

Discretionary Rights in Islamic Perspective – A Critical Analysis

*Dr. Habib ur Rehman**

*Dr. Abdul Basit Khan**

In the present age, different kinds of rights have come up and the same are traded too in markets such as copyrights, trademarks, patents etc. This issue came under discussion by Fiqhi scholars of modern times for quite some time whether these rights can be branded as 'money' or not. And, then, again it is to be ascertained as to their sale and purchase. This problem did not however exist for Fiqhi scholars of olden times in its universality as it is found today. Yet they spoke of rights and the acceptance of taking reward, which could be visualised and was in vogue in their time, such as 'right of pre-emption', 'right to pass by' and the 'right to take water' etc. So some Fiqhi scholars have favoured taking reward for them, while others have thought it otherwise. The Fiqhi scholars of present times have put the present-age rights - as are in vogue - such as copyrights, patents, trademarks and geographical indications in the category of 'Discretionary Rights'. To ascertain whether the said rights could be treated as saleable or non-saleable, and how fair it was to note as to their sale-and-purchase, it seems appropriate to consider and analyse the decisions by primitive Fiqhi scholars in regard to the rights of their times before reaching a conclusion. As per the terminology used in present times, such as copyrights, patents, trademarks etc. which the contemporary Fiqhi scholars have included in discretionary rights and done discourse on them. So, it seems appropriate to dilate upon Discretionary Rights and its kinds here.

In the present age, different kinds of rights have come up and the same are traded too in markets such as copyrights, trademarks, patents etc. This issue came under discussion by Fiqhi scholars of modern times for quite some time whether these rights can be branded as 'money' or not. And, then, again it is to be ascertained as to their sale and purchase. This problem did not however exist for Fiqhi scholars of olden times in its universality as it is found today. Yet they spoke of rights and the acceptance of taking reward, which could be visualised and was in vogue in their time, such as 'right of pre-emption', 'right to pass by' and the 'right to take water' etc. So some Fiqhi scholars have favoured taking reward for them, while others have thought it otherwise. The Fiqhi scholars of present times have put the present-age rights – as are in vogue - such as copyrights, patents, trademarks and geographical indications in the category of 'Discretionary Rights'. To ascertain

* Assistant Professor, Federal Urdu University of Arts, Science & Technology, Islamabad.

* Assistant Professor, Sheikh Zayed Islamic Centre, University of the Punjab, Lahore.

whether the said rights could be treated as saleable or non-saleable, and how fair it was to note as to their sale-and-purchase, it seems appropriate to consider and analyse the decisions by primitive Fiqhi scholars in regard to the rights of their times before reaching a conclusion. As per the terminology used in present times, such as copyrights, patents, trademarks etc. which the contemporary Fiqhi scholars have included in discretionary rights and done discourse on them. So, it seems appropriate to dilate upon Discretionary Rights and its kinds here.

Meanings and Definition:

In Islamic Fiqh, the term ‘Discretionary Right’ is used in the Ḥanafī School of Thought. However, this term is not desirable among the Maliki, Shaf’i and Ḥanbali Schools of Thought. The Ḥanafī studies have debated ‘Discretionary Rights’ in regard to the value of rights and benefits whether it is justifiable to claim some (material) reward for that or not. According to the Ḥanafī School of Thought, claiming a reward for the rights, which do not fall into the category of saleable goods, is unfair. On the contrary, taking a reward on saleable rights is fair.

The Ḥanafī School of Thought does not clearly define ‘Discretionary Rights’. There is, however, an allusion made while stating some Fiqhi terms which help in comprehending the definition of ‘Discretionary Rights’ as IbneĀbidīn writes:

لَا يَجُوزُ الْإِعْتِيَاظُ عَنِ الْحُقُوقِ الْمُجَرَّدَةِ عَنِ الْمَلِكِ

“This is undesirable (unreasonable) to claim a reward for the rights without ownership.”

That is to say, ‘Discretionary Rights’ are those without ownership i.e. enjoying this right, yet he cannot claim the ownership. Nonetheless, that right which stands linked to that site/place is not his property e.g. the right to pass by (using the path of another’s property). The ‘right to pass/drive through’ has been defined in ‘MujalaAḥkāmāl-Ādliya’ as:

حَقُّ الْمَشِيِّ فِي مَلِكِ الْغَيْرِ وَذَلِكَ بِأَنْ تَكُونَ رَقَبَةُ الطَّرِيقِ
مَمْلُوكَةً لِشَخْصٍ وَلَا خَرَ الْحَقُّ بِأَنْ يَمُرَّ مِنْهَا فَقَطْ

“Walking through someone else’s land (while the owner is somebody else), the passer-by is just entitled to use the path. This is one of the discretionary rights.”

Thus the ‘right to pass through (another person’s land) is itself no proof that the owner himself does not enjoy the right to use that path, rather the owner has every right to use that path in the capacity of an owner.

The above lines are sufficient to prove that ‘Discretionary Right’ is devoid of the ownership right, while the second hint is that the right is not confined to some particular site or place. In other words, there is still a possibility of its being existed as a separate entity (from its site or place) as written by Ibne Hammām in ‘Fathāh-Qadīr’.

أَنَّهَا (شُفْعَتُهُ) لَيْسَتْ بِحَقِّ مُتَقَرَّرٍ فِي الْمَجَلِّ بَلْ مُجَرَّدُ حَقِّ
التَّمَلُّكِ فَلَا يَصِحُّ الْإِعْتِيَاظُ عَنْهُ

“The Right of Pre-emption is not such a right which may be fixed at some specific site/place rather it is devoid of ownership. So it is wrong to claim a reward for it.”

From amongst the contemporary Fiqhi scholars, Ali Khafīf has defined ‘Discretionary Right’ as:

فالمجرد ما كان غير متقرر في محله

“A discretionary right is which is not fixed at its site/place.”

This definition seems to have derived from the excerpts of the Hanafi School of Thought books as concluded in the ‘Right of Pre-emption’ discussion.

أَنَّهَا (شُفْعَتُهُ) لَيْسَتْ بِحَقِّ مُتَقَرَّرٍ فِي الْمَجَلِّ

After what has been stated above, ‘Discretionary Right’ can be defined as:

“A Discretionary Right is a right to benefit (from) which is peculiar to someone special that it is not fixed at its place or site, for instance the ‘Right of Pre-emption’ and the ‘Right to Pass (by).”

In some Hanafi books, ‘Haq-e-Mufrid’ has been used instead of ‘Haq-e-Mujarad’ such as the text of ‘al-Badā’āal-Sanā’ā’.

الحقوق المفردة لا تختص بالتملك

Thus the contemporary Fiqhi scholars have used the term ‘Haq-e-Mehdh’ for ‘Haq-e-Mujarad’.⁷

Types of ‘Discretionary Rights’

Sometimes a 'Discretionary Right' falls into the financial category while it is otherwise at some other time. Similarly, it is indeed enacted in itself and at other times for removal of injury (or loss).

