IN THE NAME OF GOD, MOST MERCIFUL AND COMPASSIONATE

Al-Hidāyah

THE GUIDANCE

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Burhān al-Dīn al-Farghānī al-Marghīnānī

A TRANSLATION OF AL-HIDĀYAH FĪ SHARḤ BIDĀYAT AL-MUBTADI
A CLASSICAL MANUAL OF ḤANAFĪ LAW : VOLUME TWO

Translated from the Arabic with
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For My Daughter Aamirah

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Al-Hidāyah

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Ṭalāq (Divorce)

Chapter 66

Divorce by Person Suffering From Terminal Illness

مَن يُرِدِ اللهُ بِهِ خَيرًا يُفَقِّهْهُ فِي الدِينِ
He for whom God wills His blessings is granted the *fiqh* of *Dīn*
حديث شريف

In the Name of God, Most Merciful and Compassionate, and (with) prayers and blessings on Muḥammad and his family.

If a man divorces his wife, during his terminal illness, through an irrevocable (*bā'in*)[1] repudiation and then dies while she is still in her waiting period, she will inherit from him. If he dies after the termination of the waiting period, she is not entitled to inheritance. Al-Shāfi'ī (God bless him) said that she will not inherit in either case,[2] because the state of being married has been annulled due to this obstacle[3] where marriage was the basis (of inheritance), therefore, even he will not inherit from her if she dies.

[1]For the meaning of *bā'in* divorce and its legal effects, see fn 4 on page 569 in Volume I of this translation; see also section 67.1 (What Makes a Divorced Wife Lawful) in this volume on p. 14.

[2]According to al-'Aynī this means before the waiting period and after the waiting period. Al-'Aynī, vol. 5, 440. The text indicates, however, that it means if he dies during her *'iddah* or after such waiting period.

[3]The obstacle of irrevocable repudiation

Our argument is that the state of marriage is the cause of her inheritance during his terminal illness, and the husband intended its annulment,[4] therefore, his intention is restrained by delaying the operation of the divorce up to the time of the termination of the waiting period in order to avert injury to the wife, which is possible. The reason is that during the waiting period some of the legal effects of *nikāḥ* remain. Consequently, it is permissible that they remain with respect to her inheritance from him.[5] This is distinguished from the situation after the termination of the waiting period when there is no possibility (of delaying the operation of divorce). The state of marriage in this situation is not the basis of his inheriting from her, therefore, inheritance is annulled in his case, especially due to his consenting to it.[6]

If he divorces her thrice upon her request[7] or he says to her, "choose," and she chooses herself[8] or obtains *khul'* (redemption) from him, and then he dies, while she is in her waiting period, she will not inherit from him. The reason is that she consented to the annulment of her right and the extinction of the delayed operation of her claim.[9] If she says, "Divorce me through a revocable repudiation," but he divorces her thrice, she will inherit from him, because a revocable repudiation does not eliminate marriage. In this case, she does not consent to the annulment of her right.

If he says to her during his terminal illness, "I had divorced you thrice during my period of health and now you have completed your waiting period" and she verifies it, following which the husband acknowledges a debt that he owes her or makes a bequest in her favour, then, according to Abū Ḥanīfah (God bless him) she is entitled to the lesser of this amount or inheritance. Abū Yūsuf and Muḥammad (God bless them) said: His acknowledgement and bequest are valid. If he divorces her thrice during his illness upon her request and then acknowledges a debt or makes a bequest in her favour, she will have the lesser of this amount or inheritance according to the view of all three jurists. According to Zufar (God bless him) she will have the entire bequest amount

[4]That is, the annulment of her inheritance.

[5]In order to avoid injury to her.

[6]By declaring his intention to terminate the contract of marriage irrevocably through the repudiation.

[7]Like her saying during his illness, "Divorce me thrice."

[8]Chooses divorce.

[9]Till the end of her *'iddah*.

and what has been acknowledged, because inheritance has been annulled upon her request and this has removed the obstacle in the way of the validity of acknowledgement and bequest.

The reasoning of the two jurists in the first issue is that when both (husband and wife) mutually verified the occurrence of divorce and the termination of the waiting period, she became like a stranger for him so much so that it is permitted to him to marry her sister, thus, any suspicion (of the persistence of the relationship) that there was is eliminated. Do you not see that his testimony in her support will be admissible, and payment of *zakāt* to her will be valid. This is different from the second issue where the waiting period subsists and is a cause for the suspicion (of the continuing relationship). The rule turns on the evidence of such suspicion and invokes the implications of *nikāḥ*[10] and close relationship.[11] In the first issue, the waiting period does not exist.

Abū Ḥanīfah's reasoning is that in both issues the suspicion still exists, because the woman may have chosen to pave the way for acknowledgement and bequest in her favour so that her share increases. The spouses sometimes mutually agree to acknowledge separation and termination of the waiting period so that the husband may grant her his wealth in excess of her inheritance. This suspicion operates upon excess, therefore, we have rejected it in this case. There is no suspicion in the case of the amount of inheritance, therefore, we deem it valid. There is normally no mutual compact in the case of the right to *zakāt*, (another) marriage, and testimony. Consequently, there is no suspicion in the case of these rules.

He said: **If a person is under siege or is participating in battle and divorces his wife thrice, she will not inherit from him. If he has a duel with some person or is brought forth for execution on account of *qiṣāṣ* (retaliation) or for *rajm* (stoning to death), she will inherit if he dies in this way or is killed.** The source of this rule is what we have elaborated, that is, the wife of a person evading the rules of inheritance (*fārr*) will inherit on the basis of *istiḥsān*. The rule of the evader is established when the right of the wife is linked to his wealth. This linkage is established through illness in which there is usually an apprehension of death, like his being bed-ridden in a state where he cannot take care of his basic needs as does one in sound health. The rule for the evader is sometimes

[10]Where he cannot marry her sister, for example.

[11]The testimony of one close relative for another is not admissible.

established through situations that acquire the meaning of death-illness with respect to the likelihood of the occurrence of death. Situations in which the usual result is survival do not lead to the application of the rule of the evader. Thus, for a person under siege and one participating in battle the usual result is survival, because a fort is meant to repel enemy attacks, and likewise defence in battle, thus, the rule of the evader is not established. The person who takes part in a duel or is brought forth for execution will most likely die, therefore, the rule of the evader is established. There are other cases similar to these that can be classified under this rule. His statement (in the *matn*), "If he dies in this way or is killed" is evidence of the fact that it makes no difference if he dies as a result of this cause or dies through another cause, just like the person suffering from terminal illness if he is killed.

A man says to his wife, when he is in sound health, "When the next month commences" or "When you enter the house" or "When so and so offers the *ẓuhr* prayer" or "When so and so enters the house," "then you stand divorced." If these occurrences take place when the husband is terminally ill, she will not inherit. If the statements were issued in a state of *maraḍ* (illness), she will inherit, except in the case of the statement "When you enter the house." This case has many forms. Divorce is either made contingent upon the arrival of a time or upon the act of a stranger or his own act or the act of the wife. Each of these variations has two further forms: (1) divorce is made contingent during sound health when the condition occurs during illness; and (2) both things take place during illness.

As for the first two forms in which the condition is associated with the arrival of time, where he says, "When the next month commences, you stand divorced," or it is associated with the act of a stranger, where he says, "When so and so enters the house," or "When so and so offers the *ẓuhr* prayer," if the association and the occurrence take place during illness, she is entitled to inheritance. The reason is that the intention to evade inheritance stands verified by his pronouncing a contingent divorce in a state when her right stands linked to his wealth. If the stipulation takes place in health and the occurrence stipulated takes place during illness, she is not entitled to inheritance. Zufar (God bless him) said that she does inherit, because association with a happening moves the time of stipulation to the time of occurrence, thus, it is as if the stipulation was made during illness. We maintain that prior stipulation becomes a repudiation at the

time of occurrence of the stipulated happening in the legal sense and not the intended sense. Injustice can only take place if intended, therefore, his act is not rejected.

As for the third form, which is the making of divorce contingent upon his own act, it is the same if the stipulation was during health and the occurrence during illness or whether these were during illness, or whether the act is such that there is a way out of it for him, he will be an evader due to the existence of the intention to nullify marriage either through the stipulation or by bringing about the occurrence during illness. If he does not have a way out of the occurrence of the act stipulated, he does have a thousand ways out of the stipulation itself, therefore, his act is rejected, in order to avoid injury to her.

As for the fourth form in which he makes divorce contingent upon her act, if the stipulation and occurrence are during illness and the act is one in which there is a way out for her, like speaking to Zayd and so on, she will not inherit as she has consented to the divorce. If the act is one in which there is no way out for her, like the eating of food, the afternoon prayer, speaking to parents, she will inherit, because she was under a compulsion to undertake an act to ward off the fear of perishing either in this world or the next, and there is no consent in a state of duress.

If, however, the stipulation is made in health and the occurrence is during illness, then, if the act is one in which there is a way out for her, there is no ambiguity that she will not inherit. If there is no way out for her from the act, then the response is the same according to Muḥammad (God bless him), which is also the view of Zufar (God bless him), because there is no act on the part of the husband after her right has become linked to his wealth. According to Abū Ḥanīfah and Abū Yūsuf (God bless them), she will inherit, because the husband has compelled her to undertake the act, therefore, the act is reverted back to him. It is as if she has become an instrument in his hands, as in the case of coercion (*ikrāh*).

He said: **If he divorces her thrice when he is ill and thereafter recovers and then dies, she will not inherit.** Zufar (God bless him) said that she will inherit, because he intended evasion of inheritance insofar as he pronounced it during illness, and he died thereafter while she was in her *'iddah* (waiting period). We say that when illness is followed by recovery it acquires the status of sound health, because terminal illness becomes non-existent due to recovery. This makes it evident that no right of hers became linked to his wealth. Accordingly, the husband did not become

an evader. If he had divorced her and then she became an apostate, God forbid, and then converted back to Islam after which the husband died due to his illness, while she was in her waiting period, she would not have inherited. If she does not become an apostate, but submits for sexual intercourse to her husband's son, she will inherit. The reason for the distinction is that by apostasy she nullified her legal capacity to inherit, as the apostate does not inherit from anyone, and inheritance is not possible without legal capacity. By submitting (for sex) she did not annul her legal capacity, because entering the prohibited category for marriage does not negate inheritance, which remains. This is different from submitting for sex during the validity of marriage, because it gives rise to separation, therefore, she consents to the nullification of the cause (of inheritance). After the three repudiations, the prohibition is not established through submission to sex as the three divorces were prior in time to the submission, therefore, the two cases are distinguished.

If a person commits *qadhf* (false accusation of unlawful sexual intercourse) against his wife when he is healthy, but then subjects her to the *li'ān* (imprecation) procedure when he is ill, she will inherit. Muḥammad (God bless him) said that she will not inherit. If the accusation is during illness, she will inherit according to the unanimous view of all three jurists. This is related to divorce being contingent upon an act in which there is no way out for her as she is constrained to have recourse to legal disputation to ward off the shame of *zinā* from herself.

If he makes a vow of continence (*īlā'*) to stay away from her when he is in sound health, and then she is separated irrevocably from him when he is ill, she does not inherit. If the vow too was made during illness, she will inherit. The reason is that *īlā'* amounts to a divorce made contingent upon the passage of four months that are devoid of sexual contact. Thus, it is linked with the stipulation based upon the passage of time, and we have elaborated its underlying reasoning.

He (God be pleased with him) said: **In a divorce where he possesses the right of retraction, she will inherit in all cases,** because of what we elaborated, that is, marriage is not dissolved when intercourse can be lawfully undertaken. Thus, the cause (of inheritance) continues to exist.[12]

[12]See the first issue in this discussion.

He said: **In each case where we have said that she will inherit, she inherits if he dies when she is in her waiting period.** We have elaborated this. Allāh, the Exalted, knows what is correct.

Chapter 67

Raj'ah (Recourse to Wife for Retracting Divorce)

If a man divorces his wife through a revocable repudiation or two repudiations, he may have recourse to her during her waiting period whether or not she consents to this.[1] This is based upon the words of the Exalted, "Take them back on equitable terms,"[2] without further detail (about the consent of women in such a case). The waiting period must still be continuing, because retraction is the continuation of the ownership (of the benefits of *nikāḥ*). Do you not see that it has been called *imsāk* (taking back), which is continuation. The continuation (of ownership) is realised within the waiting period, because there is no ownership once the waiting period terminates.

***Raj'ah* takes place by his saying, "I have taken you back" or "I have taken my wife back."** This is the clear statement about *raj'ah* and there is no disagreement among the jurists about this.

He said: **Or he has intercourse with her, or kisses her, or fondles her with desire, or looks at her vagina with desire.** This is the position in our view. Al-Shāfi'ī (God bless him) said that *raj'ah* is not valid except by a formal expression where he possesses the ability to speak, because *raj'ah* has the status of the initial marriage contract so much so that it is prohibited to have intercourse with the woman.[3] In our view, it is the seeking of the continuance of *nikāḥ*, as we have elaborated and we will be establishing it again,[4] God willing. The occurrence of the act (of retraction) is

[1]There is consensus (*ijmā'*) on this point. Al-'Aynī, Vol. 5, 455.

[2]Qur'ān 2:231

[3]That is, according to al-Shāfi'ī. Thus, intercourse is not permitted in this case without formal expression of retraction, in his view.

[4]At the end of the chapter that a revocable divorce does not prohibit intercourse.

an evidence of the attempt to continue it as in the case of the termination of an option. This evidence is found due to an act that is specific to marriage. These acts (mentioned) are specific to it in the case of a freewoman[5] as against fondling and looking without desire, because such acts may be permitted without marriage as well, as in the case of the physician, the midwife and others. A glance at the body other than the vagina occurs in the case of those residing together, and the husband is living with the wife during *'iddah*. If such other acts were to amount to *raj'ah*, he would have to divorce her again, thus, prolonging her *'iddah*.[6]

He (al-Qudūrī) said: **It is recommended that two witnesses testify to the act of retraction, but if they do not testify, the act of retraction is (still) valid.** Al-Shāfi'ī (God bless him), in one of his two opinions, said that it is not valid, which is also the view of Mālik (God bless him), due to the words of the Exalted, "Thus when they (are about to) fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you,"[7] because a command necessitates obligation. In our view, the divorce laid down in the texts[8] is devoid of the restriction of testimony. Further, it is the seeking of continuation of marriage and testimony is not a condition during a state of continuation as in retraction during *īlā'*, except that it is recommended for additional precaution so that denial is not incurred in it. What he (al-Shāfi'ī) has recited is construed to mean this. Do you not see that He has associated it with separation, therefore, for *raj'ah* it is recommended. It is also recommended that he (the husband) inform her about retraction so that she does not fall into sin.[9]

When the waiting period terminates, and he says, "I took her back during the waiting period," it amounts to retraction if she confirms it, but if she does not deem him truthful it is her statement that will be given preference. The reason is that he is reporting something that he cannot initiate at that time. His statement will be suspicious, except that

[5]In whose case marriage is necessary for the permissibility of these acts.

[6]And that would amount to an injury to the woman, which is not permitted due to the words of the Exalted, "Take them back on equitable terms." Qur'ān 2 : 231

[7]Qur'ān 65: 2

[8]Qur'ān 2 : 228, 229: "And their husbands have the better right to take them back in that period," and "the parties should either hold together on equitable terms, or separate with kindness."

[9]When the husband has intercourse with her when the *'iddah* is actually over and he is not aware of it.

with verification the suspicion is removed. In this case, she is not to be administered an oath according to Abū Ḥanīfah (God bless him). This is one of the issues that pertains to oaths in six things and that has preceded in the *Book of Nikāh.*

If the husband says, "I have taken you back,"[10] and in response to this she says, "My waiting period is over," the retraction is not valid according to Abū Ḥanīfah (God bless him). The two jurists said that retraction is valid as it has coincided with the *'iddah*, for it still remains *prima facie* until she informs him of it, and in this case it has preceded such information. Accordingly, if he were to say, "I divorced you" and she says in response, "My waiting period is over," then divorce takes place. Abū Ḥanīfah's reasoning is that it has coincided with the state of termination of the *'iddah*, because a woman is deemed trustworthy with respect to the report about termination.[11] Thus, when a woman makes such a report it indicates that termination was prior (to retraction), because the statement about the termination is the closest to the statement of the husband.[12] The issue of divorce is a matter of dispute,[13] but even if it was a matter of agreement divorce would take place through his admission after termination (of the waiting period). Retraction, on the other hand, is not established through admission (*iqrār*).

If the husband of a slave woman, after the termination of her waiting period, says "I took her back," and the owner (of the woman) deems him truthful, but she does not, then, it is her statement that will be given precedence, according to Abū Ḥanīfah (God bless him). The two jurists said that the statement of the owner will be given precedence. The reason is that her body is owned by the master, and he has acknowledged what is purely his right in favour of the husband, therefore, his statement resembles his acknowledging her marriage to him. He (Abū Ḥanīfah) argues that the rule of *raj'ah* is structured upon the waiting period, and the statement to be given precedence about the waiting period is her statement; likewise in a matter that is based upon it. Had the situation been the

[10]The text in al-'Aynī is: "I have taken you back within the *'iddah*."

[11]That is, trustworthy with respect to reports about what is in their wombs. Allah Almighty has said: "Nor is it lawful for them to hide what Allah Hath created in their wombs, if they have faith in Allah and the Last Day." Qur'ān 2 : 228.

[12]Had she remained silent for some time and then made her statement the position would have been different.

[13]Due to the absence of witnesses.

reverse[14] then according to the two jurists, the statement preferred would be that of the master, and so also in his view according to the authentic report, because she has passed the waiting period at that time and the ownership of the master over her benefits has taken over, therefore, her statement annulling such ownership is not valid. This is distinguished from the first situation, because in that the owner, through his verification of the waiting period, is acknowledging the existence of the waiting period for her and his ownership does not take over with the existence of the *'iddah*. **If she were to say, "My waiting period is over," and the husband as well as the master were to say, "Your waiting period is not over," then the preferable statement is hers.** The reason is that she is trustworthy in this respect for she has knowledge of it.

When the blood from the third period of menses ceases to flow after ten days, retraction (*raj'ah*) stands excluded, even though she has not bathed. If it ceases to flow in less than ten days, retraction is not excluded until she takes a bath or one complete timing of prayer passes after it. The reason is that there is no excess over ten days for menses,[15] therefore, by mere termination (of bleeding) she moves out of her period of menses and her waiting period is terminated, thus excluding the retraction. In what is less than ten days, there is a probability of resumption of bleeding, therefore, the reality of termination of bleeding must be strengthened with bathing by abiding by one of the rules that are to be followed by women in a state of ritual purity, that is, through the passing of one timing of prayer. This case is distinguished from that of a Kitābiyyah,[16] because in her case the rule is not based on one of these additional factors, and it is actual termination (of bleeding) that is deemed sufficient. The bleeding is deemed to be terminated[17] when she performs *tayammum* and prays, according to Abū Ḥanīfah and Abū Yūsuf (God bless them). This is based upon *istiḥsān*. According to Muḥammad (God bless him), the period terminates when she performs *tayammum*. This is based upon analogy, because *tayammum* in the absence of water is considered absolute purification so much so that the *aḥkām* established through bathing are established for it too. Thus, it has the same status as bathing. The two

[14] With the owner deeming him untruthful and the woman deeming him truthful.

[15] According to legal rules.

[16] Christian or Jew.

[17] In case of bleeding for less than ten days.

jurists maintain that it is a pollutant[18] and does not (actually) purify. It has been deemed purification (legally) due to necessity so that the obligations do not multiply. This necessity is realised in a state of performing prayer and not in the timings prior to it.[19] Likewise the rules established are also those demanded by necessity. Thereafter, it is said that *'iddah* terminates by commencement itself in the opinion of the two jurists, and it is said after completion so that the ruling of validity of prayer is established.[20]

When she bathes and forgets to wash a part of her body on which water does not flow, then, if this is a limb or more retraction is not cut off, but if it is less than a limb, it is cut off. He (God be pleased with him) said: This is *istiḥsān*, while analogy in the case of a complete limb is that *raj'ah* should not remain, because she has washed most of her body. Analogy in what is less than a limb is that *raj'ah* should remain, because the rule for major ritual impurity and menstruation cannot be split up. The interpretation associated with *istiḥsān* is the difference, that is, in what is less than a limb is subject to drying up due to its small size, therefore, one cannot be certain of water having reached it. Thus, we said that it cuts off *raj'ah*. It is, however, not permitted to her to marry on the basis of precaution about both,[21] as distinguished from a complete limb as that is not subject to swift drying up and usually its dryness is not ignored. The two, therefore, stand distinguished. It is reported from Abū Yūsuf (God bless him) that neglecting gargling and drawing water into the nostrils (*maḍmaḍah* and *istinshāq*) is the same as neglecting a complete limb. It is also reported from him, and it is the view of Muḥammad (God bless him), that it is of the status of what is less than a limb, because there is a disagreement about their being a definitive obligation as compared to the rest of the limbs.

If a man divorces his wife when she is pregnant or gives birth to a child from it,[22] and he says, "I did not have intercourse with her," he has a right to take her back. The reason is that when pregnancy becomes apparent during a period in which it can be assumed that it is from the

[18] Actually, but not legally.

[19] In which the state of *'iddah* will continue.

[20] As finding water during prayer will nullify *tayammum*.

[21] The exclusion of *raj'ah* and marriage.

[22] That is, from the marriage giving birth to the child prior to divorce. His statement, "I did not have intercourse with her," will not be accorded significance.

marriage, it is deemed to have arisen due to the marriage. This is based upon the words of the Prophet (God bless him and grant him peace), "The child belongs to one who has legal access for intercourse."[23] This is an evidence of intercourse on his part. Likewise, if the paternity of the child is attributed to him; he will be deemed to have had intercourse. When intercourse is established, lawful ownership of the benefits of marriage is established, and divorce is part of such established ownership, which is followed by retraction. His belief (statement) will be nullified by the denial issued by the *sharī'ah*. Do you not see that with such intercourse the attribute of *iḥṣān* is established. Thus, *raj'ah* has a higher priority for being affirmed (available). The interpretation of the issue of giving birth to the child is that she give birth prior to divorce, because giving birth after divorce will terminate the waiting period through birth itself, and *raj'ah* cannot be conceived in such a case.

He said: **If he secludes himself with her and closes the door or draws the curtain and then says that he did not have intercourse with her, but thereafter divorces her, he does not possess the right of retraction.** The reason is that ownership (of benefits) is established through intercourse and he has acknowledged its absence. He, thus, affirms it against himself for retraction is his right. He is not deemed untruthful by law as distinguished from dower (*mahr*), because the affirmation of the stated dower is based upon delivering the counter-value not upon actual possession, as distinguished from the first case.[24]

If he takes her back, meaning thereby after being in seclusion with her, and saying, "I did not have intercourse with her," **and thereafter she gives birth to a child in a period that is less than two years by one day,[25] the retraction is valid.** The reason is that paternity stands attributed to him as she did not acknowledge the termination of the *'iddah* and the child stays in her womb during this period,[26] therefore, he will be deemed to have undertaken intercourse prior to divorce and not after it, because

[23]It is related through many channels. One version related by Abū Hurayrah (God be pleased with him) is recorded by all the six sound compilations. Al-Zayla'ī, vol. 3, 236.

[24]This means that in the case of dower all that is required is being available for intercourse through valid seclusion not actual intercourse. This is not the case for retraction.

[25]From the day of divorce and not the day of retraction.

[26]This may appear strange to some who may consider the jurists to be simpletons unaware of scientific knowledge that we possess today. The wisdom behind the law has to be discovered beginning with the preceding tradition and the welfare of the child, who cannot be adopted according to Islamic law.

in the latter case ownership is extinguished by divorce itself due to its absence prior to (final) divorce, thus, such intercourse is prohibited and a Muslim does not indulge in *ḥarām*.

If he says to her, "When you give birth you stand divorced," and she gives birth to a child. Thereafter, she gives birth to another child. This amounts to *raj'ah*. This means from another pregnancy, which means that it should be after six months, and even if it is after more than two years as long as she did not acknowledge the termination of the waiting period. The reason is that divorce took place with the birth of the first child leading to the observance of the waiting period. The second child is, therefore, through the conception due to him during the waiting period. As she did not acknowledge the termination of the waiting period he will be deemed to have taken her back.

If he says, "Each time you give birth to a child, you are divorced,"[27] and she gives birth to three children through different pregnancies, then, the first child amounts to divorce and the second child is retraction, and so also the third. The reason is that when she gives birth to the first child, it amounts to divorce and she enters the waiting period; with the second he becomes one who has retracted divorce, as we have explained that he caused the conception through fresh intercourse during *'iddah*. The second divorce occurs with the birth of the second child, because the oath has been qualified with the word "whenever," and the waiting period becomes obligatory. With the birth of the third child he becomes one who retracts divorce, due to what we mentioned, and the third divorce takes place with the third birth. The waiting period now becomes obligatory through the menstrual periods, as she was free of pregnancy having her periods when the third divorce took place.

A woman divorced through a revocable repudiation may become noticeable and seek adornment. The reason is that she is lawful for her husband and the relationship of marriage subsists between them. Thereafter, retraction is recommended and adornment attracts him to her, therefore, it is lawful.

It is recommended for the husband that he is not to approach her unless he seeks her permission or makes his approach known to her through the sound of his shoes. This means when he does not intend

[27] This type of statement is not conceivable from a rational person, unless he is playing games with his wife. It is obvious that it is a hypothetical example to explain the limits of the rule.

retraction, because it is likely that she may be uncovered, and his sight may rest on parts that amount to retraction. He will then have to divorce her again and this will prolong her waiting period.

He is not to take her on a journey with him until he seeks witnesses to testify retraction. According to Zufar (God bless him), he has a right to do so as the bond of marriage exists between them. This is the reason, in our view, of permitting the husband to have intercourse with her. We rely on the words of the Exalted, "And turn them not out of their houses."[28] Further, delay in the operation of the nullifying act (divorce) is due to the need of the husband to retract. If he does not take her back till the waiting period terminates, it becomes obvious that he did not have such a need. Thus, it becomes evident that the nullifying act operated in accordance with his wishes from the start for which reason the menstrual periods were reckoned for the waiting period. Thus, the husband does not possess the right to take her out, unless he seeks witnesses for his retraction. This will annul the waiting period and reestablish the husband's ownership. The meaning of his taking witnesses is the recommendation to do so that we mentioned earlier.

A revocable divorce does not prohibit intercourse. Al-Shāfi'ī (God bless him) said that it does prohibit it, because the state of marriage stands dissolved due to a terminating factor, which is divorce. We maintain that it subsists so that he possesses the right of retraction without her permission, because the right of retraction was established keeping in mind the husband so as to enable him to make amends when faced with remorse. This concept leads to retraction being a continuation of the contract of marriage. It also leads to its being a continuation and not a renewal (of the marriage contract),[29] which is negated by the evidence (of retraction being for the husband). The operation of the nullifying factor has been delayed for a period due to consensus[30] or for his benefit, as has preceded.

[28]Qur'ān 65 : 1.

[29]Response to al-Shāfi'ī's claim that it is dissolved.

[30]For even al-Shāfi'ī (God bless him) agrees that *raj'ah* through a formal expression without the consent of the woman is valid.

67.1 WHAT MAKES A DIVORCED WIFE LAWFUL

When the divorce is irrevocable, but is through less than three repudiations, he may marry her during her waiting period or after it. The reason is that lawfulness of the subject-matter still remains for its complete removal is contingent upon the third repudiation, and is not present prior to it. Such permissibility for another (man) is due to the resulting confusion about paternity, but no such confusion exists (for the husband) as a result of the permission (by the Lawgiver).

If the divorce is through three repudiations for a freewoman, and two for a slave, she cannot become lawful for him until she marries another husband through a valid marriage and he has intercourse with her, and who thereafter divorces her or dies while married to her. The source in this are the words of the Exalted, "So if a husband divorces his wife (irrevocably), he cannot, after that, remarry her until after she has married another husband and he has divorced her."[31] The meaning (in the verse) is the third repudiation. Two repudiations in the case of the slave woman are like three in the case of a freewoman. The reason is that slavery, as was known,[32] makes the subject-matter half with respect to permissibility. The purpose is marriage with a husband in absolute terms.[33] Such a relationship is established through a valid marriage, while the condition of intercourse is established through the indication of the text (*ishārat al-naṣṣ*), which is done by construing the word *nikāḥ* to mean intercourse, a construction that conveys a complete meaning and avoids repetition, because the words "contract of marriage" are understood from the unqualified use of the term "husband."[34] This meaning can also be added to the meaning of the text through the well known tradition, which in the words of the Prophet (God bless him and grant him peace) is: "She does not become lawful for the first until she has tasted

[31]Qur'ān 2 : 230

[32]In *uṣūl al-fiqh.*

[33]This means that the husband may be a major or a minor or even an insane person, provided that such a person is capable of intercourse.

[34]In the verse, the word *nikāḥ* in one of its senses means intercourse. In this sense, the translation will read, "until after she has had intercourse with another husband and he has divorced her." The reason is that the term husband already conveys the meaning of marriage. Had intercourse not been implied, the words, "Until she takes another husband, who then divorces her," would have been sufficient.

the sweetness of another."[35] It has been reported through different channels. No one disagrees about it (the condition of intercourse) except Sa'īd ibn al-Musayyib (God be pleased with him). His view is not taken into account, so much so that that if a *qāḍī* renders judgement on the basis of this view, his judgement will not be implemented. The condition is that of penetration and not ejaculation, because ejaculation is completion and perfection in the act. Completion becomes an additional condition.

An adolescent minor is like a major for making the woman lawful, because of the existence of penetration in a valid marriage, which is the condition imposed by the text. Mālik (God bless him) opposes us in this issue,[36] but the proof (*ḥujjah*) against him is what we have elaborated. Muḥammad (God bless him) elaborated the meaning of such a minor and said that he is "a boy who has not attained puberty, but is capable of intercourse. If such a boy has intercourse with a woman she is under an obligation to bathe and he makes her lawful for the first husband." The meaning of this statement is that he has an erection and derives pleasure. Bathing, however, is obligatory for her (even though he cannot ejaculate) due to the meeting of the genitals,[37] which is the cause for her orgasm. There is, thus, a need for making bathing obligatory for her (by way of precaution), but for such a minor there is no bathing, however, he is ordered to bathe so that he acquires the habit of doing so.

He said: **Sexual intercourse of a master with the slave woman does not make her lawful (for the first husband),** because the purpose is intercourse by the husband. **If he marries her on the condition of making her lawful, then, the marriage is disapproved (*makrūh*).** This is due to the words of the Prophet (God bless him and grant him peace), "The curse of Allāh upon one who makes lawful and the one for whom he makes lawful."[38] This is the construed meaning of the tradition (that is, disapproval).[39] **Consequently, if he divorces her after having had intercourse with her she becomes lawful for the first,** due to intercourse in a valid

[35]It is reported by all the six sound compilations from 'Ā'ishah (God be pleased with her). Al-Zayla'ī, vol. 3, 237.

[36]Because ejaculation is a condition in his view and that is not found in case of such a minor.

[37]The outward cause has been assigned the rule of the consequences.

[38]It is recorded through many channels and one such channel is recorded by al-Tirmidhī, al-Nasā'ī and others. Al-Zayla'ī, vol. 3, 238.

[39]The apparent meaning may be construed as prohibition, however, the tradition has called the person "one who makes lawful," therefore, disapproval is the real meaning.

marriage, because marriage is not annulled as a result of the condition. It is reported from Abū Yūsuf (God bless him) that the condition renders the contract irregular (*fāsid*) insofar as there is an element of limited time in it, and the marriage does not make the woman lawful for the first husband due to the irregularity. It is reported from Muḥammad (God bless him) that the marriage is valid, on the basis of our explanation, but the woman does not become lawful for the first, because he attempts to hasten what has been considered delayed by the law (*shar'*), thus, he will be penalised by denying him the objective as in the case of murder of the ancestor (inheritee).

If he divorces a freewoman with one repudiation or two repudiations, and she completes her waiting period and then marries another man, but then returns to the first husband (after divorce from the second), she comes back with (the first husband possessing) three divorces. The second husband demolishes the repudiations that are less than three just as he demolishes three repudiations. This is the position according to Abū Ḥanīfah and Abū Yūsuf (God bless them), while Muḥammad (God bless him) said that he does not demolish what is less than three, because the contract is the ultimate solution for the prohibition on the basis of the text, therefore, the (second) husband removes it, but there can be no removal prior to the proof of the prohibition (through three repudiations). The two jurists rely on the words of the Prophet (God bless him and grant him peace), "The curse of Allāh upon one who makes lawful and the one for whom he makes lawful,"[40] in which the second husband has been called one who makes lawful, and he establishes lawfulness (completely).

If he divorces her thrice and she then says, "I completed my waiting period, married again, he had intercourse with me, divorced me and thereafter I completed my waiting period," and the duration is sufficient for all this, then it is permitted to the first husband to consider her truthful when he believes that she is generally truthful. The reason is that it is a transaction or is a religious matter with which lawfulness is associated, and in both the word of a single person is acceptable. Further, the report of the woman is not suspicious as the duration is enough. They disagreed about the minimum period of such a duration. We shall elaborate it in the Chapter on the Waiting Period.

[40] See above.

Chapter 68

Īlā' (Vow of Continence)

When a man says to his wife, "By Allāh, I will not come near you," or he says, "By Allāh, I will not come near you for four months," then he is one who has made a vow of continence, due to the words of the Exalted, "For those who take an oath for abstention from their wives, a waiting for four months is ordained; if then they return, Allah is Oft-forgiving, Most Merciful. But if their intention is firm for divorce, Allah heareth and knoweth all things."[1]

If he has intercourse with her within four months, he has broken his oath and become liable for expiation, because expiation is the consequential liability for breaking an oath. **The vow of continence, however, will be extinguished,** as an oath is removed when it is broken.

If he does not come near her until four months are over she is divorced irrevocably from him through a single repudiation.[2] Al-Shāfi'ī (God bless him) said that she is separated irrevocably by the pronouncement of the *qāḍī*. The reason is that the husband is denying her her right of cohabitation, therefore, the *qāḍī* acts in his place in pronouncing it as in the case of the person with an amputated organ or the eunuch. Our argument is that he committed injustice against her by denying her her right, therefore, the *sharī'ah* deemed it permissible by annulling the blessing of *nikāḥ* with the passage of this period. This is reported[3] from 'Uthmān, 'Alī, the three Abd Allāhs, and Zayd ibn al-Thābit, may Allāh

[1]Qur'ān 2: 226, 227.

[2]Al-'Aynī uses the words "through a single irrevocable repudiation." Al-'Aynī, vol. 5, 489. He says this, perhaps, to emphasise that he can marry her again without an intervening marriage.

[3]It is recorded by 'Abd al-Razzāq. Al-Zayla'ī, vol. 3, 241.

be pleased with them all, and their example is sufficient. Further, this amounted to (immediate) divorce in the period of Jāhiliyyah and the *sharī'ah* ordained the delaying of its occurrence up to the end of the period.[4]

If he makes a vow to abstain for a period of four months the oath lapses,[5] because it was limited in time by this period. **If he makes a vow for all times, the oath subsists.** The reason is that it is independent of time, and no annulment is found.[6] The repudiation (resulting from such an oath) does not repeat itself (every four months), unless there is prior marriage, because there was no denial of her right after the occurrence of irrevocable separation. **But if her goes back on it and marries her, the *īlā* is revived. If he does not have intercourse with her (after marriage), another repudiation will occur with the passage of four months.** The reason is that the oath subsists for it is absolute in nature, and her right is established again with marriage and injustice occurs. The commencement of such *īlā* will be reckoned from the time of marriage. **If he marries her a third time, the *īlā* comes back and repudiation occurs with the passage of another four months if he does not approach her,** as we have explained. **If he marries her again after another husband (and subsequent divorce) no repudiation will occur due to this (the earlier) *īlā*,** because it stands restricted by the divorce of such ownership. This is a sub-issue of the disputed topic of "completion" that has preceded earlier.[7] **The oath, however, subsists** due to its absolute form and the absence of annulment. **If he has intercourse with her, he violates his oath** due to the existence of the violating factor.

If he makes an oath for a period that is less than four months, he has not made the vow of continence. This is due to the words of Ibn 'Abbās (God be pleased with him) that there is no *īlā* in what is less than four months.[8] Further, refusing to go near her for a period is without a legal obstacle (like a vow). Divorce is not established with such abstention.

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[4]"For those who take an oath for abstention from their wives, a waiting for four months is ordained; if then they return, Allah is Oft-forgiving, Most Merciful." Qur'ān 2:226.

[5]On the passage of four months.

[6]That is, a cause for the annulment of the oath, which is intercourse.

[7]See Volume I of this translation, last para on p. 608 and note 4.

[8]It is recorded by Ibn Abī Shaybah. Al-Zayla'ī, vol. 3, 243.

If he says, "By Allāh, I will not approach you for two months and then for two months after these," then he has made the vow of continence. The reason is that the two periods are joined by a word used for conjunction and it becomes an addition. **If he waits for a day and then says: "By Allāh, I will not approach you for two months after the first two months," then he has not made the vow of continence,** because the second statement amounts to a report about the first, therefore, it blocks the first oath for about two months. After the second two months it amounts to four months less one day for which he waited, thus, the preventing period of four months is not complete.

If he says, "By Allāh, I will not approach you for a year, except one day" he has not made the vow of continence. Zufar (God bless him) disagrees for he construes the exemption to apply at the end of the period on the analogy of *ijārah* (hire) thus considering the period to be complete. In our view, the person making the vow of continence is one who is not able to approach his wife for four months without violating his oath that is binding on him. In this case he is able to do so. The reason is that the exempted day is unspecified as distinguished from hire, because in hire construing it to mean the end of the period is necessary for its validity. Hire is not validly constituted with unspecified days—an oath is unlike hire.

If he cohabits with her on a day when four months or more still remain, he becomes one who has made the vow of continence, because of the extinction of the exception.

If he says, while he is at Basrah, "By Allāh I will not enter Kufah," and at this time his wife is at Kufah, he has not made the vow of continence. The reason is that it is possible for him to approach her without being bound by his oath by her coming out from Kufah.

He (al-Qudūrī) said: **If he makes an oath (that if he approaches her he will be liable) for *ḥajj*, fasting, emancipation of a slave or divorce, then he has made a vow of continence.** This is due to the occurrence of prevention on account of an oath, which consists of the mentioning of the condition and its consequences. These consequence are preventive insofar as there is great hardship in them. The form of the oath for emancipation is that he associate his approaching her with the emancipation of his slave. In this there is disagreement on the part of Abū Yūsuf (God bless him). He says that it is possible for him to sell (the slave) and then approach her after which he will not be liable for anything. The two jurists say that

sale (of the slave) is probable (he may or may not sell), therefore, this probability does not eliminate the prohibition of approaching his wife. The oath with respect to divorce is that he suspend her divorce upon his approaching her or the divorce of her companion wife. All these things prevent him from cohabiting with her.

If he makes a vow of continence with respect to his wife whom he has repudiated with a possibility of retraction, his vow is valid, but if he makes it with respect to his wife whom he has divorced irrevocably, it is not valid. The reason is that the relationship of marriage exists in the case of the first, but not in the case of the second, and the subject-matter of *'īlā'*, on the basis of the text, are those who are still our wives. If the waiting period ends prior to the termination of the period of *'īlā'*, the oath is extinguished due to the extinction of the subject-matter.

If he says to a woman who is a stranger, "By Allāh, I will not cohabit with you," or he says, "You are like my mother's back for me," and thereafter he marries her, he has not made the vow of continence or that of injurious assimilation (*ẓihār*). The reason is that the statement in its expressed form is void due to the absence of the subject-matter and cannot be converted into a valid statement later. **If, however, he cohabits with her he commits a sin,** due to the occurrence of the violation of the vow, because the oath is found as far as violation is concerned.[9]

The period of *'īlā'* for a slave woman is two months. The reason is that this oath amounts to a period for irrevocable divorce, therefore, it is converted to half like the duration of the waiting period.

If the person making the oath is ill and does not have the ability to undertake intercourse, or she is ill or suffers from *ratq*[10] or is a minor with whom intercourse is not undertaken or there is between them a distance and she cannot be reached within the period of the vow, then, in all these cases he may say in words that he has had recourse to her during the period of *'īlā'*. If he says this the vow is terminated. Al-Shāfi'ī said that there is no recourse except through intercourse. This is also the view upheld by al-Ṭaḥāwī, because if it amounted to recourse it would amount to a violation. Our reasoning is that he (merely) tormented her by mentioning denial, therefore, is now appeasing her with an expression

[9]This is true with respect to the statement about not cohabiting, but not with respect to the injurious assimilation. Al-'Aynī, vol. 5, 498.

[10]Birth defect in which the vulva is blocked, or the sides of the vulva are joined together.

of promise. If he has removed the basis of injustice, he is not to be reprimanded through a divorce. **If he recovers the ability to have intercourse during this period, the verbal recourse is annulled and his recourse now is through intercourse.** The reason is that he is now able to perform the primary duty prior to the performance of the substitutory duty.

If he says to his wife, "You are henceforth prohibited for me," he will be asked about his resolve. If he says that he was lying, it will be presumed to be so. The reason is that he formed an intention according to the actual use of his words. It is also said that for purposes of adjudication, his statement about his resolve will not be accepted, because it is an oath that is apparent. **If he says that he intended divorce, then, it will be presumed to be a single irrevocable repudiation, unless he intended three.** We have already discussed this under metaphorical statements. **If he says that he intended injurious assimilation (*ẓihār*), it will be deemed injurious assimilation.** This is so according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that it does not amount to *ẓihār* due to the lack of resemblance with prohibition, which is an essential ingredient for it. The two jurists said that he has used prohibition in unqualified terms, and *ẓihār* is one type of prohibition. Here the unqualified is to be construed in terms of the qualified. **If he says that he intended prohibition thereby or did not intend anything in particular, then, it is an oath by virtue of which he will be deemed to have made a vow of continence.** The reason is that the basis in the prohibition of something lawful is an oath in our view. We shall mention this in the topic of vows/oaths, God willing. Among the Mashā'ikh are those who interpret the word prohibition to mean divorce without any particular resolve, and this according to the rule of custom. Allāh knows what is correct.

Chapter 69

Khul' (Redemption)

69.1 *Khul'* (Redemption)

When the spouses face constant discord and are apprehensive that they will not be able to maintain the limits imposed by Allāh (*ḥudūd Allāh*), then there is no harm if she seeks to redeem herself from him through wealth on account of which he will let her go. This is based upon the words of the Exalted, "If ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something for her freedom. These are the limits ordained by Allah, so do not transgress them. If any do transgress the limits ordained by Allah, such persons wrong (themselves as well as others)."[1]

If they do so, an irrevocable divorce occurs through *khul'* and payment of wealth becomes binding on her. This is due to the words of the Prophet (God bless him and grant him peace), "*Khul'* is an irrevocable repudiation."[2] Further, *khul'* implies divorce that occurs with an indirect expression, and divorce through an indirect expression is irrevocable (but it is dependent upon resolve (*niyyah*)).[3] The mentioning of wealth, however, does away with the need for *niyyah* here. In addition to this, a woman will not deliver wealth until her own being is delivered to her, and this occurs through irrevocability.

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[1]Qur'ān 2 : 229

[2]It is recorded by al-Dār'quṭnī in his *al-Sunan* and thereafter by al-Bayhaqī. Al-Zayla'ī, vol. 3, 243.

[3]See volume I of this translation on page 588.

If hostility occurs on his part, it is considered disapproved that he take compensation from her (for her release), due to the words of the Exalted, "But if ye decide to take one wife in place of another, even if ye had given the latter a whole treasure for dower, take not the least bit of it back."[4] The reason is that he has already distressed her by taking another wife, thus, he should not add to her distress by taking wealth.

If the discord is because of her, we consider it disapproved that he take from her more than he had given her. In the narration of *al-Jāmi' al-Ṣaghīr* it is said that it is acceptable to charge excess too due to the unqualified meaning of the verse that we have recited in the beginning.[5] Another reason is provided by the words of the Prophet (God bless him and grant him peace) in the case of the wife of Thābit ibn Qays ibn Shimās, "As for excess, no!"[6] In this case, discord was on her part.

If he takes back in excess (of what he gave her) it is valid for purposes of adjudication. Likewise if he takes more when the discord is due to him. The reason is that the legally implied meanings in the verse are two: legal permissibility and permissibility for the hereafter. Acting upon permissibility for purposes of the hereafter has been given up due to an obstacle[7] and that leaves the option to act upon what remains.

If he divorces her in return for compensation by way of wealth and she accepts, divorce takes place and she becomes liable for payment of wealth. The reason is that the husband is independent in pronouncing immediate or contingent divorce, and here he has made it contingent upon her acceptance. The woman, on the other hand, has the legal capacity to undertake financial transactions due to her authority over her own affairs. The ownership through *nikāḥ* is something that can be the object of compensation, even though it is not wealth as in the case of *qiṣāṣ*. **Divorce in such a case will be irrevocable** due to what we have elaborated, because it is a transaction that entails the exchange of wealth for self. The husband came to own one of these counter-values, thus, she comes to own the other, and that is her self in confirmation of equality.

If the counter-value becomes unlawful, like giving a Muslim in lieu of *khul'* something like *khamr* (wine), swine or carrion, then, the husband

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[4]Qur'ān 4 : 20

[5]That is, "If she give something for her freedom."

[6]It is recorded by Abū Dāwūd in his *marāsīl*. Al-Zayla'ī, vol. 3, 244.

[7]The tradition that says, "As for excess, no!"

gets nothing, but the separation is irrevocable. If, however, the counter-value is invalid in the case of divorce, the divorce becomes revocable. Divorce in both cases is contingent upon her acceptance, but there is a distinction between their legal rules. The reason is that when the counter-value becomes invalid, the operating factor in the first case is the word *khul'*, which is an indirect expression (for divorce). In the second case it is explicit and its consequence is a revocable divorce. Nothing is due to the husband from her, because she did not mention marketable wealth so that she may be said to have deceived her husband. Further, there is no basis for imposing a liability for delivering the named thing nor for imposing a duty of giving something else due to the lack of obligation. This is different from the case where he participated in *khul'* in return for vinegar itself, but it turns out to be *khamr*, which is also a type of wealth, thus, she will be deceiving him. This is further distinguished from the case where he enters into an agreement of *mukātabah* or emancipates a slave in return for *khamr*, in which case the value of the slave will become due. The reason is that the property of the owner in this case is marketable and he has not agreed to forgo ownership gratis.

As for ownership of (rights to) sex they are not marketable at the time of termination of the relationship, as we will mention. This is distinguished from *nikāḥ*, because rights to sex at the time of entry into the contract are marketable. The legal basis (*fiqh*) in this is that it is something honourable and it is not lawful to own it without paying a counter-value in recognition of its honour. As for the extinction of the rights, it is in itself something honourable, therefore, there is no need to create a liability for wealth.

He said: **What is valid as payment of dower is valid as a counter-value for *khul'*.** The reason is that if something can be a counter-value for a marketable thing it can preferably be a counter-value for something that is not marketable.

If she were to say to him, "Grant me *khul'* in exchange for what is in my hand" and he agrees to give her *khul'*, but there is nothing in her hand, then, he has no claim against her. The reason is that she did not deceive him by saying that she had some thing of value in her hand. **If she were to say, "Grant me *khul'* for the valuable thing I have in my hand" and he did so, but there was nothing in her hand, she is under a liability to return her dower to him.** The reason is that when she named something of value, the husband was not ready to undo the bond except

in exchange for something. There is no reason for imposing liability for the value of what was named due to uncertainty nor the value of sexual rights, I mean thereby reasonable dower (*mahr al-mithl*), because it is something that is not marketable at the time of termination of the contract. Thus, liability for what the husband had given is imposed in order to avoid harm to his interests. **If she were to say, "Grant me *khul'* for the *dirhams* or for the number of *dirhams* in my hand," but there is nothing in her hand, she is liable for three *dirhams*.** The reason is that she mentioned a plural and the minimum number assigned to the plural is three. The word *min* (of) is for establishing a link and not division, because the statement would lose meaning without it.

If she is granted *khul'* for her runaway slave and she stipulates that she is absolved of all liability (for capture), she will not be absolved of such liability and is liable for delivering the slave if that is possible or for the payment of his value if she is unable to deliver him. The reason is that this is a commutative contract and, therefore, requires the soundness of the counter-value. The stipulation of no liability on her part is the stipulation of a vitiated (*fāsid*) condition, which is annulled. The *khul'*, however, is not annulled due to vitiated conditions. The same rules apply to *nikāḥ*.

69.2 Divorce in Exchange for Wealth

If she says, "Divorce me thrice for a thousand (*bi-alf*)," and he divorces her with a single repudiation, then she is liable for one-third of one thousand. The reason is that when she demanded three for one thousand, she demanded each one of them for one-third of a thousand. The reason is that the letter *bā'* accompanies counter-values and the counter-value is divided over what it is paid for. The divorce, however, is irrevocable due to the obligation of paying wealth for it.

If she says, "Divorce me thrice on one thousand (*'alā alf*)," and he makes one repudiation, then she is under no obligation to pay anything according to Abū Ḥanīfah (God bless him), but he possesses the right of retraction. The two jurists said that it is a single irrevocable repudiation for one-third of a thousand. The reasoning (of the two jurists) is that the word *'alā* has the same impact as *bā'* with respect to commutative contracts. Thus, the saying, "Transport this wheat for a *dirham* (*bi-dirham*) or on one *dirham* (*'alā dirham*)," are the same. Abū Ḥanīfah's reasoning

is that the word *'alā* is for stipulation. Allāh, the Exalted, has said, "When believing women come to thee to take the oath of fealty to thee, that they will not associate in worship any other thing whatever with Allah."[8] Further, when a person says to his wife, "You are divorced on (*'alā*) entering the house," it is a condition. The reason is that it is originally for creating an obligation, but is used as a loan-word for a condition as it accompanies a consequence. If it is used for a condition, then conditions are not split up and distributed over the consequences of a condition. This is distinguished from the letter *bā'*, because *bā'* is used for a counter-value as has preceded. Accordingly, when payment of wealth is not obligatory, it amounts to a declaration through which divorce takes place and he possesses the right of recourse.

If the husband were to say, "Divorce yourself for one thousand or on one thousand," and she divorces herself with a single repudiation, no divorce takes place. The reason is that the husband did not agree to irrevocability, unless the entire one thousand is delivered to him. This is distinguished from her statement, "Divorce me thrice for one thousand," as she was agreeing to irrevocability for a thousand, therefore, agreeing for a part of it is prior.

If he were to say, "You are divorced on (*'alā*) one thousand," and she accepts, she stands divorced. She is now under an obligation to pay one thousand. It amounts to the same thing as saying, "You are divorced for (*bi*) one thousand." Acceptance is necessary in both cases, because the meaning of his words, "For a thousand" is "For a counter-value of one thousand that you have to pay me." The meaning of his statement, "On one thousand," is "On the condition of one thousand that you have to pay me." A counter-value does not become due without acceptance, and something suspended upon a condition cannot be done away with prior to its coming into existence. The divorce, however, is irrevocable, on the basis of what we have said.

If a person says to his wife, "You are divorced and one thousand is due from you," and she accepts, and he says to his slave, "You are free and one thousand is due from you," and the slave accepts, then the slave stands emancipated and the woman divorced, but they do not owe anything according to Abū Ḥanīfah (God bless him). If they do not accept then neither divorce nor emancipation has taken place. The two jurists

[8]Qur'ān 60 : 12

argue that this statement is used in the sense of compensation. The statement, "Transport these goods and for you is a *dirham* at the destination," amounts to saying *bi-dirham*. He argues that the later part is a complete sentence and is not to be linked by implication to what precedes it. The reason is that the basis in these is independence and not implication, because divorce and emancipation are (normally) devoid of wealth as distinguished from sale and hire as such contracts cannot take place without it.

If a person says (to his wife), "You are divorced on one thousand on the condition that I have an option for three days," or he says, "You have an option for three days," and the woman accepts, then the option is void where it belongs to the husband, but it is valid where it belongs to the wife. If she rejects the option within the three days, the divorce is annulled, but if she does not reject it she stands divorced and is liable for paying one thousand. This is the case according to Abū Ḥanīfah (God bless him). **The two jurists said that the option is void in both cases, but the divorce occurs and she is liable for one thousand *dirhams*.** The reason is that the option is for rescission after conclusion (of the agreement) and not for preventing conclusion. These two transactions do not admit of rescission from either party, because from his side it amounts to an oath and from her side a condition. According to Abū Ḥanīfah (God bless him), *khul'* from her perspective is of the status of a sale so much so that her retraction is valid, but such retraction does not exist beyond the session of the contract, thus, the stipulation of an option is valid in it. As for his perspective, it is an oath such that it is not valid to retract from it and it abides till after the session, and there is no option in oaths. The perspective of the slave in the case of emancipation is like her perspective in case of divorce.

If a person says to his wife that he divorced her the day before on one thousand *dirhams*, but she did not accept, and in response to which she says that she did accept, then the acceptable statement is that of the husband. Where a person says to another, "I sold this slave to you yesterday for one thousand *dirhams*, but you did not accept," and he says in response that he did accept, then the acceptable statement is that of the buyer. The underlying reasoning for the distinction is that divorce in lieu of wealth is an oath from the perspective of the husband, therefore, acknowledging it does not amount to acknowledgement with a condition due to its validity without it, however, in the case of sale

it is not concluded without acceptance and acknowledging it amounts to acknowledging something that is not concluded without it. Thus, his denial of the acceptance will amount to withdrawing from the sale.

69.3 *Mubāra'ah* (Divorce With No Liabilities)

He said: ***Mubāra'ah* is like *khul'*. Both extinguish each of the rights that the spouses have over each other with respect to *nikāḥ*, according to Abū Ḥanīfah (God bless him).** Muḥammad (God bless him) said: No right is extinguished in either except that named. Abū Yūsuf (God bless him) sides with him in the case of *khul'*, but he sides with Abū Ḥanīfah (God bless him) in the case of *mubāra'ah*. Muḥammad (God bless him) argues that this is a commutative agreement and in commutative agreements only the specified conditions are taken into account and nothing else. Abū Yūsuf (God bless him) argues that *mubāra'ah* is a derivative of *barā'ah* (to absolve of all liability), therefore, this is legally required for both sides. Further, it is unqualified in meaning and we have qualified it through the rights pertaining to *nikāḥ* due to the implication of the obligation. As for *khul'* its legal requirement is the removing of the relationship, and this is achieved through the annulment of the contract of *nikāḥ*, but there is no necessity to cut off other legal rules as well. Abū Ḥanīfah (God bless him) argues that *khul'* is constructed upon the meaning of doffing or taking off, like taking off shoes or giving up work, and this meaning is absolute like *mubāra'ah*, thus, the absolute meaning has to be given operation with respect to *nikāḥ*, its legal effects, and rights.

He said: **If a person obtains *khul'* for his daughter with her wealth when she is a minor, it is not valid for her.** The reason is that she cannot form a consent for this, because rights of access for sex are not marketable at the time of moving out of the contract, while the counter-value is marketable. This is distinguished from *nikāh*, because rights of access for sex are marketable at the time of entry into the contract. It is for this reason that *khul'* in the case of a woman suffering from terminal illness are operative up to a third of her entire wealth and the contract of marriage of a man in terminal illness can operate through reasonable dower out of the entire wealth. As such a *khul'* is not valid, the liability for the payment of dower is not extinguished, and the husband is not entitled to her wealth. Thereafter, in one narration it is said that divorce takes place, while in another narration it is said that it does not take place. The first narration

is more authentic, because it amounts to association of the divorce with the condition of acceptance by her, therefore, it will be considered like all other contingent stipulations.

If this person (the father) obtains *khul'* for her by saying that he stands surety for payment, then the *khul'* takes effect and the father is liable for the thousand (*dirhams*). The reason is that stipulating payment of the counter-value by a stranger is valid, therefore, for the father it has prior validity. Her right to dower, however, is not extinguished, because that does not fall under the authority (*wilāyah*) of the father.

If he stipulates that the thousand will be paid by her, the contract is suspended subject to her ratification if she is one who can legally accept. If she does accept, divorce takes place, due to the stipulation of wealth **but there is no liability for payment,** because she is not one on whom a financial burden can be imposed. If the father accepts on her behalf, then there are two narrations in this. **Likewise if he obtains *khul'* for her in lieu of her dower, but the father does not stand surety for payment of the dower. It will be subject to her acceptance; if she accepts divorce takes place, but dower is not extinguished.** If the father accepts on her behalf, then there are two narrations. **If the father stands surety for the dower, when it is one thousand *dirhams*, she stands divorced,** due to his acceptance, which is a condition. On the basis of *istiḥsān* he is made liable for five hundred, but on the basis of analogy he is liable for the entire one thousand. The rule for a woman who is a major when she obtains *khul'* prior to consummation in lieu of one thousand where her dower is also one thousand, is liable for an additional five hundred, on the basis of analogy. On the basis of *istiḥsān*, however, she is not liable for anything, because it is usually intended in such a case that she give what she is bound to pay.

Chapter 70

Ẓihār (Injurious Assimilation)

If a man says to his wife, "You are for me like the back of my mother," then she stands prohibited for him. It is not permitted to him to have intercourse with her or to fondle her or to kiss her, unless he offers expiation for his oath of *ẓihār*. This is based upon the words of the Exalted, "But those who pronounce the oath of *ẓihār* to abstain from their wives, then wish to go back on the words they uttered,—(it is ordained that such a one) should free a slave before they touch each other: thus are ye admonished to perform: and Allah is well-acquainted with (all) that ye do."[1]

The pronouncement of *ẓihār* amounted to divorce in the days of the Jāhiliyyah. The *shar'* (law) affirmed its basis, but transferred its legal effects to those of temporary prohibition to be done away with expiation (*kaffārah*) without eliminating the contract of *nikāḥ*. The reason is that *ẓihār* is an offence due to the use of false and iniquitous words,[2] therefore, it is suitable to impose the penalty of her prohibition that is removed through expiation. Thereafter, intercourse that is prohibited is prohibited along with its preliminaries so that he does not succumb to it as in the case of *iḥrām*.[3] This is distinguished from the cases of menstruation and fasting as they occur frequently, thus, if the preliminaries are

[1]Qur'ān 58 : 3

[2]The Qur'ān says: "If any men among you pronounce *ẓihār* for their wives, they cannot be their mothers: none can be their mothers except those who gave them birth. And in fact they use words (both) iniquitous and false: but truly Allah is All-Pardoning, All-Forgiving." Qur'ān 58 : 2

[3]That is, *iḥrām* for *ḥajj* prohibits intercourse and its preliminaries.

prohibited it will lead to hardship. The cases of *ẓihār* and *iḥrām* are not like this.[4]

If he has intercourse with her prior to expiation, he is to seek the forgiveness of Allāh, but there is no (additional) liability for him except the first expiation. He is not to repeat his act until he offers expiation. This is based upon the words of the Prophet (God bless him and grant him peace) in the case of a person who committed intercourse prior to the offering of expiation, "Seek the forgiveness of Allāh and do not commit it again until you offer expiation."[5] Had there been some other liability he would have indicated that.

He said: **This word (*ẓihār*) cannot mean anything other than *ẓihār*,** because it is explicit in its use for such meaning (does not have a figurative sense). **If he intends a divorce thereby it is not valid.** The reason is that such an implication has been abrogated, thus, he cannot bring it about through his intention.[6]

If he says, "You are for me like the body of my mother," or names her thighs or her vagina, then he is a *muẓāhir*. The reason is that *ẓihār* is nothing more than drawing a similarity between a permitted woman and a prohibited woman. Such a meaning, however, stands realised in a limb that is not to be looked at (in the case of a prohibited woman).

The same rule applies if he draws such a similarity with a woman who is prohibited forever with respect to glancing at her, like his sister, aunt or foster mother. The reason is that these women with respect to perpetual prohibition are like the real mother.

Likewise, if he says, "Your head is for me like the back of my mother" or he names her vagina, her face, legs, half her body, one-third of the body, or her body. The reason is that he has used an expression for her about her entire body, and the rule is established for an undivided part and then extends to the entire body, as we elaborated in the case of divorce.

If he says, "You are for me like my mother," or "You are like my mother," recourse is to be had to his intention, so as to unveil the rule.

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[4]That is, they do not occur frequently.

[5]It is recorded by Abū Dāwūd, al-Tirmidhī, Ibn Mājah and al-Nasā'ī in their *Sunan*. Al-Zayla'ī, vol. 3, 246.

[6]The earlier implication of the period of Jāhiliyyah has been abrogated by the *sharī'ah* and the subject cannot alter such an abrogation through his intention. al-'Aynī, vol. 5, 535.

If he says, "I merely intended respect," then it is as he says. The reason is that according respect through similarities is widespread in speech. **If he says, "I intended *ẓihār*," it is to be treated as *ẓihār*.** The reason is that the similarity drawn is with the entire person, which includes a similarity of limbs, but it is not explicit, therefore, the need of recourse to his intention arises. **If he says, "I intended divorce," then it is an irrevocable repudiation.** The basis is that it is a similarity drawn with the mother with respect to prohibition. It is as if he had said, "You are prohibited for me," and had intended divorce. **If he did not form any intention, then it amounts to nothing,** according to Abū Ḥanīfah and Abū Yūsuf (God bless them) due to the probability of being construed as the according of respect. Muḥammad (God bless him) said that it amounts to *ẓihār*. He maintains that drawing a similarity with her in the case of a limb amounts to *ẓihār*, therefore, drawing a similarity with her whole person is to be accorded greater precedence. If he had meant prohibition thereby and nothing more, then, according to Abū Yūsuf (God bless him) it amounts to *īlā'* so that what is established is the lowest category of prohibition. According to Muḥammad (God bless him), it is *ẓihār*, because the character *kāf* of similarity is specific to *ẓihār*.

If he says, "You are prohibited for me like my mother," and intended *ẓihār* or divorce thereby, then it will be as he intended. The reason is that it probably implies both forms. It implies *ẓihār* due to the existence of similarity, and divorce due to the existence of prohibition where the similarity is for emphasis. If he does not have an intention, then, according to the view of Abū Yūsuf (God bless him), it is *īlā'*, but according to the view of Muḥammad (God bless him), it is *ẓihār*. The two probabilities we have explained.

If he says, "You are prohibited for me like the back of my mother," and he intends thereby divorce or *īlā'*, it will not be anything else but *ẓihār*, according to Abū Ḥanīfah (God bless him). The two jurists said that it will be as he intended. The reason is that prohibition implies all this, as we have explained, however, according to Muḥammad (God bless him) if he intends divorce the pronouncement does not amount to *ẓihār*. According to Abū Yūsuf (God bless him) it amounts to all these forms, and this has been explained at its occasion. According to Abū Ḥanīfah (God bless him), it is explicit for purposes of *ẓihār* and does not imply another form. Further, it is *muḥkam* (unalterable), therefore, the prohibition is associated with it.

Ẓihār does not apply to cases other than that of the wife so that if he makes the pronouncement for his slave woman he does not become a *muẓāhir*. This is based upon the words of the Exalted, "If any men among you pronounce *ẓihār* for their wives..."[7] The reason is that the permissibility pertaining to the slave woman is secondary[8] and is not to be associated with that for the lawfully married wife. Further, the legal effects of *ẓihār* have been transferred from divorce, and there is no divorce in the case of owned slaves.

If he marries a woman who has not consented (as yet) and then pronounces *ẓihār* with respect to her, but thereafter the woman ratifies the marriage, the *ẓihār* stands annulled. The reason is that he was truthful at the time of drawing the similarity between prohibitions, therefore, his statement was not false. *Ẓihār* is not a right from among his rights so that it can be suspended, as distinguished from the emancipation of a slave by a buyer who has bought him from an abductor, because there it is a right of ownership.

Where a man says to his wives, "You are (all) for me like the back of my mother," he becomes a *muẓāhir* with respect to all of them. The reason is that he attributed *ẓihār* to all of them, just like he would link divorce with all of them. **He is liable for expiation (independently) for each one of them.** The reason is that prohibition is established for each one of them and expiation is for the termination of the prohibition, thus, it will multiply with their multiplication, as distinguished from *īlā'* with respect to all of them, because expiation there is for protecting the sacredness of the name[9] and the name mentioned does not increase in number.

70.1 *Kaffārah* (Expiation)

The expiation for *ẓihār* is the emancipation of a slave (*raqabah*). If a slave is not found then consecutive fasting for two months. If that is not possible then sixty needy persons are to be fed. This is based on the text laid down for this purpose, for it requires expiation in this order.

He said: **And all this is prior to cohabitation.** This is obvious from the text in the case of emancipation and fasting, but it is the same for feeding as well, because expiation does away with prohibition, therefore,

[7]Qur'ān 58 : 2

[8]The main purpose being *milk yamīn*.

[9]Of Allāh Almighty.

it is necessary that it precede intercourse so that the intercourse becomes lawful.

He said: **It is deemed sufficient to emancipate a slave who is an Unbeliever, Muslim, male, female, minor or major.** The reason is that the term *raqabah* applies equally to all of them, as it is an expression for the person of an enslaved owned human being from all perspectives. Al-Shāfi'ī (God bless him) opposes us in the case of an unbelieving slave. He maintains that expiation is the right of Allāh, the Exalted, therefore, it is not proper to apply it to the enemies of Allāh, as is the case with *zakāt*. We say that what is stated in the text is the emancipation of a *raqabah* and that meaning is realised. The intention (of the person offering expiation) is the granting of the ability to be obedient. Thereafter, commission of sins will be construed to arise from the bad choices made by the emancipated slave.

It is not deemed sufficient to emancipate a slave who is blind or whose hands or legs have been amputated. The reason is that the lost limbs are part of the benefits, which are sight, grasping and walking and this prevents expiation.[10] If, however, the benefit is diminished, it does not prevent expiation, thus, a slave with one eye or one amputated hand or leg from the opposite side is acceptable, because what is lost is part of the benefits but are available in a diminished form. This is distinguished from the case where a hand and a leg are amputated from the same side that do no make the benefit of walking available for that is difficult for such a person. It is permissible to emancipate a deaf slave for expiation, although analogy dictates that he is not acceptable, which is a narration in the *Nawādir*. The reason is that it is part of the main benefit, but we permitted it on the basis of *istiḥsān*, because the essential benefit still remains for he may hear when shouted at. If, however, he does not hear at all, having been born deaf, and he is dumb, it is not deemed sufficient.

It is not valid to emancipate a slave whose thumbs have both been amputated, because the power of grasping is due to them and with their loss an essential benefit is lost.

It is not permitted to emancipate an insane slave, who cannot comprehend, as the utility derived from limbs is based upon reason, thus, he has lost the main benefit. **It is valid to emancipate a slave who has fits of**

[10]The reason obviously is that the slave should not be one who is useless for the master anyway,and he tries to get rid of him through expiation.

insanity, but then recovers, because disturbance of the benefits does not prevent the main benefit.

It is not sufficient to emancipate a *mudabbar* slave (to be set free on death of master) nor a slave mother, because they are entitled to freedom from one aspect and the attribute of slavery in them is deficient. Likewise the *mukātab* who has made some payments, because his emancipation is based upon payment of a counter-value. It is narrated from Abū Ḥanīfah (God bless him) that his emancipation is sufficient due to the existence of slavery in all respects, therefore, rescission of the contract of *kitābah* is permitted. This is distinguished from the categories of slave mothers and *mudabbars*, because these transactions do not admit of rescission. If the *mukātab* is emancipated when he has not paid anything, the emancipation is valid, with al-Shāfi'ī (God bless him) disagreeing. He maintains that the *mukātab* has become entitled to freedom from the perspective of *kitābah*, therefore, he resembles the *mudabbar*. We argue that the attribute of slavery is present in all respects, as we have explained. This is based upon the words of the Prophet (God bless him and grant him peace), "The *mukātab* is a slave as long as a single *dirham* is owed by him."[11] Further, *mukātabah* does not negate the attribute of slavery, it is merely the removal of interdiction like the authorisation for undertaking trade, however, it is in lieu of a counter-value and is binding on the master. Had it been enough to prevent emancipation, it would be revoked as a requirement of emancipation, because it admits of revocation. The earning and children are delivered to him, however, because emancipation, as far as the slave is concerned, is on the basis of *kitābah* or that (in the alternative) revocation is necessary, but this necessity does not extend to children and earning.

If he buys his (slave) father or son, intending expiation through the purchase, it is valid for expiation. Al-Shāfi'ī (God bless him) said that it is not permitted. On the same disagreement is based the violation of an oath, and the issue will come before you, God willing, in the *Book of Aymān (Vows/Oaths)*.

If he emancipates one-half of a jointly owned slave, when he enjoys financial ease, and guarantees the value of the remaining, it is not permitted according to Abū Ḥanīfah (God bless him), while it is permitted

[11] It is recorded by Abū Dāwūd in his *Sunan*. Al-Zayla'ī,vol.3,247.

according to the two jurists.[12] The reason is that he comes to own the share of his co-owner through the guarantee, and is like a person who emancipates a whole slave in lieu of expiation when he owns the slave. This is distinguished from the case where the emancipator is in financial straits, because it will become obligatory on the slave to work for the share of the co-owner and this converts it to emancipation for a counter-value. According to Abū Ḥanīfah (God bless him) the share of the co-owner is eliminated from his ownership and then reverts back to him through *ḍamān* (guarantee), and this transaction prevents expiation.

If he emancipates one-half of his slave in lieu of expiation and thereafter emancipates the remaining part for the same reason, it is valid. The reason is that he emancipated him through two statements and the loss (in the remaining part) is possible in his own share due to emancipation for the purpose of expiation, and such a transaction does not act as an obstacle. It is like a person who lays out a goat for sacrifice and the knife pierces the goat's eye. This is different from the previous case, because in that the loss occurred in the share of the co-owner. This is the position according to the principle upheld by Abū Ḥanīfah (God bless him). As for the two jurists, emancipation cannot be split into parts, therefore, the emancipation of one-half is the emancipation of the whole, thus, it is not emancipation through two statements.

If he emancipates one-half of his slave and thereafter has intercourse with his wife for whom he pronounced *ẓihār* following which he emancipates the other half of the slave, it is not valid according to Abū Ḥanīfah. The reason is that emancipation can be split into parts in his view, and the condition of emancipation, on the basis of the text, is that he emancipate prior to cohabitation; in this case, emancipation of one-half occurred after cohabitation. According to the two jurists, the emancipation of one-half is the emancipation of the whole, therefore, the entire emancipation occurred prior to cohabitation.

If the *muẓāhir* does not find a slave for emancipation, then the expiation for him is fasting consecutively for two months without an intervening month of Ramaḍān or *'īd al-fiṭr* or the day of sacrifice or the days of *tashrīq*. As for consecutive months it is based upon the texts. The month of Ramaḍān (cannot be included in these two months) as it

[12]Emancipation cannot be split into parts in their view, and emancipation of a part is emancipation of the whole.

does not qualify as expiation for *ẓihār* insofar as it amounts to annulling what has been made obligatory. Fasting in the other days (mentioned) is prohibited, thus, they cannot become a substitute for completing the obligation.

If he has intercourse with the wife, against whom he pronounced *ẓihār*, during the two months, intentionally during the night and out of forgetfulness during the day, he is to start fasting all over again according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf (God bless him) said that he is not to start over again, because the consecutive fasting is not prevented as the fast is not rendered *fāsid* and that is the condition. He argues that if the precedence of expiation is a condition for cohabitation then what we uphold is the precedence of part of it, and in what you hold is the delaying of cohabitation till the whole is completed. The two jurists argue that the condition for fasting is that it precede cohabitation, and such fasting should be free of cohabitation as a necessary requirement of the text. This condition is violated, therefore, he is to start all over again. **If he does not fast for a day with or without an excuse, he is to fast all over again.** This is due to the absence of consecutive fasting when he is able to do so.

If a slave pronounces *ẓihār*, the only expiation for him is through fasting, because he does not own anything, therefore, he is not eligible for expiation through wealth. **If the master were to emancipate a slave on his behalf, or feed the needy, it is not valid.** The reason is that he does not have the legal capacity for ownership, therefore, passing ownership to him does not make him an owner.

If the *muẓāhir* is not able to fast, then, he is to feed sixty needy persons, due to the words of the Exalted, "And if any has not (the means), he should fast for two months consecutively before they touch each other. But if any is unable to do so, he should feed sixty indigent ones, this, that ye may show your faith in Allah and His Messenger. Those are limits (set by) Allah. For those who reject (Him), there is a grievous Chastisement."[13] **He is to feed each needy person one-half *ṣā'* of wheat or one *ṣā'* of dates or barley or give him the value of these.** This is based upon the words of the Prophet (God bless him and grant him peace) in the tradition of Aws ibn al-Ṣāmit and Sahl ibn Ṣakhr, "For each needy person is one-half

[13]Qur'ān 58 : 4

ṣā' of wheat."[14] The reason is that the factor to be considered is meeting the need of the day of each needy person, therefore, it is estimated on the analogy of *ṣadaqat al-fiṭr*. His statement "Or the value of these" is the opinion of our school, and we have mentioned it in the *Book of Zakāt*.

If he gives one maund of wheat and two maunds of dates or barley, it is valid. The purpose is achieved as the class is common.[15] **If he orders another to feed on his behalf for his *ẓihār*, and this person does so, he is rewarded.** The reason is that it is the taking of a loan in meaning. The poor man first takes possession on his behalf and thereafter for himself, therefore, making him the owner and then acquiring ownership is realised.

If he gives them meals in the afternoon and in the evening, it is valid whether they have consumed less or more. Al-Shāfi'ī (God bless him) said that he is not to be rewarded except by making them owners in consideration of what is done in the case of *zakāt* and *ṣadaqat al-fiṭr*. The reason is that making one an owner is more effective in meeting needs, therefore, permissibility (of meals) cannot be made a substitute for ownership. Our argument is that what is stated in the text is feeding, which is the real meaning of granting the ability to have meals. The permissibility of meals carries this meaning just like the making of a person an owner. In the obligation of *zakāt*, however, the meaning is of giving, while in *ṣadaqat al-fiṭr* it is payment, and these two meanings carry the sense of ownership in reality.

If there is among the persons given a meal an infant who has not weaned, he is not rewarded. The reason is that he cannot consume a meal. It is necessary to serve curry (or fatty substance) with barley bread so that the person fed can eat to his satisfaction. Curry is not stipulated for wheat bread.

If he feeds a single needy person for sixty days, he is rewarded. If he grants him the entire food (liability) in one day, he will not be rewarded except for one day, because the purpose is to drive away the want of the needy person, and his want is renewed every day. Thus, giving him food the next day is like giving food to another person. This is the view, without disagreement, in the permissibility of giving meals. As for making a

[14] According to al-Zayla'ī, the correct name is Salamah ibn Ṣakhr and the tradition is *gharīb*, however, there are other traditions that give the same meaning. Al-Zayla'ī, vol. 3, 247.

[15] The class is common here means that the class is feeding and not clothing.

single needy person an owner in one day through (sixty) instalments, it is said that he is not rewarded, while it is also said that he is rewarded, because the need to own is renewed within one day. This is distinguished from the making of one single payment as the making of a distinction is obligatory due to the text.

If he cohabits with the wife subject to *ẓihār*, while the meal is being taken, he is not to renew the feeding. The reason is that Allāh, the Exalted, has not laid down that the feeding be prior to cohabitation, except that he is prohibited from doing so before it. Perhaps, it is possible that he may acquire the ability to emancipate a slave or fast, and in such a case they will occur after touching. A prohibition that exists due to an external reason does not negate legality in itself.

If he gives food on account of two *ẓihārs* by giving sixty needy person one *ṣā'* of wheat each (instead of one-half), he is not to be rewarded except for just one of the two *ẓihārs*, according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that he is to be rewarded for both. If he feeds like this on account of breaking his fast and *ẓihār*, he is to be deemed rewarded for both. Muḥammad (God bless him) argues that what he has given is enough for the satisfaction of the two obligations, and those to whom he has given are the object of the grant, therefore, it is rightly given to them. It is as if the causes are different or a distinction has been made in payment. The two jurists argue that the intention (in this case) for one of the categories becomes redundant and it is taken into account in (the absolute sense for) both categories. Thus, when the intention becomes redundant, but the given food qualifies for one expiation, because one-half *ṣā'* is the minimum quantity, reduction is prevented and not excess, therefore, it is valid for one expiation, as if he had made a resolve for this expiation itself. This is distinguished from the case where he makes a distinction in payment, because the second payment will be treated as payment to another needy person.

