

[II]

The Notion of Higher Objectives in the Malikite School

I have devoted this section to the Malikite school in particular for two reasons: Firstly, such a focus will help us to gain a better grasp of the foundations and origins of al-Shāṭibī's theory. For as many will be aware, al-Shāṭibī was a Malikite. He grew up in an environment in which the Malikite school held complete sway; indeed, this region became, over time, one of the most insular of all Islamic environments, and the least open to interaction with other Islamic schools of jurisprudence. Secondly, the Malikite school is set apart from other schools of Islamic jurisprudence by its particular interest in and consideration for the objectives of Islamic Law. Prior to immersing myself in this study, I was unaware of this peculiarity; little by little, however, it revealed itself to me with increasing clarity, and I observed its manifest influence on al-Shāṭibī's own work.

Before presenting the most significant characteristics which caused the Malikite school to become 'the school of objectives' par excellence, I would like to clarify a matter which may help to dispel some of the confusion which arises in connection with the topic at hand. This matter is itself one of the first features which lent the Malikite school its place of distinction in connection with the objectives of Islamic Law.

What do I mean by the Malikite School?

Generally speaking, when a school of thought is attributed to a particular person – such as the attribution of the Ḥanafite school to Imam Abū Ḥanīfah, the Shafī'ite school to Imam al-Shafī'ī, the Maturidite school to Imam al-Māturīdī, or the Ash'arite school to Imam al-Ash'arī – this attribution serves as evidence of the foundational role which this person performed. Similarly, it is an indication that the school's founder is the one who originated the theories and premises upon which the school in question rests. However, this does not apply to the attribution of the Malikite school to Imam Mālik ibn Anas. The reason for this is that Mālik did not bring this school

into being, nor did he lay its foundations or formulate its principles. Rather, he came upon it ready-made, as it were. In other words, having inherited it as a complete, mature system, he adhered to it and proceeded to issue independent interpretations and judgments within the framework which it provided. Hence, when we say ‘the Malikite school,’ this is only valid if, when so speaking, we mean the school with which Mālik was associated, not the school which is attributed to Mālik as its founder.

Mālik, as is well known, inherited the knowledge of the scholars of Madinah; it was on the basis of this learning and knowledge that he issued fatwas* and it was upon this knowledge that he built. The most eloquent attestation to this may be found in *al-Muwattaʿa*, which is replete with expressions such as: ‘that which is agreed upon among us,’ ‘the view held among us,’ ‘in our city,’ ‘I came upon those with knowledge,’ ‘the Sunnah as understood and practiced among us,’ ‘I heard those with knowledge say,’ ‘the view which I found people to hold,’ ‘what I most treasure of what I heard’ or ‘the best thing I heard,’... and so forth. All such phrases bear explicit testimony to the fact that Mālik was carrying on a ‘school’ which was already established in both theory and practice. This is an acknowledged fact among those well-versed in the history of Islamic jurisprudence. Another fact which is similarly well established is that this ‘school’ is simply that which was inherited by the ‘followers of the followers’ – among whom Mālik counted himself – from the followers, and which the followers had inherited from the Companions of the Prophet in collective succession and in the form of both narratives and practical applications.

Let us reflect on the following exchange quoted by Ibn Farḥūn on p.25 of *al-Dibāj*:

Ibn Abī Uways states that someone once asked Mālik, “When you say in your book, ‘that which is agreed upon among us,’ ‘the view held among us,’ ‘in our city,’ ‘I came upon those with knowledge,’ ‘I heard some of those with knowledge saying,’ etc., [what do you mean]?” Mālik replied, “The book consists primarily of opinions. But I tell you truly, they are not my opinions. Rather, they are the views which I

heard from many knowledgeable men and the exemplary imams from whom I received learning. It is they who were most conscious of God Almighty. Then, having accumulated such a vast amount on their authority, I recorded my own opinion as well, and it is, indeed, my opinion. As for their views, they are the views which they found the Companions adhering to before them; and I likewise found them to be adhering to these points of view. This, then, is learning which has been passed down to us over the generations. Whatever opinion is presented [here], it was likewise the view held by an entire community of imams, or religious leaders, who came before us. When I write, ‘that which is agreed upon among us,’ I am speaking of statements made by those well established in fiqh and knowledge, and about which there has been no disagreement among them. Similarly when I write, ‘the view held among us,’ I am speaking of the views which have been adhered to by people among us, which have been conveyed in the form of legal rulings, and of which all have been aware, the ignorant and the knowledgeable alike. Similarly when I use the phrase, ‘in our city’ or ‘some of those with knowledge,’ I am referring to statements of which I approve by those with knowledge. As for those things which I did not hear from them, they are my own interpretations and judgements based on my investigation into the teachings of those whom I encountered; I have sought thereby to arrive at what appears to be the truth or near to it, lest my view depart from the teachings and views of the inhabitants of Madinah. Hence, if there is some particular view which I did not hear them express, I attribute it to myself after having engaged in my own interpretation and arrived at my own judgment. Such interpretations and judgments on my part, however, are based on the Sunnah, the prevailing practices of those with knowledge who have served as examples for others to follow, and the views in accordance with which we have been conducting ourselves since the days of the Messenger of God and the rightly guided imams. Hence, I have not departed from their views or adopted something which conflicts with them.”