'Discretionary Rights' which are related to financial matters include 'Ḥaq-e-Shirb'⁸, 'Ḥaq-e-Marūr'⁹, 'Ḥaq-e-Tasyīl'¹⁰, 'Ḥaq-e-Majrī'¹¹, 'Ḥaq-e-Tāllī'¹² and 'Ḥaq-e-Intefāā-bil-Jidār'¹³. In the same manner, 'Ḥaq-e-Shufāh'¹⁴, 'Ḥaq-e-Khulūū'¹⁵ and 'Ḥaq-e-Tāhjīr'¹⁶ also form part of this financial category.

Non-Financial Discretionary Rights include 'Ḥaq-e-Qasm'¹⁷ and 'Ḥaq-e-Khīyār'¹⁸ etc.

Similarly Discretionary Rights, which were enacted on the basis of removing injury or loss, included 'Ḥaq-e-Qasm', 'Ḥaq-e-Khīyār' and 'Ḥaq-e-Shufāh'; in the same manner the Discretionary Rights – enacted in themselves – included all those afore-mentioned financial rights except 'Ḥaq-e-Shufāh'.

In the light of Mufti TaqīUsmāni's discussion on rights, 'Discretionary Rights' can be divided into two main categories:

- i. Sharīāh Rights
- ii. Customary Rights

i. Sharīāh Rights:

By Sharīāh Rights, those rights are meant which have been conveyed to man from Allah through His Prophet (PBUH) and there is no iota of notion in it. That means that their evidence has been handed down to the right-holder on the basis of the Qur'ān and the Hadīth. If there had been no revealed text of the Holy Qur'ān and the Hadīth, the rights would not have been proved. For example, 'Right of Pre-emption', 'Right of Wilāyah and 'Right of Inheritance' and 'Right of Compensation', the 'Right of Satisfaction' from wife, 'Right of Divorce' and 'Ḥaq-e-Qasm' (a wife's right to have her husband's company on her turn).

There are two more types of the Sharīāh rights:

- (1) First, those rights which are not just delivered, rather they have been enacted in order to remove injury from the right-holder e.g. 'Right of Pre-emption', 'Ḥaq-e-Qasm' (a wife's right to have her husband's company on her turn), the 'Right of a child's upbringing' and 'Ḥaq-e-Khīyār'. Moulana TaqīUsmāni has attributed these rights to the 'Rights of Necessity'.
- (2) Secondly, those rights which are originally proved for the right-holder are not enacted to remove injury. For example, 'Right of Compensation', Right of husband to benefit from

wife by construing the marriage contract and the 'Right of Inheritance'. Moulana Taqī Usmāni has attributed these rights to the 'Real Rights'.

ii. Customary Rights:

The second kind of 'Discretionary Rights' is 'Customary Rights', which are basically those Sharia rights that are proved for the right-holder due to customs and traditions among the people. These rights are lawful in Sharia because it (Sharia) has accepted them due to customs and traditions. But the source of these rights is the custom and not the Qur'ān and the Hadīth e.g. the 'Right to Pass' (Ḥaq-e-Marūr), 'The right to drain out water etc. Moulana Taqī explained the customary rights into three more kinds:

- (1) The rights which relate to interest on articles due to continuous benefit e.g. 'Ḥaqūq-e-Irtefāq'.¹⁹
- (2) The rights which entitle a person to occupy a (permissible) place on the 'first-come-first' basis. This right is called 'Ḥaq-e-Asbaqīyat' (the Right to Outshine).
- (3) The rights which are given as a result of making a pledge (or striking an agreement) or then retaining an existing pact, e.g. renting out a house or a shop, or to continue retention of some fixed function.²⁰

Discretionary Rights enacted for Removal of Injury

Rights which are enacted to remove injury (loss) from the right-holder are the 'Right of Pre-emption', 'Ḥaq-e-Qasm' (a wife's right to have her husband's company on her turn), the 'Right of a child's upbringing', 'Right to Custody of an Orphaned Child' etc. As these type of rights are not as saleable commodities in market and Shariah also doesn't allow it. So the descriptions of these rights and its commandments aren't being described here.

'Ḥaqūq-e-Irtefāq' (The right of Take Advantage)

By 'Ḥaqūq-e-Irtefāq' it is meant to reap benefit out of another person's adjacent land when it comes to using one's own intended advantage from his land, so one simply cannot make use of one's own land until he benefits from the other person's land which is adjacent (connected) to it.

Shaikh Muṣṭafa Al-Zarqa's words clearly describe 'Ḥaqūq-e-Irtefāq':

²¹ الارتفاق منفعة مقررة لعقار علي عقار آخر مملوك لغير الاول

“Irtefāq means taking advantage of one’s own land by using (as a benefit) the other person land.”

The Encyclopaedia of Kuwait (Mosua al-FiqhiaKuwaitia) describes ‘Haqūq-e-Irtefāq’ in these words:

حَقُّ الْإِرْتِفَاقِ عِبَارَةٌ عَنْ حَقِّ مُقَرَّرٍ عَلَى عَقَارٍ لِنَفْعَةِ عَقَارٍ آخَرَ مَمْلُوكٍ

لِغَيْرِ مَالِكٍ²²

“Haqūq-e-Irtefāq is a fixed right of taking advantage of one’s property, which is adjacent to another owner’s land that is not his (own) property.”

In Haqūq-e-Irtefāq, ‘Haq-e-Shirb’, ‘Haq-e-Marūr’, ‘Haq-e-Tasyīl’, ‘Haq-e-Majrī’, ‘Haq-e-Intefāà-bil-Jidār’ etc. are included.

There will be discussion on the above-mentioned rights in the next pages.

i. ‘Haq-e-Shirb’

Literally ‘Haq-e-Shirb’ means a part of water as found in Lisān al-Arab:

وَالشَّرْبُ: الْحِظُّ مِنَ الْمَاءِ²³

The Qur’ān has described same words while giving a narration of HazratSaleh (AS) miraculous camel.

قَالَ هَذِهِ نَاقَةٌ لَهَا شِرْبٌ وَلَكُمْ شِرْبٌ يَوْمَ مَعْلُومٍ²⁴

He said: (Behold) this she-camel. She hath the right to drink (from the well), and ye have the right to drink (each) on fixed day.

The same is stated in SūrahQamar:

وَنَبِّئْهُمْ أَنَّ الْمَاءَ قِسْمَةٌ بَيْنَهُمْ كُلُّ شِرْبٍ مُخْتَصِرٌ²⁵

“And tell them that the water is to be divided between them: each one’s right to drink being brought forward (by suitable turns).”

In the above verses, the word ‘Shirb’ is used to show a part of the water.

