is incapable of fulfilling it, or it may be because it prevents him from fulfilling what is obligatory; and both of these situations necessitate the expiation for an oath.<sup>1</sup>

**I say:** Based on this, the vow of one who vows never to leave the mosque is invalid, and he is required to offer the expiation for an oath.

### **[The Ruling on One Who Vows a Thousand Pilgrimages]**

**Question:** A man has vowed a thousand ḥajjs; what is required of him?

**Answer – and Allah is the One who grants success:** This vow is invalid, because it does not fall under the scope of what is within one’s capability. In such a case, what is required is the expiation for an oath; and this is the position of the madhhab, as in *al-Sharḥ*.<sup>2</sup>

**If it is said:** Why do you not say that this vow-maker should perform ḥajj as much as he is able, and then offer the expiation for an oath for what remains?

**We say:** It is stated in *al-Sharḥ*<sup>3</sup>, quoting some of the scholars of the madhhab, that no scholar has ever adopted this opinion. If that is the case, then it is not permissible to adopt it, because it contradicts consensus.

The proof for this issue is His saying *the Exalted*: “*Allah does not burden a soul beyond its capacity.*” [al-Baqarah:286] and the like.

### **[The Prohibition of Handing a Vowed Offering to a Custodian Who Will Consume It]**

1- *al-Bayān al-Shāfi*, manuscript, 2/171.

2- *Sharḥ al-Azhār* 4/52.

3- *Sharḥ al-Azhār* 4/53.

**Question:** Is it permissible to hand over a vowed offering or an endowment (waqf) to the custodian of a mosque, when it is known, or thought likely, that the custodian will not spend it properly but will consume it?

**Answer – and Allah is the One who grants success:** Handing it over in such a situation is not permissible and does not suffice; rather, it is obligatory upon the one who made the vow, or the one who established the endowment, to safeguard it until he is able to place it in its proper place.

The proof of that is the generality of His saying the Exalted: *“Indeed, Allah commands you to render trusts to whom they are due.”* [al-Nisā’:58]

### **[Giving Precedence to What Is More Important in Vows and Other Matters]**

**Question:** If a man vows to fast a month or two, without specifying which month, and he wishes to fulfill that vow, but fasting will cause him to miss important lessons in (religious) knowledge, and this will cause significant deficiency for the students of knowledge, is he required to hasten in fulfilling the vow, or is it permissible for him to delay the fasting and give precedence to seeking knowledge?

**Answer – and Allah is the One who grants success:** What is required is to give precedence to what is more important, then to what is next in importance; sound human nature so judges. On that basis, one gives precedence to seeking the knowledge that is obligatory, such as knowing the fundamentals of the religion and the rulings of those acts of worship that have become personally obligatory upon the student, like the rulings of purification and prayer, and other than that of what it is not permissible, in the sight of Allah, to remain ignorant of.

**Yes,** if the one who made the vow did not stipulate continuity in his vow, then it is appropriate that he distribute that fasting over the days of the weekly holidays, thus combining between both matters.

The scholars of the madhhab have said: One who vows to fast a month is not obligated to fast it continuously, unless he intends continuity or explicitly mentions it in words.

### **[The Ruling on One Who Swears by a Vow of a Sum of Money Not to Enter His Parents’ House]**

**Question:** A man swore by a vow of a sum of money that he would not enter the house, then he regretted this oath, and he is poor and does not possess that large sum; what is he to do? And this house is his parents’ house.

**Answer – and Allah is the One who grants success:** What is obligatory for him is to please his parents and enter their house, if they



will not be pleased except by his entering upon them. It is not permissible to fulfill an oath that involves an act of disobedience. If he enters, then let him offer the expiation for an oath, and that will suffice him. This has been narrated from many of the Imams and others; among those who have mentioned it is Abū Ṭālib (*Peace be Upon Him*) in *al-Taḥrīr*.

And in the athar (tradition): “Whoever swears an oath concerning something, then sees that something else is better than it, let him offer expiation for his oath and do that which is better.”

### **[The Ruling on a Charity or Vow for “al-Hādī”]**

**Question:** In our lands there sometimes comes a vow or charity “for al-Hādī” from many people, and we do not know what they intend by “al-Hādī”. Do they mean the mosque? Or the shrine and dome of al-Hādī? Or the students who study in his shrine? And this is while knowing that the agents of al-Hādī who are appointed to receive such things – it is not known where they take them. So what should one do with such offerings when they come into his hand to be delivered “to al-Hādī”?

**Answer:** What appears to me is that what the one who makes a vow or gives charity “for al-Hādī” intends is the mosque, and the mosque of al-Hādī (*Peace be Upon Him*) is already sufficiently provided for by the abundance of its endowments.

What I see in this matter is that whoever has a charity “for al-Hādī” fall into his hand should spend it on a mosque in need, or on reviving knowledge, or on some public interest.

### **[Vows Made upon the Dead or upon the Pigeons of Makkah]**

The scholars of the madhhab have said, as in *al-Tāj*: that if the one who makes a vow leaves it unrestricted – that is, upon something that cannot be owned – then it is invalid. They explained this by saying: because it is a transfer of ownership, and such things cannot be owned. But if, in the case of a vow upon the pigeons, what is intended is that they be supplied with food from it; or, in the case of a vow upon a dead person, that his shrine or dome be repaired, or that whoever serves him be supported, then it is valid.

**I say:** If a vow or an endowment is made “for the pigeons of Makkah” or “for a dead person” or for something that is not capable of ownership, and there is a known custom among the people that whoever vows in this manner, the vow is spent on repairing the shrine or on those residing at it, then the vow is valid, and it is applied according to that custom.

If there is no such custom, and the vow comes in unrestricted form, then the apparent ruling is that the vow or endowment is invalid, and

Allah knows best. This is derived from the words of the scholars of the madhhab.

### **[A Legal Device (Ḥilah) for Getting Free from a Large Vow]**

If a man vows all his wealth, or his car, or his field, if Allah heals his sick relative or the like, then the legal device for getting free from this vow is that he transfer whatever he vowed out of his ownership: he gives ownership of it to his son or his wife, then breaks what he swore upon. When he has broken it, he reclaims his car or his wealth and the like. This legal device is according to the madhhab, as in *al-Sharḥ*<sup>1</sup> and *al-Tāj*.

### **[Invalid and Valid Legal Devices]**

In *al-Minha* from Imām al-Nāṣir: “Every legal device by which one reaches the nullification of the objective of the Law is invalid; and every legal device by which one reaches safety from sin is permissible.” End of quote.

### **[The Ruling on Bringing a Vow Forward]**

**Question:** A woman vowed ten thousand riyals for some of her relatives, stipulating that this vow is to be carried out at the time of her death. Is it valid to bring this vow forward [i.e. to fulfill it before that time]? And if she actually did so, believing that it was permissible, is it valid?

**Answer – and Allah is the One who grants success:** What I see is that it is permissible to bring such a vow forward, by analogy with the permissibility of bringing forward the zakāt of gold, silver, and trade-goods. The common element between them is the presence of the cause of obligation: in the original case, the existence of the wealth in one’s ownership; and in the subsidiary case, the occurrence of the vow. The obligation (in principle) exists in both the original and the subsidiary; nothing remains except the condition for the obligation’s effect, which is the arrival of the time.

On the basis of what we have mentioned, it is valid to bring forward a suspended vow before its time arrives. This is the position of the madhhab, as in *al-Azhār* and its commentary, where it says: “Except in charity and the like, in which case bringing it forward suffices...” etc.<sup>2</sup>

**[The Difference Between “‘Alayya Ḥajjah (A Pilgrimage Is Due from Me)” and “Lil-Lāhi ‘Alayya Ḥajjah (It Is for Allah, upon Me, to Perform a Pilgrimage)”]**

In *al-Majmū‘* it says: Zayd ibn ‘Alī (*Peace be Upon them*) said regarding

1- *Sharḥ al-Azhār* 4/49.

2- *Sharḥ al-Azhār* 4/56.

a man who said, “If I speak to so-and-so, [then] a ḥajj”: that nothing is binding upon him. But if he says, “If I speak to him, then it is for Allah upon me to perform a ḥajj,” it becomes binding upon him. End of quote from *al-Ṣaḥīḥ al-Mukhtār*.

### **[The Ruling on One Who Makes Something Obligatory upon Himself by Intention Alone]**

**Question:** A man made something obligatory upon himself in his heart, by intention, such as fasting some days, or giving some money in charity. What is binding upon him?

**Answer – and Allah is the One who grants success:** It is not binding to fulfill what is mentioned in the question. That is because supererogatory acts of worship do not become obligatory merely by the intention of a vow; rather, they only become obligatory if he makes them binding upon himself by spoken wording, such as saying, “I have vowed to Allah the Exalted to fast two days,” or the like. It has been mentioned in the commentary of al-Qāḍī Zayd that there is consensus on this.

It is possible to adduce as evidence for this the ḥadīth: *“Indeed, Allah has overlooked for my community what they speak to themselves about, so long as they do not speak it aloud or act upon it.”*

For further benefit, we say: The actions of the heart are: knowledge and assumption (ẓann) and what follows from them; faith and disbelief and what follows from them; will, resolve, and intention.

Inner self-talk (ḥadīth al-naḥs) is something else.

And the action of the tongue is informing about what is in the heart, and performative speech (inshā’), and legal “effects” (iqā‘āt).

Among the performative utterances are the contracts of marriage and sale and all other exchanges. Among the “effects” are divorce, manumission, vows, endowments, oaths, and the like.

The Wise Lawgiver has attached the rulings of those performative utterances and those “effects” to the verbal expression of the tongue and its articulation of them.

### **[A Vow Accompanying a Sale]**

**Question:** A man sold a plot of land for a known price, in a valid sale. Then, at the end of the sale, he stated that he “bore witness and vowed and sold” for what had been mentioned. What is the ruling of this vow that accompanied the sale?

**Answer – and Allah is the One who grants success:** Consideration is given to the sale in what is mentioned, and the vow has no ruling; because an exchange has taken place and the essence of sale exists. Thus, the mention of the vow is mere idle wording.

### [Explanation of the Ḥadīth on Vows: *"It Does Not Bring Any Good"*]

It is narrated that the Prophet, *May Allah bless him and his family and grant them peace*, forbade vows and said: *"It does not bring any good; it is only by it that something is extracted from the miser."* Agreed upon.

I say: Allah the Exalted has commanded fulfilling vows in His saying the Exalted: *"And let them fulfill their vows."* [al-Ḥajj:29] And He has praised those who fulfill their vows in His saying the Exalted: *"They fulfill [their] vows and fear a Day whose evil will be widespread."* [al-Insān:7]

Allah the Exalted has also mentioned vows regarding the communities of previous dispensations. He said, concerning the mother of Maryam: *"[Mention] when the wife of 'Imrān said, 'My Lord, indeed I have vowed to You what is in my womb, dedicated [to Your service], so accept this from me. Indeed, You are the Hearing, the Knowing.'"* [Āl 'Imrān:35] And He said, concerning Maryam: *"Indeed, I have vowed to the Most Merciful abstention, so I will not speak today to [any] man."* [Maryam:26]

If vows were prohibited, as the outward sense of the ḥadīth suggests, Allah the Exalted would not have praised those who fulfill them, nor commanded them to fulfill them.

Having understood that, we say: The prohibition can be interpreted as being for the purpose of guidance to what is better – namely, leaving off making vows – because a vow increases one's burden of obligation: through a vow, something that was not obligatory becomes obligatory; and a person may not carry it out, thereby exposing himself to the anger of Allah. From this aspect, a vow is disliked; for that reason, it was avoided in those specific instances concerning which the Qur'an was revealed.

As for the vow in and of itself, it is not disliked; rather, it is recommended and encouraged, because Allah the Exalted, as we have mentioned, praised those who fulfill their vows and commanded that vows be fulfilled.

The ḥadīth can also be interpreted as referring to the kind of vow made by the one who vowed to stand in night prayer without sleeping, and the one who vowed to fast by day without breaking the fast, and the one who vowed never to approach women. The Prophet, *May Allah bless him and his family and grant them peace*, said to them, in meaning: *"As for me, I pray at night and sleep, I fast and break my fast, and I approach women. Whoever turns away from my Sunnah is not of me..."* and so on.

Or like the vow of the man who had a golden egg and offered it to the Prophet, *May Allah bless him and his family and grant them peace*, as charity, saying that he owned nothing else. The Prophet, *May Allah bless him and his family and grant them peace*, threw it back at him and

returned it to him, and said, in meaning: *“One of you takes his entire wealth and gives it in charity, then sits (afterward) begging from people.”*

Or the ḥadīth may be understood to refer to vows in acts of disobedience, or vows concerning what one cannot bear.

## [The Book of Strayed Animals, Lost Property, and Foundlings]

**[The Ruling on Lost Property in the Sacred Precinct]**

**Question:** If a man sees some money in Makkah or in Minā, is it permissible for him to pick it up?

**Answer:** If a man finds lost property in Makkah, it is required that he announce it. If he loses hope of finding its owner, he should spend it on (public) interests. If he is poor, or there is some (personal) benefit in that, it is permissible for him to spend it on himself.

If the lost property is a small, insignificant amount, he may pick it up and spend it immediately; this is because, due to the large number of people in Makkah in this age, one quickly loses hope of finding the owner. The same applies if the lost property is scattered coins with no container and no tie, and it is found in a place where it is not possible to identify its owner. But if it is in a place where the owner can be identified – such as if he finds it in a residential building or in a private camp – then he can ask the residents of the building or the camp.

If he announces it among the residents of the building or the camp, and no claimant appears, then once he has lost hope it is permissible for him to spend it on himself if he is poor or if there is a (legitimate) benefit, or to spend it on a poor person or a (public) interest.

If a man finds money in one of the bathhouses of the Sacred Precinct, then if he wishes to pick it up, he may do so and stand by the bathhouse until its owner comes; for its owner will return to the bathhouse if he remembers it. And if he wishes to leave it, he may leave it; it is not obligatory upon him to pick it up.

On the basis of what we have mentioned, Makkah and other places are the same in the rulings of lost property. As for the ḥadīth: *“Its lost property is not permissible except for one who announces it,”* this – and Allah knows best – is only to draw attention to the extra sanctity of (Makkah). Otherwise, lost property is not permissible except for one who announces it, in Makkah and elsewhere. It is only that the burden of sins is multiplied in Makkah more than in other places, just as the reward of acts of obedience is multiplied there.

It is not permissible to take lost property for oneself, neither in Makkah nor elsewhere; whoever takes it for himself is liable for it.

The scholars of the madhhab have said, as in the marginal notes on *Sharḥ al-Azhār*: It is not obligatory to publicly announce coins (dirhams) unless proof (bayyinah) regarding them is possible – such as when they are in a tied purse. End of quote.

And they said: When one thinks the owner does not exist, the obligation of making an announcement falls from him. End of quote.

And they said: If, from the outset, it is known that the owner will definitely never be known, then it is not obligatory to seek him; this applies to hidden things such as coins and the like, and it is permissible to dispose of them immediately. End of quote.

**I say:** The scholars of the madhhab have said that it is not permissible to return lost property except with (proper legal) proof, and that mere mention of descriptive signs is not sufficient for returning it, even if there is a strong presumption of truth. There are, however, two other opinions:

*First:* that returning it based on a (correct) identifying sign is permissible, but not obligatory.

*Second:* that returning it based on a (correct) identifying sign is obligatory.

What is more likely to me is that it is obligatory to return it based on a (correct) identifying sign when mentioning that sign produces a strong presumption (of truth), for acting upon presumption is obligatory. On that basis, it is obligatory to make an announcement about coins even if they are not in a purse, because their owner may be able to mention (distinguishing) signs.

Furthermore, the presumption arising from mentioning an identifying sign may be stronger than the presumption produced by (formal) proof.

**If it is said:** Formal legal proof (bayyinah) has come to be acted upon in wealth and rights and other matters, whereas mention of identifying signs has not been established by any evidence to be acted upon – so where is the proof for acting upon it?

**We say:** Mentioning an identifying sign is itself a kind of legal proof, not less in its ability to produce a presumption (of truth) than the testimony of two witnesses. What is meant by “bayyinah” is anything by which the right becomes clear. They have said that it is permissible to consume the property of another if circumstantial indicators show that it has been made permissible; and they have said that if a husband and wife both lay claim to what is contained in their house, it is judged that each owns what is appropriate for him or her, with no evidence except circumstantial indication. There are many similar examples.

### **[The Ruling on Silver Found in a Ruined Village]**

In the *Amālī* of Aḥmad ibn ‘Īsā, from Ali, *Peace be Upon Him*: regarding silver (coins) that were found in a ruined village, he said: “It is to be announced; if it is not recognized, then let him enjoy it.” And he said: “Whoever finds lost property must announce it for a year; if it is not recognized, then let him enjoy it as he would his own wealth.” End of quote from *al-Ṣaḥīḥ al-Mukhtār*.

### [The Ruling on One Who Picks Up a Banknote]

**Question:** Is a person who picks up a banknote required to announce it? And how is that to be done?

**Answer** – and Allah is the One who grants success: The madhhab, as mentioned in the marginal notes, is that it is not obligatory to announce coins (dirhams) unless legal proof (bayyinah) regarding them is possible – such as when they are in a purse.<sup>1</sup>End of quote.

**I say:** He is obliged to return it to whoever comes seeking it if a presumption of his truthfulness arises. Such a presumption may arise in the case of someone who comes seeking a specific banknote in a particular place, and informs that it slipped from his hand at a particular time. That is because the public calling out for lost property, the fact that it is a specific banknote, that the seeking of it is in a particular place, and that the loss occurred at a specified time – all of these are indications, the sum of which points to a presumption of the owner's truthfulness. All of this is so long as the one who is seeking it has not heard that someone picked something up in that place.

As for when that (presumption) does not arise, he should give the dirham or the banknote in charity to a believing poor person, or to a student of knowledge, or the like – or to himself if he is deserving of it. The Prophet, *May Allah bless him and his family and grant them peace*, gave 'Alī (*Peace be Upon Him*) permission to eat the dīnār that he had picked up.

### [The Ruling on Returning Lost Property to One Who Describes Its Features]

**Question:** If a man comes to the finder of lost property and claims that the item is his, and the finder asks him about its distinguishing signs and marks, and he describes it exactly as it is – does the finder's liability fall away by returning it to him?

**Answer** – and Allah is the One who grants success: There are three views in this matter:

1. That it is not permissible (to return it), even if the presumption of the claimant's truthfulness is strong. This is the position of the madhhab.
2. That it is permissible to return it based on the identifying mark, but not obligatory; this is the opinion of the majority of the People of the Household (Ahl al-Bayt) and the two groups (i.e. *Hanfis* and *Shafies*).
3. That returning it is obligatory in what is between the finder and Allah the Exalted. This is the madhhab of Mālik and Aḥmad, and it is

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1- *Sharḥ al-Azhār* 4/64.



narrated from al-Hādī and al-Mu’ayyad Billāh.

These views are mentioned in *Sharḥ al-Azhār*.<sup>1</sup>

**I say:** What appears strongest to me – *and Allah knows best* – is the third view: that it is obligatory to return it if the presumption of the man’s truthful claim is strong, and the liability of the finder falls away by doing so, as long as his lie does not become evident. If his lie later becomes evident – such as if another man comes and claims it, bringing upright legal proof or something that shows that it is his property – then in this case the finder is liable for it.

If the finder wishes to be safe from liability, he should stipulate upon the man who claims the lost property and describes it that he (the claimant) will bear responsibility if the true owner later appears; or he should state that he will not hand it over to him except by an order from the judge.

We chose the third madhhab for several reasons:

1– That in the Qur’an there are texts from which acting upon circumstantial indications (qarā’in) is derived; such as His saying the Exalted: *“If his shirt is torn from the front, then she has told the truth and he is of the liars; but if his shirt is torn from the back, then she has lied and he is of the truthful...”* [Yūsuf:26–27] and His saying the Exalted: *“O you who have believed, when the believing women come to you as emigrants, test them. Allah is most knowing as to their faith. And if you know them to be believers, then do not return them to the disbelievers...”* [al-Mumtaḥanah:10]

2– What has come in the Sunnah: that the Prophet, *May Allah bless him and his family and grant them peace*, returned the dīnār which ‘Alī (*Peace be Upon Him*) had picked up as lost property to the one who was seeking it, and it has not been narrated that he, *May Allah bless him and his family and grant them peace*, asked the seeker for legal proof (bayyinah).

3– What has been established: that it is obligatory in the dīn of Islam to act upon predominant presumption (al-ẓann al-ghālib).

4– Those who follow the first madhhab – those who say that it is not permissible to return it even if the presumption of the claimant’s truthfulness is strong – are addressed as follows: Legal proof (bayyinah) does not produce anything more than presumption, and yet you have declared that returning (property) based on legal proof is obligatory. So if an identifying description produces the same degree of presumption as legal proof, or even more, then what prevents the obligation of returning it (on that basis)?

1- *Sharḥ al-Azhār* 4/63.

**If it is said:** What prevents that is the existence of (other) possibilities; and there is another impediment, namely that it is not permissible to act based upon presumption in respect of the property of another.

**We say:** Those possibilities also exist with legal proof, because legal proof too only produces presumption; thus it is not sound to make that an impediment.

And your statement that “it is not permissible to act upon presumption in respect of the property of another” is refuted by the fact that legal proof produces nothing but presumption, and yet acting upon it in another’s property is permissible – rather, obligatory.

**If it is said:** We only ruled that returning property based on legal proof is obligatory – even though it produces nothing but presumption – because acting upon it regarding wealth is established in the Qur’ān, as in the verse of indebtedness in Sūrat al-Baqarah, and because of consensus on that. No proof has come establishing the obligation of acting upon what you have mentioned in the question.

**We say:** The fruit of testimony is presumption, and that is the objective of it. Whatever produces the same effect must be given the same ruling.

**If it is said:** Acting upon testimony is a matter of pure devotional compliance (ta’abbud), and thus it is obligatory to act upon it but not upon what you have mentioned. If it were otherwise, it would be obligatory to act upon the testimony of a fāsiq (openly sinful person) whenever it produced presumption; for this reason we said that it is not permissible to act upon circumstantial indications even if they produce predominant presumption.

**We say:** Acting upon testimony is rationally comprehensible in meaning. The reason why acting upon the testimony of two upright witnesses is obligatory is precisely because it produces presumption in the Sharī’ah. The testimony of the openly sinful was rejected because it does not produce presumption in the Sharī’ah. Allah the Exalted, Who is All-Knowing and All-Wise, has said: *“O you who have believed, if there comes to you a fāsiq with information, investigate, lest you harm a people out of ignorance and become, over what you have done, regretful.”* [al-Ḥujurat:6] Thus, Allah the Exalted has described the content of the fāsiq’s report as “ignorance” which is followed by regret. The report of a fāsiq does not, in reality, produce presumption; rather, as Allah the Exalted has informed, it produces ignorance and yields regret. From what we have mentioned, it is established that acting upon the testimony of two upright witnesses is obligatory precisely because it produces presumption.

### [Concerning a Child's Lost Property]

**According to the madhhab:** It is obligatory for the guardian to take it – i.e. the lost property – from the hand of the child, since he has no (legal) trustworthiness.

The rationale is that in preserving it there is preservation of the child's wealth, because the child is liable from his own wealth if it is destroyed before it is transferred to the guardian. End of quote from *al-Tāj*.

**I say:** on this basis, if the lost property is destroyed while in the hand of the child, then if its owner comes and the judge rules in his favour, if the child has wealth, the child's guardian must pay what the judge has obligated him to pay of its value. If the child has no wealth, then what is owed becomes a debt against him until wealth comes to him. This is according to the purport of what the scholars of the madhhab have mentioned.

It may be said: If the child is non-discerning (*ghayr mumayyiz*), he is closer in resemblance to cattle; in that case he is liable only to the extent that liability exists for damage caused by cattle, and the liability is upon his guardian, as with cattle. This is if the child is non-discerning. If, however, he is discerning (*mumayyiz*), then he is liable, because of his resemblance to rational persons.

### [The Ruling on a Child Picking Up Lost Property]

**Question:** If a child picks up lost property, what is the ruling? And what is required?

**Answer – and Allah is the One who grants success:** If a child picks up lost property, then what is required of his guardian is to take it from him. It then becomes, at that point, lost property in the hand of the guardian, to which the rulings of lost property are applied. If the lost property is destroyed while in the hand of the child, or is lost from his hand, its liability is upon the child, from his own wealth.

Thus, they only said that it is obligatory for the guardian to take it from the hand of the child in order to safeguard the child's wealth, for if it is destroyed while in the child's hand, the liability is upon the child from his wealth.

**Yes,** what we have mentioned is the madhhab, as in the marginal notes on *al-Sharḥ*<sup>1</sup>. They have considered lost property to be usurped property (*ghaṣb*) in the hand of the child, and for that reason they ruled that the child is liable, but they did not mention the underlying reason.

1- *Sharḥ al-Azhār* 4/58.

Perhaps the underlying reason – and Allah knows best – is that the child’s picking up the lost property is an aggression (jināyah) against the wealth of another, and the aggressions of children are liable from their wealth even though they are not legally accountable (mukallaf). This may be indicated by the generality of His saying the Exalted: *“So whoever has assaulted you, then assault him in the same way that he has assaulted you.”* [al-Baqarah:194]

Furthermore, they have held the owner of an animal liable when it destroys the crop of another, even though the animal is not legally accountable; so the aggression of a child is even more deserving of liability. There is no basis for making the guardian liable, because he is not the owner of the child. The child is the owner of himself, so the liability is upon him, from his wealth, and not from the guardian’s wealth.

What we have mentioned may also be indicated by His saying the Exalted: *“And (remember) David and Solomon, when they gave judgment concerning the field when the sheep of the people overran it at night, and We were Witness to their judgment. So We guided Solomon to the right understanding of the case; and to each [of them] We gave judgment and knowledge.”* [al-Anbiyā’:78-79]– and this is along with recourse to the reason for revelation.

### **[The Ruling on What the Torrent Mixes and Drags Away from a Market to a Distant Place]**

**Question:** What is the ruling concerning what a flood mixes together and drags away from a market to a distant place, such that one person’s property is no longer distinguishable from another’s, in addition to the fact that the people of the market are many?

**Answer – and Allah is the One who grants success:** If the owner of some item that the flood has dragged away cannot be identified, and the people (involved) are many such that it is not possible to distribute it among them, then it becomes for public interests (al-maṣāliḥ), and is spent therein; and the poor are among those public interests.

As for what it is possible to identify its owner, or where those involved are few such that it can be distributed among them, it must be returned to its owner. In summary, its ruling is the ruling of lost property, and Allah knows best.

### **[The Ruling on Taking Furnishings Blown from the Rooftop of a House]**

**Question:** A man saw some furnishings blown by the wind from the rooftop of one of the houses, so he ordered one of his workers to take them, and the worker took them. What is the ruling? And how does one free himself from the consequences of that?

**Answer – and Allah is the One who grants success:** Those furnishings must be returned by whoever has them in his hand, due to His saying the Exalted: *“Indeed, Allah commands you to return trusts to their rightful owners...”* [al-Nisā’:58] and the like of such verses that forbid consuming people’s wealth wrongfully and forbid mutual wrongdoing. Thus, whoever has those taken furnishings in his hand is obliged to return them immediately, whether he is the one who gave the order or the one who carried it out.

The other party must also strive to return them to their owner, or obtain release from him and ask him for pardon. That is because rectifying what was corrupted by the sin is a condition of repentance, by evidence of His saying the Exalted: *“Indeed, those who hide what We have sent down of clear proofs and guidance after We made it clear for the people in the Book – those are cursed by Allah and cursed by those who curse, except for those who repent and correct themselves and make evident (what they concealed) – those, I will accept their repentance, and I am the Accepting of repentance, the Merciful.”* [al-Baqarah:159–160]

Moreover, in the words of the scholars of the madhhab there is that which indicates that liability is incumbent upon everyone in whose hand (the item) has been, meaning that the owner of the furnishings has the right to claim from each one in whose hand they have been, and that one who has had them in his hand is not absolved by returning them to someone else who is not their owner.

**I say:** That is because everyone in whose hand they have been is commanded to return them to their owner, by evidence of His saying the Exalted: *“Indeed, Allah commands you to return trusts to their rightful owners...”* [al-Nisā’:58] and by evidence of what has been narrated from the Prophet, *May Allah bless him and his family and grant them peace*, that he said: *“The hand is responsible for what it has taken until it returns it,”* or as he said.

Whoever returns what was taken to someone other than its owner has not complied with what is in the verse and the ḥadīth and has not fulfilled what is required; rather, he is still required to return it to its people – and its people are its owner.

**If it is said:** A person may buy a commodity, then it later becomes clear that it was stolen. What then is the ruling regarding the buyer, given his ignorance, and the absence of the seller – and the price of the commodity may be high?

**We say:** What is required is that the commodity be returned to its owner, and what is required of the seller is that he return the price to the buyer.

However, the scholars of the madhhab have said: The seller is not

required to return the price to the buyer except in two cases:

1. If the buyer returns the commodity to its owner by a judicial ruling of the judge based on legal proof (*bayyinah*).
2. If he returns the commodity by order of the seller.

If he returns it without these two conditions, the seller is not required to return the price.

### **[The Ruling on Lost Property That People Commonly Overlook]**

In *al-Tāj* it says: That which people commonly overlook is what its owner would not seek if it were lost, of things that have no (real) value, such as a date or a raisin; such items are treated like things that are permissible to take. End of quote.

**I say:** There are trivial things that nonetheless have some value, which their owners may forget; and if they do remember them, they do not go back to them nor demand them afterwards. Custom has established leniency regarding such things. What appears to me – and Allah knows best – is that these are included under what the scholars of the madhhab mentioned. It has been narrated that the Prophet, *May Allah bless him and his family and grant them peace*, excused (overlooked) a staff, a whip, and the like.

### **[He Picked Up a Bracelet Then Sold It before Announcing It]**

**Question:** A man picked up a gold bracelet and sold it to his companion who was with him when he picked it up. After a long time, the buyer wanted to clear his liability, but he had already sold the gold. His purchase had been in Saudi Arabia, and he was in a state of ignorance and heedlessness of the religion. Later, after he sat with students of knowledge, learned from them, returned, and repented to Allah, what is required of him?

**Answer – and with Allah is success:** The scholars of the madhhab have said that if a finder picks up lost property for himself, not in order to identify its owner, his ruling in respect of liability is the ruling of a usurper (*ghāṣib*). And the buyer from a usurper has the same ruling as the usurper with respect to liability. On that basis, the finder is liable, and the buyer is also liable.

What I see is that if the buyer knows that the finder has freed himself from responsibility for what he picked up and has cleared his liability regarding it, then the buyer's liability is also cleared and he does not need to free himself as well. But if (the original) wrongdoing has not been cleared, then it is upon the buyer to free himself from it.

We only said that each of the finder and the buyer is liable for the lost property – such that it is obligatory upon each of them to return it or to return its value – because each one of them took possession of it and

held it; thus he is liable to be called to account for it, since it is not valid to take ownership of a Muslim's right except with the willingness of his own soul, and each of them took and possessed it without the owner's willing consent.

### **[The Ruling on Lost Items Forgotten in Means of Transport or Shops]**

A useful point that was asked about, and this is the answer:

– If a man forgets some of his belongings in a bus – whether a paid bus or otherwise – or in a shop, or in a house, then it is obligatory upon the owner of the bus, the house, or the shop to safeguard what its owner has forgotten with him of belongings. He is not obliged to announce it as he would with (regular) lost property, but he is obliged to preserve it until he reaches a state of conviction and despair regarding the return of its owner. When that despair and conviction occur, it is permissible for him to give it in charity to a poor person, or for a general public interest.

If thereafter its owner comes, the man informs him that he has given it in charity. If its owner is pleased with that, then (nothing more is required); otherwise, the man must guarantee it for him by paying its value, if he is unable to retrieve what he gave away from the poor person.

– If what its owner forgot was meat, vegetables, or the like of things which spoil and decay with the passage of time, then it is obligatory upon the owner of the bus or shop to sell whatever of that they find with them, and to safeguard the price. When its owner comes, he is given the price.

The proof that this is obligatory is the consensus that the guardian (walī) and the executor (waṣī) must safeguard whatever wealth of the orphans is under their hand or in their charge; and (likewise) the obligation upon the finder of lost property to preserve what he has picked up; and upon the trustee (amīn) to preserve what he is entrusted with; and likewise the borrower, pledgee, tenant, partner, investment-agent (muḍārib), proxy (wakīl), messenger, and so on.

### **[Written Announcements about Stray Animals and Lost Property Suffice Instead of Verbal Announcement]**

Written announcements in newspapers, on the doors of mosques, and in markets, concerning stray animals and lost property, take the place of announcing them verbally; because the intended purpose is to make them known and to seek their owner, and that is attained through written announcements.

Indeed, written announcements are even more effective and more complete in making (the matter) known, since the notice remains posted by night and day, and at the times of the prayers and other than them, as

is obvious.

### **A Benefit (Concerning Stray Animals)**

The scholars of the madhhab have said: A stray animal (al-dāllah) is not to be returned based on descriptive signs; rather, it is only to be returned with legal proof (bayyinah) along with a judge's ruling upon it. If the judge does not rule based upon the legal proof, then it is not permissible to return it. And if there is no legal proof, but the claimant only brings its distinguishing marks and descriptive signs, it is not permissible to return it, even if the presumption of the truth of his claim is strong, because acting upon presumption regarding the rights of another person is not permissible. End of quote from *al-Tāj* in meaning.

**I say:** With the corruption of the times, as in our present age, if the finder acts according to the statement of the scholars of the madhhab, claimants to stray animals or lost property will hurry forward and witnesses will crowd in, out of greed for that “windfall”. The better course is to turn instead to acting upon circumstantial indications and descriptive signs and to return (the property) on that basis. Allah the Exalted has said: *“So fear Allah as much as you are able.”* [at-Taghābun:16]

What we have mentioned is more effective in preserving lost property for its owner and returning it to him. Mentioning descriptive signs and circumstantial indications may even yield knowledge, for the unseen is known only to Allah.

**As for their statement** that acting upon presumption regarding the rights of another person is not permissible.

**We say:** Acting upon presumption regarding the rights of another person is not permissible when acting upon knowledge is possible. But when acting upon knowledge is impossible, it is permissible to act upon presumption, due to His saying the Exalted: *“So fear Allah as much as you are able”* – indeed, in cases of necessity, acting upon presumption becomes required. This is the very principle upon which the scholars of legal theory (uṣūl) have built their doctrine in practical rulings.

Furthermore, acting upon presumption in the wealth of another has been related from the Prophet, *May Allah bless him and his family and grant them peace*, that he, *May Allah bless him and his family and grant them peace*, said to Jābir ibn ‘Abdillāh: *“When you come to my agent at Khaybar, take from him fifteen wasqs. If he asks you for a sign, then place your hand upon his collar-bone.”*

### **[The Ruling on Finding a Sheep in a Village Whose People Have Fled]**

**Question:** If a man finds a sheep in a village whose people have fled out of fear of war, and he thinks that its owners have turned it loose,



renounced it, and left it, and that if he does not take it, it will die – is it permissible for him to take it for himself?

**Answer:** If the matter is as described, and the man finds a sheep or more, then he takes it either for himself or on behalf of its owner. If he slaughters the sheep, he must ascertain its descriptive signs and distinguishing marks, and then slaughter it.

After that, he must ask the people of that locality about the owner of the sheep. If he finds (the owner) and it becomes clear to him that he is the owner, he gives him the sheep or its value. If he does not find an owner for it, he gives the sheep or its value in charity. If the one who found the sheep is poor, then let him spend it upon himself.

**[The Book of Slaughtered Animals, the Uḏḥiyah, and the ‘Aqīqah]****[(Slaughtering in Reconciliation Gatherings – *al-maqāṣid*)]**

A question was raised about slaughtering in the *maqāṣid* (reconciliation gatherings), and there was a group present in the session when that question came, so there took place in the session discussion and review about that.

What appeared to me from that discussion is that there is no harm in the slaughter which people perform in the *maqāṣid*; because no evidence for prohibition has been established, and everything that has been cited as proof for forbidding it is of no benefit.

Moreover, slaughtering in order to appease a man does not constitute a valid cause for declaring it prohibited. This is because there is no disagreement that slaughtering to honour a guest, or for the sake of selling the meat, or to broaden provision for one’s family, or for other such purposes – among aims that may be recommended, obligatory, permissible, or disliked – is (in principle) allowed.

What appears is that what is forbidden among such things and unlawful to do is that the slaughterer mentions, over the sacrificial animal, a name other than the name of Allah – such as saying, “In the name of so-and-so” – or that he deliberately does not mention the name of Allah over it; because of His saying the Exalted: *“He has only forbidden to you dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah.”* [al-Baqarah:173] and His saying: *“And do not eat of that upon which the name of Allah has not been mentioned, for indeed, it is grave disobedience.”* [al-An‘ām:121]

Some also try to use as evidence for prohibition His saying the Exalted: *“So pray to your Lord and sacrifice [to Him alone].”* [al-Kawthar:2]

**We say:** What is forbidden of slaughtering for other than Allah is when the legally responsible person slaughters or sacrifices in a manner of worship and drawing near (to that other). Whatever slaughtering is of this kind is neither lawful nor permitted – just like what the people of Jāhiliyyah used to do in slaughtering for idols.

**It may be said:** The slaughter done in the *maqāṣid* is intended for appeasement, seeking pardon, making souls content, and showing appreciation, honour, and exaltation to the one for whom it is slaughtered; thus the slaughter, in this way, resembles slaughtering for idols.

**We reply:** Slaughter falls into three categories:

1. Slaughter for Allah the Exalted.
2. Slaughter for idols.

### 3. Slaughter for some other purpose.

Slaughter for Allah the Exalted is that by which one seeks nearness to Allah the Exalted, such as what is slaughtered in ḥajj, ‘umrah, and on the day of Eid.

Slaughter for idols is done in order to venerate them with sacrificial rites in a way akin to venerating Allah the Exalted, and they used to mention the names of the idols over the slaughter; for this reason He the Exalted said: *"and that which has been dedicated to other than Allah."* [al-Baqarah:173]

As for the slaughtering in the *maqāṣid*, it does not resemble that. What is intended by it, as it appears to me, is feeding those present from both sides; the shedding of blood is not sought in and of itself, and may not even occur to anyone's mind. The slaughter is only done for the sake of eating the meat and the two parties sitting together to eat, and what arises from that of hearts becoming pleasant and rancour leaving them.

What indicates that the aim in the *maqāṣid* is what we have mentioned is that, if the party coming for reconciliation were to slaughter the animal and then go back to his home, leaving it at the house of the other party, this would not be accepted from him. By doing so he would be nearer to blame and to an increase in estrangement and enmity. From this it becomes clear to us that the slaughter is only for the sake of gathering together to eat it, and what results from that of closeness, the removal of alienation, and the attainment of mutual good feeling.

#### [Some Lawful Slaughters]

In the marginal notes on *Sharḥ al-Azhār* it is mentioned: A question was put to Sayyid Aḥmad al-Shāmī, *may Allah have mercy on him*:

"What is your view regarding a number of Muslims who appease one another with sheep and the like – is such meat to be eaten, or is it forbidden? For al-Mu'ayyad Billāh (*Peace be Upon Him*), whenever he came upon something of that sort, would discipline the one who did it."

He answered: "If that appeasement is done by mutual consent, with hearts being put at ease, and for the sake of hearts coming together and the removal of rancour, then there is no harm in it. Otherwise, it is forbidden." End of quote (*Established*) (قرر).<sup>1</sup>

And in it: That slaughter which is done upon the reception of the ruler,

1- *Sharḥ al-Azhār* 4/83.

out of joy at his coming, is *lawful*. End of quote.<sup>1</sup>

And in it: al-Dawwārī, one of the scholars of the madhhab, mentioned that whoever slaughters for the jinn, intending thereby to draw near to Allah the Exalted so that He may repel their evil from him, then it is lawful. End of quote.

And in it, from some of the companions of al-Shāfi'ī, it says: Whoever slaughters a sheep and says, "I slaughter this for so-and-so, seeking his pleasure," the slaughtered animal is lawful, because he is not seeking nearness to him; unlike one who seeks nearness to an idol. End quote<sup>2</sup>.

### **[Taking Possession of the Slaughtered Animals of Belligerent Disbelievers]**

In the marginal notes on *Sharḥ al-Azhār*, according to the madhhab, it is stated that taking possession of the slaughtered animals of belligerent disbelievers makes them lawful and pure, and thus eating them becomes permissible.<sup>3</sup>

### **The Slaughtered Animals of the Jabriyah and the Mushabbihah**

**Question:** Are the slaughtered animals of the Jabriyah [those who believe in absolute compulsion] and the Mushabbihah [anthropomorphists] lawful?

**Answer – and Allah is the One who grants success:** The position of the madhhab is that their slaughtered animals are forbidden, as in *al-Sharḥ*<sup>4</sup>. Al-Amīr al-Ḥusayn ibn Badr al-Dīn, *May Allah have mercy on him*, chose the view that their slaughtered animals are lawful, treating them by analogy as People of the Book with regard to the permissibility of their slaughter.

I say: It may be argued for that view by the fact that it has not been narrated from the Prophet, *May Allah bless him and his family and grant them peace*, nor from any of the Companions that they avoided the slaughtered animals of the hypocrites, despite their great number in his time, *May Allah bless him and his family and grant them peace*.

It may also be supported by analogical reasoning with the slaughtered animal of the openly sinful person (al-fāsiq).

Moreover, what appears is that considering the soundness of the religion of the one who performs the slaughter (al-mudhakkī) is a matter

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1- *Sharḥ al-Azhār* 4/83.

2- *Sharḥ al-Azhār* 4/83.

3- *Sharḥ al-Azhār* 4/79.

4- *Sharḥ al-Azhār* 4/80.

in which leniency is appropriate, because, according to one opinion, the slaughtered animals of the People of the Book are lawful; likewise, the slaughtered animals of idolaters become lawful when taken as war booty; and the slaughtered animal of the fāsiq and the hypocrite is also lawful.

**[A Note on the Mention of the Prohibition of the Food of Polytheists and the Slaughtered Animals of the People of the Book and Others]**

[‘Alī ibn Bilāl] narrated, with his chain, in *Sharḥ al-Aḥkām* from Muḥammad ibn ‘Abd Allāh al-Nafs al-Zakiyyah: “Do not eat from the food of the people of shirk, nor from the slaughtered animals of the People of the Book; and do not cook in their pots until you have cleansed them with fire and water; and do not drink from their houses milk, or water, or clarified butter, or honey; and do not approach their food so long as it is in their houses; and their clothes are not lawful for you until they are washed; nor their vessels until they are cleansed with fire and water.” End quote.

**Benefit: (Hunting)**

Birds are safe in their nests; it is not permissible to take them, nor their eggs, by night or by day. The same applies to non-birds: if an animal has a den or “house”, it is not permissible to take it from there. If they are taken (in that way), eating them is lawful, but the one who took them has sinned in taking them.

It is permissible to hunt animals and birds at night if they are outside their “houses”. The prohibition concerns taking them from their houses by night or by day. If they are outside their houses, then it is permissible to take them and hunt them by night or by day.

**The Uḍḥiyah (Sacrificial Animal of Eid)**

In Sunan al-Tirmidhī, with his chain from ‘Aṭā’, he said: I asked Abū Ayyūb al-Anṣārī: How were the uḍḥiyahs in the time of the Messenger of Allah, *May Allah bless him and his family and grant them peace*? He said: “A man would offer a sheep as a sacrifice on his own behalf and on behalf of the people of his household; they would eat from it and feed others from it, until people began to boast (and compete), and it became as you see.” End quote.

And in it: Wakī‘ said: “A *jadh*‘ from the sheep is one that is six or seven months old.” End quote.

**I say:** What people practice, as we know in our lands – and among them is a great multitude of scholars – is that the single household offers one sheep as their uḍḥiyah and does not increase beyond that.

What I see regarding what has been narrated – that one sheep only

suffices for one person, a cow suffices for seven, and a camel for ten – is that this applies when the one offering the sacrifice is a pilgrim; there, it suffices only on behalf of one person.

### **Benefit: (The ‘Aqīqah)**

The ḥadīth: *“Every newborn is held in pledge by his ‘aqīqah: it is slaughtered for him on his seventh day, his head is shaved, and he is given a name.”*

The meaning of *“held in pledge (murtaḥan) by his ‘aqīqah”* has been explained in several ways:

It was said: If he dies while still a child, he will not intercede for his parents; this view is narrated from Ibn Ḥanbal.

It was also said: The meaning is that it (the ‘aqīqah) is binding and unavoidable, so its binding nature for the newborn is likened to the binding nature of collateral in the hand of the one holding the pledge.

And it was said: The intended meaning is that he is “held in pledge” by the harm of his hair; for that reason it came in the ḥadīth: *“So remove the harm from him.”* These explanations are mentioned in *Subul al-Salām*. The best of these explanations is the last one.

### **[Shaving the Hair of the Newborn on the Seventh Day]**

**Question:** Is the hair of a female child shaved on the seventh day just as the hair of a male child is shaved, and its weight in gold or silver given in charity, or not?

**Answer – and Allah is the One who grants success:** The apparent wording of the scholars of the madhhab is that male and female are the same with regard to the legislation of shaving their heads on the seventh day.<sup>1</sup>

What appears to me is that the wisdom in shaving the hair of the newborn on the seventh day is cleanliness, then the strengthening of hair growth; and this wisdom is required for both sexes.

The evidence for what we have mentioned as the underlying reason is what has been narrated from the Prophet, *May Allah bless him and his family and grant them peace*, in this chapter: *“Remove the harm from him.”*

## [The Book of Foods and Drinks]

### [The Original Ruling on Animals is Prohibition or Permissibility?]

**Question:** Is the basic principle regarding animals prohibition, or permissibility?

**Answer – and Allah is the One who grants success:** It has been said that the basic principle regarding animals is prohibition; this is the view of the scholars of the madhhab and others.<sup>1</sup>

And it has been said that the basic principle is permissibility.

Evidence for the first view can be adduced as follows:

1. Reason finds it repugnant and ugly to cause pain to an animal, by slaughtering, killing, or otherwise.
2. From His statement the Exalted: *“Livestock animals are permitted for you”* [al-Mā’idah:1], it is understood that, before Allah permitted them, they were forbidden.

Evidence for the second view can be adduced from His statement the Exalted: *“It is He who created for you all of that which is on the earth”* [al-Baqarah:29], from which it is derived that everything He created on the earth – and among that are animals – has been created so that the human being may benefit from it.

According to the first view, nothing from among animals is lawful to eat except what the Lawgiver has explicitly granted permission to eat, such as livestock animals.

According to the second view, it is lawful to eat all animals, except what the Lawgiver has explicitly forbidden, such as the dog, the pig, and domesticated donkeys.

### [What Becomes Pure by Taking Possession of the Abode of War]

In *al-Tāj* it says: Nothing becomes pure by taking possession of the Abode of War except that which has become impure by their slaughtering it. So if the Muslims take control of the place where the animal was slaughtered, it becomes pure, and whatever slaughtered animal they find becomes lawful, as well as whatever became impure by their moisture, such as clarified butter, fats, vessels, and the like... end (in summary).

**I say:** Included with that are the hides they use, for they are from the skins of what they slaughter.

It is also possible to include with that the case when the people of the Abode of War embrace Islam: in that case, their vessels and the hides

1- *Sharḥ al-Azhār* 4/97.

they use become pure, by evidence that it has not been transmitted that the Prophet, *May Allah bless him and his family and grant them peace*, forbade the people of Madinah, when they embraced Islam, from using the hides they used in irrigating their fields, despite their abundance.

### **Benefit: (Seeking Treatment by Means of Prohibited Things)**

In *al-Tāj*, according to the madhhab, its meaning is: It is not permissible to seek treatment by that whose prohibition is a matter of consensus. Thus, one addicted to wine is not permitted to seek treatment with anything of wine in order to ward off destruction from himself. As for one addicted to opium or similar narcotics, whenever he fears perishing from leaving it, it is permitted for him to use that by which he repels destruction from himself. End (in meaning).

*I say:* On that basis, it is permitted to seek treatment by the meat of the hedgehog and the frog, and by horse's milk and its meat.

### **[The Ruling on Drinking Donkey's Milk for One Afflicted with a Type of Cough]**

**Question:** Is it permissible to drink donkey's milk for a patient afflicted with a type of cough that, in our usage, is called "al-qahlūl", which is a severe cough?

**Answer:** It is permissible in case of necessity – "*except for that to which you are compelled*" [al-An'ām:119] – and Allah the Exalted has granted concession, in cases of necessity, for eating the meat of carrion; and donkey's milk is less severely prohibited than carrion.

### **[Fertilizing Farmland with Human Excrement and the Excrement of Animals Whose Meat Is Not Eaten]**

**Question:** Is it permissible to fertilize farmland with human excrement and the excrement of animals whose meat is not eaten?

**Answer – and Allah is the One who grants success:**

- The Sacred Law has come forbidding close contact with impurity and getting moistened by it, and has made it obligatory to keep away from it. He the Exalted said: "*And uncleanness avoid*" [al-Muddaththir:5], and: "*And do not approach immoralities – what is apparent of them and what is concealed*" [al-An'ām:151].

- There is no problem in the permissibility of touching the hand of a polytheist if it is dry. The Prophet, *May Allah bless him and his family and grant them peace*, spread out his garment for one of the polytheists to sit on; and it is obvious that, when he sat on the garment, his feet would be in contact with it. It is well known in the works of sīrah that the Prophet, *May Allah bless him and his family and grant them peace*, lodged the delegation of Thaqīf in his mosque, and that polytheists used to enter the mosque to meet him.



- In light of what we have mentioned, we can say: If the excrement is dry and hardened, it is permissible to take it and use it to fertilize crops and trees, especially if its collection and distribution are done with a shovel and basket.

- This is from the perspective of taking it, transporting it, and distributing it in the field. As for using it as fertilizer for crops, they have ruled that it is not permissible to use impure things. What appears to me – *and Allah knows best* – is that it is permissible to fertilize with impure excrement.

### **[The Ruling on Transplanting an Organ from a Deceased Person]**

**Question:** Is it permissible to transplant an organ from a deceased person, after his death, to another man with his prior consent before death and with the consent of his heirs; or with the consent of the deceased’s heirs alone; or is that not permissible?

**Answer – and with Allah is success:** There are legal principles agreed upon among the scholars of the Muslims, namely:

1. That the Muslim, alive or dead, has an inviolability that must be preserved and respected.
2. That severing a limb from among the limbs of a Muslim is not made lawful by (his) permission; and likewise causing him pain, killing him, humiliating him, and degrading him.
3. It is permissible to sever a limb of a Muslim and cause him pain when there is necessity for that – such as when the limb is afflicted with cancer.
4. Necessity makes prohibited things permissible, to the extent that the necessity is removed.

Upon consideration of what has preceded, the permissibility (of transplanting) becomes apparent.

**The proof of permissibility**, which indicates that transplantation is permissible, is necessity. The scholars of the madhhab have said, as in *al-Azhār* and its commentary: It is permitted under coercion to commit any prohibited act, except causing pain to a human being, killing him, committing fornication, and the like.

Their words thus indicate the permissibility, under coercion, of what is other than those; and among that is transplanting an organ from the dead by carrying out a surgical operation.

### **[The Ruling on Causing Pain to a Human Being]**

It is permissible to cause pain to a human being:

1. Either to repel a harm – such as surgical operations to remove disease, and cauterization for healing, and the like.

2. Or to bring about a benefit – such as circumcision, bloodletting (faṣḍ), and cupping (ḥijāmah).

### **Narcotic Substances**

**Question:** What is the ruling concerning narcotic substances?

**Answer – and Allah is the One who grants success:** Of narcotic substances, whatever acts upon a person in the manner of wine is prohibited; whatever is like that is, in ruling, wine, and is called “wine” in the Sacred Law, as it has been established that “every intoxicant is wine.”

Likewise, of narcotic substances, whatever harms a person’s health is prohibited. It is well known that narcotic substances, in general, harm the person and destroy his health, and that using them involves extreme danger. It has become widely known in the world that the disease of AIDS is among the consequences of using narcotics.

And it is well known today that narcotics are more harmful than wine. It is among the agreed principles with rational people that whatever’s harm and corruption outweigh its benefit and advantage is prohibited.

### **[A Note Mentioning What Is Disliked to Eat]**

In the marginal notes on *Sharḥ al-Azhār* it says: It is disliked to eat the gallbladder, the glands<sup>1</sup>, the animal’s private part, the tip of the “ear” of the heart, the tip of the tongue, the tip of the (outer) ear, the fat of the eye, the bladder, the two testicles, the hoof, the urinary passage, raw meat, the two eyes, the fat of the two ears, cartilage, and the brain. That is the end of the quotation from the marginal notes.<sup>2</sup>

### **[The Length of Time It Is Permissible to Drink Grape Juice, Fresh Date Juice, and Nabīdh]**

According to the madhhab: It is permissible to drink grape juice, fresh date juice, and nabīdh made from dates and raisins for three days. When four days are completed, it becomes disliked but not forbidden. It becomes forbidden at seven days, due to the intensity of its boiling and its throwing up froth. This may differ according to time, place, heat, and cold: whenever the boiling becomes intense and it throws up froth, it is forbidden even if that occurs before seven days.

In *al-Tāj*, according to the madhhab: The one who drinks or eats hashish, opium, and their like from (intoxicating) plants is not subjected to the ḥadd punishment; rather, he is only given discretionary punishment (taʿzīr).

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1- *al-ghuddad*: flesh between the skin and the meat resulting from a disease. End of quote from the marginal notes.

2- *Sharḥ al-Azhār* 4/82.

### [When the Purchase of Qāt Becomes Forbidden]

**Question:** The prices of qāt may be high. Is buying it considered extravagance and waste, so that buying it would then become forbidden for that reason?

**Answer – and Allah is the One who grants success:** The purchase of qāt is not forbidden for that reason; however, its purchase may become forbidden for another reason unrelated to high price, namely when buying it results in neglecting those one supports and failing to care for them. In the ḥadīth: *“It is enough sin for a man that he neglects those whom he maintains...”* But if a person fulfils what is incumbent upon him towards those he supports, then there is no blame upon him in enjoying what Allah has brought forth for His servants of good things, as He the Exalted said: *“Say, ‘Who has forbidden the adornment of Allah which He has produced for His servants and the good [lawful] things of provision?’ Say, ‘They are for those who believe during the worldly life, [but] exclusively for them on the Day of Resurrection.’”* [al-A‘rāf:32]

**[A Note in Explaining the Ḥadīth of the Prophet, May Allah bless him and his family and grant them peace: “Whoever Reclines on al-Ma’tḥūr ...” etc.]**

‘Alī ibn Bilāl narrated from Abū al-‘Abbās al-Ḥasanī, then mentioned the chain up to the Prophet, *May Allah bless him and his family and grant them peace*, who said: *“Whoever reclines upon al-ma’tḥūr, and wears al-mashhūr, and rides al-manzūr, and eats (all) the desires, will not smell the fragrance of Paradise.”*

**I say:** *al-ma’tḥūr* is the soft, luxurious mattress. Wearing *al-mashhūr* means: wearing clothes that people deem great when they see them (as if they are garments of dazzling colours). Riding *al-manzūr* means: riding a mount which people lift up their eyes to look at, because of its greatness and beauty. “Eating the desires” means: that he eats whatever the soul finds delightful and pleasing.

**Yes,** it is possible that what is intended is the one who does that in order to elevate himself above people and aggrandize himself; for whoever is like that rarely remains safe from pride, haughtiness, and self-admiration. For this reason He the Exalted said: *“Had Allah given abundant provisions to ‘all’ His servants, they would have certainly transgressed throughout the land.”* [al-Shūrā:27]

What has compelled us to this interpretation is that everything mentioned in the ḥadīth is, in itself, lawful, by evidence of His saying the Exalted: *“Say, ‘Who has forbidden the adornment of Allah which He has produced for His servants and the good [lawful] things of provision?’ Say, ‘They are for those who believe during the worldly life, [but] exclusively for them on the Day of Resurrection.’”* [al-A‘rāf:32] – except for the wearing of

gold, silk, and purely red and purely yellow (garments).

**[Benefit: On the permissibility of feeding the disobedient person in case of need, and on attending hospitality hosted by unbelievers]**

In *al-Muhadhdhab*: “Whoever feeds a disobedient person in case of need is rewarded.” End.

And in it also: “It is permissible to attend hospitality hosted by unbelievers in the Abode of Islam if the slaughterer is someone whose slaughtered meat is lawful to eat.” End.

**[The ruling on hospitality for the stranger who arrives]**

**Question:** Is it obligatory to show hospitality to a stranger who arrives? And does the one who falls short in that sin?

**The answer – and Allah is the One who grants success** – is as he said in the *Sharḥ* on *al-Azhār*: “Hospitality is only obligatory upon those who are from the people of tent-dwellings (*ahl al-wabar*), and they are the Bedouins, because of the report, and it is the saying of the Prophet (*May Allah bless him and his family and grant them peace*): ‘Hospitality is upon the people of tent-dwellings, and it is not upon the people of mud-brick dwellings (*ahl al-madar*).’” And this issue is a position held by Imām al-Mahdī ‘Alī ibn Muḥammad. End.

And what also indicates that is what has been narrated from the Prophet (*May Allah bless him and his family and grant them peace*), that he said: “Whoever lodges by a village, then wakes up in their courtyard hungry, it is a duty upon every Muslim to assist him until he takes his right.”

And in the marginalia of *al-Azhār*: al-Faqīh Muḥammad ibn Yaḥyā said: “Feeding the guest is a communal obligation (*farḍ kifāyah*) where food is not sold, not where it is sold.” End.

**I say:** People of sound reason censure the one who falls short in feeding the stranger who has arrived, whether he has arrived to the people of tent-dwellings or to the people of mud-brick dwellings whose villages do not contain restaurants and markets, and they describe the one who falls short in that as base and mean. In this there is evidence for the correctness of the saying of the scholars of the madhhab that it is obligatory in the case of the people of tent-dwellings, and for the soundness of the ḥadīth which they mentioned from the Prophet (*May Allah bless him and his family and grant them peace*).

**Yes**, the people of villages who resemble the people of tent-dwellings can be analogically compared to them; thus it is obligatory upon them to host the stranger just as it is obligatory upon the people of tent-dwellings.

**If it is said:** It has come in the ḥadīth which they narrated: “*Hospitality is upon the people of tent-dwellings, and it is not upon the people of mud-brick dwellings,*” and there is no analogical reasoning in the presence of a text.

**We say:** What is meant by “the people of mud-brick dwellings” in the ḥadīth are the people of villages in which markets are available, and in which food and that which the traveller and the stranger need is sold.

This being so, the enforcing of hospitality upon the people of the villages in Yemen took place according to what we have mentioned, as reported from those who caught the last period of the rule of the Imāms, and this analogical reasoning which we have mentioned is sound; because there is no difference between the original case and the branch except hair (of tents) and earth (of buildings), and it is not valid to distinguish between them by that, for hair and dust have no effect in making hospitality obligatory or not, and there is no appropriate causal link in that.

**If it is said:** It has come in the ḥadīth from the Prophet (May Allah bless him and his family and grant them peace): “There is no right in wealth except zakāt,” and: “It is not lawful to take the wealth of a Muslim except with his willing consent.”

**We say:** That is general, specified by what we have mentioned, and by the maintenance of relatives, and by relieving one in dire necessity.

And in *al-Bayān*: <sup>Issue:</sup> Imām Yaḥyā said: “Feeding the guest is a communal obligation (*farḍ kifāyah*) where food (that is, prepared food – marginal note) is not sold, not where it is sold; because of the saying of the Prophet (May Allah bless him and his family and grant them peace): ‘Hospitality is upon the people of tent-dwellings and it is not upon the people of mud-brick dwellings.’”

### **[The ruling on hospitality when the host deals in narcotics]**

**Question:** Is it permissible to accept hospitality from one who deals in narcotics? And is it permissible to borrow from him?

**The answer – and Allah is the One who grants success** – is that what appears to me is the permissibility of both matters; thus there is no objection to eating from his food and borrowing from his wealth.

The proof for that is that the Prophet of Allah (May Allah bless him and his family and grant them peace) used to buy food from the Jews while he knew that they consumed usury and unlawful gain, and likewise did the Companions.

And the Prophet (May Allah bless him and his family and grant them peace) stipulated upon the Christians of Najrān, in his peace treaty with

them, that they host the envoys of the Muslims for twenty days.

## [Book of Clothing]

### [Wearing red and yellow under the garments]

**Question:** Is it permissible for a man to wear under his clothes a red or yellow undershirt?

**The answer:** What appears to me is that there is no objection to that, because there is no adornment in such a case and no arrogance.

And it has been mentioned in the *Sharḥ* from al-Qāsim, *peace be upon him*, that he said: "There is no harm in rugs and cushions stuffed with silk."

And it has also been mentioned in the *Sharḥ* from the jurist Yaḥyā ibn Ḥasan al-Buḥaybīḥ that if something else is spread over the silk, it is permissible.

This, what we have said, is of the category of specifying (the ruling) by the underlying cause.

### [Is wearing trousers and the necktie imitation of the unbelievers?]

**Question:** Is wearing trousers alone and the necktie considered imitation of the unbelievers, and likewise shaving the beard?

**The answer – and Allah is the One who grants success** – is that imitation has come to be prohibited in an unrestricted way, without being confined to something specific. He, Exalted, said: "*O you who have believed, do not be like those who disbelieved...*" [Āl ‘Imrān:56], and likewise in the Sunnah. And wearing trousers and the necktie today is no longer a dress specific to the unbelievers, as appears; therefore, wearing that is not considered imitation of the unbelievers. Likewise, shaving the beard is not something specific to the unbelievers, so the one who shaves his beard is not considered an imitator of the unbelievers.

### [The ruling on curtains and fabrics with which the walls are adorned]

**Question:** What is the ruling regarding curtains and fabrics with which the walls are covered for adornment?

**The answer – and Allah is the One who grants success** – is that what appears to me – *and Allah knows best* – is that this is permissible and there is no objection to it. The proof for that is His saying, Exalted: "*Say, 'Who has forbidden the adornment of Allah which He has produced for His servants and the good things of provision?'*" [al-A‘rāf:32]. This is so as long as it is not accompanied by exalting oneself over people or by showing off.

And another proof is His saying, *Exalted*: "*And were it not that mankind would have become one community [of disbelievers], We would*

*have made for those who disbelieve in the Most Merciful – for their houses – ceilings of silver and stairways upon which they ascend, and for their houses doors and couches upon which they recline, and ornaments. And all that is not but the enjoyment of worldly life; and the Hereafter with your Lord is for the righteous."* [al-Zukhruf:33-35].

**If it is said:** It has been narrated that the Prophet (*May Allah bless him and his family and grant them peace*) tore down curtains that ‘Ā’ishah had hung on the walls of her house.

**We say:** The Prophet (*May Allah bless him and his family and grant them peace*) disliked that because of what was in them of images, and the Prophet (*May Allah bless him and his family and grant them peace*) used to dislike the adornment of worldly life, as a refinement of his character by the etiquette of Allah with which He singled him out, in His saying, Exalted: *"And do not extend your eyes toward that by which We have given enjoyment to [some] of them – the splendour of worldly life by which We test them. And the provision of your Lord is better and more enduring."* [Tā Hā:131].

As for what has been narrated from the Prophet (*May Allah bless him and his family and grant them peace*) in its meaning: “We have not been commanded to cover stones and clay,” this does not indicate prohibition, nor does it entail it.

Furthermore, it has not been transmitted that any of the Muslims disapproved of the *kiswa* (covering) of the Ka’bah, neither in the past nor in recent times; rather, the Prophet (*May Allah bless him and his family and grant them peace*) approved of the covering of the Ka’bah and did not disapprove of it.

**Yes**, if that is accompanied by exalting oneself over people, showing off, or the like, then it is forbidden, due to the prohibition of arrogance, pride, and showing off.

### [The ruling on manufactured leather]

**Question:** What is the ruling on manufactured leather that is imported from the lands of the unbelievers, such as shoes and the like?

**The answer:** It has not been narrated that the Prophet (*May Allah bless him and his family and grant them peace*), when he migrated to Madīnah, forbade them from using leather, water-skins, and vessels made from leather; he did not command them to discard them nor to replace them. And the scholars of the madhhab have said that this and the like of it, such as clarified butter and fat, become pure by the dominance of the Muslims over it. Based on this, whatever manufactured leather enters the lands of the Muslims is ruled to be pure.

### [The ruling on plucking white hair]



**Question:** Is it permissible to pluck white hair from the beard, the cheeks, and the head, or not?

**The answer – and Allah is the One who grants success and support** – is that the scholars of the madhhab have mentioned, as in *al-Bayān* and its marginal notes, that it is forbidden to pluck the hair of the pubic region and other than it, and they did not except from that except plucking the hair of the nose and the armpit.

And that which can serve as an indication for this is what came in a ḥadīth from the Prophet (*May Allah bless him and his family and grant them peace*), that he cursed the woman who joins hair (to another's hair)... and so on, and he mentioned in it *al-nāmiṣah* [the woman who plucks], and they explained *al-namṣ*, as in *al-Bayān*, that it is plucking the hair of the pubic region, and it was said: It is plucking the hair of the forehead and the face. (A marginal note from *Sharḥ al-Azhār*. Completed, and (*taqrīr*) (تقرير)).

Then he said in *al-Bayān*, in enumerating the disliked matters with respect to the beard: “It is disliked to lengthen the beard with the hair of the temples, and to arrange it, and to whiten it with sulphur in order to display advanced age, and to pluck the white hairs from it, and to tie it, and to split it into two halves, and to twist it, and to leave the hair dishevelled and dusty.” End.