We read in *Tartīb al-Madārik* that “Ḥamīd ibn al-Aswad said, ‘After ‘Umar, the religious authority among us was Zayd ibn Thābit,

and after him, ‘Abd Allāh ibn ‘Umar.’ ‘Ali ibn al-Madīnī tells us that, ‘Among those who followed Zayd’s views there were twenty-one men who received his teachings. These men’s knowledge was then passed on to three: Ibn Shihāb, Bukayr ibn ‘Abd Allāh, and Abū al-Zinād. The knowledge of all these men together was then passed on to Mālik ibn Anas.’”¹⁰⁷

Muḥibb al-Dīn al-Khaṭṭāb¹⁰⁸ quotes the great Indian scholar Walī Allāh al-Dahlawī as stating that in his view, the primary source of fiqh during the age of the Companions was a specified group of Companions, whose leader and motive force was ‘Umar ibn al-Khaṭṭāb. The fiqh propounded by ‘Umar and the Companions then passed onto a group known as “the seven jurists of Madinah” namely, Sa‘īd ibn al-Musayyab, ‘Urwah ibn al-Zubayr, al-Qāsim ibn Muḥammad ibn Abū Bakr al-Ṣiddīq, ‘Ubayd Allāh ibn ‘Abd Allāh ibn ‘Utbah, Khārijah ibn Ziyād, Sulaymān ibn Yasār, and Sālim ibn ‘Abd Allāh ibn ‘Umar ibn al-Khaṭṭāb. These men’s knowledge was inherited by their disciples, including men such as Ibn Shihāb al-Zuhrī, Yaḥyā ibn Sa‘īd al-Anṣārī, Zayd ibn Aslam, the servant of ‘Umar ibn al-Khaṭṭāb, Nāfi‘, servant to ‘Abd Allāh ibn ‘Umar ibn al-Khaṭṭāb, Rabī‘ah al-Ra’y, and Abū al-Zinād. The knowledge of all these men was then passed on to Mālik ibn Anas al-Aṣḥabī.

There is no contradiction between this statement and the previous one; rather, each of them highlights a different aspect of the collective links by means of which the fiqh which prevailed in Madinah was passed on in succession. Moreover, these two statements are in agreement on a particular point of significance, namely, that this chain began with ‘Umar ibn al-Khaṭṭāb and ended with Mālik ibn Anas.

This is confirmed by Ibn Taymiyah, who adds that:

When deciding the proper course of action, the people of Madinah would either follow the Sunnah of the Messenger or refer to the cases on which decisions had been made by ‘Umar ibn al-Khaṭṭāb. It is [also] said that Mālik ibn Anas took most of what is found in *al-Muwatta’* from Rabī‘ah, who took his knowledge from Sa‘īd ibn al-Musayyab, who took his knowledge from ‘Umar, who was a transmitter of

prophetic traditions. Al-Tirmidhī quotes a tradition on the authority of the Messenger of God in which he said, “If I had not been sent among you, ‘Umar would have been sent.” In Muslim and al-Bukhārī we read that he said, “Nations before you had transmitters of traditions, and if there is any such transmitter in my nation, it is ‘Umar.” The other collections of authentic prophetic traditions include the following words of the Prophet as well: “Emulate the two who will come after me, namely, Abū Bakr and ‘Umar.”

‘Umar used to consult the senior Companions such as ‘Uthmān, ‘Alī, Talḥah, al-Zubayr, Sa‘d, and ‘Abd al-Raḥmān, who made up the consultative council. Hence al-Sha‘bī states, “Consider the rulings issued by ‘Umar, since he used to consult others...”¹⁰⁹

Given the foregoing, it may be seen that ‘Umar ibn al-Khaṭṭāb was a great statesman in the realms of policy and economy, war and peace, legislation and the judiciary, education and upbringing. He was a great statesman from the time the Islamic state was established by the Messenger of God to the moment when he was martyred in the year 32 AH. It is this which gives him unrivaled claim to the most authoritative position in the realm of fiqh, whether it pertains to matters of the spirit or those of material existence. And how much more worthy must he be of this standing in his capacity as an inspired transmitter of prophetic traditions who clung to the Sunnah and sought refuge from error through consultation? Based on what we have seen, then, it is ‘Umar ibn al-Khaṭṭāb who constitutes the initial link in the school of fiqh which prevailed in Madinah.

