FOUNDATIONAL ROOT-PRINCIPLES OF THE MĀLIKIYYAH – 1

Al-Qarāfī and other scholars (at-Tusūlī, Ibn Ḥamdūn, etc.) enumerated twenty root-principles the *Mālikiyyah* built their methodology upon.

Principles I-V: The Book

1) The explicit implication of the Book (*Naṣṣ al-Kitāb*)

What the Book explicitly indicates through an implication making room for no alternative.

Example:

His statement, Exalted is He: «**Allāh has permitted sale**» (Sūrah al-Baqarah: 275).

This Qur'ānic text is in fact explicit about the lawfulness of purchase and sale, and no divergent implication is countenanced by it.

The *naṣṣ* is an obvious example of a clear word.

2) The manifest implication of the Book (*Ẓāhir al-Kitāb*)

What the wording of the Qur'ān indicates through an implication of preponderant likelihood compared to a divergent one.

The *ẓāhir* is another instance of a clear word.

Example:

His statement, Exalted is He: «[**A]nd forgo any remaining ribā**» (Sūrah al-Baqarah: 278).

Allah commanded the mu'minūn to give up any *ribā* outstanding at the time of the revelation of the āyah.

Two possible implications from the wording of the āyah:

- Giving up what they had physically taken possession of, including what they had contractually agreed upon, although it was not yet in their hands;
- Giving up only what they had physically taken into their possession.

The implication (*dalālah*) of a Divine command is obligatoriness (= the command to do something obligatory), for that is the normal corollary of an imperative verb, so long as no circumstantial pointers take it out of its manifest implication, based on His statement, may He be Exalted: «**Those who oppose His command should beware of a testing trial coming to them or a painful punishment striking them**» (Sūrah an-Nūr: 63).

Accordingly, the manifest implication is the first one, i.e. they are commanded to forgo any *ribā* in their hands, physically in their possession or otherwise.

Dalālah al-mafhūm is an implied meaning not indicated in the text but arrived at by way of inference.

There are two recognized types:

3) The divergent meaning (*Mafhūm al-mukhālafah* or *Dalīl al-khiṭāb*, as it is interchangeably termed)

Affirming, for what is passed over in silence, the opposite ruling of what is explicitly verbalized, wherever the sole purpose behind mention of the explicitly verbalized ruling is negating its applicability to what is passed over in silence.

It is a meaning derived from the words in the text in such a way that it diverges from the explicit meaning thereof.

The *Ḥanafis* and even some *Mālikī* scholars, such as al-Bājī, essentially refute its permissibility.

Example:

Allah the Exalted says: «**Divorced women should receive maintenance (mut`ah)**» (Sūrah al-Baqarah: 241), «**a duty for all those who have taqwā (al-muttaqīn)**» (Sūrah al-Baqarah: 241).

He also says, concerning divorced women whose union has not been consummated: «**But give them a maintenance (matti`ūhunna)… a duty for all good-doers (al-muhsinīn)**» (Sūrah al-Baqarah: 236).

- The explicitly verbalized situation: A post-divorce maintenance is a duty on muhsinīn and muttaqīn;
- The only purpose for verbalizing that ruling is negating its applicability to lower human categories, negating, that is, the legal obligatoriness of that Divine instruction, which those who have taqwā and good-doers bind themselves by out of their higher conscience;
- The ruling on the situation passed over in silence, that of the generality of Muslims: the opposite of what is expressly verbalized, i.e. the post-divorce maintenance not being a legal obligation but only a meritorious gift.

Or we could say:

- The explicit meaning It is a meaning the words in the text: Post-divorce maintenance is a duty;
- The divergent meaning derived from the words in the text: Post-divorce maintenance is not a duty.

4) The harmonious meaning (*Mafhūm al-muwāfaqah* or *al-Mafhūm bi'l-awlā*, the meaning a fortiori, or *laḥn al-khiṭāb*, the parallel meaning, or *faḥwā al-khiṭāb*, the superior meaning, as it is

interchangeably termed)

Affirming, for what is passed over in silence, the same ruling as the one applying to what is explicitly pronounced, on an equal footing at least.

It is an implicit meaning on which the text may be silent but is nevertheless in harmony with the pronounced meaning.

Example:

Allah the Exalted says: «**People who consume the property of orphans wrongfully consume nothing in their bellies except Fire. They will roast in Searing Blaze**» (Sūrah an-Nisā': 10).

- The pronounced meaning: The Divine threat against those who devour the property of orphans indicates the prohibition of such a wrongful consumption thereof;
- The implicit meaning harmonious with it: The Divine threat against those who devour the property of orphans implies the prohibition of destroying such property altogether in a different manner, by for instance burning it. Consuming and burning (or the like) are in fact equal in bringing about the destruction of the orphan's property, which is the effective cause (*'illah*) of the prohibition. That is so even if burning his property goes to an event greater extent of wasting it away than its consumption, since that extra degree of destructiveness is not what the āyah purposively focuses on.

5) The notification of the efficient cause, or the alerting to the effective cause of a ruling, by the Divine address (*Tanbīh al-khiṯāb*)

Here, the Divine address informs us of the efficient cause of a ruling.

Example:

Allah the Exalted says: «**[Say: 'I do not find, in what has been revealed to me, any food it is harām to eat except for carrion, flowing blood and pork – for that is rijs (unclean, putrid and a cause of sinful rebellion against Allah**» (Sūrah al-An`ām: 145).

- Carrion, flowing blood and pork are prohibited;
- The efficient cause ('*illah*) of the prohibition of carrion, flowing blood and pork is their nature as rijs;
- The implication of His statement, may He be Exalted, in this āyah is to alert us to the prohibition of anything that is rijs.

Next:

The root-principles the *Mālikiyyah* have extracted from the Prophetic Sunnah

After looking at the five root-principles the *Mālikiyyah* derived from the Book, we are going to deal now with

the five mirror principles drawn by them from the Prophetic Sunnah.

Principles VI-X: The Sunnah

6) The explicit implication of the Sunnah (*Nass as-Sunnah*)

What the Prophetic Sunnah explicitly indicates in such a manner as to leave no room for any alternative implication.

Example:

His statement, Sallallāhu ʻalayhi wa-Sallam, about the sale of a lactiferous animal (such as a milk cow), the milk of which is retained in the udder, thereby enlarging its size and creating the impression that an abundance of milk is its normal state: "**Whoever buys it has the benefit of two options after milking it: if he is pleased with it he keeps it, and if he is displeased with it he returns it along with four double-handed scoops of dry dates**" (Cf. *Sahīh al-Bukhārī*).

This hadīth, in fact, explicitly indicates the option conferred on a purchaser to return the animal plus a *sā* ʻ (a measure) of dry dates as consideration for what he milked, or to keep it and sanction the sale with approval, in which case he owes nothing to the vendor. No alternative implication is permitted by this explicit text.

7) The manifest implication of the Sunnah (*Zāhir as-Sunnah*)

What the wording of the reported Sunnah indicates through an implication of preponderant likelihood compared to a divergent one.

