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THE THEORY OF ISTIḤSAN (JURISTIC PREFERENCE) IN ISLAMIC LAW.

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ABSTRACT

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Istiḥsān (juristic preference) deviates from and sometimes contradicts well-established general precepts of law. It calls for a considerable amount of personal judgment on the part of the jurist who applies it. In the early period of Islam, *istiḥsān* was identified with *ra'y* (personal opinion) which frequently lacked systematic guide-lines. Abū Ḥanîfah (d. 150/767) does not consider *istiḥsān* as a merely arbitrary opinion. He believes that it is a procedure of setting aside an apparently strict ruling of analogy in the interest of fairness and justice.

On the other hand, Shāfi`î (d. 204/819) adopts a text-oriented approach; he believes that a Muslim jurist is guided, not by intuition, but by textual evidence (*dalîl*). He therefore subscribes to *qiyās* (inference by analogy) and rejects *istiḥsān*. An Ḥanafî jurist, Sarakhsî, (d. 490/1096) later wrote a chapter on the explanation of *qiyās*, *istiḥsān* and *takhṣīṣ al-`illah* (particularization of the cause) as a rebuttal to Shāfi`î's criticism of *istiḥsān*. Ibn Taymîyah (d. 728/1327), an Ḥanbalî jurist, not only agrees with the *istiḥsān*, but believes that it is in reality *takhṣīṣ al-`illah*. To this effect, he wrote a treatise on *istiḥsān* and called it *Mas'alat al-Istiḥsān*.

This thesis studies the concept of *istiḥsān* as described by the above mentioned jurists, and some of their works on the subject are translated into English. The purpose of this thesis is to offer an historical study on juristic preference, its relationship with *qiyās* and *takhṣīṣ al-`illah*. This study attempts to add to our knowledge of *istiḥsān* and leads us to further and fuller analysis of

why Shāfiʿī rejected it.

Résumé

Auteur: Riḍwān Aremu Yūsuf.

Titre: Théorie de l'istiḥsān (préférence du juriste) dan le droit islamique.

Diplôme: Ph.D.

L' *istiḥsān* (préférence du juriste) découle d'un certain nombre de principes juridiques généraux bien établis et parfois les contredit. Cette notion fait largement appel au jugement personnel du juriste qui l'applique. Au début de l'Islam, *istiḥsān* était identifié à *ra'y* (opinion personnelle) qui manquait très souvent de directives systématiques. Abū Ḥanīfah (d. 150/767) ne considère pas l' *istiḥsān* comme une opinion purement arbitraire. Il estime qu'il s'agit d'une procédure permettant de mettre de côté les règles apparentes et strictes de l'analogie au profit de l'impartialité et de la justice.

D'autre part, Shāfi`ī (d. 204/819) adopte une méthode centrée sur le texte; il estime qu'un juriste musulman est guidé, non par l'intuition mais par la preuve littérale (*dalīl*). Il souscrit par conséquent au principe du *qiyās* (déduction par analogie) et rejette l' *istiḥsān*. Un juriste Ḥanafī, Sarakhsī (d. 490/1096) a par la suite rédigé un chapitre explicatif sur *qiyās*, *istiḥsān* et *takhṣīṣ al-`illah* (particularisation de la cause) qui réfute la critique que Shāfi`ī fait de l' *istiḥsān*. Ibn Taymîyah (d. 728/1327), juriste Ḥanbalî, approuve non seulement l' *istiḥsān* mais estime qu'il s'agit en réalité du *takhṣīṣ al-`illah*. Il a d'ailleurs écrit un traité sur l' *istiḥsān* et l'a intitulé *Mas'alah al-Istiḥsān*.

Cette thèse étudie le concept de l' *istiḥsān* du point vue des juristes mentionnés ci-dessus; certaines de leurs oeuvres ont été traduites en anglais. L'objet de cette thèse est de donner une perspective historique de la préférence du juriste et de ses relations avec *qiyās* et *takhṣīṣ al-`illah*. Cette étude

approfondit nos connaissances de l' *istiḥsān* et débouche sur une analyse plus approfondie des motifs qui ont poussé Shāfi'ī à le rejecter.

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TABLE OF CONTENTS

Introduction.

One of the major questions often raised about *sharī`ah* (Islamic law) is this: being a divine law, how can its rulings be changed to accomodate modern developments and cultural diversity? In other words, can *sharī`ah* rulings provide adequate solutions to modern problems and modern crises without violating its divinity? Can the jurists in Islam interpret the revealed laws without being charged with legislating arbitrarily or with subordination by interfering with Allah's decree? The answers to these questions are not easy; however, some writers on Islamic law have argued justifiably that the doors of *ijtihād* (legal interpretation) are never closed.[1] *Ijtihād* takes different forms, and one of the means of interpretation of the law is the ability of the jurist to use his discretion within the guidelines of the *sharī`ah* to choose the better legal judgement in a case which has two possible solutions. This exercise, called *istiḥsān* (juristic preference), is the focus of this thesis. Jurists in Islam are considered to be discovering the rules already existing in the revelation, and are therefore, not legislators.

The Qur'ān constitutes, among other things, the enduring focus for understanding the commands of God for a given time, place and situation. Mankind's evolutionary understanding of the divine way continues to widen, deepen and heighten with developments in the human mentality and in the physical and human environment. The preliminary pattern of this understanding can be observed in the early development of different human interpretations of the *sharī`ah*, and the various schools of Islamic law. These different

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[1] *`Ulamā'* and scholars, including al-Shawkānī, Abū Zahrah, and Muḥammad Iqbāl, among others, have rejected in principle, the validity of the closure of the door of *ijtihād*. Wael Hallāq, "On the Origins of the Controversy About the Existence of *Mujtahids* and the Gate of *Ijtihād*," *Studia Islamica* 63 (1984), p. 129.

understandings or (*fiqh*) of God's revelation constitute responses to changes of time and situations.

Before Shāfi`ī (d. 204/820), *istiḥsān* was used as a means of rectifying an unfair legal judgement that arose from the application of *qiyās* (legal reasoning)[2] and therefore, *istiḥsān* signified a departure from the established rule of *qiyās* in favour of justice. According to the definition ascribed to Abū Ḥanīfah (d. 150/767), *istiḥsān* was "that which is agreeable to human beings."[3] This definition exposed *istiḥsān* to a serious attack and criticism. Shāfi`ī thus condemned it outright and wrote a section in his book *Al-Umm* wherein he criticized *istiḥsān*. He called the section: *Bāb ibṭāl al-istiḥsān* (Chapter on the Refutation of Juristic Preference). Instead of *istiḥsān*, Shāfi`ī subscribed to *qiyās* as a method of solving problems which are not directly covered by the texts of revelations.

Due to Shāfi`ī's attack on *istiḥsān*, the later Ḥanafīs such as Pazdawī (d. 482/1088) and Sarakhsī (d. 490/1096) seem to have agreed to re-define *istiḥsān* by identifying it with *qiyās*. Hence, they defined it as a *qiyās* that is stronger than another.[4]

As a rebuttal of Shāfi`ī's criticism of *istiḥsān*, Sarakhsī wrote a chapter in his book *Uṣūl* wherein he explained the Ḥanafīs' concept of *istiḥsān* and *takhṣīṣ al-`illah* (particularization of cause). He approves the use of *istiḥsān*,

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[2] Ibn Idrīs Shāfi`ī, *al-Risālah*, ed. M. Killānī (Cairo: Muṣṭafā Bābī al-Ḥalabī, 1969), p. 206. In Shāfi`ī's terminology, *qiyās* and *Ijtihād* are synonymous.

[3] Shams al-Dīn Sarakhsī, *al-Mabsūṭ*, 30 vols. (Cairo: Maṭba`at al-Sa`ādah, 1324/1905), 10:145. Sarakhsī (d. 490/1096) is a reknowned follower of Abū Ḥanīfah who has written on the subject of *Istiḥsān*.

[4] Abū Ḥusayn al-Baṣrī, *Al-Mu`tamad fī Uṣūl al-Fiqh*, *ed.* M. Ḥamidullah, 2 vols. (Damas: Institut Francais de Damas, 1964-1965), vol. 2, p. 839.

but he does not believe that it is the same as *takhṣīṣ al-`illah*. In his above mentioned book, Sarakhsî says: "whoever advocates the idea that *istiḥsān* is *takhṣīṣ al-`illah* is mistaken."[5] He argues that the method of particularization destroys the *`illah* and thereby makes it unsuitable for *istiḥsān*. An example given by Sarakhsî to illustrate this point is as follows: The leftovers of food and water of a wild bird are impure and therefore prohibited according to *qiyās*. The implied analogy is that it has been mentioned in a prophetic tradition that stray cats are unclean. But the former *qiyās* which prohibits leftovers of food of a wild bird was rejected in favour of another *qiyās* now called *istiḥsān* which permits the consumption of this food. The explanatory reasoning given is as follows: When cats and other pets eat or drink, their tongues are covered with the food, thus causing its impurity. Birds, however, use their beaks, which are formed of bone; and when they eat or drink, only the bone comes in touch with the food. Since bones are considered clean according to the saying of the Prophet Muḥammad, the food from which the birds eat is also clean and, therefore, permitted for consumption.[6]

According to Sarakhsî, this permission is a legal result of *istiḥsān* which has annulled the previous *qiyās* with its entire *`illah*. Therefore, there is no need for particularization of the *`illah*; rather *istiḥsān* here is based on textual evidence or on the equally strong doctrine of consensus.[7]

Ibn Taymîyah (d. 728/1327), not only challenged Shāfi`î's criticism of *istiḥsān*, but also argued that Sarakhsî's position of separating *istiḥsān* from

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[5] Sarakhsî, *Uṣūl*, ed. Abū al-Wafā al-Afghānî, 2 vols, (Cairo: Maṭba`at Dār al-Kitāb al-`Arabî, 1372/1951), pp. 208, 241.

[6] Ibid., vol. 2, pp. 207-208.

[7] Ibid., p. 202; *Mabsūṭ*, op. cit., vol. 10, p. 145.

*takhṣīṣ al-`illah* is incorrect. He believes that the *istiḥsān* which Shāfi`ī rejected is in reality *takhṣīṣ al-`illah*.[8]

An illustration given by Ibn Taymīyah to affirm the relationship between *istiḥsān* and *takhṣīṣ al-`illah* in connection with *qiyās* is as follows: According to *qiyās*, the produce of land taken by force belongs to the usurper if he has cultivated the land. However, according to *istiḥsān*, the produce belongs to the owner of the land, and the usurper is entitled only to a wage. *Qiyās* is put aside in this case due to a tradition from the Prophet Muḥammad who said: "He who cultivates the land of other people receives a wage; the crop is the (property of the) owner."[9]

In the above example, the *`illah* in the original *qiyās* has been particularized by the *`illah* in the *ḥadīth*; therefore, one cannot rule out the affinity or the relationship between *istiḥsān* and *takhṣīṣ al-`illah* in connection with *qiyās*. Ibn Taymīyah has noticed the importance and the urgent need for examining the above relationship when he says: "These are principles" (i.e. *istiḥsān*, *qiyās* and *takhṣīṣ al-`illah*) "about which there has been great confusion on the part of jurists and there is urgent need for examining them with respect to many questions of the sacred law, its fundamental principles as well as its general application."[10]

It is our intention in this thesis to fill this gap by studying the concept of *istiḥsān* historically in connection with that of *qiyās* and *takhṣīṣ al-`illah*. Ta-

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[8] Ibn Taymīyah, *Mas'alat al-Istiḥsān* edited by G. Makdisi "Ibn Taimiya's Autograph Manuscript on Istiḥsān: Materials for Study of Islamic Legal Thought," in *Arabic and Islamic Studies in Honor of H. A. R. Gibb*, (*Cambridge*: *Harvard University* Press, 1965), p. 464.

[9] Ibid., p. 457.

[10] Ibid., p. 454, the translation is that of the editor on page 446.

king into consideration the different schools of law which Sarakhsî, Shāfi'î, and Ibn Taymîyah represent, namely: the Ḥanafî, Shāfi'î and Ḥanbalî schools respectively, we have selected some of their writings on *istiḥsān* for our study in this thesis. The selected writings of these jurists are then translated into English for a better understanding of the subject by non-Arabic speakers.

A survey of Western scholarship on the subject reveals that *istiḥsān* has been taken as an "expression of expediency" by some writers. For instance, Brunschvig believes that "*istiḥsān* consists in adopting without an underlying text or formal reasoning a solution judged good."[11] We do not think that the procedure of *istiḥsān* should be taken as a licentious legal practice nor as expediency. To take this position is tantamount to adopting a face-value judgmental approach. Advocates of *istiḥsān* claim that preference is merely a convenient technical term; it is not to be taken in the sense of "I happen to prefer."[12]

Other writers on Islamic law such as Emile Tyan and Noel Coulson believe that the notion of equity is incorporated in the concept of *istiḥsān*, or that equity, which is sometimes expressed as public utility or common good, is equivalent to *istiḥsān* and that it depends more on the jurist's conscience than on stipulated guidelines from the Qur'ān and the *Sunna*. For instance, Tyan believes that more than one solution to a problem may be derived through the concept of *istiḥsān* without falling into a mistake; whereas there could be only one solution through the process of *qiyās* because the latter depends

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11 Robert Brunschvig, "De l'aquisition du legs dans le droit Musulman Orthodoxe," *Mémoires de l'Academie Internationale de Droit Comparé 3, pt.* 4. (1955), 109; quoted from A. Zysow *The Economy of Certainty*: *An Introduction to the Typology of Islamic Legal Theory*, (Harvard University, 1984, unpublished dissertation), pp. 399-400.

12 Sarakhsî, *Uṣūl*, op. cit., vol. 2, p. 200.

exclusively on the text of an already existing rule and does not change with time.[13] This interpretation of *istiḥsān* suggests that it is subjective because it depends greatly on the jurist's conscience rather than on the Qur'ān and the *Sunna*.

A similar observation has been noticed in Coulson's description of *istiḥsān* when he says: "in some cases strict analogical reasoning might entail injustice and that it was then permissible to use a more liberal form of reasoning. Although this conception came close to being the same as the *ra'y* of the ancients, it was now dressed up in more sophisticated terminology and called *istiḥsān* ("seeking the most equitable solution"), or *Istiṣlāḥ* ("seeking the best solution for general interest"). But this was no longer regarded, in theory, as giving human reason sovereign play. "Equity and 'the public interest' were now seen as the purposes of Allah which it was the task of jurisprudence to implement in the absence of any more specific indication in the Qur'ān or the *Sunna*."[14] Our understanding of *istiḥsān* is contrary to the interpretations of the above two writers. We believe that *istiḥsān* can be applied in conformity with Quranic guidelines but not as the mere choice of a jurist.

Examining Joseph Schacht's opinion on *istiḥsān*, one finds that he has two different opinions. Initially, his description of *istiḥsān* happens to be in agreement with that of Tyan who believes that *istiḥsān* is the jurist's choice. Schacht says in *The Origins of Muhammadan Jurisprudence* that *istiḥsān* is reasoning which "reflects the personal choice of the lawyer, guided by his idea of appropriateness, (therefore) called *istiḥsān* or *istiḥbāb* 'preference'. The

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[13] Emile Tyan, "Méthodologie et Sources du droit en Islam", *Studia Islamica* 10 (1959), p. 95.

[14] Noel Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (*Chicago*: University of Chicago Press, 1969), pp. 6-7.

term *istiḥsān* therefore, came to signify a breach of strict analogy for reasons of public interest, convenience, or similar consideration."[15] Schacht later changed his opinion to conform with that of Paret who states that *istiḥsān* is strictly controlled within the bounds of the Qur'ān and the *Sunna*.[16] The later opinion of Schacht in his *Introduction to Islamic Law* reads as follows: "however, much consideration of fairness and appropriateness entered into the decisions of the earliest lawyers, in the fully developed system the principle of *istiḥsān* (and *Istiṣlāḥ*) is confined to very narrow limits and never supersedes the recognized rules of the material sources (Koran and *sunna*), their recognized interpretations by the early authorities, and the unavoidable conclusions to be drawn from them; it often amounts merely to making a choice between the several opinions held by the ancient authorities, that is to say, *ikhtiyār*. Occasionally, too, custom is taken into account by *istiḥsān*."[17]

Chafik Chehata takes another approach in his description of *istiḥsān*. He believes that it is composed of various aspects which accommodate the idea of justice and utility.[18] He states that: "*istiḥsān* is a method for extracting the spirit of legal theories (*l'esprit des théories légales*) from the texts of the law, Chehata emphasizes that this "spirit" must be sought within the texts of the law itself."[19] His approach suggests that *istiḥsān* may still be justified as a personal

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15 Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: The Clarendon Press 1950), pp. 98-99.

16 *Encyclopedia of Islam*, New Edition, "Istiḥsān and Istiṣlāḥ," by R. Paret, vol. 4, pp. 255-259.

17 Joseph Schacht, *An Introduction to Islamic Law* (Oxford: The Clarendon Press, 1964), p. 204.

18 Chafik Chehata, "L' équité en tant que source du droit ḥanafite," *Studia Islamica*, 25 (1966), p. 123.

19 Ibid., pp. 91-94.Quoted from John Makdisi, "Legal Logic and Equity in Islamic Law," *American Journal of Comparative Law*, 33 (1985), p. 72.

interpretation of the texts of the law which is more flexible than reasoning by analogy.

From the above survey of the writings of some of the Western scholars on *istiḥsān*, we have noticed that they all agree that *istiḥsān* is a procedure for maintaining justice when the outcome of *qiyās* leads to the opposite. However, there are areas that have not been touched upon; e.g., What are the limits which the use of reasoning imposes on *istiḥsān*, or vice-versa? What does Ibn Taymîyah mean by saying that "no valid *qiyās* will be contrary to *sharī`ah*"? If *istiḥsān* really predominates over *qiyās*, why is it not accepted in the same way as *qiyās*? What is the relationship among *istiḥsān*, *qiyās* and *takhṣīṣ al-`illah*? Why is the study of *istiḥsān* so important in the field of Islamic law? All these questions are part of the subjects which we will consider in this thesis.

The study of *istiḥsān* nowadays is important especially in the West where there is a great interest, due to the crisis in the Muslim World, to know more about the Islamic system of justice. The advocates of juristic preference argue that the application of *qiyās* has often failed to accommodate fairness and equity, and therefore, *istiḥsān* may be used to serve that purpose. The laws from the primary sources of *Sharī`ah*, i.e. the Qur'ān and the *Sunna* cannot be changed because such laws are considered divine. However, rulings from the subsidiary sources such as *istiḥsān* and *Istiṣlāḥ* (equity) are considered flexible. Their flexibility depends on knowledge about the reasons (*`ilal*) for which such rulings are decreed. Once the reasons are known, legal reasoning can be used to extend the rulings of the original sources to new cases that are not specifically mentioned in the revealed texts. The motives behind certain ritual actions, however, are unknown and therefore not subject to rational deduc-

tions.

In order to show the limits and the role of reasoning in the extension of textual values, the issue of *qiyās* and the role of *`illah* therein are treated first in this thesis. Following this discussion come the definition and analysis of *istiḥsān*, its historical development, the pre-Shāfi`î practice of *istiḥsān*, his attack on the concept, and discussion of *takhṣīṣ al-`illah*. Selected writings of Shāfi`î, Sarakhsî, and Ibn Taymîyah on the subject are translated into English, are commented on, and are followed by concluding remarks.

CHAPTER ONE.

QIYAS: DEFINITION AND ANALYSIS.

Qiyās literally means 'to measure', 'to compare', and 'to weigh'. In the legal reasoning before Shāfi`ī (d.204/820), the definition of *qiyās* in a formal technical manner is non-existent because *istiḥsān* was generally used at that time in the sense of a parallel, a precedent or a method of reasoning by comparison. The logical idea of major and minor premises with the common essential factor had not yet come into existence with respect to *qiyās*. For instance, Abū Ḥanīfah (d. 150/767) maintains that if the mother of a child (*umm al-walad*) embraces Islam in enemy territory and migrates to the Muslim territory, then in case she is not pregnant, she can marry if she desires, and no *`iddah* (waiting period) is binding upon her. Abū Ḥanīfah, according to Abū Yūsuf, (d.182/798) argues thus on the basis of a *ḥadīth* from the Prophet. But Awzā`ī differs from him on this point and remarks that if a woman leaves her country for the sake of God to protect her religion, her case is parallel to that of the women who migrated from Mecca to Medinah during the life of the Prophet. She cannot marry, he adds, until the expiry of her *`iddah*. He elaborates his argument by citing the female emigrants who had gone to the Prophet at Medinah while their husbands, who were non-Muslims, lived on in Mecca. Furthermore, the Prophet returned the wives of those persons who became Muslims, and they still observed the *`iddah*.[20] This example shows that *qiyās* in the early schools of Islamic law consisted of the presentation of a parallel case without any specific restrictions; but that conditions and other restrictions on the implementation of *qiyās* were later imposed.

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[20] Abū Yūsuf, *al-Radd `alā Siyar al-Awzā`ī*, ed. Abū al-Wafā al-Afghānī (Haidarabad: Lajnat Iḥyā' al-Ma`ārif al-Nu`māniyyah, 1357/1938), pp. 99-100.

Similarly, Mālik (d.179/795) used *qiyās* to mitigate a punishment prescribed by the Qur'ān, namely, amputation of the thief's hand. In one of his decisions, Mālik says that if a labourer or an employee working along with a person steals the latter's property, his hand will not be amputated. This case is not, he adds, parallel to that of a thief but to that of an embezzler; and the hand of an embezzler is not amputated.[21]

From the above two examples, we can see that the use of *qiyās* was unregulated and unrestricted, and that this was common among the jurists of Iraq and Medinah. Sometimes words such as *mathal* (like), *bimanzilah* (with degree) are used to denote the similarity between two parallel matters. This is the reason why Shāfi`ī criticized the early use of *qiyās*. He later imposed restrictions on its practice.

As for the definition of *qiyās*, no logical delimitation was given by the early jurists, including Shāfi`i who used the word *ijtihād* as a synonym for *qiyās*. This usage created confusion. For instance, when he was asked: What is *qiyās*? Is it *ijtihād*; or are the two different? Shāfi`ī replied: They are two terms with the same meaning. His interlocutor asked: What is their common (basis)? Shāfi`ī replied: On all matters touching the (life of a) Muslim, there is either a binding decision or an indication as to the right answer. If there is a decision, it should be followed; if there is no indication as to the right answer, it should be sought by *ijtihād*, and *ijtihād* is *qiyās*.[22]

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21 Mālik b. Anas, *al-Muwaṭṭa'* (Cairo: Dār Iḥyā' al-Turāth al-`Arabî, 1951), vol. 2, p. 841.

22 Shāfi`ī, *al-Risālah*, ed. M. Shākir (Cairo: Maṭba`at Muṣṭafā Bābî al-Ḥalabî, 1940), p. 477; Majid Khadduri, *Islamic Jurisprudence Shāfi`ī's Risāla* Translated with an Introduction, Notes and Appendices (Baltimore: The John Hopkins Press, 1961), p. 288.

However, Shāfi`ī has given us the ingredients of what constitutes *qiyās* when he says: If in any command given by God or His Prophet, there is an indication that the command was given for a certain idea or reason (*ma`na*), and a new situation for which no textual rule exists, arises, the law about the similar situation already covered by the text should be applied to this new situation, provided it has the same idea or reason (*ma`na*).[23] This statement implies that he had a clear notion of *qiyās* in his mind. From the above statements of Shāfi`ī, we can infer the definition of *qiyās* as follows: *Qiyās* is a method of seeking a rule of law about a new situation not covered by the text by applying a rule of law about a situation already covered by the text if it has the same reason or idea (*ma`na*) as the new situation has.[24]

In the third century after the Hijrah, the four parts of *qiyās* began to take shape. Abū Bakr al-Jaṣṣāṣ (d.370/955) gave his own definition, stating: *Qiyās* is nothing but the application of the parallel case (*far`*) to the original (*aṣl*) on the basis of the idea or reason (*ma`na*) which appears in both cases and necessitates equality between the rules of law concerning them.[25]

In the fourth century after the Hijrah, the word *ma`na* which Shāfi`ī used to mean the reason linking the original and the parallel cases changed and became an *`illah* (effective cause). Abū Ḥusayn al-Baṣrī (d.436/1044) in his definition of *qiyās*, says: "*Qiyās* means applying the law of the original case to the parallel case in order to achieve (*taḥṣīl*) the same ruling in both cases by reason of their similarity of an *`illah* (effective cause) in the opinion of the

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[23] *al-Risālah*, op. cit., p. 512.

[24] Ibid., p. 512.

[25] Abū Bakr al-Jaṣṣāṣ, *Uṣūl al-Jaṣṣāṣ*; Ms. Dār al-Kutub al-Maṣriyyah, *uṣūl al-fiqh* 229, fol. 267; quoted from Aḥmad Ḥasan "*Qiyās* in Islamic Jurisprudence", *Islamic Studies* 19 (1980), p. 7.

jurist."[26] He also divides *qiyās* into two categories, namely: *qiyās ṭard* (co-extensive) and *qiyās `aks* (co-exclusive).

In the fifth century after the Hijrah, Ghazālî (d. 505/1111) enumerates the Qur'ān, *Sunna* and *Ijmā`* as the sources of law and deals with *qiyās* separately under the category of 'methods of deriving rules' (*ṭuruq al-istithmār* -literally, methods of seeking fruits). Thus, he considers *qiyās* as a method of deriving rules of law from the original sources and not a source of law by itself.[27] He objects to Shāfi`î's usage of *ijtihād* as a synonym of *qiyās*. Ghazālî says: *Ijtihād* does not imply the particular meaning of *qiyās*; it simply indicates an effort which is only a state of the user of *qiyās* (*ḥāl al-qayyās*).[28] By this argument, Ghazālî tends to show that Shāfi`î's definition of *qiyās* is logically defective. It is not exclusive (*māni`*) as it includes questions based on personal opinion called *ijtihād*, and is not exhaustive (*jāmi`*) as it does not include some kinds of *qiyās* such as patent analogy (*qiyās al-jalî*) in which the user of analogies does not spend any effort to find the rule of a new case. Ghazālî therefore gives two definitions of *qiyās*: (1) "*Qiyās* means to establish (*ithbāt*) for the parallel case the law of the original case by reason of their sharing the effective cause of the law; (2) "*Qiyās* is the agreement of the ruling of a known case with a newly discovered case by establishing or negating the same law from those cases on the basis of a common link between them."[29]

In the sixth century of the Hijrah, a fresh theory about *qiyās*, different

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[26] Abū Ḥusayn al-Baṣrî, *al-Mu`tamad fî*, op. cit., vol. 2, p. 697.

[27] Abū Ḥāmid Ghazālî, *al-Mustaṣfā min `ilm al-Uṣūl*. 2 vols. (Cairo: Maṭba`at Muṣṭafā Muḥammad, 1937), vol. 1, p. 6.

[28] Ibid., II, 54.

[29] Ibid., II, 54.

from the previous one, appeared. During this period, some scholars such as al-Amidî (d. 631/1234) and Ibn al Ḥājib (d. 646/1248) thought that *qiyās* was an independent source or basis of law like the Qur'ān, and the *Sunna*. Al-Amidî defines *qiyās* as "the equation between the original and the parallel cases in respect of the effective cause derived from the law of the original case".[30] The term 'equation (*musāwat, istiwā'*) of parallel case with the original case', brought another change in the theory of *qiyās*. Earlier, it was thought that *qiyās* meant equalization (*taswiyah*) of the parallel case with the original case by the effort of the *mujtahid*. The new theory of equation influenced later thinkers such as `Aḍūd al-Dîn al-Ijî (d. 756/1357), Taftazānî (d. 790/1388) and Ibn Humām (d. 861/ 1456). They all maintain that *qiyās* is an independent source of law like the Qur'ān and the *Sunna*, and that it means equation between the parallel and the original cases in respect of the effective cause.

In summary, the historical development of *qiyās* indicates that it started as a rudimentary comparison between parallels, and gradually admitted the "classical group of four *uṣūl*". This acceptance happened as a result of a compromise between the unrestricted use of personal opinion (*ra'y*) and rejection of all human reasoning in law.[31] The linking factor between the original and the parallel cases known as *ma`na* later became an *`illah* (effective cause). We may now discuss the definition of an *`illah*, its characteristics, how it can be identified and then summarize its historical development.

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[30] Sayf al-Dîn al-Amidî, *al-Iḥkām fī Uṣūl al-Aḥkām* (Cairo: Maṭba`at al-Ma`ārif, 1914), vol. 3, p. 273.

[31] Schacht, *An Introduction*, op. cit., pp. 60-64.

Definition and Analysis of `illah (Effective Cause).

What is *`illah* in Islamic jurisprudence? The different definitions and opinions of the jurists regarding what constitutes an *`illah* are evident in the etymology given to the term. In the medieval period, *`illah* was defined alternately as *sabab* (mediate cause), *amārah* (sign),[32] *dā`ī* (motive), *bā'ith* (driving force or motive), *manāṭ* (basis), *dalīl* (indication), *mūjib* (that which necessitates or obligates), *mu`arrif* (signifier), *jālib* (causative factor) and *mu'aththir* (effective cause).[33]

There are three other words, each of which has been used by the jurists to define *`illah* literally and juristically. First, in the literal sense, *`illah* means *`āriḍ* (an accident) by which the quality of an object changes from one condition to another when an *`illah* is applied to that object.[34] On the basis of this literal meaning, *`illah* is defined in law as "a quality which effects a rule of law". In other words, *`illah* determines the rule of law, by changing the law from particularity to generality or vice-versa. For instance, wine is prohibited because of its intoxicating quality, and, therefore, any other liquor that intoxi-

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32 According to Abū Ḥusayn al-Baṣrī, *al-Amārah* (sign) leads to probability (of intended rule) and that is why *al-amārah* is different from demonstrative evidence *dalālah*. The theologians call whatever leads to probability *al-amārah* irrespective of whether it is related to speculative reasoning or divine law (*shar`*). However, the jurists call subsidiary sources (*al-amārāt al-shar`iyah*) such as *qiyās* and isolated *ḥadīth* proofs (*adilah*). They do not regard speculative reasoning (*amārāt al-`aqliyah*) as a proof. *Mu`tamad, op. cit., p. 690.*

33 Shawkānī, Muḥammad b. `Alī, *Irshād al-Fuḥūl ilā Taḥqīa al-Ḥaqq min `Ilm al-Uṣūl* (Cairo: Idārat al-Ṭiba`at al-Muniriyyah, 1347 A.H.), p. 181; Aḥmad Ḥasan, "The Legal Cause In Islamic Studies," *Islamic Studies* 19 (1980), 250.

34 Fakhr al-Islam `Alī b. Muḥammad al-Pazdawī, *Uṣūl al-Fiqh*. On the margin of al-Bukhārī *Kashf al-Asrār*, 4 vols. (Cairo: n.p., n.d.,), vol. 4. pp. 1290-91; Ḥasan, "The legal cause in Islamic Studies" op. cit., p. 248; *Irshād al-Fuḥūl*, op. cit., p. 181.

cates will be forbidden whenever the common factor of power to intoxicate is determined to be present therein. As for the second example, a dead animal is generally forbidden for consumption unless there is a compelling necessity; therefore, the eating of any other forbidden things will be allowed at a particular time of necessity when one is about to die due to hunger and starvation. The rule of law is restricted to the case mentioned in the texts before the determination of the *`illah*. Once the *`illah* is determined, the rule of the law in the text will be externally changed from particularity to generality. And whenever the *`illah* is found in a parallel case, the same rule of law will be applied.[35]

Second, *`illah* is derived literally from *`alal* which means the repeated drinking of water by animals. The jurists use this word in the legal sense for the repetition of the rule of law wherever the *`illah* is found. The rule of *qiyās* can be extended to parallel cases as long as the *`illah* exists therein.[36]

Third, in the literal sense, *`illah* is a disease which drastically alters one's health. The legal aspect of the third definition of *`illah* thus means a quality which has an effective impact on the establishment of the rule of law.[37]

The issue of *`illah* is very complicated in the books of Islamic theology and philosophy.[38] The Mu`tazilis maintain that the motive or cause brings about the rules of law because the works of God are not purposeless.[39] The

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[35] *Kashf*, op. cit., p. 1290.

[36] Ibid., p. 1290. This means that the rule (*ḥukm*) of an *`illah* will always be repeated whenever it appears in parallel cases.

[37] *Kashf*, op. cit., pp. 1290-91.

[38] Abū al-Ḥasan al-Ash`arî, *Maqālāt al-Islāmiyyīn*, ed. Muḥammad Muḥy al-Dîn (Istanbul: Maṭba`at al-Dawlah, 1929), pp. 51-53

Ash`aris believe that it is God who necessitates the law: law does not exist because of the *`illah*; the causes of laws existed before the advent of Islam, but the causes did not necessitate the laws. The law became effective only after the exercise of the authority of the Lawgiver.[40]

The Maturîdîs adopt a middle stance between these two views. They believe that legal injunctions are given for certain purposes, and have definite causes. However, God does not decree the rules of law on the basis of their causes and purposes, but out of grace to mankind. The authority of God makes the rules obligatory but not the causes. The legal injunctions are figuratively attributed to their causes.[41]

According to the Sunnîs, the wording of the text stipulates the law and the *`illah* motivates it. This means that the law of an original case (*ḥukm al-aṣl*) comes from the Lawgiver Who makes a law an obligation. Another view maintains that the law is attributed to the *`illah*, not to the text, in both the original and the parallel cases. The *`illah*, according to this view, is a sign (*`alāmah* or *amārah*) for the existence of a law (*li thubūt al-ḥukm*) in both cases. The majority of the jurists uphold this view.[42]

Characteristic and Role of `Illah in Qiyās.

The first characteristic of an *`illah* is that it must be an apparent attribute (*waṣfan ẓāhiran*). This means that the *`illah* in an original case must be distinguished in such a way that one must perceive its presence in the ruling of the

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39 *Kashf*, op. cit., vol. 4, pp. 1349-51.

40 Ibid., pp. 1349-52.

41 Ibid., pp. 1349-51

42 Ibid., p. 1064.

original case; so that when the ruling is extended to similar cases, its presence will also be known. For instance, the power to intoxicate is an apparent attribute which can be observed from drinking wine; such an attribute will be used as an *`illah* to extend the ruling of prohibition to any other drinks that can intoxicate. The color or name of the drink is immaterial to the ruling because they are not considered effective causes. In another example, a blood relationship cannot be determined in *Sharī`ah* through the presence of a husband's semen in the womb of his wife. An apparent attribute such as a valid marriage contract is considered to be the cause of determining blood relationship.[43]

Secondly, an *`illah* must be consistent (*munḍabitan*). This means that the attributes of the cause must be equal and precise in both the original and the extended cases. For instance, the Prophet Muhammad said: "A person who kills the one from whom he inherits should be deprived of the inheritance". Avoidance of conflict of interest is considered to be the attribute of the *`illah*; therefore, a person who kills his bequestor (*mūṣī*) will be prevented from inheriting. As for fasting, there are inconsistent attributes concerning its observance such as, 'hardship' (*mashāqqah*) and 'inconvenience' in relation to the fasting of both rich and poor men. A rich man may not feel any inconvenience in traveling by air when fasting; whereas a poor man will face hardship if he must travel by camel. Because these attributes are inconsistent with one another, travelling and illness are chosen as the reasonable excuse or the *`illah* governing exceptions to fasting instead. The injunction thus eradicates discrimination between the poor and the rich on the issue of fasting.

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[43] Muḥammad `Alī al-Shawkānī has enumerated about twenty four characteristics of *`illah* in his *Irshād al-Fuḥūl*, op. cit., p. 207.

Thirdly, an attribute of an *`illah* is that it must be suitable (*munāsabah*). According to Ghazālī, *al-Munāsabah* means a quality which bears the character of *maṣlaḥah* (human welfare) in such a way that if the rule of law is attributed to it, it makes sense.[44] Ibn al-Ḥājib believes that *munāsabah* is the determination of *`illah* through the affinity between the cause and the rule of law from the *aṣl* (original case) itself and not from the text or anything else.[45] For instance, intoxication (*iskār*) is the *`illah* for prohibiting the drinking of alcoholic beverages and intentional killing is the *`illah* for prohibiting retaliation. A reflection on the motives behind these two laws of prohibition indicates their suitability for the laws themselves.[46]

Fourthly, another attribute of an *`illah* is that it must be transitive (*muta`ddiyah*).[47] This means that the *`illah* should not be confined to the rule of law in the original case. Since the *`illah* is the determining factor of a relationship between the original case and a new case, it follows that such an *`illah* should not be limited (*qāṣirah*). For instance, the consumption of the flesh of a hawk is prohibited for a Muslim because it preys on other animals. Therefore, the consumption of the flesh of any other predatory animals such as lions, dogs, tigers etc. are forbidden for Muslims. On the other hand, examples of attributes that are limited and cannot be extended are those that pertain particularly to the Prophet Muḥammad for they cannot be extended to other cases (e.g. only the Prophet is allowed to marry more than four wives;

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44 Abū Ḥāmid Muḥammad al-Ghazālī, *Al-Mustaṣfā min `Ilm al-Uṣūl*, 2 vols. (Cairo: Maṭba`at Muṣṭafā Bābī al-Ḥalabī, 1937), vol. 2, p. 77.

45 Ibn al-Ḥājib, *Mukhtaṣar al-Muntaha*, along with the commentary by al-Ijī, (Istanbul: n.p., 1307/1891), pp. 386-89.

46 Ibid., pp. 386-89.

47 Baṣrī, *al-Mu`tamad*, op. cit., vol. 2, pp. 801-803.

this ruling cannot be extended to any other Muslims irrespective of their financial or social status).[48]

On the condition of *ta`diyah*, some jurists do not agree that an *`illah* should be particularized.[49] Al-Jaṣṣāṣ stresses that: "not all legal theorists were ready to endorse the idea that a legal *`illah* can and should be particularized. Bishr ibn Ghiyāth al-Marîsî and Shāfi`î were against it, while the majority of the Ḥanafis, excepting some who were living in Baghdad during al-Jaṣṣāṣ's time and Mālik ibn Anas commended it".[50] According to al-Jaṣṣāṣ, unless an *`illah* is definitely particularized, (such as the example of the prophet cited above), there is no reason why a certain *`illah* cannot be applied to as many cases as one can find. Since the issue of *takhṣīṣ al-`illah* (particularization of cause) is part of this thesis, details on this aspect will be discussed later. We may now focus on the means by which an *`illah* is identified.

Identification of the Effective Cause.

There are a number of ways in which a *`illah* may be identified. According to Shawkānî,[51] The first is by means of Qur'anic verse or a prophetic tradition. Whenever either of them indicates certain attributes as the cause for the ruling of law in a given case, such attributes are considered as the *`illah*. Attributes may be explicit or implicit; as for an explicit *`illah*, such formulae

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48 "And any believing woman who dedicates her soul to the prophet if the prophet wishes to wed her (after the fourth wife) this only for thee, and not for the believers (at large)". Qur'ān 33:50.

49 In his *Uṣūl al-fiqh*, al-Jaṣṣāṣ mentions that Bishr Ibn Ghiyāth al-Marîsî and Shāfi`î are against particularization of cause (*takhṣīṣ al-`illah*). Cited by Nabil Shehaby in his article on "*`Illah* and *qiyās* in Early Islamic Legal Theory," *Journal of the American Oriental Society* 102, (1982), p. 39

50 Ibid., p. 39.

51 *Irshād*, op. cit., pp. 184-185.

as 'so that' or 'because of this' or 'the cause is such and such' must be expressed in a statement that consists of an explicit effective cause. For instance, Allah says in the Qur'ān: "Apostles who gave good news as well as warning, *so that* mankind (after coming) of the apostles, should have no plea against God."[52] An example of an implicit *`illah* in a text is as follows: The Prophet orders Muslims to wash a pot seven times if a dog licks it. This ruling indicates that such a pot is to be regarded as defiled (*najas*) because the legal sources speak of cleanliness (*ṭahārah*) in connection with pots licked by a dog.

Second, an *`illah* can be identified by consensus (*ijmā`*). Whenever the jurists (*mujtahidūn*) agree on a certain attribute as an *`illah* for a case, that agreement may be acceptable and the *`illah* may be used for extension to another similar case. It must be stressed here that the validity of the rule of *ijmā`* derived through *qiyās* is questionable, because the Ẓāhiris and others who do not subscribe to *qiyās* will not be part of this kind of *ijmā`*. How can such a consensus be accomplished without their consent? Al-Shawkānî maintains that *ijmā`* cannot be considered as a valid method to determine an *`illah* because *ijmā`* on cases whose *`ilal* are derived by analogy are not certain (*qāṭ`ī*). They may be probable (*ẓānnī*) only.[53]

Thirdly, investigation and successive elimination (*al-sabr wal-taqsīm*) is another method of finding the *`illah*. This method consists of probing or classifying a number of attributes or qualities worthy of being the *`illah* of a given law. A jurist in such a situation then chooses one of them as the cause and excludes the rest. This method includes invalidation (*ilghā'*): this means that a

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[52] Qur'ān 4:165.

[53] *Irshād*, op. cit., p. 184.

certain rule of law is established on the basis of a specified *`illah* and the rest of the *`ilal* are rejected by the jurist who has shown that they have no connection with the rule. This method is similar to the process of *`aks* (co-exclusiveness), which indicates that when an *`illah* does not exist, the rule based on it also does not exist.[54]

Among the methods of *al-sabr wal-taqsīm* is *ṭarḍ* (co-extensiveness). This term means that the quality excluded by the jurist was also dropped by the lawgiver himself. For instance, the consideration of being tall or short is irrelevant to cases of retaliation, expiation, inheritance, and the emancipation of a slave. These qualities will not be taken into account while determining the causality of a rule, because the lawgiver neglected them. Nor is gender taken into consideration by the lawgiver in the emancipation of slaves; it is considered by him, however, in cases of witnesses, administration of justice, guardianship in marriage and inheritance. Therefore, the sex of a person will be dropped as an *`illah* in the case of the manumission of slaves.[55]

Fourthly, *tanqīḥ al-manāṭ* (re-examination or revision of the place where the *`illah* is suspended) is another means to identify an *`illah*. This method is different from the previous one, i.e. *al-sabr wal-taqsīm*, because the latter has no textual indication of where the ruling of the *`illah* is, whereas *tanqīḥ al-manāṭ* has. For instance the penalty (*kaffārah*) of freeing a slave is involved in the judgement of the Prophet upon a bedouin who had sexual intercourse with his wife by day while he was fasting during the month of Ramaḍān. The summary of the dialogue between the Prophet and the bedouin is as follows: "I

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[54] Ibn al-Ḥājib, *Mukhtaṣar al-Muntahā*, along with the commentary by al-Ījī, op. cit., pp. 386-89.

[55] Ibid., pp. 390-91.

had sexual intercourse during *Ramaḍān*" says the bedouin. The Prophet replied: "If you had intercourse, then you should make expiation." This condition and its result explicitly indicate the cause of the injunction. The jurist's role in this case is to re-examine the ruling by dropping the irrelevant attributes. Such attributes are: 'he is a bedouin', or 'he came running', or 'riding a horse'. He will then single out the *`illah* as "having intercourse by day during *Ramaḍān*" and on that basis the penalty (*kaffārah*) of freeing a slave is enjoined.

There are other means of identifying an *`illah* such as *dawarān* and *al-tanbīh wa 'līmā'* which are almost the same as *al-sabr wal-taqsīm* and *tanqīḥ al-manāṭ* which have been explained above respectively.[56]

Al-Baṣrī's methods of identifying an *`illah* are almost the same as those above except that he treats the matter in a polemic manner. He stresses the role of revelation and accommodates methods of reasoning to find the attributes of effective causes. Abū Ḥusayn al-Baṣrī is an advocate of *takhṣīṣ al-`illah*, and at the beginning of his discussion on the issue of *`illah* he says that the only means of sorting out the effective cause of a divine law is through revelation (*shar`*). He justifies this assertion on the basis that confirmation of a ruling depends on the efficiency of the *`illah* therein.[57] For instance, the ruling based on a certain *`illah* in an original source of revelation (*al-aṣl*) must be confirmed, and the ruling should disappear when the *`illah* disappears. Baṣrī therefore argues that *al-`illah al-shar`iyyah* (legal cause) can be known only by revelation. This argument undermines the role of reasoning in determining a

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[56] Examples given to illustrate both *dawarān* and *tanbīh wa 'līmā'* are the same as those that I have given earlier on *al-ṭard wa 'Taks* and *tanqīḥ al-manāṭ*.

[57] *Mu`tamad*, op. cit., vol. 2, p. 773.

divine law in a case wherein certain attributes are known, through the use of reason, to have an impact on the existence and the disappearance of its ruling. In a dialectical approach, Baṣrî tries to define the role of an *`illah* in both reasoning and revelation, and thereby raises a question: Can the *`illah al-shar`iyyah* be derived through a sign (*amārah*)[58] known by custom in the same manner that one can determine the price of a lost item or arrive at the direction of the *Ka`bah* (from a far distance) through a customary sign, (such as the indication of the sun)? It is possible, indeed, common to know the price of a lost item by comparing it with its existing equivalent; but due to the rule of revelation, its *`illah* cannot be determined by custom. However, al-Baṣrî concludes this argument as follows: "We do not deny (the role of reasoning) but what we negate is the use of speculative means (alone) as a vehicle for determining the *`illah* of a divine law.[59] Stressing the role of reasoning and revelation in sorting out the effective causes, Abū Ḥusayn al-Baṣrî believes that an *`illah* can be identified by expression (*lafẓan*) or by deduction (*istinbāṭan*). Through expression, the *`illah* can be made either explicit or implicit. As an example of the former, an *`illah* must be clearly expressed; e.g. "this is an obligation on you because of *such a reason*". Another example of an explicit *`illah* is a phrase like 'in order to' or 'so as not to' whenever any of them is added to a statement; e.g. the reason behind the distribution of *zakāt* among the poor was given explicitly as follows: "So that wealth may not be merely made to circulate among the rich among mankind."[60] As for the implicit expressions which are used to identify an *`illah* Abū Ḥusayn al-Baṣrî divides

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[58] See the manner in which he defined *al-amārah* above under the definition of *`illah*; *Mu`tamad*, op. cit., pp. 773-74.

[59] Ibid., p. 774.

[60] Qur'ān 59:7.

them into four categories:

Firstly, an *`illah* is established through a statement that contains attributes on which the ruling in the matter concerned is based. In such a situation, the conjunction *fā'* must be put at the end of the statement. For instance, the Prophet says: "perfume should not be used on the body of a person killed during the struggle (*jihād*) against the non-Muslims and his head should not be covered because (*fa innahu*) he will be resurrected as an obedient servant (*mulabiyan*).[61] Another example of this category is seen when the conjunction *fā'* is attached to the ruling and the *`illah* is at the beginning of the statement. For instance, God says: "As to the thief, male or female, cut off his or her hands" (*faqṭa`ū aydiyahumā*).[62] Although stealing is not explicitly mentioned as the reason for the amputation, it is understood to be so.

The second category of implicit expressions, which are used to identify an *`illah* is that which includes the affirmation of a verdict by the Prophet following upon his knowledge of the suitable attributes for the judgement in the case. For instance, a person asked the Prophet about the ruling in a certain case, and the questioner mentioned the attributes which are suitable as an effective cause. Taking into consideration the attributes indicated, the Prophet pronounced his ruling. An illustration of this situation is as follows: A person told the Prophet: "I broke my fast"; the Prophet asked him to make expiation (*kaffārah*). The demand for expiation from the man indicates that breaking his fast is an attribute suitable as the effective cause in the case.

The third category of expression which introduces an implicit *`illah* is a

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61 *Mu`tamad*, op. cit., vol. 2, p. 776.

62 Qur'ān 5:38

statement which contains attributes that must be accepted as *`illah*; otherwise the attributes would be redundant. Such a statement must include a conjunction such as 'because' (*inna*). For instance, it was reported that the Prophet refused to enter the house of some people who were keeping dogs in their homes; but he entered another house where cats were residing with the tenants. When he was asked about these two different attitudes, he explained that: "cats are not dirty because they are always around you" (*innahā mina al-ṭawwāfīna `alaykum*). The phrase: -because they are always around you- is the attribute considered to be the effective cause for the cleanliness of cats; otherwise the phrase would be meaningless.

The fourth category of expression which indicates an implicit *`illah* is any act which prevents one from observing an obligatory act. For instance, the Qur'ān[63] commands the believers to hasten earnestly on Friday to the remembrance of Allah (i.e. to the Mosque) and not to entertain any business transaction at that moment. The command is so, because trading diverts attention from the remembrance of Allah, and, therefore, it is the implicit effective cause. This command not to engage in any business transaction can be extended to any other acts that draw attention away from worship. The last example of this category given by Abū Ḥusayn al-Baṣrî has a great connection with *qiyās*. He explains that if an action is insulting and therefore prohibited by an implicit *`illah*, a similar action which is more forceful than insulting someone (such as beating) must also be prohibited. An example of this rule is the prohibition from saying "fie" to both parents.[64] It is insulting to say "fie" to both parents and therefore forbidden; lack of respect towards them is the

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[63] Qur'ān 62:9.

[64] Qur'ān 17:23.

implicit effective cause. This *`illah* is also an effective prohibition of beating one's parents since beating is an even greater insult to the parents than the act of saying "fie". Therefore, beating one's parents is prohibited on the grounds of an implicit *`illah* namely: that insulting one's parents is forbidden; this is understood from the word 'fie' in the text of the Qur'ān.

In summary, it appears that the term *`illah* did not come into use in juridical reasoning until the post Shāfi`ī era. Shāfi`ī sometimes terms the common factor between two parallel cases *ma`na* (idea) and at other times *aṣl* (basis). Ibn al-Mudaynī (d. 258/871), and Muzanī (d. 264/877) discussed various aspects of *`illah* in relation to theological and legal matters[65] and in a fairly detailed account about the prohibition of wine, `Amr b. `Ubayd (d. 244/858) used the term in a strictly technical sense.[66]

The procedure of *qiyās* seems to have been systematized and expanded drastically after the death of Shāfi`ī. It was during the third/ninth century when various aspects of the *`illah* relative to theological and legal matters were discussed. Among the discussants were scholars such as Naẓẓām (d. 220-231/835-845), Iskāfī (d.240/854), Ibn al-Mudaynī (d. 258/871) and Muzanī (d. 264/877).[67] During this period, certain conditions began to be set for a valid *`illah*. Among them are that the *`illah* must be relevant to both the original and the assimilated cases so that the judgement from the former case can be transferred to the latter; and that a similar *`illah* must be found and

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65 *Maqālāt al-Islāmiyyīn*, op. cit., vol. 2, pp. 75-77.

66 Cited in Abū Ḥayyān al-Tawḥīdī, *al-Baṣā'ir wa Dhakāir*, ed. I. Kilānī, 4 vols. (Damascus: n.p., 1964-1966), vol. 2, pp. 741-742; Wael B. Ḥallāq, "The Development of Logical Structure in Sunni Legal Theory," *Der Islam* 64 (1987) 1:47.

67 Ibn al-Nadīm, *al-Fihrist*, ed. G. Flugel (Beirut: Idārat al-Ṭibā`at al-Munīrīyyah, 1970), pp. 360-322; *Maqālāt*, op. cit., pp. 75-79.

verified in each of the cases.

During the fourth/tenth century, the concept of *`illah* was elaborated and defined by Baṣrî (d. 436/1044) as that whose effect (*ta'thīr*) creates a legal judgement.[68] This means that the attribute (*waṣf*) found in the *`illah* must affect the judgement in the original case and subsequently in the assimilated case.

Methods and conditions of how to extract the *`illah* from texts were set out properly during this period. Among the major contributors to this process is al-Baṣrî. In the fifth/eleventh century, al-Ghazālî (d. 505/1111) developed, modified and refined the theory of *`illah* for the purpose of facilitating the drawing of valid legal conclusions from the sources of *Sharî`ah*.

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[68] *Mu`tamad*, op. cit., vol. 2, pp. 704-705.

CHAPTER TWO.
DEFINITION AND USES OF ISTIḤSĀN: A HISTORICAL PERSPECTIVE

Historically, there was no dispute over the usage of the word *istiḥsān* before Abū Ḥanîfah; for it was used in the work of an early Umayyad jurist named Iyās b. Mu`āwiyah (d. 122/740). He gave instructions saying: "Use *qiyās* in judgement so far as it is beneficial to people, but when it leads to undesirable results, then use juristic preference *"(Fa'staḥsinū)"*.[69] This quotation indicates how the predecessors of Abū Ḥanîfah used the word *istiḥsān* to correct any injustice to which the strict ruling of *qiyās* might lead. *Istiḥsān* began to pose a problem only after Abū Ḥanîfah who used to say: *"qiyās* is such and such, but we apply *istiḥsān"*, without giving the reasons for his decisions on *istiḥsān*.[70] However, in examining his legal decisions, one finds that the pieces of evidence he used sometimes refer to *āthār* (traces), or *riwāyāt* (narrations).[71] For instance, he said: "If it were not for the precedent, I would have decided here according to *qiyās"* ; or "If it were not for the sake of *riwāyah*, I would have decided the case by *qiyās"* Such statements suggest that Abū Ḥanîfah used to base his evidence for *istiḥsān* sometimes on approved precedents or on narrations of the Prophet Muḥammad which might not be known to others.[72]

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69 Wakî` M. Ḥayyān, *Akhbār al-Quḍāt* (Beirut: n. p., n.d.), vol. 1, p. 341.

70 *Kashf*, op. cit., p. 1125.

71 Athār are precepts or traces which can be used as traditions from persons other than the Prophet. See Schacht's *Origins*, op. cit., p. 78. *Athār* may also be used for the traditions of Prophet Muḥammad. Ibid., p. 119.

72 *Kashf*, op. cit., pp. 1126-1130.

The use of *istiḥsān* based on approved customs or on isolated *ḥadīth* was not confined to Abū Ḥanīfah and his disciples. However, the Ḥanafīs being the champions of this practice, must have had evidence to support such a usage. Their reasons for using *istiḥsān* may not necessarily have been expressed along with their decisions based on customs and isolated *ḥadīths*. One can assume that there was no urgent reason at the time to detail the line of reasoning along with the legal decision. The failure of the Ḥanafīs to explain the procedure of *istiḥsān* is a major problem which caused the proponents of juristic preference to be charged with judging cases without any textual basis.

It is difficult to distinguish between the use of *qiyās* and the use of *istiḥsān* in the early period before Shāfi`ī. The jurists of that time have not provided us with straightforward definitions of the words, nor have they given clear rules as to when either of the two methods should be applied. Abū Ḥanīfah's general statement that: *"qiyās* will be such and such, but we apply *istiḥsān* in this case"[73] suggests that though both words were used to indicate a mode of legal reasoning, they were by no means synonymous. If both were *dalā'il* (pieces of evidence) one might argue about why and when one method should be used in preference over the other. Although Abū Ḥanīfah's books no longer exist to provide an answer to this question, it has been related that he used *istiḥsān* as a means of making his legal opinions prevail whenever his disciples questioned his analogical decisions.[74] His failure to provide

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[73] *Kashf*, op. cit., pp. 1122-1132.

[74] Muḥammad Shaybānī mentioned that whenever there was a dispute between Abū Ḥanīfah and his disciples over the question of analogical deduction, Abū Ḥanīfah would resort to juristic preference by saying: (*"Anā Astaḥsin fī hadhihi al-mas'alah"*.) See Abu Zahrah Muḥammad, *Abū Ḥanīfah: Ḥayātuhu wa `Aṣruhu* (*Cairo: Dār* al-Fikr, 1366/1947), p. 342.

guide-lines as to why he resorted to *istiḥsān* in connection with any legal challenge, has led to great opposition and to the resentment of this concept by some jurists.[75] The various definitions of *istiḥsān* preoccupied the later Ḥanafîs for centuries. In fact, to some extent, the relationship of *istiḥsān* to *qiyās* remains unclear among the adherents of this school of law even till the present time.

Nevertheless, we know that *qiyās* and *istiḥsān* are related in the sense that they are both procedures of legal reasoning. They differ from one another in that the former is the deriving of similar rules by comparison, while the latter is a departure from an established rule of *qiyās* due to a precedent *athar* or necessity.[76] Al-Muzanî,[77] one of Shāfi`î's most important students, explains: *"qiyās* is (only) a matter of drawing likenesses between things and applying similar (rulings) to them (on that basis) - *"at-tashbīh bi'l 'umūr wa 'tamthīl `alayhā"*.[78] If *istiḥsān* is a departure from the rule of *qiyās*, it may therefore, mean either of the following:

(a) A rule chosen from one of two contradictory analogies. Such a rule is

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[75] The Ẓāhirîs and the Shāfi`îs vigorously oppose the concept of *istiḥsān*. See I Goldziher, *The Zahiris: Their Doctrine and their History*, transl. W. Behn (Leiden: E.J. Brill, 1971), pp. 1-34.

[76] Abū Yūsuf holds that if a ruler sees a man who has committed theft or illegitimate sexual intercourse, he should not enforce the *ḥadd* punishment on him without further testimony. He designates this as *istiḥsān*, and says that the basis for this is an *athar* from Abū Bakr and `Umar, even though *qiyās* required that the *ḥadd* should be enforced. For details, see Abū Yūsuf, *Kitāb al-Kharāj*, op. cit., p. 178.

[77] Ismā`îl ibn Yaḥyā Al-Muzanî (175-264/792-877) lived and died in Egypt and was one of the most important proponents of the Shāfi`î school of law. Al-Muzanî frequently disagrees with Shāfi`î and for that reason some have spoken of a distinctive school of Al-Muzanî. See F. Sezgin, "Fiqh," *Geschichte des arabischen Schrifttums*, 1 (1961), p. 492.

[78] Cited by Abū Zahrah, *Mālik: Ḥayātuhu wa `Aṣruhu* (Cairo: Dār al-Fikr, 1366/1940), p. 314.

sometimes called *al-qiyās al-mustaḥsan* (preferable analogy). It is so called because it is not instantly intelligible to the mind as to why the jurist has chosen it.[79] However, the reason for its being chosen will appear after a good deal of reflection.

(b) or an exceptional rule the evidence for which has been inferred from the *Qur'ān* and the *Sunna*.[80]

According to Ibn al-Muqaffa' (d. 139/756), the secretary of state during the first years of `Abbasid rule, discretion cannot be ruled out in deciding all matters for which there is no precedent from the revelations; rather, fairness and justice in accord with the spirit of the Qur'ān and *Sunna* must be maintained. Along these lines, he declared that unreserved adherence to *qiyās* sometimes leads to injustice, and that there should be flexibility in the law in cases where the outcome of analogically derived rules is unfair. Ibn Muqaffa' explains: "An excessive adherence to *qiyās* in matters of religion and law will inevitably lead to a serious mistake. Whosoever indulges in such a practice will continuously be judging with ambiguities, knowing fully well that he is covering up what is ugly by refusing to abide with a correct decision so as not to abandon the dictates of *qiyās*. *Qiyās* is only an evidence that can be applied for good results, and one upholds it as long as it serves that purpose. But when it leads to unfairness and injustice, one must abandon it; for the objective of the law is not adherence to *qiyās* itself, but to judge according to what is good and appropriate".[81]

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[79] al-Pazdawî, op. cit., pp. 1123-1126.

[80] Ibid., pp. 1128-1135.

[81] Ibn Muqaffa', *Risālah fī al-Ṣaḥābah* in the *Rasā'il al-Bulaghā'*, ed. Muḥammad Kurd `Alî, 4th edition (Cairo: n.p., 1954), pp. 125-126.

From the above quotation, later jurists such as Abū Ḥanîfah and his followers derived a justification for the use of *istiḥsān* as juridical discretion in legal decisions in so far as it does not contradict revelation. An indication of the role of discretion manifests itself in the later legal terms such as *qiyās*, *istiḥsān*, *istithnā'* (exceptional rule) all of which are from the same umbrella of *ra'y*. *Ra'y* is an individual reasoning or opinion, which later gradually acquired different technical meanings on the basis of how it was employed and the procedure attached to it.[82] For instance, the idea of establishing (*ithbāt*) a rule for a case by resorting (*radd*) to the *Qur'ān* or to the *Sunna* of the Prophet to discover the effective cause (*`illah*) is a product of *qiyās*. Likewise, the idea of seeking something useful (*manfa`ah*) or of preventing a harmful act (*maḍarrah*) becomes a matter of equity (*al-maṣlaḥ al-mursalah*). Finally, the rule of exception from the fundamental principles (*al-qawā`id al-uṣūliyyah*) and pieces of evidence (*adillah*) has become *istiḥsān* (juristic preference). The following examples indicate that jurists in the early period of Islamic jurisprudence used *qiyās* as an *aṣl* (basic principle) to formulate a rule. And when jurists say that a case is against the rule of *qiyās* (*khilāf al-qiyās*), they mean that the rule of a particular case contradicts the established precept (*al-aṣl*) due to a necessity; hence it is exceptional. For instance, Abū Ḥanîfah says: "We confirmed stoning to death as a penalty for adultery on the basis of *istiḥsān*, in opposition to the rule of *qiyās* (*"Athbatnā al-rajm bi'l istiḥsān khilāf al-qiyās"*). What Abū Ḥanîfah means is that the basic rule in the *Qur'ān* concerning the penalty for *zinā* (fornication) is one hundred lashes.