Whoever makes even the briefest examination of *al-Muwatta’* will realize that it is ‘Umar’s fiqh, legal rulings, fatwas and established customs which, after the Sunnah of the Messenger of God, form the underpinning for the entire book. Similarly, those who speak about the fundamentals which distinguish the Malikite school will have no difficulty in seeing that these principles bear ‘Umar’s stamp more than they do that of Mālik. For much of the conduct adhered to by the people of Madinah finds its roots not only in the prophetic Sunnah itself and the traditions established by the rightly guided

caliphs, but, quite specifically, in ʿUmar’s era. As for unrestricted interests (*al-maṣāliḥ al-mursalab*) and the prohibition of evasive legal devices (*sadd al-dharāʿiʿ*), it was ʿUmar who first introduced these principles in both theory and practice, and it is his policies which provide the best possible application of both.

Hence, if the Malikite school must be attributed to an individual, there is no one worthier of this attribution than ʿUmar. However, the origin of this school goes beyond ʿUmar and his interpretations and judgments to Islam itself, for it is in Islam that all of ʿUmar’s teachings and practices were rooted, and it is from Islam that they sprang. It was only after the rise of Islam that ʿUmar’s experience and school came into being, upheld by the collective viewpoint of the Companions after which there came a succession of scholarly and hermeneutical links in the chain of Madinah’s jurists, a chain which was brought to a close with Mālik ibn Anas.

The appellation which links ʿUmar’s fiqh with that of Mālik and which brings together all that developed between the former and the latter is ‘the Madinah school.’ It was this appellation which prevailed until Mālik’s day and thereafter, at which time it was gradually replaced, first with the term, ‘Mālik’s school,’ then with the term, ‘the Malikite school,’ in keeping with the burgeoning custom of naming schools of jurisprudence after individuals and limiting such schools to what these individuals had come to represent. An unhealthy phenomenon, the spread of this custom signaled a phase of stagnation and decadence.

Abd al-Hayy ibn al-Siddiq states, “The innovation of imitating a single man led to the development of a further innovation which was even more noxious than its predecessor, in which the adherents of each school began championing their school alone and forbidding anyone to identify with any of the other schools...There were even some who went to excess and found fault with some of the imams in ways that no reasonable person would find acceptable.”¹¹⁰

Hence, what I have to say about ‘the Malikite school’ in this section, as well as elsewhere in this book, has to do with a communal school, as it were. It was communal in nature both before and after Mālik’s day, though what most concerns us here is that which was

prior to and contemporary with Mālik and which we may term, 'the Madinah school.' If, then, the matter has to do with the school represented by the inhabitants of Madinah, whose authority is derived from that of the Companions and the rightly guided caliphs, and most notably, 'Umar, it follows that this 'school' has no need for anyone, least of all someone like me, to champion and defend it. However, there is a need for a reminder of facts which are universally acknowledged or, at the very least, clear, especially given the long time which has passed since their initial recognition.

Of relevance in this connection is a statement made by Ibn Taymiyah who, as good fortune would have it, was not a follower of the Malikite school. Ibn Taymiyah devotes more than 100 pages of his *Majmū' al-Fatāwā* to an introduction to the Madinah school, in which he presents the basis for its superiority and authoritative status in both its roots and its branches.¹¹¹ He states, "The school which they established in the era of the Companions, their followers and their follower's followers, is the soundest of all such schools, East and West, in its roots as well as its branches."¹¹² Similarly he says, "Whoever gives careful thought to the fundamentals of Islam and the principles of Islamic Law will find that the fundamentals adhered to by Mālik and the inhabitants of Madinah were the soundest of all principles and rules."¹¹³ Moreover, although he writes at length and in detail on this subject, he says, "This is a vast topic, and if we were to do a thorough investigation of the merit of Madinah's scholars and the soundness of their principles, we would have a great deal more to say."¹¹⁴ He also writes, "This said, there can be no doubt on anyone's part that of all people, no one has shown greater concern for the Madinah school than Mālik whether by transmitting the narratives through which it has been passed down or by explicating its views. Indeed, neither in his own era nor since his era has anyone done more than he in this respect."¹¹⁵

Based on the foregoing, it will be clear what I mean when I speak of the Malikite school. It will likewise be clear that it is a school with which Mālik ibn Anas was associated, and that this imam was only one of its numerous links. Even so, he was, both in his own era and thereafter, the one who possessed the most thorough understanding

of this school and who undertook the most comprehensive collection of its supporting narratives. It will thus be understood that when I speak in the pages to follow about fundamentals or principles of the Maliki school, my intent will be to say not that these principles are somehow Mālik's possession but, rather, that Mālik was their possession, as it were, both in his *fiqh* and his independent interpretations.

Fundamentals of the Maliki School and the Objectives of Islamic Law

In what follows we will examine the most important Maliki fundamentals of direct relevance to the objectives of Islamic Law.