Example:

The contract of *salam* or sale by advance is a species of sale where payment of the purchase price is immediate, i.e. advanced, for goods specified in the contract to be delivered at a specified later time.

In a hadīth transmitted on the authority of Ibn ʻAbbās, may Allah be pleased with him, the Prophet, Sallallāhu ʻalayhi wa-Sallam, is reported as saying: "**Whoever advances the purchase price for dried dates (to be delivered later), let him advance payment about a known mass and a known weight and for a known date of future delivery**" (Cf. *Sahīh Muslim*).

Here, the implication of the use of the imperative (**fa'l-yuslif, let him advance payment**) is the legal obligation of stipulating the deferred delivery of the *salam* goods (deferred, that is, compared to the immediate payment of the price).

The manifest implication of the imperative is in fact obligatoriness, so long as no circumstantial pointers prove otherwise, based on His statement, may He be Exalted: «**Those who oppose His command should beware of a testing trial coming to them or a painful punishment striking them**» (Sūrah an-Nūr: 63).

Hence, the manifest implication of the hadīth, the obligation of stipulating deferred delivery of the *salam* goods, prevails over a divergent implication (the neutral permissibility or meritoriousness of such a stipulation).

It is not, however, an implication that leaves no room for a divergent one, as there might theoretically be evidence deflecting the imperative from the outward implication of a command to do the obligatory.

Another example:

The Prophet, Sallallāhu ʻalayhi wa-Sallam, after saying: "**Pure earth is ritually pure, even if you cannot find water for up to twenty years**", added: "**but if you find water, let it touch your skin**" (Cf. *Sunan Abī Dāwud*).

Once again, the imperative verb is used (**fa-amissahu jildak, let it touch your skin**). The manifest implication thereof, no evidence having deflected it from its scope, is the obligation to revert to water once it is available.

8) The divergent meaning from the Sunnah (*Mafhūm al-mukhālafah* or *Dalīl al-khiṭāb*, as it is interchangeably termed)

A meaning derived from the words in the text in such a way that it diverges from the explicit meaning thereof; i.e. affirming, for what is passed over in silence, the opposite ruling of what is explicitly verbalized.

It is a proof according to Mālik and his followers (with some notable exceptions such as al-Bājī).

What is the ground for considering it a proof?

We have the statement from the Prophet, Sallallāhu ʻalayhi wa-Sallam, on the authority of Abū Saʿīd al-Khudrī: "**Water is only from water**" (Cf. *Saḥīḥ Muslim*).

In its pronounced meaning, this earlier Prophetic statement is to the effect that when sperm is discharged after the two circumcised parts meet in the act of sexual intercourse the ritual bath (*ghusl*) is obligatory.

The implicit divergent meaning of the hadīth, as such understood by the Companions, is that if, despite penetration by the male, he does not emit sperm, the ritual bath is not obligatory, since "**[w]ater is only from**" or "**on account of water**".

This is therefore an instance of deriving a judgment of the Law from *mafhūm al-mukhālafah* or *dalīl al-khiṭāb*.

The Companions concurred on the fact that this hadīth was either abrogated (*mansūkh*) or specified (*mukhassas*) by the subsequent Prophetic statement, transmitted on the authority of ʻĀʾishah, may Allah be pleased with her: "**When the circumcised part crosses the circumcised part**

the ritual bath (ghusl) becomes obligatory" (Cf. *Sunan at-Tirmidhī*). Had they not understood the earlier ḥadīth in the way we mentioned, there would have been in fact no point in unanimously stating that the later ḥadīth had abrogated or at least specified it.

There are different types of divergent meanings recognized and relied upon by the *Mālikiyyah*, of different degrees of probative force:

1. *Mafhūm aṣ-ṣifah* (The descriptive meaning, i.e. the meaning implied from the descriptive attribute)

Example from the Sunnah:

The Prophet, Ṣallallāhu ʻalayhi wa-Sallam, said: "**Deferring repayment of a debt by an affluent person is unjust**" (Cf. *Ṣaḥīḥ al-Bukhārī*, on the authority of Abū Hurayrah).

This is the pronounced meaning, and it rests on the description of the debtor as a well-to-do person.

The divergent meaning implied from it is that a delay to repay a debt by a person in straitened circumstances (an opposite description) is acceptable and not an injustice: accordingly, a debtor in a dire financial state cannot be imprisoned because of such delay.

A further example:

On the authority of Ibn ʻUmar, it is narrated that the Prophet, Ṣallallāhu ʻalayhi wa-Sallam, said: "**Whoever buys a palm-tree and it is pollinated, its fruits belong to the seller, unless the purchaser stipulates otherwise in the contract**" (Cf. *Ṣaḥīḥ al-Bukhārī*).

This is the pronounced meaning, and it rests on the description of the palm-tree as having been pollinated.

The divergent meaning implied from it is that, prior to pollination, the fruits of any such tree are the property of the purchaser.

The descriptive meaning (*mafhūm aṣ-ṣifah*), though a proof for the *Mālikiyyah*, is not strong enough to counter a contrary proof in the pronounced meaning.

Here is an example:

As a category subjected to the wealth-tax in Islam, cattle can be fed with fodder by the owner or left to graze freely.

The Prophet, Ṣallallāhu ʻalayhi wa-Sallam, has said: "**Zakāt is levied on freely-grazing cattle.**"

This is the pronounced meaning, and it rests on the description of the cattle as freely grazing.

The divergent meaning implied from it is that cattle fed with fodder by the owner is exempted

from the wealth-tax.

That is, however, not so. The generality of the pronounced wording in the other hadīth: "**For every forty cattle, one cattle is owed as tax**" (Cf. *Sunan at-Tirmidhī*) takes precedence, being of greater probative force than the said divergent meaning implied from the other narration.

The *Mālikī* ruling is thus to levy zakat on both categories of cattle, without any differentiation.

In *Al-Ishārah ilā Ma`rifah al-Uṣūl wa al-Wajāzah*, Imām al-Bājī, having mentioned that the divergent meaning implied from the said hadīth is the non-taxability of cattle that do not graze freely, and having laid out his denial of *dalīl al-khiṭāb* being a proof, stated what follows:

> · For those who see it as proof, it is to make a judgment conditional on a meaning applicable to some members of a genus, the implication being to negate that judgment in respect of other members of that genus bereft of that meaning;
>
> · The truth is that making a judgment conditional on a descriptive attitude in some members of a genus simply entails the applicability of that judgment to the members thereof with such descriptive attitude; as for the judgment specific to all the other members of that genus without such descriptive attitude, it should be investigated independently and not implied by "harmonious divergence" from it.

Be it as it may, the established *Mālikī* position is contrary to his on this aspect.

2. *Mafhūm al-'adad* (The numerical meaning, i.e. the meaning implied from the number)

Here, the ruling based on the implicit meaning rests on the specification of the number in the text.

Example from the Sunnah:

In the hadīth transmitted on the authority of Ibn 'Umar, may Allah be pleased with him, it is stated that "the Prophet, Sallallāhu 'alayhi wa-Sallam, cut off a hand for the theft of a shield the price of which was three silver coins" (Cf. *Ṣaḥīḥ al-Bukhārī*).