### **The ruling on trimming beards**

**Question:** Is there any evidentiary basis that permits trimming the beard, given that the apparent sense of the saying of the Prophet (*May Allah bless him and his family and grant them peace*): “Trim closely the moustaches and let the beards grow,” indicates the obligation of letting it grow, and that “letting it grow” (*al-iʿfā*) means leaving it upon its natural state, as is well known – namely, that its hair be allowed to grow and not be cut like the moustache, as is stated in *Nihāyat* Ibn al-Athīr?

And this is further strengthened by the occurrence of some well-known narrations with the wording: “*Make the beards abundant*,” which was mentioned by my master, the genius ‘Alī ibn Muḥammad al-‘Ajrī (*may Allah have mercy on him*) and others.

And does the aspect of “differing from the polytheists” – and in some narrations from the Magians, and in some from the Jews – indicate an emphasis on the obligation of letting it grow, or a prohibition of trimming it, as some scholars of legal theory have mentioned: that when a prohibition is coupled with censure it indicates an emphasis on the prohibition of the thing forbidden?

And in my mind is that Imām al-Hādī (*Peace be upon Him*) considered letting the beard grow to be of the Sunnah in the *Kitāb al-Sunnah*, so

what is the contextual indicator that diverts the command from obligation to recommendation? Or does he intend by “Sunnah” the way and manner upon which the Prophet (*May Allah bless him and his family and grant them peace*) was, which would then include obligation – as is indicated by its being mentioned alongside circumcision, rinsing the mouth, inhaling water into the nose, and the like in some aḥādīth? Clarify for us the answer, for the earlier scholars of our land are strict regarding obligation. May Allah be with you. End of question.

**The answer:** The question and what it contains revolves around the ḥadīth that commands trimming the moustache and letting the beards grow. So know that this ḥadīth and those similar to it occur in the chapter of etiquette (*bāb al-ādāb*). By “those similar to it” we mean such as the ḥadīth concerning eating with the right hand, eating from what is directly in front of the eater, trimming the fingernails, plucking the armpit hair, shaving the pubic hair, and the like. What has come in this chapter is one of the categories of Sunnah.

And the command in it does not go beyond recommendation (*nadb*), and the prohibition in it does not go beyond dislike (*karāhah*). The contextual indicator that diverts the command and prohibition from obligation and forbiddance in this chapter is that all of it occurs within the chapter of etiquette.

**And we add in clarification of that:** that the tribes of the Arabs, including Quraysh, used to conduct themselves with many praiseworthy etiquettes, such as wearing turbans, combing the hair and parting it, cleanliness of clothes and bodies, observing dignity in eating, walking, and speaking, letting the beards grow and trimming the moustache, and so on.

This chapter has distinguishing features and signs, among them:

1. That these etiquettes were known before the coming of the Sacred Law.
2. That it appears that the command and prohibition in this chapter are not based on consideration of benefits and harms in the way that is the case in what has come concerning fornication, wine, theft, prayer, fasting, jihād, and so on.

- A command from the Messenger (*May Allah bless him and his family and grant them peace*) has indeed come regarding differing from the polytheists, the Jews, and the Magians. As for the matter of the beard, the apparent case is that the polytheists and Jews used to let their beards grow, and perhaps the Prophet (*May Allah bless him and his family and grant them peace*) commanded differing from the Magians with regard to the beard and the moustache.

And in summary, what has come from the Prophet (*May Allah bless*

*him and his family and grant them peace*) of commands to differ from the Magians, the Jews, or the polytheists is divided into categories:

1. Of it is what occurs concerning something they do which is prohibited; then differing from them is obligatory.
2. And of it is what occurs concerning an act that is recommended; then it is recommended, such as his command to fast the ninth along with the tenth in the fast of ‘Āshūrā’, if he indeed commanded that.
3. And of it is what occurs in the chapter of etiquette; then it is recommended, such as what has come regarding beards and the moustache.

Except that there is a special case in which differing from them is obligatory in all circumstances, without looking to anything else: namely, when the Jews or others are distinguished by doing some practice – such as what the Jews in Yemen do of lengthening the hair in what is known as *al-zunāratayn* (the two sidelocks). Differing from them in that is obligatory.

Likewise, if the authorities of Yemen were to impose upon the Jews wearing blue clothing instead of the two sidelocks, in such a way that wearing blue would become for them a distinguishing mark by which they are known and recognized, just as they are now distinguished by the two sidelocks – then differing from them would be obligatory, not because wearing blue is prohibited in itself, but because wearing it would indicate that the one wearing it is, outwardly, a Jew. He would then have to be treated as a Jew, and a ruling of apostasy would be applied to him according to outward appearance.

And the prohibition of resembling women in clothing and the like is not due to the clothing itself being prohibited, but because the man who wears women’s clothes has, outwardly, not shown regard for Allah’s blessing upon him, in that He honoured him, ennobled him, and raised his rank. It is as if, by resembling women, he has made himself equal to them and has been content for himself with being like them; and that is ingratitude for Allah’s blessing upon him, in that He raised his station above the stations of women.

- Al-Hādī (*Peace be upon Him*) has stated in *Kitāb Ma‘ānī al-Sunnah* that shaving the hair, using the tooth-stick, letting the beard grow, and taking from the moustache are among those things which the Messenger of Allah (*May Allah bless him and his family and grant them peace*) adopted from himself and by his own choice, and that he regarded them as among those for which neither Allah nor His Messenger, *May Allah bless him and his family and grant them peace*, has made any punishment upon the one who leaves them – such as witr prayer, trimming the

fingernails, and like the additional voluntary acts of worship.

**Yes**, among the contextual indicators that show that a command or prohibition has been diverted from obligation and forbiddance to recommendation and the like, or dislike, is that the thing commanded be something whose ruling was known beforehand – such as wearing the turban, cleaning the hair, combing it and parting it, letting the beard grow, and the like. For the goodness of these etiquettes was known before the coming of the Sacred Law – and likewise eating and drinking of wholesome things, hunting, and the like of what is permissible. So when a command comes concerning such things, it is carried, in the first case, upon recommendation, and in the second upon permissibility, because the ruling in both cases was already known beforehand.

– And the reality of a command is that it denotes obligation, and prohibition denotes forbiddance. What has come of them is carried upon their real meaning, except when there is a contextual indicator that diverts it from its real meaning; and here such an indicator is indeed present, namely what we have mentioned.

– If shaving the beard becomes a distinctive emblem specific to the openly disobedient or to the unbelievers, then it is not permissible to shave it; because the one who shaves it thereby exposes himself to suspicion of debauchery or unbelief.

– In *‘Uyūn al-Mukhtār* there is a marginal note from our master<sup>1</sup> (*may Allah have mercy on him*) that Imām al-Qāsim ibn Ibrāhīm (*Peace be upon Him*) used to resemble the Bedouins by lengthening the moustache. Our master mentioned something similar to what we have mentioned, so refer back to his words; from that the school of Imām al-Qāsim ibn Ibrāhīm (*Peace be upon Him*) is understood. As for al-Hādī (*Peace be upon Him*), he has explicitly stated that there is no punishment for leaving the beard without letting it grow, and so on.

– It has been transmitted from some of the Companions that he used to trim from his beard, and no disapproval has appeared from the scholars regarding that.

– There is a well-known saying that among the signs of a fool are things including: having a long beard. No criticism appears to have been directed at this statement despite its notoriety.

In the books of legal theory, concerning His saying, Exalted: *“And when you have exited the state of iḥrām, then [you may] hunt”* [al-Mā’idah:2], some scholars say that a command that comes after a prohibition

1- *‘Uyūn al-Mukhtār min Funūn al-Ash’ār wa-l-Āthār*, by Imām al-Ḥujjah Majd al-Dīn ibn Muḥammad al-Mu’ayyadī (*Peace be upon Him*).

indicates permissibility; thus, they considered the preceding prohibition to be a contextual indicator for permissibility.

As for the prohibition of men wearing gold and silk, as well as the prohibition of wearing red and yellow for them, and of garments that hang below the ankles, and of walking in a haughty manner, turning the cheek away in arrogance, folding the side of the garment (in pride), undoing the buttons (in a showy way), covering the nakedness, lowering the gaze, and the like: even though these fall within the chapter of etiquette, there has nevertheless come an explicit text from the Prophet (*May Allah bless him and his family and grant them peace*) concerning the prohibition of gold and silver for men, and the prohibition of red and yellow has come because of what they contain of ostentatious display that calls to arrogance, self-admiration, and haughtiness. Likewise, whatever is below the ankles is forbidden because of haughtiness; and turning the cheek away and folding the side of the garment are forbidden because of what they indicate of arrogance; likewise, walking in a haughty manner. Covering the nakedness was made obligatory by reason even before the Sacred Law; and lowering the gaze is obligatory in order to block the pathways of Satan.

### **[The ruling of the Sacred Law on cosmetic operations]**

*Question:* What is the ruling of the Sacred Law concerning cosmetic operations on the face and the like? And what is the explanation of His saying, Exalted: *“And I will command them so they will change the creation of Allah”* [al-Nisā’:119]?

*The answer – and Allah is the Patron of success –* is that the Wise Lawgiver has forbidden that a person cause himself or another pain that harms him, without a reason of illness or the like; and this is the basic principle.

There is no disagreement that cauterization with fire is permissible in the case of an illness that necessitates it, and likewise cupping and bloodletting, and cutting off a limb afflicted by a known disease, and carrying heavy loads, and plucking the armpit hair, and prescribed punishments (*ḥudūd*), and disciplinary measures, and the like.

Accordingly, the basic principle is that causing pain to the body for the purpose of adornment is forbidden; so it is not permissible for a Muslim to cause himself pain by a cosmetic operation except in the manner we have mentioned, in that which has been specified by the evidence.

And it has come in an authentic ḥadīth that the Messenger of Allah (*May Allah bless him and his family and grant them peace*) cursed the woman who tattoos and the woman who seeks to be tattooed... to the end of the ḥadīth. Tattooing is: making a wound in the face or the like, then putting kohl in the wound; when the wound heals, a black mark

appears in its place in the shape of an adornment. In this authentic narration there is proof for what we have mentioned.

**If it is said:** If the effective cause (*'illah*) in the prohibition of cosmetic operations is the painful harm, then the physician, before carrying out the operation, anaesthetizes the place of the operation such that the person does not feel any pain, then after the operation he gives him treatment whereby he does not feel pain until he recovers; so, in that case, there is no reason for prohibition.

What strengthens this further is that, in this same mentioned ḥadīth, there has come the curse of the woman who plucks and the one who seeks to be plucked, and *al-namṣ* is plucking the hair of the pubic region; yet the scholars have allowed its plucking if it is smeared with depilatory paste (*nūrah*), because the pain of plucking with *nūrah* is removed, so it appears that the prohibition revolves with pain, in existence and non-existence.

**We say:** We have mentioned that the effective cause is painful harm; thus harm (*al-adha*) is a qualifier of pain, and they have said that the ruling attaches itself to the qualifier, so the effective cause in reality is harm, and harm is injury.

And even if the pain is removed by anaesthetic, the surgical operation cannot be separated from harm and injury after the operation; everyone to whom a surgical operation has been carried out in any part of his body knows this.

As for plucking the hair of the pubic region with *nūrah* and the like, it does not result in any harm or any injury in the future, unlike surgical operations.

- Regarding His saying, Exalted: *"and I will command them so they will change the creation of Allah"* [al-Nisā':119], what I see in its explanation is that what is meant is changing the rulings concerning Allah's created things; for that is what in fact occurred from the disbelievers among the children of Adam: by his (Satan's) seduction of them, they declared lawful what Allah had forbidden, and declared forbidden what Allah had made lawful. Examples of this are many. And He, Exalted, has said: *"And do not say about what your tongues assert of untruth, 'This is lawful and this is unlawful,' to invent falsehood about Allah. Indeed, those who invent falsehood about Allah will not succeed."* [al-Naḥl:116].

**[On al-namṣ (plucking)]**

**Question:** Is it permissible for a woman to pluck the hair of the eyebrows?

**The answer:** It is not fitting for a religiously committed woman to pluck her eyebrows, because our scholars – *may Allah be pleased with*

them – have explained *al-namṣ*, concerning which the prohibition came from the Prophet (*May Allah bless him and his family and grant them peace*), with two explanations: plucking the hair of the face, and plucking the hair of the pubic region. And it is in keeping with the nature of the believer that he is apprehensive about embarking on either of the two, or both of them. And in the ḥadīth: “Leave that which causes you doubt for that which does not cause you doubt,” and in another ḥadīth: “The believers are those who come to a halt at doubtful matters.”

### [The ruling on *al-namṣ*]

In *al-Tāj*: “It is forbidden for the woman and the man to practice *al-namṣ*, which is: plucking the hair of the pubic region; for what is legislated concerning it is shaving, unless it is removed with *nūrah*. Likewise, it is forbidden to pluck the hair of the beard and the moustache – not the hair of the nose, for that is permissible.” End.

**I say:** What appears to me is that the prohibition of *al-namṣ*, which is plucking the hair of the pubic region, is due to the pain involved in plucking it, and it is not permissible for a morally responsible person to torment himself with that. The proof for this is that there is no disagreement that it is permissible to remove the hair of the pubic region with *nūrah* or the like, and its removal with *nūrah* is in fact by way of plucking, except that the one who does the plucking does not feel pain in plucking it. And the report has come concerning the recommendation of plucking the armpit hair, and the pain of plucking it is slight. Accordingly, plucking hair from the face or from the forearms is permissible if the pain resulting from plucking it is no more than what occurs when plucking the hair of the two armpits; likewise, the plucking of the hair of the forearms and the shins.

### [Wearing two rings]

**Question:** Is it permissible for a man to wear two rings?

**The answer:** In the marginalia of *Sharḥ al-Azhār* according to the madhhab: It is not permissible to combine between two rings on one hand. And in it: As for a ring on each hand, then that likewise is not permissible.

**I say:** Perhaps the evidence for that is what there is in such combining of resemblance to women. And Allah knows best.

### **The ruling on looking at the nakedness (*‘awrah*) of a young boy**

**Question:** Is it forbidden for a morally responsible person to look at the nakedness of a young boy, or not?

**The answer – and Allah is the One who grants success** – is that if the boy is so young that no desire is aroused by him and he does not arouse desire, then there is no objection to looking at his nakedness. This has

been mentioned by the scholars of the madhhab in the chapter on washing the deceased. And in a marginal note from the marginalia of *Sharḥ al-Azhār* in the chapter on clothing is the following wording: "As for the young children, male and female, with respect to whom no desire is attached, it is permissible to look at them, even at their nakedness."

End.

It is understood from their words that it is not permissible to look at the nakedness of a boy who feels desire or for whom desire is felt.

This being so, it is possible to adduce evidence for this issue by saying: Exposing the nakedness and looking at it is something regarded as repugnant in the innate dispositions of minds even before the Sacred Laws were sent down. Perhaps the nakedness (*ʿawrah*) was only called *ʿawrah* for this reason we have mentioned. So those from among males and females with respect to whom desire is not attached, the intellect does not deem it repugnant that their nakedness be exposed, nor that it be looked at, nor does this encounter any disapproval from reasonable people.

As for the one who feels desire or for whom desire is felt among the boys, then by this characteristic he has entered the category of those who are of the age of legal responsibility; so it is forbidden to look at his nakedness, and it is obligatory for a non-maḥram woman to lower her gaze from him. This is with regard to the rulings that pertain to others.

As for the rulings that pertain to the child himself, the scholars have differed. Some of them say: When twelve years have passed over him, the rulings apply to him and against him in that which is between him and Allah, Exalted.

And some of them say: When the boy distinguishes between good and evil, and can understand excuses and warnings, then the rulings apply to him in that which is between him and Allah, *Exalted* – and they said this without fixing a specific number of years.

And another says: Whoever among the boys is in such a state is charged with rational obligations (*al-aḥkām al-ʿaqliyyah*) but not with the Sacred Law obligations (*al-aḥkām al-sharʿiyyah*).

And another says: Allah, Exalted, has lifted the pen from the boy until he reaches legal puberty (*al-bulūgh al-sharʿī*); thus no rulings pertain to him, neither outwardly nor inwardly, even if his intellect is completed before that.

This being so, as for the guardian of the mentioned boy, it is obligatory upon him to discipline his child upon praiseworthy etiquettes and to train him upon noble character traits. The Messenger (*May Allah bless him and his family and grant them peace*) has guided his community, at



this age, to accustom their children, train them, and teach them. He said, in what is its meaning: “*Command your children to pray at seven, and beat them for it at ten.*” So it is not permissible for a man to neglect his child in the second seven years (of his life).

### **A benefit concerning uncovering the nakedness, and the use of the coil (IUD)**

In the *Sharḥ*: “Among the situations of necessity is that of the midwife; it is permissible for her to look at the woman’s private part.” Al-Faqīh ‘Alī said: “And likewise the man [i.e., a male doctor] if no midwife is available and there is fear for her [the woman’s] destruction or harm.” End of quotation from the *Sharḥ* and its marginalia, and all of that is according to the madhhab.

**I say:** It is possible to derive from this the permissibility of using the coil (intrauterine device) to prevent pregnancy if there is fear for the woman from pregnancy.

### **[When is it permissible to uncover the severe private part (*al-‘awrah al-mughalazzah*) before a doctor?]**

**Question:** I have an illness and, during examination by the doctor, I need to uncover the severe private part. Is it permissible for me to do that or not?

**The answer – and Allah is the One who grants success and assistance** – is that it is permissible to uncover the severe private part before the doctor in the following cases:

1. That the illness is dangerous, and there is fear that the patient may die because of it.
2. That the illness continues with the patient together with intense pain if he does not receive treatment.
3. That fractures or wounds occur around the private part whose treatment cannot be carried out except by a doctor.

And whatever resembles what we have mentioned, it is permissible in it to uncover the severe private part before the doctor.

The proof for that is what has been established and settled of the permissibility for the midwife to look at the woman’s private part at the time of birth, and also what has been established and settled of the permissibility for women to look at the private part of a virgin woman against whom fornication has been testified.

From this is what has been narrated from the Commander of the Believers (*Peace be upon Him*), in meaning: “I would not have carried out a hadd upon whom is the seal of Allah.” He said that concerning a virgin woman against whom they had testified to fornication, but she denied it and said that she was still a virgin. So he (*Peace be upon Him*) ordered

the women to look at her private part... and so on.

In that there is what indicates the permissibility of uncovering the private part in order to repel harm, even if it has not reached the level of danger to life.

**If it is said:** Is it then permissible to uncover the private part for the sake of seeking a benefit – such as when a woman has inflammation in her womb which prevents the embryo from implanting, or when the female doctor places in her womb something that prevents pregnancy, or the like?

**We say:** If the woman is suffering from the pain of the inflammation, or she is harmed by repeated miscarriages because of the inflammation, or none of that has occurred but she fears that her husband will divorce her, or take another wife, or something similar that will cause her harm – then it is permissible for her to uncover her private part for treatment before the female doctor. Likewise, it is permissible for her to uncover herself before the female doctor so that she may place in her private part what prevents pregnancy, if she fears from becoming pregnant some harm to herself or to her small child.

And it is possible to infer this from what has been established and settled: that it is permissible for the witnesses of fornication to look at the private parts of the two fornicators so that they may bear witness to the act of fornication; their looking was permitted because of the public interests involved and the prevention of probable harm.

**Yes,** if a man is infertile and no child is born to him, is it permissible for him to uncover his private part before the doctor, and for semen to be extracted from him by medical means in order to know the cause of his infertility so that it may be treated?

**It can be said:** That is permissible in one situation, namely when the wife of that man insists upon the necessity of treating her husband's infertility, otherwise she will leave him and separate from him and will not accept him as a husband; and the husband finds no answer to this demand except treatment for infertility, while he is harmed by separating from her because he is attached to her, loves her, and cannot be patient in her absence.

Or he is unable, if he separates from her, to marry another woman because of his poverty and lack of means; or he thinks that if he divorces her for this reason, women will not be pleased to accept him if he seeks their hand; or the like of that which leads to harm occurring because of the lack of a wife, or to falling into the prohibited. In that case it is permissible for him to undergo treatment with the doctor, because of His saying, Exalted: *"Allah does not intend to make difficulty for you"* [al-Mā'idah:6].

But if none of that harm occurs, then it is not permissible; rather, he must be patient with what has been decreed for him, and it is not permissible for him to enter into sin without necessity. And praise be to Allah, Lord of the worlds, and may Allah bless Muhammad and his family and grant them peace in great abundance.

### **[A benefit concerning plucking the hair of the pubic region]**

In *al-Muhadhdhab*: “It is not permissible to pluck the hair of the pubic region; rather, what is obligatory is shaving it, because it is *al-namṣ* which has been prohibited, except if he removes it with *nūrah* (depilatory paste), then it is permissible.” End.

### **A benefit concerning the punishment for fornication**

In *Sharḥ al-Aḥkām* it is narrated that ‘Alī ibn Bilāl, from Abū al-‘Abbās al-Ḥasanī, then he mentioned the chain up to the Prophet (*May Allah bless him and his family and grant them peace*), who said: “*In fornication there are six traits: three in this world and three in the Hereafter. As for those in this world: it removes splendour, hastens annihilation, and cuts off hope. As for those in the Hereafter: an evil reckoning, the wrath of the Most Merciful, and abiding in the Fire.*”

**I say:** AIDS is among the diseases caused by fornication. This disease changes a person’s appearance, hastens death, and the one afflicted with this disease falls into despair; the doors are closed and shut in his face, and he surrenders himself to the inevitable fate.

And in it, with his chain, from Muḥammad ibn ‘Abd Allāh, *peace be upon him*, concerning His saying, *Exalted: “and [lawful in marriage are] chaste women from among those who were given the Scripture”* [al-Mā’idah:5], that he said: “It was abrogated by His saying, *Exalted: “And do not marry polytheist women until they believe.”* [al-Baqarah:221]. The women of the People of the Book were only made lawful to the Muslims at a time when Muslim women were few. When the number of Muslim women became many, Allah abrogated it by this verse, and by His saying: *“And do not hold on to marriage bonds with disbelieving women.”* [al-Mumtaḥanah:10]. So do not marry their women, and do not eat their slaughtered meat.” End.

### **A benefit: (reflecting upon sins)**

In *al-Tāj* according to the madhhab: It is said in *al-Bayān*: “As for reflecting in the heart upon sins, such as fornication and the like, if there is fear that it will lead to temptation, then it is not permissible; otherwise it is permissible.” This was mentioned by al-Mu’ayyad bi-llāh. End.

**I say:** It befits the believer not to deliberately reflect upon sins; and we only said that because it is known that Allah, *Glorified and Exalted*, hates sins, and it is in the nature of the believer that he hates what Allah,

Exalted, hates. And there is no doubt that a person does not deliberately reflect upon what he hates; rather, if his own self whispers to him about something that he hates, he strives to repel that thought.

### **The ḥijāb with paternal cousins**

**Question:** In many desert communities it is customary that the wife removes her ḥijāb before her husband's brothers, and she also removes the ḥijāb before her paternal cousins and maternal cousins. If the husband wants her to observe ḥijāb, he is met with strong disapproval, and the woman may even be required to shake hands with those men despite their dislike of that or her dislike of it. What is the way out in such a situation?

**The answer – and Allah is the One who grants success** – is that it is obligatory upon the man, in such a case, to lower his gaze from what Allah has forbidden him to look at. Likewise, the woman must lower her gaze and cover her nakedness (*‘awrah*). And it is obligatory upon both of them not to meet together in a place where they are alone and away from people.

She is not required to cover her face; rather, what is obligatory upon both the man and the woman is what we have mentioned: lowering the gaze and covering the nakedness. She incurs no sin in uncovering her face; rather, what is obligatory upon the man is to lower his gaze, and upon her to lower her gaze.

However, beyond that it is obligatory upon the woman to remain settled in her home and not to display herself with her adornment. Allah, Exalted, has said: *"And stay in your homes and do not display yourselves with the display of the former times of ignorance."* [al-Aḥzāb:33] And He, Exalted, has said: *"And let them not display their adornment except to their husbands..."* until His saying at the end of the verse: *"And let them not stamp their feet so as to make known what they conceal of their adornment..."* [al-Nūr:31]. She incurs no sin, from all of that, in uncovering her face and her hands; that is not among the reprehensible matters. What is obligatory upon the man is that he lower his gaze.

The reprehensible matter which is not permissible for the woman is that she uncover her forearms, or show any part of her hair, or show her neck, or display her adornment, or leave her house and expose herself to men without need.

As for kissing and handshaking, it is not appropriate and it is not permissible; for when Allah, Exalted, has forbidden looking, then a fortiori He has forbidden kissing and handshaking.

And know that Allah, Exalted, by what He has legislated and commanded of lowering the gaze, forbidding display of adornment, remaining settled in the homes, and that they (women) are not spoken to

except from behind a veil – by all of that He intends to block the avenues of immorality and to cut off the road upon Satan. On this basis it is necessary to abandon everything that calls to immorality. Among that is what the poet said:

A look, then a smile, then a greeting,

Then speech, then an appointment, then a meeting.

And handshaking, kissing hands, letting the conversation run on, and joking and laughing together are among the things that call to that.

**Yes**, if a person is tried with something of that, or there is a need for something of that, he must restrict himself to the extent of the need: such as speech, in which he restricts himself to what necessity requires and does not let himself go in what there is no need for. The Messenger of Allah (*May Allah bless him and his family and grant them peace*) used to speak to women and they used to speak to him. Among that is his conversation with the woman from (the tribe of) Khath‘am at the time when he was going to stone the jamarāt, and al-Faḍl ibn ‘Abbās was his rider behind him. The woman asked the Prophet (*May Allah bless him and his family and grant them peace*) about certain issues and he answered her, while the Prophet (*May Allah bless him and his family and grant them peace*) was, at that time, shielding al-Faḍl from looking at the woman with his cloak.

As for looking, then nothing of it is permissible except to the extent of need – such as for a witness, or a judge, or a doctor, and the like. As for other than a need, then it is not appropriate; for that reason the Prophet (*May Allah bless him and his family and grant them peace*) covered al-Faḍl ibn ‘Abbās and prevented him from looking at the Khath‘amī woman who had asked the Prophet (*May Allah bless him and his family and grant them peace*).

And if the situation forces him to handshaking, then he should wrap his hand with the end of his shawl or the like, and avoid as much of all that as he can. With sound intention and the fear of Allah, Exalted, Allah will grant him a way out and relief, as He, Exalted, has said: *“And whoever is mindful of Allah, He will make for him a way out.”* [al-Ṭalāq:2].

### **A benefit (concerning the unrelated woman)**

In *Kitāb al-Nahy* by al-Murtaḍā (Peace be upon Him), from him it is reported that he, *May Allah bless him and his family and grant them peace*, said: *“(He) forbade a man to look at a woman who is not his maḥram out of desire, and forbade a man to look at anything which Allah has forbidden him, and forbade a man to persist in the first glance, and forbade a man to speak to a woman out of desire or without desire if she is not his maḥram, and forbade him to eat together with her, and forbade him to be alone with her.”* End of quotation from *al-Ṣaḥīḥ al-Mukhtār*.

And in the *Amālī* of Aḥmad ibn ʿĪsā, with his chain, that the Prophet (May Allah bless him and his family and grant them peace) said: “There is no inviolability for the women of the People of the Covenant (*ahl al-dhimmah*) such that one would be prevented from looking at their hair and their bodies...” End of quotation from *al-Ṣaḥīḥ al-Mukhtār*. Abū Jaʿfar said: “He must not look with a gaze that the heart inclines to.”

### Looking at the backs of maḥram women

**A benefit:** In *al-Majmūʿ al-Manṣūrī*, second section, second volume, Imām al-Manṣūr bi-llāh says – and he was asked about (looking at) the backs of maḥram women – that it is not permissible to look at the backs of maḥram women, whether necessity compels to that or not; because necessity only permits (taking) property, not enjoyment by way of looking or anything similar... and so on.

**I say:** Evidence for this issue can be taken from His saying, Exalted: “*And let them not display their adornment except what (ordinarily) appears thereof...*” up to His saying: “*...except to their husbands...*” the verse [al-Nūr:31]. And from what has been narrated in the ḥadīth from the Prophet (May Allah bless him and his family and grant them peace) that he said: “*Women are incapacity and nakedness.*” Thus this indicates that the woman is entirely nakedness (ʿawrah), and nakedness must be covered and the gaze lowered from it. Allah, Exalted, has granted a concession to the woman’s kin in looking at what appears of her adornment. The places of adornment are: the face, the ears, the neck, the chest, the hands, the forearms, and the feet. The back is not among the places of adornment concerning which the concession has come.

This being so, it may be said that the nakedness (ʿawrah) of a woman is divided into three categories:

1. The nakedness of a woman in relation to another woman.
2. The nakedness of a woman in relation to her maḥram men.
3. The nakedness of a woman in relation to unrelated men.

And this division concerns the free Muslim woman.

So the nakedness of a woman in relation to another woman, as it appears to me, is like the nakedness of a man in relation to another man; whereas she is entirely nakedness in relation to unrelated men.

And her nakedness in relation to maḥram men, in ruling, is like the nakedness of a woman in relation to another woman and a man in relation to another man – that is, from below the navel to the knee.

Evidence for this may be taken from the fact that the nakedness of a female slave is like the nakedness of a man – from below the navel to the knee – without disagreement. So if a woman had nakedness other than that, Allah, Exalted, would have obliged covering it in the case of the

slave woman; because exposing nakedness is repugnant both rationally and according to the Sacred Law.

**If it is said:** You have said that a woman is entirely nakedness in relation to unrelated men.

**We say:** What is meant by that is that she is like nakedness, in that Allah, Exalted, has obliged covering her. In reality and in fact, she has only been commanded to cover herself in order to safeguard chastity and to block the avenues of temptation and the entry points of Satan – as is indicated by what Allah, Exalted, has mentioned in Sūrat al-Nūr in this regard, such as His saying: *“That is better for you”* [al-Nūr:27], *“That is purer for you”* [al-Nūr:28], and *“That is purer for them”* [al-Nūr:30].

### **Thinking about committing a forbidden act**

**Question:** If a man deliberately thinks about committing a forbidden act – for example, he imagines himself playing and being intimate with a particular beautiful woman – at the time he wants to have intercourse with his wife, in order thereby to stir up his desire; and likewise if he looks at images of women on television for this purpose – what is the ruling regarding that?

**The answer – and Allah is the One who grants success and assistance** – is that what has been mentioned in these two questions is among those things that a Muslim ought to rise above and avoid. This is because of what has come in the ḥadīth: *“The believers are those who come to a halt at doubtful matters,”* and: *“The lawful is clear and the unlawful is clear, and between them are doubtful matters...”* and so on, or as he (*May Allah bless him and his family and grant them peace*) said. What has been mentioned is among such doubtful matters, as is indicated by the fact that Allah, Exalted, has forbidden in His Book and upon the tongue of His Messenger, *May Allah bless him and his family and grant them peace*, the causes that lead to falling into the sin of fornication. He has forbidden being alone with an unrelated woman, and commanded lowering the gaze, and commanded seeking permission when entering houses, and commanded women to cover their shame with silence and to cover their nakedness by remaining in their homes. And he, *May Allah bless him and his family and grant them peace*, has forbidden following one glance with another, and he has forbidden them from displaying their adornment – even to the extent of forbidding them to stamp their feet in such a way that it should be known what they are concealing of their adornment.

Then Allah, *Exalted*, has forbidden listening to singing for various interests, among them that it stirs and arouses desire – to the point that they said: A chaste woman has never been enticed away from her chastity with anything like singing, and so on. What we are dealing with



here is close to that; and the fact that doing what is mentioned in the question is for a purpose connected to the wife does not justify it.

Thus, the point of what we have mentioned is that in this issue there is a doubtful matter which it is fitting for the believer to avoid and rise above.

### **The ruling on looking at the physical charms of a disbelieving woman**

**Question:** What is the ruling on looking at the physical charms of a disbelieving woman?

**The answer – and Allah is the One who grants success** – is that Allah, *Glorified and Exalted*, has intended to shut the doors that lead to temptation and to close the inlets of Satan through which he comes in order to make those who are morally responsible fall into the unlawful. Allah, Exalted, has commanded the believing men and believing women to lower their gaze, and He has commanded the believing women to be chaste, and forbidden them from displaying their adornment before unrelated men, and forbidden them from being soft in speech, and from stamping their feet so that what they conceal of their adornment may be known. Allah, Exalted, has forbidden the Muslims from entering houses except after seeking permission. And in Sūrat al-Aḥzāb He has said to the Mothers of the Believers: *“And stay in your homes and do not display yourselves with the display of the former times of ignorance.”* [al-Aḥzāb:33]

And there has come in the ḥadīth, in this chapter, a great deal – among it the ḥadīth: *“It is not lawful for a woman who believes in Allah and the Last Day to travel the distance of a barīd (post-stage) except with a man who is a maḥram to her,”* or as he (May Allah bless him and his family and grant them peace) said.

Among it also is the prohibition of a man being alone with a woman who is not a maḥram to him. And among it is the ḥadīth: *“Women are incapacity and nakedness, so veil their incapacity with silence and their nakedness with (remaining in) their houses.”* And the ḥadīth: *“Do not follow one glance with another, for you have the first and not the second,”* and many other narrations.

The purpose of all these teachings that have come in the Book and the Sunnah is to shut the doors of temptations and the causes of desire.

When you know this, then know that looking at a disbelieving woman, if it stirs desire and is a cause leading to falling into temptation, is forbidden. There is no doubt that, as has come in the report, the gaze is an arrow from the arrows of Iblīs. The poets and sages have spoken about this, and the poet said:

A look, then a smile, then a greeting,



Then speech, then an appointment, then a meeting.

**Yes**, if the Muslim is safe from the stirring of desire and from falling into temptation, then it is permissible for him to look at the disbelieving woman and the openly immoral, reckless woman; and similar to that is looking at a female slave. To this is attached looking at images displayed on television screens.

**If you say:** Looking at television screens does not lead to falling into temptation, because the image displayed is far from the viewer and he cannot reach her.

**We say:** If looking at images of women and their charms causes the stirring of desire which leads to falling into the unlawful, then looking (in that case) is forbidden – and there is no difference between the unlawful act being with the woman whose image is seen or with some other woman.

### [The nakedness (‘awrah) of the free woman]

The nakedness of the free woman in relation to her maḥrams is from the navel to below the knee, and the back and the belly – this is what the scholars of the madhhab have said.

And the Chief Judge said, as in *al-Bayān*: “The back and the belly are not nakedness.” And I consider this saying to be the stronger; because they have said that the nakedness of the slave woman is from the navel to below the knee, like the nakedness of a man. So if the back and the belly were nakedness, it would be obligatory upon the slave woman to cover them.

**If it is said:** Allah, *Exalted*, has said: “*And let them not display their adornment except what (ordinarily) appears thereof...*” up to His saying: “*And let them not display their adornment except to their husbands...*” the verse [al-Nūr:30]. Thus Allah, *Exalted*, has granted the women a concession that they may display their adornment to the maḥrams, and what is meant is the places of adornment. The places of adornment are the face, the hair of the head, the neck, the ears, the forearms, the chest, and the shins; and whatever is other than that, the side of prohibition is predominant in it as a matter of caution.

**We say:** There is nothing in the verse that proves that the back and the belly are nakedness, neither by explicit wording nor by implication. Giving precedence to the side of prohibition is only where proofs of prohibition and permissibility conflict; and here no proof of prohibition has come.

The basic principle is the permissibility of looking at maḥrams, except what has been established to be nakedness. And what has been established to be nakedness is from the navel to below the knee. The

scholars have agreed that this is the nakedness in the man and in the slave woman; and whatever is other than that is not nakedness in them.

**[The ruling on returning the salām to a woman and greeting her]**

**Question:** Is it permissible for a young woman to give salām to an unrelated man? And is it permissible for the unrelated man to return her salām, or to initiate salām to her?

**The answer – and Allah is the One who grants success** – is that it has come in the ḥadīth: *“Women are incapacity and nakedness, so veil their incapacity with silence and their nakedness with (remaining in) their houses.”* And Allah, Exalted, has commanded the woman to observe covering, and has emphasized that to the extent that He has forbidden them, Glorified be He, from even revealing the sound of their jewellery, when He said, Exalted: *“And let them not stamp their feet so as to make known what they conceal of their adornment...”* [al-Nūr:31].

On this basis we say: It is not permissible for a woman to initiate salām to an unrelated man, nor to return his salām if he initiates it; and likewise, it is not permissible for a man to initiate salām to an unrelated woman, nor to return her salām.

However, what we have mentioned is not absolute; for there are exceptional situations in which it is permissible for salām to be given and returned between the two sexes – namely, in what necessity and need call for. In such situations there is a condition binding upon the women, namely what Allah, Exalted, has commanded them in His saying: *“Then do not be soft in speech, lest he in whose heart is a disease should covet; but speak with appropriate speech.”* [al-Aḥzāb:32]

**A benefit concerning walking along a road where there are unveiled women**

In *al-Muhadhdhab*: “It is permissible to walk along a road in which women are unveiled, and he must avoid looking; because the original ruling for the shoulders of the earth (i.e. walking upon the land) is permissibility.” End.

**[On seeking blessing (tabarruk) through the hair of the Prophet (May Allah bless him and his family and grant them peace)]**

In al-Bukhārī, from ‘Uthmān ibn ‘Abd Allāh ibn Mawhab, who said: “My family sent me to Umm Salamah, the wife of the Prophet (May Allah bless him and his family and grant them peace), with a small cup of silver – and Isrā’īl closed three of his fingers (to indicate its size) – in which there were hairs from the hair of the Prophet (May Allah bless him and his family and grant them peace). Whenever a person was afflicted by an eye (i.e. the evil eye) or something else, they would send to her his vessel. So I looked into the little bell-shaped container (*al-jiljil*) and saw a

few red hairs...” End.

**I say:** In this narration there is a clear indication that, in the time of the Companions, it was something familiar and accepted to seek healing through the blessing of a few hairs from the hair of the Prophet (*May Allah bless him and his family and grant them peace*); they would seek cure for the eye and other afflictions with the water that had touched his hair after his death.

## [Book of Claims (Kitāb al-Da‘āwā)]

**[“*The burden of proof is upon the claimant, and the oath is upon the one who denies.*”]**

The ḥadīth: “*The burden of proof is upon the claimant, and the oath is upon the one who denies,*” or as the Prophet (May Allah bless him and his family and grant them peace) said.

The position of the madhhab is that if the denier refuses to swear the oath and persists in abstaining (*al-nukūl*) in the presence of the judge, then the right that is claimed against him becomes binding upon him; the judge rules against him for it.

And it is possible to infer that the right becomes binding merely by the abstention from the oath, from the following:

- That abstaining from the oath is, in meaning, an admission; for if he were truthful in his denial, he would not shrink from the oath nor flee from it, since it would be a truthful oath in which there is no consequence upon him.
- That whoever a claim concerning a right has been directed against is obliged, towards the claimant, to do one of two things: either to hand over the right that is being claimed against him, or to take an oath. If he rebels and refuses to do either of the two after the judge has ruled that he must take an oath, then the judge rules that the right is established, otherwise rights would be lost.

**If it is said:** The judge could, when the denier rebels and refuses the oath, imprison him until he either swears or admits; if he swears, he clears him; and if he admits, he obliges him to hand over (the right).

**We say:** The claimant may be harmed if the denier continues to insist upon rebellion; and among the duties of judges is the removal of harm between people, and putting an end to their disputes. Imprisonment does not remove the harm from the claimant, nor does it end the dispute or remove the harm from the disputants, except in the manner we have mentioned.

**If it is said:** Some people shrink from taking an oath and feel constrained by it even if they are truthful – as we see with many people in their disputes today – so how can it be ruled that the right is established against them?

**We say:** The judge must rule according to what is outward; and to Allah belongs the judgment of what is in the inner selves on the Day of Resurrection. The one who shrinks from the oath can return it upon the claimant: if the claimant takes the oath, he deserves the right; and if he abstains, his claim is nullified.

Furthermore, if we say that the judge imprisons the rebel until he

swears or admits, and he persists in rebellion despite lengthy imprisonment, then what is the judge to do when the claimant continues to demand his right? At that point the judge must return to what we have mentioned, namely ruling on the basis of abstention from the oath (*al-nukūl*), or else he will be wasting the interests of both disputants: the claimant, by the loss of his right; and the abstainer, by the loss of his person and those who depend upon him, through imprisonment.

What we have mentioned – that abstention from the oath is in the ruling like an admission – is supported by what has been established: that if the husband who accuses (his wife) of adultery abstains from the oaths, he is liable for the prescribed flogging; and if the wife abstains from the oaths, the ḥadd (punishment) becomes binding upon her. This is in His saying, Exalted: *“And it will avert the punishment from her if she bears witness four times [swearing] by Allah...”* the verse [al-Nūr:8]

**[A benefit concerning one who claims something for himself and his brother]**

**A benefit:** Whoever claims that something belongs to him and to his brother as inheritance from their father, and he provides evidence for that while his brother is absent, then his claim and his evidence and the ruling regarding his share are valid; and he has the authority to receive his brother’s share if he is trustworthy... and so on. End.<sup>1</sup>

**[The evidence of the outsider and the insider]**

In *al-Tāj* according to the madhhab: “If the outsider (*al-khārij*) provides evidence that the thing is his property, and the insider (*al-dākhil*) provides evidence that he purchased it from such-and-such a person the son of such-and-such, and that person (the seller) provides evidence that he sold it to him while it was in his ownership, then the evidence of the outsider is given precedence.” End.

**I say:** If the two sets of evidence are equal, then the evidence of the outsider is to be given precedence. But if the outsider’s evidence is general and the insider’s evidence is detailed and specific – as in the previous example – and like when the witnesses testify for the insider that he bought the land from so-and-so and built it for himself, and that he purchased its tools and whatever it needed, then in such a situation the evidence of the insider is stronger, as is borne out by taste and natural judgment.

**[Evidence concerning plundered caravan-goods]**

**A benefit:** It suffices to have evidence that the caravan was plundered, or that the town in which the manufactured or transported item was

1- *Sharḥ al-Azhār* 4/133.

located was plundered – but the evidence must also show that that specific item was in the caravan or in the town, or the two disputants must agree on that. End of quotation from the marginalia of *Sharḥ al-Azhār*, where this was mentioned in relation to what a jointly hired worker (*al-ajir al-mushtarak*) can establish evidence for.

**[The indicatory circumstances (*qarā'in*) are operative in the Sacred Law]**

It appears to me – *and Allah knows best* – that *qarā'in* (indicatory circumstances) are operative in the Sacred Law; what is meant are those which give rise to (strong) presumption (*ẓann*). The judge must pay attention to these indicatory circumstances and not neglect them, but if they are in favour of the claimant, then he is required to support them with an oath.

The *qarā'in* are such as:

- Documents whose handwriting is known, while their scribe and the two witnesses have died.
- Instruments written in the hand of the defendant and bearing his signature, when it is presumed or known that the writing and signature are his, by comparing the instrument with his other handwritings and signatures.
- Signing by fingerprint on an instrument, or a sale, or the like; for such a thing is not less, in the presumption it gives of the truth of the claim, than the testimony of a single man.

And the indicatory circumstances differ, and the reference-point for considering them is the judgment of the judge.

**The ruling on *baṣā'ir* (written deeds) whose scribe and witnesses have died**

**Question:** What is the ruling on *baṣā'ir* (written deeds) whose scribe and witnesses have died? Is acting upon them valid or not?

**The answer – and Allah is the One who grants success** – is as in the marginalia of *Sharḥ al-Azhār*: that *baṣā'ir* which establish a right among rights, whose witnesses are those whose religiousness and trustworthiness are known, are acted upon according to the Sacred Law, even if their scribe and witnesses have died – but on condition that this is joined by the established possession (*thubūt al-yad*) of that right. As for when the *baṣā'ir* concerns a right over which its owner has no (actual) possession, then it carries no ruling, no reliance is placed upon it, and it is not acted upon according to the Sacred Law. This is what our Imām al-Hādī 'Izz al-Dīn ibn al-Ḥasan (*may Allah have mercy on him*) used to adopt... and so on. (*Taqrīr*) (تقرير). End of quotation from the marginal

note<sup>1</sup>.

**I say:** The more fitting course is to distinguish in the ruling on a *baṣīrah* whose owner has no (actual) possession of what it contains of right. That is: what is required of the judge is to look into the circumstances of the owner of the *baṣīrah*. He may have been, at the beginning of his life, an orphan who did not manage his own wealth, which may have led to some of his relatives, or his guardian, or others taking possession of some of his wealth. Or the owner of the *baṣīrah* may live outside his homeland. Or it may be the habit of the owner of the *baṣīrah* to buy property in any land and then sharecrop it, or the like – such that the money leaves his hand, as scholars occupied with knowledge often do: they may earn some money and then hand it over to one of the farmers as a sharecropping partnership. In such a case, what is required of the judge is to act upon the *baṣīrah* that establishes the right, even if the right itself is not in the hand of the owner of the *baṣīrah*.

This is so when the *baṣīrah* is sound: that the handwriting is known and the witnesses are upright. For the judge, (strong) presumption of its soundness is sufficient, since attaining certainty in that is not possible.

**If it is said:** What is the judge to do then?

**We say:** The judge demands of the one whose hand over the disputed matter is established that he present the reasons for ownership of that which is disputed: that is, either upright testimony, or documents bearing upright testimony with known handwriting. If the one in possession presents what indicates ownership – either testimony or a *baṣīrah* – then acting upon that is preferable, due to the joining of established possession with the *baṣīrah*, and at that point acting upon the *baṣīrah* that is in the hand of the claimant is abandoned. This is in the case where the two *baṣā’ir* are in conflict.

As for when the two *baṣā’ir* are not in conflict – such as when the *baṣīrah* of the claimant states that the claimant bought what it contains from the one in possession, and the denier does not present anything which conflicts with that – then acting upon it in that case is preferable.

**In summary:** what is required of the judge is to take into consideration a sound *baṣīrah*, whose scribe and witnesses are known, even if established possession is not joined to it; and he must treat it as living testimony and place it in the same category, except that it is a little weaker. It is therefore placed at least in the position of a single witness, and thus requires that the claimant strengthen it with an oath. As for discarding it completely, that is not appropriate, for it contradicts what is

known of the practice of the Muslims, in ancient times and in more recent times. The Messenger (*May Allah bless him and his family and grant them peace*) used to send written letters to convey the call to Allah – as in his letters to the king of Persia, the king of Egypt, the king of Rome, the king of Abyssinia, and so on –

and to convey the legal rulings, as in the famous letter of ‘Amr ibn Ḥazm; then the Companions after him, then the Muslims up to today. Among that is the writing of knowledge and ḥadīth and recording them on scrolls; and before that is what Allah, *Exalted*, has related of the letter of Sulaymān (*Peace be upon him*) to the Queen of Sheba.

From this Allah, *Exalted*, has shown His favour upon the servants, saying, *Glorified be His Majesty: "Recite in the name of your Lord who created – created man from a clinging clot. Recite, and your Lord is the Most Generous, who taught by the pen, taught man that which he knew not."* [al-‘Alaq:1–5] And He, *Glorified and Exalted*, has sworn, saying: "*Nūn. By the pen and what they inscribe.*" [al-Qalam:1]

And He, *Glorified*, has directed His servants to record debts in writing, and for that He revealed the longest verse in the Qur’an, which is called the Verse of Debt at the end of Sūrat al-Baqarah.

For that reason we have said: it is not appropriate to discard sound documents whose owner does not have (actual) possession over what they concern; for that would be to discard the benefit of documentation in writing, whose validity is known, in ancient times and more recent times.

We have only said that they are weak and therefore need to be strengthened by an oath, because of what has come in the verse in Sūrat al-Mā’idah, which is His saying, *Exalted: "O you who have believed, testimony between you when death approaches one of you at the time of bequest..."* [al-Mā’idah:106] up to His saying, *Exalted: "But if it is found that those two were guilty of sin, then let two others stand in their place from among those who have a lawful claim against them, and let them swear by Allah, 'Our testimony is truer than their testimony, and we have not transgressed. Indeed, we would then be of the wrongdoers.'"* [al-Mā’idah:107]

In this verse, and in the story for which it was revealed, there is consideration of writing. It has been related that the heirs of the deceased found a sheet which the deceased had written, in which the wealth and goods that were with him at the time of his death were recorded. When his heirs saw that register, they demanded from the executors of their deceased what was missing. Allah, *Exalted*, ruled that they should swear an oath concerning what they claimed – that is, concerning what was missing from that which their deceased had



recorded in a sheet which he had placed among the goods.

**If it is said:** Neither in the verse nor in the story has the consideration of writing been mentioned.

**We say:** The reports that spoke about this story have unanimously mentioned the writing of the deceased's bequest, and that it was this which revealed to his heirs the missing goods. In the context of the story, the heirs had accepted the oaths of the executors; but when they saw the sheet that the deceased had written among the goods, they returned to demand what was missing, relying on what they saw of the writing. When they made their claim a second time before the Messenger (*May Allah bless him and his family and grant them peace*), he did not persuade them that the judgment by the oaths of the executors had already been concluded, nor that the writing was not acted upon, nor that it was not permissible for them to rely upon it. Rather, he approved their claim, to which what they saw of the writing had led them, and he requested from them oaths concerning what they claimed.

From this we have said: The verse in Sūrat al-Mā'idah and its story support what we have mentioned. So when the owner of the *baṣīrah* joins an oath to his *baṣīrah*, he becomes entitled, by that, to what is in dispute; and if he does not swear, then the denier swears.

### **Fingerprints**

**Question:** What is the legal ruling in the Sacred Law on acting upon fingerprints?

**The answer – and Allah is the One who grants success** – is that if it is established that every human being has a fingerprint specific to him, then it is permissible to act upon it; rather, it is obligatory upon the judge to act upon the fingerprint in other than ḥudūd (prescribed penalties) – that is, in financial matters and rights. The proof for that is:

1. That what is required of the judge is that he rule with the truth; so when the truth becomes clear to the judge, it becomes obligatory upon him to give effect to it and to rule accordingly.
2. That the fingerprint is in the position of the signet-ring with which letters and messages are sealed. The Messenger of Allah (*May Allah bless him and his family and grant them peace*) used to have a ring with which he sealed his letters and messages, and it is narrated that he forbade people from taking a ring like his. After him, the caliphs likewise had rings with which they sealed their letters and messages.
3. That the *bayyinah* (proof) by which it becomes obligatory upon the judge to rule is broader than (oral) testimony; its reality is: that by which the truth of the claim becomes clear to the judge.

They [the scholars] have said: “Droppings indicate the camel; footprints indicate the journeying; will the heaven with its constellations and the earth with its pathways not indicate the All-Subtle, the All-Aware?” – and the fingerprint falls under this heading, and its indication is decisively inferential.

**Yes**, and we only said that one acts upon the fingerprint in other than ḥudūd because the duty in ḥudūd is to avert them as far as possible. The Prophet (*May Allah bless him and his family and grant them peace*) said: “Repel the ḥudūd as much as you find (a way),” and he said: “Ward off the ḥudūd by doubts.” And from ‘Alī (*Peace be upon Him*): “That I err in pardoning is more beloved to me than that I err in punishing.” And it is narrated from the Prophet (*May Allah bless him and his family and grant them peace*) that he used to suggest to the thief what would make the ḥadd fall away from him.

On that basis, if it is established by way of fingerprints that a man is the one who took the property from its secure place, then the man is bound to guarantee (compensate) the property, and the ḥadd is averted from him.

This, and it is necessary that it be established with the judge that fingerprints do not resemble one another.

### **[The ruling on acting upon fingerprints]**

**Question:** Does the judge act, in establishing a right, by the fingerprint or not?

**The answer:** It is permissible for the judge, in establishing financial rights and the like, to act upon fingerprints, because it has been established and become widespread that every person has his own specific fingerprint.

And at the very least, the fingerprint is a strong indicatory circumstance (*qarīnah*), and acting upon indicatory circumstances is recognized in the purified Sacred Law, so long as nothing stronger than it opposes it.

### **[What is acted upon of written documents]**

That which is acted upon of them is where the holder of the document is in actual possession and in control of what the document contains. As for when a man has a document concerning a piece of land or the like, but the land is in the hand of another man who is in possession of it and dealing with it, then the document is not accepted and no ruling is made by it. This concerns old documents whose scribe and witnesses have died.

It is possible to adduce for this that established possession (*thubūt al-yad*) over land and the like indicates ownership outwardly.

### **[On written documents also]**

If there is a piece of land in the hand of a man, and before him it was in the hand of his father, then another man comes and claims that land, and produces a written document whose scribe and witnesses have died, stating that that land belongs to the claimant – then the ruling therein is that the land is ruled to belong to the one in whose hand it is, together with his oath. If the document is against him personally, he swears definitively; and if it is against his ancestor, he swears according to his knowledge.

We have only said that because established possession is stronger in its indication of ownership in favour of the denier – and that is the outward appearance – and one does not depart from it except by a proof which is stronger than the outward appearance. The written document whose scribe and witnesses have died is a weak proof, due to what is in it of possible alternatives, namely:

1. The possibility of forgery – and how widespread that is in this time.
2. The possibility that the document was written between the two parties, then after it was written a dispute occurred, and then they both abandoned (rescinded) the contract.
3. The possibility that the sale did indeed take place, then after that there was cancellation, or annulling, or a re-purchase.
4. And finally: if the sale had been valid in reality, the buyer would not have remained silent for a long time until its scribe and its witnesses died.

– One acts upon documents which are not opposed by established possession nor by anything stronger than them, even if their scribe and witnesses have long since died, but on condition that the handwriting is known.

### **[When does the judge rule ownership to the one in possession (*dhū al-yad*)?]**

**According to the *madhhab*:** The judge rules ownership to the one in whose hand the property is, with four conditions:

1. That he disposes (of it as an owner).
2. That it is ascribed to him [i.e. that people attribute the property to him].
3. That there was no disputant in what has passed of time.
4. That established possession has lasted three years – and this is in other than movable property. As for movable property, it suffices that possession be established over it even for an hour, so long as

it is not predominantly assumed that it belongs to someone else.

**[The ruling when two men claim the same thing, or their properties have become mixed]**

It is authentically reported from ‘Alī (*Peace be upon Him*) that he used to cause those drowned and the like to inherit from one another, and that he used to assign to the hermaphrodite of uncertain sex (*al-khunthā al-mushkil*) half the share of a male and half the share of a female.

**I say:** Derived from that are the following:

1. If two men claim something, each one of them claiming that it belongs to him to the exclusion of his companion, and neither of them has possession over it, and each of them brings a proof, or each of them swears that it belongs to him to the exclusion of his companion, or they both abstain from taking an oath – then in any of these situations, the thing claimed is divided between them into two halves.
2. If the property of two men becomes mixed, and each of them claims that he has more than half, then it is divided between them into two halves. This is in the absence of proof and the like.

**[The ruling on a man bringing a claim with the aim of fining the one who harms him]**

**Question:** Is it permissible for a man to take revenge and requite one who harms him and persists in harming him, by imposing fines upon him – that he fabricate against him lawsuits and claims, bring him into court proceedings, and make him liable for fines in those proceedings, so that he may be safe from his evil and that he cease his harm?

**The answer – and Allah is the One who grants success** – is that if a man finds no way to be safe from the harm of his companion except by quarrelling and litigating with him, then it is permissible for him to do so – but on condition that he not bring against him a claim that is outright false; for lying is forbidden and it is not permissible to deliberately commit it. Rather, in his claim he comes with allusive expressions, suggestions, and double-entendres.

The proof for what we have mentioned is what has been established in its proper place: that a person has the right to ward off from himself (harm), and that he must begin with the lighter means and then the lighter (than that). He must not use the sword when it is possible to ward off (harm) with a stick or a whip. In light of that we have said what we said.

If the man finds a way that is lighter than quarrelling, then it is not permissible for him to quarrel. Likewise, all reprehensible things are to be repelled by the lighter means than the lighter; it is not permissible to

repel them with what is more severe when it can be repelled with what is lighter.

The proof for that is that Allah, Exalted, has forbidden the blood, skins (bodies), honour, and wealth of the Muslims. There is no doubt that Allah, Exalted, has made it incumbent upon the believers to repel reprehensible things by the texts of the Qur’an. If it is possible to repel the reprehensible without touching the blood, skins, honour, or wealth of the Muslims, then that is the obligation.

If it is not possible to repel it except by means that affect their wealth, or their honour, or their bodies, or their blood, then let that be with the least and lightest amount possible, and no excess is permissible.

**[Whoever buys land, then someone contends with him over it whom he thinks has no right]**

**Question:** A man bought a piece of land from another man, and the buyer built a wall around it. Then a third man, known for frequent quarrelling and disputation, came and claimed to the buyer that he has a share in this land. The seller had already guaranteed to the buyer whatever might be deficient or invalid, and so on. Is the buyer obliged to open for himself, over this land, the door of quarrel and dispute before the judges, or is he not obliged to do that?

**The answer:** If the buyer knows, or thinks, that the claimant’s claim is invalid, and no indicatory circumstance appears to him that points to the validity of what the man claims – then he is not obliged to answer him. But if there appears to him something that points to the soundness of his demand, then it becomes obligatory for him to answer him.

**[Benefit: The ruling on abstaining from an oath (*al-nukūl ‘an al-yamīn*)]**

“The burden of proof is upon the claimant, and the oath is upon the one who denies.” And if the denier wishes to redirect the oath to the claimant, then that is for him; and if the denier abstains from the oath (*nakhala ‘an al-yamīn*), it is said: the right becomes binding upon him by his abstention, and this is the madhhab.<sup>1</sup>

And it is said: He is not ruled against because of his abstention, but rather he is imprisoned until he either acknowledges or swears.

The more cautious view is that of the one who said: nothing becomes binding merely by abstention, unless the claimant swears. This is because nothing becomes binding by mere claim according to consensus, and abstaining from the oath is not a confession. Abstention from the

1- *Sharḥ al-Azhār* 4/145.

oath may be due to stubbornness, or it may be because the possibility of the claimant's truthfulness exists, while the denier does not wish to swear except upon one-hundred-percent certainty. Or it may be because of the claimant's truthfulness in his claim. Since there are these possibilities in abstention, it cannot be treated as confession.

This having been said, after that I came to consider the position of the people of the madhhab stronger – namely, that the right does indeed become binding by abstention. This is because of His saying, Exalted, in Sūrat al-Nūr: *"And it will avert the punishment from her if she bears witness four times [swearing] by Allah..."* [al-Nūr:8].

### **[Judgment by abstention from the oath]**

Allah, Exalted, has said: *"And those who accuse their wives [of adultery] and have no witnesses except themselves – then the testimony of one of them [shall be] four testimonies [swearing] by Allah that indeed, he is of the truthful; and the fifth [oath will be] that the curse of Allah be upon him if he should be among the liars. But it will avert the punishment from her if she bears witness four times [swearing] by Allah..."* to the end of the verse. [al-Nūr:6–8]

Allah, Exalted, has made the oaths incumbent upon the wife who is accused by her husband. If she swears, the ḥadd (prescribed punishment) is averted from her; if she does not swear, she is punished with the ḥadd of fornication. There is nothing that necessitates punishment in this case except abstention from the oaths.

### **[The ruling of the judge by abstention from the oath]**

His saying, Exalted: *"And it will avert the punishment from her if she bears witness four times [swearing] by Allah..."* [al-Nūr:8] – this verse came regarding a husband who accuses his wife of fornication and has no proof.

Taken from this verse is that the judge rules by abstention from the oath. So whoever is claimed against concerning a right, and no proof (for the claimant) is found, and he persists in denial – the judge obliges him to take an oath. If he swears, the judge rules, outwardly, that he is free of the claimed right. If he refuses to swear and persists in abstention, the judge rules that the claimed right is established against him – unless he redirects the oath to the claimant; in that case, the judge does not rule that the right is binding upon him, but rather obliges the claimant then to swear. If the claimant swears, he is entitled to that upon which he swore; and if he abstains from the oath, the judge rules that the defendant is free of liability.

**If it is said:** This verse pertains to the husband accusing his wife of fornication, whereas what you have mentioned concerns financial rights and the like. How can one be analogized with the other?

**We say:** What we have taken from the verse is that abstention from the oath is, in ruling, like confession; abstention and confession are one and the same, whether they relate to money, or a right, or a ḥadd, or anything else.

**If it is said:** The ruling in the verse, that the wife is punished with the ḥadd, is due to the husband's testimony of four oaths by Allah that he is of the truthful, and not due to her abstention.

**We say:** The husband's four oaths, then the fifth, only came upon him and became incumbent in order to avert from himself the ḥadd of slander (*ḥadd al-qadḥ*). This is indicated by His joining to his oaths His saying, *Exalted: "And it will avert the punishment from her..."* – which shows that the husband's oaths were to avert the ḥadd from himself.

Based on that, if the husband were to abstain from the oaths, the ḥadd of slander would become obligatory upon him. From this comes what is reported in the story for which the verse was revealed: that the Prophet (*May Allah bless him and his family and grant them peace*) said to the two [who were invoking mutual imprecation (*al-mutalā'inayn*)] at the time of the oaths: "*Fear Allah, for one of you is lying, and the punishment of this world is lighter than the punishment of the Hereafter.*" – this is the meaning of the report. This indicates that if the husband had not sworn, he would have deserved the ḥadd, which is the punishment of this world.

- "The ḥadd upon the husband, if he abstains from the oaths, is because of slander, so he is punished for slander, not for abstention" – thus they have stated.

What appears to me is that if the husband abstains from the oaths, that is (treated as) a confession of his lying in the slander, so he is punished, in that case, because of his confession of lying about her. For this reason Allah, *Exalted*, has said: "*Then the testimony of one of them [shall be] four testimonies [swearing] by Allah that indeed, he is of the truthful.*" [al-Nūr:6] So if he does not swear that he is truthful in what he accused her of – fornication – then he is a liar, and is punished for lying about her.

- And they have said, as in the marginalia of *Sharḥ al-Azhār*, that if the woman abstains, she is punished because of the husband's oaths; for his oaths are in the position of four witnesses.

**The answer:** If the wife abstains after the husband has taken the oaths, and she persists in abstention, that is an admission from her that the husband is truthful in what he has accused her of; so the ḥadd, in that case, is on account of her confession.

**If it is said:** Why did the Prophet (*May Allah bless him and his family and grant them peace*) encourage the two who were invoking mutual imprecation to reconcile, by his saying, *May Allah bless him and his family*

and grant them peace: “Allah knows that one of you is lying, so is there any of you who will repent?” – while it is known that the Prophet (*May Allah bless him and his family and grant them peace*) did not love concealment in such cases, and he, *May Allah bless him and his family and grant them peace*, would prompt the one confessing to fornication with what would cause the ḥadd to fall away from him? And it is narrated: “Ward off the ḥudūd by doubts,” and so on?

**We say:** The Prophet (*May Allah bless him and his family and grant them peace*) knew that one of them was certainly lying, and that the one of them who swore while lying would incur the wrath and curse of Allah. So he, *May Allah bless him and his family and grant them peace*, guided him to encourage them that the liar among them should repent and bear the punishment of his sin in this world, for that is better and easier than that Allah’s wrath should be upon him in the Hereafter.

### [Benefit concerning the oath]

- The oath (*al-yamīn*) is weak evidence; it is not permissible for the judge to base a ruling upon it alone, unless another proof is joined to it.
- The oath is only accepted from the denier because of its being joined to the original presumption of innocence.
- The oath of the claimant is accepted when joined to the testimony of a single witness.
- The oath can be a route to judgment by it alone when the two disputants mutually agree to accept judgment based on the oath of one of them.

### [Benefit concerning mutual agreement upon the oath, or reconciliation by it]

It is valid for the two disputants, concerning what is between them of dispute, to mutually agree that one of them will swear an oath and the other will be satisfied. It is likewise permissible for a reconciler between the disputants to make reconciliation on that basis. If the two disputants are content with that, and the oath has been taken, then the disputant has no right thereafter to demand that his opponent swear another oath, nor to bring him before the judge, for he has renounced his right by means of the oath.

**If it is said:** Do they not say that upright testimony (*al-bayyinah al-‘ādilah*) is stronger than a wicked oath, and that the judge must rule according to the *bayyinah* even if he had previously ruled according to the oath?

**We say:** What you have mentioned relates to what the judge has ruled upon; as for what we have mentioned, it relates to what occurred by mutual agreement between the two disputants. So the two cases are



different.

**[The ruling when documents are found after reconciliation and mutual satisfaction between the two disputants]**

**Question:** If reconciliation and mutual satisfaction have taken place between two disputants concerning a matter, and each of them has been content with what they reconciled upon, and each has fully waived every right and claim, then after that one of the two disputants finds a document indicating that he has more than what he accepted in the reconciliation – does he have the right to demand from his opponent, arguing that he only found the document after the reconciliation?

**The answer, by Allah’s enabling,** is that what appears to me is that the disputant has no right to demand anything from his opponent after the reconciliation and mutual satisfaction between them concerning a matter.

The proof of that is that the satisfaction of the two disputants with the reconciliation and their entering into it is in fact that each of them has been pleased with what has come to him by that reconciliation, and has yielded to his opponent whatever is beyond that.

Once the reconciliation has taken place on that basis, and mutual satisfaction with it has been completed in the presence of upright witnesses, then it is a valid reconciliation. A valid reconciliation is not undone except by a new reconciliation to undo it.

- And every reconciliation that takes place among the Muslims is valid and permissible, except a reconciliation that makes lawful what is unlawful or makes unlawful what is lawful; such a reconciliation is not valid. In this meaning the narration from the Prophet (*May Allah bless him and his family and grant them peace*) is authentic.
- There is no way to annul what has been correctly concluded of reconciliation; otherwise no reconciliation would ever be valid or stable, since it would always be possible for one of the two reconciled parties to claim that after the reconciliation something appeared to him indicating that he deserves more than that upon which the reconciliation was concluded.