1) *Unrestricted Interests**

I do not wish to concern myself here with the definition of "restricted interests" or to enter into a discussion of their validity, which entails an examination of the views of those who support or reject the concept. This and related issues have been discussed in numerous modern writings on *uṣūl al-fiqh*, including entire books and university theses, some of which will be mentioned at appropriate points later in this study.

Rather, I would like to focus on those points which have a direct bearing on the topic at hand. The first such point is that the practice of setting up the concept of benefit, or interest (*al-maṣlaḥah*) as a determining factor in Islamic legal rulings finds its origin in the practice of the Companions, and most notably 'Umar himself. We have consistent, indisputable textual evidence that this practice was engaged in by the Companions. Hence, al-Ghazālī, despite his Shafi'ite affiliation, states that, "The Companions, may God be pleased with them, are the Muslim nation's model when it comes to the practice of *qiyās*,"* in connection with which it has been determined beyond any doubt that they relied on interests."¹¹⁶ In so saying, al-Ghazālī is repeating what his shaykh, al-Juwaynī, had stated previously in his book *al-Burhān*, in the section thereof on *istidlāl*,* where he acknowledges the validity of *al-istidlāl al-maṣlaḥī*, or the practice

of employing human interests as a source of evidence on which to base a legal ruling, since this was done by the Companions. Indeed, this practice is frequently in evidence in their application of Islamic Law and the fatwas which they issued. On this basis, al-Ghazālī approved the practice, stipulating only that the interest being taken into consideration be similar to those interests which are explicitly recognized by the Lawgiver – a stipulation which is taken as a given by those who recognize the concept of (unrestricted) interests.

What is of greater concern to us, however, is the link between human interest, or benefit, and the objectives of the Lawgiver. Among the points which became clear in the previous section and about which more detail will be forthcoming is that the Lawgiver's objectives in their entirety may be summed up in the phrase, 'the achievement of benefits [interests] and the prevention of harm.' This link is found consistently in all rulings of Islamic Law, and most of all in the rulings having to do with customs and daily transactions.

From this it follows that any independent interpretation of the principles of jurisprudence must be based on what is termed *istiṣlāḥ*,* and that one's understanding of the relevant texts and the conclusions one draws from them must be based on the principle that the objectives of such texts are to achieve benefit and prevent harm. Any analogy which is drawn between one ruling and another must likewise take this principle into consideration. This is the meaning of 'consideration of human interest' (*murā'āt al-maṣlaḥah*) in the Malikite school. It is not simply a matter of considering relevant unrestricted interests in cases to which no explicit text or analogy applies; rather, it is a matter of bearing human interest or benefit in mind when seeking to understand any relevant text or when drawing an analogy between two rulings.

The title I have chosen for this section is based on the recognized fact that Malikite fundamentals are distinguished by their consideration for what is termed 'unrestricted interests.' Of course, the concept of 'interest' for the Malikites, as for the other schools with the exception of the Zahirite, or literalist school, goes far beyond this. However, the Malikite school, in comparison with the other schools, is more explicit in its consideration for human interests or benefits in

view of the conviction that it is these interests which embody the overall aim, or intent, of Islamic Law, as well as the specific objective or intent behind each of this Law's rulings, particularly in the areas of customs (*al-ʿādāt*) and everyday transactions (*al-muʿāmalāt*). In the other schools, by contrast, consideration for human interests or benefits is tinged with a degree of hesitation and ambiguity. For the sake of greater clarity on this matter, let us now turn to some specific examples: it is a known fact that the Prophet prohibited many kinds of transactions involving buying and selling due to the risk and uncertainty which they entail, and due to the possible harm to which they might lead for one of the parties to the transaction. Avoidance of such harm requires the utmost clarity and precision in defining the various types of sales and their features, including prices, deadlines for delivery and payment, etc. All related rulings are subject to explanation and interpretation in terms of their bases and occasions, and the human interests and benefits involved may be clearly perceived.

However, there are many situations in which it is difficult or impossible to fulfill all conditions stipulated in such rulings, as a result of which the interests of the parties to the transaction – which are, themselves, the basis for the conditions stipulated – require a degree of leniency with respect to these same conditions and the willingness to disregard some of them. In relation to situations such as these there are two contrasting orientations. The first orientation leans toward leniency and disregard for certain conditions out of consideration for individual interests and as a means of avoiding injury and hardship; this orientation is represented by the Maliki and Ḥanafite schools of jurisprudence. The other orientation, by contrast, leans toward strict observance of the original conditions of sale and adherence to their associated formalities no matter what degree of difficulty this may entail; this orientation is represented by the Shafiʿite school. Ibn Taymiyah writes,

