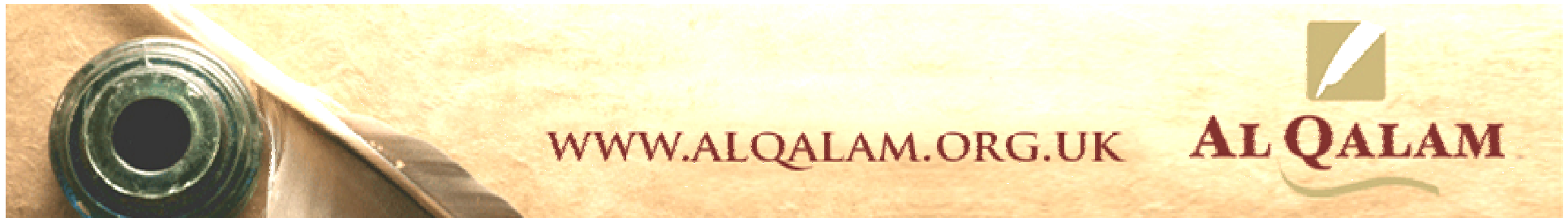


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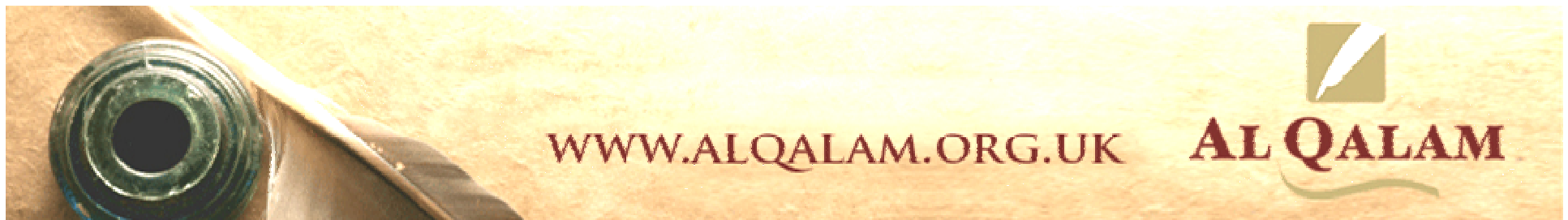


Unit 1: Introduction to Mu‘āmalāt and its Prohibitions



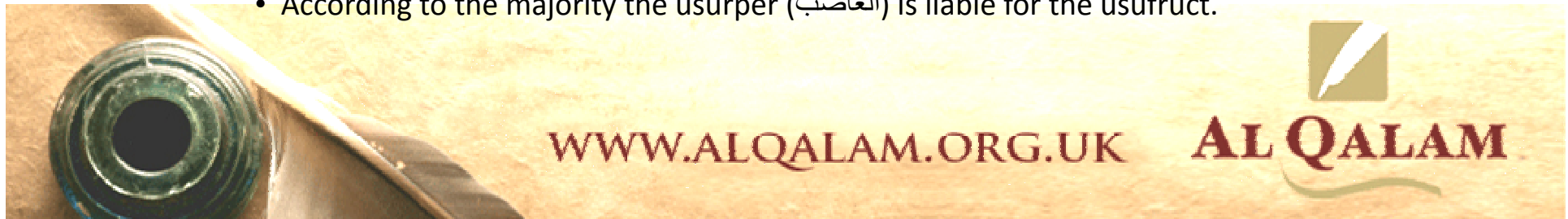
Contents

- Defining property
- Types of contract
- Stipulating conditions in a contract
- Enforceability of a promise
- Difference between a contract and a promise
- Some major prohibitions
 - Ribā
 - Gharar
 - Qimār and meysir
- Stratagems – (الحِيل)



Defining property

- Corporeal property (عين), usufruct (منفعة), and right (حق)
 - Corporeal property is property by consensus if it can be possessed and benefit can be derived therefrom
 - Rights not related to property is not property by consensus. e.g. right to custody (حق الحضانة) and right to guardianship (حق الولاية)
 - Rights related to property and usufruct:
 - Not property according to Ḥanafī School
 - cannot be possessed themselves
 - are non-existent prior to coming in to being and then
 - become non-existent again
 - Are property according to the majority
 - possession is realised through possession of the corporeal property
 - are the raison d'être of the corporeal property
 - one is disposed towards them
 - E.g. If A usurps the property of B and then returns it to A after using the property
 - According to Ḥanafī School no liability (ضمان) except:
 - If the property is an endowment (موقوف), is the property of an orphan, is for investment
 - According to the majority the usurper (الغاصب) is liable for the usufruct.

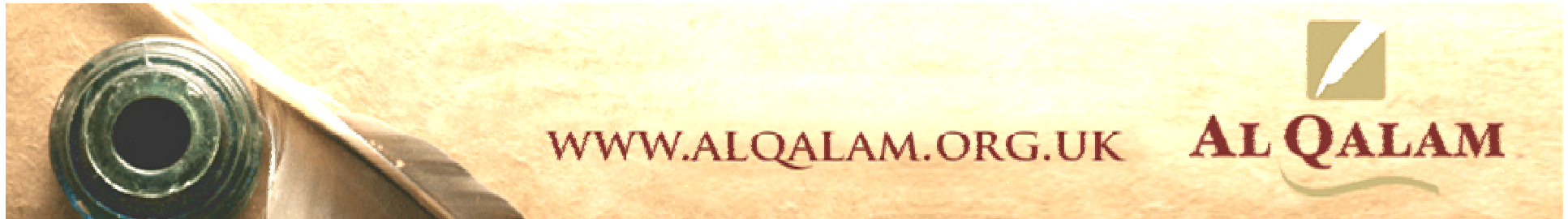


Types of contract

Type of Contract	Purpose	Some Examples
Exchange	Permanent exchange of ownership of the counter values	Sale of goods – البيع Lease – الإجارة
Investment	To earn a profit for the partners; input of capital or labour from partners with a share of the yield	Partnership – المشاركة Silent partnership – المضاربة Sharecropping – المزارعة
Charity	Unilateral transfer of wealth without condition upon the recipient.	Gift – الهبة Loan – القرض
Security	To secure a pre-existing or defined liability in favour of a creditor, or to improve trust in a commercial relationship. This involves the creation of some kind of right over an asset owned by the debtor, but no benefit is taken by the creditor.	Mortgage – الرهن Guarantee – الكفالة
Other	To improve the ease and efficiency of commercial and other dealings.	Agency – الوكالة Trust – الأمانة Bill of exchange – الحوالة

