The Fundamental Principles of Maliki Fiqh

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Introduction

Malik did not record the fundamental principles on which he based his school and on whose basis he derived his judgements and to which he limited himself in the derivation of his rulings. In that respect he resembled his contemporary, Abu Hanifa, but not his student, ash-Shafi'i, who did record the principles he used in derivation and defined them precisely, specifying the motives which moved him to consider them and their position in deduction.

Nonetheless, Malik did indicate the principles he used in some of his *fatwas*, questions and the *hadiths* which had *muttasil* (uninterrupted), *munqati'* (broken), or *mursal* (link missing) *isnads* and *balaghat* (without *isnad*) *hadith*, even if he did not precisely explain his method or defend it or explain the motives which moved him to adopt it and why he used that method rather than another.

For instance, the *Muwatta'* makes it clear to us that Malik uses *mursal*, *munqati'* and *balaghat hadiths* but does not explain how he chose them because it does not go into the problems concerning the *isnads*. The reason for this is that Malik only transmitted from people in whose *mursal* and *balaghat hadith* he had absolute confidence. That is why his great concern was with the choice of transmitter. When he had confidence in the character, intelligence and knowledge of the transmitter he dispensed with the chain of narration.

Malik clearly stated that he took the practice of the people of Madina as a source and explained the motives which led him to do so. The *Muwatta'* shows that he used it in making analogy, as he when he made an analogy between the wife of a missing man when he returns to her after she has married someone else and someone who divorces his wife with a revocable divorce and then takes her back when she knows about the divorce but not the taking back and consequently remarries.

Thus in the *Muwatta'* you will see clear statements or indications of Malik's principles of derivation even if he did not actually clarify or identify them specifically. For instance, he did not clarify the rules and grades of the underlying legal principles *('illa)* in analogy and such things.

The *fuqaha'* of the Maliki school have done with Malik's *fiqh* what the *fuqaha'* of the Hanafi school have done with their school – studied the secondary rulings and derived from them what can validly be employed as fundamental principles on which to base deduction. They called the principles they derived in this way the 'fundamental principles (*usul*) of Malik'. For instance, they say that Malik employed certain textual principles which they called *'mafhum al-mukhalafa'* (an interpretation which diverges from the obvious meaning of a given text), *'fahwa al-khatab'* (implied meanings of a given text), and *'dhahir'* (apparent meanings of a given text). They say that he also said certain things about general unspecific texts. The truth is that although these principles are transmitted as having been formulated by him, they are in fact derived from secondary judgements reported from him; and the specific proofs of these principles are derived from the

actual context or were formulated by the *fuqaha'* who came after him. Deduction from texts can only validly be undertaken when the necessary evidence exists.

We do not automatically have to accept these principles as being the *usul* of Malik's school since they are the formulations of scholars who post-dated him but nor must we refute them simply because they were not transmitted by Malik himself. We are bound, however, to reject those of them which we think contradict any clear, firm statements he is definitely known to have made or those which apply to some secondary rulings he made but not to most of them. Scholars deem that established propositions should be adopted and respected unless the proof of their opposite is established. In that case they have to be rejected because they have been proved invalid by clear evidence not by simple denial.

These principles are mentioned in various places in the books on the science of *usul* which Malikis have written or in the glosses which other Malikis have added to such books. They say about every principle that Malik's opinion regarding it was such-and-such but that is in fact only deduced from secondary rulings. In *at-Tanqih*, you will see that al-Qarafi mentions a principle and then mentions Malik's opinion about it which may differ or agree with the majority view. The sum of those opinions which comprise the *usul* of the Maliki school, whatever the strength of their ascription to the Imam, is without a doubt the basis on which the positions of the Malikis are based and that from which the judgements of those both in early and later times in that very productive school are derived.

We will mention the *usul* in general and then we will go into some details to demonstrate the bases for deduction in the Maliki school, the reason for its growth and spread, the great number of the questions with which it deals and its suitability for various environments. We will attempt to clarify the principles which are particular to it and which are considered to be one of the things which distinguish it from other schools and give it a flexibility which is not found in other schools even though it is a school founded on tradition more than the others.

In *Tartib al-Madarik* Qadi ÔIyad mentions the general foundations of Islamic *fiqh* which are: the Noble Qur'an, its explicit texts (*nusus*), its apparent meanings (*dhawahir*) and implied meanings (*mafhumat*); the *Sunna – mutawatir* (with multiple transmission), famous (*mashhur*) and single *hadiths*; then consensus, and then analogy. Then he mentions the principles used by Malik and his position.

If you look straight away at the methods of these Imams and the establishment of their principles in fiqh and ijtihad in the Shari'a, you will find that Malik pursued a clear methodology in respect of these principles and ordered them according to their respective ranks. He put the Book of Allah first and put the traditions with it, placing them before analogy and opinion. He left anything which was not considered probable by reliable men known for their sound knowledge, or when he found that the great majority of the people of Madina did something different and contrary to it. He did not pay any attention to those who interpreted things according to their own opinions: explicitly declared that such rulings were false and baseless. (*Tartib al-Madarik*, p. 16)

Qadi 'Iyad also lists the basic foundations of the school of Malik as being the Book and *Sunna*, the practice of the people of Madina and *qiyas* (analogy), but he does not mention any others. He does not mention *ijma'* (consensus) or the other methodological principles which distinguish the Maliki school, such as *masalih mursala*, *sadd adh-dhara'i'*, custom (*'urf*), and certain other principles which other people have mentioned.

In the commentary on *al-Bahja* sixteen basic principles are listed:

- An explicit text (*nass*) of the Qur'an.

- A apparent (*dhahir*) text which is (an apparent meaning derived from a text which is general and non-specific).

- An indicative (*dalil*) text, which may have an interpretation which diverges from its obvious meaning.

- An implicit (*mafhum*) text, which has an added meaning coinciding with its obvious meaning.

- An expositive (*tanbih*) text, which reports the underlying reason for a judgement (like the statement 'it is filth').

- The same five categories in respect of the *Sunna*;

- Consensus (*ijma'*).

- Analogy (*qiyas*).

- The practice of the people of Madina (*'amal ahli'l-madina*).

- A statement of a Companion (*qawl as-sahabi*)

- Judicial preference (*istihsan*)

- Blocking of the means (*sadd adh-dhara'i'*).

- There is disagreement about a seventeenth principle which is whether or not to take note of a dispute (*mura'a al-khilaf*). Abu'l-Hasan said that *istishab* (presumption of continuance) is one of them. (*al-Bahja*, p. 126, vol. 2)

This list is logical. An unequivocal text of the Qur'an, an apparent text, what is implied, its proof, and its clarification are all connected to the same fundamental source, the Qur'an, and the same is true of the same five elements when applied to the *Sunna*. They are mentioned individually because they do not have the same weight where deduction is concerned. An apparent text of the Qur'an is not as strong as an unequivocal text and a text which can have a divergent meaning is not as strong as an apparent text and so forth.

In *at-Tabaqat*, as-Subki stated that there were more than five hundred fundamental principles in the Maliki school. He may have been referring to the legal precepts derived from secondary rulings. There is a distinction between them and the *usul* of the school. The *usul* are the sources for deduction, the methods of deduction which also involves the strength and ranks of legal evidence and which of them to prefer when they are in contradiction. Legal precepts (*qawa'id*) are

general precepts which clarify the method of exercising *ijtihad* in the school and the links which connect minor cases. The precepts are later in their conceptual and actual existence than the secondary rulings because the precepts are the derived unifying principle of the rulings.

In the case of the *usul*, it is clear that they must exist before the secondary branches because they are the prerequisites which the *faqih* himself uses in his deduction. So the Qur'an is advanced before the *Sunna*, the unequivocal text of the Qur'an is stronger than its *dhahir* text and all other procedures used in making *ijtihad*. The fact that these principles are revealed by the secondary ruling does not indicate that the secondary rulings precede them. Rather they were in existence previous to them and the secondary rulings indicate and reveal them as the child indicates his parent, the fruit indicates the plant, and the crop indicates the the type of seed.

The most precise enumeration of the principles of the Maliki school is that given by al-Qarafi in his book *Tanqih al-Usul*. He stated that the foundational principles of the school are: the Qur'an, the *Sunna*, the consensus of the people of Madina, analogy, the statement of the Companions, together with *masalih mursala* (considerations of public interest), *'urf* (custom), *'adat* (common usage), *sadd adh-dhara'i'* (blocking the means), *istishab* (presumption of continuity), and *istihsan* (discretion).

These are the fundamental principles of the Maliki school and we will discuss each of them and its rank in deduction. Next we will discuss the Qur'an and the *Sunna* and *nass* texts, *dhahir* texts, *dalil* texts and *mafhum* texts since Maliki *fuqaha'* ascribe these distinctions to Malik. Each of them has a specific rank in deduction in the Book and *Sunna* as defined by the Maliki view.

The First Source: The Book of Allah

According to ash-Shatibi al-Maliki in al-Muwafaqat:

"The Qur'an is the whole of the Shari'a, the support of religion, the fount of wisdom, the sign of Prophethood and the light of the eyes and the heart. There is no way to Allah except through it and there is no salvation by any other means than it. You must not hold to anything that contradicts it. None of this needs affirmation or deduction because it is known to the deen of the Community. Since that is the case, whoever wants complete knowledge of the Shari'a and desires to perceive its aims and be joined to its adherents must necessarily take the Qur'an as his constant companion and make it his intimate, night and day, in both investigation and action... If he is able to do that, he will soon have students and find himself among the Frontrunners and in the first rank. He will not be able to do it without being helped in that by the *Sunna* which clarifies the Book and, failing that, the works of earlier Imams and the *Salaf*, which will guide him in this noble aim and lofty purpose." (p. 247, vol. 3)

Malik viewed the Qur'an in the same way. So he was only seen reciting the Qur'an or relating *hadiths* or deriving *fatwas* from them to answer questions which were directed to him. He did not look at the Qur'an with the eye of a debater. It is not reported that he ever said that the Qur'an consisted of both words and meaning or meaning only; nor did he engage in any discussion of the *mutakallimun* about the Qur'an being created since he did not consider such subjects to be debatable. He believed that whenever a man argued with another, he cheapened that which Jibril had revealed to Muhammad, peace and blessings be upon him.

Malik knew that the Qur'an contains all the Shari'a and that the *Sunna* is simply its exposition. The Qur'an cannot be understood correctly and completely unless the clarification which elucidates it, the *Sunna* of the Prophet, is taken into account. He was thirsty for it, not merely because it was the second Islamic source, but because it also clarifies and expounds the Qur'an and gives detail to what is general and limits what is unrestricted.

The Qur'an is in Arabic and was revealed in the Arabic language. The people of eloquent Arabic saw that its style was inimitable and were overwhelmed by it as all people are. However, it is in Arabic, and Malik did not think that it was proper for anyone to try to explain it unless he had deep knowledge of the Arabic language, its different dialects, and styles of speech. That is why it is reported that he said, "No one who explains the Book of Allah who does not know the dialects of the Arabs is brought to me without my making an example of him."

The *Sunna* is the straight way to grasp the meanings of the Book. That is why it is not correct to hold only to the Qur'an without seeking help in its explanation, meaning the *Sunna*. Malik disliked including any Biblical or Jewish (Talmudic) material in its explanation. He did not have confidence in the transmission of anyone who proceeded in this way. He mentioned that there was excellence in a certain person but criticised him for accepting *tafsir* from Qatada because he reckoned that Qatada included in his *tafsir* much that was not sound.

Malik considered the Qur'an to consist of both expressions and meanings, which is the position and consensus of the majority of Muslims, but he did not get involved in any wrangling or debate about this. That is why he did not consider that a translation of the Qur'an could be used for recitation in the prayer, or to be that for whose recitation there is prostration, or to be that whose copy may only touched by someone who is pure, or to be that which may not be recited by a woman who is menstruating or bleeding after childbirth or someone in a state of major impurity. A translation can never be more than an explanation of the meaning or rather a partial explanation of what can be understood from the Arabic original.

Scholars of the Maliki school mentioned that he used all the various degrees of textual interpretation referred to above, just as he took note of those matters in the *Sunna*. We are obliged to clarify the method and opinion of Malik concerning these matters in brief and his position in respect of other opinions without going into excessive detail.

1. EXPLICIT TEXTS (*NASS*) AND APPARENT (*DHAHIR*) TEXTS IN THE QUR'AN

In the case of judgements taken from the Book of Allah, the researcher must study the Qur'an's linguistic construction, the nature of its evidence, the meaning it conveys, the meaning which can be understood from it but in a manner which is subsidiary to the meaning which would be normally be clear from the expression, and what its aim is. Then one must identify its immediate and further aims from what its expression indicates and what its indications allude to. Each piece of evidence has its place in elucidation and a certain degree of strength. Derivation of judgements from it requires recognition of all these factors in order to distinguish that which is more likely from that which is not as strong.

That is why the scholars of *usul* who came after ash-Shafi'i were concerned with studying the construction of the Qur'an as ash-Shafi'i had been, ascertaining the degrees and strength of evidence and giving each its proper weight. From the secondary rulings of the Imams, they learned how they had applied the textual evidence and how they favoured one kind of evidence over another when they were contradictory and what the basis of that preference was.

One thing which these scholars were concerned with, whether Hanafi or Maliki, was to identify the nass and dhahir texts of the Qur'an. They noted that in his secondary judgements Malik made use of the difference between *nass* and *dhahir* texts, even if he did not clearly define and explain them. As we have seen, according to *al-Bahja*, the *nass* and *dhahir* of the Qur'an were

among his legal proofs. The Malikis state that they do not possess the same level of proof when making a judgement, the nass being stronger than the *dhahir*, as they deduce from the secondary judgements transmitted from Malik. The scholars of the Maliki principles say that the difference between explicit, unequivocal texts (*nass*) and apparent texts (*dhahir*) is that *nass* texts are not open to interpretation whereas *dhahir* texts are.

Before we clarify the potential for interpretation or lack of it, we should first indicate the difference between the *nass* and the *dhahir* which ash-Shafi'i did not discuss in his *Risala*, as be considered *nass* and *dhahir* to be basically indistinguishable. Al-Ghazali said ash-Shafi'i adopted linguistic usage and there is nothing in the Shari'a to prevent him doing that. Linguistically nass means manifestation (*dhuhur*), used, for instance, to describe a gazelle when it raises its head so that it can be seen, so he defined it as meaning the the same thing as *dhahir*. Thus a text can be considered both *dhahir* and *nass*. (*al-Mustasfa*, pt. 1, p. 384)

It can be seen from this that ash-Shafi'i did not differentiate between the *dhahir* and *nass*, but scholars after him did because the secondary legal rulings derived by the *fuqaha'* before and after him require a differentiation to be made between the two types of texts: one whose evidence is so strong that no probability is applicable to it nor can any other judgement possibly be derived from it, and the other whose meaning is obvious but which allows of another possibility, even though when someone hears it the other possibility does not in fact come to mind. So each text does have a rank in deduction and there is nothing to prevent names being given to them to indicate their rank and clarify the position of each of them in respect of the other.

Those *fuqaha'* who make a distinction say that the nass text is of two kinds:

* A *nass* text is one which does not give rise to any other possibility at all, like the word 'five' which cannot mean six or four.

* A *nass* text is one which does not admit of any other possibility arising from deduction.

As al-Ghazali, al-Qarafi and others mentioned, in evidence a *dhahir* text wavers between two or more possibilities, but one of them is indicated more than the others so that it comes to mind when it is heard. In this respect, it is distinct from what is commonly known as an undefined (*mujmal*) text. A *mujmal* text wavers between two or more possibilities, none of them being stronger than the others. It is known as undefined because the basic expression can legitimately support more than one meaning, like the word *qar'* which can have two meanings in its basic form: purity or menstruation. If it is mentioned out of a context which specifies one or the other of them, it is undefined.

There is also the case when the reason for the lack of definition in a text is due to something other than the linguistic form, as in the case of the words of the Almighty, *"Pay its due on the day of its harvest"* (6:141). It is obvious that this refers to the obligation of *zakat* because it clarifies that the poor have a right to some of it. That does not leave scope for doubt. But the amount which must be paid is not made clear and might equally well be either a small or large fraction of the total. Something like this is not known as either *nass* or *dhahir* but as mujmal. That is why the amount

the must be clarified and the *Sunna* comes and makes it clear that the amount referred to is a tenth.

This applies to all texts which are mujmal whether they are undefined on account of their linguistic form or for some other reason and clarification of them can only be gained from factual evidence from the *Sunna* or another source. Once a *mujmal* text has been clarified, it then becomes like a nass or a *dhahir* text based on the strength of the clarification.

A *dhahir* text may be connected to something which will stipulate one of two possibilities and is then elevated from the level of preference to the level of absolute and certain. That is when clarification from the *Sunna* or the Qur'an is added to it which turns the probable interpretation into a *nass*.

Maliki *fuqaha'* state that the evidentiary status of a generally applicable text (*'amm*) usually falls into the category of *dhahir*, not that of *nass*. That is why al-Qarafi used general expressions as examples of the *dhahir*. He said, "When one meaning of an *'amm* text is preferred to other possible meanings, however few or many there may be, then that text is called *dhahir*, although it is still general since it is inclusive. Thus the expression in it is *dhahir* but not specific (*khass*)." If an *'amm* text has nothing in it to indicate that its generality is of the nature of *dhahir* evidence, then Malik considers it to be probabilistic (*zanni*) as does ash-Shafi'i, which he makes clear in his *Risala*. We should at this point briefly examine the notion of *'amm* (generally applicable) and *khass* (specifically applicable) texts.

2.   THE GENERALLY APPLICABLE (*AMM*) AND SPECIFICALLY APPLICABLE (*KHASS*)

Al-Qarafi defined an *'amm* text as one with a universal meaning which includes everything to which it is applicable. So anything which has the name *'amm* applied to it includes within its general definition everything which that term could normally be said to encompass. When you say that the adult human being is legally responsible for the prayer, *zakat* and *hajj*, everyone to whom the name 'adult human being' can be applied is included in this judgement. When Allah says that the thief has his hand cut off, then, according to this statement, all with this quality, which is theft, merit this judgement.

When the judgement concerning the *'amm* in an expression is not applied to everything encompassed by it but only partially, it becomes specific (*khass*). This is shown in the words of the Almighty, *"free a believing slave"* (4:92) and *"set free a slave before they may touch one another."* (58:3) The expression in both cases is specific because it does not apply to all those who have this description, but only to one of them, even though the first is limited by a certain quality ('believing'), while the second is not.

The Maliki view of *'amm* texts is distinct from the Hanafi view in two ways: definition and judgement. The definition of *'amm* in the books of the Hanafis is an expression which includes

everything encompassed by it, whether it is by the outward form of the words or the meaning, like "Zayds" meaning everyone with that name, or similar nouns which indicate generality, like 'people', 'jinn', 'mankind' etc. which indicate plurals. The *khass*, on the other hand, is an expression which applies to only one meaning , i.e. it is an expression with one meaning which other things do not share, whether that meaning designates a species, like an animal, or a type, like a man or a person like Zayd. So the named which is one and not multiple is *khass*.

You see from this that there is a clear difference between the two types of definition. The first designates every universal which has a shared meaning. The second considers it to be a collection of individual things which are included in the phrase or meaning.

The second difference, which is in judgement, lies in the fact that the Malikis consider the evidence of an *'amm* text to be general unless it is accompanied by some sort of context which would render it *dhahir*. The Hanafis consider the *'amm* text to be absolutely *'amm* and unaffected by any probability.

Scholars disagree about the definitiveness of the *khass*. Thus its rank in evidence is stronger with those who judge that the *'amm* text is evidentially equivalent to the *dhahir* text since they also believe that the definitive evidence of the *khass* is of the same category as *nass*. The evidence of a *nass* text is stronger than that of a *dhahir* text, as you know, but the Hanafis consider them to be the same. That is why if they find a contradiction between a *khass* and *'amm* text, given that they are contemporaneous, then the *khass* makes the *'amm* specific so that they are both acted on simultaneously. That is one of the means of harmonisation which is adopted if nothing else is feasible. If there is a gap in time between them, the later of the two abrogates the earlier no matter whether the later is *'amm* or *khass*. The Hanafis think that the *'amm* can abrogate the *khass*, while others disagree with them about that.

Most scholars think that even if the evidence of an *'amm* text is considered to extend to all of its units by *fuqaha'* to the extent that that almost amounts to a consensus, it is still open to specification, i.e. some of its units can be made specific if there is evidence for that. Precise scholars, however, consider that specification does not exclude some of the units of the *'amm* from the *'amm* judgement after they were included in it. Rather it is the clarification of the will of the Lawgiver that they were specified from the very beginning and that the units which the general expression included in the basic linguistic position were not in fact all included in the evidence from the very beginning. In *al-Mustasfa*, al-Ghazali clarifies this: "It is permitted to say that *'amm* evidence has been made *khass* ... This *khass* evidence defines the will of the speaker and that by the expression a particular meaning is specified. According to this, specification is clarification which moves the wording of a text from being *'amm* to being *khass* and the context makes it clear that the expression is figurative rather than literal."

This is, in fact, the basis of the difference between making an *'amm* text *khass* and abrogating it since abrogation actually changes confirmed judgements. When an *'amm* judgement or part of it is abrogated, then the judgement which was fixed for certain units changes. Making it *khass* prevents the inclusion of units which were never in fact part of the original *'amm* judgement in

the first place. It confines the definition of the *'amm* to certain of the units embraced by its wider meaning.

According to the strength of the evidence in the expression of the *'amm* in its basic form, that which is specified can be a little or a lot. For those who deem that in its basic form, its evidence in respect of the generality of its units is unequivocal, the things specified are few because only that which has the same weight of definiteness can be elevated to the rank of specification. Therefore they consider the general statements of the Noble Qur'an to be unequivocal in their evidence and unequivocal in their firmness. So they are can only be rendered specific by that which has the same rank as them in both cases. On that basis, they think that the *hadiths* of individuals do not make the *'amm* of the Qur'an *khass*. Its generality is accepted and the *hadiths* are rejected because individual *hadiths* are probable in their firmness, even if they are unequivocal in their evidence, and the Hanafis consider the generalities of the Qur'an as unequivocal in both cases.

As for those who deem that the evidence of the *'amm* is probable, they widen the scope of what can render it specific, and individual *hadiths* are part of what they consider can make the *'amm* text of the Qur'an specific in certain cases because while their certainty is probable, the *'amm* of the Qur'an is probable in its evidence, and the probable can render the probable specific.

You know that the Malikis state that Malik believed that the evidence of the *'amm* on the generality of the units had the force of the *dhahir*, not that of the nass and that the evidence of the *dhahir* is probable and not unequivocal because it does not forbid probability. That is why he considered many things to be rendered *khass* since the possibility of specification is immediate and not remote according in his view.

Al-Qarafi mentioned that Malik thought that there were fifteen modes in which the *'amm* was rendered *khass*. He said: "Its forms of specification are fifteen in the view of Malik". (*Tanqih*, p. 90)

Perhaps this great number will cause astonishment. He made the area of making the *'amm* a wide one. However, although we acknowledge that the specifications of general texts are undoubtedly numerous in the Maliki school, we admit that this number, fifteen, includes things which most people do not consider to be part of specification. They things are not normally considered as specifications, but actual circumstances of how the verbal usage is applied to the general, and thus we move it from fact to metaphor. Similarly they include: the exception, the precondition, the attribute, and the end. These are specifications in speech and speech is only complete with them. They are not distinct. That is why the Hanafis do not consider them to be part of specifications. This is why it is not valid to accuse the Malikis over these matters because others accept them, even if they do not call them that. Thus it is not the qualification of the *'amm* in a position of dispute. What is disputed is what is called specification.

After that there are eight matters, four of which are also agreed upon by the *fuqaha'*. They are: specification of the Book by the Book, and by *mutawatir Sunna*, and the *mutawatir Sunna* by the Book and by its like. This is also not held against Malik because in it he is in agreement with other *fuqaha'*. There is consensus on this except for the specification of the *Sunna* by the Book with which ash-Shafi'i disagrees. The dispute is about the specification of the Book by consensus,

analogy, single reports, and custom. We will speak on the difference between Malik and others in each of these matters.

The difference between him and others in using consensus to make the Book specific is insignificant. Indeed, discussion on it is negligible. There are generalities in the Qur'an which the people of knowledge among the Companions, Followers and those who came after them agree are rendered specific by reliable evidence. They include the words of the Almighty, *"Or what your right hands own."* It is general and is becomes specific when one excludes from it the milk-sister and other women it is forbidden to marry. Here I consider that it is the Noble Qur'an which specifies it. That is His words, *"Forbidden to you are your mothers..."* So here the prohibition is general and includes the prohibition by contract and the prohibition by intercourse. This is why people agree on that. It is not specification by consensus. Here the specification is the place of consensus and it is the Qur'an which specifies the Qur'an.

As we stated, this is not that important. That is also the case with the specification of th*e 'amm* by single traditions which are supported by something else, as we will clarify when discussing the *Sunna*. Malik did not adopt this absolutely nor was he the only to adopt it. Indeed ash-Shafi'i adopted it after him and he states that he derived from the *fiqh* of Malik that the *'amm* can be a probable proof. If its evidence is probable, then the probable single report makes it specific because the probable can specify the probable. As for the Iraqis who state that the *'amm* is unequivocal before its specification, and that when it is specified, it becomes probable and can validly be specified by single reports, they do not put single reports in the rank of the unequivocal *'amm*. It is that which cannot be made *khass*, and those are matters in which fiqh of the people Madina differs from the *fiqh* of the people of Iraq. Malik and the Madinans after him state that it is permitted to make the *'amm* specific by single traditions unrestrictedly, and the Iraqis forbid that single traditions specify the *'amm* of the Qur'an before there is specification by something else. By the Madinans we mean those who came after Malik and followed the method of the Madinans like ash-Shafi'i.

There remain two other matters. They are making the 'amm of the Qur'an specific through analogy and making the *'amm* of the Qur'an specific by custom. These are two matters which should be looked at again. Malik, or to to be more precise, Maliki *fiqh*, almost alone has them to the exclusion of other *fuqaha'*, revealing the extent of opinion of Malik's *fiqh* and that he was a *faqih* in both opinion and tradition.

Regarding analogy, al-Qarafi said, "Ash-Shafi'i, Abu Hanifa, al-Ash'ari and Abu'l-Hasan al-Basri agree with us about analogy being unrestricted (i.e. whether clear or hidden). 'Isa ibn Aban said that if it is specified by an unequivocal proof, then it is permitted. Otherwise it is not. Al-Karkhi said that if it is specified with separate evidence, then it is permitted. Otherwise it is not. Ibn Shurayh and many of the Shafi'is say that it is permitted when it is not hidden and they disagree about what is evident. It is said that it is analogy of meaning, and it is said that it is analogy of like. It is said that the evident is that whose cause is understood like the words of the Prophet, may Allah bless him and grant him peace, "The qadi should not render judgement when he is angry." It is said that whatever impairs judgement is judging by other than it. Al-

Ghazali said, 'If they are equal, we agree. Otherwise there is preference.' Qadi Abu Bakr and the al-Juwayni hesitated. This is when the basis of analogy is mutawatir. If it is a single report, then the disagreement is stronger." (*Tanqih*, p. 90)

This is what al-Qarafi mentioned about the disagreement of the *fuqaha'* regarding the specification of the *'amm* of the Noble Qur'an by analogy. In it he stated that Malik believed that the *'amm* of the Qur'an was specified by analogy, whether the basis of the analogy was single or *mutawatir* reports and whether the analogy was evident or hidden. Then he mentioned the opinion of those who disagreed with that.

We notice that his words about the opinions of those opposed to it are not accurate and precise. He mentioned first that Abu Hanifa believed that analogy specifies the Qur'an unrestrictedly. That was not transmitted from Abu Hanifa since the *usul* were not transmitted from him, but from those who derived his opinion from the secondary branches in his school – especially 'Isa ibn Aban and Abu'l-Hasan al-Karkhi. No one deduced that the opinion of Abu Hanifa about making the general specific is that analogy makes it specific before something else makes it specific.

Secondly he mentioned that al-Karkhi's opinion was that it is permitted if it is made specific by something separate, then after that it can be made specific by analogy. The truth is that the Hanafis believe that specification is only by something separate as we mentioned. The precondition, attribute and other things connected to the word itself are called qualifications and not specifications. There is no disagreement between al-Karkhi and 'Isa ibn Aban on that.

Thirdly he mentioned that ash-Shafi'i thought that analogy rendered the general specific. We find that in the *Risala* and in the *Kitab Jima' al-'Ilm*, ash-Shafi'i advances the *nass* before analogy. He says: "Knowledge has two aspects: following and deduction. Following is to follow the Book of Allah Almighty. If not, then the *Sunna*. If not, then the position of the *Salaf* which is not known to be disputed. If not, then analogy based on the Book of Allah. If not, then analogy based on the Sunna of the Messenger of Allah, may Allah bless him and grant him peace. If not, then analogy based on a position of the *Salaf* not known to be disputed. The statement is only valid by analogy. When those who have analogy make analogy, they disagree and it is permitted for each to speak according to the extent of his *ijtihad*. If he cannot do so, then he follows someone else in his *ijtihad*."

So we see that ash-Shafi'i thinks that the science of analogy is the science of deduction, and that knowledge of the Book and the *Sunna*, even if the expression is general, is the science of following. He does not think that deduction is used when following is possible.

