THE FIVE SCHOOLS OF ISLAMIC LAW

AL-FIQH 'ALA'L-MADHAAHIB AL-KHAMSAH

Al-Hanafi, Al-Hanbali, Al-Ja'fari, Al-Maliki and Al-Shafi'i

BY:
MUHAMMAD JAWAD MAGHNIYYAH



Presented by: https://Jafrilibrary.com

www.bookshia.com
knowledge enlivens the soul

THE FIVE SCHOOLS OF ISLAMIC LAW

AL-HANAFI, AL-HANBALI, AL-JA'FARI, AL-MALIKI, AL-SHAFI'I

BY MUHAMMAD JAWAD MAGHNIYYAH

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

www.bookshia.com
knowledge enlivens the soul

Maghniyyah, Muhammad Jawad, 1904 – 1980.
The five Schools of Islamic Law: *al-Hanafi, al-Hanbali, al-Ja'fari, al-Maliki, al-Shafi'i*/ by Muhammad Jawad Maghniyyah.- Ansariyan, 2003
XVI, 607 P.
Original title: الفقه على المذاهب الخمسة
ISBN: 964-438-459-8
1. Islamic law – comparative. I. Title.
297.324 BP169.7.M3F5

الفقه على المذاهب الخمسة

THE FIVE SCHOOLS OF ISLAMIC LAW

Al-Hanafi, al-Hanbali, al-Ja'fari, al-Maliki, al-Shafi'i

Author: Muhammad Jawad Maghniyyah
Publisher: Ansariyan Publications – Qum
First Edition 1416 – 1995 - 1374
Second Reprint 1424 – 2003 - 1382
Ofuq Press Quantity: 2000
Number of Pages: 625 Size: 162X229
ISBN: 964-438-459-8

ALL RIGHTS RECORDED AND RESERVED FOR THE PUBLISHER

Ansariyan Publications
P.O. Box 187
22 Shohada St., Qum
Islamic Republic of Iran
Tel: ++98 251 7741744 Fax: 7742647
Email: ansarian@noornet.net
www.ansariyan.org & www.ansariyan.net

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

www.bookshia.com
knowledge enlivens the soul



IN THE NAME OF ALLAH,
THE COMPASSIONATE, THE MERCIFUL

PART – 1
`IBADAH

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

CONTENTS

Preface
Foreword

PART - I

TAHĀRAH

Tahārah 1
Al-Najāsat 12
Al-Muṭahhirāt (The Purifiers) 16
Conditions Requiring *wuḍū'* 17
The Objects of *wuḍū'* 20
The Essentials of wuḍū'(*Farāiḍ al-wuḍū'*) 21
Conditions of *wuḍū'* 24
Ghusl 28
Menstruation (*al-Ḥayd*) 33
Al-'Istiḥāḍah 36
Touching a Corpse (*Mass al-mayyit*) 38
Al-Tayammum 52
The Rules of Tayammum 57

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ṢALĀT

Ṣalāt	62
The Qiblah	66
The Rules of Modesty	68
Wājib Covering During Ṣalāt	74
The Place of Ṣalāt	79
Adhān	82
The Essentials of Ṣalāt	85
Error and Doubt During Ṣalāt	96
The Friday Prayer	101
The ʻĪd Prayers	104
The Prayer of the Eclipses	106
Prayer for Rain	107
Ṣalāt al-Qaḍā'	109
Ṣalāt al-Jamāʻah	111
Ṣalāt During Travel (Ṣalāt al-Musāfir)	118
The Invalidating Causes of Ṣalāt (Mubṭilāt)	122

FASTING

Fasting	131
Conditions (Shurūṭ) of Fasting	134
Muftirāt	135
The Various Kinds of Fasts	138
Evidence of the New Moon	143

ZAKĀT

Zakāt	148
Conditions for Zakāt on Property	148
Zakāt on Livestock	150
Classes Entitled to Receive Zakāt	156
Zakāt al-Fiṭr	160
Khums	164

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

THE ḤAJJ

The Ḥajj	168
The Conditions for the Ḥajj	171
Istināb̄ah (Deputation)	176
Al-'Umrah	180
The Forms of the Ḥajj	184
The Iḥrām	189
Iḥrām, Its Wājibāt and Mustaḥabbāt	191
Restrictions of Iḥrām	197
Ṭawaf	207
Sa'y and Taqṣîr	219
The Wuqūf in 'Arafāt	226
The Wuqūf in Muzdalifah	230
At Minā	234
Jamrat al-'Aqabah	235
Hady	237
Between Makkah and Minā	247
The Dhū al-Ḥijjah New Moon	251
Ziyārah of the Greatest Prophet (ṣ)	253
History of Al-Ḥaramayn Al-Sharîfayn	254

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

PART - II

MARRIAGE

The Marriage Contract and its Conditions	260
Capacity to Enter into a Marriage Contract	264
Stipulation of Conditions by the Wife	267
Claim of Marriage	269
The Prohibited Degrees of Female Relations (*al-Muḥarramāt*)	272
Matrimonial Guardianship	292
Al-Kafā'ah (Equality)	297
Al-'Uyūb (Defects)	298
The Option to Include Conditions (Khayār al-Sharṭ)	304
Al-Mahr	310
Inability of the Husband to Pay the Mahr	317
Disagreement between the Spouses	321
Dowry (al-Jihāz)	324
Lineage (Al-Nasab)	327
Artificial Insemination	342
Custody (Al-Ḥiḍānah)	349
The Right to Maintenance	355
Determination of Maintenance	364
Maintenance of Relatives	371

DIVORCE

The Divorcer (al-Muṭalliq)	381
Al-Khul'	395
Al-'Iddah	402
Return to the Divorcé (al-Raj'ah)	417
The Acceptance of a Claim Without Proof	421

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Court Divorce (Ṭalāq al-Qāḍī) 424
Al-Ẓihār 428
Al-'Īlā 430

WILL AND BEQUEST (WAṢĀYĀ)

Will and Bequest (Waṣāyā) 434
The extent of Testamentary Rights 441
The Dispositional Rights of an Ailing Person 447
Appointment of Executor (al-Wiṣāyah) 452

INHERITANCE

Rules Concerning the Heritage 462
Causes of Inheritance and Impediments 466
Distribution of the Heritage 473
Al-Ta'ṣīb 479
Al-'Awl 486
Exclusion (al-Ḥujb) 488
The Return (al-Radd) 491
The Inheritance of a Foetus; Disowned and Illegitimate Children 493
The Marriage and Divorce of an Ill Person 495
The Father's Share in Inheritance 496
The Mother's Share in Inheritance 498
The Inheritance of Children and Grandchildren 503
The Inheritance of Brothers and Sisters 507
The Inheritance of Paternal and Maternal Uncles and Aunts 514
The Inheritance of the Spouses 518
A Missing Person's Property 520
Inheritance of Persons Killed by Drowning, Fire and Debris 520
Illustrations 528

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

WAQF

Waqf	539
Conditions of a Waqf and His Pronouncement	552
The Management of Waqf (al-Wilāyah ʻalā al-Waqf)	560
Public and Private Waqfs	572
Some Curious Waqfs	578

ḤAJR (LEGAL DISABILITY)

Ḥajr	583
Insanity	583
Minority	584
Idiocy (al-Safah)	588
The Guardian	592
The Qualifications of a Guardian	595
The Insolvent Person (al-Muflis)	599

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

PREFACE

The Islamic *fiqh* (jurisprudence) is divided into several sections: *'Ibādāt* (rituals) that include: ritual purity (*ṭahārah*), prayers (*ṣalāt*), fasting (*ṣawm*), alms (*zakāt*), one-fifth (*khums*) and pilgrimage (*ḥajj*). These six chapters are included in the first part of the Book *al-Fiqh 'alā al-madhāhib al-khamsah* (*Fiqh* according to five schools of Islamic Law), which was published first by Dār al-'Ilm li al-Malāyîn, achieving unprecedented circulation, that prompted this foundation to republish it for the second, third and fourth time, all of which have run out of print.

The second section of Islamic *fiqh* contains the Individual conditions (*al-'Aḥwāl al-shakhṣiyyah*), that include: marriage, divorce, will and bequest, endowment (*waqf*) and legal disability (*ḥajr*), which constitute the second part of the book published by Dār al-'Ilm li al-Malāyîn, whose copies have run out of print.

Some honourable personages suggested to the Dār to republish the two parts in one volume, of which the first part to be *'Ibādāt* and the second *al-'Aḥwāl al-Shakhṣiyyah*. The Dār has complied, as the subject of the two parts being one, by the same author. I hope that this work will be beneficial for the readers.

The Almighty Allah is the guarantor of success.

AUTHOR

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

FOREWORD

In the Name of Allah, the Beneficent the Merciful

Allah's benediction and peace be upon our Master Muḥammad and his honourable Progeny and Companions.

It is stated in a holy tradition: "Gabriel descended upon Adam, and said to him: Allah has commanded me to let you choose one of these three: intellect (*'aql*), religion, and modesty (*ḥayā'*). Adam said: I choose intellect. Then modesty and religion said: So we shall come with you, O Adam, as Allah has commanded us to be with intellect wherever it be."

The points to be derived from this *ḥadîth* are:

1. Whatever is disdained by intellect has no place in religion, and one who has no intellect, has neither religion nor modesty, though praying all the night and fasting during daytime. Henceforth one of Muslims' Imams has said: The proper criterion with which we can distinguish between the Prophetic and non-Prophetic tradition is that its having substantial reality, and being under explicit light, since that which has no reality or luminosity is but an utterance of Satan.

2. As long as religion is inseparable from intellect, closing the door of *ijtihād* is regarded as closure to the door of religion, as *ijtihād* (inference of rules) means settting free of intellect (*'aql*), and giving room for deriving branches from their origins, since interdicting intellect is an interdiction to religion due to the interrelation between them. In other words, if we call for closing the door of *ijtihād* we have to abide by one of two choices: either to close the door of religion as we did with *ijtihād,* or to claim that intellect does not support religion, admitting none of its rules, which

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

are both not accepted by logic of *shar'* (Islamic Law) and reason.

3. Any *'ālim* (scholar) who bigots for any creed (*madhhab*) is worse than the *jāhil* (ignorant) who has not been a fanatic, in this case, for religion and Islam, but being fanatic for an individual, particularly the leader of the *madhhab,* as long as intellect does not necessitate following him in person. Also opposing the *madhhab* is not an opposition to the nature and reality of Islam, but to the leader of that *madhhab,* or more proper to the mental image he had of Islam.

Anyhow, we are all aware of the fact that in the first stage of Islam there were no *madhāhib* (schools of law) nor *firaq* (sects), as Islam was free from any flaw and blemish, and Muslims have been the vanguard of all nations. We are also certainly aware that these sects and creeds have sown seeds of discord among Muslims, setting up barriers and distances that prevented their attaining to might and treading one path toward one end, creating thus a good chance for the colonialists and enemies of Islam to exploit this division for instigating seditions. The West could never dominate and extremely exploit and subdue the East, but only through this disunity and crumbling of forces.

For this reason, the staunch leaders made up their minds to apply the idea of making agreement among and consolidating the Islamic community, and striving for its interest with all available means, like opening the door of *ijtihād,* and annulling the prevalence of following a certain *madhhab* (creed).

It is known among the jurisprudents that the reason necessitating the closure of the door of *ijtihād* lies in that its opening has created confusion and chaos, as it was transgressed by juniors from among knowledge-seekers, and claimed by unqualified persons, that is: the reformers (*muṣliḥūn*) have cured the disease by exterminating the patient, not by uprooting the disease!

This claim was stated by the ancestors in their books, and reiterated by the latters without any investigation or putting to the test. But I think the only reason for closing the door of *ijtihād* lies in that the oppressive ruler was fearing from freedom of opinion and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

criticism against him and his throne, so he resorted to trickery, using -- as usual -- the claim of protecting the religion, as a medium to rely upon any freeman disdaining from cooperating with his government upon debauchery and dissipation.

The best evidence for this fact is that the call for letting the door of *ijtihād* open has never emerged but only with the decline of the domination of the foreign and regressive powers, the call whose achievement was conditioned upon attaining freedom with its fullest meanings.

Thereafter, both imitation and submission to the avaricious are but slavery and servitude, which we have experienced for a long time, but time is opportune to have freedom in our thoughts, as we be free in our homeland, to abandon imitating a specific creed and a certain utterance, and to select from among the *ijtihādāt* of all the *madhāhib* (creeds) what can comply with development of life, and easiness of the Sharī'ah (Islamic Law). If selecting from among the creeds is not an absolute *ijtihād,* it may be considered anyhow a sort of *ijtihad.*

On the basis, and for the sake of paving the way for selecting from among all the creeds, I have determined to compile this book, abridging in it all the opinions of the five schools of law: Ja'farī, Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī, from their sources. These opinions include beliefs that conform with life and achieve justice, beside ideas which must be covered and rejected. So I have disdained from the latter for maintaining the honour of *fiqh* and *fuqahā',* and have published the former ones, doing my best to make them easy to understand by every knowledge-seeker, and expound them in a brief and explicit way. On this course, I met with the difficulties that are faced by anyone intending to translate any book from a foreign language to his own language, as the difference between the old method and new method of writing is like that between the Arabic language and any other language.

I have come across some libraries, as I used to do every day, searching for what is recently brought out by publishers. In one of the libraries I saw a student from the Tunisian mission, intending

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

to specialize in the Lebanese University, searching in books. When his eyes fell upon the book "*'Alī wa al-Qur'ān*" in my hand, he asked my permission to look into it, but as soon as he read the advertisement on the cover about the book "*'al-Fiqh 'alā al-madhāhib al-khamsah*", he rejoiced and said: We are in bad need for a book like this.

I said: What for? He replied: "We in Morocco follow the *madhhab* (creed) of al-'Imām Mālik, and he is very strict in matters with which other imams deal leniently. We, the youth, whatever be our culture and trends, and regardless of others' opinions and charges against us, never intend to oppose Islam or rebel against its commandments. But we, at the same time, do not desire to be in distress and impediment while applying and abiding by Islam's rules, so in case of facing any trouble in which Mālik is strict, we would like to know others' opinions in it, hoping for finding a way out to perform, feeling certain of not perpetrating any forbidden act. But getting acquainted with the *fiqh* of other schools of law, has been infeasible for us, because our shaykhs ignore or disregard whatever contradicts Imam Mālik's verdicts. If we refer to ancient books, it will be impossible for us to apprehend them due to the complexity, obscurity and prolixity that lead us nowhere, but in your book we shall find the simplification and facilitation badly needed by every youth."

I rejoiced at his saying, which prompted me to go forward in bringing out the other parts, making me not regretful or sorry for abandoning my former decision, as I intended in the outset to mention along with every opinion of every school, the proof upon which it was based, including a Qur'ānic verse, or narration, or unanimity (*ijmā'*), or reason (*'aql*), or a companion's utterance. But I have been recommended to suffice with mentioning the sayings alone, as this being easier for people to comprehend, and a good motive for the circulation of the book, as the proofs cannot be recognized but only by knowledgeable people. It seem as if this saying has drawn my attention to a fact inherent inside me, since a large number of those who acquired *fiqh* are more concerned with

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

fatwā more than with its proof or source, so how about others?! Then I changed my mind, being sufficed with abridging and exposing the opinions of the five schools of law, abandoning giving proofs and comments, except in some rare cases, with the aim that the book be for all people and not dedicated for certain elite, and for the public not for the elect.

Despite this, I faced a difficulty in translation not known but only by those who practised and suffered it, a difficulty I never met in all my previous works. Then I heard someone saying: Writing the *fiqh* according to the schools is too easy, as it is just conveying, no more no less, which is like the saying: War is no more than holding a weapon, and coming forth toward battle, with no consequences!

Whereas the fact is that *fiqh* is an infinite sea, as one matter can be divided into different ramifications, about any of which the schools' opinions may be numerous and contradictory, and rather the opinions of the *fuqahā'* of the same school, or even the opinions of the same scholar. Any one trying to have full conception of any ethical matter, will encounter the severest hardship and suffering, so how about writing the whole *fiqh,* with its branches: the rituals (*'ibādāt*) and transactions (*mu'āmalāt*) according to all schools?!

Thus when al-'Azhar Mosque intended to prepare the book "*al-Fiqh 'alā al-madhāhib al-'arba'ah*" in 1922, it chose a committee of renowned *'ulamā'* of schools for this purpose, each writing according to his school. So the committee embarked on this task that lasted for years, till succeeding in compiling the rules without their proofs, as we witness in this book. While admitting that this work has relieved me of many efforts, but it has at the same time caused me many troubles in numerous matters, compelling me towards searching and investigation into lengthy and abridged books for so long time. I spent more than thirty-three years in acquiring, teaching and compiling *fiqh,* so how about one knowing nothing about it except the name?!

While the book "*al-Fiqh 'alā al-madhāhib al-'arba'ah*"

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

reports every school's opinion separately, as stated in the books of its *fuqahā'* except what is concurred by all the four schools, this book states together the agreement of two or more schools in one sentence, for the sake of brevity and easiness.

I never experienced a hardship like that I found in contradiction of transmission, and multiplicity of narrations from one imam about one matter, as this book supposes prohibition, the second one permission, while the third book considers the same matter as an honour. And as my intention has been facilitation for the readers, so I avoided, as possible, reporting various narrations, being sufficed with narrating from the previous authors, especially when the narrator being a follower of the imam he is narrating from. I may sometimes report the concurrence of the four Sunnī imams about an issue being agreed upon by three of them, while two narrations have been reported from the fourth imam: one concurs with the three and the other contradicts them. So I choose the concurrent one for the sake of narrowing the gap and circle of difference and dispute.[1] But if the narration being concurred by all, I mention the disagreeing one explicitly referring most the time to the four schools: Shāfi'ī, Ḥanafī, Mālikī and Ḥanbalī by the term "*al-'Arba'ah*" (the four) alone.

Concerning the Ja'farī *fiqh* followed by the Imāmiyyah,[2] I have reported from it that which got their unanimity, and chosen only that is widely known from the issues upon which they differed.

In conclusion I like to reiterate the statement mentioned in the preface of the book "*al-Fiqh 'alā al-madhāhib al-'arba'ah*" whose compilation has been shared by seven renowned *'ulamā'* from al-'Azhar, which reads: "It is no fault that this book being blamed for any shortage, since perfection is only Allah's, but the fault is in that who sees the wrong and never guides to its right, and in that who guides to the right but never corrects his wrong."

We implore Allah, the Exalted, to guide us to the truth, making these pages of benefit for those seeking it, and praise be for Him at first and last.

Muḥammad Jawād Maghniyyah

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Beirut -- 1st October 1960

NOTES:

1. Here is an example: The Imāmiyyah, Shāfi'īs, Ḥanafīs and Mālikīs hold that: *Zakāt* (alms) is due for the brothers and paternal uncles, while two opinions are ascribed to al-'Imām Aḥmad ibn Ḥanbal, one observes permission and the other prohibition, so I mentioned the concurrence.

2. The term Imāmiyyah has been used for those believing in the obligation of (following) the Imamate (Twelve Imams) and the establishment of the text (*naṣṣ*) from the Prophet (S) appointing 'Alī ibn Abī Ṭālib as his successor. The Imāmiyyah *fiqh* is called *al-Fiqh al-Ja'farī*, as the disciples of al-'Imām Ja'far al-Ṣādiq have written from him four hundred compilations for four hundred compilers, that have been called "*al-'Uṣūl al-'Arba'mi'ah*". Then they were compiled in four books called: *al-Kāfī, Man lā yaḥḍuruhu al-faqīh, al-'Istibṣār*, and *al-Tahdhīb*, which are considered the most renowned references for getting acquainted with the traditions of rules for the Imāmiyyah.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ṬAHĀRAH

The Muslims have paid great attention to *ṭahārah* (ritual purity) and have written lengthy treatises about it. They make their children get accustomed to it and teach it in their places of worship and instruction. The leaders of all the schools of fiqh have considered it a basic condition for the validity of *'ibādah* (worship), and I am not exaggerating when I say no other religion had given importance to *ṭahārah* to the extent of Islam.

Ṭahārah literally means purity, and in the terminology of the legists it implies the removal of *ḥadath* or *khabath*. The latter pertains to such physical impurities as blood and excrements. *Ḥadath* is a ritual condition which occurs to a person consequent to his performing an act that prohibits him from performing *ṣalāt* and necessitates the performance of *wuḍū'* or *ghusl* or *tayammum*. The *ṭahārah* from *ḥadath* is not achieved unless accompanied by the intention (*niyyah*) to seek nearness to God (*taqarrub*) and obey His command regarding it. As to the *ṭahārah* of the hands, clothes and utensils from *najāsah* (impurity), it requires no *niyyah;* rather, if the wind carries a defiled (*najis*) piece of clothing and it falls into a 'large quantity' of water (*al-mā' al-kathīr,* details follow), it attains *ṭahārah* automatically.

Water brings about *ṭahārah* from both *ḥadath* and *khabath*. This accords with these statements of God Almighty:

...وَيُنَزِّلُ عَلَيكُم مِّنَ ٱلسَّمَآءِ مَآءً لِيُطَهِّرَكُم بِهِۦ،...

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

And He sends down upon you water from heaven to purify you thereby... (8:11)

...وَأَنزَلْنَا مِنَ السَّمَاءِ مَاءً طَهُورًا ﴿٢٥:٤٨﴾

And We sent down from heaven pure water. (25:48)

Ṭahūr means that which is itself pure and capable of purifying others as well. Considering that water is found either in a small (*qalîl*) or a large quantity (*kathîr*), and includes juicy extracts, solutions and water in its natural form, the legists have divided water into two types: *muṭlaq* (pure) and *muḍāf* (mixed).

Al-Mā' al-Muṭlaq (Pure Water):

Al-mā' al-muṭlaq is water that has retained its natural state--the state possessed while coming down from the sky or welling from the ground--so that it is correct to apply the word 'water' to it without the addition of any adjective which would alter its natural state. That includes rainwater, seawater and water of river, well, spring and water derived from hail and snow.

Water is considered to remain in its 'pure' form if the change that occurs in it is due to factors usually unavoidable, e.g. mud, soil, stagnation, fallen leaves or collection of straw, etc., or the salt, sulphur, and other minerals that it contains at its source or picks up in its course. *Al-mā' al-muṭlaq* is considered pure and purifying from both *ḥadath* and *khabath* by absolute consensus. As to the statement that has been narrated from 'Abd Allāh ibn 'Umar, that he preferred *tayammum* to seawater, it stands refuted by these words of the Prophet (S):

مَنْ لَم يُطَهِّرْهُ البَحرُ فَلا طَهَّرَهُ اللهُ.

He whom the sea does not purify, will not be purified by God.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Al-Mā' al-Musta'mal (Used Water):

When *najāsah* is removed from the body, a piece of clothing or a utensil by pure water, the water separating from the object purified, either freely or by wringing, is called '*ghusālah*' or '*musta'mal*' by the legists. It is impure (*najis*) because it is water in 'small quantity' (*al-mā' al-qalîl*) that has come into contact with the impurity and has consequently become *najis,* irrespective of whether it has itself undergone any change or not. Accordingly, it cannot remove *khabath* or *ḥadath.*

A group of legists belonging to different schools observe: If this water separating from the washed object undergoes a change by the *najāsah,* it is *najis.* Otherwise its state would be the state of the washed object--if *najis* then *najis,* and if *ṭāhir* then *ṭāhir.*

This observation will not be correct unless we take into account the state of the object being washed before water has reached it, for the object containing *najāsah* is purified by the water poured over it and the water separating from it would be *najis* due to having come into contact with *najasah.*

If water is used for removing *ḥadath,* it is considered pure (*ṭāhir*) but not purifying (*muṭahhir*). This is the preponderant opinion of the Ḥanafî school and the apparent view of al-Shāfi'î and Aḥmad. According to one of the two opinions narrated from Mālik, it is both pure and capable of purifying (Ibn Qudāmah, *al-Mughnî,* vol. 1, p. 19).

The Imāmiyyah say: The water used for non-obligatory *wuḍū'* and *ghusl*--e.g *ghusl al-tawbah* or *ghusl al-jumu'ah*--is pure as well as capable of purifying from both *ḥadath* and *khabath;* i.e. it is valid to use it for *ghusl, wuḍū'* and for removing *najāsah.* As to the water used for performing obligatory *ghusl*--such as *ghusl al-janābah* and *ghusl al-ḥayḍ*--the Imāmî legists concur that it can remove *najāsah,* but they differ concerning its ability to purify from *ḥadath* and the validity of *wuḍū'* and a second *ghusl* with it.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

A Subsidiary Issue:

About a person in the state of *janābah* (the state of major ritual impurity following sexual intercourse) who dips himself in *al-mā' al-qalîl* after cleansing the locale of *najāsah* and makes *niyyah* for purification from the *ḥadath,* the Ḥanbalîs observe: The water will be considered used and the *janābah* too will not be removed; he will have to repeat the *ghusl.* The Shāfi'i, Imāmî and Ḥanafî schools state: The water will be considered used, though the *janābah* will be removed and he will not have to repeat the *ghusl* (Ibn Qudāmah in *al-Mughnî,* vol. 1, p. 22, 3rd ed., and Ibn 'Ābidîn, vol. 1, p. 140, printed by al-Maymaniyyah).

The people of the Middle Ages stood in need of this and similar issues, which have been discussed in voluminous works of fiqh, because water was more scarce and expensive in those days than oil is today. But now, after human knowledge has become capable of transporting water from under the ground to every house in the highest of mountains, our interest in this issue is like the interest shown to historical relics kept in museums.

Mixed Water (al-Mā' al-Muḍāf):

Al-mā' al-muḍāf is either water extracted from fruits, e.g. lime and grape juice, or that which was pure initially before something was added to it that changed its character, e.g. rose-water and soda-water. It is *ṭāhir,* but does not purify *khabath* as per the consensus of all schools except the Ḥanafî. The Ḥanafîs consider valid the removal of *khabath* with any non-oily liquid, except that which has changed by cooking, and al-Sayyid al-Murtaḍā from among the Imāmiyyah has concurred with them.

All the schools, except the Ḥanafî, also concur that it is not valid to perform *wuḍū'* or *ghusl* with *al-mā' al-muḍāf.* According to Ibn Rushd's *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid* (p. 32, 1354 H. ed.) and *Majma' al-'anhur* (p. 37, Istanbul): Abū Ḥanîfah has considered valid the performance of *wuḍū'* with date-wine (*nabîdh*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

al-tamr) during travel. Further, it has been mentioned in Ibn Qudāmah's *al-Mughnî* (vol. 1, p. 12), according to Abū Ḥanîfah it is valid to perform *wuḍū'* with *al-mā' al-muḍāf*. Al-Shaykh al-Ṣadūq, an Imāmî, held that it is valid to perform *wuḍū'* and *ghusl al-janābah* with rose-water.

The Ḥanafîs have relied for proving the validity of *wuḍū'* with *al-mā' al-muḍāf* on this Qur'ānic verse:

...فَلَمْ تَجِدُوا مَاءً فَتَيَمَّمُوا صَعِيدًا طَيِّبًا...

...And when you can find no water, then have recourse to wholesome dust... (5:6)

They say: The verse means, 'when you cannot find water, *muṭlaq* or *muḍāf'*; accordingly when *al-mā' al-muḍāf* is available, it is not valid to resort to *tayammum*. The same verse has been relied upon by the imams of other schools to prove its invalidity. They observe: The word *al-mā'* in the verse brings to one's mind *al-mā' al-muṭlaq* and not *al-mā' al-muḍāf*. Hence the meaning of the verse will be: If you do not find *al-mā' al-muṭlaq*, then resort to *tayammum*. In this case the presence and absence of *al-mā' al-muḍāf* would be irrelevant. This is the correct opinion, because when you ask water from the owner of a cafe or someone else, he will not give you juice or soda, and it is a known fact that the subjects of the Sharî'ah laws are understood on the basis of common usage.

This difference of opinion of the imams of fiqh concerning the interpretation of the word *al-mā'* in the verse is similar to the difference between men of letters concerning the meaning of a couplet or philologists concerning the meaning of a particular word. This difference is one of understanding and *ijtihād* and not of jurisprudential principles and sources.

Al-Kurr and al-Qullatān:

All the schools concur that if the colour, taste or smell of water changes as a result of coming into contact with *najāsah*, it will

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

become *najis,* irrespective of its being *qalîl* or *kathîr,* flowing or stationary, *muṭlaq* or *muḍâf.* But if the smell of water is changed by the diffusion of the smell of *najāsah* without its coming into contact with it (such as where there is a carcass nearby and the air carries its smell to the water) the water will remain *ṭāhir.*

But in the case where *najāsah* mixes with water without changing any of its qualities (colour, taste and smell), Mālik, in one of the two opinions narrated from him, says: It is *ṭāhir* whether it is *qalîl* or *kathîr.* The other schools observe: It is *najis* if *qalîl,* and *ṭāhir* if *kathîr.*

But they differ in their definition of *kathîr.* The Shāfi'îs and the Ḥanbalîs[1] state: *'Kathîr'* is that which has reached two *qullah*s (literally meaning jar, pot, bucket and olla) in accordance with the tradition: If water has reached two *qullah*s it is not affected by *khabath.* Two *qullah*s equal 500 Iraqi *riṭl* (1 *riṭl* is approximately 330 grams). Some scholars of al-'Azhar consider it equal to 12 *tanakah.* The Imāmiyyah observe: *'Kathîr'* is that which is at least equal to a *kurr,* because of the tradition:

إذا بَلَغَ الماءُ قَدرَ كُرٍّ لَم يُنَجِّسهُ شَيْءٌ.

If water has reached the extent of a *kurr* nothing makes it *najis.*

A *kurr* is equal to 1200 Iraqi *riṭl* and approximately to 27 *tanakah.* The Ḥanafîs say: *'Kathîr'* means a quantity of water whose other end remains motionless if one end of it is disturbed.[2]

From this discussion it becomes clear that the Mālikîs do not take into consideration the measures *qullatān* or *kurr,* and there is no specific quantity for water in their opinion. Hence *'qalîl'* and *'kathîr'* quantities are similar for them in that when one of the qualities is changed they become *najis,* not otherwise. Their opinion has been favoured from among the Imāmiyyah by Ibn Abî 'Aqîl who has acted on the general import of the tradition:

الماءُ طَهورٌ لا يُنَجِّسهُ شَيْءٌ إلّا ما غَلَبَ ريحَهُ أوطَعمَهُ أولَونَهُ.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

> Water is pure, and nothing makes it *najis* except that which affects its smell, taste or colour.

But this tradition is general (*'āmm*) and the tradition of *qullatān* and *kurr* is particular (*khāṣṣ*), and the particular enjoys precedence over the general.

The Ḥanafîs also do not take into account *qullatān* and *kurr* relying instead on movement, and regarding this movement I have not found any trace in the Qur'ān and the Sunnah.

A Subsidiary Issue:

The Shāfi'î and the Imāmî schools observe: Liquids other than water, e.g. vinegar and oil, become *najis* merely on coming into contact with *najāsah,* be their quantity *qalîl* or *kathîr,* and regardless of any change that may affect them. This opinion corresponds with the principles of the Sharî'ah because that which is understood from the Prophet's statement:إذابَلَغَ الماءُ قُلَّتَينِ لَمْ يُنَجِّسْهُ شَيْءٌ. is *al-mā' al-muṭlaq.* The Ḥanafîs say: The rule applicable to other liquids is the same as that of *al-mā' al-muṭlaq* in relation to their being *qalîl* and *kathîr,* and hence only their *qalîl,* and not *kathîr,* quantity will become *najis* on contact. It has been mentioned in the *Ḥāshiyah* of Ibn 'Ābidîn (vol. 1, p. 130, printed by al-Maymaniyyah): The rule applicable to liquids, as per the most correct opinion, is the one applicable to water, and even if urine falls into a juice of *kathîr* quantity it will not be polluted, and if blood from someone's foot mixes with the juice it will not become *najis.*

Flowing and Stationary Water (al-Jārî wa al-Rākid):

The schools differ concerning flowing water. The Ḥanafîs observe: Every kind of flowing water--irrespective of its being *qalîl* or *kathîr* and regardless of its connection to a source--will not become *najis* solely on contact. Rather, if there is *najis* water in one

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

vessel and *ṭāhir* water in another and both of them are poured together from a height so that they mix in the air before coming down, all the water will be *ṭāhir*. Similar is the case if the two are made to flow on the ground (Ibn 'Ābidin, vol. 1, p. 131). Thus the criterion is flow, and wherever and in whatever manner it is achieved, flowing water will enjoy the status of *al-mā' al-kathîr*. But if it does not flow, then it is like *qalîl* even if it is connected to a source. On this basis, they have ruled that when rainwater falls on *najis* ground and does not flow on it, the ground will remain *najis*.

Consequently, according to the Ḥanafîs, water which does not become *najis* on coming into contact with *najāsah* is of two types: first, a body of stationary water whose other end remains motionless when one end of it is disturbed; second, flowing water, irrespective of its mode of flow. As to *al-mā' al-qalîl* that becomes *najis* on coming into contact with *najāsah*, it is a body of stationary water whose other end is set in motion if one end of it is disturbed.

The Shāfi'îs neither differentiate between flowing and stationary water nor between one connected to a source and one not connected. The criterion is simply its quantity, *qalîl* or *kathîr*. Hence *kathîr*, which is a body of water at least equal to *qullatān*, will not become *najis* on contact, and that which is less than *qullatān* will become *najis*, whether flowing or stationary, and whether welling from a source or not. They rely on the unqualified nature of the tradition. إذا بَلَغَ الماءُ قُلَّتَين لَمْ يَحمِلْ خَبَثاً.

They say: When water is flowing and there is *najāsah* in it, if the body of the flow containing the *najāsah* has reached the quantity of *qullatān* without there being a change in its qualities, all the water will be *ṭāhir;* and if the quantity of the body is less than *qullatān*, it will be *najis*, although the water above and beneath the flowing body of water will be *ṭāhir*. They interpret a flowing portion (*jiryah*) as the body of water between the two banks of a stream. Therefore, according to the Shāfi'îs the difference between flowing and stationary water is that stationary water is considered altogether as a single body of water, while flowing water, although its parts are connected with each other, is divided into flowing portions, each

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

such portion having a separate status and becoming *najis* only if it is *qalîl* and not otherwise.

Consequently, if one's hand is *najis* and one washes it in one of the portions of flowing water and this portion is less than *qullatān,* it is not valid for one to drink from it or perform *wuḍū'* with it, because it is *najis.* One must wait for the next portion or move upstream or downstream.

A great difference is noticeable between the opinions of the Shāfi'î and the Ḥanfaî schools concerning flowing water; the Ḥanafîs onsider flowing water--even if little--as capable of purifying. This is indicated by their example of two vessels of water, one *ṭāhir* and the other *najis,* and the water becomes *ṭāhir* if the two waters are mixed in a state of flow. The Shāfi'îs, on the other hand, do not give credence to flow even if it is a big stream and consider each 'flowing portion' separately despite the portions being connected with each other.

The Ḥanbalîs say: Stationary water becomes *najis* solely on contact if it is less than *qullatān,* irrespective of whether it is connected to a source or not. But flowing water does not become *najis* unless its qualities (colour, smell and taste) change. Thus the rule applicable to it is the rule applicable to *al-mā' al-kathîr,* even if it is not connected to a source. This opinion is close to the one held by the Ḥanafîs.

As to the Mālikî view, we have already mentioned that in their opinion *qalîl* does not become *najis* solely by contact. They also do not differentiate between stationary and flowing water. To sum up, they do not differentiate between *qalîl* and *kathîr,* flowing and stationary, and water connected to a source and otherwise. The only criterion for them is the change of qualities due to *najāsah.* Hence if *najāsah* changes any one of the qualities of water it becomes *najis,* otherwise it remains *ṭāhir* irrespective of whether it is flowing or stationary, *qalîl* or *kathîr.*

The Imāmiyyah state: Flow has no effect at all and the criterion is the existence of a source of flow or the presence of *kathîr* quantity. Hence if water is connected to a source--even if through a

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

trickle--it will fall under the rule applicable to *kathîr.* That is, it will not become *najis* solely on contact even if it is *qalîl* and stationary, because of the preservative power and abundance of the source. When water is not connected to a source, if it amounts to a *kurr* nothing will make it *najis* except the change of one of its qualities; but if it is less than a *kurr,* it will become *najis* on contact irrespective of its being stationary or flowing, except where it flows downstream, where the upstream part will not become *najis* by an insignificant contact.

It follows that the presence or absence of flow is equal in the eyes of the Imāmiyyah, and it is observable that they stand apart from the other schools in considering the source of flow a criterion and in applying to the water connected to it the rule applicable to *al-mā' al-kathîr* even though it may appear to be *qalîl.* Al-'Allāmah al-Ḥillî is an exception here, because he does not attach any importance to source and considers water to become *najis* solely on contact if its quantity is less than a *kurr.* Rainwater, during rain, is considered by the Imāmiyyah as equivalent to water connected to a source and *al-mā' al-kathîr.* It does not become *najis* by contact and purifies the earth, clothes, vessels and other objects solely by raining upon them after the *najāsah* itself is removed from them.

Purifying Najis Water:

1. Concerning *al-mā' al-qalîl* that has become *najis* by contact without any of its qualities having undergone a change, the Shāfi'îs observe: If water is added to this *najis* water so that they together add up to *qullatān,* it will become both *ṭāhir* and *muṭahhir,* irrespective of whether the water added is *ṭāhir* or *najis.* And if this water is later separated after its coming together, it will retain its *ṭahārah.* Therefore, if a person has two or more vessels, all containing *najis* water, and all their water is collected in a single place so that their total volume reaches *qullatān,* it will become both *ṭāhir* and *muṭahhir* (*Sharḥ al-Muhadhdhab,* vol. 1, p. 136.)

The Ḥanbalîs and most Imāmî legists state: *Al-mā' al-qalîl* is

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

not purified after it is increased to a *kurr* or *qullatān* irrespective of whether the added water is *najis* or *ṭāhir*, because adding *najis* water to another of its kind does not make the whole *ṭāhir*. And similarly *al-mā' al-qalîl* which is *ṭāhir* becomes *najis* by coming into contact with *najis* water. Hence it is necessary for purifying it that it be connected to a *kurr* quantity or to water having a source of flow as per the Imāmî view, and to *qullatān* as per the opinion of the Ḥanbalîs.

2. If the qualities of *al-mā' al-kathîr* have changed because of *najāsah*, it will become *ṭāhir* if the change vanishes; it will not require anything else. This is the opinion of the Ḥanbalî and the Shāfi'î schools. The Imāmiyyah say: If *al-mā' al-kathîr* does not have a source of flow it will not become *ṭāhir* on the vanishing of the change; rather, it is necessary to add a *kurr* of *ṭāhir* water to it after the vanishing of the change, or to connect it with a source of flow, or there be rain over it. And if water has a source of flow it becomes *ṭāhir* solely by the vanishing of the change even if it is *qalîl*.

The Mālikîs observe: Water which has become *najis* is purified by pouring *al-mā' al-muṭlaq* over it until the qualities of the *najāsah* disappear.

The Ḥanafîs state: *Najis* water becomes *ṭāhir* on flowing. Thus if there is *najis* water in a tub and water is poured over it to make it overflow, it will become *ṭāhir*. Similarly, if there is *najis* water in a pool or a pit, and then another pit is dug beside it at a distance, even if small, and the water is made to flow in the channel between them so that it gathers in the other pit, it will become *ṭāhir*. Now if this water becomes *najis* a second time after becoming stationary in the second pit, a third pit will be dug to repeat the same process, and the water will again become *ṭāhir*. This process can go on infinitely.

Therefore a body of water that could not be used while it was stationary, can validly be used for *wuḍū'* if caused to flow in any manner, even if it contains a carcass or people urinate in its downstream part without producing any observable effect in the flow. All this despite the knowledge that it is not connected to any source of flow (Ibn 'Ābidîn, vol. 1, p. 131).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Al-Najāsāt:

Dog: It is *najis* except in the opinion of Mālik, though he says: A vessel licked by a dog will be washed seven times not because it is *najis,* but because of *ta'abbud* (obedience to the command of the Lawgiver). The Shāfi'ī and the Ḥanbalī schools observe: A vessel licked by a dog will be washed seven times, of these once with dust. The Imāmiyyah state: A vessel licked by a dog will be washed once with dust and then twice with water.

Pig: It is similar to a dog in the view of all the schools except the Imāmī which considers it necessary to wash on contamination with it seven times with water only. Similar to it is a dead *juradh,* which is a large land rat.

Corpse: The schools concur regarding the *najāsah* of the carcass of a land animal--other than man--which possesses blood which flows on coming out. As to the human corpse, the Mālikī, Shāfi'ī and Ḥanbalī schools consider it *ṭāhir.* The Ḥanafīs consider it *ṭāhir.* The Ḥanafīs consider it *najis* though it becomes *ṭāhir* after *ghusl.* The Imāmī view is the same though they restrict it to the corpse of a Muslim. There is a consensus among all the schools concerning the *ṭahārah* of the musk derived from the musk-deer.

Blood: The four Sunnī schools concur upon the *najāsah* of blood. Among exceptions to this is the blood of a martyr as long as it is on his body, the blood retained in the body of a slaughtered animal, and the blood of fish, lice, flea and bug. According to the Imāmiyyah, the blood of every animal whose blood flows on coming out is *najis* irrespective of whether it is human blood or not, the blood of a martyr or a non-martyr. They consider the blood of an animal which does not flow out, whether it is a terrestrial or sea animal, as *ṭāhir.* Similarly, they consider the blood retained in a slaughtered animal as *ṭāhir.*

Semen: The Imāmī, the Mālikī and the Ḥanafī schools consider the semen of human beings and other animals as *najis,* though the Imāmīs exclude the animals whose blood does not flow out and regard their semen and blood as *ṭāhir.* The Shāfi'īs regard the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

semen of human beings as well as other animals, except the dog and the pig, as *ṭāhir*. According to the Ḥanbalîs, human semen and that of animals used for food is *ṭāhir* and that of other animals *najis*.

Pus: It is *najis* in the opinion of the four schools and *ṭahir* according to the Imāmîs.

Human Urine and Excrement: They are considered *najis* by consensus.

Animal Excrement: Animals other than man, are either birds or other animals, and among the two are those which are used for food and those which are not. Among the birds that are eaten is the pigeon and the hen, and of those which are not eaten are the eagle and the falcon (although Mālik permits all of them for food). Among animals other than birds, there are some which may be used for food, e.g. the cow and the sheep, and others which are unlawful, e.g. the wolf and the cat (although Mālik allows them).

The schools differ in their opinions regarding the *ṭahārah* of animal excrement. The Shāfi'îs say: Every kind of animal excrement is *najis*. The Imāmîs state: The excrement of all birds is *ṭāhir*, so also that of every animal whose blood does not flow on coming out. But those animals whose blood flows on coming out, if permissible for food--e.g. the camel and the sheep--their excrement is *ṭāhir;* if not--such as the bear and other beasts of prey--their excrement is *najis*. The excrement of every animal whose lawfulness for eating is doubtful is *ṭāhir*.

The Ḥanafîs observe: The excrement of animals other than birds is *najis*. Among the birds themselves, those which excrete in mid-air--e.g. the pigeon and the sparrow--their excrement is *ṭāhir*, and those which excrete on the ground--e.g. hens and geese--their excrement is *najis*.

According to the Ḥanbalî and the Mālikî schools, the excrement of animals permitted for food is *ṭāhir*, and that of animals forbidden for food whose blood flows on coming out, is *najis*, irrespective of its being a bird or any other animal. All the schools concur that the excrement of any animal that eats human excrement is *najis*.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Liquid Intoxicants: All the schools consider it *najis*. The Imāmiyyah add a further qualification: that which is intrinsically liquid. By this condition they include an intoxicant that dries due to an external factor. Hence it continues to remain *najis*. An Imāmī legist states: Both the Sunnī and Shī'ī 'ulamā' concur regarding the *najāsah* of liquor, except a small group from among us and them whose opposition is not taken notice of by the two sects.

Vomit: The four schools consider it *najis* while the Imāmiyyah regard it as *ṭāhir*.

Madhy and Wadhy: The Shāfi'ī, the Mālikī and the Ḥanafī schools consider both the secretions *najis*, while the Imāmiyyah consider both *ṭāhir*. The Ḥanbalīs differentiate between these secretions of animals that make lawful food and others which may not be used for food. They regard these secretions of the former as *ṭāhir* and of the latter as *najis*. *'Madhy'* is the thin genital discharge emitted while caressing, and *wadhy* is a dense discharge emitted following micturition.

In the same manner as the four schools differ with the Imāmiyyah in considering the vomit, *madhy* and *wadhy* as *najis*, the Imāmiyyah differ with the other schools concerning the *najāsah* of the sweat of a *junub* person whose *janābah* is consequent to an unlawful sexual act. They say: The sweat of one who becomes *junub* by fornication, sodomy, masturbation or copulation with an animal and perspires before performing the *ghusl*, is *najis*.

Left-over: The Ḥanafī, the Shāfi'ī and the Ḥanbalī schools state: The left-over of a dog and pig is *najis*. They also concur that the left-over of an ass and a donkey are *ṭāhir*, though not *muṭahhir* (purifying). Rather, the Ḥanbalīs observe: *Wuḍū'* may not be performed by the water left-over by any animal whose meat is not eaten, except a cat and that which is smaller than it in size--e.g. rat and weasel. The Ḥanafīs have added to the left-over of the dog and the pig: the left-over of a drunk person immediately after drinking, the left-over of a cat immediately after eating a mouse, and the left-over of a wolf, lion, panther, leopard, fox and hyena (Ibn 'Abidīn, vol. 1, p. 156).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Imāmiyyah state: The left-over of a *najis* animal--e.g. dog and pig--is *najis,* and that of a *ṭāhir* animal is *ṭāhir,* irrespective of its permissibility for food, i.e. the left-over of every animal is subordinate to its own *ṭahārah* and *najāsah.*

The Mālikīs observe: The left-over water of a dog and a pig is *ṭāhir,* and may be used for drinking and *wuḍū'.* (Ibn Qudāmah, *al-Mughnî,* vol. 1, p. 47, 3rd ed.).

Rules of the Closet:

The Shāfi'î, the Mālikî and the Ḥanbalî schools concur that it is not *ḥarām* to face, or keep one's back to the *qiblah* while relieving oneself in a closet or in open air, provided there is a screen. However, they differ concerning relieving oneself outdoors without a screen. The Shāfi'îs and the Ḥanbalîs do not prohibit it, and the Mālikîs do. The Ḥanafîs say: It is reprehensible to the extent of being *ḥarām,* whether it be in closed or open space (*al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol. 1, *baḥth qaḍā' al-ḥājah*)

The Imāmiyyah observe: It is totally *ḥarām* to face or turn one's back to the *qiblah* while relieving oneself whether it be in a closed or open space, with or without a screen.

All the schools concur that *al-mā' al-muṭahhir* removes *najāsah* from the urinary and anal outlets. The four schools also concur that stones also suffice for purifying the two outlets. The Imāmiyyah say: The urinary outlet is not purified except with water; as to the anal outlet there is an option, either to use water or to wipe it thrice with stones or a *ṭāhir* rag, provided the excrement has not spread around the outlet, in which case only water may be used.

According to the Imāmî, the Shāfi'î and the Ḥanbalî schools repetition is necessary when stones and the like are used for wiping, even if purification is achieved the first time. The Mālikîs and Ḥanafîs do not consider repetition necessary and regard the purification of the outlet as sufficient. Similarly, the Ḥanafîs allow the removal of *najāsah* from the two outlets with any *ṭāhir* liquid other than water.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Al-Muṭahhirāt (The Purifiers):

Al-mā' al-muṭlaq: It is *ṭāhir* and *muṭahhir* by consensus.

Other liquids: Only according to the Ḥanafīs is any *ṭāhir* liquid, e.g. vinegar and rose-water, *muṭahhir.*

The Ground: It purifies the soles of the feet and the sole of shoes in the opinion of the Imāmī and the Ḥanafī schools provided it is walked on or they are rubbed on it and the actual *najāsah* is thereby removed.

The Sun: The Imāmiyyah observe: The sun purifies the earth and other fixed objects, such as trees (including leaves and fruit), grass, buildings and poles. Similarly, it purifies straw mats among movable things, not carpets and sofas. The condition for its purifying is that these objects should dry solely as a result of the sun's heat without the aid of wind.

The Ḥanafīs state: Drying purifies the ground and trees irrespective of its being achieved by the sun or the wind. The Shāfi'ī, the Mālikī and the Ḥanbalī schools concur that the ground is neither purified by the sun nor the wind; rather it requires the pouring of water over it. They differ concerning the manner of its purification.

Al-'Istiḥālah (Transformation): It is the changing of one substance to another (e.g. the changing of deer's blood into musk). It results in purification, by consensus.

Fire: The Ḥanafīs say: The burning of *najāsah* by fire purifies provided the actual *najāsah* disappears. They consider *najis* clay as *ṭāhir* when it is turned into fired clay and *najis* oil *ṭāhir* when made into soap. The Shāfi'ī and the Ḥanbalī schools observe: Fire is not among the *muṭahhirāt.* They hold an extreme position in this regard and consider even the ash and smoke of a *najis* object as *najis.* The Mālikīs regard the ash as *ṭāhir* and the smoke as *najis.*

According to the Imāmiyyah fire plays on part in purification and the criterion in it is *istiḥālah.* If *najis* wood is transformed into ash or *najis* water into steam they become *ṭāhir.* But if wood becomes charcoal and clay becomes earthenware, the *najāsah* will

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

remain because transformation has not occurred.

Tanning: The Ḥanafīs observe: Tanning purifies the skin of a carcass and every other *najis* animal, except pigskin. As to the skin of a dog, it becomes *ṭāhir* by tanning and fit to be prayed on (*al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol. 1, *mabḥath izālat al-najāsah*). The Shāfi'īs say: Tanning is *muṭahhir,* except for the skin of the dog and the pig. The Mālikīs, the Ḥanbalīs and the Imāmīs do not consider tanning as *muṭahhir,* although the Ḥanbalīs allow the use of a *najis* tanned skin where liquids are not involved, so that its use does not lead to the spread of *najāsah.*

Carding: The Ḥanafīs say: Cotton is purified on being carded.

Disposition: According to the Ḥanafīs, when a part of wheat and the like becomes *najis,* if a part of it equal to that which had become impure is disposed of by being eaten, gifted or sold, the remainder will be purified (Ibn 'Abidīn, vol. 1, p. 119).

Rubbing: The Ḥanafīs say: Semen if removed by rubbing does not require water, because *ṭahārah* is achieved by rubbing.

Wiping: The Ḥanafīs observe: An object which has a polished surface, e.g. iron, copper and glass, becomes *ṭāhir* solely by wiping and does not require water. The Imāmīs state: The removal of *najāsah* from the body of an animal, achieved in any manner, is sufficient for purification; but vessels, clothes and the human body require to be purified by water after the removal of *najāsah.*

Saliva: The Ḥanafīs say: If the breast or a finger becomes *najis,* they become *ṭāhir* on being licked thrice (Ibn 'Ābidīn, vol. 1, p. 215).

Boiling: The Ḥanafīs state: If *najis* oil or meat is boiled on fire, they become *ṭāhir.* A group of Imāmiyyah legists observe: The grape juice on boiling becomes *najis,* and when two-thirds of it evaporates on boiling it automatically becomes *ṭāhir.*

Conditions Requiring Wuḍū':

Discharge of Urine, Faeces and Wind: There is a consensus among Muslims that discharge of urine and excrement, as well as wind, cause *wuḍū'* to break. The coming out of a worm, stone, blood

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and pus breaks the *wuḍū'* in the opinion of the Shāfi'ī, Ḥanafī and Ḥanbalī schools and not in the opinion of the Mālikīs if these things have been produced in the stomach. But if they are not produced in the stomach (e.g. as when someone has swallowed a pebble and it comes out) the *wuḍū'* will break. The Imāmīs observe: The *wuḍū'* will not break unless these things are discharged stained with excrement.

Discharge of Madhy and Wadhy: According to the four schools their discharge breaks the *wuḍū'*, but doesn't according to the Imāmiyyah. The Mālikīs exempt a person who suffers with a chronic flow of *madhy*.

Loss of Consciousness: If someone loses his senses due to intoxication, madness, fainting or epilepsy, *wuḍū'* is broken, by consensus of all the schools. As to sleep, the Imāmiyyah say: Sleep breaks the *wuḍū'* when it prevails over the mind, the hearing and the vision so that the person asleep neither hears nor understands the talk of those present nor sees anyone of them, irrespective of whether he is lying down, standing or sitting. The Ḥanbalī view is nearly the same. The Ḥanafīs observe: If a person who has performed *wudū'* sleeps lying down or reclining on one of his sides, his *wuḍū'* breaks. But if he dozes while sitting, standing, kneeling or prostrating, it will not. Hence if one sleeps in his *ṣalāt* in any of its postures, his *wuḍū'* remains intact even if he sleeps for a long period (al-Shi'rānī, *al-Mīzān, mabḥath asbāb al-ḥadath*).

The Shāfi'īs state: If (the sleeping posture is such that) the outlet of the wind is pressed firmly like a capped bottle, the *wuḍū'* is not broken by sleep, otherwise it is broken. The Mālikīs differentiate between heavy and light sleep. Hence if sleep is light the *wuḍū'* remains intact; so is the case if the person in *wuḍū'* sleeps deeply for a short period while his outlet is blocked. But if he sleeps soundly for a long duration, his *wuḍū'* will break irrespective of whether the outlet is blocked or not.

Emission of Semen: In the opinion of the Ḥanafīs, the Mālikīs and the Ḥanbalīs, emission of semen breaks the *wuḍū'*; it does not in the opinion of the Shāfi'īs. The Imāmiyyah state: Emission of semen

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

requires *ghusl* and not *wuḍū'*.

Touch: The Shāfi'îs observe: If a man in *wuḍū'* touches (the skin of) an *ajnabî* woman (any woman apart from wife and female relations within prohibited degrees of marriage) without there being any intervening medium (like clothing), his *wuḍu'* will break. But if the woman is not an *ajnabî*--such as one's mother or sister--the *wuḍū'* will not break. The Ḥanafîs say: *Wuḍū'* is not broken except by touch accompanied with erection. The Imāmiyyah say: Touch has absolutely no effect. That was concerning touching women. As to a person in *wuḍū'* touching his frontal or rear private parts without intervening medium, the Imāmî and the Ḥanafî schools do not regard that as invaliding *wuḍū'*. The Shāfi'îs and the Ḥanbalîs say: *Wuḍū'* is invalidated by such a touch regardless of its being with the palm of one's hand or its back. The Mālikîs are said to differentiate between touching with the palm--in which case the *wuḍū'* is broken--and touching with the back of the hand--in which case it remains intact (Ibn Rushd, *al-Bidāyah wa al-nihāyah, mabḥath nawāqiḍ al-wuḍū'*).

Vomiting: According to the Ḥanbalî school, vomiting in general breaks *wuḍū'*. In the opinion of the Ḥanafîs it does so only when it fills the mouth. In the opinion of the Shāfi'î, the Imāmî and the Mālikî schools, it does not break the *wuḍū'*.

Blood and Pus: According to the Imāmiyyah, the Mālikîs and the Shāfi'îs, anything that comes out of the body from a place other than the two outlets--e.g. blood and pus--does not invalidate the *wuḍū'*. The *wuḍū'* is broken, say the Ḥanafîs, if it spreads from its source. The Ḥanbalîs say: The *wuḍū'* is broken if the quantity of blood or pus coming out is large.

Laughter: There is a consensus among all the Muslims that laughter makes *ṣalāt bāṭil*. It does not invalidate the *wuḍū'*, during or outside *ṣalāt*, except in the opinion of the Ḥanafîs, who say: *Wuḍū'* is broken if one laughs during *ṣalāt*, but not if laughter occurs outside it.

Meat of a Slaughtered Animal: Only the Ḥanbalîs consider the *wuḍū'* to break if a person eats the meat of a slaughtered animal.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Istiḥāḍah Blood: Al-'Allāmah al-Ḥillī, one of the major Imāmī legists, writes in *al-Tadhkirah*: The discharge of *istiḥāḍah* blood, if its quantity is little, requires *wuḍū'*. Other Imāmī 'ulamā', except Ibn Abī 'Aqīl, have also adopted this view. Mālik observes: *Wuḍū'* is not compulsory for a woman having *istiḥāḍah* discharge.

The Objects of Wuḍū':

Legists consider *ḥadath* to be of two kinds: minor and major. Minor *ḥadath* requires only *wuḍū'*, and the major one is of two types: that which requires ony *ghusl* and that which requires both *ghusl* and *wuḍū'*. The details will be given shortly. The presence of the minor *ḥadath* (*al-ḥadath al-'aṣghar*) is a hindrance to the performance of the following acts:

1. *Wājib* and *mustaḥabb ṣalāt,* as per the consensus of all the schools. The Imāmiyyah have excepted the funeral prayer (*ṣalāt al-janāzah*), observing: It is not necessary to be *ṭāhir* for *ṣalāt al-janāzah,* though it is *mustaḥabb* to be so, considering that it is a prayer and not *ṣalāt* in its real sense. This will be further discussed in its proper place.

2. *Ṭawāf,* like *ṣalāt,* is not valid without *ṭahārah* according to the Mālikī, Shāfi'ī, Imāmī and Ḥanbalī schools, in accordance with the tradition.الطَّواف في البَيت صلاةٌ (*Ṭawāf* in the Sanctuary is *ṣalāt*). The Ḥanafīs say: One who performs *ṭawāf* of the Ka'bah in a state of *ḥadath* performs it validly, though he sins thereby.

3. According to the four schools, *ṭahārah* is *wājib* for performing prostration (*sujūd*) made obligatory by the recitation of certain verses of the Qur'ān and the prostration performed to express gratitude (*shukr*). The Imāmiyyah consider it *mustaḥabb.*

4. All the schools concur that it is prohibited to touch the script of the Qur'ān without *ṭahārah,* but they differ regarding the permissibility of someone in a state of minor *ḥadath* writing the Qur'ān, reading it from a script or from memory, touching it through an intervening medium and wearing it as an amulet. The Mālikīs observe: It is not permissible for him to write it or touch its binding

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

even through an intervening medium, though he may read it from a script or from memory. But they, i.e. the Mālikîs, differ among themselves regarding carrying it as an amulet.

The Ḥanbalîs state: Writing it and carrying it as an amulet with a cover is permissible.

The Shāfi'îs say: It is not permissible to touch its cover even if detached from it and its hanger while it is hanging from it, though it is permissible to write it, carry it as an amulet, and to touch a cloth embroidered with Qur'ānic verses.

The Ḥanafîs observe: It is not permissible to write or touch the Qur'ān even if it is written in a different language; but it is permissible to read it from memory.

According to the Imāmî school, it is *ḥarām* to touch Arabic script of the Qur'ān without an intervening medium, irrespective of whether the script is in the Qur'ān itself or somewhere else. But it is not *ḥarām* to recite or write it, or carry it as an amulet and to touch its non-Arabic transcription, excepting the glorious name, 'Allah,' which it is *ḥarām* for a person in a state of *ḥadath* to touch, regardless of the language in which it is written and irrespective of whether it occurs in the Qur'ān or elsewhere.

The Essentials of Wuḍū' (Farā'iḍ al-Wuḍū')

Niyyah: It means the intention to perform an act with a motive of obedience and submission to the command of God Almighty. The schools concur that *niyyah* is essential for *wuḍū'* and its time is at the commencement of *wuḍū'*. The Ḥanafîs say: The validity of *ṣalāt* does not depend upon a *wuḍū'* performed with *niyyah*. Hence if a person washes to cool or cleanse himself and it includes those parts of the body which are washed in *wuḍū'* and then performs *ṣalāt*, his *ṣalāt* is valid, because the purpose of the *wuḍū'* is to attain *ṭahārah* and it has been achieved. But they exclude water which is mixed with water left over by a donkey or mixed with date-wine, considering *niyyah* necessary in these cases (Ibn 'Ābidîn, vol. 1, p. 76).

Washing the Face: 'Washing the face' means causing water to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

flow over it, and it is obligatory to do it once. Its extent lengthwise is from the place where the hair grow to the end of the chin. The Shāfi'īs observe: It is also obligatory to wash the area under the chin. Its extent breadth-wise, in the opinion of the Imāmīs and the Mālikīs, is the area covered between the thumb and the middle finger (when the open hand with the thumb pushed back is streched across the face), while in the opinion of the other schools it is the area between the two earlobes.

The Imāmiyyah consider it *wājib* to start washing the face down from the top and invalid to do its reverse. The four schools say: That which is *wājib* is to wash the face, irrespective of how it is done and from where it starts, though it is better to start from the top.

Washing of Hands: The Muslims concur that it is *wājib* to wash the hands along with the elbows once. The Imāmiyyah consider it *wājib* to start from the elbows and consider its reverse *bāṭil* (invalid). Similarly, they consider it *wājib* to wash the right hand before the left. The other schools observe: That which is *wājib* is to wash them, in any manner, though washing the right hand first and starting up from the fingers and washing towards the elbow is better.

Wiping the Head: The Ḥanbalīs observe: It is *wājib* to wipe the whole head and the ears. In their opinion washing suffices in place of wiping, provided the hand is passed over the head. The Mālikīs say: It is *wàjib* to wipe the whole head except the ears.

The Ḥanafīs regard as *wājib* the wiping of one-fourth of the head. It also suffices if the head is dipped in water or water is poured over it.

The Shāfi'īs state: It is *wājib* to wipe a part of the head, even if little. Washing and sprinkling also suffice in place of wiping.

The Imāmiyyah observe: It is *wājib* to wipe a part of the frontal part of the head and the wiping of a minimal area is sufficient. It is not valid to wash or sprinkle. They also consider it *wājib* that the wiping should be with the wetness of the earlier act of the *wuḍū'* performed (i.e. the washing of hands). Hence if hands are rinsed anew with water for wiping the *wuḍū'* will become *bāṭil.* The other four schools consider it *wājib* that new water be used (Ibn Qudāmah,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

al-Mughnî, vol. 1, *faṣl masḥ al-ra's* and al-'Allāmah al-Ḥillî, *al-Tadhkirah*). As to wiping the turban (*'imāmah*), the Ḥanbalîs permit it, provided an end of the turban hangs down in the manner termed *taḥt al-ḥanak*. The Ḥanafîs, the Shāfi'îs and the Mālikîs say: It is valid on the presence of an excuse, not without it. The Imāmîs observe: It is in no manner valid to wipe the turban because of the words of the Qur'ān وَامسَحوا بِرُؤوسِكُمْ (and wipe your heads), and the turban is not 'head.'

The Two Feet: The four schools state: It is *wājib* to wash the two feet along with the ankles once. The Imāmiyyah observe: It is *wājib* to wipe the two feet with the wetness of the earlier act of *wuḍū'* from the head of the toes to the ankles. By 'ankle' is implied the raised bone of the foot. It is valid to wipe the left foot before the right one in the opinion of all the schools, though it is against precaution (*khilāf al-'iḥtiyāṭ*) in the view of the Imāmiyyah and against preference (*khilāf al-'awlā*) in the opinion of the other four schools.

The difference of opinion concerning the wiping or washing of the feet has its basis in the interpretation of the sixth verse of *Sūrat al-Mā'idah*:

يأَيُّهاالَّذينَءامَنوٓاْ إِذاقُمتُمٓ إِلَى الصَلَوٰة فَاغسِلوا وُجوهَكُم وَأَيدِيكُمْ الَى المَرافِقِ
وَا مسَحوا بِرءُوسِكُم وَأَرجُلَكُمْ إِلَى الكَعبَينِ...

O believers, when you stand up to pray, wash your faces, and your hands up to the elbows, and wipe your heads, and your feet up to the ankles (5:6)

Those interested in investigating the meaning of the verse should refer to al-Rāzî's exegesis of the Qur'ān.

The four schools allow the wiping of shoes and socks instead of washing the feet, while the Imāmîs consider it as invalid in accordance with this statement of Imām 'Alî (*'a*):

ماأبالي أمسَح عَلَى الخُفَّينِ أوعَلَى ظَهرِ عِيرٍ بالفَلاةِ.

I see no difference between the wiping of the shoes and wiping the back of a wild ass.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Sequence (al-Tartīb): It is in accordance with what the verse mentions: First the face, then the hands, and then the head, followed by the feet. This sequence is *wājib* and a condition for the validity of *wuḍū'* in the opinion of the Imāmīs, Shāfi'īs and Ḥanbalīs.

The Ḥanafīs and the Mālikīs say: The observance of the sequence is not *wājib* and it is permissible to start with the feet and end with the face.

Continuity (al-Muwālāt): It is the observance of continuity in the washing of the different parts, i.e. to proceed immediately to the next act after having completed the earlier. The Imāmīs and the Ḥanbalīs consider it *wājib,* the former adding a further condition that the part washed earlier should not dry before beginning washing the next. Hence if the whole of the part washed earlier dries the *wuḍū'* will become *bāṭil* and it will be *wājib* to start it anew.

The Ḥanafīs and the Shāfi'īs say: Continuity is not obligatory, though it is reprehensible (*makrūh*) to separate the washing of the different parts without any excuse, and on the presence of an excuse the *karāhah* disappears.

The Mālikīs observe: The observance of continuity is *wājib* only when the person performing *wuḍū'* is conscious of it and when no unforeseen incident takes place (e.g. spilling of the water he had brought for performing *wuḍū'*). Hence if he washes the face and forgets to wash the hands, or when he lacks the amount of water he believes to be necessary for *ṭahārah,* he may complete the *wuḍū'* from where he had left off, even if a period of time has passed.

Conditions of Wuḍū':

Wuḍū' has certain conditions. Among them are: The water used should be *muṭlaq* and *ṭāhir* and must not have been used for removing *khabath* or *ḥadath,* as per the details given while discussing water. There should be no hindrance such as illness in the way of using water or any urgent need for it. Moreover, the parts of the body involved in *wuḍū'* should be *ṭāhir* and without a covering that might prevent water from reaching the skin. Also there should be

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

sufficient time. The last condition will be dealt with in detail in the chapter on *tayammum.* All or most of these conditions are accepted by all the schools.

The Imāmiyyah further consider it necessary that the water and the vessel used for *wuḍū'* should not have been usurped, and the place where *wuḍū'* is performed and where its water falls should be legitimate and not encroached land. If either of these two conditions does not exist, the *wuḍū'* will become *bātil.* In the view of the other schools the *wuḍū'* will be valid though the performer of such a *wuḍū'* will have sinned (Ibn 'Ābidîn, vol. 1 p. 128, and *Sharḥ al-Muhadhdhab,* vol. 1, p. 251).

Mustaḥabbāt of Wuḍū':

The number of acts recommended (*mustaḥabb*) in *wuḍū'* is very large. They include starting by washing the hands, rinsing the mouth and drawing water into the nose. The Ḥanbalîs consider the last two *wājib.* Wiping the ears is also among them, though the Ḥanbalîs consider it *wājib* as well and the Imāmîs impermissible. Brushing the teeth and facing the *qiblah* while performing *wuḍū'* is recommended and so is the reciting of traditional prayers. It also includes, in the opinion of the four schools, the washing of the face and hands twice and thrice.

The Imāmîs observe: Washing once is *wājib,* twice *mustaḥabb,* and thrice *bid'ah* (heretical) and the person doing so is a sinner if he performs it as a religious duty. But if he does not, there is no sin upon him, although the *wuḍū'* will become *bāṭil* on his wiping (the head) with this water (Āqā Riḍā al-Hamadānî's *Miṣbāḥ al-faqîh*). There are many other recommended acts which are mentioned in voluminous books.

Doubt Regarding Ṭahārah and Ḥadath:

If a person certain of having been *ṭāhir* doubts whether a *ḥadath* has occurred, he remains *ṭāhir.* But if a person certain of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ḥadath having occurred doubts having achieved *ṭahārah* later, his *ḥadath* shall remain. That is, he shall act in accordance with his earlier certainty and brush aside the subsequent doubt. This is based on the following tradition.

لا تَنقُضِ اليَقينَ أبداً بِالشَّكِّ، وَلكِنْ تَنْقُضُهُ بِيَقينٍ مِثلِه.

A condition of certainty is never invalidated by a doubt, but it can be invalidated by a certainty resembling it.

This principle has not been disregarded by anyone except the Mālikîs, who say: If a person is certain of having been *ṭāhir* and doubts later about the occurrence of *ḥadath,* he is considered *ṭāhir.* But they do not differentiate between the two situations.

If both *ṭahārah* and *ḥadath* have occurred and it is not known which of the two was subsequent so as to be made the basis, the Ḥanafîs consider the person in such a situation *ṭāhir* while the Imāmî authorities consider his *ḥadath* to prevail.

The Shāfi'îs and the Ḥanbalîs observe: The opposite of the earlier condition will be accepted. Hence if he possessed *ṭahārah* earlier he will now be considered in the condition of *ḥadath* and vice versa.

There is a fourth view which takes the condition prior to the occurrence of the *ṭahārah* and *ḥadath* by denying the effect of both, because both possibilities being equal are nullified by the conflict, leaving the prior condition to be relied upon. That which is nearer to caution in this matter of ritual is always to renew *ṭahārah* irrespective of whether the prior condition is known or unknown.

The Imāmîs and the Ḥanbalîs say: When a person performing *wuḍū'* doubts whether he has washed a particular part or wiped his head, if the doubt occurs while performing the *wuḍū'* he will repeat the doubtful part and complete rest of the *wuḍū'.* But if the doubt occurs after the completion of *wuḍū'* it will not be heeded, because it is a doubt which has occurred in an *'ibādah* after its completion.

Al-'Allāmah al-Ḥillî has narrated in *al-Tadhkirah* from some Shāfi'îs that they do not differentiate between a doubt occurring

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

during *wuḍū'* and one occurring after its completion. They consider it *wājib* to restart from the place of doubt and to complete the *wuḍū'* in both the situations.

The Ḥanafîs observe: Every part of the *wuḍū'* will be viewed separately. Hence if there occurs a doubt concerning a particular part before moving on to the next it will be repeated and not otherwise. For example, if he doubts having washed his face before starting washing his hands, he will restart from the face, and if he has started washing the hands he will carry on without heeding the doubt.

All the schools concur that the doubt of a chronically uncertain person (*kathîr al-shakk*) is not a valid doubt; i.e. his doubt has no value and it is *wājib* for him to carry on without heeding it, whatever the circumstances.

NOTES:

1. The Ḥanbalîs observe: *Al-mā' al-kathîr* does become *najis* on contact, provided the *najāsah* is not urine or excrement. On contact with the two it will become *najis,* irrespective of whether its qualities have changed or not, unless it happens to be like those puddles visible on the way to Makkah (Ibn Qudāmah, *al-Mughnî,* vol. 1).

2. Apart from these, there are other definitions of *al-mā' al-kathîr* which have been omitted. Among them are those which state that *al-kathîr* is forty *qullah*s, 2 pails (*dalw*), and 40 pails.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

GHUSL AND TAYAMMUM

GHUSL:

A *ghusl* (ritual bath) is required after the following different states of ritual impurity:

1. Major ritual impurity, as caused, e.g., by sexual intercourse (*janābah*).
2. Menstruation (*ḥayḍ*).
3. Childbirth (*nifās*).
4. Death (*mawt*).

These four kinds of *ghusl* are recognized by all the schools. The Ḥanbalîs add a fifth to this list: the *ghusl* of a non-Muslim (*kāfir*) on his embracing Islam.

The Shāfi'î and the Imāmî schools observe: If a *kāfir* embraces Islam while being in a state of *janābah,* he will be required to perform the *ghusl* of *janābah,* not for embracing Islam; but if he is not in a state of *janābah,* he will have no obligatory (*wājib*) *ghusl* to perform.

The Ḥanafîs say: No. *ghusl* will be *wājib* upon him (on embracing Islam), irrespective of whether he is in a state of *janābah* or not (Ibn Qudāmah, *al-Mughnî,* i, 207).

The Imāmiyyah add to the above four ritual baths two more:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

1. *Ghusl al-mustaḥāḍah* (i.e. the bath required of a woman at the end of her periods when she has intermittent discharge of blood).
2. The ritual bath after touching a corpse.

They consider it *wājib* for a person who has touched a corpse after it has turned cold and before it has been given a ritual bath, to perform a bath (more details will follow). From what has been mentioned it becomes clear that the number of obligatory baths are four in the opinion of the Ḥanafîs and the Shāfi'îs, five in the opinion of the Ḥanbalîs and the Mālikîs, and six in the opinion of the Imāmîs.

Ghusl al-Janābah:

The state of *janābah,* which makes a *ghusl* obligatory, occurs in two situations.

1. On the discharge of semen, whether in sleep or the waking state. The Imāmî and the Shāfi'î schools say: The discharge of semen makes the *ghusl wājib,* regardless of whether one is sexually aroused or not. The Ḥanafîs, the Mālikîs, and the Ḥanbalîs observe: *Ghusl* is not *wājib* unless the discharge is accompanied with pleasure. Hence if the discharge is due to a stroke, or cold or diesease, and without sexual arousal, no bath is required. But if the seminal secretions are released internally without coming out of the body, *ghusl* is not *wājib* except in the opinion of the Ḥanbalîs.

A Subsidiary Issue: If a person on waking up finds wetness in his clothes and is unable to ascertain whether it is semen or *madhî,* the Ḥanafîs state that *ghusl* is *wājib.* The Shāfi'î and Imāmî schools say: It is not *wājib* because the pre-existence of *ṭahārah* is certain while the occurrence of *ḥadath* is doubtful. The Ḥanbalîs observe: if he has seen something before sleeping which had excited him or thought about it, *ghusl* will not be *wājib;* and if the sleep was not preceded by any cause entailing such excitement, *ghusl* will become *wājib* on the presence of any dubious wetness.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

2. The insertion of the glans (the part of the male organ covered by foreskin prior to circumcision) into the vagina or anus. The schools concur that the mere insertion of the glans makes *ghusl wājib,* even if no emission occurs, though they differ regarding the conditions, whether the sole insertion necessitates *ghusl* irrespective of its mode or if only a particular manner of insertion requires *ghusl.*

The Ḥanafīs consider *ghusl wājib* on the fulfilment of the following conditions:

i. Puberty (*bulūbh*): Hence if only one of the partners has attained puberty the *ghusl* will be *wājib* only on the one who has attained puberty. If both of them have not attained puberty, *ghusl* is not *wājib* on either.

ii. There should be no thick sheath preventing the warmth of the locale from being felt.

iii. The person with the passive role should be a living human being. Hence if it is an animal or a corpse, *ghusl* is not *wājib.*

The Imāmī and the Shāfi'ī schools say: The insertion of the glans suffices for making *ghusl wājib,* irrespective of whether the person has attained puberty or not, is the active or the passive partner, or if there exists a sheath or not, whether it is by choice or under duress, and whether the passive participant is alive or dead, a human being or an animal.

The Ḥanbalīs and the Mālikīs observe: *Ghusl* is *wājib* on both the partners if a sheath preventing the sensation of pleasure from being felt is not used, regardless of whether the passive participant is a human being or an animal and dead or alive.

As to puberty, the Mālikīs state: *Ghusl* is *wājib* upon the active partner if he is a *mukallaf* and the passive participant is capable of having intercourse. It is *wājib* upon the passive partner if the active partner is an adult. Hence, if a boy has intercourse with a woman, *ghusl* will not be *wājib* upon her if she does not have an orgasm. The Ḥanbalīs further stipulate that the male should not be less than ten years and the female not less than nine.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Acts Whose Validity Depends Upon Ghusl al-Janābah:

All those acts which are dependent (for their validity or permissibility) upon *wuḍū'* are also dependent upon *ghusl al-janābah,* such as *ṣalāt, ṭawāf* and touching the script of the Qur'ān. To this is added halting in a mosque, with all the schools concurring that it is not permissible for a *junub* person to remain in a mosque, though they differ regarding the permissibility of his passing through it, such as when he enters from one door and leaves through another. The Mālikîs and the Ḥanafîs say: It is not permissible unless necessary.

According to the Shāfi'îs and the Ḥanbalîs, passing is permissible though remaining is not.

The Imāmiyyah observe: It is not permissible (for a *junub* person) either to remain or pass through al-Masjid al-Ḥarām and Masjid al-Rasūl; but he may pass through and not remain, in other mosques, in accordance with verse, 43 of the *Sūrat al-Nisā'* ولاجُنُباً إلاّ عابِري سَبيلٍ i.e. *junub* persons should not enter the place of worship in mosques except as passersby. The Imāmîs exclude the above-mentioned two mosques on the basis of particular proofs.

As to the reciting of the Qur'ān, the Mālikîs state: It is forbidden for a *junub* person to recite anything from the Qur'ān except a little for the sake of protection or citing it as a proof. What the Ḥanbalîs observe is close to this view.

The Ḥanafîs say: It is not valid except where the *junub* person is a teacher of Qur'ān and he instructs by pronouncing each word separately. The Shāfi'îs consider it *ḥarām* to even recite a single word except when it is with the intention of remembrance, such as saying the *tasmiyah* (بسم الله الرّحمٰن الرّحيم) before meals.

The Imāmiyyah observe: It is not *ḥarām* for a *junub* person to recite the Qur'ān except the four *sūrahs* called *al-'aẓā'im al-'arba'ah,* which are *Iqra', al-Najm, Ḥā' Mîm Sajdah* and *Alif Lām Mîm Tanzîl;* reciting a part of them is also *ḥarām.* Apart from these *sūrahs,* its recital is permissible, though if it exceeds seven verses it is considered *makrūh* (reprehensible), and the *karāhah*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

(reprehensibility) is aggravated if it exceeds 70 verses.

The Imāmiyyah have added (to things dependent upon *ghusl al-janābah*) fasting during Ramaḍān and its *qaḍā';* they observe: The fast is not valid if a person remains *junub,* intentionally or forgetfully, at dawn. But if he sleeps during the day or at night and wakes up in the morning to find that he had an emission during sleep his fast remains valid. The Imāmiyyah are alone among the schools in holding this view.

The Essentials of Ghusl al-Janābah:

That which is *wājib* in a *wuḍū'* is also *wājib* in *ghusl al-janābah*--such as that the water used should be *ṭāhir* and *muṭlaq,* the prior *ṭahārah* of the body (from *khabath*), and the absence of anything on the body that may prevent water from reaching the skin, as already mentioned while discussing *wuḍū'. Niyyah* is also *wājib,* except in the opinion of the Ḥanafīs who do not consider it among the conditions for the validity of *ghusl.*

The four Sunnī schools do not require any particular manner of performing the *ghusl* and consider it sufficient that it should include the whole body in any possible manner, irrespective of whether one begins from the top or the bottom. The Ḥanafīs add that rinsing the mouth and drawing water into the nose is also *wājib.* They also say: It is *mustaḥabb* to start with the head, washing next the right half of the body and then the left half.

The Shāfi'ī and the Mālikī schools observe: It is *mustaḥabb* to start with the upper parts of the body before moving to the lower parts, except the private parts, which it is *mustaḥabb* to wash first.

According to the Ḥanbalīs, washing the right half before the left is *mustaḥabb.*

The Imāmiyyah recognize two forms of *ghusl al-janābah: tartîb* (in order) and *irtimās* (by immersion). In the *tartîb* form, one pours water on himself. Here they consider it *wājib* that the start should be made with the head, followed by the right half and then the left. If he breaks this order by washing first that which is to come later in the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

order, the *ghusl* would be invalid. In the *irtimās* form one submerges the whole body under water all at once, and if any part of the body remains unsubmerged it will not suffice.

In the opinion of the Imāmiyyah *ghusl al-janābah* dispenses the need for *wuḍū';* they observe: Every *ghusl* requires *wuḍū'* except *ghusl al-janābah.* The other four schools do not differentiate between *ghusl al-janābah* and other baths, in that none of them suffices where *wuḍū'* is a requirement.

Menstruation (al-Ḥayḍ):

Lexically *ḥayḍ* means 'flood' and in the terminology of the legists it is the periodic blood discharge experienced by women during specific days. Its effect is abstention from *'ibādah* and termination of the period of *'iddah* of a divorcée (if it is the third mense after the divorce). It is usually black or red, thick and warm, and comes out in spurts, though its qualities may differ from those mentioned depending upon constitution.

The Mensturating Age:

All the schools concur that any discharge that occurs before a girl reaches the age of 9 years cannot possibly be menstrual; it is due to disease or injury. The same is true of the discharge of a woman who has reached the age of menopause. The schools differ concerning the age of menopause. The Ḥanbalīs consider it to be 50 years, the Ḥanafīs as 55, and the Mālikīs as 70.

The Shafi'īs observe: As long as a woman is alive she can have menses, though generally it ceases at the age of 62 years.

The Imāmiyyah say: The age of menopause for a non-Qurayshī woman and one whose being Qurayshī is doubtful is 50 years, and for a Qurayshī woman 60 years.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Period of Menstruation:

The Ḥanafîs and the Imāmîs state: The minimum period of menstruation is three days and the maximum ten. Hence any discharge that does not last up to three days or exceeds ten days is not considered *ḥayḍ.*

The Ḥanbalîs and the Shāfi'îs observe: The minimum period is one day and night and the maximum 15 days.

According to the Mālikîs, its maximum period for a non-pregnant woman is 15 days. They do not specify any minimum period.

The Imāmîs say: The minimum period between two menstruations is the maximum period of *ḥayḍ,* i.e. 10 days.

A Subsidiary Issue: The schools differ concerning *ḥayḍ* during pregnancy, as to whether any discharge of blood during it can be considered *ḥayḍ:* The Shāfi'î, Mālikî and most Imāmî legists observe: *Ḥayḍ* can accompany pregnancy. The Ḥanafîs, the Ḥanbalîs and al-Shaykh al-Mufîd from among the Imāmiyyah say: *Ḥayḍ* can never occur during pregnancy.

Rules Applicable to a Ḥā'iḍ:

All that which is forbidden for a *junub* person is also *ḥarām* for a *ḥā'iḍ* (a menstruating woman), such as touching the script of the Qur'ān, staying in a mosque, etc. *Ṣalāt* (prayer) and *ṣawm* (fast) are not required of her during this period, though she will have to perform the *qaḍā'* of the *ṣawm* of the month of Ramaḍān. The *qaḍā'* of *ṣalāt* is not required of her in accordance with the aḥādîth and for saving her from the strain of performing the large number of daily prayers omitted.

It is forbidden to divorce a *ḥā'iḍ;* though in the opinion of the four Sunnî schools, if given it is valid, although the divorcer will be considered as having sinned. Such a divorce is void in the opinion of the Imāmiyyah if the divorcer has consummated the marriage, or is not travelling, or if the divorcée is not pregnant. Thus the divorce of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

a *ḥā'iḍ* who is pregnant, or whose marriage has not been consummated, or whose husband is away from home, is valid. This has been discussed in detail in the chapter on divorce.

All the schools concur that *ghusl al-ḥayḍ* does not suffice for *wuḍū'* and the *wuḍū'* of a *ḥā'iḍ* prior to *ghusl* does not remove her *ḥadath.* There is also consensus regarding it being *ḥarām* to have sexual intercourse with her during *ḥayḍ.* As to any other kind of sexual contact with her between her navel and knees, the Imāmīs and the Ḥanbalīs say: It is permissible unconditionally, regardless of there being any covering in between or not.

The preponderant (*mashhūr*) Mālikī opinion is that it is not permissible even if there is a covering in between. The Ḥanafīs and the Shāfi'īs say: It is *ḥarām* without a covering and permissible with it.

Most Imāmī legists observe: If a person overcome by sexual desire has intercourse with his *ḥā'iḍ* wife, he must atone by giving a dīnār in charity if the intercourse occurs during the initial days of the *ḥayḍ,* a half dīnār if in the middle of this period, and a quarter if in its last days.

The Shāfi'īs and the Mālikīs say: It is *mustaḥabb* and not *wājib* to give charity. As to the woman, there is no atonement for her in the opinion of all the schools, though she will be considered a sinner if she is willing and co-operative.

The Manner of the Ghusl:

The *ghusl al-ḥayḍ* is exactly like *ghusl al-janābah* in that the water used should be *ṭāhir* and *muṭlaq,* the body should be *ṭāhir,* there should be nothing preventing the water from reaching the skin, the *niyyah* should have been made, and--according to the Imāmīs--the start should be made with the head, followed by the right and then the left half of the body. Also, according to the Imāmīs it is sufficient to submerge the entire body under water.

The other four schools consider it sufficient to wash the whole body in any manner, as already mentioned while discussing *ghusl*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

al-janābah.

Al-'Istiḥāḍah:

Istiḥāḍah is a term used by the legists for the blood discharge which occurs outside the periods of *ḥayḍ* and *nifās* (postpartal discharge) and which cannot be considered *ḥayḍ* (such as a discharge occurring after the maximum period of *ḥayḍ* or within its minimum period). It is usually yellowish, cold, thin and flows out slowly as opposed to *ḥayḍ.*

The Imāmīs regard a *mustaḥāḍah* (a woman undergoing *istiḥāḍah*) to be of three kinds:

1. *Ṣughrā* (minor), when the blood stains the cotton without soaking it. Her duty is to perform *wuḍū'* for every *ṣalāt* while changing the cotton. Thus she may not perform two *ṣalāt*s with a single *wuḍū'*.

2. *Wusṭā* (medium), when the blood soaks the cotton without flowing from it. Her duty is to perform one *ghusl* every day before daybreak, change the cotton, and to perform *wuḍū'* before every *ṣalāt.*

3. *Kubrā* (major), when the blood flows after soaking the cotton. Her duty is to perform three *ghusl*s daily, the first before the daybreak prayer, the second for the midday and afternoon prayers and the third for the sunset and night prayers. Most Imāmī legists observe: It is also *wājib* in this situation to perform *wuḍū'* and change the cotton.

The other four schools do not recognize these categories, as they do not consider it obligatory for a *mustaḥāḍah* to perform *ghusl.* Al-Sayyid Sābiq in *Fiqh al-sunnah* (1957, p. 155) observes: "She has no *wājib ghusl* to perform for any *ṣalāt* or at anytime except a single *ghusl* on the termination of *ḥayḍ;* that is, the *ghusl* is for *ḥayḍ* and not for *istiḥāḍah.* This has been the opinion of the majority (*jumhūr*) of scholars of the former and later generations."

According to the four schools, those things which are prohibited during *ḥayḍ,* such as reading and touching the Qur'ān, entering a

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

mosque, *i'tikāf, ṭawāf,* sexual intercourse, etc.--as already mentioned in detail while discussing the acts prohibited for one in the state of major impurity--are not prohibited during *istiḥāḍah* (*al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol. 1, *mabḥath al-'istiḥāḍah*).

The Imāmiyyah say: The 'minor' type of *mustaḥāḍah* is considered as being in a state of minor ritual impurity. Hence nothing that requires a *wuḍū'* is permissible for her unless she performs *wuḍū'*. The 'medium' and 'major' types are regarded as being in a state of major impurity. Therefore, they are prohibited from everything requiring a *ghusl.* They are like a *ḥā'iḍ* as long as they have not performed what has been considered *wājib* for them. Once they have performed this *wājib,* they are considered *ṭāhir* and it becomes valid for them to perform *ṣalāt,* enter a mosque, perform *ṭawāf* and have sexual intercourse. The Imāmīs regard the manner of performing *ghusl al-'istiḥāḍah* to be exactly similar to the mode of *ghusl al-ḥayḍ.*

Nifās:

The Imāmīs and the Mālikīs state: The *nifās* blood is a uterine discharge that occurs during or after childbirth, not before it.

The Ḥanbalīs say: It is a discharge which occurs during or after parturition or up to two or three days before it, along with signs of labour.

According to the Shāfi'īs, it occurs only after parturition and not during or before it.

The Ḥanafīs observe: It is a postpartal discharge.

In the opinion of the Shāfi'īs, Ḥanafīs and Mālikīs, *ghusl* is *wājib* upon a woman after giving birth, even if she has not had *nifās;* the Imāmīs and Ḥanbalīs do not consider it *wājib.*

All the schools concur that there is no minimum period of *nifās,* though the maximum period is 10 days as per the preponderant Imāmī view, 40 days in the opinion of the Ḥanbalīs and the Ḥanafīs, and 60 days in the opinion of the Shāfi'īs and the Mālikīs.

In a Caesarian delivery the woman will not have *nifās,* although

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

this form of birth will bring to end the *'iddah* of a divorcée.

Nifās is like *ḥayḍ* in that *ṣalāt* and *ṣawm* are not permissible, the *qaḍā'* of the latter is *wājib,* sexual intercourse, entering or making a halt in a mosque, touching the script of the Qur'ān is *ḥarām,* and so on.

The manner and conditions for this *ghusl* are exactly like those of *ghusl al-ḥayḍ.*

Touching a Corpse (Mass al-mayyit):

If a person touches a human corpse is it obligatory for him to perform a *wuḍū'* or a *ghusl* or is neither obligatory upon him?

The four schools observe: Touching a dead body does not result either in a minor or major *ḥadath;* i.e. neither *wuḍū'* nor *ghusl* is required. But it is *mustaḥabb* for a person who has given bath to a dead body and not just touched it, to perform *ghusl.*

Most Imāmîs say: *Ghusl* becomes *wājib* on touching a corpse after it has turned cold and before it is given the bath provided in the Sharî'ah. Hence if it is touched before turning cold and immediately after death or after it has been given *ghusl,* such a touch will not require anything.

The Imāmîs do not differentiate between the corpse of a Muslim and a non-Muslim in relation to the *ghusl* becoming *wājib* to touch. Similarly they do not differentiate between the age of the dead body, whetehr it is of an adult, or a child or even a four-month foetus. There is also no difference between a touch prompted by necessity or by choice. Further, the person touching may be sane or insane, an adult or a child. Hence the *ghusl* will become *wājib* on an insane person on attaining sanity and on a child on attaining puberty. The Imāmîs even require a person who touches an amputated part of a dead or living person to perform *ghusl* if it contains a bone. Accordingly, if he touches an amputated finger of a living person, *ghusl* will become *wājib.* Also, if a tooth separated from a corpse is touched. But if a separated tooth of a living person is touched *ghusl* will be *wājib* only if it has flesh attached to it and not otherwise.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Though the Imāmîs require *ghusl* on touching a corpse, they regard such a person as being in minor *ḥadath,* i.e. he is prohibited from only those acts which require a *wuḍū'* and not those which require *ghusl.* There, it is valid for him to enter a mosque and remain in it, and to recite the Qur'ān.

The *ghusl* required on touching a corpse is performed like *ghusl al-janābah.*

The Rules Pertaining to a Dead Body:

These will be discussed in the following sections:

1. Al-'Iḥtiḍār:

Al-'Iḥtidār is to make a dying person face the *qiblah.* The schools differ regarding the manner in which this is to be done. The Imāmîs and the Shāfi'îs observe: He will be made to lie on his back with the soles of his feet facing the *qiblah,* so that if he sits up he will be facing it.

The Mālikîs, the Ḥanbalîs and the Ḥanafîs state: He will be made to recline on his right side with his face towards the *qiblah,* in the same manner as he would be buried.

As the schools differ in the manner of turning the dying man to face the *qiblah,* they also differ regarding its being obligatory. The four schools and a group from among the Imāmîs consider it *mustaḥabb* and not *wājib,* though the preponderant Imāmî view is that it is *wājib kifā'î* (explained below) like giving *ghusl* to the dead and their burial. It is observed in the Imāmî work *Miṣbāḥ al-faqîh:* The *wujūb* of making those approaching death to face the *qiblah* includes both adults and children.

It should be noted that all those things which will be mentioned as *wājib* with reference to a dead body are all *wājib kifā'î,* i.e. if some persons perform it, others will be relieved of the duty of performing it, but if no one performs it, they will all be responsible and liable for its neglect.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

2. The Ghusl of a Corpse:

The schools concur that a *shahîd,* i.e. one who is martyred in battle with infidels, will not be given *ghusl.*[1] The schools, excepting the Shāfi'îs, also concur that it is not permissible to give *ghusl* to a non-Muslim; the Shāfi'îs consider it permissible. There is also consensus that a foetus of less than four months does not require *ghusl.*

They differ where the foetus has completed four months. The Ḥanbalîs and the Imāmîs observe: It is *wājib* to give it *ghusl.* The Ḥanafîs observe: If it is born alive and then dies or is still-born in a fully developed state, its *ghusl* is *wājib.*

According to the Mālikîs, giving *ghusl* will not be *wājib* unless a similar baby is considered by knowledgeable persons as capable of survival.

The Shāfi'îs state: If it is born after six months *ghusl* will be given, and even if born before six months if all parts of its body have fully developed. But if it is not born fully developed but is known to have been alive, then *ghusl* will be given but not otherwise.

A Subsidiary Issue: If a part of a corpse is destroyed by fire or disease or is eaten by an animal, will the *ghusl* of the rest be *wājib*?

The Ḥanafîs say: *Ghusl* will not be *wājib* unless most of the body or half of it with the head is present.

The Mālikîs consider *ghusl* to be *wājib* if two-thirds of the body is present.

The Ḥanbalîs and the Shāfi'îs observe: *Ghusl* will be given even if a small part of the body remains.

The Imāmîs state: If the part of the dead body found includes the chest or a part of it containing the heart, all the rules applicable to a complete corpse will apply to it and it will be given *ghusl* and *kafan* (shroud) and prayed upon. But if the part found does not contain the chest or a part of it, it would be given *ghusl* if it contains a bone and then buried by wrapping it in a piece of cloth. And if it does not contain a bone, it will be wrapped in a piece of cloth and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

buried without a *ghusl.*

The Person Giving Ghusl (*Ghāsil*):

It is *wājib* that the *ghāsil* and the *maghsūl* (the dead person being given *ghusl*) belong to the same sex: men should give *ghusl* to men and women to women.

The Imāmī, Shāfi'ī, Mālikī and Ḥanbalī schools consider it permissible for either husband and wife to give *ghusl* to the other on death.

The Ḥanafīs say: It is not permissible for husband to give *ghusl* to his wife because her death dissolves the marital bond. The wife, however, can give *ghusl* to her dead husband because she is in his *'iddah;* i.e. the marital bond exists in relation to her while it is non-existent in relation to the husband.

If she dies after his divorcing her and the divorce is irrevocable, there is consensus that neither of them can give *ghusl* to the other.

But if it is a revocable divorce, the Imāmīs allow either of them to give *ghusl* to the other. The Ḥanafīs and the Ḥanbalīs observe: Such a wife can give *ghusl* to the dead husband but not vice versa. The Mālikīs and the Shāfi'īs state: Neither of them may give *ghusl* to the other. Moreover, they do not differentiate between a revocable and an irrevocable divorce.

The Imāmīs allow a woman to give *ghusl* to a boy of under three years, and allow a man to give *ghusl* to a girl of less than three years. The Ḥanafīs permit up to four years and the Ḥanbalīs up to seven years. The Mālikīs observe: A woman can give *ghusl* to a boy up to the age of eight years and a man can give *ghusl* to a girl of two years and eight months.

The Manner of Bathing the Dead:

The Imāmīs say: It is *wājib* that the dead body be washed thrice; at first with water containing a little of *sidr,* then a second time with water containing a bit of camphor, and a third time with plain water.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The *ghāsil* should start by first washing the head, then the right half of the dead body and then the left.

The four Sunnî schools observe: Washing only once with plain water is *wājib,* and the two additional washings are *mustaḥabb.* There is no specific manner of giving the *ghusl* and it is valid in any manner it takes place, just like *ghusl al-janābah.* The use of *sidr* and camphor is not *wājib* in their opinion; rather, it is *mustaḥabb* if camphor or a similar perfume is added to the water used for the last wash.

Niyyah, the plainness (*iṭlāq*) and ritual purity (*ṭahārah*) of the water used, the removal of *najāsah* from the dead body, and the removal of anything preventing water from reaching the skin, are indispensable for the validity of the *ghusl.*

The Imāmîs state: It is *makrūh* to give *ghusl* to a dead body with hot water. The Ḥanāfîs say: Hot water is better. The Ḥanbalî, Mālikî and Shāfi'î schools observe: Cold water is *mustaḥabb.*

All the schools concur that camphor is not to be added to water used for the *ghusl* of a person that dies in the state of *iḥrām* of ḥajj. Similarly, they are of one opinion that in the state of *iḥrām* one must abstain from all kinds of perfumes.

If *ghusl* is not possible due to the non-availability of water, or the body being burnt or affected by a disease in such a manner that it might cause the flesh to fall apart on being washed, there is a consensus that *tayammum* would be resorted to in place of *ghusl.* As to the method of the *tayammum,* it is like the *tayammum* performed by a living person. Details follow in the discussion on *tayammum.* A group of Imāmî legists says: It is *wājib* to perform the *tayammum* thrice, the first in place of washing with water containing *sidr,* the second in place of water containing camphor, and the third in place of washing with plain water. But the authorities among them consider a single *tayammum* as sufficient.

Ḥunūṭ:

Ḥunūṭ means rubbing the seven parts of a dead body which

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

touch the ground while prostrating with camphor after *ghusl;* these are the forehead, the two palms, the knees, and the heads of the big toes of the feet. The Imāmîs alone among the schools consider *ḥunūṭ* as *wājib* in this manner, and in this regard there is no difference between an adult and a child, even if an aborted foetus, nor between a male and a female, the only exception being a person in *iḥrām* of ḥajj. In addition to the seven locations, they regard the *ḥunūṭ* of the nose as *mustaḥabb.*

Kafan (Shroud):

All the schools consider *takfîn* (providing with *kafan*) of a dead body as *wājib.* The four Sunnî schools observe: That which is *wājib* in *takfîn* is a single piece of cloth covering the whole body, though the use of three pieces is *mustaḥabb.*

The Imāmîs state: The use of three pieces is *wājib,* not *mustaḥabb;* the first is called *mi'zar* and resembles a loin-cloth extending from the navel to the knees; the second is the *qamîṣ,* which covers the body from the shoulders to the shanks; and the third, called *izār,* covers the whole body.

The *kafan* should possess all the qualities necessary, irrespective of sex, for clothes worn while performing *ṣalāt,* such as their being *ṭāhir, mubāḥ* (lawfully owned), their not being made of silk, gold or the skin or fur of an animal which is not eaten, and other qualities which will be mentioned in their appropriate place.

The Imāmîs, the Shāfi'îs and the Ḥanafîs consider the husband responsible for the *kafan* of his wife if he is capable of providing it. The Mālikîs and the Ḥanbalîs say: It is not compulsory for a husband to provide the *kafan* of his wife even if she is indigent. The amount necessary for the *kafan* and other expenses of burial is taken from the legacy of the deceased before the satisfaction of the claims of his debtors, the beneficiaries of his will, and his heirs, though not in preference over the share of the wife and the mortgage of a specific property.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Death of an Indigent Person:

The four schools and a group from among the Imāmīs observe: If the deceased does not leave behind any wealth, his *kafan* will have to be provided by the person who was supposed to maintain him when he was alive. But if he had no supporter, or had but he too is indigent, the *kafan* will be provided from the public treasury or from *zakāt* if possible. Otherwise it will be the duty of all Muslims capable of providing it to do so.

A group of Imāmī legists say: If a person dies a pauper and there exists no one who maintained him while he was alive, it is not *wājib* upon anyone to provide him with a *kafan,* because that which is *wājib* is the performance of an act and not the spending of wealth. Therefore spending wealth is *mustaḥabb* on the basis of charity, and in the absence of a charitable person he will be buried without a *kafan.*

The Ṣalāt Performed Over a Shahīd:

The schools concur that it is *wājib* to perform *ṣalāt* over Muslims and their children on death, irrespective of their sect and school of fiqh. They also concur that the *ṣalāt* is not valid unless performed after the dead body has been given *ghusl* and *kafan,* and that a *shahîd* is not given *ghusl* and *kafan,* but is buried in his clothes. The Shāfi'îs allow the option between burying him in his own clothes and removing them and giving him a *kafan.* The schools differ regarding offering *ṣalāt* over a martyr. The Shāfi'îs, the Mālikîs and the Ḥanbalîs observe: *Ṣalāt* will not be offered over him.

The Imāmîs and the Ḥanafîs state: It is *wājib* to offer *ṣalāt* over him in the same manner as over the other dead.

The Ṣalāt Offered for Children:

The schools differ regarding *ṣalāt* over a baby; the Shāfi'îs and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the Mālikīs say: *Ṣalāt* will be performed over it if it had cried on being born; i.e. the rule applicable to *ṣalāt* is the one applied for establishing inheritance.

The Ḥanbalīs and the Ḥanafīs consider *ṣalāt wājib* over it if it has completed four months in the womb. The Imāmī view is that *ṣalāt* is not *wājib* over the bodies of Muslim babies unless they have reached the age of six years, though it is *mustaḥabb* over babies below it.

Funeral Ṣalāt in Absentia:

The Imāmī, Mālikī and Ḥanafī schools observe: In no situation is *ṣalāt* in absentia valid. They argue that if it had been performed by the Prophet (ṣ) and the Ṣaḥābah, it would have become widely known and a *tawātur* would exist; moreover, facing the *qiblah* with the dead body's face turned towards it and the presence of the *muṣallī* (the person performing *ṣalāt*) at the body while performing the *ṣalāt* are among its necessary conditions.

The Ḥanbalīs and the Shāfi'īs say: *Ṣalāt* in absentia is valid. The basis of their argument is that the Prophet (ṣ) performed it on hearing the news of Najāshī's death. This argument has been countered by observing that this act was particular to the Prophet (ṣ) or was particularly performed in the case of Najāshī, and this explains why it was not repeated by the Prophet (ṣ) when he heard of the death of prominent Ṣaḥābah who died away from him (ṣ).

The Awliyā' of the Deceased:

The Imāmīs state: The validity of the acts--whether *ghusl, kafan, ḥunūṭ* or *ṣalāt--wājib* for preparing the corpse for burial depends upon the permission of the *walī* of the deceased. Any of these acts performed without the permission of the *walī* are void and their repetition is *wājib.* The *walī* may carry out these himself or allow others to perform them. But where he neither carries them out himself nor permits others to perform them, his permission has no

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

effect.

The Imāmīs give precedence to the husband in *wilāyah* as regards the wife over all other relatives, and the *awliyā'* besides the husband stand in the order applicable to inheritance. Hence the first category, which consists of her father and sons, has precedence over the second category, which includes her grandfather and brothers, which in turn has precedence over the third category to which paternal and maternal uncles belong. The father is given priority over all others in the first category and the grandfather over the brothers in the second. Where no male exists in a category, the right to *wilāyah* will belong to the female relatives. Where there are several brothers or paternal and maternal uncles, the funeral rites will depend upon the permission of all of them.

The other four schools have made no mention of the *walî* while discussing the *ghusl* and *kafan,* and this proves that his permission has no significance in their opinion for the performance of these rites. They do say who enjoys priority and has a better right to offer *ṣalāt* over the dead body. The Ḥanafîs observe: Those who have priority are: the ruler, then his representative, then the *qāḍî,* then the police chief, then the deceased person's *imām* in his life if he is better than the *walî* of the deceased, then the *walî,* and then as per the order applicable to authority with respect to marital affairs.

The Shāfi'îs say: The father of the deceased will come first, followed by the son, then the full brother, then the brother on father's side, and so on in the order of inheritance.

The Mālikîs state: Foremost is the person whom the deceased has appointed in his will for performing *ṣalāt* over his body seeking the *barakah* of the former's righteousness. After him comes the caliph, then the son, the grandson, the father, the brother, the brother's son, the grandfather, the paternal uncle, etc., in the descending order.

The Ḥanbalîs give priority to the *'ādil* executor of the will, followed by the ruler, his representative, the father, the son, and so on in the order of inheritance (*al-Fiqh 'alā al-madhāhib al-'arba'ah, mabḥath al-'aḥaqq bi al-ṣalāt 'alā al-mayyit*).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Uncertainty Concerning a Corpse:

When a body is found and it is not known whether it belongs to a Muslim or a non-Muslim, if it is found in a Muslim locality it will be considered a Muslim's body; otherwise anyone who sees it has no obligation, for there is a doubt concerning the obligation itself.

Where the bodies of Muslims and non-Muslims are mixed and differentiating them is not possible, the Imāmīs, Ḥanbalīs and Shāfi'īs observe: *Ṣalāt* will be performed on all of them with a conditional *niyyah* of "if he is a Muslim." The Ḥanafīs say: The majority will be taken into consideration, and if the majority of bodies belong to Muslims, *ṣalāt* will be performed, not otherwise.

The Manner of the Ṣalāt:

The dead body will be laid on its back and the *muṣallī* will stand not far behind it[2] facing the *qiblah* with the head of the body to his right. There should be no intervening barrier in the form of a wall and the like and the *muṣallī* should be standing unless there exists a legitimate excuse. Then he will make *niyyah* and say *takbīr* four times.

The Mālikīs observe: A prayer (*du'ā'*) is *wājib* after each of the four *takbīrāt* and the least that the *muṣallī* must say is: اللّٰهُمَّ اغفِرْلِهٰذَالمَيِّت (O God, pardon this deceased). If the deceased is a child, the *du'ā'* will be made for the parents. *Salām* will be said after the fourth *takbīr* and the *muṣallī* will not raise his hands except in the first *takbīr*. Accordingly, the following form will suffice:

اللهُ اكبر اللّٰهُمَّ اغفِرْ لِهٰذاالمَيِّت، اللهُ اكبر. اللّٰهُمَّ ارحَمْهُ وَارحَمنا، اللهُ اكبر. اللّٰهُمَّ تُبْ عَلَيهِ وَعَلَينا، اللهُ اكبر. اللّٰهُمَّ أَسْكِنْهُ فَسيحَ جِنانِك، السَّلام عَليكُم.

The Ḥanafīs say: God will be praised after the first *takbīr*, *ṣalawāt* on the Prophet (ṣ) will be said after the second, *du'ā'* after the third, and *salām* after the fourth. The *muṣallī* will not lift his

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

hands except in the first *takbîr*. The following form is sufficient:

اللهُ اَكبر سُبحانَ اللهِ وَلَهُ الحَمد، اللهُ اكبر. اللّٰهُمَّ صَلِّ علىٰ مُحمَّد، اللهُ اَكبر. اللّٰهُمَّ ارحَم هٰذاالمَيِّت، اللهُ اَكبَر. السَّلامُ عَلَيكُم وَرَحمةُ اللهِ، السَّلامُ عَليكُم وَرَحمةُ اللهِ.

The Shāfi'îs and the Ḥanbalîs state: The *Sūrat al-Fātiḥah* will be recited after the first *takbîr, ṣalawāt* on the Prophet (ṣ) after the second, *du'ā'* after the third, and *salām* after the fourth. The *muṣallî* will lift his hands at every *takbîr*. Hence the following form suffices:

اللهُ اَكبر وَيَقرَأ الفاتحة، اللهُ اَكبر. اللّٰهُمَّ صَلِّ علىٰ مُحمَّد، اللهُ اَكبر. اللّٰهُمَّ ارحَمنا وَاِيّاهُ، اللهُ اَكبر. السَّلام عَليكُم.

According to the Imāmîs, five *takbîrāt* are obligatory in consonance with the number of daily obligatory prayers. The *muṣallî* will recite the *shahādatayn* after the first *takbîr; ṣalawāt* on the Prophet (ṣ) after the second; *du'ā'* for the faithful, men and women, after the third; *du'ā'* for the deceased after the fourth; and end with the fifth without reciting anything after it. Lifting the hands at every *takbîr* is *mustaḥabb*. The following is the minimum which is *wājib*:

اللهُ اَكبر أشهَدُ أنْ لا الهَ الاّ اللهُ وَاَنَّ مُحمَّداً رَسولُ اللهِ، اللهُ اَكبر. اللّٰهُمَّ صَلِّ عَلىٰ مُحمَّد وَآلِه، اللهُ اَكبر. اللّٰهُمَّ اغفِرْ للمُؤمنينَ وَالمُؤمنات، اللهُ اَكبر. اللّٰهُمَّ اغفِرْ لِهذاالمَيِّت اللهُ اَكبر.

Our intention in mentioning these short forms was to show the minimum which is *wājib*, otherwise all the schools have lengthy prescribed prayers which are mentioned in their appropriate place.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The four schools require *ṭahārah* and covering of the private parts while performing *ṣalāt* over the deceased, in the same manner as in the daily obligatory prayers. The Imāmîs say: Here *ṭahārah* and covering of the private parts are not conditions for its validity, though they are *mustaḥabb.* This is because *ṣalāt* over the deceased is not *ṣalāt* in the real sense; rather it is a *du'ā',* and hence, in their opinion, the *imām* (in this *ṣalāt*) does not recite anything on behalf of the *ma'mūm.*

This also explains why the four schools consider four *takbîrāt* as *wājib* over the deceased while the Imāmîs regard five *takbîrāt* to be *wājib.* Al-'Imām Ja'far al-Ṣādiq (*'ā*) says: "God has made five *ṣalāt*s obligatory, and has appointed a *takbîr* for the deceased in the place of each *ṣalāt.*" He also observes: "The Prophet (*ṣ*) used to say five *takbîrāt* over all the dead, and when God prohibited him from praying for the hypocrites (*munāfiqūn*) he (*ṣ*) would say five *takbîrāt* over those who were not hypocrites and four over the hypocrites without praying for them."

The Place of the Ṣalāt:

The Shāfi'îs observe: It is *mustaḥabb* to offer *ṣalāt* over the deceased in a mosque. The Ḥanafîs consider it *makrūh* to do so. The Imāmîs and the Ḥanbalîs consider it permissible provided there is no fear of contaminating the mosque.

Time of Ṣalāt over the Deceased:

The Shāfi'îs and the Imāmîs state: The *ṣalāt* over the deceased can be performed at any time. The Mālikî, Ḥanbalî and Ḥanafî schools say: The *ṣalāt* may not be performed over it at sunrise, midday and sunset.

The Burial:

The schools concur that it is not permissible, except where

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

necessary, to place the body on the surface of the ground and to raise a tomb over it without digging, even if it is placed in a coffin. It is *wājib* to place it in a pit, where it would be secure and which would keep its smell from spreading. They also concur that the body should be laid to rest on its right side with its face towards the *qiblah* and the head to the west and the feet to the east.[3]

The Mālikîs say: To lay the body to rest in this manner is *mustaḥabb* and not *wājib*.

The Imāmîs observe: A woman must be lowered into the grave by her husband or anyone from among her *maḥārim* (male relatives within prohibited degrees of marriage), or by other women; if none of these are present, then any righteous person may do it.

The Ḥanbalîs and the Ḥanafîs state: The husband becomes a stranger after dissolution of the marital bond on death. In *al-Wajîz*, al-Ghazālî, a Shāfi'î, observes: "Only a man may lower the body into the grave. Therefore, if the deceased is a woman, her husband or *maḥram* may perform it, and in their absence her slaves, followed by two eunuchs, her relatives and then strangers." This implies that a male stranger is preferred over a woman.

Disposing a Corpse into the Sea:

If a person dies on a ship far away from land, if it is possible to retain it for burial on land, retaining it will be *wājib*. But if there is a fear of decay, it will be given *ghusl* and *kafan* and *ṣalāt* will be performed over it and then it will be placed in a firm coffin or a barrel which can be capped and thrown into the sea. If this is not possible, a piece of iron or a stone will be tied to it. It is obvious that the legists have dealt with this and similar issues because during those days there was no means of preserving the body from decay. But today, when it is possible to place it in cold storage or use other means which save the dead body from mutilation and harm, to retain the body becomes *wājib* even if it is for a prolonged period of time.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Making the Grave at Level with the Ground:

All the schools concur that the *sunnah* in respect of the grave is to make it at level with the ground, because the Prophet (ṣ) did so while making the grave of his son, Ibrāhīm. This *sunnah* is accepted by the Imāmīs and the Shāfi'īs.

The Ḥanbalīs, Ḥanafīs and Mālikīs say: To make it raised is better, only because to level the grave has become the slogan of some religious groups!

Reopening the Grave:

All the schools concur that it is *ḥarām* to reopen the grave, irrespective of whether the deceased is an adult or a child, sane or insane, unless the body is known to have decomposed and turned into dust or there is cause to be concerned for the body, such as where the grave is in the way of a flood or at the bank of a river, or it has been buried in a usurped land either forcefully or due to ignorance or negligence and the owner refuses to give permission and take compensation, or if it has been wrapped in an impermissible kind of *kafan,* or when something of value belonging to the deceased or someone else has been buried along with the body.

The schools differ regarding reopening where the body has been buried without a *ghusl* or after a *ghusl* which is not valid in the Sharī'ah. In this regard, the Ḥanafīs and some Imāmīs observe: It is not valid because it is irreverent and may cause mutilation of the corpse. The Ḥanbalīs, Shāfi'īs, Mālikīs and most Imāmī legists observe: It may be reopened and *ghusl* and *ṣalāt* will be performed for it provided there is no fear of its having decayed.

Some Imāmīs further add: It may also be reopened where the establishment of a claim or right is dependent upon the examination of the body.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Al-TAYAMMUM:

Performing *tayammum* (as a substitute for *wuḍū'*) is justified under certain circumstances. It is performed in a particular manner and with specific substances and there are certain rules which are applicable to it.

Conditions in which Tayammum is Performed:

The schools differ concerning the permissibility of *tayammum* by a healthy person who is not travelling, in the event of his not finding water (for *wuḍū'*). The question is, does the absence of water justify the performance of *tayammum* only in the state of journey or ill-health, or is the permissibility general and includes the state of health and non-travel?

Abū Ḥanîfah observes: A healthy person who is not travelling will neither perform *tayammum* nor *ṣalāt* if he is unable to find water (Ibn Rushd, *al-Bidāyah wa al-nihāyah,* i, 63, 1935 ed. and Ibn Qudāmah, *al-Mughnî*, i, 234, 3rd ed.). He cites verse 6 of *Sūrat al-Mā'idah* as the basis of this opinion:

...وَإِن كُنتُم مَّرْضَىٰ أَوْعَلَىٰ سَفَرٍ أَوْجَآءَأَحَدٌ مِّنكُم مِّنَ الغَآئِطِ أَوْلَمَستُمُ النِّسَآءَ فَلَمْ تَجِدُواْ مَآءً فَتَيَمَّمُواْ صَعِيدًاطَيِّبًا...

If you are sick or on a journey, or if any of you comes from the privy, or you have touched women, and you can find no water, then perform tayammum on wholesome dust....(5:6)

The verse (the Ḥanafîs say) is explicit that the sole unavailability of water does not justify *tayammum* unless the person is sick or on a journey. Therefore, if *tayammum* is limited to a sick person and a traveller, a healthy person who is not travelling has no obligation to perform *ṣalāt* in this situation because he cannot acquire *ṭahārah.*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The remaining schools concur that a person not possessing water will perform *tayammum* and offer *ṣalāt* regardless of his being a traveller or not, and irrespective of his being healthy or sick. This is in consonance with the following *mutawātir* tradition accepted by all the schools:

اِنَّ الصَّعِيد اَلطَّيِّبَ طَهورُالمُسلِمِ، وَاِنْ لَم يَجِد الماءَ عَشرَ سِنينَ.

Wholesome dust is surely a purifier for a Muslim even if he does not find water for ten years.

These schools omit the condition of travel mentioned in the verse since it also implies the usual non-availability of water during journeys in the past.

Apart from this, if the argument of Abū Ḥanīfah be accepted, the position of a traveller and a sick person would be more taxing than that of a non-travelling healthy person, because *ṣalāt* will be *wājib* on the two and not on the latter.

The Shāfi'īs and the Ḥanbalīs say: If water available is not sufficient for performing complete *ṭahārah,* it is *wājib* to perform as much of it as is possible with water and to do *tayammum* for the remaining parts. Hence if he has water which is only sufficient for washing the face, he will wash the face and then resort to *tayammum.*

The other schools observe: The presence of insufficient water is equivalent to its absence, and nothing is *wājib* in such a situation except *tayammum.*

However, the issue of non-availability of water does not have that applicability in our times because water is available in sufficient quantity for all people and at all places, at home as well as during travel. The reason the legists dealt in detail with the *wujūb* of searching for water and the extent of effort to be made, and with the case when there is a danger to one's life, possessions or honour from robbers and wild animals and the case where he finds a well without a bucket, and the case where he has to pay more than the usual price for it, etc., was that travellers used to face great difficulty in obtaining water.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Harm to Health:

The schools concur that among the reasons justifying *tayammum* is the harm the use of water may do to one's health or the probability of such a harm. Anyone who fears falling ill, or fears that his illness would become more acute or prolonged or that its cure would become more difficult, can resort to *tayammum* for *ṭahārah* instead of using water.

A Subsidiary Issue: Where there is no time for using water (such as when a person wakes up in the morning and finds so little time left for the *wājib ṣalāt* that if he intends to procure water for *ṭahārah* he would have to perform its *qaḍā'* after the appointed time while if he resorts to *tayammum* he would be able to perform it *adā'*) is it *wājib* for such a person to perform *tayammum* or must he perform *ṭahārah* with water?

The Mālikīs and the Imāmīs observe: He should perform *ṣalāt* by making *tayammum,* but must repeat the *ṣalāt* with *wuḍū'*.

The Shāfi'īs say: In no situation is *tayammum* permissible in the presence of water.

The Ḥanbalīs differentiate between the states of journey and stay, observing: If such a situation arises during a journey, he must perform *ṣalāt* with *tayammum* without being required to repeat it, and if it arises during a state of non-travel, there will be no justification for *tayammum*.

The Ḥanafīs state: *Tayammum* is permissible in such a situation for performing those supererogatory (*nāfilah*) *ṣalāt*s which have a specific time of performance, e.g. the *sunnah ṣalāt*s after the noon and sunset prayer. But *tayammum* is not permissible for a *wājib ṣalāt* if water is available, even if there is insufficient time; rather, he will do *wuḍū'* and perform the *qaḍā'*, and if he performs it with a *tayammum* during the appointed time, he will have to repeat it after the time has passed.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Substance on which Tayammum is Performed:

There is a consensus among the schools regarding the *wujūb* of performing *tayammum* on 'wholesome dust' (*al-ṣa'îd al-ṭahūr*) in consonance with the verse and the noble tradition خُلقَت الأرضُ مَسجداً وَطَهوراً. (The earth has been created a place for performing prostration and as a purifier). *Ṭayyib* means 'pure', and 'pure' means that which has not come into contact with *najāsah*. The schools differ concerning the interpretation of the word '*ṣa'îd*'. The Ḥanafîs and a group of Imāmîs understand it to mean the ground surface and therefore permit *tayammum* on dust, and sand and rocks and prohibit it on minerals such as quicklime, salt, arsenic, etc.

The Shāfi'îs interpret it as soil (*turāb*) and sand and consider *tayammum wājib* on these two if they contain fine dust. They do not permit *tayammum* on stones.

The Ḥanbalîs take it to mean only dust and hence *tayammum* is not valid in their opinion if performed on sand and stones. This is also the opinion of most Imāmî legists, though they allow it on sand and rocks in case of necessity.

The Mālikîs take the word *ṣa'îd* rather liberally and include in its meaning dust, sand, rocks, snow and minerals provided they have not been moved from their place. But they exclude gold, silver and precious stones and do not permit *tayammum* on them under any condition.

The Manner of Performing Tayammum:

The schools concur that *tayammum* is not valid without *niyyah*. Even the Ḥanafîs observe: It is required in *tayammum* though not in *wuḍū';* and as they accept that *tayammum* removes *ḥadath* like *wuḍū'* and *ghusl,* they allow the *niyyah* of removing *ḥadath* to be made for its performance just like the *niyyah* of permissibility of *ṣalāt* (*istibāḥat al-ṣalāt*).

The other schools state: *Tayammum* only permits *ḥadath* without removing it. Hence a person performing *tayammum* should

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

make *niyyah* of permissibility of that which requires *ṭahārah* and not *niyyah* of removal of *ḥadath*. But an Imāmī legist says: The *niyyah* of removal of *ḥadath* is valid with the knowledge that *tayammum* does not remove it, because the *niyyah* of removal of *ḥadath* necessarily implies the *niyyah* of permissibility.

The best way of reconciling all these opinions for a person performing *tayammum* is that he make *niyyah* of seeking the nearness of God (*qurbatan ilā Allāh*) by obeying the command pertaining to *tayammum*, irrespective of whether this command pertains to it as such or arises from the command of *ṣalāt* or some other act which requires the performance of *tayammum*.

The schools, in the same way as they differ in interpreting the word *ṣa'îd*, also differ in their interpretation of the words *wajh* (face) and *aydî* (hands) occurring in the verse. The four Sunnî schools and Ibn Bābawayh, an Imāmī, say: By *wajh* is meant the whole face including the beard, and by *yadayn*, the hands and the wrists along with the elbows. Accordingly, the parts of the face and arms to be wiped in *tayammum* are exactly the same as (are washed) in *wuḍū'*. Thus the hands will be struck twice (on that upon which *tayammum* is valid), and the first time the whole face will be wiped and the second time the two arms from the end of the fingers to the elbows.

The Mālikîs and the Ḥanbalîs say: The wiping of hands is *farḍ* up to the wrist-bones, and *sunnah* up to the elbows.

The Imāmîs state: The word *wajh* is to be interpreted as 'part of the face because *bā'* in the verse فَامْسَحوا بِوُجوهِكُمْ. connotes the meaning of a part (*tab'îḍ*) when prefixed to an object (*maf'ūl*). And if the *bā'* does not signify a part, it will have to be considered superfluous because the verb *imsaḥū* is transitive by itself. The part of the face that must be wiped in their opinion is from the upper part of the forehead where the hair grow, to the upper part of the nose including the eye-brows. They say: By *yadayn* is meant only the hands (*kaffān*);since the word *yad* in Arabic has various meanings and the most common of them in usage is *kaff* (Ibn Rushd, *al-Bidāyah wa al-nihāyah*, i, 66).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Accordingly, the manner of performing *tayammum* in the Imāmī school is by first striking on the earth with the palms and wiping the face from where the hairs grow to the upper part of the nose, then striking a second time and wiping the entire back of the right hand with the left palm and then the entire back of the left hand with the right palm.

The Imāmīs also consider sequence to be *wājib;* hence if the hands are wiped before the face, the *tayammum* becomes invalid. Similarly, it is necessary to start from the top and proceed downwards; doing the opposite would invalidate it. Most of them consider striking on the earth as *wājib,* so that if one only places his hands on it without striking, the *tayammum* becomes *bāṭil.*

The Ḥanafīs observe: If dust settles on his face and one places his hand on it and wipes it, he can do without striking the earth.

All the schools concur that the *ṭahārah* of the parts of the body involved in *tayammum* is a necessary condition, irrespective of whether it is the wiping or the wiped part. The same applies to the substance on which *tayammum* is being performed. They also concur that it is essential to remove one's ring while performing *tayammum* and that just moving it, as in *wuḍū',* is not sufficient.

They differ concerning continuity; the Imāmīs and the Mālikīs require it between its different parts. Hence if there is a time gap between them which vitiates continuity the *tayammum* becomes invalid.

The Ḥanbalīs say: Both continuity and sequence are *wājib* if the *tayammum* is for minor *ḥadath,* but none for major *ḥadath.* The Shāfi'īs require sequence, not continuity. The Ḥanafīs require neither sequence nor continuity.

The Rules of Tayammum:

1. All the schools, except the Ḥanafī, concur that it is not valid to perform *tayammum* for a *ṣalāt* before its time has arrived. The Ḥanafīs say: *Tayammum* is valid before the arrival of time.

The Imāmīs observe: If one performs *tayammum* before the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

time of *ṣalāt* for any other purpose for which *tayammum* is permissible and then the time of *ṣalāt* arrives while his *tayammum* is still intact, he may perform *ṣalāt* with that *tayammum*.

The Imāmīs and the Ḥanafīs allow the performance of two *ṣalāt*s with a single *tayammum*.

The Shāfi'īs and the Mālikīs say: It is not permissible to offer two obligatory (*farḍ*) *ṣalāt*s with a single *tayammum*. The Ḥanbalīs allow them, both as *adā'* and *qaḍā'*.

2. After one performs *tayammum* in accordance with the Sharī'ah, he will be like one who has performed *ṭahārah* with water, and everything which is permissible for the latter will be permissible for him. The *tayammum* is broken by all those kinds of major and minor *ḥadath* which require renewal of *wuḍū'* or *ghusl*, as well as on the disappearance of the excuse of unavailability of water or disease.

3. If water becomes available after the performance of *tayammum* but before beginning the *ṣalāt*, the *tayammum* becomes invalid in the opinion of all the schools. If it becomes available while he is performing the *ṣalāt*, some Imāmīs say: If that happens before his first *rukū'*, both the *tayammum* and *ṣalāt* become *bāṭil*, and if after the *rukū'*, he will complete the *ṣalāt*, which will be deemed valid.

The Shāfi'īs, Mālikīs and Ḥanbalīs in one of the two opinions narrated by them, as well as some Imāmīs state: After saying the *takbīrat al-'iḥrām*, he will continue the *ṣalāt* without paying attention, and the *ṣalāt* will be valid because God Almighty says: وَلَاتُبْطِلُوا أَعْمَالَكُمْ (And do not make your acts invalid). The Ḥanafīs observe: Such a *ṣalāt* will be invalid. The schools concur that if the justification (for performing *tayammum*) disappears after the performance of the *ṣalāt* while its time is still there, one is not obliged to repeat the *ṣalāt* again.

4. If a person in state of *janābah* performs *tayammum* in place of *ghusl* and then a minor *ḥadath* occurs and there is water enough for only performing *wuḍū'*, will *wuḍū'* be *wājib* along with the repetition of *tayammum* in place of *ghusl*?

The Mālikīs and most Imāmīs observe: He will perform

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

tayammum in the place of *ghusl.*

The Ḥanafîs, Shâfi'îs, Ḥanbalîs and a group of Imâmîs state: He will perform *wuḍū'* because the *tayammum* was in place of *janābah* and was broken by something other than *janābah.* Hence he will not become *junub* again unless the *janābah* recurs, and he will be considered as being affected only by the minor *ḥadath.*

5. The Ḥanbalîs differ from all the other schools in their acceptance of *tayammum* for material *najāsah* present on the body (*al-Fiqh 'alā al-madhāhib al-'arba'ah, mabhath arkān al-tayammum*).

6. If both the ways of acquiring *ṭahārah* (i.e. with water and *tayammum*) are not possible (such as in the case of a person who is imprisoned in a place where there is neither water nor any substance on which *tayammum* is performed, or he is so ill that he can neither perform *wuḍū'* nor *tayammum* and there is no one to help him in performing them) will it be *wājib* to perform *ṣalāt* without *ṭahārah*? Further, presuming that the *ṣalāt* is *wājib* and he performs it, must he repeat it after *ṭahārah* becomes possible?

The Mâlikîs say: He is not required to perform *ṣalāt,* neither *adā'* nor *qaḍā'.*

The Ḥanafîs and the Shâfi'îs observe: It will remain *wājib,* either as *adā'* or *qaḍā'.* In the opinion of the Ḥanafîs, the meaning of performing it *adā'* is that he will simulate the movements of a *muṣallî,* while the Shâfi'îs require him to perform real *ṣalāt.* After the excuse disappears he will repeat this *ṣalāt* as required by the Sharî'ah.

Most Imâmîs state: He is not required to offer it as *adā',* though it will remain *wājib* as *qaḍā'.*

The Schools and the Verse Concerning Tayammum:

It became clear from our discussion on the topics of *al-mā' al-muḍāf,* the causes which break the *wuḍū',* and *tayammum,* that the difference of opinion among the schools of Islamic fiqh relates mostly to the interpretation of the words of the verse dealing with *tayammum*:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

...وَإِن كُنتُم مَّرضَىٰٓ أَو عَلَىٰ سَفَرٍ أَو جَآءَ أَحَدٌ مِّنكُم مِّنَ ٱلغَآئِطِ أَو لَٰمَستُمُ ٱلنِّسَآءَ فَلَم تَجِدُواْ مَآءً فَتَيَمَّمُواْ صَعِيدًا طَيِّبًا فَٱمسَحُواْ بِوُجُوهِكُم...

If you are sick or on a journey, or if any of you comes from the privy, or you have touched women and you can find no water, then perform tayammum on wholesome dust and wipe your faces....(5:6)

The legists first differ concerning one on whom *tayammum* is obligatory in the event of unavailability of water: is it one who is sick or on a journey, or does it also apply to a healthy non-traveller? Is the meaning of 'touching' women sexual intercourse or just touching them with the hand? Does the word 'water' mean only plain water (*al-mā' al-muṭlaq*) or does it include *al-mā' al-muḍāf* as well? Does the word *ṣa'îd* mean just dust or does it signify the surface of the earth, irrespective of its being dusty, sandy or rocky? Does the word *wajh* mean the complete face or just a part of it? Does the word *yad* imply only the hand or does it include the hand and the forearm? Here we will give a summary of the opinions discussed:

1. Abū Ḥanîfah observes: *Tayammum* is not valid in the absence of water for a healthy person who is not travelling, and thus *ṣalāt* is also not *wājib* upon him because the verse permits only a sick person and a traveller to perform *tayammum* in the absence of water.

The four schools say: Touching a woman who is a 'stranger' (*ajnabiyyah*) with the hand has exactly the same effect as returning from the privy and breaks the *wuḍū'*.

The Imāmîs state: Sexual intercourse breaks the *ṭahārah* and not touching with the hand.

2. The Ḥanafîs say: The meaning of فَلَمْ تَجِدواماءً فَتَيَمَّمُوا. is water, either *muṭlaq* or *muḍāf*. The other schools say: The word 'water' occurring in the verse is commonly understood to mean plain water and not *al-mā' al-muḍāf*.

3. The Ḥanafîs and a group from among the Imāmîs observe: The word *ṣa'îd* means dust, sand and rock.

The Shāfi'îs say: It means only dust and sand.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

According to the Ḥanbalīs it means only dust.

The Mālikīs state: It includes dust, sand, rock, snow and minerals.

The four schools say: By *wajh* in the verse is meant the whole face.

The Imāmīs say: It means only a part of it.

4. The four schools observe: The word *aydī* should be interpreted as including the hands, wrists and elbows.

The Imāmīs consider it to mean only the hands.

This difference of opinion among the schools, if it proves anything, proves that this divergence of views is superficial, not substantial, and one of language and not of principle. It resembles the difference between philologists concerning a particular word or between men of letters concerning the interpretation of a verse or couplet. This is the reason why we find that legists belonging to the same school differ among themselves exactly like one school differing with another.

NOTES:

1. The Ḥanafīs say: A martyr is someone who is killed unjustly, irrespective of whether it is in war or by a robber or dacoit. The requirement that they lay down for not giving him *ghusl* is that he should not be in a state of major *ḥadath* at the time of death.

2. The Shāfi'īs and the Mālikīs permit *ṣalāt* to be offered over a dead body while it is placed on the back of a beast of burden or held on the hands or shoulders of men.

3. The description that the dead body's head would point towards the west and his feet towards the east applies to Lebanon, the author's homeland. (Editor)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

SALÃT

Salāt (prayer) is either obligatory (*wājib*) or supererogatory (*mandūb*). The most important of prayers are the obligatory prayers performed daily five times, and there is consensus among Muslims that a person who denies or doubts their *wujūb* is not a Muslim, even if he recites the *shahādah,* for these prayers are among the 'pillars' (*arkān*) of Islam. Their *wujūb* is an established necessity of the faith (*al-Dîn*) that does not need any *ijtihād* or study, *taqlîd* or questioning.

The schools differ regarding a person who does not perform the *ṣalāt* (*tārik al-ṣalāt*) due to laziness and neglect though believes in its *wujūb.* The Shāfi'îs, Mālikîs and Ḥanbalîs observe: He will be killed.

The Ḥanafîs state: He will get perpetual imprisonment unless he starts performing *ṣalāt.*

The Imāmîs state: Whoever neglects any *wājib* duty such as *ṣalāt, zakāt, khums, ḥajj* and *ṣawm,* will be chastened by the *ḥākim* in a manner deemed appropriate by him. If he does not yield to remonstrance, he will be chastened a second time, and if he does not turn penitent, a third time. And if he continues in the same manner, he will be killed the fourth time (al-Shaykh al-Kabîr, *Kashf al-ghiṭā',* 1317 ed. p. 79).

The Daily Supererogatory Prayers (Rawātib):

Supererogatory prayers are of various kinds, and among them

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

are those which are performed along with the obligatory daily prayers (*farā'iḍ*). The schools differ regarding the number of their *rak'ah*s. The Shāfi'îs consider them to be eleven *rak'ah*s: two before the morning (*ṣubḥ*) prayer, two before the noon (*ẓuhr*) prayer and two after it, two after the sunset (*maghrib*) prayer, two after the night (*'ishā'*) prayer and a single *rak'ah* called *'al-watîrah'*.

The Ḥanbalîs consider them to be ten *rak'ah*s; two *rak'ah*s before and after the noon prayer, two after the sunset and the night prayer, and two *rak'ah*s before the morning prayer.

According to the Mālikîs there is no fixed number for the supererogatory (*nawāfil*) prayers performed with the obligatory *ṣalāt,* though it is best to offer four *rak'ah*s before the *ẓuhr* and six after the *maghrib* prayer.

The Ḥanafîs classify the *nawāfil* performed along with the *farā'iḍ* into *'masnūnah'* and *'mandūbah'*.[1] The *'masnūnah'* are five: two *rak'ah*s before the *ṣubḥ;* four before the *ẓuhr,* and two after it, except on Friday; two after the *maghrib* and two after the *'ishā'* prayer.

The *'mandūbah'* are four: four--or two--*rak'ah*s before the *'aṣr,* six after the *maghrib,* and four before and after the *'ishā'* prayer.

The Imāmîs observe: The *rawātib* are 34 *rak'ah*s: eight before the *ẓuhr,* eight before the *'aṣr,* four after the *maghrib,* two after the *'ishā'* (recited while sitting and counted as a single *rak'ah;* it is called *'al-watîrah'*), eight *rak'ah*s of the midnight prayer (*ṣalāt al-layl*), two *rak'ah*s of *al-shaf',* a single of *al-watr,*[2] and two *rak'ah*s before the morning prayer, called *'ṣalāt al-fajr'*.

The Time of Ẓuhr and 'Aṣr Prayers:

The fuqahā' begin with *ṣalāt al-ẓuhr,* because it was the first *ṣalāt* to be declared obligatory, followed by the *'aṣr,* the *maghrib,* the *'ishā'* and the *ṣubḥ* prayer, in that order. All the five prayers were made obligatory in Makkah on the night of Prophet's cosmic journey (*al-'Isrā'*), nine years after the beginning of his ministry (*bi'thah*). Those who hold this opinion cite as proof verse 78 of the *Sūrat*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

al-'Isrā' which stipulates all the five prayers:

أَقِمِ الصَّلَوٰةَ لِدُلُوكِ الشَّمسِ إِلَىٰ غَسَقِ ٱلَّيلِ وَقُرءَانَ الفَجرِ إِنَّ قُرءَانَ الفَجرِ كَانَ مَشهُودًا ﴿٧٨﴾

Perform ṣalāt from the declining of the sun to the darkening of the night and the recital of the dawn; surely the recital of the dawn is witnessed (17:78)

The schools concur that *ṣalāt* is not valid if performed before its appointed time and that the time of the *ẓuhr* prayer sets in when the sun passes the meridian. They differ concerning its duration.

The Imāmīs say: The specific period of the *ẓuhr* prayer extends from the moment the sun crosses the meridian up to a period required to perform it, and the specific period of the *'aṣr* prayer is the duration required to perform it just before sunset. The time between these two specific periods is the common period for the two *ṣalāt*s. That is the reason they consider it valid to perform both the prayers successively during their common period.[3] But if the time remaining for the end of the day is sufficient only for performing the *ẓuhr* prayer, the *'aṣr* prayer will be offered first with the ***niyyah*** o f *adā'* and later the *ẓuhr* prayer will be performed as *qaḍā'*.

The four Sunnī schools observe: The time of the *ẓuhr* prayer begins when the sun crosses the meridian and continues till the shadow of an object becomes as long as its height; and when the length of the shadow exceeds the height of the object, the time for the *ẓuhr* prayer comes to an end. Here the Shāfi'īs and the Mālikīs add: These limits are for an unconstrained person (*mukhtār*), and for one who is constrained (*muḍṭarr*), the time for *ẓuhr* prayer extends even after an object's shadow equals its height. The Imāmīs consider the time when an object's shadow equals its height as the time of *faḍîlah* for the *ẓuhr,* and when it equals twice the height of the object as the time of *faḍîlah* for the *'aṣr* prayer.

The Ḥanafīs and the Shāfi'īs state: The time of *'aṣr* prayer begins when the length of an object's shadow exceeds its height and continues up to sunset.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Mālikîs say: For the *'aṣr* prayer there are two times, the first for ordinary circumstances and the second for exigencies. The former begins with an object's shadow exceeding its height and lasts until the sun turns pale. The latter begins from when the sun turns pale and continues until sunset.

The Ḥanbalîs observe: One who delays offering the *'aṣr* prayer till after an object's shadow exceeds twice its height, his *ṣalāt* will be considered *adā'* if performed before sunset, though he will have sinned because it is *ḥarām* to delay it until this time. They are alone in all the schools in holding this opinion.

The Time of Maghrib and 'Ishā' Prayers:

The Shāfi'î and the Ḥanbalî schools (in accordance with the view of their respective Imams) state: The time for the *maghrib* prayer begins when the sun sets and ends when the reddish afterglow on the western horizon vanishes.

The Mālikîs say: The duration for the *maghrib* prayer is narrow and confined to the time required after sunset to perform the *maghrib* prayer along with its preliminaries of *ṭahārah* and *adhān*, and it is not permissible to delay it voluntarily. But in an emergency, the time for the *maghrib* prayer extends until dawn. The Mālikîs are alone in considering it impermissible to delay the *maghrib* prayer beyond its initial time.

The Imāmîs observe: The period specific to the *maghrib* prayer extends from sunset[4] for a duration required to perform it, and the specific period of the *'ishā'* prayer is the duration required to finish it before midnight. The time between these two specific periods is the common time for both *maghrib* and *'ishā'* prayers. Hence they allow the joint performance of these two *ṣalāt*s during this common time.

That was with respect to someone who is in a position to act out of free choice (*mukhtār*), but as to a person constrained by sleep or forgetfulness, the time for these two *ṣalāt*s extends until dawn, with the period specific for the *'ishā'* prayer becoming the time required

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

to perform it just before dawn and the specific period for the *maghrib* prayer becoming the time required to perform it just after midnight.

The Time of Ṣubḥ Prayer:

There is consensus among the schools, with the exception of the Mālikī, that the time for the morning prayer begins at daybreak (*al-fajr al-ṣādiq*) and lasts until sunrise. The Mālikīs say: The *ṣubḥ* prayer has two times: for one in a position to act out of free choice it begins with daybreak and lasts until there is enough twilight for faces to be recognized; for one in constrained circumstances it begins from the time when faces are recognizable and continues up to sunrise.