In this connection, Mālik permits the sale of produce which is concealed underground, such as carrots and turnips and other fruits and vegetables which grow underground wholesale. He also permits, along

with the majority [of jurists], the sale of broad beans and the like while still in their pods. There can be no doubt that Muslims have adhered to such practices since the days of their Prophet and continue to do so now. Nor would it serve people's best interest to do otherwise. It should not be thought that this sort of practice involves deceit or fraud; indeed, similar practices are permitted in other types of sale, since the degree of risk or uncertainty involved is slight, and since there is a need for such transactions. Both [orientations] permit them [despite their philosophical differences]; how much more likely would they be to permit them, then, if they came together [on such points of disagreement]?¹¹⁷

This orientation, then, bases its position on the fact that the element of risk and uncertainty (Arabic, *gharar**) is slight and that there is a need for the sale concerned. What this means is that the prohibition against sales involving risk and uncertainty (*bay' al-gharar*) is based on the dual assumption that (1) the element of risk and certainty is great and (2) the transaction involves harm which equals or exceeds the degree which the prohibition is intended to prevent.

Concerning the type of *gharar* which is prohibited in the prophetic traditions, al-Ḥāfiẓ ibn 'Abd al-Barr al-Mālikī states, "The overall meaning of *gharar* is that the buying/selling being engaged in by the parties to the transaction involves an element of risk and gamble, and that there is ignorance [on the buyer's part] concerning most aspects of the goods being sold. If the degree of uncertainty concerning the goods is minor or if the element of risk is small, and if there is no intent to deceive, the transaction is not to be classified as the type of *gharar* which is prohibited, since the prohibition is directed against those who intend deceit and engage in it deliberately."¹¹⁸

This statement provides confirmation of what was stated earlier, that transactions which entail only an insignificant degree of uncertainty and risk, for which there is an overriding need, and in which the risk or uncertainty is not intended by either party, fall outside the purview of the prohibition against *bay' al-gharar*, because the Law-giver does not prohibit that which serves an overriding interest.

Based on this interest-based perspective with its consideration for

the Lawgiver's intentions, the Malikites – in contrast with the Shafi'ites – permit the sale of goods for which a description has been provided but which have not yet been seen by the purchaser. In keeping with this position, the sale is binding if the goods are found in the end to fit the description which was given of them. The Ḥanafites, although they permit this type of sale, affirm the purchaser's right to see the goods prior to the sale even if they conform to the description given of them; in so doing, however, they cancel out its benefit and nullify its intent.

In this connection also, we have what al-Shāṭibī quoted from a book entitled *al-Utbiyyah*, which contains statements made by Mālik and passed on by Ibn al-Qāsim who says,

I asked Mālik about the oil presses for sesame seed and radishes. [I told him that] one person brings several *ardebs*¹¹⁹ [of one thing], while someone brings several *ardebs* [of something else], after which they put everything together and press it. Mālik replied, "This practice is undesirable because some varieties of produce yield more oil than others. However, if people need to do so, it is hoped that they will do so in moderation, since they need to do that which will serve their interests. And in regard to those things which they find to be unavoidable, it is my hope that they will be granted some latitude, which I believe is acceptable." Then he added, "And the same applies to olives." Commenting on this statement Ibn Rushd states, "He [Mālik] softened his judgment on this matter given the necessity of the practice in question, since it is unfeasible to press a small amount of either sesame seed or radish by itself."¹²⁰

This judgment by Mālik is not simply an example of consideration for human interests and the manner in which rulings are based thereon; rather, if one ponders it carefully, one will find that it also lays foundations and formulates principles relevant to other, analogous questions. Consequently, we find that al-Shāṭibī draws upon this judgment by Mālik in his decision to approve people's practice of combining milk brought by a number of individuals in order to produce cheese from it cooperatively as a means of avoiding undue

hardship and expense.¹²¹ Al-Shāṭibī approves this practice despite the fact that, as in the case of pressing sesame seeds and radishes collectively, it will inevitably entail some degree of unfairness and also inequality. He then concludes his fatwa with the words, “It appears to be permissible in keeping with this principle as affirmed by the [Malikite] school.” Hence, the interest-based approach clearly has a long, established history in the Malikite tradition.

Al-Shāṭibī confirms this fact elsewhere as well. In the context of discussing Mālik’s practice of confirming rulings relating to daily transactions and customs, he states, “He waxes prolix on the understanding of interest-based objectives, yet without losing sight of or departing from the Lawgiver’s intent, and without violating any of its principles.”¹²²

Prior to al-Shāṭibī, al-Qāḍī ‘Iyāḍ wrote that one of the considerations given weight by Mālik’s school is the interest-based perspective founded upon the objectives and principles of Islamic Law. He states, “The third consideration calls for careful examination and for a discerning heart free of prejudice. In other words, it requires that we bear in mind the foundations and universals of Islamic Law and understand the wise purpose for which the Lawgiver established it.”¹²³ Indeed, contemporary scholar Muhammad al-Mukhtar Walad Abahu favors the view that this is the most significant distinguishing feature of the Malikite school.¹²⁴

Al-Shāfi‘ī hesitated to adopt the principle of human interests in his system of thought,¹²⁵ while Abū Ḥanīfah adopted it in the rather vague form of *istiḥsān*.^{*} Mālik, however, followed neither of these paths, since he did not establish his school but, rather, came upon it fully formed. It strikes one as odd, then, that Mustafa al-Zarqa considers the Malikite theory of *istiṣlāḥ* to be simply a more mature, advanced form of the Ḥanafite *istiḥsān*.