Conditions in a contract

- Asserts the very same rights and obligations effected by the contract – شرط يقتضيه العقد
 - e.g. buyer (مشتري) will secure proprietary rights (حقوق الملكية) upon conclusion of the sale
 - Vendor (بائع) will have the right to retain possession of the object of sale until the price is paid in full
- Does not assert the rights and obligations effected by the contract, but nevertheless is congruent with the requirements of the contract – شرط لا يقتضيه العقد لكن يلائمه
 - e.g. requiring the buyer to provide a guarantor (كفيل) or a pawned object (مرهون) in a sale with deferred payment (بيع مؤجل)
- Neither asserts the rights and obligations effected by the contract nor is congruent with the requirements of the contract, yet is expressly sanctioned by Sharī'ah - شرط لا يقتضيه العقد ولا يلائمه لكن ثبت تصحيحه شرعا
 - e.g., deferred payment in sale: deferred price in *bey' mu'ajjal* and delayed delivery of the object of sale as in *salam* - forward contract
- Neither asserts the rights and obligations effected by the contract nor is congruent with the requirements of the contract, and nor is expressly sanctioned by Sharī'ah - شرط لا يقتضيه العقد ولا يلائمه ولم يثبت تصحيحه شرعا
 - If it provides a benefit to a party to the contract otherwise not effected thereby it renders the contract voidable (فاسد). E.g. buyer will gift the seller a gift or extend a loan to the seller
 - However, if such conditions are accepted by convention (عرف) and market norm (تعامل), then on the basis of juristic preference (الاستحسان) they are permitted. E.g. purchase of woven wool with the condition that the seller will make a hat out of it, manufacturer's/retailer's guarantee.



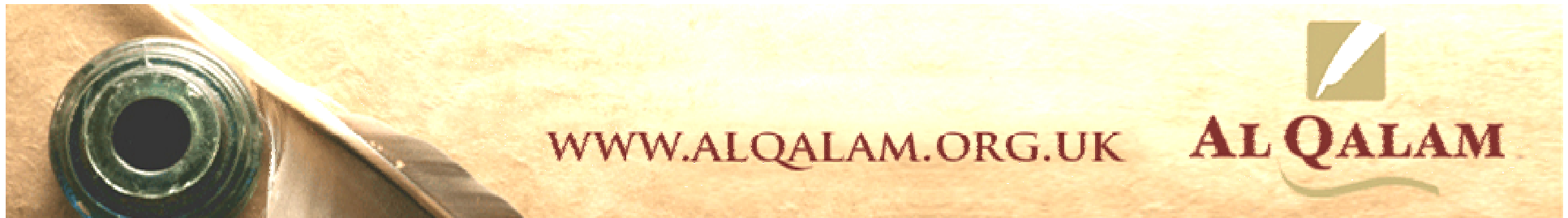
Enforceability of a promise

Moral obligation (ديانة) only or legal obligation (قضاء) too?

1. **Moral obligation only** - general opinion within the Ḥanafī, Shāfi‘ī and Ḥanbalī schools is that it is preferable (مستحب). Some Mālikī jurists also hold this opinion.

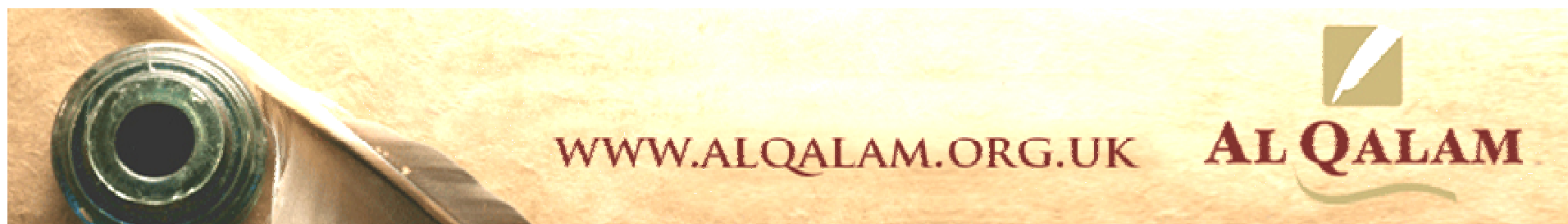
Prohibition is when the promisor (الواعد) has no intention of fulfilling the promise at the onset

2. **Moral and legal obligation** – opinion of Samurah b. Jundub, ‘Umar b. ‘Abd al-‘Azīz, Ḥasan al-Baṣrī, Qāḍī Sa‘īd b. Al-Ashwa‘, Iṣḥāq b. Rāhaweyh, Imām Bukhārī, and some Mālikī jurists. Qāḍī Abū Bakr Ibn al-‘Arabī and Ibn al-Shāṭ have preferred this opinion.
3. **Moral and legal obligation if the promisee (الموعود له) has incurred considerable expense or liability** – the well known opinion of the majority within the Mālikī School.
4. **Normally a moral obligation only, but if needed it can be deemed a legal obligation too** - Some Ḥanafī jurists have expressly concurred in two situations:
 - I. There is a general need
 - II. The promise is made conditional



Enforceability of a promise

- **General need** - e.g. Bey‘ bi al-wafā‘
- Vendor agrees with the buyer that whenever the vendor shall return the price to the buyer the buyer will sell back the object to the vendor.
- Legal ruse to benefit from a mortgaged object (مرهون)
- Some Ḥanafī jurists allowed the sale and condition of return due to need. Al-Zeyla‘ī has given fatwā on this opinion. Ibn ‘Ābidīn has recorded from the author of al-Nahr al-Fāiq practice on this opinion in his region.
- Most Ḥanafī jurists have not allowed the condition of return in the sale contract. However, a separate promise has been allowed and is considered legally binding. (هكذا في جامع الفصولين وفتاوى قاضيخان ورد المختار) (وشرح المجلة للأتاسي)

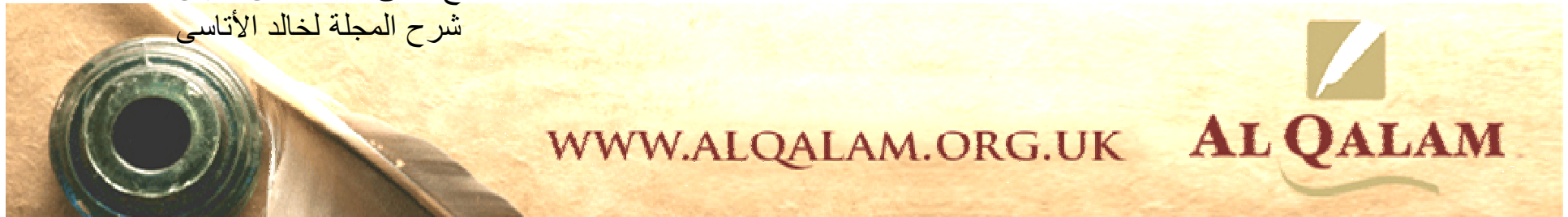


Enforceability of a promise

- **Conditional promise** - الْمَوَاعِيدُ بِصُورِ التَّعَالِيْقِ تَكُونُ لَازِمَةً
- A asks B to sell something to C with the assurance that if C does not pay B the price A promises to pay it to him. In the event of default A has to pay B.
- Although the wording is general the examples mentioned by the fuqahā' refer only to two situations:
 - Security/guarantee (الكفالة)
 - Vow (النذر)

Further reading:

غير سودى بينكارى لمحمد تقى عثمانى
مجلة مجمع الفقه الإسلامى
أنوار البروق فى أنواع الفروق للقرافى
فتح العلى المالك لابن عlish
شرح المجلة لخالد الأتاسى



Contract or Promise?