THE QIBLAH

The schools concur that the Ka'bah is the *qiblah* of one who is near it and is able to see it. They differ regarding the *qiblah* of one who is away from the Ka'bah and unable to see it.

The Ḥanafīs, Mālikīs, Ḥanbalīs and a group of Imāmī legists observe: The *qiblah* of one at a distance is the direction of the Ka'bah and not the Ka'bah itself.

The Shāfi'īs and most Imāmīs state: It is *wājib* for one who is near the Ka'bah as well as for one at a distance, to face the Ka'bah itself. Thus if it is possible to ascertain that one is facing the Ka'bah itself, one must do so; otherwise the probability (*ẓann*) that one may be facing it is sufficient. It is obvious that one who is far away from the Ka'bah is in no way capable of ascertaining that he is facing the Ka'bah, considering that the earth is spherical. Consequently, the *qiblah* of one away from the Ka'bah will be the direction of the Ka'bah and not the Ka'bah itself.

Ignorance of the Qiblah:

It is *wājib* for a person ignorant of the *qiblah* to inquire and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

strive to determine its exact or approximate direction, and in case neither of the two is possible, the four Sunnî schools and a group from among the Imāmîs say: He may perform *ṣalāt* in any direction; his *ṣalāt* will be valid and it will not be *wājib* for him to repeat it except in the opinion of the Shāfi'îs.

Most Imāmîs observe: He will perform *ṣalāt* in four directions to comply with the command for *ṣalāt* and to ascertain its proper performance. But if there isn't sufficient time for performing *ṣalāt* four times or if one is incapable of performing it in four directions, he will perform *ṣalāt* in the directions that he can.

A Subsidiary Issue:

If a person prays not facing the *qiblah* and comes to know about his mistake, the Imāmîs state: If the error is known during the *ṣalāt* and the correct *qiblah* lies between his two hands, the part of the *ṣalāt* already performed will be valid and he will have to correct his direction for the remaining part of the *ṣalāt.* But if it is known that he has been praying facing the east, or the west, or the north with his back towards the *qiblah* (this is with reference to Lebanon where the *qiblah* lies to the south) the *ṣalāt* will be invalid and he will perform it anew. If the error is known after performing the *ṣalāt,* it would be performed again if its time is still there, not otherwise. Some Imāmîs say: The *ṣalāt* will not be repeated if there is only a little deviation from the *qiblah,* irrespective of whether its time is still there or not. But if it has been performed facing the east or the west, it should be repeated if its time is there, not otherwise. If the *ṣalāt* is performed with one's back to the *qiblah,* it should be repeated regardless of whether its time is still there or has passed.

The Ḥanafîs and the Ḥanbalîs observe: If after inquiring and striving to find the *qiblah* one is unable to ascertain its approximate direction and performs *ṣalāt* in a direction which turns out to be wrong, he must change his direction accordingly if the mistake is known during the *ṣalāt,* and if it is known afterwards his *ṣalāt* is valid and he has no further obligation.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Shāfi'īs say: If it becomes certain that there has been a mistake in determining the *qiblah,* it is *wājib* to repeat the *ṣalāt,* but if there is only a likelihood of mistake, the *ṣalāt* is valid irrespective of whether the probability arises during the *ṣalāt* or after it.

As to one who neither makes an inquiry nor an effort to determine the *qiblah,* but by chance performes the *ṣalāt* in the right direction, the Mālikīs and Ḥanbalīs consider his *ṣalāt* to be *bāṭil.* The opinion of the Imāmīs and the Ḥanafīs is that his *ṣalāt* is valid provided he has no doubts while praying and was sure about the direction of the *qiblah* at the time of starting the *ṣalāt,* because, as pointed out by the Imāmīs, in such a situation it is correct for him to make the *niyyah* of acquiring nearness (*qurbah*) to God.

THE RULES OF MODESTY

The issue is one of those from which numerous bylaws are derived, such as those specifying the parts of one's body that must be covered (*'awrah*) and the parts of another person's body which it is *ḥarām* to look at, those relating to the difference between *maḥārim* (relatives through lineage or marriage with whom marriage is prohibited) and non-*maḥārim* persons in this regard, the difference in this regard due to sameness or difference of sex, the difference between looking and touching and similar rules which are discussed below.

1. Looking at One's Own Body: The schools differ concerning covering of one's *'awrah* from one's own view and whether it is *ḥarām* for one to uncover one's *'awrah* in privacy.

The Ḥanafīs and the Ḥanbalīs observe: In the same way that it is not permissible for a person to expose his *'awrah* in the presence of anyone for whom it is not permissible to look at it, it is not permissible for him to expose it when alone without necessity, as arises at the time of bathing or answering the call of nature.

The Mālikīs and Shāfi'īs say: It is not unlawful but reprehensible (*makrūh*) to be bare without necessity.

The Imāmīs, state: It is neither *ḥarām* nor *makrūh* when no one

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

is looking at.

Ibn Abî Laylā holds an uncommon opinion that prohibits one from baring oneself even for bath for the reason that water is inhabited by living beings (*al-Majmū' sharḥ al-Muhadhdhab,* ii, 197).

2. Woman and Her Maḥārim: The schools differ concerning the parts of the body a woman must cover in the presence of her *maḥārim*--except the husband--and Muslim women.[6] In other words, what constitutes the *'awrah* of a woman in the presence of Muslim women as well as her *maḥārim,* both through lineage and marriage?

The Ḥanafîs and the Shāfi'îs say: It is *wājib* for her to cover the area between the navel and the knees in their presence.

The Mālikîs and the Ḥanbalîs observe: She must cover the area between the navel and the knees in front of women, and in the presence of her *maḥārim,* her whole body except the head and the arms.

Most Imāmîs state: It is *wājib* for her to cover her rear and private parts in the presence of women and her *maḥārim;* to cover other parts as well is better though not *wājib,* except where there is a fear of sin.

3. Women and 'Strangers': About the extent of the body to be covered by a woman in the presence of a 'stranger' (any male apart from the *maḥārim*), the schools concur that it is *wājib* for her to cover her whole body except the face and hands (up to the wrists) in accordance with verse 31 of *Sūrat al-Nūr*:

...وَلَا يُبْدِينَ زِينَتَهُنَّ إِلَّا مَا ظَهَرَ مِنْهَا وَلْيَضْرِبْنَ بِخُمُرِهِنَّ عَلَىٰ جُيُوبِهِنَّ...

...And reveal not their adornment save such as is outward; and let them cast their veils over their bosoms (24:31)

considering that 'outward adornment' (*ẓāhir al-zînah*) implies the face and hands. The word *'al-khimār'* (whose plural *'khumur'* occurs in the verse) means the veil which covers the head, not the face, and the word *'al-jayb'* (whose plural *'juyūb'* occurs in the verse) means the chest. The women have been commanded to put a covering on their heads and to lower it over their chests. As to verse 59 of *Sūrat*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

al-'Aḥzāb:

يَٰٓأَيُّهَا ٱلنَّبِيُّ قُل لِّأَزْوَٰجِكَ وَبَنَاتِكَ وَنِسَآءِ ٱلْمُؤْمِنِينَ يُدْنِينَ عَلَيْهِنَّ مِن جَلَٰبِيبِهِنَّ...

O Prophet, say to your wives and daughters and the believing women, that they draw their veils close to them..., (33:59)

the word *'al-jilbāb'* (whose plural *jalābîb* occurs in the verse) does not mean a veil covering the face; rather it is a shirt or garment.

4. Man's 'Awrah: The schools differ concerning the parts of man's body which it is *ḥarām* for others to see and for him to expose.

The Ḥanafîs and the Ḥanbalîs state: It is *wājib* for a male to cover the area between the navel and the knees before all except his wife. It is permissible for others, irrespective of their being men or women, *maḥārim* or strangers, to look at the rest of his body when there is no fear of sin.

The Mālikîs and the Shāfi'îs say: There are two different situations for a male with respect to the extent he can expose his body: the first, in the presence of men or those women who are his *maḥārim;* the second, in the presence of women who are not his *maḥārim.* In the former instance he is only supposed to cover the area between the navel and the knees, while in the latter it is *ḥarām* for a woman stranger to look at any part of a man's body. Though the Mālikîs exclude the head and the arms if looked at without any sensual motive, the Shāfi'îs do not permit any exception (*al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol. 1, *mabḥath satr al-'awrah*).

The Imāmîs differentiate between the parts of other person's body which can be looked at and those parts of one's own body which ought to be covered. They observe: It is *wājib* for a male to cover only his rear and private parts, though it is *wājib* for women who are not his *maḥārim* to abstain from looking at any part of his body except head and hands (up to the wrist). To summarize the Imāmî opinion, it is permissible for a male to view the body of other men and his female *maḥārim*--except the rear and private parts--provided no sensual motive is involved. Similarly, a woman can view the body of other woman and her male *maḥārim*--excepting the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

rear and private parts--provided no sensual motive is involved.

5. Children: Concerning the body of a child, the Ḥanbalīs say: It is not prohibited to touch or look at the body of a child below seven years. It is not permissible to look at the rear and private parts of a male child between the age of 7 to 9 years, and for 'strangers' the whole body of a female child above the age of seven.

The Ḥanafīs observe: No part of the body of a boy of four years and below is prohibited from being looked at. Above this age only his rear and private parts are prohibited from being looked at as long as sexual desire has not awakened in him. If he reaches the age of sexual desire, the rule applicable to adults will be applicable to him with respect to both the sexes.

The Mālikīs state: It is permissible for a woman to look at and touch the body of a boy below the age of eight years, and only look at it till the age of twelve. A boy above the age of twelve is considered similar to an adult. It is permissible for a man to look at and touch the body of a girl below two years and eight months, and to look at, though not touch, till she reaches the age of four years.

According to the Shāfi'īs, the rules applicable to an adult apply to an adolescent male child. But if a child is below that age and is also incapable of describing what he sees, all parts of his body can be looked at. But if he can describe what he sees with a sexual interest, he will be considered similar to an adult. As to a girl below the age of adolescence, only if she has developed sexual appeal will she be considered similar to a full-grown woman, not otherwise, though it will be *ḥarām* for anyone except someone who looks after her to look at her parts.

The Imāmiyyah observe: It is *wājib* to cover one's *'awrah* in front of a child of discriminating age, who can describe what he sees, though not before one who is incapable of doing so, because (in this respect) he is similar to an animal. That was regarding the covering of the body in the presence of a child, but with respect to looking at a child's *'awrah*, al-Shaykh Ja'far in his book *Kashf al-ghiṭā'* states: It is not *wājib* to abstain from looking at the parts of a child below five years, though it is absolutely impermissible to look at them with a

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

sexual interest.

From what I have been able to ascertain from the traditions of the Ahl al-Bayt, the age limit for the permissibility of looking at the child's *'awrah* is six years, not five.

6. Woman's Voice: All the schools concur that listening to the voice of a woman is not prohibited, except where pleasure is involved or where there is a fear of sin. The (Imāmī) author of *al-Jawāhir*, at the beginning of the chapter on marriage, has mentioned as his proof the continuing practice of Muslims belonging to different periods and regions, the sermons of Fāṭimah (*'a*) and her daughters, the innumerable instances of conversations of the wives of the Prophet (*ṣ*), the Imams and the 'ulamā'--which cannot possibly be considered as having taken place due to emergency--and the holding of mourning and wedding ceremonies by women in the presence of men from early times, the conversations between opposite sexes while conducting transactions, as well as the Qur'ānic verse فَلا تَخْضَعْنَ بِالقَوْلِ (Be not complaisant in your speech, 33:32), in which not speech itself but its manner and complaisance have been prohibited.

7. The Colour, Not the Shape: The schools concur that it is *wājib* to cover (the body's) colour, not its shape. This writer comments: If the colour of the covering is similar to the colour of the skin, so that it is not discernable from it, as in the case of skin-coloured stockings, the presence or absence of the covering will be equal.

8. The Difference Between Looking and Touching: Every part that is permissible to touch, may be looked at and every part that is *ḥarām* to be looked at may not be touched. Here there is a general consensus among the schools because touching involves greater pleasure than looking, and no legist of any school claims concomitance between the permissibility of looking and the permissibility of touching. Hence, though it is permissible for a man to look at a female stranger's face and hands, it is not permissible for him to touch her except in an emergency, such as for medical treatment or for rescuing her from drowning. The following tradition has been narrated from al-'Imām al-Ṣādiq (*'a*):

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

هَل يَصافِحُ الرَّجُلُ المَرأَةَ لَيسَتْ لَهُ بذي مَحرَمٍ؟ قال: لا إلاّ من وراء ثِيابٍ.

(Al-'Imām al-Ṣādiq ['a] was asked:) "Can a man shake hands with a woman who is not his *maḥram*?" The Imam ('a) replied: "No, unless there is a cloth in between."

The Ḥanafîs exclude shaking hands with an old woman from the prohibition. In the book of Ibn 'Ābidîn (vol. 1, p. 284) it is stated: It is not permissible to touch the hands or face of a young woman even with the assurance of absence of any sexual motive. As to an old woman who has no sexual appeal, there is nothing wrong in shaking hands with her with the assurance of absence of a sexual motive.

The Imāmîs and the Ḥanafîs allow touching the body of any *maḥram* provided no sexual motive or pleasure is involved. The Shāfi'îs prohibit touching even those parts of a *maḥram*'s body which it is permissible to look at. It is even not permissible in their opinion for a person to touch the belly or back of his mother, pinch her ankles or feet or kiss her face. Similarly, it is not permissible for a person to ask his daughter or sister to press his legs (al-'Allāmah al-Ḥillî, *al-Tadhkirah,* vol. 2, beginning of *bāb al-zawāj*).

9. The Difference Between Exposing and Looking at: The Imāmîs observe: There is no concomitance between the permissibility of exposing the body and the permissibility of looking at it. Hence it is permissible in their opinion for a man to expose the whole of his body except his rear and private parts, while it is not permissible for a non-*maḥram* woman to look at it. I have not found anyone expressing this opinion in the numerous books of the four Sunnî schools which I possess.

10. Old Women: God Almighty says in the Qur'ān:

وَالقَوٰعِدُ مِنَ النِّسَاءِ الّٰتِي لَا يَرجُونَ نِكَاحًا فَلَيسَ عَلَيهِنَّ جُنَاحٌ أَن يَضَعنَ ثِيَابَهُنَّ غَيرَ مُتَبَرِّجَاتٍ بِزِينَةٍ وَأَن يَستَعفِفنَ خَيرٌ لَّهُنَّ وَاللهُ سَمِيعٌ عَلِيمٌ ﴿٦٠﴾

And such women as are past child-bearing and have no hope of marriage, it is no sin for them if they put off their clothes, so be it that they flaunt no ornament; but

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

to abstain is better for them, and God is All-hearing, All-knowing. (24:60)

This noble verse indicates that it is permissible for old women who have no desire for marriage due to their old age "to expose their face and a part of their hair and arms, and such other parts which aged women usually keep exposed. The traditions of the Ahl al-Bayt (*'a*) also point to the same, on condition that such exposure be not with the intent of display. Rather, it is to allow them to come out for fulfilling their needs, though it is better for them to keep themselves covered."[7]

This permission is with the assumption that it is not permissible to expose any of the above-mentioned parts of the body if there is fear of its leading to something *ḥarām,* because a woman, regardless of her elderly age, remains an object of sexual interest. Hence the leniency in the case of an aged woman arises from her being similar to a young girl who is presumably not an object of sexual interest and pleasure. Therefore, if there is any likelihood of that kind, the rule applicable to her will be the rule applicable to young women.

Islam is lenient with respect to elderly women and strict regarding young women. But in practice we observe the opposite of what the Qur'ān has ordered. We see shamelessness and display of charms among young women, while elderly women keep themselves covered and are reserved. So where God is strict, they are lenient, and where He is lenient, they are strict.

Wājib Covering During Ṣalāt

The schools concur that it is *wājib* upon both men and women to cover those parts of their bodies during *ṣalāt* which should ordinarily be kept covered before 'strangers'. Beyond that their positions differ. Is it *wājib* for a woman to cover, fully or partly, her face and hands during *ṣalāt,* although she is not required to do so outside *ṣalāt*? Is it *wājib* for a man to cover other parts of his body during *ṣalāt* apart from the area between the navel and the knees, though it is not *wājib* to do so outside *ṣalāt*?

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Ḥanafîs observe: It is *wājib* upon a woman to cover the back of her hands and the soles of her feet as well, and upon a man to cover his knees in addition to the area between the navel and the knees.

The Shāfi'îs and Mālikîs say: It is permissible for a woman to keep her face and both the palms and the back of her hands uncovered during *ṣalāt.*

The Ḥanbalîs state: It is not permissible for her to expose any part except the face.

The Imāmîs observe: It is *wājib* for both men and women to cover those parts of their body during *ṣalāt* which they are supposed to cover ordinarily in the presence of a 'stranger'.. Hence it is permissible for a woman to expose during *ṣalāt* that part of her face which is washed during *wuḍū',* her hands up to the wrists, and her feet up to the ankles--both the back as well as the palms of hands and the soles of feet. For a man, it is *wājib* to cover the rear and the private parts, though better to cover the entire area between the navel and the knees.

The Material Used for Covering During Ṣalāt:

The covering should meet the following requirements where the ability and freedom to meet them exist:

1. Ṭahārah: The *ṭahārah* of the covering and the body are necessary for the validity of *ṣalāt* in the opinion of all the schools, although each of them concedes certain exceptions in accordance with the following details:

The Imāmîs state: Blood from wounds and sores, irrespective of its quantity, is considered excusable on the dress as well as the body if its removal entails difficulty and harm (*mashaqqah wa ḥaraj*). A blood spot smaller than the size of a dirham coin, regardless of its being due to one's blood or that of someone else, is also excusable provided that: it is in a single place and not in different places; it is not the blood of *ḥayd, nifās* and *istiḥāḍah;* it is not the blood of anything intrinsically *najis,* such as dog and pig, or the blood of a

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

maytah. Also excusable is the *najāsah* of anything that does not constitute part of essential dress during *ṣalāt,* e.g. a sash, cap, socks, shoes, ring, anklet and that which one carries with oneself, e.g. knife or currency. The *najāsah* of the dress of a woman rearing a child, irrespective of whether she is the mother or someone else, is exempted on condition that it be difficult for her to change it and that she washes it once every day. In other words, in their opinion every *najāsah* on dress or body is exempted in conditions of emergency (*iḍṭirār*).

The Mālikîs observe: Cases of controlless discharge of urine or excrement, as well as piles, are excusable; so is any impurity on the body or clothes of a woman suckling an infant that may be soiled by the infant's urine or faeces. So also are exempted the body and clothes of a butcher, surgeon and scavenger. Also exempted is: blood--even that of a pig--if it is less than the size of a dirham coin: the discharge from boils, the excrement of fleas, and other things which need not be mentioned because they occur rarely.

The Ḥanafîs say: *Najāsah,* blood or anything else, if less than the size of a dirham coin is exempted. Also exempted in emergencies is the urine and excrement of a cat and mouse. Tiny splashes--as small as the point of a needle--of urine, the blood that unavoidably stains a butcher, and the mud on roads--even if it is usually mixed with *najāsah* and provided the *najāsah* itself is not visible--are exempted. Consequently, they consider *najāsah* in a small quantity as exempted, such as the urine of an animal eating which is *ḥalāl,* if it covers a fourth of the clothes and less than one-fourth of the body.

According to the Shāfi'îs, every *najāsah* which is in such a small quantity that the eye cannot see it is exempted. So is the mud on roads which is mixed with a small quantity of *najāsah,* worms present in fruits and cheese, *najis* liquids added in medicines and perfumes, excrements of birds, *najis* hair in small quantity if they do not belong to a dog or a pig, and other things as well which are mentioned in detailed works.

The Ḥanbalîs say: Minute quantities of blood and pus are exempted, and so is the mud on roads whose *najāsah* is certain, as

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

well as the *najāsah* that enters the eyes and washing which is harmful.

2. Wearing Silk: There is consensus among the schools that wearing silk and gold is *ḥarām* for men both during and outside *ṣalāt,* while it is permissible for women. This is in accordance with this statement of the Prophet (ṣ):

حُرِّمَ لِباسُ الحَرِيرِ والذَّهَبِ عَلىٰ ذكورِ اُمَّتي، وأُحِلَّ لإِناثِهِم.

Wearing silk and gold is unlawful for the men of my ummah, while it is lawful for its women.

Accordingly, the Imāmîs observe: A man's *ṣalāt* is not valid if he wears pure silk and any clothing embroidered with gold during it, regardless of whether it is a waistband, cap, socks, or even a gold ring. They allow wearing silk during *ṣalāt* in times of illness and during war.

The Shāfi'îs state: If a man performs *ṣalāt* while wearing silk or over something made of it, it will be considered a *ḥarām* act, though his *ṣalāt* will be valid (al-Nawawî, *Sharḥ al-Muhadhdhab,* iii, 179).

I have not found an express statement in the books of the remaining schools concerning the validity or invalidity of *ṣalāt* performed in silk, though the Ḥanafîs as well as the Ḥanbalîs (in accordance with one of two narrations) concur with the Shāfi'îs regarding the general rule that if there is any command prohibiting something which is not directly connected with *ṣalāt*--such as the command prohibiting usurpation--the *ṣalāt* will be valid if it is not observed and the person will be considered as having performed a *wājib* and a *ḥarām* act together. Accordingly, the *ṣalāt* performed in a dress of silk is valid.

The author of *al-Fiqh 'alā al-madhāhib al-'arba'ah* reports a consensus that it is valid for a man constrained to perform *ṣalāt* while wearing silk, and it is not *wājib* for him to repeat it.

3. Lawfulness of the Clothing: The Imāmîs consider it necessary that the clothing worn be lawfully owned. Hence if a person performs *ṣalāt* in usurped clothes with the knowledge of their being so, his *ṣalāt* is *bāṭil.* This is also the opinion of Ibn Ḥanbal in one of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the two statements narrated from him.

The other schools regard *ṣalāt* in usurped clothes as valid on the grounds that the prohibition does not directly relate to *ṣalāt* so as to invalidate it. The Imāmiyyah are very strict concerning usurpation, and some of them even observe: If a person performs *ṣalāt* in clothes in which a single thread is usurped, or carries with him an usurped knife, dirham, or any other thing, his *ṣalāt* will not be valid. But they also say: If one performs *ṣalāt* in usurped clothes out of ignorance or forgetfulness, his *ṣalāt* is valid.

4. The Skin of Animals not Used for Food: The Imāmīs are alone in holding that it is invalid to perform *ṣalāt* while wearing the skin, even if tanned, of an animal whose flesh may not be eaten, as well as anything consisting its hair, wool, fur or feathers. The same is true of clothes bearing any secretion from its body--e.g. sweat and saliva--as long as it is wet. Hence, even if a single hair of a cat or any such animal happens to be present on the dress of a person performing *ṣalāt* and he performs it with the knowledge of its presence, his *ṣalāt* is *bāṭil.*

They exclude wax, honey, the blood of bugs, lice, fleas and other insects which have no flesh, as well as the hair, sweat and saliva of human beings.

They also consider *ṣalāt* invalid if any part of a dead animal (*maytah*) happens to be on the clothes irrespective of whether the animal is one used for food or not, whether its blood flows when cut or not, and its skin is tanned or not.

A Subsidiary Issue: If there is only a single clothing to cover the body and that too is *najis* to an extent that is not excusable, what should one do if he has no alternative other than either performing *ṣalāt* in the *najis* clothing or in the state of nature?

The Ḥanbalīs say: He should perform *ṣalāt* in the *najis* clothing, but it is *wājib* upon him to repeat it later.

The Mālikīs and a large number of Imāmīs observe: He should perform *ṣalāt* in the *najis* clothing and its repetition is not *wājib* upon him.

The Ḥanafīs and the Shāfi'īs state: He should perform *ṣalāt*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

naked and it is not valid for him to cover himself with the *najis* clothing.

The Place of Ṣalāt

An Usurped Place: The Imāmīs consider *ṣalāt* performed in an usurped place and usurped clothing as *bāṭil* provided it is done voluntarily and with the knowledge of the usurpation. The other schools observe: The *ṣalāt* performed in an usurped place is valid, though the person performing it will have sinned, since the prohibition does not relate directly to *ṣalāt;* rather, it relates to dispensations (of property). Their position in this regard is the same as in the case of usurped clothing.

What a great distance between this opinion of the four schools that an usurper's *ṣalāt* is valid in usurped property, and the opinion of the Zaydiyyah that because of the prohibition on the use of anything usurped it is not valid even for the true owner to perform *ṣalāt* in his property as long as it remains usurped.

The Imāmī view represents a middle position, because they consider valid the *ṣalāt* of the true owner and anyone whom he permits, and regard as *bāṭil* the *ṣalāt* of the usurper and anyone whom the owner has not granted permission. The Imāmīs also permit *ṣalāt* in vast stretches of (owned) land which are either impossible or difficult for people to avoid, even if the permission of the owner has not been acquired.

Ṭahārah of the Place: The four Sunnī schools observe: The place should be free from both wet and dry *najāsah.* The Shāfi'īs overdo by observing: The *ṭahārah* of all that which touches and comes into contact with the body or clothes of the *muṣallī* is *wājib.* Therefore, if he rubs himself against a *najis* wall or cloth or holds a *najis* object or a rope lying over *najāsah,* his *ṣalāt* will be *bāṭil.* The Ḥanafīs require only the location of the feet and the forehead to be *ṭāhir;* the Imāmīs restrict it to the location of the forehead, i.e. the place of *sajdah.* As to the *najāsah* of other locations, the *ṣalāt* will not be *bāṭil* unless the *najāsah* is transmitted to the body or clothing of the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

muṣallî (the person performing *ṣalāt*).

Ṣalāt Performed on a Mount: The Ḥanafîs and the Imāmîs require the place to be stationary; hence it is not valid in their opinion to perform *ṣalāt* while riding an animal or something that swings back and forth, except out of necessity, because one who has no choice will perform *ṣalāt* in accordance with his capacity.

The Shāfi'îs, Mālikîs and Ḥanbalîs observe: *Ṣalāt* performed on a mount is valid even during times of peace and despite the ability to perform it on the ground, provided it is performed completely and meets all the requirements.

Ṣalāt Inside the Ka'bah: The Imāmîs, Shāfi'îs and Ḥanafîs state: It is valid to perform *ṣalāt, farîḍah* or *nāfilah,* inside the Ka'bah.

The Mālikîs and the Ḥanbalîs say: Only *nāfilah,* not *farîḍah,* is valid therein.

A woman's Prayer Beside a Man: A group of Imāmî legists observe: If a man and a woman perform *ṣalāt* in a single place so that she is either in front of him or beside him, and there is neither any screen between them nor does the distance between the two exceed 10 cubits, the *ṣalāt* of the one who starts earlier will not be *bāṭil,* and if both start simultaneously, the *ṣalāt* of both will be *bāṭil.*

The Ḥanafîs say: If the woman is in front or beside a man, the *ṣalāt* will be *bāṭil* if performed in a single place with no screen at least a cubit high between them, the woman has sex appeal, her shanks and ankles are adjacent to his, the *ṣalāt* is not a funeral prayer, and the *ṣalāt* is being jointly performed, i.e. either she is following him or both are following a single imām.

The Shāfi'îs, the Ḥanbalîs and most Imāmîs are of the view that the *ṣalāt* is valid, though the manner of performance is *makrūh.*

The Locale of Sajdah: The schools concur that the place where the forehead is placed during prostration should be stationary and should not be inordinately higher than the location of the knees (during *sajdah*). They differ regarding that on which *sajdah* is valid. The Imāmîs state: It is not valid to perform *sajdah* on anything except on earth and those things which grow on it and are not used for food or clothing. Therefore, a person cannot perform *sajdah* on

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

wool, cotton, minerals and that which grows on the surface of water, for water is not earth.

They permit *sajdah* on paper because it is made of a material which grows on earth. They argue their position by pointing out that *sajdah* is an *'ibādah* prescribed by the Sharī'ah that depends for its particulars on textual evidence (*naṣṣ*). The legists of all the schools concur regarding the validity of *sajdah* on earth and that which grows on it, thus restricting it to that regarding which there is certainty. They offer as further evidence these traditions of the Prophet (ṣ):

لا تَتِمُّ صَلاة أَحَدِ كُم حَتّىٰ يَتَوَضّأ كما أَمرالله، ثُمَّ يَسجُد مُمَكِّناً جَبهَتَهُ مِنَ الأَرض.

The *ṣalāt* of any of you will not be valid unless he performs *wuḍū'* as instructed by God and then performs *sajdah* by placing his forehead on the earth.

خَلِقَت الأَرضُ مَسجِداً وطَهوراً.

The earth has been created a *masjid* (a place for performing *sajdah*) and a purifier.

Khabbāb says: "We complained to the Prophet (ṣ) regarding the excessive heat of sun-baked ground on our foreheads, but he did not accept our complaint." Had it been valid to perform *sajdah* on carpets, why would they have complained?

The Imāmīs permit *sajdah* on cotton and linen in case of *iḍṭirār*.

The four schools observe: It is valid to perform *sajdah* on anything, including even a part of one's turban, provided it is *ṭāhir*. Rather, the Ḥanafīs permit *sajdah* on one's palm even without an emergency, though it is considered as *makrūh*.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ADHĀN

Adhān literally means 'announcement', and in the Sharī'ah it means the announcement made in specific words at the time of *ṣalāt*. It was introduced in the first year of the Hijrah at Madīnah. The cause of its introduction, in the opinion of the Imāmīs, was that Gabriel came down with the *adhān* in a message from God to the Prophet (ṣ). The Sunnīs say that 'Abd Allāh ibn Zayd saw a dream in which he was taught the *adhān* by someone. When he related his dream to the Prophet (ṣ), he approved it.

Adhān is a Sunnah:

The Ḥanafīs, Shāfi'īs and Imāmīs say: *Adhān* is a *sunnah* which has been emphatically recommended (*mu'akkadah*). The Ḥanbalīs observe: It is a *kifā'î farḍ* of non-travelling men in villages and towns to make the *adhān* for the five daily prayers.

The Mālikīs state: It is *wājib kifā'î* in towns where the Friday prayer is held, and if the people of such a place abandon *adhān* they will be fought on that account.

Adhān is Invalid in Certain Cases:

The Ḥanbalīs observe: It is not valid to make *adhān* for a funeral prayer (*ṣalāt al-janāzah*) or for a supererogatory prayer (*al-ṣalāt al-nāfilah*) or for one performed to fulfil a vow (*al-ṣalāt al-mandhūrah*).

The Mālikīs say: It is not valid for a supererogatory or funeral prayer or for an obligatory daily prayer performed after the lapsing of its time (*al-ṣalāt al-fā'itah*).

The Ḥanafīs state: It is not valid for the prayers performed on the two 'īds (*'îdayn*), for the prayer performed on the occurrence of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

an eclipse (*ṣalāt al-kusūf*), for prayers made for rain (*istisqā'*), and for *tarāwîḥ* and *sunnah* prayers.

The Shāfi'îs do not consider it valid for *janāzah, mandhūrah* and *nawāfil* prayers.

The Imāmîs observe: The Sharî'ah has introduced *adhān* only for the five daily *ṣalāt*s, and it is *mustaḥabb* for them, whether performed as *adā'* or *qaḍā'*, with a group (*jamā'ah*) or singly (*furādā*), during journey or stay, both for men and women. It is not valid for any other *ṣalāt, mustaḥabb* or *wājib,* and the *mu'adhdhin* will call out *"al-ṣalāt"* three times on occasions of *ṣalāt al-kusūf* and *'îdayn.*

The Conditions for Adhān:

The schools concur that the conditions for the validity of *adhān* are: maintaining continuity of its recital and the sequence of its different parts, and that the *mu'adhdhin* be a sane Muslim man.[8] *Adhān* by a child of discerning age is valid. All the schools concur that *ṭahārah* is not required for *adhān.*

The schools differ regarding other aspects. The Ḥanafîs and the Shāfi'îs say: *Adhān* is valid even without *niyyah.* The other schools require *niyyah.*

The Ḥanbalîs consider making *adhān* in any language other than Arabic as being unconditionally valid.

The Mālikîs, Ḥanafîs and Shāfi'îs state: It is not valid for an Arab to make *adhān* in any other language, though it is valid for a non-Arab to make it in his own tongue, for himself and his colinguals.

The Imāmîs observe: *Adhān* is not valid before the arrival of the time of *ṣalāt* except in the case of *ṣalāt al-fajr.* The Shāfi'îs, Mālikîs, Ḥanbalîs and many Imāmîs permit the making of the *adhān* of announcement before the dawn. The Ḥanafîs do not permit it, making no difference between *ṣalāt al-fajr* and other *ṣalāt*s. This opinion is closer to caution.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Form of Adhān:

Allāhu akbar--four times according to all the schools and twice according to the Mālikîs.
Ashhadu an lā ilāha illallāh--twice according to all the schools.
Ashhadu anna Muḥammadan rasūl Allāh--twice according to all the schools.
Ḥayya 'ala al-ṣalāt--twice according to all the schools.
Ḥayya 'ala al-falāḥ--twice according to all the schools.
Ḥayya 'alā khayr il-'amal--twice according to the Imāmîs only.
Allāhu akbar--twice according to all the schools.
Lā ilāha illallāh--once according to the four schools and twice according to the Imāmîs.

The Mālikîs and Shāfi'îs permit repetition of the last line, considering it *sunnah;* that is the *adhān,* according to them, is not invalid if it is recited only once, as the Imāmîs hold. The author of *al-Fiqh 'alā al-madhāhib al-'arba'ah* mentions a consensus among the four schools regarding *'al-tathwîb'* being *mustaḥabb. 'Al-tathwîb* means reciting the words *"al-ṣalātu khayrun min al-nawm",* ('*Ṣalāt* is better than sleep') twice after "*ḥayya 'ala al-falāḥ*". The Imāmîs prohibit it.[9]

Iqāmah:

For both men and women it is *mustaḥabb* to recite *iqāmah* before every daily obligatory *ṣalāt,* with the *ṣalāt* immediately following it. The rules applicable to *adhān,* such as continuity, sequence, its being in Arabic, etc., apply to *iqāmah* as well. Its form is as follows:

Allāhu akbar--twice according to all the schools except the Ḥanafîs who require it four times.
Ashhadu an lā ilāha illallāh--once according to the Shāfi'îs, Mālikîs and Ḥanbalîs and twice

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

according to the Ḥanafīs and Imāmīs.

Ashhadu anna Muḥammadan rasūlullāh--once in the opinion of the Shāfi'īs, Mālikīs and Ḥanbalīs, and twice according to the Ḥanafīs and Imāmīs.

Ḥayya 'ala aṣ-ṣalāt--once in the opinion of the Shāfi'īs, Mālikīs and Ḥanbalīs, and twice according to the Ḥanafīs and Imāmīs.

Ḥayya 'ala al-falāḥ--once in the opinion of the Shāfi'īs, Mālikīs and Ḥanbalīs, and twice according to the Ḥanafīs and Imāmīs.

Ḥayya 'alā khayr il-'amal--twice only according to the Imāmīs.

Qad qāmat iṣ-ṣalāt--twice in the opinion of all schools, except the Mālikīs who recite it once.

Allāhu akbar--twice in the opinion of all the schools.

Lā ilāha illallāh--once in the opinion of all the schools.

A group of Imāmī legists observe: It is valid for a 'traveller' and a person in a hurry to recite each sentence of both the *adhān* and *iqāmah* only once.

The Essentials of Ṣalāt

The validity of *ṣalāt* is dependent upon *ṭahārah*--both from *ḥadath* and *khabath*--setting in of its time, facing the *qiblah,* and wearing sufficient clothing. The fulfilment of these conditions (called *shurūṭ*) before starting the *ṣalāt* is necessary, and they have been discussed in detail in the preceding pages. *Ṣalāt* also comprises certain essentials (*arkān wa farā'iḍ*) which are performed as parts of *ṣalāt.* They are many, and among them are the following:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

1. Niyyah:

The schools--or rather the legists of each school among themselves--differ regarding the content of the *niyyah* (intention) required for *ṣalāt,* that is, whether it is necessary to specify the *ṣalāt* (such as its being *ẓuhr* or *'aṣr* prayer), whether it is obligatory or supererogatory, *tamām* (complete) or *qaṣr* (shortened), *adā'* o r *qaḍā',* and so on.

The essence of *niyyah,* as mentioned in the chapter on *wuḍū',* is the intention to perform an act with the motive of obedience to a command of God Almighty. Specification of a particular *ṣalāt,* whether it is obligatory or supererogatory, *adā'* or *qaḍā,* is dependent upon the intention of the *muṣallî.* Thus if he intends to perform a supererogatory *ṣalāt* at the start and performs it with this intention, it will be supererogatory; if he intends to perform an obligatory *ṣalāt,* such as *ẓuhr* or *'aṣr* prayer, it will be so. But if he does not intend anything it will be a waste of labour, though it is impossible for one not to intend anything. Because any act performed by a sane person cannot be without an intention regardless of whether he expresses it in specific words or not, and irrespective of whether he is attentive to his intention or not. Therefore, all the schools concur that expressing the *niyyah* in words is not necessary. Similarly, it is also ordinarily impossible for one who knows the difference involved to intend *ẓuhr* while performing *'aṣr* and an obligatory *ṣalāt* while performing a supererogatory one.

However, discussions regarding *niyyah* and its various forms were not in vogue among the pioneering scholars of the Sharî'ah. It would be good to quote here the observations of two great scholars, Ibn al-Qayyim from among Sunnî legists, and Sayyid Muḥammad, the author of *al-Madārik,* from among the Imāmiyyah.

The former observes in his *Zād al-ma'ād,* as quoted in the first volume of Ibn Qudāmah's *al-Mughnî:* "The Prophet (ṣ) used to say "*Allāhu akbar*" when he stood for prayer and did not say anything before it. He did not express the *niyyah* in words, such as saying: 'I perform such and such prayer in four *rak'ah*s facing the *qiblah* as an

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

imām or *ma'mūm'* (one who follows the *imām*). Neither did he mention whether it was *adā'* or *qaḍā'* nor its time. These ten are later elaborations and no one has ever narrated them from him (ṣ) in either *ṣaḥîḥ* or *ḍa'îf* form, and neither the *tābi'ūn* nor the four Imams have opted for them."

The latter, in *Madārik al-'aḥkām* (*mabḥath al-niyyah awwal al-ṣalāt*) observes: "That which is inferable from the sources of the Sharî'ah is that *niyyah* is a simple matter and all that it involves is the intention to perform an act in obedience to God, the Exalted. This is something which no sane person can do without while turning to perform an act of worship (*'ibādah*)."

Here some scholars have observed: If God were to enjoin the performance of *ṣalāt* or any other *'ibādah* without a *niyyah,* it would have amounted to demanding something impossible. Al-Shahîd has mentioned in *al-Dhikrā* that our earlier scholars did not mention *niyyah* in their books on fiqh; they would state: 'The first *wājib* i n *wuḍū'* is washing the face, and the first *wājib* in *ṣalāt* is *takbîrat al-'iḥrām.'* The reason for this was that that which is essential in regard to *niyyah* is something which is inescapable, and anything in addition to it is not *wājib.* That which confirms this is that *niyyah* has not been mentioned in the context of any of the *'ibādāt*--and particularly not in their case--and the traditions describing the *wuḍū', ghusl* and *tayammum* of the Prophet (ṣ) do not make any mention of it.

2. Takbîrat al-'Iḥrām:

Ṣalāt does not materialize without *'takbîrat al-'iḥrām.'* Its name derives from the statement of the Prophet (ṣ):

مِفتاحُ الصَّلاةِ الطُّهورُ، وَتَحريمُها التَّكبيرةُ، وَتَحليلُها التَّسليمُ.

Taḥārah is the key to *ṣalāt;* its consecration (*taḥrîm*) is the *takbîrah;* and its termination (*taḥlîl*) is *taslîm.*

It means that with *takbîrat al-'iḥrām* it becomes *ḥarām* to speak

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and perform any act incompatible with *ṣalāt,* and by reciting *taslîm* those acts which were prohibited after reciting the *takbîrah* become permissible again.

Its formula is "*Allāhu akbar*", and according to the Imāmîs, Mālikîs and Ḥanbalîs no other form is permissible. The Shāfi'îs observe: Both "*Allāhu akbar*", and "*Allāhu al-'akbar*" (with the addition of *alif* and *lām* to "*akbar*") are permissible. The Ḥanafîs state: Any other synonymous words such as *'Allāhu al-'a'ẓam'* and *'Allāhu al-'ajall'* will do.

All the schools, excepting the Ḥanafî, concur that it is *wājib* to recite it in Arabic, even if the *muṣallî* is a non-Arab. If he cannot, it is obligatory for him to learn it; and if he cannot learn, he may translate it into his own tongue. The Ḥanafîs observe: It is valid to recite it in any language even if one can recite it in Arabic.

There is consensus among the schools that at the time of reciting *takbîrat al-'iḥrām* all the conditions necessary for *ṣalāt* (such as *ṭahārah,* facing the *qiblah,* covering the body, etc.) should be present, and that it should be recited--when one has the ability to do so--while standing stationarily, and in a voice that he can hear. The word *'Allāh'* should precede *'akbar',* and the reverse, *'akbar Allāh',* will not suffice for entry into *qiyām.*

3. Qiyām:

The schools concur that *qiyām* is *wājib* in the obligatory *ṣalāts* from the beginning of *takbîrat al-'iḥrām* to the making of *rukū',* and that standing uprightly, stationarily and independently are its requisites. Hence it is not valid to recline on any support when one is able to stand without it. If one cannot stand, he may perform *ṣalāt* sitting, and if this too is not possible, while lying down on the right side facing the *qiblah* (in the same position that a dead body is placed in the grave). This is the opinion of all the schools except the Ḥanafîs, who state: A person who cannot sit will perform *ṣalāt* lying down on his back with his feet pointing towards the *qiblah,* so that his gestures in lieu of *rukū'* and *sajdah* are made towards the *qiblah.*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

If it is not possible to perform *ṣalāt* while lying on the right side, the Imāmīs, Shāfi'īs and Ḥanbalīs permit him to perform *ṣalāt* lying on his back by making gestures with his head. If gesturing with the head is not possible, he will gesture with the eyelids.

The Ḥanafīs say: If his state is as bad as that, the duty of *ṣalāt* will no longer apply to him, though he will have to perform it *qaḍā'* when his condition improves and the hindrance is removed.

According to the Mālikīs, a sick person such as this is not required to perform *ṣalāt* and it is also not *wājib* for him to perform its *qaḍā'*.

The Imāmīs, Shāfi'īs and Ḥanbalīs state: The duty of *ṣalāt* does not disappear in any situation; if he is unable to gesture by blinking his eyes he will pass the *ṣalāt* through his mind and move his tongue for reciting the *qirā'ah* and *dhikr*. If he is unable to move the tongue he will imagine it in his mind as long as his mind works. To sum up, *ṣalāt* is *wājib* upon those who are fully capable and those who are not so capable. It may not be neglected in any situation, and every person must perform it in accordance with his ability. Hence it is performed while standing, then sitting, then lying down on one's side, then lying down on one's back, then gesturing by blinking the eyes, and passing it through the mind, in that order. A fully capable person as well as one not capable will move from the previous state to the new situation which has come into existence. Hence if a fully capable person loses his ability during *ṣalāt* or one not capable regains it, either of them will perform the remaining part in accordance with his ability. Therefore, if he performs one *rak'ah* standing and is then unable to stand, he will complete it sitting, and if he performs the first *rak'ah* sitting and then regains the strength to stand, he will complete the remaining *ṣalāt* standing.

4. Qirā'ah:

The schools differ whether the recitation of *Sūrat al-Fātiḥah* is *wājib* in every *rak'ah*, or in the first two *rak'ah*s, or in all the *rak'ah*s without there being any other alternative. They give different

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

answers to the following questions: Is the *basmalah* an essential part of *al-Fātiḥah* or is it valid to omit it? Is it *wājib* or *mustaḥabb* to recite aloud or in a low voice? Is it *wājib* to recite another *sūrah* after *al-Fātiḥah* in the first two *rak'ah*s? Can the *tasbîḥ* replace the *sūrah*? Is *takattuf* (the folding of arms during *ṣalāt*) a *sunnah* or is it *ḥarām*? And so on.

The Ḥanafîs observe: It is not compulsory to recite only *Sūrat al-Fātiḥah* in the daily obligatory *ṣalāt*s, and anything recited from the Qur'ān may take its place, because God the Exalted, says: فَاقْرَأُوا مَا تَيَسَّرَ مِنَ الْقُرْآنِ *'Therefore recite of the Qur'ān so much as is feasible'* (73:20) (*Bidāyat al-mujtahid,* vol. 1, p. 122 and al-Shi'rānî's *Mîzān,* "bāb ṣifat al-ṣalāt"). The recital from the Qur'ān is *wājib* in the first two *rak'ah*s; but in the third *rak'ah* of the *maghrib* prayer and the last two *rak'ah*s of *'aṣr* and *'ishā'* prayers there is an option between reciting from the Qur'ān or saying the *tasbîḥ* or keeping quiet (al-Nawawî, *Sharḥ al-Muhadhdhab,* vol. 3, p. 361).

Moreover, the Ḥanafîs say: It is valid to forego the *basmalah* because it is not a part of any *sūrah.* Neither reciting aloud nor in a low voice are *mustaḥabb,* and a *muṣallî* praying alone is free to recite in a voice that he alone can hear or in a voice hearable to others. There is no *qunūt* in *ṣalāt* with the exception of *ṣalāt al-watr.* As to *takattuf,* it is *masnūn* (a *sunnah*) and not *wājib,* and its preferable form is for a man to place the palm of his right hand on the back of his left hand below the navel, and for a woman to place her hands on her chest.

The Shāfi'îs state: *Sūrat al-Fātiḥah* is *wājib* in every *rak'ah,* without there being any difference in this regard between the first two *rak'ah*s and the other *rak'ah*s and between *wājib* and *mustaḥabb ṣalāt*s. The *basmalah* is a part of the *sūrah* and cannot be omitted in any circumstance. The recitation should be aloud in the morning prayer and the first two *rak'ah*s of *maghrib* and *'ishā'* prayers; the remaining recitals are to be in a low voice. The *qunūt* is *mustaḥabb* only in the morning prayer, and is to be performed after rising from the *rukū'* of the second *rak'ah.* Similarly, it is *mustaḥabb* to recite another *sūrah* after *al-Fātiḥah* only in the first two *rak'ah*s. *Takattuf*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

is not *wājib* but a *sunnah* for both the sexes, and its preferable form is to place the right hand palm on the back of the left hand between the chest and the navel and towards the left side.

According to the Mālikîs, reciting *Sūrat al-Fātiḥah* is necessary in every *rak'ah,* without there being any difference in this regard between the earlier and later *rak'ah*s and between *farḍ* and *mustaḥabb ṣalāt*s, as observed earlier by the Shāfi'îs. It is *mustaḥabb* to recite another *sūrah* after *al-Fātiḥah* in the first two *rak'ah*s. The *basmalah* is not a part of the *sūrah* and it is *mustaḥabb* to omit it altogether. Reciting aloud is *mustaḥabb* in the morning prayer and the first two *rak'ah*s of *maghrib* and *'ishā'* prayers. *Qunūt* is to be recited only in the morning prayer. *Takattuf* is valid in.their opinion, though it is *mustaḥabb* to keep the hands hanging freely in the *farḍ* prayers.

The Ḥanbalîs consider *al-Fātiḥah* to be *wājib* in every *rak'ah,* and to recite a *sūrah* after it in the first two *rak'ah*s as *mustaḥabb.* The morning prayer and the first two *rak'ah*s of *maghrib* and *'ishā'* prayers are to be recited aloud. The *basmalah* is a part of *sūrah*s though it will be recited in a low voice and not aloud. *Qunūt* is to be recited in *ṣalāt al-watr* and not in any other *ṣalāt. Takattuf* is a *sunnah* for both men and women and its preferable form is to place the right hand palm on the back of the left hand below the navel.

It is evident that *takattuf,* which the Sunnî legists call *'qabḍ'* and the Shî'ah legists *'takfîr'*--i.e to conceal--is not *wājib* in the opinion of any of the four Sunnî schools.

The Imāmîs state: Reciting *Sūrat al-Fātiḥah* is necessary in the first two *rak'ah*s of every *ṣalāt* and no other *sūrah* can suffice in its place. But it is not *wājib* in the third *rak'ah* of *maghrib* and the last two *rak'ah*s of four-*rak'ah* prayers; rather, one has an option between it and *tasbîḥ. 'Tasbîḥ'* means the recitation of: سُبحانَ اللهِ وَالحَمدُ للهِ وَلا الهَ الاّ اللهُ وَاللهُ اَكبَرُ. thrice, though even once is sufficient. It is *wājib* to recite another complete *sūrah* in the first two *rak'ah*s, and the *basmalah* is a part of the *sūrah*s which cannot be omitted in any circumstance. It is *wājib* to recite aloud only the *sūrah*s and not the other recitations in the morning prayer and the first two *rak'ah*s of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

maghrib and *'ishā'* prayers. The *qirā'ah* in *ẓuhr* and *'aṣr* prayers is to be done, except for the *basmalah,* in a low voice in their first two *rak'ah*s and also in the third *rak'ah* of *maghrib* and the last two *rak'ah*s of *'ishā'* prayers. *Qunūt* is *mustaḥabb* in the five daily prayers and its place is the second *rak'ah* after the recital of the *sūrah*s and before *rukū'*. The minimum level of voice considered 'loud' is that a person nearby be able to hear it, and the minimum for 'low' voice is that the person himself be able to hear it. The schools concur that reciting aloud is not prescribed for a woman, nor is reciting in a voice lower than what can be heard by herself. If a *muṣallî* voluntarily recites loudly something which is to be recited in a low voice and vice versa, his *ṣalāt* will be invalid, if this is not done due to ignorance or forgetfulness.

The Imāmîs also consider saying "*Āmmîn*" (Amen) during *ṣalāt* to be *ḥarām* and a cause for the *ṣalāt* to become *bāṭil,* irrespective of whether one is praying individually or as an *imām* or *ma'mūm,* because it is something adopted by the people, and nothing adopted by them is capable of being included in the *ṣalāt.* The four Sunnî schools concur that it is *mustaḥabb* in accordance with the narration of Abū Hurayrah that the Prophet (ṣ) said:

> When the *imām* says, "*ghayr il maghḍūbi 'alayhim wa la-ḍḍāllîn,*" then say: "*Āmmîn*".

The Imāmîs negate the authenticity of this tradition.

Most Imāmîs consider *takattuf* in *ṣalāt* to render it *bāṭil* because there is no explicit statement (*naṣṣ*) in support of it. Some of them say: *Takattuf* is *ḥarām* and one who does it sins, though his *ṣalāt* does not become *bāṭil.* A third group from among them observes: It is *makrūh* and not *ḥarām.*

5. Rukū':

There is consensus among the schools that *rukū'* is *wājib* in *ṣalāt,* but they differ regarding the extent to which it is *wājib* and the necessity of staying motionless in that position.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Ḥanafîs observe: That is *wājib* is to bend down in any possible manner, and staying motionless is not *wājib.*

The remaining schools consider it *wājib* to kneel down till the palms of the *muṣallî* reach his knees and to stay motionless during *rukū'.*

The Shāfi'îs, Ḥanafîs and Mālikîs state: It is not *wājib* to recite anything during *rukū',* though it is *sunnah* that the *muṣallî* say: "*Subḥāna Rabbî al-'aẓîm.*"

The Imāmîs and the Ḥanbalîs consider *tasbîḥ* to be *wājib* during *rukū'* and its formula in the opinion of the Ḥanbalîs is "*Subḥāna Rabbî al-'aẓîm,*" and according to the Imāmîs "*Subḥāna Rabbî al-'aẓîm wa bi ḥamdih*" or just "*Subḥānallāh*" thrice. It is *mustaḥabb* in the opinion of the Imāmîs to add after the *tasbîḥ* a benediction for Muḥammad (ṣ) and his Family (*Allāhumma ṣallî 'alā Muḥammadin wa āli Muḥammad*).

The Ḥanafîs say: It is not *wājib* to return to the standing position after *rukū',* and it is sufficient, though *makrūh,* to perform *sajdah* straightaway.

The other schools consider it *wājib* to return to the standing position and *mustaḥabb* to recite the *tasmî',* which is to say: "*Sami'allāhu li man ḥamidah*" (God hears one who praises Him). According to the Imāmîs, it is *wājib* to stay motionless in this *qiyām.*

6. Sujūd:

There is consensus among the schools that *sujūd* (prostration) is *wājib* twice in each *rak'ah.* They differ regarding its details, as to whether it is *wājib* to prostrate with all the seven parts of the body touching the ground while performing it or if it is sufficient to lay on the ground only some of them. These seven parts are; the forehead, the palms, the knees and the big toes.

The Mālikîs, Shāfi'îs and Ḥanafîs state: It is *wājib* to lay only the forehead on the ground in *sujūd,* and laying down the other parts is *mustaḥabb.*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Imāmîs and the Ḥanbalîs observe: It is *wājib* to lay on the ground all the seven parts while performing *sujūd*. It has been narrated from the Ḥanbalîs that they add the nose to these seven, thus making them eight.

The difference of opinion regarding reciting *tasbîḥ* and being motionless during *sujūd* is similar to the difference mentioned concerning *rukū'*. Those who consider them *wājib* there, consider them *wājib* here as well.

The Ḥanafîs do not consider it *wājib* to sit between the two *sajdah*s; the remaining schools consider it *wājib*.

7. Tashahhud:

Tashahhud can be recited twice in *ṣalāt;* the first, after the second *rak'ah* of *ẓuhr, 'aṣr, maghrib* and *'ishā'* prayers, which is not followed by *taslîm;* the second in the last *rak'ah* of the two-, three-, and four-*rak'ah* prayers, which is followed by *taslîm*.

The Imāmîs and the Ḥanbalîs state: The first *tashahhud* is *wājib*. The remaining schools consider it *mustaḥabb* and not *wājib*.

The second *tashahhud* is considered *wājib* by the Shāfi'îs, Imāmîs and Ḥanbalîs, and *mustaḥabb* by the Mālikîs and Ḥanafîs (*Bidāyat al-mujtahid,* vol. 1, p. 125).

The following are the forms of *tashahhud* observed by the different schools:

The Ḥanafîs:

«التّحيـاتُ لله والصّلـواتُ وَالطَّيبـاتُ والسّلام عَليكَ أيُّهاالنّبيُّ وَرَحمةُ الله وَبركاتُه، السّلامُ عَلَينا وَعَلىٰ عبادِالله الصّالحين، أشهدُ أنْ لاإلهَ إلاّ اللهُ، وَأشهدُ أنَّ مُحَمَّداً عَبدُهُ وَرَسولُهُ...»

The Mālikîs:

«التّحيّاتُ لله الزّاكياتُ لله الطَّيّباتُ الصّلَواتُ لله ، السّلامُ عَليكَ أيُّهاالنّبيُّ وَرَحمةُ الله وَبرَكاتُهُ، السّلامُ عَلَيناوَعَلى عِبادِالله الصّالحينَ، أشهدُ أنْ لاإلهَ إلاّ اللهُ وَحدَهُ لاشَريكَ

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

لَهُ، وَأَشهدُ أَنَّ مُحمَّداً عَبْدُهُ وَرَسُولُهُ...»

The Shāfi'îs:

«التَّحيّاتُ المباركاتُ الصَّلواتُ الطَّيّباتُ لله ، السَّلامُ عَليكَ أَيُّهاالنَّبيُّ وَرَحمةُ الله وَبَركاتُه، السَّلامُ عَلَينا وَعَلى عِبادالله الصّالحين أَشهدُ أَنْ لاإلهَ إلاّ اللهُ وَأَشهدُ أَنَّ سَيِّدَنامُحمَّداًرَسولُ الله...»

The Ḥanbalîs:

«التَّحيّاتُلله وَالصَّلواتُ وَالطَّيّباتُ، السَّلامُ عَليكَ أَيُّهاالنَّبيُّ وَرَحمةُ الله وَبَركاتُه، السَّلامُ عَلَينا وَعَلَى عِبادالله الصّالحين، أَشهدُ أَنْ لاإلهَ إلاّ اللهُ وَحدَهُ لا شَريكَ لَهُ، وَأَشهَدُ أَنَّ مُحمَّداً عَبدُهُ وَرَسولُهُ، اللّهُمَّ صَلِّ عَلى مُحمَّد...»

The Imāmîs:

«أَشهدُ أَنْ لاإلهَ إلاّ اللهُ وَحدَهُ لا شَريكَ لَه وَأَشهدُأَنَّ مُحمَّد اًعَبدُهُ وَرَسولَه، اللّهمَّ صَلِّ عَلى مُحمَّدٍ وَآلِ مُحمَّد..»

8. Taslîm:

The Shāfi'îs, Mālikîs and Ḥanbalîs observe: *Taslîm* is *wājib*. The Ḥanafîs do not consider it *wājib* (*Bidāyat al-mujtahid,* vol. 1, p. 126). The Imāmîs differ among themselves, a group considers it *wājib,* while others, including al-Mufîd, al-Shaykh al-Ṭūsî and al-'Allāmah al-Ḥillî, regard it as *mustaḥabb.*

It has only one form in the opinion of the four Sunnî schools, and it is .السَّلامُ عَليكُم وَرَحمةُ الله. The Ḥanbalîs say: It is obligatory to recite it twice. The others consider reciting once as sufficient.

The Imāmîs state: *Taslîm* consists of two formulas; the first is: السَّلامُ عَليكُم وَرَحمةُ الله and the second: السَّلامُ عَلَينا وَعَلى عِبادالله الصّالحين. وَبَركاتُه. One of them is *wājib.* Hence if a person recites the former, the latter will be *mustaḥabb,* and if he recites the latter, he will stop

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

at it. As to السَّلامُ عَلَيكَ أَيُّهاالنَّبيُّ وَرَحمةُ الله وَبَركاتُه, it is not a part of *taslîm,* and is a *mustaḥabb* addition to the *tashahhud.*

9. Sequence:

Proper Sequence (*tartîb*) is *wājib* between the different parts of *ṣalāt.* Hence the *takbîrat al-'iḥrām* must precede *qirā'ah,* the *qirā'ah* must precede *rukū',* the *rukū'* must come before the *sujūd,* and so on.

10. Continuity:

Continuity (*muwālāt* and *tatābu'*, i.e. to occur one after another) is *wājib* between the parts of *ṣalāt* and between the different portions of a part. Therefore, the *qirā'ah* must begin immediately after the *takbîrah* and *rukū'* must similarly follow the *qirā'ah,* and so on. The verses, words and letters must not be recited in a manner breaking continuity.

Error and Doubt During Ṣalāt

The schools concur that a willful violation of any *wājib* act in *ṣalāt* renders it invalid and that a flaw by mistake (*sahw*) can be atoned for by performing *sujūd al-sahw* as described below.

The Ḥanafîs state: The form of *sujūd al-sahw* is that the *muṣallî* should perform two *sajdah*s followed by the recitation of *tashahhud* and *taslîm,* prayer and benediction for the Prophet (ṣ). This *sujūd* should be performed after *taslîm,* provided there is sufficient time (for the *ṣalāt*). Hence if, for instance, someone makes an involuntary error in *ṣalāt al-fajr* and finds that the sun has risen before his performing *sujūd al-sahw,* he is not required to perform it any more. The cause necessitating *sujūd al-sahw* is the *muṣallî*'s omitting a *wājib* part or adding an extra essential part (*rukn*)--such as *rukū'* or *sujūd.* If numerous lapses occur (in a single *ṣalāt*), the two *sajdah*s will suffice for them all, because their repetition is not valid in their opinion. And if there occurs a lapse in the *sujūd al-sahw* it

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

requires no rectification (*Majma' al-'anhūr,* vol. 1, "bāb sujūd al-sahw").

The Mālikîs observe: In its form, *sujūd al-sahw* consists of two *sajdah*s followed by *tashahhud* without any supplication and benediction for the Prophet (ṣ). As to the place of this *sujūd,* in the event that it is on account of an omission or due to both an omission and an addition, it will be performed before the *taslîm;* but if the cause is only an addition, then after the *taslîm.* Moreover, *sujūd al-sahw* atones for an involuntary omission of a *mustaḥabb* part of *ṣalāt;* hence if the omitted part is a *farḍ* part of *ṣalāt* it cannot be atoned by *sujūd al-sahw* and must be performed. However, if the mistake is one of involuntary addition--such as an extra *rukū'* or two, or one or two additional *rak'ah*s--it is atonable by *sujūd al-sahw.*

The Ḥanbalîs say: It is valid to perform *sujūd al-sahw* before or after the *taslîm.* It consists of two *sajdah*s followed by *tashahhud* and *taslîm.* Its causes are involuntary addition or omission as well as doubt. An example of addition is to perform an additional *qiyām* (standing) or *qu'ūd* (sitting). One who sits where he is supposed to stand or vice versa will perform *sujūd al-sahw.* Where there is an omission, the following procedure is to be followed in their opinion. If he remembers the omission before starting the *qirā'ah* of the next *rak'ah,* it is *wājib* for him to perform the part omitted as well as *sujūd al-sahw;* and if he comes to remember it only after starting the *qirā'ah* of the next *rak'ah,* the former *rak'ah* will be annulled and the latter will take its place and *sujūd al-sahw* will also be performed. To illustrate the same, if a person forgets *rukū'* in the first *rak'ah* and becomes aware of it after performing the *sujūd* (of the same *rak'ah*), he will perform the *rukū'* and then repeat the *sujūd,* and if he becomes aware of it only after starting the *qirā'ah* of the second *rak'ah,* the former *rak'ah* will be considered null and void and the second *rak'ah* will take its place. An example of doubt necessitating *sujūd al-sahw* is the case when one doubts whether he has performed the *rukū',* or has a doubt regarding the number of *rak'ah*s performed. Here he will consider that portion of the *ṣalāt* he is sure of having performed as the basis and will perform the remaining *ṣalāt,* and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

carry out *sujūd al-sahw* on finishing it. Two *sajdah*s suffice for several mistakes, even if their causes differ, and a lapse committed by someone prone to making mistakes will not be considered a lapse.

According to the Shāfi'īs, the place of *sujūd al-sahw* is after the *tashahhud* and benediction of the Propeht (*ṣ*) and before the *taslīm*. Its mode of performance is like the one prescribed by the above-mentioned schools. The reasons for its performance are: omission of an emphasized (*mu'akkadah*) *sunnah*, a little additional recital, the recital of *al-Fātiḥah* by mistake, the following of an *imām* whose *ṣalāt* is vitiated, a doubt in the number of *rak'ah*s, and the omission of a specific part.

The Imāmīs differentiate between the rules applicable to cases of doubt and those applicable to errors. They state: No attention will be paid to a doubt arising concerning any act of *ṣalāt* after its completion, or the doubt of a *ma'mūm* regarding the number of *rak'ah*s if the *imām* has ascertained their number and vice versa, with each of them referring to the memory of the other. No significance is attached to the doubts of a person who doubts excessively, and similarly to a doubt respecting any act of a *ṣalāt* arising after entry into its subsequent act. Hence if a doubt occurs regarding the *qirā'ah* of *al-Fātiḥah* after starting the *qirā'ah* of the subsequent *sūrah*, or regarding the *sūrah* after having gone into the *rukū'*, or with respect to the *rukū'* after having entered the *sajdah*, the *ṣalāt* will be continued without heeding the doubt. But if the doubt occurs before starting the performance of the subsequent act, it is *wājib* to rectify it. Hence a person who has doubt regarding the recital of *al-Fātiḥah* before starting the subsequent *sūrah*, will recite it, and similarly the *sūrah* if he has a doubt concerning its recital before entering the *rukū'*.

As to *sujūd al-sahw*, it is ordained for every omission and addition, except for reciting aloud instead of in a low voice and vice versa--as it does not entail anything--and except for any omission or addition that does not pertain to the *arkān* of *ṣalāt*, because their omission or addition invalidates the *ṣalāt* irrespective of its being willful or by mistake. The *arkān* in their opinion are the following

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

five: *niyyah, takbîrat al-'iḥrām, qiyām, rukū'* and the two *sajdah*s of a *rak'ah.* It is not *wājib* to perform any part omitted by mistake after the *ṣalāt* except *sajdah* and *tashahhud,* which are alone required to be performed among the forgotten parts. These will be performed after the completion of the *ṣalāt,* followed by *sujūd al-sahw,* which consists of making two *sajdah*s and reciting بسم الله وَبِالله، اللَّهُمَّ صَلِّ عَلى مُحَمَّدٍ وَآلِ مُحَمَّدٍ. in the state of prostration, followed by *tashahhud* and *taslîm.* The number of *sujūd al-sahw* required is equal to the number of the causes entailing it. They consider the mistake of a person committing excessive mistakes and a mistake committed while rectifying one as no mistake.

Doubt in the Number of Rak'ahs:

The Shāfi'îs, Mālikîs and Ḥanbalîs observe: If the *muṣallî* has a doubt regarding the number of *rak'ah*s performed, he will consider the number of *rak'ah*s he is certain of having performed as the base and will complete the *ṣalāt* by performing the rest.

The Ḥanafîs state: If the *muṣallî*'s doubt in *ṣalāt* is for the first time in his life, he will repeat it from the beginning. But if it occurs to him that he has doubted in *ṣalāt* earlier as well, he will think for quite a while and will act in accordance with what seems more probable to him. But if the doubt remains (even after thinking), he will consider the number of *rak'ah*s he is certain of having performed as the base.

The Imāmîs say: If the doubt concerning the number of *rak'ah*s performed occurs in a two-*rak'ah ṣalāt* (such as *ṣalāt al-ṣubḥ,* the *ṣalāt* of a 'traveller', *ṣalāt al-jumu'ah, ṣalāt al-'îdayn* and *ṣalāt al-kusūf*) or in *ṣalāt al-maghrib* or in the first two *rak'ah*s of *'ishā', ẓuhr* and *'aṣr* prayers, that *ṣalāt* will become invalid and it will be *wājib* to start it again from the beginning. But if the doubt occurs in the *rak'ah*s subsequent to the first two *rak'ah*s of the four-*rak'ah* prayers, he will perform *ṣalāt al-'iḥtiyāṭ* after completing the *ṣalāt* and before performing any act incompatible with *ṣalāt.* For example, if a doubt arises after the completion of the two *sajdah*s of the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

second *rak'ah* as to whether it is the second or the third *rak'ah* he will take the greater number of *rak'ah*s as his basis and complete the *ṣalāt*. He will then perform as *iḥtiyāṭ* (caution) two *rak'ah*s while sitting or a single *rak'ah* standing. If the doubt concerns his being in third or fourth *rak'ah*, he will consider it the fourth *rak'ah* and complete the *ṣalāt* and follow it up with a single *rak'ah* standing or two *rak'ah*s sitting by way of caution. If the doubt concerns his being in second or fourth *rak'ah*, he will consider it the fourth *rak'ah*. He will then offer two *rak'ah*s standing. If there is a doubt regarding its being second, third or fourth *rak'ah*, he will assume it to be the fourth *rak'ah*, and offer following it two *rak'ah*s standing and two *rak'ah*s sitting.

According to them, the reason for performing these *rak'ah*s is to preserve the prescribed form of *ṣalāt* and avoid additions and omissions. Their point is illustrated by the example of a person who has a doubt between its being third or fourth *rak'ah*. He will consider it to be the fourth *rak'ah* and perform a single *rak'ah* separately after completing the *ṣalāt*. If his *ṣalāt* has been complete, the additional *rak'ah* performed separately will be considered as *nāfilah*, and if the *ṣalāt* had been incomplete, the separate *rak'ah* will complement it. However, this manner of performing *ṣalāt al-'iḥtiyāṭ* (cautionary prayer) is particular to the Imāmîs.

They limit this procedure to the obligatory *ṣalāt*s, and among them to *ẓuhr*, *'asr* and *'ishā'* prayers only. As to the *nāfilah* prayers, the *muṣallî* is free to consider the minimum or maximum *rak'ah*s probably performed as the basis, provided such supposition does not invalidate the *ṣalāt* (such as where he doubts his being in second or third *rak'ah* with the knowledge that the *nāfilah* comprises only two *rak'ah*s; here he will consider the minimum number of *rak'ah*s probably performed as the basis). It is better in all *mustaḥabb* prayers to consider the minimum ascertainable number of *rak'ah*s as the basis. If a doubt concerning *rak'ah*s arises in *ṣalāt al-'iḥtiyāṭ*, the maximum number of *rak'ah*s probably performed will be made the basis, except where doing so invalidates the *ṣalāt*, in which case the minimum number of *rak'ah*s will be the basis. Some Imāmîs observe:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

One is free to choose as basis either the minimum or the maximum *rak'ah*s probably performed.

The Friday Prayer

Its Wujūb:

There is consensus among all the Muslims regarding the Friday prayer (*ṣalāt al-jumu'ah*) being *wājib* in accordance with the words of God, the Exalted:

يَأَيُّهَاالَّذِينَءَامَنُوٓاإِذَانُودِىَ لِلصَّلَوٰةِ مِن يَومِ الجُمُعَةِ فَاسعَوا إِلَىٰ ذِكرِاللهِ وَذَرُواالبَيعَ...

O believers, when proclamation is made for prayer on the Day of Congregation (yawm al-jumu'ah) hasten to God's remembrance and leave trading aside, (62:9)

as well as the *mutawātir* traditions narrated both by Shī'ī and Sunnī sources.

They differ as to whether its *wujūb* is conditional to the presence of the ruler or his deputy in it or if it is *wājib* unconditionally.

The Ḥanafīs and the Imāmīs state: The presence of the ruler or his deputy is necessary; the Friday prayer is not *wājib* if neither of them is present. The Imāmīs require the ruler to be just (*'ādil*); otherwise his presence is equal to his absence. To the Ḥanafīs, his presence is sufficient even if he is not just.

The Shāfi'īs, Mālikīs and Ḥanbalīs attach no significance to the presence of the ruler, and a large number of Imāmīs observe: In the absence of a ruler or his representative and the presence of a just *faqīh*, there exists an option between performing either the Friday or the *ẓuhr* prayer, although preference lies with the performance of Friday prayer.[10]

Conditions:

The schools concur that the requirements for other *ṣalāt*s (such

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

as *ṭahārah*, covering the body, and facing the *qiblah*) also apply to Friday prayers, that its time is from when the sun crosses the meridian up to when the shadow of an object equals its height, and that it can be performed in a mosque as well any other place, except in the opinion of the Mālikîs who don't consider it valid except in a mosque.

There is also consensus that it is *wājib* for men, not for women, that one who performs it is not required to perform the *ẓuhr* prayer, that it is not *wājib* for the blind, and that it is not valid except when performed in *jamā'ah* (congregation). They differ regarding the minimum number of persons required to form a *jamā'ah;* the Mālikîs state: Its minimum is 12, excluding the *imām.* The Imāmîs consider it to be 4, excluding the *imām.* In the opinion of the Shāfi'îs and Ḥanbalîs, it is 40, including the *imām;* according to the Ḥanafîs it is 5, though some of them say it is 7.

The schools, excepting the Ḥanafî, concur in its being prohibited for someone upon whom the Friday prayer has become *wājib* and its conditions fulfilled, to travel after the sun has crossed the meridian before performing it. The Ḥanafîs allow it.

The Friday Sermons:

There is consensus that the two sermons are a requirement for convening the Friday prayer and that they are to be delivered before the *ṣalāt,* though after the setting in of its time and not earlier. They differ regarding the *wujūb* of standing while delivering them. The Imāmîs, Shāfi'îs and Mālikîs require it, but not the Ḥanafîs and Ḥanbalîs.

As to their content, the Ḥanafîs say: The sermon will be considered delivered even by a minimal *dhikr,* such as uttering "*al-ḥamdulillāh*" or "*astaghfirullāh*", though such brevity is *makrūh.*

The Shāfi'îs observe: It is necessary in both the sermons to praise God, invoke blessings on the Prophet (*ṣ*), to exhort to piety, to recite a verse in at least one of the sermons, though reciting it in the first is better, and to supplicate for the faithful in the second

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

sermon.

According to the Mālikīs anything considered by custom as a sermon suffices, provided it includes exhortation and announcement of good news.

The Ḥanbalīs consider it essential to praise God, invoke blessings on the Prophet (ṣ), recite a verse and counsel piety.

The Imāmīs state: It is *wājib* in each of the sermons to praise and extol God, invoke blessings on the Prophet (ṣ) and his Family (*'a*), preach, and recite something from the Qur'ān, and in the second sermon, to implore God's forgiveness and to pray for the faithful.

The Shāfi'īs and Imāmīs observe: It is *wājib* for the preacher to separate the two sermons by sitting down for a short while between them. The Mālikīs and Ḥanafīs consider it *mustaḥabb.*

According to the Ḥanbalīs, the sermon should be delivered in Arabic, if possible. The Shāfi'īs consider Arabic necessary if the people are Arabs, and if they are non-Arabs, the preacher should preach in their language even if he is well-versed in Arabic.

The Mālikīs say: It is *wājib* to preach in Arabic even if the people are non-Arabs and do not understand a word of Arabic. If there is no one among them who knows Arabic, there is no obligation to perform the Friday prayer.

The Ḥanafīs and the Imāmīs do not consider Arabic a condition for delivering the sermons.

Its Mode of Performance:

The Friday prayer comprises two *rak'ah*s, just like the morning prayer. The Imāmīs and the Shāfi'īs observe: After *Sūrat al-Ḥamd* of each *rak'ah,* it is *mustaḥabb* to recite *Sūrat al-Jumu'ah* in the first *rak'ah* and *Sūrat al-Munāfiqūn* in the second.

The Mālikīs state: *Sūrat al-Jumu'ah* will be recited in the first *rak'ah* and *Sūrat al-Ghāshiyah* in the second.

According to the Ḥanafīs it is *makrūh* to confine to a particular *sūrah.*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The 'Īd Prayers

The schools differ concerning the prayers performed on the two *'Īds, al-Fiṭr* and *al-'Aḍḥā,* as to whether they are *wājib* or *mustaḥabb.* The Imāmīs and the Ḥanafīs observe: It is *wājib* for every individual if the conditions mentioned in Friday prayer are fulfilled. If some or all of these conditions do not exist, there is no *wujūb* in the opinion of the two schools, except that the Imāmīs add: In the absence of conditions necessary for its *wujūb,* one can perform it as *mustaḥabb* either singly or in *jamā'ah,* both during journey and stay.

According to the Ḥanbalīs it is *farḍ kifā'î.* The Shāfi'īs and the Mālikīs consider it a *sunnah mu'akkadah.*

In the opinion of the Imāmīs and the Shāfi'īs its time is from sunrise until the sun crosses the meridian. According to the Ḥanbalīs, its time is from when the sun rises to the height of a spear until it crosses the meridian.

The Imāmīs say: Delivering of two sermons is *wājib* here as in the Friday prayer. The other schools consider it as *mustaḥabb.* All the schools concur that the sermons are to be delivered after the *ṣalāt,* as against the Friday prayer, in which they are delivered earlier.

According to the Imāmīs and the Shāfi'īs it can be validly performed individually as well as in *jamā'ah.* The other schools consider *jamā'ah* necessary for *ṣalāt al-'Īd.*

As to the mode of its performance, it comprises two *rak'ah*s, performed differently by the various schools in the following manner.

The Ḥanafīs: *Takbîrat al-'iḥrām* will be said after making the *niyyah,* followed by the praise of God. Then will follow three more *takbîrah*s, with an interval of silence equalling three *takbîrah*s, and it is also correct to say: سُبحانَ الله وَالحَمدُ لله وَلا الهَ الاّ الله وَالله اَكبَرُ . Then will follow the recital of *Sūrat al-Fātiḥah,* another *sūrah,* the *rukū'* and *sujūd,* in that order. The second *rak'ah* will begin by reciting *Sūrat al-Fātiḥah,* which will be followed by another *sūrah,* three *takbîrah*s , *rukū'* and *sujūd.* After this the *ṣalāt* will be completed.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Shāfi'īs: After saying the *takbîrat al-'iḥrām,* the *Du'ā' al-'Istiftāḥ*[11] will be recited, followed by seven *takbîrah*s, reciting after every two of them in a low voice سُبحانَ الله وَالحَمدُ لله وَلا إلٰهَ الاّالله وَالله ُ أكبَرُ. ; then after *ta'awwudh* (أعوذُ بالله مِنَ الشَّيطان الرَّجيم.), *al-Fātiḥah,* and *Sūrat Qāf* will be recited, followed by *rukū'* and *sujūd.* After standing up for the second *rak'ah* and saying a single *takbîrah* for it, five more *takbîrah*s will be added, reciting after every two of them سُبحانَ الله وَالحَمدُ لله وَلا الهَ الاّ الله وَالله ُ أكبَرُ. This will be followed by *al-Fātiḥah* and *Sūrat Iqtarabat,* and then the *ṣalāt* will be completed.

The Ḥanbalīs: The *Du'ā' al-'Istiftāḥ* will be recited followed by six *takbîrah*s reciting after every two of them in a low voice الله أكبرُ كَبيراً،وَالحمدُ لله كَثيراً،وَسُبحان الله بُكرَةً وأصيلاً، وَصَلّى الله عَلى مُحمَّد وَآلِه وَسَلَّمَ تَسليماً. This will be followed by *ta'awwudh, basmalah, al-Fātiḥah* and *Sūrat Sabbiḥisma Rabbik.* The *rak'ah* will be then completed. Upon standing up for the second *rak'ah,* five *takbîrah*s, apart from the *takbîrah* for the *qiyām,* will be said, reciting after every two of them what was mentioned concerning the first *rak'ah.* Then the *basmalah,* will be followed by *Sūrat al-Ghāshiyah* and *rukū'* and the *ṣalāt* will then be completed.

The Mālikīs: After the *takbîrat al-'iḥrām,* six more *takbîrah*s will be said, followed by *al-Fātiḥah, Sūrat al-'A'lā, rukū'* and *sujūd.* Then standing up for the second *rak'ah* and saying the *takbîrah* for it, five more *takbîrah*s will be said, followed by *al-Fātiḥah, Sūrat al-Shams* or a similar *sūrah;* the *ṣalāt* will then be completed.

The Imāmīs: The *takbîrat al-'iḥrām* will be followed by *al-Fātiḥah* and another *sūrah.* Then five *takbîrah*s will be said with *qunūt* after each of them, then *rukū'* and *sujūd* will follow. After standing up for the second *rak'ah, al-Fātiḥah* and another *sūrah* will be recited, followed by four *takbîrah*s, each of them followed by *qunūt.* Then the *rukū'* will be performed and the *ṣalāt* completed.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Prayer of the Eclipses

The four Sunnî schools observe: The solar- and lunar-eclipse prayer is an emphasized *sunnah* and not *wājib.*

The Imāmîs state: It is obligatory for every *mukallaf.*

It odes not have a special form in the opinion of the Ḥanafîs; rather it is to be performed in two *rak'ah*s like a *nāfilah* prayer, each *rak'ah* comprising a single *qiyām* and *rukū'*. The *muṣallî* is free to perform it in two, four, or more *rak'ah*s.

According to the Ḥanbalîs, Shāfi'îs and Mālikîs, it has two *rak'ah*s, with each *rak'ah* having two *qiyām*s and two *rukū'*s. After the *takbîrat al-'iḥrām, al-Fātiḥah* and another *sūrah* will be recited, followed by *rukū'*. After rising from the *rukū', al-Fātiḥah* and another *sūrah* will be recited, followed by *rukū'* and *sujūd.* Then standing up for the second *rak'ah,* it will be performed like the first, and the *ṣalāt* completed. It is also valid to perform it in the manner of a *nāfilah ṣalāt.*

There is consensus that it can be performed singly as well as in *jamā'ah,* except that the Ḥanafîs observe regarding the lunar eclipse prayer: It has not been enacted for *jamā'ah,* and has to be performed singly, at home.

As to its time, all the schools excepting the Mālikîs concur that it begins and ends with the eclipse. The Mālikîs say: Its time begins when the sun is at a spear's height above the horizon and continues until noon.

The Ḥanafîs and the Mālikîs say: A two-*rak'ah ṣalāt* is recommended at the time of any fearsome incident, such as an earthquake, thunderbolt, unusual darkness, epidemic, etc.

According to the Ḥanbalîs, it is recommended only for earthquakes.

The schools concur that this *ṣalāt* does not have an *adhān* and *iqāmah,* though an announcer will call out "*al-ṣalāt*" three times according to the Imāmîs, and "*al-ṣalāt jāmi'ah*" according to the other schools.

The Imāmîs observe: The *ṣalāt* is *wājib* upon every individual

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

during solar and lunar eclipses, earthquakes, and on the occurrence of all unsettling celestial phenomena such as the sky's darkening or becoming extraordinarily red, strong winds, big sounds, etc.

If performed in *jamā'ah,* the *imām* will recite only the *sūrah*s on behalf of those following him, just as in the daily prayers. The time for performing the *ṣalāt* for solar and lunar eclipses is the period of their occurrence, and one who does not perform them at that time will perform them later as *qaḍā'*. There is no specific time for *ṣalāt*s to be performed consequent to earthquakes and similar fearsome incidents; rather, it is *wājib* to perform these *ṣalāt*s as soon as their causes occur, though in the event of delay they can be performed as *adā'* as long as one is alive.

Its mode of performance is that after *takbîrat al-'iḥrām, al-Fātiḥah* and another *sūrah* are recited, followed by *rukū'*. Upon rising up from the *rukū', al-Fātiḥah* and a *sūrah* will be repeated, followed again by *rukū'*. This will continue until five *rukū'*s are performed, and they will be followed by two *sajdah*s. On standing up for the second *rak'ah, al-Fātiḥah* and another *sūrah* will be recited, followed by a *rukū'*; this will be repeated till five *rukū'*s are performed in the second *rak'ah* as well. Then will follow two *sajdah*s , *tashahhud* and *taslîm.* Thus altogether there are ten *rukū'*s, and every five of them is followed by two *sajdah*s both in the first and the second *rak'ah*s.

Prayer for Rain

Prayer for rain (*ṣalāt al-'istisqā'*) has been expressly mentioned in the Qur'ān and the Sunnah, and there is consensus concerning it. God Almighty says:

وَإِذِ اسْتَسْقَىٰ مُوسَىٰ لِقَوْمِهِ....

When Moses prayed for water for his people..., (2:60)

فَقُلْتُ ٱسْتَغْفِرُوا رَبَّكُمْ إِنَّهُ كَانَ غَفَّارًا ﴿١٠﴾ يُرْسِلِ السَّمَآءَ عَلَيْكُم مِّدْرَارًا ﴿١١﴾

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

And I said: 'Ask forgiveness of your Lord; surely He is ever All-forgiving, and He will lose heaven upon you in torrents. (71:10--11)

A tradition reports that once when the people of Madînah were facing drought and the Prophet (ṣ) was delivering a sermon, a man stood up and said: "Horses and women have perished. Pray to God to give us rain." The Prophet (ṣ) extended his hands and prayed. Anas narrates: "The sky was (clear) like a piece of glass. Then the wind began to blow. The clouds emerged and gathered and the sky poured forth its blessings. We went forth wading through the pools till we reached our homes. It continued to rain till the next Friday, and the same person stood up again and said: 'O Prophet of Allah, houses have fallen and the caravans have been detained. So pray to God to stop it. The Prophet (ṣ) smiled and then said: 'O God, make rain around us, not upon us.' Then I looked at the sky and saw it (i.e. the clouds) split and form a garland around Madînah."

The occasion for this *ṣalāt* is drought, scanty rainfall, and drying up of springs. The schools concur that if rain is delayed even after performing the *ṣalāt,* it is *mustaḥabb* to repeat it. If it is preceded by three days of fasting and the people go forth on foot, in a humble and supplicating manner, accompanied by their women and children, their elderly, men and women, and cattle, it will be more conducive for invoking Divine mercy.

There is consensus that it is valid to perform it individually as well as in *jamā'ah,* and that it does not have an *adhān* and *iqāmah;* it is *mustaḥabb* for the *imām* to deliver a sermon after the *ṣalāt.* As to its mode, the schools concur that it comprises two *rak'ah*s, to be performed like the two *rak'ah*s of *ṣalāt al-'îd* in accordance with what each school specifies in that regard. The Mālikîs and the Ḥanafîs say: It is like *ṣalāt al-'îd* though without the additional *takbîrah.*

The Imāmîs observe: It is *mustaḥabb* after every *takbîrah* to recite *qunūt* imploring the mercy and blessing of God and seeking rainfall.

The four schools state: This kind of supplication will be

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

mentioned by the preacher after the *ṣalāt* during the sermon, not in the *ṣalāt* itself.

Ṣalāt al-Qaḍā'

There is consensus among the schools that it is *wājib* to perform *qaḍā'* of every obligatory *ṣalāt* omitted either intentionally, or on account of forgetfulness, ignorance or sleep, and that there is no *qaḍā'* for a woman for the prayers left during *ḥayḍ* and *nifās,* because *ṣalāt* is not *wājib* during these periods. The schools differ regarding one who is insane, unconscious or intoxicated.

The Ḥanafîs state: *Qaḍā* is *wājib* upon one who loses his senses by consuming a *ḥarām* intoxicant, such as wine or something of its kind. As to someone insane or in a swoon, he is not required to perform *ṣalāt* in the following two situations: firstly, if the state of swoon or insanity continues for a period exceeding five *ṣalāt*s (hence if it lasts for less than that period the person should perform its *qaḍā'*); secondly, if the recovery from insantiy or swoon does not occur at the time of *ṣalāt* (hence if he recovers and does not perform the *ṣalāt,* its *qaḍā'* will be *wājib* upon him).

The Mālikîs are of the opinion that an unconscious or insane person has to perform *qaḍā'*. An intoxicated person will perform *qaḍā'* if the cause of intoxication is the drinking of something *ḥarām;* but if it is something *ḥalāl* (such as sour milk) there is no *qaḍā'* for it.

According to the Ḥanbalîs, an unconscious person and one intoxicated by something *ḥarām* will perform *qaḍā',* though an insane person is not required to do so.

The Shāfi'îs state: An insane person whose state of insanity extends over the entire period of a *ṣalāt* will not perform its *qaḍā'*. The same applies to one in a swoon or one intoxicated, provided he is not responsible for his state.

The Imāmîs consider it *wājib* for anyone who has consumed an intoxicant to perform *qaḍā',* irrespective of whether he drinks it knowingly or unknowingly, voluntarily or out of an exigency or under duress. As to an insane person and one in a swoon, they have no

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

qaḍā' to perform.

The Mode of Performing Qaḍā':

The Ḥanafîs and Imāmîs observe: A person who has omitted an obligatory *ṣalāt* will perform its *qaḍā'* exactly in the manner he would have performed it *adā'*. Hence if a person with an outstanding complete *ṣalāt* intends to perform it during journey, he should perform it completely, and one performing a *qaṣr* prayer as *qaḍā'* at home will perform it *qaṣr*. Similar is the rule respecting recital in a high or low voice. Hence if *maghrib* and *'ishā'* prayers are performed *qaḍā'* during daytime, their recital will be loud, and in the *qaḍā'* o f *ẓuhr* and *'aṣr* prayers during night the recital will be in a low voice.

The Ḥanbalîs and the Shāfi'îs state: The one who intends to perform the *qaḍā'* of a *qaṣr* prayer during journey will perform it *qaṣr* in accordance with the *ṣalāt* missed by him. But if he happens to be staying (*ḥaḍr*), it is *wājib* upon him to perform it complete as *qaḍā'*. This was with respect to the number of *rak'ahs*. As to its recital in a high or low voice, the Shāfi'îs say: The one who performs the *qaḍā'* of *ẓuhr* at night will recite in a loud voice and one performing *qaḍā'* of *maghrib* during daytime will do so in a low voice. The Ḥanbalîs require all *qaḍā'* prayers to be recited in a low voice, irrespective of their being those that are recited in a high voice or low, and regardless of whether the *qaḍā'* is performed during daytime or at night, except where the person performing it is an *imām* and the *ṣalāt* is one which is recited in a high voice and it happens to be nighttime.

The schools, excepting the Shāfi'î, concur that sequence should be maintained in the performance of the prayers missed. Thus the *qaḍā'* of one missed earlier will be performed before the *qaḍā'* of one missed later. Hence if *maghrib* and *'ishā'* prayers are missed, the former will be offered before the latter, as is the case while performing them *adā'*.

According to the Shāfi'îs, the maintaining of sequence in prayers missed is *sunnah* and not *wājib*. Hence the *ṣalāt* of a person

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

who performs the *'ishā'* prayer before the *maghrib* prayer is valid.

Proxy for Acts of Worship:

There is a general consensus that appointing a proxy for carrying out prayers and fasts for a living person is not valid in any situation irrespective of whether he is capable or incapable of performing them himself. The Imāmīs state: It is valid to appoint a proxy for carrying out fasts and prayers on behalf of a dead person. The four Sunnī schools observe: It is not valid in the case of a dead person, in the same manner as it is not valid for a living one.

The schools concur that appointing a proxy for Ḥajj is valid in the case of a living person provided he is incapable of performing it himself, and with greater reason in the case of a dead person. An exception are the Mālikīs who say: The appointing of a proxy, both for a living or a dead person, is of no consequence.

The Imāmīs are alone in observing that it is *wājib* for a child to perform the *qaḍā'* of the fasts and prayers left unperformed by its father. But they differ among themselves, and some of them state: It is *wājib* to perform all that which has been missed by the father, even if intentionally. Others say: It is necessary to perform the *qaḍā'* of only those acts which he has been unable to perform due to illness or some similar cause. There are others who observe: Nothing except that which has been missed by him during death-illness is to be performed as *qaḍā'* by the child. According to some others, the *qaḍā'* of the mother will also be performed by the child in the same manner as that of the father.

Ṣalāt al-Jama'ah

The Muslims are one voice regarding *ṣalāt al-jamā'ah* (congregational prayer) being a ceremony and symbol of Islam. It was performed perpetually by the Prophet (ṣ) and by the Caliphs and the Imams after him. The schools differ as to whether it is *wājib* or *mustaḥabb*.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Ḥanbalīs state: It is *wājib* upon every person capable of it. But if he forsakes the *jamā'ah* and prays individually, his *ṣalāt* will be valid, though he will have sinned.

The Imāmīs, Ḥanafīs, Mālikīs and most Shāfi'īs observe: It is neither *wājib* individually (*'aynī*) nor collectively (*kifā'ī*) but is an emphasized *mustaḥabb*.

According to the Imāmīs, the Sharī'ah has ordained *jamā'ah* only for *wājib*, not for *mustaḥabb* prayers, except *istisqā'* and *'īdayn* prayers despite the absence of its conditions. The four schools consider it ordained for both *wājib* and *mustaḥabb* prayers.

Conditions for Jamā'ah:

The following conditions have been laid down for the validity of *jamā'ah*:

1. Being a Muslim. There is a consensus about it.

2. Sanity. They concur regarding it.

3. According to the Imāmīs, the Mālikīs, and the Ḥanbalīs in one of the two opinions narrated from Imām Aḥmad, *'adālah* (i.e. 'justice', of the *imām*) is necessary. The Imāmīs cite as their evidence the Prophet's statement, "A woman will not act as an *imām* for a man, nor a *fājir* (a libertine) for a believer", the consensus of the Ahl al-Bayt (*'a*), as well as the reason that the *imāmah* in *ṣalāt* is suggestive of leadership, and a *fāsiq* is not competent to assume it under any circumstance. But they also observe: If a person were to trust someone and pray behind him, later coming to know that he is a *fāsiq* person, it is not *wājib* upon him to repeat the prayer.

4. Being a male is necessary, and a woman cannot act as an *imām* for men, though other women can follow her as their *imām* according to all the schools except the Mālikīs who say: A woman cannot act as an *imām* even for women.

5. The Mālikīs, Ḥanafīs and Ḥanbalīs consider maturity as a requirement for the *imām*. The Shāfi'īs are of the opinion that it is valid to follow a child of discriminating age (*mumayyiz*). The Imāmīs have two opinions; in accordance with the first, maturity is necessary,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and according to the second the *imāmah* of an adolescent *mumayyiz* is valid.

6. As per consensus, the minimum number of persons required for *jamā'ah* is two, one of them being the *imām;* this does not include the Friday prayer.

7. The *ma'mūm* should not stand ahead of the *imām,* in the opinion of all the schools except the Mālikîs, who observe: The *ṣalāt* of the *ma'mūm* will not be invalid even if he stands ahead of the *imām.*

8. The *jamā'ah* should be conducted in a single place and there should be no partitions. The Imāmîs state: There should not be an unusual distance between the *ma'mūm* and the *imām* without there being a connection through the continuity of the rows. The *Jamā'ah* is not valid if there exists between the *imām* and a male *ma'mūm* an obstacle which prevents the latter from seeing the *imām* or seeing those ahead of him who see the *imām.* Women are excepted, and they can follow a male *imām* despite the presence of a partition provided the acts of the *imām* are not uncertain for them.

The Shāfi'îs observe: A distance of more than 300 cubits between the *imām* and the *ma'mūm* is not objectionable provided there exists no obstacle.

The Ḥanafîs are of the opinion that if a person whose house adjoins a mosque follows the *imām* from his house with only a wall separating them, his *ṣalāt* will be valid, provided the actions of the *imām* are known to him. But if the house and the mosque are separated by a road or stream, following the *imām* is not valid.

The Mālikîs state: The difference of place does not preclude the validity of following the *imām;* hence if the *imām* and the *ma'mūm* are separated by a road, stream or wall, the *ṣalāt* will be valid as long as the *ma'mūm* is capable of ascertaining the acts of the *imām.*

9. There is consensus that it is necessary for the *ma'mūm* to make the *niyyah* of following the *imām* (*niyyat al-'iqtidā'*).

10. The identity of the *ṣalāt* of the *ma'mūm* and the *imām.* The schools concur that following the *imām* is not valid if the two *ṣalāt*s

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

differ in their *arkān* and *af'āl* (acts) (such as the daily prayers as compared to the *ṣalāt* of funeral or *'îd*); they differ regarding the remaining matters. The Ḥanafîs and the Mālikîs observe: It is not valid for a person offering *ẓuhr* prayer to follow one offering *'aṣr*, and for one offering *qaḍā'* to follow someone offering *adā'*, and vice versa.

The Imāmîs and the Shāfi'îs consider all these as valid. The Ḥanbalîs consider it invalid to offer *ẓuhr* prayer behind someone offering *'aṣr* and vice versa, but they consider valid the offering of *ẓuhr* prayer as *qaḍā'* behind someone performing it *adā'*.

11. The *qirā'ah* of the *imām* should be perfect. Hence the schools concur that it is not valid for a person knowing *qirā'ah* to follow one who does not know it, and if he does so his *ṣalāt* will be invalid. According to the Ḥanafîs, the *ṣalāt*s of both the *imām* and the *ma'mūm* will be invalid; and they have a sound ground for holding the opinion that an illiterate person should follow, as far as it is possible, someone whose recital is correct, and it is not valid for him to pray singly where he can pray with a correct *qirā'ah* by attending a *jamā'ah*.

Following the Imām:

There is consensus that one praying with *wuḍū'* can follow an *imām* who prays with *tayammum* and that it is obligatory for the *ma'mūm* to follow the *imām* in the recital of the *adhkār* (such as سَمِعَ اللهُ لِمَنْ حَمِدَه and سُبحانَ رَبِّيَ العظيم، سُبحانَ رَبِّيَ الأعلىٰ). They differ concerning following him in the *qirā'ah*.

The Shāfi'îs observe: The *ma'mūm* should follow the *imām* in the *ṣalāt*s that are recited silently and not in those that are recited loudly, and it is *wājib* for him to recite *al-Fātiḥah* in all the *rak'ah*s.

The Ḥanafîs state: He should not imitate the *imām* either in the *ṣalāt*s where the *qirā'ah* is silent nor in those where it is loud; rather, it has been narrated from Imām Abū Ḥanîfah that the *qirā'ah* of a *ma'mūm* behind the *imām* is a sin (al-Nawawî, *Sharḥ al-Muhadhdhab,* vol. 3, p. 365).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

According to the Mālikīs, the *ma'mūm* should perform the *qirā'ah* in the *ṣalāt*s where it is silent, not in the *ṣalāt*s where it is loud.

The Imāmīs do not consider it *wājib* (for the *ma'mūm*) to perform *qirā'ah* in the first two *rak'ah*s, but consider it *wājib* in the third *rak'ah* of *maghrib* prayer and the last two *rak'ah*s of the four-*rak'ah* prayers.

All the schools concur concerning the *wujūb* of following the *imām*'s actions by the *ma'mūm.* but differ in their interpretation of the term 'following' (*mutāba'ah*).

The Imāmīs state: The meaning of *mutāba'ah* is that every act of the *ma'mūm* should neither precede the corresponding act of the *imām* nor follow it after an inordinate delay; rather it should be either simultaneous or follow it with a small lag.

In the opinion of the Ḥanafīs, *mutāba'ah* is achieved by performing simultaneously or immediately afterwards or with some lag the acts performed by the *imām.* Hence if the *ma'mūm* performs *rukū'* after the *imām* has raised his head from the *rukū'* but before his going down for *sajdah,* he will be considered as having 'followed' the *imām* in the *rukū'.*

The Mālikīs say: The meaning of *mutāba'ah* is that every act of the *ma'mūm* should take place after the corresponding act of the *imām* without preceding it or occurring simultaneously with it or following it after excessive delay, so that the *ma'mūm* will perform *rukū'* before the *imām* has raised his head from it.

The Ḥanbalīs are of the opinion that *mutāba'ah* implies that the *ma'mūm* should neither precede the *imām* in any of the acts of *ṣalāt* nor delay any act after the *imām* has performed it. Hence the *ma'mūm* should not enter *rukū'* after the *imām* has finished it, and the *imām* should not have ended the *rukū'* before the *ma'mūm* has entered it.

Joining the Jamā'ah in the Middle:

If a person joins the *jamā'ah* after the *imām* has finished one or

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

more *rak'ah*s, the schools concur that he will make the *niyyah* for *jamā'ah* and continue to perform it with the *imām*. But the question is whether he will consider the *rak'ah*s being performed along with the *imām* as the initial part of his *ṣalāt* or the end part of it. For example, if he performs only the last *rak'ah* of *maghrib* prayer with the *imām*, there remain two more *rak'ah*s which have to be performed; now, will the third *rak'ah* which he has performed with the *imām* be considered his third *rak'ah* as well with the first two *rak'ah*s remaining to be performed, or will it be considered his first *rak'ah*, with the second and the third *rak'ah*s remaining to be performed?

The Ḥanafīs, Mālikīs and Ḥanbalīs observe: The part of the *ṣalāt* which the *ma'mūm* performs with the *imām* will be considered the end part of the former's *ṣalāt*. Therefore if he performs only the last *rak'ah* of *maghrib* prayer in *jamā'ah*, it will be considered his last *rak'ah* as well, and he will perform after it a *rak'ah* in which he will recite *al-Fātiḥah* and another *sūrah*, followed by *tashahhud*, and in the next *rak'ah*, *al-Fātiḥah* and a *sūrah*. To put it briefly, in such a situation he will offer the third *rak'ah* before the first two *rak'ah*s by considering the part of his *ṣalāt* performed with the *imām* as the end part, and the part performed without the *imām* as the initial part.

The Shāfi'īs and the Imāmīs state: The part of the *ṣalāt* which the *ma'mūm* performs with the *imām* will be considered the initial part of his *ṣalāt*, not the end part of it. Hence if he performs the last *rak'ah* of *maghrib* prayer with the *imām*, he will count it as his first *rak'ah* and will stand up for performing the second *rak'ah*, which will include *tashahhud*, and will follow it up with the third *rak'ah* that will be the end part of his *ṣalāt*.

Preference for the Imāmah:

The Ḥanafīs say: If equally qualified men gather for *ṣalāt*, the person most learned in its rules will be preferred for leading it, followed by one with the best *qirā'ah*, then the most pious, then the one whose acceptance of Islam was earlier, then the eldest, then the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

superior in character, then the most handsome, then the noblest in respect of lineage, and then the most cleanly dressed, in that order. If they are all equal in respect of these qualities, the selection will be by casting lots among them.

The Mālikīs are of the opinion that the ruler or his deputy will lead the prayers, followed by the *imām* of the mosque, then the master of the house, then the one most learned in *ḥadîth,* then the most jûst, then the one having the best *qirā'ah,* then the most devout (*al-'a'bad*), then the one preceding others in his acceptance of Islam, then the one having the best lineage, then the one with the best character, and then the one who is best dressed, in that order. If they are equal in these respects, lots will be cast among them.

The Ḥanbalīs observe: The most learned in fiqh (Islamic law) and having the best *qirā'ah* will be preferred, followed by one who excels only in *qirā'ah;* then comes the one who excels in the rules of *ṣalāt,* then the one who excels in *qirā'ah* but does not know the fiqh of *ṣalāt,* then the most aged, then the person with the best lineage, then the one who has migrated earliest, then the most God-fearing (*al-'atqā*), and then the most pious (*al-'awra'*), in that order. If they are equal in these qualities, lots will be cast.

The Shāfi'īs prefer the ruler, and then the *imām* of the mosque, then the one most learned in fiqh, then the one having the best *qirā'ah,* then the most ascetic (*al-'azhad*), then the most pious (*al-'awra'*), then the one who has migrated earliest, then the most eloquent, then the best in terms of lineage, then the best in character, then the cleanest in matters of dress, body and craft, then the one with the best voice, then the most handsome, and then a married person, in that order. In the event of their being equal in respect of these qualities, lots will be cast.

The Imāmīs state: If a number of persons are eager to lead the prayers for the sake of the *thawāb* (spiritual reward) of *imāmah* and not for any worldly purpose, the one whom the *ma'mūm*s prefer on the basis of the preferential qualities mentioned in the Sharī'ah with a religious intent in mind and not with mundane intentions, will be the *imām.* But if they differ, it is better that a *faqîh* be preferred, followed by one who has the best *qirā'ah,* then the most eloquent,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and then one who enjoys a preference in accordance with the Sharī'ah.

Ṣalāt During Travel (Ṣalāt al-Musāfir)

The schools concur that the shortening (*qaṣr*) of prayers during travel is limited to the obligatory four-*rak'ah* prayers. Hence *ẓuhr, 'aṣr* and *'ishā'* prayers will be performed in two *rak'ah*s, like the morning prayer. The schools differ as to whether *qaṣr* is obligatory during travel or if there is an option between it and complete *ṣalāt*?

The Ḥanafīs and the Imāmīs observe: It is obligatory and has to be performed.

The other schools state: There is an option and a person may either perform it *qaṣr* or complete.

Conditions for Qaṣr:

Qaṣr requires the following conditions:

1. There is consensus that travelling over a certain distance is a condition. The distance, in the opinion of the Ḥanafīs, is 24 parasangs in the direction of journey; below this, *qaṣr* is not permissible.

The Imāmīs consider it to be 8 parasangs in the direction of journey or to and fro together.[12]

The Ḥanbalīs, Mālikīs and Shāfi'īs regard it as 16 parasangs, only in the direction of journey, though it does not matter if the distance travelled is less than this distance by two miles (eight miles, in the opinion of the Mālikīs).

A parasang is equal to 5.04 km (*al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol. 4, "mabḥath shurūṭ al-qaṣr").

Hence the minimum distance to be travelled in the opinion of the Ḥanafīs, the three other schools, and the Imāmīs is 120.96 kms, 80.64 kms and 40.32 kms respectively.

2. The schools concur that the intention to travel the complete

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

distance should be present at the start of the journey, and that the intention of a 'follower'--such as wife, servant, captive or soldier--is subject to the intention of the 'commander' whom he follows, provided that the one under command knows the intention of that commander or leader; in the event of ignorance he/she will perform the *ṣalāt* complete.

3. *Qaṣr* is not valid in the opinion of the four schools except after leaving behind the buildings of a town.

The Imāmîs observe: Leaving the constructed areas is not sufficient; rather, it is necessary that either the walls of the town should disappear from sight or its *adhān* should not be hearable. The limit they have set for the beginning of the journey is also the limit for terminating it; i.e. if a person is returning back home, he is supposed to pray *qaṣr* until he sees the walls of his town or is able to hear its *adhān.*

4. The journey should be for a legitimate purpose. Hence if it is for an illegitimate purpose, such as a journey for the sake of committing theft, etc., he may not pray *qaṣr* in the opinion of all the schools, except the Ḥanafîs, who observe: He will pray *qaṣr* in all journeys even if the journey is an illegitimate one; at the most he will be sinning by performing an unlawful act.

5. In the opinion of the four schools, the traveller may not pray in a *jamā'ah* being led by a local *imām* or another traveller whose *ṣalāt* is complete. If he does so, it is *wājib* for him to perform the complete *ṣalāt.* The Imāmîs do not accept this condition and consider it valid for a person whose *ṣalāt* is complete to pray behind a person praying *qaṣr* and vice versa, provided each performs his own duty. Therefore, if a traveller prays behind a local resident the *ẓuhr, 'aṣr* and *'ishā'* prayers, he will perform two *rak'ah*s and *tashahhud* along with the *imām* and say the *taslîm* individually, while the *imām* continues with his *ṣalāt* till its end. And if a local person prays behind a traveller, he will perform two *rak'ah*s in *jamā'ah* and complete the remaining part of his *ṣalāt* individually.

6. The *niyyah* of *qaṣr* is essential for the *ṣalāt* being so performed. Hence if a person prays without making *niyyah* of *qaṣr,*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

he will perform that *ṣalāt* complete in the opinion of the Ḥanbalīs and the Shāfi'īs.

The Mālikīs state: It is sufficient to make the *niyyah* of *qaṣr* in the first *qaṣr ṣalāt* of the journey, and it is not necessary to repeat it in every *ṣalāt*.

The Ḥanafīs and the Imāmīs observe: The *niyyah* of *qaṣr* is not a condition for *qaṣr* becoming *wājib*, so that if one does not make it he will have to perform it complete, because the actual status of a duty is not altered by intentions. Moreover, such a person has intended the journey from the very beginning. However, the Imāmīs say: If a traveller intends to stay at a particular place and later changes his mind, he will offer *qaṣr* as long as he has not performed any complete *ṣalāt*. Hence if he performs even one complete *ṣalāt* and then changes his plan of staying there, he will continue to perform *ṣalāt* completely.

7. His intention should not be to stay continuously at one place for: fifteen days in the opinion of the Ḥanafīs, ten days in the opinion of the Imāmīs, and four days in the opinion of the Mālikīs and the Shāfi'īs, and a period during which more than 20 *ṣalāt*s become *wājib* in the opinion of the Ḥanbalīs. The Imāmīs further add: If he is unable to decide for how long he will stay at a particular place, he will continue to perform *qaṣr* for thirty days, and after this period it will be *wājib* for him to perform complete *ṣalāt* even if it happens to be a single one.

8. The traveller's nature of work should not require continuous travel--e.g. one who hires out his beast of burden or a tradesman whose trade requires continuous travelling--so that he is unable to stay at home for the stipulated period of days. This condition has been upheld only by the Ḥanbalīs and the Imāmīs.

9. The traveller should not be a nomad who has no fixed house and keeps moving from place to place. Only the Imāmīs have expressly stated this condition.

10. The Ḥanafīs, Ḥanbalīs and Mālikīs observe: If a traveller changes his mind and intends to return to the place from where he began his journey, in the event of his not having travelled the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

distance required for performing *qaṣr,* his journey will be considered concluded and he will perform his *ṣalāt* complete. But if he has travelled the distance stipulated by the Sharī'ah, he will pray *qaṣr* till returning back to his native place.

The Shāfi'īs say: Whenever a person decides to turn back in the course of his journey, he will perform his *ṣalāt* complete (al-Ghazālī, *al-Wajīz,* "ṣalāt al-musāfirīn"). This implies that he will start performing *ṣalāt* complete on his way back despite having travelled the stipulated distance, because the absence of the mention of any conditions proves inclusiveness and generality.

The Imāmīs state: If one desists from his journey or becomes hesitant before covering the stipulated distance, it is *wājib* for him to offer his prayers completely; and if the stipulated distance has been covered, he will pray *qaṣr.* The continuous presence of the intent of journey is a condition as long as the stipulated distance has not been travelled, but after it has been covered, the subject is, of necessity, realized and its existence no longer depends upon intention.

There is consensus among the schools that every condition that entails *qaṣr* is also a condition for the validity of breaking one's fast during journey, though some schools have added other conditions for the validity of breaking the fast which will be mentioned in the chapter on fasting. The Imāmīs add no further conditions; they observe: مَنْ اَفْطَرَقَصَّرَ، ومَنْ قَصَّرَاَفْطَرَ. i.e. one who breaks the fast (consequent to travelling) will perform his *ṣalāt* as *qaṣr,* and he who performs *ṣalāt* as *qaṣr* will break his fast.

Successive Performance (Jam') of Two Ṣalāts:

Mālik, al-Shāfi'ī and Aḥmad consider it permissible while travelling to perform *ẓuhr* and *'aṣr* prayers, as well as *maghrib* and *'ishā',* successively by either advancing the performance of one of them or delaying the performance of the other. Abū Ḥanīfah observes: It is not valid to perform two *ṣalāt*s successively for the excuse of journey under any circumstance.

The meaning of 'advancing' their successive performance is to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

perform *ẓuhr* and *'aṣr* prayers in the time meant for *ẓuhr,* and by 'delaying' is meant their successive performance in the time specified for *'aṣr.*

Ignorance and Forgetfulness:

The Imāmîs observe: The *ṣalāt* of one who intentionally performs complete *ṣalāt* while travelling is *bāṭil,* and he is supposed to repeat it *adā'* if its time has not elapsed, and *qaḍā'* if it has elapsed. But if a person who is ignorant about *qaṣr* being *wājib* does so, he will not repeat the *ṣalāt,* irrespective of whether its time has elapsed or not. If a person performs it complete out of forgetfulness and then remembers while its time has not elapsed, he will repeat the *ṣalāt,* and if he remembers it after its time has elapsed, he will not repeat it.

The Imāmîs further state: If the time of a *ṣalāt* sets in while a person is at home and capable of performing it and he sets out on his journey before performing it, he will perform it *qaṣr.* But if the time of a *ṣalāt* comes while a person is travelling and he does not perform it till he has reached his native place or a place where he intends to remain for ten days, he will perform the *ṣalāt* complete. Hence the criterion is the time when the *ṣalāt* is performed and not the time when it becomes *wājib.*

The Invalidating Causes of Ṣalāt (Mubṭilāt)

The following causes render *ṣalāt* invalid:

1. Speech. Its minimum is anything composed of two letters, even if they are meaningless, and of a single letter if it makes sense (such as the word قِ , which is a verb in the imperative case of the root *waqā*).

The *ṣalāt* will not become *bāṭil* by uttering a single letter which has no meaning and by an involuntary sound comprising many letters.

The Ḥanafîs and the Ḥanbalîs do not differentiate between intentional speech and anything spoken by mistake in respect of its

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

being a cause that invalidates *ṣalāt.*

The Imāmīs, Shāfi'īs and Mālikīs observe: *Ṣalāt* is not invalidated by anything spoken by mistake provided it is short and does not vitiate the form of the *ṣalāt.*

The Imāmīs and the Mālikīs are of the opinion that *ṣalāt* is not invalidated by clearing the throat, irrespective of whether it is done due to necessity or not. The other schools consider it a cause that invalidates *ṣalāt* if done needlessly but not otherwise, such as for clearing one's voice for better phonation of for signalling the *imām* to correct himself.

The schools concur that it is valid to supplicate during *ṣalāt,* seeking blessing and forgiveness from Allāh, *subḥānahu,* except that the Ḥanafīs and the Ḥanbalīs restrict this supplication to what has been mentioned in the Qur'ān and the Sunnah, or that which is sought only from God, such as *rizq* (provision) and *barakah.*

To recite *tasbīḥ* (*subḥān Allāh*) to indicate that one is performing *ṣalāt,* or to guide the *imām,* or to correct his mistake, is not considered as a speech that invalidates *ṣalāt.*

The four Sunnī schools state: Included in speech that invalidates *ṣalāt* is the returning of *salām.* Hence if someone says *salām* to a person who is praying and he returns the *salām* verbally, the *ṣalāt* becomes invalid. However, there is no harm if the *salām* is returned by a gesture.

The Imāmīs observe: It is *wājib* for the *muṣallī* to return a salutation which contains the word *'salām'* with a similar salutation, though not any other salutation such as 'good morning', etc. They also specify that the form of the salutation being returned should be exactly like the initial salutation without any difference. Hence the reply of *'salām 'alaykum'* will be the same without *alif* and *lām,* and the reply of *'al-salām 'alaykum'* will be with the *alif* and *lām.*

2. Every action which destroys the form of the *ṣalāt* invalidates it. The schools concur that the form is destroyed by any act which gives an onlooker the impression that the person performing that act is not praying.

3. There is a consensus regarding eating and drinking though

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

they differ regarding the quantity that invalidates *ṣalāt*.

The Imāmîs observe: Eating and drinking invalidate *ṣalāt* if they distort the form of *ṣalāt* or violate any of its conditions, such as continuity, etc.

The Ḥanafîs observe: Every form of eating and drinking invalidates *ṣalāt* irrespective of the quanity consumed, even if it is one sesame seed or a drop of water and regardless of whether it is done intentionally or otherwise.

The Shāfi'îs state: Any food or drink which reaches the stomach of a *muṣallî*, irrespective of its being a small or a large quantity, invalidates *ṣalāt* if the *muṣallî* does so intentionally and with the knowledge of its being *ḥarām*. But if done out of ignorance or forgetfulness, a small quantity will not invalidate *ṣalāt*, though a large quantity will.

According to the Ḥanbalîs, a large quantity will invalidate *ṣalāt*, whether consumed intentionally or by mistake, and a small quantity only if consumed intentionally, not otherwise.

4. The occurrence of any minor or major *ḥadath*, which causes the *wuḍū'* or the *ghusl* to break, will also invalidate *ṣalāt* in the opinion of all the schools except the Ḥanafîs, who observe: It will invalidate *ṣalāt* if it occurs before the last *qu'ūd* (sitting) by a duration equal to *tashahhud*, and if it occurs after it and before *taslîm*, the *ṣalāt* will not become invalid.

5. The schools concur that laughter invalidates *ṣalāt*, though the Ḥanafîs apply to it the same rule that they apply to *ḥadath*, as mentioned above.

* * *

Considering the importance of the causes that invalidate *ṣalāt* and their number and diversity, and considering that each school has its own opinion which at times concurs or differs with the opinions of other schools, it would be appropriate to give a summary of these causes in accordance with the opinion of each school separately.

The Shāfi'îs observe: The causes invalidating *ṣalāt* are: *ḥadath*, which necessitates the performance of *wuḍū'* or *ghusl;* speech; crying; groaning, in certain situations; inordinate movement(s); a

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

doubt concerning *niyyah;* indecision concerning discontinuing the *ṣalāt* while continuing to perform it; shifting one's *niyyah* from one *ṣalāt* to another, except where it is an obligatory *ṣalāt,* for it is valid to change one's *niyyah* to that of a supererogatory *ṣalāt* in order to perform the obligatory *ṣalāt* with *jamā'ah;* exposure of the *'awrah* when one is capable of covering it; nakedness, as soon as a covering becoming available; the presence of *najāsah* to an inexcusable extent, when one does not speedily remove it from himself; the repetition of *takbîrat al-'iḥrām;* intentional omission of a *rukn;* praying in *jamā'ah* behind an *imām* who is not fit for *imāmah* due to his *kufr,* etc; performing an additional *rukn* intentionally; the reaching of any food or drink to the stomach; turning away with the chest from the *qiblah;* and wrongly performing a *rukn* involving movement before other acts.

The Mālikîs say: *Ṣalāt* is invalidated by: omitting a *rukn,* intentionally or by mistake, if the *muṣallî,* thinking that his *ṣalāt* is correct, does not remember having omitted it until after *taslîm* and the passage of an inordinate duration; intentionally performing an additional *rukn,* such as *rukū'* or *sujūd;* performing *tashahhud* out of place while sitting; laughter, both intentional and otherwise; eating and drinking intentionally; speaking intentionally and not for correcting the *imām;* vomiting, if intentional; puffing intentionally with the mouth; occurrence of anything that causes *wuḍū'* to break; exposure of the *'awrah* or any part of it; *najāsah* falling on the *muṣallî;* inordinate movement; performing four additional *rak'ahs* in a four-*rak'ah ṣalāt* knowingly or by mistake; doing *sujūd* before *taslîm;* inadvertent omission of three *masnūn* acts from among the *sunan* of *ṣalāt* and then failing to perform *sujūd al-sahw.*

The Ḥanbalîs state: The causes that invalidate *ṣalāt* are: any inordinate movement; the presence of *najāsah* to an inexcusable extent; turning one's back to the *qiblah;* incidence of any *ḥadath* breaking the *wuḍū';* intentional exposure of the *'awrah;* reclining heavily on a support without any excuse; returning to perform the first *tashahhud* after starting the *qirā'ah,* provided the *muṣallî* is aware and conscious of it; performing an additional *rukn*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

intentionally; intentionally changing the sequence of the *arkān;* mispronunciation that results in a change of meaning despite being capable of proper pronunciation; intending to disrupt the *ṣalāt* or indecision regarding it; a doubt regarding *takbîrat al-'iḥrām;* laughter, speech, both intentional or otherwise; saying *taslîm* intentionally before the *imām;* eating and drinking, even if due to forgetfulness or ignorance; needlessly clearing the throat; any puffing that may be construed as phonation of two letters; and weeping if not out of the fear of God.

According to the Ḥanafîs, the causes that invalidate *ṣalāt* are: speech, whether intentional, by mistake, or due to ignorance; any supplication (*du'ā'*) not out of the Qur'ān or Sunnah; any inordinate movement; turning the chest away from the *qiblah;* eating and drinking; clearing the throat without reason; saying "*uff*" (i.e. 'fie; or 'ugh'; an expression of anger or displeasure); groaning; saying "*Ah*!" (*ta'awwuh*); weeping loudly; saying "*al-ḥamdulillāh*" on sneezing; saying "*Innā lillāh...*" on hearing some bad news and "*al-ḥamdulillāh*" on hearing some pleasing news; saying "*subḥān Allāh*" or "*lā ilāha illallāh*" as an expression of surprise; availability of water for one praying with *tayammum;* the rising of the sun for one offering the morning prayer or its crossing the meridian for one performing *ṣalāt al-'îd;* the falling off of a bandage from one who attains recovery; willful occurrence of *ḥadath,* but if the *ḥadath* is involuntary it will not invalidate the *ṣalāt,* though one will have to perform *wuḍū'* again and recommence the *ṣalāt* from where he had left it.[13]

The Imāmîs observe: The causes that render *ṣalāt* invalid are: ostentation (*riyā'*); uncertainty in *niyyah;* performing any act of *ṣalāt* while having made up one's mind to discontinue it; changing one's intent from a preceding *ṣalāt* to a subsequent *ṣalāt,* such as from *ẓuhr* to *'aṣr.* However, the transition from *'aṣr* to *ẓuhr* prayer is permissible; hence if a person makes the *niyyah* of performing *'aṣr* prayer with the idea that he has performed the *ẓuhr* prayer and remembers during it that he has not performed the *ẓuhr* prayer, it is valid for him to shift his *niyyah* to offering the *ẓuhr* prayer. Similarly,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

it is permissible to shift from the *niyyah* of *jamā'ah* to *niyyah* of performing it individually; but the opposite is not valid. However, it is valid for a person performing an obligatory *ṣalāt* individually to change his *niyyah* to that of a supererogatory *ṣalāt* in order to perform the obligatory *ṣalāt* with *jamā'ah*. *Ṣalāt* is also invalidated by an additional *takbîrat al-'iḥrām*. Hence if one says *takbîrah* for a *ṣalāt* and then repeats it, the *ṣalāt* becomes invalid and a third *takbîrah* will be necessary. Again if he says *takbîrah* for the fourth time, the *ṣalāt* will become invalid and a fifth *takbîrah* will be necessary; thus every even *takbîrah* results in the *ṣalāt* becoming *bāṭil* due to the addition of a *rukn*, and becomes valid again by every odd *takbîrah*. Among the causes that invalidate *ṣalāt* is the incidence of *najāsah* to an extent not excusable, when the *muṣallî* is unable to remove it without any inordinate movement that may vitiate the form of the *ṣalāt*. The availability of water during *ṣalāt* for a person praying with *tayammum* invalidates both the *tayammum* and *ṣalāt*, provided it becomes available before performing the *rukū'* of the first *rak'ah;* if later, he will complete the *ṣalāt* which will be valid. *Ṣalāt* will also be invalidated by: the absence of certain conditions, such as the covering and the lawfulness of a particular location; the occurrence of a *ḥadath;* intentional deviation with the whole body from the *qiblah* either to the right or the left or any other direction in between; speaking voluntarily and weeping on account of one's worldly woes; laughter; any act that destroys the form of *ṣalāt;* eating and drinking; the intentional addition or omission of a part; and the omission, intentional or otherwise, of a *rukn* from among the five *arkān*. The five *arkān* are: *niyyah, takbîrat al-'iḥrām, qiyām, rukū'* and the two *sajdah*s of every *rak'ah*.

Crossing over in Front of the Muṣallī:

The schools concur that someone's passing from in front of the *muṣallî* does not invalidate the *ṣalāt*, but they differ regarding its impermissibility.

The Imāmîs state: It is neither impermissible for a person to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

pass from in front of the *muṣallî* nor for the latter (to pray in such a place). But it is *mustaḥabb* for the *muṣallî* to place before him an 'obstruction' if there is no barrier before him to prevent passers. The 'obstruction' can be a stick, a rope, a pile of earth, etc. which the *muṣallî* may place before him as a mark of veneration for *ṣalāt*, which signifies detachment from the creation and attention towards the Creator.

The Mālikîs, Ḥanafîs and Ḥanbalîs observe: It is *ḥarām* to cross over in front of a *muṣallî* in any circumstance, irrespective of whether he has placed an obstruction or not. Rather, the Ḥanafîs and the Mālikîs add: It is *ḥarām* for the *muṣallî* to create interference for passers by if he can keep out of their way.

According to the Shāfi'îs, it is *ḥarām* to cross over in front of the *muṣallî* if he has not placed an obstruction, and if he has done so, it is neither *ḥarām* nor *makrūh*.

NOTES:

1. The Ḥanafîs use two terms (*'farḍ'* and *'wājib'*) for something whose performance is obligatory and whose omission is impermissible. Hence they divide obligation into two kinds: *farḍ* and *wājib*. *'Farḍ'* is a duty for which there is a definite proof, such as Qur'ānic text, *mutawātir* sunnah, and *ijmā'* (consensus). *'Wājib'* is a duty for which there is a *ẓannî* (non-definite) proof, such as *qiyās* (analogy) and *khabar al-wāḥid* ('isolated tradition'). That whose performance is preferable to its omission is also of two kinds: *'masnūn'* and *'mandūb*. *'Masnūn'* is an act which the Prophet (ṣ) and the *'Rāshidūn'* caliphs performed regularly, and *'mandūb'* is an act ordered by the Prophet (ṣ) though not performed regularly by him (ṣ). That which it is *wājib* to avoid and whose performance is not permissible is *'muḥarram'* if it is established by a difinite proof. If based on a *ẓannî* proof, it is *'makrūh'*, whose performance is forbidden.

2. According to the Ḥanafîs, the *ṣalāt al-watr* consists of three *rak'ah*s with a single *salām*. Its time extends from the disappearance of twilight after sunset to dawn. The Ḥanbalîs and Shāfi'îs say: At minimum it is one *rak'ah* and at maximum eleven *rak'ah*s, and its time is after the *'ishā'* prayer. The Mālikîs observe: It has only one *rak'ah*.

3. There are among 'ulamā' of the Sunnî schools those who agree with the Imāmîs on performing the two *ṣalāt*s together even when one is not travelling. Al-Shaykh Aḥmad al-Ṣiddîq al-Ghumārî has written a book on this topic, *Izālat al-khaṭar 'amman jama'a bayn al-ṣalātayn fî al-ḥaḍar*.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

4. There is no difference regarding the definition of sunset between the Imāmīs and the other four schools. But the Imāmīs say that the setting of the sun is not ascertained simply by the vanishing of the sun from sight, but on the vanishing of the reddish afterglow from the eastern horizon, for the east overlooks the west and the eastern afterglow, which is a reflection of sun's light, pales away as the sun recedes. That which is rumoured regarding Shī'īs that they do not break their fast during Ramaḍān until the stars become visible, has no basis. In fact they denounce this opinion in their books on fiqh with the argument that the stars may be visible before sunset, at the time of sunset or after it, and declare that "one who delays the *maghrib* prayer till the stars appear is an accursed man (*mal'ūn ibn mal'ūn*)." They have said this in condemnation of the Khaṭṭābiyyah, the followers of Abū al-Khaṭṭāb, who held this belief. They are now--thank God--one of the extinct sects. Al-'Imām al-Ṣādiq (*'a*) was told that the people of Iraq delay the *maghrib* prayer until the stars become visible. He answered, "That is on account of Abū al-Kaṭṭāb, enemy of Allāh."

5. The command to face al-Masjid al-Ḥarām has come in verse 144 of *Sūrat al-Baqarah*:: فَوَلِّ وَجْهَكَ شَطْرَالْمَسْجِدِ الحَرام (so turn your face towards al-Masjid al-Ḥarām), and the leave to turn in any direction in verse 115 وللهِ المَشْرِقُ وَالمَغْرِبُ فَأَيْنَما تُوَلُّوافَثَمَّ وَجْهُ اللهِ. (To God belong the East and the West; whethersoever you turn there is the Face of God). Some scholars have held that the former verse abrogates the latter. Others disagree and point out that there is no abrogation involved here, nor is it a case of one being particular and the other general. The way to reconcile the two verses, they point out, is that the former verse applies to those who know the direction of the *qiblah* and commands them to turn towards it. The latter verse specifically applies to one who is at a loss regarding its direction and orders him to perform *ṣalāt* in any direction he wants. This opinion seems to be more credible.

6. Verse 31 of *Sūrat al-Nūr* mentions those before whom women can expose their adornment, and among them are Muslim women. Thus the verse prohibits a Muslim woman from exposing herself before a non-Muslim woman. The Shāfi'īs, Mālikīs and Ḥanafīs construe this prohibition as implying *taḥrīm*.

Most Imāmīs and the Ḥanbalīs say: There is no difference between Muslim and non-Muslim women. But according to the Imāmīs it is *makrūh* for a Muslim woman to expose herself before a non-Muslim woman, because she may describe what she observes to her husband.

7. *Al-Jawāhir*, at the beginning of bāb al-zawāj.

8. The Imāmīs observe: It is *mustaḥabb* for a woman to say *adhān* for her *ṣalāt*, though not as a call to prayer. Similarly, it is *mustaḥabb* for women while holding their own *jamā'ah* that one of them make the *adhān* call and the *iqāmah* in a manner that men do not hear it. The four Sunnī schools consider *iqāmah* as *mustaḥabb* and *adhān* as *makrūh* for women.

9. Ibn Rushd in *Bidāyat al-mujtahid* (1935 ed.) vol. 1, p. 103, says: "Others have said: 'The phrase *'al-ṣalātu khayrun min al-nawm'* should not be recited, because it is not a *masnūn* part of the *adhān*, and this is the opinion of al-Shāfi'ī.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The cause for the disagreement is the question whether it was said (as part of *adhān*) during the time of the Prophet (ṣ) or during that of *'Umar''*. It is stated in Ibn Qudāmah's *al-Mughnî* (3rd ed.) vol. 1, p. 408: "Isḥāq has said that this thing has been innovated by the people and Abū 'Īsā has said: 'This *tathwîb* is something that the learned (*ahl al-'ilm*) have regarded with distaste. It is that on hearing which Ibn 'Umar left the mosque.' "

10. Al-Shahîd al-Thānî, in *al-Lum'ah*, vol. 1, "bāb al-ṣalāt," *faṣl* 6, observes: "The *wujūb* of *ṣalāt al-Jumu'ah* during the occultation of the Imam is obvious in the opinion of most 'ulamā'... and if there has been no claim of *ijmā'* regarding its not being *wājib*, the opinion that it is *wājib 'aynî* would have been extremely strong. Therefore, the least that can be said is that there is an option between it (*ṣalāt al-Jumu'ah*) and the *ẓuhr* prayer, with the *Jumu'ah* (prayer) enjoying preference."

11. According to the Sunnî schools, the *Du'ā' al-'Iftitāḥ* or *Du'ā' al-'Istiftāḥ* is: سُبحانَكَ اللّهُمَّ وَبِحَمدِك وَتَبارَكَ اسمُكَ وَتَعالىٰ جَدُّك وَلا إلٰهَ غَيرُك.

12. Provided he returns within one day and one night, because in this case the journey has taken up all his day. Some others among them say: One should perform *qaṣr* if he intends to return within 10 days.

13. This is a summary from *al-Fiqh 'alā al-madhāhib al-'arba'ah.*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

FASTING

Fasting in the month of Ramaḍān is one of the 'pillars' of the Islamic faith. No proof is required to establish its being obligatory (*wājib*) and one denying it goes out of the fold of Islam, because it is obvious like *ṣalāt,* and in respect of anything so evidently established both the learned and the unlettered, the elderly and the young, all stand on an equal footing.

It was declared an obligatory duty (*farḍ*) in the second year of the Hijrah upon each and every *mukallaf* (one capable of carrying out religious duties, i.e. a sane adult) and breaking it (*ifṭār*) is not permissible except for any of the following reasons:

1. *Ḥayḍ* and *nifās*: The schools concur that fasting is not valid for women during menstruation and puerperal bleeding.

2. Illness: The schools differ here. The Imāmīs observe: Fasting is not valid if it would cause illness or aggravate it, or intensify the pain, or delay recovery, because illness entails harm (*ḍarar*) and causing harm is prohibited (*muḥarram*). Moreover, a prohibition concerning an *'ibādah* (a rite of worship) invalidates it. Hence if a person fasts in such a condition, his fast is not valid (*ṣaḥîḥ*). A predominant likelihood of its resulting in illness or its aggravation is sufficient for refraining from fasting. As to excessive weakness, it is not a justification for *ifṭār* as long as it is generally bearable. Hence the extenuating cause is illness, not weakness, emaciation or strain, because every duty involves hardship and discomfort.

The four Sunnî schools state: If one who is fasting (*ṣā'im*) falls

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ill, or fears the aggravation of his illness, or delay in recovery, he has the option to fast or refrain. *Ifṭār* is not incumbent upon him; it is a relaxation and not an obligation in this situation. But where there is likelihood of death or loss of any of the senses, *ifṭār* is obligatory for him and his fasting is not valid.

3. A woman in the final stage of pregnancy and nursing mothers. The four schools say: If a pregnant or nursing woman fears harm for her own health or that of her child, her fasting is valid though it is permissible for her to refrain from fasting. If she opts for *ifṭār,* the schools concur that she is bound to perform its *qaḍā'* later. They differ regarding its substitute (*fidyah*) and atonement (*kaffārah*). In this regard the Ḥanafîs observe: It is not at all *wājib.* The Mālikîs are of the opinion that it is *wājib* for a nursing woman, not for a pregnant one.

The Ḥanbalîs and the Shāfi'îs say: *Fidyah* is *wājib* upon a pregnant and a nursing woman only if they fear danger for the child; but if they fear harm for their own health as well as that of the child, they are bound to perform the *qaḍā'* only without being required to give *fidyah.* The *fidyah* for each day is one *mudd,* which amounts to feeding one needy person (*miskîn.*).[1]

The Imāmîs state: If a pregnant woman nearing childbirth or the child of a nursing mother may suffer harm, both of them ought to break their fast and it is not valid for them to continue fasting due to the impermissibility of harm. They concur that both are to perform the *qaḍā'* as well as give *fidyah,* equalling one *mudd,* if the harm is feared for the child. But if the harm is feared only for her own person, some among them observe: She is bound to perform *qaḍā'* but not to give *fidyah,* others say: She is bound to perform *qaḍā'* and give *fidyah* as well.

4. Travel, provided the conditions necessary for *ṣalāt al-qaṣr,* as mentioned earlier, are fulfilled as per the opinion of each school. The four Sunnî schools add a further condition to these, which is that the journey should commence before dawn and the traveller should have reached the point from where *ṣalāt* becomes *qaṣr* before dawn. Hence if he commences the journey after the setting in

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

of dawn, it is *ḥarām* for him to break the fast, and if he breaks it, its *qaḍā'* will be *wājib* upon him without a *kaffārah*. The Shāfi'îs add another condition, which is that the traveller should not be one who generally travels continuously, such as a driver. Thus if he travels habitually, he is not entitled to break the fast. In the opinion of the four Sunnî schools, breaking the fast is optional and not compulsory. Therefore, a traveller who fulfils all the conditions has the option of fasting or *iftār*. This is despite the observation of the Ḥanafîs that performing *ṣalāt* as *qaṣr* during journey is compulsory and not optional.

The Imāmîs say: If the conditions required for praying *qaṣr* are fulfilled for a traveller, his fast is not acceptable. Therefore, if he fasts, he will have to perform the *qaḍā'* without being liable to *kaffārah*. This is if he starts his journey before midday, but if he starts it at midday or later, he will keep his fast and in the event of his breaking it will be liable to the *kaffārah* of one who deliberately breaks his fast. And if a traveller reaches his hometown, or a place where he intends to stay for at least ten days, before midday without performing any act that breaks the fast, it is *wājib* upon him to continue fasting, and in the event of his breaking it he will be like one who deliberately breaks his fast.

5. There is consensus among all the schools that one suffering from a malady of acute thirst can break his fast, and if he can carry out its *qaḍā'* later, it will be *wājib* upon him without any *kaffārah*, in the opinion of the four schools. In the opinion of the Imāmîs, he should give a *mudd* by way of *kaffārah*. The schools differ in regard to acute hunger, as to whether it is one of the causes permitting *iftār*, like thirst. The four schools say: Hunger and thirst are similar and both make *iftār* permissible. The Imāmîs state: Hunger is not a cause permitting *iftār* except where it is expected to cause illness.

6. Old people, men and women, in late years of life for whom fasting is harmful and difficult, can break their fast, but are required to give *fidyah* by feeding a *miskîn* for each fast day omitted: similarly a sick person who does not hope to recover during the whole year. The schools concur upon this rule excepting the Ḥanbalîs, who say:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Fidyah is *mustaḥabb* and not *wājib.*

7. The Imāmīs state: Fasting is not *wājib* upon one in a swoon, even if it occurs only for a part of the day, unless where he has formed the *niyyah* of fasting before it and recovers subsequently, whereat he will continue his fast.

Disappearance of the Excuse:

If the excuse permitting *iftār* ceases--such as on recovery of a sick person, maturing of a child, homecoming of a traveller, or termination of the menses--it is *mustaḥabb* in the view of the Imāmīs and the Shāfi'īs to refrain (*imsāk*) from things that break the fast (*mufṭirāt*) as a token of respect. The Ḥanbalīs and the Ḥanafīs consider *imsāk* as *wājib,* but Mālikīs consider it neither *wājib* nor *mustaḥabb.*

Conditions (Shurūṭ) of Fasting:

As mentioned earlier, fasting in the month of Ramaḍān is *wājib* for each and every *mukallaf.* Every sane adult (*al-bāligh al-'āqil*) is considered *mukallaf.* Hence fasting is neither *wājib* upon an insane person in the state of insanity nor is it valid if he observes it. As to a child, it is not *wājib* upon him, though valid if observed by a *mumayyiz.* Also essential for the validity of the fast are Islam and *niyyah* (intention). Therefore, as per consensus, neither the fast of a non-Muslim nor the *imsāk* of one who has not formed the *niyyah* is acceptable. This is apart from the afore-mentioned conditions of freedom from menses, puerperal bleeding, illness and travel.

As to a person in an intoxicated or unconscious state, the Shāfi'īs observe: His fast is not valid if he is not in his senses for the whole period of the fast. But if he is in his senses for a part of this period, his fast is valid, although the unconscious person is liable to its *qaḍā',* whatever the circumstances, irrespective of whether his unconsciousness is self-induced or forced upon him. But the *qaḍā'* is not *wājib* upon an intoxicated person unless he is personally

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

responsible for his state.

The Mālikīs state: The fast is not valid if the state of unconsciousness or intoxication persists for the whole or most of the day from dawn to sunset. But if it covers a half of the day or less and he was in possession of his senses at the time of making *niyyah* and did make it, becoming unconscious or intoxicated later, *qaḍā'* is not *wājib* upon him. The time of making *niyyah* for the fast in their opinion extends from sunset to dawn.

According to the Ḥanafīs, an unconscious person is exactly like an insane one in this respect, and their opinion regarding the latter is that if the insanity lasts through the whole month of Ramaḍān, *qaḍā'* is not *wājib* upon him, and if it covers half of the month, he will fast for the remaining half and perform the *qaḍā'* of the fasts missed due to insanity.

The Ḥanbalīs observe: *Qaḍā'* is *wājib* upon a person in a state of unconsciousness as well as one in a state of intoxication, irrespective of whether these states are self-induced or forced upon them.

In the opinion of the Imāmīs, *qaḍā'* is only *wājib* upon a person in an intoxicated state, irrespective of its being self-induced or otherwise; it is not *wājib* upon an unconscious person even if his loss of consciousness is brief.

Muftirāt:

The *mufṭirāt* are those things from which it is obligatory to refrain during the fast, from dawn to sunset. They are:

1. Eating and drinking (*shurb*) deliberately. Both invalidate the fast and necessitate *qaḍā'* in the opinion of all the schools, though they differ as to whether *kaffārah* is also *wājib*. The Ḥanafīs and the Imāmīs require it, but not the Shāfi'īs and the Ḥanbalīs.

A person who eats and drinks by an oversight is neither liable to *qaḍā'* nor *kaffārah,* except in the opinion of the Mālikīs, who only require its *qaḍa'*.

(Included in *shurb* [drinking] is inhaling tobacco smoke)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

2. Sexual intercourse, when deliberate, invalidates the fast and makes one liable to *qaḍā'* and *kaffārah,* in the opinion of all the schools.

The *kaffārah* is the manumission of a slave, and if that is not possible, fasting for two consecutive months; if even that is not possible, feeding sixty poor persons. The Imāmīs and the Mālikīs allow an option between any one of these; i.e. a *mukallaf* may choose between freeing a slave, fasting or feeding the poor. The Shāfi'īs, Ḥanbalīs and Ḥanafīs impose *kaffārah* in the above-mentioned order; i.e. releasing a slave is specifically *wājib,* and in the event of incapacity fasting becomes *wājib.* If that too is not possible, giving food to the poor becomes *wājib.*

The Imāmīs state: All the three *kaffārah*s become *wājib* together if the act breaking the fast (*muftir*) is itself *ḥarām,* such as eating anything usurped (*maghṣūb*), drinking wine, or fornicating.