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82 J. Schacht, explains in his *Origins* that "Individual reasoning in general is called *ra'y* ,'opinion'. When it is directed towards achieving systematic consistency and guided by the parallel of an existing institution or decision it is called *qiyās* 'analogy'. When it reflects the personal choice of the lawyer, guided by his idea of appropriateness, it is called *istiḥsān* or *istiḥbāb* preference'." *Origins*, op. cit., p. 98.

The fact that the text states a general rule without specifying to whom the penalty should be applied may lead a layman to think that the rule includes both single and married people. But when the Prophet specified the rule for married men and his companions implemented its directives by stoning adulterers to death, the rule of punishment for fornication then became entirely different from that for adultery. Hence Abū Ḥanīfah holds that the rule in the case of fornication is against *qiyās*. He explains that the punishment for adultery is exceptional and that it is established by *istiḥsān* through the practice of the Prophet and the practice of his companions. By going through the above case and reflecting on the *sharī`ah* principle which forbids a jurist to have a legal opinion different from what is stated in the textual revelation (*naṣṣ*) in the Qur'ān and in the *sunna* of the Prophet, then one wonders whether the function of *istiḥsān* is sometimes over-rated or not in the legal reasoning of Abū Ḥanīfah. Prophet Muḥammad approved the usage of legal discretion with caution when there was no direct provision from the revelations for a new case. For instance, the Prophet endorsed the legal procedure of Mu`ādh b. Jabal when he sent him to Yemen. When he asked him how he would decide cases presented to him, Mu`ādh replied that he would judge according to the Qur'ān and the *sunna*, and that he would use his discretion with caution when there is no direct ruling to the specific case in the above two sources (the Qur'ān and the prophetic traditions). The Prophet then approved this legal procedure of Mu`ādh.[83]

Adultery and fornication are two different matters with two different pen-

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[83] Abū Dawūd, *Ṣaḥīḥ Sunan al-Mustaṣfā*, 2 vols. (Cairo: Maṭba`at al-Sa`ādah, 1929), II, p. 116. Ibn Ḥazm declares that people fabricated this *ḥadīth* in order to support *qiyās*. See his *al-Iḥkām fī Uṣūl al-Aḥkām*, ed. Aḥmad M. Shākir, 8 vols. (Cairo: Maṭba`at al-Sa`ādah, 1345-1348/1926-1929), vol. 7, p. 976.

alties, and the method of *istiḥsān* is not called for in respect to them, for there are textual rules for each of the two cases. However, the phrase *Khilāf al-qiyās* illustrates how the Ḥanafīs used *istiḥsān* to mean an exceptional rule which contradicts a basic precept.

There is a difference of opinion about the originator of the concept *istiḥsān*. While Goldziher believes that its origin lies in the writings of Abū Ḥanīfah and his contemporaries,[84] Schacht argues that the use of the term was part of the actual reasoning of the Iraqis even before Abū Ḥanīfah.[85] Historically, this conclusion seems to be justified for one comes across the use of the word in the instructions of the early Umayyad jurist Iyās b. Mu`āwiyah whom we have mentioned above.[86]

Other writers attribute the origin of the concept of *istiḥsān* to `Umar b. al-Khaṭṭāb because of his decision in the case known as *al-ḥimāriyah* ('The Donkey Case'). A deceased woman was survived by her husband, her mother, two germane brothers, and two uterine brothers. In his first decision, `Umar followed the precedent of the prophet who had drawn a distinction between two categories of heirs, the *ahl al-farā'iḍ* (those heirs whose portions are specified in the *Qur'ān*)[87] and the *`aṣabah* (the residual heirs).[88] The former have absolute priority in the distribution of the estate, in the sense that their allotted

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84 Quoted by Schacht in his *Origins*, op. cit., p. 112.

85 Ibid., p. 112.

86 See Chapter two page 29 of this thesis..

87 See Qur'ān 4:1-40 for the details of the heirs whose portions are categorically mentioned therein.

88 These residual heirs are those individuals who may in some circumstances receive the inheritance that remains after the obligations to primary heirs are satisfied but who are sometimes excluded from inheritance when those who have absolute priority have exhausted the inheritance.

portions are to be charged against the estate first, even if this should result in the exclusion of the latter who were regarded as residual heirs. Acting on this principle of the precedent, `Umar gave one-half of the estate to the husband, one sixth to the mother and one-third to the uterine brothers. The germane brothers, considered as residual heirs, were excluded from succession. After they appealed the matter, `Umar revised his decision on the basis of what he considered to be equity and better judgement (*istiḥsān*) and then ordered that the one-third of the estate that remained after the deduction of the husband's and mother's portions should be distributed in equal shares among the germane and the uterine brothers. The case takes its name from the way in which the germane brothers explained their position. They said: "suppose our father were a donkey (*ḥimār*), do we not still have the same mother as the deceased?".[89]

The argument here is that `Umar's decision on the appeal was used to explain how the basic concept of *istiḥsān* was formulated.[90]

The previous example leads to the conclusion that *istiḥsān* signified a departure from *qiyās*, on the grounds that the principle derived from the precept of the Prophet (*athar*) seemed to be in opposition to the *qiyās* in question. The conclusion also follows that juristic preference signified a departure from *qiyās* in favour of considerations of equity and justice, or in favour of a doctrine which might have formally been less systematic, but more appealing to the common-sense. Therefore, this example does not confine the use of *istiḥsān* to `Umar; but indicates that it is applicable in any case in which the

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[89] N.J. Coulson, *Succession in the Muslim Family* (London: Cambridge University Press, 1971), pp. 73-74. Also see Abū Zahrah, *Mālik*, op. cit., p. 324.

[90] Ibid., p. 324.

legist, in spite of the fact that an analogy with the fixed code clearly points out one course, 'considers it better' to follow a different one. However, adhering to *Sharī`ah* objectives and guide-lines is essential in this exercise.

We shall confine further illustrations of the use of *istiḥsān* before Shāfi`ī to those which help us to determine whether or not *istiḥsān* is an arbitrary form of reasoning as claimed by Shāfi`ī in his writings. In Abū Yūsuf and Shaybānī's writings, one gets the impression that the procedure of *istiḥsān* was formulated in opposition to *qiyās* and that the purpose of the term was not to deny the legitimacy of *qiyās* as such, but to restrict its scope so as to avoid the unfavourable consequences that might follow as a result of adhering rigidly to *qiyās*. Again, *istiḥsān* was used to affirm the validity of the jurist's discretion in departing from strict analogy because of other important considerations. According to Shaybānī, *istiḥsān* does not justify deviation from *athar* (precept), but merely from *qiyās*.

The following are examples of *istiḥsān* as used by jurists before Shāfi`ī. In two similar cases, Shaybānī gives different rulings by using *istiḥsān* as a discretionary option in breach of analogical deduction in one case and by using *qiyās* in the second and similar case. For instance, he was asked: "If a warrior set free a slave boy or a slave girl from the spoil, do you think that this manumission would be lawful?." He replied "No". The questioner demanded an explanation saying: "Why, since he (the warrior) is entitled to a share of the [spoil] ?" Shaybānī replied: "Because he does not know what his share is going to be".[91] In a similar case, the questioner asked: "If a captive male or female slave, after the spoil was divided, fell into the collective lot of 10 or

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91 M. Khadduri, *al-Siyar*. The Islamic Law of Nations Shaybānī's *Siyar* (Baltimore: The Johns Hopkins Press, 1966), pp. 114-116.

100 warriors [and individual distribution has not yet taken place] and one [of the warriors] set him free, do you think that his manummision would be lawful"? Shaybānî replied: "Yes, if [the party of Muslims who set him free] were 100 men or less, and I do not see a time limit on this matter". Question: "Would this [emancipated slave] be like a slave owned by partners, some of whom had set him free?" Answer: "Yes". Question: "Would the situation be different from the first case, where the slave was set free before the division of the spoil and where [you held] that the emancipation would not be permissible?" Answer: "The two situations are analogically the same, but in the first I would *prefer* to abandon the analogy and follow *istiḥsān* (juristic preference) and hold that the emancipation before the division of the spoil is not permissible".[92] In the second case, it appears as if Shaybānî's opinion were based on the assumption that the group of warriors could act separately in the way they wanted, having taken possession of the spoil after division.[93]

Shaybānî's Uses of Istiḥsān.

(1) Shaybānî uses *istiḥsān* based on an acceptable custom (*'urf*) as grounds for a breach of *qiyās*. For instance, he says, if the inhabitants of a town or a certain fort seek protection from Muslims, the protection, according to *qiyās*, would apply only to the fort or the town excluding their contents. But Shaybānî holds that on the basis of *istiḥsān*, the protection would cover the fort or the town along with their contents because the terms *qal'ah* or *madīnah* in their common usage (*'urf*), do not simply mean buildings, but also all the contents of the buildings.[94]

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[92] *al-Siyar*, op. cit., pp. 115-116.

[93] See Sarakhsî, *Mabsūṭ*, op. cit., vol. 10, p. 51. cited by Khadduri in his translation of Shaybānî's *al-Siyar*, op. cit., pp. 115-116.

(2) Sometimes Shaybānī uses *istiḥsān* to legitimize a necessity which permits what would have otherwise been forbidden. For instance, on the basis of the *ḥadīth* which forbids the sale of non-exisiting items at the time of the contract, all pre-paid sales are invalid. According to *qiyās*, advanced sales of manufactured items would also be invalid since they will be delivered later. However, Shaybānī validates the sale of manufacturing goods which are ordered in advance; in order to do so, he uses *istiḥsān* based on necessity.[95] According to Shaybānī, business transactions such as *muḍārabah*,[96] *musāqah*[97] and *muzāra`ah*,[98] which are unlawful by *qiyās* , are all considered valid by virtue of *istiḥsān*.

(3) The procedure of *istiḥsān* is sometimes used to explain an ambiguous statement in Shaybānī's legal decisions. For instance: if a man makes a statement to his wife: "If you enter the house, you are divorced", while his wife is actually in the house, then according to *qiyās*, says Shaybānī, the presence of the wife in the house at the time of his making this statement amounts to a

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94 Shaybānī, *Al-Siyar Al-Kabīr* with commentay by al-Sarakhsī (Hyderabad: Deccan, 1335 A.H.), vol. 1, p. 270. For more examples , see pp. 208, 209, 219 and 279.

95 Shaybānī, *al-Aṣl* (Cairo: n.p., n.d.), vol. 1. p. 27. Another good example is on wuḍū' (ablution), see p. 32 of the same volume.

96 *Muḍārabah* means a contract of co-partnership, in which one of the parties (the proprietor) is entitled to a profit on account of the capital (*ra's al-māl*) he has invested. He is designated as the owner of the capital (*rabb al-māl*). The other party is entitled to profit on account of his labour , and this last is denominated as the *muḍārib* (or the manager) inasmuch as he derives a benefit from his own labour and endeavours.

97 *Musāqah* is a contract between two parties, whereby one party takes charge of the fruit-tree of the other partner on condition that the crops shall be divided between them on specific terms.

98 *Muzāra`ah* is a contract between two persons, whereby one party is the landlord and the other the cultivator. They both agree that whatever is produced by cultivation of the land shall be divided between them in specified proportions.

fulfilment of the condition which the husband had set. According to *istiḥsān*, however, the condition would only be fulfilled if the woman were to re-enter the house after once having left it.[99] The statement is ambiguous because fulfilling the condition would consist in the the man's acting against his own oath; that is not the situation here. According to what Shaybānî calls *qiyās*, the wife in the above case is held to have done something that incurs the consequence of the husband's oath. The issue seems not to be whether the condition was met but rather one of whether the oath can be considered valid under these circumstances. However, the procedure of *istiḥsān* in the above case is clearer than that of *qiyās* because the former states that the condition is met only if the wife re-enters the house.

(4) According to Shaybānî, *istiḥsān* can be used to validate a speculative judgement. Consider for instance, a person who acquires a slave illegally, then sells him to someone who then sets the slave free. Freeing the slave was held to be permissible according to *istiḥsān*, because the original owner is assumed to have given his consent to the sale of the slave. But Shaybānî, following Abū Ḥanîfah and Abū Yūsuf, held the sale of the slave to be impermissible because there was no assurance that the assumption of the original owner's consent was valid. The very discussion of this matter also indicates that in the early period of Islam before Shāfi`î, *istiḥsān* was used to validate speculative judgements.

There were other important jurists before Shāfi`î, such as Abū Yūsuf (113-182/731-798)[100] who employed *istiḥsān* when the ruling of *qiyās*

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[99] Shaybānî, *Al-Jāmi` Al-Ṣaghîr*, ed. `Abd Al-Ḥayy Al-Laknawî (Lucknow: n.p., n. d.), p. 1310. Cited by Z. Isḥāq, Anṣārî *The Early Development Of Islamic Fiqh In Kufah* (Montreal: Unpublished Ph.D thesis, McGill University, 1966), vol. 2, p. 310.

contradicted the general interest of a Muslim population.[101]

Abū Yūsuf's Uses of Istiḥsān.

(1) According to the rule of *qiyās*, the hand of a Muslim who steals or who cuts off the hand of an infidel must be amputated. The latter rule is valid because an infidel is allowed to live in Muslim territory under the terms of an agreement that he will be protected if he pays the *jizyah* (tax). Abū Yūsuf holds a contrary opinion, and he bases it on *istiḥsān*. He maintains that the hand of such a Muslim should not be cut off. This is one of the peculiar legal opinions which those who oppose *istiḥsān* have used against it. No one can easily understand why Abū Yūsuf insists on not cutting off the hand of the accused Muslim; however, the general interest of protecting Muslims from foreign influence is said to have been considered in this case.[102]

(2) Four persons testified against a man who was accused of fornication (*zinā*) for which the prescribed Quranic penalty is one hundred lashes. After the accused had received some lashes, two other men testified that he was married. He was, therefore, sentenced to be stoned in accordance with another Quranic verse on adultery.[103] If it should appear later, before the stoning took place, that the witnesses were slaves or that they had withdrawn

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100 Abū Yūsuf Ya`qūb ibn Ibrahîm was a Kūfian and one of the most important followers of Abū Ḥanîfah, under whom he studied as well as under the Kūfian ibn Abî Laylā. Towards the end of his life, Abū Yūsuf was appointed a qāḍî of Baghdad. He kept that office until his death and was the first in Islamic history to have been called *qāḍî al-quḍāt* (chief judge). F. Sezgin, op. cit., 1, 419.

101 *al-Jāmi`* op. cit., p. 107.

102 Abū Yūsuf, *Kitāb al-Kharāj*, op. cit., p. 117.

103 The Quranic verse to this effect has been abrogated in terms of its written form, but the rule enunciated is still valid and effective.

their testimonies, the accused would still have been subjected to the rest of the whipping according to *qiyās*. However, *istiḥsān* rules that he should have been relieved of both the penalty of whipping and of stoning[104] because there was an element of doubt and uncertainty (*shubhah*) in the evidence. According to *sharī`ah*, a (*ḥadd*) punishment should be ruled out in the case of doubtful evidence. Secondly, if the rule of *qiyās* were enforced, the accused would be subjected to two different punishments for a single offence. This double punishment is deemed repugnant, and must therefore be avoided.[105] Juristic preference overrules *qiyās* in the above case because *istiḥsān* is justified by the fundamental *sharī`ah* rule which clearly states that a *ḥadd* punishment should not be carried out in the face of any doubtful evidence.

(3) The following is an example of custom and its impact on the force of *istiḥsān*. According to custom, a ruler must have given permission to an individual to dig a well before the latter can award the contract of digging to a labourer. Therefore, if a person employs a labourer to dig a well for him near to or beside a path along which Muslims always travel, (without that individual having gained permission from the ruler), and subsequently, someone falls into the well and dies, the labourer, according to *qiyās*, would have to bear responsibility for the death. Abū Yūsuf, however, argues that *qiyās* should not be followed in this case because the labourer assumed that permission to dig the well had been obtained by the employer. According to *istiḥsān*, the responsibility should be that of the family (*al-`Aqīlah*) of him who employed the labourer to dig the well.[106] Here again, the rule of *qiyās* is put aside in

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104 Abū Yūsuf, *al-Jāmi` al-Ṣaghīr*, op. cit., p. 165.

105 Ibid., p. 165.

106 Ibid., p. 182.

favor of *istiḥsān* which is based on custom.[107]

(4) A woman apostasized from Islam during her mortal illness. Abū Yūsuf and Abū Ḥanîfah are of the opinion that her husband should inherit her belongings according to *istiḥsān*. Muslims, according to *sharī`ah*, are prohibited from inheriting from unbelievers;[108] therefore, the husband of an apostate should be excluded from inheritance. However, Abū Yūsuf comments that the decision to permit the husband to inherit in this case recognizes a distinction between apostasy in normal circumstances and apostasy while in the state of (mortal) illness. He explains that there is a high possibility that the woman's apostasy during her mortal illness was a matter of malice in order to deny the husband's right. Therefore, the rule of *istiḥsān* is preferred in the above case because *qiyās* does not make provision for a differentiation between a state of normal illness and a mortal sickness.[109]

Abū Ḥanîfah's uses of Istiḥsān.

(1) The rules of *istiḥsān* are almost a departure from the established rules of *qiyās* when the latter leads to injustice. *Sharī`ah* accommodates certain customs such as the use of bathrooms after one has paid a certain amount, regardless of the time spent therein. According to *qiyās*, this custom will not be allowed due to the undetermined period of time which different users of the bathroom might spend therein. Although *istiḥsān* approves certain customs

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107 For another example of *istiḥsān* based on custom, see Schacht, *Introduction*, op. cit., p. 157.

108 According to the tradition from the Prophet, it is forbidden for a non-Muslim to inherit from a Muslim and vice-versa. See the ḥadîth compilation of Aḥmad b. Ḥanbal and that of al-Dārimî on the subject of inheritance on page 41.

109 Ibid., pp. 182-183.

including the above, it sometimes overrides customs when they cause hardship. For instance, Abū Ḥanîfah on the basis of *istiḥsān*, disapproves of the custom of *Ish`ār* (the practice of stabbing one side of a camel's hump in order to indicate that the animal is intended for sacrifice). *Ish`ār* is based on a prophetic tradition which states that the Prophet Muḥammad, peace be upon him, during the Ḥajj, prayed the afternoon prayer (Ẓuhr) at Dhu-Ḥulay and then asked for a camel on which he then made a mark (*Ish`ār*) on the right side of its hump.[110] Abū Ḥanîfah did not disapprove the *ḥadîth*, but he vigorously opposed the excessive manner in which the Iraqis customarily made the incision. Some people misunderstood Abū Ḥanîfah's position in the above matter, and this misunderstanding gave rise to their objections to *istiḥsān*. Did he reject the *ḥadîth* of the Prophet on the basis of personal preference? Or did he reject the custom? Obviously, what he rejected was the brutal way of implementing the *ish`ār* because the Prophet forbade cruelty to animals.[111]

(2) Sometimes Abū Ḥanîfah used *istiḥsān* as a deterrent against criminal acts. For instance, A man committed adultery, and there were witnesses: but the witnesses disagreed on the corner of the room in which the act was performed. Because of the uncertainty of the evidence, the accused, according to *qiyās*, should have been freed from the *ḥadd* punishment. Abū Ḥanifah opined, however, that the punishment should have been inflicted upon him on the basis of *istiḥsān*.[112] Some later jurists vigorously rejected Abū Ḥanîfah's opinion on this case. Assuming that Abū Ḥanîfah interpreted the evidence of

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110 Imām Majd al-Dîn Ibn al-Athîr, *Jāmi` al-Uṣūl fî Aḥādîth al-Rasūl* (Beirut: Maktabat al-Ḥalwānî, n.d.), vol. 3, pp. 338-339.

111 Ṭaḥawî one of the followers of Abū Ḥanîfah gave details on this issue. See M.Y. Mūsā, *Abū Ḥanîfah*, op. cit., pp. 76-79.

112 Sarakhsî. Shams al-Dîn, *al-Mabsūṭ*, op. cit., vol. 4, p. 138.

each witness to mean that the act took place in a different corner of the room, says al-Ghazālī, such evidence does not constitute the standard proof which can be accepted as sufficient for implementation of the *ḥadd* punishment. The *ḥadd* punishment should be applied only when there is an indisputable evidence.[113]

(3) *Istiḥsān* is sometimes used by Abū Ḥanīfah to give priority to the statement of a woman whose husband doubts her statement about menstruation. For instance, a man tells his wife: "If you have menstruated, you are divorced". The woman says: "I have menstruated". If the husband denies the veracity of her words, her statement will not be accepted. Therefore according to the rule of *qiyās*, she is not divorced because the condition of her being divorced is based on the menses. However, according to *istiḥsān*, she is divorced because the menses lies exclusively within her. None except the woman can be certain of the matter. Hence, her words should be accepted.[114]

(4) When an incident is beyond a man's control, Abū Ḥanīfah uses *istiḥsān* to justify its legitimacy. For instance, fasting in Islam is made void by eating or drinking anything between dawn and dusk. Therefore, according to *qiyās*, a person's fast is rendered void if a fly enters his mouth. But on the basis of *istiḥsān*, Abū Ḥanīfah says that the person's fast would still be valid. He argues that this is a case of circumstances beyond the control of the person who is fasting, like that of blowing dust which enters one's mouth when one is talking. He adds that only edible things render fasting null and void.[115]

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113 Ibid., pp. 138-140.

114 Sarakhsī, *Uṣūl*, op. cit., vol. 2, p. 202.

115 Sarakhsī, *Mabsūṭ*, op. cit., vol. 4, p. 93.

Mālik's uses of istiḥsān.

Mālik's way of using *istiḥsān* is not significantly different from that of his predecessors, except that he often uses expressions that are different from those used by others such as: *"aḥabbu ilayya"* i.e. (more acceptable to me) instead of the word *istiḥsān* or *"astaḥsin" (I prefer this)*.[116] The followings are some of his decisions based on juristic preference.

(1) It is related in his *Muwaṭṭa'*[117] that Mālik thinks that for an aged or infirm person, feeding the poor in order to compensate for not fasting in *Ramaḍān* is not obligatory. However, Mālik qualifies this judgment by saying: "It is more acceptable to me (*aḥabbu ilayya*) that he feeds the indigent, if he has the means."[118] Whereas Allah says in the Qur'ān that: "As for those who can fast (but do not due to hardship), the expiation of this shall be the feeding of one needy person for one fast day."[119]

Mālik uses discretion here to interpret the above Quranic provision. He argues that the incapability of an aged man to fast is something beyond his control; if the expiation of feeding an indigent person is made obligatory upon an aged person, the permission not to fast, which is given to one who can fast only with difficulty, has no meaning. Although Mālik does not forbid an old person who has the means of feeding the indigent from doing so, he does not

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116 Mālik, *Muwwaṭṭa'*, op. cit. vol. 1, p. 307.

117 Ibid., pp. 307-308

118 Ibid., p. 307.

119 Qur'ān 2:184. Those who can do it with hardship: such as aged people, or persons specially circumstanced. The Shāfi'īs would include a woman expecting a child, or one who is nursing a baby, but on this point opinion is not unanimous, some holding that they ought to observe fasts later, when they can.

think it to be an obligation upon him. Mālik's *istiḥsān* in this example is a matter of common sense.

(2) Contrary to the opinion of Ibn Shihāb al-Ẓuhrī (d. 124/742) that there is no harm in one's entering Mecca without putting on pilgrim's garb, Mālik holds that no one coming from another city should enter Mecca at any time without pilgrim's garb. However, he allows the people living in the areas around Mecca such as Ṭā'if and Jeddah to enter the City without wearing the pilgrim's garb. These people frequently go to Mecca to bring firewood and food stuffs. On the basis of *istiḥsān*, Mālik permits them to enter without the pilgrim's garb in order to relieve them from hardship (*raf' al-ḥaraj*). He explains that it would be a burden upon them (*yakburu `alayhim*) if they were required to put on the garb every time they enter Mecca. Generally, all people entering Mecca, irrespective of their intentions, are supposed to put on the special pilgrim's garb as a religious duty in respect for the Holy city.[120]

(3) In another case, Mālik is reported in *al-Mudawwanah* to have used the term *istiḥsān*. Saḥnūn wondered whether the duty of *Kaffārah* (expiation) would fall upon a person if he unintentionally hit the abdomen of a pregnant woman causing a spontaneous abortion. He asked Ibn Qāsim about this, and the latter reports that Mālik said: "According to the *Qur'ān*, *Kaffārah* falls on a free man if he kills without intent. But in the case of abortion, I prefer (*astaḥsin*) to impose *Kaffārah* on the accused."[121] The causing of abortion here is the crime, not the abortion itself. In this example, Mālik extended *kaffārah* -which is the punishment for a manslaughter committed by a free man- to an

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120 Mālik, *Muwaṭṭa'*, op. cit., p. 307; *Mabsūṭ*, op. cit., vol. 4, p. 138.

121 Saḥnūn, *al-Mudāwwanah al-Kubrah* (Cairo: al-Maṭba`ah al-Khairiyah, 1324/1909), vol. 16, pp. 199-200.

abortion committed by mistake. Murder and abortion are similar crimes, and therefore Mālik gave similar judgements in the two cases. The *Qur'ān* does not spell out the rule for abortion in such a situation; therefore, the discretion of a jurist is necessary to work out the rule for the case.

(4) According to *qiyās*, a washerman[122] is not obliged to pay his customers for materials damaged or stolen from his stores. He is like an *Amīn* (a trust-worthy person); and the Prophet Muḥammad has explained that there is no liability (*ḍamān*) that falls on an *Amīn*. But Mālik maintains that on the basis of *istiḥsān*, there should be compensation for his customers in order to give more security and confidence to the customers regarding their belongings, and to make the manufacturers more conscious of their duties.

From all the examples of the above jurists one may conclude that *istiḥsān* was used in the early days before Shāfi'ī in two ways: first, as a process to be employed in exceptional cases which must be treated according to their merits. Mālik says: *"istiḥsān* is a special permission" which must be used to prevent an evil result.[123] Second, as a way to guarantee the well-being of mankind. The welfare of mankind is the ultimate goal of *sharī`ah*. It must be noted that all the virtues and good qualities that have always been accepted as good but are contrary to the rule of analogy led to the use of the phrase *khilāf al-qiyās* (contrary to the rule of analogy). This is to avoid rigid adherence to *qiyās*.

The early use of the phrase *khilāf al-qiyās*[124] for the outcome of a case decided by *istiḥsān* supports the idea that juristic preference is an exceptional

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122 Dry-cleaner in the modern terminology.

123 *al-Mudāwwanah al-Kubrā*, op. cit., pp. 320-323.

124 Ibn Taimiyyah, *Mas'alah*, op. cit., Most of the treatise deals with this issue.

legal procedure. Its being exceptional means that the legal preference of a jurist in a given case whereby he decides contrary to *qiyās*, is due to particular contingencies being taken into account.[125]

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For instance, Ibn Qāsim says that he asked Mālik about the isolated *ḥadīth* which stipulates that one should wash a pot from which a dog has drunk seven times before using it again and discard the contents. Mālik replied: "This *ḥadīth* has come to us but I do not know its truthfulness (*ḥaqīqah*)" Ibn Qāsim indicates that Mālik on the basis of *istiḥsān*, regarded the domestic dog as an exception to other canines (*sibā`* that lived in the wild, because such dogs live in man's company and are like members of the household (*"Ka 'annahu min ahl al-bayt"*). Thus it would be absurd and overbearing to expect people to wash their pots seven times whenever their dogs drink from them. Ibn Qāsim further explains that Mālik also holds that people should still consume the cooking butter *samn* or milk that might have been in the pot, even though their dog might have eaten some of it while they were not attending. Mālik would say: "I regard it as preposterous *`azīmah* that one throw out to a dog sustenance that God has provided merely because the dog has licked it". When Mālik was asked why he held that opinion concerning dogs and contrary opinions concerning other types of animals; Mālik replied, said Ibn Qāsim, "Each thing has its own standpoint (from which it must be considered") *"wa li kulli shayin wajh"*.

CHAPTER THREE.

SHAFI'I'S CRITICISM OF ISTIḤSAN.

In both *al-Risālah* and *al-Umm*, Shāfi'ī vigorously attacks the proponents of *istiḥsān*. He does not offer a definition of the concept he is criticizing; nevertheless, it is unlikely that Shāfi'ī's remarks on *istiḥsān* are based on his understanding of its literal meaning alone.

An examination of Shāfi'ī's rejection of *istiḥsān* reveals that his attack on this procedure is based on the threat which it poses to the stability he wishes to inject into Islamic jurisprudence as a nascent science. He clearly expresses his criticism of *istiḥsān* in the following terms: "Supposing the governor and the *muftī* should say concerning a case that there is no provision for it either in a text or by analogy, and supposing they should have recourse to preference (*istiḥsān*); would it not be incumbent upon them to concede to others the right to prefer (*an yastaḥsinū*) some other ruling? Consequently, every governor and *muftī* in the various cities would rule according to his preference (*bimā yastaḥsin*) and there would be many contradictory rulings and *fatwas* in the same case."[126]

Shāfi'ī subscribes to legal reasoning by *qiyās* and restricts its free arbitrary use by objecting to *istiḥsān*. He thus differentiates between *qiyās* and *istiḥsān*. He believes that *ijtihād* is *qiyās*.[127] He explains that both are an effort to search for the truth (*al-ḥaqq*) based on what is apparent (*ẓāhir*) in a text. Therefore, in this endeavour, a jurist is not obliged to follow other jurists'

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126 Shāfi'ī, *Kitāb al-Umm*, op. cit., vol. 7, pp. 273-274. Also cited by Maḥmaṣṣānī, *Falsafat al-Tashrī` fī al-Islām*, transl. F. Ziadeh (Leiden: E.J. Brill, 1961), p. 89.

127 Shāfi'ī, *al-Risālah*, op. cit., p.479; also in *Islamic Jurisprudence: Shāfi'ī's Risālah*, transl. M. Khadduri, op. cit., pp. 289-290.

interpretations of the same text. Shāfi`ī argues that: "On all matters touching the (life of a) Muslim, there is either a binding decision or an indication as to the right answer. If there is a decision, it should be followed; if there is no indication as to the right answer, it should be sought by *ijtihād*, and *ijtihād* is *qiyās*."[128]

The procedure of *istiḥsān*, says Shāfi`ī, is "doing what is agreeable" (to one's mind) *taladhdhudh*,[129] or something which comes to one's mind" *"mā khaṭara `alā qulūbinā"*.[130] Shāfi`ī hereby gives the literal meaning of *istiḥsān* as a subjective act which has no objective criteria such as those provided by legal texts.

Before embarking on Shāfi`ī's arguments against *istiḥsān*, it is important to mention that even the authoritativeness of *qiyās* which he strongly advocates, is disputed among some jurists.[131] According to Goldziher, "Dāwūd's aim, although molded by Shāfi`ī's initiative, was to go beyond Shāfi`ī by banning *qiyās* as one of the legitimate sources of canonical legal deductions."[132] Shāfi`ī recognises that some jurists have tried, and others might later attempt to ridicule analogical reasoning. He therefore paves the way for *qiyās* by equating it with the consensus of the jurists, *ijmā`*,[133] and by rejecting *istiḥsān* once and

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128 Khadduri, op. cit., p. 288.

129 Shāfi`ī, *al-Risālah*, op. cit., p. 507.

130 Shāfi`ī, *Jimā` al-`Ilm*; *al-Umm*, op. cit., vol. 7, p. 272.

131 Ignas Goldziher, *The Ẓahirīs*, op. cit., he states that: "They (Dawud's followers) reduced the sources of discernment of the law exclusively to explicitly defined points in the *Qur'ān* and the traditions, and to the consensus as representing all that which the laws were supposed to contain.....This means that Dawud's followers did not allow application of analogy...P.30.

132 Ibid., p. 30.

for all.[134] The opponents of *qiyās* declare that its rulings are subjective because of the element of uncertainty over whether *qiyās* rulings will be acceptable to God or not. Moreover, God's rules are not subject to *ta`līl* (finding an effective cause for legislation) which is the essence of reasoning by *qiyās*. Shāfi`ī considers that the compelling need for *qiyās* renders these arguments irrelevant. *Qiyās* he believes, is a legitimate method of legal reasoning to extend the rulings of the texts to cover issues which are not explictly mentioned therein. *Qiyās* has, therefore, come to stay, and cannot be eliminated from the legal sources because of the important role it plays as a means of extending textual rules to other similar cases that are not specifically mentioned in the texts.[135]

Unlike *qiyās*, *istiḥsān*, according to Shāfi`ī, means deriving a rule without basing the decision upon a parallel textual example.[136] The following are the main points gathered from both *al-Risālah* and *al-Umm* where Shāfi`ī sets out his objections to *istiḥsān*.

First, Shāfi`ī holds that the *Sharī`ah* provides all the basic needs of mankind because men are created with a purpose, and that the Creator has made it clear that the rules of *sharī`ah* ought to be followed. According to Shāfi`ī , the rules of *sharī`ah*, which are not categorically mentioned, are nevertheless implied in the text but are discovered by analogical deduction. Hence there is

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133 Shāfi`ī, *al-Risālah*, op. cit., p. 479. He considers rules derived from *ijma`* and *ijtihād* through *qiyās* as right decisions. See Khadduri's translation of the text in *Islamic Jurisprudence*, op. cit., pp. 289-290.

134 Ibid., pp. 289-290.

135 These understandings are apparent in both *al-Risālah* and *al-Umm*. See chapters on *qiyās* and *Ibṭāl al-istiḥsān* in *al-Umm*, op. cit., vol. 7, pp. 272-275.

136 Shāfi`ī, *al-Risālah*, op. cit., p. 25.

no room for *istiḥsān* to determine any rule as "suitable" for mankind.[137]

Second, Shāfi'ī observes that the Prophet Muhammad used to await revelation in order to determine the proper rule for an unprecedented incident. He quotes the example of someone who was denying the legitimacy of a child born to him by his wife. The Prophet found no text to determine a rule for this matter nor was he able to base a decision on analogy. He therefore, waited until the verse of *li'ān*[138] was revealed as the judgement.[139] Shāfi'ī argues, then, that if giving a legal opinion by preference, *istiḥsān*, or basing a rule on an unreliable source is allowed, the Prophet should have been the first to be permitted to do so.[140]

Third, Shāfi'ī says: God orders obedience to both His commandments and His messenger, viz., obedience to what is revealed in the *Qur'ān* and the *sunna*. Shāfi'ī argues that if there is no specific text related to a case for which a judgement is sought, analogical reasoning based on either the *Qur'ān* or the *Sunna* should be practised to determine the appropriate rule for the case. *Istiḥsān* however, is neither of the two.[141]

Fourth, Shāfi'ī argues that since the Prophet disapproved of the acts of some of his companions who relied on juristic preference, there is no basis for

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137 Ibid., p. 508.

138 The word *li'ān* is the cursing of one another by both the wife and husband when the husband accuses his wife of adultery and the latter denies the accusation. They will both utter the oath of condemnation, and thereby be separated for good by a jurist.

139 For many examples of how the Prophet waited for revelations to decide legal issues, see *Kitāb al-Umm*, vol. 7, pp. 272-273.

140 Ibid., pp. 267-274.

141 Ibid., pp. 270-271.

deciding through *istiḥsān*.[142]

Fifth, according to Shāfi`ī, *istiḥsān* lacks guide-lines and therefore, it provides no means of knowing the correct judgement of a case subjected to juristic preference. Thus, if every jurist or judge is permitted to give his own rule by *istiḥsān* on cases that have no textual basis, the whole judicial system of *Sharī`ah* would be chaotic and merely expedient.[143] He adds that this would result in arbitrary rules on a case, and this is not how *Sharī`ah* should be understood or interpreted.[144] To decide by *istiḥsān* means to legislate without basing one's decision upon a parallel example.[145] Shāfi`ī emphazises that whoever follows the opinion of a person who judges by *istiḥsān* without a source, is liable to commit an error, at the same time the follower is erroneously ascribing prophethood to the person whom he follows by *istiḥsān*.[146]

Shāfi`ī, fully realizing the implication of the above arguments, raises a hypothethical question by asking whether *qiyās* could also lead to different opinions (*Khilāfāt*) just as *istiḥsān* does. He evades answering this question directly arguing that, overwhelmingly, most jurists accept *qiyās* as a source of law. According to Shāfi`ī, *qiyās* is the appeal to the analogy of attributes (*al-tashābuh fī al-awṣāf*) between a case already settled by the text and a (similar) case whose rule has not been given. *Qiyās* is based on definite criteria and is

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142 Shāfi`ī cited many examples of the prophet's disapproval of some of the acts of his companions. One of these was the case of the man killed after he had testified to the Oneness of God. (Apparently, the man did this under the fear of the sword). See Shāfi`ī's book, *al-Umm*, op. cit., vol. 7, pp. 205-206.

143 Ibid., p. 273

144 Ibid., p. 273.

145 Shāfi`ī, *al-Risālah*, op. cit., pp. 504-505.

146 Shāfi`ī, *al-Umm*, op. cit.; vol. 7, p. 206

supported by consensus whereas *istiḥsān* is not.[147]

In support of Shāfi`ī's view, al-Muzanî says: Thus, it is not permissible for anyone to deny the validity of *qiyās*; for it is (only) a matter of drawing likenesses between things and applying similar (rulings) to them on that basis. (*at-tashbīh bi-'l- 'umūr Wa 't-tamthīl `alayhā*).[148]

Concerning the *ḥadīth* which indicates that there are two rewards for a jurist's successful interpretation of a case and that there is a reward even for an unsuccessful *ijtihād*, Shāfi`î argues that the *ḥadīth* does not indicate that both judges practice their *ijtihād* as mere guesses based on preference. He believes that they are both entitled to the rewards indicated on the merit of their interpretations based on the Book and the *Sunnah*.[149] Shāfi`î concludes his objections to *istiḥsān* by observing that whoever says: "I will practice *istiḥsān* without any command from God and His prophet, (that person) does not accept (rules) from God and His messenger".[150]

The above quotation of Shāfi`î clearly indicates that his objection to *istiḥsān* is not because it is unsuitable as a legal procedure, but that the application of juristic preference before Shāfi`î was unregulated and therefore inconsistent with the sources of Islamic law; namely: the Qur'ān and the *Sunna*. Along with this our understanding of Shāfi`î's objection to *istiḥsān* is that Abū Ḥanîfah, the major advocate and presumably the originator of *istiḥsān*, provides

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147 Ibid., vol. 7, p. 20.

148 Cited by Abū Zahrah, *Mālik*, op. cit., p. 314; `Abd Allah `Umar Faruq's *Mālik's Concept of `Amal*, Ph.D. thesis (University of Chicago, 1978), p. 210.

149 See Shāfi`î *al-Umm*, op. cit., vol. 7, p. 273.

150 Ibid., p. 273.

no rules or guidelines for the application of the concept. Clarification of the matter was left to his followers such as Sarakhsî, who explains that according to Abū Ḥanîfah, *istiḥsān* is the procedure by which a jurist sets *qiyās* aside, and instead adopts another rule which is more suitable for mankind. Sarakhsî comments on the above statement in *al-Mabsūṭ* saying that "suitability is the objective of *Sharī`ah*".[151]

al-Jaṣṣāṣ, another Ḥanafî jurist, defines *istiḥsān* as departure from the rule of *qiyās* to stronger evidence. All these definitions apparently reject *qiyās* which Shāfi`î considers as the major means for legitimate legal reasoning. Obviously, Shāfi`î not only opposed these definitions, but he also questioned their evidence. Shāfi`î rejects not only the Ḥanafîs' concept of *istiḥsān*[152] but also that of the Mālikîs despite the fact that he studied *fiqh* under both Shaybānî and Mālik.

Conclusion of Shāfi`î's Criticism of Istiḥsān.

Shāfi`î's goal, as we have stated earlier, was to remove the element of personal opinion from *Sharī`ah* by insisting upon strict adherence to the literal texts of law or *qiyās* based on them. Nevertheless, it must be pointed out that according to Shāfi`î, as long as one subscribes to the principle of *istidlāl* (deductive method), some degree of personal discretion in the interpretation is inevitable.[153] The principle of *istidlāl* contains both *maṣlaḥah* and *mafsadah*

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151 Sarakhsî, *al-Mabsūṭ*, op. cit., vol. 10, p. 145.

152 Distinction must be drawn between the early and the later Ḥanafî doctrines of *istiḥsān*. Shāfi`î specifically criticizes the early Ḥanafîs' definitions. The later Ḥanafî jurists, such as Sarakhsî, Pazdawî and others, review the definition of the concept and its methodology. However, this does not mean that the later definition of the other school will not be rejected if it threathens the basic *uṣūl* methodological approach which Shāfi`î was trying to establish.

which are tools that enable the *faqīh* to apply the law to new and changing circumstances equitably and justly.[154]

On the basis of the above considerations and the historical use of *istiḥsān*,[155] its rejection by Shāfi`ī should be interpreted as a renunciation of inconsistency in its use in the early period before him. Shāfi`ī believes that *istiḥsān* has to be guided in such a way that the jurist must validate his legal decision with evidence from a legal source. He must also determine at which point strict application of the general precept becomes excessive and thereby inappropriate.[156] Moreover, Shāfi`ī's use of the verb *astaḥsin* and the special licenses (*aḥkām ar-rukhaṣ*) provided for in both the *Qur'ān* and *sunna*, such as the exceptional rules governing travellers who are exempted from the obligation of fasting in the month of *Ramaḍān*, are manifestations of the principle that underlines *istiḥsān*.[157]

Since the main objective of *Sharī`ah* is the welfare of the whole of mankind, and because the concept of accountability is a major part of the Islamic

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153 Ibid., p. 508.

154 For instance when the *Qur'ān* explains that there is benefit and harm in *al-Khamr* intoxicant, the Law-Giver commands us to refrain from it. Despite the benefit therein Muslims are enjoined to refrain from drinking it because the evils of *Khamr* are greater than its benefit. The disregard for any benefit from intoxicants indicates that discretion must be used to put aside any rule of which its harm is greater than its benefit.

155 Iyās b. Mu`āwiyah (d. 122/740) used *istiḥsān* and gave instruction that *qiyās* should be abandoned whenever it leads to injustice. Wakī` Ḥayyān *Akhār al-Quḍāt*, op. cit., vol. 1, p. 341; also see chapter two for details.

156 Shāfi`ī says: (*astaḥsin*) *e.g., I prefer that thirty dirhams* should be the gift *al-mit`ah* for unconsummed marriage. It is important here to notice that the *Qur'ān* has prescribed no specific amount for this gesture. All it suggests is "A gift of reasonable amount." See *Qur'ān* 2:236.

157 Observation on this point can also be seen in Shāṭibī's *al-I`tiṣām* (Cairo: Maṭba`at Muṣṭafā Muḥammad, n.d.), p. 119; *al-Muwafaqāt*, 4 vols. (Tunis: Maṭba`at al-Dawlatiyyah, 1884), vol. 1, p. 102.

faith, a Muslim jurist therefore always keeps away from pronouncing any judgement merely on the basis of his own preference. Nor will he give a legal opinion without giving due consideration to the aim and objective of *Sharī`ah*.

To sum up, Shāfi`ī's objection to *istiḥsān* is only an attempt to systematize the science of Islamic jurisprudence. He, therefore, formulated certain abiding rules and regulations for Islamic legal procedures. This conclusion is based on the fact that before his time there existed no "well-defined" *uṣūl* book on Islamic jurisprudence. Shāfi`ī believes in legal reasoning or *ijtihād*; he does not, however, accept *istiḥsān* as an independent source of law.[158] Nor does he subscribe to any legal rule which has no support from textual revelations, *ijmā`* and *qiyās*.[159]

Controversy over *istiḥsān* continued after Shāfi`ī. Later Ḥanafī jurists such as Sarakhsī and Pazdawī tried to clarify the concept of juristic preference by providing clearer definitions, giving various definitions of *istiḥsān* and most importantly, by negating the idea that *istiḥsān* is *takhṣīṣ al-`illah* as Ibn Taymīyah proclaims. We may now discuss the opinions of the proponents and opponents of *takhṣīṣ al-`illah*

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158 According to al-Subkī, making *istiḥsān* a source of *sharī`ah* (such as the *Qur'ān*, *Sunna*, and *Ijmā`* and *Qiyās*) is what Shāfi`ī rejected. Afterwards Shāfi`ī prefers (*istaḥsana*) the use of the Qur'ān as a determing factor of the truth by swearing with it. (*Taḥlīf `Alā al-Maṣḥaf*). For more examples, see al-Ghazali, *al-Mankhūl min Ta`līqāt al-Uṣūl*, ed., Muḥammad Ḥasan (Cairo: n.d.,), p. 374.

159 `Abd al-Raḥmān al-Bannānī, *Ḥāshiyat `Alā Matn Jam` al-Jawāmi`*, 4 vols. (Cairo: Maṭba`at Muṣṭafā al-Bābī, 1937), vol. 2, pp. 2, pp. 123-126; *Kashf al-Asrār*. op. cit., pp. 1122-1126.

CHAPTER FOUR

TAKHṢĪṢ AL-`ILLAH (PARTICULARIZATION OF THE CAUSE).

Particularization of the cause is the limitation of the motive a law by means of granting an exceptional ruling in certain cases. There are instances wherein a precedent ruling can not be extended on the basis of its *`illah* because such an extension would weaken, invalidate, or change the benefit intended by God.

For example, there is a general ruling in the Qur'ān that Muslims are forbidden to eat meat which has not been slaughtered in accordance with Islamic ritual requirement (*mayta*). If a life is at stake, however, this ruling has to be put aside and an exceptional permission to eat such meat is granted to a Muslim when there is nothing else edible available to him except the *mayta*. Starving to death is the *`illah* that particularizes the original ruling of the general prohibition of *mayta*. Because of the rigidity of the ruling of *qiyās* which would not allow the eating of *mayta* under any circumstances, the general ruling is put aside, and the procedure of *istiḥsān* is taken.

This is the reason why many Ḥanafī jurists have defined *istiḥsān* as the "abandoning of one judgement in favor of another."[160] From the above example, it appears that *qiyās* does not allow particularization of the cause whereas *istiḥsān* does, by changing a part of the content of the *`illah* or some of its properties to conform with the objective of the *sharī`ah* ruling.

This explanation should not, however, be taken as a licence to manipulate the *sharī`ah* law arbitrarily; for there must always be a reliable source upon which such a ruling of *takhṣīṣ al-`illah* is based. Many Ḥanafīs such as

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160 Ibn Taymīyah, *Mas'alah*, op. cit., pp. 457-458.

al-Karkhî, al-Jaṣṣāṣ and Abū Zayd al-Dabūsî[161] believe that *istiḥsān* emanated from a special group of *`ilal* which require particularization.[162] Therefore, *istiḥsān* cannot be be ruled out completely as being a product of *takhṣīṣ al-`illah*; hence we include its discusion below.

Ibn Taymîyah (d. 728/128) indicates the urgent need for the examination of the relationship of *istiḥsān* and *takhṣīṣ al-`illah* to the question of sacred law, in terms of both fundamental and general application.[163]

Other jurists before Ibn Taymîyah such as Abū Ḥusayn al-Baṣrî, Sarakhsî, and Pazdawî devoted chapters to the issue of *takhṣīṣ al-`illah*. At the beginning of his discussion of *takhṣīṣ al-`illah*, Abū Ḥusayn al-Baṣrî (d. 436/1044) divides *`illah* into two categories: The first is what he calls "breakage" (*al-kasr*). According to this category,the meaning of an *`illah* may exist in a parallel case (*far`*) but without the rule being evident therein. This happens when one singles out an attribute (*waṣf*) from among other qualities of an *`illah* and thinks that the isolated attribute has no effect (*ta'thīr*) upon the discovered

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161 Abū Zayd al-Dabūsî is described by Ghazālî as "the most extreme proponent of particularization (*ashadd al-nāṣ fî takhṣīṣ al-`illah*). See Ghazālî, *al-Shifā' al-Ghalîl fî Bayān al-Shabah wa al-Mukhîl wa Masā'sl al-Ta`lîl*, ed. al-Kabisî (Baghdād: Ri'āsat Diwān al-Awqāf, 1971), p. 465.

162 Ibn Taymîyah, *Mas'alah*, op. cit., p. 458.

163 The term *takhṣīṣ al-`illah* may be translated as specification, particularization, specialization or limitation; the most suitable term will be used in accordance with the sequence of the statement involved. Both George Makdisi and John Makdisi use "limitation" for *takhṣīṣ*. See their articles: G. Makdisi, "Ibn Taymiyah Autograph Manuscript on *Istiḥsān*" in the *Arabic And Islamic Studies In Honor of Hamilton A. R. Gibb*, 1965, p. 446; John Makdisi, "Legal Logic And Equity In Islamic Law" in the *American Journal of Comparative Law*, vol. 32, pp. 71 and 82. Aron Zysow uses "Specialization" in his unpublished Ph.D thesis The Economy of Certainty, op.cit., p. 403. Ḥallaq Wael, uses "Particularization", in his article "Considerations On The Function And Character Of Sunnî Legal Theory", *Journal Of The American Oriental Society*, 104.4, (1984), p. 683.

rule.[164] The jurist then retains the rule and abandons the irrelevant attributes: he may say, for example, that the performance of the prayer of fear (*ṣalāt al-khawf*)[165] is made obligatory because it constitutes worship (*`ibādah*) and is, therefore, comparable with other regular prayers which must be made up by restitution (*qaḍā'*).[166] This rule may be deduced from the fact that a Muslim is obliged to observe the regular prayer by *qaḍā'* if he misses the prescribed time for it. An opponent may disagree and proclaim that the *qaḍā'* alone is not sufficient to be the effective cause of making prayer obligatory in the case of *ṣalāt al-khawf*; therefore, he may reject *al-qaḍā'* since it is not required of a woman after her monthly period to do the restitution of the prayers omitted. She is required after her period to do the *qaḍā'* of fasting but not that of prayer. According to Abū Ḥusayn al-Baṣrî, the above opponent's view is a fallacy because worship has an impact (*ta'thīr*) upon both the prayer and the fasting except that *qaḍā'* of the prayer after the menstrual period is lifted while that of fasting is retained.[167]

The *`illah* in both prayer and fasting is worship, and it exists in them but becomes broken (*kasr*) when the applicable ruling of *al-qaḍā'* is lifted from prayer and retained in that of fasting for women during their monthly period. The point that may be added to the above explanation is as follows: Restitution (*qaḍā'*) for fasting is easier than that for prayer; it is so because prayer should be conducted five times a day while fasting is a singular daily service. Therefore, after menstruation, to make up prayers for every single one of the

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164 *Mu`tamad*, op. cit., vol. 2. p. 821.

165 Muslims' special prayer usually conducted when there is fear or war.

166 The making up of prayer at a later time when one has missed it at its prescribed time is called (*al-qaḍā'*).

167 *Mu`tamad*, op. cit., pp. 821-822.

omitted days would be more difficult than making up for fasting which occurs once in a day. And "on no soul doth God place a burden greater than it can bear"; in terms of spiritual duty.[168]

The second category of *`illah* which Abū Ḥusayn al-Baṣrî describes as "the logical incompatibility" (*al-naqḍ*), is the identification of a cause by virtue of its wording and its meaningful principle (*lafẓuhā wa ma`nāhā*) in a parallel case which lacks its rule.[169] There is a great deal of controversy over the validity of this category of *`illah*. Abū Ḥusayn al-Baṣrî validates and defends it against various charges: The opponents argue, for example, that an *`illah* without its rule is invalid and illogical, but al-Baṣrî argues that if what is meant by illogic is the existence of a cause without its rule and without evidence preventing the existence of the rule, an *`illah* is not necessarily invalid in such a case. The presence of the *`illah* without its rule signifies simply that the person who deduced the *`illah* made a mistake by not following up the *`illah* with its rule.[170] But if the opponents define logical incompatibility (*naqḍ*) as a case wherein an *`illah* exists without its rule, but with evidence suggesting the reason why the rule does not exist (*intifā'*), then there is an obvious inconsistency in their procedure which does not mean that the *`illah* is invalid. Abū Ḥusayn al-Baṣrî solves the problem by supposing that someone says: "I pardon a person because he is a Baṣrian", yet he does not pardon another person from Baṣrah. Any layman or any intelligent person will ask why other Baṣrians are excluded. If the man explains that an animosity exists between himself and the latter irrespective of whether he is a Baṣrian , the speaker cannot then be

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168 Qur'ān 2:286.

169 *Mu`tamad*, op. cit., p. 822.

170 Ibid., p. 822.

blamed or be compelled to retract his conditional statement which is based on enmity.[171] Another example given by al-Baṣrî is as follows: Although fire is the cause of burning, it had no impact on the Prophet Ibrahîm when he was thrown into the fire. The inability of the fire to burn the Prophet, which is due to other external factors, cannot negate the acceptance of fire as a cause for burning.

If the opponents claim that *takhṣīṣ al-`illah* can become valid only by accepting contradictory statements, the reply is as follows: According to the proponents of *takhṣīṣ al-`illah*, if the *`illah* in the original text is obstructed in cases parallel to it, (*furū`ihā*), this does not necessarily invalidate the *`illah*; rather it demonstrates what *takhṣīṣ al-`illah* actually means. That is: *takhṣīṣ al-`illah is a ruling which is limited to a particular case whose ruling* cannot be extended to a parallel case due to an impediment in its effective cause (*`illah*).

The proponents of *takhṣīṣ al-`illah* make a strong case by giving an illustration of how a legal cause should be considered as the signifier (*amārah*) of a rule and of how its presence in some cases without its rule does not necessarily negate it as a signifier, as the opponents claim.[172] Abū Ḥusayn al-Baṣrî explains by illustration that a *qāḍī's* horse standing in front of the king's house is a sign that the *qāḍī* is inside; *qaḍī's* absence does not negate the horse as a sign that the *qāḍī* is somewhere around, since at most other times he is riding it. Similarly, the presence of a diffused cloud in the sky in the winter without rain does not negate the cloud's being a sign of the coming of rain. Therefore,

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171 *Mu`tamad*, op. cit., p. 830.

172 Examples of *takhṣīṣ al-`illah* by the opponents such as Pazdawî, and Sarakhsî can be found in Pazdawî's book *Kashf al-Asrār* op. cit., pp. 1128-1129. Their views will be discussed later in this thesis.

whenever an *`illah* occurs without its rule, *takhṣīṣ al-`illah* is due to other external factors which prevent the ruling from playing a role in the parallel case; and the presence of an *`illah* without its rule does not invalidate the cause. From all these examples, it appears that God is the Cause and that an *`illah* is figuratively ascribed to the rule. Abū Ḥusayn al-Baṣrî concludes that we may know the reason why a rule for a case does not exist despite the existence of its *`illah*, only if we understand that there must be an impediment (*mānî`*) in the case.

Ibn Taymīyah and Abū Ḥusayn al-Baṣrî's Views on Takhṣīṣ al-`Illah

The simple understanding of *takhṣīṣ al-`illah* sees it as the existence of a cause without the existence of the expected legal norm (*ḥukm*) due to an obstacle.[173] This means that the cause of a legal norm may be ignored in the *Qur'ān* and the *Sunna*. In such a situation, a jurist will then try to determine the cause of the ruling by his reasoning. Once his discretion indicates the cause, it follows that the ruling of the text should be extended to new similar cases. However, application of such a ruling is sometimes impossible due to impediments, obstructions or conflicts with other sources of law. This often happens because the determination of the cause which is based on human reasoning is subject to error. Such an error is clearly noticed when another source of law opposes the extension of the legal norm of the text to a new case.[174]

According to Ibn Taymîyah, a cause may be either completly rejected or modified so as to accomodate certain new cases if the cause consists of a

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173 *Mas'alah*, op. cit., p. 458.

174 *Kashf al-Asrār*, op. cit., p. 1160.

meaning (*ma`nā*) which can be ascertained from the *sharī`ah* and which distinguishes the new case from the original case. He therefore, calls *istiḥsān* the particularization of the cause either through the modification of the *`illah* or through its complete nullification.[175]

Abū Ḥusayn al-Baṣrî believes that an *`illah* is a sign (*amārah*) which signifies the determination of a ruling and that the presence of an *`illah* without its ruling does not invalidate the *`illah*. He considers the procedure in such a case to be the essence of grasping the concept of particularization of causes. To illustrate this situation, let us analyze the example he gave at the beginning of his discusion of *takhṣīṣ al-`illah*: Fasting and prayer are two ritual obligations that the Muslim must fulfil. Being acts of worship, the two should be subjected to the same ruling, namely restitution (*al-qaḍā'*), whenever one omits observing them at their prescribed times. The presumed *`illah* in both cases is an "act of worship", however, this *`illah* is particularized in the case of prayer by lifting the ruling of restitution for prayer from women whenever they miss this act of worship during their monthly periods. In other words, after the menstrual period, women will be required to compensate only for fasting and not for prayer. From this example, the following aspects of *takhṣīṣ al-`illah* may be considered.

First, there is a difference between divine causes and rational causes.[176] Baṣrî asserts that the ruling of the former follows its *`illah* whenever there is no impediment preventing the ruling. In the above example of fasting, the attribute of the *`illah*, "act of worship" is present. A Muslim must fast at the prescribed time; but this ruling concerning fasting is absent and is replaced by

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175 *Mas'alah*, op. cit., pp. 459-69.

176 *Mu`tamad* op. cit., p. 825.

another ruling, namely: the "restitution of fasting for women after menstruation", and that is due to an impediment namely: the "monthly period". The cause does not follow the ruling here because it is a divine *`illah*; whereas, rational causes always follow their rulings without any exception. A similar exposition of this idea has been expressed by another Ḥanafī jurist, al-Kharkhī, who asserts that "in theology the *`illah* can in no way be stripped of (*`āriyah*) the judgment related to it. But in legal theory, he continues, the relationship concerned is different; for the juridical judgment does not necessarily follow from the *`illah*. For this reason, the *`illah* in legal theory is called a sign (*`alāma* or *amāra*).[177]

Second, the causes elicited by the jurists from revealed sources (*`ilal al-ḥukm*) were signs whereby the rule of law might be extended to new cases. The jurists were not entitled to identify these causes with the policy behind the divine legislation. When a cause was explicitly particularized in a text, however, it was to be taken to indicate the interest served by the law (*`illah al-maṣlaḥah*). Revelation, in fact, was the only means of knowing these causes. When an explicit cause turned out to be subject to particularization, this meant that what appeared to be the motive cause of the law was only part of the cause.

Third, the jurist is not in a position to determine what harm or benefit God intends through an extracted *`illah*. For instance, it is not the duty of a jurist to justify the reason why the hand of a person who removes a coffin from a grave (*al-nabāsh*) should or should not be cut off. Suffice it that the property is stolen from its proper place where it is supposed to be kept and that the appropriate ruling of theft is carried out according to the stipulated

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[177] Shehaby, "Illa and Qiyās..." op. cit., p. 34.

law of *sharī`ah*.

Fourth, an *`illah* extracted by a jurist does not impart certainty but only probability. However, when an *`illah* is determined, a jurist is entitled to use it to extend its ruling to parallel cases unless there is an impediment which prevents such an extension. Such an impediment does not completely destroy the jurist's probable opinion (*ẓann*) that the cause is valid; it only indicates a need for particularization.

It is interesting to note that al-Baṣrî does not mention the word *istiḥsān* throughout his polemic on *takhṣīṣ al-`illah*. This however, does not mean that the two are separate procedures; some jurists consider them identical. Among them is Ibn Taymîyah who argues categorically that *takhṣīṣ al-`illah* is *istiḥsān*. In his *mas'alah* on *istiḥsān*, Ibn Taymîyah says: "Surely, the objective (*ghāyah*) of *istiḥsān* which is considered to be contrary to the ruling of *qiyās* is in reality a particularization of cause".[178]

The Ḥanafîs agree in recognizing *istiḥsān*; they differ as to whether *istiḥsān* is to be identified with *takhṣīṣ al-`illah*. This situation comes about because in opposition to almost all the rulings of *istiḥsān* there is an analogy which is rejected in favor of some text, consensus or a stronger analogy. The cause upon which the rejected analogy depends is present in each such case, but without the expected legal consequences.[179]

Particularization of the cause is thus a bridge between analogy and *ijtihād* but the former faces a major objection because its opponents believe that it leads to the infallibility of *ijtihād*. However, the dispute over *takhṣīṣ al-`illah*

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178 *Mas'alah*, op.cit., pp. 458, 465, and 468.