Is there a difference between a contract (عقد), a unilateral promise (وعد) and a bilateral promise (مواعدة/معاهدة)?

Contract – to physically bring a transaction into existence with all the related rights and responsibilities

E.g. On 1st November A purchases a BMW 5 Series from B for £15,000 through offer and acceptance; proprietorship of the BMW is immediately transferred to the buyer; vendor can demand the £15000; rights and responsibilities of the contract accrue to both parties

Unilateral promise – one party unilaterally assures another of an act or omission

E.g. On 1st November A promises B that he will purchase his BMW 5 Series from him for £15,000 on 1st December
Sale has not come in to existence; no proprietary transfer; vendor cannot demand the price

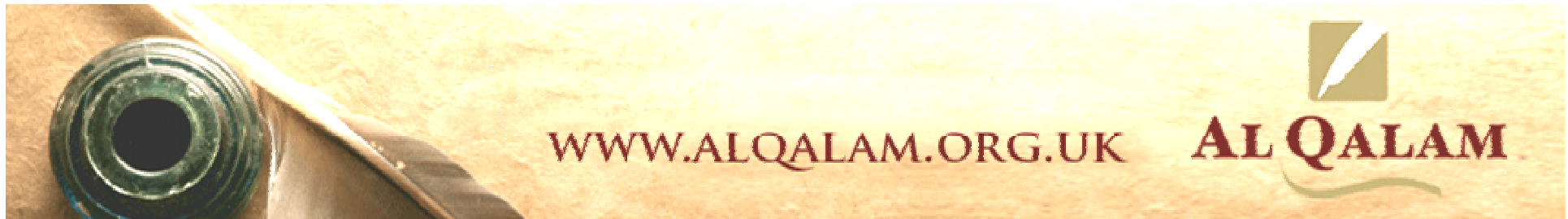
Bilateral promise – both parties assure one another that they will conclude a contract at a known future date.

E.g. A promises B that he will purchase his BMW 5 Series from him for £15,000 on 1st November, B promises to sell it to A on that date for the stated price

Sale has not come in to existence; no proprietary transfer; vendor cannot demand the price

Contemporary scholars who accept the enforceability of promise:

- Unilateral binding promise – accepted by all
- Bilateral binding promise – most scholars do not allow it in situations where a contract is not allowed (forward currency contracts), as it amounts to a contract prior to acquisition of the item to be sold. [IFA Resolution NO. 41(3/5), AAOIFI Standard No. 8] Some scholars of the subcontinent consider bilateral promise as enforceable by law except for the bilateral promises in transactions like short-selling of currencies or shares of joint stock companies. [AYUB, P115]



Some Major Prohibitions

► Ribā

► lexical definition: الزيادة excess, increase or addition

► Legal definition - فضلٌ خالٍ عن عوضٍ شرط لأحد العاقلين

“Excess compensation without due consideration made conditional for either party to a contract.”

► 2 Types of ribā:

1. Ribā al-Nasī'ah – ربا النسيئة

To charge a specified increase or profit on a specific amount lent for a given period

Also known as: Ribā al-Jāhiliyyah and Ribā al-Qur'ān

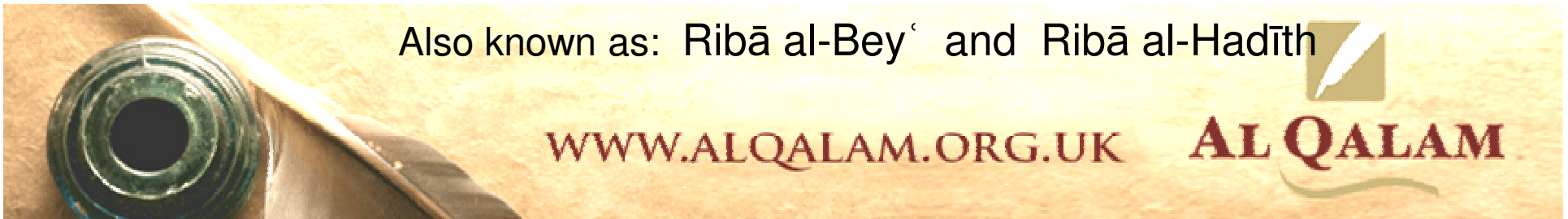
2. Ribā al-Faḍl – ربا الفضل

Excess that is taken in the exchange of homogenous (متجانس) commodities and is encountered in their hand to hand purchase and sale

Also known as: Ribā al-Bay' and Ribā al-Hadīth

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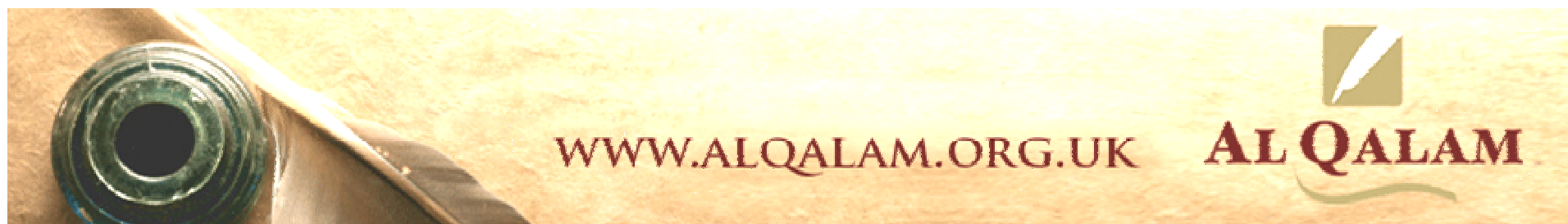
Historical Analysis - Verse 1

وَمَا آتَيْتُمْ مِّنْ رَبِّاٍّ لِّرَبُّوْا۟ فِى۟ اَمْوَالِ النَّاسِ فَلَا يَرْبُوْا عِنْدَ اللّٰهِ وَمَا آتَيْتُمْ مِّنْ
زَكَاٰةٍ تُرِيْدُوْنَ وَجْهَ اللّٰهِ فَاُولٰٓئِكَ هُمُ الْمُضْعِفُوْنَ (39) [الروم]

And that which you give in ribā for increase through the property of [other] people, will have no increase with Allāh. But that which you give in charity seeking the countenance of Allāh, it is these who will get a recompense multiplied.