After this, al-Qarafi mentioned the proof of the school which the Malikis favour: it is that the *'amm* can be made specific by analogy, and the examination of the secondary rulings transmitted from Malik led to them saying that it was his position. That proof is based on the fact that analogy is reliable evidence, like unequivocal texts. Even though every analogy on its own is based on text, the principle is connected to the secondary ruling on the basis of the underlying

reason for the judgement in it. Analogy is a comprehensive principle which takes the other principles into consideration.

According to this, when the general in its generality is in conflict with the judgement necessitated by analogy, then two principles clash: one is general and its evidence admits of probability, even if it is preferred, and the second is specific and there is no probability in its evidence. One of the established rules is that when two principles clash, and one of them has a probable indication and the evidence of the other contains no probability, then you take the one which has no probability. Utilisation is better than disregarding, and so acting on both together is better than disregarding one of them. It is clear that using analogy and making the general specific is to act by both of them because the general remains acted on in what remains after specification. If we deny the specification, that disregards analogy and denies the continuity of its underlying reason in that place without any reason which necessitates that. There is no impediment to prevent action since the evidence of the general is probabilistic.

That proof can be made clear by an example, which is found in the words of the Almighty: *"Allah has made trade lawful and usury unlawful."* (2:275) Its literal generality demands that it is lawful to sell rice for rice with disparity and on delay because it is trade, which is lawful by the generality. The Messenger of Allah, may Allah bless him and grant him peace, forbade selling gold for gold, dates for dates, or barley for barley, except like for like, hand to hand, which necessitates an analogy based on it which forbids selling rice for rice because it is like grain for grain in the cause which demands the prohibition of disparity and delay. If the general text of the Qur'an had not been made specific, that analogy would be disregarded. If we make it specific, we use analogy, and then the evidence of the ayat becomes a clear declaration about the other goods which the *hadith* mentions and those like them.

This is the argument of the Malikis, or most of them, about analogy making the general text specific. We can examine it from several aspects:

One: Its basis is that the evidence of *'amm* probably indicates the generality, but its evidence includes probability which does not actually originate with the evidence. We explained that ash-Shatibi did not take that line because that would undermine legal evidence and weaken the generality of unequivocal texts unnecessarily, and because the evidence of expressions must be considered as general unless there is evidence to the contrary, and then only the probable which originates from evidence is considered. That is the view of the Iraqis and it is the strongest.

Two: In the Shari'a one only moves to analogy when the *mujtahid* lacks an unequivocal text. Here there is analogy while a text exists. That nullifies some of what is understood from the text. That is the opposite of the proper order and it proceeds on other than what is fixed and confirmed in matters of the Shari'a.

Three: The *hadith* mentioned does not make the text specific through analogy because the selling of usurious materials is outside of the generality of what is lawful. The Almighty says, *"He has made usury unlawful."* The comprehensiveness of the lawful does not include selling rice for rice. It is not specified by analogy; it is a specification by Qur'anic text. *Hadith* and analogy clarify

things subject to usury. Thus that which specifies is the Qur'an and not analogy. The difference between the two is immense because according to the Maliki interpretation, analogy nullifies the generality of the *ayat*, and according to what we say that which makes the generality of the ayat specific is the Qur'an, and the text and its cause clarify the Qur'anic text.

Four: It supposes that the evidence of the analogy is unambiguous even though there is a conflict in the qualities, and the cause which is derived from them is probable in its evidence and the basis on which analogy is based is probable, and so it is probablistic in its level of support.

The scarcity of sound *hadiths* in Iraq motivated the Iraqis to use Qur'anic texts with the widest possible comprehensiveness, and they relied on its generalities and proceeded in their legal methods on that basis. In the *fiqh* of the Imam of Madina, Malik, we see that the Madinans or the Malikis who inherited the knowledge of the Madinans, restricted the generality of the texts and used analogy to make specific the generality of the Qur'an and hadith.

Do we not see in this that the Madinans, led by their Shaykh Malik, may Allah be pleased with him, made use of a great of *fiqh* of opinion (*fiqh ar-ra'y*)? If Malik is considered one of the *fuqaha'* of opinion, that does not lessen the fact that Abu Hanifa was one of those who used opinion. Although the two methods are different, the end is the same, and there is no disagreement in the end.

This is about rendering the general text of the Qur'an specific by analogy. As for making the general of the Qur'an specific by custom (*'adat*), this is something on which the Malikis said there is consensus among the *fuqaha'*. What is meant by custom which makes words specific is verbal custom, i.e. the specific linguistic usage which governed usage in the time when the Qur'an was revealed: what the Muslims understood and what was encompassed by usage of things which qualify it because that usage qualifies the word. Al-Qarafi says about that:

"The rule is that if an expression has a customary meaning and usage, then its expression is applied according to its usage. If the speaker is the Shari'a, then we apply its expression to its customary usage and we make the general expressions in that specific if custom demands that they be specific, or metaphorical if it requires the metaphor and we leave what is factual. In general, the indication of customary usage precedes the indication of the language because the custom abrogates the language and the abrogating precedes the abrogated. As for new customs which arise after articulation, they are not imposed on that articulation. The articulation is unaffected by the contradiction of the new. An example is when a sales contract takes place: the price is applied to the current custom in money and any customs in money which arise after that are not considered in this prior sale. It is like that with vows, confessions and bequests. When the customs arise after them, they are not considered. Customs are considered which are connected to them. It is the same with the unequivocal texts of the Shari'a - they are only affected by customs connected to them." (*Tanqih* p. 194)

The custom which makes general texts specific is the custom of those addressed by the text. The usage allows the listeners to understand what is meant by the words restricts what is

understood from the forms in its general linguistic meaning. This practical view is called verbal custom, elucidation, or the customary usage of the speakers. Ash-Shatibi says about this:

"The generality is interpreted by usage. The aspects of usage are many, but they are governed by the exigencies of circumstances which are the basis of clear declaration. The words of the Almighty, *'Destroying everything at its Lord's command'* (46:25) does not mean that the heavens, earth, mountains, waters and similar things will be destroyed. What is meant is that everything will be destroyed which is subject to what effects it in general. That is why the Almighty then says, *'When morning came you could see nothing but their dwellings.'"* (*al-Muwaqafat*, pt. 3, p. 271)

We see from these words that making the general specific by customary usage or custom is something on which there is consensus because it is only explaining the words according to customary usage. That is not unusual.

There is something which makes the general specific which some of the Malikis mention which al-Qarafi did not mention in this chapter. That is the *al-masalih al-mursala* (public welfare). Some Malikis mention that it makes the general specific. In *Ahkam al-Qur'an* Ibn al-'Arabi mentioned in the *tafsir* of the words of the Almighty, *"Mothers should nurse their children for two full years - those who wish to complete the full term of nursing,"* (2:233) that Malik said that when a woman is noble, she is not bound to suckle her child if it will accept the breast of another for the benefit of preserving her beauty according to the custom of the Arabs in that. That makes the general text of the Qur'an specific.

We will leave discussion of that for the section on *masalih mursala*.

This is a brief survey of the *dhahir* and *nass* and their position in deduction with Malik. We have discussed the general and specific since they state that the evidence of the *'amm* falls into the category of *dhahir* and the evidence of the *khass* falls into the category of *nass*. That is why when there is something general and something specific in a subject, the general is applied according to the specific. It specifies it because when there is a conflict, the *nass* is advanced before the *dhahir* and so the specific is advanced before the general and is regarded as specifying it.

The Iraqis do not hold that view. They consider the general to have the force of the specific in respect of evidence, and that when the specific and general clash, they consider that the earlier is abrogated by the later, whether the later is specific or general. If they are from the same time, then the specific is considered to specify the general inasmuch as the temporal connection is a factor which makes the general not a nass in its general meaning. Even though it is absolute in its evidence that does not preclude a possibility which originates from evidence indicated by the temporal connection which makes it specific (*khass*).

Now we will move on to the meanings which are deduced from the Qur'an and the *Sunna*. These are: parallel meaning (*lahn al-khitab*), which is the necessary inference (*dalalat al-iqtida'*) or the intended sense of words, and that whose understanding a divergent meaning or one which is consistent with it.

3. PARALLEL MEANING (*LAHN AL-KHITAB*) ITS SUPERIOR MEANING (*FAHWA*) AND IMPLICIT MEANING (*MAFHUM*)

These are three technical terms which clarify the type of evidence provided by some expressions of the Noble Qur'an and the *Sunna*. All of them are used by Malik when they are not contradicted by the *dhahir* and *nass* of Qur'an. That is why it is incumbent on us to define them briefly and make their meaning clear and we will give examples which clarify what the scholars of usul mean by them.

As for parallel meaning (*lahn al-khitab*), which some scholars designate as the 'necessary inference' (the Hanafis), it refers to what is entailed by the expression. That is like the words of the Almighty, *"So We revealed to Musa, 'Strike the sea with your staff.' And it split in twoÉ"* (26:63) Speech demands an implied elided word which is "He struck" and the sea split. In the *Sunna* it is found in the words of the Prophet, may Allah bless him and grant him peace, "Error and forgetfulness have been removed from my community and what they are forced to." There is no removal of a thing until it occurs and so there must be something implied to rectify the words. What is implied is that it is a sin. So the meaning of the statement is, "The sin of error and forgetfulness have been removed from my communityÉ." So the judgement indicated by the *hadith* here is Necessary Inference because it brings something which is implied and elided and the statement is only complete by its implication.

As for what is implicit, which is called *mafhum al-mukhalafa*: or an interpretation which diverges from the obvious meaning of a given text, the Malikis call it the 'indication (*dalil*) of speech'. It confirms the opposite of what is said although it is unspoken, as the Prophet, may Allah bless him and grant him peace, said: "There is *zakat* on freely grazing sheep." His words indicate the obligation of *zakat* on freely grazing sheep and it is understood from it that *zakat* is not obliged on other than freely grazing sheep.

Some scholars divide *mafhum al-mukhalafa* (divergent meaning) into ten categories in respect of the qualification. The basis of *mafhum al-mukhalafa* is that the words are qualified, and so the judgement is affirmed in the state which contains the qualification and the opposite is affirmed in that which does not have the qualification. There are ten qualifications and so *mafhum al-mukhalafa* has ten categories: what is understood from the cause like, "Whatever intoxicates is unlawful"; what is understood from the attribute like the previous *hadith* about *zakat*; what is understood from the precondition like "The prayer of whoever is pure is sound"; what is understood from the end is like the words of the Almighty *"Complete the fast until night"* (2:187); what is understood from the exception like the words of the Almighty, *"Never again accept them as witnesses. Such people are the wantonly deviant, except for those who after that repent..."* (24:4); what is understood from inclusion, like water is part of water; what is understood from time; what is understood from place; what is understood from number like the words of the Almighty, *"Flog them with eighty lashes"* (24:4) i.e. more is not permitted; and what is understood from title, i.e. name, like there is *zakat* on sheep.

These are the categories of divergent meaning. The Hanafis only accept the exception and inclusion among them, and they do not consider that to be part of implicit evidence. They consider it part of what is spoken because inclusion and exception contain negation and affirmation. If someone says, "The speaker on," he negates and affirms by the spoken phrase. It is the same with the exception. The affirmation of the opposite is not part of the category of what is unspoken. It is part of what is spoken. They disagree about other things because they do not acknowledge the basis of the derivation is from the spoken word or that it is necessitated by the implication of what is spoken or that what is affirmed as binding is dependent on what is spoken. That by which the divergent meaning is not one of these things.

The Malikis say that what is implicit is evidence except for what is understood by title. They said in the argument for its exclusion: "The difference between what is implied by title and other forms of what is implied is that other forms, like what is implied by the attribute and so forth, smack of causation. The attribute, the precondition and their like accord the sensation of causation and that which implies no cause demands the lack of effect. So there must be no judgement regarding that which is unspoken, which is what is implied. The title is a marker and it is connected to the generic nouns. So there is a difference between the words of the Prophet, 'There is *zakat* on freely grazing sheep' and his words, 'There is *zakat* on sheep.' The first makes one aware of the cause and the second does not. This is the reason for its inclusion." (*Sharh at-Tanqih*, p. 119)

The precondition for accepting what is implied by the attribute is that it follows the predominant custom, like the words of the Almighty in the *ayat* of the prohibition of women, *"Your stepdaughters who are under your protection, being the daughters of your wives you have had sexual relations with."* (4:23) We see here two attributes: one is mentioned by way of prevailing custom. Mentioning it does not indicate the affirmation of the opposite of the judgement when it does not exist - which is lawfulness. It is their being under protection. The other is not of this type. He mentioned it as affirming the opposite of the judgement. It is that of the mothers with whom he has sexual relations.

The superior meaning (*fahwa*), which is what the Hanafis call the "inferred or implied meaning of a text" *(dalala an-nass)* or the indication of the most appropriate or harmonious meaning, or clear analogy in the definition of some *fuqaha'*. It is when the spoken judgement establishes that about which it is silent since that judgement is even more appropriate. It has two categories:

One: Affirmation of what is greater since it is established in what is less because a lot increases the strength of the judgement, like the words of the Almighty, *"Do not say 'Uff' to them, and do not chide them."* (17:23) That extends to hitting, which is more likely to be forbidden than saying 'uff' and it has greater harm. That is the reason for the prohibition.

Two: The affirmation of the judgement in a little because a little necessitates strength of judgement which is not found in a lot, like the words of the Almighty, "Among the People of the Book there are some who, if you trust them with a pile of gold, will return it to you. But there are others among them who, if you trust them with a single dinar, will not return it to you," (3:75)

because whoever is trusted with a lot can be trusted with a little. Whoever is trusted with a pile can be trusted with a dinar. This example includes both categories.

These are the forms of evidence of the Noble Qur'an and their strength and rank in deduction with Malik. First is the unequivocal text (*nass*), then the *dhahir*, then that by which a harmonious meaning is implicit (*mafhum al-muwafaqa*) and then the implicit divergent meaning (*mafhum al-mukhalafa*). But into which category do we place the explication (*bayan*) of the Qur'an in general and detail? We must speak briefly on it:

4.   BAYAN AL-QUR'AN (EXPLICATION OF THE QUR'AN)

The Noble Qur'an is the first source of this Shari'a and it is its totality from which its roots and branches are derived and evidence is taken from it by the strength of deduction based on it. Since the Qur'an is like that, its declaration of the Shari'a must be undefined (*mujmal*) and require details, and its judgements general which need to be clarified. That is why help must be sought in the *Sunna* to derive some judgements from it, to clarify the general if it is undefined, or to confirm what in it needs clarification by its confirmation in the hearts of the believers.

The one who examines the Qur'anic ayats which clarify legal judgements will find some judgements which do not require explanation, like the ayat of slander, which is the words of the Almighty: "But those who make accusations against chaste women and then do not produce four witnesses: flog them with eighty lashes and never again accept them as witnesses. Such people are the wantonly deviant..." (24:4)

It is also like that with the ayat which clarifies the li'an divorce and how it is done. That is the words of the Almighty: "Those who make an accusation against their wives and have no witnesses except themselves, the legal proceeding of such a one is to testify four times by Allah that he is telling the truth and a fifth time that Allah's curse will be upon him if he is lying. And the punishment is removed from her if she testifies four times by Allah that he is lying and a fifth time that Allah's anger will be upon her if he is truthful." (24:6-9)

In this *ayat* the *li'an* is explained as well as the circumstances in which it is obliged. The *Sunna* clarified what results from it.

Some of the *ayats* of the Qur'an connected to judgements require clarification when they are undefined and require details, or something is hidden in them which requires explaination or interpretation, or they are unqualified and then are qualified. Scholars agree that the *Sunna* is that which clarifies them, and the *fuqaha'* of Madina and the *fuqaha'* of Iraq concur on that. If there is a difference between them, it is that the people of Iraq limit the places where clarification is needed and the *fuqaha'* of Madina widen its scope. According to the Iraqis the specific does not need clarification in the Qur'an and they consider every clarification of it as superfluous. So all that comes in the *Sunna* connected to its subject is superfluous to it and not accepted unless it is firm. The *fuqaha'* of Madina and those who follow their path believe that all that is sound of

tradition in one of the subjects which the Qur'an mentions clarifies it, makes its general specific, limits what is unrestricted, or clarifies its specific.

In fact the *Sunna* is the clarification of the laws of Noble Qur'an. So *zakat*, fasting, the prayer and *hajj* are all laws which have come in general and are clarified by the *Sunna*. Usury and its categories have come in the Qur'an in general and the *Sunna* clarifies them. Many of the rules of marriage come in general and the *Sunna* clarifies them. It is then clarification of the Qur'an and its interpretation. Allah Almighty says, *"We revealed the Reminder to you to make clear to people what was revealed to them."* (16:44) That is why it says in the books of ash-ShafiÔi, the student of Malik, that the Book and the *Sunna* are considered as a single source, the first of sources and its origin.

The Second Source: The *Sunna*

There is no dispute that Malik was an Imam in *hadith* and *fiqh*: a transmitter of the first rank in *hadith* and a *faqih* with insight into *fatwa* and the deduction of judgements. His transmission of *hadith* is also considered one of the soundest of transmissions, particularly in his choice of transmitters and knowledge of the accuracy of their transmission. He was a *faqih* with insight into *fatwa* and derivation of judgements, analogy of similar things, recognition of the welfare of people, and what *fatwas* are appropriate without being far from the text nor shunning what is transmitted of cases and *fatwas* ascribed to the righteous *Salaf*.

Some people criticised the *riwaya* of ash-Shafi'i and Abu Hanifa. In spite of their prejudice, they were not able say anything about Malik's transmission. Some scholars, including at-Tabari, deny that Ahmad ibn Hanbal was a *faqih* and said that he was a only a *muhaddith* and not a *faqih*. Malik alone is a *muhaddith* who is counted in the first rank by consensus and a *faqih* with insight into the subjects of *fatwas* and its sources by consensus. This is a confirmed and established matter on which there is agreement among the scholars of *hadith* and *fiqh*.

Imam al-Bukhari, whose book come to be considered the soundest of the books in *hadith* and the strongest of them in attribution considers the *isnad* of Malik in some *hadiths* as the soundest *isnad*. It is: Malik from Abu'z-Zinad from al-A'raj from Abu Hurayra.

Abu Dawud, the author of the *Sunan*, says, "The strongest *isnad* is: Malik from Nafi' from Ibn 'Umar, then Malik from az-Zuhri from Salim from his father; then Malik from Abu'z-Zinad from al-A'raj from Abu Hurayra, and he did not mention anyone except Malik.

This testimony from the people of this science indicates that two things place him in the first rank of *hadith* scholars:

He himself is reliable. He is just and accurate and there is no way to attack his transmission in respect of his person or his accuracy. People have spoken against others in that respect.

He was excellent in selecting those from whom he transmitted. He and his men from whom he related are in the first rank since al-Bukhari considers him and some of his men to have the soundest *isnad*, and Abu Dawud considers him and his men in the first three ranks in the strength

of *isnad*. He is reliable and excellent in the measure of men by the testimony of the people of skill and precision who know this business.

He was strict about the preconditions of good character and accuracy in his transmitters.

THE SHARI'A OF THE *SUNNA* IN RELATION TO THE NOBLE QUR'AN

There are three ways in which the Sunna clarifies and complements the Qur'an.

1: It directly confirms the judgements of the Qur'an; in this case it adds nothing new whatsoever, nor does it clarify something unclear or limit something which is unrestricted or specify something referred to in general terms like: "fast when you see it and break the fast when you see it." This *hadith* is confirmation of the Qur'an and reinforces the words of the Almighty: *"The month of Ramadan is the one in which the Qur'an was revealed."* (2:185)

2: The *Sunna* also casts light on the intention of the Qur'an and limits some things which are unrestricted in the Book and gives detailed form to some matters which are undefined by the Book.

One example of that is the sound *hadith* of the Prophet, may Allah bless him and grant him peace, which clarifies the *ayat*: *"Those who believe and do not mix their belief with any wrongdoing."* (6:82) in which he makes it clear that 'wrongdoing" in this context means *shirk*. Another example is the way that the *Sunna* delineates the details of the prayer, *zakat* and *hajj*. The Noble Qur'an deals with these acts of worship in general. It prescribes the prayer but does not give details of its pillars and times. The Prophet expounded them by action and said, 'Pray as you saw me pray." The Qur'an commands us to pay *zakat* but the *Sunna* gives us its details, specifying the *zakat* to be paid on gold and silver, on crops and fruits, and on livestock. The same applies to the *hajj*. It is referred to in general terms in the Qur'an but it is the Sunna of the Prophet which clarifies its practices for us.

The Sunna also clarifies the hudud in the same way. Allah says: "As for both male thieves and female thieves, cut off their hands as payment for what they have earned: an object lesson from Allah." (5:38) The ayat does not define the minimum for which the hand is cut off, or its preconditions. That is left to the Sunna. There are, of course, a great many other situations in which the Sunna amplifies Qur'anic texts in the same way.

Part of what the Malikis consider unspecified is that which has a shared meaning. It indicates one of two or more meanings in its basic form, like the word '*qar*" in the words of the Almighty, *"Divorced women wait with themselves for three periods (qar')."* It is used both for menstruation and for purity. The *Sunna* is what makes it clear according the disagreement between the scholars in this clarification.

Part of clarification is to make the general specific. Malik, as we made clear, stated that the *Sunna* makes what is general in the Qur'an specific with preconditions which we will mention, even if it is a single report if it has support because in his view, when the general and specific meet, the general is specified by it, if something else supports the *Sunna*.

In addition to this view, Malik distinguishes between the *Sunna*'s clarification in making the general specific and the clarification of what is undefined. The undefined cannot be acted on without clarification. As for the general, its generality can be acted on, even there is a possibility in its evidence, but the predominance of its evidence for every other possibility is acted upon until the evidence is established that it is specific. Then there is a difference between it and the undefined, even if the *sunna* of single reports clarifies it according to Malik and his students.

3. The third way in which the *Sunna* complements the Qur'an is in judgements about which the Book is silent. An example of this is Malik's position of rendering judgement with only one witness and an oath when a claimant does not have two witnesses. The testimony of one witness is heard and the oath of the claimant takes the place of the second witness. This procedure is based on a tradition which Malik considers sound. This also includes the fact that having the same wet-nurse makes marriage unlawful so that suckling makes unlawful what lineage makes unlawful. Another example is inheritance by a grandmother, which is not mentioned in the Qur'an.

These categories of the *Sunna* are in respect of the Qur'an, and they clarify it or bring a judgement which it makes clear, even if the basis of its argument is based on the Qur'an.

There is something about which scholars disagree: when the Sunna clashes with the *dhahir* text of the Qur'an, whether the *dhahir* is general, as Malik considers the evidence of the general, or not. Some of them think that the *Sunna* specifies the *dhahir* text of the Qur'an whenever it encounters it because the *Sunna* clarifies it and the evidence of the *dhahir* is probabilistic and so it is close to the undefined, even if it is not undefined. The *Sunna* is that which clarifies the undefined and makes clear what is meant by the obscure, as it clear when it makes it clear that 'wrongdoing' means shirk in the words of the Almighty, *"Those who believe and do not mix their belief with any wrongdoing."* (6:82)

A group of the *Salaf* adopted that view and Ibn al-Qayyim supported it saying, "If it were permissible to reject the sunan of the Messenger of Allah, may Allah bless him and grant him peace, based on what a man understands from the dhahir of the Book, most of the *sunan* would have been rejected and totally nullified. So if anyone is presented with evidence from a sound *sunna* which opposes his school and stance, he could cleave to the generality or unrestrictedness of an ayat, and say that this *sunna* is opposed to that generality or this unrestricted statement and so it is not accepted. The Rafidites [Shi"a] reject the *hadith*, "We, the company of Prophets, do not leave inheritance" by the generality of the *ayat*, *"Allah instructs you regarding your children: A male receives the same share as two females,"* (4:11) No one rejects the *sunna* by what is understood from the *dhahir* of the Qur'an but that he accepts it many times over when it is like."

Others disagree with that.

Of which sort was Malik, the Imam of the Abode of the *Hijra*, and the shaykh of Hijazi *fiqh* in his time?

We find that in certain cases he put the *dhahir* of the Qur'an before the *Sunna*, and in certain judgements he made the Sunna oversee the *dhahir* of the Qur'an, and so one must look for the underlying cause in the two matters in order to deduce the rule in it.

We find that he took the Noble Qur'an, even though the evidence of the expression was *dhahir* and rejected the hadith, "The Messenger of Allah, may Allah bless him and grant him peace, forbade eating all birds with talons" since the famous position of the school of Malik is that it is permitted to eat birds, even if they have talons. For that, he took the *dhahir* text of the Noble Qur'an: *"Say: "I do not find, in what has been revealed to me, any food unlawful to be eaten except for carrion, poured out blood, pig-meat.."* (6:145) and abandoned the *hadith* and considered it weak in this conflict.

As for the *hadith* of prohibition of wild beasts with fangs, he accepted it and made that disliked, not forbidden. So it is as if the *ayat* is taken literally. This is what the Malikis mention as ascribed to Malik, but the *Muwatta'* contains the prohibition of every wild animal with fangs which is taken from the explicit *hadith*.

We also find that he forbade eating horses based on the *dhahir* text of the Qur'an, *"Horses, mules and asses for you to ride and adornment"* (16:8) which did not mention eating. So the text of the Qur'an forbids it. It is reported that it is lawful in certain *hadiths*.

The explicit text of the *Sunna* is advanced about being married to a woman and her aunt over the *dhahir* words of the Almighty, *"Lawful to you is what is beyond that."* (4:24)

The Malikis were guided in the light of investigation to the fact that Malik put the *dhahir* of the Qur'an before the Sunna. In that he is like Abu Hanifa, except when the *Sunna* is reinforced by something else. In that case it is considered as specifying the general of the Qur'an or qualifying what is unqualified. The *Sunna* can be reinforced by the Practice of the People of Madina, as he mentioned in the *hadith* of the prohibition against eating any wild animal with fangs. The *Sunna* is considered as specifying what the *dhahir* of the text contains. That is why it states in the *Muwatta'* after the *hadith* of the prohibition against eating any wild animal with fangs, "This is the custom among us." (25.4.14) This tells us that the people of Madina accept that.

It is like that when it is reinforced by consensus, as it the case in the prohibition against being married to a woman and her aunt. There is consensus on that. This vindicates the *Sunna* and it makes the generality of the *ayat* specific.

According to Malik, however, if the *Sunna* is not supported by consensus, the Practice of the People of Madina or analogy, the text must be taken literally and any *sunna* which contradicts that literal text is rejected if it is transmitted via a single tradition. When it comes through multiple transmissions (*mutawatir*), the *Sunna* can be raised to the level of abrogating the Qur'an in Malik's opinion. So it is more appropriate that it be raised to making the general specific and qualifying the unqualified and preferring the probable in its literal sense. That is acting according to both texts and accepting them.

So Malik preferred the *dhahir* text over a single tradition, even one considered sound, if it was not reinforced by consensus or practice. On this basis he rejected the report "If a dog drinks out of one of your vessels, you should wash it seven times, once with earth" because it clashes with the apparent meaning of the Qur'an in the words of the Almighty, *"what is caught for you by hunting animals which you have trained."* (5:4) According to this, anything caught by hunting dogs is permitted, which indicates its purity and refutes the idea suggested by the report that it is impure.

This was the view of Malik about the generality of the Qur'an with the *Sunna*. You see that his view is close to those of the *fuqaha'* of Iraq, even if they deem that the general is absolute in its evidence and has no probability in it which originates from evidence. He stated that it falls into the category of the apparent (*dhahir*), but he advanced the *dhahir* over the tradition when it is not reinforced by something else - consensus, the Practice of the People of Madina, or analogy.

RIWAYA (TRANSMISSION) IN MALIK'S VIEW

The *hadiths* of the Prophet are supported by an *isnad* connected by one of three paths: *tawatur* (multiple), *mustafid* (exhaustive) and *mashhur* (famous, from more than two), or single traditions (*ahad*).

Al-Qarafi defined the mutawatir report as the report of people about a tangible matter in which their multiple transmission normally makes lying impossible. This definition demands that the chain of the entire line of transmission be by multiple transmission so that the *hadith* was learned by several people from several people until the *isnad* reaches the Prophet, may Allah bless him and grant him peace.

This is what distinguishes the mutawatir from the *mustafid* or famous in the Hanafi view, which is the *hadith* in which the first or second rank has single individuals. Then after that it became famous and people, whose multiple transmission is not suspected of lying, transmitted it. The author of *Kashf al-Asrar* said, "Fame is taken into account in the second and third generations, but fame is not considered in the generations after the third generation. Most single reports are famous in these generations but are not called 'famous'."

The *mutawatir* conveys knowledge which is essential, i.e. there is no scope for the *faqih* to deny it.

Some scholars have said that the exhaustive is not like single reports inasmuch as it is open to uncertainty (*dhann*). Rather it conveys a knowledge in which one is confident since it was famous in the generation of the Followers, which was a time of recent transmission when the waymarks of the *sunna* were visible and the traditions clear. Its fame in that time refutes the suspicion of any lie or error in transmission. Some scholars reckon it to be in the rank of the *mutawatir* since it conveys certainty, but not by way of necessity, but by way of investigation and deduction. Some scholars consider it to be like single traditions since uncertainty is affirmed in it.