179 *Sarakhsī*, op. cit., vol. 2, p. 213.

constitutes the inner dimension of *istiḥsān*. Our next three chapters will be focused on the translation of the chapters on *istiḥsān* written by Shāfi'ī, Sarakhsī, and Ibn Taymîyah in their different books.

CHAPTER FIVE.

THE SELECTED ARABIC TEXTS FOR TRANSLATION INTO ENGLISH

Shāfi`ī, Sarakhsī, and Ibn Taymîyah's works are chosen for translation because of the different schools of law which they represent, namely, the Shāfi`ī, Ḥanafī and Ḥanbalī respectively. They have different views on *istiḥsān* and *takhṣīṣ al-`illah*, and they have contributed greatly to the better understanding of these two legal procedures.

The first jurist, Shāfi`ī, for instance, is the founder of the Shāfi`ī School of law; and he strongly attacked *istiḥsān*. The bases for his refutation of *istiḥsān* have been explained in the previous chapter. The subsequent chapter provides a brief biography, and an English translation of the arguments which Shāfi`ī used against *istiḥsān* in *Kitāb al-Umm*. This is the first time this section of the work has been translated completely into English with commentary. Shāfi`ī calls the chapter: "A Section on the Refutation of Juristic Preference". Such scholars as Joseph Schacht,[180] Ṣubḥî Maḥmaṣṣānî,[181] and Aḥmad Ḥasan have referred to this chapter of Shāfi`ī many times in their discussions of *istiḥsān*.[182]

Following the translation of Shāfi`ī's work will be that of the second jurist, Sarakhsī, who represents the Ḥanafī School of law. Two Sections are selected

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180 In his *Origins* op. cit., Schacht quoted Shāfi`ī by translating a few lines of this chapter when he was discussing Shāfi`ī and *istiḥsān* on pages 121-122.

181 In his *Falsafat al-Tashrī` al-Islāmī*, Ṣubḥî quoted Shāfi`ī from this chapter when he was explaining the issue of *istiḥsān*. See his above mentioned book translated by F. Ziadeh, (Leiden: E.J. Brill 1961), p. 89.

182 When he was discussing *istiḥsān*, Ḥasan quoted Shāfi`ī from the same chapter that we will be translating. See his article on "The Sources of Islamic Law," *Islamic Studies* 7 (1968), p. 177.

from his book called *Uṣūl* Sarakhsî. The first section deals with the explanation of *qiyās* and *istiḥsān*; while the other treats the issue of *takhṣīṣ al-`illah*. These sections offer a clear picture of the Ḥanafî concept of *istiḥsān* in relationship to *takhṣīṣ al-`illah*. At the same time, this work of Sarakhsî is considered to be a rebuttal of Shāfi`î's criticism of *istiḥsān* from linguistic and legal points of view respectively.

The last translation is from the third jurist, Ibn Taymîyah, who represents the Ḥanbalî School of law; there is an autograph manuscript on *istiḥsān* from Ibn Taymiyah. The manuscript has been edited by George Makdisi but without a translation.[183] Ibn Taymîyah discussed the issue of *istiḥsān*, and its relationship with *qiyās* and *takhṣīṣ al-`illah*.

The works of the jurists, Shāfi`î, Sarakhsî and Ibn Taymîyah are unique, and particularly that of Ibn Taymîyah, which combines the analytical discussion of the three principles of *qiyās*, *takhṣīṣ al-`illah*, and *istiḥsān*. We therefore believe that rendering the works of the above jurists into English will be useful for a better understanding of the subject of *istiḥsān*.

Shāfi`î's Brief Biography and Legal Reasoning.

Born in Gaza, a small provincial town on the Mediterranean sea in the year 150/767, Shāfi`î grew up in the Ḥijāz.[184] He then went to Iraq where he

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183 Ibn Taymîyah, *"Mas'alat al-Istiḥsān,"* ed., George Makdisi, "Ibn Taymîyah's Autograph Manuscript on Istiḥsān: Materials for the Study of Islamic Legal Thought", *Arabic and Islamic Studies in Honor of Hamilton A.R. Gibb*, (Massachusetts: Harvard University Press, 1965), pp. 446-479.

184 Daqar `Abd al-Ghanî, *al-Imām Shāfi`î* (Beirut: Dār al-Qalam, 1972), p. 44; Shāfi`î Muhammad b. Idrîs, *al-Risālah* translated by Majid Khadduri, *Islamic Jurisprudence* (Baltimore: The Johns Hopkins Press, 1961), pp 9-10.

was exposed to the practices of the Iraqi jurists. He studied under both Mālik b. Anas (d. 179/795) champion of the upholders of tradition (*ahl al-ḥadīth*) and Abū Ḥanīfah (d. 150/767) who is considered to be the leader of the upholders of opinion (*ahl al-ra'y*). Acquainted with these two great Imams, Shāfi`ī was able to play an important role in solving some of the disagreement (*ikhtilāf*) or controversy between the schools of traditions and personal opinion. He found a common ground of agreement on what was to be the position of tradition in relation to the Qur'ān and the other sources.[185] The traditionists accused their opponents of making excessive use of opinions in deciding legal issues at the expense of *ḥadīth*, while the rationalists condemned the former for using unreliable 'living traditions'.[186] Shāfi`ī was able to establish a system whereby only the Qur'ān along with traditions from the Prophet Muḥammad should be considered as sources of law and not the living traditions. He says: "Every tradition related by reliable persons as going back to the Prophet, is authoritative...."[187] Shāfi`ī provided a precise method of legal reasoning by rejecting customs and personal opinions as sources of *sharī`ah*. He defined the methods by which legal reasoning was to be restricted within the framework of the authoritative sources; namely: Qur'ān, *Sunna*, *ijmā`*, and *qiyās*.

Ijtihād (personal endeavor) and *qiyās*[188] are discussed by Shāfi`ī in an

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185 His famous book, *al-Risālah* Shāfi`ī testifies to the above assertion, see Muḥammad Ibn Idrīs Shāfi`ī, *al-Risālah*, ed. Aḥmad Muḥammad Shākir, (Cairo: 1940), pp. 478-479.

186 Joseph Schacht, *An Introduction to Islamic Law* (Oxford: The Clarendon Press, 1964), p. 62.

187 Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (*Oxford*: *The Clarendon* Press, 1950), p. 12.

188 *Qiyās* is more than analogy, it is the procedure by which the ruling of a precedent case is extended to this new case on the basis of some underlying common characteristic or rationale which governs the two cases. M. Bernard's article "Ḳiyās," *Encyclopaedia of Islam*. 2nd ed. (Leiden: E.J.

attempt to draw a line between them and *istiḥsān*. He often uses the terms *qiyās* and *ijtihād* interchangeably, and permits reasoning only through *qiyās*. For him, *qiyās* is not a source but rather a subordinate or a derivative (*far`*) kind of evidence which must be based on the Qur'ān, *Sunna*, or Consensus. Shāfi`ī divides knowledge into two kinds: The first is certitude and covers both the apparent and the hidden. An example of this type is the definite text (*al-naṣṣ*) from God or an established tradition from the Prophet Muḥammad.[189] The second type is knowledge acquired through *qiyās*. The product of *qiyās* does not constitute certainty but only appears to be true (*ḥaqqan fī al-ẓāhir*), and that is the reason why the rules deduced through *qiyās* are not obligatory for all jurists to accept. Such rulings are true for the person who deduced them only.

Again, Shāfi`ī divides *qiyās* into two categories: The first is based on a *ma`nā* (reason) shared by two cases. For instance, when God or the Prophet allows or forbids something on the basis of a *ma`nā*, and if we find the same *ma`nā* in another case that is not treated in the legal sources, the ruling covering the first can be extended and applied to the second.[190] The second kind of *qiyās* is the one based on resemblances (*ashbāh*). This type is employed when a case that is not treated in the authoritative legal sources resembles other cases that are. In this situation, the case under examination acquires the ruling of the case that is most similar to it. Shāfi`ī believes that disagreement among jurists can easily arise here, presumably because the concept of similar-

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Brill, 1954-), vol. 5, pp. 238-242; Wael B. Ḥallāq, "Non Analogical Arguments in Sunnī Juridical Qiyās," *Arabica* 36 (1989), pp. 286-306.

189 *al-Risālah*, op. cit., pp. 478-79.

190 Shāfi`ī remarks that some scholars believe that the term *qiyās* must be used only to cover this category. *al-Risālah*, op. cit., pp. 515-517.

ity is not well defined.

Granted that *qiyās* has a strong element of analogical reasoning, its definition covers inference by *a fortiori* argument in both its forms, the *a minori ad maius* and the *a maiori ad minus*.[191] For instance, the Qur'ānic verse pointed out by Shāfi'ī: "Whoso has done an atom's weight of good shall see it, and whoso has done an atom's weight of evil shall see it" is an illustration of *a minori ad maius*. The meaning of this verse is that God's reward for doing more than atom's weight of good and His punishment for doing more than atom's weight of evil are greater than that promised for an atom's weight.[192] The explanation of Shāfi'ī that any punishment less than killing could be inflicted upon a non-Muslim who waged war against Muslims is an illustration of an example of the *a maiori ad minus* type. The inference is drawn from the Qur'ānic verse which permits the killing of such non-Muslims. In other words, if killing them is allowed, any other punishments that are less severe than killing, such as confiscation of their property, are permitted.[193] Shāfi'ī considers the use of *qiyās* as a necessity. Just as *tayammam* (ablution by sand) becomes lawful in the absence of water during a journey; so is the use of *qiyās* in the absence of textual sources. According to him, *qiyās* cannot supersede an authoritative text; neither should it be based on a special or exceptional precedent (*istithnā'*); it must conform to the spirit and the general rules and

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191 Wael B. Ḥallāq pointed out that *qiyās* is more than analogy, but covers inferences such as the *a fortiori* argument in both its two forms mentioned above. For details, see his article "Non-Analogical Arguments..." op. cit., pp. 286-290; Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (An unpublished Ph.d Desertation, Harvard University, 1984), pp. 157-174.

192 "Non-Analogical.." op. cit., p. 289, the example is cited from *al-Risālah*, op. cit., pp. 514-515.

193 Ibid., p. 515.

principles of the law. In taking such a position, Shāfi`ī established a balance between those who used *qiyās* extensively as a source of law and those who rejected it altogether.[194]

Istiḥsān is declared unacceptable by Shāfi`ī because, according to him, it permits unrestricted use of personal reasoning. He described *istiḥsān* as *taladhdhudh* (doing what is pleasurable). In refuting *istiḥsān*, Shāfi`ī says: "God's orders as to what is right and wrong should not be applied by treating a case without due consideration or by dealing with it on the basis of *istiḥsān*. *Istiḥsān* is merely doing what is agreeable."[195]

The issue of *istiḥsān* became controversial during the early formation of the science of Islamic jurisprudence, mainly because its proponents were unable to provide convincing evidence for its authority. They put themselves in a defensive position by saying merely that: "the partisans of a doctrine know best what their predecessors intended."[196] The primary issue of whether *istiḥsān* should be accepted as an authoritative source of law was not adequately treated by the classical jurists.[197]

Perhaps this is another reason why Shāfi`ī rejects *istiḥsān* as an authoritative source. Because of the effort of some later jurists such as al-Ghazālī (d. 505/1111), al-Amidī (d. 631/1233), Ibn Taymîyah (d. 728/1328) and others to

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194 The first group are the Ḥanafis while the other are some of the Ẓāhirîs who prefer to use what they call *mafhūm al-ma`nā* instead of *qiyās*.

195 *Risālah* of Shāfi`ī translated by Khadduri, op. cit. However, there are many instances wherein Shāfi`ī has used very strong language in condemning *istiḥsān* in *Kitāb al-Umm*. Paragraphs 15 and 23 of the translation below are good examples.

196 Abū Ḥusayn al-Baṣrī, *al-Mu`tamad*, op. cit., vol. 2, p. 838.

197 Pazdawī's book mentioned above did not touch this aspect. See volume 2 of his *Uṣūl*, pp. 1133-9.

exonerate *istiḥsān* from being condemned as conjecture, its authoritativeness in Islamic law as a subsidiary source has been accepted in *uṣūl al-fiqh*. However, Shāfi`ī's refusal to accept it as a valid legal procedure is due to lack of guidelines; he therefore wrote a chapter in his *Kitāb al-Umm* wherein he alluded to unregulated practice of *istiḥsān*. We may now briefly describe the text of the chapter.

Shāfi`ī's Ibṭāl al-Istiḥsān

The present translation of *bāb ibṭāl al-istiḥsān* has been made principally from volume seven of an edition of *Kitāb al-Umm* published in Būlāq by al-Maṭba`at al-Kubrā *al-Amīriyyah* in 1321/1903. We have also referred to another edition of the book by Muḥmmad Ẓahrī al-Najjār published by al-Azhar.

Shāfi`ī's style is very succinct but full of meaning and exhibits a good deal of skill in logic and dialectical argumentation. He sometimes uses different words or terms interchangeably; e.g. *qiyās* and *ijtihād* for legal reasoning.[198] In the chapter, he quotes different references from both the Qur'ān and the Prophetic traditions to support his arguments. It is noteworthy also that some of his writings are repeated in other of his works. For instance, he has a chapter on *istiḥsān* in his *al-Risālah*[199] which is repeated almost word for word in volume one of his book, *Kitāb al-Umm*. The two chapters concentrate more on *qiyās* than on *istiḥsān*; but he calls each one of them *bāb ibṭāl al-istiḥsān*.[200] Again, his *bāb ibṭāl al-istiḥsān* may be found in both volumes one

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198 Paragraph 24 of the translation and Shāfi`ī's statement in his *Risālah* under the section of *Qiyās*. In the later, he categorically says: *"ijtihād* is *qiyās"*. Khadduri's translation, op. cit., p. 288.

199 Muḥammad Ibn Idrîs Shāfi`ī, *al-Risālah*, op. cit., pp. 503 569.

and seven of *Kitāb al-umm*; although the section in volume one is labelled as a refutation of juristic preference, it contains only a compilation of Qur'anic references on the subject without mentioning the word *istiḥsān* even once. The section in the seventh volume which is translated below, has a detailed explanation of his refutation of *istiḥsān*, but with almost identical Qur'anic references as in the first volume. Shāfi`ī was a prolific writer, who has reportedly wrote about one hundred books.[201]

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[200] *Kitāb al-Umm* ed. M. al-Najjār, op. cit., pp. 294-298.

[201] Daqr `Abdul al-Ghanî, *a-Imām Shāfi`ī Faqīh al-Sunnat al-Akbar*, (Beirut: Dār al-Qalam n.d.), p. 275.

Translation

(1) Shāfi`ī said:[202] All that I have discussed[203] and (all) that I am saying or I am silent about,[204] having already given sufficient (explanation) on it[205] apart from (the sources) that I have not mentioned,[206] namely, the decree of God, and then, that of His Prophet, and that of the Muslims, are proofs that it is not permissible for a person who is qualified to be a judge or a jurisconsult (*muftī*) to judge or to issue legal opinion unless it is on the basis of a binding report, namely, the Book, then the *Sunna* or whatever the learned (jurists) have said without disagreement, or legal inference (*qiyās*) based on any one of the above. And he may not judge or give a legal opinion based on *istiḥsān* since it is neither binding nor is it derived from these sources.

(2) Question: What is the evidence that *istiḥsān* is not allowed, since it is neither included among these sources,[207] nor mentioned in what you have said in your book?[208] Answer: God, the Most exalted, said: "Does man think he

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202 The phrases such as: "Shāfi`ī said", "If someone asked", "Shāfi`ī replied", are repeated many times in the text; and therefore, we shall be substituting for them with "Question" and "Answer". However, some of them may be kept intact whenever and wherever deemed appropriate in order to preserve the dialectical approach of the arguments.

203 In his *al-Risālah*, Shāfi`ī has described *istiḥsān* as *taladhudh* (merely doing what is agreeable).

204 In the present chapter which is being translated into English.

205 In volume one of *Kitāb al-Umm*, op. cit.

206 Concerning the detailed references from the Qur'ān *Sunna*, and *ijmā`* on the refutation of *istiḥsān* in *al-Risālah*.

207 Shāfi`ī means that *istiḥsān* is not among the sources of law which are the *Qur'ān*, *sunna*, *ijmā`*, and *qiyās*.

208 In his *al-Risālah*, Shāfi`ī has mentioned *Qur'ān*, *Sunna*, *ijmā`*, *and* qiyās; under the chapter on *Ijmā`*. pp. 475-476.

will be left without purpose"?[209] As far as I know, there is no disagreement among those learned in the Qur'ān, that the meaning of *sudā*[210] is to believe that one's actions are neither commanded nor forbidden. So whoever gives a legal opinion or judges without being commanded, has allowed himself to be included in the meaning of *sudā*. But God has told him that (mankind) was not created without a purpose. God knows that (such) a person proclaims that: "I will say whatever I wish and claim the opposite of what has been revealed in the Qur'ān and in the Prophet's traditions"; so he has deviated from the teachings[211] of the Prophets and the judgment of all those in the world who transmit from Him.[212]

(3) Question: Where is what you have mentioned to be found in the Qur'ān and in the teachings of the Prophets, peace be upon them? Answer: God the Most High said to His Prophet, peace be upon him, "Follow that which is inspired in you by your Lord"[213] and He said: "So judge between them by that which God has revealed, and follow not their desires".[214] Then a group of people came to the Prophet and asked about the People of the Cave and others.[215] The Prophet said I will let you know tomorrow; he meant that: I will ask Gabriel, then I will tell you. Thereupon, God the Most High revealed:

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209 Qur'ān 75:36.

210 *Sudā* means aimlessness or to think that mankind is created without a purpose; or that there will be no accountability on the day of judgement.

211 *Minhāj* literally means path. It is more accurate to use the word teaching in this place.

212 The pronoun seems to be referring to God.

213 Qur'ān 6:107.

214 Qur'ān 5:49.

215 Qur'ān Qur'ān 18:9-26 disscuses about the people of the cave.

"And say not of anything I shall be sure to do that tomorrow, without adding 'by the will of God'.[216] And then the wife of Aws b. Ṣāmit[217] came to him (the Prophet) complaining of Aws, but he did not reply to her until God the Most High revealed: "God has indeed heard (and accepted) the statement of the woman who pleads with you concerning her husband".[218]

(4) Then al-`Ajlānī[219] came to him accusing his wife of calumny. The Prophet said: Nothing has been revealed concerning you and I am waiting for revelation.[220] When the revelation came down he called the two of them and made the oath of condemnation.[221] God said to His Prophet "So judge between them by that which God has revealed".[222] And He said: "O David, Lo We have set you as a viceregent in the earth; therefore judge aright between mankind".[223] Nobody will be commanded to judge aright except he who has known the truth, and the right will not be known except from God, through a text or

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216 Qur'ān 18:23.

217 Aws b. Ṣāmit was one of the companions of Prophet Muḥammad who participated in the Holy war of Badr. He accused his wife of calumny and the Prophet asked him to divorce his wife by *li`ān* (oath of condemnation). This was the first case of *li`ān* in Islam. Aws died in the year 36 A.H. at the age of 72 in Jerusalem. Ibn al-Athîr `Iz al-Dîn, *Usd al-Ghābah fî ma`rifat al-Ṣaḥābah* (Cair o: Su`ab 1970), vol. 1., p. 172.

218 Qur'ān 58:1.

219 The story of al-`Ajlānî is related in *Ṣaḥīḥ al-Bukhārī* as follows:.. `Uwaymir al-`Ajlānî proceeded to Prophet Muhammad and in the midst of people he said: "O Allah's Prophet If a man sees another man with his wife, would the former kill the latter man whereupon you would kill him, or what should he do?" Allah's Prophet said: "Allah has revealed some decree as regards you and your wife's case. "Go and bring her". So they carried out the process of *li`ān* while I (`Aṣim, another companion who related the story) was present among the people with Allah's apostle. When they had finished their *li`ān* `Uwaymir said, `O Allah's apostle: If I should now keep her with me as a wife, then I have told a lie'. The Prophet then ordered him to divorce his wife thrice. (This is a final dissolution of marriage without any future reconciliation. Ibn Shihāb another companion who witnessed the case said: "so divorce was the tradition of all those who were involved in a case of *li`ān*). *Ṣaḥiḥ al-Buk-*

by an indication from God. God has set what is right in His Book then in the *Sunna* of His Prophet peace be upon him. No problem will befall a person but that the Book will (have a solution) to it with a clear, specific text (*naṣ-ṣan*)[224] or a clear general sentence (*jumlatan*)[225]

(5) Question: What is the clear provision and the general statement? Answer: The clear provision is what God has prohibited or permitted in a clear specific way. He prohibited marrying mothers, grandmothers, paternal and maternal aunts and those categorized with them[226] but permitted others than them. He prohibited carrion blood, flesh of swine[227] and forbade what is shameful,[228] whether it is visible or invisible. He ordered ablution and said: "Wash your faces and hands".[229] Revelation is a sufficient source for a clear sign of what He revealed in regard to (the case) along with what is like it.

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hārī, transl. Muḥsin Khān (Chicago: Kazi publication, 1979), vol. 7., 4. p. 17.

220 The word *wa antaẓir* (I am waiting) can also be in an imperative form; and thereby means (You) be expecting. The first meaning seems to be more appropriate because the revelation is given to the Prophet.

221 Launching a charge of fornication or adultery against another person requires four witnesses; otherwise, the plaintiff will be flogged with eighty stripes. See Qur'ān 24:4). However, the case of a married couple is different. If the husband accuses his wife of unchastity, the accusation reflects on him as well. It is almost impossible to find four witnesses if a husband catches his wife in adultery; yet after such an experience it is against human nature that he can live a normal married life. In such a situation, the husband will be summoned to swear solemnly four times to the fact that his wife is guilty of adultery, and in addition, to invoke a curse on himself if he lies about his allegation. But if the wife swears similarly four times and similarly invokes a curse on herself, she is in *sharī'ah* law acquitted of the guilt; otherwise the punishment follows. In either case, the marriage is dissolved. For reference, see Qur'ān 24:2-10.

222 Qur'ān 5:49.

223 Qur'ān 38:26.

(6) Question: What is a general statement? Answer: It is what God has made obligatory such as prayer, alms to the poor, pilgrimage etc.; the Prophet peace be upon him, demonstrated how to perform the prayer and mentioned the number of its (prostrations) and its (prescribed) time and explained what to do during the prayer. He explained how to give alms tax, on what type of property and at what precise time it should be paid, and the proportion of it that should be given out. The Prophet also explained how to perform pilgrimage, the type of duties it requires, and he explained what is permitted and forbidden during it.[230]

(7) Question: May the general statement be acceptable as the clear statement was?[231] Answer: Yes. Question: How is this so? Answer: (The Prophet received) from God His aggregate speech (as) he accepted its interpretation[232] from Him because God has made it incumbent to obey His Prophet. God the

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224 In his *Risālah*, Shāfi'ī has explained that *al-nass* is what God has declared to His creatures by clear text in the Qur'ān such as duties owing to Him. *Risālah*, Shākir's edition, op. cit. p. 21; Khadduri's transl. op.cit., pp. 67-68.

225 The collective duties, obligations and prohibitions which God has established in His book but the modes of which He made clear by the tongue of His Prophet such as the numbers of prayers, amount of money to be paid for *zakah* e.t.c. ibid. pp.21-22.

226 Qur'ān 4: 22-25.

227 Qur'ān 16:115.

228 Qur'ān 16:90. A. J. Arberry translated the verse as: "And He forbids indecency." *The Koran Interpreted* (London: Oxford University Press, 1964), p. 268.

229 Qur'ān 5:6.

230 The explanation of the Prophet includes the requirements of the type of dresses allowed to be put on and the type of performances that takes one out of the pilgrimage, such as sexual relationship.

231 The question here is whether the explanation and interpretation of the

Most High said: "And whatsoever the Messenger gives you, take it; and whatsoever he forbids, abstain from it".[233] And He said: "He who obeys the Messenger, obeys God",[234] along with what He has made obligatory by obeying His Messenger. Question: If this is accepted from God as you have described, is the Prophetic tradition inspired? Answer: God knows best.[235]

(8) Muslim b. Khālid narrated to us on the authority of Ṭāwūs that al-Rabî` said: It is related by Ibn Jurayj, [who had it] from Ibn Ṭāwūs [who in turn had it] from his father, that he book possessed a book which contained a list of wergilds (*`uqūl*)[236] which were divinely inspired. The Prophet, peace be upon him, never made something obligatory except through revelation, and part of revelation is what is recited and part of it is what was inspired in the Messenger and then he, peace be upon him, established the *Sunna* on revelation. `Abd al-`Azîz b. Muḥammad narrated from `Amr b. Abî Amr [who had it] from al-Muṭṭalib b. Ḥanṭab that the Prophet said: "I have not omitted anything of what God has commanded you to observe, indeed I have ordered you to follow it, and there is nothing that God has prohibited for you but I asked you to abstain from it. And the trustworthy spirit (Gabriel) has inspired me (with the thought) that no soul will ever die until it will

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Prophet be accepted as a revelation?

232 The Holy Qur'ān is meant here.

233 Qur'ān 59:7.

234 Qur'ān 4:80.

235 Although there is a sign of period here in the Arabic text, the a wer continues on the next line with a Prophetic tradition.

236 *`Uqūl* is the plural of *`aql* which is blood money (wergild) paid to the relatives of a murder victim in compensation for loss and to prevent a blood feud. See Aḥmad Ḥasan, "The sources of Islamic law", *Islamic Studies* 7 (1968), p. 177.

receive its full provision. Therefore, behave decently in your request (for sustenance)."

(9) Shāfi'ī said: It has been said that he (the Prophet) did not recite the Qur'ān , but that Gabriel cast it in his mind by God's order and that it was an inspiration unto him. It is also said that God instructed him to establish the *sunna*, because of what He witnessed in him, namely, that he was a guide to the right path. Whichever may be the case,[237] God has made the two compulsory upon His creatures. He has left them no choice in their affairs concerning what he set as *sunna* for them, and they are obliged to follow his *sunna*.

(10) Question: What is the evidence for accepting as authority what the community agrees upon? We reply that since the Prophet ordered adherence to the Muslim community, such adherence would be meaningless without abiding by their consensus. And it is reasonable that as a community, they will not all be ignorant of a command made by God and His Messenger, peace be upon him, and that ignorance (i.e. mistake) only occurs from an individual. But when they all agree on a matter, then no error will occur. Whosoever accepts their consensus would do so on the basis of the clear sign of the tradition of the Prophet peace be upon him.[238]

(11) Question: Do you think that in a case where there is neither revelation nor *Sunna* nor consensus and you order inference therein based on the

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237 Irrespective of whether it is an inspiration or a revelation.

238 Joseph Schacht believes "that the thesis that 'everything of which the Muslims approve or disapprove is good or bad in the sight of Allah' had been formulated shortly before Shāfi'ī ...and that the Community would never agree on an error, was put into the form of a tradition from the Prophet only towards the middle of the third century of the hijra." Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), p. 47.

Qur'ān and the *Sunna* , can (the inference be considered as) a rule from God? Answer: Yes, the general (indication) for it is from God. Question: What is the general indication for it? Answer: It is the interpretation of it on the basis of the Qur'ān and the *Sunna*

(12) Question: Is there any indication from the Qur'ān supporting what you have stated? Answer: Yes, God has changed the direction of the *Qiblah*[239] from Jerusalem and commanded mankind to face the House (*Ka`bah*),[240] thereby making it incumbent upon the person who can see the House with his own eyes to face the exact direction; and He ordered one who is far from it to face more or less the direction of the Sacred House since the House is in the Sacred Mosque. Therefore, he who is certain that he faced the precise direction of the House grasped the location, and he who is far from it, faces in the approximate direction of the House. Both face it on the authority of God, but one of them by direct apprehension and the other by a (guiding) sign. The latter apprehends it by fulfilling the general statement of what is commanded, though he does not apprehend it in the same way as one who sees the House directly. But this direct apprehension is not commanded.

(13) Question: With what (indication) will he be guided to face the House (from afar) ? Answer: God mentioned, "It is He who has appointed for you the stars, that by them you might be guided in the darkness of land and sea".[241] And He said: "And landmarks and by the stars they might be guided".[242] The landmarks are mountains whose places are known on earth.

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239 *Qiblah* is the direction to which the Muslims face during prayer.

240 Qur'ān 2:144. "Turn then thy face in the direction of the sacred Mosque wherever ye are, turn your faces in that direction".

241 Qur'ān 6:97.

The sun, the moon, and the stars whose orbits are known, and the wind whose source is known in the air, to indicate the direction of the Sacred House. And He made compulsory on them the seeking of the clear signs pointing toward the direction of the Sacred Mosque. God said: "Whencesoever you come forth turn your face toward the inviolable place of worship; and wheresoever you may be (O Muslims') turn your faces towards it (when you pray)".[243]

(14) It is then reasonable that God, the Most High, has ordered them to face the direction of (the House) by seeking the clear signs which point to it, but not on the basis of their own personal preference, or on the basis of whatever occurs in their minds or comes into their imaginations, without a clear sign which God provides them with; for He decreed that He did not create them without purpose. It is reasonable that when He asked them to face in the direction (of the House) at a distance, He would not have them face it however they liked, but would have them achieve the direction by seeking clear indications leading to it. Shāfi'ī quoted: God the Most High said: "And call to witness two just men among you".[244] And He said: "Of such as you approve as witnesses".[245] The judges must accept as a witness, a just man seen to be apparently just. The qualities of a just (person) are well-known to them (the judges). I have mentioned these qualities elsewhere.

(15) A witness may be apparently just but inwardly corrupt. However, God did not demand from them that which He made unknown to them. He

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242 Qur'ān 16:6.

243 Qur'ān 2:150.

244 Qur'ān 65:2.

245 Qur'ān 2:282.

did not pave the way for them to have the knowledge of the unseen; hence they might possibly reject the witness of a person who appears to them (the judges) corrupt but (in reality), to God, the man is better than he who only appears just. God commands that they formulate a decision based on what they know publicly and nothing else.

(16) God Whose praise is High said: "Kill not game while in the Sacred Precincts or in pilgrim garb; if any of you does so intentionally, the expiation is an offering, brought to the *Ka`bah*, of a domestic animal equivalent to the one he killed, as adjudged by two just men among you".[246] It is conceivable that God (meant the same) concerning game (hunting) of the ostrich, and the zebra, the wild ass, the wild goat, the young and the old gazelle, the hare, the jerboa, etc. It is conceivable that (the same rule should be applied to hunting of grazing live stock) such as camels, cows, and goats. Among this category are those (animals) that are smaller than goats, camels and cows. Equal compensation is not a matter of what is conceivable , nor was this the stance of whoever has judged since the inception of the Muslim Community, except to the extent that, concerning game, they judged as best (decided by way of compensation) on the basis of a similarity between animals. And He did not permit them to ignore (compensation) when it was closer to the gazelle than to the goat, and to the hyena than to the ram, so as not to ignore (the compensation of) the jerboa despite its remoteness from the size of a small sheep. They must formulate a personal judgement, since He had made it possible for them. And every command of God, Whose praise is abundant, and similarities (to such commands by deduction from His words) point clearly to the permissibility of practising *qiyās*. And He prohibited what is opposed to it, such as *istiḥ-*

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[246] Qur'ān 5:95

sān , because whoever seeks the command of God by an indication (*dalālah*) seeks it in whichever way is it compulsory upon him. Whoever says: "I will practice *istiḥsān* without any command from God and His Prophet, peace be upon him", would not be accepting the word of God nor that of His Prophet. He does not practise what he says based on the authority of God and His Prophet; whoever says this would be in error. We have explained that his attitude is: "I will speak and act on what I am neither commanded, nor forbidden and without following any example of what I am commanded and forbidden to perform". God has decreed the opposite of what he said. For He did not create mankind except to worship Him.

(17) As for God's statement: "Does man think that he will be left without a purpose"?[247] he who makes a judgement or renders a legal opinion based on a binding narrative or through analogical reasoning based on it, has discharged the duty incumbent upon him. He has also pronounced a verdict and given a legal opinion according to the way he was ordered. He fulfilled the textual obligation precisely, applied *qiyās* through interpretation perfectly, and obeyed God as well as His Prophet in both matters.

(18) The Prophet, peace be upon him, ordered Muslims to be obedient to God, then to His Messenger, and to undertake *ijtihād*.[248] It is related that he asked Mu`ādh:[249] "On what bases will you judge (among people)? He said: 'With the Book of God' He asked: 'If there is no precedent therein with what

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247 Qur'ān 75:36

248 *Ijtihād* is the legal interpretaion of a jurist.

249 Mu`ādh b. Jabal is one of the companions of Prophet Muhammad; he embraced Islam at the age of eighteen and participated in the wars of badr and Uhud. He died eighteen years after Hijrah and died at the age of thirty-eight. *Usd al-Ghābah*, op. cit., pp. 194-197.

will you judge?' He said: 'With the *Sunna* of the Prophet peace be upon him'. He said: 'If there is no precedence therein, with what will you decide?' He said: 'I will formulate a personal decision.' The Prophet said: 'Praise be to God Who has made the messenger of the Prophet successful'. The prophet then said: 'If a judge makes a decision through *ijtihād* and succeeds, there are two rewards for him. But if he fails, still there is one reward for him.'"[250] Therefore, you ought to know that it is incumbent upon a judge to practice *ijtihād* and *qiyās* in legal decisions.

(19) The position of whosoever allows himself to render a judgement or legal opinion without a binding narrative or an analogy based on it, would be indefensible, since the meaning of his statement "I will do whatever I wish even if I am not commanded to do it" runs against the intent of the Book and the *Sunna*. His position would also be indefensible on the basis of what he himself said and on the basis of a principle no one disputes. Question: (Would you) explain this? Answer: That I have known no one among the scholars who has permitted anyone among the philosophers and the literary adepts (*ahl al-ʿuqūl wa al-ādāb*) to give legal decisions and judgements on the basis of his mere opinion, especially if he is not knowledgeable about legal inference based on the Book, the *Sunna*, and consensus and (thereby) lacks the mind to analyse the unclear textual passages. If they claim this, they will be asked: Why is it that the philosophers whose level of thinking is better than the comprehension of most of the scholars of the Qur'ān, *Sunna* and legal opinions, are not allowed to declare verdicts on whatever has happened of

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250 This tradition is classified as a *mursal* i.e. a tradition which has no connected narrators with the Prophet. According to Ibn Ḥazm, the tradition is not a sound one because it is narrated by one al-Ḥārith Ibn ʿUmar al-Ḥazl and nobody kn him. Muhammad Muṣleḥudeen, *Philosophy of Islamic Law and the Orientalists* (Pakistan: Islamic publication limited), p. 139.

which they know that there is no Book, nor *Sunna* nor consensus on it; despite their being better in thinking and more eloquent in what they say than the majority of you?

(20) If you maintain that it is because they do not possess knowledge of the principles of jurisprudence (*uṣūl*); you will be asked to produce proof of your knowledge of the principles when you speak without basing yourself on a source or an inference based on a source. Are you afraid of the ignorance of *uṣūl* by the philosophers more than their lack of knowledge about the principles; and therefore, are they not competent to practice *qiyās* (based on what they do not recognize)? Has your knowledge of the principles led you to acquire inferences (by *qiyās*) based on the principles, or has the knowledge of *qiyās* permitted you to neglect them?[251] If it has led you to neglect them, then they may speak in spite of you, because what is feared most from them is the neglect of analogy (based) on the principles (*usūl*) or error. Thus I do not know them (as ignorant) but rather I praise (them) on (what is) right; because they spoke without (a binding) example from you. And if anyone deserves to be praised without evidence, they are; because they were not aware of an example and thereby overlooked it. I granted them an excuse over the mistake they commited through you. And I do not know you except that you became greater in sin than they when you abandoned what you know about *qiyās* based on the *uṣūl* which you are not unaware of.

(21) If you maintain that: "we neglected *qiyās* for a reason other than ignorance of the *aṣl*", the reply would be that if *qiyās* is valid, then you must have disagreed with the truth knowingly. There is a great sin in this. Were you to be ignorant of it, you would not be competent to have a say in this science,

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[251] To neglect the principles (*uṣūl*).

and if you claim that you may neglect (the practice of analogy), and speak on the basis of what occurs in your imagination or comes to your mind and what your ears prefer, you will be confounded by what we have described from the Qur'ān, then the *Sunna* and the consensus that points to it, [namely] that nobody should speak except with knowledge, and with what you have no disagreement upon.

(22) If two men litigate before a judge over a piece of cloth or over a slave[252] as to whether either was sold with hidden defects, the judge must not decide the case with the problem (of uncertainty) therein. Instead he must resort to those who are learned and must ask for their opinion on whether there was a fault in the object of sale. If both men seek the value of the fault in the commodity, then the judge will ask (the scholars) to estimate its value. If the most religious and knowledgeable among them confesses: "Presently I have no idea of the market price, although I used to know it previously; but I may guess it now", it is not proper for the judge to accept his word due to his ignorance of the current market price. Only one who is conversant with the market price of the commodity at that time may be accepted. If one who knows the market price at that time suggests: "If you compare this commodity with other commercial products in terms of its value, and you base it on what the price used to be, inference shows me that it is such and such, but I prefer other means". Then it is not permissible for the judge to accept his preference. And it is forbidden for him to judge against what was said to be the market price at that time.

(23) Similarly, in the case of a woman with a void dowry, an equivalent dowry for her in terms of beauty, wealth, purity, youthfulness, intelligence and

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252 Over the ownership of the slave.

good manners, will be required. If it is claimed that the dowry should be one hundred *dināṛs*,[253] but we prefer to increase the amount by a *dirhām*[254] or to decrease it by a *dirhām*, then it is not permissible for the judge (to act on this preference). He[255] said to the one who maintains: "I prefer to increase the dowry or decrease it" that: "such preference is not permissible for me and you; but the husband must pay the dowry equivalent to her category". If this sort of judgement is given on monetary issues which are not very serious to the one from whom (the equivalent dowry) was taken away, and *istiḥsān* was not applied therein, and yet the learned jurists enforced the application of *qiyās* (therein) without allowing the ignorant to conduct their own analogy in the case because they did not possess the ability for proper legal inference, then God's permission and prohibition concerning blood, private parts, and other matters, which are more important, deserve to be enforced (with certainty) by the judges and jurisconsults.

(24) Supposing the governor and the jurisconsult should say concerning a case that there is no provision for it either in a text or in analogy, and supposing they should have recourse to *istiḥsān*, would it not be incumbent upon them to concede to others the right to (practise) *istiḥsān* in some other rulings? Consequently, every governor and *muftī* in a city would rule according to his *istiḥsān*, and there would be many contradictory rulings and legal opinions in the same case. If they permit this, they render themselves useless by judging according to their desires. If it is inappropriate, then, they may not get

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253 *Dināṛ* signifies a certain gold coin. E.W. Lane, *Arabic/English Lexicon*, op. cit., vol. 1, p. 876.

254 *Dirhām* is an Arabized word from Persian. It is a silver coin. Ibid., p. 876.

255 One of the plaintiffs.

involved in it. If one who advocates the rejection of *qiyās* should say: "People must follow whatever I say," he should be asked: "Who authorized your leadership so that people must follow you? Or do you think that if someone were to utter (a similar statement), will you yourself obey him or say: I will not obey anybody except the one I am ordered to obey?" Similarly, there is no obligation on anyone to obey you. Obedience belongs only to the one to whom God or His Messenger has ordered his obedience. The truth is found in that which God and His Messenger have commanded, or that which God and His Messenger have pointed to through a clear text or by the deductive method based on clear signs. For when God commanded us to turn toward the House when it is out of sight, He made this possible [for us] through formulating personal judgements based on the search for clear signs pointing to it. And when He commanded us to seek the testimony of a just witness it was an indication of non-acceptance of a dishonest witness. Is the just man recognized in distinction from the unjust except by seeking the signs pointing to his justice? Don't you think that when He ordered judgement based on equal compensation in the matter of hunting, He commanded the judgement to be only by what is like it (in shape)? And therefore each of these is personal judgement and *qiyās*. Do you think that when the Prophet commanded the practice of *ijtihād* in making a legal decision, one becomes a *mujtahid* without seeking a source? (Don't you think that) the search for certainty can never be completed except by specific clear signs pointing to it? And that is achieved through the practice of analogy; because it is quite impossible to formulate personal judgement (about a case) without studying the appropriate circumstances and seeking the signs that lead to it. One who follows whatever occurs to his mind or comes to his imagination (in a legal decision) cannot be considered a seeker (of justice). [Shāfi'ī said]: "More than what I have men-

tioned can be applied to whomsoever puts aside (the practice) of analogy. And some of what I have mentioned is an evidence against him. I beseech God's success for myself and all His creatures".

(25) It is not permissible for a judge to accept[256] nor for a ruler to acquit anyone, nor is it permitted for a jurisconsult to issue an opinion to anyone except after each has acquired all necessary knowledge of the Book (the Qur'ān), the knowledge of those verses which abrogate and those which are abrogated, and knowledge of what is specific and what is general, and of its manner. He must be knowledgeable about the traditions of the Prophet, peace be upon him, well informed about the doctrines of the past and present scholars (of law), conversant in the Arabic language, intelligent so as to be able to distinguish unclear (passages of the Qur'ān) and capable of understanding legal inference. If he lacks any of these qualities, it is not permissible for him to practice *qiyās*; also, if he is knowledgeable about the principles (of law) but lacks the ability to practice legal inference, which is a branch of the science of *uṣūl*, he should not practice *qiyās*.

(26) It is not permissible to demand analogical reasoning from (an ordinary) man because he does not know how to perform *qiyās*. If he possessed the ability of legal inference but lacked the knowledge of *uṣūl* or part of it, he cannot be asked to think analogically about what he is ignorant of, just as a blind man to whom I say "Put something in your right hand and another in your left, and when you reach such and such a place, turn right", he cannot be asked to apply (such) *qiyās* because he cannot see what is being described (to him). Nor can he be asked to travel to a town he has never travelled to or been in before, nor possesses any knowledge about the town which can assist

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256 The innocence of any accused.

him in recognizing it, nor does he have any sense of direction that can direct him, simply because he is travelling without an adequate guide.

(27) And as it is not permitted for a person who knew the price market of a commodity a long time ago to estimate the price of a servant, based on his description as such and such, if he has not kept up his knowledge of the variable market price for over a year; so also it cannot be expected of a man who saw a part of one kind of commodity, but did not know other than that category, and who possessed no (clear) indication from the part of the category he saw such that it could assist him to know the one he did not know, (then he can not be asked) to appraise the price.[257] Similarly, a builder cannot be asked to estimate the value of certain cloths, nor should a tailor be asked to give an estimate of a building.

(28) Question: What if a person who did not possess all the qualities you have mentioned were to render judgment and legal opinion? Answer: Have you seen their judgements and opinions? Have you seen much apparent contradictions in them? Did you see each of the two groups how it criticizes its opponent in his judgment and opinion? God the Most High is the Assistant.[258]

(29) Question: "Do you know where the truth is before God in a case in which the *mujtahids* have tried their utmost to interpret (but have different opinions)? Answer: According to our (opinion), it is not necessary.[259] God knows best. Of all the results of that case, only one can be right; because the knowledge of God the Most High and His rules are unanimous due to the fact

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257 A commodity which he knew nothing about.

258 In other words, their judgement will be full of contradictions.

259 In this case to know the exactly correct interpretation.

that apparent and secret (matters) are known to Him in the same manner, and His knowledge concerning each is one and equal. May His praises be more exalted.

(30) Question: If those who are capable of interpretation and therefore can deduce rules from the Qur'ān and *Sunna* disagree among themselves, should that disagreement be allowed? or would it be appropriate to say that despite their disagreement they are all correct, and incorrect at the same time, or that some of them are mistaken and some are correct? Answer: None of them may be said to be entirely wrong even though they disagree in their judgement, especially when each (of them) is capable of *ijtihād* and has tried his utmost. But it may be explained that each of them has obeyed what he was commanded, has fulfiled his obligation correctly, since he was not ordered to know the unseen, the mysteries of which no one is acquainted with.

(31) Question: Could you give an example on this issue. Answer: The best demonstration is that of being far away from the Holy Mosque and seeking the correct direction to turn toward the *Ka`bah* (during the prayer). If two men tried to know the direction by two different means with their knowledge of astronomy, the direction of winds, the sun, and the moon, and one of them concludes that the *Qiblah*[260] is on the right side while the other believes that it is somewhat off from the spot established by the former; it is then compulsory for each of them to pray towards the direction which he has been able to establish. He should not follow his partner's, if his own interpretation has led him to a different direction. Neither of the two (men) is overtasked to know the exact spot of the Holy House, since he does not see it in front of himself. Moreover, he has discharged the duty entrusted to him, namely: facing the

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260 The direction which Muslims face during their prayer.

direction by following the clear signs which can lead to it.

(32) If it is argued that one of them must be mistaken, we reply: concerning what has been entrusted to the *mujtahidūn*, neither of them has committed a sin and yet one of the jurists is mistaken about the exact direction, since the Holy House is not in two different directions. If it is argued that he is erroneous, [then my] answer is: he can be compared to a person aspires to be faithful in judging (cases) which are subject to interpretation, but where there is no sin in error. Since he is not commanded to achieve [a goal] which is invisible to him, therefore, he does not fall into error when he is unable to achieve it.[261] Question: Could you provide a Prophetic tradition as an evidence of (this) description. Answer: Yes. `Abdul `Azîz b. Muḥammad narrated from Yazîd b. `Abdullah b. al-Hādî from Muḥammad b. Ibrahîm from Bishr b. Sa`îd from Abū Qais, client to Amr b. al- `Aṣî from Amr b. al-`Aṣî that he heard the Prophet peace be upon him, saying: "If a judge considers a judgement, formulates his personal decision, and succeeds, he has two rewards , but if he is wrong there is still a reward for him".[262] Yazîd b. al-Hādî said that he mentioned this tradition to Abū Bakr b. Muhammad b. Amr b. Ḥazm, (and the latter) said: "This was exactly what Abū Salmā informed me from Abū Hurairah".

(33) Question: (What is) the meaning of this? Answer: What I have described earlier means that if he (the judge) employs *ijtihād* in his ruling, and succeeds, he has then combined two rewards; one for employing *ijtihād*, the other for the correctness of his interpretative effort. But if he is incorrect with

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261 Namely, to achieve with accuracy, the exact location of the *Ka`bah* from a place very far away.

262 Muḥammad Muḥsin, *Ṣaḥīḥ al-Bukhārī* (translated) op. cit., vol. 7, p. 387

the exact judgment, he is rewarded for his effort of interpretation only, though not at all for the mistake of the outcome of his interpretation. It is preferable to stop what leads to a mistake. This explains what I have mentioned that (the judge) is by no means commanded to know the exactly correct direction. (Someone) argued that God blames disagreement. The reply would be that disagreement is of two categories. The first, is the one whereby God has provided evidence for mankind, so that they are well-informed about it. Mankind has no choice but to follow it and should have no differences respecting this category. If men disagree on this category, it is this type of disagreement that God blames and does not permit. Question: Where is the evidence for this? Answer: God the Most High said: "Nor did the people of the Book make schisms, until after there came to them clear Evidence."[263]

(34) Whoever disagrees with a text of the Book which carries no ambiguity, or with an authentic *Sunna*, it is not permissible for him to disagree (on them). And I do not think that it is permissible for him to deviate from the Muslim Community even if there is no evidence from the Book and the *Sunna* to support their stance. Whoever disagrees with a matter which is subjected to *ijtihād* and comes to a conclusion which is a possible outcome, and has clear signs pointing to this result, is not.....[264] in disagreement with the his partner because he is not contradicting a clear text of the Book nor the valid Prophetic Tradition, nor (the Consensus of) the majority, nor a *qiyās*. But he made an inference and came out with the opposite result to that of his partner. His own analogical reasoning led him to a different direction through the clear sign of the stars. Question: Does this concern the judgement? Answer: Yes.

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263 Qur'ān 98:4.

264 The lacuna is from the original manuscript.

(35) (Someone) requested an illustration that there is a clear sign concerning the judgement pointing to the correct solution. The reply would be that we recognize the sign in some of the judgments. For instance, a case may have two similar sources which admit of legal inference, where one person upholds one source and another person adheres to another, and therefore, disagree. Question: Is there any way for either of them to establish evidence against his opponent upon some of what they disagreed over? Answer: Yes, if God the Most High wills, the case will be examined and if it resembles one of the two sources in a single way and the other in two (ways), then the judgment will be taken from the case that has two similarities, rather than from the one that resembles it in a single way. The same rule will prevail if it is closer to one of the two sources than it is to the other. Question: (Give us) an example of this (category), Answer: There is no difference of opinion that there is no paying of blood money on a slave killed by mistake other than his actual value. If his value is one hundred *dirhams*, more or less, up to or less than ten thousand *dirhams*, (the payment) is incumbent on the one who killed him.

(36) Some Eastern scholars (*al-Mashriqiyyūn*) hold that if his blood money is more than ten thousand *dirham* (the excess) will be deducted from ten thousand *dirham* and some of them maintain that it should not be equal to the blood-money of a free-man. But some of our supporters maintain that it can be equal to the blood-money of a free-man. If his price was one hundred *dirhams*, the owner of the slave will not exceed that payment because the judgement on it is that this is the price. The same thing will happen if it exceeds the blood-money of free-men. His master will take the excess as if an animal were killed for him of which its amount was equivalent to the blood-money of free-men; then it will be taken from him. This is what we understood from the statement of the Eastern scholars, that it is a matter in which no mistake is

permitted according to what we have described.

(37) Then some of them withdrew their statements and upheld that a slave should be killed for a slave and that a free-man should be held (accountable) and that no retaliatory punishment will be implemented on a free person by a slave or on a servant except in (the case of taking) a life. Then I (Shāfiʿī) asked one of them who was better informed; "why would you kill more slaves in retaliation for the (murdered) slave and you did not oblige the slave to retaliate except in the case of life?" He then replied: "We based our position on the source that when slaves were mistakenly killed, their price should be paid and their price is equivalent to (that of) the animals and property. And we maintained that there should be no diminution in any one of them over the other in terms of injury because they are all property." Then I (Shāfiʿī) argued: "Sould retaliatory punishment (*qiṣāṣ*) be compared with *diyāt* (blood-monies) and (the equivalent) prizes or is it (not the case that) the retaliatory punishment contradicts the ruling of *diyāt* and the paying of (equivalent) prizes?" If it were to be compared to blood-monies, it has no effect that you killed a slave equivalent to a sum of one thousand *dināars* for a slave equivalent to five *dināars*, and you killed (in retaliation) for him slaves whose amount is more than his value; and you did not do anything (similar to that) when you killed some slaves for others. You equate them with animals and possession, so that one beast should not be killed for the other if it killed another.

(38) If you think that blood-monies are the sources and that some blood-monies are less in consideration because you kill the man for the woman but her blood money is half of the blood money of the man, then why do you follow a method of overlooking the retaliatory punishment or *qiṣāṣ* among the slaves except in the case of a life, when you kill the slave? It may be that the

one goes less well with the other and that their prices are different despite what these words of yours force you to. He (the opponent) asked: What do my words force me to? Shāfiʿī then explained that you claim that whoever kills a slave should perform an atonement (*Kaffārah*), and incumbent on him, is what is obligatory on someone who kills a free-man in terms of the sin committed. Because he is a Muslim and on him is an obligation from God, for he has the inviolable rights of Islam. But you do not claim this to be the case for someone who killed a camel or destroyed property. You claim that what is incumbent on a slave is the distinction between the lawful and the forbidden, and the obligations while none of these is incumbent on the animals.

(39) Shāfiʿī, may the mercy of God be upon him, said: God the Most High decreed two rules for His servants; one pertaining to what is between them and Him, that is to reward them or punish them for what they have done in secret as He will deal with them for what they have performed openly. He made it known to them how the evidence will be compiled against them as He explained to them that He knew their concealed and their unconcealed actions. He said: "He knows the secret (thought) and that which is yet more hidden";[265] and He said: "He knows the treachery of the eyes and that which the breasts hide."[266] But His creatures know only what God the Most High wills; and He has concealed the knowledge of hidden things from His servants. He sent messengers among them and they uphold the rulings of God on His creatures. He explained to His messengers and mankind the rulings of His creation in this world according to what they apparently profess, and He allowed the shedding of the blood of the unbelievers among His creatures. He said "Slay the Pagans

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265 Qur'ān 20:7.

266 Qur'ān 40:19

wherever you find them."[267] He forbade (the shedding of) their blood if they appeared to embrace Islam. He said: "And fight them until persecution is no more, and religion is for Allah."[268] He said: "It is not for a believer to kill a believer unless (it be) by mistake."[269] He said: "Whoever slays a believer intentionally, is rewarded with Hell for ever."[270]

(40) He then permitted the (shedding of) blood of idolaters, by making war against them a necessity and an obligation if they do not openly proclaim the faith. But when some hypocrites pronounced the faith (only to deceive), God informed His apostle concerning them that what they hide is contrary to what they do publicly. God said: "They swear by Allah that they said nothing (wrong), yet they did say the word of disbelief, and did disbelieve after their surrender (to Allah)";[271] and He said: "They will swear by Allah to you, when you return unto them, that you may let them be. Let them be."[272] Despite what the hypocrites have mentioned, He did not allow His Prophet to fight them if they manifest Islam, and the Prophet peace be upon him, did not prevent them from marrying Muslims nor prevent them from inheriting from them.

(41) Shāfi'ī may the mercy of God be upon him said: I found an example in the *Sunna* of the Prophet peace be upon him. The Prophet said: "I was commanded to fight people until they say that there is no God except Allah and when they say it, they have saved their lives from me and preserved their

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267 Qur'ān 9:5.

268 Qur'ān 2:193.

269 Qur'ān 4:92.

270 Qur'ān 4:93.

271 Qur'ān 9:74.

272 Qur'ān 9:95.

property only because of its truth, and their account lies with God." Miqdād said: "O Prophet of God, if an unbeliever fights me and cuts my hand, then takes refuge from me behind a tree and then embraces Islam, shall I kill him"? The Prophet replied :"Do not kill him , for God almighty the Most High says: 'Concerning those who accuse their wives but have no witnesses except themselves...'[273] And He said: 'And it shall avert the punishment from her.'"[274] He then judged by oath between the two of them since the husband knows from his wife what the outsiders do not know; (God) averts from the couples the punishment (of stoning to death) by her denial but (asked them to swear) because one of them is telling a lie.

(42) And He judged, concerning the man who accused another man's wife of adultery, that he should be punished[275] if he cannot produce four witnesses for what he proclaimed. And the Prophet did not decree the banishment between al-`Ajlānî and his wife when the latter accused her of committing adultery with Sharîk b. al-Suḥmā. The Prophet said: "Watch over her, if she delivers a black boy with deep black and large eyes with fat buttocks, then he (the husband) must be truthful[276] because that is the description of Sharîk whom he alleged his wife to have been with, and by whom he thought that she

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273 Qur'ān 24:6.

274 The complete verses are as follows: "And those who launch a charge against their spouses, and have (in support) no evidence but their own, their solitary evidence (can be received) if they bear witness four times (with an oath) by God that they are solemnly telling the truth; and the fifth (oath should be) that they solemnly invoke the curse of God on themselves if they tell a lie. But it would avert the punishment from the wife, if she bears witness four times (with an oath) by God, that (her husband) is telling a lie." Qur'ān 24: 6-8.

275 By flogging him with eighty stripes and reject his evidence ever after. This is according to the prescribed punishment in the Qur'ān 24:4.

276 In his allegation.

was made pregnant." The Prophet again explained that if she delivers a *wah-rah*,[277] then he must have lied, because this is the description of her husband. (At last) She delivered a boy like Sharîk b. al-Suḥmā. The Prophet peace be upon him, then explained that his position is now plain and clear, but if it had not (been so), because of what Allah has decreed I would have judged otherwise, that is, -God knows best- because of the clear sign pointing to the truthfulness of her husband.

(43) Since the evidence cannot be (totally) encompassed or known thoroughly by mankind, it signifies the nullification of judgment based on (suspcious) indication. If it did not confirm (guilt), the judgment on what is an obligation against (him/her)[278] will not be impossible (but suspended) until evidence is produced. However, the judgment will then be taken according to the commandment of God, and not by (suspicious) indication. Rakanah b. `Abdul `Azîz divorced his wife finally (three times) and then went to the Prophet peace be upon him and swore that he only intended to divorce his wife once, and the Prophet returned his wife to him.

(44) Shāfi`î may the mercy of God the Most High be upon him, said: since his statement is likely because he meant to divorce his wife only once, the Prophet accepted his statement according to what he professed, as God has decreed the acceptance of the one who manifests faith[279] in this world. He will be allowed to marry Muslim women and inherit from Muslims, but God will make known that their secrets are different from what they manifest.

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277 A light-red boy.

278 The editor mentioned here that this is how the unclear statement appears in the original manuscript.

279 By testifying that there is no other god except Allah.

Anyone who ever heard about the triple divorce as mentioned above would think that most probably (the husband) meant the final divorce from which there will be no retraction.

(45) A man from the tribe of Fazārah went to the Prophet peace be upon him and said: "My wife gave birth to a black baby" and he started alluding to adultery. The Prophet said: "Do you have a camel? He answered: 'Yes.' The Prophet then asked of its color. 'RED' he replied; the Prophet peace be upon him asked again: 'Is there any blue color (with the camel)?' He answered: 'Yes.' The Prophet then asked: 'From where did the blue color come from?' The man replied: 'May be from its ancestors.' The Prophet then explained to him that it is possible that the baby gained the (black) color from his ancestors.'" He did not pronounce a verdict of *ḥadd* punishment on him nor did he separate them by *liān*.[280] since the husband did not express adultery categorically.[281] He probably did not mean to accuse her of adultery even though his listener would most likely think that he meant to accuse her of adultery. However, the judgments of God the Most High and that of His Messenger peace be upon him, point to what I have mentioned.

(46) Likewise it is not permissible for a judge to pronounce a judgement by mere assumption (*ẓann*). If there are some closer signs pointing to the offence, he should only judge according to the command of God on the basis of clear evidence which is produced against the accused, or on the basis of a clear confession from him just as God has declared that His judgment is bases on what is apparent. Likewise, He decides that whatever is apparent should

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280 Curse by oath which causes separation for good between wife and husband.

281 Against the wife in his accusation.

be given its appropriate judgement, because God permitted (the shedding of) blood for disbelief (*kufr*) even if it is (only) by pronouncing it.[282] It is not permissible in any of the judgments affecting mankind to make a judgment except on the basis of what is apparent and not on mere (circumstancial) evidence.

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282 Shedding blood by disbelief is permitted whenever the disbelievers are threatening the existence of Islam or when they are preventing people from knowing the truth. Although "there is no compulsion is Religion", (Qur'ān 2:256), when abusive language is being used to undermine Islam, Muslims may strike back. Perhaps this is what Shāfi'ī means by the phrase "pronouncing a statement of unbelief".

CHAPTER SIX

SARAKHSI'S BRIEF BIOGRAPHY AND TRANSLATION

This chapter consists of an English translation of the sections on *qiyās* (inference by analogy), *istiḥsān* (juristic preference) and *takhṣīṣ al-`illah* (particularization of cause) from the *Uṣūl* work of Abū Bakr Muḥammad Aḥmad al-Sarakhsî Also included are a brief biography of Sarakhsî and comments on his work.[283]

Sarakhsî was an important Ḥanafî jurist of the fifth/eleventh century. Born in Sarakhs in 448/1056,[284] he gained the title *shams al-A'immah*[285] due to his competence in the field of *uṣūl al-fiqh*.[286] He was a courageous jurisconsult who alone, among the `Ulamā' in his time confronted the ruler Khaqān Ḥasan, saying that marrying the mother of his manumitted slave (*umm al-walad*) without observing the *`iddah* (waiting period) was illegal.[287] He was

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283 Sarakhsî and his juristic ideas are not very popular in the books of the Western writers on *uṣūl al-fiqh*. However, some light has been shed recently on his opinions on *istiḥsān* and *takhṣīṣ al-`illah* by Zysow Aron, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Unpublished Ph.D thesis, Harvard University 1984), pp. 403-419; Wael B. Hallāq, "Consideration on the Function and Character of Sunnî legal Theory." *Journal of the American Oriental Society* 104 (1984), pp. 683-684.

284 Sarakhs is an old town between Mashhad and Marw, where the frontier between modern Persia and Russia turns from East to South on the lower course of the Harirūd. J. Ruska, "Sarakhs" *First Encyclopaedia of Islam*, ed. A.J. Wensinck, H.A.R. Gibb, W.Heffening and E. Levi-Provencal (Leiden: E. J. Brill 1987), vol. 7, p. 159.