**Furthermore,** reconciliation is stronger than a judicial ruling,

- because it is built upon the satisfaction of the two disputants with that upon which the reconciliation took place and their acceptance of it;
- and because Allah, *Exalted*, says: **“And reconciliation is best”** [al-Nisā’:128].
- And because reconciliation grants each of the two disputants ownership, both outwardly and inwardly, of that which has come

to him by it, since it is built upon mutual satisfaction; whereas a judicial ruling only establishes ownership for the disputants outwardly.

- And if a correct judicial ruling is not, in general, annulled, then reconciliation is all the more not annulled.
- And Allah, *Exalted*, has said: “*O you who have believed, fulfil (all) contracts.*” [al-Mā'idah:1]

**If it is said:** When, after a judicial ruling, a decisive proof contrary to it becomes clear, that ruling is annulled. So likewise, if after a reconciliation a decisive proof contrary to what the reconciliation was concluded upon appears, [it should be annulled].

**We say:** The judicial ruling is only annulled when it contradicts a decisive proof because it becomes clear that it was invalid from the outset. As for reconciliation, the appearance of a decisive proof contrary to it does not invalidate it, because it is built upon the satisfaction of the two disputants, as we have already mentioned – and satisfaction is the strongest, or among the strongest, routes for transferring ownership.

**[Acting upon reconciliation or mutual agreement after a judgment has been issued in the case]**

**Question:** If a judgment has been issued between two disputants, or reconciliation has taken place between them concerning a matter, then after that a further reconciliation and mutual agreement on that same matter occur, and this latter reconciliation contains some points that differ from the prior judgment or prior reconciliation – which of these is to be acted upon?

And is it valid for one of the two disputants to argue for the invalidity of the last reconciliation by citing the previous judgment or previous reconciliation?

**The answer, by Allah's enabling, is:**

- That what is to be acted upon is the last reconciliation, with everything it contains, whether it agrees with what came before it or differs from it.
- That is because each of the two disputants has been content and satisfied with what has come to him in the last reconciliation, and is satisfied that his opponent should have what has come to him, and has completely yielded that to him and to every claim regarding it, and has fully relinquished it.
- Moreover, the reconciliation between the two disputants concerning a matter is considered an acknowledgement from each of them to the other of ownership of that which has come to him by this last reconciliation.

**If it is said:** Suppose that after this last reconciliation one of the two

disputants claims that he only discovered the document of the previous judgment or the previous reconciliation after this last reconciliation, and that had he known of it before the last reconciliation he would not have been satisfied with it – does that constitute an excuse for him to annul the last reconciliation?

**We say:** That is not a valid justification for annulling the last reconciliation, for the reasons we have already mentioned: that reconciliation is, in essence,

1. The renunciation, by each of the two disputants, of every claim concerning what has come to his opponent;
2. The acknowledgement, by each of them, that the other owns what has come to him by that reconciliation.

It is not valid for either of them to demand what he has yielded to his opponent or what he has acknowledged to be his.

What we have mentioned is further supported – in addition to what has preceded – by what is narrated from the Commander of the Believers (*Peace be upon Him*): that a man came to him and said: “O Commander of the Believers, my slave has married without my permission.” So the Commander of the Believers (*Peace be upon Him*) said: “Separate between them.” The man then said to his slave: “Divorce her, O enemy of Allah!” So the Commander of the Believers (*Peace be upon Him*) said to the slave: “Now, O slave, if you wish you may keep her, and if you wish you may divorce her.” The man objected to the Commander of the Believers (*Peace be upon Him*) because he had taken the matter out of his hand and placed it in the hand of the slave. So the Commander of the Believers (*Peace be upon Him*) clarified to him what he objected to and said: “You have confirmed him in the marriage and given him permission for it when you commanded him to divorce her, for you would not have commanded him to divorce her except that you had acknowledged the contract of marriage.” This is the meaning of the narration, not its exact wording – so let it be known.

The words of the Commander of the Believers (*Peace be upon Him*) in this narration indicate that a person’s yielding his right to another person is a route for the right to be established for that other person and for the first person’s right to be cut off, and that no claim is to be heard thereafter from the one who has yielded.

- And the narration indicates that it is obligatory upon the judge to rule according to what is outward, even if the one against whom he rules is heedless or naïve.

Similar to what has preceded is when there are dealings of debt between two men. Then the records of the debt are lost or stolen, and the two men wish to free themselves from that debt. They meet, estimate the

debts, and negotiate concerning them, and their opinion agrees that the debtor shall pay a specific sum to his companion, and that they shall mutually forgive what is more or less than that. The payer then yields what may be in excess of that amount of debt, if there is any; and the receiver yields what may be less of his debt, if there is any. They separate on that basis, with a document written by an upright scribe and two upright witnesses. Then, after some time, the lost records are found. Does the finding of those records constitute a reason to annul that reconciliation, mutual relinquishment and mutual pardon, or not?

- The answer is as we have already mentioned in the first question, namely that reconciliation and mutual agreement have cut off the path of any further claims in that matter.

**Yes**, if the reconciliation and relinquishment were conditioned upon the non-appearance of the record, then in that case the record is acted upon.

### **Al-Shamlan**

What is widespread today among the general people, the tribes, the courts of judges, and arbitrating judges is that the ruling issued by the judge does not bind the two litigants until they both perform *al-shamlan* regarding it.

What appears to me is that when the lawful judge passes judgment between the disputants who are before him, writes down the judgment and has it witnessed, then it becomes obligatory upon the two parties to act upon it and implement it. If the judge has authority, it is upon him to enforce it; or, if the two parties have guarantors and sureties, enforcement is directed against them – whether the two parties have performed *al-shamlan* or have not performed it.

That is because the evidences that have come in this chapter have not mentioned the *shamlan* of the two parties.

**Yes**, if one of the two disputants claims against the judge that he has erred or mistaken in his ruling, and clarifies the aspect of the error or mistake, then it is upon the judge to review the matter; and it is upon other judges, if that ruling is brought before them, to examine it: if they find an error or mistake, they correct it and clarify it.

- It is permissible for the judge, when he issues his ruling between the disputants, to say: “This is what I have judged between you; if you wish and are pleased (then accept it), otherwise there is one more knowledgeable than I – so-and-so – so take your case to him.” This is based on what is narrated from ‘Alī (*Peace be upon Him*) that he ruled among some people with a ruling and left its acceptance to their choice: if they were pleased with it, [so be it]; otherwise they were to take the case to the Messenger of Allah (*May Allah bless him and his family and*

*grant them peace*).

– The judge should not say this except with certain conditions:

1. That the judge sense, from the state of the disputants, that they are not at ease with his ruling, because they imagine that his knowledge of judicial matters is deficient.
2. That there be, near to them, someone whom they regard as more knowledgeable in judicial matters, or someone who is, among them, equal to the judge in knowledge of judicial matters.
3. That the judge be safe from any discord that might arise as a result of giving them the choice of accepting his ruling.

**[Is evidence accepted after the two disputants have been “restricted” (*tahjīr*)?]**

**Question:** May the judge accept, after *tahjīr*, evidence (*bayyinah*) from one of the two disputants?

**The answer:** There is no objection to accepting evidence after *tahjīr*, and the other party has the right to counter that evidence.

The proof of that is that the intended purpose of appointing judges is the establishment of truth and fairness among people, and evidences are among what makes the truth appear and clarifies it. It is not permissible for the judge to reject something by which the truth becomes clear to him; otherwise, he would be turning away from judging according to the truth.

And *tahjīr* means that the two disputants have completed what they have of claims, responses, and proofs, and that they have given the judge permission to judge. So if one of the two disputants presents to the judge evidence after that, but before he has passed judgment, it is upon the judge to accept it, and upon his opponent to counter it.

As for when the disputant brings his evidence after *tahjīr* and after judgment has been given on the basis of an oath, the scholars of the madhhab have said, in meaning: If it was the disputant himself who requested the oath from his opponent and said to the judge: “Let him swear for me, and I am satisfied, content, relinquishing [my claim],” or similar words – then the judge made him swear, and wrote the judgment of ownership for the one who swore, on the basis of the disputant’s request for that – then, after that, the disputant’s evidence is not accepted and is not heard.

But if it was the judge who obliged the denier to take an oath and demanded it of him, then he swore, and after the judge made him swear he ruled that ownership was his, and then after that the disputant brought upright evidence – then it is obligatory upon the judge to accept it, and to oblige the one who swore to listen to it and to answer it. If he

produces something that undermines it or counters it, then so be it; and if not, then it becomes obligatory upon the judge to rule according to it and to overturn the first judgment. Thus have the scholars of the madhhab said.

**[May the judge, if the claimant does not know how to formulate his claim, order someone to write his claim for him?]**

**Question:** If the claimant does not know how to formulate a legal claim, may the judge order someone to ask him about what is in his mind and about his story with his opponent, and then, once he understands his intention, to write out the claim for him?

**The answer – with success from Allah** – is that if the claimant does not know how to formulate a claim, and the judge has understood from his state and his speech that he does in fact have a rightful claim against his opponent, but that he has not been able to express it properly because of his ignorance, or his extreme rusticity, or his speech impediment – then there is no objection to sending him to someone who will look into what he wants and examine what is in his mind, then write out the claim for him accordingly.

Indeed, if the matter is like that, it is not permissible for the judge to nullify his claim and turn away from hearing it, because the responsibility and function of the judge is to repel injustices, and to grant people justice, one from another, and so on; and that cannot be achieved except if he does what we have mentioned. This is not counted as the prohibited prompting (*talqīn*); for prompting is when the judge says to the claimant: “Say such-and-such, and do not say such-and-such,” or “Deny, and do not confess.”

### [Book of Acknowledgment]

#### **[Two partners in a right, one of them acknowledges to a third some of it]**

In the marginal notes according to the madhhab: If there is between two people a right of flow of water, or passage of water, or something similar, and one of them acknowledges to a third person some of it, then his acknowledgment is not valid. This is unlike (the case of) properties, where it is valid and the third shares with him in his portion. End.

**I say:** It is as though they justify that by saying that rights do not admit of division, unlike properties. For if one of the two (owners) acknowledges to a third, he shares with him in his share; whereas a right of passage, for example, in a path does not validly admit of (someone) sharing with him in his portion.

#### **[The acknowledgment of one afflicted with obsessive thoughts (*al-muwaswas*)]**

The acknowledgment of the one afflicted with obsessive thoughts (*al-muwaswas*) is not valid, because he imagines that he has done a thing while in reality he has not done it; and he imagines that it has been said to him and that he has said [something in reply], while in reality nothing of that has happened; and he imagines that so-and-so – a man or a woman – has done and has said, while in truth nothing of that has taken place.

This type of illness is widespread in our present age. You see the man, in his dealings, like a sane person and you do not find anything objectionable in him; but when you bring up his problems with him, or he brings them up with you, and you become acquainted with his secrets, you find in him delusions and obsessive suspicions about his wife, or his brother, or his father, which hardly any sane person would accept. At that point you realise the deficiency and weakness of his mind.

Such a person is judged to be insane; and it has been said: “Madness is of many kinds.” Whoever is like that, it is not permissible to accept his acknowledgment, and his divorce is not valid.

#### **A benefit: (acknowledgment by writing)**

In the marginal notes of *Sharḥ al-Azhār*: <sup>ʿ</sup>Imām Yaḥyā (*Peace be upon Him*) said: If a man dies and it is found, in his handwriting, (written) that a particular bag belongs to Zayd, or the name of a man is found written on the bag, no ruling is given on that basis; because he may have deposited something with him, then later taken ownership of it; or he may have bought a bag upon which a man’s name was written. End of his wording.

***I say:*** What appears preferable is other than what the people of the madhhab have said here; for the pen is one of the two tongues. Whatever is known to be from the handwriting of the deceased is acted upon accordingly, and it is not appropriate to neglect that writing because of remote possibilities – unless those possibilities are strengthened by means of signs and circumstantial indicators, in which case they have their ruling. This is what appears to me, and Allah knows best, and praise belongs to Allah, Lord of the worlds.

**[The basic rule concerning accidental killing]**

The scholars of the madhhab said: If a man claims against another man that he killed his father, and the man says: “That was by mistake,” then this is an acknowledgment of killing, and it is treated as accidental killing, because the basic presumption is freedom from liability.

And in the marginal notes; the preferred view is that it is stated that the basic rule is (to consider it) accidental, whether the killing is established by testimony or otherwise. End.<sup>1</sup>

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1- *Sharḥ al-Azhār* 4/176.



### [Book of Testimonies]

#### [The seven matters in which testimony by presumption is given, and the issues of notoriety (*al-ishtihār*)]

The seven matters concerning which testimony based on presumption (*ẓann*) is given are gathered in the poet's saying:

*"Your testimony by presumption is (accepted) in seven, so take the enumeration of that in brief:*

*regarding the rectitude (ta'dīl) of a person and his insolvency, and the value of what has been consumed, and (his) affluence, and the compensation for injuries – followed by testimony of ownership and (testimony based upon) notoriety."*

And al-Qāḍī Muḥammad Mashḥam gathered them in his saying:

*"And I present to you seven (matters) in which it has been permitted for a witness to suffice, concerning them, with the outcome of his presumption:*

*Rectitude, insolvency, affluence, notoriety, compensation, established possession, and the value of what was destroyed."*

The issues of notoriety (*masā'il al-ishtihār*) are five matters agreed upon: death, marriage, (and the number of heirs – according to those other than (our) madhhab), lineage (*al-nasab*), and testimony against the judge. And there are two matters about which there is disagreement: (they are) loyalty (*al-walā'*) and endowment (*al-waqf*).

#### [Bearing witness to divisions of inheritance (*al-qisāmāt*) and other than them]

**Question:** Is it obligatory to call witnesses for the divisions of inheritance between brothers and the like? Or is it sufficient to specify and for the scribe to write his name, given that he is the one who divided (the estate)? And may a person bear witness to a sale or a division which he attended with the parties, while he does not know the item sold or the property divided with complete familiarity? May he testify, and how should his testimony be?

**The answer:** Allah, *Exalted*, has legislated the bearing of witness over transactions between people – such as sales, leases, and divisions – out of fear of denial.

If the brothers divide among themselves, with mutual consent and choice, the division is valid, and there is no problem upon them if they do not call witnesses to the division. However, should they later quarrel, the judge will rule by an oath upon the claimant to validate the division – and this is the completing oath (*al-yamīn al-mutammimah*) – because the scribe is considered a witness; or he will rule by an oath upon the denier

to validate the division. If there is testimony regarding the division, there will be no need for oaths; and litigation and quarrelling may not arise in the first place because of the writing and the witnesses.

- It is permissible for the witness to testify even if he does not know the specific item sold or the property divided, and that is by bearing witness to the confession of the two contracting parties regarding the sale, the price, the payment, the receipt, and the sold item, even if he has not seen any of that. This is because the confession and acknowledgment from both parties, and their satisfaction with what the contract contains of details, is sufficient. Likewise in the matter of (property) divided, the witness testifies to what the co-dividers have accepted, acknowledged, and fully and finally agreed upon of the specification mentioned in the written document between them; it is not a condition that the witness know the very items that were divided.

- His testimony, therefore, is to their satisfaction with what the division document contains of details, specification, and so on.

**[A benefit concerning the ruling on the testimony of one who is not just (*ghayr al-ʿadl*)]**

Imām al-Mutawakkil ʿalā-llāh said: If not accepting the testimony of one who is not just would lead to the nullification of a known right, then there is no avoiding taking it into account and accepting it, if it supports what is outward in the incident. If the judge's presumption of its truthfulness predominates, he acts upon it. End.

And Imām al-Manṣūr bi-llāh ʿAbd Allāh ibn Ḥamzah (Peace be upon Him) said in his *Muḥadhdhab*, concerning accepting the testimony of the openly sinful (*al-fussāq*), the following words: "Justice (*al-ʿadālah*) in testimony was only legislated for the protection of people's wealth. If some lands are devoid of just witnesses, then we must not treat justice as a condition; we accept the testimony of those who habitually abandon the prayer (*quṭṭāʿ al-ṣalāh*) whenever they are from the people of truthfulness. For if we were to insist upon justice, we would waste people's wealth – and justice was not legislated except to safeguard it..." and so on. End.

**[On explaining the justice required in a witness]**

In *al-Azhār*, in explaining that the judge must request the rectification (*taʿdīl*) of evidence whose justice is unknown, then that it may be repelled by the denier. End.

**I say:** What is meant by "justice" (*al-ʿadālah*) in this chapter is what people know among themselves: for when they see a man maintaining the prayers, not harming people in their wealth and their honour, and not committing prohibitions, they call him "just" and bear witness for him of justice.

And this is known and observed by the people of his village and his quarter, and by those who frequently associate with him, or frequently deal with him and keep his company.

### **The way to testifying to the justice of witnesses**

**According to the madhhab** there are three ways:

1. To examine the state of the witness in health and sickness, residence and travel, anger and pleasure, hardship and ease.
2. That a judge has ruled for his justice.
3. That he be well-known (*mashhūr*) for justice.

These are the ways such that, if the one who validates (*al-mu‘addil*) knows one of them, it is permissible for him to testify to the justice of the witness.

**I say:** I am hesitant as to whether the judge is obliged to ask the claimant to bring what indicates the justice of his witnesses, or whether that is not the judge’s task, but rather the task of the one about whom testimony is given – that he is the one who requests that the witnesses’ justice be established, then attacks their justice and impeaches them if he is able to do so, and the judge’s role is then to look into the soundness of what both sides have brought of validation and impeachment.

The people of the madhhab have said that it is obligatory upon the judge to request of the claimant the validation of evidence whose justice is unknown to the judge, even if the opponent does not request that – because the right belongs to Allah. End.

**Yes**, the justice of witnesses is a condition for the validity of testimony, due to His saying, *Exalted*, in the Verse of Debt: *"And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses"* [al-Baqarah:282]; and His saying, *Exalted*, in Sūrat al-Ṭalāq: *"And bring to witness two just men from among you"* [al-Ṭalāq:2]; and His saying, *Exalted*, in Sūrat al-Mā'idah: *"O you who have believed, testimony between you when death approaches one of you at the time of bequest is (that it be) two just men from among you"* [al-Mā'idah:106].

The scholars have differed concerning the reality of justice and its meaning, upon two views:

1. That it is the uprightness of the legally responsible person in performing acts of obedience and avoiding prohibitions, and leaving what he is blamed for of doubtful matters or what violates dignity; whoever is like that is the "just" person whose testimony is accepted.
2. That justice is self-restraint and rising above the blame of lying; whoever is known for that is just, and his falling short in obeying

Allah, or committing acts of disobedience, does not nullify it.

What is preferable, in my view, is the first view, and it is what appears from the madhhabs of our scholars.

The second view is the view of the ḥadīth scholars among Ahl al-Sunnah, as is shown by their authenticating the narrations of the Khārijites, the Rāfiḍites, and the Nāṣibites. For what is relied upon with the people of this view is that the narrator be one who is presumed to be truthful; and whoever among the narrators is presumed to be accused (of lying), his narration is not accepted. For that reason they narrate from the Khārijites if they know of their carefulness in truthfulness, and they avoid narrating from some of the people of their own madhhab if he is one presumed to lie.

This is the foundation of their madhhab regarding the justice of narrators, but they contradict it when desire presents itself to them: they disparage those who are truthful and trustworthy if he narrates the virtues of the Commander of the Believers or of the People of the House (*Peace be upon Them*).

The basis of the first madhhab is that justice is the existence of a competence (*ahliyyah*) in the narrator, namely: adherence to piety (*taqwā*), and the avoidance of vices and of what conflicts with dignity. If this competence is present in the narrator, his narration is accepted; and if this competence is taken away from him, his narration is rejected and it is not permissible to rely upon it, even if he is known for truthfulness and for guarding himself from lying.

And as we have said, this is the preferable madhhab, due to His saying, *Exalted: "O you who have believed, if a wicked person comes to you with news, then verify, lest you harm a people out of ignorance and then become, over what you have done, regretful"* [al-Ḥujurāt:6].

So Allah, *Exalted*, commanded the believers to verify the report of the wicked person (*al-fāsiq*), and its meaning is to refrain from acting upon it until its soundness or its corruption appears to you from other directions. Allah then gave as the reason that the report of the wicked is ignorance, followed by regret.

And He, *Glorified*, has said: *"And do not incline toward those who do wrong"* [Hūd:113]; and "inclining" (*rukūn*), as the exegetes have said, is a slight leaning; and relying, in religion, upon the reports of the wicked is among the greatest forms of inclining.

And He, *Exalted*, has said: *"And Allah testifies that the hypocrites are surely liars"* [al-Munāfiqūn:1].

In these verses, the rejection of the reports of those mentioned is tied to wickedness, wrongdoing, and hypocrisy. Thus it is not permissible to

accept the reports of the wicked, the wrongdoer, and the hypocrite, even if he is presumed to be truthful, because of the existence of a quality that prevents accepting his report.

What we have mentioned is further supported by His saying, *Exalted*, in Sūrat al-Nūr, concerning slander of chaste women: "*And if they do not produce the witnesses, then they, in the sight of Allah, are the liars*" [al-Nūr:13]; so Allah, *Exalted*, has judged them to be liars, even if they were, in reality, truthful.

**Yes**, what I incline to is that if the judge sees in the appearance of the witness and in his speech what indicates his justice, then he is not obliged to investigate, and he suffices with that outward (sign); but he is obliged to open the door for the one about whom testimony is given to impeach (*al-jarḥ*), and to request from him that he refute the testimony, if he has something with which to refute it of impeachment or other than it.

And if, in the appearance of the witness and in his speech, there is what arouses doubt, then the judge requests from the claimant that he establish his justice, and he opens the door for the one about whom testimony is given to refute his testimony by means of impeachment or otherwise. Similar to this is when the witness is from a community the majority of whom are righteous, or from a community the majority of whom are corrupt. With predominance of righteousness, the outward (signs) suffice for the judge, and the judge opens for the opponent the door of impeachment; and with predominance of corruption, the judge requests that the evidence be rectified (by showing justice).

### **(The testimony of a transgressor by misinterpretation (*fāsiq al-ta'wīl*))**

In *Sharḥ al-Azhār*, al-Yalā said: "The correct view is to accept his testimony (that is, the one who is a *fāsiq* by misinterpretation) if he avoids the prohibitions of his religion." End.<sup>1</sup>

He had previously explained the *fāsiq al-ta'wīl* and said: such as the rebels (*al-bughāt*) and the Khārijites; and in the marginal note he mentioned the Rāfiḍites.

**I say:** As for the Khārijites, the Nākithūn, and the Qāsiṭūn, the Prophet (*May Allah bless him and his family and grant them peace*) has disparaged them; it is authentic that the Prophet (*May Allah bless him and his family and grant them peace*) commanded that they be fought, and that he said about ‘Alī (*Peace be upon Him*): "*None loves him except a believer, and none hates him except a hypocrite,*" and other (reports) of that sort are

1- *Sharḥ al-Azhār* 4/94.

many.

As for the Rāfiqites, likewise the Prophet (*May Allah bless him and his family and grant them peace*) has disparaged them, as in the well-known ḥadīth from Zayd ibn ‘Alī (*Peace be upon them*). This disparagement that is narrated from the Prophet (*May Allah bless him and his family and grant them peace*) is something that impairs and contradicts justice.

**It may be said:** That does not contradict justice, because of the presence of ambiguity (*al-shubha*).

**We say:** The matter is not as you have said, for the ambiguity has impaired faith, and justice is one of its branches. The proof that it has impaired faith is several points:

1. That one who is in such a state is not described as a believer, neither explicitly nor by interpretation, with the people of justice.
2. That it is obligatory to show enmity towards him.
3. That his blood is lawful (to shed).

If the *fāsiq al-ta’wīl* were a believer, none of that would be permissible with respect to him. Thus we know, at that point, that he is entirely devoid of faith.

**Yes,** from here it becomes clear that justice has two meanings:

*The first:* what we have mentioned – a quality produced by faith and branching from it. When faith is absent, that quality is absent; when faith is present, it is present. This is the view of those who say that wickedness (*fisq*) removes competence (*ahliyyah*).

*The second:* that the legally responsible person is characterized by carefulness in truthfulness and avoidance of lying, along with Islam. This is the view of those who say that wickedness is a presumption of accusation; so when accusation is absent from the legally responsible person, he is just, and his report and testimony are accepted, even if he is a *fāsiq*.

The people of the madhhab have taken a part of the first madhhab and a part of the second: they have rejected, absolutely, the testimony of the *fāsiq al-jāriḥah* [the one whose limbs commit open sin]. This is on the basis that the wickedness of open sin removes competence. And they have allowed the testimony of the *fāsiq al-ta’wīl*, on the basis that his wickedness is a presumption of accusation which is removed when the *fāsiq* by misinterpretation prohibits lying and is careful about truthfulness.

**Yes,** among what supports that wickedness, absolutely, removes competence is what has come from the Commander of the Believers ‘Alī ibn Abī Ṭālib (*Peace be upon Him*), when Mu‘āwiyah secretly sent to him to ask his legal opinion concerning the hermaphrodite (*al-khunthā*). That

(report) is, in meaning: “May Allah distance a people who deem our blood lawful and then accept our legal opinions or our words.” The story is well known.

And likewise what appears from the carefulness of the earlier Imams in narrating ḥadīth and their caution: they used to avoid the reports of the people of innovation and the reports of the Nāṣibites, and so on.

**The testimony of those who differ in madhhab, some of them regarding others**

**Question:** Is the testimony of those who differ in madhhab, some of them against others, accepted or not?

**The answer – and Allah is the One who grants success** – is that it is appropriate that the testimony of some followers of madhhabs against others who are not upon their madhhab not be accepted; because of what usually arises between them of enmity. And it has been established in the Sacred Law that the testimony of an enemy against his enemy is not accepted. This is in addition to the fact that each party sees the other as not just, so that each of them may then impugn the witness as being unjust.

As for the testimony of the Mujbira (Jabrites), for example, some of them for others, or the Mushabbiha, or the Murji’a, or any adherents of a madhhab when some of them testify for others in front of a judge – then that judge may rule on the basis of that testimony, even if he does not regard the people giving testimony as just according to his own madhhab.

The proof of that is the ruling of the Prophet (*May Allah bless him and his family and grant them peace*) by stoning the two adulterous Jews after he came to Madinah, based upon the testimony of some of the Jews that they had committed fornication.

In this case, it is required that the witnesses be acceptable to the people of that group.

Branching from this is the acceptance of the testimony of the Bedouins, some of them for others, in matters of sales, marriage, divorce, and the like; and similar to them are many of the people of remote regions who are far from Islamic teachings, and many of the people of villages whom ignorance has overwhelmed. The testimony of some of them for others is accepted by analogy with what has preceded, provided the witnesses are among those whose testimony is acceptable in those lands.

What has compelled us to what we have said is necessity. Allah, *Exalted*, has permitted the testimony of non-Muslims in cases of necessity, in His saying: *“O you who have believed, testimony between you*

*when death approaches one of you at the time of bequest is (that it be) two just men from among you or two others from outside of you, if you are travelling through the land and the disaster of death should strike you* [al-Mā'idah:106]. If the testimony of those we have mentioned were not accepted, contracts of sale, marriages, and all other contracts would be invalidated, and from that there would follow a great amount of corruption, and we would open upon people a door of tremendous evil. Allah, *Exalted*, says: "*Allah intends for you ease and does not intend for you hardship*" [al-Baqarah:185], and He says: "*He has not placed upon you in the religion any difficulty*" [al-Ḥajj:78].

### **[The testimony to acknowledgment by telephone]**

**Question:** Is it permissible to testify to an acknowledgment and the like, heard by telephone and the like, or not?

**The answer – and Allah is the One who grants success** – is that if a person hears the voice, and ascertains it, and ascertains who is speaking and knows him, then there is no objection to testifying and to the validity of that testimony.

The scholars of the madhhab have permitted the testimony of a blind man in that which does not require sight and direct observation,<sup>1</sup> and on this basis it follows, in the madhhab, that testimony is valid regarding an acknowledgment heard by telephone and the like.

### **[Testimony regarding transactions by telephone, by analogy with the blind person]**

Speech by telephone is like the speech heard by a blind person. Whatever the testimony of a blind person is accepted in, the testimony of the one listening by telephone is accepted in; and whatever it is not, then not. This is in the chapter of testimony to a voice heard by telephone.

It is valid to conclude agreements by telephone, if the witnesses know the voice and ascertain it – whether it be an agreement of sale or otherwise, such as a contract of *muḍārabah* (profit-sharing) or partnership – except in what requires hand-to-hand exchange (*taqābuḍ fī al-majlis*), such as selling one kind for its like among measured commodities, and currency exchange (*ṣarf*) and forward-sale (*salam*).

**Yes**, *ṣarf* and *salam* and selling one kind for its like may be permissible by telephone, on the condition that each of the buyer and seller has a balance and an account in the bank, and that each of them transfers into the account of the other what is due from him.

### **[Benefits concerning testimony and acknowledgment]**

1- *Sharḥ al-Azhār* 4/199.



– If a legally responsible person testifies to something, then retracts his testimony, his testimony is invalidated.

– If a legally responsible person acknowledges, against himself, a right owed to another, then retracts it, his retraction is not accepted.

**[Benefit concerning the non-acceptance of the testimony of a “disbeliever by interpretation” (*kāfir al-ta’wīl*) against others]**

In *al-Tāj*, according to the madhhab: As for the “disbeliever by interpretation”, such as the Mujbira and the Mushabbiha, his testimony is accepted against the Muslim and others, and his report from the Prophet (*May Allah bless him and his family and grant them peace*) is accepted, though not his issuing of legal opinions nor his appointment as judge. End.

***I say:*** What appears to me and is preferable in my view is that the testimony of the Mujbira, the Mushabbiha, and their likes among the “disbelievers by interpretation”, as well as their narrations of reports from the Prophet (*May Allah bless him and his family and grant them peace*), all of that is not accepted – except for their testimony one for another, which is accepted just as the testimony of the Jews is accepted some of them for others.

***What indicates what we have mentioned is:***

1. That the enmity of the Mujbira and the like towards the Mu‘tazilah, the Shī‘ah, and others among the people of madhhabs is to the utmost degree of enmity, inherited by the successors from the predecessors; likewise the enmity of the followers of madhhabs towards the Mujbira. And it is well-known and agreed that the testimony of an enemy against his enemy is not accepted.
2. The testimony and narration of an open disbeliever (*kāfir al-taṣrīḥ*) are not accepted, and the reason for non-acceptance is disbelief; and that same reason exists in the “disbeliever by interpretation” (*kāfir al-ta’wīl*).
3. Allah, *Exalted*, has said: “*And do not incline toward those who do wrong, lest the Fire touch you*” [Hūd:113], and there is no doubt that relying upon their narrations and accepting their testimonies is among the clearest forms of inclining (*rukūn*), and *rukūn* is a slight leaning.
4. There is no doubt that faith (*īmān*) is a condition for justice, or a pillar among its pillars; and the “disbeliever by interpretation” has deficient faith.
5. The Commander of the Believers (*Peace be upon Him*) did not accept what al-Zubayr ibn al-‘Awwām narrated to him on the Day of the Camel, namely the ḥadīth: “*Ten are in Paradise.*”
6. Acting upon presumption (*ẓann*) is condemned in the texts of the

Qur'ān, and no exception has been made from that except the report of a believer; all else remains under the generality of the condemnation, as in His saying, Exalted: *"And most of them follow not except assumption. Indeed, assumption avails not against the truth at all"* [Yūnus:36], and His saying, Exalted: *"And do not pursue that of which you have no knowledge..."* to the end of the verse [al-Isrā':36].

**Yes**, the scholars have differed: is disbelief and wickedness (*kufṛ* and *fisq*), whether by interpretation or openly, a removal of competence (*salb ahliyyah*), or merely a presumption of accusation (*maznūnat t-tuhmah*)? Those who said that it removes competence rejected the reports of anyone who was a disbeliever or wicked person absolutely, because they have lost the competence for their reports to be accepted.

Those who said that it is a presumption of accusation examined the person bringing the report: if he was careful to avoid lying and was truthful, they accepted his report, even if he was a disbeliever, a wicked person, or a hypocrite; and if he was not careful in that regard, they did not accept his report.

The discussion of the scholars of the madhhab has been built upon this latter view. However, what is famous from the madhhab of al-Hādī (*Peace be upon Him*) is that he did not accept the reports of the Mujbira, the Mushabbiha, and their likes, absolutely, and that it is not permissible to rely upon them. This is the correct view, supported by His saying, Exalted: *"And never accept their testimony – ever"* [al-Nūr:4], and His saying, Exalted: *"And do not incline toward those who do wrong"* [Hūd:113]; and there is no inclining greater than taking religion from them, and accepting their testimonies in ḥudūd, retributions, wealth, and so on.

And His saying, Exalted: *"O you who have believed, if there comes to you a wicked person with information, then verify, lest you harm a people out of ignorance and become, over what you have done, regretful"* [al-Ḥujurāt:6]. He, *Glorified*, has commanded verification in the case of the report of the wicked person, and that acting upon it without verification is ignorance, followed by regret. And the open disbeliever, or the disbeliever by interpretation, is a wicked person (*fāsiq*).

**[Benefit concerning the ruling on one who finds another's handwriting indicating a right he owes]**

In the marginal notes: Whoever <sup>finds</sup> another's handwriting indicating a right he owes, and he denies the right, it is not permissible to bear testimony on that basis nor to give judgment against him on the basis of his handwriting, even if he acknowledges that it is his

handwriting. End.<sup>1</sup>

**I say:** The pen is one of the two tongues; so if the person whose handwriting it is acknowledges that the handwriting is his, or testimony is established to that effect, it is permissible to give judgment against him according to what the writing contains. It is possible to infer this from His saying, *Exalted: "O you who have believed, when you contract a debt for a specified term, write it down..."* to the end [al-Baqarah:282]. If it is obligatory to act according to what a just person has written and two witnesses have testified to his writing, then all the more is it obligatory to act according to what a man has written against himself and has acknowledged that it is his writing, for acknowledgment is stronger than testimony.

**[Benefit concerning non-acceptance of the testimony of the judge after his removal, and of the divider regarding what he has divided]**

The testimony of the judge, concerning that which he has ruled on, is not accepted after his removal [from office], and likewise the testimony of the divider (*al-qassām*) is not accepted regarding what he has divided between the co-owners or has designated for each of them; this is because such testimony entails affirming their own actions.

**Benefit concerning *al-jarḥ wa-t-ta’dīl* (impeachment and validation)**

**According to the madhhab,** *al-jarḥ wa-t-ta’dīl* is testimony, so a full (witness) quota is required; whereas according to al-Mu’ayyad bi-llāh and others it is (merely) a report, so one upright man or one upright woman suffices.<sup>2</sup>

**I say:** What is more likely in my view is that it is a report, not testimony, for the following reasons:

1. His saying, *Exalted: "...from among those whom you are pleased with as witnesses"* [al-Baqarah:282], while the report of the upright person yields presumption (*ẓann*), and the testimony of one whose impeachment (*jarḥ*) is merely presumed is not to be approved.
2. His saying, *Exalted: "And if there comes to you a wicked person with information, then verify"* [al-Ḥujurāt:6]; and the implication of the attribute indicates that the report of the upright person is to be accepted in (the matter of) *jarḥ*.
3. What appears from the scholars of *al-jarḥ wa-t-ta’dīl* is that they accept reports in that field, and this is perhaps a consensus among them, in that no one has objected to them about it throughout

1- *Sharḥ al-Azhār* 4/233.

2- *Sharḥ al-Azhār* 4/201.

history.

**[Benefit for the madhhab regarding *jarḥ* and *ta'dīl*]**

In the marginal notes of *Sharḥ al-Azhār*: If the one who impeaches (*al-jāriḥ*) knows that the impeached witness testified to the truth, and that the right in question is agreed upon, then it is not permissible for him to impeach him, lest he nullify an agreed-upon right. But if the right is a matter of disagreement, then it is permissible for him to impeach him. End.<sup>1</sup>

*I say*: The proof for this benefit is His saying, *Exalted*: “*And cooperate in righteousness and piety, but do not cooperate in sin and aggression. And fear Allah; indeed, Allah is severe in penalty.*” [al-Mā'idah:2]

**[From what my father, the erudite scholar Muḥammad ibn ‘Abd Allāh ‘Awad – may Allah preserve him – said in verse, summarising the cases of *ḥisbah* testimony]**

Accept the testimony of a witness in nine (matters)  
without a claim from one alleging fairness:

In endowment (*waqf*) and suckling, then regarding *walā’*,  
and death, and sound, pure lineage;

The freedom of one wronged, then manumission,  
and the inviolability of a human being in customary norms;

Then triple divorce before consummation –  
so here you have them, strung like shells.

After these, add its acceptance in (cases of) drinking wine,  
or a roadway open to travellers on all sides,

Or whatever the neglect of it would lead to the occurrence of a sin –  
and this gathers together all the branches.

**[Benefit: that impeaching by alleging fornication is not considered slander (*qaḍhf*)]**

*According to the madhhab*: The one who impeaches (a witness) by (alleging) fornication is not thereby a slanderer (*qādhif*). End of what is in the marginal notes.<sup>2</sup>

1- *Sharḥ al-Azhār* 4/200.

2- *Sharḥ al-Azhār* 4/202.

### [Book of Agency and Guarantee]

**[A man was killed, and his son took from the estate the expenses of taking revenge]**

**Question:** A man was killed and left one son and four daughters. Then the son insisted on exacting retribution from the killer of his father, and in that he needs to incur expenses. Is it permissible for him to take those expenses from the principal of the estate or not?

**The answer:** It is not permissible for him to take the expenses from the principal of the estate unless the rest of the heirs give him permission for that, or appoint him as their agent in demanding retribution. If they do not give him permission for that and do not appoint him as their agent, then he may not take from the principal of the estate. If he has already taken (from it) for that purpose, then he must inform them; if they are pleased (with that), then so be it, otherwise he has no right except with their consent.

**[The ruling on compensations when they are issued in the names of other people]**

**Question:** In this time, compensations and aids have been given after the war and during the war. Some people may go to the authorities and obtain something of that, but they register their application in the names of other people without having been appointed as their agents. Then the person who applied wants to take what was obtained, and those whose names were used in the application demand it from him, and disagreement and dispute arise. What is the solution from the Shar‘ī point of view?

**The answer – and from Allah is success** – is that the situation differs:

1 – If the entity that is giving aid intends by its aid the needy and those harmed, without specifying individuals, and the person who applies is among the needy and intends, by his application, to apply for himself and not for the names he recorded in his application, then in this case he owns what he has received of the aid. We only said this because what he has taken is like a public right; thus he is more entitled to what he has received, and he only took what he took by his own work and effort: he is the one who went and came, jostled, waited, wrote, registered, toiled, and so on, whereas those who demand it from him had no effort, no work, no going, no coming, and so on.

2 – If the entity that gives the aid has assigned a specific quantity to the tribe of so-and-so, and a quantity to the tribe of so-and-so, and a quantity to the tribe of so-and-so, and has made a specified quantity for each of them according to their number, then if one or two people from the tribe come and apply in the name of the tribe until they receive the

specified quantity or most of it, they are not entitled to what they have received; because they have received a specific right whose owner has been determined.

After that, the best of all solutions when a dispute occurs is that the two parties reconcile: the one in whose name (the aid) was registered is given a share, and the one who applied is given a share, according to what the mediator reconciling between the two parties sees.

A dispute of this sort was brought before me, and I resorted to reconciliation.

**[Appointing a man to sell at a set price, and he sells for more – may he take the extra?]**

**Question:** If a man orders another man, or appoints him as his agent, to sell a commodity for twenty, for example, and he sells it for twenty-five, is it permissible for the man (agent) to take the extra five for himself and give the owner of the commodity twenty?

**The answer – and Allah is the One who grants success** – is that the five mentioned belong to the owner of the commodity, because it is part of the price of his commodity. It is not permissible for the man (agent) to take it, and the owner of the commodity is not obliged to give it in charity.

Those who say that he should give the five in charity may use as evidence the ḥadīth of Ḥakīm ibn Ḥizām, that the Prophet (*May Allah bless him and his family and grant them peace*) gave him a dīnār and ordered him to buy for him with it an animal for sacrifice. Ḥakīm went and bought a sheep for a dīnār, then sold it for two dīnārs, then bought a sheep for a dīnār, and returned to the Prophet (*May Allah bless him and his family and grant them peace*) with a sheep and a dīnār. The Prophet (*May Allah bless him and his family and grant them peace*) took the sheep and ordered him to give the dīnār in charity, and he supplicated for Ḥakīm that he be blessed in his buying and selling. This is the gist of the narration.

**It may be said in reply:** What is closer (to the truth) is that the Prophet (*May Allah bless him and his family and grant them peace*) ordered him to give the dīnār in charity because the Prophet (*May Allah bless him and his family and grant them peace*) had ordered him to buy a sacrificial animal with the dīnār. Ḥakīm bought a sacrificial animal, and by his buying it, it became a sacrificial animal, and thus it became a sacrifice offered to Allah. So the Prophet (*May Allah bless him and his family and grant them peace*) ordered him to give the dīnār in charity because it was from the price of a sacrificial animal that had been designated as a sacrifice by purchasing it for that purpose.

The ḥadīth of Ḥakīm ibn Ḥizām contains several benefits, among

them:

1. That the approval of the owner validates the sale conducted by an unauthorized person (*al-faḍūlī*).
2. That the owner's ordering the unauthorized person to dispose of the price, or to receive it, or his supplication for him for blessing, constitutes an approval of the sale.
3. That the sacrificial animal becomes a sacrificial animal by purchasing it with the intention that it be a sacrifice.
4. That certain types of disposal in another's property are permissible when his approval is presumed.
5. That it is valid to appoint an agent to carry out certain financial acts of devotion, such as purchasing and giving charity.

### **[When do rights attach to the agent?]**

Rights attach to the agent in sale, lease, and settlements involving money; and other than that, they do not attach to him, such as marriage, divorce, loan, gift, lending, release of debt, guarantee, and so on. In the first category, it is not valid for one person to undertake both sides of the contract; in the second, it is valid.

### **[Some of what it is permissible for the agent to conceal]**

**Question:** A man has money with another, with which the latter buys and sells. When the owner of the money wanted to pay the zakāt, he said to his agent: "Take five hundred thousand riyāls from my partner so-and-so as zakāt." When the agent went to take the zakāt, the partner said: "Losses have occurred in these years, and I will give you three hundred thousand riyāls." So the agent took the zakāt. Is he obliged to inform the man that he only took three hundred thousand riyāls? This is bearing in mind that the merchant is a friend who loves that his fault be concealed, and perhaps Allah, Exalted, will bless the business until he recovers what he lost.

**The answer – and Allah is the One who grants success** – is that the agent is not obliged to inform the man that he only took three hundred thousand; rather, it only becomes obligatory upon him if either the owner of the wealth or the merchant requests that from him. There is no basis for the obligation of informing except when it is requested, and Allah knows best.

### **[Difference of madhhab between the agent and the principal]**

**According to the madhhab:** If the madhhab of the agent and of the principal differ, then consideration is given to the madhhab of the principal in matters in which there is disagreement about validity and invalidity, not in matters in which they differ about permissibility and prohibition. Thus the agent does not do except what both he and the principal together deem permissible. End, from *al-Tāj*.

**[Some rulings of agency]*****According to the madhhab:***

1. If a man says to another: "Pay my debt on my behalf," and the second delivers in payment goods in kind (*'urūd*), and the real value of the goods is in fact less than the debt, he may not seek from the one who ordered him except the value of the goods.
2. If the agent sells the commodity for more than the price set by the principal, the surplus belongs to the principal, not to the agent.
3. If the principal says to the agent: "Buy that specified commodity for me with this money," and the agent complies and buys it, then the commodity belongs to the principal, even if the agent intended it for himself.
4. If he buys it for more and intends it for himself, then it belongs to him and not to the principal; and if he buys it for less, it belongs to the principal, even if the agent intended it for himself.

**[On the agent and the principal]*****According to the madhhab*, from *Sharḥ al-Azhār* and its marginal notes:**

1. If there is confusion as to which came first, the (principal's) divorcing of the wife carried out by the agent, or the dismissal of the agent, the ruling is that divorce has occurred.
2. If the sale has been issued by both the agent and the principal, and it is unclear which preceded, then the sale is divided into halves, and the buyers have the choice (to accept or not). If the two sales occurred simultaneously, dismissal (of the agent) is given precedence.

***I say:*** The scholars of the madhhab have ruled, in the first issue, that divorce has occurred, and that is based on the assumption that the basic presumption is non-dismissal (of the agent). Al-Mu'ayyad bi-llāh preferred the view that divorce has not occurred, based on the assumption that the basic presumption is non-divorce.

What appears preferable to me is the view of the scholars of the madhhab; for although the two basic presumptions conflict – namely, the presumption of non-divorce and the presumption of non-dismissal – the problem arising from the confusion over which came first, the dismissal or the divorce, is that the ruling that divorce occurred, or did not occur, depends on the ruling that dismissal occurred, or did not occur. It is therefore necessary first to consider the ruling concerning dismissal or its absence, because divorce, or its absence, is dependent upon that; one should not consider that except after considering the ruling on dismissal or its absence. Thus, when it has become confused to us which of dismissal and divorce came first, we rule that dismissal did not occur, because that is the basic presumption. This is clear.



## [Chapter on Suretyship (Kafālah)]

### [Suretyship in the Noble Qur’an]

In the Name of Allah, the All-Merciful, the Ever-Merciful, and may Allah bless Muhammad (*May Allah bless him and his family and grant them peace*) and his pure family and grant them peace. Allah the Exalted says: *“They said, ‘We are missing the king’s goblet; whoever brings it will receive a camel-load, and I personally guarantee it.’”* [Yūsuf:72]

The meaning of “*za‘īm*” is: guarantor (surety).

- In this there is an indication of the validity of suretyship (kafālah) in respect of wealth.
- And that whoever assumes for another a liability of wealth, it becomes obligatory upon him to discharge it.
- And that, in *ju‘ālah* (contract of reward), it is valid that the one for whom the reward is made be unknown.
- And that compliance (performance) in it takes the place of explicit acceptance.
- And that a named (specified) *ju‘ālah* becomes binding, whether the effort and work in it are little or much.

### [The Meaning of “*al-Za‘īm Gārim*” (the guarantor is liable)]

In the *Amālī* of Aḥmad ibn ‘Īsā, on the authority of Abū Umāmah, there is the hadith: *“The borrowed article must be returned, the debt must be paid, and the guarantor is liable (al-za‘īm gārim).”*, and it was narrated by the authors of the Sunan collections, and Ibn Ḥibbān declared it authentic, on the authority of Abū Umāmah also, with this wording.

**I say:** *al-za‘īm* is the surety (kafīl), and the meaning is that the surety is bound to pay the wealth for which he has undertaken surety, and judgment is passed against him for it.

And the hadith has come in the form of an informative statement, while its meaning is command; thus, it is obligatory upon the borrower of a lent article to return the borrowed item to its owner, and it is obligatory upon the debtor to discharge what is upon him of debt, and upon the *za‘īm*, who is the surety, to pay what he has guaranteed.

And in another narration with Aḥmad ibn ‘Īsā, on the authority of Abū Umāmah: *“The borrowed article must be returned, the manīḥah is to be given back, and the guarantor is liable.”*, and this wording was transmitted by Aḥmad, Abū Dāwūd, al-Tirmidhī and others; this was mentioned in *Ra’b al-Ṣad* “Mending the Breach”.

And *al-manīḥah* is: a she-camel, or a cow, or a sheep which a man grants to his Muslim brother so that he may benefit from its milk, then he must return it to its owner whenever he asks for it.

And this is evidence for the validity of lending land so that its yield may be benefited from, and lending a tree so that its fruit may be benefited from, and the like of that.

### **Benefit: (Suretyship)**

Its beginning is regret, its middle is reproach, and its end is liability.

And the fee of the surety is permissible if someone like him would normally receive a fee. End, from the marginal notes.

If a man undertakes surety for a specific guaranteed item, such as a car, he is obliged to deliver it; if it is destroyed, he is not obliged to deliver its value unless it was stipulated upon him to deliver the value when delivery of it is impossible. End, from *al-Sharḥ*<sup>1</sup>.

If he cannot (i.e. cannot obtain a surety) except by paying money, then it becomes obligatory upon him; because whatever a duty cannot be fulfilled without, itself becomes obligatory like it. But is it permissible for the surety to take a fee? It was answered that it is not lawful for him, and he has the right of recourse (to reclaim it). End. (This) is to be reviewed; rather, it is lawful if someone like him would normally receive a fee. End.

### **Benefit: (Guarantee / Ḍamānah)**

It is that a man guarantees for another man what is in the liability (*dhimmah*) of a third man, even if the guaranteed amount is unknown in its exact quantity, or guarantees what will later become established in that liability, such as: "Whatever you sell to so-and-so, I am its guarantor," or: "Whatever you lend to so-and-so, I am its guarantor," or: "Whatever is proven to you against so-and-so by your claim, I am its guarantor."

Whatever is established by evidence and (judicial) ruling becomes binding upon the guarantor, not what is established by (mere) confession, nor by refusal (to swear) and return of the oath; because it is possible that the creditor and the debtor collude upon more than what is actually due.

- *Ḍamān al-darak* (guarantee against loss): such as one who says to another: "Marry [a woman], or divorce [your wife], and the dower is upon me; perform *ḥint* (a breaking of an oath, i.e. incur liability) and the expiation is upon me; buy, and the price is upon me." This and what is similar to it is valid, and the guarantor is bound by what he guaranteed.
- It is not valid, and no guarantee is established, in the like of a man

1- *Sharḥ al-Azhār* 9/531.

saying to another: “I have guaranteed for you whatever is drowned or stolen,” without specifying the thief; or: “Whatever of your wealth is lost or plundered, I am its guarantor.” These and the like are invalid guarantees, except if he guarantees that for a (specific) purpose, in which case it is valid and is of the category of undertaking (*iltizām*), such as when the guarantor has a known fee in return for that; for example, he says: “Send your wealth in such-and-such ship or such-and-such car, and I undertake for you whatever is destroyed by an overwhelming cause or by a non-overwhelming cause.” In that case it is valid; so have said the scholars of the madhhab, as in *al-Tāj*.

**I say:** What is contained in insurance companies is of this type.

**[A man ordered another to sell in a market and undertook whatever loss he incurred]**

**Question:** A man said to another: “Sell and buy in such-and-such place, and I undertake for you whatever loss you incur in your trade,” and the guarantor had a purpose in this undertaking, namely to strengthen that market. Is it permissible for the man to take the loss (amount) from him?

**The answer:** The scholars of the madhhab have permitted such a case and deemed it sound; therefore, there is no objection, and Allah knows best.

**[A contractor paid money to the bank so that it would guarantee him]**

**Question:** A man contracted a large project from some party, and that party requested from the man a bank guarantee on him. The contractor went to the bank and asked it to guarantee him to that party; the bank agreed, but in return for a specified sum of money. Is it permissible for the man to pay the bank money in return for its guaranteeing him or not?

**The answer – and in Allah is success:** What appears to me – and Allah knows best – is that it is permissible, for:

1. The basic rule in transactions is permissibility.
2. The one who pays money to the bank is paying it in return for a benefit which he obtains from the bank, so this is not consuming people’s wealth wrongfully.
3. The contracting party has stipulated upon the contractor a bank guarantee; if he brings it, otherwise he will not be given the contract. The contractor counts it as part of his potential loss in the contract, and he does not agree to the contract unless he is sure he will obtain an attractive excess (profit). Thus, what he has given to the bank is reckoned in reality upon the contracting party.

**[The ruling on *al-shamlan* (comprehensive assumption) for oneself, one's children, and the tribe]**

**Question:** Among what occurs nowadays and in earlier times in agreements or sales contracts, or in a reconciliation agreement, or in an undertaking, or the like, is that the elder of the household, who acts on their behalf, or the chief of the tribe, or the wise man of the household, attends and states that he is “comprehensive” (*shāmīl*) for himself and his brothers or his household or his tribe; and likewise the other party. Custom has run on acting according to this *shamlan* and obliging (by) it. Is this permissible, and may the judge rule on its basis?

**The answer:** What appears to me – *and Allah knows best* – is that this *shamlan* is permissible, and the judge may rule according to it.

**[Retraction from an undertaking]**

**Question:** Three brothers undertook (to perform) ḥajj on behalf of their mother, then after a time she took her share of inheritance from her husband – one-eighth – and the three brothers are poor, while their mother is still alive. Is it permissible for them to retract what they undertook for their mother of ḥajj, given their poverty and her wealth by the one-eighth, or not?

**The answer – and Allah is the One who grants success** – is that the children may retract what they undertook for their mother so long as she is alive; and likewise in any undertaking. If a man says to another: “Marry [a woman], and whatever becomes obligatory upon you is on me,” then he has the right to retract from this undertaking so long as that man has not married. Once the man has married, it is not valid for the one who undertook (the obligation) to retract from what he undertook.

We only said that they may retract during their mother's lifetime by analogy with the executor (*waṣī*); for there is no disagreement that he may withdraw (from the appointment) before the testator's death, not after his death. Likewise the guarantor may withdraw from the guarantee before the right is established, not after it. And the agent (*wakīl*) may resign from the agency, and the seller may withdraw from the sale before acceptance; likewise the donor and the one giving charity may withdraw before acceptance – or before taking possession in the case of charity.

**[The ruling on what insurance companies take on goods]**

**Question:** I buy goods from Egypt, then ship them by boat to Yemen, and there are insurance companies which guarantee the arrival of the goods to Yemen and undertake to guarantee what is diminished of the goods due to sinking, fire, or the like, in return for money. Is it permissible for me to give that company the required amount in return for the mentioned guarantee, bearing in mind that the insurance

company does not appoint anyone to guard the goods, does not exert effort, and incurs no cost in preserving the goods, except that if something is destroyed it pays its value, and if the goods are all destroyed it pays their full value?

***The answer – and Allah is the One who grants success*** – is that this type of transaction is a newly-emerged type, and what appears to me is that it is permissible; for the owner of the goods pays an amount of money in return for the preservation of his wealth, and the insurance company takes what it takes in return for preservation and guarantee.

I hold that the shipping company, because of the insurance, will be exceedingly careful to safeguard the cargoes, because the insurance company will question it, demand from it, and then litigate against it regarding what has perished of the cargo. For this reason, the shipping company will be extremely diligent in caring for and preserving the goods. Thus, it (the shipping company) takes what it takes in return for what truly deserves a fee.

The scholars have said that the duty is to construe the transactions of Muslims as valid wherever possible.

### **[On insurance of goods, health, cars, and other things]**

In *al-Tāj* for the madhhab: “And among that is that he says to him: ‘Send your wealth in such-and-such ship or such-and-such car or the like, and I undertake for you whatever of your wealth is destroyed by an overwhelming cause or a non-overwhelming cause’; this is valid, even if it is for a purpose, such as that the guarantor has a known fee for that.” End.

***I say:*** From this is derived the validity of some forms of insurance:

1. Insurance for transporting goods from one country to another, by sea or by land or by air. This is valid, and it is an explicit text of the madhhab, as you have seen in what we quoted from *al-Tāj*.
2. Health insurance: that the insurance company undertakes to provide what the insured person and the members of his family need of treatment and medical care during the year, in return for a specified sum of money.
3. Car insurance: that the company undertakes to repair the insured person’s car or guarantee it if it is destroyed in a collision or the like, in return for a specified amount which the car owner pays annually.
4. Insurance for the safety of commercial shops from specified causes agreed upon; the company guarantees what is destroyed by one of those causes, in return for money paid by the shop owner.

### **Life insurance**

There is a type of insurance called life insurance. It is that a man enters into a contract with a company whereby he pays each year a sum of money until he dies, on condition that the company undertakes to support his family after his death and provide what they need. This type of insurance differs from the previous types.

The previous types are such that the insurance company undertakes a defined commitment: either for a fixed period, such as a year, in car insurance, insurance of commercial shops, and health insurance; or for covering a specific distance from one country to another by sea, air, or land. In return for that it takes a defined amount.

As for life insurance, the company takes each year a defined sum of money, but the years themselves are not defined; for the insured person's lifespan may be long or may be short, and the company's guarantee for the insured person's family after his death is not limited by a number of years. Thus the unknown nature of both considerations [what is paid and what is received] prevents the validity of this type (of contract). And if this transaction is invalid, then the shar'ī judiciary, when dispute occurs, must dissolve this transaction and not bind the two parties to what they undertook in the agreement.

And if it is invalid, is it permissible to enter into it?

**The answer:** If the company undertakes to provide the family with what they need of foodstuffs and health items in return for what the insured pays, then that is permissible.

But if the company undertakes to pay money to the family every month or every year, then that is something which is not fitting; for it has been established in Islamic law that for gold against gold it is "like for like", and for silver against silver it is "like for like", and paper currencies are, in meaning, like gold and silver.

### **[Registration with insurance companies for cars and others]**

Insurance for the car, for transporting goods from one country to another, for protecting commercial shops from calamities, for health, and for a person's safety on a journey, or in a country, or in a company: it is permissible to enter into all of that with the mutual consent of the two parties, and there is no objection in it. The insurance company takes what it takes in return for its guarantee and its undertaking towards the insured to provide what his car needs of repair due to accidents within the period defined between the two parties, and in return for its guarantee of what is destroyed or lost of the goods by sea, land, or air; and in return for its guarantee and undertaking to compensate the owner of the commercial shop for what is destroyed or lost of his trade by one of the causes included in the agreement between them; or in return for its undertaking to provide what the sick person needs of

treatment.

### **[Ruling on insurance for goods and for life]**

**Question:** Insurance is a newly arisen issue; what is the ruling of the shari‘ah concerning it?

**Answer:** As it appears, insurance has three different forms:

**The first form:** That a person pays, for example, a sum of money each month to a company or to a particular body, on condition that if that person is afflicted by, for instance, a fire in his house or something similar, that company or body compensates him for what he has lost, whatever it may amount to. What appears is that there is no objection to entering into such an arrangement; among its examples is what the people of the *farzah* (taxi stand) do with the hire cars. This form can be attached to the chapter of undertaking (*iltizām*), and it is evidenced by His saying, *Exalted is He*: “*O you who have believed, fulfill [all] contracts.*” [al-Mā'idah:1] and by the report: “*The believers abide by their conditions*”, and: “*Fulfil (your promises) when you promise.*”

**The second form:** That a person pays, for example, a sum of money each month, and when someone in need is afflicted by some calamity that befalls him, he is assisted out of that money. This form also has no objection in it; rather, entering into it is preferable because of the beneficence and righteousness (*iḥsān wa birr*) that it contains.

**The third form:** What is called life insurance; that is, a person pays each year, for example, a defined sum of money, on condition that if he dies in that year, the company or body pays a defined sum of money to the children of the deceased. What appears to me is that this form and what resembles it is not permissible to enter into, except in one case, namely: that the money paid to the company be equal to the money paid out to the heirs of the deceased.

### **[Guarantee of what is not yet in one's liability]**

In *al-Bayān* for the madhhab: Guaranteeing what is not (yet) in one's liability (*dhimmah*) is not valid, except if it is in return for a purpose or compensation; such as: “Whatever is burned of your property, or destroyed, or drowned, I am its guarantor,” and likewise whatever a beast of prey devours; and likewise such as: “Throw your wealth into the sea and I am its guarantor.” Such a guarantee is valid if it is for a purpose or for compensation. So was stated in *al-Bayān*.

### **[Guaranteeing documents]**

The scholars of the madhhab said: One who denies a document does not guarantee what is in it; he only guarantees its value as a written

document. End, from *al-Sharḥ*<sup>1</sup>.

**I say:** It should be that, in such a case, requiring or not requiring compensation is left to the judgment of the judge; for a person may have a voucher against a bank or a company, and the bank will not pay anyone except upon presentation of a voucher, and whoever loses his voucher, the bank is not liable. In such a case, the one who denies or destroys the voucher should be held liable; for by destroying it he has destroyed what it contained and has wasted it for its owner.

### [On *al-qittā'āt* (tribal seizures)]

In Ṣaḥīḥ Muslim, in a long hadith – in the chapter “There is no fulfillment of a vow in disobedience to Allah nor in what the slave does not own” – there is what its meaning is: that the Messenger of Allah (*May Allah bless him and his family and grant them peace*) captured a man from Banū ‘Uqayl, while Thaḳīf had captured two men from the Companions of the Messenger of Allah (*May Allah bless him and his family and grant them peace*), and Thaḳīf were allies of Banū ‘Uqayl. The ‘Uqaylī man said: “O Muhammad, for what have you taken me?” He (*May Allah bless him and his family and grant them peace*) said: “I have taken you in exchange for the raid of your allies Thaḳīf.” So he was ransomed with the two men. End of what is relevant from the hadith.

**I say:** From this hadith there is derived justification for what the tribes do; namely, that if a man from one tribe assaults someone from another tribe, or rebels against justice, that tribe “cuts off” something from that tribe – they seize a car or the like from any individual of the tribe. Then the intermediaries for reconciliation begin to move, and those who seized (the car) say: “We took the car so that they will give us justice concerning their man.” When they give them justice, they return what they took.

And I hold that such an action, if there is no state to prevent some people from harming others, and if the wronged person is unable to reach his right by any means, is permissible – but on condition that they do not use the car, that they preserve it, and that they do not dispose of it in any manner; and if any damage occurs to the car, then they are liable for it.

The proof for what we have mentioned is that among the individuals of each tribe in our lands there are covenants and pacts that they are as one hand in whatever may befall them from any tribe, and in all that is due to them or upon them of blood-money, killing, and so on. Thus, if one individual of the tribe commits aggression, the whole tribe is deemed to

1- *Sharḥ al-Azhār* 4/156.



have committed aggression; and if aggression is committed against one individual of the tribe, that is considered aggression against the whole tribe. Every individual of the tribe knows this and believes it, and it is not possible for any individual of the tribe to evade it.

### **Applying customary practice (‘urf) in the Sharī‘ah**

**Question:** The tribes have customary practices (*a‘rāf*) by which they recognize one another and conduct their dealings; what is the ruling of the Sharī‘ah regarding these customs?

**Answer – and Allah is the One who grants success and help:** What appears is that tribal customs are of two types: those that contradict the Sharī‘ah, and those that do not. Whatever of them contradicts the Sharī‘ah is an evil that it is not permissible to approve of or be pleased with; rather, it is obligatory to denounce it.

And whatever of them does not contradict (the Sharī‘ah), there is no harm in it; one may enter into it and be pleased with it. This answer is a general one.

Among the permissible and good tribal customs is the making of a pact (*ḥilf*) between individuals of one tribe, or between a group of people with different lineages, to support one another mutually, and that they are brothers like a single body.

Such alliances existed in ancient times among the Arab tribes; Islam came and approved them. Indeed, the Prophet (*May Allah bless him and his family and grant them peace*) himself and those with him entered into a pact with (the tribe of) Khuza‘ah. It has come in the *sīrah* that a delegate from Khuza‘ah came to the Prophet (*May Allah bless him and his family and grant them peace*) in Madinah asking him to fulfil the pact and to grant them support, so he recited before the Prophet (*May Allah bless him and his family and grant them peace*):

“O Allah, I am a supplicant to Muḥammad, By the pact of his father and our ancient pact.”

So the Prophet (*May Allah bless him and his family and grant them peace*) answered him, saying – the meaning of which is: “*May Allah not grant me victory if I do not grant you victory.*”

And among the customs that may be either good or bad is *al-qitā‘* (tribal seizure), and what I hold is that it is a good and permissible custom – but only in cases of necessity. What makes it appear good in my view, in cases of necessity, is that by it rights are extracted from the other tribe, and that it is lighter and less severe than fighting and raiding; and that they announce in the markets before the *qitā‘* that “such-and-such tribe is being cut off in such-and-such tribe.”

What is meant by saying that such *qitā‘* is good is when it is for the

sake of extracting a right. As for when it is for other than that, it is not permissible.

**If it is said:** *Qitā'* encompasses the doer of good and the doer of evil, the innocent and the non-innocent, so how can it be good?

**We say:** *Qitā'* encompasses the tribe that contains the aggressor; and it is obligatory upon the tribe to restrain the wrongdoer from his wrongdoing and aggression and to compel him to give people justice. This is something required by Islam and required by tribal customs. If the tribe falls short in this duty and allows the aggressor to persist in his aggression, then it is a partner with him in what he has done.

On that basis, *qitā'* against the entire tribe does not cease to be on the side of what is good; and Allah *the Exalted* has said: *"So whoever has assaulted you, then assault him in the same way that he has assaulted you."* [al-Baqarah:194]

**If it is said:** Some individuals of the tribe may have an excuse for not restraining him from aggression and not compelling him to give justice – such as weakness, or fear, or the like of that by which they are excused before Allah the Exalted – so *qitā'* in their regard would be injustice.

**We say:** Even if the individuals of the tribe are excused for what you have mentioned, they are not excused from declaring disavowal of that aggressor and expelling him from the pact and companionship, as is the established custom among the tribes. For if one of their men overpowers them and they are unable to restrain him, they disavow him and publicly declare that in the markets.

After disavowal from a person, the individuals of his tribe are not held accountable for him. If the tribe does not do that, then it is responsible for the actions of that person. Such is what the customs have decreed.

And what I hold is that they do not contradict the rulings of the Shari'ah. For Allah *the Exalted* has said in His Noble Book: *"And cooperate in righteousness and piety, but do not cooperate in sin and aggression. And fear Allah; indeed, Allah is severe in penalty."* [al-Mā'idah:2] And He said: *"They used not to forbid one another from wrongdoing that they did. How wretched was that which they were doing."* [al-Mā'idah:79] and other verses in this regard.

All that we have mentioned is only deemed good and permissible with certain conditions:

*First:* That they do not make use of anything at all from the wealth of those against whom *qitā'* is made.

*Second:* That they preserve their property from loss, damage, and waste.

*Third:* That they return everything they have held back to those

against whom *qiṭā‘* is made.

*Fourth:* That they do not beat, wound, or kill in their *qiṭā‘*.

*Fifth:* That justice and fairness be absent from the arena.