If a person is under an obligation to make expiation for two *ẓihārs*, and he emancipates two slaves, without specifying an intention for either one of them, it is valid for both. Likewise if he fasts for four months or feeds one hundred and twenty needy persons, it is valid. The reason is that there is unity of category, therefore, a specific intention is not needed. **If he emancipates one slave for both or fasts for two months, he is required to determine for which of the two the expiation is intended.**

If he does this for intentional homicide and for *ẓihār*, it is not valid for either. Zufar (God bless him) said that he is not to be deemed rewarded in both cases. Al-Shāfiʿī (God bless him) said that it is up to him to allocate to one in both cases, because all expiations due to the unity of purpose are a single genus. Zufar's argument is that he emancipated one-half slave for each *ẓihār* and he does not have the choice to allocate them to one after he has done it for both, because the matter is out of his hands now. Our argument is that the intention of ascertainment in case of unity of genus is not beneficial and is deemed redundant. It is beneficial in case of different genera, and the difference in genera for purposes of the rules is expiation here with different causes. The example of the first is where he fasts for one day by way of *qaḍā'* (delayed substitute performance) for two days of Ramaḍān, he is to be rewarded for one day. The illustration of the second is that he is under an obligation to offer *qaḍā'* for Ramaḍān and *nadhr* (vow), so he must make a distinction through intention. Allāh knows best.

Chapter 71

Li'ān (Imprecation)

If a person accuses his wife of having committed *zinā*, when both spouses are eligible to give testimony, while the woman is one whose accuser can be awarded *ḥadd* for *qadhf*, or he denies the paternity of her child, and she demands the consequences of *qadhf* to follow, then he is under a duty to follow the procedure of *li'ān*. The basis is that *li'ān*, in our view, are testimonies strengthened through oaths and linked to cursing, and these are a substitute for the *ḥadd* of *qadhf* in the case of the husband and a substitute for the *ḥadd* of *zinā* in the case of the wife. This is based upon the words of the Exalted, "And for those who launch a charge against their wives, and have (in support) no evidence but their own,"[1] the exception being made from the genus (of witnesses). Allāh, the Exalted, has said, "Let one of them testify four times by Allah that he is of those who speak the truth," which is explicit in the meaning of testimony and oath. Accordingly, we say that the essential ingredient (*rukn*) is testimony supported by oath. Thereafter, the *rukn* is associated in his case with a curse if he is untruthful, and this is a substitute for the *ḥadd* of *qadhf* and then it is linked with wrath in her case and this is a substitute for the *ḥadd* of *zinā*.

When this is established, we say: It is necessary that both be eligible for rendering testimony, because the *rukn* is testimony. It is also essential that she be one whose false accuser is liable for the *ḥadd*, because it acts as a substitute for the *ḥadd* of *qadhf* in his case, therefore, she must be a *muḥṣan*. This becomes obligatory by the denial of paternity. The reason is that as soon as he denies paternity he has apparently committed *qadhf*. The possibility that the child could be of some other man through

[1]Qur'ān 24 : 6

intercourse based upon doubt is not to be taken into account, just like the case of a stranger denying the paternity of a person from his well known father. The reason is that the governing basis in case of paternity is lawful access for sexual relations, and unlawful access is related to it, therefore, his denying valid access amounts to *qadhf* until it becomes evident that unlawful access is now linked to it. Her demand of proceedings is stipulated as it is her right, therefore, it is necessary that the demand is initiated by her as in the case of all other rights.

If he refuses to take the oath of *li'ān*, the judge is to imprison him until he takes the oath of *li'ān* or declares himself to be a liar. The reason is that it is a right being claimed from him and he is in a position to meet this claim, thus, he is imprisoned until he delivers what is being claimed from him or declares himself to be untruthful so that the cause of action is removed.

If he agrees to the process of *li'ān*, the procedure of *li'ān* becomes obligatory upon him, due to the text that we have recited, however, we begin with the husband for he is the complainant.

If she refuses to take the oath, the *qāḍī* is to imprison her till she takes the oaths or deems him truthful. The reason is that it is his right against her, and she is able to meet the claim, therefore, she is imprisoned on account of it.

Where the husband is a slave, or an unbeliever[2] or has been convicted for *qadhf*, and he commits *qadhf* against his wife, he is to be subjected to the *ḥadd*. The reason is that *li'ān* is not possible due to a disqualification found in him, therefore, it is converted to the original obligation, which is established by the words of the Exalted, "And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations),—flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors; Except those who repent thereafter and mend (their conduct); for Allah is Oft-Forgiving, Most Merciful."[3] *Li'ān* is a substitutory duty for this (primary) obligation.

If the wife is one who is qualified to testify, but is an unbelieving slave or has been awarded *ḥadd* for *qadhf*, or is one whose false accuser is not punished, like being a minor, or insane, or one convicted for *zinā*,

[2]This is the case where both spouses are unbelievers and the wife accepts Islam after which he accuses her, but prior to the extending of the invitation to him for accepting Islam. Al-'Aynī, vol. 5, 566. The text has been taken from *Fatḥ al-Qadīr*.

[3]Qur'ān 24 : 4,5

then, **there is neither *ḥadd* for him nor *li'ān*,** due to the negation of the legal capacity of rendering testimony, the lack of *iḥṣān* (chastity), and this is from her side. The prevention of *li'ān* is due to a fault in her, therefore, *ḥadd* is waived; it is as if she confirmed his statement. The legal basis for this are the words of the Prophet (God bless him and grant him peace), "There are four persons between whom and their spouses there is no *li'ān*: a Jew or a Christian woman married to a Muslim; a slave woman married to a freeman; and a freewoman married to a slave."[4] If the spouses have been convicted (and punished) for *qadhf*, then, the husband will be subjected to *ḥadd*, because the prevention of the *li'ān* procedure is due to a fault in him as he is not eligible for it.

The description of *li'ān* is that the *qāḍī* begins with the husband. He testifies four times, saying each time, "I testify by Allāh that I am truthful in my accusing her of *zinā*." The fifth time, he says, "The curse of Allāh be on him, if he is untruthful with respect to his accusation of *zinā*." In all these statements he points towards her. The wife then testifies four times, saying each time, "I testify by Allāh that he is untruthful in the accusation he has made against me with respect to *zinā*. In the fifth testimony, she says, "The wrath of Allāh be on her if he is truthful with respect to the accusation against me about *zinā*." The legal basis in all this is the text that we have already recited. It is narrated by al-Ḥasan from Abū Ḥanīfah (God bless him) that he is to use the form of direct address by saying, "In what I have accused you of *zinā*" insofar as that is explicit in removing uncertainty. The reasoning underlying what has been stated in the *Book* (by al-Qudūrī) is that when the form used for one absent is corroborated by pointing to her the probability of uncertainty is removed.

He said: **When they have both made the statements of *li'ān*, a separation does not occur between them until the *qāḍī* separates them with his pronouncement.** Zufar (God bless him) said that separation does occur by their *li'ān* statements, because perpetual prohibition is established by the operation of the tradition.[5] We argue that the proof of prohibition

[4]Ibn Mājah and al-Dār'quṭnī have recorded it in their *Sunan*. Al-Zayla'ī, vol. 3, 248.

[5]Al-Zay'alī says that it appears he is pointing to the tradition, "The spouses participating in *li'ān* can never come together." He says that it is recorded by Abū Dāwūd in his *Sunan*. Al-Zayla'ī, vol. 3, 249, 250. Al-'Aynī says that it has been recorded by 'Abd al-Razzāq as a *mawqūf* tradition. Al-'Aynī, vol. 5, 571.

eliminates the retention of the relationship in fairness, therefore, the husband is to adopt fairness. If he refuses to do so, the *qāḍī* becomes his deputy in order to avoid injustice. This is indicated by the Companion who said, "I have accused her unjustly, and she is divorced thrice if I take her back."[6] This he said after the *li'ān* proceedings.

The separation will amount to a single irrevocable repudiation, according to Abū Ḥanīfah and Muḥammad (God bless them), because the act of the *qāḍī* is attributed to him. **He can propose again if he declares himself to be untruthful,** according to the two jurists. Abū Yūsuf (God bless him) maintains that it amounts to perpetual prohibition due to the words of the Prophet (God bless him and grant him peace), "The spouses participating in *li'ān* can never come together,"[7] which is explicit in the meaning of perpetual prohibition. The two jurists maintain that admitting falsehood amounts to retraction and testimony has no force after retraction. Further, they cannot come together as long as they remain in the state of *li'ān*, but such *li'ān* no longer subsists and has no legal value after admission of falsehood, therefore, they can come together.

If the *li'ān* was based upon the denial of paternity, the *qāḍī* annuls his paternity and associates him with his mother's name. The form of *li'ān* (in this case) is that the *qāḍī* orders the man to say, and he says: "I testify by Allāh that I am truthful in what I have accused you of with respect to the denial (of the paternity) of the child." The similar form is adopted from the woman's side.

If he accuses her of *zinā* and also denies the paternity of the child, he mentions both things in his *li'ān* statement. Thereafter the *qāḍī* revokes the paternity of the child and associates it with its mother. This is based upon the report "that the Prophet (God bless him and grant him peace) revoked the paternity of the child of Hilāl ibn Umayyah's wife with respect to Hilāl and associated it with her."[8] Further, the purpose of this *li'ān* is the denial of paternity for the child and this purpose is achieved completely, and it is included in the pronouncement of separation through the judgement. It is reported from Abū Yūsuf (God bless him) that he said: The *qāḍī* pronounces the separation and says, "I have made him

[6] It has been recorded by al-Bukhārī, Muslim, Abū Dāwūd and others. Al-Zayla'ī, vol. 3, 249-50.

[7] See note above.

[8] It is recorded by Abū Dāwūd and others. Al-Zayla'ī, vol. 3, 251.

a dependant of his mother and removed him from the paternity of the father." As denial of paternity is independent of separation, it is necessary to mention it.

If the husband repeats the accusation and then admits that he was lying, the *qāḍī* is to subject him to *ḥadd*,[9] due to his admission leading to the obligation of awarding *ḥadd* to him. **And he permits him to remarry her.** This is the view according to the two jurists, because after the awarding of *ḥadd*, he is no longer eligible to participate in *li'ān*, therefore, the rule on which it is based, which is perpetual prohibition, is also removed. **Likewise if he commits *qadhf* against another woman and is awarded *ḥadd* for it,** due to what we have explained. **And likewise if she commits *zinā* and is awarded *ḥadd*,**[10] due to the negation from her side of the eligibility for *li'ān*.

If he commits *qadhf* against his wife, who is a minor or is insane, there is no *li'ān* between them. The reason is that *ḥadd* is not awarded to the accuser of such a woman, even if she is a stranger, thus, the husband is not to proceed with *li'ān* as he stands in the same position. **Likewise if the husband is a minor or is insane,** due to the lack of liability in such a case.

***Qadhf* by a dumb person is not relevant for *li'ān*,** because it pertains to an express accusation like the *ḥadd* of *qadhf*. In this al-Shāfi'ī (God bless him) disagrees, however, the basis is that this case is not free of doubt and the *ḥudūd* are to be waived on account of doubt.

If the husband says to her, "Your pregnancy is not due to me," then there is no *li'ān* between them. This is the view of Abū Ḥanīfah and Zufar (God bless them), because he is not sure of the existence of pregnancy,[11] therefore, he does not become an accuser (*qādhif*). Abū Yūsuf and Muḥammad (God bless them) said that *li'ān* becomes obligatory by the denial of pregnancy when he denies it in a period that is less than six months, which is the point made (by Muḥammad) in *al-Aṣl*, because

[9]This is the case where she has not been irrevocably divorced after the accusation. If, however, this takes place after the irrevocable divorce, there is neither *ḥadd* nor *li'ān*, because the purpose of *li'ān* is separation. This is the view of al-Sarakhsī as quoted by al-'Aynī, vol. 5, 576.

[10]The question arises as to how she can remarry when she has been awarded *ḥadd*, which should be *rajm* in her case. The response given is that this is a case where she has been accused prior to consummation of marriage in which case the *ḥadd* will be 100 stripes and not *rajm*. See al-'Aynī, vol. 5, 576.

[11]Perhaps, he is not sure of being able to cause a pregnancy.

we come to know for sure about pregnancy in such a period,[12] therefore, *qadhf* is affirmed. We would say to this that if it does not amount to *qadhf* immediately, then, it becomes subject to a condition. It is as if he is saying to her, "If you are pregnant, then it is not because of me." *Qadhf* that is suspended upon a condition does not take place.

If he says to his wife, "You have committed *zinā* and this pregnancy is due to *zinā*," they are to undergo the procedure of *li'ān*. This is due to the existence of *qadhf* as he has expressly mentioned *zinā*. **The *qāḍī* in this case will not revoke paternity.** Al-Shāfi'ī (God bless him) said that he is to revoke paternity, because the Prophet (God bless him and grant him peace) revoked the paternity of the child of Hilāl as he had accused her when she was pregnant.[13] We maintain that the legal effects do not take place except after the birth of the child due to the possibility of absence of pregnancy. The tradition is construed to mean that he had come to know about the existence of conception on the basis of revelation.

If a man denies the child of his wife after birth or at a time when felicitations are accepted and things subsequent to birth are procured, his denial is valid and *li'ān* proceedings are in order. If he denies it after this, he is to undergo *li'ān*, but paternity is established. This is the view according to Abū Ḥanīfah (God bless him). Abū Yūsuf and Muḥammad (God bless them) said that his denial is valid if it takes place within the postnatal period. The reason is that denial is valid within a short period, but is not valid after a long period, and we have separated the two periods with the period of *nifās* (postnatal period), because it is the consequence of birth. The Imām (God bless him) says that there is no point in such fixing of durations, because time is needed for pondering over the matter and the situation of people differs with circumstances. Accordingly, he says, we have taken into account things that indicate lack of denial and these are like his acceptance of felicitations, or his silence when congratulated, or his buying of things needed after birth, or the passage of this period with his non-denial of paternity. If he was absent and did not know about the birth, but arrives thereafter, the period will be taken into account on the basis of both rulings that we have mentioned.[14]

[12]This is also the minimum period for pregnancy.

[13]It has preceded.

[14]The view of the Imām and the two jurists.

He said: **If she gives birth to twins through the same pregnancy and he denies the first and accepts the second, their paternity stands established** as they have been conceived as twins from the same sperm. **The husband is to be subjected to *ḥadd*,** because he has admitted his falsehood through the second claim.

If he accepts the first and denies the second, their paternity stands established, on the basis of what we have mentioned, and **they undergo *li'ān* proceedings.** The reason is that he has become a *qādhif* through the denial of the second and has not retracted his claim. The acknowledgement of chastity is prior to the commission of *qadhf*. It is as if he first said that she is chaste and then said that she is a *zāniyah*. In such a situation *li'ān* is the consequence, so also here.

Chapter 72

Impotence and Other Causes of Divorce

If the husband is impotent the *qāḍī* is to grant him a year. If he is able to cohabit with her, then it is good, otherwise he is to announce a separation between them if the woman makes a request for that. This is how it has been reported from 'Umar, 'Alī and Ibn Mas'ūd (God be pleased with them).[1] The reason is that her right to intercourse is established, but it is probable that the inability may be due to some temporary ailment and it is probable that it is due to a congenital defect. It is, therefore, necessary to have a duration to gain knowledge about this. We have fixed this duration to be a year as it consists of all the four seasons. When the period is over and he has not been able to cohabit with her, it becomes obvious that it is due to some congenital (or permanent) defect. This leads to the demise of retention in marriage according to what is good, and dealing with her in fairness becomes obligatory. If he refuses, the *qāḍī* acts as his representative and pronounces the separation between them. It is necessary that the woman demand separation, because separation is her right (in such a case).

This separation amounts to a single irrevocable repudiation. The reason is that the act of the *qāḍī* is attributed to the husband; it is as if he has divorced her himself. Al-Shāfi'ī (God bless him) said that it is revocation, however, *nikāḥ* does not accept revocation in our view. It amounts to an irrevocable divorce, because the purpose, which is the elimination of injustice to her, cannot be achieved without it. If it is not irrevocable, the woman will be suspended due to the possibility of retraction.

[1]These reports are to be found in the works of 'Abd al-Razzāq, Muḥammad ibn al-Ḥasan al-Shaybānī and Ibn Abī shaybah. Al-Zayla'ī, vol. 3, 254.

She is entitled to full dower if he went into seclusion with her, because seclusion with an impotent husband is valid. **The waiting period is obligatory,** because of what we elaborated earlier. This is the case where the husband acknowledges that he has not been able to have intercourse with her.

If the husband and wife differ about his being able to have intercourse with her, then if she is a non-virgin the acceptable statement will be that of the husband along with his oath. The reason is that he is denying the entitlement to the right of separation, and the basis is the fitness or the functioning of the organ.

Thereafter, if he takes the oath, her right is extinguished, but if he refuses the matter is to be delayed for a year. If she is a virgin, the women are to examine her and if they testify that she is a virgin the delay of a year is to be granted, due to the manifestation of his falsehood. **If they say that she is deflowered, the husband is to be administered the oath. If he takes the oath, she has no right, but if he refuses the matter is delayed for a year. If he has a cut up organ, the separation is to be pronounced at once if she so demands.** The reason is that there is no use in delaying the matter. **The case of a castrated man is also be to be delayed like that of the impotent person,** because there is some hope of his being able to cohabit.

If the impotent man is granted a year and then he says that I have had intercourse with her, but she denies it, she is to be examined by women. If they say that she is a virgin, she is to be given an option. The reason is that their testimony has affirmed the underlying factor and that is virginity. **If they say that she is a non-virgin, the husband is to be administered the oath. If he refuses to take the oath, she is granted the option,** due to the confirmation of her position because of his refusal. **If he takes the oath, she is not granted an option.**

If she was originally a non-virgin, the acceptable statement is the husband's along with his oath. We have mentioned this already.

If she chooses her husband, she will no longer have an option. The reason is that she has agreed to the extinction of her right. In the case of delay, the lunar year is to be taken into account, and that is the sound narration. The calculation is to be made without excluding the days of menstruation and the month of Ramaḍān because of their occurrence within the year. The days of his illness and her illness are not to be counted, because such illness may not occur within a year.

If the wife has a defect, the husband does not have an option (of revocation). Al-Shāfi'ī (God bless him) said that she is to be rejected on account of five defects: leprosy; *baraṣ* (skin disease); insanity, *ratq*;[2] and *qarn*.[3] The reason is that they prevent contact for physical access and desire. Desire is emphasised in the *shar'* (law) due to the words of the Prophet (God bless him and grant him peace) "Run from the person with leprosy like you run from the lion."[4] We argue that the extinction of satisfaction essentially upon death does not lead to revocation, therefore, it is necessary that by mere disturbance due to defects it should not be so. The reason is that satisfaction is derived from the fruits of marriage, and the claim is that these be available and they are.

If the husband suffers from insanity, *baraṣ* or leprosy, then the wife does not have an option (of revocation) according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that she does have the option, so as to repel injury to her, as in the case of loss of organ or impotence, as distinguished from his case for he is able to do away with the injury through divorce. The two jurists maintain that the basis is the absence of an option insofar as it amounts to annulling the right of the husband. It is granted in the case of a partially missing organ or impotence as they prevent the attainment of the objective for which marriage has been made lawful. These defects, on the other hand, do not upset such objective, therefore, the two are distinguished. Allāh knows best what is correct.

[2]Birth defect in which the vulva is blocked, because the sides of the vulva are joined together.

[3]Birth defect in which the vulva is blocked due to bone structure or other reason.

[4]Recorded by al-Bukhārī. See al-Zayla'ī, vol. 3, 255.

Chapter 73

'Iddah (Waiting Period)

If a man divorces his wife through an irrevocable or a revocable repudiation, or a separation occurs between them without divorce,[1] when she is a freewoman who has menstrual periods, then her *'iddah* (waiting period) extends to three periods, due to the words of the Exalted, "Divorced women shall wait concerning themselves for three monthly periods."[2] Separation when it takes place without divorce bears the meaning of divorce, because *'iddah* has been made obligatory to identify the vacation of the womb in a separation that is imposed upon *nikāḥ*, and this occurs within the separation. The term "period" is applied to mean menses in our view. Al-Shāfi'ī (God bless him) said that it applies to the period of purity. The word *qurū'* in its actual application is used for both meanings and has been used for the opposite meanings. This is what has been stated by Ibn al-Sikkīt. It does not, however, apply to both meanings at the same time as a *mushtarak* word. Construing it to mean menses is better. First, by acting upon the plural meaning, because applying it to mean period of purity where divorce takes place in a period of purity prevents it from being a plural. Second, in its meaning as an identifier of the vacation of the womb, which is the purpose of *'iddah*. Third, by interpreting it in the light of the words of the Prophet (God bless him and grant him peace), "The waiting period of the slave woman are two menses," and these words act as an elaboration (*bayān*) for the word.

If she is one who does not menstruate due to young or old age, then, her waiting period is three months, due to the words of the Exalted,

[1]This separation may occur through *khiyār al-bulūgh*, emancipation, one spouse coming to own the other, and apostasy. Al-'Aynī, vol. 5, 593.

[2]Qur'ān 2 : 228

"Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have any doubts, is three months."[3] **Likewise those who have reached the age of puberty, but have not begun to menstruate,** due to the words at the end of the verse.[4]

If she is pregnant, then, her *'iddah* is up to the time she delivers the child, due to the words of the Exalted, "For those who are pregnant, their period is until they deliver their burdens."[5]

If the wife is a slave woman her *'iddah* is two menses, due to the words of the Prophet (God bless him and grant him peace), "The divorce of the slave woman is two repudiations and her waiting period is up to two menses."[6] The reason is that slavery converts matters into half, but the menstrual period cannot be halved, therefore, they are fixed at two menses. This is what 'Umar (God be pleased with him) is reported to have said, "If I could I would have deemed it a menses and a half."[7] **If the slave woman is one who does not menstruate, then her waiting period is a month and a half.** The reason is that it can be divided and it is possible to make it half while acting upon the attribute of slavery.

The waiting period of a freewoman in the case of death (of her husband) is four months and ten days, due to the words of the Exalted, "If any of you die and leave widows behind, they shall wait concerning themselves four months and ten days."[8] **The waiting period of a slave woman (in this case) is two months and five days,** because slavery converts it to half.

If she is pregnant, then, her waiting period is until she delivers, due to the unqualified meaning of the verse, "For those who are pregnant, their period is until they deliver their burdens."[9] 'Abd Allāh ibn Mas'ūd (God be pleased with him) said, "If anyone wants I can engage with him in mutual curses to show that this verse was revealed after the verse that is in Sūrat al-Baqarah."[10] 'Umar (God be pleased with him) said that "if she

[3]Qur'ān 65 : 4

[4]That is, "And for those who have no courses (it is the same)." Qur'ān 65 : 4

[5]Qur'ān 65 : 4

[6]It is recorded from 'Ā'ishah and Ibn 'Umar (God be pleased with them). The different versions are recorded by Abū Dāwūd, al-Tirmidhī, Ibn Mājah and others. Al-Zayla'ī, vol. 3, 226, 255.

[7]It is reported by 'Abd al-Razzāq. Al-'Aynī, vol. 3, 256.

[8]Qur'ān 3 : 234

[9]Qur'ān 65 : 4

[10]It is recorded by al-Bukhārī. Al-Zayla'ī, vol. 3, 256.

delivers while her husband is yet on the bier, her waiting period is over and it is lawful for her to marry."[11]

If the divorced woman comes to inherit during the terminal illness of her husband, her waiting period is the longer of the two periods. This is the view according to Abū Ḥanīfah and Muḥammad (God bless them), while Abū Yūsuf (God bless him) said that it is three menses. The meaning here is that when the divorce is irrevocable or has been pronounced thrice. If, however, it is revocable, then she is to observe the waiting period of death by agreement. According to Abū Yūsuf (God bless him), the marriage stood dissolved prior to death through divorce, and she was obliged to wait for three menses. The waiting period following death becomes obligatory when the marriage is terminated during death, except that it subsists for the right of inheritance and not for altering the right to alter the waiting period. This is distinguished from the revocable divorce, because there the marriage subsists in all respects. The two jurists argue that as it subsists for purposes of inheritance it is deemed to subsist, by way or precaution, for the purpose of waiting period as well thereby reconciling the two. If the husband is executed as a result of his apostasy where the wife inherits from him, then, the issue is governed by the same disagreement. It is also said that her waiting period is governed by the periods of menstruation, on the basis of consensus (*ijmā'*), because marriage in such a case is not considered to subsist till the time of death for purposes of inheritance as a Muslim woman cannot inherit from an unbeliever.

If a slave woman is emancipated within her waiting period following a revocable divorce, her waiting period is converted to the waiting period of free women, because of the continuance of marriage in all respects. **If she is emancipated following an irrevocable divorce or is one whose husband has died, her waiting period is not converted** to that for freewomen due to the termination of marriage after an irrevocable divorce or death.

If she is a woman who has had menopause and is undergoing the waiting period on the basis of months, and then sees bleeding, her waiting period that has passed is erased and she is to renew her waiting period on the basis of menses. This means that if she witnesses bleeding as was usual for her. The reason is that her reverting to her normal

[11]It is recorded by Mālik (God bless him) in *al-Muwaṭṭa'*. Al-Zayla'ī, vol. 3, 256.

courses annuls the menopause, which is the correct view, thus, it is apparent that it is not a substitutory duty. The reason is that the condition for substituting a duty is the confirmation of menopause and this takes place through the inability (to bleed) until death, as is the case of *fidyah* (ransom) for the enfeebled old person. **If, however, she has two menstrual periods (in her waiting period) and then her menopause, she is to calculate her waiting period on the basis of months,** as a precaution in order to avoid combining what is substitutory with the original.

In the case of a woman who is married through an irregular *nikāḥ*, and a woman who has had intercourse on the basis of *shubhah*, their waiting period, both in the case of separation and death, is through menses. The reason is that this is for identifying the vacation of the womb and not for complying with the requirements of marriage, because menses are the identifier for this purpose.

If the master of a slave woman, who has borne him a child, dies or he emancipates her, then, her *'iddah* is up to three menses. Al-Shāfi'ī (God bless him) said that it is a single menstruation. The reason is that it becomes obligatory due to the termination of lawful ownership, therefore, it resembles vacation of the womb. We argue that it becomes obligatory due to the termination of the relationship permitting lawful access for sex, therefore, it resembles the *'iddah* of *nikāḥ*. Thereafter, our leader in this is 'Umar (God be pleased with him), for he said: "The *'iddah* of the *'umm al-walad* is three menses."[12] **If she is one who does not menstruate, then, her waiting period is three months,** as in the case of *nikāḥ*.

If the minor husband of a woman dies and she is pregnant, then, her *'iddah* is up to the time she delivers. This is the view according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf (God bless him) said that her waiting period is for four months and ten days, which is also the opinion of al-Shāfi'ī (God bless him). The reason is that the pregnancy is not established as to paternity with respect to him. It is as if it occurred after his death. The two jurists argue on the basis of the unqualified meaning of the verse, "For those who are pregnant, their period is until they deliver their burdens."[13] The reason is that it is determined by the period of delivery irrespective of the period being more or less, and is not for the identification of the vacation of the womb, because the waiting

[12]Al-Zayla'ī says that it is *gharīb*, however, he records a similar statement from 'Amr ibn al-'Āṣṣ. Al-Zayla'ī, vol. 3, 258.

[13]Qur'ān 65 : 4

period following death has been validated despite the existence of menses. The purpose is to meet the requirements of the contract of *nikāḥ*. This meaning is realised in the case of the minor even if the pregnancy was not due to him. This is is distinguished from a pregnancy conceived after the death of the husband, for once the waiting period becomes obligatory on the basis of months, it cannot be altered due to later conception. In the case that we are considering, when the waiting period became obligatory it became so with the duration of the waiting period, therefore, the two are distinguished. This point does not affect the wife of a grown up (major) man when the pregnancy occurs after his death, because the paternity will be attributed to him; it is as if it existed legally at the time of death.

The paternity of the child will not be established in either case.[14] The reason is that the minor does not have sperm, therefore, conception on his account cannot be thought of, so the *nikāḥ* acts as the substitute for sperm conceptually.

If a man divorces his wife during her menstrual period, she is not to reckon the period in which the divorce occurred, because the waiting period is determined to be three complete menses, thus, their number is not to be reduced.

If a woman undergoing *'iddah* is made to cohabit due to *shubhah* (doubt), then, she is to undergo another *'iddah*. The two waiting periods will run concurrently and the bleeding that the woman witnesses during menses will be counted towards both. When the first waiting period terminates, and the other has not ended, it is obligatory for the woman to complete the second waiting period. This is our view. Al-Shāfi'ī (God bless him) said that the two waiting periods will not run concurrently. The purpose is worship, he said, and it is worship that prevents marriage and going out of the house, therefore, the periods will not run concurrently just like two fasts cannot be undertaken in one day. Our argument is that the purpose is to verify the vacation of the womb, and this purpose is achieved with one waiting period, therefore, they will run concurrently. The meaning of worship here is secondary. Do you not see that the waiting period passes without her knowledge even if she gives up not going out?

[14]That is, conception before death or after it.

If a woman undergoing *'iddah* following death is led to cohabitation as a result of doubt, she is to undergo the waiting period on the basis of months and she is also to take account of the menses occurring during this period. This is to ensure concurrence as far as it is possible.

The commencement of *'iddah* in the case of divorce is after the divorce, while in the case of death it is after death. If she does not come to know of the divorce or the death till such time that the duration of the waiting period is over, then, her *'iddah* is over. The reason is that the cause of the waiting period is either divorce or death, therefore, its commencement is reckoned from the time the cause comes into existence. Our jurists (from Bukhārah) have issued a ruling (*fatwā*) in the case of divorce that the commencement of the waiting period is from the time of acknowledgement (of divorce) so that the accusation of having conspired is avoided.

The (commencement of the) waiting period arising from a *fāsid* contract is after separation, or after the determination of the man that he will not have intercourse with her. Zufar (God bless him) said that it begins after the last intercourse, because it is intercourse that is the obligating cause. We argue that each intercourse found within the *fāsid* contract is like a single intercourse due to the association of all with the rule for a single contract. It is for this reason that it is sufficient to have a single dower for all. Accordingly, the commencement of the waiting period is not established prior to mutual relinquishment or determination to abstain when there is the likelihood of another taking place (after the last). Further, the ability to undertake it by way of *shubhah* acts as a substitute for actual intercourse due to its concealed nature, and there is a need to know the rule for the sake of the right of another man.

If a woman undergoing the waiting period says that her *'iddah* has terminated, but her husband denies this, then the acceptable statement will be that of the wife along with her oath. The reason is that she is considered trustworthy in this, and when she has been accused of falsehood she takes the oath, just like the custodian of a deposit.

If a man divorces his wife through an irrevocable divorce, and thereafter marries her during her waiting period, but divorces her (again) prior to cohabitation, he is liable for a complete dower, and she has to undergo a subsequent (renewed) *'iddah*. This is the view according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that he is liable for one-half dower and she is to complete

the previous waiting period. The reason is that it is a divorce prior to touching, therefore, it does not give rise to full dower nor the renewal of the waiting period. The completion of the first *'iddah* is due to the first divorce, when the second marriage has not affected the first waiting period. Thus, when the legal effects of the second marriage are removed through the second divorce, the legal effects of the first come into view, as if he had bought his slave woman who had borne him children and then emancipated her. The two jurists maintain that she is within his grasp in reality due to the first intercourse and its effect remains, which is the waiting period. Thus, when he renews the marriage, while she is still under his control, the first control stands in the place of the second control to which he derived the right through this marriage. It is like a usurper buying the usurped item that is in his possession, where he (now) comes to have possession by the contract alone. This makes it evident that it is divorce after cohabitation. Zufar (God bless him) said there is no waiting period at all for her, because the first waiting period was extinguished by the second marriage and cannot return, while the second was never imposed. The response to his view is what we have said.

If a Dhimmī divorces a Dhimmiyyah, there is no waiting period for her. Likewise, if a woman from the enemy land crosses over to our side as a Muslim. If she marries it is valid, unless she is pregnant. This is the view according to Abū Ḥanīfah (God bless him). The two jurists said she as well as the Dhimmiyah have to undergo the waiting period. As for the Dhimmiyyah, the disagreement here is similar to the disagreement about their marrying within the prohibited category, and we have elaborated this in the *Book of Nikāḥ*. The view of Abū Ḥanīfah (God bless him) applies where there is no waiting period for them according to their belief. As for the woman migrating, the reasoning of the two jurists is that if the separation had occurred between them due to another reason, there would be a waiting period, likewise in the case of such separation. This is distinguished from the case where a man migrates and leaves her behind (there will be no waiting period) due to the lack of information about the *sharī'ah*. Abū Ḥanīfah (God bless him) argues on the basis of the verse, "O ye who believe! When there come to you believing women refugees, examine (and test) them: Allah knows best as to their Faith: if ye ascertain that they are Believers, then send them not back to the Unbelievers. They are not lawful (wives) for the Unbelievers, nor are the (Unbelievers) lawful (husbands) for them. But pay the Unbelievers what they have spent

(on their dower), and there will be no blame on you if ye marry them on payment of their dower to them."[15] The reason is that when the waiting period becomes obligatory, the right of humans is attached to it, and the enemy is associated with these rights so that he can be the subject matter of ownership. The exception is where the woman is pregnant, because inside her womb is a child whose paternity is established. There is a narration from Abū Ḥanīfah (God bless him) that it is permitted to marry such a (pregnant) woman, but he is not to have intercourse with her, as is the case with a woman pregnant after *zinā*. The first view, however, is more authentic.

73.1 Mourning

For the irrevocably separated woman,[16] as well as one whose husband has died, when she is a major and a Muslim, is prescribed mourning. As for the woman whose husband has died, it is due to the words of the Prophet (God bless him and grant him peace), "It is not lawful for a woman, who believes in Allāh and the Day of Judgement, to mourn for the dead in excess of three days, except for her husband for four months and ten days."[17] As for one irrevocably separated, it is the opinion of our school. Al-Shāfi'ī (God bless him) said that there is no obligation of mourning for her. The reason is that it has been prescribed for expressing sorrow upon the death of her husband who stood by his compact with her till his death. The husband (separated from her) has cast her into despair through separation so there is no cause for sorrow upon his loss. We rely upon the report from the Prophet (God bless him and grant him peace) in which he forbade the woman undergoing *'iddah* from using henna as a hair dye. He said, "Henna is perfume."[18] Further, the reason is that it is necessary to express sorrow for the loss of the blessing of marriage, which

[15]Qur'ān 60 : 10

[16]Through divorce or *khul'* and so on.

[17]This tradition has been reported through many sound channels and the various traditions have been recorded by most of the authentic compilations. Al-Zayla'ī, vol. 3, 260.

[18]This tradition has preceded in the section on offences during *ḥajj*. It is recorded by Abū Dāwūd in his *Sunan*. Al-Zayla'ī, vol. 3, 261.

was the cause of her protection and support for her subsistence. Separation is more severe for her in this case than death insofar as she can bathe her dead husband prior to separation but not later.

***Ḥidād* (mourning)**, also called *iḥdād*, and both are part of usage, **is that the woman give up perfume, adornment, kohl, and the use of oil whether it is perfumed or non-perfumed, except due to a valid excuse. The narration in *al-Jāmi' al-Ṣaghīr* is: except when in pain.** The underlying reason is understood in two ways. The first is what we have mentioned with respect to the expression of sorrow. The second is that these things become a cause for arousing desire when she is prohibited from marrying, therefore, she is to avoid them so that they do not become the means for committing the prohibited. It has been reported through authentic narrations from the Prophet (God bless him and grant him peace) that he prohibited the woman undergoing *'iddah* from using kohl,[19] while oil is not free of some kind of perfume and is used for the adornment of hair. It is for this reason that one in a ritual state of *iḥrām* has been prohibited from using it. He (al-Qudūrī) said, "Except due to an excuse," because there is necessity in it, but the meaning is for medicinal use not adornment. If the woman is used to applying oil and she fears pain (if avoided), and if this is more likely, it is lawful for her to use it for the usual occurrence is like the actual. Likewise silk if she needs to wear it due to an excuse; there is no harm in it.

She is not to use henna, due to what we have related **nor is she to use a dress dyed with the yellow dye or with saffron,** because a pleasant smell arises from such a dress.

He said: **There is no *ḥidād* for the unbelieving woman,** because the claims of the *sharī'ah* are not addressed to her. **There is no *ḥidād* for the minor either,** because the communication of liability is lifted in her case.

The slave woman is to undertake *iḥdād*, because the communication of liability (*khiṭāb*) is addressed to her for meeting the duties owed as rights of Allāh insofar as these do not annul the right of the master. This does not apply to going out of the house as it amounts to annulling the right of the master, when the right of the individual has precedence due to his need.

He said: **There is no *iḥdād* during the waiting period of the slave mother nor one following a *fāsid* (irregular) marriage.** The reason is that

[19]It is recorded by the six sound compilations. Al-Zayla'ī, vol. 3, 261–62.

they have not lost the blessing of *nikāḥ* so that sorrow be exhibited, and permissibility is the original rule.

It is not proper to make a proposal of marriage to a woman undergoing the waiting period, but there is no harm in conveying one's interest in her. This is based upon the words of the Exalted, "There is no blame on you if ye make an indirect offer of betrothal or hold it in your hearts. Allah knows that ye cherish them in your hearts: But do not make a secret contract with them except in terms honourable, nor resolve on the tie of marriage till the term prescribed is fulfilled. And know that Allah knoweth what is in your hearts, and take heed of Him; and know that Allah is Oft-Forgiving, Most Forbearing."[20] The Prophet (God bless him and grant him peace) said, "A secret proposal amounts to *nikāḥ*."[21] Ibn 'Abbās (God be pleased with him) said that *ta'rīḍ* is when the man says, "I need to get married." Sa'īd ibn Jubayr (God be pleased with him) said in a well known statement, "I am interested in you" and "I wish we could be together."

It is not permitted to a woman divorced through a revocable repudiation or a woman separated irrevocably to go out of her house during the day or night. A woman whose husband has died may go out during the day and for part of the night, but she is not to spend the night out of her house. As for the divorced woman, it is based upon the words of the Exalted, "And turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness. Those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation."[22] It is said that *fāhishah* (lewdness) here means going out of the house itself. It is also said that it means *zinā*. They have to go out for the execution of the *ḥadd*.

As for the woman whose husband has died, the reason is that she does not have any kind of maintenance, therefore, she has to go out for seeking a livelihood and this may extend up to the arrival of the night. The case of the divorced woman is not similar, because her maintenance is reaching her from the wealth of her husband. If she bargained away her right to maintenance through *khul'*, it is said that she may go out during the day.

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[20] Qur'ān 2 : 235

[21] It is *gharīb* according to al-Zayla'ī, but is recorded by Ibn Abī Shaybah. It was originally reported by Abū Bakr al-Rāzī. Al-Zayla'ī, vol. 3, 262.

[22] Qur'ān 65 : 1

It is also said that she is not to go out as she extinguished her own right, therefore, this extinction cannot annul the claim that is made against her.

The woman undergoing the waiting period is to stay in the house associated with her for her residence in case of the occurrence of separation or death (of husband). This is based upon the words of the Exalted, ""And turn them not out of their houses."[23] The house attributed to her is the house in which she lives, therefore, if she is visiting her relatives and her husband divorces her, she is required to return to her house and complete the waiting period there. The Prophet (God bless him and grant him peace) is reported to have said to a woman whose husband was killed, "Reside in your house till the term prescribed by the Book is complete."[24]

If her share in the house of the deceased is not sufficient for her, and the heirs dispossess her of her share, she is to move out. The reason is that this is moving out due to an excuse, and an excuse is effective in the case of acts of worship. It is as if she is apprehensive about her goods or she is apprehensive about the collapsing of the house, or that it is on rent and she does not have enough to pay for it.

Thereafter if a separation occurs through an irrevocable divorce or three repudiations, it is necessary to have a veil between them, after which there is no harm in it (residing in the house). The reason is that the husband has made known her prohibition, unless he is a *fāsiq* with whom a woman is not safe. In such a case she is to leave the house, because it is an excuse. She is not to move out of the house where she has moved. It is better, however, that he move out of the house leaving her behind.

If they appoint a reliable woman who is able to act as a barrier, it is good. If the space in the house becomes constricted, the woman is to move out. His moving out, however, is better.

If a woman travels with her husband to Makkah and he divorces her thrice or dies in a place other than the city, then, if there is between her and her city a distance of less than three days travel she is to return to her city. The reason is that it does not carry the meaning of moving out, but is part of the entire duration. **If the distance is equal to three days travel, then she may return if she likes or spend the time of the period there whether or not there is a *walī* with her.** The meaning here is that when there is three days journey towards the destination as well. The reason is

[23]Qur'ān 65 : 1

[24]It is recorded in the four *Sunan*. Al-Zayla'ī, vol. 3, 263.

that staying at this location is more fearsome for her than moving out, except that returning is preferable so that the waiting period is spent in the house of the husband.

He said: **The exception is where her husband divorces her or dies within a city. In this case she is not to come out and is to complete the waiting period. After which she is to come out if there is a relative of the prohibited degree with her.** This is the view of Abū Ḥanīfah (God bless him). **Abū Yūsuf and Muḥammad (God bless them) said that if there is such a *maḥram* with her, there is no harm if she moves out of the city prior to the completion of the waiting period.** They argue that such moving out in itself is permissible in order to eliminate the torment of being a stranger and the dread of being alone, and this acts as an excuse. The prohibition pertains to travelling and this is removed with the presence of a *maḥram*. The Imām (God bless him) argues that the waiting period bears a greater prohibition as compared to the absence of a *maḥram*, because a woman is permitted to go out without a *maḥram* for a distance that is less than a journey. The woman undergoing the waiting period does not have this permission. As going out for a journey is prohibited for her without a *maḥram* there is greater priority for prohibition during *'iddah*.

Chapter 74

Proof of Paternity

A a man says, "If I marry so and so, she stands divorced," and he then marries her. If she gives birth to a child within six months from the day he married her, the child belongs to him and he is liable to pay dower. As for paternity, the reason is that he has legal access for intercourse, and as she brought forth a child in six months of the marriage, she did so within the minimum prescribed period from the time of divorce, therefore, the conception took place before divorce in a state of marriage. This is conceptually established as he married her while he was cohabiting with her, therefore, ejaculation corresponded with marriage. Paternity is something in which precaution has to be exercised. As for dower, the reason is that when paternity is established through him, he is legally considered to have had intercourse, and dower is affirmed due to it.

He said: **The paternity of the child of a woman divorced through a revocable repudiation is established if she delivers the child within two years or more as long as she does not acknowledge the termination of her waiting period,** due to the possibility of conception during the waiting period and due to the validity of her being one with a lengthy period of purity.

If she brings forth the child in less than two years, she stands irrevocably separated from her husband upon the termination of her *'iddah*, and paternity of the child is established for the husband, due to the existence of conception during the period of marriage or the waiting period. He is not deemed to have taken her back due the probability of conception prior to divorce. There is also the probability of conception after this, but he will not be deemed to have retracted on the basis of doubt.

If the woman gives birth to the child after more than two years, she will be considered to have been taken back. The reason is that the conception took place after divorce and it is obvious that it is due to him, as the presumption is the absence of *zinā* on her part, thus, by having intercourse he is deemed to have taken her back.

In the case of a woman separated irrevocably from her husband, the paternity of the child stands established, if she gives birth to it in a period that is less than two years. The reason is that there is a (legal) possibility of the child having been conceived at the time of divorce, therefore, the termination of legal access for intercourse will not be presumed, thus, paternity will be established by way of precaution.

If she gives birth to the child upon the completion of two years from the time of separation, paternity is not established, because the pregnancy occurred after the divorce, therefore, it cannot be due to the husband, because such intercourse is prohibited. **Unless he claims such paternity,** because he has admitted to be bound by it, and his justification will be that he had intercourse with her during the waiting period due to doubt.

If the irrevocably separated female is a minor with whom sex is possible, and she gives birth to a child in nine months, it is not binding on the husband for purposes of paternity, unless she gives birth to it in a period that is less than nine months, according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf (God bless him) said that paternity is established through him up to two years. The reason is that she is a woman undergoing the waiting period and she has not acknowledged the termination of her *'iddah*, therefore, she resembles a major woman. The two jurists argue that for the termination of her waiting period a duration is fixed and that is on the basis of months. When the months pass, the law (*shar'*) gives the ruling of termination, which is legally more persuasive than her acknowledgement. The reason is that it does not admit of disagreement, while her acknowledgement does admit of it. If she is one who has been divorced through a revocable repudiation, the response is the same in their view, but according to Abū Yūsuf (God bless him) paternity will be established up to seventeen months, as he will be deemed to have cohabited with her towards the end of the waiting period, which is of three months. Thereafter, she brings forth the child within the maximum period of pregnancy, which is two years. If she is a minor, who claims pregnancy within the waiting period, then

the response in her case and in the case of a major woman is the same, because by her acknowledgement the ruling of her becoming a major is issued.

The paternity of the child of a woman whose husband has died is established within a period that extends from the time of death up to two years. Zufar (God bless him) said that if she delivers the child six months after the time of termination of the waiting period, paternity is not established. The reason is that the law (*shar'*) has ruled about the duration of the waiting period by fixing it through the method of months, therefore, it amounts to acknowledging the termination of the waiting period, as we explained in the case of the minor. We say, however, that for the determination of her waiting period there is another method, which is the delivery of the child, as distinguished from the case of the minor, because the basis in that was the absence of pregnancy. The reason is that she is not presumed to conceive prior to attaining *bulūgh* in which there is doubt.

If a woman in her waiting period acknowledges the termination of her waiting period and thereafter gives birth to a child in less than six months, the paternity of the child is established, because her falsehood has been established with a certainty, therefore, her acknowledgement is annulled. **If she gives birth to the child within a period of (complete) six months, it is not established.** The reason is that we cannot know about the falsehood of the acknowledgement due to the possibility of the conception after it. This statement in its unqualified meaning applies to each woman in her waiting period.

If a woman gives birth to a child, the paternity of the child is not established, according to Abū Ḥanīfah (God bless him), until two men or one man and two women testify that birth has taken place, unless there is an obvious pregnancy or there is acknowledgement of it on the part of the husband, in which case paternity is established without testimony. Abū Yūsuf and Muḥammad (God bless them) said that paternity is established in all cases with the testimony of one woman, because legal access to intercourse subsists with the continuance of the waiting period, and this makes the husband bound by the ruling of paternity. Further, the need is to determine that the child was delivered by the woman and this is determined by her testimony as is the case of birth during the existence of marriage. According to Abū Ḥanīfah (God bless him), her *'iddah* is terminated through her acknowledgement and the birth of the child, but

the termination is not valid proof, therefore, there is a need to establish paternity *ab initio*, accordingly the meeting of the need is stipulated. This is distinguished from the case where the pregnancy becomes obvious or the husband issues an acknowledgement, because paternity is established prior to birth and determination is established through her testimony.[1]

If a woman is undergoing the waiting period after the death of her husband and the heirs deem her truthful about the birth of a child, and none of them testifies to the effect, then the child belongs to the dead husband, according to the unanimous view of the three jurists. This is manifest with respect to the right of inheritance, which is solely their right, therefore, their confirmation in this respect is accepted. As for the right paternity, is it established with respect to others? They (the jurists) said: If they are eligible as witnesses, the right of paternity is established due to the furnishing of proof. It is for this reason it is said that the word "testimony" is stipulated. It is also said that it is not stipulated, because the proof with respect to others is secondary to the proof with respect to the heirs through their acknowledgement. What is established as a secondary fact does not require the stipulation of conditions for it.

If a man marries a woman and she gives birth to a child within six months from the day of marriage, the paternity of the child is not established, because the conception precedes marriage, therefore, the child does not belong to the husband. **If she gives birth to it within six months or more, paternity is established irrespective of the husband acknowledging it or remaining silent.** The reason is that legal access to intercourse subsists and the period is complete.

If he denies the birth, it is established with the testimony of a single woman, who renders testimony about the birth, so much so that if the husband denies this he has to undertake *li'ān*. The reason is that paternity is established due to the continuance of the legal access for sexual intercourse. *Li'ān* becomes obligatory due to *qadhf* (false accusation of unlawful sexual intercourse), and the existence of a child is not necessary for it; it can be committed without the child.

If the woman gives birth to a child and then they differ with the husband saying, "I married you four months ago," while she says, "You married me six months ago," then the acceptable statement is hers and the child is attributed to him. The reason is that the *prima facie* evidence

[1]That is, the testimony of the midwife.

supports her, for she gives birth evidently as a result of marriage and not as a result of an unlawful act. He has not mentioned the taking of oaths, which is a matter that is disputed.

If he says to his wife, "If you give birth to a child you stand divorced," and after this a woman (midwife) testifies that she has given birth to a child, she is not divorced, according to Abū Ḥanīfah (God bless him). Abū Yūsuf and Muḥammad (God bless them) said that she is divorced. The reason is that her testimony amounts to proof for this purpose. The Prophet (God bless him and grant him peace) said, "The testimony of women, in things that men are not allowed to see, is permitted."[2] Further, when it is accepted in matters of birth, it is acceptable in matters that are based upon it, that is, divorce. According to Abū Ḥanīfah (God bless him), the wife is alleging the breaking of oath, and this cannot be established without complete proof. The reason is that the testimony of the woman in the case of birth is necessary, but it is not effective in the case of divorce for that is a separate matter.

If the husband acknowledges the pregnancy, she stands divorced without testimony, according to Abū Ḥanīfah (God bless him). According to the two jurists, the testimony of the midwife is stipulated. The reason is that it is essential to have proof for her claim of (the husband) breaking his oath, and her testimony is proof for this according to what we elaborated. Abū Ḥanīfah (God bless him) maintains that acknowledgement of the pregnancy is also acknowledgement of what it leads to, which is birth. Further, he has acknowledged her to be trustworthy, therefore, her statement is to be accepted when she gives back what is due.

He said: **The maximum period for gestation is two years,** due to the words of ʿĀ'ishah (God be pleased with her), "The child does not stay in the womb for more than two years, even if it is like the shadow of the spindle."[3] **The minimum period is six months,** due to the words of the Exalted, "The carrying of the (child) to his weaning is (a period of) thirty months,"[4] after which the Almighty said, "And in years twain (two) was his weaning"[5] This leaves six months (minimum) for the gestation

[2]It is *gharīb* and is reported by Ibn Abī Shaybah as well as by ʿAbd al-Razzāq. Al-Zaylaʿī, vol. 3, 264.

[3]It is recorded by al-Dār'quṭnī and by al-Bayhaqī in their *Sunan*. Al-Zaylaʿī, vol. 3, 265–65.

[4]Qur'ān 46 : 15

[5]Qur'ān 31 : 14

period. Al-Shāfi'ī (God bless him) determines the maximum period to be four years, and the proof against him is what we have related. It is obvious that she ('Ā'ishah) stated this on the basis of transmission, because reason does not lead to this conclusion.

Where a person marries a slave woman then divorces her and thereafter buys her, if she brings forth a child in less than six months from the date he bought her, he is bound by it (for purposes of paternity), otherwise he is not bound to accept it. In the first situation (less than six months), it is the child of a woman undergoing *'iddah*, the conception being prior to purchase, while in the second case it is the child of an owned slave, because the conception is to be attributed to the closest time. It is, therefore, necessary to file a claim of paternity. This is the case if it was a single irrevocable repudiation, *khul'* or a revocable repudiation. If, however, two repudiations were pronounced, the paternity will be established for up to two years from the time of divorce, for she was prohibited for him with an enhanced prohibition, therefore, the conception cannot be attributed to a period other than what was prior to it, because she cannot become permitted through purchase.

If a man says to his slave woman, "If there is a child in your womb, it is due to me," and a woman testifies to the birth of a child, she becomes his *umm al-walad*, because the need is to determine the existence of the child. This is established through the testimony of the midwife, on the basis of consensus (*ijmā'*).

If a man says about a male slave, "He is my son," and thereafter dies after which the mother of the slave appears and says that she is his wife, then she is his wife and the boy his son; they will both inherit from him. In the book *al-Nawādir*, this response is deemed to be *istiḥsān*. Analogy dictates that she is not entitled to inheritance, because just as paternity is established through a valid *nikāḥ*, it is established through an irregular *nikāḥ* as well as through unlawful intercourse and lawful ownership, therefore, his statement does not amount to acknowledgement of marriage. The reasoning for *istiḥsān* is that the issue applies where the woman is known to be free and that she is the mother of a slave. A valid marriage determines paternity both under the law and in practice.

If it is not known that she is a freewoman, and the heirs say, "You are an *umm al-walad*," then there is no inheritance for her. The reason is that proof of freedom on the basis of the *dār* is admissible for refuting the claim of slavery, but not for establishing inheritance. Allāh knows best.

Chapter 75

Right to Custody of Child

If a separation occurs between the spouses, then the mother has a superior right to the custody of the child, due to the report that a woman said, "O Messenger of Allāh, this child of mine, for him my belly is like a cradle, my lap like a tent, and my breast like a beaker, but now his father wants to separate him from me." The Prophet (God bless him and grant him peace) said, "You have a superior right to him, as long as you do not wed."[1] Further, the reason is that the mother is more loving and more capable of bringing up (*ḥaḍānah*) the child. Accordingly, there is greater justice in giving the child to the mother. It is this toward which Abū Bakr al-Ṣiddīq (God be pleased with him) pointed when he said, "Her saliva has greater blessing in it than the nectar and honey you will give him, O Umar."[2] He said this when a separation occurred between him and his wife making the statement when a large number of Companions (God be pleased with them) were present. **The maintenance is upon the father** as we shall mention.

The mother, however, is not to be forced to undertake *ḥaḍānah*, because it is possible that she may become unable to bring up the child.

If the child does not have a mother,[3] then the mother's mother, however remote she might be, has a higher priority than the father's mother. The reason is that this form of *wilāyah* (authority) belongs to the mothers.

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[1]It is recorded by Abū Dāwūd in his *Sunan*. Al-Zayla'ī, vol. 3, 265.

[2]It is *gharīb* in these exact words, but it has been recorded by Ibn Abī Shaybah and others. Al-Zayla'ī, vol. 3, 266.

[3]Includes the case where she does not wish to take care of the child

If there is no mother's mother (or her mother) then the father's mother is better than the sisters, for they too are mothers and for which reason they are granted one-sixth of the inheritance being more loving towards the offspring.

If the child does not have a paternal grandmother, then the sisters have a higher priority as compared to the paternal and maternal aunts, for they are the daughters of both parents. It is for this reason that we have given them precedence for purposes of inheritance. In one narration it is said that the maternal aunt has priority over a sister from the father's side, due to the words of the Prophet (God bless him and grant him peace), who said, "The maternal aunt is a mother."[4] It is also said that it is due to the words of the Exalted, "And he raised his parents high on the throne,"[5] where she was his maternal aunt.

The sister from both father and mother has been given precedence for she is more loving **thereafter the sister from the mother's side followed by the sister from the father's side,** because they have a greater right on account of the mother.

Thereafter, the maternal aunts are preferable to the paternal aunts by giving preference to the close relationship with the mother. **They descend just like we made the sisters descend.** This means preference to those with relationship from both sides and then according to the relationship with the mother. **Thereafter the descending scale for the paternal aunts is the same.**

And each one out of these who marries extinguishes her right, due to what we have related, and also because the husband of the mother, when he is a stranger, will give him what is less and will look down upon him, which is not in the welfare of the child.

He said: **The exception is the paternal grandmother when her husband is the paternal grandfather,** for he stands in the place of the father, and will keep the welfare of the child in view. **Likewise each husband who is within the category of the prohibited degree,**[6] due to the existence of the love, taking into account the nearness of kin.

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[4]It is reported from 'Alī, Ibn Mas'ūd and Abū Hurayrah (God be pleased with them all), and is recorded in various reports. Al-Zayla'ī, vol. 3, 267-68.

[5]Qur'ān 12 : 100

[6]Like a paternal uncle if he marries the child's mother.

For a woman who has lost her right due to marriage, the right will revert if the marriage relationship is dissolved, because the obstacle stands removed.

If the child does not have a woman among the relations and the men disagree about him, then the preference is to be given to one who is closest on the basis of *'aṣabiyyah* (residuaries), because *wilāyah* belongs to the nearest of kin, and the grades have been identified at the relevant place. The infant girl, however, is not to be given to male relatives who are not within the prohibited degree, like the emancipating master and paternal uncle's son in order to avoid temptation.

The mother and the maternal grandmother have a greater right to the custody of a boy until he is able to eat, drink, dress, and perform *istinjā'* all by himself. In *al-Jāmi' al-Ṣaghīr* the statement is until he is independent and is able to eat, drink and dress up all by himself. The meaning of both statements is the same, as being completely independent is possible with the ability to perform *istinjā'*. The reasoning is that once he is independent, he needs to be disciplined and to be taught the manners and habits of men. The father is more capable of disciplining him and give him training for the cultivation of the mind. Al-Khaṣṣāf (God bless him) determined the age of independence to be seven years going by the majority of the cases.

The mother and the maternal grandmother have a superior right for the custody of the girl until she starts menstruating. The reason is that after becoming independent she is in need of learning the ways of women and the mother is more capable of imparting such training. After puberty, she is more in need of security and protection, and the father is stronger in this and in providing guidance. It is narrated from Muḥammad (God bless him) that she is to be given to the father when she reaches the age of desire, for the need for protection is realised then.

Women other than the mother and maternal grandmother have a greater right to the girl until she reaches the age of desire. In *al-Jāmi' al-Ṣaghīr* until she is independent. The reason is that these women cannot employ her in work, and for this reason cannot give her services on hire, therefore, the purpose is not attained, as distinguished from the mother and maternal grandmother as they are able to do so under the law (*shar'*).

The slave woman, when she is emancipated by the master, as well as the *umm al-walad* when manumitted, are like the freewoman in their

rights of custody over the child. The reason is that they are both free-women at the time of accrual of the right. **They do not have the right to custody of the child prior to their emancipation,** because of the inability to provide care to the child, being occupied with the service of the master.

The Dhimmī woman has a right to the custody of her children till such age that they do not understand the difference between religions or till the time that there is an apprehension that they will become unbelievers, due to the loving care required prior to such age and the likelihood of injury after it.

The boy and the girl do not have an option (in all this). Al-Shāfi'ī (God bless him) said that they do have an option, because the Prophet (God bless him and grant him peace) granted them such an option.[7] We argue that the child, due to lack of discretion, will choose the person who is more lenient and who gives a free hand for play. In such a case loving care is not realised. It has been proved as authentic that the Companions (God be pleased with them) did not grant an option.[8] As for the tradition, we would say that the Prophet (God bless him and grant him peace) said, "O Lord, guide him,"[9] and with his prayer the child was guided in his choice. In the alternative, the tradition will be construed to apply to a child who is a major.

75.1 LEAVING THE CITY

If a divorced woman wishes to leave the city along with her child, then she does not have the right to do so, due to the injury in this to the father. **Unless she is going with the child to her hometown, and it is a town where the husband married her,** because the husband made that location binding for himself according to custom and the law (*shar'*) The Prophet (God bless him and grant him peace) said, "He who establishes family relations in a city is one of them."[10] It is for this reason that the enemy becomes a Dhimmī. If, however, she decides to move to a town that is not her hometown, but the marriage took place there, then al-Qudūrī

[7]It is recorded by the compilers of all the four *Sunan*. Al-Zayla'ī, vol. 3, 268.

[8]It has preceded, for example, in the case where Abū Bakr (God be pleased with him) delivered the child to the mother. Al-Zayla'ī, vol. 3, 269.

[9]It is recorded by Abū Dāwūd. Al-Zayla'ī, vol. 3, 269.

[10]It is recorded by Ibn Abī Shaybah in his *Musnad*. Such a person is to offer the prayer of the resident there. Al-Zayla'ī, vol. 3, 271.

indicates in the *Book* that she does not have a right to do so. This is the narration of the *Book of Divorce*. It is, on the other hand, stated in *al-Jāmiʿ al-Ṣaghīr* that she does have such a right. The reason is that when a contract takes place in a certain location, it gives rise to the operation of the rules there, just like sale gives rise to the delivery of goods at the place of contract, and among these rights is the right to the custody of the child. The reasoning underlying the first view is that marriage in a strange land is not, according to custom, an undertaking to reside there. This is the correct view. The conclusion is that it is necessary to have both conditions together, that is, the homeland and the fact that the marriage took place there.

All this applies when there is between the two towns a sufficient distance. If the towns are so close by that it is possible for the father to see his child and then be able to spend the night at his own house, there is no harm in her moving there. The same response is given for two villages. If she moves from a village of the city to the city, there is no harm. This is in consideration of the welfare of the minor so that he can grow up learning the culture of the city. There is no harm in this for the father. In the reverse situation there is harm for the minor if he grows up among the villagers and adopts the habits of the people of the countryside; in such a case she is not to move to the village.

Chapter 76

Nafaqah (Maintenance)

He said: **It is obligatory for the husband to provide maintenance to his wife whether she is Muslim or an unbeliever, when she is ready to stay at the residence (to be provided), in which case he is under an obligation to provide maintenance, clothing and residence.** The basis for this are the words of the Exalted, "Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him,"[1] and His words, "But he (the father of the child) shall bear the cost of their food and clothing on equitable terms."[2] In addition there is the saying of the Prophet (God bless him and grant him peace) on the occasion of the Farewell Pilgrimage, "They have a right over you for their food and clothing according to what is customary."[3] Further, maintenance is the compensation for the restraints placed upon her. Each person who is restricted to meeting obligations for another is entitled to maintenance. The basis for this is the office of the *qāḍī* and the official in the case of *zakāt*. In these evidences there are no details, therefore, the Muslim woman and the unbelieving woman are equal for this purpose.

In the provision of maintenance the status of both shall be considered. This feeble servant has to say that this is the investigation of Khaṣṣāf (God be pleased with him) and the *fatwā* today is upon this. The meaning in detail is that if they are enjoying financial ease, the maintenance of the well off is to be provided, but if the spouses are in financial straits, the

[1]Qur'ān 65 : 7

[2]Qur'ān 2 : 233

[3]This has preceded as a lengthy tradition from Jābir (God be pleased with him). Al-Zayla'ī, vol. 3, 271.

maintenance of those who are hard up is to be provided. Al-Karkhī (God bless him) said that the status of the husband alone is to be taken into account. This is also the view of al-Shāfi'ī (God bless him). The basis are the words of the Exalted, "Let the man of means spend according to his means."[4]

The reasoning for the first view is the directive of the Prophet (God bless him and grant him peace) to Hind the wife of Abū Sufyān, "Take what is fair from the wealth of your husband what is sufficient for you and for your child."[5] In this he considered her status and that is the underlying *fiqh*. Maintenance is obligatory in accordance with what is sufficient and a poor woman does not need the maintenance of those who enjoy financial ease. Accordingly, the meaning of excess does not apply. As for the text, we give a ruling according to what it requires and the requirement is that he is to pay according to what is within his capacity at the time and the remaining becomes a debt attached to his liability. The meaning of the word *ma'rūf* in the text is "the average," and that is obligatory. This elaborates that there is no meaning in the fixing of the quantity as has been held by al-Shāfi'ī (God bless him) saying that for the well off it is two *mudds*, for the person in financial straits it is one *mudd*, while for one having reasonable means it is one and one-half *mudd*. The reason is that what is made obligatory by way of being adequate does not admit of quantification according to the *shar'* (law).

If she refuses to submit herself to her husband until she is paid her dower, she is still entitled to maintenance, because she refused on the basis of a right. Thus, the absence of being restrained is due to a cause that originated with him, therefore, the right is deemed not to have been lost.

If the woman goes away, she is not entitled to maintenance until she returns to his house, because the loss of confinement is due to her. If she returns the confinement will be renewed and maintenance will be revived. This is distinguished from the situation where she refuses to have sexual intercourse while remaining in her husband's house as confinement persists and the husband is able to coerce her to have intercourse.[6]

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[4]Qur'ān 65 : 7

[5]It has been recorded by all the sound compilations, except al-Tirmidhī. Al-Zayla'ī, vol. 3, 271.

[6]This is being considered marital rape today.

If she is a minor with whom intercourse is not undertaken, then there is no maintenance for her, because the denial of cohabitation is due to a cause found in her. Obligatory confinement is such that it becomes a means to the entitled purpose through marriage and that is not found here, as distinguished from the case of a woman who is ill, which we will elaborate. Al-Shāfi'ī (God bless him) said that she is entitled to maintenance for he considers her the subject-matter of ownership as is the case with an owned slave woman through lawful ownership. We maintain that the dower paid is compensation for ownership, and two counter-values cannot be combined for one counter-value, thus, she has dower and not maintenance.

If the husband is a minor who is not old enough to have intercourse, while she is grown up, she is entitled to maintenance from his wealth. The reason is that submission is complete on her part and the inability is from his side and he is deemed equivalent to the husband with an amputated organ or one who is impotent.

If a woman is imprisoned for non-payment of a debt, there is no maintenance for her. The reason is that loss of confinement to the house is due to her because of the demand by the creditor. If it is not due to her as when she is unable to pay, the cause is still not due to him. Likewise, when she is forcefully abducted by a man who flees with her. According to Abū Yūsuf (God bless him) she is entitled to maintenance, but the *fatwā* today is according to the first view. The reason is that the loss of confinement is not due to him so the confinement may be determined to persist. Likewise if a woman proceeds on *ḥajj* with a *maḥram*, because the loss of confinement to the house is due to her. It is narrated from Abū Yūsuf (God bless him) that she is entitled to maintenance, because undertaking a definitive obligation amounts to an excuse, however, he is obliged to pay the maintenance of one resident and not that of one going on a journey, for she is entitled to that alone. If the husband travels with her for *ḥajj* she is entitled to maintenance by agreement. The reason is that confinement continues with her being in his control, but the maintenance of the resident is due and not that of one on a journey, nor is rent due on the basis of what we said.

If she falls ill in the house of the husband, she is entitled to maintenance. Analogy dictates that there be no maintenance for her, because illness prevents intercourse, as there is loss of confinement for purposes of intercourse. The reasoning underlying *istiḥsān* is that the husband can

come close to her and touch her and she looks after the house, and the prevention is due to an obstacle that is similar to menstruation. According to Abū Yūsuf (God bless him) if she submits herself and thereafter falls ill, maintenance is obligatory due to the realisation of submission. If, however, she falls ill and then submits herself, it is not obligatory, because submission was not sound. The jurists said that this is good (as *istiḥsān*) and in the *Book* are statements that indicate this.

The husband, if he is well off, is obliged to pay maintenance for her as well as for her servant. The meaning here is the elaboration of the maintenance of the servant. Consequently, it is stated in some manuscripts, "It is made obligatory for the husband, if he is well off, to pay the maintenance of her servant." The construction placed on this is that providing adequately for her is obligatory. Providing for the servant is part of giving her adequately as it is necessary for her to have one.

Maintenance for more than one servant is not to be made obligatory. This is the view according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf (God bless him) said that it is to be made obligatory, because she needs one servant for household chores and another for dealing with matters outside the house. The two jurists argue that the same person can look after both tasks, therefore, there is no need for two persons. The reason is that if he were to meet her needs himself it would be deemed sufficient, likewise if one person were to stand in his place. They said that the financially well off husband is obliged to provide the same maintenance for the servant that a husband in financial straits provides for his wife, which is the minimum subsistence. His statement in the *Book*, "If he is enjoying financial ease," is an indication that there is no obligation to pay the maintenance of a servant if he is in financial straits. This is a narration of al-Ḥasan from Abū Ḥanīfah (God bless him), which is the correct view as distinguished from what Muḥammad (God bless him) said. The reason is that the obligation upon the husband in financial straits is to pay the minimum subsistence and this is one where the wife serves herself.

If a person is unable to pay his wife's maintenance, they are not to be separated rather it will be said to her, "Borrow against the liability of your husband." Al-Shāfi'ī (God bless him) said that they are to be separated, because he has failed to retain her in an equitable way. The *qāḍī* stands in his place in pronouncing the separation, as is the case of the person with an amputated organ or the impotent person. In fact, this

case has a higher priority for separation, because maintenance is a much stronger thing. Our argument is that (by separation) his right stands annulled and her right is delayed. The first is stronger with respect to injury, and this (the lesser injury) is so as maintenance becomes a debt imposed by the *qāḍī*, thus, it can be recovered in the next period. The loss of a right to wealth is subservient in the case of marriage and is not attached to what is the main purpose, which is procreation. The benefit of the instruction to raise a loan, along with judicial support, is that she can transfer the claim of the creditor to the husband. If, however, the raising of the loan is without the directive of the *qāḍī*, the debt will be claimed from her and not the husband.

If the *qāḍī* awards her the maintenance of a person in financial straits, but then he becomes financially well off after which she files a claim for more, the maintenance of one in financial ease is to be completed for her. The reason is that maintenance varies with financial ease and hardship, and what he awarded was maintenance that is not obligatory (now), thus, if the husband's financial status changes, she has a right to demand her full right.

If the husband does not provide her with maintenance for a certain period, and she demands this maintenance from him, then there is nothing for her, unless the *qāḍī* had determined maintenance for her or if she had made a settlement with the husband for part of the past maintenance, in which case the *qāḍī* will award her the past maintenance. The reason is that maintenance is a grant in our view and not a counter-value, as has preceded, therefore, the obligation is not strengthened except through adjudication. It is just like a gift, which does not become obligatory except by a strengthening factor and that is possession. Settlement (*sulḥ*) has the same status as adjudication, because his authority over himself is stronger than the authority of the *qāḍī* over him. This is distinguished from dower, which is a counter-value.

If the husband dies after an award of maintenance is pronounced against him, and several months pass, the claim of maintenance lapses. Likewise if the wife dies. The reason is that maintenance is a grant and grants lapse on account of death, just as a gift becomes void with death prior to taking possession. Al-Shāfiʿī (God bless him) said that it is converted into a debt prior to adjudication and is not extinguished because of death. The reason is that it is a counter-value in his view, and is to be

treated like all other debts. The response to this we have already elaborated.

If he grants her in advance the maintenance of a year, that is, hastens payment, **and thereafter dies, nothing is to be recovered from her. This is the view according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that the maintenance of the period that has passed is to be calculated and the remainder is to be credited to the (estate of the) husband.** This is also the view upheld by al-Shāfi'ī (God bless him). The same disagreement governs clothing, because the wife has hastened it as a counter-value in conformity with what is due to her as a result of confinement to the house. The entitlement stands annulled due to death, therefore, the counter-value is diminished in the same ratio, just like the subsistence paid to the *qāḍī* and the grants made to the fighters. The two jurists argue that it is a grant and it is followed by possession. There is no recovery of grants after death as their *ḥukm* (legal effect) stands terminated, as in the case of a gift. Consequently, if the maintenance is lost without having been consumed by the woman, it is not to be recovered from her on the basis of consensus (*ijmā'*). It is related from Muḥammad (God bless him) that if she takes possession of the maintenance of a month or what is less nothing is to be recovered from her as it is insignificant and takes the rule of what is consumed currently.

If a slave marries a freewoman then her maintenance becomes a debt for which he can be sold. The meaning is that if he marries her with the permission of the master. The reason is that it is a debt that becomes obligatory as his liability due to the existence of its cause. Its existence becomes evident with respect to the master, therefore, it becomes linked to his slave like the debt of trade in relation to the slave authorised to trade. It is up to him to ransom him with payment, because the wife's right is attached to maintenance and not to the corpus of the slave. If the slave dies, the claim is extinguished. Likewise if he is killed according to the authentic narration, because it was a grant (and not a debt).

If a freeman marries a slave woman and her master lets her stay with him at his house, then he is liable for maintenance, because confinement to the house stands realised. **If he does not permit her to stay with the husband then there is no maintenance,** due to the absence of confinement. Permission to stay with the husband is where he leaves her alone at the husband's residence and does not employ her for services. If

he employs her after letting her stay there, maintenance is extinguished, because confinement is lost. Letting her stay exclusively with the husband is not binding on him in the case of marriage, as has preceded. If, however, the woman serves the master occasionally without his employing her, maintenance is not extinguished for he did not employ her so as to amount to her return. The *mudabbarah* (to be set free upon the death of the master) and the slave mother are like the married slave woman in this respect. Allāh, the Exalted, knows what is correct.

76.1 Right to Residence

It is the liability of the husband to make her reside in an independent house in which there is no one else who belongs to his family, unless she chooses that herself. The reason is that residence is part of what is deemed adequate for her, therefore, it is obligatory like maintenance. Accordingly, Allāh has made it obligatory along with maintenance. If the Almighty has made it obligatory as her right, then he has no right to make her share it with another. The reason is that such sharing is injurious for her as she cannot be carefree about her things, it prevents her free interaction with her husband as well as from cohabitation. The exception is where the woman chooses this herself for then she is agreeing to the reduction of her rights.

If he has a child from another, the husband does not have the right to make it reside with her, due to what we have elaborated. If he makes her reside in a room within a house, where it can be closed it would be sufficient as the purpose has been achieved.

He has a right to prevent her parents, children from another man, and her relatives from visiting her in her house. The reason is that the residence is in his ownership and he has a right to prevent entry into his property. **He is not to prevent them (her relatives) from looking at her and to speak to her at any time they choose,** as that will amount to the severing of the womb. In letting them do so there is no injury being caused to him. It is said that he is not to prevent them from visiting her or speaking to her, but he may prevent them from staying on and constant presence, because their prolonged stay and speech is detrimental. It is also said that he is not to prevent her from going out to visit her parents nor to prevent them from visiting her each Friday. In the case of other persons, the number is linked to one year.

If the husband disappears and he has wealth that is in possession of another, who acknowledges it as well as the marriage contract, the *qāḍī* is to award maintenance from this wealth for the wife of the missing husband, the minor children and his parents. Likewise if it is in the knowledge of the *qāḍī* even though the man (in possession) denies it. The reason is that when he acknowledged the existence of marriage as well as the deposit, he acknowledged that she is entitled to take it, because she has a right to take from the wealth of her husband without his consent. The acknowledgement of the person in possession is admissible against him (the husband), especially in this case. If he denies either of the two facts, the testimony of the woman will not be admissible against him (the custodian), because the custodian is not a party in the issue of establishing the relationship of marriage against him nor is the woman a party in proving the rights of the person missing. If this (marriage) is established in his case, the proof will also operate against the missing person. Likewise if the wealth in his possession is held by way of *muḍārabah*. The same response is given in the case of a debt. All this applies if the wealth is of a type that can be claimed through her right, like *dīnārs*, *dirhams*, food or clothing that is suitable for her right. If, however, the wealth is of another species, maintenance is not to be awarded as for that he will need to sell the goods, and the wealth of the missing person cannot be sold by agreement. In fact, according to Abū Ḥanīfah (God bless him) it cannot be sold even in the case of one present, therefore, the same applies to one absent. As for the two jurists, the reason is that he adjudicates against the person present when he is denying it, but he cannot adjudicate against a person absent for he does not know whether he is denying it.

He said: **He is to take a surety from her for the amount paid,** in the interest of the person absent, because it is possible that she has already taken the maintenance or her husband has divorced her and her waiting period is over. He (the Author) distinguished between this case and the case of the inheritance when it is divided between the heirs in the presence of witnesses (confirming them as heirs) and they have not said that they know of another heir. In such a case a surety is not obtained according to Abū Ḥanīfah (God bless him). The reason is that in this case the person for whom surety is taken is unknown, while in this case he is known, and it is the husband. She is also required to take the oath by Allāh for what she is paid to preserve the interest of the missing person.

He said: **He (the *qāḍī*)is not to award from the wealth of the missing person, except to these persons.** The distinction is that the maintenance of these persons becomes due prior to the award by the *qāḍī*, therefore, they have the right to take prior to adjudication by the *qāḍī*. It is as if the award of the *qāḍī* is additional support for them. As for other near relatives, their maintenance becomes due through the award of the *qāḍī* as it is a matter that is subject to *ijtihād*, and passing a judgement against a person who is absent is not permitted.