285 The title literarily means 'the Sun of the jurists' which indicates the leader or head of the jurists during his time.

286 Muḥammad b. Aḥmad Sarakhsî, *Sharḥ Kitāb al-Siyar al-Kabīr*, ed. Ṣalaḥ al- al-Manjad (Maṭba`at Sharkat al-i`ilānāt 1971), vol. 1, p.1 0.

287 Muhammad b. Ahmad Sarakhsî, *al-Nukt, Sharḥ Ziyādat al-Ziyādāt of Shaybānî*, ed. Abu¯ al-Wafā' al-Afghānî (India: Lajnat Iḥyā' al-Ma`ārif al-Nu`maniyah 1378, A.H.), p. 1.

imprisoned for ten years for this legal pronouncement.[288]

Sarakhsî was a prolific writer, the author of many books and commentaries. Among them were his famous *Uṣūl* and *Mabsūṭ* (14 volumes). He composed the latter while he was in prison and without the benefit of a library. The book turned out to be one of the most comprehensive of the earlier *Fiqh* books. It is a standard reference in the Ḥanafî legal School. Among his commentaries is *al-Nukt Sharḥ Ziyādāt al-Ziyādāt*.[289] and others.

Sarakhsî's contributions to the elaboration of positive law are remarkable. Details on this can be found in his *Uṣūl*.[290] The sections which deal with *qiyās*, *istiḥsān* and *takhṣīṣ al-`illah* in the book are translated into English in this chapter.

As for *qiyās*, and *istiḥsān*, Sarakhsî believes that there is no contradiction in their rulings except that *qiyās* is put aside where *istiḥsān* is applied. He clarified this statement by saying that *istiḥsān* cannot be applied when there is a conflict of proofs; but that a weaker proof of *qiyās* will be dropped in favour of stronger proof of *istiḥsān*.[291] He asserts that *istiḥsān* is not mere speculation as Shāfi`î claimed it to be, but carefully drawn legal reasoning on the basis of textual evidence. The word *istiḥsān*, he argues, has brought criticism upon juristic preference. Nevertheless, the phrase "I prefer" is more eloquent than "I like better" which Shāfi`î used instead in his legal pronouncements.[292]

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288 Ibid., p. 10.

289 Ibid., p. 10.

290 Sarakhsî, *Uṣūl*, ed. Abū al-Wafā al-Afghānî, 2 vols. (Cairo: Maṭba`at Dār al-Kitāb al-`Arabî, 1372 A.H.), vol. 2, pp. 1

291 Details on this are in paragraphs 9-11 of the translation below.

292 See paragraph 5 of the translation below.

Takhṣīṣ al-`illah* is a later development which some Ḥanafīs adopted in order to rescue *istiḥsān* from being rejected. Sarakhsī attacked the procedure of *takhṣīṣ al-`illah and considered it as alien to the path of the worthy Ḥanafī predecessors. The practioners of *takhṣīṣ al-`illah*, according to Sarakhsī, are believed to be inclining towards the Mu`tazilis in their principles.[293] Sarakhsī upholds that in every case wherein some of the attributes of the *`illah* are non-existent, the expected ruling will be non-existent. He concludes that this principle is due to the absence of the complete attribute of the *`illah* but not because of the procedure of *takhṣīṣ al-`illah*.[294]

Preface to the Translation of the Arabic Text.

The following translation comprises the sections of *qiyās*, *istiḥsān*, and *takhṣīṣ al-`illah* from *Uṣūl Sarakhsī*. We have used the edition of Abū al-Wafā' al-Afghānī who stated that he had two manuscripts of the text at his diposal which were both sent to him from the Aḥmadiyah library and `Uthmāniyah Madrasah in Aleppo, Syria.[295] The editor also explained that he later found another copy of the text in Ḥaydarabād, India, and that he compared it with the others before establishing this edition. Comments of the editor on some of the differences between these copies are pointed out and preserved in the footnotes throughout the translation. In order to comprehend the Ḥanafī legal reasoning in the three sections of the text chosen, and thereby to facilitate the translation, the *Kashf al-Asrār* of Abū Barakāt Aḥmad al-Nasafī and the *Uṣūl Fakhr al-Islām Sharḥ Uṣūl Pazdawī* of `Abdul `Azīz al-Bukhārī, among others, were consulted. As for the translation of Qur'anic passages,

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293 Details are in paragraph 37 of the translation below.

294 See paragraph 22 of the translation below.

295 *Uṣūl*, ed. Abū al-Wafā', op. cit., pp. 3-4.

Yusuf Ali and A.J. Arberry's translations were used, incorporating slight changes whenever required.

Translation: *A Section on the Explanation of Qiyās and Istiḥsān.*

[1] Sarakhsî, may God be pleased with him, said: you ought to know that section four, which we have elaborated in the previous part, deals with these two aspects. They are, according to us, *qiyās* and *istiḥsān*. A jurist, in his book[296] , has criticized other jurists over the expression of our sages: "Except that we put aside *qiyās* and apply *istiḥsān*" in the books (of jurisprudence). He said: The proponents of *istiḥsān* put aside the application of *qiyās* which is an evidence in *Sharī`ah* and think that they are doing what is good by (holding) to that (*istiḥsān*). How can putting aside a legal proof which is *qiyās* be appropriate (and how can) the acting on a mere inclination or on low desire which is not a proof (be accepted)? If they intend to abandon *qiyās* which is a proof, then (they should realize that) the *Sharī`ah* evidence is the (only) truth and that whatever is against the truth is an error. But if they mean (by *istiḥsān*) the putting aside of an invalid *qiyās* (which contradicts) *Sharī`ah*, then, one should not even bother to mention the invalid (*qiyās*).

(2) (The opponents) have mentioned in their books in some chapters that we uphold *qiyās*; if the intention is this (as explained above), then how can the acceptance of the invalid (*qiyās*) be permissible? Mentioning something of this nature reflects a sign of little (or no) prudence, piousness and a great irresponsibility on the part of its advocate.

[3] We reply: With God's guidance to the right path, *istiḥsān* literally is the appearance of something (considered to be) good such as when a man says: "I preferred this ruling to be as such" which means: "I believed it to be good in opposition to what is bad", or that its meaning is the seeking of the

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296 Shāfi`î in his book, namely: *Kitāb al-Umm*, op. cit., pp. 270-277.

best (ruling) which is the one commanded (by God to be followed) as He the Most High says: "So announce the good news to my servants those who listen to the word and follow the best (meaning) in it."[297] According to the jurists, *istiḥsān* is of two kinds: (The first kind) is the application (of *istiḥsān*) by interpretation through the most appropriate opinion in resemblance to (the ruling) whose application the Legislator has entrusted to our opinion, such as the issue of the gift mentioned in the word of God the Most High: "A gift of a reasonable amount is due from those who wish to do the right thing."[298] (God) has made that (gift) an obligation according to prosperity and adversity on condition that it is reasonable.[299] Therefore, we know that the intended (ruling) is what is known to be preferred by the most appropriate opinion. Also, God the exalted said: "If the father desires to complete the term but he shall bear the cost of their food and clothing on equitable terms."[300] It is unthinkable that any of the jurists will oppose this kind of *istiḥsān*.

(4) Another kind is the proof which happens to be in opposition to the apparent (ruling) of *qiyās*. Our imaginations[301] question this type of ruling before properly reflecting on it; but after deep consideration of the ruling in the case, and its similarities in the principles of jurisprudence, it appears that the evidence which opposes (the *qiyās*) surpasses it in strength. Therefore,

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297 Qur'ān 39:18

298 Qur'ān 2:236.

299 According to one's income.

300 Qur'ān 2:233. The maximum weaning period of a child is two years; but if by mutual consent the mother does not nurse the baby till that time, her privileges must not be curtailed. On the other hand, the child shall not be used as an excuse for driving a hard bargain on either side. In a matter of this kind, the general interest must be observed.

301 By a sudden surprise that how can a *sharī`ah* ruling be in opposition to *qiyās* which is a source of Islamic law.

application of the evidence is an obligation and they call it *istiḥsān* in order to differentiate between this kind of proof from the apparent (inference) which comes to imaginations spontaneously before reflection on the meaning which goes with the ruling from that apparent (inference). *Istiḥsān* is preferred due to the strength of its proof. It is similar to the expression used by the artisans to differentiate between the ways of knowing the intended (terminologies). The grammarians used to say this (word) is in the accusative case by interpretation, this one in the subjunctive mood by gerund this one in the accusative case by adverb of time and this one in the subjunctive mood by exclamation.[302] They did not establish these expressions except to distinguish among the particles of the subjunctive mood.[303] Professors of the science of poetic meters and versification used to say: this verse belongs to the long ocean (*al-baḥr al-tawīl*);[304] and this belongs to the nearby ocean (*al-baḥr al-mutaqārib*) and this belongs to the extensive ocean (*al-baḥr al-madīd*).[305] And that is exactly the use of the expressions *qiyās* and *istiḥsān* by our learned jurists in order to distinguish between the two contradicting proofs. One of them is particularized as *istiḥsān* because its application is considered preferrable and because it opposes the path of the apparent *qiyās*. This name is loaned due to the presence of the meaning of the noun "preference" therein. Just like *ṣalah* which is a name for prayer, and is used for worship which covers all aspects of the

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302 E.W. Lane, *Arabic/English Lexicon*. op. cit., vol. 2, p. 1956.

303 Such as An, lan, kay and idhan. These particles are equivalent to the English subordinate conjunction: [that]. When an imperfect verb follows any of the above Arabic particles, the verb is put in the subjunctive mood.

304 Name of a poetical meter. Hans Wehr, *A dictionary of Modern Written Arabic*, ed. by J.M. Cowan, 3rd edition (New-York: Spoken Language Services, 1976), p. 576.

305 Name of a poetical meter.

actions and statements of supplication by custom. The preference for the stronger evidence of two proofs cannot be considered as the following of a capricious notion and mere lustful desire. This has nothing to do with *istiḥsān*.

[5] Even Shāfi`î has used similar terms in this (connection), he used to say: "I like that". What is the diference between the expression of a person who says: "I prefer that" and another person who says: "I like it"? Of course, the use of *istiḥsān* is the more eloquent of the two expressions, and it more closely corresponds to *Sharī`ah* expressions in this regard.

[6] Then some of the later (jurists) among us think that application of *istiḥsān* is more appropriate; at the same time, they permit the use of *qiyās* in the place of *istiḥsān*. And they compare that (practice) with co-extensiveness,[306] and effectiveness.[307] Surely, the application of *al-mu'aththir* is more suitable even though the usage of *al-ṭarḍ* is allowed. He,[308] may God be pleased with him, said: "In my opinion, this is a delusion", because the (following) statement has been mentioned in the books (of the jurists) in many cases, i.e. "except that we put aside this *qiyās*" and what has been put aside it is not permissible to use. Sometimes he says: "except that I detest that

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306 *Ṭarḍ* (co-extensiveness) is defined as follows: When we find that a law is established on the basis of a certain quality in a single case, it is presupposed that the same quality will operate as an *`illah* in all the cases by the probability of opinion. The exponents of *ṭarḍ* believe that a co-extensive quality is characterized by the fact that when it exists the law must exist). Al- Shawkānî, *Irshād al-Fuḥūl* (Cairo: Idārat al-Ṭiba`ah al-Munîrîyah, 1347/1932), pp. 192-194.

307 *Mu'aththir* is a quality which is suitable for being the *`illah* of the rule, and this suitability is indicated by the text (*al-naṣṣ* or consensus and that the *`illah* shows the effectivness (*ta'thīr*) of the essence of the quality in ruling, e.g. prohibition is the ruling of wine due to intoxication which is the *`illah*.

308 Sarakhsî

(analogy)". And whatever is permissible to uphold as a *Sharī`ah* proof, detesting it is an act of disbelief. Therefore, we know that the correct (statement) should be that: *qiyās* is put aside as a source (of law) in the place where we apply *istiḥsān*. And thereby, it is clear that *istiḥsān* cannot be applied with the existence of a contradiction but with the consideration that the weak is dropped in favour of the stronger evidence.

[7] He[309] has mentioned in the book concerning the punishment of theft: If a group of thieves entered a house and collected the property and then put it on the back of one of them who carried it out while others followed him, according to *qiyās*, the amputation should be confined to the carrier in particular; but in *istiḥsān*, the gang should all suffer amputation. He also mentioned in the book of legal punishment that: If witnesses in a case of fornication disagreed over which of the two corners of a house the action took place, according to *qiyās*, there is no punishment on the accused; but by *istiḥsān*, the punishment must be applied. It is known (in Islamic law) that punishment is dropped by doubt and a slight contradiction implies doubt; how then can *istiḥsān* be applied in a doubtful case?

[8] Abū Ḥanîfah and Muḥammad (Shaybānî) may God be pleased with the two of them, also mentioned the same thing concerning validation of apostasy of a minor by *istiḥsān*. Whereas it is known that when a contradictory evidence exists, a predominant (ruling) which necessitates Islam is given even if it is weaker; such as when a child is born to a non-Muslim by a Muslim.[310] Then, how can the ruling of *istiḥsān* (which validates apostasy of a minor)

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309 The pronoun is refering to Abū Ḥanîfah

310 The ruling here is that the minor child should be following the religion of the mother who is entitled to the custody at that minor age of the child.

prevail (in the case)? We (therefore) know that *qiyās* (ruling) is put aside as a source in a case where *istiḥsān* is applied. We call the two[311] contradictory proofs due to the original term given to each of the two categories, and not because there is a contradiction between them in the same place (of ruling).

[9] The evidence which supports this meaning is mentioned by him[312] in the book of divorce: that if (a man) said to his wife: "If you have already menstruated you are divorced" and she replied: "I have menstruated"; then if the husband did not believe her, she will not be considered truthful in her statement according to *qiyās*. Because menstruation is the condition on which the divorce is apparently based upon; it is like her entering the house or her speaking to Zaid. However, she is divorced according to *istiḥsān*; because menstruation is something within her body. No other person knows the actuality of it more than herself and therefore, her statement about menstruation must be accepted in the same manner that love and hatred (are accepted as personal issues).

[10] He said: some *qiyās* may be included in this *istiḥsān*. He means by it that in the rest of the rulings which relate to menstruation, such as inviolable sexual relationship and the expiration of the waiting period (*al-ʿiddah*), we[313] accept her words. Recognition of this ruling along with the rest of the other rulings is a kind of *qiyās*. The first *qiyās* was dropped originally because of *istiḥsān's* strength of proof.[314] And that is because she was commanded to

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311 *Qiyās and istiḥsān.*

312 The pronoun refers to Abū Ḥanîfah

313 The pronoun refers to the Ḥanafîs. Waiting period is the three monthly courses which a divorced woman has to observed before getting mary to another man. For details on this, see (Qur'ān 2:228, 65:4, 33:49).

314 See the first case on paragraph 13.

confess as to what was in her womb and was prohibited from hiding (it). God the most High says: "Nor is it lawful for them (divorced women) to hide what God has created in their wombs".[315] And by necessity, the prohibition from hiding means she is trustworthy in the manifestation of it.[316] To that effect, Ubayy b. Ka`b may God be pleased with him said: "Part of trustworthiness is to believe a woman in what (she says) is in her womb." This is the reason why that *qiyās* (in paragraph 9) was dropped due to its contradiction of this strong evidence, which must be followed.

[11] The reality of the argument is that: Putting aside the *qiyās* is sometimes due to the text, consensus, or necessity. As regards its being put aside due to the text, it is pointed out by Abū Ḥanîfah, may God be pleased with him, in the case of a person who ate out of forgetfulnesss when he was fasting. "If not because of what (I heard) people saying, I would have decided that he should compensate (for the fasting)." He means by this the report from the Prophet of God peace be upon him; and that narration is a text which must be complied with after its confirmation. And to believe that every *qiyās* is invalid, is against the text. This is similar to what `Umar -may God be pleased with him- has expressed in the story of the fetus: "We almost acted by our opinion against that for which there was a binding report."

[12] Also, *qiyās* rejects *salam*[317] because the object of the contract is non-existent at the time of the contract. We put it aside due to the text of permission which is confirmed by the saying of the Prophet peace be upon him: "and he gave permission for *salam*." As for the putting aside of *qiyās* by consensus,

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315 Qur'ān 2:228.

316 Of what is inside her womb.

317 *Salam* is the contract for delivery with pre-payment.

an example is that of manufactured products whereby people interact with one another. *Qiyās'* does not allow it but we set aside the *qiyās* due to a consensus which people have become accustomed to since the life of the Prophet (peace be upon him) until this our present day. [And this],[318] there is a possibility of mistake and error in (the application) of *qiyās*; and through the text or consensus, the mistake in it will be known. Then, the putting aside (of *qiyās*) becomes an obligation while its application becomes impermissible in a case where the mistake is apparent.

[13] As for abandoning (of *qiyās*) by necessity, it is like the ruling which stipulates the cleanliness of water in the wells and in the basin of a river, after it has been polluted. And the approving of a dirty cloth as clean if it is washed in the washing vessels. *Qiyās* (ruling) does not approve it,[319] because whatever is (a source) of dirt, makes other things dirty by mixing with it. We abandoned (this ruling of *qiyās*) due to necessity of mankind in general, in favour of the above. And surely, hardship is prevented by the (Quranic) text.[320] At the time of necessity, the meaning of hardship becomes a reality. If *qiyās* were to be applied, it would mean the putting aside of the (Quranic) text.

[14] And also, the permission for the rental contract which is established against *qiyās*, is allowed because of the need of mankind; because a contract where the benefits have been realized cannot be repeated. Therefore, the actual thing to be benefited from, should be put in the place of the usufruct (during the agreement) so as to give a permissible ruling of the contract, due

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318 [And this], the editor pointed out that in Indian edition of the book, the words in the parenthesis is an additional phrase.

319 Its cleanliness.

320 "God does not wish to place you in difficulty, but to make you clean". Qur'ān 5:6.

to mankind's need for that (rental contract).

[15] Again, each of the two[321] is of two kinds in reality: one of the two categories of *qiyās* is the one whose effect is weak but obvious and apparent; the other kind is the one whose invalid (rule) is obvious, but the point of its soundness and effectiveness is hidden. And one of the two categories of *istiḥsān* is the one whose effect is strong even if it is hidden. The second (category) is the one whose effect is apparent but whose corrupt point is hidden in it. Normally, preference is given to the strength of effectivness and not to the appearance or the concealment. This is according to what we have explained that the *`illah* which necessitates the application of *sharī`ah* (ruling) is the one which is effective. The (*`illah*) whose effect is weak is dropped in comparison with the one which has a strong effect, irrespective of whether it is apparent or hidden. It is like the example of wordly life in comparison with the hereafter. The world is apparent but the hereafter is unseen; the preference is given to the hereafter to the extent that seeking it necessitates hard work. Whereas there is a reluctance for seeking the worldly life due to the strength of the effect of the hereafter in terms of its everlastingness, eternity and purity. And such is like the heart with the soul and the senses with the sight.

[16] An explanation of the *qiyās* whose recognition is dropped due to the strong effect of *istiḥsān* which is considered as the preferable *qiyās*, is as in the example of the leftovers of the wild bird. *Qiyās* in this case stipulates the impurity (of the leftovers) in consideration that the *`illah* which prevents the eating of the leftovers of the wild animal (also exists in that of the wild bird). But according to *istiḥsān*, (the leftovers) are not impure because making use

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321 *Qiyās* and *istiḥsān*.

of predatory animals.[322] is not prohibited. And from that, we know that the beast of prey by itself is not impure but that what is considered impure and therefore forbidden for human consumption is the leftovers of the predatory animal; because it drinks with its tongue which is wet due to its saliva, and the saliva comes from flesh.[323] However, this is not found in the wild bird because it takes and swallows water by its beak. And its beak is dry bone; and since the bone of the dead is not impure, how can the bone of the living be considered impure?

[17] He[324] then supported this with the *`illah* which was mentioned in the (case) of the cat; because the meaning of the general necessity[325] is realized in the leftovers of the wild bird. Because it flies around in the atmosphere and foods cannot be safeguarded from being reached by the prey in the desert. From this, it is clear that whoever advocates the idea that *istiḥsān* is *takhṣīṣ al-`illah* is mistaken; because what we have mentioned makes it clear that the meaning which necessitates the impurity of the leftovers of the wild beast is the wet impurity of the organ (tougue) with which it drinks (water), and that (organ) is non-existent in the wild birds. Then, the absence of the ruling due to the absence of the *`illah*, has nothing to do with *takhṣīṣ al-`illah*. By considering the illustration, one may think that he has seen that (*`illah* by illusion), but after reflection, the non-existence of the *`illah* becomes clear. Because the *`illah* is the necessity to be safeguarded from the wet impurity which is possible to safeguard against without hardship. This has been made known by

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322 For hunting.

323 The tongue comes in contact with the food thus causing the impurity of the food.

324 Abū Ḥanīfah

325 (*al-balwā*)

specification of the text on this causation in the case of the cat. Therefore, in every single case whereby some of the attributes of the *`illah* are non-existing, the absence of the ruling is due to the absence of the *`illah*; and it cannot be a particularization.

[18] Explanation on *istiḥsān* whose effect (of its *`illah*) is apparent but whose corruption is latent, (in comparison) with *qiyās* whose effect is hidden, but very strong in itself, to the extent that its ruling of *qiyās* is taken while that of *istiḥsān* is dropped, according to what he[326] says, in the book of prayer: When (a muslim is praying) and reads a chapter which ends with a prostration (verse), and then bows or bends down (instead of prostration), according to *qiyās*, this is sufficient to reward him; but according to *istiḥsān*, (bending down) does not suffice to reward him for prostration. However, with *qiyās* we uphold (the former). The underlying point of *istiḥsān* is that bending is not prostration[327] Don't you see, for instance, that bending in the prayer does not substitute for prostration in prayer, nor does it substitute for the prostration of recitation[328] in a more profound manner; because the close (relationship) between the bend in the prayer and prostration is more obvious in the sense that each one of them necessitates the prohibition (of engaging in other activities during their performance). If he recites (a verse of prostration) outside the prayer and then bows down for it, he is not rewarded for the prostration; therefore, in a more emphatic manner, he will not be rewarded during the prayer if he bows instead of prostrating. Because bowing here necessitates

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326 Abū Ḥanîfah

327 The putting of the forehead on the groung when praying.

328 There are some verses of the Qur'ān which require prostration by reciting them. Each of the verses is called *ayat al-sajdah* or (verse of prostration).

facing a certain direction but in the latter, there is no necessary obligation.[329] Concerning *qiyās*, he said: bowing and prostrating are similar to one another, for God says: "He fell down, bowing (in prostration)".[330] But this by the apparent meaning, is a pure metaphorical (use). The underlying point of *istiḥsān* in terms of the manifestation is the recognition of similarity as valid; but the strength of the effective (cause) of the *qiyās* is hidden and the corruption of *istiḥsān* is also latent.

[19] Explanation of the above: The prostration during the recitation[331] is not by itself the actual objective; and that is why a single prostration is not considered as an intended worship on its own, so as not to necessitate the solemn pledge, rather the objective is the showing of humility and distinction between those who refused to prostrate out of arrogance, as God has informed (us) concerning them in the places of *sajdah* (verses).[332] We say: The meaning of showing respect often happens by bowing but its condition is that it must be through the means of worship. And this is present in prayer; because in bowing down there is worship such as in the prostration. (Such humility) cannot be found outside prayer. Due to the strength of the effect of this point of view, we uphold *qiyās* even if the cause is latent. The consideration of the other side in its opposition is dropped.[333]

[20] He mentioned the same thing with regards to business transactions. If there is a dispute between the buyer and the seller in terms of (accurate)

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329 Of facing a certain direction.

330 Qur'ān 38:24.

331 Of the verse of *sajdah*.

332 Qur'ān 7:206; 84:21.

333 Here, the recognition of *istiḥsān* is dropped in this case.

measurement of the object of sale, the two of them are to swear according to *qiyās*. And with *qiyās*, we uphold. According to *istiḥsān*, the words of the buyer prevail. The stressing point of *istiḥsān* is that the object has been sold and therefore the argument over its accurateness is not based on the original dispute. But the dispute is over its attributes in terms of length and breadth; and that does not require swearing like the dispute over the measurement of the cloth sold in its essence.

[21] The underlying point of *qiyās* is that: the two of them (the seller and the buyer) are disputing the right of delivery and that requires swearing on both sides. The effect of *qiyās* is hidden but it is powerful in the sense that the contract of delivery is based on the attributes mentioned[334] without pointing to the essence of the sale. The description was that the measurement was five by seven, which was not the same as the description (of the other party) who claimed it to be four by six. From this, it is clear that the dispute here is over who has the original right (of delivery) by the contract; we therefore, uphold the *qiyās* for this.

[22] He[335] said in (connection with) the deposit given as a security: If each of two men were to claim an object to be a deposit for security from a man due to the debt owed by him and they both have a proof, then according to *istiḥsān*, the case would be decided that the object is given as a security with the two of them, as if he were to take an object as security from two men. And it is a *qiyās* of trading in that (respect). But, according to *qiyās*, the two proofs are void; because it is impractical to settle the deposit of security to each one of them in its totality and because there is a shortage of time

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334 During the contract agreement.

335 The author is probably refering back to Abū Ḥanîfah in this paragraph.

for that (transaction). As for the half of it, joint ownership prohibits validity of such deposit of security; we therefore, uphold the *qiyās* due to the strength of its hidden effect (and that is) each one of them here, is confirming the right exclusively to himself by the same designation. Each one of them is not pleased with the competition of the other (party) in the property at hand from which they are deriving benefit through the contract of the security. Unlike the security from two men, (with one person) there is only one contract, and it is therefore possible to assert the necessity of the contract here together with the place, but the other is impossible here. It is rare to find this type[336] in the books and only few examples are available. Examples of the previous kind[337] are too numerous to count in the books (of *fiqh*).

[23] Then, a distinction is drawn[338] between *istiḥsān* which is supported by the text or by consensus and (*istiḥsān*) which is applied through a preferable hidden *qiyās*. Verily, the ruling of this last category can be extended (to other similar cases), whereas, the other category cannot be extended. Based on what we have explained, that the ruling of the *qiyās* which conforms with *sharī`ah* is to be transitive, this concealed (*qiyās*) even though it is particularly called *istiḥsān* due to meaning, it is not outside the scope of a *qiyās* which is according to *sharī`ah*. And therefore, its ruling is transitive. The first (category) calls for the putting aside of *qiyās* due to the text, and (the ruling) therefore, cannot accomodate extension as we have explained.

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336 The editor explains that on the margin of `Uthman's edition, this type is the upholding to *qiyās* and abandoning *of* istiḥsān.

337 The editor also explains that on the margin of `Uthman's edition, this kind is the upholding to *istiḥsān* and abandoning *qiyās*.

338 The editor observes that in `Uthman's edition, the sentence reads as: "Then the difference ..."

[24] Its illustration is (an example) whereby the seller and the buyer disagree on the price when the object is not yet received. According to *qiyās*, the final word is that of the buyer because the seller is claiming an excess in his right from the buyer on the price, whereas, the buyer is denying (the excess). According to *sharī`ah*, swearing by oath should come from the side of the person who is denying.[339] And the buyer is not claiming anything from the seller apparently, since the object of sale is in his possession by the contract. But according to *istiḥsān*, the two will swear; because the buyer is claiming from the seller the necessity of delivering the object to him when the lesser of the two prices is presented, and the seller is denying that. And as the right of the property of sale belongs to the seller, so too does the right to deliver the sale to the buyer when the price is given to him. Because it is a concealed *qiyās*, this *istiḥsān*'s ruling is extended to rent and marriage according to the saying of Abū Ḥanīfah and Muhammad (Shaybānī), may God be pleased with both of them. It is also extended to a case whereby there is a dispute among the inheritors after the death of the (two buying and selling parties). It is also extended to an article which later perishes, and where the seller has left a substitute, such as when an already sold slave is killed before the possesion. If the dispute over the price between the two of them is expressed after the possesion of the object, the ruling of swearing by the two of them is confirmed by the text in opposition to the *qiyās*; and this (ruling) does not entertain extension. To the extent that after the commodity has perished, swearing by both is not applicable irrespective of whether he left a substitute or not.

[25] And in rent, after the settlement over the object of the contract, there

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339 A principle of *sharī`ah* on this issue says: "The proof must be produced by the plaintiff (who claims something as his own) and the oath from the defendant (who denies the claim)".

is no swearing on either side. If the dispute is among inheritors, after the possesion of the commodity, there is no swearing. It may be possible that the *qiyās* which is in opposition to *istiḥsān*, whose originality we have explained to be a preferable one, has been confirmed by the tradition. Such as what he[340] said concerning prayer: "When one sleeps during his prayer and dreams by discharging semen", according to *qiyās*, he should take a shower and continue as if he has been polluted by the impurity. That is considered preferable by tradition. But by *istiḥsān*, he cannot continue.[341]

[26] And this kind which has been held,[342] is the correct *istiḥsān* by all means. Because in reality, it is a return to the original *qiyās* by an explanation which makes it clear that this is not in the sense of a departure from the original *qiyās* which is supported with narration from all aspects. If a ruling is confirmed according to *qiyās*, it is by means of extension; and abandoning the ruling of *qiyās* by tradition does not accomodate extension. And the explanation is that minor purification[343] does not require nudity nor many actions to perform it. And the observance of minor purification has become a general necessity[344] before entering into the prayer, unlike a major purification.[345] If there is nothing in its meaning[346] from all (legal) points, then, the affirmation

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340 Abū Ḥanîfah

341 This means that he cannot continue prayer from where he stopped after the daylight dreaming. He should start the prayer all over from the beginning.

342 That is the *istiḥsān* which is considered preferable by tradition.

343 Such as urinating, passing gas e.t.c.

344 To be cleaned from it by ablution.

345 Which necessitates taking a bath.

346 This means that an *istiḥsān* which is not supported by legal sources such as the Qur'ān, *Sunna*, and *ijmā'*.

of the ruling therein is through the means of extension and not by the text itself and that has no meaning.

[27] From all what we have mentioned, it is now clear that upholding *istiḥsān* has nothing to do with particularization of cause; but that by choosing this expression of preference, there is (a meaning of) following the Book (Qur'ān)[347] and the tradition (of Prophet Muhammad p.b.u.h) and the preceeding jurists. The Prophet of God peace be upon him has said: "Whatever the Muslims see as good, it is also good in the sight of God." And many times, Ibn Mas`ūd used to adopt this expression. Mālik b. Anas in his book (*al-Muwaṭṭa'*), mentioned the word *istiḥsān* in many places. Shāfi`ī may God be pleased with him said: I prefer (by using the phrase *astaḥsin*) giving thirty *dirham* as a gift.[348]

[28] By this, we know that there is no contestation on this expression (of *istiḥsān*); and in terms of the meaning, it is a statement which indicates that: (When) the ruling is non-existent, the *`illah* is non-existent and no one disputes this. When we permit the usage of a bathroom by paying certain renumeration on the basis of *istiḥsān*, we put aside the invalid ruling which *qiyās* imposes; because of the non-existence of an invalid *`illah*. And the invalid contract which is due to ignorance of the object of the contract, is not so because of the ignorance itself, but because the ignorance leads to dispute which prevents acceptance and submission.[349] And this dispute is non-existent

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347 The editor of this book says that on the margin of `Uthman's edition, the following Quranic verse is written: "So announce the good news to my servants those who listen to the word and follow the best (meaning) in it". Qur'ān 39:18.

348 This is a gift given to a divorced woman before the consumption of the marriage. For details, see paragraphs 4-6 above and Quranic verse 2:236.

here (in the case of bathroom) and in its similar (cases). Therefore, the non-existence of the ruling[350] is only because of the non-existence of the cause[351] and not by the means of particularization of the cause.

Section on the Explanation of the Invalid Statement that: Particularization is Permissible in the Causes (Behind the Rulings) of Sharī`ah

[29] He, Sarakhsī, peace be upon him said: the advocates of the principle of co-extensiveness[352] thought that those who are holding to effective causes and those who are making the effectiveness a correcting factor for the validity of *sharī`ah* causes, have no other choice but to uphold the particularization of *sharī`ah* causes. This is a great error as we shall (soon) explain. And some of our followers thought that particularization of *sharī`ah* causes is permissible and that it is not against the path of the predecessors nor against the Sunni Schools of law. That is a mistake of its advocate; because the view of those who have the favour of our predecessors is that particularization of *sharī`ah* causes is impermissible. And whoever permits that, is acting against the Sunnis, and he is inclining towards the Mu`tazilîs in their principles.

[30] The illustration of particularization is that when a case is presented to the *mu`allil*,[353] if the ruling therein is the opposite of what he intends to establish by his effective cause, he says: What makes my effective cause obligatory

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349 To the contract agreed upon.

350 Which prevents the usage of bathroom by paying certain fare.

351 Namely: dispute over the object of contract.

352 A co-extensive quality is characterized by the fact that when it exists the law must exist.

353 *al-mu`allil* is the person who looks to the effective cause of a case to determine its ruling on the basis of another case which has a similar effective cause.

is this, except that an impediment appears and thereby subjects (the case) to be specified due to that impediment, like a general (statement of) which a part of it is specified due to the necessitating evidence for the particularization. Then the one who permits that (procedure) says: particularization is not a contradiction, literally, legally, by *fiqh*, and by *ijmā`*.

[31] Literally, contradiction means refutation of an act which has been previously established like demolition of a building. And particularization is an explanation that what has been excluded is not part of has been stated. Then how can it be a contradiction? Don't you see that the opposition of a demolition is construction and formation? and (that) the opposite of specification is generalization? From the traditional (*sunna*) point of view, particularization is permissible in the texts of *sharī`ah* namely: from the Book and the tradition; contradiction is not permissible in the two of them by any means. According to the consensus, the legal *qiyās* is sometimes abandoned in some cases due to the text or consensus or necessity. That will be a particularization, not a contradiction. And that is why that (abandoned) *qiyās* is necessarily applicable in a different place.

[32] An inconsistent *qiyās* is invalid and it is not permissible to apply it in any case. According to rational (proof), whenever the *mu`allil* mentioned an appropriate attribute, and claimed that the ruling is related to that attribute, and when a case with that attribute is presented to him, the ruling will be opposite to it. Then (he proclaims) that it is due to the corruption in the origin of his *`illah*; or that it is because of an impediment which prevents the existence of the ruling. Don't you see that the reason which makes *zakah* (ritual tax) obligatory is the possession of an increasing minimum amount of property liable to the payment of *zakah*, and then the same payment of *zakah* is made

prohibited after the existence of *niṣāb*[354] due to an impediment. And that is the non-existence of increment on the capital after a year; and that is not evidence that the reason[355] is invalid. Also, sales with stipulated right of cancellation prevents the confirmation of ownership (of the object) due to an impediment which is the stipulated right, and not because of the corruption of the original reason which is the selling.

[33] But if he[356] says: This case[357] has been particularized from my (determined) *`illah*, due to an impediment, then he has proclaimed something which is probably doubtful and he must be asked to defend it by a proof. If he points out an appropriate impediment, he has established what he proclaimed with the proof and it will be accepted from him, otherwise, his evidence is dropped. Because the probability cannot be a proof, and it is with it that the claimant distinguished particularization in the text. He will not be asked to produce a proof for what he claims to have become particularized by an evidence from the general (statement) of the Qur'ān and *sunna*; because there is no probability of corruption in what he has indicated. The standpoint of particularization is clear therein by the consensus. And here in his *`illah*, there is a possibility of corruption. Therefore, on whatever there is no proof of specification and yet he claims it to be specified by an *`illah*, it will not be accepted from him as being free from corruption and that is why it is not accepted from him, in as much that the impediment is unclear.

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354 The minimum amount required for the payment of *zakah*.

355 Of the payment of *zakah*)

356 (*al-mu`allil*)

357 The first case mentioned above in the rational proof. See paragraph 40.

[34] Then the advocate divided impediment[358] into five categories:

[First], what prevents the originality of the *`illah*.

[Second], what prevents the accomplishment of the *`illah*.

[Third], what prevents the initiation of the ruling.

[Fourth], what prevents the ruling from being accomplished.

[Fifth], what prevents the necessity of the ruling.

That will be clear rationally and legally. From the rational point of view, all this is explained in the (illustration of) throwing (an arrow).

[First], Surely, the termination of the desire or,

[Second], the fracture of the notch of the arrow prevents the origin of the action which is the releasing after the complete intention of the one who is shooting it; or the striking of the arrow on a wall or a tree which wards off (the arrow) and thereby prevents the accomplishment of the objective.

[Third], the using of the object itself as a shield, prevents the initial ruling. The purpose of the shooting after the complete *`illah*, is to reach the target and that is the wounding and the killing.

[Fourth], the treatment of the wound after what has struck (the object), until the wound becomes healed and clear, prevents the full (meaning) of the ruling.[359]

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358 An impediment is what prevents a ruling to take effect with the existence of the *`illah*.

359 Which is the killing through the strike.

[Fifth], and when he becomes tied down to the bed due to the strike, then (the sickness) prolongs until he becomes secured from death, thereby preventing the necessity of the ruling. Just like someone affected by hemiparesis,[360] when it is prolonged, and (the affected person) is saved from being killed, he is like an healthy person in all his activities.

[35] On the legal points of view: [First], the attribution of sale to a free-man prohibits the original *`illah* of the contract.[361]

[Second], its attribution to the property of another person prohibits the complete *`illah* of the contract from the right of the owner until the point of the obstruction therein is known by his death.

[Third], the stipulation of right of cancellation by the owner on himself in the sale, prohibits initiation of the ruling.

[Fourth], the (seller's) affirmation of the right of seeing (the future defect of the object of sale) to the buyer, prohibits the accomplishment of the ruling (of ownership); in the sense that 'striking hand upon hand' (*ṣafqah*) will not be completed.[362]

[Fifth], the affirmation of the stipulation right of later rescission prevents the necessity of the ruling until it is possible to return it after the complete 'hand

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360 Hemiparesis is a slight paralysis disease which affects only one side of the body.

361 Because the selling of a free-person is null and void.

362 "*Taslīm* and *qabḍ* do not necessarily effect transfer of ownership in all cirmustances, e.g. not in the case of a sale with the right of rescission; the reasoning that this is because the full intention of transfering ownership is lacking is, however, absent from Islamic law." J. Schacht, *An Introduction to Islamic Law*. op. cit., p. 138.

upon hand' through the taking possession (*al-qabḍ*) [of the object of sale by the seller].

[36] The proof of our learned jurists concerning the refutation of particularization of the cause, is the evidence from the Qur'ān, the rational and the undisputable explanation. As for the Qur'ān, (the proof) is the statement of God the Most High: "Say: has He forbidden the two males, or the two females or (the young) which the wombs of the females enclose? Tell me with knowledge if ye are truthful".[363] In the (Quranic) verse, there is a demand from the unbelievers to give an explanation on the reason of what they claim to be prohibited; in a way that they have no backing (point) and thereby become defeated by it. This means that whenever they give an explanation that one of these (above) meanings is the reason for the prohibition, they became confounded[364] by their confirmation of allowing the same meaning in another place with the presence of that similar reason therein. If particularization of causes were to be allowed in *sharī`ah* rulings, they (the opponents) would not have been confounded Then one will not be unable to say that the ruling of prohibition is annulled in that place due to an impediment. They were wise (people) who believe in the permissibility in another place due to an obscurity or an imaginary meaning from them. And in His wording, (God) the Most High: "Tell me with knowledge"[365] (there) is a clear demonstration that particularization of causes in the *sharī`ah* (ruling) has nothing to do with the knowledge and therefore, (particularization) is ignorance.

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363 Qur'ān 6:143

364 The editor says that in the `Uthman's edition, the phrase reads as: "Their evidence becomes inconsistence".

365 6:143

[37] As to the rational (proof), the effective causes in the (ruling of) *sharī`ah* are supposed to be transitivity as we have affirmed (earlier). And without the transitiveness, they will not be valid in the first place; because they will be devoid from discharging their duty. If it is possible for an impediment to arise (against) the extension of the ruling in some places with this *`illah*, then it is possible for it to arise in the rulings of all (similar) cases. This leads to the statement that: it is a valid *`illah* whose ruling cannot be extended to (similar) secondary cases. And we have already mentioned the inconsistency of this statement with the evidence. And if the extension of the ruling (by the *`illah*) to a secondary (case) is a proof of its validity, then the absence of extension of the ruling to another secondary (case) which has the same *`illah* therein, is a proof of its inconsistency. With equal proof of valid and invalid (*`illah*), the evidence of making the *sharī`ah* ruling obligatory is not certain. He repeats that: the impediment which he claims in the specified case[366] must be confirmed to be equal with the kind of (impediment) which is established by the *`illah* that makes the ruling obligatory; because if it is less equal than it, then it is not suitable to be an expellant nor an impediment to its ruling. If it is equal to the impediment, that impediment can be justified by an *`illah* which necessitates the extension of a negative ruling to the rest of the secondary (cases). This is like the original (case) whose the *mu`allil* has pointed to its attribute as a justification for the ruling therein. Then, contradiction becomes a reality between the two (cases) from this point of view. Is there any inconsistency clearer than this contradiction under the umbrella of equal attribute?

[38] And we have explained previously that the special evidence is similar to abrogation in its form and similar to exceptional (case) in its ruling. Surely,

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366 The editor notes that in the `Uthman's edition, it is written as: (in the specific place).

it is a separate (case) by itself like an abrogating evidence; but it will not be so until it implies a comparative meaning such as exception. One of these two[367] cannot be realized through effective causes (*`ilal*). Abrogation of the *`illah* by the *`illah* is not permissible but the opponent permits the impediment to be an *`illah* such as the *`illah* which he claims to be its particularization. How can the abrogation be permitted when the *`illah* therein is probably invalid due to its extraction by reasoning? Whenever something which prevents its application appears at the outset, then the corruption (of its ruling) becomes apparent. Unlike the text, it entertains no probable corruption, and abrogation will be an explanation as long as the text is applied in conjunction with the abrogation.

[39] This kind has another explanation; with the (application of) special evidence, it indicates that it can be used in some cases and not in others. And that it is permissible to apply special evidence where it is allowed to uphold to it as a valid abrogation; to the extend that it is said that specific evidence is applicable with abrogation sometimes and not atimes. And exceptionality is used in the statements to indicate that an intended speech reflects an exception beyond the exempted. And this (procedure) will not be possible in the special meanings.

[40] From what we have mentioned, it is clear that upholding the particularization is appropriate in the texts in the sense that with the specific evidence, the doubt about corruption in the text will be impossible in every aspect. But the term "text" does not cover the area of specific evidence whereby the general term is valid and necessitates its absolute application before the appearance of the specified evidence. Those who permit

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367 Abrogation and exceptional cases.

particularization of the cause will have no option but to accept that all the jurists are correct.[368] And the infallibility of interpretation from commiting mistake and error, would be like the infalibility of the text in that (comparison). And this is a proclamation that every jurist (*mujtahid*) is correct with certainty and that interpretation necessitates knowledege with certainty. In that (statement) there is a doctrine of obligation (on God) to do what is the best (for mankind) and also, in another aspect of it, there is a doctrine which upholds an intermediate position and (the docrine) which upholds an everlasting punishment of Hell fire on those who committed great sins without repentance before their death.

[41] This is the meaning of our statement: "Surely, upholding the permissibility of particularization of the cause is an inclination to the principles of the Mu`tazilis in many aspects". But we[369] believe that the non-existence of the ruling is not possible except when there are insufficient or excessive attributes (in an intended secondary case), and that is what they call a specifying impediment. And with this excess and insufficiency, the *`illah* changes inevitably; thereby, what used to be the *`illah* of the ruling becomes non-available legally. The non-existence of the ruling when the *`illah* is absent has nothing to do with particularization of the cause.

[42] Explanation of this is that: What makes *zakah* (ritual tax) obligatory, legally, is the possession of an increasing minimum amount required after a year. This is known from the statement of the Prophet peace be upon him: "There is NO *zakah* on a property until a year has passed over it."[370] Negation

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368 In all of their legal interpretations.

369 The Ḥanafis.

370 Sayyid Sābiq, *Fiqh al-Sunna* 4 vol. (Lebanon: Dār al-Fikr, 1981), vol. 1,

of the obligation (of *zakah*) is the meaning intended.[371] Legal values do not necessitate ruling by themselves, but it is the law-giver who makes them obligatory, as we have explained that Allah the Most High is the One Who obligates. And the attribution (of ruling) to the *`illah* is to explain that the law-giver makes them obligatory for our convenience.[372] If with this, the attribute is made obligatory legally, we therefore, know that when the absence of the attribute is felt, the absence of the ruling is felt; because of the non-existence of the necessitating *`illah*.

[43] The permisibility of discharging the duty[373] is not incumbent on us because the *`illah* which necessitates it is not the *`illah* which permits its observation. We have confirmed this earlier, that during the first part of the time , it is permissible to observe prayer by obligation even if (the time) itself is not an obligating factor, it is an effective attribute. The increment,[374] which is the objective (condition), only happens after the period (of a year). Don't you see that the obligation is repeated by the repetition of the year so as to renew the meaning of the increment with the passing of every year? And so also, in the sale which accommodates the stipulation (right of cancellation), what necessitates ownership legally is the absolute sale (by offer and acceptance); but with the (above) stipulation, (the sale) cannot be absolute. But by the additional (condition), the sale is subjected to the ruling like (any other) conditional sale. And we have explained that a sale with condition is not like an absolute one.

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p. 287. In Paragraph 40 above, there are some more explanations on this issue.

371 In the *ḥadīth* until the requirement is met.

372 In terms of how to extract the rulings.

373 The permission that prayer may be delayed by necessity.

374 After the possession of the minimum amount required for *zakah*.

The attribute of the absoluteness, also has its own effect. Surely, what necessitates ownership by the (Quranic) text is the trading with satisfaction and contentment,[375] and the complete satisfaction (occurs) when there is an absolute offer without stipulation of right (of cancellation). [From this], it appears that the *`illah* disappears by additional attribute or inadequate attribute. And this is the reality which must be considered. They call this: the changing meaning, "specifying impediment". Thereby saying: The non-existence of the ruling with the remaining of the *`illah* by the existance of an impediment is particularization. Like the general text which is connected with a specific (text), the text remains applicable to what is left after the specification.

[44] And we say: The *`illah* disappears when the changing (factor) appears and therefore condemns the ruling to disappear, due to the absence of the *`illah*. This (statement) is concerning the valid *`ilal*. Unlike the texts, the specific text does not make the general text disappear. In accordance to this method, (we understand) why our learned jurists favored *qiyās* in their books. *Istiḥsān* can be based on the text, and with the presence of the text the *`illah* extracted by reasoning disappears. This is because there is no original recognition with the *`illah* in the place (where) the text exists and there is no inconsistence in the textual ruling.

[45] Also, (the same ruling applies) when *istiḥsān* is by consensus; because consensus is like the text from the Qur'ān, or the tradition (of the Prophet) in the sense that it necessitates knowledge. Also, what is by necessity, (implies knowledge) because in the place of necessity there is a consensus or textual support of it. And (*istiḥsān*) will not be recognized with the *`illah* where the text exists. The non-existence of the ruling in these places is

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375 From the both parties i.e. the seller and the buyer.

because of the absence of the *`illah*. Also, (the same ruling applies) when *istiḥsān* is approved by a preferred *qiyās* whose effective strength is apparent. Based on what we have previously explained, the weak (proof) legally disappears before a strong one.

[46] Explanation of what we have mentioned can be found in the case of the person who is sleeping. If water is poured in his throat while sleeping, his fasting is not void according to Zufar's opinion; because he has been excused. [He] is like the (person) who forgets (that he was fasting) or even greater (in comparison) than him. According to our opinion, his fasting is null and void because of the missing pillar of the fasting. And worship cannot be offered without its pillar; therefore, this (ruling) is enforced on the one who forgets. The advocate of particularization of the cause says: The non-existence of the ruling is due to the presence of an impediment which is the tradition (from the Prophet) and therefore, (the forgetfulness by drinking is) particularized from this *`illah* (which is general) and as such, the *`illah* remains (effective). And we say: The non-existence of the ruling in the (case of the) person who forgets, is because of the non-existence of the *`illah* legally. Nobody among the servants (of God) has a hand in the making of forgetfulness; and it has been asserted by the (traditional) text that God the Most High is the One Who fed him and quenched (his thirst for) him. Therefore, his action of eating has been overlooked without recognition of it. The missing of the pillar (of fasting) can only be realized through the action of eating (intentionally) but when this action is non-existent legally, then the pillar of fasting is still standing legally. The broken (ruling of fasting) does not occur here because of the absence of the *`illah* which necessitates the broken (rule). Again, the person who is sleeping is not (included) in this meaning, because the action which causes the missing pillar of fasting is attributed here to the servants (mankind).

Therefore, it remains (the action) considered but without the pillar of fasting. [This view] is opposite to (the ruling) that would have been given if (the action) were to be attributed to the person who has the right.[376]

[47] We also say that: What is usurped becomes the property of the usurper when the compensation has been confirmed (to be due) from him; because with this reason the property is determined to be compensated in value which is a legal ruling. The owner will then state the equivalent price, and the (usurper of a servant) will be compelled to separate (free) the servant whose freedom is attached to the death of his master; in the sense that the property[377] will be determined by its equivalence for whosoever's slave was abducted. Therefore, the property concerning the slave will not be confirmed to the usurper. The advocate of particularization of the cause says: Confirmation of the ruling in the slave is nullified due to an impediment (even) with the presence of the *`illah*. The reason being that he is not subject to be transferred from one master to another.

[48] We say: The *`illah* which necessitates ownership in the case of a slave (*al-mudabbar*)[378] is non-existent and therefore, the ruling is absent because of the absence of the *`illah*. This is (valid) because the *`illah* determines the ownership by a price which is a substitute for the object (of sale) but the price of the slave is not a substitute for (the slave) itself. Because the condition which makes the price a substitute for the object is that the object may be owned; and this (ownership) is non-existent in the slave (of *al-mudabbar*). Because

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376 The person who has the full responsibility of the consequence of his action e.g. the one who breaks his fasting willingly and intentionally.

377 The slave's price.

378 A slave whose freedom is attached to the death of his master.

al-mudabbar has acquired a manumission on one aspect[379] and the freedom at the place[380] which prevents the necessity of the object's price due to usurpation. But compensation is necessary in consideration of the punishment inflicted upon the usurper which led to his losing of his hand; because of the freedom on one aspect (which the *mudabbar* will later enjoy), the hand (amputated) and the property (the slave) remain as the right of the master. If that is non-existent, it proves the affirmation of emancipation at the time (of usurpation) by all means. From that, we know that the ruling is non-existent only because the *`illah* is absent due to the presence of what changes it.

[49] And also, when we say: That by fornication the prohibition of marriage relationship is confirmed, (we mean that) because initially the confirmation of the prohibition is considered in the child who is being created from the two fluids of the couple. Thereby, her mothers (including grandmothers) and her daughters (including daughters of her daughters) have all became like his mothers and daughters respectively through the (product of) the child in accordance to the man's right. [Similarly] his sons and fathers according to her right, are like her fathers and her sons. Then sexual intercourse in the place of production (womb) is a reason for the existence of the child, and therefore, he substitutes him. From this, it necessitates that the prohibition should be extended to the sisters, paternal aunts and maternal aunts from both sides. Whoever subscribes to particularization of the cause says: The confirmation of the ruling with the existence of the *`illah* is prohibited (from taking place) in these (above) cases due to the text or the consensus. We say: The non-existence of the ruling is due to the absence of the *`illah*; because in the

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379 After the death of his master.

380 Probably Sarakhsî meant Time instead of Place.

text which necessitates the prohibition of marriage relationship, the mothers, daughters, fathers and sons are mentioned specifically. Therefore, the extension of the prohibition to the sisters, paternal aunts and maternal aunts will be a changing (of the textual ruling); and affirmation of another prohibition. The intention (of the law therein) is not the extended (prohibition); but that the text mentioned (was extended by) valuation. And it is not permissible to exchange the text mentioned with causation. Therefore, the non-existence of the ruling in these (above) places is due to the non-existence of the *`illah* and not because of an impediment along with the *`illah*. Again, it necessitates that the (woman) who has sexual intercourse will not be made forbidden to the man whom she had the affair with due to the child (involved) and that the relationship between the two of them is more needed.[381] The outcome according to that (view) is that the ruling is non-existent in that (case) due to the non-existence of the *`illah* in consideration of the text mentioned therein as we have established.

[50] This is an important source and a great jurisprudential (asset). Whoever frees himself from obstinacy by reflecting with fairness, all that was not mentioned in this (section) will become clear to him from the similar (cases) which we have stated to him previously. One of the means of grasping this science of jurisprudence is through (effecient) knowledge of the evidence of the specific (cases). If one of two textual proofs is general and the other is specific, the general can neither be nullified by the specific in reality, nor in the essence of the legal ruling it conveys. Neither of the two texts can be considered invalid; by this we know that the special (case) is specified in a (certain) place which has been previously covered by the general ruling and that

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[381] Than the illicit sexual relationship.

the general (ruling) remains effective on the other aspects beyond that (specified area). It maybe possible to see in this (case), a kind of ambiguity in terms of being similar to a metaphorical (ruling) in what is actually a general ruling.

[51] As for the *`illah*, even if it is effective, there is a possibility of error and mistake therein, for it tolerates disappearance of legal (implications). When something that changes the *`illah* appears, we make it non-existent in terms of its ruling in that place. Then, the absence of the ruling is due to the absence of the *`illah*; and there is nothing which signifies the meaning of contradiction and it has nothing to do with particularization; God knows best.

CHAPTER SEVEN

IBN TAYMIYAH'S BRIEF BIOGRAPHY AND TRANSLATION

This chapter offers a brief biography of Ibn Taymîyah, his views on *istiḥ-sān*, and the translation of his work on the subject.

Aḥmad Ibn Taymîyah was born in Ḥarrān, Northern Syria on the 10th of Rabîʿ al-Awwal 661 A.H./13th of January 1263 A.D.[382] He lived during the period of the first Mamlūk dynasty 648-784/1250- 1382 and witnessed the chaos which happened in Northern Syria due to the Tartar-Mongolian invasion. He participated in the battle which brought back Mamlūk rule in Syria.[383]

Ibn Taymîyah was one of the followers of Aḥmad ibn Ḥanbal the leader of the Ḥanbalî School of law was inclined to depend, in the issues of religion, on the Qur'ān, on the sayings and actions of the Prophet and on the practices of the first generation of Muslims. The school, at the outset, was not in favour of opinion nor did it pay any attention to its use. Ibn Taymîyah saw this as a deficiency and therefore studied philosophy and logic. In addition, he wanted to confront the philosophers of that era who were numerous and able to influence their audience.[384] Being an able scholar, who was blessed with a sharp memory, he became competent in this field. At an early age, he memorised the Qur'ān and was trained by his father and other renowned scholars in Islamic studies. At the age of twenty one, he succeded his father as the chief

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382 Muḥammad Abū Zahrah, *Ibn Taymîyah: Ḥayātuhu wa ʿAṣruhu Arāuhu wa Fiqhuhu* (Cairo: al-Fikr al-ʿArabî, 1958), p. 17.

383 Omar A. Farrukh, *Ibn Taymîyah on Public and Private Law in Islam*, translated from Arabic (Beirut: Khayat Book and Publishing Company, 1966), p. 3.

384 Abū Zahrah, *Ibn Taymîyah*, op. cit., pp. 17 and 19.

Imam of the Central mosque in Damascus. Ibn Taymîyah tried to harmonize reason and revelation, for he strongly believed that "'authority' and 'reason' are the only avenues of knowledge although 'traditional authority' can never be divorced from 'reason'. But the fact that something is a *sharî`ah*-value cannot be validly opposed to something being rational.."[385] Ibn Taymîyah wrote many books on *sharî`ah*, philosophy, logic and dialectical responses to the arguments of the logicians. Some of his books are: *Al-Radd `alā al-Mantiqiyyīn*, *Naqd al-Mantiq*, *Minhāj al-Sunna al-Nabawīyah fī naqd kalām al-Shī`ah wa al-Qadariyah*, *Muntaqā min Minhāj al-I`tidāl fī naqd kalām ahl al-rafd wa al-I`tizāl*, as well as his autograph manuscript on *istiḥsān*. Ibn Taymîyah successfully argued with the Sūfîs, the Ash`arîs, the Ẓāhirîs and the Maturidîs. And these arguments led to his persecution on many occasions; at least four major trials (*miḥnāt*) are reported as having been held against him. First, in Egypt, he was accused of saying that "God is on the throne in reality and that He talks verbally with a voice".[386] He was condemned to execution which was later reduced to imprisonment. He was released after eighteen months. Second, he was accused of insulting the Ṣūfî order in Cairo and showing a lack of respect to the Prophet by his legal opinion (*fatwā*) that: the seeking of aid should not be directed to anyone including the Prophet and that Only God is the Sustainer. When he was summoned to the court, he recited the Qur'anic verse "For us God sufficeth, and He is the Best Disposer of affairs."[387] After his sentence, he was given three choices: (1) to return to his country, Syria,

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385 Ibn Taymîyah, *Muwāfaqāt Ṣarîḥ al-Ma`qūl 4 vols.* (Cairo: 1321/1906), vol. 1, p. 48. (Printed on the margin of *Minhāj al-Sunna* by the same author). The translation of this quotation is from Fazlur Rahmān, *History of Religion Islam* (*London*: *Weidenfield and Nicolson*, 1966), p. 111.

386 Abū Zahrah, op. cit., p. 56.

387 Qur'ān 3:173.

(2) to go to Alexandra on condition that he would not spread his ideology in either place. (3) to be kept in prison. Ibn Taymîyah preferred the latter but his followers urged him to return to Syria; he then set out on his way. But the government realized the danger of that decision and therefore, compelled him to go to jail where he spent some time. At the third trial, he was accused of violating the law which prevented him from giving legal opinions. He was arrested and kept in prison for five months and ten days. The last trial was based on a legal opinion which he had given about seventeen years before when he prohibited visitation to graves. He based his decision on the saying of the Prophet that "God cursed the Jews and the Christians who took the graves of their prophets as mosques." The opponents of Ibn Taymîyah had been looking for an excuse to get rid of him and therefore stressed this matter until he was again imprisoned and prevented from writing. Ibn Taymîyah did not survive this persecution;, he died after five months of depression and deprivation in the year 728/1328 at the age of of sixty-seven.

"Ibn Taymîyah reinstated into Muslim theology the docrine of the purposiveness of the Divine behaviour, a doctrine so ardently opposed by Ash`arism, Maturidism and Zahirism as compromising the omnipotence of God's will and His dissimilarity to His creation. This purposiveness is God's involvement in the destiny of man and from this he directly deduces the idea of God as the Commander or the *sharī`ah*-Giver."[388] On the issue of the jurists' interpretation of the texts, Ibn Taymîyah elucidated a very important point when he explained that "sometimes by *sharī`ah* is meant that which the lawyers of the *sharī`ah* say on the basis of their own effort of thought, and by 'the truth' is meant what the ṣūfîs find by direct experience. Undoubtedly,

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[388] Fazlur Rahman, op. cit., p. 91.

both these groups are seekers of truth; sometimes they are right and sometimes they are wrong while neither of them wishes to contravene the Prophet. If the findings of both agree, well and good; otherwise neither of them has an exclusive claim to be followed, except by a clear proof from the *sharī`ah*."[389] On the basis of this quotation of Ibn Taymîyah, the following translation of his *Mas'alah al-istiḥsān* or (The Question of Juristic Preference) is in conformity with his legal conviction.

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389 Ibn Taymîyah, *Iḥtijāj bi'l-Qadar*, in his *al-Rasā'il* op. cit., vol. 2, pp. 96-97. The translation was quoted from Fazlur Rahman's *Islam*, op. cit., p. 113.

Translation

[1] Praise be to Allah, we ask for His assistance and for His forgiveness; we seek refuge with Him from the mischief of our hearts and the evils of our deeds. Whomsoever is guided by Allah, there is no one to lead him astray, and whomsoever is led astray there is no guardian for him. We bear witness that there is no god except Allah.[390] He is alone without any associate with Him; I bear witness that Muhammad is His servant and His messenger. Peace be upon him.

[2] Chapter on *istiḥsān* (juristic preference), and *takhṣīṣ al-'illah* (particularization of the cause), and the issue of whether *qiyās* (inference by analogy) can be applied therein or not. And also whether the existing rulings that are confirmed by the text and the consensus but which are considered[391] to be against *qiyās*, can be inferred therein or not. There has been great confusion on the part of the jurists concerning these principles; and there is a pressing need to examine them with respect to many questions of the sacred law, its fundamental principles as well as its general applications.