Similarly there is the disagreement of scholars about the famous (*mashhur*). It appears that Malik ranked the famous above the single, because it was famous in the rank of the Followers and exhaustive so it is the transmission of several people from the Companions, and he believes that that leaves no scope for doubt.

As for single reports, they are what a group of the first three generations did not relate, and they are considered evidence by the majority of the Muslims. Indeed, they are evidence by their consensus, but knowledge of them conveys uncertainty, even if acting by them is obligatory. Ash-Shatibi said, "Acting by single reports is obligatory because, even though it is acting by uncertain evidence, is is based on the definitive because Allah Almighty commanded us to follow the Messenger in all that he brought. The Almighty says, *"Anything the Messenger gives you you should take and anything He forbids you you should leave alone."* (59:7) and the Almighty says, *"Anyone who obeys the Messenger has obeyed Allah."* (4:80) When the path of reaching the statement of the Messenger is uncertain, it is like the indication of the Qur'an: even if it is uncertain, that does not preclude acting by it." Ash-Shatibi said about this:

"One acts on the probable meaning of something uncertain (*dhann*) which derives from a definitive source when most single reports have it. It clarifies the Book when the Almighty says, *"We revealed the Reminder to you to make clear to people what was revealed to them."* (16:44) The like of that has come in *hadiths* which describe lesser and major purification, the prayer and the *hajj* which clarify the text of the Book. It is like that with the *hadiths* which prohibit a group of sales, usury and other things since that derives from the words of Allah Almighty, *"But Allah has permitted trade and He has forbidden usury,"* (2:285) and the words of the Almighty, *"Do not consume one another's property by false means, only by means of mutually agreed trade,"* (4:29) and other types of clear signs transmitted by single reports." (*al-Muwafiqat*, pt. 3, p. 17)

Acting by single reports, even if they are uncertain, relies on an definitive fundamental source: the Book of Allah Almighty, and the fact that it is uncertain does not prevent acting on it.

Ibn Rushd divided the *Sunna* in the Maliki view into four categories according to the strength of its methods of transmission and its subject matter.

A *sunna* whose rejection is a mark of unbelief. If someone does reject it they are asked to repent. If they do not, they are to be killed as unbelievers. This applies to *sunnas* which have been transmitted by multiple transmission. Acquiring knowledge of such a *sunna* is obligatory: like wine being unlawful, the prayers being five, the Messenger of Allah, may Allah bless him and grant him peace, commanding the calling of the *adhan*, and other similar things.

A *sunna* which only people of deviation, error and denial reject and which all the People of the *Sunna* agree to be sound: such as the hadiths of intercession, the Vision, the punishment in the grave, and similar things connected with faith, even if they are not mutawatir in their isnad.

A *sunna* which it is obligatory to know and to act on, even if some of the opponents of the People of *Sunna* oppose it, such as wiping over leather socks, because it is known that it is acted upon by the vast majority of the Muslims and its opponents are very few.

A *sunna* which it is obligatory to act on, being one which is transmitted by a reliable source from a reliable source. They are numerous in all the categories of law and it is obligatory to act by them. An example of this is judging by the testimony of two witnesses of good character, even if they might lie or be suspect in their testimony.

As we said, Malik is strict about criteria for accepting transmission. He used to say, "Knowledge is not taken from four, and it is taken from other than them. It is not taken from a fool. It is not taken from someone following a sect who invites people to his innovation, nor from a liar who lies in his conversation with people, even if he is not suspected of that in the *hadith* of the Messenger of Allah, may Allah bless him and grant him peace, nor from an old man with excellence, righteousness and worship if he does not know what he relates and what he says."

He used to say, "I have met shaykhs of excellence and righteousness in this land who relate and I have not listened to anything from them." He was asked "Why, Abu 'Abdullah?" He said, "Because they did not know what they were reporting."

This indicates the preconditions which he required in his men. He made acknowledged good character a precondition and did not accept transmission from anyone lacking good character. He did not accept it from someone unknown because someone who rejects people of good character when they do not know what they convey is more likely to reject someone who is not known. Perhaps he might not be upright, and perhaps if he is not upright, he does not know what he conveys and what he leaves. Indeed it is a precondition that the transmitter be more than upright. He should not be foolish and should be without stupidity, ignorance and lack of balance. Stupidity can be combined with worship and fear of Allah. Malik did not accept from the stupid godfearing nor from the worshipper who did not balance matters soundly.

There are two more preconditions in addition to the two already mentioned:

That he is not someone following an erroneous view who invites people to his innovation. Transmission is not accepted from those who following different sects, out of the fear that partisanship for their position will move them to impute things to the Messenger of Allah which he did not say. In Malik's view, they and whoever follows that innovation are considered deviant (*fasiq*). He considers deviation in the soul and intellect worse than the iniquity of the limbs.

Accuracy and understanding and knowledge of the meanings of the *hadith*, and its goals and aims. This is why he did not accept transmission from the one who did not know what he conveyed.

He rejected the hadiths of many of his contemporaries, even when they had good character since they were not the people of this business.

Then it must be noticed that if someone fulfils Malik's preconditions for transmission and is an acceptable source, nonetheless what is taken from him must be examined regarding the understanding of the *hadith* which he related as well as the connection between it and what is well-known of the legal rules, what is derived from the Book of Allah and the *Sunna* of His Messenger, that on which the people of his time agreed and that which the people of Madina have. If it did not deviate from any of that, he gave *fatwa* on its basis and took the contents of its

judgements. If it did not accord with all of that, he rejected it because he did not like anomalous knowledge. This may coincide with the juristic principle affirmed by the scholars of the fundamentals in the Maliki school about what is related by means of single traditions, including what is related by *tawatur* in which there single transmissions, like the rules of the Shari'a in the obligation of the prayer, *zakat*, *hajj*, fasting and the times and judgements of these obligations. That is why when Malik learned that a *hadith* was *gharib* [with only a single reporter at one stage of the chain], he rejected it even though its transmitter was reliable. He avoided the *gharib* and distrusted it, even if the transmitter fulfilled all his preconditions.

It is noteworthy that he used to relate hadiths and record them, but he would give *fatwa* contrary to them. Perhaps that *fatwa* was after he learned of a fault in them which demanded their refutation and that came about after he had transmitted it. For instance, he related the *hadith* about the option of cancelling a sale in the meeting and then did not use it, and he related the *hadith* of the dog licking a vessel and rejected it because it was contrary to the explicit text of the Qur'an. Then he said, "It is not in the *Muwatta'* and is not firm."

In general, Malik sometimes rejected the *hadiths* of reliable people when he found them contrary to the well-known and famous judgements of Islam. That is why sometimes there is a clash between analogy and single reports. Malik studied them and favoured one of them over the other. Sometimes he rejected analogy and sometimes he rejected the single reports.

Accepting the *mursal hadith* [where the link between the Follower and the Prophet is missing]: Malik used to accept *mursal hadith* and *balaghat* (where the Prophet is quoted directly). It is clear that in that he acted as most of the *fuqaha'* of his time acted. Al-Hasan al-Basri, Sufyan ibn 'Uyayna, and Abu Hanifa used to accept *mursal* hadith.

If you open the *Muwatta'*, you will find many *mursalat* in it. Part of that is the *hadith* of flogging, which says:

"Malik related from Zayd ibn Aslam that a man confessed to fornication and the Messenger of Allah, may Allah bless him and grant him peace, called for a whip and he was flogged. Then he said, "People! The time has come for you to observe the limits of Allah. Whoever has had any of these ugly things befall him should cover them up with the veil of Allah. Whoever reveals his wrong action to us, we will perform what is in the Book of Allah against him." (41.2.12)

Part of that is the *hadith* of the witness and the oath which is *mursal*. Its text in the *Muwatta'* is: "Malik said from Ja'far ibn Muhammad from his father that the Messenger of Allah, may Allah bless him and grant him peace, pronounced judgement on the basis of an oath along with a single witness." (36.4.5)

We see that the *isnad* in it only has Ja'far as-Sadiq ibn Muhammad ibn 'Ali Zayd al-'Abidin and the Companion is uncertain in it. It is *mursal* because the Companion is not mentioned in the strongest suppositions. In spite of that, Malik took it and gave it weight.

Part of the *mursal* is also the transmission of what the Prophet, may Allah bless him and grant him peace, did with the people of Khaybar. Malik said, "From Ibn Shihab from Sa'id ibn al-Musayyab that the Messenger of Allah, may Allah bless him and grant him peace, said to the

Jews of Khaybar on the day that Khaybar was conquered, 'I confirm you in it as long as Allah establishes you in it provided that the fruits are divided between you and us." (33.1.1)

One of the *balaghat* on which he relied has come in the *Muwatta'* about the compensatory gift in divorce: "Malik said that it had reached me that 'Abdu'r-Rahman ibn 'Awf divorced his wife and gave her compensation in the form of a slave-girl." (29.17,45)

You see from this that he relied in his reporting from 'Abdu'r-Rahman ibn 'Awf the Companion on something that was conveyed to him. He did not mention the one who conveyed it and did not mention the *isnad* from 'Abdu'r-Rahman ibn 'Awf.

Why did Malik accept the *mursalat* and the *balaghat* and give *fatwa* on their basis although he is the one who was strict about them? The answer is that accepting the *mursal* is when it is from men who are trusted and selected and so he was strict in investigating the man who was reliable. If he fulfilled all the preconditions, he was content with him and accepted his isnad from him and accepted his *mursal* and *balaghat*. The strictness in his selection is the reason of tranquillity and accepting the mursal.

His acceptance of the *mursal* in this manner is not evidence that he allowed the mursal absolutely and permitted its acceptance absolutely. He allowed the *mursal* from those from whom he accepted the *mursal*. So the concern is with the person who conveyed it as a *mursal* report, not with the fact of its being *mursal* in itself.

It appears that the acceptance of the *mursal* reports was something widespread in Malik's time because reliable Followers used to declare that they omitted the name of the Companion when they related the *hadith* from a number of Companions. Al-Hasan al-Basri used to say, "When four Companions agree on a *hadith*, then I transmit it *mursal*." He also said, "When I say to you, 'So-and-so related to me,' it is his *hadith* and no one else's. When I say, 'The Messenger of Allah, may Allah bless him and grant him peace, said,' then I heard it from seventy or more."

It is related that al-A'mash said, "I said to Ibrahim when a *hadith* was related to me from 'Abdullah and he gave me the *isnad* and said, 'When I say "So-and-so related to me from 'Abdullah," he is the one who related that to me. When I said, "'Abdullah said," more than one related it to me.'"

It is clear that the *mursal* transmissions were frequent before there were a lot of false statements attributed to the Messenger of Allah, may Allah bless him and grant him peace. When there was a lot of that, scholars were compelled to adopt the *isnad* to define the transmitter and his position. Ibn Sirin said that: "We did not give the *isnads* for the *hadiths* until the Sedition occurred."

This is why Malik accepted them as Abu Hanifa accepted the *mursal* within the limits which we noted, which is that those who report the *mursalat* are reliable.

OPINION (*RA'Y*) AND *HADITH* FROM MALIK

It might be imagined that Malik was lacking in opinion, to judge from the statements of those who have written about the history of Islamic *fiqh* and divided *fiqh* into *fiqh* of tradition and *fiqh* of opinion, considering Madina to be the place of the first and Iraq the place of the second and stating that Malik was a *faqih* of tradition and Abu Hanifa a *faqih* of opinion.

We see that this is not true of Malik but is true of Abu Hanifa. We find, for instance, that Ibn Qutayba considered Malik to be a *faqih* of opinion. We mentioned in our account of the life of Malik that his contemporaries considered him to be a *faqih* of opinion so that one of them asked in his time, "Who is capable of formulating an opinion in Madina now that Rabi'a and Yahya ibn Sa'id have gone?" The reply was "Malik".

Malik used to study questions of *fiqh* with the eyes of an expert who could compare them against the measure of people's best interests and compare them by means of analogy, and study the *hadiths* of the Prophet in the light of these things, and compare them against the general meaning of the Noble Qur'an. He explored all these matters with a profound and precise examination. In this study we see that Malik was the *faqih* whose opinion did not swerve from the deen just as we have seen that he was a *hadith* scholar with reliable transmissions.

The extent of Malik's use of opinion is shown clearly by two things: firstly the considerable number of questions in dealing with which he relied on opinion, whether it was reached by analogy or *istihsan*, *masalih mursala*, *istihsan* or by *sadd adh-dhara'i'*. There were many and if you open the *Mudawwana* you will see that clearly. The methods by which Malik reaches opinions are more numerous than those used by others and that shows the great importance of opinion in his work. Its frequency is a clear indication of his reliance on it and that he clearly made use of it.

Secondly we find that when there is a conflict between single traditions and analogy, which is one kind of opinion, we find that many of the Malikis confirm that he preferred analogy, and they all mention that sometimes he used analogy and rejected traditions if they came from a single source.

Al-Qarafi said in the *Tanqih al-Fusul* in the discussion regarding the conflict between single reports and analogy:

"Qadi 'Iyad in *at-Tanbihat* and Ibn Rushd in *al-Muqaddamat* report two positions in the Maliki school about giving priority to analogy over the single tradition. The Hanafis also have two positions. The argument behind giving priority to analogy is that it is in harmony with the rules when it entails obtaining benefits or repelling evils while the report which differs from it would prevent that, and so that which is in harmony with the rules is preferred over what opposes them.

"The reason for the prohibition (of giving analogy priority over the tradition) is that analogy is derived from the texts and that which is derived is not preferred to its source. As for analogy being derived from the texts, analogy can only be evidence when it is based on texts and thus it is subsidiary to them. Furthermore, that to which the analogy is connected must also be a text, and

analogy is dependent on texts from both aspects. The branch cannot be giving precedence over its root. If it were given precedence before its root, that would invalidate it. If it invalidates its root, then it itself would be invalid.

"The answer to this point (i.e. that the branch is not advanced over its root) is that the texts, which are the basis of analogy, are not the text over which analogy is preferred. So there is no contradiction and the branch is not preferred over its root. It is based on other than its root." (*Tanqih*, p. 761)

This tells us three things:

1. The school of Malik, according to many of his followers, prefers analogy to the single report. The scholars of his school have two positions in that just as the scholars of the Hanafi school have two positions in it. As there are those in the Hanafi school who state that analogy is preferred over single traditions, so there are Malikis who say that Malik preferred analogy over single traditions. The Hanafi who made this statement was 'Isa ibn Aban. Al-Bazdawi says that analogy is preferred over the single tradition when the Companion who related it is not a *faqih*. That cannot conceivably be his opinion. When he sometimes rejected the single traditions and accepted analogy that was not because he unrestrictedly preferred analogy: it was because some analogies are definitive or because he did not accept the isnad of the single tradition. So is that view of Malik? We will clarify that soon, Allah willing.

2. It shows that he thought that Malik's position was to give analogy priority over single traditions. Indeed, he clearly stated that in the beginning of his words: "Malik preferred analogy over single traditions." Then the disagreement is reported. He explicitly states that that is the position of Malik. That is why the argument of the one who says that analogy is not given priority is criticised, and the argument of the one who relates that analogy is preferred without criticism is abandoned.

3. He indicates that the basis of analogies is to bring about benefits and avert harm. That is the objective of Maliki *fiqh* since that is the basis of opinion in his view, however numerous its categories and different its names. Whether opinion is done by analogy or by something else - *istihsan*, *masalih mursala*, or *sadd adh-dhara'i*– its bedrock is to bring benefits and avert harm.

This is one of the texts which the Maliki *fuqaha'* wrote in which they mentioned the opinions of the Imam of Madina when there is a conflict between a tradition and analogy. Al-Qarafi is the one from whom we transmitted that it has a position in Maliki *fiqh*. He collected its rules, formulated its principles, expounded it, and directed attention to its judgements in a manner which made it flexible and appropriate for application, in accordance with the welfare and benefit of people.

In *al-Muwafaqat*, ash-Shatibi lists a group of questions in which Malik used analogy, benefit, or the general principle and abandoned the single tradition because he thought that the principles which he adopted were definitive or referred to a definitive basis, and the report which he rejected was probabilistic.

1: One example is that Malik rejected the *hadith* about washing the vessel seven times after it has been licked by a dog, once with earth. Malik said in it, "The *hadith* has come but I do not know what the truth of it is." He considers it weak and says, "One eats what it catches so how can its spittle be disliked?" So he derived a definitive principle from the confirmation about eating its game. This is the words of the Almighty, *"what is caught for you by hunting animals which you have trained,"* (5:4), indicating the purity of its spittle while the hadith indicates its impurity and thus the hadith clashes with the definitive deduction from the Noble Qur'an.

2: He rejected the *hadith* about limiting the option of cancelling a sale to the meeting which demands that each those who make the contract have the right to cancel the contract as long they have not parted. He said, *"There is no specified limit according to us."* (38.38) The reason for rejecting it is that the meeting does not have a known end so that cancellation would have a known period. By consensus the precondition of the option to cancel is invalidated if it does not have a known term, so how can a judgement by the Shari'a affirm a precondition not permitted by the Shari'a. If the option had been permitted for an unknown term, then the precondition of the option would be permitted without limit. Furthermore the *hadith* with an unknown period would contrast with the rule regarding uncertainty and ignorance which is not affirmed in contracts.

3: He did not accept the tradition "If anyone dies owing fasting, his guardian can fast for him," nor the report which has come from Ibn 'Abbas, "A woman came to the Messenger of Allah, may Allah bless him and grant him peace, and said, 'Messenger of Allah, my mother has died owing a month's fast." He asked, 'Do you think that if you father left a debt, you would pay it?' She replied, 'Yes.' He said, 'The debt of Allah is more entitled to be paid.' He related this hadith under hajj and not fasting, and related about vows and fasting. Malik rejected it all and took the rule derived from the Noble Qur'an: *"No bearer of a burden can bear the burden of another, and man has nothing but that for which he strives."* (53:37-38)

4: Malik denied the report about overturning the pots in which camels and sheep had been cooked before the division. It is related that camels and sheep from the booty were slaughtered before the division and that the Prophet, may Allah bless him and grant him peace, ordered that the pots be overturned and he began to rub the meat in the dirt. Malik rejected the *hadith* because overturning the pots and rubbing meat in the earth is waste which negates benefit and the ban is enough in to clarify the error of what they did and that they did wrong in what they did. Then they ought to eat what they slaughtered or divide it without overturning the pots nor rubbing it in the earth.

5: Malik did not adopt the *hadith*, "If anyone fasts Ramadan and follows it with six of Shawwal..." he has He took that position on the basis of the principle of *sadd adh-dhara'i'* out of fear that doing it constantly would lead to adding to Ramadan and making that obligatory.

6: Part of that is that suckling does not have a specific minimum of times, like ten or five based on the rule derived from the noble *ayat*: *"Your mothers who suckled you and your sisters by suckling."* Derived from its general nature is that a little and a lot of suckling both make unlawful. The definition of ten or five opposes the general meaning of the *ayat*, and so suckling applies to both a few and many and does not have a minimum.

7: He rejected the report about the animal whose milk is allowed to collect by not being milked. It is what is related from Abu Hurayra that the Messenger of Allah, may Allah bless him and grant him peace, said, "Do not allow the milk of camels and sheep to collect in the udders. If anyone buys it, he has a choice between views after he has milked it. If he wishes, he keeps it, and if he wishes, he returns the animal and a *sa'* of dates."

In one of the two positions of Malik he rejected it and said about it, "It is not in the *Muwatta'* and it is not firm." It contradicts the basis principle of "Revenue is by virtue of responsibility" [ascribed to the Prophet] and because someone who destroys a thing is responsible for its like or its price, and not a fine in the form of another type of food or goods. (*al-Muwafaqat*, pt. 3, pp. 24-25)

We have quoted several secondary rulings, and without a doubt they indicate that Malik sometimes rejected single traditions when they opposed legal decisions. Is it deduced from this that Malik gave preference to analogy over the single traditions unrestrictedly, as the statement of al-Qarafi would indicate?

Before we state what we think is probable in the subject, we note that some of these secondary rulings are disputed among the Malikis – some of them abandon the single tradition for the apparent text of the Qur'an. We mentioned at the beginning of what we said about the *Sunna* that if it is opposed by the *dhahir* text of the Qur'an, then the *dhahir* text of the Qur'an is taken unless the *Sunna* is reinforced by more evidence like the Practice of the People of Madina. Thus not adopting the tradition of suckling, the tradition of fasting for a dead person, and the tradition of washing the vessel seven times after it is licked by a dog is because of opposition to the *dhahir* text of the Qur'an. It is not because of preferring analogy or opinion over single traditions.

As for the four other matters and other instances in which the single tradition is abandoned since it opposes a confirmed legal rule from the totality of Islamic *fiqh* or some of its texts, what is understood from what ash-Shatibi said is that a single tradition is rejected in favour of opinion without a text itself when it opposes a general rule which is definitely one of the rules of the Islamic Shari'a.

Thus not every analogy or opinion refutes the single tradition. Rather it is the analogy or opinion which relies on a definitive basis and confirmed rule in which there is no scope for doubt. That principle is straightforward because analogy based on a definitive rule is definitive and the single tradition is probable, and when a probable is opposed by something definitive, then the definitive is taken.

Malik did not only stipulate that the principle by which the single tradition is refuted be definitive. Rather he stipulated that the tradition not be reinforced by another principle. If it is, the single tradition is not rejected.

Ibn al-'Arabi said: "When a single tradition is in conflict with one of the principles of the Shari'a, is it permitted to act by it? Abu Hanifa said, 'It is not permitted to act by it.' Ash-Shafi'i said. 'It is permitted.' Malik hesitated in the question." He said, "His best-known statement, and

that on which one relies, is that if the *hadith* is reinforced by another principle, it is acted on. If it is alone, it is abandoned. Then he mentioned the question of Malik about the dog licking. He said, 'Because this *hadith* is in conflict with two great fundamental principles: 1. The words of the Almighty: *'Eat what they catch for you.'* (5:4) 2. The cause of purity is life and it exists in the dog. He also mentioned the hadith about the *'ariyya* (which is selling the dates on the trees for their like in dry dates). Although that conflicts with the principle regarding usury, it is supported by the principle of what is conventional and accepted (*ma'ruf*)." (*al-Muwaqafat*, p. 18)

This is what Ibn al-'Arabi concludes. He thinks that the single report is refuted by general principles when they are definitive and when it is not reinforced by another principle. That is why he accepted the *hadith* of the *'ariyya* although accepting it is contrary to the rule about usury which forbids selling likes of the same type in different amounts or with a delay. Although that hadith clashes with the rule about usury, it is reinforced by the principle of what is conventional and giving comfort to the poor, or so that those who do not own trees which bear fresh dates can offer what they have of dry dates in return for taking from what is on the trees and this satisfies the need of those who have stored dates which they offer to eat from the new dates. The notion of usury is remote in that.

After thus examining the statements of those scholars who have distinction in deduction in Maliki *fiqh*, we cannot confirm the preference indicated in what al-Qarafi said: favouring analogy over the single tradition absolutely. We see that analogy is favoured over the single tradition when it is based on a definitive principle and the single tradition is not reinforced by another definitive principle.

Analogy is favoured in this case because the single tradition clashes with unequivocal texts from which this principle is derived and the interconnected judgements which come from the Wise Lawgiver and from which this principle is formed which are one of the fundamental principles of Islamic *fiqh*.

This is what we think is the opinion of the Imam of the *Sunna* and the Abode of the *Hijra* when a single tradition clashes with analogy. Analogy is given priority in that case with these restrictions. That makes Malik one of the most distinguished *fuqaha'* of opinion. It does not in any way detract from him being the Imam of the *Sunna*. Rather it makes that Imamate more impressive, because the Imam of the *Sunna* is not someone who simply follows every tradition which comes to him without investigating its isnad and the text. Malik investigated the *isnads* and was most particular about the people from whom he related and rigorous in examining their states.

In the same way he examined the texts of the traditions and weighed them very finely. He would weigh them against other general Islamic principles which are derived from its texts and goals and attested to by various judgements from the secondary rulings. If everything about them was in order with them, he would accept them. If anything was not right, he would reject them.

We should state at this point that if a single tradition was reinforced by the Practice of the People of Madina, that would raise it from being merely an isolated report to the rank of

consensus. In this case it cannot be rejected, for if the practice of the people of Madina reinforces a single tradition it is preferred even to an apparent text of the QurÕan. Similarly the single tradition is given priority when it clashes with some analogies and is reinforced by the Practice of the People of Madina. In such a case it is not considered single.

As we said, this does not indicate that Malik forsook the *Sunna* in any way: it simply indicates that he used individual opinion (raÕy) and that this was the method of some of the righteous *Salaf*. For instance, 'A'isha and Ibn 'Abbas, may Allah be pleased with them, rejected the tradition of Abu Hurayra about washing the hands before putting them into a *wudu'* jug under the general established principle of removing constriction from the deen. Neither 'A'isha nor Ibn 'Abbas ever forsook the *Sunna* or abandoned any sound and established statement of the Prophet, may Allah bless him and grant him peace. But when they saw a tradition which clashed with a general confirmed principle on which there is no doubt, they left it and judged that its ascription to the Prophet, may Allah bless him and grant him peace, was not sound. They did not abandon the statement of the Prophet, but rather they rejected its ascription to him.

The Third Source: *Fatwas* of the Companions

In his early studies Malik concentrated on learning the cases of the Companions, their *fatwas*, and their judgements in respect of the questions which he concerned him. We have already seen how eager he was to learn the *fatwas* of 'Abdullah ibn 'Umar from his client Nafi'. He used to lie in wait for him when he went out so that he might ask him about the statements of 'Abdullah. He also was eager to learn the cases of 'Umar ibn al-Khattab, may Allah be pleased with him. He learned the *fiqh* of the seven *fuqaha'* of Madina. They transmitted the disagreements, perceptions, *fatwas* and decisions of the Companions as well as the *hadiths* of the Messenger of Allah, may Allah bless him and grant him peace.

The knowledge which he was taught and which he mastered and on which he based himself and on the basis of which he made deduction and according to which he proceeded with the implementation of the hadiths of the Messenger of Allah was the decisions and fatwas of the Companions.

That is why the *fatwas* of the Companions occupied a major place in Malik's deduction. He took them and did not infringe them. He accepted the position of the People of Madina because the Companions had been there, as he mentioned in his letter to al-Layth.

"Know, may Allah have mercy on you, that I have been informed that you give people *fatwas* which are contrary to what is done by our community and in our city. You are Imam and have importance and position with the people of your city and they need you and rely on what they get from you. Therefore you ought to fear for yourself and follow that whose pursuit you hope will bring you salvation.

"Allah Almighty says in His Mighty Book, *'The outstrippers, the first of the Muhajirun and the Ansar.'* (9:100) Allah Almighty further says, *'So give good news to My slaves, those who listen well to what is said and then follow the best of it.'* (39:18) It is essential to follow the People of Madina. The *Hijra* was made to it, the Qur'an was sent down in it, and the *halal* was made *halal* and the *haram* was made *haram* there. The Messenger of Allah was among them and they were present when the Revelation was revealed. He commanded them and they obeyed him. He made the *Sunna* for them and they followed it until Allah caused him to die and chose for him what is with Him. May the blessings of Allah and His mercy and blessing be upon him.

"Then after his death, the Muslims followed those from among his community who were given authority after him. When something happened to them that they knew how to deal with, they carried it out. If they had no knowledge on the subject, they asked about it and then they followed the most best line that they could deduce by *ijtihad*. In this they were helped by having been until recently in personal contact (with the Prophet). If someone opposed them or proposed an alternative view which was stronger and better than the ruling they had made , they left the former and acted upon the latter."

You see from this clear statement that is is necessary to accept the statement of the Companion. It contains a clear indication of the motive which moved him to accept their statements: they were first outstrippers among the Muhajirun and Ansar and that Allah praised those who follow them in the best. There is no doubt that accepting their statements is to follow them. That is praised in the Noble Qur'an and they were close in time to the Prophet. They were present when the Revelation was being received and the Prophet commanded them and they obeyed him. He made a *sunna* for them and they followed it. They were the people with the most knowledge of this *deen* and of the *sunnas* of the Noble Prophet. Accepting their statement is to accept their *sunna*.

Malik realised that the *Sunna* was to be found in what the Companions had. He saw that when 'Umar ibn 'Abdu'l-'Aziz wanted to spread knowledge of the *Sunna*, he commanded that the decisions and *fatwas* of the Companions in Madina be collected. Malik used to relate what this upright khalif said on this subject.

"The Messenger of Allah laid down a *sunna* and those in command after him laid down *sunan*. Accepting and acting on that is tantamount to following the Book of Allah, the completion of obedience to Allah, and firmness in the *deen* of Allah. No one after them can change the *Sunna* or is permitted to take on anything which opposes them. Whoever is guided by them is guided. Whoever seeks help by them is helped. If anyone leaves them to follow a way other than that of the believers, Allah will assign him what he has turned to and Hellfire will roast him. What an evil return!"

Malik admired those words and clung to them, holding that they embodied the perfect definition of the *Sunna*. He accepted that. The *Muwatta'* contains the *fatwas* of the Companions alongside hadiths of the Messenger of Allah, may Allah bless him and grant him peace. So he recorded the *fatwas* and decisions of the Companions as he recorded the statements of the Prophet, may Allah bless him and grant him peace, and considered them to be part of the *Sunna*.