If the *qāḍī* is not aware of her being his wife, when the person holding the wealth does not acknowledge it either, and she brings witnesses to prove she is his wife, or if he has not left any wealth and she brings witnesses to prove marriage so that the *qāḍī* may award maintenance against the missing person and direct her to raise a loan for the purpose, then the *qāḍī* is not to adjudicate all this, because it amounts to adjudicating against a missing person. Zufar (God bless him) said that he is to adjudicate this matter as it is for the preservation of her interest, while there is no injury in this to the interest of the missing person. If he were to reappear and affirm what she has claimed, she will have taken her right. If he denies it, he will be made to take the oath, and if he refuses he will be affirming her claim. If she were to bring witnesses, her right would be established, but if she is unable to do so the surety or the woman will be held liable. Today, the *qāḍīs* act upon this. The *qāḍī* awards maintenance against the missing person due to the need of the people, and this is a matter that is subject to *ijtihād*. On this issue there are other opinions too that have been withdrawn, therefore, these are not mentioned.

76.2 Divorcees, Widows and Other Cases

If a man divorces his wife, then she has maintenance and residence during her waiting period whether the divorce is revocable or irrevocable. Al-Shāfi'ī (God bless him) said that there is no maintenance for the woman separated irrevocably, unless she is pregnant. As for the one whose divorce is revocable, her *nikāḥ* still continues, especially in our view, for it is lawful for him to have sexual intercourse with her. As for one whose divorce is irrevocable, the reasoning underlying his view is based upon what is reported from Fāṭimah bint Qays, who said, "My husband divorced me thrice, and the Messenger of Allāh (God bless him and grant

him peace) did not award me residence or maintenance."[7] Further, he has no rights of ownership with respect to her, and maintenance is based upon ownership. It is for this reason that maintenance is not obligatory for the woman whose husband has died due to the lack of ownership. This is distinguished from the case where she is pregnant, because that we have identified through the text, which in the words of the Exalted is, "And if they are pregnant, then spend (your substance) on them until they deliver their burden."[8] Our argument is that maintenance is in lieu of confinement to the house, as we have mentioned, and confinement subsists with respect to the main purpose of *nikāḥ*, which is procreation. As the waiting period is obligatory for the preservation of progeny, it leads to the obligation of maintenance due to which she has residence too on the basis of consensus (*ijmā'*). It is as if she has become pregnant. The tradition of Fāṭimah bint Qays was rejected by 'Umar (God be pleased with him). Thus, he said: "We will not cast aside the Book of our Lord nor the *Sunnah* of our Prophet for the statement of a woman about whom we do not know whether she is telling the truth or is lying, has retained it in memory or forgotten. I heard the Messenger of Allāh (God bless him and grant him peace) saying, 'For the woman divorced thrice is maintenance and residence as long as she is in her waiting period.' "[9] Her tradition was also rejected by Zayd ibn Thābit, Usāmah ibn Zayd, Jābir and 'Ā'ishah (God be pleased with them all).

There is no maintenance for the woman whose husband has died. The reason is that her confinement is not due to the right of the husband rather it is due to the right of the law (*shar'*), and her staying confined is worship on her part. Do you not see that identification of the vacation of the womb is not taken into account in this so that taking note of menstruation is not stipulated in her case. Accordingly, maintenance is not made obligatory for her. Further, maintenance becomes due in phases, and he has no ownership after death, thus, it cannot be imposed on the ownership of the heirs.

In the case of each separation that occurs due to an offensive act of the woman, like apostasy or kissing the son of the husband (stepson), there is no maintenance for her. The reason is that she has confined

[7]It is recorded by all the sound compilations, except al-Bukhārī. Al-Zayla'ī, vol. 3, 272.

[8]Qur'ān 65 : 6

[9]It is also reported by others and is recorded by Muslim. Al-Zayla'ī, vol. 3, 273.

herself without lawful right, and it is as if she has become rebellious. This is distinguished from the case of dower after consummation of marriage, because submission is found through intercourse in lieu of dower. It is also distinguished from the case where separation has occurred on account of her, but without an offence, like the option of emancipation or the option of puberty as well as separation due to lack of proportional status. The reason is that in such a case she has confined herself due to a right, and such a case does not extinguish maintenance, like the situation where she keeps herself confined for obtaining her dower.

If he divorces her thrice and then, God forbid, she becomes an apostate, her maintenance is extinguished, but if she lets the son of her husband have physical access to her, she is entitled to maintenance. The meaning here is that she lets him have access to her after divorce, because separation occurs due to the three repudiations. Apostasy and and physical involvement have no operation in this case, except that the apostate female is kept in confinement till she repents. There is no maintenance for one confined, and one who has physical contact is not kept in confinement. It is for these reasons that the distinction is found.

76.3 Maintenance of Minor Children

The maintenance of minor children is the liability of the father and no one else participates in this with him, just like no one else participates with him in the maintenance of the wife. This is due to the words of the Exalted, "But he (the father of the child) shall bear the cost of their food and clothing on equitable terms."[10] The *mawlūd lahū* is the father.

If the child is breast-fed, then the mother is not obliged to breast-feed him, due to what we elaborated that adequate subsistence is the liability of the father. The wages of breast-feeding are like maintenance. Further, the reason is that she is probably not able to do so due to an inability found in her, therefore, compelling her to do so has no meaning. It is said in the interpretation of the words of the Exalted, "No mother shall be treated unfairly on account of her child,"[11] that she is obliged to do so despite her reluctance. This is what we have mentioned as an elaboration of the rule, which means that if someone is found who will breast-feed

[10]Qur'ān 2 : 233
[11]Qur'ān 2 : 233

the child. If, however, no one is found to feed the child, the mother is to be compelled to feed the child for the survival of the child and its loss.

He said: **The father is to hire the woman who will feed the child where the mother is.** As for the hiring by the father, it is so because hiring is his duty. His statement "where the mother is" means if she so desires as bringing up the child is her responsibility.

If he hires her to feed his child when she is his wife or one who is undergoing the waiting period on account of him, then this is not valid. The reason is that feeding is her moral obligation. Allāh, the Exalted, has said, "The mothers shall give suck to their offspring,"[12] unless she offers an excuse due to the possibility of her inability. If she undertakes it for wages, her ability to do so becomes apparent when the act is obligatory upon her. Thus, taking wages for such an act is not permitted. In the case of a woman undergoing the waiting period after a revocable divorce, this is the position according to a unanimous narration (from our jurists), because the marriage subsists. Likewise there is one narration about the woman separated irrevocably. In another narration it is said that hiring her is valid, because the marriage stands dissolved. The reasoning of the first narration is that the marriage subsists for purposes of some *aḥkām*.[13]

If he hires her when she is still married to him or is in the waiting period for feeding a child of his from another woman, it is valid, because it is not part of her duties. **If her waiting period is over and then he hires her,** that is, for the feeding of his child **it is valid,** because the marriage is dissolved in all respects and she is now like a stranger.

If the father says: "I will not hire her (the mother)," and brings another woman, but then the mother agrees on similar wages or without wages, then she has a greater right to feed the child. The reason is that she has more love for the child and the welfare of the child requires that he be given to her (for nursing). **If, however, she demands higher wages, the father is not to be compelled to hire her,** in order to avoid loss to the father. It is this that has been indicated by the words of the Exalted, "No mother shall be treated unfairly on account of her child, nor the father on account of his child,"[14] that is, by making it binding upon him to accept her on wages higher than those of a stranger.

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[12]Qur'ān 2 : 233

[13]Which are the waiting period and the obligation of providing residence.

[14]Qur'ān 2 : 233

The maintenance of a minor is obligatory upon the father even if he differs from him with respect to religion just like the maintenance of the wife is obligatory upon the husband even if she professes a different faith. As for the child, it is due to the unqualified meaning of what we have recited. Further, he is a part of him and is like himself in meaning. As for the wife, the basis is that the cause is the valid contract of marriage and because maintenance is in lieu of confinement, which has been established through the valid contract. The contract between a Muslim man and an unbelieving woman is valid giving rise to confinement, therefore, maintenance becomes obligatory.

In all the cases that we have mentioned, maintenance is obligatory upon the father where the minor does not have wealth of his own. If, however, he does have wealth then the rule is that the maintenance of a human being is from his own wealth whether he is a minor or a major.

76.4 Maintenance for Parents and Grandparents

A man is under an obligation to spend on his parents, his grandfathers and grandmothers, if they are poor, even if they profess a different faith. As for the parents, it is based upon the words of the Exalted, "Bear them company in this life with justice (and consideration)."[15] The verse was revealed in the case of unbelieving parents. It is not part of justice and fairness to live enjoying the blessings of Allāh and to leave them to die of hunger. Likewise for the grandfathers and grandmothers for they too are like fathers and mothers. It is for this reason that the grandfather stands in the place of the father at the latter's death. Further, they were the cause of his life and that gives rise to their survival with the same status as parents. Poverty is stipulated, however, as the possession of wealth lends greater priority to the obligation of maintenance from their own wealth as compared to its obligation from the wealth of another. Maintenance is not prevented due to a difference in religion on the basis of what we have recited.

Maintenance does not become obligatory with a difference in religion, except for the wife, parents, grandfathers, grandmothers, children and grandchildren. As for the mother it is due to what we have recited

[15]Qur'ān 31 : 15

and that it is obligatory due to a valid contract that leads to her confinement as a duty that has a purpose. All this is not related to a common religion. As for the others, because being a part is established and the part of a man is like the man himself, just as it does not prevent spending on himself due to his unbelief, it does not prevent the maintenance of his part. The exception is that if they are the enemy, their maintenance is not obligatory on a Muslim even when they have come over on safe-custody (*amān*). The reason is that we have been prohibited to be kind to those who fight with us due to our *dīn*.

The Christian is under no obligation to provide maintenance for his Muslim brother, likewise a Muslim is under no obligation to provide maintenance for his Christian brother. The reason is that maintenance is linked to inheritance by the text as distinguished from manumission through ownership for it is annulled due to kinship and being in the prohibited degree of marriage on the basis of a tradition.[16] Further, kinship gives rise to a bond that is further strengthened with the similarity of religion. The continued ownership (of relatives) is stronger in cutting off the bonds of the womb than the non-payment of maintenance. Accordingly, we have adopted for what is stronger the true underlying cause (*'illah*), and in the case of the lesser case the *'illah* that strengthens. It is for this reason that the distinction is made.

No one is to participate with the child in the provision of maintenance for his parents. The reason is that they have priority in the wealth of the child on the basis of a text, while they do not have such priority in the wealth of another, and also because the child is the closest person to them, thus, he is the first from whom their maintenance is claimed. The obligation falls equally upon the males and females according to the most authentic narration (*ẓāhir al-riwāyah*), which is correct as the meaning includes both.

Maintenance is due for each relative within the prohibited degree of marriage if such relative is a poor minor, or is a poor major woman or is a major male who is poor and has a chronic illness or is blind. The reason is that maintaining the bond of the womb is obligatory in the case of close relatives and not distant relatives, and the distinguishing factor is that they be in the prohibited degree of marriage. Allāh, the Exalted,

[16]It is recorded by al-Nasā'ī to the effect that whoever comes to own a relative in the prohibited degree of marriage, such relative is set free on his account. Al-'Aynī, vol. 5, 702.

has said, "An heir shall be chargeable in the same way."[17] In the recitation of 'Abd Allāh ibn Mas'ūd (God be pleased with him), "An heir within the prohibited degree of marriage shall be chargeable in the same way." Thereafter, it is necessary that attributes like need, minority, and being a female be found. Chronic illness and blindness are signs of need due to the existence of the inability. One who is able to earn is well off due to his earning as distinguished from the parents as the labour of earning is linked with them. The child is commanded to eliminate injury to them, therefore, maintenance is made obligatory despite their ability to earn.

The share of maintenance is in proportion to the share of inheritance and the person will be compelled to pay it. The reason is that mentioning the heir in the text is an indication for considering the (share in) inheritance. Further, liability is in proportion to revenue, while compelling is for the satisfaction of the right of one to whom it is due.

The maintenance of a major daughter and a son, who is chronically ill, is upon the parents in thirds: on the father is two-thirds and on the mother one-third. The reason is that inheritance is due to them in this proportion. This feeble servant says: This is what is related through the narration of al-Khaṣṣāf and al-Ḥasan (God bless them). In the *Ẓāhir al-Riwāyah* the entire liability is that of the father due to the words of the Exalted, "But he (the father of the child) shall bear the cost of their food and clothing on equitable terms."[18] Here the chronically ill is like a minor child. The distinction on the basis of the first narration is that the authority of *wilāyah* and the burden of support are gathered in the father so much so that he is liable for his *ṣadaqat al-fiṭr* (amount due on *īd al-fiṭr*), therefore, maintenance is also made specific to him. The major child is not like them due to the lack of *wilāyah* in his case, therefore, the mother participates in this with him. For persons other than the father, the ratio of inheritance is taken into account, so that the maintenance of the minor is upon the mother and the grandfather in thirds, while the maintenance of the brother in financial straits is upon various sisters who are well off in fifths in accordance with inheritance, except that what is considered is the eligibility for inheritance on the whole and not its actual disbursement. Thus, if the person in financial straits has a maternal uncle and the son of

[17]Qur'ān 2 : 233
[18]Qur'ān 2 : 233

a paternal uncle, his maintenance is upon the maternal uncle, while his inheritance goes to the son of the paternal uncle.

Their maintenance (close relatives) is not due when there is a difference of faith, due to the annulment of the legal capacity for inheritance as that must be taken into account.

Maintenance is not obligatory on the poor man, because it is made obligatory for strengthening the bonds of the womb and he is entitled to it himself so how can the obligation be demanded from him? This is distinguished from the maintenance of the wife and his minor child, because he made it binding upon himself by going ahead with the contract, because interests are not secured without it, and in such a case difficult financial straits do not operate. Thereafter, financial ease is determined on the basis of the *niṣāb*, according to what is narrated from Abū Yūsuf (God bless him). According to Muḥammad (God bless him) it is determined by what is in excess of maintenance for himself and his family for a month or by what is surplus over this through his permanent and daily earning. The reason is that what is taken into account in the case of the rights of individuals is the ability and not the *niṣāb*, as that is for financial ease. The *fatwā* today is on the first view where the *niṣāb* is the *niṣāb* that prevents *ṣadaqah* (payment of *zakāt*).

If the missing son has wealth, the maintenance for the parents is to be awarded from it, and we have already elaborated the reasoning underlying this.

If his father sells his goods to recover his maintenance, it is permitted, according to Abū Ḥanīfah (God bless him), and this is based upon *istiḥsān*. **If he sells his immovable property, it is not permitted.** In the opinion of the two jurists, it is not permitted to sell such property, and this is based upon *qiyās*. The reason is that he has no authority (*wilāyah*) over him as it was terminated on the son's attaining puberty, therefore, he does not possess such authority even during his presence. Consequently, he does not possess the authority to sell for any kind of debt except that of maintenance. Likewise, the mother does not possess such authority. According to Abū Ḥanīfah (God bless him), the father has the authority to preserve his son's wealth when he is missing. Do you not see that the *waṣī* has such authority, therefore, the father has greater priority for such authority due to the bond of affection. The sale of movable property falls within the authority of preservation, but immovable property is not like this as it stands protected on its own. This is distinguished from the

case of relatives other than the father, for they have no authority at all to undertake transactions for him during his minority nor do they have authority of preservation after his majority. If the sale by the father is permitted and the price is of a species that is suitable for his right, which is his maintenance, he has a right to recover it from the price. It is just like selling the movable and immovable property for the minor, which is permitted due to complete *wilāyah*, and then recovering his maintenance from it as it is a species compatible with his right.

If the parents hold wealth belonging to the missing son and they spend on themselves from it, they are not to be held liable for compensation, because they have satisfied their claim as their maintenance becomes obligatory prior to adjudication, as has preceded. They have taken a species compatible with their right.

If a stranger holds his wealth and he pays their maintenance without the permission of the *qāḍī*, he is held liable. The reason is that he has undertaken a transaction in the wealth of another without authority, because he is a deputy merely for safe-custody of the wealth. This is distinguished from the case where the *qāḍī* orders him to do so, as his directive is binding due to his general authority. When he is held liable, he cannot have recourse to the person who took possession of the wealth, as he came to own it through *ḍamān* and it is as if he made a donation.

Where the *qāḍī* makes an award of maintenance for the child, parents, and the next of kin, and a certain period passes over such award, it lapses. The reason is that the maintenance of these persons becomes obligatory to meet a need and is not due when financial ease exists, and such ease is found with the passage of time. This is distinguished from the maintenance of the wife, when the *qāḍī* makes an award, because that is obligatory even with financial ease, and is not extinguished with the attainment of financial ease in the past days.

The exception is where the *qāḍī* has allowed (the relatives) to raise a loan in the person's name. The reason is that the *qāḍī* has general authority and his order becomes the order of the missing person, thus, the debt becomes his liability that does not lapse with the passage of time. Allāh, the Exalted, knows what is correct.

76.5 Maintenance for Slaves

The master is under an obligation to spend for the maintenance of his slave woman and male slave, due to the words of the Prophet (God bless him and grant him peace) about slaves, "They are your brothers whom Allāh, the Exalted, has made to fall under your authority. Feed them out of what you eat and clothe them out of what you wear, and do not torment the servants of Allāh."[19]

If he refuses to do so and they have a means of earning, they should earn and spend on themselves, because in this is the securing of the interests of both sides, as it will keep the owned slave alive and remain within the ownership of the master.

If they do not have a means of earning like a slave who is chronically ill or a slave girl whose services are usually not let out on hire **then the master will be compelled to sell them.** The reason is that they are eligible for maintenance, and in their sale is the satisfaction of their right as well as the survival of the right of the master by substitution (the price). This is distinguished from the maintenance of the wife as that becomes a debt that can be delayed. The maintenance of the slaves does not become a debt, and is annulled. It is also distinguished from the remaining animal species, because they are not eligible for maintenance, therefore, the owner cannot be compelled to spend on them, except that he has been ordered to do so with respect to what is between him and Allāh, the Exalted. The reason is that the Prophet (God bless him and grant him peace) has prohibited the tormenting of animals, and this occurs by not spending on them. He also forbade the wasting of wealth, and by not spending leads to the wasting of animals. It is narrated from Abū Yūsuf (God bless him) that the owner is to be compelled, however, the correct view is the one we have stated. Allāh knows best.

[19]It is recorded by al-Bukhārī and Muslim. Al-Zayla'ī, vol. 3, 276.

Al-Hidāyah

BOOK NINE

ʿAṭāq (Emancipation)

Chapter 77

The Legal Status of Emancipation

Emancipation is a transaction that is recommended. The Prophet (God bless him and grant him peace) said, "If any Muslim emancipates a believer, Allāh will protect from the Fire each limb of his for each limb of the person set free."[1] It is for this reason that they deemed recommended that a man emancipate a male slave, and a woman set free a female slave so that the comparison of limb for limb may be realised.

The Author (God be pleased with him) said: **Emancipation is valid on the part of a freeman, who is major and sane, with respect to his ownership.** Freedom is stipulated, because emancipation is not valid except where ownership is found, and owned slaves cannot own. Majority is stipulated, because a minor does not possess legal capacity for the transaction as it amounts to a manifest loss, and for this reason the *walī* does not have such authority over him. Sanity is stipulated as the insane person does not have legal capacity. Accordingly, if a person who has attained puberty were to say, "I emancipated him when I was a minor," his statement will be followed. Likewise if a person who emancipated were to say, "I emancipated him when I was insane," where his insanity was manifest, and factors existed that negated the likelihood of emancipation. Similarly, if a minor were to say, "Every slave that I own will be free when I attain puberty," it is not valid, because he does not have the capacity to issue a binding statement. It is essential that the slave be in the ownership of the emancipating person, thus, if he were to emancipate another person's slave such emancipation will not be executed, due to the words of the

[1] It has been recorded by all the six sound compilations. Al-Zayla'ī, vol. 3, 277.

Prophet (God bless him and grant him peace), "There is no emancipation where one does not own a human being."[2]

If a person says to his male slave or to his female slave, "You are free," or "You are emancipated," or "You are liberated" or "You are released" or "I have set you free," or "I have emancipated you," then he has emancipated the slave whether or not he had intended emancipation. The reason is that these words are explicit in the meaning of emancipation as they are employed in the law and in practice for the purpose. Accordingly, the need for intention is eliminated. These forms even when they are meant as reports are employed for the creation of rights in legal transactions on the basis of need, as is the case in divorce, sale and other matters.

If he says that he meant thereby a false report or meant that he is released from work, he is to be deemed truthful morally (not legally), as such meaning is probable **but he is not deemed truthful legally,** because the intention opposes the apparent meaning.

If he were to say to him, "O Freeman," or "O Emancipated One," the slave is emancipated. The reason is that it amounts to calling someone by a name that is explicit as it amounts to summoning the person called with the specific description mentioned. This is the actual application. It requires the realisation of the attribute in him and is established from his side. By proving it he requires its verification, and we shall repeat this in what follows, God, the Exalted, willing. The exception is where he has named him Freeman and then calls him by that name, because the purpose is naming with his proper name, which is the title he has given him. If he calls him in Persian saying, "O Azad," where he has given him the name *Ḥurr*, the jurists maintain that he stands emancipated. Likewise, the opposite, because it does not amount to calling him by his proper name, thus, it will be considered to mean a report about an attribute (freedom).

Likewise if he says, "Your head is free," "Your face is free," "Your neck is free," or "Your body is free," or he says to his female slave, "Your vagina is free." The reason is that these words are employed to express the meaning of the entire body, and the discussion has preceded in the *Book of Divorce.*

If he associates emancipation with an undivided part (percentage), it applies to that part (and thereafter extends to the whole), and the disagreement about this will be coming up God, the Exalted, willing. If,

[2]It has been recorded by Abū Dāwūd and al-Tirmidhī. Al-Zayla'ī, vol. 3, 278.

however, he associates it with a specific limb, which does not imply the entire body, like the hand or foot, emancipation does not take place in our view, with which al-Shāfi'ī disagrees, and the discussion has preceded in the *Book of Divorce* where we elaborated it.

If he were to say, "I do not own you," intending emancipation thereby, the slave is emancipated, but if he did not intend it he is not emancipated. The reason is that it is probable that he intended, "I do not own you for I have sold you," or he intended, "I do not own you for I have emancipated you." One of these cannot be identified except through intention.

He (God be pleased with him) said: **The same applies to *kinyāt* with respect to emancipation.** The examples are like his saying, "You have moved out of my ownership," "I have no hold over you," "I have no claim of slavery over you," and "I have moved out of your way," for this implies the negation of a hold over him. Moving out of ownership or moving out of the way are probable in the same way for sale and *kitābah* as they are for emancipation, therefore, intention is necessary. Likewise his saying to his female slave, "I have let you go," because it is the same as saying, "I have moved out of your way," and this is narrated from Abū Yūsuf (God bless him) as distinguished from the words, "I have divorced you," which we will explain in what follows God, the Exalted, willing.

If he were to say, "I have no authority over you," intending emancipation thereby, the slave is not emancipated. The reason is that the word *sulṭān* (authority) is an expression for control, and the ruler has been called *sulṭān* due to his control over the kingdom. Ownership remains even with loss of control as in the case of the *mukātab* slave. This is distinguished from the words "I have no hold over you," because its negation in absolute terms is through the negation of ownership. The reason is that the master has a hold over the *mukātab*, therefore, it implies emancipation.

If the master says, "This is my son," and persists in this, the slave is emancipated. The meaning of this issue is that if one like him (of his age) gives birth to one like him (of his age), but if he does not, then the issue is discussed (by al-Qudūrī) after this. Thereafter, if the slave does not have a known ancestry, his paternity will be attributed to him, because the authority of claiming on the basis of ownership is established and the slave is in need of paternity, therefore, his paternity is attributed to him. Accordingly, his emancipation is established for he is linking paternity

to the time of conception. If the slave has a well known parentage, his paternity is not established due to the impossibility of this being true, but he is emancipated by acting on the statement in its figurative meaning due to the difficulty of acting upon the actual meaning. The meanings of figurative use will be mentioned by us God, the Exalted, willing.

If he says, "He is my client (*mawlā*)," or "O my client," the slave is emancipated. As for the first, the term *mawlā* even though it includes the meanings of "helper," "paternal uncle's son," "authorities in religion," "superior and subordinate in emancipation" yet the subordinate is identified here and becomes like a proper name for him. The reason is that the master is usually not given help by his owned slaves, and the paternity of the slave is well known, therefore, the first meaning is eliminated. The second and the third are a type of figurative use when the statement requires actual application. Attributing the meaning to the slave negates his being the emancipator, therefore, the meaning of the subordinate *mawlā* is identified and linked to an explicit meaning. Likewise if he says to his female slave, "She is my client," on the basis of what we have said. If he says that I intended thereby *mawlā* with respect to religion or that he made a false statement, his statement will be deemed truthful for what is between him and Allāh the Exalted. He will not be deemed truthful for purposes of adjudication as it opposes the apparent meaning. As for the second, when the subordinate was identified as the intended meaning it became attached to the explicit meaning, and calling by an explicit word leads to emancipation, as if he had said, "O Freeman" or "O Liberated Man." Likewise, calling with this word. Zufar (God bless him) said that he is not set free through the second meaning as he intended respect like saying "O my master" or "O my owner." We would say that the statement is used in its actual meaning and it has become possible to act upon it in distinction from what he has said, because there is nothing in it that is specific to emancipation and is, therefore, mere respect.

If he were to say, "O my son" or "O my brother," the slave is not emancipated. The reason is that a call is to alert the one called, except that when it is through an attribute that is possible for the one calling to affirm on his part, it will be for the affirmation of that attribute in the one called, so that he can be made to come with that specific attribute, as was the case with the statement, "O *ḥurr*," as we elaborated. When the call is made through an attribute that is not possible for the caller to affirm from his side, it is merely a name without the affirmation of

that attribute in that person due to the obstacle in the way. Sonship is not established by calling him so, for if he was created with the sperm of another he cannot be his son through such a call, therefore, it is merely for identification through a name. It is narrated from Abū Ḥanīfah (God bless him) through an isolated report that the addressee is set free with these statements, but the reliance is on the authentic narration.

If he says, "O son," the slave is not emancipated, because the truth is as he has stated that the slave is the son of his father. **Likewise, if he says, "O small son" or "O small daughter,"** The reason is that this is the diminutive form of son and daughter without attributing them to himself, and the matter is as he has stated.

If he says about a male slave, who cannot be born of him, "This is my son," he is emancipated according to Abū Ḥanīfah (God bless him). The two jurists said that he is not emancipated and that is the opinion of al-Shāfi'ī (God bless him) as well. These jurists argue that this statement is meaningless in its true application, therefore, it is to be rejected and deemed redundant. It is like his saying, "I set you free prior to my being created, or your being created." According to Abū Ḥanīfah (God bless him), though this statement in its actual application cannot be given meaning, it can be given meaning in its figurative sense, because it is a report about his freedom from the time he came to own him. The reason is that sonship in the case of slaves is a cause for their freedom either by way of consensus or due to the bond of kinship. Using the cause and thereby intending the effect in the figurative sense is permitted in usage. Further, freedom coexists with (is dependent upon) sonship in the case of slaves. Expressing a similarity through a dependent attribute is one way of intending the figurative meaning, as has been known, therefore, it is to be construed in such meaning in order to avoid redundancy. This is different from the case that the jurists have presented as there is no possibility of the figurative meaning in that, therefore, rejection is determined. This is distinguished from the case where he says, "I cut you hands," but the man takes out both hands and displays them as being sound, then this cannot be construed in the figurative sense with respect to an acknowledgement for paying compensation and undertaking it as an obligation, even though cutting of the hands is the cause for the obligation of paying wealth, as cutting by mistake is the cause for the obligation of specific damages called *arsh*. This opposes the meaning of wealth in the unqualified sense in its description insofar as it is imposed upon the *'āqilah* to

be paid within a period of two years. Establishing all this is not possible without actual cutting of the hands. Cutting is not the cause of what can be established. As for freedom, it does not differ in essence and in its legal rule, therefore, it is possible to deem it the figurative meaning.

If he were to say, "This is my father," or "This is my mother," and a person of this age cannot be born to them, then it is the opposite of what we have elaborated. If he were to say about a minor boy, "This is my grandfather," it is said that it is governed by the same disagreement, while it is also said that he is not emancipated by consensus, because this statement does not affect ownership except through a link, which is the father, and this is not established in his statement. Accordingly, it is not possible to deem a figurative meaning with respect to emancipation. This is distinguished from paternity and sonship, because they have a direct bearing on ownership without an intervening cause. If he were to say, "This is my brother," the slave is not to be emancipated according to the *Ẓāhir al-Riwāyah.* According to Abū Ḥanīfah (God bless him), he stands emancipated. The reasoning of both narrations we have already explained. If he were to say to his male slave, "This is my daughter," it is said that it is governed by the same disagreement, while it is also said that it is governed by consensus as the person pointed to is not of the same gender as the one named, therefore, the *ḥukm* is related to the one named, and she is non-existent, therefore, is not taken into account. We have established all this in the *Book of Nikāḥ.*

If he says to his slave girl, "You are divorced" or "You are irrevocably separated," or "Put on a veil," and he intends emancipation thereby, she is not emancipated. Al-Shāfi'ī (God bless him) said that if he intends that then she stands emancipated. Likewise on the same disagreement are interpreted all the explicit words as well as figurative meanings (in marriage as well as emancipation), according to what their Mashā'ikh (jurists) (God bless them) have said. Al-Shāfi'ī (God bless him) argues that he intended what his words probably imply, because in both types of ownership (marriage and slave) there is some compatibility, because both types are ownership of something that can be taken into possession. As for *milk yamīn*, it is obvious and likewise ownership arising from marriage with respect to the *ḥukm* of an *'ayn.* Consequently, perpetuity is a condition for it and limitation by time annuls it. Both statements operate to extinguish what is his right, which is ownership. It is for this reason that making it contingent through a condition is valid. As for the *aḥkām,*

they have been established due to a prior cause and that is his being a subject with legal capacity. It is for this reason that the words emancipation and freedom may be used figuratively for divorce. Likewise its opposite.

In our view, he has intended something that his statement does not imply as a probable meaning. The reason is that emancipation is a term that established greater strength, while divorce removes a restriction. The reason is that a slave is associated with inanimate things and with emancipation he is revived with ability. The married woman is not like this for she already possesses ability, but the restriction of marriage is an obstacle. This obstacle is removed through divorce and the power reappears. There is no ambiguity that the first has greater strength, and that the ownership of the right hand is superior to the ownership through marriage, therefore, its extinction has greater strength too. A word is suitably used in its figurative sense for what is lesser in reality, and not for what is superior to it. Consequently, it will be prevented in what is disputed and will be permitted in what is its opposite.

If he says to his slave, "You are like a freeman," the slave is not emancipated. The reason is that the term "like" (*mithl*) is used for participation in some of the attributes in practice, therefore, a doubt is created with respect to freedom.

If he were to say, "You are nothing but a freeman," the slave stands emancipated, because an exception for a negative meaning establishes the positive meaning with emphasis, as is the case with the *kalimat shahādah* (There is no God, but God).

If he says, "Your head is the head of a freeman," he is not emancipated, because it is a comparison by eliminating the letter used for comparison.[3] **If he says, "Your head is a free head," the slave is emancipated.** The reason is that this establishes freedom in his being, because the head is an expression for the entire body.

77.1 SLAVE RELATIVES

If a person comes to own a relative in the prohibited degree of marriage, the slave is emancipated on his account. This is a report[4] related from the Prophet (God bless him and grant him peace), "Whoever comes to

[3]That is, the character *kāf*, to say *ka-ra's*.

[4]It is related by al-Nasā'ī in his *Sunan*. Al-Zayla'ī, vol. 3, 278.

own a relative in the prohibited degree that relative is emancipated."[5] This tradition in its generality includes each relative permanently prohibited for marriage whether it is by birth or otherwise. Al-Shāfi'ī (God bless him) opposes us in those who are not related by birth. He argues that the proof of emancipation without the consent of the owner is negated by *qiyās* or it does not require it. Brotherhood and what resembles it is lesser than kinship by birth (that is, between parents and children), therefore, it prevents linking with them or reasoning leading to it. It is for this reason that *mukātabah* within a *mukātabah* is not allowed for other than those related by kinship of birth,[6] when it is not disallowed for those related by birth.

We rely on what we have related and also on the argument that he has come to own a relative whose relationship is effective in prohibiting marriage, therefore, such relative is emancipated on his account. In fact, this is effective in reality and kinship by birth is to be rejected (for this purpose), because it is this for which the strengthening of the bond has been made obligatory and its severing is prohibited so much so that maintenance becomes obligatory and *nikāḥ* prohibited. There is no difference if the owner is a Muslim or an unbeliever in the *dār al-Islām* due to the generality of the underlying cause (*'illah*). The *mukātab* when he buys his brother or other such relative, the relative does not become a *mukātab* as he does not have complete ownership that can enable him to emancipate him, and the obligation is linked with the ability to undertake the act. This is distinguished from kinship by birth, because emancipation (of the entire family) is one of the purposes of *kitābah*. Accordingly, the sale of such a relative is prohibited and the slave is set free in order to realise the purposes of the contract. It is narrated from Abū Ḥanīfah (God bless him) that even the brother will be part of the *mukātabah*. This is the view of the two jurists as well. Accordingly, we are obliged to prevent sale. This is distinguished from the case where he comes to own the daughter of his paternal uncle when she is also his sister through *raḍā'* (foster-sister), because the prohibition is not established through kinship. A minor is deemed eligible for such emancipation and likewise an insane person so that a close relative is emancipated on their account when they come to

[5]It is related by the compilers of the four *Sunan*. Al-Zayla'ī, vol. 3, 279.

[6]This means that if a *mukātab* slave who is paying in instalments for his freedom comes to own his father, the father is also treated as part of the *mukātabah*. This does not apply if he comes to own his brother.

own him, because here the right of the individual is involved and this resembles maintenance.

If a person emancipates a slave for the sake of Allāh, or for Satan, or for an idol, the slave stands emancipated, due to the issuance of the essential element (*rukn*) of emancipation from one who has the legal capacity to do so with respect to the subject-matter. The words for nearness, "for the sake of," with respect to the first case (where it is for Allāh) is an excess and its absence with respect to the other two cases does not cause any disturbance.

Emancipation by one coerced to do so or one in a state of intoxication takes effect, due to the issuance of the essential element from one with legal capacity with respect to the subject-matter (slave) as is the case in divorce, and we have elaborated this earlier.

If he makes emancipation contingent upon ownership or another condition, it is valid as in the case of divorce. As for ownership, there is a disagreement with al-Shāfiʿī (God bless him), and we elaborated this in the *Book of Divorce.* As for making it contingent with a condition, the reason is that it amounts to relinquishment (*isqāṭ*), therefore, associating it with a condition is valid as distinguished from other types of ownership, as has been known within its own discussion.

If the slave of an enemy moves over to our territory as a Muslim, he stands emancipated. This is based upon the words of the Prophet (God bless him and grant him peace) about the slaves of Ṭaif when they crossed over to him as Muslims, "They are the emancipated slaves of Allāh."[7] Further, he has preserved himself in a state when he was a Muslim, and slavery cannot be imposed on a Muslim as a new imposition.

If a person emancipates a pregnant woman, the foetus is emancipated with her, as it is linked to her. **If he emancipates the foetus exclusively, it stands emancipated without the mother.** The reason is that there is no intended legal basis for her emancipation due to the absence of association with her nor with the foetus as a consequence for it amounts to inverting the object of emancipation. Thereafter the emancipation of the foetus is valid, but its sale and gift is not valid, but none of these is a condition for emancipation, therefore, they are distinguished.

If a person emancipates a foetus in lieu of wealth, it is valid, but the wealth is not due, because there is no basis for obligating the payment of

[7]It is recorded by Abū Dāwūd in the chapter on *jihād.* Al-Zaylaʿī, vol. 3, 280.

wealth for the foetus, due to the lack of authority over it, nor is there a basis for making it binding for the mother with respect to a being whose existence is separate from her. Further, stipulating a counter-value for emancipation on someone other than the one being emancipated is not valid, as has preceded in the discussion of *khul'*. The existence of pregnancy at the time of emancipation will be known when she bring forth the child in a period that is less than six months from the time of emancipation, as that is the minimum period of gestation.

The child of a slave woman from her master is a free person, as it has been created from his sperm, therefore, it is emancipated on his account. This is the basic rule and there is nothing conflicting with it, as the child of a slave girl belongs to the master.

The child of a slave woman from her husband belongs to her master, due to its inclination towards the mother on the basis of *ḥaḍānah* or due to the mingling of his sperm with hers where mutual exclusion is realised, while the husband has consented to this, as distinguished from the child of the one deceived for in that case the father has not consented.

The child of a freewoman is a freeman under all circumstances, because inclination towards her is greater, therefore, he follows her with respect to the attribute of freedom just as he follows her in ownership, slavery, *tadbīr* (freedom after death), being the child of the slave mother, as well as *kitābah*. Allāh, the Exalted, knows best.

Chapter 78

Partial Emancipation

If the master emancipates part of his slave that part stands emancipated, and he works for the rest of the value for his master, according to Abū Ḥanīfah (God bless him). The two jurists said that the slave is fully emancipated. The basis is that emancipation can be split into parts in his view and emancipation can thus be confined to the part that is emancipated. According to the two jurists emancipation cannot be split into parts, and this is also the view of al-Shāfi'ī (God bless him). Accordingly, associating emancipation with part of the slave is like associating it with the whole, therefore, the slave is emancipated as a whole. The two jurists argue that emancipation is the establishing of freedom, which is a legal power, and it is established by negating its opposite, which is slavery and that is a legal deficiency. In their view, all this cannot be split into parts and is like divorce, pardon in the case of *qiṣāṣ*, and declaring a slave woman to be an *umm al-walad*. According to Abū Ḥanīfah (God bless him) emancipation is the establishing of the attribute of freedom by eliminating ownership or it is the elimination of ownership itself, because ownership is his right, while slavery is the right of the law (*shar'*) or it is a public right. The authority for transaction is whatever falls under the authority of the person undertaking the transaction and this is restricted to the extinction of his right and nothing more. The basic rule is that a transaction is restricted to the object to which it is associated, while extension beyond that takes place due to necessity and in the absence of divisibility. Ownership, however, is divisible as in the case of sale and gift. Accordingly, emancipation in this case will follow this rule.

Earning becomes obligatory as the value of the remaining part of the ownership is in control of the slave. According to Abū Ḥanīfah (God bless

him), the slave on whom earning becomes obligatory has the status of a *mukātab* slave, because attributing emancipation to a part gives rise to the affirmation of ownership in the whole (for purposes of emancipation), but the continuance of ownership in part of the slave prevents this. Consequently, we have acted upon both evidences by granting him the status of the *mukātab*, for he has the possession and not the ownership, and earning has become like the counter-value of *kitābah*. The master has the right to demand earning from him and he has the option to emancipate him (completely), because the *mukātab* is eligible for emancipation, except that in this case if he is unable to pay he does not revert to slavery. The reason is that it is an extinction of a right that is not in favour of anyone, therefore, it does not accept rescission, as distinguished from the case where *kitābah* is intended *ab initio,* as that is a contract that accepts *iqālah* (negotiated settlement) as well as rescission. In divorce and pardon from *qiṣāṣ* there is no middle ground, therefore, we have affirmed it for the whole giving preference to the prohibited over the permitted. *Istīlād* is divisible in his view, thus, where the owner makes a *mudabbarah* and *umm walad* up to the extent of his share, it will be restricted to that share alone. In the case of a (jointly owned) slave girl, when he guarantees the share of his co-owner by rendering his ownership *fāsid* through *istīlād*, he comes to own her fully through the guarantee and *istīlād* is completed.

Where the slave is owned by two co-owners and one of them emancipates his share, the slave is emancipated as a whole. If the emancipator is enjoying financial ease, the co-owner has the option to either emancipate the slave to the extent of his share or to hold his co-owner liable for the value of his share or even to hold the slave liable for earning and paying his share. Where he holds the co-owner liable, he has recourse to the slave, and the *walā'* belongs to the emancipator. If he sets him free or asks him to earn his share, then the *walā'* belongs to both. If the emancipator is in a difficult financial position, the co-owner has the option to emancipate the slave or to ask him to earn his share, and the *walā'* is shared by them in both cases. This is the position according to Abū Ḥanīfah (God bless him). The two jurists maintain that he has no choice in the case of financial ease except to hold the emancipator liable for his share and in the case of financial difficulty to ask the slave to earn his share. Further, the emancipator does not have recourse to the slave for the amount, and the *walā'* belongs to the emancipator.

This issue[1] is structured upon two principles. The first is the divisibility and non-divisibility of emancipation, as we have explained. The second is that the financial ease of the emancipator does not prevent the imposition of earning on the slave according to Abū Ḥanīfah (God bless him), while it does prevent it according to the two jurists. The two jurists argue, with respect to the second principle, on the basis of the words of the Prophet (God bless him and grant him peace) about a person emancipating his slave that if he is well off, he is to be held liable for the share of the partner, but if he is poor the slave is to earn his share.[2] Thus, he divided the liabilities, and division negates participation. According to Abū Ḥanīfah (God bless him), he locked up the value of the partner within the slave, therefore, he has the right to hold him liable. It is just like the blowing wind casting the dress of a person into the dye prepared by another thereby colouring the dress; the owner of the dress is liable for paying the cost of the dye whether he is in financial difficulties or is well off, as we have said. Likewise here, except that the slave is poor, therefore, he is asked to earn. Thereafter, the financial ease that is stipulated is that of adequacy, that is, he should own wealth that is sufficient to pay for the share of the co-owner. It is not the financial ease of the wealthy, because with adequate ease a balance is maintained between the two sides by the realisation of what the emancipator intended with respect to nearness to Allāh and the delivery of the share to the one who remained silent.

Thereafter the legal reasoning for deriving the rule (*takhrīj*) emerging from the view of the two jurists is obvious, which is that the absence of recourse to the slave by the emancipator for the amount for which he has been made liable is due to the absence of imposing earning on the slave in the state of financial ease where the *walā'* goes to the emancipator, as emancipation is entirely on his part due to its indivisibility. As for the *takhrīj* on the basis of his (Abū Ḥanīfah's) opinion, the option of emancipation is due to the continuation of his ownership in the slave, as emancipation is divisible in his view. The imposition of liability on the emancipator is that of an offender for he has rendered vitiated the co-owner's share in the slave insofar as it prevents his sale, gift and so on, that is, transactions other than emancipation and its consequences along with requiring him to work, as we have elaborated. The emancipator has

[1]That is, recourse by the emancipator to the slave for the value of the remaining ownership and not having recourse to him on the provision of security.

[2]It is recorded by all the six sound compilations. Al-Zayla'ī, vol. 3, 282.

recourse to the slave for the payment he guaranteed, because he comes to stand in the place of the one remaining silent through the provision of surety. The co-owner had the right to recover the amount by making him earn; likewise the emancipator. The reason is that he came to own him indirectly by the payment of the amount due. It is now as if he owns him solely and he has emancipated a part of the slave, therefore, he has the option to emancipate the remaining part or if he likes to ask him to earn the value. The *walā'* belongs to the emancipator on the basis of this reasoning. The reason is that emancipation is entirely on his part insofar as he came to own him entirely on the payment of the amount due. In the case of financial difficulty of the emancipator if he likes he may emancipate him (entirely) due to the continuation of his ownership and if he likes he asks him to work as we have elaborated. *Walā'* belongs to the emancipator in both cases, because emancipation is on his part. The person (slave) obliged to work does not have recourse to the emancipator for what he has paid on the basis of a consensus among our jurists, because he has worked for release from his bondage and he is not paying a debt on account of the emancipator, for he does not owe anything due to his financial hardship. This is different from the pledged slave if he is emancipated by the pledgor who is in difficult straits, because he is working for the release of bondage or for a debt that is due from the pledgor, therefore, he has recourse to him.

The opinion of al-Shāfi'ī (God bless him) in the case of financial difficulties is like the opinion of the two jurists. In the case of financial difficulties, he said the share of the co-owner stays within his ownership and he may sell it or gift it. The reason is that there is no basis for making the co-owner liable due to his financial hardship, nor is there a basis for making the slave earn its value for the slave is not an offender and he has not consented to this. Further, there is no basis for emancipating the slave completely due to the injury being caused to the silent co-owner, therefore, what stands determined is what we determined. We said that earning is a means for it does not need an offence to be justified, rather earning is based on the arresting of value within the slave. Thus, the power arising from ownership and the negative deficiency cannot both be combined in one person.

If each co-owner furnishes testimony against his co-owner about emancipation, the slave will work for both for their shares whether they are in financial ease or difficulty, according to Abū Ḥanīfah (God bless

him). Likewise, if one of them is enjoying financial ease, while the other is facing financial hardship. The reason is that each one of them believes that his co-owner has emancipated his share, therefore, he has become like a *mukātib* in conformity with his belief, according to Abū Ḥanīfah (God bless him). Consequently, it has become prohibited for him to enslave him, and he acknowledges this with respect to himself, therefore, he is prevented from keeping him in bondage and he makes him earn. The reason is that we are sure about the right to make him earn whether he is lying or is truthful for he is either his *mukātab* or his slave. Accordingly, they make him work and this does not differ with financial ease or difficulty, because his right in both situations is in one of two things. The financial ease of the emancipator does not prevent the requirement of earning, in Abū Ḥanīfah's view. Making the co-owner liable has become difficult due to the denial of the co-owner, thus, the other option is implemented, which is the requirement of earning. *Walā'* belongs to both of them for each one of them claims that the share of the co-owner has been emancipated against his right, due to emancipation on his part, thus, the *walā'* belongs to him, and he says: "My share has been emancipated through earning, therefore, *walā'* belongs to me."

Abū Yūsuf and Muḥammad (God bless him) said that if both are enjoying financial ease there is no requirement of work for the slave. The reason is that each one of them absolved him of earning through his claim of emancipation against his co-owner, because the financial ease of the emancipator prevents earning in the opinion of the two jurists. The claim is not established due to the denial of the other, however, being absolved of earning is established by his acknowledgement against himself.

If they are in financial difficulties, he is to work for both, because each one of them claims that he is required to work for him whether he is lying or is truthful, as we have elaborated, for the emancipator is in financial straits.

If one of them is enjoying financial ease while the other is facing financial constraints, he is to work for the one who is enjoying financial ease. The reason is that he is not claiming compensation from his co-owner due to his financial difficulty; he merely demands earning from the slave, therefore, the slave is not absolved from earning. **He is not to earn for the one who is in a difficult financial situation.** The reason is that he claims compensation from his co-owner due to his financial ease, therefore, he is absolving the slave from earning. *Walā'* is suspended in

all this, according to the two jurists, because each one of them is transferring it to his co-owner, while he claims to be absolved of it, thus, it is to remain suspended until they agree about emancipation by one of them.

If one of the co-owners says, "If so and so does not enter this house tomorrow, then this slave is a freeman." The other co-owner says, "If he enters this house, he is free." The next day passes, but it is not known whether or not the person entered the house, one-half of the slave stands emancipated, and he works for them for the other half. This is the rule according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that he is to work for his entire value. The reason is that by the extinction of the requirement of work, the person against whom judgement has to be given becomes unknown, and an award cannot be made against an unknown person. It is as if he says to another, "You have a claim of one thousand *dirhams* against one of us." In such a case, no ruling can be issued against either one of them due to uncertainty. Likewise here. The two jurists argue that we are certain about the extinction of one-half of the earning. The reason is that one of them here is certainly breaking his vow, and with certainty about the extinction of one-half. How then can a ruling be given about the obligation of the entire amount? Uncertainty is removed through spreading and distribution (of the liability), as in the case where a person emancipates one of his two slaves without identifying one specific slave or by identifying him, but forgetting which one and dying before recalling or elaborating. The derivation of rules in this is based upon the issue whether or not financial ease prevents the requirement of earning, and this is in accordance with the disagreement that has preceded.

If they take the oath (as in the previous issue) about two slaves, each one owned by them separately, none of them will be emancipated. The reason is that the person against whom the ruling with respect to emancipation is to be given is unknown. Likewise, the subject-matter of emancipation is unknown. Uncertainty, therefore, becomes intense and prevents judgement. In the case of a single slave, the person in whose favour the judgement is to be rendered and the subject-matter of the judgement is known, thus, the known part dominates the unknown part.

If two persons buy the son of one of them, the share of the father stands emancipated. The reason is that he has come to own a part of his relative and such purchase amounts to emancipation, as has preceded. **No compensation is imposed on him (for the share of the co-owner),**

whether or not the other was aware that he was his relative. **The same applies if they come to inherit him, and the co-owner has the option to either emancipate his share or to require the slave to earn the value.** This is the rule according to Abū Ḥanīfah (God bless him). The two jurists said that in the case of purchase the father pays one-half of the value if he is enjoying financial ease. If he is in financial difficulties, the son works for half the value for the co-owner of his father. The same disagreement governs cases where they come to own him through a gift, charity or bequest. In accordance with this reasoning, if two persons buy him, when one of them has taken an oath that he will emancipate him if he comes to own one-half share in him, the two jurists maintain that the father has annulled the share of his co-owner through emancipation, because buying a relative amounts to emancipation. This becomes similar to the case where two strangers come to own the slave and one of them emancipates his share. According to Abū Ḥanīfah (God bless him), he has consented to the vitiation of his share, therefore, he cannot ask him for compensation. It is as if he had expressly asked him to emancipate his share, and the evidence of this is that he participated with him in something that becomes the underlying cause of emancipation, which is purchase. The reason is that purchase of a close relative is his emancipation to the extent that he becomes free of the liability of expiation through it, in our view. According to the apparent meaning of the opinion of the two jurists, the payment of the value is compensation for wasting his share, and it differs in the case of financial ease and difficulty, while it is extinguished due to consent. The rule does not differ with knowledge or lack of it, which is an authentic narration (*ẓāhir al-riwāyah*) from Abū Ḥanīfah (God bless him). The reason is that the rule revolves around the cause; it is as if he says to another, "Eat this food," when the food is owned by the one giving the order, but the one giving the order is not aware of this.

If a stranger begins first and purchases one-half of the slave, after which the father comes and purchases the other half, and he is well off, then the stranger possesses the option; if he likes he can hold the father liable for compensation. The reason is that he did not consent to the vitiation of his share. **If he likes, he can make the son work for the value of his half,** for his share stands arrested within the slave. **This is the view according to Abū Ḥanīfah (God bless him).** The reason is that the financial ease of the emancipator does not prevent the requirement of work, in his view. The two jurists said that he has no option, and he is to hold the

father liable for half the slave's value. The reason is that financial ease of the emancipator prevents the requirement of work in their view.

If a person buys one-half of his son, while he is enjoying financial ease, there is no liability for him (of paying for the other half), according to Abū Ḥanīfah (God bless him). The two jurists said that he is liable if he is enjoying financial ease. This means that he buys one-half from a person who owns the entire slave. Thus, the seller will have no claim of compensation in his view. We have already stated the underlying legal reasoning.

If a slave is owned by three persons, and one of the co-owners enjoying financial ease declares that he will be free after his death, thereafter another co-owner, also enjoying financial ease, emancipates him, after which they agree upon liabilities, then the one remaining silent has the right to make the *mudabbir* liable for one-third of the value of the entire slave, but he does not make the emancipator liable, while the *mudabbir* has the right to make the emancipator liable up to one-third of the value of the *mudabbar* slave (that is, one-third of two-thirds of the whole), and he does not hold him liable for the one-third that he paid. This is the position according to Abū Ḥanīfah (God bless him). The two jurists said that the entire slave now belongs to the one who made him a *mudabbar* initially, and he is liable to his two co-owners for two-thirds of the value of the slave irrespective of his being financially sound or in difficult straits. The basis for this issue is that *tadbīr* is divisible according to Abū Ḥanīfah (God bless him) with the two jurists disagreeing as is the case with emancipation. The reason is that *tadbīr* is an offshoot of emancipation and will be analysed accordingly. As it is divisible in his view, it will be restricted to the share of the *mudabbir*, but he has vitiated the shares of the two other co-owners. Thus, each one of the two has an option to either to adopt *tadbīr* for his share, to emancipate, to adopt *mukātabah*, to hold the *mudabbir* liable for compensation, to make the slave work for compensation, or to leave him in that state. The reason is that the shares of each of the two co-owners continue to be owned by them having been vitiated through the vitiation of their co-owner insofar as the means of benefiting from him through sale or gift have been blocked for them, as already explained. If one of these two opts for emancipation, his right is determined with respect to the slave, and he loses his other options. This gives rise to two causes of liability for the co-owner who is silent: *tadbīr* by the *mudabbir* and emancipation by the emancipator. He has the right,

however, to hold the *mudabbir* liable so that the compensation becomes compensation as a counter-value,[3] as that is the primary form of compensation, and it has even been deemed so for usurpation according to our principle. This is possible in the case of *tadbīr*, because it is possible to transfer it from one ownership to another at the time of *tadbīr*, but it is not possible in the case of emancipation for at that time he is either a *mukātab* or a freeman, subject to the disagreement between the two principles. Further, rescission requires the consent of the *mukātab* so that it can accept transfer. For these reasons he is to hold the *mudabbir* liable. Thereafter, the *mudabbir* has the right to hold the emancipator liable for a third of the value in the state of *tadbīr*, because he caused vitiation of his share as a *mudabbir*. Compensation is estimated according to the value of the destroyed thing, and the value of the *mudabbar* is two-thirds of the value of the entire slave according to what they (the jurists) say. He is not to hold him liable for his value for compensation from the perspective of the silent co-owner, because the ownership is established after reliance on *tadbīr*. It is established at the time of compensation and not at the time of *tadbīr*, therefore, it is not applicable to the liability of the emancipator. *Walā'* will be shared between the *mudabbir* and the emancipator on the basis of thirds, with two-thirds going to the *mudabbir* and one-third to the emancipator, because the slave has been emancipated through their ownership in this ratio. As *tadbīr* is not divisible in the opinion of the two jurists, the entire slave will belong to the *mudabbir*. He has vitiated the shares of the two co-owners, as we elaborated, therefore, he will compensate them. This rule does not differ on the basis of financial ease and hardship, for it is compensation in lieu of transfer of ownership, thus, it resembles the case of the *umm walad*, and is distinguished from emancipation for that is compensation arising from an offence (of vitiation). *Walā'* in this case belongs entirely to the *mudabbir*, which is obvious.

If a slave girl is owned by two men where one of them thinks that she is the *umm walad* of the other, but the other denies this, then she is to remain suspended from service for one day and the next day she is to serve the one who denied, according to Abū Ḥanīfah (God bless him). The two jurists said that the one who denies, if he likes, may make her work for half her value, and thereafter she becomes free with no hold over her. The two jurists argue that when his co-owner does not

[3]And not compensation resulting from an offence.

confirm his claim, the acknowledgement reverts to the one who made the claim. It is as if he has himself made her an *umm walad*. The case becomes like one where the buyer makes a claim that the seller emancipated the slave prior to the sale as in this case he (the buyer) will be deemed to have emancipated her. Likewise here. This prevents service to him, but the share of the one denying remains under the rule of ownership. Thus, she can move towards freedom through earning, as in the case of a Christian slave mother when she converts to Islam. According to Abū Ḥanīfah (God bless him) had his claim been affirmed, the entire service would have been for the one denying (in reality), but if it was denied the denier would have half of the service, thus, what is certain is established, which is one-half. There is no service for the co-owner who testified nor is there the option of earning, because he extinguished all this through his claim of *istīlād* and compensation. An acknowledgement of being an *umm walad* includes the acknowledgement of paternity; it is a presumption that is not rebuttable, therefore, it is not possible to consider the one acknowledging as one who has declared her his *umm walad*.[4]

If an *umm walad* is owned by two men, and one of them emancipates her, while he is in a sound financial condition, there is no liability for compensation on him, according to Abū Ḥanīfah (God bless him). The two jurists said that he is liable for one-half of her value. The reason is that in his view the *umm walad* does not have a marketable value, while she does have a marketable value in their opinion. On this rule, a number of issues are structured and these we have recorded in *Kifāyat al-Muntahī*.

The reasoning of the two jurists is that she is being utilised for sex, hiring and service. This is an evidence of her having a marketable value. By the prevention of her sale, her marketable value is not extinguished, as in the case of the *mudabbar* slave. Do you not see that a Christian *umm walad*, when she converts to Islam, is obliged to earn her value, and this is a sign of her having a marketable value, except that her value is one-third of the value of a regular slave, as the jurists have said, due to the loss of the benefit of sale and working after death (of the master). This is distinguished from the case of the *mudabbar*, because what is lost is the benefit of sale, but earning and service still continue.

[4]This is a response to the above assertion of the two jurists, "It is as if he has himself made her an *umm walad*."

According to Abū Ḥanīfah (God bless him), marketable value is based on the type of ownership, and she is in possession for procreation and not for having a marketable value. Possession for marketability is secondary. It is for this reason that she does not work for repaying a debt, or for an heir, as distinguished from the case of the *mudabbar*. The reason for this distinction is that the cause (which is freedom) has been realised for her in her current state, and this is the relationship between her and the master through the child, as has been known about the prohibition of marriage, except that its operation has not been given effect with respect to ownership due to the necessity of benefiting from her. The cause, therefore, operates to extinguish her marketability. In the case of the *mudabbar* the cause comes into effect after death (of the master), and the prevention of sale in his case is for the realisation of this purpose, therefore, the two are distinguished. In the case of the Christian *umm walad* we have ruled about her becoming a *mukātab* slave in order to avoid injury to both sides. The counter-value of *mukātabah* does not necessitate the existence of marketability.

Chapter 79

Emancipating One of Several Slaves

If a person has three slaves, and when two of them come to him he says, "One of you is a freeman." Thereafter one departs, and another enters, and then he says, "One of you is a freeman." He dies following this without elaborating. The slave who faced the statement twice will be free to the extent of three-fourths, while the two other slaves will be free to the extent of one-half of each. This is the view according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said the same except for the third slave who he said would be free to the extent of one-fourth. The first statement applies to the one who went out and to the one who remained, who heard the statement twice, thus, the emancipation from slavery applies equally to both due to their equality with respect to slavery. Both are, therefore, entitled to one-half emancipation. The slave who stayed back derived another fourth from the second statement, because the second statement applies to him and to the one who entered later, and he is the one whom he (Imām Muḥammad) called "the other" in the *Book,* therefore, it will be distributed in halves among them. The first, however, who stayed behind, became entitled to one-half of freedom with the first statement, thus, the entitlement with respect to the second statement will be spread over his two halves (one free and the other in bondage). The half that applies to the half freed due to the first statement becomes redundant, while the second half that applies to the unoccupied part will apply and he will be free to the extent of one-fourth. This completes three-fourths for him. The reason is that if the master had intended thereby the slave staying behind, he would be free to the extent of one-half and had he intended the one entering later, this half would not be emancipated. Consequently, the halves are spread out and

he is emancipated up to one-fourth by the second statement and to the extent of one-half by the first. As for the slave entering later, Muḥammad (God bless him) says that when the statement applies to him and to the one staying behind, and when the one staying behind derives one-fourth from it, the one entering later should derive the same. The two jurists say that it does apply to both, but the issue is of spreading the halves, which reduces it to one-fourth for the one staying on due to his entitlement to one-half through the first statement, as we have mentioned. The one entering later was not entitled to any emancipation prior to this so he will be given one-half.

He (Muḥammad) said: **If the statements made by him were during terminal illness, one-third of this (wealth) will be distributed.** The commentary of this statement is that the emancipated shares are to be gathered together, and these are seven according to the two jurists. The reason is that we take the lowest denominator for each slave to be four due our need for working on the basis of three over four (the largest fraction). We therefore say: The one who stayed back is emancipated to the extent of three shares, while the other two are emancipated to the extent of two shares. The emancipated shares, thus, come to seven. Emancipation during terminal illness is a bequest and its implementation is up to one-third of the subject-matter. It is, therefore, necessary to make the share of the heirs double of this. Accordingly, each slave will be analysed into seven shares with the entire wealth coming to twenty-one shares. The one who stayed back will be emancipated up to three shares and he is made to earn the remaining four. From the other two slaves, two shares each are to be emancipated and they earn the remaining five shares. When you ponder over this and make the addition it all adds up to one-third plus two-thirds. According to Muḥammad (God bless him), each slave is analysed into six shares, for the one entering later is given one share in his view. This reduces the emancipated shares by one share and the entire wealth comes to eighteen shares. The remaining derivation is according to what has preceded.

Had this happened in the case of divorce, where the marriage had not been consummated with any of them, with the husband dying prior to an elaboration, one-fourth of the dower of the one who went out would be extinguished, three-eighths from the one who stayed and one-eight from the dower of the one who entered later. It is said that this is exclusively the view of Muḥammad (God bless him), while the two jurists

maintain that one-fourth will be extinguished. It is also said that it is the view of the two jurists as well. We have mentioned the difference and all its sub-issues in (the commentary of) *al-Ziyādāt.*

If a man says to his two slaves, "One of you is free." Thereafter he sells one of them or one of them dies, or if he said to him (one of them), "You are free after my death," the (remaining) slave stands emancipated. The reason is that the slave is no longer the subject-matter of emancipation due to death and for emancipation by this man due to his sale, and also for emancipation from each perspective for purposes of *tadbīr.* Accordingly, the remaining slave will be identified for emancipation. Further, through sale he intended to obtain the price and through *tadbīr* the derivation of benefit up to his death. Both purposes negate emancipation that has been made an obligation, therefore, the remaining slave is identified by implication. Likewise if he declares one of two female slaves as an *umm walad.* In this case, there is no difference between valid and irregular sales with or without possession, nor is there a a difference between an unqualified sale or one that grants an option to one of the parties to the contract. This is due to the absolute nature of the statement in the *Book.* The meaning of all this is in what we said (with respect to the purposes). Making an offer for sale is linked directly to the sale according to a narration preserved from Abū Yūsuf (God bless him). Gift with delivery, and donation with delivery have the same status as sale, because it amounts to transferring of title.

The same applies if he says to his two wives, "You are divorced" and then one of them dies, due to what we said. Likewise, if he has intercourse with one of them, on the basis of our elaboration.

If he says to his two slave girls, "One of you is free," but thereafter has intercourse with one of them, the other is not emancipated, according to Abū Ḥanīfah (God bless him). The two jurists said that she is emancipated. The reason is that intercourse is not permitted except on the basis of ownership and one of them is a freewoman. By undertaking intercourse he seeks to maintain ownership with the slave woman that he slept with, therefore, the other stands identified due to the elimination of ownership due to emancipation, as is the case with divorce. The Imām (God bless him) argues that ownership subsists in the case of the slave woman with whom he had intercourse, because emancipation pertains to an unknown person, while she is ascertained, therefore, having intercourse with her is permitted. This does not amount to an elaboration

of the statement (of emancipation) he made. Accordingly, having intercourse with either is permitted in his view, except that he did not issue a *fatwā* on this basis.[1] Thereafter it is said that emancipation is not eliminated prior to an elaboration, because it is linked to it. In the alternative it is said that it is eliminated with respect to one unknown and will be evident through his acceptance, while intercourse is only possible with the one identified. This is distinguished from divorce, because the primary purpose of marriage is procreation. The intention to procreate through intercourse indicates the continuation of ownership in the woman with whom he is cohabiting in order to preserve the interests of the child. As for the slave woman, the purpose of intercourse with her is the satisfaction of carnal desire without procreation, therefore, it does not indicate the continuation of ownership.

If a person says to his slave girl, "If the first child you give birth to is a boy, then you are free," but she gives birth to a boy and a girl, and it is not known who was born first, then one-half of the mother is emancipated and one-half of the girl, but the boy remains a slave. Each one of them (the mother and daughter) will be emancipated in one situation, which is where the woman has given birth to the boy first; she is emancipated due to the stipulation, while the girl is free as she follows the mother, and the mother is a freewoman when she gave birth to her. They will remain in bondage in another situation, which is where she gives birth to the girl first, and this due to the absence of fulfilment of the condition. Thus (in this situation), one-half of each one of them (mother and daughter) is emancipated. The boy, however, remains in bondage in both situations, therefore, he remains a slave. If the mother claims that it was the boy who was born first, whereas the master denies this, while the girl is a minor, then the acceptable statement is that of the master along with his oath as he is denying the occurrence of the condition of the emancipation. If he takes the oath, none of them will be emancipated, but if he refuses to take the oath, the mother and the girl will be emancipated, because the claim of the mother pertains to the freedom of the minor girl and this is taken into account being a pure benefit. Consequently, the refusal is taken into account for purpose of their freedom, and we declare them

[1] In short, the Imām is saying that the statement made by the person in this issue is not legally admissible for purposes of emancipation. Further, the act of intercourse is not linked or cannot be linked with this statement, and cannot act as an elaboration of the statement.

free. If the girl is a major and she does not claim anything, and the matter is as it was (where she claims that the boy was born first), the mother alone is emancipated due to the refusal of the master to take the oath, but not the girl, because the claim of the mother is not effective in determining the rights of a major girl. The validity of the refusal depends upon the claim, therefore, it does not apply to the status of the girl. If the major girl is the claimant about the precedence of the boy's birth and the mother remains silent, the freedom of the girl is established through refusal of the master to take oath, but not that of the mother, due to what we said. The administering of the oath is on the basis of knowledge, in the situations we have mentioned, because it is an oath about the act of another, and through this explanation the situations we mentioned in *Kifāyat al-Muntahī* become known.

If two men testify against a man that he emancipated one of his two slaves, then the testimony is void according to Abū Ḥanīfah (God bless him), unless it pertains to a bequest, on the basis of *istiḥsān*, which he mentioned in the *Book of Emancipation*. **If two men testify that he divorced one of his two wives, the testimony is acceptable and the husband will be compelled to divorce one of them.** This is based on consensus (*ijmā'*). **Abū Yūsuf and Muḥammad (God bless them) said that the position of the testimony in emancipation is the same as this (that is divorce).** The rule in this is that testimony about emancipation of a male slave is not acceptable without a claim being lodged by the slave, according to Abū Ḥanīfah (God bless him), while it is acceptable according to the two jurists. Testimony about the emancipation of a slave woman and the divorce of a married woman is acceptable without a claim by agreement, and the issue is well known. Insofar as the claim of the male slave is a condition according to the Imām, it is not realised in the issue stated in the *Book*. The reason is that the claim of an unknown person cannot be the basis of adjudication, therefore, the testimony is not accepted. According to the two jurists, it is not a condition so the testimony is accepted even though the claim is non-existent. As for divorce, the absence of a claim does not give rise to vitiation of the testimony, as it is not a condition for it. If the two men testify that he emancipated one of his two slave women, the testimony is not acceptable according to Abū Ḥanīfah (God bless him), even though a claim is not a condition for it. The reason is that the claim is not stipulated as it includes the prohibition of sex, therefore, it is similar to divorce. Ambiguous emancipation does

not give rise to the prohibition of sex, in his view, as we have mentioned, thus, it amounts to testimony about the emancipation of one of two male slaves. All this applies if the two render testimony about his emancipating one of his two slaves while he was in sound health.

If, however, they testify that he emancipated one of his two slaves, while he was in a terminal illness, or they testify to his declaring *tadbīr* in sound health or during terminal illness, and the rendering of testimony is during his terminal illness or after his death, it is accepted on the basis of *istiḥsān*, because *tadbīr* when it occurs, it occurs by way of a bequest. Likewise, emancipation during terminal illness amounts to a bequest. The litigant in a bequest is the legator, and he is known, and he also has representatives and these are the *waṣī* or the heir. The reason is that emancipation pronounced during terminal illness gets distributed between the two slaves, therefore, each one of them is a known litigant. If the two persons testify after his death that he said in sound health that one of them was free, then it is said that it is not to be accepted as it does not amount to a bequest, while it is also said that it is to be accepted as emancipation stands distributed between both. Allāh knows best.

Chapter 80

Oath of Emancipation

If a person says, "If I enter the house then all the slaves that I own that day are free." He does not have slaves, but if he buys them and then enters the house they stand emancipated. The reason is that his saying, "that day," means "the day I enter," except that he extinguished the act through the syntax so that what is taken into account is the existence of ownership at the time of entry. Likewise, if on the day of the oath there was in his ownership a slave who remained in his ownership till he entered, he too will be emancipated, due to what we have said.

If he had not said in his oath the words "that day," they would not be emancipated. The reason is that his saying, "all the slaves that I own," applies to the present and the consequence is the freedom of the slaves owned at present, except that when the condition is inserted into the consequence, it is delayed till the time of the fulfilment of the condition, therefore, the slave is emancipated if he remains in his ownership up to the time of entry. This statement, however, does not include the slaves who were bought after the oath.

If a person says, "All the male slaves I own are free," then if he has a slave woman who is pregnant and gives birth to a male, he is not emancipated. This is the case if she gives birth to the child within six months or more. The reason is that the statement is for the present, and there is a probability of the conception taking place at the time of the oath due to the passage of the minimum period after it. The same applies if she gives birth to the child in less than six months, because the statement includes owned slaves in absolute terms, and the foetus is owned too following the mother, though not as the intended purpose. The reason is that he is like a limb in some respects and the term owned slaves includes life and

not limbs. Accordingly, the master does not have the right to sell the foetus independently. This feeble servant says: The effect of the qualification with the words "male" is that had he said, "all the slaves owned by me" it would have included the pregnant woman and consequently the foetus.

If he were to say, "Each slave that I own is free day after tomorrow," or he says, "Each slave that I have, is free day after tomorrow," and he has slaves, but he buys another one, thereafter, on the day after tomorrow the slaves that he owned at the time of the oath are emancipated. The reason is that his words, "I own," apply to the present in reality like his saying, "I own so and so," and he means thereby at present. Likewise such a statement is employed without context and for the future by associating it with the literal forms used for the future. The unqualified statement applies to the present, thus, the consequence is the freedom of the slave at present in association with the day after tomorrow, therefore, it does not include the slave he bought after the oath.

If he says, "Each slave that I own," or says, "Each slave that I have, is free after my death," and he has slaves, but he buys another slave, then the one who was in his ownership at the time of the oath will be a *mudabbar*, but the one bought later is not a *mudabbar* and when he dies he is emancipated from a third of his estate. Abū Yūsuf (God bless him) said in *al-Nawādir* that the one in his ownership on the day of the oath is emancipated, but the one acquired after his oath is not emancipated. On the same lines if he says, "Each slave that I have, when I die he is free," then he argues that the statement is applied in reality to the present, in accordance with our elaboration. consequently, those whom he will own in the future are not emancipated, therefore, the first becomes a *mudabbar*, but not the other. The two jurists (Abū Ḥanīfah and Muḥammad) maintain that this statement gives rise to emancipation and bequest and he will be accommodated within one-third of the estate. In bequests the state is awaited and the present circumstances are taken into account. Is it not noticed that he participates in the bequest on the basis of wealth that is acquired by the master after making the bequest, and in a bequest for the children of so and so is the participation of children who are born after the making of the bequest. The obligation is valid when it is associated with ownership or with its cause. Insofar as it gives rise to emancipation, it includes the owned slave taking into account the present situation, thus, he becomes a *mudabbar* so that his sale is not valid. Insofar as it is a bequest, it includes the slave he buys taking into account the state

that is awaited, and this is the state of death. Prior to death, the state of acquisition of ownership is merely the awaited future, therefore, it does not come within the meaning of the statement. At the time of death, it is as if he said: "Each slave that I have or each slave that I own is free." This is different from his saying "after tomorrow," in accordance with what has preceded. The reason is that it is a single transaction, which is the obligation of emancipation, and it does not include a bequest. The state is merely that of waiting for the future, thus, they are distinguished. It cannot be said that "you have combined the present and the future," because we would say, "Yes, but due to two separate causes: the obligation of emancipation and bequest." This, however, is not permitted due to a single cause.

Chapter 81

Emancipation Through *Ju'ālah*

If a person offers to free his slave in lieu of wealth, and the slave accepts this, he stands emancipated. This is like his saying, "You are a freeman on one thousand *dirhams* of for one thousand *dirhams*." He is emancipated due to his acceptance, because it is an exchange of wealth for what is not wealth, for the slave does not own himself. The legal position of exchange of counter-values is the following of legal effects immediately upon the acceptance of the counter-value, as in a sale. Accordingly, if he accepts he becomes a freeman, and what he has stipulated becomes a debt for him so that providing surety for it is valid. This is different from a counter-value in the contract of *kitābah*, because that is established with a negating factor, which is the existence of bondage, as has been explained. The unqualified use of the term wealth (*māl*) includes its various types like cash, goods, and animals without identifying the animals. The reason is that it is an exchange of wealth with what is not wealth, therefore, it resembles marriage, divorce, and settlement (*ṣulḥ*) for intentional homicide. The same applies to food and things measured and weighed when their species are known. It is not affected by uncertainty of description, because it is trivial.

If he makes his emancipation contingent on the payment of wealth, it is valid and the slave becomes an authorised slave (authorised to earn independently). This is like his saying, "If you pay me one thousand *dirhams* you are a freeman." The meaning of the words "it is valid," means that he will be emancipated on payment of wealth without becoming a *mukātab*, because the statement is explicit in making emancipation contingent upon payment, even though there is found in it a meaning of compensation in the final analysis, as we shall elaborate, God, the Exalted,

willing. He becomes an authorised slave for the master prompted him to earn by demanding payment from him, The meaning is trade and not begging, therefore, it amounts to permission for him by implication.

If he presents wealth for payment, the *qāḍī* is to compel him to accept it and declare the slave emancipated. The meaning of compelling here and in all claims is that the claimant comes into possession by the mere surrender of the wealth.[1] Zufar (God bless him) said that he is not to be compelled to accept it (this way), and this is analogy as it is a transaction based on oath, for it is emancipation made contingent upon the fulfilment of a condition on the basis of a statement. Consequently, it does not depend upon the acceptance of the slave (for it is an oath of emancipation) nor does it accept rescission, and there is no compulsion in furthering the conditions of an oath. The reason is that there is no entitlement prior to the coming into existence of the condition. This is distinguished from *kitābah* as that is a commutative contract in which giving a counter-value is obligatory. We argue that it is a contingent offer taking into account the statement, while it is a commutative contract taking into account the purpose. The reason is that he has made it contingent only to urge the slave on to pay the wealth. The slave in return acquires the dignity of freedom, while the master gets wealth in lieu of it as is the case in *kitābah*. It is for this reason that the compensation in case of divorce is given through a similar form so that it becomes irrevocable. Accordingly, we have deemed it a condition from the start by acting upon the form and for repelling injury to the master, so that he is not prevented from selling him and the slave does not become entitled to his earnings. Further, the emancipation does not travel down to the child born prior to payment. We have deemed it a counter-value in the final analysis, at the time of payment, to repel injury to the slave so that the master is compelled to accept payment. It is this on which issues of *fiqh* turn and rules are derived, and its precedent is a gift with the stipulation of compensation. If he makes part payment, the master is compelled to accept it, however, he is not emancipated until the entire amount is paid, because the condition has not been fulfilled. It is as if he (the master) has reduced part of the payment and paid the rest. Thereafter, if he pays one thousand that he earned the master has recourse to him (for another thousand) and he is emancipated on the basis of that amount. If he earns

[1]And removal of obstacles if any.

it after the stipulation, the master does not have recourse to him, because he is an authorised slave appointed by him for the purpose of payment. Finally, the word "pay" within his statement "if you pay" is confined to the session as it is the granting of an option, but in his statement "when you pay" is not confined to it, because the word "when" here is used in the meaning of "whenever."

If a person says to his slave, "You are free after my death for one thousand *dirhams*," then acceptance is (exercised) after death, due to the association of the offer with the time after death. It is as if he said, "You are free tomorrow for one thousand *dirhams*." This is different from his statement, "You are a *mudabbar* for one thousand *dirhams*," insofar as acceptance has to be immediate, because the offer of *tadbīr* is immediate, except that the payment of wealth does not become obligatory due to the existence of slavery. The later jurists said that he is not to be emancipated on this account in the issue stated in the *Book* even if he accepts after the death of the master, unless the heir emancipates him. The reason is that a dead person does not have the legal capacity to emancipate. This is correct.