This is the pronounced meaning.

The divergent meaning implied from it is that no hand can be amputated for the theft of a property of a lesser monetary value than that.

A second example:

It is transmitted on the authority of Sahl b. Abī Hathmah that the Prophet, Sallallāhu 'alayhi wa-Sallam, said about the oath of *qasāmah* to establish criminal liability for murder: "**Are you prepared to take fifty oaths, so that you may be entitled to the blood-wit of your companion or your man who has murdered?**" (Cf. *Ṣaḥīḥ Muslim*).

The divergent meaning implied from the explicit pronouncement is that less than fifty oaths cannot establish entitlement to blood-wit.

A third example:

Abū Hurayrah, may Allah be pleased with him, has narrated from the Prophet, Sallallāhu ʻalayhi wa-Sallam, that he said: "**The container of any one of you which a dog has licked is ritually pure if he washes it seven times, the first time with sand**" (Cf. *Saḥīḥ Muslim*).

This is the pronounced meaning.

The divergent meaning implied from it is that washing the container less than seven times is incapable of rendering it ritually pure.

3. *Mafhūm ash-sharṭ* (The conditional meaning, i.e. the implied from the condition)

Example from the Sunnah:

The Prophet, Sallallāhu ʻalayhi wa-Sallam, said on the authority of Ibn ʻUmar, may Allah be pleased with him: "**If one buys food, he cannot resell it until he has received it into his possession**" (Cf. *Saḥīḥ al-Bukhārī*).

· Condition: If … then …;

· Implied divergent meaning: If a person receives food as a gift, not as a result of a sale, he can sell it before taking possession of it (by mass or weight).

4. *Mafhūm al-ghāyah* (The meaning implied from the end-point, time- or place-wise, of a thing)

Example from the Sunnah:

As we saw just now, the Prophet, Sallallāhu ʻalayhi wa-Sallam, said: "**If one buys food, he cannot resell it until he has received it into his possession.**"

The pronounced meaning: Once he has taken possession of it (by mass or weight), he can resell food he has purchased. Receiving the purchased food into one's possession is the end-point beyond which permissibility sets in.

The divergent meaning implied from it: Before taking possession of it (before reaching that end-point), he is forbidden to resell food he has purchased.

Another example:

The Prophet, Sallallāhu ʻalayhi wa-Sallam, said on the authority of ʻAlī, may Allah be pleased with him: "**The pen has been lifted from three: from the sleeping person until he wakes up, from a child until he becomes of age, and from an idiot until he comes to his senses**" (Cf. *Sunan at-Tirmidhī*).

The pronounced meaning: There is no legal accountability (*taklīf*) until one of the three end-points (waking up, puberty, or mental sanity) is reached.

The divergent meaning implied from it:

Legal accountability (*taklīf*) only exists upon cessation of sleep, after puberty or in a state of mental sanity (after crossing the said end-points).

5. *Mafhūm al-ḥaṣr* (The restrictive meaning, i.e., the meaning implied from the restrictive specification)

It applies to statements prevalently using the tool of restrictive exclusivity "*innamā*".

Example from the Sunnah:

In *Ṣaḥīḥ al-Bukhārī* it is reported, on the authority of Jābir b. 'Abdillāh, may Allah be pleased with him, that the Prophet, Ṣallallāhu 'alayhi wa-Sallam, "established the right of pre-emption (shuf`ah) only (innamā) in respect of any jointly owned property as yet undivided; once boundaries are traced and roads diverted, there is no longer any right of pre-emption."

This is the pronounced meaning: The restriction of the right of pre-emption exclusively to undivided co-owned property.

The divergent meaning implied from it is that a neighbour, who, not being a co-owner in a person's property but only an adjoining owner, falls outside the restricted scope, has no right of pre-emption.

A second example:

'Ā'ishah, may Allah be pleased with her, narrated that the Prophet, Ṣallallāhu 'alayhi wa-Sallam, said: "**Buy her. Clientage is only (innamā) for the one who sets a slave free**" (Cf. *Ṣaḥīḥ al-Bukhārī*).

This is the pronounced meaning: The restriction of the ties of clientage to the person setting a slave free.

The divergent meaning implied from it is that no clientage can accrue in favour of the buyer of a slave, not even if he stipulates it in his favour, as he falls outside the restricted scope.

A third example:

'Umar, may Allah be pleased with him, has narrated from the Prophet, Ṣallallāhu 'alayhi wa-Sallam, that he said: "**Actions are only by their intentions (innamā'l-a`mālu bin-niyyāt)**" (Cf. *Ṣaḥīḥ al-Bukhārī*).

Innamā restricts the compass of sound actions to those underpinned by intention.

The divergent meaning implied from it is that no action is sound if unaccompanied by intention, falling, that is, outside the restricted scope.

A fourth example:

The Prophet, Sallallāhu ʻalayhi wa-Sallam, said: "**No hand of a thief is cut off unless the value of the stolen property is one-quarter of a gold coin or more**" (Cf. *Saḥīḥ Muslim*).

This is the pronounced meaning: The restriction of the imposition of the prescribed penalty for theft to the theft of a property valued at one-quarter of a gold coin or more.

The divergent meaning implied from it is that no *ḥadd* can be inflicted for the theft of an asset below that value.

9) The harmonious meaning ((*Mafhūm al-muwāfaqah*)

Affirming, for what is passed over in silence but implied, the same ruling as the one applying to what is explicitly pronounced, on an equal footing (parallel meaning) or with even greater force (superior meaning).

Example:

The statement by the Prophet, Sallallāhu ʻalayhi wa-Sallam, on what establishes proof in civil suits between litigants: "**Your two witnesses or his oath**" (Cf. *Saḥīḥ al-Bukhārī*).

This is the pronounced meaning.

The implicit meaning harmonious with it is that proof by more than two witnesses establishes your right on even stronger grounds.

It is thus an example of *faḥwā al-khiṭāb*, the superior meaning, one of the two categories of harmonious meaning: what is implied and not pronounced is more entitled to the judgment (*ḥukm*), here sufficiency of proof in a civil case, than what is explicitly pronounced.

A second example:

The ḥadīth transmitted on the authority of Ibn ʻUmar, may Allah be pleased with him, in which he said: "The Prophet, Sallallāhu ʻalayhi wa-Sallam, cut off a hand for the theft of a shield the price of which was three silver coins" (Cf. *Saḥīḥ al-Bukhārī*).

This is the pronounced meaning.

The implicit meaning harmonious with it (again a superior meaning) is that, a fortiori, the prescribed penalty should be levied on someone who steals property exceeding that value.

A third example:

The Prophet, Sallallāhu ʻalayhi wa-Sallam, said: "**Whoever forgets a ṣalāt ought to perform it upon remembering it. There is no expiation (kaffārah) for it other than making it up; and establish ṣalāt to remember Me**" [1] (Cf. *Saḥīḥ al-Bukhārī*).

This is the pronounced meaning.