Someone who reads the *Muwatta'* will not find any difficulty about the transmission of examples of the *fatwas* of the Companions which are related and recorded in the *Muwatta'* and accepted. If you turn its pages, you must see the *fatwas* of the Companions accepted. A few examples will illustrate this:

1) There is what has come about a loan in which it is made a precondition that the place where it be repaid is a country other than that in which the contract was made. The *Muwatta'* says: Malik reported that it had reached him that 'Umar ibn al-Khattab heard about a man who lent some food to a man on the basis that he would give it back to him in another country. 'Umar ibn al-Khattab disliked it and said, "Where is the transport?" (31.44.91) You see from this that Malik forbade that type of precondition based on this *fatwa* of 'Umar.

2) Another instance is a loan is when the lender imposes a precondition that he will get more than what he lent. We read in the *Muwatta'*: "Malik related that he had heard that a man came to 'Abdullah ibn 'Umar and said, 'Abu 'Abdu'r-Rahman, I gave a man a loan and stipulated that he give me better than what I lent him.' 'Abdullah ibn 'Umar said, 'That is usury.' 'Abdullah said, 'Loans are of three types. A free loan which you lend by which you desire the pleasure of Allah, a free loan which you lend by which you desire the pleasure of your companion, and a free loan which you lend by which you take what is impure by what is pure, and that is usury.' He said, 'What do you order me to do, Abu 'Abdu'r-Rahman?' He said, 'I think that you should tear up the agreement. If he gives you less than what you lent him, take it and you will be rewarded. If he gives you better than what you lent him of his own good will, that is his gratitude to you and you have the wage of the period you gave him the loan." (31.44.92)

Malik took this view. So if anyone made a precondition in a loan that he would get more than what he lent or better than it, the loan was invalid and he should take what he gave. It is better to let the term finish and take it at the end of it and the precondition is invalid.

3) Another instance concerns the gift which is invalid if the recipient dies before it is received or the giver falls ill before it is taken. In that he accepted the fatwa of Abu Bakr and 'Umar which comes in the *Muwatta'*: "Malik reported from Ibn Shihab from 'Urwa ibn az-Zubayr that 'A'isha, the wife of the Prophet, may Allah bless him and grant him peace, said, 'Abu Bakr as-Siddiq gave me some palm-trees which produced twenty awsaq from his property in al-'Aliyya. When he was dying, he said, 'By Allah, little daughter, there is no one I would prefer to be wealthy after I die than you. There is no one it is more difficult for me to see poor after I die than you. I gave you some palm-trees which produce twenty *awsaq*. If you had cut them and taken possession of them, they would have been yours, but today they are the property of the heirs who are your two brothers and two sisters, so divide them according to the Book of Allah.'" (36.33.40)

We also read: "Malik reported from Ibn Shihab from 'Urwa ibn az-Zubayr ... that 'Umar ibn al-Khattab said, "What is wrong with men who give their sons gifts and then keep hold of them? If the son dies, they say, "My property is in my possession and I did not give it to anyone." But if they themselves are dying, they say, "It belongs to my son. I gave it to him." If anyone gives a gift and does not hand it over to the one to whom it was given, the gift is invalid." (36.33.41)

Malik accepted these two reports.

Malik often accepted the *fatwa* of the Companions and considered their *fatwas* to be part of the *Sunna*. According to ash-Shatibi, the Imam of the *Sunna* was well known in his lifetime as strongly favouring this position.

He said in al-Muwafaqat:

"Malik often used this reason in relation to the Companions or the one who is guided by their guidance or takes on their *sunna* who Allah makes an example for others. The contemporaries of Malik followed his traditions and imitated his actions seeking the blessing of following someone whom Allah and His Messenger have praised and made them and those who follow them, may Allah be pleased with them, the Party of Allah. Allah Almighty says, *"The Party of Allah, they are the winners."* (58:22)

This was the way Malik viewed the fatwas and decisions of the Companions. He and Imam Ahmad are probably the Imams who held most strongly to the *fatwas* of the Companions and were most eager to learn them and take them as a basis for other decisions and *fatwas* and it was they who did that most often. They accepted the statements and *fatwas* of the Companions without limitation or precondition regarding their number, their attributes, their actions, or the type of opinion related from them. When they disagreed, they chose the majority position and that which was acted upon by the community as a whole.

Even if the Imams of the people of the four schools agree on this question, the amount of it in their *fiqh* differs. Malik and Ibn Hanbal rely on it a lot so that they consider it to be a pillar of their *ijtihad* and were trained in it in their juristic studies. Abu Hanifa and ash-Shafi'i are less than that in their acceptance, even those the methods are similar and the direction on the whole the same.

Although the four Imams accepted the statements of the Companions, there are those who do not accept the statements of Abu Bakr and 'Umar. Others do not accept the statements of the four rightly-guided khalifs. Whatever the situation of those later ones, the early and later ones among the Followers and those who came after them feared to oppose the Companions. When you examine most of what you find of this sort in the sciences of the dispute between the Imams and their schools, you will find that they bolster their schools by mentioning those of the Companions who held their positions. That is only because they they and their opponents esteemed them and the strength of their source, and the greatness of their position in the Shari'a.

Malik and the other Imams of the four schools accepted the statements of the Companions and sometimes proclaimed that their *fatwas* are based on the *fatwas* of the Companions, but we want to pose a question: Did Malik accept the statement of the Companions as evidence and as

one of the branches of the *Sunna* because the statement of the Companions is either by transmission from the Messenger and thus is *sunna* without a doubt, or it is by the *ijtihad* of opinion, and in their *ijtihad* they were closer to the *deen* and *Sunna* since they were present at the revelation, and so even if it is nor explicit *Sunna*, it is connected to the *Sunna*?

Before we answer this question, we state that ash-Shafi'i, the student of Malik, believed that following the Companions when they agreed was evidence of consensus. If they disagreed, then one can chose of their statements that which he thinks is closer to the *Sunna* or agrees with analogy. If he only prefers one statement, he follows it by imitation. He used to say, "Their opinions are better for us than our opinions for ourselves." He did not accept the statements of the Companions as being *sunna*, but on the basis of imitating them and preferring some of their positions over others because that is the safest course.

Abu Hanifa's opinion is deduced by the *fuqaha'* of his school and there are two interpretations. Abu Sa'id al-Baradha'i transmitted from al-Bazdawi in his *Fundamentals*: "Imitation of the Companions is a duty for which analogy is abandoned. We found our shaykhs doing this." So al-Baradha'i reported that his shaykhs, including Abu Hanifa, imitated the Companions, and the statements transmitted from Abu Hanifa indicate that.

Al-Karkhi, one of the Imams of deduction in the Hanafi school, relates that accepting the statement of the Companion is part of the *Sunna*. That is why he only takes it in what is not perceived by analogy, like the *miqats* and the like which come by transmission. So the Companion is followed in this case since his statement is transmission and not opinion. On that basis, his statement is accepted, not simply by imitation, but because it is *sunna*.

It is clear from looking at the principles of the Malikis and the *Muwatta'* that Malik, like Ahmad ibn Hanbal, accepted the statements of the Companions as a source of fiqh and as having authority and constituting one of the branches of the *Sunna* of the Prophet. That is why to know them is to know the *Sunna* and to go against them is innovation. Ibn al-Qayyim clearly states in *I'lam al-Muwaqqi'in* that it is part of the *Sunna*.

When a Companion makes a statement or gives a judgement or a *fatwa*, it may stem from discernment which he has and we do not, or from discernment in which we share. As for what is particular to him, it is likely that he heard it directly from the mouth of Prophet, may Allah bless him and grant him peace, or from another Companion narrating from the Messenger of Allah. The knowledge they possessed and to which we do not have access is more than will ever be known. None of them related all that they heard. Where is what Abu Bakr as-Siddiq, 'Umar al-Faruq and the other great Companions, may Allah be pleased with them, heard, compared to what they relate?

There are not even a hundred *hadiths* related from the *Siddiq* of the Community, despite the fact that he was not absent from the Prophet, may Allah bless him and grant him peace, in any of his battles and accompanied him from the time of his prophetic mission, or indeed, even before that time, until his death. Abu Bakr was the most knowledgeable of the community about him, may Allah bless him and grant him peace, and about his words, actions, guidance and conduct.

The same applies to the majority of the Companions: the amount that they transmit from the Prophet is very little indeed in comparison with what they actually heard and witnessed from him. If they had related all that they heard and witnessed, it would have been many times more than what Abu Hurayra transmitted. He was only a Companion for about four years and related a great deal from him.

The statement 'If the Companions had known anything about this matter...' can only be made by someone who does not understand the behaviour and states of people. They were in awe of transmitting from the Messenger of Allah, may Allah bless him and grant him peace, and attached great importance to it. They did not often do so, fearing to add to or subtract from his words.

Any *fatwa* which one of the Companions gave will be based on one of six foundations:

- He heard it himself directly from the Prophet, may Allah bless him and grant him peace.

- He heard it from someone else who heard it.

- He understood it from an *ayat* of the Book of Allah in a manner which is unknown to us.

- It is something which all the Companions were agreed upon but only the statement of the one who gave the *fatwa* has been transmitted to us.

- ¥He understands it through his complete knowledge of the language and what the phrase indicates in a manner to which he has access and we do not or by direct knowledge of the actual circumstances which were being addressed; or by the sum of matters which he understood over the passage of time through seeing the Prophet, may Allah bless him and grant him peace, and witnessing his actions, states and behaviour and listening to his words, knowing his aims and witnessing the arrival of Revelation and witnessing its interpretation through action. Because of all this, the Companion was able to understand things which we cannot.

If the basis of the *fatwa* is any of the above five criteria, it is authoritative for us and must be followed.

It was based on an individual understanding of something that the Messenger, may Allah bless him and grant him peace, about which the Prophet did not speak and the Companion was wrong in his understanding.

This sixth aspect is a theoretical one and the possibility of its occurring is remote, especially in the case of the exalted Companions who transmitted the Islamic *deen* to the next generation. This excellent directive clarifies Malik's view in considering the statement of the Companion as an authoritative source and the fact that he accepted it as being part of the *Sunna*. It was not on the basis that it was imitation and simply following.

The difference between the two views has clear consequences, and so is necessary to examine it. Since Malik accepted the statements of the Companions as *Sunna*, it is possible that there would be some clashes with single traditions and he would prefer one over the other by various

means of preference. If accepting them had been simply imitation, as ash-Shafi'i and Abu Hanifa do with some deductions, it would not be accepted except inasmuch as it is not *sunna*.

The first was the method of Malik, may Allah be pleased with him. This was one of the causes of the disagreement between him and his student ash-Shafi'i, as you will see in *The Disagreement with Malik* by ash-Shafi'i. It contains a clear statement about the questions in which Malik abandoned single traditions and accepted the statement of the Companion. Ash-Shafi'i criticised him for that and disagreed with him.

On the basis of this principle, Malik sometimes used to prefer the statement of the Companions over some *hadiths*, after comparing them. In some cases there were certain aspects of opinion, the practice of the people of Madina, statements of the people or the general bases of the Shari'a, which made the statement of a Companion preferable to an individual *hadith*.

In so doing, Malik did not prefer the statement of the Companion over the *Sunna* but rather in that instance it was the statement of the Companion in fact which constituted the *Sunna*. Because they differed in their conclusions he carefully compared them and ended by accepting one and rejecting the other. He did not reject a statement of the Messenger of Allah, may Allah bless him and grant him peace, for a statement of a Companion. He rejected one tradition from the Messenger for another which was more reliable and had a more truthful transmission.

Ash-Shafi'i disagreed with him in that method and said about it that he rejected the root by the branch and rejected the stronger for the weaker, but the clear position followed by Maliki *fiqh* is that it does not advance the statement of the Companion over the tradition of the Messenger as such. We seek refuge with Allah from that being the method of the Imam of the Abode of the *Hijra* and the shaykh of the *hadith* scholars of his generation. Rather the truth is what we mentioned, and it is that he considered the statement of the Companions as understanding which was received from the Messenger of Allah, may Allah bless him and grant him peace, and so it is true transmission when there is no doubt in its transmitters. Then it is measured against a report directly from the Messenger and so there is only comparison between two traditions from the Prophet, especially since he only took from the Companions who were with him over a long period.

Fatwas of the Followers (*Tabi'un*)

The scholars accepted the statements of the Companions either by way of imitation or as an authoritative source of the Shari'a since it was sunna derived from the guidance of the Prophet, may Allah bless him and grant him peace. Most scholars do not accord the Followers this rank. Abu Hanifa explicitly stated that he used to strive as al-Hasan, Ibn Sirin, ash-Sha'bi and Ibrahim an-Nakha'i strove. In his *Risala*, ash-Shafi'i did not mention that he allowed imitating them. Perhaps in these cases he did not reach a confirmed and established *ijtihad* which was definitive in the question. When he saw a statement by one of the Followers in the question, he accepted it, but not on the basis that it was a juristic choice based on evidence or on the basis that its imitation was permitted, like that of the Companion. It was giving information about the position of those before him in something in which he did not have an opinion.

Some Hanbalis accepted the statements of the Followers when they did not differ from the statements of the Companions or the Followers.

Which of the two parties did Malik fall into? It is clear that Malik did not consider the statements of the Followers to occupy the same position in the *Sunna* as those of the Companions; but he did take account of the positions of some of the Followers because of their knowledge of *fiqh* or their truthfulness or their exalted qualities of character. These included such people as 'Umar ibn 'Abdu'l-'Aziz, Sa'id ibn al-Musayyab, Ibn Shihab az-Zuhri, Nafi' the client of Ibn 'Umar, and others who were accurate in transmission of knowledge and had high proficiency in *fiqh*. He accepted a *fatwa* from them when its basis was a known *sunna*, or was in accordance with the Practice of the People of Madina, or with the position of the majority of scholars. Sometimes he was satisfied with their *ijtihad* when he had confidence in it and did not find anything to contradict it.

We will mention some the transmissions which support what we said and attest to it:

1. Part of that is forbidding man to sell what is not in his possession. In that Malik accepted the opinion Sa'id ibn al-Musayyab. We read in the *Muwatta'*: Malik reported from Musa ibn Maysara that he heard a man say to Sa'id ibn al-Musayyab, "I am a man who sells for a debt." Sa'id said, "Do not sell except for what you take directly to your camel." (31.40.85)

2. Malik accepted the position of Zayd ibn Aslam on the reality of the usury of the *Jahiliyya*:

"Malik related from Zayd ibn Aslam that the usury in the Jahiliyya was that a man would give a loan to a man for a set term. When the term was due, he would say, 'Will you pay it off or increase me?" Based on this, a reduction of the debt in return for a reduction in the term is part of usury. That is why he said, "The disapproved way of doing things about which there is no dispute among us is that a man gives a loan to a man for a term, and then the demander reduces it and the one from whom it is demanded pays it in advance. To us that is like someone who

delays repaying his debt after it is due to his creditor and his creditor increases his debt. This is nothing else but usury."

3. Another instance is that he accepted the statement of al-Qasim ibn Muhammad ibn Abi Bakr about it being disliked to reduce the price in exchange for early payment and to increase it in exchange for delay. In the *Muwatta'*: "Malik conveyed to him that al-Qasim ibn Muhammad was asked about a man who bought goods for ten dinars cash or fifteen dinars on credit. He disapproved of that and forbade it."

From this you see that Malik used to accept the statements of some of the Followers. Furthermore two things must be pointed out:

One: He used to compare their statement with the famous *Sunna*, the probable and unequivocal texts of the Noble Book, what he knew of the general principles of the Shari'a, what was well-known of sound and established analogies, what the people of Madina had and how people acted. On the whole, he studied their conclusions alongside all the principles he knew. If he did not find anyone who disagreed with what they said and he was familiar with it, he took that view which he ascribed to them. In fact, in his *fiqh* Malik acted according to that method.

He did not accept only a single principle in the question on which he relied, but combined the roots in his study of each question. When there was a noble *ayat* on the question whose apparent text indicated a judgement which should be studied on the basis of that apparent text, along with the well-known Shari'a, the Practice of the People of Madina and the general principles, and all of that led to accepting the *dhahir* text or making it specific by the well-known Sunna, the Practice of the People of Madina or the general principles, then he would study the questions using all the sources of deduction at his disposal. If there was a single tradition on it, he studied it in that way combining the general principles of deduction. When he reached a comprehensive judgement, he adopted it. This was the view by which he was distinguished and in which he was opposed by his student ash-Shafi'i. Ash-Shafi'i thought that the tradition, even if a single tradition or a specific tradition, was accepted and specified the *dhahir* text of the Qur'an and rejected analogy. Malik compared and allocated priority, while ash-Shafi'i accepted the evidence of the *Sunna* on its own, even though Malik himself was the transmitter of the tradition and recorded it in his *Muwatta'*.

Two: He did not consider the statement of the Follower, inasmuch as he was a Follower, as being *Sunna* as was the case with the words of the Companions of those who clung to the Messenger of Allah, may Allah bless him and grant him peace. Their statements were considered to be part of the *Sunna* as they were Companions who clung to the Messenger, were present when the Revelation was received and perceived its aims. He did not accept the statements of the Followers by imitation and following. It was because through his study he had ended up agreeing with them and did not find anything to diminish them. Those Followers are in the position of the shaykhs on whose *fiqh* he based his deduction and he accepted their statements because he did not find anything to invalidate them and his *ijtihad* led to him agreeing with them.

Before we finish this topic, we will compare Malik and Abu Hanifa regarding acceptance of the statement of the Followers. It is reported that Abu Hanifa used to transmit that an-Nakha'i, al-Hasan al-Basri, Ibn Sirin and other Followers strove and that he could strive as they strove, and that they were men and he was a man, and that this is why he did not consider their statement an authoritative source so that it had to be accepted and followed. But in addition to that clear statement of his and his proclamation of his juristic independence and then his imitation of those whose imitation is not considered as adopting the *Sunna*, we see in the Book of Traditions that he proclaimed his preference for many opinions stated by Ibrahim an-Nakha'i, as Malik took the statements of Sa'id ibn al-Musayyab, Zayd ibn Aslam, al-Qasim ibn Muhammad, 'Umar ibn 'Abdu'l-'Aziz and other great Followers whose *fiqh* was well-known in Madina.

The truth is that a deep study of the books of traditions of this two respected Imams shows us the compatibility of their methods in this case.

Abu Hanifa accepted so many *fatwas* from Ibrahim that some people attacked his *fiqh* and claimed that it was the *fiqh* of Ibrahim and that he had not exceeded the rank of the one who trained him because of the great amount he took from the statements of Ibrahim and other *fuqaha'* among the Followers in Kufa. However, he selected many of Ibrahim's opinions because their opinions concurred, not by following and imitation.

A sound study of the development of these two Imams ends with a correspondence in their method in respect of the Followers, even if their individual Followers were different. Abu Hanifa trained under Hammad in his juristic development, and Hammad transmitted from Ibrahim. So in *fiqh* he learned the *fiqh* of Ibrahim and then he expanded his studies and *ijtihad*, especially after he sat in of Hammad's place after his death. He continued to research and strive for about thirty years. Thus it is only logical that he was often satisfied with the Ibrahim's opinions independently, not by the imitation or following.

Similarly, Malik was trained in his legal development by the *fuqaha'* who learned *fiqh* from the seven *fuqaha'* and others. That study was the legal substance in which he made his deductions. Part of connecting affairs to their causes was that the opinions of the seven *fuqaha'* had a place in consideration and an assessment with him. He either agreed with it or disagreed. If he agreed, it was from study and the comparison of fundamental principles with one other. If they disagreed, then it was by conflict with what was stronger than it and a more authentic statement.

The Fourth Source: Consensus (*Ijma'*)

Malik, may Allah be pleased with him, was probably the one of the four Imams who most frequently mentioned consensus and used it as evidence. If you open the *Muwatta'*, you will find in many places that the ruling in the case mentions that it is Òthe generally agreed-on way of doing things,Ó and that was considered to be an evidence which was sufficiently authoritative for him to give fatwa by it. We will give you some examples:

1. The *Muwatta'* mentions the inheritance of paternal half-siblings: "Malik said, 'The generally agreed-on way of doing things with us is that when there are no full-siblings with them, half-siblings by the father take the position of full-siblings. Their males are like the males of the full-siblings, and their females are like their females except in the case where the half-siblings by the mother and full-siblings share, because they are not offspring of the mother who joins these.'" (27.6) Then he proceeded to the secondary rulings based on this consensus.

2. Another example of that is the inheritance of maternal half-siblings. Malik said about that: "The generally agreed-on way of doing things with us is that maternal half-siblings do not inherit anything when there are children or grandchildren through sons, male or female. They do not inherit anything when there is a father or the father's father. They inherit in what is outside of that. If there is only one male or female, they are given a sixth. If there are two, each of them has has a sixth. If there are more than that, they share in a third which is divided among them. The male does not have the portion of two females." (27.4)

3. Another instance is what the *Muwatta'* says about the judgement of the sale with the precondition of being free of all defects: "The generally agreed-on way of doing things with us regarding a person ...who sells a slave, slavegirl or animal which is meant to be free of defects is that he is not responsible for any defect in what he sold unless he knew about the fault and concealed it. If he knew that there was a fault and concealed, his declaration that he was it was free of faults does not absolve him, and what he sold is returned to him." (31.4)

4. It is reported that the sale of meat for meat can entail a form of usury (*riba al-fadl*). Malik said, "It is the generally agreed-on way of doing things with us that the meat of camels, cattle, sheep and similar wild animals is not to be bartered one for one, except like for like, weight for weight, from hand to hand. There is no harm in that. If it is not weighed, then it is estimated to be like for like from hand to hand. There is no harm in bartering the meat of fish for the meat of camels, cattle and sheep and so on, two or more for one, from hand to hand. If delayed terms enter into the transaction, however, there is no good in it." (31/28.67)

In all of this you see that Malik used consensus as authoritative and said, "The generally agreed-on way of doing things with us". We turn to what is quoted from him to discover his explanation of the term, 'agreed-on'. We find that transmitted in what we quoted before in his words in the *Muwatta'*. Let us see what Malik himself says in explanation of his use of the term 'agreed-on'. We find that he says in the *Muwatta'*:

As for 'the agreed-upon practice', it is something that the people of *fiqh* and knowledge agree upon without dispute. This is the agreement of the people of this community who contract agreements (*ahl al-hall wa'l-'aqd*) in any matter. By agreement we mean agreement in word, action or belief.

The definition of the *mujtahidun* who produce consensus was investigated by Malik as we will make clear.

That is the consensus which Malik took as an authoritative evidence and which you see often used in the *Muwatta'* in resolving questions about which there is no unequivocal text or when he believes that the text needs to be amplified, or when the text is an *ayat* whose meaning is of the apparent sort (*dhahir*) which admits of interpretation and specification.

The discussion of scholars regarding the principles in consensus is extensive and detailed. We do not want to quote them here. Here we will mention what is connected to Malik's *fiqh* and the different varieties of consensus he used to employ and how authoritative he viewed consensus and its ranks and its basis. In general, we will speak about consensus where it has a a firm connection to our subject: Malik's *fiqh*.

Before we turn to Malik's view, we will define the case which the books of some of the legists mention: when consensus is advanced before the Book and the *Sunna*. This case is mentioned by some of the legists and before we clarify how it is invalid, we will mention their explanation of it so that people will not err in understanding, even though we are not happy with any explanation of it.

What they mean is the consensus which is based on the Book or the *Sunna*, and it acquires strength by that support so that it is given priority over other texts. That is because consensus supports the text. It strengthens it to the degree that it becomes definitive and whatever judgement it contains cannot be denied. Some of them reckon that a person is an unbeliever if he denies a judgement which is established by consensus which is derived from text. That is because consensus based on the evidence of the text to the judgement raises it in the level of something which is understood from the *Deen* by necessity.

Even when the discussion is interpreted in that way, many scholars do not permit it because consensus of this type is only in fundamental obligations, like the prayer being five, the times of the prayer, fasting Ramadan, the obligation of *zakat* and so forth. They are obligations established by text and there is consensus on them, and so the texts do not admit of any probability in them. Ash-Shafi'i denied the claim of consensus except in the principles of legal questions and Ahmad ibn Hanbal denied the existence of any consensus except the consensus of the Companions.

The generalised nature of the proposition has allowed some people to oppose some unequivocal texts based on the claim of consensus in questions, whether the consensus in them is a subject of dispute or is not agreed upon at all. The generalisation contains an attack against the texts to support the partisanship for a school. Indeed this generalisation makes some of those who do not understand Islamic *fiqh*, its principles or the expressions of its writers suppose that it is within the ability of people to agree on something which then it becomes a deen which is followed, even if it opposes the texts and undermines established judgements.

Ibn al-Qayyim refuted that in *I'lam al-Muwaqqi'in*:

"If someone does not acknowledge disagreement between imitators when there is evidence for it in the Book and *Sunna* and says, 'This is contrary to the consensus,' this is the one whom Imams of Islam repudiate and censure from every aspect. They refute the one who claims that. Ibn Hanbal said, 'Whoever claims consensus is a liar. Perhaps people disagreed. This was the claim of Bishr al-Marisi and al-Asamm, but he says, "We do not know whether people disagreed or that has not reached us."' He said, 'How can it be permitted for a man to say, "They agreed" when I heard them say they agreed and I suspected them? If only he had said, "I do not know of any who opposes."' He said, 'This is a lie. I do not know that the people agreed. It is better to say, "I do not know of any disagreement about it" than to say, "The consensus of the people." Perhaps the people disagreed.'" (pt. 2, p. 179)

In truth, we do not permit in any case that it be said that consensus in any description is given priority before the Book and the *Sunna*, even if some of the questions agreed upon reach the level of necessary matters in the *Deen*. That is because of the position of the unequivocal text which is attested to by consensus. It is based on its evidence, not by consensus alone, especially when some of the Imams permit consensus to be ascribed to indication or analogy. When we advance consensus derived from analogy, then we advance analogy over the unequivocal text, and that is illogical except in the areas which we already have stipulated.

Scholars have agreed that the support (*sanad*) of consensus can be the Book, *mutawatir Sunna*, *dhahir* text of the Book, or a single tradition. When something which is probabilistic in its evidence or its certainty is supported by consensus and there is consensus that judgement is issued according to it, then by that the judgement becomes definitive. The definitiveness comes from the consensus on the judgement derived from the text, not from the text itself. So it is as if the text provides the judgement and consensus provides definitiveness. He mentioned from Malik that consensus can be supported by analogy. Support in it is not confined to a text of the Book or the *Sunna*. In this case, the judgement derived from the analogy is elevated from the rank of the probable to the rank of the definitive, and that was obtained from consensus, and so it provides definitiveness when it is based on analogy, as it provides it when it is based on single traditions.

There is a case which requires investigation and study of Malik's opinion about it. This is the definition of those whose agreement forms consensus. We will present two points in the explanation of this problem:

1. Malik did not think that the common people were included in the generality of those who constituted consensus. That was because the proofs of consensus were specifically a duty of those who are not the common because the unsupported statement of the common person is of no consequence. Consensus must have a support on which it is based, and that is not conceivable from common people. Furthermore the Companions agreed that the common people are not taken into account and they must follow the men of knowledge. The common are not included in the consensus about them because they do not have the ability to understand it or to form a respected opinion in it. Its basis is investigation based on legal deduction.

2. Who are those of the *mujtahidun* whose agreement amounts to consensus? Are they the scholars of a certain time in all Islamic locations? Are the people of innovations among the *mujtahidun* included or not? Or is the consensus taken into account that of the people of Madina about an opinion? In that we are not concerned with the disagreement of the scholars of legal principles in that – that has its proper place in that science. That which concerns us is the opinion of Malik, and scholars disagree about whether his opinion was to consider that consensus was achieved by the consensus of the scholars of Madina or only by the consensus of all. That is the matter which concerns us in the study of consensus. Al-Ghazali said in *al-Mustasfa*:

"Malik said: 'The authoritative source is only the consensus of the people of Madina.' He said that the people considered for consensus are the people of the *Haramayn*: Makka and Madina, and the two cities: Kufa and Basra. Those who deduce mean by this that these locations comprised the people of *hall wa'l-'aqd* in the time of the Companions. If Malik meant that the people of Madina included all of them, then that is accepted if it is comprehensive. Thus actual place has no effect. That would not be accepted. Madina did not contain all of the scholars, either before or after the *Hijra*. They were constantly dispersed in journeys, expeditions and garrisons. So there is no sense in the words of Malik unless he says that the action of the people of Madina is authoritative because they are numerous and there is consideration of the statement of the majority or a a statement which indicates their agreement in word or action that they relied on something definitive which they heard. The abrogating revelation was revealed among them, and so the fine points of the Shari'a do not elude them. This is accurate since it is not impossible that someone else heard a *hadith* from the Messenger of Allah, may Allah bless him and grant him peace, on a journey or in Madina, but he left it before he transmitted it. So the authoritative source is in the consensus and not a consensus." (pt. 1, p. 187)

Al-Ghazali stated that consensus in Malik's view is only that which is formulated by the *fuqaha'* of Madina, and that he does not include anyone else with them. He vindicates that statement by the fact that in the *Muwatta'* whenever Malik used the agreement of the scholars about a matter as evidence, he says, "This is the generally agreed-on way of doing things with us." If you examine the *Muwatta'*, you will find the word "with" *('inda)* follows "generally agreed-on." There is no doubt that "*'inda*" here refers to place, meaning the generally agreed-on way of doing things in Madina. That is also supported by the fact that in his letters and in his *fiqh*, Malik used to consider other than the people of Madina as being subservient to them in *fiqh*. The logic of his position demands that what they agree on be considered consensus. Thus consensus and

the practice of the people of Madina are the same type of evidence, i.e. that which the people of Madina have is consensus and that consensus is the consensus of their *fuqaha'* rather than others.