He said: **If a person emancipates his slave in lieu of service for four years and the slave accepts, he is emancipated. He then dies immediately thereafter. According to Abū Ḥanīfah and Abū Yūsuf (God bless them), he is liable for his value. Muḥammad (God bless him) said that he is liable for the four year value of his services.** As for emancipation, the reason is that he deemed service for a determined period to be the counter-value, therefore, emancipation is associated with acceptance, which is found and service for four years becomes binding upon him as it is a valid counter-value. It is as if he emancipated him for a thousand *dirhams*. Thereafter if the slave dies then the disputed issue is based upon another disputed case, which is that if he sells the same slave for a female slave after which the female slave is claimed by a third party or dies (prior to delivery), the master has the right of recourse to the slave for the slave's value, according to the two jurists, and for the value of the slave girl according to him (Muḥammad). This issue is well known and the reason for basing the current issue on it is that just like delivery of the slave girl has become obstructed due to death or a third-party claim, obtaining the services for four years is also obstructed with the death of the slave and likewise the death of the master, therefore, it becomes a precedent for this case.

If a person says to another, "Emancipate your slave girl for a thousand on the condition that you give her to me in marriage," and the man emancipates her, but she refuses to marry him, then the emancipation is valid and the one making the request is not liable for anything. The reason is that if a person says to another, "Emancipate your slave for one thousand *dirhams* to be paid by me," and he does that then there is no liability for payment and the emancipation is on account of the one ordered. This is distinguished from the case where a man says to another, "Divorce your wife for one thousand *dirhams* to be paid by me," and he does that then in this case one thousand *dirhams* are due from the person giving the order, because stipulation of a counter-value for a stranger is valid in the case of divorce, but in emancipation it is not valid. We have recorded this earlier.

If he says, "Emancipate your female slave on my account for one thousand *dirhams*," while the issue is the same, then the one thousand are divided over her value and her reasonable dower. What is allocated to the value is to be paid by the one ordering, and what is allocated to the dower is deemed void. The reason is that when he said, "On my account," it includes purchase by legal requirement as is known. When this is the case, then the one thousand is compensation for purchase of the slave and for marital benefits through *nikāḥ*, therefore, it is divided over them. The part that represents what has been delivered to him, which is the slave, becomes due, but what has not been delivered to him becomes a nullity, which is the benefits of marriage. In the case where she marries him is not mentioned (in *al-Jāmi' al-Ṣaghīr*. The response is that what is allocated to her value is dropped in the first case (where he did not say "on my account"), but it belongs to the master in the second case. What is allocated to her reasonable dower becomes her dower in both cases.

Chapter 82

Emancipation Upon Death of Owner (*Tadbīr*)

If the master says to his owned slave, "When I die you are free," or "You are free when I turn my back (die)," or "You are a *mudabbar*, or "I have made you a *mudabbar*," then he becomes a *mudabbar*. The reason is that all these expressions are explicit for purposes of *tadbīr* for they establish emancipation upon death.

Thereafter it is not permitted to sell this slave nor gift him nor transfer him from his ownership, except for freedom, as is the case with *kitābah*. Al-Shāfi'ī (God bless him) said that it is permitted, because it is emancipation made contingent upon the fulfilment of a condition, therefore, sale and gift are not prevented due to it, as in all contingent stipulations, and also in the case of the restricted *mudabbar*, because *tadbīr* is a bequest and it does not prevent all this. We rely upon the words of the Prophet (God bless him and grant him peace), "The *mudabbar* is not to be sold, nor gifted, nor inherited, and he is free from the third."[1] The reason is that it is the cause of freedom, because freedom is established with death and there is no other cause besides it. Thereafter deeming it a cause in the present is better, due to its existence in the present, and treating it as absent after death, because what happens after death is the extinction of the legal capacity to undertake transactions, thus, it is not proper to delay the causation till the time of extinction of legal capacity. This is distinguished from all other contingent transactions,[2] because the obstacle for the causation subsists prior to the fulfilment of the condition. The reason is that it is an oath and the oath is an obstacle, while prevention is the purpose (of this oath). Further, it is contrary to the occurrence of divorce

[1]It is recorded by al-Dār'quṭnī. Al-Zayla'ī, vol. 3, 284.

[2]Al-Shāfi'ī claims that there is no distinction.

and emancipation, as it is possible to delay the causation (in the latter) up to the time of the occurrence due to the existence of legal capacity at the time. The transactions are, thus, distinguished. In addition to this, it is a bequest of succession like inheritance, and declaring its cause as void is not permitted.[3] This is what sale and things similar to it attempt to do.

He said: **The master has the right to utilise his services or to let them out on hire, and if it is a slave woman he has the right to cohabit with her and he also has the right to give her away in marriage to another,** because his ownership in the slave is established for him from which he derives the authority for these transactions.

When the master dies, the slave is emancipated from one third of his wealth, on the basis of the tradition we have narrated. The reason is that *tadbīr* is a bequest as it is an act of donation associated with the time of death. The act is not given legal effects at once, therefore, it is executed from a third (of the estate), thus, if he does not have wealth other than the slave, the slave is to earn the other two-thirds. If there is a debt claim against the master, then he works for his entire value due to the precedence that a debt has over a bequest. It is not possible to reject the emancipation, therefore, returning the value becomes obligatory.

The child of a *mudabbarah* is deemed a *mudabbar*. The consensus of the Companions (God be pleased with them) is recorded on this.

If he qualifies *tadbīr* with a stipulation, like his saying, "If I die from this illness of mine, or from my journey, or such and such illness," then he is not a *mudabbir* and his sale is permitted. The reason is that the cause has not come into operation at present due its vacillation because of the stipulation, as distinguished from the unqualified *mudabbar* as his emancipation is related to death in the absolute meaning, which is bound to come into existence.

If the master dies in the manner stipulated and mentioned, he is emancipated just like a *mudabbar* is emancipated, which means from a third. The reason is that the legal effects of *tadbīr* come into being in the last of the segments of his life for the realisation of this qualification. Accordingly, it is taken into account from a third. Among the qualifications is his saying, "If I die within a year or in ten years," as distinguished from his saying, "One hundred years," for no one usually lives that long. The reason is that the shorter period is bound to come.

[3]Response to al-Shāfi'ī, who permits sale or gift of a *mudabbar*.

Chapter 83

Emancipating the Slave Mother

If a slave woman gives birth to the child of her master she becomes his *umm walad*. It is not permitted to sell her or to transfer her ownership. This is based upon the saying of the Prophet (God bless him and grant him peace), "Her child has emancipated her."[1] He (God bless him and grant him peace) elaborated her emancipation with which some of the legal implications were established, which include the prohibition of sale. The reason is that physical participation has resulted between the two cohabiting persons through the child, because fluids of the two mixed together so that it is not possible to distinguish between them, as was known in the discussion of prohibition for purposes of marriage. Total participation, however, remains in the legal sense not in reality. This results in the weakening of the cause (of emancipation) and it is delayed and made legally obligatory after death. The remaining physical participation in the legal sense is in consideration of paternity that is found from the side of men. Likewise freedom is established in their favour and not in favour of women. Thus, if a freewoman comes to own her husband, when she has given birth to his child, the slave whom she has come to own is not emancipated due to her death. The proof of delayed emancipation establishes the right to freedom immediately, therefore, it prevents the validity of sale or moving her out of his ownership other than freedom in the present, and it gives rise to her freedom after his death. Likewise if she was owned in part by him, because *istīlād* is not divisible; it is a sub-rule of paternity, therefore, it will be analysed on the basis of the governing principle.

[1]It is recorded by Ibn Mājah in his *Sunan*. Al-Zayla'ī, vol. 3, 287.

He said: **He has the right to have intercourse with her, to utilise her services, make her work for wages and to give her away in marriage.** The reason is that he continues to own her, therefore, she resembles the *mudabbarah.*

The paternity of her child is not established unless he acknowledges it. Al-Shāfi'ī (God bless him) said that the paternity of the child from him is established even if he does not claim it legally. The reason is that if paternity can be established through contract, it should certainly be established through intercourse, and that birth is more likely through it. Our argument is that having intercourse with the slave woman is for the satisfaction of carnal desire, and not procreation for which a prevention exists (as birth is not desired). It is, therefore, necessary to make a claim for the same legal grounds as is done for *milk yamīn* without intercourse. This is distinguished from the contract of marriage, because a child is desired as the primary purpose, therefore, there is no need for filing a claim.

If she brings forth another child after this, the paternity of this child is established without acknowledgement. This means after acknowledgement by him about the paternity of the first child. The reason is that through the first claim it is determined that the purpose is to produce children with her. She now becomes someone with legal access for sexual intercourse like a woman with whom marriage is contracted. **If, however, he denies the paternity (of the later child) it stands negated through his declaration,** because the physical relationship here is weak insofar as he possesses the right to transfer it through marriage to another. This is distinguished from the lawfully wedded wife as paternity cannot be negated by his denial, except through *li'ān* because of the strength of the marital bond, and he does not possess the right to annul it by giving her away in marriage. This situation that we have mentioned is on the basis of the legal rule. As for the moral rule (between him and his Creator), if he has had intercourse with her and has given her protection[2] and has not been ejaculating outside the vagina, it is binding on him to acknowledge the child and file a claim for it, because it is obvious that it is his child. If he has ejaculated outside or has not been protecting her, it is permitted that he deny the paternity of the child, because one obvious state is opposed by another. This is how it has been transmitted from Abū Ḥanīfah (God

[2]That is, he has not permitted her to go out and so on.

bless him). There are two other narrations about it from Abū Yūsuf (God bless him) as well as from Muḥammad (God bless him), and we have mentioned both in *Kifāyat al-Muntahī*.

If he gives her away in marriage, and she brings forth a child, the child has the same status as the mother, because the right to freedom passes on to the child as in *tadbīr*. Do you not see that the child of a freewoman is free, while the child of a slave woman is a slave.

Paternity is established through the father. The reason is that the right of legal access for cohabitation belongs to him, even if the marriage is irregular, because irregularity in this case is linked to validity in conformity with the legal rules. If the master claims it as his child, paternity is not established through him, because the child's paternity is already established from another. The child, however, stands emancipated and the mother becomes his *umm walad* due to his acknowledgement.

When the master dies, the *umm walad* will be emancipated from his entire estate (not a third). This is based on the tradition of Sa'īd ibn al-Musayyab (God be pleased with him) "that the Prophet (God bless him and grant him peace) ordered that the *ummahāt al-awlād* be emancipated and not sold in lieu of a debt, and that they should not be emancipated from a third."[3] The reason is that the need for offspring is primary, therefore, she will have priority over the rights of the heirs and debts like burial, as distinguished from *tadbīr*, because that is a bequest and that is over and above the primary needs.

There is no labour for her in lieu of a debt of the master owed to the creditors, due to what we have related. The reason is that she is not marketable wealth, therefore, her compensation cannot be paid as a consequence of abduction, according to Abū Ḥanīfah (God bless him). Accordingly, the right of the creditors is not linked to her as in the case of *qiṣāṣ* and as distinguished from the *mudabbar* for he is marketable wealth.

If a Christian *umm walad* (owned by a Dhimmī) converts to Islam, then she is obliged to work for her value, and she has the status of the *mukātabah*, who is not emancipated until she pays the earned value. Zufar (God bless him) said that she is to be emancipated at once and the earned value is treated as a debt to be paid by her. The same disagreement applies to the case where Islam is offered to the master and he refuses

[3]It is *gharīb*, but there are other traditions like it recorded by al-Dār'quṭnī. Al-Zayla'ī, vol. 3, 288.

to convert. In such a case if the *umm walad* converts she will remain in the same status. Zufar (God bless him) maintains that removing degradation from her after she has converted is obligatory, and this can take place through sale or emancipation. Sale becomes difficult, therefore, emancipation is selected. We maintain that the welfare of both sides is affirmed by considering her a *mukātabah*, as this removes humiliation for her by her becoming free immediately, while injury to the Dhimmī with her compulsion to work for acquiring the dignity of freedom, thus, the Dhimmī will obtain the counter-value of his ownership. If she is emancipated, while she is insolvent, she will be reluctant to work. The *umm walad* owned by a Dhimmī is marketable according to his belief, therefore, he is to be left to his rules, but even if she is not marketable wealth she is protected, which gives rise to the liability for compensation as is the case with a joint claim of *qiṣāṣ* where one of the heirs has forgiven the offender and the rest are entitled to financial compensation. **If her master dies, she is emancipated without the obligation of earning,** because she is his *umm walad*. If she is unable to pay during his lifetime she does not revert to slavery. The reason is that if she does revert she becomes a *mukātabah* due to the existence of the obligating cause (for the sake of Islam of her child).

If a man has children through marriage with a slave girl of another and thereafter comes to own her, she becomes his *umm walad*. Al-Shāfi'ī (God bless him) said that she does not become his *umm walad*. If a man has a child through a slave girl that he owns after which she is claimed by a third party following which he comes to own her again, even then she will be his *umm walad*, in our view. He has two views on this, and the child is of a person deceived. He (al-Shāfi'ī) argues that she conceived a slave, therefore, she cannot be his *umm walad*; it is as if she conceived as a result of *zinā* and then the *zānī* comes to own her. The reason is that becoming an *umm walad* depends upon conceiving a free child, for he is part of the mother in that state, and a part is not incompatible with the whole. In our view, the cause is being a part (of the master), as we have mentioned earlier, and such participation is established between them with reference to a single child being attributed completely to both. As paternity has been established participation is also established through this connection. This is distinguished from *zinā*, because in that there is no paternity for the child that is attributed to the fornicating father, but the child is emancipated if such a father comes to own him, for he is part

of him in reality without a legal connection. A parallel case is that of a person who buys his brother, who was born as a result of *zinā*, and who is not emancipated. The reason is that he is attributed to him through the relationship with the father, and that is not established.[4]

If a man has intercourse with a slave girl owned by his son, and she gives birth to a child, after which he claims it as his own, the paternity is established, while the woman becomes his *umm walad.* He is liable for her value, but is liable neither for *'uqr* nor for the value of the child. We have mentioned the issue along with its evidences in the *Book of Nikāḥ* within this book. He is not liable for the value of the child as it was conceived in a state of freedom, due to the association of ownership with him prior to intercourse causing birth. **If the father's father had intercourse, while the father was alive, paternity is not established.** The reason is that the grandfather does not have *wilāyah* while the father is still alive. **If the father is dead, it is established for the grandfather just as it is established for the father,** because of the emergence of his legal authority (*wilāyah*) after the loss of the father. The *kufr* (Unbelief) of the father or his enslavement is the same as his death for it cuts off legal authority.

If a slave girl is owned jointly by two co-owners and she gives birth to a child with one of them claiming it as his own, paternity is established for him. The reason is that when paternity is established for his half claim it is established for the remaining due to necessity, as paternity cannot be divided for its cause cannot be divided, which is conception. The reason is that one child cannot be conceived from two different sperms. **She becomes his *umm walad*,** because producing a child is not divisible according to the two jurists. **According to Abū Ḥanīfah (God bless him) she becomes an *umm walad* to the extent of his share, thereafter he comes to acquire the share of his co-owner as that can be owned and he is liable for half her value.** The reason is that he comes to own the share of his co-owner insofar as he is completely responsible for the birth. He is liable to one-half of her *'uqr* (compensation for unlawful intercourse), because he had intercourse with a jointly owned slave woman. The ownership is established legally due to the birth and leads consequentially to the ownership of the share of his companion. This is distinguished from the case of the father who causes birth through the slave girl of his son,

[4]The slave is his brother through his father. If he was his brother through his mother, he would be emancipated. Al-'Aynī, vol. 6, 103.

because the ownership in that case is established upon the condition of birth, therefore, it is established prior to it, thus, he had intercourse with one in his ownership. **He is not liable for the value of her child,** because paternity was established by relying upon the time of conception, thus, the conception did not take place through the ownership of his co-owner.

If both claim ownership at once, paternity is established for both. This means that if she became pregnant within their ownership. Al-Shāfi'ī (God bless him) said that recourse is to be had to physiognomists. The reason is that the establishing of paternity for two persons together, is despite our knowledge that the creation of a child from two different sperms is not possible, therefore, we acted upon physical resemblance. The Prophet (God bless him and grant him peace), was happy with the statement of the physiognomist in the case of Usāmah (God be pleased with him).[5] We rely on the letter of 'Umar (God be pleased with him) written to Shurayḥ in this case: "It has become ambiguous then it is ambiguous for both, and if it is obvious, it is obvious for both. He is the child of both men: he will inherit from them and they will inherit from him, however, he will belong to the one who outlives the other."[6] A similar decision is reported from 'Alī (God bless him).[7] The reason is that both are equal in establishing their entitlement, therefore, they are equal in paternity. Even though paternity is not divisible, yet divisible rules are related to it, thus, whatever accepts divisibility is established as a right for both, and what does not accept divisibility is established for each one of them completely as if the other does not exist. The exception is where one of the co-owners is the father of the other co-owner or one of them is a Muslim and the other is a Dhimmī, due to the existence of a basis for preference, which is Islam, while in the case of the father it is his wealth on the basis of his right in the share of his son. The happiness of the Prophet (God bless him and grant him peace) in what is related was due to the reason that the unbelievers used to doubt the paternity of Usāma (God be pleased with him), and the statement of the physiognomist put an end to this dispute, therefore, he was happy about it.

[5]It has been recorded by the six Imāms in their sound compilations. Al-Zayla'ī, vol. 3, 290.

[6]It is recorded by 'Abd al-Razzāq. Al-Zayla'ī, vol. 3, 291.

[7]It is recorded by 'Abd al-Razzāq. Al-Zayla'ī, vol. 3, 291.

The slave woman will become an *umm walad* for both, due to the validity of the claim of both with respect to their share in the child, thus, their shares in her render her a joint *umm walad* following her child.

Both are liable for one-half of the *'uqr*, paid to each other from the claim of one upon the other. The child will inherit from both of them the inheritance of a full son, because each person has acknowledged his full right of inheritance, and it works as a proof against him. **They inherit from him the inheritance of a single father,** due to their equality with respect to paternity, as if both had furnished the same testimony.

If the master has intercourse with the female slave of his *mukātab* and she gives birth to a child with the master claiming it as his own, paternity will be established if the *mukātab* deems him truthful. It is related from Abū Yūsuf (God bless him) that he did not take into account the confirmation of the *mukātab* on the analogy of the father claiming the child of the slave girl of his son. The legal reasoning underlying the authentic narration, which is the distinction (between the two cases with respect to confirmation), is that the master does not possess the right to undertake transactions in the *mukātab's* earning and cannot transfer it whereas the father does possess the right to transfer it, therefore, confirmation by the son is of no account.

He said: **He is liable for the *'uqr* paid to her,** because ownership does not precede intercourse. The reason is that whatever right of ownership he possesses is sufficient for the validity of birth, as we will mention. **He is also liable for the value of her child.** The reason is that he is within the meaning of a child born of deception insofar as he relies upon the evidence that the child is his due to his doing, and he does not agree to its enslavement, thus, it will be free on payment of its value with paternity attributed to him. **The slave girl does not become his *umm walad*,** because he does not own her in reality as in the case of the child born of deception.

If the *mukātab* does not confirm his claim about paternity, it is not established. In accordance with our elaboration that his confirmation is essential. **If he comes to own her one day, his paternity will be established,** due to the existence of the cause that gives rise to it along with the extinction of the right of the *mukātab*, which is the obstacle. Allāh, the Exalted, knows best.

Al-Hidāyah

BOOK TEN

Aymān (Vows/Oaths)

Chapter 84

The Legal Status of Vows/Oaths

He said: **Oaths are of three kinds: *yamīn ghamūs*,[1] *yamīn mun'aqidah* and *yanīn laqhw*. *Ghamūs* is an oath based on a past event by which falsehood is intended. Through this oath, the one who takes it commits a sin.** This is based on the words of the Prophet (God bless him and grant him peace), "One who make false oath, will be thrust by Allāh into the fire."[2]

There is no expiation for such an oath, except repentance and the seeking of Allāh's forgiveness. Al-Shāfi'ī (God bless him) said that there is expiation in it, for expiation has been stipulated for the removal of sin and for violating the sanctity of the name of Allāh, the Exalted. Such violation has been established by the use of the name of Allāh for a falsehood. Thus, it resembles the *yamīn ma'qūdah* in form. We rely on the argument that it is a pure *kabīrah* (grave sin), while expiation is an act of worship that is rendered with fasting and for which forming and intention is stipulated, therefore, a grave sin is not to be linked to expiation. This is distinguished from the *ma'qūdah* for that is permitted, and though even there is an element of sin in it, the sin is subsequent to the oath and is linked to a new exercise of the will (for breaking the oath). The sin in the *qhamus* oath is directly associated with a grave sin, therefore, it prevents its linkage with expiation.

The *mun'aqidah* is an oath taken to undertake or not to undertake an act in the future. If he breaks such an oath he is liable for expiation. This is due to the words of the Exalted, "Allah will not call you to account

[1] *Yamīn ghamūs* in simple terms is swearing to cover up falsehood.

[2] It is *gharīb* in this version. The meaning, however, is recorded in other traditions reported by al-Ṭabarānī and others. Al-Zayla'ī, vol. 3, 292.

for what is void in your oaths, but He will call you to account for your deliberate oaths,"[3] and that is what we have mentioned.

The *yamīn laghw* is an oath taken about a past fact under the belief that it is the truth, but the truth is different from it. This is the oath about which we hope that Allāh will not hold accountable the person making it. Such a null oath is like a person saying, "By Allāh it was Zayd," and he believes that it was Zayd, but it was actually 'Amr. The legal basis of this are the words of the Exalted, "Allah will not call you to account for thoughtlessness in your oaths, but for the intention in your hearts; and He is Oft-Forgiving, Most Forbearing."[4] He (Muḥammad (God bless him)) has, however, associated it with hope due to the disagreement about its interpretation.

He said: **The persons making a vow intentionally, under coercion or out of forgetfulness are all equal,** so that expiation becomes obligatory (for its violation). This is based upon the words of the Prophet (God bless him and grant him peace), "Three things if intended seriously are taken seriously and if said in jest are still taken seriously: marriage, divorce and *yamīn*."[5] Al-Shāfi'ī (God bless him) opposes us in this.[6] We will elaborate the distinction under the topic of coercion, Allāh, the Exalted, willing.

If the person undertakes the act mentioned in the oath (thus violating it) under coercion or out of forgetfulness, it is the same (as if the violating act was intended). The reason is that a real act is not made non-existent due to coercion, and the bringing about of the (violating) act is a condition. Likewise if he brings about the (violating) act in a fit of fainting or insanity, because of the fulfilment of the condition (of violation) in reality. If the rationale behind the rule (of expiation) is the removal of blame, then the legal rule turns upon its evidence, which is its violation, and not on actual blame.[7] Allāh, the Exalted, knows what is correct.

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[3]Qur'ān 5 : 89

[4]Qur'ān 2 : 225

[5]The Author uses the word *yamīn* in the tradition, while other jurists use the word *'aṭāq* instead. All these are *gharīb*. The tradition recorded by Abū Dāwūd uses the word *raj'ah* (retraction). Al-Zayla'ī, vol. 3, 293.

[6]He relies on the tradition that says that the Pen (of liability) has been lifted in the case of forgetfulness, insanity and minority.

[7]For there is no blame for one under a fit of fainting or of insanity.

Chapter 85

Valid and Invalid Vows/Oaths

He said: **An oath is taken in the name of Allāh, or in another name from among the names of Allāh, the Exalted, like al-Raḥmān or al-Raḥīm, or by mentioning one of His attributes that are used for oaths in practice, like the Might of Allāh, His Majesty or His Greatness.** The reason is that vow by naming the attributes is known in practice, and the meaning of the oath reflects the power that is obtained, for he believes in the Glory of Allāh and His attributes, therefore, the mentioning of Allāh's name and His attributes is suitable for urging him to act or to prevent him from doing so.

Except that if he uses the words "By the knowledge of Allāh," then this will not amount to a vow, because these words are not used in practice. The reason is that he uses them and means thereby what is known. It is said: "O Lord, forgive us what is in Your knowledge of our sins," that is, what exists in Your knowledge.

If he says, "By the wrath of Allāh and His displeasure," then he has not made a vow. Likewise "By His mercy," because a vow with the use of these words is not known in practice. Further, by His mercy is sometimes meant its effect, like rain or heaven, while wrath and displeasure are intended to mean punishment.

If a person uses words meant for someone other than Allāh, like , "Prophet" or "ka'bah," he has not made a vow, due to the words of the Prophet (God bless him and grant him peace), "When one of you makes a vow, he should make it in the name of Allāh or abstain from making it." **Likewise if he makes a vow by naming the Qur'ān,** because this is not done in practice. The Author (God be pleased with him) said: This means that he says, "Wa-al-Nabī, wa-al-Qur'ān." If, however, he says, "I am free

of both (the Prophet and the Qur'ān)," then this will amount to a vow, because being free of both amounts to *kufr* (unbelief).

He said: **The oath employs the character used for the *qasam* (oath). These characters are the "*waw*," as in his statement "*wallāhi*," the character "*bā'*," as in "*billāhi*" and the "*tā'*," as in "*tāllāhi*."** The reason is that all these are already known to be used for oaths, and are mentioned in the Qur'ān.

The character is sometimes concealed through the personal pronoun in which case he is making a valid oath, like his statement, "Allāh, I will not do such and such," because omitting the character is among the usage of the Arabs by way of eloquence. It is also said that while omitting the character, the noun is in the accusative, and it is also said that it is in the genitive with the lowered vowel point indicating the omission of the character. Likewise if he says, "*lillāhi*" (for Allāh), according to the authentic view, because it has taken the place of the character "*bā'*." Allāh, the Exalted has said: "*Āmantum lahu* (literally, "Ye believed for Him"), that is, "Ye believed in Him."[1]

Abū Ḥanīfah (God bless him) said: If he says, "*wa-ḥaqqillāhi*," then he has not made a valid oath. It is also the view of Muḥammad (God bless him), and one of the views of Abū Yūsuf (God bless him), but in another narration from him it amounts to a valid oath, because *Ḥaqq* is one of the attributes of Allāh, the Exalted, and it is as if he said, "Wallāhi al-ḥaqqi," and an oath by this word is known in practice. In the opinion of the two jurists, he intends thereby obedience to Allāh, and obedience is one of His rights, therefore, it is not a vow in the name of Allāh. The Mashā'ikh (jurists) have said that if he says, "wa-al-ḥaqqi," it amounts to a valid oath, but if he says, "ḥaqqan," it is not a vow. The reason is that *al-Ḥaqq* is one of the names of Allāh, while with the indeterminate he tries to affirm his statement of promise.

If he says, "I swear," "I swear by Allāh," "I vow," "I vow in the name of Allāh," "I bear witness," or "I bear witness by Allāh," then he has made an oath. The reason is that these words are used for making vows, and this form is for the present, but it is employed for the future through the accompanying evidences, therefore, he is deemed to make a vow in the present. Further, bearing witness is an oath. Allāh, the Exalted, has said, "When the Hypocrites come to thee, they say, 'We bear witness that

[1]Qur'ān 20 : 71

thou art indeed the Messenger of Allah.' "[2] Thereafter He said, "They have made their oaths a screen (for their misdeeds)."[3] A vow in the name of Allāh is well known and legal, and without His name it is prohibited and will be construed to mean this. It is for this reason that it is said that it does not need *niyyah* (intention), while it is also said that it is necessary due to the probability of it being a promise or an oath in the name of someone other than Allāh.

If he says in Farsi, "*Sawgand mīkhuram ba-khudā'ī*," it amounts to an oath. The reason is that it is for the present. If he says, "Sawgand khuram," then it is said that it does not amount to an oath. If he says in Fārsī, "Sawgand khurum ba-ṭalāq zanam (I swear by the divorce of my wife)," it does not amount to an oath, because it is not well known.

Likewise his statement *la-'amrullāhi wa-aymullāhi* (I swear by God), because *'amrullāh* implies that Allāh remains, while *aymullāh* means *aymunullāhi*, which is the plural of *yamīn*. It is also said that it means *wallāhi* (I swear by Allāh). The word *aym* is a link like the character *waw*, and an oath with both is well known. **So also if he says, "The covenant of Allāh and His compact."** The reason is that compact is an oath. Allāh, the Exalted, has said, "Fulfil the Covenant of Allah,"[4] The term *mīthāq* (compact) is an expression used to mean *'ahd* (covenant).

Likewise if he says I am obliged by a *nadhr* (vow of consecration) or *nadhrullāh*. This is based upon the words of the Prophet (God bless him and grant him peace), "One who makes a vow of consecration (*nadhr*) without naming the object, is liable for the expiation of an oath."[5]

If he says, "If I do such and such thing then I will be Jew or a Christian or an unbeliever," then it amounts to an oath. The reason is that when he deemed the condition a sign of unbelief, he believed that it was obligatory to prevent its occurrence. The statement by its creating an obligation of avoiding it without the condition makes it an oath, just as you would say in the prohibition of the permitted.[6] If he says this about an act that he committed in the past then it will amount to a *yamīn ghamūs*, and he will not fall into unbelief taking into account its operation in the

[2]Qur'ān 63 : 1

[3]Qur'ān 58 : 16.

[4]Qur'ān 16 : 91

[5]The tradition is recorded by Abū Dāwūd and Ibn Mājah. Al-Zayla'ī, vol. 3, 294.

[6]Like saying, "Each permitted thing is forbidden for me." This will be considered an oath. Al-'Aynī, vol. 6, 131.

future. It is said that it will amount to unbelief because of its immediate implication, and it is as if he said that he was a Jew. The correct view, however, is that he does not move over to unbelief in both cases if he knows that it is an oath. If he believes that he will move to unbelief through the oath, then he will become an unbeliever in both cases, because he consented to being an unbeliever insofar as he went ahead with the act.

If he says, "If I do such and such an act then upon me is the wrath of Allāh or His displeasure," then he has not made an oath. The reason is that it is a supplication for himself and is not related to conditions. Further, it is not well known. **Likewise if he says, "If I do such and such a thing, I am a fornicator or a thief or one who drinks wine or one who consumes *ribā*."** The reason is that the prohibition of these things admit of abrogation[7] and amendment, therefore, they are not in the meaning of the sacredness of the name of Allāh. Further, this form is not known in practice.

85.1 *Kaffārah* (Expiation)

Expiation for an oath is the emancipation of a slave, with the same types deserving reward as they do in the case of *ẓihār*, and if he likes he can clothe ten needy persons with one dress for each person or what is more than that. The shortest dress is one in which prayer can be offered. If he likes he can feed ten needy persons like the feeding in the expiation of *ẓihār*. The legal basis for this are the words of the Exalted, "The expiation for it is the feeding of ten indigent persons on a scale of the average for the food of your families; or clothe them; or give a slave his freedom. If that is beyond your means, fast for three days."[8] The word "*aw* (or)" in the verse is for choice, thus, the obligation is for one of the three things mentioned.

He said: **If he is not able to undertake any one of the three things, he should fast for three consecutive days.** Al-Shāfi'ī (God bless him) said that he is to be given a choice (in the days) due to the unqualified meaning of the text. We rely on the recitation of Ibn Mas'ūd (God be pleased with him), "The fasting of three consecutive days," and this is like a *mashhūr* tradition. Thereafter, the elaboration of the shortest length of the clothing

[7] *Zinā* and *sariqah* do not admit of abrogation. Al-'Aynī, vol. 6, 133.

[8] Qur'ān 5 : 89.

mentioned in the Qur'ān is narrated from Muḥammad (God bless him). It is narrated from Abū Ḥanīfah and Abū Yūsuf (God bless them) that it is the minimum that will cover most of his body, so that it is not permitted to give just trousers (*sarāwīl*), and that is correct, because one who wears just trousers is called naked in practice. If the dress given by him does not meet the requirement of the minimum it will be deemed rewarded if its value is equal to the food that is deemed sufficient.[9]

If his expiation precedes the violation of the oath, it is not rewarded. Al-Shāfi'ī (God bless him) said that he is to be rewarded for expiation on the basis of wealth for he paid it subsequent to the arising of the cause, which is the oath, therefore, it resembles expiation after causing an injury. We argue that expiation is for covering up the offence, but there is no offence here. Further, the *yamīn* is not the cause for it is an obstacle and does not lead to the rule, as distinguished from injury for that leads to the rule (by causing death).

Thereafter what is paid to the needy person is not taken back from him, because of its incidence as charity.

He said: **A person who makes a vow to commit a sin (offence) like saying that he will not pray, or will not speak with his father, or that he will kill so and so, it is necessary that he considers himself to have violated such an oath and is to offer expiation.** This is based upon the words of the Prophet (God bless him and grant him peace), "If a person vows to do something and then deems another act better than it, he should commit the better act and thereafter offer expiation for his vow."[10] The reason is that in what we have there is a loss of piety (due to not abiding by his vow) and moving towards a compulsory act, which is expiation, and there is no compelling factor, as opposed to this, for committing the offence.

If an unbeliever makes a vow and then violates his vow in a state of unbelief or after converting to Islām, there is no violation for him. The reason is that he does not possess the legal capacity for a *yamīn* for it is made or the Glory of Allāh, and with his unbelief he cannot uphold this. Further, he is not eligible for expiation for that is an act of worship.

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[9]That is if it reaches the value of one-half *ṣā'* of wheat even if it is not a dress of the minimum required length.

[10]It is recorded by Muslim from Abū Hurayrah (God be pleased with him). Al-Zayla'ī, vol. 3, 296.

If a person prohibits for himself something that he possesses, it does not become prohibited, but he is under an obligation, if he makes it lawful for himself, to offer expiation. Al-Shāfi'ī (God bless him) said that there is no expiation for him, because prohibiting the permitted is like inverting what is lawful, therefore, a lawful act, which is the *yamīn*, cannot be the subject-matter of a transaction that is unlawful. We argue that his statement indicates the proof of prohibition and its operation is possible for establishing it through matters external to it leading to the establishing of the consequences of the vow, thus, resulting in its prohibition. Thereafter if he commits an act, partially or completely, from among those that he prohibited, he violates the oath and expiation becomes obligatory. This is the meaning of making it lawful mentioned, because prohibition when established affects each of its constituent.

If a person says, "Each lawful thing is prohibited for me," then it applies to eating and drinking, unless he has formed an intention for other things. *Qiyās* dictates that he violates the oath the moment he completes his pronouncement, because he has committed a permissible act, which is breathing and so on. This is the opinion of Zufar (God bless him). The reasoning underlying *istiḥsān* is that the purpose is piety and it is not attained by applying it to the most general meaning. When such application is rejected, the statement applies to eating and drinking in the light of what is customary, as the statement is employed in practice for what is consumed. The statement does not include his wife, except on the basis of intention, due to the non-consideration of the most general meaning. If he intends it, it amounts to *īlā'*, and the vow will not move away from eating and drinking. All this is the response on the basis of the authentic narration (*ẓāhir al-riwāyah*). Our Mashā'ikh (jurists), God bless them, said that a divorce occurs through it without an intention due to the preponderance of its usage for this, and the *fatwā* issued on this view. Likewise, if he says (in Fārsī, "*Ḥalāl* is *ḥarām* for me," and this on the basis of custom. They differed about the statement (in Fārsī), "Anything I take in my right hand is prohibited for me," as to whether intention is to be stipulated for this. The more authentic view is that without intention it is to be deemed divorce on the basis of what is customary.

If a person makes a vow of consecration (*nadhr*) in absolute terms, then he is under an obligation to fulfil it. This is based on the words of the

Prophet (God bless him and grant him peace), "If a person makes a vow of consecration and names the object, he should fulfil what he names."[11]

If he links the vow of consecration to a condition, and the condition is found, then he must fulfil the vow itself,[12] due to the absolute terms of the tradition, because what is suspended on a condition is one that requires immediate performance in his view. **It is narrated from Abū Ḥanīfah (God bless him) that he withdrew that opinion and said: If he says, "If I do such and such thing then I am under an obligation to perform *ḥajj* or to fast for a year or give in charity what I own," it is to be deemed compensated through expiation for the vow. This is also the view of Muḥammad (God bless him).** He also moves out of the undertaking by fulfilling what he mentioned in the vow. This is the case when it is a condition that he does not desire in itself[13] for it contains the meaning of prevention in it in the sense of *yamīn*. It is on the face of it a vow of consecration, therefore, he is given a choice between choosing any of the two options that he likes. This is distinguished from the case where it is a condition that he desires for itself, like saying, "If Allāh gives health to my sick?," because in this there is an absence of the meaning of a *yamīn*, that is, prevention. This detail is correct.

He said: **If a person makes a vow and says, "If Allāh wills," linking it with his vow, then there is no violation of the vow.** This is based on the words of the Prophet (God bless him and grant him peace), "If a person makes a vow and says, "If Allāh wills," then he is absolved of his vow."[14] It must, however, be linked with the vow, because after having made the complete statement it is followed by retraction and there is no retraction in a vow. Allāh, the Exalted, knows best.

[11]It is *gharīb*, however, there are other traditions about the fulfilment of *nadhr* that have been recorded by al-Bukhārī. Al-Zayla'ī, vol. 3, 300.

[12]He cannot opt for expiation due to the absolute meaning of the above tradition. Al-'Aynī, vol. 6, 143.

[13]Like drinking *khamr*.

[14]It is *gharīb* in these words. There are, however, other traditions recorded by the Authors of the four *Sunan* that convey the same meaning. Al-Zayla'ī, vol. 3, 301.

Chapter 86

Vows About Entering Houses and Residing There

If a person makes a vow that he will not enter a room, but then enters the Ka'bah, or a mosque, or a church or a synagogue, then he has not violated his oath. The reason is that rooms are those that are built for spending the night there, and these structures are not built for this purpose.

Likewise if he is on the entrance of the room or under the awning over the main door, due to what we have mentioned. The awning is usually over the side street. It is said that if the entrance is such that he will be inside the room if the door is closed and it has a roof over it, then he has violated his vow, because this is a place where one usually sleeps.

If he enters the ledge, he has violated his oath. The reason is that it is built for sleeping in sometimes, therefore, it becomes like the winter and summer enclosures. It is said that this is the case when the ledge has enclosing walls for their ledges were made like this. It is also said that the response is meant for the unqualified meaning, and this is correct.

If a person makes a vow that he will not enter a house, and he enters a house that is in ruins, he does not violate his oath. If, however, he makes a vow that he will not enter a particular house and he enters is after it is razed to the ground and has become an open space, he violates his oath. The reason is that the term *dār* is used for the courtyard of the house both by Arabs and non-Arabs. It is said: *dār 'āmirah* and *dār ghāmirah* (for built and unbuilt houses). The poetry of the Arabs supports this meaning (of courtyard). The structure is an additional description for it (in the vow), except that it is redundant where the structure is present, but taken into account where it is absent.

If he makes a vow that he will not enter this particular *dār*, and it turns into ruins and then another is built there, he violates his vow when he enters it, on the basis of what we have said, because the name lingers on after its collapse.

If the lot is turned into a mosque or a bath or a garden or a room, and he enters it, he does not violate his vow. The reason is that it is no longer a *dār* due to the imposition of another name on it. Likewise if he enters it after the razing of the bath or other structure, because it does not revert to the name of *dār*.

If he makes a vow that he will not enter this particular room, and he does so when it is demolished and the lot has become an open space, he does not violate his vow, because of the removal of the name room from it, as it cannot be used for spending the night. If the walls are standing and the roof is missing he will violate his oath as nights can be spent there, while the roof is an additional attribute for it. **Likewise if another room is built there, he does not violate his oath upon entry.** The reason is that the name did not survive after it was demolished.

If a person makes a vow that he will not enter this particular *dār* and he stays on its roof, he violates his vow. The reason is that the roof is part of the *dār*. Do you not see that a person in *i'tikāf* does not invalidate it if he goes to the roof of the mosque, therefore, it is said that he does not violate his vow, and this is the view preferred by the *faqīh* Abū al-Layth.

He said: **Likewise if he comes into the entrance of the house.** This should be understood in terms of the detail given earlier.

If he stands in the window of the house so that if it is closed he will not be inside, he does not violate his vow. The reason is that the door is for enclosing the house, therefore, what is within it is not outside the house.

If a person makes a vow that he will not enter this particular house, and he is inside the house, he will not violate his vow by getting up, but he will by moving out and reentering, on the basis of *istiḥsān*. *Qiyās* dictates that he has violated his vow, because staying on is assigned the rule of commencement. The reasoning underlying *istiḥsān* is that entry does not have the meaning of staying on, because it is separate entry from outside into the house.

If he makes a vow that he will never wear this particular dress when he is wearing it, and he takes it off at once, he does not violate his vow. Likewise if he makes a vow that he will not ride this particular animal,

when he is riding it, and then dismounts at once, he does not violate his vow. Similarly, if he makes a vow that he will not reside in this particular house when he is living in it, and begins to vacate it immediately. Zufar (God bless him) said that he violates his vow due to the existence of the condition even if it is partial. We argue that a *yamīn* is made for its completion, therefore, the period of its realisation is exempted.

If he continues to wear the dress for some time, he violates his vow. The reason is that all these acts are presumed to exist till a similar act is undertaken. Do you not see that a duration is fixed for them. It is said, "I rode for a day," and "I wore it for a day," as distinguished from entry for it is not said, "I continued to enter for a year," in order to indicate duration and limitation. If he resolves a pure initial wearing, he is to be deemed truthful, because his statement probably implies this.

He said: **If a person makes a vow that he will not reside in this particular house, and he then moves out without returning, while his assets and his family are still inside, he has violated his vow.** The reason is that he will deemed to be residing in it with his assets and his family still in it, according to custom, thus, a person operating in the market will say, "I live in such and such street." The house and courtyard have the same status as a house. If the vow pertains to a city, completion does not depend upon moving assets and family according to what is narrated from Abū Yūsuf (God bless him), because according to custom he is not counted a resident of a city from which he has moved, as distinguished from the first case (of the house). A village has the same status as the city (for this purpose) according to the sound response. Thereafter, Abū Ḥanīfah (God bless him) said that it is necessary that he move all his assets, because their remaining behind leads to violation of the vow. The reason is that residence is established by all these things, and such residence remains as long as any part of these remains behind. Abū Yūsuf (God bless him) said that the major portion is taken into account, because moving everything may sometimes be difficult. Muḥammad (God bless him) said that things that constitute his *kadkhudhā'ī* (Fārsi: family and servants) are taken into account, because what is beyond this is not part of his residence. The jurists said that this is the best view and most compassionate for the people. It is necessary that he move to another house without delay so that the vow is completed. If he moves out to the street or to the mosque, they say it is not completed. The *dalīl* (evidence) in *al-Ziyādāt* is that a person who moves from a city with his family is deemed to be the resident of that

land for purposes of prayer until he takes up residence in another land. Likewise here. Allāh knows best.

Chapter 87

Entering and Leaving Buildings, and Other Matters

He said: **If a person makes a vow that he will not leave the mosque, but he then orders someone who carries him out, then he has violated his vow.** The reason is that the act of the person ordered is attributed to the one giving the order. It is as if he mounted an animal and moved out. **If he is moved out under duress he has not violated his vow,** because the act is not transferred to him due to the absence of an order. **If he is carried out with his consent, but not his order, he does not violate his oath,** according to the authentic narration, because transferring of the act to him is through a command and not mere consent.

If he makes a vow that he will not leave his house except for a funeral, and then he goes out for a funeral, but thereafter he attends to another need (while he is out), he does not violate his vow by doing so. The reason is that the present going out is exempted and going to a place after that does not amount to going out.

If he makes a vow that he will not go out to Makkah after which he goes out intending to go there, but turns back, he has violated his vow, as he has gone out with the intention of going to Makkah, which is the condition, because exit means moving from within and going out.

If he makes a vow that he will not visit Makkah, he will not violate his vow unless he enters Makkah. The reason is that this is an expression for reaching. Allāh, the Exalted, has said, "So come, both of you, to Pharaoh, and say:"[1] If he makes a vow that he will not go to it, then it is said that

[1]Qur'ān 26 : 16

this is in the meaning of visiting, while it is said that it is like going out, which is correct as it is an expression for leaving.

If he makes a vow that he will certainly visit Baṣrah, but he does not do so till he dies, then he has violated his vow in the last moment of his life for it was possible to fulfil it prior to this.

If he says to another, "I will certainly visit you tomorrow if I am able to," then this is to be construed to mean ability with respect to health and not normal ability. It has been elaborated in *al-Jāmi' al-Ṣaghīr*, where he (Muḥammad) said: If he is not unwell, or the *sulṭān* has not prevented him, or some other event has not taken place that deprives him of the ability to visit him, he has violated his vow. If he intended the ability of *qaḍā'* (that is, if destined to come) then the matter is between him and Allāh, the Exalted. This is so as the reality of ability accompanies the act. The unqualified term includes the safety of limbs and the soundness of means that are so in practice. Thus, an unqualified use of the term will be interpreted in this meaning. Intending the first meaning is morally correct as well, for he intended the true meaning of the words used. Thereafter it is said that the statement is sound in the sense of *qaḍā'* as well, as we have elaborated, but it is also said that it is not sound as it goes against the apparent meaning.

If a person makes a vow that his wife will not go out without his permission, and he permits her once and she goes out, but then she goes out another time without his permission, he has violated his vow. In this situation it is necessary to take permission for going out each time. The reason is that the exempted exit is linked with permission and what is beyond that is covered by general prohibition. If he intended permission just once, he is to be deemed truthful morally, but not legally, because it probably includes this meaning, nevertheless it goes against the apparent meaning.

If he says (in the previous statement), "Unless I permit you," and then permits her once and she goes out, but thereafter goes out again without his permission, he has not violated his vow. The reason is that this phrase is for a limited meaning, therefore, the oath terminates with it (permission). It is as if he said, "Till such time that I permit you."

If the wife of a person intends to go out, but he says to her, "If you go out you are divorced," after which she sits down for a while, and then goes out, then he has not violated his vow. Likewise where a person decides to beat his slave, and another person says to him, "If you beat

him, then my slave is a freeman." He holds back for a while after which he beats him. This type of vow is known as a *yamīn fawr*. It was Abū Ḥanīfah (God bless him) alone who gave expression to it. The underlying reasoning is that in practice the intention of the person making the intervening statement is to prevent the beating and going out, and (statements of) oaths/vows are based on practice.

If a man says to another, "Sit down and have lunch with me," and the other says, "If I have lunch my slave is a freeman," after which he goes out and returns to have lunch, he has not violated his vow. The reason is that his statement was made in response to the invitation, therefore, it will be construed for that invitation and applied to the lunch to which he was invited. This is distinguished from the case where he says, "If I have lunch today," as in this he has gone beyond the response, therefore, it will be considered as an independent statement.

If a person vows not to ride an animal of such and such person, but then rides an animal belonging to the authorised slave (of such person), whether or not this man is indebted, he has not broken his vow, according to Abū Ḥanīfah (God bless him). He does not violate his vow when the debt exceeds assets even when he included the animal owned by his slave in his intention as this person does not have any ownership in the slave. If, however, the debt does not exceed the assets or he does not have any debt, then he does not break his vow as long he does not include the slave's animal in his intention as his ownership in the slave subsists, however, it is customary to attribute ownership to the slave, therefore, it is done legally as well. The Prophet (God bless him and grant him peace) said, "If a person buys a slave and he has wealth, then it belongs to the buyer."[2] Consequently, attributing ownership to the master becomes doubtful, therefore, it is necessary to stipulate intention. Abū Yūsuf (God bless him) said that in all these situations he breaks his vow if he had such intention due to the ambiguity in attributing ownership. Muḥammad (God bless him) said that he breaks his vow even if he did not have such intention taking into account the reality of the ownership. The reason is that a debt does not eliminate ownership in the option of the two jurists.

[2]It is recorded by all the six sound compilations. Al-Zayla'ī, vol. 3, 304.

Chapter 88

Vows About Eating and Drinking

He said: **If a person makes a vow not to eat of a particular date palm, then his statement applies to its fruit.** The reason is that he associated his vow with something that is not eaten, therefore, it is construed to apply to what grows out of it, that is, its fruit, because the tree is the cause for it. Accordingly, it is the figurative meaning that is suitably used for it, however, the condition is that the fruit is not altered into something new so that he does not break his vow by using mead, vinegar and what is cooked.

If he makes a vow that he will not eat these unripe dates, but he eats them when they ripen, he will not be breaking his vow. Likewise if he says that he will not eat from these ripe dates or drink this milk and the dates turn into dry dates, the milk into thick paste, he will not violate his vow. The reason is that the qualities of being unripe and ripe are the basis of the vow, likewise its existence as milk, therefore, it will be restricted to them. The reason is that milk is consumable, therefore, the vow will not be interpreted to apply to what is extracted from it. This is distinguished from the case where he vows that he will not speak to this minor or this young man, but he does speak to him after he grows old (he will break his vow), because cutting off relations with a Muslim by ceasing to speak to him is prohibited according to the *sharī'ah*, therefore, the cause will not be deemed a cause according to the *sharī'ah*.

If he vows not to eat the meat of this very young lamb, but he eats of it when it becomes a ram, he will be breaking his vow, because the attribute of being small is not the basis of the vow. The reason is that the prohibition of what is prohibited is greater than the prohibition of ram meat.

He said: **If a person vows not to eat unripe dates and eats ripe dates he has not broken his vow,** because they are not unripe.

If a person vows not to eat unripe or ripe dates, or he vows to eat neither unripe dates nor ripe dates, but then eats partially ripe (two coloured) dates, he breaks his vow according to Abū Ḥanīfah (God bless him). The two jurists said that he does not break his vow by eating ripe dates, that is, by saying ripe and eating partially ripe dates and by saying unripe and eating partially unripe dates. The reason is that partially unripe dates are called ripe and partially ripe dates are called unripe dates. It is as if the vow was about buying such dates. He (Abū Ḥanīfah (God bless him)) argues that partially unripe dates are those that have a small unripe part at the tail, while partially ripe dates are those that are the opposite, thus, one who eats them has eaten unripe and ripe dates, and each of these is intended for consumption, as distinguished from buying as that applies generally and the partially follows the fully ripe.

If he makes a vow not to buy ripe dates, but he buys a bunch of dates in which there are ripe dates, he has not broken his vow. The reason is that purchase applies to the whole and the predominant prevails. **If the vow pertained to eating, he would have broken his oath,** because eating applies gradually to small parts, therefore, the dates in their entirety are intended. It becomes as if he vowed not to buy barley or not to consume it, and he buys wheat in which their are grains of barley and he consumes it, he breaks the vow with respect to eating but not buying, on the basis of what we said.

He said: **If a person makes a vow that he will not eat meat, but then eats fish meat, he does not break his vow.** Analogy dictates that he does break it, because it has been called meat in the Qur'ān. The basis for *istiḥsān* is that this use of the term is figurative as *laḥm* is produced from blood and there is no blood in them due to their existence in water. **If he consumes swine flesh or human flesh, he breaks his vow,** because it is *laḥm* in reality except that it is forbidden, and an oath is constituted validly for avoiding something that is prohibited. **Likewise if he consumes liver or tripe.** The reason is that it is *laḥm* in reality and grows through blood. Further, it is used in the place of meat. It is said that he will not break his vow as in our custom it is not treated as meat.

He said: **If he makes a vow that he will not eat or buy fat, he will not break his vow except in the case of fat around the stomach (of the animal), according to Abū Ḥanīfah (God bless him). The two jurists said**

that he will break it due to the fat from the animal's back. It is fatty meat due to the existence of fat in it, which melts over fire. The Imām argues that it is meat in reality. Do you not see that it grows through blood and is used as meat for deriving strength from it. Consequently, he breaks his vow by eating it with respect to a vow about meat, but he does not violate his vow by selling it in a vow about selling meat. It is said that this is based upon the Arabic language, but in Farsi the word *peh* does not apply in any way to the fat in the back of the animal.

If he makes a vow that he will not buy, or not eat, meat or fat, but then he buys the fat tail of a sheep, or eats it, he does not break his vow, because it is a third type and is not used as a substitute for meat or fat.

If he makes a vow not to eat from a particular lot of wheat, he will not break his vow until he chews the wheat. If he eats bread made of this wheat, he will not break his vow, according to Abū Ḥanīfah (God bless him). The two jurists said that he will break his vow even if he eats bread made of the wheat, because it falls within its comprehended meaning in practice. According to Abū Ḥanīfah (God bless him) it has an independent reality in use for it is boiled and roasted and chewed, and this meaning governs the figurative customary meaning on the basis of the rule preferred by him. If he chews it, he breaks his vow according to the two jurists, and this is correct due to the generality of the figurative meaning. It is just as if he says that he will not put a foot in the house of so and so. It is this (general meaning) towards which the opinion points when it says that he will break his vow if he eats its bread.

If he makes a vow that he will not eat of this flour, but he eats of its bread, he breaks his vow, because the flour itself cannot be eaten, therefore, it applies to what is derived from it. **If he swallows the flour as it is, he will not break his oath,** which is correct, as it gives way to the figurative meaning.

If he makes a vow not to eat bread, then his vow will apply to what the residents of the city, according to their custom, consider eating bread. This is bread made of wheat and barely as that is what is customary in most lands. **If he eats bread of *qaṭā'if* (triangular doughnuts made in butter), he does not break his vow,** as they are included in the meaning of bread in its broad meaning, unless he included them in his intention, for his statement probably implies this. **Likewise if he eats rice bread in Iraq, he will not violate his vow,** because it is not part of their practice,

but if he was in Ṭabirsistan or another land where it is consumed as bread, he will violate it.

If he makes a vow that he will not eat grilled food it will apply to meat and not to eggplant or carrots. The reason is that in its unqualified meaning it applies to grilled meat, unless he includes in his intention all things that can be roasted like eggs and other things so that the true meaning of his statement is given effect.

If he vows not to eat cooked food, then this applies to meat that is cooked. This is based upon *istiḥsān* keeping customary practice into account. The reason is that giving it a very general meaning is difficult, therefore, it will be applied to what is specific and well known, which is food cooked in water. The exception is where he includes other things in his intention for it amounts to going to extremes. If he consumes the curry/gravy of this meat even then he will be violating his vow insofar as it contains constituents of meat, it is called cooked food.

If a person makes a vow that he will not eat heads (skulls), his vow will be applied to those that are buried in clay ovens and sold in the market. These are called *yuknas*. **In *al-Jāmiʿ al-Ṣaghīr* the statement is that if a person vows that he will not eat a head (skull), it will be applied to heads of cows and goats, according to Abū Ḥanīfah (God bless him). Abū Yūsuf and Muḥammad (God bless them) said that it applies only to sheep.** This is a difference of periods and times, and the customary practice in his times was for the two types, while in their period it applied to sheep alone. In our times, the *fatwā* is to be issued in accordance with practice, as is mentioned in *al-Mukhtaṣar*.

He said: **If a person makes a vow that he will not eat *fākiḥah* (fruit), but he eats grapes or pomegranates or moist dates or cucumbers, he does not violate his vow. If he eats apples or melon or apricots, he does violate it. This is the view according to Abū Ḥanīfah (God bless him). Abū Yūsuf and Muḥammad (God bless them) said that he does violate it by also eating grapes, moist dates and pomegranates.** The basis is that the term *fākiḥah* is applied to what is enjoyed before a meal and after it, that is, it is consumed in excess of the normal meal by way of appetisers. In this dry and fresh things are equal after having enjoyed them in the usual manner, thus, by having dried melon, he does not violate his vow. This meaning is present in an apple and its species, therefore, he violates his vow by eating them. The meaning is not found in a watermelon and cucumber, as these are more like vegetables with respect to

sale and consumption, thus, he does not break his vow with them. In the case of grapes, moist dates and pomegranates, the two jurists say that the meaning of additional enjoyment is present in them as these are the most sought after fruits and enjoyed more than other fruits. Abū Ḥanīfah (God bless him) says that these are things that provide nutrition and are used as medicines. It leads to deficiency in the meaning of enjoyment through their use in one's need for survival. Consequently, the dried fruits from among them are used as condiments or basic food.

He said: **If a person makes a vow that he will not eat *idām* (anything eaten with bread)[1] then each thing that alters the colour of bread is *idām*, but roasted meat is not *idām*, while salt is *idām*. This is the view according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that each thing usually eaten with bread is *idām*.** This is also a narration from Abū Yūsuf (God bless him). The reason (according to Muḥammad) is that the term *idām* is from *muwādamah*, which means compatibility. Each thing that is eaten with bread is compatible with it, like meat and eggs and the like. The two jurists argue that *idām* is something that is eaten as a secondary item, and the meaning of being secondary in a mixed form is found in reality in these, and when consumed independently the meaning is found in the legal sense. Complete compatibility depends upon absorption as well. Vinegar and other liquids are not eaten alone but are drunk, while salt is not eaten separately in practice as it dissolves, therefore, it is secondary. This is different from meat and other similar things for these are eaten separately. The exception is where he includes them in his intention insofar as this would be an extreme case. Grapes and melon are not *idām*, which is the correct view (out of different views).

If a person vows not to have *ghadā'* (breakfast/lunch), then *ghadā'* is between the morning prayer up to *ẓuhr* prayers, while *'ashā'* (dinner/supper) is between the *ẓuhr* prayer up to midnight. The reason is that the meal after the declining of the sun is *'ashā'*. It is for this reason that the *ẓuhr* prayer is referred to in a tradition as one of the two prayers of *'ishā'*. ***Suḥūr* is between midnight and the rising of the sun.** As it is derived from the word *saḥr* and is applied to what is close to it. Thereafter *ghadā'* and *'ashā'* are meals that are intended to satisfy appetite. The

[1]The word *idām* has a very wide meaning. It includes things like vinegar, oil, honey, butter, milk, salt and curry.

practice of the residents of each land is taken into account for them, but it is stipulated that the meal satisfy at least one-half of the appetite.

If a person says, "If I wear, eat or drink, then my slave is free," but then adds, "I meant some things and not others." He is not to be deemed truthful legally or otherwise. The reason is that intention is valid in association with the expression, when a dress or other things are not mentioned. A thing implied has no generality, therefore, an intention making it specific becomes redundant. **If he says, "If I wear a dress or eat food or drink a beverage (liquid)," he is not to be deemed truthful adjudication alone.** The reason is that it is an indefinite noun used for a condition, therefore, it becomes general and the restrictive intention operates on it, except that it goes against the apparent meaning, thus, it will not be deemed true for adjudication.

If he makes a vow that he will not drink from the Dijlah (Tigris) River, but he drinks its water in a utensil, he has not broken his vow, until he sips water from the river, according to Abū Ḥanīfah (God bless him). The two jurists said that if he drinks from it with the help of a utensil he has broken his vow as that is the commonly understood meaning. The Imām argues that the word *min* is used for divisibility and the true meaning here is in sipping and this is the usage. Accordingly, he breaks his vow on the basis of consensus, and transferring the meaning to its figurative sense is prevented even if it is well known.

If he says that he will not drink of the water of the Tigris, but then drinks from its water with the help of a utensil, he breaks his vow. The reason is that even after scooping up the water it remains attributed to the river, and that is the condition. It is as if he has drunk from a canal that has been taken out from the river.

If a person says, "If I do not drink today the water that is in this jar, then my wife is divorced," but there is no water in the jar, then he does not violate the vow. If there is water in the jar, but is spilt prior to the arrival of the night, he does not violate his vow. This is the view according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf (God bless him) says that he breaks his vow in both cases, that is, after the day is over. On the same disagreement is analysed the case where the vow is sworn in the name of Allāh, the Exalted. The basis is that a condition of the vow becoming effective and its continuance is the concept of completion in the opinion of the two jurists, with Abū Yūsuf (God bless

him) disagreeing. The reason is that a *yamīn* is formulated for completion, therefore, such completion must be found in order to give effect to it. He (Abū Yūsuf) argues that it is possible to say that it is effective leading to completion in a manner that affects the substitutory duty, which is expiation.[2] We would say that it is necessary that the original duty be conceivable so that it can operate on the substitutory duty. It is for this reason that the *yamīn ghamūs* does not become effective for purposes of expiation.

If the vow was absolute, then in the first situation, he does not break it in the opinion of the two jurists, but according to Abū Yūsuf (God bless him) he violates it immediately. In the second case he breaks his vow in the opinion of all three jurists. Abū Yūsuf (God bless him) makes a distinction between the absolute and one limited by time. The reasoning underlying the distinction is that limitation of time is to provide space, thus, the act does not become obligatory except in the last segment of the time. Accordingly, he does not break the vow prior to this. In the case of the absolute vow it is necessary to fulfil it as soon as he is free of the pronouncement. In this case he is unable to do so, therefore, he breaks the vow at once. The two jurists also distinguish between the cases and the reasoning for the distinction is that in the absolute vow he is required to fulfil it as soon as he ends the statement, but as the fulfilment is lost due to the loss of the object of the vow, he breaks his vow as if the person making the vow dies while the water remains. As for the vow limited by time, fulfilment is obligatory in the last segment of the time and at this time the object of completion does not remain due to the absence of its conception, therefore, fulfilment is no longer obligatory in it, and the vow is annulled. It was as if he made the vow initially in this state.

He said: **if a person makes a vow that he will rise up into the sky or to convert this stone into gold, his vow has become effective and he breaks it immediately thereafter.** Zufar (God bless him) said that it does not become effective for it pertains to what is usually impossible, therefore, it is the same as what is impossible in reality. Thus, it does not become effective. We argue that fulfilment is possible in reality, because rising into the sky is possible in reality. Do you not see that the angels rise up into the sky, likewise a stone is turned into gold when converted by Allāh, the Exalted. If it can be conceived it becomes effective for purposes of the

[2]Because it pertains to an act in the future.

substitutory duty. Thereafter, he breaks it through the ruling of inability that is established in practice, like the person making the vow dying, for he breaks his vow despite the possibility of life returning. This is different from the issue of the jar (stated above), because the drinking of water at the time of making the vow, when there is no water in it, cannot be conceived and thus cannot become effective.

Chapter 89

Vows About Speaking

He said: **If a person makes a vow that he will not speak with so and so, then he speaks to him in a manner that the person can hear him though he is asleep, he has broken his vow.** The reason is that he spoke to him and his voice reached him, but he did not understand due to sleep. It is as if he called out to him so that he could hear him, but he did not understand due to inattention. In some versions of *al-Mabsūṭ* the condition is stipulated that he wake him up. The majority of our Mashā'ikh (jurists) uphold this. The reason is that if he does not draw his attention it will be as if he called out to him from a distance and he is in a situation where he cannot hear him.

If he makes a vow that he will not speak to him except with his permission, and he permits him, but he is not aware of his permission till he speaks with him, he has broken his vow. The reason is that the term *idhn* is derived from *adhān*, which is a notification or it is derived "from falling into the ears," and all this is not realised without hearing. Abū Yūsuf (God bless him) said that he has not broken his vow, because permission is release, and it is complete with permission like consent. We say that consent is an inner act, but permission is different from this as has preceded.

He said: **If he makes a vow that he will not speak with him for a month, then the time begins from the time of the vow.** The reason is that if he does not mention the month, the vow will become perpetual. The mentioning of the month is for excluding what is beyond the month. What remains following his vow is within it taking into account the state he is in (possible anger). This is distinguished from the situation where he says, "By Allāh, I will fast for a month." The reason is that if he does

not mention the month, the vow will not become perpetual. Mentioning it will be for determining the fasts through it. As it is indefinite, the determination is left to him.

If a person makes a vow that he will not speak, but then he recites the Qur'ān in his prayer, he does not break his vow, however, by reciting it outside the prayer he will break his vow. The same rule applies to *tasbīḥ*, *tahlīl* and *takbīr*. Analogy dictates that he breaks the vow in both cases, which is also the view of al-Shāfi'ī (God bless him), because recitation is speech in reality. We argue that in prayer it is not treated as speech either in customary understanding or according to the *shar'* (law). The Prophet (God bless him and grant him peace) said, "For this prayer of ours, nothing that pertains to the speech of humans is suitable."[1] It is also said that according to our custom he does not break the vow even while reciting outside prayer for in that case he is referred to as a reciter and one glorifying the greatness of Allāh.

If he says, "The day I speak to so and so, my wife stands divorced," then the day will mean day and night. The reason is that in the term "day" when it is associated with an act that does not extend over time, the intention is that it is unqualified. Allāh, the Exalted, has said, "If any do turn his back to them on such a day,"[2] The speech is not extended either. **If he had formed an intention that it pertains to the day alone, then he will be deemed truthful for adjudication.** The reason is that the statement is used to mean this as well. It is narrated from Abū Yūsuf (God bless him) that he is not to be deemed truthful as it goes against the well known meaning. **If he says, "The night I speak to him, ..." then it is construed to mean night specifically.** The reason is that it is the true meaning for the darkness of the night just as brightness is for the day specifically. The word night is not used in the absolute sense so as to be independent of time.

If a person says, "If I speak with so and so, my wife is divorced, unless so and so comes or until so and so comes, or unless so and so gives permission or until so and so gives permission," following which he speaks

[1]The tradition has preceded in the topic of factors annulling prayer. Al-Zayla'ī, vol. 3, 304. The words there were: "In this prayer of ours no part of human speech is valid for it is glorification, the proclamation of God's greatness and the recitation of the Qur'ān." It is recorded by Muslim in his *Ṣaḥīḥ*, and other versions by al-Bukhārī and al-Dār'quṭnī. Al-Zayla'ī, vol. 2, 66.

[2]Qur'ān 8 : 16

with him prior to the person's arrival and permission, then he breaks his vow. If he speaks with him after his arrival and permission, he does not break his vow, because that is the limit, and the oath continues prior to the limit and ends after it. Thus, he does not violate the vow after the termination of the *yamīn*. **If the person named (so and so) dies, the vow lapses.** Abū Yūsuf (God bless him) disagrees with this. The reason is that the prohibited thing is speech, which ends with permission and arrival, and after death such termination cannot be conceived to exist, therefore, the *yamīn* lapses. According to his view such conception is not a condition, therefore, upon the cessation of the limit the *yamīn* becomes perpetual.

If a person makes a vow that he will not speak to some other person's slave, but he does not identify a specific slave in his intention. He may also say he will not speak to some other person's wife, or friend. Thereafter such other person sells his slave, or irrevocably divorces his wife or develops enmity with his friend, and he speaks to one of them, he has not broken his vow. The reason is that his vow has been made with respect to an act that operates on a subject-matter that is attributed to another person, either to his ownership, or to his relations, and such an act is not found, therefore, he does not break his vow. The Author (God be pleased with him) said: There is agreement when the act is attributed to his ownership, but where it is attributed to his relations then according to Muḥammad (God bless him) he breaks his vow, that is, in the case of the wife and friend. He says in *al-Ziyādāt* that this association is merely for identification, because the purpose is not to speak to his wife or friend, therefore, the permanent association is not stipulated. Thus, the *ḥukm* will apply to their persons as if he had pointed towards them. The basis for what is mentioned here (in the *matn*) is the narration in *al-Jāmiʿ al-Ṣaghīr*, and the reasoning is that it is probable that the cessation of speech was intended for this man himself, therefore, he did not identify a specific slave. Consequently, he does not break his vow after the elimination of such association on the basis of doubt.

If his vow pertains to a specific slave, that is, if he says, "Such and such slave," or "Such and such wife," or "Such and such friend," he does not break his vow in the case of the slave, but he does break his vow in the case of the wife and the friend. This is the opinion of Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that he breaks his vow with respect to the slave as well. This is the view of Zufar

as well (God bless him). **If he makes a vow that he will not enter this house of so and so, and that person sells it, after which he enters it, then it is governed by the same disagreement.** The reasoning for the view of Muḥammad and Zufar (God bless them) is that attributing things to him here is for identification. Pointing out, however, is more explicit here for it cuts of participation of other persons,[3] as distinguished from attributing in an unspecified way. Accordingly, pointing out is taken into account and general association becomes superfluous, so the slave becomes like the friend and wife. The two jurists (Abū Ḥanīfah and Abū Yūsuf (God bless them)) argue that the reason for the vow is some meaning that is found in the person mentioned, because avoidance and rejection of these things (animals, houses and so on) is not undertaken for their own attributes. Likewise the slave due to his reduced status. In truth it is for a meaning found in one who owns them, therefore, the vow is qualified with the state of existence of ownership. This is distinguished from the case where the reference is to an association of relationship like the friend and wife for enmity may be for their own persons in which case the association is for identification and the underlying reason for the vow being a meaning in the man is less evident here due to the lack of ascertainment, as distinguished from what has preceded.

He said: **If a person makes a vow that he will not speak to the owner of this covering (shawl), but he sells it, after which he speaks to him, he has broken his vow.** The reason is that this association does not imply anything other than identification, because a human being does not develop an enmity due to a head-covering (shawl). It is as if he had pointed to the person himself.

If a person says, "I will not speak with this young man," but he speaks to him when he grows older, he breaks his vow. The reason is that the *ḥukm* is linked to the person pointed to as his attributes at the present time are superfluous. Further, this quality is not the basis of the vow, according to the explanation that has preceded earlier.

89.1 On Duration

He said: **If a person makes a vow saying, "I will not speak with him for a time (*ḥīn*)," or "I will not speak with him for some time (*zamān*)," or "I**

[3]That is, the probability of some other slave, wife, friend or house.

will not speak with him for a time or some time," then it is construed to mean six months. The reason is that the word *ḥīn* is sometimes applied to a short period, and sometimes it means forty years. Allāh, the Exalted, has said, "Has there not been over Man a long period of Time (*ḥīn*),"[4] which could mean six months (gestation),[5] and Allāh, the Exalted, has said, "It brings forth its fruit at all times (*ḥīn*)."[6] This (six months) is the middle period, therefore, the meaning is directed towards it. The reason is that a very small period is not intended for prevention, because such prevention may exist under normal circumstances. A perpetual period is not usually intended, because that implies forever, and had he not mentioned it, it would have meant forever. Accordingly, the period we have mentioned is identified. Likewise the words *zamān* is used in the meaning of *ḥīn*. It is said, "I have not seen you for a *ḥīn* or for some time" in the same meaning. All this applies when he has not formed an intention. If he did intend something then the period is as he intended for he meant what he said in reality.

Likewise if he uses the word *dahr* (time), according to the two jurists. Abū Ḥanīfah (God bless him) said: *Dahr*, I do not know what that means. This disagreement lies in using it as an indefinite noun, which is correct. If it is made definite by the use of *alif* and *lām* (*al-*), then it means eternity according to the customary meaning. The two jurists maintain that the word *dahr* is used in the meaning of *ḥīn*. It is said, "I have not seen you since a *ḥīn* or *dahr*," to imply the same meaning. Abū Ḥanīfah (God bless him) suspended his judgement in determining a period for it, because languages are not understood on the basis of analogy. Further, usage does not last long enough due to its changing meaning.

If he makes a vow that he will not speak to him for days, then it will be construed to mean three days. The reason is that it is a plural used as an indefinite noun, therefore, it includes the minimum used for the plural and that is three. If he makes a vow that he will not speak to him for *al-ayyām*, then it is taken to mean ten days, according to Abū Ḥanīfah (God bless him). The two jurists said that it will be taken to mean the days of the week. If he makes a vow that he will not speak to him for months, then it is taken to mean ten months in his view, but in their

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[4]Qur'ān 14 : 25

[5]Some commentators have said it means forty years. Al-'Aynī, vol. 6, 204. But see Abū Ḥanīfah's view below.

[6]Qur'ān 14 : 25

opinion it is twelve months, because the character *lām* is meant for what is previously known, and that is what we mentioned for the issue turns on it. According to him it is a definite plural and will be applied to the maximum that is included in the plural, and that is ten. **The reply is the same in his view for the plural "years."** According to the two jurists it will apply to his entire life, because there is no previously familiar period other than this.

If a person says to his slave, "If you serve me for a large number of days, then you are free," then "large number of days," according to Abū Ḥanīfah (God bless him) are ten days. The reason is that this is the maximum implied by the word "days (*al-ayyām*)." The two jurists say that it means seven days, because what exceeds this is repetition. It is said that if the vow is in Fārsi, it is taken to mean seven days, because it is mentioned with a singular and not a plural. Allāh knows what is correct.

Chapter 90

Vows About Emancipation and Divorce

If a person says to his wife, "If you give birth to a child, you are divorced," and she does give birth to a dead child, then she is divorced. Likewise if he says to his slave woman, "If you give birth to a child, you are free." The reason is that what exists is a child born in fact, and is called by this name in common usage. Further, it is considered a child in the law (*shar'*) insofar as *'iddah* is terminated by its birth, the bleeding following birth is called *nifās*, and the mother (if she is a slave) is called an *umm walad*. Thus, the condition is complete, which is the birth of the child.

If he says to her, "When you give birth to a child, the child is free," then she gives birth to a stillborn child followed by another who is alive. The one alive is alone deemed free, according to Abū Ḥanīfah (God bless him). The two jurists said that none of them is free, because the condition is fulfilled by the birth of the dead child, as we have explained. The *yamīn*, thus, lapses without the effect of its consequences upon the subject-matter. The dead child is not a subject-matter of freedom, and the child is the consequence. Abū Ḥanīfah (God bless him) argues that the unqualified use of the term is qualified with the attribute of life, because the person making the vow intended the establishment of freedom as a consequence, which is a legal power that emerges for repelling the authority of another person. This cannot be established in a corpse, therefore, it is qualified with the attribute of life. It is as if he had said, "If you give birth to a living child, it is free." This is distinguished from divorce and freedom of the mother as consequences, because these cannot be qualified.

When he says, "The first slave I buy is free," then he buys a slave; the slave is free, because the word "first" is a term for the individual who

comes first. **If he buys two slaves together, and thereafter another, none of them is emancipated,** due to the absence of individuality in the first two and the absence of not coming first in the third, thus, the attribute of being first is missing. **If he says, "The first slave I buy separately is free," then the third slave is emancipated,** because he intended individuality in the state of purchase by his statement. The reason is that being separate is an attribute of a certain state, and the third slave is the first with this attribute.

If he says, "The last (next) slave I buy is free," but he buys a slave and dies thereafter, the slave is not emancipated. The reason is that the term "last" is a term for an individual who had to come next and there is none before him, therefore, he is not the next. **If he buys a slave and then another and dies thereafter, the next (last) slave is free,** because he is the next individual, therefore, the attribute of being next is affirmed. **He stands emancipated the day he bought him, according to Abū Ḥanīfah (God bless him), so that his freedom is worked out from the entire estate. The two jurists say that he is emancipated the day the master dies,** so that his freedom is worked out from a third of the estate, because being last is not established without the absence of purchase of another slave after him, and this is realised after death. Thus, the condition is found upon death and is restricted to death. According to Abū Ḥanīfah (God bless him), death is merely an identifier (and not a condition), and as for the attribute of being last it is established from the time of purchase, therefore, it is established by reliance on the moment following it. The same disagreement governs the making of three repudiations contingent upon it. The effect is seen in the operation of prohibition of inheritance and its absence.

If a person says, "Each slave who gives me the good news about a child born to such and such woman, is free," then three slaves separately give him such news, the first one bearing the news is emancipated. The reason is that *bashārah* is that news about another which reflects happiness on the face, and it is stipulated that it be a news of happiness according to common usage. This is realised in the news given by the first. **If they all give him the news at the same time, they stand emancipated,** because it is realised due to all.

If a person says, "If I buy so and so, he is free," then he buys him with the intention of the emancipation being expiation for his vow, he is not rewarded, because the condition is that intention coincide with the cause

of emancipation, which is the oath. As for purchase, it is the condition for emancipation. **If he buys his father with the intention of the emancipation being expiation for his oath, he is deemed rewarded in our view.** Zufar and al-Shāfi'ī (God bless them) disagree. They argue that the purchase is the condition for emancipation, while the *'illah* is kinship. The reason is that purchase is establishing of ownership, while emancipation is its extinction and between them there is contradiction (purchase is not emancipation). We argue that the purchase of a close relative amounts to emancipation, due to the words of the Prophet (God bless him and grant him peace), "A child can never be rewarded through his father, unless he finds him in bondage and buys him, thus, emancipating him."[1] Here he deemed the purchase itself as emancipation, and did not stipulate anything else besides it, and it is a parallel for the saying, "He watered it and irrigated it."

If he buys his *umm walad*, he is not rewarded. The explanation of this issue is that he says to his *umm walad* through marriage, "If I buy you, you are free as expiation for my oath," and thereafter he buys her. She stands emancipated due to the fulfilment of the condition, but he is not rewarded on account of his expiation, because she is entitled to freedom on account of bearing his child, therefore, such freedom cannot be associated with the oath in all respects. This is distinguished from the case where he says to another slave woman, "If I buy you, you are free on account of the expiation of my oath." Here, if he buys her, he is rewarded, because her freedom is not a matter of entitlement from another perspective. Accordingly, associating it with the oath does not cause any disturbance (of the rules) when intention accompanies it.