As to sexual intercourse by oversight, it does not invalidate the fast in the opinion of the Ḥanafīs, Shāfi'īs and Imāmīs, but does according to the Ḥanbalīs and the Mālikīs.

3. Seminal emission (*al-'istimnā'*): There is consensus that it invalidates the fast if caused deliberately. The Ḥanbalīs say: If *madhy* is discharged due to repeated sensual glances and the like the fast will become invalid.

The four schools say: Seminal emission will necessitate *qaḍā'* without *kaffārah.*

The Imāmīs observe: It requires both *qaḍā'* and *kaffārah.*

4. Vomiting: It invalidates the fast if deliberate, and in the opinion of the Imāmīs, Shāfi'īs and Mālikīs, also necessitates *qaḍā'.* The Ḥanafīs state: Deliberate voimiting does not break the fast unless the quantity vomited fills the mouth. Two views have been narrated from Imam Aḥmad. The schools concur that involuntary vomiting does not invalidate the fast.

5. Cupping (*ḥijāmah*) is *muftir* only in the opinion of the Ḥanbalīs, who observe: The cupper and his patient both break the fast.

6. Injection invalidates the fast and requires *qaḍā'* in the opinion

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

of all the schools. A group of Imāmī legists observe: It also requires *kaffārah* if taken without an emergency.

7. Inhaling a dense cloud of suspended dust invalidates the fast only in the opinion of the Imāmīs. They say: If a dense suspended dust, such as flour or something of the kind, enters the body the fast is rendered invalid, because it is something more substantial than an injection or tobacco smoke.

8. Application of kohl invalidates the fast only in the opinion of the Mālikīs, provided it is applied during the day and its taste is felt in the throat.

9. The intention to discontinue the fast: If a person intends to discontinue his fast and then refrains from doing so, his fast is considered invalid in the opinion of the Imāmīs and Ḥanbalīs; not so in the opinion of the other schools.

10. Most Imāmīs state: Fully submerging the head, alone or together with other parts of the body, under water invalidates the fast and necessitates both *qaḍā'* and *kaffārah*. The other schools consider it inconsequential.

11. The Imāmīs observe: A person who deliberately remains in the state of *janābah* after the dawn during the month of Ramaḍān, his fast will be invalid and its *qaḍā'* as well as *kaffārah* will be *wājib* upon him. The remaining schools state: His fast remains valid and he is not liable to anything.

12. The Imāmīs observe: A person who deliberately ascribes something falsely to God or the Messenger (ṣ) (i.e. if he speaks or writes that God or the Messenger said so and so or ordered such and such a thing while he is aware that it is not true), his fast will be invalid and he will be liable to its *qaḍā'* as well as a *kaffārah*. A group of Imāmī legists go further by requiring of such a fabricator the *kaffārah* of freeing a slave, fasting for two months, and feeding sixty poor persons. This shows the ignorance or malice of those who say that the Imāmīs consider it permissible to forge lies against God and His Messenger (ṣ).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Various Kinds of Fasts:

The legists of various schools classify fasts into four categories: *Wājib*, *mustaḥabb* (supererogatory), *muḥarram* (forbidden), and *makrūh* (reprehensible).

Obligatory fasts:

All the schools concur that the *wājib* fasts are those of the month of Ramaḍān, their *qaḍā'*, the expiatory fasts performed as *kaffārah*, and those performed for fulfilling a vow. The Imāmīs add further two, related to the Ḥajj and *i'tikāf*. We have already dealt in some detail with the fast of Ramaḍān, its conditions and the things that invalidate it. Here we intend to discuss its *qaḍā'* and the *kaffārah* to which one who breaks it becomes liable. Other types of obligatory fasts have been discussed under the related chapters.

Qaḍā' of the Ramaḍān Fasts:

1. The schools concur that a person liable to the *qaḍā'* of Ramaḍān fasts is bound to perform it during the same year in which the fasts were missed by him, i.e. the period between the past and the forthcoming Ramaḍān. He is free to choose the days he intends to fast, excepting those days on which fasting is prohibited (their discussion will soon follow). However it is *wājib* upon him to immediately begin their *qaḍā'* if the days remaining for the next Ramaḍān are equal to the number of fasts missed in the earlier Ramaḍān.

2. If one capable of performing the *qaḍā'* during the year neglects it until the next Ramaḍān, he should fast during the current Ramaḍān and then perform the *qaḍā'* of the past year and also give a *kaffārah* of one *mudd* for each day in the opinion of all the schools except the Ḥanafī which requires him to perform only the *qaḍā'* without any *kaffārah*. And if he is unable to perform the *qaḍā'*--such as when his illness continues throughout the period between the first

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and the second Ramaḍān--he is neither required to perform its *qaḍā'* nor required to give *kaffārah* in the opinion of the four schools, while the Imāmīs say: He will not be liable to *qaḍā'* but is bound to give a *mudd* as *kaffārah* for each fast day missed.

3. If one is capable of performing the *qaḍā'* during the year but delays it with the intention of performing it just before the second Ramaḍān, so that the *qaḍā'* fasts are immediately followed by the next Ramaḍān, and then a legitimate excuse prevents him from performing the *qaḍā'* before the arrival of Ramaḍān, in such a situation he will be liable only to *qaḍā'* not to *kaffārah.*

4. One who breaks a Ramaḍān fast due to an excuse, and is capable of later performing its *qaḍā'* but fails to perform the *qaḍā'* during his lifetime, the Imāmīs observe: It is *wājib* upon his eldest child to perform the *qaḍā'* on his behalf.

The Ḥanafīs, Shāfi'īs and Ḥanbalīs state: A *ṣadaqah* of a *mudd* for each fast missed will be given on his behalf.

According to the Mālikīs, his legal guardian (*walī*) will give *ṣadaqah* on his behalf if he has so provided in the will; in the absence of a will it is not *wājib.*

5. In the opinion of the four schools, a person performing the *qaḍā'* of Ramaḍān can change his intention and break the fast both before and after midday without being liable to any *kaffārah* provided there is time for him to perform the *qaḍā'* later.

The Imāmīs observe: It is permissible for him to break this fast before midday and not later, because continuation of the fast becomes compulsory after the passing of the major part of its duration and the time of altering the *niyyah* also expires. Hence if he acts contrarily and breaks the fast after midday, he is liable to *kaffārah* by giving food to ten poor persons; if he is incapable of doing that, he will fast for three days.

Fasts of Atonement (Kaffārah):

The fasts of atonement are of various kinds. Among them are atonement fasts for involuntary homicide, fasts for atonement of a

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

broken oath or vow, and atonement fasts for *ẓihār*. These atonement fasts have their own rules which are discussed in the related chapters. Here we shall discuss the rules applicable to a person fasting by way of *kaffārah* for not having observed the fast of Ramaḍān.

The Shāfi'îs, Mālikîs and Ḥanafîs say: It is not permissible for a person upon whom fasting for two consecutive months has become *wājib* consequent to deliberately breaking a Ramaḍān fast to miss even a single fast during these two months, because that would break their continuity. Hence, on his missing a fast, with or without an excuse, he should fast anew for two months.

The Ḥanbalîs observe: If he misses a fast due to a legitimate excuse, the continuity is not broken.

The Imāmîs state: It is sufficient for the materialization of continuity that he fast for a full month and then a day of the next month. After that he can skip days and then continue from where he had left. But if he misses a fast during the first month without any excuse, he is bound to start anew; but if it is due to a lawful excuse, such as illness or menstruation, the continuity is not broken and he/she will wait till the excuse is removed and then resume the fasts.

The Imāmîs further observe: One who is unable to fast for two months, or release a slave or feed sixty poor persons, has the option either to fast for 18 days or give whatever he can as *ṣadaqah*. If even this is not possible, he may give alms or fast to any extent possible. If none of these are possible, he should seek forgiveness from God Almighty.

The Shāfi'îs, Mālikîs and Ḥanafîs state: If a person is unable to offer any form of *kaffārah*, he will remain liable for it until he comes to possess the capacity to offer it, and this is what the rules of the Shārî'ah require.

The Ḥanbalîs are of the opinion that if he is unable to give *kaffārah*, his liability for the same disappears, and even in the event of his becoming capable of it later, he will not be liable to anything.

The schools concur that the number of *kaffārah*s will be equal to the number of causes entailing it. Hence a person who breaks two

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

fasts will have to give two *kaffārah*s. But if he eats, drinks or has sexual intercourse several times in a single day, the Ḥanafîs, Mālikîs and Shāfi'îs observe: The number of *kaffārah*s will not increase if *ifṭār* occurs several times, irrespective of its manner.

The Ḥanbalîs state: If in a single day there occur several violations entailing *kaffārah,* if the person gives *kaffārah* for the first violation of the fast before the perpetration of the second, he should offer *kaffārah* for the latter violation as well, but if he has not given *kaffārah* for the first violation before committing the second, a single *kaffārah* suffices.

According to the Imāmîs, if sexual intercourse is repeated a number of times in a single day, the number of *kaffārah*s will also increase proportionately, but if a person eats or drinks a number of times, a single *kaffārah* suffices.

Prohibited Fasts:

All the schools except the Ḥanafî concur that fasting on the days of *'Īd al-Fiṭr* and *'Īd al-'Aḍḥā* is prohibited (*ḥarām*). The Ḥanafîs observe: Fasting on these two *'Īd*s is *makrūh* to the extent of being *ḥarām.*

The Imāmîs say: Fasting on the days of *Tashrîq* is prohibited only for those who are at Minā. The days of *Tashrîq* are the eleventh, twelfth and thirteenth of Dhū al-Ḥijjah.

The Shāfi'îs are of the opinion that fasting is not valid on the days of *Tashrîq* both for those performing Ḥajj as well as others.

According to the Ḥanbalîs, it is *ḥarām* to fast on these days for those not performing Ḥajj, not for those performing it.

The Ḥanafîs observe: Fasting on these days is *makrūh* to the extent of being *ḥarām.*

The Mālikîs state: It is *ḥarām* to fast on the eleventh and the twelfth of Dhū al-Ḥijjah for those not performing Ḥajj, not for those performing it.

All the schools excepting the Ḥanafî concur that it is not valid for a woman to observe a supererogatory fast without her husband's

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

consent if her fast interferes with the fulfilment of any of his rights. The Ḥanafîs observe: A woman's fasting without the permission of her husband is *makrūh,* not *ḥarām.*

The Doubtful Days:

There is consensus among the schools that *imsāk* is obligatory upon one who does not fast on a "doubtful day" (*yawm al-shakk*) that later turns out to be a day of Ramaḍān, and he is liable to its *qaḍā'* later.

Where one fasts on a doubtful day that is later known to have been a day of Ramaḍān, they differ as to whether it suffices without requiring *qaḍā'*.

The Shāfi'î, Mālikî and Ḥanbalî schools observe: This fast will not suffice and its *qaḍā'* is *wājib* upon him.

In the opinion of the Ḥanafîs, it suffices and does not require *qaḍā'*.

Most Imāmîs state: Its *qaḍā'* is not *wājib* upon him, except when he had fasted with the *niyyah* of Ramaḍān.

Supererogatory Fasts:

Fasting is considered *mustaḥabb* on all the days of the year except those on which it has been prohibited. But there are days whose fast has been specifically stressed and they include three days of each month, preferably the 'moonlit' days (*al-'ayyām al-bîḍ*), which are the thirteenth, fourteenth and fifteenth of each lunar month. Among them is the day of 'Arafah (9th of Dhū al-Ḥijjah). Also emphasized are the fasts of the months of Rajab and Sha'bān. Fasting on Mondays and Thursdays has also been emphasized. There are other days as well which have been mentioned in elaborate works. There is consensus among all the schools that fasting on these days is *mustaḥabb.*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Reprehensible (Makrūh) Fasts:

It is mentioned in *al-Fiqh 'alā al-madhāhib al-'arba'ah* that it is *makrūh* to single out Fridays and Saturdays for fasting. So is fasting on the day of *Now Rūz* (21st March) in the opinion of all the schools except the Shāfi'ī, and fasting on the day or the two days just before the month of Ramaḍān.

It has been stated in Imāmī books on fiqh that it is *makrūh* for a guest to fast without the permission of his host, for a child to fast without the permission of its father, and when there is doubt regarding the new moon of Dhū al-Ḥijjah and the consequent possibility of the day being that of *'Īd*.

Evidence of the New Moon:

There is a general consensus among Muslims that a person who has seen the new moon is himself bound to act in accordance with his knowledge, whether it is the new moon of Ramaḍān or Shawwāl. Hence it is *wājib* upon one who has seen the former to fast even if all other people don't,[2] and to refrain from fasting on seeing the latter even if everyone else on the earth is fasting, irrespective of whether the observer is *'ādil* or not, man or woman. The schools differ regarding the following issues:

1. The Ḥanbalīs, Mālikīs and Ḥanafīs state: If the sighting (*ru'yah*) of the new moon has been confirmed in a particular region, the people of all other regions are bound by it regardless of the distance between them; the difference of the horizon of the new moon is of no consequence.

The Imāmīs and the Shāfi'īs observe: If the people of a particular place see the new moon while those at another place don't, in the event of these two places being closeby with respect to the horizon, the latter's duty will be the same; but not if their horizons differ.

2. If the new moon is seen during day, either before or after midday, on 30th Sha'bān, will it be reckoned the last day of Sha'bān

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

(in which case, fasting on it will not be *wājib*) or the first of Ramaḍān (in which case fasting is *wājib*)? Similarly, if the new moon is seen during the day on the 30th of Ramaḍān, will it be reckoned a day of Ramaḍān or that of Shawwāl? In other words, will the day on which the new moon is observed be reckoned as belonging to the past or to the forthcoming month?

The Imāmīs, Shāfi'īs, Mālikīs and Ḥanafīs observe: It belongs to the past month and not to the forthcoming one. Accordingly, it is *wājib* to fast on the next day if the new moon is seen at the end of Sha'bān, and to refrain from fasting the next day if it is seen at the end of Ramaḍān.

3. The schools concur that the new moon is confirmed if sighted, as observed in this tradition of the Prophet (ṣ): صوموالرُؤيَته، وَأفطر وا لرُؤيَته. ('Fast on seeing the new moon and stop fasting on seeing it'). They differ regarding the other methods of confirming it.

The Imāmīs observe: It is confirmed for both Ramaḍān and Shawwāl by *tawātur* (i.e. the testimony of a sufficiently large number of people whose conspiring over a false claim is impossible), and by the testimony of two *'ādil* men, irrespective of whether the sky is clear or cloudy and regardless of whether they belong to the same or two different nearby towns, provided their descriptions of the new moon are not contradictory. The evidence of women, children, *fāsiq* men and those of unknown character is not acceptable.

The Ḥanafīs differentiate between the new moons of Ramaḍān and Shawwāl; they state: The new moon of Ramaḍān is confirmed by the testimony of a single man and a single woman, provided they are Muslim, sane and *'ādil*. The Shawwāl new moon is not confirmed except by the testimony of two men or a man and two women. This is when the sky is not clear. But if the sky is clear--and there is no difference in this respect between the new moon of Ramaḍān and Shawwāl--it is not confirmed except by the testimony of a considerable number of persons whose reports result in certainty.

In the opinion of the Shāfi'īs, the new moon of Ramaḍān and Shawwāl is confirmed by the testimony of a single witnesss provided he is Muslim, sane, and *'ādil*. The sky's being clear or cloudy makes

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

no difference in this regard.

According to the Mālikīs, the new moon of Ramaḍān and Shawwāl is not confirmed except by the testimony of two *'ādil* men, irrespective of the sky's being cloudy or cloudless.

The Ḥanbalīs say: The new moon of Ramaḍān is confirmed by the testimony of an *'ādil* man or woman, while that of Shawwāl is only confirmed by the testimony of two *'ādil* men.

4. There is consensus among the schools, excepting the Ḥanafī, that if no one claims to have seen the new moon of Ramaḍān, fasting will be *wājib* after the thirtieth day allowing thirty days for Sha'bān. According to the Ḥanafīs, fasting becomes *wājib* after the twenty-ninth day of Sha'bān.

This was with respect to the new moon of Ramaḍān. As to the new moon of Shawwāl, the Ḥanafīs and the Mālikīs observe: If the sky is cloudy, thirty days of Ramaḍān will be completed and *iftār* will be *wājib* on the following day. But if the sky is clear, it is *wājib* to fast on the day following the thirtieth day by rejecting the earlier testimony of witnesses confirming the first of Ramaḍān regardless of their number.

The Shāfi'īs consider *iftār* as *wājib* after thirty days even if the setting in of Ramaḍān was confirmed by the evidence of a single witness, irrespective of the sky's having been cloudy or clear.

According to the Ḥanbalīs, if the setting in of Ramaḍān was confirmed by the testimony of two *'ādil* men, *iftār* following the thirtieth day is *wājib,* and if it was confirmed by the evidence of a single *'adl,* it is *wājib* to fast on the thirty-first day as well.

In the opinion of the Imāmīs, both Ramaḍān and Shawwāl are confirmed after the completion of thirty days regardless of the sky's being cloudy or clear, provided their beginning was confirmed in a manner approved by the Sharī'ah.

The New Moon and Astronomy:

This year (1960) the governments of Pakistan and Tunisia have decided to rely upon the opinion of astronomers for the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

confirmation of the new moon with a view of putting an end to confusion[3] and the general inconvenience resulting from not knowing in advance the day of *'Īd*, which at times comes as a surprise, and at other times is delayed despite all the preparations.

This decision of the two governments has become an issue of heated controversy in religious circles.

The protagonists of the move observe that there is nothing in the religion that disapproves of reliance on the opinion of astronomers; rather it is supported by this verse of *Sūrat al-Naḥl*:

وَعَلَٰمَٰتٍ وَبِالنَّجْمِ هُمْ يَهْتَدُونَ ﴿١٦﴾

...And way marks; and by the stars they are guided. (16:16)

The antagonists state: The decision contradicts the above-mentioned prophetic traditon: صوموا لرُؤيَته، وأفطروا لرُؤيَته. That, because the word *ru'yah* (sighting) implies sighting the moon with the eyes, which was common among the people during the time of the Prophet (ṣ). As to using a telescope or relying on astronomical calculations, they are inconsistent with the literal import of the tradition, they point out.

In fact, none of the sides has advanced sound reasons, because 'guidance by the stars' implies determination of land and sea routes with the help of the stars, and not determination of days of months and new moons. As to the tradition, it does not contradict sound scientific knowledge, because 'seeing' is a means for acquiring knowledge and not an end in itself, as is the case with any means that helps confirm facts. However, in my opinion, the judgements of astronomers do not lead to certain knowledge, nor do they remove all doubts as removed by vision, because their judgements are based on probability not on certainty. This is evident from their divergent judgements about the night of the new moon as well as the time of its occurrence and the period that it remains (above the horizon).

If a time comes when the astronomers attain accurate and sufficient knowledge, so that there is consensus among them and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

they recurringly prove to be right to the extent that their forecasts become a certainty like the days of the week, then it will be possible to rely upon them. Rather, then it will be obligatory to follow their judgements and to reject everything that goes against them.[4]

NOTES:

1. Approximately 800 grams of wheat or something similar to it.

2. But the Ḥanafīs observe: If he testifies before a *qāḍī* who rejects his testimony, it is *wājib* upon him to perform its *qaḍā'* without liability to *kaffārah* (*al-Fiqh 'alā al-madhāhib al-'arba'ah*).

3. In 1939 the *'Īd al-'Aḍḥā* was observed on Monday in Egypt, on Tuesday in Saudi Arabia, and on Wednesday in Bombay.

4. Refer to the discussion on this issue in the first volume of our book *Fiqh al-'Imām Ja'far al-Ṣādiq* (*'a*), the section on the proof of the new moon at the end of *bāb al-ṣawm*.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ZAKAT AND KHUMS

Zakāt is of two kinds: on property and on individuals. The schools concur that payment of *zakāt* is not valid without *niyyah*. Its obligation depends on the following conditions:

Conditions for Zakāt on Property:

1. The Ḥanafîs and the Imāmîs observe: Sanity and adulthood are necessary for liability to *zakāt;* hence the property of a child or an insane person is not liable to it.[1]

The Mālikîs, Ḥanbalîs and Shāfi'îs state: Neither sanity nor adulthood is required; it is *wājib* on the property of a minor as well as an insane person and the guardian is responsible for its payment from his ward's property.

2. The Ḥanafîs, Shāfi'îs and Ḥanbalîs say: *Zakāt* is not *wājib* upon a non-Muslim (*al-Fiqh 'alā al-madhāhib al-'arba'ah*). According to the Imāmîs and the Mālikîs, a non-Muslim is as liable to it as a Muslim, without there being any difference.

3. Complete ownership is necessary for the incidence of *zakāt*. Every school has elaborate discussions concerning the definition of 'complete ownership.' What is common in their observations is that the owner should have complete control over the property and must be able to dispense it at his will. Hence lost property or property usurped from its owner--though he will retain its ownership--will not be liable to *zakāt*. As to debt, it will be liable to *zakāt* only after the creditor has recovered it (for example, the wife's dower owed by the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

husband), for a debt is not possessed unless collected. The rule applicable to the debtor will be discussed later.

4. A lunar year of uninterrupted possession for property other than grain, fruits and minerals. Details are given below.

5. The possession of a certain minimum (*niṣāb*) which differs with the kind of property liable to *zakāt,* as will be explained later.

6. Is a debtor who possesses property to the extent of the *niṣāb* liable to *zakāt*? In other words, does debt prevent liability to *zakāt*?

The Imāmīs and the Shāfi'īs state: The property's freedom from debt is not a condition; hence a debtor will be liable to *zakāt* even if the debt covers his entire property equalling the *niṣāb*. Rather, the Imāmīs say: If one borrows something on which *zakāt* is payable, in a quantity equalling its *niṣāb* and it remains in his possession for a year, the borrower shall be liable to *zakāt*.

According to the Ḥanbalīs, debt prevents liability to *zakāt*. Hence a debtor who possesses property should first meet his debt; he will pay *zakāt* if the remainder reaches the *niṣāb* limit, not otherwise.

The Mālikīs are of the opinion that debt prevents the incidence of *zakāt* on gold and silver, not on grain, livestock and minerals. Therefore a debtor possessing gold and silver in the quantity of *niṣāb* is supposed to meet the debt, and *zakāt* is not *wājib* upon him. But if the debtor possesses something other than gold and silver in the quantity of the *niṣāb,* he is liable to *zakāt*.

The Ḥanafīs observe: If the debt is a duty owed to God (*ḥaqq Allāh*), such as the obligation of ḥajj and *kaffārah,* and persons have no claims against him, such a debt does not prevent liability to *zakāt*. But if the debt is owed to persons or to God when there is such a claim against him as outstanding *zakāt* whose payment is demanded by the ruler (*imām*), such a debt prevents liability to *zakāt* on all kinds of property except crops of the field and fruits.

All the schools concur that ornaments, jewelry, one's dwelling, clothes, household articles, mount, weapons and other things of personal use such as instruments, books and tools are not liable to *zakāt*. The Imāmīs also exclude gold and silver ingots. Related details are given below.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Kinds of Property Liable to Zakāt:

The Noble Qur'ān considers the needy as real sharers in the wealth of the rich. Verse 19 of *Sūrat al-Dhāriyāt* states:

وَفِيٓ أَمۡوَٰلِهِمۡ حَقّٞ لِّلسَّآئِلِ وَٱلۡمَحۡرُومِ ﴿١٩﴾

And in their possessions is a share for the beggar and the deprived. (51:19)

The verse does not differentiate between wealth acquired through agriculture, industry or trade in respect of this right, and hence the legists of all the schools acknowledge it as *wājib* in livestock, grain, fruits, currency and minerals.

However, they differ in delimiting some of these categories, in specifying the *niṣāb* applicable to some of them, and the size of the share of the needy in some others. Thus the Imāmīs consider it *wājib* to pay one-fifth (*khums*) from the profits of trade, while the four schools prescribe one-fortieth (2 1/2%) on merchandise. The same applies to minerals, from which the Ḥanafīs, Imāmīs and Ḥanbalīs prescribe payment of *khums* while the remaining two schools that of 2 1/2%. The following description gives the details of the points of agreement and difference of the schools.

Zakāt on Livestock:

There is a consensus that *zakāt* is *wājib* upon three kinds of livestock: camels, cattle, sheep and goats. They concur that *zakāt* is not *wājib* upon horses, mules and donkeys, except when they form a part of merchandise. The Ḥanafīs consider horses to be liable to *zakāt* only when these include mares.

Conditions for Zakāt on Livestock:

There are four conditions for the incidence of *zakāt* on livestock:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

1. The Niṣāb: The *niṣāb* of camels is as follows:

If the number of camels is 5, one sheep; if it reaches 10, two sheep; for 15, three sheep; and for 20, four. All the schools agree on this prescription. But if the number of camels reaches 25, the *zakāt* according to the Imāmīs is 5 sheep, and a camel in its second year according to the other four schools. However, the Imāmīs consider that as *zakāt* of 26 camels; thus if the number of camels reaches this limit they form a single *niṣāb*.

The schools concur that the *zakāt* of 36 camels, is a camel in its third year; of 46 camels, a camel in its fourth year; of 61 camels, a camel in its fifth year; of 76 camels, two camels in their third year; of 91 camels, two camels in their fourth year.

The schools also concur that there is no additional *zakāt* for camels over 91 and below 121. For this number the different opinions of the schools and their details can be found in elaborate works.

There is consensus that there is no *zakāt* on less than 5 camels, as well as on the number above a particular *niṣāb* and below the next *niṣāb*.

Niṣāb of Cattle: The *zakāt* for every 30 cattle is a *tabî'* o r *tabî'ah* (an ox or cow in its second year); for every 40, a *musinnah* (cow in its third year). Thus for 60, the *zakāt* is two *tabî'*s; for 70, one *tabî'* and one *musinnah;* for 80, two *musinnah*s; for 90, three *tabî'*s; for 100, two *tabî'*s and one *musinnah;* for 110, two *musinnah*s and one *tabî';* for 120, three *musinnah*s, or four *tabî'*s, and so on. No *zakāt* is levied on a number which exceeds a certain limit but falls short of the next higher limit. All the schools concur regarding the above-mentioned *niṣāb.*[2] *Tabî'* is a cow which has completed a year and entered the second, and *musinnah* is one which has entered the third year. The Mālikīs define *tabî'* as one which has completed two years and entered the third, and *musinnah* as one which has completed three years and entered the fourth.

The Niṣāb of Sheep: The schools concur that the *zakāt* for 40 sheep is one sheep; for 121, two; for 201, three.

The Imāmīs state: If their number reaches 301, the *zakāt* is four

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

sheep up to 400; from then on for each extra 100 the *zakāt* is one sheep.

The four Sunnî schools observe: The *zakāt* for 301, like that for 201, is three sheep up to 400, on which four sheep become due; thereafter for each extra 100 the *zakāt* is one sheep.

There is consensus among the schools that a number between any two limits is exempt from *zakāt.*

2. Grazing: 'Grazing livestock' is that which grazes freely on public pastures for most of the year and whose owner does not bear the cost of providing it with grass except rarely. This is a condition on which all the schools excepting the Mālikî concur. The Mālikîs levy *zakāt* on both 'grazing' and 'non-grazing' livestock.

3. One Year of Ownership: All the livestock in the *niṣāb* should be owned by its owner for a complete lunar year. Thus if its number falls short of the *niṣāb* even by one during the year, it will not be liable to *zakāt* even if the *niṣāb* materializes at the end of the year (e.g. if a person owns 40 sheep at the beginning of the year and after a few months their number is reduced by one for some reason, such as sale, gift or death, and later becomes 40 again, *zakāt* will not be levied at the end of the year). The Imāmîs, Shāfi'îs and Ḥanbalîs concur regarding this condition, while the Ḥanafîs observe: If the number falls below the *niṣāb* during the year but is resumed at the end of it, *zakāt* will be levied as if the *niṣāb* had existed throughout the year.

4. The animals should not be those intended for work, such as an ox used for tilling or a camel for transport. Hence there is consensus among the schools, excepting the Mālikî, that *zakāt* is not levied on animals used for work, irrespective of their number. According to the Mālikîs, *zakāt* is levied on both working as well as other animals without any difference.

The schools concur that if a person possesses many kinds of livestock of which no single kind reaches the number required for *niṣāb,* it is not *wājib* upon him to consider them jointly (thus if he has less than 30 cattle and less than 40 sheep, it is not *wājib* to make up the *niṣāb* of the cattle with the sheep or vice versa).

The schools differ where two persons jointly own a single *niṣāb.*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Imāmīs, Ḥanafīs and Mālikīs state: They are not liable to *zakāt*, together or singly, unless the share of each one of them separately reaches the *niṣāb* limit. The Shāfi'īs and the Ḥanbalīs observe: Wealth owned jointly is liable to *zakāt* if it reaches the *niṣāb* limit, even if each share falls short of it.

Zakāt on Gold and Silver:

The legists prescribe *zakāt* on gold and silver if their respective *niṣāb*s are reached. According to them the *niṣāb* of gold is 20 *mithqāl* (4.8 grams) and that of silver 200 dirhams (2.52 grams). They further require that the *niṣāb* be owned for one complete year. The rate of *zakāt* on these two is 2 1/2%.

The Imāmīs observe: *Zakāt* is *wājib* on gold and silver coins used as money, not on ingots or jewellery.

The four Sunnī schools concur that *zakāt* is *wājib* on gold and silver ingots in the same manner as on money coined from them. They differ regarding *zakāt* on jewellery made of them; some consider it *wājib*, others don't.

The above remarks concerning *zakāt* on gold and silver coins will suffice, for they have practically no role in our times. As to bank-notes, the Imāmīs prescribe the payment of one-fifth (*khums*) of the surplus left after a year's expenses. Details are given below.

The Shāfi'īs, Mālikīs and Ḥanafīs state: *Zakāt* is not *wājib* on bank-notes unless all the conditions including *niṣāb* and the completion of a year are fulfilled.

The Ḥanbalīs say: *Zakāt* is not *wājib* on bank-notes except when converted into gold or silver.

Zakāt on Crops and Fruits:

The schools concur that the rate of *zakāt* on crops of the field and fruits is 10% if irrigated by rain or riverwater, and 5% if irrigated by Artesian wells and the like.

There is also consensus among the schools, excepting the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Ḥanafī, that the *niṣāb* for crops and fruits is 5 *wasq* (60 *ṣā'*, approx. 910 kg). There is no *zakāt* under this limit. The Ḥanafīs prescribe *zakāt* irrespective of the quantity of the produce.

The schools differ regarding the kinds of crops and fruits on which *zakāt* is *wājib*. The Ḥanafīs prescribe *zakāt* on all fruits and crops and all agricultural produce except wood, hay and Persian cane.

The Mālikīs and the Shāfi'īs prescribe *zakāt* on everything that is stored as a provision, such as wheat, barley, rice, dates and raisins.

The Ḥanbalīs require *zakāt* on everything that is weighed and stored from among fruits and grains.

The Imāmīs do not levy *zakāt* on anything except wheat and barley among grains, and dates and raisins from among fruits. Apart from these, it is *mustaḥabb*, not *wājib*.

Zakāt on Merchandise:

'Merchandise' (*māl al-tijārah*) consists of property whose ownership is acquired through commercial transactions made for profit. It is necessary here that the ownership be acquired through the owner's own activity; hence, if acquired through inheritance, there is consensus that it will not be considered merchandise.

According to the four Sunnī schools, *zakāt* is *wājib* on merchandise. The Imāmīs consider it *mustaḥabb*. The *zakāt* is paid from the price of the commodities of trade at the rate of 2 1/2%.

The schools concur that a year's passage is necessary for the incidence of *zakāt*. It is considered to begin from the time commercial transactions commence. When a year passes and profit is made, *zakāt* becomes payable.

The Imāmīs observe: The capital should remain undiminished throughout the year. Thus if it is reduced during the year, *zakāt* will not be levied. When restored, the new year will be reckoned from the date of recovery.

According to the Shāfi'īs and the Ḥanbalīs, the criterion for liability to *zakāt* is only the position at the end of year. Thus if the *niṣāb* is not reached at the beginning of the year or during it but only

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

at its end, *zakāt* becomes *wājib.*

The Ḥanafīs state: The criterion is the position at the beginning and the end of the year not what happens in its middle. Thus if at the beginning of the year a person owns merchandise fulfilling the *niṣāb* and its value falls below this limit during the year recovering to reach the limit at the end of the year, he will be liable to *zakāt.* But if the *niṣāb* is not reached either at the year's beginning or end, *zakāt* will not be levied.

Also, the value of merchandise should reach the *niṣāb,* On evaluation its total value will be compared with the *niṣāb*s of gold and silver; *zakāt* will be levied if it equals or exceeds any of them, not if it is less than the *niṣāb* of silver. The authors of *al-Fiqh 'alā al-madhāhib al-'arba'ah* (1922) calculate this *niṣāb* as 529.2/3 Egyptian piasters.

The Character of Liability:

The schools differ as to whether *zakāt* pertains to the property itself that is liable to *zakāt,* so that one entitled to receive it has a share in it together with the owner (like all property owned jointly by partners), or if it is a personal liability like other debts, though it pertains to a specific property, like the debt pertaining to the legacy of a deceased person.

The Shāfi'īs, Imāmīs and Mālikīs state: *Zakāt* is *wājib* upon the zakātable property itself and its recipient is a real co-sharer in it with the owner in accordance with the statement of God, the Most High:

وَفِيٓ أَمۡوَٰلِهِمۡ حَقّٞ لِّلسَّآئِلِ وَٱلۡمَحۡرُومِ ﴿١٩﴾

And in their wealth is a share for the beggar and the deprived. (51:19)

They point out that there is also a *tawātur* of traditions stating that God has made the rich and the poor partners in wealth. However, the Sharī'ah has out of lenience permitted the owner to pay *zakāt* out of his other assets not subject to *zakāt.*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Ḥanafîs observe: The incidence of *zakāt* pertains to the property subject to *zakāt* itself. It is like the claim of a mortgagor over mortgaged property and is not met except by being handed over to the recipient.

Two views have been narrated from Imam Aḥmad, one of which agrees with the Ḥanafî position.

Classes Entitled to Receive Zakāt:

The schools concur that there are eight different classes of those who deserve to receive *zakāt* as mentioned in the following verse of *Sūrat al-Tawbah:*

إِنَّمَا الصَّدَقَٰتُ لِلْفُقَرَآءِ وَالْمَسَٰكِينِ وَالْعَٰمِلِينَ عَلَيْهَا وَالْمُؤَلَّفَةِ قُلُوبُهُمْ وَفِى الرِّقَابِ وَالْغَٰرِمِينَ وَفِى سَبِيلِ اللَّهِ وَابْنِ السَّبِيلِ...

The ṣadaqāt are for the poor (fuqarā') and the needy (masākîn), their collectors ('āmilîn), those whose hearts are to be conciliated (mu'allafatu qulūbuhum), the ransoming of slaves (riqāb), debtors (ghārimîn), in God's way (sabîl Allāh), and the traveller (ibn al-sabîl)...(9:60)

The views of the schools in determining these classes are as follows:

1. The Needy (Faqîr): According to the Ḥanafîs, *'faqîr'* is someone who owns less than the *niṣāb* even if he is physically fit and earning. As to one who owns any property equal to the *niṣāb* of its category after providing for his basic needs--such as house, articles, clothes, and etc.--it is not valid to spend *zakāt* on him. The proof they offer is that *zakāt* becomes *wājib* upon one who owns assets equal to the *niṣāb* of anything and one who is himself liable to *zakāt* cannot receive it.

According to the other schools, the criterion is need, not ownership; *zakāt* is *ḥarām* for a needy person although he may own one or several *niṣāb*s, because the word *'faqr'* means need. God, the Exalted, says:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

يَأَيُّهَاالنَّاسُ أَنتُمُ الفُقَرَآءُ إِلَى اللهِ...

O men, you are the ones that have need of God. (35:15)

The Shāfi'îs and the Ḥanbalîs say: One who possesses half of what suffices him will not be considered *faqîr;* consequently it is not permissible for him to receive *zakāt.*

According to the Imāmîs and the Mālikîs, *'faqîr'* in the context of the Sharî'ah is one who does not possess a year's provision for himself and his family. Thus one who owns property or livestock not sufficient to provide his family for a whole year can be given *zakāt.*

The Imāmîs, Shāfi'îs and Ḥanbalîs further observe: It is not permissible for one capable of earning to receive *zakāt.*

The Ḥanafîs and the Mālikîs permit him to receive *zakāt* and it may be given to him.

The Imāmîs state: One's claim to be *faqîr* will be accepted without requiring a witness or an oath, provided he has no visible wealth and the falsehood of his claim is not known. This is because once two men came to the Prophet (ṣ) while he was distributing *ṣadaqāt* and asked him to give them something from it. The Prophet (ṣ) lifted his eyes and fixing his glance on them said: "If you like I will give it to you, for there is no share in it for one who is well provided or one who makes an earning." Thus he left it to them to benefit from *zakāt* without requiring witness or oath.

2. Al-Miskîn: The Imāmîs, Ḥanafîs and Mālikîs consider *'miskîn'* to be one who is worse off than a *faqîr* person.

The Ḥanbalîs and the Shāfi'îs, however, define *faqîr* as someone worse off than a *miskîn* because, they say, *'faqîr'* is one who has nothing or lacks even half of what he needs, while *'miskîn'* is one who possesses more than half of what he needs, and he is provided the other half from *zakāt.*

Whatever be the case, there is no essential difference between the schools in their interpretation of the terms *'faqîr'* and *'miskîn,'* for the objective is that *zakāt* be used to fulfil the urgent need for housing, food, clothing, medical care, education, and such other

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

needs.

The schools, excepting the Mālikī, also concur that it is not permissible for one liable to *zakāt* to give it to his parents, grandparents, children, grandchildren or wife. The Mālikīs allow its payment to grandparents and grandchildren because their maintenance is not one's obligation in their opinion.

There is also consensus that it is valid to give *zakāt* to brothers, uncles and aunts. However, the prohibition on giving of *zakāt* to one's father and children pertains only to the share meant for the two classes of the needy (*fuqarā'* and *masākîn*). Hence if they belong to a class other than these two, they are permitted to receive it, e.g. if the father or the son is a warrior fighting in the way of God, or one of 'those whose hearts are to be conciliated,' or a debtor whose debt arises out of a legitimate act, or one involved in a case of peacemaking, or a collector of *zakāt,* because these classes of recipients are entitled to receive *zakāt* even if they are well off (Al-'Allāmah al-Ḥillî, *al-Tadhkirah,* vol. 1, "Bāb al-Zakāt").

However, it is preferable to give *zakāt* to a relative whose maintenance is not *wājib* upon the giver.

The schools differ regarding the transfer of *zakāt* from one town to another. The Ḥanafîs and the Imāmîs observe: It is preferable and more meritorious to spend the *zakāt* on the residents of the town except where some urgent need necessitates its transfer to another place.

The Shāfi'îs and the Mālikîs do not permit the transfer of *zakāt* from one town to another.

The Ḥanbalîs allow its transfer to a place at a distance where *ṣalāt* does not become *qaṣr* on one making the journey, and forbid its transfer beyond that distance.

3. ('Āmilūn): As per consensus, by *'āmilūn 'alayhā'* in the verse is meant the collectors of *zakāt.*

4. Al-Mu'allafatu qulūbuhum: They are those who are won over by paying a part of *zakāt* in the interest of Islam. The schools differ as to whether this category still holds or if it has been abrogated, and if not abrogated whether this winning over is restricted to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

non-Muslims or includes Muslims of weak conviction as well.

The Ḥanafîs observe: This principle was introduced in the Sharî'ah at the advent of Islam when the Muslims were weak. But now, when Islam has become firmly established, this provision has no applicability due to the absence of its cause.

The other schools have elaborately discussed the different kinds of 'those whose hearts are to be conciliated,' and their observations may be summarized as follows: The regulation holds and has not been abrogated; the share of *zakāt* pertaining to *al-mu'allafatu qulūbuhum* can be given to a Muslim as well as a non-Muslim, on condition that this bestowal secures the advantage of Islam and Muslims. The Prophet (ṣ) gave *zakāt* to Ṣafwān ibn Umayyah, who was an idolater, and to Abū Sufyān and his like, after they embraced Islam, as a measure of precaution to safeguard Islam and Muslims from their malice.

5. Al-Riqāb: It implies the buying of slaves with *zakāt* funds to set them free. This provision clearly shows that Islam devised numerous ways to end slavery. In any case, this provision has no practical application in our times.

6. Al-Ghārimūn: They are the debtors who have fallen in debt for some non-sinful cause. The schools concur that they may be given *zakāt* to help them repay their debts.

7. Sabîl Allāh: The four Sunnî schools consider it to imply those warriors who have volunteered to fight for the defence of Islam.

The Imāmîs observe: Apart from warriors, this category includes building of mosques, hospitals, schools and other public works.

8. Ibn al-Sabîl: It means a traveller cut off from his hometown and means. Hence it is valid to give him *zakāt* to an extent that will enable him to reach his hometown.

Subsidiary Issues:

1. The schools concur that it is *ḥarām* for one belonging to the Banū

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Hāshim to receive *zakāt* from someone who is not a Hāshimite himself. But he may receive *zakāt* from a Hāshimite.

2. Is it permissible to give one's entire *zakāt* to a single *miskîn*?

The Imāmîs permit it even if it makes the recipient well off by being given all at once.

The Ḥanafîs and the Ḥanbalîs state: It may be given to a single person if this does not make him sufficiently provided.

The Mālikîs permit giving of one's entire *zakāt* to a single recipient provided he is not a collector of *zakāt*, because he may not take more than the remuneration of his work.

The Shāfi'îs are of the opinion that it is obligatory to so spread out the *zakāt* as to include all the eight categories, if they exist; in the absence of some of them it should be distributed among the categories present. A minimum of three persons from each category should receive it.

3. The property liable to *zakāt* is of two types. First, that which is possessed for a year, such as livestock and merchandise. In this case, *zakāt* does not become obligatory before the completion of a year. A 'year' in the opinion of the Imāmîs means eleven months of possession of the property liable to *zakāt* and the setting in of the twelfth month.

The second type does not require the passage of a year, such as fruits and grains, and *zakāt* becomes *wājib* upon them at the time of harvest. As to the time of payment, there is consensus that it is when the fruits are gathered and dried in the sun, and when the crop is harvested and the straw and husk removed. One who delays taking out the *zakāt* after its time has arrived and its payment has become possible is a sinner (though he remains liable to it), because he has delayed the carrying out of a time-bound obligation and been negligent.

Zakāt al-Fiṭr:

Zakāt al-fiṭr is also called *'zakāt al-'abadān* (the *zakāt* of the bodies). Its pertinent issues include the following questions: by

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

whom it is to be paid? for whom? what is its quantity, its time of payment, and who are its eligible recipients.

Those on Whom it is Wājib:

The four Sunnî schools state: *Zakāt al-fiṭr* is *wājib* upon every financially capable (*qādir*) Muslim, major or minor. Thus it is *wājib* for a guardian to pay it out from the property of his ward to the needy.

A financially capable person in the opinion of the Ḥanafîs is one who owns property equal to a *niṣāb* of *zakāt* or something equal in value after meeting all his needs. According to the Shāfi'îs, Mālikîs and Ḥanbalîs, it is one who possesses anything in excess of his and his family's food on the day and night of the *'îd,* apart from such essential needs as house, clothes and other necessities. The Mālikîs add: One who is capable of borrowing will be considered capable if he hopes to repay it.

According to the Imāmîs, *zakāt al-fiṭr* is *wājib* only upon a capable sane adult. Therefore it is not *wājib* on a child's property or that of an insane person in accordance with the tradition:

رُفِعَ القَلَمُ عَن ثَلاثَةٍ: عَنِ الصَّبِيِّ حَتّىٰ يَحتَلِمَ، وَعَنِ المَجنونِ حتّىٰ يَفيقَ، وَعَنِ النّائِمِ حَتّىٰ يَستَيقِظَ.

The (lawgiver's) pen has absolved these three of obligations: a child, till he reaches the age of puberty; an insane person, until he regains sanity; and a person in sleep, until he wakes up.

A financially capable person in their opinion is one who possesses, either actually or potentially, a year's provision for himself and his family--such as when he possesses an asset that he can utilize or a skill by which he can earn.

The Ḥanafîs observe: It is *wājib* for a capable person to pay the *zakāt al-fiṭr* for himself, his minor children, his servant, and his major child if he happens to be insane. But if the major child is sane,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

his *zakāt* is not *wājib* upon the father. Also the wife's *zakāt* is not *wājib* upon the husband.

The Ḥanbalīs and the Shāfi'īs consider it *wājib* to pay the *zakāt al-fiṭr* for oneself as well as those whose maintenance is *wājib* upon one, such as wife, father and son.

The Mālikīs say: It is *wājib* for oneself and for those one is maintaining; they include: one's indigent parents; sons, who have no means of their own, provided they are still young and incapable of earning themselves; indigent daughters who have not yet been married; and wife.

The Imāmīs state: It is *wājib* to pay *zakāt al-fiṭr* for oneself and for all those whom one feeds on the night of *'îd al-fiṭr,* irrespective of whether their maintenance is *wājib* upon one or not, and regardless of their being children or adults, Muslims or non-Muslims, relatives or strangers. Hence if a guest comes to his house moments before the new moon for the month of Shawwāl is sighted and joins the family, it becomes *wājib* to pay *zakāt al-fiṭr* for him as well. Similarly, if a child is born to him or he marries before or at the time of sunset preceding the night of *'îd al-fiṭr.* But if the child is born, or he marries, or a guest arrives, after sunset, it will not be *wājib* to pay the *fiṭrah* for them. Anyone whose *fiṭrah* is *wājib* upon another is not required to pay his own *fiṭrah* even if he is wealthy.

Its Quantity:

The schools, excepting the Ḥanafī, concur that the *wājib* quantity of *fiṭrah* per head is one *ṣā'* (approx. 3 kg) or wheat, barley, dates, raisins, rice, maize or any other staple crop. The Ḥanafīs consider half a *ṣā'* of wheat per head as sufficient.

Time of Wujūb:

The Ḥānafīs observe: Its *wujūb* commences from the dawn of the day of *'îd* and continues till the end of life, because *zakāt al-fiṭr* is among those obligations which do not have a time limit and it is

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

valid to pay it early or late.

The Ḥanbalîs say: It is *ḥarām* to delay its payment beyond the day of *'îd* and it may be paid two days before the *'îd*, though not earlier.

The Shāfi'îs state: The time of its *wujūb* extends from the last part of Ramaḍān (i.e. from a little before sunset on the last day of Ramaḍān) up to the first part of Shawwāl. It is *sunnah* to set it aside during the early part of the day of *'îd* and *ḥarām* to delay it beyond the sunset of the day without an excuse.

There are two narrations from Imām Mālik, and in accordance with one of them its *wujūb* commences from sunset on the last day of Ramaḍān.

The Imāmîs observe: *Zakāt al-fiṭr* becomes *wājib* with the falling of the night of the *'îd*, and its payment is *wājib* from sunset up to noon on the day of *'îd;* it is meritorious to pay it before *ṣalāt al-'îd*. But if no deserving person (*mustaḥiqq*) is found at that time, it should be set aside with the intent of giving it at the first opportunity. If the payment is delayed beyond this time despite the presence of a deserving recipient, it remains *wājib* to pay it later, because this obligation is not annulled in any situation.

Mustaḥiqq:

The schools concur that those entitled to receive ordinary *zakāt*, as per the Qur'ānic verse ...إِنَّمَاالصَّدَقَاتُ لِلفُقَرَاءِ وَالمَسَاكِينَ , are also entitled to receive *zakāt al-fiṭr*.

In the place of paying in kind, it suffices to pay the price of the cereals, and it is *mustaḥabb* to give it to one's needy relative, and then to the neighbours, as there is a tradition which says:

جيرانُ الصَّدَقةِ أَحَقُّ بِها.

The neighbour of (someone paying) *ṣadaqah* is more entitled to receive it.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

KHUMS:

The Imāmīs assign a separate chapter to *khums* in their books on fiqh, after the chapter on *zakāt,* and its basis is verse 41 of *Sūrat al-'Anfāl:*

وَاعلَمُوٓا أَنَّمَا غَنِمتُم مِّن شَيءٍ فَأَنَّ لِلَّهِ خُمُسَهُ وَلِلرَّسُولِ وَلِذِي القُربَى وَاليَتَٰمَىٰ وَالمَسَٰكِينِ وَابنِ السَّبِيلِ...

Know that, whatever booty you take, the fifth of it is God's and the Messenger's, and the near kinsman's and the orphans', and for the needy and the traveller (8:41)

They do not confine the scope of the term *'ghanîmah'* to the spoils of war acquired by Muslims, but consider it to include seven categories, mentioned below along with what information we could gather about the view of other schools regarding each category:

1. Booty acquired in war: All the schools concur that it is liable to *khums.*

2. Minerals: It includes everything that is of value extracted from the earth--apart from soil--e.g. gold, silver, lead, copper, mercury, petroleum, sulfur, etc.

The Imāmīs observe: It is *wājib* to pay *khums* (20%) on minerals if their value reaches the *niṣāb* of gold, which is 20 *dinar*s, or the *niṣāb* of silver, which is 200 *dirham*s. There is no *khums* below this limit.

The Ḥanafīs state: There is no *niṣāb* for minerals, and their *khums* is *wājib* irrespective of value.

The Mālikīs, Shāfi'īs and Ḥanbalīs are of the opinion that there is no levy if the mineral extracted is lesser in value than the *niṣāb,* but if it reaches that limit it is liable to *zakāt* at the rate of 2 1/2%.

3. Rikāz: It consists of articles of value buried at a place whose inhabitants have perished and there is no sign left of them, such as sites which the archeologists escavate for this purpose.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The four schools state: *Khums* is *wājib* on *rikāz,* and it has no *niṣāb* and therefore entails *khums* irrespective of its worth.

The Imāmīs observe: *Rikāz* is like minerals with respect to *niṣāb* and liability to *khums.*

4. The Imāmīs say: That which is retrieved from the sea through diving, e.g. pearls and corals, is liable to *khums* if its value is one *dînar* or more after deducting the cost of retrieval.

In the opinion of the four schools, there is no levy on such things, whatever their value.

5. The Imāmīs observe: *Khums* is *wājib* upon the surplus remaining after a person has made provision for himself and his family for a period of one year, irrespective of his profession and the mode of income--trade or industry, agriculture or office work, or work on daily wages, or real state, gift or something else. Hence if there remains a single piaster or anything of that value after a year's expenditure, it is liable to *khums.*

6. The Imāmīs state: If a person comes to acquire some illegitimate wealth which gets mixed with his legitimate wealth and neither the quantity of the *ḥarām* wealth nor its owner is known, he is obliged to pay *khums* from his whole wealth in the way of God. If he does so, his remaining wealth will become *ḥalāl* irrespective of whether the illegitimate portion was lesser or greater than a fifth. But if the illegitimate wealth is identifiable, it is obligatory to return it itself; and if it is not identifiable but its quantity is known, he will return that quantity fully even if it equals all his wealth. If he knows the people from whom he has embezzled it without knowing the quantity of the portion due to them, he is bound to seek their satisfaction by reaching a settlement or seeking their pardon. In short, the payment of *khums* from adulterated wealth is correct only when both the quantity and the owner of its illegitimate portion are not known.

7. According to the Imāmīs, if a *dhimmî* purchases land from a Muslim, the *dhimmî* is personally liable to pay its *khums.*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Uses of Khums:

The Shāfi'îs and the Ḥanbalîs observe: *Khums* will be divided into five parts, of which one part will be the share of the Prophet (ṣ) and used for the benefit of Muslims. Another part will be the share of *dhawî al-qubrā,* and they are those who have descended from Hāshim through their fathers, irrespective of any distinction between the rich or the poor among them. The three other parts will be spent on orphans, the poor and the travellers, whether they belong to the Banū Hāshim or not.

The Ḥanafîs consider the share of the Prophet (ṣ) as annulled after his demise. As to the *dhawî al-qurbā* (i.e. those belonging to Banū Hāshim), they are like other poor in receiving *khums,* they say; they will be entitled to it on account of their need, not by virtue of their kinship with the Prophet (ṣ).

The Mālikîs state: The ruler (*imām*) has complete authority over *khums* funds and he may use it for any purpose that he deems fit.

According to the Imāmîs, the shares of God, the Prophet (ṣ) and the *dhawî al-qurbā* will be paid to the Imām (*'a*) or his representative, to be spent for the benefit of the Muslim community. The other three parts are to be given to the orphans, destitutes and travellers belonging exclusively to Banū Hāshim.

We conclude this chapter with al-Shi'rānî's words in his *Kitāb al-mîzān* (the chapter on *zakāt al-ma'din*). He says:

> The ruler (*imām*) is authorized to tax the mine owners in accordance with the interest of the public exchequer to avoid the concentration of wealth in the hands of mine owners who may thereby seek political power and spend money on the troops. This would lead to evil (political) consequences (*fasād*).

This is another way of expressing the "modern" view that capital enables the capitalists to gain control of the government. 406 years have passed since the death of the author of this opinion.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

NOTES:

1. Except that sanity and adulthood are not considered essential for liability to *zakāt* on crops of the field and fruits in the opinion of the Ḥanafīs.

2. The Ḥanafīs observe: The number of cows between the two limits is exempt from *zakāt* except when their number is between 40 and 60. After 40, *zakāt* will be levied on each extra cow at the rate of 2 1/2% of a ***musinnah*** (***al-Fiqh 'alā al-madhāhib al-'arba'ah,*** "Bāb al-Zakāt").

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

THE ḤAJJ

The Acts of the Ḥajj:

At the beginning, in order to make it easier for the reader to follow the opinions of the five schools of fiqh about various aspects of Ḥajj, we shall briefly outline their sequence as ordained by the Sharī'ah.

The Ḥajj pilgrim coming from a place distant from Mecca assumes *iḥrām*[1] from the *mîqāt*[2] on his way, or from a point parallel to the closest *mîqāt,* and starts reciting the *talbiyah.*[3] In this there is no difference between one performing *'Umrah mufradah* or any of the three types of Ḥajj (i.e. *tamattu', ifrād, qirān*). However, those who live within the *ḥaram*[4] of Mecca assume *iḥrām* from their houses.[5]

On sighting the Holy Ka'bah, he recites *takbîr* (i.e. اللهُ أَكْبَرُ, 'God is the greatest') and *tahlîl* (i.e. لاإلٰهَ إلّاالله , 'There is no god except Allah') which is *mustaḥabb*[6] (desirable, though not obligatory). On entering Mecca, he takes a bath, which is again *mustaḥabb.* After entering al-Masjid al-Ḥarām, first he greets the Black Stone (al-Ḥajar al-'Aswad)--if possible kisses it, otherwise makes a gesture with his hand--then makes the *ṭawāf* (sevenfold circumambulation of the Ka'bah) of the first entry, which is *mustaḥabb* for one performing *Ḥajj al-'ifrād* or *Ḥajj al-qirān.* Then he offers the two *raka'āt* of the *ṭawāf,* again greets the Black Stone if he can, and leaves al-Masjid al-Ḥarām. After this, he remains in the state of *iḥrām* in Mecca. On the day of *tarwiyah,* i.e. the eighth day of the month of Dhū al-Ḥijjah, or if he wants a day earlier, he goes forth towards 'Arafāt.

If the pilgrim has come for *'Umrah mufradah* or *Ḥajj al-tamattu',* he performs the *ṭawāf* of the entry, which is obligatory

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

(*wājib*) for him, and prays the two *raka'āt* of the *ṭawāf*. Then he performs the *sa'y* between Ṣafā and Marwah, and, following it, the *ḥalq* (complete head shave) or *taqṣîr*[7] (partial shortening of the hair of the head). Then he is relieved of the state of *iḥrām* and its related restrictions, and things prohibited in *iḥrām* become permissible for him, including sexual intercourse.[8] Then he proceeds from Mecca after assuming *iḥrām* for a second time, early enough to be present at the *wuqūf* (halt) at 'Arafāt (referred to as *'mawqif'*, i.e. the place of halting) at noontime on the ninth of Dhū al-Ḥijjah. Assumption of *iḥrām* on the day of *tarwiyah*, i.e. eighth Dhū al-Ḥijjah, is preferable.

The Ḥajj pilgrim, irrespective of the type of Ḥajj he intends to perform, turns towards 'Arafāt, passing through Minā. The period of the *wufūq* at 'Arafāt is, for the Ḥanfaî, Shāfi'î, and Mālikî schools, from the noon of the ninth until the day break of the tenth; for the Ḥanbalî school, from the daybreak of the ninth until the daybreak of the tenth; and for the Imāmiyyah, from non until sunset on the ninth, and in exigency until the daybreak of the tenth.[9] The pilgrim offers invocations (*du'ā'*) at 'Arafāt, preferably (*istiḥbāban*) in an imploring manner.

Then he turns towards Muzdalifah (also called al-Mash'ar al-Ḥarām), where he offers the *maghrib* and *'ishā'* prayers on the night of the 'Īd (i.e. the tenth of Dhū al-Ḥijjah). Offering the two prayers immediately after one another is considered *mustaḥabb* by all the five schools. According to the Ḥanafî, Shāfi'î, and Ḥanbalî schools, it is obligatory to spend this night (i.e. the night of the 'Īd) at Muzdalifah; for the Imāmiyyah, it is not obligatory but preferable. After the daybreak, he makes the *wuqūf* at al-Mash'ar al-Ḥarām, which is *wājib* for the Imāmiyyah and *mustaḥabb* for other schools. And at Muzdalifah, preferably, he picks up seven pebbles to be thrown at Minā.

After this, he turns towards Minā before sunrise on the day of 'Īd. There he performs the ritual throwing of stones, called *ramy*, at Jamarāt al-'Aqabah, no matter which of the three kinds of Ḥajj he is performing. The *ramy* is performed between sunrise and sunset, preferably (*istiḥbāban*) accompanied by *takbîr* and *tasbîḥ* (i.e.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

proclaiming God's glory by saying سُبْحَانَ الله, 'How far God is from every imperfection!'). Then if a non-Meccan on *Ḥajj al-tamattu'*, he should slaughter the sacrificial animal (a camel, cow or a sheep), by agreement of all the five schools. However, it is not obligatory for one on *Ḥajj al-'ifrād;* again by consensus of all the five schools. For one on *Ḥajj al-qirān,* the sacrifice is obligatory from the viewpoint of the four Sunnî schools, and for the Imāmiyyah it is not obligatory except when the pilgrim brings the sacrificial animal (*al-hady*) along with him at the time of assuming *iḥrām.*

For a Meccan performing *Ḥajj al-tamattu'*, the sacrifice is obligatory from the viewpoint of the Imāmiyyah school, but not according to the four Sunnî schools.

After this, he performs the *ḥalq* or *taqṣîr,* irrespective of the kind of Ḥajj he is performing. After *ḥalq* or *taqṣîr,* everything except sexual intercourse becomes permissible for him according to the Ḥanbalî, Shāfi'î and Ḥanafî schools, and according to the Mālikî and Imāmiyyah schools, everything except intercourse and perfume.

Then he returns to Mecca on the same day, i.e. the day of the 'Īd, performs the *ṭawāf al-ziyārayh,* prays its related two *raka'āt,* regardless of which kind of Ḥajj he is performing. After this, according to the four Sunnî schools, he is free from all restrictions including that of sexual intercourse. Then he performs the *sa'y* between Ṣafā and Marwah if on *Ḥajj al-tamattu',* by agreement of all the five schools. For the Imāmiyyah school, the *sa'y* after *ṭawāf al-ziyārah* is also obligatory for one performing *Ḥajj al-qirān* and *Ḥajj al-'ifrād.* But for other schools, it is not obligatory if the pilgrim had performed the *sa'y* after the *ṭawāf* of first entry, otherwise it is.

For the Imāmiyyah, it is obligatory for all the types of Ḥajj to perform another *ṭawāf* after this *sa'y.* Without this *ṭawāf,* called *ṭawāf al-nisā',* one is not relieved of the interdiction of abstinence from intercourse.

Then the pilgrim returns to Minā on the same day, i.e. the tenth, where he sleeps on the night of the eleventh, performs the threefold throwing of stones (*ramy al-jamarāt*) during the interval from the noon until the sunset of the eleventh--by consensus of all the five

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

schools. For the Imāmiyyah, the *ramy* is permissible after sunrise and before noon. After this, on the day of the twelfth, he does what he had done the day before. All the legal schools agree that he may now depart from Minā before sunset. And if he stays there until sunset, he is obliged to spend the night of the thirteenth there and to perform the threefold *ramy* on the day of thirteenth.

After the *ramy,* he returns to Mecca, before or after noon. On entering Mecca, he performs another *ṭawāf, ṭawāf al-wadā'* (the *ṭawāf* of farewell), which is *mustaḥabb* for the Imāmiyyah and Mālikī schools and obligatory for the non-Meccans from the viewpoint of the remaining three. Here the acts of the Ḥajj come to conclusion.

The Conditions for the Ḥajj:

The conditions (*shurūṭ*) which make the Ḥajj obligatory (*wājib*) for a Muslim are: maturity (*bulūgh*), sanity (*'aql*), and 'capability' (*istiṭā'ah*).

The Proviso of Bulūgh:

The Ḥajj is not obligatory for children, regardless of whether a child is of the age of discretion (*mumayyiz*) or not (*ghayr mumayyiz*). For a *mumayyiz* child, the Ḥajj is voluntary and valid. However, it does not relieve him/her of the obligation to perform the obligatory Ḥajj (called *ḥijjat al-'Islām*) later as an adult possessing *istiṭā'ah;* this, in case he/she does not attain adulthood before the *wuqūf.* On this all the five schools of fiqh are in agreement.

It is permissible for the guardian (*walī*) of a *ghayr mumayyiz* child to take him along on the Ḥajj pilgrimage. In that case, he puts on the child the dress of *iḥrām;* instructs him to say the *talbiyah,* if the child can say it well, or otherwise says it himself on the child's behalf; and is cautious lest the child commits some act unlawful (*ḥarām*) for the pilgrims (*ḥujjāj*). The accompanying guardian also tells him to perform every act that the child can perform himself, and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

what he cannot, the guardian performs it on the child's behalf.

The schools of fiqh differ on two questions relating to the Ḥajj of a *mumayyiz* child: firstly, whether his Ḥajj is valid, irrespective of the permission of the guardian; secondly, whether he is relieved of the obligation of Ḥajj if he attains adulthood before *mawqif*. According to the Imāmiyyah, Ḥanbalī, and Shāfi'ī schools, the guardian's permission is a provision for the *iḥrām* to be valid. According to Abū Ḥanīfah, the idea of validity is inapplicable to the child's Ḥajj, even if *mumayyiz,* and regardless of whether he obtains the permission of the guardian or not; because, according to him, there is nothing to a child's Ḥajj except its significance as an exercise (*Fatḥ al-Bārī, al-Mughnī, al-Tadhkirah*). According to the Imāmiyyah, Ḥanbalī and Shāfi'ī schools, if the child attains adulthood before *mawqif,* his obligatory duty of Ḥajj (*ḥijjat al-'Islām*) is thereby fulfilled. And according to Imāmiyyah and Mālikī schools, the duty is fulfilled if he renews *iḥrām* (as an adult), otherwise not; which means that he should start the Ḥajj all over again from the beginning. (*al-Tadhkirah*)

Insanity:

Basically the condition of insanity relieves a person of all duties. Even if he were to perform the Ḥajj, and presumably in the way expected of a sane person, it would not fulfil his obligatory duty were he to return to sanity. If his insanity is periodic, when regained for a sufficiently long interval it is *wājib* for him to perform the Ḥajj with all its conditions and in all its details. However, if the interval of sanity is not sufficient to perform all the acts of the Ḥajj, he is quit of the obligation.

Istiṭā'ah:

All the five schools of fiqh agree that *istiṭā'ah* is a requirement for the Ḥajj duty to become obligatory, as mentioned by the Qur'ānic verse: مَنِ اسْتَطَاعَ إِلَيْهِ سَبِيلًا ("...if he is able to make his way there").[10]

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

However, there is disagreement about the meaning of *istiṭā'ah.* In ḥadîth it has been defined as consisting of *"al-zād wa al-rāḥilah".* *'Al-rāḥilah'* implies the expenses of to and fro journey to Mecca, and *'al-zād'* stands for the expenses required for transport, food, lodging, passport fees, and the like. Moreover, the funds needed to meet such expenses must come out of the surplus after paying one's debts, after arranging for one's family's livelihood, meeting the requirements of one's source of income (such as land for a farmer, tools for a craftsman, capital for a tradesman, and so on), and without compromising the security of his life, property and honour. All schools agree about it except the Mālikîs, who say that the duty of Ḥajj is obligatory for anyone who can walk. The Mālikîs also do not consider the necessity of providing for the living expenses of the family. Rather, they consider it compulsory for one to sell off his essential means of life, such as land, livestock, tools, and even books and unessential clothes. (*al-Fiqh 'alā al-madhāhib al-'arba'ah*)

If a person upon whom the Ḥajj duty is not obligatory due to absence of *istiṭā'ah,* takes upon himself the burden and performs the Ḥajj, in case he attains *istiṭā'ah* afterwards, is his first Ḥajj sufficient or should he perform the Ḥajj once again? According to the Mālikî and Ḥanafî schools, yes, repetition is not compulsory. According to the Ḥanbalî school, yes, but a duty left unattended, such as an unpaid debt, must be discharged.

According to the Imāmiyyah school, it does not suffice the obligation of Ḥajj if he attains *istiṭā'ah* afterwards, because the provisional is inseparable from the provision both in its presence and its absence. The Ḥajj performed before the attainment of *istiṭā'ah* is considered supererogatory (*nafl*). Later, with its realization, repetition of the Ḥajj becomes obligatory.

Immediacy (al-Fawr):

The Imāmiyyah, the Mālikî, and the Ḥanbalî schools consider the obligation (*wujūb*) of the Ḥajj duty to be immediately applicable (*fawrî*); i.e. it is not permissible to delay it from the moment of its

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

possibility. It is sinful to delay, though the Ḥajj performed with delay is correct and fulfils the obligation. The author of *al-Jawāhir* says:

> The immediacy of the obligation of Ḥajj means that it is necessary to take initiative to perform the Ḥajj in the first year of attaining *istiṭā'ah*, and failing that at one's next earliest opportunity.... Thereafter, there is no doubt about the sinfulness of the delay if one were to forgo the first opportunity in the case of absence of another.

According to the Shāfi'î school, the obligation of Ḥajj is not immediate (upon attainment of *istiṭā'ah*); rather one may delay it and perform it when he wishes.[11] According to Abū Yūsuf, the Ḥajj is an immediate obligation. Muḥammad ibn al-Ḥasan considers delay (*tarākhî*) permissible. Abū Ḥanîfah has no explicit text on the matter, though some of his contemporaries state that he implicitly believes in the immediacy of the obligation.

Secondary Issues Related to Istiṭā'ah:

Women and the Ḥajj:

Are there any additional conditions for women with regard to performance of the Ḥajj? All the five schools agree that it is not required that a woman should obtain the husband's permission for the obligatory Ḥajj duty, nor may he prevent her from undertaking it. However, there is a difference of opinion about whether the Ḥajj is obligatory upon her or not if she does not find a husband or a *maḥram*[12] to accompany her on the journey. According to the Imāmiyyah, Mālikî and Shāfi'î schools, the *maḥram*'s company or that of the husband is not at all a condition, regardless of whether she is young or old, married or unmarried; since the *maḥram*'s company is a means of her safety, not an end in itself. Accordingly, we have two cases: either she feels confident of her security on the journey, or she doesn't. In the first case, the Ḥajj is obligatory upon her and the *maḥram*'s company is irrelevant. In the second case, she lacks the requirement of *istiṭā'ah,* in spite of the *maḥram*'s company.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Accordingly, there is no essential difference between a man and a woman in this respect.

According to the Ḥanbalî and Ḥanafî schools, the company of the husband or *maḥram* is a provision for the woman's Ḥajj, even if she were old. It is not permissible for her to perform the Ḥajj without his company. The Ḥanafî school further stipulates the condition that her location should be at a distance of three days' journey from Mecca.

Bequest (al-Badhl):

Al-Mughnî, a text of Ḥanbalî fiqh, states: "If a person bequeaths money to another, it is not binding upon him to accept it, and it does not make the recipient *mustaṭî'* (possessing *istiṭā'ah*), irrespective of whether the bequeather is a relative or a stranger, regardless of whether the bequest suffices for the expenses of the journey and food. According to al-Shāfi'î, if the bequest is made by one's son, enough to enable him to undertake the Ḥajj journey, the Ḥajj becomes obligatory. This, because it enables him to perform the Ḥajj without having to bear a stranger's favour or without any accompanying encumbrance or harm.

According to the Imāmiyyah school, if the bequest is an unconditional gift made without the provision of performing the Ḥajj by the recipient, the Ḥajj is not binding, irrespective of who makes the bequest. But if the bequest is made with the condition that one perform the Ḥajj, the acceptance of the bequest is binding and may not be rejected, even if the bequest is made by a stranger; since it makes him *mustaṭî'* to undertake the pilgrimage.

Marriage:

What if one has only enough money either to get married or to perform the Ḥajj? Which of them is prior? The Ḥanafî text *Fatḥ al-qadîr* (vol. II, *"Bāb al-Ḥajj"*) mentions this question being put to Abū Ḥanîfah, who, in his reply, considered that priority lies with the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Ḥajj. The generality (*iṭlāq*) of this answer in which he gives priority to the Ḥajj, taking into consideration that marriage is obligatory under certain conditions, allows us to conclude that for Abū Ḥanīfah delay in Ḥajj is not permissible.

According to the Shāfi'ī, Ḥanbalī and Imāmiyyah scholars, marriage has priority if there is likelihood of distress (*ḥaraj*) or difficulty (*mashaqqah*) in refraining from marriage. In that case priority does not lie with the Ḥajj. (*Kifāyat al-'akhbār, al-Mughnī, al-'Urwat al-wuthqā*)

Khums and Zakāt:

Payment of the *khums* and *zakāt* has priority over the Ḥajj. The condition of *istiṭā'ah* is not realized until both are paid off, like other kinds of debts.

Istiṭā'ah by Chance:

If someone travels to a place in the vicinity of the holy city of Mecca, on business or for some other purpose, and his stay continues until the Ḥajj season, and if it is possible for him to reach the Holy Ka'bah, he thereby becomes *mustaṭī'*. And if he were to return home without performing the Ḥajj, by consensus of all the schools, he is not relieved of the obligation.

Istināb (Deputation):

The Islamic duties (*'ibādāt*) are divisible into three categories, depending on a duty's nature whether it mainly involves bodily acts or financial expenditure.

1. The purely bodily *'ibādāt* are those which, like fasting (*ṣawm*) and prayer (*ṣalāt*), do not involve any financial aspect. According to the four Sunnī schools, such duties cannot in any circumstance be delegated to a proxy (*nā'ib*), either on behalf of a living or a dead person. But according to the Imāmiyyah school, taking a *nā'ib* is

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

permissible on behalf of a dead person, though not for a living person, to perform *ṣawm* and *ṣalāt* for him, and under all circumstances.

2. The purely financial *'ibādāt* are those which do not involve bodily acts, such as *khums* and *zakāt.* In such *'ibādāt,* all legal schools agree, it is permissible to take a *nā'ib.* It is permissible for one to depute another to take out *zakāt* and pay other kind of alms (*ṣadaqāt*) from his assets.

3. The duties which involve both bodily and financial aspects, such as the Ḥajj, which requires such bodily acts as *ṭawāf* (circumambulation of the Ka'bah), *sa'y* (to and fro movement between Marwah and Ṣafā), *ramy* (the symbolic throwing of stones), and financial expenditures such as for the journey and its accompanying requirements. All the five legal schools agree that one who is capable of undertaking the Ḥajj in person and fulfils all the conditions thereof, should do so himself in person. It is not permissible for him to depute another to undertake it, and if he does so it would not relieve him of his obligation to perform it himself. If he does not do it in his life, according to the Shāfi'ī, Ḥanbalī and Imāmiyyah schools, he is not relieved of the duty because of the preponderance of the financial aspect, and it is obligatory to hire someone to perform the Ḥajj with a similar expenditure. In case he does not make a will for the Ḥajj, the amount should be taken out from his undivided heritage.[13]

According to the Ḥanafī and Mālikī schools, he is relieved of the obligation due to the bodily aspect; but if he mentions it in his will, the expense is taken out from the one third of his inheritance--like all other bequests--and if he doesn't, *istināb*ah is not obligatory.

The Physically Incapable (al-Qādir al-'Ājiz):

One who meets all the financial conditions for the Ḥajj pilgrimage but is incapable of undertaking it personally due to old age or some incurable disease, all the legal schools agree, is relieved

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

of the obligation of performing the Ḥajj in person, for God says: وَمَا جَعَلَ عَلَيْكُمْ فِى الدِّينِ مِنْ حَرَجٍ (...and He has laid no impediment in your religion....).[14] However, it is obligatory upon him to hire someone to perform the Ḥajj for him. But if he doesn't, is it a negligence of a duty whose fulfilment continues to remain upon him? All the legal schools, with the exception of the Mālikī, agree that it is obligatory upon him to hire someone to perform the Ḥajj for him. The Mālikī says that the Ḥajj is not obligatory upon one who is incapable of undertaking it in person. (*al-Mughnî, al-Tadhkirah*)

Furthermore, if a sick person recovers after deputing someone to perform his Ḥajj, is it obligatory upon him on recovery to perform the Ḥajj in person? According to the Ḥanbalī school, another Ḥajj is not obligatory. But according to the Imāmiyyah, Shāfi'ī and Ḥanafī schools it is obligatory, because what was fulfilled was the financial obligation, and the bodily obligation has remained unfulfilled.

***Istināb*ah in al-Ḥajj al-Mustaḥabb:**

According to the Imāmiyyah and Ḥanafī legal schools, one who has performed the *Ḥijjat al-'Islām,* if he wants to depute another for a voluntary, *mustaḥabb* Ḥajj, may do so, even if he is capable of undertaking it in person. But according to the Shāfi'ī school, it is not permissible. There are two narrations from Aḥmad ibn Ḥanbal, one indicating prohibition and the other permission. According to the Mālikī school, it is permissible for an incurable sick person and for one who has performed the obligatory Ḥajj to hire another for the Ḥajj. The Ḥajj so performed is valid, though *makrūh* (reprehensible). It is not considered as the Ḥajj of the hirer (*musta'jir*) and is counted as the *mustaḥabb* Ḥajj of the hired (*ajîr*). The hirer gets the reward for providing assistance in the performance of the Ḥajj and shares the blessings of the prayers offered. When the Ḥajj is performed for the benefit of a dead person, irrespective of whether he has asked for it in his will or not, it is counted neither as fulfilment of the duty (*farḍ*) nor as a supererogatory (*nafl*) act, nor does it relieve him of the duty of the obligatory Ḥajj. (*al-Fiqh 'alā al-madhāhib al-'arba'ah*)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Conditions for the Nā'ib:

The *nā'ib* should fulfil the conditions of: *bulūgh* (adulthood), *'aql* (sanity), belief in Islam, exemption from the duty of obligatory Ḥajj, and ability to perform the Ḥajj properly. A man may represent a woman and a woman may represent a man, even if both the *nā'ib* and the one whom he represents have not performed the Ḥajj before.[15]

Should the *nā'ib* commence the journey from his own place or that of the deceased whom he represents, or from one of the *mawāqît*? According to the Ḥanafî and Mālikî schools, the *nā'ib* should commence the pilgrimage journey from the place of the deceased, if he has not specified the starting point; otherwise according to his wish. According to the Shāfi'î school, the pilgrimage commences from one of the *mawāqît;* if the deceased person has specified one, then the *nā'ib* must act accordingly, otherwise he is free to choose one of the *mawāqît.* According to the Ḥanbalî school, the *nā'ib* must start from the place that the deceased was obliged to begin from if he had performed the Ḥajj himself, and not from the place of his death. If the deceased person had attained *istiṭā'ah* at a place to which he had migrated, later returning to his own place, the *nā'ib* should start from the place of migration, not from the deceased person's home, except when the distance (between his home-town and the place of migration) is less than what is required for *qaṣr* in prayers performed by a traveller.[16]

According to the Imāmiyyah school, the Ḥajj is classified into *mîqātî* (i.e. one which starts from one of the *mawāqît*) and *baladî* (i.e. one which starts from the town of the deceased). If the deceased has specified one of these two kinds, then the one specified. If he has not specified, any one of the two may be performed. Otherwise the Ḥajj is *mîqātî* and, if possible, starts from the *mîqāt* nearest to Mecca, or else the *mîqāt* nearest to the town of the deceased. The cost of *al-Ḥijjat al-mîqātiyyah* is taken out from the undivided legacy in the case of obligatory Ḥajj, and the expense exceeding the cost of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

al-Ḥijjat al-mîqātiyyah is taken from the one third. (*al-Jawāhir*)

Delay by the Nā'ib:

Once the *nā'ib* is hired, it is obligatory for him to act with immediacy. He may not postpone the Ḥajj beyond the first year. Also, it is not permissible for him to depute another, since the duty is his own. If we do not know that he actually went on the pilgrimage and performed all its essential acts, or if we doubt whether he performed them correctly and properly or not, or whether he failed to fulfil any of its obligatory essentials, then we assume that he acted correctly and properly, unless there is proof to the contrary.

Change of Purpose by the Nā'ib (al-'Udūl):

According to the Ḥanafî and Imāmiyyah schools, if one specifies to the *nā'ib* a particular kind of Ḥajj; such as *Ḥajj al-'ifrād,* or *Ḥajj al-qirān;* then it is not permissible for him to make any change. However, if a particular town was specified as the starting point and the *nā'ib* starts from another town, the purpose of the one who hires him is considered as fulfilled if the said specification was not really intended by the hirer; i.e. if by mentioning the route he meant the Ḥajj itself, and not the route specifically. (*al-Tadhkirah, al-Fiqh 'alā al-madhāhib al-'arba'ah*)

Al-'Umrah:

The Meaning of 'Umrah:

The word *'umrah* in common speech "visit", but in the Sharî'ah it means paying a visit to the *Bayt Allāh al-Ḥarām* (the Sacred House of God, i.e. the Holy Ka'bah) in a specific form.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Kinds of 'Umrah:

The 'Umrah is of two kinds: the first which is performed independently of the Ḥajj (called *al-'Umrat al-mufradah al-mustaqillah 'an al-Ḥajj*), and the second kind which is performed in conjunction with the Ḥajj (*al-'Umrat al-munḍammah ilā al-Ḥajj*). The *al-'Umrat al-mufradah,* the independent 'Umrah, all the five legal schools agree, can be performed at all times of the year, though it is meritorious to perform it during the month of Rajab according to the Imāmiyyah, and in Ramaḍān according to the four Sunnī schools. The time of the conjugate 'Umrah, which is performed before the Ḥajj and in the course of the same journey by the Ḥujjāj coming to the Holy Makkah from distant countries, by consensus of all five schools, extends from Shawwāl to Dhūl Ḥijjah. However, there is disagreement among legists about the month of Dhūl Ḥijjah, whether the entire month or only the first ten days belong to the Ḥajj season. Anyone who performs the conjugate 'Umrah is considered relieved of the obligation to perform the *al-'Umrat al-mufradah* by those who believe in its being obligatory.

Difference Between the Two Kinds of 'Umrah:

The Imāmiyyah scholars make a distinction between *al-'Umrat al-mufradah* and *'Umrat al-tamattu'*, citing the following reasons:

1. The *Ṭawāf al-nisā'* (to be explained later) is obligatory in *al-'Umrat al-mufradah,* not in the *'Umrat al-tamattu'*, and according to some jurists is forbidden.

2. The time of *'Umrat al-tamattu'* extends from the first of the month of Shawwāl to the ninth of Dhū al-Ḥijjah, whereas *al-'Umrat al-mufradah* can be performed at all times of the year.

3. The pilgrim (*mu'tamir*) performing the *'Umrat al-tamattu'* is required to shorten his hair (*al-taqṣîr*), whereas the *mu'tamir* of *al-'Umrat al-mufradah* can choose between shortening his hair or completely shaving his head (*al-ḥalq*), as shall be explained later.

4. The *'Umrat al-tamattu'* and the Ḥajj occur in the same year,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

which is not the case with *al-'Umrat al-mufradah.*

Karrārah, in his book *al-Dîn wa al-Ḥajj 'alā al-madhāhib al-'arba'ah,* says that, according to the Mālikī and Shāfi'ī schools, for the *mu'tamir* of *al-'Umrat al-mufradah* all things are permissible, even sexual intercourse, after the shortening of hair (*al-taqṣîr*) or the head shave (*al-ḥalq*), irrespective of whether he brings along with him the sacrificial offering (*al-hady*) or not. But according to the Ḥanbalī and Ḥanafī schools, the *mu'tamir* gets away with *al-taqṣîr* or *al-ḥalq,* if he does not bring the sacrificial offering; otherwise he remains in the state of *iḥrām* until he gets through the Ḥajj and the 'Umrah on the day of sacrifice (*yawm al-naḥr*).

The Conditions of the 'Umrah:

The conditions for the 'Umrah are essentially the same as mentioned in the case of the Ḥajj.

The Status of 'Umrah:

According to the Ḥanafī and Mālikī schools, the 'Umrah is not obligatory but a highly recommended *sunnah* (*sunnah mu'akkadah*). But according to the Shāfi'ī and Ḥanbalī schools and the majority of Imāmiyyah legists, it is obligatory (*wājib*) for one who is *mustaṭî'*, and desirable (*mustaḥabb*) for one who is not *mustaṭî'*. In support, they cite the Qur'ānic verse:... وَأَتِمُّوا الْحَجَّ وَالْعُمْرَةَ لِلَّهِ (Perform the Ḥajj and the 'Umrah for Allah.[17] (*Fiqh al-Sunnah, vol. V; al-Fiqh 'alā al-madhāhib al-'arba'ah; al-Jawāhir; al-Mughnî*)[18]

The Acts of the 'Umrah:

According to *al-Fiqh 'alā al-madhāhib al-'arba'ah,* whatever is *wājib* or *sunnah* for the Ḥajj is also *wājib* and *sunnah* for the 'Umrah. But the 'Umrah does differ from the Ḥajj in certain respects: there is no specific time for performing the 'Umrah; it does not involve the halt (*wuqūf*) in the plain of 'Arafāt; neither the departure

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

thenceforth to al-Muzdalifah; nor the *ramy al-jamarāt.*[19] The Imāmiyyah book *al-Jawāhir* mentions that: "The obligatory acts (*af'āl* or *a'māl*) of the Ḥajj are twelve: *iḥrām;* the *wuqūf* at 'Arafāt; the *wuqūf* at al-Mash'ar al-Ḥarām; the entry into Minā; the *ramy;* the *dhibḥ* (sacrifice); its related *taqṣîr* or *ḥalq;* the *ṭawāf* (the sevenfold circumambulation of the Ka'bah), and its related *raka'āt* (units of the length of prayers); the *sa'y;* the *ṭawāf al-nisā'*, and its related *raka'āt.* The obligatory acts of *al-'Umrat al-mufradah* are eight: *niyyah* (intention); *iḥrām;*[20] *ṭawāf;* its related *raka'āt;* the *sa'y;* the *taqṣîr;* the *ṭawāf al-nisā';* and its related *raka'āt.*"

This indicates that all the legal schools agree that the acts of the Ḥajj exceed those of the 'Umrah by the acts associated with the *wuqūf.* Moreover, the Imāmiyyah school considers it obligatory for the performer of the *al-'Umrat al-mufradah* to perform a second *ṭawāf,* the *ṭawāf al-nisā'.* Similarly the Mālikî school differs from others in considering *ḥalq* or *taqṣîr* as non-obligatory for *al-'Umrat al-mufradah.*

Two Subsidiary Issues:

1. The obligation (*wujūb*) of *al-'Umrat al-mufradah* is not connected with the *istiṭā'ah* for the Ḥajj. If, supposedly, it is possible for a person to go to Mecca at a time other than that of the Ḥajj and not possible at the time of the Ḥajj, then the 'Umrah instead of the Ḥajj becomes obligatory for him. If he dies without performing it, its expense is taken out from his heritage.[21]

Similarly, if one has *istiṭā'ah* for *Ḥajj al-'ifrād* instead of the 'Umrah, it becomes obligatory upon him; because each of them is independent of the other. This applies to *al-'Umrat al-mufradah.* As to *'Umrat al-tamattu'*, which shall be explained later, its *wujūb* depends upon that of the Ḥajj, since it is a part of it.

2. According to the Imāmiyyah, it is not permissible for one intending to enter the Holy Mecca to cross the *mîqāt* or enter its *ḥaram* (sacred precincts) without getting into the state of *iḥrām,* even if he has performed the Ḥajj and the 'Umrah many times

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

before. Only when the exit and entry recur several times during a month, or when after entering the city as a *muḥrim* he goes out and re-enters for a second time in less than thirty days, it is not obligatory. Therefore, *iḥrām* with respect to entry into Mecca is comparable to the *wuḍū'* before touching the Holy Qur'ān. This clearly demonstrates the baselessness of the lie that the Shî'ah do not consider al-Bayt al-Ḥarām as sacred, and that they pretend to perform the Ḥajj for the sake of polluting the holy sanctuaries. (!)

According to Abū Ḥanîfah, it is not permissible to go beyond the *mîqāt* and enter the *ḥaram* without *iḥrām*, but entry into the remaining area is permissible without *iḥrām*. Mālik does not agree with this, and two opinions are ascribed to al-Shāfi'î on the matter.

This much of discussion about the 'Umrah is sufficient for throwing light upon it, so that the reader may grasp its difference with the Ḥajj, though only in some aspects. What we shall say later will offer further clarification.

The Forms of the Ḥajj:

All the five legal schools agree that there are three kinds of Ḥajj: *tamattu'*, *qirān*, and *ifrād*. They also agree that by *Ḥajj al-tamattu'* is meant performance of the acts of the 'Umrah during the months of the Ḥajj. The acts of the Ḥajj itself are performed after getting through the 'Umrah. They also agree that by *Ḥajj al-'ifrād* is meant performing the Ḥajj first and then, after getting through the acts of the Ḥajj, getting into the state of *iḥrām* for performing the 'Umrah and its related acts. The four Sunnî legal schools agree that the meaning of the *Ḥajj al-qirān* is to get into *iḥrām* for the Ḥajj and the 'Umrah together. Then the *talbiyah* uttered by the pilgrim is: لَبَّيْكَ اللّٰهُمَّ بِحَجٍّ وَعُمْرَةٍ

According to the Imāmiyyah school, the *Ḥajj al-qirān* and *Ḥajj al-'ifrād* are one and the same. There is no difference between them except when the pilgrim performing the *Ḥajj al-qirān* brings the *hady* at the time of assuming the *iḥrām*. Then it is obligatory upon him to offer what he has brought. But one who performs the *Ḥajj al-'ifrād*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

has essentially no obligation to offer the *hady*. In brief, the Imāmiyyah do not consider it permissible to interchange two different *iḥrām*'s,[22] or to perform the Ḥajj and the 'Umrah with a single *niyyah* (intention) under any condition; but the other legal schools permit it in *Ḥajj al-qirān*. They say that it has been named *'al-qirān'* because it involves union between the Ḥajj and the 'Umrah. But the Imāmiyyah say that it is because of the additional feature of the *hady* accompanying the pilgrim at the time of *iḥrām*.[23]

According to the four Sunnī legal schools, it is permissible for the pilgrim, Meccan or non-Meccan, to choose from any of the three forms of the Ḥajj: *al-tamattu'*, *al-qirān*, or *al-'ifrād*, without involving any *karāhah* (reprehensibility). Only Abū Ḥanīfah considers *Ḥajj al-tamattu'* and *Ḥajj al-qirān* as *makrūh* for the Meccan. The four Sunnī legal schools also differ as to which of the three kinds of Ḥajj is superior to the others. The best according to the Shāfi'ī school is *al-'ifrād*, and *al-tamattu'* is superior to *al-qirān*. According to the Ḥanafī school, *al-qirān* has greater merit than the other two. The best according to the Mālikī school is *al-'ifrād*, and according to the Ḥanbalī and Imāmiyyah schools is *al-tamattu'*.

According to the Imāmiyyah school, *Ḥajj al-tamattu'* is obligatory upon one living at a distance of over forty-eight miles from Mecca, and he may not choose any other kind except in emergency. The *Ḥajj al-qirān* and *Ḥajj al-'ifrād* are performable by the people of Mecca and those living around it within a distance of forty-eight miles, and it is not permissible for them to perform except one of these two kinds. The Imāmiyyah base their argument on this verse of the Qur'ān:

....فَمَنْ تَمَتَّعَ بِالْعُمْرَةِ اِلَى الْحَجِّ فَمَااسْتَيْسَرَمِنَ الْهَدْى فَمَنْ لَمْ يَجِدْ فَصِيَامُ ثَلٰثَةِ اَيَّامٍ فِى الْحَجِّ وَسَبْعَةٍ اِذَارَجَعْتُمْ تِلْكَ عَشَرَةٌ كَامِلَةٌ ذٰلِكَ لِمَنْ لَمْ يَكُنْ اَهْلُهُ حَاضِرِى الْمَسْجِدِ الْحَرَامِ...

Moreover, according to the Imāmiyyah school, it is not permissible for one obliged to perform the *Ḥajj al-tamattu'* to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

change over to something else, except for the problem of shortage of time available, or, in the case of women, due to impending menses. In those cases it is permissible to change either to *al-qirān* or *al-'ifrād* on condition that the 'Umrah is performed after the Ḥajj. The limit of the shortage of time is failure to be present at the *wuqūf* in 'Arafāt until noon.

For one whose duty is *al-qirān* or *al-'ifrād*, such as the natives of Mecca or those from its surrounding region, it is not permissible to change to *al-tamattu'*, except in exigency (such as the fear of impending menses). After explaining this position of the Imāmiyyah school, the author of *al-Jawāhir* says, "I have not come across any different opinion on this matter."

And all the five legal schools agree that the *hady* is not compulsory for one performing *Ḥajj al-'ifrād*, though better if performed voluntarily.

NOTES:

1. *'Iḥrām'* is the state of pilgrim sanctity, which a pilgrim of Ḥajj or 'Umrah assumes on reaching *mîqāt* (see note No. 2). A pilgrim in the state of *iḥrām* is called *'muḥrim'*. (Tr.)

2. *Mîqāt* (pl. *mawāqît*) refers to a number of stations outside Mecca from where the pilgrims intending Ḥajj or 'Umrah assume *iḥrām*. They are: (1) Dhū al-Ḥulayfah (specifically, Masjid al-Shajarah); (2) Yalamlam; (3) Qarn al-Manāzil; (4) al-Juḥfah; (5) three points situated in the valley of al-'Aqîq: al-Maslakh, al-Ghamrah, and Dhāt al-'Irq. Those pilgrims whose houses are nearer to Mecca than to any of the above *mawāqît*, assume *iḥrām* from their houses. (Tr.)

3. The *talbiyah* is *wājib* according to the Imāmiyyah, Ḥanafî, and Mālikî schools, and *mustahabb* according to the Ḥanbalîs Its time is the moment of beginning of *iḥrām*.

4. The area roughly within a radius of six miles, with the Holy Ka'bah at the centre, is called *'ḥaram'*, the sacred and inviolable territory of the sanctuary of the Holy Ka'bah. See the brief discussion under the subheading; *"The Limits of the Ḥarams of Mecca and al-Madînah"* in the present article. (Tr.)

5. According to the Imāmiyyah school, *Ḥajj al-tamattu'* is obligatory for non-Meccans, and Meccans may choose between *Ḥajj al-qirān* and *Ḥajj al-'ifrād*. According to the four Sunnî schools, there is no difference between a Meccan and a non-Meccan with regard to choice of any particular kind of Ḥajj, except that according to the Ḥanafî school *Ḥajj al-tamattu'* and *Ḥajj al-qirān* are *makrūh* for

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the Meccan.

6. The *ṭawāf* of the first entry or the arrival (called *ṭawāf al-qudūm*) is *mustaḥabb* from the viewpoint of all except the Mālikī school, which regards it as obligatory.

7. According to the Imāmiyyah school, one is free to choose between *ḥalq* and *taqṣîr* if on *'Umrah mufradah*. But a pilgrim on *Ḥajj al-tamattu'* is required to perform *taqṣîr*. Also according to the Imāmiyyah, it is obligatory for one on *'Umrah mufradah* to perform, after the *ḥalq* or *taqṣîr*, a second *ṭawāf*, the *ṭawāf al-nisā'*, before which sexual intimacy is not permissible to the pilgrim. According to the four Sunnî schools, one is free to choose between *ḥalq* and *taqṣîr* in both. They do not require the pilgrim of Ḥajj or 'Umrah to perform *ṭawāf al-nisā'*, and according to the Mālikî school *ḥalq* or *taqṣîr* is not obligatory on one performing *'Umrah mufradah*.

8. According to the Imāmiyyah school, the *mutamatti'* (pilgrim on *Ḥajj al-tamattu'* and its conjugate 'Umrah) acquires *taḥlîl* (i.e. relief from *iḥrām*) after *taqṣîr*, even when he brings along with him the sacrificial animal (*hady*). But according to the other schools, the *mutamatti'* who assumes *iḥrām* for 'Umrah from the *mîqāt* obtains *taḥlîl* on *ḥalq* or *taqṣîr* when not accompanied by *hady;* but if he has brought along with him the *hady,* he remains in the state of *iḥrām*. However, according to them, the pilgrim of *'Umrah mufradah* obtains *taḥlîl* regardless of whether the *hady* accompanies him or not. The author of *al-Mughnî*, after making the above statement, says, "I have not come across a contrary opinion on this matter."

9. According to the Imāmiyyah school, the halt in *'Arafāt* is obligatory for the entire period of time. But according to the other schools, a moment of halt is sufficient. All the legal schools are in agreement that offering the *ẓuhr* (noon) and *'aṣr* (afternoon) prayers immediately after one another is *mustaḥabb,* because the Prophet (ṣ) had done so.

10. The Qur'ān, 3:97.

11. Although the times have tended to support this opinion, and even though the traditions in favour of immediacy (*al-fawr*) of the duty of Ḥajj are open to criticism and controversy, but it leads towards negligence, and gradually towards abandonment of this sacred rite. Accordingly, the stress on immediacy is preferable, being more conducive from the viewpoint of the necessity to preserve the vitality of the Islamic faith.

12. *Maḥram* is a male relation with whom marriage is not permissible; viz; father, grandfathers, sons, grandsons, brothers, sons and grandsons of one's sister or brother, etc.

13. The Imāmiyyah, Shāfi'î, and Mālikî schools permit hiring another person to perform the Ḥajj for a fee. The Ḥanafî and Ḥanbalî schools do not consider it permissible. Nothing more than the expenses of journey, food and lodging may be given to the hired, they say.

14. The Qur'ān, 22:78.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

15. One who has not performed the Ḥajj before is called *ṣarūrah*. According to the Shāfi'ī and Ḥanbalī schools, if one who has not performed the Ḥajj before, undertakes it on behalf of another, the Ḥajj performed is considered his own. But according to the Mālikī, Ḥanafī, and Imāmiyyah schools, the Ḥajj performed depends on his intention (*niyyah*).

16. The minimum distance required for *qaṣr* in *ẓuhr, 'aṣr* and *'ishā'* prayers is 8 parasangs (approximately 44 kms. or 27.5 miles). (Tr.)

17. The Qur'ān, 2:196.

18. According to *al-Mughnī*, Aḥmad ibn Ḥanbal did not consider the 'Umrah as being obligatory for Meccans, for the reason that the most important act of the 'Umrah is *ṭawāf* (circumambulation of the Ka'bah) which they do and it suffices them.

19. In the book *al-Fiqh 'alā al-madhāhib al-'arba'ah*, it is the author's wont to give the text followed by a commentary and notes. In the text, he states the points of consensus of all the four Sunnī schools, the different position of each is given in the commentary. What we have quoted here is taken from the text, not from the commentary.

20. According to *al-Dīn wa al-Ḥajj 'alā al-madhāhib al-'arba'ah*, by Karrārah, one of the things which distinguishes the 'Umrah from the Ḥajj is that its *iḥrām* is not assumed from any of the *mawāqīt* specified for the Ḥajj. From the Imāmiyyah viewpoint, there is no difference between the *mīqāt* for one performing 'Umrah and the *mīqāt* for one on Ḥajj with regard to *iḥrām*.

21. The Imāmiyyah author of *al-Madārik* says: "The better known and sounder of opinions is that the obligation of 'Umrah is independent of the obligation of Ḥajj." The author of *al-Jawāhir* states, "The statements of fuqahā' are not free of confusion... the one which appears sounder is that those who live far away from Mecca are relieved of the obligation of *'Umrah mufradah*, and that which is obligatory upon them is *'Umrat al-tamattu'*, whose *wujūb* is related to that of Ḥajj.

22. According to *al-Jawāhir, al-Madārik, al-Ḥadā'iq* and other Imāmiyyah works on fiqh, it is not permissible for one already in the state of *iḥrām* to assume *iḥrām* for another purpose, until he completes all the acts of the rite (Ḥajj or 'Umrah) for which he had assumed *iḥrām*.

23. Ibn 'Aqīl is alone among Imāmiyyah legists in agreeing with the Sunnī legists in that the acts of both the Ḥajj and the 'Umrah may be performed with a single *iḥrām* in *Ḥajj al-qirān*.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

THE IḤRĀM:

Mawāqît al-'Iḥrām:

The *iḥrām* is compulsory for all the various kinds of Ḥajj as well as 'Umrah, and is regarded as their basic element (*rukn*) by the Imāmiyyah, and as obligatory by other schools. All the five schools agree that the *mîqāt* of the people of al-Madînah from where they assume *iḥrām* is Masjid al-Shajarah, also known as Dhū al-Ḥulayfah;[1] for the pilgrims of al-Shām (which includes the Syrians, the Lebanese, the Palestinians and the Jordanians, noting further that the routes have changed from what they used to be in the past), Morocco and Egypt the *mîqāt* is al-Juḥfah;[2] for the pilgrims of Iraq, it is al-'Aqîq;[3] for those from Yemen and others who take the same route, it is Yalamlam.[4]

According to the Imāmiyyah, *Qarn al-Manāzil*[5] is the *miqāt* for the people of al-Ṭā'if and those who take their route towards Makkah. But according to the four Sunnî schools, it is the *mîqāt* of the people of Najd. The *mîqāt* for those from Najd and Iraq according to the Imāmiyyah is al-'Aqîq. All the legal schools agree that these *mawāqît* also apply to those who in their journey take similar routes, even though they may not be natives of those regions. For instance, if a Syrian starts on Ḥajj from al-Madînah, it is permissible for him to assume *iḥrām* from Dhū al-Ḥulayfah; if he starts on Ḥajj from Yemen, his *mîqāt* is Yalamlam; if from Iraq, then

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

al-'Aqîq, and so on. If one does not pass the mentioned *mawāqît* on his route, the *mîqāt* for him is the place parallel to any one of them.

If someone lives at a place nearer to Makkah than any of the prescribed *mawāqît,* then he assumes *iḥrām* from the place of his residence. For someone who resides in Makkah itself, his *mîqāt* is Makkah. For one performing the *al-'Umrat al-mufradah,* the *mawāqît,* according to the Imāmiyyah, are the same as for the Ḥajj.

Iḥrām Before Mîqāt:

The four Sunnî legal schools agree on the permissibility of assuming *iḥrām* before the point of *mîqāt,* but disagree as to which has greater merit. According to Mālik and Ibn Ḥanbal, *iḥrām* before *mîqāt* is more meritorious (*afḍal*). According to Abū Ḥanîfah, the merit lies in assuming *iḥrām* while starting the Ḥajj journey from one's town. Two opinions are ascribed to al-Shāfi'î in this regard.

However, according to the Imāmiyyah school, *iḥrām* before *mîqāt* is not permissible except for one who intends to perform the 'Umrah in the month of Rajab and is afraid of missing it if *iḥrām* is delayed until *mîqāt* is reached, and for one who makes a vow (*nadhr*) to assume *iḥrām* before the *mîqāt.* (*al-Tadhkirah, Fiqh al-Sunnah*)

Iḥrām after Mîqāt:

There is consensus among all the legal schools that it is not permissible to cross the *mîqāt* without *iḥrām,* and one who does so must return to the *mîqāt* for assuming *iḥrām.* If he does not return, according to the four Sunnî schools, his Ḥajj is correct though he should offer a *hady* in atonement. But if there be any impediment, such as fear of insecurity on the way or shortage of time, there is no sin. This, regardless of whether there are other *mawāqît* before him on his path or not.

According to the Imāmiyyah, if he has deliberately neglected to assume *iḥrām* at the *mîqāt* while intending to perform the Ḥajj or

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the 'Umrah, if he does not turn back to the *mîqāt*, there being no other *mîqāt* before him from which he can assume *iḥrām*, his *iḥrām* and Ḥajj are invalid, whether he had a valid pretext for not returning or not. But if his failure to assume *iḥrām* at *mîqāt* was on account of forgetfulness or ignorance, if it is possible to return, he must do so; but if it is not possible, then from the next *mîqāt* before him. Otherwise he ought to assume *iḥrām* as far as possible outside the *ḥaram* of Makkah, or within it; though the former is preferable. (*al-Tadhkirah, al-Fiqh 'alā al-madhāhib al-'arba'ah*)

Iḥrām before the Ḥajj Months:

According to the Imāmiyyah and Shāfi'î schools, the *iḥrām* before the months of the Ḥajj is invalid if assumed with the purpose of Ḥajj, though it is valid when assumed for the purpose of the 'Umrah. They cite in this regard the Qur'ānic verse (2:197): اَلْحَجُّ اَشْهُرٌ مَّعْلُوْمَاتٌ... But according to the Ḥanafî, Mālikî and Ḥanbalî schools, it is permissible with *karāhah*. (*al-Tadhkirah, Fiqh al-Sunnah*)

Iḥrām, Its Wājibāt and Mustaḥabbāt:

The Mustaḥabbāt of Iḥrām:

There is no disagreement among the legal schools with respect to the *iḥrām* being an essential *rukn* of the 'Umrah and all the three forms of the Ḥajj, namely, *tamattu'*, *qirān* and *ifrād*. Also, there is no difference of opinion that *iḥrām* is the first act of the pilgrim, irrespective of whether his purpose is *'Umrah mufradah*, or any of the three forms of Ḥajj. There are certain *wājibāt* and *mustaḥabbāt* related to the *iḥrām*.

The legal schools agree that it is *mustaḥabb* for anyone intending *iḥrām* to cleanse his body, clip his fingernails, shorten his moustaches, and to take a bath (even for women undergoing *ḥayḍ* or *nifās*, for the aim is cleanliness). It is also *mustaḥabb* for one intending Ḥajj to abstain from cutting the hair of his head from the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

beginning of the month of Dhū al-Qi'dah, to remove the hair from his body and armpits, and to enter *iḥrām* after the *ẓuhr* (noon) or any other obligatory prayers. It is also *mustaḥabb* to pray six, four or at least two *raka'āt*. However, freedom from the state of ritual impurity (*ḥadath*) is not a condition for the *iḥrām* to be valid.

According to the Ḥanafī and Mālikī schools, if water is not available, one is relieved of the duty to take the bath (*ghusl*), and *tayammum* as an alternative is not permissible. According to the Ḥanbalī and Shāfi'ī schools, *tayammum* substitutes *ghusl*. The Imāmiyyah jurists differ on this matter, some consider it permissible, others not.

According to the Imāmiyyah school, it is *mustaḥabb* to leave the hair of the head uncut, but according to the Shāfi'ī, Ḥanafī and Ḥanbalī schools, it is *mustaḥabb* to shave the head. (*al-Fiqh 'alā al-madhāhib al-'arba'ah*)

According to the Ḥanafī school, it is *sunnah* for one who wants to assume *iḥrām* to scent his body and clothes with a perfume whose trace does not remain after *iḥrām* except the smell. According to the Shāfi'ī school, it is *sunnah,* except when one is fasting, to apply perfume to the body after the bath. Also, perfuming the clothes does not matter. According to the Ḥanbalī school, one may perfume the body; and the clothes with *karāhah*. (*al-Fiqh 'alā al-madhāhib al-'arba'ah*)

According to the Ḥanafī, Mālikī and Shāfi'ī schools, it is *mustaḥabb* for the *muḥrim* to pray two *raka'āt* before assuming *iḥrām* after the noon prayer or any other obligatory prayer. If he has no obligatory prayer to make at the time of *iḥrām,* he should offer six, or four or at least two *raka'āt* for the *iḥrām*. (*al-Jawāhir*)

Al-'Ishtirāṭ:

Al-Muḥaqqiq al-Ḥillī, the Imāmiyyah scholar, in his work *Tadhkirat al-fuqahā'*, says that for one intending *iḥrām* it is *mustaḥabb* to make a condition with God at the time of assuming *iḥrām,* by saying:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

اَللّٰهُمَّ إِنِّي أُرِيدُ مَاأَمَرْتَنِي بِهِ، فَإِنْ مَنَعَنِي مَانِعٌ عَنْ تَمَامِهِ وَحَبَسَنِي عَنْهُ حَابِسٌ فَاجْعَلْنِي فِي حِلٍّ.

O God, indeed I wish to fulfil Thy command, but if any impediment keeps me from completing it or a barrier obstructs me from it, exonerate me.

Abū Ḥanīfah, al-Shāfi'ī, and Aḥmad ibn Ḥanbal also consider it *mustaḥabb.* However, this *ishtirāṭ* does not help in relieving one of the obligation of the Ḥajj if he were to encounter an impediment which keeps him from getting through it.

The Wājibāt of Iḥrām:

The *wājibāt* of *iḥrām,* with some difference between the legal schools on some points, are three: *niyyah* (intention); *talbiyah;* and putting on of the clothes of *iḥrām.*

Al-Niyyah:

Obviously *niyyah* or intention is essential to every voluntary act; for every such act is motivated by conscious intent. Therefore, some scholars have pointed out that had we been assigned a duty to be performed without intention it would have been impossible to be carried out. However, when the question of intention is raised in relation to the pilgrim (of the Ḥajj or the 'Umrah), what is meant is whether he becomes *muḥrim* solely on account of the *niyyah* or if something else is required in addition, acknowledging that *iḥrām* is void if assumed frivolously or absent-mindedly.

According to the Ḥanafī school, *iḥrām* is not considered to commence solely with intention unless it is accompanied by the utterance of the *talbiyah* (*Fatḥ al-qadīr*). According to the Shāfi'ī, Imāmiyyah and Ḥanbalī schools, the *iḥrām* is assumed merely by *niyyah* (*al-Jawāhir, Fiqh al-Sunnah*). The Imāmiyyah add that it is obligatory for the *niyyah* to coincide with the commencement of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

iḥrām, and it is not sufficient for the act of *niyyah* to occur in the course of assuming *iḥrām.* Also while making the *niyyah* it is essential to specify the purpose of *iḥrām,* whether it is Ḥajj or 'Umrah, whether it is *Ḥajj al-tamattu',* *Ḥajj al-qirān* or *Ḥajj al-'ifrād,* whether he is performing the Ḥajj for himself or as a *nā'ib* of someone else, whether for the obligatory Ḥajj (*Ḥijjat al-'Islām*) or for something else. If one assumes *iḥrām* without specifying these particulars, postponing their determination to future, the *iḥrām* is invalid. (*al-'Urwat al-wuthqā*).

According to the Ḥanafī text *al-Mughnî,* "It is *mustaḥabb* to specify the purpose of *iḥrām.* Mālik is of the same opinion. Two opinions are ascribed to al-Shāfi'ī. According to one of them, it is adequate if one assumes *iḥrām* with a general, non-specific purpose of pilgrimage... without determining the exact purpose, whether Ḥajj or 'Umrah. The *iḥrām* thus assumed is valid and makes one a *muḥrim....* Afterwards, he may select any of the kinds of pilgrimage." All the five schools agree that if one assumes *iḥrām* with the intention to follow another person's intention, his *iḥrām* is valid if the other person's purpose is specific. (*al-Jawāhir; al-Mughnî*)

The Talbiyah:

That the *talbiyah* is legitimate in *iḥrām* is acknowledged by all the five schools, but they disagree as to its being *wājib* or *mustaḥabb,* and also about its timing. According to the Shāfi'ī and Ḥanbalī schools, it is *sunnah,* preferably performed concurrently with *iḥrām.* However, if the intention to assume *iḥrām* is not accompanied by *talbiyah,* the *iḥrām* is correct.

According to the Imāmiyyah, Ḥanafī,[6] and Mālikī schools, the *talbiyah* is obligatory, though they differ about its details. According to the Ḥanafī school, pronouncement of *talbiyah* or its substitute--such as *tasbîḥ,* or bringing along of the sacrificial animal (*al-hady*)--is a provision for *iḥrām* to be valid. According to the Mālikī school, the *iḥrām* neither becomes invalid if *talbiyah* is recited after a long gap of time, nor if it is not pronounced

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

altogether. However, one who fails to pronounce it must offer a blood sacrifice.

According to the Imāmiyyah, neither the *iḥrām* for *Ḥajj al-tamattu'*, nor *Ḥajj al-'ifrād*, nor their conjugate 'umrahs, nor for *al-'Umrat al-mufradah*, is valid without *talbiyah*. However, one who intends to perform *Ḥajj al-qirān* may choose between *talbiyah, ish'ār*[7] or *taqlîd; ish'ār* for this school being exclusively restricted to a camel, though *taqlîd* may apply to a camel or the other forms of *hady*.

The Formula of Talbiyah:

The formula of *talbiyah* is:

لَبَّيْكَ اللّٰهُمَّ لَبَّيْك، لا شَريكَ لَكَ لَبَّيْكَ، إِنَّ الْحَمْدَوَالنِّعْمَةَ لَكَ وَالْمُلْكَ لا شَريكَ لَكَ

All the legal schools agree that *ṭahārah* is not a proviso for pronouncing *talbiyah*. (*al-Tadhkirah*).

As to its occasion, the *muḥrim* starts reciting it from the moment of *iḥrām*, being *mustaḥabb* for him to continue it--all the five schools agree--until the *ramy* of *Jamarāt al-'aqabah*. To utter it loudly is *mustaḥabb* for men (not for women), except in mosques where prayers are offered in congregation, particularly in the Mosque of 'Arafāt. According to the Imāmiyyah school, it is *mustaḥabb* to discontinue reciting the *talbiyah* on sighting the houses of Makkah. A woman may recite the *talbiyah* just aloud enough to be heard by herself or someone near her. It is also *mustaḥabb* to proclaim blessings on the Prophet and his Family (*ṣ*). (*al-Tadhkirah; Fiqh al-Sunnah*).

The Muḥrim's Dress:

All the five schools agree that it is not permissible for a *muḥrim* man to wear stitched clothing, shirts or trousers, nor may he cover his face. Also, it is not permissible for him to wear shoes (*khuffān*)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

except when he cannot find a pair of sandals (*na'lān*),[8] and that after removing the covering on the back of the heels from the base. A woman, however, should cover her head, keep her face exposed, except when she fears that men may ogle at her.

It is not permissible for her to wear gloves, but she may put on silk and wear shoes (*khuffān*). According to Abū Ḥanīfah, it is permissible for a woman to wear gloves. (*al-Tadhkirah;* Ibn Rushd's *al-Bidāyah wa al-nihāyah*)

The book *al-Fiqh 'alā al-madhāhib al-'arba'ah,* under the heading 'That which is required of one intending *iḥrām* before he starts to assume it', states. "According to the Ḥanafī school,... among other things he wears *izār* (loin-cloth) and *ridā'* (cloak). The *izār* covers the lower part of the body from the navel to the knees. The *ridā'* covers the back, the chest and the shoulders, and its wearing is *mustaḥabb*.

According to the Mālikī school, it is *mustaḥabb* to wear *izār, ridā',* and *na'lān;* but there is no restriction on wearing something else that is not stitched and does not encircle any of the parts of the body. According to the Ḥanbalī school, it is *sunnah* to put on a new, white and clean *ridā'* and *izār* together with a pair of *na'lān* before assuming *iḥrām.* According to the Shāfi'ī school, the *ridā'* and *izār* should be white, new or washed ones.

According to the Imāmiyyah school, the *ridā'* and the *izār* are obligatory, preferably (*istiḥbāban*) of white cotton. The *muḥrim* may put on more than these two pieces of clothing on condition that they are not stitched. Also it is permissible to change the clothes in which one commenced *iḥrām,* though it is better to perform the *ṭawāf* in the same *ridā'* and *izār* as worn at the beginning. All the requirements of the dress for *ṣalāt* apply to the dress of *iḥrām,* such as *ṭahārah,* its being non-silken for men, not made of the skin of an animal eating whose flesh is not permissible. According to some Imāmiyyah legists, clothing made of skin is not permissible (in *ṣalāt* and *iḥrām*).

In any case, the disagreement between the legal schools about the *muḥrim*'s dress is very limited. This is well indicated by the fact

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

that whatever is regarded as permissible by the Imāmiyyah is also considered permissible by the remaining schools.

Restrictions of Iḥrām:

There are certain restrictions for the *muḥrim,* most of which are discussed below.

Marriage:

According to the Imāmiyyah, Shāfi'ī, Mālikī and Ḥanbalī schools, it is not permissible for the *muḥrim* to contract marriage for himself or on behalf of another. Also he may not act as another's agent for concluding a marriage contract, and if he does, the contract is invalid.

Furthermore, according to the Imāmiyyah school, he may not act as a witness to such a contract.

According to Abū Ḥanīfah, marriage contract is permissible and the contract concluded is valid. According to the Ḥanafī, Mālikī, Shāfi'ī and Imāmiyyah schools, it is permissible for the *muḥrim* to revoke divorce of his former wife during the period of her *'iddah.* According to the Ḥanbalī school, it is not permissible. From the viewpoint of the Imāmiyyah, if one enters a marriage contract with the knowledge of its prohibition, the woman becomes *ḥarām* for him for life merely by the act of concluding the contract, even if the marriage is not consummated. But if done in ignorance of the interdiction, she is not prohibited to him, even if consummation has been affected. (*al-Jawāhir; Fiqh al-Sunnah; al-Fiqh 'alā al-madhāhib al-'arba'ah*)

Intercourse:

All the five legal schools agree that it is not permissible for the *muḥrim* to have sexual intercourse with his wife, or to derive any kind of sexual pleasure from her. If he performs intercourse before

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

taḥlîl[9] (i.e. relief from the state of *iḥrām*) his Ḥajj becomes void, although he must perform all its acts to the conclusion. Thereafter, he must repeat the Ḥajj the next year, performing it 'separately' from his spouse.[10] The seclusion is obligatory according to the Imāmiyyah, Mālikî and Ḥanbalî schools, and voluntary from the viewpoint of the Shāfi'î and Ḥanafî schools. (*al-Ḥadā'iq; Fiqh al-Sunnah*)

Moreover, according to the Imāmiyyah, Shāfi'î, and Mālikî schools, besides the fact that his Ḥajj becomes invalid, he must sacrifice a camel in atonement, and according to the Ḥanafî school, a sheep.

All the five legal schools agree that if he commits intercourse after the first *taḥlîl* (i.e. after the *ḥalq* or *taqṣîr* in Minā, after which everything except intercourse--and also perfume according to the Imāmiyyah school--become permissible for the pilgrim), his Ḥajj is not void, nor is he called upon to repeat it. Nevertheless, he must offer a camel, according to the Imāmiyyah and Ḥanafî schools and according to one of the two opinions ascribed to al-Shāfi'î. But according to the Mālikî school, he is obliged to offer a sheep only. (*al-Ḥadā'iq; Fiqh al-Sunnah*).

If the wife yields willingly to intercourse, her Ḥajj is also void, and she must sacrifice a camel in expiation and repeat the Ḥajj the year after. But if she was forced, then nothing is required of her, but the husband is obliged to offer two camels: one on his own behalf, and the second on hers. If the wife was not in the state of *iḥrām*, but the husband was, nothing is required of her, nor is she obliged to offer anything in atonement, nor is anything required of the husband on her account. (*al-Tadhkirah*).

If the husband kisses his wife, his Ḥajj is not void if it does not result in ejaculation. On this all schools are in agreement. But according to the four Sunnî schools, he is obliged to make a sacrificial offering in atonement even if it be a sheep. The Imāmiyyah author of *al-Tadhkirah* says, the sacrifice of a camel is obligatory only if the kiss is taken with sexual desire, otherwise he should sacrifice only a sheep. If he ejaculates, the Ḥajj is void according to the Mālikî school, but remains valid according to the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

other schools, although he should make an offering in atonement, which is a camel according to the Ḥanbalī school and a group of Imāmiyyah legists, and a sheep according to the Shāfi'ī and Ḥanafī schools. (*al-Ḥadā'iq; al-Mughnî*)

Use of Perfume:

All the legal schools agree that the *muḥrim,* man or woman, may not make use of any perfume, either for smelling, or for applying on himself, or for scenting edibles. Indeed it is not permissible to wash the dead body of a *muḥrim,* nor to perform *ḥunūṭ* upon it by applying camphor or any other kind of perfumery. If the *muḥrim* uses perfume forgetfully or on account of ignorance, he needs not make any offering in atonement according to the Imāmiyyah and Shafi'ī schools. But according to the Ḥanafī and Mālikī schools, he must make a sacrificial offering (*fidyah*). In this relation two different opinions are ascribed to Aḥmad ibn Ḥanbal.

However, when one is forced to use perfume on account of disease, it is permissible and no *fidyah* is required. According to the Imāmiyyah school, if one uses perfume intentionally, he must offer a sheep, irrespective of the use, whether applied to the body or eaten. However, there is nothing wrong in the *Khalūq* of Ka'bah even if it contains saffron, and the same applies to fruits and aromatic plants. (*al-Jawāhir*)

Use of Kohl:

Al-Tadhkirah states: "There is consensus among the Imāmiyyah legists on the point that darkening the eyelids with kohl or applying a kohl containing perfume is not permissible for the *muḥrim,* man or woman. Apart from that (i.e. *iḥrām*) it is permissible." According to the author of *al-Mughnî,* "Kohl containing antimony is *makrūh,* and does not require any *fidyah.* I haven't come across any different opinion on this topic. However, there is no *karāhah* in use of kohl without antimony, as long as it does not contain any perfume."

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Shortening of Nails and Hair; Cutting of Trees:

All the five legal schools agree about impermissibility of shortening the nails and shaving or shortening of the hair of the head or the body in the state of *iḥrām, fidyah* being required of the offender.[11] As to cutting of trees and plants within the *ḥaram,* all the legal schools agree that it is impermissible to cut or uproot anything grown naturally without human mediation. Al-Shāfi'ī states that there is no difference between the two with regard to the prohibition, and *fidyah* is required for both: cutting of a big tree requires *fidyah* of a cow, and of other plants of a sheep. According to Mālik, cutting of a tree is a sin, though nothing is required of the offender, regardless of whether it has grown with or without human mediation.

According to the Imāmiyyah, Ḥanafī, and Ḥanbalī schools, cutting of something planted by human hands is permissible and does not require a *fidyah;* but anything grown by nature requires *fidyah,* which is a cow according to the Imāmiyyah for cutting a big tree and a sheep for cutting smaller plants. According to the Ḥanafī school, the owner of the tree is entitled to a payment equivalent to the cost of the *hady.* (*Fiqh al-Sunnah, al-Lum'ah*)

All the five schools agree that there is no restriction for cutting a dry tree or for pulling out withered grass.

Looking into a Mirror:

It is not permissible for a *muḥrim* to look into a mirror, and all the five schools agree that there is no *fidyah* for doing so. However, there is no restriction on looking into water.

Use of Henna:

According to the Ḥanafī school, it is permissible for the *muḥrim,* man or woman, to dye with henna any part of his body,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

except the head. According to the Shāfi'ī school, it is permissible, with the exception of hands and feet. According to the Ḥanafī school, dyeing is not permissible for the *muḥrim,* man or woman. (*Fiqh al-Sunnah*) The predominant view among the Imāmiyyah legists is that dyeing is *makrūh* not *ḥarām.* (*al-Lum'ah*)

Use of Shade; Covering the Head:

All the five schools agree that it is not permissible for the *muḥrim* man to cover his head voluntarily. According to the Mālikī and Imāmiyyah schools, it is not permissible for him to immerse himself under water until the head is completely submerged, although it is permissible for him, all the five schools except the Shāfi'ī agree, to wash his head or pour water over it. The Mālikīs say that with the exception of the hands it is not permissible to remove dirt by washing. If he covers the head forgetfully, nothing is required of him according to the Imāmiyyah and Shāfi'ī schools, but a *fidyah* is required according to the Ḥanafī school.

All the schools, with the exception of the Shāfi'ī, agree that it is impermissible for the *muḥrim* to shade himself while moving. Neither it is permissible for him to ride an automobile, an aeroplane or the like, which are covered by a roof. But it is permissible while walking to pass under a shadow.[12] If one needs shadow in case of exigency, such as illness or intense heat or cold, it is permissible, but a *kaffārah* is required according to the Imāmiyyah school. All the five schools agree that it is permissible for the *muḥrim* when stationary in a place to be under the shade of a roof, wall, tree, tent, etc. According to the Imāmiyyah school, it is permissible for a woman to use shadow while moving about. (*al-Tadhkirah*)

Stitched Clothing and Ring:

All the five schools agree that it is forbidden for the *muḥrim* man to wear stitched clothes and clothes which encircle body members, e.g. turban, hat and the like. These are permissible for

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

women, with the exception of gloves and clothes which have come into contact with perfume. According to the Imāmiyyah school, if the *muḥrim* wears stitched clothes forgetfully, or in ignorance of the restriction, nothing is required of him. But if one wears them intentionally to protect himself from heat or cold, he should offer a sheep. Also according to them it is not permissible to wear a ring for adornment, but it is permissible for other purposes. Also, it is not permissible for woman to wear jewelry for the sake of adornment.

'Fusūq' and 'Jidāl':

God, the most Exalted, says in the Quran:

...فَلا رَفَثَ وَلا فُسُوقَ وَلا جِدالَ فِي الْحَجِّ...

'...There should be no obscenity, neither impiety, nor disputing in Ḥajj....' (2:197).

In the above verse, the meaning of *'rafath'* is taken to be sexual intercourse, to which reference has been made earlier. *'Fusūq'* is taken to mean lying, cursing, or commission of sins. In any case, all of them are forbidden for the pilgrims of Ḥajj and the non-pilgrims as well. The stress here is meant to emphasize abstention from them in the state of *iḥrām.* The meaning of *'jidāl'* is quarrelling. According to an Imāmiyyah tradition from al-'Imām al-Ṣādiq (*'ā*), he is reported to have said, "It (i.e. *'jidāl'* in the above-mentioned verse) means using such expressions as 'Yes, by God!' or 'No, by God!' in conversation. This is the lowest degree of *jidāl.*"

According to the Imāmiyyah school, if the *muḥrim* tells a lie for once, he must offer a sheep; if twice, a cow; if thrice, a camel. And if he swears once taking a veritable oath, there is nothing upon him; but if he repeats it three times, he is obliged to sacrifice a sheep.

Cupping (Ḥijāmah):

All the five schools agree on permissibility of cupping in case of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

necessity, and the four Sunnî schools permit it even when not necessary as long as it does not require removal of hair. The Imāmiyyah legists disagree on this issue; some of them permit it and others not. (*al-Tadhkirah; al-Fiqh 'alā al-madhāhib al-'arba'ah*)

Hunting (al-Ṣayd):

All the five schools are in agreement about the prohibition on hunting of land animals, either through killing or through *dhabḥ,* and also on guiding the hunter or pointing out the game to him in the state of *iḥrām.* Also prohibited is meddling with their eggs and their young ones. However, hunting of the animals of water is permitted and requires no *fidyah.* This, in accordance with the Qur'ānic verse:

أُحِلَّ لَكُمْ صَيْدُ الْبَحْرِ وَطَعامُهُ مَتاعاً لَكُمْ وَلِلسَّيَّارَةِ وَحُرِّمَ عَلَيْكُمْ صَيْدُ الْبَرِّ ما دُمْتُمْ حُرُماً وَاتَّقُوااللهَ الَّذى اِلَيْهِ تُحْشَرُونَ ❋

Permitted to you is the game of the sea and the food of it, as a provision for you and for the journeyers; but forbidden to you is the game of the land, so long as you remain in the state of iḥrām: and fear God, unto whom you shall be mustered. (5:96)

The prohibition on hunting within the precincts of the *ḥaram* apply to the *muḥrim* and the non-*muḥrim* (*muḥill*) equally. However, outside the *ḥaram,* the prohibition applies only to the *muḥrim.* If the *muḥrim* slaughters a game, it is considered *maytah* (a dead animal not slaughtered in accordance with ritual requirements), and its flesh is unlawful for all human beings. The five legal schools agree that the *muḥrim* may kill a predatory bird called *ḥada'ah,* crows, mice and scorpions. Others include wild dogs and anything harmful.

According to the Imāmiyyah and Shāfi'î schools, if the game hunted on land resembles some domestic beast in shape and form (like the oryx, which resembles the cow), he has the choice between: (1) giving the meat of one of similar beasts of his livestock in charity after slaughtering it; (2) estimating its price and buying food of the amount to be given in expiation and charity to the needy, distributing

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

it by giving two *mudd*s (the *mudd* is a dry measure equal to 800 grams) to every individual; (3) fasting, a day for every two *mudd*s.

The Mālikîs hold the same viewpoint, except that, they add, the price of the hunted animal itself should be estimated, not that of its domestic equivalent. The Ḥanafîs say that one who hunts in the state of *iḥrām* should arrange for the estimated price of the hunted animal, whether there is a domestic animal similar to it or not. When the price has been estimated, he is free to choose between: (1) purchasing livestock of the money and giving its meat away in charity; (2) giving it from his own livestock; (3) purchasing food of the amount to be given away in charity; (4) fasting, a day for every *mudd* of food to be given away. (*al-Tadhkirah; Fiqh al-Sunnah*) In this connection all the legal schools base their position on this Qur'ānic verse:

يَاأَيُّهَاالَّذِينَ اٰمَنُوالا تَقْتُلُواالصَّيْدَ وَاَنْتُمْ حُرُمٌ وَمَنْ قَتَلَهُ مِنْكُمْ مُتَعَمِّداً فَجَزَاءٌ مِثْلُ مَاقَتَلَ مِنَ النَّعَمِ يَحْكُمُ بِهِ ذَوَا عَدْلٍ مِنْكُمْ هَدْياً بَالِغَ الْكَعْبَةِ اَوْ كَفَّارَةٌ طَعَامُ مَسَاكِينَ اَوْعَدْلُ ذٰلِكَ صِياماً لِيَذُوقَ وَبَالَ اَمْرِهِ عَفَا اللهُ عَمَّا سَلَفَ وَمَنْ عَادَفَيَنْتَقِمُ اللهُ مِنْهُ وَاللهُ عَزِيزٌ ذُو انْتِقَامٍ*

O believers, slay not the game while you are in the state of iḥrām. Whosoever of you slays it willfully, there shall be reparation--the like of what he has slain, in livestock, as shall be judged by two men of equity among you, as offering on reaching the Ka'bah; or expiation--food for poor persons or the equivalent of that in fasting, so that he may taste the mischief of his action. God has pardoned what is past; but whoever offends again, God will take vengeance on him; God is All-mighty, Vengeful. (5:95)

The meaning of the phrase يَحْكُمُ بِهِ ذَوَا عَدْلٍ in the above verse is that two equitable (*'ādil*) witnesses should judge whether a certain domestic animal is similar to the hunted wild beast. The meaning of the phrase هَدْياً بَالِغَ الْكَعْبَةِ is that he should slaughter the equivalent livestock and give its meat in charity on arrival in Makkah.

According to the Imāmiyyah work *al-Sharā'i'*, "Every *muḥrim* who wears or eats anything forbidden for him should slaughter a sheep, regardless of whether his action was intentional, forgetful, or

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

on account of ignorance."

The Imāmiyyah and Shāfi'ī schools agree that no expiation (*kaffārah*) is required of someone who commits a *ḥarām* act forgetfully or in ignorance, except in the case of hunting, in which case even killing by mistake requires *kaffārah*.

The Limits of the Ḥarams of Ma*kkah *and of Al-Madīnah:

The prohibition of hunting and cutting of trees applies both to the *ḥaram* of Makkah and that of al-Madīnah. According to *Fiqh al-Sunnah,* the limits of the *ḥaram* of Makkah are indicated by signs in five directions, which are one-meter-high stones fixed on both sides of the roads. The limits of the *ḥaram* of Makkah are as follows: (1) the northern limit is marked by al-Tan'īm, which is a place at a distance of 6 kms. from Makkah; (2) the southern limit is marked by Iḍāh, 12 kms. from Makkah; (3) the eastern limit is al-Ja'rānah, 16 kms. from Makkah; (4) the western limit is al-Shumaysī, 15 kms. from Makkah.

The limits of the *ḥaram* of the Prophet's shrine extend from 'Īr to Thawr, a distance of 12 kms. 'Īr is a hill near the *mīqāt,* and Thawr is a hill at Uḥud.

Al-'Allāmah al-Ḥillī, an Imāmiyyah legist, states in his work *al-Tadhkirah* that "the *ḥaram* of Makkah extends over an area of one *barīd* by one *barīd* (1 *barīd*=12 miles), and the *ḥaram* of al-Madīnah extends from 'Āyir to 'Īr.[13]

NOTES:

1. Dhū al-Ḥulayfah, nowadays known as Bi'r 'Alī or Ābyār 'Alī, is at a distance of about 486 kms. from Makkah to the north and 12 kms. from al-Madīnah. (Tr.)

2. Al-Juḥfah, lies a distance of about 156 kms. from Makkah to the north-west. (Tr.)

3. There are three points in the valley of al-'Aqīq, 94 kms. from Makkah in the north-east, from where *iḥrām* is assumed: al-Maslakh, al-Ghamrah, and Dhāt al-'Irq. According to the Imāmiyyah *fuqahā',* it is permissible to assume *iḥrām* from any of these points, though al-Maslakh is considered best, then al-Ghamrah, and then Dhāt al-'Irq. (Tr.)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

4. Yalamlam is a mountain of the Tahāmah range, lying at a distance of 84 kms. from Makkah (Tr.)

5. Qarn al-Manāzil, the *mîqāt* for those coming from al-Ṭā'if, lies at a distance of 94 kms. east of Makkah.

6. According to the Ḥanafî school, bringing along of *hady* substitutes the *talbiyah*, as mentioned by Ibn 'Ābidîn and the author of *Fatḥ al-Qadîr*.

7. *"Ish'ār"* here means slitting the right side of the camel's hump. By *"taqlîd"* is meant the hanging of an old horseshoe in the neck of the *hady*, which is meant to identify the sacrificial animal as such.

8. The *na'l* has a sole, but is devoid of the covering on the sides and the back of the foot at the heels. The *khuff* is the common shoe, which covers the foot on the sides and the heels.

9. After performing *ramy al-jamarāt* and *ḥalq*, everything except intercourse and perfume becomes permissible to the pilgrim--such as wearing of stitched clothes and other things. This is called *al-ḥill al-'awwal* (or "the first relief" from the restrictions of *iḥrām*). After the last *ṭawāf*, all things including intercourse become permissible to him. This "second relief'--to be explained later--is called *al-ḥill al-thānî*.

10. According to *al-Tadhkirah*, It is necessary during the next Ḥajj that the 'separation' should take place from the point where the misdemeanour was committed during the first Ḥajj. The meaning of 'separation' (*tafrîq*) is that the two should not be alone together without there being present a third *muḥrim*, whose presence acts as a deterrent.

11. According to the Imāmiyyah, the *kaffārah* for cutting a single nail is giving one *mudd* (800 grams) of food in charity. If all the nails of fingrs and toes are cut in one sitting, the *kaffārah* is one sheep, but if done in several sittings, it is sacrifice of two sheep.

12. The author of *al-Tadhkirah* ascribes impermissibility of shadowing oneself while moving to Abū Ḥanîfah, and the author of *Raḥmat al-'ummah* ascribes to him permissibility.

13. *Al-Mughnî* states, "Those knowledgeable about al-Madînah do not know of any Thawr or 'Îr," but it is possible that names have changed with time.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ṬAWĀF

Ṭawāf is an essential part (*rukn*) of 'Umrah, and the *ṭawāf al-ziyārah* (also called *'ṭawāf al-'ifāḍah'*) is a *rukn* of the *Ḥajj al-tamattu'*, *Ḥajj al-'ifrād* and *Ḥajj al-qirān*. As said earlier, the assumption of *iḥrām* is the first act of the pilgrim regardless of whether he comes for *'Umrah mufradah* or for any of the three types of Ḥajj.

Now, after the assuming of *iḥrām*, what is the next step for the pilgrim? Is it *ṭawāf*, or *wuqūf*, or something else? The answer is: it depends on the purpose (*niyyah*) with which the pilgrim assumes *iḥrām*. If it is 'Umrah, then the next step is *ṭawāf*, regardless of whether it is *'Umrah mufradah* or *'Umrat al-tamattu'*. Thus *ṭawāf* is the second step for the *mu'tamir* (pilgrim intending 'Umrah), by agreement of all the legal schools.

However, if the purpose of *iḥrām* is Ḥajj only--such as in the case of pilgrim on *Ḥajj al-'ifrād*, or one intending to perform the *Ḥajj al-tamattu'* after getting through the acts of 'Umrah--the second step is (as shall be explained later) *wuqūf* in 'Arafāt. In other words, one who enters Makkah with the sole purpose of 'Umrah or *Ḥajj al-tamattu'* performs *ṭawāf* before everything else, then *sa'y* and then *taqṣîr*. After this, if on *Ḥajj al-tamattu'*, he assumes *iḥrām* for a second time; but he is not required to perform another *ṭawāf* after this *iḥrām*. The *ṭawāf* (pertaining to the Ḥajj acts), as we shall explain, comes after getting through the *wuqūf* at 'Arafāt and passage through Minā.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Kinds of 'Umrah in View of the Ahl al-Sunnah:

The imams of the four Sunnī schools distinguish between three kinds of *ṭawāf:*

1. Ṭawāf al-Qudūm: It is the *ṭawāf* performed by the 'outsiders', (i.e. those coming from outside Makkah and from beyond its outskirts within a radius of 88 kms.) on entry into Makkah. It is similar to the two *raka'āt* of *ṣalāt* performed as *taḥiyyat al-masjid* (*lit.* 'greeting of the mosque'), and so is also called *'ṭawāf al-taḥiyyah'*. The four Sunnī schools agree on its being *mustaḥabb,* and no penalty is required for default according to all except the Mālikīs who require a blood sacrifice.

2. Ṭawāf al-Ziyārah: This *ṭawāf* (also called *'ṭawāf al-'ifāḍah'*) is performed by Ḥajj pilgrims after getting through the acts of Minā, the *ramy* of *jamarāt al-'aqabah,* the sacrifice (*dhibḥ*), and the *ḥalq* or the *taqṣīr.* The pilgrim performs this *tawāf* on returning to Makkah. It is called *'ṭawāf al-ziyārah'* because it is performed on the visit (*ziyārah*) to the Ka'bah after leaving Minā. It is called *'ṭawāf al-'ifāḍah'* because the pilgrims pour forth (*'ifāḍah'* means 'pouring forth') into Makkah from Minā. It is also called *'ṭawāf al-ḥajj'* because by consensus of all the schools it is *rukn* of the Ḥajj.

After performing this *ṭawāf* all things become permissible for the (Sunnī) Ḥajj pilgrim, even sexual intimacy with women. The Imāmiyyah, who disagree, say that sex is not permitted before performing the *sa'y* between Ṣafā and Marwāh followed by a second *ṭawāf,* which they call *'ṭawāf al-nisā'.'* This shall be further clarified presently.

3. Ṭawāf al-Wadā': It is the last *ṭawāf* performed by the *Ḥujjāj* before departing from Makkah. The Ḥanafī and Ḥanbalī schools consider it obligatory, though all that is required of the defaulter is a sacrifice. The Mālikīs consider it *mustaḥabb* and do not require any

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

penalty for the default. Al-Shāfi'ī has two opinions on this matter. (*al-Mughnî, al-Fiqh 'alā al-madhāhib al-'arba'ah, Fiqh al-Sunnah*)

Kinds of Ṭawāf from the Imāmiyyah Viewpoint:

The Shī'ah agree with the Sunnī schools about the legitimacy of the above three kinds of *ṭawāf,* and regard the second *ṭawāf,* i.e. *ṭawāf al-ziyārah* as a *rukn* of the Ḥajj whose omission makes the Ḥajj invalid.[1] However, the first kind, i.e. *ṭawāf al-qudūm* is considered *mustaḥabb,* and may be omitted. Regarding the third, i.e. *ṭawāf al-wadā',* they agree with the Mālikī school in its being *mustaḥabb,* there being nothing on the defaulter.

However, the Shī'ah add another kind of *ṭawāf* to the above three, the *ṭawāf al-nisā',* which they consider obligatory, its omission being impermissible in *'Umrah mufradah* as well as in all the three kinds of Ḥajj (i.e. *tamattu', qirān,* and *ifrād*). They do not permit its omission except in case of *'Umrat al-tamattu',* considering the *ṭawāf al-nisā'* performed during the course of *Ḥajj al-tamattu'* as sufficient. The schools of the Ahl al-Sunnah state that there is no obligatory *ṭawāf* after the *ṭawāf al-ziyārah,* after which sexual intimacy is permissible. The Shī'ah say that it is obligatory upon the pilgrim, after performing *ṭawaf al-ziyārah* and the *sa'y,* to perform another *ṭawāf,* the *ṭawāf al-nisā',* which derives its name precisely because of the sanction of permissibility of relations with women (*nisā'*) following it. They say that if the pilgrim defaults in regard to this *ṭawāf,* sexual relations are forbidden for man and woman (for men even the conclusion of marriage contract), unless he/she performs it in person or deputes another to perform it on his/her behalf; and if he/she dies without performing it or without deputing someone to do it for him/her, it is incumbent upon the heir (*walî*) to have it performed on the behalf of the dead person. According to them, even in case of a *mumayyiz* child who fails to perform the *ṭawāf al-nisā'* while performing the Ḥajj, even if he omits it by mistake or on account of ignorance, women are forbidden to him after adulthood nor he may conclude a marriage contract (*'aqd*) unless he

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

performs it himself or deputes another for the job.