*Sixth:* That the opponent (the wrongdoer) persists in refusing to give justice, and his people persist in refusing to compel him to give justice.

**Indeed**, we have only adopted this opinion because of what is established from the general principles which state that dealings of Muslims should be interpreted in the light of validity as far as possible, and that the Muslim must be presumed innocent and sound as long as a good interpretation can be found for him.

Likewise, among the theoretical maxims with the scholars is that “the madhhab of the common person is the madhhab of the one whom he follows,” and doubtless it is permissible for the Imām of the Muslims to do such acts (of force) to restrain the obstinate wrongdoers.

**Yes**, what was obligatory is that the Sultan of the Muslims undertake to give people justice against one another, to secure the roads, to restrain the wrongdoer from his wrongdoing, and to repel corruption and the corrupters. But this Sultan has in fact disappeared entirely from many of the regions and deserts inhabited by the Yemeni tribes; and it has been established in reason that some evils are less than others. Thus *qiṭā‘* is the lightest and least severe means by which the wrongdoer and the obstinate one can be restrained from his wrongdoing and obstinacy.

**If it is said:** There is another solution which is safer in this world and the Hereafter, namely to be patient with injustice and remain silent.

**We say:** The Arab tribes refuse humiliation and do not accept injustice and disgrace; they prefer death over that. It is not possible for the Arab tribes to abandon this trait by which they have been known since ancient times. Arab poets have spoken much on this, of which is:

*“No one remains under an oppression intended for him,*

*Except two abject ones: the wild donkey of the encampment and the stake.*

*This one is bound by his rope to the place of trouncing,*

*And that one is struck, yet none feels pity for him.”*

And Imām Yaḥyā ibn Zayd (*Peace be upon them*) said:

*“O son of Zayd, did not Zayd say:*

*Whoever loves life will live in humiliation.”*

**[How does prevailing customary practice become a ruling of Allah the Exalted?]**

**Question:** It is said that the prevailing *‘urf* (custom) is acted upon in the Shari‘ah so long as it does not contradict a text; meaning that the

judge rules in accordance with it, and it is said regarding it that it is the ruling of Allah. What is the evidence for that?

**It may be said in answer:** The prevailing customary practice among the people of that custom is tantamount to their consent to it and their commitment to it; and there is no doubt that a person is held to what he has bound himself to and consented to. The ruling from Allah the Exalted upon the legally responsible (mukallafīn) by what they have accepted and committed themselves to has been established by His saying: *"But man, against himself, will be a witness."* [al-Qiyāmah:14] And His saying: *"Except that it be trade conducted by mutual consent."* [al-Nisā':29] And His saying: *"Fulfil the contracts."* [al-Mā'idah:1] And His saying: *"They fulfil their vows."* [al-Insān:7] And His saying: *"And among them are those who made a covenant with Allah (saying): 'If He gives us out of His bounty...'"* [al-Tawbah:75] And the like of: *"...and when he breaks his promise..."*. Thus, there is no objection to stating that the ruling which results from customary practice (ʿurf) is a ruling of Allah the Exalted.

#### **(Al-ṣuḥb and mutual obligations within the tribe)**

**Question:** Among the members of a tribe there may be something they call "al-ṣuḥb" in our land. It consists of obligations and covenants among them to support one another and cooperate, with their persons and their wealth, regarding whatever calamities may occur. What is the ruling on that?

**Answer – and Allah is the One who grants success** – is that al-ṣuḥb, and the obligations and covenants among the members of a tribe, are something good which must be fulfilled, except for whatever involves sin or aggression; such must not be fulfilled, for the covenant with Allah has a greater right to be fulfilled.

And Allah, *Exalted is He*, has made it obligatory upon those who are legally accountable to fulfill covenants and contracts. He, *Most High*, said: *"And fulfill [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned."* [al-Isrā':34] and: *"O you who have believed, fulfill [all] contracts."* [al-Mā'idah:1] and: *"But yes, whoever fulfills his commitment and fears Allah – then indeed, Allah loves those who fear Him."* [Āl 'Imrān:76]. The verses in this regard are many. And in the well-known hadith, breaking one's promise is among the characteristics of the hypocrites. And Allah, *Exalted is He*, praised Isma'il (Peace be Upon Him), saying: *"And mention in the Book, Ishmael. Indeed, he was true to his promise, and he was a messenger and a prophet."* [Maryam:54].

**[Book of Bankruptcy (Taflīṣ), Interdiction (Ḥajr) and what is attached to them]**

**[A man who bought from the bankrupt a car in place of what was lacking from his merchandise]**

**Question:** If a man becomes bankrupt and incurs many debts, while in his hand are some goods that do not cover even a quarter of his debt, and his guardians and relatives want to have interdiction (ḥajr) imposed upon him, because in the end they will bear the responsibility by virtue of the bonds of companionship (al-ṣuḥb) and the tribe – but they are unable to find a judge who can pronounce interdiction upon him due to security and political circumstances, and due to the prevailing state of chaos, disputes and enmities – then, instead of that, his paternal uncle, who is the closest to him and the one looked up to by the people in the family, went and informed those who deal with him that the man is bankrupt, so let them reclaim what they had sold to him, for his wealth is swallowed up by debts and in his hand there is not what covers a quarter of his debt.

Then those who dealt with him took back what they had sold him on credit, and took their merchandise itself. Then one of them bought from the bankrupt a car, and made its price in exchange for the deficiency that had befallen his merchandise which he had taken back from him. So what is the solution in that scenario, in the absence of judges?

**Answer – and success is from Allah** – is that the paternal uncle of the bankrupt man has done well towards the man who had sold a commodity to the bankrupt, in that he informed him that his nephew is bankrupt, so let him reclaim his commodity which he had sold to the bankrupt on credit; for that reason, the seller took back his commodity from the bankrupt.

And if the people are in a state of chaos and instability, and there are no judges, then the public declaration by the head of the bankrupt's household of his son's bankruptcy, and his warning to those who deal with him so that they may reclaim their goods from him, takes the place of the judicial ruling of a judge, due to necessity.

At that point, it is not permissible for the one who has taken back his commodity from the bankrupt to buy from him any commodity, because what is in his hand of goods has become held and frozen by the declaration of his bankruptcy, and no disposal by the bankrupt in it is valid; rather, it is then distributed among the creditors, each according to the amount of his debt.

We have only deemed the declaration of the head of the family regarding the bankruptcy of their son to stand in the place of the ruling

of the judge because it entails a benefit similar to that entailed by the judge's ruling.

### [Ruling on the bankrupt]

In *Uṣūl al-Aḥkām* it is related that the creditors of Mu'ādh sought Mu'ādh from the Messenger of Allah (*May Allah bless him and his family and grant them peace*), that he might hand him over to them. After the Prophet (*May Allah bless him and his family and grant them peace*) had sold his property on him [i.e. for the benefit of the creditors], he said: "*You have nothing except that.*" And in the marginal note it says: It was narrated by al-Mu'ayyad bi-llāh in *Sharḥ al-Tajrīd*, and by Muslim, and Ibn Ḥibbān, and al-Bayhaqī, and Abū Dāwūd, and al-Tirmidhī, and he mentioned other sources as well.

And in another wording: "*Take what you find; you have nothing except that.*" – the same sources.

In this ḥadīth there is an indication that the creditors of a bankrupt person have nothing but what they find [i.e. what is present of his property], and whatever remains of their debts upon the bankrupt has fallen [i.e. drops from his liability]. So if the bankrupt later becomes solvent, they have no right to demand from him, due to the restriction and confinement that has come in the ḥadīth.

If it is said: But Allah, *Exalted is He*, has said: "*And if someone is in hardship, then [let there be] postponement until [a time of] ease.*" [al-Baqarah:280], which indicates that the debt does not fall by bankruptcy.

We say: The ḥadīth is specific to the bankrupt, and the verse is general, so the verse is restricted by the ḥadīth, in reconciliation between the evidences.

And the ḥadīth is authentic, for it agrees with the Qur'an and with justice and truth. That is because when the creditors of Mu'ādh pressed him in demanding payment, and made things tight for him, and took him to the Prophet (*May Allah bless him and his family and grant them peace*), the Prophet (*May Allah bless him and his family and grant them peace*) sold his property and gave (its proceeds) to them, and there remained for them remnants of their debts. It is as though they raised their heads to ask him about the remainder of their debts, so he said to them: "*You have nothing except that.*"

Thus the ruling of the Prophet (*May Allah bless him and his family and grant them peace*) was that Mu'ādh should pay all his property, and he sold it on him and delivered it to his creditors; and that was the utmost of what Mu'ādh possessed of capacity and ability. And Allah, *Exalted is He*, has said: "*Allah does not charge a soul except [with that within] its capacity*" [al-Baqarah:286], and He said: "*Allah does not charge a soul except [according to] what He has given it*" [al-Ṭalāq:7].

**Yes**, if the creditors of Mu‘ādh had been lenient and not severe upon him to the extent that they forced him to litigation, then they would have had the right, at the time of his later solvency and wealth, to demand from him all of their debts.

**A benefit: [Regarding what is taken from the bankrupt]**

In *al-I‘tiṣām*: “All the compilers [of the Sunnah] except Mālik in the *Muwaṭṭa’* and al-Bukhārī have narrated from Abū Sa‘īd al-Khudrī who said: ‘A man was afflicted in the time of the Messenger of Allah (*May Allah bless him and his family and grant them peace*), concerning fruits he had bought; his debts became many and he became bankrupt. So the Messenger of Allah (*May Allah bless him and his family and grant them peace*) said: “Give charity to him.” So the people gave him charity, but that did not reach full payment of his debt. Then the Messenger of Allah (*May Allah bless him and his family and grant them peace*) said to his creditors: “Take what you find; you have nothing except that.”’ – end quote.

**I say**: From the ḥadīth it is understood that the liability of the bankrupt is cleared after he has given to his creditors everything that is found (of property) other than that which has been excepted for him, and that nothing is binding upon him after that, if Allah then opens the door of provision for him, to pay the rest of the debts that had been upon him. However, the matter is not so except if his bankruptcy is by the ruling of a judge, and the judge has distributed among the creditors what was in the hand of the bankrupt.

**If it is said**: Indeed, His saying, *Exalted is He*: ““then [let there be] postponement until [a time of] ease.”” [al-Baqarah:280] indicates that the debtor’s liability is not cleared by bankruptcy and hardship.

**We say**: The verse is general for everyone in hardship, and this ḥadīth is specific to the bankrupt; so what the specific text covers is acted upon, and the general text is applied to what remains, as has been established in the science of legal theory (uṣūl).

Furthermore, what we have mentioned is borne witness to by His saying, *Exalted is He*: ““Allah does not charge a soul except [according to] what He has given it.”” [al-Ṭalāq:7], and the like.

And it has come in many narrations that the wealth of the bankrupt is divided among his creditors, and each one of them takes in proportion to his debt. So if, for example, the creditors are three: one of them is owed fifty, the second thirty, and the third twenty, and in the hand of the bankrupt is only what equals ten, then it is apportioned according to the debt; the first will have five, the second three, and the third two – and so on.

And in the narrations there is no mention of what remains upon the bankrupt of debts; and since the narrations have omitted mention of

them, we know that they have no legal effect, and that the bankrupt is not liable for them.

**[The division of the bankrupt into three categories]**

The scholars of the madhhab have divided the bankrupt into three categories:

1. ***The earner (al-kasūb)***: He is the one who has a craft or profession from which income comes to him. The judge sells all his property in order to settle his debt, and leaves for him the tools of his craft by which he earns, and what suffices him and those he must support, in the customary manner for one like him among the poor, until the time when his earnings arrive, whether that period is short or long.
2. ***The one with surplus income (al-muta faḍḍil)***: He is everyone who has an income from a bequest, or a waqf (endowment), or a vow (nadhr), that is in excess of his need and the need of those he supports, up until the time when the yield (of that income) comes.

If a rented house is found for both the earner and the one with surplus income, the judge sells their two houses, and the rent will be from their income.

3. ***The one who is neither an earner nor one with surplus income among the bankrupts***: The judge sells all his property and leaves for him his garment and the dwelling he needs, and sustenance for a day, consisting of two meals, for him and those he supports.

***I say***: What I see is that the judge should leave for this last type the sustenance of a week or two or something like that, for him and for those he supports among children, wives and others.

We have only said that so that the bankrupt may be able, within a week or two, to manage his livelihood during this period; for if he knows that nothing has been left for him except the sustenance of one day for him and those he supports, he will be overwhelmed, his insight will be clouded, and his mind will be preoccupied, such that he will not be able, in that state, to think about a suitable means of acquiring what he and those he supports need.

**[Interdiction (Ḥajr) upon the bankrupt]**

The scholars of the madhhab said: Interdiction (ḥajr) upon the bankrupt is not valid except from the judge, and it is not valid except if it is requested by the people of the debts or some of them ... and so on.

***I say***: The official judge, or a judge by virtue of being qualified [i.e. a de facto judge in lands without formal courts], may pronounce interdiction upon the bankrupt if it becomes clear to him that the interest (maṣlaḥah) necessitates that. Likewise, if the one requesting interdiction is the



relatives of the bankrupt, they have a right to request interdiction; and this is the case in our lands.

That is because his relatives bear responsibility before other people and before the other tribes. For if the creditor is from another tribe, he will seize vehicles belonging to the men of the tribe to which the bankrupt is affiliated and retain them, and he will not return them to their owners until they pay him what they are owed of debts that were upon the bankrupt.

And this is what has led us to the position of saying that a ruling of interdiction on the bankrupt may be made at the request of his relatives, if the judge knows that the interest lies in placing interdiction upon him, as we have mentioned in the example.

What we have mentioned is supported by what is related from the Commander of the Faithful (*Peace be Upon Him*), that he requested ‘Uthmān to impose interdiction upon ‘Abdullāh ibn Ja‘far ibn Abī Ṭālib. If interdiction had not been valid by his request (*Peace be Upon Him*), he would not have requested it. In sum, the judge must observe the interest in this matter, and repel corruption and reduce it.

And the scholars of the madhhab said: A man is not to have interdiction imposed upon him on account of his squandering his wealth, his ruining it, his wasting it, and his foolishness in it.

Others said: Rather, interdiction is imposed upon him; and this is preferable, due to what is in *al-Majmū‘* from ‘Alī (*Peace be Upon Him*) that he asked ‘Uthmān to impose interdiction upon ‘Abdullāh ibn Ja‘far when it reached him that he had bought something and had been cheated in it to an excessive degree – namely that he bought a saline, barren piece of land for sixty thousand.

And this is the madhhab of many of the imams. It was chosen by Imām Muḥammad ibn al-Muṭahhar in *al-Minhāj*, and he reported it from Zayd ibn ‘Alī, and it is the position to which Imām Yaḥyā inclined, and Imām al-Mahdī ‘Alī ibn ... and his son Ṣalāḥ ibn ‘Alī.

## [Chapter: Reconciliation (al-Ṣulḥ)]

## [Some types of reconciliation (ṣulḥ)]

1. Reconciliation is valid with fifty riyals payable immediately in lieu of one hundred riyals deferred.
2. Likewise with fifty deferred in lieu of one hundred deferred.
3. Likewise with fifty payable immediately in lieu of one hundred payable immediately. All of that is because the reduction is a relinquishment or discharge (of part of the right).
4. And reconciliation is not valid with fifty deferred in lieu of one hundred payable immediately. All of this is according to the madhhab, while al-Mu'ayyad bi-llāh allowed the last scenario.
5. And reconciliation with a known amount in lieu of an unknown amount is valid if it is known that the sum agreed upon in reconciliation is less than that being reconciled about, so that it does not become usury (ribā).

**Ruling on reconciliation along with denial**

**Question:** The statement of the scholars of the madhhab that reconciliation upon denial is not valid has been problematic for us, and so has their statement in the chapter of judiciary that it is recommended for the judge to urge the two disputants to reconcile first. Although it has been interpreted in *al-Tāj* that he urges them to reconcile after mutual acknowledgement (of the facts) and the establishment of the right, and after informing the one who has the right that it has been established, so that he drops some of it by way of forbearance – yet the problem in this is that whoever knows that the right is firmly his will not be pleased to drop anything of it.

And they say: The judge hastens to reconciliation so long as the right has not become clear to him; but when the right becomes clear to him, he rules accordingly. So what is your view on that, bearing in mind that most of the reconciliations carried out at the hands of the scholars take place along with denial?

**Answer:** What appears to me regarding this issue is that reconciliation along with denial is permissible, likewise reconciliation along with mutual admission of the disputed right, and also along with the right being clear to the judge. That is because the Lawgiver has urged excellence, forbearance, pardon and doing good. *“And do not forget graciousness between you.”* [al-Baqarah:237] and: *“But indeed, whoever is patient and forgives – indeed, that is of the matters [requiring] resolve.”* [al-Shūrā:43].

Ruling strictly by the right is only when separation [between them] becomes impossible except by that, and when the two disputants insist

upon pure strict right and their souls do not accept forbearance. The Prophet (*May Allah bless him and his family and grant them peace*) saw a man clinging to another because of a debt, demanding its payment from him, so he (*May Allah bless him and his family and grant them peace*) gestured to the creditor to take half of his debt and remit the other half; the man agreed – this is the meaning of the narration.

And in the story of the trial (muḥākamah) between al-Zubayr and the Anṣārī in the presence of the Prophet (*May Allah bless him and his family and grant them peace*) there is that which indicates the permissibility of reconciliation even when the right has become clear to the judge. Likewise, what is in the story of the reconciliation of Sawdah with the Prophet (*May Allah bless him and his family and grant them peace*), for she, in that reconciliation, gave up a right that was firmly hers, and he (*May Allah bless him and his family and grant them peace*) in turn gave up a firm right of his that Allah had permitted him – namely, divorce.

**Yes**, the ḥadīth: *“Reconciliation is permissible between Muslims except for a reconciliation that makes lawful what is unlawful or makes unlawful what is lawful”* does not include what we have mentioned, for nothing in it makes lawful the unlawful or makes unlawful the lawful.

For the owner of a right may relinquish to his opponent or to someone else his right or his property, or some of either; and the opponent may give from his wealth whatever he wishes to whom he wishes, whether an opponent or someone else. There is nothing in that of forbidding what Allah has permitted or permitting what He has forbidden.

And reconciliation in such a manner does not make any unlawful thing lawful nor make any lawful thing unlawful; rather, it is an encouragement to perform acts of beneficence and graciousness, which are better than strict contention and mutual obstinacy. In it is safety from grudges and rancour, and in it is resolving the dispute without there being, in that, a victor and a vanquished, a conqueror and the conquered.

It is customary that the one against whom judgment is passed suffers a shock that is followed by grudges and rancour against the judge and against the one in whose favour judgment has been given. From this came the saying of Shurayḥ: *“I awake each morning while half the people are angry with me.”* In light of what we have mentioned, it becomes clear that reconciliation is better and more virtuous in such cases.

By this, the weakness of the statement of the scholars of the madhhab on this issue is also made evident, and its weakness is further borne witness to by what we observe – as you have mentioned – of the reconciliations that scholars effect between people in situations of denial; and praise be to Allah, Lord of the worlds.

**[Regarding reconciliation]**

**According to the madhhab**, as in *al-Tāj*:

- It is not permissible to reconcile for five ṣā's of barley against six ṣā's of barley that are still existing and not destroyed; because that is tantamount to a sale, and it is not permissible to sell such (homogeneous commodities) with disparity (in amount).
- Reconciliation with that is permissible if the six ṣā's are no longer existing, but have become a liability (a debt) upon the one making reconciliation; because that is tantamount to discharge (ibrā'), not sale.
- It is not permissible to reconcile for fifty riyals deferred in return for one hundred riyals whose term has already fallen due; because that takes the same ruling as selling ten for five deferred, which is not permissible – just as it is not permissible in currency exchange (ṣarf).
- It is not permissible to reconcile upon denial. An example of that: a man claims against another one hundred dirhams, and he (the defendant) denies it, so mediators of reconciliation intervene between them such that the denier pays fifty dirhams.

**I say:** What appears to me is that this is permissible; for if the claimant is truthful, then he has taken fifty of his right and has, outwardly, discharged the defendant from fifty. And if he is lying, then his taking the fifty for which reconciliation was made is in the position of a gift that is lawful for him outwardly; and the giver, even if he knows that he is free of what has been claimed against him, has only given it in exchange for the claimant restraining his harm from him and for safety from the oath. Thus it is lawful for him outwardly; but as for what is between him and Allah, then it is not lawful for him.

### [Chapter: Discharge (al-lbrā’)]

#### [A benefit regarding discharge in respect of a specific item (‘ayn) and discharge in respect of a right]

**According to the madhhab:** Discharge (al-barā’ / al-ibrā’) is not valid when there is deception by claiming poverty, and likewise all other transfers of ownership, such as vows (nadhr), gifts (hibah) and others. The only exception is sale, for it is valid even with such deception, and in that case the seller has the option (of rescinding).

**According to the madhhab:** Permission (ibāḥah – to use property) is nullified by the death of the one to whom permission was granted, and by the death of the one granting permission if it was absolute (unrestricted). But if it was restricted to a specific time, then after his death it becomes a bequest (waṣiyyah) which is executed from one-third (of his estate).

**According to the madhhab:** Discharge of liability with respect to a trust-deposit (amānah) is deemed a permission regarding it; therefore, it is permissible to consume it, and the owner may retract before its physical consumption, in actuality but not in legal ruling.

**According to the madhhab:** It is not valid to discharge what is not in the liability (al-dhimmah), such as the right of water-flow (ḥaqq al-masīl), the right of passage (ḥaqq al-istitrāq), the right to place beams in a wall, and the like; because their locus is the specific property (‘ayn) not the liability, unlike pre-emption (shuf’ah) and the like, such as the right of rescission by reason of defect, the right of rescission by inspection, and the right of rescission by stipulated option.

**I say:** Custom runs that discharge in respect of a specific property (‘ayn) entails transfer of ownership. So if a man discharges another man from a trust-deposit, and the latter accepts, the discharge is valid and the man becomes owner of the trust-deposit. Thereafter the original owner has no right of return, except where it is known from his intent in issuing the discharge that he only made matters easy for him in using the trust and consuming it in case of need; in such a case, it is a permission (ibāḥah), just as the scholars of the madhhab have said.

As for discharge from the right of water-flow and the like, what appears to me is that discharge is a relinquishment and dropping of the right, whether it is in the liability or not; for discharge, in customary usage, is employed in that way.

#### A benefit regarding unknown discharge (al-barā’ al-majhūl)

The madhhab holds that unknown discharge is valid, and that it is not obligatory upon the one seeking discharge (al-mustabrī’) to explain what right is upon him, even if it is predominant in his mind that, were it to be

known, he would not be discharged – except if he is asked, in which case clarification becomes obligatory upon him.

And Imām al-Manṣūr bi-llāh (*Peace be Upon Him*) mentioned that if a person seeks discharge from what is upon him without specifying it, then if it is known from the state of the one granting discharge that, were he to specify it for him, he would not discharge him, his discharge is not valid until he clarifies it. This is the end of what is in the commentary and marginal notes, in meaning.

**I say:** The madhhab of Imām al-Manṣūr bi-llāh (*Peace be Upon Him*) is strong and contains precaution, and it is supported by the ḥadīth: “*The property of a Muslim is not lawful except with the willing consent of his soul.*”

**[Regarding a woman who discharged her husband from her dower, then he divorced her before consummation]**

**According to the madhhab:** If the husband divorces [his wife] before consummation, after she has discharged him from the dower (mahr), then she is liable to him for the like of half of the named dower.

Abū Ṭālib mentioned that nothing is binding upon her for him; and the same is related from Imām ‘Izz al-Dīn and Imām Sharaf al-Dīn. This is the end of what is in the commentary and marginal notes.

**I say:** The statement of Abū Ṭālib is strong, because when she discharged him from the dower, she only discharged him from something she would have been entitled to against him; and she is not entitled, if he divorces her before consummation, except to half of the named dower. Thus her discharge applies to what she is entitled to, not to what she is not entitled to. For her entitlement to the full dower is conditioned upon consummation, and consummation has not occurred.

Likewise, if a seller discharges a buyer from part of the price, then the buyer later returns the sold item by one of the options (of rescission), the seller is not obliged to return to the buyer except what he actually received of the price, and he is not obliged to pay him an amount equivalent to what he had discharged him from. That is because the seller only discharged the buyer from part of the price for that specific sold item; when the sale is nullified and invalidated, everything that was built upon it is nullified. By the nullification of the sale, it becomes clear that the seller was not entitled to the price, so it is as though the seller discharged the buyer from what he did not, in fact, deserve.

**[One who asks for forbearance (musāmaḥah) without stating the amount]**

When a man seeks forbearance and discharge from a right he owes to another man, without stating the amount of that right or that he is poor,

then that is valid; this is the madhhab, as in *al-Azhār* and its marginal notes.<sup>1</sup>

And in the marginal note: Even if it is predominant in the mind that, were he to know the amount, he would not discharge him – this is contrary to Imām al-Manşūr bi-llāh (*Peace be Upon Him*), for he said: If a person seeks discharge from what is upon him without specifying it, then if it is known from the state of the one granting discharge that, were he to specify it for him, he would not discharge him, his discharge is not valid until he clarifies it. End quote.

**I say:** The madhhab of Imām al-Manşūr bi-llāh (*Peace be Upon Him*) is more cautious, and it is attested to by the well-known ḥadīth: “*The property of a Muslim is not lawful except with the willing consent of his soul.*”

#### [Ruling on retracting forbearance (musāmaḥah)]

**Question:** Two men disputed, and one of them said: “I am retracting what I had previously forgiven you of debts.” Is his retraction in that valid or not?

**Answer – and Allah is the One who grants success** – is that this is not valid, even if the dropping of the debt occurred with the wording of “gift” (hibah). That is because gifting a debt is a form of relinquishment, and from here they said that gifting a debt does not need acceptance.

What is valid to retract from is conditioned upon certain conditions, among them: that the retraction be from a specific item (‘ayn), not from a debt – except where the gift of the debt was in exchange for a consideration and that consideration was not received; then he has the right of retraction.

Another condition is that the specific item still exists and has not been consumed.

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1- *Sharḥ al-Azhār*, 4/302.

## [Chapter: Coercion (al-Ikrāh)]

### [Regarding the types of coercion]

Enduring being killed when coerced to utter a word of disbelief is more virtuous, and likewise anything of that sort which contains exaltation of the religion.

And it is obligatory to eat carrion and to drink wine when one is coerced to do so by threat of being killed, and he sins if he does not do so. Al-faqīh Yūsuf said: "Except if he is someone who is taken as an example, then it is permissible for him to leave it." End of quote from the marginal notes, and all of this is according to the madhhab.

And they said: If the coercion is only by causing harm, such as beating and harmful imprisonment, then it is permissible to omit an obligation, but it is not permissible to commit what is prohibited. End quote. What has preceded is the view of the madhhab.

Imām Yaḥyā (*Peace be Upon Him*) said: Removing a man's turban and insulting the people of virtue is counted as coercion, because that greatly affects his standing in the sight of the notables, and may perhaps be more serious than physical harm. End of quote from the marginal notes.

### [What is permissible to do under coercion]

**As for coercion:** Insulting a human being with something he does not deserve, and likewise slandering him with fornication, then according to the scholars of the madhhab this is not permitted even under coercion. End quote from *al-Tāj*.

**I say:** What appears to me is that this is permissible, like other acts of disobedience that are permitted under coercion. This is due to what is well-known from Amīr al-Mu'minīn (*Peace be Upon Him*), that he said: "Indeed, there will appear over you after me a man with a wide gullet, who will command you to insult me and to disavow me. As for the insult, then insult me, for it is purification for me and salvation for you; but as for disavowal, do not disavow me, for I was born upon the natural disposition (fiṭrah), and I was foremost in Islam and in migration," or as he (*Peace be Upon Him*) said.



**[Book of Judiciary, Judgment, and Judges]****Benefits related to the chapter of Judiciary**

1 – Judging between people with truth and justice, which Allah Most High has commanded in His Book, is not achieved except by the judge verifying what the claimant and the respondent say; and it is not a case of impermissible prompting (talqīn) that he ask and seek clarification, such as: “What do you intend by such-and-such?” and the like.

2 – What I see as obligatory justice upon the judge is that if one of the two disputants before him is a woman, or a man weak in understanding, he should ask that such a person bring along a knowledgeable man, or he should order one of his own men to look into that person’s affair and then speak on his behalf, by initiating the claim or by responding.

3 – What is forbidden is that the judge himself set himself up as a disputant, claiming or responding, or that he say to one of them: “Say such-and-such.”

4 – Among the completion of the judge’s justice and his judging with truth is that he treat the disputing parties equally in speech and in friendly openness, and in seating; indeed, that is the beginning of his justice between those in dispute. Thus he must be extremely cautious of anything that suggests leaning toward one of them, such as inviting one of them as a guest without the other, or the like.

5 – As the saying goes, “Souls are naturally inclined to love those who do good to them.” The judge must therefore guard himself against anything that would call him to incline toward one of the disputants. He must not accept a gift, nor stay as a guest with one of the disputants. This is in order to establish justice, to guard against bias in judgment, and to keep himself far from accusations.

6 – If the denier has taken an oath and the judge has given judgment, then afterward the denier himself makes an admission, or the claimant brings righteous testimony establishing the right, the judge acts according to that; because he is commanded to uphold truth and justice. On this basis, the first judgment is in the position of being restricted to the absence of testimony or confession.

7 – “Whatever an obligation cannot be completed without becomes obligatory like it”. On this basis, it is obligatory to imprison the defiant person upon whom a right is due, in order to establish truth and justice among people. Thus a man is imprisoned for the maintenance of his child, the maintenance of his wife, and the maintenance of his poor parents.

8 – The judge may rule according to what he knows, because Allah Most High has commanded judgment with justice and truth, except in

ḥudūd punishments, due to His saying: “*and then do not produce four witnesses.*” [al-Nūr:4]. And this is also due to what Allah Most High has commanded of concealment (covering faults).

9 – It is incumbent upon the judge to order spending on the wife from the property of her absent husband, and likewise to enforce any debt that is legally established against one who is absent; for that is part of justice and truth.

10 – If the judge knows that the testimony of the two witnesses is flawed and invalid, he should ask the claimant to bring additional witnesses, so that the two witnesses will not be offended by the non-acceptance of their testimony if he were to state its invalidity. This is due to His saying: “*...and let neither scribe nor witness suffer harm. For if you do so, indeed, it is grave disobedience in you.*” [al-Baqarah:282].

11 – The judge has the authority to impose interdiction upon the debtor or to imprison him, if the opposing parties request that, and all of that is for the sake of attaining justice among people and allowing every person entitled to a right to take his right. This is when the bankrupt has property beyond what has been excepted for him.

12 – Likewise, he has the right to sell the property of the bankrupt in order to pay his creditors, for the reason we have mentioned of establishing justice; otherwise, it is not permissible to imprison him, due to His saying: “*then [let there be] postponement until [a time of] ease.*” [al-Baqarah:280].

13 – The judge should avoid issuing his rulings at times when his mind is disturbed by hunger, the pressure of needing to urinate or defecate, anger, drowsiness, pain, and the like; all of that is for the sake of precaution in judging with equity and justice.

### **A benefit: (The arbitrating judge / al-ḥākim al-muḥakkam)**

I saw in a response by Imām al-Mahdī Muḥammad ibn al-Qāsim, the master of Barṭ (*Peace be Upon Him*), that judges are of three types:

1. A judge appointed by the Imām (leader).
2. A judge of competence (ḥākim al-ṣalāḥiyyah) in places where there is no Imām.
3. A judge chosen as arbitrator (muḥakkam) by the two disputants.

Then he said, in meaning: This judge – that is, the one appointed as arbitrator by the two disputants – is not required to be a mujtahid; rather, it is upon him to ask, to investigate, and then to judge. End quote.

Then I saw in *Ḍaw’ al-Nahār* a passage concerning this issue which points to the reason why such a judgment issued by the arbitrator is permissible, despite his lacking the knowledge that is a condition for the permissibility and validity of judging. It said: This judgment is only

permissible and binding because it falls under the heading of agency (tawkīl). On this basis, the objection is not valid that is based on His saying: *“They wish to refer legislation to Ṭāghūt, while they were commanded to reject it.”* [al-Nisā’:60]: for what we are dealing with here is not in the category of adjudication, but rather in the category of agency and delegation.

**Yes**, in these Yemeni lands it has become customary to take disputes to the tribal shaykhs for judgment. Because of that, on the basis of what has preceded, we should say: We do not rule that the judgments of the shaykhs are ṭāghūt-judgments in an absolute sense, nor that they are non-ṭāghūt in an absolute sense; rather, we distinguish and say:

The ṭāghūt-type judgment among these is that which rests upon tribal laws and customs that conflict with the Sacred Law, such as judging that eleven [persons or items] are taken in exchange for one, or judgments of defects and exorbitant fines of that sort. Whatever is like that is a ṭāghūt-judgment.

As for judgments that are not of this sort, they fall into two categories:

1 – That the two disputants mutually agree to appoint the shaykh as arbitrator between them in their dispute, and delegate authority to him, and have that witnessed; then his judgment is binding upon them, on condition that his judgment does not entail making something unlawful lawful, nor something lawful unlawful. **The criterion** of that is that his judgment is permissible in everything for which reconciliation between the two disputants would be permissible. One may cite as evidence for this His saying: *“O you who have believed, fulfill [all] contracts...”* [al-Mā’idah:1], and His saying: *“And fulfill [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned.”* [al-Isrā’:34].

2 – That the two disputants are driven to the shaykh by force so that he may judge between them. In such a case, the shaykh’s judgment over the two is not permissible and is not binding upon them, because they have not committed nor pledged to accept his judgment, nor contracted upon that.

**Yes**, the binding nature of the arbitrator’s judgment may also be evidenced by the Jews appointing Sa’d ibn Mu’ādh (*May Allah be pleased with him*) as arbitrator, and by His saying: *“send an arbitrator from his people and an arbitrator from her people.”* [al-Nisā’:35]; in this there is an indication of the legislated permissibility of arbitration in general.

*“And whoever does not judge by what Allah has revealed – then it is those who are the defiantly disobedient.”* [al-Mā’idah:47], it does not apply to what we are discussing here, for what we are dealing with – as we have mentioned – is not in the category of judicial ruling, but rather in the category of agency, delegation, and undertaking. Whatever issues

from the arbitrator only issues from him by virtue of the agency and delegation that the two disputants have granted him.

Furthermore, one may also cite as evidence for what we are discussing the Quraysh appointing the Messenger of Allah, Prophet (*May Allah bless him and his family and grant them peace*), as arbitrator on the day when their clans disputed over who would place the Black Stone in its place.

Likewise, among what is connected to what has preceded and in harmony with it is that we say: There are customs and usages that have become established among the tribes. Whatever of these does not conflict with the rulings of the Sacred Law must be adhered to by them, and the judge of the Sacred Law rules that they are binding upon them. This is like paying a certain sum of money, which they call *al-furūq*. The scholars of the madhhab have said – as in the marginal notes on *Sharḥ al-Azhār* – that a person must fulfill what he has committed himself to. Thus the *farq* with the tribe is obligatory, so long as it is not in disobedience to Allah, because of the commitment and agreement among the tribe concerning that, according to what they have undertaken.

### **[When the two disputants request the ruling of Allah]**

**Question:** If the two disputants say to the judge, “Judge between us with the ruling of Allah,” and the matter over which the dispute has arisen is from the issues of *ijtihād*, does he then judge according to his own *ijtihād*? And if he judges according to his own *ijtihād*, is it permissible for him to say that this is the ruling of Allah? And is the judgment of a *muqallid* [one who follows another’s *ijtihād*] permissible and valid? And if it is permissible and valid, may it be said about it that it is the ruling of Allah?

**Answer – and success is from Allah:** If the judge rules in a presumptive, *ijtihād*-based issue according to his own *ijtihād*, that is valid for him, and it is permissible for him to say that this is the ruling of Allah.

The proof for that is that Allah, *exalted is He*, has commanded in His Book that judgment between people be according to what Allah has sent down, and He has commanded judgment with truth. Judgment with truth includes judgment by what Allah has sent down, by what has come from the Messenger of Allah (*May Allah bless him and his family and grant them peace*), by what is established through consensus (*ijmāʿ*), and by what is sound through analogy (*qiyās*) and *ijtihād*. Likewise, because of what has been narrated in the *ḥadīth* of Muʿādh when the Prophet (*May Allah bless him and his family and grant them peace*) asked him: “How will you judge?” Muʿādh said: “I will judge according to the Book of Allah; then according to the Sunnah of the Messenger of Allah (*May Allah bless*

*him and his family and grant them peace*); then I will exert my opinion (ijtihād).” The Messenger of Allah (*May Allah bless him and his family and grant them peace*) approved him for that. This is the answer to the first part of the question.

**As for the second part:** the ruling of a muqallid is permissible and valid in case of necessity. There is no doubt that when lands are wide-expanding, the mujtahids are not sufficient [in number], and thus the need arises to appoint judges who are muqallids in order to fill the gap. When they issue judgments, it is permissible and valid for them to say that this is the ruling of Allah, for taqlīd, in the case of one who is not a mujtahid, is a legally prescribed path to taking the rulings of Allah, *exalted is He*, as indicated by His saying: *“So ask the people of the message if you do not know.”* [al-Nahl:43]

What appears to me is that it is a condition for the judge that he possess intelligence, discernment, strength of understanding, and deliberation; for thereby he attains to knowing stratagems, recognizing false claims, and distinguishing the one who is in the right from the one who is in the wrong by examining subtle indications.

On this basis, the Prophet (*May Allah bless him and his family and grant them peace*), on the day of the conquest of Mecca, appointed ‘Attāb ibn Asīd—and he was among those whose release had just been granted (from the newly freed of Quraysh)—over Mecca; and ‘Attāb at that time was not among those firmly grounded in the knowledge of the Book and the Sunnah.

### **[Ahkām (rulings) related to the judiciary and the judge]**

1 – It is required that the judge be just in himself, for one who lacks a thing cannot give it.

2 – The judge is bound to be just between the two disputants, and the first aspect of his justice between them is that he not prefer one of them over the other in seating in a better place, nor in being more open and friendly in conversation with him than with the other, nor by honoring him with water or coffee or the like to the exclusion of the other, nor by inviting him into his house to the exclusion of the other, nor by shaking his hand warmly to the exclusion of the other. In sum, nothing should issue from the judge toward one of the two adversaries that would suggest that he inclines toward him; for that causes suspicion to enter the soul of the other adversary and causes fear to take root in his heart that the judge will incline in his judgment toward his opponent.

### **[Matters that must be present in one who takes up judging between people]**

Whoever takes up judging between people must possess a number of matters:

1. That he be scrupulous and religiously committed, and that this be known among people so that they place their trust in him.
2. That he avoid everything that engenders suspicion, even if it is not prohibited, so that trust in him continues.
3. That he be intelligent, sharp in understanding, and alert.

**Benefit: (regarding the judiciary)**

1 – The Prophet (*May Allah bless him and his family and grant them peace*) ordered ‘Alī (*Peace be upon him*) to judge in Yemen. He remained in Ṣan‘ā’ for forty days, entered various areas in Yemen, brought forth the hot spring that became famous as Ḥammām ‘Alī, and reached Lahij, Abyan, Law‘ah, and so on—this as mentioned in the marginal notes.

2 – What appears to me is that the judgment of a muqallid is permissible. What is indispensable is that he be good in discernment, of clear mind, possessing sharpness and intelligence. This must be in addition to general information and rules connected to the judiciary which he must acquire, such as: “The burden of proof is upon the claimant, and the oath is upon the one who denies,” and knowledge of acceptable and rejected testimony, valid and invalid claims, and the like of the information that relates to the judiciary.

Among what indicates the permissibility of the judgment of a muqallid is what has been narrated in the *sīrah*: that the Prophet (*May Allah bless him and his family and grant them peace*) entrusted judgment in Mecca on the day of the conquest to ‘Attāb ibn Asīd, and ‘Attāb was one of those whose freedom had just been granted; and it is far-fetched that ‘Attāb was among the mujtahids.

Furthermore, it is far-fetched that in a single time period there would be found a sufficient number of mujtahids to cover all lands.

3 – It is permissible for the judge to leave off issuing judgment, or to delay it, if he fears harm from one of the two disputants; but he must not judge with anything other than the truth, for abandoning a duty is lighter than committing a prohibition. This is what is concluded in the marginal notes upon the madhhab.<sup>1</sup>

4 – In the commentary from Ibn Jarīr: that the judgment of a woman is valid absolutely. Abū Ḥanīfah said: Her judgment is valid in that wherein her testimony is valid, but not in the ḥudūd [prescribed criminal punishments]. End quote.

And the madhhab is that the judgment of a woman is not valid.<sup>2</sup>

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1- *Sharḥ al-Azhār* 4/315.

2- *Sharḥ al-Azhār* 4/310.

5 – It is prohibited for the judge to prompt (yulaqqin) one of the disputants. The meaning of prompting is to say to him: “Say: I claim,” or “Bear witness to such-and-such.” As for his saying: “Do you claim such-and-such?” or “Do you bear witness to such-and-such?” in the form of a question, that is permissible. This is according to the madhhab.<sup>1</sup>

And the scholars of the madhhab said: It is not permissible to judge after giving a fatwa.

Al-Faqīh Muḥammad ibn Sulaymān said: If that would give rise to suspicion, or if the disputant knows of it, then it is not permissible; but if that does not occur, then it is permissible for him to judge.

The scholars of the madhhab argued that judgment after fatwa is a confirmation of the fatwa, just as the testimony of a witness that would affirm his own act is not valid; and because it leads to suspicion. End quote from the text and marginal notes.<sup>2</sup>

***What appears stronger to me*** is that it is permissible for the judge to judge after giving a fatwa, and that the fact that the judgment confirms the fatwa does not prevent this. Were that a valid preventer, it would not be permissible for the judge to issue a judgment if he had issued a similar judgment previously, due to the fact that it confirms his first judgment.

The reason for the invalidity of the testimony of a witness whose testimony confirms his own act is that, in reality, he is testifying in favor of himself.

As for the judge, he judges for one of the two disputants against the other; he does not judge for himself, as in the aforementioned testimony.

6 – The judge is permitted to rule according to his own knowledge in all rights, financial matters, cases of retribution (qīṣāṣ), and the ḥadd for slander (qadhf). It is not permitted for him to do so in the rest of the ḥudūd punishments, except in theft – and that only for the purpose of establishing ownership of the property, not for establishing the cutting of the hand. Thus have the scholars of the madhhab stated, as in the commentary.<sup>3</sup>

And the proof of that is that the judge’s personal knowledge is stronger in evidentiary force than testimony, for testimony yields only supposition, whereas knowledge is stronger than supposition. And in the Qur’an there are many verses like His saying, Exalted is He: ***“So judge between the people in truth”*** [Ṣād:26]. So whoever judges according to his

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1- Sharḥ al-Azhār 4/318.

2- Sharḥ al-Azhār 4/318.

3- Sharḥ al-Azhār 4/320.

knowledge has judged in truth. However, whoever rules according to his own knowledge must not rule except after hearing the claim and the response. (*This is what is affirmed*) (قرو).<sup>1</sup> As for the ḥudūd, he is not permitted to rule in them according to his own knowledge, because ḥudūd are ward off by doubts.

**[Regarding the judge ruling in an issue after he has given a fatwa on it]**

In *al-Tāj*: “For the presumption in criminal matters is that they are accidental (by mistake).” End quote.

The scholars of the madhhab said: It is forbidden for the judge to issue a ruling after he has given a fatwa in that same issue; because his ruling would be an affirmation of his fatwa, like the case of a witness [affirming his own act]. This holds even if he gave the fatwa before he assumed the office of judge, whether the disputant knows of it or not, whether it gives rise to suspicion or not, and whether the fatwa was against the questioner or in his favor. End quote.

**I say:** The fatwa is issued by the mufti according to the outward sense of the question posed by the questioner, whereas the judgment is issued by the judge on the basis of the formal claim, the response, the witnesses, the oaths, the admission, the denial, refusal to swear, and so on. So if the judgment is based on all that, and fully in accordance with the sharʿī procedures, no reason appears for preventing him from ruling with the truth.

Their statement that “his ruling is an affirmation of his fatwa” is not a valid impediment, for affirming truth by truth is demanded in Islam; what is blameworthy is affirming falsehood by falsehood.

There is a difference between the witness and the judge: when a witness testifies that he himself did such-and-such, his testimony is not accepted, because he is testifying in his own favor, and the Sunnah has come that such testimony is not accepted. As for the judge, when he rules in affirmation of the fatwa, his ruling is not an affirmation of his own act; rather, it is an affirmation of the fatwa, which is an expression of the ruling of Allah Most High. That is not testimony on one’s own behalf.

If the fatwa and the judgment were of the same category as testimony on one’s own behalf, then it would not be permissible to accept one fatwa after another like it, nor to accept a fatwa after a judgment similar to it, nor to accept a judgment after a previous judgment like it.

**[Some of what is required in a judge]**

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1- *Sharḥ al-Azhār* 4/320.



– It is a condition in the judge that he be a mujtahid. Some of the imams said: It is permissible that he be a muqallid [follower of others’ ijtihād] out of necessity; for it is not feasible for the ruler to appoint, in every land, a judge who is a mujtahid, due to the scarcity of mujtahids in every age. Evidence for this is also that the Prophet (*May Allah bless him and his family and grant them peace*) appointed for the people of Mecca, on the day of the conquest, a judge from among the new Muslims of that conquest, namely ‘Attāb ibn Asīd.

– In this there is proof of the validity of a judge being a muqallid, when there is an excuse. And perhaps the excuse in appointing ‘Attāb over the judiciary of Mecca is that the people of Mecca were extremely zealous and proud; their tribal zeal and fervor would not allow someone who was not of them to rule over them and judge among them. The Prophet (*May Allah bless him and his family and grant them peace*) understood this about them and knew the greatness of their sense of honor, so he appointed over them a man from among them – indeed, from the greatest house in Quraysh, Banū ‘Abd Manāf.

**If you were to say:** How was it permissible for the Prophet (*May Allah bless him and his family and grant them peace*) to appoint over them a man who was only recently removed from Jāhiliyyah, who did not know the rulings of Islam?

**I say:** His appointment was permissible for several reasons:

1 – Because of the reconciliation it contained for Quraysh and the pacifying of their Jāhili spirit.

2 – That ‘Attāb had embraced Islam and committed himself to adhering to the rulings of Islam, and he was able to learn the rulings from the teachers charged with teaching the people of Mecca the rulings of Islam.

3 – That the Prophet (*May Allah bless him and his family and grant them peace*) would not advance or delay in any matter of the affairs of Islam except by the permission of Allah *Most High*.

4 – That judgment with truth and justice is divided into two types:

a) A type whose rulings are known by the innate sound reason (fiṭrat al-‘aql).

b) A type whose rulings are known by way of the Sacred Law (al-shar‘).

– What we intend by “what is known by the innate sound reason” is what may be understood through the strength and sharpness of the intellect when examining strong and weak contextual indicators and signs, discerning the sound among them from the unsound, distinguishing the evidences that are acted upon from those that are not,

and being alert to the stratagems, plotting and cunning of schemers, and so forth.

– Adorning oneself with this category is not contingent upon knowledge of the detailed sharʿī rulings.

Among the examples of this category is what has come in the Qurʿan in the story of Yusuf (*Peace be Upon Him*): *"If his shirt is torn from the front, then she has told the truth and he is of the liars. But if his shirt is torn from the back, then she has lied and he is of the truthful." So when he (her husband) saw that his shirt was torn from the back, he said: 'Indeed, this is of your (women's) plotting. Truly, your plotting is great.'"* [Yūsuf:26–28].

– By sound natural intelligence and the strength of its discernment, it is known that:

1 – A claim is not acceptable or valid unless it relates to something known and clearly specified. For example, the claimant says: "I claim that such-and-such a plot of land, located in such-and-such a town, near such-and-such a place, bounded on the north by such-and-such, and so on, belongs to me"; or "So-and-so has with him for me a sum of such-and-such in Yemeni currency"; or "I claim that I have the right of pre-emption (shufʿah) with So-and-so in the land situated in such-and-such a town, bounded by such-and-such," and so forth.

As for if the claimant were to say: "I claim that So-and-so has some furnishings of mine, or a rifle, or a jambiyyah (dagger)," such a vague claim would not be accepted by any reasonable person.

2 – And the seasoned judge knows that a claim made on behalf of someone other than the claimant is not acceptable when the claimant is neither a guardian nor an agent. In such a case the judge will reject it and say to the claimant: "What concern do you have with this claim? You have no right to raise a claim against So-and-so, for you are not claiming any right of your own against him, nor are you a guardian of the one who possesses the right, nor his agent."

3 – The judge knows, by his discernment, that if a witness is an enemy of the one against whom he testifies, his testimony is not acceptable. And he knows that if there is a benefit returning to the witness by virtue of his testimony, that testimony is not acceptable.

### **[Regarding appointing muqallids as judges]**

It is difficult for the ruler to appoint, in every region, a judge who is a mujtahid, due to the scarcity of scholars who are mujtahids. On this basis, it is permissible to appoint judges who are muqallids out of necessity. However, it is preferable that the affairs of these muqallid-judges be overseen by a mujtahid judge – or more than one – whom they consult in matters that are problematic for them.

### **Foundations of the judiciary**

Judging with truth rests upon certain foundational principles which are indispensable; otherwise, judgment with truth will not be realized. The foundations of the judiciary are:

1 – That the judge be endowed with intelligence, understanding, and discernment.

2 – That the judge be just, possessing complete uprightness.

3 – That the claim be heard with attentive understanding, and it is a condition of the claim that it be valid.

4 – That the response be heard with attentive understanding.

5 – Distinguishing between sound proofs and others, and between valid claims and others.

6 – Knowledge of what the All-Wise, *Exalted is He*, has ruled in His Book of the shar‘ī rulings, or [knowledge of them] on the tongue of His Messenger (*May Allah bless him and his family and grant them peace*).

7 – That the judge keep away from anything that would lead to suspicion about him.

8 – That he possess such intelligence and discernment that he recognizes implicit acknowledgment and necessary (implied) acknowledgment, and that he understands contextual indicators and signs, along with the strength and weakness of their evidentiary value, and that he knows the situations in which it is permissible to act upon such indicators, and the situations in which it is not permissible to act upon them.

#### **[“No harm and no reciprocating harm”]**

Hadith: “*There is to be no harming and no reciprocating harm in Islam*” is a famous hadith among the scholars of the Muslims, including the Zaydis, and it is used as evidence in many chapters of fiqh.

#### **[Judging according to outward appearances]**

His saying, *Exalted is He*: “*and when you judge between people to judge with justice.*” [al-Nisā’:58].

What is meant is judging with the truth according to the outward [evidence], and the judge attains judgment with the truth by means of avenues which the Wise Lawgiver has clarified, and they are:

1. The testimony of two just men, or of one man and two women, in matters of wealth and rights. If just testimony is established and there is nothing that counters it regarding the ownership of something by a person, the judge rules that this person owns it.
2. A thing being firmly in the possession of someone without any disputant is a means to ruling that the one in whose possession it

is owns it.

3. And if there is a dispute with the one in possession of the thing, it is ruled to belong to him along with his oath, if there is no [other] evidence.
4. Acknowledgment, in favor of the claimant, of what he claims is a means to ruling ownership for the claimant. Included under acknowledgment is refusal to take an oath, and acknowledgment may be implicit or necessary (by implication).

#### **[How the judge rules in hidden/obscure disputes]**

**Question:** If two men bring their case before one of the people of knowledge and appoint him to judge between them with the ruling of Allah regarding what lies between them of disagreement, but their problem is subtle and hidden, such that there is no specific ruling from Allah Most High and His Messenger (*May Allah bless him and his family and grant them peace*) regarding it, then what is the arbitrator to do?

**Answer:** The judge rules in such a matter according to what preponderates for him, if he is among the people of weighing [evidences]; and there is no way to attain more than presumption and preponderance in subsidiary ijtihād-based issues. The ruling of Allah Most High in practical subsidiary issues is divided into two types:

1. A type in which the ruling is known with certainty.
2. A type in which the ruling of Allah is thought by presumption.

And in all of them it is said that it is the ruling of Allah.

#### **[One of the disputants wanting only to prolong the dispute]**

**Question:** If the judge comes to know, from the speech of one of the two disputants – through his innuendo, evasion, and lack of desire to end the dispute – that he wants to prolong the case and multiply its offshoots, while explicitly declaring and outwardly showing that he wants the ruling of Allah and to magnify the size of the case, then what is the judge to do in such a situation, knowing that every offshoot of that case requires claims, answers, and so on, while the outward appearance of his demands is [that they are] rightful?

**Answer:** If the matter is like that, and the judge knows that what he wants is only to harm his opponent, then the judge must admonish him and frighten him from doing that; if the admonition benefits, then so be it, otherwise it becomes incumbent on the judge to restrain his harm from his opponent as far as possible.

As for if the judge knows that there is a particular point over which disagreement has arisen, and that it is what has caused the multitude of claims and their numerous offshoots, then the judge must address that sensitive point and resolve the dispute therein, and strike out what is

besides it.

**(Revoking the judgment of the judge)**

**Question:** Is it valid and permissible for the two disputants to mutually agree between themselves to revoke a judgment that has been issued concerning their dispute, and then for the dispute and quarrel to start anew?

**Answer – and success is from Allah** – is that this is neither permissible nor valid, and that both of them must accept the judgment and be satisfied with it; this is due to His saying, *Exalted is He: “The only statement of the [true] believers when they are called to Allah and His Messenger to judge between them is that they say, ‘We hear and we obey.’”* [al-Nūr:51]. And the judgment of a judge is not validly revoked except by the judgment of another judge, under conditions that are mentioned in the books of fiqh.

However, it is permissible for the two disputants, after the judgment – or for one of them – to relinquish what he is entitled to under the judgment and to pardon his opponent in that regard. As for revoking the judgment without that, it is neither valid nor permissible.

**[When is it permissible to reject the arbitrator’s judgment?]**

**Question:** If the two disputants agree upon an arbitrator to resolve the dispute between them, is it permissible for one of them to reject the judgment issued by the arbitrator if it does not please him, or not?

**Answer – and success is from Allah** – is that when the arbitrating judge has ruled between the two disputants, it is obligatory to be content with his judgment, and it is not permissible for either of the disputants to reject it.

The proof for that is His saying, *Exalted is He: “O you who have believed, fulfill [all] contracts.”* [al-Mā'idah:1]. Except if he has ruled without justice; in that case it is permissible to reject it, but on condition that this be done through another judge who rules that it is invalid. If that occurs, then there is no objection to rejecting it; but without that, it is not permissible.

And the proof that a judgment is annulled and may be rejected if it contravenes justice is His saying, *Exalted is He: “Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice.”* [al-Nisā':58], and His saying, *Exalted is He: “[We said], ‘O David, indeed We have made you a successor upon the earth, so judge between the people in truth and do not follow [your own] desire, as it will lead you astray from the way of Allah.’”* [Ṣād:26].

Furthermore, the scholars of the madhhab have mentioned – as in *al-Azhār* and its commentary – that judges are of three types:

- 1 – The judge appointed by an Imām or a muḥtasib.
- 2 – The judge appointed by “the five.”<sup>1</sup>
- 3 – The arbitrating judge appointed by the two disputants.

### [The procedure followed in judiciary in these days]

The traditional procedure in the judiciary today is as follows:

1. That the two disputants write between them a document that includes their mutual agreement to appoint a person as arbitrator, and that whatever emerges from him concerning their dispute they are content with it, and so on, and they have it witnessed.
2. That the claim of the claimant be written and signed, and likewise the response be written and signed.
3. The claim is submitted to the judge; then the judge orders the defendant to answer the claim. The answer is then submitted to the judge, who presents the answer to the claimant, and so on until the two disputants have presented what they have.
4. The judge writes down everything that has been presented to him of claims and answers, in order.
5. When the two disputants have completed their claims and answers, the judge asks them for *tahjīr* (closing the case to further submissions). If they both perform *tahjīr*, he records that and has it witnessed.
6. When they have performed *tahjīr* and have had that witnessed, they then ask the judge to issue a judgment according to what is contained in the compiled record (*al-muḥaṣṣal*), and they are to have that witnessed.
7. After that, the judge reads to the two disputants the compiled record from beginning to end, so that neither of them may claim that something of what he presented to the judge has fallen from it. If the two disputants wish to take the compiled records in order to examine them and then return them at a specified time, let them take them; but this should be before *tahjīr* and the request for judgment.
8. Then, after that, the judge reflects upon the compiled record. If there are testimonies in it upon which judgment can be built, the judge should summon the witnesses so that they attend before him and give their testimonies regarding the disputant; the judge then opens for the disputant the opportunity to question and cross-

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1- The judge appointed by “the five.” It is the view of Imām al-Muʿayyad bi-Ilāh (*Peace be Upon Him*) that it is a condition for the judge that he be appointed by five upright men from the people of the town; while the position of the madhhab is that whoever is fit for something may carry it out. Completed by the author.

examine the witnesses. Thereafter the judge forms his view concerning those testimonies, and the judge must also open for the disputant the opportunity to challenge the testimony and the witnesses.

### **A benefit regarding the judge's wage**

**According to the madhhab:** It is permissible to take a fee for writing the judgment and the legal opinion (fatwa), because writing is not obligatory.

And the judge's wage is from the funds of public interests (*amwāl al-maṣāliḥ*) if such a fund exists; otherwise, from the people of the land of his jurisdiction, who collect it for him in a manner that does not lead to suspicion. This is the end of the quotation from the commentary<sup>1</sup>.

**Yes**, if the judge has a salary from the public treasury (*Bayt al-māl*), then it is not lawful for him thereafter to take a fee from the disputants. But if he has no salary from the public treasury, then there is no harm upon him in taking from the disputants a fee for his work.

And the scholars of the madhhab have said: He is to be assessed according to the typical fee of someone like him who is not a judge<sup>2</sup>.

### **[The fee of an arbitrator between two men]**

**Question:** If two men dispute and they place a *ribākh* (a sum held with him) with a man, and that man reconciles between them, so they both give him a fee in return for his reconciling them – is it permissible for him to take that fee, even if they did not give him the fee except while they were forcefully pressing one another to do so?

**Answer** – and Allah is the One who grants success: Reconciliation between believers is obligatory, due to His saying, *Exalted is He: "so make peace between your brothers. And be mindful of Allah so you may be shown mercy."* [al-Ḥujurāt:10] And it has been established that taking a wage for performing an obligatory act is forbidden; therefore, taking a wage for that is forbidden.

As for what this reconciler is given by the disputants without any condition from him, neither outward nor inward, and with both of them willingly content with it, then the apparent ruling is that there is no harm upon him in taking it, whether it was given amid mutual insistence between them or not.

However, staying away from such things is more fitting for the believer, more protective of his religion, farther from doubtful matters,

1- *Sharḥ al-Azhār* 4/332.

2- *Sharḥ al-Azhār* 4/332.

and farther from the manners of the people of ignorance and misguidance.

### **[Specifying the curse upon the briber and the bribed]**

In *al-Tāj*: “It is not permissible for one who has a right to give a bribe to the judge so that he will rule for him by it, even if that which is being claimed is a due and binding right that he cannot attain except by the bribe, due to the generality of the ḥadīth: “The Messenger of Allah (*May Allah bless him and his family and grant them peace*) cursed the one who offers a bribe and the one who takes it in (judicial) judgment.”

**I say:** The apparent meaning of His saying, *Exalted is He: “And do not consume one another’s wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].”* [al-Baqarah:188] is that what is prohibited of bribery is that which is for the sake of devouring people’s wealth without right. As for what is given to the judge in order that he may rule with the truth, then in my view it is not called “bribery”; rather, it is a fee or a gift.

As for the judge, it is not permissible for him to take a fee for judging, because judgment is obligatory upon him, and taking a fee for an obligatory act is prohibited. But if it is given to him by way of kindness, and the giver’s soul is content with it, and taking it does not bring suspicion upon the judge, and his ruling is not dependent upon the gift – then it is lawful for him to take it.

As for the giver, there is no reason to deem him sinful, for he is merely ransoming his right; his case is only like one who appeases highway robbers with a portion of his wealth so that they do not take all his wealth from him, or so that they return to him what they have taken.

And the scholars of the madhhab have said: If the guardian of an orphan knows that a wrongdoer will take the orphan’s wealth, it is permissible for him to give a part of it to that wrongdoer to protect the remainder; he is neither sinful nor liable, indeed it is not far-fetched that this be obligatory. End quote – this was indicated in *al-Tāj*.



## [The Book of Ḥudūd (Prescribed Legal Punishments)]

### (Benefit regarding the ruling of carrying out the Ḥudūd)

In *Sharḥ al-Aḥkām*, from Muḥammad ibn ‘Abd Allāh al-Nafs al-Zakiyya (*peace be upon them*): “As for the limits of Allah, there is to be no disputation in them whenever there is a way to establish them. How, then, could the ḥudūd be lifted from the people to whom they are due, when it is only the friends of Allah and those who strive in His path who go out seeking to establish them and to restore wronged rights to their people?” End [quote].

### Benefit (Concerning authority over the Ḥudūd)

**According to the madhhab**, the authority over the Ḥudūd belongs to the Imām, and he has the right to suspend them for a [public] interest.<sup>1</sup>

What indicates this is the Prophet of Allah (*May Allah bless him and his family and grant them peace*) leaving the ḥadd concerning ‘Abd Allāh ibn Ubay; he did not carry it out on him.

If the fornicator admits that he has committed zinā four times, the Imām carries out the ḥadd upon him. It is stipulated that his confession to zinā be connected to one woman only and not to more than one; otherwise the ḥadd falls from him.

And if the four witnesses testify against a man that he has committed zinā with a woman whom they do not know, he is not subjected to the ḥadd.

It is not a condition that the witnesses to zinā be present together; rather, it is a condition that they testify to the reality of the zinā, its time, its place, and its manner—whether it was standing or sitting. If their testimonies agree, they are valid; otherwise they are not valid. If they speak in general terms and do not give details, their testimony is not valid.

In the marginal notes, from Qāḍī ‘Abd Allāh ibn Ḥasan al-Duwārī: If legal proof has been established for a ḥadd or a ta‘zīr, it is not permissible for him to allow himself to be taken in order for that to be carried out upon him; rather, it is obligatory for him to flee and to resist as far as he is able, because warding off harm from oneself is obligatory. It is obligatory upon the Imām and the judge to exert effort in fully enforcing the ḥadd upon him. It is not permissible for the one upon whom the ḥadd is due to fight them in their attempt to enforce it upon him, because they are in the right, even though it is permissible for him to flee.

1- *Sharḥ al-Azhār*, 4/334.

And the ḥadd is dropped by [the accused's] confession; so if four witnesses testify to zinā against a man, then the man confesses once, or twice, or three times, the ḥadd is dropped. And if he confesses four times, then retracts from—

If the slanderer (al-qādhif) brings along with him three witnesses, the ḥadd of slander (qadhif) is dropped from him, even if they are disbelievers, or slaves, or discerning children, or four women; and it is said, according to the madhhab: even if the children are not discerning.<sup>1</sup>

The ḥadd is also dropped from the slanderer by his establishing two witnesses to the effect that the one slandered (al-maqqdhūf) has confessed to zinā, or [by his producing] one man and two women, or [by his producing] one witness together with the oath of the claimant.

And the proof for the first issue is His saying, *exalted is He: "And those who accuse chaste women and then do not produce four witnesses – lash them with eighty lashes and do not accept from them testimony ever after. And those are the defiantly disobedient."* [al-Nūr:4] Thus, the apparent generality of the verse rules in accordance with what the people of the madhhab have said. However, consideration must be given to the testimony of non-discerning children, for the non-discerning one is not capable of giving testimony, and none is called a witness except one who is proficient in delivering testimony.

### **[Averting the Ḥudūd on the Basis of Doubts]**

The ḥadīth: *"Avert the ḥudūd by means of doubts (shubuhāt)."* The ḥadīth: *"Repel the ḥudūd whenever you find any way to repel them."* And the report: *"For me to err in pardoning is more beloved to me than to err in punishing."* This is the end of what is in *al-Jāmi' al-Kāfī*.

### **Benefit concerning not acting upon the apparent meaning of wording in obligating wealth, rights, and ḥudūd**

In the ḥadīth of "Mā'iz", who confessed to zinā in the presence of the Prophet (*May Allah bless him and his family and grant them peace.*): *"Perhaps you only kissed? Or you only gestured (with your eyes)?"* He said: "Yes." He said: *"Did you actually lie with her?"* He said: "Yes." He (*May Allah bless him and his family and grant them peace*) said: *"Did you have physical contact with her?"* He said: "Yes." He (*May Allah bless him and his family and grant them peace*) said: *"Did you have intercourse with her?"* He said: "Yes." He said: *"Did that [of you] enter that [of her]?"* He said: "Yes." He said: *"As the kohl-stick disappears into the kohl-pot, and the rope into the well?"* He said: "Yes." He said: *"Do you know what zinā is?"* He said: "Yes." He said: *"You have approached from her, unlawfully, what a*

1- *Sharḥ al-Azhār*, 4/254.

*man approaches [from his wife]...” and so on.*

And in the ḥadīth of the “two dinars” which Abū Qatādah undertook on behalf of a dead man: Abū Qatādah said: “The two dinars are upon me.” So the Messenger of Allah (*May Allah bless him and his family and grant them peace*) said: “*As a right due to the creditor?*”—that is, the right has become binding upon you and established against you—“*and he (the dead man) is free of them?*” Abū Qatādah said: “Yes.” ... and so on.

From this it is understood that one is not held to the mere apparent wording in obligating wealth, rights, and ḥudūd; rather, the wording of contracts and admissions must be verified, and a right is not established by wording that is open to multiple possible meanings.