If a person says, "If I take a slave woman as my mistress, she is free," then when he does take one whom he owns as a mistress, she is free. The reason is that the vow has been concluded for her benefit due to the existence of ownership. Further, the word *jāriyah* is indefinite, therefore, it includes each slave woman individually. **If he buys a slave woman and turns her into his mistress, she is not emancipated through this vow.** Zufar (God bless him) disagrees. He says that making a slave woman a mistress is not valid unless there is ownership, and mentioning it means mentioning ownership. It is as if he said to a strange woman, "If I divorce

[1]It is recorded by all the sound compilations, except al-Bukhārī. Al-Zayla'ī, vol. 3, 304.

you, my slave is free," then marriage here is implied. We argue that ownership is mentioned by necessity for the validity of making her a mistress, and it is a condition, therefore, it is limited to the extent of need. It is not effective for the validity of the consequence, which is freedom. In the case of divorce, it is effective with respect to the condition and not the consequence. Thus, if he says to her, "If I divorce you, then you stand divorced thrice," then he marries her and divorces her with a single repudiation, she is divorced thrice. This acts as the standard for our issue here.

If a person says, "Each slave that I own is free," then his *ummahāt al-awlād, mudabbars*, and slaves are all free, due to the unqualified association with all of them, because ownership is established in them both as ownership of the corpus and possession. **His *mukātab* slaves are not free unless he includes them in his intention,** because he does not have possession over them, therefore, he does not own their incomes nor does he have a right to have intercourse with his *mukātabah*. This is distinguished from the *umm al-walad* and *mudabbarah*. Thus, the association is improper and *niyyah* is necessary.

If a person says to his wives, "This one is divorced or this one and this one," then the last one is divorced, while he has an option with respect to the first two. The reason is that the word "*aw*" is for establishing of one the of two things mentioned. He included her in the first two and then added a third to the divorced woman. The reason is that the conjunction is for participation in the rule, therefore, it is confined to the subject-matter. It is as if he said, "One out of you two is divorced and this one." **Likewise if he says to his slaves, "This one is free or this one and this one," then the last one is emancipated.** He has an option with respect to the first two, as we explained. Allāh knows what is correct.

Chapter 91

Vows About Sale, Purchase and Marriage

If a person makes a vow that he will not buy or sell or take on hire, then appoints an agent who undertakes all this, he has not violated his vow. The reason is that the contract is concluded by the contracting party and he owns the rights of performance (*ḥuqūq*).[1] Accordingly, if the contracting party had made the vow, he would have violated his oath. The act that is a condition is, therefore, not found, and that is the contract on the part of the one giving the order(principal), for what is established for him is the *ḥukm* of the contract. **Unless, he includes this in his intention,** for this appears extreme **or the person making a vow is one in authority,** who does not undertake contracts on his own, because he prevented himself from undertaking something that is normally done.

If a person makes a vow that he will not marry, or divorce, or emancipate, but then appoints an agent to do so, he has broken his vow. The reason is that an agent in all this is like an emissary and a messenger. He does not attribute these acts to himself, but to the person giving the order, and the rights of performance revert to the one giving the order and not to him. **If he says that he formed the intention of not speaking about these things, he is not to be deemed truthful for adjudication alone.** We shall be pointing out the meaning of this in the explanation of the difference, God, the Exalted, willing.

If he makes a vow that he will not beat his slave and will not slaughter his goat, but he orders another who does it, then he has violated his vow. The reason is that the owner has the authority of beating his slave and of slaughtering his goat, therefore, he possesses the right to delegate

[1]The Ḥanafis make a distinction between the *ḥukm* and *ḥuqūq* in the contract of agency.

the authority to another. Further, the benefit of doing so reverts to the owner, therefore, he is deemed the direct actor as there are no rights that go to the person ordered. **If he says, "I intended not to undertake these acts myself," he is to be deemed truthful for purposes of adjudication,** as distinguished from what has preceded about divorce. The underlying reasoning for the distinction is that divorce is nothing but the expression of words that lead to the occurrence of divorce for her. Ordering such an act is like expressing those words, and the word "divorce" includes both, therefore, if he intended their expression then he intended one particular meaning out of a general meaning. Accordingly, he is to be deemed truthful morally not legally. As for beating and slaughter, they are physical acts that are recognised by their effects, and attributing them to the person ordering are by way of causation in the figurative sense. Thus, if he intended to undertake the act himself, then he intended what is true in fact, therefore, he is to be deemed truthful morally and legally.

If a person makes a vow that he will not beat his child, but orders another person to do so and he does beat him, he has not violated his vow. The reason is that the benefit of beating the child will revert to the child, which is disciplining and refinement, therefore, his act will not be attributed to the person ordering. This is distinguished from the order to beat the slave, because the benefit of obedience through his order will go to the person ordering. Consequently, the act is attributed to him.

If a person says to another, "If I sell this dress for you, then my wife is divorced," after which the person who is the object of the vow conceals this dress within the dresses of the person making the vow, who sells them without knowing of such concealment, then he has not broken his vow. The reason is that the character *lām* precedes the word sale and this requires that it be specific to him, and this means that he sell under his orders, because sale accepts delegation, but this is not found here. This is different from the case where he says, "If I sell a dress that you own...," for here he will violate his vow as he will be selling a dress owned by him, whether or not it is under his order, and whether or not he is aware of it. The reason is that the character *lām* precedes the subject-matter as it is proximate to it, therefore, it requires that it be specific to him. This is true if the dress is owned by him. Cases parallel to this are of dyeing and stitching and each act that accepts delegation of authority, as distinguished from eating, drinking and beating the slave, as these acts

do not accept delegation, therefore, the rule will not be separate in both cases.

If a person says, "This slave is free if I sell him," and he sells him on the condition that he has an option, the slave is emancipated, due to the existence of the condition, which is sale, and ownership in the slave continues, therefore, it is converted to its consequence, which is freedom. **Likewise if the buyer says, "If I buy him he is free," and he buys him on the condition that he has an option, the slave is emancipated,** as well. The reason is that the condition is fulfilled, and that is purchase, and ownership is established in him. This is obvious on the basis of the rule upheld by the two jurists[2] as well as on the rule upheld by the Imām, because this emancipation depends on its condition, and what is contingent is like the immediate. If emancipation is given effect immediately, prior ownership is established for him, likewise in this case.

If a person says, "If I do not sell this male slave or this female slave, then my wife is divorced," following which he emancipates them or gives them the status of *mudabbar*, his wife is divorced. The reason is that the condition stands fulfilled, which is the absence of sale due to the loss of the subject-matter of sale.

If a woman says to her husband, "What if you bring another wife?" and he replies, "Each wife that I have will stand divorced thrice," then this wife who took the vow from him stands divorced (too) for purposes of adjudication. According to Abū Yūsuf (God bless him), "This wife is not divorced for he excluded her through his response," therefore, the decision will be accordingly. Further, his intention is to please her and that is by divorcing others besides her, thus, it will be qualified accordingly. The reasoning underlying the authentic narration is based on the generality of the statement, and he went beyond the context of the response, therefore, the statement will be treated as an independent statement. Further, his purpose could have been to point to a grave action when she raised an objection about what the *shar'* (law) has deemed lawful for him, and with such vacillation of the issue it is not suitable for restriction. If he intended wives other than her, then he is to be deemed truthful morally, but not legally, as it amounts to the restriction of the general meaning. Allāh knows what is correct.

[2] *Khiyār* of the buyer does not prevent the passing of title to him.

Chapter 92

Vows About *Ḥajj*, Prayer and Fasting

He said: **If a person, while in the Ka'bah or in another place says, "I am under an obligation to walk to the House of Allāh, the Exalted or to the Ka'bah," then he is under an obligation to perform *ḥajj* or *'umrah* on foot. If he likes he may ride, but then he has to offer a sacrifice (*dam*).** Analogy dictates that he is not obliged to do anything, because he made obligatory upon himself what is not an obligatory means of seeking nearness to Allāh or is intended essentially. Our opinion has been transmitted down to us from 'Alī (God be pleased with him). Further, the people were accustomed to make *ḥajj* and *'umrah* obligatory through such vows. Thus, it is as if he had said, "It is obligatory upon me to visit the House on foot." This makes it obligatory for him to go on foot, but if he likes he can take a ride and make an offering. We have already mentioned this in the topic on religious rites.

If he says, "It is obligatory upon me to go out or to move towards the House of Allāh, the Exalted," then there is no such obligation upon him. The reason is that acquiring the obligation to perform *ḥajj* or *'umrah* through such expression is not part of the common usage.

If he says, "I am under an obligation to walk to the Ḥaram or to al-Safā wa-al-Marwah," then there is no such obligation for him. This is the view according to Abū Ḥanīfah (God bless him). **Abū Yūsuf and Muḥammad (God bless them) said that because of his statement, "I am under an obligation to walk," he is obliged to perform *ḥajj* or *'umrah*.** If he had said, "Up to al-Masjid al-Ḥarām," then the same disagreement of views applies. The two jurists are of the view that the Ḥaram is included in the House being adjacent to it. Likewise, al-Masjid al-Ḥarām is included in the House, therefore, mentioning one amounts to mentioning the

other. This is distinguished from the case where he mentions al-Ṣafā and al-Marwah, because they are separated from the House. According to the Imām, the creation of the obligation of *iḥrām* through such expressions is not part of the common usage, and it is not possible to create an obligation through the use of the word "walking" in its actual meaning, therefore, the obligation is prevented.

If a person says, "My slave is free if I do not perform this year," and thereafter he says that he has performed the *ḥajj* with two witnesses testifying that he offered a sacrifice this year at Kufah, then his slave will not be emancipated. This is the view according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that he is emancipated, because this testimony is about an act that is known, which is sacrifice. This act necessarily indicates the negation of the performance of *ḥajj*, therefore, the condition (of the vow) stands fulfilled. The two jurists maintain that it is the negation of *ḥajj*, because the purpose is to establish the negation of *ḥajj* and not the offering of the sacrifice (therefore it is not admissible as testimony), because there is no demand for such negation (on the part of the public). It is as if they rendered testimony that he did not perform *ḥajj* this year. The utmost that can be said is that this negation is within the knowledge of the witnesses, but we cannot distinguish one form of adjudication from the other (for purposes of adjudication).

If a person makes a vow that he will not fast, but he forms the intention of a fast and fasts for a moment then breaks it, he has violated his vow, because fasting is abstaining from acts leading to the breaking of the fast with the intention of seeking nearness to Allāh.

If he makes a vow that he will not fast for one day or keep one fast, but fasts for a moment and then breaks it, he has not broken his vow. The reason is that by this is meant a complete fast that is considered so by the law (*shar'*), and this occurs by terminating it at the end of the day, and the day is explicitly mentioned in determining its duration.

If he makes a vow that he will not pray, but he performs the *qiyām, rukū'*, then he does not break his vow. If, however, he also performs the prostration and then terminates it, he breaks his vow. Analogy dictates that he has violated his oath by commencement taking into account the ruling for the commencement of fasting. The basis for *istiḥsān* is that prayer is an expression for various elements (*arkān*). Thus, as long as he

does not perform all of them it cannot be called prayer. This is distinguished from fasting as that consists of a single *rukn*, which is abstaining and is repeated in the next moment.

If he makes a vow that he will not offer *ṣalāt*, he does not break his vow until he completes two *rak'ahs*. The reason is that he meant by it the legally acknowledged *ṣalāt*, and the minimum is two *rak'ahs* due to the prohibition of offering a single (odd) *rak'ah* (*butayrā'*). Allāh knows best.

Chapter 93

Vows About Dresses and Jewellery

If a person says to his wife, "If I wear cloth made of the yarn you spin, then it is *hady*," and he then buys cotton that she spins and weaves after which he wears it, it is a *hady* according to Abū Ḥanīfah (God bless him). The two jurists say that he is not obliged to treat it as *hady*, unless she spins yarn from the cotton owned by him on the day of the vow. The meaning of *hady* is charity that is to be given at Makkah, because it is the name of the charity made for it. The two jurists argue that a *nadhr* (vow) is valid in the case of a thing owned or when it is associated with the cause of ownership, which is not found here. The reason is that clothing and spinning by a woman are not causes of ownership. The *imām* argues that spinning by a woman is usually from the yarn owned by the husband, and it is the usual that is intended, and this is the cause of ownership. It is for this reason that he will break his vow if she spins from the cotton owned by him at the time of the vow, because cotton is not mentioned in the statement of the vow.

If a person vows that he will not wear jewellery, but he wears a silver ring, he has not broken his vow, because it is not considered jewellery according to custom or law, therefore, its use is allowed for men and as a seal for sealing things. **If it is made of gold, he has broken his vow,** because it is jewellery, therefore, its use is not allowed for men.

If he wears a string of pearls that are not inlaid, he does not break his vow according to Abū Ḥanīfah (God be pleased with him). The two jurists said that he has broken his vow, because it is jewellery in reality insofar as even the Qur'ān has called it as such. The Imām argues that it is deemed jewellery according to custom, unless it is not inlaid, and the basis of vows is custom. It is said that this a disagreement arising from

differences of time and age. The *fatwā* is issued according to the view of the two jurists, because wearing pearls as jewellery by themselves is customary.

If a person vows that that he will not sleep on a bed, but he sleeps on it when on top of it is a blanket (*qirām*), then he has broken his vow, because it is a constituent part of the bed, therefore, he will be considered to have slept on it. **If he places another bed on it and sleeps on it, he does not break his vow.** The reason is that something similar to it is not part of it and the reference to the first stands terminated.

If he makes a vow that he will not sit on the ground, but then he sits on a rug or mat, he has not broken his vow, because this cannot be termed as sitting on the ground. This is distinguished from the case where between the ground and his body is his dress, because that is deemed a subsidiary part of him and cannot be considered a barrier.

If he makes a vow that he will not sit on a cot, but then he sits on a cot upon which is a rug or a mat, he has broken his vow, because he is considered to be sitting on the cot. Sitting on a cot in practice is usually in this way. This is different from the situation where he places another cot on top of it, because it is similar, and reference to the first is terminated. Allāh knows what is correct.

Chapter 94

Vows About Homicide and Causing Injury

If a person says to another, "If I strike you then my slave is free," and he strikes him after he is dead, then this statement will be construed "while he is alive." The reason is that striking (hitting) is a term for an act that is painful and establishes contact with the body. Pain is not realised in the case of a corpse. A person who will be tormented in the grave will be brought to life, according to the view of most scholars. The same is the case with the giving of clothing, because the meaning is the passing of ownership when used in an unqualified sense. Clothing by way of expiation belongs to this category, and it is not realised in the case of a corpse, unless he intends thereby a covering. It is said that in Farsi it is construed to mean clothing. **Likewise speech and entering upon someone.** The reason is that the purpose of speech is to make the other person understand and death negates this. The meaning of entering upon is visiting a person and after death it is his grave that is visited, not the person.

If he says, "If I give you a bath, my slave is free," and he gives him a bath after his death, he has broken his vow (for by not emancipating the slave). The reason is that bathing means causing the water to flow and its purpose is purification. This stands realised in the case of a corpse.

If a man says that he will not beat his wife, but then pulls her hair, tries to strangle her, or bites her, then he has broken his vow, because beating is a term for a painful act, and pain stands realised. It is said that he will not break his vow in case of play for it amounts to enjoyment and not beating.[1]

If a man says, "If I do not kill so and so then my wife is divorced," when this so and so is dead and he is aware of it, he breaks his vow. The

[1]That would mean that if he beats her during play he does not break his vow.

reason is that he formed his vow on the basis of life that Allāh renews for him, and that is conceivable, therefore, the vow takes effect and he breaks it due to normal inability. **If he is not aware of his death, he does not break his vow.** The reason is that he based his vow on life that was running through him, in which case completion is not conceivable. The issue becomes analogous to the issue of the jar[2] along with the disagreement over it. In that issue there is no detail about having knowledge, which is correct.

[2]If I do not drink from this jar, ... As discussed earlier.

Chapter 95

Vows About the Demand of *Dirhams*

If a person says that he will definitely repay his debt soon, then it means a period that is less than a month. If he says after an extended period then it extends beyond a month. The reason is that what is less than it is considered a short period and what is more than that is an extended period. It is for this reason that it is said after a long period, "I have not seen for more than a month."

If a person says, "I will pay the debt of so and so today," then he pays him, but that person finds that the coins are demonetised, or counterfeit, or they belong to a third party, then the person making the vow has not broken his vow. The reason is that demonetisation is a defect, but a defect does not eliminate the species, therefore, if he permits repayment in such coins the debt will be satisfied and the condition of fulfilment of the vow will be found. Taking possession of coins claimed by a third party is valid, and returning these does not eliminate the fulfilment that is realised.

If he finds them alloyed with copper or bronze, he breaks his vow, because these are not from the species of *dirhams* so it is not permitted to use them in transactions of *ṣarf* (currency transactions) and *salam* (advance payment). **If he sells him a slave in lieu of the claim and the creditor takes possession, he has fulfilled his vow.** The reason is that the satisfaction of the debt claim is by way of swapping. The condition was realised by the mere sale of the slave, but possession has been stipulated to affirm it. **If he makes a gift of it to him,** that is, of the debt claim **the vow is not fulfilled,** due to the lack of swapping, because satisfaction is his act, while gift is the extinction of the debt on the part of the creditor.

If a person vows that he will not take possession of his debt claim in parts (some *dirhams* and not others), and he takes possession of part of

it, he has not broken his vow until he takes possession of the entire debt in parts. The reason is that the condition is possession of the entire debt, but has been qualified by instalments. Note that he spelled out possession with respect to the debt that was identified, therefore, it applies to the entire debt, and he does not break his vow before it. **If he takes possession of his debt in two types of measures of weight, and is not occupied with anything but the process of weighing in between the two processes, he does not break his vow and it is not separate possession.** The reason is that sometimes it is usually not possible to take possession all at once in a single act, therefore, this discrepancy is exempted.

If a person says, "If I have any amount except one hundred *dirhams*, my wife is divorced," but he has only fifty *dirhams*, he does not break his vow. The reason is that the purpose of such statement in common usage is to deny any amount in excess of one hundred. Further, the exemption of one hundred is the exemption of its constituent parts. **Likewise if he says other than one hundred or besides one hundred,** because all these are instruments of exemption. Allāh knows what is correct.

Chapter 96

Scattered Issues

If he makes a vow that he will not do such and such act, he has to give it up forever, because he negated the act in absolute terms, therefore, the prevention became general and acted as a general negation. **If he makes a vow that he will definitely do such and such act, then if he does it once he has fulfilled his vow,** because what is binding is the commission of the act once without being specified. This is the situation of positive action, therefore, he fulfils it by commission of the act once. He will break his vow when he gives up hope of committing the act, and this will take place due to his death or by the destruction of the object of the act.

If a ruler takes a vow from a person that he will definitely inform him about the entry of each mischiefmonger into the land, then this vow continues till the authority of such ruler exclusively. The reason is that the purpose is to repel his mischief or the mischief of another through deterrence. Consequently, there is no benefit of this after the termination of his authority, and such termination is through death or by his removal according to the authentic narration (*ẓāhir al-riwāyah*).

If a person makes a vow that he will gift his slave to so and so, but that person does not accept the gift, then he has fulfilled his oath, with Zufar (God bless him) disagreeing. He compares it to sale, because it is the passing of ownership for something similar. We maintain that it is a contract of donation, and is completed by action on the part of the donor. It is for this reason that he said in the statement that he made a gift, but the donee did not accept. Further, the purpose is the expression of donation and is completed through it. As for sale it is an exchange of counter-values, which requires action from both sides.

If a person makes a vow that he will not smell aromatic plants, but he smells rose or jasmine, he does not break his vow, because it is a name for a thing that does not have a stem, while these two have a stem.

If he makes a vow that he will not buy violets, and he has no particular intention, then it will be construed to mean its oil, on the basis of customary usage. It is for this reason that one who sells such oil is said to be a seller of violets, and purchase is based upon this as well. It is said that in our usage the term is applied to its petals. If he makes this vow with respect to a rose, then it will apply to its petals, because the actual application (not figurative) is this, and usage affirms this. In the case of violets usage is predominant. Allāh knows what is correct.

Al-Hidāyah

BOOK ELEVEN

Ḥudūd (Fixed Penalties)

Chapter 97

The Meaning and Proof of *Ḥadd*

He said: *Ḥadd* literally means prevention. In this sense, the word *ḥaddād* is applied to mean a guard. In the *sharī'ah* (technical sense), it is a penalty that is predetermined (fixed) as a right of Allāh. Consequently, *qiṣāṣ* (retaliation) is not called *ḥadd* as it is a right of the individual, nor is *ta'zīr* called *ḥadd* as it is not predetermined. The primary purpose in promulgating it as law is deterrence from acts that are harmful for subjects. Purification (from sin) is not the primary purpose in *ḥadd*, on the evidence that it is ordained for the unbeliever as well.

He said: ***Zinā* (unlawful sexual intercourse) is proved through testimony and confession.** The meaning here is proof presented before the *imām* (*qāḍī*). The reason is that testimony is a manifest evidence and likewise confession, because the truth in it is predominant, especially when it concerns the proof of injury and incrimination. As arriving at certain knowledge is difficult, manifest evidence is deemed sufficient.

He said: **Testimony is found where four witnesses testify against a man or a woman that they have committed *zinā*.** This is based on the words of the Exalted, "If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them, or Allah ordain for them some (other) way."[1] Allāh, the Exalted, has also said: "And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors."[2] The Prophet (God bless him and grant him peace) said to

[1]Qur'ān 4 : 15
[2]Qur'ān 24 : 4

a man who had accused his wife, "Bring four (witnesses) who will testify to the truth of your allegation."[3] The reason is that in the stipulation of four witnesses the meaning of concealment is realised, and that is recommended, while publication is opposed to this purpose.[4]

When they (the witnesses) testify, the *imām* asks them about *zinā* as to what it is and how it is committed, where did the person commit *zinā*, when did he commit *zinā*, and with whom did he commit *zinā*? The reason is that the Prophet (God bless him and grant him peace) sought an elaboration from Mā'iz[5] about the mode of commission and about the woman with whom it was committed. The reason is that precaution in such a case is obligatory, because it is possible that he committed the act, but not through the vagina even if intended, or that he committed the act in the *dār al-ḥarb*, or he committed an act that is barred by time, or there is a *shubhah* or doubt in it that is not known to him or to the witnesses. Accordingly, an exhaustive investigation is to be made to find a way for waiving the *ḥadd*.

Thus, when they have testified to this effect, and said, "We saw him having intercourse with her through her vagina, like the kohl stick inside the container," the *qāḍī* has enquired about them and they are found to be *'adl*, both through secret and public inquiry, he is to give a ruling on the basis of their testimony. He is not to deem sufficient a public enquiry about their *adālah*, and this to find a way out for waiving the penalty. The Prophet (God bless him and grant him peace) has said, "Waive the *ḥudūd* penalties as far as you can." [6] This is different from all other rights according to Abū Ḥanīfah (God bless him). We will elaborate the meaning of

[3]Al-Zayla'ī says that the tradition is *gharīb* with these words, however, Abū Ya'lā al-Mawsilī has recorded a tradition in the same meaning in his *Musnad*, "Four witness else the *ḥadd* on your back." Al-Zayla'ī then records a large number of traditions that convey similar meanings. Al-Zayla'ī, vol. 3, 306.

[4]The underlying *ḥikmah* mentioned by the Author is extremely important for understanding the nature of the offence of *zinā* and how it is treated in Islamic law. In our view, unless the factor of concealment is appreciated, the nature of the offences of *zinā* and *qadhf* cannot be understood.

[5]It is recorded by Abū Dāwūd. Another tradition conveying a similar meaning is also recorded by Abū Dāwūd as well as al-Nasā'ī. Al-Zayla'ī, vol. 3, 308.

[6]It is recorded in different versions from 'Ā'ishah, 'Alī and Abū Hurayrah, God be pleased with them all. The versions are recorded by al-Tirmidhī, al-Ḥākam, al-Dār'quṭnī and Abū Ya'lā al-Mawṣilī. Al-Zayla'ī, vol. 3, 309.

establishing *'adālah*, both public and secret, in the Book of Testimony, Allāh, the Exalted willing.

He (Muḥammad al-Shaybānī) said in *al-Aṣl* that he is to restrain him till he has asked about the (moral probity of) witnesses who are making the allegation of the offence. The Messenger of Allāh (God bless him and grant him peace) restrained a man on the basis of an accusation. This is different from debts where there is no imprisonment prior to the manifestation of *'adālah*. The distinction will be made evident for you, Allāh, the Exalted, willing.

He (al-Qudūrī) said: **Confession is where a major and sane person confesses to the commission of *zinā*. He does this four times in four (different) sessions, with the *qāḍī* rejecting his confession each time he makes it.** Majority and sanity have been stipulated, because the statements of the minor and insane are not considered (are inadmissible), or because they are not liable for *ḥadd*. The stipulation of four (confessions) is our view. According to al-Shāfi'ī a single confession is sufficient, on the analogy of the remaining rights. The reason is that it (a single confession) manifests the truth, and the repetition of the confession does not enhance the manifestation of the truth, as distinguished from increase in the number of witnesses (to four).

We rely on the tradition of Mā'iz (God be pleased with him). The Prophet (God bless him and grant him peace) delayed the implementation of the *ḥadd* till the confession was completed by him four times in four sessions. If what is less than this was sufficient to bring out the truth, he would not have delayed the matter for the proof of the obligation (of implementation). Further, the testimony was made exclusive by increasing the number of witnesses, likewise the confession. This was done due to the gravity of the offence of *zinā* and to realise the meaning of concealment. It is necessary to have different sessions, on the basis of what we have related, because the unity of session affects the establishing of the different elements that need to be proved, and in case of a single session it gives rise to the possibility of focusing on a single element. Confession depends upon the person confessing, therefore, it is his sessions that are taken into account and not those of the *qāḍī*. Separate sessions means that the *qāḍī* sends him out each time he confesses so that when he goes out the *qāḍī* can no longer see him and he then returns and confesses again. This is reported as an opinion of Abū Ḥanīfah (God bless him),

because the Prophet (God bless him and grant him peace) rejected Mā'iz each time and he went out disappearing behind the walls of Madīnah.

He said: **When his confession four times is complete, he is to ask him about *zinā*, as to what it is, how it is committed, where he committed it and with whom? If he elaborates all this, imposition of *ḥadd* becomes binding,** due to the completion of proof. The rationale underlying these questions we have elaborated in the topic of *shahādah* (testimony). He did not mention here the question about time, but he did mention it in the topic of *shahādah*, because limitation of time prevents the rendering of testimony though not a confession. It is said that if he did question him about it, it would be valid due to the possibility of his having committed it during his minority.

If the person confessing retracts his confession prior to the execution of the *ḥadd* or during it, his retraction is to be accepted and he is released. Al-Shāfi'ī (God bless him), and this is also the view of Ibn Abī Laylā (God bless him), the *ḥadd* is to be implemented for it became obligatory through his confession, therefore, it is not annulled due to his retraction or his denial, just as if it had become obligatory through testimony and stood proved like *qiṣāṣ* (retaliation) and the *ḥadd* of *qadhf* (false accusation of unlawful sexual intercourse). We argue that retraction is a report that is probably true and is just like confession, and there is no one who holds him to be lying, therefore, a *shubhah* is established in his confession. This is distinguished from the cases where the rights of the individual are involved, which are *qiṣāṣ* and the *ḥadd* of *qadhf*, due to the existence of those who hold him to be lying. This is not the case with what is purely the right of Allāh.

Chapter 98

The Nature of Intercourse That Gives Rise to *Ḥadd*

He said: **Intercourse that gives rise to *ḥadd* is *zinā*.** In technical legal language and in usage it is sexual intercourse of a man with a woman through the vagina without lawful ownership (of such access) and without the *shubhah* (justifed yet erroneous belief) of ownership (of such access). The reason is that it is an act that is prohibited and the prohibition is absolute when it is devoid of ownership or its justified but erroneous belief. This is supported by the words of the Prophet (God bless him and grant him peace), "Waive the *ḥudūd* in case of justified yet erroneous belief (*shubhah*)."[1]

Thereafter, *shubhah* is of two types. The first is called *shubhah fi al-fi'l* (doubt in the act) also called the doubt of ambiguity (*ishtibāh*). The second is called *shubhah fī al-maḥall* (doubt in the subject-matter) also called legal doubt (*ḥukmiyyah*). The first is realised in the case of a person for whom it has become ambiguous, because the meaning is that he considers an evidence that is not really the proper evidence. In this probability is essential for the realisation of ambiguity. The second arises by adducing evidence that negates the prohibition itself, but it does not depend upon the conjecture of the offender or his belief.

Ḥadd is not enforced in both cases, due to the absolute meaning of the tradition. Paternity is established in the second type of *shubhah* if he claims it, but it is not established in the first type even if he claims it. The reason is that in the first type the act is purely *zinā*, but the *ḥadd* is

[1]It is *gharīb* in this version. It is recorded by Ibn Abī Shaybah and is found in the *Musnad* of Abū Ḥanīfah (God bless him). Al-Zayla'ī, vol. 3, 333.

not enforced due to a factor that is referred back to the actor, and this is the ambiguity created in his mind. In the second it is not treated purely as *zinā*. *Shubhah fī al-fi'l* is committed with eight types of persons: the slave girl of the offender's father, of his mother, and of his wife; the wife divorced thrice while she is in her waiting period; the woman divorced irrevocably in lieu of wealth while she is in her *'iddah*; the *umm al-walad* whom the master has emancipated and she is in her waiting period; the slave girl of the master with respect to the slave; and the pledged slave girl with respect to the mortgagee, according to the narration in the Book of *Ḥudūd*. In all these cases there is no *ḥadd* for the offender if he claims that he thought she was permissible for him. If, however, he says that he knew that she was prohibited for him, he is to be awarded *ḥadd*.

Shubhah fī al-maḥall occurs in six cases: the slave girl of his son; the woman divorced irrevocably through figurative expressions; the slave woman sold to buyer prior to delivery with respect to the buyer; the woman entitled to dower prior to its possession by her with respect to the husband; a slave girl owned jointly with respect to one co-owner; the pledged slave girl with respect to the mortgagee, according the narration from the *Book of Rahn*. In these six cases *ḥadd* is not enforced, even if he says I knew that she was prohibited for me. Thereafter, doubt is established, according to Abū Ḥanīfah (God bless him) on the basis of *'aqd* (contract), even if it is agreed upon for its prohibition and he knows about it. According to the rest, *shubhah* is not established if he had knowledge of the prohibition. This will be obvious in the case of the marriage within the prohibited degrees, as will be coming up, God, the Exalted, willing.

Now that we have understood this (we say:)

If a person divorces his wife thrice and then has intercourse with her during her *'iddah* following which he says that he knew that she was prohibited for him, he is to be subjected to *ḥadd*, due to the extinction, from all aspects, of ownership that legalises access. In this case *shubhah* is negated. The Qur'ān stated the negation of permissibility here and on this there is *ijmā'* as well. The opinion of one who opposes this is not taken into account for it is opposition not disagreement. If he were to say, "I thought she was permitted for me," he is not to be subjected to *ḥadd*, because the ambiguity of the subject-matter persists. The reason is that the effect of ownership continues with respect to paternity, confinement to the house, and maintenance, therefore, the uncertainty in his mind is

taken into account for waiving the *ḥadd*. The *umm al-walad* emancipated by the master, a woman who has obtained *khul'* and the one who has been divorced in lieu of wealth are in the position of the woman divorced thrice, due to the prohibition based upon consensus and the continuity of some effects during *'iddah*.

If he says to her, "You are free," or "You are absolved," or "Your affair is in your hands," and she chooses herself, after which he has intercourse with her during her *'iddah* and says that he knew she was prohibited for him, he is not to be subjected to *ḥadd*, due to the disagreement about this divorce among the Companions (God be pleased with them). It was the opinion of 'Umar (God be pleased with him) that this amounts to a single revocable repudiation. Likewise the response in the remaining cases of repudiation through figurative expressions. Likewise if he intended three repudiations (in figurative expressions) due to the existence of disagreement (of the Companions) along with this.

If a woman, other than his wife, is brought to him on his wedding night, and the women bringing her say, "She is married to you," following which he has intercourse with her, he is not to be subjected to *ḥadd*. He is liable for her dower. 'Umar (God be pleased with him) gave this decision in such a case. She also has to undergo *'iddah*. The reason is that he relied upon an evidence and that was a report about the subject-matter of ambiguity. The reason is that one does not distinguish between one's wife and another woman on the first meeting. Consequently, he is like one who has been deceived. The person who commits *qadhf* against him (on this account) is not to be awarded the *ḥadd*, except according to one narration from Abū Yūsuf (God bless him), because ownership (of legal access) is absent in reality.

If a man finds a woman on his wife's bed and has intercourse with her, he is to be subjected to *ḥadd*. The reason is that there is no ambiguity here due to the long association (with his wife). The ambiguity is not based upon a *dalīl* here. The reason is that some women in the prohibited degree, who are present in her room, may sleep on her bed. Likewise if he is blind, because it is possible for him to distinguish through questioning and other means, unless he calls out to the stranger and she responds saying that she is his wife, and he has intercourse with her, because a report is valid evidence.

If a person marries a woman with whom his *nikāḥ* is not lawful, and he has intercourse with her, he is not to be subjected to *ḥadd*, according to Abū Ḥanīfah (God bless him). He is, however, liable to some penalty if he knows about such prohibition. Abū Yūsuf, Muḥammad and al-Shāfi'ī (God bless them) said that he is to be subjected to *ḥadd* if he was aware of the prohibition, because it is a contract that has not been concluded for its subject-matter, therefore, it is meaningless, as if it had been associated with males. The reason here is that the subject-matter of the transaction should be the subject-matter for its legal effects, when the legal effect is permissibility, while the woman here is in the prohibited degree. Abū Ḥanīfah (God bless him) relies on the argument that the contract has been concluded in conformity with its subject-matter, because the subject-matter of the transaction is one that suits its purpose for females are the daughters of Adam who are meant for procreation, which is the purpose. Thus, it is necessary that the contract be concluded for all its legal effects, except that this contract fell short of full permissibility (due to the text), therefore, it gives rise to *shubhah*. The reason is that *shubhah* is something that resembles what is established, and is not the exact thing that is established. He has, however, committed an offence, and as there is not fixed penalty for it he is to be awarded *ta'zīr*.

If a man has intercourse with a strange woman through locations other than the vagina, he is to be awarded *ta'zīr*, because it is an offence for which there is no fixed penalty.

If a man has intercourse with his wife through a location that is *makrūh* (rectum), or commits an act similar to the acts of the People of Lot, there is no *ḥadd* for him according to Abū Ḥanīfah (God bless him), rather he is to be awarded *ta'zīr*. The addition in *al-Jāmi' al-Ṣaghīr* is that he is to be imprisoned. The two jurists maintain that it is like *zinā*, therefore, he is to be subjected to *ḥadd*, which is also one opinion from al-Shāfi'ī (God bless him). The two jurists argue that it carries the meaning of *zinā*, because it is the satisfaction of lust through a location that is aroused in a manner that is completely a sexual act and invokes pure prohibition due to the intention of unlawfully spilling sperm. The Imām argues that it is not *zinā* due to the disagreement of the Companions (God be pleased with them) about the obligation of burning with fire, making a wall fall on them, and dropping from a high place face downwards followed by the raining of stones on them. Further, it is not in the meaning of *zinā* for it does not amount to the wasting of children nor

confusion about parentage. Likewise it is a lesser offence as the desire is from one side while the desire in *zinā* is from both sides. In addition to this, what has been related by way of traditions is to be construed as a penalty to be awarded by way of *siyāsah* or is to be awarded to one who considers homosexuality as lawful. The act, however, is to be punished with *ta'zīr* in his view, as we have elaborated.

There is no *ḥadd* for a person who commits bestiality, because it does not convey the meaning of *zinā* insofar as it is an offence, and also with respect to desire as a normal person is repelled by it. The cause for it is uncontrolled sexuality and extreme lewdness, therefore, this offence is not to be concealed, however, the offender is to be subjected to *ta'zīr*. The report that the animal is "to be slaughtered and burned"[2] is for ending a discussion about it, and that too is not obligatory.

If a person commits *zinā* in enemy territory or in an area controlled by rebels and then moves over to us (*dār al-Islām*), he is not to be subjected to the *ḥadd*. Al-Shāfi'ī (God bless him) said that he is to be awarded *ḥadd*. The reason is that by professing the Islamic faith he has chosen to be bound by its *aḥkām* wherever he is located. We rely on the saying of the Prophet (God bless him and grant him peace), "The *ḥudūd* are not to be implemented in the *dār al-ḥarb*."[3] The purpose is deterrence and the authority of the *imām* is cut off in these territories, therefore, the obligation becomes devoid of any purpose. The *ḥadd* is not to be implemented after he has moved out of these territories, because it was not obligatory initially and cannot be converted into an obligation now. If the person who has such authority to implement the *ḥadd* takes part in the battle himself, like the *khalīfah* or the governor of a city, he is to implement the *ḥadd* in the case of a person who commits *zinā* in his military camp, because he is under his authority. This is distinguished from the military commander or the commander of a detachment, because the authority to implement the *ḥudūd* is not delegated to them.

If an enemy male enters our territory on *amān* (safe-custody) and commits *zinā* with a Dhimmiyyah, or a Dhimmī with an enemy woman,

[2]It is *gharīb* in these words, however, a similar tradition is recorded by the compilers of the four *Sunan*. Al-Zayla'ī, vol. 3, 342.

[3]It is *gharīb* in these words, but it is recorded by al-Bayhaqī from al-Shāfi'ī from Abū Yūsuf (God bless him). Al-Zayla'ī, vol. 3, 343. There are *āthār* conveying the same meaning. Ibid.

the Dhimmī and the Dhimmiyyah are to be awarded the *ḥadd* according to Abū Ḥanīfah (God bless him), while the enemy, male or female, are not to be subjected to *ḥadd*. This is also the opinion of Muḥammad (God bless him) in the case of a Dhimmī, that is, when he has intercourse with an enemy woman. If, however, an enemy male has intercourse with a Dhimmiyyah, they are not to be subjected to *ḥadd* according to Muḥammad (God bless him), which is the earlier opinion of Abū Yūsuf (God bless him). **Abū Yūsuf (God bless him) said that they are all to be subjected to the *ḥadd*,** which is his second opinion. Abū Yūsuf (God bless him) argues that the person entering our territory on safe-conduct (*musta'min*) has agreed to make our *aḥkām* pertaining to the *mu'āmalāt* binding on himself during the period of his stay, just as the Dhimmī has agreed to abide by them for his entire life. Consequently, he is to be awarded the *ḥadd* of *qadhf* and is to be subjected to *qiṣāṣ* (retaliation), as distinguished from the offence of drinking *khamr*, because its permissibility is part of his faith. The two jurists argue that he has not entered for taking up residence, but for a need like trade and so on, therefore, he does not become a resident of our territory, due to which reason he is facilitated in returning to the *dār al-ḥarb*. For the same reason a Dhimmī or a Muslim are not subjected to *qiṣāṣ* if they kill him. He has agreed to abide by the laws that help him attain his purpose, and these are the rights of individuals. If he has agreed to seek justice then he must give justice too and *qiṣāṣ* and the *ḥadd* of *qadhf* are the rights of these individuals. As for *zinā* it is purely a right of the *shar'* (law). For the distinction drawn by Muḥammad (God bless him), he argues that the basis in the category of *zinā* is the act of the male, while a woman is in a secondary position, as we will be mentioning, God, the Exalted, willing. Consequently, prevention of the *ḥadd* in the case of the primary actor requires that it be prevented in the case of the secondary actor as well. As for prevention in the case of the secondary actor, it does not lead to prevention in the case of the primary actor. The parallel for this is where a major male has intercourse with a minor girl or with an insane woman, or where a major female facilitates the minor or an insane male.

Abū Ḥanīfah (God bless him) argues that the act of the enemy *musta'min* is *zinā*, because the prohibitions in the divine communication are addressed to him, even though he is not an addressee for all our laws, according to the authentic narration, in the light of the principle followed by our School. Facilitating is an act that amounts to *zinā*, and it gives rise

to the obligation of *ḥadd* for her, as distinguished from the minor and the insane as they are not addressees of the communication. The parallel of this disagreement is where a person is coerced by one willing, where the willing woman is awarded the *ḥadd*, but not the man coerced, in his view. According to Muḥammad (God bless him), she is not subjected to *ḥadd*.

He said: **If a minor male or an insane male commits *zinā* with a woman who made him yield, then there is no *ḥadd* for him nor for her.** Zufar and al-Shāfi'ī (God bless them) said that *ḥadd* is obligatory for her. This is also one narration from Abū Yūsuf (God bless him). **If a person who is mentally sound has intercourse with an insane woman or a minor girl (who is usually considered of age for sex), the man alone is to be subjected to *ḥadd*.** This is based upon consensus (*ijmā'*). The two jurists (Zufar and al-Shāfi'ī) argue that the obstacle from her side does not prevent the awarding of *ḥadd* to him, so also an obstacle from his side. The reason is that each one of them is to be held accountable for his or her act. We argue that the act of *zinā* is realised on his part, while she is merely the subject-matter of the act. It is for this reason that it is he who is called the one committing intercourse and *zinā*. The woman is the passive party and she is the one whom *zinā* is committed, except that she has been called a *zāniyyah* in the figurative sense, using the act of the active party for the passive, like saying pleased for pleasing. Another reason is that she is causing it through facilitation, therefore, the *ḥadd* is linked to her for facilitating the evil of *zinā*. The act of *zinā* is the act of one who has been commanded to avoid it and he has sinned by undertaking it, but the act of the minor is not of this nature, therefore, *ḥadd* is not suspended on it.[4]

He said: **If a person is coerced by the *sulṭān* to commit *zinā* and he does it, there is no *ḥadd* for him.** Abū Ḥanīfah (God bless him) used to say earlier that he is to be awarded *ḥadd*, and this is the view of Zufar (God bless him) as well. The reason is that intercourse on the part of the male is not possible without erection of the penis, and erection is an evidence of consent. Thereafter he retracted this opinion and said that there is no *ḥadd* for him as the cause of duress is apparently in existence. Further, erection is a vacillating evidence as it sometimes occurs without intention, as it occurs on the basis of nature not voluntarily, like in the

[4]In other words, as the act of the minor is not *zinā*, her act cannot be called *zinā* either, as distinguished from the act of the male in this case when he has intercourse with a minor.

case of the person sleeping, therefore, it gives rise to *shubhah*. If someone other than the *sulṭān* were to compel him, he is to be subjected to *ḥadd* according to Abū Ḥanīfah (God bless him). The two jurists say that he is not to be awarded *ḥadd* in this case either as coercion is realised from a person other than the *sulṭān*. The reason is that the effective factor is the fear of death and that is possible on the part of another person too. In the Imām's opinion coercion on the part of another person is not persistent, except rarely, for he is able to seek help from the *sulṭān* or from a group of Muslims, and it is also possible for him to repel it himself by the use of weapons. Something that is rare is not assigned a general rule, therefore, *ḥadd* is not to be waived on account of this. This is distinguished from the case of the *sulṭān*, because in this case he is not able to seek help from another quarter nor is he able to revolt against him through the use of weapons, therefore, the two cases are different.

A person who confesses four times in different sessions that he had unlawful sexual intercourse with such and such woman, but she claims that he married her or she confesses and the man says that he married her, then there is no *ḥadd* for him and he is liable for the payment of dower in this case. The reason is that the claim of *nikāḥ* is probably true and it takes place between two parties, therefore, it gives rise to *shubhah*. Consequently, when the *ḥadd* is dropped dower becomes obligatory due to the sanctity of the prohibition of having sex.

He said: **Each act that the *imām*, who does not have another *imām* above him, commits, there is no *ḥadd* for him, except *qiṣāṣ*, for which he is liable, and he is also liable for financial claims.** The reason is that the *ḥudūd* are rights of Allāh and their implementation falls within his authority and of no other person, and it is not possible for him to implement the *ḥadd* against himself, for there is no benefit of doing so. This is distinguished from the rights of individuals, because these are claimed by the authorised heir either due to his own ability or through cooperation and the force of the Muslims, and *qiṣāṣ* as well as financial claims are within these rights. As for the *ḥadd* of *qadhf*, the jurists said that the predominant right in it is the right of the law (*shar'*), therefore, the rule for it is the same as the rule for the remaining *ḥudūd*, which are the rights of Allāh. Allāh, the Exalted, knows what is correct.

Chapter 99

Testimony of *Ḥadd* and its Retraction

He said: **If witnesses testify with respect to a *ḥadd* that is time barred, when they were not prevented from rendering it due to their great distance from the *imām*, their testimony will not be accepted for cases other than *qadhf*. It is stated in *al-Jāmi' al-Ṣaghīr:* If witnesses testify against the accused for theft or drinking of *khamr* or *zinā* after the passage of a duration, it is not to be accepted, and the offender will be liable for compensating the stolen goods.** The principle in this is that the *ḥudūd* are purely rights of Allāh, the Exalted, and lapse on account of the limitation of time, with al-Shāfi'ī (God bless him) disagreeing with this. He considers them the rights of individuals. Nor is the confession annulled in his view on account of time, and it is one of the two methods of proof. Our view is that the witness has an option of taking up two kinds of consequences: rendering of testimony or concealing the offence. If the delay is on account of concealment then coming forth with testimony after this is due to their awakened malice or enmity that has brought them into action, therefore, they are to be accused of this. If the delay was not due to concealment, he has become a *fāsiq* who has sinned, and we are certain of treating this as a prevention. This is distinguished from a confession, because a person usually does not incriminate himself. The *ḥadds* of *ainā*, drinking of wine and *sariqah* are pure rights of Allāh, due to which reason it is valid to retract the confession in them after having made it, therefore, time acts as limitation in these *ḥudūd*. As far as the *ḥadd* of *qadhf* is concerned, there is a right of the individual in it insofar as it involves the repelling of injury from him. Consequently, it is not permitted to retract a confession in this offence after such confession has been made. Time

does not act as a limitation in cases involving the rights of the individuals. Further, the lodging of a complaint is a condition for it, therefore, delay on the part of the witnesses can be construed to mean the absence of a complaint. Consequently, it is not permitted to declare them *fāsiqs* in this case as distinguished from the *ḥadd* of *sariqah*, because making a complaint is not a condition for this *ḥadd* as it is a pure right of Allāh, the Exalted, as has preceded. It is only stipulated for the financial claim within it. Further, as the *ḥukm* revolves around the *ḥadd* being the right of Allāh, the Exalted, the proving of the allegation is not taken into consideration in each individual case. In addition to this, theft is undertaken in stealth at a time of inattention on the part of the owner, therefore, it is imperative for the witness to identify him at once, and by concealing it he becomes a sinful *fāsiq*. Thereafter, the limitation of time, just as it prevents testimony at the initial stage, it prevents the implementation after the decision of the *qāḍī*, in our view, with Zufar (God bless him) disagreeing. Thus, if he runs away after part of the *ḥadd* has been implemented (like stripes) and is captured after the passage of the time of limitation, he is not to be subjected to *ḥadd* (again). The reason is that the passage of time with respect to adjudication is also part of the *ḥudūd*.

The jurists disagreed about the duration of time for purposes of limitation. Muḥammad (God bless him) indicated in *al-Jāmiʿ al-Ṣaghīr* that it was six months, for he said it is after a *ḥīn*. This is what al-Ṭaḥāwī too has indicated. Abū Ḥanīfah (God bless him) did not fix a period for this and left it to the discretion of the *qāḍī* in each age. It is also reported from Muḥammad (God bless him) that he determined it to be one month, because what is less than this amounts to acting swiftly. This is also one narration from Abū Ḥanīfah and Abū Yūsuf (God bless them), which is correct. This is the position when between them and the *qāḍī* the distance is not that of one month of travel. If it is such a distance then their testimony is accepted, because what was preventing them was the distance from the *imām*, therefore, the allegation of malice is not established. *Taqādum* (limitation) in the case of the *ḥadd* of drinking is the same according to Muḥammad (God bless him), and according to the two jurists it is to be determined on the basis of disappearance of smell, as will be coming up in its chapter, God, the Exalted, willing.

If the witnesses testify against a man that he had intercourse with such and such woman who is not present, he is to be subjected to *ḥadd*, but if they testify that he stole from so and so and he is not present, he is

not to be subjected to *ḥadd*. The reason is that by absence, the complaint becomes infructuous, and it is a condition in the case of theft, but not *zinā*. By her presence there is a likelihood that a *shubhah* may arise,[1] but such probabilities are not taken into account in this case.

If they testify that he had intercourse with a woman whom they do not know, he is not to be subjected to *ḥadd*, due to the probability that he might have done so with his wife or his slave girl. In fact, there is a higher probability of this.[2] **If he confesses having done so (with an unknown woman), he is to be subjected to *ḥadd*, for he is supposed to know his wife or slave girl.**

If two witnesses testify that that he had intercourse with so and so and coerced her, while two others testify that she submitted voluntarily, the *ḥadd* is to be waived from both, according to Abū Ḥanīfah (God bless him), which is also the opinion of Zufar (God bless him). **The two jurists said that it is only the man who is to be subjected to *ḥadd*,** because of their agreement about the obligation in which one of them has committed an additional offence, which is coercion. This is not so in her case, because her consent is the condition for the proof of the obligation as far as she is concerned, and this is not established due to their disagreement. The Imām argues that *zinā* is a single act that is relevant to both, however, the two witnesses claiming consent have committed *qadhf* against them. The *ḥadd* is waived for both due to the two witnesses of coercion, because *zinā* on her part is under coercion, while *qadhf* tries to do away with the the presumption of chastity in her case, thus, the two witnesses of consent become litigants with respect to them.[3]

If two witnesses testify that he committed *zinā* with a woman at Kufah, while two others testify that he did so with her at Basrah, the *ḥadd* is waived for all. The reason is that the act witnessed is the act of *zinā* and it differs with a difference in location and the *niṣāb* of witnesses (four) is not complete for either. The witnesses are not to be awarded the *ḥadd* (of *qadhf*), with Zufar (God bless him) disagreeing, because there is a probability (*shubhah*) of the unity of the offence taking into account the form and the woman.

If the witnesses differ about the location within a single room, the man and woman are both to be awarded the *ḥadd*. The meaning is that

[1]For she might claim that she is married to him or is his slave girl.

[2]For the presumption is that a Muslim does not commit *zinā*.

[3]Consequently, their testimony against them is not admissible.

each set of two witnesses testify about a different location within the room. This is based on *istiḥsān*, while analogy dictates that *ḥadd* does not become obligatory, because of the difference in location in reality. The basis for *istiḥsān* is that the two locations can be made to conform by saying that the act began in one location of the room and ended at another due to the lack of (too much) space in the room. In the alternative, the act was committed in the middle of the room, but those who were in front treated it as one location and those at the back another.

If four witnesses testify that the man committed *zinā* with a woman at Nukhaylah[4] at sunrise, while four others testify that he committed *zinā* with the woman at Dayr Hind, the *ḥadd* is to be waived for all. As for the man and woman, because we are certain that one unascertained group of witnesses is lying, and as for the witnesses due to the probability of one of the groups being truthful.

If four witnesses testify against a woman about *zinā* and she is a virgin, the *ḥadd* is waived from the two accused and from the witnesses as well. The reason is that *zinā* is not established with the existence of virginity. The meaning of the issue is that women examine her and when they say that she is a virgin, then their testimony is proof for the waiving of *ḥadd*, but it is not testimony for establishing *ḥadd*. It is for this reason that the *ḥadd* is waived in her case, and in their case it does not become obligatory.

If four witnesses testify that a man has committed *zinā* when these witnesses are blind or have been awarded *ḥadd* for *qadhf* or one of them is a slave or has been awarded *ḥadd* for *qadhf*, then all of them are to be subjected to the *ḥadd* of *qadhf*, but the person against whom they rendered testimony is not to be awarded *ḥadd*. The reason is that even a financial claim is not established through their testimony so how can *ḥadd* be established, for they are not eligible to render testimony. The slave is not eligible for witnessing or rendering testimony, therefore, even the probability of *zinā* is not established here as *zinā* is established through the rendering of testimony.

If they render such testimony and they are *fāsiqs* or it is discovered that they are *fāsiqs*, they are not to be awarded the *ḥadd*. The reason is that a *fāsiq* can bear and render testimony even though in the rendering of testimony there is a type of shortcoming due to the allegation of *fisq*.

[4]A place near Kufah.

It is for this reason that if the *qāḍī* decides on the basis of the testimony of a *fāsiq* it is executed in our view. The probability of the existence *zinā* is established through their testimony, however, taking into account the shortcoming in their testimony due to the allegation of *fisq* the probability of absence of *zinā* is also established. It is for this reason that both forms of *ḥadd* (*zinā* and *qadhf*) are prevented. The disagreement of al-Shāfi'ī (God bless him) will be coming up later based on his principle that a *fāsiq* is not eligible for giving testimony, for he is like a slave in his view (for purposes of testimony).

If the number of witnesses falls short of four, they are to be awarded the *ḥadd* (for *qadhf*). The reason is that they have committed *qadhf*, for their is no case when there is a shortage of number, and the moving out of the category of *qadhf* is on the basis of number.

If four persons testify against a person that he committed *zinā* and he is subjected to stripes on the basis of their testimony, but it turns out that one of them was a slave, or was already convicted for *qadhf*, they are to be awarded the *ḥadd*. The reason is that they have committed *qadhf* for the witnesses are just three.

They are not liable, nor is the treasury liable, for the *arsh* (compensation) to be paid to the person subjected to stripes. If he is subjected to stoning (*rajm*, his blood-money (*diyah*) is to be paid by the treasury. This is the position according to Abū Ḥanīfah (God bless him). The two jurists said that the *arsh* for stripes is also to be paid by the treasury. This feeble servant, may Allāh keep him in his protection, said: The meaning is that if he wounds him. The same disagreement governs the issue when he dies from the stripes. Accordingly, when the witnesses retract their testimony, they are not liable for compensation, in his view, but in the opinion of the opinion of the two jurists they are liable. The two jurists argue that the obligation arising from their testimony in absolute terms is stripes (that includes wounds and other things), because avoiding some kind of injury is beyond the power of the executioner, therefore, the obligation includes one who will wound and others. Consequently, the injury is attributed to their testimony, and they are liable in case of retraction. If they do not retract, the compensation becomes obligatory for the treasury, because in this case the act of the executioner is transferred to the *qāḍī*, and he is the official representing Muslims, thus, compensation from their wealth becomes obligatory. In this it resembles cases of *rajm* and *qiṣāṣ*. According to Abū Ḥanīfah (God bless him) what

is obligatory is the implementation of stripes, which amounts to painful strokes, but not wounding or causing fatal injury. Thus, such stripes do not injure, unless it is due to the executioner because of lack of training, therefore, the error is to be confined to him. It is, however, not proper to make compensation obligatory for him, according to the sound opinion, so that the people are not prevented from implementing the *ḥudūd* out of fear of financial penalties.

If four persons testify by transmitting the testimony of four witnesses (hearsay), he is not to be subjected to *ḥadd*, insofar as there is an increase in the *shubhah* and there is no necessity of bearing such *shubhah*. **If the original witnesses then come and testify that they saw the offence at that location, even then he is not to be subjected to *ḥadd*.** The meaning is that they testify that they saw the actual crime themselves. The reason is that their testimony has been rejected in some respects by the rejection of the testimony of the secondary witnesses with respect to this offence itself, for they were standing in their place with respect to the the command and bearing of testimony. The witnesses are not to be subjected to *ḥadd* either, because their number is complete and the prevention of the *ḥadd*, with respect to the accused, was due to a type of *shubhah*, and this is sufficient for the waiving of *ḥadd*, but not its imposition.

If four witnesses testify against a man about the offence of *zinā* and he is subjected to *rajm*, then each time a witness retracts he is to be subjected to *ḥadd* and is made liable for one-fourth of the *diyah* (blood-money). As for the compensation, the reason is that the witnesses whose testimony still remains unretracted owe three-fourths of the amount due, therefore, the one retracting is required to pay one-fourth of the amount due. Al-Shāfi'ī (God bless him) said that what is obligatory is execution and not wealth. This is based on his principle upheld for *qiṣāṣ*, and we shall elaborate it in the topic of *Diyāt*, God, the Exalted, willing. As for the *ḥadd*, it is the opinion of our three jurists (God bless them). Zufar (God bless him) said that he is not to be subjected to *ḥadd*. The reason is that if the retracting accuser (*qādhif*) is alive, then his *qadhf* is annulled by the death of the person stoned, and if he is dead then the offender was stoned through the judgement of the *qāḍī*, and this gives rise to *shubhah*. We argue that the testimony is converted into *qadhf* due to retraction, because by retraction his testimony is vitiated and in such a state it is deemed as *qadhf* of a dead man. As the proof is vitiated, what is based upon it is also vitiated, and that is the judgement against him, therefore,

it does not give rise to *shubhah*. This is distinguished from the case where another person commits *qadhf* against him, because he is not a *muḥsan* with reference to another due to the existence of the judgement against him.

If the *ḥadd* is still not implemented when one of the witnesses retracts his testimony, all of the witnesses are to be subjected to *ḥadd* and the *ḥadd* awarded to the accused is not enforced. Muḥammad (God bless him) said that the one retracting is to be awarded *ḥadd* exclusively, because the testimony has been strengthened through the judgement, therefore, it is not vitiated except in the case of the retracting witness. Likewise if he retracts after the implementation of the judgement. The two jurists argue that the implementation is on the part of the judicial authority, therefore, it is as if one of them retracted prior to the delivery of the judgement, therefore, the *ḥadd* was not enforced against the convicted person. When one of them retracts his testimony before the judgement is handed down, all of the witnesses are subjected to *ḥadd*. Zufar (God bless him) said that the witness retracting is alone to be subjected to *ḥadd*, because his retraction is evidence of falsehood against himself and not the others. We argue that their statements amount to *qadhf ab initio*, and they become testimony when linked with the judgement. Thus, when such testimony is not linked with the judgement it remains *qadhf*, thus, they are subjected to *ḥadd*.

If there were five witnesses and one of them retracts he is not liable for anything. The reason is that the entire claim is to be linked to the testimony of witnesses who remain, which is the testimony of four witnesses. **If another witness retracts, he is to be subjected to *ḥadd* and is liable for one-fourth of the *diyah*.** As for the *ḥadd*, we have already mentioned that. As for the financial penalty, three-fourths of it remains linked to the witnesses who have not retracted, and what is taken into account is what still remains and not the retraction of the witness who has retracted, as is known.

If four witnesses testify against a man about the commission of *zinā*, after clearing the process of *tazkiyat al-shuhūd*, and he is stoned to death, but it turns out that the witnesses were Magians or slaves, then the *diyah* is to be paid by the *muzakkīs* (who cleared them), according to Abū Ḥanīfah (God bless him). This means if they take back their *tazkiyah* (in the meaning of admitting that they intentionally cleared them). **Abū Yūsuf and Muḥammad (God bless them) said that the *diyah* is to be paid**

by the treasury. It is said that this is the case when they say that we intentionally approved the *tazkiyah* despite knowing who they were. The two jurists argue that they praised the witnesses and deemed them good, and that amounted to deeming the accused as good. It is as if they rendered testimony about his chastity. The Imām argues that testimony becomes effective through *tazkiyah*, therefore, *tazkiyah* assumes the meaning of *'illat al-'illah* (the cause of the underlying cause), therefore, the *ḥukm* is attributed to it. This is distinguished from the witnesses of *iḥṣān*, because that is merely a condition. There is no difference between their clearing them with the word "testimony" or that of a report, that is, if they are reporting on freedom and Islam. If, however, they say, "They are *'adl* (morally upright)," but it turns out that they are slaves, the *muzakkīs* are not to be held liable, because even a slave can be morally upright. **And there is no liability for the witnesses.** The reason is that their statements did not have the effect of testimony. Further, they are not to be subjected to the *ḥadd* of *qadhf* for they committed *qadhf* against a living person and he is dead; his right cannot be inherited.

If the man is subjected to *rajm* and then the witnesses are found to be slaves, the *diyah* is to be paid by the treasury. The reason is that he complied with the command of the *imām*, therefore his act is transferred to the *imām*. If, however, the *imām* undertook the act directly then the *diyah* is obligatory for the treasury, on the basis of what we mentioned. Likewise in this case. This is distinguished from the case where he executed him, because in this case he was not following his order.

If witnesses testify about *zinā* against a man and say that they intentionally looked at their private parts, their testimony is to be accepted. The reason is that it is permitted to them to look due to necessity for bearing witness, thus, it is a case similar to that of the physician and the midwife.

If four witnesses render testimony about *zinā* against a man and he denies that he is a *muḥṣan*, but he has a wife who has given birth to his child, then he is to be subjected to *rajm*. The meaning here is that he denies consummation after the existence of all the remaining conditions. The reason for the decision is that after paternity is established legally it amounts to attributing intercourse to him, therefore, if he were to divorce her it would be followed up by the rule of retraction. *Iḥṣān* is established on the basis of such facts.

If she has not given birth to his child and a man and two women testify to his *iḥṣān*, he is to be subjected to *rajm*. Zufar and al-Shāfi'ī (God bless them) disagree. Al-Shāf'ī (God bless him) followed his principle that the testimony of women is not acceptable in matters other than wealth. Zufar (God bless him) says that it is a condition in the meaning of an underlying cause, because the penalty is extreme here in his view, therefore, the rule is attributed to it and it comes to resemble a real *'illah*. Consequently, the testimony of women is not to be accepted for this purpose as a device for admitting *shubhah*. It comes to resemble the case where two Dhimmīs testify against a Dhimmī, whose Muslim slave has committed *zinā*, that he emancipated him prior to the commission of *zinā*; such testimony will not be accepted, on the basis of what we mentioned.[5] Our argument is that *iḥṣān* is the name for virtuous traits and it also prevents one from falling prey to *zinā*, as we have mentioned, therefore, it does not acquire the meaning of an underlying cause, and it is as if they testified about it in a situation other than this. This is distinguished from what has been mentioned, because emancipation is established by the testimony of the two Dhimmīs. It is not established for a prior date, because the Muslim denies it or the Muslim is going to be injured through it.

If the witnesses testifying to *iḥṣān* retract, they are not held liable, in our view, with Zufar (God bless him) differing, and this is a sub-issue of what has preceded. Allāh, the Exalted, knows best.

[5]Accepting it would double the penalty for the slave.

Chapter 100

The *Ḥadd* for Drinking *Khamr*

If a person drinks *khamr* and is caught when the smell is still on him, or they bring him in a drunken state and witnesses testify against him about drinking, then he is to be subjected to *ḥadd*. Likewise if he confesses and the smell is still on him. The reason is that the offence of drinking has been proved and the period is not barred by time. The basis for this are the words of the Prophet (God bless him and grant him peace), "If a person drinks *khamr*, subject him to stripes; if he repeats it, subject him to stripes (again)."[1]

If he confesses after the disappearance of smell, he is not to be subjected to *ḥadd* according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that he is to be subjected to *ḥadd*. Likewise if they bear witness against him after the smell is gone along with the intoxication, he is not to be subjected to *ḥadd* according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that he is to be subjected to *ḥadd*. *Taqādum* (limitation of time) prevents the acceptance of testimony by agreement, except that it is determined in his view taking into account the *ḥadd* of *zinā*. The reason is that delay is realised with the passage of time, while the smell may sometimes exist due to another reason, as it is said: They say to me you have drunk liquor, but I say to them I just had quince.[2] According to the two jurists, the time is determined with the dissipation of the smell, on the basis of the saying of Ibn Mas'ūd (God be pleased with him), "If

[1]The tradition has been reported through many channels. The one from Abū Hurayrah (God be pleased with him) has been recorded by the compilers of the four *Sunan*. Al-Zayla'ī, vol. 3, 347.

[2]A fruit similar to a pear.

you find the smell on him, subject him to stripes."[3] The reason is that the subsistence of the effect is the strongest evidence of having used it. This is converted to determination on the basis of time when it is difficult to judge by smell. The distinction between smells is possible for one skilled, but it can be confusing for one who is not adept in this.

As for confession, limitation of time does not annul it according to Muḥammad (God bless him), as in the case of the *ḥadd* of *zinā*, as has preceded in its description. According to the two jurists, the *ḥadd* is not to be awarded, except when the smell is found. The reason is that the *ḥadd* for drinking is established by the consensus (*ijmā'*) of the Companions (God be pleased with them), and there can be no *ijmā'* without the opinion of Ibn Mas'ūd (God be pleased with him), and he stipulated the existence of smell, according to what we have related.

If he is taken into custody by the witnesses and the smell is found on him, or he is intoxicated, but they go from one town to another where the *imām* is located, but his state changes prior to their reaching the destination, he is to be awarded *ḥadd* in the opinion of all the jurists. The reason is that this amounts to an excuse like the distance in the *ḥadd* of *zinā*, and the witness is not to be objected to in this.

If a person gets intoxicated by drinking the mead of dates, he is to be subjected to *ḥadd*, on the basis of what is related that 'Umar (God be pleased with him) awarded the *ḥadd* to a villager due to intoxication from *nabīdh* (mead of dates). We shall elaborate the discussion about the *ḥadd* of intoxication and the extent (number) of the *ḥadd* that is to be awarded to the offender. God, the Exalted, willing.

There is no *ḥadd* on the person on whom the smell is found or who vomits out *khamr* (without testimony about actual drinking). The reason is that the smell is subject to interpretation and so is the intoxication, that it may be due to coercion or under duress.

The intoxicated person is not to be awarded the *ḥadd* until it is known that he has become intoxicated due to *nabīdh*, and that he drank it voluntarily. The reason is that intoxication from something that is permitted is not liable to *ḥadd* like *bhang* (henbane) and mare's milk. Likewise, the intoxication resulting from coercion is not liable to *ḥadd*.

[3]It is *gharīb* in these words, however, 'Abd al-Razzāq has recorded it in the same meaning. Al-Zayla'ī, vol. 3, 349.

He is not to be subjected to *ḥadd* until the effect of intoxication is gone, so as to realise the purpose of deterrence.

The *ḥadd* for drinking *khamr* (wine) in the case of a freeman is eighty lashes, due to the consensus (*ijmā'*) of the Companions (God be pleased with them). **The strokes are to be distributed over his body like the *ḥadd* of *zinā*, as has preceded.** Thereafter his top garment has to be taken off according to the well known narration (of the school). It is narrated from Muḥammad (God bless him) that it is not to be taken off due to the lighter form of whipping as the text has not laid down the penalty. The basis for the well known view is that we have already lightened the penalty once, therefore, it cannot be done again.[4]

If the offender is a slave, the *ḥadd* for him is forty lashes, because slavery reduces the penalty to one-half, as has been explained.

If a person confesses to drinking *khamr* (wine) or to intoxication, but then retracts, he is not to be subjected to *ḥadd*, because it is purely a right of Allāh.

Drinking is established through the testimony of two witness, and proof by confession is by confessing once. It is narrated from Abū Yūsuf (God bless him) that he stipulated that the confession be twice. It is the parallel of the disagreement in the case of *sariqah*, and we will explain it there, God willing.

The testimony of women along with men is not to be accepted in this offence, because in this is *shubhah badaliyyah* and the accusation of wavering and forgetfulness.

The intoxicated person who is awarded *ḥadd* is one who (while in that state) does not understand speech, whether less or more, and he cannot distinguish between a man and a woman. This feeble servant says: **This is the position according to Abū Ḥanīfah (God bless him). The two jurists said that he is one who speaks irrationally and in a confused manner,** because this is the meaning of intoxication in the customary meaning, and it is this that has been favoured by most Mashā'ikh (jurists) (God bless them). The Imām argues that in *ḥudūd* the extreme factors are to be given effect so as to increase the possibility of waiving the *ḥadd*, and the extreme of intoxication is that it dominate reason completely depriving it of the ability to discriminate between one thing and another. What

[4]That is, it was fixed at eighty stripes and not one hundred as in the case of *zinā*.

is less than this is likely to be considered sober. What is considered effective in the size of the intoxicating container with respect to prohibition is, by way of precaution, what leads to the state that the two jurists have both held (with respect to irrational speech and confusion). Al-Shāfi'ī (God bless him) considers his gait, movements and swaying for purposes of the effect of the liquor, however, these are things that vary from person to person, therefore, there is no point in considering them.

The intoxicated person is not to be awarded *ḥadd* on the basis of his confession, due to the greater possibility of his lying in his confession, therefore, it is considered a factor for waiving the punishment. The reason is that this is a pure right of Allāh, as distinguished from the *ḥadd* of *qadhf*, which includes the right of the individual, and an intoxicated person is like a sober person for purposes of punishment as is the case with all his other transactions.

If an intoxicated person becomes an apostate, his wife is not to be separated from him, because *kufr* is a matter of belief, which is not realised through intoxication. This is the view of Abū Ḥanīfah and Muḥammad (God bless them). In the *ẓāhir al-riwāyah* it is stated that it amounts to apostasy. Allāh knows best.

Chapter 101

The *Ḥadd* of *Qadhf*

If a man commits *qadhf* (false accusation of unlawful sexual intercourse) against another man, who is a *muḥsan*, or against a woman, who is a *muḥsanah*, explicitly about the commission of *zinā*, and the person so accused demands the implementation of *ḥadd*, then the *imām* is to subject him to *ḥadd* of eighty lashes, if he is a freeman. This is based on the words of the Exalted, "And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes."[1] The meaning here, by consensus (*ijmā'*), is an accusation of *zinā*, and in the text there is an indication of this, and that is the stipulation of four witnesses for that is specific to *zinā*. The demand (complaint) by the person accused is stipulated, because his individual right is involved in this insofar as it pertains to the repelling of injury to him. The stipulation of *iḥṣān* (chastity) is due to the text that we have recited.

He said: **The strokes are to be spread over his limbs,** as has preceded in the case of *zinā*, **and his dress is not to be taken off,** because its cause is not definitive (*qaṭ'ī*), therefore, it is not to be applied with greater force as distinguished from the *ḥadd* of *zinā*. **Furs and quilted garments, however, are to be removed,** because they prevent pain from reaching his body.

If the offender is a slave, he is to be given forty lashes, due to the existence of slavery.

The meaning of *iḥṣān* is that the person accused (of *zinā*) be free, sane, major, Muslim and chaste, that is, be free of conviction for the act of *zinā*. Freedom is stipulated, because the term *iḥṣān* is used to mean that

[1]Qur'ān 24 : 4

too. Allāh, the Exalted, has said, "If any of you have not the means wherewith to wed *muḥṣanāt* (free believing women), they may wed believing girls from among those whom your right hands possess,"[2] that is, free women. Reason and puberty are stipulated, because this injury does not affect minors and the insane, because they are not capable of committing the (legal) act of *zinā*. Islam is stipulated due to the words of the Prophet (God bless him and grant him peace), "Anyone who associates another with God is not a *muḥṣan*."[3] Chastity is stipulated, because a person who is not chaste is not hurt through the accusation, and the accuser is truthful in his accusation.

If a person negates the paternity of another by saying, "You are not your father's (son)," he is to be subjected to *ḥadd*. This is the case when the mother of such person is a freewoman, because he has in reality committed *qadhf* against his mother. The reason is that paternity is negated with respect to the person who has committed *zinā* and no one besides him.

If a person says to another in anger, "You are not the son of so and so," taking the name by which his father is called, then he is to be subjected to *ḥadd*, but if he says it when he is not angry, there is no *ḥadd* for him. The reason is that in anger he intended the reality and meant it to be an abuse, while in other cases he intends thereby a reprimand by denying resemblance with his father in terms of manners and behaviour.

If he says, "You are not the son of so and so," and means thereby his grandfather, he is not to be subjected to *ḥadd*, because he is truthful in his statement. If he were to attribute his paternity to his grandfather even then he is not to be awarded *ḥadd*, because a grandson is sometimes attributed to him in the figurative meaning.

If he says to him, "O son of a *zāniyah*," when his mother is dead and was a chaste woman, after which the son demands that the offender be awarded *ḥadd*, he is to be awarded *ḥadd*, because he committed *qadhf* after her death. **Only the person who has been directly defamed with respect to his paternity on account of an accusation against a dead person can demand the implementation of *ḥadd*, and this person is the child or the parent,** because the injury is associated with him due to direct blood relationship (being parts of each other), therefore, the accusation

[2]Qur'ān 4 : 25

[3]This has preceded in the chapter on *zinā*. Al-Zayla'ī, vol. 3, 353.

includes these persons in meaning. According to al-Shāfi'ī (God bless him) the right to demand prosecution lies with each heir, because the right to claim the *ḥadd* of *qadhf* is inherited in his view, as we will elaborate. In our view, the authority to demand prosecution is not available by way of inheritance, but on the basis we have mentioned. It is for this reason that it is established for one deprived of inheritance through murder, and it is established for the child of a daughter just as it is established for the child of a son with Muḥammad (God bless him) disagreeing. It is also established for the child of a child even when the child exists with Zufar (God bless him) disagreeing with this.

If the accused (victim) is a *muḥṣan*,[4] it is permissible for his unbelieving son and slave to make a demand for the implementation of *ḥadd*. Zufar (God bless him) disagrees with this saying that *qadhf* either applies to him in meaning alone (when the parent accused is living at the time of *qadhf* and then dies), and because the defamation reverts to him when the method of acquiring this right is not inherited in our view, therefore, it is as if it includes him in form as well as meaning (that is, as if the *qadhf* was against him directly, but an unbeliever cannot be a *muḥṣan*). In our view, the defamation is by way of *qadhf* of a *muḥṣan*, therefore, he is to be subjected to *ḥadd*. The reason is that *iḥṣān*, for the person to whom *zinā* is attributed, is a condition so that defamation can be complete. Thereafter, this defamation passes over in its complete form to the child, and unbelief does not negate the eligibility of acquiring a right. This is different from the case where the child is accused by way of *qadhf* himself, as in that case the defamation is not complete due to the absence of *iḥṣān* in the person to whom *zinā* is attributed (being an unbeliever).

The slave does not have the right to demand prosecution of his master with respect to the *qadhf* of his mother, who is free, nor does the son have the right to demand prosecution of his father for the *qadhf* of his mother who is free and a Muslim. The reason is that the master is not to be punished on account of his slave and likewise the father on account of his son. It is for this reason that the father is not subjected to retaliation (*qiṣāṣ*) on account of his son nor the master for his slave. If the woman had a son from another man, he would have the right to demand it due to the realisation of the cause and the absence of an obstacle.

[4]But dead.

If a person accuses another by way of *qadhf* and thereafter the accused person dies, the *ḥadd* is annulled. Al-Shāfi'ī (God bless him) said that it is not annulled. **If the accused person dies when part of the *ḥadd* has been implemented, the remaining is annulled,** in our view with which he also differs based on the rule that it is inherited in his view, while in our view it is not. There is no disagreement that the right includes the right of the law (*shar'*) and the right of the individual. It has been laid down for repelling the injury to the person subjected to *qadhf*, and it is he who is to avail of this right exclusively, and from this perspective it is the right of the individual. Thereafter the *shar'* provides for deterrence and for this reason it has been called a *ḥadd*. The purpose of the deterrence provided by the *shar'* (law) is to clear the world of corruption, and this is a sign of the right of the *shar'*. To all this the *aḥkām* stand witness. When the two sides collide, then al-Shāfi'ī (God bless him) inclines towards the predominance of the right of the individual preferring it in consideration of the need of the individual and the absence of need from the perspective of the *shar'*. We incline towards the predominance of the right of the *shar'*, because the right that the individual has is under the authority of his master, thus, the right of the individual is secured through him. The reverse of this is not like this, because the slave has no authority in seeking satisfaction for the rights of the *shar'*, except when deputised to do so. This is the well known principle on the basis of which the various cases that are disputed are settled, and among these is inheritance. The reason is that inheritance applies to the rights of the individuals and not to the rights of the *shar'*. Among these is also forgiveness (*'afw*), because forgiveness by the one accused of *qadhf* is not valid in our view, but is valid in his view. Among these is also the issue that compensation is not allowed and limitation of time applies to it, but it does not apply according to him. Abū Yūsuf (God bless him) according to a narration holds the same view as al-Shāfi'ī (God bless him) in the case of forgiveness. Among our jurists are those who said that the right of the individual is predominant and they derive the rules accordingly, but the first is the more authentic opinion.