[3] As for *istiḥsān*, it is known, through its meanings, to be in an opposition to *qiyās* due to an evidence; and other (meaning) may be intended for that. The jurists have three views concerning its wording and its meaning mentioned (above). There are those who totally reject this word; they are the opponents of *qiyās* such as Dawūd and his followers and a majority of the philosophers among the Mu'tazilites and the Shī'ites and others. They neither

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390 The Western writers use the word 'God' for the Creator and Ruler of the universe, but the Muslims prefer to use 'Allah' instead; because the word 'God' has a pagan origin.

391 By some people.

consider *qiyās* nor *istiḥsān* among the sources of the (*sharī`ah*) law.

[4] There are those who approve *istiḥsān* with this (above) meaning and thereby apply it in opposition to *qiyās*; they use *qiyās* in another form, different from that of *istiḥsān*. This approach is known to be that of Abū Ḥanîfah and his followers.

[5] (Finally) there are those who criticize *istiḥsān* sometimes but apply it sometimes such as Shāfi`î, Aḥmad b. Ḥanbal and Mālik and others. In the books of Mālik and his followers, the word *istiḥsān* is mentioned in many places. Shāfi`î said: "Whoever applies *istiḥsān* has legislated"; he spoke on the refutation of *istiḥsān*[392] and gave details on that. He was among the greatest Imams who criticized *istiḥsān* and he wrote book (?)....and....(?)[393] on the subject. And this is the position of his followers concerning *uṣūl al-fiqh* (science of jurisprudence). Despite all this, he said: "I prefer thirty *dirhams* as *al-mit`ah* (compensation).[394] That is why it is related that Shāfi`î has two views on *istiḥsān*: Old and new.

[6] And it is related by Abū Ṭālib from Aḥmad b. Ḥanbal that he said: Whenever the followers of Abū Ḥanîfah decided a case in an opposition to the ruling of *qiyās*, they say: "we prefer this and we put aside the *qiyās*. They therefore call what they believe to be the correct *istiḥsān*. He[395] said: I follow every related *ḥadīth* and I do not apply *qiyās* on it.

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392 In the book of Shāfi`î *Kitāb al-Umm* op. cit., vol. seven, pp. 270-277.

393 The lacunae are from the original manuscript.

394 This is a compensation for a divorce woman before consummation. The Qur'ān does not stipulate a specific amount for this compensation; all what it mentions is "a gift of a reasonable amount is due from from those who wish to do the right thing". Qur'ān 2:236.

395 Aḥmad b. Ḥanbal

[7] Al-Qāḍî Abū Ya`lā said: The apparent meaning of this (speech) necessitates the refutation of *istiḥsān* and means that (Aḥmad b. Ḥanbal) did not apply *qiyās* with a specifically mentioned text over (another case) with a specifically mentioned text. I[396] said: Aḥmad's intention is "I accept all the texts and I do not apply *qiyās* on one of the two texts in an opposition to another text as those whom he mentioned used to do."[397] They apply *qiyās* on one of the two texts, then use *qiyās* in the place of *istiḥsān* either with a text or without. To them, *qiyās* must necessitates an effective suitable cause; then they invalidate the effective cause which they claim to be suitable (in *qiyās*) with its equivalence in its rank.

[8] This, from Aḥmad, implies a necessity of nullifying a suitable *`illah*, and that its nullification, inspite of its efficiency, necessitates the invalidity (of its ruling). That is why he said: I do not apply a *qiyās* on one of two texts which will invalidate the other text. Surely, that indicates that the *qiyās* therein is null and void. He applied this procedure in many places. As an example, he related a tradition from Abū Salma in which the prophet says: "If anyone of you wants to sacrifice (she camel) and he has entered the tenth (month of *Dhu al-ḥijjah*), he should not shave any part of her hair or her skin". Another *ḥadīth* of `Aishah goes: "I used to twine the garla nd of the animal which the Prophet peace be upon him, intended for sacrifice, then he sends it for (sacrifice) while he is still in (Mecca) and never made forbidden on himself anything that is forbidden to a pilgrim."

[9] On this, jurists are of three opinions; among them are those who

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396 Abū Ya`lā

397 He meant here the Ḥanafis.

uphold a distinction between the animal[398] for offering and the animal (such as sheep) for sacrifice, in terms of the prohibition.[399] They say: If a pilgrim sends an animal for sacrifice, it is not permissible to tamper with it until it is offered. This is related from Ibn `Abbās and others. Some uphold no distinction between the two[400] (offerings of animals) in terms of the permission (of tampering with them). They say: the person who is offering (a camel) will not be prevented from anything as the one who is sacrificing (a sheep) should not be prevented (from doing so). They apply *qiyās* on one of the two texts[401] over what contradicts the other text.

[10] The traditionalists/jurists such as Yaḥyā b. Sa`îd, Shāfi`î, Aḥmad b. Ḥanbal and others, implemented the two texts (of the *ḥadīths*) and they did not apply *qiyās* on one of them against the other; again, when Allah permitted trade and prohibited interest, the Muslims did not apply *qiyās* on one of them against the other, because such a *qiyās* belongs to the unbelievers. By the same token, when He permitted the slaughtering (of animals) and forbade (eating) carrion,[402] they did not apply *qiyās* on one of them against the other; since this is the *qiyās* of the unbelievers. Again, when both the Qur'ān and the *sunna* approved balloting and prohibited gambling, (the Muslims) did not apply *qiyās* on this over the other. They allowed the casting of ballots and prohibited gambling, dedication of stones[403] or divination by arrows. Contrary

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398 Such as camel

399 From tampering with them.

400 The distinction between the animal for sacrifice (*al-aḍḥiyyah*) and the animal for offering (*al-hadiy*).

401 Of the above *ḥadīths*.

402 Qur'ān 5:3.

403 The seeking to know what was not alloted by that means

to those who consider balloting as gambling or dedication of arrows, they do not attach to it a ruling. And Aḥmad was the foremost practioner of casting the ballots among the jurists, according to a lot of textual proofs and traditions.

[11] Again, Aḥmad and other traditionalists/jurists uphold the same view as the above based on the tradition whereby the Prophet peace be upon him, commanded the believers to pray sitting down altogether whenever their Imam is leading them by sitting down in prayer. And when they started to pray with the Imam standing up, he should complete the prayer with them standing up as well. (Aḥmad) applied the two traditions without using *qiyās* on one of them against the other and (without) abrogating it; as some jurists, such as Shāfi'ī, al-Ḥumaydiyy and others did. Aḥmad and others gave an evidence that the companions after the death (of the Prophet), when they prayed sitting down, those who used to pray behind them were asked to pray sitting down. These companions have witnessed his prayer towards the end of his life; among them was Usayd b. al-Ḥudayr who was among the first best Anṣār (Muslims) during the reign of Abū Bakr. He was murdered in the war against the apostates of Ḥunaifah followers of Musaylimah the lier

[12] Aḥmad has subscribed to *istiḥsān* in many places (cases) such as in his opinion related by Ṣāliḥ on limited partnership (*al-muḍārabah*): If a partner disobeyed (the owner) by buying what he was not authorized to,[404] the profit belongs to the owner and the partner is entitled to an equal shall in his labour; except that the labour will be unrewarded if the profit is exhausted by an equal's share in his labour. He said: I used to hold the opinion that the profit belongs to the owner of the money, then I changed to prefer

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404 If it resulted into a profit....

(otherwise).[405]

[13] And (Aḥmad) said: in the narration of al-Maymuniyy: I prefer that (a Muslim) should make a sand ablution for every prayer; but according to *qiyās*, sand ablution is equivalent to water until he becomes unclean,[406] or finds water.

[14] And Aḥmad said: in the narration of al-Marwadhiyy: It is permissible to buy the rural area of Iraq but it is not permissible to sell it. He was asked: How can you buy something from someone who does not possess (it). (Aḥmad) replied: The *qiyās'* ruling is what you are saying, but this ruling is according to *istiḥsān*. Aḥmad gave an evidence that the companions of the Prophet peace be upon him, allowed the buying of the Holy Qur'ān but disapproved its selling; and this resembles that.

[15] (Aḥmad) said in a narration from Abū Bakr b. Muḥammad concerning someone who usurped and cultivated a land: The crop belongs to the owner of the land and the expenses are (incumbent) on him. This in no way agrees with *qiyās*, [but][407] I prefer that the expenses should be refunded to him.

[16] Al-Qāḍî Abū Ya`lā has included the case in two narrations. Abū Ya`lā and his disciples such as Abū al-Khiṭṭābî and ibn `Uqayl and ibn [al-Zāghwanîyy ?][408] supported the (procedure) of *istiḥsān* as the followers of Abū

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405 That an equal wage for the labour from the profit.

406 By excrement or semen discharge.

407 The editor explained that: "the context requires the addition of this word [but], corroborated in the same quotation cited in MS on *uṣūl al-fiqh* attributed to the Taimiya family, *Dār al-kutub* Library, Cairo. *uṣūl al-fiqh* 150,fo. 179, line 5 from bottom of page".

Ḥanîfah uphold. This group (of al-Qāḍî) and the group (of Abū Ḥanîfah) defined *istiḥsān*, which they advocate, as abandoning a ruling in favour of another ruling which is closer to the case in question. And it is said that: *istiḥsān* is the more appropriate (ruling) of the two *qiyāses*. They said- and this is the wording of al-Qāḍî- : The proofsof *istiḥsān* are: sometimes the Qur'ān, and sometimes the *Sunna* and thirdly, *ijmā`*. The proving evidence carries more weight of similarity from some sources than the other. As we have said by *istiḥsān*, taking the people of the Book as witnesses for Muslims in Wills during a journey where there is no single Muslim, is due to the Book.[409]

[17] (Aḥmad b. Ḥanbal) said: Concerning *istiḥsān* based on *sunna* (an example) is that of a person who usurped a piece of land and cultivated it; the crop belongs to the owner of the land who must pay the labour expenses to the person who planted the crops. This is based on the *ḥadīth* narrated by Rāfi` b. Khadîj from the Prophet peace be upon him: "Whoever plants in other people's land, the crops belong to the owner of the land and are his (the expenses". The *qiyās* ruling used to be that the crop belongs to whoever plants it.

[18] (Aḥmad b. Ḥanbal) said: Among what we have approved to be permissible by *istiḥsān* based on consensus, are (hand to hand) exchange of

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408 The editor explained that: "this insert such as Abū al-Kiṭṭābî and ibn `Uqayl and ibn is written by the author above the line, between *wa'tibā`uhu* and *ka qawl*. See Ibn Taymîya, *Minhāj al-Sunna*, 4 vols. (Cairo: Būlāq, 1321-22/1903-04), *passim*, *where this trio of Ḥanbali jurisconsults is frequently* mentioned among the disciples of Qāḍî Abū Ya`lā".

409 The basic ruling is that a Muslim should be witness for a Muslim, but in an exceptional case whereby there is no Muslim available, such as the above case, then people of the Book i.e. the Christians and the Jews can be witnesses. For details, see Qur'ān 65:2.

darāhim and *danānīr*[410] in the food items that can be weighed. Although this is not permissible by *qiyās* because of the weighing attribute present in the nature of the (case), they allow this (case) on the basis of consensus.

[19] I[411] said: from that, the expenses of a child and his nurse must be settled by his father without his mother. This is according to the text and the consensus. According to *qiyās*, those who make the expenses compulsory on every heir either by priority[412] or by residual,[413] or on every relative with defined portion (of inheritance) or on an absolute major relative, both parents should be responsible. They also maintain that: renting of a wet-nurse is permissible by the text and by the consensus but in contradiction to the *qiyās*; they even maintain that renting, loaning, co-partnership,[414] and others are based on consensus in contradiction to the (ruling) of *qiyās*.

[20] But if they support a meaning which implies particularization such as: need, then (there is no dispute); since all the leaders[415] and all the sunni jurists uphold the view such as: the permission (to eat) the dead animal (is permit-

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410 *Darāhim* is the plural of *dirham* which is a silver coin and *danānīr* plural of *dinār* which is a golden coin.

411 Ibn Taymîyah

412 These are the hiers whose portions are categorically mentioned in the Qur'ān, chapter 4.

413 These are the hiers who sometimes take the remaining inheritance and are sometimes excluded from it when those who have absolute priority exhausted the inheritance.

414 *Al-Qirāḍ* is also used as *al-muḍārabah*. See Lanes dictionary op. cit. vol. 2, p.5515; which is contract of co-partnership in which one of the parties (the proprietor) is entitled to a profit on account of the capital *ra's al-mal*. The other party is entitled to the profit on account of his labour, and this last is denominated as the *muḍārib* (or manager) in as much as he derives a benefit from his own labour and endeavours.

415 Of the schools of law.

ted) to someone compelled due to necessity; and like the example of a sick person praying by sitting down due to need; and so on. They only have dispute (among themselves) on either of the two (above) cases when there is no meaning which necessitates distinction.[416]

[21] That is why the definition of *istiḥsān* is given by more than one jurist as particularization of the cause; as mentioned by Abū Ḥusayn al-Baṣrī, al-Rāzī and others, and also by him (Aḥmad b. Ḥanbal). Surely the objective of *istiḥsān* which they advocate to be in opposition to *qiyās*, is in reality a particularization of the cause. And what is widely known from the followers of Shāfi`ī is the refutation of *takhṣīṣ al-`illah*. But the followers of Abū Ḥanīfah subscribe to *takhṣīṣ al-`illah*; each of the two groups is known for its rejection and acceptance of it respectively. However, there is a dispute over *takhṣīṣ al-`illah* in Shāfi`ī's school of law as well as in the schools of law of both Mālik and Aḥmad. There are some people who related that the four schools of law[417] accept *takhṣīṣ al-`illah*. Abū Isḥāq b. Shakīlā has related from the followers of Aḥmad b. Ḥanbal two views on *takhṣīṣ al-`illah*. Among other people are those who related the two views directly from Aḥmad. Qāḍī Abū Ya`lā and most of his disciples like ibn `Aqīl (and others)[418] disagree over *takhṣīṣ al-`illah* despite their acceptance of *istiḥsān* and that same position is held by the followers of Mālik|.

[22] As for Abū al-Khiṭṭāb, he accepts *takhṣīṣ al-`illah* in accordance with the followers of Abū Ḥanīfah . Verily, this (procedure of *takhṣīṣ al-`illah*) is

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416 For instance, a necessity or a need.

417 The Ḥanafis, the Malikis, the Shāfi`īs and the Ḥanbalis schools of law.

418 The editor mentioned that: *"Wa ghayruhu* (and others than him): was added for the context. The author had begun to write something after the word `Aqīl, but crossed it out"

the *istiḥsān* as stated earlier. This group permits *takhṣīṣ al-`illah* with an ordinary evidence pointing to the particularization; even if the procedure of the particularization does not explain the contradiction in the non-existence of a condition[419] or the presence of an impediment (in the case). This is the actual explanation of Abū Ya`lā and of this group on *istiḥsān* as it has been indicated in the examples already mentioned.[420]

[23] But al-Qāḍî and others who accept *istiḥsān* and reject *takhṣīṣ al-`illah*, made distinction between the two. The said [the wording is that of al-Qāḍî]: The the particularization of the cause in Islamic law is not permissible (because) its particularization implies inconsistency. Al-Qāḍî said: In a narration of al-Ḥusay b. Ḥassa he (ɒ. Ḥanbal) said: *Qiyās* is to apply analogy on something over another thing if the latter is as the former in all of its aspects; but if it resembles it in one situation and differs from it in another situation, then this (analogy) is a mistake. He[421] said: this statement prevents its particularization; he said: Abū Isḥāq -he means ibn Shāqila- has mentioned in the comments of al-Khurqiyy saying: our companions have two views. Among them are those who accept *takhṣīṣ al-`illah* and among them are those who reject it. He[422] said: Abū al-Ḥasan al-Khirziyy has mentioned (this issue) as a part of cases in the science of law, maintaining that particularization is not permissible. Aḥmad b.Ḥanbal said: *"Al-qiyās* implies that it is not allowed to buy the land of the rural area of Iraq (*arḍ al-sawād*) because it is not permissible to sell it"; this statement does not necessitate *takhṣīṣ al-`illah*;

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419 Necessary in the case.

420 By Aḥmad b. Ḥanbal.

421 Aḥmad b. Ḥanbal.

422 Aḥmad b. Ḥanbal.

since it is verily a special ruling. Ibn Taymîyah believes that what Aḥmad (b. Ḥanbal) has mentioned is a contradiction of the text over the *qiyās* of *uṣūl* in a general ruling; and (such) a *qiyās* can be put aside in favor of a narration.

[24] That is the reason why those who permit its particularization reply with *istiḥsān* as an evidence. Ibn Taymîyah said: If someone asks: Isn't it true that Aḥmad b. Ḥanbal has mentioned this in the narration of al-Marwadhiyy (above) and that someone has replied that: how can (something) be purchased from the person who has no ownership (of it)? Isn't it that (Aḥmad b. Ḥanbal) has replied: *Qiyās* is according to what you are saying, but the ruling here is *istiḥsān*? And he gave evidence by the statement of the companion on the (buying) of Holy Qur'ān . In replying, Ibn Taymîyah says: "particularization of the cause (is a procedure) that cannot be applied in a special ruling".

[25] (Ibn Taymîyah explains): what Aḥmad (b. Ḥanbal) has stated earlier is only a contradiction of the text over the *qiyās* of the *uṣūl* because they apply *istiḥsān* from (a case) of *qiyās* and without a *qiyās*; and this (inconsistency) makes its meaning impossible (as) a particularization with a proof. Abū al-Khiṭṭāb has already refuted it.

[26] And this, which al-Qāḍî has mentioned, had been stated by many jurists concerning contradictions of the *qiyās al-uṣūl*. The jurists gave priority to the text; but they differ on when an isolated tradition contradicts *qiyās al-uṣūl*: such as the tradition of *al-muṣarāt* and its like. As for the first category, it is like the example of taking *al-ʿāqilah*[423] to be responsible.[424] They say: this is against *qiyās al-uṣūl*; and (the ruling) is confirmed by the text and the

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[423] A clan committed by unwritten law of the Bedouins to pay the bloodwite for each of its members.

[424] For the crime committed by member of its family.

consensus. Some people consider this as a third view concerning *takhṣīṣ al-`illah*. They mention a fourth view that it is permissible to particularize a specifically mentioned *`illah* and not an extracted one. Most advocates of particularization among the followers of Shāfi`ī and Aḥmad like ibn Ḥamîd Abū al-Qāḍî Abū Ya`lah, ibn `Aqîl and others, maintain that when the specifically mentionned (*`illah*) is particularized, it clearly indicates the invalidity of the *`illah* or that it is not permissible at all to apply *takhṣīṣ al-`illah* therein.

[27] This dispute is over (a rejected) *`illah* of which there is evidence as to (its) effectiveness and suitability. But if (the dispute) is confirmed simply on *ṭarḍ* (co-extensiveness)[425] whose non-existence is not known from its effectiveness nor is it known to be free from deficiences, particularization is void unanimously. As for a specified *ṭarḍ*, which lacks logical meanings, none of the jurists and the logicians recognize it.

[28] Concerning the dispute over the resembling co-extensiveness (*al-ṭarḍ al-shabahiyy*),[426] such as the permitted (cases) by resemblance,[427] which most

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425 *Ṭarḍ* has been defined by al-Rāzî as "a quality which is neither suitable (*munāsib*) for the law itself nor is concomitant to the suitable quality (*mustalzim lil munāsib*), and the law is established by this quality in all cases". Another definition states: When we find that a law is established on the basis of a certain quality in a single case, it is presupposed that the same quality will operate as an *`illah* in all the cases by the probability of opinion". Aḥmad Ḥasan, "Methods of finding the cause of a legal injuncti Islamic jurisprudence", *Islamic Studies* 25 (1986), p. 37.

426 *Shabah* (resemblance), is one of the methods of finding *`illah*. According to al-Amidî, *shabah* means comparison of a case with the two parallel cases one of which is more corresponding to the parallel case than the other. Thus to select a parallel case which is more corresponding to it is called *shabah*. Al-Amidî, *Al-Iḥkām fī uṣūl al-Aḥkām* 4 vols. (Cairo: Maṭba`ah al-Ma`ārif, 1914), vol. 3, pp. 422-27. Although the discussion is on the dispute over a resembling co-extensiveness, it is appropriate to bring the above definition of *shabah*, since the definition of *ṭarḍ* has been given in paragraph 27. Again, each of the terms *ṭarḍ* and *shabah* is a separate method of finding an *`il* and therefore we may pressume that Ibn Taymîyah here only intends a case which has a resembling *`illah* of *ṭarḍ*.

of the followers of the four schools of law recognize, the classical Shāfi`ī followers are especially inclined towards the dispute over the above terms more than others.

[29] The outcome (of our) investigation in this chapter is that the *`illah* should be compared with a genuine cause which follows its effect always. Whenever this ruling is violated, it is invalid unanimously. *Qiyās* can be applied on the *`illah* which has different grantings. It is called the effective granting, or a guiding reason, or evidence of the cause, or something similar to that. And this is when it contradicts, due to an effective disparity therein between the contradicting case and other cases that are not corrupted. Then, if the secondary case which is the domain of the dispute, goes along with the disparity, it will be joined with its ruling. But if the (*`illah*) goes along with the meaning of the original case, it will be joined with its ruling. Whoever says emphatically that particularization is absolutely impossible without a missing condition or, without the presence of an impediment, that is totally mistaken. And his view is against the consensus of all the ancestors, the four leaders of the schools of law; because they all uphold *takhṣīṣ al-`illah* in a meaningful situation which necessitates such a disparity. Their discussion on

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427 An example on this in connection with the removal of impurities. Shāfi`ī says that purification is intended for prayer; water has been specified for the purpose of removing defilement. In this example, the suitability of water for purification is not obvious. But it can be known by investigating the injunctions pronounced by the prophet, such as teaching of the Qur'ān, offering the prayer, circumambulation of the *ka`bah* and others. The use of water for those purposes indicating its suitability for removing ritual impurity is known by implication. There are three points in this example, namely: purification, removal of impurity, intention of prayer. We discern that the first and the third points have received the attention of the lawgiver, and formulated law according to them, i.e. prescribed water for purification; but the lawgiver has not paid attention directly to the second point. This point was not taken into consideration to be a quality for being a cause (*al-`illah*) by the lawgiver. Thus, *al-`illah* for the prescription of water for purification is "purification intended for prayer". Al-Amidi; op. cit. pp. 423-27.

this is more than what can be encompassed. This is what is meant by those who say that the four leaders of the schools of law uphold *takhṣīṣ al-`illah*.

[30] Upholding to *istiḥsān* which is against the *qiyās* is impossible except by holding to *takhṣīṣ al-`illah*. What they have mentioned in terms of the text contradicting the *qiyās al-uṣūl*, is simply one of the categories of *takhṣīṣ al-`illah*...;[428] the nature of *`illah* accepts the particularization in the sentence. The dispute over the issue of *istiḥsān* which contradicts *qiyās* lies on the part of those who permit the *`illah* simply because of evidence (known to them) but without (their) explanation of the difference between the case of *takhṣīṣ* and other (cases).

[31] Then this *`illah*, if it is extracted and specified by a text without explaining the meaningful difference between *al-takhṣīṣ* and the other, is even the weakest.[429] This is the type[430] which many of the Shāfi`īs, Ḥanbalīs and others hold against the practice of some of the followers of Abū Ḥanīfah and others. Aḥmad (b. Ḥanbal's) previous statement intended this (above criticism). The validity of the explained *`illah* cannot be known except through opinion; and whenever the text contradicts it, it indicates the corruption of the *`illah*. And the text, whenever it goes against the *`illah* proves that the *`illah* is null and void; likewise, whenever the text contradicts the confirmed ruling (derived) through *qiyās*, the invalidility of its ruling is proved by the consensus.

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428 The editor mentioned here that two or three words are missing because they "remain illegible" to him.

429 It is the weakest argument to prove.

430 Of *istiḥsān*

[32] But when the specifically mentioned *`illah* is particularized by a text in some certain aspects of the *`illah*, then, neither Aḥmad, nor Shāfi`ī nor others deny this. When a text comes in a certain form and another text opposes it in another form, if there is a similarity between the two texts in which there is no proof that the ruling therein is hanging on the similitude, all the jurists approve the texts and they do not apply *qiyās* on a specifically mentioned text which will oppose the ruling of the former. This is a kind of the (practice) of those who said: "Trade is like usury."[431] On this, Aḥmad comments as follows: I accept every tradition as it came and I do not apply *qiyās* on it -this means that he does not compare it with another form of *ḥadīth*- ; I put the contradictory traditions where they belong and I repel some of them with another part. In fact, I use all of them.[432]

[33] Those who repel part of the texts with another part say: The two forms are equal and that there is no difference between them. However, one of the two texts is abrogating the other. An example of this is numerous. The jurists who are conversant with tradition do not dispute over this (exercise). Those who argue with them are those who apply *qiyās* by giving similar ruling of a specifically mentioned text to another specifically mentioned text. They then consider one of the texts to be abrogated by the other due to its contradiction to the *qiyās* (ruling) of the other text on the basis of this analogical reasoning.

[34] The matter continues to revolve on whether or not the *Sharī`ah* law approves equal (status) between the two forms. This means that equal rulings can be applied and that the ruling contained in one of them will be abrogated

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431 Qur'ān 2:275.

432 In their respective different places.

by the opposite ruling in the other. As the one who abrogates casting of lots (sortilege) by the Qur'anic verse on gambling;[433] or the case of those who are following the Imam during the prayer by glorifying God (after him) whenever he glorifies Him, or by bending (after him) whenever he bends, or by sitting down (after him) whenever he sits down praying- will their prayers be considered abrogated by standing up during some of the prayer which they observed with an Imam who was standing as well as the rest (of the prayer) observed with an Imam sitting down? They/he[434] take one of the *ḥadīths* on the sacrifice,[435] to be abrogated by the other. They make the amputation of (the hand of) the one who denies what he borrows abrogated- if they agree that his hand was amputated because of that- abrogated[436] by the prophetic tradition where he says: "There is no amputation of hand for the one who seizes something by force , or the one who (steals) from the spoils of war, or the one who cheats. And they abrogate the punishment on property by the prohibition of wasting money; and they abrogate the doubling of the fine of the one who concealed the crime of amputation, and thereby overlook (it) by a Qur'anic verse: "The recompense for an injury is an injury equal thereto" (in degree).[437] And they abrogate the implementation of the fulfilment of the condition which the Prophet made between him and the unbelievers in the treaty, by another *ḥadīth* whereby he says: whoever makes a condition which is not in the Book of

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433 Qur'ān 5:90.

434 The editor observed that the verb *yaʃalun/yaʃal* "is repeated by the author more than once in this section, first in the singular then modified to the plural in order to put them in agreement with the same verb in the marginal note".

435 Of what one brings as an offering to Mecca.

436 The editor refers the repetition of the words to the author.

437 Qur'ān 42:40.

God is invalid. And there are many (cases) which they proclaim to be included in the abrogating (ruling) of which they do not know that they were pronounced after the abrogation.

[35] This and other (cases) whereby the clearly explained texts are being repelled with an unclear word or *qiyās*, are among the procedures which Aḥmad and others deny. Aḥmad used to say: people make mistakes mostly in regards to interpretation and *qiyās*. And he said: it is desireable that the person who speaks about *fiqh* avoid these two sources of ambiguity and *qiyās*. His intention is that any ruling established by a special text must not be contradicted by the two sources and they should not be used in isolation before looking to the texts and to the restrictively special proofs. The general and the unrestricted (terms) are included in the meaning of his speech. The view of other Imams such as Shāfi`ī and others than him, accomodate ambiguity. They do not intend lack of clarity with the word ambiguity as some people might think, nor do they mean by ambiguity (a ruling) devoid of a proof. Undoubtedly, this is not permissible under any circumstances. But if two texts came with two different rulings in two forms and there is a case whose ruling is not mentioned, can *qiyās* be applied therein to provide a ruling not mentioned by basing it on one of the two texts? The ruling of the case which is not stated can be joined with it (one of the texts) even if we do not know the different meanings between this and that.[438]

[36] This is the *istiḥsān* which we abstain from, and many jurists such as Abū Ḥanīfah and many of the followers of Aḥmad and others uphold to it. This is what al-Qāḍī has mentioned by saying: the text contradicted *qiyās al-uṣūl*. In reality, it is *takhṣīṣ al-`illah* as mentioned previously. The jurist who

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[438] Between the stated and the unstated rulings.

does not permit particularization of the cause except with a disparity between the particularized and other (case) says: the uniting or the separating (factors) must be known, and that by joining (a case) whose ruling is not mentioned with one of the (above) two texts does not give a priority to a text over the other. If the meaningful (factor) is known in one of the two texts and unknown in the other, it is possible that (the case whose ruling) is not mentioned may be in this or in that. Then the (ruling) will not be attached with either of them except by a proof. If the meaning is known in one of the two texts and it is founded in the (case whose ruling) is not stated and the meaning is unknown in the other, then this (text) is stronger than the one before it. Therefore, the appropriate ruling of *qiyās* is known here and its comprehensiveness has covered the case (whose ruling) is not mentioned. The presence of a disparity in it is doubtful therein. This is like an example of taking one of the texts mentioned in the case of *sujūd sahw* (prostration of forgetfulness).[439] A mistake that happened before the word *salām* (peace),[440] will be absorbed by the text and a mistake that occured after *salām* will be absorbed by it. And with (any other mistakes) for which there is no text,[441] the ruling text for the amendment of the mistake before the pronouncement of *salām* will be adopted; because this is *qiyās* according to him.[442]

[37] The outcome of this section is as follows: either the effective attributes of (*Sharī`ah*) law are known to be equal in the two forms or that the two

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439 *Sujūd al-sahwī* is a prostration usually conducted after or before the end of the prayer as a correction of any mistake or forgetfulness that happened during the prayer.

440 Saying the word *salām* loudly brings the prayer to an end.

441 About how to correct them.

442 Al-Qāḍī mentioned at the beginning of the this paragraph.

(cases) are known to be different from one another or that (the attributes) of one of them are unknown. What we mean by knowledge here, is what the jurists call certainty- whereby there will be a proof based on similarity and equality (of rulings), or difference and disparity, or there will be no (proof) to support any of the two.

[38] As for the first, whenever the ruling is confirmed in some aspects of the case and it is not confirmed in the other part, then the effective cause is known to be invalid. This is like the case of someone who proclaims that what has made the financial responsibility (on the father) is the giving of birth itself, or the forbidden womb itself, or the absolute inheritance by priority or by residuary. We reply: whenever the grandfather and the grandmother are together, they both bear the responsibility; but when it is confirmed by the text and by the consensus that whenever the two parents exist together, the financial responsibility is on the father, therefore, it is known that paternal relatives in that case should be put forward over the other even if he inherits by priority.

[39] This is one of the two narrations from Aḥmad. And it is known from the Qur'anic verse which states: "An heir shall be chargeable in the same way"[443] that he[444] the absolute heir whose share must firstly be settled from the property (before others) and he is the paternal relative when he exists. Because `Umar (b. Khaṭṭāb) compelled Manfūs to take financial responsibility of the child of his uncle. And this verse clearly indicates that the paternal heir should take the financial responsibility of the minor. This is also the opinion of the majority of the predecessors. There is no proof at all for anyone who opposes this. However, some proclaim that the verse has been abrogated.

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[443] Qur'ān 2:233.

[444] The heir intended here is the absolute heir.

This opinion was related to be from Mālik|. Some of them say: the *`illah* is that there should be no inconvenience.[445] Neglecting this verse by proclaiming its abrogation or by (other) interpretation, is a type of distortion, taking a word out of its context without any real opposite (justification) for doing that; and (such a practice) is known for its corruption by anyone who studies the case.

[40] If the mother is the closest person to him, the financial responsibility will not be on her with the existence of the father. Those who allow one third to be given to her,[446] prevent the father (from the responsibility) because it is not compulsory on the grandmother with the existence of the grandfather. Those who allow one sixth[447] are more accurate and stronger.[448]

[41] Those who uphold the (above opinion) say: *qiyās* makes one third[449] obligatory on the mother, but this (ruling) is put aside because of a text. Someone asked: what type of *qiyās* do you have? Reply: it would have been a *qiyās* if they were to have a text which covers this case by its wording or by its meaning. They do not have that; and if that were to be (the case), the directive of this text would have been implied in this (case), then, joining its similar cases would have been made obligatory. *Qiyās* would then be applied on the father with the mother based on the obligatory share of every paternal relative who is among those heirs that inherit by priority.

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445 The opponents are refering to the first part of the verse which indicates that: "No soul shall have a burden laid on it greater than it can bear". Qur'ān 2:233.

446 Based on the Qur'anic verse 4:11.

447 To be taken by the mother.

448 In their opinion.

449 Of the responsibility.

[42] Also, the acceptance of the two currencies (*naqdayn*) on the food items considered to be measured by weighing, nullifies the idea that weighing is the *`illah*. And there is no clear text to confirm that except through an extracted *`illah* which may be opposed by another (factor) that is stronger than the (former) *`illah*. If the difference between the two currencies (and others) is not explained, the inconsistency of the *`illah* definitely necessitates its invalidity, most especially when the inconsistence does not articulate any meaningful disparity. The lawgiver is wise in what he legislates by not differentiating on two similar cases. There will be no two similarities with (a ruling) which will differentiate between them. In fact, the difference between the two rulings is proof that the two cases are different in that particular matter. If it is known that he[450] differentiates between them, then, that is proof of their incompatibility, even if the evidence of dissimilarity is unknown. When it is known that he applies equal (rulings) between them, that is proof that the two are equal. If this and that is unknown, then it is not permissible to join and equalize[451] except with evidence indicating that.

[43] This is the meaning of the statement of Iyās b. Mu`āwiyah on judicial issues: (Be) upright (in the application of) *qiyās*, and when it becomes unjustifiable, apply *istiḥsān*. He instructes against *qiyās* when it becomes unsuitable.

[44] Aḥmad subscribes to *istiḥsān* because of the difference between it and others. This is a section of *takhṣīṣ al-`illah* due to the effectual disparity. He rejects *istiḥsān* whenever it particularizes an *`illah* without an effectual disparity. Due to this, he says: they proclaim *qiyās* which is in reality, to them, is *istiḥsān*. This, again, is the *istiḥsān* which Shāfi`ī and others reject. It is a

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450 The lawgiver.

451 The ruling of the two cases.

repugnant (procedure), as they did reject it. This type of *istiḥsān* and what they deviated from, in terms of *qiyās* which opposes it,[452] necessitates a disparity and a combination of the two forms without a justifiable reason of *Sharī`ah*, except on the basis of opinion which does not rely on any explanation of God and His prophet nor God's commandment and that of His prophet. This has no *Sharī`ah* point of view at all. God has said: "What? Have they partners (in godhead), who have established for them some religion without the permission of God?[453]

[45] That means that when the lawgiver does not mention the *`illah* of the *qiyās*, and the expression of the law does not indicate a general meaning therein, but someone (a jurist) observes it (the *`illah*) by suitability or by resemblance in which he thinks that the ruling is based upon, he then particularizes it from that meaning, in cases with a text opposite to that; he is excused from his action by the text.[454] But the appearnce of the text in opposition to that *`illah* in some of the forms is a proof that it is not a complete absolute *`illah*. Because a complete *`illah* will not accomodate the inconsistency. If he does not know that the source of the text is specified by a meaning which necessitates the disparity, he will not be convinced that the meaning should be (taken) as the *`illah*; but that it is possible to have another meaning as the *`illah*; or that the meaning is part of the *`illah*. And therefore, he will not differentiate the ruling in all the places he thinks the meaning to be the *`illah*.

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452 *Istiḥsān*.

453 Qur'ān 42:21.

454 The text is the tradition of the Prophet which states that if a jurist strives and succeded in deciding a case, he has two rewards; and if he failed, he has a reward for his effort and nothing against him on the mistake.

[46] And if in the case where *istiḥsān* is agreeable with a meaning he thinks to be a suitable or resembling (attribute), then he needs to confirm that by proofs which demonstrate the effectiveness of that attribute. In that case, there will be no putting aside of the *qiyās* except by a stronger *qiyās* than it, and due to the particularization of the case of *istiḥsān* with what necessitates a disparity between it and others. And therefore, we will not have *istiḥsān* devoid of a text or *qiyās*.

[47] And this is what Shāfi`ī and Aḥmad and others deny in *istiḥsān*. What the two of them have said concerning it, is that *istiḥsān* is a deviation from *qiyās* due to the particularization of that procedure with what necessitates the disparity. And consequently, the valid *istiḥsān* will not be a deviation from a valid *qiyās*; and it is not permissible under any circumstances to deviate from a valid *qiyās*.

[48] And this is the correct (interpretation) as we have explained with details in a unilateral book[455] where it is indicated that there is nothing in the (Islamic) law which contradicts the valid *qiyās* basically. Therefore, the cases of *istiḥsān* whose rulings have deviated from the paths of *qiyās*, are accepted as basis for (further) inference by Mālik, Shāfi`ī, Aḥmad and others if the meaning on which the ruling therein is based upon is known.

[49] It is related from the followers of Abū Ḥanīfah that *qiyās* cannot be based on them and that it is a kind of *takhṣīṣ al-`illah* and *istiḥsān*. As for those who prevent *takhṣīṣ al-`illah* and *istiḥsān* without a meaningful disparity, they say: what deviates from the paths of *qiyās* should not necessarily have a meaningful disparity; and therefore, *istiḥsān* should not be based on it,

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455 Here, probably, Ibn Taymîyah is referring to his book *Al-qiyās fī shar`i al-Islāmī*.

because it is a condition of *qiyās* the existence of the *`illah* and its disparity. As for the advocates of *qiyās*, they say it is not possible except with a disparity, and when we know it, we apply *qiyās*.

[50] Al-Qāḍî and others say: (concerning) a case which is particularized from the general *qiyās*, inference can be based on it and other (cases) can be based on it. As for basing inference on it, Aḥmad says in a narration of Ibn Manşūr that: if someone vows to kill himself and (later) ransom himself with a ram, then inference can be drawn therein: that ransom by a ram for someone who vows to kill himself (can be extended) to someone who vows to murder his son even though that (former case) is particularized from the general *qiyās*; but it is confirmed by the saying of Ibn `Abbās.

[51] As for its inference in other (cases), Aḥmad says in the narration of al-Marwadhiyy: it is permissible to buy the cultivated land (of Iraq)[456] but it is not allowed to sell it. Someone asked: how can something be purchased from a person who doesn't own it. (Aḥmad replied): *qiyās* is what you are saying, but this is *istiḥsān*. And he gave an evidence that the companions allowed the buying of Holy Qur'ans and not their selling; and this resembles that. He said: A specific (case) from the general *qiyās* has been based on a specific (case) from the general *qiyās*. And Shāfi`î upholds to this.

[52] The followers of Abū Ḥanîfah said: It cannot be used as inference in other (case) and inference by analogy cannot be based on it, unless the *`illah* is categorically mentioned or there is a consensus on the permissibility of *qiyās* on it. The specifically mentioned (*`illah*) is like the prophet's saying: They

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456 *Arḍ al-sawād* is the cultivated land of Iraq or district between al-Baṣrah and Kufah with the towns or villages arround them. Lane's Dictionary, op. cit., p. 1462.

are[457] the walking creatures around you. The point here is that the cats are clean because they are allowed to live inside the house where prayer is being observed. It is like the consensus which permits swearing on a rental dispute based on the *qiyās* which permits swearing on a sale due to the agreement of those who obligate swearing on a sale and consider its ruling equal. And the prohibition is like the comparison of the funeral prayer (*al-janāzah*) with the regular prayer in terms of its nullification by guffawing; and cancellation of expiation by vomiting cannot be compared with eating (intentionally). Making ablution with the juice extracted from dates cannot be compared with other juice; and the permission to build upon the prayer after one commits a (minor) impurity, cannot be compared with the one who discharges semen by dreaming nor with its similar.

[53] The followers of Shāfi'ī and Aḥmad gave some proofs: This is the expression of Abū Ya'lā who said: And again, when we compare other cases with the specified text or the specified with other cases, and we carry (the ruling of) the extracted juice to other liquids and guffawing to speaking, our opponent will testify to the validity of this *qiyās*; (by saying that) it is necessary to compare the extracted juice with other liquids and guffawing with speaking, but he proclaims that it is preferable to put it aside because of what is more appropriate than it.

[54] They say: This is invalid for two reasons. One of them is that it is incumbent on him[458] to explain what is 'the more appropriate', if not, the ruling of *qiyās* is directed on him. This is as if to say: The Qur'ān stipulates this but I put it aside due to prophetic tradition, thereupon, the proof of the

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457 The cats.

458 The opponent.

Qur'ān is compulsory on him as long as he does not explain the prophetic tradition which is stronger than the Qur'ān And the mere proclamation of that is not enough.

[55] Second, he proclaims that *istiḥsān* is stronger than *qiyās* and he puts it aside due to that. As for the *qiyās*, if stronger evidence contradicts it, it must be an invalid *qiyās* which has no value. It is as if it were to be in contradiction with a text from the Book, a prophetic tradition or a consensus. When *qiyās* is decided here to be valid, it is then impossible that what contradicts it is stronger than it, and acts as a barrier against its application.

[56] I say that: The content of this is to be a refutation that this specific is part of the general *qiyās*, and it is a rejection of its comparison with other cases. This means that when *istiḥsān* opposes *qiyās* the *istiḥsān* must be condemned if the *qiyās* is valid. Or that the *qiyās* must be rejected if the *istiḥsān* which contradicts it is valid. This has no meaning from the point of view of the advocates of *istiḥsān*; and it contradicts the ruling of the *'illah*. And this is absolutely the saying of the rejectors of *istiḥsān*.

[57] The reality of that is that whenever *qiyās* and *istiḥsān* contradict one another without disparity, one of the two must be invlalid. And it is exactly the case of particularization of the cause itself. If there is no disparity between the specific case and others, then equality[459] is necesary. Thereupon, the *'illah* may be invalid or that the particularization of that case is invalid.

[58] This is 'the correct' in all of this. And it is the one which Shāfi'ī, Aḥmad, and others deny against those who uphold *qiyās* which the *istiḥsān* opposes. Because they do not provide any effective distinction between the

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459 By giving the same ruling to both the cases.

extracted juice of dates and other liquids, nor between guffawing in the prayer which consists of bowing and prostration, and the prayer of *janāzah* and other than the two (prayers) where purification is not a condition.

[59] They mentioned other good proofs such as their saying -the expression is that of al-Qāḍî-: And again, whatever is received with the trace[460] has became a source by itself and the application of *qiyās* on it is binding like the rest of the sources. And the rejection of this source, due to its opposition to those sources , is not better than their renouncement due to their contradiction to this source. Therefore, it is necessary to apply each one of them in accordance with its requirement, and to implement it on its general (application). Again, *qiyās* operates like an isolated narration in the sense that each one of the two of them is asserted by high probability. Then it later became established that it is valid to reject an opposing (narration) to the *qiyās* of the *uṣūl*. *Qiyās* is also like that.[461]

[60] I said:[462] From this category, is the combination of the prayer at `Arafah and Muzdalifah by the Prophet, peace be upon him; even though no other text is received on other travellings. As for shortening (prayer) in `Arafah with the people of Mecca and others, it is not contrary to his habit. He does not seize to shorten (prayer) during the journey. In fact, it is an explanation that long and short journeys are equal in that respect. But concerning the prevention of the people of Mecca from shortening (prayer), it is against the confirmed *sunna* undoubtedly. And the one that acts against that is the one who

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460 To be an authentic prophetic tradition.

461 In the sense that it will be also rejected if it contradicts the inference of the other sources.

462 The pronoun here is refering back to Ibn Taymîyah

does not know about this *sunna*. As for the shortening of the prayer other than the Meccans, it is because shortening is not part of the characteristics of pilgrimage, and it is not connected with it. But it is connected with travelling from all directions and in all of its aspects.

[61] Their speech on this issue implies that what is said to be against the *qiyās* in form of *istiḥsān*, must either be that its *qiyās* is invalid or that its particularization by *istiḥsān* is invalid when there is no effective distinguishing factor therein. And this is the correct (statement) in this chapter.

[62] They say: The opponent asserts that affirmation of something (apparent) is not valid with the existence of what negates it. And when *qiyās* becomes an impediment to a narration which has been received, the application of *qiyās* therein is not permissible for us. Because if that is allowed, there will be no difference between it and other sources from which it is forbidden to infer its *qiyās*. And therefore, it is taken outside the scope of being specified from the total analogical reasoning.

[63] They say: The answer to that is two sided. First, we do not agree that there is anything here which negates it; because the inconsistency must be supported by a special proof. What they have mentioned in these issues are not a special proof of what we are saying in terms of interpretation. Second, that the inconsistency occurs through its comparison with others by elimination of the original ruling. As for the application of other *qiyās* on it, there is no negation to it because that does not negate the ruling of the text according to them; and therefore, the application of *qiyās* on (the ruling) is valid.

[64] I[463] say, this second (opinion) is the reply on application of other

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463 Ibn Taymîyah

qiyās on it (the ruling). And the first is the reply of applying its| qiyās| on other (rulings); and it is prohibited because it is specified from the general analogical reasoning. The reality is that even if it is specified from the general *qiyās*, it is still specified from a certain designated *qiyās*; and not from every *qiyās*. It is specified from a meaning therein which necessitates a distinction between it and another (ruling). If other *qiyās* is applied on it with that meaning, it is not possible for the other *qiyās* to be specified from the first *qiyās*.

[65] The truth of all this is that the ruling may be established against the valid *qiyās* in the same manner. Whoever advocates *istiḥsān* without an effective disparity and upholds *takhṣīṣ al-ʿillah* without an effective disparity and prohibits *qiyās* on the specified (case), is affirming rulings against the *qiyās* in the same manner.

[66] And this is the *istiḥsān* which has been rejected by the majority such as Shāfiʿī, Aḥmad and others. They sometimes reject validity of the *qiyās* which they oppose because of the *istiḥsān* and sometimes they deny opposition of valid *qiyās* because they proclaim it to be part of the *istiḥsān* which has no legal proof. And sometimes they negate the validity of the two; thereby there would be no valid *qiyās* nor would what they rejected because of it be valid. But each of the two proofs is weak; and negation of this kind is rampant in the speech of these (jurists).

[67] SECTION: I have reflected on all of these topics which some people proclaim to be established in opposition to the valid *qiyās*, and also on the issue that the valid *ʿillah* is specified without legal disparity due to a missing condition or due to an existing impediment, or that the valid *istiḥsān* is against the valid *qiyās* without legal disparity; and I found that the case is opposite to that (proclamation). Most of the Imams, such as Shāfiʿī and Aḥmad and

others uphold that one of these (jurists) may be inconsistent by specifying again what he makes as *`illah* without any effective disparity as he is making *qiyās* without an effective *`illah*.

[68] The intended is the grasping of the (science of) Islamic jurisprudence (*uṣūl al-fiqh*) in general form, from all of its angles; and also it is an explanation that there is no contradiction in *sharī`ah* at all. And nothing will be against the valid *qiyās* except a contradiction; because the valid *qiyās* is the equalization between two identicals and the differentiation between two incompatibles and the unification among the things in which God and His Messenger join together there; and separation among those in which God and His Messenger have made separate there.

[69] *Qiyās* is the giving of consideration to the combining, sharing meaning which the Lawgiver recognized and made the basis for the ruling. That meaning may also be a general legal expression and thereby the ruling that comes with its general (meaning) will be the expression of the Lawgiver and His meaning. We have explained not in this place, that all the rulings are established with the expression of the Lawgiver and His meaning. His expressions cover all the rulings. And all the rulings are validated by effective meanings. His meanings again, cover all the rulings. But the person who does not know the general expression may understand the meaning; and the person who does not understand the general *`illah* may know the general expression and its implication. And many times a mistake is committed by a person who thinks that He[464] said something but He didn't; or that He made it general or specific, but the intention of the Lawgiver is the opposite of that. Likewise, an

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[464] The Lawgiver.

error is made by a person who rejects an expression which He[465] has uttered; in the same manner, mistake is made by a person who thinks He[466] considers a meaning[467] but He does not consider it; or nullifies a meaning of which He has considered and so on like that.

[70] By God, we will bring what the learned jurists have considered as *istiḥsān* against the *qiyās*. Some of that is what Aḥmad says in one of the two narrations from him when he recognized *istiḥsān*. Two narrations have been related from him as mentioned. And the third points to his most correct (statements) that the *istiḥsān* which is against the *qiyās* is valid when there is an effective disparity between the two of them, and the Lawgiver has recognized it. And that it is not correct when they are joined together without a legal proof or separated without a legal proof. And that it is not allowed to reject the valid *qiyās*.

[71] As to his saying that: "I prefer *tayammam*[468] for each prayer, but *qiyās* indicates that it is like water until the water becomes available or he discharges excrement." This *qiyās* is another narration from him. And this is the opinion of Abū Ḥanîfah and the Ẓāhiris and others; and it is the correct (opinion) as the Book and the *Sunna* point to it.

[72] Concerning his saying: "The *qiyās* is the legal *qiyās* by expression and meaning." The saying of the Prophet peace be upon him,: "clean sand is a cleanser for years", and his saying: "the earth has been made for me as a mos-

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465 The Lawgiver.

466 The Lawgiver.

467 For a ruling.

468 Sand ablution.

que and as a cleanser", such similar expression are statements that indicate that sand is a cleanser just like water. The Qur'ān indicates that sand is a cleanser in its wording when it mentions *tayammam*: "God does not desire to place on you a difficulty but to make you clean, and to complete His favor upon you."[469] Those who instructed him to make *tayammam* for every prayer.....[470] And I saw from some of the companions that it is weak; and from them is what goes against it. They say that it does not remove impurity but it is a permission and it should be allowed according to the degree of the necessity. They say: If it were to remove impurity when the use of water is restricted, it would not have qualified as unclean[471] from the previous state of impurity without the re-occurence of the impurity. They support this with the Prophet's saying to `Amr b. al-`Aṣ: Did you pray with your companion while you were in the state of major ritual impurity (*Junub*)?[472]

[74] The answer to their statement that "(*Tayammam*) does not remove (dirt) but it is a permission", (we say) it is an unrealistic expression. If what they said were to be true, they would not have a proof therein; because the impurity[473] is not a visible matter such as in a state of major ritual impurity (*junub*), but it is an abstract impurity that prevents prayer. Since the prayer is permissible (with it) or even obligatory, it is impossible to have in this case, an

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469 Qur'ān 5:6.

470 The editor indicates here that two words remain illegible for him.

471 The companion who performed *tayammam* after he had a major impurity would not have been described as unclean by the Prohet's interogation: Did you pray while you are in the state of impurity?

472 *Junub* is a state when one has sexual relationship and he/she has not taken a bath.

473 Which necessitates ablution.

impediment against the prayer, except that the impediment[474] be removed completely.

[75] If they say: "It is an impediment but it does not prevent by virtue of *tayammam*." [Answer]: The impediment that does not prevent is not an impediment. If it is argued that: It prevents when the using of water is restricted. [Answer]: It is only then that the impediment exists. [Question] How can the impediment come back without the re-occurence of the impurity? [Answer]: It is like the returning of what prohibits without the re-occurence of the impurity; because what prohibits the prayer is the impediment and what makes it permissible is the removal of this impediment. If it is argued that (*tayammam*) is allowed until one is able to use the water, it will be explained that it also removes the impediment until the time of the ability; as they used to say: "It is allowed temporarily", it can be said also that it is temporarily removed.

[76] If they say: We are not going to accept anything other than what absolutely removes (impurity) such as water. [Answer]: Also, we are not going to accept anything other than what absolutely permits that which is similar to water. Again, God and His Messenger call it a cleanser. And the Prophet peace be upon him has made it the cleanser of the Muslim whenever he cannot find water. And a cleanser is what is used for cleaning. God Almighty has said: "If you are in a state of ceremonial of impurity (from sex pollution) bathe your whole body."[475] *Tayammam* does purify and with the purification no dirt remains because cleanliness contradicts filthiness. The objective of *tayammam* is to remove the abstract impurity; and purification

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474 Which is the impurity.

475 Qur'ān 5:7.

contradicts the impurity.

[77] If it is said: Prayer with *tayammam* is a permission like eating dead animals out of hunger. Permission is the allowing of what is prohibited with the existing of what prohibits and the preventing of the impediment. If the impediment were to remain, the prayer would not have been permitted. Therefore, the elimination of the impediment is known. And it is not permissible to be said here that prayer is allowed with the existence of what prohibits it. Because what prohibits is an hindrance which removes the prohibition of eating the dead animal due to a preponderant conflict. And that is: The meaning which necessitates the prohibition attached to the dead animal is present at the time of dreadful hunger as it exists at the time of ability.[476] The dead animal itself does not change, but the condition of the person has changed. He was not in need of it, then he became needy of it...[477] Prohibition (?)[478] This rejects his proclamation to eat the dead animal[479] and it does not prevent his proclamation here.[480] Because nothing will happen to him except death (if he were to refrain from it) since his condition has changed to the need. And his need prevents the inevitable calamity completely, thus it is *tayammam*.

[78] It is argued: This is a wrong *qiyās*; because he hunted a dead animal and ate it and the dead animal remained unchanged but only the condition of

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476 To survive without eating it.

477 The editor explained that: "two or three words cut off by binder's scissors or through natural wear of folio's edge."

478 The editor noticed that the rest of the sentence was "partly cut off."

479 When there is no compeling need.

480 To eat from the dead animal when there is a need.

the one who ate it has changed. And here it is only the impurity which has made prayer forbidden for him; then the prayer became an obligation on him or permissible by *tayammam*. If his condition were to remain unchangeable, legally, and the prayer were to be made permissible for him in a certain situation and made prohibited on him in another situation, then it would be prohibited to call it a cleanser at the time when its use was allowed. And sand has been made as a cleanser in the same manner the water has been made as a cleanser.

[79] The saying of the Prophet, peace be upon him, to `Amr b. al-`Aṣî| "Did you pray with your companions while you were in the state of impurity?", is an interrogation. He asked him: "Was that true or not?" And that is not an information to indicate that he prayed while he was in the state of impurity. But when he informed him that he (al-`Aṣî) has performed *tayammam* because of the fear of cold, it was clear that he was no longer impure; then the Prophet peace be upon him embraced him. Otherwise, if the meaning were to be information, and he had offered an acceptable prayer in the state of impurity, he would not have asked him. If *janābah* is an absolute impediment for prayer, his excuse[481] would not have been accepted. And he did not say to him: "Did you pray while you were in a state of impurity without *tayammam*?" in order to let him understand the forbidden situation[482] and that is why the Prophet designated prayer with *janābah*.[483] They are saying:[484] It is permissible with *janābah* sometimes and not permissible at other times. The saying of the

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481 That he performed sand ablution because of cold.

482 Whereby prayer is not permissible.

483 To show that the two are incompatibles.

484 The opponents.

Prophet indicates prohibition of prayer with *janābah* absolutely; and that the interrogation is a "disapproval". And that when it was clear that he had performed *tayammam*, it was declared that he was no longer in the state of impurity; and therefore, there is no disapproval anymore on him with this (declaration), God knows best.

[80] It has become clear here that the *qiyās* is correct without *istiḥsān* which contradicts it. And particularization of the cause is denotes that this is a substitute, a cleanser, a permission which stands in the position of water whenever it is impossible to obtain it in all aspects of its rulings; and it is not specifically confined to certain rulings of substitution, purification and permission. And normally, a substitute stands in the position of what it represents in terms of its ruling, not its appearance. The ruling is the permission to pray with it[485] whenever he cannot find water or he becomes impure.

[81] That opinion is against *qiyās* and *takhṣīṣ al-`illah* undoubtedly; and the *`illah* is valid undoubtedly. And for us, when we say: It is not permissible to have a particularization without an effective disparity, it implies two reasons. One of them is that when it is confirmed that the *`illah* is valid, its particularization is not allowed; such as in this case. Second, if its particularization is confirmed, its invalidity becomes known. This is the meaning of our saying: A valid *qiyās* and a valid *istiḥsān* cannot be together in a case unless there is an effective disparity in the legal (issue therein).

[82] As for his opinion in the case of the manager *muḍārib* in a co-partnership,[486] when he opposes (his partner) by buying what he was not asked to,

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485 With *tayammam*

486 *Muḍārabah* means a contract of co-partnership in which one of the parties, the proprietor is entitled to a profit on the account of the capital

the profit belongs to the owner of the capital and the manager is entitled to a similar reward unless the profit has exhausted the equivalent (reward of his labour) then, there will be nothing for him. He said: I used to uphold that the profit belongs to the owner of the capital, then I preferred not to. And this preference is with a disparity which he deemed to be effective. The *qiyās* is extracted and the *istiḥsān* is also extracted; and it is a particularization of an *`illah* which is extracted with a distinctive deduction. Aḥmad b. Ḥanbal does not reject this type of *istiḥsān*, but it is possible that one or two *`ilal* are invalid. invalid. In the same manner, he does not reject *takhṣīṣ al-`illah*, which is textually mentioned with *sunna*[487] which has made his prayer permissible. And it is not (prohibited) here except due to the impurity.

[83] The difference is that the *muḍārib* works under instruction, he does not work on a fixed wage but as a partner in the profit. His labour is for him, and the owner of the capital owns all. That is why the learned jurists have opinions on what is his right in an invalid co-partnership and similar (contracts). Is he entitled from the profit to an equivalent share of his labour, or to an estimated wage which is a similar reward? The first opinion is certainly the correct one. And this is *qiyās* according to Aḥmad's school of law. Surely, its originality is that all these transactions are co-partnerships not based on known landlordship wages; and according to *qiyās*, in our opinion, it is valid.

[84] Those who uphold to the view of giving similar wages are those who consider it[488] a kind of rent (*al-Ijārah*). We say: *Qiyās* ruling stipulates its

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(*ra's al-māl*). The other party is entitled to profit on account of his labour and he is called the manager (*al-muḍārib*).

487 Such as *tayammam*.

invalidity; and the employee involved therein is paid according to the need. At any rate, he works for himself in order to be entitled to the share or the profit; and he works for the owner of the capital as well. He is not like an usurper whose labour has been designated to the owner of the capital as a donor. But surely this takes the capital to the work for a reward. And with disobedience, it does not take money out of his hand for working for a profit. But he did what he was not instructed to do, therefore, he must be liable for his aggression. But when he is not liable, the reward of his existing labour will not be put off; in as much that he has been given permission with the contract to conduct business in general, and he does not deny (his former disobedience) in that (transaction).

[85] It is again from another source; and that is: When he acts freely without his authorization, the action is that of an uncommissioned agent and the object of the contract should be stopped. This is one of the two narrations from Aḥmad, and the opinion of most of the learned jurists. It is also the one mentioned by al-Kharqiyy in his *mukhtaṣar* (summary) that the sale by an uncommissioned and agent its purchase is not invalid but must be stopped. If he sells or buys with the same money, it must be suspended; if he buys by debt it must be interrupted and if the buyer allows him, he is permitted; if not, the buyer must stop it.

[86] As for al-Qāḍî and his followers, they choose that his free act (without authorization) is rejected except if he buys by debt. What al-Kharqiyy mentioned is more appropriate. But he compared this case among the topics in his *mukhtaṣar*, with an agent when he acts without his authorization. And if he allows him and asks for his share of profit, it becomes lawful and he

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488 *Muḍārabah*.

becomes a commissioned agent for him. And the agent works only because of his own share from the profit and therefore, he is entitled to his share from the profit.

[87] The saying of Aḥmad: "I used to uphold the view that the profit is for the owner of the capital then I later preferred not to", is a return to this. His giving of the profit in all cases to the owner of the capital indicates that an uncommissioned act is allowed when permission has been given, otherwise, the sale is null and void.

[88] And also, buying with the very same money is permissible, as Shāfi`ī and those who support the other view maintain. Thereby, he is liable only to what he spent from his money. The owner has no more than this; and the agent will have no profit because he did not do anything.

[89] Related traditions confined to the companions, and those after them, (*al-tābi`ūn*) on the section of sale, marriage, divorce and others, indicate that they used to say that the transaction must be stopped especially when the permission from the owner is very difficult to obtain.

[90] Due to this, Aḥmad says that it should be stopped here as in the case of the contract agreement by following the companions on that. The person who does not understand what the stopping of the contract agreement involves, proclaims that it is against the *qiyās*; as in the (case) of a found object. The speech of the predecessors, on who allows profit from the property of others, is a proof of the valid free act. According to them, it is allowed since the owner has given him the permission.