In the Fiqhi term, bringing water for use of man and of an animal and to irrigate a field is called ‘Shirb’.²⁶ ‘Duraral-Hukām’ describes ‘Shirb’ as:

هُوَ نَصِيبٌ مُعَيَّنٌ مَعْلُومٌ مِنَ النَّهْرِ وَيَكُونُ عَامًّا أَوْ خَاصًّا بِمَزْرَعَةٍ أَوْ
بُسْتَانٍ أَوْ حَدِيقَةٍ وَيُعَيَّنُ مِقْدَارُهُ هَذَا الْحَقُّ بِالزَّمَنِ تَارَةً وَأُخْرَى بِأَنْيَابٍ أَوْ
فَجَوَاتٍ ذَاتِ اتِّسَاعٍ مُعَيَّنٍ.²⁷

“Haq-e-Shirb is such a known and fixed part of water taken from stream, either common or individual, for farm, garden or an orchard. The quantity of this right (to get water), sometimes, is determined by the time or sometimes by known and fixed wide water pipes and tributaries (used for irrigation purposes)”.

The Commandments of ‘Haq-e-Shirb’:

‘Haq-e-Shirb’ is related to water and the commandments concerning also vary as regards its various forms. Water can be categorised in four basic forms:²⁸

- (a) Safe (drinking) water in a pot;
- (b) Water of a personal well or a hose;
- (c) Water of a personal canal;
- (d) Water of a stream and rivers;

(a) Safe (drinking) water in a pot:

The one who keeps the water safe in a pot has a right over it. No-one else enjoys this right (other than him). This can be exemplified by hunting that after being fallen prey it (animal) becomes the possession of its hunter. In the same manner, the water in the pot is its possession which he also can sell out for money.²⁹ If a person is too thirsty to die and the water in the pot is in excess than to quench his thirst, then that person can grab water in duress provided he does not use a weapon (for this purpose).³⁰

(b) Water of a personal well or a hose:

The water in a well or a hose, as a principle, is fair for use and all and sundry can benefit from it because the Holy Prophet (PBUH) says:

المُسْلِمُونَ شُرَكَاءُ فِي ثَلَاثٍ: فِي الْكَلْبِ، وَالْمَاءِ، وَالنَّارِ³¹

“Three things: water, fire and grass
are partnered by Muslims.”

Hence, the owner of a personal hose and a well cannot prevent people and animals from drinking water. Still he can stop them from irrigating their fields or trees. Nevertheless, if dug in the vicinity of his personal rather than in a public or government land,

he may obstruct its users. If there is a substitute to that, people can take water from there. Or the owner should himself bring water in a bucket or some other pot so as to meet their need. If people are thirsty and there is no other way to take water and the well-owner neither supplies water nor let them have it, then the needy can push themselves forward and take water by force.³² The Fiqhi scholars have reasoned with the Hadīth on this issue:

عَنْ أَبِي هُرَيْرَةَ، قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: لَا يُمْنَعُ فَضْلُ الْمَاءِ لِيُمنَعَ بِهِ الْكَلْبُ³³

AbūHuraira narrated a Tradition that Allah's Apostle said, "Do not withhold the superfluous water, for that will prevent from grazing their cattle."

(c) Water of a personal canal:

The water which comes out of some special canal owned by people, as a principle, is fair just as the Hadīth mentioned above describes. Though for the use of people and their cattle, the use of water is fair, it is not however fair if used to irrigate the fields etc.³⁴

(d) Water of a stream and river:

The water of large streams and rivers is owned by people and no-one enjoys any distinction in this respect. Everybody can use this water, get it for their animals or can irrigate their fields; moreover, small canals can be started and other means can also be used to suck water, provided all that does not do any harm to anybody.³⁵

2. Inheritance to Ḥaq-e-Shirb:

The HanafiFiqhi scholars believe in inheritance on Ḥaq-e-Shirb and its ownership will be transferred as IbneÀbidīn has explained:

لِأَنَّ الْمَلَكَ بِالْإِزْثِ يَقَعُ حُكْمًا لَا قَصْدًا، وَيَجُوزُ أَنْ يَنْبُتَ الشَّيْءُ حُكْمًا
وَإِنْ كَانَ لَا يَنْبُتُ قَصْدًا كَالْخَمْرِ تُمْلِكُ حُكْمًا بِالْمِيرَاثِ، وَإِنْ لَمْ تُمْلِكْ
قَصْدًا بِسَائِرِ أَسْبَابِ الْمَلَكَ³⁶

"The ownership that is transferred by dint of inheritance is by God's Commandment and not through man's intention; and that is fair that something proves for someone as an order, whereas it is not proved intentionally e.g. wine which can become the property of someone by way of order as inheritance but none can claim its ownership deliberately through money."

Reward (money) for Sale and Purchase of Shirb:

Some important point of discussion before the Fiqhi scholars is whether Ḥaq-e-Shirb is rewarding or not. It is unfair to claim a reward on Ḥaq-e-Shirb, which is concerned with big streams and rivers because in reality it belongs to the common man.³⁷

As for a deal on sale of Ḥaq-e-Shirb on a personal well or a hose, it will be fair to trade land with which its ownership is linked.³⁸ The Maliki scholars and Mashaikh-e-Balakh consider it fair to earn a reward on Ḥaq-e-Shirb.³⁹ The Maliki scholars acknowledge it by bearing in mind the ownership of Ḥaq-e-Shirb as ÀllamaQarāfi explains in the following statement:

يَجُوزُ شِرَاءُ شَرْبِ يَوْمٍ أَوْ يَوْمَيْنِ مِنْ عَيْنٍ أَوْ بئرٍ دُونَ الْأَصْلِ وَشِرَاءُ أَصْلِ
شَرْبِ يَوْمًا أَوْ يَوْمَيْنِ مِنَ النَّهْرِ لِأَنَّهُ مَعْلُومٌ عَادَةً⁴⁰

So from this above text it is cleared that it is fair to sell Ḥaq-e-Shirb, for one or two days, from a hose, well or a personal canal because it is a common practice.

Mashaikh-e-Balakh call it *Māl*, terming it a part of water so believe it is fair on the basis of some practice or a custom.⁴¹

The scholars who issued a decree (edict) of sale of Ḥaq-e-Shirb being unfair have described its reason as loss and ignorance that it Ḥaq-e-Shirb is sold, then it is not possible to quantify the water. But it becomes fair if its (water) quantity is measured as is mentioned in Rūdhahal-Tālibīn:

جَارَ لِمَالِكِهِ أَخَذَ نَمَمِهِ إِذَا بَاعَهُ مُقَدَّرًا بِكَيْلٍ أَوْ وَزْنٍ،
وَلَا يَجُوزُ، يَبْعُهُ مُقَدَّرًا بِرِيِّ الْمَاشِيَةِ وَلَا الزَّرْعِ.⁴²

In the light of the above discussion, it can safely be inferred that this issue is *Ijتهād* (an exercise in judgment of law) and is based on practices and customs of all times and the vicinities.

ii. The Right to Pass through (Ḥaq-e-Marūr)

Ḥaq-e-Marūr means passing through (or by) some way so that a person should enter his/her house or land. ‘Durar al Hukām’ defines it in the following words:

حَقُّ الْمُرُورِ هُوَ حَقُّ الْمَشِيِّ فِي مَلِكِ الْغَيْرِ وَذَلِكَ بِأَنْ تَكُونَ رَقَبَةُ الطَّرِيقِ
مَمْلُوكَةً لِشَخْصٍ وَلَا خَرَّ الْحَقُّ بِأَنْ يَمُرَّ مِنْهَا فَقَطْ⁴³

“Ḥaq-e-Marūr’ is the right to pass through one’s land in such a way that the land (through which one

passes) belong to a person, while the other just has the right to pass.”