[30:39]

- Revealed in Makkah
- Not prohibitive in nature
- According to the majority of exegetes, refers to the gift that is extended to another with the intention that the latter will return it with a better gift



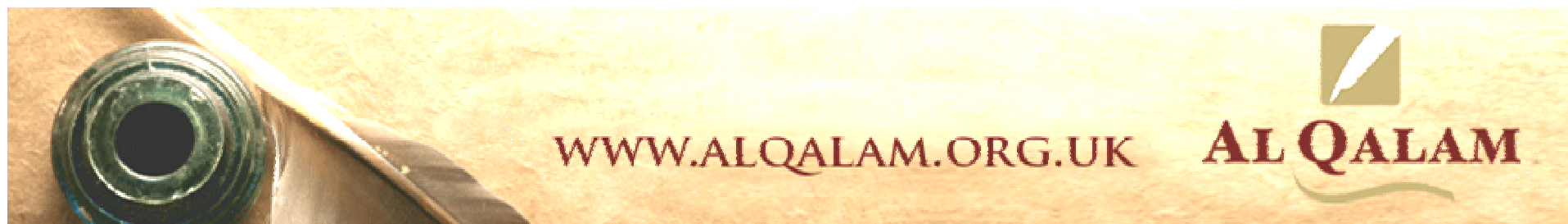
Historical Analysis - Verse 2

وَأَخَذِهِمُ الرِّبَا وَقَدْ نُهُوا عَنْهُ وَأَكْلِهِمْ أَمْوَالَ النَّاسِ بِالْبَاطِلِ وَأَعْتَدْنَا
لِلْكَافِرِينَ مِنْهُمْ عَذَابًا أَلِيمًا (161) [النساء]

That they took ribā, though they were forbidden ...

[4:161]

- Enumeration of the iniquity and wickedness of the Jews
- Exact time of revelation is uncertain
- Context indicates before 4th year AH as most Jews had by the departed Madīnah
- According to al-Ṭabarī – refers to predetermined excess taken upon the lending of a specified amount for a specified period
- Not explicitly prohibitive for Muslims
- Prohibition for Muslims is inferred, otherwise Jews would not be blameworthy



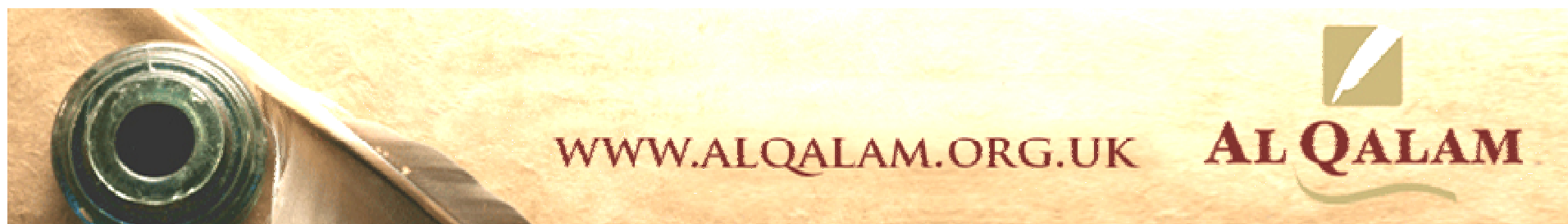
Historical Analysis - Verse 3

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا الرِّبَا أَضْعَافًا مُضَاعَفَةً وَاتَّقُوا اللَّهَ لَعَلَّكُمْ
تُفْلِحُونَ (130) [آل عمران]

O you who believe! Devour not ribā, doubled and multiplied; but fear Allāh,
that you may prosper.

[3:130]

- According to Ibn Ḥajar – revealed in 2AH as preceding and succeeding verses are about the Battle of Uḥud
- Prevented Muslims from usurious loans to equip their armies in response to the action of the pagans
- Explicit prohibition of compound interest
- Qualification is not exclusive but rather suggestive of prevalent practice

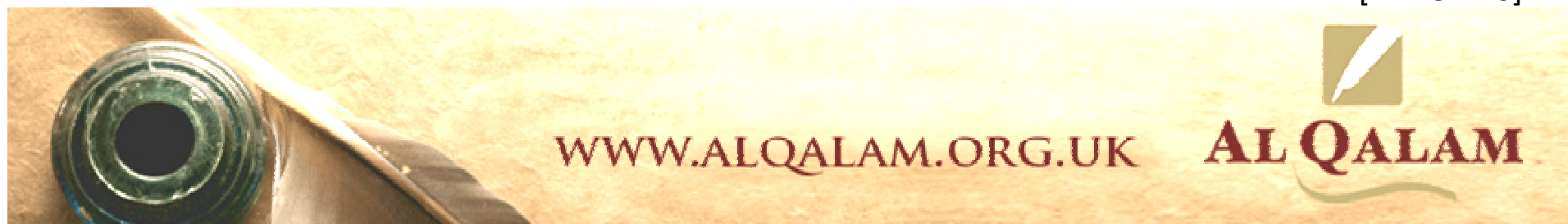


Historical Analysis - Verses 4 & 5

الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ ذَلِكَ بِأَنَّهُمْ
قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ مِّنْ رَبِّهِ فَانْتَهَى
فَلَهُ مَا سَلَفَ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ (275)
يَمْحَقُ اللَّهُ الرِّبَا وَيَرْبِي الصَّدَقَاتِ وَاللَّهُ لَا يُحِبُّ كُلَّ كَفَّارٍ أَثِيمٍ (276) [البقرة]

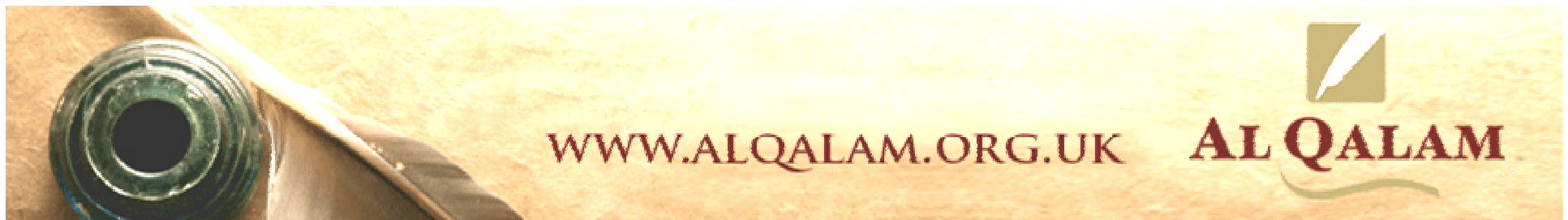
Those who devour ribā will not stand except as stands one the Satan has driven to madness by his touch. That is because they have said: "Trade is but like ribā." but Allāh has permitted trade and forbidden ribā. So, whosoever after receiving admonition from his Lord desists, he shall be pardoned for the past, and his case is for Allāh (to judge); but one who reverts (to the offence), those are the companions of the fire. They will abide therein (for ever). Allāh destroys ribā and gives increase for deeds of charity, for Allāh loves not any ungrateful/non-believing sinner.