### **[Benefit in rulings related to zinā]**

- It is a condition for the obligation of carrying out the ḥadd that the cause—such as zinā—occurs during the time of one Imām, and in a land over which that Imām has authority. If the ḥadd is not carried out until a different Imām has taken office, the ḥadd drops.
- If pregnancy appears in a woman without testimony and without confession, no ḥadd is due upon her, because it can be allowed that it is due to a mistake or something similar. Nor is it appropriate that she be imprisoned so that she might confess; and if she is imprisoned in order that she might confess, then there is likewise no ḥadd, because confession under coercion is not valid.
- It is recommended to prompt [the accused] with what will cause the ḥadd to fall, and thus, at that point, it is disliked to scrutinize and investigate in the manner that would establish it.
- Whoever slanders a foundling (laqīṭ) who is known as “the child of zinā,” the ḥadd is obligatory upon the slanderer, because the one slandered is a free, Muslim, adult, sane, chaste person; so his case is as if he were not a foundling.

**I say:** Whoever slanders the foundling with zinā, and the one slandered is as has been described, the ḥadd becomes obligatory. As for one who slanders him by saying that he is “the son of zinā,” then regarding the ḥadd there is a problem. That is because what is firmly settled in the minds of common people is that foundlings are children of zinā, and it is extremely far-fetched that someone would abandon his own child and leave him as a foundling, in view of how Allah has implanted in human beings—and indeed in most animals—the utmost tenderness and compassion towards their offspring, even if their condition of hardship, difficulty, and poverty has reached the furthest extent.

**Therefore, we say:** such slander as this ought not to have the ḥadd

carried out upon the slanderer, because of the doubt and excuse that exist for him. However, it is incumbent upon the judge to forbid him from that and to threaten him concerning returning to it; and if he returns after being warned, the judge disciplines him with what he deems appropriate. That is because the honor of a Muslim is sacred and must be protected.

Likewise, it is neither appropriate nor permissible that he be called or named by something that harms him, even if it is true—such as [calling out], “O foundling,” or “The found girl has come,” or “The foundling.”

**[The car is not a ḥirz (protected place of safekeeping) for what is placed in it]**

**Question:** Is a car considered a ḥirz (protected enclosure) for what is placed in it?

**The answer – and Allah is the One who grants success** – is that what appears to me is that the car is not a ḥirz for what is placed in it, whether its doors are locked or unlocked.

The proof of that is that the car itself, if it is stolen from within a ḥirz, the thief’s hand is cut; but if it is stolen from outside its ḥirz, the thief’s hand is not cut. This is what the evidences entail, and it is the madhhab, as stated in *al-Azhār* and its commentaries.

And whatever is in itself a thing that is kept in a ḥirz does not become a ḥirz for something else; and this is what the scholars of the madhhab have said regarding the bag, the sack, the chest, and the like of that.<sup>1</sup>

**[Is the one whose hand was cut for theft required to return what he took?]**

**Question:** A man stole, and then his hand was cut off. Is he required to return what he stole?

**The answer – and Allah is the One who grants success** – is that the thief is not required to return the stolen property on account of which his hand was cut. That is because he has already received the recompense which Allah has prescribed for him in His saying: *“As for the thief, the man and the woman, cut off their hands as recompense for what they have earned, a deterrent from Allah; and Allah is Mighty, Wise.”* [al-Mā’idah:38] And what we have mentioned here is the madhhab, for they have stated in the legal maxims of the madhhab: “Two liabilities are not combined against a person in both his wealth and his body.”

**[The ruling on one who repeatedly commits theft]**

**Question:** There is a thief who brazenly attacks the qāt farms of some

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1- *Sharḥ al-Azhār*, 4/372.

people. The owners of the qāt have tried to make him stop harming them, but those attempts have not been of any benefit. Is it permissible for them to beat him if they find him stealing their qāt, or to imprison him in their houses? This is bearing in mind that he used to steal from other people, and they beat him, and after that he did not steal from them again. So if it is permissible for us to beat him, what is the ruling if that beating causes his death? Please inform us. Peace be upon you.

***The answer – and Allah is the One who grants success and gives support*** – is that it is permissible for a person to defend himself and his property. However, it is not permissible for him to repel (the aggressor) with what is more severe when it is possible to repel him with what is lighter.

Thus, the questioner should first ask the thief’s family to restrain him from harming him. Then, if they do not restrain him, he should ask the state to prevent this thief’s harm from reaching him. Then, if that does not help, he should threaten and warn the thief. Then he should frighten him by shooting (firearms) around him. Then, if none of that deters him, (it is) beating at that point – and “the last of remedies is cauterization.”

The proof for what we have mentioned is the proof (evidences) of forbidding evil.

However, if beating the thief or imprisoning him would stir up his tribe to seek revenge and retaliation, which could lead to tribulation between the two tribes and perhaps to killing between the two sides, then it is not permissible to beat the thief in that case. That is because the corruption that results from the beating would be greater than the benefit that results from it.

**[A man who used to steal muṣḥafs from mosques and then repented]**

**Question:** A man used to steal old muṣḥafs [written Qur’an copies] from mosques, erase them, then write in them, and then sell them. Now he has turned back to Allah and repented. What is required of him concerning what he stole from the mosques?

**The answer:** It is obligatory upon him to pay the value of everything he took from the mosques – whether a complete muṣḥaf, or loose sheets, or a single sheet. The value is to be determined by those with expertise in the values of ancient handwritten manuscripts. It is not sufficient that he simply buy printed muṣḥafs for the mosques in place of what he took.

**[Repentance of the highway robber]**

**Question:** Give us a fatwa regarding a man who used to cut off the road (i.e., a highway robber), and now he regrets what he did. What is required of him regarding the wealth he had taken? What should he do?

**The answer – and Allah is the One who grants success** – is that if the highway robber repents before he falls into the hands of the state, then it is not permissible for anyone to transgress against him, nor to demand from him anything of what he committed during the time he was cutting off the road, whether his crime was against life (killing) or property.

The proof for that is His saying, *exalted is He*, at the end of the verse about those who wage war (against Allah and His Messenger) and spread corruption on earth: *"Except for those who repent before you gain power over them; so know that Allah is All-Forgiving, Most Merciful."* [al-Mā'idah:34] And it is narrated in the Sunnah that the Commander of the Faithful, 'Alī (*Peace be upon him*), forbade transgressing against the one who had repented during his time. And the outward sense of the words of al-Hādī (*Peace be upon him*) is that it is not permissible to transgress against the repentant one.

Moreover, the hidden reason and wisdom in that – *and Allah knows best* – is that making things easy and light upon the highway robber in his repentance is an encouragement for him to repent and to leave off cutting the road. If his repentance were not accepted except after returning everything he had taken, and so on, that would drive him to persist in corruption and highway robbery. And in that there would be such widespread corruption upon the Muslims in general as is not hidden. So Allah, *exalted is He*, made it light in his repentance, out of His regard, glorified is He, for the general interest of all the Muslims.

And in *al-Bayān* it states: If he repents before he is captured, his repentance is valid, accepting it is obligatory, and every right of Allah, *exalted is He*, and of the children of Adam falls from him – even killing, usurpation, theft, and other things which he may have destroyed while in the state of fighting (as a highway robber).

And likewise, if he repents but does not come back to the Imām, or if there is no Imām, then everything falls from him in what is between him and Allah, *exalted is He*. And this is also the statement of al-Hādī (*Peace be upon him*). This is the end of what is in *al-Bayān* and its marginal notes.

### [Repentance of the intentional killer]

**Question:** Does the one who intentionally kills (another) have repentance?

**The answer is that** if the intentional killer repents, his repentance is accepted. The proof for that is:

1. Allah, *exalted is He*, mentioned in Sūrat al-Furqān the warning concerning shirk, killing, and zinā, then after that He said: *"Except for those who repent and believe and do righteous deeds; for such,*

*Allah will replace their evil deeds with good ones. And Allah is Ever Forgiving, Ever Merciful."* [al-Furqān:70]

2. And He, *glorified is He*, said: *"Say, 'O My servants who have gone to excess against their own souls, do not despair of the mercy of Allah. Indeed, Allah forgives all sins; truly, He is the Ever-Forgiving, the Ever-Merciful.' And turn in repentance to your Lord..."* [al-Zumar:53-54]
3. There is no disagreement that committing shirk with Allah is the greatest of the major sins, and there is no disagreement that Allah, *exalted is He*, forgives it by repentance. So all the more so will Allah, *exalted is He*, forgive by repentance what is less than shirk, such as intentional killing.

**[The ruling on one who frequently curses and uses obscene speech while he is committed to acts of obedience]**

**Question:** What is the ruling on one who frequently curses and uses obscene speech with his children and his family, while he is committed to the rest of the acts of obedience?

**The answer:** In some societies, a man may grow up, and cursing and obscene speech enter into his language and his speech as a consequence of the language and speech of his community. Then he grows older, turns to Allah, and becomes committed to obedience to Him. Yet still, there issues from him what issues of cursing and insulting, without intention or purpose towards the meaning. Rather, what issues from his tongue issues only because of the language upon which he grew up, and it became his nature and disposition.

Such a person ought not to be judged as being in a state of disobedience and sin. And Allah, *exalted is He*, has said concerning something of this type, according to one of the two interpretations: *"Allah does not call you to account for what is idle in your oaths, but He calls you to account for what your hearts have earned. And Allah is All-Forgiving, All-Forbearing."* [al-Baqarah:225]

However, whoever is in such a state ought to train his tongue to leave off cursing and obscene speech. I myself have seen and heard many of this sort, in whose speech there runs much cursing and insulting, without any intention on their part towards its meaning.

If you were to say to one of them, "Why do you insult and curse?" he would deny that, and that is only because insulting and cursing have entered into their language.

At the same time, they use cursing and insulting as a metaphor for something else. So they say, "The cold 'had intercourse with' him," meaning: the cold hurt him severely. And they say, "So-and-so 'had

intercourse with him' in his merchandise," when he bought it from him and overpowered him in the purchase. And, "He 'had intercourse with him' in his right," meaning: he bought it from him, or overpowered him in it by a judgement, or by purchase, or the like of that. And, "He 'had intercourse with him' with a stab," that is, he stabbed him with a thrust. And, "I will curse his face," meaning: I will humiliate him.

And we have heard them inserting insulting expressions into the speech of a friend with his friend, and a brother with his brother, without intending by it the meaning of insult, nor desiring it. Rather, it is of the same kind as what has come in the ḥadīth: *"Then marry the one who is religious – may your hands be dusty."* The phrase "may your hands be dusty" is a supplication for destruction, but it is not intended in the ḥadīth nor meant; rather, it entered into the ḥadīth following the (customary) language.

And likewise the expression *"Woe to his mother,"* which is (literally) a supplication against him for destruction, and yet the Messenger of Allah (*May Allah bless him and his family and grant them peace*) said it concerning some of his allies among the believing fighters in the path of Allah.



### [The Book of Jināyāt (Criminal Offences)]

#### [Benefit regarding killing one who deserves to be killed]

In *al-Bayān* it states: that whoever kills the muḥṣan adulterer after the act of zinā, or at the time of zinā, and he has proof of the zinā by way of four witnesses, then according to Abū Ṭālib – and this is the madhhab and the view of (the companions of al-Shāfi‘ī) – there is nothing upon him except sin, whether this is in the time of an Imām or not, since such a person’s blood is lawful [he is legally subject to killing]. This is the end of what is in *al-Bayān* and its marginal notes.

**I say:** It follows from this that there is nothing upon the killer of one who, in the ruling of Allah, deserves to be killed, except sin – such as killing a killer, or an apostate – and that what incurs sin for him is his taking upon himself a ruling that does not belong to him, for the ḥudūd are a matter whose affair is assigned to the Imāms.

#### [The ruling on removing medical machines and nutritive feeds from one whose life is despaired of]

**Question:** If there is a patient in the hospital who has completely lost consciousness, does not move, is being nourished by feeding solutions, and is breathing through a medical machine, and the physicians supervising him say that if they remove from him the breathing machine he will certainly die – what is the ruling on removing the machine and leaving (only) the nutritive feeds until he dies?

**The answer – and Allah is the One who grants success** – is that if the physicians have lost all hope in his recovery and no longer have any expectation of his being cured, then it is permissible for them to remove from him the breathing machine and to cut off from him the nutritive feeds, because there is at that point no benefit in that, and no interest in prolonging his life, neither for him nor for his family.

It has been narrated in the biography of Imām Zayd ibn ‘Alī (*Peace be upon them*) that when he was struck in battle by an arrow in his forehead, a physician was called for him. When the physician looked at the arrow, he said to Imām Zayd: “If I pull the arrow out of you, you will die.” So Imām said: “Remove it, for death is better than what I am in of pain.” This is the sense of his words, and in it is what supports and bears witness to what we have mentioned.

**Question:** If the patient is under modern medical machines in a condition such that, were the machines to be removed from him, he would certainly die, then what is the ruling?

**The answer:** If the matter is indeed certainly as described, then the patient is to be considered legally dead, so his property is inherited, his wife observes her waiting period, and so on.

This is according to what the scholars of the madhhab have mentioned concerning one whose body has been severed into two halves, or one whose jugular vein has been cut: he is like the dead, even if he remains alive for some time; thus his estate is inherited, and his wives observe the waiting period, and so on.

**Branch issue:** If the patient would certainly die were the machines to be removed from him, is it permissible to remove the machines from him, knowing that he will die when they are removed? Or is that not permissible, even if leaving them (running) involves financial loss for the heirs?

What appears is that it is permissible to remove the machines, because he is, in the legal ruling, dead, and his life under the machines is not (true) life. Thus, he does not die by the removal of the machines from him; rather, his death had already in fact occurred beforehand.

**[One who placed a rifle upon his donkey and it went off against one of his companions]**

**Question:** A man was carrying on his donkey a rifle in the side-bag (*khurj*) of the donkey. He was walking along with his donkey in company with a group on a road, and the rifle which was in the side-bag of the donkey went off without any direct handling of it by the man, and it killed one of the companions. What is required (of him)?

**The answer:** If the owner of the rifle that was being carried knew of the danger of carrying the rifle on his donkey, then he is liable (for compensation). But if he did not know of its danger, then there is no liability.

We have only said that because the scholars of the madhhab have said something similar about a leaning wall: they hold its owner liable if he knew of its danger; otherwise there is no liability.

However, the danger of rifles that are loaded with bullets is, in general, known as danger among the generality of people. So if an injury occurs through its discharge, then its owner is liable, because its danger is known to young and old, male and female.

**[Standing in an unsafe place]**

**Question:** Does a man incur sin by standing in a place that is being continuously targeted by bombardment, or does he not incur sin? And if he keeps his wife and children with him in the dangerous place, what is his ruling?

**The answer – and Allah is the Guardian who grants success** – is that the ruling is tied to predominant assumption (*ẓann*). If a man predominates in assumption that safety will prevail in his standing in the dangerous place, then there is no sin upon him in standing there. But if

he predominantly assumes that he will be exposed to destruction or injury, then it is prohibited for him to stand there – except if he is standing there to defend his property, or his neighbor, or his believing brother; in that case, he does not incur sin.

If he keeps his family and children with him while he assumes safety, then there is no sin upon him. But if he assumes that they will be exposed to danger, then he incurs sin. The proof for that is rational, for people of sound intellect judge in accordance with what we have mentioned.

**[The ruling on appointing a proxy (wakīl) to carry out qīṣāṣ]**

**Question:** A man appointed another man as his proxy to undertake the execution of qīṣāṣ (retaliatory killing) against the killer of his relative, after it had become established for both the proxy and the one who appointed him, by way of wide-spread report and recurrent mass-transmission (shuhrah and tawātur), that this killer had killed that man’s relative in aggression, transgression, and injustice. Is that permissible and valid, or not?

**The answer – and Allah is the One who grants success** – is that the scholars of the madhhab have said: appointing a proxy to execute qīṣāṣ is not valid, except if the proxy carries it out in the presence of the one who appointed him; in that case it is valid. And it is in my mind that they explained the invalidity of (unrestricted) agency in this by saying: there remains the possibility that the one who appointed (the proxy) may pardon (the killer).<sup>1</sup>

What appears to me is the validity of appointing a proxy, for the killer may be a fugitive, in hiding and fearful, while the guardian of the blood (walī al-dam) may be a woman, or someone chronically ill, or a weak old man, and none of them is able to track the killer, pursue him, and lie in wait for the opportunity to kill him. If we do not affirm the validity of appointing a proxy, the taking of qīṣāṣ will be lost and the killer will be safe.

This is supported by what people actually practice: some of the guardians of blood carry out qīṣāṣ from the killer while some other heirs are absent, in the courts and elsewhere, and none of the scholars has objected to that.

**Yes**, it is not permissible for the proxy to carry out qīṣāṣ unless he knows that the killer carried out intentional, aggressive killing – either by direct witnessing, or through the killer’s confession, or through shuhrah and tawātur, or by the ruling of a recognized judge.

Likewise is the ruling for the guardian of the blood: it is not

1- *Sharḥ al-Azhār*, 4/240.

permissible for him to carry out qīṣāṣ except in accordance with what we have mentioned regarding the proxy.

**Yes**, it is possible that knowledge of that may be obtained through signs and circumstantial indicators.

### **[Killing a man who does not pray and does not fast]**

**Question:** A man killed another man, and the slain man was a wicked person who neither prayed nor fasted. Later on, the killer felt remorse. Is his repentance valid without his turning himself in to the heirs of the murdered man?

**The answer – and Allah is the One who grants success** – is that it is hoped for the one who has repented and regretted killing a man who does not pray and does not fast [that his repentance will be accepted], and this is with respect to what is between him and Allah, *exalted is He*. The proof for that consists of several matters:

1. It is permissible for the Imām of the Muslims and their ruler to kill the one who does not pray and does not fast, after inviting him to repent.
2. It is permissible for the Imām of the Muslims to launch a raid against a village in which no adhān is heard and in which the prayer is not established.
3. His saying, *exalted is He*, while mentioning the polytheists: *“But if they repent, establish prayer, and give zakāh, then they are your brothers in religion.”* [al-Tawbah:11]
4. What has been established that the prayer is one of the pillars of Islam, and likewise fasting. So the Islam of one who neither prays nor fasts is not valid.

On the basis of what has preceded, it is therefore hoped that the repentance of the aforementioned man, who repented after killing the one mentioned in the question, will be accepted. That is because, in his killing of that man, he killed one who deserved to be killed. However, he did disobey Allah, *exalted is He*, in that he undertook that which does not belong to him, for killing one who does not pray and does not fast is the prerogative of those in authority, not of the subjects. From here the scholars say: there is no qīṣāṣ upon one who kills a person who deserves to be killed – such as an apostate, a muḥṣan adulterer, and so on.

Moreover, what we have mentioned is further supported by His saying, *exalted is He*: *“And whoever kills a believer intentionally – his recompense is Hell, wherein he will abide forever; and Allah has become angry with him and has cursed him and has prepared for him a great punishment.”* [al-Nisā’:93] For He, *exalted is He*, has decreed a severe threat for one who kills a believer; and the killing committed by the man mentioned in the question does not fall under the threat mentioned in

the verse, for whoever does not pray and does not fast is not a believer.

**[The ruling on one who killed his father because his uncles made hatred of his father seem fair to him]**

**Question:** A boy at the stage of approaching puberty had uncles who were beautifying for him enmity towards his father and making him hate him, until he became filled with enmity and hatred toward his father. His father was sick, bedridden, and the only heirs he had were this son and the boy's mother. This adolescent son entered upon his father when no one else was with him, and struck him a single blow on the head with a stick, and the father died from that blow. It was not a strong blow; had it been struck on a healthy man, he would not have died from it. The son concealed this and did not inform anyone; people thought he had died a natural death. Then the boy grew up, his intellect became complete, he benefited from admonitions and guidance, migrated to (the tribe of) Āl al-‘Āmirī, felt remorse and fear, and wanted to free himself [from the guilt] and repent to Allah. He disclosed his story to me, while he is still concealing it from everyone else to this day, and he asked me for a ruling.

**The answer,** in accordance with how the question came, is as follows: the basic presumption concerning the son at the time of the killing is that he was a minor and had not yet reached puberty.

Accordingly, the killing is ruled to be accidental, and the rulings of accidental killing apply to it. The son who killed inherits his father's estate; no fasting is required of him, nor is any blood-money required of him. That is because the heirs of the blood-money would be his uncles, and the uncles are the very ones who incited him against his father and drove him to kill him. The least that they should be punished with is being deprived of his blood-money. As for his mother, she will pardon her son, and he should ask her for pardon and forgiveness.

**The ruling on rejoicing at the killing of some sinners**

**Question:** Does a man incur sin if his soul rejoices and is pleased at the killing of certain sinners who persist in harming people, even though he has no share whatsoever in the act of killing them?

**The answer – and Allah is the One who grants success** – is that if the matter is as described, then the one who rejoices at the killing of the one who harms people and insists on harming them does not incur sin. Rather, his killing is a blessing for which the people must give thanks, since Allah has spared them his harm without any effort on their part. Likewise, there is no blame on the believer if he supplicates against sinners who harm the believers, asking for their killing, and then rejoices when Allah answers his supplication.

**In sum:** there is no blame in rejoicing at the killing of one who disobeys Allah because of his disobedience. The blame and sin lie in

rejoicing and being glad at the killing of a believer because of his faith.

If rejoicing and happiness occur at the killing or death of a believer because the one who rejoices will obtain an inheritance from his estate, or will receive wealth from his estate by a bequest, or because the heirs are poor and his estate will enrich them...

I have heard some of my teachers in knowledge say to certain people, jokingly: "My death will be a cause of joy for my heirs, because my death will be a cause of their becoming wealthy; whereas you, there will be no joy in the death of your testator." This is the gist of his words – *may Allah have mercy on him* – and he was a scholar and a wealthy man.

**If it is said:** it has been established that approval (riḍā) of an evil deed is itself an evil deed; the one who is pleased with disbelief is, in ruling, like a disbeliever, and the one who is pleased with the killing of a Muslim is, in ruling, like the killer. Allah punished the people of Ṣāliḥ when they approved of the killing of the she-camel, even though the actual killer of it was only one of them: *"But they denied him and hamstrung her; so their Lord crushed them for their sin and levelled them (with the ground)."* [al-Shams:14]

**We say:** the people of Ṣāliḥ all wanted to kill the she-camel and resolved upon that, in disobedience to the words of their Prophet Ṣāliḥ (*peace and blessings of Allah be upon him*) which Allah related in His saying: *"This is the she-camel of Allah as a sign for you, so leave her to graze in Allah's land and do not touch her with harm, lest a painful punishment seize you."* [al-A'rāf:73] He, their Prophet (*Peace be Upon Him, and May Allah bless him*), warned them against transgressing against the she-camel of Allah and (against transgressing) upon her share of water, forbade them from attempting that, and warned them of Allah's punishment if they did what he had prohibited them from. But they rebelled against their Prophet Ṣāliḥ (*peace be upon him*), belittled him, and denied him. They all shared in rebellion, disobedience, and denial, and resolved to oppose him in what he had prohibited them from and warned them about.

Approval (riḍā) is one thing, while joy and happiness are something else. Our Imāms have said: "Riḍā is a word synonymous with 'will' (irādah); it is not correct to say, 'I was pleased with this but did not will it,' nor, 'I willed it but was not pleased with it.' Whoever says that is considered self-contradictory." This is how they have stated it in the books of the principles of religion.

On this basis, approval (riḍā) is an inward act of the heart for which the legally responsible person is rewarded or punished.

As for joy and happiness (farḥ and surūr), they are a psychological reaction that occurs in the soul upon the occurrence of their cause, and

its occurrence is involuntary; the one who rejoices has no choice regarding its occurrence. Rather, it arises in the soul according to its natural disposition.

It has been established in the Shari‘ah that the legally responsible person is not punished for what arises from the natural disposition of the soul, because it is not within his capacity to rid himself of that. It has been related that the following was revealed concerning this: *“Allah does not burden any soul beyond its capacity.”* [al-Baqarah:286]

We should recognize that it is among the characteristics of a believer that he is distressed by the killing of a believer, and that he rejoices and is gladdened by the killing of the enemies of the believers. If you see a legally responsible person rejoicing at the killing of believers because they are believers, then he is not a believer.

It is also among the characteristics of the believer that he rejoices at the killing of sinful Muslims because of their disobedience to Allah, their rebellion against Him, and their persistence in that; for the believer hates disobedience to Allah and shuns it: *“...and has made hateful to you disbelief, wickedness, and disobedience...”* [al-Ḥujurāt:7]

**If it is said:** most sinners do not deserve death with Allah, nor in His law, on account of their sins and persistence in them; rather, they deserve disciplinary punishment (ta’dīb). Therefore, it is not permissible to rejoice and be glad at their being killed with a killing they do not deserve in Allah’s ruling; and there is no doubt about the ugliness of rejoicing and being glad at what contradicts Allah’s ruling.

**It is said:** the joy and happiness at the killing of the wicked, the harmful, and those who persist in disobedience to Allah is not because of the killing itself, but because of the safety from their evil and harm that is realized through their being killed, and because of the disappearance of disobedience through the death of the disobedient. This is the aspect in which the believer rejoices at their being killed. There is no disagreement about the goodness of rejoicing and being glad at safety from evil and harm and from the disappearance of acts of disobedience.

There is no doubt whatsoever that what motivates the believer’s joy and happiness at the killing of sinners is not the fact that the killing contradicts Allah’s ruling. There is no doubt that rejoicing at the contravention of Allah’s ruling is not among the traits of the believers; rather, it is only among the traits of the disbelievers and the openly sinning.

What has preceded clarifies for us that rejoicing at killing is praiseworthy from one perspective and blameworthy from another.

Moreover, our scholars and others have established in the chapter of commanding right and forbidding wrong that killing sinners is

permissible – or even obligatory – if they persist in disobedience and do not desist from it after efforts have been made to remove it by every possible means. If there remains no way to remove the evil except through killing, then killing becomes permissible or obligatory – “and the last of cures is cauterization.” In that case, killing becomes Allah’s ruling concerning those sinners who persist in their disobedience, upon whom gentleness, fear of Allah, and clarification of the proofs and evidences, and neither this nor that, etc., have had no effect.

Allah, *exalted is He*, has described the killing of the wicked as a victory for His allies, in His saying: *“Were it not that Allah repels people, some by means of others, monasteries, churches, synagogues, and mosques in which Allah’s Name is much mentioned would surely have been demolished. And Allah will certainly help those who help His cause. Indeed, Allah is All-Strong, All-Mighty.”* [al-Ḥajj:40] And He, *exalted is He*, has described this as bounty and grace in His saying: *“And were it not that Allah repels people, some by means of others, the earth would surely have been corrupted; but Allah is full of grace to (all) the worlds.”* [al-Baqarah:251]

It is among the characteristics of the believers that they rejoice in Allah’s bounty upon them, as He, *exalted is He*, says: *“Say, ‘In the bounty of Allah and in His mercy – in that let them rejoice; it is better than what they accumulate.’”* [Yūnus:58]

And it is among their characteristics that they rejoice in Allah’s granting victory to His believing allies, as He, *exalted is He*, says: *“And on that Day the believers will rejoice in the help of Allah. He helps whom He wills, and He is the All-Mighty, the Most Merciful.”* [al-Rūm:4-5] So what room is there for any objection against a believer rejoicing in Allah’s bounty and in His granting victory to His allies

### **[The ruling on rejoicing at the killing of a man]**

**Question:** If a man rejoices at the killing of a man for a religious reason or for a worldly reason, does he bear any consequence for that?

**The answer:** Rejoicing at the killing of a man because he is a person of innovation, or a person of sin, or because of his harming the one who rejoices or others, or the like of that – is permissible, and there is no harm in it.

But if the rejoicing at his killing is on account of his faith, his piety, or his knowledge, then that is not permissible; for the believer is not truly a believer until he loves for his brother what he loves for himself, and hates for him what he hates for himself.

### **The ruling on a believer stirring up causes of enmity among the corrupters**

**Question:** Is it permissible for the believer to stir up the causes of



enmity and fighting among those who spread corruption on earth?

**The answer – and Allah is the One who grants success** – is that if their corruption is of the sort for which they deserve to be killed, then there is no harm in stirring up enmity and the causes of killing among them. However, it is obligatory that this be after a fatwā in the specific matter in question, and that people of opinion and insight be consulted about it, due to the gravity of entering into such an affair. The fatwā is a proof for him before Allah, and consultation is a safeguard for him from becoming entangled in grievous consequences.

So if the people of opinion and insight advise him to refrain, because of fear that evils may occur in this matter whose harm and corruption would extend to many of the innocent and the weak, then it becomes obligatory for him to leave it.

**[The ruling on cancelling (the claim for) one slain person in exchange for another slain person who is not the killer]**

**Question:** A man killed another man. The tribe of the slain man then rose up and killed a man from the tribe of the killer. Later, others came and made peace between the two tribes, treating the slain man as (compensation) for the other slain man. They were content with that, and the reconciliation was concluded upon that basis. What is the ruling of the Sharī‘ah regarding this reconciliation and similar cases?

**The answer – and Allah is the One who grants success** – is that such a reconciliation happens very often among the tribes of Yemen, and they have become accustomed to it. If the tribe had killed, in its revenge, the actual killer, then the reconciliation would be Shar‘ī, with no objection to it. If we want the reconciliation mentioned in the question to be Shar‘ī, then we must oblige the first killer to hand over a full blood-money to the heirs of the slain man, and likewise oblige the second killer to hand over a blood-money to the heirs of the other slain man – unless the heirs from each of the two tribes are pleased to waive their right to the blood-money, or to waive part of it. In that case, the reconciliation is Shar‘ī and there is no objection to it.

Furthermore, we say: the reconciliation mentioned in the question is good and permissible; indeed, it may even be obligatory insofar as it puts a stop to tribulation. The scholars have explained His saying, *exalted is He: "And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly."* [al-Ḥujurāt:9] They said: what is meant by the reconciliation first mentioned in the verse is the halting of the fighting, without looking (yet) at what each group is

entitled to from the other of blood-monies, blood (claims), and wealth.

Then they said: what is meant by the reconciliation mentioned second in the verse is that each of the two groups be given in full what it is entitled to from the other of blood-monies and compensations for injuries against life and property.

Thus, the reconciliation mentioned in the question is an instance of the reconciliation first mentioned in the verse, while the second reconciliation remains.

It was incumbent upon those who reconciled (the two sides), after the first stage of reconciliation, to reconcile a second time, by examining what had been lost from both sides, so that everyone from whom something had been lost be given compensation for what he lost – whether what was lost was a life, or property, or a limb, or a wound.

**[Two men fired bullets at a man, and he was killed by the bullet of one of them]**

**Question:** Two men fired bullets at a man, and he was killed by the bullet of one of them. It then became clear that the slain man was an adversary of one of them, inasmuch as his son had killed the brother of one of the two men. At the time of reconciliation, one of the two men who had fired the shots swore that he was not the killer and that the killer was his companion, and he did so in order to shut the door to tribulation. When he swore, the two tribes made peace and regarded (this) slain man in exchange for the (previously) slain man. What is required of the one who swore, although he wants to extricate himself, while he does not know whether it was his bullet that struck the slain man or the bullet of his companion, and although the parties to the claim have already reconciled?

**The answer – and Allah is the One who grants success** – is that what is required is repentance to Allah and remorse for what he undertook of killing and of taking an oath. After the reconciliation of the two sides and their being content with slain-for-slain, there is no blood-money due from him and no qīṣāṣ, and nothing is required of him except repentance, as we have mentioned.

We have derived that from His saying, *exalted is He*: “*And if two groups among the believers fight, then make peace between them...*” [al-Ḥujurāt:9], for His saying, *exalted is He*, “*then make peace between them*” indicates that reconciliation is sufficient for discharge of liability.

This is supported by His saying, *exalted is He*, after that: “*But if one of them oppresses the other...*” [al-Ḥujurāt:9], for that indicates that reconciliation is sufficient for discharge of liability and the dropping of all rights – qīṣāṣ in life and less than life, and the guarantee of property. This is in addition to the basic presumption of freedom of liability, so he

is not to be ruled a killer.

**[The ruling on the employer if the work causes the worker to be killed]**

**Question:** A man said to another: “Do this work for me if you are knowledgeable about doing it, or if you are an electrician.” The man said, “I am an electrician.” The employer warned him about the danger of electricity. When the man began the work, the electricity seized him and killed him. What is required of the employer in that case?

**The answer – and Allah is the One who grants success** – is that the employer is not responsible for what happened to the worker, so no blood-money and no expiatory fast is required of him, for he is not a killer, neither by direct action nor by causation, nor did any act of reckless endangerment come from him. Rather, it is the worker who brought this upon himself. This is what appears to me, and Allah knows best.

**(Highway robbery)**

**Question:** A group of people travelled and, near the end of the night, they encountered on their way a group of highway robbers who blocked the road against them and pointed their machine guns at the driver’s head. Then some companions of the driver came upon the robbers from behind them and surrounded the highway robbers. Is it permissible in this situation to kill the highway robbers, bearing in mind that in such a situation the robbers are trying to attack the travellers by any means if they can?

**The answer – and Allah is the One who grants success** – is that Allah, *exalted is He*, has permitted the killing of those who are in such a state, and that is:

1. For the sake of self-defence.
2. Because of the corruption they cause among the Muslims by cutting off the road and looting wealth.

In such a situation, they should not be left alone nor allowed to go free when there is the ability to deal with them, because of the general corruption that there is in that for the Muslims. This situation does not require authority or the permission of the ruler of the Muslims, for Allah, *exalted is He*, has granted a general permission to defend oneself and to repel corruption and evil and remove it. He, *exalted is He*, said: *“The recompense of those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is that they be killed or crucified...”* [al-Mā'idah:33].

**Yes**, getting rid of the highway robbers in such a situation is either from the door of self-defence or from the door of ḥisbah (enjoining right

and forbidding wrong).

In such a situation, the door of ḥisbah is open. The people of knowledge have said that it is obligatory to repel evil deeds by whatever means is possible, when one has the ability to do so – especially in what relates to defending the Muslims, their interests, and the security of their routes.

**If it is said:** It has been narrated from the Prophet (*May Allah bless him and his family and grant them peace*) that he said, with a meaning close to this: “*Do not initiate fighting them until they initiate fighting you.*” And it has been narrated from the Commander of the Faithful (*Peace be upon him*) that he would not initiate fighting in his battles against his opponents; rather, he would restrain his companions’ hands from fighting until he saw killing among them, saw blood flowing from their wounds, and heard their clamour and cries because of the abundance of wounds.

**We say:** Highway robbers have a ruling different from the ruling of disbelievers and rebels. From this angle Allah, *exalted is He*, said: “*The recompense of those who wage war against Allah...*” (the verse), and He introduced it with a particle of restriction and limitation, indicating that, regarding them, attention is not to be paid to anything other than killing, crucifixion, and so on – except if they come repentant from highway robbery, on condition that their repentance is before having power over them. As for their repentance when there is control over them and power over them, it does not benefit them and, in Allah’s ruling, it is not a repentance; such a repentance does not ward off from them killing, crucifixion, and so on.

This is unlike the case of rebels and disbelievers: if they repent when they are under control, their repentance is accepted and it becomes obligatory to lift the sword from them.

Moreover, in the case of highway robbers, by their cutting off the road, aggression, transgression, and initiating hostilities have already been realized on their part, so there is no contradiction between what we have said and what has come in the ḥadīth.

**Question:** A man got into his car at night and drove off. Suddenly he was met with bullets pouring down upon him and his car. One of the bullets directed at him wounded him. He stopped his car and stepped out immediately to defend himself. He saw one of his attackers pass in front of the car’s headlights, so he killed him, while the rest of the attackers were hiding. What is required of this man who defended himself, for his killing one of his attackers?

**The answer – and Allah is the One who grants success** – is that a person has the right to defend himself, even by killing, and even in the

Sacred Precinct (al-ḥaram al-muḥarram). In such a situation, nothing at all is required of him – neither a little nor a lot: no qīṣāṣ, no blood-money, and no expiatory fast. Allah, *exalted is He*, has said: *“Permission [to fight] has been given to those who are being fought, because they were wronged; and indeed Allah is competent to give them victory.”* [al-Ḥajj:39].

### **[Benefit regarding retaliation (qīṣāṣ) in cases of bone injuries]**

In *Subul al-Salām*: As for bone other than the tooth, consensus has been established that there is no qīṣāṣ in a bone whose retaliation would be feared to lead to loss of life. Some of them have explained this by saying: because there is a barrier before the bone – of skin, flesh, and sinew – which makes exact equivalence impossible... and so on.

### **[Benefit in rulings related to qīṣāṣ]**

- If two men fire shots at a man and he is struck by two wounds, one of them fatal and the other non-fatal, and it becomes unclear which wound was the fatal one and which was merely injurious, then there is no qīṣāṣ. This is according to the madhhab.
- If a man is killed and some of his heirs are insane with original (lifelong) insanity, qīṣāṣ drops from the killer. If the insanity is incidental [occurring later in life], then one waits until he regains sanity, so that he may either pardon or demand (qīṣāṣ). If his recovery is despaired of, qīṣāṣ drops. This is according to the madhhab.<sup>1</sup>
- It is permissible to defend oneself, even by killing, if the aggressor cannot be repelled by other means, even if what is feared from his attack is only harm and pain. Fleeing is not obligatory, and no qīṣāṣ is due upon the defender.<sup>2</sup>
- Qīṣāṣ is taken from the one coerced into killing, except in a situation where no effective act remains attributable to him; in that case, qīṣāṣ is taken from the one who coerced him into it.<sup>3</sup>
- **According to the madhhab:** There is nothing (due) in the case of a hired worker upon whom a mine collapses, nor in the case of one who was hired to demolish a house and the house collapses upon him, nor in the case of a lover who dies because of love, and nothing (is due) in the case of one who dies by the evil eye. This is according to the madhhab.<sup>4</sup>

1- *Sharḥ al-Azhār*, 4/405.

2- *Sharḥ al-Azhār*, 4/407.

3- *Sharḥ al-Azhār*, 4/407.

4- *Sharḥ al-Azhār*, 4/408.

- **According to the madhhab:** If someone ties another person up in front of a predatory beast and the beast kills him, or (ties him) in a land populated by wild beasts and the beasts kill him, then there is no qīṣāṣ upon him, because the beasts have a will of their own and he did not compel them to do it – except if he gathers him and them together in a confined place; in that case he has compelled the beast to attack him, and qīṣāṣ becomes obligatory upon him.<sup>1</sup>
- **According to the madhhab,** and it is narrated from al-Manṣūr bi-llāh (*Peace be upon him*) regarding a situation where harm from another person cannot be repelled except by cutting down his crops and trees and ruining his land, that this is permissible in order to repel his harm, even without an order from the ruler. End of quote from the marginal notes.<sup>2</sup>
- **According to the madhhab:** The blood of two people who mutually kill one another with weapons is wasted (no liability) if they are both aggressors (bāghiyayn), in that neither of them can ward off the other except by the injuries that occur between them. But if only one of them is the aggressor, then his blood alone is wasted, and not that of the other who is not an aggressor.<sup>3</sup>
- According to the madhhab: It is not permissible to cut off an extra limb without an excuse.<sup>4</sup>

**I say:** The effective cause (‘illah) is what there is in cutting of causing pain to the person and allowing (the likelihood of) harm. If the cause is as we have mentioned, then it is permissible to cut off the extra limb by means of a physician, since the physician cuts in such a way that the one whose limb is cut does not feel the pain, and he devises means to ward off the possible and feared harm.

**[Clarification of which injuries are legally disregarded (have no liability)]**

In *Sharḥ al-Azhār* and its marginal notes, under the clarification of which offences (injuries) are disregarded: “Whatever is caused by the (victim) himself, whether by his own direct action or as an effect of it, is disregarded (no liability), for he is in the ruling of one who commits the offence against himself.

Among what is disregarded is his transgressing in (standing in) a

1- *Sharḥ al-Azhār*, 4/410.

2- *Sharḥ al-Azhār*, 4/435.

3- *Sharḥ al-Azhār*, 4/449.

4- *Sharḥ al-Azhār*, 4/450.

place (where he should not be), even if he is a discerning child: if someone else, who is not transgressing, falls upon him and kills him. For example, he stands in one of the Muslims' pathways and a passer-by passes and trips over him, without transgressing, and falls upon him and kills him; in that case it is disregarded. Likewise if he stands in someone else's property." End quote.

**I say:** In that case, nothing like expiation (kaffārah) is due from the one who falls on him, because the slain person is in the ruling of one who has killed himself. Once you know this, be aware that some of what occurs today of killings by car collisions can be attached to this ruling. This is the case, for example, when a lane is designated specifically for cars, and a person stands in it or passes through it in a way that is an unlawful intrusion, whether by standing or passing, and then a car strikes him – in that case, the (liability for) killing is disregarded. But if the lane is shared by both cars and pedestrians, then it is not disregarded – just like the markets inside and outside the cities.

As for other roads, the known practice is that they are designated specifically for cars. In that case, the killing is disregarded, with two conditions:

1. That the driver did not deliberately cause injury and was not reckless.
2. That he did not contravene the established traffic regulations.

We have only said what we said for several reasons:

1. By branching this ruling from what the scholars of the madhhab have stated in similar cases, as quoted above from the commentary.
2. Because of what has come in the report: "*The owner of an animal (al-‘ajmā’)* is not liable," meaning: (the injury it causes) is disregarded; the meaning is that what the animal causes of damage is without liability for its owner.

**If it is said:** The usual practice in the courts is to rule that there is liability in car accidents, and we have not seen them disregard anything.

**We say:** They apply that ruling on the basis of the driver's fault, for most car accidents result from drivers' transgressing the traffic regulations, such as speeding. If the driver were to abide by the speed limits, almost no accident would occur.

### **[The ruling on killing in the sacred months]**

**According to the madhhab,** the prohibition of killing in the sacred months has been abrogated. These months are Dhū al-Qa'dah, Dhū al-Ḥijjah, Muḥarram, and Rajab.

**I say:** This should be reconsidered, for Sūrat al-Tawbah is among the

last of what was revealed in the Qur'an, and in it there is a renewal of the prohibition of killing in the sacred months. In addition, the Messenger of Allah (*May Allah bless him and his family and grant them peace*) emphasized in his sermon at the Farewell Pilgrimage the prohibition of killing in the sacred months.

What appears to me is that their sanctity remains, and that what is prohibited in them is aggression, transgression, corruption, and killing without right. The proof is His saying, *exalted is He*: *"Indeed, the number of months with Allah is twelve months in the register of Allah from the day He created the heavens and the earth; of these, four are sacred. That is the correct religion, so do not wrong yourselves therein. And fight the polytheists all together..."* [al-Tawbah:36].

His saying, *exalted is He*, *"so do not wrong yourselves therein"* means: do not transgress, do not act tyrannically, and do not do that which angers Allah against you. Then He, *exalted is He*, said: *"And fight the polytheists all together..."* – making clear that fighting the polytheists, as an act of obedience to Allah, is not restricted to a particular time.

### **[Two men jointly commit accidental killing]**

**Question:** Two men killed a man by mistake. What is required of them?

**The answer – and Allah is the One who grants success** – is that what is required of the two men is one blood-money (diyāh), to be paid to the family of the slain man, and each of the two men must perform an expiation (kaffārah).

### **[He does not bear the blood-money of those killed when his car overturned due to a defect in it]**

**Question:** A reckless youth, who had four friends like him, took his father's car secretly and travelled in it along with his reckless companions. While they were driving, the youth heard a rattling noise inside the car, so he asked his companions about this rattling. They said to him: "Do not be afraid, keep going." So he continued to drive, and then a defect occurred in the car which caused it to overturn, and four of them died while the driver survived. It is known that the accident was not due to the driver, but due to a defect in the car, and neither he nor his companions knew how dangerous it was. Is the driver liable for the blood-money of those who were killed?

**The answer – and Allah is the One who grants success and aid** – is that the driver does not owe the blood-money of his passengers. That is because he neither directly killed them nor caused their killing by (culpable) causation, and there is no liability except upon one who causes or one who directly commits (the act).



As for direct action, it is clear that he did not directly kill them. As for causation, it is clear from the question that the cause of the accident was a defect in the car, the danger of which neither the driver nor the passengers were aware.

Moreover, the passengers themselves reassured the driver that there was no danger and told him to continue driving. Thus the driver was not transgressing in his driving, due to their permission and instruction for him to continue.

***If it is said:*** The cause of the accident is shared between the defect that occurred in the car and the driving of the vehicle.

***We say:*** The cause is the defect that occurred in the car; as for the driving, it is only a condition. That is, the defect does not result in the car overturning except on condition that the car is being driven. It is established in its proper place that a condition is not part of the efficient cause (muqtaḍī), i.e., it is not part of the legal cause (‘illah).

### **[Two cars collide and a man in one of them dies]**

***Question:*** If two cars collide and a man in one of them dies, who is the killer who must pay the blood-money and perform the expiation?

***The answer – and Allah is the One who grants success*** – is that if both cars were in violation of the known rules of traffic and driving, then the blood-money and expiation are upon both of them. Otherwise, it is upon the one who violated the traffic regulations, and not upon the one who did not violate them. For example, if a driver blocks the public road with his car, then he is liable for whatever injuries result from his blocking the road.

### **[The driver of a car hits a woman and flees]**

***Question:*** The driver of a car struck a woman with his car and fled. Many years passed, and now he wishes to clear himself and repent, but he does not know who this woman was, and he fears that if he investigates, her family will burden him with heavy obligations, according to customary practice, in addition to the blood-money. What should he do?

***The answer – and Allah is the One who grants success*** – is that what is obligatory upon him is blood-money, to be handed over to her family, and an expiation: fasting two consecutive months, and if he is unable, then feeding sixty poor people. This man must search for the woman’s family and find out who they are, then hand over the woman’s blood-money to them. If he fears that they will impose on him other burdens besides the blood-money, then he should use lawful stratagems to get it to her family through other people.

### **[Two cars collide, and one of the drivers is in violation of the**

**traffic law]**

**Question:** The owner of a car was driving in his lane at normal speed. Then another car came speeding and crashed into the side of the first car. It is known that this second car was at fault in entering the lane, both according to customary practice and according to traffic law. What is required of the owner of the first car regarding the death and injuries that occurred in the second car?

**The answer – and Allah is the One who grants success** – is that what appears – *and Allah knows best* – is that nothing is upon the owner of the first car: no blood-money and no expiation. Whatever has occurred of that is upon the driver of the second car: the blood-money and compensations (arsh) are required of him, because he is the transgressor, and he is the one who crashed his car into the side of the first car, so he is liable for those who died with him. As for him, if he dies in the accident, his blood is disregarded, because he is the one who killed himself.

**If it is said:** The same should apply to pedestrians when they enter the roadway of cars and are hit.

**We say:** There is a difference between the two cases in people's customary understanding and in traffic law. The well-known traffic regulations among drivers of cars in general require drivers to take account of pedestrians in all lanes and to protect them. At the same time, the customary and legal rule among drivers is that it is forbidden for a driver to block the road of another car with his vehicle or to drive in that car's lane.

**[Collision of two cars and the death of two persons in each of them]**

**Question:** If two cars collide and, as a result of the collision, two persons in each car die, who is liable for what is lost of lives in the two cars?

**The answer – and Allah is the One who grants success** – is that if both drivers shared in the fault, then each driver is liable for what has perished of lives and property in the other car.

If, however, the fault that caused the collision was on the part of one of them alone and not the other, then the one at fault is liable for what was lost in both cars, and nothing is due from the other driver.

**[Benefit: Analogy of cars with ships]**

The scholars of the madhhab have mentioned that if two horsemen collide, or likewise if two ships collide by mistake, liability attaches to the 'āqilah (male agnatic relatives) of the two horsemen and to the owners of the two ships. Therefore we say: if two cars collide by mistake, the

‘āqilah of the two drivers guarantee what is lost of lives and what occurs of wounds. This is in the case where neither of the two drivers was transgressing in his driving. If one of them was transgressing and the other was not, then liability is upon the ‘āqilah of the transgressor and not upon the ‘āqilah of the other driver.

The difference is that for cars there are roadways: one lane for the one going and one lane for the one coming. If each car stays in its lane, no collision occurs; but if a car leaves its lane into the other lane, a collision may occur. As for ships, their “roads” are not like that; rather, the entire sea is a roadway for the one going and the one coming.

### **Benefit regarding car accidents**

All praise is due to Allah, Lord of the worlds, and may Allah bless and grant peace to our master Muḥammad and to his pure family. To proceed: these are issues related to what occurs of car accidents:

1 – If the driver of a car is driving within the permitted speed and a defect occurs in the car that causes it to overturn – such as the explosion of a tyre [tire] or the like – and death occurs among the passengers of the car or others as a result of the overturning, then in such a situation the driver is not required to perform an expiation (kaffārah). This is because, according to the scholars of the madhhab, kaffārah is only required in mistaken killing when the killing is by direct action,<sup>1</sup> and here the killing is not by direct action.

### **Collision of cars and how liability is determined**

**Question:** Concerning car collisions and how liability (for damages) is determined, and if death occurs in the accident, whether few or many, how is the expiation for killing to be observed, etc.? This is the gist of the question.

**The answer – and Allah is the One who grants success** – is that the scholars of the madhhab have divided mistaken killing into two types:

1 – That the killing occurs through a direct act.

2 – That it occurs through a causing factor (sabab); such as when a man digs a pit in a public road, or in a public right of way, and a person falls into it and dies; or when he places a stone in a public road and a passer-by trips because of it and falls and dies, and the like.

The scholars of the madhhab said: the one who has transgressed by committing a causative act – like the two mentioned examples – is liable for what occurred because of his pit or his stone. He is liable for the blood-money (diyah) of the one who died in that manner, and the diyah

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1- Sharḥ al-Azhār, 4/429.

is borne by his ‘āqilah. Likewise, he is liable for what is less than full diyah, such as wounds and loss of property.

They also said: the one who dug the pit, and the like, is not required to perform kaffārah, because he did not directly kill the one who fell into the pit. Rather, the one who fell is the one who killed himself by falling into the pit. The digger only dug the pit and did no other act; and kaffārah is only required of one who is a mistaken killer, and the digger is not a killer – the doer of the killing is the one who fell.

We shall now present examples and scenarios of many types of car accidents in light of what we have understood from the words of the scholars of the madhhab in this chapter. Success is from Allah:

***First scenario:***

If a defect occurs in the car – such as the explosion of one of its tyres, or a defect arises in the braking system, or the like – and this leads to the car overturning or colliding with another car or with something else, then in such an accident, if death occurs as a result, no kaffārah is required. This is because, by the occurrence of the defect, the car has gone out of the driver’s control.

The scholars of the madhhab have said something similar concerning a ship when it goes out of control.

***Second scenario:***

If two cars collide because one of the cars has violated the traffic regulations commonly recognized among drivers, then whatever killing occurs in the two cars is upon the transgressing driver, because he is the one who caused the accident. There is no kaffārah upon him, because he is a doer of a causative act (sabab).

***Third scenario:***

If a collision or overturning occurs because of dirt on the roadway, or water, or a stone, or the like – things that cause the car to skid, veer off, or its tyre to explode – then liability for what occurs of deaths and other losses lies upon the one who placed the stone, the speed-bump, the dirt, the water, and the like, and there is no kaffārah. This is because the killing occurred by a causative factor, and liability lies upon the one who committed the causative act – if there is such a person. If the cause is from Allah, *exalted is He* [i.e., no human actor], then liability is attached to the driver and to his ‘āqilah.

***Fourth scenario:***

If a person falls from the back of the car and dies, then: if his fall was due to a speed-bump or a stone in the road, liability lies upon the one who placed the bump or the stone in the road, if he was transgressing in placing it, and there is no kaffārah.

If the person fell because of an action of the driver – such as his pressing the brakes or the like – then there is no liability and no kaffārah, unless the driver intended to make the passenger fall; in that case, he is liable, but there is still no kaffārah.

The scholars of the madhhab have mentioned something similar regarding someone who fires a rifle and a child, for example, dies from the sound of the gunshot. They said that there is no liability upon him unless he intended to kill the child by firing his rifle.

The reason why the driver is not held liable is that he has not transgressed in committing the causative act; he is permitted to press the brakes when danger suddenly appears. The one riding on the back of the vehicle is the one negligent in protecting himself.

***Fifth scenario:***

That the accident is a mistaken one caused by both drivers. In that case, the two drivers are jointly liable for what occurred because of their mistake, and each one is liable according to the extent of his mistake. There is no kaffārah.

***Sixth scenario:***

That a person steps out into the car's lane and the car hits him and he dies. If the owner of the car was driving at the normal speed, then there is no liability and no kaffārah, because he has not transgressed in the causative act.

If he has transgressed in speed, then liability is upon him but not kaffārah. The normal amount of speed differs from one type of road to another: there is a specific limit for city streets, and so on.

Perhaps the reason why the usual practice of judges is to hold drivers liable is because, in most cases, the cause of cars hitting people is excessive speed beyond what it should be.

***Seventh scenario:***

That a collision or overturning occurs because of fog or rain. In that case, reference is made to the traffic regulations commonly known among drivers. If it is known among them that driving in such weather and on such roads is prohibited because of its danger, then the driver is liable, but there is no kaffārah upon him. He is held liable because he transgressed in committing the causative act.

If the common practice is to drive in such weather, then there is no liability and no kaffārah, because the driver has not transgressed in the causative act.

***Eighth scenario:***

That a camel, donkey, or the like enters the roadway and the car

overturns by striking it. In that case, there is no liability and no kaffārah.

If the driver swerves the car so as not to strike the camel, donkey, another car, a person, or the like, and as a result the car either overturns or collides with another car, then: If the car overturns, what appears to me is that there is no liability and no kaffārah, because he has not transgressed by swerving the car from its path. If, by swerving the car from its path, a collision with another car occurs, then if he swerved to the point that the car ended up in a lane that was not its own, he is liable for what occurred in both cars, and there is no kaffārah. We only held him liable because he left his usual lane into the lane of the other car; we did not hold him liable merely for the act of swerving.

#### ***Ninth scenario:***

That the driver is suddenly surprised by a sharp bend and is unable to slow down, and he finds no way to be safe except by turning the car into that bend at high speed, which leads to its overturning. If he knew the speed limit on that road and exceeded it, then he is liable because he transgressed in the causative act, but there is no kaffārah.

If he did not know and did not suspect any speed limits or the presence of dangerous bends, and so he drove fast, then there is no liability because he did not transgress in speed, and there is no kaffārah.

**Yes**, Allah, *exalted is He*, has made kaffārah and diyah obligatory in the case of killing a believer by mistake. He, *exalted is He*, says: *"And whoever kills a believer by mistake – then (his atonement is) the freeing of a believing slave and a compensation payment handed over to the family of the deceased..."* [al-Nisā':92]. The apparent sense of the verse is that for every believer killed, there is both a kaffārah and a diyah. Therefore, diyah and kaffārah multiply according to the number of persons killed.

There is no disagreement that diyah multiplies according to the number of slain persons, and kaffārah goes with diyah as its parallel. What has made both obligatory is mistaken killing; so there is no basis for differentiating between diyah and kaffārah.

#### **[On a collision]**

A motorcycle collided with the side of a bus at the junction of two roads, where the bus was travelling along its route and the motorcycle was travelling along its route, and the rider of the motorcycle died.

In this case, the father of the motorcycle rider and the owner of the bus came to me. Neither of them had anything that could identify which of the two was at fault. All that each of them knew was that the two vehicles collided while both were moving. Both parties were people of scrupulousness who did not like to say what they did not know, nor to swear an oath about what they did not know.

The guardian of the slain man wanted to obtain his due right from the owner of the bus, and the owner of the bus wanted to clear his liability for whatever might be required of him before Allah. They both asked me to give a ruling in this matter.

After hearing what they presented to me, I issued a ruling that the owner of the bus must pay half of the *diyah* (blood-money) to the guardian of the slain man.

The basis of this ruling is that I considered the matter and saw that the occurrence of the accident was, without doubt, caused by an error in driving – either on the part of the bus or the motorcycle, or on the part of both of them together.

Since nothing was presented that could determine exactly who was at fault, I decided to divide the fault between them in halves.

***If it is said:*** On the basis of what you have mentioned, nothing of the *diyah* should be required from the owner of the bus, because the basic principle is freedom from liability, so it is not permissible to burden him with half the *diyah* merely on the possibility that he was at fault or shared in the fault.

***It is said:*** Indeed, the basic principle is freedom from liability; however, in this chapter there are matters that support what we have mentioned. Among them:

1. We find that the Lawgiver has greatly stressed that blood not be left wasted, to the extent that in the case of *qasāmah* – if the guardians of the slain person do not designate an outsider as the killer – the people of the village in which the slain man was found are required to swear fifty oaths that they did not kill him and do not know any killer; then they are all bound to pay the *diyah* – those who swore and those who did not.
2. We see that when a slain person is found and his killer is not identified, and *qasāmah* cannot be applied, he is compensated for out of the Muslims’ public treasury (Bayt al-Māl).

**[What is required of a driver who caused an accident from which his passengers died]**

***Question:*** A passenger bus carrying more than thirty passengers was involved in an accident, and nearly all the passengers died while the driver survived. Approximately seventy percent of the fault was due to the driver. What is required of the driver? Is he liable for the *diyahs* of all of them? Must he fast two consecutive months for each one?

***The answer – and Allah is the One who grants what is correct*** – is that if the driver was the one who caused the accident by mistake, then the *diyahs* of those killed are obligatory, but they are borne on his behalf

by his ‘āqilah (male agnatic relatives).

Mistaken killing (*qatl al-khṭaʿ*) is divided into two types: one type in which both diyah and kaffārah (expiation) are required, and another type in which diyah is required but not kaffārah. The type in which both diyah and kaffārah are required is mistaken killing by *direct* action; and the type in which only diyah is required is mistaken killing by *causation*. Among its examples is that a person digs a pit in a public right of way and someone falls into it and dies, or that he places a stone in a public right of way and a person dies as a result of it.

***In light of this, we look at the car accident:***

1 – If the accident resulted from a defect in the car or bus – such as the tyres (wheels) exploding, the brakes failing, or the like, which leads to the driver losing control over the vehicle and being unable to manage it – then such a case is considered killing by causation, and no kaffārah is required.

2 – If the accident was caused by a stone or the like in the road, or another car, or a donkey, or a camel, or the like getting in the way of the bus so that the bus collides with it and deaths result from that, then no kaffārah is required.

3 – If the car’s lights go out, or the lights of other cars dazzle and confuse the driver, or something occurs on the road that causes skidding – all while the speed is the normal, customary speed – and an accident occurs thereby in which someone perishes, then no kaffārah is required.

4 – If two cars collide and deaths occur as a result of that, then there is no kaffārah.

5 – If a fire breaks out in the vehicle because of a car accident, and someone dies because of the fire, then there is no kaffārah.

***There remain cases that are as follows:*** when the bus or car leaves its lane due to an action of the driver and strikes into a ravine, a mountain, or the like. Examples of this include:

1. The driver falls asleep.
2. Leaving the lane due to the driver’s heedlessness, such as being occupied with playing with his child, or searching for something, or the like.
3. Leaving the lane in order to escape from something he sees in his path, such as another car or the like.

**[The ruling on mistaken killing by direct action or by causation]**

The scholars of the madhhab have said that mistaken killing is of two types:

- 1 – Killing by direct action (*mubāsharah*).



## 2 – Killing by causation (*tasabbub*).

In mistaken killing by direct action two things are required:

1 – *Diyah*.

2 – *Kaffārah*.

In mistaken killing by causation only one thing is required, namely *diyah*; *kaffārah* is not required.

*Kaffārah* is not required in this case because the one who falls into the pit and dies is the one who has killed himself by falling into it; the one who dug the pit, having transgressed by digging it, is a doer of a causative act and did not perform the act of killing. The verse in *Sūrat al-Nisā’* made *kaffārah* obligatory upon the one who kills a believer by mistake, and the one who performs only the causative act is not a killer, as we have explained.

*Diyah* is only obligatory upon him so that the blood of a Muslim not be left without compensation, when no one besides the doer of the causative act can be held liable.

### **[On the ruling of killing by mistake in identifying the victim (*ghalaṭan*)]**

In our time, killing by mistake in identification (*ghalaṭan*) has become common. This is when a man shoots another man, thinking he is his enemy, and once he has killed him it becomes clear that he was someone else. This type of error requires *qīṣāṣ* (retaliatory death-penalty), because it is deliberate, aggressive killing, and this is the position of the *madhhab*.

The evidence for that is that Allah, *exalted is He*, has forbidden killing a soul without right, and has commanded the Muslims to verify and take care when killing. He, *exalted is He*, said: "*O you who have believed, when you go forth in the path of Allah, then verify (and investigate)...*" [*al-Nisā’*:94].

What sound reasoning entails is a detailed distinction, namely that we say: If the doubt in the case of mistaken identification is strong, the killing is to be attached to the ruling of mistaken killing, in a situation where the slain person himself has entered into the doubtful circumstances – such as when he leads the killer to think that he is his enemy, so the killer assumes he is his enemy and shoots him. In cases of this kind, the killing is assimilated to mistaken killing.

- But if the confusion arises from the killer himself, and nothing on the part of the slain person gives the killer any cause for suspicion, then this type of killing is to be attached to intentional killing.

This is what ought to be said concerning this issue. In line with this, we have seen rational people excuse the killer in the first scenario, and

not excuse him in the second.

Among the examples of the second scenario is that a killer sees, on a public highway filled with cars going and coming, a car and thinks it is the car of his enemy because of its resemblance to it, so he shoots its driver on the basis of believing that he is his enemy. In such a case, the killer is not excused.

**[Ruling on a woman who poured a drink into her relative's child and he choked and died]**

**Question:** A woman took the child of her female relative and poured a drink into his mouth; the child choked on that drink and died. What is required of this woman?

**The answer – and Allah is the One who grants success** – is that the woman who poured the drink into the child's mouth is not liable if she was not transgressing, but she is liable if she was transgressing.

Transgression is: that the woman knows that this drink causes choking, or that she is negligent in pouring it, so that she pours more than a child of his like can bear – whether by the size of the draught, or by repeatedly pouring – while knowing the danger involved in that. This is on the assumption that it does indeed cause choking.

What appears to me is that choking is a condition that occurs in a human being – whether small or large – not because of the drink or food. For this reason, a person may choke on water in rare instances, and may likewise choke on food. Choking is a human trait that occurs in a person without there being a cause that goes back to the drink or food.

A person may choke on his own saliva, or on what comes up from the stomach of *zughr* (which may be called phlegm), or he may choke on what descends from the head. I myself have seen some people choke in their sleep; they leap up from their sleep like a madman, unable to speak because of the intensity of the choking.

Thus, choking – as we have mentioned – is a trait with which Allah has created human beings; it does not occur except when Allah permits it to occur, and a person is not able to protect himself completely from its occurrence.

**If it is said:** Is it not transgression that the woman pours a drink into a child who is not hers without permission?

**We say:** A woman's pouring a drink into the child of her sister, or her relative, or her friend is not counted as transgression, because such women are as if they have been given permission by the mother and father. Indeed, the parents regard such an act as kindness. This is the general "law" (custom) among people.

**If it is said:** The child may be full and satiated with food and drink; if

the unrelated woman then takes him and pours a drink into his mouth, he will be harmed, so she has injured the child unintentionally and therefore must be liable for the mistaken injury that resulted from her.

**We say:** If the child is in such a state, he will not accept food or drink, as we see and observe from what we know of children. In that case, no injury occurs that would entail liability – and what we mean here concerns choking in particular.

**Yes,** what we have mentioned here accords with what the scholars of the madhhab mention in this chapter, where they said: “The nurse (ḥāḍinah) is liable if a child dies due to her negligence while she knows that he will die because of that negligence.” And where they said: “There is nothing (no liability) in what results from conjugal relations of a sound wife in the usual manner,” and the like.

**[Ruling on one who tied a band around her infant’s head and the band strangled him]**

**Question:** A woman was in the habit of tying a band around her infant’s head to protect him from the cold. One day she woke up to find that her child had died because of the band, as it had slipped down and covered his nose, strangling him. Is she required to fast an expiation for this, or not?

**The answer – and Allah is the One who grants success** – is that our scholars have said: kaffārah (expiation) is not required in cases of killing by causation, and it is only required in cases of killing by direct action. This killing asked about is of the category of killing by causation, so she is not required to perform kaffārah.

This can be evidenced by the fact that Allah, *exalted is He*, has only made kaffārah obligatory upon one who kills by mistake, and the one who kills by causation is not truly a killer. For example, if a person digs a well in a road, and then a man comes, falls into it, and dies, the digger of the well has not killed this man; rather, the man is the one who threw himself into the well, so in reality he is the one who killed himself, and the owner of the well has merely caused (the situation).

As for the woman in the question: she did not kill her son by tying the band around his head. The child, by turning over in the bed until the band slipped down over his nose, is the one who strangled himself; the mother had no act in that. Her only act was tying the band around her son’s head, and that is not killing; it is only a cause leading to the killing. Thus, the one who performs the causative act of killing is not truly called a killer, and so he does not fall under the verse.

**[A woman who killed her infant while sleeping]**

For a woman who killed her infant while sleeping, there are two cases,

as appears to me – and Allah knows best:

1 – That she knows about herself that she tosses and turns while sleeping,

- and she knows the danger this poses to her child if he sleeps beside her due to his young age,
- and she has not put in place barriers that would prevent her from rolling over onto him.

In such a case, she must perform kaffārah.

2 – That she knows about herself that she does *not* toss and turn while sleeping,

- and she did not know and did not suspect any danger to the infant,
- and that she had taken the necessary precautions in the sleeping place to protect the child.