The Commandments of Ḥaq-e-Marūr

1. Since Ḥaq-e-Marūr is the right to pass by, it may have different kinds by the nature of ways (to be used). So every way has to be followed by different Commandments.
 - (a) The first kind of the way is called a thoroughfare and it does not belong to anyone (person). It is fair enough to benefit from the way, provided the way remains open (should not be blocked) for all people. For example, windows and doors can be opened in the way, balconies can be built, way-outs can be managed and parking lots set up. These rights remain intact till no harm or inconvenience is caused to anybody, as long as the ruler allows them (their use).⁴⁴
 - (b) The second kind is a special way (exclusively used for the privileged) which may belong to one or more people. Everybody will have the right to pass that way, the landlord will have no right to debar the way-users. Yet the users will not have any right to build windows, doors or balconies in that way. If that way is shared by more than one people, one can take advantage of the way as long as the share-holders agree on it.⁴⁵
 - (c) In the third case, if one has a block of land which falls behind the land of another owner and there is no other way to get there, then does the right to pass through the other person’s land stands intact (or sustains) while he has to benefit from that? So it is not fair, as agreed by all Fiqhi scholars, for one to pass through the land owned by another person without his consent, or sweet will. Hence, it is not fair (reasonable) to pass through one’s land.⁴⁶
2. The second issue related to the reward of Ḥaq-e-Marūr is about to earn reward over it. The Fiqhi scholars believe that it is not fair to earn profit from the users of a thoroughfare. While the scholars have two different views as to earn a reward on the use of a special road. One view is that of the Ḥanbali, Maliki, Shaf’i scholars and yet another group (of scholars) from the Ḥanafī School of Thought who are convinced that earning a reward on the use of a special road is fair, as it is written in ‘Al-Moudawana’:

قُلْتُ: أَرَأَيْتَ إِنْ اشْتَرَى رَجُلٌ مِنْ رَجُلٍ مَمْرَهُ فِي دَارِهِ مِنْ غَيْرِ أَنْ يَشْتَرِيَ مِنْ رَقَبَةِ الْبَيْتَانِ شَيْئًا، أَيْجُوزُ هَذَا أَمْ لَا فِي قَوْلِ مَالِكٍ؟ قَالَ: ذَلِكَ جَائِزٌ لَهَا.⁴⁷

“If a person gets the permission (on payment) to use the way through another person’s house, while he does not buy anything from the building in deal, then will it be deemed fair or not? According to Imam Malik’s opinion, the one who answered said that it is fair.”

Similarly, it is found in ‘Minhāj’ that:

مِنَ الْمَنَافِعِ شَرَعًا حَقُّ الْمَمْرِ بِأَرْضٍ أَوْ عَلَى سَطْحٍ وَجَارَ كَمَا يَأْتِي فِي الصَّلْحَةِ تَمَلُّكُهُ بِالْعَوَضِ عَلَى التَّيْبِيدِ بِلَفْظِ الْبَيْعِ⁴⁸

“It is a reward from the Sharīhah point of view the right to pass through a land or some other surface (roof etc.)”

Thus as the Sharīhah ordains, it is just the right (fair) to earn a reward over the passing through of one’s land. Or for that matter, some other place such as roof etc.

And the same is mentioned in ‘Al-Insāf’:

وَيَجُوزُ أَنْ يَشْتَرِيَ مَمْرًا فِي دَارٍ⁴⁹

“And it is fair to buy some way to pass through a house.”

From among the Hanafī scholars, Allama Ibn Hammām has issued an edict of its being fair on earning a reward on Ḥaq-e-Marūr, explaining that this right relates to land:

أَنَّ حَقَّ الْمُرُورِ حَقٌّ يَتَعَلَّقُ بِرَقَبَةِ الْأَرْضِ وَهِيَ مَالٌ هُوَ عَيْنٌ فَمَا يَتَعَلَّقُ بِهِ يَكُونُ لَهُ حُكْمُ الْعَيْنِ،⁵⁰

“That Ḥaq-e-Marūr concerns land and land is such a saleable commodity (asset) which is material and tangible, so a Commandment of matter and tangibility applies to it as well.”

The second view of Fiqhi scholars concerns earning or otherwise on the use of a special road or street (Ḥaq-e-Marūr Khas) is illegal (unfair), which is evident from ‘Zāhir al-Rawayah’⁵¹:

iii. Haq-e-Tasyīl

Ḥaq-e-Tasyīl means the right to drain out access (or used) water from one’s house or land.⁵² That is to say that a person drains out

water from his land and that reaches (and enters) another person's land, leaving a question whether to whose land the water reaches has a right to prevent it or not. The right of draining out water is a discretionary right because it is proved on account of its separation from the real ownership. Hence, Ḥaq-e-Tasyīl means the right of flowing access (or used) water from a land or surface which belongs to another person. Or that is a public property and does not belong to any single individual.

The Commandments of Ḥaq-e-Tasyīl

1. Fixing a drain up some thoroughfare: Even though it is everybody's right, according to the Tradition of Maliki, Shaf'i and Hanbali School of Thought⁵³, yet it should do no harm to the passer-by, for the real right remains the passing by through that way. As for the argument of this issue is concerned, an anecdote is ascribed to Hazrat Umar (RA) who uprooted a drain fixed outside of the house of Hazrat Abbas (RA) upon which the latter told Hazrat Umar (RA) that the drain uprooted by you was actually installed by the Prophet (PBUH) himself. Hazrat Umar (RA) said: "If it is so, then honest to God you fix it up again while climbing on my back." Accordingly, Hazrat Abbas climbed up the back of Hazrat Umar (RA) and he did the needful.⁵⁴

By the above Tradition it is clear that fixing up drains at thoroughfares is fair, hence reasonable because it falls into the category of necessity (need). Obviously, it is not possible for the house-owner to divert the used (access) water toward his home. Moreover, it is customary among Muslims. But the scholars belonging to the Hanafi and Hanbali (according to their known opinion) School of Thought do not deem it fair. And they argue:

- (i) That doing so is tantamount to acting in such an atmosphere as is common (shared) by the house-owner and other people;
- (ii) It causes inconvenience to passers-by because the drained-out water may fall on them; and such (drained) water is not always clean. That can even be dirty due to urine etc. So this act may prove unclean. Moreover, it will make the way slippery.⁵⁵

So far as the above-mentioned narration is concerned, that is a special anecdote and there is an apprehension that that way is closed, i.e. not thoroughfare. Or that way is made

out after the installation of that drain system. Nonetheless, those opposing it say that there will be no inhibition to it in case the ruler himself allows it. Aside from it, this fact should be kept in mind that nowadays the drained-out water flows down right through pipes and that does not cause inconvenience to passers-by, anyway. So the arguments on which they have based their opinion are no more effective.