However, we find that in his *Usul* al-Qarafi lists the forms of evidence, and counts consensus as one proof and that which the People of Madina have as a different form of evidence. He says "Evidence is: the Book, the Sunna, the consensus of the Community, the consensus of the people of Madina, analogy, the statement of the Companions, *masalih mursala* and *istishab*."

He speaks about consensus and mentions Malik's views on it which indicate that he considered consensus as one of the sources of the Shari'a other than the consensus of the people of Madina. At the beginning of the discussion on Malik's *usul*, we mentioned what was said by the *mujtahidun* in Maliki fiqh. They ennumerated the forms of evidence and counted consensus as an independent root separate from the consensus of the people of Madina.

We cannot say that all the Malikis follow the method of al-Qarafi which I quoted from at the beginning of our discussion on his principles. Indeed, we found that in his *Fatwas*, Shaykh 'Ullaysh stated that the Malikis say that the agreement of the people of Madina is what Malik considers consensus. That is why he said:

"There were in Madina the Imams of the Followers who were not in other places – like the seven *fuqaha'*, az-Zuhri, Rabi'a, Nafi', and others. That is why the Imam referred to them and considered their agreement to be consensus. Consulting consensus and using it as evidence is not imitation. It is *ijtihad* itself. This is self-evident and Ibn al-Hajib stated that."

He said about comparing a single tradition with the action of the people of Madina:

"You know that the people of Madina are loftier, more numerous and have more knowledge than others. Thus it is them who must be consulted to when there is disagreement. When a *hadith* is sound and the practice of the people of Madina differs from it, one of the following must apply: they are all judged to be ignorant, which is something an intelligent man is too shy to utter since those are the most knowledgeable of the Imams and bad opinion is iniquity; or they are judged to be deliberately in opposition to the *Sunna* and playing around, which is worse and more foolish; or they are judged to possess knowledge and action, and thus when they abandoned a *hadith*, they left it for something stronger.

This is what we claim. It is known that consensus is a proof which must have a support which may be known or not known. Their agreement was from something reliable since there is no way to call them ignorant or misguided. So the clear truth is evident to you if you accept. Those whose action the Imam used as evidence were the Followers whom he met, and they did not leave the path of the Companions." (*Fatwas* of Shaykh ÔUllaysh, pt. 1, p. 43.)

This clearly indicates that Malik considered the agreement of the people of Madina to be consensus and authoritative. When it is added to what we quoted from al-Ghazali and his explicit expression in the *Muwatta'* when consensus is used as evidence (the generally agreed-on way of doing things with us), that results in the conclusion that the consensus which is used as evidence by Malik is the consensus of the people of Madina.

This is a logical result of his considering the agreement of Madina to be binding evidence which must be followed and that it refutes single traditions because when the consensus of the people of Madina is evidence on its own, there would be no need for the agreement of others. If someone considers their agreement alone as binding, it is more fitting that it be binding when they agree with other Muslim scholars. It is also clear that consensus in the view of Malik is the consensus of the people of Madina, and this leads us on to the practice of the people of Madina.

The Fifth Source: The Practice of the People of Madina

Malik, may Allah be pleased with him, considered the practice of the people of Madina to be a legal source on which he relied in his *fatwas*. That is why he often said, after mentioning the traditions and *hadith*, "the way of doing things generally agreed-on among us." Sometimes, when no text or other authority existed, Malik used the practice of the people of Madina as an evidence to be relied on absolutely. His previously mentioned letter to al-Layth ibn Sa'd shows the great extent to which he relied on it and his objection to those who followed anything other than the practice of the People of Madina.

"I have been informed that you give people fatwas which are contrary to what is done by our community and in our city. You are Imam and have importance and position with the people of your city and they need you and rely on what they get from you. Therefore you ought to fear for yourself and follow that whose pursuit you hope will bring you salvation. Allah Almighty says in His Mighty Book, *'The outstrippers, the first of the Muhajirun and the Ansar.'* (9:100) Allah Almighty further says, *'So give good news to My slaves, those who listen well to what is said and then follow the best of it.'* (39:18) It is essential to follow the People of Madina in which the Qur'an was revealed..."

In this he clearly stated that the Practice of the People of Madina cannot validly be opposed and that people should follow it. Then after that he clarifies the evidence which moved him to follow this course:

"The basis of this proof is that the Qur'an contains laws and the *fiqh* of Islam was revealed there and its people were the first who were made responsible for it, encharged with the command and prohibition and who answered the caller of Allah in what he commanded and established the buttress of the *Deen*. Then after the Prophet, may Allah bless him and grant him peace, among them lived the people of his community who most followed him: Abu Bakr, 'Umar and then 'Uthman.

They implemented his *Sunna* after investigating it and studying it while it was still fresh. Then the Followers after them followed those paths and they followed those *sunan*. Madina had inherited the knowledge of the *Sunna* and the *fiqh* of Islam in the time of the Followers of the Followers. That is the time in which Malik saw it. The business there was clear and acted on it and no one is permitted to oppose it because of that inheritance in their hands which none is allowed to plagarise or lay claim to."

This is Malik's evidence regarding his use of the Practice of the People of Madina as proof and that in some cases he advanced the Practice of the People of Madina over single traditions for the reason which he mentioned. It is that the famous opinion which is acted upon in Madina in the famous transmitted sunna and the famous sunna is advanced over single traditions.

It is clear that Malik was not the first person to use the practice of the people of Madina as an authoritative evidence. Malik's shaykh, Rabi'a, mentioned the method and said, "A thousand from a thousand is better than one from one." Malik said, "The learned men among the Followers quoted hadiths which had been conveyed to them from others and they said, 'We are not ignorant of this, but the common practice is different.'"

He also said, "I saw Muhammad ibn Abi Bakr ibn 'Amr ibn Hazm who was a qadi. His brother 'Abdullah knew many *hadiths* and was a truthful man. When Muhammad gave a judgement and there was a *hadith* contrary to it, I heard 'Abdullah criticise him, saying, 'Isn't there a *hadith* which says such and such? 'Yes,' he replied. 'Then what is the matter with you? Why don't you give judgement by it?' asked his brother. 'Where are the people in respect to it?' replied Muhammad, meaning 'what is the consensus of action on it in Madina?' He meant that the practice outweighs the hadith in that instance." (*Madarik*, p. 38)

So it can be seen that Malik, may Allah be pleased with him, did not originate that method. Rather he travelled a path which others among the Followers and the people of knowledge before him had followed. He became renowned for it, however, because of the great number of *fatwas* he was asked for and because some of his *fatwas* were contrary to *hadiths* which he also related. He became the most famous of those who accepted the practice of the people of Madina as an authoritative source and so the method was ascribed to him; but the truth is that in that respect he was a follower, not an originator.

We see that in the statements which were transmitted from him or the letters which Malik wrote, he stated that what the community of the people of knowledge had in Madina amounted to evidence which had to be accepted for the reasons which we mentioned, and that if a single tradition was contrary to the practice of Madina, he rejected the tradition and accepted their knowledge since it was transmitted from the Prophet, may Allah bless him and grant him peace, in a more reliable transmission and truer account. The examples transmitted from Malik in general contain the practices of the people of Madina which cannot be known except by reliance, like the *adhan*, the *mudd* of the Prophet and other things. Included within the practice of the people of Madina is that which can derive from *ijtihad* and deduction whose method is like some decisions and the judgements of behaviour between people.

It is evident that the Malikis after Malik did not agree on that generalisation, but made a distinction between his method of reliance and transmission and his method of *ijtihad* and deduction. Their books state that the opinion of Malik was that their practice was only in that whose method is reliance. Al-Qarafi said, "Malik considered the consensus of the people of Madina as authoritative in that whose path was reliance as opposed to the rest. This is shown by the words of the Prophet: 'Madina expels people like the blacksmith's bellows expels the dross of iron.' Error is dross and so it must be expelled.

That is also because their disagreement was transmitted from their ancestors and by sons from their fathers, and thus the tradition leaves the realm of uncertainty and supposition for certainty. Some of the Companions said that their consensus was absolutely authoritative and that it was evidence in their practice, not in a transmission which they transmitted. The first evidence indicates this generalisation rather than the second. They argued by the words of the Prophet, peace be upon him, 'My community will not agree on an error.' It is understood that some of the community are permitted to err and the people of Madina are part of the community. The response is that what is articulated by the positive *hadith* is stronger than what is understood from the negative *hadith*." (*Tanqih*, p. 146)

We see from this that Malik said that their consensus was authoritative in that on which he relies while some of his people said that their consensus was absolutely a proof, which is the literal meaning of the words of Malik. Then the proof of those who considered that their consensus is absolutely authoritative was the *hadith*, "Madina expels people like the blacksmith's bellows expels the dross of iron." Its wording conveys the expulsion of every dross, and error is dross and thus error is not joined to the people of Madina. The evidence of those who distinguished between that which comes by way of reliance and that which was by *ijtihad*, is that which comes by way of reliance is a a *mutawatir* transmission, and that which comes through *ijtihad* is deduction in which error is possible. Misguidance in *ijtihad* is only denied in the community as a whole. It is possible that some of them may agree on error. That is understood from his words, "My community will not agree on misguidance." Al-Qarafi preferred the opinion of those who considered the Practice of the People of Madina to be authoritative based on the wording in the *hadith*, "Madina expels its dross..." and others argued by the *hadith*, "My community will not agree..." and when the wording and the meaning conflict, it is agreed that the evidence of the wording is preferred.

It appears that the first part of the consensus of the people of Madina, which is that which has no path except that of reliance, must be taken as authoritative when there is consensus among the scholars because it is *mutawatir* transmission, or at least famous and exhaustive. Qadi Iyad clarified that and said about it:

The consensus of the people of Madina is of two types: one type by way of transmission, and this type is divided into four categories:

What is transmitted from the Prophet, may Allah bless him and grant him peace, in the form of words like the *adhan, iqama* and not saying the *basmala* aloud in the prayer. They transmitted these things from his words.

His action, like the description of the prayer, the number of its *rak'ats*, its *sajdas* and the like of that.

The transmission of his affirmation of what he saw from them when his disapproval was not transmitted from him.

The transmission of his leaving things which he saw them doing and judgements which he did not oblige on them although they were well-known among them, like his not taking *zakat* on vegetables although he knew that they were numerous among them. This type of their consensus in these aspects is a proof which must result, and whatever is contrary to it in the form of single tradition or analogy is abandoned since this transmission is verified and known and must therefore be definitive knowledge which is not abandoned for what probability demands. This is what Abu Yusuf and other opponents of those who debated with Malik and other people of Madina referred to in the question of *waqfs*, the mudd and sa' until he noted the transmission and verified it. It is not permitted for a fair person to debate such evidence, and this which Malik has from most of our shaykhs, and there is no disagreement about the validity of this method and that is proof among the intelligent. He was opposed in those questions by other than the people of Madina to whom that transmission had not reached. There is no disagreement in this. As-Sayrafi and other people of ash-Shafi'i agree with him as al-Ahmadi reported from him. Some of the Shafi'ites disagreed out of sheer obstinacy. (*Madarik*, p. 41)

The fact is that, even if the Malikis are famous for that opinion, others share with them in it or follow them in it, and we must examine those to discover their opinion. The first of them was ash-Shafi'i himself. He respected their consensus when they agreed because in his view they do not agree on something unless that is the subject of consensus. The place of disagreement between him and his shaykh and the Malikis was in one thing: the validity of those who claimed consensus. His opposition to it was about the validity of the claim.

We find that in *I'lam al-Muwaqqi'i*n that Ibn al-Qayyim divides the Practice of the People of Madina whose basis is transmission into three categories: the first of them is transmission of Shari'a directly from the Prophet, the second is transmission connected to action, and the third is transmission of places, individuals and measures of things.

The first category is the transmission of the Shari'a directly. It is what Qadi 'Iyad mentioned the examples and categories he mentions. The second category is the transmission of continuous action, which is like the transmission of the *waqf*, sharecropping, the *adhan* from elevated places, making its phrases double and those of the *iqama* single.

As for the transmission of places and individuals, it is like their transmission of the *sa'* and the *mudd*, specification of the place of the minbar and its position for the prayer, and the specification of the Rawda, al-Baqi' and the Musalla. This is transmission, like places of practices, like Safa and Marwa and Mina, and the sites of the Jamrat and Muzdalifa, 'Arafa and the places for assuming *ihram*, like Dhu'l-Hulayfa and elsewhere. After mentioning and clarifying these categories, Ibn al-Qayyim mentioned that such transmission is respected and used as evidence. He said, "This transmission and this action are a proof which must be followed and a *sunna* which

is gladly accepted. When the scholar obtains that, he is happy and his soul at peace with it. (*I'lam*, pt. 2, p. 304)

It is clear from these words that Malik accepted the consensus of the people of Madina when the source of consensus was transmission which cannot be criticised. Indeed, scholars accept it: it is *mutawatir* transmission. So it is not rejected in favour of a single tradition or analogy, as we will make clear. As for the practice of the people of Madina whose basis is deduction, transmission in it varies from Malik. Some Malikis express three opinions about it:

1. It is not an authoritative proof at all. The proof is the consensus of the people of Madina is by way of transmission and no *ijtihad* is preferred over the other. This is the position of Abu Bakr al-Abhari. He and those who took that position said that arguing by it is a position of Malik or one of his reliable companions, i.e. that is far from the Maliki school. We indicated that opinion when we quoted from al-Qarafi.

2. It is not an authoritative proof, but their *ijtihad* is preferred over the *ijtihad* of others, and some Malikis and some Shafi'is accepted that.

3. Their consensus by way of *ijtihad* is an authoritative proof. This is the school of some Malikis. They said that it is the opinion of Malik and his expression in his letter to al-Layth which we quoted indicated this is the course followed by those who take this position, and most of the Maghribis among the followers of Malik accept this position and follow this method. The context of al-Qarafi, as we will make clear, indicates its preference or at least the absence of considering it weak.

This is the practice of the people of Madina and the strength of the evidence by it when it is transmission or *ijtihad*, and there is no disagreement between the Malikis that when the basis of their action is transmission, that it is an authoritative source. Indeed the method of others is the same in that. When its basis is *ijtihad*, they disagree about it. Most of the Malikis considered it evidence as al-Qarafi mentioned.

We have not discussed the details of the Practice of the People of Madina when it conflicts with a single tradition.

The details of the position in it is that if the basis of the consensus of the people of Madina is transmission, it is preferred over the single tradition because it is *mutawatir* transmission and the single report does not oppose the *mutawatir* because it is probable while the *mutawatir* is definitive. This is not disputed among the Malikis.

When the basis of the Practice of the People of Madina or their consensus is *ijtihad*, then the tradition is more appropriate according to most of the Malikis although some of them state that consensus can be by way of *ijtihad* and that the consensus of Madina, whatever its origin, is an authoritative proof which weakens the single tradition. However that statement must be examined if we admit that it is possible that consensus be transmitted when the basis of consensus is analogy or opinion because it is distinguished by contradiction and disparate different views. So all the views are one view without a text: something which is the place of investigation, indeed a place of doubt.

If we admit the existence of the consensus of the *fuqaha'* of Madina is based on deduction by opinion, and it is favoured over the text, how can deduction whose source is unknown be favoured over the text? This opinion, even if it is the consensus of a group of the community, does not stand before the tradition.

There is a distinction between this consensus whose existence is uncertain and their consensus on something transmitted. The first consensus is logically similar. If it occurs, *tawatur* transmission is advanced in deduction over the single report which is probable.

The difference is attested between the two types of consensus from the people of Madina when it conflicts with a tradition. Ibn al-Qayyim says:

"It is known that the practice after the end of the time of the Rightly-guided khalifs and Companions in Madina was according to the *muftis*, amirs and market inspectors among them. The rabble did not differ from those people. When the muftis gave *fatwas* on a matter, the governor and inspector carried it out and it became practice. This is that which is not considered when it opposes the *sunan*. It is not the action of the Messenger of Allah, may Allah bless him and grant him peace, and his khalifs and Companions: that is the *Sunna*. So one is not confused with the other. We are strongest in making this the arbiter, but when the other practice opposes the *Sunna*, we are stronger in leaving it, and success is by Allah. Rabi'a ibn Abi 'Abdu'r-Rahman used to give *fatwa* and Sulayman ibn Bilal the market-inspector carried out his *fatwa* and the rabble acted by the *fatwa* and the implementation, as practice appears in a town or region in which there is only the statement of Malik according to his position and *fatwa* and they do not permit action there by the position of other Imams of Islam. If anyone acts otherwise, they are severe in objecting to him." (*I'lam*, pt. 2, p. 307.)

He ends his statement about this with a clarification that every practice agreed-on whose basis was transmission is not opposed to sound *sunna* and every action whose basis is *ijtihad* is not preferred over a *sunna* at all. He says:

"It is affirmed that every action contrary to the sound *sunna* does not occur from the path of transmission at all. It occurs by way of *ijtihad*, and every action whose path is transmission is not opposed to a sound *sunna* at all." (*I'lam*, pt. 2, p. 308.)

We clarified the the practice of the people of Madina according to Malik, and we distinguished that practice and mentioned the position of that scholarly method in the principles of deduction of the Malikis and others. We clarified how the opponents were forced to agree with the Malikis in some of the consensus which the people of Madina especially possessed whose basis was transmission and we mentioned that when the practice of the People of Madina is based on *ijtihad*, it is a place of dispute even among the Malikis themselves and it is open to investigation.

We must state that when Malik used 'the matter agreed on' in his land as evidence, he did not confine himself to matters which were only known by reliance. He mentioned that regarding matters in which opinion has scope. He accepted their position in them because he avoided deviation as much as possible and his statement in his letter to al-Layth attests to that general

application as we mentioned about that. Al-Layth's reply shows that they were questions in which opinion had scope. But did Malik give priority to the consensus of the people of Madina over the tradition when it was a single tradition?

You know that he analysed the *hadiths* with great penetration to seek out their *sunan* and that he compared them with the general principles and confirmed firm principles whose sources interconnect to establish them. Perhaps after this study of the *hadiths* and in the light of what he saw done and transmitted from the Followers and the Companions before them, he found some traditions weak and that the basis from the beginning was opinion and he accepted it because he disliked the *gharib* since he saw deviation in it.

The Sixth Source: Analogy (*Qiyas*)

Malik, may Allah be pleased with him, issued *fatwas* for more than fifty years. People came to him from the East and West to ask for *fatwa*. Since questions are endless and events occur every day, it is necessary for understanding of the texts to go beyond their immediate significance to recognition of their immediate and further aims and to perception of their indications and suggestions, so that the extent of their comprehensiveness may be correctly ascertained. Only then is it possible to understand what lies behind the judgements made by the Companions in cases where there was no well-known *sunna* and which could not be included within the meaning of the literal text, even though the text might indirectly indicate to it.

That is why analogy is necessary for someone like Malik. Since *fiqh*, in its finest meaning, is the penetration of the insight of the *faqih* to ascertain what is meant by the expressions which indicate judgements and thus recognise its causes and recognise its ends, the faqih must therefore use analogy since he must ascertain the cause behind the judgement in order to recognise the full extent of what is meant by the Shari'a. When he knows the cause, then the judgement is established in all that it applies to because the similarity between matters demands similarity in judgement, and sameness between things with the same qualities demands sameness in the judgements to which they are subject.

Analogy in Islamic *fiqh* denotes the connection of something without a text to its judgment by another textual matter with a judgement by virtue of a shared cause between the two. It is part of submitting to the principle of similarity between matters which obliges similarity in its judgements because sameness in the cause obliges similarity in judgement. Thus analogy is natural and logical because of the logical connection based on similarity. When the similarity is complete, then it must be connected to the same judgement.

We find that the Noble Qur'an uses the law of sameness in judgments by the resemblance of qualities and actions in all its similes and instructions, and Allah says, "Have they not travelled in the earth and seen what was the end result of those before them? Allah destroyed them utterly. And those who reject will get the same as that." (47:10) He clarifies the difference of judgement when there is no sameness when He says, "Or do those who perpetrate evil actions reckon that We will make them like those who believe and do right actions, their living and their dying being the same? How evil is the judgement that they make!" (45:21) The Almighty also says, "Would We make those who believe and do right actions the same as the corrupters of the earth? Would We make the godfearing the same as the dissolute?" (38:28)

You see that the Qur'an applies the rule of logical equality in the most perfect manner and it confirms the judgment when similarity exists and negates it when there is disparity. There are numerous reports from the Prophet about adopting this wise dictum and guiding the Companions to it.

It is related that 'Umar ibn al-Khattab said to the Messenger, may Allah bless him and grant him peace, "Messenger of Allah, I did something terrible. I kissed while I was fasting." The Messenger of Allah said, "Do you think that you can rinse your mouth with water while you are fasting?" He replied, "There is no harm in it." The Messenger of Allah said, "So fast." Do you not see that the Messenger of Allah made a connection between rinsing the mouth with water while fasting and kissing while fasting? He pointed out the similarity between them since both of them could lead to something which would break the fast or not. It does not in itself break the fast. Breaking the fast is possible if it leads to that. Because of the similarity between them they are equal in judgement. As rinsing does not break the fast - and that was known to 'Umar - and so the kiss does not break it.

The traditions from the Messenger of Allah are numerous about the application of this just principle in the deduction of judgments for which there is no clear text. Some texts are applied to them by the sameness in the judgement between similar things.

Al-Muzani, the companion of ash-Shafi'i, summarises the idea of analogy and the action of the Companions in it excellently:

"The *fuqaha'* from the time of the Messenger of Allah, may Allah bless him and grant him peace, until today have used analogies in all judgements in their *deen* and they agreed that the like of what is true is true and the like of what is false is the false, and no one is permitted to deny analogy because it is the resemblance and similarity of things."

Malik used that method and used the similarity between things to arrive at a judgement. When they were similar, the legal cause existed. He employed analogy in certain questions in which he knew the decisions of the Companions. So he made an analogy about the condition of the wife of a missing man when he is deemed to be dead and she does an *'idda* as a widow and then marries someone else and then the first man appears alive. He compared this with the case of someone who had divorced his wife and informed her of divorce and then took her back but did not inform her of being taken back and then she married after the end of the *'idda*. That was

because 'Umar gave a *fatwa* that this woman belonged to her second husband, whether or not the marriage had been consummated. Malik used this as an analogy for the wife of the missing man and said that she belongs to the second husband, whether or not it has been consummated. There is no doubt that the basis of this analogy is the similarity between the two cases, even if he mentions it with the agreement of the People of Madina. By this it is clear that the basis of the agreement is this analogy, and the basis of the similarity is that both of them married with a good intention on the basis of legal knowledge established by legal means, but the error became clear after that. She had no way to ascertain the error before he appeared. Thus the wife of the missing man married on the basis of the legal judgement and the divorced woman married on the basis of divorce and end of the *'idda*, and the wife of the missing man had no way to ascertain whether he is alive and the divorced woman had no way to know she had been taken back. So the two cases are similar and the judgement must be the same and the same judgment is a result of this similarity.

When no direct precedent was available to him Malik used to make analogies based on judgements derived directly from texts in the Qur'an and judgements derived directly from *hadiths* of the Prophet. The *Muwatta'* contains many examples of that. We find that at the beginning of the chapter he presents those *ayats* and *hadiths* which he considers to be directly relevant to the subject in hand and then after that he gives secondary rulings, connecting like to like and similar to similar.

He also drew analogies based on the consensus of the people of Madina because, as we have seen, he considered that to be the *Sunna*. In the *Muwatta'* he mentions the 'generally agreed-on way of doing things' and then gives secondary rulings in situations where there is similarity in the circumstances surrounding the questions about which he was asked for a *fatwa*.

Malik also used to utilise the *fatwas* of the Companions as a basis for analogy, as we saw in the case of the wife of the missing husband in which he followed the *fatwa* of 'Umar about the divorced woman who was not aware of having been taken back by her husband, which was confirmed by the agreement of the people of Madina on similar cases.

In general, he used analogy based on textual matters according to their judgement in transmitted sources or what is judged to be transmitted in his view: the Book, *Sunna*, consensus of the people of Madina and the *fatwas* of the Companions.

Some of the analogies were stronger in his view because they were based on general legal principles affirmed by many sources of Islamic Shari'a which have become part of the known Islamic Shari'a. These analogies are raised to the level of contradicting of some of the texts in which a judgement is established by a probabilistic means – either because the evidence is probable like general expressions, and so Malik considers the evidence to be probable, or it is because the means of its confirmation is probable because it is a single tradition and so its ascription to the Messenger is uncertain.

We mentioned earlier that the general text of the Qur'an is made specific by that sort of analogy, that he preferred it to the single tradition, and that the single tradition is weakened by its opposition.

Maliki fiqh does not make an analogy based only on textual judgements applied directly to the text as ash-Shafi'i mentioned in his *Usul*. Analogy can be based on questions which were deduced by analogy. When the analogy is complete in one of the secondary rulings and there is another secondary ruling, he can make an analogy based on it. Ibn Rushd clarifies that in *al-Muqaddamat* when he says:

"When he knows the judgement in the secondary rulings, it becomes a principle and it is permitted to base analogy on it by another cause derived from it. It is called a secondary ruling as long as it vacillates between two principles and it does not yet have a judgement. It is like that when an analogy is made on that secondary ruling after it is established as a principle by another secondary ruling which established the judgement in it by a cause derived from it: so it becomes a basis and analogy is permitted on it.

"It is not as some ignorant people state: 'Questions are secondary rulings and it is not valid to use them for analogy against one another; valid analogy is based on the Book, *Sunna* and consensus.' This is a clear error. The Book, *Sunna* and consensus are the fundamental principles of the Shari'a. Analogy is first based on them and analogy is only validly based on what is derived from them after it is impossible to make analogy on them. When the event occurs and there is nothing in the book or in the *Sunna* or in what the community agrees is a definitive text... then analogy must be made according to what is derived from them." (pt. 1, p. 22)

Then he makes it clear that that was agreed upon by Malik and his people.

He says:

"Know that this idea is part of what Malik and his people agree upon. They do not disagree in their books about making use of analogy by comparing questions against each other. It is a sound idea, even when people disagree with it, because the Book, *Sunna* and consensus are the basis for legal judgements, just as necessary knowledge is a basis for logical knowledges. So as logical knowledge is based on necessary knowledge or on that which is based on necessary knowledge, so it continues endlessly according to order and sequence according to likelihood. It is not valid to base the more likely on the less likely. It is like that with oral knowledges based on the Book, *Sunna* and consensus of the community or on what is can validly be based and so on forever. One must compare the most likely with the most likely, and it is not valid to base the more likely on the less likely."

You see from this that Ibn Rushd stated that Malik and his people believed that analogy was not only based on established judgements from the three principles: the Book, the *Sunna* and consensus, but there could also be analogy based on secondary rulings established by deduction and what was similar to them in the sum of its attributes which gave it this judgement.

The benefit in this is clear and evident in three ways. Or it might be said that its fruits appear in these three aspects:

1. Malik based analogy on questions which the Companions had deduced and used them for analogy. So he used them as a basis for analogy in similar questions, relying on the Companions' *fatwas* .

2. Comparing the secondary ruling to a principle known by analogy expands the area of analogy because in this case the cause by which the first analogy was established has been forgotten, and a new comparison is formed between this secondary ruling and the other which is considered as its principle. So the cause of the judgement in defined in it and established in the secondary ruling since they share in this quality. Indeed, the case will end in linking the new cause with the old cause. Analogy is the same, but the mujtahid is not burdened with the effort of investigation into the basis of the first analogy. Rather he considers the established secondary ruling to be a confirmed principle on which to base analogy.

3. This subject expands deduction in a school of one of the *mutjahidun* because he considers the secondary rulings in which the principles were deduced which he does not use for comparison and by that the scope of *fiqh* is expanded and *ijtihad* in it and deduction based on it grows and *fatwas* are not constricted or difficult. Indeed, the area of deduction is open and the path is improved.

Part of the benefit in that type of analogy used frequently in Maliki *fiqh* – considering the secondary ruling as a principle to be used in analogy – is that partial secondary rulings are compared to one another while the cause in them is not universal, as it is in Hanafi *fiqh*. Hanafi *fiqh* makes the underlying causes in them inclusive and all-embracing in the form of a universal rule and every secondary ruling achieved in it establishes the judgement which is its cause; and so all the rulings are connected to the first principle and one secondary ruling is not compared to another. Thus the analogies of the Hanafis are universal and the analogies of the Malikis are partial in this respect.

At this point we do not intend to detail the categories of analogy nor the attributes of the underlying cause nor its method because that subject is the science of fundamental principles and most of the principles of the Malikis coincide with those of others and are not different from them. There is nothing in their study which will distinguish Maliki fiqh from others. What we are studying is the distinct quality of Maliki *fiqh* by indicating the areas which set it off from others and give it an independent legal being.

Here we should indicate something which clarifies an area of Maliki thinking, or to be more precise, indicates the most characteristic thing by which Maliki fiqh is distinguished. It is the attention to public welfare (*al-masalih al-mursala*). Maliki *fiqh* is distinct among the various types of *fiqh* by the pre-dominance of public welfare in it.