Concerning this he states that, “...the Malikite school, having come later in history than the Ḥanafite school, focused on the technical formulation of the principle of unrestricted interests and its associated conditions, and it was for this formulation that the Malikite school became well known.”¹²⁶

If we bear in mind what has already been stated concerning the

true nature and origins of the Malikite school, no further comment on al-Zarqa's claim is needed. However, even if we disregard all of the above, al-Zarqa's claim remains unacceptable as anything but a reversal of the facts! After all, it is an established fact based on eye witness testimony that the Ḥanafite school – and indeed, each of the remaining three schools of jurisprudence – drew upon the Malikite school and its principles, and most particularly, from Mālik himself. Moreover, if some doubt might be cast on the accounts which Abū Ḥanīfah transmitted on Mālik's authority or on his having read Mālik's *al-Muwatta'*,¹²⁷ no such doubt may be cast on the fact that two pillars of the Ḥanafite school, namely, Muḥammad ibn al-Ḥasan and Abū Yūsuf, benefited significantly and directly from Imam Mālik.

It appears that al-Zarqa has relied for his aforementioned claim on the fact that Abū Ḥanīfah (d. 150 AH/767 AC) was more advanced in age than Mālik (d. 179 AH/795 AC). However, this is of no relevance to the matter at hand, especially if we view it in light of other facts. Of interest in this connection is a statement with which al-Zarqa immediately follows the statement quoted above. He writes, "There then appeared the Shafi'ite interpretation which rejected both the theory of *istiḥsān* and the theory of unrestricted interests." One wonders why it is that a later historical appearance is not associated with academic progress in this case as well? Why is it that the "technical formulation" of the theory of *istiṣlāḥ* was not given precedence, especially in view of the fact that Mālik¹²⁸ is known to have pioneered in this field?

The fact of the matter is that the place where Islam became established most fully and perfectly was the city of Madinah. It was in Madinah that, through the narratives and understanding passed down by those who first embraced the religion and the ways in which they applied it to their lives, Islam found stability and set out toward new levels of maturity. The prophetic era was then followed by the era of the caliphate, and it was the practices established by the rightly guided caliphs which served as the model to be emulated and from which to draw inspiration. All of this was embraced and understood by Madinah's inhabitants and scholars. This era was then followed

by Islam's spread to distant parts, where Muslim scholars emerged here and there, receiving what was passed down to them of the Madinan heritage and laboring diligently to understand and apply what they had received, to be guided by it, and to draw analogies between situations to which it had already been applied and new situations which had arisen in their own unique circumstances. Throughout this process, they approached the original ideal in varying degrees, subject to a wide range of circumstances and influences, not to mention their own dispositions and mentalities and their ability to apprehend the ideal for which they strove in both its generalities and its particulars.

Abū Ḥanīfah achieved insight into the interest-based objectives of the Law of Islam, an insight which he expressed through many of his interpretations of the Law and its rulings, as well as through the notion of *istiḥsān*. However, the notion of *istiḥsān* remained somewhat vague and ill-defined for quite some time, at least in attempts to convey it to others. In fact, it became nearly impossible for the Ḥanafites themselves to agree on a single, unambiguous definition of it. It was this lack of clarity in the concept and practice of *istiḥsān* which led Imam al-Shāfi'ī to launch such a vehement attack against it; at the same time, however, he was receptive to various forms of *istiḥlāḥ*, from which one may conclude that he did, in fact, adopt the notion of human interests in the understanding of the Law despite his hesitation to expand on this notion after the manner of Mālik and the Malikites.

Hence, the theory of human interests in the Malikite school was not brought to maturity by virtue of the passage of time but, on the contrary, by virtue of its early appearance. That is to say, it came into existence as a fully developed theory within Islamic Law; it was then further highlighted by the Prophet's own applications thereof, after which it expanded and emerged with greater clarity when, after the divine revelation had ceased, there was an increasing need for it. This expansion and clarification took place through exemplary practices of the rightly guided caliphs, and most notably, through the practices and teachings of 'Umar ibn al-Khaṭṭāb.

It should also be noted that the passage of time and geographical

distance from the original Islamic model contributed to such distortion and obfuscation that some Malikites themselves – such as al-Bāqillānī and Ibn al-Ḥāḥib – came to deny the validity of unrestricted interests!