He said: **If a person confesses to the commission of *qadhf* and thereafter retracts his confession, the retraction is not accepted.** The reason is that the person accused by way of *qadhf* has a right in the claim and he considers the offender to be lying with respect to his retraction. This is

different from what is purely a right of Allāh, because no one is there to question his veracity (with respect to the retraction).

If a person says to an Arab, "O Nabaṭī (Nabatean)," he is not to be subjected to *ḥadd*, because he intends a comparison with respect to traits or the lack of eloquence. Likewise if he were to say, "You are not an Arab," on the basis of what we said.

If a person says to another, "O son of water from the sky," then he has not committed *qadhf*, because he intends a simile to show generosity, magnanimity and purity, because water from the sky has been attributed with purity and abundance.

If a person attributes the paternity of another to his paternal or maternal uncle or to the husband of his mother (not his own father), then he has not committed *qadhf* for each one of them may be described as a father. As for the first, it is due to the words of the Exalted, "We shall worship thy God and the God of thy fathers, of Abraham, Ismail and Isaac,—the One (True) God,"[5] when Ismā'īl was his uncle. The second is due to the words of the Prophet (God bless him and grant him peace), "The maternal uncle is a father."[6] The third is considered a father for upbringing.

If a person says to another, "You have committed *zinā* (pronounced with a *hamzah*) in the mountain," and then maintains that he meant climbing the mountain, he is to be subjected to *ḥadd*. This is the view according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that he is not to be subjected to *ḥadd*. The reason is that the word with a *hamzah* is for climbing in reality. An Arab poetess said: Rise up to the blessings by climbing the mountain. The mentioning of the mountain emphasises the meaning. The two jurists argue that the word is also used with a *hamzah* for the shameful act. The reason is that some Arabs use the soft *alif* as a *hamzah* and the *hamzah* as a soft *aliph*. The state of anger and hurling abuses will determine the meaning to be *fāḥishah* like the statement, "O *Zānī*', or *zana't*." The mentioning of the mountain will determine the meaning to be climbing when it is used with *'alā*, as it is used in that meaning. It is said that if he had said, "You climbed (*zana't*) the mountain," he would not be subjected to

[5]Qur'ān 2 : 133

[6]It is *gharīb*. Al-Zayla'ī, vol. 3, 353.

ḥadd, on the basis of what we said. It is also said that he will be subjected to *ḥadd* on the basis of the reason we elaborated.

If a person says to another, "O *zānī*," and the other replies, "No. In fact, you," then both are to be subjected to *ḥadd*, because the meaning is "In fact, you are a *zānī*." The reason is that it is a word used as a conjunction through which an error is grasped, so that the report about the first person becomes a report about the second.

If a man says to his wife, "O *zāniyyah*," and she says, "No. In fact, you," the woman is to be subjected to *ḥadd*, and there is no *li'ān*. The reason is that both have committed *qadhf*. His *qadhf* gives rise to *li'ān* and her *qadhf* leads to *ḥadd*. Commencing with *ḥadd* annuls *li'ān*, because a person who has been convicted for *qadhf* is not eligible for *li'ān*. The opposite does not lead to annulment (of *ḥadd* in her case) and is transferred to the annulment of *li'ān*, because *li'ān* too is in the meaning of *ḥadd*. **If she were to say, "I committed *zinā* with you," then there is no *ḥadd* and no *li'ān*.** The meaning is that she says this after he has called her a *zāniyyah*. The reason is the existence of a suspicion in each of the statements. It is possible that she meant the commission of *zinā* prior to marriage in which case *ḥadd* becomes obligatory and not *li'ān* due to her confirmation of this and the absence of a statement on his part. It is also probable that she meant, "My *zinā* that was with you, because I did not do it with anyone other than you," and that is the meaning in such a situation. Taking this into account, *li'ān* becomes obligatory and not *ḥadd* for the woman, due to the existence of *qadhf* on his part and its absence on her part, therefore, we arrive at what we said.

If a person acknowledges a child as his and then denies it, then he is to undergo the process of *li'ān*. The reason is that acceptance of paternity has become binding on him due to his acknowledgement, and by negating it later he has committed *qadhf*, therefore, he has to undergo *li'ān*. **If he negates it first and then acknowledges it, he is to be subjected to *ḥadd*.** The reason is that when he declares himself to have lied, *li'ān* is annulled, because it is a necessary *ḥadd* in which it is imperative to declare each other as indulging in falsehood. The basis of this is the *ḥadd* of *qadhf*. When mutual imputation of falsehood has been annulled, it is reverted back to its basis. In this there is a disagreement that we have mentioned in the topic of *Li'ān*. **The child remains attributed to him,** in both cases due to his earlier or later acknowledgement. *Li'ān* is valid without cutting off paternity, just as it is valid without the existence of a child.

If he says (to his wife), "He is neither my son nor yours," then there is no *ḥadd* and no *li'ān*. The reason is that he is denying the birth, and he does not commit *qadhf* by doing so.

If a person commits *qadhf* against a woman, who has children with her whose father is not known, or he commits *qadhf* against a woman who has undergone *li'ān* due to a child and the child is alive, or he commits *qadhf* after the death of the child, then there is no *ḥadd* for him, because of the existence of the signs of *zinā* with respect to her, and the sign is the birth of a child whose father is not known. This leads to the loss of chastity taking her situation into account, and chastity is a condition of *iḥṣān*. **If he commits *qadhf* against a woman who has undrgone *li'ān* without a child, then he is subjected to *ḥadd*,** due to the absence of the signs of *zinā*.

He said: **If a person has prohibited sexual intercourse without lawful ownership, then a person who commits *qadhf* against him is not to be subjected to *ḥadd*,** due to the loss of chastity, which is a condition for *iḥṣān*. The reason is that the person committing *qadhf* is truthful. The rule for this is that if a person who commits prohibited sexual intercourse, that is prohibited for itself, such an act does not give rise to *ḥadd* due to *qadhf*. The reason is that *zinā* is sexual intercourse prohibited for itself. If the intercourse is prohibited for some other reason (like that done during menstruation, *nifās* or with a *mukātabah* and so on), the person committing *qadhf* will be subjected to *ḥadd*, for that is not *zinā*. Thus, intercourse in other cases complete in all respects or in some respects is prohibited in itself. Likewise in a case of ownership with perpetual prohibition (like intercourse with a slave girl with whom his father has had intercourse), but if the prohibition is temporary then it is intercourse that is prohibited for some external reason. Abū Ḥanīfah (God bless him) stipulates that the perpetual prohibition must be one whose rule has been established through consensus or a *mashhūr* tradition, so that it is established without vacillation. **The explanation is that if a person commits *qadhf* against a man who has had intercourse with a slave girl jointly owned with another, then there is no *ḥadd* for him,** due to the absence of ownership in some respects. **Likewise if a person commits *qadhf* against a woman who committed *zinā* during the days when she was a Christian,** due to the bringing about of *zinā* in the legal sense and with the absence of ownership, therefore, she was liable for *ḥadd*.

If he commits *qadhf* against a man who has had sex with his slave girl who is a Magian, or his wife who was menstruating, or his *mukātabah*, then he is to be subjected to *ḥadd*, because the prohibition exists with the subsistence of ownership and it is temporary, therefore, it is prohibition for an external reason and does not amount to *zinā*. According to Abū Yūsuf (God bless him) if he has intercourse with his *mukātabah*, his *iḥṣān* is annulled. This is also the view of Zufar (God bless him). The reason is that ownership has been removed with respect to intercourse, therefore, he is liable to *'uqr* for such intercourse. We say that the ownership of the person subsists and the prohibition is for an external reason, for it is temporary.

If a person commits *qadhf* against a person who has had intercourse with his slave girl who was his foster sister, then he is not to be subjected to *ḥadd*. The reason is that the prohibition is perpetual and this is the authentic view.

If a person commits *qadhf* against a *mukātab* slave, who dies and leaves enough wealth for payment of his remaining instalments, then there is no *ḥadd* for this person, due to the possibility of *shubhah* with respect to his freedom on the basis of the disagreement among the Companions (God be pleased with them) about this issue.

If a person commits *qadhf* against a Magian, who had married his mother and then converted to Islam, he is to be subjected to *ḥadd* according to Abū Ḥanīfah (God bless him). The two jurists said that he is not to be subjected to *ḥadd*. This is based on the issue that the Magians marry relatives in the prohibited degree and marriage is to be assigned the rule of validity for matters between them in his view, with the two jurists disagreeing. The discussion has preceded in the topic of *Nikāḥ*.

If an enemy (*ḥarbī*) enters our territory on the undertaking of safe-conduct and commits *qadhf* against a Muslim, he is to be subjected to the *ḥadd*. The reason is that this offence involves the right of the individual present in it, and the visitor has undertaken to abide by laws affecting the rights of individuals. Further, he desires that he should not be tormented, therefore, he is bound not to torment others, and the consequence of the injury caused by him is *ḥadd*.

If a Muslim is subjected to *ḥadd* due to *qadhf*, his eligibility for giving testimony is annulled, even if he repents. Al-Shāfi'ī (God bless him) said that it is acceptable if he repents, and this issue is discussed in the topic of *Shahādāt*.

If an unbeliever is subjected to *ḥadd* for *qadhf*, he loses the right to testify against the Ahl al-Dhimmah. The reason is that he can testify against his own kind, therefore, it is rejected in order to complete his *ḥadd*.

If he converts to Islam, his testimony is acceptable against them and against Muslims. The reason is that this right to testify was acquired after conversion to Islam, therefore, it does not fall under the rule of rejection. This is distinguished from the case of the slave if he is awarded the *ḥadd* of *qadhf* and is emancipated thereafter when he has no right to render testimony. The reason is that he has no right to testify originally in the state of slavery, therefore, the rejection of his testimony after emancipation is for completion of his *ḥadd*.

If he has been given one lash on account of the *ḥadd* of *qadhf*, and he converts to Islam, and is then given the remaining lashes, his testimony is acceptable. The reason is that rejection of testimony completes the *ḥadd* and becomes an attribute for him, while the *ḥadd* awarded after conversion to Islam is part of the *ḥadd*, thus, rejection of testimony does not become his attribute. It is narrated from Abū Yūsuf (God bless him) that his testimony is to be rejected, because the smaller part is subservient to the major, however, the first opinion is correct.

He said: **If a person commits *qadhf* or *zinā* or drinks *khamr* more than one time, and is awarded *ḥadd*, then it is sufficient for all of these offences.** As for the first two, the implementation of *ḥadd* is undertaken as a right of Allāh, the Exalted, for purposes of deterrence. The probability of the purpose being achieved with the first implementation exists, and this gives rise to the *shubhah* (suspicion) of this purpose being lost in the second implementation.

This is distinguished from the case where he commits *zinā*, *qadhf*, theft, and drinks *khamr*, because the purpose of one category is different from another category, therefore, they cannot be treated as concurrent. As for *qadhf*, the dominant right in it, in our view, is the right of Allāh, therefore, it will be linked with the other two offences. Al-Shāfi'ī (God bless him) says that if the person accused and the act committed, which is *zinā*, are for different offences they cannot be merged, because the dominant right in *qadhf*, according to him, is the right of the individual.

101.1 *TA'ZĪR*

If a person commits *qadhf* by accusing a male or female slave, or an *umm al-walad*, or an unbeliever of *zinā*, he is to be subjected to *ta'zīr*. The reason is that it is the offence of *qadhf*, but the obligation of *ḥadd* was prevented due to the absence of *iḥṣān*, therefore, *ta'zīr* became obligatory.

Likewise if he commits *qadhf* against a Muslim, without the imputation of *zinā*, by saying, "O Fāsiq," or "O unbeliever," or "O *khabīth*," or "O thief." The reason is that he caused him mental torture and associated dishonour with him, and there is no possibility of using analogy in *ḥudūd*, therefore, *ta'zīr* becomes obligatory, except that *ta'zīr* in the first case (of accusing a non-*muḥṣan* of *zinā*) reaches the maximum level for the offence, because it belongs to the genus in which *ḥadd* is obligatory, but in the second case it is left to the discretion of the *imām*.

If he calls him, "O donkey," or "O pig," he is not to be subjected to *ta'zīr*. The reason is that he has not associated dishonour with him due to the certainty of the negation (of the name called as he is a human). It is said that according to our custom he is to be subjected to *ta'zīr*, because it is considered an abuse. It is said that if the persons subjected to abuse are respected persons like the *fuqahā'* and the elite, he is to be subjected to *ta'zīr*, because they will feel degraded by it. If, however, they are from among the common people, he is not to subject them to *ta'zīr*, and this appears reasonable.

The maximum limit of *ta'zīr* is thirty-nine lashes, while the minimum is three. Abū Yūsuf (God bless him) said that the maximum for *ta'zīr* is seventy-five lashes. The basis for it are the words of the Prophet (God bless him and grant him peace), "One who reaches the level of the *ḥadd* in matters other than the *ḥadd* is a transgressor."[7] When enforcement of the *ḥadd* is obstructed, then Abū Ḥanīfah and Muḥammad (God bless them) take into account the minimum number for the *ḥadd*, which is the *ḥadd* for a slave in the case of *qadhf*, and they adopted this. It is forty lashes and they reduced one lash from it. Abū Yūsuf (God bless him) considered the minimum *ḥadd* for freemen, because the original rule is that of freedom, and then reduced one lash from it, according to one narration from him, which is also the view of Zufar (God bless him), and is based on analogy. In the narration that we have mentioned, he reduced

[7]It is recorded by al-Bayahaqī. Al-Zayla'ī, vol. 3, 354.

five lashes, and this is reported from 'Alī (God be pleased with him),[8] and he followed his opinion. Thereafter, he determined the minimum in the *Book* as three lashes, as what is less than that does not serve as a deterrent. Our Mashā'ikh (jurists) have determined that the minimum is what the *imām* considers to be so, therefore, he determines it to be the minimum that will act as a deterrent, because it differs for different people. It is narrated from Abū Yūsuf (God bless him) that it depends upon the gravity and triviality of the offence. It is also related from him that it is to be treated in relation to each category of offence, thus, fondling and kissing are to be associated with the *ḥadd* of *zinā*, while *qadhf* without *zinā* is to be related with the *ḥadd* of *qadhf*.

He said: **If the *imām* is of the opinion that he should combine with lashes, awarded as *ta'zīr*, imprisonment as well, he may do so,** because it is suitable by way of *ta'zīr*. The *sharī'ah* has laid it down in general terms, therefore, it is permitted that he deem imprisonment as sufficient or he may combine it with lashes.

He said: **The greatest intensity in lashes is in *ta'zīr*,** because it has been lightened in terms of number, therefore, it is not to be lessened in terms of intensity so that it does not lead to the loss of purpose (deterrence). Consequently, it is not lightened with respect to spreading it over the different limbs.

This is followed by the *ḥadd* of *zinā*, because it is established through the *Qur'ān*, while the *ḥadd* of drinking *khamr* (its number) is established by the opinion of the Companions (God be pleased with them). Further, it is the gravest form of offence so that *rajm* was laid down for it by the law (*shar'*). **Then comes the *ḥadd* of drinking,** because its cause is definitive. **Thereafter the *ḥadd* of *qadhf*,** because its cause is probable, due to the possibility of the accuser being truthful. Further, there is enhancement of standards in it due to the rejection of testimony, thus, it is not to be enhanced in terms of intensity.

If a person is subjected to *ḥadd* or *ta'zīr* by the *imām* and he dies as a result of it, then there is no liability for such death, because he undertook the act under the directives of the law (*shar'*), and the act of one obeying orders is not restricted by the assurance of safety, as in the case of the cupper or the veterinary, but is different from the case of the husband

[8]It is *gharīb*, but al-Baghawī has narrated it from Ibn Abī Laylā. Al-Zayla'ī, vol. 3, 354.

trying to punish his wife as the permission there is unqualified and an unqualified permission may be restricted with the condition of safety, like walking in the street. Al-Shāfi'ī (God bless him) said that in this case *diyah* is imposed upon the treasury, because causing injury amounts to an error in the implementation, because *ta'zīr* is for disciplining. *Diyah,* however, is imposed on the treasury, because the benefit of the act of the person implementing the lashes reverts back to the Muslims generally, thus, the financial burden is placed on their wealth. We say that when the right of Allāh is being exacted from him under His command, it is as if Allāh Himself has caused him to die without any intervening cause, therefore, there is no liability.

Al-Hidāyah

BOOK TWELVE

Sariqah (Theft and Highway Robbery)

Chapter 102

The Legal Status of *Sariqah*

Sariqah in its literal meaning is the taking of something from another by way of concealment and stealth. It is from this that the meaning of eavesdropping is derived. Allāh, the Exalted, has said, "But any that gains a hearing by stealth."[1] In the technical meaning (in the *sharī'ah*) some additional stipulations have been added, and the elaboration of these will be coming up before you, God, the Exalted, willing. The literal meaning, however, is observed in it both initially and at the end, or in the beginning and not later. For example, a person breaches a wall by stealth then takes away the wealth of the owner by the use of force and openly. In the major form of this offence (*kubrā*), I mean, the cutting off of the highway in concealment from the monitoring of the *imām* for it is he who undertakes the protection of the highway with his security force. In the minor form (*ṣughrā*) the concealment is from the vision of the owner or of the person who stands in his place.

He said: **If a sane and major person steals ten *dirhams* or a thing that reaches the value of ten minted *dirhams* from a *ḥirz* (place of its safe-custody) in which there is no *shubhah*, then it is obligatory to subject him to *ḥadd*.** The basis for this are the words of the Exalted, "As to the thief, male or female, cut off his or her hands: a retribution for their deeds, and exemplary punishment from Allah, and Allah is Exalted in Power, Full of Wisdom."[2] It is necessary to take into account *aql* (reason) and *bulūgh* (puberty), because the offence is not committed without them. Cutting of the hand is the compensation for the offence, therefore, it is essential that it be of substantial wealth, because the inclination

[1]Qur'ān 15 : 18
[2]Qur'ān 5 : 38

to acquire trivial amounts is weak. Likewise the taking of insignificant things is not concealed, thus, the *rukn* (essential element) is not realised nor is there wisdom in deterring it for that is done in what is predominant. Determining it to be ten *dirhams* is the opinion of our school, but according to al-Shāi'ī (God bless him) it is fixed at one-fourth of one *dīnār*.[3] According to Mālik (God bless him) it is fixed at three *dirhams*. These two jurists maintain that cutting of the hand during the period of the Prophet (God bless him and grant him peace) was not undertaken unless it reached the price of the *mijann* (shield made of leather),[4] and the minimum that is transmitted for its price is three *dirhams*. Adopting the minimum assures certainty and is preferable. Al-Shāfi'ī (God bless him) says, however, that the value of the *dīnār* during the period of the Prophet (God bless him and grant him peace) was twelve *dirhams*, and the figure three is one-fourth of it.

Our argument is that adopting the maximum in this category is preferable so as to find a way for waiving the *ḥadd*. The reason is that in adopting the minimum there is a *shubhah* (suspicion) of the absence of an offence, and such suspicion leads to the waiving of the *ḥadd* in any case. This is supported by the words of the Prophet (God bless him and grant him peace), "There is no cutting of the hand, except in one *dīnār* or ten *dirhams*."[5] The term *dirham* is customarily applied to mean minted coins. This should explain to you the stipulation of the term minted, as was stated in the *Book*; it is the *zāhir al-riwāyah* (authentic narration), and is the correct opinion keeping in view the completion of the offence. Consequently, if he were to steal ten nuggets whose value is less than ten minted coins, cutting of the hand is not obligatory. What is considered is seven *mithqāls* in weight, as that is what is in practice in most lands. His statement, "or a thing that reaches the value of ten minted *dirhams*," is an indication that in things other than *dirhams* it is the value of the *dirhams* that is taken into account even when the thing stolen is gold. Further, it is necessary that there be a *ḥirz* (place of its safe-custody) in which there is no *shubhah*, because *shubhah* leads to waiving of the *ḥadd*, and we shall explain it in what follows, God, the Exalted, willing.

He said: **The slave and the freeman for purposes of the cutting of the hand are the same.** The reason is that the text (*naṣṣ*) did not provide

[3]There are ten or twelve *dirhams* in a *dīnār* according to different views.

[4]It is recorded by al-Bukhārī and Muslim. Al-Zayla'ī, vol. 3, 355.

[5]It is recorded by al-Ṭaḥāwī in *Shar al-Āthār*. Al-Zayla'ī, vol. 3, 355.

details and conversion to one-half is not possible, thus, the full penalty is given for the sake of the protection of the wealth of the people.

***Ḥadd* becomes obligatory by the confession of the offender even if made once. This is the view according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf (God bless him) said that cutting is not undertaken except after a confession made twice.** It is narrated from him that these be made in two different sessions, because confession is one type of proof and is corroborated by the other type, which is testimony. We did the same in the case of *zinā*. The two jurists argue that the *sariqah* (theft) stands proved by a single confession, therefore, it is deemed sufficient as is the case with *qiṣāṣ* and the *ḥadd* of *qadhf*. The testimony is not taken into account in this case, because excess in testimony reduces the allegation of falsehood, but in a confession it does not provide such a benefit for there is no cause for suspicion there. Further, the means to retraction of the confession with respect to the *ḥadd* are not blocked by repetition, while retraction with respect to wealth is not valid at all, because the owner of the wealth deems him to be a liar. The stipulation of additional times in the case of *zinā* is contrary to analogy, therefore, it is better to confine such repetition to the issue of the text (*shar'*).

He said: **It becomes obligatory with the testimony of two witnesses,** due to the manifestation of the proof as is the case with all the remaining rights. It is necessary, however, that the *imām* ask them about the method of theft, its nature, time and place for additional precaution, as has preceded in the case of the *ḥudūd*. He is to imprison him until he has made enquiries from the witnesses due to the charge against him.

He said: **If a group participates in the theft, and each one of them takes away wealth valued at ten *dirhams*, they are to be subjected to amputation, but if what they take away individually is less then their hands are not amputated.** The reason is the obligating factor is the theft of the *niṣāb* (minimum amount for theft), and is to be worked out for each one of them as a result of their offence, thus, the completion of *niṣāb* for each person is to be taken into account. Allāh knows best.

Chapter 103

Theft That Gives Rise to Punishment of Amputation

There is no cutting of the hand for what is treated as insignificant and free (permissible) in the Dār al-Islām, like wood, grass, cane, fish, birds, game, arsenic, clay and lime. The basis for this is the tradition of ʿĀ'ishah (God be pleased with her), who said: "The hand was not cut during the period of the Prophet (God bless him and grant him peace) for insignificant things,"[1] that are trivial. Such a thing is one whose original species is found to be free in its own form and is not desired for itself, for it is trivial there being little desire to hoard it or be niggardly with respect to it. Whenever such a thing is taken away without the willingness of the owner there is no need to lay down a deterrent in the law (*sharʿ*) for such taking. It is for this reason that the cutting of the hand is not obligatory in the case of things that are below the value of the *niṣāb*. Further, the place of safe-custody (*ḥirz*) in such things is deficient. Do you not see that hay is thrown in front of the doors, and it is taken inside the house for construction purposes and not for storing? The birds fly away and game can flee. Likewise things of common ownership in game, as it is of the same nature giving rise to *shubhah*, and *ḥadd* is waived on account of it. Fish includes both salted and fresh, while birds include chicken, ducks, and pigeons due to what we have mentioned, and also because of the unqualified meaning of the words of the Prophet (God bless him and grant him peace), "There is no amputation for birds."[2] It is narrated from

[1]It is recorded by Ibn Abī Shaybah. Al-Zaylaʿī, vol. 3, 360.

[2]It is *gharīb*, and is recorded by ʿAbd al-Razzāq and Ibn Abī Shaybah. Al-Zaylaʿī, vol. 3, 360.

Abū Yūsuf (God bless him) that the punishment of cutting of the hand is to be awarded for all these things except for clay, soil and dung. This is also the view of al-Shāfi'ī (God bless him). The evidence against them is what we have mentioned.

He said: **There is no cutting of the hand for things that are prone to decay like milk, meat, and fresh fruit,** due to the saying of the Prophet (God bless him and grant him peace), "There is no cutting in *thamar* (fruit) or *kathar*,"[3] where *kathar* is *jumār* (edible tuber of the palm tree). It is also said that it means *wadi* (small date palm). The Prophet (God bless him and grant him peace) said, "There is no cutting in food,"[4] and the meaning, God knows best, is what is prone to decay and is ready for eating, or whatever has the same meaning like meat and fruit, because the hand is cut in things like wheat and sugar on the basis of consensus. Al-Shāfi'ī (God bless him) said that the hand is to be cut for these things due to the words of the Prophet (God bless him and grant him peace), "There is no cutting in *thamar* (fruit) or *kathar*, but when it is stored in a stone basin, the hand is to be cut."[5] We would say that it is to be construed in conformity with practice for what was preserved in the basin according to their practice was fruit that was dried and in that there is amputation.

He said: **There is no cutting of the hand in fruit that is on the tree and in crop that has not been harvested,** due to the lack of preservation for safe-custody.

There is not cutting of the hand in intoxicating beverages, because the act of the thief in acquiring them will be construed to be for spilling. Further, some of these beverages are not deemed wealth, while there is a disagreement about the value of others, thus, the suspicion (*shubhah*) of the absence of value is created.

There is no cutting for the mandolin, because it is one of the instruments of amusement.

There is no cutting for the *muṣḥaf* even if it is ornamented with gold. Al-Shāfi'ī (God bless him) said that the hand is to be cut as it is marketable wealth and even its sale is permitted. A view similar to this is narrated from Abū Yūsuf (God bless him). It is also narrated from him

[3]It is recorded by al-Tirmidhī, al-Nasā'ī, Ibn Mājah and others. Al-Zayla'ī, vol. 3, 361.

[4]It is *gharīb* in these words, and has been recorded by Abū Dāwūd in the *mursal* traditions. Al-Zayla'ī, vol. 3, 362.

[5]It is *gharīb* in these words. Another tradition giving the same meaning has been recorded by Abū Dāwūd and al-Nasā'ī. Al-Zayla'ī, vol. 3, 362.

that the hand is to be cut if the ornamentation reaches the level of the *niṣāb*, because it is not part of the *muṣḥaf* and is to be treated separately. The reasoning underlying the authentic narration (*ẓāhir*) is that the person acquiring it is to be construed to do so for recitation and study. The reason is that it has no market value by virtue of its being writing. Its preservation is for itself and not for the leather, pages (paper), or ornamentation, for these are secondary things, and secondary things are not taken into account. It is as if someone stole a utensil in which there is wine when the value of the utensil reaches the *niṣāb*.

There is no cutting for the doors of a mosque, due to the lack of custody, and this door becomes like the door of a house in fact better, because things in the house are protected with the door of the house, but the things in the mosque are not protected this way with the door, so much so that there is no cutting for the theft of the assets inside the mosque.

He said: **There is no cutting for a cross made of gold, nor for chess nor backgammon,** because the person who takes them will construe it to be for breaking, in conformity with forbidding the evil. This is different from the *dirham* with engraving on it, because it has not been prepared for worship, therefore, the doubt of permissibility of destroying it does not arise. It is narrated from Abū Yūsuf (God bless him) that if the cross is in a place of worship, there is no cutting of the hand, due to the absence of safe-custody (*ḥirz*), but if it is present in another room the hand is to be cut due to the completion of value and existence of *ḥirz*.

There is no cutting of the hand for abducting a minor (infant) who is a free person even if he is wearing jewellery. The reason is that a free person is not wealth, and the jewellery he is wearing is secondary to his person. Further, the defence can be put up that the minor was taken to pacify him or to carry him to his governess (nanny). Abū Yūsuf (God bless him) said that amputation is awarded if the child is wearing ornaments of the value of the *niṣāb*, because cutting will be obligatory by stealing the jewellery separately, so also when taken with another thing (child). The same applies when the thief steals a silver goblet that has mead or broth in it. The disagreement here is about an infant who cannot walk or speak so that he is not under his own control.

There is no cutting of the hand for taking away a grown up slave, for that is treated as *ghaṣb* (misappropriation, abduction) or deception.

The hand is to be cut for taking away a young (minor) slave due to the occurrence of theft in conformity with its *ḥadd*, unless he can convey who he is, because then this minor and the major are the same in respect of control over themselves. Abū Yūsuf (God bless him) said that cutting of the hand is not to be awarded even if he is a minor who does not understand or cannot speak on the basis of *istiḥsān*, because he is a human being from one aspect and wealth from another. The two jurists argue that he is wealth in the absolute sense due to the benefit to be obtained from him or due to the withheld benefit to be derived from him despite the obstacle (of being human as that does not eliminate his being wealth), except that the attribute of being a human is associated with him (this form of wealth).

There is no cutting of the hand for all kinds of bound books (*dafātir*), because their purpose is what is contained in them and that is not *māl* (wealth) **except for books of accounts,** as what is in them is not intended through the taking, and the (real) purpose is (to steal) the paper (*kawāghid*).

He said: **There is no cutting of the hand for the theft of a dog or a lion,** because those who are in the same species are found to exist freely in an original state of permissibility and they are not desired for themselves. Further, the disagreement among the jurists is obvious with respect to marketable value of a dog, therefore, it gives rise to *shubhah*.[6]

There is no cutting of the hand for a tambourine, drum, harmonium, or flute, because in their view these things have no marketable value. According to Abū Ḥanīfah (God bless him) the one who takes them will take the plea of destroying them.

The hand is to be cut for taking teakwood, bamboo, ebony and sandalwood, because these are types of wealth that are protected for they are precious in the eyes of the people, and they are not found in a free form in the Dār al-Islām.

He said: **The hand is to be cut for stealing emeralds, rubies and green jewels (from chrysolite),** because these are the most sought after and precious forms of wealth and are not found freely in the undesirable original permissible form in the Dār al-Islām, therefore, they are like gold and silver.

[6]Which gives rise to the waiving of the *ḥadd*.

When utensils and doors are made from wood, there is cutting of the hand for stealing them, because through labour they come to be associated with precious wealth. Do you not see that they are protected as distinguished from mats, for craftsmanship has not come to dominate their species so that they are spread out without protection? In mats from Baghdād it is said that the hand is to be cut for its theft due to the domination of craftsmanship over the original material. The hand is to be cut for doors that are not fixed (to the walls), and it is to be cut when they are light and are not heavy for carrying by one person, because there is no inclination to steal heavy doors.

There is no cutting of the hand for the deceiver, male or female, due to the deficiency in *ḥirz* (place of safe-custody), **neither for the embezzler nor for one who extorts wealth,** because he does this openly. The basis is the saying of the Prophet (God bless him and grant him peace), "There is no cutting of the hand for the embezzler, the extorter and the deceiver."[7]

There is no cutting of the hand for the grave-robber. This is the view according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf and al-Shāfi'ī (God bless them) said that he is liable for cutting of the hand, due to the words of the Prophet (God bless him and grant him peace), "We cut the hand of one who robs a grave."[8] The reason is that the shroud is marketable wealth that is preserved in a *ḥirz* meant for it, therefore, his hand is to be cut. The two jurists rely on the words of the Prophet (God bless him and grant him peace), "There is no cutting of the hand for the *mukhtafī*,"[9] and he is the grave-robber (*nabbāsh*) in the language of the people of Madinah. The reason is that *shubhah* has arisen with respect to ownership, because the corpse has no ownership in reality nor does the heir due to the prior need of the dead person (before the heir became the owner). Further, a disturbance has occurred in the purpose, which is deterrence, because the offence in itself is of rare occurrence. In addition to this what he (Abū Yūsuf) has relied upon is not *marfū'* or it is interpreted to apply to *siyāsah* offences. If the grave is inside a locked room, then the issue is disputed on the same grounds, according to the sound narration, on the basis of what we said. Likewise if a person steals

[7]It is recorded by all the sound compilations. Al-Zayla'ī, vol. 3, 363–65.

[8]It is related by al-Bayhaqī. Al-Zayla'ī, vol. 3, 366.

[9]This is a *gharīb* tradition, but Ibn Abī Shaybah has recorded a tradition conveying the same meaning. Al-Zayla'ī, vol. 3, 367.

from the coffin while going with a caravan when the corpse is inside it, due to what we said.

The hand of the person who steals from the treasury (*bayt al-māl*) is not to be cut, because this is public wealth and he is one of them, **nor when he steals from wealth in which the thief is a co-owner,** due to what we have said.

If a person is owed *dirhams* by another and he steals from him, his hand is not to be cut, because this amounts to the satisfaction of his claim, and prompt and deferred are in the same position with respect to this, on the basis of *istiḥsān*. The reason is that delay is due to the postponement of the demand (for satisfaction). Likewise if he steals in excess of his right, because he becomes a co-owner with him in the stolen amount to the extent of his claim.

If he steals goods from him, his hand is to be cut, because he does not have the authority to seek satisfaction from them, except on the basis of sale by consent. It is narrated from Abū Yūsuf (God bless him) that his hand is not to be cut for he has the right, according to some jurists, to acquire them in satisfaction of his claim or as property pledged with him for his claim. We say that this is a statement that does not rely on an authentic evidence, therefore, it is not to be acknowledged without linking it to a suit filed for it, and if he does so the *ḥadd* will be waived. The reason is that it is the case of probability in a matter that is subject to disagreement. If his claim was for *dirhams* and he stole *dīnārs* from him, it is said that his hand will be cut as he does not have the right to take them. It is also said that his hand is not to be cut as currencies are a single species.

If a person steals some ʿayn (something that can be taken into physical possession) and his hand is cut for it, but thereafter he returns it and then steals it again when this thing is in the same physical state, his foot is not to be cut. Analogy dictates that his hand is to be cut, and it is one narration from Abū Yūsuf (God bless him). It is also the opinion held by al-Shāfiʿī (God bless him), due to the saying of the Prophet (God bless him and grant him peace), "If he repeats it, cut his hand (again),"[10] without going into details. The reason that the second theft is complete like the first. In fact, it is more atrocious due to the implementation of the (first) deterrent punishment, and it is as if the owner had sold it to

[10]It is recorded by al-Dār'quṭnī in his *Sunan*. Al-Zaylaʿī, vol. 3, 368.

the thief and then bought it from him after which theft was committed. We maintain that the cutting of the hand led to the elimination of protection for the stolen property, as will be known in what follows, God, the Exalted, willing. By returning the property to the owner the protection returned in reality, but a doubt (*shubhah*) remained with respect to the existence of protection taking into account the unity of ownership and subject-matter as well as the existence of the cause (of loss of protection), which is cutting of the hand. This is distinguished from what has been said (with respect to sale by abū Yūsuf), because ownership becomes different with a difference in the cause. Further, repetition of the offence by such a person (with respect to the same property) is rare due to his having borne the hardship of the deterrent, therefore, implementation once again becomes devoid of purpose, due to the rare occurrence of the offence. It is as if the person subjected to the *ḥadd* of *qadhf* commits *qadhf* against the first person again.

If the state of the stolen property changes, for example, it was yarn when he stole it and his hand was cut then he returned it and it was woven, but he repeats the offence and steals the cloth, his foot is to be cut. The reason is that the *'ayn* has changed its form, therefore, a person misappropriating the yarn and weaving it will come to own the cloth. This is the sign of alteration in each subject-matter. When it stands altered, *shubhah* arising from the unity of subject-matter and amputation is negated, thus, cutting of the hand a second time becomes obligatory. Allāh knows what is correct.

Chapter 104

Place of Safe Custody (*Ḥirz*)

If a person steals from his parents or children or relatives in the prohibited degree, his hand is not to be cut. In the first case, which is relationship by birth, there is free sharing of wealth and entry into the *ḥirz*. The second is due to the second meaning (entry into the *ḥirz* without permission). It is for this reason that the law (*shar'*) has permitted glancing at visible locations of adornment (parts of the body) as distinguished from friends with whom an enmity is created through theft. In the second case there is a disagreement with al-Shāfi'ī (God bless him), because he associates them with distant relatives, and we have elaborated this in the topic of emancipation.

If he steals from the house of a relative in the prohibited degree assets belonging to another, his hand is not cut, but if he steals his own assets from the house of another (not a relative) his hand is cut, on the basis of entry into the *ḥirz* with and without permission.

If a person steals from his foster mother, his hand is cut. According to Abū Yūsuf (God bless him) his hand is not to be cut, because he enters her house without permission and bashfulness. This is distinguished from the case of the foster sister, due to the absence of such a relationship according to custom. The reasoning underlying the authentic narration is that there is no kinship and the prohibition without kinship is not respected, like the prohibition established due to *zinā* and kissing with lust. Closer than this is the foster sister. The reason is that fosterage is not publicised, therefore, there is no sharing of wealth or free entry into the *ḥirz* in order to avoid allegations of suspicion. This is different from blood kinship.

If one spouse steals from the other spouse or a slave from his master or from the wife of his master or from the husband of his mistress, there is no cutting of the hand, due to the existence usually of permission for entry. If one of the spouses steals exclusively from the place of safe-custody (*ḥirz*) of the other spouse when both do not reside in such a place, then the rule is the same in our view. Al-Shāfi'ī (God bless him) disagrees. The reason (for our argument) is that there is a free sharing of wealth among them in practice and implication (of the relationship of marriage). This is a parallel case to the disagreement in the case of testimony.[1]

If the master steals from his *mukātab* slave, his hand is not to be cut, because he has a right in his earning.

Likewise a person who steals from the spoils, because he has a share in them and this is related from 'Alī (God be pleased with him) both with respect to the waiving of *ḥadd* and the underlying rationale.

He said: ***ḥirz* is of two types: (1) *ḥirz* for the meaning of protection within it, like rooms and houses, and (2) *ḥirz* through a guard.** This feeble servant (the Author) says: *Ḥirz* is essential, because the meaning of stealth is not established without it. Thereafter it sometimes exists through location, and that is the location prepared for guarding assets, like houses, rooms, trunks and shops. At other times it exists through a guard like a person sitting in the street or in a mosque when he has some baggage with him, then he is the guard for these assets. The Prophet (God bless him and grant him peace) ordered the amputation of the hand of the person who stole the cloak of Ṣafwān from under his head when he was sleeping in the mosque.[2]

In a *ḥirz* based on location, custody through a guard is not taken into account. This is correct, because it is protected without a guard, and such a *ḥirz* is a room even when it does not have a door or has one, but it is open, so that a person stealing from there is subjected to amputation. The reason is that a structure is for purposes of safe-custody, except that there is no cutting of the hand without his bringing the property out of it, because of the existence of prior possession of the owner. This is different from the *ḥirz* through a guard insofar as cutting of the hand becomes obligatory as soon as he takes it away from him, due to the elimination of

[1]The Ḥanafīs say that the testimony of one spouse is not accepted in favour of another, but the Shāfi'īs in one view say that it is accepted.

[2]It is recorded by Abū Dāwūd, Ibn Mājah and al-Nasā'ī. Al-Zayla'ī, vol. 3, 368.

the possession of the owner by the mere act of taking thereby completing the act of theft. There is no difference between the situations where the guard is asleep or is awake and whether the goods are under him or lying next to him. This is the correct view, because the person sleeping next to his goods is considered to be guarding his things in practice. It is for this reason that the custodian and the borrower of goods (sleeping next to the goods) is not held liable for compensation, because in such a case it is not the loss of goods, as distinguished from what has been preferred for *fatwā*.

He said: **If a person steals from a *ḥirz* or from a place other than the *ḥirz* when the owner is next to the property guarding it, his hand is to be cut,** because he has stolen from one of the two types of *ḥirz*.

There is no cutting of the hand for a person who steals wealth from a public bath or a house in which entry to the public is permitted, due to the existence of permission in practice or actual for entry, therefore, the *ḥirz* is demolished. This includes the shops of traders and public inns, except when theft is committed there at night, because they are built for custody of assets, and the permission pertains to the day.

If a person steals assets from a mosque when the owner (custodian) is there, his hand is to be cut, because it is protected by a guard. The reason is that a mosque is not built for safe-custody of assets, therefore, the wealth inside is not protected through *ḥirz* of location. This is distinguished from a public bath, and a room that is open to the public for entry so that the hand is not cut, because it is built for safe-custody, therefore, the *ḥirz* is by location (though undone by free-entry) and *ḥirz* by a guard is not taken into account.

There is no cutting of the hand for the guest who steals from his host, because the room (house) is no longer a *ḥirz* as far as he is concerned due to the permission given to him for entry. The reason is that he has the same status as the residents of the house, therefore, his act is misappropriation and not theft.

If a person commits theft of something and does not move it out of the *ḥirz* his hand is not to be cut, because the entire house is a single *ḥirz*, therefore, it is essential to move it out of it. The reason is that the house and what is in it is in the possession of the owner conceptually, therefore, leaving the stolen thing gives rise to a *shubhah* of not taking.

If the house has a number of rooms and the thief brings the stolen goods out into the courtyard, his hand is to be cut, because each room with respect to its occupant is an independent *ḥirz* in itself.

If one of the occupants of the rooms in the house enters a room by stealth and steals from it, his hand is to be cut, due to what we have elaborated.

If a thief makes a hole in the wall of a room, enters it, takes wealth and hands it over to another thief outside (while he is still inside), then there is no cutting of the hand for them, because the first one is not found to have come out and thus the protective possession of the owner is acknowledged over the wealth prior to its being brought out. The second is not found to violate the *ḥirz*, therefore, the act of *sariqah* has not been completed by either. It is narrated from Abū Yūsuf (God bless him) that if the one inside stretches his hands outside and delivers the goods to the one outside then the cutting of the hand is for the one inside. If the one outside inserted his hands inside and took the goods from the hands of the one inside, then the cutting of the hand is for the one who was outside. This is based on the issue that will be coming up later. God, the Exalted, willing.

If he flings the goods outside and then goes out and picks them up his hand is to be cut. Zufar (God bless him) said that his hand is not to be cut, because throwing the goods outside does not give rise to the obligation of amputation. It is as if he went out and did not pick up the stolen goods. Likewise taking the goods from the street is as if someone else took the goods. We argue that throwing the goods is a device thieves use due to the difficulty of coming out with the goods or because they (some) want to be free to fight with the owner or for running away. His act is not prevented by the possession of the owner, therefore, the entire activity is deemed a single act. If he does not pick up the goods when he comes out then he is a waster and not a thief.

He said: **Likewise if he loads them upon a donkey and drives him out,** the movement of the donkey is attributed to him as he is driving it.

If a group enters a *ḥirz* and some of them commit the taking, the hands of all are to be cut. This feeble servant (Author) says: This is based upon *istiḥsān*. Analogy dictates that the one carrying the stolen goods out should alone be subjected to cutting, which is the opinion of Zufar (God bless him). The reason is that he is found to move the goods outside, therefore, the theft is completed by him. We maintain that theft has been

committed by all due to collaboration as is the case with *sariqah kubrā*. The reason is that the practice among them is that some carry the goods and the rest buckle up for defence. If cutting is prevented in this case, it will lead to the blocking of the door of *ḥadd* (in this category).

He said: **If a person makes a hole in a room and puts his hand inside to take something out, his hand is not to be cut.** It is narrated from Abū Yūsuf (God bless him) in *al-Imlā'* that his hand is to be cut, because he brought out the wealth from the *ḥirz* and that is the objective. Thus, entry is not to be stipulated for it as in the case where he inserts his hand into a safe for cash and brings out Ghitrīfī *dirhams*. We argue that the violation of the *ḥirz* is stipulated for the completion of the offence and to eliminate the *shubhah* of absence of *ḥirz*. Completion with respect to entry is where such entry is considered possible. Entry into a house is in the normal way and this is distinguished from opening a trunk, because what is possible there is insertion of the hand and not full entry. It is also distinguished from what has preceded where some thieves are carrying the goods, because that is what is done in practice.

If a person cuts (and takes) a purse that is outside the sleeve, his hand is not to be cut, but if he puts his hand inside the sleeve, it is to be cut. The reason is that in the first case the knot is on the outside, therefore, by cutting the taking occurs on the outside, thus, the violation of the *ḥirz* has not occurred. In the second case the knot is on the inside, therefore, by cutting taking from the *ḥirz* is realised, and the *ḥirz* is the sleeve. If in place of cutting he opens the knot, then, in both situations the response will be reversed, due to the inversion of the underlying cause (*'illah*). It is narrated from Abū Yūsuf (God bless him) that the hand will be cut in all circumstances, because the purse is protected either by the sleeve or by the owner himself. We say that the *ḥirz* is the sleeve for he is relying on it for protection, while his own purpose is to complete the journey or to rest, therefore, it is as if it is the pack on the camel's back.

If he steals a camel from a train of camels or a the load (on the camel), his hand is not to be cut. The reason is that it is intended to be a *ḥirz*, therefore, it gives rise to the *shubhah* of the absence of *ḥirz*, because the driver, the guide and the rider have as their purpose the undertaking of the journey and the transfer of goods and not protection. Thus, it is said that if there is someone with the loads who is following them to guard them, then the hand is to be cut. **If he cuts up the load pack and takes from it, his hand is to be cut,** because the bags in such a situation are a

ḥirz, because by placing the goods in the bags, the intention is to protect them, as in the case of the sleeve. Consequently, the taking is from a *ḥirz*, therefore, the hand is to be cut.

If he steals a camel bag, in which there are goods, while the owner is protecting it, but is asleep, his hand is to be cut. The meaning is that if the bag is in a place that is not a *ḥirz*, like the highway and so on, so that the *ḥirz* is through the presence of the owner due to his being on watch for their protection. This is the case where the consideration is given to the normal watch by sitting next to the bags. Sleep in this situation is reckoned as *ḥirz* in practice. Likewise sleeping nearby, according to what we preferred earlier. It is mentioned in some manuscripts that "when he is sleeping on top of the bags or where he is able to protect them," and this affirms what we have stated about the preferred opinion. Allāh knows what is correct.

Chapter 105

Mode of Amputation and its Proof

He said: **The right hand of the thief is to be cut from the forearm and is to be singed/cauterised.** The cutting is undertaken on the basis of what we recited earlier. The selection of the right hand is based on the recitation of ʿAbd Allāh ibn Masʿūd (God be pleased with him). The selection of the *zand* (wrist, forearm) is due to the reason that term *yad* includes the entire arm up to the armpit, and this joint, I mean wrist, is something about which there is certainty. The reason is that there are sound reports about the ordering of the amputation in the case of the hand of the thief from the wrist by the Prophet (God bless him and grant him peace).[1] Cauterisation is undertaken due to the saying of the Prophet (God bless him and grant him peace), "Cut it and cauterise it."[2] The reason is that if it is not cauterised it can lead to death, and the *ḥadd* is a deterrent not a killer.

If he steals a second time, his left foot is to be cut, and if he steals a third time, there is no cutting and he is to be left in the prison till he repents. This is *istiḥsān*, and he is to be given *taʿzīr* as well, as mentioned by the Mashāʾikh (jurists) (God bless them). Al-Shāfiʿī (God bless him) said that on the third offence his left hand is to be cut and on the fourth his right foot is to be cut, due to the saying of the Prophet (God bless him and grant him peace), "If someone steals cut (his hand). If he repeats the offence cut again. If he repeats again cut again."[3] It is also related with all

[1]There are traditions about this and one of them is recorded by al-Dār'quṭnī. Al-Zaylaʿī, vol. 3, 370.

[2]It is recorded by al-Ḥākam in *al-Mustadrak*. Al-Zaylaʿī, vol. 3, 371.

[3]It is recorded by Abū Dāwūd. Al-Zaylaʿī, vol. 3, 371.

the details, as is expressed in his opinion.[4] The reason is that the third offence is just like the first in being an offence. In fact, it is more grievous, therefore, it calls for laying down the *ḥadd* by the law (*shar'*). We rely on the saying of 'Alī (God be pleased with him), "I feel afraid of Allāh, the Exalted, if I do not leave him with a hand with which to eat and to perform *istinjā'* and a leg on which he can walk."[5] He then argued with the rest of the Companions (God be pleased with them) and was able to convince them, therefore, an *ijmā'* occurred. Further, it amounts to killing him in meaning for it is the loss of all benefits of being alive, and the *ḥadd* is a deterrent (not a destroyer). In addition to this, it is of rare occurrence and deterrence is stipulated in things that are of widespread occurrence, as distinguished from *qiṣāṣ* as that involves the right of the individual, therefore, retaliation is extracted by force as far as is possible for the satisfaction of his right. The tradition has been criticised by al-Ṭaḥāwī (God bless him) for authenticity, or it is construed to be applicable to *siyāsah*.

If the thief has a paralysed or amputated left hand or an amputated right leg, amputation is not to be enforced. The reason is that in doing so there is a loss of the benefit of grasping or walking. Likewise if his right leg is paralysed, on the basis of what we said. **Likewise if the thumb of his left hand is cut off or paralysed, or two of the fingers of the hand other than the thumb,** because the strength of grasping comes from the thumb. **If one finger other than the thumb is cut off or paralysed, his hand will be cut,** because the loss of one finger does not create an apparent dysfunction in grasping, as distinguished from two fingers for they assume the position of the thumb in the loss of grasping.

If the judge says to the executioner cut off the right hand of this man for a theft that he has committed, and he cuts off his left hand intentionally or by mistake, then he is not liable for anything according to Abū Ḥanīfah (God bless him). The two jurists said that he is not liable in case of a mistake, but is liable for the intentional cutting. Zufar (God bless him) said that he is liable for a mistake as well, and this is based upon *qiyās* (analogy). The meaning of mistake here is a mistake in *ijtihād*.[6] As for a mistake in distinguishing the right from the left, it is not deemed an excuse. It is said that this mistake is to be deemed a justified excuse

[4]It is recorded by al-Dār'quṭnī and al-Ṭabarānī. Al-Zayla'ī, vol. 3, 373.

[5]It is recorded by Muḥammad ibn al-Ḥasan al-Shaybānī (God bless him) in *Kitāb al-Āthār*. Al-Zayla'ī, vol. 3, 374.

[6]As the text says, "Cut of their hands."

as well. He (Zufar) says that he has cut off a hand that was protected (by the law), and a mistake in the case of the right of the individual cannot be overlooked, therefore, he is to be compensated. We say that he made a mistake in his *ijtihād* as the text does not identify either the right or the left, and a mistake in *ijtihād* is to be overlooked. The two jurists say that he cut a protected limb without justification and there is no possibility of interpretation as he intentionally committed injustice, therefore, it is not to be forgiven even though it was a matter subject to *ijtihād*. It was essential that retaliation be imposed in this case, however, it was prevented due to *shubhah*. According to Abū Ḥanīfah (God bless him) he destroyed it leaving behind the same type that is better than it (that is, the right hand), therefore, it is not to be deemed as destruction. It is like the witnesses testifying against another that he sold a man's wealth for a reasonable price and then retracting their testimony.[7] Accordingly, if a person other than the executioner had cut it off, he would not be liable either, which is correct. If the thief extended his left hand saying that it was his right, he would not be liable by agreement, because he cut the hand under the thief's order. Thereafter, in the case of intentional cutting, according to Abū Ḥanīfah (God bless him), there is a liability for the thief to compensate the stolen wealth, because the cutting has not been implemented as a *ḥadd*. In mistake too the same method is followed, but according to the method of *ijtihād* (preferred by Abū Yūsuf) the thief is not liable.

The hand of the thief is not to be cut unless the person whose property has been stolen is present and demands adjudication for the theft. The reason is that litigation is a condition for proving it. There is no difference between confession and testimony in our view. Al-Shāfiʿī (God bless him) disagrees with respect to confession.[8] The reason is an offence against the wealth of another cannot be proved without litigating the matter with him.

Likewise if he is absent at the time of cutting of the hand, because satisfaction is through adjudication in cases of *ḥudūd*.

The custodian (holding a deposit), the usurper, and the person who has made a transaction of *ribā*[9] can demand the cutting of the hand of the thief who has stolen from them. The depositor too has a right to

[7]They are not liable for the loss.

[8]Meaning thereby that in case of confession a trial is not needed.

[9]Like giving ten *dirhams* and taking twenty.

demand cutting of the hand. Likewise the person whose property has been usurped. Zufar and al-Shāfi'ī (God bless them) said that the hand is not to be cut on the complaint of the custodian and the usurper. On the same disagreement are analysed the positions of the borrower (commodate loan), the person who has hired property, the *muḍārib*, the person who borrows goods for sale, the person taking possession of goods offered for sale, the pledgee and any person, other than the owner, who has custodial possession. The hand is to be cut on the complaint of the owner for theft from any of these persons, except that in the case of the mortgagor it can be cut on his complaint when the property exists and he has paid his debt, because he has no right to initiate a claim for the property without this. Al-Shāfi'ī (God bless him) based his view on the rule preferred by him that these persons do not have the right to demand the return of the property. Zufar (God bless him) says that the right to initiate litigation for the return of property arises from custodial necessity, but it does not arise for purposes of demanding cutting of the hand, because it leads to the loss of financial protection.[10] We maintain that theft in itself gives rise to cutting of the hand, and it is proved before the *qāḍī* through legal proof, which is the testimony of two witnesses following the complaint that is considered in the absolute sense.[11] The consideration is due to the need of these persons for the return of the property, and along with that the cutting of the hand is implemented as well. The purpose of the litigation is the securing of his right, while the loss of financial protection is a necessity for claiming this right, therefore, it is not taken into account. The *shubhah* that may possibly be raised as an objection that is not taken into account, for example, if the owner is present and the custodian is absent, the cutting will be undertaken on the basis of his (owner's) litigation, even though the *shubhah* that the custodian may have given the thief permission to enter the *ḥirz* exists.

If a thief's hand is amputated for theft and the property has been stolen from him, neither he nor the owner has the right to demand the cutting of the hand of the second thief. The reason is that the wealth has no marketable value as far as the thief is concerned so that he is not held liable due to the loss of the property, therefore, theft in itself does not give rise to the obligation. The first thief, however, has the authority for the

[10]Because there is no compensation of property where the hand is cut.

[11]Not just for the financial claim.

recovery of the property, according to one narration, because the return of the property is obligatory for him.

If the second thief steals prior to the cutting of the hand of the first, or after the *ḥadd* has been waived due to *shubhah*, his hand is to be cut on the basis of the first complaint. The reason is that the extinction of marketable value is a necessity of cutting of the hand, and this is not found, therefore, he becomes like a usurper.

If a person steals something and then returns it to the owner before the commencement of proceedings before the judge, his hand is not to be cut. It is narrated from Abū Yūsuf (God bless him) that it is to be cut like the situation where he returns it to the owner after the commencement of proceedings. The reasoning underlying the authentic narration (*ẓāhir al-riwāyah*) is that a complaint (litigation) is a condition for proving theft, because testimony is deemed a necessity for eliminating the dispute and the dispute stands terminated in this case. This is distinguished from the situation where it is returned after the proceedings, where the litigation stands terminated and its purpose has been attained (through prosecution), thus, it remains finally settled.

If a decision has been rendered against a person for cutting of the hand in a case of theft, and the stolen property is gifted to the thief, amputation is not carried out. The meaning is if it is delivered to him. **Likewise if the owner sells it to him.** Zufar and al-Shāfi'ī (God bless them) said that his hand is to be cut. It is also one narration from Abū Yūsuf (God bless him), because the theft stands completed both with respect to commission and proof, and this transaction (gift or sale) has not made obvious whether ownership passed to the thief at the time of the commission of the theft, thus, there is no *shubhah* here (therefore, his hand has to be cut). We argue that execution is a consequence of the judgement in this category (of *ḥudūd*), for it (judgement) is not sufficient without the satisfaction of the claim through execution, because judgement is for proving the offence, while cutting of the hand is a right of Allāh, the Exalted, and this is claimed at the time of cutting. If this is the case, the continuance of prosecution (claim of *sariqah*) is stipulated up to the time of satisfaction of this right (and this claim has been given up through the gift or sale), thus, it is as if he made him the owner prior to the adjudication.

He said: **Likewise if the value of the stolen property decreases and becomes less than the *niṣāb*,** that is, prior to execution and after judgement. It is narrated from Muḥammad (God bless him) that the hand is

to be cut, which is also the opinion of Zufar and al-Shāfi'ī (God bless them), in the light of the deficiency in the value of the *'ayn* (when partly destroyed or lost by the thief after the theft). We maintain that as the completion of the *niṣāb* is a condition that must continue up to the time of execution, due to what we have said, as distinguished from the material loss in the thing for which he is liable to compensation, therefore, the *niṣāb* there is complete by way of *'ayn* and *dayn* (actual material and that to be compensated), even where he destroys the whole of it. As for the loss in price, it is not liable to compensation.

If the thief claims that the thing stolen is owned by him, amputation will be waived, even if he does not come up with testimony, that is, after the witnesses have testified to the theft. Al-Shāfi'ī (God bless him) said that it is not waived by a mere claim, because the thief is able to do this easily and this will lead to the closing of the door to this type of *ḥadd*. We maintain that *shubhah* has the effect of waiving the penalty and this has been created by the mere claim due to its probability.[12] What he (al-Shāfi'ī) has said is not valid, due to the validity of retraction after confession by the thief.[13]

If two persons confess to the commission of theft, and then one of them says that it is his wealth, the hands of both persons are not to be cut, because the retraction is operative with respect to the person retracting and it gives rise to a doubt in the case of the other, because the theft was proved through the confession of both about an offence committed through participation.

If two persons commit a theft and then one of them disappears, while two witnesses testify to the theft committed by both, the hand of the other thief is to be cut, according to Abū Ḥanīfah (God bless him) in his second opinion, and this is the opinion of the two jurists. The Imām used to say earlier that it is not to be cut, as the other might appear and come up with a ground for creating *shubhah*. The reason for his second opinion is that absence prevents the proof of theft against the thief absent, therefore, he remains non-existent and one who is non-existent cannot create a *shubhah*. There is no validity of the likely *shubhah* to be created, as has preceded (in the earlier opinion).

[12]Even when he has not been able to establish a clear title.

[13]Because the purpose is to create a *shubhah*, and that is created through his claim which is probably true.

If a slave who is subject to interdiction confesses to stealing ten *dirhams* in coins, his hand is to be cut, while the stolen money is to be returned to the one from whom it was stolen. This is the view according to Abū Ḥanīfah (God bless him). Abū Yūsuf (God bless him) said that his hand is to be cut, but the ten *dirhams* belong to the master (of the slave). Muḥammad (God bless him) said that his hand is not to be cut and the ten *dirhams* are for the master, which is the opinion of Zufar (God bless him) as well. The meaning here is when the master declares that the slave is lying. **If he confesses to stealing consumable goods, his hand is to be cut. If the slave is an authorised slave (permitted to undertake business), his hand is to be cut in both situations.** Zufar (God bless him) said that his hand is not to be cut in all these situations. The reason is based on the principle preferred by him that the confession of the slave against himself is not valid in cases of *ḥudūd* and *qiṣāṣ*, as such a confession affects his life and limbs and all this is the wealth of the master, and a confession against another is not acceptable. The authorised slave, however, is held liable for compensation and wealth due to the validity of his acknowledgement of these as he has been granted authority by the master over these things, while the interdicted slave's acknowledgement with respect to wealth too is not acceptable.

We maintain that his confession is valid from the perspective of his being a human being and thereafter it extends to value, and it is valid from the perspective of his being wealth. Further, there is no suspicion in such a confession insofar as it includes an injury, and such a confession is acceptable against another. Muḥammad (God bless him) argues in the case of the interdicted slave that his acknowledgement with respect to wealth is void, therefore, an acknowledgement of misappropriation on his part is not valid and the wealth remains that of the master, and there is no cutting of the hand for stealing the wealth of the master. This is supported by the fact that wealth is the primary factor in his case, while cutting of the hand is secondary so that prosecution proceedings are valid for it and not for cutting of the hand, and a claim of wealth is established without it too. The opposite of this dispute cannot be heard by a court nor is it established. Consequently, when a claim is void with respect to the primary thing it is void with respect to the secondary as well. This is different from the case of the authorised slave, because an acknowledgement about the wealth in his possession is valid, therefore, a confession with respect to the secondary thing is valid too.

Abū Yūsuf (God bless him) argues that he confessed to two things in his confession for purposes of cutting of the hand. The first is against himself and this is valid on the basis of what we have mentioned. The second is with respect to wealth, and this is not valid due to the right of the master in him. Cutting of the hand becomes due without this. It is as if a freeman says, "The dress that is in the possession of Zayd I stole from 'Amr." Zayd then says, "It is my dress." The hand of the person confessing will be cut even if he is not correct in identifying the dress, and the dress is not recovered from Zayd.

According to Abū Ḥanīfah (God bless him) the confession with respect to the cutting of the hand is valid on his part, due to what we elaborated, therefore, it is valid with respect to wealth too based on this. The reason is that the confession is compatible with the state of subsistence, and wealth in a state of subsistence is secondary to cutting of the hand insofar as the protection accorded by the law to wealth is extinguished as a result of it, thus, the claim for cutting of the hand is satisfied even after the destruction (consumption) of the property. This is distinguished from the issue about the freeman, because amputation becomes obligatory even by stealing from a custodian, but what does not lead to the obligation through theft by the slave is the wealth of the master. If the master were to deem him truthful his hand would be cut in all the above cases due to the elimination of the obstacle.

He said: **If the hand of the thief is cut and the thing (stolen) still exists in his possession, it is to be returned to the owner,** due to its (continued) existence in his ownership. **If, however, it stands consumed, he is not held liable for compensation.** This generality includes consumption and destruction, and it is a narration of Abū Yūsuf (God bless him) from Abū Ḥanīfah (God bless him) and it is well known. Al-Ḥasan narrated from him that he is to be held liable in case of consumption. Al-Shāfi'ī (God bless him) said that he is liable for compensation in both cases, because these are two rights with two different causes and they do not preclude each other. Amputation is the right of the law (*shar'*), and its cause is the non-avoidance of an act that the law (*shar'*) has prohibited, while compensation is the right of an individual and its cause is the taking of wealth. It is as if a person consumes owned game inside the Ḥaram or drinks wine owned by a Dhimmī.

We rely on the saying of the Prophet (God bless him and grant him peace), "There is no financial penalty for the thief after his right hand

has been amputated."[14] The reason is that the obligation of financial liability negates cutting of the hand, because he comes to own the property by payment of compensation right from the time of the taking, which makes it obvious that it falls into his ownership and that negates amputation due to *shubhah*, and whatever is negated by it (amputation) stands negated (compensation). Further, the subject-matter no longer remains protected as the right of the individual (after theft), for if it did it would be permissible in itself and would negate cutting of the hand due to doubt, therefore, the property becomes prohibited due to the right of Allāh, like carrion in which there is no compensation. The protection, however, is not lost with respect to consumption, because it is an act other than theft and there is no necessity with respect to its consumption. Likewise *shubhah* is acknowledged in what is the cause and not in other things. The reasoning for the well known view (that includes both consumption and destruction for the absence of compensation) is that consumption is the completion of the purpose (of theft), therefore, *shubhah* is considered with respect to it. Likewise the loss of protection is established with respect to compensation because it is one of the necessities of its loss with respect to destruction for negating similarity between theft and compensation.

He said: **If a person commits theft several times and is subjected to amputation for one of them, it is considered amputation for all of them, and he is not liable for compensating anything according to Abū Ḥanīfah (God bless him). The two jurists said that he makes compensation for every property except the one for which his hand is cut.** The issue pertains to the case where one of them is present to claim his right, but if all of them are present and his hand is cut due to their prosecution he is not liable for any compensation in any of the cases by agreement of the jurists. The two jurists argue that the person present is not the deputy of all those absent, and prosecution is necessary for establishing the offence of theft. Thus, theft relevant to those absent is not established, and his hand is not cut on account of those thefts, therefore, their stolen properties stand protected. The Imām argues that the obligation for all these thefts is a single amputation as the right of Allāh, the Exalted, because the *ḥudūd* are based on the rule of merger and concurrence. Prosecution

[14] It is *gharīb* in these words, but a similar tradition has been recorded by al-Nasā'ī in his *Sunan*. Al-Zayla'ī, vol. 3, 375.

before the *qāḍī* is a condition for its proof, thus, when the claim is satisfied it is satisfied on account of all the obligations (of amputation). Do you not see that its benefit reverts to all, therefore, it is implemented on behalf of all? On the basis of the same disagreement is analysed the case where all the *niṣābs* belong to a single individual and he prosecutes him for some. Allāh, the Exalted, knows what is correct.

Chapter 106

Mode of Stealing Property and Related Issues

If a person steals a dress and cuts it into two inside the house and thereafter takes it out so that its value outside is ten *dirhams*, his hand is to be cut. It is narrated from Abū Yūsuf (God bless him) that his hand is not to be cut as in this there is a basis for his ownership, and that is by tearing that is excessive. He is liable for its value and comes to own the compensated property. He is now like a buyer who steals the sold commodity where the seller has an option.[1]

The two jurists argue that taking is deemed a cause for compensation, but not for ownership. Ownership is established by way of necessity for facilitating the payment of compensation so that both counter-values do not gather in the same ownership. Such a case does not give rise to *shubhah* by the taking itself. It is like the seller stealing a defective commodity that he sold,[2] as distinguished from what is mentioned (by Abū Yūsuf), because the contract of sale is constituted for the purpose of acquiring ownership. The present disagreement is about the case where he (the owner) chooses compensation of the loss and the taking of the dress, but if he chooses the compensation of value and the leaving of the dress with him (the thief), his hand is not to be cut by agreement, because the dress is in his ownership extending from the time of taking. It is as if he made a gift of the dress to him. All this applies when the loss is excessive. It the loss is minor, his hand is to be cut by agreement, due to the absence of the cause of ownership, for then the owner does not have the option of making him liable for the entire value.

[1]Amputation is not awarded in this case.

[2]Where the buyer is not aware of the defect. In this case amputation is awarded.

If he steals a goat, slaughters it, and then takes it out, his hand is not to be cut. The reason is that the theft is committed in meat, and there is no amputation for meat.

If a person steals gold or silver for which amputation is awarded, and he moulds them into *dirhams* and *dīnārs*, his hand is to be cut, while the *dirhams* and *dīnārs* are returned to the person from whom the metals were stolen. This is the view according to Abū Ḥanīfah (God bless him). The two jurists said that there is no way for the owner (from whom the metals were stolen) to have access to the coins. The primary offence was usurpation, but this is craftsmanship that has marketable value in their view, with the Imām disagreeing. Thereafter, the implementation of *ḥadd* is not difficult according to his view, because the thief did not come to own the coins. It is said that according to the view of the two jurists amputation is not obligatory, because he came to own them prior to cutting of the hand. It is also said that it does become obligatory, because by craftsmanship it became something else, therefore, he did not come to own the substance of the stolen metals.

If he steals a dress and dyes it red, his hand is to be cut and the dress is not to be taken from him, yet he does not compensate the value of the dress. This is the position according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless them) said that the dress is to be taken from him and the addition made through dyeing is to be paid to him, on the analogy of usurpation (*ghaṣb*). The argument that combines the two (the basis of analogy and its extension) is that the primary thing is the existence of the dress and the existence of the dyeing is a secondary thing. The two jurists argue that the dyeing is in existence in both forms (appearance of red colour) and meaning (value) so that if he (the owner) decides to take it in dyed form he compensates the addition due to dyeing. The right of the owner subsists in the dress in form (insofar as he has the right to recover the dress) but not in meaning (value), because the thief is not liable for compensation if it is destroyed, therefore, we inclined towards the situation of the thief. This is distinguished from the case of the usurper, because the right of each one of them continues in both form and meaning, thus, they are equal from this perspective. We preferred the perspective of the owner in what we have said (above about the dress being primary and the dyeing secondary).

If he dyes it black, it is taken from him according to both sides (all three jurists), that is, according to Abū Ḥanīfah, Abū Yūsuf and

Muḥammad (God bless them). According to Abū Yūsuf (God bless him), this case and the previous one are the same, because the black colour is an addition in his view just like the red colour. According to Muḥammad (God bless him), it is an excess like the red, but it does not sever the right of the owner. According to Abū Ḥanīfah (God bless him), the black colour is a decrease in value, therefore, it does not sever the right of the owner to recover. Allāh knows best.

Chapter 107

Highway Robbery (*Qaṭʿ al-Ṭarīq*)

He said: **If an armed group (having the force to resist), or a single armed person able to employ force, come out with the intention of cutting off the highway are apprehended before they have the opportunity to seize wealth or to kill someone, the *imām* is to imprison them till they repent. If they seize wealth belonging to a Muslim or a Dhimmī, and the wealth so seized when divided among their group comes to ten *dirhams* or more per person or what reaches such value, the *imām* is to cut their hands and feet from the opposite sides. If they kill someone without seizing wealth, the *imām* is to execute them by way of *ḥadd*.** The basis for this are the words of the Exalted, "The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter."[1]

The meaning, Allāh knows best, is the distribution of the punishments mentioned (in the text) over situations (offences),[2] and these are four: three are mentioned[3] and we shall be mentioning the fourth, God, the Exalted, willing. The reason is that offences change with circumstances, and the punishment is to suit the gravity of the offence.

As for the meaning of imprisonment, it is because of what is meant by the exile mentioned in the text, because it is exile from the face of the

[1]Qur'ān 5 : 33.

[2]This is meant to negate the opinion held by Imām Mālik (God bless him) that the *imām* has a right to choose the punishment he likes.

[3]The first is attempt; the second is seizing wealth; and the third is killing without taking wealth.

earth to prevent them from doing evil to its inhabitants. They are also to be subjected to *ta'zīr* for undertaking the act of terrorising people. The ability to use force has been stipulated, because the act of *muḥārabah* is not realised without force. The second situation (offence) that we have explained is due to the text that we have recited. The stipulation for the wealth taken, that it be the wealth of a Muslim or *Dhimmī* was due to the reason that its protection be perpetual. Consequently, if they cut off the way of the *musta'min* (enemy visiting on safe-conduct), cutting of the limbs is not obligatory. The completion of the *niṣāb* is stipulated with respect to each one of them so that his limbs do not become liable to cutting without having acquired what is substantial. The meaning of cutting is the cutting of the right hand and the left foot so that the benefit of moving around is not completely lost. The third situation (offence) that we have described is due to what we have recited.

They are to be executed by way of *ḥadd* so that if the heirs were to forgive them, their forgiveness would not be permitted, because it is the right of the law (*shar'*) **And the fourth is where they kill and seize wealth, then the *imām* has the option of cutting off their hands and legs from the opposite sides or to executing them and crucifying them, or of executing them (only), or of crucifying them. Muḥammad (God bless him) said that he is to execute them or crucify them, but not to cut off their limbs.** The reason is that it is a single offence, therefore, two *ḥadds* are not obligatory, because an offence less than homicide is included in homicide with respect to the *ḥadd*, like the *ḥadd* of theft and stoning. The two jurists maintain that this is a single penalty that has been enhanced due to the gravity of its cause, which is the total destruction of peace through killing and snatching of wealth. It is for this reason that the cutting of the hand and the foot together is a single *ḥadd* in the major (*kubrā*) form of theft, even though they amount to two *ḥadds* in the minor form. Concurrence/merger is operative in several *ḥudūd* and not within a single *ḥadd*.

Thereafter, he mentioned in the *Book* a choice between crucifixion and its relinquishment, and this is the authentic statement (*ẓāhir al-riwāyah*). It is narrated from Abū Yūsuf (God bless him) that it is not to be given up for it is stated in the text (Qur'ān), and the purpose is to publicise it so that others learn a lesson from it. We say: the primary form of publicising is through execution, while the extreme form is crucifixion, therefore, a choice has been given with respect to it.

He then said: **He is to be crucified while alive and his body is to be notched with a spear until he is dead.** A similar view has been narrated from al-Karkhī (God bless him). It is narrated from al-Ṭaḥāwī that he is to be killed and then crucified in order to avoid mutilation. The reasoning underlying the first view, which is correct, is that the crucifixion in this form is more effective with respect to deterrence and that is its purpose.

He said: **He is not to be crucified for more than three days,** because he will start decomposing after that and it will be offensive for the people. It is narrated from Abū Yūsuf (God bless him) that he is to be left on the wooden planks till he breaks down into pieces and falls so that others are overawed by it. We say that such a lesson is learnt from what we have said and such extreme measures are not required.

He said: **If the highwayman is executed then he is not liable to compensate the wealth that he took,** on the analogy of the minor form of theft, and we have elaborated that.

If one of them undertook the killing, the *ḥadd* is to be imposed on all of them together, because it is the consequence of *muḥārabah*. The offence is realised because some of them are supporting others, and they fall back on their supporters when they retreat. The condition is killing on the part of one of them and this stands fulfilled.

He said: **Killing with a stick, or with a stone or with a sword is all the same for this purpose,** because it has occurred by cutting off the highway and the waylaying of the travellers.

If the highway robber does not kill nor takes wealth, but wounds someone, he is to be subjected to *qiṣāṣ* for injuries in which *qiṣāṣ* is applicable, while *arsh* (compensation) is to be taken in injuries liable to *arsh*, and this is to be done by the heirs. The reason is that there is no *ḥadd* for these offences, therefore, the right of the individual is established, which is what we have mentioned, and this is claimed by the *walī*.

If he seizes wealth and then wounds someone, his hand and foot are to be cut, and the claims for wounds are annulled. The reason is that when *ḥadd* is imposed as the right of Allāh, the protection of life as the right of the individual is annulled, just as the protection of wealth is annulled.

If he seizes wealth after having repented and commits intentional homicide (murder), then the *awliyā'* have the option to kill him by way of retaliation or to forgive him. The reason is that *ḥadd* is not applicable in this offence after repentance, due to the exemption mentioned in the

text (Qur'ān). The reason is that repentance depends upon the return of wealth, and there is no cutting in such a case, therefore, the right of the individual is established for life and wealth, so that the *walī* can claim *qiṣāṣ* or forgive him. Compensation is imposed if the wealth is destroyed in his possession or he consumes it.

If there is among the highway robbers a minor or an insane person or a relative of the prohibited degree among the waylaid persons, the *ḥadd* is waived with respect to the rest. The statement about the minor and the insane is the opinion of Abū Ḥanīfah and Muḥammad (God bless them). It is narrated from Abū Yūsuf (God bless him) that if the offence is undertaken by sane persons, the rest (other than the insane) are subjected to *ḥadd*. The minor form of theft is governed by this rule as well. He argues that the direct actor is the primary actor, while the supporters are secondary. There is no shortcoming in the direct action of the sane, while the shortcoming in the secondary is not taken into account. In the opposite form the meaning as well as the *ḥukm* are reversed as well. The two jurists argue that it is a single offence undertaken by all. If the act of some does not raise a liability, the act of the others will be reduced to a partial cause (*'illah*), and the *ḥukm* is not established by it. It will be like a person committing a mistake participating with one undertaking the act intentionally.

As for the relatives of the prohibited degree, it is said in its interpretation that this is the case where wealth is jointly held by the offender and the victim. The correct view, however, is that it is unqualified, because it is a single offence, as we have mentioned, and the use of force against some gives rise to the use of force against the rest. This is distinguished from the case where there is among the victims an enemy on safe-conduct (*musta'min*), because the use of force with respect to him is due to the shortcoming in protection, but this is specific to him. As regards the case here, it is due to the shortcoming in the *ḥirz*, and a caravan is a single *ḥirz*.

When the *ḥadd* is waived, the claim of *qiṣāṣ* for murder is transferred to the *awliyaā'*, due to the emergence of the right of the individual as we mentioned. **If they like they can claim execution by way of retaliation or if they like they can forgive them.**

If some travellers in the caravan waylay the rest, *ḥadd* does not become obligatory. The reason is that the *ḥirz* is one, therefore, the entire caravan is like a single house.

Where a person cuts off the road, during the day or night, in a city, or between Kufah and Ḥīrah, then he is not a *qāṭiʿ al-ṭarīq* (highway robber) on the basis of *istiḥsān*. On the basis of analogy, he would be considered a highway robber, which is the opinion of al-Shāfiʿī (God bless him), due to its occurrence in reality. It is related from Abū Yūsuf (God bless him) that *ḥadd* becomes obligatory if the offence is committed outside the city, even if he is very close to it, because help cannot reach due to the calls of the victim. It is also narrated from him that if they take up the offensive during the day with weapons or during the night with weapons or with sticks, then they are highway robbers, because use of weapons is swift and at night help is slow in coming. We say: *qaṭʿ al-ṭarīq* takes place by the cutting off of the highway for the travellers, and this is not realised within a city or very close to it, because rescue is available in these locations. The reason is that they are taken to task for the return of wealth for securing the right of the person entitled, and they are punished and imprisoned for their offence (inside the city). If they commit murder then the matter is transferred to the *awliyā'*, as we have explained.