2. The installation of a drain on the 'no-way' streets. It is the right of the dweller to install or not install a drain in the blocked (no-way) streets.⁵⁶
3. To flow water onto the land or surface of another person: This issue is also agreed upon that it is unfair to flow water onto to the land or surface belonging to another person. That, however, is fair only when there is a need for it and the owner also allows it.⁵⁷
4. Earning a reward on Ḥaq-e-Tasyīl: First, the draining out of water in a thoroughfare or open streets is out of question; however, there are two different views held by Fiqhi scholars on flowing water at some specific place for money.

The Maliki, Shaf'i and Ḥanbali scholars favour the flowing of water on the condition that the land over which the water flows should be measured. However, the quantity of the drained-out water should not necessarily be known.⁵⁸ The most important argument which is offered by these scholars is that this right is one of the profits earned as per the dictates by the Sharī'ah and the sale-and-purchase of the profit is fair as the Sharī'ah allows. In such matters a bit of ignorance is pardoned due to a necessity.⁵⁹

According to the second view, reward is not fair on Ḥaq-e-Tasyīl. This is the view held by the Ḥanafī scholars because to them, it is not a saleable commodity; for it cannot be occupied, nor it is possible to remove the ignorance thereof. Hence, its sale and purchase is not fair nor it is fair to reconcile over it. The Ḥanafī scholars have differentiated between Ḥaq-e-Marūr and Ḥaq-e-Tasyīl in that Ḥaq-e-Marūr is known by the relation to one's piece of land, whereas if the right to drain water (Ḥaq-e-Tasyīl) is on a roof, then it is akin to Ḥaq-e-Ta'ali the sale and purchase of which, according to all Fiqhi scholars, is not fair; because this right is not about some saleable commodity, rather it is related to air.

Similarly, it will hardly be known as to how much land will be affected if it concerns draining out water on someone's land. Then this will be ambiguous as the drained out water will enter the vicinity (boundary) of some other person's land and the sale-purchase of the ambiguous is not fair.⁶⁰

iv. Haq-e-Majrī

Haq-e-Majrī means taking water to one's own land, while that water reaches there from someone else's land.

The Commandments of Haq-e-Majrī

1. Haq-e-Majrī is also a Discretionary Right because it is a right of carrying water through someone else's land. Now, is it fair for one to prevent the carriage of water through the use of his land or not? As a principle, as per the saying of the Holy Prophet (PBUH):

لَا يَحِلُّ لِأَمْرِيٍّ مِنْ مَالِ أَخِيهِ إِلَّا مَا أَعْطَاهُ عَنْ طَيْبِ نَفْسٍ⁶¹

“It is not fair for a Muslim to take some from the asset of another without his consent except for what he gives with his own sweet will.”

So it is inferred from this Hadīth that it is not fair for a Muslim to take anything from somebody without his permission. Therefore, the water that reaches some other person's land is profitable, hence an asset (saleable commodity). The Four School of Thought agrees on a point that it is unfair for a person to drain water in such a manner that it crosses over another person's land unless permitted.⁶² Nevertheless, as is clear from a decision taken by Hazrat Umar (RA)⁶³ that the basis for this argument should be raised that there is no harm if the drained-out water also leaves another person's land irrigated, rather it is beneficial. Hence, no right to prevent it but if the draining of water does harm, then the affected person has a right to stop it. More over if one has been enjoying Haq-e-Majrī from the primitive times, then it (the primitive) will be kept as a continued practice, as a Fiqhi principle “القديم يترك علي قدمه”⁶⁴.

2. The second issue is related with the reward of Haq-e-Majrī: There are two sayings by Fiqhi scholars on taking reward on Haq-e-Majrī:
 - (i) It is fair to receive profit on Haq-e-Majrī. This is a mutually-agreed saying by the scholars of three Schools of Thought⁶⁵ except for the Hanafi scholars, though the Maliki scholars consider it a kind of a *Bai'* (sale and

purchase) while the Shaf'i and Hanbali scholars term it a kind of some reconciliation and take it as rent. Accordingly, they take it as granted like a rented-out premises, a certain time-limit should be ensured and in order to store water a trench should be dug up, however, they do not impose a condition to quantify the water because the amount of water will be drained out as will be sufficient to irrigate the land and that too will be measured (estimated) by the size of the dug-up trench.

- (ii) The second saying is that of the Hanafi scholars: As they do not deem it fair to get a reward on Haq-e-Tasyil (the right to drain out water), it is unreasonable (unfair) for them to get a reward on Haq-e-Majri.⁶⁶

v. Haq-e-Ta'ali (The Aerial Right)

Haq-e-Ta'ali means the right to build a second storey on top of a house (building).⁶⁷ The Fiqhi scholars include it in Discretionary Rights for the reason that it is possible to separate it from the real ownership. Just as in present times, second or the third storey of a building is sold out to different parties separately. Then its buyer is neither the owner of the real land, nor the claimant of benefits related to ground.

Getting a reward on Haq-e-Ta'ali:

The Fiqhi scholars differ on the Haq-e-Ta'ali issue. The scholars of the Maliki, Shaf'i and Hanbali Schools of Thought consider the sale and purchase of Haq-e-Ta'ali as fair.⁶⁸ Though they impose a condition that terms and conditions should be settled before-hand to build an upper storey, and that the owners of the two storeys should agree on it so the owner of the ground storey building should not suffer a loss in case of another storey built up there.