To summarize, the Shī'ah consider three *ṭawāf's* to be obligatory for the pilgrim on the *Ḥajj al-tamattu':* (1) the *ṭawāf* of the conjugate 'Umrah, of which it is *rukn;* (2) the *ṭawāf al-ziyārah* (or *ṭawāf al-ḥajj*), which is a *rukn* of the Ḥajj; and (3) the *ṭawāf al-nisā',* which is also an obligatory part of it, though not a *rukn* similar to the *Sūrat al-Fātiḥah* in relation to the *ṣalāt.* The Ahl al-Sunnah agree with the Shī'ah in all except *ṭawāf al-nisā',* which they do not recognize. However, of a pilgrim on the *Ḥajj al-'ifrād* o r *Ḥajj al-qirān,* only two *ṭawāf's* are required by the Shī'ah.[2]

Entry into Makkah:

All the schools agree that it is *mustaḥabb* for one entering Makkah to take a bath, pass through its heights during the approach towards the city, enter through Bāb Banī Shaybah, raise his hands on sighting al-Bayt al-Ḥarām, pronounce *takbîr* and *tahlîl,* and to recite whatever he can of certain prayers prescribed by tradition. The Mālikīs, however, disagree about the *istiḥbāb* of raising the hands for the *du'ā'.*

Thereafter, he approaches the Black Stone; if possible kisses it or caresses it with his hand or else just makes a gesture with his hand, and prays.

According to the Imāmiyyah, it is *mustaḥabb* while entering the *ḥaram* of Makkah to be barefooted, to chew the leaves of a plant called *'adhkhir'* used for refreshing the mouth, or to clean the mouth to purge its odour.

The Provisos (Shurūṭ) of Ṭawāf:

According to the Shāfi'ī, Mālikī, and Ḥanbalī schools ritual purity (*ṭahārah,* i.e. freedom from *ḥadath* and *khabath*) is required; thus the *ṭawāf* of one who is *Junub* or a woman undergoing *ḥayḍ* or *nifās,* is not valid. Also, it is necessary to cover one's private parts completely as in *ṣalāt.*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The author of the *Fiqh al-Sunnah* (p. 154, 1955) says: "In the opinion of the Ḥanafîs, freedom from *ḥadath* is not an essential requirement. However, it is an obligation whose omission may be compensated through a blood sacrifice. So, if one performs *ṭawāf* in the state of minor impurity (*ḥadath aṣghar*) his/her *ṭawāf* is valid, though one is required to sacrifice a sheep. If *ṭawāf* is performed in the state of *janābah* or *ḥayḍ*,[3] the *ṭawāf* is valid, though the sacrifice of a camel is required during the pilgrim's stay in Makkah."

According to *al-Fiqh 'alā al-madhāhib al-'arba'ah* (vol.I, p. 535, 1939): "The *ṭahārah* of the clothes, the body, and the location of prayer (in *ṣalāt*) is (only) a highly recommended sunnah (*sunnah mu'akkadah*) from the Ḥanafî viewpoint; (this is true) even of *ṭawāf,* there being no penalty even if all the clothes are completely ritually unclean (*najis*)."

According to the Imāmiyyah, *ṭahārah* from *ḥadath* and *khabath*) is a proviso for validity of an obligatory *ṭawāf.* In the same way, covering the private parts (*satr al-'awrah*) with a ritually clean cloth legitimately owned (*ghayr maghṣūb*) is also a requirement. Moreover, it should not be made of silk or the skin of an animal whose flesh may not be eaten, nor made of golden fabric --requirements which are the same as for *ṣalāt.* It may be said that the Imāmiyyah are even more stringent with regard to *ṭawāf* than *ṣalāt.* They consider a blood spot of the size of a *dirham* as pardonable for one performing *ṣalāt,* but not for one performing *ṭawāf.* Further, they consider wearing of silk and gold as impermissible even for women during *ṭawāf* (which is permissible for women in *ṣalāt*). According to the Imāmiyyah, circumcision is a requirement for *ṭawāf,* without which it is invalid, both for an adult man and a child (*al-Jawāhir, al-Ḥadā'iq*).

The manner of Performing Ṭawāf:

According to the Imāmiyyah and Ḥanbalî schools, the purpose or *niyyah* must be specified in every *ṭawāf;* but according to the Mālikî, Shāfi'î and Ḥanbalî schools, a general *niyyah* for the Ḥajj is

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

sufficient and no separate *niyyah* for *ṭawāf* is required. (*al-Jawāhir, Fiqh al-Sunnah*)

As pointed out earlier, *niyyah* as a motive behind all voluntary actions is an inevitable and necessary matter; as such, debate and controversy regarding it is futile.

Ibn Rushd, in his *Bidāyat al-mujtahid,* writes: "The Sunnî legists are in consensus on the opinion that every *ṭawāf,* whether obligatory or not, begins from the Black Stone (and according to the *Fiqh al-Sunnah* ends thereat). The pilgrim, if he can, kisses it, otherwise touches it with his hand. Then, with the Ka'bah on his left, starts moving towards the right to make the seven circumambulations, walking with a moderately fast pace (*ramal*) during the first three rounds and with an ordinary pace during the last four rounds. (The *ramal*[4] applies to the *ṭawāf al-qudūm* performed on entry into Makkah by the 'Umrah and Ḥajj pilgrim, not one on *Ḥajj al-tamattu';* also no *ramal* is required of women pilgrims). Then he kisses al-Rukn al-Yamānî" (the south-western corner or *rukn* of the Ka'bah which falls before the one with the Black Stone mounted on it during the anti-clockwise rounds made during *ṭawāf.*--Tr.).

According to the Imāmiyyah, there are certain things obligatory (*wājib*) in *ṭawāf;* they are as follows:

1. The *niyyah,* to which reference has already been made.

2. The *ṭawāf* should be made on foot, and in case of inability on a mount. Many Imāmiyyah fuqahā' do not recognize this requirement and a group of them explicitly permit *ṭawāf* on a mount. They cite the precedent of the Prophet (ṣ) who performed *ṭawāf* on camelback, according to traditions in *al-Kāfî* and *Man lā yaḥḍuruhu al-faqîh.*

3. The condition that the *ṭawāf* should begin and end at the Black Stone is stated in this manner in many books of fiqh: "The *ṭawāf* should be begun at the Black Stone, so that the first part of one's body is in front of the first part of the Black Stone. Then the pilgrim begins moving with the Black Stone on his left, ending the last circumambulation exactly in line with the point where he commenced his first, thus ensuring that the seven rounds are

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

completed without advancing or falling behind a single step or more. The danger of advancing or falling behind necessitates that the first circumambulation should commence at the beginning of the Black Stone; because if begun in front of its middle, one cannot be sure of having advanced or fallen behind some steps; and if one began from its end, then the beginning may not be said to have commenced from the Black Stone...." and so on and so forth.

The author of the *Jawāhir al-kalām* makes elaborate critical remarks about this kind of meticulousness, which show his balanced and moderate taste and temperament. This is the substance of what he has to say: "The difficulty and the exasperating *ḥaraj* (impediment) inherent in realizing such a requirement is not concealed.... To give it consideration is to fall into silly scruples. The debate is similar to the depraved and unseemly musings of madmen.[5] And it has been narrated of the Prophet (ṣ) that he performed *ṭawāf* on camelback, and attaining this kind of precision is infeasible when on a mount."

That which can be understood from the remarks of the author of *al-Jawāhir* is that he agrees with the author of *al-Sharā'i'*, who confines himself to this statement, without adding another word: "It is obligatory to begin and end the *ṭawāf* at the Stone." It means--as is also apparent from his above-mentioned remarks--that in the opinion of the author of *al-Jawāhir* it is sufficient to fulfil this condition in the commonly understood sense. Al-Sayyid al-Ḥakīm, in *al-Munsik*, holds a similar position when he says, "The pilgrim performing *ṭawāf* should begin a little before the Stone with the intent of performing what is really obligatory. When he performs in this fashion he knows that he began at the Stone and finished thereat."

4. The Ka'bah must be on the left during *ṭawāf*. According to al-Sayyid al-Khū'ī, it is sufficient to realize this requirement in the commonly understood sense (i.e. without giving scrupulous attention to precision); slight shifts of direction do not matter as long as the movement meets the requirement in the ordinary sense. According to him the only crucial factor is satisfaction of the requirement in its

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ordinary sense.

5. The Ḥajar Ismā'īl must be included in *ṭawāf.* That is the circumambulation should be made around it and without entering it,[6] and it should be kept to the left while making the *ṭawāf.* Thus if one passes between it and the Ka'bah during *ṭawāf,* making it fall to his right, the *ṭawāf* becomes invalid.

6. The body should be completely out of the Ka'bah (because God says وَلْيَطَّوَّفُوا بِالْبَيْتِ الْعَتِيقِ , which means that *ṭawāf* should be made around and so outside the Ka'bah, not inside it). Also if one were to walk on its walls or on the protruding part of its walls' foundations, the *ṭawāf* would be invalid.

7. The *ṭawāf* should be performed between the Ka'bah and the rock called Maqām Ibrāhīm, which is a stone on which Abraham (*'ā*) stood during the building of the Ka'bah.

8. The *ṭawāf* should consist of seven rounds, no more no less. Obviously, recognition of these points requires an informed guide to indicate them to the pilgrims.

After finishing *ṭawāf,* it is obligatory to offer two *rak'ah*'s of *ṣalāt* behind the Maqām Ibrāhīm regardless of the crowd; but if it is not possible, one may offer the prayer in front of it, and if that, too, is not possible, anywhere in al-Masjid al-Ḥarām. It is not permissible to begin a second *ṭawāf* without performing the two-*rak'ah* prayer. If one forgets performing them, it is obligatory on him to return and perform them. But if returning were not feasible, he can offer them wherever he can. This is true of the obligatory *ṭawāf.* But if the *ṭawāf* were a *mustaḥabb* one, he can offer the two *rak'ah*'s wherever he can. (*al-Tadhkirah, al-Jawāhir, al-Ḥadā'iq*)

This shows that the jurists of all the legal schools are in agreement over certain points: the *ṭawāf* starts and ends at the Black Stone; the Ka'bah should be on the left during *ṭawāf;* the *ṭawāf* should be made outside the Ka'bah; seven rounds should be made; kissing the Black Stone and the Rukn is *mustaḥabb.* However, they disagree with respect to the permissibility of break between successive rounds of the *ṭawāf.* According to the Mālikī, Imāmiyyah, and Ḥanbalī schools, continuity without break (*muwālāt*) is

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

obligatory. According to the Shāfi'ī and Ḥanafī schools, it is *sunnah* (i.e. *mustaḥabb*) to observe *muwālāt,* so if there is a substantial break between the rounds without any excuse, the *ṭawāf* is not invalidated. (*Fiqh al-Sunnah*) Similarly according to Abū Ḥanīfah, if one leaves off after the fourth round, he must complete his *ṭawāf* if he is in Makkah; but if he leaves Makkah, he must compensate it with a blood sacrifice. (*al-Tadhkirah*)

The schools disagree with respect to the necessity of the *ṭawāf* being undertaken on foot. The Ḥanafī, Ḥanbalī, and Mālikī schools consider it obligatory. According to the Shāfi'ī school and a group of Imāmiyyah scholars it is not obligatory and one may perform *ṭawāf* on a mount. Also, they disagree with respect to the two-*rak'ah* prayer (*rak'atān*) after *ṭawāf.* According to the Mālikī, Ḥanafī, and Imāmiyyah schools, the *rak'atān*--which is exactly like the daybreak prayer--are obligatory. The Shāfi'ī and Ḥanbalī schools regard it as *mustaḥabb.*

The Mustaḥabbāt of Ṭawāf:

The book *Fiqh al-Sunnah,* discussing the topic under the heading *"Sunan al-ṭawāf",* states, "Of things which are *sunnah* in *ṭawāf* are: kissing the Black Stone while starting the *ṭawāf,* accompanied with *tahlīl* and *takbīr,* to raise the two hands as in *ṣalāt,* to greet the Stone by drawing one's hands upon it (*istilām*), to kiss it soundlessly, to lay one's cheek on it if possible, otherwise to touch it only." Other *mustaḥabbāt* are: *iḍṭibā'* for men, *ramal,* and *istilām* of al-Rukn al-Yamānī.

According to *al-Lum'at al-Dimashqiyyah,* an Imāmiyyah work, of things *mustaḥabb* in *ṭawāf* are: to halt in front of the Black Stone, to make the prayer later offered with the hands raised, to recite the Sūrat al-Qadr, remember Allāh--subḥānahu wa ta'ālā, to walk peacefully, to draw one's hand on the Black Stone, to kiss it if possible otherwise to make a gesture, to draw one's hand on every corner of the Ka'bah every time one passes by or to kiss it, to draw one's hand on al-Mustajār--which is in front of the door and before

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

al-Rukn al-Yamānî--during the seventh round, and to keep oneself as near as possible to the Ka'bah. To speak during *ṭawāf,* apart from *dhikr* and recitation of the Qur'ān, is *makrūh*.

The Aḥkām of Ṭawāf:

According to the Imāmiyyah, if a woman undergoes *ḥayḍ* during *ṭawāf,* she discontinues *ṭawāf* and performs *sa'y,* if it happens after the fourth round. Then she completes the *ṭawāf* after attaining *ṭahārah,* and she is not required to repeat the *sa'y*. But if the *ḥadath* occurs before completing the fourth round, she waits until the day of 'Arafah. If by that time she regains *ṭahārah* and is in a position to complete the remaining acts, she does so. Otherwise her Ḥajj is converted to *Ḥajj al-'ifrād*.

As mentioned earlier, the Ḥanafîs permit *ṭawāf* for a woman in the state of *ḥayḍ,* and do not require *ṭahārah*. According to the Ḥanafî work *Fatḥ al-Qadîr,* one who leaves three or fewer rounds of the *ṭawāf al-ziyārah* should sacrifice a sheep; if four, he remains in the state of *iḥrām* as long as he does not complete the rounds of *ṭawāf*. But if he leaves off more than four rounds, it is as if he had not started the *ṭawāf* at all.

According to the Imāmiyyah, if after completing the rounds of *ṭawāf* one doubts whether he performed them correctly as required by the Sharî'ah or whether he performed the exact number of rounds, his doubt is of no consequence. His *ṭawāf* is considered valid and complete and there is nothing upon him. But if the doubt occurs before finishing the *ṭawāf,* he should consider whether he has performed at least seven rounds, such as when he doubts whether he made seven or eight rounds. If he is certain of having performed seven rounds, then his *ṭawāf* is considered valid. However, if he is not certain of having performed seven rounds--as in the case when he doubts whether he is in his sixth or seventh round, or in his fifth or sixth--in that case his *ṭawāf* is invalid and he should start afresh. It is preferable in such a case to complete the present *ṭawāf* before starting afresh.[8] This is true of a *wājib ṭawāf*. In case of a *mustaḥabb*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ṭawāf, the basis is the least number of rounds under seven one is certain of having performed, regardless of whether the doubt occurs during or after the last round.

For the non-Imāmiyyah schools, the rule is the least number of rounds one is certain of having performed--a rule which is similar to the one they apply to the doubt in the number of *rak'ah*'s of *ṣalāt.*

These are the *aḥkām,* the *mustaḥabbāt,* and the *wājibāt* of *ṭawāf,* which, like the *rukū'* and *sujūd* in *ṣalāt,* is always the same in all cases, whether as a part of the *'Umrah mufradah, 'Umrat al-tamattu', Ḥajj al-qirān,* or *Ḥajj al-'ifrād,* and regardless of whether it is *ṭawāf al-ziyārah, ṭawāf al-nisā', ṭawāf al-qudūm,* or *ṭawāf al-wadā'.*

As mentioned above, the *ṭawāf* is the next act after *iḥrām* in *'Umrat al-tamattu';* but in the Ḥajj its turn comes after the pilgrim has gone through the rituals of Minā (on the *'Īd* day) as shall be explained later.

NOTES:

1. According to the author of *al-Ḥadā'iq,* Ḥajj is invalid if *ṭawāf* is omitted intentionally, but not if omitted by mistake; although it is obligatory to perform it after omission.

2. According to Ibn Rushd, in his *Bidāyah,* the four Sunnī schools agree that the pilgrim of *Ḥajj al-tamattu'* and its related 'Umrah is required to perform *ṭawāf* twice; the one on *Ḥajj al-'ifrād* is required to perform *ṭawāf* once. They disagree regarding *Ḥajj al-qirān,* in which case according to al-Shāfi'ī, Mālik, and Aḥmad ibn Ḥanbal, one *ṭawāf* is required, but two according to Abū Ḥanīfah.

3. According to *al-Jawāhir, al-Masālik, al-'Urwat al-wuthqā* and other works of Imāmiyyah *fiqh,* it is not permissible for one in the state of *janābah* or *ḥayḍ* to enter or pass through al-Masjid al-Ḥarām or Masjid al-Rasūl (al-Madīnah), to say nothing of tarrying (*makth*) therein. However, it is permissible for one in the state of *janābah* or *ḥayḍ* to pass, without stopping or halting, through other mosques.

4. *'Ramal'* means walking fast, without running or making a rush. According to the Imāmiyyah work *al-Lum'ah, ramal* is *mustaḥabb* in the first three rounds of *ṭawāf*--a position which is exactly the same as that of the four Sunnī schools.

5. The author of *al-Jawāhir* makes this remark when comparing those who stipulate such kind of conditions for *ṭawāf* to others with a similar attitude with regard to the *niyyah* of *ṣalāt.*

6. Ḥajar Ismā'īl ibn Ibrāhīm (*'ā*) is the place where his house was built, and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

there he buried his mother.

7. By *'iḍṭibā''* is meant the style of wearing the *ridā'* whose hanging sides are drawn under the right armpit and then thrown over the left shoulder. In the book *al-Fiqh 'alā al-madhāhib al-'arba'ah,* the *istiḥbāb* of *iḍṭibtā'* is ascribed to the Ḥanafī, Shāfi'ī, and the Ḥanbalī, not to the Mālikī, schools.

8. This is in agreement with the *fatāwā* of al-Sayyid al-Ḥakīm and al-Sayyid al-Khū'ī.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

SA'Y AND TAQṢĪR

Sa'y:

All the schools agree that *sa'y* follows the *ṭawāf,* or its *rak'atayn* for those who consider them *wājib.* So also they agree that one who performs *sa'y* before *ṭawāf* should revert and perform his *ṭawāf* first and then the *sa'y.* I haven't come across any opinion holding that the *sa'y* must immediately follow the *ṭawāf* (*muwālāt*).[1]

The Mustaḥabbāt of Sa'y:

According to the book *Fiqh al-Sunnah,* it is *mustaḥabb* to ascend the hills of Ṣafā and Marwah, and, facing the Holy Ka'bah, to pray to God for some religious or secular matter. It is well known that the Prophet (ṣ), going out from Bāb al-Ṣafā until he could see the Ka'bah. Facing it, he thrice declared the Unity of God and magnified Him; then praising God he said:

لا إلٰهَ إلاَّ اللهُ وَحْدَهُ لاشَريكَ لَهُ، لَهُ ٱلْمُلْكُ، وَلَهُ ٱلْحَمْدُ، يُحْيِي وَيُميتُ، وَهُوَ عَلىٰ كُلِّ شَيْءٍ قَديرٌ، لاإلٰهَ إلاَّ اللهُ وَحْدَهُ،أَنْجَزَ وَعْدَهُ،وَنَصَرَ عَبْدَهُ، وَهَزَمَ ٱلْأَحْزابَ وَحْدَهُ.

There is no god except Allah. He is One, and has no partner. To Him belongs the Kingdom and the Praise. He gives life and makes to die and He is powerful

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

over every thing. There is no god except Allah. He is One. He has fulfilled His promise and granted victory to His slave, vanquishing all the parties (of the infidels). He is One.

The *mustaḥabbāt* of *sa'y* according to the Imāmiyyah book *al-Jawāhir* are the following: to draw one's hand on the Black Stone; to drink from the water of Zamzam and to sprinkle it on oneself; to leave [al-Masjid al-Ḥarām] through the door facing the Black Stone; to ascend the Ṣafā; to face al-Rukn al-'Irāqî; to praise God (*ḥamd*) and magnify Him (*takbîr*); to prolong one's stay al-Ṣafā; and, after seven *takbîr*s, to say three times:

لاإلٰهَ إلاَّ اللهُ وَحْدَهُ، لاشَرِيكَ لَهُ، لَهُ ٱلْمُلْكُ، وَلَهُ ٱلْحَمْدُ، يُحْيِي وَيُمِيتُ، وَهُوَحَيٌّ لايَمُوتُ، بِيَدِهِ ٱلْخَيْرُ، وَهُوَ عَلىٰ كُلِّ شَيْءٍ قَدِيرٌ.

After this he recites the prayer recommended by tradition (*al-du'ā' al-ma'thūr*).

As can be seen from the above, there is no divergence in this matter between the Shî'ah and the Sunnî schools, except for some difference of expressions used. Also, I have not come across any jurist who regards *ṭahārah* (from *ḥadath* and *khabath*) as obligatory for *sa'y;* most of the schools have expressly stated its being only *mustaḥabb* and the same is true (except for the Shāfi'î) of the drawing of the hand (*istilām*) on the Black Stone before leaving for *sa'y*.

Also, all the schools are explicit about the *istiḥbāb* of covering the distance between 'the Milayn' (an expression used by the Ḥanafîs and Mālikîs) or 'the intervening distance' (*wasaṭ al-masāfah,* an expression used by Shāfi'îs) or 'between the Minaret and the Alley of the Pharmacists' (as Imāmiyyah say) with a fast pace (*harwalah*).[2] Without doubt, an informed guide is necessary to enable the pilgrims to recognize the points designated as 'Milayn' or 'the Alley of the Pharmacists' (Zuqāq al-'Aṭṭārîn), or 'the Minaret'.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Way of Performing Sa'y:

Although there is agreement between the schools about the necessity of *sa'y,* they disagree about its being an essential part (*rukn*) of the rites of Ḥajj. According to the Imāmī, Shāfi'ī, and Mālikī schools, it is a *rukn;* according to Abū Ḥanīfah, it is not a *rukn,* though a *wājib.* Two different traditions are narrated from Aḥmad ibn Ḥanbal. (*al-Tadhkirah, Fiqh al-Sunnah*)

All are agreed on the number of *ashwāṭ* (sing. *shawṭ*) being seven, and that the performer of *sa'y* (i.e. *sā'ī*) should begin at Ṣafā going towards Marwah, and return again to Ṣafā,[3] covering this distance seven times. Thus the pilgrim makes four *ashwāṭ* going from Ṣafā to Marwah and three *ashwāṭ* while returning from Marwah to Ṣafā, beginning his first *shawṭ* from Ṣafā and finishing the seventh at Marwah.

The schools disagree as to the permissibility of making the *sa'y* on a mount in spite of the ability to walk, and all of them, with the exception of the Ḥanbalīs, permit it regardless of whether one can walk or not. The Ḥanbalīs say that it is permissible only for one who cannot walk.

I have not come across any opinion regarding continuity (*muwālāt*) between the *ashwāṭ* as *wājib,*[4] with the exception of the Ḥanbalīs, who, as also mentioned by the author of *al-Fiqh 'alā al-madhāhib al-'arba'ah,* consider it *wājib.* Also, it is said of Mālikīs that according to them if the gap between the *ashwāṭ* were to become inordinate, one should begin *sa'y* afresh; but if the gap were not prolonged, such as when one discontinues for selling or purchasing something, it is forgivable.

Note:

Al-Sayyid Muḥsin al-Ḥakīm, in his book on the rites of Ḥajj, says, "It is obligatory, while going and returning, to keep one's face turned towards one's destination.... Therefore, if someone were to turn his face away from it or were to walk backwards, or in a lateral

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

way, it is not correct. However, there is nothing wrong in turning the face this way and that way while continuing to face the destination in the course of movement." He means that it is obligatory that the body should face Marwah while going and should be toward Ṣafā while returning, and it is not permissible to make the approach with only a shoulder facing the direction of the destination--as may happen due to overcrowding of the pilgrims; also, while moving, the face in particular should remain in the right direction.

Al-Sayyid al-Khū'ī makes a similar statement in his work on the rites of Ḥajj; his words are: "It is *wājib* to face Marwah while going and to be towards Ṣafā while returning. Thus if one turns his back towards Marwah while going and towards Ṣafā while returning, it does not satisfy [*lam yujzi'*, i.e. the conditions for a correct *sa'y*]. Also, one should not turn towards his right or left, neither should he turn back either during the going (*dhahāb*) or during the return (*iyāb*).

The Aḥkām of Sa'y:

One who cannot perform the *sa'y*, either on foot or on a mount, may depute another to perform it on his/her behalf, and the Ḥajj would be correct. There is nothing wrong in looking to the right or the left or turning back to look during the coming and the going.

If someone makes more than seven *ashwāṭ* intentionally, his *sa'y* is invalid, but not if the lapse was unintentional. If one were to have doubts about the number of the *ashwāṭ* performed after finishing his *sa'y*, it is assumed to have been correct and nothing is required of him. The author of *al-Jawāhir* bases this *ḥukm* about the doubt after finishing on the principle of negation of *ḥaraj*, as well as on tradition.

However, if the doubt were to occur before finishing the *sa'y*, the author of *al-Jawāhir* says that there is no difference of opinion about, nor any objection against, the invalidity of the *sa'y* in case of any doubt about the number of the *ashwāṭ* performed, whether of having exceeded or fallen short of the required number. In both

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

cases the *sa'y* at hand is invalid. If one suspects one's having begun from Ṣafā, his *sa'y* is correct. But if he thinks that he might have started from some other place, it is invalid. Also if one suspects the number of *ashwāṭ* already performed, and does not know how many one has completed, one's *sa'y* is invalid.

If one has recorded the number of *ashwāṭ* performed, but doubts whether one started the first one from Ṣafā or Marwah, he should consider the number of his present *shawṭ* and the direction he is facing. If, for instance, the number is an even one (2, 4, or 6) and he is at Ṣafā or facing it, his *sa'y* is correct; because this shows that he had begun at Ṣafā. Similarly, if the number is odd (3, 5, or 7) and he is at Marwah or facing it. But if the case is reverse, that is in an even *shawṭ* he is facing Marwah or in an odd one facing towards Ṣafā, his *sa'y* is invalid and should be begun anew. (*al-Jawāhir*)

According to the other schools, the rule is to take the minimum one is certain of having performed, as in the case of *ṣalat.* (*Kifāyāt al-'akhyār*)

According to Abū Ḥanīfah the Ḥajj is not invalid even if the *sa'y* is omitted altogether, because it is not a *rukn* and can be made good by a sacrifice. (al-Shi'rānī's *al-Mîzān*)

Taqṣîr:

According to Aḥmad ibn Ḥanbal and Mālik, it is necessary to shave (*ḥalq*) or shorten the hair (*taqṣîr*) of the entire head. According to Abū Ḥanīfah the same of a one-fourth portion of the head is sufficient; according to al-Shāfi'ī cutting of three hairs suffices. (Karrārah's *al-Dîn wa al-Ḥajj*)

According to the Imāmiyyah, in *taqṣîr* one has the free choice of performing it by shortening either the hair of the head, the beard, or the mustaches or the fingernails.

All the five schools agree that *taqṣîr* is an obligatory rite, though not a *rukn.* According to al-Sayyid al-Ḥakîm, its relationship to Ḥajj is the same as that of the *salām* with respect to the *ṣalāt,* because the *muḥrim* is relieved after it of his state of *iḥrām* in the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

same way as one performing the *ṣalāt* is after the *salām*.

The *taqṣîr* or the *ḥalq*, whatever be the divergence of opinion about them, is to be performed once during *'Umrah mufradah* and twice during *Ḥajj al-tamattu'*. The details follow.

Taqṣîr in 'Umrah:

According to the Imāmiyyah, one performing *'Umrat al-tamattu'* has to perform *taqṣîr* after the *sa'y;* it is not permissible for him to perform *ḥalq*. After it everything forbidden to him in the state of *iḥrām* becomes permissible. But if he performs *ḥalq*, he should sacrifice a sheep. However, if he is on *'Umrah mufradah*, he may choose between *ḥalq* and *taqṣîr*, regardless of whether he brings along with him the *hady* or not.

If the *taqṣîr* is omitted intentionally, in case one had planned to perform *Ḥajj al-tamattu'* and had assumed *iḥrām* before performing the *taqṣîr*, his 'Umrah is invalid and it is then obligatory upon him to perform *Ḥajj al-'ifrād:* that is, the rites of Ḥajj followed by *'Umrah mufradah*, and it is better for him to do Ḥajj again the next year.[5]

According to non-Imāmiyyah schools, one has a choice between *taqṣîr* and *ḥalq* after finishing his *sa'y*. As to relief from the state of *iḥrām*, if one were performing a non-*tamattu' 'Umrah*, he obtains relief from *iḥrām* after *ḥalq* or *taqṣîr*, regardless of whether the *hady* accompanies him or not. But if one is performing *'Umrat al-tamattu'*, he is relieved of *iḥrām* if not accompanied by the *hady;* but if accompanied he remains in the state of *iḥrām*. (*al-Mughnî*)

Taqṣîr in Ḥajj:

The second type of *taqṣîr* is a part of the rites of all the various kinds of Ḥajj--*tamattu'*, *qirān*, or *ifrād*--to be performed by Ḥajj pilgrim after the *dhabḥ* or *naḥr* (animal sacrifice) in Minā. All the schools agree that here one has a choice between *taqṣîr* and *ḥalq*, *ḥalq* being more meritorious. They disagree, however, in regard to one with matted hair, whether he must shave his head or if, like

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

others, he also has a choice between *ḥalq* and *taqṣîr*. The Ḥanbalî, the Shāfi'î, and the Mālikî schools prescribe only *ḥalq* for him, but the Imāmiyyah and the Ḥanafî give him the same choice as others.

All the legal schools agree that women don't have to perform *ḥalq*, rather, they may perform only *taqṣîr*.

Abū Ḥanîfah and a group of Imāmiyyah legists say that one who is bald, completely or partially, as when only the frontal portion of the head is hairless, must nevertheless draw the razor over the [hairless portion of the] head. The rest only consider it *mustaḥabb* (*al-Ḥadā'iq, Fiqh al-Sunnah*)

According to the Imāmiyyah, the *ḥalq* or the *taqṣîr* is obligatory in Minā. Therefore, one who departs without *ḥalq* or *taqṣîr* should return to perform either of the two, regardless of whether his lapse was intentional or not, and despite the knowledge or out of ignorance. However, if it is difficult or infeasible for him to return, he may perform it wherever he can.

As to the rest, they say that it should be performed within the *ḥaram*. (*Fiqh al-Sunnah*)

All agree that sex is not permitted after the *ḥalq* or the *taqṣîr*. The Mālikîs include perfume as also being impermissible. The Imāmiyyah include with the above two hunting (*ṣayd,*), which is forbidden because of the respect for the sanctity of the *ḥaram*. Apart from these three things, the rest are permissible by the consensus of all the five schools. For the four Sunnî schools, everything, including sex, becomes permissible after the *ṭawāf al-ziyārah*. As for the Imāmiyyah, sex and perfume are not allowed until after the *ṭawāf al-nisā'*.

We conclude this section with the words of al-'Allāmah al-Ḥillî in his *Tadhkirah*:

> If [the pilgrim] departs from Minā without *ḥalq* or *taqṣîr*, he returns to perform it there--an obligation if within the reach of possibility. But if his returning is not possible, he performs *ḥalq* wherever he is, sending his hair to be carried to Minā to be buried there, which if he cannot there is nothing upon him.... The time for *ḥalq* is on the day of 'Îd, by consensus, for the Almighty has said [in Qur'ān]: ولا تَحْلِقُوا رُؤُوسَكُمْ حَتَّى يَبْلُغَ الْهَدْيُ مَحِلَّهُ, "And do not shave your

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

head until the sacrifice reaches its [specified] destination." (2:196); and the place of the sacrifice (*hady*) is Minā on the day of 'Īd. it has been recorded that the Prophet (ṣ) performed first *ramy*, then *naḥr*, and then *ḥalq*, at Minā on the 'Īd day.

We shall have occasion to refer to the *ḥukm* about the *ḥalq* performed prior to the *dhabḥ* while discussing later the rites of Minā.

THE WUQŪF IN 'ARAFĀT:

The pilgrim performing *'Umrah mufradah* or *Ḥajj al-tamattu'* first assumes *iḥrām*, then performs *ṭawāf*, offers the *rak'atayn*, then performs *sa'y*, then *taqṣīr*. This order is obligatory, and in it while the *iḥrām* precedes all the other steps, the *ṭawāf* precedes the *ṣalāt*, the *ṣalāt* is prior to the *sa'y*, and at the end is *taqṣīr*.[6]

The Second Rite of Ḥajj:

The rites of Ḥajj, as in the case of 'Umrah, start with *iḥrām*. However, the rite which is next to *iḥrām* in the case of Ḥajj, and is considered one of the *arkān* of Ḥajj by consensus, in the *wuqūf* (halt) in 'Arafāt, there being no difference whether one is on *Ḥajj al-'ifrād* or *Ḥajj al-tamattu'*, although it is permissible for those on *Ḥajj al-'ifrād* or *Ḥajj al-qirān* to enter Makkah to perform a *ṭawāf* after assuming *iḥrām* and before proceeding to 'Arafāt. This *ṭawāf* (called *ṭawāf al-qudūm*) resembles the *rak'atayn* called *taḥiyyat al-masjid*, recommended as a mark of respect to a mosque. Al-Sayyid al-Ḥakīm, in his book on the rites of Ḥajj, says, "It is permissible for one intending *Ḥajj al-qirān* or *al-'ifrād* to perform the *mustaḥabb ṭawāf* on entering Makkah and before proceeding to *wuqūf* [in 'Arafāt]." Ibn Ḥajar, in *Fatḥ al-Bārī bi Sharḥ al-Bukhārī*, writes: "All of them [the four legal schools] agree that there is no harm if one who has assumed *iḥrām* for *Ḥajj al-'ifrād* performs a *ṭawāf* of the (Holy) House," that is, before proceeding to 'Arafāt. One on *Ḥajj al-tamattu'*, as said, should perform the *ṭawāf* of *'Umrat al-tamattu'* instead of the *ṭawāf al-qudūm*.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Before the Halt in 'Arafāt:

There is consensus among the legal schools that it is *mustaḥabb* for the Ḥajj pilgrim to go out from Makkah in the state of *iḥrām* on the day of Tarwiyah (the 8th of Dhū al-Ḥijjah), passing towards Minā on his way to 'Arafāt.

According to the Imāmiyyah books *al-Tadhkirah* and *al-Jawāhir*, it is *mustaḥabb* for one intending to proceed towards 'Arafāt not to leave Makkah before offering the *ẓuhr* and *'aṣr* prayers. The four Sunnî schools say that it is *mustaḥabb* to offer them at Minā. (*al-Mughnî*)

In any case, it is permissible to proceed to 'Arafāt a day or two before that of Tarwiyah, in particular for the ill, the aged, women, and those who are clustrophobic. Also it is permissible to delay until the morning of the 9th so as to arrive at 'Arafāt by the time when the sun crosses the meridian (*zawāl*).

I have not come across any jurist who considers it *wājib* to spend at Minā the night before the day of *wuqūf* at 'Arafāt, or to perform some rite there. Al-'Allāmah al-Ḥillî, in his *Tadhkirah*, writes: "To spend the night of 'Arafah at Minā for resting is *mustaḥabb;* but it is not a rite, nor is there anything against one who doesn't do it." *Fatḥ al-Bārî* and *Fatḥ al-Qadîr* have something similar to say.

The word 'rest' (for *istirāḥah*) used by al-'Allāmah al-Ḥillî does not need to be explained, for travel in the past used to be exhausting; so he considered it *mustaḥabb* for the pilgrims to stay for the night at Minā so as to arrive looking fresh and in good spirits at 'Arafāt. But travel today is quite a pleasure. Therefore, if one spends the night of 'Arafah in Makkah, going to 'Arafāt the following morning, or after the *ẓuhr* prayer, passing through Minā on his way--as the pilgrims' practice is nowadays--that is sufficient and there is nothing wrong in that. The pilgrim will return to Minā later after the halt in 'Arafāt, for the *ramy al-Jamrah*--but to that we shall come later.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Period of the Halt in 'Arafāt:

There is consensus among the legal schools that the day of the halt in 'Arafāt is the 9th of Dhū al-Ḥijjah, but they disagree as to the hour of its beginning and end on that day. According to the Ḥanafī, the Shāfi'ī, and the Mālikī schools, it begins at midday on the 9th and lasts until the daybreak (*fajr*) on the tenth. According to the Ḥanbalī school, from the daybreak on the 9th until daybreak on the tenth. According to the Imāmiyyah, from midday on the 9th until sunset on the same day, for one who is free to plan; and in case of one in an exigency, until the following daybreak.

It is *mustaḥabb* to take a bath for the *wuqūf* in 'Arafāt, to be performed like the Friday bath. There is no rite to be performed in 'Arafāt except one's presence there: one may sleep or keep awake, sit, stand, walk around or ride a mount.

The Limits of 'Arafāt:

The limits of 'Arafāt are 'Arnah, Thawbah, and from Nimrah to Dhū al-Majāz, which are names of places around 'Arafāt. One may not make the halt in any of those places, neither in Taḥt al-'Arāk, because they are outside 'Arafāt. If one were to make the halt in any of those places, his Ḥajj is invalid by consensus of all the schools, with the exception of the Mālikī, according to which one may halt at 'Arnah though he will have to make a sacrifice.

The entire area of 'Arafāt is *mawqif* (permissible for the *wuqūf*) and one may make the halt at any spot within it by consensus of all schools. Al-'Imām al-Ṣādiq (*'ā*) relates that when the Prophet (*ṣ*) made the halt at 'Arafāt, the people crowded around him, rushing along on the hoof-prints of his camel. Whenever the camel moved, they moved along with it. (When he saw this), the Prophet said, "O people, the *mawqif* is not confined to where my camel stands, rather this entire 'Arafāt is *mawqif,*" and pointed to the plains of 'Arafāt. "If the *mawqif* were limited to where my camel stands, the place would be too little for the people." (*al-Tadhkirah*)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Conditions Applicable to the Halt:

Ṭahārah (ritual purity) is not a condition for the halt at 'Arafāt, by consensus of all the schools. According to the Imāmiyyah and the Mālikī schools, the halt at 'Arafāt must be made with prior intention (*niyyah*) and with the implied knowledge that the place where he is halting is indeed 'Arafāt. Thus if he were to pass on without knowing, or know without intending the *wuqūf,* it is not considered *wuqūf* as such.

According to the Shāfi'ī and the Mālikī schools, neither intent nor knowledge is a condition. All that is required is freedom from insanity, intoxication, and loss of consciousness. According to the Ḥanafīs, neither intent, nor knowledge, nor sanity is a condition; whosoever is present in 'Arafāt during the specific period, his Ḥajj is correct, intent or no intent, whether he knows the place or not, whether sane or insane. (*Fiqh al-Sunnah, al-Tadhkirah*)

Is it necessary to make the halt in 'Arafāt for the full specified period, or is it sufficient to be present there for some time, even if it is for a single moment?

According to the Imāmiyyah, there are two kinds of periods for the halt, depending on whether one arrives at a time of his own choice (*ikhtiyārī*) or the time is forced upon him by circumstances beyond his control (*iḍṭirārī*). In the case of the former, the period of halt for him is from midday on the ninth until sunset on the same day; in the case of the latter, the period lasts until the daybreak of the tenth. So one who can make the halt from noon until sunset for the entire period, it is *wājib* upon him; although halt not for the entire period but halt for a part of it is *rukn* [that is without it the Ḥajj would not be valid], the rest being merely a *wājib.* This means that if someone omits the halt his Ḥajj is invalid for not performing a *rukn* of it. But if one makes a short halt, he has omitted only a *wājib* which is not *rukn,* and so his Ḥajj does not lose its validity [on this account]. Moreover, if someone cannot make the halt for the entire *ikhtiyārī* period, due to some legitimate excuse, it is sufficient for him to make the halt for a part of the night of 'Īd.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

According to the Shāfi'î, the Mālikî, and the Ḥanbalî schools, mere presence even if for a single moment, is sufficient. (*al-Fiqh 'alā al-madhāhib al-'arba'ah, Manār al-sabîl*)

According to the Imāmiyyah, if one leaves 'Arafāt intentionally before the midday, he must return and there is nothing upon him if he does. But if he doesn't, he must sacrifice a camel, and if that is beyond his means fast for 18 days in succession. But if the lapse were by oversight and he does not discover it until the time is past, there is nothing upon him, on condition that he is present at the halt in al-Mash'ar al-Ḥarām in time. But if he remembers before the period expires, he must return as far as possible, and if he doesn't he must sacrifice a camel.

The Mālikîs say that one who makes the halt in 'Arafāt after the midday and leaves 'Arafāt before the sunset, he must repeat the Ḥajj the following year if he does not return to 'Arafāt before the daybreak (on the 9th). But all other legists say that his Ḥajj is complete. (Ibn Rushd's *Bidāyah*)

According to *al-Fiqh al-muṣawwar 'alā madhhab al-Shāfi'î,* "if one forgets and omits the halt, it is obligatory upon him to change his Ḥajj into 'Umrah, and then complete the remaining rites of Ḥajj after performing its rites; also he must repeat the Ḥajj in the immediate following year."

It is *mustaḥabb* for one performing the halt in 'Arafāt to: observe *ṭahārah;* face the Holy Ka'bah; and do a lot of *du'ā'* and *istighfār,* with due surrender, humility, and with a heart-felt presence before God.

THE WUQŪF IN MUZDALIFAH:

The halt in Muzdalifah is the next rite after the halt in 'Arafāt, by consensus of all the schools. They also agree that when the Ḥajj pilgrim turns to Muzdalifah (where al-Mash'ar al-Ḥarām is situated) after the halt in 'Arafāt, he is acting in accordance with the following Divine verse of the Qur'ān:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

...فَاِذَاۤاَفَضْتُمْ مِنْ عَرَفَاتٍ فَاذْكُرُواللهَ عِنْدَ الْمَشْعَرِ الْحَرَامِ وَاذْكُرُوْهُ كَمَاهَدٰ لَكُمْ...

When you pour forth from 'Arafāt, then remember Allah in al-Mash'ar al-Ḥarām, remembering Him in the way you have been shown. (2:198)

Also, there is agreement that it is *mustaḥabb* to delay the *maghrib* (sunset) prayer on the night preceding the 'Īd day until Muzdalifah is reached. The author of *al-Tadhkirah* writes that when sun sets in 'Arafāt, then one should go forth before the (*maghrib*) prayer towards al-Mash'ar al-Ḥarām and recite there the supplication prescribed by tradition. The author of *al-Mughnî* says, "It is *sunnah* (i.e. *mustaḥabb*) for one leaving 'Arafāt not to offer the *maghrib* prayer until Muzdalifah is reached, whereat the *maghrib* and the *'ishā'* prayers should be offered together. There is no difference regarding this, as Ibn al-Mundhir also points out when he says: "There is consensus among the 'ulamā', and no divergence of opinion, that it is *sunnah* for the Ḥajj pilgrim to offer the *maghrib* and the *'ishā'* prayers together; the basis for it is that the Prophet (ṣ) offered them together.' "[7]

All the legal schools, with the exception of the Ḥanafî, agree that if one were to offer the *maghrib* prayer before reaching Muzdalifah and not offer the two prayers together, his *ṣalāt* is nevertheless valid despite its being contrary to what is *mustaḥabb*. Abū Ḥanîfah does not consider it valid.

The Limits of Muzdalifah:

According to *al-Tadhkirah* and *al-Mughnî,* Muzdalifah has three names: Muzdalifah, Jam', and al-Mash'ar al-Ḥarām, its limits are from al-Ma'zamayn to al-Ḥiyāḍ, towards the valley of Muḥassir. The entire Muzdalifah is *mawqif,* like 'Arafāt, and it is legitimate to make the halt at any spot inside it. According to *al-Madārik,* it is a settled and definite matter among the Imāmiyyah legists that it is permissible, in case of overcrowding, to ascend the heights towards the hill, which is one of the limits of Muzdalifah.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Night at Muzdalifah:

Is it obligatory to spend the entire night of 'Īd at Muzdalifah, or is it sufficient to halt in al-Mash'ar al-Ḥarām even for a moment after the daybreak? (It is assumed, of course, that the meaning of *wuqūf* is mere presence: one may be walking around, sitting or riding a mount, as in the case of the halt at 'Arafāt).

According to the Ḥanafī, the Shāfi'ī, and the Ḥanbalī schools, it is obligatory to spend the entire night at Muzdalifah and the defaulter is required to make a sacrifice. (*al-Mughnī*) According to the Imāmiyyah and the Mālikī, it is not *wājib,* though meritorious. This is what Shihāb al-Dīn al-Baghdādī the Mālikī, in his *Irshād al-sālik,* and al-Ḥakīm and al-Khū'ī have confirmed. However, no one has considered it a *rukn.*

As to halting in al-Mash'ar al-Ḥarām after the daybreak, Ibn Rushd, in *al-Bidāyah wa al-nihāyah,* cites the consensus of the Sunnī fuqahā' to the effect that it is one of the *sunan* (sing. *sunnah*) of the Ḥajj, not one of its *furūḍ* (duties; sing. *farḍ*).

According to *al-Tadhkirah,* "It is obligatory to halt in al-Mash'ar al-Ḥarām after the daybreak, and if someone were to leave intentionally before the daybreak after halting there for the night, he must sacrifice a sheep. Abū Ḥanīfah also says that it is obligatory to halt after the daybreak. The rest of the schools permit departure after midnight." Therefore, with the exception of the Imāmiyyah and the Ḥanafī schools, others permit departure from Muzdalifah before the daybreak.

The Imāmiyyah say that the time of halt in al-Mash'ar al-Ḥarām is of two kinds: the first (*ikhtiyārī*) is for one who has no reason for delaying, and that is the entire period between the daybreak and the sunrise on the day of 'Īd; whoever leaves advertently and knowingly from the Mash'ar before the daybreak and after being there for the whole or part of the night, his Ḥajj is not invalidated if he had halted at 'Arafāt, although he must sacrifice a sheep. If he had left the Mash'ar on account of ignorance, there is nothing upon him, as made explicit in the above quotation. The second (*iḍṭirārī*) is for women

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and those who have an excuse for not halting between the daybreak and the sunrise; their time extends to midday on the day of 'Īd. The author of *al-Jawāhir* says that there is both textual evidence (from ḥadīth) as well as consensus to support the above prescription, and the *fatāwā* of al-Sayyid al-Ḥakīm and al-Sayyid al-Khū'ī are also in accordance with it. The latter has not stated midday as the *iḍṭirārī* time limit, but says that it is sufficient to make the halt after sunrise.

The Imāmiyyah also say that the *wuqūf* in the two specified periods of time is a *rukn* of the Ḥajj. Therefore, if someone does not perform it altogether either in the *ikhtiyārī* period for the night or in the *iḍṭirārī* period, his Ḥajj is invalid if he hadn't spent the night there; but not if the default was on account of a legitimate excuse, on condition that he had performed the halt at 'Arafāt. So one who fails to make the halts at 'Arafāt and the Mash'ar, neither in the *ikhtiyārī* nor in the *iḍṭirārī* period, his Ḥajj is invalid even if the failure was on account of a legitimate reason. It is obligatory upon him to perform Ḥajj the year after if the Ḥajj intended was a *wājib* one; and if it was a *mustaḥabb* Ḥajj, it is *mustaḥabb* for him to perform it the next year. (*al-Jawāhir*)

The halt in al-Mash'ar al-Ḥarām is held in greater importance by the Imāmiyyah than the one in 'Arafāt; that is why they say that one who loses the chance to be present at the halt in 'Arafāt but participates in the halt at the Mash'ar before the sunrise, his Ḥajj is complete. (*al-Tadhkirah*)

Mustaḥabbāt of the Mash'ar:

According to the Imāmiyyah it is *mustaḥabb* for one performing Ḥajj for the first time to put his feet on the ground of the Mash'ar. (*al-Jawāhir*)

According to the Imāmiyyah, the Shāfi'ī and the Mālikī schools, it is *mustaḥabb* while leaving for Minā to gather seventy pebbles, for the *ramy al-jamarāt,* at Muzdalifah. The reason for this, according to the author of *al-Tadhkirah,* is that when the Ḥajj pilgrim arrives in Minā he should not be detained by anything from the rite of the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ramy. Ibn Ḥanbal is narrated to have said that the pebbles may be gathered from any place; and there is no disagreement that it suffices to gather them from whatever place one wishes.

The maintenance of *ṭahārah*, the pronouncing of *tahlîl, takbîr,* and *du'ā'* (the prescribed one or something else) is also *mustaḥabb*.

AT MINĀ:

All the schools are in agreement that the rites after the halt at al-Mash'ar al-Ḥarām are those of Minā, and that departure from Muzdalifah is after the sunrise, and one who leaves before sunrise, passing beyond its limits, according to al-Khū'î, must sacrifice a sheep as *kaffārah*.

At Minā one performs several rites which continue from the Day of Sacrifice (*yawm al-naḥr*), or the day of 'Īd, until the morning of the thirteenth or the night of the twelfth. The *wājibāt* of Ḥajj are completed in Minā. The three days following the day of 'Īd (the 11th, 12th, and the 13th) are called *"ayyām al-tashrîq."*[8]

Three rites are obligatory at Minā on the day of 'Īd: (1) *ramy* of the Jamrat al-'Aqabah; (2) *al-dhabḥ* (slaughtering of the sacrificial animal); (3) *ḥalq* or *taqṣîr*. Agreeing that the Prophet (ṣ) performed first the *ramy,* then the *naḥr* (or *dhabḥ*) and then the *taqṣîr,* the schools disagree whether this order is obligatory and if it is impermissible to change that order, or if the order is only *mustaḥabb* and may be altered.

According to al-Shāfi'î and Aḥmad ibn Ḥanbal, there is nothing upon one who changes the order. Mālik says that if someone performs *ḥalq* before the *naḥr* or the *ramy,* he must make a sacrifice; and if he was performing *Ḥajj al-qirān* then two sacrifices. (Ibn Rushd's *al-Bidāyah*). According to the Imāmiyyah, it is a sin to change the order knowingly and intentionally, although repetition is not required. The author of *al-Jawāhir* says, "I have not found any difference of opinion on this point", and *al-Madārik* states that the jurists are definite on this point.

Now we shall deal with each one of these rites under a separate

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

heading.

Jamrat al-'Aqabah:

The Number of Jimār:

Ramy al-jimār, or the symbolic throwing of pebbles performed in Minā, is obligatory upon all pilgrims of the Ḥajj, whether *tamattu',* *qirān* or *ifrād.* This rite is performed ten times during the four days. The first *ramy,* in which only one point called Jamrat al-'Aqabah is stoned, is performed on the day of 'Īd. On the second day, i.e. 11th of Dhū al-Ḥijjah, the three *jimār* are stoned, and again every three on the third and the fourth day. This applies to the Ḥajj pilgrim who spends the night of the twelfth in Minā; otherwise there is no *ramy* for him on that day.

Jamrah of the Tenth of Dhū al-Ḥijjah:

The legal schools agree that it suffices to perform the *ramy* of the Jamrat al-'Aqabah any time from sunrise until sunset on the tenth of Dhū al-Ḥijjah, but disagree as to its performance before or after that period. According to the Mālikī, the Ḥanafī, the Ḥanbalī and the Imāmī schools, it is not permissible to perform the *ramy* of the Jamrat al-'Aqabah before the daybreak, and if performed without an excuse, must be repeated. They permit it for an excuse like sickness, weakness, or insecurity (fear). According to the Shāfi'ī school, performing the rite earlier is unobjectionable, for the specified period is *mustaḥabb* not *wājib* (*al-Tadhkirah,* Ibn Rushd's *Bidāyah*). However, if delayed until after sunset on the day of 'Īd, according to Mālik, the defaulter must make a sacrifice if he performs the rite during the night or the next day. According to the Shāfi'īs, there is nothing upon him if he performs the rite of *ramy* in the night or the next day. (Ibn Rushd's *Bidāyah*)

According to the Imāmiyyah, the time of this *ramy* extends from sunrise until sunset on that day. If forgotten, the rite must be

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

performed the next day. If again forgotten, on the 12th, and if one fails again, it can be performed on the 13th. But if one forgets until one has left Makkah, he may carry it out the following year, either himself or through a deputy who carries it out on his behalf.[9]

The Conditions of Ramy:

There are certain conditions for the validity of *ramy al-jamarāt*:

1. *Niyyah:* stated by the Imāmiyyah explicitly.

2. That each *ramy* must be carried out with seven pebbles; there is agreement on this point.

3. The pebbles must be thrown one at a time, not more; again there is consensus on this point.

4. The pebbles must strike the known target; there is also consensus on this point.

5. The pebbles must reach their target through being thrown (*ramy*); thus if they are tossed in some other manner, it does not suffice according to the Imāmī and the Shāfi'ī schools, and is not permissible according to the Ḥanbalī and the Ḥanafī schools. (*al-Mughnî*)

6. The pebbles must be of stone, not of other material, like salt, iron, copper, wood or porcelain, etc.; this is accepted unanimously by all the schools except that of Abū Ḥanīfah, who says that it is all right if pebbles are made of some earthen material, such as porcelain, clay or stone. (*al-Mughnî*)

7. The pebbles must be 'new', that is, not used for *ramy* before; the Ḥanbalîs state this condition expressly.

Ṭahārah is not a condition in *ramy,* though desirable.

The Imāmiyyah say that it is *mustaḥabb* that the pebbles be about the size of a finger tip and rough, neither black, nor white, nor red. The other schools say that their size must be about that of the seed of a broad bean (*bāqilā'*).

The Imāmiyyah also say that it is *mustaḥabb* for the Ḥajj pilgrim to perform all the rites facing the *Qiblah,* with the exception of the *ramy* of the Jamrat al-'Aqabah on the day of 'Īd, which is *mustaḥabb*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

to perform with one's back towards the *Qiblah,* since the Prophet (*ṣ*) had performed this rite in that way. The other schools say that facing the *Qiblah* is *mustaḥabb* even in this rite.

Also, it is *mustaḥabb* to perform the *ramy* on foot (though riding a mount is permissible), not to be farther from the Jamrah than 10 cubits, to perform it with the right hand, to recite the prayers prescribed by tradition and other prayers. Following is one of the prayers prescribed by tradition:

اللّهُمَّ آجْعَلْهُ حَجّاً مَبْرُوراً، وَذَنْباً مَغْفُوراً..اللّهُمَّ إِنَّ هٰذِهِ حَصَياتي ، فأَحْصِهِنَّ لي، وَآرْفَعْهُنَّ في عَمَلي .. اللهُ أَكْبَرُ. اللّهُمَّ آدْحَرِ الشَّيْطانَ عَنّي .

O God, make my Ḥajj a blessing, a forgiving of my sins.... O God, these pebbles of mine, reckon them and place them high in my actions.... God is Great. O God, repel Satan from me.

Doubt:

What if one doubts whether the pebble thrown has struck its target or not? It is assumed not to have hit. If one doubts the number thrown, he may count from the least number of which he is sure he has thrown.

Jamrat al-'Aqabah is the first rite performed by the Ḥajj pilgrim in Minā on the day of 'Īd, which is followed by the *dhabḥ,* then *ḥalq* or *taqṣīr.* After that he proceds to Makkah for *ṭawāf* the same day. On this day, there is no other rite of *ramy* for him. Now we shall proceed to discuss the sacrifice (*hady*).

Hady:

The second obligatory rite in Minā is the *hady* or animal sacrifice. The issues related to it are: (1) its kinds, *wājib* and *mustaḥabb,* and the various kinds of *wājib* sacrifice; (2) regarding those for whom the *hady* is *wājib;* (3) the requirements of the *hady;* (4) its time and place; (5) the legal rules about its flesh; (6) the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

substitute duty of one who can neither find the *hady* nor possess the means to purchase one. The details are as follow:

The Kinds of Hady:

The *hady* is of two kinds; *wājib* and *mustaḥabb.* The *mustaḥabb* sacrifice is the one mentioned in the following verse of the Qur'ān: فَصَلِّ لِرَبِّكَ وَانْحَرْ ❋ 'So pray unto the Lord and sacrifice' (108:2), which is interpreted as a commandment to the Prophet (ṣ) to sacrifice after the 'Īd day prayer. A tradition relates that the Prophet (ṣ) sacrificed two rams, one white and the other black.

According to the Mālikīs and the Ḥanafīs, the sacrifice is obligatory for every family once every year; it is, they say, similar to the *zakāt al-fiṭr.* The Imāmiyyah and the Shāfi'ī schools say that the *mustaḥabb* sacrifice can be carried out in Minā on any of the four days, the day of 'Īd and the three days following it (called *ayyām al-tashrîq*). But at places other than Minā the sacrifice may be carried out only during three days: the day of 'Īd, and the 11th and the 12th. According to the Ḥanbalīs, the Mālikīs, and the Ḥanafīs, its time is three days whether in Minā or elsewhere. In any case, the best time for the sacrifice is after sunrise on the day of 'Īd during a period sufficient for holding the 'Īd prayer and delivering its two *khuṭbah*s (sermons).

The obligatory sacrifices, in accordance with the Qur'ānic text, are four: (1) The sacrifice related to *Ḥajj al-tamattu'* in accordance with the verse:

...فَإِذَا أَمِنْتُمْ فَمَنْ تَمَتَّعَ بِالْعُمْرَةِ إِلَى الْحَجِّ فَمَا اسْتَيْسَرَ مِنَ الْهَدْيِ...

...If in peacetime anyone of you combines the 'Umrah with the Ḥajj, he must offer such sacrifice as he can... (2:196)

(2) The sacrifice related to *ḥalq,* which is a *wājib* open to choice, in accordance with the verse:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

...فَمَنْ كانَ مِنْكُمْ مَريضاً اَوْبِه اَذىً مِنْ رَأْسِه فَفِدْيَةٌ مِنْ صِيامٍ اَوْصَدَقَةٍ اَوْ نُسُكٍ..

But if any of you is ill or suffers from an ailment of the head, he must offer a fidyah either by fasting or by alms-giving or by offering a sacrifice. (2:196)

(3) The sacrifice related to the penalty (*jazā'*) for hunting, in accordance with the verse:

..وَمَنْ قَتَلَهُ مِنْكُمْ مُتَعَمِّداً فَجَزاءٌ مِثْلُ ما قَتَلَ مِنَ النَّعَمِ يَحْكُمُ بِهِ ذَوا عَدْلٍ مِنْكُمْ هَدْياً بالِغَ الْكَعْبَةِ...

He that kills game by design, shall present, as an offering near the Ka'bah, a domestic beast equivalent to that which he has killed, to be determined by two honest men among you;....(5:95)

(4) The sacrifice related to *"iḥṣār"* [some hindrance which keeps one from completing the rites of Ḥajj, such as illness or interruption due to an enemy], in accordance with the following verse (*al-Tadhkirah*):

...فَاِنْ اُحْصِرْتُمْ فَمَا اسْتَيْسَرَ مِنَ الْهَدْيِ...

If you cannot; offer such sacrifice as you can afford... (2:196)

Besides the above four, there are also the obligatory sacrifices related to any of the following: *'ahd* (pledge), *nadhr* (vow), *yamîn* (oath). In what follows we shall discuss *hady* as one of the rites of Ḥajj.

For Whom is Hady Wājib?

The *hady* is not obligatory, by consensus of all the schools, upon one performing *'Umrah mufradah*, nor on one performing *Ḥajj al-'ifrād*. Similarly, there is consensus regarding its being obligatory upon the non-Makkan pilgrim on *Ḥajj al-tamattu'*. The four Sunnî schools add that it is also obligatory upon the pilgrim on *Ḥajj*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

al-qirān.

According to the Imāmiyyah, it is not obligatory on one on *Ḥajj al-qirān* except with *nadhr* (vow), or when he brings along with him the sacrificial animal at the time of assuming *iḥrām.*

There is disagreement regarding whether the Makkan performing *Ḥajj al-tamattu'* must offer a sacrifice or not. According to the four Sunnī schools, the *hady* is not *wājib* upon him. *Al-Mughnī* states that "there is no disagreement among scholars that the sacrifice of *tamattu'* is not *wājib* on those living in the neighbourhood of al-Masjid al-Ḥarām." The Imāmiyyah say that if the Makkan performs *Ḥajj al-tamattu'* the *hady* is obligatory upon him.[10] This is stated by *al-Jawāhir* where it says, "If the Makkan were to perform *Ḥajj al-tamattu',* the *hady* is *wājib* upon him according to the widely held (*mashhūr*) opinion [of the Imāmī fuqahā']."

The legal schools, however, agree that the obligatory *hady* is not one of the *arkān* of Ḥajj.

The Requirements of the Hady:

The *hady* must meet the following requirements:

1. It must belong to cattle, such as camel, cow, sheep, or goat, by consensus of all the five schools. As stated by *al-Mughnī,* according to the Ḥanafī, the Mālikī, the Shāfi'ī and the Ḥanbalī schools: if a sheep, it must be at least six months; if a goat, of one year; if a cow, of two years; and if a camel of five years. This agrees with the Imāmiyyah view as stated by *al-Jawāhir,* with the difference that the camel must have entered its sixth and the goat its second year.

Al-Sayyid al-Ḥakīm and al-Sayyid al-Khū'ī have said that it suffices if the camel has entered its sixth and the cow or the goat its third. As to the sheep, they add, to be cautious, the sheep must have entered its second.

2. The sacrificial animal must be free of any defect, and, by consensus, must not be one-eyed, lame, sick or old and decrepit. There is disagreement, however, regarding its acceptability in case of castration, being without horns or with broken ones, missing or

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

mutilated ears or tail. Such are not acceptable according to al-Sayyid al-Ḥakîm and al-Sayyid al-Khū'î, but acceptable according to the author of *al-Mughnî*.

Al-'Allāmah al-Ḥillî, in *al-Tadhkirah,* says that female camel and cow and male sheep and goats are to be preferred, although the permissibility of the converse in the two cases is not disputed by any school. The author of *al-Mughnî* says that the sex of the sacrificial animal is irrelevant.

The Time and the Place of the Sacrifice:

As to the occasion of the sacrifice, it is, according to the Mālikî, the Ḥanafî, and the Ḥanbalî schools, the day of 'Īd and the two days following it. Abū Ḥanîfah adds that this time is specific for the sacrificial rite of *Ḥajj al-qirān* and *tamattu';* but for the others he sets no such time limit. The Mālikîs do not recognize any difference between various kinds of *hady,* as mentioned by *al-Fiqh 'alā al-madhāhib al-'arba'ah.*

The Ḥanbalîs say that if the sacrifice is made before its time, it must be made again. If after its time: in case of *mustaḥabb* the lapse of time cancels it; and in case of *wājib* it must be fulfilled. According to the Ḥanafîs, slaughtering the sacrificial animal before the three days of 'Īd is not sufficient, but is if done later though a *kaffārah* is required for the delay. According to the Shāfi'îs, the time of the obligatory sacrifice for *Ḥajj al-tamattu'* starts with *iḥrām;* therefore, performing it earlier [than the day of 'Īd] is permissible, and there is no time limit for delaying, although it is best performed on the 'Īd day. (*al-Fiqh 'alā al-madhāhib al-'arba'ah*)

The Imāmiyyah regard *niyyah* as being obligatory in slaughtering (*dhabḥ* or *naḥr*), and say that its time is on the day of 'Īd; although it is acceptable until the third day following it, or even until the end of Dhū al-Ḥijjah, although the delay is a sin. The author of *al-Jawāhir* reports that there is no divergence [among Imāmî legists] on this point, even if the delay is without a [legitimate] excuse. It is not permissible, according to the Imāmiyyah, to make the sacrifice

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

before the 10th of Dhū al-Ḥijjah.

As to the place, it is the *Ḥaram,* according to the Ḥanbalī, the Shāfi'ī, and the Ḥanafī schools, which includes Minā[11] and other places, as mentioned above while discussing *iḥrām* and the limits of the *ḥarams* of Makkah and al-Madīnah.

According to the Imāmiyyah, there are three conditions for slaughtering the *hady* in Minā: (1) that the *hady* must have been brought in the *iḥrām* assumed for Ḥajj, not in the *iḥrām* for 'Umrah; (2) the pilgrim should have halted for some time of the night with the *hady* in 'Arafāt; (3) he should have made the resolve to make the sacrifice on the day of 'Īd or the following day. Also the Imāmiyyah say that the pilgrim of *Ḥajj al-tamattu'* may make the sacrifice nowehere but in Minā, even if his Ḥajj is supererogatory. But the *hady* brought along in the *iḥrām* of 'Umrah is to be slaughtered in Makkah. (*al-Tadhkirah*)

In any case, for all the schools offering of the sacrifice is legitimate and preferable at Minā. Ibn Rushd says that the consensus of the 'ulamā' is in favour of slaughtering the *hady* at Minā. Secondly, the difference between the Imāmiyyah and the other schools is that the Imāmiyyah specify Minā, while others allow an open choice between Minā and other places inside the *ḥaram* of Makkah.

The Flesh of the Hady:

The Ḥanbalīs and the Shāfi'īs say that the flesh of the *ḥady* whose slaughtering inside the *ḥaram* is *wājib* is to be distributed among the poor inside it. The Ḥanafīs and the Mālikīs say: it is permissible to distribute it inside or outside the *ḥaram.* The Shāfi'īs say: one may not (oneself) eat the flesh of a *wājib hady,* but that of a voluntary or *mustaḥabb hady* is permissible. The Mālikīs say: with the exception of the sacrifice made as *fidyah* for hurting someone (*adhā*), hunting, or sacrifice vowed (*nadhr*) specifically for the poor, and the voluntary *hady* which dies before reaching its destination, the flesh of the *hady* may be eaten in all cases. (*al-Mughnī, al-Fiqh*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

'alā al-madhāhib al-'arba'ah, Fiqh al-Sunnah)

The Imāmiyyah say: a third of the flesh should be given to the poor believers; another third to other believers, even the well off; and the remaining third may be consumed by the pilgrim. (*al-Jawāhir*, al-Sayyid al-Ḥakīm and al-Sayyid al-Khū'ī in their books on the *manāsik* of Ḥajj).

The Substitute Duty (al-Badal):

All the legal schools agree that when the Ḥajj pilgrim cannot find the *hady* nor possesses means to acquire one, its substitute is to keep fasts for ten days, three of which for successive days, are to be kept during the Ḥajj days and the remaining seven on returning home. This is in accordance with the Divine verse:[12]

...فَمَنْ لَمْ يَجِدْ فَصِيامُ ثَلٰثَةِ اَيّامٍ فِى الْحَجِّ وَسَبْعَةٍ اِذارَجَعْتُمْ تِلْكَ عَشَرَةٌ كامِلَةٌ ...

...But if he lacks the means let him fast three days during the pilgrimage and seven when he has returned; that is ten days in all. (2:196)

The criterion of capacity to offer the *hady* is ability to arrange one in the place, and when it can't be done the duty of *hady* is changed into that of the fasts. This holds even if the pilgrim should be a man of means in his own homeland. This is because the obligation is specific to the occasion and so is the capacity to fulfil it. A similar case is that of availability of water for *ṭahārah*.

Dhabḥ by a Wakīl:

It is preferable that the Ḥajj pilgrim should slaughter the *hady* himself, though it is permissible to ask someone else to do it, because it is one of the rites in which delegation is possible. The one deputed (*wakīl*) makes the *niyyah* of slaughtering on behalf of the one who deputes, and it is better that both of them should make the *niyyah* together. According to the Imāmiyyah it is *mustaḥabb* for the pilgrim

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

to put his hand on that of him who slaughters or at least be present at the time of slaughtering.

Shaykh 'Abd Allāh al-Māmqānî, in *Manāhij al-yaqîn,* writes: "If the *wakîl* makes an error in mentioning the name of the one who appoints him, or forgets his name altogether, there is no harm in it." There is a good point here, for it is related from one of the Imams (*'ā*) that in a marriage ceremony the *wakîl* made a mistake while mentioning the bride's name or mentioned some other name. The Imam (*'ā*) said, "It doesn't matter."

Qāni' and Mu'tarr:

In regard to the verse 36 of the *Sūrat al-Ḥajj:*

...فَكُلُوا مِنْهَا وَأَطْعِمُوا الْقَانِعَ وَالْمُعْتَرَّ...

...and eat of their flesh and feed with it the qāni' and the mu'tarr....(22:36)

al-Imām al-Ṣādiq (*'ā*) said, "The *qāni'* is the (poor) man who is content with what you give him and does not show his displeasure and does not frown or twitch his mouth in irritation. The *mu'tarr* is one who comes to you for charity and presents himself."

The Substitute for Camel Sacrifice:

If the sacrifice of a camel is obligatory upon someone, through *kaffārah* or *nadhr,* and he cannot arrange it, he must sacrifice seven sheep one after another, and if that is not possible fast for 18 days. (*al-Tadhkirah*)

Taqlîd and Ish'ār:

'Taqlîd', in this context, means putting a shoe or the like in the neck of the sacrificial animal. *'Ish'ār'* means making an incision in the right side of the hump of a camel or cow and letting it be stained

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

by blood. The Sunnî jurists regard *ish'ār* and *taqlîd* as *mustaḥabb* except Abū Ḥanîfah, who says that the *taqlîd* of the sheep and the camel is *sunnah*, but *ish'ār* is by no means permissible due to the pain it causes to the animal. (*al-Mughnî*) We all favour kind treatment of the animals, and at the same time we are all Muslims. Islam has permitted the slaughtering of animals and even made it obligatory in case of *hady*, as Abū Ḥanîfah also concedes by his act and verdict. In this light, *ish'ār* is more entitled to permissibility.

Charity to Non-Muslims:

Al-Sayyid al-Khū'î, in his book on the rites of Ḥajj, says, "The Ḥajj pilgrim giving something in charity (*ṣadaqah*) or gifting the meat of the slaughtered animal, may give the latter to anybody he wishes, even a non-*mu'min* or a non-Muslim.

In general the Imāmiyyah permit the giving of non-*wājib ṣadaqāt* or making of endowment (*waqf*) in favour of a Muslim or a non-Muslim. Sayyid Abū al-Ḥasan al-'Iṣfahānî, in his *Wasîlat al-najāt*, says: "In giving of *mustaḥabb ṣadaqah*, poverty or possession of *îmān* or *islām* is not a condition for the recipient. He may be a well-to-do man, a non-'Imāmî, a Dhimmî, and a total stranger (not a blood relation of the giver of charity)." Al-Sayyid al-Kāẓim, in the appendices of *al-'Urwat al-wuthqā*, permits giving of *ṣadaqah* even to a warring infidel (*kāfir ḥarbî*).

The Burning or Burying of Slaughtered Animals:

It is a custom among Ḥajj pilgrims nowadays that they offer money to whoever would accept the *hady*,[13] which he on receiving either buries or throws away because the number of the slaughtered animals is great and nobody around to make use of their meat. Throughout whatever I have read I did not come across anyone who should raise a question about the permissibility or otherwise of this practice. In 1949 a group of Egyptian pilgrims asked the al-'Azhar for a *fatwā*, asking the permission for giving the price of the *hady* as

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

help to the needy. In reply, al-Shaykh Maḥmūd Shaltūt, in Vol. 1, No.4 of the journal *Risālat al-'Islām* which was issued by the Dār al-Taqrīb at Cairo, considered it obligatory to make the slaughter even if it should require burning or burial of the bodies of the slaughtered beasts. I contested his opinion in a long article which appeared in two successive numbers of the above-mentioned journal in the year 1950. When the Dār al-'Ilm li al-Malāyîn, Beirut, wanted to bring out a new edition of my book *al-'Islām ma'a al-ḥayāt,* I included it also with a title *"Hal ta'abbadanā al-Shar' bi al-hady fî ḥāl yutrak fîhi li-al-fasād?"* ("Does the Sharî'ah command us to make the sacrifice in order to rot?"). There, I have drawn the conclusion that the *hady* is obligatory only when one can find someone to eat it or where it is possible to preserve the meat through drying or canning. But when the sacrifice is solely carried out for destruction through burning or burying, its permissibility in the present conditions seems doubtful and questionable. Anyone who wishes to see the details of my argument may refer to the second edition of *al-'Islām ma'a al-ḥayāt.*

Later I came across a tradition in *al-Wasā'il* which confirmed my position, and which the author had placed in the Book of *uḍḥiyyah* (sacrifice) in a section entitled *"Bāb ta'akkud istiḥbāb al-'uḍḥiyyah".* The tradition reads:

عَنِ الصّادِقِ عَنْ آبائِه عَنْ رَسُولِ اللهِ (ص) أَنَّهُ قالَ: ﴿إِنَّما جُعِلَ هذَا الْأُضْحىٰ لِتَشْبَعَ مَساكِينُكُمْ مِنَ اللَّحْمِ فَأَطْعِمُوهُمْ.﴾

From al-Ṣādiq (*ā*), from his ancestors, from the Prophet (*ṣ*), that he said: "This sacrifice has been instituted to feed the poor among you with meat. So feed them."

Although this tradition is related particularly to voluntary sacrifice, it also throws light on the purpose behind *al-hady al-wājib.*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Between Makkah and Minā:

As mentioned, the first rite in Minā on the 10th is *ramy* of Jamrat al-'Aqabah, after that the offering of *hady,* and then thirdly, *ḥalq* or *taqṣîr.* We have already discussed the third under the head "Ḥalq or Taqṣîr." We have referred to the rule about doing the *ḥalq* or *taqṣîr* before the *dhabḥ* when discussing the order of the rites under the head "In Minā", where the reader will find its details.

When the pilgrim completes his rites in Minā on the day of 'Īd (such as *ramy* and *dhabḥ*), he returns to Makkah to perform the *ṭawaf al-ziyārah;* then he offers its related *rak'atayn* and performs the *sa'y* between Ṣafā and Marwah. According to the four Sunnī schools, he returns to Minā after that *ṭawāf* and everything becomes permissible to him thereupon, even sex. According to the Imāmiyyah, he has to perform another *ṭawāf,* the *ṭawāf al-nisā',* and offer its related *rak'atayn.* Sex does not become permissible to the pilgrim, from the Imāmiyyah viewpoint, without this *ṭawāf,* which we have already discussed in detail above.

The Night at Minā:

After completing the *ṭawāf,* the pilgrim must return to Minā during what are called Layālî al-Tashrîq, which are the nights of the 11th, 12th, and 13th--with the exception of him who being in a hurry departs after midday and before sunset on the 12th; there being nothing against him who leaves under these circumstances on the third day, in accordance with the verse:

...فَمَنْ تَعَجَّلَ فِى يَوْمَيْنِ فَلَا اِثْمَ عَلَيْهِ...

...He that departs on the second day incurs no sin.... (2:203)

According to Abū Ḥanîfah, to stay overnight in Minā is *sunnah* not *wājib.* Those who consider it *wājib* agree that it is a rite and not a *rukn.* They disagree, however, regarding the necessity of *kaffārah*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

upon the defaulter. According to Aḥmad ibn Ḥanbal, there is none; according to al-Shāfi'ī, a *mudd* (*al-Tadhkirah, al-Mughnî, Fiqh al-Sunnah*); and according to Mālikîs, a sacrifice (al-Zarqānî's *sharḥ* of Mālik's *Muwaṭṭa'*). According to the Imāmiyyah, "If one spends the night at a place other than Minā, there is nothing upon him if he spends it at Makkah praying all the night until morning; but if the night is spent there without prayer, or somewhere else, in prayer or otherwise, he must sacrifice a sheep, even if the default was on account of oversight or ignorance". (al-Sayyid al-Ḥakîm's *Manāhij al-nāsikîn*).

There is no obligatory rite for the nights in Minā, though spending them in prayer and worship in *mustaḥabb.*

Ramy during the Ayyām al-Tashrîq:

The schools agree that there is no rite except *ramy* of the three *jimār* everyday during the three days called *ayyām al-tashrîq,* regardless of whether the pilgrim is performing *Ḥajj al-tamattu', al-'ifrād* or *al-qirān.* As to the number of pebbles and other things they have been mentioned under "Jamrat al-'Aqabah."

According to the Imāmiyyah, the time of *ramy* on each of the three days extends from sunrise until sunset, midday being the preferable hour. The other schools say that it extends from midday until sunset, and if done earlier should be repeated. Abū Ḥanîfah permits *ramy* before midday only on the third day. *Ramy* after sunset is permissible only for those with a [valid] excuse.

All the five schools are in consensus about the number of *jimār* and the way of performing the *ramy* on the three days. Below is the way of its performance as described by *al-Tadhkirah* and *al-Mughnî*:

The pilgrim performs *ramy* on each of the three days by throwing 21 pebbles, seven in each of the three times. He begins at the first *jamrah,* al-Jamrat al-'Ūlā, which is the farthest of them from Makkah and nearer to Masjid al-Khayf. It is *mustaḥabb* to toss the pebble in a fashion called *ḥadhf,* from the left side standing at Baṭn al-Masîl, and to say *takbîr* with every pebble that is thrown and to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

pray.

After that, he proceeds to the second *jamrah,* called al-Jamrat al-Wusṭā, halts at the left side of the way, and, facing the *Qiblah,* praises Allāh and prays for blessings upon the Prophet (ṣ), then moving ahead a little prays, and then throws the pebbles in the same way as above, then pauses and prays after the last pebble.

Then he moves on to the third point called *Jamrat al-'Aqabah,* and performs the rite of *ramy* as before, without any pause after finishing. With this the rites of *ramy* for the day are complete.[15]

The total number of pebbles thrown on the three days in 63 (that is, if one spends the night of the 13th in Minā), 21 each day. With the seven thrown on the day of 'Īd the total number is 70.

The author of *al-Tadhkirah,* after the above description, says that there is no difference of opinion about it. The author of *al-Mughnî* makes a similar remark, adding that Mālik has opposed the raising of hands.

The description of the rites of *ramy* given by the author of *al-Mughnî* is similar if not exactly the same as the one given above by the author of *al-Tadhkirah.*

All schools, except Abū Ḥanīfah, agree about the order of the *ramy* of the *jimār,* and that if one of them is stoned out of turn, then it is obligatory to repeat the rite in the correct order. Abū Ḥanīfah says that the order is not binding. (*al-Tadhkirah, al-Mughnî*)

The *ramy* may be performed on foot or from a mount, though the former is better. It is permissible for one who has an excuse that someone else may perform it for him, and there is nothing upon one if he omits the *takbîr,* the prayer or the pause after the second *jamrah.*

If the *ramy* is delayed by a day intentionally, or on account of ignorance or oversight, or is put over completely until the last day of Tashrîq and is performed on a single day, the pilgrim does not incur a *kaffārah* according to the Shāfi'îs and the Mālikîs. Abū Ḥanīfah says that if one, two, or three pebbles are delayed by a day, for every pebble delayed a poor man must be fed; if four are delayed by a day, a sacrifice becomes essential. All the four schools are in consensus

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

that if one does not perform the *ramy* at all until the days of Tashrîq are past, he is not obliged to perform the rite later any time. But they disagree as to the related *kaffārah,* which, according to the Mālikîs is sacrifice regardless of some--even one--or all of the pebbles being omitted; according to the Ḥanafîs the sacrifice is required for omitting all, and for fewer one must feed a poor man for every pebble omitted. The *kaffārah* according to Shāfi'îs is a *mudd* of food for every pebble if two are omitted; for three a sacrifice becomes obligatory. (Ibn Rushd's *Bidāyah, al-Mughnî*)

The Imāmiyyah say, if the *ramy* of one or more *jimār* is forgotten, the rite must be performed during the days of Tashrîq; but if forgotten altogether until one reaches Makkah, the pilgrim is obliged to return to Minā to perform them if the days of Tashrîq are not past; otherwise he must perform the rite himself the following year, or depute another to perform it; in any case there is no *kaffārah* upon him. (*al-Tadhkirah*) This agrees with the *fatāwā* of al-Sayyid al-Ḥakîm and al-Sayyid al-Khū'î, with the difference that the former regards the legal grounds in favour of the obligation of completion of the rite as stronger (*aqwā*), whereas the latter considers it as dictated by caution (*aḥwaṭ*), and both agree that intentional omission of *ramy* does not invalidate the Ḥajj.

We referred earlier to the consensus of all the schools that it is sufficient for the Ḥajj pilgrim to remain for only two days of Tashrîq in Minā and that he may depart before the sunset on 12th; if he remains until sunset, it is obligatory upon him to stay overnight and perform the rite of *ramy* on the 13th. The Imāmiyyah, however, say that the permissibility of leaving on the 12th is only for one who has not violated the prohibition on hunting and sex in the state of *iḥrām;* otherwise he is obliged to remain in Minā on the night of the 13th.

Offering *ṣalāt* in the Masjid al-Khayf at Minā is *mustaḥabb,* so also on the hill called Khayf. (*al-Tadhkirah*)

On returning to Makkah after the rites of Minā, it is, according to Imāmîs and Mālikîs, *mustaḥabb* to perform the *ṭawāf al-wadā',* which, according to Ḥanafîs and Ḥanbalîs, is *wājib* for non-Makkans and those who do not wish to stay on in Makkah after returning from

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Minā. There is no *ṭawāf al-wadā'*, nor any *fidyah,* for women who enter their periods before the departure, even from the viewpoint of those who consider the *ṭawāf* as obligatory; however, it is *mustaḥabb* for her to bid farewell to the House from the door nearest to it and without entering al-Masjid al-Ḥarām.

Here we conclude the discussion about the rites of Ḥajj.

THE DHŪ AL-ḤIJJAH NEW MOON:

It happens often that the Dhū al-Ḥijjah new moon is established for a non-Imāmī scholar, and he declares its sighting, and the authorities of al-Ḥaramayn al-Sharīfayn make it compulsory for all pilgrims to follow his ruling, regardless of whether the new moon has been established for an Imāmī *mujtahid* or not. In such a case, what is an Imāmī pilgrim to do about the *wuqūf* in 'Arafāt and other rites related to specific dates and times if he cannot act according to his own school of fiqh? Is his Ḥajj invalid if he makes the halt with others, performing all the rites simultaneously with them?

Al-Sayyid al-Ḥakīm, in his *Manāhij al-ḥajj* (1381 H.), p. 91, says: "When the non-Imāmī authority (*ḥākim*) rules that the new moon has been sighted, so that the halt in 'Arafāt takes place on the 8th of Dhū al-Ḥijjah and the halt in the Mash'ar on the 9th, then on the principle of *taqiyyah,* or the fear of being harmed, the halt with others is valid and relieves one of the duty. The same holds in case of a *nā'ib* undertaking Ḥajj on another's behalf or one on a *mustaḥabb* Ḥajj of oneself or that of another. Also, there is no difference with respect to fulfilment of the duty whether he knows or not that the ruling (of the non-Imāmī *ḥākim*) is contrary to the reality."

Al-Sayyid al-Khū'ī in *Manāsik al-ḥajj* (1380 H.), p. 80, says: "When the new moon is established for a non-Imāmī *qāḍī* and he rules that it has been sighted, but the sighting of the new moon is not established for the Shī'ah 'ulamā', to follow others in making the halt is obligatory and satisfactory of the Ḥajj duty if there is a probability of the ruling being correct. One who acts contrary to the dictates of *taqiyyah* and the possibility of being harmed, thinking that

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

legal caution lies in acting contrary to them, has committed something forbidden and his Ḥajj is invalid."[16]

There is no doubt that God desires ease not hardship for His servants, and there is hardship in repeating the Ḥajj another time, even for one who has the means to undertake it more than once. But what should a poor man do who returns the next year to find the same thing to have occurred again? Should he keep on repeating the pilgrimage, two, three, or four times... until it coincides with the ruling of his school? May God's peace and benedictions be upon Amîr al-Mu'minîn, the Sayyid al-Waṣiyyîn, who said:

إِنَّ اللهَ كَلَّفَ يَسِيراً، وَلَمْ يُكَلِّفْ عَسِيراً، وَأَعْطَى عَلَى ٱلْقَلِيلِ كَثِيراً.

God has assigned duties which are easy to fulfil not difficult to cope with; and He rewards much for little.

Besides, we know that such kind of things happened during the era of the Infallible Imams (*'ā*) and not one of them is known to have commanded the Shî'ah to repeat the Ḥajj. It is on this basis that al-Sayyid al-Ḥakîm, in *Dalîl al-nāsikîn,* says, "To fall in with the ruling of the non-Imāmî *qāḍî* is permissible; this is in accordance with definitive practice from the times of the Imams (*'ā*), which has been to follow them (i.e. the non-Imāmîs) in the halt (at 'Arafāt), and no other alternative has ever been suggested."

However, al-Sayyid al-Shāhrūdî, in his *Manāsik al-ḥajj,* says, "It is permissible to follow, in regard to this question, the *fatwā* of the absolute *mujtahid* (*al-mujtahid al-muṭlaq*) who considers it permissible." To tell the truth, to me this kind of thing is not digestible when coming from a *mujtahid muṭlaq,* although I have read and heard such things from more than one *mujtahid* whom the common people follow. Because, a *mujtahid muṭlaq* in his *fatwās* should either take an affirmative or a negative stand, and if he doesn't, has no right to be a legal authority (for *taqlîd*). Someone may say that it is not a condition for being *mujtahid muṭlaq* that he should never abstain from giving a definitive *fatwā* or give up caution (*iḥtiyāṭ*) in some matter, for 'caution is the path of salvation'

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

(*al-'iḥtiyāṭ sabîl al-najāt*). In answer I would say, this is an obvious fallacy. Because, *iḥtiyāṭ* in a matter is something, and giving a *fatwā* to consult someone else is another matter. In fact when the *mujtahid* sees the necessity of *iḥtiyāṭ* in a matter, he does not give a *fatwā* upon it--as is the practice of legal authorities regarding several issues.

ZIYĀRAH OF THE GREATEST PROPHET (*ṣ*):

The *ziyārah* of the Greatest Prophet--may Allah's peace and benedictions be upon him and his Family--is a highly *mustaḥabb* duty. He is reported to have said, "Whoever visits my grave after my death is like one who has migrated with me in my life." He also said, "A *ṣalāt* in my mosque is like a thousand ones offered elsewhere with the exception of al-Masjid al-Ḥarām, as to which a *ṣalāt* there is equal to a thousand in my mosque." It is emphasized that the *mustaḥabb ṣalāt* in the Prophet's Mosque should be offered between his tomb and the *minbar,* where, a tradition says, is a 'garden of the gardens of Paradise.' To visit all other mosques of al-Madînah, like Masjid Qubā, Mashrabat Umm Ibrāhîm, Masjid al-'Aḥzāb, etc. and also the graves of the martyrs, in particular that of Ḥamzah (*'ā*) at Uḥud, is also *mustaḥabb.* Also *mustaḥabb* is paying visit to the tombs of the Imams (*'ā*) buried in al-Baqî', viz., al-'Imām al-Ḥasan, al-Imām Zayn al-'Ābidîn, al-Imām al-Bāqir, and al-'Imām al-Ṣādiq, who upon whom all be peace and best of blessings.

As to the *ziyārah* of Fāṭimah (*'ā*), the mother of al-Ḥasan and al-Ḥusayn, it is as important as that of her father, of whom she is a part (*biḍ'ah*). There are several reports about the location of her honoured tomb, of which the most probable seems to be the one according to which she was buried in her house adjacent to her father's mosque. When the mosque was extended by the Umayyads, the grave also came to be included inside it. This is what Ibn Bābawayh (al-Shaykh al-Ṣadūq) believed. We think this is highly probable, because it agrees closely with the tradition that her grave is in a garden between the grave (of the Prophet) and the *minbar.* Allah alone has knowledge of everything.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

HISTORY OF AL-ḤARAMAYN AL-SHARĪFAYN:

The Ka'bah:

'It is the first temple ever to be built for men, a blessed place a beacon for the nations' (3:96) and the most ancient of them in the Middle East. It was first built by Ibrāhîm, the ancestor of the prophets, and Ismā'î, his son, and the Qur'ān quotes them praying as they raised its walls:

وَاِذْ يَرْفَعُ اِبْرٰهِيمُ الْقَوَاعِدَ مِنَ الْبَيْتِ وَاِسْمٰعِيلُ رَبَّنَا تَقَبَّلْ مِنَّا اِنَّكَ اَنْتَ السَّمِيعُ الْعَلِيمُ ✱

And when Ibrāhîm and Ismā'îl raised up the foundations of the House [and dedicated it, saying]: 'Our Lord, accept this from us; Thou hear all and know all'. (2:127)

Ismā'îl gathered the stones and Ibrāhîm put them on one another until the walls were raised to the height of a man. Then the Black Stone was put in its place. According to tradition, the Ka'bah (*al-Bayt al-'Atîq*) was nine cubits high and had an area of twenty by thirty cubits when Ibrāhîm (*'ā*) built it. It had two doors, but was without a roof. As to the Black Stone, it is said to have been brought by Gabriel from heaven. It is also said that Adam brought it along with him on his descent from Paradise, that at first it was snow-white and was blackened by the deeds of men, and so on. There is no harm in not believing any of these stories and the like, nor are we obliged to establish their verity, nor to know the origin of the Stone. All we are obliged to do is to revere it because the Prophet (*ṣ*) considered it sacred and revered it. If someone asks the secret behind the Prophet's regarding this stone as sacred, all we can say is that only God and His Apostle know best.

According to some traditions the Ka'bah stood as Ibrāhîm and Ismā'îl had built it until it was rebuilt by Quṣayy ibn Kilāb, the fifth ancestor of the Prophet (*ṣ*). The structure built by Quṣayy stood

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

until the time when the Prophet was 35 years old, when a great flood demolished its walls. The Quraysh rebuilt it. When the walls were raised to a man's height the clans disputed as to who should receive the honour of lifting the Black Stone into its place. They almost came to war with one another, if it was not for their making Muḥammad the arbiter amongst themselves. The Prophet's solution was to spread a cloak on the ground. Then taking up the Black Stone he laid it on the middle of the garment. "Let the eldest of each clan take hold of the border of the cloak," he said. "Then lift it up, all of you together." When they had raised it to the right height, he took the Stone and placed it in the corner with his own hands.

May God's benedictions and His mercy be upon you, O Apostle of God! You raised the Stone first with your noble hands from the ground and then put it into its place again with your hands. Thus you made God and man well pleased with you. This event was a definite evidence of your superiority over all, and of your being a 'mercy for all the worlds', before your declaration of the apostlehood as after it. Your act was a clear sign that you were the bearer of a Divine mission, and that those who rejected you were enemies and opponents of the truth and of humanity.

The Ka'bah remained in its condition until Yazīd ibn Mu'āwiyah became caliph and till 'Abd Allāh ibn al-Zubayr challenged his sovereignty over the Ḥijāz. Yazīd's forces installed catapults on the hills around Makkah and bombarded the Ka'bah with tens of thousands of stones. The Ka'bah caught fire which finally demolished its structure. Ibn al-Zubayr repaired it as it was before without making any changes, and he put a wooden fence around it. When 'Abd al-Malik ibn Marwān came to power, Ibn al-Zubayr was besieged by his forces under al-Ḥajjāj ibn Yūsuf, who ultimately killed Ibn al-Zubayr after causing damage to a part of the Ka'bah. Al-Ḥajjāj rebuilt the demolished portions and made some changes in the walls as they used to be, and also had one of its doors (the 'western door') blocked.

The Ka'bah remained in the altered condition after al-Ḥajjāj's repairs until the year 1040/1630 when its walls collapsed due to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

heavy rains. Thereat the Muslims from every corner gathered together to restore it and collected contributions from various regions of the Muslim world to rebuild it in the form as it stands to this day.

The Prophet's Mosque:

When the Prophet came to al-Madînah after the migration, the first thing that he built there was the mosque. Afterwards he built the houses by its side. At first its area was 30 by 35 metres, which the Prophet (ṣ) extended, making it 57 by 50 metres.

There was no *minbar* in the mosque at the time of its making. The Prophet (ṣ) used to deliver his sermons leaning against one of the pillars, which were made of trunks of date-palms. Later, the Companions built a wooden *minbar* with two steps. 'Umar ibn al-Khaṭṭāb, during his reign, extended the mosque by five metres on southern and western sides and fifteen on the northern. He left untouched the eastern side where the dwellings of the Prophet's wives were situated.

'Uthmān ibn 'Affān demolished the mosque and rebuilt it, extending it in area by an amount almost equal to the one before by 'Umar and left the houses of the Prophet's wives untouched. The building remained as 'Uthmān had made it until al-Walîd ibn 'Abd al-Malik demolished it again and extended it on all sides, and including even the houses of the Prophet's wives, together with that of 'Ā'ishah, thus making the Prophet's tomb a part of the mosque.

The building constructed by al-Walîd stood until 266/879 when al-Mahdî, the 'Abbāsid caliph, greatly extended its northern side. The building endured until the year 654/1256 when a fire broke out bringing down the roof and burning doors and the Prophet's *minbar*. The Mamlūk sulṭān al-Ẓāhir rukn al-Dîn Baybars I (658--676/1260--1277) ordered its reconstruction and the mosque was restored to its original form before the fire.

In 886/1481, lightening struck the mosque destroying all the building except the chamber of the Prophet's tomb and a dome in the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

mosque's courtyard. It was rebuilt by the Mamlūk king al-'Ashraf Sayf al-Dîn Qait Bay (872--901/1467--95) in a fashion better than before. In the 10th/16th century the Ottoman sulṭān Salîm had it renovated, building the *miḥrāb* (niche) on the western side of the *minbar* and which is still there.

In the 13th/19th century the Ottoman sulṭān Maḥmūd II (1223--1255/1808--1839) had the green dome constructed. During the same century the mosque again needed repairs, which were carried out by the orders of the Ottoman sulṭān. This time, the engineers dismantled the old building little by little gradually building in its place the new structure which was completed in 1277/1861.

وَصَلِّ اللّٰهُمَّ عَلىٰ مُحَمَّد وَأَهْله الطّاهرينَ، وَعَرِّفْ بَيْنَنا وَبَيْنَهُمْ، وَآرْزُقْنا شَفاعَتَهُمْ يَوْمَ نَلْقاكَ، يامُبَدِّلَ السَّيِّئاتِ بِأَضْعافِها مِنَ الْحَسَناتِ... إِنَّكَ ذُوالْفَضْلِ الْعَظيمِ.

NOTES:

1. Al-Sayyid al-Ḥakîm says: "It is not obligatory to hasten to perform the *sa'y* after finishing the *ṭawāf* and its *ṣalāt*, but it is also not permissible to delay voluntarily until the next day." Al-Sayyid al-Khū'î says, "It is binding on one not to make a considerable delay without need in performing the *sa'y* after the *ṭawāf* and its *ṣalāt*, and it is not permissible to delay it intentionally until the next day." I say, these verdicts of the two scholars are supported by *ṣaḥîḥ* aḥādith.

2. *Harwalah* is a kind of walk which resembles that of a camel when it wants to pick up speed. According to the Imāmiyyah, if the one performing the *sa'y* is riding, he should spur it to make the beast walk faster.

3. The author of *al-Mîzān* quotes Abū Ḥanîfah to the effect that he does not see any objection in the converse, i.e. performing of the *sa'y* by starting at Marwah and finishing at Ṣafā.

4. Al-Sayyid al-Ḥakîm in his book on the *manāsik* of Ḥajj says that *muwālāt* (continuity of succession) is not required in the *ashwāṭ* of the *sa'y*, and it is permissible to separate or interrupt them--even after a single *shawṭ*--and to pick up the count again after the break.

5. This agrees with the *fatwā*s of al-Ḥakîm and al-Khū'î. Al-Ḥakîm, however, distinguishes between one who forgets (*nāsî*) and one who is ignorant (*jāhil*); he excuses the first not the latter, who is included with the willful defaulter (*'āmid*).

6. Al-Shaykh 'Abd al-Muta'āl al-Ṣa'îdî says: This order is obligatory in the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

rites of 'Umrah, but in the rites of Ḥajj there is no order of sequence between the *ṭawāf* and the *ḥalq*, or between the *sa'y* and the *wuqūf* at 'Arafāt. See *al-Fiqh al-muṣawwar 'alā Madhhab al-Shāfi'î*.

7. This act of the Prophet (ṣ) makes the grounds for the Imāmiyyah for the permissibility of offering the two prayers together, because the Prophet (ṣ) had said, صَلُّوا كَمَا رَأَيْتُمُونِي أُصَلِّي , "Pray in the same way as you see me praying." The fact that something is permitted at one time or a place suggests its permissibility in all places and at all times, unless there is some textual proof (*naṣṣ*) to show that it is particular and not general. But there is no *naṣṣ* in favour of its being particular (*takhṣîṣ*). Therefore offering the two prayers together is permissible in general and at all times and in all places.

8. There is disagreement about the Ayyām al-Tashrîq as to whether they comprise two or three days. As to their naming, it is because during those days the pilgrims used to dry strips of the meat of the sacrificed animals in the sun.

9. This is in agreement with the *fatwās* of al-Ḥakîm and al-Khū'î.

10. As mentioned earlier, the Makkan's duty, according to the Imāmiyyah, is either *Ḥajj al-qirān* or *al-'ifrād;* but according to the other schools, he can choose one of the three types.

11. The distance of Minā from Makkah is one parasang (approx. 4 miles).

12. It may be noted that whenever there is an explicit text of the Qur'ān there is also agreement and consensus between the Islamic schools of fiqh and no difference between the Sunnîs and the Shî'ah. The divergence of opinion between them arises either on account of the absence of *naṣṣ* (text), or its being synoptic (*mujmal*), or its weakness, or its contrariety with another text, or in its interpretation and application. This is a definite proof of the fact that all of them are derived from a single source.

13. Al-Sayyid al-Ḥakîm says, "The duty to offer the *hady* in *ṣadaqah* does not remain if one cannot do it... and when the poor man would not accept it without money, it is not obligatory."

14. *Ḥadhf* means a certain way of tossing in which the pebble is held under the thumb and tossed by the back of the index finger.

15. Al-Sayyid al-Ḥakîm says that it is desirable that the third *ramy* should be done with one's back toward the *Qiblah*. According to *al-Mughnî* it should be done facing the Ka'bah.

16. Our teacher al-Sayyid al-Khū'î makes the absence of knowledge (that the *fatwā* of the non-Imāmî authority about the sighting of the new moon is contrary to fact) a condition for the Ḥajj being satisfactory of the duty. But al-Sayyid al-Ḥakîm considers the knowledge of its contradiction with reality or absence of such knowledge indifferent to the Ḥajj (performed on the basis of the non-Imāmî faqîh's declaration) being satisfactory of the duty. Here we affirm al-Ḥakîm's position, because we understand from the necessary grounds for *taqiyyah* that the 9th is a requirement for *wuqūf* in 'Arafāt when that requirement can be satisfied in presence of security and absence of any fear of harm. But in case of insecurity and fear this

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

condition does not stand, exactly like the requirement for *sajdah* (prostration) in *ṣalāt* that it should be made on something which is not edible or wearable (*ghayr al-ma'kul wa al-malbūs*)--a requirement which applies to conditions when security is present and which falls in case of insecurity and fear.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

PART - II

PERSONAL LAW

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

MARRIAGE

The Marriage Contract and its Conditions:

All the five schools of fiqh concur that marriage is performed by the recital of a marriage contract which contains an offer made by the bride or her deputy (*nā'ib*), such as her guardian or agent (*wakîl*), and a corresponding acceptance by the groom or his deputy. A mere agreement without the recital of the contract does not amount to marriage.

The schools also agree that a marriage contract is valid when recited by the bride or her deputy by employing the words, *ankaḥtu* or *zawwajtu* (both meaning, I gave in marriage) and accepted by the groom or his deputy with the words, *'qabiltu'* (I have accepted) or *'raḍîtu'* (I have agreed).

The schools of fiqh differ regarding the validity of the contract when not recited in the past tense or recited by using words other than those derived from the roots *al-zawāj* and *al-nikāḥ*, such as, *al-hibah* and *al-bay'*.

The Ḥanafîs say: A marriage contract is valid if recited by any word conveying the intention of marriage, even if the words belong to the roots *al-tamlîk, al-hibah, al-bay', al-'aṭā, al-'ibāḥah* and *al-'iḥlāl*, provided these words indicate their being used for the purpose of marriage. But the contract will not conclude if the words used are derived from *al-'ijārah* (hiring) and *al-'i'ārah* (lending), because these words do not convey the meaning of perpetuity and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

continuity. They have based their argument on this narration from the *Ṣaḥîḥ al-Bukhārî* and the *Ṣaḥîḥ Muslim.* A woman came to the Prophet (ṣ) and said: "O Apostle of Allah, I have come to offer myself to you." On hearing this the Prophet (ṣ) lowered his head and did not reply. Then, one of those present said: "If you do not want her, marry her to me." The Prophet (ṣ) asked him: "Have you anything?" He replied, "By God, I have nothing." Again the Prophet asked him, "Have you any knowledge of the Qur'ān?" He replied regarding the extent of his knowledge of the Qur'ān. Then the Prophet said, "I make her your property in exchange for your knowledge of the Qur'ān" (using the word *mallaktu*).[1]

The Mālikîs and the Ḥanbalîs say: The contract is valid if recited by using the words *al-nikāḥ* and *al-zawāj* or their derivatives and is also valid when the word used is *al-hibah,* with the condition that the amount payable as dower (*mahr* or *ṣidāq*) is also mentioned. Words other than these cannot be used. They have based their argument for the use of the word *al-hibah* on this verse of the Qur'ān (see Abū Zuhrah, *al-'Aḥwāl al-shakhṣiyyah* [1948] p. 36):

...وَامْرَاَةً مُّؤْمِنَةً اِنْ وَهَبَتْ نَفْسَهَا لِلنَّبِيِّ اِنْ اَرَادَ النَّبِيُّ اَنْ يَّسْتَنْكِحَهَا...

....And a believing woman if she gave (wahabat, derived from *al-hibah) herself to the Prophet, if the Prophet desired to marry her....(33:50)*

The Shāfi'î scholars consider it *wājib* that the words used in the contract should be either the derivatives of the root *al-zawāj* or that of *al-nikāḥ.*

The Imāmiyyah say: It is *wājib* that the offer be made by using the words *ankaḥtu* and *zawwajtu* in the past tense. The marriage is not concluded if the word used is not in the past tense and does not belong to the roots *al-zawāj* and *al-nikāḥ,* because these two roots conventionally convey the meaning of marriage and the past tense conveys the meaning of certainty and also because the Qur'ān testifies their use: اُرِيْدُ اَنْ) -- (فَلَمَّا قَضٰى زَيْدٌ مِّنْهَا وَطَرًا زَوَّجْنَاكَهَا) (اَنْكَحَكَ (28:27; 33:37). Apart from this, the absence of consensus invalidates the use of words other than these in such a contract. For

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

acceptance, according to them, the word *qabiltu* or *raḍîtu* can be used.

The Imāmiyyah, the Shāfi'î and the Ḥanbalî schools mention 'immediacy' as a condition for a marriage contract. By immediacy they mean the acceptance of the offer without any delay. The Mālikîs consider a minor delay inconsequential, such as a delay caused due to the recital of a short sermon or the like of it. The Ḥanafî school is of the opinion that immediacy is not necessary. Even if a man addresses a letter to a woman conveying his proposal of marrying her and the woman gathers witnesses and reads out the letter to them and says, "I marry myself to him," the marriage is performed (*al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol. 4, the discussion regarding conditions of marriage; *al-'Aḥwāl al-shakhṣiyyah* by Muḥammad Muḥy al-Dîn 'Abd al-Ḥamîd).

All the schools concur that the contract can be recited in any language when it is impossible to recite it in Arabic, but differ as regards the validity of the contract when so recited despite the possibility of its being recited in Arabic. The Ḥanafî, the Mālikî and the Ḥanbalî schools consider this as valid. The Shāfi'î and the Imāmiyyah schools consider it as invalid. (Abū Zuhrah, *al-'Aḥwāl al-shakhṣiyyah,* p. 27)

The Imāmiyyah, the Ḥanbalî and the Shāfi'î schools consider a contract in writing as invalid. The Ḥanafî school is of the opinion that a written contract is valid, provided the bride and the groom are not present together at the place of contract. The schools concur that a dumb person can convey his intention to marry by signs in case he is incapable of expressing it in writing. If he can express it in writing, it is better for him to combine both, writing and signs, in conveying his intention.

According to the Ḥanbalî and the Ḥanafî schools, if a clause is included in the contract giving a choice to the bride and the groom to annul the contract, the contract is valid but the condition is void. The Mālikî school is of the opinion that, if the marriage is not consummated, this condition as well as the contract are both void. But if the marriage has been consummated, the condition is void, not

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the contract. The Imāmiyyah and the Shāfi'ī schools have declared both the contract and the condition as void irrespective of whether the marriage has been consummated or not.[2] (*al-Fiqh 'ala al-madhāhib al-'arba'ah,* vol. 4; *al-Tadhkirah* by al-'Allāmah al-Ḥillī, vol. 2; and *al-Masālik* by al-Shahīd al-Thānī, vol. 2)

As a matter of course, the offer is made by the bride and is accepted by the groom. The bride says, *'zawwajtuka'* (I have married myself to you) and the groom accepts by saying, *'qabiltu'* (I have accepted). The question which now arises is, is the contract valid when the acceptance precedes the offer and the groom addresses the guardian of the bride saying, *'zawwijnīhā'* (marry her to me) and the guardian replies, *'zawwajtukahā'* (I have married her to you)? The Ḥanbalī school considers it as invalid while the other schools concur on its validity (*al-Tadhkirah* by al-'Allāmah al-Ḥillī, vol. 2). Al-'Allāmah al-Ḥillī, an Imāmiyyah scholar, in his book *al-Tadhkirah,* says, "A marriage contract cannot be made contingent on a future event because certainty is one of its conditions. If a condition is included prescribing a certain time or a certain quality, such as, when the offer is made with the condition that the marriage will conclude at the beginning of the forthcoming month and this offer is accepted, the contract is not valid. Al-Shāfi'ī is of the same opinion." Abū Zuhrah, a Ḥanafī scholar, writes in his book *al-'Aḥwāl al-shakhṣiyyah:* A marriage should be concluded on the recital of the contract, because marriage is a contract and the consequences of the contract cannot be delayed after its conclusion. Therefore it is not possible to postpone the consequences of a contract till the fulfilment of a future condition. In the book *A'lām al-mūqi'īn,* Imam Aḥmad has been referred to as validating a conditional contract of marriage.

A Subsidiary Issue:

Al-Fiqh 'alā al-madhāhib al-'arba'ah, quoting Ḥanafī and Shāfi'ī scholars, states: If an illiterate person mispronounces the word *'zawwajtu'* and says instead, *"jawwaztu,"* the contract is valid.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Al-Sayyid Abū al-Ḥasan al-'Iṣfahānī, an Imāmiyyah scholar, in his *Wasīlat al-najāt,* gives a similar *fatwā*.

Witnesses:

The Shāfi'ī, the Ḥanafī and the Ḥanbalī schools concur that the presence of witnesses is a necessary condition for a valid contract. The Ḥanafī school considers as sufficient the presence of two men or a man and two women. However, if all the witnesses are women, the contract is not valid. This school does not consider *'adālah* (justice) as a condition for the acceptability of the witnesses. The Shāfi'ī and the Ḥanbalī schools consider as necessary the presence of two male Muslim witnesses possessing the quality of *'adālah.* According to the Mālikīs, the presence of witnesses is not necessary at the time of the contract but their presence is necessary at the time when marriage is to be consummated. Therefore, if the contract is recited without the presence of witnesses, it is valid. But, when the groom intends to consummate the marriage it is incumbent upon him to have two witnesses. If the marriage is consummated without the witnesses, the contract becomes void compulsorily, and this is considered as amounting to an irrevocable divorce. (*Bidāyat al-mujtahid* by Ibn Rushd; *Maqṣad al-nabih* by Ibn Jamā'ah al-Shāfi'ī)

The Imāmiyyah do not consider the presence of witnesses as *wājib* but only *mustaḥabb.*[3]

Capacity to Enter into a Marriage Contract:

All the schools agree that sanity and adulthood (*bulūgh*) are necessary qualities for both the parties to the contract, unless the contract is concluded by the guardian of any of them. The contract with the guardian shall be discussed later. The schools also agree that there should be no obstacle to marriage between the man and the woman such as consanguinity or any other disabling factor of a permanent or temporary character. We will discuss the legal

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

obstacles to marriage in a separate chapter.

The schools also consider the ascertainment of both the parties to the contract as necessary. Therefore, when it is said, "I marry you to one of these two daughters," or "I marry myself to one of these two men," the contract will not be valid.

All the schools except the Ḥanafî consider free consent as a *sine qua non* without which the contract does not conclude. The Ḥanafîs are of the opinion that the contract is concluded even if coercion is present (*al-Fiqh 'alā al-madhāhib al-'arba'ah*). Al-Shaykh Murtaḍā al-'Anṣārî, an Imāmiyyah scholar, after mentioning free consent as a condition, writes: "That which is commonly held by the Imāmiyyah scholars of the latter period is that, when a person coerced consents freely later on, the contract is valid. In the book *al-Ḥadā'iq wa al-riyāḍ* their consensus has been reported on this issue." Al-Sayyid Abū al-Ḥasan al-'Iṣfahānî, an Imāmiyyah legist, in his *al-Wasîlah* in the chapter on marriage, writes: "Free consent of both the parties is a necessary condition for a valid contract. If both of them or any of them is coerced, the contract is invalid. But if the party coerced consents later, the reason in favour of the validity of the contract seems strong." According to the above-mentioned criterion, if the man or the woman pleads coercion and then willingly live together like a married couple and show the happiness of a newly married bride and groom, or if the woman takes the *mahr* or does any other act proving consent, the claim of coercion will be rejected and no other evidence will be accepted contradicting the consent.

According to the four schools of fiqh, a contract recited in jest concludes the marriage. Therefore, when a woman says jokingly, "I marry myself to you" and the man accepts it in a similar fashion, the contract is concluded. Divorce and the freeing of a slave also conclude if recited in jest according to the tradition:

ثَلاثٌ جِدُّهُنَّ جِدٌّ وَهَزْلُهُنَّ جِدٌّ: اَلزَّوَاجُ وَالطَّلاقُ وَاَلْعِتْقُ.

The three whose intentional and jestful (recital) is considered intentional are: marriage, divorce and freeing of a slave.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Imāmiyyah school considers all contracts involving jest as null and void due to the absence of the will to contract, and as regards the above-mentioned tradition, they consider the narrators as unreliable.

The Ḥanafī and the Ḥanbalī schools regard the marriage of an idiot as valid irrespective of whether the guardian has given permission or not. The permission of the guardian is necessary in the view of the Imāmiyyah and the Shāfi'ī schools.

According to the Imāmiyyah and the Ḥanafī schools, the consent given when the two conditions of sanity and adulthood (*bulūgh*) are present concludes the marriage as per the authority of the tradition.

إِقْرارُ ٱلْعُقَلاءِ عَلىٰ أَنْفُسِهِمْ جائِزٌ.

The consent of sane persons even if detrimental to their interest, is valid.

Al-Shāfi'ī, in the latter of his two views, considers the marriage as established when the bride being a sane adult acknowledges the marriage and the husband confirms her acknowledgement, because marriage is the right of both the parties. Mālik recognizes a difference here. According to him, when the bride and the groom are in a foreign land their acknowledgement establishes the marriage; but when they are in their hometown they will have to furnish a proof of their marriage because it is convenient for them to do so. This was the former view of al-Shāfi'ī. (*al-Tadhkirah* by al-'Allāmah al-Ḥillī)

Bulūgh:

There is consensus among the schools that menses and pregnancy are the proofs of female adulthood. Pregnancy is a proof because a child comes into being as a result of the uniting of the sperm with the ovum; and menses, because, like the production of sperm in male, is a mark of female puberty. All schools, except the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Ḥanafî, consider the growth of pubic hair as a sign of adulthood, but the Ḥanafîs consider them no different from other hair of the body. According to the Shāfi'î and the Ḥanbalî schools, the adulthood of both the sexes is established on their completing fifteen years. According to the Mālikîs, it is seventeen years for both the sexes. The Ḥanafîs consider eighteen years for a boy and seventeen years for a girl as the age of maturity (Ibn Qudāmah, ***al-Mughnî, Bāb al-ḥijr,*** vol. 4). The Imāmiyyah have mentioned fifteen years for a boy and nine years for a girl as the age of maturity on the authority of the following tradition narrated by Ibn Sinān:

إذا بَلَغَت الجارِيَةُ تِسْعَ سِنينَ دُفِعَ إِلَيْها مالُها، وَجازَ أَمْرُها، وَأُقيمَتِ الْحُدُودُ التّامَّةُ لَها وَعَلَيْها.

When a girl reaches the age of nine her property will be returned to her and it will be rightful for her to handle her own affairs, and the *ḥudūd* are applied against her and in her favour.

Expreience also proves that a girl can conceive at the age of nine, and the ability to conceive is equivalent to conception in all aspects.

Note: That which the Ḥanafîs have said regarding the age of maturity is the maximum age limit for maturity. The minimum age limit according to them is twelve years and nine years for a boy and a girl respectively; because at this age it is possible for a boy to ejaculate and to impregnate, and for a girl to have orgasm, to menstruate, and to conceive (Ibn 'Ābidîn [1326 H.], ***Bāb al-ḥijr,*** vol. 5, p. 100).

Stipulation of Conditions by the Wife:

The Ḥanbalî school is of the opinion that if the husband stipulates at the time of marriage that he will not make her leave her home or city, or will not take her along on journey, or that he will

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

not take yet another wife, the condition and the contract are both valid and it is compulsory that they be fulfilled, and in the event of their being violated, she can dissolve the marriage. The Ḥanafī, the Shāfi'ī and the Mālikī schools regard the conditions as void and the contract as valid, and the Ḥanafī and the Shāfi'ī schools consider it compulsory in such a situation that the wife be given a suitable *mahr*, not the *mahr* mentioned (Ibn Qudāmah, *al-Mughnī*, vol. 6, chapter on marriage).

According to the Ḥanafī school, when the man puts the condition that the woman would have the right to divorce, such as when he says, "I marry you on the condition that you can divorce yourself," the condition is invalid. But if the woman makes such a condition and says to the man, "I marry myself to you on the condition that I shall have the right to divorce," and the man says in reply, "I accept," the contract and the condition are both valid and the woman can divorce herself whenever she desires.

According to the Imāmiyyah school, if at the time of contract, the woman stipulates such conditions as, that the man shall not take another wife, or shall not divorce her, or shall not prohibit her from leaving home whenever she wants and wherever she wants to go, or that the right to divorce will be hers, or that he shall not inherit her, or any other such condition which is against the spirit of the contract, the condition will be considered void and the contract will be valid.[4] But if she lays down such conditions as that the man will not make her leave her city, or will keep her in a specific home, or will not take her along on journeys, the contract and the condition are both valid. But if any of these conditions are not met, she does not have the right to dissolve the marriage. However, if in such a situation the woman refuses to accompany him, she still enjoys all the rights of a wife, such as being provided with maintenance and the like of it.[5]

When the wife pleads of having included a valid condition in the contract and the husband repudiates the inclusion of such a condition, the wife will have to furnish evidence, because she has pleaded this extra condition. On the wife being unable to furnish the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

evidence, the husband will take an oath regarding the non-inclusion of the condition because he is the one who negates it.

Claim of Marriage:

If a man claims having married a woman and she repudiates the claim, or the woman claims so and the man repudiates it, the burden of proof will lie on the claimant and the party negating the claim will take an oath.

The schools concur regarding an acceptable proof that it requires the testimony of two just men. The evidence of women, alone or along with a man, is not acceptable except to the Ḥanafī school which considers the evidence of a just man and two just women as acceptable. Therefore, the *'adālah* of witnesses is necessary, according to the Ḥanafī school, at the time of establishing the fact of marriage when any of the parties negates or contends it, but not a condition at the time of conclusion of the marriage contract. The Ḥanafī and the Imāmiyyah schools consider the testimony of a witness as sufficient without his mentioning any conditions and details of the marriage. But the Ḥanbalī school considers it necessary that the witness describe the conditions of marriage because there is a divergence of opinion regarding the conditions and it is possible for a witness to believe in the validity of a marriage whereas it may have been actually invalid.

The Imāmiyyah, the Ḥanafī, the Shāfi'ī and the Ḥanbalī schools regard a marriage as proved even if a few people have a knowledge of it and it is not necessary that it be commonly known.

Does the Living Together of a Couple Prove Marriage?

From time to time claims of marriage are brought before Sharī'ah courts and often the claimant brings witnesses to prove their living together and having a common residence in the manner of a husband and wife. The question now is, does this prove marriage or not?

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

On the face of it, it can be said that marriage is prima facie considered as established unless the contrary is proved. This means that the living together of a man and woman apparently establishes marriage, and this conclusion compels the acceptance of the claimant's contention unless he is proved to lie. Apart from this, to decide the contention of the claimant claiming marriage as a lie is very difficult on the basis of the Imāmiyyah view which considers the presence of witnesses as not necessary at the time of marriage. But this prima facie conclusion in favour of the claimant is contrary to the general rule according to which every event--marriage or something else--whose occurrence is doubtful is assumed not to have occurred unless there is evidence to the contrary. Accordingly, the stand of the respondent, repudiating the claim of marriage, becomes congruent with the general rule. Therefore, the proof of marriage will be demanded from the claimant, and in the event of his failure to do so the respondent will take an oath and the claim will be dismissed.

This way of settling a claim is the right approach which corresponds with the rules of the Sharī'ah, because the Imāmiyyah scholars accept the rule that, when there is a conflict between a prima facie conclusion and a general rule, the rule will be given precedence and the prima facie conclusion will not be given credence without additional proof in its favour and there is no such proof in this case.

When it is known that a marriage contract has been recited, but there is a doubt regarding its having been carried out correctly, the contract will be undoubtedly considered valid. But when there is a doubt as regards the occurrence of the contract itself, it is not possible to substantiate it on the strength of the social intercourse or co-residence of the two.

A question can be raised here: The principle that the act of a Muslim is to be considered as valid on the face of it, compels the acceptance of the claim of the person claiming marriage by giving precedence to *ḥalāl* over *ḥarām* and to good over evil. We are also commanded as regards every act in which there is a possibility of it

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

being valid or invalid, that we rule out the possibility of its invalidity and give credit to the possibility of its validity.

The reply is that, the consideration of the act of the claimant as valid in the present problem does not prove marriage, and that which is proved is that the two have not committed any *ḥarām* by social intercourse and sharing a common residence. The absence of any ground to consider their association as illegitimate may be due to marriage or due to a misconception (*shubhah*) on their part about the legitimacy of marriage, such as when both of them imagine it as *ḥalāl* and later on discover it to be *ḥarām* (details of this will come later while discussing doubtful *nikāḥ*). It is obvious that a general premise does not prove a particular one. For Instance, when you say, "There is an animal in the house," it does not prove the presence therein of a horse or a deer. In the same manner, here, when a man has social intercourse with a woman, not knowing the cause we may say, "She is his wife," but we should say that, "They have not committed *ḥarām,*" for it is possible that their associating with one another may be the result of marriage or the result of a misconception of marriage.

We shall give another example to further clarify the point. If you hear a passer-by say something without knowing whether that utterance is a curse or a greeting, it is not permissible for you to consider it a curse. Also, in such a situation it is not binding on you to return the greeting, because you are not sure of the greeting. But if you are certain that he greeted you and doubt whether it was meant as a greeting or intended to ridicule, it is binding upon you to return the greeting, considering it to be a genuine greeting and by giving precedence to good over evil. Our problem is also like this. Even if living together be considered valid, it does not prove the presence of a contract. But if we are sure about the occurrence of a contract and doubt only its validity, we will consider the contract as valid without any hesitation.

In any case, the social intercourse by itself does not prove anything, but it supplements and strengthens any other proof available. The decision in such a situation depends upon the view,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

satisfaction, and assessment of the judge, on the condition that he does not consider their living together as an independent proof in itself for basing his judgement.[6]

The above-mentioned conclusion was as regards the establishment of marriage. But as regards children, the rule of considering the act of a Muslim as valid compels the regarding of the children as legitimate at all times, because the living together of the parents is either the result of marriage or the result of a false impression of marriage, and the children born due to such false impression are equal in status to children born of marriage for all legal purposes. Therefore, if a woman has claimed a man as her lawful husband and also of having a child by him, while the man refutes marriage but acknowledges the child as his, his claim will be accepted because it is possible that the child was born due to a false impression of marriage.

To conclude, it needs to be mentioned that this problem is based on the supposition that witnesses are not required for concluding a marriage contract, as is the Imāmiyyah view. But according to the other schools, it is for the party claiming marriage that it mention the name of the witnesses, and if the party pleads its inability to present the witnesses due to their death or absence, it is possible that the above-mentioned criterion be applied.

It is also necessary to point out that the living together does not prove marriage when there is contention and disagreement to that effect; but when there is no such disagreement, we settle the claim of inheritance and its like by giving credit to the possibility of marriage, and on this issue there is a consensus among the schools.

The Prohibited Degrees of Female Relations (*al-Muḥarramāt*):

One of the conditions of a valid marriage contract is that the woman be free from all legal obstacles, which means that she be competent to contract marriage. The restrictions are of two kinds: the prohibition due to consanguinity and those due to other causal factors. The first include seven categories which permanently

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

prohibit marriage. Of the second, ten categories prohibit marriage permanently and others only temporarily.

Consanguinity (al-nasab):

The schools concur that the female relatives with whom marriage is prohibited are of seven kinds:

1. Mother, which includes paternal and maternal grandmothers.
2. Daughters, which includes granddaughters how low so ever.
3. Sisters, both full and half.
4. Paternal aunts, which includes fathers' and grandfathers' paternal aunts.
5. Maternal aunts, which includes fathers' and grandfathers' maternal aunts.
6. Brother's daughters how low so ever.
7. Sister's daughters how low so ever.

The above prohibition has its origin in the following verse of the Qur'ān:

حُرِّمَتْ عَلَيْكُمْ أُمَّهاتُكُمْ وَبَناتُكُمْ وَأَخَواتُكُمْ وَعَمّاتُكُمْ وَخالاتُكُمْ وَبَناتُ الْأَخِ وَبَناتُ الْأُخْتِ...

Forbidden to you are your mothers and your daughters and your sisters and your paternal aunts and your maternal aunts and brother's daughters and sister's daughters. . . . (4:23)

These were the prohibited degrees of relations as a result of consanguinity. Those which are the result of causal factors (*al-sabab*) are as follows:

I. Al-Muṣāharah (Affinity):

Affinity is the relationship between a man and a woman which forbids marriage between them; it includes the following:

1. The schools agree that the father's wife is forbidden for the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

son and the grandson how low so ever, by the sole conclusion of the marriage contract irrespective of the establishment of sexual contact. The origin of this concurrence is this verse of the Qur'ān:

وَلا تَنْكِحُوا مانَكَحَ اٰبا ؤُ كُمْ مِنَ النِّساءِ...

And marry not women whom your fathers married . . . (4:22)

2. The schools concur that the son's wife is forbidden for the father and grandfather, how high so ever, merely by the conclusion of the contract. This view is based on the following verse of the Qur'ān:

...وَحَلا ئِلُ اَبْنا ئِكُمْ الَّذينَ مِنْ اَصْلا بِكُمْ...

...And the wives of your sons who are of your own loins.... (4:23)

3. The schools concur that the wife's mother and her grandmother how high so ever, is forbidden on the mere conclusion of the contract though sexual contact may not have been established as per this verse of the Qur'ān:

...وَاُمَّهاتُ نِسائِكُمْ...

... And the mothers of your wives.... (4:23)

4. The schools agree that marriage with the wife's daughter is not forbidden merely on the conclusion of the contract, and they consider it permissible for a man, if he divorces that wife before sexual intercourse, or before looking at her or touching her with a sexual intent, to marry her daughter on the authority of this verse of the Qur'ān:

وَرَبائِبُكُمُ الّلاتى فى حُجُورِكُمْ مِنْ نِسائِكُمُ الّلاتى دَخَلْتُمْ بِهِنَّ...

... And your step-daughters who are in your guardianship, (born) of your wives to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

whom you have gone in.... (4:23)

The condition فی حُجُورِکُم explains the general situation. The schools concur that the daughter is forbidden when a person marries her mother and establishes sexual contact with her. But the schools differ as regards the daughter being forbidden when the marriage has been concluded and sexual contact has not been established, but when he has looked at her or touched her with a sexual intent.

The Imāmiyyah, the Shāfi'ī and the Ḥanbalī schools are of the view that the daughter would be forbidden only on sexual intercourse and looking and touching with or without sexual intent does not have any effect. The Ḥanafī and the Mālikī schools consider both, looking and touching with sexual intent, as sufficient causes for prohibition and are like sexual intercourse in all aspects. (*Bidāyat al-mujtahid,* vol. 2; *al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol. 4, the chapter on marriage)

There is a consensus among the schools that the establishment of sexual contact due to a mistake or a false impression is like marriage itself in establishing affinity and creating its related prohibition. The meaning of 'sexual contact due to mistake' is occurrence of sexual contact between a man and a woman under the false impression that they are lawfully wedded followed by the discovery that they are strangers and that the contact was a result of a mistake of fact. As a consequence of this latter knowledge, the two will separate immediately and the woman will observe an obligatory period of *'iddah* and a reasonable *mahr* will become *wājib* on the man. Affinity would be established as a result, but the two will not inherit each other and the woman will not have the privilege of alimony (*nafaqah*).

II. Consanguinity Between Wives:

The schools concur that combining two sisters in marriage at the same time is forbidden according to this verse of the Qur'ān:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

...وَاَنْ تَجْمَعُوا بَيْنَ الْاُخْتَيْنِ...

...And that you should have two sisters together.... (4:23)

The four schools agree that a man cannot combine in marriage neither a woman and her paternal aunt nor a woman and her maternal aunt, because they have a general rule, that it is not permissible to marry two women of whom if one were to be a male it would be *ḥarām* for him to marry the other. Therefore, if we suppose the paternal aunt a male, she would become a paternal uncle and it is not permissible for an uncle to marry his niece, and if we suppose the niece a male, she would become a nephew and it is not permissible for a nephew to marry his aunt. The same rule applies to a maternal aunt and her sister's daughter.

The Khawārij considered as permissible combining as wives the aunt and her niece, irrespective of whether the aunt has granted permission for marrying her niece or not.

Among the Imāmiyyah legists there is a divergence of opinion. Some of them concur with the view of the other four schools, but most of them are of the opinion that if the niece is the first to be married, it is permissible for him to marry her paternal or maternal aunt even if the niece does not grant permission for this marriage. But if the paternal or the maternal aunt has been first married, the marriage with her niece is permissible only by her permission. The proponents of the above view have based their argument on the following verse of the Qur'ān:

...وَاُحِلَّ لَكُمْ مَاوَرَاءَ ذٰلِكُمْ...

...And lawful to you are (all women) besides those.... (4:24)

In this verse, after mentioning those women with whom marriage is forbidden, the rest have been permitted, and this permission extends to combining the aunt and the niece together in marriage, and had it been *ḥarām* the Qur'ān would have explicitly

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

mentioned it as it expressly mentions the prohibition regarding combining two sisters in marriage. As regards the general rule which supposes one of the two women to be a male, it is *istiḥsān,* which is considered unreliable by the Imāmiyyah. Apart from this, Abū Ḥanīfah has considered it permissible for a man to marry a woman and her father's wife despite of the fact that if any of these two were supposed a male, his marriage with the other would not be permissible. Obviously, it is not permissible for a man to marry his daughter or step-daughter, in the same way as it is not permissible for him to marry his mother or his father's wife. (*Kitāb ikhtilāf Abî Ḥanîfah;* Ibn Abî Laylā, the chapter on marriage)

III. Fornication (al-Zinā):

It comprises the following issues:

1. The Shāfi'î and the Mālikî schools consider a man's marrying his daughter born of fornication as permissible and so also marrying his sister, his son's daughter, his daughter's daughter, his brother's daughter, and his sister's daughter, because she is legally a stranger to him and because the law of inheritance does not apply between them, nor the law of maintenance. (*al-Mughnî,* vol. 6, the chapter on marriage)

The Ḥanafî, the Imāmiyyah and the Ḥanbalî schools regard marriage with a daughter by fornication as *ḥarām* (prohibited) as one with a lawful daughter, because, they say, the daughter by fornication is born of his seed and is therefore considered his daughter in the literal sense and by the society in general. Her legal disability to inherit does not negate the fact of her being his daughter; it only negates such legal effects as inheritance and maintenance.

2. The Imāmiyyah have observed: He who commits fornication with a woman or establishes sexual contact with her by mistake, while that woman is either married or is observing the *'iddah* period as a result of a revocable divorce, she would become *ḥarām* for him permanently, i.e. it is forbidden for him to marry her even if she separates from her husband as a result of an irrevocable divorce or

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

death. But if he establishes sexual contact with a woman while she is unmarried or is undergoing the *'iddah* period as a result of the death of her husband or as a result of an irrevocale divorce, she would not be forbidden for him.

According to the four schools, fornication or adultery is no obstacle to marriage between the two, regardless of whether the woman is married or unmarried.

3. According to the Ḥanafî and the Ḥanbalî schools fornication and adultery establish affinity. Therefore, he who establishes illegitimate sexual contact with a woman, the mother and daughter of that woman will become *ḥarām* for him, and that woman will be *ḥarām* for his father and his son. These schools do not make any difference between the establishment of such illegitimate contact before marriage or after it. Therefore, when a person establishes sexual contact with his wife's mother or a son with his father's wife, the wife will become *ḥarām* for her lawful husband permanently; rather, according to the Ḥanafî book *Multaqā al-'anhur* (volume 1, the chapter on marriage): "If a person intends to wake up his wife for intercourse and his hand reaches her daughter and he caresses her with sexual emotion while she, thinking it to be her mother, entetains it, her mother will become *ḥarām* for him permanently. The same will apply to a woman who intends to wake up her husband and (mistakenly) caresses his son from another wife."

The Shāfi'î school is of the opinion that fornication does not establish affinity in the light of this tradition:

الْحَرامُ لا يُحَرِّمُ الْحَلالَ.

A *ḥarām* does not illegitimate a *ḥalāl*.

The Mālikîs have two views on this question. One of them favours the Shāfi'î view, the other, the Ḥanafî view. The Imāmiyyah consider fornication as capable of creating the prohibition pertaining to affinity. Thus he who fornicates with a woman, makes her *ḥarām* for his father and his son. But as regards adultery after marriage,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

they observe that it does not illegitimate the lawful conjugal ties. Thus he who commits adultery with his wife's mother or his wife's daughter, his marriage with her stays as it is. The same applies to a father who commits adultery with his son's wife or a son with his father's wife; in both the cases the wife would not be considered *ḥarām* for her lawful husband.

IV. Number of Wives:

The legal schools concur that it is permissible for a man to have four wives at a time, but not a fifth as per the verse:

...فَانْكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَاثَ وَرُبَاعَ...

... Then marry such women as seem good to you, two and three and four .... (4:3)

When any one of those wives is released from the bonds of marriage, either due to her death or divorce, it becomes permissible for him to marry another. The Imāmiyyah and the Shāfi'ī schools say: When a man gives one of his wives a revocable divorce, it is not permissible for him to marry another till the expiry of the *'iddah* period. But if it be an irrevocable divorce it is permissible for him to do so. Also, it is permissible that he marry his irrevocably divorced wife's sister during his wife's *'iddah* because an irrevocable divorce prohibits marriage and breaks the marital bond.

According to the other schools, it is not permissible for him to marry a fifth wife or the sister of his divorced wife until the expiry of the *'iddah* period irrespective of whether the divorce is a revocable or an irrevocable one.

V. Li'ān:

When a man accuses his wife of adultery or denies the paternity of her child, and she denies the charge and he has no proof to offer, it is permissible for him to pronounce the *li'ān* against her. The

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

method of taking the oath of condemnation is that, first the man swears by Allah four times that he is indeed speaking the truth in accusing her, and the fifth time that the curse of Allah fall on him should he be lying. Then the woman will swear four times by Allah that he is lying, and the fifth time that the wrath of Allah be on her if he be speaking the truth. If the man refuses to pronounce the *li'ān,* he is punished with the *ḥadd* (for *qadhf*); but if he takes the oath of *li'ān* and the woman refuses to pronounce the *li'ān,* she is liable to the *ḥadd* for adultery. If both of them pronounce *li'ān* against each other, none is liable to *ḥadd* and the two will separate and the child whose paternity he had denied would not be given to him.

The source of the above discussion are these verses of the *Sūrat al-Nūr:*

وَالَّذِينَ يَرْمُونَ اَزْوَاجَهُمْ وَلَمْ يَكُنْ لَهُمْ شُهَدَاءُ اِلَّا اَنْفُسُهُمْ فَشَهَادَةُ اَحَدِهِمْ اَرْبَعُ شَهَادَاتٍ بِاللهِ اِنَّهُ لَمِنَ الصَّادِقِينَ * وَالْخَامِسَةُ اَنَّ لَعْنَتَ اللهِ عَلَيْهِ اِنْ كَانَ مِنَ الْكَاذِبِينَ * وَيَدْرَؤُا عَنْهَا الْعَذَابَ اَنْ تَشْهَدَ اَرْبَعَ شَهَادَاتٍ بِاللهِ اِنَّهُ لَمِنَ الْكَاذِبِينَ * وَالْخَامِسَةَ اَنَّ غَضَبَ اللهِ عَلَيْهَا اِنْ كَانَ مِنَ الصَّادِقِينَ *

If a man accuses his wife but has no witnesses except himself, he shall swear four times by Allah that his charge is true, calling down upon himself the curse of Allah if he is lying. But if his wife swears four times by Allah that his charge is false and calls down His curse upon herself if it be true, she shall receive no punishment. (24: 6--9)

There is consensus among the schools that it is *wājib* for the two to separate after the *li'ān.* But they differ as to whether such a wife is permanently *ḥarām* for her husband so as to make it impermissible for him to remarry her later, even if he denies his own charge, or if she is *ḥarām* only temporarily so as to permit him to marry her after withdrawing his own accusation. The Shāfi'ī, the Imāmiyyah, the Ḥanbalī and the Mālikī schools forbid her permanently for him even if he denies his own accusation. The Ḥanafī school considers separation due to the *li'ān* like divorce; it would not make her *ḥarām* permanently because the prohibition arises from the *li'ān* and is

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

removed on the withdrawal of his accusation. (*al-Mughnî,* vol. 7; al-Sha'rânî, *al-Mîzân,* the chapter on *mulâ'anah*)

VI. Number of Divorces:

The schools concur that if a man divorces his wife for the third time having resumed conjugal relations twice earlier, she will become *ḥarām* for him and will not become *ḥalāl* for him again unless she marries another husband. This requires that she observe the *'iddah* after her third divorce and after the completion of this period consummate a permanent marriage with another man. Then if she separates from the second husband, due to his death or as a result of divorce, and completes the *'iddah,* it becomes permissible for the first to remarry again. After this, if he again repeats the same sequence and divorces her three times, she becomes *ḥarām* for him until she consummates marriage with another man. Similarly, she becomes *ḥarām* for him after every third divorce and becomes *ḥalāl* by marrying another, even if she be divorced a hundred times. Accordingly, every third divorce is considered a temporary not a permanent obstacle to marriage.

But the Imāmiyyah observe: If a woman is divorced nine times in the *ṭalāq al-'iddah* form she becomes *ḥarām* permanently. By *ṭalāq al-'iddah* they mean that the husband first divorces his wife, then resumes conjugal and sexual relations; then he divorces her again during another period when she is not having menses, then again resumes conjugal and sexual relations; then divorces her in yet another period when she is free from menses. Now she will not be *ḥalāl* for him until she consummates a permanent marriage with another man. Now, if this first husband marries her again after her separating from that second husband and divorces her three times in the *ṭalāq al-'iddah* form, she becomes *ḥalāl* again by consummating marriage with another. If he then marries her (for the third time) and divorces her in the *ṭalāq al-'iddah* form, the divorces completed, she will become *ḥarām* for him permanently. But when the divorce is not a *ṭalāq al-'iddah,* such as when he returns to her and then

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

divorces her without establishing sexual relations or marries her by another fresh contract after her completing the *'iddah,* she will not become *ḥarām* for him even if she is divorced a hundred times.

VII. Difference of Religion:

The schools agree that it is not permissible for a male Muslim nor for a female Muslim to marry those who do not possess neither a revealed nor a quasi-revealed scripture, or those who worship idols, fire or the sun, the stars and other forms, or non-believers who do not believe in Allah. The four schools concur that marriage is not permissible with those who possess a quasi-scripture, such as the Zoroastrians. By 'quasi-scripture' is meant a scripture which is said to have originally existed, as in the case of the Zoroastrians, but was changed, causing it to be lifted from them.

According to the four schools, it is permissible for a Muslim man to marry a woman belonging to the Ahl al-Kitāb, which implies Christians and Jews. But it is not permissible for a Muslim woman to marry a man belonging to the Ahl al-Kitāb. The Imāmiyyah scholars agree with the other four schools that a Muslim woman cannot marry a man belonging to the Ahl al-Kitāb, but differ among themselves regarding the marriage of a Muslim man with a female belonging to the Ahl al-Kitāb. Some of them hold that intermarriage, either permanent or temporary, is not permissible. They base their argument on these verses of the Qur'ān:

...وَلا تُمسِكُوا بِعِصَمِ الْكَوافِرِ...

...And hold not to the ties of marriage of unbelieving women.... (60:10)

وَلا تَنْكِحُوا الْمُشْرِكاتِ حَتّىٰ يُؤْمِنَّ...

... And do not marry the idolatresses until they believe.... (2:221)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Here they interpret *shirk* as *kufr* and not having faith in Islam. According to the Qur'ān the Ahl al-Kitāb are not *mushrikūn,* as this verse shows:

لَمْ يَكُنِ الَّذِينَ كَفَرُوامِنْ اَهْلِ الْكِتابِ وَالْمُشْرِكِينَ مُنْفَكِّينَ حَتّٰى تَاْ تِيَهُمُ الْبَيِّنَةُ ۞

The unbelievers among the People of the Book and the pagans did not break off (from the rest of their communities) until the proof came unto them. (98:1)

Others are of the opinion that such a marriage, both temporary and permanent, is permissible, and as a proof they quote the following verse of the Qur'ān:

...وَالْمُحْصَناتُ مِنَ الْمُؤْمِناتِ وَالْمُحْصَناتُ مِنَ الَّذِينَ اُوتُوا الْكِتابَ مِنْ قَبْلِكُمْ...