The implicit meaning harmonious with it (once more a superior and not just a parallel meaning) is that, a fortiori, a person who intentionally discarded a ṣalāt is obliged to make it up.

10) The notification of the efficient cause, or the alerting to the efficient cause of a ruling, by the Sunnah (*Tanbīh as-Sunnah*)

Here, the text informs us of the efficient cause behind a ruling.

Example 1:

In a hadīth transmitted on the authority of Abū Bakrah, may Allah be pleased with him, the Prophet, Sallallāhu ʻalayhi wa-Sallam, is reported as saying: "**A judge must not preside over a case between two litigants whilst he is angry**" (Cf. *Sunan Ibn Mājah*).

The implication of this statement is to alert us to the fact that anger, and whatever is akin to it that distracts and clutters one's mind, is the efficient cause (*ʻillah*) of the prohibition, and so long as that cause subsists, it is impermissible for a judge to preside over a case.

Example 2:

In a hadīth transmitted on the authority of Saʿd b. Abī Waqqās, may Allah be pleased with him, the Prophet, Sallallāhu ʻalayhi wa-Sallam, is reported as saying about the barter of fresh dates for dry dates: "**Do they shrink when they become dry?**". As they replied in the affirmative, he, Sallallāhu ʻalayhi wa-Sallam, said: "**Then no permission is given?**" (Cf. *Musnad Aḥmad and Sunan at-Tirmidhī*, who commented: "*ḥasan ṣaḥīḥ*").

The implication of this statement from the Sunnah is to inform us of the cause behind the prohibition of bartering fresh dates for dry dates, namely, the lack of equivalence in the exchange of a usurious foodstuff for its genus.

Example 3:

The Prophet, Sallallāhu ʻalayhi wa-Sallam, said: "**I only forbade you for the sake of the downtrodden Bedouins who came from the desert**" (Cf. *Ṣaḥīḥ Muslim*).

The implication of this Prophetic statement is to notify us of the fact that the efficient cause for the prohibition of hoarding the meat of the animals slaughtered for ʻĪd was the arrival that year in al-Madīnah of weak and impoverished desert Arabs.

Example 4:

In a hadīth transmitted on the authority of Abū Qatādah, may Allah be pleased with him, the Prophet, Sallallāhu ʻalayhi wa-Sallam, said about the female cat: "**It is not impurity. It is in fact part of the male and female creatures moving around in your environs**" (Cf. *Sunan at-Tirmidhī*).

The implication of this hadīth is to awake us to the fact that the efficient cause of the ritual purity of female cats and their leftover water is their abundant mixing with humans in their houses, so guarding against them, purity-wise, would be a burdensome inconvenience.

Next, Allah willing, are root-principles 11 to 16: Scholarly consensus (*ijmāʿ*), analogical reasoning (*qiyās*), the practice of the People of Madīnah, statement of a Companion, juristic preference

(*istiḥsān*) and custom and usage.

Having previously looked at the two sets of five root-principles each which the *Mālikiyyah* garnered from the Book and the Prophetic Sunnah, we turn now to the investigation of the following four root-principles: Scholarly consensus (*ijmā* `), analogical reasoning (*qiyās*), the normative practice of the People of al-Madīnah (*'amal Ahl al-Madīnah*) and saying by a Companion (*qawl aṣ-Ṣaḥābī*).

Principle XI: Scholarly consensus (Ijmā `)

It is too well-known a root-principle to require a definition here. All the schools of Ahl as-Sunnah take by it.

Examples thereof are:

- The unanimous informed opinion on *ribā* (usury) being forbidden in the six genera mentioned in the Prophet's, Sallallāhu 'alayhi wa-Sallam's statement: "**Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt, like for like …**" [Reported by Muslim in his Ṣaḥīḥ, ḥadīth no. 1587].
- Scholarly consensus on dormant partnership (*qirāḍ*) and partnership properly so-called (*shirkah*) wherever one of the two parties to the arrangement stipulates in his favour a fixed share of the profit below which he is not going to dip.
- Concurrence of scholarly views on forbidding the sale of food prior to taking possession thereof or selling what is not in the vendor's ownership.
- Unanimity of informed views on the fact that the grandfather is entitled to a share of the inheritance.
- Scholarly consensus on an intoxicated person being lashed 80 times.
- Agreement by the scholars on the Caliphate of Abū Bakr, may Allah be pleased with him,

and on recording the Qur'ān in written *maṣāḥif*.

Principle XII: Analogical reasoning (Qiyās)

Each of the four canonical schools (but not the Literalists) include it as one of their root-principles.

It is to extend to a new case or *far'* (branch) the textual ruling of an original case or *aṣl*, due to the effective cause (*'illah*) of the latter being entrenched in the former as well (presence of commonality of the cause between the original case and the new one).

Example:

The analogy drawn by modern *Mālikiyyah* between paper currencies/coins and gold/silver in forbidding the mutual exchange of units of the same genus with a time delay or a quantitative discrepancy, based on them sharing the effective cause of price-ness.

The *Mālikiyyah* have a specific approach to the scenario where analogical reasoning clashes with a transmitted report and contradicts it.

This is not the suitable locus to delve into such a ponderous issue in any detail.

Suffice it to say that the *Mālikiyyah* (or their Imam for that matter) do not lend precedence to *qiyās* over *khabar* (transmitted report) generally and in an unqualified sense, just as they do not do the opposite either.

Rather, they weigh between the two of them in the light of the evidentiary material and arch-rules provided by the Law. As a result, wherever no other evidence lends preponderance to an analogical reasoning (other than itself, that is), the transmitted report outweighs the *qiyās*, hence, e.g., Mālik takes by the ḥadīth that instructs washing a container licked by a dog seven times, even though analogical reasoning would point to the opposite (i.e. discarding action by it), given the ritual purity of dogs in his view. Several other examples reinforce that approach.

Similarly, analogical reasoning would suggest that a woman's testimony has the same weight as a man's, as they equally share intellect and *taklīf*, Mālik takes by the textual ruling to the contrary in Sūrah al-Baqarah: 282 [Consideration of sameness in terms of intellect and *taklīf* is thus deemed unsound and corrupt here].

Principle XIII: Normative practice of the People of al-Madīnah (Qiyās)

The *Mālikiyyah* take as we know by the normative practice of the People of al-Madīnah (*'amal Ahl al-Madīnah*) established through continuous transmission all the way to the Prophet, Sallallāhu 'alayhi wa-Sallam, whether it takes the form of a deed or a saying, an omission or an endorsement.

That is so since taking by such a practice is tantamount to taking by a Prophetic Sunnah and a transmitted report and using it as proof.

That is the position with the accurate verifiers of the truth in the school, such as Judge ‘Abdu’l-Wahhāb al-Baghdādī, Judge ‘Iyāḍ al-Yaḥṣubī from Ceuta or his fellow Andalusian or al-Bājī.