[91] Due to this, what Aḥmad had preferred became apparent and he later returned to it, because if the agent became an authorized person by the

permission and he did not work except with certain wages according to the owner's satisfaction, then, it is not permissible to deny him his right. This is based on (the opinion) that if he acts freely at the inception,[489] all the profit belongs to the owner. And it is one of the opinions in this case; and someone said, the two of them will donate it as charity; it is a narration from Aḥmad. Some have said: It belongs to the agent, such as in the opinion of Shāfiʿī, while some have said: the two of them are co-partners in it and it is the most valid of the opinions. And it is traced from ʿUmar in the (contract of) *al-muḍārabah*.

[92] It is related from ʿUmar that because the owner has given him permission in it, he is like a manager. He is not working so as to let the profit be for the owner as a limited partner. If he were to do that, the profit would have been for the owner. But he conducted the bussiness in order that the profit will be for him or the the two of them. The owner has authorized his sale; and he does not permit him to have all the profit for himself. Therefore, the increment is realized through the money of this (owner) and through the sale of this (agent). The 'free act' is valid, permitted, and therefore, the profit should be between the two. Those who say: "They should both donate it as charity", they make the agent an unauthorized person in it and therefore, a malignant. He is an aggressor, because the right belongs to the two of them which he should not trespass. But if the owner has authorized the 'free act', then, it is permissible.

[93] And that is in all the actions of the usurper, especially by the person who does not know him as an usurper. If he 'acts freely' on something usurped with that which changes its name such as the grinding of grain, or weaving of cloth or similar to that, there are three opinions in that. According

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[489] Of the contract.

to Aḥmad's school of law and others, it is said that that (all the profit) belongs to the owner without the usuper's share and he is liable to the damage, as Shāfi`ī opines. And it is said: The usurper owns it and incumbent on him is its substitution as Abū Ḥanīfah upholds. And it is said: The owner will be given the option to choose between the two as Mālik advocates; and this is the most valid, based on the stopping of the unauthorized acts. If the owner wishes, he may approve his free action and demands from him the deficit as in the case of the disobedience of the agent. And if he wishes, he may demand from him a substitute for damaging it and by taking that as a compensation for him. Thereupon, the owner will be given the optional right of choice on the item of substitution.

[94] If the owner is pleased with it, would the usurper be a co-partner[490] in his work? In that, there are two views: The more apparent of them is that the result of his labour belongs to him. As an oppressor, he incurs liability of (what he usurped) but not by taking the result of his labour and giving it to someone else without an exchange. Obviously, this is an oppression against him; and it is an obligation is remove the oppression. The recompense for an injury is an injury equal thereto (in degree),[491] not more.

[95] As for his saying on someone who usurped land and cultivated it: "The plant belongs to the owner of the land and incumbent on him are the expenses and this has nothing to do with *qiyās*, [but] I prefer to pay him his expenses". To this, he has quoted the text as stated earlier on the basis of the *ḥadīth* of Rāfi` b. Khudayj. It necessitates that the *qiyās* which contradicts this text is invalid if there is no text which indicates its validity (i.e. of *qiyās*);

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490 In the sharing of the profit.

491 Qur'ān 42:40.

and the effective disparity is apparent. Otherwise, when the *qiyās* opposes the text, it is invalid.

[96] As for the corruption of the ruling which contradicts a text, it is unanimously agreed upon to be invalid, and also the corruption of the *`illah* according to the opinion of the majority of those who do not conceive *takhṣīṣ al-`illah* except with an effective disparity. And this text has opposed the *qiyās*. As for their saying: "The *qiyās* is that the crop belongs to the one who plants it", they have no text nor similar (proof). But the ruling of *qiyās* stipulates that the crop is either to be shared between the two of them like in the *muzāra`ah*[492] or belong to the owner; because the crop on the earth is like pregnancy in the stomach; and the throwing of the seed is like ejaculating semen. If a male (slave) cohabits with female (slave), the pregnancy belongs to the master of the female not to the master of the male. This is the chosen (opinion) of Ibn `Aqīl and others. But semen cannot be measured in comparison to the crop; and that is why he stipulates that he bears its expenses. Surely, the whole of the crop is on the land, its soil, its water, its air and its sun. As the whole pregnancy is in the stomach of the mother. The sperm of the father is relatively small, as the grain is small. So also are the trees when its female is cross-pollinated by its male, the fruits belong to the owner of the female not to the person who performed the cross-pollination. And the grain is like the pollinator.

[97] Concerning the saying of Aḥmad: "On him lies the expenses of it", this implies equal grain and it also implies compensation for his labour and the

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492 *Muzāra`ah* is a contract between two persons, whereby one party is the landlord and the other the cultivator. They both agree that whatever is produced by cultivation of the land shall be divided between them in specified proportions.

work of his yoke.[493] As for his saying: "Nothing in this (case) agrees with the *qiyās*", is like his saying in the case of a disobedient agent: "Then I prefer that the reward should be given to him." His *qiyās*, as we can see in the case of the usurper, is that he should not be given the wages for his labour and for the labour of his yoke. He[494] is in opposition to the *qiyās* in this evidence; because he (the usurper) only works to earn wages, he does not work freely as in the case of the (disobedient) agent in *al-muḍārabah*; since the grain belongs to him and he is not an exclusive usurper.

[98] Narration differs from Aḥmad as to whether to give (the usurper) what he has spent or the like of his wage. The text has been established on the first (opinion); indicating that nothing is due from the crop, but that his expenses must be paid to him. The *qiyās* ruling stipulates the second (opinion).[495] Probably, his argument against *qiyās* is from this point of view. And that the one on which the textual (evidence) received, may be concerning what he spent and the similar wage equal to (his labour) is due therein.

[99] As for the selling of the Holy Qur'ān and that of cultivated land, distinction has been made between the selling and the buying of the two. The *'illah* is present in the selling but not in the buying. The buyer is interested in the Qur'ān, exonerating it and spending his money on it; but the seller exchanges money for it. The law separates between that (interest) and this (lack of interest) as it distinguishes between the donor and the recipient of (charity) among those whose hearts have been weaned from hostility to

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493 Animal, especially oxen couple together by the neck for cultivation.

494 Aḥmad.

495 Which indicates that the equal payment of his wage is his entitlement.

Islam,[496] and also in the emancipation of slaves and so on.

[100] If it is known that if the Qur'ān and the cultivated land were to be given to him without an exchange, it would be permissible; then the giver substitutes it with that (exchange) as against that whose possesion is not permissible such as wine and other (prohibited things). If he spends for him...[497] the exchange, his free action will not be except on the seller.

[101] If it is argued: When one cannot obtain a trained dog except at a price, then it is permissible to give it even if it is not allowed to take it. Answer: If there is no effective distinction between the two of them legally, that is how it should be. If it is argued that: there, it is necessary to give the dog without an exchange unlike the land and the Qur'ān, then, this is different.

[102] Despite that, what is confirmed from the companions is that the selling of the Qur'ān is reprehensible. And Ibn `Abbās used both to disapprove it and again, he used to permit it; and he says: It is only a speculative (legal decision) and he has a reward for his speculation. This shows that it is a blameless disapproval. It is narrated from another source: I wish that the hands were amputated in the selling of the Qur'āns; and this is an emphatical prohibition. That is why there is a different narration from Aḥmad on whether it is a blameless prohibition or it is forbidden. As to whether its buying and its exchanging is permissible or reprehensible, there are two views: A narration from Ibn `Abbās indicates that it is permissible to sell it and use its price for buying another Qur'ān. There is no worldly bargain in the exchanging and in

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496 Those who might be persecuted by their former associates and thereby require assistance until they establish new connections in their enviroment. (Qur'ān 9:60).

497 The editor observed the missing of one or two words here.

the buying of the (Qur'ān). What is more popular is the permission of that; therefore, no aversion. And surely, the sale is not forbidden but it is disapproved as a token of respect for the Book of Allah, because there is no legal evidence on the prohibition.

[103] Also, concerning the land of al-Kharājīyah,[498] basically there is no legal evidence which prevents its sale. Those among the learned jurists who prohibit it say: It is an endowment and the selling of an endowment is not permissible. And this (prohibition) is confined to the endowment, the right of selling it which its owner becomes null and void; and that is the endowment which cannot be inherited nor given as a gift. But as for *al-Arḍ al-Kharājīyah*, it can be inherited as well as be given as a gift. And in that, the buyer stands in the position of the seller, he cannot invalidate the right of the owner of the endowment.

(104) And the School of law of Aḥmad b. Ṭāhir permits selling a slave on manumission by contract[499] due to this meaning. Such sale does not invalidate his right of the stipulation, but he will be with the buyer as he used to be with the seller. He can be inherited according to the unanimous agreement. However, when he made a contract with him, those who forbid his sale, imagined it to be selling of a free man as those (other people) imagined that an endowment is sold, but the truth is not what they assumed. The sale of the freedom is to be enslaved so as to be denied a freedom and the selling of the endowment is to be left unrestricted and to be used by those who do not deserve it.

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498 It is the land gained after *jihād* and became property of the Muslims.

499 *al-Mukātabah* is a slave with the contract of becoming free as soon as he has paid off a stipulated amount of his value.

[105] As for the land of *al-Kharājīyah*, its cultivation remains unchanged. And it is the tax from the land which is spent on it, irrespective of whether it is a tax such as the one applied by `Umar[500] or if it became divided as the later caliphs did with the rural area of Iraq (*arḍ al-sawād*), as did al-Manṣūr. On either of the two propositions, the right of the Muslims remains; as it disappears with death and gift. The companions who disapprove of its sale did so for the reason of preventing the Muslims from participation in the *kharāj* of the non-Muslims on agreement with Muslims (*ahl al-dhimmah*);[501] or to repudiate the right of the Muslims with the (purchasing of) the land. And surely, the buyer, if he pays the *kharāj*, it is a tax and he has adhere not to be humiliated; but if he does not pay it, he has violated the right of the Muslims. That is why `Umar and others among the companions disapproved and forbade the sale.

[106] As for the sale, non-Muslims with a contract used to sell it, because the land of *al-Kharājiyyah* is kept in the hands of *ahl al-dhimmah*. The reason for that, again, is to keep the Muslims from being pre-occupied with agricultural and trival issues at the expense of *jihād*. When the Muslims became the majority and most of them became non-combatants, and their contribution of *kharāj* became more useful to the Muslims in general than when it was entrusted to the hands of the *dhimmis*, then, no more humiliation remains on the *dhimmis* as it used to be at the early stage of Islam, except those (Muslims) who prefer cultivation of land than *jihād*. This is not confined on *al-*

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500 When the Muslims gained the land in certain area of Iraq, `umar decided that the land should not be distributed but kept in the hands of the non-Muslim owners, certain taxes are stipulated on those who are keeping the land as a share contribution from the profit they gain therein.

501 They are the non-Muslims who are protected by a treaty of surrender and they are allowed to own the land and give the *kharāj*.

kharājiyyah, for the Prophet peace be upon him, said: "No nation will enter into this profession except that humiliation will abide with her", al-Bukhārī narrated the *ḥadīth*. Despite that, the Anṣār used to be farmers on their lands; this (condemnation) is of the pre-occupation with worldly construction at the expense of the *jihād*. This is not specified with *al-kharājīyah*.

[107] As for the statement of al-Qāḍī concerning the acceptance of the witness of *ahl al-dhimmah* to a will during a journey, there is no doubt that the distinction here is apparent. This is part of *istiḥsān* and *takhṣīṣ al-`illah* in which the distinction is apparent. The prohibition from (accepting) their testimony by the Muslims is confirmed by the text; and the permission is also granted here due to need. Could this be related to all cases of the need? There are two narrations on that from Aḥmad, which are based on the assurance that the reason (*al-`illah*) is known. It is non-existent in this place, and this is the viewpoint of the permissibility.

[108] As for the viewpoint of the prohibition, either we may say that: We do not know the *`illah* and that it is common, or that we know its particularization from this case due to the general necessity therein. Notwithstanding, if the general prohibition is asserted in any, other than this case, it could either be through an expression or by a meaning. And there are no general expressions related to the prohibition in the Qur'ān or in the *Sunna*. No other (source) remains except the *qiyās*. And in those circumstances, seeking two Muslims as witnesses is instructed.

[109] It is understood that (witness of a Muslim for a Muslim) is required only when it is possible to obtain both their witnesses. And this is an obligation in the case of bequest during travelling. But if it is difficult for those who are on the journey to obtain both witnesses, or the revocation, then, there is

no provision in the Qur'ān which points to the prohibition (of the witness of non-Muslims). If there is no (proof) in the Qur'ān nor in the *sunna* prohibiting the witness of *ahl al-dhimmah* when it is difficult to obtain the witness of two Muslims, there is no *qiyās* here in opposition to this verse. The companions and the majority of those after them (*al-tābiʿūn*) have applied this (rule). Those who did not apply it have no textual (proof from) the (Qur'ān), consensus or *qiyās* opposing it. They have interpreted it completely without an acceptable foundation. Some of them say: It is on the testimony of oath. The three opinions are null and void from many points of view.

[110] As for the saying of those who uphold that: "It is not permissible under any circumstances to have *ahl al-dhimmah* as witnesses on Muslims", they do not have with them a text, nor *qiyās* to support that (proclamation). But many people commit mistakes because they are making the specific from the lawgiver's general (statement). Allah (God) has commanded to seek Muslim witnesses over the Muslims whenever it is possible. Therefore, those who speculated, taught that none other than Muslims should testify even if a Muslim is not available.

[111] The case of witnesses is based on the distinction between a situation of ability (to find them) and a situation of inability. That is why the testimony of women is acceptable in what men cannot investigate. Aḥmad has mentioned on their testimony on injury (*al-jarrāḥ*) and others when they are exclusively together without men such as their sharing of the same bathrooms, or their assembling in wedding and any other similar gatherings. And this is correct; because there is no text, consensus or *qiyās* which prevents women witnesses on such occasions. Nor is there in the Book or the *Sunna*, anything that prevents women's testimony in the punishments absolutely.

[112] But if he solemnly pledges to murder his son or himself, Aḥmad follows what is asserted from Ibn `Abbās and that is the *qiyās* and the text. If he is able to afford a ram, that is (sufficient) for him. If he advances a loan on it, an atonement of a ram is on him. This is the most authentic narration from Aḥmad. And that is what is openly expressed by him in many places. It is said that: On him, is an atonement of a ram in all, and it is said two rams in all cases, and it is said there is nothing on him. And that is because whoever pledges to do something, it is compulsory on him to fulfil the pledged or make a substitute according to the *sharī`ah*. And here, when the object of the pledge is excusable, it was changed to the legal substitute which is the ram, as it is in its similar (cases). And there is nothing here which contradicts the valid *qiyās*.

[113] This section is a section which requires reflection on the general and the specific, of the wording of the legal (issues), and their meanings which are the reasons (*`ilal*) for the rulings. It is the foundation from which the *sharī`ah* rules of Islam are known. Allah knows best. And praise be to Allah and the blessing of Allah be upon Muḥammad and his family.

Summary and Conclusion.

The failure of the proponents of *istiḥsān* to explain why they base their opinions on juristic preference is the major problem which caused them to be charged with judging matters without any textual basis. A typical example is the statement of Abū Ḥanîfah: *"Qiyās* will be this and that, but we apply *istiḥsān* in this case."[502] This quotation of Abū Ḥanîfah is subject to criticisms because there is no evidence to support his legal preference in that expression.

It becomes clear from our research that the early jurists such as Abū Ḥanîfah, who lived before Shāfi'î, used *qiyās* as an *aṣl* (basic principle) to formulate a rule. And when they say that a case is against the rule of *qiyās* (*khilāf al-qiyās*), they mean that the rule in that particular case contradicts the established principle due to necessity. Abū Ḥanîfah used the above expression often in his application of *istiḥsān*.[503]

If *istiḥsān* is taken as a departure from the rule of *qiyās*, it means either of the following: (a) A rule chosen from two contradictory analogies, in which case, preference is given to one of them; that is why the one chosen is sometimes called *al-qiyās al-mustaḥsan* (the preferable analogy), or (b) an exceptional ruling the basis of whose preference has been inferred from the Qur'ān, from the *sunna* or from the consensus.[504]

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502 In fact Shaybānî mentioned that whenever there was a dispute over Abū Ḥanîfah's analogical deduction between him and his disciples, Abū Ḥanîfah would resort to juristic preference by simply saying: "I prefer to use *istiḥsān* in this case." (*"Anā astaḥsin fî hathih al-mas'alah."*) For details, see chapter one of this thesis, pp. 30-31.

503 See chapter one page 35.

504 See Pazdawî op. cit. pp. 1128-1137.

Discretion cannot be ruled out in deciding matters for which there was no precedent concerning them in the revelations; however, fairness and justice in accordance with the spirit of the Qur'ān and the *sunna* must be maintained. The objective of *Sharī`ah* is not adherence to *qiyās*, but judgement according to what is good and appropriate through the guide-lines of the revelations. To this effect, Shaybānī and many other jurists have used *istiḥsān* to signify a discretionary opinion in breach of *qiyās*[505] or the necessity to legitimize a ruling which would otherwise have been forbidden.[506]

Our study of Shāfi`ī's rejection of *istiḥsān* reveals that his attack on juristic preference is based on the threat which the concept poses to the stability he wishes to inject into Islamic jurisprudence as a nascent science. This conclusion is supported by his use of *istiḥsān* despite his criticism of the procedure.[507] Sarakhsī's work, which we have translated above, may be correctly considered as a rebuttal of Shāfi`ī's criticism of *istiḥsān*. Even though the author did not mention that fact specifically, he alludes to it in paragraphs one and two at the beginning of his work.

Ibn Taymīyah believes that Shāfi`ī has two opinions, an older one and a newer one. In his old opinion, Shāfi`ī criticized *istiḥsān* while in his later opinion he used it in legal decisions; therefore, the later opinion should prevail over the former. As for the expression that a certain legal decision is "against inference by analogy" (*khilāf al-qiyās*), Ibn Taymīyah states that there is no single valid ruling of *Sharī`ah* which contradicts valid *qiyās*. Therefore,

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505 See chapter 1, p. 39.

506 See chapter 1, p. 41.

507 *Uṣūl Sarakhsī*, the selected chapter which has been translated above; see paragraph 5.

when *istiḥsān* is applied in the matters of rent, loan and co-partnership, which are all based on consensus, one should not say that they are against *qiyās*, but that they imply particularization of the cause (*takhṣīṣ al-`illah*).

Ibn Taymîyah explains that the *`illah* which would have made the above transactions forbidden is the non-existence of the objects of the contract at the time of the agreement. However, that *`illah* has been put aside through particularization. A new *`illah* which consists in need or necessity is given priority and therefore, overrides the previous *`illah*. Ibn Taymîyah argues that there is no dispute among the jurists that necessity permits what would have been made forbidden. He justifies this by the example of the permission to eat a dead animal by someone compelled to do so because of necessity.

In a nutshell, the argument of Ibn Taymîyah is as follows:

(a) That *qiyās* is a valid legal procedure.

(b) That *istiḥsān* is not contrary to valid *qiyās*; rather the *`illah* of the latter is particularized by that of the former.

(c) That the procedure of particularization of the cause amounts to the procedure of juristic preference; and therefore, *istiḥsān* is *takhṣīṣ al-`illah*.[508]

The dispute over the issue of *istiḥsān*, which some Ḥanafîs consider to be against *qiyās*, lies in the jurist's intention and the explanation he gives to the extracted *`illah*. If the jurist extracts an *`illah* from *qiyās* and particularizes it without explaining how and why it is particularized, then such an action is considered weak;[509] and this is the type of *istiḥsān* which Shāfi`î holds Abū

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508 See paragraphs 19-21 of his *al-Mas'alat al-Istiḥsān* translated above.

509 See Ibn Taymîyah, *al-Mas'alah*, op. cit., paragraph 31.

Ḥanīfah and other advocates of juristic preference to be quilty of.

From this study of the procedure of *istiḥsān*, it is apparent that legal rules in *sharī`ah* are based on *`ilal* (causes and purposes) "all of which are founded on the interests of human beings in this life and the hereafter." Consequently, all rules should cease to apply when the effective causes on which they are based and which provide their *raison d'être*, exist no more.

Being a corner-stone in the field of Islamic jurisprudeence, the *`illah* of a given ruling must be determined by a jurist either directly from the text or through reasoning. This latter exercise leads to diversity of opinion; however, different opinions and interpretations should be used to enhance the flexibility of *sharī`ah* and not as a source of animosity and hatred among jurists.

Diversity of opinion requires tolerance and gives opportunity not only to choose from the legal rules based on the interpretations of jurists, but also from those which are most suitable to the needs of modern society, public interest and the principles of justice and equality. This is what the procedure of *istiḥsān* stands for. Again, *istiḥsān* can be used as one of the means of fulfilling the adaptability of *sharī`ah*.

It is undeniable that laws change according to changes in times, places and conditions. In the light of this fact, Ibn Khaldun rightly comments: "The condition of the world and nations, their customs and sects, does not persist in the same form or in a constant manner. There are differences according to days and periods, and changes from one condition to another. Such is the case with individuals, times, and cities, and it likewise happens in connection with regions and districts, periods and dynasties."[510]

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510 Ibn Khaldun, *The Muqaddimah : An Introduction to History* (New

If the early jurists, despite their piety and sincerity, have understood the above reality and used *istiḥsān* as one of the means of interpreting the laws, thereby discovering appropriate laws for their time, then there is no reason why the same approach cannot be practised by modern Muslim jurists. Provisions of law should not remain rigid and immutable. The gift of reason given by God to human beings, and His encouragement to pursue rational inquiry into His creation[511] cannot be confined to the *`Ulamā'* of the first three centuries of Islam. It is not logical that only such *`Ulamā'* should be entitled to the formation of opinion and *ijtihād* and that the generations after them be deprived of this freedom.

The early Ḥanafīs were not bothered by the fact that the *`ilal* (causes) did not operate without exceptions. They were convinced that legal causes are signs, and that as such, they function almost like the signs of language, which, it is agreed, are subject to particularizations.[512] Modern jurists may emulate such courageous patterns of the early jurists and thereby adhere to the spirit of Islamic law by translating the broad objective of the *sharī`ah* into laws that are capable of serving contemporary society.

Jersy: Princeton University Press, 1969), p. 25.

511 "Surely in the creation of the heavens and the earth, and the alternation of Night and Day, there are indeed Signs for men of understanding, men who remember Allah standing, sitting, and lying down on their sides, and contemplate the (wonders of) creation.... Qur'ān 3:190.

512 *Mu`tamad*, op. cit., vol. 2, p. 834.

(باب ابطال الاستحسان)

(قال الشافعي) وكل ما وصفت مع ما أنا ذاكر وساكت عنه اكتفاء بما ذكرت منه عما لم أذكر من حكم الله (1)
ثم حكم رسوله صلى الله عليه وسلم ثم حكم المسلمين دليل على أن لا يجوز لمن استأهل أن يكون حاكما أو مفتيا

(1)

أن يحكم ولا أن يفتي الا من جهة خبر لازم وذلك الكتاب ثم السنة أو ما قاله أهل العلم لا يختلفون فيه أو قياس على بعض هذا ولا يجوز له أن يحكم ولا يفتي بالاستحسان اذ لم يكن الاستحسان واجبا ولا في واحد من هذه المعاني فان قال فاستدل على أن لا يجوز أن يستحسن اذا لم يدخل الاستحسان في هذه المعاني مع ما ذكرت في كتابك هذا قيل قال الله عز وجل أيحسب الانسان أن يترك سدى فلم يختلف أهل العلم بالقرآن فيما علمت أن السدى الذي لا يؤمر ولا ينهى ومن أفتى أو حكم بما لم يؤمر به فقد أجاز لنفسه أن يكون في معاني السدى وقد أعلمه الله أنه لم يتركه سدى ورأى أن قال أقول بما شئت وادعى ما نزل القرآن بخلافه في هذا وفي السنة فخالف منهاج النبيين وعوام حكم جماعة من روى عنه من العالمين فان قال فأين ما ذكرت من القرآن ومنهاج النبيين صلى الله عليهم وسلم أجمعين قيل قال الله عز وجل لنبيه عليه الصلاة والسلام اتبع ما أوحي اليك من ربك وقال وأن احكم بينهم بما أنزل الله ولا تتبع أهواءهم الآية ثم جاءه قوم فسألوه عن أصحاب الكهف وغيرهم فقال أحدثكم غدا يعني أسأل جبريل ثم أعلمكم فأنزل الله عز وجل ولا تقولن لشئ اني فاعل ذلك غدا الا أن يشاء الله الآية وجاءته امرأة أوس بن الصامت تشكو اليه أوسا فلم يجبها حتى أنزل الله عز وجل قد سمع الله قول التي تجادلك في زوجها وجاءه الجلاني بقذف امرأته قال لم ينزل فيكما وانتظر الوحي فلما نزل دعاهما فلاعن بينهما كما أمره الله عز وجل وقال لنبيه وأن احكم بينهم بما أنزل الله وقال عز وجل يا داود إنا جعلناك خليفة في الارض فاحكم بين الناس بالحق الآية وليس يؤمر أحد أن يحكم بحق إلا وقد علم الحق ولا يكون الحق معلوما إلا عن الله نصا أو دلالة من الله فقد جعل الله الحق في كتابه ثم سنة نبيه صلى الله عليه وسلم فليس تنزل بأحد نازلة الا والكتاب يدل عليها نصا أو جملة فان قال وما النص والجملة قيل النص ما حرم الله وأحل نصا حرم الامهات والجدات والعمات والخالات ومن ذكر معهن وأباح من سواهن وحرم الميتة والدم ولحم الخنزير والفواحش ما ظهر منها وما بطن وأمر بالوضوء فقال اغسلوا وجوهكم وأيديكم الآية فكان مكتفى بالتنزيل في هذا عن الاستدلال فيما نزل فيه مع أشباهه فان قيل فما الجملة قيل ما فرض الله من صلاة وزكاة وحج فدل رسول الله صلى الله عليه وسلم كيف الصلاة وعددها ووقتها والعمل فيها وكيف الزكاة وفي أي المال هي وفي أي وقت هي وكم قدرها وبين كيف الحج والعمل فيه وما يدخل به فيه وما يخرج به منه (قال الشافعي) فان قيل فهل يقال لهذا كما قيل للاول قيل عن الله قيل نعم فان قال فمن أين قيل قيل عن الله لكلامه جملة وقيل تفسيره عن الله بأن الله فرض طاعة نبيه فقال عز وجل وما آتاكم الرسول فخذوه وما نهاكم عنه فانتهوا وقال من يطع الرسول فقد أطاع الله مع ما فرض من طاعة رسوله فان قيل فهذا مقبول عن الله كما وصفت فهل سنة رسول الله صلى الله عليه وسلم يوحى قيل الله أعلم • أخبرنا مسلم بن خالد عن طاوس • قال الربيع • وعن ابن جريج عن ابن طاوس عن أبيه أن عنده كتابا من الملوك نزل به الوحي (قال الشافعي) وما فرض رسول الله صلى الله عليه وسلم شيأ فظ الا بوحي فمن الوحي ما يتلى ومنه ما يكون وحيا الى رسول الله صلى الله عليه وسلم فيسنه • أخبرنا عبد العزيز بن محمد عن عمرو بن أبي عمرو عن المطلب بن حنطب أن رسول الله صلى الله عليه وسلم قال ما تركت شيأ مما أمركم الله به الا وقد أمرتكم به ولا شيأ مما نهاكم عنه الا وقد نهيتكم عنه وان الروح الأمين قد ألقى في روعي أنه لن تموت نفس حتى تستوفي رزقها فأجملوا في الطلب (قال الشافعي) وقد قيل ما هو مثل قرآنا نما ألقاه جبريل في روعه بأمر الله فكان وحيا اليه وقيل جعل الله اليه لما شهد له به من أنه يهدي الى صراط مستقيم أن يسن وأيهما كان فقد ألزمهما الله تعالى خلقه ولم يجعل لهم الخيرة من أمرهم فيما سن لهم وفرض عليهم اتباع سنته (قال الشافعي) فان قال قائل فما الحجة في قبول ما اجتمع الناس عليه قيل لما أمر رسول الله صلى الله عليه وسلم بلزوم جماعة المسلمين لم يكن لزوم جماعتهم معنى الا لزوم قول جماعتهم وكان معقولا أن جماعتهم لا تجهل

كما حكم الله ولا لرسوله صلى الله عليه وسلم وأن الجهل لا يكون الا في خاص وأما ما اجتمعوا عليه فلا يكون فيه
الجهل فمن قبل قول جماعتهم فبدلالة سنة رسول الله صلى الله عليه وسلم قبل قولهم (قال الشافعي) رحمه الله (11)
وان قال قائل أرأيت ما لم يمض فيه كتاب ولا سنة ولا يوجد الناس اجتمعوا عليه فأمرت أن يؤخذ فيه قياسا على
كتاب أو سنة أيقال لهذا قبل عن الله قيل نعم قبلت جملته عن الله وان قيل ما جملته قبل الاجتهاد فيه على (12)
الكتاب والسنة فان قيل أفيوجد في الكتاب دليل على ما وصفت قيل نعم نسخ الله قبلة بيت المقدس
وفرض على الناس التوجه الى البيت فكان على من رأى البيت أن يتوجه اليه بالعيان وفرض الله على من
غاب عنه البيت أن يولي وجهه شطر المسجد الحرام لان البيت في المسجد الحرام فكان المحيط بانه أصاب البيت
بالمعاينة والمتوجه قصد البيت ممن غاب عنه قابلين عن الله معا التوجه اليه وأحدهما على الاحاطة والآخر
متوجه بدلالة فهو في احاطة من صواب جملة ما كلف وعلى غير احاطة كاحاطة الذي يرى البيت من صواب
البيت ولم يكلف الاحاطة (قال الشافعي) فان قيل فلم يتوجه الى البيت قيل قال الله تعالى هو الذي جعل لكم (13)
النجوم لتهتدوا بها في ظلمات البر والبحر وقال وعلامات وبالنجم هم يهتدون وكانت العلامات جبالا يعرفون
مواضعها من الارض وشمسا وقمرا ونجوما مما يعرفون من الفلك ورياحا يعرفون مهابها على الهواء تدل على قصد
البيت الحرام فجعل عليهم طلب الدلائل على شطر المسجد الحرام فقال ومن حيث خرجت فول وجهك شطر
المسجد الحرام وحيث ما كنتم فولوا وجوهكم شطره وكان معقولا عن الله عز وجل أنه انما يأمرهم بتولية (14)
وجوههم شطره بطلب الدلائل عليه لا بما استحسنوا ولا بما سنح في قلوبهم ولا خطر على أوهامهم بلا دلالة
جعلها الله لهم لانه قضى أن لا يتركهم سدى وكان معقولا عنه أنه اذا أمرهم أن يتوجهوا شطره وغيب عنهم
عينه أن لم يجعل لهم أن يتوجهوا حيث شاؤا الا قاصدين له بطلب الدلائل عليه (قال الشافعي) وقال الله
عز وجل وأشهدوا ذوي عدل منكم وقال ممن ترضون من الشهداء فكان على الحكام أن لا يقبلوا الا عدلا
في الظاهر وكانت صفات العدل عندهم معروفة وقد وصفتها في غير هذا الموضع وقد يكون في الظاهر عدلا (15)
وسريرته غير عدل ولكن الله لم يكلفهم ما لم يجعل لهم السبيل الى علمه ولم يجعل لهم اذ كان يمكن الا أن يردوا من
ظهر منه خلاف العدل عندهم وقد يمكن أن يكون الذي ظهر منه خلاف العدل خيرا عند الله عز وجل من
الذي ظهر منه العدل ولكن كانوا أن يجتهدوا على ما يؤتمنون من الظاهر الذي لم يؤتوا أكثر منه (قال الشافعي) (16)
وقال الله جل ثناؤه لا تقتلوا الصيد وأنتم حرم ومن قتله منكم متعمدا فجزاء مثل ما قتل من النعم يحكم به ذوا
عدل منكم فكان معقولا عن الله في الصيد النعامة وبقر الوحش وحماره والتيتل والظبي الصغير والكبير
والأرنب واليربوع وغيره ومعقولا أن النعم الابل والبقر والغنم وفي هذا ما يصغر عن الغنم وعن الابل وعن
البقر فلم يكن المثل فيه في المعقول وفيما حكم به من حكم من صدر هذه الامة الا أن يحكموا في الصيد بأولى
الاشياء شبها منه من النعم ولم يجعل لهم اذ كان المثل يقرب قرب الغزال من العنز والضبع من الكبش أن
يبطلوا اليربوع مع بعده من صغير الغنم وكان عليهم أن يجتهدوا كما أمكنهم الاجتهاد وكل أمر الله جل ذكره
وأشباه لهذا تدل على اباحة القياس وحظر أن يحل خلافه من الاستحسان لان من طلب أمر الله بالدلالة
عليه فانما طلبه بالسبيل التي فرضت عليه ومن قال أستحسن لا عن أمر الله ولا عن أمر رسوله صلى الله عليه
وسلم فلم يقل عن الله ولا عن رسوله ما قال ولم يطلب ما قال بحكم الله ولا بحكم رسوله وكان الخطأ في قول من
قال هذا بينا بأنه قد قال أقول وأعمل بما لم أومر به ولم أنه عنه وبلا مثال على ما أمرت به ونهيت عنه وقد
قضى الله بخلاف ما قال فلم يترك أحدا الا متعبدا (قال الشافعي) في قول الله عز وجل أحسب الانسان (17)
أن يترك سدى إن من حكم أو أفتى بخبر لازم أو قياس عليه فقد أدى ما كلف وحكم وأفتى من حيث أمر
فكان في النص مؤديا ما أمر به نصا وفي القياس مؤديا ما أمر به اجتهادا وكان مطيعا لله في الامرين ثم لرسوله

فارض رسول الله صلى الله عليه وسلم أمرهم بطاعة الله ثم رسوله ثم الاجتهاد · فيروى أنه قال لمعاذ بم تقضى
قال بكتاب الله قال فان لم يكن في كتاب الله قال بسنة رسول الله صلى الله عليه وسلم قال فان لم يكن قال
أجتهد قال الحمد لله الذي وفق رسول رسول الله صلى الله عليه وسلم وقال اذا حكم الحاكم فاجتهد فأصاب
فله أجران وان أخطأ فله أجر فأعلم أن للحاكم الاجتهاد والمخبر في موضع الحكم (قال الشافعي) ومن
استجاز أن يحكم أو يفتي بلا خبر لازم ولا قياس عليه كان محجوجا بأن معنى قوله افعل ما هو بيت وان لم أؤمر
به مخالف معنى الكتاب والسنة فكان محجوجا على لسانه ومعنى ما لم أعلم فيه مخالفا فان قيل ما هو قيل لا أعلم
أحدا من أهل العلم رخص لأحد من أهل العقول والآداب في أن يفتي ولا يحكم برأي نفسه اذا لم يكن عالما
بالذي تدور عليه أمور القياس من الكتاب والسنة والاجماع والعقل لتفصيل المشتبه فاذا زعموا هذا قيل
لهم ولم يجز لأهل العقول التي تفوق كثيرا من عقول أهل العلم بالقرآن والسنة والقياس أن يقولوا فيما قد نزل
مما يعلمونه معا أن ليس فيه كتاب ولا سنة ولا اجماع وهم أوفر قولا وأحسن اباتة لما قالوا من عامكم فان
قلتم لا نعلم لهم بالأصول قيل لكم فما حجتكم في علمكم بالاصول اذا قلتم بلا أصل ولا قياس على أصل
هل ختم على أهل العقول الجهلة بالاصول! كثير من أنهم لا يعرفون الاصول فلا يحسنون أن يقيسوا
بما لا يعرفون وهل أكسبكم علمكم بالأصول القياس عليها أو أجاز لكم تركها فاذا جاز لكم تركها جاز لهم
القول معكم لان أكثر ما يخاف عليهم ترك القياس عليها والخطأ ثم لا أعلمهم الا أحدث في الصواب أن قالوا على
غير مثال منكم لو كان أحد يحمد على أن يقول على غير مثال لانهم لم يعرفوا مثالا فتركوه وا عذر بالخطأ منكم
وهم أخطؤا فيما لا يعلمون ولا أعلمكم الا أعظم وزرا منهم اذ تركتم ما تعرفون من القياس على الأصول التي
لا تجهلون. فان قلتم فصفوا تركنا القياس على غير جهالة بالاصل قيل فان كان القياس حقا فانتم خالفتم
الحق عالمين به وفي ذلك من الاثم ما ان جهلتموه لم تسلموا أن تقولوا في العلم وان زعمتم أن واسعا لكم ترك
القياس والقول بما سمع في أوهامكم وحضر أذهانكم واستحسنته مسامعكم بحجتين عارضتا من القرآن
ثم السنة وما يدل عليه الاجماع من أن ليس لأحد أن يقول الا بعلم وما لا تختلفون فيه من أن الحاكم لو تداعى
عنده رجلان في ثوب أو عبد تنابعاه عينا لم يكن للحاكم اذا كان مشكلا أن يحكم فيه وكان عليه أن يدعو
أهل العلم به فيسألهم عما تداعيا فيه هل هو عيب. فان طالبا قيمة عيب فيه وقد فات سألهم عن قيمته فلو
قال أفضلهم دينا وعلما اني بعت هذا بسوقه اليوم وان كنت عالما بها قبل اليوم ولكني أقول فيه لم يسعه أن
يقبل قوله بجهالته بسوق يومه وقبل قول من يعرف سوق يومه ولو جاء من يعرف سوق يومه فقال اذا قلت
هذا بغيره مما يباع وقومته على ما مضى وكان عيبه دلني القياس على كذا ولكني أستحسن غيره لم يحل له أن
يقبل استحسانه وحرم عليه الا أن يحكم بما يقال انه قيمته في يومه وكذلك هذا في امرأة أصيبت بصداق
فلسد يقال كم صداق مثلها في الجمال والمال والصراحة والشباب والبيوت والأدب فلو قيل مائة دينار ولكنا
نستحسن أن نزيدها درهما أو ننقصها لم يحل له وقال الذي يقول أستحسن أن أزيدها أو أنقصها ليس ذلك
لي ولا للزوج في الزوج صداق مثلها وانما حكم بمثل هذا في المال الذي تقل رزيته على من أخذ منه ولم يوسع
فيه الاستحسان وألزم فيه القياس أهل العلم به ولم يجعل لأهل الجهالة قياسا فيه لانهم لا يعلمون ما يقيسون
عليه فحلال الله وحرامه من الدماء والفروج وعظيم الأمور أولى أن يلزمها الحكام والمفتين (قال الشافعي)
أفرأيت اذا قال الحاكم والمفتي في النازلة ليس فيها نص خبر ولا قياس وقال أستحسن فلا بد ان زعم أن جائزا
لغيره أن يستحسن خلافه فيقول كل حاكم في بلد ومفت بما يستحسن فيقال في الشيء الواحد بضروب من
الحكم والفتيا فان كان هذا جائزا عندهم فقد أهملوا أنفسهم فحكموا حيث شاؤا وان كان ضيقا فلا يجوز
أن يخلوا فيه وان قال الذي يرى منهم ترك القياس بل على الناس اتباع ما قلت قيل لمن أمر بطاعة حتى

يكون على الناس اتباعك أو رأيت ان ادعى عليك غيرك هذا أتطيعه أم تقول لا أطيع الا من أمرت بطاعته فكذلك لا طاعة لك على أحد وانما الطاعة لمن أمر الله أو رسوله بطاعته والحق فيما أمر الله ورسوله باتباعه ودل الله ورسوله عليه نصا أو استنباطا بدلائل أو رأيت انا أمر الله بالتوجه قبل البيت وهو مغيب عن المتوجه هل جعل له أن يتوجه الا بالاجتهاد بطلب الدلائل عليه أو رأيت انا أمر باجتهاد العدل فدل على أن لا يقبل غيرها هل يعرف العدل من غيرها الا بطلب الدلائل على عدله أو رأيت انا أمر بالحكم بالمثل في الصيد هل أمر أن يحكم الا بأن يحكم بنظره فكل هذا اجتهاد وقياس أو رأيت انا أمر النبي صلى الله عليه وسلم بالاجتهاد في الحكم هل يكون مجتهدا على غير طلب عين وطلب العين لا يكون الا باتباع الدلائل عليها ونفي القياس لان محالا أن يقال اجتهد في طلب شيء من لم يطلبه باجتباله والاستدلال عليه لا يكون طالب الشيء من سمع على وهمه أو خطر بباله منه (قال الشافعي) وانه ليلزم من ترك القياس أكثر مما ذكرت وفي بعضه ما قام عليه الحجة وأسأل الله تعالى لي ولجميع خلقه التوفيق وليس للحاكم أن يقبل ولا الوالي أن يدع أحدا ولا ينبغي للفتي أن يفتي أحدا الا متى يجمع أن يكون عالما علم الكتاب بسببه وعلم ناسخه ومنسوخه وخاصه وعامه وأدبه وعالما بسنن رسول الله صلى الله عليه وسلم وأقاويل أهل العلم قد سمعا وحديثا وعالما بلسان العرب عاقلا يميز بين المشتبه و يعقل القياس فان عدم واحدا من هذه الخصال لم يحل له أن يقول قياسا. وكذلك لو كان عالما بالأصول غير عاقل للقياس الذي هو الفرع لم يجز أن يقال لرجل قس وهو لا يعقل القياس وان كان عاقلا للقياس وهو مضيع لعلم الاصول أو شيء منها لم يجز أن يقال له قس على ما لا تعلم كما لا يجوز أن يقال قس لأعمى وصفته اجعل كذا عن يمينك وكذا عن يسارك واذا بلغت كذا فانتقل متيامنا وهو لا يبصر ما قيل له يجعله يمينا ويسارا أو يقال سر بلادا ولم يسرها قط ولم يأتها قط وليس فيها علم يعرفه ولا يثبت له فيها قصد سمت يضبطه لانه يسير فيها على غير مثال قويم وكما لا يجوز لعالم بسوق سلعة منذ زمان ثم خفيت عنه سنة أن يقال له قوم عبدا من صفته كذا لان السوق تختلف ولا رجل أبصر بعض صفة من التجارات وجهل غير صفته والغير الذي جهل لا دلالة عليه ببعض علم الذي علم قوم كذا كما لا يقال لبناء انظر قيمة الخياطة ولا لخياط انظر قيمة البناء فان قال فانك تقدم على وأنت من لم يجمع ما وصفت قيل فقد رأيت أحكامهم وفتياهم فرأيت كثيرا منها متضادا متباينا ورأيت كل واحد من الفريقين يخطئ صاحبه في حكمه وفتياه والله تعالى المستعان فان قال فأرأيت ما اجتهد فيه المجتهدون كيف الحق فيه عند الله قيل لا يجوز فيه عندنا والله تعالى أعلم أن يكون الحق فيه عند الله كله الا واحدا لأن علم الله عز وجل وأحكامه واحد لا سواء السرائر والعلانية عنده وأن حكمه بكل واحد جل ثناؤه سواء فان قيل من له أن يجتهد فمقيس على كتاب أو سنة هل يختلفون ويسعهم الاختلاف أو يقال لهم ان اختلفوا مصيبون كلهم أو مخطئون أو بعضهم مخطئ وبعضهم مصيب قيل لا يجوز على واحد منهم ان اختلفوا ان كان ممن له الاجتهاد وذهب مذهبا محتملا أن يقال له أخطأ مطلقا ولكن يقال لكل واحد منهم قد أطاع فيما كلف وأصاب فيه ولم يكلف علم الغيب الذي لم يطلع عليه أحد فان قال قائل قل لي من هذا شيئا قيل لا مثال أدل عليه من الغيب عن المسجد الحرام واستقباله فاذا اجتهد رجلان (م) بالطريق عالمان بالنجوم والرياح والشمس والقمر فرأى أحدهما القبلة متيامنا منه ورأى أحدهما القبلة منصرفة عن حيث رأى صاحبه كان على كل واحد منهما أن يصلي حيث يرى ولا يتبع صاحبه انا أذا اجتهدا الى غير ما أدى صاحبه اجتهاده اليه ولم يكلف واحد منهما صواب عين البيت لانه لا يراه وقد أدى ما كلف من التوجه اليه بالدلائل عليه فان قيل فلزم أحدهما اسم الخطأ قيل أما فيما كلف فلا وأما خطأ عين البيت فنعم لان البيت لا يكون في جهتين فان قيل فيكون مطيعا بالخطأ قيل هذا مثل جاء لم يكن مطيعا بالصواب لما كلف من الاجتهاد وغيره ثم بالخطأ

فان لم يكلف صواب المخطئ العين عنه فاذا لم يكلف صوابه لم يكن عليه خطأ لم يجعل عليه صواب عينه فان قيل أفتجد سنة تدل على ما وصفت قيل نعم • أخبرنا عبد العزيز بن محمد عن يزيد بن عبد الله بن الهاد عن محمد بن ابراهيم عن بسر بن سعيد عن أبي قيس مولى عمرو بن العاص عن عمرو بن العاص أنه سمع رسول الله صلى الله عليه وسلم يقول اذا حكم الحاكم فاجتهد فأصاب فله أجران واذا حكم فاجتهد فأخطأ فله أجر قال يزيد بن الهاد فحدثت بهذا الحديث أبا بكر بن محمد بن عمرو بن حزم فقال هكذا حدثني أبو سلمة عن أبي هريرة

(33) فان قال قائل فما معنى هذا قيل ما وصفت من أنه اذا اجتهد فمع الصواب بالاجتهاد وصواب العين التي (33)
اجتهد كان له حسنتان واذا أصاب الاجتهاد وأخطأ العين التي أمر أن يجتهد في طلبها كانت له حسنة
ولا يثاب من يؤدي في أن يخطئ العين ويحسن من يؤدي ان يكف عنه وهذا يدل على ما وصفت من أنه
لم يكلف صواب العين في حال فان قيل ذم الله على الاختلاف قيل الاختلاف وجهان فما أقام الله تعالى
به الحجة على خلقه حتى يكونوا على بينة منه ليس عليهم الا اتباعه ولا لهم مفارقته فان اختلفوا فيه فذلك الذي
ذم الله عليه والذي لا يحل الاختلاف فيه فان قال فأين ذلك قيل قال الله تعالى وما تفرق الذين أوتوا الكتاب
(34) الا من بعد ما جاءتهم البينة فمن خالف نص كتاب لا يحتمل التأويل أو سنة قائمة فلا يحل له الخلاف ولا (34)
أحسبه يحل له خلاف جماعة الناس وان لم يكن في قولهم كتاب أو سنة ومن خالف في أمر له فيه الاجتهاد
فذهب الى معنى يحتمل ما ذهب اليه ويكون عليه دلائل لم يكن في (1) من خلاف لغيره وذلك أنه
لا يخالف حينئذ كتابا ولا سنة قائمة ولا اجماعا ولا قياسا بأنه انما نظر في القياس فأداه الى غير ما أدى
صاحبه اليه القياس كما أدى في التوجه الى البيت بدلالة النجوم الى غير ما أدى اليه صاحبه فان قال ويكون هذا
(35) في الحكم قيل نعم فان قيل فقل هذا اذا كان في الحكم دلالة على موضع الصواب قيل قد عرفنا ما في بعضه (35)
وذلك أن تنزل نازلة يحتمل أن تقاس فيوجد لها في الأصلين شبه فيذهب ذاهب الى أصل والآخر الى أصل غيره
فيختلفان فان قيل فهل يوجد السبيل الى أن يقيم أحدهما على صاحبه حجة في بعض ما اختلفا فيه قيل نعم
ان شاء الله تعالى بأن تنظر النازلة فان كانت تشبه أحد الأصلين في معنى والآخر في اثنين صرفنا الى الذي
أشبهته في الاثنين دون الذي أشبهته في واحد وهكذا اذا كان شبيها بأحد الأصلين أكثر فان قال قائل فقل
من هنا شيأ قيل لم يختلف الناس في أن لا دية للعبد بقتل خطأ موقتة الا قيمته فان كانت قيمته مائة درهم
(36) أو أقل أو أكثر الى أن تكون أقل من عشرة آلاف درهم فعلى من قتله وذهب بعض المشرقيين الى أنه ان (36)
زادت ديته على عشرة آلاف درهم نقصها من عشرة آلاف درهم وقال لا أبلغ بها دية حر وقال بعض أصحابنا
تبلغ بها دية أحرار فاذا كان ثمنه مائة درهم لم يزد عليها صاحبه لان الحكم فيها أنها ثمنه وكذلك اذا زادت على
دية أحرار أخذها سيده كما تقتل له دابة تسوى ديات أحرار فتؤخذ ثمنه وكان هذا عندنا من قول من قال من
(37) المشرقيين أمر لا يجوز الخطأ فيه لما وصفت ثم عاد بعض المشرقيين فقال يقتل العبد بالعبد وآخذ الأحرار (37)
بالعبيد ولا يقتص العبد من حر ولا من العبد فيما دون النفس فقلت لبعض من تقدمهم ولم تقتل العبد
والأمة بالعبد قودا ولم تقيد والعبد من العبد فيما دون النفس قال من أصل ما ذهبنا اليه في العبيد اذا قتلوا
خطأ أن فيهم أثمانهم وأثمانهم كالدواب والمتاع فقلنا لا نقص لبعضهم من بعض في الجراح لانهم أموال
فقلت لهم أفيقاص القصاص على الديات والأثمان أم القصاص مخالف للديات والأثمان فان كان يقاص على
الديات فلم تصنع شيأ قتلت عبدا يسوى ألف دينار بعبد يسوى خمسة دنانير وقتلت به عبدا كلهم ثمنه أكثر
من ثمنه ولم تصنع شيأ حين قتلت بعض العبيد ببعض وأنت تعلمهم بالبهائم والمتاع وأن لا تقتل بهيمة بهيمة
(38) لو قتلها فان زعمت أن الديات أصل والديات عمرة لانك تقتل الرجل بالمرأة وديتها نصف دية الرجل فلم تذهب (38)
مذهبا تبقي كل القصاص بين العبيد فيما دون النفس اذا قتلت العبد بالعبد كان أن يتاف بعضه ببعضه أقل

(1) بياض بالاصل

وان اختلفا بأنهم مع ما يلزمك من هذا القول قال وما يلزمني بقولي هذا قلت أنت تزعم أن من قتل عبدا فعليه الكفارة وعليه جاء على من قتل الحر من الاثم لانه مسلم عليه فرض الله له حرمة الاسلام ولا تزعم هذا فيمن قتل بعيرا أو حرق متاعا وتزعم أن على العبد حلالا وحراما وحدودا وفرائض وليس هذا على البهائم (قال الشافعي) رحمه الله تعالى ان الله عز وجل حكم على عباده بحكمين حكما فيما بينهم وبينه أن أمانهم وعاقبهم على ما أسروا كما فعل بهم فيما أعلنوا وأعلمهم اقامة الحجة عليهم وبينها لهم أنه علم سرائرهم وعلم علانيتهم فقال يعلم السر وأخفى وقال يعلم خائنة الأعين وما تخفي الصدور وخلقه لا يعلمون الا ما شاء عز وجل ويجب علم السرائر عن عباده وبعث فيهم رسلا فقاموا بأحكامه على خلقه وأبان لرسله وخلقه أحكام خلقه في الدنيا على ما أظهروا وأباح دماء أهل الكفر من خلقه فقال اقتلوا المشركين حيث وجدتموهم وحرم دماءهم ان أظهروا الاسلام فقال وقاتلوهم حتى لا تكون فتنة ويكون الدين كله فقد وقال وما كان لمؤمن أن يقتل مؤمنا الا خطأ وقال ومن يقتل مؤمنا متعمدا فجزاؤه جهنم فجعل حقن دماء المشركين مباحة وقتالهم حتما وفرضا عليهم ان لم يظهروا الايمان ثم أظهره قوم من المنافقين فأخبر الله نبيه عنهم أن ما يخفون خلاف ما يعلنون فقال يحلفون بالله ما قالوا ولقد قالوا كلمة الكفر وكفروا بعد اسلامهم وقال سيحلفون بالله لكم اذا انقلبتم اليهم لتعرضوا عنهم فأعرضوا عنهم مع ما ذكر به المنافقين فلم يجعل لنبيه قتلهم اذا أظهروا الايمان ولم يمنعهم رسول الله صلى الله عليه وسلم مناكحة المسلمين ولا موارثتهم (قال الشافعي) رحمه الله ورأيت مثل هذا في سنة رسول الله صلى الله عليه وسلم قال رسول الله صلى الله عليه وسلم أمرت أن أقاتل الناس حتى يقولوا لا اله الا الله فاذا قالوها عصموا مني دماءهم وأموالهم الا بحقها وحسابهم على الله وقال المقداد أرأيت يا رسول الله لو أن مشركا قاتلني فقطع يدي ثم لاذ مني بشجرة فأسلم أفأقتله قال لا تقتله وقال الله تبارك وتعالى والذين يرمون أزواجهم ولم يكن لهم شهداء الا أنفسهم وقال عز وجل ويدرأ عنها العذاب الآية فحكم بالايمان بينهما اذا كان الزوج يعلم من المرأة ما لا يعلمه الأجنبيون ودرأ عنه وعنها بها على أن أحدهما كاذب وحكم في الرجل يقذف غير زوجته أن يحد ان لم يأت بأربعة شهداء على ما قال ولا عن رسول الله صلى الله عليه وسلم بين العجلاني وامرأته بنفي زوجها وقذفها بشريك بن السحماء فقال رسول الله صلى الله عليه وسلم انظروها فان جاءت به يعني الولد أصهم أدعج عظيم الأليتين فلا أراها الا صدقت وتلك صفة شريك الذي قذفها به زوجها وزعم أن حملها منه قال رسول الله صلى الله عليه وسلم وان جاءت به أحيمر كأنه وحرة فلا أراه الا كذب عليها وكانت تلك الصفة صفة زوجها فجاءت به يشبه شريك بن السحماء فقال النبي صلى الله عليه وسلم ان أمره لبين لولا ما حكم الله أي لكان لي فيه قضاء غيره يعني والله أعلم لبيان الدلالة بصدق زوجها فلما كانت الدلالة لا تكون عند العباد احاطة دل ذلك على ابطال كل ما لم يكن احاطة عند العباد من الدلائل ان لم (٢) يقروا به من الحكم عليه لم يمتنع مما وجب عليه أو تقوم عليه بينة فيؤخذ من حيث أمر الله أن يؤخذ لا يؤخذ بدلالة وطلق ركانة بن عبد يزيد امرأته البتة ثم أتى النبي صلى الله عليه وسلم فأحلفه ما أراد الا واحدة وردها عليه (قال الشافعي) رحمه الله تعالى لما كان كلامه محتملا لأن لم يرد الا واحدة جعل القول قوله كما حكم الله فيمن أظهر الايمان بأن القول قوله في الدنيا فينكح المؤمنات ويوارث المؤمنين وأعلم بأن سرائرهم على غير ما أظهروا وانه يغلب على من سمع طلاق البتة أنه يريد الاثنتان الذي لا غاية له من الطلاق وجاء رجل من بني فزارة فقال ان امرأتي ولدت غلاما أسود فجعل يعرض بالقذف فقال له النبي صلى الله عليه وسلم هل لك من ابل قال نعم قال ما ألوانها قال حمر قال فهل فيها من أورق قال نعم قال فأنى أتاه ذلك لعله نزعه عرق قال ولعل هذا نزعه عرق ولم يحكم عليه بحد ولا لعان اذ لم يصرح بالقذف لانه قد يحتمل أن لا يكون أراد قذفا وان كان الأغلب على سامعه أنه أراد

(٢) كذا في النسخة بهذا التعريف وحرر كتبه مصححه

القذف مع أن أحكام الله عز وجل ورسوله صلى الله عليه وسلم تدل على ما وصفنا من أنه لا يجوز لهم أن يحكم بالظن وان كانت له عليه دلائل قريبة فلا يحكم الا من حيث أمره الله بالبينة تقوم على المدعى عليه أو اقراره منه بالأمر البين وكما حكم الله أن ما أظهر فله حكمه كذلك حكم أن ما أظهر فعليه حكمه لانه أباح الدم بالكفر وان كان قولا فلا يجوز في شيء من الأحكام بين العباد أن يحكم فيه الا بالظاهر لا بالدلائل

﴿ كتاب الرد على محمد بن الحسن في باب الديات ﴾

• أخبرنا الربيع بن سليمان قال أخبرنا محمد بن ادريس الشافعي قال أخبرنا أبو حنيفة رضي الله تعالى عنه في الدية على أهل الذهب ألف دينار وعلى أهل الورق عشرة آلاف درهم وزن سبعة وقال أهل المدينة على أهل الذهب ألف دينار وعلى أهل الورق اثنا عشر ألف درهم وقال محمد بن الحسن بلغنا عن عمر بن الخطاب أنه فرض على أهل الذهب ألف دينار في الدية وعلى أهل الورق عشرة آلاف درهم • حدثنا بذلك أبو حنيفة رضي الله عنه عن الهيثم عن الشعبي عن عمر بن الخطاب وزاد وعلى أهل البقر مائتا بقرة وعلى أهل الغنم ألفا شاة • أخبرنا سفيان الثوري قال أخبرني محمد بن عبد الرحمن عن الشعبي قال على أهل الورق عشرة آلاف درهم وعلى أهل الذهب ألف دينار وقال أهل المدينتان عمر بن الخطاب رضي الله عنه فرض على أهل الورق اثني عشر ألف درهم وقال محمد بن الحسن كلا القولين يتعذر روي عن عمر وانظر أي الروايتين أقرب الى ما قال المسلمون في غير هذا فهو الحق أجمع المسلمون جميعا لا اختلاف بينهم في القولين كافة أهل الحجاز وأهل العراق أن ليس في أقل من عشرين دينارا من الذهب صدقة وليس في أقل من مائتي درهم من الورق صدقة فجعلوا لكل دينار عشرة دراهم ففرضوا الزكاة على هذا فهذا لا اختلاف فيه بينهم فاذا فرضوا هذا في الصدقة فكيف ينبغي لهم أن يفرضوا الدية أكل دينار بعشرة دراهم أو يفرضوا كل دينار بانني عشر درهما انما ينبغي أن يفرضوا الدية بما يفرضون عليه الزكاة وقد جاء عن علي بن أبي طالب رضي الله عنه وعبد الله بن مسعود أنهما قالا لا تقطع اليد الا في دينار أو عشرة دراهم فجعلوا الدينار بمنزلة العشرة الدراهم فعلى هذا الأحرى ما فرضوا في مثل هذا ان زاد سعر أو نقص لم يتغير في ذلك ألا ترى لو كان له مائة درهم وعشرة دنانير وجب في ذلك الزكاة وجعل في كل صنف منها زكاة وجعل دينار على عشرة دراهم فهذا أمر واضح ليس ينبغي لهم أن يفرضوا الدية فيما الا على ما فرضت عليه الزكاة ونحوها ونحن فيما نظن أعلم بفريضة عمر بن الخطاب رضي الله عنه حين فرض الدية من أهل المدينة لان الدراهم على أهل العراق وانما كان يؤدي الدية أهل العراق وقد صدق أهل المدينة أن عمر رضي الله عنه فرض الدية اثني عشر ألف درهم ولكنه فرضها اثني عشر ألف درهم وزن ستة • أخبرنا الثوري عن المغيرة عن ابراهيم النخعي قال كانت الدية الابل فجعلت الابل الصغير والكبير كل بعير بمائة وعشرين درهما وزن ستة فذلك عشرة آلاف درهم (٣) وقيل لشريك بن عبد الله ان رجلا من المسلمين قال لشريك قال أبو حنيفة فاقد رجل منا رجل من العدو وضربه فأصاب رجلا منا فكبه على وجهه حتى وقع على حاجبيه وأنفه ولحيته وصدره فقضى فيه عثمان بن عفان رضي الله عنه اثني عشر ألف درهم وكانت الدراهم يومئذ وزن ستة (قال الشافعي) روى مكحول وعمرو بن شعيب وعدد من الحجازيين أن عمر فرض الدية اثني عشر ألف درهم ولا أعلم بالحجاز أحدا خالف فيه عن الحجازيين ولا عن عثمان بن عفان وممن قال الدية اثنا عشر ألف درهم ابن عباس وأبو هريرة وعائشة ولا أعلم بالحجاز أحدا خالف في ذلك قديما ولا حديثا ولقد روى عكرمة عن النبي صلى الله عليه وسلم أنه قضى بالدية اثني عشر ألف درهم وزعم عكرمة أنه نزل فيه وما نقموا الا أن أغناهم الله ورسوله من فضله فزعم محمد بن الحسن عن عمر حديثين مختلفين قال في أحدهما فرض الدية عشرة آلاف درهم

SARAKHSĪ

UṢŪL SARAKHSĪ VOL. 2

pp 109 – 215

فصل فى بيان القياس والاستحسان

[١] قال رضي الله عنه : اعلم بأن القسم الرابع الذى بيناه فى الفصل المتقدم يشتمل على هذين الوجهين ، وهو القياس والاستحسان عندنا ، وقد طعن بعض الفقهاء فى تصنيف له على عبارة علمائنا فى الكتب : إلا أنا تركنا القياس واستحسنا ، وقال : القائلون بالاستحسان يتركون العمل بالقياس الذى هو حجة شرعية

ويزعمون أنهم يستحسنون ذلك ، وكيف يستحسن ترك الحجة والعمل بما ليس بحجة لاتباع هوى أو شهوة نفس ؟ فإن كانوا يريدون ترك القياس الذى هو حجة فالحجة الشرعية هو حق وماذا بعد الحق إلا الضلال ، وإن كانوا
(2) يريدون ترك القياس الباطل شرعاً فالباطل مما لا يشتغل بذكره . وقد ذكروا فى [2] كتبهم فى بعض المواضع أنا نأخذ بالقياس ، فإن كان المراد هذا فكيف يجوزون الأخذ بالباطل . وذكر من هذا الجنس ما يكون دليل قلة الحياء
(3) وقلة الورع وكثرة التهور لقائله . فنقول وبالله التوفيق : الاستحسان لغة : [3] وجود الشىء حسناً ، يقول الرجل : استحسنت كذا : أنى اعتقدته حسناً على ضد الاستقباح ، أو معناه : طلب الأحسن للاتباع الذى هو مأمور به ، كما قال تعالى : « فبشر عبادى الذين يستمعون القول فيتبعون أحسنه » وهو فى لسان الفقهاء نوعان : العمل بالاجتهاد وغالب الرأى فى تقدير ما جعله الشرع موكولا إلى آرائنا نحو المتعة المذكورة فى قوله تعالى : « متاعاً بالمعروف حقا على المحسنين » أوجب ذلك بحسب اليسار والعسرة وشرط أن يكون بالمعروف ، فعرفنا أن المراد ما يعرف استحسانه بغالب الرأى . وكذلك قوله تعالى : « وعلى المولود له رزقهن وكسوتهن بالمعروف » ولا يظن
(4) بأحد من الفقهاء أنه يخالف هذا النوع من الاستحسان . والنوع الآخر [4] هو الدليل الذى يكون معارضاً للقياس الظاهر الذى تسبق إليه الأوهام قبل إنعام التأمل فيه ، وبعد إنعام التأمل فى حكم الحادثة وأشباهها من الأصول يظهر أن الدليل الذى عارضه فوقه فى القوة فإن[1] العمل به هو الواجب ، فسموا ذلك استحساناً للتمييز بين هذا النوع من الدليل وبين الظاهر الذى تسبق إليه الأوهام قبل التأمل على معنى أنه يمال بالحكم عن ذلك الظاهر لكونه مستحسناً لقوة دليله ، وهو نظير عبارات أهل الصناعات فى التمييز بين الطرق لمعرفة المراد ، فإن أهل النحو يقولون : هذا نصب على التفسير ، وهذا نصب على المصدر ، وهذا نصب على الظرف ، وهذا نصب على التعجب ،

(١) وفى العثمانية : وأن .