... And the chaste from among the believing women and the chaste from among those who have been given the Book before you (are lawful to you)... (5:5)

This verse, according to them, explicitly permits marriage with women of the Ahl al-Kitāb. The third group, seeking to reconcile the texts in favour and against such intermarriage, only permits temporary not permanent marriage. They take those texts which forbid such marriage to imply permanent marriage, and those which permit it are taken to imply temporary marriage. On the whole most of the contemporary Imāmiyyah scholars consider permanent marriage with a woman belonging to the Ahl al-Kitāb as permissible and the Imāmī Sharī'ah courts in Lebanon marry a Muslim male to a female belonging to the Ahl al-Kitāb. They register such a marriage with all the legal effects proceeding therefrom.

All schools, except the Mālikī, recognize the marriages of all non-Muslims as valid if performed according to their tenets. The Muslims confer upon such a marriage all the legal effects of a valid marriage without differentiating between the Ahl al-Kitāb and others--even if they permit marriage within prohibitive limits of consanguinity. The Mālikīs consider such a marriage as invalid because, they explain, it would be invalid if performed by a Muslim.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Therefore, the same is true of non-Muslims. This stance of the Mālikîs is not reasonable, because it makes non-Muslims scared of Islam and leads to anarchy and disruption of the social order. Apart from this, the Imāmiyyah have recorded these traditions which confirm their stance:

مَنْ دانَ بِدِينِ قَوْمٍ لَزِمَتْهُ أَحْكامُهُمْ...

For one who follows the religion of a community, its rules would be binding upon him....

وَأَلْزِمُوهُمْ بِمَاأَلْزَمُوابِهِ أَنْفُسَهُمْ.

And require them to follow that which they consider binding upon themselves. (*al-Jawāhir,* chapter on divorce)

Litigation Between the Ahl al-Kitāb:

In the Imāmiyyah work, *al-Jawāhir* (chapter on *jihād*), there is a useful discussion which is relevant here. Its summary is as follows:

If two non-Muslims litigate before a Muslim judge, should he give his judgement according to the laws of their religion or according to the Islamic law? The answer is: If the litigants are *dhimmîs,* the judge has a discretion to either judge according to the Islamic law or to dismiss the case without any hearing. The following verse of the Qur'ān gives this discretion:

...فَاحْكُمْ بَيْنَهُمْ أَوْ أَعْرِضْ عَنْهُمْ وَإِنْ تُعْرِضْ عَنْهُمْ فَلَنْ يَضُرُّوكَ شَيْئاً وَإِنْ حَكَمْتَ فَاحْكُمْ بَيْنَهُمْ بِالْقِسْطِ...

...Judge between them or turn aside from them, and if you turn aside from them, they shall not harm you in any way; and if you judge, judge between them with fairness.... (5:42)

It was asked of al-'Imām al-Ṣādiq (*'a*) regarding two men of the Ahl al-Kitāb between whom there is a dispute and they take the case before their own judge and when this judge judges between them,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the one against whom the judgement was given refuses to comply and asks that the issue be settled before the Muslim judge. The Imām (*'a*) replied, "The judgement shall be according to the law of Islam."

If the litigants are those who are at war with the Islamic State (*ḥarbî*), the judge is not obliged to settle their dispute and to protect some of them against others, as he is in the case of *dhimmîs*.

If one of the litigants is a *dhimmî* or a *ḥarbî* and the other a Muslim, the judge is obliged to accept the suit and to judge between them according to the Islamic law, in accordance with the Divine command:

وَاَنِ احْكُمْ بَيْنَهُمْ بِمَا اَنْزَلَ اللهُ وَلَا تَتَّبِعْ اَهْوَاءَهُمْ وَاحْذَرْهُمْ اَنْ يَفْتِنُوكَ عَنْ بَعْضِ مَا اَنْزَلَ اللهُ اِلَيْكَ...

Pronounce judgement between them in accordance with Allah's revelations and do not be led by their desires. Take heed lest they should turn you away from a part of that which Allah has revealed to you.... (5:49)

Moreover, if a *dhimmî* woman sues her husband, the judgement will be given according to the Islamic law.

The above discussion makes it clear that Muslims should recognize as valid all those transactions of non-Muslims which are in conformity with their religion, as long as they do not refer it to Muslims for a decision. But if they seek a decision from Muslims, it is *wājib* for them to decide, at all times, according to the Islamic law. As is understandable from the verses of the Qur'ān and the traditions, it is also *wājib* to judge between them in accordance with the norms of justice and fairness.

VIII. Fosterage (al-Riḍā'):

All the schools concur regarding the veracity of the tradition: يَحْرُمُ مِنَ الرِّضاعِ مايَحْرُمُ مِنَ النَّسَبِ. (That which becomes *ḥarām* due to consanguinity becomes *ḥarām* due to fosterage). According to this

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

tradition fosterage includes the same limits of relationship prohibitive to marriage as consanguinity. Thus any woman who as a result of breast-feeding becomes a foster-mother or a foster-daughter or a sister or an aunt (both maternal and paternal) or a niece, marriage with her is *ḥarām* according to all the schools. But the schools differ regarding the number of breast-feedings which cause the prohibition and the conditions applicable to the foster-mother and the foster-child.

1. The Imāmiyyah say: It is necessary that the woman's milk be the result of lawful sexual relations, and if it secretes without marriage or as a result of a pregnancy due to adultery, the prohibition does not come into effect. It is not necessary that the woman remain conjugally bound to the person who is the cause of her turning lactiferous. Even if he divorces her or dies while she is pregnant or lactiferous, the prohibition comes into effect if she breast-feeds a child, even though she marries another and has intercourse with him.

The Ḥanafī, the Shāfi'ī and the Mālikī schools are of the opinion that there is no difference between the woman being a virgin or a widow and between her being married or unmarried as long as she has milk with which she feeds the child. According to the Ḥanbalī school the legal effects of fosterage will not follow unless the milk is the result of a pregnancy, and they do not set a condition that the pregnancy be due to lawful intercourse (Muḥammad Muḥyî al-Dîn 'Abd al-Ḥamîd in *al-'Aḥwāl al-shakhṣiyyah*).

2. The Imāmiyyah consider it necessary that the child should have sucked milk from the breast, so if it is dropped in his mouth or he drinks it in a manner other than direct sucking, the prohibitive relationship would not be established. The other four schools consider it sufficient that the milk reach the child's stomach, whatever the manner (*Bidāyat al-mujtahid; Ḥāshiyat al-Bājūrî, "Bāb al-riḍā'"*). According to *al-Fiqh 'alā al-madhāhib al-'arba'ah*, the Ḥanbalîs consider it sufficient that the milk reach the child's stomach, even if through his nose.

3. According to the Imāmiyyah, the prohibitive relationship is

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

not realized unless the child is suckled one day and one night in a manner that his exclusive diet during this period be the milk of that woman without any other food, or is breast-fed fully fifteen times uninterrupted by breast-feeding by another woman. In the book *al-Masālik* the giving of food has been considered effectless. The reason given for the above-mentioned quantity is that it leads to the growth of flesh and hardens the bones.

The Shāfi'ī and the Ḥanbalī schools regard five breast-feedings as the minimum necessary. The Ḥanafī and the Mālikī schools consider that the prohibitive relationship is established simply by being breast-fed irrespective of the quantity fed, be it more or less or even a drop. (*al-Fiqh 'alā al-madhāhib al-'arba'ah*)

4. The Imāmiyyah, the Shāfi'ī, the Mālikī, and the Ḥanbalī schools have mentioned the period of breast-feeding to be up to two years of the age of the child. The Ḥanafī school considers it to be two and a half years.

5. According to the Ḥanafī, the Mālikī, and the Ḥanbalī schools, it is not necessary that the foster-mother be alive at the time of feeding. Therefore, if she dies and the child crawls up to her and sucks from her breast, it is sufficient to establish the prohibitive relationship. But the Mālikīs have gone further and observed that even if there is a doubt as to that which the child has sucked, whether it is milk or not, the prohibitive relationship would be established. (*al-Fiqh 'alā al-madhāhib al-'arba'ah*)

The Imāmiyyah and the Shāfi'ī schools consider it necessary that the woman be alive at the time of breast-feeding and if she dies before completion of the minimum feedings, the prohibitive relationship would not be established.

The schools concur that the *ṣāḥib al-laban*, i.e. the husband of that woman, will become the foster-father of the breast-fed child, and between the two all those things which are *ḥarām* between fathers and sons will be *ḥarām*. His mother will become a grandmother for the breast-fed child, and his sister the child's aunt in the same manner as the woman who breast-feeds the child becomes his mother and her mother his grandmother and her sister his aunt.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

IX. Al-'Iddah:

There is consensus among the schools that marriage with a woman undergoing *'iddah* is not permissible and she is like a married woman in all aspects, irrespective of whether she is undergoing *'iddah* due to the death of her husband or as a result of divorce, revocable or irrevocable, in accordance with the following verses of the Qur'ān:

وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلٰثَةَ قُرُوءٍ...

And the divorced women should keep themselves in waiting for three menstrual courses.... (2:228)

وَالَّذِينَ يُتَوَفَّوْنَ مِنْكُمْ وَيَذَرُونَ أَزْوَاجاً يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْراً...

And (as for) those of you who die and leave wives behind, they (the wives) should keep themselves in waiting for four months and ten days.... (2:234)

The meaning of *al-tarabbuṣ* is to be patient and to wait.

The schools differ regarding one who marries a woman during her *'iddah,* as to whether she will become *ḥarām* for him. According to the Mālikî school she becomes *ḥarām* for him permanently if intercourse takes place, otherwise not. According to the Ḥanafî and the Shāfi'î schools the two should separate, there being no impediment to remarriage on completion of the *'iddah.* (*Bidāyat al-mujtahid*)

It is mentioned in the seventh part of *al-Mughnî,* a book of the Ḥanbalîs (chapter on *'iddah*): "If a person consummates marriage with a woman during her *'iddah* and both know it and know that marriage is *ḥarām* during *'iddah,* both of them would be considered fornicators and liable to punishment." In the sixth part of the same book (chapter on marriage) it is stated: "If a woman fornicates, marriage with her will not be *ḥalāl* for one who knows it unless these two conditions are fulfilled: completion of the *'iddah* and penitence for fornicating... If these two conditions are fulfilled, there is no

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

obstacle to her marriage with the fornicator or someone else." This shows that according to the Ḥanbalîs, marriage during *'iddah* does not result in permanent prohibition to marriage.

According to the Imāmiyyah, marriage with a woman during *'iddah,* after a revocable or an irrevocable divorce, is not permissible, and if one marries her with the knowledge of the *'iddah* and the related prohibition, the contract is void and she would become *ḥarām* for him permanently, irrespective of sexual contact. But if he has no knowledge of the *'iddah* and of such marriage being *ḥarām*, she would not become *ḥarām* permanently unless he has had intercourse with her. If he has not had intercourse, only the contract would become void, and he may marry her after the completion of the *'iddah* (*al-Masālik,* vol. 2, chapter on divorce).

X. Al-'Iḥrām:

The Imāmiyyah, the Shāfi'î, the Mālikî and the Ḥanbalî schools say: A *muḥrim* for Ḥajj or 'Umrah, man or woman, cannot marry nor conclude marriage on behalf of another acting as a guardian or an agent. The marriage, if performed, is void in accordance with the tradition:

لاينكح المحرم، ولاينكح، ولايخطب.

A *muḥrim* may not propose, nor marry, nor conclude marriage for another.

The Ḥanafî school considers *iḥrām* as no hindrance to marriage. The Imāmiyyah hold that if a marriage is performed without the knowledge of the prohibition during the state of *iḥrām,* it will make the woman temporarily *ḥarām.* When they are relieved of *iḥrām*--or he, when the woman had not been in the state of *iḥrām* at all--it is permissible for him to marry her. But if concluded with the knowledge of the prohibition, the two should separate, and she would become permanently *ḥarām* to him. The other schools hold that she would become *ḥarām* only temporarily. (al-'Allāmah al-Ḥillî

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

in *al-Tadhkirah,* vol. 1, chapter on Ḥajj; *Bidāyat al-mujtahid,* chapter on marriage)

NOTES:

1. The Imāmiyyah have narrated this tradition with different words. According to their version: A woman came to the Prophet (ṣ) and said, "Get me married." The Prophet then announced, "Who is ready to marry her?" One of those present stood up and said, "I". The Prophet (ṣ) then asked him, "What can you give her?" He replied, "I have nothing." The Prophet said, "No." The woman repeated her request and the Prophet (ṣ) repeated the announcement but none stood up except the same man. The woman again repeated her request and the Prophet (ṣ) announced again. Then the Prophet (ṣ) asked him, "Do you have any good knowledge of the Qur'ān?" He replied, "Yes, I do." The Prophet (ṣ) then said, "I marry her to you (*zawwajtukahā*) in exchange for your teaching her what you know well of the Qur'ān." Therefore, the word used was *al-zawāj,* not *al-milk*.

2. This is the view of most of the Imāmiyyah scholars. But some of them, such as Ibn Idrīs among the early legists, and al-Sayyid Abū al-Ḥasan al-'Iṣfahānī among the recent ones, are of the opinion that the contract is valid and the condition is void. Accordingly, the Imāmiyyah scholars in both their views are on the whole like the scholars of the other schools.

3. Dr. Muḥammad Yūsuf Mūsā, in his book *al-'Aḥwāl al-shakhṣiyyah* (1958) page 74, states: "The Shī'ah consider the presence of witnesses as necessary for marriage." He considers the Shī'ah and the Ḥanafī, the Shāfi'ī and the Ḥanbalī schools to hold a common view. But there is no source of reference for what he states.

4. According to the Imāmiyyah, an invalid condition in a non-marriage contract results in the contract becoming void. But in a contract of marriage such a condition does not cause the contract nor the *mahr* to be void unless a choice is given regarding the voiding of the contract or a condition is laid that none of the consequences of the contract will follow, which is against the spirit of the contract. They have argued on the basis of reliable traditions that there is a difference between a marriage contract and other forms of contract. Some of the legists have said: "The secret of this difference is that marriage is not an exchange in the true sense of the word as in the case of other forms of contract." The Imāmiyyah scholars have extensive discussions on these conditions the like of which are not found in books of other schools. Those who want further information regarding these conditions may refer to *al-Makāsib* of Shaykh Murtaḍā al-'Anṣārī and *Taqrirāt al-Nā'înî* of al-Khwānsārī, vol. 2, and the third part of *Fiqh al-'Imām al-Ṣādiq* by this author.

5. In *Farq al-zawāj* of Ustādh 'Alî al-Khafîf, it is stated that the Imāmiyyah consider these kind of conditions as void. This is a mistake which has been caused as

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

a result of confusing these kind of conditions with those which negate the spirit of the contract.

6. Apart from this, the statements of the legists in *al-Bulghah, al-Sharā'i'*, and *al-Jawāhir* (chapter on marriage) regarding the question at hand indicate that living together prima facie shows the presence of marriage, and this is not farfetched.

7. *'Iddah* is a period of waiting prescribed by the Sharī'ah to be observed by a woman on divorce or the death of her husband. The *'iddah* for divorce is three months (three menstrual cycles); for death, four months and ten days. (Tr.)

8. It is strange that al-Shaykh Abū Zuhrah, in *al-'Aḥwāl al-shakhṣiyyah*, page 83, ascribes it to some Shī'ahs that they consider it valid to have nine wives at a time on the basis that *mathnā, thulāth*, and *rubā'* (in the Qur'ānic verse about the permissible number of wives) i.e. two, three and four, adds up to a total of nine! Firstly, there is no source for this statement. Al-'Allāmah al-Ḥillī, in *al-Tadhkirah*, says, "This view is attributed to some Zaydiyyah, but they categorically deny it, and I have not seen anyone expressing this view."

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Matrimonial Guardianship:

W*ilāyah* in marriage implies the legal authority granted to a competent guardian to be exercised over one under a legal disability for his or her advantage. This discussion comprises the following issues:

Wilāyah over a Mature and Sane Girl:

The Shāfi'ī, the Mālikī and the Ḥanbalī schools are of the opinion that the *wālī* (guardian) has the sole authority with respect to the marriage of his sane and major female ward if she is a maiden. But if she is a *thayyib* (that is, a girl who has had sexual intercourse), his authority is contingent on her consent. Neither he can exercise his authority without her consent, nor she can contract marriage without his permission. It is *wājib* that the *walī* take the responsibility of concluding the contract, which would not conclude if the woman recites it, though it is essential that she consent.

The Ḥanafîs regard a sane, grown-up female as competent to choose her husband and to contract marriage, irrespective of her being a maiden or a *thayyib.* No one has any authority over her, nor any right to object, provided she chooses one her equal and does not stipulate less than a proper dower (*mahr al-mithl*) for the marriage. If she marries someone who is not her equal, the *walî* has the right to object and demand the annulment of the contract by the *qāḍî*, and if she marries her equal but for less than the proper dower, the *walî* has the right to demand annulment if the husband does not agree to a proper dower. (Abū Zuhrah, *al-'Aḥwāl al-shakhṣiyyah*)

Most of the Imāmiyyah scholars are of the view that a sane girl of full age, on maturing, is fully competent to decide her contractual as well as non-contractual affairs and this includes marriage, regardless of her being a maiden or *thayyib.* Therefore, it is valid for her to contract for herself or on behalf of others, directly or by appointing a deputy, by making an offer or giving her acceptance, and irrespective of her having or not having a father, a grandfather,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

or other relatives. It is of no consequence whether the father agrees or not. The social status of the girl, higher or lower, and whether she marries a respectable or an abject person, is of no consequence. No one has a right of objection in this regard. Thus, she is in all respects on a par with a male, without any difference whatsoever. The scholars support this argument by quoting the following verse of the Qur'ān:

...فَلا تَعْضُلُوهُنَّ اَنْ يَنْكِحْنَ اَزْواجَهُنَّ...

...Then do not prevent them from marrying their husbands... (2:232)

The following tradition of the Prophet (ṣ) narrated by Ibn al-'Abbās also supports their view:

اَلْاَيِّمُ اَحَقُّ بِنَفْسِهَا مِنْ وَلِيِّهَا.

An *aym* has more authority over him/herself than his/her guardian.

'Aym' is one who is without a mate, man or woman; a maiden or *thayyib.*

The scholars have also put forth a rational argument and observed that reason dictates that every human being has total liberty regarding his own affairs and no other person, regardless of his being a near or distant relative, has any authority over him. Ibn al-Qayyim has well observed when he says: "How can it be legitimate for a father to marry his daughter without her consent to anyone of his choice, while she disapproves such a marriage and regards him as the most detestable person in the world, and yet he should forcefully marry her and hand her over as a captive to him!..."

Wilāyah in Cases of Minority, Insanity and Idiocy:

The legal schools concur that the guardin is authorized to contract marriage on behalf of his minor or insane ward (male or

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

female). But the Shāfi'ī and the Ḥanbalī schools have limited this authority to the case of a minor maiden, and as regards a ward who is minor *thayyib,* they do not recognize any such authority for the guardian. (*al-Mughnî,* vol. 6, Chapter on Marriage)

The Imāmiyyah and the Shāfi'ī schools consider only the father and the paternal grandfather as competent to contract marriage on behalf of a minor ward. The Mālikîs and the Ḥanbalîs further limit it to the father. The Ḥanafî school extends it to other relatives, even if it be a brother or an uncle.

The Ḥanafî, the Imāmiyyah, and the Shāfi'ī schools regard a contract of marriage with an idiot as invalid without the consent of his guardian. The Mālikî and the Ḥanbalî schools consider it valid, and the consent of the guardian is not required. (*al-Tadhkirah,* vol. 2; *al-Mughnî,* vol. 2, chapter on *ḥijr*)

The Order of Priority in Guardianship:

The Ḥanafîs give priority to the son as regards *wilāyah* over his mother, even if he be an illegitimate one. After the son, his son is given the right to *wilāyah* and then follow: the father, the paternal grandfather, the full brother, the half-brother (paternal), the full brother's son, the half-brother's son, the paternal uncle, the paternal uncle's son, and so on.

From this it is clear that the executor of the ward's father's will does not have matrimonial guardianship even if he has been explicitly given this authority.

The Mālikîs give priority to the father and after him the *wilāyah* goes to the executor of his will. Then comes the turn of the son--even if he be an illegitimate one. Thereafter come the brother, the brother's son, the paternal grandfather, the paternal uncle... and so on. On this order being exhausted the *wilāyah* will finally lie with the *ḥākim.*

The Shāfi'ī scholars give the father priority in exercising *wilāyah.* After him the paternal grandfather, the full brother, the half-brother (paternal), the brother's son, the paternal uncle, the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

paternal uncle's son, and so on, will exercise *wilāyah* in the descending order till it finally reaches the *ḥākim.*

The Ḥanbalîs regard the father, and after him the executor of his will, as those competent to exercise *wilāyah.* After these two, the order follows the pattern of inheritance till it finally reaches the *ḥākim.*

According to the Imāmiyyah, only the father and the paternal grandfather--and on some occasion, the *ḥākim*--are those authorized to exercise *wilāyah* with respect to marriage. Both the father and the grandfather are independent in the exercise of their *wilāyah* over a minor (girl or boy) or over an adult whose lunacy or idiocy precedes his adulthood, that is, when he/she has been a lunatic or an idiot when a minor and this state has continued into adulthood. But if lunacy or idiocy has resulted after maturity, the father and the grandfather have no authority for contracting marriage on behalf of such an adult. In this case the *ḥākim* will exercise his *wilāyah* despite the presence of the father and the grandfather. When the father chooses one mate and the grandfather another, the latter's choice shall prevail.

The marriage contracted by the *walî*--be it the father, the grandfather or the *ḥākim*--comes into effect if it is not against the interests of the ward. If it is, the ward has the option of dissolving the marriage on attaining maturity.

The Ḥanafîs have observed: When the father or the grandfather of a minor girl marries her to a person who is not her equal or for less than *mahr al-mithl,* the marriage will be valid unless it is evident that there has been a misuse of authority. But if such a marriage is concluded on behalf of a minor girl by her *walî* who is neither her father nor her grandfather, the marriage will be considered void *ab initio.*

The Ḥanbalî and the Mālikî schools have said: The father may give his daughter in marriage for less than *mahr al-mithl.* The Shāfi'î school says that he may not, and if he does so, the daughter has the right to claim *mahr al-mithl.*

The Imāmiyyah have said: If the *walî* gives his minor female

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ward in marriage for less than *mahr al-mithl* or contracts marriage on behalf of his minor male ward for more than such *mahr*, the contract and the *mahr* will both be valid on there being a good reason for doing so. In the absence of such a reason, only the contract will be valid and the validity of the *mahr* will depend upon the ward's agreeing to it after maturity. If the ward does not agree the *mahr* will be reduced to the *mahr al-mithl.*

There is consensus among the schools that a just ruler (*ḥākim*) can contract marriage on behalf of a lunatic, male or female, if he/she has no *walî* from among their relatives. This consensus is based on the following tradition:

اَلسُّلْطانُ وَلِيُّ مَنْ لاَ وَلِيَّ لَهُ.

The ruler is the *walî* of him who has no *walî*.

The Imāmiyyah and the Shāfi'î schools do not consider the *ḥākim* competent to exercise *wilāyah* over a minor girl. The Ḥanafî school gives this authority to the *ḥākim,* but does not consider the contract so concluded as binding. Therefore, the girl can set it aside on maturity. Thus the position of the Ḥanafîs is in fact similar to that of the Imāmiyyah and the Shāfi'î schools because the *ḥākim* becomes redundant in this matter. According to the Mālikî school, the *ḥākim* is competent to contract marriage on behalf of a minor or a lunatic (male or female) with their equals on their not having any relative to act as *walî*. The *ḥākim* is also given competence to conclude marriage on behalf of a sane grown-up girl, with her consent.

The schools concur that it is necessary for a *walî* that he be an adult Muslim male. As to the condition of *'adālah* (justice), it is required in the *ḥākim* who is acting as *walî*, not for a relative acting as such, except by the Ḥanbalî school which considers *'adālah* as necessary for every *walî* regardless of his being a relative or a *ḥākim.*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Al-Kafā'ah (Equality):

The meaning of *"al-Kafā'ah"*, according to those who consider it as consequential in marriage, is that the man be an 'equal' of the woman in certain things. Moreover, they require *kafā'ah* of men only, because it is not something disapprovable for a man to marry a woman lower in status as against a woman doing the same.

The Ḥanafî, the Shāfi'î and the Ḥanbalî schools concur in requiring *kafā'ah* in religion (Islam), freedom[1] (i.e. in his not being a slave), profession and lineage. These schools differ regarding *kafā'ah* in prosperity and wealth. The Ḥanafî and the Ḥanbalî schools recognize it, while the Shāfi'î school does not.

The Imāmiyyah and the Mālikî schools do not accept the notion of *kafā'ah* except in religion, in accordance with the following tradition:

إِذَا جَاءَ كُمْ مَنْ تَرْضَوْنَ دِيْنَهُ وَخُلُقَهُ فَزَوِّجُوهُ اِنْ لَا تَفْعَلُوا تَكُنْ فِتْنَةٌ فِي الْأَرْضِ وَفَسَادٌ كَبِيرٌ.

When someone, whose faith and conduct is acceptable to you, comes to you with a proposal, then marry him. If you don't, it will result in corruption upon the earth and great discord.

In any case, the condition of *kafā'ah* in marriage does not harmonize with the following verse of the Qur'ān:

...اِنَّ اَكْرَمَكُمْ عِنْدَ اللهِ اَتْقٰكُمْ...

...Surely the most honourable amongst you in God's sight is the most pious amongst you.... (49:13)

The condition of *kafā'ah* contradicts a basic principle of Islam which says:

لَا فَضْلَ لِعَرَبِيٍّ عَلٰى عَجَمِيٍّ إِلَّا بِالتَّقْوٰى.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

There is no superiority for an Arab over a non-Arab except on the basis of *taqwā* (piety).

Also, it is opposed to the practice (*sunnah*) of the Prophet (ṣ), who ordered Fāṭimah bint Qays to marry Zayd ibn Usāmah and ordered Banū Bayāḍah to marry Abū Hind, who was a cupper. That is why we see a group of eminent scholars, such as Sufyān al-Thawrī, al-Ḥasan al-Baṣrī, 'al-Karkhī among the Ḥanafīs and Abū Bakr al-Jaṣṣāṣ and the followers of these two among the scholars of Iraq' (Ibn 'Ābidīn, vol. 2, chapter on marriage) disregarding *kafā'ah* as a condition in marriage.

Al-'Uyūb (Defects):

Is it possible for one of the spouses to dissolve the marriage on finding a certain defect in the other? The schools have differed regarding the defects which justify the dissolution of the marriage and also regarding the rules that apply in these circumstances.

Al-'Anan (Impotence):

Al-'anan is a disease which renders a man incapable of sexual intercourse. All the five schools give the wife the right to dissolve the marriage in such a situation. But in a situation where the husband's inability is limited to his wife and he is capable of intercourse with any other, the schools have different views regarding the wife's right of dissolving the marriage.

The Imāmiyyah have said: The wife's right to dissolve the marriage is not ascertained unless the husband is incapable of having intercourse with any woman whatsoever. Therefore, on his inability being limited to his wife and not others, the right of dissolving the marriage does not accrue,[2] because the source of this right is a rule which gives the power of dissolving marriage to the wife of an impotent man; one who is capable of having intercourse with other women is not considered impotent in the true sense of the word.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

This is so because impotence is a bodily defect which renders a man incapable of intercourse with any woman, exactly like a blind man who cannot see anything. In a case where a person is incapable of intercourse, with his wife and not others, then the reason is necessarily an external cause apart from an innate physical defect. The reason could be shyness or fear or a quality of the wife which makes her detestable, or something else. It has also been observed that there are such criminals whose dislike of legitimate (sexual) relations has reached such a degree that they are unable to perform it. On the contrary, their inclination towards *ḥarām* is such that it gives them the required strength and the pleasure of performing it.

According to the Shāfi'ī, the Ḥanbalī and the Ḥanafī schools, a person's inability to copulate with his wife gives her the right to dissolve the marriage despite his being capable of it with other women, because in such a case he will be considered impotent with respect to her. Besides, they point out, of what benefit is it to the wife if he is capable of having intercourse with other women!

However, there is consensus among the schools that when a woman pleads the impotence of her husband and he denies the charge, the burden of proof will rest on her to prove that he is impotent. On no proof being offered[3] it will be seen whether she was a maiden prior to marriage or not. If she had been one, she will be referred to female specialists to determine her present condition, and their opinion will be acted upon. In a case where the wife is not a maiden, the husband will be made to take an oath because it is he who denies the charge made by the wife claiming the presence of a defect sufficient for dissolving the marriage. If he takes the oath, the wife's claim will be dismissed. But on his abstaining from taking the oath, the wife will take the oath and then the *qāḍî* will give him a lunar year's time. When this period also does not yield any benefit for the wife, the *qāḍî* will grant her the option of remaining with him or of dissolving the marriage. If she elects to remain with him, the choice is hers, and if she desires dissolution, she will herself annul the marriage or the *ḥākim* on her request. According to the Imāmiyyah, the Shāfi'ī and the Ḥanbalī schools, she does not

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

require a divorce for the separation. The Mālikīs have said: She will divorce herself by the order of the *qāḍî*. This observation of the Mālikīs does in fact mean annulment. The Ḥanafî school is of the opinion that the *qāḍî* will order the husband to pronounce the divorce and on his refusal the *qāḍî* will pronounce the divorce.

The Ḥanafîs, in such a case, regard the payment of the full *mahr* as necessary; the Imāmiyyah consider the payment of half the *mahr* as sufficient. The Mālikî, the Shāfi'î and the Ḥanbalî schools are of the opinion that she will not be entitled to receive any *mahr*.

If the husband's impotence is subsequent to the consummation (*al-'aqd wa al-dukhūl*) of marriage, the wife will not have the choice of dissolving the marriage. However, if impotence occurs after the contract but before the consummation of marriage, she will have the choice of annulment in the same manner as when impotence precedes the contract.[4]

***Al-Jabb and al-Khiṣā'*:**

Al-jabb means the state of mutilation of the male organ and by *al-khiṣā'* is meant castration, either by the removal or by the crushing of both testicles. Both, *al-jabb* and *al-khiṣā'*, if present before the consummation of marriage, give the wife the immediate right to annul the contract. But if these two defects occur after the consummation of marriage, the right to annul the marriage will not result.

The Ḥanafîs have observed that if the castrated person has the capacity of erection, the right to annul the marriage does not arise, even though ejaculation be absent. The other schools regard ejaculation as a necessary condition regardless of erection, because the inability to ejaculate is a defect similar to impotence.

Al-Shahîd al-Thānî, in the chapter on marriage of his book *al-Masālik*, volume 1, has narrated that a castrated person can penetrate and have orgasm, and his condition during the act is more intense than a normal male, although he does not ejaculate. This inability is sufficient for rescinding the contract, because the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

traditions prove the right of the wife of a castrated person to opt for separation.

The Ḥanafîs have said: When the contract is rescinded as a result of any of these two defects, the wife shall be entitled to full *mahr*. The other schools have observed that, if the contract is annulled as a consequence of *al-jabb,* no *mahr* need be paid because marriage has not been consummated. But if *al-khiṣā'* be the cause for rescinding the contract, she will receive *mahr* only when consummation has occurred.

The Ḥanafî school does not recognize any ground on which the husband may annul the contract, even though there may be tens of defects in the wife. On the contrary, the wife has the right of annulling the marriage on the basis of any of the three above-mentioned defects, i.e. *al-'anan, al-jabb* and *al-khiṣā'*. Therefore, the Ḥanafîs have nothing to say about the forthcoming defects.

Insanity:

The Mālikî, the Shāfi'î and the Ḥanbalî schools concur that the insanity of one spouse gives the other the right to annul the marriage. But these schools differ regarding the details. The Shāfi'î and the Ḥanbalî schools have granted the right of annulment irrespective of whether madness results before or after marriage, and even after consummation. There is no period of waiting before annulment, as required in the case of impotence.

According to the Mālikîs, if the insanity occurs before marriage, the right to annul the contract results for the sane spouse, on the condition that he or she suffers harm in living with the other. But if the insanity results after marriage, only the wife has the right to annul the marriage after a probationary period of a year granted by the judge. The husband cannot annul the marriage if his wife loses sanity after marriage.

According to the Imāmiyyah, the husband will not annul the marriage where the wife has become insane after marriage, because

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

he has the option of divorce. The wife, on the contrary, can annul the marriage on the husband's insanity, regardless of its preceding the marriage or occurring afterwards, and even after consummation.

The Imāmiyyah, the Ḥanbalī, the Shāfi'ī and the Mālikī schools concur that the wife is entitled to receive full *mahr* if the marriage has been consummated, and nothing if not.

Leprosy and Leucoderma:

According to the Imāmiyyah, leprosy and leucoderma are among defects that give the husband, not the wife, the right to annul the marriage on condition that such disease be antecedent to the marriage without the husband's knowledge. The right to annul the marriage does not exist for the wife if her husband suffers from any of these two diseases.

The Shāfi'ī, the Mālikī and the Ḥanbalī schools regard these two diseases among the causes that give both the man and the woman an equal right to annul marriage. On one of the spouses suffering from any of these two diseases, the other acquires the right to annul the contract. According to the Shāfi'ī and the Ḥanbalī schools, the rule that applies in the case of insanity applies here as well.

The Mālikīs are of the opinion that the wife has the right of annulment equally whether the husband's leprosy antedates the marriage or follows it. As regards the husband's right, he can do so on the wife's being leprous before marriage or at the time of marriage. Regarding leucoderma, both the spouses have the choice of annulment if the disease precedes marriage, and if it occurs after marriage, only the wife can exercise her choice and not the husband. The milder forms of leucoderma, on their appearance after marriage, do not give rise to any right. The judge gives a probationary period of one lunar year for those suffering from these two diseases, for there is a possibility of cure.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Al-Ratq, al-Qarn, al-'Afal & al-'Ifḍā':

...These four defects,[5] which occur only among women, give the husband, according to the Mālikīs and the Ḥanbalīs, the right to annul the marriage contract. According to the Shāfi'īs, only in case of either *al-ratq* or *al-qarn* the husband has such a right; not when the wife suffers from *al-'ifḍā'* or *al-'afal*. According to the Imāmiyyah, such a legal effect follows only in the case of *al-qarn* or *al-'ifḍā'*, not in the case of *al-ratq* or *al-'afal*. They also state that the husband, if he wishes, can annul the marriage contract when he finds blindness or visible lameness in the wife after the conclusion of the contract if he had no knowledge of it before. But either of the defects when found in the husband does not give such a right to the wife.

In our opinion, any disease, regardless of its being peculiar to one of the sexes or its being common to both of them, that is capable of being diagnosed and cured without leaving behind any deformity or defect, does not give rise to any legal right and its occurrence, like its non-occurrence, is legally without any effect. The reason behind this opinion is that, when a disease becomes curable, it becomes similar to any other ordinary disease that may affect any person. The time-honoured significance attached by the legists to the above-mentioned defects is because they could not be treated surgically during the past.

Immediacy (al-Fawriyyah):

According to the Imāmiyyah school, the choice of annulling the marriage exists so long as it is exercised immediately. Therefore, if the man or the woman, on knowing the defect, does not initiate the proceedings for annulling the marriage, the contract will become binding. The same rule applies for annulling the marriage in a case of deception.

The author of *al-Jawāhir* has said that ignorance regarding the right to annul the marriage, and even immediacy, is a good excuse,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

considering that this right has been given without imposing any conditions. He has also observed that the annulment of marriage, in all its forms, does not depend on the judge. He has only the power to grant a probationary period in the case of impotence.

The Option to Include Conditions (Khayār al-Sharṭ):

The difference between *sharṭ al-khayār* and *khayār al-sharṭ* is that in the first the option to annul the marriage be included in the contract. For example, when the bride making the offer says, "I marry myself to you on the condition that I shall have the choice of annulling the marriage within three days," and the groom accepts with a *qabiltu,* or when the bride says, "I marry myself to you," and the groom, while accepting, says, "I accept on the condition that I shall have the choice to annul the marriage within such and such a time;" we see that in both the cases the option to annul the marriage is mentioned in the contract itself, and this, as has been mentioned earlier, results in the contract becoming null and void, according to all the five schools.

But in *khayār al-sharṭ* the option to annul the marriage is not mentioned as a condition *per se* in the contract. That which is mentioned as a condition in this case, is a particular quality--such as the bride's virginity or the groom's possessing a university degree--in a manner that if the said quality is not found to exist the other shall have the right to annul the contract. The schools have a difference of opinion in this regard.

The Ḥanafîs have said: If a spouse mentions a negative condition in the contract, such as the absence of blindness or a disease, or a positive condition, such as presence of beauty, virginity, etc., and then the opposite of it comes to light, the contract will be valid. Regarding the condition, it will not apply except when the wife lays down a condition related to *al-kafā'ah;* such as a condition regarding lineage, profession or wealth. Here she has the right to annul the contract. But as regards the husband, any similar condition laid down by him will not be considered applicable because

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

al-kafā'ah, as mentioned earlier, is a condition with reference to the husband, not the wife.

The Mālikī, the Shāfi'ī, the Imāmiyyah and the Ḥanbalī schools have said: The condition is valid and if not satisfied results in the spouse laying the condition acquiring the option of either upholding or annulling the contract. The following tradition is cited in support of this view:

الْمُسْلِمُونَ عِنْدَ شُرُوطِهِمْ.

The Muslims are bound to (fulfil) their conditions.

Furthermore, they state, the aforesaid conditions are not against the spirit of the contract and do not contradict the Qur'ān or the Prophet's Sunnah; neither they amount to changing *ḥalāl* into *ḥarām* nor vice versa.

Deceit (Tadlīs):

The Imāmiyyah have discussed under this head the deception of the groom by the bride by either hiding a defect or by claiming a merit which is absent. In the first case, i.e., her hiding a defect and not mentioning it, the right to annul the contract will not accrue if he has not mentioned the absence of such a condition specifically in some way or another. A tradition is narrated from al-'Imām al-Ṣādiq (*'a*) which says:

فِي الرَّجُلِ يَتَزَوَّجُ إِلَى قَوْمٍ، فَإِذَا امْرَأَتُهُ عَوْرَاءُ، وَلَمْ يُبَيِّنُوا لَهُ. قَالَ لَا تُرَدُّ.

About a person who marries in a family and finds his wife to be one-eyed while they have not revealed it to him, the Imam said: The contract will not be withdrawn.

This is the opinion of all the schools.

As regards the second form of deceit--i.e., where she claims a merit which in fact she does not possess--if the claimed merit has

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

been mentioned as a condition in the contract, as said earlier, the condition will hold good according to all except the Ḥanafīs. But if the claimed merit has not been mentioned in the contract as a condition--i.e., it has either been mentioned simply as a quality in the contract, or has been mentioned before the contract and the contract has been recited on that basis--then two different situations arise:

1. The merit has been mentioned in the contract as a quality, such as when the bride's attorney says, "I marry this maiden to you," or, "I marry this girl who is free from any defect to you." The Imāmiyyah state that when it is known that she does not possess the mentioned merit, the husband has the choice to annul the contract.

2. The merit has neither been mentioned as a condition nor as a quality in the contract, but has been mentioned during the course of the marriage negotiations, such as when she herself or her attorney says that she is a virgin and has no defect, and then the contract is recited on the basis of this statement, so that it is understood that the contract has been recited on the girl's possessing this particular quality. In the legal sources that I have referred to, I have not come across anyone who has discussed this particular aspect except the Imāmiyyah, among whom there is a difference of opinion as to whether in such a case the husband has an option of annulment. Some of them, including al-Sayyid Abū al-Ḥasan al-'Iṣfahānī, in *al-Wasîlah,* uphold the husband's option, because, they point out, the negotiations of the contracting parties regarding a particular quality followed by the conclusion of the contract on their basis, makes this quality similar to an implicit condition. Others, who oppose this view, have said that it will have no effect unless the quality is mentioned in the contract or its presence in the contract established in some way or another. Al-Shahîd al-Thānî, in *al-Masālik,* holds the same opinion, on the basis that a contract is binding unless there is categorical proof of its invalidity, and such a proof is not present in this case.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

To summarize, if the quality has been recognized in the contract in one of the three ways (i.e., as a condition, as a quality mentioned in the contract, or when mentioned during pre-contract negotiations), the husband has the option to annul or retain the contract. If he retains it, he will not have any right of reducing her *mahr,* whatever the defect, except when the condition was virginity. According to the Imāmiyyah, in this case, the husband may reduce the *mahr* by an amount equal to the difference between a maiden's *mahr* and that of a woman who is not a maiden.

If he chooses to annul the contract, she will not be entitled to receive any *mahr* if marriage has not been consummated, according to the Imāmiyyah and those of the four schools who permit the option of annulment in case of deceit. On the marriage being annulled after consummation, she will receive the *mahr al-mithl,* and, according to the Shāfi'ī school, the husband paying such *mahr* will not claim it from the person responsible for the deceit.

The Imāmiyyah observe: It depends upon who is responsible for the fraud. If it is the bride, she will not be entitled to any *mahr,* even after consummation. If someone else, then she will receive her full *mahr,* and the husband will claim this amount from the deceiver in accordance with the rule, 'the deceived will level his claim against the deceiver.'

Supplementary Issue:

1. If after marriage, one of the spouses finds a defect in the other and claims that the contract was concluded after freedom from such defect was understood, through one of the three above-mentioned modes, the other refuting, the burden of proof will lie with the claimant. If the claimant furnishes the proof, the judge will grant him/her the right to dissolve the marriage. If the claimant is unable to prove his/her claim, the respondent will take an oath and the case will be dismissed by the judge.

2. When a person marries a woman after it has been understood, through one of the three mentioned ways, that she is a virgin, and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

then finds her to be otherwise, he will not be entitled to dissolve the marriage, unless it is proved that her loss of virginity preceded the contract. This can be proved, either by her confession, or through evidence, or any such circumstantial evidence as may lead to certain knowledge--such as when after the marriage, intercourse takes place within a period during which the chances of her losing her virginity (due to other causes) do not exist.

If the issue stays unsettled and it cannot be proved in any of the said ways, whether she lost her virginity before the marriage or after it, the right to dissolve the marriage will not accrue to the husband, because the presumption is that her loss of virginity does not precede the marriage, and also because the possibility of her having lost it due to an unknown reason--such as riding or jumping--also exists (*al-Masālik* of al-Shahīd al-Thānī, vol. 2, Chapter on Marriage in Imāmiyyah Fiqh).

3. Al-Sayyid Abū al-Ḥasan al-'Iṣfahānī, in *al-Wasîlah,* the chapter on marriage, writes: If a man marries a girl, without virginity being mentioned in the negotiations previous to the marriage, without the contract being based on it, and without it being included as a condition or a quality in the contract, but only believing her to be so because of her not having married anyone before him, he will not have the right to dissolve the marriage if it is later proved that she was not a virgin. But he has the right to partly reduce her *mahr.* This reduction will be proportional to the difference between the *mahr* of her like if a virgin and if not a virgin. Therefore, if her *mahr* be fixed at 100 and the *mahr* of a virgin like her is 80 and a non-maiden like her is 60, he will reduce from 100 a fourth part, i.e. 25, with 75 remaining as *mahr.*

Accordingly, al-Sayyid al-'Iṣfahānī envisages four possible conditions regarding virginity:

i) Where virginity is mentioned in the contract as a condition;

ii) Where it is mentioned in the contract as a quality;

iii) Where it is mentioned during settlement of marriage and the contract is based upon it;

iv) Where he marries her believing her to be a virgin and does

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

not mention it, neither before the contract nor in the contract.

In the first three conditions, the husband has the choice to annul the marriage; in the fourth, he has no such choice, but can reduce a part of the *mahr* in the above-mentioned manner.

NOTES:

1. By including 'freedom' as one of the conditions of *al-kafā'ah*, the Ḥanafī school contradicts one of its own fundamental principles. This school allows the death penalty of a freeman for murdering a slave and that of a slave for murdering a freeman, whereas the other schools, including the Imāmiyyah, have said: A freeman may not be killed for killing a slave, but a slave will be killed for killing a freeman. Apart from this, the Ḥanafīs do not consider it necessary that a guardian, in a contract of marriage, be a freeman, and this is contrary to the opinion of some other schools.

2. Al-Shahīd al-Thānī, in *al-Masālik*, quotes al-Shaykh al-Mufīd: The criterion regarding the annulment of marriage by a woman is that her husband be incapable of intercourse with her, irrespective of his ability regarding other women. The general notion supports this view.

3. A case of similar nature was brought before me and I referred the respondent for medical check-up. The reply given was: Medical science has not yet devised any method for diagnosing impotence and the inability to have sexual intercourse is the only method of proving it.

4. After this, in the original Arabic text, the author in a note discusses the opinion of the Imāmī author of *al-Jawāhir* relating to a case of allegation of impotence against the husband. This note, which extends over a page of the book, has been deleted in this translation. (Trans.)

5. *Al-ratq* means the presence of obstruction in the vaginal opening making intercourse difficult. *al-qarn* (*lit.* horn) means the presence of a horn-like protrusion inside the vaginal passage; *Al-'afal* means a fleshy obstruction in it. *Al-'ifḍā'* means the condition of merging of anal and vaginal passages. (Trans.)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

AL-MAHR

M*ahr* is one of the (pecuniary) rights of a wife established in the Qur'ān and the Sunnah, and on which there is consensus (*ijmā'*) among Muslims.

There are two kinds of *mahr: al-mahr al-musammā* and *mahr al-mithl.*

1. Al-Mahr al-Musammā:

Al-mahr al-musammā is the *mahr* agreed by the couple and specified by them in the contract. This *mahr* does not have any upper limit, by consensus of all the schools, in accordance with the following verse of the Qur'ān:

وَاِنْ اَرَدْتُمُ اسْتِبْدَالَ زَوْجٍ مَكَانَ زَوْجٍ وَاٰتَيْتُمْ اِحْدٰىهُنَّ قِنْطَاراً فَلَا تَاْخُذُوا مِنْهُ شَيْئاً...

And if you wish to take a wife in place of another and have given one of them a heap of gold, then take not from it a thing. (4:20)

But the schools differ regarding the lower limit. The Shāfi'ī, the Ḥanafī and the Imāmiyyah schools observe: Everything which is valid as price in a contract of sale is valid as *mahr* in a marriage contract, though it be a single morsel.

The minimum *mahr* according to the Ḥanafīs is ten dirhams,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and a contract concluded for a lesser amount is valid and the minimum--i.e. ten dirhams--shall be payable.

The Mālikîs have said: The minimum is three dirhams. Therefore, if something less is specified and later the marriage is consummated, the husband will pay her three dirhams; if it has not been consummated, he has a choice between giving her three dirhams or dissolving the contract by paying her half the specified *mahr*

Conditions of Mahr:

It is valid that *mahr* be specified in terms of currency, jewellery, farmland, cattle, profit, trade commodities and other things of value. It is necessary that the value of the *mahr* be known, either exactly (e.g. a thousand lira) or approximately (e.g. a particular piece of gold or a particular stock of wheat). If the *mahr* is totally vague, so that its value is unascertainable in any manner, according to all the schools except the Mālikî, the contract is valid and the *mahr* void. The Mālikîs observe: The contract is invalid and will be considered void before consummation, but if consummation has occurred it will be valid on the basis of *mahr al-mithl.*

Among the conditions is the being *ḥalāl* of the *mahr* and its being valued in terms of a commodity whose transaction is considered legal by the Islamic Sharî'ah. Therefore, if it is mentioned in terms of liquor, swine or *maytah* or anything else whose ownership is invalid, according to the Mālikîs the contract shall be invalid if it has not been consummated, and if consummated, shall be valid and the *mahr al-mithl* shall be payable.

The Shāfi'î, the Ḥanafî, the Ḥanbalî and most of the Imāmiyyah legists have said: The contract is valid and she shall be entitled to the *mahr al-mithl.* Some Imāmiyyah legists have entitled her to the *mahr al-mithl* only if the marriage has been consummated, while others amongst them lay no such condition and are in consonance with the other four schools.

If the *mahr* is usurped property, such as when she is married for

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

a farm as her *mahr* and later it is known to belong to the groom's father or someone else, the Mālikīs have said: If the farm is known to the two and both happen to be sane, the contract shall be invalid if not consummated and if consummated shall be considered valid on the basis of *mahr al-mithl.* The Shāfi'ī and the Ḥanbalī schools regard the contract as valid and entitle her to the *mahr al-mithl.* The Imāmiyyah and the Ḥanafī schools are of the opinion that the contract is unconditionally valid; but regarding the *mahr* they observe: If the owner agrees, she shall receive the farm itself; if the owner refuses, she shall be entitled to receive a similar farm or its price because the stipulated *mahr* in this case is capable of being validly owned though ownership does not materialize, in contrast with liquor or swine which cannot be owned at all.

2. Mahr al-Mithl:

The concept of *mahr al-mithl* is relevant in the following cases:

(1) There is consensus among the schools that *mahr* is not an essential ingredient (*rukn*) of a marriage contract, as price is in a contract of sale. On the contrary, *mahr* is only one of the effects of a marriage contract, and even without its stipulation the contract is valid. Thus, *mahr al-mithl* shall be payable on consummation (when *mahr* was not specified) and if he divorces her before the consummation of marriage, she shall not be entitled to any *mahr,* but will receive *al-mut'ah,* which is a gift given by the husband to his wife (at the time of divorce) in accordance with his status, such as a ring or a dress, etc. If they both agree on this gift, it will suffice; otherwise it will be fixed by the judge. The issue whether the couple's retiring to seclusion (*khalwah*) is tantamount to consummation or not, will be discussed later.

The Ḥanafī and the Ḥanbalī schools observe: If the husband or the wife dies before consummation, full *mahr al-mithl* shall be payable as if the marriage had been consummated (*Majma' al-'anhur* and *al-Mughnī,* chapters on marriage).

According to the Mālikīs and the Imāmiyyah, no *mahr* is

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

payable if any of the two dies before consummation (*al-Mughnî* and *al-Wasîlah*).

The Shāfi'îs have two views: (a) That the *mahr* shall be payable; (b) no *mahr* shall be paid (*Maqṣad al-nabîh*).

(2) If the marriage contract is concluded with specification of *mahr* in terms of a commodity which cannot be owned, e.g. liquor or swine, as mentioned earlier.

(3) All the schools agree that *mahr al-mithl* becomes *wājib* as a result of intercourse-by-mistake. Intercourse-by-mistake is intercourse with someone with whom it is not legally permissible, though without the knowledge of it being so; such as a person marrying a woman without the knowledge of her being his foster sister and coming to know of it later, or his having intercourse with her after both have appointed their deputies for reciting the contract, thinking it to be sufficient for establishing sexual contact. In other words, intercourse-by-mistake is intercourse without proper marriage, though the presence of a legal excuse precludes penal action. On this account the Imāmiyyah include under this head intercourse by a person who is either insane or intoxicated or in sleep.

(4) The Imāmiyyah, the Shāfi'î and the Ḥanbalî schools have said: One who coerces a woman to fornicate shall have to pay *mahr al-mithl;* but if she had yielded voluntarily she shall not be entitled to anything.

(5) A marriage concluded on the condition that no *mahr* shall be paid is valid according to all except the Mālikîs, who say: The contract shall be invalid if not consummated, and valid if consummated due to the obligation to pay *mahr al-mithl.* A large number of Imāmiyyah legists have said: He shall give her something, be it much or little. Traditions from the Ahl al-Bayt (*'a*) support this view.

According to the Imāmiyyah and the Ḥanafî schools, if an invalid marriage contract is recited with a certain *mahr* and the marriage is consummated, she shall be entitled to receive the *mahr* stipulated even though it was less than the *mahr al-mithl* because of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

her prior consent. But if the stipulated *mahr* is more, she shall receive only the *mahr al-mithl,* because she is not entitled to receive more than *mahr al-mithl.*

Mahr al-mithl is computed by the Ḥanafîs by taking into account the *mahr* of her equals from the paternal, not the maternal side. According to the Mālikîs, her *mahr* shall be commensurate with her physical and mental qualities. The Shāfi'îs, take the *mahr al-mithl* of the wives of her paternal relatives as reference, i.e. the wife of her brother, that of her paternal uncle, then her sister etc. For the Ḥanbalîs, the judges shall compute the *mahr al-mithl* by taking into account the *mahr* of her female relations, such as the mother or maternal aunt.

The Imāmiyyah have said: There is no fixed way of determining *mahr al-mithl* in the Sharî'ah. It is estimated by those who know her status, descent, and all those aspects which influence the increase or decrease of *mahr.* But this *mahr* shall not exceed the *mahr al-sunnah,* which is equal to five hundred dirhams.

Immediate and Deferred Payment of Mahr:

All the schools concur regarding the validity of deferred payment of *mahr,* fully or partly, provided that the period be known, either exactly (such as when it is said, "I marry you for a hundred, of which fifty shall be paid immediately and the rest after one year") or in an indeterminate manner (such as when it is said, "The *mahr* is deferred till death or divorce"). The Shāfi'î school disapproves the latter form of deferment.

But if the period is so mentioned that it is totally vague, such as when it is stated that the payment of *mahr* shall be made on the return of a certain traveller, the time clause shall be void.[1]

The Imāmiyyah and the Ḥanbalî schools have said: If the *mahr* has been mentioned without specifying whether its payment is immediate or deferred, the entire *mahr* shall be immediately payable.

According to the Ḥanafîs, the local practice shall be observed; i.e. the portions to be immediately paid and deferred will follow the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

local custom.

The Ḥanafîs have also said: If the *mahr* is deferred without mentioning the period of deferment (such as when it is said, "Half of it is immediately payable and the rest deferred"), the full *mahr* shall be immediately payable.

The Ḥanbalîs observe: The *mahr* can be deferred until death or divorce.

The Mālikîs are of the opinion that such a marriage is invalid, it is voidable before consummation, though valid after it on the basis of *mahr al-mithl.*

The Shāfi'îs state: If the period is known not exactly but in an indeterminate manner (such as until death or divorce) the *mahr* stipulated shall become invalid and the *mahr al-mithl* will be payable (*al-Fiqh 'alā al-madhāhib al-'arba'ah*).

The Ḥanafî and the Ḥanbalî schools have said: If the bride's father apportions for himself, as a condition, a part of her *mahr,* the *mahr* is valid and the condition shall have to be complied with.

The Shāfi'îs say: The *mahr* stipulated shall become invalid and *mahr al-mithl* shall be payable.

According to the Mālikîs, if this condition is included at the time of marriage, the bride shall receive the entire *mahr,* including her father's share; and if the condition is laid after the marriage, the bride's father shall receive his share (*al-Mughnî* and *Bidāyat al-mujtahid*).

The Imāmiyyah observe: If her *mahr* has been specified with a fixed portion of it mentioned for her father, she shall get her full stipulated *mahr* and her father will not get his share.

The Wife's Right to Refuse Her Conjugal Society:

There is consensus among the schools that the wife, simply after the recital of the contract, has the right to demand her full specified *mahr* immediately and to refuse her conjugal society until the *mahr* is paid. But, if she surrenders once willingly without demanding the *mahr,* she loses her right of refusal; all concur on this issue except

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Abū Ḥanīfah. He observes: She has the right to refuse even after surrender. Abū Ḥanīfah's disciples, Muḥammad and Abū Yūsuf oppose his view.

The wife is entitled to receive maintenance if she refuses her conjugal society until the payment of *mahr;* because her refusal in such a case is legally valid. But if she refuses to fulfil her conjugal duties after receiving *mahr* or after voluntary surrender, she shall not be entitled to maintenance except according to Abū Ḥanīfah.

If the wife be a minor unfit for marital relations and the husband a major, it is up to her *walî* to demand the *mahr;* it is not necessary that he wait until her maturity. Similarly, if the wife be a major and the husband a minor, the wife has the right to demand the *mahr* from his *walî,* and it is not necessary for her to wait until his maturity.

The Imāmiyyah and the Shāfi'î schools state: If a dispute arises between the couple, with the wife refusing to surrender until payment of *mahr* and the husband refusing payment until her surrender, the husband shall be compelled to deposit the *mahr* with a trustee and the wife will be asked to surrender. Then if she surrenders, she shall receive her *mahr* and be entitled to maintenance. But if she refuses, she shall not receive the *mahr* and will not be entitled to any maintenance. If the husband refuses to deposit the *mahr,* he will be ordered to pay her maintenance on her demanding it.

The Ḥanafî and the Mālikî schools state: The payment of *mahr* has precedence over the woman's surrender, and the man may not say, "I will not pay the *mahr* until she surrenders". If he insists on this, he shall be ordered to pay her maintenance, and if she, after receiving the *mahr,* refuses her conjugal society, the husband is not entitled to claim the return of *mahr.*

According to the Ḥanbalî school, the husband shall be first compelled to pay the *mahr.*

This opinion concurs with the Ḥanafî view except that according to the Ḥanbalîs, if she refuses her conjugal society after receiving the *mahr,* he has the right to demand the return of the *mahr.* (*Maqṣad al-nabîh, Majma' al-'anhur* and *al-Fiqh 'alā*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

al-madhāhib al-'arba'ah)

Inability of the Husband to Pay the Mahr:

The Imāmiyyah and the Ḥanafī schools observe: If the husband is unable to pay the *mahr,* the wife is not entitled to dissolve the marriage, and the judge, too, cannot pronounce her divorce. But she has the right to deny her conjugal society.

The Mālikīs state: If his inability is proved before the consummation of marriage, the judge will grant him time according to his own discretion.

If, after the expiry of such period his inability continues, the judge will pronounce divorce, or the wife will divorce herself and the judge shall endorse its validity. But if he has consummated the marriage, she can in no way dissolve it.

The Shāfi'ī school is of the opinion that if his inability is proved while the marriage has not been consummated, she can dissolve it. But if it has been, she cannot dissolve it.

The Ḥanbalīs state: She may dissolve the marriage even after its consummation, provided she had no knowledge of his inability before the marriage. Therefore, if she had the knowledge the question of dissolving the marriage does not arise. Even when the marriage is dissolvable, only the judge has the authority to do so.

The Father and His Daughter-in-Law's Mahr:

The Shāfi'ī, the Mālikī and the Ḥanbalī schools hold that if a father concludes the marriage of his pauper son, he shall be liable for payment of *mahr* even if the son be a major and the father acts as his *walī* for the marriage as his son's deputy. If the father dies before *mahr* is paid, which was *wajib* upon him, it shall be paid out of his legacy.

The Ḥanafī school observes: The payment of *mahr* is not *wājib* upon the father, regardless of whether the son is a well-to-do person or a pauper, a major or a minor (*al-'Aḥwāl al-shakhṣiyyah* by Abū

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Zuhrah).

The Imāmiyyah state: If the minor son possesses property and his father gets him married, the *mahr* shall be paid from the son's assets and the father shall not be liable at all. But if the minor has no property at the time of marriage, the father shall be liable to pay the *mahr;* the husband (son) shall not be liable even if he becomes a man of means later. Also, the father is not required to pay the *mahr* of his major son's wife unless he guarantees it on the conclusion of the contract.

Consummation and Mahr:

Sex relations with a woman fall within these three categories:

1. Fornication (*zinā*) to which she surrenders with the knowledge of its being *ḥarām.* In this instance, she will not get any *mahr;* rather shall be liable to penal action.

2. As a result of a misunderstanding on her behalf of its being legal, followed by later knowledge that it was *ḥarām.* Here, her act has no penal consequences and she is entitled to receive *mahr al-mithl,* irrespective of the man's knowledge of the act being *ḥarām.*

3. As a result of a valid marriage. In this case she is entitled to receive the specified *mahr* if it has been validly stipulated, and the *mahr al-mithl* if no *mahr* was specified in the contract or was specified in an invalid form (e.g. in terms of liquor or swine).

If one of the spouses dies before consummation, then, according to the four schools, she is entitled to receive the entire specified *mahr.* The Imāmiyyah jurists differ. Some of them, in consonance with the four Sunnī schools entitle her to the entire specified *mahr,* while others (including al-Sayyid Abū al-Ḥasan al-'Iṣfahānī in his *al-Wasīlah* and Shaykh Aḥmad Kāshif al-Ghiṭā' in *Safīnat al-najāt*) to half the specified *mahr* on a par with a divorcee.

Wife's Crime Against Husband:

The Shāf'ī, the Mālikī and the Ḥanbalī schools have observed:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

If a wife kills her husband before the consummation of marriage she shall not be entitled to any *mahr.*

According to the Ḥanafî and the Imāmiyyah schools, she shall not be deprived of her right to *mahr,* though she loses her right to inherit him.

Al-Khalwah:

According to the Shāfi'î school and the majority of Imāmiyyah jurists, the mere enjoyment of privacy or retirement by the couple has no effect on *mahr* nor any other consequence. Only the consummation of marriage is consequential in this regard.

The Ḥanafî and the Ḥanbalî schools have observed: 'Valid seclusion' confirms *mahr,* establishes descent, and requires observance of *'iddah* in case of divorce, even though such seclusion does not result in consummation. The Ḥanbalîs also consider gazing and touching with a sexual intent and kissing on a par with consummation and therefore sufficient for confirming *mahr.* By 'valid seclusion' is meant the seclusion of the couple in a place where they are secure from observation by others and where there is no impediment to intercourse.

The Mālikîs state: If the period of seclusion is prolonged, *mahr* is established even without consummation. Some of them have fixed the period of 'prolonged seclusion' at one complete year (*al-'Aḥwāl al-shakhṣiyyah* of Abū Zuhrah; *Raḥmat al-'ummah* of al-Dimashqî).

Half the Mahr:

There is consensus among the schools that if *mahr* is specified at the time of the contract and then the husband pronounces divorce without consummation, or seclusion--for those who consider the latter to be consequential--half the *mahr* shall be payable. But if the contract is recited without specifying *mahr,* she shall get nothing except *al-mut'ah,* as mentioned earlier, in accordance with the following verse:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

لا جُناحَ عَلَيْكُمْ انْ طَلَّقْتُمُ النِّساءَمالَمْ تَمَسُّوهُنَّ اَوْتَفْرِضُوالَهُنَّ فَر يضَةً وَمَتِّعُوهُنَّ عَلَى الْمُوسِعِ قَدَرُهُ وَعَلَى الْمُقْتِرِ قَدَرُهُ مَتاعاً بِالْمَعْرُوفِ حَقّاًعلىَ الْمُحْسِنِينَ * وَاِنْ طَلَّقْتُمُوهُنَّ مِنْ قَبْلِ اَنْ تَمَسُّوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَر يضَةً فَنِصْفُ ما فَرَضْتُمْ...

There is no blame on you if you divorce women when you have not touched them or appointed for them a portion; yet make provision for them, the wealthy man according to his means and the needy man according to his means, a provision according to honourable usage; (this is) a duty on the good-doers. And if you divorce them before you have touched them and you have appointed for them a portion, then (pay them) half of what you have appointed... (2:236--37)

Therefore, if the husband, not having paid anything to the wife whose *mahr* has been specified, divorces her before consummating the marriage, he shall pay her half the *mahr.* But if he has paid the entire *mahr,* half of it shall be returned if it still exists, and the equivalent of it in cash or kind if it has perished.

If the husband and wife do not specify *mahr* in the contract but later agree upon it and then the husband divorces her before consummation, in this case, shall she be entitled to receive half of the *mahr* agreed upon as if the *mahr* had been specified in the contract, or shall she get nothing except the *mut'ah,* as if they had not agreed upon *mahr* later?

The Shāfi'ī, the Imāmiyyah[2] and the Mālikī schools are of the opinion that she is entitled to half the *mahr* agreed upon, and according to the Ḥanbalī book *al-Mughnî* (vol. 6, chapter on marriage), she is entitled to half the *mahr* agreed upon after the contract, but not *mut'ah.*

This discussion was related to the right to full *mahr* and the right to half *mahr.* Instances of annulment of the right to full *mahr* can be found in our above discussion on 'defects'.

An Exceptional Case:

If the husband (by his finger or something else) causes the wife's loss of virginity, will it be considered consummation for the sake of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

confirming *mahr*?

There is no doubt that such an act followed by intercourse has all the legal consequences such as *mahr, 'iddah,* establishment of parenthood and so on.

But the question is, if he, without intercourse, divorces her after causing her loss of virginity in this manner, does it confirm only half the specified *mahr* because the marriage has not been consummated, or will the full *mahr* be payable on account of her loss of virginity?

I put this question to Āyatullāh al-Sayyid Abū al-Qāsim al-Khū'î. This was his reply: "The husband is liable to pay the full *mahr* because of the loss of virginity, on the basis of the tradition narrated by 'Alî ibn Ri'āb in which the Imām (*'a*) has stated: If they (wives) are as they were when they joined the husband, then she will get half the specified *mahr.* That which is understood from this conditional clause is that after divorce only half the *mahr* is to be paid if the wife's condition at the time of divorce is the same as it was when she joined him. Therefore, due to the general meaning connoted, it indicates that the wife, if she is not what she was, the husband is liable to pay the entire *mahr,* and it shall not be reduced to half irrespective of whether the change and loss of virginity occurs as a result of intercourse or some other factor."[3]

Disagreement between the Spouses:

The spouses may at times differ regarding the consummation of marriage and sometimes regarding the specification of *mahr,* its value, its receipt by the wife, or as to whether that which was received was given as a present or as *mahr.* Here we have the following issues:

1. Where the husband and wife differ regarding the consummation, the Ḥanafî school has two opinions, the more preferable of which is: If the wife claims the occurrence of consummation or seclusion, which the husband refutes, the wife's word shall be accepted and the burden of proof will rest on the husband, because it is she who actually contests the reduction of half

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

her *mahr* (*al-Fiqh 'alā al-madhāhib al-'arba'ah*).

The Mālikīs say: If the wife visits the husband at his home and then claims consummation while he denies it, her word shall be accepted on oath. If the husband visits her at her place and then she claims consummation while he denies it, his word shall be accepted on oath. And similarly, if they both go to see someone else at his place and she then claims consummation while he denies it, his word shall be accepted.

According to the Shāfi'īs, in case of dispute regarding consummation, the husband's word shall be accepted (*Maqṣad al-nabīh*).

The Imāmiyyah observe: If the spouses differ regarding consummation and the wife denies its taking place in order to preserve her right to deny him her conjugal society until payment of her *mahr,* agreed to be paid promptly, and he claims consummation in order to establish his claim that her refusal is without legal justification, or if he denies consummation seeking to reduce his liability to half the *mahr* and she claims consummation to have occurred, seeking to establish her right to full *mahr* and maintenance during the *'iddah,* in both these instances the word of the party denying consummation shall be accepted irrespective of whether it is the husband or the wife; and, as said earlier, seclusion has no effect.

This may lead a question to arise in one's mind: how do the Imāmiyyah jurists accept in this case the word of the party denying consummation, while, as mentioned earlier, they accept the word of even an impotent man claiming consummation?

The answer is that the issue here is the act of consummation, which is an occurrence and an event claimed to have happened.

The presumption is that an event claimed to have happened has not occurred, and therefore the burden of proof rests on the party claiming its occurrence. That which was in dispute in the issue regarding impotence is the *presence* of this defect, which justifies dissolution of marriage. Therefore, the wife's denial of consummation implies that she is claiming the presence of that defect, and thereby becoming the claimant. The husband's statement

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

that consummation has occurred implies that he refutes the claim of the presence of the said defect, thereby challenging the claim.

2. If they differ regarding the fact of stipulation of *mahr,* with one of them claiming that valid *mahr* was stipulated prior to the contract, while the other refutes it, saying that the contract was recited without *mahr* stipulation, the Imāmiyyah and the Ḥanafī schools observe: The burden of proof rests on the party claiming stipulation and the party refuting it shall take an oath. But if the wife claims that the *mahr* has been specified and the husband refutes it, and takes an oath after her failure to prove the stipulation, she shall receive *mahr al-mithl* if the marriage has been consummated, on condition that *mahr al-mithl* does not exceed the amount she claims as having been specified. Thus, if she claims that the contract was concluded with a *mahr* of ten units while he denies it and the *mahr al-mithl* happens to be twenty units, she shall receive only ten, in view of her own admission that she is not entitled to more.

The Shāfi'īs are of the opinion that both the parties are claimants, i.e. each one of them is a claimant as well as a refuter. Therefore, if one of them furnishes proof while the other fails to do so, the judgement shall be given in favour of the party furnishing proof, and if both furnish proof or both fail to do so, they shall both take oath and *mahr al-mithl* shall be confirmed.

3. If both agree that *mahr* has been specified, but disagree regarding its amount, here the Ḥanafī and the Ḥanbalī schools are of the opinion that the word of the party claiming an amount equal to the *mahr al-mithl* shall be accepted. Therefore, if she claims the *mahr al-mithl* or something else, her claim shall be accepted. If the husband's claim amounts to the *mahr al-mithl* or more, his word shall be accepted. (*al-Mughnî* and Ibn 'Ābidîn).

The Shāfi'īs state: Both are claimants, and if both are unable to furnish proof, *mahr al-mithl* shall be confirmed after their oath.

According to the Imāmiyyah and the Mālikī schools, the wife is the claimant and the burden of proof shall rest on her. The husband challenging the claim shall take an oath.

4. Where the spouses disagree regarding the actual payment of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

mahr, with the wife denying that she received it and the husband claiming to have paid it, the Imāmiyyah, the Shāfi'ī and the Ḥanbalī schools have observed: The wife's word shall be accepted because she challenges the husband's claim who shall have to furnish proof. The Ḥanafī and the Mālikī schools observe: The wife's word shall be accepted if the dispute arises before consummation and the husband's word if consummation has occurred.

5. When both admit that she has received something and the wife claims that it was a present, while the husband claims it to have been *mahr,* the Imāmiyyah and the Ḥanafī schools observe: The husband's word shall be accepted because he knows his own intention. Therefore, he shall take an oath and it is for the wife to furnish proof that it was a present (*al-Jawāhir* and Ibn 'Ābidīn).

Such is the case when there is no circumstantial evidence such as local custom or a particular circumstance of the husband showing that it was a present, such as when it is something eatable or a gift of dress, or what the Lebanese call *al-'alāmah* (mark or token) and the Egyptians *al-shabakah* (net), which is a ring or something similar given as a gift to the fiancée by the fiancé so that she may decline other proposals. Therefore, if the thing is something of this kind, the word of the wife shall be accepted.

If the fiancée changes her mind about the marriage after having accepted the ring but before the contract, she is liable to return the ring on his demanding it, and if the fiancé changes his mind, the custom gives him no right to claim it back. But the rules of the Sharī'ah do not recognize any difference between his or her changing his/her mind and therefore she is liable to return the gift as long as it is with her and she has not sold it or gifted it or changed its form.

Dowry (al-Jihāz):

The Imāmiyyah and the Ḥanafī schools concur that *mahr* is the sole property of the wife and one of her rights. She can use it according to her own will, bequeathing it or buying her dowry with it,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

or saving it for her own use at her pleasure, and no one has the right to question or oppose her. The responsibility of furnishing their home lies solely on the husband and she is in no way responsible for anything, because maintenance, in all its different forms, is required only of the husband.

The Mālikîs observe: It is incumbent upon the wife to buy from the *mahr* she has received all those things which women of her status buy as their dowry, and if she has not received any *mahr* then it is not *wājib* for her to bring dowry except in the two cases: (1) if the local custom considers it compulsory for the wife to bring dowry even though she has not received anything; (2) if the husband sets the condition that she furnish their home with her own means.

If the husband and wife dispute regarding the ownership of any household item, it will be seen whether the item is used only by men or women or by both. Thus three different situations arise:

(1) Where the item is used by men only, such as his clothes, his books, his measuring instruments if he is an engineer or his medical apparatus if a doctor. The ownership of this kind of items shall be determined by accepting the word of the husband under oath, except when the wife furnishes proof that she is the owner. This is the opinion of the Imāmiyyah and the Ḥanafî schools.

(2) Where the item is used only by women, such as her clothes, jewellery, sewing machine, cosmetics, etc., the ownership of these shall be determined by accepting her word under oath, except when the husband furnishes proof to the contrary.

(3) Where the item is used by both of them, such as carpets, curtains, etc., it shall be given to the party furnishing proof of its ownership. But if both are unable to furnish proof, each of them shall testify under oath that the said item belongs to him/her; then the items will be equally divided between them. If one of the parties takes an oath while the other abstains, the party taking oath shall be given the item. This is the opinion of the Imāmiyyah.

Abū Ḥanîfah and his pupil Muḥammad are of the view that the husband's word shall be accepted regarding items of common use.

The Shāfi'îs say: If the husband and wife dispute regarding the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ownership of household goods, these shall be divided between them irrespective of their being of individual or common use. (*Mulḥaqāt al-'Urwah* of al-Sayyid Kāẓim, chapter on *qaḍā'; al-'Aḥwāl al-shakhṣiyyah;* Abū Zuhrah)

NOTES:

1. I had stated in my book *al-Fuṣūl al-Shar'iyyah* that the deferring of *mahr* till death or divorce is not correct due to the need to avoid vagueness in the period of deferment. Later on, it occurred to me that it is correct, because *mahr* can stand vagueness to a greater extent than price in a transaction of sale, and also because it is not a compensation (*'iwaḍ*) in the real sense of the term. Thus, it is sufficient for *mahr* that it be determinable by sight (i.e. without being weighed or measured) or receivable or that it be teaching the wife of that which the husband knows of the Qur'ān. Apart from this, one of the two terms (death or divorce) is in fact known, though not to the parties to the contract. Thus one of these two events, death or divorce, will inevitably occur. Moreover, it is also valid that a marriage be concluded without mentioning the *mahr,* as well as when a third person is delegated to determine the *mahr.*

2. The author of *al-Jawāhir* has observed about the third problem relating to the issue of *al-tafwîḍ*: whenever there is an agreement on a thing, that thing shall be the *mahr* and shall in fact become the property of the wife, either by itself or in the form of a debt, immediately or in a deferred form, and all those rules which apply to *mahr* specified in the contract, shall apply to it.

3. It has been observed in a tradition on the authority of Yūnus ibn Ya'qūb that: لا يُوجِبُ الصَّداقَ إلاّ الوِقاعُ في الفَرْجِ (Nothing makes *mahr wājib* except vaginal intercourse).

This tradition is an explanation of the one narrated by Ibn Ri'āb, and on this basis the Imam's words: فَإِنْ كُنَّ كَمادَخَلْنَ عَلَيْهِ (If they are as they were when they joined him), would appear to include only the natural form of copulation, not those instances where virginity is lost as a result of unnatural means, and the tradition narrated by Ibn Ri'āb fails to provide a valid basis for argument. Whatever be the case, the *fatwā* of al-Sayyid al-Khū'î concurs with those of al-Sayyid al-Ḥakîm in *Minhāj al-ṣāliḥîn* (where he states: "If he causes her to lose her virginity by using his finger without her consent, the *mahr* shall be payable") and al-Shaykh Aḥmad Kāshif al-Ghiṭā' in *Safînat al-najāt* (chapter on *ḥudūd*).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Lineage *(Al-Nasab)*

Introduction:

Every man is free within the limits of law and morality to say whatever he wants, and no one is entitled to stop him from doing so. But it is also not incumbent upon anyone to heed his statements or to consider them with respect. This is true irrespective of the speaker's station, whether high or low, venerable or otherwise, when his speech pertains to something outside the area of his specialty. Therefore, if an authority on law gives an opinion on a question of medicine or agriculture, it is not correct for a plaintiff to cite that opinion in support of his case, nor is it correct for a judge to base his judgment upon it.

Similarly, in the case of apostles, prophets, Imams and authorities on law, it is not obligatory upon anyone to believe their statements about issues concerning physical nature, such as the creation of the earth and the heavens, the distances between them, their origin and end, the elements of which they are composed and the forces therein. Sacred personalities at times explained a certain phenomenon in their capacity as a sacred authority; at other times they spoke about things in their personal capacity, like all other human beings who say what they conjecture or hear from others. Therefore, when they speak in their religious capacity, it is *wājib* upon us to listen to them and to obey them, as long as their religious decree does not exceed

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the limits of their specialty. But when they speak in their personal capacity, it is not *wājib* to follow them, because, here, their word is not regarding religion or things related to it.[1]

Thus a legislating authority, religious or secular, should limit itself to framing and expounding laws and regulations, with the aim of encouraging some acts and discouraging others, and explaining their causes and effects, approving one contract as binding together with its terms and conditions and invalidating another as not binding, and issues of this kind which safeguard the social order and ensure the common good.

But as regards natural phenomena--such as the minimum or the maximum period of pregnancy--it is not within the domain of a lawgiver to either affirm or deny them or to make amendments. This is because the realities of nature and their causes are not alterable; they do not change due to the change of conditions and passage of time, in contrast with social laws, which are laid down, abrogated and modified by the lawgiver's will.

It is obvious that a lawgiver does make external realities of nature the subject of his laws, for instance, when he lays down that a child in the womb has the right to inherit from the father, that the birth of a child leads to an increase in the statutory allowance of the mother, or that when the wheat produce exceeds the consumption of farmers, the surplus should be taken into government custody, etc. But the explanation of natural phenomena relating to the subject of laws is the task of specialists. If there is anything in the statements of legal authorities explaining or defining such phenomena, it is nothing but an attestation of what specialists have reported. Therefore, when a judge refers an issue for specialist opinion and the fact is known showing the error of its description by legists, it is not *wājib* that their observations be followed, because we know with certainty that the legists have spoken regarding a phenomenon which pre-existed legislation; the intent of their remarks was to explain this pre-existing fact. Thus, when the opposite is proved,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

to follow their word would be equivalent to acting against their purpose and intention. The legists themselves name this kind of mistake "mistake in application"; it is similar to the mistake of a person who asks for a cup while pointing towards a stone resembling it.

After this introduction, we move on to our actual subject. As the child is the subject of many Islamic laws--such as its right to inherit from the father; the illegitimacy of its marriage with its sibling, the father's right to act as a guardian of its person and property until maturity; the *wujūb* of its maintenance, and such other legal and moral rights--the legists are forced to determine the minimum and the maximum period of gestation. It is obvious that this issue pertains to the specialty of doctors of medicine not of law, and, therefore, it is not necessary that the word of legists be acted upon if it contradicts actual fact and reality. Because, in such circumstances, the logic of reality is stronger than their logic, and its proof prevails over their evidence. When the opinions of natural philosophers and physical scientists collapse before reality, it is more in order that the observations of those who are in no way connected with a particular field of specialization should collapse before facts. We mention here the views of different schools of Islamic law regarding the minimum and maximum period of gestation, on the assumption that one is not obliged to follow these views when they are not in consonance with facts.

The Minimum Period of Gestation:

The opinion of all the legal schools of Islam, both *Sunnî* and *Shî'î*, is that the minimum gestation period is six months, because the 15th verse of the *Sūrat al-'Aḥqāf* expressly states that the gestation period (*muddat al-ḥaml*) along with the period of suckling (*riḍā'ah*) is thirty months (...وَحَمْلُهُ وَفِصَالُهُ ثَلٰثُونَ...) and the 14th verse of the *Sūrat Luqmān* states that the period of suckling is to be two complete years (...وَفِصَالُهُ فِى...

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

.(...عامَيْن When two years are substracted from thiry months, the remainder is six months, which is the minimum period of gestation. Modern medicine supports this view and the French legislature has also adopted it.

The following rules are derived from the above observations:

1. When within six months of her marriage a woman gives birth to a child, the child will not be attributed to her husband. Al-Shaykh al-Mufîd and al-Shaykh al-Ṭūsî--both Imāmî--and al-Shaykh Muḥyî al-Dîn 'Abd al-Ḥamîd of the Ḥanafî school have said that the choice of denying or accepting the child's parentage lies with the husband. If he accepts the child as his, the child shall be considered his legitimate offspring, and shall enjoy all the rights of a legitimate child. Similarly, the father shall have all those powers over it as over the other legitimate children.[2]

When the couple differs regarding the period of their conjugal relationship (she claiming that they existed since six months or more, and he denying it, claiming the period to be shorter than six months and denying the child to be his), Abū Ḥanîfah is of the opinion that the wife's word shall be considered true and acted upon without her taking an oath.[3]

The Imāmiyyah have said: If circumstantial evidence favours his or her contention, it will be acted upon, and if no such evidence exists, the judge shall accept the wife's word after her taking an oath that sex relations with the husband had existed since six months; then the child shall be attributed to the husband.[4]

2. When a husband divorces his wife after intercourse and she, after observing the *'iddah,* marries another and gives birth to a child within six months of her second marriage, if six months or more--but not exceeding the maximum period of gestation--have elapsed since her intercourse with the first husband, the child shall be attributed to the former husband. But if more than six months have elapsed after her second

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

marriage, the child be attributed to the second husband.

3. When a woman contracts a second marriage after divorce and then gives birth to a child within six months of intercourse with the second husband, if more than the maximum period of gestation has elapsed since intercourse with the former husband, the child shall not be attributed to any of them. For example, if eight months after divorce a woman marries another person and after living with him for five months gives birth to a child, supposing the maximum period of gestation to be a year, it is not possible to attribute the child to the former husband, because more than a year has elapsed since they had intercourse. It is neither possible to attribute the child to her present husband because six months have not yet passed since their marriage.

The Maximum Period of Gestation According to Ahl al-Sunnah:

Abū Ḥanîfah has said: The maximum gestation period is two years on account of a tradition narrated by 'Ā'ishah that a woman does not carry a child in her womb for more than two years. Mālik, al-Shāfi'î and Ibn Ḥanbal state the period to be four years, on the basis that the wife of 'Ajlān carried her child for four years before delivery. It is strange that the wife of his son, Muḥammad, had a similar gestation period. In fact all women of Banū 'Ajlān have a gestation period of four years,[5] which indicates God's power over His creation.

This argument, if it proves anything, shows the piousness of these legists and their good intentions, and how often the logic of piety prevails over the logic of reality.

'Abbād ibn 'Awwām puts the maximum period of gestation at 5 years, al-Zuharî at 7 years, and according to Abū 'Ubayd there is no maximum period of gestation.[6]

It follows from these conflicting opinions, that if a person divorces his wife or dies and she, without marrying again after him, bears a child, the child shall be attributed to him if born after: two years, according to Abū Ḥanîfah; four years,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

according to Shāfi'îs, Mālikîs and Ḥanbalîs; five years, according to Ibn 'Awwām; seven years according to al-Zuharî; and twenty years according to Abū 'Ubayd.

Legislation in Egypt relieves us from a critical examination of these varied opinions. The Egyptian Sharî'ah courts followed the Ḥanafî code until the passing of Act 25 of 1929. Section 15 of this Act categorically mentions that the maximum period of gestation is one year.[7]

The Maximum Gestation Period According to the Shî'ah:

There is a difference of opinion among Imāmî scholars regarding the maximum period of gestation. Most of them have stated it to be nine months, some of them ten months, and some others a year. Thus there is a consensus that the period does not exceed a year, even by an hour. Therefore, if a woman, divorced or widowed, gives birth to a child after one year, the child shall not be attributed to the husband, because there is a tradition from al-'Imām al-Ṣādiq (*'a*):

إذاطَلَّقَ الرَّجُلُ زَوْجَتَهُ وَقالت: أناحُبلىٰ وجاءت بِهِ لأَ كْثَرَ مِنْ سَنَةٍ ولَوْ ساعة واحِدَة لَم تُصَدَّق في دَعْوَاها

If a man divorces his wife and she claims to be pregnant, and then gives birth to a child after more than a year has passed, even though by an hour, her claim shall not be accepted.[8]

Walad al-Shubhah:

Shubhah--that is a mistake which leads a man to have intercourse with a woman *ḥarām* to him, as a result of his ignorance of her being such--is of two kinds: *shubhat 'aqd*(mistake of contract) and *shubhat fi'l* (mistake of act).

1. 'Mistake of contract' occurs where a man concludes a marriage contract with a woman in a manner in which legal contracts

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

of marriage are concluded and later it is known that the contract was invalid due to the presence of a cause sufficient to invalidate the contract.

2. 'Mistake of act' occurs where a person copulates with a woman without there being between them any contract, valid or invalid, and he does so either without conscious attention or thinking that she is *ḥalāl* to him, and later the opposite is discovered.

Sexual intercourse by a lunatic, or an intoxicated person, or a person in sleep, or a man under the false impression that the woman is his wife, comes under this category. Abū Ḥanīfah has extended the meaning of this form of 'mistake' to its utmost limits where he has observed: Where a man hires a woman for some work and then fornicates with her, or hires her for fornication and does so, the two will not be penalized for fornication, because of his ignorance that his hiring her does not include this act.[9]

Accordingly, if she is working in a business establishment or a factory and the proprietor of such establishment copulates with her believing this to be one of the benefits which accrue to him as a result of his hiring her, this act will not be termed fornication, but will be considered 'a mistake' and shall be a valid excuse for the proprietor in Abū Ḥanīfah's opinion.

It follows from the above discussion that a child born as a result of 'intercourse by mistake' is a legitimate offspring and is equal in all respects to a child born out of a valid wedlock, irrespective of whether the mistake is a 'mistake of contract' or a 'mistake of act'. Therefore, he who has intercourse with a woman while in a state of intoxication, or in sleep, or in a state of lunacy or under coercion, or before reaching the age of maturity, or under an impression that she is his wife, with the opposite being discovered later--in all such cases if she gives birth to a child, it shall be attributed to him.

The Imāmiyyah have said: In all such cases of mistake, the legality of lineage is established and if the man refuses to recognize the child as his, his refusal shall not be accepted and the child will be compulsorily attributed to him.[10]

Muḥammad Muḥyī al-Dīn, in *al-'Aḥwāl al-shakhṣiyyah,* p. 480,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

observes that lineage is not established in any form of 'copulation by mistake' unless the person acting mistakenly claims the child to be his and acknowledges it, because he knows himself better. But this view is incorrect when applied to a lunatic, to one in sleep, or to an intoxicated person, because they do not act with conscious intent. It is also inapplicable in the case of mistake of contract because there is no difference between a valid contract and an invalid contract except that the couple shall separate when the invalidity of the contract becomes known, and there is a consensus among the Sunnî and Shî'î schools that whenever a mistake, in any one of its different forms, is proved, it is *wājib* for the woman to observe *'iddah,* as observed by a divorcee; she is also entitled to receive the full *mahr.* Therefore, the rules which apply to a wife will apply to her as regards *'iddah, mahr* and child's lineage.[11]

The mistake may be from the side of the man as well as the woman, so that both are ignorant and inattentive. It may be from only one side, such as when the woman knows that she has a lawful husband but hides it from the man, or when he is aware while she is a lunatic or in a state of intoxication. When the mistake is from both sides the child shall be attributed to both of them, and if the mistake is from only one side the child shall be attributed to the parent acting under mistake and not to the parent who was aware.

If a person copulates with a woman and then claims ignorance regarding its being *ḥarām,* his word shall be accepted without proof and oath.[12]

In any case, the legal principles, according to Sunnî and Shî'î schools, do not permit any ruling ascribing illegitimate birth to a child born of a father when there is a possibility of ascribing its birth to a mistake. Therefore, if a *qāḍî* has evidence before him to suggest 99% probability of the child's illegitimate birth and only 1% probability suggesting it is 'a child by mistake', it is incumbent upon him to accept the latter evidence and disregard the former, giving preference to *ḥalāl* over *ḥarām* and legitimacy over illegitimacy, in consonance with the Divine injunctions:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

...وَقُولُواللنّاسِ حُسْناً...

And speak good to the people (2:83)

...إجْتَنِبُوا كَثيراًمِنَ الظَّنِّ إنَّ بَعْضَ الظَّنِّ إثْمٌ...

Eschew much suspicion, for surely some suspicion is a sin. (49:12)

Commentators of the Holy Qur'ān have narrated that one day when the Prophet (ṣ) was delivering a sermon, a man who was taunted by people regarding his lineage, stood up and asked, "O Prophet, who is my father?" The Prophet (ṣ) replied, "Your father is Ḥudhayfah ibn Qays." Another person asked him (ṣ), "O Prophet, where is my father?" The Prophet (ṣ) replied, "Your father is in hell." Here verse 101 of the *Sūrat al-Mā'idah* was revealed:

يا اَيُّهَاالَّذينَ امَنُوالاتَسْئَلُوا عَنْ أشْياءَانْ تُبْدَ لَكُمْ تَسُؤْكُمْ...

O believers, question not concerning things which, if they were revealed to you, would vex you....[13]

Traditions of the Prophet (ṣ) recorded by Sunnī and Shī'ī sources state:

الحدُودُتُدْرَأُ بالشُبُهاتِ

Penal consequences are repelled by doubts.

دَعْ مَايُريبُكَ إلىٰ مالا يُريبُكَ

Leave that which puts you into doubt for that which does not.[14]

Imām 'Alī ibn Abī Ṭālib (*'a*) has said:

ضع أمْرَأخيكَ عَلىٰ أحْسَنِه

Give the best interpretation to your brother's act.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Al-'Imām al-Ṣādiq (*'a*) has said:

كَذِّبْ سَمْعَكَ وَبَصَرَكَ عَنْ أَخِيكَ

Reject the evidence of your ear and eye regarding your brother.[15]

The above-mentioned verses of the Qur'ān and the reliable and unambiguous traditions quoted, as well as many other verses and traditions of the kind, make it incumbent upon every person to abstain from testifying and judging anyone as an illegitimate offspring unless there exists certainty that he is not in reality a child of mistake in any of its forms.

Child Born of al-Mut'ah:

There is something in this regard of which most people are not aware, and I thank the person who wrote me a letter inquiring about this issue. Now, with the present opportunity to explain this legal and historical issue, I intend to be brief to the best of my ability. I shall be a narrator, not a partisan or critic, and shall leave the reader to judge for himself, keeping the matter open for him to affirm or reject.

There is a consensus amongst the Sunnî and Shî'î schools that *mut'ah* (temporary marriage) was *ḥalāl* by the order of the Prophet (*ṣ*) and that Muslims performed *mut'ah* during his time. But they differ regarding its revocation. The Sunnîs say: *Mut'ah* has been revoked and made *ḥarām* after being *ḥalāl* earlier.[16]

The Shî'ah state: Revocation has not been proved: it was *ḥalāl* and shall remain so until the Day of Judgment. The Shî'ah cite verse 24 of the *Sūrat al-Nisā'* as evidence:

...فَمَا اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ فَآتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً...

...Give them their dowry for the mut'ah you have had with them as a duty.... (4:24)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

And that which Muslim has narrated in his *al-Ṣaḥîḥ* as a proof:

إستَمْتَعَ الأَصْحابُ في عَهْدِ رَسُولِ اللهِ وَأَبِي بَكرٍ وَعُمَرَ.

The Companions of the Prophet (*ṣ*) performed *mut'ah* during his lifetime and during the reigns of Abū Bakr and 'Umar.

The *mut'ah* form of marriage is a marriage for a fixed period of time, and according to the Shī'ah it is similar to the permanent marriage as regards the recital of a contract proving express intention of marriage.

Consequently, any form of sexual contact between a man and a woman without a contract will not be considered *mut'ah* even if it is by mutual consent and inclination. When the contract is recited it becomes binding and its observance becomes obligatory.

It is compulsory that *mahr* be mentioned in the contract of *mut'ah*. This *mahr* is similar to the *mahr* of a permanent wife, there being no prescribed minimum or maximum limit, and half of it subsides when the stipulated period is gifted or expires without consummation, in consonance with the rule applied in the *mahr* of a permanent wife divorced before consummation.

It is incumbent upon the woman with whom *mut'ah* has been contracted to undergo the *'iddah* after the completion of the stipulated time, with the difference that a divorcee observes an *'iddah* of three months or three menstrual cycles, while in *mut'ah* she observes an *'iddah* of two menstrual cycles or forty-five days. But as to the *'iddah* observed on the death of the husband, the wife in *mut'ah* observes it for four months and ten days, which is the same as observed by a permanent wife, irrespective of consummation.

The child born of this form of marriage is legitimate and enjoys all the rights of a legitimate child without the exception of a single legal or moral right.

It is compulsary that *mut'ah* be contracted for a fixed period of time and it is necessary that this stipulated time be mentioned in the contract. The wife in *mut'ah* does not inherit from her husband and her maintenance is also not obligatory upon him, in contrast with the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

permanent wife, who both inherits and is entitled to maintenance. But a wife in *mut'ah* can stipulate at the time of the contract that she shall inherit and be entitled to maintenance, and if the contract is concluded on these terms, the wife in *mut'ah* becomes similar to a permanent wife.[17]

In spite of their belief in the validity of *mut'ah,* the Shî'îs of Syria, Iraq and Lebanon do not practise it, and the Ja'farî Sharî'ah Courts in Lebanon, since their inception, have neither applied this form of marriage nor authorized it.

***The Illegitimate Child* (Walad al-Zinā):**

One who studies the verses of the Qur'ān, the traditions of the Prophet (ṣ) and the statements of Muslim legists, finds that Islam leaves no room for anyone to accuse others of fornication. Islam has framed the related rules of furnishing proof and giving judgment in a manner that makes this task difficult or even impossible. Whereas Islam considers two just (*'ādil*) witnesses sufficient for proving homicide, in the case of fornication it requires four just witnesses to testify that they have witnessed the act of penetration itself. It is not sufficient for them to say that so and so fornicated with so and so, or that they saw the two naked hugging each other in a bed under a single cover. If three witnesses bear witness while the fourth abstains, each of the three shall be liable to a punishment of eighty lashes. Similarly a person who accuses a man or a woman of fornication shall be liable to eighty lashes.[18]

The purpose behind all this is to cover the deeds of people, to protect their honour, to protect the family from the fear of ruined descent and the children from homelessness.

Fornication is the committing of the act by a mature and sane person with the knowledge of its being *ḥarām.* Therefore fornication cannot be committed by a person who has not attained maturity or is insane or is ignorant or has been coerced or is in a state of intoxication. The act committed by these people will be considered 'intercourse by mistake', and we have discussed earlier the rules

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

which apply to it. From the above discussion, it becomes clear that the Islamic Law gives a very restricted interpretation to fornication; firstly, by limiting its application to an act committed with knowledge and intention, wherein there is no scope for attributing it to a mistake or fault in any manner. Secondly, it has restricted the manner of proving it in court by requiring four just witnesses who have seen it with their own eyes, whereas, generally, such an act is not observable. It is possible for a single witness to have seen it, while it is almost impossible for three or four persons to do so. All this clearly indicates that Islam has firmly closed the door in the face of those who seek to raise this thorny issue, because God does not like the spread of indecency among His creatures.

There is a consensus among legists of all the legal schools that when fornication is proved in its above-mentioned meaning and manner, the child born of it shall not inherit from the father because no legal lineal bond is established between them.

But the legists have landed themselves in a legal difficulty by giving the *fatwā* that an illegitimate issue cannot inherit, and are puzzled in finding a way out of this difficulty: If an illegitimate child is not attributable legally to its male 'parent', then, accordingly, in such a situation, it cannot be impermissible for a man to marry his illegitimate daughter and for an illegitimate son to marry his sister or paternal aunt as long as he is considered a stranger to the male 'parent'.

Therefore, an illegitimate son is either a legally recognized issue and thereby entitled to everything to which legally recognized children are entitled, including the right of inheritance and maintenance, or he is not a legally recognized issue and thereby entitled to all those things which are established as regards those who are legally unrelated, including the marriage with a daughter or a sister. To differentiate between the effects of a single undivided cause is to claim something without requisite proof; it amounts to inclining towards something without any reason for doing so. Therefore, we see the legists differ on this question after having

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

concurred earlier (i.e. in excluding him from inheritance). Mālik and al-Shāfi'ī have said: It is permissible (in such a case) for the person to marry his daughter, his sister, his son's daughter, his daughter's daughter, his brother's daughter and his sister's daughter when these relations have been established as a result of fornication, because they are 'strangers' to him and no legal lineal bond exists between them.[19] But this manner of solving the problem reminds one of the saying: "The cure is worse than the disease."

Imāmiyyah legists, Abū Ḥanīfah and Ibn Ḥanbal have observed: We ought to differentiate between the two situations. We must disqualify the child from inheriting, while at the same time prohibiting matrimonial relationship between the child or its father within the prohibited degrees of relationship. Apart from marriage, to touch and to look at each other is also *ḥarām* for both of them. Therefore, a father cannot look at or touch his illegitimate daughter despite her inability to inherit from him and his of inheriting from her.[20]

They argue that the establishment of matrimonial relationship is *ḥarām* by pointing out that an illegitimate child is after all an offspring, both literally and by general acceptance. Consequently, whatever is *ḥarām* between fathers and children is also *ḥarām* for the illegitimate child and its father. Their argument about the child's disqualification from inheriting is based upon the fact that the child is not acknowledged by the Sharī'ah as its father's offspring and this is expressly stated by the verses of the Qur'ān and traditions.

Al-Laqīṭ:

Al-laqīṭ is a child found by a person in a state in which it is incapable of fending for itself, whom he takes and brings it up along with the rest of his family. All the legal schools concur that the *laqīṭ* and its guardian do not inherit from each other, because the act of giving shelter to an abandoned child is purely an act of kindness done in the spirit of cooperating in the performance of good and righteous deeds. It resembles the gifting of a fortune to someone

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

making him prosperous after earlier indigence and distress with the hope of acquiring God's grace. As this act of kindness is no cause for inheritance, similarly the giving of shelter to an abandoned child.

Adoption (al-Tabannî):

Adoption is the taking by a person of a child of known parentage and attributing it to himself. The Islamic Sharî'ah does not consider adoption as a cause of inheritance, for it does not change the actual fact from what it is; the lineage of the child is both known and established, and lineage can neither be abrogated nor eliminated. This has been clearly mentioned in this verse of the *Sūrat al-'Aḥzāb*:

...وَمَا جَعَلَ أَدْعِيَاءَ كُمْ أَبْنَاءَكُمْ ذٰلِكُمْ قَوْلُكُمْ بِأَفْوَاهِكُمْ وَاللهُ يَقُولُ الْحَقَّ وَهُوَ يَهْدِي السَّبِيلَ * اُدْعُوهُمْ لِآبَائِهِمْ هُوَ أَقْسَطُ عِنْدَ اللهِ...

...Neither has He made your adopted sons your sons (in fact). That is your own saying, the words of your mouths; but God speaks the truth, and guides on the way. Call them after their true fathers; that is more equitable in the sight of God.... (33:4, 5)

The exegetes have mentioned an interesting episode in relation to the revelation of this verse. Zayd ibn Ḥārithah was made captive during the *Jāhiliyyah* and the Prophet (ṣ) bought him. After the advent of Islam Ḥārithah came to Makkah and asked the Prophet (ṣ) to sell his son to him or to free him. The Prophet (ṣ) said: "He is free; he can go wherever he wants." But Zayd refused to leave the Prophet (ṣ). His father, Ḥārithah, became angry and said: "O people of Quraysh, bear witness that Zayd is not my son." The Prophet (ṣ) then said: "O people of Quraysh, bear witness that Zayd is my son."[21]

The legists have mentioned many other subsidiary issues under this head, and of these are some which are neither acceptable to human reason nor in harmony with the Sharî'ah. One of them is the one quoted by the author of *al-Mughnî* (vol.7, p.439) from Abū Ḥanîfah, who holds: If a man marries a woman in a gathering and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

then divorces her in the same gathering before leaving it, or marries her while he is in the east and she in the west, either way if she gives birth to a child six months after the marriage, the child shall be attributed to the husband.

Other opinions are such as whose validity seems questionable from the viewpoint of medical science. The author of *al-Mughnî,* in the same volume and on the same page, says: "If the husband is a child of 10 years and his wife becomes pregnant, the child shall be attributed to him."

Similar is the one quoted by the Shî'î author of *al-Masālik* (vol.2, *Faṣl aḥkām al-'awlād*): "If penetration occurs without discharge taking place, the child shall be attributed to the husband."

Artificial Insemination:

A hot debate is going on in the West regarding the answer to this question: If a barren husband agrees with his wife that she be artificially inseminated with a stranger's sperm, is this legally permissible?

This question was raised before the House of Commons in England and a committee of the House was set up to deliberate on the issue. In Italy the Pope declared it illegal. In France, the doctors observed: It is permissible if done by the couple's consent. In Austria, the government recognizes the child as a legitimate issue of the couple unless the husband makes a formal objection.

As to Islamic legists, I doubt whether they have dealt with this question, since it is a problem of recent origin. The Imāmiyyah scholars have narrated a tradition under the head of *ḥudūd*. Al-Ḥasan ibn 'Alî (*'a*) was asked regarding a woman who after intercourse with her husband engages in Lesbian intercourse with a virgin transferring his sperm to her, consequently making the latter pregnant. The Imam (*'a*) replied: The *mahr* of the virgin shall be exacted from the married woman because the child would not be delivered without the virgin losing her virginity. Then, the other woman shall be stoned to death because of her marital status.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Regarding the pregnant woman, they shall wait until she delivers and the child shall be given to the father, i.e. the person of whose sperm it was born. After this, she shall be flogged.[22]

Four rules can be deduced from this tradition: (1) stoning of the married woman, (2) liability of the married woman to pay the *mahr* of the other woman as a compensation for her lost virginity, (3) flogging of the other woman, (4) attribution of the child to the person of whose sperm the child was born.

The Imāmiyyah legists differ regarding application of this tradition. Of those who have applied this tradition in totality are al-Shaykh al-Ṭūsī and his followers. Others, who accept the last three rules without accepting the first one, include the author of *al-Sharā'i'*, who holds the punishment of the married woman to be flogging instead of stoning.[23] Ibn Idrīs has rejected the tradition totally, objecting to the statement about the stoning of the married woman, because the sentence for Lesbian intercourse is flogging, not stoning. He also objects to the attribution of the child to the person of whose sperm it was born, because it was not born as a result of intercourse through valid marriage or by mistake. He even objects to the rule which compels the married woman to pay the *mahr* of the pregnant woman, because, according to him, the woman made pregnant was not coerced, and Lesbian intercourse with consent is similar to fornication, which does not result in liability to pay *mahr*.

This is what I have found in the legal books closely or distantly relating to the question at hand. In any case, we have two questions at hand: (1) Is artificial insemination permissible or not in the Islamic Sharī'ah? (2) If, as a result of artificial insemination, a child is born, what shall be its legal status and to whom shall it be attributed?

Artificial Insemination is Prohibited:

Regarding the first question, there is no doubt that such insemination is prohibited due to following reasons: (1) Our knowledge of the Sharī'ah, and its warning and emphasis concerning

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

sexual matters, tell us that permissibility of anything in this regard rests upon permission of the Sharī'ah. Therefore, the mere possibility of its being impermissible is sufficient for making restraint and caution obligatory. (2) In the thirty-first verse of *Sūrat al-Nūr*:

وقُلْ لِلْمُؤْمِناتِ يَغْضُضْنَ مِنْ اَبْصارِهِنَّ وَيَحْفَظْنَ فُرُوجَهُنَّ..

And say to the believing women that they cast down their looks and guard their private parts....(24:31)

God has commanded women that they 'safeguard' their organs of reproduction; but He has not mentioned from what they are supposed to be safeguarded. Neither has He specified that they safeguard them from intercourse or some other thing. The jurisprudents as well as linguists of the Arabic language concur that any proposition devoid of any particular specification implies the generality of inclusion. Similarly the inclusion of a specification in a proposition limits the proposition to that extent. For example, if it is said, "Safeguard your wealth from thieves", it denotes that wealth must be protected only from being robbed. But if it is said, "Safeguard your wealth," without specifying any specific thing, it implies that wealth is to be protected from being robbed, from damage, from waste, etc. Accordingly, the verse of the Qur'ān connotes that the organs of reproduction be safeguarded from everything including insemination. This verse is reinforced by verses 5-7 of the *Sūrat al-Mu'minūn*:

وَالَّذِينَ هُمْ لِفُرُوجِهِمْ حافِظُونَ * اِلاّ عَلىٰ اَزْواجِهِمْ اَوْمامَلَكَتْ اَيْمانُهُمْ فَاِنَّهُمْ غَيْرُ مَلُومِينَ * فَمَنِ ابْتَغىٰ وَراءَ ذٰلِكَ فَاُولٰئِكَ هُمُ الْعادُونَ *

And who guard their private parts. Save from their wives or those whom their right hands own, for then they surely are not blameworthy. But whoever seeks to go beyond that, those are the transgressors. (23: 5--7)

The phrase فَمَنِ ابْتَغىٰ وَراءَ ذٰلِكَ indicates that any act contrary to the guarding of the parts amounts to transgression of the lawful

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

limits, except that which occurs through marriage or ownership. Though the verses speak specifically of men, it does not hinder their application to women, because there is consensus that there is no difference between men and women in rules of this kind.

Some may say that the phrase يَحْفَظْنَ فُرُوجَهُنَّ does not prove that this kind of insemination is *ḥarām*. It only indicates the impermissibility of (extra-marital) sexual relations, and this is the meaning that comes to mind and is understood from the verse. In other words, this verse may imply a wider meaning which includes artificial insemination or something else; but that which is apparent from its words is fornication, and it is a known fact that it is the generally understood meanings of dicta that are accepted for deriving the rules of the Sharī'ah, not their literal meaning.

The answer is that this apparent meaning of the verse is not inherent in it; rather, this meaning has come to be associated with the verse because of its frequent usage in that context (i.e. to mean fornication). This is similar to the use of the word 'water' in Baghdad to mean the water of the *Tigris* and in Cairo to mean the water of the *Nile,* but this apparent meaning is of no consequence at all, for it fades on a little amount of reflection. No one can claim that the word 'water' in Baghdad was coined to mean only the water of the *Tigris* and in Cairo to mean only that of the *Nile*. Moreover, if artificial insemination were considered permissible on this ground, so would be the licking of dogs..., because both these notions are far removed from the meaning which immediately comes to the mind.

The Offspring by Artificial Insemination:

Now a child is born as a result of artificial insemination; shall it be a legitimate child, and to whom shall it be attributed?

The answer is: As regards the sterile husband, the child cannot be attributed to him under any circumstances, and adoption is not valid in Islam:

...وَما جَعَلَ اَدْعِياءَ كُمْ اَبْناءَكُمْ...

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

And He has not made those whom you call your sons, your sons. (33:4)

As to the woman who bears it, some legal schools attribute the child to her, because an illegitimate child inherits from its mother and from its relatives through her and they inherit from it.[24] Therefore, if an illegitimate child can be attributed to its mother, a child born by artificial insemination is better entitled to be similarly attributed.

The Imāmiyyah, who do not attribute an illegitimate child to the fornicator or the fornicatress, observe: The child born by artificial insemination does not inherit from its father or mother, and neither do they inherit from it. Āyatullāh al-Sayyid Muḥsin al-Ḥakîm al-Tabāṭabā'î has differentiated between an illegitimate child and a child born by insemination. He observes: A child born by insemination shall be attributed to its mother, because there is no valid reason to negate its status, and the grounds which prohibit an illegitimate child from attribution to its mother do not apply here.

But as regards the man whose sperm is inseminated, al-Sayyid al-Ḥakîm says: The child shall not be attributed to him, because in order for a child to be attributed to a person it requires that he should have had intercourse irrespective of whether he performs it, or is unable to perform it but has his sperm reach her reproductive organ during his effort, or is transferred to another woman as a result of Lesbian intercourse as mentioned in the tradition from al-'Imām al-Ḥasan (*'a*). Apart from these cases, a child shall not be attributed to the person of whose sperm it was conceived, even if he is the husband.[25]

Whatever the case, artificial insemination is *ḥarām* and no Muslim may pronounce it *ḥalāl.* But the impermissibility of artificial insemination does not necessarily imply that the child born of it is an illegitimate issue, for at times intercourse may be prohibited but the child born of it is considered legitimate--as in the case of the person who has intercourse with his wife during her menses or during the fast of Ramaḍān, in both of which cases it is a prohibited act; but

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

nevertheless the lineal bond between the child and the parents shall be established. Accordingly, if a person has artificial insemination performed despite its impermissibility, the child born shall not be attributable to the husband because it was not born of his sperm, nor shall it be attributable to the man whose sperm was inseminated, because he has not had sexual intercourse, neither by marriage nor by mistake. But the child shall be attributed to its mother because it is her actual offspring and her legal child, and every actual offspring is a legally recognized issue unless the opposite is proved.

NOTES:

1. *The Editors' Note:* The late author's statement about prophets and Imams does not seem to be in accordance with the Shī'ī belief in their *'iṣmah.* To say that prophets and Imams, like ordinary human beings, make statements about things unknown to them on the basis of conjecture and hearsay, goes against the doctrine of *'iṣmah,* i.e. the belief that they, as God's representatives and the trustees of His doctrines and laws, are saved by God from falling not only in minor sins but even errors and omissions.

An important question relevant here is that pertaining to the relationship between religion and nature. From the viewpoint of Islam, religion, as a system of doctrines and laws, is closely associated with nature and reality. While the doctrines of the faith, in order to be true, must reflect the reality, the entire philosophy of law in Islam is based on the close association between law and nature. The lawgiver, in order to be able to legislate beneficial laws, must know thoroughly the facts and realities which are relevant to his laws.

Hence God's prerogative to legislate is based, in addition to His Sovereignty and Beneficence, upon His Omniscience: that His knowledge encompasses all things. Now if God authorizes prophets and Imams to legislate about certain matters and to lay down rules and regulations, it cannot be without His putting at their disposal the knowledge of the realities related to those rules and regulations.

Furthermore, we know from the Qur'ān that it is a Divine command that one should not go beyond the limits of one's knowledge to make statements based on conjecture and hearsay:

وَلَا تَقْفُ مَالَيْسَ لَكَ بِهِ عِلْمٌ إِنَّ السَّمْعَ وَالْبَصَرَ وَالْفُؤَادَ كُلُّ أُولٰئِكَ كَانَ عَنْهُ مَسْؤُلًا ●

And pursue not that thou hast no knowledge of; the hearing, the sight and the heart--all of these shall be questioned.(17:36)

Therefore, it is not possible for prophets and Imams, who are most obedient to God

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

in all matters and hence are models for other human beings to emulate, to make statements about things of which they are ignorant.

Nevertheless, the author is right in rejecting tradition as a source of knowledge in a field which lies well within the scope and range of scientific inquiry, for it is not possible to ascertain the authenticity of traditions with certainty.

2. The Shī'ī work *al-Jawāhir, Bāb al-zawāj, aḥkām al-'awlād* and *al-'Aḥwāl al-shakhṣiyyah* of Muḥammad Muḥyī al-Dīn, p.476.

3. *Al-Durar fī sharḥ al-Ghurar*, vol.1, p.307.

4. *Al-Wasīlat al-kubrā* of al-Sayyid Abū al-Ḥasan, *Bāb al-zawāj, faṣl al-'awlād.*

5. *Al-Mughnī* of Ibn Qudāmah, 3rd edition, vol.7, p.477, and *al-Fiqh 'alā al-madhāhib al-'arba'ah*, 1st ed. vol.4, p.523, mention the maximum period of gestation according to the Mālikīs to be five years.

6. *Al-Mughnī*, 3rd ed. vol.7, p.477.

7. *Al-'Aḥwāl al-shakhṣiyyah*, p.474.

8. See *al-Jawāhir, al-Masālik, al-Ḥadā'iq* and other Shī'ī books.

9. *Al-Mughnī*, 3rd. ed. vol.8, p.211.

10. *Al-Jawāhir, al-Ḥadā'iq* and other Shī'ī works.

11. *Al-Mughnī*, vol.7, p.483; vol.6, p.534; and the Shī'ī works *al-Jawāhir* and *al-Masālik*.

12. *Al-Mughnī*, vol.8, p.185.

13. See *Majma' al-Bayān fī tasfsīr al-Qur'ān.*

14. *Al-Rasā'il*, al-Shaykh al-'Anṣārī, chapter on *al-Barā'ah.*

15. *Ibid.*, chapter on *Aṣl al-ṣiḥḥah.*

16. *Al-Mughnī*, 3rd. ed., vol.6, p.644.

17. *Al-Jawāhir.*

18. The Shī'ī work *al-Lum'ah*, vol.2, the chapter on *ḥudūd;* the Sunnī work *al-Mughnī*, vol.8, p.198 ff.

19. *Al-Mughnī*, 3rd. ed., vol.6, p.578.

20. *Al-Mughnī*, vol.6, p.577, and the Shī'ī work *al-Masālik*, vol.1, chapter on marriage, *faṣl al-muṣāharah.*

21. *Majma' al-Bayān fī tafsīr al-Qur'ān.*

22. *Al-Jawāhir* and *al-Masālik*, chapters on *ḥudūd.*

23. As mentioned in *al-Jawāhir*, most Shī'ī legists observe that the sentence for Lesbian intercourse is 100 lashes for a married as well as an unmarried woman, irrespective of the passive or active roles of the participants. In Ibn Qudāmah's *al-Mughnī*, 3rd. ed. vol.8, p.189, it has been observed: There is no *ḥadd* for Lesbian intercourse because there is no penetration involved, and it is for the judge to award a suitable punishment (*ta'zīr*) to the two culprits.

24. *Al-Mīrāth fī al-Sharī'at al-'Islāmiyyah* of al-'Ustādh 'Alī Ḥasb Allāh, 2nd. ed. p.94; Ibn 'Ābidīn, and Ibn Qudāmah in *al-Mughnī*, chapter on inheritance, *faṣl al-'aṣabāt* (male relatives).

25. The letter of al-Sayyid al-Ḥakīm, dated 7th Ramaḍān 1377, in reply to a question regarding this issue.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Custody *(Al-Ḥiḍānah)*

Custody has no connection with guardianship (*wilāyah*) over the ward with respect to marriage; it is limited to the care of a child for its upbringing and protection for a period of time during which it requires the care of women. Custody is the right of the mother by consensus, though there is a difference of opinion regarding: the period after which it expires, the person who is entitled to custody after the mother, the qualification for a woman to act as a custodian, her right to receive a fee for it, and other aspects which we shall discuss subsequently.

The Right to Act as a Custodian:

If it is not possible for a mother to act as the custodian of her child, to whom will this right belong?

The Ḥanafīs observe: It is transferred from the mother to the mother's mother, then to the father's mother, then to the full sisters, then to the uterine sisters, then to the paternal sisters, then to the full sister's daughter, and so on till it reaches the maternal and paternal aunts.

The Mālikīs say: The right is transferred from the mother to her mother, how high so ever; then to the full maternal aunt; then the uterine maternal aunt, then the mother's maternal aunt, then the mother's paternal aunt, then the father's paternal aunt, then his (father's) mother's mother, then his father's mother and so on.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Shāfi'îs say: The mother, then the mother's mother, how high so ever, on condition that she inherits; then the father, then his mother, how high so ever, on condition that she inherits; then the nearest among the female relatives, and then the nearest among the male relatives.

According to the Ḥanbalîs, the mother is followed by her mother, then her mother's mother, then the father, followed by his mothers; then the grandfather followed by his mothers; then the full sister; then the uterine sister; then the paternal sister; then the full maternal aunt; then the uterine maternal aunt, and so on.

The Imāmiyyah observe: The mother, and then the father, and if the father dies or becomes insane after he has ṭaken the child's custody, the right to custody will revert to the mother on her being alive, because she is better entitled than others--including the paternal grandfather--even if she has married a stranger. If the parents are not there, the custody of the child will lie with the paternal grandfather, and if he isn't there nor has an executor, the child's custody will lie with its relatives in order of inheritance, the nearer taking precedence over the remote. If there is more than one relative of the same class, such as the maternal and paternal grandmothers or maternal and paternal aunts, the matter will be decided by drawing lots in the event of contention and dispute. The person in whose name the lot is drawn becomes entitled to act as the custodian till his death or till he forgoes his right.[1] This is also the view of the Ḥanbalîs (*al-Mughnî,* vol. 9, *bāb al-ḥiḍānah*).

The Qualifications for Custody:

The scholars concur regarding the qualifications required for a female custodian, which are: her being sane, chaste and trustworthy, her not being an adulteress, a dancer, an imbiber of wine, or oblivious to child care. The purpose of these requirements is to ensure the proper care of the child from the viewpoint of physical and mental health. These conditions also apply if the custodian is a man.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The schools differ as to whether being Muslim is a condition for custodianship. The Imāmiyyah and the Shāfi'ī schools say: A non-Muslim has no right to the custody of a Muslim.

The other schools do not consider Islam as a requirement for a custodian, except that the Ḥanafīs say: The apostasy of a custodian, male or female, terminates his/her right to custody.

The Imāmiyyah state: It is compulsory that the female custodian be free from any contagious disease.

The Ḥanbalī school says: It is compulsory that she should not suffer from leprosy and leucoderma, and that which is important is that the child should not face any harm.

The four schools have said: If the mother is divorced and marries a person who is unrelated to the child, her right to custody shall terminate. But if the husband is of the child's kin, the right to custody remains with the mother.

The Imāmiyyah observe: The right to custody terminates with her marriage irrespective of whether the husband is related to the child or not.

The Ḥanafī, the Shāfi'ī, the Imāmiyyah and the Ḥanbalī schools have said: If the mother is divorced by the second husband, the disability is removed and her right to custody reverts after its earlier termination due to her marriage.

According to the Mālikī school, her right to custody does not revert.

The Period of Custody:

The Ḥanafīs say: The period of custody for a boy is 7 years, and for a girl 9 years.

The Shāfi'ī school observes: There is no definite period of custody; the child shall remain with its mother until it is able to choose between the two parents; and when it has reached the discriminating age it will choose between the two. If a boy chooses to stay with his mother, he will stay with her during the night and spend the day with his father, so that the father can arrange for his

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

instruction. If a girl chooses to stay with her mother, she will continue to stay with her during the day as well as in the night. If the child chooses both the parents together, lots will be drawn between them, and if the child keeps quiet and does not choose any one of them, the custody shall lie with the mother.

The Mālikîs consider the period of custody for a boy to be from birth until puberty and for a girl until her marriage.

According to the Ḥanbalî school, it is 7 years irrespective of the child's sex, and, after that, the child can choose to live with one of the parents.

The Imāmiyyah have said: The period of custody for a boy is 2 years, and for a girl 7 years. After this, the custody shall lie with the father until the girl reaches the age of 9, and the boy the age of 15; thereafter they can choose to live with one of the parents.[2]

Fee for Custody:

The Shāfi'î and the Ḥanbalî schools state: A female custodian has the right to claim a fee for her services irrespective of whether she is the mother or someone else. The Shāfi'îs clarify that this fee shall be paid from the child assets if any; otherwise it is incumbent upon the father, or upon whoever is responsible for the child's maintenance.

The Mālikîs and the Imāmiyyah[3] observe: The female custodian is not entitled to any fee for her services. But the Imāmiyyah add: She is entitled to be paid for breast-feeding. Therefore, if the child has any assets she shall be paid out of that; otherwise, the father shall pay it if he is capable of doing so (*al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol.4; *al-Masālik;* vol.2).

The Ḥanafî school has said: The payment of fee for custody is *wājib* if: there does not exist any marital relationship between the female custodian and the child's father; if she is not in the course of observing the *'iddah* of a revocable divorce given by the child's father; if she is observing the *'iddah* of an irrevocable divorce of an invalid marriage, in which case she is entitled to receive maintenance

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

from the child's father. If the child has any property, the payment shall be made from it; otherwise the payment shall be made by the one responsible for the child's maintenance (*al-'Aḥwāl al-shakhṣiyyah* by Abū Zuhrah).

Travelling With the Child:

In case the mother takes the child under her custody, and the father intends to travel with his child to settle down in another town, the Imāmīs and the Ḥanafīs say: He cannot do so. The Shāfi'ī, the Mālikī and the Ḥanbalī schools observe: He can do so.

But if it is the mother who intends to travel with the child, the Ḥanafī school gives her the right to do so if the two following conditions are met: (1) That she be migrating to her own town; (2) that the marriage contract should have been recited in the town to which she is migrating. If any of these two conditions is not met, she is forbidden to travel except to a place so near that it is possible to return before it gets dark.

The Shāfi'ī and the Mālikī schools, and Aḥmad in one of the two traditions narrated from him, observe: The father has greater right over the child irrespective of whether he is moving or she (*Raḥmat al-'ummah fī ikhtilāf al-'a'imah*).

The Imāmiyyah state: A divorced mother is not permitted to travel with the child under her custody to a far-off place without the consent of the child's father. The father, too, is not permitted to travel with the child to any town which is not the mother's hometown while the child is in her custody.

Voluntary Breast-Feeding and Custody:

The difference between custody and breast-feeding (*al-riḍā'*) is that by 'custody' is meant only the upbringing and care of the child; it excludes breast-feeding, which involves the infant's nourishment. Because of this difference, it is valid for a mother to forgo her right to breast-feed while her right to custody remains intact. The

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Imāmiyyah and the Ḥanafî schools concur that if a woman volunteers to breast-feed a child gratuitously while the mother refuses to breast-feed without recompense, the woman volunteering shall be given precedence over the mother, whose right to suckle her child is lost. But her right to the custody of her child shall remain as it is, and the child shall be under her care while the nurse comes to feed it or it is taken to the nurse to be fed.

If a woman volunteers to act as a child's custodian, the child shall not be separated from the mother, according to the Imāmiyyah and the other schools which do not require compensation for a custodian's services.

But the Ḥanafîs, who consider the payment of compensation for custody as *wājib,* observe: Where the mother refuses to act as a custodian unless she is paid and another woman volunteers to act as a custodian, the mother is better entitled to custody if the compensation is to be paid by the father, or if the woman is an outsider and there are no women custodians among the child's relatives. But if the woman volunteering is related to the child and the compensation lies upon an indigent father, or is to be paid from the child's property, the other woman shall be preferred, because, in such a situation, the child is saved from payment of fee out of its assets by the woman volunteering. Therefore, she shall be given preference over the mother in the child's interest (*al-'Aḥwāl al-shakhṣiyyah* by Abū Zuhrah).

Surrendering of the Right to Custody:

Is the right to custody specifically the right of a female custodian that terminates on her surrendering it--similar to the right of pre-emption which can be surrendered--or is it a right of the child that binds the female custodian precluding her right to surrender it, as in the case of a mother's right which cannot be surrendered?

The Imāmiyyah, the Shāfi'î and the Ḥanbalî schools observe: Custody is the specific right of a female custodian, and she can surrender it whenever she pleases and she shall not be compelled to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

act as a custodian on her refusing to do so. There is a tradition from Mālik regarding this, and the author of *al-Jawāhir* has argued on its authority that the legists have not concurred that a female custodian can be compelled to act as a custodian, and the Sharī'ah does not expressly mention such compulsion; on the contrary, the texts of the Sharī'ah apparently consider custody similar to breast-feeding, and, consequently, she has the right to surrender her custody at will.

The same principle applies where a child's mother seeks a divorce from her husband by surrendering in his favour her right to custody of the child, or when the husband surrenders to her his right to take away the child after the expiry of her period of custody. This form of divorce is valid and neither of the two can refrain from discharging their agreement after it is concluded, except by mutual consent. Similarly, if the two compromise and she surrenders her right to custody or he surrenders his right to take away the child, the compromise is binding and its fulfilment is *wājib*.

Ibn 'Ābidîn has reported a difference of opinion amongst the Ḥanafîs on this issue. He has pointed out that it is better that custody be considered as a right of the child, so that the mother does not have the right to surrender her responsibility to act as a custodian, to make compromise over it, or to exchange it for securing a divorce.

The Sunnî Sharī'ah courts in Lebanon consider a divorce of this kind as valid, but consider as invalid the condition that she would surrender her right to custody; any compromise which includes the surrendering of her right to custody is considered void *ab initio*. But the Ja'farî Sharī'ah courts consider the divorce, the condition, and the compromise as valid.

The Right to Maintenance:

There is consensus among all Muslims that marriage is one of the causes that make maintenance *wājib*. A similar consensus exists regarding kinship (*al-qarābah*). The Holy Qur'ān has explicitly mentioned the wife's maintenance in the following verse:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

...وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ...

...And on the child's father (the husband) is their food and clothing....(2:233)

By the pronoun هُنَّ are meant wives and the الْمَوْلُود لَهُ is the husband. There is also a tradition which says:

حَقُّ الْمَرْأَةِ عَلىٰ زَوْجِهاأَنْ يُشْبِعَ بَطْنَها، وَإِنْ جَهِلَتْ غَفَرَلَها.

The right of a woman over her husband is that he feed her, clothe her, and if she acts out of ignorance, to forgive her.

The Qur'ān has referred to the maintenance of relatives in the phrase وَبِالْوالِدَيْنِ اِحْساناً, and the Prophet (ﷺ) has said أَنْتَ وَمالُكَ لِأَبِيكَ (You and your property are for your father).

Our discussion comprises two issues: first, the maintenance of a wife and her maintenance during the *'iddah* period; second, the maintenance of relatives.

The Maintenance of a Wife and a Divorcée During 'Iddah:

The legal schools concur that the wife's maintenance is *wājib* if the requisite conditions, to be mentioned subsequently, are fulfilled, and that the maintenance of a divorcée is *wājib* during the *'iddah* of a revocable divorce. The schools also concur that a woman observing the *'iddah* following her husband's death is not entitled to maintenance, whether she is pregnant or not, except that the Shāfi'î and the Mālikî schools state: If the husband dies, she is entitled to maintenance only to the extent of housing.

The Shāfi'îs have said: If he separates from her while she is pregnant and then dies, her maintenance shall not cease.

The Ḥanafîs observe: If she is a revocable divorcée and the husband dies during the *'iddah,* her *'iddah* of divorce shall change into an *'iddah* of death, and her maintenance shall cease, except where she had been asked (by court) to borrow her maintenance and she had actually done so. In this case, the maintenance shall not

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

cease.

There is consensus that a woman observing *'iddah* as a result of 'intercourse by mistake' is not entitled to maintenance.

The schools differ regarding the maintenance of a divorćee during the *'iddah* of an irrevocable divorce. The Ḥanafîs observe: She is entitled to maintenance even if she has been divorced thrice, whether she is pregnant or not, on condition that she does not leave the house provided by the divorće (husband) for her to spend the period of *'iddah*. According to the Ḥanafî school, the rules which apply to a woman in an *'iddah* following the dissolution of a valid contract are the same as those which apply to a divorcée in an irrevocable divorce.

According to the Mālikî school, if the divorcée is not pregnant, she shall not be entitled to any maintenance except residence, and if she is pregnant she is entitled to her full maintenance; it shall not subside even if she leaves the house provided for spending the *'iddah,* because the maintenance is intended for the child in the womb and not for the divorcée.

The Shāfi'î, the Imāmiyyah and the Ḥanbalî schools state: If she is not pregnant she is not entitled to maintenance, and if pregnant, she is entitled to it. But the Shāfi'îs add: If she leaves the house of her *'iddah* without any necessity, her maintenance shall cease.

The Imāmiyyah do not consider the dissolution of a valid contract similar to an irrevocable divorce; they observe: A divorcée undergoing the *'iddah* of a dissolved contract is not entitled to any maintenance whether she is pregnant or not.

A Disobedient Wife (al-Nāshizah):

The schools concur that a disobedient wife is not entitled to maintenance. But they differ regarding the extent of disobedience which causes the maintenance to subside. According to the Ḥanafîs, when a wife confines herself to her husband's house and does not leave it except with his permission, she shall be regarded as

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

'obedient', even if she denies him her sexual company without any valid reason. Therefore, though such an act is *ḥarām* for her, it shall not cause her maintenance to cease. Thus, the cause which entitles her to maintenance, according to the Ḥanafîs, is her confining herself to her husband's home, and her denial of her sexual company has no effect at all. This view of the Ḥanafî school is contrary to the view of all the other schools who concur that if a wife does not allow her husband free access to her person without any legal and reasonable excuse, she shall be considered 'disobedient' and shall not be entitled to any maintenance. The Shāfi'îs further add: Her allowing him free access is not enough unless she comes forth and says expressly to him: 'I surrender myself to you'.

In fact, the criterion for ascertaining 'obedience' and 'submission' is the general custom, and there is no doubt that the people consider a wife obedient if she does not deny him access when he demands it, and they do not consider it necessary that she offer herself to him morning and evening. Whatever be the case, we have here the following questions concerning 'obedience' and 'disobedience'.

(1) If the wife is a minor, unfit for intercourse, and the husband a major capable of it, shall maintenance be *wājib*?

The Ḥanafîs say: There are three types of female minors:

(i) A minor wife who is neither of any use for service nor for sociability, shall not be entitled to maintenance.

(ii) A minor wife with whom intercourse is possible enjoys the rights of a major wife.

(iii) A minor wife who is of use for service or for sociability alone, but not for intercourse, shall not be entitled to maintenance.

The remaining schools state: A minor wife is not entitled to maintenance even if the husband is a major.

(2) If the wife is a major capable of intercourse while the husband is a minor and incapable of it, the Ḥanafî, the Shāfi'î and the Ḥanbalî schools observe: Her maintenance is *wājib* because the hindrance is from his side, not her.

The Mālikîs and some scholars of the Imāmiyyah have said:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Maintenance is not *wājib* because the sole granting of access from her side has no effect while there exists a natural disability in the husband, and a minor husband is free of obligations (*ghayr mukallaf*), and as to the duty of his guardian, there is no proof (that he is responsible for his ward's wife's maintenance).

(3) If the wife is sick or suffers from *al-ratq* or *al-qarn,* [4] her maintenance does not cease according to the Imāmiyyah, the Ḥanbalī and the Ḥanafī schools,[5] and it does according to the Mālikī school if she is suffering from a serious disease or if the husband himself is similarly ill.

(4) If the wife apostatizes, her maintenance ceases according to all the schools. The maintenance of a wife belonging to the *Ahl al-Kitāb* is *wājib,* and there is no difference between her and a Muslim wife from the viewpoint of maintenance.

(5) If a wife leaves her husband's home without his permission or refuses to reside in a house which fits her status, she shall be considered 'disobedient' and shall not be entitled to maintenance according to all the schools. The Shāfi'ī and the Ḥanbalī schools further add: If she goes out with his permission for his need she shall be entitled to maintenance, and if she goes out not for his need, her maintenance shall cease even if he had granted her permission to do so.

(6) If she goes out for performing the obligatory Ḥajj pilgrimage, her maintenance shall cease according to the Shāfi'ī and the Ḥanafī schools, and according to the Imāmiyyah and the Ḥanbalīs, it shall not.

(7) If the wife is obedient to the husband in granting him access and resides with him wherever he wants, but uses harsh language while talking to him, frowns in his face and opposes him in many matters, as is the case with many women, shall this be a cause for the maintenance to cease or not?

I have not come across the views of the schools on this question, but in my opinion if the wife has a hot-tempered disposition by nature and this is her way of behaviour with everyone including her parents, she shall not be considered disobedient. But if she is not so

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

by nature and is well-disposed towards everyone except her husband, she should be considered disobedient and not entitled to maintenance.

(8) If the wife refuses to obey her husband unless she is paid her *mahr,* agreed to be paid immediately, shall she be considered disobedient? The schools have divided the question--as mentioned in the chapter on *mahr*--between her refusing him before granting him access to her person and her refusal after granting him access willingly before taking the *mahr.*

In the first case, her refusal is due to a legally valid excuse and therefore she shall not be considered disobedient. In the second case, her refusal is without any valid excuse and, therefore, she shall be considered disobedient.

(9) I have come across an opinion expressed by the Ḥanbalīs that if a wife imprisons her husband, demanding her maintenance or *mahr,* her maintenance shall cease if he is indigent and unable to meet her monetary rights, and if he has the means to pay but delays doing so it shall not.[6]

This opinion is both good and firm because if she has imprisoned him while he is an indigent man unable to pay, she is oppressing him; and if she has imprisoned a husband who has the means to pay her but delays doing it, he is oppressing her. A verse of the Qur'ān says:

وَاِنْ كَانَ ذُوعُسْرَةٍ فَنَظِرَةٌ اِلٰى مَيْسَرَةٍ...

And if the debtor is in straitness, let there be postponement till the time of ease....(2:280)

And there is a tradition which says:

الْواجِدُ تَحِلُّ عُقوبَتُهُ وَعِرْضُهُ.

It is permissible to punish and dishonour a person who possesses (but does not pay his liabilities).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

It has also been narrated that 'Alī (*'a*) used to detain one who delayed his creditors and release him if his penury was ascertained. Accordingly, a judge, after having ascertained that the circumstances of the husband are straitened and that the wife is entitled to maintenance, will order it to be considered a debt payable by the husband until further notification. If the judge determines the maintenance without mentioning the period during which it is to be paid, and the wife then imprisons the husband despite indigence and poverty, the husband is entitled to approach the judge to have her maintenance annulled from the date of his imprisonment, and the judge is bound to respond to his plea.

(10) If a wife is divorced while she is disobedient, she will not be entitled to maintenance; and if she is undergoing the *'iddah* of a revocable divorce and turns disobedient during this period, her maintenance shall cease; but on her reverting to obedience, it shall resume from the date of his knowledge of her becoming obedient.

(11) If the wife remains at her father's home after the recital of the marriage contract for a period of time and then claims maintenance for that period, shall she be entitled to it?

The Ḥanafīs observe: She is entitled to maintenance even if she hasn't shifted to her husband's home, either because the husband hasn't asked her to do so, or has but she has refused to come until she is given her *mahr* (Ibn 'Ābidīn).

According to the Mālikī and the Shāfi'ī schools, she is entitled to maintenance if the marriage has been consummated or she has offered herself to him.

The Ḥanbalī school states: If she doesn't offer herself, she is not entitled to maintenance even if she remains in such a state for years.

The Imāmiyyah consider her entitled to maintenance from the date of the consummation of marriage--even if such consummation should occur while she is with her family--and from the date of her asking him to take her along with him.

From the above-mentioned views, it follows that all the schools entitle her to maintenance if she has offered herself and showed her readiness to comply, and also if the marriage has been consummated,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

except that the Ḥanafīs do not suffice with consummation but consider her willingness to confine herself also necessary. Apart from this, it has been pointed in the answer to the eighth question of this section that the wife has the right to refuse obedience till she is paid her prompt *mahr,* and her doing so is legally valid and does not cause her maintenance to cease.

(12) The Mālikī, the Shāfi'ī and the Ḥanbalī schools state: An absent husband is similar to a husband present in regard to the rules of maintenance. Therefore, if an absent husband has any known assets, the judge shall order her maintenance to be paid from them, and if he does not possess such property, the judge shall pass an order of maintenance against him and the wife will borrow against his name. This is the procedure followed in Egypt (*al-'Aḥwāl al-shakhṣiyyah,* Abū Zuhrah).

In *al-'Aḥwāl al-shakhṣiyyah* (1942, pp. 269, 272) of Muḥammad Muḥyi al-Dīn 'Abd al-Ḥamīd it is stated: The Ḥanafī school presumes that the absent husband has left in his property a share for his wife... and if he has not left any property, the judge shall consider him liable to pay the maintenance and will order the wife to borrow against his name. If she complains of not having found a person ready to lend her in her husband's name, the judge shall order the person on whom her maintenance is *wājib* to lend her on the supposition that she has no husband, and if this person refuses to lend her maintenance, the judge will imprison him.

The Imāmiyyah observe: If the husband disappears after her surrendering herself to him, her maintenance is *wājib* upon him on the supposition that her obedience still persists from the time he left her; and if he disappears before consummation, she shall appear before the court and declare her obedience and willingness to live with him. The judge will then order the husband to present himself to inform him of her willingness. If the husband presents himself, or sends for her, or sends her her maintenance, it suffices. But if he does not fulfil any of these alternatives, the judge shall allow a period of time sufficient for the issuance of a notification and the reception of his reply or for his sending of her maintenance; he will

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

not issue any order during this period. After the expiry of this period he shall issue orders. If, for instance, such a period is two months, he shall order the payment of maintenance beginning from the date of expiry of the two months. Or if the wife informs the husband of her state without the mediacy of the judge and proves it, it shall also suffice. Then she shall be entitled to maintenance from that date.

(13) If the wife pleads before a judge to pass an order against the husband for the payment of her maintenance without mentioning the date from which she is entitled to receive it, the judge shall order payment from the date of her demanding maintenance, after ascertaining that the conditions have been fulfilled. If the wife mentions a date which is prior to the date of demand, shall the judge order payment of her maintenance for the period prior to the date of demand?

The Ḥanafîs have said: Past maintenance may not be demanded from the husband; it is annulled by the passage of time except when the period is less than a month or if the judge has ordered its payment, because maintenance ordered to be paid by court remains a debt for the husband irrespective of the passage of time.

The Mālikîs observe: If the wife demands her past maintenance, and the husband possessed the means to pay her during that time, she has the right to such a claim against him even if it had not been ordered by the court. But if the husband was indigent and unable to pay during that period, she cannot claim her maintenance from him, because, according to this school, indigence annuls maintenance; and if his indigence is subsequent to his affluence, the maintenance for the period of indigence shall be void and he shall be liable for the payment of the maintenance pertaining to his period of affluence.

The Imāmiyyah, the Shāfi'î and the Ḥanbalî schools state: The wife's maintenance remains his liability, if the conditions entitling the wife to maintenance are fulfilled, no matter how much time has passed and irrespective of whether he was affluent or indigent during that time and regardless of whether the judge had ordered such payment or not.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Determination of Maintenance:

The schools concur that a wife's maintenance is *wājib* in all its three forms: food, clothing and housing. They also concur that maintenance will be determined in accordance with the financial status of the two if both are of equal status. Here, by the financial status of the wife is meant the financial status of her family and its standard of living.

But when one of them is well-off and the other indigent, the schools differ whether maintenance should be in accordance with the husband's financial status (commensurable with his means if he is well-off and the wife indigent, and commensurable with his indigence if he is indigent and she is well-off), or whether the financial status of both should be considered and a median maintenance be fixed for her.

The Mālikī and the Ḥanbalī schools state: If the couple differ in financial status, a median course will be followed.

The Shāfi'ī school observes: Maintenance will be determined in accordance with the financial status of the husband, and the status of the wife will not be considered; this is regarding food and clothing. But as regards housing, it should be according to her status, not his (al-Bājūrī, 1343 H., vol.2, p.197).

The Ḥanafīs have two views. According to the first, the status of both will be considered, and according to the second only the status of the husband.

Most Imāmiyyah legists observe that maintenance will be fixed in accordance with her requirements of food, clothing, housing, servants and cosmetics used by women of her standing among her townspeople. Some Imāmiyyah legists consider the husband's not the wife's financial status as the criterion for fixing maintenance.

Whatever the case, it is necessary that the financial condition of the husband be taken into consideration as the Qur'ān has expressly stated:

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ... لِيُنْفِقْ ذُوسَعَةٍ مِنْ سَعَتِهِ وَمَنْ قُدِرَعَلَيْهِ رِزْقُهُ

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

فَلْيُنْفِقْ مِمَّا اٰتٰهُ اللّٰهُ لَا يُكَلِّفُ اللّٰهُ نَفْساً اِلَّا مَا اٰتٰـهَا...