[2:275-276]



Historical Analysis - Verses 4 & 5

- Those engaged in ribā are consumed by greed leaving them 'intoxicated' thereby which will be mirrored on the Day of Judgement
- Consequence of their mocking justification – both earned a profit
- Obviously erroneous similitude was not countered on the basis of reason
- Prohibition was not retrospective



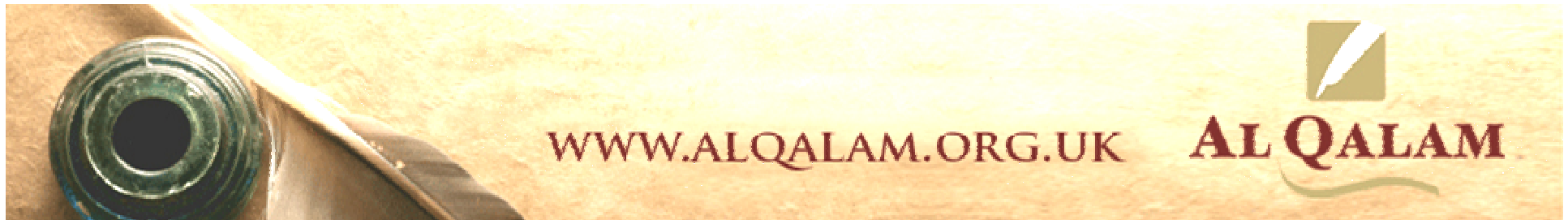
Historical Analysis - Verses 6 & 7

يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُّوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنتُمْ مُؤْمِنِينَ (278)
فَإِنْ لَمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِنَ اللَّهِ وَرَسُولِهِ وَإِنْ تُبْتُمْ فَلَكُمْ رُءُوسُ أَمْوَالِكُمْ لَا
تَظْلُمُونَ وَلَا تُظْلَمُونَ (279) [البقرة]

O you who believe! Fear Allāh, and give up what remains of your demand for ribā, if you are indeed believers. If you do it not, take notice of war from Allāh and His Messenger. But if you repent you shall have your capital sums. Deal not unjustly, and you shall not be dealt with unjustly.

[2:278-279]

Dispute between Banū ‘Amr b. ‘Umeyr of Banū Thaqīf [who embraced Islam in 9AH] and Banū Mughīrah over vast outstanding claims of interest earned prior to prohibition.



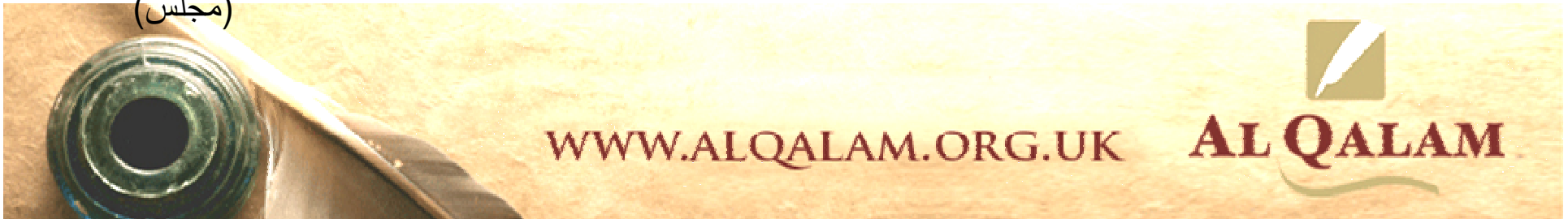
ربا البيع – Ribā of trade

عن عبادة بن الصامت رضي الله عنه قال: قال رسول الله صلی اللہ علیہ وسلم: الذهب بالذهب والفضة بالفضة والبر بالبر والشعير بالشعير والتمر بالتمر والملح بالملح مثلاً بمثل سواءً بسواء يداً بيد. فإذا اختلفت هذه الأصناف فبيعوا كيف شئتم إذا كان يداً بيد. رواه مسلم.

It is reported from ‘Ubādah b. al-Şāmit رضي الله عنه, he said: the Messenger of Allah صلی اللہ علیہ وسلم said: “Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt, like for like, equal for equal, and hand to hand. If these commodities differ, then you may trade as you wish, provided that the exchange is hand to hand.”

[Muslim]

- (نوع) and (مقدار) refer to equality in amount and not type and مثلاً بمثل
- يداً بيد refers to possession of the countervalues within the same session (مجلس)



ربا البيع – Ribā of trade

Ribā of trade can exist either of two ways:

1. surplus in the mutual exchange of a usurious commodity with the same genus – **ribā al-faḍl**
2. delay in the settlement of one or both of the usurious countervalues – **ribā al-nasī'ah**

Ribā al-faḍl occurs when:

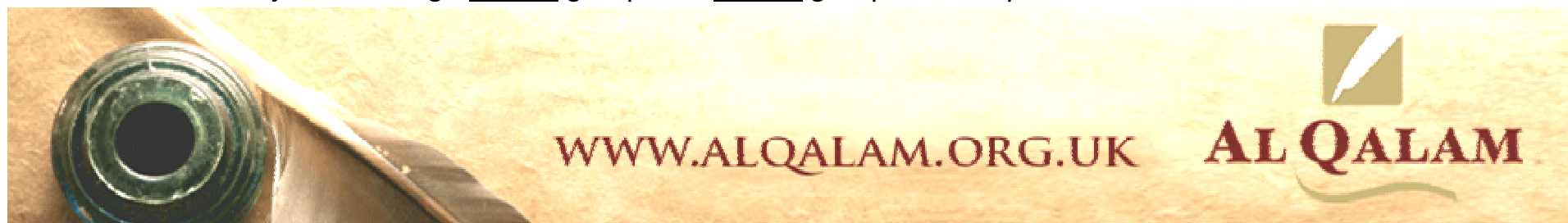
1. The exchange is in a commutative contract (عقد معاوضة)
2. The countervalues (العوضان) are usurious (ربوى)
3. The exchange is between the same genus (جنس)

Ribā al-nasī'ah occurs when:

1. The exchange is in a commutative contract
2. The countervalues are usurious

Important exception:

- Gold and silver are one group (A)
- The remaining commodities are another group (B)
- Delayed exchange between a commodity from group A and B is permitted
 - delay in commodity B = salam
 - delay in commodity A = deferred sale
- Delayed exchange **within** group A or **within** group B is not permitted



ربا البيع – Ribā [al-Faḍl] of trade

Can the ruling of ribā al-faḍl be extended beyond the six mentioned commodities?

- No – The Zahiritic School (Dawūd b. Alī, Ibn Ḥazam), Uthmān al-Battī, Qatādah, Tā'ūs, Ibn 'Aqīl al-Ḥanbalī
- Yes – The overwhelming majority (الجمهور) agrees that:
 - The text comprises a causative factor (علة).
 - The causative factor for gold and silver is the same.
 - The causative factor for the remaining 4 commodities is the same.