The scholars of the Maliki, Shaf'i and Hanbali Schools of Thought believe that Haq-e-Ta'ali is also an ownership and as it is fair to get a reward for any other ownership, similarly it is equally fair to claim a reward on it.⁶⁹

The second saying is that of the Hanafi scholars. They do not consider it fair to take reward on Haq-e-Ta'ali.⁷⁰ They argue that this right is related to air; so not to speak of its being an asset it does not even relate to an asset (or saleable commodity), for a saleable goods is *Māl* and *Mālis* something which can be stored and occupied, while air can neither be stored, nor sold out.⁷¹

Furthermore, this sale is undistinguishable because it is related to air and it is not fair to sell it.⁷²

Some Fiqhi scholars from the Hanafi School of Thought consider the sale of Ḥaq-e-Marūr as fair and the sale of Ḥaq-e-Ta'ali as unfair. According to them, the difference between the two is that Ḥaq-e-Ta'ali is related to a thing which in itself has no existence e.g. building a second storey. So it is like profit and getting a reward on some profit, according to the Hanafi scholars, is not fair because that is not *Māl*, while Ḥaq-e-Marūr is related to a thing that is eternal and that is the earth, so that is like a tangible object, as explained in 'FathAl-Qadīr':

أَنَّ حَقَّ الْمُرُورِ حَقٌّ يَتَعَلَّقُ بِرَقَبَةِ الْأَرْضِ وَهِيَ مَالٌ هُوَ عَيْنٌ فَمَا يَتَعَلَّقُ بِهِ يَكُونُ لَهُ
حُكْمُ الْعَيْنِ، أَمَّا حَقُّ التَّعَلِّيِّ فَحَقٌّ يَتَعَلَّقُ بِالْهَوَاءِ وَهُوَ لَيْسَ بِعَيْنٍ مَالٍ⁷³

But some contemporary Fiqhi scholars from the Hanafi School of Thought do not accept this difference. They hold that just as Ḥaq-e-Marūr is related to the surface of the earth, similarly Ḥaq-e-Ta'ali is related to a built house. The surface of the earth is full of air and the surface of the upper portion of a house. Therefore, as per an assumption the sale of Ḥaq-e-Ta'ali should also be allowed.⁷⁴ Further, at the time of selling Ḥaq-e-Ta'ali it is just possible that the lower ground building should not exist. For example, a 10-storey building plan is in the pipeline with a plan to sell off the building's second to 10th storeys, while the first storey is yet to be built. But it is to be taken into consideration that second to 10th storeys will be built on the first storey, whenever they are built. Obviously, all the upper storeys will be equalised tangibly to the surface of the other ones. Thus, the upper storeys will stand connected to the one on the ground (first storey) materially.⁷⁵ Then the strongest basis is the customary act that relates to building high-rise plazas in view of the population explosion or influx. It will prove an intolerable and serious loss if the sale of Ḥaq-e-Ta'ali is declared unfair. (No doubt, Allah Almighty knows better as to what will happen).

vi. Rights related to Wall

Rights related to wall mean all those rights which concern a wall around one's land as a profit, such as fixing of bamboos, constructing a door or a window etc.

This situation emerges when there is a house facing towards the wall which is common between both of them, or the walls of both are separate but still adjacent. As for such a wall which is common

between two owners, there is a saying of a group of the Fiqhi scholars that to benefit from the wall of one's neighbour without his due permission is not fair, especially when the profit risks the weakening of that wall or in another case there is no real need for earning profit out of it. This view, according to a tradition, is established by the Ḥanafī, Maliki and Ḥanbali scholars and Shaf'ī (according to a modern opinion).⁷⁶ The argument of this School of Thought as enunciated by the Sharī'ah injunctions which prohibit one to benefit from the other person's land without his permission. The second view of the Shaf'ī scholars (according to the primitive view) and as per a tradition of the Ḥanbali scholars,⁷⁷ is that a neighbour if in need can coerce his neighbour to seek permission for a benefit e.g. if a girder has to be fixed in the wall and there is no other option. There is an argument by the Holy Prophet (PBUH):

عَنْ أَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُ: أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: «لَا يَمْنَعُ جَارٌ جَارَهُ أَنْ يَغْرِزَ خَشْبَهُ فِي جِدَارِهِ»، ثُمَّ يَقُولُ أَبُو هُرَيْرَةَ: مَا لِي أَرَاكُمْ عَنْهَا مُعْرِضِينَ، وَاللَّهِ لَأُزْوِينَ بِهَا بَيْنَ أَكْتَا فِكُمْ⁷⁸

AbūHuraira said, "Allah's Apostle said, 'No-one should prevent his neighbour from fixing a wooden peg in his wall.'" AbūHuraira said (to his Companions), "Why do I find you averse to it? By Allah, I certainly will narrate it to you."

In the context of the wall benefits, the Fiqhi scholars have narrated an issue related to getting a reward on it. The Maliki and Shaf'ī (according to their modern opinion) pronounce the sale and purchase of this right,⁷⁹ while the Ḥanbali scholars dilate on this right, saying that a reward can be earned only when the neighbour does not have such a need as to be pressured for that. Because if a right has got to be conceded to by force, then it should be meant to remove injury upon which earning a reward is not fair.⁸⁰

The Ḥanafī scholars do not allow this. They maintain that a reward can be claimed on a thing the sale or purchase of which is fair.⁸¹

vii. Haq-e-Tahjīr

If a barren land is made cultivable by an individual on permission by the government, he then gets the ownership rights over that land. According to Fiqhi term, it is called 'Aḥyā-Mūwāt'. Another term related to this is 'Tahjīr' which actually is used to determine land by stone-laying as a symbol.⁸²

Moulana Taqī Usmāni has described ‘Ḥaq-e-Taḥjīr’ as ‘Ḥaq-e-Asbaqīat’ and he defines ‘Ḥaq-e-Asbaqīat’ in the following words:

“Ḥaq-e-Asbaqīat is a right associated with one’s first of all taking into possession something previously unoccupied and the traits attached to it. For instance, the cultivation of a land in a remote area gives one the right of ownership.”⁸³

The Commandments of Ḥaq-e-Taḥjīr

1. Taḥjīr does not automatically prove the ownership of a land, rather it shows the right to make it cultivable; that is to say that one who marks and lays a stone there (at the land) is more rightful to make it useful than others.⁸⁴ The Holy Prophet (PBUH) said:

مَنْ سَبَقَ إِلَى مَاءٍ لَمْ يَسْبِقْهُ إِلَيْهِ مُسْلِمٌ فَهُوَ لَهُ⁸⁵

“Allah’s Apostle said if anyone reaches water which has not been approached previously by any Muslim, then it belongs to him.”

2. The Holy Prophet (PBUH) says in yet another Hadīth:

مَنْ أَحَاطَ حَائِطًا عَلَى أَرْضٍ فَهِيَ لَهُ⁸⁶

“If anyone marks a piece of land erecting a wall, it belongs to him.

3. However, two conditions are mentioned as a rightful claim of Ḥaq-e-Taḥjīr:

- (i) One should mark as much land as is sufficient for his personal use;
- (ii) The land bounded by one should be such that he should be able to cultivate.⁸⁷

4. As for the time-limit allowed to cultivate a land, the Ḥanafi scholars have fixed three years for this purpose.⁸⁸ They present reasons from a tradition by Hazrat Umar (RA):

“A person who had such a piece of land and even after a period of three years could not cultivate it is supposed to forego his right to others who succeeded in cultivating the same land and, thus, became more rightful.”