Lodge them where you are lodging, according to your means....Let the man of plenty expend out of his plenty.... As for him who has his means of subsistence straitened, let him expend of what God has given him. God does not burden anyone except to the extent of what He has granted him....(65:6,7)

Under Egyptian law (act 25, 1929), the wife's maintenance, to be paid by the husband, is fixed in accordance with his financial condition, irrespective of the condition of the wife.

Here it becomes clear that providing a servant and expenses of tobacco, cosmetics, tailoring, etc., requires that two things be taken into consideration: the husband's condition and the custom prevailing among her likes. Therefore, if she demands more than that the husband is not obliged to comply, irrespective of his financial condition; and if she demands what her likes generally require, it is compulsory that the husband meet her demands if he is well-off, but not if his means are straitened. Here, the following questions are also pertinent:

Medical Expenses:

If the wife needs medicines or surgery, will the husband be compelled to pay her medical and surgical expenses?

The answer to this question leads us to another one: Is medical care part of maintenance or something apart from it? When we refer to the canonical sources, we find that the Qur'ān makes the wife's food and clothing *wājib*. The aḥādith say: It is for the husband to satiate her hunger and to clothe her. There is no mention of medicine and medical treatment in the Qur'ān and the traditions. The legists have limited maintenance to the providing of food, clothing and housing, and have not touched the matter of medical care. On the contrary, some of them have explicitly said that it is not *wājib* for the husband. In *al-Fiqh 'alā al-madhāhib al-'arba'ah,* it has been narrated from the Ḥanafīs that medicines and fruits are not *wājib* on the husband during the period of dispute between the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

couple. In the Imāmî work *al-Jawāhir* (vol. 5) it is stated: The wife is not entitled to claim from the husband medicine during illness, or the expenses of cupping and bathing except during winter. Al-Sayyid Abū al-Ḥasan observes in *al-Wasîlah:* If the medicines are of common use and needed for common ailments, such medicines are included in maintenance and are *wājib* upon the husband; but if the medicines are for difficult cures and uncommon ailments, which require expensive treatment, they are not included in maintenance and it is not the husband's duty to provide them.

This was a summary of the opinions of the legists which I have come across. It is also said that the treatment of simple diseases, such as malaria and ophthalmia, is included in maintenance, as observed by the author of *al-Wasîlah.* But regarding surgeries, which require large sums of money, if the husband is poor and the wife is financially well-off she will bear the expenditure; and if he is a man of means while she is poor, he will meet the expenses -- for of all people the husband, being her life partner, is most entitled to be kind to her. If both of them are indigent, they will share in meeting the expenses.

In any case, it is certain that the Sharî'ah has not explicitly defined the limits of maintenance, but has only made it *wājib* on the husband, leaving it to be determined in accordance with *'urf* (usage). Therefore, we should refer to *'urf* and not make anything *wājib* for the husband except after ascertaining that it is considered part of maintenance by *'urf.* And there is no doubt that *'urf* disapproves the conduct of a husband who while possessing the means neglects his wife who needs medical attention, exactly as it considers a father blameworthy if he neglects his ailing children while having the means to buy medicines and pay the doctor's fee.

Expenses of Child-birth:

The essential expenses of child-birth and the obstetrician's fee will be paid by the husband when called upon by need.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Adjustment of Maintenance:

If a judge determines a certain sum of money, or the spouses mutually settle it in lieu of maintenance, it is valid to adjust it by increasing or decreasing it in accordance with changes in prices or changes in the financial condition of the husband.

The Wife's Housing:

The Imāmiyyah, the Ḥanafī and the Ḥanbalī schools state: It is necessary that the house provided to the wife befit the couple's status, and that the husband's family and children not reside in it except by her consent.

The Mālikīs observe: If the wife is of a humble status, she may not refuse to stay with the husband's relatives, and if of a high social status she can refuse to stay with them except if it had been mentioned as a condition in the contract. If so, it is *wājib* for her to reside with his family on being provided a room where she can enjoy privacy whenever she desires and does not suffer from mistreatment by his family.

According to the Shāfi'ī school, it is *wājib* that the housing suit her and not his status, even if he is poor.

The truth is that it is necessary to consider the condition of the husband in everything concerning maintenance, without there being any difference between food, clothing and housing in this regard, because the Qur'ān says,

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ...

Lodge them where you lodge, according to your means, (65:6)

on condition that she have an independent home and does not suffer by staying in it.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

A Working Wife:

The Ḥanafîs are explicit that a woman if she works and does not stay at home is not entitled to maintenance if the husband demands her to stay at home and she does not concede to his demand. This view is in concurrence with what the other schools hold regarding the impermissibility of her leaving her home without his permission. The Shāfi'î and the Ḥanbalî schools further state, as mentioned earlier, that if she leaves home with his permission for meeting her own requirements, her maintenance ceases.

But a correct view would be to differentiate between a husband who knows at the time of marriage that she is employed and her employment prevents her staying at home, and a husband who is ignorant about her employment at the time of marriage. Therefore, if he knew and remained silent and did not include a condition that she leave her job, he has no right in this case to ask her to forgo her job; and if he demands and she refuses to comply, her maintenance shall not cease, because he has concluded the contract with the knowledge that she works. And many men marry working women with an intention of exploiting them, and when they are unable to do so they ask the wives to stop working with the purpose of harming them (financially).

But if the husband does not know that she works at the time of marriage, he can demand that she stop working, and if she does not comply, she shall not be entitled to maintenance.

Surety for Maintenance:

Is the wife entitled to claim from her husband a surety to secure her future maintenance if the husband intends to travel alone without leaving anything for her?

The Ḥanafî, the Mālikî and the Ḥanbalî schools observe: She is entitled to do so, and he is bound to arrange a surety for maintenance, and on his refusal she can ask that he be prevented from making the journey. The Mālikîs further add: She is entitled to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

claim from him advance payment of maintenance if he intends to go for a usual journey, and if the wife accuses him of planning to go for an unusual journey she has the right to claim immediate payment of maintenance for the period of a usual journey and to provide her a surety for the period which exceeds the period of a usual journey.

The Imāmiyyah and the Shāfi'ī schools state: She is not entitled to claim a surety for her future maintenance because its payment hasn't become due, and in the future the possibility of its ceasing due to her disobedience or divorce or death is always present.

My opinion is that she has the right to claim a surety because the cause on whose basis a surety is demanded is present, and this is her present obedience. Therefore, al-Shaykh Aḥmad Kāshif al-Ghiṭā' has observed in his *Safînat al-najāt* (*bāb al-ḍamān*): But the opinion (that she can claim a surety) is not farfetched if not opposed by consensus (*ijmā'*), so that her future maintenance is insured like her past and present maintenance.

As the matter leads to consensus, it lacks strength from the Imāmī viewpoint, because, according to their principles of jurisprudence, every consensus reached after the period of the Imams (A) faces the possibility of being refuted. Thus if there is a possibility that the consensus of the concurring legists is based on their belief that future maintenance does not become payable presently because it is not correct to provide surety for something which has not become payable, the argument on the basis of consensus fails due to the presence of this possibility. Now it should be seen whether the rule (that everything which has not yet become payable does not require a surety) on which the legists have based their argument is correct and whether it can be applied here or not. Here, as already explained, the cause (the wife's obedience) is present, which is sufficient to justify surety. Accordingly, the wife is entitled to claim a surety for her maintenance if the husband intends to travel, especially when he cannot be relied upon and is known to be irresponsible.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Dispute between Spouses:

If after the husband accepts the wife's right to maintenance, the two differ about the actual payment of maintenance (she denying that he has paid, and he claiming to have paid it) the Ḥanafī, the Shāfi'ī and the Ḥanbalī schools observe: The wife's word shall be accepted because she is the refuter and the burden of proof is not on her.

The Imāmiyyah and the Mālikī schools state: If the husband resides with her in the same house, his word will be accepted, otherwise her word.

If the husband concedes that he has not paid maintenance on the excuse that she is not entitled to it due to her not surrendering herself to him, his word will be accepted according to all the schools. The consensus on this issue is a corollary to the consensus of the schools on the issue that *mahr* becomes payable on the conclusion of the contract and becomes fully payable on consummation; but maintenance does not become payable solely on the conclusion of the contract, it is necessary for her to surrender herself to the husband. It is the practice of the Sharī'ah courts of Lebanon, both Sunnī and Shī'ī, when the spouses differ regarding disobedience (*nushūz*) (he claiming that she is disobedient and she charging him with disobedience), to order the husband to provide a suitable house and to order the wife to reside in it. If the husband refuses to provide a house, he will be considered disobedient; and if he provides a house which fulfils all the conditions and she refuses to reside in it and to obey him, she will be considered disobedient.

The Wife's Claim of Expulsion:

If the wife leaves her husband's home claiming that she has been expelled, and he denies this, the burden of proof will rest on her and he will be made to take an oath; because it is not valid for her to leave home without an acceptable excuse, and as she claims the presence of such an excuse, she is burdened with proving it.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Loss of Maintenance:

When the husband provides his wife with maintenance for the future, and then it is stolen or destroyed while in her possession, it is not *wājib* upon the husband to replenish it, irrespective of whether such loss occurs due to an unavoidable cause or on account of her negligence.

Husband's Debt Claim against Wife:

If a wife owes a debt to her husband, can he adjust this debt against her present or future maintenance?

The Imāmiyyah legists have dealt with this issue; they observe: If she is financially well-off and yet refuses to repay the debt, it is permissible for him to adjust it from her day-to-day maintenance, which means that he consider her debt to him as her maintenance for each day, separately. But if she is financially straitened, he cannot do so; because any payment towards debt should be from what exceeds her daily expenditures.

Maintenance of Relatives:

Who are the relatives entitled to maintenance and who amongst them is liable to provide maintenance? What are the conditions which make such maintenance *wājib*?

Definition of a Relative's Maintenance:

According to the Ḥanafîs, the criterion for the responsibility of the relative to provide maintenance of another is the prohibited degree of marriage, so that if one of them is supposed a male and the other a female, marriage between them would be considered *ḥarām.*

Therefore, this responsibility includes fathers--how high so ever--and sons--how low so ever--and also includes brothers, sisters,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

uncles and aunts, both paternal and maternal, because marriage between any two of them is prohibited.

The nearest relative shall be liable to provide maintenance, and affinity here has nothing to do with the title to inheritance. Therefore, if there is someone in the two classes of lineal ascendants and descendants, maintenance will be *wājib* on him, even if he is not entitled to inherit (from the person he is liable to maintain). One not belonging to these two classes will not be liable to provide maintenance, though he should be entitled to inherit. For example, if a person has a daughter's son and a brother, his maintenance will be *wājib* upon the former and not the latter, though the latter alone be entitled to the entire legacy to the exclusion of the former (*al-Durar fī sharḥ al-Ghurar,* vol. 1, *bāb al-nafaqāt*).

Similarly, between two relatives of the same class, the nearer one will be responsible, even if he isn't entitled to any share in the legacy. Therefore, if a child has a paternal great grandfather and a maternal grandfather, his maintenance will be *wājib* upon the latter not the former, though the former should be an heir to the exclusion of the other. The secret here is that the maternal grandfather is nearer though he does not inherit, while the paternal great grandfather is comparatively distant, though he is an heir.

The Ḥanafīs also state: The well-to-do son is responsible for the maintenance of his indigent father's wife, and he is also liable to get his indigent father married if he needs a wife.

The Mālikīs observe: Maintenance is *wājib* only on parents and children, not on other relatives. Thus, a grandson is not responsible to maintain his paternal or maternal grandfathers or grandmothers, and, reciprocally, a grandfather is not liable to maintain his grandsons and granddaughters. On the whole, the responsibility for maintenance is limited to parents and children, to the exclusion of grandparents and grandchildren.

They also state: It is *wājib* upon a well-to-do son to maintain the servant of his indigent parents, even if they don't need him; but it is not *wājib* for a father to maintain his son's servant. A son is also liable to maintain his father's wife and her servant and have his

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

father married to one or more wives, if one wife does not suffice.

The Ḥanbalîs state: It is *wājib* that fathers, how high so ever, provide and receive maintenance. Similarly, it is *wājib* that sons, how low so ever, provide and receive maintenance, irrespective of their title to inheritance. Maintenance of relatives not belonging to the two classes is also *wājib* if the person liable to provide maintenance inherits from the person being maintained either by *farḍ* or by *ta'ṣîb*;[6] but if excluded from inheritance, he will not be responsible for maintenance. Thus, if a person has an indigent son and a well-to-do brother, neither may be compelled to maintain him, because the son's indigence relieves him of the responsibility, and the brother by being excluded from inheritance due to the son's presence (*al-Mughnî*, vol. 7, *bāb al-nafaqāt*).

They also state: It is *wājib* on the son to arrange for his father's marriage and to maintain his wife, in the same way as it is *wājib* on the father to have his son married if he is in need of marriage.

According to the Imāmiyyah and the Shāfi'î schools, it is *wājib* for sons to maintain their fathers and mothers, how high so ever, and it is *wājib* for fathers to maintain sons and daughters, how low so ever. The obligation of maintenance does not transcend these two main lineal classes to include others, such as brothers and paternal and maternal uncles.

But the Shāfi'îs are of the view that a well-to-do father is liable to have his indigent son married if in need of marriage; and a son is likewise bound to arrange for his indigent father's marriage if in need of marriage. Moreover, the liability for a person's maintenance includes the maintenance of his wife (*Maqṣad al-nabîh, bāb nafaqat al-'aqārib*).

Most Imāmiyyah legists state: It is not *wājib* to arrange for the marriage of a person whose maintenance is *wājib*, irrespective of whether he is father or son. Similarly, it is not *wājib* for a son to maintain his father's wife if she is not his mother, or for a father to maintain his son's wife, because the canonical proofs (*adillah*) which make maintenance *wājib* include neither the father's wife nor the son's, and an obligation is assumed to be non-existent until proved.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Conditions for the Wujūb of Maintenance:

The following conditions are necessary for making the maintenance of one relative *wājib* upon another.

(1) The person to be maintained must be in need of maintenance. Therefore, maintaining a person who is not needy is not *wājib*. The schools differ regarding a person who is needy and can earn his livelihood but does not do so, as to whether it is *wājib* to maintain him or not.

The Ḥanafī and the Shāfi'ī schools state: The inability to earn is not a necessary condition for the *wujūb* of the maintenance of fathers and grandfathers. Therefore, their maintenance is *wājib* on sons even if they have the ability to work but neglect to do so. Regarding other relatives who are able to make a living for themselves, their maintenance is not *wājib;* rather, they will be compelled to make a living, and a one who neglects to work or is sluggish commits only a crime against himself. But the Shāfi'īs say regarding a daughter: Her maintenance is *wājib* on the father until she is married.

The Imāmiyyah, the Mālikī and the Ḥanbalī schools state: If one who was earlier making his livelihood by engaging in a trade that suited his condition and status later neglects to do so, his maintenance is not *wājib* upon anyone, irrespective of whether it is the father or the mother or the son. The Mālikīs agree with the Shāfi'īs' position regarding a daughter and the reason for this is that formerly women were considered generally incapable of earning their own livelihood.

(2) That the maintainer be well-off, according to all the schools, except the Ḥanafīs who say: Being well-to-do of the maintainer is a condition only for the maintenance of those who are neither ascendants nor descendants; but financial capacity is not a condition in the maintenance of the scion by one of the parents or the maintenance of the parents by the scion. The only condition here is the presence of the actual ability to maintain or the presence of the ability to earn. Therefore, a father who is capable of work will be

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ordered to maintain his child, and similarly a son with respect to his father, except where one of them is indigent and incapable of making an earning, such as due to blindness, etc.

The schools differ regarding the degree of financial ease necessary to cause the liability for providing maintenance to a relative. According to the Shāfi'ī school, it is the surplus over the daily expenditure of his own, his wife's and his children's.

The Mālikīs add to this the expenditure incurred upon servants and domestic animals.

According to the Imāmiyyah and the Ḥanbalī schools: It is the surplus over the daily expenditure of oneself and one's wife, as the maintenance of descendants and ascendants belongs to the same category.

Ḥanafī legists differ in defining the state of financial ease. According to some of them, it is possession of an amount of wealth which gives rise to the incidence of *zakāt* (*niṣāb*); according to others, it should be enough to prohibit his taking of *zakāt*. The third opinion differentiates between the farmer and the worker, allowing the farmer his and his family's expenditure for a period of one month and the worker a day's expenditure as deduction.

(3) According to the Ḥanbalīs, their belonging to the same religion is necessary; thus, if one of them is a Muslim and the other a non-Muslim, maintenance will not be *wājib* (*al-Mughnī*, vol. 7).

The Mālikī, the Shāfi'ī and the Imāmiyyah schools state: Their belonging to the same religion is not necessary. Therefore, a Muslim can maintain a relative who is not a Muslim, as is the case when maintenance is provided by a Muslim husband to his wife belonging to Ahl al-Kitāb.

The Ḥanafīs observe: Belonging to the same religion is not required between ascendants and descendants, but necessary between other relatives. Therefore, a Muslim will not maintain his non-Muslim brother and vice versa (Abū Zuhrah).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Determination of Relative's Maintenance:

It is necessary that maintenance paid to a relative be sufficient to cover his/her essential needs, such as food, clothing and housing, because maintenance has been made *wājib* to protect life and to provide its needs. Thus it is to be determined in accordance with the needs (*al-Mughnî*, vol. 7, *al-Jawāhir*, vol. 5).

Dispute Between Relatives:

The Mālikîs state: Maintenance of parents will not be *wājib* on a son unless their condition of need is proved by the testimony of two just male witnesses; the testimony of a just male witness along with two female witnesses or the testimony of a just male witness along with an oath will not suffice.

The Shāfi'îs state: The father's word will be accepted without an oath if he claims to be in need.

The Ḥanafîs state: Need is presumed unless there is proof to the contrary. Therefore, if the person claiming maintenance pleads indigence, his word will be accepted on oath and the person from whom maintenance is claimed is burdened to disprove the claim of the claimant. And if the person from whom maintenance is claimed pleads indigence, his word will be accepted on oath and the claimant will be burdened with proving the former's financial capacity. If the presence of financial capacity was established in the past and incapacity is subsequently claimed, the former state will be presumed to exist until the opposite is proved.

The Imāmiyyah concur with the Ḥanafî position on this issue, because it is in accordance with the principles of the Sharî'ah, except where the person claiming indigence owns known assets. If he does, his plea will be rejected and the word of the person claiming his financial capacity will be accepted.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Payment of Past Maintenance:

The schools concur that the past maintenance of relatives will not be payable if the judge had not determined it; the spirit of mutual assistance and fulfilment of need being the reason behind it, it cannot be made good for past time. The schools differ where the judge determines it and orders its payment, as to whether outstanding maintenance must be paid after the judge's order or whether it is annulled (with the passage of time) as if he had not ordered its payment at all.

The Mālikīs state: If a judge orders the payment of maintenance to a relative and then it remains unpaid, it will not be annulled.

The Imāmiyyah, the Ḥanafī and some Shāfi'ī legists observe: If the judge orders maintenance to be borrowed and the relative entitled to receive maintenance does so, it is *wājib* for the maintainer to clear this debt. But if the judge does not order the borrowing of maintenance, or orders but it is not borrowed, the maintenance will be void. The Ḥanafīs require the payment of past maintenance after the judge's order if it accrues for a period of less than one month; so if the judge orders payment and a month passes since its becoming due, the relative will be entitled to claim the maintenance of the current month only, not of the month past.

It should be noted that if a relative entitled to maintenance receives the maintenance of a day or more through litigation, through gift, *zakāt* or some other manner, the maintenance due to him will be deducted to the extent of what he received through these means, even if the judge has ordered the payment of maintenance.

The Order of Relatives on Whom Maintenance is Wājib:

The Ḥanafīs observe: If there is only one person responsible for maintenance, he will pay it; if two or more belonging to the same category and capacity are responsible--such as two sons or two daughters--they will share equally in providing maintenance, even if

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

they differ in wealth, after their financial capacity has been proved.[7]

But where they are of different categories of relationship or of varying capacities, there is confusion in the views of Ḥanafî legists in providing the order of those responsible for maintenance (*al-'Aḥwāl al-shakhṣiyyah,* Abū Zuhrah).

The Shāfi'îs state: If a person in need has a father and a grandfather who are both well-off, his maintenance will be provided solely by the father. If he has a mother and a grandmother, the maintenance will be solely provided by the mother. If both the parents are there, the father will provide the maintenance. If he has a grandfather and a mother, the grandfather will provide the maintenance. If he has a paternal grandmother and a maternal grandmother, according to one opinion, both are equally responsible, according to another opinion, the paternal grandmother will be solely liable (*Maqṣad al-nabîh, nafaqat al-'aqārib*).

The Ḥanbalîs state: If a child does not have a father, his maintenance will be on his heirs; and if he has two heirs, they will contribute in proportion to each's share in legacy. If there are three or more heirs, they will contribute in proportion to their share in legacy. Thus if he has a mother and a grandfather, the mother will contribute one-third of maintenance and the grandfather the remainder, as they inherit in the same proportion (*al-Mughnî,* vol. 7).

The Imāmiyyah state: The child's maintenance is *wājib* on the father. If the father is dead or indigent, its maintenance will lie upon the paternal grandfather; and if the grandfather is dead or indigent, the mother will be liable for maintenance. After he, her father and mother along with the child's paternal grandmother will share equally in the maintenance of the grandchild if they are financially capable. But if only some of them are well-off, the maintenance will lie only on those who are such.

If an indigent person has father and a son, or father and a daughter, they will contribute to his maintenance equally. Similarly, if he has many children, it will be shouldered equally by them without any distinction between sons and daughters. On the whole, the Imāmiyyah consider the nearness of relationship as criterion while

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

determining the order of relatives who are liable to provide maintenance; on their belonging to the same class, they are compelled to contribute equally without any distinction between males and females or between ascendants and descendants, except that the father and the paternal grandfather are given priority over the mother.

NOTES:

1. *Al-Jawāhir* and *al-Masālik, bāb al-zawāj: al-ḥiḍānah*.

2. The child's right to choose to live with the father or the mother on reaching this age is not in conflict with the (Lebanese) law according to which the age of majority is 18 years; because this age has been considered by the law as a condition for marriage and not for choosing between the parents.

3. The author of *al-Masālik* has inclined towards the absence of any compensation for custody, and the author of *al-Jawāhir* has inclined towards its presence. Considering that there is no explicit reference in the Sharī'ah about compensation being *wājib*, and considering that it is not customary to pay compensation for custody, the opinion expressed by the author of *al-Masālik* is correct.

4. The Ḥanafīs state: If she falls sick at her husband's home, she is entitled to maintenance; and if she falls sick before consummation and it is not possible to shift her to his home, she will not be entitled to maintenance. This opinion of the Ḥanafīs is in accordance with their basic principle that maintenance is a compensation for her confining herself to her husband's home.

5. The Mālikīs state: The wife's maintenance ceases during the husband's indigence, irrespective of consummation. If he becomes well-off later on, she does not have the right to claim maintenance for the period during which he was indigent.

6. By *'farḍ'* is meant the specific share of inheritance decreed for an heir by the Qur'ān.

Al-Ta'ṣīb is a doctrine accepted by the Sunnī schools. It applies in situations where the total shares of the decreed sharers fall short of the total legacy. Here, the Sunnī schools assign the balance to be inherited by distant relatives, as the nearer relatives have already received their decreed shares and are not entitled to anything in addition to their decreed shares. For example, if a person dies leaving behind a daughter and an uncle, the decreed share of the daughter being half, the other half will be inherited by the uncle and the daughter will not be entitled to inherit more than her decreed share.

The Imāmiyyah do not accept this doctrine and in the above example entitle the daughter to inherit the whole heritable interest to the exclusion of the father's uncle. They apply the rule: the nearer in degree excludes the remote.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

7. Some judges distribute the maintenance of a relative between those on whom his maintenance is *wājib* in accordance with the financial capacity of each. Therefore, if an indigent father has two sons, one of them very rich, and the other merely well-off, the first will contribute more than the second to the father's maintenance. The Ḥanafīs give no weightage to this difference in financial capacity and consider the two equally liable after their capacity has been proved. This is a right required by the legal-bases, and the statements of the author of *al-Jawāhir* also bear this out where he says: If he has a son who is presently well-off and another son who is in the course of becoming such, the two will contribute equally because the applicable *adillah* are unconditional.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

DIVORCE

The Divorcer (al-Muṭalliq):

A divorcer should possess the following characteristics:

1. Adulthood: Divorce by a child is not valid, even if of a discerning age (*mumayyiz*), according to all the schools except the Ḥanbalī, which observes: Divorce by a discerning child is valid even if his age is below ten years.

2. Sanity: Divorce by an insane person is not valid, irrespective of the insanity being permanent or recurring, when the divorce is pronounced during the state of insanity. Divorce by an unconscious person and one in a state of delirium due to high fever is also not valid. The schools differ regarding the state of intoxication. The Imāmiyyah observe: Such a divorce is not valid under any circumstance. The other four schools[1] remark: The divorce is valid if the divorcer has voluntarily consumed an unlawful intoxicant. But if he drinks something permissible and is stupefied, or is coerced to drink, the divorce does not materialize.

Divorce by a person in a fit of anger is valid if the intention to divorce exists. But if he loses his senses completely, the rule which applies to an insane person will apply to him.

3. Free volition: All the schools except the Ḥanafī concur that divorce by a person under duress does not take place in view of the tradition:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

رُفِعَ عَنْ أُمَّتِي الخَطَأُ والنِّسْيانُ وَمااُسْتُكْرِهوا عَلَيْهِ.

My ummah have been exculpated of genuine mistakes, forgetfulness, and that which they are coerced to do.

The Ḥanafîs say: Divorce by a person under duress is valid.

The practice of the Egyptian courts has been not to recognize the divorce by a person under duress or intoxication.

4. Intention: According to the Imāmiyyah, divorce pronounced unintentionally or by mistake or in jest is not valid.

Abū Zuhrah says (page 283): The Ḥanafî school considers divorce by all persons except minors, lunatics and idiots as valid. Thus divorce pronounced by a person in jest, or under intoxication by an unlawful intoxicant, or under duress, is valid. On page 286 he writes: It is the accepted view of the Ḥanafî school that a divorce by mistake or in a state of forgetfulness is valid. On page 284 he observes: Mālik and al-Shāfi'î concur with Abū Ḥanîfah and his followers regarding a divorce pronounced in jest, while Aḥmad differs and regards such a divorce as invalid. Ibn Rushd states (*Bidāyat al-mujtahid,* vol. 2, p. 74): Al-Shāfi'î and Abū Ḥanîfah have said, "Intention (*niyyah*) is not required in divorce".

The Imāmiyyah have narrated from the Imams of the Ahl al-Bayt (*'a*):

لاطَلاقَ إلاّ لِمَنْ أرادَ الطَّلاقَ... لاطَلاق إلاّ بِنيَّة.

No divorce (takes effect) except by one who intends divorce. Divorce does not take place except by intention.

The author of *al-Jawāhir* says: If one pronounces divorce and subsequently denies intention, his word shall be accepted as long as the divorcée is undergoing her *'iddah,* because the fact of his intention cannot be known except from him.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Divorce by the Guardian (Ṭalāq al-Walī):

The Imāmiyyah, the Ḥanafī and the Shāfi'ī schools state: A father may not divorce on behalf of his minor son, because of the tradition:

الطَّلاقُ لِمَنْ أَخَذَ بِالسَّاقِ

The Mālikīs state: A father may divorce his minor son's wife in the *khul'* form of divorce. Two opinions are ascribed to Aḥmad.

The Imāmiyyah observe: When a child of an unsound mind matures, his father or paternal grandfather may pronounce divorce on his behalf if it is beneficial for him. If the father and the paternal grandfather do not exist, the judge may pronounce the divorce on his behalf. As mentioned earlier, the Imāmiyyah allow the wife of a lunatic to annul the marriage.

The Ḥanafīs state: If a lunatic's wife suffers harm by living with him, she may raise the issue before a judge and demand separation. The judge is empowered to pronounce divorce to rescue her from the harm, and the husband's father has no say in this affair.

All the schools concur that divorce by a stupid husband (*safīh*) and his agreeing to *khul'* are both valid.[2]

The Divorcée (al-Muṭallaqah):

There is consensus that the divorcée is the wife. For the validity of the divorce of a wife with whom intercourse has occurred, the Imāmiyyah require that she should not have undergone menopause nor she should be pregnant, that she be free from menses at the time of divorce, and that intercourse should not have occurred during the period of purity. Thus, if she is divorced during her menses or *nifās*,[3] or in a period of purity in which she has been copulated with, the divorce will be invalid.

Al-Rāzī, in his exegesis of the first verse of *Sūrat al-Ṭalāq*, يا أَيُّهَا النَّبِيُّ إِذا طَلَّقْتُمُ النِّساءَ فَطَلِّقُوهُنَّ لِعِدَّتِهِنَّ..., has said "By *'iddah* is meant

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the period of purity from menses, by consensus of all Muslims. A group of exegetes has observed that by divorce at the time of *'iddah* is meant that the wife may be divorced only during the period of purity in which intercourse has not occurred. In brief, it is compulsory that divorce occur during the period of purity, otherwise it will not be according to the Sunnah, and divorce according to the Sunnah is conceivable only in the case of an adult wife with whom marriage has been consummated, and one who is neither pregnant nor menopausal." For there is no *sunnah* concerning the divorce of a minor wife, a wife who has not been copulated with, or a wife in menopause or pregnancy. This is exactly what the Imāmiyyah hold.

In *al-Mughnî* (vol. 7, p. 98, 3rd. ed.) the author states: "The meaning of a *sunnah* divorce (*ṭalāq al-sunnah*) is a divorce in consonance with the command of God and His Prophet (*ṣ*); it is divorce given during a period of purity in which intercourse with her has not occurred." He continues (p. 99): "A divorce contrary to the *sunnah* (*ṭalāq al-bid'ah*) is a divorce given during menses or during a period of purity in which she has been copulated with. But if a person pronounces such a divorce, he sins, though the divorce is valid according to the view generally held by the scholars. Ibn al-Mundhir and Ibn 'Abd al-Birr have said: None oppose the validity of this form of divorce except the heretics (*ahl al-bida' wa al-ḍalālah*)"! If to follow the command of Allah and the Sunnah of His prophet (*ṣ*) is heresy and misguidance, then it is of course proper that following Satan be called *'sunnah'* and 'guidance'.

Whatever the case, the Sunnîs and the Shî'ah concur that Islam has prohibited the divorcing of an adult, non-pregnant wife with whom marriage has been consummated, who is either undergoing periods or has been copulated with during her period of purity. But the Sunnî schools add that the Sharî'ah's prohibition makes the divorce *ḥarām* (unlawful) but not invalid, and one who pronounces divorce in the absence of these conditions sins and is liable to punishment, but the divorce will be valid. The Shî'ah state: The Sharî'ah's prohibition is for invalidating such a divorce, not for making it *ḥarām*, for the mere pronouncing of divorce is not *ḥarām*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and the sole purpose is to nullify the divorce as if it had not taken place at all, exactly like the prohibition of sale of liquor and swine, where the mere recital of the contract of sale is not *ḥarām,* only the transfer of ownership fails to take effect.

The Imāmiyyah permit the divorce of the following five classes of wives, regardless of their state of menstruation or purity:

1. A minor wife under the age of nine.

2. A wife whose marriage has not been consummated, regardless of whether she was a virgin or not, and irrespective of his having enjoyed privacy with her.

3. A menopausal wife; menopause is taken to set in at fifty for ordinary women and at sixty for Qurayshī women.

4. A wife who is pregnant.

5. A wife whose husband has been away from her for a whole month and the divorce is given during his absence from her, since it is not possible for him to determine her condition (whether she is in her menses or not). A prisoner husband is similar to a husband who has been away.

The Imāmiyyah state: The divorce of a wife who has reached the age of menstruation but does not have menses due to some defect or disease or childbirth, is not valid unless the husband abstains from intercourse with her three months. Such a woman is called *al-mustarābah* (a term derived from *rayb,* doubt).

The Pronouncement of Divorce (al-Ṣīghah):

The Imāmiyyah observe: Divorce requires the pronouncement of a specific formula without which it does not take place. This formula is أَنْتِ طالِقٌ (you are divorced), or فُلانَة طالِقٌ ('so and so' is divorced), or هِيَ طالِقٌ (she is divorced). Thus if the husband uses the words, الطّالِقُ or المُطَلَّقَةُ or طُلِّقَتْ or الطَّلاقُ or مِنَ المُطَلَّقات etc., it will have no effect even if he intends a divorce because the form طالِقٌ is absent despite the presence of its root (*ṭ-l-q*). It is necessary that the formula be properly recited without any error in pronunciation and that it be unconditional. Even a condition of certain occurrence such

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

as, 'at sunrise', etc. is not adequate.

If the husband gives the wife the option of divorcing herself and she does so, divorce will not take place according to Imāmī scholars. Similarly, divorce will not take place if the husband is questioned, "Have you divorced your wife", and he answers affirmatively with the intention of effecting a divorce. If the husband says, "You are divorced, three times", or repeats the words, "You are divorced", thrice, only a single divorce takes place if the other conditions are fulfilled. Divorce does not take place through writing or by gesticulation, unless the divorcer is dumb, incapable of speech. It is necessary that the divorce be recited in Arabic when possible. It is better for a non-Arab and a dumb person to appoint an attorney, if possible, to recite the divorce on his behalf. Similarly, according to the Imāmiyyah, divorce will not take place by an oath, a vow, a pledge or any other thing except by the word طالقٌ, on fulfilment of all the limitations and conditions.

The author of *al-Jawāhir,* citing a statement from *al-Kāfī,* says: "There can be no divorce except (in the form) as narrated by Bukayr ibn A'yan, and it is this: The husband says to his wife (while she is free from menses and has not been copulated with during that period of purity): اَنت طالقٌ (You are divorced), and (his pronouncement) is witnessed by two just (*'ādil*) witnesses. Every other form except this one is void". Then the author of *al-Jawāhir* quotes *al-'Intiṣār* to the effect that there exists consensus on this issue among the Imāmiyyah.

Consequently, the Imāmiyyah have restricted the scope of divorce to its extreme limits and impose severe conditions regarding the divorcer, the divorcée, the formula of divorce, and the witnesses to divorce. All this is because marriage is a bond of love and mercy, a covenant with God. The Qur'ān says:

وَكَيفَ تَأخُذونَهُ وَقَد أَفضىٰ بَعضُكُم إِلىٰ بَعضٍ وَأَخَذنَ مِنكُم مِيثٰقًا غَليظًا ﴿٢١﴾

How can you take it back after one of you hath gone in into the other, and they (the wives) have taken a strong pledge from you? (4:21)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

وَمِنْ ءَايَٰتِهِۦٓ أَنْ خَلَقَ لَكُم مِّنْ أَنفُسِكُمْ أَزْوَٰجًا لِّتَسْكُنُوٓا۟ إِلَيْهَا وَجَعَلَ بَيْنَكُم مَّوَدَّةً وَرَحْمَةً...

And one of His signs is that He created mates for you from yourselves that you may find tranquillity in them, and He ordained between you love and compassion. (30:21)

...وَلَا تُمْسِكُوا۟ بِعِصَمِ ٱلْكَوَافِرِ...

...And hold not to the ties of marriage of unbelieving women....(60:10)

Therefore, it is not permissible in any manner that one break this bond of love and compassion, this pledge and covenant, except with a knowledge that leaves no doubt that the Sharī'ah has surely dissolved the marriage and has broken the tie which it had earlier established and confirmed.

But the other schools allow divorce in any manner in which there is an indication of it, either by oral word or in writing, explicitly or implicitly (such as when the husband says: "You are *ḥarām* for me", or "You are separated" or "Go, get married", or "You are free to go wherever you want," or "Join your family," and so on). Similarly, these schools allow an unconditional as well as a conditional divorce (such as when the husband says: "If you leave the house, you are divorced," or, "If you speak to your father you are divorced," or "If I do this, you are divorced," or "Any woman I marry, she is divorced;" in the last case the divorce takes place as soon as the contract of marriage is concluded!). There are various other pronouncements through which divorce is effected, but our discussion does not warrant such detail. These schools also permit a divorce in which the wife or someone else has been authorized to initiate it. They also allow a triple divorce by the use of a single pronouncement. The legists of these schools have filled many a long page with no result except undermining the foundation of the family and letting it hang in the air.[4]

The Egyptian government has done well in following the Imāmiyyah in most aspects of divorce. Apart from this, the four schools do not consider the presence of witnesses a condition for the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

validity of divorce, whereas the Imāmiyyah consider it an essential condition. We hand over the discussion to al-Shaykh Abū Zuhrah regarding this issue.

Divorce and Witnesses:

In *al-'Aḥwāl al-shakhṣiyyah* (p. 365), al-Shaykh Abū Zuhrah has observed: "The Twelve-Imāmī Shī'ī legists and the Ismā'īliyyah state: A divorce does not materialize if not witnessed by two just (*'ādil*) witnesses, in accordance with the Divine utterance regarding the rules of divorce and its pronouncement:

فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ وَأَشْهِدُوا ذَوَيْ عَدْلٍ مِنْكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ ذَٰلِكُمْ يُوعَظُ بِهِ مَنْ كَانَ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَمَنْ يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مَخْرَجًا ﴿٢﴾ وَيَرْزُقْهُ مِنْ حَيْثُ لَا يَحْتَسِبُ...

Then when they (the wives) have reached their 'iddah, retain them honourably, or part from them honourably. And have two just men from among yourselves bear witness, and give testimony for Allah's sake. By this then is admonished he who believes in Allah and the Last Day. And whoever is careful of (his duty to) Allah, He will provide for him an outlet, and give him sustenance from whence he never reckoned.... (65: 2--3)

This command about the witnesses in the Qur'ān follows the mention of divorce and the validity of revoking it. Therefore, it is appropriate that the calling in of witnesses should be related to divorce. Moreover, the reason given for calling in the witnesses, that God seeks thereby to admonish those who believe in God and the Last Day, confirms this interpretation, because the presence of just witnesses is not without the good adivce which they would offer to the couple; and this could bring about for them an escape from divorce, which is the most hated of lawful things in the eyes of God. If it were for us to choose the law to be acted upon in Egypt, we would choose this opinion, which requires the presence of two just witnesses for effecting a divorce".

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Together with the restrictions that the Imāmiyyah have laid down for the divorcer, the divorcée, and the pronouncement of divorce, they have also laid down an additional limitation regarding the witnesses by demanding that if all conditions are fulfilled except that the two just witnesses do not hear the pronouncement of the divorce, the divorce will not take place. Therefore, a single witness will not suffice even if he is a good substitute, not even if he is an infallible (*ma'ṣūm*) person.[5] Further, the witnessing of the pronouncement by one of them by listening and of the other by testifying to their admission (of having concluded the divorce) is not sufficient. The testimony of a group of people will also not suffice, even if it is big enough to make the divorce a known public fact. The testimony of women, with or without the testimony of men, is not sufficient. Similarly, if the husband pronounces the divorce and then brings in the witnesses, it will have no effect.

The Case of a Sunnî Husband and a Shî'î Wife:

If a Sunnî husband divorces his Shî'î wife, either through a conditional divorce contingent upon something, or in a period of purity during which sexual intercourse has occurred, or during menses or *nifās,* or without two just witnesses being present or by an oath of divorce, or by saying, حَبْلُكِ عَلىٰ غارِبِكِ "Go wherever you want," or in any other form which is valid in accordance with Sunnî law and invalid according to Shî'î law, is such a divorce considered valid by the Shî'ah, so that the woman may remarry after completing her *'iddah*?

The answer is that there is consensus among the Imāmî jurists that every sect is bound by its own precepts,[6] and that the transactions of its followers, as well as their affairs pertaining to inheritance, marriage and divorce, are valid if performed according to rules of their *sharî'ah.* A tradition has been narrated from the Imams of Ahl al-Bayt (*'a*):

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

أَلْزِمُوهُمْ مِنْ ذٰلِكَ ما أَلْزَمُوا أَنْفُسَهُمْ.

Bind them with the laws with which they have bound themselves.

In another tradition, al-'Imām al-Ṣādiq (*'a*) was questioned regarding a woman who had been divorced by a Sunnî husband against the principles of the Sunnah, whose compliance is necessary for the validity of a divorce according to the Shî'ah. The Imam (*'a*) replied:

تَتَزَوَّجُ، وَلا تُتْرَكُ الْمَرْأَةُ مِنْ غَيْرِ زَوْجٍ.

She will marry, and a woman shall not be left without a husband.

In a third tradition it is stated:

يَجُوزُ عَلىٰ أَهْلِ كُلِّ دِينٍ ما يَسْتَحِلّونَ.

For the followers of every religion, that which they consider lawful is permissible for them.

A fourth tradition says:

مَنْ دانَ بِدِينِ قَوْمٍ لَزِمَتْهُ أَحْكامُهُمْ.

One who follows the religion of a particular sect, is bound by its rules, (*al-Jawāhir*, vol. 5, the discussion regarding *ṣ îghat al-ṭalāq*)

Consequently, if a Shî'î husband divorces his Sunnî wife according to the principles of her school and not his, the divorce is invalid, and if a Sunnî divorces his Shî'î wife according to the principles of his own school, the divorce is valid.

Revocable and Irrevocable Divorce:

A divorce is either revocable or irrevocable. The schools concur that a revocable divorce is one in which the husband is empowered

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

to revoke the divorce during the *'iddah*, irrespective of the divorcée's consent. One of the conditions of a revocable divorce is that the marriage should have been consummated, because a wife divorced before consummation does not have to observe the *'iddah* in accordance with verse 49 of *Sūrat al-'Aḥzāb*:

يأَيُّهَا الَّذِينَ ءَامَنُوا إِذَا نَكَحْتُمُ الْمُؤْمِنَٰتِ ثُمَّ طَلَّقْتُمُوهُنَّ مِن قَبْلِ أَن تَمَسُّوهُنَّ فَمَا لَكُمْ عَلَيْهِنَّ مِنْ عِدَّةٍ تَعْتَدُّونَهَا...

O believers! When you marry the believing women and then divorce them before you touch them, you are not entitled to reckon for them an 'iddah....

Among the other conditions of a revocable divorce are that the divorce should not have been given on the payment of a consideration and that it should not be one which completes three divorces.

The divorcée in a revocable divorce enjoys the rights of a wife, and the divorcer has all the rights of a husband. Therefore, both will inherit from each other in the event of death of one of them during the *'iddah*. The deferred *mahr* payable on the occurrence of any of the two events, death or divorce, will become payable only after the expiry of the *'iddah* if the husband does not revoke the divorce during that period. On the whole a revocable divorce does not give rise to a new situation except its being accountable for ascertaining whether the number of divorces has reached three.

In an irrevocable divorce, the divorcer may not return to the divorced wife, who belongs to one of the following categories:

1. A wife divorced before consummation, by consensus of all the schools.

2. A wife who has been divorced thrice. There is consensus here as well.

3. A divorcée through *khul'*. Some legists consider this form of divorce void and say that it is not a divorce at all.

4. A menopausal divorcée, in the Imāmī school, which observes: She has no *'iddah* and the rules applicable to a divorcée before

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

consummation apply to her as well. According to it, in verse 4 of *Sūrat al-Ṭalāq*:

وَٱلَّـٰٓـِٔي يَـِٔسْـنَ مِنَ ٱلْمَحِيضِ مِن نِّسَآئِكُمْ إِنِ ارْتَبْتُمْ فَعِدَّتُهُنَّ ثَلَـٰثَةُ أَشْهُرٍ وَٱلَّـٰٓـِٔي لَمْ يَحِضْنَ...

If you are in doubt concerning those of your wives who have ceased menstruating, know that their waiting period is three months, and (the same is the waiting period of)those who have not yet menstruated...,

the phrase واللائی یَئِسْنَ does not imply those women who are known to have reached menopause but those whose menses have stopped and it is not known whether the reason is disease or age; consequently, their *'iddah* is three months. There is no question of doubt regarding those whose menopause is certain. The doubt arises in cases of uncertainty, as indicated by the words ان ارْتَبْتُمْ (if you are in doubt) of the verse, because it is not the Lawgiver's wont when explaining a law to say: "If you are in doubt regarding the law regarding something, the law is that...." This confirms that the doubt mentioned in the verse relates to the fact of menopause, in which case she is to observe an *'iddah* of three months. As to the phrase وَالّلائی لَمْ یَحِضْنَ, it refers to women who despite attaining the age of menses do not have them due to some congenital or contingent factor. Many traditions have been narrated from the Imams of the Ahl al-Bayt (*'a*) with this interpretation of this verse.

5. The Ḥanafîs say: Valid seclusion (*khalwah*) with the wife, even without consummation, requires the observance of *'iddah*. But the divorcer is not entitled to return to her during the *'iddah*, because here the divorce is irrevocable.

The Ḥanbalîs state: Seclusion is similar to consummation in all respects so far as the necessity of *'iddah* and the right of revocation is concerned. As mentioned earlier, seclusion has no effect according to the Imāmiyyah and the Shāfi'î schools.

6. The Ḥanafîs observe: If a husband says to his wife: "You are divorced irrevocably" or "divorced firmly," "(with a divorce as firm)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

as a mountain," and such similar strong words, the divorce will be irrevocable and the divorcer will not be entitled to return during the *'iddah*. Similarly, a divorce pronounced by using words which connote a break of relationship (such as, "She is separated," "cut off," "disassociated").

The Triple Divorcée:

The schools concur that a husband who divorces his wife thrice cannot remarry her unless she marries another person through a valid *nikāḥ,* and this second person consummates the marriage, in accordance with verse 230 of *Sūrat al-Baqarah*:

فَإِن طَلَّقَهَافَلَا تَحِلُّ لَهُ مِن بَعدُ حَتَّىٰ تَنكِحَ زَوجاًغَيْرَهُ...

So if he divorces her, she shall not be lawful to him afterwards, until she marries another husband.... (2:230)

The Imāmī and the Mālikī schools consider it necessary that the person who marries her (*muḥallil*) be an adult. The Ḥanafī, the Shāfi'ī and the Ḥanbalī schools consider his capacity for intercourse as sufficient, even if he is not an adult. The Imāmī and the Ḥanbalī schools state: If in a marriage contract *taḥlīl* (causing the woman to become permissible for her former husband to remaryy) is included as a condition (such as when the second husband says, "I am marrying you to make you *ḥalāl* for your divorcer), the condition is void and the contract valid. But the Ḥanafīs add: If the woman fears that the *muḥallil* may not divorce her after the *taḥlīl,* it is permissible for her to say, "I marry you on the condition that the power to divorce be in my hands," and for the *muḥallil* to say, "I accept this condition." Then the contract will be valid and she will be entitled to divorce herself whenever she desires. But if the *muḥallil* says to her: "I marry you on the condition that your affair (of divorce) be in your own hands," the contract is valid and the condition void.

The Mālikī, the Shāfi'ī and the Ḥanbalī schools state: The

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

contract is void *ab initio* if *taḥlîl* is included as a condition. The Mālikî and Ḥanbalî schools further add: Even if *tahlîl* is intended and not expressed the contract is void.

The Mālikîs and some Imāmî legists consider it necessary that the second husband (*muḥallil*) have intercourse with her in a lawful manner (such as when she is not menstruating or having *nifās*, and while both are not fasting a Ramaḍān fast). But most Imāmî legists give no credence to this condition and regard mere intercourse, even if unlawful, to be sufficient for *taḥlîl*.

Whatever be the case, when a divorcée marries another husband and is separated from him, either due to his death or by divorce, and completes the *'iddah*, it becomes permissible for the first husband to contract a new marriage with her. Then, if he again divorces her thrice, she will become *ḥarām* for him until she marries another. This is how she will become *ḥarām* for him after every third divorce, and will again become *ḥalāl* by marrying a *muḥallil*, even if she is divorced a hundred times.

But the Imāmiyyah state: If a wife is divorced nine times in the *ṭalāq al-'iddah* form, and is married twice (i.e following *taḥlîl* after every third divorce), she will become permanently *ḥarām*. The meaning of *ṭalāq al-'iddah*, according to the Imāmiyyah, is a divorce in which the husband after divorcing returns to her during the *'iddah* and has intercourse with her, and then divorces her again in another period of purity, then returns to her and has intercourse, then divorces her for a third time and remarries her, after a *muḥallil* does the *taḥlîl*, by concluding a fresh contract, and divorces her thrice in the same manner, with a *muḥallil* doing the second *taḥlîl*, and remarries her again. Now if he divorces her thrice again, the ninth *ṭalāq al-'iddah* completed, she will become *ḥarām* for him permanently. But if the divorce is not a *ṭalāq al-'iddah* (such as when he divorces her, then returns to her and then divorces her again before having intercourse), she will not become *ḥarām* perpetually, and will become *ḥalāl* through a *muḥallil*, even if the number of divorces is countless.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Doubt in the Number of Divorces:

The schools (except the Mālikî) concur that he who has doubt regarding the number of divorces (whether a single divorce has taken place or more) will base his count on the lower number. The Mālikîs observe: The aspect of divorce shall preponderate and the count will be based on the higher number.

Divorcée's Claim of Taḥlîl:

The Imāmî, the Shāfi'î and the Ḥanafî schools state: If the husband divorces his wife thrice, and he or she knows nothing about the other for some time and thereafter she claims having married a second husband and separated from him and having completed the *'iddah,* her word will be accepted without an oath if this period is sufficient for her undergoing all this, and her first husband is entitled to marry her if he is satisfied regarding her veracity, and it is not necessary for him to inquire further. (*al-Jawāhir,* Ibn 'Ābidîn, and *Maqṣad al-nabîh*)

Al-Khul':

Khul' is a form of divorce in which the wife releases herself (from the marriage tie) by paying consideration to the husband. Here we have the following issues.

The Condition of the Wife's Destestation:

When they both agree to *khul'* and she pays him the consideration to divorce her, though they are well settled and their conduct towards each other is agreeable, is their mutual agreement to *khul'* valid?

The four schools state: The *khul'* is valid and the rules applicable to it and their effects will follow. But it is *makrūh*[7] (detestable though lawful).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

According to the Imāmiyyah, such a *khul'* is not valid and the divorcer will not own the consideration. But the divorce (so pronounced) will be valid and revocable if all the conditions for revocability are present. The proof they offer are traditions of the Imams of the Ahl al-Bayt (*'a*) and verse 229 of *Sūrat al-Baqarah*:

...فإنْ خفتُم ألاّ يُقيما حُدودَ الله فَلاَ جُنَاحَ عَلَيهِمَا فِيمَاافتَدَت بِه...

...Then if you fear that they cannot maintain the limits set by Allah, there is no blame on the two for what she gives to release herself...

wherein the verse has made the validity of consideration contingent upon the fear of sinning in case the marital relationship were to continue.

Mutual Agreement to Khul' for a Consideration Greater than Mahr:

The schools concur that the consideration should have material value and that its value may be equal to, lesser, or greater than the *mahr.*

Conditions for Consideration Payable in Khul':

According to the four schools, it is also valid to conclude a *khul'* agreement with anyone apart from the wife. Therefore, if a stranger asks the husband to divorce his wife for a sum which he undertakes to pay, and the husband divorces her, the divorce is valid even if the wife is unaware of it and on coming to know does not consent. The stranger will have to pay the ransom to the divorcer. (*Raḥmat al-'ummah* and *Farq al-zawāj* of al-'Ustādh al-Khafîf)

The Imāmiyyah observe: Such a *khul'* is invalid and it is not binding upon the stranger to pay anything. But it is valid for a stranger to act as a guarantor of the consideration by the wife's permission and ask the husband, after the wife's permission, to divorce her for such a consideration guaranteed by him. Thus, if the husband divorces her on this condition, it is binding on the guarantor

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

to pay him that amount and then claim it from the divorcée.

All that which is validly payable as *mahr* is also valid as consideration in *khul'*, by consensus of all the five schools. It is also not necessary that the amount of consideration be known in detail beforehand if it can be known eventually (such as when she says: "Grant me *khul'* for that which is at home", or "in the locker", or "my share of inheritance from my father", or "the fruits of my garden").

If *khul'* is given in return for that which cannot be owned, such as liquor or swine, the Ḥanafī, the Mālikī and the Ḥanbalī schools observe: If both knew that such ownership is *ḥarām,* the *khul'* is valid and the divorcer is not entitled to anything, making it a *khul'* without consideration. The Shāfi'īs say: The *khul'* is valid and she is entitled to the *mahr al-mithl.* (*al-Mughnî,* vol. 7)

Most Imāmī legists state: The *khul'* shall be void and the divorce will be considered revocable if it is an instance of revocable divorce; otherwise, it will be irrevocable. In all the cases, the divorcer shall not be entitled to anything.

If the husband grants her *khul'* for a consideration that he believes to be *ḥalāl* and it later turns out to be *ḥarām* (such as when she says: "Grant me *khul'* for this jar of vinegar," which turns out to be wine) the Imāmī and the Ḥanbalī schools observe: He shall claim from her a similar quantity of vinegar. The Ḥanafīs state: He shall claim from her the stipulated *mahr.* According to the Shāfi'ī school, he shall claim from her the *mahr al-mithl.*

If she seeks *khul'* for a consideration she considers to be her property and it turns out to be someone else's, the Ḥanafī school and most Imāmī legists observe: If the owner allows it, the *khul'* will be valid and the husband will take it, but if he disallows, the husband is entitled to a similar consideration either in cash or kind. The Shāfi'ī school states: The husband is entitled to *mahr al-mithl.* This is in accordance with the Shāfi'ī principle that when a consideration becomes invalid, it becomes void and *mahr al-mithl* becomes payable (*Maqṣad al-nabîh*). According to the Mālikīs, the divorce becomes irrevocable, the consideration becomes void, and the divorcer gets

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

nothing even if the owner permits (*al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol. 4).

If the wife seeks *khul'* by undertaking to nurse and maintain his child for a certain period, the *khul'* will be valid and she will be bound to nurse and maintain the child, as per consensus. The Ḥanafī, the Mālikī and the Ḥanbalī schools further clarify that it is valid for a pregnant wife to seek *khul'* from her husband in return for maintaining the child in her womb, on the same grounds on which it is valid for her to seek *khul'* by undertaking the maintenance of a born child. I have not come across in the Imāmī and Shāfi'ī sources accessible to me anyone who has dealt with this issue, although the principles of the Sharī'ah do not prohibit it, because the cause, which is the child in the womb, is present, and the wife's pledge is a condition by which she binds herself to the effect that in the event of the child being born alive she will be responsible for its nursing and maintenance for a specific period, and Muslims are bound by the conditions they lay down, provided this does not result in a *ḥalāl* becoming *ḥarām* or vice versa. Hence this condition is valid in itself, for it does not suggest anything legally void; therefore, its fulfilment is compulsory because it is part of a binding contract. The uncertainty concerning the child being born alive or dead, and its dying after birth before the stipulated period, is overlooked in a *khul'*.

The furthest one can go in asserting its impermissibility and invalidity is by likening a pledge to maintain with a discharge from maintenance. Therefore, when a discharge from maintenance is invalid because it is an annulment of something not binding, similarly a pledge to maintain is not valid because it is not presently *wājib.* But there is a great difference between a pledge and a discharge, because it is necessary that a discharge be from something present and actual, while a pledge need not be so. Apart from this, we have already discussed in the chapter on marriage regarding *khul'* in return for foregoing the right to custody of a child by the father or the mother.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

A Related Issue:

If a husband grants *khul'* to his wife in return for her maintaining the child, she is entitled to claim the child's maintenance from its father on her not being able to maintain it, and he will be compelled to pay the maintenance. But he can reclaim this maintenance from the mother if she comes to possess the means. If the child dies during the stipulated period, the divorcer is entitled to claim a compensation for the remaining period in accordance with the words of the verse (2:229) فيمَاافْتَدَتْ به It is better for a woman to undertake the nursing and maintenance of the child for a certain period so long as it is alive. Then the divorcer will not have the right to a claim against her if the child dies.

Conditions for a Wife Seeking Khul':

There is consensus among the schools that a wife seeking *khul'* should be a sane adult. They also concur that the *khul'* of a stupid (*safîh*) wife is not valid without the permission of her *walî* (guardian). The schools differ regarding the validity of *khul'* where the guardian has granted her the permission to seek *khul'*. The Ḥanafîs observe: If the guardian undertakes to pay the consideration from his own personal assets, the *khul'* is valid; otherwise, the consideration is void, while the divorce takes place, according to the more authentic of two traditions (Abū Zuhrah).

The Imāmî and the Mālikî schools state: With the guardian's permission to her to pay the consideration, the *khul'* is valid by payment from her wealth, not his. (*al-Jawāhir* and *al-Fiqh 'alā al-madhāhib al-'arba'ah*)

The Shāfi'î and the Ḥanbalî schools consider the *khul'* of a stupid wife as invalid irrespective of the guardian's permission. The Shāfi'î school allows one exception to the above opinion, wherein the guardian fears the husband's squandering her wealth and grants her permission to seek a *khul'* from him for the protection of her property. The Shafi'îs then add: Such a *khul'* is invalid and the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

divorce is revocable. The Ḥanbalīs say: Neither the *khul'* nor the divorce will take place except when the husband intends a divorce through *khul'* or if the *khul'* takes place in the words of a divorce.

If a woman seeks *khul'* during her last illness, it is considered valid by all schools. But they differ where she pays as consideration more than a third of her wealth or more than the husband's share to be inherited from her on assumption of her death during the *'iddah*. As said above, they inherit from each other in this situation.

The Imāmī and the Shāfi'ī schools state: If she seeks *khul'* for *mahr al-mithl,* it is valid and the consideration is payable from her undivided legacy. But if it exceeds *mahr al-mithl,* the excess will be deducted from one-third of her legacy.

The Ḥanafīs observe: Such a *khul'* is valid and the divorcer is entitled to the consideration if it does not exceed either one-third of her wealth or his share of inheritance from her were she to die during the *'iddah*. This means that he will take the least of the three amounts: the consideration of the *khul'*, his share of inheritance from her, or a third of her legacy. (Therefore, if the consideration for the *khul'* is 5, his share of inheritance 4, and a third of her legacy 3, he shall be entitled to 3).

According to the Ḥanbalī school, if she seeks *khul'* in return for a consideration equalling his share of inheritance from her or something lesser, the *khul'* and the consideration are valid. But if she seeks *khul'* for a higher consideration, only the excess will be void (*al-Mughnī,* vol. 7).

The Imāmiyyah moreover require the wife seeking *khul'* to fulfil all the requirements in a divorcee (such as her purity from menses, non-occurrence of intercourse in the period of purity if her marriage has been consummated, her being neither menopausal nor pregnant, her not being a minor below the age of nine). Similarly, they require the presence of two just witnesses for the *khul'* to be valid. But the other schools validate a *khul'* irrespective of the state of the wife seeking it, exactly like a divorce.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Conditions for a Husband Granting Khul':

Excepting the Ḥanbalî, all the other schools concur that a husband granting *khul'* requires to be a sane adult. The Ḥanbalîs state: *Khul'* granted by a discerning minor (*mumayyiz*) is valid, as is a divorce given by him. As mentioned at the beginning of this chapter on divorce, the Ḥanafîs permit a divorce pronounced in jest, under duress, or in a state of intoxication, and the Shāfi'î and the Mālikî schools concur with them concerning divorce pronounced in jest. A *khul'* granted in a state of rage is valid if the rage does not eliminate the element of intention.

There is consensus among the schools concerning the validity of a *khul'* granted by a stupid (*safîh*) husband. But the consideration will be given to his guardian, and its being given to him is not valid.

Regarding a *khul'* granted by a sick husband on his death bed, it is undoubtedly valid, because when his divorcing without receiving any consideration is valid, a divorce along with consideration would be more so.

The Pronouncement of Khul':

The four schools permit the use of explicit words--such as derivatives of *al-khul'* and *al-faskh* (dissolution)--in the pronouncement, as well as implicit words (such as "*bāra'tukî*" [I relinquish you] and "*abantukî*" [I separate myself from you]). The Ḥanafîs have said: The use of the words *al-bay'* (to sell) and *al-shirā'* (to purchase) is valid (for instance, when the husband says to the wife: "I sell you to yourself for so much", and the wife replies: "I purchase", or when he says: "Buy your divorce for so much", and she replies: "I accept"). Similarly the Shāfi'î school accepts the validity of a *khul'* pronounced with the word *al-bay'*.

The Ḥanafîs allow the conditional *khul'*, the *khul'* by exercise of an option, and the *khul'* in which the pronouncement and the payment of consideration is separated by an extended time interval (such as, where a husband is away from his wife and it reaches him

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

that she has said, "I seek a *khul'* for so much," and he accepts it). Similarly the Mālikîs also do not consider the time factor an impediment.

Khul' is valid according to the Ḥanbalî school even without an intention if the word used is explicit (such as, *al-khul'*, *al-faskh* and *al-mufādāt*); but it requires that the pronouncement and payment take place simultaneously and unconditionally.

The Imāmiyyah have said: *Khul'* does not take place by using implicit words or even explicit words other than *al-khul'* and *al-ṭalāq*. If desired, they can be used together or singly (thus, she may say: "I pay you this much for divorcing me", and he will reply: "I grant you *khul'* for it, and therefore you are divorced". This form of pronouncement is the safest and most suitable in the view of all Imāmî legists. It also suffices if he says: "You are divorced in return for it," or "I grant you *khul'* in return for it"). The Imāmiyyah require that *khul'* should be unconditional, exactly as in divorce, and consider necessary the absence of any time gap between its pronouncement and payment of consideration.

Al-'Iddah:

There is consensus among Muslims about the general necessity of *'iddah*. Its basis is the Qur'ān and the Sunnah. As to the Qur'ān, we have the following verse:

وَٱلْمُطَلَّقَٰتُ يَتَرَبَّصْنَ بِأَنفُسِهِنَّ ثَلَٰثَةَ قُرُوٓءٍ....

Women who are divorced shall wait, keeping themselves apart, three (monthly) courses....(2:228)

As to the Sunnah, there is the Prophet's tradition commanding Fāṭimah bint Qays:

اِعْتَدّي في بَيْتِ ابْنِ أُمِّ مَكْتومٍ.

Observe *'iddah* in the house of Ibn Umm Maktūm.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

They differ, however, regarding: the *'iddah* of a wife separated from her husband due to divorce or annulment of marriage; the *'iddah* of a widow; the *'iddah* of a woman copulated by mistake; the relief of an adulteress (from menses); and the *'iddah* of a wife whose husband has disappeared.

Divorcée's 'Iddah:

The five schools concur that a woman divorced before consummation and before the occurrence of valid seclusion has no *'iddah* to observe. The Ḥanafī, the Mālikī and the Ḥanbalī schools state: If the husband secludes with her without consummating the marriage and then divorces her, she will have to observe *'iddah*, exactly as if consummation had occurred.

The Imāmiyyah and the Shāfi'īs observe: Seclusion has no effect. As mentioned earlier in relation with the distinction between revocable and irrevocable divorce, the Imāmiyyah do not require a menopausal wife with whom coitus has taken place to observe *'iddah*. The reasons given by the Imāmiyyah for this opinion were also mentioned earlier.

The *'iddah* for every kind of separation between husband and wife, except the one by death, is the *'iddah* of divorce, irrespective of its being due to: *khul'*, *li'ān*, annulment due to a defect, dissolution arising from *riḍā'* (breast-feeding), or as a result of difference of religion.[8]

Moreover, the schools concur that the *'iddah* is *wājib* on a wife divorced after consummation and that the *'iddah* will be one of the following kinds:

1. The five schools concur that a pregnant divorcée will observe *'iddah* till childbirth, in accordance with the verse:

...وَأُوْلَـٰتُ ٱلْأَحْمَالِ أَجَلُهُنَّ أَن يَضَعْنَ حَمْلَهُنَّ...

And as for pregnant women, their term shall end with delivery. (65:4)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

If she is pregnant with more than one child, her *'iddah* will not terminate until she gives birth to the last of them, as per consensus. The schools differ concerning a miscarriage if the foetus is not completely formed; the Ḥanafī, the Shāfi'ī and the Ḥanbalī schools observe: Her *'iddah* will not terminate by its detachment. The Imāmī and the Mālikī schools state: It will; even if it is a lump of flesh, so far as it is a foetus.

The maximum period of gestation is two years according to the Ḥanafīs, four years according to the Shāfi'īs and the Ḥanbalīs, and five years according to the Mālikīs, as mentioned by *al-Fiqh 'alā al-madhāhib al-'arba'ah.* In *al-Mughnī,* it is narrated from Mālik to be four years. Details of this were mentioned in the chapter on marriage.

A pregnant woman cannot menstruate according to the Ḥanafī and the Ḥanbalī schools. The Imāmī, the Shāfi'ī and the Mālikī schools allow the possibility of its occurrence.

2. She will observe an *'iddah* of three lunar months if she is: an adult divorcée who has not yet menstruated or a divorcée who has reached the age of menopause.[9] This age is seventy years according to the Mālikīs, fifty years according to the Ḥanbalīs, fifty-five years according to the Ḥanafīs, sixty-two years according to the Shāfi'īs, and according to the Imāmiyyah fifty for ordinary women and sixty for those of Qurayshī descent.

Regarding a wife copulated with before her completing nine years, the Ḥanafīs observe: *'Iddah* is *wājib* on her even if she is a child. The Mālikī and the Shāfi'ī schools state: *'Iddah* is not *wājib* on a minor incapable of intercourse, but *wājib* on one who is capable even if she is under nine. The Imāmī and the Ḥanbalī schools do not consider *'iddah wājib* on a minor under nine years even if she has the capacity for intercourse. (*al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol. 4, discussion on the *'iddah* of a menopausal divorcée).

3. A divorcée over nine who has had monthlies and is neither pregnant nor menopausal has an *'iddah* of three *qurū',* as per consensus. The Imāmī, the Mālikī and the Shāfi'ī schools have interpreted the word *qara'* to mean purity from menses. Thus, if she

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

is divorced at the last moment of her present period of purity, it will be counted as a part of *'iddah,* which will be completed after two more of such terms of purity. The Ḥanafîs and the Ḥanbalîs interpret the term to mean menstruation. Thus, it is necessary that there be three monthlies after the divorce, and the monthly during which she is divorced is disregarded. (*Majma' al-'anhur*)

If a divorcée undergoing this kind of *'iddah* claims having completed the period, her word will be accepted if the period is sufficient for the completion of *'iddah.* According to the Imāmiyyah, the minimum period required for accepting such a claim is twenty-six days and two 'moments', by supposing that she is divorced at the last moment of her first purity, followed by three days of menses (which is the minimum period) followed by a ten-day purity period (which is the minimum period of purity according to the Imāmiyyah) followed again by three days of menses, then a second ten-day purity followed by menses. The period of *'iddah* comes to an end with the sole recommencement of menses, and the first moment of the third monthly is to make certain the completion of the third period of purity. *Nifās* is similar to menses, in the opinion of the Imāmiyyah. Accordingly, it is possible for an *'iddah* to be completed in twenty-three days, if the wife is divorced immediately after childbirth but before the commencement of *nifās* (in which case the *'iddah* is 23 days, considering a moment of *nifās* followed by ten days of the first purity, followed by three days of menses--which is the minimum period for it--followed by a second ten-day purity).

The minimum period for accepting such a claim by a divorcée is thirty-nine days according to the Ḥanafî school, by supposing his divorcing her at the end of her purity, and supposing again the minimum three-day period of menstruation, followed by a 15-day purity (which is the minimum in the opinion of the Ḥanafîs). Thus, three menses, covering nine days, separated by two periods of purity, making up thirty days, make up a total of thirty-nine.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Maximum Period of 'Iddah:

As mentioned earlier, a mature divorcée who has not yet menstruated will observe a three-month *'iddah,* as per consensus. But if she menstruates and then ceases to do so--as a result of her nursing a child or due to some disease--the Ḥanbalî and the Mālikî schools observe: She will observe *'iddah* for one complete year. In the later of his two opinions, al-Shāfi'î has said: Her *'iddah* will continue until she menstruates or reaches menopause; after this, she will observe an *'iddah* of three months. (*al-Mughnî,* vol. 7, "*bāb al-'idad*")

The Ḥanafî school is of the opinion that, if she menstruates once and then ceases perpetually due to disease or breast-feeding a child, her *'iddah* will not terminate before menopause. Accordingly, the period of *'iddah* can extend for more than forty years in the opinion of the Ḥanafî and the Shāfi'î schools. (*al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol. 4, the discussion on *'iddat al-muṭallaqh idhā kānat min dhawāt al-ḥayḍ*).

The Imāmiyyah observe: If menstruation ceases due to some accidental cause the divorcée will observe an *'iddah* of three months, similar to a divorcée who has never menstruated. If menses resume after the divorce, she will observe *'iddah* for the shorter of the two terms, i.e. three months or three *qurū'*. This means that if three *qurū'* are completed before three months, the *'iddah* will be over on their completion, and if three months are completed before three *qurū',* then again the *'iddah* will terminate. If she menstruates even a moment before the completion of three months, she will have to wait for nine months, and it will not benefit her if she is later free from menses for a period of three months. After the completion of nine months, if she gives birth before the completion of a year, her *'iddah* will terminate, and similarly if she menstruates and completes the periods of purity. But if she neither gives birth nor completes the periods of purity before the end of the year, she will observe an additional *'iddah* of three months after completing the nine months. This adds up to a year, which is the maximum period of *'iddah*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

according to the Imāmiyyah.[10]

The Widow's 'Iddah:

There is consensus among the schools that the *'iddah* of a widow who is not pregnant is four months and ten days, irrespective of her being a major or a minor, her being menopausal or otherwise, and regardless of the consummation of her marriage, in accordance with the verse:

وَٱلَّذِينَ يُتَوَفَّوْنَ مِنكُمْ وَيَذَرُونَ أَزْوَٰجًا يَتَرَبَّصْنَ بِأَنفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا...

And those among you who die and leave behind wives, (these wives) should keep themselves in waiting for four months and ten days. (2:234)

This is the case when she is sure of not being pregnant. But if she has a doubt she is bound to wait until delivery or attainment of certainty that she is not pregnant. This is the opinion of many legists belonging to different schools.

The four Sunnî schools state: The *'iddah* of a pregnant widow will terminate on delivery, even if it occurs a moment after the husband's death. This permits her to remarrying immediately after giving birth, even if the husband has not yet been buried, as per the verse:

...وَأُوْلَٰتُ ٱلْأَحْمَالِ أَجَلُهُنَّ أَن يَضَعْنَ حَمْلَهُنَّ...

And as for pregnant women, their term shall end with delivery. (65:4)

The Imāmiyyah state: Her *'iddah* will be whichsoever is longer of the two terms, i.e. delivery or four months and ten days. Thus if four months and ten days pass without her giving birth, her *'iddah* will continue until childbirth; and if she delivers before the completion of four months and ten days, her *'iddah* will be four months and ten days. The Imāmiyyah argue that it is necessary to combine the verse 2:234 يَتَرَبَّصْنَ بِأَنفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا with the verse

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

65:4 اَجَلَهُنَّ اَنْ يَضَعْنَ حَمْلَهُنَّ. The former verse has fixed the *'iddah* at four months and ten days, and it includes both a pregnant and a non-pregnant wife. The latter verse has stipulated the *'iddah* of a pregnant wife to last until childbirth, and it includes both a divorcée and a widow. Thus an incompatibility emerges between the apparent import of the two verses regarding a pregnant widow who delivers before the completion of four months and ten days. In accordance with the latter verse her *'iddah* terminates on delivery, and in accordance with the former the *'iddah* will not terminate until four months and ten days have been completed. An incompatibility also appears if she does not deliver after the completion of four months and ten days; according to the former verse her *'iddah* terminates when four months and ten days are over, and in accordance with the latter the *'iddah* will not terminate because she has not yet delivered. The word of the Qur'ān is unequivocal, and it is necessary that parts of it harmonize with one another. Now, if we join the two verses like this,

وَالَّذِينَ يُتَوَفَّوْنَ مِنْكُمْ وَيَذَرُونَ اَزْوَاجاً يَتَرَبَّصْنَ بِاَنْفُسِهِنَّ اَرْبَعَةَ اَشْهُرٍ وَعَشْراً، وَاُولاتُ الاَحْمالِ اَجَلُهُنَّ اَنْ يَضَعْنَ حَمْلَهُنَّ.

the meaning will be that the *'iddah* of a widow who is not pregnant, or is pregnant but delivers within four months and ten days, is four months and ten days; and that of a widow who delivers after four months and ten days is until the time of her delivery.

If someone questions how the Imāmiyyah specify the *'iddah* of a pregnant widow to be the longer of the two terms (delivery or four months and ten days) while the verse وَاُولاتُ الاَحْمالِ is explicit that the *'iddah* of a pregnant woman terminates on her giving birth, the Imāmiyyah say: How have the four schools said that the *'iddah* of a pregnant widow is two years, if the gestation period so extends, in spite of the verse وَالَّذِينَ يُتَوَفَّوْنَ مِنْكم وَيَذَرُونَ اَزْواجاً يَتَرَبَّصْنَ بِاَنْفُسِهِنَّ اَرْبَعَةَ اَشْهُرٍ وَعَشْراً which is explicit that it is four months and ten days? If the questioner replies: The four schools have done so acting in accordance with the verse وَاُولاتُ الاَحْمالِ the Imāmiyyah reply: We have acted in accordance with the verse وَالَّذِينَ يُتَوَفَّوْنَ. Therefore it is not possible to apply both the verses except by stipulating the longer

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

of the two terms as *'iddah*.

The schools excepting the Ḥanafī, concur that *al-ḥidād* is *wājib* on the widow, irrespective of her being major or minor, Muslim or non-Muslim. The Ḥanafīs do not consider it *wājib* for a non-Muslim and a minor widow because they are not *mukallaf* (responsible for religious duties).

The meaning of *al-ḥidād* is that the woman mourning her husband's death refrain from every adornment that makes her attractive. Its determination depends on prevailing customs and usage.

The Imāmiyyah observe: The *'iddah* of divorce will commence on the recital of the divorce, irrespective of the husband's presence or absence. The *'iddah* of a widow commences on the news of his death reaching her, if he is away. But if the husband is present and she comes to know of his death after some time, her *'iddah* will commence from the time of his death, as per the predominant opinion among Imāmiyyah legists.

The schools concur that if the husband of a revocable divorcée dies while she is undergoing *'iddah,* she is bound to start anew with a widow's *'iddah* from the time of his death, irrespective of the divorce taking place during the husband's mortal illness or health, because the marital bond between her and the husband has not yet broken. But if the divorce is irrevocable, it will depend. If he divorces her while healthy, she will complete the *'iddah* of divorce and will not have to observe any *'iddah* due to the husband's death, as per consensus, even if the divorce was without her consent. Similar is the case if he divorces her during his mortal illness on her demand. But what if he divorces her during his mortal illness without her demanding it, and then dies before the termination of her *'iddah*? Shall she start the widow's *iddah*, like a revocable divorcée, or shall she continue to observe the *'iddah* of divorce?

The Imāmī, the Mālikī and Shāfi'ī schools state: She shall continue to observe the *'iddah* of divorce without changing over to the *'iddah* of widowhood.

According to the Ḥanafī and the Ḥanbalī schools, she shall

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

change over to the *'iddah* of widowhood.

In short, a revocable divorcée will start observing the *'iddah* of widowhood if the divorcer dies before the termination of her *'iddah* of divorce, and an irrevocable divorcée will continue to observe the *'iddah* of divorce, as per the concurrence of all the schools except the Ḥanafī and the Ḥanbalī, who exclude an irrevocable divorcée if the divorce takes place during the divorcer's mortal illness without her consent.

'Iddah for Intercourse by Mistake:

According to the Imāmiyyah, the *'iddah* of 'intercourse by mistake' is similar to the *'iddah* of a divorcée. Therefore, if the woman is pregnant, she will observe *'iddah* until childbirth; if she has menstruated, her *'iddah* will be three *qurū'*, otherwise three months. An 'intercourse by mistake' is, according to the Imāmiyyah, one in which the man involved is not liable to penal consequences, irrespective of the woman being one with whom marriage is unlawful (such as wife's sister or a married woman) or lawful (such as any unmarried woman outside the prohibited degrees of marriage). The view held by the Ḥanbalīs is nearly similar to this view, where they observe that every form of sex relations necessitate the observance of *'iddah*. They do not differ from the Imāmiyyah except in some details, as indicated below on the discussion of the *'iddah* of a fornicatress.

The Ḥanafīs state: *'Iddah* is *wājib* both as a result of intercourse by mistake or an invalid marriage. *'Iddah* is not *wājib* if the marriage is void. An example of the 'mistake' is a man's having relations with a sleeping woman thinking her to be his wife. An invalid (*fāsid*) marriage is one with a woman with whom marriage is lawful but in which some essential conditions remain unfulfilled (such as where a contract has been recited without the presence of witnesses). A void (*bāṭil*) marriage is a contract with a woman belonging to the prohibited degrees of relatives (e.g. sister or aunt). The *'iddah* for intercourse by mistake according to them is three menstruations if

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

she menstruates, or three months if she is not pregnant. If she is pregnant, the *'iddah* will continue until childbirth.

The Mālikîs state: She will release herself after three *qurū'*; if she does not menstruate, by three months; if pregnant, on childbirth.

Whatever be the case, if a man who has had intercourse by mistake dies, the woman will not observe the *'iddah* of widowhood, because her *'iddah* is due to intercourse, not marriage.

The 'Iddah of a Fornicatress:

The Ḥanafi and the Shāfi'î schools, as well as the majority of Imāmiyyah legists, remark: *'Iddah* is not required for fornication, because the relations have no sanctity. Thus, marriage and intercourse with a fornicatress is lawful, even if she is pregnant. But the Ḥanafîs permit marriage with a woman pregnant through fornication without allowing intercourse with her before her delivery.

The Mālikîs state: Fornication is similar to intercourse by mistake. Thus she will release herself in a period equal to the period of *'iddah* except when she is to undergo the punishment, in which case she will release herself after a single menstruation.

The Ḥanbalîs observe: *'Iddah* is as *wājib* on a fornicatress as on a divorcée (*al-Mughnî*, vol. 6 and *Majma' al-'anhur*).

The 'Iddah of a Kitābiyyah:

The schools concur that a *kitābiyyah* (a non-Muslim female adherent of a religion having a scripture) wife of a Muslim will be governed by the laws applicable to a Muslim wife concerning the necessity of *'iddah*, and *al-ḥidād* in an *'iddah* of widowhood. But if she is a wife of a non-Muslim *kitābî*, the Imāmî,[11] the Shāfi'î, the Mālikî and the Ḥanbalî schools consider *'iddah wājib* upon her. But the Shāfi'î, the Mālikî and the Ḥanbalî schools do not consider *al-ḥidād wājib* for her while observing the *'iddah* of widowhood.

The Ḥanafîs state: A non-Muslim woman married to a non-Muslim does not have an *'iddah*. (al-Shi'rānî, *Mîzān, bāb*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

al-'idad wa al-'istibrā')

Wife of a Missing Husband:

A missing person can be in one of these two situations: First, where his absence is continuous but his whereabouts are known and news about him is received. Here, according to consensus, his wife is not entitled to remarry. The second situation arises where there is no more any news of him and his whereabouts. The imams of the various schools differ regarding the law applicable to his wife.

Abū Ḥanīfah, al-Shāfi'ī according to his later and preferred opinion, and Aḥmad according to one of his two traditions, observe: Marriage is impermissible for the wife of a missing husband as long as he may be considered alive on the basis of a usual life-span. Abū Ḥanīfah has fixed this period at 120 years; al-Shāfi'ī and Aḥmad at 90 years.

Mālik states: She shall wait for 4 years and then observe an *'iddah* of four months and ten days, after which she may remarry.

Abū Ḥanīfah and al-Shāfi'ī in the more reliable of his two opinions state: If the first husband returns after she marries another, the second marriage shall become void and she will become the first's wife.

Mālik observes: If the first husband returns before the consummation of the second marriage, she will belong to the first husband, but if he returns after consummation she will remain the second's wife. It will be *wājib,* however, for the second husband to pay *mahr* to the first.

According to Aḥmad, if the second husband has not consummated the marriage she belongs to the first; but if he has, the choice lies with the first husband: he may either reclaim her from the second husband and give him the *mahr* or allow her to remain with him by taking the *mahr.* (*al-Mughnî,* vol. 7 and *Raḥmat al-'ummah*)[12]

The Imāmiyyah state: The case of a missing person who is not known to be living or dead will be studied. If he has any assets by which the wife can be maintained, or has a guardian willing to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

maintain her, or someone volunteering to do it, it is *wājib* for her to patiently wait for him; it is not permissible for her to marry in any circumstance until she learns of his death or his divorcing her. But if the missing husband has neither any property nor someone willing to maintain her, if the wife bears it patiently, well and good; but if she wants to remarry, she will raise the issue before the judge. The judge will order a four-year waiting period for her from the time the issue was brought to him, and then start a search for the husband during that time. If nothing is known, and the missing husband has a guardian or an attorney in charge of his affairs, the judge will order him to divorce her. But if the husband has neither a guardian nor an attorney, or has, but has prohibited him from divorcing, and it is not possible to compel him, the judge will himself pronounce the divorce by using the authority granted to him by the Sharî'ah. After this divorce the wife will observe an *'iddah* of four months and ten days after which she may remarry.

The method of search is that the judge will question about his presence and seek information from those coming from the place where there is a possibility of his being present. The best way of it is to depute a reliable person from among the people of the place where the search is being conducted to supervise the search on his behalf and report to him the result. A search of an ordinary extent is sufficient, and it is neither necessary that his whereabouts be inquired in every place which can possibly be reached, nor that the inquiry be conducted continually. When the search is completed in a period of less than four years in a manner that it becomes certain that further inquiry is fruitless, the search is no longer *wājib.* Yet it is necessary that the wife wait for four years; this is in compliance with an explicit tradition and the demand of precaution in marital ties, as well as the possibility of the husband returning during these four years.

After the completion of this period the divorce will take place and she will observe an *'iddah* of four months and ten days without *ḥidād.* She is entitled to maintenance during this period, and the spouses inherit from each other as long as she is in *'iddah.* If the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

husband comes back during the *'iddah,* he may return to her if he wants or let her remain as she is. But if he comes back after the completion of the *'iddah* but before her marrying another, the preferable opinion is that he has no right over her; and more so if he finds her married.[13]

The Rules Governing 'Iddah:

We said in the chapter on maintenance that there is consensus regarding a revocable divorcée's right to maintenance during her *'iddah.* We also said that there is a difference of opinion regarding an irrevocable divorcée during her *'iddah.* Here we shall discuss the following issues:

Inheritance Between a Divorcer and a Divorcée:

There is consensus that when a husband revocably divorces his wife, their right of inheriting from each other does not disappear as long as she is in *'iddah,* irrespective of the divorce being given in mortal illness or in condition of health. The right to mutual inheritance is annulled on the completion of the *'iddah.* There is a consensus again regarding the absence of mutual inheritance if the husband divorces his wife irrevocably in health.

Divorce by a Sick Person:

The schools differ when a sick person divorces his wife irrevocably and then dies in the same sickness. The Ḥanafîs entitle her to inherit as long as she is in *'iddah,* provided the husband is considered attempting to bar her from inheriting from him and the divorce takes place without her consent. In the absence of any of these two conditions she will not be entitled to inherit.

The Ḥanbalîs state: She will inherit from him as long as she does not remarry, even if her *'iddah* terminates.

The Mālikîs state: She inherits from him even after her

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

remarriage.

Three opinions of al-Shāfi'ī have been reported, and one of them is that she will not inherit even if he dies while she is observing *'iddah*.

It is notable that apart from the Imāmiyyah the other schools speak of a divorce by a sick person only when it is irrevocable. But the Imāmiyyah have observed: If he divorces her while sick, she will inherit from him irrespective of the divorce being revocable or irrevocable, on the realization of the following four conditions.

1. That the husband's death occurs before the completion of one year from the date of divorce. Thus, if he dies one year after the divorce, even if by an hour, she will not inherit from him.

2. That she does not remarry before his death. If she does and he dies within a year (of the divorce), she will not inherit.

3. That he does not recover from the illness in which he divorced her. Thus, if he recovers and then dies within a year, she will not be entitled to inherit.

4. That the divorce does not take place on her demand.

'Iddah and Location:

The schools concur that a revocable divorcée will observe *'iddah* at the husband's home. Therefore, it is not permissible for him to expel her. Similarly, it is not permissible for her to leave it. The schools differ regarding an irrevocable divorcée. The four schools are of the opinion that she will observe *'iddah* like a revocable divorcée, without there being any difference, in accordance with the verse:

...لاَتُخْرِجُوهُنَّ مِن بُيُوتِهِنَّ وَلاَ يَخْرُجْنَ إِلاَّ أَن يَأْتِينَ بِفَاحِشَةٍ مُبَيِّنَةٍ...

Do not expel them from their homes, and neither should they themselves go forth, unless they commit an obvious indecency. (65:1)

The Imāmiyyah state: An irrevocable divorcée is free to decide about her own affairs and may observe *'iddah* wherever she wants,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

because the marital bond between her and the husband has snapped; neither do they inherit from each other, nor is she entitled to maintenance, unless pregnant. Accordingly, the husband is not entitled to confine her. As to the above verse, they say that it relates specifically to revocable divorcées, and there are many traditions from the Imams of the Ahl al-Bayt (*'a*) to this effect.

Marriage with a Divorcée's Sister in 'Iddah:

If a person marries a woman, it is *ḥarām* for him to marry her sister. However, if she dies or is divorced and her period of *'iddah* terminates, it becomes *ḥalāl* for him to marry her sister. But is it *ḥalāl* for him to marry her sister before her *'iddah* comes to an end? The schools concur that it is *ḥarām* to marry the sister of a divorcée in *'iddah* if the divorce is revocable, and differ where the divorce is irrevocable. The Ḥanafī and Ḥanbalī schools observe: Neither marriage with her sister is permissible nor the marrying of a fifth wife (if he had four, one of whom he has divorced) until the completion of her *'iddah,* irrespective of the divorce being revocable or irrevocable.

The Imāmī, the Mālikī and the Shāfi'ī schools state: It is permissible to marry the sister of a divorcée and a fifth wife before the completion of *'iddah* if the divorce is irrevocable.

Can a Divorcée in 'Iddah be Redivorced?

The four schools state: In revocable divorce, he is entitled to divorce her again while she is observing *'iddah,* without returning to her, but not if the divorce is irrevocable (*al-Mughnī,* vol. 7, chapters on *khul'* and *raj'ah; al-Fiqh 'alā al-madhāhib al-'arba'ah,* the discussion on conditions of divorce).

The Imāmiyyah observe: Divorce of a divorcée, revocable or irrevocable, does not take place unless he returns to her, because it is meaningless to divorce a divorcée.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Return to the Divorcée (al-Raj'ah):

Al-raj'ah in the terminology of legists is restoration of the divorcée and her marital status. It is valid by consensus and does not require a guardian, or *mahr,* or the divorcée's consent, or any action on her part, in accordance with the verses:

...وَبُعُولَتُهُنَّ أَحَقُّ بِرَدِّهِنَّ...

Their husbands are better entitled to restore them. (2:228)

فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ...

So when they have reached their prescribed term retain them honourably or separate from them honourably.... (65:2)

The schools concur that it is necessary that the divorcée being restored be in the *'iddah* of a revocable divorce. Thus there is no *raj'ah* for: an irrevocable divorcée of an unconsummated marriage, because there is no *'iddah* for her; for a triple divorcée, because she requires a *muḥallil;* and for the divorcée of *khul'* against a consideration, because the marital bond between the two has been dissolved.

There is consensus among the schools that the return is effected by oral word, and they consider it necessary that the pronouncement be complete and unconditional. Thus if the *raj'ah* is made contingent upon something (such as when he says: "I return to you if you so desire"), it will not be valid.[14] Accordingly, if neither an act nor a satisfactory declaration proving *raj'ah* takes place on his part after the unsatisfactory pronouncement and the period of *'iddah* expires eventually, the divorcée will become a stranger for him.

The schools differ regarding the possibility of *raj'ah* being effected by an act, such as sexual intercourse or its preliminaries, without any pronouncement preceding it. The Shāfi'īs observe: It is necessary that *raj'ah* be either by spoken word or in writing. Thus it is not valid by intercourse even if he intends *raj'ah* through it, and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

such intercourse with her during *'iddah* is *ḥarām,* making him liable to *mahr al-mithl* because it is an 'intercourse by mistake.'

The Mālikîs state: *Raj'ah* is valid by an act if it is with the intention of *raj'ah.* Thus, if he has intercourse without this intention, the divorcée will not return to him. But such intercourse does not make him liable to any penal consequences nor *mahr,* and if she becomes pregnant consequently, the child will be attributed to him; and if she does not become pregnant, she will release herself after a single menstrual course.

The Ḥanbalîs are of the opinion that *raj'ah* is valid by an act only if he has intercourse. Thus, when he has intercourse, she will be considered restored even if he does not intend it. Any act apart from intercourse, such as caressing and kissing, etc., does not result in *raj'ah.*

According to the Ḥanafîs, *raj'ah* is effected by intercourse, as well as caressing, kissing, etc., by the divorcer and the divorcée, provided it is with a sexual intent. Also, *raj'ah* by an act of one in sleep, or by an act performed absent-mindedly or under coercion, or in a state of insanity (as when the husband divorces his wife, turns insane, and has intercourse with her before the termination of her *'iddah*) is valid. (*Majma' al-'anhur, bāb al-raj'ah*)

The Imāmiyyah state: *Raj'ah* is effected through intercourse, kissing and caressing, with and without a sexual intent, as well as by any other act which is not permissible except between a married couple. It is not necessary that *raj'ah* be preceded by an oral pronouncement, because the divorcée is a wife as long as she is observing *'iddah,* and all it requires is an intention of *raj'ah.* The author of *al-Jawāhir* goes a step further, observing: "Perhaps the unconditional nature of the canonical texts (*al-naṣṣ*) and the *fatwās* requires that *raj'ah* take place by an act even if he does not intend to restore her by it." Sayyid Abū al-Ḥasan writes in *al-Wasîlah*: "It is highly probable that it (the act) be considered *raj'ah* even if the intent is absent."

The Imāmiyyah attach no significance to an act of a person in sleep or something done absent-mindedly, or under a false

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

impression (such as his having intercourse under the impression that she is not his divorcée).

Raj'ah and Witnesses:

The Imāmī, the Ḥanafī and the Mālikī schools state: *Raj'ah* does not require witnessing, though it is desirable (*mustaḥabb*). A tradition narrated from Aḥmad conveys the same, and so does the more reliable opinion of al-Shāfi'ī. Accordingly, it is possible to claim a consensus of all the schools regarding the non-necessity of witnesses in *raj'ah.*

Raj'ah of an Irrevocable Divorcée:

The restoration of an irrevocable divorcée during *'iddah* is possible only in the case of a divorcée who has been granted *khul'* in return for a consideration, provided that the marriage has been consummated and the divorce is not one which completes three divorces. The four schools concur that the law applicable here is the one which applies to a stranger and requires a new marriage contract, along with *mahr,* her consent and the permission of the guardian (if necessary), with the exception that she is not required to complete the *'iddah.* (*Bidāyat al-mujtahid,* vol. 2)

The Imāmiyyah observe: A divorcée of *khul'* is entitled to reclaim what she has paid as a consideration as long as she is in *'iddah,* provided the husband is aware of her reclaiming the consideration and has not married her sister or a fourth wife. Thus, when he is aware of it and there is no impediment, he is entitled to recant the divorce. By his recanting she becomes his lawful wife and there is no need for a new contract or *mahr.* If he becomes aware of her reclaiming the consideration but does not recant the divorce, the divorce which was irrevocable becomes revocable and all the rules applicable to it and its consequences will follow, and the divorcer will be compelled to restore what the divorcée had given him for divorcing her.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Disagreement During the 'Iddah:

If there is a disagreement between the divorcer and a revocable divorcée, such as when he claims: "I have returned to her," and she denies it, the divorcer will be considered to have made the return if it takes place during the *'iddah,* and similarly if he denies having divorced her at all, because his saying this guarantees his connection with the wife.

The burden of proof rests on the divorcer to prove *raj'ah* if the two differ regarding it after the expiry of the *'iddah.* On his failing to do so, she will take an oath that he has not returned to her, if he claims having returned to her by an act (such as sexual intercourse, etc.). If the divorcer claims *raj'ah* by oral word and not by an act, she will take an oath that she knows nothing about it. According to Abū Ḥanīfah, her word will be accepted without an oath. (Ibn 'Ābidīn)

If they differ regarding the expiry of *'iddah,* such as when she claims its expiry by menstruation in a period sufficient for creating the possibility of her claim being veracious, her word will be accepted, as per consensus, though the Imāmī, the Shāfi'ī and the Ḥanbalī schools also require her to take an oath. The author of *al-Mughnî* (vol. 7, *bāb al-raj'ah*) has narrated from al-Shāfi'ī and al-Khiraqī: "In all cases where we said that her word will be accepted, she will have to take an oath if the husband denies her claim."

If she claims the expiry of *'iddah* by the completion of three months, the author of *al-Mughnî,* a Ḥanbalī, and the author of *al-Sharā'î'*, an Imāmī, observe: The husband's word will be accepted. Both argue that the difference is in reality regarding the time of divorce and not the *'iddah,* and divorce being his act, his word will be accepted.

But the author of *al-Jawāhir* observes that the acceptance of the divorcer's word is in accordance with the principle of presumption regarding the continuation of *'iddah* (unless the opposite is proved) and the presumption that any new situation is a latter development;

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

but it contradicts the literal import of the canonical texts and the prevalent opinion among the legists, which place the affair of *'iddah* in the woman's hand. He further adds: The sole possibility of her veracity in a matter concerning *'iddah* is sufficient for its acceptance. This preference in accepting her word is in accordance with the tradition:

فَوَّضَ اللهُ إِلَى النِّساءِ ثَلاثَةَ أَشْياءَ: الحَيْضَ والطُّهْرَ والحَمْلَ.

God has placed three things in the hands of women: menstruation, purity, and pregnancy.

In another tradition, menstruation and *'iddah* are mentioned instead of the above three.

The Acceptance of a Claim Without Proof:

We have referred above to the acceptance of the woman's word in matters concerning *'iddah*. Here it is appropriate to explain an important rule of the Sharî'ah closely related to our present discussion that has often been referred to in the works of the legists, especially those of the Imāmî and the Ḥanafî schools. However, these legists have discussed it as a side issue, in the context of other related issues. I have not come across in the sources I know of anyone who has written a separate section on this problem except my brother, the late al-Shaykh 'Abd al-Karîm Maghniyyah,[15] in his work *Kitāb al-qaḍā'*.

It is a known fact that both in the ancient and modern system of law the burden of proof lies on the claimant and the negator is burdened with an oath. The rule under discussion is just the opposite of it. According to it, it is binding to accept the claimant's word where it concerns his intention and cannot be known except from him, and which cannot possibly be witnessed. Examples of it abound in law, both in matters related to rituals (*'ibādāt*) and transactions (*mu'āmalāt*). Some of them are the following:

1. If something is entrusted to a person and he claims having

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

returned it, or claims its destruction without any negligence or misuse on his part, his word will be accepted on oath despite his being the claimant.

2. When a marriage contract is concluded between two minors by an officious third party, if one of them, on maturing, agrees and gives his/her consent to the contract and then dies before the other's majority, a part of his/her estate, equal to the minor's share will be set apart, and on his/her majority and agreement to the contract, he/she would also be required to take an oath that his/her consent is not motivated by greed for the legacy. On his/her taking the oath, he/she will take his/her share of the deceased's estate. This is so because the intention of a person can be known only from him.

3. If a person pronounces the divorce of his wife and then claims that he did not intend it, his claim will be accepted as long as she is undergoing *'iddah*.

4. The claim of a person to have paid *zakāt* or *khums* will be accepted.

5. The claim of a woman concerning her state of menstruation, purity, pregnancy and *'iddah* will be accepted.

6. The claim of indigence and need.

7. The claim by a woman that she is free of all impediments to marriage.

8. The claim of a youth that he has attained puberty (*iḥtilām*).

9. The husband's claim that he has had intercourse with his wife, after she claims that he is impotent and the judge grants him a year's time. Details of it were mentioned while discussing impotence (in the chapter on marriage).

10. The claim of a working partner in a *muḍārabah* partnership (where one partner contributes capital while the other contributes his skill, labour and knowhow) that he has purchased a particular commodity for himself, which the partner contributing capital denies. Here the purchaser's word is accepted because he knows his intention better. There are other such examples.

Al-Shaykh 'Abd al-Karîm has mentioned three proofs in his *Kitāb al-qaḍā'*:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The first proof is confirmed consensus, both in theory and practice. I have seen legists invoking this principle in all instances of its application, issuing *fatwā*s on its basis in different branches of law, considering it as one of the most incontrovertible of principles. All this points towards a definite proof and a consensus regarding its being a general premise referred to in instances of doubt. The legists invoke this principle as a cause while accepting the word of an insolvent person, because if his word is not accepted, it will result in a sentence of perpetual imprisonment due to his inability to prove it.

The second proof is that which has been explicitly reported in some traditions. A certain narrator says, "I asked al-'Imām al-Riḍā (*'a*), '(What is to be done) if a man marries a woman and then a doubt arises in his mind that she has a husband?' The Imam (*'a*) replied, 'He is not required to do anything; don't you see that if he asks her for a proof, she will not be able to find anyone who can bear witness that she has no husband?' "

Thus, the impossibility of producing witnesses is common to all these instances where another person's testimony is not possible due to the act being a private fact between the person and his Lord, which cannot be known except from the person himself. This is in addition to what has been narrated in the tradition regarding the acceptability of women's claim concerning menses, purity, *'iddah* and pregnancy.

The third proof is that in the event of not accepting the claimant's word in matters that cannot be known except from him, the dispute would of necessity remain unresolved and there would be no means in the Sharî'ah for deciding disputes, and this is contradictory to the basic principle that says that there is a solution for everything in the Sharî'ah. Therefore, in such circumstances the claimant's claim will be accepted after his taking an oath, because apart from this there is no other way to settle the dispute.

As to the need for an oath, it is in line with the consensus that in every claim in which the claimant's word is given precedence, he is bound to take an oath, because disputes are solved either by evidence or oath, and when it is not possible to produce a proof, the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

claimant's oath is the only alternative. Here it is not possible to burden the negator with an oath, because among the requirements of an oath is certain knowledge of the fact for which the oath is being taken, and there is no way a negator can have knowledge of the claimant's intention. It is necessary to point out that the need to make such a claimant take an oath arises in the case of a dispute that cannot be settled except by his oath. But if there is no such dispute, his word will be accepted without an oath (e.g. his claim of having paid *zakāt* and *khums,* or his claim of their not being *wājib* upon him because he does not fulfil the conditions for their incidence).

Also necessary for accepting the claim of such a claimant is the absence of circumstantial evidence refuting the veracity of his claim. Thus if an act of his proves his intention--such as when he buys or sells and then claims that it was unintentional--it would result in his proving his own falsity because the apparent circumstances establish his intention. As to the acceptance of a claimant that he did not intend divorce, it is limited, as mentioned earlier, to a revocable divorce as long as the divorcée is undergoing *'iddah,* and this claim of his is considered his reclaiming her. Hence his word will not be given credence and his claim will not be heard if the divorce is irrevocable or if he makes the claim after the completion of *'iddah.*

Court Divorce (Ṭalāq al-Qāḍī):

Is a judge entitled to divorce someone's wife against his will? Abū Ḥanīfah says: A judge is not entitled to divorce someone's wife, whatever the cause, except when the husband is *majbūb, khaṣî* or *'anîn,*[16] as mentioned earlier in the section on defects. Thus failure to provide maintenance, intermittent absence, life imprisonment, etc. do not validate a woman's divorce without the husband's consent, because divorce is the husband's prerogative.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Mālik, al-Shāfi'ī and Ibn Ḥanbal allow a woman to demand separation before a judge on certain grounds, of which some are the following:

1. Non-provision of maintenance: These three legists concur that when the incapability of a husband to provide essential maintenance is proved, it is valid for his wife to demand separation. But if his inability is not proved and he refuses to provide maintenance, al-Shāfi'ī observes: The two may not be separated; Mālik and Aḥmad remark: Separation may take place, because the failure to provide his maintenance is similar to insolvency. The law in Egypt explicitly validates the right to claim separation on the failure to provide maintenance.

2. Causing harm to the wife with word or deed: Abū Zuhrah, in *al-'Aḥwāl al-shakhṣiyyah* (page 358), says: It is stated in Egyptian law, Act 25 of 1929, that if a wife pleads harm being caused to her by the husband, so that the like of her cannot continue living with him, the judge will divorce her irrevocably on her proving her claim and after the judge's failing to reform the husband. If the wife fails to prove her claim but repeats her complaint, the judge will appoint two just arbitrators related to the couple to find out the reasons for the dispute and to make an effort to resolve it. On their failing to do so, they will identify the party at fault, and if it is the husband or both of them, they will cause their separation through an irrevocable divorce on the judge's order. This law is based on the opinion of Mālik and Aḥmad.

The Sunnī Sharī'ah courts in Lebanon rule separation if a dispute arises between them and two arbitrators specify the necessity of separation.

3. On harm being caused to a wife by the husband's absence, according to Mālik and Aḥmad, even if he leaves behind what she requires as maintenance for the period of his absence. The minimum period after which a wife can claim separation is six months according to Aḥmad, and three years according to Mālik, though a period of one year has also been narrated from the latter. The Egyptian law specifies a year. Whatever the case, she will not be

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

divorced unless he refuses both to come to her or to take her to the place of his residence. Moreover, Mālik does not differentiate between a husband having an excuse for his absence and one who has none with regard to the application of this rule. Thus both the situations necessitate separation. But the Ḥanbalīs state: Separation is not valid unless his absence is without an excuse. (*al-'Aḥwāl al-shakhṣiyyah* of Abū Zuhrah, and *Farq al-zawāj* of al-Khafīf)

4. On harm being caused to a wife as a result of the husband's imprisonment. Ibn Taymiyyah, a Ḥanbalī, has explicitly mentioned it and it has also been incorporated in Egyptian law that if a person is imprisoned for a period of three years or more, his wife is entitled to demand separation pleading damage after a year of his imprisonment, and the judge will order her divorce.

Most Imāmiyyah legists do not empower the judge to affect a divorce, regardless of the circumstances except in the case of the wife of a missing husband, after the fulfilment of the conditions mentioned earlier. This stand of the Imāmiyyah is in consonance with the literal meaning of the traditon .الطَّلاقُ بِيَد مَنْ أَخَذَ بِالسَّوْق.

But a group of grand legal authorities (*al-marāji' al-kibār*) have permitted divorce by a judge, with a difference of opinion regarding its conditions and limitations. We cite their observations here.

Al-Sayyid Kāẓim al-Yazdī, in the appendices to *al-'Urwah* (*bāb al-'iddah*), has said: The validity of a wife's divorce by a judge is not remote if it comes to his knowledge that the husband is imprisoned in a place from where he will never return, and similarly where the husband though present is indigent and incapable of providing maintenance, along with the wife's refusal to bear it patiently.

Al-Sayyid Abū al-Ḥasan al-'Iṣfahānī, in the *bāb al-zawāj* of *al-Wasîlah* (under the caption, *al-qawl fî al-kufr*), writes: If a husband refuses to provide maintenance while possessing the means to do so and the wife raises the issue before a judge, the judge will order him to provide her maintenance or to divorce her. On his refusing to do either, and it not being possible to maintain her from his wealth or to compel him to divorce, the obvious thing which comes to the mind is that the judge will divorce her, if she so desires.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Al-Sayyid Muḥsin al-Ḥakîm has given a similar *fatwā* in *Minhāj al-ṣāliḥîn* (*bāb al-nafaqāt*).

The author of *al-Mukhtalif* has narrated from Ibn Junayd that the wife has the option to dissolve marriage on the husband's inability to provide maintenance. The author of *al-Masālik,* while discussing the divorce of a missing person's wife, observes: As per an opinion, the wife is entitled to break off marriage on the basis of non-provision of maintenance due to pennilessness. The author of *Rawḍāt al-jannāt* (vol. 4), in the biographical account of Ibn Āqā Muḥammad Bāqir al-Behbahānî, one of the great scholars says: He wrote a treatise (*risālah*) on the rules of marriage concerning indigence, entitled *Muẓhir al-mukhtār.* In it, he has upheld the validity of wife's annulling marriage in event of husband's refusing, despite his presence, to maintain or divorce her, even if his refusal is a result of poverty and indigence.

The Imams of the Ahl al-Bayt (*'a*) are on record as having said: "If a husband fails to provide his wife clothes to cover her body (*'awrah*) and food to fill her stomach, the *imām* is entitled to separate them." This, along with other reliable traditions, especially the tradition: الطَّلاقُ لِمَنْ أَخَذَ بِالسَّاقِ, bestows upon the Imāmî legist the authority to grant divorce on the fulfilment of the requisite conditions and no one may object to him for it as long as his act is in accordance with the principles of Islam and those of the legal schools.

There is no doubt that the scholars who have refrained from granting divorces have done so on account of caution and the fear lest this power should be misused by persons devoid of the necessary learning and commitment to the faith, resulting in divorces being granted without the fulfilment of the conditions of the Sharî'ah. This is the sole reason which has caused me to refrain despite the knowledge that if I do so I would be justified before God. I consider that a sensible solution to this problem and one which would prevent every unfit person from exercising this authority is the appointment by the *marāji'* of reliable representatives in Iraq or Iran bound by certain conditions and limitations within which they may affect a divorce--as was done by al-Sayyid Abū al-Ḥasan al-'Iṣfahānî.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Al-Ẓihār:

'Ẓihār' means a husband telling his wife: "You are to me like the back of my mother." The schools concur that if a husband utters these words to his wife, it is not permissible for him to have sex with her unless he atones by freeing a slave. If he is unable to do so, he should fast for two successive months. If even this is not possible, he is required to feed sixty poor persons.

The schools also concur in considering a husband who has intercourse before the atonement a sinner, and the Imāmiyyah also require him to make a double atonement.

The Imāmiyyah consider *ẓihār* valid if it takes place before two just male witnesses hearing the husband's pronouncement to the wife in a period of purity in which she has not been copulated with, exactly as in the case of divorce. Similarly, researchers among them also require her marriage to have been consummated, otherwise *ẓihār* will not take place.

The reason for opening a separate chapter for *ẓihār* in Islamic law are the opening verses of the *Sūrat al-Mujādilah.* The exegetes describe that Aws ibn Ṣāmit, one of the Prophet's (ṣ) Companions, had a wife with a shapely body. Once he saw her prostrating in prayer. When she had finished, he desired her. She declined. On this he became angry and said: "You are to me like the back of my mother". Later he repented having said so. *Ẓihār* was a form of divorce amongst the pagan Arabs, and so he said to her: "I presume that you have become *ḥarām* for me. She replied: "Don't say so, but go to the Prophet (ṣ) and ask him". He told her that he felt ashamed to question the Prophet (ṣ) about such a matter. She asked him to permit her to question the Prophet (ṣ), which he did. When she went to the Prophet (ṣ), 'Ā'ishah was washing his (ṣ) head. She said: "O Apostle of God! My husband Aws married me when I was a young girl with wealth and had a family. Now when he has eaten up my wealth and destroyed my youth, and when my family has scattered and I have become old, he has pronounced *ẓihār,* repenting

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

subsequently. Is there a way for our coming together, by which you could restore our relationship?"

The Prophet (ṣ) replied, "I see that you have become *ḥarām* for him." She said, "O Prophet of God! By Him Who has given you the Book, my husband did not divorce me. He is the father of my child and the most beloved of all people to me." The Prophet (ṣ) replied, "I have not been commanded regarding your affair". The woman kept coming back to the Prophet (ṣ) and once when the Prophet (ṣ) turned back she cried out and said: "I complain to God regarding my indigence, my need and my plight! O God, send upon Thy Prophet (ṣ) that which would end my suffering". She then returned to the Prophet (ṣ) and implored his mercy saying, "May I be your ransom, O Prophet of God, look into my affair." 'Ā'ishah then said to her: "Curtail your speech and your quarrel. Don't you see the face of the Apostle of God?" Whenever the Prophet (ṣ) received revelation a form of trance would overtake him.

The Prophet (ṣ) then turned towards her and said: "Call your husband." When he came, the Prophet (ṣ) recited to him the verses:

قَدْ سَمِعَ ٱللَّهُ قَوْلَ ٱلَّتِى تُجَٰدِلُكَ فِى زَوْجِهَا وَتَشْتَكِىٓ إِلَى ٱللَّهِ وَٱللَّهُ يَسْمَعُ تَحَاوُرَكُمَآ إِنَّ ٱللَّهَ سَمِيعٌۢ بَصِيرٌ ﴿١﴾ ٱلَّذِينَ يُظَٰهِرُونَ مِنكُم مِّن نِّسَآئِهِم مَّا هُنَّ أُمَّهَٰتِهِمْ إِنْ أُمَّهَٰتُهُمْ إِلَّا ٱلَّٰٓـِٔى وَلَدْنَهُمْ وَإِنَّهُمْ لَيَقُولُونَ مُنكَرًا مِّنَ ٱلْقَوْلِ وَزُورًا وَإِنَّ ٱللَّهَ لَعَفُوٌّ غَفُورٌ ﴿٢﴾ وَٱلَّذِينَ يُظَٰهِرُونَ مِن نِّسَآئِهِمْ ثُمَّ يَعُودُونَ لِمَا قَالُوا۟ فَتَحْرِيرُ رَقَبَةٍ مِّن قَبْلِ أَن يَتَمَآسَّا ذَٰلِكُمْ تُوعَظُونَ بِهِۦ وَٱللَّهُ بِمَا تَعْمَلُونَ خَبِيرٌ ﴿٣﴾ فَمَن لَّمْ يَجِدْ فَصِيَامُ شَهْرَيْنِ مُتَتَابِعَيْنِ مِن قَبْلِ أَن يَتَمَآسَّا فَمَن لَّمْ يَسْتَطِعْ فَإِطْعَامُ سِتِّينَ مِسْكِينًا ذَٰلِكَ لِتُؤْمِنُوا۟ بِٱللَّهِ وَرَسُولِهِۦ وَتِلْكَ حُدُودُ ٱللَّهِ وَلِلْكَٰفِرِينَ عَذَابٌ أَلِيمٌ ﴿٤﴾

God has heard the speech of her who disputes with you concerning her husband and complains to God. And God hears your colloquy. Surely God is the Hearer, the Seer. Those among you who pronounce ẓihār to their wives, they (the wives) are not their mothers. Their mothers are only those who gave them birth; and they indeed utter an ill word and a lie, and indeed God is Pardoning, Forgiving. And those who pronounce ẓihār to their wives and then recant their words, should free a slave before they touch each other. Unto this you are exhorted; and God is aware of your actions. And he who does not possess the means, should fast for two successive months before they touch each other. And he who is

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

unable to do so, should feed sixty needy ones. This, that you may put trust in God and His Apostle. These are the limits set by God; and for unbelievers is a painful chastisement. (58: 1--4)

After reciting these verses the Prophet (ṣ) said to the husband: "Can you afford to free a slave?" The husband replied: "That will take up all my means." The Prophet (ṣ) then asked him, "Are you capable of fasting for two successive months?" He replied: "By God, if I do not eat three times a day my eyesight becomes dim and I fear that my eyes may go blind." Then the Prophet (ṣ) asked him, "Can you afford to feed sixty needy persons?" He replied: "Only if you aid me, O Apostle of God." The Prophet (ṣ) said, "Surely I will aid you with fifteen *Ṣā'* (a cubic measure) and pray for blessings upon you." Aws, taking what the Prophet (ṣ) had ordered for him, fed the needy and ate along with them and thus his affair with his wife was settled.

Al-'Īlā':

Īlā' is an oath taken by a husband in God's name to refrain from having sex with his wife. The Qur'ānic basis of this concept is verse 226 of the *Sūrat al-Baqarah*:

لِّلَّذِينَ يُؤْلُونَ مِن نِّسَآئِهِمْ تَرَبُّصُ أَرْبَعَةِ أَشْهُرٍ فَإِن فَآءُوا فَإِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ ﴿٢٢٦﴾
وَإِنْ عَزَمُوا الطَّلَاقَ فَإِنَّ اللَّهَ سَمِيعٌ عَلِيمٌ ﴿٢٢٧﴾

Those who forswear their wives (by pronouncing îlā') must wait for four months; then if they change their mind, lo! God is Forgiving, Merciful. And if they decide upon divorce, then God is surely Hearing, Knowing. (2:226--227)

The Imāmiyyah require that marriage should have been consummated in order for *îlā'* to be valid, otherwise *îlā'* will not take place.

The schools concur that *îlā'* takes place where the husband swears not to have sex with his wife for the rest of her life or for a period exceeding four months.[17] The schools differ if the period is four months; the Ḥanafîs assert that it takes place and the other

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

schools maintain that it doesn't.

There is consensus that if the husband has sex within four months, he must atone (for breaking his oath), but the hindrance to the continuation of marital relations will be removed. The schools differ where four months pass without sex. The Ḥanafîs observe: She will divorce herself irrevocably without raising the issue before the judge, or the husband will divorce her. (*Bidāyat al-mujtahid*)

The Mālikî, the Shāfi'î and the Ḥanbalî schools state: If more than four months pass without his having sex, the wife will raise the issue before the judge so that he may order the husband to resume sexual relations. If the husband declines, the judge will order him to divorce her. If the husband declines again, the judge will pronounce her divorce, and in all situations the divorce will be revocable. (*Farq al-zawāj* of al-Khafîf)

The Imāmiyyah state: If more than four months pass without sex, and the wife is patient and willing, it is up to her and no one is entitled to object. But if she loses patience, she may raise the issue before the judge, who, on the completion of four months,[18] will compel the husband to resume conjugal relations, or to divorce her. If he refrains from doing either, the judge will press him and imprison him until he agrees to do either of the two things, and the judge is not entitled to pronounce divorce forcibly on behalf of the husband.

All the schools concur that the atonement for an oath is that the person taking the oath should perform one of these alternatives: feed ten needy persons, provide clothing to ten needy persons, free a slave. If he has no means for performing any of these, he should fast for three days.

Furthermore, according to the Imāmiyyah, only those oaths which are sworn in the name of the sacred Essence of God will be binding. The oath of a child and a wife is not binding if the father and the husband prohibit it, except when the oath is taken for performing a *wājib* or for refraining from a *ḥarām*. Similarly, an oath will not be binding upon anyone if it is taken to perform an act refraining from which is better than performing it, or is taken to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

refrain from an act whose performance is better than refraining from it, except, of course, the oath of *'îlā'*, which is binding despite the fact that it is better to refrain from it.

NOTES:

1. The Ḥanafî and the Mālikî schools are explicit regarding the validity of a divorce by an intoxicated person. Two opinions have been narrated from al-Shāfi'î and Aḥmad, the preponderant among them is that the divorce does take place.

2. Al-'Ustādh al-Khafîf writes in his book *Farq al-zawāj* (p. 57): "The Imāmiyyah accept the validity of a divorce by a *safîh*, if effected by the permission of his guardian, as expressly mentioned in *Sharḥ Sharā'i' al-'Islām.*" There is no mention of this statement in the said book. Rather, such a statement is not present in any Imāmî book, and that which is mentioned in *Sharḥ Sharā'i' al-'Islām* is that the *safîh* husband is entitled to divorce without the permission of his guardian. See *al-Jawāhir*, vol. 4,"*Bāb al-ḥijr.*"

3. *'Nifās'* means the vaginal discharge of blood at the time of birth or thereafter, for a maximum period of: ten days according to the Imāmiyyah, forty days according to the Ḥanbalîs and the Ḥanafîs, and sixty days according to the Shāfi'îs and Mālikîs.

4. The author of *Ta'sîs al-naẓar* (1st ed. p. 49) has narrated from Imām Mālik that he has observed: If a person resolves to divorce his wife, the divorce takes place by mere resolution, even if he does not pronounce it.

5. The use of the expression 'infallible' (*ma'ṣūm*) here belongs to the author of *al-Jawāhir.*

6. In *Ta'sîs al-naẓar* of Abū Zayd al-Dabūsî al-Ḥanafî it is stated: "According to Abū Ḥanîfah the presumption *ab initio* is that non-Muslims living under the protection of an Islamic State will be left to follow their beliefs and precepts. But his two disciples, Abū Yūsuf and Muḥammad, say that they will not be left to themselves."

7. Al-'Ustādh al-Khafîf, *Farq al-zawāj* (1958), p. 159.

8. The Imāmiyyah state: When the husband, a born Muslim, apostatizes, his wife will observe the *'iddah* of widowhood, and if he apostatizes by returning to his former faith, she will observe a divorcée's *'iddah.*

9. As mentioned earlier, the Imāmiyyah do not consider *'iddah wājib* for a menopausal woman. But they say: If he divorces her, and she menstruates once before reaching menopause, she will complete her *'iddah* after two more months. The four Sunnî schools observe: She will start observing *'iddah* anew, for three months, and her menstruation will not be included in the *'iddah.*

10. The authors of *al-Jawāhir* and *al-Masālik* have mentioned the prevalent opinion (*mashhūr*) in this regard, acting in accordance with the tradition narrated by Sawdah ibn Kulayb. Both have discussed this issue at length and narrated other

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

views which are not *mashhūr* and which most Imāmiyyah legists have deliberately ignored.

11. The following observation has been made in *al-Jawāhir,* (vol. 5, *bāb al-'idad*). The *'iddah* of a non-Muslim woman is exactly like that of a free Muslim woman in regard to both divorce and death. I have not come across any difference of opinion because of the generality of the proofs and an explicit tradition from al-'Imām al-Ṣādiq (*'a*) from al-Sarrāj, who asked him (*'a*): "What is the *'iddah* of a Christian woman whose husband, a Christian, has died." He replied: "Her *'iddah* is four months and ten days."

12. This is when she does not raise the issue before a judge. But if she suffers as a result of his absence and files a complaint in court demanding separation, both Aḥmad and Mālik allow her to be divorced in such a situation. Details follow under the section on divorce by a judge.

13. See *al-Jawāhir,* appendices to *al-'Urwah* of al-Sayyid Kāẓim, *al-Wasîlah* of al-Sayyid Abū al-Ḥasan, and other books on Imāmiyyah fiqh. But the greater part of our discussion is based on *al-Wasîlah,* because it is both comprehensive and lucid.

14. The authors of *al-Jawāhir* and *al-Masālik* state that the *mashhūr* opinion among the Imāmiyyah legists is that a conditional *raj'ah* is not valid. The author of *al-Masālik* (vol. 2, *bāb al-ṭalāq*) says: The more *mashhūr* opinion is that *raj'ah* will not take place, and even those who consider contingent divorce valid hold this opinion by placing *raj'ah* alongside *nikāḥ*.

15. He died in 1936 and left behind many compilations, all of them related to law and jurisprudence, and none of which have appeared in print. Among them is a good and useful treatise on *'adālah.* The best of these works is a big book on *qaḍā'* and there exists only a single copy of this work written in his own hand. It is a unique work and no other book like it has been compiled on this issue. My first reliance in writing this section has been on that book, then on *al-Jawāhir* and the appendices of *al-'Urwah.*

16. For the meanings of these terms, see "Marriage According to Five Schools of Islamic Fiqh," Part 2, under *"al-'Uyūb* (defects)", *al-Tawḥîd,* vol. IV, No. 4, pp. 39--41.

17. The secret of stipulating this period is that a wife has a right to sex at least once every four months. It has been said that the difference goes back to the interpretation of the verse لِلَّذِينَ يُؤْلُونَ . Here, there are those who say that the verse has not stipulated any period for *îlā',* and others who consider it necessary that four months pass before the judge may warn the husband either to restore conjugal ties or to divorce her, and this obviously requires a period of more than four months, even though by a moment.

18. Most Imāmiyyah legists state: The judge will allow the husband four months time from the day the matter was brought to his notice, and not from the day of the oath.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Will and Bequest (Waṣāyā)

The five schools concur regarding the legality of making a will (*waṣiyyah*) and its permissibility in the Islamic Sharî'ah. *Waṣiyyah* is a gift of property or its benefit subject to the death of the testator. A will is valid irrespective of its being made in a state of health or during the last illness, and in both cases the rules applicable are the same according to all the schools.

A will requires a testator (*mūṣî*), a legatee (*mūṣā lahu*), the bequeathed property (*mūsā bihi*), and the pronouncement (*ṣîghah*) of bequest.

The Pronouncement:

No specific wording is essential for making a will. Hence any statement conveying the intention of gratuitous transfer (of property or its benefit) after the death of the testator is valid. Thus if a testator says: "I make a will in favour of so and so," the words indicate testamentary intention, without needing the condition 'after death' to be specified. But if he says (addressing the executor): "Give it" or "Hand it over to so and so", or when he says, "I make so and so the owner of such and such a thing" it is necessary to specify the condition, 'after death', because without this consideration his words do not prove the intention of making a will.

The Imāmî, the Shāfi'î and the Mālikî schools observe: It is valid for a sick person who cannot speak to make a will by

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

comprehensible gestures. Al-Shi'rānī, in *al-Mīzān,* narrates from Abū Ḥanīfah and Aḥmad the invalidity of making a will in this condition. In *al-Fiqh 'alā al-madhāhib al-'arba'ah* (vol. 3, *bāb al-waṣiyyah*) this opinion is ascribed to Ḥanafīs and Ḥanbalīs: If a person suffers loss of speech due to illness, it is not valid for him to make a will (by gestures), unless it continues for a long period of time and he becomes dumb, settling down to communicating in familiar gestures. In that case, his gestures and writing will be considered equivalent to his speech.

Al-Shi'rānī ascribes this opinion to Abū Ḥanīfah, al-Shāfi'ī and Mālik: If a person writes his own will and it is known that it is in his hand, it will not be acted upon unless he has it attested. This implies that if a will written in his hand is found which he neither got attested nor made known its contents to people, the will will not be probated even if it is known to have been made by him.

Aḥmad says: It will be acted upon, unless he is known to have revoked it. Researchers among the Imāmī legists observe: Writing proves a will, because the apparent import of a person's acts is similar to the import of his spoken statements, and writing is the sister of speech in the sense that both make known his intent; rather, writing is the superior of the two in this regard, and is preferable to all other evidence that proves intent.[1]

The Testator:

There is consensus among all the schools that the will of a lunatic in the state of insanity and the will of an undiscerning child (*ghayr mumayyiz*) are not valid.

The schools differ regarding the will of a discerning child; the Mālikīs, the Ḥanbalīs, and al-Shāfi'ī in one of his two opinions, observe: The will of a child of ten complete years is valid because the Caliph 'Umar probated it. The Ḥanafīs say: It is not valid except where the will concerns his funeral arrangements and burial. And it is well-known that these things do not require a will. The Imāmiyyah are of the opinion that the will of a discerning child is valid if it is for

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

a good and benevolent cause and not otherwise, because al-'Imām al-Ṣādiq considered it executable only in such cases. (*al-Jawāhir* and Abū Zuhrah's *al-'Aḥwāl al-shakhṣiyyah*).

According to the Ḥanafīs, if a sane adult makes a will and then turns insane, his will is void if his insanity is complete and continues for six months; otherwise, it is valid. If he makes a will in sound mind and then develops a condition of delusion leading to mental derangement lasting until death, his will will be void (*al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol. 3, *bāb al-waṣiyyah*). The Imāmī, the Mālikī and the Ḥanbalī schools are of the opinion that subsequent insanity does not nullify a will even if it continues till death, because subsequent factors do not nullify preceding decisions.

The Ḥanafīs, the Shāfi'īs and the Mālikīs consider the will of an idiot as valid. The Ḥanbalīs observe: It is valid in regard to his property and invalid regarding his children. Therefore, if he appoints an executor over them, his will will not be acted upon (*al-'Aḥwāl al-shakhṣiyyah* of Abū Zuhrah and *al-Fiqh 'alā al-madhāhib al-'arba'ah*). The Imāmiyyah state: The will of an idiot is not valid concerning his property and valid in other matters. Thus if he appoints an executor over his children, his will is valid, but if he wills the bequest of something from his property, it is void.

The Imāmiyyah are unique in their opinion that if a person inflicts injury upon himself with an intention of suicide and then makes a will and dies, his will is void. But if he first makes a will and then commits suicide, his will is valid.

The Mālikī and the Ḥanbalī schools regard the will of an intoxicated person as invalid. The Shāfi'īs say: The will of a person in a swoon is not valid. But the will of a person who has intoxicated himself voluntarily is valid.

The Ḥanafī school is of the opinion that a will made in jest or by mistake or under coercion is not valid (*al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol. 3, *bāb al-waṣiyyah*)

The Imāmiyyah observe: A will is not valid if made in a state of intoxication or stupor, in jest, by mistake, or under coercion.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Legatee:

The four Sunnî schools concur that a will in favour of an heir is not valid unless permitted by other heirs.

The Imāmiyyah observe: It is valid in favour of an heir as well as a non-heir, and its validity does not depend upon the permission of the heirs as long as it does not exceed a third of the estate. The courts in Egypt earlier used to apply the opinion of the Sunnî schools, but then switched over to the Imāmî view. The Lebanese Sunnî Sharî'ah courts continue to consider a will in favour of an heir as invalid. But since some years their judges have inclined towards the other view and have brought a bill to the government authorizing wills in favour of heirs.

All the schools concur that it is valid for a *dhimmî* (a non-Muslim living under the protection of an Islamic State) to make a will in favour of another *dhimmî* or a Muslim, and for a Muslim to make a will in favour of a *dhimmî* or another Muslim, in consonance with the verse;

لَا يَنْهَكُمُ اللهُ عَنِ الَّذِينَ لَمْ يُقَتِلُوكُمْ فِي الدِّينِ وَلَمْ يُخرِجُوكُم مِّن دِيَرِكُم أَن تَبَرُّوهُم وَتُقسِطُوٓا إِلَيهِمْ إِنَّ اللهَ يُحِبُّ الْمُقسِطِينَ ﴿٨﴾ إِنَّمَا يَنهَكُمُ اللهُ عَنِ الَّذِينَ قَتَلُوكُمْ فِي الدِّينِ وَأَخرَجُوكُم مِّن دِيَرِكُم وَظَهَرُوا عَلَىٰ إِخرَاجِكُم أَن تَوَلَّوهُم وَمَن يَتَوَلَّهُمْ فَأُولَٰئِكَ هُمُ الظَّلِمُونَ ﴿٩﴾

God does not forbid you respecting those who have not made war against you on account of your religion, and have not expelled you from your homes, that you show kindness to them and deal with them justly; surely God loves the just. God only forbids you respecting those who made war with you on account of your religion, and expelled you from your homes and assisted in your expulsion, that you befriend them. And whosoever takes them for friends--they are the evildoers. (60: 8--9)

The schools differ regarding the validity of a will made by a Muslim in favour of a *ḥarbî*.[2] The Mālikîs, the Ḥanbalîs and most of the Shāfi'îs consider it valid. According to the Ḥanafî and most Imāmî legists, it is not valid. (*al-Mughnî*, vol. 6, *al-Jawāhir*, vol. 5,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

bāb al-waṣiyyah)

The schools concur regarding the validity of a will made in favour of a foetus, provided it is born alive. Bequest is similar to inheritance, and there is *ijmā'* that afterborn children inherit; hence their capacity to own bequests as well.

The schools differ as to whether it is necessary for the foetus to exist at the time of making the will. The Imāmī, the Ḥanafī and the Ḥanbalī schools, as well as al-Shāfi'ī in the more authentic of his two opinions, say: It is necessary, and a foetus will not inherit unless it is known to exist at the time of making the will. The knowledge of its existence is acquired if its mother has a husband capable of intercourse with her and it is born alive within a period of less than six months from the date of the bequest. But if it is born after six months or more, it will not receive anything from the legacy, because of the possibility of its being conceived after the time of the bequest. This opinion is based on the invalidity of a bequest in favour of one not in existence.

The Mālikīs state that bequest in favour of existing foetus as well as one to be conceived in the future is valid, for that they regard a bequest in favour of someone non-existent as valid.[3] (al-'Allāmah al-Ḥillī's *Tadhkirah; al-Fiqh 'alā al-madhāhib al-'arba'ah; al-'Uddah fī fiqh al-Ḥanābilah, bāb al-waṣiyyah*)

If a person makes a will in favour of a foetus and then twins, a boy and a girl, are born, the legacy will be distributed among them equally because a bequest is a gift, not an inheritance; thus it resembles his giving them a gift after their birth.

The schools concur that it is valid to make a will for public benefit, such as for the poor and destitute, for students, for mosques and schools. Abū Ḥanīfah excludes bequest in favour of a mosque or something of the kind, because a mosque does not have the capacity to transfer ownership. Muḥammad ibn al-Ḥasan, his pupil, considers it valid, the income of the legacy being spent for the mosque. This has been the custom among the Muslims in the east and the west, in the past and at the present.[4]

The schools differ where the legatee is a specific person, as to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

whether his acceptance is necessary or if the absence of rejection on his part is sufficient.

The Imāmī and the Ḥanafī schools observe: His not rejecting the bequest is sufficient. Therefore, if the legatee is silent and does not decline the bequest, he will become the owner of the legacy after the testator's death.

The Imāmiyyah are of the opinion that if a legatee accepts the bequest during the life of the testator, he is entitled to decline it after his death; also if he refuses the bequest during the testator's life, he is entitled to accept it after his death, because his acceptance and refusal have no effect during the life of the testator, for ownership does not materialize during such time. According to the Ḥanafī school, if he refuses during the testator's life, he is entitled to accept after his death; but if he accepts during his life, he cannot reject it thereafter.

The Shāfi'ī and the Mālikī schools state: It is necessary that the legatee accept the bequest after the death of the testator, and his silence and non-refusal do not suffice. (al-'Allāmah al-Ḥillī's *Tadhkirah, al-Fiqh 'alā al-madhāhib al-'arba'ah*)

The four Sunnī schools observe: If the legatee dies before the testator, the will becomes void because the bequest then becomes a gift to a dead person, and this causes it to become void. (*al-Mughnī*, vol. 6, *bāb al-waṣiyyah*)

The Imāmiyyah say: If the legatee dies before the testator and the testator does not revoke the will, the heirs of the legatee will take his place and play his role in accepting or rejecting the bequest. Thus if they do not reject the bequest, the legacy will be solely their property, which they will distribute between themselves in the form of an inheritance, without it being incumbent upon them to pay from this bequest the debts of the decedent or to comply with his will in regard to the bequest. They argue that acceptance of the bequest was the decedent's right, which is transferred to his heirs, like the option to reject (*khayār al-radd*). They also cite the traditions of the Ahl al-Bayt[5] as another basis for their argument.

According to Mālik, and al-Shāfi'ī in one of his two opinions, a

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

bequest in favour of the murderer (of the testator) is valid regardless of its being an intentional or unintentional homicide. The Ḥanafîs validate the bequest if permitted by the testator's heirs.

The Ḥanbalîs observe: The bequest is valid if it is made after the injury causing death, and is void if murder takes place after the bequest. (Abū Zuhrah's *al-'Aḥwāl al-shakhṣiyyah, bāb al-waṣiyyah*)

The Imāmiyyah say: A bequest is valid in favour of a murderer, because the proofs regarding the validity of a will are general. The verse مِنْ بَعْدِ وَصِيَّةٍ يُوصِي بِهَا أَوْ دَيْنٍ includes a murderer as well as others, and to limit it to a non-murderer requires proof.

The Legacy:

The schools concur that it is necessary that the bequest be capable of being owned, such as property, house and the benefits ensuing from them. Therefore, the bequest of a thing which cannot be owned customarily (e.g. insects) or legally (e.g. wine, where the testator is a Muslim) is not valid, because transfer of ownership is implicit in the concept of bequest and when it is not present there remains no subject for the bequest.

There is consensus among the schools regarding the validity of the bequest of the produce of a garden, perpetually or for a specific number of years.

The Imāmiyyah extend the meaning of bequest to its utmost limit, permitting therein that which they don't permit in a sale and other transactions. They consider as valid a bequest of something non-existent with a probability of future existence, or something which the testator is incapable of delivering (e.g. a bird in the sky or a straying animal), or something which is indeterminate (e.g. the bequest of a dress or animal without mentioning what dress and which animal). They further observe: It is valid for the testator to be vague to the utmost extent (he may say: 'I promise to give something', 'a little', or 'a large quantity', 'a part', or 'a share', or 'a portion',[6] to a certain person).

None of these forms is valid in a transaction of sale, though valid

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

in a bequest. The author of *al-Jawāhir* says: "Perhaps the validity of all these forms is due to the general nature of the proofs validating wills, which include all these forms and all interests that are capable of being transferred.... Perhaps the rule in bequests is that all things can be bequeathed except those that are known to be non-bequeathable," i.e. those which have been excluded by a canonical proof (e.g. wine, swine, *waqf,* the right to *qiṣāṣ,* the punishment for *qadhf,* etc.). Some of them have stated that it is not valid to sell an elephant, though it can be validly bequeathed.

Al-Shaykh Muḥammad Abū Zuhrah, in *al-'Aḥwāl al-ṣhakhsiyyah, bāb al-waṣiyyah,* says: The fuqahā' have extended the scope of the rules of bequest and have permitted in it that which they don't permit in other forms of transfer, e.g. the bequest of something indeterminate. Thus if you make a will using the words, 'a share', 'a piece', 'something', 'a little', etc., the will will be valid.... and the heirs will have to give any quantity they desire from among the probable quantities understood from that word.

This observation is in concurrence with the view of the Imāmiyyah, and, accordingly, there is an agreement concerning this issue.

The Extent of Testamentary Rights:

A gratuitous bequest is operative only up to one-third of the testator's estate in the event of having heir, irrespective of the bequest being made in illness or good health. As per consensus, any excess over one-third requires the permission of the heirs. Therefore, if all of them permit it, the will is valid, and if they refuse permission, it becomes void. If some heirs give permission and others refuse, the will will be executed by disposition of the excess over one-third from the share of the willing heirs. The permission of an heir will not be effective unless he be a sane and mature adult.

The Imāmiyyah observe: Once the heirs give permission, they are not entitled to withdraw it, regardless of whether the permission was given during the life of the testator or later.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Ḥanafî, the Shāfi'î and the Ḥanbalî schools say: The permission given by the heirs or their refusal to do so will have no consequences except after the testator's death. Thus if they give permission during his lifetime and then change their minds and decline permission after his death, it is valid, irrespective of the permission having been given during the health of the testator or during his illness. (*al-Mughni*)

The Mālikîs are of the opinion that if the heirs give permission during the illness of the testator, they are entitled to withdraw it, and if they permit while he is healthy, the will will be executed from their share of the legacy, without their having a right to revoke the permission.

The Imāmî, the Ḥanafî and the Mālikî schools state: When permission is granted by the heir for that which exceeds one-third of the legacy, it is considered approval of the testator's act and the operationality of the bequest, not as a gift from the heir to the legatee. Accordingly, it neither requires possession, nor other rules applicable to a gift apply to it.

The schools differ concerning a testator who has bequeathed all his wealth and does not have any specific heir. Mālik observes: The bequest is only valid up to one-third of the legacy. Abū Ḥanîfah states: It is permissible for the whole legacy. Al-Shāfi'î and Aḥmad have two opinions, and so do the Imāmiyyah, the more reliable of them being the one declaring its validity. (*al-Bidāyah wa al-nihāyah; al-Tadhkirah, bāb al-waṣiyyah*)

There is consensus among the schools that inheritance and bequest are operational only after the payment of the debt of the decedent or his release from it. Therefore, the one-third from which the will is executed is a third of what remains after the payment of debt. They differ concerning the time at which the one-third will be determined: Is it a third at the time of death or at the time of the distribution of the estate?

The Ḥanafîs say: The one-third will be determined at the time of distributing the estate. Any increase or decrease in the estate will be shared by the heirs and the legatees. Some Ḥanbalî and Mālikî

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

legists concur with this opinion.

The Shāfi'îs observe: The one-third will be determined at the time of the testator's death. (Abū Zuhrah)

The Imāmiyyah state: That which the decedent comes to own after his death will be included in his estate (e.g. the reparation for unintentional homicide and for intentional murder, where the heirs compromise over reparation, and as when the decedent had during his life set up a net and birds or fish are trapped in it after his death; all these will be included in the estate and from it a third will be excluded). This observation of the Imāmiyyah is close to the Ḥanafî view.

The Imāmî, the Shāfi'î and the Ḥanbalî schools state: If the decedent is liable for payment of *zakāt* or any *wājib* expiation (*kaffārah*) or to perform the compulsory ḥajj or other *wājib* duties of monetary nature, these will be taken from his whole estate, not from a third of it, irrespective of his having willed to this effect or not, because these duties are related directly to God (*ḥaqq Allāh*), and as mentioned in the traditions have a greater right to be fulfilled. If the decedent has made a provision for their fulfilment in his will and has determined their expenses from a third of his estate, his word will be acted upon, in consideration of the heirs.

The Ḥanafîs and the Mālikîs observe: If he has provided for his unfulfilled duties in the will, their expenses will be taken from a third of his estate and not the whole, and if he makes no provision for them in his will they will annul on his death (*al-Mughnî, al-Tadhkirah, al-Bidāyah wa al-nihāyah*)

The schools concur that a will for performing *mustaḥabb* acts of worship will be executed from a third of the estate.

Clashing Wills:

If the bequeathable third is insufficient for meeting all the provisions of a will (such as where the testator has made a bequest of one thousand for Zayd, two thousand for the poor, and three thousand for a mosque, while his bequeathable third is five thousand,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and the heirs do not permit the excess to be met from their share), what is the rule here?

The Mālikī, the Ḥanbalī and the Shāfi'ī schools say: The bequeathable third will be distributed among them in proportion to their amounts; i.e. the deficit will affect every legatee in proportion to his share in the will. (*al-Mughnī*)

The Imāmiyyah state: If the testator makes many wills exceeding his bequeathable third, and the heirs do not permit the excess, on the wills being conflicting to one another (such as when he says: "One-third of my estate is for Zayd," and says later, "One-third is for Khālid") the later will will be acted upon, and the former ignored. And if the wills include *wājib* and non-*wājib* provisions, the *wājib* provisions will be given precedence. If the wills are of equal weight, then if the testator has included them in a single statement and said: "Give Jamāl and Aḥmad 1000," while his bequeathable third is 500, this amount will be distributed among the two, each receiving 250. But if the testator gives precedence to one of them and says: "Give Jamāl 500, and Aḥmad 500", the whole amount will be given to the first and the second will will be considered void because the first will has completely exhausted the bequeathable third and no subject remains for the second.

The four Sunnī schools boserve: If a testator bequeaths a specific thing in favour of a person, and then bequeaths the same thing in favour of another, that thing will be equally distributed between them (thus, if he says: "Give this car to Zayd after my death," and says later: "Give it to Khālid," it will become the joint property of both).