Ḥanafī School

- Weight with genus [الوزن مع الجنس] (gold & silver)
- Volume or weight (whether edible or not) with genus [الكيل أو الوزن مع الجنس] (wheat, barley, dates & salt)

Shāfi'ī School

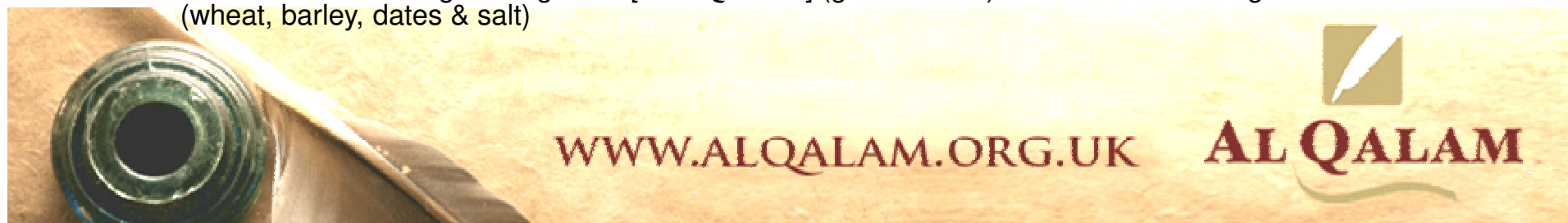
- Medium of exchange with genus [الثمنية مع الجنس] (gold & silver)
- Edible (by humans, whether staple – القوت, sweet – الفاكهة or medication - الدواء) with genus [الطعم مع الجنس] (wheat, barley, dates & salt)

Mālikī School

- Medium of exchange with genus [الثمنية مع الجنس] (gold & silver)
- Staple, preserveable edibles with genus [الطعم المقتات والمدخر مع الجنس] (wheat, barley, dates & salt)

Ḥanbalī School - 3 opinions

- Same as Ḥanafī – the dominant opinion
- Same as Shāfi'ī
- Medium of exchange with genus [الثمنية مع الجنس] (gold & silver) and Edible with weight or volume (wheat, barley, dates & salt)



ربا البيع – Ribā [al-Nasī'ah] of trade

Ḥanafī and Ḥanbalī School

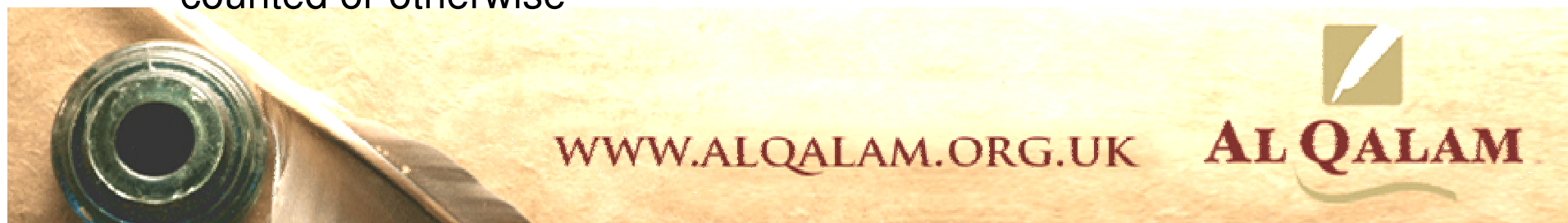
- Deferment in exchange of weighed with weighed [موزون بموزون] whether of the same genus or not, or measured with measured [مكيل بمكيل] whether of the same genus or not
- There is no ribā al-nasī'ah in the exchange of weighed with measured except in one minority (مرجوح) opinion within the Ḥanbalī School

Shāfi'ī School

- Deferment in the exchange of gold and silver
- Deferment in the exchange of edibles (whether staple – القوت, sweet – الفاكهة or medication - الدواء) whether weighed, measured, counted or otherwise

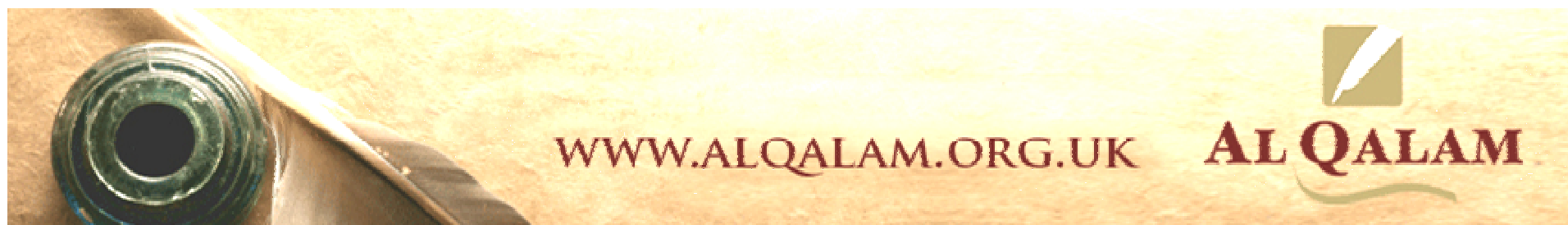
Mālikī School

- Deferment in the exchange of gold and silver
- Deferment in the exchange of edibles (whether staple – القوت or sweet – الفاكهة **but not medication** - الدواء) whether weighed, measured, counted or otherwise



Some misconceptions

- The verses on ribā were revealed in the final days of the Prophet Mohammed (SAW)'s life and he therefore did not have time to explain them properly.
- Interest only becomes ribā when the poor are exploited.
- Interest is only ribā when the amount loaned is 'doubled and re-doubled' – أضعافاً مضاعفة
- Interest is only ribā when loans are given for consumption needs, not productive needs.
- We can justify ribā on the basis of it being a necessity of the current time and economic climate.