If a person strangles another thereby killing him, then the *diyah* is to be paid by the *ʿāqilah*, according to Abū Ḥanīfah (God bless him). This pertains to the issue of killing with a blunt weapon and we shall elaborate it in the chapter on *Diyāt*, God, the Exalted, willing. **If he kills more than once by strangulation inside the city, he is to be executed,** because he has become one who is spreading terror in the land, therefore, his evil is to be eliminated through execution. Allāh, the Exalted, knows best.

Al-Hidāyah

BOOK THIRTEEN

Siyar (Relations With Non-Muslims)

Chapter 108

The Legal Status of *Jihād*

The word *siyar* is the plural of *sīrah*, and it is the strategy adopted for managing affairs. In the *sharī'ah* it is applied specifically to the strategy adopted by the Prophet (God bless him and grant him peace) in his military expeditions.

He said: ***Jihād* is a communal obligation. If a group from among the people undertakes it, the obligation is removed from the rest.** As for its obligation, the basis is found in the words of the Exalted, "And fight the Pagans all together as they fight you all together. But know that Allah is with those who restrain themselves,"[1] and in the words of the Prophet (God bless him and grant him peace), "*Jihād* is determined till the Day of Judgement."[2] He (God bless him and grant him peace) meant thereby a definitive obligation (*farḍ*) that will always remain. The reason is that it has not been made a definitive obligation for itself, as in itself it is disruptive.[3] It has been made a definitive obligation for strengthening the *Dīn* of Allāh and for driving away evil from His servants. When the purpose is achieved through some, the obligation is removed with respect to the others, like the funeral prayer or returning the salutation.

If no one undertakes it, all the people commit sin by neglecting it, because the obligation is placed upon all, and the occupation of all with

[1]Qur'ān 9 : 36

[2]It is recorded by Abū Dāwūd in his *Sunan*. Al-Zayla'ī, vol. 3, 377. A question is raised in *al-'Ināyah* as to how an obligation has been derived from a *khabar wāḥid*. He replies that if a *khabar wāhid* is supported by a definitive evidence, obligation may be attributed to it.

[3]By bringing desolation to the lands and annihilation of humans. *Al-'Inayah*.

it would cut off the material for *jihād* like horses and weapons, therefore, it is made obligatory as a communal obligation.

Unless the call to arms is general, in which case it becomes a universal obligation, due to the words of the Exalted, "Go ye forth, (whether equipped) lightly or heavily, and strive and struggle, with your goods and your persons, in the Cause of Allah. That is best for you, if ye (but) knew."[4] It is stated in *al-Jāmi' al-Ṣaghīr: Jihād* is obligatory, except that the Muslims have an option until there is need for them. The first part of this statement indicates a communal obligation, while the latter part indicates a general call to arms. The reason for the general call to arms is that the purpose is not being attained without it, except by the participation of all, therefore, it is made a definitive obligation for all.

***Jihād* is not an obligation for the minor,** because minority is an object of compassion, **nor is it an obligation for the slave or the woman,** due to the precedence accorded to the right of the master and the husband.

It is also not an obligation for the blind, or the invalid, or one whose limbs are amputated. If, however, the enemy attack a land it becomes obligatory upon all the people to defend it. For doing so the woman goes out without the permission of her husband and the slave without the permission of his master, because it has now become a *farḍ 'ayn* (universal obligation), and lawful ownership and the enslavement of marriage do not stand in front of the universal obligations, as is the case with prayer and fasting. This is distinguished from the situation that is prior to the making of the general call, as before it they are self-sufficient without these two categories, thus, there is no need to annul the right of the master and the husband.

There is no need to impose a cess (on the people to support the army) as long as there is revenue (*fay'*) available. The reason is that it does not resemble wages, and there is no necessity for it, because the wealth in the treasury is intended for the representatives of the Muslims.

He said: **If there is nothing available, then there is no harm if some of them strengthen others.** The reason is that in this there is repelling of a higher injury by accepting a lower level injury. This is supported by the fact that the Prophet (God bless him and grant him peace) took some coats of mail from Ṣafwān (God be pleased with him)[5] and 'Umar

[4]Qur'ān 9 : 41

[5]It is recorded by Abū Dāwūd in the section on sales. Al-Zayla'ī, vol. 3, 377.

(God be pleased with him) used to send to battle bachelors on behalf of married men, and he used to give the horse of the person who could not participate in battle to one moving on foot (towards the enemy).[6]

[6]It is recorded by Ibn Abī Shaybah. Al-Zayla'ī, vol. 3, 377.

Chapter 109

The Rules of Warfare

When the Muslims commence battle, and they have surrounded a city or a fort, they are to invite the inhabitants to accept Islam, due to what is related by Ibn 'Abbās (God bless them both) "that the Prophet (God bless him and grant him peace) did not commence combat with a people without first inviting them to Islam."[1]

He said: **If they respond positively, they are to refrain from fighting them,** due to the attainment of the purpose.

If they refuse, they are to invite them to the payment of *jizyah*, and this is what the Prophet (God bless him and grant him peace) ordered the commanders of the armies to do[2] for it is one of the consequences upon the conclusion of battle, according to what the text has stated. This applies to those among them who are eligible to accept the payment of *jizyah*. Those from whom *jizyah* is not acceptable like the apostates or the idol worshippers from among the Arabs, there is no benefit in inviting them to accept *jizyah*, because only Islam is acceptable from them. Allāh, the Exalted, has said, "Then shall ye fight, or they shall submit."[3]

If they commence payment (*badhalū*), then they have the same rights as the Musims, and they have the same liabilities like those of the Muslims, due to the saying of 'Alī (God be pleased with him), "They have paid the *jizyah* so that their blood (is protected) like our blood, and their wealth (is protected) like our wealth."[4] The meaning of *badhl* here

[1]It is recorded by 'Abd al-Razzāq from Sufyān al-Thawrī. Al-Zayla'ī, vol. 3, 378.

[2]It is recorded by all the sound compilations, except al-Bukhārī. Al-Zayla'ī, vol. 3, 380.

[3]Qur'ān 48 : 16

[4]It is *gharīb*, and is recorded by al-Dār'quṭnī in his *Sunan*. Al-Zayla'ī, vol. 3, 381.

is acceptance, likewise the meaning of the term *i'ṭā'* that is mentioned in the Qur'ān. Allāh knows best.

It is not permitted to engage in battle those whom the invitation to accept Islam has not reached without first inviting them. This is based on the saying of the Prophet (God bless him and grant him peace) when he gave advice to the commanders of the detachments, "Invite them then to witness that there is no god, but God."[5] The reason is that through the invitation they come to know that we engage them in battle on account of our *Dīn* and not for purloining their wealth and enslavement of their families. Perhaps, they will respond positively so that the burden of battle is avoided. If the commander engages them in battle before communicating the invitation, he commits a sin. Nevertheless, there is no financial penalty due to the absence of there being protection, which arises from *Dīn* or their being in the *dār al-Islām*. Thus, it becomes like the killing of women and children.

It is recommended that even those whom the invitation has reached already, be invited, so that there is an enhanced warning for them. This is not obligatory, however, as there is an authentic report "that the Prophet (God bless him and grant him peace) carried out a raid against Banū al-Muṣṭaliq and caught them unawares. He also took an undertaking from Usāmah (God be pleased with him) that he will raid Ubnā in the early hours of the morning and then set it on fire."[6] A raid is not undertaken with an invitation.

If they reject the invitation, they are to seek the help of Allāh and engage them in combat, due to the saying of the Prophet (God bless him and grant him peace) in the tradition of Sulaymān ibn Buraydah, "If they reject this then invite them to accept the *jizyah*," till he said, "if they refuse that, then seek the help of Allāh against them and engage them in combat."[7] The reason is that it is Allāh, the Exalted, who helps His friends and destroys His enemies, thus, His help is to be sought in all affairs.

There is no harm in taking women and copies of the Qur'ān along with the Muslim soldiers if they are a huge army who can can be relied upon for their security, because the usual in such a case is safety, and the usual is treated like something that stands realised.

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[5]This has preceded earlier. Al-Zayla'ī, vol. 3, 381.

[6]It is recorded by al-Bukhārī and Muslim. Al-Zayla'ī, vol. 3, 381.

[7]This tradition has preceded. Al-Zayla'ī, vol. 3, 382.

It is considered disapproved to take them along with a detachment who cannot be relied upon for their security, for this amounts to exposing them to loss and dishonour, while the exposure of the *muṣḥaf* can cause its desecration for they will desecrate it due to their hate for the Muslims. This is a sound interpretation due to the words of the Prophet (God bless him and grant him peace), "Do not travel with the Qur'ān to the land of the enemy."[8] If, however, a Muslim crosses over to their land on an undertaking of safety (*amān*), there is no harm if he carries the *muṣḥaf* with him, if they are a people who abide by their treaty, as apparently it will not be exposed to desecration. It is old women who go out with a huge army to undertake duties that are suitable for them, like cooking, giving water and nursing. As for the younger women they are to stay in their houses so as to avoid problems.

A woman is not to participate in battle without the permission of her husband nor a slave without the permission of the master, as we elaborated, **unless there is a necessity due to an attack by the enemy upon the land.** It is imperative for the Muslims not to become rebellious or to purloin the spoils or to mutilate bodies. This is based upon the saying of the Prophet (God bless him and grant him peace), "Do not purloin (the spoils), do not become rebellious and do not mutilate (bodies)."[9] *Ghulūl* is theft from the spoils, while *ghadr* is going back on the compact of loyalty and breaking it. The *muthlah* related in the tradition of the 'Uraniyyīn[10] is abrogated by a later prohibition and that has been transmitted.

A woman, minor, enfeebled old man, an invalid, and a blind man are not to be killed. The reason is that permitted killing is of those persons who are capable of hostility, and this is not realised in the case of these persons. It is for this reason that they are not to kill a paralysed person, one whose right hand has been amputated, and one whose hand and leg of the opposite sides are cut. Al-Shāfi'ī (God bless him) goes against our opinion in the case of the enfeebled old man, the invalid, and the blind. The reason is that permitted killing in his view is based upon unbelief, but the evidence against him is what we have elaborated. There is an authentic tradition that the Prophet (God bless him and grant him peace)

[8]It is recorded by all the sound compilations, except al-Tirmidhī. Al-Zayala'ī, vol. 3, 383.

[9]It has preceded in an earlier tradition. Al-Zayla'ī, vol. 3, 385.

[10]It is recorded by al-Bukhārī. Al-Zayla'ī, vol. 3, 385.

forbade the killing of minors and females.[11] When the Messenger of Allāh (God bless him and grant him peace) saw a slain woman, he said, "This woman: she was not one who would engage in combat, so why was she killed?"[12]

He said: **Unless one of these persons have an advisory capacity in war or the woman is a ruler,** due to the consequences of her injurious action towards the servants of Allāh. Likewise any of these people who actually participates in battle for repelling their evil, because actual fighting permits this.

The insane person is not to be killed. The reason is that he is not addressed by the divine communication (creating liability), unless he is actually fighting in which case he is to be killed in order to avoid his evil.

It is considered disapproved that a man advance upon his father, who is among the polytheists, in order to kill him, due to the words of the Exalted, "Yet bear them company in this life with justice (and consideration), and follow the way of those who turn to Me."[13] The reason is that it is obligatory upon him to spend on him for his survival, therefore, permission to kill him will negate this.

[11] It is *gharīb* in these words, but the same meaning is found in traditions recorded by all the sound compilations, except Ibn Mājah. Al-Zayla'ī, vol. 3, 386.

[12] It is recorded by Abū Dāwūd and al-Nasā'ī. Al-Zayla'ī, vol. 3, 387.

[13] Qur'ān 31 : 15

Chapter 110

Negotiating Cessation of Hostilities and Safe Conduct

If the *imām* deems it proper to negotiate the cessation of hostilities with the residents of the *dār al-ḥarb* or with one group among them, and in this there is the securing of the interest of the Muslims, then there is no harm in it, due to the words of the Exalted, "But if the enemy incline towards peace, do thou (also) incline towards peace, and trust in Allah."[1] The Messenger of Allāh (God bless him and grant him peace) negotiated a cessation of hostilities with the residents of Makkah in the year of al-Ḥudaybiyyah on the terms that the war between them and him will cease for ten years.[2] The reason is that a negotiated settlement is *jihād* in meaning if it is in the interests of the Muslims, because the purpose is to repel the evil that will result from continued hostilities. It is not necessary to limit the duration of the settlement to what is narrated (ten years) due to the extension of the purpose in excess of that, as distinguished from the case where it is not in the interest of the Muslims, because that would amount to giving up *jihād* in both form and meaning.

If they commit a breach of the truce, he is to engage them in combat and is not to communicate the repudiation to them, if the breach is committed by them in agreement, because they have all broken the treaty, therefore, there is no need to terminate it. This is distinguished from the case where some of them enter our territory and commit highway robbery (*qaṭʿ al-ṭarīq*) where there is no one to restrain them, as this will not amount to a termination of the treaty. If there is some resistance to them

[1]Qur'ān 8 : 61

[2]It is recorded by Abū Dāwūd in his *Sunan*. Al-Zaylaʿī, vol. 3, 388.

and they openly fight with the Muslims, it will amount to a termination of the treaty on the part of these particular people, but not all of them. The reason is that it is without the permission of their king (ruler), thus, it does not bind the rest of them. If it was by permission of their ruler, it would amount to termination as it was with their agreement in meaning.

If the *imām* decides to conclude a truce with the enemy and he takes wealth from them for doing so, there is no harm in this. The reason is that when a settlement is permitted without wealth, it is permitted with wealth as well. This, however, is permitted when the Muslims are in a state of need. If there is no such need it is not permitted, as we have explained earlier. The amount so taken will be utilised on the avenues on which *jizyah* is spent. This is the case when the Muslim armies have not descended into their plains, rather they have sent an emissary, for then it is in the meaning of *jizyah*. If, however, the army lays siege to them and takes wealth from them, it will be deemed spoils and from which a fifth will be taken and the rest will be divided among them, because it has been derived through the use of force in reality.

As for the apostates, the *imām* is to conclude a truce with them till he has examined their affairs. The reason is that coming back into the fold of Islam is desired from them, therefore, it is permitted to delay combat with them with a view to their coming back to Islam. **He is not to take wealth for doing so,** because it is not permitted to take *jizyah* from them, due what has been explained. **If he does take it, however, he is not to return it,** because it is (legally) unprotected wealth. If the enemy lay siege to the Muslims and demand a truce in lieu of wealth that the *imām* should pay them, then the *imām* is not to do so insofar as it amounts to degradation and the association of humiliation with the community of Islam. The exception is where he sees destruction in this, because repelling death is obligatory through all means possible.

They are not to sell weapons to the Ahl al-Ḥarb nor to sell other assets to them, because the Prophet (God bless him and grant him peace) forbade the sale of weapons to the residents of the *dār al-ḥarb* or to carry them over to them (by way of trade).[3] The reason is that in this is the strengthening of their ability to wage war against the Muslims. Consequently, they are forbidden to do so. Likewise horses, due to the explanation we have given. So also the transportation of iron ore for that

[3]It is *gharīb* in these words. It is recorded by al-Bayhaqī. Al-Zayla'ī, vol. 3, 391.

is the basis of weapons. The same restriction is to be observed after truce for that truce is likely to be terminated or will end and they will wage war on us. The analogy based on this applies to food and dresses as well, except that we have understood through the text that the Prophet (God bless him and grant him peace) ordered Thumāmah to send supplies to the people of Makkah, who were at war with him.[4]

110.1 Safe Conduct

If a freeman, or a freewoman, grants *amān* (assurance of safety) to an unbeliever, or to a group, or to the residents of a fort, or the residents of a city, such assurance is valid, and none among the Muslims is permitted to engage them in combat. The basis for this is the saying of the Prophet (God bless him and grant him peace), "The blood of all Muslims is equal (with respect to *qiṣāṣ*) and the least among them may strive to extend their assurance of safety,"[5] that is, the minimum number among them, which is one.[6] The reason is that (being a freeman) he is eligible to participate in battle, and for this reason they may be apprehensive of him for he possesses the ability to restrain them, therefore, the granting of an assurance of safety is realised on his part, due to its linkage with the subject-matter of the assurance (that is, their apprehension) and thereafter extending to others besides him.[7] The reason is that its cause is not divisible and that is *īmān* (faith, affirmation). Likewise *amān* is not divisible and is completed like the authority to give in marriage.[8]

He said: **Unless there is an injury resulting from this in which case it is to be repudiated (and communicated to them).** It is like the *imām* granting the *amān* himself, but then he comes to the conclusion that the securing of interests demands that it be repudiated, and we have elaborated that already. If the *imām* lays siege to a fort and one among the army

[4]It is recorded by al-Bayhaqī in *Dalā'il al-Nubuwwah*. Al-Zayla'ī, vol. 3, 391.

[5]It is recorded in the two *Saḥīḥs*. Al-Zayla'ī, vol. 3, 393–94.

[6]He says this to counter the interpretation that the least among them is the slave and even he can grant *amān*.

[7]Just like the sighting of the moon of Ramaḍān is seen by one and then applies to the rest.

[8]Where there are several *awliyā'* with equal authority and one of them has given the woman away in marriage.

grants them *amān*, but the *imām* perceives an injury in this and terminates the assurance, as we have explained, then he is to discipline him for acting against his opinion. This is distinguished from the case where the granting of such assurance is a matter of interpretation, because the benefit is sometimes lost due to delay (in seeking the opinion of the *imām*), therefore, he is to be excused.

The *amān* granted by a slave under interdiction is not valid according to Abū Ḥanīfah (God bless him), unless his master has permitted him to participate in battle. Muḥammad (God bless him) said that it is valid. It is also the opinion of al-Shāfi'ī (God bless him). Abū Yūsuf (God bless him) sides with Muḥammad (God bless him) in one narration and with Abū Ḥanīfah (God bless him) in another narration. Muḥammad (God bless him) relies on the saying of the Prophet (God bless him and grant him peace), "The *amān* of a slave is *amān*,"[9] which was related by Abū Mūsā al-Ash'arī (God be pleased with him). The reason is that he is a *mu'min* (believer) with the power to restrain, therefore, his *amān* is valid on the analogy of the slave authorised to participate in battle as well as on the analogy of permanent *amān* (for making an enemy a Dhimmī). The stipulation of having *īmān* (faith) is that it is a precondition for *'ibādah* (worship) and *jihād* is worship. The stipulation of the power to restrain is for the realisation of fear through it, while its effect is the dignity of religion and the securing of interests of the community of Muslims, when the assurance is given in such a situation. He does not possess the right to participate in battle (of his own authority), because in this there is the suspension of the benefits accruing to the master, but there is no such suspension through a mere statement. According to Abū Ḥanīfah (God bless him) he is placed under interdiction from participating in battle, therefore, his *amān* is not valid, because they do not hold him in awe. Consequently, the *amān* is not linked to its subject-matter, as distinguished from the slave authorised to participate in battle, because awe is realised in his case. Further, he does not possess the right to participate in battle insofar as it is a transaction that affects the right of the master in a manner that is not devoid of an injury resulting to his interests.

Amān is a type of combat and it consists of what we have mentioned. The reason is that the slave sometimes makes an error (in assessing the

[9]It is *gharīb*. It is recorded by 'Abd al-Razzāq. Al-Zayla'ī, vol. 3, 396.

need for *amān*) and that is obvious (for he is not trained for warfare). In it is also the blocking of the means to the attainment of spoils. This is distinguished from the case of the authorised slave, because the master has agreed to his participation, and error is rare due to his direct participation in combat (and experience). It is also distinguished from the perpetual *amān*, which is the suspension of warfare required by Islam, thus, it has the status of an invitation extended to him (which is a benefit), and also in return for *jizyah* (which is a benefit). Finally, it is obligatory on the *imām* to respond to their request (for the contract of *dhimmah*) and the suspension of the obligation is a benefit, therefore, they are distinguished.

If a minor, who does not possess discretion, grants *amān* his position is like that of the insane person. If he does possess discretion, his position is like the slave not authorised to participate in battle, along with the disagreement in it.[10] If, however, he is permitted to participate in battle, then the correct view is that it is valid. Allāh knows what is correct.

[10]With Abū Ḥanīfah (God bless him) saying that his *amān* is not valid and Muhammad (God bless him) saying that it is.

Chapter 111

Spoils of War and Their Division

When the *imām* conquers a land *'anwatan*, that is by the use of force (mobilisation of the army), **then he has a choice. If he likes he may divide it (the land) among the (combating) Muslims,** as did the Prophet (God bless him and grant him peace) with the lands of Khaybar,[1] **and if he likes he may leave the residents settled on it by imposing *jizyah* on them and *kharāj* on their lands.** This is what 'Umar (God be pleased with him) did with the Sawād lands of Iraq with the agreement of the Companions (God be pleased with them), while those who opposed it were not praised. In each of these there is a model, therefore, he is to make a choice. It is said that the first is to be adopted when the combatants are in need, and the second when there is no such need, so that it yields its benefits for those who come next. This is the position in the case of immovable property. As for the purely movable property, it is not permitted to make a grant by returning it to them (the residents), because the law (*shar'*) has not required this.

In the case of immovable property, there is a disagreement with al-Shāfi'ī (God bless him), because in making a grant (for the residents) there is the annulment of the right or ownership of the combatants entitled to the spoils, therefore, it is not permitted without a counter-value that is equivalent to it. *Kharāj* is not equivalent due to its paucity. This is distinguished from ownership of slaves as the *imām* has the right to execute them and annul their right altogether. The evidence against him is what we have narrated. The reason is that this is subject to examination, for they are like agriculturists for the Muslims in general and proficient in the various ways of cultivation, while the financial burden of cultivation

[1]It is recorded by al-Bukhārī in his *Ṣaḥīḥ*. Al-Zayla'ī, vol. 3, 397.

is removed (from the liability of the *imām* and the Muslims) along with the fact that it will benefit those who come later. *Kharāj*, even though it is meagre at the moment, will amount to an immense return over time. If the slaves and land are granted to them, the movable property is also to be given to them to an extent that will enable them to undertake work, and also for the reason that the act will move out of the disapproved category.[2]

He is not to accept ransom for the captives, according to Abū Ḥanīfah (God bless him). The two jurists said he may accept ransom for them in the form of an exchange for Muslim prisoners, which is also the view held by al-Shāfi'ī (God bless him). The reason is that in this there is release of the Muslim, which is better than the execution of an unbeliever or making use of him. The Imām (God bless him) argues that in this there is support for the unbelievers for he will return as a warring enemy against us. The repelling of his mischief hostility is better than the release of Muslim captives, because if they were to stay in their captivity would be a trial for them but would not be associated with us, while support by sending their captives to them will have direct repercussions on us. As for ransom by accepting wealth from them in return, it is not permitted according to the authentic view of our school, as we have elaborated. In *al-Siyar al-Kabīr* it is stated that there is no harm in doing so if the Muslims are in dire need of funds, and this on the analogy of the captives of Badr.[3] If the captive converts to Islam in our captivity, he is not to be exchanged for a Muslim who is in their captivity, because there is no benefit in doing so, unless he volunteers to go and when there is satisfaction with respect to his acceptance of Islam.

He said: **It is not permitted to release them as a favour,** that is, to the captives. Al-Shāfi'ī (God bless him) disagrees and says that the Prophet (God bless him and grant him peace) released one of the prisoners of the Battle of Badr as a favour.[4] We rely upon the words of the Exalted, "Then fight and slay the Pagans wherever ye find them."[5] The reason is that by captivity and subjugation the right to enslave is established against them,

[2]That is if their slaves and lands are given to them, but the rest of their wealth and families are taken away this would be a disapproved act, although the *imām* would be acting within his authority in doing so.

[3]It is recorded by Muslim. Al-Zayla'ī, vol. 3, 402.

[4]It is recorded by al-Bukhārī as a tradition from Nāfi'. Al-Zayla'ī, vol. 3, 404.

[5]Qur'ān 9 : 5

therefore, it is not permitted to extinguish this right without obtaining a benefit and compensation. What he has narrated is abrogated by what we have recited.

If the *imām* decides to return and with him are cattle that he cannot move to the *dār al-Islām*, he is to slaughter them and burn them, but he is not to hamstring them or set them loose. Al-Shāfi'ī (God bless him) said that he is to set them loose, because the Prophet (God bless him and grant him peace) prohibited the slaughtering of a goat except for purposes of consumption.[6] We argue that the slaughter of an animal is permitted for a legally sound purpose, and there is no purpose better than the demolition of the power of the enemy. Thereafter, he is to burn them in order to sever the benefit that can go to the unbelievers. It is like the demolition of a building. It is different from burning them prior to slaughter for that is prohibited.[7] This is distinguished from hamstringing the animal as that amounts to mutilation (*muthlah*). Weapons are to be set on fire as well, and what cannot be burned is to be buried where the unbelievers cannot find it so as to eliminate the benefit that can go to them.

The spoils are not to be divided in the *dār al-ḥarb*, not until they are moved to the *dār al-Islām*. Al-Shāfi'ī (God bless him) said that there is no harm in doing so. The basic rule for this, in our view, is that the ownership of the combatants is not established in the spoils until they are gathered and moved to the *dār al-Islām*. In his view such ownership is established (before that). From this rule arise a number of issues that we have mentioned in the *Kifāyat al-Muntahī*. He argues that the cause of ownership is the seizure of wealth when such wealth is permissible, as in the case of hunt. Seizure has no meaning except the affirmation of possession, and this stands realised. We argue on the basis of the tradition that the Prophet (God bless him and grant him peace) prohibited the sale of spoils within the *dār al-ḥarb*,[8] and the disagreement is established with respect to it (sale). Division is sale in meaning, therefore, it is included in it. Further, possession is both for protection and for transporting property. The second meaning (transportation) does not exist due to the ability of the unbelievers to have it released and the existence

[6]It is *gharīb* and is recorded by Ibn Abī Shaybah. Al-Zayla'ī, vol. 3, 406.

[7]There are traditions on this recorded by al-Bukhārī and others. Al-Zayla'ī, vol. 3, 407.

[8]It is *gharīb* in the absolute sense. Al-Zayla'ī, vol. 3, 408.

of this ability is obvious (as the spoils are in their land). Thereafter, it is said that the disagreement is in the issue whether division will have its legal effects when the *imām* divides the spoils without examination (immediately), because the legal effects of ownership are not established without ownership (being transferred to the combatants). It is said that doing so would be disapproved and it is disapproval that is close to prohibition (*taḥrīm*) according to Muḥammad (God bless him), for this is what he said in response to the view of Abū Ḥanīfah and Abū yūsuf (God bless them) that it is not permitted to divide the spoils in the *dār al-ḥarb.* Thus, it is preferable according to Muḥammad (God bless him) to divide the spoils in the *dār al-Islām.* The reason for disapproval is that the evidence of prohibition has greater precedence yet it has been held back from negating permissibility (and giving rise to prohibition), but it cannot be held back from giving rise to disapproval.

He said: **The supporting soldier in the army and the soldier participating directly in combat are the same (with respect to entitlement),** due to their equivalence with respect to the cause, which is crossing over or witnessing the battle as is known. Likewise if a soldier has not been able to fight due to illness or another reason, due to what we have mentioned.

If reinforcements arrive prior to their transporting the spoils to the *dār al-Islām*, they will participate with them in the spoils. Al-Shāfi'ī (God bless him) disagrees saying that this is not allowed after the cessation of hostilities, on the basis of his principle that we elaborated earlier (that ownership results from mere taking). In our view, the right of participation ends by the taking of possession, or by division by the *imām* within the *dār al-ḥarb*, or by the sale by him of the spoils, because by each one of these acts ownership becomes complete cutting of the right of participation by the reinforcements arriving later.

He said: **There is no entitlement in the spoils for the vendors in the market for the military, unless they participate in battle.** Al-Shāfi'ī (God bless him) said that a share is to be given to them, due to the saying of the Prophet (God bless him and grant him peace), "The spoils are for those who witness the battle."[9] Further, the meaning of *jihād* is found due the swelling of numbers (present). We argue that their crossing over is not with the intention of participating in battle, therefore, the apparent cause

[9]What the Author says is correct. It is recorded by Ibn Abī Shaybah. Al-Zayla'ī, vol. 3, 408.

is absent, thus, the real cause is taken into account, which is participation in battle. The entitlement is implemented in accordance with the state of such a fighter as to whether he is a rider or a foot-soldier during battle. What he has related is *mawqūf* at 'Umar (God be pleased with him), or the interpretation is that if he witnesses the battle with the intention of participating in it.

If the *imām* does not possess the means of transportation for transporting the spoils, he is to divide the spoils among the entitled combatants, but it is a division among custodians, so that they can carry them over to the *dār al-Islām*. Thereafter, he recovers the spoils from them and divides them. This feeble servant says: This is how it has been mentioned in *al-Mukhtaṣar*, and he did not stipulate their consent in this. It is a narration of *al-Siyar al-Kabīr*. The general statement about this issue is that if the *imām* finds carriers within the spoils, then he is to transport the spoils on them, because both the carriers and the spoils are their wealth. Likewise if there are in the treasury surplus bearers, because that is the common wealth of the Muslims. If the carriers belong to the combatants or to some of them, he is not to compel them according to the narration in *al-Siyar al-Ṣaghīr*, because it is hire *ab initio*. It is as if a person's animal dies in a desolate place and his companion has an extra animal (that he rents). According to the narration in *al-Siyar al-Kabīr*, they are to be compelled, because it is the repelling of a public injury by bearing a private injury.

The sale of spoils within the *dār al-ḥarb*, prior to division, is not permitted, because there is no ownership prior to that. In this there is the disagreement of al-Shāfi'ī (God bless him) and we elaborated the principle (on which it is based).

If a combatant entitled to spoils dies within the *dār al-ḥarb*, then he has no entitlement to the spoils. If a combatant dies after the spoils have been moved out to the *dār al-Islām*, then his share goes to his heirs, because inheritance operates where there is ownership and there is no ownership prior to possession (gathering); the ownership arises after that. Al-Shāfi'ī (God bless him) says that a combatant who dies after the cessation of hostilities his share is inherited due to the existence of his ownership in it in his view, and we have elaborated this.

He said: **There is no harm if the army takes fodder from the *dār al-ḥarb* and consumes the food that it finds.** This feeble servant says: He (al-Qudūrī) has made an unqualified statement and has not restricted it

to the case of need, when it is stipulated in one narration and not stipulated in another. The reason underlying the first narration is that it is common property for the combatants, therefore, utilising it is not permissible without a need, as is the case with animals and dresses. The underlying reasoning of the second narration is based upon the words of the Prophet (God bless him and grant him peace) about the food of Khaybar, "Eat it and use it for fodder, but do not carry it."[10] Further, the rule revolves around the evidence of need, and that is his being in the *dār al-ḥarb*. The reason is that the combatant does not carry his food or the fodder of his ride himself during his stay there and the supplies are cut off. Consequently, the food consumed stays permissible due to need according to the original rule of permissibility. This is distinguished from weapons for he carries them with him, therefore, the evidence of need is non-existent. At times the need may arise and then the reality is to be taken into account. He may then use the weapons and return them to the spoils when he no longer needs them. Animals are like weapons, while food is like bread, meat and what is used with them like fat and oil.

He said: **They are to use wood,** and in some manuscripts the word is perfume. **They are to use oil for massage and to use it for oiling the hoofs of animals,** due to the occurrence of need for all this.

They are to engage in combat with whatever weapons they can find, and all this without division of the spoils. The interpretation of this is that when they are in need of this and do not have weapons, and we have already explained this.

It is not permitted to them to sell any of these things or to convert them into other forms of wealth, because sale is based upon ownership and there is no ownership here, as has preceded. It is merely a state of permissibility and is like a person permitted to have food. His statement, "to convert them into other forms of wealth" is an indication that are not to sell them for gold, silver and goods for there is no need for them. If one of them does so he is to return the price to the spoils, because it is a counter-value for a thing that belonged to the whole army. As for dresses and items of use, it is considered disapproved to utilise them without need prior to the division due to common ownership, unless the *imām* distributes these among them within the *dār al-ḥarb* when they are in

[10]It is related by al-Bayhaqī, but similar traditions are recorded by others including al-Bukhārī. Al-Zayla'ī, vol. 3, 409.

need of dresses, animals and items of use. The reason is that even the prohibited becomes permissible at the time of necessity, therefore, the disapproved may be made permissible with less reluctance. Further, the arrival of reinforcements is probable and the need of these persons for these things is certain, therefore, it has a priority for consideration. He did not mention a division of weapons, but there is no difference in reality. Thus, if one of them needs them he is to be permitted to utilise them in both cases (that is, need for weapons and need for other things). If all of them need them, they are to be divided in both cases. This is distinguished from the case where they are in need of captive prisoners, for they are not to be divided; the need being for something additional and not a necessity.

He said: **The person among them who converts to Islām,** the meaning being in the *dār al-ḥarb*, **he protects himself through his Islām,** because Islām negates the commencement of enslavement, **and his minor children too,** as they become Muslims as a consequence of his Islām. **He also preserves all the (movable) wealth that is in his possession,** due to the words of the Prophet (God bless him and grant him peace), "If a person converts to Islām while possessing wealth, the wealth belongs to him."[11] The reason is that he was the first, in reality, to take it into his possession as a conqueror. **This applies to a deposit in the custody of a Muslim or Dhimmī.** The reason is that it is a valid possession that is protected and the possession of the custodian is like his own possession.

If we conquer the enemy territory, then his real property (lands and buildings) are *fay'* (booty). Al-Shāfi'ī (God bless him) said that it belongs to him as it is in his possession and will be treated like movable property. We argue that the real property is in the possession of the residents of the territory and their authority, as it is a constituent part of the *dār al-ḥarb*, therefore, it is not in his possession in reality. It is said that this is the opinion of Abū Ḥanīfah (God bless him) and one opinion of Abū Yūsuf (God bless him). In the opinion of Muḥammad (God bless him), which is also another opinion of Abū Yūsuf (God bless him), it is like the rest of his wealth. This disagreement is based upon the rule upheld by the two jurists that (physical) possession of real property is not established in reality, while according to Muḥammad (God bless him) it is established.

[11]It is recorded by Abū Ya'lā al-Mawṣilī in his *Musnad*. There are other traditions conveying a similar meaning and these are recorded by al-Bukhārī and Abū Dāwūd. Al-Zayla'ī, vol. 3, 410.

Property that is usurped and in the possession of a Muslim is booty according to Abū Ḥanīfah (God bless him). Muḥammad (God bless him) said that it is not. This feeble servant says: This is how the disagreement is recorded in *al-Siyar al-Kabīr*. The jurists have mentioned the opinion of Abū Yūsuf (God bless him) alongside the opinion of Muḥammad (God bless him) in the commentaries on *al-Jāmi' al-Ṣaghīr*. The two jurists maintain that wealth is subordinated to the person, and such wealth became protected through his conversion to Islām for it follows him for purposes of protection. The Imām argues that this wealth is permissible and is owned through seizure, while the person does not become protected through Islām. Do you not see that the person is not marketable wealth, and that it is prohibited to commit aggression against him according to the original rule, because he is a human being. The permissibility of aggression arises from the obstacle of his mischief, and such permissibility was done away with by his Islām. This is distinguished from wealth, which has been created for use, therefore, it is a valid subject-matter for ownership. Legally it is not in his possession, thus, legal protection (for such wealth) is not established.

When the Muslims are moving out of the *dār al-ḥarb*, it is not permitted to them to take fodder from the spoils or to consume it, because the necessity stands lifted and permissibility was on account of it. Further, the right has come to be established so that his share is now inheritable wealth. The position is not like this prior to moving over to the *dār al-Islām*.

The surplus fodder and food that he has is to be returned to the spoils, which means if the spoils have not been divided. Al-Shāfi'ī (God bless him) has an opinion like ours, but he has another opinion that says that he is not to return it on the analogy of stolen wealth. We argue that acquisition was due to the necessity of need, and this has been removed as distinguished from the one stealing (from the enemy territory). Further, the thief had a greater right to it prior to its transportation, and likewise after it. After distribution (if they are in possession of the fodder and food), they are to give it away as charity if they are rich and to use it if they are needy, because it is now governed by the rule of found property due to the difficulty of returning it to the combatants entitled to the spoils. If they utilise it after its transportation, they are to pay its value to the combatants entitled to the spoils. This is the case when the spoils have not been distributed. If the spoils have been distributed, they

give away its value as charity if they are rich. There is no liability for the poor person, because the value stands in the place of the original thing, and thus is assigned its rule. Allāh knows what is correct.

111.1 Modes of Division

He said: **The *imām* divides the spoils and (first) takes out a fifth from it,** due to the words of the Exalted, "a fifth share is assigned to Allah, and to the Messenger,"[12] which exempt a fifth.

He is to divide the (remaining) four-fifths among those entitled to the spoils, because the Prophet (God bless him and grant him peace) divided four-fifths among them.[13]

Thereafter, the rider gets two shares and the foot-soldier one share, according to Abū Ḥanīfah (God bless him). **The two jurists said that the rider gets three shares,** which is also the view of al-Shāfi'ī (God bless him). The basis is what is related by Ibn 'Umar (God be pleased with both) "that the Prophet (God bless him and grant him peace) granted three shares to the rider and one share to the foot-soldier."[14] Further, the entitlement is on the basis of wealth owned. The rider's contribution is three times that of the foot-soldier due to his being equal to those who launch an attack, those who retreat and those who remain firmly on the ground, while the foot-soldier is equal only to those who stand their ground. Abū Ḥanīfah (God bless him) relies on what is related by Ibn 'Abbās (God be pleased with both) "that the Prophet (God bless him and grant him peace) granted the rider two shares and to the foot-soldier one share."[15] Further, it is related from Ibn 'Umar (God be pleased with both) "that the Prophet (God bless him and grant him peace) divided (the spoils) giving the rider two shares and to the foot-soldier one share."[16] When the two traditions conflict, the tradition besides them has to be preferred. The reason is that those attacking and those retreating are one category, therefore, his contribution is twice that of the foot-soldier. Consequently, he is to be preferred over him by one share. In addition to this,

[12]Qur'ān 8 : 41

[13]It is recorded by al-Ṭabarānī in his *Mu'jam*. Al-Zayla'ī, vol. 3, 412.

[14]It is recorded by all the sound compilations, except al-Nasā'ī. Al-Zayla'ī, vol. 3, 413.

[15]It is *gharīb*, however, in the same meaning are traditions recorded by others. Al-Zayla'ī, vol. 3, 416–17.

[16]It is *gharīb* in the absolute sense. Al-Zayla'ī, vol. 3, 17.

it is difficult to assess the excess of such contribution due to the lack of information about it. Accordingly, the rule is based upon the obvious reason when the rider shows two such causes: himself and his horse. The foot-soldier possesses one such cause, thus, he is given one share due to the deficiency.

The share is given to just one horse. Abū Yūsuf (God bless him) said that one share is to be given for two horses due what is reported "that the Prophet (God bless him and grant him peace) gave one share to two horses,"[17] because one can be exhausted and he may need the other. The two jurists argue that the al-Barā' ibn Aws brought two horses, but the Messenger of Allāh (God bless him and grant him peace) gave a share to just one horse.[18] Further, fighting is not undertaken with two horses at the same time, therefore, the obvious cause does not point to fighting with both, thus, the share is given to one. It is for the same reason that the share is not given for three horses. What he has related is interpreted to mean a reward, just as he gave a reward to Salamah ibn al-Akwah by giving him two shares when he was a foot-soldier.

The *birdhawn* (non-Arabian) and the *'atāq* (thoroughbred Arabian horse) are the same, because the intimidation mentioned in the Qur'ān is attributed to the species of horses. Allāh, the Exalted, says, "Against them make ready your strength to the utmost of your power, including steeds of war, to strike terror into (the hearts of) the enemies of Allah and your enemies."[19] The term horses is applied, through a single generic term, to mean *barādhīn* (non-Arabian), *'irāb* (Arabian), *hajīn* (mother Arabian) and *maqrif* (father Arabian). If the Arabian horse is better for pursuit and is stronger for purposes of intimidation, the *birdhawn* is smoother in manoeuvring, therefore, each one of them has an acknowledged benefit and are deemed equal.

If a person enters the *dār al-ḥarb* on horseback, but his horse dies, he is entitled to the share of a rider. If a person enters on foot and then buys a horse, he is entitled to the share of a foot-soldier. The response given by al-Shāfi'ī (God bless him) is the opposite of this in both cases. Likewise, Ibn al-Mubārak has narrated from Abū Ḥanīfah (God bless him) that he (in the second case) is entitled to the share of a rider. The net result is that

[17]It is recorded by al-Dār'quṭnī in his *Sunan*. Al-Zayla'ī, vol. 3, 418.

[18]It is *gharīb*. In fact, there is a tradition that gives the opposite meaning. Al-Zayla'ī, vol. 3, 419.

[19]Qur'ān 8 : 60

what is considered effective in our view is the state at the time of crossing over, while in his view it is the state at the time of termination of combat. He maintains that the cause is vanquishing and fighting, therefore, the state of a person at that time is to be considered. Crossing over is a means to the cause, like coming out of the house. The suspension of the rules upon fighting indicates that possibility of relying on it for deriving rules. If there is an obstacle in the way of doing so or there is a difficulty, then reliance should be placed upon the witnessing of the battle as that is the closest to it (actual fighting). In our view, crossing over to the enemy territory in itself is combat, because it is at this time that they are overcome by fear, and the state after this is one of continuation, therefore, it cannot be taken into account. Further, placing reliance upon the actual act of fighting is difficult, likewise the state of witnessing the combat for it is the time of formation of the lines of battle. Consequently, crossing over is made to stand in its place for it is the apparent cause of participating in combat when such crossing over is with the intention of fighting. Thus, the state of a person is determined by his state while crossing over as to whether he is a rider or a foot-soldier. If he enters on horseback and fights on foot due to the lack of space, he is entitled to the share of a rider by agreement. If he enters on horseback and then sells his horse, gifts it, rents it out, or pledges it, then according to a narration of al-Ḥasan from Abū Ḥanīfah (God bless him) he is entitled to the share of a rider giving effect to the state at the time of crossing over. In the authentic narration (*ẓāhir al-riwāyah*) he is entitled to the share of the foot-soldier, because undertaking these transactions indicates that it was not his intention at the time of crossing over to fight on horseback. If he sells the horse after the battle is over, the share of the rider is not annulled. Likewise if he sells it during battle according to some jurists. The correct view, however, is that the share is annulled, because sale indicates that his purpose is to indulge in the trading of the horse, and that he was waiting for its value to go up.

As for the fifth (set aside at the beginning), it is divided into three shares: a share for the orphans, a share for the needy, and a share for the wayfarer. The poor among the near relatives are included in these types, and are to be given precedence over them, but nothing is to be given to the rich near relatives. Al-Shāfiʿī (God bless him) said that they are to be given a fifth of the fifth with the poor and rich being equal. The fifth is to be divided among them on the basis of two shares for the male and

one for the female, and it will be for the Banū Hāshim and the Banū al-Muṭṭalib, but not for others, due to the words of the Exalted, "For the near relatives,"[20] where no distinction has been made between the rich and the poor. We argue that the four Khulafā' Rāshidūn (God be pleased with them) divided the fifth in the manner that we have stated, and their acts are sufficient as a model for us. The Prophet (God bless him and grant him peace) said, "O People of the Banū Hāshim, Allāh has deemed disapproved for you the filth of the people and in return has granted you a fifth of the fifth."[21] A substitute counter-value is established in favour of those in whose favour the original counter-value was established, and these are the poor relatives. The Prophet (God bless him and grant him peace) granted this to them for their support. Do you not see that the Prophet (God bless him and grant him peace) declared the underlying cause as, " 'They continued to be with like this during the Jāhiliyyah as well as Islam,' and he joined two of his fingers."[22] This indicates that the meaning of the text is nearness of support and not nearness of kinship.

He said: **The mentioning of the name of Allāh, the Exalted, in relation to the fifth is for commencing the statement and as a blessing through His name. The share of the Prophet (God bless him and grant him peace) lapsed with his death as did the right to make the first choice (*ṣafiyy*).** The reason is that the Prophet (God bless him and grant him peace) was entitled to it due to his mission and there is no prophet after him. *Ṣafiyy* is a thing that the Prophet (God bless him and grant him peace) would choose for himself from the spoils like a coat of mail, sword or a slave girl.[23] Al-Shāfi'ī (God bless him) said that the share of the Prophet (God bless him and grant him peace) is to be transferred to the *khalīfah*, but the argument against him is what we have presented.

The near relatives were entitled to a share, during the lifetime of the Prophet (God bless him and grant him peace) due to their support, on the basis of what we have related **and due to poverty after his time.** This feeble servant, may Allāh protect him, says: The statement mentioned (by al-Qudūrī) is the opinion of al-Karkhī (God bless him). Al-Ṭaḥāwī (God bless him) said that the share of the poor among them has also lapsed on

[20]Qur'ān 8 : 41

[21]It is *gharīb* and is recorded by al-Ṭabarānī. Al-Zayla'ī, vol. 3, 424.

[22]It is recorded by Abū Dāwūd, al-Nasā'ī and Ibn Mājah. Al-Zayla'ī, vol. 3, 425.

[23]Opinion of Ibn 'Abbās (God be pleased with both), and a tradition recorded by Abū Dāwūd. Al-Zayla'ī, vol. 4, 426–27.

the grounds of consensus, which we related. Further, it includes within it the meaning of charity in consideration of the avenue of expenditure, therefore, it is prohibited just like the prohibition of the wages of *ṣadaqah*. The reasoning underlying the first view, and it is said that this is the sound view, is based on the report that 'Umar (God be pleased with him) did give it to the poor among them, while the consensus took place about the extinction of the share of the rich. As for their poor they are included in the three categories of the fifth.

If one or two persons enter the *dār al-ḥarb* without the permission of the *imām*, and acquire something it is not to be subjected to the taking of a fifth. The reason is that spoils are taken after conquest and overpowering and not through pilferage and theft, and the setting aside of a fifth is from the spoils. If one or two persons enter with the permission of the *imām*, then in this case there are two opinions. According to the well known opinion a fifth is taken, because the *imām* by granting them permission made their help binding on himself through support, therefore, they become like a military contingent.

If a group, that possesses military strength, enters and takes something it is subjected to the fifth even when the *imām* did not grant them permission for entry, because it was taken with the use of force and domination, therefore, it is like spoils. Further, it is obligatory upon the *imām* to lend them support for if he withdraws support it will result in weakening the Muslims, as distinguished from one or two persons in whose case it is not obligatory on him to help them. Allāh knows what is correct.

111.2 Rewards

He said: **There is no harm if the *imām* promises rewards during battle in order to encourage the soldiers to fight. Thus, he may say, "Whoever kills an opponent may take the belongings on his person," or he may say to a detachment, "I promise you a fourth after the fifth is set aside."** This means after a fifth has been taken from the spoils. The reason is that encouragement is recommended (*mandūb*). Allāh, the Exalted, has said, "O Prophet! Rouse the Believers to the fight."[24] The granting of rewards is a form of encouragement. Thereafter, encouragement is undertaken through what has been said and sometimes it is through other methods,

[24]Qur'ān 8 : 65

except that it is not for the *imām* to give away the entire spoils as reward as in this there is annulment of the right of all. If he does that while sending a raiding party then it is permitted, because this is left to his discretion and the securing of interests may demand this.

He is not to make a reward after the spoils have been secured within the *dār al-Islām*, because the rights of others are now entrenched in the spoils after their collection.

He said: **The exception is the fifth,** because the combatants winning the spoils have no right in it.

If he does not grant the belongings on the person of the enemy combatant to one who slays him, then they form part of the total spoils, and the slayer and others have equal rights with respect to them. Al-Shāfiʿī (God bless him) said that the *salab* (belongings on the person of the combatant) belong to the slayer, if he is one who is eligible for a share and when he slays him in combat, due to the words of the Prophet (God bless him and grant him peace), "Whoever slays an enemy is entitled to the belongings on his person."[25] It is obvious that this tradition a mandatory provision of the law (not discretionary reward), because he was sent for this. Further, a person slain in frontal combat results in a greater benefit (for *jihād*), therefore, the person slaying him has the exclusive right to his belongings as an expression of the difference between him and the others. We maintain that it has been acquired through the power of the army, thus, it is a part of the spoils, and is to be divided in the manner laid down in the text (verse). The Prophet (God bless him and grant him peace) said to Ḥabīb ibn Salamah, "You have no right to the personal belongings of the person you slay except with the consent of your *imām*."[26] What he has related probably implies a mandatory provision of the law and it probably implies a reward, therefore, we construe it to mean the latter on the basis of what we have related. The additional benefit is not taken into account for a single species (advancing and retreating), as we mentioned.

***Salab* includes the clothes worn by the slain fighter, his weapons, ride, and whatever is on his ride like a saddle or instruments. It also includes what is upon his load animal in his bag or around his waist. What is besides this is not part of the *salab*.** The things that may be with his slave on another animal are not part of the *salab*. Thereafter, the right

[25]It is recorded by all the sound compilations, except al-Nasāʾī. Al-Zaylaʿī, vol. 3, 428.

[26]The correct name is Maslamah, and the tradition is recorded by al-Ṭabarānī. Al-Zaylaʿī, vol. 3, 430.

to a reward cuts off the right of the rest over it. As for ownership it is established after gathering in the *dār al-Islam*, as has been stated earlier. Thus, if the *imām* were to say, "Whoever captures a female she belongs to him," and thereafter a person does make a female captive, establishes that she is not with child, it is not permitted to him to have intercourse with her. Likewise, he is not to sell her. This is the position according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) maintains that he has the right to have intercourse with her and to sell her too, because ownership is established through *tanfīl* (promise of reward) in his view, just as it is established through division (of the spoils) within the *dār al-ḥarb* and purchase from an enemy. The obligation of compensation as a consequence of destruction, it is said, is also based upon this disagreement. Allāh knows what is correct.

Chapter 112

Conquests by the Unbelievers

If the Turks (Unbelievers) overcome the Byzantines, enslave them and seize their wealth, it belongs to them, because seizure is realised in wealth that it permissible (for them), and that is the cause, as we shall elaborate, God, the Exalted, willing. **If we overcome the Turks, then whatever we find of this wealth with them is lawful for us,** on the analogy of their remaining wealth.

If they seize our wealth and, God forbid, are able to secure it within their territory, they come to own such wealth. Al-Shāfi'ī (God bless him) said that they do not come to own it as such seizure is prohibited initially (in our territory) and finally (in their territory after seizure). The prohibited does not become a cause for ownership, as is known through the principle upheld by the opponent (al-Shāfi'ī). We maintain that seizure has taken place with respect to permissible wealth, therefore, it occurs as a cause of ownership to meet the needs of the subject, just like seizure of their wealth by us. This is so, as protection of wealth is established in contravention to the evidence[1] due to the necessity of enabling the owner to utilise the thing. If such a facility is eroded, the wealth reverts to its original state of permissibility, except that seizure of wealth does not take place unless it has been secured within the *dār*. The reason is that seizure is an expression of exercising control over the subject-matter by way of present use (in our territory) and as a final consequence (in their own). A thing prohibited due to an external factor (but not prohibited in itself), if it can be a valid cause for something that is superior to ownership (as in the case of prayer in unlawfully possessed property), which is spiritual reward, then what do you think about ownership in the temporal world.

[1]"It is He Who hath created for you all things that are on earth." Qur'ān 2 : 29

If the Muslims come to seize the wealth and the owners come across it prior to division, then the wealth belongs to them without any compensation, but if they come across it after division, they may take it by paying its value if they so wish. This is based upon the saying of the Prophet (God bless him and grant him peace), "If you find it prior to division, it is yours without any cost, but if you find it after division, then it is yours after paying its value."[2] The reason is that the ownership of the original owner has been extinguished without his consent, therefore, he has a right to repossess it taking his interest into account (as the property is not owned by others as yet), except that repossessing it after division results in an injury to the person from whom it is taken by extinguishing his private ownership, thus, he is to take it by paying its value so that the interests on both sides are balanced. The joint ownership prior to division is public, therefore, the injury is less and it is for this reason that he can take it without paying its value.

If a trader enters the *dār al-ḥarb*, buys this property and brings it over to the *dār al-Islām*, then the original owner has an option: if he likes he can buy it for the price that the trader paid for it, or he may leave it. The reason is that taking it without compensation will result in an injury. Do you not see that he has paid a counter-value in exchange for it, therefore, the balanced view is to be found in what we said. If he has bought it in exchange for goods, he is to pay him the value of the goods. If they made a gift of the property to the Muslim, he is to pay its value, because private ownership is established for him and it cannot be eroded without payment of value. If the property is (now) part of the spoils, and it is fungible, he may take it prior to the division, but he cannot take it after division, because taking it by giving a similar is futile. Likewise if it is gifted property, he cannot take it on the basis of what we have said. Similarly, if he has purchased it with a similar corresponding in quantity and description.

He said: **If a slave is made captive and a man buys him then brings him over to the *dār al-Islām*, but his eye is lost and he takes compensation for that, the master may acquire the slave by paying the price for which he bought him from the enemy.** As for taking him for the price it is due to what we have stated. **He (the master) does not take the compensation (for the eye).** The reason is that the ownership in the slave is valid.

[2]It is recorded by al-Dār'quṭnī and al-Bayhaqī. Al-Zayla'ī, vol. 3, 434.

If he takes him, he takes him by paying a similar, which is futile. No part of the price is reduced, because the attributes are not a counter-value for any part of the price. This is distinguished from pre-emption (*shuf'ah*) as in the bargain, when it is transferred to the pre-emptor, the property is in possession of the buyer through a purchase that is vitiated (*fāsid*). The attributes are subject to liability in this case, as in the case of usurpation. In the case under examination, however, the sale is valid,[3] thus, the distinction is made.

If they take a slave prisoner and a man buys him for one thousand *dirhams*, but they take him prisoner again moving him to the *dār al-ḥarb* where another man buys him for one thousand *dirhams*, then the first master does not have the right to take him from the second buyer by paying the price, because imprisonment did not take place during his ownership. **The first buyer may take him from the second on paying the price,** because imprisonment took place during his ownership. **Thereafter, the first master may take him by paying two thousand *dirhams*, if he likes.** The reason is that he came to own him through two prices, therefore, he is to be taken on payment of both. Likewise, if the person from whose possession he was made captive the second time (the first buyer) is missing, the original owner cannot take him (from the second buyer) on the analogy of the situation when he was present.

The enemy cannot come to own, by defeating us, our *mudabbar* slaves, *ummahāt al-awlād*, *mukātab* slaves, or our free persons, while we come to own all such persons against their claim. The reason is that the cause gives rise to ownership in its subject-matter when the subject-matter is permissible wealth. The free person is completely protected, and so also those besides him, because freedom stands established in their case in some respects. This is distinguished from their slaves as the *shar'* (law) has annulled their protection as a recompense for their offence and turned them into slaves. There is, on the other hand, no offence on the part of our slaves.

If a slave owned by a Muslim runs away entering enemy territory and they capture him, they do not come to own him according to Abū Ḥanīfah (God bless him). The two jurists said that they do come to own him, because protection was linked with the master due to the existence

[3]As the sale was valid in this case, the buyer was not holding property with liability. In *shuf'ah* and other cases of vitiation, he does hold it with the accompanying liability.

of his possession and this has been extinguished, therefore, if they capture him from the *dār al-Islām* they come to own him. The Imām argues that he comes to acquire possession over himself by moving out of our territory, because it was suspended due to the intervening possession of the master over him so as to enable him to benefit from him. As the possession of the master is removed, his own possession over himself emerges and he becomes protected in his own right; he is no longer a subject-matter of ownership. This is distinguished from the case of the runaway (within the *dār al-Islām*), because the possession of the master over him still remains due to the possession of the residents of the *dār*, and this prevents the emergence of his own possession. When ownership is not established for them according to Abū Ḥanīfah (God bless him), the original owner takes him without paying anything, irrespective of his being gifted, bought or taken as part of spoils, before or after division, and the compensation is to be paid from the treasury, as it is not possible to reverse the division due to the different persons entitled to spoils and the difficulty of their coming together. Further, he (the combatant or the trader) cannot claim the reward (*ju'l*) for the capture of the slave for he was acting on his own account under the assumption that he owned him.

If a camel runs away to their side and they catch it, they come to own it, due to the realisation of control over it. The reason is that the camel has no way of exercising possession over itself on going out of our territory as distinguished from the slave on the basis of what we stated.

If a man buys the camel and brings it over to the *dār al-Islām*, the (former) owner has the right, if he likes, to take it for the price paid, as we elaborated.

If a slave runs away and with him are a horse and assets, and all these are captured by the polytheists, but thereafter a man buys all these and brings them over to the *dār al-Islām*, then the owner will take the slave without compensation, while he will take the horse and the assets with compensation. This is the view according to Abū Ḥanīfah (God bless him). The two jurists say that if he likes he will take the slave and what was with him for the price paid. This is based upon the analogy of a group of things upon individual things, and we have elaborated the rules for each individual case.

If an enemy enters our territory on safe-conduct and buys a Muslim slave taking him over to enemy territory, the slave stands emancipated according to Abū Ḥanīfah (God bless him). The two jurists said that he is

not emancipated. The reason is that the surrender of possession resulted through a specified way, which is sale, and the authority to restrain him ended (upon his entry into enemy territory), therefore, he remains in his possession as a slave. Abū Ḥanīfah (God bless him) argues that the release of the Muslim from the degrading control of an unbeliever is obligatory, therefore, a condition is stipulated, which is the difference of territories, and is made to stand in the place of the underlying cause; namely, emancipation to secure his release. It is just like making three menstrual periods in place of separation when one of the spouses from the enemy territory embraces Islam.

If a slave owned by an enemy embraces Islam and then moves over to our territory or if the territory is conquered, then he stands emancipated. Likewise if their slaves come over to the military camp of the Muslims, they stand emancipated. This is based upon the report that some of the slaves of Ṭā'if converted to Islam and came over to the Messenger of Allāh (God bless him and grant him peace), so he gave a decision about their emancipation. He said, "They are emancipated by Allāh."[4] Further, he preserved his own self by coming over to us and relinquishing his master, or by aligning himself with the protective power of the Muslims when they conquer the enemy territory. Considering him to have possession over himself is superior to considering the possession of Muslims over him, because his possession over himself was established first, thus, what is needed in his interest is to strengthen it, while it is in their interest to establish possession over him *ab initio* (but his possession is superior), therefore, his possession is preferred. Allāh knows what is correct.

[4]It is recorded by Aḥmad and Ibn Abī Shaybah in their *Musnads*. Al-Zayla'ī, vol. 3, 436.

Chapter 113

Entering Enemy Territory on *Amān*

If a Muslim enters the *dār al-ḥarb* as a trader, it is not lawful for him to transgress against any of their wealth or their persons. The reason is that by seeking *amān* he undertook not to be aggressive against them. Transgression after this amounts to treachery, and treachery is prohibited, unless the enemy ruler commits treachery against these traders by taking their wealth or imprisoning them, or someone from among the enemy does that with the knowledge of the ruler, who does not prevent them from doing so. In this case, they are the ones who committed breach of the assurance. This is distinguished from the case of the prisoner for he is not on safe-conduct, therefore, transgression is permitted for him, even if they voluntarily let him move around freely.

If he deceives them, that is the trader **and takes something and returns with it, he owns it through a prohibited ownership,** due to seeking control over permitted wealth, except that it has been acquired through deception, and this gives rise to an element of wickedness in it. **He is to be ordered to give it away as charity.** The reason is that prohibition due to an external factor does not prevent the cause (of ownership) from taking effect, as we have explained.

If a Muslim enters the *dār al-ḥarb* on *amān* and an enemy gives him a loan, or he gives the enemy a loan, or one of them usurps the property of the other, and thereafter he comes back and grants the enemy *amān*, the claims of one against the other are not admissible. The reason is that adjudication relies on authority (jurisdiction), and there was no authority at all at the time of the giving of the loan nor at the time of the adjudication against the person on *amān*, because he did not agree to be bound by the *aḥkām* of Muslims in his transactions occurring in the past;

he did so for future transactions. As for usurpation, the property moved into the ownership of the usurper who misappropriated it due to control over unprotected wealth, as we have explained. The same applies if two enemy persons undertake these transactions and then come over to our territory, due to what we have said.

If two enemy persons come over to us after embracing Islam, the issues of their debts are to be adjudicated, but not the case of usurpation. As for the loan transactions they were concluded in a valid manner due to the existence of consent, and jurisdiction is established at the time of adjudication due to their agreeing to abide by the *aḥkām* of Islām. As for usurpation it is controlled by what we elaborated, that is, he came to own it and there is no element of sin in the enemy's wealth so that he may be asked to return it.

If a Muslim enters the *dār al-ḥarb* and usurps an enemy's property after which both come over as Muslims, then he is to be ordered to return the usurped property, but a judgement (decree) is not to be rendered about usurpation. As for the absence of a decree, it is due to what we have elaborated, that is, it is his wealth now. In the case of the order for returning the property, it means by issuing a *fatwā* about it insofar as there is an irregularity pertaining to the wealth for he committed breach of his compact.

If two Muslims go to the *dār al-ḥarb* on *amān* and one of them kills the other, intentionally or by mistake, then the killer has to pay *diyah* (blood-money) from his own wealth, while he is liable for expiation in the case of mistake (manslaughter). As for expiation, it is based upon the absolute meaning in the Qur'ān, while *diyah* is paid as the protection established within the *dār al-Islām* through preservation is not annulled due to the incident of entering the enemy territory on *amān*. Retaliation (*qiṣāṣ*) does not become obligatory, because it is not possible to extract it without controlling power (jurisdiction), and there is no such power without the presence of the *imām* and a community of the Muslims, but they are not found in the *dār al-ḥarb*. *Diyah* is to be paid from his personal wealth as the *'āqilah* does not pay on account of murder, and in the case of mistake too, because they (members of the *'āqilah*) do not have the ability to prevent him due to a difference of the *dārs* when the obligation of payment is placed upon them for neglecting such prevention.

If they are both prisoners and one of them kills the other, or a Muslim trader there kills a Muslim prisoner, **then there is no liability for the**

killer nor is there expiation in the case of mistake, according to Abū Ḥanīfah (God bless him). The two jurists say in the case of prisoners that he is liable for *diyah* in the case of mistake and intentional killing. The reason is that protection is not annulled due to the incident of imprisonment, just as it is not annulled due to the incident of seeking *amān*, as we have elaborated. Retaliation is denied due to the absence of the preventive power of the state (jurisdiction), while *diyah* is imposed on his personal wealth as we stated. Abū Ḥanīfah (God bless him) argues that through imprisonment he comes to fall under their control as a result of being in their overpowering possession. It is for this reason that he becomes a resident (for prayer) through their being resident and one on a journey through their travel, therefore, the original preservation is annulled, and he becomes like a Muslim who has not migrated to our territory. Expiation is specific to mistake, because there is no expiation in the case of intentional homicide in our view. Allāh knows what is correct.

113.1 Granting Entry to the Enemy

He said: **If an enemy enters our territory as a *musta'min* he is not to stay for more than a year, and the *imām* will convey to him the statement, "If you stay for a whole year I will impose *jizyah* on you."** The basis is the rule that an enemy cannot stay permanently in our territory, except through slavery or on payment of *jizyah*. The reason is that he becomes a spy for them and grants support against us, and this will cause an injury to the Muslims. He will be enabled to stay for a short period, because denying this will result in the termination of supplies and acquisitions, and it will close the door of trade. Consequently, we separated these two situations with the duration of a year for that is a period for which *jizyah* is imposed, thus, stay is allowed in the interest of *jizyah*. Thereafter, if he returns to his land after the communication from the *imām* prior to the completion of one year then there is nothing to stop him. If he stays on for a year he becomes a Dhimmī. The reason is that when he stays on after the directive of the *imām* he agrees to bind himself to the payment of *jizyah*, thus, he becomes a Dhimmī. The *imām* has the discretion to fix a period for this that is less than a year like a month or two months.

If he stays for the period (of a year), after the communication from the *imām*, he becomes a Dhimmī, due to what we said **and thereafter he is not permitted to return to the *dār al-ḥarb*.** The reason is that the

contract of *dhimmah* cannot be terminated, for in this is the termination of *jizyah* and making his children declare war on us. In this there is injury for the Muslims.

If an enemy enters our territory on *amān* and buys *kharāj* land, then the imposition of *kharāj* on him turns him into a Dhimmī. The reason is that *kharāj* on land is like *kharāj* on the person, and if he commits to pay it he consents to staying on in our territory. He does not, however, become a Dhimmī by the mere purchase for he may be buying it for purposes of trade. When it becomes binding on him to pay the *kharāj*, he becomes bound to pay the *jizyah* for the next year, as he has become a Dhimmī due to the imposition of *kharāj* and the period is worked out from the time of his presence. His statement in the *Book:* "When *kharāj* is imposed on him he is a Dhimmī," is a clear statement about the condition of imposition, therefore, many of the rules are to be extended from it, so do not be oblivious of this.

If a woman enters on *amān* and marries a Dhimmī, she becomes a Dhimmiyyah, because she has accepted the obligation of staying in subordination to her husband. **If a male enemy enters on *amān* and marries a Dhimmī woman, he does not become a Dhimmī.** The reason is that it is possible for him to divorce her and return to his land, therefore, he has not accepted the obligation of staying on.

The wealth of the residents of the enemy territory that is gathered by the Muslims without fighting will be spent upon the interests of the Muslims like the avenues of *kharāj*. The jurists said that it is like land from which the residents have been expelled and is like *jizyah*, thus, there is no fifth in it. Al-Shāfi'ī (God bless him) said that it is subject to a fifth on the analogy of spoils. We rely on the report that "the Prophet (God bless him and grant him peace) took *jizyah*, and so also 'Umar and Mu'ādh (God be pleased with them) and they deposited this in the treasury without taking a fifth from it."[1] The reason is that it is wealth that has been acquired due to the strength of the Muslims without engaging in battle. This is different from spoils for these are owned by the direct action of the combatants entitled to them and also through the strength of the Muslims, therefore, a fifth is due from the spoils. The fifth is due on the basis of one reason, while the combatants are entitled to spoils for another reason. In

[1]It is recorded by Abū Dāwūd in *Kitāb al-Kharāj*. Al-Zayla'ī, vol. 3, 437.

this there is another basis that we have already mentioned. Consequently, there is no meaning in charging a fifth from them.

If an enemy embraces Islam in the *dār al-ḥarb* and is killed intentionally by a Muslim, or by mistake, and he has Muslim heirs over there, then the killer is not liable in any way, except for expiation on account of manslaughter. Al-Shāfi'ī (God bless him) said that he is liable for *diyah* in the case of manslaughter and for retaliation (*qiṣāṣ*) in the case of murder, because he spilled protected blood. **This is due to the protective factor and that is Islam,** for it brings dignity with it. This (obligation for blood money and retaliation) is due to the fact that protection as a matter of principle gives rise to sin (for its violation) by the attainment of an essential deterrent through it (against violation), and it is established by consensus. It also contains an element of financial value in it for the perfection of defence through it. It (the financial aspect), therefore, is an additional attribute (besides the element of sin for violation), thus, it is linked to what is linked to the fundamental principle. We rely on the words of the Exalted, "If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave (is enough). If he belonged to a people with whom ye have treaty of mutual alliance, compensation should be paid to his family, and a believing slave be freed."[2] The Almighty deemed the entire liability to be emancipation, (and this is understood) by recourse to the character *fā* (of consequence) or that it is the only thing mentioned and that negates any other liability. The reason is that sin-creating protection is related to humanity, because a human being has been created to bear the burden of *taklīf* (obligation) and to maintain its requirements by non-aggression. Wealth is subservient to it (to humanity). As for the financial value, the basis for that is wealth (not humanity), because valuation is permitted where a restoration of loss is required, and this takes place in wealth not in the person (life). The basis is that the condition of similarity is a condition for restoration, and this is possible in wealth not in the person. Consequently, the person is subservient. Thereafter, the protection subject to valuation in the case of wealth is based upon preservation within the *dār*, because its integrity is ensured through the authority (of the Muslims) to protect it. The same applies to persons, except that the *shar'* (law) has annulled the consideration of protection (authority) of the unbelievers

[2]Qur'ān 4 : 92

insofar as it has granted the authority to annul it. The apostate and the *musta'min* in our territory are legally presumed to be in their territory due to their intention to migrate to their *dār*.

If a person kills a Muslim, who has no heirs, by mistake or he kills an enemy who was visiting us on *amān* and had embraced Islām, then the *diyah* (blood money) is to be paid by the *'āqilah* (supporting clan) to the *imām*, and he (the killer) is also liable to expiation. The reason is that he has killed a protected person by mistake and it must be judged on the analogy of all other protected persons. The meaning of his words "to the *imām*," is that he has the right to take it when there are no heirs. **If he kills him intentionally, then the *imām* has the right to execute him (by way of retaliation) or to take *diyah*.** The reason is that the person was protected, the homicide was intentional, and the the *walī* is known, and these are the public or the sulṭān. The Prophet (God bless him and grant him peace) said, "The sulṭān is the *walī* (heir) of the person who does not have a *walī*."[3] The meaning of his statement, "or to take *diyah*," is that he does so by way of settlement (*ṣulḥ*), because intention gives rise to retaliation that is specified. The reason is that payment of blood-money is more beneficial in this case than retaliation, therefore, he has the authority to settle for money. **He does not have the right to pardon,** because the right belongs to the public and his authority is that of a fiduciary, and a fiduciary cannot extinguish their rights without compensation. Allāh knows what is correct.

[3]This has preceded in the early sections on marriage. Al-Zayla'ī, vol. 3, 437. It is recorded by Abū Dāwūd, al-Tirmidhī and Ibn Mājah as well as others from 'Ā'ishah (God be pleased with her). Al-Zayla'ī, vol. 3, 195.

Chapter 114

'Ushr and *Kharāj*

He said: **All Arab lands are *'ushr* lands, and they extend from 'Udhayb towards the highest rock formations at Mahrah in Yemen up to the boundary of Syria. The Sawād is *kharāj* land and it is between 'Udhayb up to 'Aqabat Ḥalwān and from al-Tha'labiyyah, it is said from 'Alath, up to 'Abbādān.** The reason is that the Prophet (God bless him and grant him peace) and the Khulafā' Rāshidūn (God be pleased with them) did not take *kharāj* from the lands of the Arabs,[1] and that is because this land is like booty, therefore, such a charge is not established against their lands just as it is not established for their persons (*jizyah*). The basis is that a condition for the people of *kharāj* is that they abide by their unbelief, as was the case in the Sawād lands. Nothing besides Islam, or the sword (death), is acceptable from the Arab polytheists. 'Umar (God be pleased with him), when he conquered the Sawād, imposed *kharāj* upon it in the presence of the Companions (God be pleased with them),[2] and he imposed it upon Egypt when it was conquered by 'Amr ibn al-'Āṣ. Likewise, the Companions (God be pleased with them) arrived at a consensus for imposing *kharāj* on Syria.

He said: **The land of the Sawād is owned by its residents and their sale of the land is valid and so are their transactions with respect to it.** The reason is that when the *imām* conquers land through the mobilisation of the armies and by force, he has a right to keep the residents settled on the land and to impose a per head *kharāj* on them. Consequently, the lands stay in the ownership of the residents, and we have presented this earlier.

[1]It is recorded by Abū 'Ubayd ibn al-Sallām in *Kitāb al-Amwāl*. Al-Zayla'ī, vol. 3, 438.
[2]The same tradition mentioned in the previous note. Al-Zayla'ī, vol. 3, 438.

He said: **All land that has been surrendered by its residents, or has been conquered by the mobilisation of the armies, and is distributed among those entitled to the spoils is *'ushr* land.** The reason is that there is a primary need to distribute it among Muslims, and imposition of *'ushr* is suitable for it insofar as it carries within it the meaning of worship. Further, it is lighter as it pertains to the produce itself.

All land that is conquered by the mobilisation of the armies and the residents allowed to remain settled on them, is *kharāj* land. Likewise if the land is annexed through negotiation, because the need primarily is to distribute it among the unbelievers, and *kharāj* is suitable for this. Makkah is excluded from this, because the Messenger of Allāh (God bless him and grant him peace) conquered it through the mobilisation of the armies, but left it for its residents without imposing *kharāj* on them.[3]

It is stated in *al-Jāmi' al-Ṣaghīr* that all land conquered by the mobilisation of forces, when the water of canals passes through it, is *kharāj* land. The land that does not get water from the canals and relies on springs, is *'ushr* land. The reason is that *'ushr* pertains to the produce of land and its produce is through its waters, therefore, what is taken into account is irrigation whether through the water of *'ushr* or the water of *kharāj*.

He said: **If a person revives barren land, then according to Abū Yūsuf (God bless him) it is to be assessed according to its proximity. If it is within the bounds of *kharāj* land,** that is, near it, **it is *kharāj* land, but if it is within the bounds of *'ushr* land, it is *'ushr* land.** Basrah, in his view, is *'ushr* land on the basis of the consensus of the Companions (God be pleased with them).[4] The reason is that the boundaries of a thing give it its governing rule, like the courtyard of a house is given the rule of the house so that the owner is permitted to use it. Similarly, it is not permitted to take land that is within a settlement. Analogy dictated that Basrah be *kharāj* land, because it is within the sphere of *kharāj* land, except that the Companions (God be pleased with them) imposed *'ushr* on it, therefore, analogy is given up due to their consensus (*ijmā'*).

Muḥammad (God bless him) said that if he revives the land with a well that he dug, or with a spring that he unearthed, or the water of the

[3]There are various traditions about this with one being recorded by Muslim. Al-Zayla'ī, vol. 3, 439.

[4]It was mentioned by Ibn 'Umar (God be pleased with both) as well as others. Al-Zayla'ī, vol. 3, 440.

Tigris or the Euphrates, or a large stream that no one owns, then it is *'ushr* land. Likewise if he revives it with rainwater. **If he revives it with the canals that were dug by non-Arabs,** like the Nahr al-Malik and Nahr al-Yazdjard, **then it is *kharāj* land,** due to what we said, by taking the water into consideration as that is the cause of development. The reason is that it is not possible to impose *kharāj* on a Muslim *ab initio* against his will, therefore, the water is taken into account, because irrigation with *kharāj* water is a binding evidence.

He said: **The *kharāj* imposed by 'Umar (God be pleased with him) on the people of Sawād was one Hashmī cafiz for each *jarīb* irrigated by water, and this was one *ṣā'* and a *dirham*. On a *jarīb* of *raṭbah* (clover, rich pasture land) it was five *dirhams*, while on a *jarīb* of continuously planted vines (vineyard) or continuously planted date-palms it was ten *dirhams*.** This is what is transmitted from 'Umar (God be pleased with him). He sent 'Uthmān ibn Ḥunayf to undertake a cadastral survey of the Sawād of Iraq, while he made Ḥudhayfah supervise his work. He surveyed the land and it came to 36,000,000 *jarībs* on which he imposed the *kharāj* that we have mentioned. This took place in the presence of the Companions (God be pleased with them) and there was no one who opposed this, thus, it resulted in a consensus on their part.[5] The burden of producing varies. Thus, the burden to be borne for (expense and labour) vineyards is the least, for crops it is the maximum, while the burden for the *raṭbah* is in between these two. The imposition of the levy varies according to the burden. Accordingly, the obligation in case of vineyards is the maximum, for crop cultivation it is the least, while for *raṭbah* is the average of the two.

He said: **In the categories besides these, like saffron and garden produce and others, the imposition is varied according to the ability to produce,** because there is no imposition narrated for them from 'Umar (God be pleased with him), and he too (presumably) took into account the ability to produce, therefore, we take the ability to produce into account in anything in which there is no imposition (from him). The jurists said: The maximum for the ability to produce is that the obligation for payment reach one-half of the produce, and it is not to exceed this. The reason is that imposition of one-half is based upon true fairness, for we

[5]All this is found in the tradition above that was recorded by Abū 'Ubayd ibn al-Sallām. Al-Zayla'ī, vol. 3, 440–41.

had the right to divide up the land among those entitled to the spoils. *Bustān* is each land that has a boundary wall around it and it includes various kinds of date-palms as well as other trees. In our lands the imposition on all land is on the basis of *dirhams* and the reduction as well, because estimation must be on the basis of the ability to produce in whatever terms it is worked out.