Examples:

- Exempting the stipulation by the vendor that the purchaser cannot resell an article other than at the original purchase price (*tawliyah*), which is a fiduciary sale, partnership in a sale article (s*hirkah*), and voluntary rescission of an unwanted sale (*iqālah*) from the prohibited category of selling food before taking possession thereof.
- Repeating the statements in the call to prayer (*adhān*) while limiting that to “*qad qāmatiṣ-ṣalāt*”) in the *iqāmah*.
- Establishing the *mudd* and *ṣā`* measures as a single and a fourfold double-handed scoop of staple food respectively.
- Abstention from levying the wealth-tax (zakāt) on vegetables.
- The nisāb of gold and silver is twenty gold coins [at a time that all the *aḥādīth* defining the nisāb of gold and silver are defective].

It might be that the transmission handing down such a practice is a continuous multiple one (*tawātur*), as in the case of determining the *ṣā`* and *mudd*, the phrases in the call to prayer (*adhān*), with their reiteration unlike the *iqāmah* except for “*qad qāmatiṣ-ṣalāt*”, and omitting audible recitation of the *basmalah* in the obligatory prayer, or is founded on one-from-one narrations, as with the said exemption of the *tawliyah*, s*hirkah* and *iqālah* from the prohibited category of selling food before taking possession thereof

Mālik was once asked about the ḥadīth on reciting the *takbīr* four times in the *adhān* (after initially reciting them softly), ‘Is it sound?’, so he replied in the affirmative. ‘Why don’t you then take by it?’, the questioner said, whereupon Mālik famously replied, ‘I do not know what is the *adhān* of one day. This is the Mosque of Allah’s Messenger, Sallallāhu ‘alayhi wa-Sallam, where the call to prayer is given from his time until ours five times a day, none of the Companions or Followers having been mentioned as refuting this way of giving the *adhān*.’

As reported from him by Ismā`īl b. Abī Uways, Mālik clarified his terminology pertaining to this root-principle of the Law as follows:

- *Al-amr al-mujma` ‘alayhi* (“the agreed upon matter”) is what is collectively adhered to by savants he is pleased with and emulates, even though there might be some dissenting voices;
- *Al-amr ‘indanā* (“the matter among us” or “with us”) and *sami`tu ba`ḍa ahl al-‘ilm* “I heard some people of knowledge” denotes the statement of someone he is pleased with and emulates, and what he chose and preferred of statements by some of them.

Transmitted reports backed up by practice are granted preference by the *Mālikiyyah* over other reports.

If practice and transmitted report clash, a distinction is drawn between:

- Normative practice established by transmission, which is lent preference over the conflicting report (and over analogy as well) due to its preponderant probative weight, inasmuch as such a practice is a *mutawātir* report, handed down by a bulk from a bulk, unlike one-from-one narrations. It avails certainty, whereas one-to-one narrations only avail a preponderant thought, i.e. a balance of probabilities, whence Rabī` ah ar-Ra'y's celebrated phrase, 'a thousand from a thousand is dearer to me than one from one';

Practice established by other than transmission (i.e. by intellectual effort or *ijtihād*), which is not lent preference over the conflicting report unless it is rendered weightier by some other corroborating element. The latter type of *'amal* is not a proof according to the accurate verifiers of the truth in the school, and is subject to judicial evaluation of evidence along with the rest.

Principle XIV: Saying by a Companion (Qawl aṣ-Ṣaḥābī)

Not every statement by a Companion is of course legal proof for the *Mālikiyyah*.

The meaning of this source of law is more specific.

Al-Bājī wrote that the saying of one Companion that did not achieve renown and widespread dissemination was not a proof. It might in fact be a specific *fatwā*.

Conversely, if his statement took place before a sizeable number of Companions in attendance, it spread around widely to an extent that it could not be occulted from the knowledge of people, and none of the other Companions opposed it, it is a proof; nay, the *Mālikiyyah* consider it part of *ijmā* `.

That is why the *Mālikiyyah* acted by what has been transmitted from Ibn 'Umar, may Allah be pleased with him, as reported in *Ṣaḥīḥ al-Bukhārī*, which is to the effect that he said: I have seen people during the lifetime of Allah's Messenger, Sallallāhu 'alayhi wa-Sallam, purchase food *juzāfan* (= in a lump, where one of the countervalues is roughly determined by mere viewing), who are beaten up if they resell it at once before taking them to their saddles.'

In a similar vein, they acted by Ibn 'Umar's statement about the man who simultaneously pronounced an insult upon three of his wives by likening them to a prohibited relation of his (*ẓihār*), 'Only one expiation (*kaffārah*) is binding on him,' since this statement, like the previous one on sale of food *juzāfan*, was widely known to his fellow Companions, who expressed no dissension.

When the Companions differed inter se between two contrasting views, it is impermissible to uphold a third view, since their limitation to two views only is equated to an *ijmā* ` on that.

If a Companion says "part of the Sunnah is such-and-such" or "we were commanded such-and-such" or "we were forbidden such-and-such", the ostensible implication is that the command is one

from Allah and His Messenger, and the Sunnah one from the Prophet, Sallallāhu ‘alayhi wa-Sallam, not someone else’s entrenched practice. Commands and prohibitions are in fact affirmations of the Law by legalizing or outlawing matters, which is the exclusive prerogative of the Prophet, Sallallāhu ‘alayhi wa-Sallam, and the unqualified use of “Sunnah” brings at once to the mind his, Sallallāhu ‘alayhi wa-Sallam, normative practice.

Accordingly, the *Mālikiyyah* used as proof ‘Alī’s, may Allah be pleased with him, saying: ‘Part of the Sunnah is that a free man is not killed as retaliation for the killing of a slave” (Reported in *Sunan ad-Dāraquṯnī*).

In the event that a Companion says, ‘The Messenger of Allah, Sallallāhu ‘alayhi wa-Sallam, commanded such-and-such”, it is construed on the basis that such a Companion heard it from him [Sallallāhu ‘alayhi wa-Sallam].

The *Mālikiyyah* further use as proof the statement by a Companion, ‘They used to do such-and-such during the lifetime of the Messenger of Allah, Sallallāhu ‘alayhi wa-Sallam’, or, ‘We used to do such-and-such,’ so long as it is something that could not have escaped Allah’s Messenger, Sallallāhu ‘alayhi wa-Sallam, and he did not refute it.

An example thereof is Jābir’s saying: ‘We used to practice coitus interruptus during the lifetime of the Prophet, Sallallāhu ‘alayhi wa-Sallam, whilst the Qur’ān was being revealed’ (Cf. *Ṣaḥīḥ al-Bukhārī*). Their practice, in fact, could not have eluded his, Sallallāhu ‘alayhi wa-Sallam, attention, for he, Sallallāhu ‘alayhi wa-Sallam, had said, when asked about coitus interruptus: “**You are not bound to refrain from it. There is no soul decreed into existence until the Day of Rising but that it will come into being**” (Cf. *Ṣaḥīḥ al-Bukhārī*).

As for the saying by a Companion, ‘We used to do this,’ referring to what is such that, not being widespread, might be hidden from the knowledge of the Prophet, Sallallāhu ‘alayhi wa-Sallam, it is not a proof establishing the ruling in a matter.