Some Major Prohibitions

Gharar

lexical definition – خدعه وأطعمه بالباطل (لسان العرب)

Legal definition –

Ḥanafī - الغرر ما يكون مستور العاقبة (المبسوط للسرخسي)

Mālikī - الغرر التردد بين أمرين أحدهما على الغرض والثاني على خلافه (حاشية الدسوقي)

Shāfi'ī - الغرر ما احتمل أمرين أغلبهما أخوفهما. وقيل: ما انطوت عنه عاقبته. (نهاية المحتاج)

Al-Ḍarīr has favoured al-Sarakhsī's definition due to its encompassing nature

Two basic bases for categorising gharar:

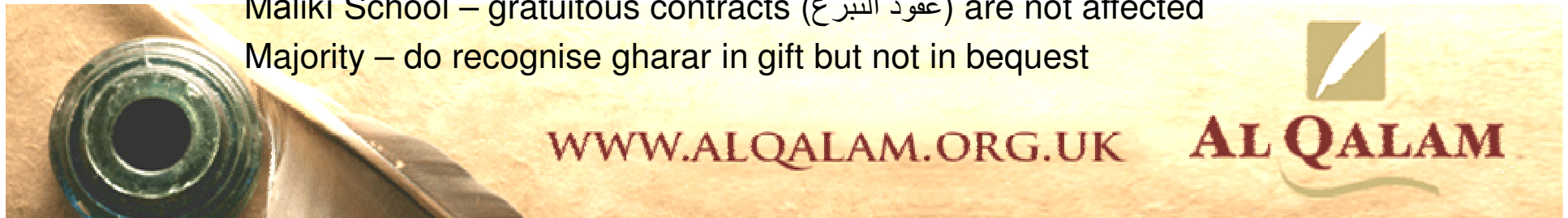
- Effective or ineffective – i.e., where it renders the contract voidable or not
- Causes of gharar – i.e., what gives rise to gharar

Effective gharar:

- Significant – i.e., leads to dispute
- Exists in the principal – sale of pregnant camel
- No genuine need – salam, milk of wet nurse
- Contract of consideration:

Mālikī School – gratuitous contracts (عقود التبرع) are not affected

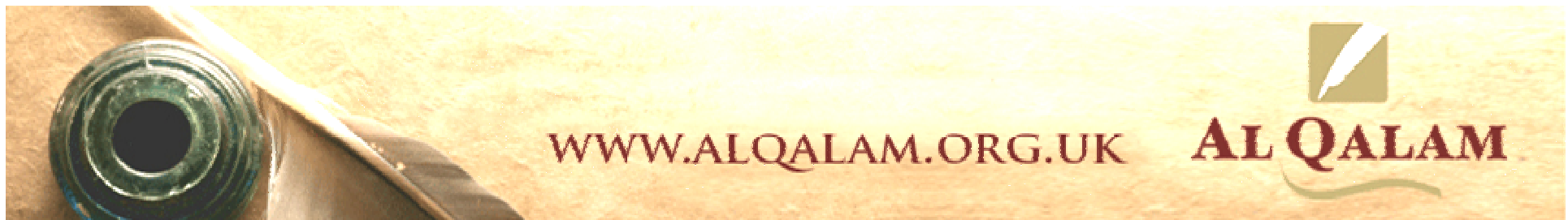
Majority – do recognise gharar in gift but not in bequest



Some Major Prohibitions

Causes of gharar:

- **Qualitative measures** - Gharar exists when there is uncertainty in the :
 - Execution of contract – e.g. contingent sale “if it rains tomorrow”
 - Subject matter (المعقود عليه)
 - Existence -
 - Ownership – e.g. fish in the sea
 - Deliverability – runaway camel
 - etc
 - Consideration (العوض) – fixing the price in a spot/credit sale
 - Tenure (الأجل) – delivery time of price/object
 - Imam Ahmad, Ibn Taymiyyah, Ibn al-Qayyim – existence, ownership, availability and possession are not requirements, only the ability to deliver at maturity
- **Quantitative measure?** - “Towards an Objective Measure of Gharar in Exchange” by Sami Al-Suwailem
 - In simple exchange of goods both parties can benefit as long as both are utility (profit) maximisers – when marginal utility of the good for the buyer is greater than or equal to the price, and the marginal cost for the seller is less than or equal to the price.
 - If the price turns out to be greater than the buyer’s marginal utility, but exceeds the seller’s marginal cost, the buyer loses while the seller wins.
 - if the price turns out to be less than the marginal cost, but exceeds the buyer’s marginal utility, the buyer wins but the seller loses
 - if the price turns out to be less than the marginal cost, but exceeds the buyer’s marginal utility, the buyer wins but the seller loses.
 - Simple exchange is a game in which players might possibly end with win-win, win-lose, or loses-lose outcomes
 - Gharar is equivalent to a zero-sum game with uncertain payoffs – one party’s payoffs cannot increase without decreasing the other party’s payoffs
 - Gharar is prohibited because it involves الأكل بالباطل and not merely risk
 - A zero-sum game expresses this concept because the winner gains by taking the payoff of the other party, forcing him to lose
 - If both parties are seeking the win-lose outcome, it becomes a gharar transaction. If only A does, and B is unaware of that, say because of informational asymmetry regarding probability distribution, it becomes a deception.

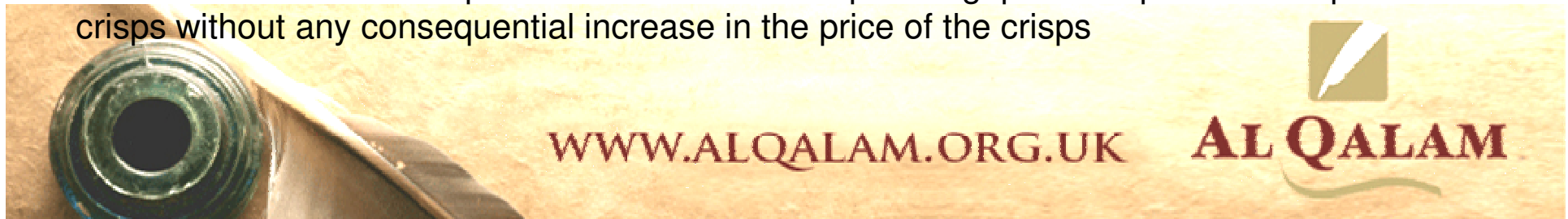


Some Major Prohibitions

Qimār and meysir:

“A mutual undertaking between two or more parties in which each party wagers his property on an event with an uncertain outcome in a manner that the wagered property of one party transfers without consideration to the other party or the property of the other party transfers without consideration to the first party.” [‘Adālatī Fayşlay, 2:243]

- Undertaking must be between two or more parties – if only one party wagers his property it is not qimār
- Parties to the mutual undertaking wager their own wealth – if a third party who is not a party to the mutual undertaking wagers his wealth it is not qimār
- Acquiring the wealth of another is made conditional on an event with an uncertain outcome – if the outcome is certain it is not qimār e.g. sun rising from the east or west
- The wagered property transfers without proper consideration – if a party receives proper consideration and then a prize in addition it is not qimār e.g. prizes in promotional packs of crisps without any consequential increase in the price of the crisps



Some Major Prohibitions

2 fundamental types of qimār:

1. No particular party to the mutual undertaking is required to pay; rather, payment for each party is made conditional on an event with an uncertain outcome