The Shaf’i and Ḥanbali scholars do not fix any period of time for Ḥaq-e-Taḥjīr, rather they leave it to the custom of that locality.⁸⁹ The Maliki scholars also do not believe in

any fixed time for the cultivation of the marked land. However, among the Maliki scholars, ÀllamaAshhāb favours the three-year period for this purpose and bases his view on the saying of Hazrat Umar (RA).⁹⁰

5. The Shaf'i and Hanbali scholars are also convinced that when a person marks some (barren) land he can forego his right to anybody he thinks fit for that purpose, allowing him (or them) to cultivate that land. Now Ḥaq-e-Asbaqīat will be transferred to the one who takes up the responsibility.⁹¹ In case of death of the person who marked the land, his heirs will get the right to do so. The following Hadīth is given as an argument:

مَنْ تَرَكَ مَالًا فَلِوَرَثَتِهِ⁹²

“Whosoever leaves *Māl* (after his death) belongs to his heirs.”

6. As far as the sale of Ḥaq-e-Taḥjīr is concerned, the Shaf'i and Hanbali scholars opine that it is not right because it is just a peculiarity, not ownership. Hence, the particular (special) person is not authorised to sell it off.⁹³ The Hanafi and Maliki scholars do not seem to have discussed this very issue. The point raised however in the discussion on the sale of different rights is that the sale of Ḥaq-e-Taḥjīr is also not fair. So MoulanaTaqīUsmāni adds to it, saying that if the bearer of Ḥaq-e-Taḥjīr and other Ḥaqūq-e-Asbaqīat gets the reward of foregoing his right during the reconciliation process, then the Fiqhi scholars allow that.⁹⁴

In the light of above discussion, It can easily be traced that Muslim jurists have provided sufficient detail of discretionary rights and that they have unanimously admitted the authenticity of such rights. Having diversified opinions in the detail of each right, their discussion provides guidelines for contemporary jurists to solve the modern problems relevant to such rights.

REFERENCES & NOTES

¹IbneÀbidīn, MuḥammadAmīn, 1995, Rad al-Moḥtārālā al-Dural-Mukhtār, Beirut, Da'īr-al-Fikr, Vol. 4, p.518

²Ali Haider, 1991, Duraral-Hukkām fi SharaḥMujallahal-Aḥkām, Dā'ir al-Jail, Beirut, Vol. 1, p. 120

³IbneHammam, Kamālal-Dīn Muhammad bin Àbdal-Wahid, Faṭḥal-Qadīr, Beirut, Da'īr-al-Fikr, Vol. 9, p.414

⁴Ahkāmāl-Māāmlātal-Sharīah, p.32

⁵Faṭḥ al-Qadīr, Vol. 9, p.414

- ⁶Badā'ī al-Sanā'ī fi Tartīb al-Sharā'ī, Vol. 6, p. 190
- ⁷Al-Mudkhalāla Nazriyah al-Itizām al-Āmah fi al-Fiqh al-Islami, p. 128
- ⁸ The right to bring water for personal use;
- ⁹ The right to pass to get home or land;
- ¹⁰ The right to drain out water from farms or homes;
- ¹¹ The right to manage bringing of water to irrigate lands;
- ¹² The right to build another storey at the house;
- ¹³ To take advantage of the neighbour's wall;
- ¹⁴ The right to purchase property of neighbour or partner due to neighbourhood or partnership in the said property;
- ¹⁵ The right to sell out further to some other party his tenancy right;
- ¹⁶ Demarcation of an inhibited land for oneself;
- ¹⁷ Wife's right to have husband's company in privacy on her turn;
- ¹⁸ The right of a married woman to split and break her marriage due to a certain reason.
- ¹⁹ The right to reap benefit out of other person's adjacent land until it is not used for one's own intended advantage from his land;
- ²⁰ Taqi Usmani, 1994, Fiqhi Maqalāt, Karachi, Memon Publishers, Vol. 1, p 160-168
- ²¹ Al-Mudkhalāla Nazriyah al-Itizām al-Āmah fi al-Fiqh al-Islami, Vol.3, p. 35
- ²² Mūsūḥah al-Fiqh al-Kuwaiti, Vol.39, p. 263
- ²³ Lisān al-Arab, Vol. 1, p.488
- ²⁴ Qur'ān, Al-Shuara:155
- ²⁵ Al-Qur'ān, Al-Qamar:28
- ²⁶ Badā'ī al-Sanā'ī, Vol.6, p. 188; Durar al-Hukkām fi Sharah Mujallah al-Aḥkām, Vol.3,p.268
- ²⁷ Durar al-Hukkām fi Sharah Mujallah al-Aḥkām, Vol.1, p. 120
- ²⁸ Khalid Saifullah Rehmani, 2007, Qāmūs al-Fiqh, Karachi, ZamZam Publishers, Vol.4, p. 182
- ²⁹ Abū Yūsuf Yāqūb bin Ibrāhīm, Al-Khirāj, Al-Maktabah al-Azharīah li al-Turath, p.94
- ³⁰ Badā'ī al-Sanā'ī Vol.6, p. 188
- ³¹ Al-Sijistāni, Abū Dāūd Sulemān bin al-Āsh'ath, Sunan Abi Dāūd, Beirut, Maktabah al-Aṣriyah Vol.3 p.278
- ³² Badā'ī al-Sanā'ī, Vol.6, p. 189
- ³³ Sunan Abi Dāūd, Vol.3 p.277
- ³⁴ Rad al-Moḥṭār Vol.6, p.438
- ³⁵ ibid
- ³⁶ Rad al-Moḥṭār Vol.6, p.445
- ³⁷ Manḥ al-Jalīl, Vol.8 p. 103
- ³⁸ Rad al-Moḥṭār Vol.6, p. 445; Tab'yīn Al-Ḥaqā'iq, , Vol.6, p.43
- ³⁹ Al-Zakhīrah, Vol. 6, p. 168; Tab'yīn Al-Ḥaqā'iq, Vol.4, p.52
- ⁴⁰ Al-Zakhīrah, Vol. 6, p. 168
- ⁴¹ Fatḥ al-Qadīr, Vol. 6, p. 427-428
- ⁴² Nawavi, Yahya bin Sharf, 1991, Rūdhah al-Taḥībīn wa Umda al-Mufteen, Beirut, Al-Maktab al-Islami, Vol. 5, p. 311
- ⁴³ Durar al-Hukkām fi Sharah Mujallah al-Aḥkām, Vol. 1, p. 120
- ⁴⁴ Durar al-Hukkām fi Sharah Mujallah al-Aḥkām, Vol. 2, p. 221; Al-Fiqh al-Islami wa Adilah, Vol. 5, p. 607
- ⁴⁵ Durar al-Hukkām fi Sharah Mujallah al-Aḥkām, Vol. 3, p. 238; Al-Fiqh al-Islami wa Adilah, Vol. 5, p. 607