There is no evidence in the Shari'a for the abrogation or consideration of *masalih mursala*. It is an independent source of deduction, and so it is examined in analogy and is one of the means of clarification and definition of the underlying cause. This is designated as commensurability.

Al-Qarafi states in his clarification:

"Commensurability contains the acquisition of benefit or averting evil. The first is as wealth is a reason for the obligation of *zakat* and the second is as intoxication is a reason for the prohibition of wine. Commensurability is divided into that which is in the position of necessities, which are needs, and that which is in the position of supplementals. So the first is given priority over the second, and the second over the third when there is a conflict. The first are like the five universals: preservation of life, religion, lineage, sanity and property.

Some say that honour [instead of religion] is one. The second level is like the marriage of the young ward. Marriage is not a necessity but a need in which a spouse is sought. The third is that which will encourage noble character, like the prohibition against taking drugs, denying someone's suitability for testimony or slaves making depositions, and maintenance of relatives. Descriptions vary between these levels: like cutting off hands of several people for the loss one hand. Its legitimacy is necessary to protect people's limbs.

"An example of all of them being combined in the same quality is that the maintenance of life is necessary, wives are a need and relatives are a supplement. The precondition of good character in testimony is necessary to protect lives and property; for being the imam (in the prayer) is a need because it is intercession and the need leads to the improvement of the state of the intercessor. Marriage is a supplement because the guardian is a relative whose nature keeps him from shame or causing injury.

"Removing hardship from people is benefit, even if it leads to the opposite of the rules. They are necessary and cause easement. This is as in the case of a land in which it is impossible to find people of good character. Ibn Abi Zayd says in *an-Nawadir*, 'The testimony of those like them is accepted immediately because that is necessary. That is also obliged in judgeship and authorities. It is applied by need with dispute in the case of trustees." (p. 169)

We quoted these words to show how Malik thought that commensurability indicated the cause of the analogy as *Kitab al-Usul* mentions. It shows how they delved into the application of that evidence, expanded it and defined many of the secondary rulings of their *fiqh* accordingly. That is why he mentioned that when there is dispute in secondary rulings, there is dispute in the fundamentals.

You see from this that in the school of Malik to they consider analogy to be founded on that which makes benefit an independent principle. That is clear since they state that if legal analogy is opposed to benefit, then one takes the benefit. So when analogy demands that good character be a precondition and there are people in a land where there is no one who could be called of good character, then there is allowance to accept the testimony of those like them and it is clear that the like of that is an event which is only witnessed by those to whom the precondition of justice applies. It is also allowed in the acceptance of the testimony of the best of those concerned.

They said something similar about authority and they accept that the one in authority can be other than someone with good character, although the basis is that he should have good

character, if there exists what obliges that allowance out fear of harm and disorder by rebellion against him or there is no one who has better character than him, and such cases.

The *fuqaha'* of the Maliki school use analogy but always subject it to the principle of bringing about the best interests of people and averting harm from them. So even if their analogy is absolutely correct, they do not proceed with it if that would prevent benefit or entail harm. They relax the general rules and leave them for the sake of specific benefits. That is part of *istihsan*.

The Seventh Source: The Principle of *Istihsan* (Discretion)

There are many sources which state that Malik used to employ *istihsan*. Al-Qarafi mentioned that sometimes he used to give *fatwa* on the basis of *istihsan* and he said about it, "Malik says it in a number of questions about artisans who work on objects giving an guarantee of their work and those who transport food and condiments giving a guarantee as opposed to others." (*Tanqih*, p. 23)

We read in the gloss of al-Banani that Ibn al-Qasim related from Malik that he said that *istihsan* was nine-tenths of knowledge. Malik used analogy but made it subject to general and partial benefit, so he only applied it when he was sure that there was no harm in its application; otherwise he left it. For Malik it was a basic rule that analogy is subject to benefit. That is why the underlying principle of Maliki *fiqh* is benefit, as we will explain.

Judgements based on *istihsan* or which make it the deciding factor when weighing up different proofs are numerous in the Maliki school, as ash-Shatibi says in *al-Muwafaqat*. One example of this is loans. A loan might be considered to be usury because a dirham is exchanged for a dirham for a period of time but it is permissible under the principle of *istihsan* because of the way people are helped by it. If loans had remained forbidden they might have suffered great hardship.

Another example is looking at the private parts of people in medical treatment. The general rule is that it is unlawful to look at private parts, but it is recommended to avert harm.

Another is sharecropping. The general principle obliges that it is forbidden since the recompense is unknown, but it is completely recommended.

Another is ignoring usury in smalls amount since it is insignificant and so it is permitted to have a small disparity in a long delay.

Another is what we mentioned before of the lack of making good character a precondition for witnessing when the qadi is in a place in which witnesses of good character are rare. The

same applies to granting trusteeship to someone without good character in order to avert hardship as was made clear under analogy.

These secondary rulings and those like them make it clear that Malik used to employ *istihsan*. What is the reality of istihsan? What are the places in which it is permitted to use it and rely on it in the construction of judgements?

Two things are evident from examining the questions in which judgements are based on *istihsan*.

Istihsan is used for *fatwa* in questions, not on the basis of its being a rule, but rather on the basis of its being an exception to the rule or according to the Maliki definition of consideration: relaxation of the rule is a temporary principle as distinct from a universal principle. We saw an example of this in the *fatwa* about accepting witnesses who do not have good character in a land in which no witnesses of good character can be found and as mentioned above when a loan is permitted to avert distress and hardship. In these matters and those like them, *istihsan* is a relaxation of the general rule which, if followed in the particular instance in question, would lead to harm. Istihsan averts that harm.

Istihsan is most often used when the application of strict analogy would necessarily entail distress. So istihsan in the Maliki school, as in the Hanafi school, is equivalent to analogy, even though the methods of the two schools in reaching it are different. Each of them proceeds according to its legal logic, and *istihsan* in the Maliki school aims to avert any distress arising from following analogy through to its logical conclusion. Asbagh, who was probably the most prolific exponent of *istihsan*, said, 'People who go to extremes in making analogy are in danger of abandoning the *Sunna*. *Istihsan* is the foundation of knowledge.' (ash-Shatibi, *al-Muwafaqat*, vol. 4, p. 118)

Ash-Shatibi says about *istihsan*: 'It entails giving priority to empowered deduction over analogy. Whoever uses istihsan does not refer to only his inclination and desire. He refers to what he knows of the intention of the Lawgiver in those kinds of theoretical matters, like the questions in which the people would give a certain judgement were it not that that matter would lead to the loss of benefit from a different aspect or would bring about evil in the same way... In some case, analogy without restriction would lead to distress and hardship in some cases, and so there is an exception for the place of distress." (*al-Muwafaqat*, pt. 4, p. 116)

An example of *istihsan* is when someone dies leaving a husband, and two siblings by the mother and two full siblings. The application of analogy to this question would demand that the husband inherits a half, the mother a sixth and the brothers have a third, and there is nothing for the full siblings although they are the children of the mother. So it is strange that they do not take anything while the maternal half-siblings alone receive a third. That is why 'Umar made them share in the third by the consideration that they are the sons of the mother. That is an excellent istihsan on his part. That establishes the sunna of istihsan to establish justice which averts distress.

Like the Malikis, the Hanafis say that *istihsan* is adopted when the analogy is offensive or when the analogy will lead to excess in judgement. When Abu Hanifa used analogy, his companions

argued with him about the criteria, but when he said he used istihsan, no one added to it, as was stated by one his pupils, ash-Shaybani.

But is *istihsan* as used by the Malikis and Hanafis the same, or to be more precise, the manner of *istihsan* with the Malikis and Hanafis?

Before we mention what the Hanafis and Malikis said about *istihsan*, we will tell you what is evident to us about istihsan in the two schools. That which is clear to us is that *istihsan* in the Maliki *fiqh* is deals with excess in analogy by referring to three matters: 1) the prevailing custom, 2) the predominant benefit, and 3) avoidance of distress and hardship, and mindfulness of pressing necessities.

The Hanafi school used to avoid extreme analogy by observing another cause different from the evident cause in the analogy. So they consider *istihsan* when there is a conflict between two analogies, one with a hidden cause and strong effect, which is what is called *istihsan*, and the other with an apparent cause and weak effect.

Analogy is negated by necessity and custom, as the Malikis state: this is called *istihsan*. So the two schools agree that consideration of hardship and prevailing custom obliges istihsan rather than analogy. Their divergence lies in the back that Abu Hanifa considered adopting consensus, or the single tradition rather than analogy, as part of the secondary parts of *istihsan* while it is clear that the Malikis do not call that istihsan.

Similarly they diverge in that the Malikis adopt partial benefit instead of universal analogy, as when someone purchases goods provided that he has an option to return them and then he dies and his heirs disagree about carrying it through or cancelling it. Ashhab said, "Analogy would demand that it is invalidated, but we use istihsan since the buyer is not able to decide himself."

You see from this that analogy is not carried through because of a partial benefit, and that is not part of Hanafi thinking.

We already mentioned some reports from Malik about how he used *istihsan* and some of the rulings recorded in his *fiqh* whose basis was *istihsan* and what some Maliki scholars said about the method of *istihsan* in them.

Now we want to define its extent in that school and the disagreement of the scholars about it. We will first mention their definitions of it and the scope they allow it will become clear.

Ibn al-'Arabi defined it in *Ahkam al-Qur'an*: "*Istihsan* according to us and the Hanafis is the use of the stronger of two pieces of evidence." This definition brings the two schools closer in the reality of *istihsan*. We made it clear that they diverge in its use, even if they stated that *istihsan* was one of the principles of deduction. Their disagreement is on some of the principles. The Hanafis refer to accepting the *hadith* to an analogy whose cause is maintained as *istihsan* and they refer to the acceptance of consensus over analogy as *istihsan*. The Malikis do not proceed in that way or, to be precise, they do not call that *istihsan*.

Ibn al-'Arabi mentioned in another definition, "*Istihsan* is to prefer to leave what the proof entails by relaxation because of something which contradicts some of its requirements." He

divided it into four categories: leaving the proof in favour of custom and leaving it in favour of consensus; leaving it in favour of a benefit; leaving it in favour of making things easy; and removing hardship and preferring expansion.

However, Ibn al-Anbari does not think that *istihsan* in the Maliki school is that general. He thinks that abandoning analogy in favour of consensus or custom is to prefer taking one piece of evidence over another. As for *istihsan*, it is only preventing the extremes of analogy: when implementing the analogy would result in injustice, or in something which is not recommended in itself, or to constriction and distress. Then analogy is abandoned in a specific case, not in all cases. That is an amendment of the definition of Ibn al-'Arabi. It is the use of a partial benefit instead of a universal analogy. So it puts the empowered deduction before analogy.

All the definitions arrive at the same end, which is that the *faqih* who is a *mujtahid* must note that when continuing with the cause would result in injustice, entail an injury, or repel a benefit, or actual distress exists, then it is necessary to abandon analogy and to adopt these matters which agree with spirit and heart of the *deen* and its texts. In the Qur'an, *"He has not placed any constraint on you in the deen."* (22:78) The Prophet said, "No harm and no causing injury." The deen brings people's welfare in this world and the Next and so using *istihsan* and abandoning analogy in these cases is the heart of Islam and the core of its *fiqh*.

We concluded in this that the scope of the direction in *istihsan* among the Malikis is to prefer partial benefit over analogy and that by that *istihsan* is close to *masalih mursala*. But ash-Shatibi says, "If it is said this is part of *masalih mursala* and not part of *istihsan*, we would reply, 'Yes, however they conceive of *istihsan* as an exception to the rules which is not the case in *masalih mursala*.'" (*al-I'tisam*, pt. 2, p. 234.)

The meaning of this is that *istihsan* is a partial exception instead of a universal proof which differs in some parts. As for *masalih mursala*, it is used when there is no evidence except it. It is used in two cases:

First Case: When there is no analogy in the subject which can be applied to a text. In this case, Malik considered this to be a separate principle We will clarify that later.

Second Case: When there is analogy and carrying that analogy through would cause hardship or constriction, or loss of benefit: then there is relaxation in abandoning analogy for this use and by that harm is avoided. When this is used instead of analogy is called *istihsan*.

Malik used analogy, but he made it subject to universal and partial welfare, and so he only applied it when it is was confirmed that there was no harm in its application. Otherwise he left it. The basis with him was that analogy is subject to welfare. That is the logic of Maliki *fiqh* regarding benefit.

Ash-Shafi'i, Malik's pupil, fumigated against his shaykh for this and said that *istihsan* amounted to abandoning the evidence for benefit which was tantamount to adopting the principle of benefit alone without attempting to rely on the texts. He criticised that and said that it was wrong and wrote a chapter on that in *al-Umm* called, "The Chapter of the Invalidation of *Istihsan*."

The basis of the disagreement in this topic is that ash-Shafi'i limits himself to the text in every question in which he gives *fatwa*. If there is no clear text, then the text is brought to bear. That is by analogy and so there is nothing other than the text with ash-Shafi'i in every question in which he gives fatwa. Malik, however, viewed the Shari'a in a comprehensive way and found that in its heart and goals it was directed to the best interests of people and the avoidance of harm. If a confirmed benefit has no harm connected to anyone, that is the confirmed goal. If there is confirmed harm, then there is confirmed prohibition. This comprehensive view is referred to often in a group of texts like the words of the Almighty, *"He has not placed any constraint on you in the deen."* (22:78) and like the words of the Almighty, *"Allah desires ease for you; He does not desire difficulty for you."* (2:185) The Messenger, peace and blessings be upon him, said, "No harm and no causing injury." A critical examination of any legal judgement will reveal that the benefit and averting of harm are both observed in it and are intended by it.

Since that is the case, then every matter which contains benefit or averting of harm is desired by the Lawgiver whether there is a text on it or not because the it is in the general text, even if the particular text does not exist.

When Malik gave *fatwas* based on *al-masalih al-mursala* or according to empowered deduction, he adopted the general firm root of investigation and scrutiny. According to Malik, *istihsan* is only one of the branches of empowered deduction as we noted. We will explain the general root and the aspects of its use when we speak about *al-masalih al-mursala*, Allah willing. He is the One who is asked for help.

The Eighth Principle: The Principle of *Istishab* (Presumption of Continuity)

This is one of the fundamental principles of legal deduction, even if it does not have a wide latitude like other principles. In general, it is a negative, not a positive principle, i.e. certain judgements arise from it, not by legal affirmation with confirmed evidence in which judgements are established by the lack of the existence of contrary established evidence which is different from the established state before.

Ibn al-Qayyim defined it as being the continuation of what is established or the negation of what does not exist, i.e. it is the judgement, negative or positive, continues until there is evidence of a change of state. This continuance is not proved by positive evidence, but by the absence of the existence of new evidence. Al-Qarafi defined it: "*Istishab* means the belief that the past or present matter must be assumed to remain as it is in the present or future."

This means that the past judgement and the knowledge of it makes one assume that it will continue in the future, like the one for whom ownership is affirmed by something like purchase or inheritance. So ownership continues until there exists something to negate it. It is also like someone who is known to be alive at a specific time. It remains probable that he is still alive until evidence is established to the contrary and something establishes his death. So an absent person is judged to be alive until there is something to indicate he has died and then the qadi judges him to be dead.

Al-Qarafi said: "*Istishab* was considered a proof by Malik as well as the Shafi'i, al-Muzani." He mentioned that he differed from the Hanafis in that. Then he mentioned that the evidence that it is a proof is that it it probable that an existing state will continue to exists until there is something to negate it. Such probability is evidence in action: like testimony. It is a binding proof for all. If it were ignored or not acted upon, rights would be lost since there would be no means to establish them.

According to this, *istishab* was considered proof by Malik as long as there was no evidence to contradict it. When a person is absent and it is not known whether he is alive or dead, he is considered to be alive until the Qadi judges that he is dead and he is deemed to be alive in the period between the absence and being judged to be dead.

Al-Qarafi mentioned that the Hanafis differ from the Malikis in that and some of them do not consider istishab to be a proof in its own right. However presumption of innocence is a firm principle which is relied on. It is like that when ownership is affirmed. It only ceases by a eliminating cause. All of this is involves the presumption of the continuation of the state. So most Hanafis who disagree with them say that continuation of the state is a defensive proof and not evidence of affirmation. That is why they permit a settlement after denial even though the claimant takes a reimbursement when the right has not been established. If *istishab* had been a proof which obliged rejection and affirmation, that settlement would not have been permitted as long as there was no evidence. So the evidence of the ownership of one against whom the claim is made would be affirmed by the principle of the continuation of the state, but the Hanafis, who permit the settlement, said that denial interferes with the principle of innocence. As they both have a right, each of them makes a settlement for a right permissible in respect of him.

They explain it as meaning a negative rather than affirmative presumption. It denies the entitlement of something against him.

Some scholars divided *istishab* into two categories:

1. Presumption of innocence. It is the continuance of inviolability until there is evidence which establishes a right, like the state of the one who denies a claim. His state is that of presumption of innocence. Ibn al-Qayyim mentions the dispute of the *fuqaha'* in it, saying that the Hanafis apply it to denial rather than affirmation. Malik, ash-Shafi'i and Ibn Hanbal accept it as absolute proof.

2. The continuity of the attribute. A judgement continues until its opposite is affirmed. Ibn al-Qayyim said that it is a proof about which the *fuqaha'* do not argue, but we disagree with Ibn al-Qayyim. The Hanafis said that the continuity of the attribute is a negative rather than affirmative proof of denial, i.e. that the attribute affirms the continuity of the condition, but it does not affirm a new right by it.

The summary of the position is that Malik, may Allah be pleased with him, used istishab as a proof and al-Qarafi, Ibn al-Qayyim, and others postulated a difference between him and the Hanafis, but the one who studies the secondary rulings of the two schools will find that both of them do not differ much from one other in the nature of the proof of istishab and the amount in which it is used as evidence. You will see that they are unified in the principle of istishab regarding the life of someone who is missing and make it affirm what was affirmed first but it does not establish a new right. They differ from ash-ShafiÔi in that.

The summary of the position is that Malik, may Allah be pleased with him, accepted *istishab* as a proof and although al-Qarafi, Ibn al-Qayyim, and others postulated a difference between him and the Hanafis, a study of the secondary rulings of the two schools shows that both of them do not differ much from one other in the nature of the proof of *istishab* and the amount in which it is used as evidence. You will see that they are unified in the principle of *istishab* regarding the life of someone who is missing and make it affirm what was affirmed first but it does not establish a new right. They differ from ash-Shafi'i in that.

The Ninth Source: The Principle of *al-Masalih al-Mursala* (Considerations of Public Interest)

The great majority of scholars of ethics incline to the view that the governing measure of all that is good and evil in any action is the benefit or harm which stems from it. If the action contains some advantage and does not cause harm to anyone, then it is good and performing it is an undoubted virtue. If it is an action which contains benefit for some people and harm for others, there is a conflict and clash between benefit and harm. In this case the good lies in abandoning a slight harm to obtain a greater benefit, or in abandoning a temporary benefit for a lasting benefit, or in abandoning an uncertain benefit to obtain a definite one.

Islamic *fiqh* in its entirety is based on the best interests of the community. That which contains benefit is desired and there is evidence for that, and that which is harmful is prohibited and there are numerous proofs for that as well. This is a confirmed principle which is agreed upon by the *fuqaha'* of the Muslims. None of them have ever alleged that the Islamic Shari'a brought anything which is not in people's best interests and none of them have ever said that there is anything harmful in any law or judgement within the Shari'a which has been legislated for the Muslims. Although there is no disagreement on its basis, there may be on its application.

Some think that the Shari'a contains the explication of everything which entails people's welfare, and so complete welfare can be found in its texts and that which cannot be taken by text can have a text applied to it by analogy, and the mujtahid cannot discover welfare when there is no testimony to it in the Shari'a. Ash-Shafi'i was the standard-bearer of that opinion. That is why he launched an all-scale attack on whoever considered that there was a benefit which had no testimony from the Lawgiver through '*istihsan*'. The basis of that opinion is not to neglect welfare. Rather its basis is that Allah did not leave man in vain and appoint a benefit in existence to which the Lawgiver did not testify. Contained within this precept is that Allah Almighty would not leave a man to his own devices. That is what Allah denied in His *ayats* when He says, *"Does man reckon he will be left to go on unimpeded?"* (75:36)

In that ash-Shafi'i was close to Hanafi *fiqh*, but the Hanafis extend the area of application of texts more than ash-Shafi'i and accept some matters in which would analogy impair people's welfare and employ the *istihsan* which Abu Hanifa used frequently. *Istihsan* without a text or hidden analogy is making use of welfare.

As for the schools of Malik and Ibn Hanbal, they both consider welfare as an independent principle in *fiqh* and state that the texts of the Lawgiver in their judgements only bring what is benefit, even if there is no text to define it, and if something is not known by text, its goal is known by the general texts of the Shari'a, like the words of the Prophet, "No harm and no causing injury," and the words of the Almighty "We have not placed on you any constraint in the *deen*."

According to these two schools, the *faqih* is able to judge that every action which contains benefit and has harm in it or has more utility than harm is desired without requiring a specific text on that type of benefit. Every matter which contains harm and no benefit or whose sin is greater than its utility is forbidden without requiring a specific text.

Some Hanbalis and Malikis go further and make the Qur'anic and Prophetic texts specific to welfare when the subject of these texts is human behaviour and not acts of worship. At-Tufi al-Hanbali was extreme in adopting that type of *fiqh* and said that when regard for benefit leads to opposition of a judgement which is agreed or a text of the Book and *Sunna*, then the regard of the benefit must be advanced.

There is no doubt that proceeding in this course which the *fuqaha'* of the Malikis and Hanbalis followed makes the Islamic Shari'a rich and productive in fulfilling the needs of people in every age and in every place. We prefer not go too far as at-Tufi did, or, to be more precise, we will not find a definite benefit which definitely opposes a legal text or a matter on which the *fuqaha'* of the Muslims agree. If we disagree with at-Tufi in anything, we disagree with him in supposing that there is a benefit which the human intellect is certain exists in a matter while the texts contain that which prevents its being observed or that the scholars would agree on its opposite.

There is no doubt that the Maliki school, and the Hanbali school as well, follow the direction that judgement by the commands of the *deen*, morality and laws is directed to the happiness of people and that utility or benefit is a governing criterion for all that is commanded or prohibited in the *deen*, as it is for the philosophers who state that it is the criterion of virtue and vice in morality, and justice and injustice in law.

When a philosopher in the last century wanted to declare that the criterion of morality is utility, he found that it was necessary to define it and to clarify its limits and to divest it of distorting ideas which people understand to be connected to it. He said: "But it is a preliminary condition of rational acceptance or rejection that the [utilitarian] formula should be correctly understood. I believe that the very imperfect notion ordinarily formed of its meaning, is the chief obstacle which impedes its reception; and that could it be cleared, even from only the grosser

misconceptions, the questions would be greatly simplified, and a large proportion of its difficulties removed.

Before, therefore, I attempt to enter into the philosophical grounds which can be given for assenting to the utilitarian standard, I shall off some illustrations of the doctrine itself; with the view of showing more clearly what it is, distinguishing it from what it is not, and disposing of such of the practical objections to it as either originate in, or are closely connected with, mistaken interpretations of its meaning." (*Utilitarianism* p. 255, John Stuart Mill)

Since poor understanding of the term utility is what provoked many objections and criticism, so ambiguity about what is meant by benefit in the case of some of the *fuqaha'* of the Muslims is what provoked their objections to considering it as a legal root on which to rely, let alone being the governing criterion, and that reliance on it in recognising the principle of all that exists of the events of the human race is something necessary so that the judgement may be in accordance with the aims and goals of Islam in social transactions.

We found those who object to deduction by benefit alone, whether it is unarticulated or in conflict with analogy, stating that it is making judgement in the *deen* by partiality. We find that al-Ghazali claiming that the *istihsan* of the Malikis is invalid: "We know absolutely that the consensus of the community is that the scholar cannot judge by his whim and penchant without examining the evidence of proofs, and *istihsan* without looking into the evidence of the Shari'a is judgement by pure whim." (*Al-Mustasfa*, pt. 1, p. 275)

He says about *al-masalih al-mursala*: "If the Shari'a does not testify, it is like *istihsan*." (p. 264)

Al-Ghazali thought that only using benefit which has no testimony from the Lawgiver in a text or several indications was judging by whim. Al-Juwayni also objected to using benefits without searching for testimony and said that it is allowing the people to judge according to their whims and they avoid what they are averse to and that judgements would then differ with different individuals.

From this you see that the attack on considering benefit in Islamic *fiqh* as a governing criterion for command and prohibition is based on the claim that it adopts the judgement of whim without a precise rule, and so the judgements of the Shari'a would be subject to and differ by different individuals, environments and conditions.

It is strange that since the school of utility developed in Greek philosophy after Socrates, it has been subjected to this very attack, rather in even harsher terms. Many of those with great intelligence among the philosophers say: "To suppose that life has (as they express it) no higher end than pleasure - no better and nobler object of desire and pursuit - they designate as utterly mean and grovelling; as a doctrine worthy only of swine, that the judgment that life has no finer goal other than utility or pleasure, to whom the followers of Epicurus were, at a very early period, contemptuously likened... When thus attacked, the Epicurians have always answered, that it is not they, but their accusers, who represent human nature in a degrading light; since the accusation supposes human beings to be capable of no pleasures except those of which swine are capable. ... Human beings have faculties more elevated than the animal appetites, and when once

made conscious of them, do not regard anything as happiness which does not include their gratification." (Mill, op cit., pp. 257-258)

This without a doubt is directed at the area which ash-Shafi'i, al-Ghazali and the al-Juwayni attacked, considering benefit as an independent legal evidence without textual support. When there are no texts on the subject, then they attack benefit since it is judgment by inclination or mere compatibility and aversion.

But the school of utility attacked in European countries after they embraced Christianity was from an aspect by which the school of benefit is not attacked in Islam: it is that adopting benefit or utility may be contrary to the principle of asceticism to which Christian religiosity calls. That is why European writers who supported the principle of utility tried to harmonise asceticism and utility. These sorts of answers are not found in Islamic *fiqh* among those who support benefit as a basis for commands and prohibitions and their opponents because asceticism for its own sake is not part of Islam. Asceticism in Islam is a positive action for the benefit of others, even if it is by foregoing personal happiness, because mortification of the flesh to purify the soul is not part of Islam. Rather it is strengthening the body so that the soul can undertake the duty.

Now we will proceed to clarify what is meant by benefit. Muslim *fuqaha'* state that Muslim responsibilities fall into two categories. The first is acts of worship, which is the system of the connection between man and his Lord, and they affirm that the basis in this category is devotion. So the texts about it are not causal in their whole, or to be more precise, a person cannot find in acts of worship the motives and ends for which they exist and on which their likes could be based. Someone does not impose on himself an act of worship which the Lawgiver did not impose whatever the logic. In addition to this prohibition, it is obligatory for the Muslims to believe that these responsibilities in worship are for the benefit of man, even if he cannot legislate the like of them by wisdom, benefit, or motives. He must stop at what the texts state and what they indicate and what it connected to them without adding to them.

As for the second category of responsibilities, which are connected to the social transactions of the human race with one another. This is what the usage of the *fuqaha'* terms 'customs'. The basis in that category is turning to the reasons and motives for which the judgements were legislated by the agreement of the *fuqaha'*. Responsibility in these matters is for the sake of forming a virtuous Islamic polity based on justice and virtue.

Ash-Shatibi affirmed that principle in *al-Muwafaqat*. It is any attention given to customs is for one of three reasons.

"1. If we investigate, we find that the Lawgiver intended the welfare of people. In customary judgements you may see something forbidden in one case in which there is no benefit, and then permitted when there is benefit, as dirham for dirham on credit is forbidden in the sale but permitted in the loan. Selling fresh dates for dry is forbidden when it is simple risk and usury without benefit, but permitted when there is predominant benefit in it.

The Almighty says, *"There is life for you in retaliation, people of intelligence,"* (2:179) and He says, *"Do not swallow up one another's property by false means."* (2:188) In *hadith*, "The judge does not give

judgement while he is angry." The Prophet, may Allah bless him and grant him peace, said, "No harm and no causing injury." He also said, "The killer does not inherit," and he forbade the sale with uncertainty. He also said, "Every intoxicant is unlawful." The Almighty says, *"Shaytan wants to stir up enmity and hatred between you by means of wine and gambling, and to debar you from the remembrance of Allah and from the prayer"* (5:91) and other countless judgements and texts. All of which indicate, indeed explicitly state that the consideration of welfare is a basis for permission and prohibition, and that permission is a mobile one.

2. The Lawgiver was flexible in clarifying causes and wisdoms in the rules of social relations between people and customary matters between them. Most of the causes are logically connected to welfare. We understand from that that the Lawgiver meant for people to follow the reasons in them, not to merely stop with the texts – which is not the case with acts of worship. Worship is only established by a text.