Example (stressed by al-Bājī): The saying by one Companion: ‘We used to have intercourse, without passing sperm, without taking the full ritual bath afterwards.’

Last time we examined four root-principles on which the *Mālikiyyah* inter alia built their methodology: Consensus of scholarly views, analogical reasoning, the normative practice of the People of al-Madīnah, and the saying by a Companion.

In this fourth instalment, we are to going to deal with juristic preference (*istiḥsān*), custom and usage (*‘urf* and *‘ādah*), and considerations of public interest not explicitly ruled upon in the Law (*maṣlaḥah mursalah*).

Principle XV: Juristic preference (Istiḥsān)

It is to set aside an established analogy in favour of an alternative ruling, based on a specific evidence linking the mas’alah to other than its analogical equivalents.

This alternative ruling is in fact what serves equity better.

Examples:

1. As emphasized by Ibn Rushd the Grandfather in "*Al-Muqaddimāt al-Mumahhidāt*", the root-position concerning artisans and manufacturers is that, being trusted hirelings, they should not be liable for the loss, damage or destruction of third party's property in their hands (leaving aside the scenario of wilful misconduct). The Prophet, Sallallāhu 'alayhi wa-Sallam, has in fact exempted hirelings from the obligation to make good such property, and analogy with the category of hirelings, under which artisans and manufacturers generally fall, would extend that exemption to them as well. However, on the basis of *istiḥsān* or juristic preference/equitable consideration, artisans and manufacturers have been excluded from the scope of that root-judgment and made liable for third party's property lost, damaged or destroyed whilst in their possession (so long as evidence of someone else's liability is lacking) to protect the public, in need of approaching them, from an ordinary occurrence.

2. *Istiḥsān* permits looking at a person's private parts for a compelling medical reason (which strict analogy would otherwise forbid).

3. The admissible testimony or appointment to a public post of the person with the highest degree of integrity at a time and place where not even such person satisfies the requirements of legally recognized integrity is another application of the principle of *istiḥsān* away from analogical strictness (that would necessitate his non-eligibility for appointment or the inadmissibility of his testimony).

4. If x sells y an article for 100 payable in one month's time and then buys it from y for 200 payable in two months' time, analogy would demand the lawfulness of the sale and the purchase, being respectively a deferred sale and a deferred purchase in a permissible outer form like the rest of deferred sales. This analogy, however, is deviated from due to the existence of a specific contrary evidence, namely, that the article entering and exiting the contracting parties' hands is no more than an insignificant medium, a fiction camouflaging the fact that it is still in the possession of the original vendor, who actually receives 100 after a month and takes the article back for 200 after two months, which is sheer usury: as a result, an alternative ruling substitutes for the one dictated by analogical reasoning.

Principle XVI: Custom and usage ('Urf and 'ādah)

This principle is based on the fact that, the Revealed Law being endowed with flexibility, certain judgments thereof are susceptible to change as times and places change.

Custom is what is rationally entrenched in people's souls and accepted by sound temperaments (thereby excluding, on that ground alone, the fungible of bank money leased to humans at interest).

It is as such contrasted with *ijmā* ', since custom consists in what people, whether elite or

commonality alike, conventionally concur upon inter se, whereas *ijmā* ` consists in the agreement of all the legal experts (*mujtahidūn*), and only them, and is binding on all creatures, unlike custom that only binds those who have concurred upon it.

'Amal Ahl al-Madīnah is a form of Sunnah endorsing people's customs as transmitted by a bulk from a bulk. No wonder, then, that Imām Mālik recognized customary practice, too, as a source of the Law.

What rulings, however, involve the application of custom?

As we stated, only those that are susceptible to variation through changing circumstances of time and place. If people collectively approved usury or customarily engaged in treachery, gambling or bribery, that would not affect Allah's immutable judgment on them, the Dīn having already been perfected in all its essentials.

Put it differently: Custom and usage, contrary to a fashionable approach promoting excess generalized leniency among modern-day Western *Mālikiyyah*, have a say only in respect of other than firmly entrenched principles and explicit texts availing conclusive proof.

Custom is acted upon on two conditions:

1. It is exclusive to man-to-man transactions (*mu `āmalāt*), without entering at all the arena of doctrinal beliefs (*'aqā'id*) or acts of worship (*'ibādāt*), which are immutable realities transcending temporal or spatial contingency. Borrowing a leaf from Imām al-Qarāfī's expression, the condition is "that the judgments must have emanated from a viewpoint of rulership and politics, not from a viewpoint of conveying the Message and *fatwā*".

2. The arch-rules and the particularized *masā'il* settled by explicit textual authorities from the Qur'ān or the Sunnah which the Lawgiver has not qualified by an effective cause, are not susceptible of *ijtihād* varying or substituting them, whether they relate to acts of worship or to man-to-man transactions, obligations, prohibitions or neutrally permissible matters, such as the fixed shares of inheritance, the compulsory expiations, the prescribed penalties for some offences, e.g. adultery and slander, the prohibition of *gharar* (material want of knowledge of one or both of the exchanged countervalues), etc. If particularized *masā'il* are founded on explicit textual authorities linking the judgments thereon to an effective cause (*'illah*), the judgments might vary as the effective cause varies in terms of existence or otherwise and in the light of changing circumstances of time and place. Thus, the Prophet, Sallallāhu 'alayhi wa-Sallam, as the Lawgiver, linked the prohibition of Hashemites receiving zakāt to its status as people's dregs, given that Allah had replaced it for them with a share in the spoils of war; as receipt of that share came to an end, a share in zakāt had to be restored to them in later epochs.

Examples of legal application of custom or usage:

1. If a proprietary dispute arises and independent corroboration is lacking, custom and/or trade usage would assign a book to a scholar and a saw to a carpenter, as they are customarily tools used

by members of each such profession respectively.

2. People's knowledge inter se of what constitutes a defect in a sale article and what does not.

3. The determination of what is an exorbitant price, one that cannot therefore be exacted, and what is an excess price deemed other than exorbitant.

4. The determination of actionable marital harm.

5. People's distinction between advance and deferred dowry, if any.

6. The determination of engagement gifts.

7. The nature of a sale as cash or credit or the terms of payment (weekly, monthly, bi-monthly and so on).

None of these actionable customs or usages (and we could go on for pages) entails an amendment to the Lawgiver's address laying down commands and prohibitions, which remains unchanged.

A customary stipulation is as entrenched in a contract, for the *Mālikiyyah*, as an explicitly worded one.

Principle XVII: Considerations of public interest (Maṣlaḥah mursalah)

It is also known as *istidlāl* or inference from evidence. This is the working field of *mujtahidūn*.

Maṣlaḥah means interest, benefit, what has wholesomeness in it. Its plural is *maṣāliḥ*.

There are three categories of *maṣāliḥ*:

1. What the Law has given explicit consideration to. Here, the appropriate description the legal judgment has been made conditional upon is one the Lawgiver has explicitly paid regard to, such as the description of intoxication founding the prohibition of *khamr*. The Prophet, Ṣallallāhu 'alayhi wa-Sallam, has in fact said: "**Every intoxicant is khamr**" (Cf. *Ṣaḥīḥ Muslim*); or such as the lawfulness of sale, the permissibility of marriage and the prohibition of fornication. This is a type of *maṣlaḥah* unanimously paid regard to.