In such a case, the closer (opinion) is that kaffārah is not obligatory upon her. The reason is that the scholars of the madhhab have mentioned something akin to this when they said: if someone shoots and does not intend to frighten a child nor to kill him, and the shooter did not know that any injury would result from the sound of his shot, then nothing is required of him; and likewise in every shout from which an injury to another is produced.<sup>1</sup>

Whoever does what is within his capacity and takes all the precautions customarily required is not obligated to perform kaffārah, even if diyah becomes obligatory upon him. The master, the proof, Majd al-Dīn ibn Muḥammad ibn Manṣūr al-Mu'ayyadī – *may Allah have mercy on him* – gave a fatwā to this effect, as I was informed by our learned brother Muḥammad ibn 'Alī 'Īsā al-Ḥudhayfī – *may Allah preserve him*.

**Question:** A car driver, with a passenger riding with him, is driving his car at the usual speed on a non-asphalted road. On the route he is travelling, there is a ridge ('urm) between the tracks of the two wheels, and the car was jolted by that ridge and overturned, and the passenger died. Is the driver required to perform kaffārah for killing, given that he was driving at the customary speed for people of cars in such a place and with that type of car – indeed, even less than that?

The answer is that what appears to me – *and Allah knows best* – is that the driver of the car is *not* required to perform kaffārah. The proof for that is what we have mentioned in the answer to the first question.

**[A mother who found her son dead while she was asleep]**

1- *Sharḥ al-Azhār*, 4/409.

**Question:** A woman lay down, and her infant son was beside her, nursing from her. When she woke up, she found that her infant had died, even though at the beginning of the night he had been in good health and sound condition. This mother became afraid that she was the one who had killed him while asleep. What is required of her?

**The answer – and Allah is the One who grants success** – is that if she admits that she caused his death, then the diyah is obligatory upon her from her own wealth, and nothing is upon the ‘āqilah, because they do not bear liability in a case proven only by confession. She is also required to fast two consecutive months.

This is the most that is required of her if she wants to act with precaution. But if she does not fear that she was the cause of his death and does not think that, then nothing is required of her; the basic principle is freedom from liability, and she is entrusted with herself.

**Question:** A woman slept while her infant child was beside her. When she woke in the morning, she saw that her child had died, and he had not been ill beforehand. What is required of her? Bearing in mind that this woman is now elderly and too weak to fast – is it sufficient that her son fast on her behalf, or what should she do?

**The answer – and Allah is the One who grants success** – is that if this mother predominantly thinks that she is the one who killed her infant while asleep, then the diyah and fasting two months consecutively are obligatory upon her. If no such assumption arises in her mind, then nothing is required of her; the basic principle is freedom from liability.

Moreover, if she is unable to fast because of her old age, it is sufficient for her to feed sixty poor persons, giving each poor person half a ṣā‘ of wheat. It does not suffice that her son fast on her behalf. We have only said this by analogy with the fasting of the month of Ramaḍān.

**If it is said:** How can the woman know whether she should have such an assumption or not?

**We say:** That is known from circumstantial indicators. If the woman wakes from her sleep in her place and in the very posture she was in when she lay down, and her habit is that she does not toss and turn while sleeping, then with these indicators she will not assume that she was the cause of his death – and the opposite applies in the opposite case.

**[Benefit concerning a woman eating something that harms her pregnancy without intending (to miscarry)]**

In the marginal notes on *al-Azhār*: “If a woman eats something that is ordinarily eaten, without intending by it to bring down the pregnancy and without knowing that it harms it, and then she miscarries because of what she ate, it is likely that she does not incur liability, because she has

not transgressed in the causative factor.” End quote.<sup>1</sup>

Likewise, she <sup>does</sup> not incur liability if her husband has given her permission to drink the medicine, for example. End of the commentary.<sup>2</sup>

**[A woman causing her pregnancy to be miscarried]**

**Question:** A woman caused her pregnancy to be miscarried and delivered it dead. What is required of her?

**The answer – and Allah is the One who grants success** – is that they have said, as in the marginal notes on *Sharḥ al-Azhār*: “There is nothing (no liability) upon one who dies due to the killing of his mother if he has not yet separated (from her), and they did not consider movement (in the womb) to entail certain knowledge (of life).”

**I say:** It is as if they built this ruling upon the established legal principle: “The basic presumption is freedom from liability (barā’at al-dhimmah).” They have applied this principle here, and nothing has arisen to overturn this basic presumption. The movement that occurs in the womb of a pregnant woman yields only conjecture, whereas freedom from liability is certain; and it is not permissible to abandon what is certain on the basis of what is conjectural. Similar to this is their statement: “The certainty of purity or impurity is not lifted except by certainty.”

**Yes,** such a woman ought to repent to Allah and seek His forgiveness.

**If it is said:** Then she ought also to pay the diyah and fast two months.

**We say:** We did not state that, for two reasons:

1 – Because the woman’s pregnancy, so long as it has not separated (from her), is like a part of her body; so if she commits an offence against it while it is in her womb, it is as if she has committed an offence against herself. One who commits an offence against himself is only required to repent and seek forgiveness.

The proof of this is that in the case of one who kills a pregnant woman whose fetus has already moved, only the diyah of the woman is obligatory, not the diyah of what is in her womb – and that is if the fetus dies in her womb because of her death.

2 – That the Messenger of Allah (*May Allah bless him and his family and grant them peace*) did not make for the fetus of a woman, which emerges dead due to an assault upon its mother by beating, anything except a *ghurra* (a specific monetary compensation), and did not oblige

1- *Sharḥ al-Azhār*, 4/417.

2- *Sharḥ al-Azhār*, 4/418.

fasting.

**[The ruling on changing sperm in the womb, and the clinging clot, and the lump of flesh]**

In *al-Tāj*: "Issue": He said in *al-Intiṣār*: It is permissible to alter sperm (al-nuṭfah) in the womb, the clinging clot (al-‘alaqah), and the lump of flesh (al-muḍghah) by means of medicines, because they have no sanctity before the spirit is breathed into them. I [the author] said: This is not permissible except with the permission of the husband; otherwise she sins, though there is no liability at all – whether he permits or not. After the spirit is breathed into it, it is not permissible in any case, whether he permits or not. She incurs sin if she intends it, and she is liable for the diyah if what comes out is alive. Likewise, it is permissible for a woman to do to herself what prevents pregnancy, even if her husband is not pleased with it, because no right has been established for him in her pregnancy except after it exists." End quote from *al-Tāj*.

**I say:** If the mother is ill and she has a pregnancy of four months, for example, and the doctors decide that it is necessary to terminate the pregnancy because the mother is exposed to danger; or, for example, the doctors decide that the woman's pregnancy in her womb, after five months have elapsed, cannot live because there is an opening in the middle of its head, or for some other reason by which the doctors determine that the child cannot live; or if, for example, a woman has been forced into fornication under compulsion and becomes pregnant, and she fears being killed by her family, and if she escapes that, she will stain her family and her tribe with the stigma of fornication, through which their honor falls to below zero, such that they are left with no value or standing – and this woman will be deprived of marriage, along with what will befall her of hatred, blame, humiliation, disgrace, and so on – then in such three situations we say:

1 – If the pregnancy is at four months or more, and the mother has not yet experienced movement from it, nor felt anything that indicates its life, then there is no harm upon her in terminating it from her womb when one of those three situations arises. This is for two reasons:

- (a) That the basic presumption is non-existence of life in the pregnancy. So if its life is not known by any of the tangible signs, nor by the report of a doctor, then it is permissible for her to remove it.
- (b) Because of the danger that arises for the mother, and this situation accords with the madhhab as mentioned earlier.

2 – If the mother senses something that indicates the life of the fetus, and the doctors rule that it is necessary to terminate it because its remaining (in the womb) endangers her life with the risk of death, then

what appears to me is that it is permissible to terminate it, for several reasons:

(a) The woman is charged with preserving what is in her womb to the extent of her effort and capacity. If the doctors determine that her capacity and strength cannot bear the continued presence of the fetus in her womb, and that if she continues to carry it, her strength and capacity will collapse and she will in fact lose her life, then in this case the obligation to continue the pregnancy falls from her. Allah, *exalted is He*, says: *"Allah does not burden a soul beyond its capacity"* [al-Baqarah:286], and He, *exalted is He*, says: *"So fear Allah as much as you are able"* [al-Taghābun:16].

(b) Two evils have come into conflict: the expected death of the mother if she continues the pregnancy, and the expected death of the child if she removes it before its time of birth. What is established among rational people, as appears, is that when causes of death are directed both at a person himself and at another, he must ward them off from himself and (also) from the other if he is able. If he is not able to ward them off from both, he wards off the causes of death from himself. There is no blame upon him for not being able to ward them off from the other.

(c) If a man's life cannot be saved except by the destruction of the one who will save him, he is not blamed for refraining from saving him and no reproach is directed at him; sound human nature judges this.

(d) If the doctors inform (her) that the fetus absolutely cannot live, then it is permissible for the woman to remove it. The scholars have said concerning a woman who dies while carrying in her womb a fetus that has moved: she is to be left from burial until her fetus dies, or she is to be struck a light blow until it dies. They only said this because, as is known by customary experience, if the fetus emerges from its mother's womb before the sixth month, it usually dies. Thus they saw no harm in carrying out the means that lead to its death.

As for the woman who has been forced into fornication and becomes pregnant from it, as mentioned in the earlier question, we can say: it is permissible for her to terminate (that pregnancy), for several reasons:

1. The placement of the drop of semen occurred in her womb without her permission, and without the permission of her guardian, indeed without the permission of the Wise Lawgiver. In such a case, the drop has no right in that woman's womb.
2. The disgrace mentioned in the question may be like death or even greater than it. We have already mentioned that it is permissible to terminate the fetus when there is fear of the mother's death.
3. The fetus in its mother's womb is like a part of her. If the mother does something that causes its expulsion and death, it is not like



killing a (separate) soul. From this angle, the scholars of the madhhab have said that if someone kills a pregnant woman whose fetus has already moved, only one diyah is required (for the woman); and if the fetus dies in her womb and then comes out dead, it is not prayed over, not washed, does not inherit or be inherited from, and is not named.

Once you know this, the preferable course for a woman who faces one of the situations mentioned is to try, by means of a doctor, to bring out the fetus as it is, alive, and to preserve it until it dies (naturally). She should not deliberately kill it in her womb. We have only said this because some evils are lighter than others.

- There is also a safer course for her religion by which she can rid herself of the pregnancy, such as carrying heavy loads, running, and jumping.

### **[A woman not returning with her daughter to the doctor]**

**Question:** A woman took her daughter to the doctor. The doctor then said to her: "If you do not bring her back for treatment after a day or two, she will die." Then some excuse arose for the mother that prevented her from returning with her daughter to the doctor, and the daughter died. What is upon the mother in that case?

**The answer – and Allah is the One who grants success** – is that the mother is not liable for diyah or kaffārah in this case. The excuse that prevented her from returning to the doctor lifts the sin from her. Were it not for the presence of the excuse, she would have been sinful. This is because it is obligatory upon the guardian of the small child who does not know how to attend to his own interests to carry out everything the child needs in terms of food, drink, clothing, cleanliness, treatment, and what is connected to that.

What indicates that this is obligatory upon the one who has custody of the child is His saying, *exalted is He*: *"Mothers shall breastfeed their children for two complete years – for whoever wishes to complete the nursing period... until His saying: "...then if they both desire weaning by mutual consent and consultation, there is no blame upon them"* [al-Baqarah:233]. This verse indicates the obligation of nursing the child for two years, and that it is not permissible to wean him before the two years except after mutual consent of the parents and their consultation concerning the best interest of the infant in being weaned.

That indicates that it is obligatory to take into account the child's interest in nursing by the indication of the verse, and in matters other than nursing by analogy.

**Benefit concerning a child's offence and concerning wrongs (maẓālim)**

In *al-Bayān*: “Branch: Whatever a child commits of injury to life or property, its guarantee (liability) is obligatory upon his guardian, from the child’s wealth, even if the injured party does not demand it.” Al-Manṣūr bi-llāh said: “It is not obligatory until he (the injured party) demands it.” End quote.

And in it (i.e., *al-Bayān*) also: “Issue: Whoever has injustices (maẓālim) on his conscience owed to people whom he does not know, and then he becomes poor, (the obligation) is not lifted from him. If it later becomes possible for him to settle them, it is obligatory. It has been said: Rather, it is lifted, and this is the apparent wording of al-Qāsim and Muḥammad ibn ‘Abd Allāh.” End quote.

### [Two children collide in a cistern (mājal), and one of them dies]

**Question:** Two boys who had not yet reached puberty went diving for water in a cistern (mājal). They went down and swam. As one of them was ascending from the bottom of the cistern toward the surface of the water, his head struck the belly of his companion. The one who was struck grabbed hold of the one who struck him, and both of them sank while in that state. Eventually, the one who was struck let go of his companion, so the one who struck him rose to the surface after his companion loosened his grip. He then waited for his companion, but he had died. Up until now the family of the dead child still do not know the true story, and the surviving boy is now a fully grown man. What is required of him?

**The answer – and Allah is the One who grants success** – is that this child, who is now a man, must pay the diyah from his own wealth alone, and nothing is upon his ‘āqilah, because the ‘āqilah do not bear liability in cases proven only by confession. As for fasting, no kaffārah is required of him, because at the time of the offence he was not legally responsible (mukallaf), and fasting is only valid from one who is legally responsible.

**Yes**, if this man fears the reaction of the dead child’s family when they learn of the story, then he should use lawful stratagems to cause the money to reach the heirs of the child, with each one receiving his share of the diyah, by any means. In this way his liability is cleared, and it is not a condition that they know it is the diyah of their child.

What may indicate this is His saying, *exalted is He*: “Allah intends for you ease and does not intend for you hardship” [al-Baqarah:185], and His saying: “He has not placed upon you in the religion any hardship” [al-Ḥajj:78], and His saying: “So fear Allah as much as you are able” [al-Taghābun:16], and His saying: “And do not throw yourselves with your own hands into destruction” [al-Baqarah:195].

### [Examples of killing by causation]

Examples of killing by causation mentioned by the scholars of the madhhab, as in the commentary and its marginal notes:

1 – Whoever prods a riding animal with a stick so that, from its fright, it throws its rider, or it kicks a man with its leg and kills them – then there is no kaffārah upon the one who prodded, because he is a doer of a causative act.

2 – If a person kneads/squeezes the belly of a pregnant woman until she miscarries her fetus alive and then it dies, then there is no kaffārah, according to the madhhab, as in the commentary and its marginal notes.

3 – Whoever places a child with someone who does not safeguard one like him, or places him in a dangerous place near water, fire, or a place where falling is feared, in such a way that it is predominantly thought he will not be safe there – then the one who placed him is liable, and no kaffārah is required.

4 – Whoever sets a net for hunting in a place that is not his own property – either in someone else’s property or in a public right of way – and then does not remove this source of danger, is liable if someone perishes in it, and no kaffārah is required.

5 – Whoever places a stone, water, a well, or fire in a public right of way or in someone else’s property, and someone perishes because of that, then no kaffārah is required of him, but he is liable for the injury.

6 – The injury caused by a leaning wall is borne by the ‘āqilah of the owner who knew of its condition and was able to repair it.

7 – From *al-Bayān*, according to the madhhab: whoever falls from a place without negligence – rather, because of wind or illness – and falls upon a person beneath him and kills him by his fall, then this is a doer of a causative act.

8 – In *al-Azhār*: “Whatever is caused by him – that is, by the slain person himself – is disregarded (no liability). Among this is his transgressing in standing in a place (of danger), while the other person is in that place without transgressing, by mistake.”

9 – Whoever admits into his house more guests than it can bear, and then it collapses, he is liable for them if he knew (of the risk), but not if he was ignorant, because he is a doer of a causative act.

10 – There is nothing (no liability) upon the owner of a date-palm if the person climbing it dies merely from seeing (something), unless the owner wears a strange, frightening garment with the intention of terrifying him; in that case he is liable, because he has been the cause of the destruction by a causative act in which there was transgression. End of the commentary.

**Derived scenarios based on the above**

1 – If a car overturns because a tyre explodes or because some mechanical part of it fails, and someone perishes because of that, then there is no kaffārah upon the driver, because the killing occurred by a causative factor, and this is derived from what the scholars of the madhhab mentioned concerning the leaning wall. As for liability, he is liable if he knew that the tyres were unfit and dangerous, and if he knew of the danger of the defect in his car.

2 – If a car wrongly blocks the path of another car's lane, and as a result the two cars collide and someone dies, then no kaffārah is required, because the killing occurred by a causative factor. As for liability, the one who was at fault is liable. The fault may be shared: one for blocking the other car's lane, and the other for exceeding the proper speed.

3 – If two cars are driving, one behind the other, and the car in front reduces its speed so that the car behind runs into it, and deaths occur in one or both cars as a result, then there is no kaffārah, because this accident occurred by a causative factor. Liability is according to the proportion of fault of the two cars.

4 – If the driver swerves the car sharply, or jumps it over a speed-bump while there are passengers on its back, and as a result someone perishes because of the swerving or the bump, then there is no kaffārah. This is because the cause is the lack of self-protection by the passengers, in addition to the bend and the bump and the speed. This can be derived from the case of placing a child with someone who does not safeguard one like him.

5 – It often happens that when a car is entering or leaving the yard/parking area, it hits a child. In such a case, liability lies upon the one who was negligent in safeguarding the child, and there is no fasting upon the negligent person. This is derived from number three above (placing a child with someone ... etc.).

6 – If a driver falls asleep while driving his car and an accident occurs because of that, in which someone perishes, then no fasting is required, because this is (killing) by causation. This can be derived from what was mentioned under number seven.

7 – If a man crosses the car's lane and the car hits him and he dies, then the driver does not fast, because the man is the one who caused his own destruction. This is derived from number eight.

8 – If there is dirt, water, oil, a stone, or a pit in the car's lane, and this causes the car to overturn, leading to the death of some of its passengers, then liability lies upon the one who placed the dirt, water, or oil, and no fasting is required of him. Nothing is upon the owner of the car. This is what the scholars of the madhhab have said, as under number five.

9 – If a camel, donkey, or the like blocks the car’s path and the car overturns because it hits it, then there is no kaffārah upon the driver, because the accident occurred by a causative factor.

10 – If the driver loses control of the car because a defect occurs in the car, and this leads to an accident in which someone perishes, then there is no kaffārah, because the death occurred by a causative factor.

11 – If a car accident occurs because the load on the car was excessive, then the driver is liable for those who perished if he knew of the danger; but if he did not know, then there is no liability, because he is a doer of a causative act, and no kaffārah is required of him. This is derived from what was mentioned under number nine.

12 – If two or more cars meet facing each other at night, and one of them raises its lights directly into the face of the opposing driver, causing him to completely lose his vision, and an accident results in which damage occurs, then there is no kaffārah upon that driver. Liability lies upon the one who transgressed by raising his lights, and no kaffārah is required of him, because he is a doer of a causative act, and the causative nature here is clear.

13 – If a car accident occurs because of something arising from another car’s passing, or from the sound of its horn, or from the sound of its brakes, or because of something similar, which causes the driver to panic or lose control so that a collision or overturning occurs and someone perishes, then there is no kaffārah upon the driver. This can be derived from number ten.

### **[Complications that occur from anaesthesia of the patient]**

**Question:** A doctor working in a hospital administers anaesthesia to a patient before an operation, and complications sometimes occur, rarely – at a rate of one or two percent. He only gives the patient a specified, standard dose. Is he liable for those complications?

**The answer** is that the doctor is not liable if he does not exceed what is customary. If he exceeds what is customary, he is liable.

### **(Rescuing a drowning person)**

**Question:** It is said that rescuing a drowning person is obligatory upon whoever is present, even if this bystander fears drowning himself. If he does not do so, he must pay the drowned person’s diyah. What is your opinion on this?

**The answer – and Allah is the One who grants success** – is that the intellect judges that it is obligatory to rescue one who has fallen into mortal danger, whether drowning or other kinds of destruction – this in general. Allah, exalted is He, says: *“And whoever saves one [life] – it is as if he had saved mankind entirely.”* [al-Mā’idah:32]

The proof that sound reason obligates this is that you see rational people severely reproaching whoever is negligent in such a matter, blaming him to the utmost for his negligence, no longer deeming him worthy of companionship thereafter, and regarding him as deficient in manliness.

The shar‘ī proof that obligates this is that Allah, *exalted is He*, has made iḥsān (kindness) obligatory towards people: towards the believers in general, and towards relatives, neighbors, companions and others in particular. He, *exalted is He*, says: *“And do good; indeed, Allah loves the doers of good.”* [al-Baqarah:195] and He, *exalted is He*, says: *“And do good to parents, relatives, orphans, the needy, the near neighbor, the neighbor farther away, the companion at your side, the traveler, and those whom your right hands possess...”* [al-Nisā’:36]

It is not part of iḥsān to leave a drowning person to drown, or one fallen into mortal danger to perish, while one is able to rescue him from drowning or destruction. This duty, which both reason and the Sharī‘ah together obligate, is only obligatory on condition of being able to fulfill it. Allah, *exalted is He*, says: *“Allah does not burden a soul beyond its capacity.”* [al-Baqarah:286] and He, *exalted is He*, says: *“So fear Allah as much as you are able.”* [al-Taghābun:16]

**On the basis of this, what appears to me** is that if someone present with a drowning person fears for himself that he will drown – because he does not know how to swim, or only knows how to swim a little – then rescuing the drowning person is not obligatory upon him. One who does not know how to swim, or only knows a little, is certainly in danger of drowning; and a drowning person cannot be rescued except by one whose skill in swimming is very high. For such persons as we have mentioned, rescuing the drowning person is not obligatory; if it is not obligatory upon them, then the diyah is not obligatory upon either of them.

Those who say that the diyah is obligatory on such a person probably looked only at the outward appearance: the one present with the drowning person has, outwardly, been negligent when he does not attempt to rescue him. This ruling of negligence is only according to the outward appearance. If he excuses himself by saying that he feared for his own life and was unable, we may say: that claim is not accepted and is a rejected plea, for a person’s testimony in his own favor is not accepted. Thus, the claim of fearing drowning does not justify the apparent negligence.

This is what can be used to justify the saying of those who make the diyah obligatory upon one who is present when someone drowns. However, it would have been necessary that if the bystander establishes

upright testimony that he does not know how to swim, then he should not be held liable for the diyah.

**If it is said:** How can the diyah be obligatory upon one who has not killed, neither by direct action nor by causation?

**We say:** They have here treated negligence in rescuing the drowning person as standing in the place of a causative act, and thus given it the same ruling. Perhaps that was in order to ensure that human lives are not allowed to be lost without compensation.

**[One who struck a person wrapped in cloth with a non-fatal blow]**

In the marginal notes on *Sharḥ al-Azhār*: “For example, someone who struck a person wrapped in a cloth with a blow that is not normally fatal, then he is later found dead – there is no liability, because the basic presumption is freedom from liability.” End quote from *Zuhūr, Kawāḍib*. (Taqrir) (فرج). And it is said, “There is no difference between whether the blow is normally fatal or not.” (Taqrir) (فرج).

**Benefit: (Expiation for killing (Kaffārat al-qatl))**

In *al-Bayān*: “The expiation for killing is not obligatory except when the killing is by *direct* action, not when the killing is by a causative act – except if the causative act itself is an instrument of killing, such as the rider of an animal in the two cases where it kills by kicking.” End quote.<sup>1</sup>

**Benefit regarding the inability to fast for the expiation of mistaken killing**

According to the madhhab, if fasting is impossible in the expiation of mistaken killing, one does *not* move on to feeding (the poor), unlike the expiation for *ḡihār*.

**I say:** The better view is that if fasting is impossible, the one making expiation moves on to feeding, because Allah, *exalted is He*, has made feeding, in the expiation for *ḡihār*, a substitute for fasting when fasting is impossible. Thus, the one making expiation feeds sixty poor people, just as in the expiation for *ḡihār*, and as in the fast of the month of Ramaḍān: if fasting Ramaḍān is impossible for someone, he breaks the fast and feeds one poor person for every day.

**[Fasting of a son on behalf of his father does not suffice in the expiation for killing]**

**Question:** A man had upon him an expiation for killing. He fell ill and

1- *al-Bayān al-Shāfi*, manuscript, 2/413.

did not fast, then died. After his death, his son fasted forty days, then broke off the fasting because of illness. What should this son do?

**The answer – and Allah is the One who grants success** – is that what has become determined upon the deceased is feeding, that is: feeding sixty poor persons. The son must therefore pay from the deceased's wealth that specified amount. As for the fasting that the son has fasted, it does not suffice for the expiation.

### **The ruling on feeding in the expiation for killing**

**Question:** A man has upon him an expiation for mistaken killing, and freeing a slave and fasting are both impossible for him. Does feeding suffice him?

**The answer – and Allah is the One who grants success** – is that the scholars of the madhhab have said: whoever is unable to free a slave and fast does *not* switch to feeding or clothing, because they are not mentioned in the verse.<sup>1</sup>

**I say:** Allah, *exalted is He*, has made feeding a substitute for fasting when it is impossible, in the expiation for *ẓihār* and in the fast of Ramaḍān, and in some cases He has given a choice between fasting and feeding. It is therefore possible to analogically relate this fast to the fast of Ramaḍān and the fast of the expiation for *ẓihār*.

Perhaps Allah, *exalted is He*, did not mention feeding in the expiation for killing because it is already known and established in the Sharī'ah that fasting, when it is impossible, has as its substitute feeding one poor person for each day.

**If it is said:** Analogy and attachment are not possible here, because: in the expiation for *ẓihār* and in the fast of Ramaḍān, the substitute for each day of fasting is feeding one poor person; in the expiation for an oath, feeding ten poor persons correspond to fasting three days; in the *fidyah* (compensation), feeding six poor persons correspond to fasting three days; in the expiation for hunting (game while in *iḥrām*), it is not specified, rather Allah, *exalted is He*, says: “*...or its equivalent in fasting*” [al-Mā'idah:95]; in *tamattu'* (the combined 'Umrah and Ḥajj), fasting ten days is set against offering a sacrifice. In short, the foundational patterns are different.

**We say:** We have attached (this case) to the fast of Ramaḍān and the fast of the expiation for *ẓihār* because it most closely resembles these two foundational cases, as is not hidden.

Analogy (*qiyās*) is an evidentiary method recognized in the Sharī'ah,

1- *Sharḥ al-Azhār*, 4/430.



and its effective cause (‘illah) is known by textual evidence: namely, inability to fast, as indicated in His saying, *exalted is He*, regarding the expiation for ḡihār: *“And he who is unable – then (his atonement is) the feeding of sixty poor persons.”* [al-Mujādilah:4]

### **[Compensation for the heir who pursues retribution (qīṣāṣ)]**

**Question:** A man was killed and he had heirs. Some of the heirs undertook to pursue the killer and dispute with him until the killer was sentenced to qīṣāṣ. In the process, many fines and costs fell upon (this pursuing heir). Are these costs upon the claimant alone, or upon him and the rest of the heirs? Bearing in mind that leaving off pursuing the killer brings great shame upon his relatives, so he is compelled or forced into what he did, and the claimant is the eldest of the heirs.

**The answer – and Allah is the One who grants success** – is that custom has its ruling in this and in similar matters. The prevalent custom in such situations is that the tribe cooperates (in paying) if they have established codes and bonds among them. If they have nothing of that, then the members of the single household cooperate.

What I see is that the other heirs must assist their brother with his financial burden, in accordance with what the tribal customs require among the tribes.

Likewise, they must cooperate in what is necessary during the days of mourning – such as coffee and the like – and what relatives require of hospitality (ṣanī‘ah) for the duration of their stay.

### **[When qīṣāṣ is permissible or obligatory]**

In the words of the scholars of the madhhab: qīṣāṣ is permissible or obligatory in:

1. Life (i.e., killing).
2. A limb that has a joint at its joint, such as the hand, the leg, the finger, the toe, the palm, and the elbow. Qīṣāṣ is not carried out until the injured person has recovered, because it is possible that he may die (from the injury).
3. An injury that exposes the bone in the head or in the body and is measured (precisely) in length and width.
4. Anything whose amount is known and defined, such as the nose, the ear, the tooth, and plucking out the eye. As for what is other than that, then qīṣāṣ is not obligatory, except for a slap or a lash with a whip and the like, according to al-Hādī (*peace be upon him*).

So if a man assaults another and cuts his hand in the middle of the palm, or in the middle of the forearm, or in the middle of the upper arm; or cuts half of his foot; or cuts his leg at the shin or at the thigh; or stabs

him in the abdomen or the head without reaching the bone – then there is no qīṣāṣ in that. What is obligatory is only the *arsh* (financial compensation).

**I say:** It is possible to infer what they have said from His, *exalted is He*, saying: *“So whoever has assaulted you, then assault him in the same way that he has assaulted you...”* [al-Baqarah:194] and His, *exalted is He*, saying: *“And the recompense of an evil deed is an evil one like it.”* [al-Shūrā:40] Thus, the one who has suffered injury has the right to exact retaliation against the assailant in like measure to his assault, without any increase. Any increase would be injustice, and Allah does not approve of injustice.

So if a man assaults another and stabs him in the chest or in the abdomen, or shoots him twice in the abdomen or the chest and the bullets exit through his back, then (the victim) receives treatment and Allah heals him, and afterwards he wishes to exact qīṣāṣ from the assailant – then qīṣāṣ in such an injury is not permissible. That is because if we allowed him to exact retaliation with a stab for a stab, or a shot for a shot, it is possible that (the assailant) would die from that, and he does not deserve death. It is not permissible to kill him, for Allah has only legislated for us to answer an assault with its like, not with more than it. Likewise, if a person’s hand or leg is cut off in a place other than the joint, it is not possible to exact identical retaliation without producing an additional harm.

### **(Killing harmful creatures)**

**Question:** Is it permissible to kill harmful insects that cause minor harm, such as ants? They may multiply until vessels, food, and water are filled with them.

**The answer – and Allah is the One who grants success** – is that it is permissible to get rid of any harmful animal, whether small or large. Permission has come (in the Sunnah) to kill the snake, the scorpion, the house lizard (wazagh), the kite, and the pied crow; by analogy, whatever is harmful among other animals falls under the same ruling.

It appears that killing lice was not disapproved in the time of the Prophet (*May Allah bless him and his family and grant them peace*) and the Companions. Had it been disapproved, that disapproval would have been transmitted. Rather, evidence has come that supports what we have said. It has been narrated that the Prophet (*May Allah bless him and his family and grant them peace*) saw Ka’b ibn ‘Ujrah during the ‘Umrah of al-Qaḍā’ while he was in iḥrām and his head was swarming with lice. The Prophet (*May Allah bless him and his family and grant them peace*) said to him: *“Are the vermin of your head harming you?”* He replied: Yes. So the Prophet (*May Allah bless him and his family and grant them peace*) ordered him to shave his head and to offer a ransom of fasting, charity,

or a sacrifice. Shaving the head in order to remove lice is a cause for destroying the lice, and the one who creates the cause is like the one who performs the resulting act, as shown by the story of the People of the Sabbath.

### **(Killing birds)**

**Question:** Some people find it objectionable to protect crops, grapevines, and the like from birds and similar creatures. Is this something that should be disapproved of or not?

**The answer – and Allah is the One who grants success** – is that there is no objection to protecting crops and the like from birds and other creatures. This protection of wealth from such things is regarded as preserving wealth, which Allah has ordered in His saying: *“And do not give the weak-minded your property, which Allah has made for you a means of sustenance...”* [al-Nisā’:5] What we have said here is also the position of the madhhab, as in the marginal notes on *Sharḥ al-Azhār*.

### **Birds that harm crops**

**Question:** There are birds that harm agricultural crops such as fruit, grain, and the like. There are also dogs that harm crops. Is it permissible to kill the birds and dogs that harm the crops, or not?

**The answer – and Allah is the One who grants success** – is that it is obligatory to ward off the harm of birds, dogs, and similar creatures by whatever means possible, even by killing. It is already permitted to ward off the harm of a human being even by killing him if his harm cannot be repelled except thereby, and dogs, birds, and the like have less sanctity than human beings.

The evidence for the permissibility of warding off the harm of a human from one’s self or property – rationally – is that rational people of various religions and otherwise deem it good to ward off the harm of human beings from the self or from property, even by killing, if it cannot be averted except in that way.

### **[Concerning camels which their owners do not guard, so they eat the crops]**

We have farmland in which we plant maize. In the season, the Bedouins’ camels come and cause us much trouble. No wall or anything else holds them back from the crops. We must expend effort, guard, and yet they still sometimes enter. They even have a natural cleverness such that they lie in wait for times of heedlessness, like the end of the night and other times. Some of them are hard to catch after they have eaten the crops and trampled them – they run away.

When we seize some of them, we charge their owner for what they have eaten, and this is called *fuqlah*, meaning: an estimate of what it has

eaten. But we also demand from them more than what was eaten, in the form of gunpowder and other things, in return for our toil, our sleeplessness, and our chasing their camels until we catch them. For their owners, if we do not seize (the camels), will neither come to drive them away from us nor acknowledge that they have eaten (our crops). They are rough Bedouins with whom kindness does not help. Note that if we left (the crops) without guarding them, they would destroy a great deal indeed.

Also, these Bedouins have no right to graze among us. This is an enclosure reserved for us, from which we even prevent their sheep. Next to their land there is a similar enclosure from which they prevent us. We tied up some of their camels, and their owner came. We demanded from him a rifle (*bunduq ribākh*) as rightful compensation. He stalled and tried to evade paying until one Friday, when we were in the congregational prayer. He went, freed his camel, and drove it off. With this in mind, I direct these questions:

**Q1:** Is it permissible for us to add an extra fine upon them for our toil, sleeplessness, guarding, and chasing their camels, given that they can lead them away into distant ravines and valleys?

**Q2:** Are we allowed to tie them up and then charge a daily fee for their tethering, at a reasonable amount – for example, one thousand five hundred (per day) in return for feeding, watering, and watching them?

**Q3:** This man whom we fined, and who then freed his camel – are we allowed to impose upon him a fine for “disgrace/insult” (*‘ayb*), because he dared to do that? If he had encountered hot-headed people, it might have led to fighting. Is it permissible to impose what is called a *ḥaqq al-‘ayb* (right for affront) in tribal custom as a deterrent to him and others from such behavior, or is imposing this “shame-fine” not allowed?

**The answer:**

1. It is not permissible to add any extra fine beyond the amount of what the camels have eaten and destroyed. If the camel owners persist in failing to guard their camels, and you are unable to stop their misconduct through the tribe, the state, or other means, then it is permissible for you to dig a pit in their path, cover it with straw and earth, in such a way that when a camel steps on it, its foreleg or hind leg falls inside and it is unable to pull it out. You do this on every path the camels take to your crops, and then you leave them until their owners come to rescue them. You are not liable for any compensation in this measure, and you bear no sin.
2. You may tie up the camels, and you must bear the cost of feeding them while they are with you. You may take from their owners only the standard, customary cost of that feeding, and nothing

more.

3. You are not allowed to impose upon the one who freed his camel a fine for “disgrace/insult” (*‘ayb*), and you have no right to punish him. Such measures belong to the authorities (those in charge of public order). The solution is what we have mentioned first: that you set things in their path which will force their owners to guard them out of fear for (the camels).

### **[Dissection of animals]**

Dissection of animals is permissible, as appears to me, and that is because:

1. In it there are general benefits related to human health.
2. Because of His saying, exalted is He: *“He is the One who created for you all that is on the earth.”* [al-Baqarah:29] From this it is understood that benefiting from all animals is permissible, except what the evidence has specifically excluded, and the dissection of an animal is among the benefits permitted by this verse.

Their dissection is of two forms:

1. Dissecting them when they are dead, and there is no objection to this.
2. Dissecting them while alive; someone may say about this that tormenting an animal is deemed repugnant by reason and not permitted by the Sharī‘ah.

**The answer is that** tormenting an animal is forbidden by reason and by the Sharī‘ah, except that the Wise Lawgiver has permitted it when there is a benefit, such as slaughtering to benefit from its meat, loading it with burdens, or ploughing the land with it.

### **Dissection of a dead human being**

There are fixed principles among the scholars of Islam which they have taken from their upright religion, namely:

1. The inviolability of the corpse of a Muslim and the corpse of a non-Muslim under covenant; it is not permissible in Islam to do to it any act that entails humiliation.
2. It is permissible to open the abdomen of a dead Muslim to extract wealth that is in his stomach.
3. It is permissible to open the abdomen of a dead Muslim woman if there is a living child in her womb.
4. There is no doubt about the permissibility of surgical operations to remove or treat disease. Indeed, it is permissible to amputate an entire limb so that the disease does not spread to other parts of the human body, and cauterization, cupping, and bloodletting are permissible for seeking cure by them.

On this basis, dissection of a human corpse is permissible in the following cases:

1. It is permissible for a Muslim to dissect the corpse of a ḥarbī who is at war with Islam and the Muslims, with whom the Muslim has neither covenant nor treaty.
2. It is permissible to dissect the corpse of a Muslim who committed major sins openly and persisted in them, and one who openly and publicly abandoned the prayer or fasting if they died without repenting.
3. It is permissible, in some cases, to dissect the corpse of a repentant Muslim, such as when the cause of the person's death is unclear to his family – whether his death was natural or due to a non-natural cause from a human or otherwise. In such a situation, it is permissible to dissect him in order to know the cause of his death, thereby either removing suspicion from someone or strengthening it.
4. 4 – It is permissible to purchase a corpse from non-Muslims in order to dissect it, because of the benefit that lies therein.

## [Chapter on Blood-Monies (Diyāt)]

### Concerning the ‘āqilah

The scholars of the madhhab said: The diyah is apportioned over the ‘āqilah in three years, and no man bears more than nine dirhams: it is apportioned to him over three years, three dirhams each year. This applies to rich and poor alike ... etc.

**I said:** It may be that the ‘āqilah are few in number, the offender is poor, and there is no Bayt al-Māl; so if the ruler sees fit to oblige the individuals of the ‘āqilah to pay an amount that lightens the burden on each of them – even if it is more than what the scholars of the madhhab have mentioned – then necessity has its own rulings. One hundred dirhams or what is equivalent to it may be a trifling sum in some lands, and likewise in some times. The ruler must take into account the people’s circumstances.

**Yes,** if the tribe has established rules and mutual agreements (*ṣuḥbah*) for cooperation in diyāt and penalties, then they should pay the diyah in accordance with what those agreements or the custom require, whether immediate payment or deferred.

### [Assisting a Tribe that has Borne Financial Liabilities for Offences]

**Question:** Is it permissible to assist a tribe that has borne financial liabilities for offences, in that it killed [someone] during a time of truce and armistice and therefore incurred many indemnities – or not?

**Answer – and Allah is the One who grants success:** It is permissible to assist them in what has become due upon them of money, except if the assistance will lead them to persist in doing such an act. People still assist the deliberate killer in what is due from him of blood-money, and we have not heard any of the scholars denounce that. The Prophet (*may Allah bless him and his family and grant them peace*) undertook the blood-money of the Anṣārī who was killed in Khaybar, and the Commander of the Faithful (*peace be upon him*) undertook the blood-money of the one whom Hamdān killed with the hooves of its horses. There are many reports from numerous notable Arabs and Muslims telling that they would undertake the blood-monies on behalf of deliberate killers in order to calm the fitnah (sedition) among the people.

### [Ruling on Taking Zakat for the ‘Āqilah of a Madman who Killed Five]

**Question:** A man’s mind became deranged and he killed five men, then he was killed immediately. The guardians of the five slain then came wanting to take revenge for their killed relatives from the kin of the madman. The tribes interceded between the two parties to block the

fitnah, and they imposed upon the guardians and relatives of the madman several millions, and both parties were satisfied with this reconciliation. Is it permissible for these [relatives] to take from zakat in order to pay this debt, bearing in mind that they possess abundant wealth, but the time is one of drought; and if Allah were to give them rain and there were a harvest of qāt, they would not need assistance and that harvest would suffice them to settle the debt? Give us a legal verdict, and may you be rewarded.

**Answer – and Allah is the One who grants success and aid:** What I see as safer and more precautionary is that it is permissible for these people to be given from zakat as a loan which they borrow and then repay at the time of the qāt harvest. We only said that because:

1. The adherents of the madhhab have said that it is a condition in the debtor (al-ghārim) that he be poor, and these are not poor because of what they possess of abundant wealth.
2. Paying those amounts from zakat entails injustice toward the poor, given their great number in this time.
3. That Allah, *Exalted is He*, has judged, upon the tongue of His Messenger (*may Allah bless him and his family and grant them peace*), in a case not like this incident, that the blood-money is upon the ‘āqilah of the killer, to be distributed over them in three years, and the scholars have not mentioned that the ‘āqilah are among the debtors (al-ghārimīn) who have a share in zakat.

Rather, zakat, as in the hadith of Imām Zayd ibn ‘Alī (*peace be upon him*): “Charity is not lawful except for three: one who has grievous blood [liability] upon him, or one who has a painful debt, or one who has crushing poverty.” Therefore zakat is not to be spent on these [relatives], because they are not among the categories of zakat recipients.

**Yes**, the one on whom zakat may be spent is the man who mediates between fighting people in order to set their affairs aright, so he takes upon himself the blood-monies of the slain who fell in that fitnah, upon himself, as a means of rectification. Such a person is helped from zakat with what he has assumed of blood-monies, and he is given an amount by which he is freed from the responsibility of what he has undertaken, even if this person who has undertaken it is wealthy in himself, for it is not considered proper that the penalty be upon him from his own wealth. This is the madhhab of al-Mu‘ayyad bi-llāh (*peace be upon him*), as in the Sharḥ, and al-Amīr al-Ḥusayn said: and this is the correct [view].<sup>1</sup>

1- *Shariḥ al-Azhar*, 1/514.



That being so, we only said that it is permissible to give such people from zakat as a loan out of consideration from us for settling the fitnah and extinguishing its flame, for the people of those lands in which the incident occurred do not adhere to the rulings of the Sharī‘ah, especially in matters like what came in the question. Therefore we saw that they should borrow from it and then repay it, and we placed them, with regard to zakat in a state of necessity, in the position of Banū Hāshim, namely the permissibility of taking [zakat] by way of borrowing with the intention of repayment.

And the evidence for what we have said, along with the foregoing analogy, is His, the Exalted’s, saying: *“except for that to which you are compelled”* [al-An‘ām:119], and: *“But whoever is forced by severe hunger with no inclination to sin”* [al-Mā’idah:3].

And among the transmitted legal maxims: “In cases of necessity, the prohibited things become permissible,” and the necessity is removed by what we have mentioned; and His, the Exalted’s, saying: *“He has not placed upon you in the religion any hardship”* [al-Ḥajj:78],: *“Allah intends for you ease and does not intend for you hardship”* [al-Baqarah:185].

And in what we have said, along with what has preceded, there is also consideration for the side of the poor, and consideration for the side of settling the fitnah. Praise be to Allah, Lord of the worlds, and *may Allah bless Muḥammad and his family and grant them peace.*

## [The Book of Bequests and Inheritances and What is Connected Therewith]

In *al-Bayān*: Whoever bequeaths land or the like to his children and their children or whomever descends from them, none enters into it except one who is in existence among them at the death of the testator, at the time of the soundness of the will, not one who comes into existence afterwards; because that is the transfer of ownership of a specific property, so it is not valid for one who is non-existent. And whoever among them dies, his share is for his heirs. End [of quotation].

And in the marginal gloss: Unlike a *waqf*, which is valid for one who is non-existent, because it is the transfer of ownership of benefits, and benefits are limited in time. End [of quotation].

**Question:** A man had no children except three daughters. At his death he bequeathed two pilgrimages (ḥajjatayn) on behalf of his two brothers who had died before him, and other [bequests besides that]. These bequests amounted to more than one-third by far, almost consuming the entire estate. Then the daughters were summoned to authorize (ijāzah) the will, and they authorized it. If the daughters did not know what authorization is nor what is meant by it, and did not know that it is their right to refuse authorization and that they have the right to prevent it, and did not know that it is not permissible for the deceased to bequeath more than one-third except with permission and authorization – are they nonetheless bound by the ruling of authorization or not? And is the bequest for pilgrimage for the two brothers valid and accepted? And if the two deceased brothers did not accept it and did not request it, does the reward of that [pilgrimage] reach them? And is reliance placed on circumstantial indicators in [establishing] *taḥwīz* (delivery of possession)?

**Answer – and Allah is the One who grants success:** Authorization, if it is as stated in the question, is of no consequence. The evidence for that is His, the Exalted's, saying: "*Do not consume one another's wealth unjustly*" [al-Baqarah:188], and his, may Allah bless him and his family and grant them peace, saying: "*The property of a Muslim is not lawful except by his willing consent.*" And if the matter is as mentioned in the question, it does not indicate willing consent.

- As for the bequest of pilgrimage for the two brothers, it is valid and accepted, and its good deeds reach them, by virtue of the hadith of the one who pronounced the talbiyah on behalf of Shubrumah – even if the two deceased brothers did not accept it and did not request it – for the Prophet (may Allah bless him and his family and grant them peace) did not ask the one pronouncing the talbiyah about Shubrumah whether

Shubrumah had bequeathed that or not.

- As for *taḥwīz*, the way to know it is through the acknowledgment of the testator and testimony to his acknowledgment, or what takes its place. For example, that he threatens the heirs by saying to them: “You will not take after me anything, little or much, and I will acknowledge [a right] for so-and-so, and I will admit [a right] for so-and-so, and I will assign [something] to so-and-so, to spite you and out of dislike for you; and if I knew that anything of my right would reach you, my grave would not accommodate me.” Then if he acts in his property in accordance with what he threatened, that is *taḥwīz* without doubt, and when it is such it is called *tawlīj*.

Many scholars have chosen that nothing falls under it except acknowledgment, and that other transfers of ownership and legal acts remain effective. Others have chosen that it includes acknowledgment and other [acts] as well.

### **[Ruling on the Rights of Allah when Their Specific Objects No Longer Remain]**

The rights of Allah that have become [mere] liabilities in the dhimmah, such as zakats whose specific property no longer remains in kind, and expiations (*kaffārāt*), and the right of a non-specified human being whose owner has become confused – Abū Ḥanīfah, Zayd ibn ‘Alī, and Mālik say that these rights lapse upon death because they are attached to the dhimmah, and the dhimmah is nullified by death.

If he made a bequest concerning them, then there is no disagreement that they do not lapse; so according to them they are taken out from the one-third [of the estate] allowed for bequest. End [of quotation].

**I say:** The meaning of that, as appears to me, is that the estate of the deceased upon whom such rights were due becomes lawful and good for the heirs; because the mentioned rights are attached to the dhimmah of the deceased, not to his property, and the dhimmah of the deceased has been nullified by death. The meaning of that is that it is not possible for the imām or the like to demand the zakat that was attached to the dhimmah of the deceased, because it has already passed and ceased to exist.

As for the deceased, he is responsible on the Day of Resurrection for those rights and will be taken to account for them.

**If it is said:** Does it benefit the deceased if the heirs discharge those rights on behalf of their deceased [relative]?

**I say:** What appears to me is a detailed answer, namely:

- 1- If the deceased died while having the intention to fulfill those rights, but death came upon him suddenly before that, then such a

person is hoped to benefit [from what the heirs do].

- 2- If the deceased died while persisting in rebellion against fulfilling them, then the performance of the heirs does not benefit him; and it can be said: his dhimmah will be cleared of those rights while the sin of rebellion and disobedience remains upon him.

### [Bequests for Providing Iftār to the Fasting Person]

**Question:** There are bequests for providing iftār to the fasting person, and generations continue to inherit them to the point that some do not even know how the bequest originally was or from whom it came, and they divide them among themselves. For example: that it be half a *qadaḥ* (a measure), and they become two households, so that each household [has] a quarter of a *qadaḥ*, then likewise until it becomes for the individual a quarter of an eighth, and so on.

So does it have a defined limit? Or is the whole [amount] considered together upon one of them? Or what should we do when it becomes something very small among many people who may not even come together?

**Answer:** It is obligatory upon every heir of property to which a bequest for a specific amount has become attached to pay his own share, and so on; and every heir is responsible for himself, so he calculates what is due from him in proportion to his share, until the share of the heir from the bequest becomes something that has no value. Then, when it has become like that, nothing is obligatory upon him. This is analogous to what the scholars of the madhhab have said regarding someone who has committed a wrong (*maẓlamah*) against a man, then that man dies and has many heirs, such that if [the compensation] were distributed among the heirs, the share of each heir would be something that has no value; they have said that in this case the *maẓlamah* has fallen from him entirely.

### [Ruling on Bequest to Some of the Children]

**Question:** Is it permissible to make a bequest in favor of some of the children to the exclusion of others?

**Answer – and Allah is the One who grants success:** Allah, *exalted is He*, has already made a bequest concerning the children, and has clarified His bequest to them; so it is not permissible to transgress the bequest of Allah, *exalted is He*, and to oppose it. He, *exalted*, said: "*Allah instructs you concerning your children: for the male is like the share of two females*", then He said at the end of that: "*An obligation from Allah. Indeed, Allah is ever Knowing, Wise*" [al-Nisā':11]. So Allah, *exalted is He*, has informed that He has prescribed that as a prescription and has made it obligatory as an obligation, and that this prescription issues from the requirement of knowledge and wisdom.

Furthermore, bequest was obligatory before the revelation of the verses of inheritance in Sūrat al-Nisā'. Allah, *exalted is He*, said: *"Prescribed for you, when death approaches any of you, if he leaves wealth, is that he should make a bequest for the parents and close relatives"* [al-Baqarah:180]. Then, when the verses of inheritance in Sūrat al-Nisā' were revealed, the Prophet (*may Allah bless him and his family and grant them peace*) said: *"Indeed Allah has given every one entitled [to a right] his right, so there is no bequest to an heir."*

**Yes**, if one of the children has a large family, and is poor and in need, while the rest of the children are in a better situation than him, and the father wishes to bequeath something to this poor child because of his poverty and need – then there is no objection to that.

Likewise, if one of the children shows much kindness and good treatment toward his father, unlike the rest of the children, and the like of that – then this is permissible and constitutes a specific [exception].

The proof of that is His, *exalted is He*, saying: *"Or feeding, on a day of severe hunger, an orphan of near kin"* [al-Balad:14–15], and His, *exalted is He*, saying: *"Is there any reward for good other than good?"* [al-Raḥmān:60]. And even if no evidence had come regarding that from the Sharī'ah, the intellect would itself have specified such cases.

**Yes**, and there is no contradiction between what we have mentioned and the hadith: *"There is no bequest to an heir"*; for what is meant by the hadith is the negation of the bequest that had been obligatory in the beginning of Islam. When the verses of inheritance were revealed, they abrogated it, so the Prophet (*may Allah bless him and his family and grant them peace*) said: *"There is no bequest to an heir,"* meaning that the bequest which had been obligatory upon you and prescribed for you – its obligation has been lifted, so it is not obligatory nor prescribed upon you. What is not meant by that is the negation of validity, which is the closer apparent meaning, because the indications of context show that what is meant is the negation of obligation, and this is not hidden from one who reflects.

Moreover, among what may support what we have mentioned is that it is established in the narration that Allah, *exalted is He*, has made for a person one-third of his wealth at the end of his life with which he may dispose by bequest and by drawing near to Allah with it in whatever avenues of righteousness he wishes; and the people with the greatest claim to righteousness and to drawing near to Allah through righteousness toward them are those who are closest, then those who are next closest.

**If it is said:** It is narrated from the Prophet (*may Allah bless him and his family and grant them peace*): *"Fear Allah and treat your children*

equally.”

**We say:** [The hadith is] specific to what we have mentioned. Also, the one who gives his children, each according to his need, is not contradicting equality; for the one who spends on his young and his adult children, and clothes them both, is equal between them, even if the adult needs many times what the young one needs, in terms of larger garments and greater food.

### **[Ruling on the Division of Debts Owed to the Deceased among the Heirs]**

**Question:** If a deceased person dies and he has many debts owed to him by people, and all of them are expected [to be paid], is it valid for the heirs to divide them among themselves such that the debt owed by so-and-so is [assigned] to so-and-so, and that owed by so-and-so is [assigned] to so-and-so, and so on?

**Answer:** What appears is that this is permissible.

**If it is said:** Division (*al-qismah*), in meaning, is a sale, and there has come a prohibition of selling a deferred debt for a deferred debt (*bayʿ al-kālīʾ bi-l-kālīʾ*).

**We say:** As for division of cash – whether it is a debt or present [in hand] – it is not a sale; rather, it is a separation (*ifrāz*). Likewise is the case with all fungible things; and the division that is in the meaning of a sale is in the division of non-fungible items (*al-qīmiyyāt*).

### **Benefit (regarding priority)**

In the marginal notes: Priority (*al-awlawiyyah*) is established in four situations: in *muḍārabah* (profit-sharing partnership), in partnership regarding the upper and lower [stories of a building], in *mughārasah* (planting partnership), and the fourth is in what the executor sells in order to pay a debt or the like; in that, the heir has priority.<sup>1</sup>

### **[When a father places his grandson in inheritance in the position of his deceased son]**

**According to the madhhab:** If a father places his son’s son, in the inheritance, in the position of his (deceased) son, that is a bequest. The one-third is carried out, together with whatever else he has bequeathed, and whatever exceeds the one-third is not carried out except to the extent approved by the heirs.

And appointing the substitute (*al-maqām*) from among the grandchildren does not cause any reduction for either of the spouses; because it is as though the testator is making the bequest of the

1- *Sharḥ al-Azhar*, 4/502.

substitute out of the shares of the remaining heirs, other than the spouses... and so on, from *al-Tāj*.

**I say:** This applies when it is known from the intention of the testator that what he means by the bequest to the substitute is that it be taken from what his remaining children would have been entitled to. For example, he has six sons and a wife, and he has a son's son who is not from these six. So he says to his sons: "My sons, my wife will take one-eighth, and there remain for you seven-eighths of the estate, and I have made my son's son the seventh among you in these seven-eighths; he shall have the seventh share as a bequest from me." If the deceased explicitly states something like this, or such is understood from his intention, then no diminution enters upon the wives from their shares, and the bequest comes out of the shares of the children.

As for when he does not state that explicitly and it is not understood from him, then it is proper that the share of the substitute be taken proportionally from the whole estate; then the remainder is divided according to the prescribed shares set out by the Sharī'ah, and in that case the diminution affects the wives and others.

#### **[A father's bequest to his son that he perform Hajj on his behalf]**

**Question:** A man instructed his son in his will that he should perform for him the Hajj of Islam. The man died, and his son had not yet performed Hajj for himself. Is it valid for the son to perform Hajj on behalf of his father while he has not yet performed Hajj for himself? And is it valid that the son perform Hajj for himself and hire one of the righteous, sound men to perform a Hajj on behalf of his father? Bearing in mind that the son wants to hasten to carry out the bequest and does not like to delay it, and that the father did not specify a particular year.

**Answer:** If the son is able [financially and physically] to perform Hajj for himself, then it is not appropriate for him to perform Hajj on behalf of his father or on behalf of anyone else. He must first perform Hajj for himself, then [after that] perform Hajj for his father or for someone other than his father.

If the son knows from his father's state that he chose him for Hajj only because of his righteousness, and that his only motive in appointing him was that righteousness, then there is no objection to the son hiring one of the righteous, sound men [to perform Hajj on his father's behalf].

But if the father appointed his son for some purpose other than mere righteousness, in addition to that righteousness, then it is not permissible for the son to hire another man for Hajj. The obligation upon the son is that he first perform Hajj for himself, and then perform Hajj for his father. This is what is indicated by the words of the scholars of the madhhab.

**Yes**, it may be permissible for the son to hire a hired person to perform Hajj on behalf of his father in a case where the son thinks it is unlikely that he will be able to perform Hajj for his father later on, due to illness, or for financial reasons, or for political reasons, or the like. In such a circumstance for the son, it is valid for him to hire someone to perform Hajj on behalf of his father, in light of His, *the Exalted's*, saying: "*Allah does not charge a soul except [with that within] its capacity*" [al-Baqarah:286], and His, *the Exalted's*, saying: "*So fear Allah as much as you are able*" [al-Taghābun:16], and the hadith of the Prophet (*may Allah bless him and his family and grant them peace*): "*When I command you with a matter, do of it what you are able.*"

### **[The heirs' permission to the testator, then their retraction]**

In *al-Bayān*: If the heirs permit the testator to [bequeath] more than one-third, or they approve what he has already bequeathed, then they return from that permission before his death, their retraction is valid according to the Qāsimiyyah, contrary to al-Nāṣir and al-Ṣādiq. If they retract after his death, then it is stated in *al-Aḥkām* that their retraction is not valid. And in *al-Funūn*, and [this is also the view of] al-Mu'ayyad bi-llāh, Abū Ḥanīfah, and al-Shāfi'ī: it is valid without restriction. Mālik said, and this was chosen by al-Faqīh Ḥasan: If their approval was during the testator's death-illness that is feared, their retraction is not valid; but if it was before that, their retraction is valid, because their approval occurred before their right was established. End [of quotation].

**I say:** Just as it is permissible for the testator to retract his will, reject it, and substitute another will in its place, likewise it is permissible for the heirs to retract their permission to the testator to bequeath more than one-third. This is in a case where the retraction occurs before the testator's death, and this is the madhhab, as is alluded to in *al-Bayān*.

On this basis, it is permissible for them also to retract after the death of the testator, since nothing exists that would justify differentiating [between before and after death].

The proof of that is that authorizing the testator to make a bequest is not a transfer of ownership to the legatee (*al-mūsā lahu*). Therefore, they may retract this permission before [the property] comes into the hand of the legatee. But once it has come into the hand of the legatee, retraction is no longer valid; for the legatee has acquired ownership of it by taking possession on the basis of the permission and the bequest.

And the proof that the bequest alone does not confer ownership is that it requires acceptance, according to Abū al-'Abbās, al-Mu'ayyad bi-llāh, and one of the two opinions of Abū Ṭālib and al-Shāfi'ī, and that it is nullified by rejection.



### [Ruling on the heirs' authorization for someone who is sick]

If the heirs authorize the sick person to bequeath more than one-third, they have no right to retract that after his death. Thus it is in *al-Aḥkām*. And in *al-Funūn*: they may retract after the death of the testator; and this is also the position of al-Mu’ayyad bi-llāh, Abū Ḥanīfah and his companions, and al-Shāfi‘ī. This is the meaning of what is stated in *Uṣūl al-Aḥkām*.

**I say:** The madhhab is the first view, as in the *Sharḥ*, and it is the closer to correctness.

**If it is said:** Their waiving of their right during the life of the sick person is a waiving of it before it has been established; what ought to be taken into account is their waiving after the right has been established for them, and it is not established for the heirs except after death. And by analogy with the right of pre-emption (*shuf‘ah*): waiving it before the sale is not considered, and it is not extinguished except by waiving it after the sale.

**The answer:** The heirs' right has already attached to the property of the sick person to some extent. The evidence for that is what has been reported: *“Indeed Allah has given charity to you with one-third of your wealth at the time of your death, as an increase in your good deeds.”* Thus, the sick person has no more than one-third of his wealth with which to dispose; Allah, exalted is He, has given that to him as charity. Before the fear-inducing illness, he was permitted to dispose of all his wealth as he wished. This indicates clearly that the heirs' right has attached to the wealth during the illness that is feared.

In that case, when the heirs permit the sick person to bequeath more than one-third and then the sick person dies, they have no right to retract what they permitted; because they permitted disposal in a right that was already established for them at the time of the permission. In this way, the invalidity of the analogy with waiving the right of pre-emption before the sale becomes clear; for the right of pre-emption is not established for the pre-emptor until after the sale, and so his waiving it before it is established is not considered.

Furthermore, what is mentioned in *al-Aḥkām* is supported by the following:

1. That it entails fulfilling the promise and adhering to truthfulness, and Allah, exalted is He, has praised those who do so and condemned the breaking of promises and the failure to fulfill covenants.
2. That it entails safety from quarrelling and dispute.
3. That it entails doing good to the deceased and showing dutifulness toward him.

### [Revocation by a Grandfather of his Transfer of Ownership to His Grandson]

**Question:** If a grandfather gives his son's son property in full ownership, is it valid for him to retract or not?

**Answer – and Allah is the One who grants success:** If the grandfather has transferred property to his grandson with a valid transfer of ownership, then the grandson has acquired that property by virtue of that transfer. Based on this, it is not valid for the grandfather to retract and take back that property except with the willing consent of his grandson. This is due to the saying of the Prophet, *May Allah bless him and his family and grant them peace: "The property of a Muslim is not lawful (for another) except with his willing consent."* And due to the saying of Allah the Exalted: *"O you who believe, do not consume one another's wealth in false ways, but only through trade by mutual consent."* [al-Nisā':29]

And His saying, *Exalted is He: "Give women their bridal gifts graciously; if they willingly forgo any part of it for you, then enjoy it in contentment."* [al-Nisā':4] It is not valid to make an analogy between the grandfather and the father regarding the permissibility of retracting, because the father—as the jurists have said—is an exception to the normal rules of analogy; therefore, the grandfather and the mother are not to be analogized to him.

### [When It Is Impossible to Divide a Specific Property Between an Heir and a Creditor]

In *al-Tāj* it is stated: If the specific property has a value greater than the debt, and it is impossible to divide it between the heir and the creditor, and it cannot be sold except as one whole, the one who refuses (to sell) is compelled to sell it in order to fulfil the right of the other. End of quote.

**I say:** The same applies to any merchandise shared between two partners or more: if one of the partners is compelled to sell his share in order to pay a debt or similar necessity, and it is impossible to sell only his share by itself, then the one who refuses to sell is compelled to agree to its sale. The partner or partners have priority in buying the share of their partner if they wish to purchase it.

### Benefit [Concerning the Debt of the Deceased]

**According to the school:** It is permissible for some of the heirs, if the deceased did not appoint an executor, to collect the debts owed to the deceased and to pay his debts. He may not take exclusive possession of what he collects of those debts; rather, it belongs to all the heirs, even if

what he collected equals no more than his own share.<sup>1</sup>

If the one who collected the debt consumes any part of what he collected, he is liable for it to the rest of the heirs. The rest of the heirs may not turn for compensation back to the person who was indebted to their predecessor. The scholars of the school stipulated in this issue that the one who collects the debt must be trustworthy and reliable, even if he is a sinner (fāsiq).<sup>2</sup>

**I say:** The debtor is discharged of liability by paying the debt to one of the heirs if that heir is trustworthy and reliable, even if he is a sinner. If there is no heir who is trustworthy and reliable, then the debtor must pay to each heir his share of the debt, because of the saying of Allah the Exalted: *“Indeed Allah commands you to render trusts to those entitled to them.”* [al-Nisā’:58]

And because debt is a trust, as indicated by His saying in the verse of debt: *“If one of you entrusts another, let the one entrusted deliver his trust, and let him fear Allah, his Lord.”* [al-Baqarah:283]

### [The Presence of Two Wills for a Deceased Person]

**Question:** Children found, after their father’s death, a document containing a will of their father. Then they found another will for him on another sheet of paper. What should the children do? Both wills are dated. Should they act upon both wills and carry out what is in them, or should they carry out only the last will?

**Answer – and Allah is the One who grants success:** What is obligatory is to execute the last will, and the children are not obliged to execute both wills; rather, it suffices to execute the latter one. We say this by way of judgment in accordance with what normally occurs: a person does not write a second will except when his opinion has changed from what was in the first will. It is extremely far-fetched that he would bequeath one-third of his wealth to Zayd in the first will, then bequeath one-third of his wealth to ‘Amr in the second will, and intend both matters together. Based on what we have mentioned, the one-third of the estate belongs to ‘Amr, not Zayd.

**If it is said:** The one-third was definitively established for Zayd by the first will, and definitively established for ‘Amr by the last will, so the one-third should be divided between them in halves, acting upon both wills; and it is not permissible to deprive Zayd, the beneficiary of the first will, without a decisive proof eliminating what was established for him in that first will.

1- Sharḥ al-Azhar 4/513–514.

2- Sharḥ al-Azhar 4/513–515.

**We say:** It would be definitive that the one-third had been established for Zayd by the first will *if* the deceased had not subsequently bequeathed that one-third to another man. As for when he has indeed bequeathed it to another man, it is no longer definitive that the one-third remained established for Zayd.

As for when the first will contains bequests relating to injustices and expiations such as zakāt and debts, while the second does not, and it has not become apparent to the heirs that the deceased cleared himself of these obligations, and they have no strong assumption that he did, then what is closer to correctness is that they should carry out what is mentioned there for two reasons: **First:** In order to clear their deceased's liability. **Second:** Because those mentioned rights are attached to the property; thus they must be taken from the estate even if the deceased did not bequeath them, whenever it is known that they remain due in his liability. Allah the Exalted has said: *"After any bequest you make or debt."* [al-Nisā':12] And the term "debt" can include expiations, zakāt, monetary debts, and the wrongfully taken property of others.

**If it is said:** Perhaps the deceased omitted mention of these rights in the second will because he had already discharged them, or for some similar reason.

**We say:** The basic presumption is that the obligation remains; one should not rule it removed unless the heirs attain knowledge or a strong assumption that the deceased has actually fulfilled what the first will mentioned. If they have neither knowledge nor strong assumption of that, it is obligatory for them to pay out what the first will contained of such rights, as we have mentioned.

As for when the first will contains a bequest for Hajj: If the deceased had already performed the obligatory Hajj of Islam, then his omission of mention of Hajj in the second will is evidence that he has retracted that bequest for Hajj. But if the deceased had *not* performed the obligatory Hajj of Islam, then it is proper for the heirs to have Hajj performed on his behalf, in order to clear his liability.

This is when it becomes clear to them that Hajj was obligatory upon him and he did not perform it. As for when it becomes clear that Hajj had *not* yet become obligatory upon him, then they are not obligated to have Hajj performed on his behalf, because at that point the obligation of Hajj was not in his liability.

The proof for this issue and the one before it is what has been narrated from the Prophet, *May Allah bless him and his family and grant them peace*, that he said: "... So the debt owed to Allah has more right to be repaid."