3. Addressing the causal factors, which are benefits, exists at times when there are no Messengers, i.e. so that their welfare can exist and their livelihoods will be in in order. The Shari'a comes to perfect good character and customs. This is why the Shari'a confirms a group of judgements which occurred in the *Jahiliyya*, like blood money, the group oath, the commenda and the like of that which were praised among the the people of the *Jahiliyya* and whatever good customs and noble character which intellects accept: and they are many." (*al-Muwaqafat*, pt. 2., p. 213)

So the manifest principle governing the legality of customs and traditions in the eyes of the Shari'a is whether or not they are beneficial in real terms. But what is the criterion used in the Shari'a to ascertain whether or not a particular matter contains benefit? To discover that we have to ascertain exactly what it is that makes a particular action permitted or forbidden.

What, then, is the nature of the benefit which makes an action acceptable in the eyes the Islamic Shari'a? It is that which coincides with its goals, and the goal of the Islamic Shari'a is to preserve the five things whose preservation is agreed to be obligatory: life, sanity, property, progeny and honour. All religions agree on the obligation to preserve these things and have that point in common. All rational people concur that society is based on protecting and preserving these things.

Scholars of *usul* divide preservation of action into three grades and base restitution on the basis of their order: necessities, needs and recommendations.

1. Necessities are those things which are necessary for the establishment of the welfare of the *deen* and this world, and when they are lacking, the benefits of the deen are not in order resulting in disorder and loss of life. The preservation of these necessities is by establishing them, making their rules firm, and by averting disorder, actual or probable. This is why foods, drinks, clothes, behaviour and their organisation is permitted. They are those things which society must have if it is to function. This is why such crimes are fought with retaliation, blood money, ensuring the value of property, the cutting off of hands, flogging, and other things which are

intended to avert actual and likely disorder. So the basis of necessities is to establish those five matters.

2. As for needs, they are connected to what is less than those five, but their absence entails constriction. Thus needs are prescribed for expansion and to remove the constriction which usually results in distress and hardship. When needs are not cared for, people experience distress and hardship. This is like permitting hunting and enjoying good things which a man can dispense with, albeit with constriction, but when they are allowed there is expansion.

3. As for recommendations, their omission does not lead to constriction, but they are part of good character and good customs. So then they consist of adopting what is proper and avoiding what is not proper of dishonourable things which superior intellects disdain, like manners in eating and drinking, and being free of prodigality and niggardliness, and so forth. We do not want to go into detail about that.

What is noticeable is that in most cases benefits are not free of evils accompanying them, and evils are not lacking some benefit connected to them. Benefits are connected to harms and harms are not lacking in some utility. Ash-Shatibi explained that established reality in by the fact that benefits are intermixed with responsibilities and hardships are connected to them, or before or after them: like eating, drinking, clothes, dwellings, riding, marriage, etc.

These matters are only obtained by toil and fatigue. Similarly evils of this world are not pure evil in existence since there is no evil conceivable in normal custom but that it is often accompanied, preceded, or followed by kindness, gentleness, and obtaining pleasures. That is because this world was set up as a mixture of the two matters. Whoever seeks to purify one of them from the other will not be able to do so, and the experience of that is a truthful witness. That is because this abode is the abode of testing, as the Almighty says, *"We test you with both good and evil as a trial,"* (21:35) and as He says, *"He who created death and life to test which of you is best in action."* (67:2)

This is what is self-evident in existence. Ibn al-Qayyim divided things into five categories according to logical hypothesis without looking at its realisation in existence. The first category is that which is pure benefit; the second is what is predominantly benefit; the third is what is pure harm; the fourth is what is mostly harm; and the fifth is that in which harm and utility are equal.

He mentioned this categorisation in respect of logical hypothesis. As for everyday reality, the theorists argue about the existence of three categories while they all agree on the existence of the other two: what is predominantly benefit and what is predominantly harm. As for the rest of the five, which are pure benefit, pure harm, and that in which they are equal, they are the subject of dispute.

Some scholars say that neither pure benefit nor pure harm exist. Ibn al-Qayyim reported that they say: "Benefit is bliss and pleasure and what leads to them, and evil is punishment and pain and what leads to them. Everything must be accompanied by endurance of a type of pain. Even if there is pleasure and happiness in it, some detriment occurs, but since this is overshadowed by benefit, it is not noticed and the benefit is not nullified because of it so that that which is

predominantly abundant good should be abandoned for the sake of a small overshadowed evil. It is like that with the evil which is forbidden.

A man does it because he desires and wants it, and this is an immediate benefit. When he is forbidden it and leaves it, he lacks its benefit and immediate pleasure and its harm is greater than its benefit and indeed, its benefit overcome by its harm as the Almighty says about wine and gambling, *"Say, 'There is great wrong in both of them and also certain benefits for mankind. But the wrong in them is greater than the benefit.'"* (2:219) So even though usury, injustice, and drinking wine are evil and harmful, they contain use and pleasure for the one who does them. This is why he prefers them and chooses them. Otherwise, if he had experienced their harm from every aspect, he would not do them at all. The most intelligent person is the one who leaves them the most because of their predominant harm in the end, even if there is pleasure and a little enjoyment in it in respect to its harm.

This is the argument which Ibn al-Qayyim presented for those who do not think that existence contains anything completely beneficial or anything completely evil. As for those who affirm that in existence, they said that it is confirmed that there are things in existence which are good without any evil in them and others which are evil without any good in them: the good Prophets and the pure angels are good without any evil in them, and Iblis the Accursed and his helpers are evil with no good in them. There are individuals who are are completely good and so there are actions which must be purely good, and some of which are purely evil. Allah described magic as harmful and not beneficial where He says, *"They have learned what will harm them and will not benefit them."* (2:102) So it is a judgement that it is pure evil and we cannot deny the judgement of Allah Almighty.

Ibn al-Qayyim separates the opponents when he says: "The conclusion is that if what is meant by pure benefit is that it is pure in itself and not mixed with any harm, then there is no doubt that it exists. If what is meant is that the benefit is not mixed with hardship or injury in its path and means to it, not in itself, it does not exist since benefits and good things, pleasures and perfections are all only obtained by a portion of hardship, and one does not reach them except through toil. Intelligent people of every nation agree that bliss is not obtained by bliss and that the one who prefers rest lacks rest, and that it is according to enduring terrors and bearing hardships that there is joy and pleasure. There is no joy for someone who has no sorrow. There is no pleasure for the one who has no patience, no bliss for someone with no misery, and no rest for the one with no fatigue. When someone is a little tired, he has long rest. When he endures the difficulty of steadfastness for a time, that leads him to eternal life. All that the people of eternal bliss are in is steadfastness for a time. Allah is the One who is asked for help. There is no strength except by Allah. Whenever souls are nobler and aspiration is higher, then the fatigue of the body is greater and the share of rest is less." (op. cit.)

We find that in his presentation which Ibn al-Qayyim considers to be a conclusion of this dispute, he states certain things:

1. That some benefits are pure, but hardship may occur in endurance in obtaining them. So what is desired is pure benefit but the means to it has pain.

2. He stated that the greatest hardship is with pure benefit since its pure good is commensurate with the effort of acquisition, expending of effort and great endurance.

3. He ends with the fact that when souls are noble and aspiration is higher, then the effort of the body is greater and rest is less and the personal utility of the doer is spiritual and the physical use is later and not immediate.

The second question on which there is a dispute is the existence of something in which the benefit and harm, or its use and corruption, or its good or evil, are equal. Some people affirm its existence and some deny it. Ibn al-Qayyim - and we along with him - state that this category has no existence in this world even if logic stipulates a portion for it. When benefit and harm, and use and corruption, pleasure and pain, are opposite one another, one of them must dominate the other, and so the judgement goes to the predominant.

To sum up, the Lawgiver only gave permission for that which is benefit and he only forbade what is harmful. It is within the capacity of the human intellect to perceive the most outstanding benefit in things of this world and to recognise them and to obtain them by the command of the Lawgiver, even if there is no explicit text on them because general commands and analysis of judgements indicate that the Shari'a is directed in its universal and partial rulings to obtaining benefit and repelling harm.

As for what is connected to the relationship of a person with his Lord, it is not easy to recognise the outstanding benefits in it, even if the intellect can perceive some of its wisdoms in the whole. That is why he can discern the benefits of the world, even if there is no specific text, but he cannot legislate an act of worship without a text. Furthermore that is innovation in the *deen* and every innovation is misguidance and every misguidance is in the Fire, as the *hadith* clearly states.

Muslim *fuqaha'* criticise connect appetites to benefits or whim to uses. Is whim or appetite considered to be inseparable from the considered benefit legally or are benefits distinct from whim and appetites?

The Muslim *fuqaha'* argued about when benefits conflict, and the benefit of one people is harm to others, or the benefit is for one part of the community and harm for another part. Muslim *fuqaha'* discussed these two matters as did moralists in relation to utilitarianism.

They stated in relation to the first matter, the connection of desires to benefits, that it is not established that they are inseparable. Desires and pure appetites are not discerned in the benefits which are considered and settled in the Shari'a. What is considered in benefits is that which will establish this world as a bridge to the Next, i.e. what will make the life of this world one of virtue and mutual help, not of mutual severance and discord.

There are four pieces of evidence to establish that what is meant by benefits is not what is inseparable from desire or simple appetite.

The first of this is that Shari'a came to prevent people from simply following their passions because Allah Almighty says, *"If the truth were to follow their whims and desires, the heavens and the earth*

and everyone in them would have been brought to ruin." (23:71) It has not come for the following of appetites, but it has come to strengthen resolve and the formation of perfect character; the benefits by which society is firmly established are strong foundations

Second is the agreement of intelligent people from earliest times that benefit is that by which life is supported and on which society is based, and that the preservation of it can be mixed with pains or pleasures. Moreover, that which one considers the goal which might be encircled by disliked things may not actually be where man's passion lies. That has been noticed by intelligent people in every nation past and present. This indicates that the passion does not enter into the calculation of benefit.

The third is that utilities and harms are usually relative and not real.They are relative since they are utilities or harms in one case rather than another, and in relation to one person rather than another or one time rather than another. For instance, eating and drinking are clearly beneficial for man when he needs to eat and when what is eaten is delicious and wholesome, not disliked or bitter, and does not produce harm immediately or later, and the aspect of obtaining it is not connected with harm, immediately or later, nor is harm connected to someone else because of it, immediately or later. These matters are rarely joined together, and thus many benefits are harmful for someone, or harmful in one time or state and not harmful in another state.

The fourth is that desires vary regarding the same thing since the fulfilment of the desire of one may harm someone else since he has a different desire. So the result of the difference in many cases is that the observance of the Shari'a will prevent benefits which take desire into account because their rules are not fixed except by observing the benefits free from desires.

This is the first matter and so we move to the second matter, which is what the Shari'a demands when there is a conflict of benefits and a conflict of evils so that as choosing some benefits entails ignoring the benefit of others, or averting some evils entails evil for others. Muslim *fuqaha'* say that what is preferred is the one which procures the most and most necessary benefits and that which averts the most harm and injury. The clearest statements about that can be found in *al-Muwafaqat* of ash-Shatibi, *Miftah Dar as-Sa'ada* by Ibn al-Qayyim, and the *Risala* of at-Tufi.

Ibn al-Qayyim says, "When you reflect on the laws of the *Deen* of Allah which He set up between His servants, you will find that they do not fail to procure pure or predominant benefits commensurate with possibility. If there is a conflict, then the most important of them is favoured, even if the least is lost. Similarly, when does not fail to stop specific or predominant evils according to possibility and there is a conflict, then the most harmful of them is stopped by enduring the least of them. It is on this basis that the Wisest of the judges set up the laws of His *Deen* which indicate Him and attest to the perfection of His knowledge and wisdom, and His kindness to His slaves and goodness to them. This sentence leaves no doubt for someone who has a taste of the Shari'a and has been nurtured by it and has drunk from the purity of its basin." (*Miftah Dar as-Sa'ada*, p. 350)

At-Tufi said: "If they are multiple so that there are two or more benefits in the place, and it is possible to obtain all of them, that is done. If it is not possible, then what is possible is obtained. If it is impossible to more than one benefit and the benefits vary in importance, then the most important is taken." (p. 768)

You see from this that Muslim *fuqaha'* state that the desired benefit or utility from the Lawgiver is that whose use is for the greatest possible number with the strongest possibility, and that the harm which is repelled is harm for the greatest number with the strongest possibility, and that things in that are relative and comparative.

BENEFIT AND TEXTS

We have already explained how the Islamic Shari'a is based on benefits and that the most evident of benefits in dealings between people can be identified while the most evident utility in acts of worship cannot be completely grasped. We quoted scholars who studied this topic who noted that the the legality of ideas of dealings which the responsible person perceived can be discerned, but acts of worship are not like that. We clarified the rules which regulate the desired benefits and which are the intended causes in the legality of Islamic dealings.

We indicated that there scholars differ about considering benefit as an independent principle. Now we want to give some details on this subject. Benefits which do not have a specific text which testifies that its category is considered is termed *al-masalih al-mursala*, and whether or not it is is a legal principle is debated among the *fuqaha'*. Al-Qarafi claimed that all the *fuqaha'* use it and consider it evidence in partial decisions, even if most of them deny that it is a principle in universals. He says on that:

"The unarticulated benefit is explicitly denied by others, but in the case of secondary rulings we find that they use the generality of benefit as cause; and in differences and comprehensive manners, even if they do not accept that it is considered. They rely on mere appropriateness and this is the unarticulated benefit." (*Tanqih*, p. 200)

Whether or not that claim is sound, it is confirmed that the consideration of benefits for which there is no specific text to be considered is a view about which scholars disagree. The statements of scholars regarding it are fall into four categories:

1. The Shafi'ites and those who adopt their method. They do not use *masalih mursala* when there is no testimony from the Lawgiver because they only use texts and applying analogy based on them. If we follow al-Qarafi, we say that it is rare for them to use benefit without analogy.

2. The Hanafis and those like them who use *istihsan* with analogy. *Istihsan* is part of what they say and it is not lacking in reliance on general benefits, and in fact, we would say that they use benefits in their deduction more than the Shaf'Ôites, even if the actual amount is

little in itself since they do not reckon these benefits to be one of their principles since they rarely rely purely on it.

3. Those who go to extreme in adopting benefits so that they put benefit before the text in people's dealings and believe that it makes it specific. Indeed, they believe that it make consensus specific, i.e. that when the scholars agree on something by a text and find it is opposed to benefit in some aspects, they advance consideration of the benefit, and also consider that a specification. At-Tufi took that position.

4. Those who are balanced. They have the soundest insight and consider unarticulated benefits in things in which there is no unequivocal text: they are most of the Malikis. We will speak about the opinions of these last two categories.

Those who say that benefit is an independent principle which is used when there is no text agree that when an actual or likely benefit exists, then it is desirable. The dispute is when there is both benefit and the text (unequivocal in its *isnad* and evidence) and there is a conflict between them. At-Tufi prescribed that the conflict be examined and he advanced benefit before that text. The Malikis, and those who follow their method among the Hanbalis other than at-Tufi, postulate that benefit is established when this text exists. It is not possible for there to be a confirmed or predominant benefit when an unequivocal text clashes with it.

It is misguided thought, an impulse of passion, appetite, or preferring a non-essential state which is not abiding, or an immediate utility which will soon vanish or in fact, a utility whose existence is doubtful. It is unsustainable when there is definitive a text which has come from the wise Lawgiver and has been. When the judgment is established by a probable text - either in *isnad* or evidence – it is reported from Malik how what is probable is specified by analogy if its evidence is closely connected and it is based on an unequivocal basis. He also considers benefit to be of that type. If its probability is established by an unequivocal means, then we have two conflicting principles before us: one of them is probable in its *isnad* or evidence, and the other unequivocal in its motives and confirmation. In this case the unequivocal is advanced over the probable. If the text is a single tradition, this weakens it, because when it differs from a confirmed predominant benefit, it opposes the sum of firm legal testimonies to seeking benefits and repelling harms.

Malik employed benefit in transactions and considered it to be independent evidence which did not rely on anything else. When benefit existed, he took it, whether it had specific testimony from the Shari'a for consideration or not. This is what the *fuqaha'* call 'al-masalih al-mursala.' Malik used it. When it clashed with probable texts and there was a conflict between them, he preferred to adopt it and make the text specific or to weaken its *isnad* if it was general. If there was no contrary text, he took it. He followed that through in a profound manner in his understanding of the beneficial ideas. Then he paid attention to the intention of the Lawgiver, which he did not leave and he did not oppose any of its principles so that scholars might find many aspects of his procedure offensive, claiming that he had loosened the rope and opened the door of legislation. How unlikely! How far from that he was! He is the one who was pleased in his fiqh to follow so

that some people imagined the he merely imitated those before him. He had insight into the *deen* of Allah. (*al-I'tisam*, pt. 2, p. 311)

In taking *masalih mursala* as an independent legal principle, Malik was a follower and not an innovator. He found the Companions of the Messenger of Allah, may Allah bless him and grant him peace, doing various things after his death which had not been done while he was alive.

They collected the Noble QurÕan into a bound book – something which had not been done during the lifetime of the Messenger – because of the inherent benefit in it, dictated by the fear that the QurÕan might be forgotten through the death of those who had memorised it. When 'Umar, may Allah be pleased with him, saw many of the memorisers of the QurÕan fall in the Ridda War, he feared that the QurÕan might be lost through their deaths and so he suggested to Abu Bakr that it should be collected together into a book. The Companions agreed to that and were pleased with it.

The Companions of the Messenger agreed after his death that the hadd for wine-drinking should be 80 lashes in view of the principle of *masalih mursala*, since they observed that one of the consequences of intoxication was the slander of chaste women

The Rightly-guided Khalifs agreed to make artisans responsible for any goods of other people they were working on, even though the basic position is that is the things in oneÕs possession are a trust (under Islamic law trustees are not responsible for unintentional damage to goods in their keeping). They did so because it was found that if they were not made liable for them they would make light of guarding other peopleÕs goods and property. So in this case public interest demanded that artisans should be made liable.

'Umar ibn al-Khattab, may Allah be pleased with him, used to confiscate half of the wealth of governors who combined their personal wealth with government assets and then used their position as governor to make a profit on it. The benefit involved in that ruling was that he thought it that would reform the governors and keep them from exploiting the office of governorship for their own ends.

It is also reported of 'Umar ibn al-Khattab that he poured away milk which had been diluted with water, as a punishment for cheating. That was for the general benefit in order that people might be protected from being cheated.

It is also transmitted that 'Umar ibn al-Khattab had a group of people executed for the murder of one person when they all participated in the murder, because public interest demanded that even though no text existed to support it. The benefit in this lies in the fact that it would otherwise become possible to shed inviolable blood with impunity, resulting in a loophole in the principle of retaliation. People would use assistance and partnership as a means to commit murder since it would be known that no retaliation would be demanded. If it is said that this is an innovative matter by which other parties than the killer are executed even when they were not all actually involved in the act of killing, the argument refuting this is that the killing group is a collective and so collective execution is the same as executing an individual, since killing is ascribed to the collective in the same way as it is ascribed to an individual. Therefore, individuals

who join together with the aim of killing are considered as a single person. Public interest demands this since it involves the prevention of bloodshed and the protection of society.

Malik found all these things and a great fund of other legal judgements which had been left the *fuqaha'* of the Companions, may Allah be pleased with them. Since he followed their methods and adhered to their path it was impossible that he should stray from the aim and goal of the Lawgiver. His *fatwas* were given with the object of ensuring benefit in all matters, both public and private.

Part of his attention to benefit in general matters was allowing homage to the less excellent when there exists someone who is more entitled to the khalifate than him, because invalidating that would lead to disorder, not establishing the benefits of people in the world, and chaos for a short time in which injustices are are committed which are not committed over a period of years.

Part of it is when the treasury is empty or there the army has needs and there is not enough to cover it. The Imam can impose on the rich what he thinks will be adequate immediately so there is money in the treasury or there is enough. He should impose this tax at times of receiving revenue and the harvest so that that will not lead to alienating hearts. The aspect of benefit is that if the just leader does not do that, his might will be hollow and dwellings will become subject to sedition and subject to being occupied by attackers. It might be said that instead of imposing this tax, the leader can borrow for the treasury. Ash-Shatibi replied to that: "Borrowing occurs in times of crisis when the treasury is expecting revenue. If nothing is expected and the prospects of income are weak so that it is not adequate, then the judgement of the tax must be carried out."

Part of that if that if the *haram* is widespread in the land or in part of the land and it is difficult to move and the means of honest earnings are blocked and their is need for increase in order to stay alive, when they cannot alter the situation and it is impossible to move to a land where the Shari'a is in force and it is is easy to earn lawfully, then individuals can with reluctance accept some of these foul earnings out of dire necessity and need such that if they did not take it, they would be in constriction and greater hardship. So they are like the one who is compelled when he fears death if he does not eat from what is unlawful, like carrion and pork. They can take beyond bare necessity to satisfy need since if they confined themselves to bare necessity, earnings and actions would be worthless and people would remain suffering that until they perish. That would entail the ruin of the *deen*.

But they should not exceed need for wealth and comfort. That is considered taking pleasure in evil and not considered remedying a rare unusual state in the legal system of Islam: the predominance of the *haram* in one of the lands of the Muslims.

We see from this how Malik proceeded in his legal derivation on the basis of dealing with the affairs of the Community by that which entails its good and welfare, and so that its affairs are easy, and not trouble, constriction, distress or hardship.

Those who study the Maliki school and know the means of deduction in it will notice that Malik's deduction of the use of *masalih mursala* contains indications of matters which are tantamount to limitations on its empowerment. They are:

1. Harmony between the benefit which is adopted and the aims of the Shari'a on the whole inasmuch as it does not negate any of its principles or any of its definitive evidence.

2. It is intelligible in itself. Logical relationships occur which are presented to people of intelligence who accept them.

3. Making use of it removes a inherent constriction in the *deen*. If the logical benefit were not taken in its place, people would be in distress. Allah Almighty says: *"We did not place any constraint on you in the deen."*

These limitations without a doubt prevent those who would give it free rein so that the affairs of people would proceed according to appetites and desires. Malik did not vary from a definitive text except for pressing necessity. If necessity arises, then it is permitted to omit some binding obligations in the state of choice. That is established by unequivocal texts.

Islamic *fiqh* takes benefits into consideration and that is noticed in all its judgments. However, the between its *fuqaha'* is in considering it as an independent source to be relied on in derivation without being derived from another source in the form of a text or action of the Prophet. All agree that benefit is taken into consideration in this case since it is one of the types of analogy, even if the resemblance which produces the analogy is not effected. Malik and Ibn Hanbal said that it is used. As for the Hanafis and ShafiÔis, the Hanafis use it in what they call *istihsan* because on the whole, it is only subject to the principle of custom, empowered benefit, or necessity. That without a doubt is subject to the idea of procuring benefit and repelling harm and removing distress and hardship. The one who consults the principles of the Hanafi school will find much in it which is based on benefits.

Such the position of benefit in Islamic *fiqh*, which is the first aim of its laws in the transactions between people. Attention is paid to it in its immediate and further aims. *Fuqaha'* agree that it is considered and they agree that it is used. Their disagreement is not in the affirmation of its principle, but in the amount of their reliance on intellect alone in perceiving it without the help of a text. Some people went to excess in trusting in the judgements of the intellect particular to benefits so that they made the judgement of the intellect that a certain matter contains benefit stand contrary to the unequivocal text and specify it, and have it specify unequivocal consensus when it is established. Others went to excess and stopped at the texts and only acknowledge benefits by means of them, and they suspect the intellects in their perception of them. There is no doubt that this hesitation in perceiving the benefits in worldly matters is not acceptable. The Messenger of Allah, may Allah bless him and grant him peace, said, "You know better the affairs of your world."

The Imam of the Abode of the *Hijra* followed the Straight Path and did not allow the judgements of the intellect to exceed their role in benefits and overstep their place. He did not let them clash with unequivocal texts and judgements reached by consensus. He did not confine the intellect and forbid it to perceive benefits except by means of texts. His method was direct and balanced in that without negligence or excess. So the school was productive and rich with ideas without exceeding proper bounds or going beyond moderation and balance. It contains

treatments for people's ills and a flexibility which allows it to encompass the customs of people and their circumstances in different manners and environments, without innovation or going outside the Shari'a. He did not abandon imitation and following. Allah Almighty is the One who inspires to what is correct.

The Tenth Source: The Principle of Means (*adh-Dhara'i'*)

This is another of the principles on which Imam Malik often relied when deriving judgements and in that respect Imam Ahmad ibn Hanbal closely resembled him. We will begin our discussion with the meaning and categories of this term and then see how it becomes a legal principle which can be used as evidence.

The meaning of *dhari'a* is "means". *Sadd adh-dhara'i'* (blocking the means) implies preventing them, which entails making the means to what is forbidden also forbidden; and *fath adh-dhara'i'* (facilitating the means) entails making the means to what is obligatory also obligatory. Thus because adultery is unlawful, looking at the private parts of a unrelated woman is also unlawful because it is likely to lead to adultery. Because the *Jumu'a* prayer is an obligation, going to it is also an obligation, and leaving off trading to go to it is also obligatory. *Hajj* is an obligation, and going to the Sacred House and the other practices of *Hajj* are obligatory for its sake.

Sources of judgements fall into two categories: objectives, which are benefits, harmful matters; and means, which are the paths leading to them. Their judgement is like the judgement of that which leads to prohibition or allowance, although they have a lesser rank than those which are judged to be objectives. Al-Qarafi says: "The means to the best of goals is the best of means, and to the worst of goals is the worst of goals. That which is in the middle is in the middle." (*Tanqih*, p. 200) Ibn al-Qayyim explained that principle:

Since objectives can only be reached by the causes and paths which lead to them, then those paths and causes which follow them must be taken into consideration. The means to unlawful things and acts of rebellion are disliked and prohibited inasmuch as they lead to their consequences, and the means to acts of obedience and acts of nearness are recommended and permitted inasmuch as they lead to their objectives.

The means to the objective is subordinate to the objective, and both of them are intended, but their being intended is the objective of the ends. They are intended as the means to what is

intended. When the Lord forbade something which has means which lead to it, He also made the means unlawful and forbade them in order to achieve the prohibition and confirm it, and to prevent people approaching it. If the means leading to it were allowed, that would impair the prohibition and entice people to it. His wisdom and knowledge completely rejects that. Indeed, it is the policy of the kings of the world to reject that. When one of them forbids his army or people or household something and then permits them the means, causes, and paths which lead to it, that is considered a contradiction. It achieves the opposite of his aim in his people and army.

It is like that with doctors when they want to terminate an illness: they forbid the one who has it the paths and means which lead to it. Otherwise, what they desire to mend will be spoiled for them. So what did do you think about the Shari'a which is in the highest ranks of wisdom, benefit and perfection? Whoever reflects on its sources and roots will know that Allah Almighty and His Messenger forbade the means which leads to unlawful things as He forbade and prohibited the things themselves." *(I'lam*, pt. 3, p. 119f.)

The basis for the assessment of blocking means is to examine the consequences of actions and what they lead to as a whole. If they lead towards benefits, which are the objectives of human transactions with one another, they are desirable commensurate with how appropriate they are to the quest for these goals, even if they are not the same as it in the goal. If their consequences are directed towards evils, they are forbidden as corresponds to the prohibition of these evils, even if the amount of prohibition is less in the means.

Investigation into these consequences is not done by examining the goal and intention of the doer. One looks at the result and fruit of the action. It is according to the intention that a person is rewarded or punished in the Next World, but it is according to the result and fruit that the action is good or repellent, or desirable or forbidden in this world, because this world is based on the welfare of people and on equity and justice. This requires investigating the result and fruit after the reckoned intention and good aim. If someone curses idols sincerely out of devotion to Allah Almighty, his intention will be reckoned with Allah in his claim, but He forbade cursing since that results in the resentment of the idolaters and they may curse Allah Almighty. The Almighty says: *"Do not curse those they call upon besides Allah, in case that makes them curse Allah in animosity, without knowledge."* (6:108) That which is noted in this noble prohibition is the result which occurs, not the religious intention.

We see from this that the prohibition in what leads to sin or corruption is not directed to the intention alone. It is directed to the result as well and so it is forbidden because of its result. Allah knows the sincere intention.

A person may intend evil by a permitted action and thus sin in what is between him and Allah, but no one has a way against him nor can judge that his actions are legally baseless. This is like someone who makes a reduction in his sale in order to injure a trader with whom he is in competition. Without a doubt that is a permitted action although it is a means to sin and so it is harming in itself and he actually intended that. In spite of that, the action is not judged in any respect to be invalid and it does not fall under the clear prohibition of the judicial decision.

From the aspect of intention, this action is a means to evil, and from its apparent aspect, it is a means to both general and specific benefit. There is no doubt that the buyer benefits from his purchase, the marketability of his trade and good reception for it; and there is general benefit in that reduction and it may lead to a lowering of prices.

So the principle of blocking means does not only involve intentions and personal aims as you see, but also what it intends of general benefit or averting general harm. It examines the result with the intention or the result alone.

Ash-Shatibi posed a case in which the doer intends to benefit himself and harm others, and there is no general benefit or general harm in the case. He said about the judgement of this case:

"There is no obscurity about the prohibition of the aim of harming inasmuch as it is harm since the evidence is established that 'there is no harm and no causing injury' in Islam, but it remains to examine this action which includes both intending a benefit and intending harm to someone else: is it forbidden so that it becomes not permitted or does it retain its basic permissibility while he sins in his intention? This is part of that in which disagreement is conceivable in general. Moreover elaboration is possible in *ijtihad*. It is that when that action can be changed in a manner which will procure that benefit or avert that harm, he will obtain what he wants in the first place. If that is the case, there is no ambiguity in prohibiting it because by that he only intends harm. If there is no way to avoid that aspect by which someone else is harmed, then avoidance or repelling is favoured over the aim of causing harm." (*al-Muwaqafat*, pt. 2, p. 242)

It is clear from this that the basis of blocking takes no account of intention in permission or prohibition. Investigation is directed to the results. If the result of the action will be general benefit, it is obligatory. If it leads to evil, it is forbidden because evil is forbidden and so what leads to it is forbidden.