وما وضعوا هذه العبارات إلا للتمييز بين الأدوات الناصبة . وأهل العروض يقولون : هـذا من البحر الطويل ، وهذا من البحر المتقارب ، وهذا من البحر المديد ؛ فكذلك استعمال علمائنا عبارة القياس والاستحسان للتمييز بين الدليلين المتعارضين ، وتخصيص أحدهما بالاستحسان لكون العمل به مستحسناً ، ولكونه مائلا عن سنن القياس الظاهر ، فكان هذا الاسم مستعاراً لوجود معنى الاسم فيه ، بمنزلة الصلاة فإنها اسم للدعاء ثم أطلقت على العبادة المشتملة على الأركان من الأفعال والأقوال لما فيها من الدعاء عادة . ثم استحسان العمل بأقوى الدليلين لا يكون من اتباع الهوى وشهوة النفس
(5) في شيء . وقد قال الشافعي في نظائر هـذا : أستحب ذلك . وأي فرق [5] بين من يقول أستحسن كذا ، وبين من يقول أستحبه ؟ بل الاستحسان أفصح اللغتين ، وأقرب إلى موافقة عبارة الشرع في هذا المراد .

(6) وظن بعض المتأخرين من أصحابنا أن العمل بالاستحسان أولى مع جواز [6] العمل بالقياس في موضع الاستحسان ، وشبّه ذلك بالطرد مع المؤثر ؛ فإن العمل بالمؤثر أولى وإن كان العمل بالطرد جائزاً . قال رضي الله عنه : وهذا وهم عندي فإن اللفظ المذكور في الكتب في أكثر المسائل : إلا أنا تركنا هذا القياس ، والمتروك لا يجوز العمل به ، وتارة يقول إلا أني أستقبح ذلك ، وما يجوز العمل به من الدليل شرعاً فاستقباحه يكون كفراً ، فعرفنا أن الصحيح ترك القياس أصلا في الموضع الذي يأخذ بالاستحسان ، وبه يتبين أن العمل بالاستحسان لا يكون مع قيام المعارضة
(7) ولكن باعتبار سقوط الأضعف بالأقوى أصلا . وقد قال في كتاب السرقة : [7] إذا دخل جماعة البيت وجمعوا المتاع فحملوه على ظهر أحدهم فأخرجه وخرجوا معه : في القياس القطع على الحمال خاصة ، وفي الاستحسان يقطعون جميعاً . وقال في كتاب الحدود : إذا اختلف شهود الزنا في الزاويتين في بيت واحد : في القياس لا يحد المشهود عليه ، وفي الاستحسان يقام الحد . ومعلوم أن الحد يسقط بالشبهة وأدنى درجات المعارضة إيراث الشبهة ، فكيف يستحسن [8] إقامة الحد في موضع الشبهة . وكذلك قال أبو حنيفة ومحمد رحمهما الله :
(8)

تصحح ردة الصبي استحساناً . ومعلوم أن عند قيام دليل المعارضة يرجح الموجب للإسلام وإن كان هو أضعف كالمولود بين كافر ومسلمة ، وكيف يستحسن الحكم بالردة مع بقاء دليل موجب الإسلام ، فعرفنا أن القياس متروك أصلا فى الموضع الذى يعمل فيه بالاستحسان ، وإنما سميناهما تعارض الدليلين باعتبار أصل الوضع فى كل واحد من النوعين لا أن بينهما معارضة فى موضع واحد . والدليل على أن المراد هذا ما قال فى كتاب الطلاق : إذا قال لامرأته إذا حضت فأنت طالق فقالت : قد حضت فكذبها الزوج فإنها لا تصدق فى القياس باعتبار الظاهر وهو أن الحيض شرط الطلاق كدخولها الدار وكلامها زيداً ، وفى الاستحسان تطلق ؛ لأن الحيض شىء فى باطنها لا يقف عليه غيرها فلا بد من قبول قولها فيه بمنزلة المحبة والبغض . قال : وقد يدخل فى هذا الاستحسان بعض القياس . يعنى به أن فى سائر الأحكام المتعلقة بالحيض قبلنا قولها نحو حرمة الوطء وانقضاء العدة ، فاعتبار هذا الحكم بسائر الأحكام نوع قياس ، ثم ترك القياس الأول أصلا لقوة دليل الاستحسان وهو أنها مأمورة بالإخبار عما فى رحمها منهية عن الكتمان ؛ قال تعالى : « ولا يحل لهن أن يكتمن ما خلق الله فى أرحامهن » ومن ضرورة النهى عن الكتمان كونها أمينة فى الإظهار ، وإليه أشار أبى بن كعب رضى الله عنه فقال : من الأمانة أن تؤتمن المرأة على ما فى رحمها . فصار ذلك القياس متروكا باعتراض هذا الدليل القوى الموجب للعمل به .

(9) [9]

(10) [10]

(11) [11]

فالحاصل : أن ترك القياس يكون بالنص تارة ، وبالإجماع أخرى ، وبالضرورة أخرى . فأما تركه بالنص فهو فيما أشار إليه أبو حنيفة رحمه الله فى أكل الناسى للصوم : لولا قول الناس لقلت يقضى . يعنى به رواية الأثر عن رسول الله صلى الله عليه وسلم ، وهو نص يجب العمل به بعد ثبوته واعتقاد البطلان فى كل قياس يخالفه . وهذا اللفظ نظير ما قال عمر رضى الله عنه فى قصة الجنين : لقد كدنا أن نعمل برأينا[1] فيما فيه أثر .

(١) وفى العثمانية والهندية : بآرائنا .

(12) وكذلك القياس يأبى جواز السلم باعتبار أن المعقود عليه معدوم عند العقد ، 12
تركناه بالنص وهو الرخصة الثابتة بقوله عليه السلام : « ورخص فى السلم »
وأما ترك القياس بدليل الإجماع فنحو الاستصناع فيما فيه للناس تعامل ؛
فإن القياس يأبى جوازه ، تركنا القياس للإجماع على التعامل به فيما بين الناس
من لدن رسول الله صلى الله عليه وسلم إلى يومنا هذا [وهذا[1]] لأن القياس
فيه احتمال الخطأ والغلط ، فبالنص أو الإجماع يتعين فيه جهة الخطأ فيه ،
فيكون واجب الترك لا جائز العمل به فى الموضع الذى تعين جهة الخطأ فيه .
13 (13) وأما الترك لأجل الضرورة فنحو الحكم بطهارة الآبار والحياض بعد ما تنجست ،
والحكم بطهارة الثوب النجس إذا غسل فى الإجّانات ؛ فإن القياس يأبى
جوازه ؛ لأن ما يرد[2] عليه النجاسة يتنجس بملاقاته ، تركناه للضرورة المحوجة
إلى ذلك لعامة الناس ؛ فإن الحرج مدفوع بالنص ، وفى موضع الضرورة
14 يتحقق معنى الحرج لو أخذ فيه بالقياس فكان متروكا بالنص . وكذلك
(14) جواز عقد الإجارة فإنه ثابت بخلاف القياس لحاجة الناس إلى ذلك ؛ فإن
العقد على المنافع بعد وجودها لا يتحقق لأنها لا تبقى زمانين فلا بد من
إقامة العين المنتفع به بمقام النفعة فى حكم جواز العقد لحاجة الناس إلى ذلك .
15 (15) ثم كل واحد منهما نوعان فى الحاصل : فأحد نوعى القياس ما ضعف
أثره وهو ظاهر جلى ، والنوع الآخر منه ما ظهر فساده واستتر وجه صحته
وأثره . وأحد نوعى الاستحسان ما قوى أثره وإن كان خفيا ، والثانى ما ظهر
أثره وخفى وجه الفساد فيه . وإنما يكون الترجيح بقوة الأثر لا بالظهور
ولا بالخفاء ، لما بينا أن العلة الموجبة للعمل بها شرعاً ما تكون مؤثرة ،
وضعيف الأثر يكون ساقطاً فى مقابلة قوى الأثر ظاهراً كان أو خفيا ، بمنزلة
الدنيا مع العقبى . فالدنيا ظاهرة والعقبى باطنة ، ثم ترجح العقبى حتى وجب
الاشتغال بطلبها والإعراض عن طلب الدنيا لقوة الأثر من حيث البقاء

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(١) زيادة من الهندية .
(٢) وفى العثمانية : ورد .

والخلود والصفاء ، فكذلك القلب مع النفس والعقل مع البصر . وبيان [16] ما يسقط اعتباره من القياس لقوة الأثر الاستحسان الذى هو القياس المستحسن
(16) فى سؤر سباع الطير ، فالقياس فيه النجاسة اعتباراً بسؤر سباع الوحش بعلة حرمة التناول ، وفى الاستحسان لا يكون نجساً لأن السباع غير محرم الانتفاع بها ، فعرفنا أن عينها ليست بنجسة ، وإنما كانت نجاسة سؤر سباع الوحش باعتبار حرمة الأكل ؛ لأنها تشرب بلسانها وهو رطب من لعابها ولعابها يتحلب من لحمها ، وهذا لا يوجد فى سباع الطير ؛ لأنها تأخذ الماء بمنقارها ثم تبتلعه ومنقارها عظم جاف والعظم لا يكون نجساً من الميت
(17) فكيف يكون نجساً من الحى . ثم تأيد هذا بالعلة المنصوص عليها [17] فى الهرة ؛ فإن معنى البلوى يتحقق فى سؤر سباع الطير ؛ لأنها تنقض من الهواء ولا يمكن صون الأوانى عنها خصوصاً فى الصحارى ، وبهذا يتبين أن من ادعى أن القول بالاستحسان قول بتخصيص العلة فقد أخطأ ؛ لأن بما ذكرنا تبين أن المعنى الموجب لنجاسة سؤر سباع الوحش الرطوبة النجسة فى الآلة التى تشرب بها وقد انعدم ذلك فى سباع الطير فانعدم الحكم لانعدام العلة وذلك لا يكون من تخصيص العلة فى شىء ، وعلى اعتبار الصورة يتراءى ذلك ولكن يتبين عند التأمل انعدام العلة أيضاً ؛ لأن العلة وجوب التحرز عن الرطوبة النجسة التى يمكن التحرز عنها من غير حرج ، وقد صار هذا معلوماً بالتنصيص على هذا التعليل فى الهرة ففى كل موضع ينعدم بعض أوصاف العلة كان انعدام الحكم لانعدام العلة فلا يكون تخصيصاً .

(18) وبيان الاستحسان [18] الذى يظهر أثره ويخفى فساده مع القياس الذى يستتر أثره ويكون قويا فى نفسه حتى يؤخذ فيه بالقياس ويترك الاستحسان فيما يقول فى كتاب الصلاة : إذا قرأ المصلى سورة فى آخرها سجدة فركع بها فى القياس تجزيه ، وفى الاستحسان لا تجزيه عن السجود ، وبالقياس نأخذ ، فوجه الاستحسان أن الركوع غير السجود وضعاً ؛ ألا ترى أن الركوع فى الصلاة

لا ينوب عن سجود الصلاة فلا ينوب عن سجدة التلاوة بطريق الأولى ؛ لأن القرب بين ركوع الصلاة وسجودها أظهر من حيث إن كل واحد منهما موجب التحريمة ، ولو تلا خارج الصلاة فركع لها[1] لم يجز عن السجدة في الصلاة أولى ؛ لأن الركوع هنا مستحق لجهة[2] أخرى وهناك لا ، وفي القياس قال : الركوع والسجود يتشابهان ، قال تعالى : « وخر راكعاً » : أي ساجداً ، ولكن هذا من حيث الظاهر مجاز محض ، ووجه الاستحسان من حيث الظاهر اعتبار شبه صحيح ولكن قوة الأثر للقياس مستتر ووجه
(19) الفساد في الاستحسان خفي . وبيان ذلك أنه ليس المقصود من السجدة عند 19
التلاوة عين السجدة ، ولهذا لا تكون السجدة الواحدة قربة مقصودة بنفسها حتى لا تلزم[3] بالنذر إنما المقصود إظهار التواضع وإظهار المخالفة للذين امتنعوا من السجود استكباراً منهم كما أخبر الله عنهم في مواضع السجدة . قلنا : ومعنى التواضع يحصل بالركوع ولكن شرطه أن يكون بطريق هو عبادة وهذا يوجد في الصلاة ؛ لأن الركوع فيها عبادة كالسجود ولا يوجد خارج الصلاة ، ولقوة الأثر من هذا الوجه أخذنا بالقياس وإن كان مستتراً وسقط
(20) اعتبار الجانب الآخر في مقابلته . وكذلك قال في البيوع : إذا وقع الاختلاف 20
بين المسلم إليه ورب السلم في ذرعان المسلم فيه في القياس يتحالفان ، وبالقياس نأخذ ، وفي الاستحسان القول قول المسلم إليه . ووجه الاستحسان أن المسلم فيه مبيع فالاختلاف في ذرعانه لا يكون اختلافاً في أصله بل في صفته من حيث الطول والسمة وذلك لا يوجب التحالف كالاختلاف في ذرعان
(21) الثوب المبيع بعينه . ووجه القياس أنهما اختلفا في المستحق بعقد السلم وذلك 21
يوجب التحالف ، ثم أثر القياس مستتر ولكنه قوى من حيث إن عقد السلم إنما يعقد بالأوصاف المذكورة لا بالإشارة إلى العين ، فكان الموصوف بأنه خمس في سبع غير الموصوف بأنه أربع في ستة ؛ فبهذا يتبين أن الاختلاف

(١) وفي الهندية : بها .
(٢) وفي العثمانية والهندية : بجهة .
(٣) وفي العثمانية والهندية : لا يلتزم .

22 هنا فى أصل المستحق بالعقد فأخذنا بالقياس لهذا . وقال فى الرهن : إذا (22)
ادعى رجلان كل واحد منهما عيناً فى يد رجل أنه مرهون عنده بدين له
عليه وأقاما البينة ، فى الاستحسان يقضى بأنه مرهون عندهما ؛ بمنزلة
مالو رهن عيناً من رجلين ، وهو قياس البيع فى ذلك ، وفى القياس تبطل
البينتان ؛ لأنه تعذر القضاء بالرهن لكل واحد منهما فى جميعه فإن المحل
يضيق عن ذلك ، وفى نصفه لأن الشيوع يمنع صحة الرهن ، وأخذنا بالقياس
لقوة أثره المستتر ، وهو أن كل واحد منهما هنا إنما يثبت الحق لنفسه
بتسمية على حدة ، وكل واحد منهما غير راض بمزاحمة الآخر معه فى ملك
اليد المستفاد بعقد الرهن ، بخلاف الرهن من رجلين فهناك العقد واحد فيمكن
إثبات موجب العقد به متحداً فى المحل وذلك لا يمكن هنا ، وهذا النوع[1]
يعز وجوده فى الكتب لا يوجد إلا قليلاً ، فأما النوع المتقدم[2] فهو
فى الكتب أكثر من أن يحصى .

23 ثم فرق[3] ما بين الاستحسان الذى يكون بالنص أو الإجماع ، وبين ما يكون (23)
بالقياس الخفى المستحسن أن حكم هذا النوع يتعدى وحكم النوع الآخر لا يتعدى ،
لما بينا أن حكم القياس الشرعى التعدية ، فهذا الخفى وإن اختص باسم
الاستحسان لمعنى فهو لا يخرج من أن يكون قياساً شرعيا فيكون حكمه
التعدية ، والأول معدول به عن القياس بالنص وهو لا يحتمل التعدية كما بينا .

24 وبيانه فيما إذا اختلف البائع والمشترى فى مقدار الثمن والمبيع غير مقبوض ، (24)
فى القياس القول قول المشترى ؛ لأن البائع يدعى عليه زيادة فى حقه وهو
الثمن ، والمشترى منكر واليمين بالشرع فى جانب المنكر ، والمشترى لا يدعى
على البائع شيئاً فى الظاهر إذ المبيع صار مملوكاً له بالعقد ، ولكن فى الاستحسان
متحالفان ؛ لأن المشترى يدعى على البائع وجوب تسليم المبيع إليه عند إحضار
أقل الثمنين والبائع منكر لذلك ، والبيع كما يوجب استحقاق الملك على البائع

(١) الأخذ بالقياس وترك الاستحسان — هامش العثمانية .
(٢) الاستحسان الذى يعمل به ويترك القياس — هامش العثمانية .
(٣) وفى العثمانية : ثم الفرق .

بوجب استحقاق اليد عليه عند وصول الثمن إليه ، ثم هذا الاستحسان لكونه قياساً خفيا يتعدى حكمه إلى الإجارة وإلى النكاح فى قول أبى حنيفة ومحمد رحمهما الله ، وإلى ما لو وقع الاختلاف بين الورثة بعد موت المتبايعين ، وإلى ما بعد هلاك السلعة إذا أخلف بدلاً بأن قتل العبد المبيع قبل القبض ولو كان الاختلاف فى الثمن بينهما بعد قبض المبيع ، فإن حكم التحالف عند قيام السلعة فيه يثبت بالنص بخلاف القياس فلا يحتمل التعدية ، حتى إذا كان بعد هلاك السلعة لا يجرى التحالف سواء أخلف بدلاً أو لم يخلف .

25 وفى الإجارة بعد استيفاء المعقود عليه لا يجرى التحالف ، وإن كان الاختلاف (25)
بين الورثة بعد قبض السلعة لا يجرى التحالف . وقد يكون القياس الذى فى مقابلة الاستحسان الذى قلنا أصله مستحسن ثابت بالأثر نحو ما قال فى الصلاة : وإذا نام فى صلاته فاحتلم : فى القياس يغتسل ويبنى كما إذا

26 سبقه الحدث ، وذلك مستحسن بالأثر ، وفى الاستحسان لا يبنى . وفى هذا (26)
النوع المأخوذ به هو الاستحسان على كل حال ؛ لأنه فى الحقيقة رجوع إلى القياس الأصلى ببيان يظهر به أن هذا ليس فى معنى المعدول به عن القياس الأصلى بالأثر من كل وجه ، فلو ثبت الحكم فيه كان بطريق التعدية ، والمعدول به عن القياس بالأثر لا يحتمل التعدية ، وذلك البيان أن الحدث الصغرى لا يحوجه إلى كشف العورة ولا إلى عمل كثير ، وتكثر البلوى فيه فى الصلاة ، بخلاف الحدث الكبرى ، فإذا لم يكن فى معناه من كل وجه كان إثبات

27 الحكم فيه بطريق التعدية لا بالنص بعينه وذلك لا وجه له . فتبين بجميع (27)
ما ذكرنا أن القول بالاستحسان ليس من تخصيص العلة فى شىء ، ولكن فى اختيار هذه العبارة اتباع الكتاب[1] والسنة والعلماء من السلف ، وقد قال رسول الله صلى الله عليه وسلم : « ما رآه المسلمون حسناً فهو عند الله حسن » وكثيراً ما كان يستعمل ابن مسعود هذه العبارة ، ومالك بن أنس فى كتابه ذكر لفظ الاستحسان فى مواضع . وقال الشافعى رحمه الله : أستحسن فى

28 (28)التهمة ثلاثين درهماً . فعرفنا أنه لا طعن فى هذه العبارة ، ومن حيث المعنى

(١) قوله : « فبشر عبادى الذين يستمعون القول فيتبعون أحسنه » — هامش العثمانية .

هو قول بانعدام الحكم عند انعدام العلة ، وأحد لا يخالف هذا ، فإنا إذا جوزنا دخول الحمام بأجر بطريق الاستحسان فإنما تركنا القول بالفساد الذى يوجبه القياس لانعدام علة الفساد ، وهو أن فساد العقد بسبب جهالة المعقود عليه ليس لعين الجهالة بل لأنها تفضى إلى منازعة مانعة عن التسليم والتسلم وهذا لا يوجد هنا وفى نظائره ، فكان انعدام الحكم لانعدام العلة لا أن يكون بطريق تخصيص العلة .

فصل فى بيان فساد القول بجواز التخصيص فى العلل الشرعية

(29) 29 قال رضى الله عنه : زعم أهل الطرد أن الذين يقولون بالعلل المؤثرة ويجعلون التأثير مصححاً للعلل الشرعية لا يجدون بدا من القول بتخصيص العلل الشرعية ، وهو غلط عظيم كما نبينه . وزعم بعض أصحابنا أن التخصيص فى العلل الشرعية جائز وأنه غير مخالف لطريق السلف ولا لمذهب أهل السنة ، وذلك خطأ عظيم من قائله ؛ فإن مذهب من هو مرضى من سلفنا أنه لا يجوز التخصيص فى العلل الشرعية ، ومن جوز ذلك فهو مخالف لأهل السنة ، مائل إلى أقاويل المعتزلة فى أصولهم . وصورة التخصيص أن العلل إذا أورد (30) 30 عليه فصل يكون الجواب فيه بخلاف ما يروم إثباته بعلته ؛ يقول موجب علتى كذا إلا أنه ظهر مانع فصار مخصوصا باعتبار ذلك المانع ، بمنزلة العام الذى يخص منه بعض ما يتناوله بالدليل الموجب للتخصيص . ثم من جوز ذلك قال : التخصيص غير المناقضة لغة وشرعاً وفقها وإجماعاً . أما اللغة فلأن (31) 31 النقض إبطال فعل قد سبق بفعل نشأه كنقض البنيان . والتخصيص بيان أن المخصوص لم يدخل فى الجملة فكيف يكون نقضاً ؟ ألا ترى أن ضد النقض البناء والتأليف ، وضد الخصوص العموم . ومن حيث السنة التخصيص جائز فى النصوص الشرعية من الكتاب والسنة والتناقض لا يجوز فيهما بحال . ومن حيث الإجماع فالقياس الشرعى يترك العمل به فى بعض المواضع بالنص أو الإجماع أو الضرورة ، وذلك يكون تخصيصاً لا مناقضة ؛ ولهذا بقى ذلك القياس موجباً للعمل فى غير ذلك الوضع ،

32 والقياس المنتقض فاسد لا يجوز العمل به فى موضع . ومن حيث المعقول إن (32)
المعلل متى ذكر وصفاً صالحاً وادعى أن الحكم متعلق بذلك الوصف فيورد
عليه فصل يوجد فيه ذلك الوصف ويكون الحكم بخلافه ؛ فإنه يحتمل أن
يكون ذلك لفساد فى أصل علته ، ويحتمل أن يكون ذلك لمانع منع ثبوت
الحكم ؛ ألا ترى أن سبب وجوب الزكاة ملك النصاب النامى ثم يمتنع
وجوب الزكاة بعد وجوده لمانع وهو انعدام حصول النماء بمضى الحول
ولم يكن ذلك دليل فساد السبب ، والبيع بشرط الخيار يمنع ثبوت الملك به
33 لمانع وهو الخيار المشروط لا لفساد أصل السبب وهو البيع . فأما إذا قال (33)
هذا الوضع صار مخصوصا من علتى لمانع فقد ادعى شيئاً محتملا فيكون مطالباً
بالحجة ؛ فإن أبرز مانعاً صالحاً فقد أثبت ما ادعاه بالحجة فيكون ذلك
مقبولا منه وإلا فقد سقط احتجاجه ؛ لأن المحتمل لا يكون حجة ، وبه
فارق المدعى التخصيص فى النص ؛ فإنه لا يطالب بإقامة الدليل على ما يدعى
أنه صار مخصوصا مما استدل به من عموم الكتاب والسنة ؛ لأنه ليس فيما
استدل به احتمال الفساد ، فكان جهة التخصيص متعينا فيه بالإجماع ،
وهنا فى علته احتمال الفساد ، فما لم يتبين دليل الخصوص فيما ادعى أنه
مخصوص من علة لا ينتفى عنه معنى الفساد فلهذا لا يقبل منه ما لم يتبين المانع .

34 ثم جعل القائل الموانع خمسة أقسام : ما يمنع أصل العلة ، وما يمنع تمام (34)
العلة ، وما يمنع ابتداء الحكم ، وما يمنع تمام الحكم ، وما يمنع لزوم الحكم ؛
وذلك يتبين كله حسا وحكما ؛ فمن حيث الحس يتبين هذا كله فى الرمى ؛
فإن انقطاع الوتر أو انكسار فُوق السهم يمنع أصل الفعل الذى هو رمى بعد
تمام قصد الرامى إلى مباشرته ؛ وإصابة السهم حائطا أو شجرة ترده عن سننه
يمنع تمام العلة بالوصول إلى المرمى ، ودفع المرمى إليه عن نفسه بترس يجعله
أمامه يمنع ابتداء الحكم الذى يكون الرمى لأجله بعد تمام العلة بالوصول إلى
المقصد وذلك الجرح والقتل ، ومداواته الجراحة بعد ما أصابه حتى اندمل وبرأ يمنع
تمام الحكم ، وإذا صار به صاحب فراش ثم تطاول حتى أمن الموت منه يمنع

لزوم الحكم ؛ بمنزلة صاحب الفالج إذا تطاول ما به وأمن الموت منه كان بمنزلة
35 الصحيح فى تصرفاته . وفى الحكميات إضافة البيع إلى الحر يمنع انعقاد أصل (35)
العلة ، وإضافته إلى مال الغير يمنع انعقاد تمام العلة فى حق المالك حتى يتعين
جهة البطلان فيه بموته ، واشتراط الخيار من المالك لنفسه فى البيع يمنع
ابتداء الحكم ، وثبوت خيار الرؤية للمشترى يمنع تمام الحكم حتى لاتتم
الصفقة بالقبض معه ، وثبوت خيار العيب يمنع لزوم الحكم حتى يتمكن
من رده بعد تمام الصفقة بالقبض .

36 والحجة لعلمائنا فى إبطال القول بتخصيص العلة الاستدلال بالكتاب ، (36)
والمعقول ، والبيان الذى لا يمكن إنكاره .

أما الكتاب فقوله تعالى : « قل آلذكرين حرم أم الأنثيين ، أما اشتملت
عليه أرحام الأنثيين نبئونى بعلم إن كنتم صادقين » ففيه مطالبة الكفار ببيان
العلة فيما ادعوا فيه الحرمة على وجه لا مدفع لهم فصاروا محجوجين به . وذلك
الوجه أنهم إذا بينوا أحد هذه المعانى أن الحرمة لأجله انتقض عليهم(١)
بإقرارهم بالحل فى الموضع الآخر مع وجود ذلك المعنى فيه ، ولو كان التخصيص
فى علل الأحكام الشرعية جائزاً ما كانوا محجوجين ؛ فإن أحداً لا يعجز من
أن يقول امتنع ثبوت حكم الحرمة فى ذلك الموضع لمانع ، وقد كانوا عقلاء
يعتقدون الحل فى الموضع الآخر لشبهة أو معنى تصور عندهم . وفى قوله تعالى :
« نبئونى بعلم » إشارة إلى أن المصير إلى تخصيص العلل الشرعية ليس من
العلم فى شىء فيكون جهلاً .

37 وأما المعقول فلأن العلل الشرعية حكمها التعدية كما قررنا ، وبدون التعدية (37)
لا تكون صحيحة أصلا ؛ لأنها خالية عن موجبها ، وإذا جاز قيام المانع فى بعض
المواضع الذى يتعدى الحكم إليه بهذه العلة جاز قيامه فى جميع المواضع فيؤدى
إلى القول بأنها علة صحيحة من غير أن يتعدى الحكم بها إلى شىء من الفروع ،
وقد أثبتنا فساد هذا القول بالدليل . ثم إن كان تعدية الحكم بها إلى فرع

(١) وفى العثمانية : علتهم .

دليل صحتها فانعدام تعدية الحكم بها إلى فرع آخر توجد فيه تلك العلة دليل فسادها ، ومع مساواة دليل الصحة والفساد لا تثبت الحجة الشرعية موجبة للعمل ؛ يقرره أن المانع الذى يدعى فى الموضع المخصوص[1] لا بد أن يكون ثابتا بمثل ما ثبتت به العلة الموجبة للحكم ؛ لأنه إذا كان دونه لا يصلح دافعا له ولا مانعاً لحكمه ، وإذا كان مثلاً له فذلك المانع يمكن تعليله بعلة توجب تعدية حكم النفى إلى سائر الفروع مثل الأصل الذى علله المعلل بما أشار إليه من الوصف لإثبات الحكم فيه فتتحقق المعارضة بينهما من هذا الوجه ، وأى
(38) مناقضة أبين من التعارض على وجه المضادة بصفة التساوى . ثم قد بينا فيما
38
سبق أن دليل الخصوص يشبه النسخ بصيغته والاستثناء بحكمه ؛ فإنه مستقل بنفسه كدليل النسخ ولا يكون ذلك إلا مقارنا معنى كالاستثناء ، وواحد من هذين الوجهين لا يتحقق فى العلل ؛ فإن نسخ العلة بالعلة لا يجوز والخصم يجوز أن يكون المانع علة مثل العلة التى يدعى تخصيصها ، وكيف يجوز النسخ والعلة فيها احتمال الفساد لكونها مستنبطة بالرأى . فإذا ظهر ما يمنع العمل بها أصلا تتعين جهة الفساد فيها ، بخلاف النص فإنه لا يحتمل جهة الفساد ، فالنسخ
(39) يكون بياناً لمدة العمل به . ولهذا نوع بيان آخر ؛ فإن بالخصوص يتبين أنه
39
معمول به فى بعض المحال دون البعض ، وذلك إنما يجوز فيما يجوز القول فيه بالنسخ مع صحته حتى يقال إنه معمول به فى بعض الأوقات دون البعض ، والاستثناء إنما يكون فى العبارات ليتبين به أن الكلام عبارة عما
(40) وراء المستثنى وذلك لا يتحقق فى المعانى الخالصة . فيتبين بما ذكرنا أن
40
القول بالتخصيص مستقيم فى النصوص من حيث إن بدليل الخصوص لا تتمكن شبهة الفساد فى النص بوجه ، بل يتبين أن اسم النص لم يكن متناولا للموضع المخصوص مع كون العام صحيحاً موجبا للعمل قطعا قبل قيام دليل الخصوص ، فمن جوز تخصيص العلة لا يجد بدا من القول بتصويب المجتهدين أجمع ، وعصمة الاجتهاد عن احتمال الخطأ والفساد كعصمة النص من ذلك ،

(١) وفى العثمانية : فى موضع المخصوص .

وهذا تصريح بأن كل مجتهد مصيب لما هو الحق حقيقة وأن الاجتهاد يوجب علم اليقين ، وفيه قول بوجوب الأصلح ، وفيه من وجه آخر قول بالمنزلة بين المنزلتين ، وبالخلود فى النار لأصحاب الكبائر إذا ماتوا قبل التوبة .

(41) فهذا معنى قولنا : إن فى القول بجواز تخصيص العلة ميلاً إلى أصول المعتزلة من وجوه . ولكنا نقول : انعدام الحكم لا يكون إلا بعد نقصان وصف أو زيادة وصف وهو الذى يسمونه مانعاً مخصصاً ، وبهذه الزيادة والنقصان تتغير العلة لا محالة ، فيصير ما هو علة الحكم منعدما حكما ، وعدم الحكم عند انعدام العلة لا يكون من تخصيص العلة فى شىء . وبيان هذا أن (42) الموجب للزكاة شرعاً هو النصاب النامى الحولى ، عرف[1] بقوله عليه السلام : « لا زكاة فى مال حتى يحول عليه الحول » والمراد نفى الوجوب ، والعلل الشرعية لا توجب الحكم بذواتها بل بجعل الشرع إياها موجبة على ما بينا أن الموجب هو الله تعالى ، والإضافة إلى العلة لبيان أن الشرع جعلها موجبة تيسيراً علينا ؛ فإذا كانت بهذا الوصف موجبة شرعاً عرفنا أن عند انعدام هذا الوصف ينعدم الحكم لانعدام العلة الموجبة . ولا يلزمنا جواز الأداء (43) لأن العلة الوجبة غير العلة المجوزة للأداء ، وقد قررنا هذا فيما سبق أن الجزء الأول من الوقت مجوز أداء الصلاة فرضاً وإن لم يكن موجبا للأداء عيناً مع أن هذا الوصف مؤثر ؛ فإن النماء الذى هو مقصود إنما يحصل بمضى المدة ؛ ألا ترى أن الوجوب يتكرر بتكرر الحول لتجدد معنى النماء بمضى كل حول ، وكذلك البيع بشرط الخيار ؛ فإن الموجب للملك شرعاً البيع المطلق ومع شرط الخيار لا يكون مطلقا بل بهذه الزيادة يصير البيع فى حق الحكم كالمتعلق بالشرط وقد بينا أن المتعلق بالشرط غير الطلق ، ولصفة الإطلاق تأثير أيضاً فإن الموجب للملك بالنص التجارة عن تراض وتمام الرضا يكون عند إطلاق الإيجاب لا مع شرط الخيار ، فظهر أن العلة تنعدم بزيادة وصف أو نقصان

(١) وفى العثمانية والهندية : عرفناه .

وصف ، وهو الحاصل[1] الذى يجب مراعاته ؛ فإنهم يسمون هذا المعنى المغير مانعاً مخصصا ، فيقولون : انعدام الحكم مع بقاء العلة بوجود مانع وذلك تخصيص
(44) كالنص العام يلحقه خصوص فيبقى نصا فيما وراء موضع الخصوص . ونحن [44] نقول : تنعدم العلة حين ثبت المغير فينعدم الحكم لانعدام العلة ، وهذا فى العلل مستقيم ، بخلاف النصوص فإن بالنص الخاص لاينعدم النص العام ، وعلى هذا الطريق ما استحسنه علماؤنا من القياس فى كتبهم ؛ فإن الاستحسان قد يكون بالنص ، وبوجود النص تنعدم العلة الثابتة بالرأى ؛ لأنه لا معتبر
(45) بالعلة أصلاً فى موضع النص ولا فى معارضة حكم النص . وكذلك [45] الاستحسان إذا كان بسبب الإجماع ؛ لأن الإجماع كالنص من كتاب أو سنة فى كونه موجباً العلم . وكذلك ما يكون عن ضرورة فإن موضع الضرورة مجمع عليه أو منصوص عليه ولا يعتبر بالعلة فى موضع النص فكان انعدام الحكم فى هذه المواضع لانعدام العلة . وكذلك إذا كان الاستحسان بقياس مستحسن ظهر قوة أثره ، لما بينا أن الضعيف فى معارضة القوى معدوم حكما .

(46) وبيان ما ذكرنا فى أن النائم إذا صب فى حلقه ماء وهو صائم لم يفسد [46] صومه على قول زفر ؛ لأنه معذور كالناسى أو أبلغ منه ، وفسد صومه عندنا لفوات ركن الصوم ، والعبادة لا تتأدى بدون ركنها فيلزم على هذا الناسى . فمن يجوز تخصيص العلة يقول : انعدم الحكم هناك لوجود مانع وهو الأثر فكان مخصوصاً من هذه العلة بهذا الطريق مع بقاء العلة . ونحن نقول : انعدم الحكم فى الناسى لانعدام العلة حكما ؛ فإن النسيان لا صنع فيه لأحد من العباد ، وقد ثبت بالنص أن الله تعالى أطعمه وسقاه ، وصار فعله فى الأكل ساقط الاعتبار ، وتفويت الركن إنما يكون بفعل الأكل ، فإذا لم يبق فعله فى الأكل شرعا كان ركن الصوم قائماً حكما ، وإنما لم يحصل الفطر هنا لانعدام العلة الموجبة للفطر ، ثم النائم ليس فى معناه ؛ لأن الفعل الذى يفوت به ركن الصوم مضاف إلى العباد هنا فيبقى معتبراً مفوتاً ركن

(١) وفى العثمانية : الخاص .

(47) الصوم ، بخلاف إذا كان مضافاً إلى من له الحق . وكذلك قلنا : إن [47]
المغصوب يصير مملوكا للغاصب عند تقرر الضمان عليه ؛ لأن بهذا السبب
لما تقرر الملك فى ضمان القيمة وهو حكم شرعى فيقرر الملك فيما يقابله فيلزم
على هذا فصل المدبر من حيث إنه يتقرر الملك فى قيمته للمغصوب منه
ولا يثبت الملك فى المدبر للغاصب ؛ فمن يرى تخصيص العلة يقول امتنع
ثبوت الحكم فى المدبر مع وجود العلة لمانع وهو أنه غير محتمل للنقل من
(48) ملك إلى ملك . ونحن نقول : انعدمت العلة الموجبة للملك فى المدبر فينعدم [46]
الحكم لانعدام العلة ؛ وهذا لأن العلة تقرر الملك فى قيمة هى بدل عن
العين وقيمة المدبر ليس ببدل عن عينها ؛ لأن شرط كون القيمة بدلا عن
العين أن تكون العين محتملا للتمليك وذلك لا يوجد فى المدبر ؛ لأن[1]
المدبر جرى فيه عتق من وجه والعتق فى المحل يمنع وجوب قيمة العين
بسبب الغصب ، ولكن الضمان واجب باعتبار الجناية التى تمكنت من
الغاصب بتفويت يده ؛ لأن مع جريان العتق فيه من وجه قد بقيت اليد
والمالية مستحقة للمالك ؛ فإن انعدام ذلك يعتمد ثبوت العتق فى المحل من
كل وجه ، فعرفنا أنه إنما انعدم الحكم لانعدام العلة بوجود ما يغيرها .
(49) وكذلك إذا قلنا فى الزنا إنه ثبتت به حرمة المصاهرة ؛ لأن ثبوت الحرمة [49]
فى الأصل باعتبار الولد الذى يتخلق من الماءين فيصير بواسطة الولد أمهاتها
وبناتها فى حقه كأمهاته وبناته ، وأبناؤه وآباؤه فى حقها كآبائها وأبنائها .
ثم الوطء فى محل[2] الحرث سبب لحصول هذا الولد فيقام مقامه ، ويلزم
على هذا أنه لا يتعدى الحرمة إلى الأخوات والعمات والخالات من الجانبين ؛
فمن يقول بتخصيص العلة يقول : امتنع ثبوت الحكم مع قيام العلة فى
هذه المواضع للنص ، أو الإجماع . ونحن نقول : إنما انعدم الحكم لانعدام
العلة ؛ لأن فى النص الموجب لحرمة المصاهرة ذكر الأمهات والبنات والآباء
والأبناء خاصة ، فامتداد الحرمة إلى الأخوات والعمات والخالات يكون تغييراً

(١) وفى العثمانية : ولأن .
(٢) وفى الهندية والعثمانية : موضع .

وإثباتاً لحرمة أخرى ؛ لأن المقصور غير الممتد ، وإنما يعلل المنصوص ، ولا يجوز تبديل المنصوص بالتعليل ، فكان انعدام الحكم فى هذه المواضع لانعدام العلة لا لمانع مع قيام العلة . وكذلك إن ألزم أن الموطوءة لا تحرم على الواطىء بواسطة الولد والقرب بينهما أمسٌ ، فالتخريج هكذا أنه إنما انعدم الحكم هناك لانعدام العلة باعتبار مورد النص كما قررنا .

(50) وهذا أصل كبير ، وفقه عظيم . من ترك التعنت وتأمل عن إنصاف يخرج له جميع ما لم يذكر بما هو من نظائر ما ذكرنا عليه . وعمدة هذا الفقه معرفة دليل الخصوص ؛ فإن النصين إذا كان أحدهما عاما والآخر خاصا فالعام لا ينعدم بالخاص حقيقة ولا حكما ، وليس فى واحد من النصين توهم الفساد ، فعرفنا أن الخاص كان مخصصاً للموضع الذى تناوله من حكم العام مع بقاء العام حجة فيما وراء ذلك وإن تمكن فيه نوع شبهة من حيث إنه صار كالمستعار فيما هو حقيقة حكم العام . (51) فأما العلة وإن كانت مؤثرة ففيها احتمال الفساد والخطأ ، وهى تحتمل الإعدام حكماً ، فإذا جاء ما يغيرها جعلناها معدومة حكماً فى ذلك الموضع ، ثم انعدم الحكم لانعدام العلة ، ولا يكون فيها شىء من معنى التناقض ، ولا يكون من التخصيص فى شىء ، والله أعلم .

باب وجوه الاحتجاج بما ليس بحجة مطلقا

قال رضى الله عنه : فهذا الباب يشتمل على فصول . فالذى نبدأ به الاحتجاج بلا دليل ؛ فإن العلماء اختلفوا فيه على أقاويل . قال بعضهم : لا دليل حجةٌ للنافى على خصمه ولا يكون حجة للمثبت . وقال بعضهم : هى حجة دافعة لا موجبة . والذى دل عليه مسائل الشافعى رحمه الله أنها حجة دافعة لإبقاء ما ثبت بدليله لا لإثبات ما لم يعلم ثبوته بدليله . والذى دل عليه مسائل أصحابنا[2] أن هذا فى حق الله تعالى ، فأما فى حق

(١) وفى العثمانية : علمائنا .

[مسألة الاستحسان]

1. [f° 325a] | الحمد لله نستعينه ونستغفره ، ونعوذ بالله من شرور أنفسنا ومن سيّئات أعمالنا ؛ من يهده الله فلا مضلّ له ، ومن يضلل فلا هادي له ؛ ونشهد أنْ لا إله إلّا الله وحده لا شريك له ، ونشهد أنّ محمّداً عبده ورسوله ، صلّى الله عليه وعلى آله وسلّم تسليماً .

2. فصل في الاستحسان ، وتخصيص العلّة ، وموضع الاستحسان هل يُقاس عليه أم لا ، وما يرد من الأحكام الثابتة بالنصّ والإجماع ويُقال إنّها مخالفة للقياس . فإنّ هذه قواعد كثر اضطراب الناس فيها ؛ والحاجة ماسّة الى تحقيقها في كثير من مسائل الشريعة أصولها وفروعها .

* * *

3. أمّا الاستحسان فالمشهور من معانيه أنّه مخالفة القياس لدليل . وقد يُراد به غير ذلك . والعلماء في لفظه ومعناه المذكور على ثلاثة أقوال . منهم من ينكر هذا اللفظ مطلقاً ؛ وهم نفاة القياس كداود وأصحابه ، وكثير من أهل الكلام من المعتزلة والشيعة وغيرهم . فليس عندهم في أدلّة الشرع لا قياس ولا استحسان .

4. ومنهم من يقرّ به بهذا المعنى ، ويجوّز مخالفة القياس للاستحسان ، ويعمل بالقياس فيما عدا صورة الاستحسان . وهذا هو المعروف عن أبي حنيفة وأصحابه .

5. ومنهم من ذمّ الاستحسان تارةً ، وقال به تارةً ، كالشافعيّ وأحمد بن حنبل ومالك[1] وغيرهم . ففي كتب مالك وأصحابه ذكر لفظ الاستحسان في مواضع . والشافعيّ قال : من استحسن فقد شرع . وتكلّم في إبطال الاستحسان ، وبسط القول في ذلك . وكان من أعظم الأئمّة إنكاراً له . وصنّف (؟) و . . . (؟) بلفظ الاستحسان كما قال . وهو الذي عليه أصحابه في أصول الفقه . ومع هذا فقد قال : أستحسن أن تكون المتعة ثلاثين درهماً . ولهذا حُكي للشافعيّ في الاستحسان قولان : قديم وجديد .

6. وكذلك أحمد بن حنبل نقل عنه أبو طالب أنّه قال : أصحاب أبي حنيفة إذا قالوا شيئاً خلاف القياس قالوا : نستحسن هذا وندع القياس . فيدعون الذي يزعمون أنّه الحقّ بالاستحسان . قال : وأنا أذهب الى كلّ حديث جاء ولا أقيس عليه .

7. قال القاضي أبو يعلى : وظاهر هذا يقتضي إبطال القول بالاستحسان ، وأنّه لا

يُقاس[1] المنصوص عليه على المنصوص عليه . قلت : مراد أحد : إنّي استعمل النصوص كلّها، ولا أقيس على[2] أحد النصّين قياساً يعارض النصّ الآخر. كما يفعل من ذكرته حيث يقيسون[3] على أحد[4] النصّين ثمّ يقيسون موضع الاستحسان إمّا لنصّ أو غيره . والقياس عندهم يوجب العلّة الصحيحة . فينقضون العلّة التي يدّعون صحّتها مع تسويتها في محالّها .

8 | وهذا من أحد يبيّن أنّه يوجب طرد العلّة الصحيحة ، وأنّ انتقاضها مع تساويها في محالّها يوجب فسادها . ولهذا قال : لا أقيس على أحد النصّين قياساً ينقض النصّ[5] الآخر. فإنّ ذلك يدلّ على فساد القياس . وهو يستعمل مثل هذا في مواضع مثل حديث أبي سلمة عنه وفيه قوله صلّعم : إذا أراد أحدكم أن يضحّي ودخل العشر فلا يأخذ من شعره ولا من بشرته شيئاً ، مع حديث عائشة : كنت أفتل قلائد هدي رسول الله [صلّى الله] عليه وسلّم، ثمّ يبعث به وهو يقيم ، فلا يُحرَم عليه شيء ممّا يُحرَم على المحرم .

9. والناس في هذا على ثلاثة أقوال . منهم من يرى بين الهدي والأضحيّة في المنع ويقول : إذا أرسل المحرم هدياً لم يحلّ حتّى يُنحَر، كما يُروَى عن ابن عبّاس وغيره . ومنهم من يرى بينهما في الإذن ويقول : بل المضحّي لا يُمنَع عن شيء كما لا يُمنَع المهدي . فيقيسون على أحد النصّين ما يعارض الآخر.

10. وفقهاء الحديث كيحيى بن سعيد والشافعيّ وأحمد بن حنبل وغيرهم عملوا بالنصّين . ولم يقيسوا أحدهما على الآخر: كما أنّ الله لمّا أحلّ البيع وحرّم الربا لم يقس[6] المسلمون أحدهما على الآخر؛ وإنّما هذا قياس المشركين . وكذلك لمّا أحلّ الذكيّ وحرّم

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[1] يُقاس: written in left margin without points or vocalization.

[2] ولا أقيس على: partly blotted out with ink, written by another hand in the right margin, vertical upward position.

[3] Blotted out except for the unpointed first letter (*yā'*) and the sign (ˇ) for the letter *sīn*; the word is written by another hand in the left margin, vertical upward position.

[4] Partly blotted out; not written in margin.

[5] ينقض النصّ: نقضه النصه MS; lapsus calami, the final letter of both words being superfluous; could also be read ينقضه النصّ with no violence done to the meaning of the sentence; but compare similar sentences in paragraphs 7 and 9.

[6] يقس: mod.

الميتة لم يقيسوا أحدهما على الآخر؛ بل هذا قياس المشركين. وكذلك لمّا جاء[1] الكتاب والسنّة بالقرعة وجاءا[2] بتحريم القمار لم يقيسوا هذا على هذا، بل أجازوا القرعة وحرّموا الميسر والاستقسام بالأزلام، بخلاف من جعل القرعة من القمار أو من الاستقسام بالأزلام[3] ولم يعلّق بها حكماً. وأحد أكثر الفقهاء عملاً بالقرعة لما كان عنده فيها من النصوص والآثار.

11. وكذلك عند أحمد وغيره من فقهاء الحديث، لمّا أمر النبيّ صلّم الناس إذا صلّى الإمام قاعداً أن يصلّوا قعوداً أجمعين، ثمّ لمّا افتتحوا الصلاة قياماً أنهى[4] بهم قياماً؛ عمل بالحديثين، ولم يقس[5] على أحدهما قياساً يناقض الآخر ويجعله منسوخاً، كما فعل طائفة من الفقهاء كالشافعيّ والحميديّ وغيرهما.[6] واستدلّ هو وغيره بأنّ الصحابة بعده لمّا صلّوا جلوساً أمروا مَنْ خَلْفَهم بالجلوس. وقد شهدوا صلاته[7] في آخر عمره، مثل أُسَيْد بن الحُضَيْر وهو من أفضل السابقين الأوّلين من الأنصار. وذلك في عهد أبي بكر فإنّه قُتل في قتال المرتدّين من حنيفة أتباع مسيلمة الكذّاب.

12. [f° 326a] وقد قال أحمد بالاستحسان المخالف للقياس في مواضع، كقوله في رواية صالح[8] في المضارب: إذا خالف فاشترى غير ما أمر به صاحب المال فالربح لصاحب المال ولهذا أجرة مثله، إلّا أن يكون الربح يحيط بأجرة مثله، فيذهب. قال: وكنت أذهب الى أنّ الربح لصاحب المال، ثمّ استحسنت.

13. وقال في رواية الميمونيّ: أستحسن أن يتيمّم لكلّ صلاة، ولكنّ القياس أنّه بمنزلة الماء حتّى يحدث أو يجد الماء.

14. وقال في رواية المروذيّ: يجوز شرى أرض السواد ولا يجوز بيعها. فقيل له:

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[1] جاء: حات MS. The author's original sentence was جاءت السّنة بالقرعة; he then crossed out the second and third words, replacing them with الكتاب والسّنة بالقرعة but forgetting to change the verb from جاءت to جاء to re-establish agreement between verb and subject.

[2] وجاءا: وحا MS.

[3] بالأزلام: بالارلارم MS.

[4] أنهى: انها MS.

[5] Mod.

[6] وغيرهما: وغيره MS. w.p.

[7] صلاته: صلويه MS.

[8] صالح: صلح MS.

كتف يُشترى ممّن لا يملك؟ فقال : القياس كما تقول ولكن هو استحسان. واحتجّ بأنّ أصحاب النبيّ صلّعم رخّصوا في شرى المصاحف وكرّهوا بيعها. وهذا يشبه ذلك.

15. وقال في رواية بكر بن محمّد فيمن غصب أرضاً وزرعها : الزرع لربّ الأرض وعليه النفقة ؛ وليس هذا شيئاً يوافق القياس ، [ولكن][1] أستحسن أن يدفع إليه نفقته.

16. وقد جعل القاضي أبو يعلى المسألة على روايتين. ونصر هو وأتباعه كأبي الخطّاب وابن عقيل وابن [الزاغونيّ؟][2] القول بالاستحسان كقول أصحاب أبي حنيفة. وفسّر هؤلاء وهؤلاء الاستحسان الذي يقولون به بأنّه ترك الحكم الى حكم هو أولى منه. وقيل : هو أولى القياسين. قالوا – وهذا لفظ القاضي – : والحجّة التي نرجع إليها في الاستحسان فهي الكتاب تارة والسنّة أخرى والإجماع ثالثة. والاستدلال يترجّح شبه بعض الأصول على بعض. كما قلنا بالاستحسان لأجل الكتاب في شهادة أهل الكتاب على المسلمين في الوصيّة في السفر إذا لم نجد مسلماً.

17. قال : وممّا قلنا فيه بالاستحسان للسنّة فيمن غصب أرضاً وزرعها ، فالزرع لربّ الأرض وعلى صاحب الأرض النفقة لصاحب الزرع ؛ لحديث رافع بن خديج عن النبيّ صلّعم : من زرع في أرض قوم فالزرع لربّ الأرض وله نفقته. وقد كان القياس أن يكون الزرع لزارعه.

18. قال : وممّا قلنا فيه بذلك للإجماع جواز سلم الدراهم والدنانير في الموزونات. وكان القياس أن لا يجوز ذلك لوجود الصفة المضمومة الى الجنس وهي الوزن. إلاّ أنّهم استحسنوا فيه للإجماع.

19. قلت : ومن ذلك أنّ نفقة الصغير وأجرة مرضعه على أبيه دون أمّه بالنصّ والإجماع. والقياس ، عند من يجعل النفقة على كلّ وارث بفرض أو تعصيب أو على كلّ ذي[3] رحم محرم أو على عمودي النسب مطلقاً، أن يكون على الأبوين. وكذلك يقولون

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[1] The context requires the addition of this word, corroborated in the same quotation cited in the MS on *uṣūl al-fiqh* attributed to the Taimīya family, Dār al-Kutub Library, Cairo, *Uṣūl al-fiqh* 150, f° 179a, line 5 from botton of page.

[2] كأبي الخطّاب وابن عقيل وابن: this insert is written by the author above the line, between وأتباعه and كقول. See Ibn Taimīya, *Minhāj al-sunna*, 4 vols. (Cairo: Būlāq, 1321-22/1903-04), *passim*, where this trio of Hanbali jurisconsults is frequently mentioned among the disciples of Qadi Abū Ya'lā.

جواز إجارة الظئر بأنّه بالنصّ والإجماع على خلاف القياس ؛ بل وقد يقولون بجواز الإجارة ، بل وجواز القرض والقراض وغير ذلك ، على خلاف القياس للإجماع .

20. لكن إذا أبدوا معنىً يقتضي التخصيص مثل الحاجة قيل : هذا يقول به جميع الأئمّة ، بل جميع علماء السنّة ، مثل إباحة الميتة للمضطرّ للضرورة ، وصلاة المريض قاعداً للحاجة ، ونحو ذلك . وإنّما يتنازعون إذا لم يظهر في إحدى الصورتين معنىً يوجب الفرق .

21. [ولهذا فسّر غير واحد الاستحسان بتخصيص العلّة ، كما ذكر ذلك أبو الحسين [f° 326b] البصريّ والرازيّ وغيرهما . وكذلك هو . فإنّ غاية الاستحسان الذي يُقال فيه إنّه يخالف القياس حقيقة تخصيص العلّة . والمشهور عن أصحاب الشافعيّ منع تخصيص العلّة ، وعن أصحاب أبي حنيفة القول بتخصيصها ، كالمشهور عنهما في منع الاستحسان وإجازته . ولكن في مذهب الشافعيّ خلاف في جواز تخصيص العلّة ، كما في مذهب مالك وأحمد . ومن الناس من حكى قول الأئمّة الأربعة جواز تخصيص العلّة . وقد ذكر أبو إسحاق[1] بن شاقلا عن أصحاب أحمد في تخصيص العلّة وجهين . ومن الناس من يحكي ذلك روايتين عن أحمد . والقاضي أبو يعلى وأكثر أتباعه كابن عقيل [وغيره][2] يمنعون تخصيص العلّة مع قولهم بالاستحسان ، وكذلك أصحاب مالك .[3]

22. وأمّا أبو الخطّاب فيختار تخصيص العلّة موافقة لأصحاب أبي حنيفة . فإنّ هذا هو الاستحسان كما تقدّم . وهؤلاء يجوّزون تخصيصها بمجرّد دليل يدلّ على التخصيص ، وإن لم يبيّن اختصاص صورة النقض فقدان شرط أو وجود مانع . وهذا حقيقة ما ذكره القاضي وهؤلاء في الاستحسان ، كما ذكره في الأمثلة .

23. ولكنّ القاضي وغيره ممّن يقول بالاستحسان ومنع تخصيص العلّة فرّقوا بينهما . فقالوا – واللفظ للقاضي – : لا يجوز تخصيص العلّة الشرعيّة ، وتخصيصها نقضها . قال : وقد قال أحمد في رواية الحسين بن حسّان : القياس أن يُقاس الشيء على الشيء إذا كان مثله في كلّ أحواله ، فأمّا إذا أشبهه في حال وخالفه في حال فهذا خطأ . قال : وهذا الكلام يمنع من تخصيصها . قال : وقد ذكر أبو إسحاق[4] – يعني ابن شاقلا – في شرح الخرقيّ فقال :

[1] اسحق : إسحاق MS.

[2] وغيره : added for the context. The author had begun to write something after the word عقيل, but crossed it out.

[3] مالك : مـ (initial *mīm*); another abbreviation by the author for Mālik; compare his abbreviation for the same name in paragraph 5.

[4] اسحق : إسحاق MS.

أصحابنا على وجهين : منهم من يرى تخصيص العلّة ، ومنهم من لا يرى ذلك . قال : وقد ذكرها أبو الحسن الخرزيّ في جزء فيه مسائل من الأصول : لا يجوز تخصيصها . قال : وقول أحمد " القياس كان يقتضي أن لا يجوز شرى أرض السواد لأنّه لا يجوز بيعها " ليس بموجب لتخصيص العلّة ، فإنّها في حكم خاصّ . وما ذكر أحمد إنّما هو اعتراض النصّ على قياس الأصول في الحكم العامّ . وقد يُترك قياس الأصول للخبر .

24. ولذلك أجاب من احتجّ على جواز تخصيصها بالاستحسان فقال : فإن قيل : أليس قد قال أحمد في رواية المروذيّ – < وقد قيل : كيف يُشترى ممّن لا يملك ؟ فقال – : القياس كما تقول وإنّما هو استحسان ؟ واحتجّ بقول الصحابة في المصاحف . ثمّ قال في الجواب : قيل : >[1] تخصيص العلّة ما منع من جريها في حكم خاصّ .

25. وما ذكره أحمد إنّما هو اعتراض النصّ على قياس الأصول . ولأنّهم قد يقولون في الاستحسان عن قياس وعن غير قياس فامتنع أن يكون معناه تخصيص بدليل . < وقد ناقضه أبو الخطّاب . >[2]

26. [وهذا الذي ذكره القاضي قد ذكره كثير من العلماء فيما إذا عارض النصّ قياس [a35 الأصول ، فقالوا يقدم النصّ . واختلفوا فيما إذا عارض خبر الواحد قياس الأصول . كخبر المصرّاة ونحوه . وأمّا الأوّل فمثل حمل العاقلة . فإنّهم يقولون : هو خلاف قياس الأصول . وهو ثابت بالنصّ والإجماع . وهذا يذكره بعض الناس قولاً ثالثاً في تخصيص العلّة . ويذكرون قولاً رابعاً . وهو أنّه يجوز [تخصيص][3] المنصوصة دون المستنبطة . وأكثر الناس في التخصيص من أصحاب الشافعيّ وأحمد ، كابن حامد وأبي الطيّب والقاضي أبي يعلى وابن عقيل وغيرهم ، يقولون : إذا خُصّت المنصوصة تبيّنّا أنّها نقض العلّة وإلاّ فلا يجوز تخصيصها بحال .

27. وهذا النزاع إنّما هو في علّة قام على صحّتها دليل كالتأثير والمناسبة . وأمّا إذا اكتُفي فيها بمجرّد الطرد الذي لا يُعلَم خلوّه عن التأثّر والسلامة عن المفسدات فهذه تبطل بالتخصيص باتّفاقهم . وأمّا الطرد المختصّ الذي يُعلَم خلوّه عن المعاني المعبرّة فذاك لا يُحتجّ به عند أحد من العلماء ولا المعبّرين .