He said: **If they are unable to pay what is imposed on them, the *imām* is to reduce the imposition.** Decreasing the imposition due to less production is valid on the basis of consensus (*ijmā'*). Do you not examine the statement of 'Umar (God be pleased with him), "Perhaps, you two have placed a greater burden on the land than it can bear." They replied, "No. In fact, we imposed what it can bear, and had we increased it, the land would bear that too."[6] This indicates the permissibility of decreasing the burden. As for increasing the levy with an increase in production, it is permitted according to Muḥammad (God be pleased with him) on the analogy of decrease in case of loss of production. According to Abū Yūsuf (God bless him), it is not permitted, because 'Umar (God bless him) did not increase it when he was told about the greater paying ability.[7]

If the *kharāj* land is covered with water (flood or water-logging), or its supply of water is cut off, or the crop is struck by some calamity, then there is no *kharāj* on it. The reason is that the possibility of harvesting is lost, which is the estimated production that is taken into account for the imposition of *kharāj*. In the case where the crop has been affected by a calamity, the estimated production is lost for part of the year, whereas the land being productive throughout the year is a condition as in the case of wealth subject to *zakāt* (therefore it is not imposed) or the rule depends upon the actual production when it is actually produced.

He said: **If the owner suspends production, he is liable for *kharāj*.** The reason is that the ability is there and it is he who has caused its loss. The jurists said: If a person moves to cheaper of two products without an excuse has to pay the *kharāj* for the more expensive product, because it is he who has caused the waste of the excess. This is known, but a ruling will not be issued on this basis so that the unjust do not acquire the justification to extort the wealth of people.

[6]It is recorded by al-Bukhārī in his *Ṣaḥīḥ*. Al-Zayla'ī, vol. 3, 441.

[7]This too is found in the tradition recorded by Abū 'Ubayd. Al-Zayla'ī, vol. 3, 441.

If a person from among those who are liable for *kharāj* converts to Islam, *kharāj* will be charged from him in the same way. The reason is that it carries within it a burden (on the land), which will be considered a burden while it exists, and its imposition on a Muslim is possible.

It is permitted to a Muslim to buy *kharāj* land from a Dhimmī and the *kharāj* will be charged from him, due to what we have said. There is a sound report that the Companions (God be pleased with them) purchased *kharāj* land and used to pay its *kharāj*.[8] This indicates the permissibility of sale and the charging of *kharāj* with its payment being made by a Muslim without any disapproval.

There is no *'ushr* on the produce of *kharāj* land. Al-Shāfi'ī (God bless him) said that the two are to be combined, because these are two separate claims that have been imposed on two separate subject-matters for two different causes, therefore, they do not negate each other. We rely on the words of the Prophet (God bless him and grant him peace), "*'Ushr* and *kharāj* are not to be combined for the land owned by a Muslim."[9]

Further, none of the just or unjust *imāms* ever combined the two charges, and their consensus amounts to a binding proof. In addition, *kharāj* is imposed on land that has been conquered through the mobilisation of the armies and the use of force, while *'ushr* is imposed on land whose residents submitted voluntarily. The two attributes cannot be combined in the same land. The cause of the two claims is one and that is productive land, except that it is assessed in the case of *'ushr* through verification (of the actual produce), while in the case of *kharāj* on the basis of (annual) estimation. It is for this reason that both are linked with the land. The same disagreement governs the charging of *zakāt* with one of these charges.[10]

***Kharāj* does not recur due to the recurrence of produce during a year.** The reason is that 'Umar (God be pleased with him) did not impose it as a recurring charge as distinguished from *'ushr*. The reason is that *'ushr* cannot be determined except by its obligation on each (seasonal) produce. Allāh knows what is correct.

[8] It is recorded by al-Bayhaqī. Al-Zayla'ī, vol. 3, 441.

[9] It is recorded by Ibn 'Adī in *al-Kāmil*. Al-Zayla'ī, vol. 3, 442.

[10] Like a person buying *'ushr* land for purposes of trade.

Chapter 115

Jizyah (Poll Tax)

***Jizyah* is of two kinds: First is *jizyah* that is imposed by consent and negotiation and it is determined according to the agreement that takes place,** just like the Messenger of Allāh (God bless him and grant him peace) made a treaty with the people of Najrān for the payment of twelve hundred *ḥullah* (dresses).[1] As the reason is consent, therefore, it is not permitted to transfer it to something other than what is agreed upon. **The second type is *jizyah* that the *imām* initiates and he imposes it when he defeats the enemy and keeps the residents settled on their property. He imposes on one who is apparently rich forty-eight *dirhams* per year by taking four *dirhams* from him every month. On a person of average means a sum of twenty-four *dirhams* is imposed taking two *dirhams* every month. On a poor person who is capable of working a sum of twelve *dirhams* is imposed taking one *dirham* every month.** This is so in our view. Al-Shāfiʿī (God bless him) said that on each major person one *dīnār* or what is equivalent is imposed, and the rich and poor are the same for this purpose. This is based upon the words of the Prophet (God bless him and grant him peace) to Muʿādh (God be pleased with him), "Take from each male and female who has attained puberty a *dīnār* or its equivalent in *maʿāfir* (cloth in Yemen)."[2] This tradition does not provide any detail (for making a distinction). The reason is that *jizyah* is imposed in place of death so that it is not imposed on one whose slaying is not permitted due to unbelief, like minor children and women. This meaning includes both rich and poor (males). Our view is transmitted from ʿUmar, ʿUthmān and ʿAlī (God be pleased with them). No one

[1]It is recorded by Abū Dāwūd in *Kitāb al-Kharāj*. Al-Zaylaʿī, vol. 3, 445.

[2]It is recorded by Abū Dāwūd, al-Tirmidhī and al-Nasāʾī. Al-Zaylaʿī, vol. 3, 445.

among the Muhājirūn or the Anṣār opposed them in this. Further, it is imposed to support the fighters, therefore, it is to be imposed according to a graded scale in the same manner as *kharāj* on land. This is so as as it is made obligatory in place of help in terms of life and wealth, and such help (from the warriors) varies too with respect to what is contributed, being more or less, likewise what is its substitute (contribution through *jizyah*). What he (al-Shāfi'ī) has related is interpreted so as to apply to imposition after negotiation. It is for this reason that he ordered him to take it from a major female as well even though *jizyah* is not taken from her.

He said: ***Jizyah* is imposed on the People of the Book and the Magians,** due to the words of the Exalted, "from among the People of the Book, until they pay the Jizya with willing submission, and feel themselves subdued."[3] The Prophet (God bless him and grant him peace) imposed *jizyah* on the Magians.[4]

He said: **And on the non-Arab idol worshippers.** Al-Shāfi'ī (God bless him) disagrees with this. He says that fighting them is obligatory due to the words of the Exalted, "And fight them on until there is no more persecution or oppression, and the religion becomes Allah's. But if they cease, let there be no hostility except to those who practice oppression."[5] We have identified (he says) the permissibility of relinquishing fighting in the case of the People of the Book through the Qur'ān, and in the case of the Magians through the tradition, and those who remain besides them are governed by the original rule. We argue that as enslaving them is permitted, therefore, imposition of *jizyah* is also permitted, because each one of these includes the meaning of taking away their personality (person) from them. Thus, such a person earns and pays the Muslims, while his own support is through his personal earning.

If he conquers their territory prior to this (imposition), then their men and women are booty, due to the permissibility of their enslavement.

***Jizyah* is not to be imposed on Arab idol worshippers nor on the apostates,** because their unbelief is of an extreme nature. As for the Arab polytheists, the reason is that the Prophet (God bless him and grant him peace) grew up among them and the Qur'ān was sent in their language,

[3]Qur'ān 9 : 29

[4]There are several traditions on this and among them is one recorded by al-Bukhārī in his *Ṣaḥīḥ*. Al-Zayla'ī, vol. 3, 448.

[5]Qur'ān 2 : 193

therefore, the miracle is clearly manifest in their case. The apostate, on the other hand, has denied his Lord, after he was guided to Islām and came to know of its merits.

There is no *jizyah* on women or minors, because it is imposed as a substitute for execution or a substitute for combat, and they are neither slain nor do they participate in combat due to the lack of legal capacity.

He said: **And there is no *jizyah* on the invalid nor on the blind.** Likewise the paralysed person and the enfeebled old man, on the basis of what we have elaborated. According to Abū Yūsuf (God bless him) it is imposed if he has wealth, for he then fights in its broad meaning if he is consulted. **There is also no *jizyah* on the poor man who is not able to work.** Al-Shāfi'ī (God bless him) disagrees with this. He relies on the unqualified meaning of the tradition of Mu'ādh (God be pleased with him).[6] We rely on the report that 'Uthmān (God be pleased with him) did not impose it on the poor man who was unable to work,[7] and this took place in the presence of the Companions (God be pleased with them). The reason is that *kharāj* is not imposed on land that is unable to produce. Likewise this *kharāj*. The tradition gives the probable meaning of one who can work.

It is not imposed on the owned slave, the *mukātab* slave, the *mudabbar* slave or on the *umm al-walad*, because it is imposed as a substitute for slaying with respect to them and is a means of support for us, and on the second consideration it is not to be imposed (for they have no wealth), therefore, it is not imposed due to the doubt inherent in it. **Their owners are not pay on their behalf,** because they will be bearing additional *jizyah* on their account.

It is not to be imposed on monks who do not mingle with the people. This is how it is mentioned here, while Muḥammad (God bless him), narrating from Abū Ḥanīfah (God bless him), has stated that it is to be imposed on them if they are able to work, and this is also the opinion of Abū Yūsuf (God bless him). The underlying reasoning for imposing it on them is that the ability to work has been wasted by the monk and he has become like *kharāj* land whose cultivation has been suspended. The reasoning for not imposing it on them is that they are not to be slain when they do not mix up with the people, while *jizyah* with respect to them is a

[6]See preceding notes.

[7]By this he means 'Uthmān ibn Ḥunayf (God be pleased with him). It is recorded by Ibn Zanjawiyyah in *kitāb al-Amwāl*. Al-Zayla'ī, vol. 3, 453.

substitute for killing. It is essential for a person who is considered capable of work that he be in sound health, and it is sufficient that he enjoy sound health for a major part of the year.

If a person embraces Islam when he owes *jizyah*, the claim against him is extinguished. Likewise if he dies in a state of unbelief, with al-Shāfiʿī (God bless him) disagreeing with this. He maintains that it is imposed as a substitute for (the guarantee of) protection or for residence. As this benefit has reached him, the compensation should not be extinguished due to this obstacle, as in the case of wages and the (amount due on account of) negotiated settlement for intentional homicide. We rely on the words of the Prophet (God bless him and grant him peace), "There is no liability of *jizyah* on a Muslim."[8] The reason is that it is imposed as a penalty for unbelief, and it is for this reason that it has been called *jizyah* for compensation (reward) and *jizyah* have the same meaning. The penalty for unbelief is extinguished due to Islam. Further, it is not awarded after death, because the laying down of a punishment in this world is only for the repelling of the mischief, and this mischief stands repelled due to death and by the acceptance of Islam. In addition to this, it has been made obligatory as a substitute for support with respect to us, and such help he provides through his own person after acceptance of Islam. Protection, on the other hand, is established for he is a human being, and the Dhimmī resides on his own property, therefore, imposing it as a substitute for protection or residence has no meaning.

If the claim of two years comes to be combined, the two are merged into one. In *al-Jāmiʿ al-Ṣaghīr* it is stated that a person from whom the per head *kharāj* is not taken up to the passage of one year, and the next year arrives, it is not to be taken. This is the view according to Abū Ḥanīfah (God bless him). Abū Yūsuf (God bless him) said that it is to be taken, which is also the opinion of al-Shāfiʿī (God bless him).

If he dies upon the completion of the year, it is not to be taken from him according to their unanimous view. Likewise if he dies during the year. As for the issue of death, we have already mentioned it. It is said that the *kharāj* on land is also governed by this disagreement. It is also said that two claims cannot be merged into one (in the case of land). The two jurists arguing about the disputed issue say that *Kharāj* is imposed as a counter-value and counter-values when they come together, when

[8]It is recorded by Abū Dāwūd. Al-Zaylaʿī, vol. 3, 453.

they can be recovered, are recovered. In the case that we are discussing it is possible to make recovery after the coming together of (the claims for) two years as distinguished from his conversion to Islam for then the recovery is not possible.

Abū Ḥanīfah (God bless him) argues that it has been imposed as a penalty for insisting on remaining an unbeliever, as we have explained. It is for this reason that it is not accepted from him if he sends it through his deputy, according to the most authentic narration, rather he is obliged to come in person and pay it while standing when the one taking from him is seated. Further, they are imposed as a substitute for execution from their perspective and as financial support from our perspective, as we have mentioned, but for purposes of the future and not for the past. The reason is that killing is due for battles taking place now and not for those that took place in the past. Likewise support is for the future, because the past is no longer in need of it. Thereafter, the statement of Muḥammad (God bless him) in *al-Jāmi' al-Ṣaghīr*, "and the next year arrives," is construed by some jurists (Mashā'ikh, God bless them) to mean the past in the figurative sense. They said that the obligation is to be met by the end of the year, therefore, it is necessary for it to be in the past so that the coming together of the two claims is realised and they can be merged. According to some, it is to be applied to the actual meaning. The obligation according to Abū Ḥanīfah (God bless him) arises at the beginning of the year, therefore, the coming together is realised by the mere passing of the year. The correct position is that the obligation, in our view, arises at the beginning of the year, while according to al-Shāfi'ī (God bless him) it arises towards the end of the year on the analogy of *zakāt*. We maintain that what it is made a substitute for is not realised except in the future, as we have determined, therefore, it becomes difficult to impose it after the passage of the year and we have imposed it from its beginning. Allāh knows what is correct.

115.1 Rights and Duties of the Dhimmīs

It is not permitted to construct new synagogues and churches within the *dār al-Islām*, due to the words of the Prophet (God bless him and grant

him peace), "There is no castration in Islam nor a church." The meaning here is construction afresh.[9]

If the old synagogues and churches are demolished they may reconstruct them. The reason is that buildings do not last forever. As the *imām* has let them settle in the land, he has given them an assurance to rebuild them, except that they are not allowed to move them (to another location) as that amounts to new construction in reality. The monks cell meant for seclusion is like the synagogue as distinguished from the place of prayer within a house as that is subservient to residence. This is the case in cities and not in villages, because it is the cities in which the symbols of rites are established and are not to be confronted through the expression of what goes against them. It is said in our lands that they are to be prevented from constructing them in villages too for there too are some symbols of rites. This view is related from the founder of the school (Abū Ḥanīfah) about the villages of Kufah, for the majority of the residents were Dhimmīs. In the Arab lands, it is said, that this is forbidden in the cities as well as the villages, due to the words of the Prophet (God bless him and grant him peace), "Two *dīns* cannot come together in the Arabian peninsula."[10]

If a Dhimmī refuses to pay the *jizyah*, kills a Muslim, uses foul language for the Prophet (God bless him and grant him peace), or has unlawful intercourse with a Muslim woman, his compact is not to be terminated. The reason is that the end result of fighting is the imposition of *jizyah* not its actual payment, and the obligation persists. Al-Shāfi'ī (God bless him) said that using foul language for the Prophet (God bless him and grant him peace) amounts to a breach of his compact, for the reason that had he been a Muslim his faith would be annulled, likewise his assurance of safe-conduct is annulled for the compact of Dhimmah is a substitute for belief. We argue that using bad language for the Prophet (God bless him and grant him peace) is an expression of unbelief on his part and the unbelief associated with him does not prevent his compact, and the recurring unbelief does not remove the assurance.

His compact is not terminated unless he moves over to the *dār al-ḥarb* or the enemy subdue a territory and they wage war against us. The reason is that in this case they have become our warring enemies and the

[9]It is recorded by al-Bayhaqī in his *Sunan*. Al-Zayla'ī, vol. 3, 453.

[10]It is recorded by Isḥāq ibn Rahwayh in his *Musnad*. Al-Zayla'ī, vol. 3, 453.

compact of *dhimmah* has become devoid of utility, which is repelling the mischief of the enemy. Allāh knows what is correct.

115.2 Christians of Banū Taghlib

The Christians of Banū Taghlib are required to pay on their wealth twice the amount of *zakāt* that the Muslims are required to pay, because 'Umar (God be pleased with him) made a settlement with them for this in the presence of the Companions (God be pleased with them).[11] **This amount is required to be paid by their women, but not their minor children.** The reason is that the settlement was made for double of the *zakāt* and such a payment is obligatory for women, but not minors, so also in the case of double payment. Zufar (God bless him) said that it is not to be taken from their women either, which is also the opinion of al-Shāfi'ī (God bless him). The reason is that in reality it is *jizyah* as was stated by 'Umar (God be pleased with him), "This is *jizyah*, so divide it up as you like."[12] It is for this reason that it is spent on the avenues specific to *jizyah*, and there is no *jizyah* for women. Our argument is that it is wealth that has become due through a settlement and a woman is eligible for the imposition of such a liability on her. The avenues are the interests of Muslims, because it is wealth that belongs to the treasury and this wealth is not linked with *jizyah*. Do you not see that the conditions of *jizyah* are not observed for it.

The (Muslim) client (*mawlā*) of a Taghlibī (freedman) is required to pay the *kharāj*, that is, *jizyah*, **while the *kharāj* on land has the status of the *mawlā* of a Qurashī (where it is not taken).** Zufar (God bless him) said that it is to be doubled, due to the words of the Prophet (God bless him and grant him peace), "The *mawlā* of a people is one of them."[13] Do you not see that the *mawlā* of a Hashimī is linked to him for purposes of the prohibition of *zakāt*. Our argument is that this (taking double) is a kind of leniency (as compared to *jizyah* for there is no accompanying humiliation), and the *mawlā* is not essentially linked to such leniency. Accordingly, *jizyah* is imposed on the client of a Muslim when he is a

[11]This has preceded towards the end of the section on *zakāt* on horses. It is recorded by al-Bayhaqī in a lengthy tradition. Al-Zayla'ī, vol. 2, 362.

[12]It is in the tradition above.

[13]This has preceded in the chapter on who is entitled to *zakāt* and who is not. Al-Zayla'ī, vol. 3, 455.

Christian as distinguished from the prohibition of *ṣadaqah*, because prohibitions are established by doubt, therefore, the client is associated with the Hāshimī with respect to it (that is, for prohibition of *ṣadaqah*). (If the question is raised: what about the client of the rich man? we say:) This is not binding in the case of the client of a rich freedman insofar as *zakāt* is not prohibited for the rich, for the rich man is entitled to take from *zakāt* (especially if he is one of the collectors). Affluence prevents it, but it is not found in the case of the client. As for the Hāshimī, he is not entitled to this support at all for he is protected due to his nobility and honour from the filth of the people, therefore, his client stands linked to him.

He said: **What the *imām* collects from *kharāj*, from the wealth of the Banū Taghlib, from what is paid as a tribute to the *imām* by the enemy, and from *jizyah* is to spent for the welfare of the Muslims like fortifications for defence, arched bridges, and embankments. He also gives from this to the Muslim judges, officials and jurists what is sufficient for their subsistence. In addition to this, he pays from this for the rations of the fighters and their families.** The reason is that it is the wealth of the treasury, and it has reached the Muslims without fighting, therefore, it is meant for the welfare of the Muslims, and these persons are their officials. The allowances of the children are the liability of their fathers. If he does not pay what is sufficient for them, they would be in need of earning and would not be free for engaging in battles.

If a person dies during the middle of a year, he has no share from the grant, because it is a type of support and is not a debt. It is for this reason that it has been called *'aṭā'* (grant). Thus, it cannot be owned prior to its being taken into possession; and it is extinguished upon death. Those entitled to the grant (*'aṭā'*) in our times are like the *qāḍī*, the teacher and the *muftī*. Allāh knows best.

Chapter 116

Rebels (*Bughāt*)

When a group of Muslims take control of a land and move out of obedience to the *imām*, he is to invite them to return to the main community and is to remove the doubts that they have. The reason is that 'Alī (God be pleased with him) did in the case of the people of Ḥarūrā' before engaging them in battle.[1] The reason is that this is the easier of the two choices and, perhaps, the mischief will be repelled through this, therefore, he begins with it.

He is not to commence hostilities until they start them. If they commence hostilities, he is to engage them till the dispersal of their group. This feeble servant (Author) says: This is how al-Qudūrī (God bless him) has stated it in his *Mukhtaṣar*. The Imām known as Khuwāhar'zadah (God bless him) has mentioned that in our view it is permissible to engage them in battle if they arm themselves and gather for hostilities. Al-Shāfi'ī (God bless him) said that it is not permitted to engage them in battle till they actually commence hostilities, because it is not permitted to kill a Muslim, except in defence, and these people are Muslims. This is distinguished from the case of unbelievers for their unbelief itself is a permitting factor, in his view. We rely on the argument that the rule revolves around the evidence, which is their gathering together and assuming military strength. The reason is that if the *imām* waits for long for their actual attack, it is possible that he may not be able to defend, therefore, he relies on the evidence due to the necessity of repelling their mischief. If the report reaches him that they have taken up arms and are poised for battle, it is necessary for him to capture them and to imprison them till they give up their resistance and to offer repentance. This is for repelling their

[1]It is recorded by al-Nasā'ī in *al-Sunan al-Kubrā*. Al-Zayla'ī, vol. 3, 461.

mischief as far as possible. The narration from Abū Ḥanīfah (God bless him) about staying in the houses (during such resistance) is construed to mean the situation when there is no *imām*. When there exists a lawful ruler it is obligatory to assist him if one has the means and the ability to do so.

If they have a group supporting them, then their wounded are to be slain and those retreating are to be pursued, in order to repel their mischief and so that they do not join up with their group.

If they do not have a group supporting them, their wounded are not to be slain nor are those retreating to be pursued, because the mischief has been repelled without this. Al-Shāfi'ī (God bless him) said that this is not permitted in both cases, because when they give up fighting their slaying is no longer in defence. The response to him is what we mentioned that what is taken into account is the evidence (of their ability to attack) and not its having taken place in reality.

Their families will not be enslaved nor will their wealth be (taken as spoils and) divided up. This is based on the saying of 'Alī (God be pleased with him) during the Battle of Jamal: "No prisoner will be slain, the privacy of families will not be violated and wealth will not be taken."[2] This is treated as a model in such cases. He is statement in about prisoners is construed to mean "when they do not have a supporting group." If there is such a supporting group, the *imām* is to execute the prisoner, but if he likes he can imprison him, due to what we have said, for these people are Muslims and Islam grants protection to life and wealth.

There is no harm if the Muslims use their weapons in combat, if they are in need of doing so. Al-Shāfi'ī (God bless him) said that it is not permitted. The same disagreement applies to using their riding animals. He maintains that it is wealth of a Muslim, therefore, utilising it without his consent is not permitted. We reply on the report that 'Alī (God be pleased with him) divided the weapons among his companions at Basrah, and it was a division due to need not for ownership. Further, the *imām* has a right to do so in the case of wealth owned by those supporting him, therefore, doing so in the wealth of rebels has higher approval. The underlying meaning is the bearing of a smaller injury to ward off a more grievous injury.

[2]It is recorded by Ibn Abī Shaybah. Al-Zayla'ī, vol. 3, 463.

The *imām* is to take their wealth into custody, and is not to return it until they repent. If they do repent he is to return it to them. As for not dividing it up, we have already elaborated it. In the case of custody, it is done to ward off their mischief by weakening their power, therefore, he takes it into custody away from them even if he is not in need of it. He is, however, to sell the riding animals as preserving the price is more rational and easier. As for returning the wealth after their repentance, the reason is that the necessity is over and their is no demand to convert them into spoils.

What the rebels have collected by way of *kharāj* and *'ushr*, from the lands that that they came to control, is not to be collected a second time by the *imām*. The reason is that the authority of the *imām* to collect is based upon the protection he accords to the residents, and he was not able to protect them.

If they spent the collected amount on lawful avenues, the person from whom it was collected stands rewarded, because the right of the beneficiary has reached him, **but if they did not spend it on the rightful avenue, then the matter for the residents is between them and Allāh with respect to its repayment,** because what is due has not reached the rightful beneficiaries. This humble servant (Author) says: They (the Mashā'ikh) said that there is no repayment for them in the case of *kharāj*, because those who took them were warriors, even if they were rich. In the case of *'ushr* (there is no repetition) if they were poor, because it is the right of the poor. We have elaborated this in the topic of *Zakāt*. In the future, the *imām* will take the dues as he is protecting them due to his regaining control and authority.

If a person kills another, and both were from the military force of the rebels, after which their area is conquered, then they (the killer) is not liable for anything. The reason is that the lawful *imām* had no authority over them at the time of the homicide, therefore, it did not give rise to liability, as in the case of homicide in the *dār al-ḥarb*.

If they take control of a city and a resident of the city intentionally kills another resident of the city, and thereafter the city is conquered, *qiṣāṣ* is to be extracted from the killer. The interpretation is that when they did not implement their own laws on the residents and were dislodged before they could do that. In such a case, the authority of the *imām* is not severed, therefore, retaliation is obligatory.

If a person from among the Ahl al-'Adl (those in lawful authority) kills a rebel, he will inherit from him. If the rebel kills him and says, "I believed I was on the lawful side, but I am now on the lawful side," he inherits from him. If he says, "I killed him knowing that I was on the unlawful side," he will not inherit from him. This is the position according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf (God bless him) said that the rebel will not inherit in either case. This is also al-Shāfi'ī's opinion. The basis is that the *'ādil*, if he kills a rebel or destroys his wealth, he does not compensate nor has he committed a sin, because he is commanded to fight them to repel their mischief. If the rebel kills an *'ādil*, he is not liable in our view, but he does commit a sin. Al-Shāfi'ī in an earlier opinion said that he is liable for compensation. On the same disagreement if an apostate repents, when he has destroyed life or wealth, he (al-Shāfi'ī) maintains that he has destroyed protected wealth or he has killed a protected person, therefore, he is to compensate, on the analogy of the position prior to the use of force. We rely on the consensus (*ijmā'*) of the Companions (God be pleased with them) that has been reported by al-Zuhrī. Further, he has killed on the basis of a *fāsid* evidence, and such an evidence is linked with one that is valid when it is supported by the use of force as an evidence of defence, just like the use of force in the case of the enemy and its justification. The absence of compensation is due to the fact that the rules (in this world) are based upon obligations and duties, and there is no duty due to the existence of permissibility on the basis of justification. There is also no obligation due to the absence of authority and the existence of hostilities, however, authority remains prior to hostilities, and in the absence of a justification obligation is established as a matter of belief, as distinguished from sin, because hostilities do not affect the right of the Lawgiver. When this is established, we say that the killing of a rebel by an *'ādil* is justifiable homicide, therefore, it does not prevent inheritance. According to Abū Yūsuf (God bless him) in the case of killing of an *'ādil* by a rebel the irregular justification is acknowledged for purposes of repelling mischief, while the need here is to establish entitlement to inheritance, therefore, the justification cannot be acknowledged with respect to inheritance. The two jurists argue in this that there is a need for doing away with prevention of inheritance, because being a near relative is the cause of inheritance, therefore, an irregular evidence will be acknowledged for this purpose. The condition here, however, will be that it is based on his morality. Thus, if he were to say, "I knew that I was

on the unlawful side," the repelling of prevention will not be found and compensation will be due.

He said: **It is disapproved to sell weapons to those who do mischief or to their military contingents,** because it amounts to supporting disobedience. **There is no harm in selling at Kufah to the residents of Kufah when the person selling does not know them to belong to the group of rebels.** The reason is that domination in the cities is of the law-abiding people. Thereafter, it is disapproved to sell the weapons alone and not those things that are not used for fighting, but are in the manufacture. Do you not see that it is disapproved to sell musical instruments and not the wood. The same is relationship between wine and grapes. Allāh knows what is correct.

Al-Hidāyah

BOOK FOURTEEN

Laqīṭ (Foundling)

Chapter 117

The Legal Status of the Foundling

The term *laqīṭ* (foundling) is used keeping in view its future insofar as it is taken into custody. Picking up (taking into custody) is recommended as in this there is the survival of the child. If the person is convinced that the child will die, taking into custody is obligatory.

He said: **The foundling is a free person.** The original rule for a human being is freedom. Likewise, the *dār al-Islam* is the *dār* of free persons, and the rule assigned is that for the majority.

The maintenance of the foundling is the responsibility of the *bayt al-māl* (treasury). It is related from 'Umar and 'Alī (God be pleased with them). The reason is that the foundling is a Muslim, who is unable to earn and has no wealth, nor does he has close relatives. Thus, he resembles a cripple (invalid) who has no wealth or relatives. Further, the treasury inherits his estate, therefore, *al-kharāj bi'-ḍ-ḍamān* (earning is based on the liability to bear loss or to give compensation), for which reason compensation for his offences is also the liability of the treasury. The person taking the foundling into custody is deemed to make a voluntary donation by spending on the foundling due to the absence of *wilāyah*, unless he is ordered by the *qāḍī* to do so that it becomes a debt against the foundling due to the general authority of the *qāḍī*.

He said: **If a person takes the foundling into custody then no other person has the right to take the child away from him,** because his right comes to be established due to his prior possession.

If a claimant claims that the foundling is his child, then his statement is to be accepted, and this means when the person taking custody has not claimed paternity of the child. This is based upon *istiḥsān*, while analogy

dictates that his statement is not admissible, because it amounts to negating the right of the person taking custody. The basis of *istiḥsān* is that it is an acknowledgement that will be of benefit for the minor, because the foundling will gain respect through paternity and will be dishonoured in its absence. Thereafter, it is said that the claim is valid with respect to paternity, but not for negating the custody of the person who found him. It is also said that negation of custody is based upon the success of his claim of paternity. If the person who has taken custody claims paternity, it is said that it is valid both by way of *istiḥsān* as well as *qiyās*. The correct view, however, is that it is based upon the difference between *qiyās* and *istiḥsān* (as mentioned), and its rule was known in *Kitāb al-Aṣl*.

If two persons claim him and one of them points to a mark of identification on his body, he is to be given preference. The reason is that the apparent facts support his claim due to the conformity of the mark of identification with his statement. If none of them describes a mark of identification, then he is considered the child of both due to their equality in terms of the cause. If, however, the claim of one of them was prior, the foundling will be considered his child, as his claim was undisputed at that time, unless the other person comes up with testimony for testimony is stronger (in terms of proof).

If a child is found in one of the cities of the Muslims or in one of their villages and a Dhimmī claims it to be his son, the paternity of the child is assigned to him, but the child is a Muslim. This is based upon *istiḥsān*, because his claim includes paternity, which is beneficial for the minor, while negation of Islam is established through the *dār* (territory) and this is harmful for the child. Consequently, his claim is allowed in what is beneficial for the child and disallowed in what is harmful for him.

If a child is found in one of the villages of the People of the Dhimmah, or in a synagogue or a church, then he is deemed to be a Dhimmī. This is the unanimous response when the person who finds him is a Dhimmī. When the person finding him in such a location is a Muslim or is a Dhimmī finding him in the locations specific to the Muslims, then the narrations vary. In the *book of the Laqīṭ*, the location has been given precedence as that comes first, while in the *Book of Da'wā*, in some manuscripts, the finder is given precedence. This is a narration of Ibn Samā'ah from Muḥammad (God bless him) based upon the strength of possession. Do you not see that status is determined on the basis of the *dār*, thus, if one of them was taken captive along with the minor, the

minor would be considered an unbeliever. In some manuscripts Islam has been given precedence due to the welfare of the child.

If a person claims that the foundling is his slave, his claim is not admitted, because the foundling is *prima facie* a free person, unless he is able to adduce evidence (testimony) that he is his slave.

If a person claims that the foundling is his child, his paternity is attributed to him, because this benefits the child, **and the child is free.** The reason is that the slave can have a child from a freewoman, therefore, apparent freedom will not be annulled on the basis of doubt.

The freeman in his claim for the child is given precedence over the slave, while the Muslim is given precedence over a Dhimmī, by giving preference to what is best for the welfare of the child.

Chapter 118

Managing the Affairs of the Foundling

If some wealth is found on the person of the foundling, tied to him, then it belongs to the foundling, on the basis of the obvious conclusion. Likewise, if this wealth is tied to his riding animal when he is riding it, due what we have mentioned. Thereafter, the finder is to spend it on him according to the orders of the *qāḍī*. The reason is that it is found wealth and it is the *qāḍī* who has the authority to spend such wealth. It is said that he may spend it without the directive of the *qāḍī*, because it obviously belongs to the foundling. **He has the authority spend on, and to buy, things that are necessary for the foundling,** like food and clothing as they are part of expenditure.

The person finding the child does not have the authority to marry her, due to the absence of the basis of such authority based on kinship, ownership or judicial authority.

The finder does not have the authority to undertake transactions in the wealth of the foundling, on the analogy of the mother. The reason is that the authority to undertake transactions is for the growth of such wealth, and this is established on the basis of perfect managerial judgement and abundant affection for the child, and each one of them (mother and finder) possesses one of these traits.

He said: **It is permitted to him to accept a gift on behalf of the foundling,** because that carries pure benefit. It is for this reason that the minor possesses such authority on his own when he possesses discretion. This authority is also possessed by the mother and the guardian.

He said: **It is permitted to him to hand him over for apprenticeship in a trade,** because this is for training him and for ensuring his survival.

He said: **He may also offer his services for hire.** This feeble servant says: This is the narration of al-Qudūrī (God bless him) in his *Mukhtaṣar*. It is stated in *al-Jāmiʿ al-Ṣaghīr* that he is not to offer his services for hire. It is mentioned in the disapproved acts, and this is the correct view. The reasoning for the first view is that it pertains to his training. The reasoning underlying the second view is that he does not possess the authority to destroy his benefits, and in this the finder resembles the uncle and not the mother, because she possesses this authority, as we will be mentioning in the chapter of disapproved things. Allāh knows what is correct.

Al-Hidāyah

BOOK FIFTEEN

Luqṭah
(Found Property)

Chapter 119

The Legal Status of Found Property

He said: **Found property is a trust (*amānah*) when the finder takes witnesses that he is acquiring it to preserve it and that he will return it to the rightful owner.** The reason is that taking possession of property in this way (in the presence of witnesses) is permitted according to the *sharī'ah*; in fact, it is preferred according to the jurists generally. It is obligatory when there is fear of loss, according to what the jurists said. When this is the rule it is not liable to compensation. Likewise if the owner and the finder confirm that he took possession on behalf of the owner, because their confirmation is proof in their favour and becomes like testimony. If he acknowledges that he took possession for himself, he is liable on the basis of consensus (*ijmā'*), because he acquired the wealth of another without his permission, and also without the permission of the *sharī'ah*. If witnesses do witness the act of taking and he says, "I took possession on behalf of the owner," but the owner rejects his claim, he is to compensate the property, according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf (God bless him) says that he is not to compensate the loss, and his statement will be given preference, because the act of taking *primā facie* supports him, because he preferred the fear of Allāh in doing good to the commission of sin.

The two jurists argue that he acknowledged bringing about the cause of compensation, which is the taking of the wealth of another and claimed what is meant to absolve him of liability, that is, taking on behalf of the owner, but in this doubt has occurred, therefore, he is not absolved of liability. What he (Abū Yūsuf) mentions about the *prima facie* position is opposed by another similar position, because it is obvious that the person undertaking the transaction was acting on his on account. It is sufficient

in the taking of witnesses to say, "If you hear a person calling out for lost property, then you are to guide him to me." This is the rule whether the found property consists of a single item or many, because *luqṭah* is a generic term.

Chapter 120

Claims on Found Property and its Identification

He said: **If the found property is worth less than ten *dirhams* then he is to keep it available for identification for several days, but if it is valued at ten *dirhams* or more he is to make it available for identification for a whole year.** This feeble servant (Author) says: This is the narration from Abū Ḥanīfah (God bless him). His words, "several days," mean in accordance with what he considers appropriate. Muḥammad (God bless him) determined it in *Kitāb al-Aṣl* to be one year without giving details about the value being less or more. This is also the opinion of Mālik and al-Shāfiʿī (God bless them), due to the words of the Prophet (God bless him and grant him peace), "If someone finds property he is to have it identified for a year,"[1] and there is no detail in this. The reasoning for the first view is that the determination of one year was laid down about found property that was valued at one hundred *dīnārs*, which is equivalent to one thousand *dirhams*. Ten *dirhams* and what is more than this comes within the meaning of one thousand insofar as it is relevant for amputation of the hand and the legalisation of marriage. In terms of *zakāt*, however, ten *dirhams* do not fall within the meaning of a thousand. Consequently, we have made identification obligatory for a year by way of precaution. What is less than ten does not fall within the meaning of one thousand in any way, therefore, we have left it to the discretion of the person facing the situation. It is said that none of these estimations are binding and the matter is to be left to the discretion of the finder, and he is to have it identified till he is convinced that the owner is no longer looking for it. Thereafter, he is to give it away as charity. If the found

[1]There are several traditions in this recorded by al-Dār'quṭnī and others. Al-Zaylaʿī, vol. 3, 466.

thing is something perishable, he is to have it identified till he fears that it will perish, then he is to give it away as charity. It is necessary to have the property identified at the location where he found it and in the main mosque, as that is more likely to ensure that it will reach its owner. If the found property is something that the owner will certainly not look for like date-stones or pomegranate seeds, then it is permitted to cast them aside and to utilise them without identification, however, such things will stay in the ownership of the owner as it is not lawful to make an unknown person the owner.

He said: **If the owner comes (he is to deliver it to him) otherwise he is to give it away as charity,** so that the right reaches the one who is entitled to it, which is obligatory as far as it is possible. This takes place by delivery of the corpus of the property when the owner if found, or the delivery of the counter-value, which is correct taking into account the ratification of the of the charitable donation by the owner. He may, however, hold on to the property in the hope of finding its owner.

He said: **If the owner turns up,** that is, after the finder has made a charitable donation, **then he has the option to allow the donation to be implemented,** for which he will be rewarded, because the donation even though it was undertaken with the permission of the *shar'* (law) it was not undertaken with his permission and is suspended subject to his ratification. The ownership for the poor donee is established prior to such ratification, therefore, the ratification does not depend upon the existence of the subject-matter. This is different from sale by the unauthorised agent (*fuḍūlī*), which is established only after ratification of the sale. **If he likes he may hold the finder liable,** because he delivered his wealth to another without his permission, except that this was done due to permissibility from the law (*shar'*). Such permission, however, does not negate the claiming of compensation as a right by the subject, just like the consumption of the wealth of another in a state of duress. If he likes he may hold the poor person liable for compensation if the property is destroyed in his hands, because he took possession of his wealth without his permission. If the property exists, he may take it as he has found his property with its corpus intact.

He said: **It is permitted to take possession of goats, cows and camels as found property.** Mālik and al-Shāfi'ī (God bless them) said that when camels and cows are found in the wilderness, it is better to leave them alone. The same disagreement governs horses as well. These two jurists

argue that the original rule about the taking of another's property is prohibition, while permissibility is due the fear of loss. When the property is equipped with that with which it can defend itself such loss is rare, but there is a possibility of loss, therefore, the ruling given is that of disapproval and the recommendation of leaving it alone. We maintain that it is found property whose loss is likely, therefore, taking possession is recommended followed by identification so that the wealth of the public does not suffer a loss, just like the case of goats.

If the finder of property undertakes expenditure on it without the permission of the judge then such expenditure will be considered a donation, due to the lack of authority on his part over the liability of the owner. If he spends with the permission of the judge then it will amount to a debt against the owner, because the *qāḍī* has authority over the wealth of the missing person for his interest. His interests are preserved through expenditure, as we will elaborate.

When the matter is referred to the *qāḍī*, he is to examine it. If the animal has some utility, he is to give it on rent and spend on it from the rent received. The reason is that in this there is the survival of the corpus by keeping it in the ownership of the owner without placing the obligation of a debt on him. He does the same with a runaway slave. **If the animal does not have such utility, and he fears that the expenditure will consume its value, he is to sell it and preserve its price,** so as to preserve in meaning when it is difficult to preserve it in substance. **If it is better to spend on it, he is to permit this (to the finder) and deem the expenditure to be a debt against the liability of the owner,** for he has been appointed to watch over interests, and in this there is the securing of the interests of both sides. The jurists (Mashā'ikh) said that he is to order expenditure for two or three days estimating the time in which the owner is likely to turn up. If the owner does not come, he is to order the sale of the property, because the continued incurring of expenditure will lead to the loss of the property, therefore, his interest is not secured through expenditure over a long period.

The Author (God be pleased with him) said: In *Kitāb al-Aṣl* the stipulation of testimony (on the part of the finder) is made, which is correct. The reason is that such property may be in his possession as usurped property, in which case he is not to order expenditure rather he is to order its custody by way of deposit. Accordingly, it is essential to require testimony so as to uncover the true situation. The testimony given here is

not for purposes of adjudication.[2] If the finder says that he has no supporting testimony, then the judge is to say to him, "Spend on it if you are speaking the truth with respect to your claim." Consequently, he will have recourse to the owner if he is truthful, but he will not if he is a usurper. His statement in the *Book* "and he is to deem the expenditure as a debt against the owner," is an indication of the direction that he has recourse to the owner if he turns up, but he is not to sell the found property if the *qāḍī* has stipulated recourse to the owner. This is one narration, and it is correct.

He said: **When he appears,** that is, the owner **then the finder has the right to refuse delivery till he presents the amount incurred as expenditure.** The reason is that the property is alive due to his expenditure. It is as if he is regaining ownership through him, and in this it resembles sold property. A closer case is that of one returning a runaway slave for he has the right to imprison the slave till the payment of the reward (*ju'l*), due to what we have mentioned. Thereafter, the debt arising as a result of expenditure is not extinguished due to the death of the property in the possession of the finder prior to restraining it, but it is extinguished if it dies after imprisonment (restraining), because by restraining it becomes like mortgaged property.

He said: **Property found in the Ḥil and the Ḥaram are the same.** Al-Shāfi'ī (God bless him) said that it is obligatory to undertake identification of the property found in the Ḥaram till the owner appears, due to the words of the Prophet (God bless him and grant him peace), "Property found in the Ḥaram is not lawful, except for one who identifies it."[3] We rely on the saying of the Prophet (God bless him and grant him peace), "Preserve its container and rope, and then have it identified for a year."[4] This does not give details. The reason is that it is found property and in giving it away as charity after the passage of the period of identification there is the preservation of the ownership of the owner in some respects, therefore, he can come to own it as in the case of other types of found property. The interpretation of what he has related is that taking possession of found property is not permitted except for identification. The mentioning of the Ḥaram is for the reason that this will not do away with

[2]Testimony is given against a litigant who denies, but there is no one here to oppose the request. It is merely to discover the nature of the property.

[3]It is recorded by al-Bukhārī and Muslim. Al-Zayla'ī, vol. 3, 467.

[4]It is recorded by all the six Imāms of the sound compilations. Al-Zayla'ī, vol. 3, 468.

the requirement of identification as it is a place that is obviously for the poor.

He said: **If a man comes and claims the property it is not to be given to him until he brings testimony to the effect. If he does provide its identifying marks, it becomes lawful for the finder to give it to him, but he is not to be compelled to do so through adjudication.** Mālik and al-Shāfiʿī (God bless him) said that he is to be compelled. The identifying marks are like stating the weight of the *dirhams* and their number, identifying the rope that ties them or the purse. These two jurists argue that the person in possession disputes the possession and not ownership, therefore, description alone is stipulated due to the existence of a dispute in some respects. The rendering of testimony is not stipulated due to the non-existence of the dispute in other respects. We maintain that possession is the intended right like ownership, therefore, he is not entitled to it without proof, and that is testimony on the analogy of ownership, except that it is lawful for him to deliver it due to the correct statement of the marks of identification. This is based upon the saying of the Prophet (God bless him and grant him peace), "If the owner appears and identifies it container and number, deliver it to him."[5] The rule of permissibility is made by acting upon the well known tradition, which is the saying of the Prophet (God bless him and grant him peace), "Testimony is the obligation of the plaintiff."[6] He is to take a surety for him for strengthening the transaction. There is no disagreement in this, because he is seeking the surety for himself as distinguished from an heir who is missing. It is said that if he does deem him truthful, he is not to be compelled to deliver, like the agent for taking possession of a deposit when he is deemed truthful. It is also said that he is to be compelled, because the owner in this case is not obvious, while the owner depositor is known.

The found property is no to be donated by way of charity to a rich person, because the thing ordered is the giving of charity, due to the saying of the Prophet (God bless him and grant him peace), "If he does not turn up," that is, the owner, "then donate it by way of charity."[7] Charity

[5]It is recorded by Muslim. Al-Zaylaʿī, vol. 3, 468.

[6]The details of this tradition are provided in the chapter on *daʿwā*. Al-Zaylaʿī, vol. 3, 468.

[7]This has preceded, and is recorded by al-Dār'quṭnī and others. Al-Zaylaʿī, vol. 3, 468.

is not meant for the rich person, and in this it resembles the obligatory charity (*zakāt*).

If the finder of property is rich, it is not lawful for him to utilise the found property. Al-Shāfi'ī (God bless him) said that it is permitted due to the saying of the Prophet (God bless him and grant him peace) in a tradition from Ubayy (God be pleased with him), "If the owner comes deliver it to him otherwise utilise it," although he was a rich person.[8] The reason is that it is permissible for the poor person so that he may agree to take care of it, but this attribute is shared by the rich person. We maintain that it is the wealth of another person, therefore, its utilisation is not permitted without his permission, due to the unqualified meaning in the texts, while the permissibility for the poor person is due to what we related or due to consensus (*ijmā'*). Accordingly, what is beyond this (the rich man) continues to be governed by the original prohibition. The meaning of "rich person" can be construed from the tradition to apply to possibility of his need during the period of identification, while the poor man may be reluctant to accept it during this period. Further, utilisation by Ubayy (God be pleased with him) was based on permission by the Imām, and this permitted with his consent.

If the finder of the property is poor then there is no harm if he utilises it himself, insofar as there is the securing of interests in this from both sides. It is for the same reason that it is permitted to give it to a poor person other than him.

Likewise if the poor person is his father, his son or his wife, if he himself is rich, due to what we have said. Allāh knows best.

[8]It is recorded in the two *Ṣaḥīḥs*. Al-Zayla'ī, vol. 3, 469.

Al-Hidāyah

BOOK SIXTEEN

Ibāq (Runaway Slaves)

Chapter 121

The Legal Status of the Runaway Slave

Capturing the runaway slave is preferable for the person who has the strength to capture him, insofar as there is the revival of the right of the master in it. As for the lost slave, it is said that the same applies to him. It is also said that leaving him alone is better, because he is not likely to depart from his location, and this will lead to the owner discovering him, but this is not the case with the runaway slave. Thereafter, the person who captures the runaway slave brings him before the *sulṭān*, because he is not able to take care of him on his own, as distinguished from found property. When the runaway is brought to the *sulṭān*, he is to imprison him, but if the lost slave is brought to him he is not to imprison him. The reason is that he cannot be sure that the runaway will not run away a second time, as distinguished from the lost slave.

If a person brings back the runaway slave to his master from a distance of three days journey or more, then the reward of forty *dirhams* is due from the master to this person. If it is a distance that is less than this, then he is to be paid according to the estimated reward. This is based upon *istiḥsān*. Analogy dictates that there is no reward for him, unless it was stipulated. This is the opinion of al-Shāfiʿī (God bless him). The reason is that he is voluntarily donating the benefits, therefore, it resembles the case of the lost slave. We rely on the report that the Companions (God be pleased with them) agreed upon the obligation of *juʿl* in principle, except that there were some among them who determined a reward of forty, while there were others who determined it to be less. Consequently, we determined it to be forty for the minimum distance of a journey and less than that for a smaller journey by reconciling and combining the varying reports. The reason is that the imposition of reward is construed

in principle to ensure return, because securing voluntary is rare, thus, it achieves the preservation of the wealth of the people. Such estimation is on the basis of transmitted evidence and there is no report with respect to the lost slave, therefore, the analogy is prevented. Further, the need to take into custody the lost slave is less than that of the runaway, because the lost slave does not hide, while the runaway conceals himself. The estimation of the reward in case of return from a distance that is less than that of a journey depends upon their agreement or is left to the discretion of the *qāḍī*. It is said that the forty *dirhams* are to be divided over three days as this is the minimum duration of a journey.

He said: **If the value of the slave is less than forty, he is to be awarded the value less one *dirham*.** The Author (God be pleased with him) said: This is the opinion of Muḥammad (God bless him). Abū Yūsuf (God bless him) said that he is entitled to forty *dirhams*, because this determination was established by the text, therefore, the reward is not to be reduced. Consequently, it is not permitted to negotiate a higher amount, as distinguished from negotiation for less, because that is reduction on the bounty-hunter's part. Muḥammad (God bless him) argues that the purpose is to encourage another to return him so that the wealth of the owner is revived. Accordingly, a *dirham* is reduced so that he is said to deliver something to him and leads to the realisation of a benefit. The *umm al-walad* and the *mudabbar* in this respect are the same as the regular slave when the return of the slave is made within the lifetime of the master as in this is the revival of his ownership. If they are returned after his death there is no *ju'l* for them, because they are emancipated with his death, as distinguished from the regular slave. If the person bringing back the slave is the father of the master, or his son, and he is among his dependents, or one spouse does it for the other, then there is no *ju'l*, because these persons undertake the return voluntarily, and they are not included in the unqualified implication of the statement in the *Book*.

Chapter 122

Returning the Slave and Compensation

He said: **If the slave runs away from the custody of one who was returning him, then he is not liable for anything.** The reason is that he is a trust in his possession, but it applies where he took witnesses, and we have mentioned this in the topic of found property. The Author (God be pleased with him) said: It is mentioned in some manuscripts that he is not entitled to anything, and this too is true, because he is like the seller in relation to the owner. It is for this reason that he is to keep the runaway restrained till he receives the reward with the same status as the seller who restrains the sold property so as to claim the price. Likewise if the slave dies in his custody, he is not liable for anything, on the basis of what we said.

He said: **If the master emancipates him as soon as he meets him, he is deemed to have taken possession through the emancipation.** As in the case of the purchased slave. Likewise if he sells him to the person returning him so as to deliver the counter-value to him. Returning the slave has the *ḥukm* of sale, but it is sale in some respects alone, for it does not fall under the proscription laid down about the sale of something that is not taken into possession, thus, it is permitted (even without possession).

He said: **It is essential that when he captures him he take witnesses to the effect that he is taking him into custody to return him.** Taking of witnesses is obligatory upon him for such custody according to the opinion of Abū Ḥanīfah and Muḥammad (God bless them) so much so that if a person returns him without taking witnesses there is no *ju'l* for him in their opinion. The reason is that the relinquishing of witnesses is evidence of the fact that he captured him for himself. It is as if he bought him from someone who took him into custody or received him through a

gift or inherited him, and when such a person returns him to the master there is no *ju'l* for him, because he is returning him for himself, unless he takes witnesses that he is buying him for returning him to his master, in which case he will be entitled to *ju'l*, but he is making a voluntary donation in the payment of the price.

If the runaway slave had been pledged then the *ju'l* (reward) is to be paid by the pledgee, because he revived his financial value through the return, and that is his right. The reason is that satisfaction of his claim is through this value and the reward is in lieu of the revival of the value, therefore, he is liable for the reward. Return during the lifetime of the pledgor or after it is the same, because the pledge is not annulled due to death. He is liable for the reward when the value of the slave is equal to the debt or less than it. If it is more than this then it is estimated in the ratio of the debt and the rest is to to be paid by the pledgor, because his right is involved to the extent of the liability for loss. It, thus, resembles the price of the medicine or retrieving him through ransom after the omission of an offence. If the slave is under debt (being an authorised slave) then the master if the master sells him choosing to repay the debt, he begins by paying the *ju'l* first and the rest is for the creditors, because the reward is a burden on ownership and ownership in the slave is suspended. The *ju'l* becomes obligatory on the person for whom the ownership is established. If the slave is an offender, then if the master decides to pay ransom so as to reclaim the benefit, he is obliged to pay the reward. It is to be paid by the *awliyā'*, due to the return of the benefit to them, if the master decides to deliver him to them. If the slave had been gifted then it is due from the person to whom he had been gifted, even if the person gifting revokes the gift after the return of the slave. The reason is that the benefit did not accrue to the donor as a result of the return of the slave, but due to the donee's relinquishing transactions in the slave after his return. If the slave was owned by a minor, then the *ju'l* is to be paid from his wealth as it is a burden of his ownership. If his guardian (*waṣī*) returns the slave, then there is no *ju'l* for him, because causing the slave to return is part of his duties. Allāh knows what is correct.

Al-Hidāyah

BOOK SEVENTEEN

Mafqūd
(Missing Person)

Chapter 123

The Missing Person and his Wealth

If a man disappears and his whereabouts (place of his location) are not known nor is it known whether he is alive or dead, the *qāḍī* is to appoint a person who will preserve his wealth, manage his affairs and secure his claims. The reason is that the *qāḍī* appoints an administrator for all those who are unable to administer their own affairs. The missing person has these attributes and has become more like a minor or insane person. In the appointment of an administrator for his wealth and an executor for his affairs, the *qāḍī* is performing his supervisory function. His statement (in the *matn*), "secure his claims" means that it is not known whether he (the *mafqūd*) took possession of his revenue, or took possession of his claim that has been acknowledged by one of his debtors, when all this pertains to the category of administration. He is to institute litigation for the recovery of debts arising out of his contacts, because he is now the principal for securing his rights. He is not to initiate litigation in matters for which authority was delegated to the *mafqūd* (*wilāyah*) nor for his share in real estate or goods that are in possession of another person. The reason is that he is neither the owner nor his deputy; he is an agent authorised by the *qāḍī* to take things into possession. He is not authorised to undertake litigation (of all types) according to the unanimous view. There is disagreement about litigation when he is an agent for taking possession of debt claims on behalf of the owner. As there is disagreement, his acts are to be approved judicially against the missing person. His acts are not valid, unless they are approved by the *qāḍī*, who gives a decision, as this is a matter that is subject to *ijtihād*. Thereafter, in things that he fears wastage, they are to be sold by the *qāḍī* if he is unable

to preserve them in their original form. This means that he is to preserve them in meaning (value, through the sale).

He is not to sell things in which there is no likelihood of wastage for the sake of maintenance or other reasons. The reason is that he does not possess authority (*wilāyah*) over the missing person, except in matters that will preserve his wealth, therefore, he is not at liberty to go beyond the preservation of the form when that is possible.

He is to spend on his wife and children out of his wealth. This rule is not confined to his children alone, but in general for all close relatives of his children. The principle is that whoever is entitled to maintenance out of his wealth during his presence, without a decision from the *qāḍī*, is to be provided maintenance from his wealth during his absence. The reason is that a judicial order lends support to it. To each person who is not entitled to maintenance out of his wealth during his absence, because maintenance in such cases is through a judicial pronouncement against a person not present is not permissible. The first priority is that of minor children and old women to whom are linked old males as well. In the second level are brothers, sisters, maternal uncles and aunts.

His statement,[1] "out of his wealth," means *dirhams* and *dīnārs*. The reason is that their right pertains to food and clothing, and when this not found in his wealth, the satisfaction of this right is in need of a judicial pronouncement for conversion into value, and these are the two currencies. Metal (gold and silver) dust has the same status for this rule as it is a suitable for valuation like currencies. This (that we have stated) is the case when the wealth is in the possession of the *qāḍī*. If the wealth is in the shape of a deposit or a debt he is to spend out of it on them, if the custodian and debtor are acknowledging the debt and the deposit along with the existence of marriage (between the *mafqūd* and the beneficiary) and paternity, and this is so when these facts have not already been proved before the *qāḍī*. If the facts stand proved before him, there is no need for an acknowledgement. If one of the categories stands proved—deposit and debt or marriage and paternity—he is to stipulate acknowledgement for what is not proved. This is the sound view. If the custodian or the debtor pay without the order of the *qāḍī*, he is to hold the custodian liable and is not to absolve the debtor, because they have not paid to the one who rightfully owns the claim nor to his representative. This is different from

[1]Al-Qudūrī's.

the case where they pay on the order of the *qāḍī*, because the *qāḍī* is his representative.

If the custodian and the debtors deny the claims themselves or deny the existence of marriage or paternity, he is not to treat one the beneficiaries of the claim as parties to the litigation, because what they claim belongs to the missing person and has not been ascertained as proof of the existence of their right, which is maintenance. The reason is that maintenance just as it is due from this wealth is due from other wealth owned by the missing person.

Chapter 124

The Wife of the Missing Person

He said: **He (the *qāḍī*) is not to cause a separation (divorce) between him and his wife.** Mālik (God bless him) said that when four years have passed, the *qāḍī* is to pronounce a separation between him and his wife. She is to undergo the waiting period of one whose husband has died, and may then marry whom she likes. The reason is that 'Umar (God be pleased with him) gave this decision[1] in the case of a man who was enchanted away by spirits at Medina, and he ('Umar) is suffices as an *imām* in this. Further, he (the husband) has denied her rights by disappearing, therefore, the *qāḍī* is to cause a separation between them after the passage of time on the analogy of *īlā'* and impotence, and after this analogy he is to take the number four from *īlā'* and years from the rule of impotence acting on the common attributes of both.

We rely on the saying of the Prophet (God bless him and grant him peace), "She is his wife till she receives clear evidence."[2] We also rely on the statement of 'Alī (God be pleased with him) about such a woman that "She is a woman subjected to a trial. She is to wait patiently till death (of the *mafqūd*) becomes evident or divorce is communicated to her."[3] This amounts to an elaboration of the term "evidence" stated in the *marfū'* tradition. Further, the proof of *nikāḥ* was established, absence does not lead to separation (divorce), death continues to be in the realm of probability, therefore, the termination of marriage continues to be uncertain. In addition to this, 'Umar (God be pleased with him) changed his opinion

[1]It is related by Ibn Abī Shaybah in his *Muṣannif* in the chapter on *nikāḥ*, by 'Abd al-Razzāq, and by al-Dār'quṭnī. Al-Zayla'ī, vol. 3, 471–72.

[2]It is recorded by al-Dār'quṭnī. Al-Zayla'ī, vol. 3, 473.

[3]It is related in *al-Muṣannif* by 'Abd al-Razzāq. Al-Zayla'ī, vol. 3, 473.

to that of 'Alī (God be pleased with him). There is no similarity with *īlā'* as that is prompt divorce, which is considered delayed in the law, thus, becoming a basis for separation. There is also no similarity with impotency, because absence is usually followed by return, while impotence rarely leads to recovery if it continues for a year.

He said: **When he completes one hundred and twenty years from the date of his birth, a proclamation of his death is to be made.** He (the Author, God be pleased with him) said: This is the narration of al-Ḥasan from Abū Ḥanīfah (God bless him). In the authentic narration of the School, it is to be estimated through ages of his contemporaries. In the report from Abū Yūsuf (God bless him), it is said to be one hundred years. Some of them determined it to be ninety years. The view that conforms most with analogy is that no standard be used to determine the period, while a compassionate view is that it be determined to be ninety years.

When a proclamation of his death is made, his wife is to observe the waiting period following death commencing from the time of the proclamation. **His wealth is to be distributed among his heirs who are present at the time of the proclamation.** It is as if he had died at that time with his death being witnessed. The reason is that the legal ruling is based upon the actual ruling.

An heir who dies before this is not to inherit from him. The reason is that the ruling of his death was not given during his life and it was as if the fact of his being alive was known.

The *mafqūd* (missing person) is not to inherit from anyone during his absence. The reason is that presumption of his being alive is based upon the presumption of continuity (*istiṣḥāb al-ḥāll*) and that is not deemed a sufficient proof for establishing rights.

Likewise, if a bequest is made in favour of the *mafqūd* and the person making the bequest dies. Thereafter, the principle is that if there is an heir inheriting along with the *mafqūd*, who is not excluded by him, but whose share is reduced by him, he will be given the lesser share and the rest will be kept in suspension. If there is with him a relative who is excluded by him, he will not be given a share at all. The elaboration of this principle is: If a man dies leaving behind two daughters, a missing son, a son's son and a son's daughter. The wealth is in the hands of a stranger and they verify that the son is missing. If the two daughters demand their inheritance, they will be given one-half as that is certain and the remaining half

will be suspended. The son's children will not be given anything as they are excluded by the *mafqūd* had he been alive. They are not entitled to inheritance on the basis of doubt.

The stranger is not to be dispossessed of the (remaining) wealth, unless he is shown to be dishonest. The similarity of this case is with pregnancy. Inheritance equal to the share of one son is held in abeyance according to the ruling *fatwā*. If, however, there is another heir with him whose share is neither eliminated not altered by the foetus, he is to be given his entire share. If there is an heir whose share can be eliminated by the foetus, he will not be given his share. If there is an heir whose share can be altered by the birth of the foetus, he is to be given the least share that is certain, as in the case of the *mafqūd*. We have elaborated this in *Kifāyat al-Muntahī* in greater detail. Allāh knows best and to Him return all things for decision.

The second volume of *al-Hidāyah* ends here. The third volume follows this and begins with "The Book of Partnership (*Sharikah*)."

GLOSSARY

Glossary

'abd: slave.

'abd ma'dhūn: slave authorised by the master to trade on his behalf.

adab: court procedure; code of judicial conduct.

'adālah: moral probity.

adillah: pl. of *dalīl*. The texts and the evidences in the texts that are the sources of the law. The general evidences for the law that contain within them the specific evidences. The Qur'ān, for example, is a general evidence, while a verse of the Qur'ān pointing to a *ḥukm* is a specific evidence or the *dalīl tafṣīlī*.

'adl: justice.

'afw: forgiveness; commutation of sentence; surplus.

aḥkām: pl. of *ḥukm* (rule).

ahl al-baghy: those who rebel against lawful authority. Those who support such authority are called *ahl al-'adl*.

ahliyyah: legal capacity.

ajr: wages; reward.

'alīqah: another name for *mahr*.

amah: slave-girl.

amān: undertaking of safe-custody for a foreigner or for a *ḥarbī* (enemy).

amīr: governor; ruler.

amwāl bāṭinah: invisible wealth.

'anwatan: conquest after mobilisation of the armies.

'aqd: knot; tie; contract.

'āqilah: clan or group responsible for paying *diyah* for a member.

'aql: reason.

arkān: pl. of *rukn*; essential elements.

arsh: estimated compensation for injury.

'asabiyyah: family ties or bond.

'atāq: the act of emancipating a slave; manumission.

awliyā': those granted authority or guardianship by the *sharī'ah* as distinguished from guardians appointed by the *awliyā'* or the court.

'ayn: something that can be taken into physical possession as distinguished from rights.

'azl: ejaculation outside the vagina to prevent conception.

bā'in: irrevocable divorce.

baraṣ: skin disease.

bayt al-māl: treasury.

baynūnah: the state of irrevocable separation.

bhang: hemp. The plant from which intoxicating substances are derived.

bughāt: rebels.

bulūgh: the age of puberty.

dalīl: evidence. See *adillah.*

dam: sacrifice by way of atonement.

ḍamān: compensation; liability.

dār: house; territory.

dār al-ḥarb: enemy territory.

dār al-Islām: the Muslim lands.

da'wah: claim.

dayn: debt; also applied to *dīnārs* and *dirhams*, that is, currency.

Dhimmī: non-Muslim citizen of the Islamic state who is supposed to have entered the contract of *dhimmah*, actual or implied.

dhimmah: the equivalent of legal personality in positive law. A receptacle for the capacity for acquisition. Liability. A contract of liability entered into with non-Muslim citizens by the Islamic state.

dīwān: the treasury.

diyah: compensation for bodily offences.

diyānah: honesty; moral uprightness.

diyānatan: something that is morally wrong even though the law chooses to ignore it; moral verdict.

diyāt: pl. of *diyah*.

faqīr: needy.

fārr: person evading the rules of inheritance.

fāsid: not valid; irregular; vitiated. It is also used in the sense of voidable in the positive law. A contract, however, is voidable at the option of the parties, while the *fāsid* contract can become valid only if the offending condition is removed. It is an unenforceable contract.

fatwā: pl. *fatāwā*. Legal rulings issued by the jurist.

fay': booty.

fidyah: ransom.

fitnah: evil; trial; disruption; insurrection.

fuḍūlī: unauthorised agent.

ghalīẓah: heavy; enhanced.

ghāzī: veteran soldier.

ghanīmah: spoils of war.

gharīb: strange; stranger. In the context of traditions it refers to a report whose text or *isnād* are not known. A principle or rule that is alien to the generally acknowledged propositions of the law.

ghārim: debtor.

ghaṣb: usurpation; misappropriation; abduction.

ḥaḍānah: Custody of the child after divorce or death of husband.

ḥadd: fixed penalties. See also *ḥudūd*.

ḥākim: the Lawgiver.

ḥalāl: lawful.

ḥaqīqiyyah: actual as distinguished from legal.

ḥarām: prohibited.

ḥarbī: enemy

ḥasan: good.

ḥaṣr: siege; confinement.

ḥawl: one year. A period necessary for the imposition of *zakāt*.

ḥayḍ: menstruation.

hibah: gift.

ḥidād: mourning after divorce or death. Also *iḥdād*.

ḥikmah: wisdom; rationale of the rule.

ḥirz: place of safe-custody of property with reference to theft (*sariqah*).

ḥudūd: pl. of *ḥadd*.

hujjah: proof; demonstrative proof. An evidence in the sources that forms the basis of persuasive legal reasoning.

ḥukm: rule; injunction; prescription. The word *ḥukm* has a wider meaning than that implied by most of the words of English deemed its equivalent. Technically, it means a communication from Allāh, the Exalted, related to the acts of the subjects through a demand or option, or through a declaration.

ḥukmiyyah: legal as distinguished from actual.

ḥukm shar'ī: see *ḥukm*. The term *ḥukm shar'ī* is used to apply to its three elements: the Lawgiver (Ḥākim); the *maḥkūm fīh* or the act; and the subject or *maḥkūm 'alayh*.

huqūq: pl. of *ḥaqq* (right).

i'ārah: commodate loan.

ibāq: running away; runaway slave.

ibn sabīl: one destitute in a foreign land.

'iddah: waiting period after divorce or death of husband.

ijārah: hire; leasing.

ikhtiyār: volition; choosing in the context of divorce where the right of divorce has been delegated to the wife.

ikhtiyārah: a single repudiation when the wife decides to choose divorce.

īlā: vow of continence. It is the swearing of an oath by a man that he will not have intercourse with his wife, for a period of four or more months.

'illah: the underlying legal cause of a *ḥukm*, its *ratio decidendi*, on the basis of which the accompanying *ḥukm* is extended to other cases.

imām: Muslim ruler; the person leading prayers.

'innīn: impotent person.

istiḥāḍah: extended or chronic menstrual bleeding.

istiḥsān: the principle according to which the law is based upon a general principle, given preference over strict analogy pertaining to the issue. The principle is used by the Ḥanafīs as well as the Mālikīs. This method of interpretation may be employed for various reasons including hardship.

istikhlāf: irregular, extended or chronic bleeding.

istiṣḥāb: presumption of continuity of a rule or of its absence. A principle within the Shāf'ī system, which means that the *status quo* shall be maintained. In a more technical sense, it means that the original rule governing an issue shall remain operative. In such a case, the primary rule assigned to all issues is that of permissibility.

'iṭq: emancipation of a slave; manumission.

jā'iz: permitted; a terminable contract.

jabr: compulsion; used for mandatory atonement for violation of rights.

jaldah: stripes; lashes.

jarīb: measure used for land.

jihād: war.

jināyāh: offence; tort; delict.

jizyah: poll-tax.

ju'ālah: reward; general offer of reward for doing something.

kafālah: surety; guaranty.

kaffārah: expiation.

kawāghid: papers.

khamr: wine.

kharāj: tax imposed on lands belonging to the Dhimmīs.

khaṭa': mistake.

khayl: horses.

khilāf: disagreement of the jurists.

khilāfah: caliphate.

khiṭāb: communication.

khiyār: option.

khiyār al-bulūgh: option of puberty.

khiyār al-sharṭ: option stipulated in a contract.

khul': redemption in marriage. Payment by woman to seek release from marriage.

khums: fifth of the spoils.

kitābah: the contract with a slave for his emancipation on payment of installments.

laqīṭ: foundling.

li'ān: imprecation. A procedure followed when the husband accuses his wife of unlawful sexual intercourse for which he cannot produce four witnesses.

luqaṭah: found property.

ma'āfir: sheets made in Yemen.

ma'dhūn: slave authorised by master to trade on his behalf.

mafqūd: missing person

mahr: dower; amount paid to the wife as part of the marriage contract.

mahr al-mithl: reasonable dower.

maḥram: husband or relative of the prohibited degree of marriage.

māl: wealth; property.

maraḍ al-mawt: death illness; terminal illness.

marīḍ: one suffering from a serious or terminal illness.

mashī'ah: leaving divorce at the discretion of the wife.

mawlā: master of a slave who has been emancipated.

mawqūf: suspended contract; a tradition whose chain stops at the Companion.

mijann: shield.

milk al-raqabah: exclusive ownership as distinguished from possession.

milk yamīn: lawful possession.

miskīn: poor.

mithqāl: a unit of weight for gold.

mubāra'ah: divorce granted to wife with no financial liability.

mudabbar: a slave who is to be emancipated on the death of his master. *Mudabbarah* is the female slave with this status.

muḍārabah: the contract in which the owner of capital bears the entire loss.

muḍārib: the worker in the contract of *muḍārabah.*

mufāwaḍah: partnership in which the partners contribute all their wealth.

muftī: jurist who issues opinions upon request.

muḥārabah: war.

muḍārib: working partner with no liability in a *muḍārabah.*

muḥṣan: married or once married through a valid contract.

muḥṣanāt: married women; free women.

mukātab: a slave who has agreed to buy his freedom by paying instalments.

mursal: a tradition whose chain of transmission is not complete. The meaning assigned to it by the Ḥanafīs differs from that adopted by the majority schools.

murtad: apostate.

mustaḥāḍah: a woman with extended or chronic bleeding.

musta'min: a person visiting the *dār al-Islām* on assurance of safety.

muthlah: mutilation.

muẓāhir: person pronouncing *ẓihār*.

muzakkī: person undertaking *tazkiyat al-shuhūd*.

muzār'ah: share-cropping; tenancy.

nabbāsh: pickpocket.

nabīdh: mead of dates.

nadhr: vow.

naḥr: slaughtering an animal, especially a camel, while it is standing.

naṣṣ: text of the Qur'ān or the *Sunnah*; text of the jurist; a word whose meaning is absolutely clear.

nifās: postnatal bleeding.

nikāḥ: marriage contract.

niṣāb: minimum scale for the imposition of a duty, especially *zakāt*.

niyyah: intention.

nuṣūṣ: texts. See *naṣṣ*.

qadhf: false accusation of unlawful sexual intercourse.

qādhif: one who commits *qadhf*.

qāḍī: judge.

qarn: a birth defect in a woman affecting her private parts.

qasāmah: a procedure for administering oath on the people of a locality when the offender in homicide is not known.

qaṭ' al-ṭarīq: highway robbery.

qaṭ'ī: definitive.

qiṣāṣ: retaliation; *lex talionis*.

qismah: division; partition.

qitāl: fighting.

qurū': periods of menses or purity.

raḍā': fosterage.

raj'ah: retraction of revocable divorce.

raj'ī: revocable form of divorce.

rajm: stoning.

ratq: a birth defect in a woman affecting her private parts.

ribā: usury; interest.

rukn: pillar. An act upon which a ritual or a contract is structured.

rushd: discretion.

ṣā': a cubic measure.

sabab: cause.

ṣadāq: dower.

ṣadaqah: pl. *ṣadaqāt*. Charity.

ṣadaqat al-fiṭr: the amount paid before the *'īd al-fiṭr* prayer.

safar: journey. The extent of travel that gives rise to exemptions.

ṣafiyy: thing chosen by the *imām* from the spoils prior to their distribution.

salab: belongings on the person of the warrior, like his weapons and other things.

salam: contract in which an advance payment is made.

ṣarf: contract of currency transactions and loans.

sariqah: theft. Also called *sariqah ṣughrā*.

sariqah kubrā: highway robbery.

shahādah: witnessing; testimony.

shahīd: martyr.

shar': the law. The Author uses this term in the meaning of the texts of the Qur'ān and the *Sunnah* as well.

shar'ī: legal; prescribed by law.

sharikah: partnership.

shawkah: power.

shaykh fānī: enfeebled old man.

shibh al-'amd: quasi wilful homicide.

shubhah: pl. *shubhāt*. Doubt in the mind of the offender as to the legality of the act. It is to be distinguished from doubt in the mind of the judge during trial.

shubhah fī al-dalīl: doubt with respect to the applicability of an evidence.

shubhah fī al-fi'l: doubt in the commission of the act.

shubhah fī al-maḥall: doubt about the object of the act.

shuf'ah: pre-emption.

siyar: relations with non-Muslims whether in enemy territory or within Muslim lands.

siyāsah: policy; administration of justice.

ṣulḥ: negotiated settlement; truce.

sulṭān: ruler.

tadbīr: the act of granting emancipation to the slave after the owner's death.

tafwīḍ: delegation of the right of divorce to wife.

takhrīj: extension of the law by reasoning from legal principles.

takhyīr: the granting of a choice.

ṭalāq: divorce.

ṭalāq al-sunnah: divorce recommended by the *Sunnah*.

tamlīk: granting the right of divorce, that is, making the wife own the right to pronounce divorce.

tanfīl: reward announced by the *imām* prior to the commencement of battle.

taqādum: limitation; being barred by time.

taqlīd: following the opinion of another without lawful justification.

ta'zīr: penalties subject to the discretion of the *qāḍī* or *imām*.

tazkiyat al-shuhūd: the process of establishing moral probity.

tazwīj: marriage.

umm al-walad: slave girl who has borne a child of her master. Pl. *ummahāt al-awlād*

ʿuqr: compensation for unlawful sexual intercourse.

ʿurf: cusomary practice.

ʿurūḍ: goods.

ʿushr: ten percent charge on the produce of the land.

wājib: obligatory.

wājib muwassaʿ: obligation that provides enough time for the required act and another one like it.

wakālah: agency.

wakīl: agent.

walī: guardian granted authority by the *sharīʿah*.

waqṣ: see *awqāṣ*.

waqf: charitable trust.

walā': clientage.

walī: person granted legal authority by the *sharīʿah* over the person and property of a minor; heir with reference to claims of retaliation and blood-money.

waras: yellow dye.

wariq: silver.

wasaq: cubic measure equal to sixty *ṣāʿs*.

waṣī: guardian appointed by the *walī*.

waṣiyyah: bequest.

wilāyah: delegated authority of guardian.

wujūb: obligation.

yamīn: oath.

yamīn ghamūs: false oath.

yamīn laghw: superfluous oath.

ẓāhir: apparent; the apparently strong opinion.

ẓāhir al-riwāyah: the authentic approved transmissions of the legal opinions of the school.

zakāt: poor-due.

zānī: person who commits unlawful sexual intercourse.

ẓannī: probable as distinguished from definitive.

ẓihār: injurious assimilation. A man prohibiting for himself intercourse with his wife by equating her with the back of his mother.

zinā: unlawful sexual intercourse.

zinā bi-al-jabr: rape.

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ABOUT THE TRANSLATOR

Imran Ahsan Khan Nyazee is the author of several books. Among these are: *Theories of Islamic Law: the Methodology of Ijtihād* (1994); *Islamic Jurisprudence: Uṣūl al-Fiqh* (2000); *Islamic Law of Business Organisations: Partnerships* (1997); *Islamic Law of Business Organisations: Corporations* (1998); *Outlines of Islamic Jurisprudence* (1998); *The Concept of Ribā and Islamic Banking* (1995); and *General Principles of Criminal Law: Islamic and Western* (1998). He translated Ibn Rushd's *Bidāyat al-Mujtahid* (The Distinguished Jurist's Primer) in 1994 and Abū 'Ubayd ibn Sallām's *Kitāb al-Amwāl* (The Book of Revenue) in 2002 into English.

After a long teaching career in law and Islamic law, he is now devoting most of his time to the development of the Advanced Legal Studies Institute as well as the Centre for Islamic Law and Legal Heritage. The latter institution has been established for the preservation and promotion of Islamic law in English. The Centre will translate the works of the classical jurists into English with a focus on providing solutions to modern problems. The Centre will initially publish translations of works from the Ḥanafī School and then take up the works of the other schools. The Advanced Legal Studies Institute focuses more on law, especially the problems of legal and judicial reform in Pakistan.