Loser of a combative game undertakes to pay the winner

Marbles for keeps, etc

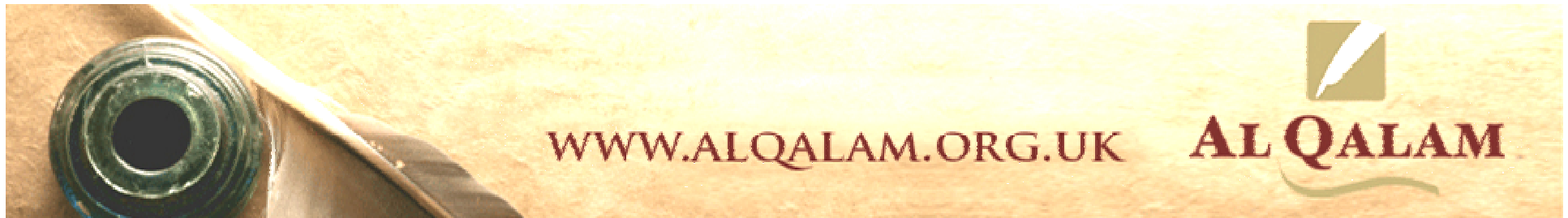
2. Payment from one party is certain whilst payment from the other party is uncertain

National Lottery

Scratch cards

Raffles

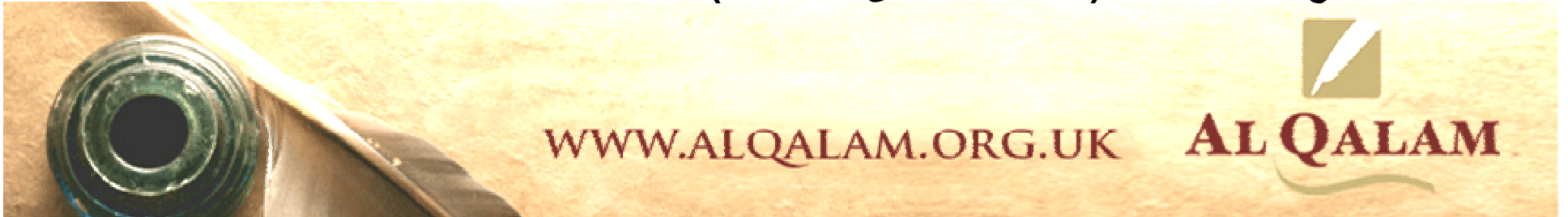
Fruit machines, etc



الحيل - Stratagems

لا بأس بالحيل فيما يحل ويجوز. وإنما الحيل شيء يتخلص به الرجل من المآثم والحرام ويخرج به إلى الحلال. فما كان من هذا أو نحوه فلا بأس. وإنما يكره من ذلك أن يحتال الرجل في حق الرجل حتى يُبطله أو يحتال في باطل حتى يموهه أو يحتال في شيء حتى يدخل فيه شبهة. فأما ما كان على هذا القبيل الذي قلنا فلا بأس بذلك. (كتاب الحيل للخصاف ، ص 4)

مذهب علمائنا أن كل حيلة يحتال بها الرجل لإبطال حق الغير أو لإدخال شبهة فيه أو لتمويه باطل فهي مكروهة ، وكل حيلة يحتال بها الرجل ليتخلص بها عن الحرام أو ليتوصل بها إلى الحلال فهي حسنة. وهي معنى ما نقل عن الشعبي رحمه الله: لا بأس بالحيل في ما يحل ويجوز ، والأصل في جواز هذا النوع من الحيل قول الله تعالى: [وَأْخُذْ بِيَدِكَ ضِغْثًا فَاضْرِبْ بِهِ وَلَا تَحْنُثْ] هذا تعليم المخرج لأيوب صلوات الله على نبينا وعليه عى يمينه التي حلف ليضربن أمراًته مائة عود. وقد تعلق محمد رحمه الله بهذه الآية في مسائل الحيل والخصاف لم يتعلق بها في حيلة. قال مشايخنا رحمهم الله: إنما لم يتعلق بها الخصاف لأن حكمها منسوخ. وعامة المشايخ رحمهم الله على أن حكمها ليس بمنسوخ ، وهو الصحيح من المذهب. (المحيط البرهاني ، 21/67)



الحيل - Stratagems

First type – impermissible and also does not achieve intended outcome

1. No change in essence (الحقيقة), change only in apparent appearance (الصورة الظاهرة)

قاتل الله اليهود حرمت عليهم الشحوم فجمّلوها فباعوها (البخارى)
ولا يجمع بين متفرق ولا يفرق بين مجتمع خشية الصدقة (البخارى)

2. Change in essence but not sufficient to effect intended outcome

Gift to wife without possession to avoid zakāt liability

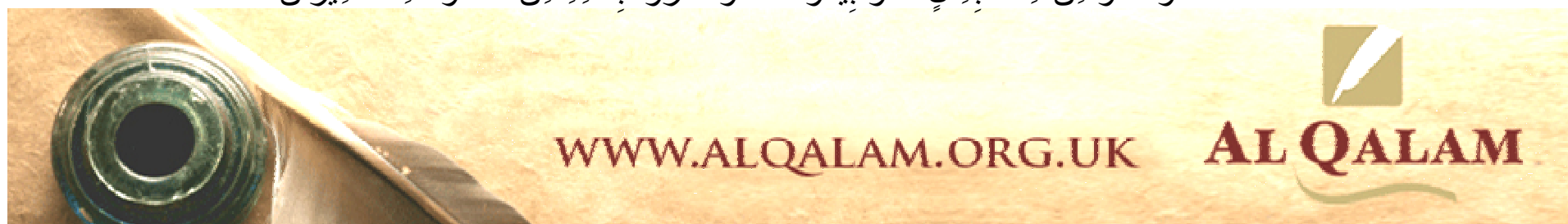
Second Type – impermissible but it still achieves intended outcome

Gift to wife with possession to avoid zakāt liability

Third type – stratagem is permissible and also achieves intended outcome

Ayūb AS

« لَا تَفْعَلُوا ، وَلَكِنْ مِثْلًا بِمِثْلِ ، أَوْ بَيِّعُوا هَذَا وَاشْتَرُوا بِثَمَنِهِ مِنْ هَذَا وَكَذَلِكَ الْمِيزَانُ »



الحيل - Stratagems

- What about stratagems to avoid incidence of ribā but achieve same rate of return?
- If a permissible form of contract is employed, is itself intended and not merely artificially contrived, all related conditions and legal requirements are met – this is not a stratagem (حيلة) and its validity is not in dispute. E.g. Deferred sale, or deferred murābaḥah when buyer's purpose is to acquire the object
- If a permissible form of contract is employed, is **not** itself intended but rather merely artificially contrived, even though all related conditions and legal requirements are met – three basic opinions:
 1. Imām Mālik – not permitted as intent is to achieve consequences of ribā through other means
 2. Imām Shaf'ī – permitted as the contract requirements have been met
 3. Ḥanafī School – if the contract gives rise to effect that distinguishes it from ribā then it is permitted, otherwise not

E.g. buy-back (بيع العينة) : Imām Mālik – not permitted, Imām Shaf'ī – permitted, Ḥanafī School - not permitted if object returns to original seller, permitted if it goes to another party (التورق)