- ⁴⁶Durar al-Hukkām fi Sharah Mujallah al-Ahkām, Vol. 2, p. 622
- ⁴⁷Mudawana, Vol.4, p.266
- ⁴⁸IbneHajar al-Haitmi, Ahmad bin Muhammad, 1983, Tuhfah al-Muhtāj fi Sharah al-Minhāj, Egypt, Al-Maktabah al-Tijārīyah al-Kubrā, Vol.4, p. 239-240
- ⁴⁹ Al-Mardāvi, Abūl Hassan, Ali bin Sulemān, Al-Insāf fi Maa'rifaal-Rājeḥ min al-Khilāf, Dār al-Ahyā al-Turathal-Arabi, Vol.5, p.251
- ⁵⁰Fath al-Qadīr, Vol.6, p.430
- ⁵¹ Muhammad, Imam, Al-Ziyadaat with reference to the FiqhiMaqalāt, Vol. 1, p. 184; Duraral-HukkāmSharahGhararal-Ahkaam, Vol. 2, p. 172
- ⁵²Durar al-Hukkām fi Sharah Mujallah al-Ahkām, Vol. 1, p. 121
- ⁵³Mughni al-Mohtāj, Vol. 3, p. 171; al-Mughni, Vol. 4, p. 323, Al-Tajwaal-Iklee, Vol. 7, p. 145
- ⁵⁴ This Tradition is narrated in al-Mughni, Vol. 4, p. 323
- ⁵⁵Badā'ī al-Sanā'ī, Vol. 6, p. 494; Al-Mughni, Vol. 4, p. 323
- ⁵⁶Mughni al-Mohtāj, Vol. 3, p. 173
- ⁵⁷Rūdhahal-Tālibīn, Vol. 3, p. 454; Al-Bahūti, Mansūr bin Yūnas, Kashāfal-Qanāa, Dār al-Kutub al-'Ilmiyah, Vol. 3, p. 407
- ⁵⁸Mughni al-Mohtāj, Vol.3, p. 185; Manḥ al-Jalīl, Vol. 4, p. 475; Al-Mughni, Vol 4, p. 320
- ⁵⁹ Al-Mughni, Vol. 4, p. 320, Kashāfal-Qanāa, Vol. 3, p. 402
- ⁶⁰Fath al-Qadīr, Vol. 6, p. 429; Al-InayaSharhal-Hidaya, Vol. 6, p. 429-430
- ⁶¹Abū Abdullah Hakim, Muhammad bin Abdullah, 1990, Al-Mustadrikelaal-Sahihain, Beirut, Dār al-Kutub al-E'Imia, Vol.2, p.274
- ⁶² Al-Mudawana, Vol. 4, p. 471; Al-Mughni, Vol. 4, p. 321; Rad al-Mohtār, Vol. 6, p. 443; Rūdhahal-Tālibīn, Vol. 4, p. 221
- ⁶³ Malik bin Ans, Imam, 1985, Muataal-Imam Malik, Beirut, DārAhyaal-Turathal-Arbi, Vol. 2, p. 746
- ⁶⁴Rad al-Mohtār, Vol. 6, p. 443
- ⁶⁵Al-Zakhīrah, Vol. 6, p. 186; Mughni al-Mohtāj, Vol. 3, p. 185; Al-Mughni, Vol. 4, p. 320
- ⁶⁶Dārural-Hukkām, Vol. 3, p. 239
- ⁶⁷Al-Mūsūāhal-Fiqhiaal-Kuwaitia, Vol. 12, p. 262
- ⁶⁸Mughni al-Mohtāj, Vol. 3, p. 180; Al-Insāf, Vol. 4, p. 270; Abū Abdullah Al-Māliki, Muḥammad bin Yūsuf, 1994, Al-Tājwaal-'Ikli, fi MukhtaṣarKhalīl, Dār al-Kutub al-'Ilmiyah, Vol. 6, p. 48
- ⁶⁹SharahMuntahā al-Irādāt, Vol. 3, p. 403
- ⁷⁰Fath al-Qadīr, Vol. 6, p. 427-428; Rad al-Mohtār, Vol. 5, p. 52
- ⁷¹ Ibid
- ⁷²Durar al-Hukkām fi Sharah Mujallah al-Ahkām, Vol. 1, p. 181
- ⁷³Fath al-Qadīr, Vol.6, p.430
- ⁷⁴Qāmūs al-Fiqh, Vol. 3, p. 284
- ⁷⁵Ma'azal-Hassan Sumbhali, Haqūqki Bai', JadīdFiqhiMabāhith, Karachi, IDārahahal-Qur'an waal-Ālūmal-Islāmīyah, Vol. 3, p. 299
- ⁷⁶Durar al-Hukkām fi Sharah Mujallah al-Ahkām, Vol. 1, p. 96; Manḥ al-Jalīl, Vol. 6, p. 231; Mughni al-Mohtāj, Vol. 3, p. 178; Al-Mughni, Vol. 4, p. 324
- ⁷⁷Mughni al-Mohtāj, Vol. 3, p. 178; Al-Mughni, Vol. 4, p. 324
- ⁷⁸Sahīḥal-Bukhārī, Vol.3, p. 132
- ⁷⁹Al-Zakhīrah, Vol. 6, p. 186; Mughni al-Mohtāj, Vol. 3, p. 179
- ⁸⁰ Al-Mughni, Vol. 4, p. 326
- ⁸¹Badā'ī al-Sanā'ī, Vol. 2, p. 48

⁸²Qāmūs al-Fiqh, Vol. 2, p. 419

⁸³FihiMaqalāt, Vol. 1, p. 192

⁸⁴Badā'ī al-Sanā'ī, Vol. 6, p. 195; Fath al-Qadīr, Vol. 10, p. 72

⁸⁵SunanAbiDāūd, Vol.3, p. 177

⁸⁶SunanAbiDāūd, Vol.3 p. 179

⁸⁷Al-Zakhīrah, Vol. 6, p. 155; Mughni al-Mohtāj, Vol. 3, p. 504; Tofahal-Mohtaj, Vol. 6, p. 213

⁸⁸Fath al-Qadīr, Vol. 10, p. 72

⁸⁹Mughni al-Mohtāj, Vol. 3, p. 503; Asnī al-Maṭālib, Vol. 2, p. 447; Al-Mughni, Vol. 5, p. 332; Kashāfal-Qanāa, Vol. 4, p. 193

⁹⁰Al-Zakhīrah, Vol. 6, p. 155

⁹¹Mughni al-Mohtāj, Vol. 3, p. 503; Al-Mughni, Vol. 5, p. 331

⁹²IbneHajar al-Asqanai, Ahmad bin Ali, 1995, Al-Talkheesal-Habeer fi Takhreej al-Hadith al-Rafe'i al-Kabir, Egypt, MuassasaQurtaba, Vol.3, p. 125

⁹³Mughni al-Mohtāj, Vol. 3, p. 503; Al-Mughni, Vol. 5, p. 331

⁹⁴FihiMaqalāt, Vol. 1, p. 198