2. What the Law has discarded. . Here, by contrast, the appropriate description the legal judgment has been made conditional upon is one the Lawgiver has explicitly denied recognition to. Examples are the interest of a suffering individual or a terminally ill person in putting an end to his own life and find relief from his pain, that being discarded by Allah's statement: «**And do not kill yourselves. Allāh is most merciful to you**» (Sūrah an-Nisā': 29); the interest of an infertile couple in a third party fertilizing the man's sperm cells and gifting them offspring thereby; establishing gender equivalence in the fixed shares of inheritance, in the production of testimony in court or in the imamate of prayer; the *maṣlaḥah* of women or a societal model in banning polygyny, etc. A good modern work on this type of *maṣlaḥah*, the discarded interest or *maṣlaḥah mulghāh*, is by Nūrud-Dīn Mukhtār al-Khādimī.

3. What the Law has neither paid consideration to nor discarded: this is the sphere of the *maṣlaḥah mursalah*. That is so as the description on which the legal judgment is founded is one for which the Law has provided no specific evidence either way, i.e. in favour (taking it into account) or against (discarding it), yet paying regard thereto attracts a benefit and repels a harm. Examples: The prohibition of hoarding at times when people are in need of some items; the admission of testimony by pre-puberty children, before they disperse, when they are privy to violent events; the Companions' demarcation of 80 lashes for slanderers, etc.

A *maṣlaḥah mursalah* is one that, if acted by, actualizes a compulsory interest (protection of the Dīn, protection of life, protection of intellect, protection of honour, protection of lineage and protection of property) or a necessary one branching out therefrom.

We complete herein our cursory survey of the root-principles founding the *Mālikiyyah*'s juristic methodology.

Principle XVIII: Blocking the means to evil (Sadd adh-dharā'i`)

Dharā'i`* is the plural of *dharī`ah, the means, which is a matter outwardly permissible convoying however to the prohibited.

The *Mālikiyyah* have gone to great lengths in paying regard to the *dharā'i`* (through which evil is actualized) and blocking the means to juristic ruses (*ḥiyal*), more than any other school. For them the underlying purpose is more important than mere form, and misrepresentation by conduct is treated on par with verbal misrepresentation.

Ruses are in fact a means to voiding the Lawgiver's purpose. For example, the marriage by a person who legalizes a woman's private parts to her former husband who divorced her irrevocably is vetoed by the school. Mālik said: 'He is not permitted to marry her, whether or not she and her former husband are aware of his "legalizing" purpose. Conversely, if the new husband did not intend any legalization of her private parts, the marriage is permissible even though the wife might have consciously intended that.'

Similarly, the *Mālikiyyah* have prohibited, pursuant to this principle of blocking the means to evil, the deferred sale known as *bay` al-'īnah* wherever it results in the combination of sale and loan or in a loan attracting an extra benefit, each of them forbidden by the Lawgiver in explicit texts, even though, formally, it might pass judicial scrutiny (and was as such approved by other schools).

That is the scenario where, say, x sells two articles for 200 gold coins payable in one month and then purchases one of them from y for 100 gold coins cash. X will thus be owed 200 gold coins: 100 of them as consideration for the article he has not taken back, which is a sale, and the remaining 100 as loan, since the article it was exchanged for has been taken back by him in return for cash. It

is but a ploy used by someone, y, "the purchaser", who, in need of money, cannot raise a good loan (*qarḍ ḥasan*) and resorts to the fiction of purchasing a sale article. It is as if no sale ever took place, and the "purchaser" received a loan of 100 gold coins upon entering the contract, to repay it with 200 gold coins after one month. That is the combination of sale and loan.

The other scenario is where x sells an article for 100 gold coins payable in one month's time and purchases it back for 50 gold coins cash.

Here, the sale article returns to x, "the vendor", who in actual fact lends 50 gold coins at the time of concluding the contract to receive the benefit of extra 50 gold coins after one month.

Bay` al-'īnah is a species of selling what one does not own. In the *Muwaṭṭa'* we find Ibn 'Umar saying to a man who comes to another and says, 'Buy such-and-such and I will then purchase it from you for such and such a profit', 'Do not sell what you do not have.'

The *Mālikiyyah* likewise acted by the principle to forbid *tawarruq*, as it exploits people's acute need to exchange money for money at a profit.

Whereas *īnah* refers to the process of purchasing the commodity for a deferred price and selling it for a lower spot price to the same party from whom the commodity was purchased, *tawarruq* or monetization refers to the process of purchasing a commodity for a deferred price determined through *musāwamah* (bargaining) or *murābaḥah* (mark-up sale) and selling it to a third party for a spot price so as to obtain cash.

Yet "Islamic" banks have turned it into a retail product for ordinary customers to use.

Indeed, had this principle been applied as it used to be when Islam and scholarship were serious realities, the ***murābaḥah* as practiced by** "Islamic" banks would have been prohibited, too, for it is unlawful *īnah*, i.e. a transaction the *Mālikiyyah* forcefully combated and al-Qāḍī 'Iyāḍ termed "sheer usury" (*ribā ṣuraḥ*) in *At-Tanbīhāṭ*.

The validity of acting by this principle of blocking the means to certain or probable evil in legal judgments is founded on several Qur'ānic āyāt.

For instance, Allah the Exalted says: «**Do not curse those they call upon besides Allāh, lest that makes them curse Allāh in animosity, without knowledge**» (Sūrah al-An`ām: 108). Cursing the idols of associationists is not unlawful in itself, nay, it is even an act of attaining nearness to Him, but it has been interdicted to block the path of associationists cursing Allah, Mighty and Majestic is He.

In a similar vein, Allah the Exalted says when addressing Adam and Eve: «**But do not go near this tree, lest you become wrongdoers**» (Sūrah al-A`rāf: 19). The tree itself is not forbidden, rather eating from its fruit, but since drawing near it is a means to falling into the real target of the prohibition, it, too, was prohibited by Allah, the Mighty and the Majestic, *saddan lidh-dharī`ah*.

Principle XIX: Presumption of continuity (Istiṣḥāb al-ḥāl)

Istiṣḥāb means in Arabic escorting or companionship, and *ḥāl* means state or condition.

The import of this root-principle (also called *al-barā'ah al-aṣliyyah*, the pristine state of affairs) is the presumption of continuity of the original state (be it positive or negative) until the contrary is established by evidence.

The existence or non-existence of facts proven in the past are presumed to remain so, for lack of evidence establishing any change.

It is a rational proof that may be resorted to in the absence of other indications. Thus, by virtue of this root-principle, there can be no punishment for a matter without a law proscribing it, since the Revealed Law does not have retrospective effect.

Muslims cannot be made accountable for any defective transaction engaged in by them prior to its legal interdiction, since theirs was a pristine state of unaccountability.