As for the Ḥanafite concept of *istiḥsān*, it is an offshoot of the theory of human interests in Islamic Law. In saying this, I do not mean necessarily that it was taken from a particular school or interpretation. Rather, it appears to have been an understanding of the texts of Islamic Law and its rulings which came directly to the great Imam. At the same time, however, and as I have had occasion to mention, it came through less clearly and took hold on a narrower scale than in the case of Mālik, the Imam of Madinah.

Istiḥsān as understood and applied by Mālik has a single, clearly defined meaning, namely, consideration for human interests. Hence, the statement attributed to Mālik by his disciples that, “*Istiḥsān* is nine-tenths of knowledge,”¹²⁹ can only refer to consideration for human interests in rulings based on independent interpretation. In this connection, Ibn Rushd (the grandson) states, “What *istiḥsān* means in most cases is attention to human interests and justice.”¹³⁰

Moreover, if, in Mālik’s view, *istiḥsān* constitutes nine-tenths of independent interpretation in the realm of fiqh, and if the meaning of *istiḥsān* is consideration for human interests and justice, then it follows that the jurispudent must never lose sight of the Lawgiver’s intent, which is to preserve human interests and justice. If he finds that there are interests which are being neglected or forfeited, then *istiḥsān* requires that he determine what will restore these interests and guarantee their protection. Similarly, if he finds harm being done, *istiḥsān* requires that he engage in independent interpretation and issue a fatwa to bring such harm to an end. If the jurispudent notes legal texts which are understood in a manner which is leading to actual harm or injury or to the neglect of an interest which is respected in the Law, he will deem it appropriate (Arabic, *istahṣana*) to reexamine this understanding. Similarly, if he comes upon an analogy between two rulings which is contrary to the Lawgiver’s intent to achieve justice and preserve human interests, he must realize that the analogy in question is unsound or inappropriate, in

which case he will deem it best (*yastahsinu*) not to adhere to this analogy but, instead, to rely upon the general principles of the Law. In all such situations, *istihsān* is, indeed, nine-tenths of knowledge.

In this connection, Ibn ‘Abd al-Barr quotes from a number of Mālik’s rulings and independent interpretations having to do with daily transactions and being a good neighbor. He then concludes, “All of this is, in essence, *istihsān* and independent interpretation for the sake of putting an end to injury and harm.”¹³¹ Hence, Malikite *istihsān* is commitment to achieving human interests and averting harm. “The word *istihsān* as understood and applied by Mālik means adherence to the guiding rule of human interest in the absence of a legal text [relating to a particular situation]. Consequently, Mālik would abandon any analogy which was in violation of the human interests appropriate to the Lawgiver’s higher objectives.”¹³²

Al-Zuhayli writes, “The fact is that if you were to investigate all types of *istihsān*, you would find no reason to view it as a form of independent, self-sufficient evidence. Rather, what is relied upon for the most part is unrestricted interests.”¹³³ He then continues, saying, “What *istihsān* relies upon most is unrestricted interests. This is the interest-based *istihsān* advocated by the Malikites.”¹³⁴

These, then, are a few glimpses into the importance which the Malikite school attaches to consideration for the human interests which it is the Lawgiver’s intent to preserve. In fact, so clear is the link between the Lawgiver’s intentions and human interests that according to one major Malikite scholar, the principles governing daily transactions and the foundations for commutative contracts consist of the following four:

1. God’s declaration, “And devour not one another’s possessions wrongfully, and neither employ legal artifices with a view to devouring sinfully, and knowingly, anything that by right belongs to others” (Qur’an, 2:188).
2. “...God has made buying and selling lawful, and usury unlawful” (Qur’an, 2:275).
3. The prophetic traditions having to do with *bay‘ al-gharar*, that is, buying and selling which entail risk and uncertainty.

4. Consideration for the objectives of Islamic Law and for human interests.¹³⁵

Let me bring this discussion to a close with some of Imam Mālik's interpretations of legal rulings. Such interpretations draw a link between legal rulings and the human interests which they are intended to preserve, while the texts of relevance are understood in light of their objectives (*maqāṣid*) and bases (*ʿilal*).

One such interpretation is included by al-Qurṭubī in his commentary. The question has to do with the command found in prophetic traditions to offer hospitality and, specifically, the issue of when such hospitality is obligatory and when it is not. Al-Qurṭubī states, "Scholars have disagreed as to who is being addressed in such commands. According to al-Shāfiʿī and Muḥammad ibn al-Ḥakam, such commands are addressed to residents of both urban and rural areas. According to Mālik, however, hospitality is not required of city dwellers. Saḥnūn states, "Hospitality is required only of those who dwell in villages; in cities, however, travelers can stay in hotels..."¹³⁶

The reason for this is that Mālik based his interpretation on the intent and wise purpose behind the ruling concerned, namely, to meet the need of the traveler or migrant. From such an understanding it follows that if the traveler or migrant is able to find room and board and other necessities, then others are exempted from the duty to provide him with hospitality, although they may certainly do so out of kindness and the desire to do good. If, on the other hand, a traveler has no place to lodge, then even urban dwellers have a collective responsibility to provide him with what he needs. Al-Shāfiʿī, by contrast, adhered to the apparent sense of the ruling and thus made no distinction between one situation and another, considering hospitality to be obligatory in all cases.