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[1] Right margin, one line, vertical upward position.

[2] Right margin, bottom of page, horizontal position; added later by the author; meant to follow the last line of f° 326b.

[3] تخصيص: added because of the context. The author had written تخصيصها which he then crossed out, without replacing it with تخصيص.

28. وأمّا النزاع في الطرد الشبهيّ، كالمجوّزات الشبهيّة التي يحتجّ بها كثير من الطوائف الأربعة لا سيّما قدماء أصحاب الشافعيّ، فإنّها كثيرة في حججهم أكثر من غيرهم.

29. [f° 327b] والتحقيق في هذا الباب أنّ العلّة تُقاس على العلّة التامّة، وهي المستلزمة لمعلولها. فهذة متى انتقضت بطلت بالاتّفاق. وتُقاس على العلّة المقتضية أدلّاء وتُسمّى المؤثّرة، ويُسمّى السبب دالّاً ودليل العلّة ونحو ذلك. فهذه إذا انتقضت لفرق مؤثّر يُفرّق فيه بين صورة النقض وغيرها من الصور لم تفسد. ثمّ إذا كانت صورة الفرع التي هي صورة النزاع في معنى صورة النقض أُلحقت بها. وإن كانت في معنى صورة الأصل أُلحقت بها. فمن قال "إنّ العلّة لا يجوز تخصيصها مطلقاً لا لفوات شرط ولا لوجود مانع" فهذا مخطىء قطعاً، وقوله مخالف لإجماع السلف كلّهم: الأئمّة الأربعة وغيرهم. فإنّهم كلّهم يقولون بتخصيص العلّة لمعنى يوجب الفرق. وكلامهم في ذلك أكثر من أن يُحصر. وهذا معنى قول من قال: يخصّصها مذهب الأئمّة الأربعة.

30. والقول بالاستحسان المخالف للقياس لا يمكن إلّا مع القول بتخصيص العلّة. وما ذكروه من اعتراض النصّ على قياس الأصول فهو أحد أنواع تخصيص العلّة. . . .[1] لكون السنّة تقبل[2] التخصيص في الجملة. وأمّا من جوّز تخصيص العلّة بمجرّد دليل لا يبيّن الفرق بين صورة التخصيص وغيرها فهذا مورد النزاع في الاستحسان المخالف للقياس وغيره.

31. ثمّ هذه العلّة إن كانت مستنبطة وخُصّت بنصّ ولم تبيّن الفرق المعنويّ بين صورة التخصيص وغيرها فهذا أضعف ما يكون. وهذا هو الذي كان ينكره كثيراً الشافعيّ وأحمد وغيرهما على من يفعله من أصحاب أبي حنيفة وغيرهم. وكلام أحمد في ما تقدّم أراد به هذا. فإنّ العلّة المبيّنة لم تُعلَم صحّتها إلّا بالرأي، فإذا عارضها النصّ كان مبطلاً لها. والنصّ إذا عارض العلّة دلّ على فسادها، كما أنّه إذا عارض الحكم الثابت بالقياس دلّ على فساده بالإجماع.

32. وأمّا إذا كانت العلّة المنصوصة وقد جاء نصّ بتخصيص بعض صور العلّة فهذا ممّا لا ينكره أحد، بل ولا الشافعيّ وغيرهما. كما إذا جاء نصّ في صورة ونصّ يخالفه في صورة أخرى لكن بينهما شبه لم يقم دليل على أنّه مناط الحكم فهؤلاء يقرّون النصوص ولا يقيسون منصوصاً على منصوص يخالف حكمه. بل هذا من جنس الذين قالوا: إنّما البيع مثل الربا.

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[1] Two or three words which remain illegible for me.
[2] Mod.

وهذا هو الذي قال أحمد فيه : أنا أذهب الى كلّ حديث كما جاء ولا أقيس عليه أي لا يقيس عليه صورة الحديث الآخر – فأجعل الأحاديث متناقضة وأدفع بعضها ببعض . بل استعملها كلّها .

33. والذين يدفعون بعض النصوص ببعض يقولون : الصورتان سواء لا فرق بينهما . فيكون [28a] أحد النصّين ناسخاً للآخر. ومثل هذا كثيراً ما يتنازع فيه فقهاء الحديث ومن ينازعهم[1] ممّن يقيس منصوصاً على منصوص ويجعل أحد النصّين منسوخاً لمخالفته قياس النصّ الآخر في طيّ هذا القياس .

34. وبقي الأمر دائراً هل دلّ الشرع على التسوية بين الصورتين حتّى يُجعَل حكمهما سواء ويُجعَل الحكم الوارد في إحداهما منسوخاً بالحكم المضادّ له الوارد في الأخرى ، كما يقوله من يجعل القرعة منسوخة بآية الميسر . وأمر المأمومين بأن يتبعوا الإمام ، فإذا كبّر كبّروا ، وإذا ركع ركعوا ، وإذا صلّى جالساً صلّوا جلوساً ، أُحمل منسوخاً بدوام قيامهم في الصلاة التي صلّوا بعضها خلف إمام قائم وباقيها خلف إمام قاعد ؟ ويجعلون[2] حديث الأضحيّة والهدي أحدهما منسوخاً بالآخر . ‹ويجعلون قطع جاحد العارية منسوخاً[3] – إذا سلّموا أنّه قطعها لذلك – منسوخاً[3] بقوله : ليس على المختلس ولا المنتهب ولا الخائن قطع[4] . › ويجعلون[5] العقوبة الماليّة منسوخة بالنهي عن إضاعة المال . ويجعلون[5] تضعيف الغرم على من ذُرّي عنه القطع منسوخاً بقوله : ﴿وجزاء سيّئة سيّئة مثلها﴾.[6] ويجعلون[7] تقضية ما شرطه النبيّ صلّعم بينه وبين المشركين في الهدنة منسوخاً بقوله : من اشترط شرطاً ليس في كتاب الله فهو باطل . وكثير ممّا يدّعونه في الناسخ لا يعلمون أنّه قيل بعد المنسوخ .

35. فهذا ونحوه من دفع النصوص البيّنة الصريحة بلفظ مجمل أو قياس هو ممّا كان

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[1] ينازعهم: followed by من at the end of the line, then by ممّن at the beginning of the next line.

[2] ويجعلون ويحمل: MS; this verb is repeated by the author more than once in this section, first in the singular then modified to the plural in order to put them in agreement with the same verb in the marginal note; this is one of those he failed to modify; see others below.

[3] منسوخاً: author's repetition.

[4] Left margin, three lines, vertical upward position.

[5] ويجعلون: modified by the author to agree with the same verb in the marginal note.

[6] Kor. XLII, 40.

[7] ويجعلون ويحمل: MS, written twice, once at the end of the line, and again at the beginning of the next line; the author failed to modify this one.

ينكره أحد وغيره. وكان أحمد يقول: أكثر ما يخطىء الناس من جهة التأويل والقياس. وقال: ينبغي للمتكلّم في الفقه أن يجتنب هذين الأصلين المجمل والقياس. ومراده أنّه لا يُعارَض بهما ما ثبت بنصّ خاصّ ولا يُعمَل بمجرّدهما قبل النظر في النصوص والأدلّة الخاصّة المقيّدة. والعامّ والمطلق يدخل في معنى كلامه وكلام غيره من الأئمّة كالشافعيّ وغيره، في المجمل. لا يريدون بالمجمل ما لا يُفهَم معناه، كما يظنّه بعض الناس، ولا ما يستقلّ بالدلالة. فإنّ هذا لا يجوز الاحتجاج به بحال. وأمّا إذا جاء نصّان بحكمين مختلفين في صورتين وثَمّ صور مسكوت عنها فهل يُقاس القياس هو مقتضى أحد النصّين، فما سُكت عنه نلحقه به وإن لم نعرف المعنى الفارق بينه وبين الآخر.

36. فهذا هو الاستحسان الذى نتورّع منه فكثير من الفقهاء يقول[1] به كأصحاب أبي حنيفة وكثير من أصحاب أحمد وغيرهم[2]. وهذا هو الذي ذكره القاضي بقوله: اعترض النصّ على قياس الأصول. وهو في الحقيقة قول بتخصيص العلّة، كما تقدّم. ومن لم يجوز تخصيصها إلّا بفارق بين صورة التخصيص وغيرها يقول: لا بدّ أن يُعلَم الجامع أو الفارق، فليس إلحاق المسكوت [عنه] بأحد النصّين بأولى من إلحاقه بالآخر. وإذا عُلم المعنى في أحد النصّين ولم يُعلَم في الآخر وجاز أن يكون المسكوت عنه في معنى هذا ومعنى هذا لم يُلحَق بواحد منهما إلّا بدليل. وإذا عُلم المعنى في أحد النصّين ووجوده في المسكوت عنه ولم يُعلَم المعنى في الآخر فهذا أقوى من الذي قبله. فإنّه هنا قد عُلم مقتضى القياس الصحيح وشموله لصورة السكوت. وأمّا وجود الفارق فيه فشكوك فيه. وهذا نظير أخذ أحد بالنصوص الواردة في سجود سهو. فما كان فيها قبل السلام[3] أخذ به، وما [كا]ن بعد السلام[3] أخذ [به]، وما لم يجيء فيه نصّ ألحقه بما قبل السلام[3] لأنّه القياس عنده.

37. | وتحقيق هذا الباب أنّه إمّا أن يُعلَم استواء الصورتين في الصفات المؤثّرة في الشرع، وإمّا أن يُعلَم افتراقهما، وإمّا أن لا يُعلَم واحد منهما. ونعني بالعلم ما يسمّيه الفقهاء علماً، وهو أن يقوم الدليل على التماثل والاستواء، أو الاختلاف والافتراق، أو لا يقوم على واحد منهما. [f° 328b]

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[1] يقول: sic MS (instead of the plural).

[2] Words crossed out by the author leave a certain awkwardness in the text (repetition of the conjunction *fa*).

[3] السلام: used three times in the passage, written السلم the first two, السلام the third.

38. فالأوّل متى ثبت الحكم في بعض الصور دون بعض عُلم أنّ العلّة باطلة. وهذا من دعوى من يدّعي أنّ الموجب للنفقة نفس الإيلاد، أو نفس الرحم المحرم، أو مطلق الإرث بفرض أو تعصيب. ونقول: إذا اجتمع الجدّ والجدّة كانت النفقة عليهما. فإنّه لمّا ثبت بالنصّ والإجماع أنّه إذا اجتمع الأبوان كانت النفقة على الأب فعُلم أنّ العصبة في ذلك يُقدَّم على غيره وإن كان وارثاً بفرض.

39. وهذا إحدى الروايتين عن أحمد. وعُلم أنّ قوله: ﴿وَعَلَى ٱلْوَارِثِ مِثْلُ ذَٰلِكَ﴾[1] هو الوارث المطلق، وهو العاصب إن كان موجوداً، لأنّ عمر جبر بني عمّ منفوس على نفقته. وهذه الآية صريحة في إيجاب نفقة الصغير على الوارث العاصب. وقال بها جمهور السلف. وليس لمن خالفها حجّة أصلاً. ولكن ادّعى[2] بعضهم أنّها منسوخة. وقيل ذلك عن مالك. وبعضهم قال: علّته أن لا يُضارّ. فتركها بدعوى النسخ أو تأويل هو من نوع تحريف الكلم عن مواضعه لغير معارض لها أصلاً، ممّا يعلم بطلانه كلّ من يدبّر ذلك.

40. وإذا كانت الأمّ أقرب الناس إليه لا نفقة عليها مع الأب. ومن يجوّز الثلث منعه بأن لا يجب على الجدّة مع الجدّ. ومن يجوّز السدس أولى وأقوى.

41. والقائلون بذلك يقولون: القياس يقتضي وجوب ثلثها على الأمّ، لكن تُرك ذلك للنصّ. فيُقال: أيّ قياس معكم؟ إنّما يكون قياساً لو[3] كان معهم نصّ يتناول هذه الصورة بلفظه أو بمعناه. وليس معهم ذلك. ولو كان ذلك لكان مجيء هذا النصّ بهذا[4] يوجب إلحاق نظائره به. فيُقاس كلّ عاصب معه فرض أوجبه من وُرّاث الفرض على الأب مع الأمّ.

42. وكذلك إسلام النقدين في الموزونات يقدح في كون العلّة الوزن. ولم يثبت ذلك بنصّ بيّن، بل بعلّة مستنبطة قد عارضها ما هو أقوى منها. فإن لم تبيّن الفرق بين النقدين وغيرهما، وإلّا كان انتقاضها مبطلاً لها. فانتقاض العلّة يوجب بطلانها قطعاً إذا لم تختصّ صورة النقض بفرق معنويّ قطعاً. فإنّ الشارع حكيم بما دلّ لا يفرّق بين المتماثلين. فلا تكون الصورتان متماثلتين ثمّ يخالف بين حكميهما، بل اختلاف الحكمين دليل على اختلاف الصورتين في نفس الأمر. فإن عُلم أنّه فرّق بينهما كان ذلك دليلاً على

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[1] Kor. II, 233.

[2] ادّعى: mod.

[3] لو: mod.

[4] بهذا: بهد MS.

افتراقهما في نفس الأمر، وإن لم يُعلَم بمجيء الفرق. وإن عُلم أنّه سوّى بينهما كان ذلك دليلاً على استوائهما. وإن لم يُعلَم هذا ولا هذا لم يجز أن يُجمَع ويُسوّى إلاّ بدليل يقتضي ذلك.

43. «وهذا معنى قول إياس بن معاوية في القضايا: استقام القياس، فإذا فسد فاستحسن. فأمر بمخالفة القياس إذا تغيّر الأمر بحصول مفاسد تمنع القياس.»[1]

44. [f° 329a] وأحمد قال بالاستحسان لأجل الفارق بين صورة الاستحسان وغيرها. وهذا من باب تخصيص العلّة للفارق المؤثّر. وهذا حقّ. وأنكر الاستحسان إذا خُصّت العلّة من غير فارق مؤثّر. ولهذا قال: يدعون القياس الذي هو حقّ عندهم الاستحسان. وهذا أيضاً هو الاستحسان الذي أنكره الشافعيّ وغيره. وهو منكر كما أنكروه. فإنّ هذا الاستحسان وما عُدل عنه من القياس المخالف له يقتضي فرقاً وجمعاً بين الصورتين بلا دليل شرعيّ، بل بالرأي الذي لا يستند الى بيان الله ورسوله وأمر الله ورسوله. فهو ليس له وضع الشرع أبداً. وقد قال تع: ﴿أَمْ لَهُمْ شُرَكَاءُ شَرَعُوا لَهُمْ مِنَ الدِّينِ مَا لَمْ يَأْذَنْ بِهِ اللَّهُ﴾.[2]

45. وذلك أنّه إذا كان القياس لم ينصّ الشارع على علّته ولا دلّ لفظ الشرع على عموم المعنى فيه، ولكن رأى الرائي ذلك لمناسبة أو لمشابهة ظنّها مناط الحكم ثمّ خصّ من ذلك المعنى صوراً بنصّ يعارضه، كان معذوراً من عمله بالنصّ. لكن مجيء النصّ بخلاف تلك العلّة في بعض الصور دليل على أنّها ليست علّة تامّة قطعاً. فإنّ العلّة التامّة لا تقبل الانتقاض. فإن لم يعلم أن مورد النصّ مختصّ بمعنًى يوجب الفرق لم يطمئنّ قلبه الى أنّ ذلك المعنى هو العلّة، بل يجوز أن تكون العلّة معنًى آخر، أو أن يكون ذلك المعنى بعض العلّة وحينئذ[3] فلا يفترق الحكم من جميع موارد ما ظنّه علّة.

46. وإن كان مورد الاستحسان موافقاً معنى ظنّه مناسباً أو مشابهاً فإنّه يحتاج[4] حينئذ الى أن يثبت ذلك بالأدلّة الدالّة على تأثير ذلك الوصف. فلا يكون قد ترك القياس إلاّ لقياس أقوى منه، ولاختصاص صورة الاستحسان بما يوجب الفرق بينها وبين غيرها. فلا يكون حينئذ لنا استحسان يخرج عن نصّ أو قياس..

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[1] Right margin, two lines, vertical upward position.
[2] Kor. XLII, 21.
[3] حينئذ: written twice, with words crossed out in between.
[4] يحتاج: صح MS.

47. وهذا هو الذي أنكره الشافعيّ وأحمد وغيرهما في الاستحسان. وما قالا به إنّما هو عدول عن أنّه قياس لاختصاص تلك الصورة بما يوجب الفرق. وحينئذ فلا يكون الاستحسان الصحيح عدولاً عن قياس صحيح. والقياس الصحيح لا يجوز العدول عنه بحال.

48. وهذا هو الصواب، كما قد بسطناه في مصنّف مفرد بمناسبة أنه ليس في الشرع شيء بخلاف القياس الصحيح أصلاً. وعلى هذا فصُوَر الاستحسان المعدول بها عن سنن القياس يُقاس عليها عند أصحاب مالك والشافعيّ وأحمد وغيرهم إذا عُرف المعنى الذي لأجله ثبت الحكم فيها.

49. وذكروا عن أصحاب أبي حنيفة أنّه لا يُقاس عليها، وهو من جنس تخصيص العلّة والاستحسان. فإنّ من جوّز التخصيص والاستحسان من غير فارق معنويّ قال: المعدول به عن سنن القياس لا يجب أن يكون لفارق معنويّ، فلا يُقاس عليه، لأنّ من شرط القياس وجود العلّة وتفريقها. ومن قاس قال: بل لا يكون إلّا لفارق، [فإذا عرفناه قسنا. [فلا

50. قال القاضي وغيره: مسألة: المخصوص من جملة القياس يُقاس عليه ويُقاس على غيره. أمّا القياس عليه فإنّ أحمد قال في رواية ابن منصور: إذا نذر أن يذبح نفسه ففدى نفسه بذبح كبش فيُقاس من نذر ذبح نفسه على من نذر ذبح ولده وإن كان ذلك مخصوصاً من جملة القياس، وإنّما ثبت بقول ابن عبّاس.

51. وأمّا قياسه على غيره فإنّ أحمد قال في رواية المروذيّ: يجوز شرى ارض السواد، ولا يجوز بيعها. فقيل: كيف يُشترى ممّن لا يملك؟ فقال: القياس كما[1] تقول، ولكن هذا استحسان. واحتجّ بأنّ الصحابة رخّصوا في شرى المصاحف دون بيعها. وهذا يشبه ذاك. قال: فقد قاس مخصوصاً من جملة القياس على مخصوص من جملة القياس. وبهذا قال الشافعيّ.

52. وقال أصحاب أبي حنيفة: لا يُقاس على غيره ولا يُقاس عليه إلّا أن تكون علّته منصوصة، أو مجمعاً على جواز القياس عليه. فالمنصوص كقوله: إنّها من الطوّافين عليكم والطوّافات. والمجمع عليه كالتحالف في الإجارة قياساً على التحالف في البيع، لاتّفاق من أوجب التحالف في البيع أنّ حكمهما سواء. والممنوع مثل قياس الجنازة على الصلاة في الإسقاط بالقهقهة[2] وإسقاط الكفّارة في الاستقاءة لا يُقاس عليه الأكل، والوضوء بنبيذ التمر لا

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[1] كما: mod.

[2] بالقهقه: MS w.p., instead of بالقهقهة.

يُقاس عليه غيره من الأنبذة ، وجواز البناء على صلاته إذا أحدث لا يُقاس عليه من أحدث بالاحتلام ، ونحوه . »[1]

53. واحتجّ أصحاب الشافعيّ وأحمد بحجج . وهذا لفظ القاضي أبي يعلى ، قال : وأيضاً فإنّا إذا قسنا على المخصوص أو قسنا المخصوص على غيره وحملنا النبيذ على غيره من المائعات والقهقه[2] على الكلام فإنّ مخالفنا يعترف بصحّة القياس ، وأنّه يجب حمل النبيذ على غيره من المائعات والقهقه[3] على الكلام ، ويدّعي أنّه استحسن تركه لما هو أولى منه .

54. قالوا :[4] وهذا غير صحيح لوجهين . أحدهما أنّه يلزمه أن يبيّن الأولى ، وإلاّ حكم القياس متوجّه عليه . وهذا كما لو قال : القرآن يدلّ على كذا ، ولكن تركته للسنّة . فتكون حجّة القرآن لازمة له ، ما لم يبيّن السنّة التي هي أقوى من القرآن . ولا يكفي في ذلك مجرّد الدعوى .

55. والثاني أنّه يدّعي أنّ الاستحسان أقوى من القياس ، فلهذا تركه . والقياس إذا عارضه دليل أقوى منه كان القياس باطلاً ولم يكن له حكم . كما لو عارضه نصّ كتاب أو سنّة أو إجماع . ولمّا حُكم بصحّة القياس ههنا[5] امتنع أن يكون ما عارضه أقوى منه ومانعاً من استعماله .

56 قلت : مضمون هذا إبطال أن يكون هذا مخصوصاً من جملة القياس ، وقياسه على سائر الصور.[6] وهذا يقتضي أنّ الاستحسان إذا خالف القياس لزم بطلان الاستحسان إن كان القياس صحيحاً ، أو بطلان القياس إن كان الاستحسان المعارض له صحيحاً . وهذا لا يتوجّه فيمن يقول بالاستحسان : ويجعل[7] معارضة الاستحسان للعلّة كمعارضته لحكمها . وهذا قول نفاة الاستحسان مطلقاً .

57. والتحقيق في ذلك أنّه إذا تعارض القياس والاستحسان فإن لم يكن بينهما فرق ،

[1] Right margin, four lines, and top of page, 29 lines (mostly single words); all in vertical upward position.

[2] بالقهقه: MS w.p., instead of بالقهقهة.

[3] والقهقه: MS w.p., instead of والقهقهة.

[4] قالوا: mod.

[5] ها هنا: MS.

[6] Three words follow (وهذا إبطال للاستحسان) which should have been crossed out by the author who crossed out much of the following line, but failed to cross out these three words. The sentence which follows includes their meaning.

[7] ويجعل: MS.; preceded by the words: لأنه جعل الاستحسان الصحيح—crossed out.

وإلاّ لزم بطلان أحدهما. وهو مسألة تخصيص العلّة بعينها. فإن لم يكن بين الصورة المخصوصة وغيرها فرق لزم الممانعة. وحينئذ فإمّا أن تكون العلة باطلة، وإمّا أن يكون تخصيص تلك الصورة باطلاً.

58. وهذا هو الصواب في هذا كلّه. وهو الذي ينكره الشافعيّ وأحمد وغيرهما على القائلين بالقياس والاستحسان الذي يخالفه. فإنّهم لا يأتون بفرق مؤثّر بينهما، كما لم يأتوا بفرق مؤثّر بين نبيذ التمر وغيره من المائعات، ولا بين القهقهة[1] في الصلاة التي فيها ركوع وسجود وبين صلاة الجنازة وغيرهما ممّا يشترطون فيه الطهارة.

59. [10b] وذكروا أدلّة أخرى جيّدة كقولهم – واللفظ للقاضي: وأيضاً فإنّ ما ورد به الأثر قد صار أصلاً بنفسه. فوجب القياس عليه كسائر الأصول. وليس ردّ هذا الأصل لمخالفة تلك الأصول له بأولى من ردّ تلك الأصول لمخالفة هذا الأصل. فوجب إعمال كلّ واحد منهما في مقتضاه. وإجراؤه على عمومه. وأيضاً فإنّ القياس يجري مجرى خبر الواحد، بدليل أنّ كلّ واحد منهما يثبت بغالب الظنّ. ثمّ ثبت أنّه يصحّ أن يرد مخالفاً لقياس الأصول. كذلك القياس مثله.

60. قلتُ: ومن هذا الباب جَمْع النبيّ صلّى الله عليه وسلّم الصلاة بعرفة ومزدلفة، لو لم يرد به نصّ في أسفار أُخر. وأمّا قصره الصلاة بعرفة بأهل مكّة وغيرهم فليس مخالفاً لعادته. فإنّه ما زال يقصر في السفر، بل هو بيان استواء السفر الطويل والقصير في ذلك. فأمّا منع قصر المكّيّين فهو مخالف للسنّة الثابتة بلا ريب. وإنّما خالف ذلك من غفل عن هذه السنّة. وأمّا قصر غير المكّيّين فلأنّ القصر ليس من خصائص الحجّ ولا متعلّقاً به. وإنّما هو متعلّق بالسفر طرداً وعكساً.

61. وكلامهم في هذه المسألة يقتضي أنّ[2] ما قيل فيه إنّه خالف القياس في صور الاستحسان فلا بدّ أن يكون قياسه فاسداً، أو أن يكون تخصيصه بالاستحسان فاسداً، إذا لم يكن هناك فرق مؤثّر. وهذا هو الصواب في هذا الباب.

62. قالوا: واحتجّ المخالف بأنّ إثبات الشيء لا يصحّ مع وجود ما ينافيه. فلمّا كان القياس مانعاً ممّا ورد به الأثر لم يجز لنا استعمال القياس فيه، لأنّه لو جاز ذلك لم يكن فرق بينه وبين سائر الأصول التي يُمنع قياسها منه. فكان يخرج حينئذ من كونه مخصوصاً من جملة القياس.

[1] القهقه: MS w.p., instead of القهقهة.

[2] أنّ: mod.

63. قالوا : والجواب عنه من وجهين. أحدهما أنّا لا نسلّم أنّ ههنا[1] ما ينافيه ، لأنّ المنافاة تكون بدليل خاصّ. وما يذكرونه في هذه المسائل ليس بدليل خاصّ لما نذكره من التأويل. والثاني أنّ المنافاة إنّما تحصل بقياسه على غيره في إسقاط حكم النصّ. فأمّا قياس غيره عليه فلا ينافيه ، لأنّه لا يسقط حكم النصّ عندهم فيصحّ القياس عليه.

64. قلتُ : هذا الثاني جواب عن قياس غيره عليه. والأوّل جواب عن قياسه على غيره. ومُنع لكونه مخصوصاً من جملة القياس. والتحقيق أنّه وإن كان مخصوصاً من جملة القياس فهو مخصوص من قياس معيّن ، لا من كلّ قياس. وإنّما يُخصّ لمعنى فيه يوجب الفرق بينه وبين غيره. فإذا قيس عليه غيره بذلك المعنى لم يتأتّ ذلك كونه مخصوصاً من ذلك القياس الأوّل.

65. وحقيقة هذا كلّه أنّه قد يثبت الحكم على خلاف القياس الصحيح في نفس الأمر. فمن يقول بالاستحسان من غير فارق مؤثّر ، وبتخصيص العلّة من غير فارق مؤثّر ، ويمنع القياس على المخصوص ، يثبت أحكاماً على خلاف القياس الصحيح في نفس الأمر.

66. وهذا هو الاستحسان الذي أنكره الأكثرون ، كالشافعيّ وأحمد وغيرهما. وهم تارة ينكرون صحّة القياس الذي خالفوه لأجل الاستحسان ؛ وتارة ينكرون مخالفة القياس الصحيح لأجل ما يدّعونه من الاستحسان[2] الذي ليس بدليل شرعيّ ؛ وتارة ينكرون صحّة الاثنين ، فلا يكون القياس صحيحاً ، ولا يكون ما خالفوه لأجله صحيحاً ، بل كلا الحجّتين ضعيفة. وإنكار هذا كثير في كلام هؤلاء.[3]

67. [f° 330b] فصل. وقد تدبّرتُ عامّة هذه المواضيع التي يدّعي من يدّعي فيها من الناس أنّها تثبت على خلاف القياس الصحيح ، أو أنّ العلّة الشرعيّة الصحيحة خُصّت بلا فرق شرعيّ من فوات شرط أو وجود مانع ، أو أنّ الاستحسان الصحيح يكون على خلاف القياس الصحيح من غير فرق شرعيّ ، فوجدتُ الأمر بخلاف ذلك ؛ كما قاله أكثر الأئمّة كالشافعيّ وأحمد وغيرهما ، وإن كان الواحد من هؤلاء قد يتناقض أيضاً فيخصّ ما يجعله علّة بلا فارق مؤثّر ، كما أنّه قد يقيس بلا علّة مؤثّرة.

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[1] ها ها : ههنا MS.

[2] الاحسان : الاستحسان MS.

[3] The marginal note on this folio (330a) does not belong to this folio; it is the conclusion of a note begun on the left margin of folio 331a.

68. فالمقصود ضبط أصول الفقه الكلّيّة المطّردة المنعكسة ، وبيان أنّ الشريعة ليس فيها تناقض أصلاً . والقياس الصحيح لا يكون خلافه إلّا تناقضاً . فإنّ القياس الصحيح هو التسوية بين المتماثلَيْن ، والفرق بين المختلفَيْن ، والجمع بين الأشياء فيما جمع الله ورسوله بينها فيه والفرق بينها فيما فرّق الله ورسوله بينها فيه .

69. والقياس هو اعتبار المعنى الجامع المشترك الذي اعتبره الشارع وجعله مناطاً للحكم . وذلك المعنى قد يكون لفظاً شرعيّاً عامّاً [1] أيضاً فيكون الحكم ما يتأتّى [2] بعمومه لفظ الشارع ومعناه . وقد بيّنّا في غير هذا الموضع أنّ الأحكام كلّها ثابتة بلفظ الشارع ومعناه . فألفاظه تناولت جميع الأحكام . والأحكام كلّها معلّلة بالمعاني المؤثّرة . فمعانيه أيضا متناولة لجميع الأحكام . لكن قد يفهم المعنى من لم يعرف اللفظ العامّ ، وقد يعرف اللفظ العامّ ودلالته من لم يفهم العلّة العامّة . وكثيراً ما يغلط من يظنّه قال لفظاً ولم يقله ، أو يجعله عامّاً أو خاصّاً ويكون مراد الشارع خلاف ذلك ، كما يغلط من ينفي لفظاً قاله ؛ وكما يغلط من يظنّه اعتبر معنًى لم يعتبره ، أو ألغى معنًى [3] وقد اعتبره ، ونحو ذلك .

70. ولنأتينّ بما يذكر العلماء أنّه استحسان على خلاف القياس . فمن ذلك ما يقوله أحمد في إحدى الروايتين عنه إذا اعتبر الاستحسان . فإنّه قد ذُكر عنه روايتان [4] كما تقدّم . والقول الثالث وهو الذي يدلّ عليه أكثر تصويبه أنّ الاستحسان المخالف للقياس صحيح إذا كان بينهما فرق مؤثّر قد اعتبره الشارع ، وليس بصحيح إذا جُمع بغير دليل شرعيّ وفُرّق بغير دليل شرعيّ ، وأنّه لا يجوز ترك القياس الصحيح .

71. أمّا قوله "أستحسن أن يتيمّم لكلّ صلاة ، لكنّ القياس أنّه بمنزلة الماء حتّى يجد الماء أو يحدث" فهذا القياس هو الرواية الأخرى عنه ؛ وهو مذهب أبي حنيفة وأهل الظاهر وغيرهم ؛ وهو الصواب ، كما دلّ عليه الكتاب والسنّة .

72. وقوله "القياس هو قياس الشرع لفظاً ومعنىً" فإنّ قول النبيّ صلّعم "الصعيد

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[1] MS. لفط سرعى عام : لفظاً شرعيّاً عامّاً

[2] MS. ساما : يتأتّى

[3] MS. العا معا : ألغى معنًى

[4] MS. . . . . .

الطيّب طهور المسلم ولو لم يجد الماء عشر سنين" ، وقوله "جعلت لي الارض مسجداً وطهوراً"، ونحو ذلك، ألفاظ دالّة على أنّ التراب طهور كالماء[1] .

73. والقرآن يدلّ على أنّه طهور بقوله لمّا ذكر التيمّم: ﴿ما يُرِيدُ ٱللَّهُ لِيَجْعَلَ عَلَيْكُمْ مِنْ حَرَجٍ وَلَٰكِن يُرِيدُ لِيُطَهِّرَكُمْ وَلِيُتِمَّ نِعْمَتَهُ عَلَيْكُمْ﴾.[2] والذين أمروه بالتيمّم لكلّ صلاة . . . .[3] [f° 331a] ورأيت عن بعض الصحابة : هي ضعيفة. وعنهم ما يخالفها. وقالوا : إنّه لا يرفع الحدث ، وإنّما هو مبيح ، فيبيح بقدر الضرورة. قالوا : ولو رفع الحدث لما كان إذا قدر على استعمال الماء يستعمله بحكم الحدث السابق من غير تجدّد حدث. واحتجّوا بقوله لعمرو بن العاصّ : أصلّيت بأصحابك وأنت جنب ؟

74. وجواب هذا أنّ قولهم "لا يرفع بل يبيح" كلام لا حقيقة له. ولو صحّ لم يكن لهم فيه حجّة. فإنّ الحدث ليس هو أمراً محسوساً كطهارة الجنب ، بل هو أمر معنويّ يمنع الصلاة. فمتى كانت الصلاة جائزة ، بل واجبة معه ، امتنع أن يكون هنا مانع من الصلاة ، بل قد ارتفع المانع قطعاً.

75. وإن قالوا "هو مانع ، لكنّه لا يمنع مع التيمّم" ، فالمانع الذي لا يمنع ليس بمانع. فإن قيل : هو يمنع إذا قدر على استعمال الماء ، قيل : هو حينئذ يوجد المانع. فإن قالوا : كيف يعود المانع من غير تجدّد حدث ؟ ، قيل : كما عاد الحاظر من غير تجدّد حدث. فالحاظر للصلاة هو المانع ، والمبيح لها هو الرافع لهذا المانع. فإن قيل : أباحها الى حين القدرة على استعمال الماء ، قيل : وأزال المانع الى حين القدرة. فكما يُقال "أباح إباحة موقّتة" ، يقال إنّه رفع رفعاً موقّتاً.

76. وإن قالوا : نحن لا نقبل إلّا ما يرفع مطلقاً كالماء ، قيل : ولا نقبل إلّا ما يبيح مطلقاً كالماء. وأيضاً فالله ورسوله قد سمّياه[4] طهوراً. وجعله النبيّ – صلّى الله [عليه وسلّم] – طهور المسلم ما لم يجد الماء. وجعل تربة الأرض طهوراً. والطهور ما يُتطهّر به.

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[1] The note on the right margin and top of this folio (330b) does not belong to this folio; it is the continuation of a note begun on the left margin of folio 331a and concluded on the left margin of folio 330a.

[2] Kor. V, 7.

[3] Two words (?) which remain illegible for me.

[4] سماه : سمّياه MS. The author had originally written فالله قد سمّاه w.p., then he added ورسوله above the line, but failed to change the verb from the singular to the dual in order to agree with the two subjects preceding it.

وقد قال تع : ﴿وَإِنْ كُنْتُمْ جُنُباً فَاطَّهَّرُوا﴾.[1] والتيمّم قد يطهّر، ومع الطهارة لا يبقى حدث. فإنّ الطهارة مناقضة للحدث، إذ غايته أن يكون نجاسة معنويّة. والطهارة تناقض النجاسة.

77. <فإن قيل : الصلاة بالتيمّم رخصة كأكل الميتة على المخمصة. والرخصة استباحة المحظور مع قيام الحاظر ومنـ[ع][2] المانع. فلو بقي مانعاً لم تجز الصلاة. فعُلم زوال المانع. ولا يجوز أن يُقال هنا إنّه استباح الصلاة مع قيام الحاظر لها. فإنّ كون الحاظر حاظراً زائل من الميتة[3]> <لتعارض راجح. وذلك أنّ المعنى المقتضي للحظر القائم بالميتة موجود حال المخمصة، كما هو موجود في حال القدرة. فإنّ الميتة في نفسها لم تتغيّر. وإنّما تغيّر حال الإنسان : كان غنيًّا عنها ثمّ صار محتاجاً إليها ....[4] حظر[5] (؟) فهذا ينكر دعواه في الميتة ولا ينكر دعواه هنا، لأنّه لا يحصل (؟) له إلّا الموت (؟) وقد تتغيّر حاجته[6] (؟)> <إليها. وحاجته تدفع الفساد الحاصل بأصلها. فكذلك التيمّم.

78. قيل : هذا قياس فاسد. وذلك أنّه صاد ميتة وأكل. والميتة لم تتغيّر، لكن تغيّر حال الأكل. وهنا ليس إلّا المحدث الذي كانت الصلاة محرّمة عليه، ثمّ صارت واجبة عليه[7]> <أو جائزة بالتيمّم. فلو لم تتغيّر حاله[8]> <في الشرع فأُبيحت له الصلاة في حال وحُرّمت عليه في حال منع تسميته في حال الإباحة متطهّراً. وجعل التراب[9]> <طهوراً، كما جعل الماء طهوراً.

79. وقول النبيّ صلّعم لعمرو بن العاصّ "أصلّيت بأصحابك وأنت جنب؟" استفهام. فسأله : أكان ذلك أم لم يكن؟ وليس هو خبراً أنّه صلّى وهو جنب. فلمّا أخبره أنّه تيمّم لخشية البرد تبيّن أنّه لم يكن جنباً، فآثره النبيّ صلّعم. وإلّا فلو كان المراد

[1] Kor. V, 7.

[2] ومنع: last letter cut off either by binder's scissors or through natural wear of folio's edge.

[3] Left margin, beginning at line 17 of the folio (331a), two lines, vertical upward position.

[4] Two or three words (?) cut off by binder's scissors or through natural wear of folio's edge.

[5] Partly cut off.

[6] Top of folio 331a, three lines, horizontal position, upside down.

[7] Right margin of folio 331a, two lines, vertical downward position.

[8] Right margin and lower part of folio 331a, one line, horizontal position, tucked under last line of the page.

[9] Top of folio 330b, one line, horizontal position, upside down.

الخبر ، وهو قد صلّى مع الجنابة صلاة جائزة ، لم يسأله . وإن كانت الجنابة مانعة من الصلاة مطلقاً لم يقبل عذره . وهو لم يقل "أصلّيت[1]» «وأنت جنب بلا تيمّم" ليكون قد استفهمه عن حال التحريم ، بل أطلق الصلاة مع الجنابة . وهم يقولون : يجوز مع الجنابة تارة ، ولا يجوز أخرى . وكلام الرسول يقتضي منعها مع الجنابة مطلقاً . وإنّ هذا استفهام[2]» «إنكار . وإنّه لمّا تبيّن أنّه تيمّم تبيّن أنّه لم يكن جنباً . فلا إنكار عليه بهذا أبداً . — والله أعلم[3] .»

80. فقد[4] تبيّن هنا أنّ القياس هو الصحيح دون الاستحسان الذى يناقضه . وتخصيص العلّة وهو كون هذا بدلاً طهوراً مبيحاً يقوم مقام الماء عند تعذّره في جميع أحكامه لم يخصّ بعض الأحكام من حكم البدليّة والطهوريّة والإباحة . والبدل يقوم مقام المبدل في حكمه لا في صورته . والحكم جواز الصلاة به ما لم يجد الماء أو يحدث .

81. فذلك القول مخالف للقياس وتخصيص للعلّة بلا ريب . والعلّة صحيحة بلا ريب . ونحن إذاً قلنا : لا يجوز تخصيص بدون فارق مؤثّر إيشار[5] سبين . أحدهما أنّه إذا ثبت أنّها علّة صحيحة لم يجز تخصيصها مثل هذا الموضع . والثانى أنّه إذا ثبت تخصيصها عُلم بطلانها . وهذا معنى قولنا : لا يجتمع قياس صحيح واستحسان صحيح إلّا مع الفارق المؤثّر في الشرع .

82. وأمّا قوله في المضارب إذا خالف فاشترى غير ما أمر به صاحب المال فالربح لصاحب المال ولهذا أجرة مثله إلّا أن يكون الربح يحيط بأجرة مثله فيذهب — قال : وكنت أذهب الى أنّ الربح لصاحب المال فاستحسنت — فهذا استحسان بفرق رآه مؤثّراً . والقياس مستنبط والاستحسان مستنبط . وهو تخصيص لعلّة مستنبطة بفرق مستنبط . وأحد لا يردّ مثل هذا الاستحسان ، لكن قد تكون العلّتان أو إحداهما فاسدة ، كما لا يردّ تخصيص العلّة المنصوصة لفرق منصوص بالسنّة لمّا جازت صلاته . وليس هنا إلّا الحدث .

83. | والفرق أنّ المضارب مأمور لا يعمل بجعل ، بل هو شريك في الربح ، وعمله له [f° 331b]

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[1] Right margin of folio 330b, three lines, vertical downward position.
[2] Left margin of folio 330a, two lines, vertical downward position.
[3] Written between lines 11 and 12 of folio 330a, one line, horizontal position, upside down; conclusion of lengthy marginal note begun on folio 331a, left margin.
[4] This paragraph begins on line 18 of folio 331a.
[5] Uncertain reading; if a cognate accusative, then it should have been تأثير, verbal form II rather than IV.

ولصاحب المال جميعاً . ولهذا كان للعلماء فيما يستحقّه في المضاربة الفاسدة ونحو ذلك قولان : هل يستحقّ ربح قسط مثله في الربح ، أو أجرة مقدّرة تكون أجرة مثله ؟ والقول الأوّل هو الصواب قطعاً . وهذا قياس مذهب أحمد . فإنّ من أصله أنّ هذه المعاملات مشاركة ، لا مؤاجرة بأجرة معلومة . والقياس عندنا[1] صحّتها .

84. وإنّما يقول أجرة المثل من يجعلها من باب الإجارة . ونقول القياس يقتضي فسادها . والمأجور فيها مأجور للحاجة . وبكلّ حال فهو يعمل لنفسه لاستحقاق القسط أو الأجر ، ويعمل لربّ المال . فليس هو بمنزلة الغاصب الذي جُعل عمله لصاحب المال كالمتبرّع . فإنّ هذا إنّما قبض المال ليعمل فيه بالعوض . وهو بالمخالفة لا يخرج عن كون المال بيده قبضه ليعمل فيه بالعوض . ولكن عمل غير ما أُمر به ، فيكون ضامناً لتعدّيه . ولكن ليس إذا كان ضامناً يكون وجود عمله كعدمه ؛ مع أنّه مأذون له في التجارة به في الجملة ، ليس منكراً[2] لم يُؤذَن له في ذلك .

85. وهو أيضاً من أصل آخر . وهو أنّه إذا تصرّف بغير أمره كان فضولياً ، فيكون المعقود موقوفاً . وهذا إحدى الروايتين عن أحمد ، وقول أكثر العلماء . وهي التي ذكرها الخرقيّ في مختصره أنّ بيع الفضوليّ وشراءه ليس باطلاً بل موقوفاً . فإن باع أو اشترى بعين المال فهو موقوف . وإن اشترى في الذمّة فهو موقوف . فإن أجازه المشتري له ، وإلّا لزم المشتري .

86. وأمّا القاضي وأتباعه فاختاروا أنّ تصرّفه مردّد ، إلّا إذا اشترى في الذمّة . والذي ذكره الخرقيّ أصحّ . لكنّه قرن هذه المسألة في مواضع من مختصره بالعامل إذا خالف كان متصرّفاً له بغير إذنه . فإذا أجازه وطلب نصيبه من الربح صار مجيزاً له ، وصار العامل مأذوناً له . والعامل إنّما عمل لأجل نصيبه من الربح ، فيستحقّ نصيبه من الربح .

87. وقول أحمد "كنت أذهب الى أنّ الربح لصاحب المال ثمّ استحسنت" رجوع منه الى هذا . وجعله الربح في جميع الصور للمالك يقتضي أنّه يصحّح تصرّف الفضوليّ إذا أُجيز ، وإلّا كان البيع باطلاً .

88. وكذلك الشرى بعين المال ، كما يقوله الشافعيّ ومن نصر الرواية الأخرى . ويكون عليه ضمان ما صرفه من ماله فقط ، ليس للمالك غير هذا . ولا يكون للعامل اقتضاء ربح ، لأنّه لم يعمل شيئاً .

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[1] عندنا : mod.

[2] منكراً : مكر MS.

89. والآثار المأثورة عن الصحابة والتابعين في باب البيع والنكاح والطلاق وغير ذلك يدلّ على أنّهم كانوا يقولون بوقف المعقود، لا سيّما حيث تعذّر استئذان المالك.

90. ولهذا أحمد يقول بوقفها هنا كما في مسألة[1] المعقود، اتّباعاً للصحابة في ذلك. وإنّما ادّعى[2] أنّها خلاف القياس من لم يتفطّن لما فيها من وقف المعقود، كما في اللقطة. وتكلّم السلف فيمن يجيز مال غيره في الربح دليل على صحّة التصرّف عندهم إذ أجازه المالك.

91. <ولهذا ظهر ما استحسنه أحمد ورجع إليه أخيراً، لأنّه إذا صار بالإجازة كالمأذون له وهو لم يعمل إلّا بجعل برضا المالك[3] فلا يجوز منعه حقّه. وهذا بناء على أنّه إذا تصرّف ابتداء فالربح كلّه للمالك. وهو أحد الأقوال في المسألة.[4] وقيل: يتصدّقان به؛ وهو رواية عن أحمد. وقيل: هو للعامل؛ كقول الشافعيّ. وقيل: هما شريكان فيه؛ وهو أصحّ الأقوال؛ وهو المأثور عن عمر في المضاربة.>[5]

92. [f° 332a] وهو المأثور عن عمر، لأنّ[6] المالك لمّا أذن فيه صار كالمضارب. وهو لم يعمل ليكون الربح للمالك كالمبضع. فإنّه لو فعل ذلك لكان الربح للمالك. وإنّما اتّجر ليكون الربح له أو بينهما. والمالك قد أجاز بيعه. ولم يجزه ليكون الربح كلّه له. فيكون الشراء حاصلاً بمال هذا وبيع هذا، والتصرّف صحيحاً مأذوناً فيه، فيكون الربح بينهما. ومن قال "يتصدّقان به" جعله كغير المأذون فيه، فيكون خبيثاً. وهو متعدٍّ، لأنّ الحقّ لهما لا يعدوهما. فإذا أجاز المالك التصرّف جاز.

93. وكذلك في جميع تصرّف الغاصب، لا سيّما من لم يُعلَم أنّه غاصب، إذا تصرّف في المغصوب بما أزال اسمه، كطحن الحبّ ونسيج الثوب ونحو ذلك؛ ففيه ثلاثة[7] أقوال

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[1] مسله: مسألة MS.

[2] ادعا: ادّعى MS.

[3] برضا المالك: MS w.p., written above the line; the preceding word بجعل (=بجُعْل) was evidently meant to be crossed out.

[4] المسله: المسألة MS.

[5] Right margin, three lines, vertical upward position. It is possible that the last sentence was meant to be crossed out; compare the beginning of the next paragraph.

[6] لأنّ: mod.

[7] ثلاثة: ثلثه MS.

في مذهب أحمد وغيره. قيل: كلّ ذلك للمالك دون الغاصب وعليه ضمان النقص. كقول الشافعيّ. وقيل: يملكه الغاصب وعليه بدله، كقول أبي حنيفة. وقيل: يُخيَّر المالك بينهما، كقول مالك. وهذا أصحّ،[1] بناءً على وقف التصرّفات. فإن شاء المالك أجاز تصرّفه وطالبه بالنقص، كما في العامل المخالف. وإن شاء طالبه بالبدل لإفساده عليه وبأخذه ذلك لأدائه عوضه. فيُخيَّر على المعاوضة لحقّ المالك.

94. وإذا رضي المالك به فهل يكون الغاصب شريكاً لما في عمله، فيه وجهان. والأظهر في الجميع أنّ[2] أثر عمله له. وكونه ظالماً يظهر في تضمينه له، لا في أن يُؤخَذ أثر عمله فيُعطَى[3] لغيره بلا عوض. فإنّ هذا ظلم له. والواجب إزالة الظلم بالعدل، لا بظلم آخر. وجزاء سيّئة سيّئة مثلها،[4] لا زيادة عليها.

95. وأمّا قوله فيمن غصب أرضاً فزرعها "الزرع لربّ الأرض وعليه النفقة وليس هذا شيئاً يوافق القياس [ولكن] أستحسن أن يدفع إليه نفقته" فهذا قاله بالنصّ، كما تقدّم لحديث رافع بن خديج. فيجب أن يكون القياس المخالف لهذا النصّ فاسداً إن لم يدلّ نصّ على صحّته ويظهر الفارق المؤثّر، وإلّا فالقياس إذا خالف النصّ كان فاسداً.

96. أمّا فساد الحكم المخالف للنصّ فبالاتّفاق، وفساد العلّة على قول الجمهور الذين لا يرون[5] تخصيص العلّة إلّا بفارق مؤثّر. وهذا نصّ قد خالف القياس. وقولهم "القياس أنّ الزرع لزارعه" ليس معهم بذلك نصّ ولا نظير، بل القياس أنّ الزرع إمّا أن يكون بينهما كالمزارعة أو يكون لربّ الأرض؛ لأنّ الزرع في الأرض كالحمل في البطن، وإلقاء البذر كإلقاء المني. ولو وطئ ذكر أنثى كان الحمل لمالك الأنثى دون مالك الذكر. وهذا اختيار ابن عقيل وغيره. لكنّ المني لا يقوم، بخلاف الزرع. فلهذا جعل له نفقته. فإنّ الزرع عامّته في الأرض، في ترابها وماءها وهوائها وشمسها، كما أنّ الحمل في البطن عامّته في الأمّ. وماء الأب قليل، كما أنّ الحبّ قليل. [وكذلك الشجر إذا لُقّح أنثاه [Ibn] بذكر فإنّ الثمر لصاحب الأنثى، لا لصاحب اللقاح. والحبّ كاللقاح.

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[1] وهذا أصحّ: MS w.p., should be وهذا الأصحّ or better still وهذا أصحّ الأقوال since a superlative, not a comparative, is needed.

[2] أنّ: mod. [3] فيُعطَى: MS. فعطا

[4] Cf. Kor. XLII, 40.

[5] الجمهور الذين لا يرون: MS w.p., written above the line; the preceding words (من لا يرى) were evidently meant to be crossed out.

97. وقول أحمد "عليه نفقته" يقتضي مثل البذر، ويقتضي أجرة عمله وعمل فدّانه. وقوله "ليس هذا شيئاً يوافق القياس" كقوله في العامل المخالف "ثمّ استحسنت أن يعطيه الأجرة". فكان قياسه على ما نراه في الغاصب أن لا يكون له أجرة عمله وعمل فدّانه. فهو مخالف للقياس في هذه الحجّة، لأنّه إنّما عمل ليأخذ العوض، لم يعمل مجّاناً كالعامل في المضاربة؛ ولأنّ البذر له فليس غاصباً محضاً.

98. وقد اختلفت الرواية عن أحمد هل يُعطى ما أنفق أو أجرة مثله. والنصّ ورد بالأوّل بقوله: فليس له في الزرع شيء وله نفقته. والقياس يقتضي الثاني. فقد يكون قوله على خلاف القياس من هذا الوجه. وما ورد به النصّ قد يكون ما أنفق وأجرة مثله فيه سواء.

99. وأمّا شرى المصاحف والسواد فإنّما فرّق فيهما بين الشرى والبيع، لأنّ العلّة موجودة في البيع دون الشرى. فإنّ المشتري راغب في المصحف، معظّم له، باذل فيه ماله. والبائع معتاض عنه بالمال. والشرع يفرّق بين هذا وهذا، كما فرّق في إعطاء المؤلّفة قلوبهم بين المعطي والآخذ؛ وكذلك في افتداء الأسير، وغير ذلك.

100. ومعلوم أنّه لو أعطاه المصحف والأرض الخراجيّة بلا عوض جاز، وقام منه مقامه؛ بخلاف ما لا يجوز تملّكه، كالخمر وغيرها. فإذا بذل له . . .[1] العوض لم يكن تصرّفه إلّا على البائع.

101. فإن قيل: فإذا لم يحصل للإنسان كلب معلّم إلّا بثمن فينبغي أن يجوز بذله، وإن لم يجز أخذه. قيل: إن لم يكن بينهما فرق مؤثّر في الشرع فهكذا[2] هو. وإن قيل: هناك يجب عليه إعطاء الكلب بلا عوض بخلاف الأرض والمصحف فهذا فرق.

102. مع أنّ الثابت عن الصحابة كراهة بيع المصحف. وابن عبّاس كان يكرّهه. وكان أيضاً يجوّزه ويقول: إنّما هو مصوّر وله أجرة تصويره. فدلّ على أنّها كراهة تنزيه. ورُوي عن غيره: وددت أنّ الأيدي تُقطّع في بيع المصاحف. وهذا تغليظ تحريم. ولهذا اختلفت الرواية عن أحمد هل هو نهي تنزيه أو تحريم. وأمّا شراه ومبادلته هل هو مباح أو مكروه على روايتين. وعن ابن عبّاس يجوز أن يبيعه ويشتري بثمنه مصحفاً آخر. وليس في المبادلة والشرى استبدال به غرضاً من الدنيا. فالأظهر جواز ذلك، فلا كراهة.

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[1] One or two words.

[2] فهاكذى: فهكذا MS.

وإنّ البيع أيضاً لا يُحرَّم ، بل يُكرَّه تعظيماً لكتاب الله ، إذ ليس عن التحريم دليل شرعيّ .

103. وكذلك الأرض الخراجيّة ليس في منع بيعها دليل شرعيّ أصلاً . فإنّ الذين منعوها من الفقهاء قالوا : إنّها وقف وبيع الوقف لا يجوز. وهذا إنّما هو من الوقف الذي يبطل حقّ أهل الوقف ببيعه . وهو الذي لا يُورَث ولا يُوهَب . والأرض الخراجيّة تُورَث وتُوهَب . والوقف الذي لا يُباع لا يُورَث ولا يُوهَب . وذلك أنّ المشتري لها يقوم مقام البائع ، لا يبطل حقّ أهل الوقف .

104. [وأحمد بن طاهر مذهبه يجوّز بيع المُكاتَب لهذا المعنى ، لأنّ ذلك لا يبطل [فقد] حقّه من الكتابة ، بل يكون عند المشتري كما كان عند البائع . وهو يُورَث بالاتّفاق . ولكن لمّا انعقد فيه سبب الحرّيّة تخيّل من منع بيعه أنّه مَباع حرّ ، كما تخيّل أولئك أنّه مَباع وقف . وليس الأمر كما تخيّلوه ، بل بيع الحرّ هو أن يُتعبّد فيصير بخلاف ما كان حرّاً ، وبيع الوقف هو أن يُجعَل طلقاً ويُصرَف فعله الى غير مستحقّيه .

105. والأرض الخراجيّة فعلها هو فعلها لم يتغيّر. وهو الخراج المصروف عليها ، سواء كان ضريبة ، كخراج عمر ، أو صار مقاسمة ، كما فعله متأخّرو[1] الخلفاء بأرض السواد وغيرها ، كما فعله المنصور. فعلى التقديرين حقّ المسلمين باقٍ ، كما ينتفي مع الموت والهبة . والصحابة الذين كرّهوا شراها إنّما كرّهوه لدخول المسلمين في خراج أهل الذمة ، أو إبطال حقّ المسلمين به . فإنّ المشتري إن أدّى الخراج وهو جزية فقد التزم الصَّغار وإن لم يؤدّه أبطل حقّ المسلمين . فلذا كرّه ذلك عمر وغيره من الصحابة . وهم نهوا عن الشرى.

106. وأمّا البيع فإنّما كان يبيعها أهل الذمّة ، لأنّ الأرض الخراجيّة إنّما كانت بأيدي أهل الذمّة . وكان ذلك أيضاً لئلّا يشتغل المسلمون بالفلاحة والصَّغار عن الجهاد . فلمّا كثر المسلمون ، وصار أكثرهم غير مجاهدين ، وصار أداؤهم الخراج أنفع لعموم المسلمين من كونها بأيدي الذمّة : لم يصر من الذمّيّ الصَّغار ما كان يكون في أوّل الإسلام ، إلّا لمن يشتغل بعمارة الأرض عن الجهاد . وهذا لا يختصّ بالخراجيّة ، بل قد رأى النبيّ صلّعم سلمة فقال : ما دخلت هذه دار قوم إلّا دخلها الذلّ ، رواه البخاريّ . مع أنّ الأنصار كانوا هم الفلّاحين لأرضهم . فهذا على الاشتغال بعمارة الدنيا عن الجهاد . وهذا لا يختصّ بالخراجيّة .

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[1] MS. ساحروا : متأخّرو

107. وأمّا ما ذكره القاضي من قبول شهادة أهل الذمّة في الوصيّة في السفر فلا ريب أنّ الفرق هنا ظاهر. وهذا من الاستحسان وتخصيص العلّة التي ظهر فيها الفرق. والمنع من شهادتهم على المسلمين ثبت بالنصّ. والإذن فيها هنا ثبت بالنصّ أيضاً للحاجة. وهل يُقرّن هذا الى جميع مواضع الحاجة فيه عن أحد روايتان، بناءً على أنّ العلّة معلومة. وهي موجودة | في [f° 333b] غير هذا الموضع. هذا وجه القول بالجواز.

108. وأمّا وجه المنع فإمّا أن نقول: لم نعلم العلّة وإنّها مشتركة، أو علمنا اختصاصها بهذه الصورة للضرورة العامّة فيها. هذا إذا ثبت عموم المنع في غير هذه الصورة، إمّا لفظاً وإمّا معنًى. وألفاظ القرآن لا عموم فيها بالمنع. وكذلك السنّة ليس فيها لفظ عامّ بالمنع. لم يبقَ إلّا القياس. وتلك المواضع أُمر فيها بإشهاد المسلمين.

109. ومعلوم أنّ ذلك إنّما هو عند القدرة على إشهادهما. وهذا واجب في الوصيّة في السفر. وأمّا إذا تعذّر إشهادهما على الدين في السفر أو على الرجعة فليس في القرآن ما يدلّ على المنع من ذلك. وإذا لم يكن في الكتاب والسنّة منع من إشهاد أهلُ الذمّة عند تعذّر إشهاد المسلمين لم يكن هنا قياس يخالف هذه الآية. وقد عمل بها الصحابة وجمهور التابعين. والذين لم يعملوا بها ليس معهم في خلافها لا نصّ ولا إجماع ولا قياس. وقد تأوّلوها ناجزين من غير أصل يُسلّم. وقال[1] بعضهم: هي منسوخة. وقال بعضهم: الشهادة اليمين. والأقوال الثلاثة باطلة من وجوه كثيرة.

110. وقول من قال "لا يجوز شهادة أهل الذمّة على المسلمين بحال" ليس معهم بذلك لا نصّ ولا قياس. ولكن كثير من الناس يغلطون، لأنّهم يجعلون الخاصّ من الشارع عامّاً. والله أمر بإشهاد المسلمين على المسلمين إذا أمكن. فظنّ من ظنّ أنّ هذا يقتضي أنّه لا يُشهد غيرهم ولو لم يُوجد مسلم.

111. وباب الشهادات مبناها على الفرق بين حال القدرة وحال العجز. ولهذا قُبلت شهادة النساء فيما لا يطّلع عليه الرجال. وقد نصّ أحد على شهادتهنّ في الجراح وغيرها إذا اجتمعن ولم يكن عندهنّ رجال، مثل اجتماعهنّ في الحمّامات والأعراس ونحو ذلك. وهذا هو الصواب. فإنّه لا نصّ ولا إجماع ولا قياس يمنع شهادة النساء في مثل ذلك. وليس في الكتاب والسنّة ما يمنع شهادة النساء في العقوبات مطلقاً.

112. وأمّا إذا نذر ذبح ولده أو نفسه فأحد اتّبع ما ثبت عن ابن عبّاس، وهو بمقتضى

[1] وقال: mod.

القياس والنصّ. فإن كان قادراً كان عليه كبش. وإن سلّف فيه بمال فعليه كفّارة كبش. وهذا أصحّ الروايات عن أحمد. وهو الذى أُصرّح به في مواضع. وقيل: عليه كفّارة كبش في الجميع. وقيل: كبشَيْن في الجميع. وقيل: لا شيء عليه. وذلك لأنّ من نذر نذراً فعليه المنذور أو بدله في الشرع. وهنا لمّا تعذّر المنذور انتقل الى[1] <البدل الشرعيّ وهو الكبش، كما في نظائره. فليس هنا ما يخالف القياس الصحيح[2].>

113. وهذا الباب – باب يدبّر العموم والخصوص من ألفاظ الشرع ومعانيه التي هي عِلَل الأحكام – هو الأصل الذى تُعرَف منه شرائع الاسلام. – والله أعلم. والحمد لله وصلّى الله على محمّد وآله.

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[1] Right margin, three lines, vertical upward position.
[2] Right margin, four lines, vertical downward position.

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Explicit, f° 333b (Ẓāhirīya, *Majmūʿ* 91)

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