The Imāmiyyah say: It belongs to the second, because the second will implies abandonment of the earlier one.

According to the Imāmiyyah, if a testator bequeaths a specific thing to every heir equal to each heir's share of the legacy, the will is valid (e.g. if he says: "The garden is for my son Ibrāhīm, and the house is for his brother, Ḥasan"), and the will will be executed if there is no favouritism involved, because there is no clash of interests of the heirs. Some Shāfi'ī legists and some Ḥanbalīs concur

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

with this view.

There is consensus among the schools that the thing bequeathed, regardless of its being an undifferentiated part (e.g. one-third or one-fourth of the whole estate) or something specific, the legatee will become its owner on the testator's death, regardless of the legacy's presence. Thus he takes his share along with the heirs if the subject of legacy is present, and similarly when the subject of legacy, not present earlier, appears.

When the subject of legacy is something distinct, independent and determinate, the Imāmī and the Ḥanafī schools say: The legatee will not become its owner unless the heirs possess twice its value (as their share of the testator's estate). But if the testator has assets not present or debts (receivable), and the subject of bequest is more than one-third in value of what the heirs possess, the heirs are entitled to resist the legatee and stop him from taking more than a third of the total estate into possession, especially where the assets not present are in danger of perishing or when it is infeasible to reclaim them. When the thing not present earlier turns up, the legatee is entitled to the remaining part of the bequest to the extent of a third of the entire present assets. But if nothing turns up, the rest of the legacy is for the heirs.

Revocation of Will:

There is consensus among the schools that a will is not binding on the testator or the legatee. Thus it is valid for the former to revoke it, regardless of its being the bequest of an asset, or benefit (*manfa'ah*) or guardianship (*wilāyah*). Discussion regarding the second point will follow shortly.

A revocation by the testator may take place by word or deed (e.g. his bequeathing an article and then consuming, gifting or selling it). The Ḥanafīs are said to hold that selling is not considered a revocation, and the legatee is entitled to receive its price.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Bequest of Benefits:

The schools concur regarding the validity of a bequest of benefit (e.g. the lease of a house, the right to reside in it, an orchard's produce, a goat's milk, and other such benefits which accrue in course of time) irrespective of the testator's restricting the benefit to a specific period or his bequeathing it perpetually.

The schools differ concerning the method of deriving the benefit from the bequeathable third. The Ḥanafîs observe: The value of the bequeathed benefit will be estimated from the subject of the benefit, irrespective of whether the bequest of the benefit is temporary or perpetual. Thus, if a testator bequeaths the right to reside in a house for a year or more, the value of the whole house will be estimated, and if its value covers a third of the legacy, the will will be operational; otherwise it will be inoperational and void.

The Shāfi'î and the Ḥanbalî schools say: The value of the benefits will be estimated in separation from the property. If a third of the property covers the value of the benefit, the bequest will be fully operational, if not, to the extent covered by a third of the property. (Abū Zuhrah)

Researchers among the Imāmiyyah state: If the bequest of the benefit is not perpetual, the calculation of its value is easy because the article or property will retain its own value after subtracting the value of the benefit. Therefore, if a testator bequeaths the benefit of an orchard for a period of five years, the value of the whole orchard will be initially estimated. Supposing its estimate is 10,000, it will be re-estimated after deducting from it the benefit of five years. Supposing the re-estimated value is 5000, the difference of 5000 will be deducted from a third of the estate if it can bear it; otherwise, the legatee will be entitled to the benefit to the extent of a third of the legacy, be it the benefit of a year or more. But if the bequest of the benefit is perpetual, the value of the orchard along with its benefit will be estimated initially, and then the procedure followed in a temporary bequest will follow. If one asks: "How and in what way can we estimate the value of a property devoid of benefit, for that

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

which has no benefit has no value?" The reply is that there are some benefits that have value even if little. Thus, in an orchard, the broken branches and dry wood can be utilized by the heir; if a tree dries up due to some reason, the land it covered can be of use; if a house falls into ruins and the legatee undertakes no repairs, the heirs may benefit from its stones and land; the meat and hide of a goat can be used after it is slaughtered; and in all situations a property is not devoid of benefits apart from the bequeathed benefit.

The Dispositional Rights of an Ailing Person:

Here, by an 'ailing person' is meant one whose death follows his illness, in a manner that the illness creates apprehensions in the minds of people that his life is at an end. Therefore, a toothache, eye pain, a slight headache, and the like are not considered alarming forms of illness. Thus, gifts made by a person suffering from an alarming sickness, who may recover from it and die after his recovery, will be considered valid.

Powers of Disposition of a Healthy Person:

There is no doubt nor disagreement between the schools that when a healthy person disposes of his wealth, completely and unconditionally--i.e. without making it contingent upon his death--his disposition is operative from his property, irrespective of the disposition being *wājib* (e.g. the payment of a debt) or an act of favour (e.g. giving a gift, or creating a *waqf*).

But if a healthy person makes the disposition of his property contingent upon his death, it becomes a bequest, as mentioned. Therefore, if it is a non-monetary *wājib* (e.g. prayer, ḥajj, etc.), it will be executed from a third of his legacy, and if it is a debt, it will be paid from the undivided estate, according to the Imāmī, the Shāfi'ī and the Ḥanbalī schools, and from a third, according to the Ḥanafī and the Mālikī schools.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Powers of Disposition of an Ill Person:

Those dispositions of an ill person that are contingent upon his death are bequests, and the rules applicable to them are those mentioned above concerning valid wills, because there is no difference between a will made during a state of health or illness, provided the ill person is mentally sound and completely conscious and aware.

If an ill person disposes his wealth without making it contingent upon his death, it will be seen whether his disposition is for his own use, such as his buying an expensive dress, enjoying food and drink, spending on medicine and for improving his health, travelling for comfort and enjoyment, etc. All these dispositions are valid and no one, including heirs, may object.

And if he disposes it impartially, such as when he sells, rents or exchanges his possessions for a real consideration, these transactions of his are enforceable from his estate and the heirs are not entitled to dispute it, because they don't lose anything as its consequence.

If he disposes in a complete form without making it contingent upon his death, and his dispositions include acts of favour (such as when he gives a gift or alms, or relinquishes a debt, or pardons a crime entailing damages, or sells for less than its actual price or buys at a higher price, or makes other such dispositions which entail a financial loss for the heirs), such dispositions will be operational from a third of his estate.[7] The meaning of its being from a third of his estate is that its enforcement is delayed until his death. Thus if he dies in his illness and a third of his estate covers his completed gratuitous acts, it is clear that they are enforceable from the very beginning, and if the third falls short of them, such dispositions in excess of the third are invalid without the heirs' permission.

Wills and 'Completed Dispositions 'During Illness':

The difference between a will and dispositions (*munjazāt*) during illness is that the will is made contingent upon death, whereas

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

dispositions during illness are not made contingent upon death, irrespective of their being incontingent perpetually or being contingent upon some event capable of conditionality (such as when he makes a vow during illness to sacrifice a particular ram if he is granted a son and then a son is born to him posthumously; such an act will be considered among dispositions during disease). According to *al-Mughnî* (a Ḥanbalî legal text) and *al-Tadhkirah* (a book on Imāmî fiqh), there are five similarities and six differences between dispositions during illness and a will, and the similar wording of the two texts shows that al-'Allāmah al-Ḥillî, the author of *al-Tadhkirah* (d. 726/1326), has taken it from Ibn Qudāmah, the author of *al-Mughnî* (d. 620/1223).[8] It is useful to give a summary here of their views.

The five similarities between dispositions during illness and a will are the following:

1. Both depend for their execution on a third of the estate, or the consent of the heirs.

2. Dispositions during illness are valid in favour of an heir, exactly like a will, according to the Imāmiyyah; according to the other four schools, they are not valid in favour of an heir, as in the case of a will.

3. Both of them have a lesser reward with God compared to charity given during health.

4. Dispositions contest with wills, within the one-third of the estate (from which both are to be enforced).

5. Both will be enforced from the one-third of the estate only at the time of death, neither before nor after it.

The six differences between a will and dispositions during illness are:

1. It is valid for a testator to revoke his will, while it is not valid for a donor during ailment to revoke his gift after its acceptance by the donee and his taking its possession. The secret here is that a will is a bequest conditional to death, and, consequently, as long as the condition is not fulfilled, it is valid to recant it, whereas a gift during illness is unrestricted and unconditional.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

2. Dispositions are required to be accepted or rejected immediately and during the life of the donor, whereas a will is not required to be accepted or rejected until the death of the testator.

3. Dispositions require the fulfilment of certain conditions, such as knowledge of the gift and absence of harm; a will is not bound by these conditions.

4. Dispositions enjoy precedence over a will if one-third of the estate falls short of meeting both of them together, except when the will involves the setting free of a slave, in which case a will takes precedence over completed gifts. This is the view of the Imāmī, the Ḥanafī and the Shāfi'ī schools (*al-Tadhkirah, bāb al-waṣiyyah*).

5. If one-third of the estate is not sufficient to enforce all the dispositions, then, according to the Shāfi'īs and Ḥanbalīs, the first among them will be enforced first, and so on. But if the one-third is not sufficient to fulfil several wills, the deficit will affect all of them, as pointed out while discussing clashing wills. The Imāmiyyah enforce both wills and dispositions on a first-come-first basis.

6. If a donor during his last illness dies before the donee has taken possession of the gift, the option lies with the heirs; if they desire they may grant it. But a will has to be compulsorily acccepted after the death of the testator, without requiring the consent of the heirs.

The sixth difference has been mentioned by the author of *al-Mughnî,* while the author of *al-Tadhkirah* does not mention it. It is better not to mention this difference, as done by al-'Allāmah al-Ḥillī, because dispositions during sickness have many forms, such as gift (*hibah*), the relinquishing of a debt, favouritism in sale or purchase, etc. Hence, when dispositions are not limited to gifts, it is not appropriate, firstly, to say "If a donor during his last illness dies before the donee has taken possession...." Secondly, if a donor during his last illness makes a gift and dies before the donee has taken its possession, according to the Ḥanbalī, the Shāfi'ī, the Imāmī and the Ḥanafī schools, the gift is void because taking possession is a condition for its completion, and if the donee takes possession before the death of the donor the gift is concluded and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

will be accounted for in the third of the estate, like a will, and will not depend for its execution on the consent of the heirs, provided it does not exceed a third of the estate. Hence it is not in fact a disposition without taking possession and after the death of the donor, for it to be said that it differs from or is similar to a will. After taking possession, the rules concerning wills will apply to it. From this it is clear that the mention of the sixth difference is out of place.

Acknowledgment During Sickness:

The four Sunnī schools concur that if during last illness a person acknowledges the debt of a non-heir, his acknowledgment is enforceable from the undivided estate, exactly like his acknowledgment during health. They differ where he acknowledges the debt of an heir; the Ḥanafī and the Ḥanbalī schools observe: The other heirs are not bound by this acknowledgment and it will be considered void unless that heir brings a valid proof to establish his claim.

The Mālikīs say: The acknowledgment is valid if the decedent is not accused of partiality, and is void if so accused (e.g. when a person having a daughter and a cousin brother acknowledges a debt of his daughter, it will not be accepted, and if he acknowledges in favour of his cousin, it will be accepted, because he cannot be accused here of depriving his daughter and transferring the wealth to his cousin). The reason for rejecting the acknowledgment is accusation, and therefore it is limited to those instances where there is an accusation. (*al-Mughnī*, vol. 5, *bāb al-'iqrār*)

The Imāmiyyah state: If he makes an acknowledgment during last illness (*maraḍ al-mawt*) for an heir or a stranger, concerning a property or a debt claim, it will be seen: If there are any indications raising the suspicion that he is not sincere in his acknowledgment, so that it seems, going by ordinary factors, farfetched that the thing acknowledged should belong to the person to whom it has been acknowledged to belong and that the sick person intends to impress this on others for some reason, the rule applicable to such an

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

acknowledgment is the one applicable to a will: It will be executed from a third. But if the ill person is secure from suspicion in his acknowledgment, so that there is no indication to prove that he has lied (such as when there has been between him and the person in whose favour he has made the acknowledgment, earlier dealings which ordinarily explain such an acknowledgment), the acknowledgment will be enforced from the original estate, whatever its value.

This is when the condition of the person acknowledging is known; what if it is not known?

If the heir says that the decedent was not honest in his acknowledgment, then the burden of proof rests on the person in whose favour the acknowledgment has been made, to prove that he owns the thing which the decedent acknowledged as his during his last illness. If he proves this by bringing two just witnesses (*al-bayyinah*), the acknowledgment will be enforced from the original estate; otherwise, the heir will take an oath that he does not know that the thing acknowledged by the decedent belongs to that person; then the acknowledgment will be enforced from a third of the estate. The Imāmiyyah have based their argument on traditions narrated from the Ahl al-Bayt (*'a*) such as the tradition narrated by Abū Baṣīr: إذا كانَ مُصَدّقاً فَأَيجوزُ (When his verity is established, it is valid) and other traditions; and as اذا is used in a conditional clause, it implies that the enforcement is made conditional to his trustworthiness and the establishment of his verity.[9]

Appointment of Executor (al-Wiṣāyah):

Al-Wiṣāyah is an undertaking by a person to execute the will of another after his death, such as clearing his debts, pursuing his debtors, the care and maintenance of his children, and other such functions. Responsibility for these functions is called *al-wilāyah* or *al-waṣiyyat al-'ahdiyyah,* and the person charged with performing it called *al-waṣî al-mukhtār* (an authorized executor).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Requirements for a Waṣī:

1. He should be a *mukallaf,* i.e. a sane adult, because a lunatic and a minor do not have authority over themselves; so there is no question of their exercising authority over the affairs of others. However, the Imāmiyyah observe in this regard: It is not valid for a child to act as an executor individually, though valid if he acts together with an adult. Then the adult will execute the will individually till the minor attains majority, and then he will join him in its execution.

The Ḥanafīs state: If a minor is appointed as *waṣī* (executor), the judge will replace him with another, and if the minor has executed the will before being removed by the judge, his acts of execution of the will are valid and enforceable. Similarly, if he attains majority before being removed, he will continue with the execution of the will (*al-Fiqh 'alā al-madhāhib al-'arba'ah* and al-'Allāmah al-Ḥillī's *al-Tadhkirah*).

2. The *waṣī*'s nomination must be determinate; thus if the testator appoints one of two persons without determining which one of them is to be the executor, the appointment of both is void.

3. The specification of the subject of will (*mūṣā bihī*). Thus if the testator makes a will without specifying it (as when he says: "So and so is my *waṣī*", and does not mention the thing over which he is to exercise this authority), the appointment is void according to the Imāmī, the Ḥanafī, the Shāfi'ī and the Ḥanbalī schools. It has been narrated from Mālik that such a *waṣī* will have authority over the whole estate.

4. That the *waṣī* be a Muslim: Thus it is not valid, as per consensus, for a Muslim to appoint a non-Muslim executor. But the Ḥanafīs state: If a Muslim appoints a non-Muslim, it is for the judge to replace him with a Muslim, though the appointment itself will be considered valid. Hence if the non-Muslim *waṣī* executes the will before his removal by the judge, or becomes a Muslim, he will remain a *waṣī,* as in the case of a minor.

5. The Shāfi'ī school observes: It is *wājib* that the *waṣī* be an

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

'adil person.

The Mālikī, the Ḥanafī and researchers among the Imāmiyyah state: It is sufficient that he be trustworthy and truthful, because *'adālah* is a means here and not an end, and when the *waṣî* strives to fulfil the provisions of the will--as is *wājib* for him--the purpose is achieved.[10]

The Ḥanbalīs say: If the *waṣî* is dishonest, the judge will appoint a trustworthy person as a co-executor. This opinion is in consonance with the opinion of al-Sayyid al-Ḥakîm in *Minhāj al-ṣāliḥîn* (vol. 2) where he observes: If a dishonest act is committed by the *waṣî,* a trustworthy person will be appointed alongside him to stop him from doing so. If this is not possible, he will be replaced by another.

6. As reported in the third volume of *al-Fiqh 'alā al-madhāhib al-'arba'ah, bāb al-waṣiyyah,* the Ḥanafī, the Mālikī and the Shāfi'î schools require the *waṣî* to be capable of executing the provisions of the will.

Al-'Allāmah al-Ḥillî has stated in *al-Tadhkirah*: Apparently, the view taken by our 'ulamā', i.e. the Imāmiyyah, is that it is valid to appoint an executor incapable of executing the will, and his incapacity will be compensated by the supervision of the *ḥākim;* i.e. the jduge himself will supervise his dispositions, or appoint a capable, trustworthy person to cooperate with the executor.

Refusal to Act as Executor:

The testator is entitled to revoke the appointment of an executor, and the executor is entitled to reject his appointment by announcing his refusal, because *al-waṣiyyat al-'ahdiyyah* in this situation is not binding, as per consensus.

The schools differ regarding the validity of a rejection to act as executor by an executor without informing the testator. The Imāmî and the Ḥanafî schools say: It is not valid in any situation for an executor to reject his appointment after the death of the testator, and it is not valid during his life without informing him.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Shāfi'ī and the Ḥanbalī schools observe: It is valid for a *waṣî* to reject his appointment at the beginning as well as during its course, without any restraint or condition. Therefore, he can reject before acceptance and after it, during the testator's life, by announcing it or without doing so, as well as after his death (*al-Mughnî*, vol. 6, *bāb al-waṣiyyah*)

Appointment of Two Executors:

There is consensus among the schools that a testator is entitled to appoint two or more executors. If he categorically mentions that each one of them is independent in his dispositions, his word will be acted upon. Similarly, if he categorically mentions that both should act together, then neither of them will have independence of individual action. The schools differ where the testator does not specify anything concerning their acting individually or jointly. The Imāmī, the Shāfi'ī, the Mālikī, and the Ḥanbalī schools observe: Both have no power to act individually. So if they quarrel and disagree, the judge will compel them to agreement, and if he is unable to do so, he will replace both of them.

The Ḥanafîs say: Each of the two executors is free to act individually concerning seven things: Shrouding of the deceased, payment of his debt, recovering of his will, returning of articles held in trust by the decedent, buying necessary food and clothing for the minor heirs, acceptance of a gift on their behalf, and pursual of legal proceedings initiated for or against the decedent. This is because agreement in such things is difficult and delays are harmful. Therefore, to act individually is valid in them. (al-Sayyid Abū al-Ḥasan's *Wasîlat al-najāt* on Imāmî fiqh, and *al-Mughnî*, vol. 6, *bāb al-waṣiyyah*)

Al-Sayyid Abū al-Ḥasan has remarked in *al-Wasîlah*: If one of the two executors dies or turns insane or anything occurs to him which annuls his appointment as an executor, the second will become independent in the execution of the will, and there is no need to appoint a new co-executor.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Ibn Qudāmah states in *al-Mughnî*: The *qāḍî* will appoint a trustworthy person as his counterpart, because the testator was not satisfied with the individual supervision of the surviving executor, and no difference of opinion has been narrated in this issue except from the Shāfi'îs.

If both the executors die or their condition changes in a manner annulling their appointment, should the judge appoint two new executors or one will suffice? Here the schools differ. The correct view is that the judge will pay attention to expediency. Consequently, if it is expedient to appoint two executors, he will do so; otherwise it will be adequate to appoint one, because what is important is the will's execution, and the reason for the multiplicity of executors is usually the concern and affection of the executor for the legally disable heir or his friendship with the testator. In any case, there is no doubt that when one or more executors (as the case may be) die, it is as if there was no executor from the very beginning.

The Imāmiyyah, the Shāfi'îs, and the Ḥanbalîs in the more preponderant of the two narrations from Aḥmad, state: An executor is not entitled to hand over the job of executing the will to another without the prior permission of the testator.

The Ḥanafî and the Mālikî schools observe: It is valid for an executor to appoint by will another person to fulfil the duties for which he was appointed executor.

Appointing an Executor for Marriage:

The schools differ as to whether anyone having authority (*wilāyah*) concerning marriage (of a ward) is entitled to transfer it to another through a will (for instance, when a father authorizes the executor of his will concerning the marriage of his daughter or son).

Mālik considers it valid. Aḥmad observes: If the father mentions the name of the specific person to whom his child should be married, it is valid to appoint an executor for marriage, not otherwise.

Al-Shaykh Abū Zuhrah, in *al-'Aḥwāl al-shakhṣiyyah, bāb al-wilāyah,* narrates from a multitude of fuqahā' that it is not valid to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

appoint an executor for marriage; the Imāmiyyah hold the same opinion.

A Waṣī's Acknowledgment:

If a *waṣî* makes an acknowledgment of the decedent's liability regarding some property or debt, his acknowledgment is not executable against the heirs, minor or major, because it is an acknowledgment regarding another's dues. If the issue is raised in the court, the *waṣî* will be considered a witness, requiring to fulfil all the qualifications for a competent witness, provided he is not himself a party to the case.

If an executor gives evidence in favour of minor heirs or the decedent, his testimony will not be accepted, because his testimony affirms his own right of disposal in regard to the subject of his evidence.

Liability of a Waṣī:

If anything suffers damage at the hands of the *waṣî*, he is not liable for it unless he has violated or neglected his duty. If a minor heir on attaining majority accuses the *waṣî* of breach of trust or negligence, the burden of proof will rest on the heir, and the *waṣî* shall take an oath, because the *waṣî* is a trustee, and in accordance with the ḥadîth:

لَيْسَ عَلَى الأَمِينِ إِلاَّ اليَمِينُ

A trustee is liable for nothing except an oath.

anyone accusing a *waṣî* of breach of trust or negligence is entitled to proceed against him legally, provided that he is sincere in his intent and by doing so seeks the pleasure of God. But if it is known that he has no aim except harassment and defamation of the *waṣî*, due to some enmity between them, his plea will not be heard.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

If a person dies intestate, and it is not possible to refer to a *qāḍî*, a reliable and trustworthy person from among Muslims may take charge of the affairs of his estate, taking care to do what is good and beneficial, especially in matters which may not be delayed. It is the judge's duty to later on endorse these dispositions, and he may not invalidate them.

Probating a Will:

The schools concur that a will concerning property or its benefit is proved by the testimony of two males, or a male along with two female, witnesses from among *'ādil* Muslims, in accordance with the verse:

...وَاسْتَشْهِدُوا شَهِيدَيْنِ مِن رِّجَالِكُمْ فَإِن لَّمْ يَكُونَا رَجُلَيْنِ فَرَجُلٌ وَامْرَأَتَانِ مِمَّن تَرْضَوْنَ مِنَ الشُّهَدَاءِ....

And call in to two witnesses from among your men, or if they are not two men, then one man and two women, such witnesses as you approve of... (2:282)

The schools differ concerning the acceptability of the testimony of *'ādil* witness from Ahl al-Kitāb in the particular case of proving a will. The Imāmiyyah and the Ḥanbalîs observe: The testimony of Ahl al-Kitāb is valid in the case of will, only during a journey when none else is available, in accordance with the verse:

يَا أَيُّهَا الَّذِينَ آمَنُوا شَهَادَةُ بَيْنِكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ حِينَ الْوَصِيَّةِ اثْنَانِ ذَوَا عَدْلٍ مِّنكُمْ أَوْ آخَرَانِ مِنْ غَيْرِكُمْ إِنْ أَنتُمْ ضَرَبْتُمْ فِي الْأَرْضِ فَأَصَابَتْكُم مُّصِيبَةُ الْمَوْتِ...

O believers, the testimony between you when any of you is visited by death, at the time of making a will, shall be two 'ādil men from among you, or two others from another folk, if you are journeying in the land and the affliction of death befalls you. (5:106)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Ḥanafī, the Shāfi'ī and the Mālikī schools observe: The testimony of a non-Muslim will not be accepted in any condition, neither in case of a will nor in anything else. They add: The meaning of the words مِنْ غَيْرِ كُمْ in the verse is, 'from among those who are not your relatives', and not, 'from those who do not belong to your religion.' (*al-Mughnī*, vol. 9, *bāb al-shahādah*)

The Imāmī, the Ḥanbalī and the Shāfi'ī schools say: Ownership of a property is proved by the evidence of one witness along with an oath. The Ḥanafīs observe: A judgment will not be given on the basis of a single witness and an oath. (*al-Mughnī*, vol. 9, *bāb al-shahādah*, and *al-Jawāhir, bāb al-shahādah*)

The Imāmiyyah state: The right to one-fourth of a bequeathed property is proved by the evidence of a single woman; to a half by the evidence of two women; to three-fourths by the evidence of three women, and to the whole property by four women witnesses, *'adālah* being essential in all the cases. This opinion is particular to the Imāmiyyah to the exclusion of other schools, because of authentic traditions from the Ahl al-Bayt (*'a*) in this regard.

This was as regards the bequest of property or its benefit. Concerning the nomination of an executor, it is not proved except by the evidence of two male *'ādil* Muslims. Hence, as per consensus, the evidence of Ahl al-Kitāb or women, both individually and jointly with men, or a single male witness along with an oath, will not be accepted.

NOTES:

1. *Al-Jawāhir, bāb al-waṣiyyah.*

2. A *dhimmī* is a person who pays *jizyah* to Muslims, while a *ḥarbī*, according to the Imāmiyyah, is one who does not pay *jizyah* although he may not be at war with them. According to the other schools, *ḥarbī* is one who takes up arms and attacks travellers on public highways (Ibn Rushd's *al-Bidāyah wa al-nihāyah*, vol. 2, *bāb al-ḥarābah*). Al-Shahīd al-Thānī in his book *al-Masālik, bāb al-waṣiyyah*, has said: A bequest in favour of anyone who does not fight us due to our religion, irrespective of his being *dhimmī* or *ḥarbī*, is valid, in accordance with the verse ...لاَ يَنْهٰكُمُ اللهُ (60:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

8,9), as well as the tradition from al-'Imām al-Ṣādiq (*'a*): Give the bequest to the legatee even if he is a Jew or Christian, for surely God has said:

فَمَن بَدَّلَهُ بَعدَ مَا سَمِعَهُ فَإِنَّمَا إِثمُهُ عَلَى الَّذِينَ يُبَدِّلُونَهُ...

Then he who alters after having heard it, its sin is on those who have altered it. (2:181)

Here no difference has been made between a *harbī* and others.

3. From among the Imāmī fuqahā', al-Shaykh Aḥmad Kāshif al-Ghiṭā' favours the Mālikī view that it is valid to bequeath in favour of a person not in existence; he remarks in *Wasīlat al-najāt, bāb al-waṣiyyah*: "There is no hindrance in a testator's making the ownership of a bequest conditional to the coming into existence of the legatee. Thus the legatee will not own it unless after his coming into being, as is the rule in *waqf*". But the author has given this view on the condition that there be no *ijmā'* opposing it.

4. The meaning of the word 'property' (*al-milk*) differs in relation to the owner. Thus, in relation to a person, it means the power and right of disposal over it in any manner the owner desires; in relation to a mosque, it implies the allocation of its income to its use. Consequently, the observation that 'a mosque or something similar has a legal personality capable of holding property and transferring it,' is meaningless.

5. The Imāmiyyah consider it necessary that if the legatee rejects the bequest during the life of the testator and dies later, and after him the testator also dies, the right of accepting the will is transferred to the heirs of the legatee, because, they say: Accepting or rejecting a will has no effect during the life of the testator.

6. It is stated in *al-Sharā'i'*, *al-Masālik* and *al-Jawāhir* that if a testator uses vague words in his will for which the law has no interpretation, his heirs will be referred to to determine their meaning. Thus, if he says: "Give him a share from my property," or "a part" or "a portion of it," or "a little of it" or "much of it," or similar terms which do not denote any fixed quantity either lexically, or legally or customarily, the heirs will give anything considered as having value.

7. The four Sunnī schools concur on these dispositions being enforceable from a third of the estate, and the Imāmiyyah differ among themselves. Most of their earlier fuqahā' considered it enforceable from the original estate, while most of the latter legists from a third. Those among them who favour its enforceability from a third are al-'Allāmah al-Ḥillī, al-Shahīd al-'Awwal, al-Shahīd al-Thānī and the authors of *al-Jawāhir* and *al-Sharā'i'*, in accordance with the tradition narrated by Abū Baṣīr from al-'Imām al-Ṣādiq (*'a*):

لِلرَّجُلِ عِندَ مَوتِهِ ثُلُثُ مالِهِ.

A person is entitled to a third of his wealth at the time of his death.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

as well as an authentic tradition narrated by Ibn Yaqṭîn:

لِلرَّجُلِ عِندَ مَوتِهِ الثُلُثُ وَالثُلُثُ كَثِيرٌ.

A person is entitled to a third at the time of his death, and a third is a lot.

These traditions do not differentiate between a bequest and dispositions. According to a tradition narrated by 'Alî ibn 'Uqabah concerning a person freeing his slave, the slave will be freed to the extent of one-third.

Had the Imam said, بَعدَمَوتِهِ (after his death) instead of عِندَ مَوتِهِ (at the time of his death), it would have been appropriate to take his words to mean a will.

8. Often al-'Allāmah al-Ḥillî quotes *al-Mughnî verbatim et literatim*, and relies on it to explain the views of the schools. It has become clear to me as a result of enquiry and research that scientific co-operation between Sunnîs and Shî'îs was much greater in the past than it is today. Al-'Allāmah al-Ḥillî quotes in *al-Tadhkirah* the opinions of the four schools, the Ẓāhiriyyah, as well as other Sunnî schools, and Zayn al-Dîn al-'Āmilî, known as al-Shahîd al-Thānî, used to teach fiqh in accordance with five schools in Ba'labak (Lebanon) in 953/1546, apart from teaching in Damascus and at al-'Azhar. Similarly, al-Shaykh 'Alî ibn 'Abd al-'Āl, known as al-Muḥaqqiq al-Thānî (d. 940/1533) taught in Syria and al-'Azhar. If this proves anything, it proves the unbiased nature of the Imāmî 'ulamā' and their pursuit of knowledge for knowledge's sake, in accordance with the tradition:

الحِكْمَةُ ضالَّةُ المُؤمِنِ يَأخُذُها أنّىٰ وَجَدَها.

Wisdom is the lost property of a believer; he acquires it from wherever he finds it.

Similarly, it proves at the same time the unity of Islamic jurisprudence (*uṣūl al-fiqh*) and its sources amongst all the schools.

9. Al-Sayyid Kāẓim al-Yazdî, *Mulḥaq Ḥāshiyat al-Makāsib*.

10. The Imāmiyyah legists differ as to whether *'adālah* is a condition for a *waṣî*. The prevalent (*mashhūr*) view among them is that *'adālah* is necessary, while researchers consider his being trustworthy and reliable as sufficient. There is a third opinion which says that he should not be a known *fāsiq*. The second view is correct, keeping in mind the general nature of the proofs, which include *'ādil* and non-*'ādil* persons, as well as the exclusion by these proofs of an untrustworthy person because his dispositions do not fulfil the testator's purpose and harm the legally disable beneficiaries.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

INHERITANCE

Rules Concerning the Heritage:

The Heritage:

The heritage (*al-tarikah*) comprises the following things:

1. That which the deceased owned before his death in the form of:

a. tangible property,

b. debts,

c. any pecuniary right, e.g. the right consequent to *taḥjîr* (demarcation of ownerless vacant land with an intention of cultivating it), where he intends to cultivate ownerless vacant land and demarcates it by constructing a wall or something of the kind, thus acquiring a right to cultivate it in preference to others; or an option (*ḥaqq al-khayār*) in a contract of sale; or the right of pre-emption; or the right of retaliation (*qiṣāṣ*) for murder or injury, where he is a guardian of the victim (e.g. if a person kills his son and then dies before retaliation, causing the right of *qiṣāṣ* to change into a pecuniary right payable from the murderer's estate, exactly like a debt).

2. That which the decedent comes to own at his death, e.g. compensation for unintentional homicide (*al-qatl al-khaṭa'*), where the heirs opt for compensation instead of *qiṣāṣ*. The rule applicable to this compensation is the one applicable to all other properties,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and all those entitled to inherit, including husband and wife, will inherit from it.[1]

3. That which the decedent comes to own after his death, e.g. an animal caught in a net that he had placed in his life, and similarly where he is a debtor and his creditor relinquishes the debt after his death or someone volunteers to pay it for him. Also, if an offender mutilates his body after his death and amputates his hand or leg, compensation will be taken from him. All these will be included in the heritage.[2]

Deductions from the Heritage:

Different types of deductions are made from the heritage. Some of them are deducted from only a third of the heritage, and discussion regarding them has preceded in the chapter on wills. Some deductions are made from the whole heritage, and they too are of different types. Hence, if the heritage suffices, they will be completely met, and what remains of it after these deductions and the execution of the will, will be for the heirs. All the schools concur on this. If the *tarikah* falls short of meeting these deductions, the more important among them will be given precedence over those of lesser importance, If anything remains after the preferred deductions are made, the next in order will follow; otherwise only the deductions of higher preference will be covered. The schools differ regarding the order of preference of these deductions.

The Imāmiyyah state: The first deduction, before any other thing, is to meet the *wājib* funeral expenses, such as expenses of ablution (*al-ghusl*), shrouding, carrying the body and digging the grave, if required, irrespective of whether the decedent has made a will to this effect or not. Therefore, funeral expenses, according to them, are prior to debts, irrespective of the debts being related to the fulfilment of religious duties (*ḥaqq Allāh*) or to creditors (*ḥaqq al-nās*). They bring proof from the tradition narrated by al-Sakūnî from al-'Imām Ja'far al-Ṣādiq (*'a*):

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

اوَّلُ شَيْءٍ يُبْدَأُ بِهِ مِنَ المالِ الكَفَنُ، ثُمَّ الدَّيْنُ، ثُمَّ الوَصِيَّةُ، ثُمَّ الميراثُ.

The first thing which is deducted from the decedent's estate is the shroud (funeral expenses), then debt, then the will, and then the inheritance.

The Imāmiyyah fuqahā' differ among themselves regarding the case where a creditor has a right over the estate itself, such as where the decedent dies after mortgaging his property with a pledgee, the property being all that he owned. Here, a group of fuqahā' give the funeral expenses preference over the right of the pledgee, because of the general nature of the traditions which include the above-mentioned tradition of al-Sakūnī in which no difference has been made between pledged and unpledged properties. Other fuqahā' give precedence to the right of the pledgee because the owner of the pledged property is forbidden by the Sharī'ah to exercise his rights of ownership, and that which is forbidden by the Sharī'ah is like that which is forbidden by reason.[3]

After meeting the funeral expenses, the repayment of debts will start, irrespective of their being *ḥaqq Allāh* or *ḥaqq al-nās,* such as unpaid *khums* and *zakāt,* pecuniary atonements (*kaffārāt*), the returning of the *maẓālim,*[4] the unperformed obligatory ḥajj, and other similar religious and non-religious liabilities. All these debts are in a single category. Therefore, if all of them cannot be completely met from the estate, they will be covered pro rata like the liabilities of an insolvent person,[5] allowing no exception to this except *khums* and *zakāt,* provided these relate to the actual items of their incidence present, in which case the two will be preferred over other debts. But if these two are due (without the items of incidence being present), they will be treated as all other debts.

The four Sunnī schools, along with the Imāmiyyah, concur that funeral expenses are preferred over the debts payable from the estate before death. The four schools then differ among themselves in giving precedence to funeral expenses over debts relating to the heritage, such as an article which the owner pledged before his death. The Ḥanafī, the Shāfi'ī and the Mālikī schools say: Those claims which are related to specific parts of the heritage will be given

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

precedence over funeral expenses (*ḥāshiyat al-Bājūrî 'alā Sharḥ Ibn Qāsim*, vol. 1, *faṣl al-mayyit*, and Abū Zuhrah's *al-Mîrāth 'inda al-Ja'fariyyah*, p. 40, 1955).

The Ḥanbalîs observe: Funeral expenses will be preferred over all other claims and debts including a pledge, penal damages, etc. (*al-Tanqîḥ fî fiqh al-Ḥanābilah*, p. 71, al-Maṭba'at al-Salafiyyah)

In short, according to all the schools the funeral expenses have precedence over debts unrelated to specific items of the heritage, and the Ḥanafî, the Shāfi'î and the Mālikî schools give priority to debts related to specific items of the heritage over funeral expenses, while the Ḥanbalî school gives priority to funeral expenses in this case. Some Imāmî legists favour the view of the three schools, and others concur with the Ḥanbalîs.

Heirs and the Decedent's Heritage:

The schools concur that the heritage devolves on the heirs immediately after the death if there is no debt or will involved. They also concur that the remainder of the heritage exceeding debts and bequests stands transferred to the heirs. The schools differ whether that part of the heritage covered by debts and bequests will be considered transferred to the heirs or not.

The Ḥanafîs state: The part which equals the value of debt will not be included in the property of the heirs. Consequently, if the complete estate is covered by debt, the heirs will not own anything from it. But they have a right to free the estate from the creditors by paying them their claim on the estate. If the estate is not totally covered by debt, the heirs will own the remainder.

The Shāfi'îs and the majority of Ḥanbalî legists say: The heirs will come to own the indebted part of the estate, irrespective of whether the debt covers the whole estate or only a part of it. However, the debt will relate to the whole estate and the estate will be liable for it. (Abū Zuhrah, *al-Mîrāth 'inda al-Ja'fariyyah*)

The Imāmiyyah differ among themselves on the issue; the majority of them hold the opinion that the estate will be transferred

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

to the heirs whether totally covered by debts or not. The debts will be linked to it in one of the various ways, like a claim of pledge, or like the claim of damages resulting from the crime of a slave, or linked directly in a way not resembling any of these two ways. In any case, a debt will not hinder the actual act of inheritance, although it hinders the right of disposal in regard to that which is covered by the debt. This opinion is close to the Shāfi'î view. (*al-Jawāhir* and *al-Masālik, bāb al-mîrāth*)

The result of the difference of opinion appears in the increase in the estate which takes place between the time of death and the time of repayment of the debt. According to the opinion of the Shāfi'îs, the Ḥanbalîs and most of the Imāmî legists, the increase belongs to the heirs and they will dispose it without any hindrance from the creditors and others. But according to the Ḥanafî view, the increase will be subject to the estate, being linked to the debts payable from it.

Causes of Inheritance and Impediments:

Causes of Inheritance:

There are three causes of inheritance:

a. blood relationship (*al-qarābah*),

b. marriage concluded by a valid contract, and

c. *al-wilā'*.

We can bring these three causes under two heads: consanguinity (*nasab*) and affinity (*sabab*). By *nasab* is meant blood relationship, and *sabab* includes both marriage and *al-wilā'*. *Al-wilā'* is a bond existing between two persons which creates between them a relationship similar to *nasab*. Hence a person manumitting a slave becomes his *mawlā* and inherits from the latter if he has no other heir. We will not discuss here *al-wilā'* with its different meanings and forms because it has no practical application today, and will discuss only the two other causes.

Blood relationship (*al-qarābah*) is established between two

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

persons through legitimate birth when one of them is a direct descendant of the other (such as fathers how highsoever, and sons how lowsoever), or when both of them are descendants of a third person (such as brothers and maternal and paternal uncles). Legitimate birth materializes through a valid marriage as well as through 'intercourse by mistake.' But the marital bond will not materialize except through a valid marriage between man and woman. There is no difference of opinion regarding mutual inheritance between husband and wife. The schools, however, differ concerning the right of inheritance of certain relatives; the Shāfi'ī and the Mālikī schools deny them such a right and consider them exactly like strangers. These relatives are: Daughter's children, sister's children, daughters of brothers, children of uterine brothers, all kinds of paternal aunts, uterine paternal uncle, maternal uncles and aunts, daughters of paternal uncles and the maternal grandfather. Therefore, if a person dies and has no relatives except one of those mentioned the heritage escheats to the public treasury (*bayt al-māl*) and they will not receive anything, according to the Shāfi'ī and Mālikī schools, because they are neither among the sharers (*dhawū al-furūḍ*) nor among the residuaries (*'aṣabāt*). (*al-Mughnī*, 3rd ed. vol. 6, p. 229)

The Ḥanafī and the Ḥanbalī schools consider them capable of inheriting in the particular situation where there are no sharers and residuaries.

The Imāmiyyah consider them capable of inheriting without this condition. Details will follow.

Impediments to Inheritance.

The schools concur that there are three obstacles to inheritance:

a. difference of religion,

b. murder,

c. slavery.

Ignoring slavery, we will discuss the other two causes.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Difference of Religion:

There is consensus that a non-Muslim will not inherit from a Muslim.[6] The schools differ regarding a Muslim inheriting from a non-Muslim. 'He inherits,' say the Imāmiyyah; 'He does not,' say the other four schools.

If one of the decedent's sons or relatives who is a non-Muslim becomes a Muslim after his death and after the distribution of the heritage between the heirs, he is not entitled to inherit by consensus. The schools differ as to whether he inherits if he becomes a Muslim after the death but before the distribution of the heritage. He inherits according to the Imāmiyyah and the Ḥanbalîs, and not, according to the Shāfi'î, the Mālikî and the Ḥanafî schools.

The Imāmiyyah state: If there is a single Muslim heir, he will take the whole heritage and the conversion of another to Islam will not entitle him to inheritance.

An Apostate (Murtadd):

A *murtadd* from Islam does not inherit in the opinion of the four Sunnî schools, irrespective of his apostasy being *'an fiṭrah* or *'an millah,*[7] except if he returns and repents before the distribution of the heritage. (*al-Mughnî,* vol. 6)

The Imāmiyyah observe: A *murtadd 'an fiṭrah,* if a male, will be sentenced to death without being asked to repent, and his wife will observe the *'iddah* of death from the time of his apostasy, and his estate will be distributed even if he is not executed. His repentance will also not be accepted concerning the dissolution of his marriage, or the distribution of his estate, or the *wujūb* of his execution, though it will be accepted in fact and by God, as well as in regard to other issues such as the ritual cleanliness of his body and the validity of his acts of worship (*'ibādāt*). Similarly, he may own after his repentance new properties acquired through work, trade, or inheritance.

A *murtadd 'an millah* will be asked to repent. If he does so, he

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

will have all the rights and obligations of Muslims. If he does not repent, he will be executed and his wife will observe the *'iddah* of divorce from the time of his apostasy. Then if he repents while she is undergoing *'iddah*, she will return to him and his property will not be distributed unless he dies or is killed.

A woman will not be sentenced to death irrespective of her apostasy being *'an fiṭrah* or *'an millah*. But she will be imprisoned and beaten at the times of *ṣalāt* till she repents or dies. Her heritage will be distributed only after her death. (al-Sayyid Abū al-Ḥasan's *Wasîlat al-najāt* and al-Shaykh Aḥmad Kāshif al-Ghiṭā"s *Safînat al-najāt, bāb al-'irth*)

Inheritance of Followers of Other Religions:

The Mālikî and the Ḥanbalî schools say: Followers of different religions will not inherit from each other. Hence a Jew will not inherit a Christian and vice versa, and similarly the followers of other religions.

The Imāmî, the Ḥanafî and the Shāfi'î schools state: They will inherit from one another because they are a single religious group, considering that all of them are non-Muslims. But the Imāmiyyah lay down a condition in the case of a non-Muslim inheriting from another of his kind, that there be no existing Muslim heir. Therefore, if such an heir is present, even though distant, his presence will prevent a non-Muslim heir, even if he is closely related, from inheriting. This condition is not relevant to the other four schools, because according to them, as mentioned earlier, a Muslim does not inherit from a non-Muslim. (*Ghāyat al-muntahā*, vol. 2, al-Shi'rānî's *Mîzān, al-Jawāhir* and *al-Masālik*)

The Ghulāt:

Muslims are unanimous in holding that the Ghulāt are polytheists (*mushrikūn*) and do not belong to Islam and Muslims in any manner. The Imāmiyyah have been specially severe concerning

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the issue of the Ghulāt because a large number of their Sunnî brothers have unjustly attributed to them the deviations of the Ghulāt. The Imāmî 'ulamā' have unequivocally mentioned in their books on doctrine and law that the Ghulāt are *kāfir.* Accordingly, al-Shaykh al-Mufîd in *Sharḥ 'Aqā'id al-Ṣadūq* (p. 63, 1371 H.) says:

> The Ghulāt feign to follow Islam. They are those who attribute divinity and prophethood to Amîr al-Mu'minîn 'Alî and the Imams of his descent, and exceed all limits and deviate from the mean concerning their excellence in the religion and the world. They are misguided, unbelievers, whom Amîr al-Mu'minîn ordered to be killed and burnt, and the Imams judged them as unbelievers and apostates from Islam.

The Imāmî 'ulamā' mention them in their legal works in the chapter on *ṭahārah* (purification), and consider them ritually unclean. Their mention also occurs in the chapter on marriage, where it is observed that the marriage of Muslim women with them, as well as marrying their women, is *ḥarām,* although the 'ulamā' permit marriage with women of Ahl al-Kitāb. The mention of Ghulāt is also made in the chapter on *jihād,* where they are considered polytheists in a state of war. In the chapter on inheritance, the 'ulamā' prohibit their inheriting from Muslims.[8]

One Who Denies an Essential of the Faith:

There is consensus among the schools that a person who denies any of the established and known doctrines of the faith and considers a *ḥarām* as *ḥalāl* or vice versa, making that his creed, goes out of the pale of Islam and becomes an infidel. To this category also belongs one who attributes *kufr* to a Muslim.

It is worthwhile here to point out two issues that have been dealt in detail by the highly learned and leading Imāmî scholar Āqā Riḍā al-Hamadānî in *Miṣbāḥ al-faqîh,* vol. I.

1. If a person appears to follow Islam and pronounces the *Shahādatān,* though we do not know whether he does so hypocritically, without having faith in it, or pronounces them with

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

veritable faith, there is no difference of opinion in judging him a Muslim. But if we have knowledge of his falsity and know that he has no faith in God and the Prophet (ṣ) but only presents himself as a Muslim hypocritically with a certain purpose in view, will we consider him a Muslim?

The gist of the Shaykh's opinion is that this hypocrite has a reality and an appearance. As to the reality he is a non-Muslim, though his appearance presents him as a Muslim. It is our duty to leave his reality to God Almighty's judgement, and there is no doubt that God will deal with him as a non-Muslim, because it is presumed that he is such in reality. But we, Muslims, will accept his appearance and associate with him as a Muslim regarding marriage and inheritance, because we have been ordered to do so. It is stated in a tradition:

مَنْ قَالَ لا إِلٰـهَ إِلاّ اللهُ حُقِنَ دَمُهُ وَمَالُهُ.

He who says *'lā ilāha illā Allāh,'* his life and property are secure.

This implies that he will be treated as a Muslim, irrespective of any doubt on our part and our knowledge of his verity or falsity. This is also confirmed by the Prophet's treatment of the hypocrites, whom he treated in the same manner in which he treated other Muslims, though he knew of their hypocrisy (*nifāq*).

2. The secret behind the consensus of Muslims regarding the *kufr* of a person denying an established rule is that this denial as such necessitates the denial of the Prophet's prophethood. It follows from this that a person making such a denial, on becoming aware that his rejection amounts to rejecting the prophethood and the messengerhood of the Prophet (ṣ), will be doubtlessly considered a non-Muslim. But if he is not aware of it--either because of ignorance, or his belief that his denial does not necessitate the denial of prophethood--will he be considered a non-Muslim?

The summary of the Shaykh's reply is that an ignorant person can be viewed in different situations. At times his ignorance is the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

result of his absorption in sin and absence of attention to what is *ḥarām* (like a person who has indulged constantly in fornication from the first day to his present old age, and this continuity has developed in him the belief that his act is *ḥalāl,* not *ḥarām*); such a person is definitely a *kāfir.*

At times his ignorance is due to his following a person whom it is not valid to follow. Such a person is also a non-Muslim even if he believes that his denial does not lead to denying the Prophet's messengerhood.[9]

3. It may be that none of the two above-mentioned causes are the result of his ignorance; rather, his ignorance may be the result of his lack of attention to the station of prophethood, so that if he is informed about it he would desist from his denial. Such a person is doubtlessly a Muslim because he resembles one who disputes regarding a certain thing with the Prophet (ṣ) while not recognizing him, but when he comes to recognize that he is the Prophet (ṣ), he refrains and is penitent.

There are other cases mentioned by the author of *Miṣbāḥ al-faqîh* which we leave for reasons of space. Those seeking details should refer to the first volume of the book.

Homicide:

The schools concur that homicide when intentional and without legal authority impedes inheritance. This is based on the tradition:

لاميراثَ للقاتِلِ.

There is no (share in) inheritance for a murderer.

Moreover, since the murderer's act expedites inheritance, his intention will be frustrated. Apart from this, the schools differ.

The Imāmiyyah observe: He who kills his relative as *qiṣāṣ* or in self-defence or on the orders of a just judge, or for similar other reasons justified by the Sharî'ah, in these instances homicide is no

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

obstacle to inheriting. Also, unintentional homicide (*al-qatl al-khaṭa'*) is no hindrance.[10]

The author of *al-Jawāhir* states: The intentional act of a child and a lunatic is considered *khaṭa'* (mistake). Similarly *khaṭa'* includes a quasi-intentional act (*shibh al-'amd*). An instance of *shibh al-'amd* is where a father beats his child with an intention of correcting him and the child dies as a result of the beating. Al-Sayyid Abū al-Ḥasan al-'Iṣfahānî writes in *al-Wasîlah*: "Some of the causes which lead to death--like digging a well on a road, if a relative falls in it--the person having dug the well will inherit him, though he will be liable to pay the compensation (*diyah*)." Accordingly, there is no hindrance to the concurrence of the liability to *diyah* and inheritance.

Each one of the four Sunnî imams has a separate opinion in this case. The opinion of Imām Mālik concurs with the Imāmiyyah. The opinion of al-'Imām al-Shāfi'î is that unintentional homicide is an obstacle to inheritance, just like intentional murder; the same is the case where the murderer is a child or a lunatic. The opinion of Imām Aḥmad is that a homicide that calls for punishment, even if of a monetary kind, impedes inheritance. This excludes lawful killing, such as killing for *qiṣāṣ*, or in self-defence, or in war, the killing of a rebel (*bāghî*) at the hands of an *'ādil* person--in all these cases he will inherit. The opinion of Imām Abū Ḥanîfah is that a homicide which hinders inheritance is one which necessitates *qiṣāṣ* or *diyah* or *kaffārah* (atonement). This includes *al-qatl al-khaṭa'*, but not *al-qatl bi al-tasbîb* (where the accused is an indirect cause of homicide) or homicide by a lunatic or a minor. (*al-Mughnî*, vol. 6, and Abū Zuhrah's *Mîrāth al-Ja'fariyyah*)

Distribution of the Heritage:

As pointed out earlier, inheritance results due to marriage or consanguinity, and there is no difference of opinion that the husband or wife has a share with all other heirs, the husband being entitled to one-fourth when there are descendants and one-half in their absence, and the wife to one-eighth in the presence of descendants

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and one-fourth in their absence. The schools differ concerning a daughter's offspring, whether he/she is in the category of descendants whose presence is capable of lowering the share of the spouse from its higher to its lower limit or if his/her presence and absence has no effect. Details of this will come while discussing the inheritance of spouses.

There is again no difference of opinion that the distribution of the heritage begins with *aṣḥāb al-furūḍ* (the 'sharers,' whose shares have been determined by the Qur'ān) and that there are six kinds of these shares. But the schools differ regarding the number of sharers entitled to these shares and regarding the residuaries (those entitled to the remainder after the sharers have received their shares).

The schools also differ about the capacity to inherit of: daughter's children; uterine paternal uncles and aunts; and maternal uncles, aunts and grandfather. We mentioned earlier that these heirs fall in the category of distant kindred in the classification adopted by the four Sunnī schools, and the rules applicable to them differ from those applicable to the sharers and residuaries.

The Shares and Sharers:

A 'share' (*al-farḍ*) is a fixed portion (of the heritage) determined by the Qur'ān. According to consensus there are six such shares: 1/2, 1/4. 1/8, 1/3, 2/3 and 1/6. Some have summarized it by saying: "1/3 and 1/4, and the double and half of each."

Half is the share of the only daughter if there is no son sharing with her, and according to the four Sunnī schools the son's daughter is like the daughter, while according to the Imāmiyyah she takes the place of her father. Half is also given to the only sister, either full or half on the father's side, if there is no brother sharing with her. A husband gets half if the wife has no offspring to inherit her.

One-fourth is the husband's share if the wife has a descendant and the wife's if the husband has no descendant.

One-eighth is the share of a wife if the husband has a descendant.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Two-thirds is the combined share of two or more daughters in the absence of male children, and of two or more sisters, full or consanguine, if there is no brother sharing with them.

One-third is the share of the mother if the decedent has no male child, or brothers whose presence, as per the forthcoming details, prevents her from inheriting more than one-sixth. Two or more uterine brothers and sisters also inherit one-third.

One-sixth is the share of the father and the mother in the presence of a child. The mother also gets one-sixth if the decedent has brothers. The same is the share of a single uterine brother or sister. The inheriting of one-sixth as sharers by the above three enjoys concurrence. The four Sunnî schools add to these sharers entitled to one-sixth, one or more son's daughters along with the daughter of the decedent. Hence if the decedent has a daughter and a son's daughter, the former will take half and the latter one-sixth. But if the decedent has two or more daughters and a son's daughter, the latter will be prevented from inheriting unless she has a male counterpart of her class, such as when she has a brother or, lower in order, her brother's son, i.e. the great grandson of the deceased. One-sixth is also given to the paternal grandfather in the absence of the father. A grandmother, just like a mother, inherits a sixth if she is a paternal or maternal grandmother or mother of the paternal grandfather. Thus if she is the mother of the decedent's mother's father, she will not inherit. If two parallel grandmothers, such as the mother's mother and the father's mother are present together, the share of one-sixth will be equally divided between them.[11]

Some of the six different shares coexist with some others. Hence, a half can exist with a half (e.g. husband and sister, each receiving a half), with one-fourth (e.g. husband and daughter, she receiving a half and he one-fourth), with one-eighth (e.g. wife and daughter, the former getting an eighth and the latter a half), with one-third (e.g. husband and mother, where her share is not reduced by a brother, he receiving a half and she a third), and with one-sixth, (e.g. husband and the only uterine brother or sister, the former receiving a half and the latter one-sixth).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

One-fourth can coexist with two-thirds (e.g. husband and two daughters, he receiving a fourth and they two-thirds), with one-third (e.g. wife and two or more uterine brothers or sisters, she receiving one-fourth and they one-third) and also with one-sixth, (e.g. wife and a single uterine brother or sister, the former receiving one-fourth and the latter one-sixth).

One-eighth can coexist with two-thirds (e.g. wife and two daughters, she receiving one-eighth and they two-thirds) and with one-sixth (e.g. wife and either parent in the presence of a child).

Two-thirds can coexist with one-third (e.g. two or more consanguine sisters along with uterine brothers) and with one-sixth (e.g. two daughters and either parent).

One-sixth can coexist with itself (e.g. parents in the presence of a child). Those shares which do not coexist are: one-fourth and one-eighth, one-eighth and one-third, and one-third and one-sixth.

The Residuaries (al-'Aṣabāt):

According to the four Sunnî schools, there are three types of *nasabî* residuaries:[12] a residuary by himself (*'aṣabah bi nafsihā*), a residuary through another (*'aṣabah bi ghayrihā*), and a residuary along with another (*'aṣabah ma'a ghayrihā*)

A 'residuary by himself' includes all males between whom and the decedent there is no intervening woman, and the meaning of being such a residuary is that he is independent of others (in his right to inherit as a residuary), and that he is a residuary in all cases and situations. A 'residuary through another' and 'residuary along with another,' are residuaries in certain cases without being so in others, as will become clear later.

The 'residuaries by themselves' are the closest of residuaries and inherit in the following order:

the son,

then the son's son, how lowsoever; he takes the place of his father,

then the father,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

then the paternal grandfather, how highsoever;
then the full brother;
then the half brother by father;
then the son of the full brother;
then the son of the half brother by father;
then the full paternal uncle,
then the consanguine paternal uncle (who is father's half brother by grandfather),
then the son of the full paternal uncle,
then the son of the consanguine paternal uncle.

If some of them exist along with others, the son will supersede the father, in the sense that the father will take his *farḍ* (share)--which is one-sixth--and the son will take the remainder as a residuary.

According to the four Sunnī schools, the son's son will similarly supersede the father, and the father will supersede the paternal grandfather. They differ regarding the paternal grandfather as to whether he will supersede the brothers in inheritance or if they inherit jointly with him, so that all of them are considered as belonging to the same class. Abū Ḥanīfah observes: The grandfather will supersede the brothers and they will not inherit anything along with him. The Imāmī, the Shāfi'ī and the Mālikī schools state: They will inherit with him because they belong to his class.

Among the residuaries, those related from both sides will supersede those related from only one side. Hence a full brother will supersede a consanguine brother and the full brother's son will supersede a consanguine brother's son. Similarly, in the case of paternal uncles the degree of their nearness (to the decedent) is taken into consideration, and the nearest is preferred. Therefore, the decedent's paternal uncle supersedes his father's paternal uncle, and he in turn will supersede the grandfather's paternal uncle.

The following four female relatives are considered 'residuaries through another':

1. daughter or daughters,
2. son's daughter or daughters,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

3. full sister or sisters,

4. consanguine sister or sisters.

It is known that all the above-mentioned inherit as sharers in the absence of a brother.[13] One of them is entitled to a half, and if more, to two-thirds, and if they have a brother they inherit as residuaries--according to the four Sunnī schools--but not if they are alone, and will share the heritage with him, the male receiving twice the share of females.

As regards 'residuaries along with another,' they are full or consanguine sister or sisters that inherit along with a daughter or son's daughter. Therefore, a sister or sisters inherit as 'sharers' if there is no daughter or son's daughter inheriting along with them, and inherit as residuaries with a daughter or son's daughter. Hence the daughter or the son's daughter will take her share and the full or consanguine sister or sisters will take the remainder, thereby becoming residuaries along with the daughter.

After this explanation it becomes clear that a full or consanguine sister inherits in three different ways. She is a sharer if she has no brother and the decedent no daughter, a 'residuary through another' if she has a brother, and a 'residuary along with another' if the decedent has a daughter. The same applies in the case of two or more sisters. It also becomes clear that full and consanguine paternal uncles will not share in the heritage along with the daughter except in the absence of full or consanguine brothers and sisters.

The four Sunnī schools concur that if there is a single residuary without any sharers, he will inherit the whole heritage, and in the presence of a sharer he will take the remainder after the sharer has taken his share. If there is no residuary, according to the Mālikī and the Shāfi'ī schools, the excess will escheat to the *bayt al-māl,* and according to the Ḥanafī and the Ḥanbalī schools it goes to the sharers by way of 'return' (*radd*), and the estate will not escheat to the *bayt al-māl* in the absence of sharers, residuaries and distant kindred.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Residuaries From the Imāmī Viewpoint:

The Imāmiyyah do not recognize these three different kinds of residuaries and limit the heirs to 'sharers' and 'residuaries' without differentiating between male and female residuaries. Hence, a single son is entitled to the whole estate; a single daughter and a single sister too are similarly entitled. They classify the heirs, both males and females, into three categories:

1. Parents and children, how lowsoever.
2. Brothers and sisters (and their children), how lowsoever, and grandparents, both paternal and maternal, how highsoever.
3. Paternal and maternal uncles and aunts and their children.[14]

Whenever there exists a male or a female heir in the higher category, it will prevent all others belonging to the lower category from inheriting, whereas in the opinion of all the other schools these different categories may combine and inherit together, and at times all the three categories may inherit together, such as a mother along with a uterine sister and a full paternal uncle, in which case the mother receives one-third, the sister one-sixth, and the uncle the remainder.

Al-Ta'ṣīb:

The six kinds of shares determined in the Qur'ān at times equal the whole estate, such as two daughters along with parents (2/3 + 1/6 + 1/6). Here the question of *'awl* and *ta'ṣīb* does not arise, because the two daughters will take two-thirds and the parents one-third.

At times the total of the shares does not exhaust the whole estate, such as a single daughter, whose share is half, or two daughters, whose share is two-thirds. This (in Sunnī schools) results in *ta'ṣīb.*

When the total shares exceed unity--such as when the husband, the parents and the daughter inherit together, the share of the husband, the daughter and the parents being one-fourth, one-half and one-third respectively--the estate cannot cover all the three

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

shares together. This results in *'awl*. *'Awl* will be discussed in the second chapter. As to *ta'ṣîb*, it has been defined here as the sharing of inheritance by the residuaries along with the closely-related sharers (such as where the decedent has two or more daughters and no son, or where he does not have any children, but has one or more sisters, no brother, and a paternal uncle). Here, the Sunnî schools regard the brother of the decedent as an heir along with the daughter or daughters, and he receives one-half with the one daughter, and one-third if there are two or more daughters. Similarly, they regard the paternal uncle to be an heir along with a sister or sisters.

The Imāmiyyah state: *Ta'ṣîb* is void, and it is *wājib* that that which remains after the sharers have received their shares be returned to the closely-related sharers. Hence, (in the above examples) the whole estate, according to them, will be inherited by the daughter or daughters and the brother will receive nothing, and if the deceased has no child at all, but has a sister or sisters, they will inherit the whole estate to the exclusion of the paternal uncle, because a sister is nearer to the decedent than him and the 'nearer excludes the remote.'

This difference between the Sunnî schools and the Imāmiyyah originates from the tradition of Ṭāwūs. The Sunnî schools accept this tradition while the Imāmiyyah reject it. The tradition states:

أَلحِقوا الفَرائِضَ بِأَهْلِها، فَما بَقِيَ فَلِأَوْلىٰ عَصَبَةٍ ذَكَرٍ.

Give the sharers their respective shares, and of what remains, the first in order is a male relative.

It has also been narrated in another form:

فَما بَقِيَ فَهُوَ لِرَجُلٍ ذَكَرٍ.

And what remains is for the male relative.

Hence, the daughter being a sharer is entitled to half the estate, and the brothers being the nearest male relatives of the decedent

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

after her will be given the remaining half. Similarly, if the decedent has no children at all, and has a sister without any brother, the sister will take half as a sharer and the other half will be inherited by the decedent's paternal uncle, because he is the decedent's nearest male relative after his sister.

The Imāmiyyah do not endorse the veracity of Ṭāwūs's tradition and reject its attribution to the Prophet (ṣ), because, according to them, Ṭāwūs is an unreliable (*ḍa'îf*) narrator. Had they endorsed this tradition they would have concurred with the Sunnî schools, in the same manner as the Sunnî schools would have concurred with them if they had rejected this tradition. After rejecting this tradition's attribution to the Prophet (ṣ), the Imāmiyyah negate *ta'ṣîb* on the basis of the Qur'ānic verse:

لِلرِّجَالِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ أَوْ كَثُرَ نَصِيبًا مَّفْرُوضًا.

Men are entitled to a share of what the parents and near relatives leave, and women are entitled to a share of what the parents and near relatives leave, whether it is little or more, a determined share. (4:7)

This verse proves an equality between men and women concerning the right of inheritance, because it speaks about the women's share exactly as it speaks about men's, whereas those who accept *ta'ṣîb* differentiate between male and female relatives and give the males the right to inherit to the exclusion of females where the decedent has a daughter, a brother's son and a brother's daughter. They give one half to the daughter and the other half to the brother's son, without the brother's daughter getting anything, although she is in the same category with him. Similarly, if the decedent has a sister, a paternal uncle and a paternal aunt, they divide the estate between the sister and the uncle and exclude the aunt. The Qur'ān entitles both men and women to inheritance, while these schools entitle men and neglect women. This shows that the opinion justifying *ta'ṣîb* is void because it leads to a void conclusion.[15]

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

In objection to this stand, it is observed that the inheriting of the whole estate by a daughter or daughters is contrary to the verse of the Qur'ān:

...فَإِن كُنَّ نِسَآءً فَوقَ اثنَتَينِ فَلَهُنَّ ثُلُثَا مَاتَرَكَ وَإِن كَانَت وَاحِدَةً فَلَهَا النِّصفُ وَلِأَبَوَيهِ لِكُلِّ وَاحِدٍ مِّنهُمَاالسُّدُسُ مِمَّاتَرَكَ إِن كَانَ لَهُ وَلَدٌ...

Then if they are more than two females they shall have two-thirds of what the deceased has left, and if there is only one, she is entitled to half the estate; and for his parents, each is entitled to one-sixth of what he has left if he has a child. (4:11)

Similarly, the inheriting of the whole estate by a single sister contradicts the explicit verse: .

...إِنِ امرُؤٌاْ هَلَكَ لَيسَ لَهُ وَلَدٌ وَلَهُ أُختٌ فَلَهَانِصفُ مَاتَرَكَ وَهُوَيَرِثُهَآ إِن لَّم يَكُن لَّهَاوَلَدٌ فَإِن كَانَتَا اثنَتَينِ فَلَهُمَاالثُّلُثَانِ...

If a childless man dies and he has a sister, her share is half of what he has left, and he shall be her heir if she has no child; then if there be two sisters, their share is two-thirds...(4:176)

The Qur'ān determines the share of a single daughter as half and that of two or more daughters as two-thirds. Similarly, it determines the share of a single sister to be half and that of two or more sisters to be two-thirds, while the Imāmiyyah obviously oppose this law.

The Imāmiyyah give the following reply in regard to the first verse (4:11):

1. Certainly, the Qur'ān has determined the share of two or more daughters to be two-thirds and that of a single daughter as half; but it is necessary that there be another person so that the remainder after the deduction of the share could revert to him. The Qur'ān does not specifically mention this person, and had it done that, there would have been no difference of opinion. The Sunnah also makes no mention of it, neither explicitly nor implicitly, and the tradition,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

وَأَلْحِقُوا الفَرَائِضَ... is not authentic as already mentioned. Hence nothing remains to prove specifically to whom the remainder goes, except the following verse of the Qur'ān:

...وَأُولُوا الأَرْحَامِ بَعْضُهُمْ أَوْلَىٰ بِبَعْضٍ فِي كِتَابِ اللهِ...

Some relatives are preferred over some others in the ordinance of God. (33:6)

It proves that the nearer relative is to be preferred to the more distant, and there is no doubt that one's daughter is more closely related to one than one's brother, because she is related to him directly while his brother is related to him through either parent or both of them. Therefore, in such a case, the remainder will revert to the daughter or daughters, to the exclusion of the brother.

2. The Ḥanafī and the Ḥanbalī schools observe: If the deceased leaves behind a daughter or daughters and there exists none else from among the sharers and the residuaries,[16] the whole estate will devolve on the daughter, half as a share and the other half by 'return,' and similarly on the two daughters, two-thirds as their share and the remaining by way of 'return.' If the verse does not prove the negation of the 'return' devolving on the sharers in this case, it will similarly not negate it in other cases, because a single proof is incapable of being broken into parts.

Furthermore, the Ḥanafī and Ḥanbalī schools say: If the decedent leaves behind a mother and there are no other sharers and residuaries, she will take a third as a sharer and the remaining two-thirds by way of 'return'. If a mother can take the whole estate, it is similarly *wājib* that the daughter be also entitled to it, because both of them belong to the class of sharers. (***al-Mughnī*** and al-Shi'rānī's ***Mīzān, bāb al-farā'iḍ***)

3. The four Sunnī schools concur that if the decedent leaves behind his father and a daughter, the father will take one-sixth as a sharer and the daughter will similarly take half as a sharer, and the remainder will revert to the father, despite the Qur'ānic verse: وَلِأَبَوَيْهِ لِكُلِّ وَاحِدٍ مِنْهُمَا السُّدُسُ مِمَّا تَرَكَ إِنْ كَانَ لَهُ وَلَدٌ. Hence as the share determined

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

by this verse does not negate the father's right to receive more than one-sixth, similarly the share determined in the verse فَلَهُنَّ ثُلُثَاماتَرَكَ... will not negate the daughters' right to receive more than two-thirds nor a single daughter's right to the excess over half, especially after the shares of both the daughters and the father have been mentioned in the same verse and the same context.

4. The Qur'ān says:

...وَٱسْتَشْهِدُواشَهِيدَينِ مِن رِّجَالِكُم فَإِن لَّم يَكُو نَارَجُلَينِ فَرَجُلُ وَامرَأَتَانِ...

And call two witnesses from among your men, but if there are not two men, then one man and two women....(2:282)

This verse explicitly states that a debt is proved by two male witnesses and also by the evidence of a male and two female witnesses. Some of the four Sunnī schools consider it provable by a single male witness and an oath; rather, Mālik says: It is proved by the evidence of two women and an oath. Hence, as this verse does not prove that a debt is not provable by a single male witness along with an oath, similarly the verse relating to inheritance does not prove the invalidity of reverting the remainder to a daughter or daughters, and to a sister or sisters.

The Imāmī reply in regard to the second verse (4:176) انِ امْرُؤا هَلَكَ لَيْسَ لَهُ وَلَدٌ is that the word *walad* is applicable to both a male and a female child, because it is derived from *wilādah* (birth), which includes son and daughter, and also because the common denominator between a person and his relatives is kinship, which is inclusive of males and females. The Qur'ān has used the word *awlād* for children of both sexes.

يُوصِيكُمُ اللهُ فِيَ أَوْلَدِ كُمْ لِلذَّ كَرِمِثْلُ حَظِّ ٱلْأُنثَيَيْنِ...

God charges you, concerning your children: to the male the like of the portion of two females....(4:11)

وَمَا يَنبَغِى لِلرَّحْمَٰنِ أَن يَتَّخِذَوَلَدًا ﴿٩٢﴾

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

...And it behaves not the All-merciful to take a child. (19:92)

As these verses show, the word *walad,* stands for 'child,' irrespective of sex.

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُم مِّن ذَكَرٍ وَأُنثَىٰ...

O mankind, we have created you from a male and a female....(49:13)

Accordingly, since a son prevents the brother from inheriting, a daughter will also prevent him. What has been said about the daughter's inheritance applies in the case of the sister as well. Apart from this, the Imāmiyyah have raised a number of objections against the Sunnī schools, bringing to their notice certain conclusions that follow logically from their thesis, which are as unnatural as they are opposed to *qiyās,* which is practised by these schools. Among these criticisms is the one mentioned in *al-Jawāhir,* that if the decedent has ten daughters and a son, the son, in this case, will take one-sixth and the daughters the remaining five-sixths. If in the place of the son the decedent has a paternal uncle's son (i.e. if he leaves behind ten daughters and a paternal uncle's son), according to the rule of *ta'ṣīb* the uncle's son will receive one-third and the daughters two-thirds, and consequently the son's position here is worse than that of the uncle's son!

This is despite the fact that man has greater affection for his children when compared to his brothers, and he sees in his children, sons and daughters, an extension of his own existence. It is for this reason that we see individuals belonging to the Lebanese families having only daughters changing their school of fiqh from Sunnī to Shī'ī solely because they fear that their brothers and uncles will become coheirs with their children.

Presently, there are many Sunnī scholars thinking of forsaking the principle of *ta'ṣīb* and accepting the Imāmī view concerning the inheritance of a daughter, exactly as they have abandoned the view invalidating bequest in favour of an heir and have accepted the Imāmī view despite the consensus of the Sunnī schools regarding its

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

invalidity.

Al-'Awl:

'Awl is applied where the shares exceed the heritage, such as where the decedent leaves behind a wife, parents and two daughters (the shares being, the wife's one-eighth, the parents' one-third, the two daughters' two-thirds; here the estate falls short of the sum of one-eighth, one-third and two-thirds [27/24]). Similarly, if a woman dies and leaves behind her husband and two agnate sisters, the share of the husband is one-half, and that of the sisters two-thirds; here the estate falls short of the sum of half and two-thirds (7/6). *'Awl* occurs only if the husband or the wife is present.

The schools differ regarding the issue. Will the deficit, in such a case, be diminished proportionately from the shares of all the sharers, or will it be diminished from the shares of only some of them?

The four Sunnī schools accept the doctrine of *'awl,* the rule that all the shares will be diminished proportionately, exactly like the creditors' claims when the assets fall short of meeting them. Hence if the heirs are wife, parents and two daughters, according to these schools it will be an instance of *'awl.* The obligation is met by dividing the heritage into 27 parts, though it earlier comprised 24 parts. The wife will take 3/27 (i.e. her share becomes 1/9 instead of 1/8), the parents take 8/27 and the daughter 16/27. The Imāmiyyah do not accept the doctrine of *'awl* and keep the corpus (in the previous example) fixed at 24 parts by diminishing the share of the two daughters. Hence the wife takes her complete share of 1/8 (which is 3/24), the parents take 1/3 (which is 8/24), and the remainder goes to the two daughters.

The four schools argue in favour of the validity of *'awl* and the reduction of all the shares by citing the precedent of a woman who died during the reign of the Second Caliph, 'Umar, leaving behind husband and two agnate sisters. The Caliph gathered the Companions and said: "The shares determined by God for the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

husband and the two sisters are a half and two-thirds respectively. Now if I start with the husband's share, the two-thirds will not remain for the two sisters, and if I start with the two sisters, the half will not remain for the husband. So give me advice."

Some advised him to follow *'awl* by diminishing all the shares proportionately, while Ibn 'Abbās vehemently opposed it. But 'Umar did not accept his view and acted according to the opinion of others, telling the heirs: "I do not see any better way regarding this estate but to distribute it amongst you in proportion to your shares." Hence 'Umar was the first person to apply *'awl* to the shares and all the Sunnī schools followed him.

The Imāmiyyah argue regarding the invalidity of the doctrine of *'awl* by observing that it is impossible for Allāh, *subḥānahu,* to divide an estate into shares of half and two-thirds, or shares of one-eighth, one-third and two-thirds, because, otherwise, ignorance and frivolity would be attributed to Him, while He is too exalted to deserve such attributes. Hence, it has been narrated from 'Alī (*'a*) and his pupil 'Abd Allāh ibn 'Abbās that they said: "He Who can count the number of sand grains (in the universe) surely knows that the number of shares do not exceed six."

The Imāmiyyah always diminish the share of the daughters or sisters, and the shares of the husband, the wife and the parents remain unaltered; because the daughters and the sisters have been assigned a single share and do not face a reduction from a higher to a lower share. They, therefore, inherit as sharers in the absence of a male heir and as residuaries in his presence, and at times they are entitled along with him to less than what they are entitled to when alone. However, the share of the husband is reduced from a half to one-fourth, the wife's from one-fourth to one-eighth, the mother's from one-third to one-sixth, and in certain cases the father, inherits one-sixth as a sharer; the share of none of them further diminishes from its determined minimum, and nothing is reduced from it. Hence, when the shares exceed the corpus, a start will be made from this minimum limit and the remainder will go to the daughters or sisters.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Al-Shaykh Abū Zuhrah, in *al-Mîrāth 'inda al-Ja'fariyyah,* quotes Ibn Shihāb al-Zuhrî[17] as having said, "If it were not for the preference given to the *fatwā* of the just leader 'Umar ibn al-Khaṭṭāb over the *fatwā* of Ibn 'Abbās, the observation of Ibn 'Abbās is worthy of being followed by every scholar and worthy of consensus over it." The Imāmiyyah have adopted the opinion of Ibn 'Abbās--may God be pleased with both of them--which is a good rule, as pointed out by Ibn Shihāb al-Zuhrî, who was an ocean of knowledge.

Exclusion (al-Ḥujb):

By *ḥujb* is meant the exclusion of some relatives from inheritance. *Ḥujb* is either exclusion from the actual inheritance itself (such as the exclusion of the grandfather by the father, which is called *'ḥujb al-ḥirmān'*) or prevention from a part of the inheritance (such as the reduction of the husband's share by a child from a half to one-fourth, which is called *'ḥujb al-nuqṣān'*).

The schools concur that parents, children, husband and wife are not excluded by *ḥujb al-ḥirmān,* and whenever present they will take their share from the inheritance and no impediment prevents them from it, because they are the nearest to the decedent, being related to him without any intermediary, while all others are related through an intermediary.

The schools concur that the son excludes brothers and sisters from inheritance, and, with greater cause, the paternal and maternal uncles. The son does not prevent the paternal grandfather and the maternal grandmother, in the opinion of the Sunnî schools, and the son's son in the absence of the son, is exactly like the son, inheriting as his father would have inherited and excluding in the same manner.

There is consensus among the schools that the father excludes the brothers and sisters from inheritance, as well as the paternal grandfather. But the maternal grandmother, according to the Sunnî schools, inherits along with the father and takes one-sixth in the absence of the mother, and in the opinion of the Ḥanbalîs the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

paternal grandmother inherits along with the father, i.e. her son. The Shāfi'ī, the Ḥanafī and the Mālikī schools say: She will not inherit with him, because she is excluded by him. (*al-Mughnî*, vol. 6, p. 211, and *al-Bidāyah wa al-nihāyah*, vol. 2, p. 344)

The Imāmiyyah state: The father is similar to the son and none of the grandparents inherit along with him, because they belong to the second category while he belongs to the first of the categories of heirs.

The four schools say: The mother excludes all kinds of grandmothers (*al-Mughnî*, vol. 6, p. 206), but does not exclude grandfathers, brothers or sisters, nor the full and agnate paternal uncles and aunts, and all of them share the inheritance with her.

The Imāmiyyah observe: The mother, like the father, excludes all kinds of grandparents, brothers and sisters.

The four schools state: The daughter does not exclude the son's son, and two or more daughters exclude the son's daughters, except when they have a male counterpart. But a single daughter does not exclude the son's daughters. A single daughter or daughters exclude cognate brothers.

The Imāmiyyah say: A daughter is like a son and excludes the children's children, both male and female, and, with greater justification, the brothers and sisters.

The schools concur that a grandfather and brother exclude paternal uncles and aunts, and a child, male or female, brings down the husband's share from a half to one-fourth and the wife's share from one-fourth to one-eighth. The schools differ regarding the minimum number of brothers or sisters required to diminish the mother's share from one-third to one-sixth.

The Mālikîs say: The minimum required to diminish her share is two brothers. The Ḥanafī, the Shāfi'ī and the Ḥanbalī schools observe: Two brothers or two sisters suffice.

The Imāmiyyah state: Brothers do not diminish the share of the mother unless the following conditions are fulfilled.

1. There should be two brothers, or a brother and two sisters, or four sisters. Hermaphrodites will be considered sisters.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

2. The absence of impediments to inheritance, such as homicide and difference of religion.

3. That the father be present.

4. The brothers should be either full or agnate.

5. They should have been born. Hence, unborn brothers do not exclude.

6. They should be alive. Hence, if one of them is dead, he will not exclude.

On the whole, the difference between the Sunnî schools and the Imāmî school is that the Imāmiyyah prefer the nearer relative to the more distant, irrespective of his/her belonging to the same category (e.g. the son supersedes the son's son, and the father supersedes the grandfather) or another category (e.g. the son's son supersedes the brothers). They say: One who is related through both parents excludes his consanguine (agnate) counterpart on the same side. Hence a full sister excludes a consanguine brother, and a full paternal aunt excludes a consanguine paternal uncle; but a full paternal uncle does not exclude a consanguine maternal uncle, because they are not from the same side. The Imāmiyyah do not discriminate between male and female heirs regarding their right to inheritance. Therefore, in the same way as the children's children represent the children in their absence, the children of brothers and sisters represent their parents in their absence.

The Sunnî schools do accept the doctrine of preferring the nearer relatives to the more distant ones, though not totally; rather, they lay down the condition of unity of class, i.e. the nearer one excludes another who is related through him/her, except the uterine (cognate) brothers, who are not excluded by the mother though they are related through her, and similarly the great grandmother, who inherits with the grandmother, i.e. with her daughter. But if he/she is not related through another, he/she is not excluded; e.g. the father, though he excludes the paternal grandfather, does not exclude the mother's mother, and similarly the mother, though she excludes the maternal grandmother, does not exclude the paternal grandfather. The uncles and aunts of the decedent are preferred over the uncles

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and aunts of the decedent's father. Similarly, the grandparents of the decedent are preferred over his/her father's grandparents. The nearer grandmother excludes the more distant grandmother. All this is due to the doctrine of the nearer being preferred.[18] These schools also differentiate between male and female heirs. Hence, the brothers of the decedent inherit with his daughters, though they do not inherit with his sons. The brothers' children do not inherit with the grandparents in the opinion of these schools, as opposed to the Imāmiyyah.

This is a very brief account of the exclusions through which I intended to highlight the salient features of the Imāmī and the Sunnī schools. Otherwise, the chapter on exclusions is a vast one and it is possible for a writer to include in it all the issues of inheritance. This will become clear from the forthcoming discussions.

The Return (al-Radd):

The question of 'return' arises only in the case of the sharers, because their shares are fixed and determined. At times they exhaust the whole estate (e.g. parents and two daughters, the parents receiving one-third, and two-thirds going to the two daughters), and on other occasions they do not exhaust it (e.g. a daughter and the mother, the former receiving half and the latter one-sixth). In the latter case, the question arises as to what is to be done with the remaining one-third and to whom should we return it. In the event of there being no specific shares for the heirs (such as brothers and uncles, who do not inherit as sharers) the question of return does not arise.

The four Sunnī schools say: The excess of the sharers' shares is given to the residuaries. Hence if the deceased has a single daughter she will take half and the remainder goes to the father; and in his absence, to the full or consanguine sisters because they are residuaries with a daughter; and in their absence to the full brother's son; and in his absence to the consanguine brother's son; and then, in this order: the paternal uncle, the consanguine uncle and the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

paternal uncle's son. In the absence of all of them, the excess will be returned to the sharers in the proportion of their shares, except the husband and the wife, as they are not entitled to the return. For example, if a decedent leaves behind mother and a daughter, the mother will take one-sixth and the daughter half as their respective shares, and the remainder will be given to them as 'return' by division into four parts, the mother receiving one-fourth and the daughter three-fourths. Similarly, if he leaves behind a consanguine and a uterine sister, the former will take the daughter's share and the latter the mother's share.

The Shāfi'ī and the Mālikī schools say: If there is no residuary, the remainder, after the assignment of the sharers' shares, will escheat to the *bayt al-māl.*

The Imāmiyyah observe: The sharers are entitled to the remainder in proportion to their shares by way of 'return' if there exists no relative in their category; and if such a relative exists, after the sharer takes his share the remainder will go to that relative (e.g. when the mother and the father are heirs, after the mother takes her determined share, the remainder shall go to the father). If there exists with a sharer a relative who does not belong to his category, the sharer will take his share and then also the remainder by way of 'return' (e.g. when the decedent is survived by his mother and a brother, she, after taking one-third as a sharer, will take the remainder by way of 'return,' the brother receiving nothing because he belongs to the second category, while she belongs to the first category). Similarly, if there exists a consanguine sister with a paternal uncle, she will inherit the first half as a share and the second half by way of 'return,' to the exclusion of the uncle, because he belongs to the third category while she belongs to the second category.

The Imāmiyyah do not give the 'return' to a uterine brother or sister in the presence of a consanguine brother or sister. Hence if the decedent is survived by a uterine and a consanguine sister, the former is entitled to one-sixth and the latter to a half (as sharer) as well as the remainder by way of 'return,' to the exclusion of the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

uterine sister. Yes, a uterine brother or sister is entitled to the 'return' if there is none belonging to their category, such as if the decedent is survived by a uterine sister and a consanguine paternal uncle, the whole estate will devolve on her to his exclusion, because he belongs to the third category, while she belongs to the second category.

The Imāmiyyah also do not entitle the mother to the 'return' in the presence of those who prevent her from inheriting in excess of one-sixth. Hence if the deceased has a daughter and parents, and also brothers--who exclude the mother from inheriting one-third--the remainder will go only to the father and the daughter. But if there are no brothers to exclude the mother, the 'return' will be shared by the father, the daughter, and the mother in proportion to their shares.

It will be seen while discussing the inheritance of husband and wife, that the Imāmiyyah entitle the husband and not the wife to inherit by way of 'return' in the absence of all other heirs apart from them.

The Inheritance of a Foetus; Disowned and Illegitimate Children:

The Inheritance of a Foetus:

If a person dies while his wife is pregnant, the distribution will be postponed, if possible, till childbirth; otherwise, a share will be withheld for the child. The schools differ regarding the share to be withheld. The Ḥanafīs observe: The share of a single son will be withheld for the child in the womb, because it is generally so and it is improbable that it should fall short. (*Kash al-ḥaqā'iq fī sharḥ Kanz al-daqā'iq,* vol. 2, *bāb al-farā'iḍ fī fiqh al-Ḥanafiyyah*)

Mu'awwaḍ Muḥammad Muṣṭafā in *al-Mîrāth fī al-Sharî'ah al-'Islāmiyyah* and Muḥammad Muḥammad Sa'fān, quoting from *al-Sirājiyyah,* state that Mālik and al-Shāfi'î have said: A share of four sons and four daughters will be withheld.

A curious incident has been reported in *al-Mughnî* (3rd ed. p.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

314): It has been narrated from al-Māridînî that a pious and learned resident of Yaman informed him that a woman of Yaman gave birth to a thing resembling a paunch. They thought that it contained no child and threw it away on the wayside. When the sun rose and it was warmed up by sunshine, it wriggled and burst open and seven male infants emerged from it. All of them survived and were physically sound, except for the smallness of their bodily members. This gentleman from Yaman further added: One of them wrestled with me and put me down, and I was reproached by the people, who would say, "You were beaten by a seventh of a man!"!

The Imāmiyyah state: The share of two male children will be withheld for caution's sake and the husband and the wife will be given their minimum shares.

A child in the womb will inherit on condition of its being born alive[19] and its mother giving birth to it in less than six months--or even six months, if her husband copulates and dies immediately afterwards. It is also necessary for the maximum gestation period not to expire after the death, in accordance with the difference among the schools regarding this period, as already mentioned in the chapters on marriage and divorce. Therefore, as per consensus, if the child is born after the expiry of the maximum gestation period, he will not inherit.

Child Disowned by the Father (Walad al-Mulā'anah):

The schools concur that there will be no mutual inheritance between the couple if the husband accuses the wife of adultery, and between the child born thereafter and its father and paternal relatives. However, the child, its mother and maternal relatives will inherit mutually. While inheriting from the child, its relatives through both parents and relatives through the mother enjoy the same status. Hence his full and uterine brothers are considered equal in status.

The Imāmiyyah observe: If the father takes back his accusation and accepts the child, the child will inherit from the father, but the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

father will not inherit from the child.

The Illegitimate Child (Walad al-Zinā):

The four Sunnî schools concur that an illegitimate child is similar to a child disowned by the father, in all that which has been mentioned concerning the absence of mutual inheritance between the child and the father and the presence of such inheritance between the child and its mother. (*al-Mughnî,* vol. 6, *bāb al-farā'iḍ*)

The Imāmiyyah say: There is no mutual inheritance between an illegitimate child and its fornicatrix mother, in the same manner as there is no such inheritance between the child and its fornicator father, because there is a common impeding cause between the two, i.e. fornication.

The Marriage and Divorce of an Ill Person:

The Ḥanafî, the Shāfi'î and the Ḥanbalî schools say: Marriage during illness is similar to marriage during health in respect of each spouse inheriting from the other, irrespective of whether the marriage is consummated or not. In this context an 'ill person' means one in his death-illness.

The Mālikîs observe: If a marriage contract is concluded during the illness of either spouse, the marriage will be considered invalid except where it has been consummated. (*al-Mughnî, bāb al-farā'iḍ*)

The Imāmiyyah state: If a person marries during death-illness and dies before consummation, the wife will neither be entitled to *mahr* nor inheritance from him. Further, he will not be entitled to inherit her if she dies before him, prior to consummation, and then he dies after her as a result of that illness (*al-Jawāhir, bāb al-mîrāth*). If a woman marries during death-illness, the rule applicable to a healthy woman applies to her concerning the right of the husband to inherit from her.

The schools concur that if an ill person divorces his wife and dies before the completion of the *'iddah,* the wife will inherit from

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

him irrespective of the revocability or irrevocability of the divorce.[20] They also concur that she will not inherit if he dies after the completion of her *'iddah* and before her marriage with another. The Mālikīs and the Ḥanbalīs observe: She will inherit regardless of the length of time.

The Ḥanafī and the Shāfi'ī schools state: After the completion of her *'iddah* she becomes a stranger and is not entitled to any share in the inheritance. (*al-Mughnī, bāb al-farā'iḍ*)

This opinion is in accordance with the Islamic jurisprudential principles, because the marital bond snaps on the completion of the *'iddah,* making her marriage with others permissible, and every woman whose marriage with others becomes permissible does not inherit from her former husband. This principle cannot be departed from except on the presence of a Qur'ānic verse or a confirmed tradition.

The Imāmiyyah say: If a husband divorces his wife during his death-illness in a revocable or irrevocable manner (as in the case of a triple, menopausal divorcee with whom marriage has not been consummated), and then dies before the completion of one year from the date of divorce, she will inherit from him if the following three conditions are fulfilled:

1. that his death be the result of the illness during which he divorced her;
2. that she should not have remarried;
3. that the divorce should not have been given on her demand.

They base these conditions on the traditions of the Ahl al-Bayt (*'a*).

The Father's Share in Inheritance:

Following are the different situations relating to the father's share in inheritance:

1. The schools concur that the father, in the absence of the mother, children, children's children, grandmothers and spouse, is entitled to the whole estate, though by relationship (*qarābah*) according to the Imāmiyyah, and through *ta'ṣîb* according to the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

rest, i.e. the difference lies in naming the cause leading to inheritance, not in the actual inheritance and his share in it.

2. If a spouse exists with the father, he/she will take the maximum share to which he/she is entitled and the remainder, as per consensus, will go to the father.

3. If there are with the father a son, or sons, or sons and daughters, or the son's son how lowsoever, the father will take one-sixth and the remainder, as per consensus, will go to the others.

4. If there is a single daughter with the father, they will be entitled to a half and one-sixth respectively as sharers. The remaining one-third will return to him by way of *ta'ṣîb* according to the Sunnî schools. Hence the daughter receives half as share, and the father the other half as share and 'return.' The father excludes the grandfathers, brothers and sisters, both paternal and maternal, irrespective of their being full, consanguine or uterine.

The Imāmiyyah observe: The remainder will return to the father and the daughter together, and not solely to the father. The remainder will be divided into four parts, the father receiving one part and the daughter three parts, because in every instance of 'return' in which two sharers are involved, the remainder will be divided into four parts, and if three sharers are involved, it will be divided into five parts (*Miftāḥ al-karāmah,* vol. 28, p. 115).

5. If there are two or more daughters with the father, according to the Sunnî schools the daughters will take two-thirds and the father one-third.

The Imāmiyyah say: The father receives one-fifth and the daughters four-fifths, because the one-sixth which remains after they have taken their shares returns to all of them and not solely to the father, as mentioned in the preceding example.

6. If a maternal grandmother is present with him, she will take one-sixth and he the remainder, because in the opinion of the Sunnî schools a maternal grandmother is not excluded by the father (*al-'Iqnā' fî ḥall alfāẓ Abî Shujā'*, vol. 2, *bāb al-farā'iḍ*)

The Imāmiyyah observe: The father will receive the whole estate and the grandmother is not entitled to anything in any manner,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

because she belongs to the second category and he to the first.

7. If there are the father and mother together, she will take one-third if not prevented from it according to the Sunnî schools, by two brothers or sisters, and by two brothers or one brother and two sisters or four sisters according to the Imāmiyyah, as mentioned while explaining *ḥujb;* the father will take the remainder. But if she is partially excluded by the brothers, her share will be reduced to one-sixth and the father will take the rest. A consensus prevails here.

A question might be appropriately raised here: Why do the Imāmiyyah not return the remainder to both parents, as done by them if a daughter inherits with the father?

The reply is that both the father and the daughter are sharers when they inherit together, and when sharers inherit together each takes his determined share and the remainder 'returns' to all of them in proportion to their shares. In the present case, the father while inheriting with the mother inherits as a residuary and not as a sharer because there is no child present, whereas the mother inherits as a sharer, and whenever a sharer inherits together with a residuary the latter takes the remainder. (*al-Masālik,* vol. 2, *bāb al-mîrāth*)

8. If a daughter's son is present with the father, the father will take the whole estate and the daughter's son, according to the four Sunnî schools, will get nothing because he is among the distant kindred.

The Imāmiyyah say: The father will receive one-sixth as his share and the daughter's son will take half as his mother's share. The remainder will return to both exactly in the manner mentioned in the fourth illustration pertaining to his inheriting with the daughter.

The Mother's Share in Inheritance:

Following are the different situations relating to the mother's inheritance:

1. The Imāmiyyah observe: The mother is entitled to the whole estate in the absence of the father, children, children's children and spouse.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The other shcools say: The mother will not receive the whole estate except in the absence of all sharers and residuaries, i.e. in the absence of the father, the paternal grandfather, children, children's children, brothers, sisters, their children, grandfathers how highsoever, paternal uncles and their children. As to the presence of grandmothers, they do not prevent her from inheriting the whole estate, because all of them are excluded by her in the same manner as the grandfathers are excluded by the father. Similarly, maternal uncles and aunts do not prevent her from inheriting the whole estate, because they are related to the decedent through her and one who is related through another person is excluded by that person.[21]

2. If the situation mentioned in the first mode prevails along with the presence of a spouse, the spouse will take his/her maximum share and the remainder will go to the mother.

3. If with the mother are present a son, or sons, or sons and daughters, or son's son how lowsoever, according to consensus she will take one-sixth and the remainder will be taken by the others.[22]

4. If a single daughter inherits with the mother and there are no other residuaries, such as the paternal grandfather, brothers, and paternal uncles, and no sharers, such as sisters and spouse, the mother will receive one-sixth and the daughter half as sharers, and the remainder, according to the Imāmī, the Ḥanafī and the Ḥanbalī schools, will be shared by both after dividing it into four parts, the mother receiving one part and the daughter three parts.

The Shāfi'ī and the Mālikī schools state: The remainder will escheat to the *bayt al-māl,* and it has been mentioned in *al-'Iqnā' fī ḥall alfāẓ Abî Shujā'* (vol. 2) that if an orderly system of *bayt al-māl* does not exist, as when the ruler is unjust, the remainder will return to the sharers in porportion of their shares.

5. If there are two daughters inheriting with the mother in the absence of all other sharers and residuaries, as in the preceding illustration, the views expressed there apply here as well, except that the remainder here will be divided into five parts, one part going to the mother and the other four to the two daughters.

6. The case where she inherits with the father has been

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

discussed in the preceding section regarding the father's share in inheritance.

7. Where she inherits with the paternal grandfather in the absence of the father, the four Sunnī schools observe: The paternal grandfather will represent the father, and the rule is the same in both cases.

The Imamiyyah say: The mother is entitled to the whole estate, to the exclusion of the grandfather, because he belongs to the second category and she to the first. As per consensus, the grandmothers, paternal as well as maternal, do not inherit with the mother and, similarly, the maternal grandfather too does not inherit with her. According to the Sunnī schools, none of the grandparents except the paternal grandfather inherit with the mother, and none of them inherit with the father except the maternal grandmother. But the Imāmiyyah do not consider grandparents capable of inheriting with either parent.

8. If a full or consanguine brother is present with the mother, she will, according to the Sunnī schools, take one-third as sharer and the remainder will go to the brother on account of *ta'ṣīb,* and if there are with her two full or consanguine or uterine brothers or sisters,[23] she will take one-sixth and the remainder will be taken by the brothers, because she is excluded by them from inheriting more than one-sixth. According to the Imāmiyyah, she will take the whole estate by share and 'return,' to the exclusion of the brothers.

9. If along with her are present a full or consanguine sister or two such sisters, the rule is like the case where a daughter or two daughters are present with her, as mentioned in the fourth and fifth cases.

10. If a single uterine brother or sister is present with her and there exists no other sharer or residuary, he/she will take one-sixth and the mother one-third, as sharers, and the remainder will 'return' to them in proportion to their shares. If there are with her two or more uterine brothers or sisters, they and the mother will each take one-third as sharers and the remainder will be proportionately shared by them together, because that which remains after the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

sharers have been assigned their shares returns to them proportionately in the opinion of the Ḥanafī and Ḥanbalī schools, and escheats to the *bayt al-māl* according to the Shāfi'īs and the Mālikīs. The Imāmiyyah give the whole estate to the mother.

11. If a full sister and a consanguine sister are present with her, the mother will take one-third, the full sister half, and the consanguine sister one-sixth to complete the two-thirds (for her one-sixth and the full sister's half add up to two-thirds, the maximum which two or more sisters can inherit). The Imāmiyyah entitle the mother to the whole estate.

12. According to the Sunnī schools the presence with her of full or consanguine paternal uncles and aunts is like that of full or consanguine brothers with respect to inheritance and their respective shares.

13. Where there are with her a paternal uncle and a uterine sister, the mother will take one-third, the sister one-sixth, and the remainder will go to the uncle. Hence the uncle who, according to the Imāmiyyah, belongs to the third category, inherits together with the sister (who belongs to the second category) and the mother (who belongs to the first category). The Imāmiyyah entitle the mother to the entire estate.

14. If with the mother are present the husband, uterine brothers and full brothers, this case is called *al-mas'alat al-ḥimāriyyah* (the case of the ass), because in such a case the Caliph 'Umar had recognized the uterine brothers' right to inheritance and excluded the full brothers, which led one of the full brothers to say:

يا أميرَ المُؤْمنينَ هَبْ أنَّ أبانا كانَ حِماراً

O Leader of the Faithful, assume that our father were a donkey.

Thereat, 'Umar changed his decision and included them among the heirs.

The Ḥanafī and the Ḥanbalī schools observe: The husband will take half, the mother one-sixth, and the uterine brother one-third.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The full brothers will receive nothing as they are residuaries and the inheritance is exhausted by the sharers alone; i.e. every sharer takes his share and nothing remains for the residuaries.

The Mālikī and the Shāfi'ī schools say: The one-third will be distributed among the full and uterine brothers, a male receiving the share of two females (*al-Mughnî,* vol. 6, p. 180, 3rd ed.)

The Imāmiyyah state: The whole estate goes to the mother.

15. If only a daughter's daughter is present with the mother, according to the Sunnī schools, the mother will take one-third as sharer and the rest as 'return' and the daughter's daughter will receive nothing.

The Imāmiyyah say: The position of the mother with the daughter's daughter is similar to her position with the daughter, as mentioned in the fourth case.

Does the Mother Take One-Third of the Remainder?

The Sunnī schools observe: If the father and a spouse are present with the mother, the mother will take one-third of what remains after the spouse has taken his/her share, not a third of the undivided estate. The stated reason, as mentioned in *al-Mughnî,* is that if she takes one-third of the original estate, her share will exceed the father's share. Al-Shaykh Abū Zuhrah says in *al-Mîrāth 'inda al-Ja'farîyyah*: "The father's taking half the mother's share appears far-fetched from the viewpoint of the intent of the Qur'ānic verse." He means that on the basis of the mother's taking one-third from the original estate and not from the remainder, her share will be 8/24, the husband's share 12/24 and the father's 4/24, which is half the mother's share. It is improbable for the verse to have intended such a result. But if she takes one-third of the remainder, her share will be 4/24 and the father's will be 8/24, which is twice her share; this is more probable and possibly what might have been intended by the verse.

The author of *Kashf al-ḥaqā'iq* says: If the paternal grandfather is present instead of the father, he will not cause the mother to take

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

one-third of the remainder; rather, she will take one-third of the original estate. Accordingly, this situation arises only when the father and a spouse are present with the mother, and other instances are not covered by it.

The Imāmiyyah say: The mother is entitled to one-third of the original estate and not to a third of the remainder, irrespective of the presence of a spouse because the *ẓāhir* (literal sense) of the Qur'ānic verse: فَلِأُمِّهِ الثُّلُثُ ("for his mother is one-third") proves that it is one-third of what the decedent has left, and this statement has not been restricted to a situation where a spouse is not present. Further, the rules of the Sharī'ah are not derived by reasoning or by applying the criterion of improbability.

The Inheritance of Children and Grandchildren:

The Sons:

In the absence of the decedent's parents and spouse, a son is entitled to the whole estate, and similarly two and more sons. When the sons and daughters inherit together, a male receives twice a female's share. A son, as per consensus, excludes grandchildren, brothers, sisters and grandparents. There is consensus that a son's son is like a son in the son's absence.

The Daughters:

The Imāmiyyah observe: A daughter or two or more daughters, in the absence of the parents and spouse, will inherit the whole estate (a single daughter takes half as her 'share' and the other half as 'return', and similarly two or more daughters take two-thirds as their 'share' and the remainder as 'return', without anything going to the residuaries).

The four Sunnī schools say: Full and agnate sisters are residuaries with daughter or daughters. This implies that a single daughter will inherit half of the estate as her share in the absence of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

a son or another daughter, and that two or more daughters will inherit two-thirds as their share in the absence of a son. Hence if the decedent has a daughter, daughters, or a son's daughter, and also has a full or an agnate sister or sisters, if the decedent has no brother the sister or sisters will inherit the remainder as residuaries after the daughter or daughters have taken their share. A full sister is like a full brother in the application of *ta'ṣîb* and in excluding an agnate brother's son and those who come after him in the order of residuaries, and an agnate sister is a residuary like an agnate brother and excludes a full brother's son and those residuaries who come after him. (*al-Mughnî*, 3rd. ed. vol. 6, p. 128, and al-Ṣa'îdî's *al-Mîrâth fî al-Sharî'at al-'Islâmiyyah*, 5th ed. p. 16)

The Imāmiyyah state: None of the brothers or sisters inherit along with a daughter or daughters, nor with a son's daughter or a daughter's daughter, because a 'daughter', how lowsoever, belongs to the first category of heirs, whereas brothers and sisters belong to the second.

The Ḥanbalî and the Ḥanafî schools state: If there is no sharer, residuary, or any other heir except daughters, they will be entitled to the whole estate, partly as a share and partly by the way of 'return'. But if the father is present with them, he will take the remainder after their share is given. If the father is not present, the remainder will go to the grandfather, and in his absence to the full brother, then to the agnate brother, then to the full brother's son, then to the agnate brother's son, then to the full paternal uncle, then to the agnate paternal uncle's son. When none of these residuaries and sharers (such as sisters) is present, the daughters take the entire estate even if the decedent has daughters' children, sisters' children, brothers' daughters, uterine brothers' children, paternal aunts of all kinds, uterine paternal uncles, maternal uncles and aunts, and maternal grandmother.

The Mālikî and the Shāfi'î schools say: If the above-mentioned situation arises, a daughter or daughters will take their prescribed share and the remainder will escheat to the *bayt al-māl*. (*al-Mughnî*, vol. 6, *bāb al-farā'iḍ* and *Kashf al-ḥaqā'iq*, vol. 2, p. 356)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Children's Children:

The schools differ where the decedent is survived by children and grandchildren. The four Sunnî schools concur that a son excludes both grandsons and granddaughters from inheritance; i.e. the children's children do not inherit anything in the presence of a son. But, if the decedent leaves behind a daughter and son's children, if the son's children are all males or some males and some females, the daughter will take a half and the other half will go to the son's children, who divide it among themselves in the proportion of the male taking twice a female's share. If there are son's daughters along with a daughter, the daughter will be entitled to a half and the son's daughter or daughters to one-sixth and the remainder will go to the sister. (*al-Mughnî*, 3rd ed. vol. 6, p. 172)

If the decedent has two daughters and son's children, and there is no male among the son's children, the latter will not be entitled to anything. But if there is a male among them, the two or more daughters will take two-thirds and the remainder will go to the son's children, who divide it among themselves in the proportion of the male taking the share of two females (*al-Mughnî*, vol. 6, pp. 170, 172). A daughter excludes the children of another daughter in a manner similar to the exclusion of a son's son by a son.

The Imāmiyyah say: None of the grandchildren inherit in the presence of a single child, male or female, of the decedent. Hence if he leaves behind a daughter and a son's son, the entire estate will go to the daughter to the exclusion of the son's son.

If the decedent has no surviving children, male or female, though has children's children, the four Sunnî schools concur that a son's son is like a son and represents him in excluding others from inheritance, in the application of *ta'ṣîb*, etc. And if there are sisters inheriting with the son's son, the estate will be divided in the proportion of a male receiving twice a female's share. The four schools also concur that son's daughters are like daughters in the absence of daughters, in that a single son's daughter is entitled to half the estate, and if they are two or more they are entitled to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

two-thirds. Like daughters, they exclude uterine brothers from inheritance, and share the estate with the son's son, a male receiving twice a female's share, irrespective of whether the son's son is their own brother or their paternal uncle's son. To sum up, a son's daughter is similar to a daughter. In other words, the children of the decedent's son are exactly like his own children. (*al-Mughnî,* vol. 6, p. 169)

According to the Shāfi'î and the Mālikî schools, daughters' children do not inherit anything irrespective of their sex, because they are considered as distant kindred. Hence if none among the sharers and residuaries exist, the daughters' children will be excluded from inheritance and the estate will escheat to the *bayt al-māl.* The same applies to the son's daughters' children.

The Ḥanafî and the Ḥanbalî schools state: The son's daughters' children will inherit in the absence of sharers and residuaries. (*al-Mughnî,* vol. 6, *faṣl dhawî al-'arḥām* and *Kashf al-ḥaqā'iq,* vol. 2, p. 255).

This was a summary of the opinions of the four Sunnî schools regarding the inheritance of grandchildren in the absence of children.

The Imāmiyyah observe: The children's children represent the children in their absence and each among them takes the share of the child through whom he is related. Therefore, the daughter's children, even if several and males, are entitled to one-third, and the son's children, even if a single daughter, are entitled to two-thirds. They distribute their share among themselves equally if of the same sex, and if they differ then a male is entitled to twice a female's share, irrespective of their being son's children or daughter's children, and the nearer descendants exclude the remote ones. They inherit jointly with the decedent's parents and the 'return' reverts to the daughter's children, males or females, in the same manner as it does to the daughter. If the husband or the wife inherits with them, they are entitled to their minimum share.[24]

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Inheritance of Brothers and Sisters:

Brothers and Sisters:

In the opinion of the Sunnī schools, brothers and sisters inherit in the absence of the son and the father,[25] and inherit jointly with the mother and daughters. According to the Imāmiyyah, they do not inherit except in the absence of parents, children and the children's children, male or female. Brothers and sisters are of three kinds:

1. full,
2. agnate (consanguine),
3. cognate (uterine).

Full Brothers and Sisters:

The following situations pertain to the inheritance of full brothers and sisters:

1. Where males and females inherit together and there does not exist along with them any sharer or residuary (i.e. in the absence of the father, mother, daughter, grandmother, son and son's son), they are entitled to the whole estate and distribute it in accordance with the rule that a male receives twice a female's share.

2. Where they consist of males, or males and females, and there is along with them a uterine brother or sister, the uterine brother or sister will take one-sixth and the remainder will go to the full brothers and sisters, a male taking the share of two females. If there are two or more uterine brothers or sisters, they are entitled to one-third irrespective of their sex, with the remainder going to the full brothers and sisters.

3. Where the decedent has a full sister, she is entitled to a half as her share; if more than one, their share is two-thirds. If there does not exist along with a full sister or sisters a daughter or any uterine brothers and sisters, or *ṣaḥīḥ* grandfathers[26] and *ṣaḥīḥ* grandmothers, the remainder, according to the Imāmiyyah, will return to the sister or sisters.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The other four schools say: The remainder will return to the residuaries who are: the full paternal uncle, and in his absence the agnate paternal uncle, in his absence the full paternal uncle's son, and then the agnate paternal uncle's son, and in his absence the remainder will return, according to the Ḥanafī and the Ḥanbalī schools, to the sister or sisters because only the sharers are entitled to the return conditional on the absence of residuaries; but according to he Shāfi'ī and the Mālikī schools the remainder will escheat to the *bayt al-māl.*

To sum up, the position of full sisters is like that of daughters; a single sister takes a half, and two or more two-thirds, and if they inherit jointly with full brothers they divide the estate, with a male taking twice a female's share.

4. The Sunnī schools say: If the decedent has a full and an agnate brother, the former will inherit to the exclusion of the latter, and the agnate brother will take the full brother's place in his absence.

If the decedent has full sister and one or more agnate sisters the full sister takes a half and the agnate sister or sisters one-sixth, except when there is also an agnate brother, in which case they are entitled along with their brother to a half, which they distribute in the proportion of a male taking twice a female's share.

If the decedent has full and agnate sisters, the full sisters are entitled to two-thirds and the agnate sisters receive nothing unless accompanied by an agnate brother, in which case they, along with their brother, are entitled to the remainder, which they distribute in the proportion of a male receiving twice a female's share.

To sum up, a full brother excludes an agnate brother; a single full sister does not exclude agnate sisters; and full sisters exclude the agnate sisters from inheritance when not accompanied by a male counterpart.

The Imāmiyyah state: Full siblings exclude agnate siblings irrespective of their number and sex. Therefore, if the decedent leaves behind a full sister and ten agnate brothers, she will inherit to their exclusion.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

5. If there is with a sister or sisters a daughter or two daughters of the deceased, the daughter or daughters will take their respective Qur'ānic share of half or two-thirds, and the remainder, according to the Sunnī schools, will go to the sister or sisters; a son's daughter is exactly like a daughter in this respect.

The Imāmiyyah observe: The whole estate will go to the daughter or daughters and the sisters will receive nothing.

Agnate Brothers and Sisters:

Agnate brothers and sisters take the place of full brothers and sisters in their absence, and the same rule applies to both. A single sister will receive a half and two or more sisters two-thirds; the principle of 'return' is similarly applicable to both in the manner mentioned earlier.

Uterine Brothers and Sisters:

Uterine brothers and sisters do not inherit in the presence of the father, the mother, the paternal grandfather, children, sons' daughters (i.e. the uterine brothers and sisters are excluded by the mother, the daughter and the son's daughter). We have mentioned earlier while discussing the inheritance of the mother and the daughter that according to the Sunnī schools full and agnate brothers and sisters inherit with the mother and the daughter. Rather, if they are present along with daughters' children, it is only they, according to the four Sunnī schools, who inherit by excluding the daughters' children, even if they are males. The uterine brothers and sisters are not excluded by the presence of full or agnate brothers and sisters, and a single uterine brother or sister inherits one-sixth; if more than one, they inherit one-third, irrespective of their sex, and, according to consensus, they share the inheritance equally, with a female receiving a share equal to that of a male.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

A Subsidiary Issue:

The author of *al-Mughnî* observes: if there exists a full, an agnate and a cognate sister, the first will take a half, and the second and the third one-sixth, with the remainder returning to them in the proportion of their shares. This implies that the corpus be divided into five parts, the full sister taking three of them and the other two sisters one each.

The Imāmiyyah say: The full sister will take a half and the uterine sister one-sixth, without the agnate sister receiving anything because of her exclusion by the full sister; the remainder will return solely to the full sister.[28] Here the corpus will be divided into six parts, five of them going to the full sister and one to the uterine sister.

Children of Brothers and Sisters:

The four Sunnî schools say: An agnate brother excludes from inheritance a full brother's son, and the full brother's sons exclude the agnate brother's sons. As to the children of sisters of all kinds (full, agnate and uterine), the uterine brothers' children and the full and agnate brothers' daughters, all of them belong to the group of distant kindred who do not inherit anything in the presence of full or agnate paternal uncles and their children. In the absence of full or agnate uncles and their children, they are entitled to inherit in the opinion of the Ḥanafî and Ḥanbalî schools, while according to the Shāfi'î and Mālikî schools they are not so entitled and are considered essentially incapable of inheriting and the estate escheats to the *bayt al-māl*[29] (*al-Bidāyah wa al-nihāyah,* vol. 2, p. 345, and *al-Mughnî,* vol. 6, p. 229)

The Imāmiyyah state: The children of brothers and sisters of all kinds do not inherit in the presence of even a single brother or sister of any kind, and when no brother or sister is present, their children take their place, each taking the share of the person through whom he is related to the decedent. Hence, one-sixth is the share of the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

son of a uterine brother or sister, and one-third is the share of the children of uterine brothers when the number of the brothers is more than one. The remainder goes to the children of a full or agnate brother, the full brother's children excluding the agnate brother's children. Hence an agnate brother's son does not inherit with a full brother's son. The children of uterine brothers and sisters share the inheritance equally among themselves like their parents, while the children of agnate brothers and sisters share their inheritance with disparity, a male taking twice a female's share, like their parents. The higher in generation among the brothers' and sisters' descendants exclude those of the lower generation; hence a brother's grandson is excluded in the presence of a sister's daughter, in accordance with the rule that the nearer excludes the remote. The children of brothers, like their parents, inherit jointly with the grandparents in the absence of their parents; hence a brother's or sister's son will inherit with the paternal grandfather, and similarly the great grandfather will inherit with the brother in the absence of the grandfather.

The Maternal Grandfather:

The Sunnî schools observe: The maternal grandfather is included in the category of distant kindred who do not inherit in the presence of a sharer or residuary. Accordingly, the maternal grandfather does not inherit with the paternal grandfather, the brothers and sisters, the children of full or agnate brothers, the paternal uncles or their sons. When all of them are absent and there is no sharer present, according to the Ḥanafî and the Ḥanbalî schools, the maternal grandfather is entitled to inherit. According to the Shāfi'î and the Mālikî schools, he is never entitled to any inheritance.

The Imāmiyyah say: The maternal grandfather inherits with the paternal grandfather and with brothers and sisters of all kinds, and, likewise, he excludes paternal and maternal uncles and aunts of all kinds from inheritance, because he belongs to the second category of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

heirs, whereas they belong to the third. Hence if a maternal grandfather is present with a full paternal uncle, he takes the whole estate to the exclusion of the paternal uncle.

Grandmothers:

There is consensus that the mother excludes from inheritance all kinds of grandmothers.

The Sunnî legists state: In the absence of the mother, her mother represents her and inherits jointly with the father and the paternal grandfather, taking one-sixth in their presence. Similarly, there is no difference of opinion concerning the maternal and paternal grandmothers inheriting jointly. According to the Sunnî schools, they are entitled to one-sixth, which they share equally among themselves.

The nearer grandmother excludes the more distant grandmother on her side. Hence the mother's mother excludes the latter's mother; the father's mother also excludes similarly. The nearer maternal grandmother (e.g. the mother's mother) prevents a remote paternal grandmother (e.g. the paternal grandfather's mother). The Sunnî schools differ among themselves as to whether or not a nearer paternal grandmother, such as the father's mother, excludes a remote maternal grandmother, such as the maternal grandfather's mother (*al-'Iqnā' fî ḥall alfāẓ Abî Shujā'*, vol. 2, and *al-Mughnî*, vol. 5, *bāb al-farā'ḍ*). According to the Ḥanbalî's, the father's mother inherits with her son; hence when they inherit together, she takes one-sixth and he the remainder.

The Imāmiyyah say: If the maternal grandmother is present along with the paternal grandmother, the former takes one-third and the latter two-thirds, because the maternal grandfathers and grandmothers take one-third irrespective of whether they are one or more, dividing their share of the estate equally, and the paternal grandparents take two-thirds, whether one or more, and divide their share with disparity (a male taking twice a female's share).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Paternal Grandfather:

The four Sunnî schools concur that the father's father represents the mother in her absence and inherits jointly with the son, like the father, though differing from the father in respect of his wife, the father's mother, because she does not inherit with the father, except in the opinion of the Ḥanbalîs, but inherits jointly with the paternal grandfather, i.e. with her husband. The father also differs from the paternal grandfather in the case of both parents jointly inheriting with a spouse; here, the mother inheriting jointly with the father and spouse receives one-third of the remainder after deducting the share of the spouse, and while inheriting jointly with the paternal grandfather and spouse she receives one-third of the original estate and not one-third of the remainder.

The four schools also concur that the paternal grandfather excludes from inheritance uterine brothers and sisters as well as the children of full and agnate brothers. These schools differ among themselves concerning whether the paternal grandfather excludes full and agnate brothers and sisters or if he inherits jointly with them.

Abū Ḥanîfah observes: The paternal grandfather excludes all kinds of brothers and sisters from inheritance, exactly in the manner that they are excluded by the father. This is despite the fact that according to the Sunnî schools the maternal grandfather excludes none of the different kinds of brothers and sisters, because he is included, as mentioned earlier, among distant kindred.

The Mālikî, the Shāfi'î, and the Ḥanbalî schools and the two disciples of Abū Ḥanîfah, Abū Yūsuf and Muḥammad ibn al-Ḥasan, state: Full and agnate brothers and sisters inherit jointly with the paternal grandfather. The manner of their inheriting with him is that he will be given the greater of these two: one-third of the whole estate or a brother's share. Accordingly, if there exist a brother and a sister, he will receive equal to a brother's share and take two-fifths of the estate, and if there exist three brothers, he will take one-third because a brother's share will be one-fourth. (*al-Mughnî*, vol. 6, p. 218)

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Imāmiyyah observe: The grandparents, brothers and sisters inherit together and belong to the same category. Hence if they exist together and are related to the decedent from the father's side, the grandfather and the grandmother will take the share of a brother and a sister respectively and the estate will be distributed with each male receiving twice a female's share. And if they are all related through the mother, they will distribute the estate with a male receiving twice the share of a female.

And if they exist together and are related to the deceased from either side--such as if there are with the maternal grandparents full or agnate brothers and sisters--the grandfather or the grandmother or both together will inherit one-third and the brothers and sisters two-thirds.

And if the paternal grandparents exist along with uterine brothers and sisters, a sole uterine brother or sister will receive one-sixth; if they are more than one, they will be entitled to one-third, distributed equally among males and females, with the remainder going to the grandparents who distribute it with the grandfather receiving twice the share of the grandmother.

'Children' how low soever, of brothers and sisters of all kinds, represent their parents in their absence while inheriting along with all kinds of grandparents, each one of them inheriting the share of the person through whom he or she is related.

The Inheritance of Paternal and Maternal Uncles and Aunts:

The four schools say: Aunts, both paternal and maternal, uterine paternal uncles and all kinds of maternal uncles and aunts do not inherit with full or agnate paternal uncles and their sons.[30] Hence if there exists a full or agnate paternal uncle or his son, all the above-mentioned will be excluded from inheritance because they belong to the class of distant kindred, whereas he belongs to the class of residuaries, and according to them the residuaries supersede the distant kindred; rather, the Shāfi'ī and the Mālikī schools do not consider them capable of inheriting at all, as mentioned repeatedly

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

above.

A full paternal uncle inherits in the absence of full or agnate brothers and their sons, and not with full and agnate sisters, because though residuaries, they (the sisters) supersede the paternal uncle in the application of the doctrine of *ta'ṣib.*

A full paternal uncle inherits jointly with the daughter and the mother, because the two inherit as sharers and he as a result of *ta'ṣîb,* and when a residuary inherits jointly with a sharer, the sharer takes his share and what remains of the estate goes to the residuary. And if there is no sharer at all, the residuary receives the whole estate. Accordingly, if there are daughter's children or daughter's son's children with full or agnate paternal uncle or their sons, according to the four schools the whole estate will go to the uncle or his son to the exclusion of the daughter's children, even if there happen to be males among them. According to the Imāmiyyah the opposite applies and the whole estate is inherited by the daughter's children to the exclusion of the paternal uncle.

In the absence of a full paternal uncle, the agnate paternal uncle takes his place, and in his absence the full paternal uncle's son. As to the mode of inheritance of a full paternal uncle and those who take his place, he takes, as pointed out earlier, the whole estate in the absence of all sharers, and in their presence he takes the remainder. To sum up, a full or an agnate paternal uncle is exactly like a full brother, or an agnate brother in the absence of a full brother.

The nearer 'paternal uncle' will supersede the distant one; hence the decedent's paternal uncle supersedes his father's paternal uncle, and the father's paternal uncle supersedes the grandfather's paternal uncle. Similarly, the full paternal uncle supersedes the agnate paternal uncle. In the absence of full and agnate paternal uncles and their sons, according to the Ḥanafî and the Ḥanbalî schools, uterine paternal uncles, paternal aunts of all kinds, maternal uncles and maternal aunts become entitled to inherit. If one of them exists solely, he will receive the whole estate, and if they exist together, the agnates will receive two-thirds and the cognates one-third. Hence if the decedent is survived by a maternal uncle and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

a paternal aunt, the uncle will receive one-third and the aunt two-thirds. The uterine maternal uncles and aunts distribute the estate in the proportion of a male receiving twice the share of a female, despite the fact that the uterine brother's children distribute the estate by allocating equal shares to males and females.[31] ('Abd al-Muta'āl al-Ṣa'īdī's *al-Mīrāth fī al-Sharī'at al-'Islāmiyyah, faṣl irth dhawī al-'arḥām*)

The Imāmiyyah state: In the absence of the parents, children, children's children, brothers, sisters, brothers' and sisters' children and the grandparents, the uncles and aunts, both maternal and paternal and of different kinds, become entitled to the estate. Some among them inherit to the exclusion of some others, while others among them inherit jointly.

If there exist paternal uncles and aunts and there are no maternal uncles and aunts with them, then a single paternal uncle or aunt is entitled to the entire estate irrespective of whether he or she is a full, an agnate or a uterine uncle or aunt.

If there exist two or more paternal uncles and aunts related similarly to the decedent, and they are all full or agnate, they will distribute the estate with the male taking twice the female's share. If they are all uterine, they will distribute it without any difference between males and females. But if the paternal uncles and aunts differ in the manner of their relationship with the deceased (some being full, some agnate and others uterine) then only the agnates among them will be excluded from inheritance by the full paternal uncles, for they inherit only in the latter's absence. The agnate paternal uncle and aunt will take the same share which the full paternal uncle and aunt would take if present.

If full or agnate paternal uncles and aunts exist together with uterine paternal uncles and aunts, a sole uterine uncle or aunt will be entitled to one-sixth, and if more than one, they together will be entitled to one-third, sharing it equally without differentiating between the sexes.

If there exist maternal uncles and aunts but no paternal uncle or aunt, a sole maternal uncle will take the whole estate irrespective of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

his being full, agnate or uterine. If there are two or more maternal uncles or aunts who are similarly related to the deceased (i.e. they are all either full or agnate or uterine), they will distribute the estate equally among themselves, a male receiving an equal share with a female.

But if they differ in the manner of their relation with the deceased (i.e. some are full, some agnate and others uterine) only the agnates among them will be excluded by their full counterparts. Where the full or agnate maternal uncles or aunts inherit with their uterine counterparts, a sole uterine uncle or aunt will take one-sixth, and if more than one, they together will be entitled to one-third, sharing it equally without differentiating between the sexes, with the remainder going to the full or agnate maternal uncles and aunts who also share it equally without differentiating between the sexes.

If a paternal and a maternal uncle or aunt inherit together, the maternal uncle or aunt will take one-third irrespective of their being one or more, and the paternal uncle or aunt two-thirds irrespective of their being one or more. The maternal uncles and aunts will distribute their share of one-third as they distributed it while they were the sole heirs in the absence of paternal uncles and aunts, and the paternal uncles and aunts will also similarly distribute their share of two-thirds.

In the absence of all paternal and maternal uncles and aunts their children take their place, each of them taking the share of the person through whom he or she is related, irrespective of their being one or more. Hence if one paternal uncle has a number of children and another paternal uncle only one daughter, the single daughter will be entitled to a half and the children of the other uncle to the other half. The nearer from among the paternal or maternal side excludes the remote from its own side as well as from the opposite side; hence a paternal uncle's son does not inherit in the presence of a paternal or a maternal uncle, except in the particular instance where a full paternal uncle's son is present with an agnate paternal uncle, when the whole estate goes to the paternal uncle's son. A maternal uncle's son does not inherit in the presence of a maternal

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

or a paternal uncle; hence if a paternal uncle's son is present with a maternal uncle, the entire estate goes to the maternal uncle, and if a maternal uncle's son is present with a paternal uncle, the whole estate goes to the paternal uncle.

Paternal and maternal uncles and aunts of the decedent and their children supersede in inheritance the paternal and maternal uncles and aunts of his father. Every child born to a nearer relative supersedes the remoter relative. Hence if a paternal uncle's son exists with the father's paternal uncle, the former is entitled to the estate, and similarly a maternal uncle's son when present with the father's maternal uncle, following the rule of the supersedence of the nearer relative.

If the husband, or wife, is present with paternal and maternal uncles or aunts, the husband or the wife will be entitled to his or her maximum share, the maternal uncles or aunts to one-third, irrespective of their number, and the remainder will go to the paternal uncles or aunts irrespective of their number. Hence the reduction of share is borne by the paternal uncle in all cases where the spouse is present along with the paternal and maternal uncles. Therefore, if the husband is present with a maternal uncle or aunt and a paternal uncle or aunt, the husband will take three-sixths, the maternal uncle or aunt two-sixths, and the paternal uncle or aunt one-sixth; and if there is a wife, she will take three-twelfths, the maternal uncle or aunt four-twelfths, and the remainder of five-twelfths will go to the paternal uncle or aunt.

The Inheritance of the Spouses:

The schools concur that the husband and the wife inherit jointly with all other inheritors without any exception, and that the husband is entitled to half the wife's estate if she does not have any child, neither from him nor from another husband, and to one-fourth if she has a child, either from him or from another husband. They also concur that a wife is entitled to one-fourth if the husband has no child, neither from her nor from another wife, and to one-eighth if

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

he has a child from her or from another wife, The four Sunnî schools observe: Here, by 'child' is meant only the decedent's own offspring or the son's child, irrespective of its sex. A daughter's child, on the contrary, does not prevent a spouse from taking his or her maximum share; rather, the Shāfi'î and the Mālikî schools say: The daughter's child neither inherits nor excludes others because it belongs to the category of distant kindred.

The Imāmiyyah state: By 'child' is meant one's offspring as well as the children's, children irrespective of their being sons or daughters. Hence a daughter's daughter, exactly like a son, reduces the share of either spouse from the higher to the lower value.

If there are many wives, they will distribute their share of one-fourth or one-eighth equally among themselves. The schools concur that if a person divorces his wife revocably and then one of them dies during the period of *'iddah* of the divorcée, they will inherit from each other as if the divorce had not occurred.

The schools differ regarding the situation where there is no other heir except the spouse as to whether the remainder will return to the spouse or escheat to the *bayt al-māl.*

The four schools say: It will return neither to the husband nor to the wife (*al-Mughnî*).

The Imāmiyyah are divided on this issue into three groups, each having a different opinion.

The first view is that it will return to the husband and not to the wife; this is the preponderant opinion and the legists have acted accordingly.

The second view is that it returns to both the husband and the wife in all situations.

The third view is that it returns to both in the absence of accessibility to a just (*'ādil*) imam, as is the case at the present, and it returns to the husband and not the wife in the presence of an *'ādil* imam. This is the opinion of al-Ṣadūq, Najîb al-Dîn ibn Sa'îd, al-'Allāmah al-Ḥillî and al-Shahîd al-'Awwal, and their argument is that some traditions say that it returns to the wife while some other traditions say that it does not return to her; hence we consider the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

first group of traditions to be applicable in the absence of an *'ādil* imam and the second group of traditions to be applicable in the event of his presence.

A Missing Person's Property:

A missing person is one who has disappeared with no news of his whereabouts and it is not known whether he is alive or dead. We have discussed in the chapters on marriage and divorce about the rules applicable to his wife and her divoce after four years, and here we intend to discuss the distribution of his property as well as his right to inheritance if any relative of his dies during the period of his disappearance. It is obvious that the divorce of the wife after four years neither entails that his estate be distributed after this period nor that it shouldn't; rather, it is possible that the wife be divorced but the estate be not distributed because there is no causal relationship between divorce and death.

The schools concur that it is *wājib* to delay the distribution of his estate so that a period of time passes after which he is not expected to be alive,[32] and the specification of this period is the prerogative of the judge and differs with circumstances. When the judge gives a ruling announcing his death, the (surviving) relative nearest to him as regards inheritance at the time of this announcement will inherit him, but not any of his relatives who has died during the period of his disappearance.

If a relative of the missing person dies during the period of his disappearance in which there is no news of him, it is *wājib* to set aside his share, which will be considered like the rest of his property until his actual condition is known or until the judge rules announcing his death after the period of waiting.

Inheritance of Persons Killed by Drowning, Fire and Debris:

Both Sunnī and Shī'ī legists have discussed the issue of the inheritance of persons killed by drowning, fire, building collapse and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the like. They differ regarding the inheriting of one of them from another in an obscure situation in which it is not known whose death among them took place earlier.

The Imams of the four Sunnī schools, the Ḥanafī, the Shāfi'ī, the Mālikī and the Ḥanbalī, have observed that none among them inherits from the other and the estate of each one of them will be transferred to the living heirs, excluding the heirs of the other decedent, irrespective of whether the cause of death, and the resultant ambiguity, is drowning, building collapse, murder, fire or plague.[33]

The Imāmī *mujtahidūn* have done extensive work on this issue, and those of the last generation have sufficiently elucidated it by going into minute details which have not crossed the minds of the legists of early and latter eras. Before going into the specifics of the inheritance of victims of drowning, building collapse, etc., they take up the more general issue of two incidents of known occurrence but of unknown sequence, in which the precedence of each to the other leads to different legal consequences. The latter day Shī'ī *mujtahidūn* (*muta'akhkhirūn*) view the issue of the inheritance of victims of drowning and the like as a particular case of a more general problem that is not limited to any single chapter or issue of fiqh, but relates to any two events of known occurrence but of obscure precedence and subsequence, irrespective of whether the two events relate to contracts, inheritance, crime, etc. Hence the problem includes two contracts of sale, one concluded by the owner himself with A regarding a particular article, and the second by his agent concerning the same article with B, it being unknown which of the two preceded the other so that the validity of the former and the invalidity of the latter contract could be ascertained. The problem thus concerns any two events in which the consequences of one event are dependent on the precedence of the other over it, where there is nothing to prove that the two events took place simultaneously or successively. Therefore, the issue of drowned persons or the like is not an independent issue; rather, it is one of the many particular issues that come in the purview of a general rule.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Thus we see that the Shī'ī *mujtahidūn* initially concentrate on elucidating the rule itself and then discuss the issue of inheritance of victims of drowning and the like to see whether the general rule is applicable to them or if they are excluded from its application. There is no doubt that this manner of presenting the argument is more beneficial.

As the understanding of this rule depends upon the comprehension of two other closely-related principles, we shall explain them to the needed extent so as to grasp the said rule, although a discussion of these two principles is not less beneficial than that of the rule itself. These two principles are as follows:

(a) The presumption of non-occurrence of an event whose occurrence is doubtful.

(b) The presumption of delayed occurrence of an event known to have occurred.

The Presumption of Non-Occurrence:

Suppose you had a relative living abroad with whom you used to correspond. At one point he stopped writing to you and you did the same. After a long period of time it came to your mind that you should write to him. You wrote to him at his earlier address without the doubt troubling your mind that he might have died or moved to another place. What led you to pay no attention to the possibility of his death or change of his address? Similarly, we believe in the honesty and integrity of a person, and rely upon him by depositing with him our valuables. Then he acts in a manner which raises a doubt in our minds that he might have changed, yet, we, despite this doubt, continue to treat him in the past manner. The same rule applies to all correspondences, transactions and communications.

The secret here is that man is led by his nature to accept the continuity of an earlier situation until the contrary is proved. Hence if A is known to be alive and later a doubt arises about his death, the presumption accepted by human nature is to consider him alive until his death is known in some manner. This is what is meant by 'the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

presumption of non-occurrence of an event' whose occurrence has not been proved, and the following statement of al-'Imām al-Ṣādiq points towards it:

مَنْ كانَ عَلىٰ يَقينٍ ثُمَّ شَكَّ فَلا يُنقَضُ اليَقينُ بِالشَّكِّ، إنَّ اليَقينَ لا يَنقُضُهُ إلاّ اليَقينُ، لاتُدخِلِ الشَّكَّ عَلىٰ اليقينِ، وَلاتَخلطْ أَحَدَ هُماعَلىٰ الآخَرِ، وَلاتَعْتَدَّ بِالشَّكِّ مَعَ اليَقينِ في حالٍ مِنَ الأحوالِ.

If a person is certain (about something) and then doubts (its remaining so), his earlier certainty will not be demolished by the doubt. Surely, certainty cannot be annulled by anything except certainty; doubt cannot dislodge certainty, nor does any of them mix with the other, under no circumstance give credence to doubt in the presence of certainty.

Hence, when we know that someone owes a debt for a particular sum and later claims having repaid it, the presumption is that he owes the debt until its repayment is proved. That is, we ought to know the payment of debt in the way that we know the fact of indebtedness, because knowledge is not annulled by anything except knowledge and a doubt arising after knowledge has no effect. Therefore, one who makes a claim which contradicts the earlier condition of something, the burden of proof rests on him to prove his claim, and he whose claim is in accordance with the earlier condition is only liable to take an oath.

The gist of the above discussion is that the principle of presumption of non-occurrence of an event means the acceptance of an earlier existing situation until the contrary is proved.

The Presumption of the Delayed Occurrence of an Event:

If a judge has knowledge of A's being alive on Wednesday and of his being among the dead on Friday, without knowing whether he died on Thursday or on Friday and has no clue to determine the time of his death, how should he decide the issue? Should he rule that A died on Friday, or that he died on Thursday?

Three different periods are involved in this case: the period in

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

which he was known to be living i.e. Wednesday; the time at which he is known to be dead, i.e. Friday; the period between the two times, i.e. Thursday, in which he is neither known to be alive nor dead. The above principle requires that this intermediate period be considered similar to the period preceding it, not to the period subsequent to it. That is, the period of ignorance about his life will be regarded similar to the preceding period in which he was known to be alive. Hence we will remain on our knowledge of his being alive until the time of the knowledge of his death. The result is that his death will be presumed to have taken place on Friday. The same rule is applicable to every event of known occurrence in which a doubt arises regarding the time of its occurrence, provided that it is a single event and not a chain of events.

The Knowledge of Occurrence of Two Events with Ignorance of Their Order of Succession:

Having explained the two principles concerning the presumption of non-occurrence of an event and the delayed occurrence of a single event, let us examine the general rule which is the end of this discussion. The general rule concerns two events known to have occurred in which the consequences of each are dependent on its preceding the other, while there exists total ignorance about the precedence of any one of them. Among the instances when this problem arises are: the conclusion of two contracts, one concluded by the owner and the other by his agent; the occurrence of a birth and the making of a gift of property; the deaths of two mutual heirs none of whom is known to have died before the other.

The application of this rule depends upon the judge's knowledge of the time of occurrence of each one of the two events or his ignorance about the time of occurrence of both events or one of them. Hence three different situations arise:

1. Where the judge comes to know the time of occurrence of both the events by examining the statements made by the parties to the suit or through circumstantial evidence. Here he will rule in

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

accordance with his knowledge.

2. Where the judge is ignorant of the precedence of one event over the other, though he comes to know the time of occurrence of one of them (such as, his knowing that a horse was sold on June 2, without knowing whether or not it was defective on June 1, to justify its return, or became such on June 3, to make it unreturnable). Here the event whose time of occurrence is known will be given precedence over the event whose time of occurrence is unknown, because the presumption of delayed occurrence of an event will not be applicable to an event whose time of occurrence is known; this knowledge prevents the application of the presumption to it. As to the event whose time of occurrence is unknown, the presumption of delayed occurrence is applicable to it because this principle is relied upon in instances of ignorance.

To sum up, if two events take place one whose time is known and the other whose time is unknown, the one whose time is known will be considered as having occurred earlier irrespective of whether the two events are of the same kind (e.g. the death of two persons, or the conclusion of two contracts) or of different kinds.

3. Where the judge is ignorant of the time of occurrence of both the events, there is no rule capable of determining the precedence or subsequence of either event, because there are no grounds for applying the principle of presumption to one of them as opposed to the other. Therefore, the presumption of delayed occurrence of an event is applicable only where a single event has taken place, or where two events occur and the time of occurrence of one of them is known. But where both the events have no known time of occurrence and there is nothing to differentiate between the time of occurrence of the two, reliance on the principle of presumption becomes impossible.[34]

Victims of Drowning and Burial under Debris:

At times, there are two close relatives who do not inherit from each other--e.g. two brothers who have children--; such a case does

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

not come in the purview of our present discussion, for the inheritance of each is received by his own children, irrespective of his and his brother's death occurring simultaneously or successively.

At times, only one of the two decedents is entitled to inherit from the other (e.g. two brothers of whom only one has children). This situation is also outside our ambit of discussion (because the estate of the brother having children will be transferred to his children, and the estate of the childless brother will be transferred to his relatives, excluding the brother who has died along with him by drowning, fire, etc.). This is because a condition of inheritance is that the heir be known to live at the time of death of the person being inherited (while in the above case we have no knowledge of the brother having children being alive at the time of the childless brother's death).[35]

There are other cases where both are entitled to inherit from each other (e.g. a son and a father; two brothers who do not have surviving parents and are childless; a couple, where the heirs of some of them are not those of the other). This situation is the focus of our discussion, and the Imāmiyyah legists lay down two conditions for the mutual inheritance of each from the other.

1. The deaths of both should be the result of a single cause, and should result specifically either by drowning or by being buried under fallen debris (such as where they are in a building which collapses upon them or in a boat which sinks with them). Hence if one of them dies by drowning and the other due to fire or the collapse of a building, or both die together in a plague or battle, they will not inherit mutually. Reportedly, the French law requires the unity of cause for mutual inheritance, but does not limit the causes to drowning and burial under debris, as observed by the Imāmiyyah; rather, in that law, mutual inheritance also takes place if the cause of death is fire.

2. The time of death of both should be unknown; hence if the time of death of just one of them is known, only the one whose time of death is unknown will inherit.

To give an example, suppose a building collapses on a couple or

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

a boat sinks with both aboard and during the rescue operations the husband is found taking his last breath at 5 o'clock. Two hours later the wife is found dead, and no one knows whether she died before, after or simultaneously with the husband. The time of death of the husband is known, while that of the wife is unknown. The principle of presumption of delayed occurrence of an event requires that the wife, whose time of death is unknown, inherit the husband whose time of death is known, while he is not entitled to inherit anything from her. Where the situation is reversed, the time of death of the wife being known and that of the husband remaining unknown, the husband will inherit not the wife. In other words, where the time of death of only one of them is known, the person whose time of death is unknown inherits from the one whose time of death is known, without the latter inheriting from the former. As the right to inherit is limited to the person whose time of death is unknown, there is no difference made in this situation by the cause of death, and the result is the same irrespective of whether the cause of death is drowning, fire, burial under fallen debris, epidemic or war.

But if the time of death of both is unknown, such as where the couple is found dead without the time of death of any of them being known, both are entitled to inherit mutually; that is, each inherits from the other. This difference between a situation where the time of death of one of two decedents is known and where the time of death of neither is known, has neither been reported from any foreign law, nor have I found it in the books of the early and latter Sunnī legists nor the early Shī'ī legists. This difference is only mentioned in the works of jurisprudence (*uṣūl al-fiqh*) of recent Shī'ī *mujtahidūn.*

To sum up, the Imāmiyyah limit the scope of mutual inheritance to the situations where the cause of death is either drowning or falling debris and where the time of death of both the decedents is unknown. Accordingly, if both die natural deaths, or by fire or are killed in battle, or as a result of a plague, etc., mutual inheritance will not take place, and the estate of each decedent will be transferred to his own living heirs without any of the two decedents

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

inheriting from the other.