An application of this root-principle is that, once ownership of a property is established in a person's favour, it endures for him and does not shift away from him save by virtue of a contrary proof of transfer of ownership, due to the presumption of continuity of the original state of his ownership thereof.

The same holds true of the marital status of spouses, until dissolution of marriage.

Proof of this root-principle is found in Allah's statement, may He be Exalted: «**Whoever is given a warning by his Lord and then desists, can keep what he received in the past and his affair is Allāh's concern**» (Sūrah al-Baqarah: 275).

As the Muslims feared for their many possessions acquired by them through usury prior to its outlawing, Allah clarified to them that there was no harm in that, given their pristine state of unaccountable innocence, and that harm only attached to ill-gotten property tainted by *ribā* subsequent to its proscription.

There is no *taklīf* (legal accountability) without a legislation to that effect: «**Allāh would never misguide a people after guiding them until He had made it clear to them how to have taqwā. Allāh has knowledge of all things**» (Sūrah at-Tawbah: 115). The mu'minūn who regretted supplicating on behalf of associationist relations of theirs who had passed away were thus reminded by Allah that their pristine state of unaccountability prior to the prohibition of any such supplication had continued unabated until the prohibiting Revelation was sent down, exonerating them from any (retroactive) culpability.

Principle XX: Partial adoption of the evidence corroborating the juristic opponent's view (Murā`āt al-khilāf)

Literally, “observing” or “directing attention” or “paying consideration to disagreement” in the mas’alah.

It means that the person inferring a legal judgment acts by the evidence (*dalīl*) supporting his juristic opponent in the mas’alah, in such a manner as not to void his own evidence entirely. He does so because of the preponderant weight and cogency he senses in the evidence thus paid regard to. As a result, the *mujtahid* takes such evidence into the reckoning without ignoring it altogether.

Another definition of this root-principle is: A mujtahid faced with a novel occurrence, after it has factually materialized, acts by the necessary implication of his own evidence in one respect, and by the corollary of another mujtahid’s evidence in another respect, so long as such conflicting evidence is cogent in his view.

What is the proof in support thereof?

1. Evidence in the Law that it is obligatory to act by what has greater probative force.

2. The Prophet’s, Sallallāhu ‘alayhi wa-Sallam, statement: “**The child from zinā belongs to the matrimonial bed, and the adulterer only has stones**”, meaning nothing (though it has also been interpreted, less cogently, as lapidation). If, then, the husband is absent from the matrimonial bed and the wife commits adultery with a stranger, the resultant child is attached to the matrimonial bed (as long as the husband does not swear the oaths of mutual repudiation, or in our times DNA testing establishes lack of his paternity for those who countenance its legal use) and the adulterer has no right over him. When one such incident famously occurred, with paternity of a child disputed between Sa`d b. Abī Waqqās and the father of his, Sallallāhu ‘alayhi wa-Sallam, wife Sawdah, the mother of the child being a slave-girl of Zam`ah, the Prophet, Sallallāhu ‘alayhi wa-Sallam, accordingly instructed that the child be attached to Zam`ah, which would have made him a *mahram* with full access to Sawdah, and that Sa`d had no right over him. At the same time, on noticing a resemblance between the child and ‘Utbah b. Abī Waqqās, who in the days of Jāhiliyyah had had a long-term association with Zam`ah’s slave-girl, and having urged Sa`d to claim paternity over the child after his birth, he took the said resemblance – one of the evidentiary elements – into consideration and ordered Sawdah to veil herself from the child, despite being her brother born in her father’s wedlock [He never saw her until he met his death]. In other words, the Prophet, Sallallāhu ‘alayhi wa-Sallam, acted by the *dalīl* of the resemblance specifically as regards the rules of *hijab*, while acting by the matrimonial (or we could say quasi-matrimonial) bed for the rest.

Some savants have refuted the soundness of this root-principle, asserting that a *mujtahid* is interdicted from yielding to the evidence of a fellow-*mujtahid* to the detriment of his, and that what he is enjoined to do is following the evidence whenever it is uniform or what is overall weightier in the event of multiple evidences.

Here are some examples of the *Mālikiyyah* applying *murā`āt al-khilāf*:

1. If a marriage is one the invalidity of which is disputed, such as a marriage without a guardian, they hold that inheritance is nevertheless established by it and that a divorce is needed to dissolve it, i.e. they act by their evidence that such a marriage is invalid whilst acting by the corollaries of the opposite view held by the *Hanafiyyah*.

2. The *Mālikiyyah* do not permit a *salam* (= sale with advance payment of the price) where delivery of the sale article is immediate. Delivery of the *salam* article must be deferred, to fifteen days minimum, otherwise it must be rescinded as stated in the *Mudawwanah*. Imām ash-Shāfi`ī permits a *salam* with immediate delivery of the *merx*. In another narration from Mālik, he endorsed a *salam* where delivery of the article was deferred to two days only *murā`ātan li'll-khilāf*, as affirmed by Ibn Habīb (Cf. *Al-Bayān wa at-Tahsīl*).

3. The *Mālikiyyah* maintain that the contract of pledge is binding simply upon its conclusion, i.e. neither parties can resile from it at will, and that taking physical possession of the pledged article perfects the contract without being a condition of validity thereof, whereas the *Hanafiyyah* and the *Shāfi`yyah* adopt the contrary view that physical possession of the pledged article is a condition of contractual validity of the pledge, failing which no binding pledge can be soundly concluded. It follows from the *Mālikī* position that the pledgor cannot dispose of the pledged article as soon as the contract is concluded, whether or not he has transferred possession thereof to the pledgee. Taking however into account the said dissenting view of *Hanafiyyah* and the *Shāfi`yyah*, they rule that the wealthy pledgor may dispose of the pledged article, by sale, donation or charitable devolution, in the interval between the conclusion of the contract and the pledgee's receipt thereof into his possession, and that the debt he owes is then exacted from him.

4. As for the mas'alah of a donor disposing of the donated property prior to the donee taking possession thereof, the *Mālikiyyah* similarly state that the contract of donation is binding upon its mere conclusion, and that possession of the donated article by the donee perfects the contract without being a condition of validity thereof. They base that ruling on cogent textual authorities from the Book and the Sunnah. The *Hanafiyyah* and the *Shāfi`yyah*, however, hold that donation is validly binding only once the donee has received it into his possession. As a result, *murā`ātan li'll-khilāf*, Ibn al-Qāsim has asserted, about someone saying to another, 'Take this maintenance and distribute it in the path of Allah, meaning warfare,' and his addressee replying, 'I know of a needy woman here,' so the former says, 'fine, give it to her': "It does not please me if he makes its use in the path of Allah compulsory; and if he does that, he is not liable for making it good.' Strictly following their own evidence, in fact, the *Mālikiyyah* should have held that the contract had already been perfected upon its conclusion, and that the donor was prevented from transferring ownership thereof to a new donee, the needy woman. At the same time, as far as the rules on liability for making good property lost, damaged or destroyed in one's hands, he relieved the donor of liability pursuant to the mere conclusion of the contract, regardless of whether the donee had taken possession of the property.