**Yes,** all that we have mentioned here applies in the case where the

heirs know which of the two wills preceded the other. As for when the dates of the two wills are unknown, and they do not know which is earlier and which is later, or when one of them is dated and the other undated, then what is required is to divide, for example, the one-third (in the earlier example) between Zayd and ‘Amr, and to act upon what both wills contain—except in matters that are duplicated, where it suffices to act upon one of the two, such as when both wills contain the bequest for one Hajj: one Hajj is sufficient. The same applies to expiations, zakāt and wrongs done to people’s property when the two wills are identical in that; but if one will mentions more of these rights than the other, then it is obligatory to pay the additional amount as well.

### **[Ruling on One Who Bequeaths an Apartment in His Building]**

**Question:** A man bequeathed one apartment of his building in order to increase his good deeds which would continue to reach him after his death, for him and his parents. He did not specify who should receive the revenue of that apartment, and he appointed one of his children as the executor. To whom should the revenues of the apartment be given?

**Answer – and Allah is the One who grants success:** In this case, the bequest is in the position of an endowment (waqf). Therefore, it is not permissible for the heirs to sell that apartment, nor for them to divide it among themselves, nor to take its revenues for themselves. The executor must spend what comes from the revenues of the apartment on believing poor people. If there are poor people among the deceased’s relatives, they have priority, because of the hadith: *“There is no charity when a relative is in need.”* (mentioned in the books of hadith with this meaning)

And because it is narrated that one of the Companions made his garden charity for Allah, so the Prophet, *May Allah bless him and his family and grant them peace*, said to him: *“Make it for your relatives.”*, or however he said.

From this, Allah *the Exalted* placed the mention of near relatives before others in His saying: *“Worship Allah alone and associate nothing with Him, and be kind to parents, relatives, orphans and the poor ...”* [al-Nisā’:36] If the relatives become self-sufficient or are wealthy, the executor is to direct the revenues to the poor and the needy.

He may also spend from it on himself if he is in need, and on his children if they are in need.

### **On Bequeathing to an Heir]**

In the well-known hadith: *“There is no bequest for an heir,”* Imām al-Hādī (*peace be upon him*) said: This is with regard to what is beyond the one-third. As for the one-third, he may bequeath it to whom he wishes, whether near of kin or distant.

Others said: It is not permissible to bequeath to an heir at all, neither a little nor a lot, unless the other heirs ratify it.

**I say:** All are agreed on the authenticity of the hadith, "There is no bequest for an heir." Bequest, in the beginning of Islam, was obligatory for parents and close relatives. Then when the verses of inheritance in Sūrat al-Nisā' were revealed, the Prophet (*may Allah bless him and his family and grant them peace*) said: "*Indeed Allah, Exalted is He, has given every one entitled to a right his right, so there is no bequest for an heir,*" or words to that effect.

Moreover, among what is commonly agreed upon as authentic is what came in the story of al-Nu'mān ibn Bashīr gifting something to one of his children. He came asking the Prophet (*may Allah bless him and his family and grant them peace*) to witness it. The Prophet said to him: "*Have you given all of your children the like of this?*" Al-Nu'mān replied: "No." He said: "*Then seek someone else, for I do not bear witness to injustice.*" This is the meaning of the narration. In it also: "*Do you love that they should be equal in dutifulness toward you?*" and in another wording: "*Fear Allah and treat your children equally.*" These indicate that a bequest ought not and is not permissible for some of the heirs to the exclusion of others, neither in a small amount nor a large one.

**If it is said:** Allah, *Exalted is He*, has granted the Muslim, at the end of his life, one-third of his wealth with which he may dispose as he wishes, whether the heirs are pleased or displeased; so he may direct it to near or distant [recipients].

**We say:** Yes, he may do that, on the condition that he treats his children equally if he chooses to place it among them.

**Yes,** it is permissible for him to bequeath something of his wealth to some of the heirs to the exclusion of others when it is by way of rewarding him for his kindness and dutifulness toward him, or the like of that among cases where rewarding and giving is fitting and appropriate.

### **Benefit: [That It Is Obligatory upon the Imām to Assume the Liabilities Owed by Deceased Muslims]**

In the margin of the *Sharḥ* it states: As for his liability (i.e. the deceased), it is discharged by payment from the heir or the executor, or by the absolution granted by the Imām or the judge, in the rights of human beings and the rights of Allah, *Exalted is He*, once those rights have been duly established before them. Tihāmī's comment ends. (قرئ)<sup>1</sup>

**I say:** It is obligatory upon the Imām of the Muslims and their ruler to

1- *Sharḥ al-Azhar*, 4/472.

assume, on behalf of deceased believers, what is upon them of liabilities, whether they are [rights] due to Allah or to human beings.

The proof of that is that the Messenger of Allah (*may Allah bless him and his family and grant them peace*) used to assume them, and would say: “*What the deceased leaves of wealth is for his heirs, and what he leaves of debt is upon me,*” or words to that effect.

We have only said that this is obligatory upon the Imām of the Muslims and their ruler because the Imām stands in the place of the Messenger (*may Allah bless him and his family and grant them peace*), and thus it is incumbent upon him to undertake what the Prophet (*may Allah bless him and his family and grant them peace*) used to undertake.

On this basis, if the Imām or the judge absolves the deceased, the deceased is cleared of liability and the debt transfers to the Imām or the judge. And Allah knows best.

**Benefit: The Prophet (*may Allah bless him and his family and grant them peace*) Will to Abū Dharr (*may Allah be pleased with him*)**

Ibn Sa’d narrated in *al-Ṭabaqāt*, through the chain of ‘Ubādah ibn al-Ṣāmit, from Abū Dharr, who said: “My close friend (the Prophet, *may Allah bless him and his family and grant them peace*) enjoined seven things upon me: that I love the poor and draw near to them; that he ordered me to look to one who is below me and not look to one who is above me; that he ordered me not to ask anyone for anything; that he ordered me to maintain ties of kinship even if they turn away; that he ordered me to speak the truth even if it is bitter; that he ordered me not to fear, for Allah’s sake, the blame of any blamer; and that he ordered me to say often: ‘There is no power and no might except with Allah,’ for they are from a treasure beneath the Throne.” This is the end of the passage from *al-Ghadīr*.

**[Ruling on the Testator Stating in His Will that He Forgives Everyone]**

**Question:** A dying person states in his will that he forgives everyone, whether near or far, releases them, and gives up every right and every wrong done to him by people. This is the meaning of what the dying person bequeaths and has witnessed. Is that sufficient for whoever has wronged the deceased, so that the deceased’s liability is cleared, or not?

**Answer – and Allah is the One who grants success:** It appears that his liability and the liability of everyone who has wronged the deceased is cleared, except that what appears to me is that this clearing of liability is within the limits of what customarily falls under mutual forgiving at the time of death and in wills. These are the wrongs that occur between neighbours, relatives, kin, companions, people of the same town, and

business associates – wrongs which habitually occur, such as taking a piece of meat (*firsah*), or picking a fruit, or an overcharge concerning water, or taking a bundle of fodder or firewood, or taking a rope, or a leftover amount, or overreaching in the price of two small purchases, and the like of that which frequently occurs in custom among those we mentioned.

As for when the wrong is great, such as seizing his land or his farm by false testimony, or by bribery, or by a perjurious oath, or seizing it by force, or stealing his car, or the like, then the taker is not cleared merely by what the deceased writes in his will.

We have only said this in accordance with what custom and usage indicate: that what is intended by such general forgiving is what we have just described of minor wrongs, not the major wrongs.

What further supports this is that the dying person, along with that, usually mentions what people owe him of debts; he only releases and forgives what is beyond that among minor things. This is what has become apparent, and Allah knows best.

### **[Matters of Bequest That May Not Be Revoked]**

Among bequests there are those which may not be revoked, such as an admission (*iqrār*) and a vow (*nadhr*), or when the bequest relates to a duty already incumbent upon him toward a human being or toward Allah, *Exalted is He*. Such a bequest may not be revoked. Whatever falls outside that, among bequests, the testator may revoke in word and deed.

### **[Some Rulings Related to Bequests]**

**According to the *madhhab*:** A bequest to one who does not yet exist is invalid. So if he bequeaths to what will be born from the pregnancy of a particular woman after his death, the bequest is invalid.

– If he says: “I bequeath such-and-such to the heirs of so-and-so,” no one is included except one who exists at the testator’s death, not one who comes into existence afterwards; because this is a transfer of ownership of a particular property, and so it is not valid for a non-existent person.

– If he bequeaths one-third of his wealth or one-quarter of it, and he possesses wealth at the time of the bequest, then his wealth later increases, the reference is to what existed at the time of the bequest, even if [afterwards] it decreases – so one-third or one-quarter of that initial amount is taken out. If the wealth that existed at the time of the bequest diminishes until it is destroyed, and after that the testator acquires new wealth, then the reference is to what exists at the time of death.

– A bequest is valid to a specific *dhimmi* (non-Muslim under covenant)



and to a specific open sinner (fāsiq), and nearness to Allah (qurbah) is not a condition in it. But it is not valid for “the sinners” in general, for then it would be an incitement to sin.

And it is also not valid for a disbeliever who is in a state of war (kāfir ḥarbī), because of what has come of the prohibition of being kind and just toward them in His saying, *Exalted is He: “Allah does not forbid you from dealing kindly and fairly with those who have neither fought you because of your faith nor driven you out of your homes. Surely Allah loves those who are fair. Allah only forbids you from befriending those who have fought you for your faith, driven you out of your homes, or supported others in doing so. And whoever takes them as allies, then it is they who are the wrongdoers.”* [al-Mumtahanah:8-9]

– What does *not* fall away by death is a human being’s debt, such as a loan, compensation (arsh), dower (mahr), price of what was sold, and the value of what has been destroyed.

There is disagreement concerning the rights of Allah, *Exalted is He*, which have become liabilities in the dhimmah, such as zakāt whose specific property no longer remains in kind, expiations (kaffārāt), and the right of a non-specified human being whose owner has become unknown. Abū Ḥanīfah, Zayd ibn ‘Alī (*peace be upon him*), and Mālik say: These rights lapse by death, because they are attached to the dhimmah, and the dhimmah is nullified by death – and this is so long as he has not bequeathed them. If he has bequeathed them, then there is no disagreement that they do not lapse. This is what is conveyed in *al-Tāj* as the view of the madhhab.

**I say:** The executor may not discharge what is subject to such disagreement except by a judge’s ruling or with the consent of all the heirs.

– The executor acts according to the madhhab of the testator with respect to what was incumbent upon the testator during his life. So if the testator used to hold that zakāt is obligatory in vegetables, and zakāt had become due upon him, then it is obligatory upon the executor to pay it out even if his own madhhab is that there is no zakāt in them. As for what relates to the future, the executor must act according to his own madhhab, in obligation or its absence. As for the type of recipients (maṣraf), the executor acts according to *his* madhhab in all cases.

When a minor attains puberty, he pays his zakāt, for what has passed, according to the madhhab of the executor. As for what lies ahead, he pays it according to his own madhhab.

### **[The Owner Dividing His Property Among His Heirs by Way of Specification]**

In the marginal notes of the commentary: If the owner divides [his

property] among his heirs by way of specification and division, so that each heir has an amount equal to his share, then this is valid if they accept that; and acceptance is [a form of] consent, and their acceptance is like ratification, so they may then retract during his lifetime only. Finished (*Taqrir*) (قرير)<sup>1</sup>.

**I say:** Perhaps these words concern a case where the division among the heirs is devoid of a transfer of ownership. As for when the owner calls witnesses and actually transfers to each of the heirs ownership of what has fallen to him of his portion, and they accept that, then retraction is not valid and is not accepted, neither during life nor after death, because of His, *the Exalted's*, saying: "*O you who have believed, fulfil [all] contracts*" [al-Mā'idah:1], and this is when the transfer of ownership fulfils the conditions of validity, among them that the division be according to the shares prescribed by Allah, *Exalted is He*.

### [Inheritance]

**Question:** A man inherited wealth from his father, and his father had been chaste, scrupulous regarding people's wealth, and religiously committed. Then, after twenty-five years, a man came to that heir and said to him: "Such-and-such an item was not your father's; rather, it belonged to so-and-so." Then another man came and said the same. This is while that so-and-so has never claimed nor requested that item, neither before nor after, and we have remained in possession of that item during the lifetime of the deceased and after him. What is required of us in this regard?

**Answer – and Allah is the One who grants success:** If the matter is as described, then there is no problem and no sin, and nothing is required of you. So dispose of that item as you wish. However, if the man who is said to own the item were to make a claim before the judge and establish sound, just, conclusive proof that it is his property, then it would be obligatory upon you to comply with the judgment.

**Yes,** if the heir attains full knowledge that this item does indeed belong to so-and-so, then it is obligatory to hand it over to him without quarrelling or disputing.

### [A Man Who Deliberately Killed His Relative While Being His 'Aṣabah – Does He Inherit Him?]

**Question:** A man deliberately killed his relative, and the killer is the closest 'aṣabah (agnate heir) of the murdered person. At the time he killed him, his (the killer's) wife was pregnant with a child. Who receives

the ‘aṣabah [share]?

**Answer:** Those entitled to fixed shares take their fixed shares, and the remainder is taken by the ‘aṣabah of the murdered person who are next after the killer. In the case mentioned in the question, the ‘aṣabah are taken by the killer’s son, with whom his mother was pregnant, if he is born alive, and no share belongs to anyone born after him. The proof of this is that it is established in the narrations that the deliberate killer does not inherit; and when he does not inherit, his existence is as non-existence. At that point, the ‘aṣabah belong to the closest agnate to the murdered person, other than the killer, and the closest in this case is the killer’s son.

### **[How One Who Holds an Inheritance and Wants to Discharge It Should Act]**

**Question:** A man has a sister, and she has an inheritance with him. He wishes to rid himself of that inheritance. Whenever he asks her to come for the division, or asks her to appoint an agent, she absolutely refuses, weeps, and swears that she will not divide with her brother, and that she wants nothing of the inheritance, neither little nor much. However, the brother wants to free himself from responsibility regarding the inheritance. How is he to proceed in dividing the estate?

**Answer – and Allah is the One who grants success:** If the brother wants the division, then let him bring together all the partners jointly owning the estate, and let them choose two just men to enumerate and value the estate. Then let them choose for themselves a just divider (*qassām*). Then the brother appoints an agent on behalf of his sister, or the brother himself acts as his sister’s agent; for he has the right to do that, since his sister’s apparent renunciation of her share in his favour implies authorizing him to dispose of it as he wishes.

On this basis, the divider designates the share of each heir separately, and designates the sister’s share separately, and it is written in an independent document, with its scribe and its witnesses; then he hands this document to his sister in her own hand.

### **[Benefit Regarding the Ruling on Fixing a Time Limit in Bequeathing Specific Items]**

In *al-Tāj*, in the Book of Bequests: As for bequeathing specific items, any time-limitation is null and void, and the legatee becomes entitled to them permanently, and they are inherited from him as in the case of a gift. The same, they said, applies in the case of a vow, a gift, and charity.

**I say:** It is more correct that the time-limitation is not null and void. When the period ends, the specific item returns to the heirs. The proof of that is that fixing a term in a bequest of a specific item is evidence that the testator only intended to bequeath its *use*, as when he bequeaths his

house to so-and-so for a year, or his farm, or his riding animal. This is in matters where benefit can be derived from the thing while it remains. But if he bequeaths something from which no benefit can be derived except by consuming it, then the time-limitation is null, such as bequeathing food or coins.

Evidence can be sought for what we have mentioned from the hadith: *"The property of a Muslim is not lawful except with his willing consent,"* and His, *the Exalted's*, saying: *"And do not consume one another's wealth unjustly ..."* [al-Baqarah:188]. For the giver, or donor in charity, or testator, or one making a vow of his house to so-and-so for a year, after which it returns to him or to his heirs, has not willingly consented to anything beyond that year, nor is he pleased with that, nor did he intend it; and no scholars or judges had previously warned him that if he fixed a term for his gift, that term would be void and it would become perpetual.

**Yes**, if the giver, or donor in charity, or testator is among the scholars acquainted with such rulings, the judgment against him is that it is perpetual, unless he claims ignorance; then his statement is accepted, for the basic presumption for a human being is ignorance.

### [Ruling on an Entailed Estate (Waqf)]

**Question:** A woman bequeathed a Hajj from her inheritance, and this inheritance is from an estate entailed (*waqf*) upon the descendants which is neither to be sold nor given away. Another man from the people of this entailed estate sold his share to some of the heirs. What is the ruling on that?

**Answer – and Allah is the One who grants success:** The mentioned estate belongs to Allah, *Exalted is He*. The descendants possess nothing of it except by misappropriation (*ghulūl*). It is not valid for the woman to bequeath what she does not own, and likewise it is not valid for the man to sell what he does not own.

However, it is permissible for the man to relinquish his share in the waqf to his partner in that waqf, and likewise he may lease it out. His renunciation and his leasing become void upon his death, because his right in the estate has ceased and passed to his heirs.

### [Ruling on the Eldest Sibling's Disposal in the Estate]

**Question:** A man has partners in an estate who are orphans. He undertakes to grow and manage the wealth, and substantial income is obtained for him and for his orphan brothers through that. Is it permissible for him to lend something from the estate in the manner commonly practiced? And is it permissible for him to give to the beggar and the needy and the like, which those who possess wealth are usually tried with?

**Answer – and Allah is the One who grants success:** What appears is that the man mentioned in the question is permitted to do what is mentioned in the question, on condition that he does not exceed the customary limit; and it is not permissible for him to give to the beggar, the needy and the like more than such people are ordinarily given by someone like him.

We have only said that this is permissible because of the common custom of feeding and honouring the guest, and giving to the beggar, and the like. The scholars of the madhhab have mentioned something similar regarding the slave who has been given permission to trade, as in the *Sharḥ*. As for a partner of the orphan who does *not* undertake to manage and grow the wealth, it is not permissible for him to give anything from it.

### **[When a Deceased Person Dies Owing Debts to Allah and to Human Beings]**

If a deceased person dies while owing debts to Allah, the Exalted – such as zakat, expiations (kaffārāt), and vows (nudhūr) – and also owes debts to human beings, then it is obligatory that these be taken out (from the estate) and paid off.

If the estate is not sufficient to cover what is upon him, the scholars have differed on this. Some of them said: the debts owed to human beings are given precedence, so they are paid off before the debts owed to Allah, because Allah is the most generous of creditors. Others said: no category of debt is given precedence over another; rather, the estate is apportioned among all the debts together – the debts owed to Allah and the debts owed to human beings.

Yet others said: the debts owed to Allah, *the Exalted*, are given precedence over the debts owed to created beings, because of the hadith: “*The debt owed to Allah has more right to be fulfilled.*”

**I say:** I find myself inclined to the second view, namely that the debts are equal – the debts owed to Allah and the debts owed to human beings – and that is because:

1. They all share in the obligation of being paid.
2. And because, when the person dies, the debt moves from his liability (*dhimmah*) to his wealth, as evidenced by His saying, *Exalted is He*: “*...after any bequest he may have made or debt.*” [al-Nisā’:11] Thus every debt must take its share from his wealth.

What is appropriate to say is that a debt which is established with certainty is given precedence over a debt that is merely presumptive; so whatever payment is certainly obligatory must be given precedence over what is only deemed obligatory on the basis of conjecture.

### [Explanation of the Walā' of Mutual Alliance]

Walā' is of two types: the walā' of mutual alliance (walā' al-muwālāt), and the walā' of manumission (walā' al-'itāq).

As for the walā' of mutual alliance: it is that a person at war (a non-Muslim enemy) embraces Islam at the hands of a Muslim, whether through his exhortation, his disputation, or the like. When he embraces Islam at his hands, walā' is established for him (i.e. for the one who called him). The Messenger of Allah (*may Allah bless him and his family and grant them peace*) explained walā', saying: "*Indeed, it is a tie like the tie of lineage,*" meaning a kinship-bond similar to the kinship-bond of blood. So if that erstwhile enemy who embraced Islam dies, then the one who called him to Islam has the strongest claim to his inheritance, if he has no heirs from among the Muslims.

### [Writing Takes the Place of Speech]

The pen is one of the two tongues. And Allah, *Exalted is He*, said: "*Read, and your Lord is the Most Generous, Who taught by the pen.*" [al-'Alaq:3-4] And He, *Exalted is He*, said: "*Nun. By the pen and what they inscribe.*" [al-Qalam:1] And the *Exalted* said: "*So woe to those who write the 'Scripture' with their own hands, then say, 'This is from Allah,' in order to exchange it for a small price. Woe to them for what their hands have written, and woe to them for what they earn.*" [al-Baqarah:79] And the *Exalted* said in the verse of debt: "*O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write it between you in justice...*" to the end of the verse. [al-Baqarah:282] And Allah mentioned the letter of the Prophet of Allah Sulaymān (Solomon) (*peace be upon him*) to Bilqīs: "*Indeed, a noble letter has been delivered to me. Indeed, it is from Solomon, and indeed, it reads: 'In the name of Allah, the Entirely Merciful, the Especially Merciful. Be not haughty with me but come to me in submission [as Muslims].'*" [al-Naml:29-31]

And Mūsā (Moses) (*peace be upon him*) came to the Children of Israel with the Torah written upon tablets. And the Prophet (*may Allah bless him and his family and grant them peace*) wrote to the kings, inviting them to Islam. All of this indicates that writing takes the place of speech and fulfils its function.

### [Has the heir the right to prevent his predecessor from making a waqf (endowment)?]

**Question:** A woman died leaving a husband and a son of her paternal aunt, and no one else. How is the inheritance to be divided?

**Answer:** The husband has one half of what his wife left, and the son of the paternal aunt has the other half.

**Question:** And does this woman have the right to dedicate some of her

wealth as a *waqf* for a mosque or some public benefit, placing the authority over that under her husband and in his hand? And does her cousin [the son of her paternal aunt] have the right to object to her?

**Answer:** If the woman is in good health and well-being, then she has the right to do with her wealth whatever she wishes, whether *waqf*, vow, sale, or transfer of ownership. Whatever she does of that or of other forms of disposal is valid, and no one has the right to object to her – neither the husband nor anyone else.

As for if she does that while in her death-illness, then her disposal is valid only in one-third of her wealth, and not in more than that, except with the permission of her heirs.

**[A family who all died by a strike from an airplane – how is their inheritance divided?]**

**Question:** A question came to me about a family composed of a man, his wife, his sons, their wives, and the sons' children who were young – all of them died together from a large bomb dropped by an airplane which utterly demolished the house, killed them all, and tore their bodies apart. They asked: What is the ruling concerning the division of what they left, knowing that the man who was the head of the family left five daughters who were not killed with them in the house; and that the wives of this man's sons, who died by the bomb, had fathers and mothers. What is the share of those fathers and mothers, and what is the share of the five daughters from what was left by the man who is the head of the family?

**Answer – and success and right guidance are from Allah:** What appears is that those who were in the house were all killed in a single instant, so none of them inherits from the others, even if we suppose that the souls of some of them left their bodies before the souls of the others. That is because whoever is struck by a certainly fatal wound – such as one whose body is cut in half or the like – is in the ruling of a dead person, even if his soul has not yet departed.

On this basis, two-thirds of the estate of the first man belong to the five daughters, and the remaining one-third belongs to the *‘aṣabah* (agnatic heirs), if they exist, and no part of his estate belongs to anyone else whatsoever. This is what the scholars of the madhhab have said regarding those who are known to have died in a single moment, as is stated in *Jawharat al-Farā'id*.

– It is not valid, regarding those who all died in a single moment, that they inherit from one another; this only applies in the case where it is unclear which of them died before the other.

Some have said that they do inherit from one another, but the correct view is what we have mentioned, as stated by the scholars of the

madhhab, because inheritance is a ruling from Allah, which He has made for the living from the dead; therefore, none is entitled to inherit except one who is alive after the death of the deceased.

**If it is said:** How is that “single moment” to be assessed? There is no doubt that if the house is four or five storeys high, the bomb will strike those on the fifth floor before it strikes those on the ground floor. If that is the case, then the people of the ground floor will inherit from those above them, the people of the second from those of the third, the people of the third from those of the fourth, and the people of the fourth from those of the fifth.

**We say:** The inhabitants of the upper floor and of the lower floor died in a single moment, and that single moment is measured by the blink of an eye. The proof for this measure is His saying, *Exalted is He: “And Our command is but one, like a glance of the eye.”* [al-Qamar:50] There is no doubt that the bomb strikes the upper and lower floor in the time of a glance of the eye; and likewise a bullet, if it strikes two people standing together.

Yes, the glance of an eye, the blink of the eye, is the least amount of time that can be conceived. A person cannot, in his mind, distinguish the beginning of the blink, its middle, and its end, such that he could conceive of each one of these three independently of conceiving of the other two.

Since he cannot do that, it is not correct to say: The inhabitants of the upper floor died at the beginning of the moment, the inhabitants of the middle floor in the middle of the moment, and the inhabitants of the lower floor at the end of the moment.

– If a plane shell, missile, or the like strikes the inhabitants of a house, and some of them die because their bodies are torn apart, while others die from suffocation, for example, and not from anything else, then the one who dies from suffocation by smoke inherits from the one whose body was torn apart; because the one who dies from smoke suffocation does not die except after the one whose body has been torn apart, by many instants.

**[If a person’s mind is lost due to illness, how is his estate to be treated?]**

**Question:** If a person falls ill with an illness that takes away his reason – such as a stroke – or goes into complete madness, how should his estate be handled? What is permissible for the heirs in terms of disposing of his wealth, and what is not permissible?

**Answer:** If the matter is as described in the question, the wealth remains in the hands of the heirs of the sick person, because they have the best claim to it, and leaving it in the hands of someone merely to



keep it may lead to its loss. The heirs may continue working in agriculture or trade as the sick person used to do, and they are entitled to receive from that what they deserve for their work.

They may give the sick person's wife – or wives – what they are entitled to of maintenance, clothing, and what follows from that, out of the sick person's estate. If there is a relative of the sick person whose maintenance is obligatory upon him, they should also pay that relative's maintenance in a customary manner. Beyond that, nothing is permissible for them; rather, their duty is to safeguard it. If the sick person recovers, he has the best claim to his wealth; and if he dies, each heir takes his share.

### **[The ruling on the wealth of one who has lost consciousness]**

**Issue:** If a man or woman loses consciousness – like one who suffers a stroke, a blow, or a loss of reason – and has wealth, then his wealth remains in the hands of his heirs: they cultivate it and grow it, and spend from it on his young children, on his wives, and on those whose maintenance is obligatory upon him. They may eat from it in a customary way in proportion to their effort and work. They are not permitted to dispose of his wealth except in ways that serve its sound management and growth.

The proof for that is that we have placed the wealth of one who has lost consciousness in the same ruling as the wealth of an orphan, and the heirs of one who has lost consciousness are his guardians.

### **[Ruling on the Division of the Property of a Madman Whose Death Is Considered Most Probable]**

**Question:** A madman has four sisters, a mother, a paternal uncle, and cousins. This madman has been missing for more than seventy-five years, and on the day he disappeared he was more than fifteen years old. No news of him has been known from the day of his disappearance until now. The strongest assumption is that he left the road and that wild beasts devoured him. This assumption arose from tracking his footprints, for they stopped in some beast-infested wilderness. Give us a legal verdict on how the property of this madman is to be divided, for there is ongoing dispute about that.

At present, two of his sisters are still alive; the third died about a year ago, and the fourth died about five years before that. The uncle died long before that, while his sons are still alive to this day.

**Answer – and Allah is the One who grants success:** If the heirs have a predominant assumption of the madman's death in the first days of his disappearance, based on indications that point to that, then they may divide what the madman left. In that case, his mother receives one-sixth, his four sisters receive two-thirds, and the remainder goes to his

paternal uncle because he is his *‘aṣabah*; and that remainder is the (last) one-sixth.

**Yes**, acting on predominant assumption (*al-ẓann al-ghālib*) in such a case is permissible, and it is the madhhab of some of our Imams (*peace be upon them*), among them al-Mu‘aḥḥad bi-llāh (*peace be upon him*), as in *al-Azhar*.

The proof for the permissibility of acting on circumstantial indications (*qarā’in*) is what Allah, *Exalted is He*, mentioned and related in the story of Yūsuf (*peace be upon him*) as evidence of his innocence, in His saying: *“If his shirt is torn from the front, then she has told the truth and he is of the liars. But if his shirt is torn from the back, then she has lied and he is of the truthful. So when he (the husband) saw that his shirt was torn from the back, he said, ‘Indeed, this is of your (women’s) plotting; indeed, your plotting is great. O Yūsuf, ignore this...’”* [Yūsuf:12].

The aspect of inference is that Allah, *Exalted is He*, has related this as evidence of Yūsuf’s innocence, did not censure it, but rather approved it.

**Thus**, if the heirs do *not* attain a predominant assumption of his death, they should postpone the division of his property until they do attain a predominant assumption or certain knowledge of his death. Whenever such certainty or predominant assumption occurs to them, they then divide his property. On that basis, his property is to be divided among the heirs who are alive at the time when the knowledge or predominant assumption of his death is attained. The scholars of the madhhab have determined that this may be assumed by the passing of a natural lifetime, which they set at one hundred and twenty years.

As for me, I hold that the lifetime by which one waits in the case of a lost missing person should be estimated according to the lifespan of the majority and the great mass of people in his land, and that is from eighty to ninety years. For those who are long-lived generally do not exceed ninety; and if they do, it is by a year or two. It has been reported in a narration: *“The harvest of my ummah is between sixty and seventy [years],”* and the Arabs call the decade that follows sixty *“daqāqat al-riqāb”* (“the neck-crusher”).

As for one hundred and twenty, none of the long-lived reach it except the rare exception. One who surveys the population of Yemen, which numbers around twenty million, may not find more than one or two such persons – and may not find anyone at all.

### [Tawliḥ]

*Tawliḥ* is in acknowledging lineage. If the heirs claim concerning their predecessor that he only acknowledged the lineage by way of *tawliḥ* (i.e. to block their inheritance), then the burden of proof is upon them. The proof is by the acknowledgment of the acknowledger or of the one

acknowledged in his favour that he meant *tawlīj*, or by the circumstance that he swore, for example, “I will certainly deprive my child of his inheritance from this house,” then says, in that same gathering, “This house belongs to Zayd.”

This is with respect to acknowledgment. As for other transfers of ownership, no evidence or claim of *tawlīj* is heard in them; rather, they are valid even if his intention was to deprive the heirs – even if he openly admits that he did so to deprive them. Thus it is stated in *Sharḥ al-Azhar* and its marginal notes, according to the madhhab.<sup>1</sup>

**I say:** The difference between the two issues is that the owner has the right to do in his property what he wills. He may sell, give in gift, and grant ownership to whomever he wishes, for whatever purpose and whatever end, and there is no restriction upon him except in the illness that is feared (to be terminal): in that state he has only one-third of his wealth in which he may dispose.

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1- *Sharīḥ al-Azhar*, 4/167.

## [The Book of Siyar]

## [Imamate]

**A broad discussion regarding Imamate**

**Question:** Is Imamate a fundamental principle (*aṣliyyah*) or a subsidiary matter (*far‘iyyah*)? And is the consensus of the People of the Household (*peace be upon them*) that Imamate is restricted to the two descendent lines (*al-baṭṭayn*) definitive (*qaṭ‘ī*) or conjectural (*ẓanni*)? And what is the answer to one who says that their consensus in this matter is a conjectural consensus?

**Answer – and Allah is the One who grants success and aid:** Imamate is one of the fundamentals of the religion, and the evidence for that is:

1 – It is a succession (*khilāfah*) to Prophethood, and Prophethood is, without dispute among the Muslims, one of the fundamentals of the religion; thus the succession follows it.

2 – The Caliphate and Imamate are by which the rites of Islam are upheld: the prayers, zakat, Hajj, and fasting are established thereby; jihād, legal punishments (*ḥudūd*), retribution (*qīṣās*), repelling mutual injustice, giving each their due, securing the roads, and restraining corrupters are established thereby. Through them are collected spoils and charities, then distributed to those entitled. Through them knowledge is given life, the rulings of the Book and the Sunnah are upheld, judgment among people is made with equity, the word of Allah is exalted, the friends of Allah are honoured, and so on to the end of the many great public and private interests – religious and worldly – of the Muslims which are attached to it.

And this is the meaning of a “fundamental principle” (*aṣl*); rather, there is no meaning to “fundamental” other than this, or what is like it.

3 – The unanimous practice of the theological works (*kutub kalāmiyyah*) among all the sects of the Muslims is to mention Imamate among the issues of the fundamentals of the religion.

4 – All the sects of the Muslims who are Ahl al-Sunnah, with all their differing groups, and the Shī‘ah, with all their differing groups – every sect among them pronounces misguidance and sinfulness upon everyone who does not agree with it in what it holds regarding the rulings of Imamate. This is the very character of the fundamentals of the religion.

All that we have mentioned of evidences is a conclusive proof for what we have said.

As for the statement of the scholars of the madhhab that “the difference over the question of whether [an issue] is definitive (*qaṭ‘iyyah*) or conjectural (*ẓanniyyah*) renders it conjectural” – this is not

general in its application. What is intended by it is what pertains to issues of the branches (*furūʿ*), for it is regarding those issues that it is said: “Every mujtahid is correct,” and the one who errs in them is not judged to be misguided or sinful.

The scholars of the madhhab have counted that statement as a principle among the juristic maxims of the madhhab; they did not intend it except in what concerns the rulings of fiqh.

Thus, from what we have mentioned it is established that Imamate and Caliphate are one of the definitive fundamentals of the religion.

This is the answer to the first question. As for the answer to the second question, **we say**:

The consensus of the People of the Household (*peace be upon them*) that Imamate is restricted to the two descendent lines (*al-baṭṭayn*) is a definitive, known consensus, regarding which there is no doubt or uncertainty. That is for the following reasons:

1 – The general fame among the scholars of the Muslims – indeed, among the majority of their common folk – that they say this. It has been famous from them in the past and in the present, just as it has been famous from the Imāmiyyah that they affirm the Imamate of twelve designated Imams; and just as it has been famous from the groups of Ahl al-Sunnah that they affirm the Imamate of Abū Bakr, then ‘Umar, then ‘Uthmān, then ‘Alī.

2 – The statement of the Zaydiyyah that Imamate is restricted to the two descendent lines has become for them a distinguishing mark and sign by which they are known among the other Islamic schools. Thus, whatever has reached this level does not require further proof; for its widespread fame in past and present suffices in place of evidence and of searching for it.

Just as the statement of Ahl al-Sunnah regarding the Imamate of Abū Bakr, then ‘Umar, then... and so on, does not admit of doubt due to its fame and spread; and likewise the statement of the Imāmiyyah regarding the Imamate of twelve designated Imams – so the statement of every group in this chapter is a statement almost reaching the level of what is known by necessity.

Whatever has attained such a degree of fame is definitive and necessary knowledge, and the one who casts doubt on it is like one who doubts that zuhr is four units (*rak‘ahs*), and that maghrib is three, and so on; and like one who doubts that zakat is obligatory in camels, cattle, and sheep when each reaches its nisāb, and so on.

In matters so widely known as these, one does not say at all: “Prove their correctness by mass-transmitted (*mutawātir*) report from each one

of the people of consensus”; rather, such a demand is only made in matters which have not become famous among the ummah.

If such doubting is allowed in this chapter, it would lead to the demolition of the foundations of the Shari‘ah. For it would then be said: “Bring us a mass-transmitted report from the entire ummah that zuhr is four rak‘ahs, that bowing is done once and prostration twice in each rak‘ah,” and so on. Indeed, the door of doubt would then be opened against the verses of the Qur’an themselves, so that every verse would require a mass-transmitted statement from the people of consensus affirming that it is Qur’an, otherwise – according to this doubter – it would be conjectural.

Thus, the doubting of one who doubts in such matters is not to be listened to nor answered; it is only a doubt arising from deficiency in intellect or deficiency in religion – and we seek refuge with Allah from both.

If we were to build on the analogy of the statement of this doubter, every verse in the Noble Book would be conjectural; and the statement that zuhr is four rak‘ahs would be conjectural, as would the numbers of the rest of the prayers; and zakat on the three grazing livestock (*al-sawā’im al-thalāth*), maize, wheat, barley, dates, and grapes would not be definitive, due to the difficulty of a mass-transmitted report on that from each one of the people of consensus. And likewise the wording of the adhān and the iqāmah.

Indeed, even the statement that Muḥammad son of ‘Abd Allāh son of ‘Abd al-Muṭṭalib (*may Allah bless him and his family and grant them peace*) claimed Prophethood would then be conjectural, and that his father’s name is ‘Abdullāh and his grandfather’s name ‘Abd al-Muṭṭalib would also be conjectural – since there is no definitive proof for that other than fame.

**If it is said:** But Allah, *Exalted is He*, said: “*Muḥammad is the Messenger of Allah*” [al-Faḥ:29].

**We say:** There is no proof that what is meant thereby is Muḥammad son of ‘Abdullāh son of ‘Abd al-Muṭṭalib – other than fame.

Now, it appears to me that this doubt has gained circulation among some of those who have taken a little learning, and so he ruled that there is no definitive proof that Imamate is restricted to the two descendent lines other than the consensus of the People of the Household (*peace be upon them*) on that; and that their consensus on that is conjectural, due to the lack of a mass-transmitted report from each individual among the People of the Household who are counted in the consensus.

I see that such a ruling arose from great heedlessness, or narrowness in scope, or deficiency in thought and understanding, or laxity in the

religion and courting favour with corrupters.

Furthermore, the fame of the statement of the People of the Household (*peace be upon them*) regarding this matter – which has reached the level of necessity, or nearly so – is supported by prophetic texts which are mass-transmitted and well-known among all the sects of the Muslims, indicating that the family (*‘itrah*) of the Prophet (*may Allah bless him and his family and grant them peace*) are his successors, those who stand in his place, and those who fill the void the ummah would experience after his death (*may Allah bless him and his family and grant them peace*). Even if there were nothing of that except the well-known hadith of “al-Thaqalayn” (*the Two Weighty Things*), which has been narrated by the sects of the Muslims and which they have judged to be authentic – namely his saying (*may Allah bless him and his family and grant them peace*): “I am leaving among you, (I am leaving with you), that which if you hold fast to it you will never go astray after me: the Book of Allah, and my progeny, the people of my household. Indeed, the All-Subtle, the All-Aware has informed me that they will never separate until they come to me at the Ḥawḍ (the Reservoir).” Then his (*may Allah bless him and his family and grant them peace*) explanation of his Household in the well-known, widely-known ḥadīth of the Cloak (*ḥadīth al-kisā’*), which the groups of the ummah have narrated and agreed upon its authenticity.

And his saying (*may Allah bless him and his family and grant them peace*) concerning ‘Alī (*peace be upon him*): “‘Alī is to me as Hārūn was to Mūsā, except that there is no prophet after me,” and: “‘Alī is with the truth, and the truth is with ‘Alī.”

How often has the ummah narrated from its Prophet (*may Allah bless him and his family and grant them peace*) concerning the People of the Household in general, and concerning ‘Alī and the two Ḥasans (al-Ḥasan and al-Ḥussain, *peace be upon them*) in particular, what pertains to the characteristics of Imamate, the signs of leadership, and the virtues of honour, such as his saying (*may Allah bless him and his family and grant them peace*): “Put them forward and do not put yourselves ahead of them,” and: “I am at war with those who fight them, at peace with those who are at peace with them,” and other such reports whose mention has filled the horizons and whose record has overflowed the expanses of books.

Whoever wishes to know something of that, let him turn to *Lawāmi‘ al-Anwār* of our shaykh, the ḥujjah, the scholar of the age, *Majd al-Dīn ibn Muḥammad ibn Manṣūr al-Mu‘ayyidī* – *may Allah, Exalted is He, support him and raise his renown in this world and the Hereafter*.

Or let him cast a glance into the book *al-Shāfi*, for its author has indeed brought therein the healing cure; or let him study *al-Ghadīr*, for it is an ocean, abundant in this chapter.

As for the bitterest adversary, who casts confusion upon himself, the evidences and clear insights avail him nothing. Long ago, the doubters in the Prophethood of Muḥammad (*may Allah bless him and his family and grant them peace*) were not convinced by what they saw of the signs indicating his truthfulness, and they did not benefit from the overpowering miracles despite hearing and witnessing them. Likewise, the hypocrites in the time of the Prophet (*may Allah bless him and his family and grant them peace*) did not benefit from that.

**If it is said:** "Show us that the widespread attribution to the People of the Household (*peace be upon them*) of restricting Imamate to the two descendent lines is like the fame of what you mentioned [before],"

**I say:** Those are the books of the fundamentals of religion among the Zaydiyyah; there is hardly a single one of them that does not mention this. Similarly, the fiqh books in the Book of Siyar, and likewise other works that have discussed this topic – such as many of the epistles of the Imams, the books of their missions and da‘wah, their poetry, and other things – and likewise the firmly grounded scholars who are present in this age.

And then there are the books of creed belonging to non-Zaydīs; when they speak about the schools, they mention in them that the doctrine of the Zaydiyyah, in Imamate, is the condition that the Imām must be from the descendants of al-Ḥasan or al-Ḥusayn (*peace be upon them*).

Moreover, among what opponents use as a pretext to turn people away from the People of the Household and their school is their saying and asserting that Imamate is only valid among them.

**Yes**, the People of the Household (*peace be upon them*) have positions that have become famous from them and are mass-transmitted; among them is this issue we are discussing.

Among them also is their statement that Allah, *Exalted is He*, is not seen in this world nor in the Hereafter.

Among them also is their statement that the morally responsible person (*al-mukallaf*) is free in his actions, not compelled in any of them, nor forced; that he brings them into existence by his own choice and will; and that he possesses a capacity (*qudrah*) by which he disposes as he wishes.

Among them also is their statement that whoever enters the Fire has entered it because of the evil of his deeds and the evil of his choice, and that he was only brought to it from his own side.

Among them also is their statement that the people of grave sins who die persistently committing them, without repentance, will abide forever in the Fire of Hell and never leave it.



And that there is no share in intercession and no portion of it for one who dies persisting in grave sins, unrepentant therefrom.

Among them also is their statement that the Commander of the Faithful ‘Alī ibn Abī Ṭālib (*Peace be upon him*) is the best of the Companions absolutely, that he had the strongest claim to the Caliphate and was most deserving of it, and that those who preceded him into the Caliphate did so without right.

As for Ahl al-Sunnah, they too have doctrines by which they are known and with which they are recognized among all the schools; among them: their statement that Allah, *Glorified and Exalted*, will be seen on the Day of Resurrection.

And that the evil and good actions of the morally responsible person have occurred and come into existence by the will and decree of Allah, *Exalted is He*, and that He, *Exalted is He*, created them, not the servant.

And it is also well-known from the Ash‘arīs among them that they say: Allah, *Exalted is He*, is the One who created the actions of the servant, and that the servant has in them only “acquisition” (*kashb*).

Likewise, their statement that intercession on the Day of Resurrection is for the people of grave sins, and that the people of grave sins from among the monotheists of this ummah will not abide forever in the Fire, but will eventually be brought out of it, and so on.

It is also well-known from the Salafis that they declare domes built over the graves of Imams and righteous people to be unlawful, and that they prohibit seeking blessing by visiting them, and so on to the rest of what is famously attributed to them concerning graves.

The Mu‘tazilah likewise have well-known doctrines by which they are recognized among the people of the schools.

The Imāmiyyah also have famous doctrines by which they are recognized among the people of the schools.

The Khawārij likewise have doctrines, among them: their evil opinion of ‘Uthmān and ‘Alī (*Peace be upon him*), their evil opinion also of everyone who came after them in the Caliphate and governorship, and then their evil opinion of the Muslims.

Among them also is their statement that Imamate is valid in someone who is neither from Quraysh nor from the Hāshimites.

All of these well-known doctrines, which each group adheres to, distinguishes itself by, and is known through, have reached us by the same paths through which the following have reached us: our knowledge of the numbers of the rak‘ahs [of prayer], the zakat-rates, the knowledge that the Qur‘an has not been increased nor diminished, nor distorted nor altered, and that it is from Allah; that Muḥammad son of ‘Abdullāh son of

‘Abd al-Muṭṭalib (*May Allah bless him and his family and grant them peace*) is the Messenger of Allah; that he had Companions, one of whom was called ‘Alī, another ‘Umar, another Abū Bakr, and Salman, ‘Ammār, ‘Uthmān, Ibn Mas‘ūd, and Abū Dharr.

And that he (*May Allah bless him and his family and grant them peace*) had enemies who denied him: one of them called al-Walīd ibn al-Mughīrah al-Makhzūmī, another called Abū Jahl, another whose name was ‘Uqbah ibn Abī Mu‘īṭ, another whose name was Abū Sufyān, and that there occurred between him (*May Allah bless him and his family and grant them peace*) and them a battle in a place called Badr, in which were killed among the idolaters ‘Utbah, Shaybah, al-Walīd ibn ‘Utbah, and so on.

In matters that are mass-transmitted like these, doubt is not accepted; one does not say regarding them: “Bring us proof of their correctness.” If doubt were accepted here, the doors of the knowledge that has come down to us in history would be shut; nothing would remain for us of it except conjecture and supposition, and then the proof of Allah would not be established over the servants, for conjecture avails nothing of the truth.

If doubt were accepted regarding the matter about which the questioner asked, doubt would then creep into the other doctrines of the People of the Household (*peace be upon them*) such as their negation of corporealism and anthropomorphism, their negation of compulsion (*jabr*), their negation of [the beatific] vision [of Allah], their position on intercession and eternal abiding [in the Fire], and their preference of ‘Alī (*Peace be upon him*).

Doubt would then also creep into the doctrines of Ahl al-Sunnah, the Mu‘tazilah, and the Imāmiyyah, and so on to the end of what we have already mentioned. And no one who cites evidence could any longer cite a verse of the Qur’an as proof; for the doubter would say: “Prove to me its authenticity and its mass-transmission back to the Prophet (*May Allah bless him and his family and grant them peace*) – first by a number of people in this age whose collusion upon a lie is impossible, and then likewise back to the Prophet (*May Allah bless him and his family and grant them peace*).” Or he would say: “Prove to me the consensus that it is a verse of the Qur’an from the mujtahids of the ummah in this age, by mass-transmission from each one of them until your judgment of its definitiveness is complete – or [likewise] from the mujtahids of the ummah in the age before, or the one before that.”

**If it is said:** There are mujtahid scholars from the People of the Household (*peace be upon them*) themselves who do not affirm that Imamate is restricted to the sons of the two grandsons [al-sibtayn], and

they are many, scattered through the various Islamic schools – among them Ash‘arīs, among them Mu‘tazilīs, and so on – and on that basis what you have mentioned of the consensus of the People of the Household on what you stated is not correct.

**We say:** It is true that among the People of the Household there are those whose creed follows the Ash‘arī school or the Mu‘tazilī school, and so on; but there is no consideration given to the statement of such a person, and his dissent does not undermine the consensus of the People of the Household (*peace be upon them*). Rather, their consensus is established, realized, and must be taken into account, even if those who disagree with them from among those affiliated to other schools are numerous.

The proof for what we say is that one from the People of the Household who is as we have described has thereby become a follower, imitator, and adherent of someone else. So the one from them who imitates al-Ash‘arī, for example, is a follower of al-Ash‘arī, not one to be followed; he has no view or school of his own beyond that of al-Ash‘arī. In that case, the existence of such an imitator is the same as his non-existence; his statement and his school carry no weight, and have no value in the marketplace of schools.

It has been established in the books of uṣūl that the statement of the imitator (*muqallid*) is not taken into account in consensus, and that consensus is complete without him. They have said that the reality of consensus is: the agreement of the just mujtahids from the ummah of Muḥammad (*May Allah bless him and his family and grant them peace*) in one age upon a matter, or the agreement of the just mujtahids from the People of the Household in one age upon a matter. And Allah, *Exalted is He*, has said: *“Is then one who guides to the truth more worthy to be followed, or one who finds no guidance unless he himself is guided? What is [wrong] with you – how do you judge?”* [Yūnus:35].

**If it is said:** The Imāmiyyah belong to none but the People of the Household; they do not affiliate themselves with the Mu‘tazilah or the Ash‘arīs or others, so it would follow, based on what you have mentioned, that whoever from the People of the Household belongs to them, his statement must be counted when validating a consensus, and consensus would not be concluded except with him.

**We say:** As for our particular issue, they are in agreement that Imamate is restricted to the People of the Household, *peace be upon them*.

**Yes,** it is likely that this doubter, through heedlessness, imagined that the matter we are discussing is of the same kind as what is mentioned in the books of uṣūl, such as their statement: “The Companions were, in a

given matter, between those who spoke and those who remained silent, and so that was a consensus,” and that such a consensus is conjectural; or like their statement that a consensus transmitted by solitary reports is conjectural. We have already explained sufficiently that this is not of that category; rather, it is among the necessary pieces of knowledge concerning the school of the People of the Household. Whoever knows the school of the People of the Household (*peace be upon them*) knows that they hold this position and affirm it as a matter of necessity.

### [The Muhtasib]

Hisbah is: undertaking, by one who has not reached the rank of the Imamate, ijtihād and other interests of the Muslims.

Its conditions are: sound and ample intellect, complete piety, sound judgment together with good management, and knowledge of the repugnance of what he forbids and the goodness or obligatoriness of what he commands.

Al-Manṣūr bi-llāh (*peace be upon him*) said: with these conditions it is permissible for a person to be a muhtasib, whether he is Qurashī, Arab, or non-Arab. This is the end of what is in the marginal notes on *Sharḥ al-Azhar*, quoting al-Ṣaʿītarī.

This marginal note came as a comment on his statement in *al-Azhar* while listing the conditions for the validity of judgeship: “Sixth: that he (the judge) have with him: authorization from a rightful Imām or from a Muhtasib”... etc.

**I say:** by this we refute and answer the one who says that the Zaydī madhhab monopolizes the general authority, making it exclusive to the Family of the Messenger, *May Allah bless him and his family and grant them peace*, to the exclusion of others.

For here are the statements of the scholars of the Zaydiyya speaking about their madhhab in this chapter, mentioning the Muhtasib and the conditions that must be present in him; and they also stipulate, for the Muhtasib, for the validity of his general authority, that there be no Imām in the time.

### [One who dies without having gone on campaign]

In *Ṣaḥīḥ Muslim* there is the ḥadīth: “Whoever dies without having fought, and without having resolved within himself to fight, dies upon a branch of hypocrisy.” ‘Abdullāh ibn al-Mubārak said: we consider that to have been in the time of the Messenger of Allah (*May Allah bless him and his family and grant them peace*). This is the end of his statement.

**I say:** that applies in the time of the Messenger of Allah (*May Allah bless him and his family and grant them peace*) and after him until the end of taklīf (moral responsibility). That is because the nature of the believer

is to hear and obey Allah, *Exalted is He*, in doing everything He has commanded and refraining from what He has forbidden, and to resolve and be determined upon that. Among the things that Allah, *Exalted is He*, has commanded and made obligatory upon the believer is jihād, when the causes of its obligation are present and the believer has no legal impediment.

The most important cause of its obligation is the existence of a just ruler under whose banner the Muslim fights. And as we have mentioned, it is the nature of every believer to prepare himself to perform the obligation of jihād, and the obligation of zakāt, and the obligation of ḥajj when the causes of their obligation are present. The faith of the believer is not complete unless his intention is formed to carry out that when its causes arise. So whoever inwardly refuses – even if he is poor – to pay zakāt when he becomes rich, or to perform ḥajj when he is able, is not a believer.

The proof for that is His saying, *Exalted is He: "The Messenger has believed in what was sent down to him from his Lord, and [so have] the believers. All of them have believed in Allah, His angels, His Books, and His Messengers [saying], 'We make no distinction between any of His Messengers.' And they say, 'We hear and we obey. [We seek] Your forgiveness, our Lord, and to You is the final return.'"* [al-Baqarah:285]

### **[Jihād in Islam]**

Among the meanings of jihād is: fighting in the way of Allah.

The wisdom in legislating fighting in Islam:

The wise purpose for which Allah, *Exalted is He*, legislated fighting in His path is what results from it of general benefits for the religion of Islam and for the Muslims.

For if you survey the verses of the Noble Qur’an in which fighting in the way of Allah is mentioned, you will see the truth of what we have mentioned.

So if fighting leads to the weakening and enfeeblement of the Muslims, and to the enemy’s gaining mastery over them, or if it is a cause of restricting the da’wah and preventing its spread, or a cause of shaking the structure of the Muslims, then fighting is forbidden in that case, and it is obligatory upon the Muslims to hold back their hands.

The proof for that is what Allah, *Exalted is He*, commanded His Prophet (*May Allah bless him and his family and grant them peace*) and those who believed with him in the early Islam, of restraining their hands from fighting, and what He commanded them of patience upon harm, during the period before the Hijrah to Madīnah.

### **[Concerning the Imām’s fighting of unbelievers and rebels]**

In *al-Azhar*, in explaining what is obligatory upon the Imām, it says: “If they refuse, war becomes obligatory, if predominance is thought likely.” This is the end of the quote.

What indicates that it is not obligatory upon the Imām to enter into war with the unbelievers or rebellious wrongdoers unless he thinks he will overpower them and be victorious over them is:

1. If he thinks that he will come out of the war with neither gain nor loss – meaning, no victor and no vanquished – then entering it in that case has no benefit, and entering into what has no benefit is the habit of fools; a rational person does not enter into that which is like that, rather entering into what is “ugly” (*qabīḥ*). Do you not see that it is foolish for a person to enter into a deal about which it is said to him: “If you enter into this, you will lose one hundred and you will obtain in return for your work one hundred.” None enters such a deal except one weak of intellect or mad.
2. If he thinks defeat is likely, then entering into war in that case is a crime, because of what it contains of weakening Islam and the Muslims, and there is no doubt that it is not permissible to strive to weaken them.
3. It is known from the *sīrah* of the Messenger of Allah (*May Allah bless him and his family and grant them peace*) that he withheld his hand and commanded his Companions to withhold their hands from fighting, and commanded them to be patient over harm for a long period exceeding ten years; that is, throughout the period before the Hijrah to Madīnah. Allah, *Exalted is He*, did not permit them to fight until after the Hijrah, when al-Aws and al-Khazraj had entered into Islam and the Muslims had become a sizeable community. That was only because of the weakness of the Muslims before the Hijrah; for if they had entered into fighting with the idolaters, the idolaters would have overcome them and perhaps would have eradicated Islam and the Muslims entirely.
4. And because of the weakness of the Islamic state in Madīnah after the Hijrah, the Messenger (*May Allah bless him and his family and grant them peace*) made treaties with the Jews of Madīnah and with tribes from among the Arab tribes, because he (*May Allah bless him and his family and grant them peace*) knew that the Muslims could not bear opening war with all enemies.
5. Imām al-Ḥasan ibn ‘Alī (*peace be upon him*) made peace with Mu‘āwiyah ibn Abī Sufyān when he saw weakness and enervation in the people of Iraq, and he did not consider it proper to enter with them into a losing war.
6. On the Day of the Trench, when the idolaters were besieging the

Muslims, he (*May Allah bless him and his family and grant them peace*) proposed to al-Aws and al-Khazraj that he give the idolaters one-third of the dates of Madīnah in return for their withdrawing from fighting the Muslims. Al-Aws and al-Khazraj refused this proposal. The Messenger, *May Allah bless him and his family and grant them peace*, had only offered them this opinion out of mercy for them, when he saw what they were suffering of weakness and small numbers.

**If it is said:** that indicates the permissibility of entering a war in which the indicators point to the enemy’s likely predominance and the Muslims’ defeat, as on the Day of the Trench.

**We say:** the entry of the Muslims into a war on the Day of the Trench in which they were not equal in strength, and the entry of al-Ḥusayn into a war that was not equal, and likewise Zayd ibn ‘Alī and Yaḥyā ibn Zayd and Muḥammad ibn ‘Abd Allāh al-Nafs al-Zakiyyah and Ibrāhīm ibn ‘Abd Allāh and al-Ḥusayn ibn ‘Alī of al-Fakhkh, and many others – entry into war is of two kinds:

1. Voluntary entry.
2. Compelled entry.

As for compelled entry: it is that the enemy forces you to one of two things – either entering into war, or surrendering to the enemy. This is what Imām al-Ḥusayn ibn ‘Alī (*peace be upon them*) fell into. He chose, *peace be upon him*, to enter into an unequal war and refused to submit to the judgment of Ibn Sumayyah the accursed. He saw that death was more beloved to him than that he should hand himself over into the hand of Ibn Sumayyah, for him to do with him as he wished. Likewise was the condition of Zayd ibn ‘Alī and of his son Yaḥyā, and of al-Fakhkh, and of al-Nafs al-Zakiyyah. When the matter is like that, then defending oneself is obligatory.

And the fighting of the people of Madīnah on the Day of the Trench is of this type, for when the enemy surrounded them, they chose to defend themselves, their wealth, and their families, and refused to repel the danger of death with humiliation and submission and payment of tribute to the confederates, acknowledging defeat and weakness.

As for voluntary entry: it is that you are in safety from the enemy; you do not fear him for yourself nor for your lands and your family. If you then have of equipment and soldiers that by which you think you will overpower the enemy, and along with that you see that the general interest of Islam and the Muslims is to enter war with the enemy, then you may enter war after consulting people of opinion.

But if you do not have of equipment and soldiers what suffices, then it is not permissible to enter war, for it will then end in destruction, ruin,

defeat, and the annihilation of crops and progeny, etc. And Allah, *Exalted is He*, has said: "*And do not throw [yourselves] with your [own] hands into destruction.*" [al-Baqarah:195]

Allah, *Exalted is He*, has permitted peace with the enemy in the state of weakness of the Muslims and has forbidden it in their state of strength. He, *Exalted is He*, says: "*So do not weaken and do not grieve, and you will be superior, if you are [true] believers.*" [Āl 'Imrān:139] And He, *Exalted is He*, says at the time of the Muslims' weakness: "*And if they incline to peace, then incline to it [also] and rely upon Allah. Indeed, He is the All-Hearing, the All-Knowing.*" [al-Anfāl:61]

And thus did the Messenger of Allah (*May Allah bless him and his family and grant them peace*): he made peace with his enemies from among the idolaters in the state of the Muslims' weakness, then he cast back to them their covenants when the affair of Islam grew great and its power became strong.

### [Dār al-Ḥarb (The Abode of War)]

It is stated in the book *al-Durrat al-Yatīmah* by Imām al-Manṣūr bi-llāh (*peace be upon him*): He said – meaning Imām Ahmed Ibn Sulaymān (*peace be upon him*): Dār al-Ḥarb is the town or district in which its people adhere to one of the characteristics of disbelief, and they do not allow anyone to reside there unless he manifests adherence to that which they profess of it, or is among those who manifest something of that under a covenant (*dhimmah*) or protection (*jiwār*). Whenever a district or town has this description, it is Dār al-Ḥarb. This is the sound and established position among the doctrines of the Pure Progeny. End [of quote].

**I say:** Based on this definition, the lands of the unbelievers in which complete freedom is granted to the Muslims to manifest their beliefs and their rites – such as the call to prayer and the prayers of Jumu'ah and congregation, and to publish their beliefs in newspapers and magazines – such lands are not Dār al-Ḥarb; as is the case today in Western countries such as France and Britain, for their laws are in effect upon that.

However, Imām al-Manṣūr (*peace be upon him*) said in this book, after that: that what is taken into account regarding a land is predominance; so if predominance is for the unbelievers, the land is Dār Kufr (an abode of unbelief), and no consideration is given to the minority, even if they manifest their religion in complete freedom without protection.

He inferred this from Makkah before the Hijrah, for it was Dār Kufr without dispute, even though the Muslims from Banū Hāshim were manifesting their religion without protection until Abū Ṭālib died; yet Makkah did not thereby cease to be Dār Ḥarb. This is the meaning of the



Imām’s words, and it is the truth.

And the definition set by Imām Aḥmad ibn Sulaymān (*peace be upon him*) may be with regard to what is predominant in Dār al-Kufr; so his saying (*peace be upon him*), “and they do not allow anyone to reside there unless he manifests adherence to that which they profess...” etc., is not meant as a condition excluding other cases, but rather he intends thereby that the description of Dār al-Kufr is like that *in most cases*.

### **[The Wisdom Behind the Prohibition of Residing in the Midst of the Polytheists]**

**Question:** What is the wisdom in the prohibition of residing in the midst of the polytheists and unbelievers?

**Answer:** Allah, Glorified and Exalted, wants the Muslim to establish the rulings and laws of his religion, and that they be manifest, and that the word of Allah be the highest; and that is not attainable in the abode of the polytheists and unbelievers. Even if the Muslim establishes therein the rites of his religion and the rulings of his law, he does so in concealment. In general, the rulings of the unbelievers and polytheists in their lands are those that are manifest and uppermost, not the rulings of Islam. Allah, *Exalted is He*, does not love nor is He pleased that the rulings of His religion be the lower, and the rulings of the unbelievers be the upper. He, *Exalted is He*, said in Sūrat al-Tawbah: *“And He made the word of those who disbelieved the lowest, and the word of Allah – it is the highest.”* [al-Tawbah:40] That is from one angle.

- And from another angle: Allah, *Exalted is He*, wants for the people of His religion and His friends honour and elevation, and He does not love nor is He pleased that they be in humiliation, under the mercy of the unbelievers and under their authority. He, *Exalted is He*, said: *“But honour belongs to Allah, and to His Messenger, and to the believers.”* [al-Munāfiqūn:8]

And Allah, *Exalted is He*, commanded His friends to leave from under the authority of the polytheists; He said: *“O My servants who have believed, indeed My earth is spacious, so worship Me [alone].”* [al-‘Ankabūt:56]

And He, *Exalted is He*, forbade the believers from yielding and humbling themselves to the authority of the unbelievers; He, *Glorified is He*, said: *“And do not weaken and do not grieve, and you will be superior if you are [true] believers.”* [Āl ‘Imrān:139]

From what we have mentioned, the wisdom behind the prohibition of residing in the midst of the polytheists becomes clear to you. In brief, residing in their lands entails two things:

1. Humiliation of the religion, and its loss of its lofty station.

2. Humiliation of the Muslim, and his yielding and humbling himself to the authority of the unbelievers.

**If it is said:** "Indeed, Muslims who truly adhere to the rulings of their religion have, throughout most of Islamic history, been subdued, overcome, and in humiliation and disgrace, due to the dominance of oppressors and the strength of their authority: they have humiliated the friends of Allah and the bearers of His religion, except those who were pleased with their falsehood, aided them in their injustice, and followed their path. So, through the length of history, the two matters you mentioned have not been realized."

**We say:** What we mentioned of the two matters is what is *obligatory*; but this obligation falls away when ability is absent, due to His saying, *Exalted is He*: "*Allah does not burden a soul beyond its capacity.*" [al-Baqarah:286] Allah, *Exalted is He*, excused the oppressed among the men, women, and children who cannot devise a plan nor find a way [out] from the duty of emigrating, and did not charge them with it due to their inability, while He did impose it on others who were able to do so.

The sincere religious people in the long course of Islamic history were in the position of the oppressed whom Allah, *Exalted is He*, excused from hijrah. For the rulers of Banū Umayyah and Banū al-ʿAbbās took control of the whole wide land of Islam, tightened their control over it, and their judgments and power ran over every part of it. The devout were unable to leave from under those rulers and found no escape: if they looked to the West, the ruler and his power stood before them; if they looked to the East, or North, or South, it was the same. So we say: they are excused before Allah, and that striving to obtain the two matters we mentioned is not obligatory upon them due to their inability.

**[Is it permissible for a Muslim to work abroad in Europe or America?]**

**Question:** Is it permissible for a Muslim to go abroad to Europe or America in order to obtain the money he needs for marriage, building a home, and so on, while he and his religion are frequently subjected there to contempt, mockery, and belittlement, and he suffers greatly from that, and cannot there defend himself or respond?

**Answer:** If the situation is as stated in the question, then going abroad is not permissible. The proof of that is:

1. That Allah has forbidden believers to sit with those who mock the religion and Islam: "*And it has already been revealed to you in the Book that when you hear the verses of Allah being denied and mocked at, then do not sit with them...*" [al-Nisā':140]
2. That Allah, *Exalted is He*, did not excuse those Muslims who remained among the polytheists under the claim of being

oppressed: *“They will say, ‘We were oppressed in the land.’ They will say, ‘Was not the earth of Allah spacious enough for you to emigrate therein?’”* [al-Nisā’:97]

3. That Allah, *Exalted is He*, has made it obligatory upon the Muslim to establish the obligations of Islam and its duties and rites completely and perfectly. It is not permissible for him to remain in a land where he cannot establish what Allah, Exalted is He, has charged him with of obligations, rites, and duties, while he has the means to go to another place where he can establish them. Allah did not excuse anyone except the oppressed among men, women, and children who cannot devise a plan nor find a way.
4. That Allah, *Exalted is He*, has assigned honour (‘izzah) to the believers, as in His saying: *“But honour belongs to Allah, and to His Messenger, and to the believers.”* [al-Munāfiqūn:8] It is not permissible for a Muslim to surrender the honour of faith while he finds a way to preserve it.

### **On Hijrah (Emigration)**

In *al-Bayān* it says: “The Mu‘tazila and Imām Yaḥyā said: If the condition of the Muslims is manifest therein (i.e. in Dār al-Kufr), and they are not compelled to commit a prohibited act or to abandon an obligation, and the Imām does not summon him to leave it, then it is not obligatory on him to leave.” This is the end of the quote.

And in it also: “Hijrah from the land of flagrant sin (*Dār al-Fisq*) is obligatory if the Imām requests it, or if one is compelled therein to commit a prohibited act or to abandon an obligation other than enjoining right and forbidding wrong. If none of that is present, and he openly boycotts its people – in their gatherings, their eating together, and other such things – in a way that removes the accusation that he is pleased with their sin, then that is like *ḥijrah*. If he does not do that, hijrah becomes obligatory according to al-Qāsim, al-Hādī, al-Nāṣir, and al-Manṣūr bi-llāh (*peace be upon them*) so that the charge of being pleased with sin is lifted from him.”