And where the time of death of only one of them is known, the decedent whose time of death is not known will inherit from the one whose time of death is known, without the latter inheriting from the former.

The Mode of Mutual Inheritance:

The method applied in mutual inheritance is that it is first assumed, in the example given above, that the husband died before the wife. Consequently, her share of his estate is separated and her heirs inherit her property which existed while she was alive, along with her share of her husband's estate that was added to it. Then it is assumed that the husband died after the wife. Consequently, his share of her estate is separated and his heirs inherit his property which existed prior to his death, along with his share of the wife's estate which was added to it. None of the two will inherit from the property which each of them has inherited from the other. Hence, if the wife possessed 100 liras and the husband 1000 liras, the wife inherits from his 1000 and the husband from her 100 only, because if one of them inherits from the property which the other has inherited from him, it will lead to a person inheriting a part of his own property after his death! And it is impossible for a person to inherit a thing which he has left to be inherited by another.

To sum up, if two mutual heirs die by drowning or being buried under falling debris, when neither the sequence of their deaths is known nor the time of death of one of them, according to the Imāmiyyah, each of them will inherit from the other from the property each owned prior to death.

Illustrations:

A study of the above discussion will show that in many cases the four Sunnī schools exclude women and those related through them

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

from inheritance. The daughter's children, paternal aunts, uterine paternal uncles, the maternal grandfather, maternal uncles and maternal aunts are not entitled to inheritance in the presence of any of the residuaries who are relatives of the deceased through the father. A full, or agnate, brother's daughter does not inherit with her own brother, and similarly a paternal uncle's daughter does not inherit with her own brother. Had there not been an explicit mention in the Qur'ān of the inheritance of daughter, agnate sister, or sisters, and uterine brothers and sisters, their situation would have been similar to that of other female relatives and those related through them.

This was the practice during the *Jāhiliyyah* during which the system of inheritance was biased in favour of males and the practice of restricting inheritance to the eldest son who bore arms and fought was prevalent. Where there was no child capable of bearing arms, they gave the inheritance to the relatives of the father. The reader has observed throughout the discussion of the Sunnī system of inheritance that a woman inherits only where her share has been specifically mentioned in the Qur'ān or where *qiyās* leads to her being considered equal to a female sharer--such as where a son's daughter is considered equivalent to a daughter. Apart from this, women are deprived from inheritance. The Imāmiyyah have considered both males and females as equally entitled to inherit, and the following examples illustrate this.

1. Where the decedent has left behind a daughter and a full or an agnate brother:

The four schools:	Daughter: 1/2 Brother :1/2
The Imāmiyyah:	The whole estate goes to the daughter to the exclusion of the brother.

2. Where the heirs are a daughter and the mother:

The four schools:	Mother: 1/6 Daughter: 3/6 The remaining 2/6 will be taken by the paternal grandfather if present, otherwise by the full brother, in their absence by the agnate brothers, and so on in the descending order of residuaries.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Imāmiyyah: Mother: 1/4 Daughter: 3/4
The residuaries receive nothing.

3. Where the deceased is survived by the parents and daughter's children:

The four schools: Mother (in the absence of a *ḥājib*): 2/6 Father:4/6
The daughter's children receive nothing.

The Imāmiyyah: Mother:1/6 Father: 2/6 Daughter's children: 3/6

4. Where a woman is survived by her parents and husband:

The four schools: Husband: 6/12 Mother: 2/12 Father: 4/12

The Imāmiyyah: Husband: 3/6 Mother: 2/6 Father: 1/6

5. Where the heirs are the parents and a wife:

The four schools: Wife: 3/12 Mother: 3/12 Father: 6/12

The Imāmiyyah: Wife: 3/12 Mother: 4/12 Father: 5/12

6. Where the father and daughter inherit:

The four schools: Father: 1/2 Daughter: 1/2

The Imāmiyyah: Father: 1/4 Daughter: 3/4

7. Where the daughter and the paternal grandfather are present:

The four schools: Daughter: 1/2 Grandfather: 1/2

The Imāmiyyah: The daughter inherits the whole estate to the exclusion of the grandfather

8. Where the decedent is survived by a wife, the mother, and the paternal grandfather:

The four schools: Wife: 3/12 Mother: 4/12 Grandfather: 5/12

The Imāmiyyah: Wife: 1/4 Mother: 3/4
The grandfather receives nothing.

9. Where the decedent is survived by the paternal and maternal grandfathers:

The four schools: The whole estate is inherited by the paternal grandfather with the maternal grandfather receiving nothing

The Imāmiyyah: Paternal grandfather: 2/3 Maternal grandfather: 1/3

10. Where the decedent is survived by the maternal grandmother and the maternal grandfather:

The four schools: The whole estate is inherited by the maternal grandmother to the exclusion of the maternal grandfather.

The Imāmiyyah: Maternal grandmother: 1/2 Maternal grandfather: 1/2

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

11. Where the decedent is survived by the maternal and paternal grandmothers:

The four schools: They will together inherit 1/6 which they will distribute equally, and the remainder will go to the highest in the order of residuaries, and in their absence it will revert to the grandmothers in the opinion of the Ḥanafī and Ḥanbalī schools, and escheat to the *bayt al-māl* in the opinion of the Mālikī and the Shāfi'ī schools.

The Imāmiyyah: Maternal grandmother: 1/3 Paternal grandmother: 2/3

12. Where the decedent leaves behind a son's daughter and a daughter's daughter.

The four schools: The son's daughter is entitled to a half and the remainder is given to the residuary without anything being given to the daughter's daughter.

The Imāmiyyah: Each one of them will take the share of the person through whom they are related;
Son's daughter: 2/3 Daughter's daughter: 1/3

13. Where the decedent leaves behind a daughter's son and a son's daughter:

The four schools: The son's daughter gets a half and the remaining half goes to the residuary, without the daughter's son receiving anything.

The Imāmiyyah: Daughter's son: 1/3 Son's daughter: 2/3

14. Where the decedent leaves behind a daughter and a son's daughter:

The four schools: Daughter: 3/6 Son's daughter: 1/6
The remainder goes to the residuary.

The Imāmiyyah: The daughter takes the whole estate to the exclusion of the son's daughter.

15. Where the decedent is survived by two daughters and a son's daughter:

The four schools: Two or more daughters receive two-thirds and the remainder goes to the residuary, with the son's daughter receiving nothing.

The Imāmiyyah: The whole estate goes to the daughters.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

16. Where the decedent leaves behind two daughters, son's daughters and a son's son:

The four schools: The two daughters receive two-thirds and the remaining one-third goes to the son's daughters and son's son who distribute it with a male receiving twice the share of a female.

The Imāmiyyah: The whole estate goes to the two daughters without the son's children receiving anything.

17. Where the decedent is survived by a daughter and a full or agnate sister:

The four schools: Daughter 1/2 Sister 1/2

The Imāmiyyah: The whole estate goes to the daughter and the sister receives nothing

18. Where the decedent leaves behind 10 daughters and a full or agnate sister:

The four schools: Sister: 1/2 10 daughters: 1/2

The Imāmiyyah: The 10 daughters are entitled to the whole estate without the sister receiving anything.

19. Where the decedent is survived by a daughter and a uterine brother:

The four schools: The daughter receives a half as the sharer and the remainder goes to the residuaries. The uterine brother receives nothing.

The Imāmiyyah: The whole estate goes to the daughter.

20. Where the decedent leaves behind a daughter, a full or an agnate sister, and a full or an agnate paternal uncle:

The four schools: Daughter 1/2 Sister 1/2
The paternal uncle receives nothing.

The Imāmiyyah: The daughter receives the whole estate.

21. Where the ḍecedent is survived by a full or an agnate paternal uncle and a similar aunt:

The four schools: The uncle receives the whole estate to the exclusion of the aunt.

The Imāmiyyah: Uncle: 2/3 Aunt: 1/3

22. Where the decedent leaves behind a daughter and a full or an

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

agnate paternal uncle:

The four schools: Daughter: 1/2 Uncle: 1/2

The Imāmiyyah: The whole estate goes to the daughter.

23. Where the decedent is survived by a daughter, a full or an agnate paternal uncle's son and a uterine paternal uncle:

The four schools: Daughter 1/2 Uncle's son 1/2
The uncle receives nothing.

The Imāmiyyah: The whole estate goes to the daughter.

24. Where the decedent leaves behind maternal uncles and aunts and a full or an agnate paternal uncle's son:

The four schools: The paternal uncle's son receives the whole estate without the maternal uncles and aunts receiving anything.

The Imāmiyyah: The maternal uncles and aunts will take the whole estate without the paternal uncle's son receiving anything. The method of distributing the estate between the maternal uncles and the maternal aunts has been mentioned earlier while discussing their inheritance.

25. Where the decedent is survived by a paternal uncle's daughter and a full or an agnate paternal uncle's son:

The four schools: The whole estate goes to the paternal uncle's son without the paternal uncle's daughter receiving anything, even where she is the full sister of the paternal uncle's son.

The Imāmiyyah: Uncle's daughter: 1/3 Uncle's son: 2/3

26. Where the decedent leaves behind a maternal grandfather and a full or an agnate paternal uncle:

The four schools: The paternal uncle takes the whole estate to the exclusion of the maternal grandfather.

The Imāmiyyah: The whole estate is inherited by the grandfather to the exclusion of the paternal uncle.

27. Where the decedent is survived by a full or an agnate brother's son and five sons of another full or agnate brother.

The four schools: The estate will be divided according to the number

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

of sons and not as per the number of fathers. Hence the estate will be divided into six parts with each receiving one part

The Imāmiyyah: The estate will be divided into as many parts as there are fathers and not into as many parts as there are heirs; each will receive the share of the person through whom he is related to the deceased. Hence one brother's son will receive five-tenths and the other brother's five sons will together receive five-tenths, each getting one-tenth.

28. Where the decedent leaves behind a brother's son and a full or an agnate brother's daughter:

The four schools: The male will inherit not the female, even though she is his full sister.

The Imāmiyyah: They inherit jointly, the male receiving twice a female's share.

These examples are enough to give a complete picture of the intrinsic difference between the rules of inheritance of the Imāmiyyah and the rules of inheritance of the Sunnî schools.

NOTES:

1. The author of *al-Jawāhir* says: The preponderant (*mashhūr*) opinion among the Imāmiyyah legists is that those related through the mother do not inherit the compensation for involuntary homicide. As to the right to *qiṣāṣ* it is inherited by all those who inherit the heritage excepting the husband and the wife, who, however, will inherit the compensation in lieu of *qiṣāṣ*.

2. Al-Shaykh Aḥmad Kāshif al-Ghiṭā', *Safînat al-najāt, bāb al-waṣāyā.*

3. This is the proof (*dalîl*) mentioned by al-Sayyid al-Ḥakim in *al-Mustamsak, bāb kafan al-mayyit.* Al-Shaykh Muḥammad Abū Zuhrah, in *al-Mîrāth 'inda al-Ja'fariyyah,* writes: It is obvious in this situation that the right of the creditors relates to the property itself and supersedes all other rights to that property. Through this observation, the Shaykh attributes to the Imāmiyyah a consensus concerning the preference of the right of the pledger over funeral expenses, while there is a difference of opinion among them on this issue, and neither of the two differing opinions is preponderant to justify the attribution of consensus.

4. There is a difference between the *maẓālim* and usurped (*maghṣūb*) properties. The *maẓālim* are those in which *ḥarām* and *ḥalāl* wealth has been mixed

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and the owner is unable to discern due to his ignorance, while the *maghṣūb* properties have a known owner. The *maẓālim* also differ from those properties whose owners are not known (*majhūl al-mālik*), because in the latter the ignorance is concerning the property itself and its being mixed with other property is not necessary. The rule for the *maẓālim* is to give them away as charity (*ṣadaqah*) on behalf of its (real) owner when there is no hope of finding him.

5. Al-Sayyid al-Ḥakîm in *Mustamsak al-'Urwah,* vol. VII, *mas'alah* 83, says: This--i.e. pro rata distribution--is customary among us, and this is what is required by the principle of not preferring something without a cause for such preference (*tarjîḥ bilā murajjiḥ*) as well as the tradition of the Prophet (ṣ): "The debt due to God is better entitled to repayment," is understood not to imply a difference (between the debts due to God and the debts due to people); rather it solely explains that it is *wājib* to fulfil *ḥaqq Allāh* and that neglecting it is not permissible.

6. The word 'Muslim' includes all those who pray facing towards the Ka'bah (*ahl al-qiblah*). Hence a Sunnî inherits from a Shî'î and vice versa, in accordance with Qur'ānic *naṣṣ*, the Sunnah, and *ijmā'*. Rather, this rule is among the essentials of the faith, exactly like the *wujūb* of *ṣalāt* and fasting.

7. *Al-Murtadd 'an fiṭrah* is a born Muslim who apostatizes. *Al-Murtadd 'an millah* is one born to *kāfir* parents who then becomes a Muslim and later deserts his faith.

8. I believe that there is no one today who considers 'Alî (*'a*) and his descendants to possess divinity and that this sect has become extinct. I have myself visited those places in Syria which are inhabited by the 'Alawîs, who are accused of holding such beliefs. I lived among them for a few days and travelled from one village to another in their region. I saw them following Islamic practices like all other Muslims, without the least difference. What do we say about one who proclaims from the *ma'ādhin* at the times of prayer "*Lā ilāha illā Allāh, Muḥummad rasūl Allāh*"? Is not negating the divinity of all except Allāh contrary to accepting the divinity of others? Then how is it correct to attribute *ghuluww* to them, when God has said:

...وَلاَ تَقُولُواْ لِمَنْ أَلْقَىٰ إِلَيْكُمُ السَّلَـٰمَ لَسْتَ مُؤْمِناً...

And do not say to anyone who offers you peace: 'You are not a believer'? (4:94)

9. This when he can acquire knowledge of the facts but neglects to do so. But one incapable of acquiring such knowledge is excusable.

10. The author of *al-Jawāhir* has narrated from a large number of Imāmî legists that a culprit in an unintentional homicide is prevented from inheriting the compensation, without being prevented from inheriting from the remaining heritage.

11. 'Abd al-Muta'āl al-Ṣa'îdî, *al-Mîrāth fî al-Sharî'at al-'Islāmiyyah,* 5th ed., p. 14.

12. *'Aṣabiyyah* is of two types, related to *nasab* or *sabab,* and by *sabab* is meant

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the *wilā'* of the manumitter and his children.

13. A single daughter and daughters, according to the Imāmiyyah, inherit as sharers as well as by 'return,' similarly, a single sister and sisters. But a son's daughter/daughters take the share of the person through whom they are related, that is the son.

14. These three categories of heirs are natural, because there is no intermediary between the decedent and his/her parents and children; hence they belong to the first category. Subsequently, after them come the brothers/sisters and the grandparents, because they are related to the decedent through a single intermediary, the parents; hence, they belong to the second category. After them is the category of the paternal and maternal uncles/aunts, because they are related to the decedent through two intermediaries, i.e. the grandfather or the grandmother, and the father or the mother; hence they belong to the third category.

15. Al-Shaykh Abū Zuhrah, in *al-Mîrāth 'inda al-Ja'fariyyah,* has dealt with the proofs mentioned by the Imāmiyyah refuting *ta'ṣîb,* but he has not mentioned this argument of theirs.

16. Full or consanguine sisters are residuaries with a daughter, and jointly share the estate with her like the full or consanguine brothers.

17. The famous and great Tābi'ī faqîh who has been highly eulogized by the Sunnî 'ulamā'. He had met ten Ṣaḥābah.

18. The paternal grandmother does not exclude a distant maternal grandmother in the opinion of the Shāfi'ī and the Mālikî schools (e.g. the father's mother with the mother's mother's mother), while in the opinion of the Ḥanafî and the Ḥanbalî schools she is excluded. (al-Ṣa'îdî's *al-Mîrāth fî al-Sharî'at al-'Islāmiyyah*)

19. The schools differ regarding the signs of life, whether it is the making of sounds or movement (crying or breast-feeding). That which is important is that life be proved in any possible manner. Hence, if it is proved that the child was born unconscious and possessed life, he will doubtlessly inherit.

20. This is the earlier opinion of al-Shāfi'ī; his latter opinion is that a divorcée of a revocable divorce inherits during *'iddah,* while a divorcée of an irrevocable divorce does not.

21. The rule that one who is related through another is excluded by the other, is fully accepted by the Imāmiyyah, while the Sunnî schools consider the uterine brothers an exception. Hence, according to them, they inherit with the mother though they are related through her. The Ḥanbalîs are of the opinion that a paternal grandmother inherits along with the father, i.e. along with her son. (*al-Mughnî,* 3rd. ed., vol. 6, p. 211)

22. According to the Sunnî schools, the mother will receive one-sixth if the decedent has children or son's children, how lowsoever. As regards the daughter's children, their presence or absence is of no effect and they do not stop the mother from inheriting more than one-sixth. According to the Imāmiyyah, the daughter's children are like one's own children. Hence, the daughter's daughter is considered a

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

child who excludes the mother from inheriting more than one-sixth, exactly like a son.

23. *Kashf al-ḥaqā'iq fī sharḥ Kanz al-daqā'iq,* vol. 2, and *al-'Iqnā' fī ḥall alfāẓ Abī Shujā',* vol. 2, *bāb al-farā'iḍ.*

24. See *al-Jawāhir, al-Masālik* and other books on Imāmī fiqh. The whole text quoted here is from al-Shaykh Aḥmad Kāshif al-Ghiṭā's *Safinat al-najāt,* which I have preferred to the text of my own book *al-Fuṣūl al-Shar'iyyah,* because it is more lucid and comprehensive.

25. Regarding the inheritance of brothers and sisters in the presence of the paternal grandfather, the Sunnī schools differ among themselves. This is discussed in the part on grandparents of this section.

26. A *"ṣaḥīḥ"* grandfather, in the terminology of Sunnī fuqahā', is one between whom and the decedent no female intervenes (e.g. the father's father), and a *ṣaḥīḥ* grandmother is one between whom and the decedent no *"fāsid"* grandfather intervenes (e.g. the mother's mother). The intervening of a *"fāsid"* grandfather (e.g. the mother's father's mother) makes the grandmother also a *"fāsid"* grandmother.

27. According to the Sunnī schools, a daughter excludes uterine brothers and sisters from inheritance, though not full or agnate brothers and sisters, despite their opinion that where a sharer and a residuary are present, the distribution will start with the sharer and the remainder will go to the residuary, and a uterine brother or sister is included in sharers while full and agnate brothers or sisters are residuaries. Hence it was obligatory here that the daughter not exclude a uterine brother and sister, or if she were to affect such exclusion, to exclude all kinds of brothers and sisters as observed by the Imāmiyyah.

28. The Imāmiyyah do not give the return to a uterine brother or sister where they jointly inherit with a full or agnate brother or sister; the return goes only to the latter.

29. On the basis that full or agnate brother's sons are regarded as residuaries and the brother's daughters as distant kindred, the four schools concur that if the decedent leaves behind a full or agnate brother's son who is accompanied by his own full sister, he takes the whole estate to her exclusion.

30. They don't inherit only with the paternal uncle's daughters; their presence is similar to their absence in the presence of paternal uncle's sons. Therefore, the four schools concur that if a decedent is survived by a full or agnate paternal uncle's son accompanied by the latter's own full sister, he will be entitled to the whole estate to her exclusion.

31. The Sunnī fuqahā' have extensively discussed about distant kindred, whom they consider a third category of heirs after the sharers and the residuaries. They mention different situations and conditions, which cannot be recorded, enumerated and comprehended easily. Hence the instances mentioned here suffice to present a general outline of them. Those interested in details should refer to *al-Mughnī,* 3rd ed. vol. 6, and al-Ṣa'īdī's *Kitāb al-mīrāth fī al-Sharī'at al-'Islāmiyyah.*

32. According to the authors of *al-Masālik* and *al-Jawāhir,* the preponderant

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

opinion among Shī'ī fuqahā' is that the decedent's property will not be distributed until after confirming his death, either by *tawātur*, or testimony, or by a report supported by indications capable of leading to such knowledge, or by the expiry of a period after which a like person does not generally stay alive.

33. Al-Shi'rānī, vol. 2, *Kitāb al-mīzān, bāb al-'irth.*

34. The details of this will be found in the books of uṣūl al-fiqh of the Imāmiyyah (*bāb tanbīhāt al-'istiṣḥāb*); of these is the popular *al-Rasā'il* of al-Shaykh al-'Anṣārī, *Taqrīrāt al-Nā'īnī* of al-Sayyid al-Khū'ī, and *Ḥāshiyat al-Rasā'il* of al-Shaykh al-'Āshtiyānī.

35. See *Miftāḥ al-karāmah, al-Masālik,* and *al-Lum'ah.*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

WAQF

Wuqūf' and *'awqāf'* are the plurals of *'waqf'* and its verb is *'waqafa'*, though *'awqafa'* is also rarely used, as in *al-Tadhkirah* of al-'Allāmah al-Ḥillī. The word *'waqf'* literally means 'to detain' and 'to prevent', as in *wuqiftu 'an sayrī*, i.e. 'I was prevented from making my journery.'

In the context of the Sharī'ah it implies a form of gift in which the corpus is detained and the usufruct is set free. The meaning of 'detention' of the corpus is its prevention from being inherited, sold, gifted, mortgaged, rented, lent, etc. As to dedication of the usufruct, it means its devotion to the purpose mentioned by the *wāqif* (donor) without any pecuniary return.

Some legists consider *waqf* to be illegal in the Islamic Sharī'ah and regard it as contradictory to its basic principles except where it concerns a mosque. But this view has been abandoned by all the schools of fiqh.

Perpetuity and Continuity:

All schools, excepting the Mālikī, concur that a *waqf* is valid only when the *wāqif* intends the *waqf* to be perpetual and continuous, and therefore it is considered a lasting charity. Hence if the *wāqif* limits its period of operation (such as when he makes *waqf* for 10 years or until an unspecified time when he would revoke it at his own pleasure, or for as long as he or his children are not in need

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

of it, etc.) it will not be considered a *waqf* in its true sense.

Many Imāmī legists hold that such a condition nullifies the *waqf*, though it will be considered as valid *ḥabs*[1] (detention) if the owner of the property intends *ḥabs*. But if he intends it to be a *waqf*, it will be void both as *waqf* as well as *ḥabs*. By a valid *ḥabs* is meant that the usufruct donated by the owner for a particular object will be so applied during the period mentioned and return to him after the expiry of that period.

However, this is not something which contradicts the provisions of perpetuity and continuity in *waqf*, although al-Shaykh Abū Zuhrah has made a confusion here due to his inability to appreciate the difference between *waqf* and *ḥabs* in Imāmī fiqh. Consequently he has ascribed to them the view that perpetual and temporary *waqf* are both valid. This is incorrect, because according to the Imāmiyyah a *waqf* can only be perpetual.

The Mālikīs say: Perpetuity is not necessary in *waqf* and it is valid and binding even if its duration is fixed, and after the expiry of the stipulated period the property will return to the owner.

Similarly, if the *wāqif* makes a provision entitling himself or the beneficiary to sell the *waqf* property, the *waqf* is valid and the provision will be acted upon (*Sharḥ al-Zarqānī*, vol. 7, *bāb al-waqf*).[2]

If a *waqf* is made for an object which is liable to expiry (such as a *waqf* made for one's living children, or others who are bound to cease existing) will it be valid? Moreover, presuming its validity, upon whom will it devolve after the expiry of its object?

The Ḥanafīs observe: Such a *waqf* is valid and it will be applied after the expiry of its original object to the benefit of the poor.

The Ḥanbalīs say: It is valid and will thereafter be spent for the benefit of the nearest relation of the *wāqif*. This is also one of two opinions of the Shāfi'īs.

The Mālikīs are of the opinion that it is valid and will devolve on the nearest poor relation of the *wāqif*, and if all of them are wealthy, then on their poor relatives (*al-Mughnī*, *al-Zarqānī*, and *al-Muhadhdhab*).

The Imāmiyyah state: The *waqf* is valid and will devolve on the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

heirs of the *wāqif* (*al-Jawāhir*).

Delivery of Possession:

Delivery of possession implies the owner's relinquishment of his authority over the property and its transfer to the purpose for which it has been donated. According to the Imāmiyyah, delivery is a necessary condition for the deed of *waqf* to become binding, though not for its validity. Therefore, if a *wāqif* dedicates his property by way of *waqf* without delivering possession, he is entitled to revoke it.

If a *wāqif* makes a *waqf* for public benefit (e.g. a mosque or a shrine or for the poor), the *waqf* will not become binding until the custodian (*mutawallî*) or the *ḥākim al-shar'* takes possession of the donated property, or until someone is buried in the donated plot of land, in the case of a graveyard, or prayers are offered in it, if it is a mosque, or until a poor person uses it with the permission of the *wāqif*, in a *waqf* for the benefit of the poor. If delivery is not effected in any of the above-mentioned forms it is valid for a *wāqif* to revoke the *waqf*.

If a *waqf* is made for a private purpose, such as for the benefit of the *wāqif*'s children, if the children have attained majority, it will not become binding unless they take possession of it with his permission, and if they are minors the need for giving permission does not arise because the *wāqif*'s possession of it as their guardian amounts to their having taken possession.

If the *waqif* dies before possession has been taken, the *waqf* becomes void and the property assigned for *waqf* will be considered his heritage. For example, if he makes the charitable *waqf* of a shop and dies while it is still in his use, it will return to the heirs.

The Mālikîs say: Sole taking possession does not suffice and it is necessary that the donated property remain in the possession of the beneficiary or the *mutawallî* for one complete year. Only after the completion of one year will the *waqf* become binding and incapable of being annulled in any manner.

The Shāfi'îs, and Ibn Ḥanbal in one of his opinions, state: A

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

waqf is completed even without delivering possession; rather, the ownership of the *wāqif* will cease on the pronouncement of *waqf* (Abū Zuhrah, *Kitāb al-waqf*).

Ownership of the Waqf Property:

There is no doubt that prior to donation the *waqf* property is owned by the *wāqif,* because a person cannot make *waqf* of a property that he does not own. The question is whether, after the completion of the *waqf,* the ownership of the property remains with the *wāqif,* with the difference that his control over its usufruct will cease, or if it is transferred to the beneficiaries. Or does the property become ownerless, being released from ownership?

The legists hold different opinions in this regard. The Mālikîs consider it to remain in the ownership of the *wāqif,* though he is prohibited from using it.

The Ḥanafîs observe: A *waqf* property has no owner at all, and this is the more reliable opinion according to the Shāfi'î school.[3] (*Fatḥ al-Qadîr,* vol. 5, *bāb al-waqf;* Abū Zuhrah, *Kitāb al-waqf*)

The Ḥanbalîs say: The ownership of the *waqf* property will be transferred to the beneficiaries.

Al-Shaykh Abū Zuhrah (1959, p. 49) has ascribed to the Imāmiyyah the view that the ownership of the *waqf* property remains with the *wāqif.* He then observes (p. 106): This is the preponderant view of the Imāmiyyah.

Abū Zuhrah does not mention the source relied upon by him for ascribing this view, and I do not know from where he has extracted it, for it has been mentioned in *al-Jawāhir,* which is the most important and authentic source of Imāmî fiqh: According to most legists, when a *waqf* is completed, the ownership of the *wāqif* ceases; rather, it is the preponderant view and the authors of *al-Ghunyah* and *al-Sarā'ir* have even reported an *ijmā'* on this view.

Though all or most Imāmî legists concur that the ownership of the *wāqif* ceases, they differ as to whether the *waqf* property totally loses the characteristic of being owned (in a manner that it is neither

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the property of the *wāqif,* nor of the beneficiaries, and, as the legists would say, is released from ownership) or if it is transferred from the *wāqif* to the beneficiaries.

A group among them differentiate between a public *waqf* (e.g. mosques, schools, sanatoriums, etc.) and a private *waqf* (e.g. a *waqf* for the benefit of one's descendants). The former is considered as involving a release from ownership and the latter a transfer of ownership from the *wāqif* to the beneficiary.

The difference of opinion regarding the ownership of *waqf* property has practical significance in determining whether the sale of such property is valid or not, and in the case where a *waqf* is made for a limited period or for a terminable purpose. According to the Mālikī view that the *waqf* remains the *wāqif's* property, its sale is valid and the corpus will return to the *wāqif* on expiry of the period of *waqf* or when the object for which the *waqf* was made terminates. But according to the view which totally negates the ownership of *waqf* property, its sale will not be valid, because only owned property can be sold, and a *waqf* for a limited period will also be invalid. According to the view which considers the ownership of *waqf* property as transferred to the beneficiaries, the property will not return to the *wāqif.* The consequences of this difference will be more obvious from the issues to be discussed below. It is necessary to understand this divergence of viewpoints because it affects many issues of *waqf.*

The Essentials of Waqf:

There are four *arkān* (essentials) of *waqf:* (1) the declaration (*al-ṣighah*); (2) the *wāqif;* (3) the property given as *waqf* (*al-mawqūfah*); (4) the beneficiary (*al-mawqūf 'alayh*).

The Declaration:

There is a consensus among all the schools that a *waqf* is created by using the word *'waqaftu'* (I have made a *waqf*), because it

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

explicitly signifies the intention of *waqf* without needing any further clarification. They differ regarding the creation of *waqf* by the use of such words as *'ḥabastu'* (I have detained), *sabbaltu* (I have donated as charity), *abbadtu* (I have perpetually settled), etc., and go into needless details.

The correct view is that a *waqf* is created and completed by using any word which is capable of proving the intention of creating a *waqf,* even if it belongs to another language, because here words are means of expressing one's intention, not an end in themselves.[4]

Al-Mu'āṭāt (The Creation of Waqf Without the Ṣīghah):

Is a *waqf* completed by an act (such as when someone makes a mosque and calls the people to pray in it, or allows burials to take place in a piece of land with an intention of making it a *waqf* for a graveyard) without one uttering *'waqaftu'* or *'ḥabastu'* or similar words, or is it necessary that the declaration take place, the act by itself being insufficient?

The Ḥanafī, Mālikī and Ḥanbalī schools say: An act by itself is sufficient and the property becomes, consequent to the act, a *waqf* (Ibn Qudāmah's *al-Mughnî,* vol. 5, *bāb al-waqf; Sharḥ al-Zarqānî 'alā Mukhtaṣar Abî Ḍiyā',* vol. 7, *bāb al-waqf*).

A group of major Imāmī scholars also holds this view, including al-Sayyid al-Yazdī in his work *Mulḥaqāt al-'Urwah,* al-Sayyid Abū al-Ḥasan al-'Iṣfahānī in *Wasîlat al-najāt* and al-Sayyid al-Ḥakîm in *Minhāj al-ṣāliḥîn.* Al-Shahîd al-'Awwal and Ibn Idrîs have also been reported to hold this view.

The Shāfi'îs observe: A *waqf* is completed only by the recital of the *ṣîghah* (*al-Mughnî,* vol. 5).

Acceptance:

Does *waqf* require acceptance or is its declaration as *waqf* (by the *wāqif*) sufficient? In other words, is *waqf* created by a single decision, or is it necessary that there be two concurrent decisions?

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

In this context the legists have divided *waqf*s into public (in which the *wāqif* has no specific beneficiary in his mind, e.g. *waqf*s made for the poor and *waqf*s of mosques and shrines) and private *waqf*s (e.g. a *waqf* made for the benefit of one's children).

The four Sunnî schools concur that a public *waqf* requires no acceptance, and according to the Mālikîs and most Ḥanafî legists a private *waqf,* like a public one, requires no acceptance.

The Shāfi'îs incline towards the necessity of acceptance (al-Ḥiṣnî al-Shāfi'î, *Kifāyat al-'akhyār,* vol. 1, *bāb al-waqf;* Abū Zuhrah, *Kitāb al-waqf,* p. 65, 1959 ed.).

The Imāmî legists differ among themselves, holding one of the following three opinions.

1. Necessity of acceptance in both public and private *waqf*s.
2. Absence of such necessity in both kinds of *waqf*s.
3. A distinction is made between a public and private *waqf*s, and acceptance is necessary only in the latter. This is the same view which the Shāfi'îs have favoured, and is also the correct one.[5]

Al-Tanjîz:

The Mālikîs observe: It is valid for a *waqf* to depend upon a contingency. Therefore, if the owner says: "When such and such a time comes, my house will become a *waqf,*" it is valid and the *waqf* is completed (*Sharḥ al-Zarqānî 'alā Mukhtaṣar Abî Ḍiyā',* vol. 7, *bāb al-waqf*).

The Ḥanafî and the Shāfi'î schools state: It is not valid to make a *waqf* contingent on the occurrence of an event; rather, it is *wājib* that *waqf* be unconditional, and if it is made to depend upon a contingency, as in the above-mentioned example, it will remain the property of the owner (Shirbînî's *al-'Iqnā',* vol. 2, *bāb al-waqf; Fatḥ al-Qadîr,* vol. 5, *kitāb al-waqf*).

I don't know how these two schools allow divorce to depend upon a contingency, while they disallow similar dependence in other spheres of fiqh, despite the fact that caution and stringency are more necessary in marital issues when compared to other issues.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Ḥanbalîs say: A *waqf* can be made contingent on the occurrence of death. Apart from this, dependence on any other contingency is invalid (*Ghāyat al-muntahā*, vol. 2, *bāb al-waqf*).

Most Imāmî legists consider *tanjîz* (its being unconditionally operational) as *wājib* and do not permit its being made contingent on a future event. (al-'Allāmah al-Ḥillî, *al-Tadhkirah*, vol. 2; *al-Jawāhir*, vol. 4; and *Mulḥaqāt al-'Urwah, bāb al-waqf*).[6] Therefore, if a person says: "When I die, this property will become a *waqf*," it will not become a *waqf* after his death. But if he says: "After my death make this property a *waqf*," it will be considered a will for creating a *waqf* and the executor of the will will be responsible for creating the *waqf*.

Al-Wāqif:

The schools concur that sanity is a necessary condition for the creation of a *waqf*. Therefore, a *waqf* created by an insane person is not valid, because the Sharî'ah does not burden him with any duty and does not attach any significance to his decisions, words or deeds.

The schools also concur upon maturity as a necessary condition. This implies that a *waqf* created by a child, irrespective of his being discerning or not, is invalid, and neither is the guardian entitled to create a *waqf* on his behalf, nor is the *qāḍî* empowered to act as a guardian in this regard or to allow the creation of such a *waqf*. Some Imāmî legists consider a *waqf* created by a child over ten years as valid, but most of them oppose this view.

An idiot is also incapable of creating a *waqf*, for it is a disposition of property and an idiot is not authorized to carry out acts of such a nature.[7] The Ḥanafîs say: It is valid for an idiot to bequeath one-third of his wealth provided that the bequest is for charitable purposes, irrespective of whether it is in the form of a *waqf* or otherwise (*al-Fiqh 'alā al-madhāhib al-'arba'ah*, vol. 2, *bāb mabḥath al-ḥajr 'alā al-safîh*).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Niyyat al-Qurbah:

There is no doubt that the intention of creating a *waqf* is necessary for its creation. Hence if a declaration signifying the creation of *waqf* is made by a person who is intoxicated, unconscious, or asleep, or is made in jest, the recital will be void, because of the principle of unchanged status of the ownership of the property.

The schools differ on the question as to whether *niyyat al-qurbah* (the intention to seek God's good-pleasure) is a necessary condition like sanity and puberty (so that if a *wāqif* makes a *waqf* for a worldly motive it would fail to be operative) or if it becomes operative without it.

The Ḥanafîs say: *Qurbah* is a necessary condition and requires to be fulfilled, either presently or ultimately; i.e. the property donated should necessarily be used for charitable purposes, either from the time of creation of the *waqf* or at a later date; e.g. when one makes a *waqf* for the benefit of some wealthy people presently alive, and after them, for the benefit of their destitute descendants (*Fatḥ al-Qadîr*).[8]

Mālik and the Shāfi'îs observe: *Niyyat al-qurbah* is not necessary in a *waqf* (Abū Zuhrah, *kitāb al-waqf,* p. 92 ff.).

The Ḥanbalîs state: It is necessary that *waqf* be made for a pious, spiritual purpose (e.g. for the poor or for mosques, bridges, books, for relatives, etc.,) because the Sharî'ah has created the institution of *waqf* for acquiring spiritual reward, otherwise the purpose for which it was incorporated in the Sharî'ah is not achieved (Ibn Ḍawayān, *Manār al-sabîl,* p. 6, 1st ed.).

From among the Imāmiyyah, the authors of *al-Jawāhir* and *Mulḥaqāt al-'Urwah* observe: *Qurbah* is not a condition for the validity of *waqf,* or for taking its possession, rather it is essential for acquiring its spiritual reward. Therefore a *waqf* is completed without the presence of a spiritual motive.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Death Illness:

An illness resulting in death or generally capable of causing it is called death illness (*maraḍ al-mawt*).

All the schools concur that if a person in such an illness makes a *waqf* of his property, it will be valid and will be created from the bequeathable third, and if it exceeds this limit the consent of the heirs is necessary regarding the excess.

Summarily, all those conditions required of a seller (e.g. sanity, puberty [*bulūgh*], maturity [*rushd*], ownership, absence of a legal disability, such as insolvency or idiocy) are also necessary for a *wāqif*.

Al-Mawqūf:

The schools concur that a *mawqūf* property should fulfil all the conditions required of a saleable commodity, that it should be a determinate article owned by the *wāqif*. Therefore the *waqf* of a receivable debt or an unspecified property (such as when the owner says 'a field from my property' or 'a part of it') or that which cannot be owned by a Muslim (e.g. swine) is not valid. The schools also concur that the *mawqūf* should have a usufruct and must not be perishable. Hence that which cannot be utilized except by consuming it (e.g. eatables) will not be valid as a *waqf*. To this class also belongs the *waqf* of usufruct; therefore, if a tenant makes a *waqf* of the usufruct of a house or land which he has rented for a specific period, it will not be valid, because the notion of *waqf* as something in which the property is detained and its usufruct dedicated for a charitable purpose is not fulfilled here.

There is consensus as well regarding the validity of *waqf* of immovable property, e.g. land, building, orchard, etc.

All the schools, excepting the Ḥanafīs, concur on the validity of *waqf* of movable property, such as animals, implements and utensils, for they can be utilized without being consumed.

According to Abū Ḥanīfah, the *waqf* of movable property is not valid. But of his two pupils, Abū Yūsuf and Muḥammad, the former

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

accepts the *waqf* of movable property provided it is attached to an immovable property (for instance, cattle and implements attached to an agricultural land) and the latter limits its validity to the weapons and horses used in war (*Fatḥ al-Qadîr,* vol. 5, and *Sharḥ al-Zarqānî,* vol. 7).

The schools further concur that it is valid to make *waqf* of an inseparate share (*mushā'*) in a property (e.g. an undivided half or one-fourth or one-third) except where it is a mosque[9] or graveyard, because these two are incapable of being jointly owned (al-'Allāmah al-Ḥillî, in *al-Tadhkirah;* al-Shi'rānî in *al-Mîzān;* Muḥammad Salām Madkūr in *al-Waqf*).

According to the author of *Mulḥaqāt al-'Urwah,* a work on Imāmî fiqh, the *waqf* of the following forms of property is not valid: (1) mortgaged property; (2) property whose possession cannot be delivered (for instance, a bird in the sky and a fish in water, even if they are owned by the *wāqif*); (3) a stray animal; (4) usurped property which the *wāqif* or the beneficiary are unable to recover; but if this property is made a *waqf* for the benefit of the usurper the *waqf* is valid because the condition of seisin is achieved.

The Beneficiary (al-Mawqūf 'Alayh):

Al-mawqūf 'alayh is the person entitled to the proceeds of the *waqf* property and its usufruct. The following requirements must be fulfilled by the beneficiary:

1. He should exist at the time of the creation of the *waqf.* If he does not (as when a *waqf* is created for a child to be born later), the Imāmî, Shāfi'î and Ḥanbalî schools consider the *waqf* as invalid, while the Mālikî school regards it as vaild. It is stated in *Sharḥ al-Zarqānî 'alā Mukhtaṣar Abî Ḍiyā'*: A *waqf* in favour of a child to be born in the near future is valid, though it will become binding only on its birth. Therefore, if it is not conceived or miscarried, the *waqf* will become void.

According to all the schools, when the beneficiary ceases to exist after having existed at the time of the creation of *waqf,* the *waqf* is

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

valid (as when a person creates a *waqf* for his existing children and their future descendants). Regarding a *waqf* in favour of a foetus, the Shāfi'ī, Imāmī and Ḥanbalī schools consider it invalid, because a foetus is incapable of owning property until it is born alive. This principle is not negated by the allocation of a share in inheritance for an unborn child in anticipation of its birth and by the validity of a bequest in its favour, because these two instances have specific proofs for their validity. Furthermore, the allocation of a share in inheritance for an unborn child is meant to safeguard its right and to avoid the complications which would arise as a result of redistribution.

2. He should be capable of owning property. Hence it is neither valid to create a *waqf* nor to make a bequest in favour of an animal, as done by Westerners, especially women, who bequeath part of their wealth to dogs. Regarding the *waqf* of mosques, schools sanatoriums etc., it is actually a *waqf* in favour of the people who benefit from them.

3. The purpose of the *waqf* should not be sinful (as it would be when made for a brothel, or a gambling club, pub, or for highwaymen). As to a *waqf* made in favour of a non-Muslim, such as a *dhimmî*, there is consensus about its validity, in accordance with this declaration of God Almighty:

لَا يَنْهَـٰكُمُ اللَّهُ عَنِ الَّذِينَ لَمْ يُقَٰتِلُوكُمْ فِى الدِّينِ وَلَمْ يُخْرِجُوكُم مِّن دِيَٰرِكُمْ أَن تَبَرُّوهُمْ وَتُقْسِطُوٓا إِلَيْهِمْ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ ﴿٨﴾

God does not forbid you respecting those who have not waged war against you on account of your religion and have not driven you forth from your homes, that you show them kindness and deal with them justly. Verily, Allah loves the doers of justice. (60:8)

The Imāmī legist al-Sayyid Kāẓim al-Yazdî observes in the chapter on *waqf* of his book *Mulḥaqāt al-'Urwah*: "...Rather, it is also valid to create a *waqf* in favour of a *ḥarbî* and to show kindness to him in order to encourage him to righteous conduct."

Al-Shahîd al-Thānî, in *al-Lum'ah al-Dimashqiyyah, bāb*

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

al-waqf, states: "A *waqf* in favour of *dhimmî*s is valid, because it is not sin and also because they are creatures of God and a part of humanity which has been honoured by Him." He adds: "It is not valid to create a *waqf* in favour of any of the Khawārij or Ghulāt,[10] because the former charge Amîr al-Mu'minîn 'Alî (*'a*) with unbelief and the latter ascribe divinity to him, while the middle path is the right one, as mentioned by 'Alî (*'a*) himself:

هَلَكَ فِيَّ اثنانِ: مُبْغِضٌ قالٍ، وَمُحِبٌّ غالٍ.

Two kinds of people will perish concerning me: The one who hates me and the other who goes to the extreme in his love for me.

4. The beneficiary should be specifically known. Thus a *waqf* created in favour of an unidentified man or woman will be void.

The Mālikîs say: A *waqf* is valid even if the *wāqif* does not mention the purpose of the *waqf*. Hence if he says: "I dedicate this house of mine as *waqf*. Hence if he says: "I dedicate this house of mine as *waqf*," without adding anything else, the *waqf* will be valid and its usufruct will be spent for charitable purposes (*Sharḥ al-Zarqānî 'alā Abî Ḍiyā'*).

5. The Imāmî, Shāfi'î and Mālikî schools observe: It is not valid for a *wāqif* to create a *waqf* for the benefit of his own person or to include himself among its beneficiaries, because there is no sense in a person transferring his property to himself. But if, for instance, he makes a *waqf* in favour of the poor and later becomes poor himself, he will be considered one of them, and similarly if he creates a *waqf* in favour of students and later becomes a student himself.

The Ḥanafî and Ḥanbalî schools, however, permit such a *waqf* (*al-Mughnî;* Abū Zuhrah, al-Shi'rānî's *al-Mizān; Mulḥaqāt al-'Urwah*).

A Waqf for Prayers (al-Waqf 'alā al-Ṣalāt):

The invalidity of a *waqf* created for the *wāqif*'s benefit reveals the invalidity of a large number of such *waqf*s in the villages of Jabal

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

(Lebanon) which have been created by their *wāqif*s to meet the expenses of the prayers to be offered posthumously on their behalf. This is so even if we accept the validity of a proxy reciting *mustaḥabb ṣalāt* on behalf of the dead--aside from its validity with respect to the *wājib ṣālat*--because it is in fact a *waqf* in one's own favour.

Doubts Concerning Waqf:

The Imāmî author of *al-Mulḥaqāt* observes: If a doubt arises as to which among two persons is the beneficiary, or which among two purposes is the intended object of the *waqf,* the solution is effected by drawing lots or by effecting a 'compulsory compromise.' (*al-ṣulḥ al-qahrî*). 'Compulsory compromise' means distribution of the usufruct among the two parties or purposes.

If the purpose of the *waqf* is unknown and we do not know whether it is for a mosque or for the poor or for some other purpose, the *waqf* will be applied to charitable purposes.

If a doubt arises as to which of two properties is subject of *waqf* (such as where we know the existence of a *waqf,* but are not certain whether it relates to the *wāqif*'s house or shop) resort will be made to drawing lots or to a compulsory compromise; i.e. a half of both the house and the shop will be treated as *waqf.*

Conditions of a Wāqif and His Pronouncement:

The Wāqif's Intention:

If a *waqf* is a gift and a charity, the *wāqif* is the giver of that gift and charity, and it is obvious that any sane and mature adult free of financial disability is free to grant from his property whatever he wishes to anyone in any manner he chooses. It is stated in the ḥadîth النّاسُ مُسَلَّطونَ عَلىٰ أموالهِمْ. (people have been given full authority over their properties), and one of the Imams (*'a*) has said: للوُقوف بحَسَبِ ما يَقِفُها أَهْلُها. (*Waqf*s are to be managed in a manner provided by their *wāqif*s). Accordingly, the legists say: The conditions laid down by the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

wāqif are like the words of the Lawgiver, and his pronouncements are like His pronouncements as regards the obligation of following them. Similar is the case of a *nādhir, ḥālif, mūṣî* and *muqirr.*[11]

Consequently, if the intention of the *wāqif* is known (that he had a specific intention and none else), it will be followed even if it is against the commonly understood meaning of his words. For instance, if we know that he intends by the words 'my brother' a particular friend of his, the *waqf* will be given to the friend, not to his brother. This is because usage is valid as a means of determining one's intention, and where we already know the intention, the usage loses its significance. But if we are unaware of the intention, the usage is followed, and if there is no particular usage concerning it and nothing special is understood from the words of the *wāqif,* the literal meaning will be resorted to, exactly like the procedure applied regarding the words of the Qur'ān and the Sunnah.

The Permissible Conditions:

We had observed that a *wāqif* meeting all the conditions is entitled to lay down conditions of his choice. Here we mention the following exceptions.

1. A condition is binding and enforceable when it is contiguous to the creation of *waqf* and occurs along with it. Thus, if the *wāqif* mentions it after completing the deed, it will be null and void, because the *wāqif* has no authority over the *waqf* property after its ownership has passed on from him.

2. He may not lay down a condition which contradicts the nature of the contract (for instance, the condition that the ownership of the *waqf* property will be retained by him, so that he could pass it on as inheritance to his heirs, or sell it, or gift it or rent it or lend it if he so intends). The presence of such a condition implies that it is and is not a *waqf* at the same time. Because the presence of such a condition abrogates the deed creating the *waqf,* the *waqf* will be left without a deed, while the presumption is that it is not executed without a deed. In other words, such a *wāqif* is similar to the seller

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

who declares: "I sell this to you on the condition that its ownership will not be transferred to you and that its consideration will not be transferred to me." This is the reason why the legists have concurred that every condition contrary to the contract, apart from being void, also nullifies the contract.

But the famous legist al-Sinhūrī mentions in his compilation of select laws from Islamic fiqh that the Ḥanafîs exclude mosques from the above rule. Hence a void condition does not nullify its *waqf*, while in *waqf*s other than for mosques such a condition is void and also nullified the *waqf* (Madkūr's *al-Waqf*).

3. The condition should not oppose any rule of the Islamic Sharî'ah. For instance, it should not require the performance of a prohibited or the omission of an obligatory act. It is mentioned in the ḥadîth:

مَنِ اشْتَرَطَ شَرطاً سِوىٰ كِتابِ اللهِ عَزَّوَجَلَّ فَلا يَجوزُلَهُ، وَلاعَلَيْه.

He who lays down a condition contradicting the Book of God Almighty, it will neither be valid for him nor against him.

One of the Imams (*'a*) states:

المُسلِمونَ عِنْدَ شُروطِهِمْ إلاّ شَرْطاً حَرَّمَ حَلالاً، وَأَحَلَّ حَراماً.

Muslims are bound by the conditions that they lay down, except those which prohibit a *ḥalāl* or permit a *ḥarām*.

Excepting the above-mentioned kind, all other conditions mentioned at the time of the deed that neither contradict its spirit nor any rule of the Book and the Sunnah are valid and their fulfilment is *wājib* by consensus (for instance if the *wāqif* lays down the condition that a home is to be built for the poor from the agricultural produce of the *waqf* or if it is to be spent on the scholars, etc.). Summarily, the *wāqif*, like anyone else, is required to base all his dispensations on the principles of logic and the Sharî'ah, irrespective of whether they pertain to *waqf* or matters of diet,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

travel, etc. Therefore, if his act is in accordance with the Sharî'ah and reason, it is *wājib* to respect it, not otherwise.

The Contract and This Condition:

There is no doubt that a void condition, whatever its form, does not require to be fulfilled. It is also evident that a void condition which is contrary to the spirit of a contract nullifies the contract itself. Hence there is consensus regarding its being void in itself and its nullifying effect extending beyond itself, without there being any difference between *waqf* and other forms of contract in this regard.

The schools differ regarding a condition which is contrary to the Book and the Sunnah without going against the spirit of the contract (for instance, when a person makes his house a *waqf* in favour of Zayd on condition that he perform *ḥarām* acts in it or abstain from performing *wājib* duties), as to whether the invalidity of this condition necessitates the annulment of the contract as well (so that the carrying out of the contract is not necessary, in the same way as fulfilment of the condition is not necessary), or if the invalidity would be limited to the condition.

According to the Ḥanafîs, as mentioned by Abū Zuhrah in *Kitāb al-waqf*, p. 162: The conditions which contradict the regulations of the Sharî'ah are void, while the *waqf* is valid. It does not become void due to their invalidity, because a *waqf* is a charity and charities are not invalidated by void conditions.

The Imāmiyyah differ among themselves. Some among them observe that the presence of a void condition does not necessitate the annulment of the contract while others consider that necessary. A third group abstains from expressing any view (*al-Jawāhir* and al-'Anṣārî's *al-Makāsib*).

Our view here is that the invalidity of a condition which contradicts the precepts of the Book and the Sunnah does in no manner entail the invalidity of the contract. The reason is that a contract possesses certain essentials (*arkān*) and conditions, such as, the offer, its acceptance, the contracting party's sanity, maturity, and

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ownership of the subject of transaction, and its transferability. When these aspects of the contract are fulfilled, the contract is undoubtedly valid. As to the presence of void conditions, which have no bearing, immediate or remote, on the essentials and conditions of the contract but exist only marginally, their invalidity does not extend to the contract. Even if it is presumed that the invalidity of a condition creates a discrepancy in the contract--such as an uncertainty resulting in risk in a transaction of sale--the contract will be void in such a situation as a result of the uncertainty, not because the condition is void.

The author of *al-Jawāhir* also holds this opinion. With his singular acumen and precision, he observes: "The claim that an invalid condition if considered restrictive entails the invalidity of the contract and if considered hortative does not lead to its invalidity, is sophistic and fruitless."

Such a distinction is obviously sophistic and nonsensical, because in practice there is no recognizable difference between the two conditions, and it is evident that the regulations of the Sharī'ah have been framed on the basis of the general level of understanding of the people and not on the basis of subtle logical distinctions.

We have mentioned that the legists divide the conditions into valid and invalid ones, and regard the fulfilment of the former as obligatory. They have also divided invalid conditions into those which contradict the spirit of the contract and those which do not, yet contradict the rules of the Sharī'ah. They concur that the first kind is both invalid and invalidating, and differ concerning the second, some considering it as invalid without being invalidating, while others consider it both invalid and invalidating.

The legists then differ regarding many particular cases and issues as to whether they belong to the class of invalid conditions, and supposing that they do, as to whether they are invalidating as well. Here we shall mention a few of such cases.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Option to Revoke (al-Khayār):

According to the Shāfi'ī, Imāmī and Ḥanbalī schools if a *wāqif* lays down a condition giving himself the option for a known period to either confirm the *waqf* or revoke it, the condition is void along with the *waqf*, because this condition is contrary to the spirit of the contract.

According to the Ḥanafīs both are valid (*Fatḥ al-Qadîr, al-Mughnî* and *al-Tadhkirah*).

Inclusion and Exclusion (al-'Idkhāl wa al-'Ikhrāj):

According to the Ḥanbalīs and the preponderant Shāfi'ī opinion, if a *wāqif* lays down a condition entitling him to exclude from the beneficiaries of the *waqf* whomever he wishes and to include others as beneficiaries, the condition is not valid and the *waqf* is void, because the condition is contrary to the spirit of the contract and invalidates it (*al-Mughnî* and *al-Tadhkirah*).

The Ḥanafīs and the Mālikīs consider the condition valid (*Sharḥ al-Zarqānî* and Abū Zuhrah).

The Imāmiyyah make a distinction between the right to include and the right to exclude. They state: If he lays down a condition stipulating an option to exclude whomever he wishes from the beneficiaries, the *waqf* is void, and if the condition is that he may include those who would be born in the future among the beneficiaries, it is valid, irrespective of whether the *waqf* is in the favour of his own children or those of someone else (*al-Tadhkirah*).

Wāqif's Maintenance and the Payment of his Debts:

The Imāmī and the Shāfi'ī schools say: If one creates a *waqf* in favour of someone and includes a condition requiring the payment of his debts and the provision of his maintenance from the proceeds of the *waqf*, the *waqf* and the condition are both void (*al-Jawāhir* and *al-Muhadhdhab*).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

A Note:

In view of the mention above of the condition of option (*sharṭ al-khayār*) and the cases of *waqf* which are limited by a condition, it will be appropriate here to point out the difference between the following terms commonly used by Imāmī legists: *khayār al-sharṭ* and *sharṭ al-khayār, muṭlaq al-'aqd* and *al-'aqd al-muṭlaq.*

Sharṭ al-khayār is involved where the executor of a contract makes an explicit mention of the word *khayār* (option) while executing the contract and thereby reserves for himself the right to use it. For instance, he may say: "I sell this article to you and I shall have the option to annul the sale and revoke it within such and such a period." As to *khayār al-sharṭ,* which is more properly an option that results from the non-fulfilment of a condition, the party executing the contract makes no mention of it in the contract; rather, it is implicit in some condition that he lays down; such as where the seller says to the customer, "I sell this thing to you on the understanding that you are a scholar" and later on the buyer turns out to be illiterate. The nonfulfilment of the condition gives the seller the option to avoid the sale and revoke it; he may either confirm the sale if he wishes or revoke it. The difference between the meanings of the two terms is obviously great.

The difference between *al-'aqd al-muṭlaq* and *muṭlaq al-'aqd* will become clear when we understand the different forms of the contract. The kind of contract in which no conditions are stipulated is called *'al-'aqd al-muṭlaq.* Another kind is a conditional contract (*al-'aqd al-muqayyad*), which may contain either positive or negative conditions. A contract in general, irrespective of inclusion of any positive or negative conditions, is *muṭlaq al-'aqd,* a term which includes both *al-'aqd al-muṭlaq* and *al-'aqd al-muqayyad.* Accordingly, *al-'aqd al-muṭlaq* and *al-'aqd al-muqayyad* differ from each other, yet are two kinds that fall under *muṭlaq al-'aqd* (like 'man' and 'woman' with reference to 'human being').[12]

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Sons and Daughters:

If a *waqf* is created in favour of sons, it will not include daughters, and vice versa. If it is created in favour of children, both are included and will equally share the benefit. If the *wāqif* states: "The male will receive twice the female's share" or "they will both share equally" or "the female will receive twice the male's share," or states, "the woman that I have married will not have a share in it," all these provisions are valid, considering that they are conditions laid down by the *wāqif*. I did not find among the books of the five schools of fiqh that have been accessible to me any view which differs from what has been mentioned, excepting the one which Abū Zuhrah narrates on page 245 of *Kitāb al-waqf* from the Mālikîs. There it is stated: Consensus prevails among the Mālikîs that it is a sin to create a *waqf* in favour of sons to the exclusion of daughters, and to entitle someone to its benefit on condition of his abstinence from marriage; and some of them consider its sinful character the cause of its invalidity.

I believe that the opinion holding the invalidity of the above conditions, as well as the opinion which includes daughters in the *waqf* when it has been created solely in favour of sons, have both been abandoned and carry no weight among the Mālikîs. Though I have with me more than five works of the Mālikîs, including their voluminous as well as shorter works, despite my search I have not found in them any reference to this view.

On the contrary, they contain the following observation: The words of the *wāqif* will be understood according to the common usage and they are like the words of the Lawgiver with respect to the obligation of their observance. Indeed, it has been narrated from 'Umar ibn 'Abd al-'Azîz that he made an effort to include daughters in *waqf*s made in favour of sons, but he was not a Mālikî. Apart from this, if his efforts prove anything, they prove his compassionate and humanitarian disposition.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Grandchildren:

In the same way as the legists differ concerning the validity of some conditions, as to whether the invalid ones are just void or are void as well as invalidating, they also differ concerning the meaning of certain words, and among such instances is the case where the *wāqif* says: "This *waqf* is in favour of my children (*awlādî*)," without making any further clarification. Here the question arises as to whether the words 'my children' includes grandchildren as well, and if they do, whether they include both the sons' and the daughters' children or the sons' children only.

The preponderant (*mashhūr*) Imāmî view is that the words 'my children' do not include grandchildren, although al-Sayyid al-'Iṣfahānî states in *Wasîlat al-najāt*: "The word 'children' (*awlād*) includes both male and female grandchildren," and this is the correct view because that is what it means in customary usage, which is the criterion in this regard.

The author of *al-Mughnî* has narrated from Ibn Ḥanbal that the word 'child' (*walad*) applies to one's sons and daughters and to the son's children, not to the daughter's children.

The Shāfi'îs observe: The word 'child' (*walad*) includes both sons and daughters, but it does not generally include grandchildren. But the words *walad al-walad* (grand child), according to them as well as the Ḥanafîs, include both the sexes (*Fatḥ al-Qadîr* and *al-Muhadhdhab*).

The Mālikîs say: Females are covered by the word *awlād,* but not by the phrase *awlād al-'awlād* (children's children) (al-Zarqānî).

This view of the Mālikîs is self-contradictory, because both the word *awlād* and the phrase *awlād al-'awlād* are derived from the same root, *w.l.d.* How can it include both the sexes when used singly and only males when used in a construct phrase?

The Management of Waqf (al-Wilāyah 'alā al-Waqf):

The *wilāyah* over *waqf* is the authority granted to someone for

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

managing, developing and utilizing the *waqf* and for applying its yield for its specified purpose. This *wilāyah* is of two kinds: general and particular. The general *wilāyah* is enjoyed by the *walî al-'amr,* and the particular one by any person appointed by the *wāqif* at the time of the creation of *waqf* or by *ḥākim al-shar'*.

The schools concur that the *mutawallî* should be an adult, sane, mature and trustworthy person. Rather, the Shāfi'î and some Imāmî legists include the condition of *'adālah* as well. In fact, trustworthiness and reliability (*wathāqah*), along with the ability to fully administer the *waqf,* suffice.

The schools concur that the *mutawallî* is a trustee and is not liable except in the event of breach of trust and misfeasance.

The schools, except the Mālikî, also concur that the *wāqif* is entitled to grant himself the authority of administering the *waqf,* either alone or along with another person, for life or for a fixed period. He is also entitled to give this authority to someone else.

According to *Fatḥ al-Bārî,* Mālik has stated: It is not valid for a *wāqif* to grant himself the *wilāyah,* for then it may become a *waqf* in one's own favour, or the passage of time may lead to the fact of its being a *waqf* being forgotten, or the *wāqif* may become insolvent and apply it for his own benefit, or he may die and his heirs may apply it for their own benefit. But if there is no fear of any of these conditions arising, it does not matter if he keeps its administration in his own hands.

The schools differ where the *wāqif* does not grant anyone this authority, to himself or someone else. The Ḥanbalîs and the Mālikîs observe: The authority of managing the *waqf* will rest with the beneficiaries provided they are known and limited, otherwise the *ḥākim* will exercise it (*al-Tanqîḥ* and *Sharḥ al-Zarqānî*).

The Ḥanafîs state: The *wilāyah* will remain with the *wāqif* even if he does not explicitly mention it (*Fatḥ al-Qadîr*).

The Shāfi'îs differ among themselves, holding three opinions. The first opinion is that the *wilāyah* will rest with the *wāqif,* the second that it will rest with the beneficiaries, and the third that it will be exercised by the *ḥākim* (*al-Muhadhdhab*).

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The preponderant view among the Imāmiyyah is that when the *wāqif* does not name the *mutawallî* the *wilāyah* belongs to the *ḥākim,* which he may exercise personally or appoint someone to it. Al-Sayyid Kāẓim, in *al-Mulḥaqāt,* and al-Sayyid al-'Isfahānî, in *al-Wasîlah,* observe: This is correct in respect of public *waqf*s, but as to private *waqf*s it is for the beneficiaries to safeguard, improve, rent the *waqf* and realize its income without the *ḥākim*'s permission, and this has been the practice.

The Imāmiyyah say: If the *wāqif* retains the *wilāyah* over the *waqf* for himself and is not trustworthy, or gives it to a person of known impiety (*fisq*), the *ḥākim* is not empowered to annul the *wilāyah* of either the *wāqif* or the person appointed by him. This is mentioned in al-'Allāmah al-Ḥillî's *al-Tadhkirah.* Rather, the author of *al-Mulḥaqāt* observes: If the *wāqif* provides that the *ḥākim* should have no say in the affairs of his *waqf,* it is valid, and if the person appointed by the *ḥākim* to administer the *waqf* dies, this power will rest with the beneficiaries or *'ādil* individuals from among Muslims.

The Ḥanafî author of *Fatḥ al-Qadîr* (vol. 5, p. 61) states: If the *wāqif* retains the *wilāyah* with himself, in the event of his being untrustworthy the *qāḍî* is bound to abrogate his authority. Similarly, if he provides that the ruler and the *qāḍî* are not empowered to abrogate his authority and hand it over to another, the condition is void because it opposes the rule of the Sharî'ah.

I do not know how this view could be reconciled with what Abū Zuhrah has narrated in *Kitāb al-waqf,* p. 372, from *al-Baḥr,* that a *qāḍî* is not to be removed on grounds of impiety; for in such a circumstance the *mutawallî* is better entitled to remain, because the administration of justice is a more elevated and sensitive job.

When the *wāqif* or *ḥākim* has appointed a *mutawallî,* no one has any authority over him as long as he is fulfilling his *wājib* duty. But if he falls short of his duty or breaches the trust reposed in him, so that his remaining would be harmful, the *ḥākim* is empowered to replace him, though it is better that he appoint, as observed by the Ḥanbalîs, a trustworthy and energetic person alongside the former.

If the person appointed by the *wāqif* dies, or becomes insane, or

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

is affected by any other disability which renders him incapable, the *wilāyah* will not return to the *wāqif* unless he had so stipulated at the time of executing the *waqf* contract.

The Mālikīs permit its return to the *wāqif,* and he is also empowered to remove the *mutawallî* at his pleasure.

The Imāmiyyah and the Ḥanbalīs state: If the *wilāyah* is granted to two persons, they will act independently if so stipulated by the *wāqif,* and if one of them dies or becomes incapable of performing his duty, the other will singly perform the tas' But if the *wāqif* provides that they act jointly and not individually, it is not valid for any one of them to act individually. Where there is no explicit provision in this regard, the *wāqif* will be understood to have meant that they should not act individually, and hence the *ḥākim* will appoint another person and make him join the existing one (*al-Mulḥaqāt* and *al-Tanqîḥ*).

It has been narrated in *Fatḥ al-Qadîr* from Qāḍî Khān al-Ḥanafî: Where the *wāqif* grants the *wilāyah* to two persons, if one of them provides in his will that his companion is entitled to exercise his *wilāyah* over the *waqf,* after he dies it becomes valid for the person alive to exercise *wilāyah* over the whole *waqf.*

The author of *al-Mulḥaqāt* observes: If the *wāqif* provides a part of the benefits of the *waqf* for the *mutawallî,* the same will hold good irrespective of whether it is a large or a small amount, and if nothing is provided, he will be entitled to the compensation for a comparable job (*ujrat al-mithl*). This is in concurrence with what *Madkūr* narrates in *Kitāb al-waqf* regarding the Egyptian law.

The schools concur that the *mutawallî* appointed by the *wāqif* or the *ḥākim* is entitled to appoint an agent for the achievement of any purpose of the *waqf,* irrespective of whether the appointing authority explicitly provides for it or not, except where it insists on his performing it personally.

The schools also concur that the *mutawallî* is not empowered to transfer the *wilāyah* after him to another person where the original *walî* prohibits it. Similarly, they concur upon the validity of his delegating the *wilāyah* to someone else where he has been authorized

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

to do so. But where the *walî* has made no mention of this issue, either affirmatively or negatively, the Ḥanafîs hold that he is entitled to do so, while the Imāmî, Ḥanbalî, Shāfi'î and Mālikî schools consider that he is not so entitled, and if he does delegate it, his act is null and void.

The Children of 'Ulamā' and Awqāf:

There exist in our times 'ulamā' whose greed for mundane things equals Imam 'Alî's love for his faith. Hence, they give the *wilāyah* over the *waqf* in their hands to their children and then to their grandchildren and so on till the day of resurrection. They hide their intention by using the words "...the most capable in order of capability from this lineage."

I do not intend to criticize this innovation--or tradition--by quoting verses and traditions. But I will raise some questions here. Is the intention of such an 'ālim, while transferring this authority to his progeny, the betterment of the *waqf* and society, or is it only for securing the private advantage of his descendants? Does the motivation of this idea come from moral sense, continence, piety and self-denial for the cause of the faith, or is it motivated by a wish to provide some booty for his descendants by selling and exploiting one's religion? Does such a person have knowledge of the future through which he knows that the most capable among his descendants would be better for the cause of Islam and Muslims than the most capable individual from someone else's descent?

Consequently, why doesn't this 'ālim take a lesson from the rift he has observed and witnessed between the children of the 'ulamā' and the people of the place where the *waqf* exists, as well as between the children themselves in determining 'the most capable', and their eventually concurring over the distribution of *waqf* as if it were inherited property?

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Sale of Waqf:

Do there actually exist causes which justify the sale of *waqf* property? What are these causes if they exist? And if such a sale is valid and takes place, what is the rule concerning the proceeds? May we replace it (the original *waqf* property) with something capable of fulfilling the objectives of the *waqf,* so that a new property takes the place of the old one and is governed by the rules applicable to it?

Al-Makāsib and al-Jawāhir:

We will discuss the opinions of the different schools in detail and this discussion will make clear the replies to these as well as some other questions. I haven't come across anyone among the legists of the five schools who has dealt with this issue in such detail as the two Imāmī legists al-Shaykh al-'Anṣārī, in *al-Makāsib,* and al-Shaykh Muḥammad Ḥasan, in *al-Jawāhir,* "bāb al-tijārah." The two have examined the issue from all the angles, together with its numerous sub-issues, and have sifted the various opinions expressed in this regard. We will present a summary of the important issues dealt with in these two incomparable books, on which we have relied more than any other work in persenting the Imāmī viewpoint.

In this regard it may be pointed out that al-Shaykh al-'Anṣārī and the author of *al-Jawāhir,* in what they have left of their works, do not save the reader from toil and effort; rather, they require from him application, patience, intelligence and a substantial educational background. Without these it is not possible to follow these two authors or even to trace the path they have taken. Rather, they leave him lost and unable to find safe passage.

But one who has a firm educational base is bestowed upon by them the most precious of gems (*jawāhir*) and the most profitable of earnings (*makāsib*), provided he possesses patience and persistence. I am not aware of any other Imāmī legist from among the earlier or later generations who has bestowed Ja'farī fiqh and its principles life and originality to the extent given to it by the mighty pen of these

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

two.

I apologize for this digression which I was compelled to make by my sense of gratitude as a pupil of these two great figures, or more correctly of their works.

The Present Question:

Numerous views have been expressed in this regard and the clash of opinions visible here is not to be seen in any other issue of fiqh, or at least in the chapter on *waqf*. The author of *al-Jawāhir* has dealt with the medley of conflicting opinions and we mention here a collection of his observations:

The legists differ regarding the sale of *waqf* in a manner the like of which we do not generally encounter in any other issue of *waqf*. Some of them absolutely prohibit the sale of *waqf*, some others allow it under certain circumstances, while a group among them refrains from giving any opinion. Rather, the number of opinions expressed is so large that each legist has his own specific view, and there are instances where a single legist has expressed contradictory views in the same book; for example, the view expressed by him in the chapter on sale contradicts his opinion in the chapter on *waqf*. Sometimes contradictory ideas have been expressed in a single argument, so that that which is observed in the beginning differs from the observations at the time of conclusion. The author of *al-Jawāhir* has recorded twelve different opinions and the reader will learn about the most important among them from the issues discussed below.

Mosques:

The rule applicable to a mosque, in all the schools of Islamic law, differs from the rules applicable to other forms of *waqf* in a number of ways. Hence all the schools, except the Ḥanbalī, concur that it is not permissible to sell a mosque irrespective of what the circumstances may be, even if it lies in ruins or the people of the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

village or locality where it is located have migrated and the road to it is cut in such a manner that it is certain that not a single person will pray in it. Despite all this, it is *wājib* that it remain in the same state without any change. The reason given for this is that the *waqf* of a mosque severs all links between it and the *wāqif* as well as everyone else except God Almighty, and, therefore, it is at times termed *fakk al-milk* (release from ownership) and at times *taḥrîr al-milk* (liberation from ownership). That is, earlier it was confined, while now it has become free from all constraints. Now when it is not anyone's property, how can its sale be valid when it is known that sale cannot take place without ownership?

Consequently, if a usurper utilizes a mosque by residing in it or cultivating it (when it is a piece of land), though he be considered a sinner, he is not liable for any damages, because it is not owned by anyone.

It is noteworthy that its ceasing to be anyone's property precludes its ownership through sale or purchase, but this prohibition does not apply if its ownership is acquired through *al-ḥiyāzah* (acquisition), like all other forms of natural bounties (*al-mubāḥāt al-'āmmah*).

The Ḥanbalîs say: If the residents of a village migrate from the locale of the mosque and it stands in a place where no one prays in it, or if it is too small for the number of people praying in it and its extension or building a part of it is also not feasible without selling a part of it, its sale is valid, and if it is not possible to draw any benefit from it except through sale, it may be sold (*al-Mughnî*, vol. 5, "bāb al-waqf").

The opinion of the Ḥanbalîs is similar in some aspects to the view expressed by the Imami legist al-Sayyid Kāẓim, who observes in *Mulḥaqāt al-'Urwah* that there is no difference between the *waqf* of a mosque and its other forms.

Thus dilapidation, which justifies the sale of other forms of *waqf* property, will also justify the sale of a mosque. As to the 'release from ownership', it does not hinder its sale in his view so long as the property has value. The correct view, in our opinion, is that it is not

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

valid to own a mosque through a contract of sale, though it is valid to do so through *al-ḥiyāzah*.

That which gives strength to the view expressed by this great legist, that there is no difference (between the various kinds of *waqf*), is that those who permit the sale of a *waqf* which is not a mosque if it is in a dilapidated condition, do so because in a dilapidated state the structure is either unable to fulfil the purpose for which it was endowed or loses the quality made by the *wāqif* as the subject of the *waqf* (such as where he endows an orchard because it is an orchard and not because it is a piece of land). This logic applies exactly in the case of a mosque as well, because the condition that it should be used as a place of prayer was what caused it to be made a *waqf*. Now when this condition is not being fulfilled, the property ceases in its use as a mosque. In such a situation, the rule applicable to a non-mosque *waqf* will also be applied here, in that it can be owned through any of the forms of acquisition of ownership, even if it be through *al-ḥiyāzah*.

Properties Belonging to Mosques:

Generally mosques have assets in the form of *waqf*s of shops, houses, trees or land, whose profits are utilized for the repairs and carpeting of mosques and for paying its attendants. Obviously, these forms of property do not enjoy the sanctity of a mosque and its merit as a place of worship, because there is a difference between a thing and the properties subject to it.

The two also differ with respect to the rules applicable to their sale. Therefore those who prohibit the sale of a mosque allow the sale of a mosque's assets because there is no causal *shar'î* or non-*shar'î* relationship between them, considering that a mosque is used for worship, a purely spiritual activity, while the *waqf* of a shop (owned by a mosque) is destined for material benefit. Hence a mosque belongs to the category of public *waqf*s--or rather it is one of the most prominent of its forms--while the properties owned by it are private *waqf*s belonging specifically to it. Consequently, it is

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

doubtlessly valid to sell *waqf* properties belonging to mosques, cemeteries, and schools, even if we accept the invalidity of the sale of a school or a graveyard.

But is it valid to sell the properties subject to a *waqf* unconditionally, even if there is no justifying cause--such as its being in a dilapidated condition or dwindling returns--or is it necessary that there exist a justifying cause so as to be treated exactly like a *waqf* in favour of one's descendants and other forms of private *waqf*?

These properties are of two types. The first type is one where the *mutawallî* buys the property from the proceeds of the *waqf*, such as where a mosque has an orchard which the *mutawallî* rents out, or buys or builds a shop from its proceeds for the *waqf*'s benefit, or obtains a shop from charitable donations received. In such a situation, both sale and exchange are valid if beneficial, irrespective of whether there exists any justifying cause mentioned by the legists, because, these properties are not *waqf* but only the proceeds or assets belonging to the *waqf*. Hence the *mutawallî* is free to deal with them in the interest of the *waqf*, exactly like he deals with the fruits of an orchard endowed for the benefit of a mosque,[13] except where the religious judge (*ḥākim al-shar'*) supervises the creation of the *waqf* of a real estate bought by the *mutawallî*, in which case the real estate will not be sold unless there exists a cause justifying its sale. But where the *mutawallî* creates a *waqf*, it has no effect without the *ḥākim*'s permission, because the *mutawallî* is appointed for managing the *waqf* and its utilization, not for creating *waqf*s.

The second type of property is one where the benefactors endow it as a *waqf* for the benefit of a mosque or school (as when a person provides in his will that his house, shop or land be made a *waqf* for the benefit of a mosque or school, or he himself makes a *waqf* of it). This kind of property is considered a private *waqf* and its sale is valid if the justifying causes, such as dilapidation or dwindling returns amounting to almost nothing, exist. But if they do not exist, it is not valid. I haven't come across in any work of the four Sunnî schools in my possession anyone making this distinction.

This is what I have inferred from what al-Shaykh al-'Anṣārî

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

mentions in *al-Makāsib* while discussing the rule applicable to a mosque's mat. He says: "A difference has been made between what is 'free' property (e.g. a mat purchased from the income of a mosque; in this case it is valid for a *mutawallî* to sell it if it is beneficial, if it has fallen into disuse or even if it is still new and unused) and between what is part of a *waqf* in favour of the mosque (e.g. a mat which a person buys and puts in the mosque, or the cloth used to cover the Ka'bah; the like of these are the public property of Muslims and it is not valid for them to alter their condition except in cases where the sale of *waqf* is valid)."

Thus when it is valid for a *mutawallî* to sell a new mat of the mosque which he has purchased from its funds, it is without doubt valid for him to sell other such items, and that which indicates an absence of difference (between a mat and something else) is the Shaykh's own observation soon after the above quotation. There he states: "The rule applicable to baths and shops which have been built for income through letting them and the like, is different from the rule applicable to mosques, cemeteries and shrines."

Exactly similar is the following view of al-Nā'înî mentioned in al-Khwansārî's *Taqrîrāt*: "Where a mosque is ruined or forsaken, in a manner that it is no longer in need of the income from its *waqf*s and other sources, the income from *waqf*s pertaining to it will be spent in worthy causes, though it is better that it be spent on another mosque." Similarly, if the *waqf* is in favour of a certain school or hospital which lies in ruins, its income will be used for charitable purposes or for another institution of its kind.

Waqfs which are not Mosques:

We have referred to the opinions held by the different schools concerning mosques, and pointed out that the Imāmî Shāfi'î, Ḥanafî and Mālikî schools are opposed therein to the Ḥanbalîs. But concerning *waqf*s other than mosques, the Imāmiyyah have their own specific stand regarding their sale. We will first mention the views of the four Sunnî schools and then deal separately with the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

opinion of the Imāmiyyah.

Since the Ḥanbalîs have allowed the sale of a mosque on the existence of a justifying cause, it is more in order for them to allow the sale and exchange of a *waqf* which is not a mosque, provided a justifying cause exists.

As to the Shāfi'îs, they absolutely prohibit its sale and exchange even if it is a private *waqf* (e.g. in favour of one's progeny) and even if a thousand and one causes exist, though they allow the beneficiaries to use up the private *waqf* themselves in case of necessity (e.g. using a dried fruit tree as fuel, though its sale or replacement is not valid for them).

The Mālikîs, as mentioned in *Sharḥ al-Zarqānî 'alā Abî Ḍiyā'*, permit the sale of a *waqf* in the following three situations. First, where the *wāqif* stipulates its sale at the time of creation of *waqf;* here his condition will be followed. Second, where the *waqf* is a movable property and is considered unfit for its prescribed purpose; here it will be sold and the amount realized will be used to replace it. Third, an immovable property will be sold for the expansion of a mosque, road or cemetery. Apart from these its sale is not valid, even if it lies in ruins and is not being utilized for any purpose.

As to the Ḥanafîs, according to Abū Zuhrah in *Kitāb al-waqf,* they allow the replacement of public and private *waqf*s of all kinds except mosques. They have mentioned the following three situations in this regard:

1. That the *wāqif* should have specified it at the time of creation of *waqf*.

2. The *waqf* should fall in a condition of disuse.

3. Where replacement is more profitable and there is an increase in its returns, and there exists no condition set by the *wāqif* prohibiting its sale.

This was a brief account of the views of the four schools regarding a *waqf* which is not a mosque, and, as noticed, they, as against the Imāmiyyah, do not differentiate between private and public *waqf*s--excepting mosques--from the point of view of their sale.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

Public and Private Waqfs:

The Imāmiyyah divide *waqf*s into two categories and specify the rules applicable to each one of them as well as their consequences.

Private Waqf: It is a *waqf* which is the property of the beneficiaries, i.e. those are entitled to utilize it and its profits. To this category belong *waqf*s in favour of one's progeny, 'ulamā', or the needy, the *waqf*s of immovable property for the benefit of mosques, cemeteries, schools, etc. It is regarding this category that there is a difference of opinion between the legists as to whether its sale is valid when the justifying causes are present or if it is totally invalid even if a thousand and one causes exist.

Public Waqf: It is a *waqf* for the common benefit of people in general, not for a specific group or class among them. To this category belong schools, hospitals, mosques, shrines, cemeteries, bridges, caravansaries of the past, springs and trees dedicated for the use of passers-by, because they are not meant for any specific Muslim individual or group to the exclusion of other individuals or groups.

The Imāmiyyah concur that these public *waqf*s cannot be sold or replaced in any situation even if they are in ruins or about to be destroyed and fall into disuse, because, according to them, or most of them, they are released from ownership, i.e. gone out of the ownership of the earlier owner without becoming anyone's property. Thus on becoming *waqf* such a property becomes exactly like the free gifts of nature, and it is obvious that there can be no sale except where there is ownership. This is in contrast to private *waqf*s which involve the transfer of ownership of the *wāqif* to the beneficiaries in some particular manner. Hence (in the case of public *waqf*s), if the purpose of a *waqf* becomes totally impossible to achieve (such as a school which has no students and consequently no lessons can be held in it) it is valid to transform it into a public library or a conference hall.

We have already pointed out in the discussion on mosques that though hey are precluded from being owned through sale, it is valid

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

to own them through *al-ḥiyāzah*. We also said that the author of *Mulḥaqāt al-'Urwah* has criticized the legists on the basis that there is no difference between public and private *waqf*s and that the reason justifying the sale of a private *waqf* also justifies the sale of a public *waqf*. He does not concede that a public *waqf* involves release and freedom from ownership, and there is no impediment to sale in his opinion even if it is accepted to be such, because, according to him, the factor justifying a thing's sale is that it should possess value.

However, we have some remarks to make about the opinion of the legists as well as that of the author of *al-Mulḥaqāt*. We reject the position of the legists on the ground that though the absence of ownership prevents ownership of a *waqf* through a contract of sale, it does not prevent its ownership through *al-ḥiyāzah*. Similarly, ownership by itself does not validate sale, because mortgaged property, which is certainly owned (by the mortgagor), cannot validly be sold without the consent of the mortgagee.

We reject the position of the author of *al-Mulḥaqāt* because possession of value by itself is not sufficient, for the unowned gifts of nature, (such as the fishes in the water or the birds in the sky), though they possess value, cannot be sold (in that state). Therefore, as observed earlier, the only way of ownership is through *al-ḥiyāzah*.

Cemeteries:

We have already mentioned that cemeteries are public *waqf*s like mosques and that the Imāmiyyah do not consider their sale valid in any situation, even if they are in ruins and their signs have been wiped out. I consider it useful to specifically discuss cemeteries in this chapter for the following two reasons.

1. The necessity of mentioning the rules in this regard, because there are numerous Muslim cemeteries which have been forsaken and are used for other purposes.

2. Usually there is a difference between cemeteries and other forms of *waqf*s. This difference will become clear in the following discussion.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

If we know about a cemetery that a person had donated his land for that purpose and it was used for burial, the rule applicable to public *waqf*s will apply to it, and it will be reckoned among *waqf*s whose sale is invalid, even if its signs have disappeared and the bones of the buried have decayed.

But if we know that the cemetery was previously an unused land not owned by anyone and the people of the village used it as a cemetery--as is usually the case--then it is not a *waqf* ab initio, neither public nor private; rather it will remain the common property of all (*al-mushā'*) and its *ḥiyāzah* is valid for anyone who takes the initiative. But if a corpse is buried in a part of it, both the opening of the grave and using it in a desecrating manner are not valid. But anyone can personally utilize any part of this land by either cultivating it or building upon it if it is without graves or there are old graves whose occupants' bones have decayed.

Using this land is valid for him, exactly like it is valid for him to use abandoned land or land whose original user has migrated and it has reverted to its previous state.

Where we are unaware of the history of a piece of land which is being used as a cemetery--i.e. as to whether it was an owned land which was endowed by the owner, so that it would be considered a *waqf* and governed by its rules, or if it was an ownerless land which the villagers later used for burying their dead--it will not be considered a *waqf* because the presumption is the absence of a *waqf* unless its existence is proved according to the Sharī'ah.

Here one might say: A *waqf* is proved if it is popularly known to be such; therefore why cannot the *waqf* of a cemetery be similarly proved?

Our reply is that if it is popularly known that a certain cemetery is a *waqf* and it has been narrated generation after generation that a particular person had endowed it for a cemetery, we would definitely confirm it as a *waqf*. But if all that is widely held is that it is a cemetery, the sole knowledge of its being a cemetery is not sufficient to prove that it is a *waqf*. It could have been common land.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

A Sub-Issue:

If a person digs a grave for himself to be buried in it at the time of his death, it is valid for others to bury in it another corpse even if there is extra space in the cemetery. But it is better to leave it for him, refraining from troubling a believer.

Causes Justifying the Sale of Waqf Property:

We have already mentioned that Imāmī legists concur that the sale of public *waqf*s, like mosques and cemeteries, etc., is not valid. But regarding private *waqf*s (e.g. the *waqf*s made in favour of one's progeny, scholars, or the needy) there is a difference of opinion between them where there exists a cause justifying their sale. The following causes justifying the sale of private *waqf*s have been mentioned by these legists.

1. Where there remains no benefit of any kind in the property from the viewpoint of the purpose for which it was endowed (e.g. a dried branch not yielding fruit, a torn mat fit only for being burnt, a slaughtered animal which can only be eaten), there is no doubt that this cause justifies sale.

2. Al-Sayyid Abū al-Ḥasan al-'Isfahānī observes in *Wasîlat al-najāt*: "The articles, carpets, cloth coverings of tombs, and similar items cannot be sold if they can be utilized in their present state. But if they are not required in the location any longer, and their being there would only damage and destroy them, they should be utilized in a similar alternative place, and if such a place does not exist or exists but does not need them, they will be used for public benefit. But where no benefit can be derived from them except by selling them and their retention amounts to their damage and destruction, they will be sold and the proceeds used for the same place if it is in need of it. Otherwise, it will be used in any other similar place if possible or for public benefit.

3. If a *waqf* is in ruins (such as a dilapidated house or an orchard which is not productive) or its benefit is so little as to be reckoned

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

nonexistent, if its repair is possible it will be repaired, even if it entails its being rented out for years; otherwise, its sale will become permissible, provided its proceeds are applied for replacing the former property as mentioned below.

4. If the *wāqif* provides for the sale of *waqf* property in case of dispute between the beneficiaries, or dwindling profits, or any other reason which does not make a *ḥarām ḥalāl* and vice versa, his desire will be carried out.

5. Where dispute occurs between the beneficiaries of a *waqf* threatening loss of life and property and there is no way of ending it except through its sale, the sale is permissible and the amount realized will be distributed among the beneficiaries.

This is what the legists say, though I do not know the basis of their opinion except what they have mentioned regarding the countering of a greater by a lesser harm. But it is obvious that it is not valid to remove harm from one person by shifting it to another, and the sale of the *waqf* entails loss to the succeeding generations of beneficiaries.

6. If it is possible to sell part of a dilapidated *waqf* property and repair the remaining part with the proceeds of the sale, such a sale is permissible.

7. If a mosque is ruined, its stones, beams, doors, etc. will neither be treated in accordance with the rules applicable to the mosque itself, nor the rules applicable to fixed property endowed for the benefit of a mosque which forbid its sale except on the presence of a justifying cause. Rather, the rules applicable to them will be those which apply to the income of the mosque and its *waqf*s (such as the rent of a shop belonging to or endowed in favour of the mosque). In this regard the *mutawallî* is free to utilize it in any manner beneficial for the mosque.

The Sale Proceeds of a Waqf:

Where a *waqf* is sold on the presence of a justifying cause, how will the sale proceeds be used? Will they be distributed among the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

beneficiaries exactly like the income generated by the *waqf,* or is it necessary, if possible, to buy with these sale proceeds a similar property to replace the one sold?

Al-Shaykh al-'Anṣārī as well as many other *mujtahid*s observe: The rule applicable to the sale proceeds is the rule applicable to the *waqf* sold, in that it is the property of the succeeding generations. Therefore, if the sale proceeds are in the form of immovable property, it will take the place of the *waqf* sold; if it is cash, we will buy with it the most suitable replacement. The replacement does not require the reciting of a *ṣîghah* for making it a *waqf,* because the fact that it is a replacement naturally implies that the latter is exactly like the former. Hence al-Shahîd states in *Ghāyat al-murād*: 'The replacement is owned on the basis of the ownership of the replaced property, and it is impossible that it be owned separately.'

Then al-'Anṣārī observes in *al-Makāsib,* at the conclusion of the discussion on the first cause validating the sale of a *waqf*: "If it is not possible to buy immovable property from the sale proceeds, the money will be kept in the custody of a trustworthy person awaiting a future opportunity. If deemed beneficial, it is also permissible to do business with it, though the profits will not be distributed among the beneficiaries, as is done in the case of the income generated from the *waqf;* rather the rule applicable here will be the rule applicable to the *waqf* itself because it is part of the property sold and not a true increase."

This is what al-'Anṣārī has said and he, may God be pleased with him, is better aware of his true intent. But I do not perceive any difference between the profits of the sale proceeds of a *waqf* and the income generated from the *waqf* itself. Therefore, as the income of the *waqf* is distributed among the beneficiaries, it is appropriate that the profits (from the sale proceeds invested) be similarly distributed, though it may be said that the income from the *waqf*'s immovable property does not belong to the class of the *waqf* property itself but is separate from it, whereas the profits from business are in the form of money which does not differ from it, and where there is a difference, the rule applicable will also differ. Whatever the case, if

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the mind is set to work, it finds a solution for every difficulty and doubt from a theoretical point of view. But, obviously, practice should be the criterion, and the tangible reality is that usage does not distinguish between the two situations, and therefore it should be resorted to.

Al-Shaykh al-Nā'înî observes in al-Khwansārî's *Taqrîrat:* If another property is purchased from the sale proceeds of the first property, the latter will neither take the place of the former nor will it be considered a *waqf* similar to the former; rather it is exactly like the income generated from a *waqf,* and it is permissible to sell it without any justifying cause if the *mutawallî* considers its sale to be beneficial.

The correct opinion is the one mentioned by al-'Anṣārî, al-Shahîd and other researchers that there is no difference between the replacement and the property replaced.

Some Curious Waqfs:

I did not intend to add anything about *waqf* after having finished discussing it and having mentioned the positions of the schools. But incidentally at the time when I had finished the chapter on *waqf* to go on to the chapter on *ḥajr* (legal disability) I read a curious and interesting account regarding Egyptian *waqf*s during the eras of the Mamlūks and earlier 'Uthmānîs. I had received two magazines, the Lebanese *Lisān al-Ḥāl* and the Egyptian *al-'Akhbār* dated 7th July 1964, and I set aside my pen and started perusing them so to know about the current developments and to relieve myself of monotony.

By chance I happened to read in the magazine *al-'Akhbār* that in the Directorate of Waqf, Egypt, is an iron vault that had remained locked for hundreds of years. The Directorate decided to open it to find out its contents. When the doors of this vault were opened, thousands of deeds and agreements covered with dust and piled upon one another were found. Twenty persons were appointed to study them. When they started this work they came across curious and amazing things: 300 deeds written with gold water, a deed

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

executed a thousand years ago, and so on. It made an interesting and enjoyable reading either because it was actually so or due to my immersion in related research and writing. I mention a part of these contents hoping that the reader too would also enjoy reading them:

An immovable property was endowed for providing grass for the mule ridden by the Shaykh of al-'Azhar at that time.

A woman created a *waqf* of 3000 feddans (' Egyptian feddan = 4200.833 sq. metre) for the benefit of the 'ulamā' who followed Abū Ḥanîfah.

Some *pāshā* endowed 10,000 feddans for covering the graves of his relatives with branches of palm and myrtle.

A person endowed parts of his wealth for the water-carriers of the city mosque.

Another created a *waqf* for the reciter of the Friday sermon.

A lady created a *waqf* for providing ropes for pails used for supplying water to a mosque.

A *waqf* for providing caftans and outer garments for old persons.

A *waqf* for incensing study sessions.

I remember having read in the past about a *waqf* in Syria whose income is used to buy new plates to replace those broken by maidservants to save them from the censure of their mistresses.

I have heard that in Ḥomṣ there is a *waqf* for those who sight the new moon of the *'Īd* of Ramaḍān. For this reason there is a multitude of claims of having sighted it in that region. There are also present *waqf*s in some villages of Jabal 'Āmil for providing shrouds for the dead.

These *waqf*s, if they reveal anything, show the thinking prevailing at that time, the mode of living and habits of the society in which the *wāqif*s lived, and that there were a large number of families who could not even provide their dead with a shroud.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

NOTES:

1. The difference between *waqf* and *ḥabs* is that in the former the ownership of the *wāqif* is completely ended, and this prevents the property from being inherited or disposed of in any other manner. In the latter case, the ownership of the *ḥābis* is preserved, and the *ḥabs* property may be inherited, sold, etc. This difference was not noticed by al-Shaykh Abū Zuhrah and he, as will be noticed, has ascribed to the Imāmiyyah that which they do not hold.

2. This issue of perpetuity in *waqf* is intimately linked with the question concerning the ownership of *waqf* property, which has been discussed separately in this chapter.

3. Abū Zuhrah has rejected this view (p. 50), on the basis that the concept of the ownership of God is meaningless in this context, for God Almighty owns everything. But it will be noticed that the meaning of God's owning the *waqf* is not that it becomes a free natural bounty (like air and water); rather, His ownership of it is like His ownership of *khums al-ghanîmah*, as mentioned in the Qur'ānic verse:

وَاعلَمُوٓاأَنَّمَاغَنِمتُم مِّن شَيءٍ فَأَنَّ لِلَّهِ خُمُسَهُ...

And know that whatever you acquire as ghanîmah, a fifth of it is for God.... (8:41)

4. As to those who say that *waqf* may be created only by using specific words, the gist of their argument is based on the presumption of the continuity of the ownership of the property by the owner. That is, the property was the owner's before the execution of the contract; following it, we will come to entertain a doubt (due to his failure to make his intent explicit through specific words) regarding the transfer of its ownership from him. Accordingly, we will presume the existing situation--which is the continuity of the owner's ownership--to continue. It will be noticed that this argument holds where there is doubt as to whether the owner intended the creation of a *waqf* or not, or where despite the knowledge of his intention of creating a *waqf* there is doubt as to whether he has executed the contract and created the cause for its existence. But where we have knowledge of both his intention to create a *waqf* as well as his having fulfilled what is required to prove its existence, there remains no ground for doubt. Now, if a doubt arises, it will be considered a mere fancy and will have no effect, unless the doubt concerns the validity of the form of recital (*al-ṣîghah*) as the cause creating the *waqf* and its effect from the point of view of the Sharî'ah.

5. This distinction has been accepted by a group of leading Imāmî scholars, such as the author of *al-Sharā'i'*, al-Shahîdayn (al-Shahîd al-'Awwal and al-Shahîd al-Thānî), al-'Allāmah al-Ḥillî, and others. According to it, a private *waqf* is a contract (*'aqd*) and requires both an offer and an acceptance, and there is no legal

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

and logical obstacle in a *waqf* being (bilateral) contract (*'aqd*) in certain circumstances and a (unilateral) declaration (*îqā'*) in others, although the author of *al-Jawāhir* has opposed it.

6. There is no proof (*dalîl*) based on the Qur'ān, Sunnah or *'aql* (reason) concerning the invalidity of contingency (*ta'lîq*) in *'aqd* and *îqā'*, and those who have considered it void have done so on the basis of *ijmā'*. But it is obvious that *ijmā'* is authority only when we cannot identify the basis on which it is based; but if its basis is known, its authority will disappear, and the basis on which the *mujtami'ūn* (those who take part in the *ijmā'*) have relied will itself be weighed to ascertain its authority. In this case the *mujtami'ūn* have relied on the assumption that the meaning of *inshā'* implies its immediate presence, and the meaning of being contingent on a future event is that the *inshā'* is not present, and this entails the presence and absence of *inshā'* at the same time.

This argument stands refuted on the ground that *inshā'* is present in actuality and is not contingent upon anything; only its effects will take place in the future on the realization of the contingency, exactly like a will, which becomes operational on death, and a vow that is contingent upon the fulfilment of a condition.

7. The schools differ concerning the disability of an idiot, as to whether it begins at the commencement of idiocy when the *qāḍî* has not yet made a declaration of his disability or if it begins after the declaration has been made. We will discuss it in detail in the chapter on wardship (*bāb al-ḥajr*).

8. By *'Fatḥ al-Qadîr'* we mean the book which has become popular by this name, although we know it to be a collection of four books, one of which is *Fatḥ al-Qadîr*.

9. Al-Sayyid Kāẓim observes in *al-Mulḥaqāt:* If a person has a share in a house, he can make a *waqf* of it for a mosque, and those who come for prayers will take the permission of the other owners. I don't understand what benefit lies in such a *waqf*.

10. For ascertaining the religious beliefs of a group, there is nothing more authentic than its religious texts--especially those on fiqh and law. Al-Shahîd al-Thānî, one of the greatest juristic authorities of the Imāmî Shî'îs, has stated explicitly that the followers of other religions are better than the Ghulāt and that they are honoured creatures of God. In view of this, is it possible to ascribe *ghuluww* to the Imāmiyyah?

11. *Nādhir* means one who takes a vow (*nadhr*); *ḥālif* means one who takes an oath (*ḥalf*); *mūṣî* means one who makes a will (*waṣiyyah*); and *muqirr* means one who makes a confession (Trans.).

12. Of such pithy expressions common among the theological students of Najaf are: *bi-sharṭ shay'*, *bi sharṭ lā* and *lā bi-sharṭ*. They mean by *bi-sharṭ shay'*, 'on condition that; laying down a positive condition, such as when one says, "I will give it to you if you do such and such a thing." *Bi-sharṭ lā* implies stipulation of a negative condition, such as when one says, "I will give it to you if you don't do such a thing."

Lā bi sharṭ means regardless of any positive or negative conditions that may be involved (as when one says, "I will give it to you," without mentioning any positive or

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

negative condition). It is obvious that *lā bi-sharṭ* includes both *bi-sharṭ shay'* and *bi-sharṭ lā*.

13. The difference between property purchased from the income of *waqf* and property purchased from the sale proceeds of a dilapidated *waqf* is noteworthy. In the former case, the property purchased will take the place of the *waqf* sold, while the property purchased from the *waqf*'s income will not take the position of a *waqf*.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

HAJR (Legal Disability)

Ḥajr:

Ḥajr literally means *man'* (to prohibit, refuse, prevent, deprive, detain), and this meaning is also evident from the Qur'ānic verse:

...وَيَقُولُونَ حِجراً مَحجُوراً ﴿٢٢﴾

(Upon the day that they see the angels, no good tidings that day for sinners: they--i.e. the angels--shall say), 'A ban forbidden.' (25:22)

Legally it implies prohibiting the dispositions of a person with respect to all or some of his property. The causes of disability, which we will discuss here, are four: (1) insanity (*al-junūn*); (2) minority (*al-ṣighar*); (3) idiocy (*al-safah*); (4) insolvency (*al-'iflās*).[1]

1. Insanity:

In accordance with explicit traditions as well as consensus, an insane person is prohibited from all dispositions, irrespective of whether his insanity is permanent or recurring. But if a person suffering from recurring insanity manages his property during the period he is free from it, his dispositions are binding. Further, where it is uncertain whether a particular disposition belongs to the period of sanity, it will not become binding. Because sanity is a condition for

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the validity of an agreement, and an uncertainty regarding it amounts to an uncertainty concerning the existence of the contract itself, not its validity, consequently its very basis is negated. In other words, where there is uncertainty about the validity of a contract due to uncertainty concerning the presence of sanity at the time of its conclusion, we will presume that the situation before the contract continues to exist and will leave it at that.

The rule applicable to an insane person is also applied to a person in a state of unconsciousness and intoxication.

If an insane person cohabits with a woman and she becomes pregnant, the child will be considered his, exactly like in the case of 'intercourse by mistake.'

2. Minority:

A minor is considered legally incapable by consensus, and there is a difference of opinion regarding some dispositions of a child of discerning age, as will be mentioned later. When a minor matures mentally and attains puberty he becomes an adult and all his dispositions become enforceable.

The Imāmī and the Shāfi'ī schools observe: When a child reaches the age of ten, his will shall be considered valid in regard to matters of charity and benevolence. More than one Imāmī legist, relying on some traditions, has said: His divorce is also valid.

The reader may refer to the chapter on marriage, the section entitled "Capacity to Enter Into a Marriage Contract," regarding the age of puberty and its signs.

Liability (al-Ḍamān):

If an insane person or a child destroys another person's property without his permission, they are considered liable, because liability pertains to *al-'aḥkām al-waḍ'iyyah* in which mental maturity and puberty are not considered as conditions.[2] Therefore, if they have any property that is being administered by their guardian, compensa-

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

tion will be claimed from this property; otherwise, the person entitled to the compensation will wait until the insane person regains sanity and the child attains puberty and then claim from them his dues.

A Discerning Child:

A discerning child (*mumayyiz*) is one who can in general distinguish between that which is harmful and beneficial, and who understands the difference between contracts of sale and rent and between a profitable bargain and one entailing loss.

The Ḥanafîs say: The dispositions of a discerning child without his guardian's permission are valid provided they involve sheer benefit, e.g. the acceptance of gifts, bequests and *waqf*s without giving anything in return. But the dispositions in which the possibility of profit and loss exists--such as transactions of sale, mortgage, rent and bailment--are not valid except by the permission of the guardian.

As to a non-discerning child, none of his dispositions are valid, irrespective of the permission of the guardian, and regardless of the thing involved being of petty or considerable worth.

The Ḥanbalîs observe: A discerning child's dispositions are valid with the permission of the guardian; so are those of a non-discerning child, even without the guardian's permission, if the thing involved is of petty worth, e.g. where he buys from a confectioner what children usually purchase, or buys a bird from someone in order to set it free. (*al-Tanqîḥ* and *al-Tadhkirah*)

The Imāmî and the Shāfi'î schools state: A transaction by a child whether discerning or not, is altogether illegal, irrespective of whether he acts as an agent or for himself, irrespective of whether he gives or takes delivery, even if the object transacted is trivial and insignificant, and whether it involves a vow (*nadhr*) or a confession (*iqrār*). Al-Shaykh al-'Anṣārî observes in *al-Makāsib*: "The basis for invalidating a child's transaction is a narrated consensus (*al-'ijmā' al-maḥkî*) strengthened by an unusual preponderance (*al-shuhrat al-'aẓîmah*). The criterion is to act in accordance with the pre-

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

ponderance."

The Imāmī legists have mentioned in this regard a number of subtle sub-issues which al-'Allāmah al-Ḥillī has recorded in *al-Tadhkirah.* Among these are the following:

1. If one owes something to a person, and he tells one: "Give what you owe me to my son," when his son is legally incapable, and one does so on the basis of the father's behest, and by chance the child loses it, in such a situation one's liability concerning the debt does not cease and the creditor is still entitled to demand it from one, although it was he who asked one to deliver it to his son. Similarly, the child will not be responsible for the thing he has lost, and one is neither entitled to claim it from his guardian nor from him on his attaining majority.

As to one's remaining liable for the debt, this is because the debt is not cleared unless it is validly delivered, and it is presumed that neither the creditor nor his authorized representative has taken delivery. As to the delivery taken by the child, its occurrence and non-occurrence are equal, presuming his incapacity for taking and giving delivery. As to the father's permission to deliver to the child, it is exactly like someone telling one: "Throw what you owe me into the sea," and one does as he tells one. Here, one's liability for the debt is not cast off.

The reason for not considering the child liable for the thing delivered to him is that it is the deliverer who has destroyed it by improperly using his discretion and giving it to someone whose possession has no effect, even if it is by the permission and order of the child's guardian.

2. Where one has in one's possession something belonging to a child and his guardian tells one to give it to him, and one gives it to the child who destroys it, one will be liable for it because one is not entitled to act negligently regarding the property of someone legally incapable even if his guardian permits it.

3. If a child gives one a *dînār* to see whether it is genuine or counterfeit, or gives one an article for pricing it or selling it or for some other purpose, it is not valid for one, after it has come into

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

one's hands, to return it to him; rather one must return it to his guardian.

4. If two children buy and sell between themselves and each takes delivery from the other and then both destroy what they have received, their guardians will be liable if they had permitted the transaction, if not, the liability will be borne from the property of each child.

This is what the Imāmī legists have observed, but what we consider appropriate is this: If we know doubtlessly that a particular disposition of a discerning child is cent per cent to his benefit, it is obligatory for his guardian to accept it and he cannot annul it, especially if his annulling it entails a loss for the child.

As to the general proofs which indicate that a child's disposition is void, they either do not include this situation or it is exempted from these general proofs. This is so because we are sure that the purpose of the Sharī'ah is benefit, and when we are certain that it exists, we are bound to accept it exactly like our acceptance of a self-evident notion or a valid syllogism. And this is not *ijtihād* contradicting *naṣṣ* (an explicit Qur'ānic verse or tradition); rather, it amounts to acting in accordance with *naṣṣ* for the knowledge of the aim of the Sharī'ah is exactly like the knowledge of a *naṣṣ*, if not a *naṣṣ* itself.

If we were to accept the view of the Imāmī and the Shāfi'ī schools, a prize--for instance, a watch--given by the school to the best student would be something out of place, and if a child under the age of majority were to receive it he would not own it. This is something unnatural and goes against the practice of rational beings, creeds and religions.

A Child's Intentional Act is a Mistake:

If a child kills a person or injures him or severs any part of his body, he will not be subject to retribution. He will be dealt exactly like an insane person, because he is not capable of being punished, neither in this world nor in the Hereafter. A tradition states: عَمدُ

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

الصَّبِيِّ خَطَأٌ (A child's intentional act is a mistake). There is no difference of opinion among the schools concerning this. As to the compensation given to the victim, it will be borne by the paternal relatives (*al-'āqilah*).

In some circumstances where beating a child is permissible, it is only for reforming him, not as retribution (*qiṣāṣ*) or punishment (*ta'zîr*).

3. Idiocy (al-Safah):

An 'idot' differs from a child due to majority and from an insane person on account of sanity. Thus idiocy as such is accompanied with the capacity to comprehend and distinguish. An 'idiot' is one who cannot manage and expend his property properly, irrespective of whether he has all the qualities necessary for its proper management but is negligent and does not apply them, or lacks these qualities. In short, he is negligent and extravagant, in that he repeatedly performs acts of negligence and extravagance. The acts of extravagance may be such as donation by him of all or a major part of his wealth, or building a mosque, school or hospital which a person of his social and monetary status would not build, so that it is detrimental to his own interests and those of his dependents, and the people view him as having strayed from the practice of rational persons in the management of property.

Declaration of Legal Disability (al-Taḥjîr):

The schools--with the exception of Abū Ḥanîfah--concur that the idiot's legal disability is confined to his financial dispositions, and excepting where his guardian permits him, his position in this regard is that of a child and an insane person. He is totally free regarding his other activities that are not closely or remotely connected with property. An idiot's disability continues until he attains mental maturity, in accordance with the following verse:

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

وَلَا تُؤْتُوا السُّفَهَآءَ أَمْوَٰلَكُمُ الَّتِي جَعَلَ اللَّهُ لَكُمْ قِيَٰمًا وَارْزُقُوهُمْ فِيهَا وَاكْسُوهُمْ وَقُولُوا لَهُمْ قَوْلًا مَّعْرُوفًا ﴿٥﴾ وَابْتَلُوا الْيَتَٰمَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُم مِّنْهُمْ رُشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَٰلَهُمْ...

And do not give to fools your property which Allah has assigned to you to manage; provide for them and clothe them out of it, and speak to them words of honest advice. And test the orphans until they reach the age of marrying; then if you find in them mental maturity, deliver to them their property; (4: 5--6)[3]

This is the view of the Imāmī, Shāfi'ī, Mālikī and the Ḥanbalī chools, as well as that of Abū Yūsuf and Muḥammad, the two lisciples of Abu Ḥanīfah.

Abū Ḥanīfah observes: Mental maturity is neither a condition for delivering property to its owners nor for the validity of their monetary dispositions. Thus if a person attains puberty in a state of mental maturity and then becomes an idiot, his dispositions are valid and it is not valid to consider him legally incapable even if his age is less than 25 years. Similarly, one who attains puberty in a state of idiocy so that his childhood and idiocy are concomitant, he will not be considered legally incapable in any manner after attaining maturity at 25 years (*Fatḥ al-Qadîr* and Ibn 'Ābidîn).

This contradicts the explicit *ijmā'* of the entire ummah, or rather it contradicts the obvious teaching of the faith as well as the unambiguous text of the Qur'ān: وَلَا تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمُ.

The Judge's Order:

Imāmī legal authorities state: The criterion for considering the dispositions of an idiot as void is appearance of idiocy, not the order of a judge declaring him legally incapable. Thus every disposition of his during the state of idiocy is void, irrespective of whether a judge declares him incapable or not, and regardless of whether his idiocy continues from childhood or occurs after puberty. Hence, if an idiot acquires mental maturity, his disability will be removed, returning only on the return of idiocy and disappearing with its disappearance (al-Sayyid al-'Iṣfahānī, *Wasîlat al-najāt*). This opinion is very close

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

to the one expressed by the Shāfi'ī school.

The Ḥanafī and the Ḥanbalī schools observe: An idiot will not be considered legally incapable without the judge's declaration. Therefore, the dispositions prior to the declaration of his legal disability are valid even if they were improper; after the declaration his dispositions are not enforceable even if appropriate.

This opinion cannot be substantiated unless we accept that the declaration of the judge alters the actual fact. This view is confined to the Ḥanafīs only. As to the Shāfi'ī, Mālikī and the Ḥanbalī schools, they concur with the Imāmiyyah in holding that the judge's order has no bearing, close or remote, on the actual fact, because it is only a means and not an end in itself. We have dealt with this issue in detail in our book *Uṣūl al-'ithbāt.*

The Mālikīs say: When a person, man or woman, comes to be characterized with idiocy he becomes liable to be declared legally incapable. But if idiocy occurs after a short period, say a year, after his attaining puberty, the right to declare his legal incapacity lies with his father, because the time of its occurrence is close to the period of his attaining puberty. But if it occurs after a period exceeding a year after puberty, his disability can be only declared by a judge (*al-Fiqh 'alā al-madhāhib al-'arba'ah,* vol. 2, "*bāb al-ḥajr*").

The Mālikīs also observe: A woman, even if she becomes mentally mature, is not entitled to dispose her property unless she has married and the marriage has been consummated. After the consummation of marriage, her right to donate is limited to one-third of the property, and for the remainder she requires the permission of the husband until her oldage (al-Zarqānī).

But all the other schools do not differentiate between the sexes, in accordance with the general import of the Qur'ānic verse (4:6): فَإِنْ آنَسْتُم مِنْهُمْ رَشداً فَادْفَعوا إِلَيْهِمْ أَمْوالَهُمْ

The Idiot's Confession, Oath and Vow:

If an idiot is permitted to dispose his property and he does so, the schools concur that it is valid. As to non-financial acts, such as

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

his acknowledgement of lineage (*nasab*) or his taking an oath or a vow to perform, or abstain from, a certain act that does not involve property, these acts are valid even if the guardian has not permitted them.

If he confesses to having committed theft, it will be accepted only for the purpose of amputation and not for financial liability, i.e. his confession will have effect vis-à-vis the right of God (*ḥaqq Allāh*) and not vis-à-vis the rights of other human beings (*ḥaqq al-nās*).

The Ḥanafîs state: His confession will be given credence in regard to those of his assets which have been realized after his disability and not from what he owned at its advent. Also, his will is valid to an extent of one-third in matters of charity and benevolence.

The Imāmiyyah state: There is no difference between the former and the latter properties. Rather, they say, it is not valid for an idiot to hire himself for any work even if advantageous without his guardian's permission. They also observe: If a person deposits something with an idiot with the knowledge of his idiocy and the idiot personally destroys it, either voluntarily or by mistake, he will be liable. But if the deposited thing is not destroyed personally by the idiot but as a consequence of his negligence in preserving it, he will not be liable, because in this situation the depositor himself has been negligent and at fault. As to the liability of the idiot where he personally destroys the deposit, it has its basis in the dictum; مَنْ أَتْلَفَ مالَ غَيره فَهُوَلَهُ ضامنٌ 'He who destroys another's property is liable for it.' (*Wasîlat al-najāt*)

The Idiot's Marriage and Divorce:

The Shāfi'î, Ḥanbalî and Imāmî schools say: The idiot's marriage is not valid, and his divorce (*ṭalāq* or *khul'*) is valid. But the Ḥanbalîs allow his marriage where it is a necessity.

The Ḥanafîs observe: His marriage, divorce, and freeing a slave are valid, because these three are valid even when performed in jest, and with greater reason in a state of idiocy. But if he marries for more than *mahr al-mithl,* the *mahr* will be valid only to the extent of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

mahr al-mithl.

The Proof of Mental Maturity:

The schools concur that mental maturity (*rushd*) is ascertainable through testing, in accordance with the words of God Almighty: وَابْتَلُوا...فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْداً But the modes of testing are not specific, though the legists mention as examples such methods as handing over to a child the management of his property, or relying upon him to buy or sell for fulfilling some of his needs, and the like. If he shows good sense in these activities, he will be considered mentally mature. As to a girl, she will be given domestic responsibilities to ascertain her mental maturity or the lack of it.

As per consensus, mental maturity in both the sexes is proved by the testimony of two male witnesses because the testimony of two male witnesses is a principle. The Imāmiyyah say: It is also proved in the case of women by the testimony of a man and two women, or that of four women. But in the case of men, it is only proved by the testimony of men (*al-Tadhkirah*).

The Guardian:

A Minor's Guardian:

We have discussed the legal disability of the minor, the insane person and the idiot. It is obvious that every legally incapable person needs a guardian or an executor to attend to the things concerning which his disability has been declared, and to manage them as his representative. Now, who is this guardian or executor? It is worth pointing out at the outset that the discussion in this chapter is limited to guardianship over property. As to guardianship concerning marriage, it has already been discussed in the related chapter.

The schools concur that the guardian of a minor is his father; the mother has no right in this regard except in the opinion of some Shāfi'î legists. The schools differr concerning the guardianship of

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

others apart from the father. The Ḥanbalī and the Mālikī schools state: The right to guardianship after the father is enjoyed by the executor of his will, and if there is no executor, by the judge (*ḥākim al-Shar'*). The paternal grandfather has no right to guardianship whatsoever, because, according to them, he does not take the father's place in anything. When this is the state of the paternal grandfather, such is the case of the maternal grandfather with greater reason.

The Ḥanafīs say: After the father the guardianship will belong to his executor, then to the paternal grandfather, and then to his executor. If none are present it will belong to the judge.

The Shāfi'īs observe: It will lie with the paternal grandfather after the father, and after him with the father's executor, followed by the executor of the paternal grandfather, and then the judge.

The Imāmiyyah state: The guardianship belongs to the father and the paternal grandfather simultaneously in a manner that each is entitled to act independently of the other, though the act of whoever precedes acquires legality, in view of that which is necessary. If both act simultaneously in a contrary fashion, the act of the paternal grandfather will prevail. If both are absent, the executor of any of them will be the guardian. The grandfather's executor's acts will prevail over those of the father's executor. When there is no father or paternal grandfather nor their executors, the guardianship will be exercised by the judge.

The Guardian of an Insane Person:

An insane person is exactly like a minor in this regard, and the views of the schools are similar for both the cases, irrespective of whether the child has attained puberty while continuing to be insane or has attained puberty in a state of mental maturity to become insane later. Only a group of Imāmī legists differ here by differentiating between insanity continuing from minority and that which occurs after puberty and mental maturity. They say: The father and the paternal grandfather have a right to guardianship over the

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

former. As to the latter, the *ḥākim al-Shar'* will act as his guardian despite the presence of both of them. This view is in consonance with *qiyās* (analogical reasoning) practised by the Ḥanafīs, because the guardianship of both the father and the paternal grandfather had ended (on the child's attaining puberty and mental maturity), and that which ends does not return. But the Ḥanafīs have acted here against *qiyās* and have opted for *istiḥsān*.

The Imāmī author of *al-Jawāhir* says: It is in accordance with caution (*iḥtiyāṭ*) that the paternal grandfather, the father and the judge act in consonance, i.e. the property of an insane person between whose insanity and childhood there is a time gap, will be managed by mutual consultation among the three. Al-Sayyid al-'Iṣfahānī remarks in *al-Wasīlah*: Caution will not be forsaken if they act by mutual consent.

In my opinion there is no doubt that caution is a good thing, but here it is only desirable and not obligatory, because the proofs establishing the guardianship of the father and the paternal grandfather do not differ in the two situations. Accordingly, the father and the paternal grandfather will always be preferred to the judge, because the applicability or inapplicability of a particular rule revolves around its subject, and the generality of the proofs proving the guardianship of the father and the paternal grandfather enjoy precedence over the generality of the proofs proving the judge's guardianship.

Apart from this, the sympathy of the judge or someone else cannot equal that of the father and the grandfather, and what rational person would approve the appointment by the judge of a stranger as a guardian over a legally incapable person whose father or paternal grandfather are present and fulfil all the necessary conditions and qualifications?

The Guardian of an Idiot:

The Imāmī, Ḥanbalī and Ḥanafī schools concur that if a child attains puberty in a state of mental maturity and then becomes an

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

idiot, his guardianship will lie with the judge to the exclusion of the father and paternal grandfather, and, with greater reason, to the exclusion of the executors of their wills.

That which was observed concerning an insane person holds true here as well, that no rational person would approve that a judge appoint a stranger as guardian in the presence of the father and the paternal grandfather. Hence, as a measure of caution, it is better that the judge choose the father or the paternal grandfather as the guardian of their child. However, if the idiocy has continued from childhood and the subject has attained puberty in that state, the opinion of the three above-mentioned shools is similar to their opinion concerning a minor (*al-Mughnî, al-Fiqh 'alā al-madhāhib al-'arba'ah,* Abū Zuhrah and *al-Jawāhir*)[4]

The Shāfi'îs neither differentiate between the guardianship of a minor, an insane person and an idiot, nor between idiocy occurring after puberty and one continuing from childhood.

The Qualifications of a Guardian:

The schools concur that a guardian and an executor require to be mentally mature adults sharing a common religion. Many jurists have also considered *'adālah* (justice) as a requirement even if the guardian is the father or the grandfather.

There is no doubt that this condition (*'adālah*) seals the door of guardianship firmly with reinforced concrete and not merely with stones and mud. Apart from this, *'adālah* is a means for safeguarding and promoting welfare, not an end in itself. The inclusion of *'adālah* as a condition, if it proves anything, proves that *'adālah* was not something rare in the society in which those who consider it necessary lived.

There is consensus among the schools that those dispositions of a guardian which are for the good and advantage of the ward are valid, and those which are detrimental are invalid. The schools differ concerning those dispositions which are neither advantageous nor detrimental. A group of Imāmî legists observe: They are only valid if

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the guardian is the father or the paternal grandfather, because the condition for their dispositions is the absence of harm, not the presence of an advantage. But where a judge or an executor is involved, their dispositions are valid only when advantageous. Rather, some of them observe: The dispositions of a father are valid even if they are disadvantageous and entail a loss for the child.[5]

Other non-Imāmī schools state: There is no difference between the father, the paternal grandfather, the judge and the executor in that the dispositions of all of them are invalid unless they are advantageous and entail benefit. This is also the opinion of a large number of Imāmī legists.

On this basis, it is valid for the guardian to trade with the wealth of his ward--be he a child, an insane person or an idiot--or to give it to another to trade with it, to buy with it real estate for his ward, and to sell and lend from what belongs to him, provided all this is done for benefit and with good intention, and the surity of benefit in lending is limited to where there is a fear of the property being destroyed.

It is beneficial here to mention some sub-issues mentioned by the great Imāmī legist al-'Allāmah al-Ḥillī in *al-Tadhkirah, "bāb al-ḥajr."*

1. Pardon and Compromise (al-'Afw and al-Ṣulḥ):

Some Imāmī scholars have said: A child's guardian can neither demand *qiṣāṣ* (retaliation), a right to which his ward is entitled, because the child may opt for pardon, nor can he pardon, because the child may opt for the execution of the sentence for his own satisfaction. Al-'Allāmah al-Ḥillī has then opined that a guardian can demand the execution of the sentence, or pardon, or conclude a compromise regarding a part of the child's property, provided it is advantageous.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

2. Divorce and Pre-emption (al-Ṭalāq and al-Shuf'ah):

A guardian is not entitled to divorce the wife of his ward, irrespective of whether it is with or without any monetary compensation.

If there is along with the child a cosharer in a property and the cosharer sells his share to a stranger, the guardian of the child is entitled to opt for pre-emption or to forgo it, depending on the child's interest. This is the more *ṣaḥîḥ* of the opinions subscribed to by the Shāfi'îs.

3. Deduction of Claims (Ikhrāj al-Ḥuqūq):

It is obligatory upon the guardian to deduct from the property of his ward those claims whose payment is compulsory, e.g. debts, criminal damages, *zakāt,* even if they have not been claimed from him. As to the maintenance of those relatives whose maintenance is *wājib* upon the child, the guardian will not pay it to the person entitled unless it is demanded.

4. Spending Upon the Ward:

It is obligatory upon the guardian to spend towards his ward's welfare and it is not permissible for him to act either niggardly or extravagantly. He is expected to act moderately, keeping in mind the standard of those similar to the ward.

The guardian and the executor are trustees and are not liable unless breach of trust or negligence is proved. Hence, when a child attains puberty and claims breach of trust or negligence on behalf of the guardian, the burden of proof lies on him, and the guardian is only liable to take an oath, because he is a trustee and the dictum, 'The trustee is liable to nothing except an oath' (وَمَاعَلَى الأَمِينِ إلاّ الْيَمِين), will apply.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

A Guardian's Sale to Himself:

The Shāfi'îs as well as some Imāmî legists observe: It is not valid for a guardian or an executor to sell himself any property belonging to his ward or to sell his own property to the ward. Al-'Allāmah al-Ḥillî himself has considered it permissible, making no distinction between the guardian and a stranger, provided such a deal is advantageous (for the ward) and no blame is involved. Similarly it is also permissible for a guardian appointed by the judge to sell to the judge an orphan's property whose sale is valid. This also applies to an executor, even if he has been appointed by the judge to act as a guardian. As to the judge selling his property to the orphan, Abū Ḥanîfah has prohibited it on the basis that it amounts to the judge's pronouncing a decision concerning himself, and such a judgement is void. Al-'Allāmah al-Ḥillî says: "There is nothing objectionable in it," i.e. the opinion of Abū Ḥanîfah.

As may be noted, there is more to it than mere objectionability, because this act is neither the same as pronouncing judgement nor related to it, closely or remotely. Therefore, if it is valid for a judge to buy from the property of an orphan provided it is advantageous, it is also valid for him to sell to the orphan if advantageous, and the distinction is arbitrary.

The Guardian's or Executor's Agent:

The guardian and the executor are entitled to appoint others as their agents for those activities which they are not capable of performing personally, as well as for those activities which they are capable of performing personally but do not consider it appropriate on the basis of custom to perform them personally. But where they consider it appropriate, the opinion prohibiting it is preferable.

It is evident here that acting personally or through an agent is a means for securing the ward's advantage and for fulfilling what is *wājib*. So wherever this end is achieved, the act is valid, irrespective of whether it is performed by the guardian or his agent; otherwise,

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the act is not valid even if performed by the guardian himself.

The Insolvent Person (al-Muflis):

'Muflis', literally, means someone who has neither money nor a job to meet his needs. In legal terminology it means someone who has been declared legally incapable by the judge because his liabilities exceed his assets.

The schools concur that an insolvent person may not be prohibited from disposing his wealth, regardless of the extent of his liabilities, unless he has been declared legally incapable by the judge. Hence, if he has disposed of all his wealth before being declared incapable, his dispositions will be considered valid and his creditor, or anyone else, is not empowered to stop him from doing so, provided these dispositions are not with an intent to elude the creditors, especially where there is no reasonable hope of his wealth returning.

A judge will not declare a person insolvent unless the following conditions exist:

1. Where he is indebted and the debt is proven in accordance with the Sharî'ah.

2. Where his assets are less than his liabilities. There is consensus among the schools regarding these two conditions.

The schools also concur on the validity of the declaration of disability where the assets are less than the liabilities. They differ where the liabilities are equal to the assets. The Imāmî, the Ḥanbalî and the Shāfi'î schools state: He will not be declared legally incapable (*al-Jawāhir, al-Tanqîḥ* and *al-Fiqh 'alā al-madhāhiḅ al-'arba'ah*). The two disciples of Abū Ḥanîfah, Muḥammad and Abū Yūsuf, observe: He will be declared legally incapable. The Ḥanafîs have followed these two in their *fatwā*. But Abū Ḥanîfah has basically rejected the idea of considering an insolvent person as legally incapable even if his liabilities exceed his assets because legal disability entails the waste of his capabilities and human qualities. However, Abū Ḥanîfah says: If his creditors demand payment, he

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

will be imprisoned until he sells his property and clears his debts.

This form of imprisonment is reasonable--as we will point out later--where the debtor has some known property. But Abū Ḥanīfah has permitted his detention even if no property is known to exist in his name. The following text has been narrated from him in *Fatḥ al-Qadîr* (vol. 7, p. 229, *"bāb al-ḥajr bi sabab al-dayn"*): If no property is known to be owned by the insolvent person, and his creditors demand his detention while he says: "I have nothing," the judge will detain him for debts accruing from contractual obligations, e.g. *mahr* and *kifālah.*

This is contrary to the explicit Qur'ānic verse:

وَإِن كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ...

...If the debtor is in straitened circumstances, then let there be postponement until they are eased. (2:280)

Moreover, there is consensus on the issue among all the legal schools of the Ummah: the Shāfi'ī, the Imāmī, the Ḥanbalī, the Mālikî, as well as Muḥammad and Abū Yūsuf (*Fatḥ al-Qadîr,* Ibn 'Ābidîn, *al-Fiqh 'alā al-madhāhib al-'arba'ah,* and al-Sanhūrî in *Maṣādir al-ḥaqq,* vol. 5)

3. The debt should be payable presently, not in the future, in accordance with the opinion of the Imāmî, Shāfi'î, Mālikî and Ḥanbalî schools. But if part of it is to be paid presently and part of it in the future, it will be seen whether the assets suffice for clearing the present debts; if they do, he will not be declared legally incapable; if not, he will be declared so. If he is declared legally incapable for debts presently payable, the debts payable in the future will remain till the time of their payment arrives (*al-Tadhkirah* and *al-Fiqh 'alā al-madhāhib al-'arba'ah*).

4. That the creditors, all or some of them, demand the declaration of his legal disability.

When all these conditions are present, the judge will declare him legally incapable and stop him from disposing his property by selling, renting, mortgaging, lending, and so on, being detrimental to

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

the interests of the creditors.

The judge will sell the assets of the insolvent person and distribute the proceeds among his creditors. If they suffice for repaying all the debts, they will be so applied. In the event of their falling short, a proportionate distribution will be affected.

On the completion of the distribution, the disability will automatically end, because its purpose was to safeguard the interests of the creditors and this has been achieved.

Exceptions:

Al-'Allāmah al-Ḥillî observes in *al-Tadhkirah, "bāb al-taflîs"*: From among the assets of the insolvent person, the house where he resides, his slave, and the horse, which he rides will not be sold. This is the view held by the Imāmiyyah, Abū Ḥanîfah and Ibn Ḥanbal. Al-Shāfi'î and Mālik state: All of these will be sold.

A day's provision will also be left for him and his family on the day of distribution, and if he dies before the distribution, the cost of his shroud and burial will be met from his own assets, because funeral expenses have precedence over debts.

In fact all that which is immediately necessary will be left for him, e.g. clothes, a day's provision or more, in accordance with the circumstances, books that are essential for someone like him, the tools of his trade by which he earns his living, the necessary household goods such as mattresses, blankets, pillows, cooking pots, plates, pitchers, and all other things which one requires for his immediate needs.

A Particular Thing and Its Owner:

If an owner (from among the creditors) finds a particular thing which the insolvent person had purchased from him on credit, that thing will belong to him in preference to all other creditors, even if there exists nothing else besides it. This is the opinion of the Imāmî, Mālikî, Shāfi'î and the Ḥanbalî schools.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Ḥanafîs observe: He is not entitled to it, but will have a joint interest in it with the other creditors (*al-Tadhkirah* and *Fatḥ al-Qadîr*).

Wealth Accruing after Insolvency:

If after legal disability any wealth accrues to an insolvent person, will his disability extend to it exactly like the wealth existing at the time of the disability, or not? Will the insolvent person be completely free in his dispositions concerning it?

The Ḥanbalîs say: There is no difference between the wealth acquired after insolvency and the wealth present at the time of it.

The Shāfi'îs hold two opinions, and so do the Imāmiyyah. Al-'Allāmah al-Ḥillî states: That which is more likely is that the disability extends to it as well, because the purpose of the disability is to give those entitled their claims, and this right is not limited to the wealth existing at the time of the declaration.

The Ḥanafîs observe: The disability does not extend to it, and his dispositions as well as acknowledgement (of debt) are valid in regard to it (*Fatḥ al-Qadîr, al-Tadhkirah,* and *al-Fiqh 'alā al-madhāhib al-'arba'ah*).

If a crime has been committed against an insolvent person, if it is unintentional and requires the payment of damages, the insolvent person cannot pardon the crime because the right of the creditors extends to it, and if it is intentional and entails *qiṣāṣ,* the insolvent person is entitled either to take *qiṣāṣ* or to opt for damages, and the creditors are not entitled to force him to take damages and forsake *qiṣāṣ* (*al-Jawāhir*).

The Acknowledgement of an Insolvent Person:

If after being declared legally incapable an insolvent person acknowledges being indebted to some person, will his word be accepted and that person included among the creditors at the time of distribution of the property?

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

The Shāfi'ī, the Ḥanafī and the Ḥanbalī schools observe: His acceptance will not be valid in respect to his property present at the time of declaration of his insolvency.

The Imāmī legists differ among themselves, with the author of *al-Jawāhir* and a large number of other authorities subscribing to the view of the Ḥanbalī, Shāfi'ī and Ḥanafī schools.

Marriage:

The Ḥanafīs say: If an insolvent person marries after his being declared legally incapable, his marriage is valid and his wife is entitled to be included among the creditors to the extent of *mahr al-mithl*, and that which exceeds it remains a claim against him.

The Shāfi'ī and the Imāmī schools observe: The marriage is valid but the entire *mahr* will be considered a claim against him and the wife will not be entitled to anything along with the creditors.

Imprisonment:

The Imāmiyyah say: It is not valid to detain a person in financial straits despite the disclosure of his insolvency because the Qur'ānic verse says:

وَإِن كَانَ ذُو عُسرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ...

And if the debtor is in straitened circumstances, then let there be postponement until they have eased (2:280).

If he is found to possess any known asset, the judge will order him to surrender it, and if he refuses to comply, the judge is entitled either to sell it and clear the debts--because the judge is the guardian (*walī*) of the uncompliant--or to imprison the debtor until he clears his debts himself, in accordance with the tradition:

الواجِدُ تَحِلُّ عُقوبَتُهُ وَعِرضُهُ

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

It is legitimate to punish and humiliate (as when the creditor calls his debtor 'injust', 'a delayer', etc.) a debtor who possesses (financial capability).

Abū Ḥanīfah observes: The judge is not entitled to sell his property against his will, but he can imprison him.

Al-Shāfi'ī and Ibn Ḥanbal state: The judge is empowered to sell and clear the debts (*al-Tadhkirah* and *al-Jawāhir*).

Prohibition on Travelling:

There is no doubt that if it is permissible to punish a debtor by imprisonment it is also valid to prohibit him from travelling provided the necessary conditions exist. These conditions are: The debt be proven as per the Sharī'ah; the debtor be capable of repaying it, and he procrastinate and keep on postponing payment. Apart from this, the interests of the creditors should be feared to be in jeopardy if he travels, such as where the journey is long and dangerous. Hence if the debt is not proved, or is proved but the debtor's circumstances are straitened and he is unable to repay, or he has an agent or surety, or there is no fear of the creditors' interests being hurt if he travels, in all these circumstances it is in no way permissible to prohibit him from travelling.

From here it becomes clear that the measures taken by the courts in Lebanon for stopping a defendant from travelling simply on the initiation of proceedings against him have no basis in the Islamic Sharī'ah but in positive law.

NOTES:

1. Last illness (*maraḍ al-mawt*) is also one of the causes, considering that it leads the person in last illness to being prohibited from dispositions exceeding one-third of his property. We have already discussed this in the chapter on wills under the title, 'Dispensations of a Critically Ill Person.' Please refer.

2. Every moral duty that is a duty vis-à-vis God Almighty is conditional to mental maturity (*'aql*) and puberty (*bulūgh*), whereas every economic duty vis-à-vis people is not conditional to mental maturity and puberty.

3. At first the Qur'ānic verse mentions the property of the legally incapable

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

while relating it to the second person (*kāf al-mukhāṭab* in أموالكم) and the second time to the third person (*hā' al-ghā'ib* in أموالهم), alluding thereby that everything owned by an individual has two aspects: firstly, his personal authority over it, and secondly, that he apply it in a manner profitable to himself and the society, or, at the worst, in a manner unharmful to the two.

4. The author of *al-Jawāhir* observes in the *"bāb al-ḥajr"*: "There is *ijmā'* among the Imāmiyyah that if idiocy occurs after the attainment of puberty, the guardianship will be exercised by the judge, and if it continues from childhood, the *'ijmā'* has been narrated that it belongs to the father and the paternal grandfather. But the truth is that there is a difference of opinion in the latter case, and a group of scholars has explicitly mentioned that the guardianship belongs to the two.

5. Al-Nā'īnī, in al-Khwānsārī's *Taqrīrāt* (1357 H., vol. 1, p. 324) states: "The truth is that the guardianship of the father is a proven fact, even if it entails disadvantage or loss for the child." But the compiler of this work narrates from his teacher, al-Nā'īnī, that he retracted from this opinion after having been emphatic about it earlier.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

BIBLIOGRAPHY

1. The Holy Qur'ān.
2. *Biḥar al-'anwār,* al-Majlisī.
3. *Uṣūl al-Kāfī,* al-Kulaynī.
4. *Tahdhîb al-'aḥkām,* al-Ṭūsī.
5. *Al-'Istibṣār,* al-Ṭūsī.
6. *Man lā yaḥḍuruhu al-faqîh,* al-Ṣadūq.
7. *Wasā'il al-Shî'ah,* al-Ḥurr al-'Āmilī.
8. *Jawāhir al-kalām,* al-Shaykh Muḥammad Ḥasan Najafī.
9. *Al-Mughnî,* Ibn Qudāmah al-Ḥanbalī.
10. *Al-Rasā'il,* Ibn 'Ābidîn al-Ḥanafī.
11. *Bidāyat al-mujtahid,* Ibn Rushd al-Qurṭubī.
12. *Al-Bidāyah wa al-nihāyah,* Ibn Rushd al-Qurṭubī.
13. *Al-Majmū' Sharḥ al-Muhadhdhab,* al-Nawawī.
14. *Al-Muhadhdhab,* Abū Isḥāq al-Shīrāzī.
15. *Mîzān al-Shi'rānî.*
16. *Fiqh al-Sunnah,* al-Sayyid Sābiq.
17. *Al-Fiqh 'alā al-madhāhib al-arba'ah,* al-Jazirī.
18. *Zād al-ma'ād,* Ibn Qayyim al-Jawzī.
19. *Madārik al-'aḥkām fî sharḥ Sharā'i' al-'Islām,* al-Sayyid Muḥammad al-'Āmilī.
20. *Tadhkirat al-fuqahā',* al-'Allāmah al-Ḥillī.
21. *Fatḥ al-Qadîr fî Sharḥ al-Bidāyah,* Ibn Hammām.
22. *Mustamsak al-'urwat al-wuthqā,* al-Sayyid Muḥsin al-Ḥakîm.
23. *Kitāb al-Dîn wa al-ḥajj 'alā al-madhāhib al-'arba'ah,* Māl Karrārah.
24. *Aḥkām al-Qur'ān,* al-Jaṣṣāṣ.
25. *Al-Ḥadā'iq,* al-Shaykh Yūsuf al-Baḥrānī.
26. *Al-Lum'ah.*
27. *Miftāḥ al-Karāmah,* al-'Āmilī.

Presented by: https://Jafrilibrary.com

Presented by: https://Jafrilibrary.com

28. *Al-Fiqh al-muṣawwar 'alā madhhab al-Shāfi'ī*, al-Ṣa'īdī.

29. *Irshād al-Sālik*, Shihāb al-Dīn al-Baghdādī al-Mālikī.

30. *Sharḥ al-Zarqānī 'alā Muwaṭṭa' Mālik.*

31. *Manāsik al-ḥajj*, al-Sayyid al-Khū'ī.

32. *Mulḥaqāt al-'urwat al-wuthqā*, al-Sayyid Kāẓim al-Yazdī.

33. *Manāsik al-ḥajj*, al-Sayyid Muḥsin al-Ḥakīm.

34. *Manāsik al-ḥajj*, al-Sayyid Maḥmūd al-Shāhrūdī.

35. *Manāsik al-ḥajj*, al-Sayyid Ḥusayn al-Brūjerdī.

36. *Maqṣad al-niyyah*, Ibn Jamā'ah al-Shāfi'ī.

37. *Al-'Aḥwāl al-shakhṣiyyah*, Muḥammad Yūsuf.

38. *Al-'Aḥwal al-shakhṣiyyah*, Abū Zuhrah.

39. *Al-'Aḥwāl al-shakhṣiyyah*, Muḥammad Muḥyī al-Dīn.

40. *Al-Rasā'il*, al-Shaykh Murtaḍā al-'Anṣārī.

41. *Ḥāshiyat al-Rasā'il*, al-'Āshtiyānī.

42. *Al-Maṭālib*, al-Shaykh Murtaḍā al-'Anṣārī.

43. *Ḥāshiyat al-Maṭālib*, al-Sayyid Kāẓim al-Yazdī.

44. *Munyat al-ṭālib*, al-Shaykh Mūsā al-Khwānsārī.

45. *Farq al-zawāj*, al-Khafīf.

46. *Fiqh al-'Imām al-Ṣādiq*, Muḥammad Jawād Maghniyyah.

47. *Masālik al-'ifhām.*

48. *Wasīlat al-najāt*, al-Sayyid Abū al-Ḥasan al-'Isfahānī.

49. *Majma' al-bayān*, al-Ṭabrasī.

50. *Al-Tibyān*, al-Ṭūsī.

51. *Risālat al-'Islām*, Dār al-Taqrīb.

52. *Al-'Iqnā' fī ḥall al-fāẓ Ibn Shujā'.*

53. *Al-Mīrāth fī al-Sharī'ah*, al-Ṣa'īdī.

54. *Kifāyat al-'uṣūl*, al-'Ākhūnd al-Khurāsānī.

55. *Mu'jam rijāl al-ḥadīth*, al-Sayyid Abū al-Qāsim al-Khū'ī.

56. *Tanqīḥ al-maqāl fī 'ilm al-rijāl*, al-Māmaqānī.

57. *Rawḍāt al-jannāt*, al-Khwānsārī.

Presented by: https://Jafrilibrary.com