What leads to the desirable benefit is desirable. Investigation of this principle shows us that it is affirmed by the confirmation of the previous principle: the procurement of benefits and repelling of harms as much as possible. Since the aim of the Shari'a is to establish welfare by imposing the judgement of the *deen* in it and repelling corruption and prohibiting harm wherever it is, all of the means and reasons which lead to that have the same judgement as that basic aim: seeking benefit and repelling harm and injury. What is meant by benefit is general utility, and by harm is the harm which befalls a large number of people. That is why if holding to permissible personal benefits for a person will lead to general harm or prevent a general benefit, then holding to it is forbidden in order to block the means and to prefer general over private utility. Thus meeting goods before they arrive in markets and taking them to control the markets is forbidden because, even if it permitted in its basis, it is a type of purchase which, if permitted, will cause constriction to people and freedom of exchange will not be established. Thus there is general harm in allowing permission and so it is forbidden to block the means and the prohibition is general, even if some of the people who meet them have a good and rewardable intention.

Ibn al-Qayyim divides means into two categories in respect to their results:

Action or words leading to evil, which has two grades:

Grade One: Doing it leads to it: like drinking the intoxicant which leads to intoxication, slander which leads to lying, and fornication which leads to confusion in paternity and corruption, and the like. These are words and deeds which lead to evils, and they clearly are nothing else.

Grade Two: Doing it leads something permitted or recommended, but it can be taken as a means to the unlawful, either intentionally or unintentionally. The first is like someone who contracts a marriage by which he intends to make a woman lawful to a previous husband or concludes a sale intending usury. The second is like someone who curses the deities of the idolaters in their presence. Then this category of means has two sub-divisions, one of which is that the benefit of the action is more likely than its harm, and so there are four categories.

The four derived divisions are:

Something forbidden which must lead to harm, like drinking wine, slander and fornication.

Something permitted which it is intended as a means to an evil.

Something permitted which may contain evil but is more likely to bring benefit.

That which is more likely to bring evil.

These divisions are sound in respect to logical hypothesis, but the first division is not considered part of means. It is counted among the aims because wine, fornication and slander, usury, wrongfully consuming people's property, misappropriation, and theft are harms in themselves and not means to worse evils.

As for the discussion on the means which are instruments which lead to evil, their avoidance is called 'blocking means', and those which lead to the procurement of benefits and are desirable are, according to the words of al-Qarafi, 'the opening of means.'

The first division is not termed 'blocking' means because it itself is evil. So the three other categories are those which are included in this division. Since the psychological goal is not considered in respect of worldly judgements even though it has consideration in respect of the reward and penalty, we leave that intention as we are dealing with the actualisation of worldly judgements. We consider ash-Shatibi's division of actions as it is composed of evils or of evil connected to other than the doer. He divided that into four categories:

What leads definitely to harm, like digging a well next to the door of a house in the dark so that one who enters the house must fall into it, and the like.

What rarely leads to harm, like digging a well in a place which would not normally lead anyone to fall into it and selling foods which normally do not harm anyone.

What often leads to harm such that it is probable that it will lead to it, like selling weapons at a time of civil war and selling grapes for wine, and other things which of which it is highly probable, but not definite that they will lead to harm.

What often leads to harm, but does not reach the level where the intellect thinks it probable that it will always lead to it, like questions about usurious sales which may lead to usury itself.

These are four categories, and we will speak on every category in order to clarify it.

As for the first category, which is that which definitely leads to harm, it is the action which in itself is forbidden as is what leads to harm, and there are two prohibitions in it: the prohibition itself and the prohibition of what leads to it, and so it is a multiple prohibition and the forbidding is strengthened.

If the action is basically permitted, then we can approach the matter in one of two ways: one is to look at the permission itself and the second is to look at the evils which result from it. There is no doubt that the side of evils predominates, especially if these evils will definitely occur in the normal course of things, and he prefers to do that, and evils occur through it – which is inevitable – then he is liable to the one who received the injury. That is because he intended that action along with whatever harm would definitely result from it and the transgressor is liable for his transgression.

The second category is that from which harm rarely results. It remains basically permitted as long as the action is permitted. That is because actions are connected to the probable, not the rare. When the action is basically permitted, the permission is only because the aspect of benefit is dominant. Harm only ensues in rare cases. That is because a pure benefit only exists rarely. The Lawgiver considered the predominance of benefit in the decisions about matters and did not consider the rare harm.

The third category is what will probably result in harm when it is done, but it is not definite and not considered rare. In this case predominant opinion is connected to definitive knowledge because blocking means obliges curtailment of the harm as much as possible. There is no doubt that curtailment demands the use of likelihood and because opinion in actual judgments occurs as knowledge. So here it follows its course. It is also because allowing it is a type of mutual help to sin and aggression and that is not permitted.

The fourth category is that which often results in harm, but does not reach the level of probability so that the aspect of harm is preferred over the basis of permission in the action, like selling on credit which often leads to usury, even if it is not predominant.

Here strong aspects of the view conflict. One is to look at the basis of the legality, and the basis of the legality is that the benefit is predominant for the doer. That is why the Lawgiver permitted it. The second is the harm which is frequent, even if it is not predominant. Abu Hanifa and ash-Shafi'i considered the basis of the legality. That is why they permit the behaviour and say there is no justification for prohibiting it since the prohibition is not based on knowledge or supposition. So the basis of legality remains.

This is the view of Abu Hanifa and ash-Shafi'i who preferred the aspect of legality because it is the basic position. Malik looked at the other side, which is also strong: the frequency of harm which results from the action, even if it is not predominant.

Malik preferred that aspect over others for three reasons:

1. He looks at the actuality, not the intentions. It can happen that the evils which result from the action are numerous, even if that is disputed. So harm soon occurs and care taken to avoid it in the action. Several evils result in precautions being taken against them when they are probable or known absolutely in the course of customs. There is knowledge of the numerous resulting harms. It is established in *fiqh* that repelling harm is favoured over procuring benefits.

2. In this case two principles conflict because the basis of the action is permissibility as it is the basis of the duty. There is a second principle, which is preserving the human being from harming and causing pain to another. The second principle is favoured because of the great number of resulting harms, and the prohibition is for prevention. Thus the action leaves its root, which is permission, for the second root, which is prohibition in order to block the means to evil.

3. Sound traditions have come forbidding matters which are basically permitted because in many cases they lead to evils, even if they are not probable or definite. The Messenger of Allah, may Allah bless him and grant him peace, forbade being alone with an unrelated woman and for a woman to travel without a relative. He forbade building mosques over graves so that the dead would not worshipped; proposing to a woman in *'idda* so that she does not lie about her *'idda;* the sale and advance; the gift of the debtor; and fasting on the *'Id al-Fitr*. In all the prohibitions of these matters is out of fear of the evils which might result from them, even if the consequence is not probable or definite.

Ash-Shatibi said in this topic:

"The Shari'a is based on circumspection and adopting discretion and being on guard against what might lead to harm." (*al-Muwafaqat*, pt. 2, p. 253)

One must note what Ibn al-'Arabi stated in his book, *The Judgements of the Qur'an*, in the discussion of the *ayat* on orphans. He explained that it is permitted for an orphan's guardian to purchase the property of the orphan. It is derived from what he said that blocking means must be adopted since the means leads to what is forbidden by text, not to the purely forbidden. He said:

"If it is said that Malik must have obliged leaving the root on account of suspicion and means when in the permissibility of buying from an orphan girl, the answer is that he did not. He deals with is a means in forbidden actions which will lead to things which are textually forbidden. In this case Allah has allowed a form of mixing property and those who mix property are assigned their trust when He says, *"Allah knows the corrupter from the one who puts right."* This is the case with every perilous matter in which Allah Almighty has assigned the responsible person a trust which is not said to be used as a means to something forbidden and thus forbidden, as Allah entrusted women with responsibility for their private parts in spite of the enormity of judgements which might result from their assertions in that, connection to the lawful and unlawful, and lineages, even if it is possible that they lie." (*Ahkam al-Qur'an*, pt. 3, p. 65)

We see from this that he confirmed that means should be blocked when they lead to something forbidden on which there is text, but anyone who studies the Maliki books on *usul* and secondary rulings will see that that which leads usually leads to harm is forbidden without

limitation about whether there is a specific text on it, or it is included in the general prohibition of harm, injury and from all corruption.

FACILITATING MEANS

We have mostly discussed the blocking of means, i.e. repelling the means of harm, and noted that means are examined for their results. If it is harm, then it is mandatory to forbid it because harm is forbidden and so what leads to it is forbidden. If it is a benefit, it is desirable to take it because benefit is sought, and that is called 'facilitating means,' as the first is called 'blocking means'. Facilitating means is used by Malik as well as blocking them. That is why al-Qarafi said in *al-Furuq*, "Know that as it is mandatory to block the means, it is also mandatory to facilitate them, or disliked, recommended and allowed. The means is the means. So as the means to the unlawful is forbidden, the means to the mandatory is mandatory, like going to *Jumu'a* and *Hajj*." (pt. 2, p. 32)

In general what leads to a benefit is desirable like seeking this benefit. If it is mandatory, then it is mandatory if it specifies the way to it. If the benefit is only permitted in it, the means in it is permitted.

Part of this is the necessity of crafts considered to be means to the general benefits on which civilisation is based and with which people cannot dispense. It is obligatory that they be undertaken in general, but it is not a specific obligation because all people are not asked to be artisans. They only asked to bring into existence the crafts necessary for the establishment of civilisation. The achievement of that obligation is enough.

Since the benefit is the desired purpose of laws, and the Islamic Shari'a makes it one of its ends, – indeed the most manifest of its ends – when something forbidden leads to a confirmed benefit, and the benefit is greater than the harm of the forbidden –or, more precisely, the harm averted by the realisation of this benefit is greater than what develops from committing what is prohibited – then that forbidden thing is moved to the rank of the legitimate in order to achieve that benefit or to repel the greater harm. The following are examples of that:

1. Paying money to rebels to ransom Muslim captives. The basic position is that it is unlawful to give money to a rebel because it strengthens him, and there is harm in that for the Muslims, but it is permitted because it achieves the repelling of a greater harm: it prevents the enslavement of Muslims and releases them and strengthens the Muslims through them.

2. One person paying money to another as a bribe and the like in order to protect himself from an act of disobedience which he intends to commit whose its harm is greater than the harm of paying him money.

3. Paying money to a hostile state to avert its harm when the Community of Muslims do not have sufficient force to defend against the attack and protect the territory.

We see in all of those cases that the harm in something prohibited becomes desirable when it repels a greater harm or procures a greater benefit. In this case, the aspect of harm is compared with what it brings of benefit or averts of harm. What is considered is the aspect of the utility or the repelling of the greater harm.

The principle of means was adopted by Malik and some *fuqaha'* have claimed that it was not one of the *usul* of any of the *fuqaha'* except him, but the Malikis mentioned that the *fuqaha'* share with them in many of their methods, even if they do not give the same name. Al-Qarafi said in *Tanqih al-Fusul*:

"As for the means, there is agreement that there are three types: one of them is considered consensus, like digging wells in the roads of the Muslims, putting poison in their food, and cursing idols in the presence of someone when it is not known whether he will curse Allah Almighty. The second is nullified by consensus like growing grapes which is not prohibited out of fear of wine. The third is one which varies, like credit sales. We consider the means in it while other disagree with us. The result is that we block means more than others, not that we alone have it." (p. 200)

In *al-Furuq* he clarified some of the details of the third type, on which there is disagreement, and he said on it:

"There is disagreement among the scholars regarding it and whether is it blocked or not, like credit sales. This is like when someone sells some goods for ten dirhams with a month's credit and then he buys them for five before the month is up. Malik says that five is taken from his hand now and he takes ten at the end of the month. This is a means to advance five for ten on credit in the form of a sale. Ash-Shafi'i says that one looks at the form of the sale and applies the matter to its outward form and so that is permitted. These sales are said to lead to a thousand questions which are particular to Malik, and ash-Shafi'i opposed him about them...

"This is also like the disagreement about the liability of artisans because they alter goods by their work so that their owners may not recognise them. So they are liable for damages in order to block the means. It is not because it is employment where the basis of hire is on trust. That is also the case in making food porters liable so that they do not filch some of it. It is frequent in these questions. We say that the means are blocked but ash-Shafi'i did not say that. Blocking of means is not particular to Malik. He does it more than others, but the basis of its blocking is agreed on." (p. 33)

We are inclined to believe that all scholars adopt the principle of means, even if they do not call it that, but most of them consider the means to be the end when it is definitely a means to this end and to any other definitely or probably. When the means is only specified by means of knowledge or by means of probability, Malik utilised the principle of means in it. When the end frequently results from the means, like credit sales which in many cases are desired to obtain usury, they are unlawful because of this and the means to usury should be blocked. Others disagreed with him about that because the the transaction is basically permitted, and that is only nullified by definitive or probable evidence. There is no evidence of that sort, but only conjecture,

and contracts are not invalidated by pure conjecture. They are only invalidated for evident known or probable matters.

The principle of means is established by the Qur'an and the Sunna. In the Qur'an, it is the words of the Almighty, "Do not curse those they call upon besides Allah, in case that makes them curse Allah in animosity, without knowledge." (6:108) It is related that the idolaters said, "You refrain from cursing our gods or we will curse your God." There are also the words of the Almighty, "O you who believe, do not say, 'Ra'ina,' but say, 'Undhurna,' and listen well" (2:104) because the aim of the Muslims is good, but the Jews used it as a means of abusing the Prophet.

As for the *Sunna*, the statements of the Prophet, may Allah bless him and grant him peace, and the *fatwas* of his Companions are numerous. Part of that is his refraining from killing the hypocrites since that would be a means for the unbelievers to say that Muhammad kills his Companions.

One example is that the Prophet, may Allah bless him and grant him peace, forbade a lender to accept a gift from a debtor unless he reckons to be part of the repayment of the debt. That is so that that will not be means to delay the debt for the sake of the gift, which would be usury. Another is that the Prophet, may Allah bless him and grant him peace, forbade cutting off hands in the expedition so that it would not be means for the one under a *hadd* to flee to the rebels. Part of it is that the first forerunners of the Muhajirun and Ansar allowed a woman who had been irrevocably divorced in her husband's final illness to inherit since there was the suspicion that he intended to deprive her of inheritance, even if the aim of deprival was not established because divorce is a means.

Another is is that the Prophet, may Allah bless him and grant him peace, forbade hoarding. He said, "No one hoards except someone who does wrong." Hoarding is a means to constrict people in what they need. There is no prohibition of hoarding what does not harm people, like jewelry and items which are not part of necessities or needs.

Yet another example is that the Prophet forbade the one who gave charity to buy back his charity even if he finds it being sold in the market, to bar the means of taking back what he gave for Allah, even for recompense, and if the giver is forbidden to take his charity by paying for it, there is a stronger prohibition against taking it without payment. To allow it to be taken for payment is a means to deceive the poor person by giving him the charity of his property and then buying it from him for less than its price. The poor person thinks that he has obtained some of his need and allows the sale. It is like that with a lot of traditions related from the Messenger of Allah, may Allah bless him and grant him peace and his Companions. Ibn al-Qayyim i*n I'lam al-Muwaqq'in* gives about ninety-nine traditions as evidence to support the prohibition in blocking means.

Means are borne in mind in half of the laws of Islam.

The principle of blocking or facilitating the means, according to al-Qarafiõs definition, is considered from the aspect of consolidation of the principle of public interest which Malik adheres to. He considers general benefit to be the outcome which the Lawgiver desires, esteems,

calls for and encourages, and so it is desirable to do anything that brings it about. Its opposite, which is corruption, is forbidden. So all that is known to lead to benefit, definitely or probably or mostly, even if it is not predominant, is desirable, and all that is known to lead, whether certainly or only probably, to corruption must be avoided.

The Eleventh Source: Customs (*'Adat*) and Customary Usage (*'Urf*)

Custom is a matter on which a community of people agree in the course of their daily life, and common usage is an action which is repeatedly performed by individuals and communities. When a community makes a habit of doing something, it becomes its common usage. So the custom and common usage of a community share the same underlying idea even if what is understood by them differs slightly.

Maliki *fiqh*, like Hanafi *fiqh*, makes use of custom and considers it a legal principle in respect of matters about which there is no definitive text. In fact it has an even deeper respect for custom than the Hanafi school since, as we have seen, public interest and general benefit are the foundation of Maliki *fiqh* in coming to decisions and there is no doubt that respect for a custom which contains no harm is one of the types of benefit. It is not valid for any *faqih* to leave it: indeed, it is obligatory to adopt it. We find that the Malikis abandon analogy when custom opposes it. Custom makes the general specific and qualifies the unqualified, as far as the Malikis are concerned.

It appears that the Shafi'ites also takes custom into consideration when there is no text. If text dominates in its judgement because people are subject to and do it by way of familiarity and habit. Nothing can prevent them from adopting it except a prohibiting text. Where there is no prohibiting text, then it must be adopted. We find that Ibn Hajar stated that custom is acted on it when there is nothing in the custom contrary to a text.

Al-Qurtubi observed that making use of custom in this way is taken from an instance when the Prophet, may Allah bless him and grant him peace, said to the wife of Abu Sufyan, "Take from the property of Abu Sufyan what is adequate for you and your child in a normal manner." In this *hadith* custom is clearly made the basis of a legal decision. This is not the case with the Shafi'ites. Ibn Hajar replies to this by saying that the Shafi'ites forbid acting by custom when it is opposed to a legal text, or is not suggested by it. This indicates that the Shafi'ites occasionally

adopt custom, but with the precondition that a legal text suggests it or does not contradict it. Therefore we can divide custom in respect to the usage of the *fuqaha'* into three categories:

1. Custom which is adopted by all the *fuqaha'*. It is the custom which is indicated by a text. In this case, it is adopted by agreement.

2. Custom which is prohibited by an unequivocal text of the Lawgiver or it is obligatory that it be overlooked as confirmed by a text. This type of custom is not respected nor adopted by consensus. It is general corruption which must be brought to an end. Silence on it is silence about commanding the correct and forbidding the incorrect and being content with sin and transgression.

3. Custom in which there is no established prohibition nor is it suggested or indicated by a text. The Malikis and Hanafis consider it an independent principle. According to the Hanafis, general custom makes the general specific, qualifies the unqualified, and custom is put ahead of analogy. The Malikis say that custom specifies the general and qualifies the unqualified since they consider custom to be one of the categories of benefit.

Custom or customary usage plays a great role in Maliki *fiqh*. It explains expressions since expressions are explained according to linguistic custom or usage rather than customs in actions. Ash-Shatibi says about this:

"Customs include those whose expression varies in meaning, and so the expression may change its meaning in relation to the same people, like the difference of terminology according to the usage of artisans in their crafts which differs from the usage of the majority, or in respect of the predominant usage in some ideas so that that expression which previously had a certain meaning which might have been understood as meaning something else. The judgement is assigned to what is customary in respect to its normal usage rather than an abnormal usage. This is the sense which is current often in oaths, contracts and divorce by indirect words." (*Al-Muwafaqat*, pt. 2, p. 198)

As expressions are explained according to customs, so customs have an effect on contracts. When the custom in marriage is to pay the bride-price before consummation, it is considered as long as there is no text contrary to it. If there is a custom that a type of sale is by cash and not credit or the reverse, or for a known term rather than without it, that commercial custom is considered as long as there is no text contrary to it. This resembles that on which judicial decision occurs by respecting the custom of commerce in cases between them and its consideration as a confirmed legal basis in their dealings.

In *al-Furuq*, al-Qarafi devotes a section to clarifying of the custom in contracts which affect it. Thus if there is an non-specific contract, it is considered to involve equal shares. A contract for land includes the trees and buildings, a contract for a building includes the earth, a contract on a house which includes its doors, stairs, and shelves. A *murabaha* contract includes within the basis for the price the wage for sewing, embroidery and all ornament. The contract on the tree includes the earth and fruit which is pollinated, and so forth, as he said in mentioning these questions and others.

This is all based on customs. Were it not for customs, this would be purely arbitrary and selling what is unknown, and risk in the price is not permitted by agreement. So these matters are based on the customs. When the custom changes or is nullified, then these fatwas become invalid and it is unlawful to give *fatwa* accordingly. Reflect on that. Study the *fatwas* in these customs and how they are received as the legal tender of every age is studied and utility is specified from the items hired when usage is silent about them, then they are used by the custom for the intended use of them.

Customs fall into two categories: first, established customs which do not differ in times or places. They are customs derived from the natural human form, and that to which human nature calls, like eating, drinking, sleep and other things. The second category are customs which vary with different people and different lands. Ash-Shatibi mentioned that section and illustrated it, saying:

"Customs can change in it from good to ugly and the reverse, like uncovering the head. That varies in different regions. In eastern lands it is considered offensive tor those of manliness it is ugly but not in western lands. So the legal judgment varies according to that. Thus it detracts from good character in the view of the people of the east but not with the people of the west." (*al-Muwafaqat*, pt. 2, p. 198)

So custom varies in many cases, because the second category is larger than the first. When judgements come in accordance with these customs and they are the basis of judgement in them, does the judgement change when they change? Is the change considered as part of the Maliki school?

Al-Qarafi was asked this question and answered it. We will quote you the question and its answer in full because it shows the extent of the effect of custom on judgements in that school and the amount of its profusion. He says about selecting fatwas and judgements:

"These judgements in the schools of ash-Shafi'i, Malik and others were subordinate to customs and the prevailing customary usage in the time when the scholars made these judgements. When those customs change, then are these fatwas which are recorded in the books of the *fuqaha'* invalid and *fatwas* given according to what is demanded by the new customs or do we say that we are imitators and we cannot produce a law since we are not qualified for *ijtihad* and so we have to give fatwa according to what is transmitted from the *mujtahidun*?

"The answer is that to confirm the judgements which are perceived through customs when those customs have changed is contrary to consensus and is ignorance of the *deen*. Indeed, all that is in the Shari'a follows customs and the judgement in it changes according to the change of custom to what the new custom demands. That is not a new *ijtihad* on the part of the imitators so that the qualifications for *ijtihad* are preconditional in it. It is a rule on which scholars strive agree. We follow them in that without undertaking a new *ijtihad*. Do you not see that in the case of business transactions when a price is designated, they apply that to the usual form of currency? When the custom is a particular sort of money, they apply it to that. When the custom moves to another form of currency, then the custom moves to it and the first is nullified since custom has

moved from it. It is like that with the application in bequests, oaths, and all the areas of *fiqh* which depend on customs.

When the custom changes, then the judgements in those areas change. It is the same with claims when the statement taken is that of the person who claims something because it was the custom. Then the custom changed and the statement taken was no longer that of the claimant. Indeed, the case was reversed. It is not a precondition that the custom change.

If we leave our land for another land whose customs are different from the land we were in, we only give *fatwa* by its custom rather than the custom of our land. Part of this is what is related from Malik: When a couple quarrel about the receipt of the bride-price after consummation, then the statement taken is that of the husband when the basis is lack of receipt. Qadi Isma'il said: 'This was their custom in Madina: that a man did not go in to his wife until she had received all of the dower. Today the custom is different. So the statement taken is that of the woman with the oath because of the change of customs.

"Since this is established, I will mention in that some judgements in which what is perceived is the custom is the basis of the fatwa and the actual situation differs from that today and so it is incumbent to change the judgment according to what the new custom demands."

After that he gives examples of the custom which makes expressions specific and explains that. He gives three examples:

1. Some of the expressions in the *wadi'a* (reduction): The custom demands that the two people involved in the transaction agree that the reduction is one in ten for twenty, then they mean that if the price is eleven, then its price is ten. The last expression means that it is reduced to half price. Al-Qarafi said about that: "This custom is nullified. This expression does not convey that meaning today at all. Most *fuqaha'* do not understand it, let alone the common people, because it has no custom and nothing specific is understood from it in respect of language. So when this contract occurs in transactions, the contract must be invalid. It is not their custom to use it at all because over the course of our entire lives, we have not heard it except in the books of *fiqh*. We have not heard it in transactions. When the price is not known by custom or not by language, the contract is invalid.

2. The second example is in *tawliya* (resale at cost price) and *murabaha* (resale with specification of gain) when he says, "I have sold to you along with what it cost me," then he said that the sale is valid. The seller has, along with the price, the wages for bleaching. embroidery, sewing, dyeing and the like of that which has a specific value. He is entitled to his share of the profit if he names a profit for every ten, and he is not entitled to what does not have a specific value unless it obliges an increase in the market for it and increases the price.

He does not have a portion of the profit for the hire of transport in transporting it and the like and what has no effect in the market. He does not have profit for things like concealment, locking up, the rent for the house, and the personal expenses of the vendor. These items are not meant linguistically by his words, "what is cost me". The sale is value by this statement if the expression demands it by custom and so the price becomes known by custom and there is no

retraction then. So this price is unknown and so we do not give a *fatwa* of its validity and details by the books since the custom has changed.

3. He mentioned what is in the *Mudawwana* that when someone says to his wife, "You are unlawful to me, or devoid of obligation, or exempt," or "I have given you to your family," the treble divorce is obliged and the claim that he meant less than three does not help him. This is based on this expression in the customary usage to remove the bond and it is famous that its number is three.

Although this is established, you know that you will not find any people who use this earlier form in that way. Times have changed and no one says to his wife when he wants to divorce her, "You are devoid of obligation" or "I have given you to your family." These expressions are not used to end marriage nor to designate the number of the divorce. The custom in these expressions is completely negated, When the custom is negated, only the language remains." (*Al-Ahkam fi Tamyiz al-Fatawa*, p. 70)

Many judgements are based on *'urf* because in many cases it coincides with public interest and public interest is indisputably a fundamental principle in Malik's school. Another reason is that custom necessarily entails people's familiarity with a matter, and so any judgement based on it will receive general acceptance whereas divergence from it will be liable to cause distress, which is disliked in the judgement of Islam because Allah Almighty has not imposed any hardship on people in His *deen*.

Allah Almighty prescribes what normal people deem proper and are accustomed to, not what they dislike and hate. So when a custom is not a vice and is respected by people, honouring it will strengthen the bond which draws people together because it is connected to their traditions and social transactions whereas opposition to it will destroy that cohesion and bring about disunity.

This especially applies where patterns of speech are concerned, since natural lucidity demands that expressions be understood in accordance with customary usage. It is also desirable to apply custom where commercial contracts are concerned as long as there is nothing unlawful in doing so. If there is, however, it is of course obligatory to not adhere to custom.

Conclusion

These are the fundamental principles of Imam Malik, may Allah be pleased with him, which the scholars of his school have derived from the corpus of the secondary rulings transmitted from him. It is by means of them that his rulings were derived and upon them that they are based.

The first thing to be noticed about these principles is their flexibility. He did not make the unqualified text of the Book or the *Sunna* unequivocal. He opened the door to making its general texts specific and to qualifying what is unqualified. Just as he opened the door of specification, he showed there to be flexibility in the texts which facilitated the means of deriving judgements from

them. A *faqih* should not be inflexible where the text is concerned, nor should he be excessively flexible.

The principles are all interconnected, one amplifying another, and so any unfamiliar meanings are winnowed out in favour of a meaning derived from an immediate principle. From that there emerges a mature *fiqh* that is strong, straightforward, familiar and known – one which people readily accept.

The second thing to be noticed after the flexibility of these principles is their orientation towards achieving the greatest benefit in the most direct manner. Analogy is made a way of achieving this. *Istihsan* is employed to achieve it by preferring a ruling derived by it if analogy is less apt to achieve the desired benefit. Consideration of public interest is made into a principle in order to achieve it by the easiest way. Malik also employed the method of facilitating or blocking the means which is also considered to be one of the fundamental principles used in deriving rulings. Then, finally, he considered custom, which is another means of removing distress, averting hardship, achieving benefit, and fulfilling people's needs.

Malik saw that the basic aim of the Divine Lawgiver in His Shari'a was to realise the greatest benefit for the maximum number of people and so he made all his *fiqh* which was not based on an unequivocal text centre on this principle. He supports it by facilitating and blocking the means and other ways which lead to it, in order to achieve it by the quickest and easiest manner.

Thirdly, the principles which Malik used in deriving judgements are interconnected with and complementary to one another. All are derived from the same source and follow the same guidance: namely, the definitive text, its spirit and meaning and the ways in which the Prophet and the Companions applied it. Hence his fiqh is aimed at the same goal: the welfare of people in this world and the Next and following path of the Prophet and Companions without any innovation.

We find that Malik relies on the cases and *fatwas* of the Companions in recognising the objective of the Shari'a and then recognises the judgements of those of the following generation with deep knowledge of the texts and goals of the Shari'a and of its immediate and long-term consequences. In so doing, Malik opened the same methodology for his students who came after him and their students. They understood *fiqh* as he did and followed his way. So Maliki *fiqh* spread far and wide.