### **[Enjoining Right and Forbidding Wrong]**

**Question:** What is the ruling on enjoining right and forbidding wrong if the one who enjoins and forbids thinks, or knows, that if he does so he will be killed?

**Answer – and Allah is the One who grants success:** The scholars have said: If enjoining and forbidding lead to the occurrence of an evil greater than that which is being forbidden, or equal to it, then enjoining and forbidding become forbidden. Allah, *Exalted is He*, said concerning something of similar meaning: *“And do not insult those they invoke*

*besides Allah, lest they insult Allah in enmity without knowledge.”* [al-An‘ām:108] Killing a believer is one of the gravest and greatest of major sins with Allah, *Exalted is He*: “*...it is as if he had killed all mankind.*” [al-Mā‘idah:32] And He, *Exalted is He*, said: “*And do not throw [yourselves] with your [own] hands into destruction.*” [al-Baqarah:195] and: “*And do not kill yourselves; indeed, Allah is to you Ever Merciful.*” [al-Nisā’:29] Reason also judges the repugnance of causing an evil to occur.

**If it is said:** It has been narrated in the well-known ḥadīth, whose meaning is: “*The best jihād is a word of truth before a tyrannical ruler.*” The outward sense of this ḥadīth would appear to include all circumstances.

**We say:** The outward sense of this ḥadīth is restricted by what we have mentioned earlier of evidences.

**If it is said:** Imām al-Ḥusayn (*peace be upon him*) and Imām Zayd (*peace be upon him*) both rose up in a circumstance in which it is known, or the predominant assumption is, that they and their companions would be killed; and that indicates the opposite of what you have mentioned.

**We say:** The two Imāms (*peace be upon them*) did not rise up except after their registers and lists (of supporters) had been filled with what led them to expect victory and realize triumph; but they were betrayed, and those who had pledged allegiance to them broke their pledge at the very moment of the uprising being declared, and it was then no longer possible for them to withdraw.

**Yes**, there is a circumstance in which enjoining and forbidding is permissible even with the assumption or knowledge of being killed: and that is when what results from it is the strengthening and exaltation of the religion. Exalting the religion is a benefit that outweighs being killed.

### [Is it obligatory to denounce singing?]

**Question:** Is it obligatory to denounce *ghinā’* (singing/music), or not, because of the existence of disagreement regarding its prohibition?

**Answer:** Singing and its instruments are an evil and reprehensible thing in the view of the scholars of the ummah of Muḥammad (*May Allah bless him and his family and grant them peace*). A few deviated and ruled it to be lawful and permitted. They fall into two categories:

1. A group who are lax in their religion, such as Ibn ‘Abd Rabbih, author of *al-‘Iqd al-Farīd*. He ruled it permissible and decided in his book that it is ḥalāl. The proof that he was lax in his religion is what is mentioned in his biography in the introduction to his book: that he was infatuated with drinking wine; and like him are those “scholars” who mix with the rulers.

2. The other group are the Ṣūfīs: they permitted from it what stirs yearning for Allah and softens the heart. This is mentioned in *Iḥyā’ ‘Ulūm al-Dīn* by al-Ghazālī.

Once you know this, then know that the disagreement of these two groups is not considered a valid disagreement and does not undermine the consensus. The first group are lax and negligent, having no concern for the disobedience of Allah, *Exalted is He*; the fatwā and judgment of a wine-drinker are not accepted at all, likewise the fatwā of those who mix with the rulers – it is not accepted, and it is not permissible to rely upon it. The Messenger (*May Allah bless him and his family and grant them peace*) warned against “scholars” who associate with rulers: “...so beware of them concerning your religion.”

As for the second group, the Ṣūfīs: their permitting some types of singing – namely that which stirs yearning for Allah and softens the heart – was only due to a benefit they thought they perceived in some kinds of singing, not due to a shar‘ī proof. As for the rest of singing, they declared it forbidden. Thus, their disagreement is not considered, because it arises from an opinion they formed, not from a proof; rather, they themselves believe singing to be forbidden, but they have, by their own opinion, excluded one type of it, as we mentioned.

What I have come to know in this era is:

1. That the followers of the Salafī madhhab declare all singing and all instruments of amusement to be forbidden; I have heard this repeatedly in their radio broadcasts.
2. The followers of the Ja‘farī Imāmī madhhab: I heard this [same prohibition] on Radio Tehran, and the state of Iran has committed itself to banning singing absolutely, neither in radio nor elsewhere, from the establishment of Khomeini’s state until today.
3. The scholars of the Zaydiyyah, in past and present, declare singing and instruments of amusement to be forbidden.

Thereafter, reason itself rules that singing and its instruments are repugnant and ugly, for several considerations that necessitate that:

1. It is the companion and partner of alcohol.
2. It arouses desire and sexual instinct in both sexes and calls to fornication.
3. It is among the practices of the openly immoral, the base, and the people of luxury and heedlessness, not among the practices of people of honour and religion.
4. It distracts from the remembrance of Allah and from the prayer, and occupies the heart with infatuation and passion.

5. Today, colonial powers are striving to corrupt the Muslims, and to corrupt their religion and morals, by various means, among them singing. It is no secret, today, what status singing and singers have of prestige, encouragement, political patronage, huge budgets, and so on. There is no doubt that they have perceived that singing is one of the means that turns the youth away from their religion and corrupts their morals.

Thereafter, numerous narrations have come from the Prophet (*May Allah bless him and his family and grant them peace*) indicating its prohibition, narrated by the Zaydīs, the Ja'farīs, and Ahl al-Sunnah wa'l-Jamā'ah. On that basis, it is obligatory to denounce it and change it.

However, Islam began as something strange and will return to being strange as it began. Thus the generality of Muslim peoples deem it lawful and see no harm in it; indeed, to them it is more lawful than pure cold water. They meet anyone who denounces singing among them with belittlement and mockery; and that is not out of ignorance of the evidences indicating its prohibition. If you tried to make them know those evidences, they would not accept them and would treat them lightly. In such a case, what is obligatory is to avoid them and migrate away from them, and it is not permissible to attend their gatherings of amusement and singing. This is what is appropriate with respect to the generality of people.

As for a man's own household, his children, his family, those under his authority and those over whom he has power, it is incumbent upon him to decisively cut off singing and remove it entirely.

We have only said all this because of His saying, *Exalted is He: "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]

As for the generality of people: there is no blame upon the believer for leaving off outward denunciation by action – not by his heart or by his keeping away from them – because circumstances today, for the believer, have become like the circumstances that existed in the Abbasid era. For true faith, with what it comprises of righteous deeds and abstaining from evil deeds, has become the thing that is condemned; its possessor is deemed deserving of punishment, expulsion, and stoning.

In such circumstances, what is obligatory upon the believer is to preserve his faith and keep away from the people of disobedience, and it is not permissible for him to expose himself to harm and humiliation.

**[The Ruling on One Who Reviles 'Alī (Peace be upon him), or His Wife, or His Two Sons]**

**Question:** What is the ruling on one who insults and curses 'Alī ibn Abī Ṭālib (*Peace be upon him*), or al-Zahrā', or al-Ḥasan, or al-Ḥusayn

(Peace be upon them)?

**Answer – and Allah is the One who grants success:** Whoever insults a believer or a Muslim on account of his being a believer, or on account of his being a Muslim – his ruling is disbelief. Likewise, whoever shows enmity to either of them on account of faith or Islam; and likewise whoever insults the scholars of religion because they are scholars of religion – the ruling for all such people is disbelief, and the rulings of disbelief apply to them.

**[How Those Upon the Truth Should Deal with an Innovator Calling to His Innovation]**

**Question:** If there is a misguided innovator in a town whose people are upon the truth, calling people to his innovation and misguidance, exerting himself in that, raising doubts for the common folk and deceiving them, constantly striving in that without tiring or slackening – how should those upon the truth deal with him?

**Answer – and Allah is the One who grants success:** If in that time there is a rightful ruler, then the matter is his; he knows best what he should do and what he should leave.

If there is no rightful ruler, then it is obligatory upon those upon the truth to repel his evil and repel his falsehood with the lightest effective means, then the next lightest, using whatever means are available. If the means are exhausted and only the means of killing remains, and they see that he cannot be repelled except by it, then it is permissible to kill him.

First with threat, then with beating, then ... and so on with the rest of evils: it is obligatory to denounce them and repel them by whatever means are possible, gradually, from the lighter to the more severe.

It is obligatory that this be after consulting the scholars and people of opinion: as for consulting the scholars, it is to be safe from the consequences of bloodshed before Allah, *Exalted is He*; and as for consulting people of opinion, it is lest the killing cause a tribulation among the people, vendettas, fear, and bloodshed. If the people of opinion see that the killing will cause great corruption that will encompass the believers, then it is not permissible to proceed to killing. Thus have the scholars of the madhhab said: it is not permissible to engage in forbidding evil if that leads to the occurrence of another evil like it or greater.

**[Concerning Sinners, Libertines, Corrupters, and Those Who Harm Their Neighbour]**

In *al-Tāj*, according to the madhhab: It is obligatory upon a sinner who has repented to inform the people who know him that he has repented, in order to remove their bad opinion of him, because defending one's

honour is obligatory. End [of quote].

And in it, according to the madhhab: It is permissible for the Muslims to imprison libertines (*al-du'ār*) and corrupters, and to shackle them, and to request from an unjust ruler that he do that to them. End.

And in it, according to the madhhab also: Whoever has a neighbour who harms him, it is permissible for him to bring that neighbour before an unjust ruler – meaning: one who has authority over him, whoever he may be – in order to repel his harm and injury. If he knows that the one who has authority over him will do to him more than what is due to him in the Shari'ah, then it is not permissible for him to bring him before him. End.

**I say:** What appears to me – and Allah knows best – is that if a neighbour who harms his neighbour has exhausted all stratagems to repel his harm and all attempts have ended in failure, and all avenues for pushing away his evil have been blocked, then, in this case, it is permissible to bring him before the ruler, even if the one bringing him knows that the ruler will do to him more than he deserves.

We have only said this because the scholars of the madhhab and others have said: it is permissible to defend one's self and property even by killing, if the harm cannot be repelled except by that; referring him to the unjust ruler is of this nature.

### [Definition of the Sorcerer, the Soothsayer, and the Astrologer]

**Question:** What is the definition of the sorcerer (*sāḥir*), the soothsayer (*kāhin*), and the astrologer (*munajjim*) whom it is not permissible to visit, as in the ḥadīth: “Whoever goes to a soothsayer...” etc.? And does this include the man who goes to someone said to inform about the place of a theft and the thief, and the like?

**Answer:** The scholars of the madhhab have defined the sorcerer, as in *al-Bayān* and other works, by saying: The sorcerer is one who presents himself as being able to alter creation, to turn a human being into an animal and the reverse, and to turn an inanimate object into an animal – this is how they stated the definition of the sorcerer.

As for the soothsayer, he is one who presents himself as having knowledge of future events.

And the astrologer is one who informs about unseen matters by means of his knowledge of the stars.

These three must not be believed in what they say and claim, because what they claim does not occur except from Allah, *Exalted is He*.

Furthermore, the person who informs about a theft and its thief should not be believed.

What is known about such a person is that he only informs by means



of an egg or something similar, in which he writes, then has a child who has not yet reached puberty look into it. The child then sees the thief as he takes the stolen property, and so on. It is not permissible in the Sharī‘ah to rely on such a thing.

What the child sees in the egg or the like is perhaps an image produced by the jinn. Someone who tried this repeatedly informed me that it became clear to him that what appears in the egg or the like is neither true nor in accordance with reality.

Accordingly, whatever is like this is neither sorcery nor soothsaying nor astrology; however, it is not permissible to rely on it nor to act upon it.

### **[Benefit (Images)]**

In *al-Azhār* it says: A statue of an animal that is complete and independent must be altered. And in a marginal note in *al-Tāj al-Mudhḍhab* commenting on this it says: On this basis, if the body of the statue is so small that a similar (living) creature could not survive, then it is not obligatory to alter it, since it is not complete and independent. End of quote.

And in *al-Tāj* there is (a statement) whose meaning is: Printed images are not among the images which the prohibition came concerning.

### **Benefit (The Ruling on Making Images and Pictures))**

In *al-Muhadhdhab*: It is not permissible to depict (draw or sculpt) an animal, and it is permissible to own pictures.

### **What Is Paid to Oppressors by Way of Taqiyyah (Dissimulation)**

In the marginal notes on *Sharḥ al-Azhār*, under a legal issue, it says: Al-Manṣūr bi-llāh, *peace be upon him*, said in *al-Muhadhdhab*: Whatever is collected for the oppressors by way of taqiyyah (dissimulation) and pushing away (harm) is permissible, if they cannot be repelled except by it. And it is permissible to take it from the weak and the strong, whether they are content or averse. The person in charge of this must strive to the utmost, whether he is a shaykh or a leader, and he must not be unjust. And whatever occurs without deliberate intention, then there is no sin.

And something close to this is in *Mi’yār al-Najri*, and it was mentioned by al-Hādī – *peace be upon him* – in *Masā’il al-Ṭabarīyīn*. But the famous opinion in the madhhab is that no one is compelled (to pay) except by the Imām or his deputy. End of quote, with verbal completion.

And in *al-Bayān*: The apparent view of the madhhab is that it is not permissible except with his consent. Finished (*Taqrir*) (قرير). End of what

is in the marginal notes<sup>1</sup>.

**I said:** It is possible to infer this from His – the Exalted – saying: “...except for that to which you have been compelled.” [al-An‘ām:119] and His saying: “Except for one who is compelled while his heart is secure in faith.” [al-Naḥl:106] and His saying: “But if you fear (an enemy), then (pray) on foot or riding.” [al-Baqarah:239].

And the scholars have laid down a universal rule derived from these verses and others like them, namely: “In cases of necessity, prohibitions become permissible.” This issue which Imām al-Manṣūr bi-llāh – *peace be upon him* – mentioned falls under what we have stated, and it does not conflict with what has come of severe threat regarding whoever helps an oppressor or collects (wealth) for him; for the threat is directed at the one who collects wealth for the oppressor without necessity, taqiyyah, or (legitimate) self-defence.

And what Imām al-Manṣūr bi-llāh – *peace be upon him* – mentioned of permissibility is only in cases of necessity, taqiyyah, and pushing away harm. So what al-Manṣūr bi-llāh – *peace be upon him* – mentioned is a concession that one only resorts to in cases of necessity. And it is well known among the scholars that there is no contradiction between concessions and strict rulings.

Moreover, this issue which Imām al-Manṣūr bi-llāh – *peace be upon him* – mentioned is beneficial, for very often traders, farmers, and others need to send some money under the name of zakāt or otherwise to some oppressors.

### [(Comforting / Putting the Oppressor at Ease)]

In the *Sharḥ* according to the madhhab: It is permissible to put the oppressor at ease (īnāsu al-ẓālim) in word and deed. As for word, it is like saying: “You are our chief and leader in our affairs, and the one among us most deserving of honour.” And as for deed, it is like hosting him or clothing him or the like.

And it is permissible to love him for traits of goodness he has, or because of kinship, not for what he is upon of tyranny and disobedience. And it is permissible to honour him and show joy at what pleases him – all of that if it is for a religious interest, whether the interest is public or private. As for a worldly interest, then that is not permissible. End of quote from the *Sharḥ* and its marginal notes for the madhhab, with some adaptation<sup>2</sup>.

1- *Sharḥ al-Azhar*, 4/530.

2- *Sharḥ al-Azhar*, 4/594 and what follows it.

**I said:** If worldly interests are general, then what appears to me is that they are attached to religious interests, such as water projects, health facilities, securing roads and repairing them, and the like.

**[Ruling on Initiating Salām for Oppressors and Open Sinners, or Responding to Them]**

**Question:** What is the ruling on initiating the greeting of salām for oppressors and open sinners? And what is the ruling on returning their salām if they initiate it?

**The answer, and success is from Allah:** “As-salāmu ‘alaykum” in meaning is a supplication for the one greeted that he be granted general mercy in this world and the Hereafter.

And the proof that what is meant is general mercy in this world and the Hereafter is His – *the Exalted* – saying: *“And peace be upon him the day he was born and the day he dies and the day he is raised alive.”* [Maryam:15] and (the words in the prayer): “Peace be upon us and upon the righteous servants of Allah.”

And the scholars have said: It is not permissible to supplicate for the enemies of Allah – the Exalted – with good of the Hereafter. They inferred this from what has come in the Qur’an of the prohibition of seeking forgiveness for the polytheists. He – *the Exalted* – said: *“It is not for the Prophet and those who have believed to ask forgiveness for the polytheists, even if they were relatives, after it has become clear to them that they are companions of Hellfire.”* [al-Tawbah:113]

- So, based upon what we have presented, it is not permissible for a believer to supplicate for an oppressor or a sinner with forgiveness, mercy, salām, or any other form of Allah’s good and reward in the Hereafter.

- You should know – even though the matter is as we have mentioned – that the phrase “as-salāmu ‘alaykum” in our time is not intended as a supplication for the one greeted. The one initiating salām does not intend it, think of it, or mean it. And the one greeted and the listener do not understand supplication from this phrase, nor does it give the impression or cause any assumption that the one greeted is among the righteous.

- Therefore, I hope that there is no sin and no objection upon the one who initiates salām to criminals, as long as the situation is as we have described.

- And what clarifies for you what we have said is that the oppressor or sinner or similar person, if his name is Ṣāliḥ (Righteous) or something like that among praiseworthy names, he is called by saying: “O Ṣāliḥ, O Fā’iz (Successful), O Muflīḥ (Prosperous), O Zayn al-‘Ābidīn, O

Walīyullāh, O Muḥsin (Doer of good), O Mu'min (Believer), O Zakī (Pure), O Taqī (Pious)...” and so on, without Muslims finding this strange among themselves and without any disagreement between them. And that is only because the caller does not intend the meaning nor desire it, and the literal meaning does not occur to the mind of the one called nor the listener, and there is no suggestion or presumption there of the linguistic meaning of those names.

- This, then, is one reason for the permissibility of initiating salām to a criminal and a sinner. But that permissibility is conditioned by conditions, namely:

1. That there be nothing in giving salām to the sinner that would comfort him in what he is upon of sin and oppression, such that he would feel in himself, because of the salām given to him, that his sin is minor, and that his sinfulness has not diminished his standing with the believers, and that by his sin he has not exited, in their view, from the circle of honour and esteem. In that case he would become tranquil, because of this, in committing sin, take the matter of sins lightly, and increase in them with ferocity.
2. That the salām to the sinner be free of any form of veneration. So it is not permissible to go specially to the sinner's house or his gathering-place or location just in order to give him salām, nor to accompany it with anything indicating veneration, such as bowing.
3. That there be a need calling for giving salām to the sinner. Examples of such a need include:
  - a) Seeking safety from his harm.
  - b) That good character and modesty call for it.
  - c) Fear of being accused of arrogance or of belittling people.

- **Yes**, it may be permissible to visit the sinner in his home, in order to repay him in kind for his action, or because he is a relative, or a neighbour, or because he has done good to you or to some of your relatives, or to your friend, or to the scholars, or to the students of knowledge, or because he defends a believer, or the like of such acts of goodness. In these cases it is permissible to visit him in his home and give him salām for that reason.

- Likewise, it is permissible to visit him for the sake of reforming him or reforming those around him, and so on.

- Once you know that initiating salām to the sinner and the oppressor is permissible according to what we have mentioned, then you know that returning the salām (to them) is even more permissible.

**[Honouring the Open Sinner and the One Who Disbelieves by Misinterpretation]**

**Question:** Very often circumstances call for honouring an open sinner (fāsiq) and one who disbelieves by misinterpretation (kāfir al-ta’wīl), and sitting with him, and perhaps he requests supplication (du‘ā’). To leave honouring him, or to leave sitting with him, or to leave supplicating for him may cause blame to be attached to the one who leaves that, and his being described as lacking in dignity (muru’ah) and baseness of character. So what is the solution to that?

**Answer:** There is no objection to honouring an open sinner or one who disbelieves by misinterpretation, or to sitting with him.

However, it is proper that this be only to the extent that need calls for, or that dignity (muru’ah) requires. And as for supplication, if it is for the good things of this world, then there is also no objection to it, such as (supplicating for) provision, security, well-being and safety. Likewise, it is permissible to supplicate for the person mentioned for guidance.

In summary: everything that Allah, *Exalted is He*, gives in this world to the disbeliever and the open sinner, it is permissible to supplicate for him to have it. As for supplicating for them for forgiveness, reward, and that which contains good of the Hereafter, that is not permissible.

**Yes**, it is not permissible to sit with the open sinner at the time of his open sinning, nor with the disbeliever at the time of his plunging into talk of disbelief.

Thus, what we mentioned previously about the permissibility of sitting with the open sinner and the one who disbelieves by misinterpretation when there is a need—the intent is outward companionship and social interaction, according to what need, dignity, and noble character call for. He is not to open his heart to them; rather, it is required that his heart be averse to them and hateful toward them.

**If it is said:** The implication of your earlier words is that it is permissible to supplicate for the oppressor and the open sinner for long life, yet it has come (in narration): “*Whoever supplicates for an oppressor that he remain (alive) has loved that Allah be disobeyed,*” or as it is narrated.

**We say:** Long life is among the things that it is permissible for Allah to give to the open sinner, the disbeliever, the oppressor, and others besides them; indeed Allah has done that, and He, *Exalted is He*, still does it. He has informed us in His Book that He will use long lifespans as an argument against them, when He, *Exalted is He*, said: “*Did We not give you life long enough so that whoever would remember therein could remember, and the warner had come to you? So taste (the punishment)...*” [Fāṭir:37] At that point, then, there is no objection to supplicating with that which is in accordance with Allah’s established way (sunnah) in His servants.

As for the narration you mentioned, its meaning is: whoever supplicates for an oppressor for long life for the sake of his oppressing, has loved that Allah be disobeyed; and supplicating for the oppressor for this purpose is not permissible and not lawful.

Once you know this, there is no contradiction between what we have mentioned and that narration.

### **[The Ruling on Seeking the Help of an Oppressor to Recover a Right]**

**Question:** Is it permissible to seek the help of an oppressor to recover a right? And is it permissible to assist the person who has the right in doing that?

**Answer – and Allah is the One who grants success and assistance:** If the right is certainly established against the one who denies it or usurps it, or if, according to the Sacred Law, retaliation (qisās) is established as deserved against a particular killer, then there is no objection to seeking help from the oppressor or from others. Allah, *Exalted is He*, has said: *“Cooperate with one another in goodness and righteousness, and do not cooperate in sin and transgression.”* [Al-Mā'idah:2] And assisting in such matters as those mentioned is among goodness and piety.

And He, *Glorified is He*, said: *“And whoever is killed unjustly, We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported.”* [Al-Isrā':33] However, it is not appropriate to seek the help of the oppressor except when it is impossible to recover the right otherwise. But if it is possible to recover it without the oppressor, then seeking his help is not appropriate, because the oppressor may be excessive and go beyond the right into falsehood.

**Yes**, if it is deemed likely that seeking the help of the oppressor will lead to going beyond the right with respect to that person, then it is better to leave off seeking his help.

### **[The Ruling on Assisting One of Two Innovating Factions Who Are Fighting Each Other]**

**Question:** There are two innovating factions, each of them calling to its own innovation, and fighting has taken place between them. However, one of the two factions is closer to the truth than the other. Is it permissible to assist the closer of the two factions against the other?

**Answer – and Allah is the One who grants success:** We can say that it is permissible to assist with wealth and weapons, without directly engaging in the fighting. Imām Amīr al-Mu'minīn 'Alī, *Peace be upon him*, said to his son al-Ḥasan, *Peace be upon him*: “Do not fight the Khawārij

after me, for the one who seeks the truth and errs in it is not like the one who seeks falsehood and attains it.”

As for assisting with wealth and weapons, it is no more than seeking the help of the openly sinful (fussāq) and the people of innovation in fighting against rebels (bughāt). Amīr al-Mu’minīn ‘Alī, (*Peace be upon him*), sought help in his battles from the Khawārij before they rebelled, and from al-Ash‘ath ibn Qays, and so on.

### **The Stance of the Believer When the Corrupt Fight One Another**

If two criminal factions fight one another, such as what occurred between Mu‘āwiyah and the Khawārij, then the believer must keep completely away from that fighting—with himself, his opinion, and all of his benefits. It has been narrated from ‘Alī, *Peace be upon him*, in this regard: “In times of tribulation (fitnah), be like the young camel (ibn al-labūn): no udder to be milked, and no back to be ridden.”

**[What Is Meant by His, Exalted is He, Saying: “If Two Groups of Believers Fight One Another, Make Peace Between Them”]**

His, Exalted is He, saying: *“And if two groups of believers fight each other, then make peace between them. But if one of them transgresses against the other, then fight against the transgressing group until they ‘are willing to’ submit to the rule of Allah. If they do so, then make peace between both ‘groups’ in all fairness and act justly. Surely Allah loves those who uphold justice.”* [Al-Ḥujurāt:9]

– If two believing sects fight one another, it is obligatory upon their believing brothers to intervene between them with reconciliation and to halt the fighting.

– If they reconcile between them and the fighting stops, then after that, if one of the groups attacks by war and launches fighting against the other group, it is obligatory upon the believers to repel its aggression and its transgression by fighting, if they do not refrain by other means. If it ceases its aggression, the believers must compel it to submit to the ruling of Allah, Exalted is He, in what is between it and the other sect.

– It then becomes incumbent upon the believers to oblige each sect with what is upon it of the right due to the other group, and to give it what it deserves, and to be careful to observe justice in that, and to be thorough in fulfilling and enabling the recovery of rights between the two groups in every major and minor matter.

– The believers are obliged, in this latter reconciliation, to be particularly careful about justice and thoroughness in fulfilling and recovering rights, more so than in the first reconciliation—so that there does not remain between the two sects anything that might stir up and re-awaken enmity. Old enmities are stirred by small things and provoked

by a trivial matter, and through carefulness and thoroughness in justice and in fulfilling and recovering rights, the causes of provocation are cut off and the entry points of Satan are closed.

– It is not permissible for the believers to abandon reconciliation between believers when they are able to do it and have the capacity for it.

– If the two fighting groups are highway robbers who terrify people by plundering, looting, killing, and spreading corruption in the land, then there is no blame upon the believers if they leave off reconciling between them.

### **[Is It Permissible to Assist an Oppressor in Acts of Good?]**

**Question:** Is it permissible to assist an oppressor in acts of good, projects of righteousness, and to accept his rewards and compensations for that, or not?

**Answer – and from Allah is success:** That is permissible, and it is not far-fetched that it may even be obligatory to assist him in what is obligatory, if no harm results from that; due to His, *Exalted is He*, saying: *“Cooperate with one another in goodness and righteousness, and do not cooperate in sin and transgression.”* [Al-Mā'idah:2] And there is no objection to accepting his rewards and compensations, but on the condition that no harm results from that in the future, such as that the oppressor may, by means of that, draw him into assisting him in falsehood, justifying his corrupt actions, keeping him company, and the like.

### **[Ruling on What Rebels, Khārijites, and Oppressors Take from the Muslims]**

**Question:** Do the rebels (*al-bughāt*), the Khārijites, and the oppressors own what they have taken, just as the disbelievers own what they have taken from the Muslims?

**The answer:** If the one fighting the believers is from the people of *jabr* (compulsion) or *tashbīh* (anthropomorphism) or those similar to them among those who are judged to be disbelievers, then by analogy they own what they have taken and prevailed over, by analogy with the polytheists, due to their sharing in disbelief.

What supports this is that Amīr al-Mu'minīn (*Peace be upon him*) did not hold the people of Baṣrah liable for what they had destroyed of the Muslims' property.

**If it is said:** Amīr al-Mu'minīn (*Peace be upon him*) did not judge them with the ruling of disbelievers; rather, it is narrated from him that “the land is a land of Islam, and it is not permissible from their property except what they have brought forth for war; as for what is beyond that,



it is forbidden, because the land of Islam makes what is in it forbidden.”

**We say:** The war of ‘Alī (*Peace be upon him*) is the war of Allah and His Messenger (*May Allah bless him and his family and grant them peace*), and whoever wages war against Allah and His Messenger is a disbeliever.

What further strengthens this is what is narrated of the exchange between ‘Ā’ishah and al-Asḥṭar, when she said to him regarding the people of Jamal: “Do you not know that the blood of a Muslim is not permissible except in one of three cases...” – the ḥadīth – so al-Asḥṭar said: “For some of that we fought them, O Mother of the Believers.”

Moreover, it is something agreed upon that deeming it lawful to kill a believer is disbelief and an exit from Islam. And it is known that the people of Jamal, outwardly, were deeming it lawful to kill the companions of ‘Alī (*Peace be upon him*) and those obedient to him. And the ummah today is unanimous that Amīr al-Mu’minīn (*Peace be upon him*) and those obedient to him in the Battle of Jamal were the party of truth.

Once you understand this, (you know that) Amīr al-Mu’minīn (*Peace be upon him*) did not judge the land with the ruling of the land of shirk for one of two reasons:

1. Either because the doubt (shubḥah) was strong, due to the presence of ‘Ā’ishah, the wife of the Prophet (*May Allah bless him and his family and grant them peace*), and Ṭalḥah and al-Zubayr, who were among the greatest of the Companions, so the general people of Baṣrah were deluded by them.
2. Or out of consideration by Amīr al-Mu’minīn (*Peace be upon him*) for the general interest; for if he had treated them as he treated the polytheists, perhaps some of those obedient to him would have wavered from him, and his enemies would have found a way thereby to blame him and disparage him. What supports this is that when, after Jamal, some things occurred from the people of Baṣrah, Amīr al-Mu’minīn (*Peace be upon him*) bestowed favour upon them by pardoning them, which indicates that he left off some of what they deserved of punishment.

### **Ruling on Customs, Taxes, Bribes, and Ḥajj/‘Umrah Fees**

**Question:** What is the ruling regarding what is paid in customs duties and taxes to a just or unjust state? Does a Muslim incur sin by paying that, given that what he pays is not from the Islamic taxes, and given what has come of severe threat regarding the tax-collector (*al-‘ashshār*)?

**The answer – and success is from Allah:** Allah, *Exalted is He*, has forbidden consuming people’s wealth unlawfully. He said: *“And do not consume one another’s wealth unjustly...”* [al-Baqarah:188] and He said: *“And cooperate in righteousness and piety, but do not cooperate in sin and*

*aggression.*" [al-Mā'idah:2]. On this basis, it is not permissible for a Muslim to cooperate in that which was mentioned in the question; this is the basic rule in this chapter.

There are, however, situations in which a Muslim is excused for money he pays without right or not in its proper place:

1. **When retrieving a due right becomes very difficult:** If it is extremely difficult for him to obtain a right that is firmly his, then it is permissible for him in that case to resort to paying some money in order to obtain his right. Even if this is called a "bribe," its prohibition, in this situation, falls upon the one who takes it – whether a judge, official, or similar – and not upon the one who gives it. One may infer this from the implied meaning of His saying, *Exalted is He: "...and do not consume a portion of the wealth of people in sin while you know (it is unlawful), by using it to bribe the judges..."* [al-Baqarah:188], and likewise if a man's money is being held back in customs. Also indicative of what we have said is what has been established of the permissibility of ransoming a captive from the hands of the polytheists or rebels.
2. **When it is paid under coercion:** That includes when one is threatened with punishment for not paying. The proof for this is His saying, *Exalted is He: "Except for one who is compelled while his heart is at rest with faith..."* [al-Nahl:106] and the ḥadīth: *"The pen has been lifted from three: from the child until he reaches puberty, from the insane until he regains sanity, and from the one who is compelled until he (freely) chooses."* (or as he said).
3. **When necessity calls for it:** Such as a sick person who needs to travel abroad for treatment and cannot do so except by paying money to the state he is travelling to; in this case, it is permissible for him to pay what is required for the travel and no sin is upon him, due to His saying, *Exalted is He: "...except what you are compelled to (eat)." [al-An'ām:119].*
4. **It is permissible to engage in essential activities of life** – like agriculture and trade – even if the unjust state takes a portion from the worker. The evidence for this is what human life necessarily requires in terms of practising and continuing these activities. Allah, *Exalted is He*, said: *"...except what you are compelled to (do)." [al-An'ām:119].*

And agriculture and trade are among the things Allah has made lawful for His servants; there is no blame upon the Muslim regarding what Allah has made lawful for him.

**If it is said:** This becomes a cause of strengthening the power of the oppressor, by what he takes from those engaged in such work; thus the

Muslim becomes thereby an assistant to the oppressor in his oppression.

**We say:** Trade and agriculture are one thing, assisting the oppressor is another. Allah permitted sale and agriculture, then forbade assisting the oppressor. Assisting the oppressor may be by wealth, by word, or by action; but trade and agriculture are not, in themselves, assisting (him).

**If it is said:** Trade and agriculture are causes and means that lead to strengthening the power of the oppressor; were it not for them, states would not stand, especially in past centuries when traders and farmers were the only source of state revenue. And Allah has forbidden a good deed when it is a cause for an evil to occur, as in His saying: *“And do not insult those they invoke other than Allah, lest they insult Allah in enmity without knowledge.”* [al-An‘ām:108].

**We say:** The causes and means that lead to committing sins or to their occurrence fall into two categories:

- **First category – prohibited causes:** as in this verse, and like looking at the physical charms of a non-maḥram woman, being alone with her, and the like – all of which the Sharī‘ah has explicitly forbidden.
- **Second category – non-prohibited causes:** these are those for which there is no text forbidding them. Trade and agriculture fall into this category. If these were prohibited in the time of unjust rulers, Allah would have explained that in His Book and on the tongue of His Messenger (*May Allah bless him and his family and grant them peace*), due to the intense and general need for such clarification. Yet Allah and His Messenger (*May Allah bless him and his family and grant them peace*) have explained matters less important than this: *“And your Lord is never forgetful.”* [Maryam 19:64].

Among this second category is what has been established of the permissibility of feeding a dhimmī (non-Muslim citizen under covenant), a captured enemy combatant, and a sinner, and of doing good to the disbeliever and the non-fighting polytheist, in His saying, *Exalted is He: “Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes – from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly.”* [al-Mumtaḥanah:8].

And among it is what has been established from the Prophet (*May Allah bless him and his family and grant them peace*) that he dealt with the Jews in buying and selling, despite him (*May Allah bless him and his family and grant them peace*) knowing that they dealt in usury and barred others from the path of Allah. And Amīr al-Mu‘minīn (*Peace be upon him*) left the people of al-Shām at Ṣiffīn free to access the water and

did not prevent them from it after he had gained control over it.

The scholars of the madhhab have said: It is permissible to engage in transactions with an oppressor in buying and selling. They also said: It is permissible to sell grapes to someone one thinks will make them into wine, on condition that the seller does not intend that they be made into wine. Likewise, there are other means which the Sharī'ah has not prohibited; trade and agriculture are of this kind. If all means were prohibited, then feeding a sinner, or selling food to him, or buying goods from him would be forbidden – due to that leading to assisting him in his sin – and no one says such a thing.

There is another case, less clear than what has preceded: that is what pilgrims pay in fees. We say: What appears to me – *and Allah knows best* – is that it is permissible for the pilgrim and the person performing 'Umrah to pay those fees which are unavoidable for whoever wishes to perform Ḥajj and 'Umrah. The scholars of the madhhab have made Ḥajj obligatory upon one who is able, if nothing is taken from him beyond what is customarily taken. Today, those fees have become a law and an official custom; therefore what we have said about its permissibility is in harmony with the statement of the scholars of the madhhab.

Moreover, there is no blame upon the Muslim in being wronged; the blame upon him is in being the wrongdoer. And there is no wrong in paying some of those fees from the side of the payer.

**In summary:** It is permissible to transact with the oppressor in what we have mentioned and what is similar to it, with the following conditions:

1. ***That the oppressor not be in a state of active war (ḥarbī);*** if he is a ḥarbī enemy, then it is obligatory to sever ties with him and show enmity toward him.
2. ***That there be a need calling for the payment of the money,*** such as Ḥajj, 'Umrah, building fees, trade taxes, and similar matters.
3. ***That intention (niyyah) has a role here:*** It is a condition that paying the money be entirely free of any intention of assisting the receiving authority, and free of any approval of what it has done. This is because of what has come in the report: "*Whoever is pleased with the deed of a people is a partner with them in their deed.*" And the ḥadīth: "*Actions are only by intentions, and every person shall have only what he intended.*"

What is preferable is to keep away from dealing with an oppressor as much as possible. However, we mentioned what we mentioned of permissibility because this issue has become a general affliction: Western laws have become dominant in the lands of the Muslims, and

Western companies likewise dominate our markets. The greater share of petroleum is owned by foreign companies, telecommunications are Western companies, and so on. A Muslim is not able to boycott such things.

Electricity has become almost a necessity, and along with the price of electricity, taxes and other fees are taken from the consumer, and likewise along with the price of petroleum. For that reason, we said that it is obligatory upon the payer not to intend thereby supporting the American or French economy, nor the tax and fee officials. There is no problem in paying, when there is a need, so long as he does not intend to support those entities.

**If it is said:** What is the forbidden assistance (*mu‘āwanah*) upon which a threat is mentioned for the one who does it, as in *Risālat al-Taḥdhīr* “The Epistle of Warning” and similar works?

**We say:** What is meant by *assistance* is supporting (the oppressor) with one’s person, wealth, opinion, and counsel; its forms and types are not hidden. What we have mentioned above is not of that, as we clarified previously.

**Question:** Is it permissible for a merchant to import goods from outside the country and then, by his own choice, pay the customs and fees, and so on?

**The answer – and success is from Allah** – can be derived from what has preceded, and we add:

Bringing goods, importing them, and selling them is among what Allah, *Exalted is He*, has made lawful, by explicit text of the Qur’an, in His saying: “*But Allah has permitted trade and forbidden usury.*” [al-Baqarah:275], and His saying: “*...except that it be trade conducted by mutual consent among you.*” [al-Nisā’:29].

On this basis, importing a commodity and purchasing it from outside the country is permissible and lawful. As for taking the commodity to the customs office and voluntarily paying customs duties, that is not permissible, because it falls under cooperation upon sin and transgression; for there is no financial tax in Islam other than zakāt, and whatever is beyond that is aggression and illicit gain.

This is so when the commodity is not a necessity, such as grains, flour, medicine, and the like. If it is of that type, then it is permissible to buy it from abroad, pass it through customs, and pay the fees – that is if there is no way to import it except in that manner.

**Yes,** it is permissible to pass the commodity through the port. If the customs authorities confiscate it, he should refuse to pay the fees under any pretext, such as lack of funds. If they keep back some of it and

release some of it to him until he pays the fees, he takes what is released, then, after that, tries to obtain the release of the remainder and ransom it however he can.

### **[Ruling on an Army Employee Who Avoids Oppression]**

**Question:** An employee in the army works at the border between two states. He takes the utmost care to avoid wronging anyone or assisting in the oppression of anyone; indeed, he often helps those who are trying to evade (the authorities) and assists them in evasion. Is there any blame upon him for this work?

**The answer – and success is from Allah:** If the employee's work is as described, then there is no sin upon him, if Allah wills. That is because working with an oppressor is not prohibited in and of itself, but (only) due to the corrupt consequences that may result from it. An employee who does not help the oppressor in his oppression, nor assist in wronging anyone, does not fall under the threat that has been reported regarding oppressors and the helpers of oppressors.

Supporting this is the fact that many of the righteous Companions assumed certain posts under some oppressors. And some of the Imams of the Prophet's family (*Peace be upon them*) held the office of *naqīb al-Ṭālibiyyīn* (head of the Ṭālibid clan) in the time of Banū al-ʿAbbās, before calling to the Imamate.

What is better and safer, however, is to keep away from that. For this reason, Imām al-Qāsim ibn Ibrāhīm (*Peace be upon him*) did not accept the gifts of oppressors, nor was he content to do what would give them comfort, such as correspondence and the like.

### **[A Study Concerning the Best Types of Righteousness (*Birr*)]**

The scholars of the madhhab have said, as in the Book of Bequests (*Kitāb al-Waṣāyā*): "The best type of *birr* (righteousness) is jihād." They mentioned this in the context of someone who makes a bequest from his wealth to the "best kinds of *birr*."

Some scholars have related that the best type is knowledge, because jihād is founded upon knowledge and dependent upon it – there is no jihād for one who has no knowledge. On this basis, it is narrated from Imām Zayd ibn ʿAlī (*Peace be upon them*) that he said: "Servants of Allah, do not fight your enemy on the basis of doubt, lest you go astray from the way of Allah. Rather, insight, insight – then fighting. For Allah recompenses for certainty with the best recompense by which He recompenses any truth. Indeed, whoever kills a soul while he is unsure of its misguidance is like one who kills a soul without right."

What is meant by knowledge is knowledge of Allah, His Messengers, and what they brought, and this is followed by knowledge of what the

Imams of guidance and the scholars among their followers have brought, then what the leading scholars of the ummah have presented.

**Some have said:** Opinions stripped of evidences are not called “knowledge” by consensus and agreement.

**We say,** for our part: They are indeed called “knowledge” by consensus and agreement. The proof of that is that centuries and ages have passed in which all Muslims have followed, in their religion, a number of Imams: al-Shāfi‘ī, Abū Ḥanīfah, Mālik, and Aḥmad – this on the side of Ahl al-Sunnah.

As for the Zaydī Shī‘ah, they were followers (*muqallids*) of al-Nāṣir, al-Qāsim, and al-Hādī (*Peace be upon them*).

And as for the Imāmī Shī‘ah, they are followers of al-Ṣādiq, al-Bāqir, and the Imams from among their offspring. These are the Muslims, and all of them would suffice themselves with studying the texts of their Imams and what branched from them, without being required to seek every proof; and they called that “the science of fiqh.” This is something known with certainty. And the scholars, throughout history, have continued to record the statements of the scholars from among the Companions, the Followers, and those who followed them.

Moreover, knowing and being acquainted with the statements of the scholars of the Prophet’s family and of the ummah benefits both the *mujtahid* and the *muqallid*:

**For the mujtahid, he benefits by:**

1. Knowing the issues of the two consensuses: the consensus of the ummah and the consensus of the Prophet’s family (*Peace be upon them*).
2. Knowing the matters of disagreement.
3. Gaining benefits in weighing the proofs: he gives preference to one proof over its counterpart because the one acting upon it is more learned, more numerous, one of the famous Imams, or one of the Imams of the Prophet’s family (*Peace be upon them*), and so on.
4. Gaining benefits when issuing a fatwā regarding the validity of what a simple layman has done, due to its agreement with the opinion of some scholar among the scholars of the ummah.
5. Finding reassurance (*isti’nās*): a *mujtahid* may have a view preponderate in a matter, yet he is hesitant to voice it; if he finds that some Imams have already held that view, he finds reassurance in it and proceeds to declare it.

**As for the *muqallid*:**

1. Because he is obliged, in his case, to act upon one of the sayings of the *mujtahids*, due to His saying, *Exalted is He*: “*So ask the people of the Reminder if you do not know.*” [al-Anbiyā':7].
2. Because of the breadth and mercy this gives the *muqallid*, allowing him to choose the easiest and most accommodating of the *madhhab*s, according to those who permit that.

**Then we say after this:** It is not appropriate to state absolutely that either *jihād* or knowledge is superior. What appears to me is that a detailed distinction is necessary: Knowledge is superior and preferred in:

1. Knowledge of that which a Muslim is not excused for being ignorant of – that is, knowledge of Allah, *Exalted is He*, His Messengers (*Peace be upon them*), the Last Day, and what is attached to that. This is what is called the fundamentals of religion (*uṣūl al-dīn*). What is intended is to know the important issues together with their proofs, without delving deeply and without detailing debates, and so on, for faith is not complete except when this knowledge becomes firm. Included in this is knowing the people of truth so that one may be with them and join their ranks, due to His saying, *Exalted is He*: “*O you who believe, fear Allah and be with the truthful.*” [al-Tawbah:119].
2. Knowledge of what it is personally obligatory for him to do of acts of obedience, and personally obligatory for him to avoid of sins. This includes knowing (the rulings of) prayer; knowing (the rulings of) *zakāt* if he is among the well-off; knowing the rights of parents and kindred, and the rights of the neighbor, the poor, and the orphans, and so on – that is, those determinate, personally obligatory duties which no one else can perform on his behalf.

Likewise, knowing what is obligatory of loyalty to the friends of Allah and enmity towards the enemies of Allah, and knowing the sins which Allah has forbidden, and which a person cannot truly be described as *muttaqī* (God-fearing) unless he avoids them.

3. There is a group of intelligent people for whom engagement in knowledge is better, in their case, than *jihād*. The number of such people, whether many or few, is according to the degree of need for them in Muslim societies.

In these three cases, seeking knowledge is better, more fitting, and more obligatory:

1. Because logical order requires that knowledge must necessarily precede action. Allah, *Exalted is He*, said: “*So know that there is no*



*god except Allah, and ask forgiveness for your sin” [Muhammad:19].*

Thus He placed knowledge first and mentioned action afterwards.

2. Because the first thing with which the Lord of the worlds came and which He made obligatory upon His servants at the beginning of Islam was knowledge of Allah. The prescribed duties, including jihād, were not revealed until a long time afterwards.
3. Because knowledge is personally obligatory (*mu‘ayyan*) for the three categories we mentioned, whereas jihād is a communal obligation (*farḍ kifāyah*), and an individual obligation takes precedence over a communal obligation.
4. Because the meaning of jihād is calling to goodness, enjoining what is right, and forbidding what is wrong – exactly as Allah, *Exalted is He*, said: *“And let there be from among you a community who call to goodness, enjoin what is right, and forbid what is wrong; and it is they who are the successful” [Āl ‘Imrān:104]*. Calling to goodness, and enjoining what is right and forbidding what is wrong, can only be complete when done by someone who knows what goodness is, and knows what is right and what is wrong.

**Yes**, if a Muslim has learned what he is strictly obliged to know and has clear insight in his religion, and he is not one of the intelligent people devoted to seeking knowledge, then jihād is better in his case – especially for those who are hardy, strong, and perceptive in warfare; and those of sound opinion, political sense, and good planning; and those of leadership and dignity, whose advancing causes people to advance and whose turning away causes people to turn away, and those like them. For such people, jihād is superior in their case.

The leaders (*a‘immah*) of the Muslims have a level of divine success and sound judgment that others do not. Therefore, they do not neglect to distribute the Muslims into what is appropriate according to what benefit and need require. They assign to jihād those who will carry it out according to the need, and they assign to the pursuit of knowledge those whom the people need in all fields of the sciences – all of that without neglecting agriculture, industry, trade, and everything that life requires.

Moreover, it is clear that it is a communal obligation, according to need, that in the Muslim lands there should be scholars of medicine, scholars of industry, of sports, and so on; and it is not fitting for those in authority to be negligent regarding that.

**Yes**, there may arise for the Muslims a situation in which jihād becomes superior – such as when the hosts of the disbelievers march forth to uproot Islam and the Muslims, and none can stand against them except everyone together. In such a situation, occupying oneself with (scholarly) learning is not permissible.

## [Benefits and assorted issues]

**At universities**

**Question:** Is it permissible for a Muslim student to enroll in universities where the sexes are mixed?

**Answer – and Allah is the One who grants success:** The mixing of the sexes is an evil, and in it there is corruption for both sexes, especially with prolonged sitting together, continued conversation, and friendly socializing. In the hadith narrated from the Prophet Muhammad (*May Allah bless him and his family and grant them peace*): “I have not left after me any trial more harmful to men than women,” or as he said. And it is narrated from him (*May Allah bless him and his family and grant them peace*): “Women are [weak in] reason and [are] private parts, so conceal their weakness with silence and their private parts with staying in the houses,” or as he said.

And Allah, *Exalted is He*, commanded the wives of the Prophet (*May Allah bless him and his family and grant them peace*) to remain settled in the depths of their homes, so He said: *"And abide in your homes and do not display yourselves as [was] the display of the former times of ignorance."* [al-Ahzab:33] And He, *Exalted is He*, said: *"And when you ask them for any goods, ask them from behind a partition. That is purer for your hearts and their hearts."* [al-Ahzab:53] And He commanded the men to lower their gazes, so He said: *"Tell the believing men to lower their gaze and guard their private parts. That is purer for them."* [an-Nur:30] And He commanded the women just as He commanded the men, so He said: *"And tell the believing women to lower their gaze and guard their private parts"* [an-Nur:31], and He commanded them to conceal their adornment, so He said: *"and not expose their adornment except that which [necessarily] appears thereof ... and not expose their adornment except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers ..."* until His saying, *Exalted is He*: *"And let them not stamp their feet to make known what they conceal of their adornment. And turn to Allah in repentance, all of you, O believers, that you might succeed."* [an-Nur:31]

Thus Allah, *Exalted is He*, directed the believing men and believing women, and expounded the verses for them in this regard, in order to block the avenues of temptation through which Satan may find an entry. For you see in the first verse that Allah, *Exalted is He* – and He is the All-Knowing, All-Wise – has forbidden believing women from exposing their adornment to immoral and suspicious women, and did not grant them concession to expose their adornment except to “their women”, and they are the believing women.

**Therefore we say:** What occurs in the university of mixing between the sexes, and what follows it of conversations and socializing, is a great evil, disobedience to Allah, *Exalted is He*, and opposition to His commands and teachings. It is not lawful for anyone who believes in Allah and the Last Day to attend such gatherings, except in the case that he is denouncing it or changing it.

And for the likes of this Allah cursed the Children of Israel, so He, Sublime is He, said: *"Cursed were those who disbelieved among the Children of Israel by the tongue of David and of Jesus, the son of Mary. That was because they disobeyed and [habitually] transgressed. They used not to prevent one another from wrongdoing that they did. How wretched was that which they were doing."* [al-Ma'idah:78-79]

### **[Employment in universities]**

**Question:** A Muslim man has a higher degree that qualifies him to be a professor at the university. Is it permissible for him to enter into this job, knowing that he is firm in creed and has inclination and desire for calling to Allah, Exalted is He, in addition to what he has of hope and expectation of reforming many of the university students?

**Answer – and Allah is the One who grants success and help:** Calling to Allah, Exalted is He, and enjoining what is right and forbidding what is wrong are among the greatest qualities of this Ummah, as in His saying, Exalted is He: *"You are the best nation produced for mankind. You enjoin what is right and forbid what is wrong and believe in Allah."* [Ali 'Imran :110] If the matter is as mentioned in the question, then there is no objection to joining the university. Once he joins, it is not permissible for him to fall short in enjoining what is right and forbidding what is wrong, according to what becomes possible and easy for him, with wisdom and good exhortation. If the call bears fruit, grows, and he succeeds in his reforming efforts, then that is excellent. But if the call does not bear fruit, or bears some fruit and then no effect appears afterwards and hope and expectation grow weak, then at that point departure (from that post) becomes obligatory.

This is supported by the practice of many of the Imams, such as al-Qasim ibn Ibrahim, and al-Hadi Yahya ibn al-Husayn and his son Muhammad ibn Yahya, upon all of them be peace.

Likewise did the Imam al-Mahdi Muhammad ibn al-Qasim al-Huthi: they left what they had entered when hope diminished and expectation weakened regarding the reform they had hoped to achieve.

What we have mentioned is also supported by the going of Musa and Harun (*Peace be Upon Them*) on that hope which Allah, Exalted is He, mentioned in His saying: *"That he may be reminded or fear [Allah]."* [Ta-Ha:44]

And the Prophet Muhammad (*May Allah bless him and his family and grant them peace*) used to attend the gatherings of the polytheists in order to call them to Allah, and Nuh (*Peace be Upon Him*) remained among his people for a thousand years less fifty years, calling them by night and day, secretly and openly, and likewise did the rest of the Prophets (*Peace be Upon Them*), for they mixed with the people of evil and sat with them for the sake of calling them to Allah and to His religion.

Thus, such an action may even become obligatory for the one who feels in himself the ability to change the evil and to call to Allah, *Exalted is He*, and has hope and expectation of success in that.

**[How should a student answer exam questions that contradict his madhhab?]**

**Question:** It may happen that the madhhab of the student at the university is contrary to the madhhab prescribed in the university, and the exam questions are framed according to what is prescribed there. The student is thus put in a bind when answering: if he answers according to his own belief, they fail him; and if he answers according to the madhhab taught in the university, he falls into what is blameworthy and false. Is there any solution or concession in that?

**Answer:** This question has been repeated to me many times, and the solution is as follows:

1. If it is possible to pass without answering the problematic question, then it becomes obligatory for the student to leave it without an answer.
2. If passing is not possible except by answering the problematic question, then he should answer it by way of attribution (reporting), so he says, for example: "Ahl al-Sunnah wa'l-Jama'ah say such-and-such," and the like.

What I advise the student is that he should not enroll in a department in which he will be exposed to such things, but rather should switch to another department in which there is no exposure to the madhhabs. This is safer for the student in his religion and his creed.

**If it be said:** The scholars of the madhhab have said that concession to commit a sin is only in the case of necessity, and there is no necessity in what has been asked about, for the necessity intended in this topic is fear of death or killing, or the cutting of a limb, or the onset of a chronic illness, or the like.

**We say:** The matter is as the scholars of the madhhab have mentioned, and what we have stated is concession regarding *reporting* (mere narration), and reporting falsehood is not in itself a sin.

But reporting falsehood is not permissible except when there is a

need to report it, for the obligation is to cause falsehood to die out and be buried.

Allah, *Exalted is He*, has reported in the Qur’an many of the doctrines of the polytheists, Jews, and Christians, and many of the statements of the hypocrites and people of falsehood.

**When does the disposition of one who is legally sound become invalid?**

**Question:** What is the limit at which the disposition of one who was previously sound in his transactions becomes invalid? And in what place have the scholars of the madhhab stated this?

**Answer:**

The limits at which the disposition of an owner becomes invalid are:

1. Madness: if the owner becomes insane, his disposition over his property becomes invalid.
2. A life-threatening illness: if the illness of the sick person reaches the point that death is imminent, his disposition is invalid except in one-third (of his estate).
3. If the owner suffers a wound from which death is certain, his disposition over all his wealth becomes invalid, and he is considered, in legal ruling, as being dead.
4. If the judge rules that the owner is interdicted from disposing (in his property) because of his squandering in his wealth, or because debts encompass his wealth, or for a similar reason.
5. And there are scattered issues, such as disposition regarding charity before it is taken possession of, and regarding khums before it is authorized, and regarding pledged property, and so forth. This is an answer to one of the two possible understandings of the question.

As for the second possible meaning of the question, it is that a person who is normally sound in his transactions may be overtaken by such intensity and anger that his disposition is no longer sound. What is the limit of anger which, if reached, invalidates his disposition?

**The answer:** The limit in such a case is that a person in his anger and intensity reaches a point where modesty (shyness) departs from him, and this is known by his raising his voice and speaking with what is not befitting.

This is the meaning of what they have mentioned, and it is in *al-Taj* (the commentary); its exact place has slipped from me. What they have mentioned is strong; for sound intellect restrains a rational person from doing what he would be ashamed of before people. So when a rational person, among people, does because of anger what one would be

ashamed of, then his intellect has diminished and weakened.

### Showing Kindness to Parents

**Question:** What is the kindness (iḥsān) that must be shown to parents and likewise to relatives by blood (arḥām)? Does it have a set measure or limit? And is it obligatory to repeat it? We ask you to clarify what is required.

**Answer – and Allah is the One who grants success:** Kindness (iḥsān) is the opposite of abuse (isā’ah). The least level of kindness is to withhold harm and to deal justly with people against your own self; whatever goes beyond that is bounty and kindness.

Based on this, the child must avoid anything by which his father is harmed. From here comes the narration from the Prophet, *May Allah bless him and his family and grant them peace*, that he commanded one of the warriors in one of the battles to return to his parents, and ordered him to make them laugh just as he had made them weep, for that warrior had set out with the Prophet, *May Allah bless him and his family and grant them peace*, for that campaign while his parents were crying.

And among the things by which the parents are harmed is what Allah has forbidden of sighing at them in annoyance, feeling disgust towards them, treating them harshly, and shouting at them, as found in His saying: *“So do not say to them even ‘uff,’ nor rebuke them, but speak to them with gracious words.”* [Al-Isrā’:23]

It is also necessary to show them reverence and magnification, and to supplicate for them with the supplication which we have been commanded to say at the end of the previous verse: *“And be humble to them out of mercy and say, ‘My Lord, have mercy on them as they raised me when I was small.’”* [Al-Isrā’:24]

It is likewise necessary to fulfill their needs if they are in need: he must spend on them if they are in need, and share with them from that with which Allah has provided him. For it is not part of dutifulness that the child sleeps full while his parents sleep hungry.

Then, after that, what is required of him is what custom and habit have established, such as visits and the like, including giving them something as a present; and he repeats that according to what is customary.

Thus, everything we have mentioned is regarded, in common customs and usages, as kindness; and whoever abandons it is not considered a doer of kindness.

As for what is obligatory of kindness towards the relatives by blood (arḥām), it is to refrain from harming them, to be just with them, and to maintain visits according to what customs have established, as well as

giving them something and providing them gifts if that exists in the customs; each person in accordance with his ease or hardship; likewise hosting them according to what is known in custom and usage; and supporting them in what is right—up to all that people’s customs and usages include in that regard.

There are also rights to which the Sacred Law and custom have urged us, such as visiting him if he falls ill, saying “yarḥamuk Allāh” to him if he sneezes, asking about him if he is absent, following his funeral if he dies, consoling him if he is afflicted, congratulating him if a blessing befalls him, and so on. And although such matters are mentioned among the general rights of the believers, relatives by blood are even more entitled to them.

### **[The Ruling on a Child Visiting the Grave of His Immoral Father]**

**Question:** A man who was immoral (fāsiq) died, and on the day of his death he did not perform the Dawn Prayer (Ṣalāt al-Fajr). His son said: Is it permissible for him to visit him (i.e. his grave)?

**Answer – and Allah is the Guardian who grants success:** There are two matters here, namely: the visit, and the supplication (du‘ā’).

As for supplicating for the immoral father for mercy, forgiveness, and the reward of the Hereafter, that is not permissible, due to His saying, *the Exalted: “It is not for the Prophet or the believers to seek forgiveness for the polytheists, even if they are close relatives, after it has become clear to them that they are the people of the Hellfire. And Abraham’s prayer for his father was only because of a promise he had made to him; but when it became clear to him that he was an enemy to Allah, he disassociated himself from him. Indeed Abraham was truly tender-hearted and forbearing.”* [Al-Tawbah:113–114]

As for the mere visit that is free of supplication for the father, it is permissible for a purpose, such as if he fears people’s blame if he were to leave it, or that they would say: “Look at this religious man—see how his religiosity leads him to abandon visiting his own father,” which would result in driving people away from listening to him and accepting what comes from him.

Furthermore, there is no doubt about the permissibility of visiting a disbelieving or immoral father during his lifetime, due to His saying, *the Exalted: “...and keep their company in this world in a good manner...”* [Luqmān:15] and His saying: *“...and be good to parents...”* [Al-Baqarah: 83] So when the father dies, the basic ruling is the permissibility of visiting him, by continuing the first ruling, and nothing has appeared to us that would change this basis; the verse only forbids seeking forgiveness for the enemies of Allah.

As for the ḥadīth in which the Prophet, *May Allah bless him and his*



family and grant them peace, said: "I asked my Lord for permission to visit my mother, and He did not grant me permission except for an hour...", this is the meaning of the ḥadīth. Perhaps that was from the Prophet, *May Allah bless him and his family and grant them peace*, in the early period, for he (*May Allah bless him and his family and grant them peace*) had previously forbidden visiting graves, then after that he commanded it, saying: "Indeed, visit them, for they remind one of the Hereafter." This ḥadīth is among the solitary reports (āḥād) according to Ahl al-Sunnah, and it has no existence in the narrations of the Zaydīs.

Visiting graves for admonition and reflection is permissible absolutely, whether the people in the graves are Muslims or non-Muslims. This may be indicated by the saying of Allah, *Exalted is He*, regarding Pharaoh: "*So today We will save you in your body so that you may be a sign for those who come after you.*" [Yūnus:92] What appears to me to be forbidden is that the motive for visiting the grave be that the deceased was an enemy of Allah; if that is the motive for visiting him, then the visit is not permissible.

And it is permissible to visit the grave of an immoral or unjust person with the intention of taking admonition, or to supplicate against him. It has been related that Imam 'Izz al-Dīn ibn al-Ḥasan, *Peace be upon him*, when he stood at the grave of Nashwān al-Ḥimyari, recited lines of poetry in which he mentioned his rank in knowledge, were it not for nasb [hostility towards the Prophet's family, *Peace be upon them*].

As for visiting graves in order to seek reward and recompense from Allah, this is only in regard to the righteous servants of Allah, for visiting them contains reward and recompense. The Prophet, *May Allah bless him and his family and grant them peace*, used to visit the people of al-Baqī', stand there for a long time, and supplicate for them; and he visited the martyrs of Uḥud eight years after they were killed, and he prayed over them a prayer like his prayer over the funeral. Fāṭimah, *Peace be upon her*, used to visit the grave of her uncle Ḥamzah ibn 'Abd al-Muṭṭalib at Uḥud every week. And the Muslims, in all eras, have continued to visit the grave of the Prophet, *May Allah bless him and his family and grant them peace*, and the graves of the martyrs of Uḥud and the people of al-Baqī'; and all the Islamic schools of law, both Shī'ah and Sunnī, seek nearness to Allah by visiting the Prophet, *May Allah bless him and his family and grant them peace*, the people of Uḥud, the people of al-Baqī', and the graves of the Imams, scholars, and devoted worshippers.

### [The Ruling on Beating Boys for Instruction]

**Question:** A teacher of young boys cannot complete their instruction in the required manner except by beating. Is it permissible to beat them for that purpose?



**Answer:** It is not permissible to beat a child without the permission of his guardian. However, the teacher is deemed outwardly to have permission, and this permission is inferred from the indication of the situation. Yet even with this inferred permission, it is not permissible for the teacher to beat the boy except after the failure of other means, which are enticing (towards good), frightening (from evil), praise, encouragement, and the like. It is necessary to restrict the beating to what there is no avoiding, and the teacher must not exceed what is customary of beating. The more the beating is lessened and reduced, the better, as a precaution against falling into what is forbidden.

### **[A Man Who Fights So That the Word of Allah May Be Supreme and for Booty]**

**Question:** A man fights so that the Word of Allah may be supreme, and also for war booty. What is the ruling on this intention?

**Answer:** That does not harm (his intention), as is evidenced by His saying, *Exalted is He*: *“Remember, O believers, when Allah promised to give you the upper hand over either target, you wished to capture the unarmed party. But it was Allah’s Will to establish the truth by His Words and uproot the disbelievers.”* [Al-Anfal:7] So the Muslims went out with the Messenger of Allah, *May Allah bless him and his family and grant them peace*, for this, and nothing was in their reckoning except intercepting the caravan of Quraysh and obtaining the booty. They were averse to confronting the fighting force of Quraysh, as Allah related that about them. Yet Allah and His Messenger, *May Allah bless him and his family and grant them peace*, did not censure them for this intention. And He, *Glorified is He*, said: *“He will also give you another favour that you long for: help from Allah and an imminent victory.”* [As-Saff:13] And He, *Glorified is He*, said: *“Allah has promised you ‘believers’ abundant spoils, which you will gain, so He hastened this ‘truce’ for you and has held people’s hands back from ‘harming’ you.”* [Al-Fath: 20] And He, *Exalted is He*, said: *“So fight them and Allah will punish them at your hands, put them to shame, help you overcome them, and soothe the hearts of the believers—”* [At-Tawbah:14] And He, *Exalted is He*, said: *“Nor do they attain any objective against an enemy, but it is written for them as a righteous deed”.* [At-Tawbah:120]

All that we have mentioned indicates that seeking booty does not cause harm (to one’s intention). Rather, it indicates that it is part of exalting the Word of Allah, since the seizing as booty of the wealth of the polytheists, taking their women captive, and enslaving their offspring are things that enrage the polytheists; and enraging them is a righteous deed that serves to raise high the Word of Allah.

### **[A Christian Woman Who Embraced Islam to Enter Mecca,**

**Intending Thereafter to Return to Christianity]**

**Question:** A Christian maidservant was accompanying those she served on a journey. When they drew near to Mecca, they became perplexed and said to her: "Embrace Islam so that you may enter Mecca and the Mosque with us." She said: "Yes, but I will return to the Christian religion after that." They asked me whether that solution was correct.

**Answer:** I replied to them that Islam is accepted from her, and it is not proper that her Islam be rejected nor that she be turned away from it on account of her intending to return to her first religion after that. It may be that she comes to desire Islam when she circumambulates the House and hears supplication and weeping, and perhaps Allah will cast desire (for faith) into her heart. The Messenger of Allah, *May Allah bless him and his family and grant them peace*, accepted the Islam of many people, and they had only accepted Islam under compulsion or for purposes other than desire for Islam. From here Amīr al-Mu'minīn, *Peace be upon him*, said concerning Mu'āwiyah and those like him: "By Allah, they did not accept Islam; rather, they only submitted."

**By Allah's aid, Volume Two is complete.**

**Following it is Volume three**

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Majd Al-Din bin Muhammad bin Mansour Al-Mua'ydi,  
Al-Imam Al-Hujjah, Al-Mujaddid Lidin  
(the Renewed of Religion) said,

"I swear by Allah, Most Highest, Most Greatest, an Oath that Allah, the All-Knowing, the Acquainted knows its truth that we have no purpose or inclination other than coming down at Allah's Judgment, and standing on the requirements of His command. And if we knew the truth in the side of the most extreme of creations whether Arabic, non-Arabic, Qurashi or Habashi, then we would accept it from him, and we would not refuse to follow him, and we will be among his helpers on it, and his followers. So, let the beholder say what he wants, and monitor only his Lord, and fear nothing but his sin. The Judge is Allah, and the appointment is the Day of Judgment, and all matters go back to Allah"



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