Similarly, there is a prophetic tradition according to which it is one's duty not to request permission to enter someone's home more than three times in succession. This tradition has been interpreted to mean that if entrance is granted after the third time, so be it; otherwise, one is to leave. Mālik, however, did not stop at the tradition's apparent meaning but looked instead to its intent. Thus, we read in

al-Qurṭubī's commentary that Ibn Wahb related that Mālik had said, "One should request permission to enter three times, and I prefer that no one go beyond this. However, if one knows that he has not been heard, I see nothing wrong with it."¹³⁷

Another example is the prophetic tradition which encourages believers to clean their teeth and gums with a *siwāk** before every prayer. Ibn al-ʿArabī states, "Scholars differ over the use of the *siwāk*. According to Ishāq, it is obligatory, and whoever deliberately neglects to do so must repeat his or her prayer. According to al-Shāfiʿī, it is an emulation of the Sunnah associated with minor ablutions (*wuḍūʿ*). As for Mālik, he considers it to be a desirable practice whenever there is a change in one's mouth."¹³⁸

Similarly in relation to the practice of drying oneself off after performing minor ablutions, Ibn al-ʿArabī mentions that scholars differ in their views of this practice. Some hold that it is undesirable following both minor and major ablutions (*wuḍūʿ* and *ghusl*), others hold that it is undesirable after minor ablutions but not after major ablutions, while still others maintain that it is permissible in all situations. It is this third view which was adopted by Mālik, "...based on the aforementioned prophetic traditions, and because the aim of [such ablutions, namely, preparing oneself for] worship, has thus been fulfilled, it makes no difference whether one dries oneself off afterwards or not."¹³⁹

2) *Sadd al-Dharāʿiʿ**

Sadd al-dharāʿiʿ, or the prohibition of evasive legal devices, is another of the principles which the Malikite school has championed, and which it has applied more frequently and explicitly than other schools of jurisprudence. The Malikites have been followed in this by the other schools to varying extents, but least of all by the Shafiʿites. *Sadd al-dharāʿiʿ* is one of the principles most clearly associated with ʿUmar who was known for his pre-emptive policies and deterrent measures. The principle of *sadd al-dharāʿiʿ* represents still one more aspect of consideration for the Lawgiver's intent to preserve human interests by achieving what is of benefit and averting that which would cause harm or corruption. It is this point which is of concern

to me here; as for other aspects of this principle, there is no need to introduce them into the present discussion. Rather, I will content myself with what has already been written on these subjects.

Ibn al-Qayyim wrote an important chapter in which he demonstrated the major importance of the principle of *sadd al-dharāʿi* in the Islamic religion. According to Ibn al-Qayyim, *sadd al-dharāʿi* constitutes one-fourth of human responsibility before the Law,¹⁴⁰ an assertion upon which he bases a lengthy discussion of the prohibition against artifices (*hiyal*, singular, *hīlah*),* which he considers to be a means of preventing evasive legal devices (*dharāʿi*, singular, *dharāʿah*) as well.

Prior to Ibn al-Qayyim, his shaykh Imam Ibn Taymiyah devoted a special work – which may or may not still be extant – to these two topics. He states, “We have expounded the principle of thwarting artifices and prohibiting evasive legal devices in a large and separate book, where we confirm the teachings and practices of the Madinah school based on the Qur’an, the Sunnah and the consensus of our forerunners among the Emigrants and Helpers.”¹⁴¹ The topic of *sadd al-dharāʿi* has also been treated in works by a number of modern writers on *uṣūl al-fiqh*, the most comprehensive of which I have seen is Muhammad Hisham Burhani’s study entitled, *Sadd al-Dharāʿi fil-Sharīʿah al-Islāmiyyah*.

The principle of *sadd al-dharāʿi* is based directly upon the notion of human interests and the objectives of Islamic Law. In other words, it is based on the premise that the Lawgiver has instituted the precepts of the Law for no other reason than to achieve the objectives of bringing benefit and averting harm and corruption. Hence, if these rulings come to be used as a pretext for achieving purposes other than those for which they were originally legislated or as a means by which to achieve that which is contrary to their true objectives, this is something which the Law cannot approve. Consequently, those charged with the Law’s preservation cannot stand by idly while its rulings are being diverted from their original objectives on the pretext that nothing is being done in violation of their apparent meanings or outward formalities.

Before citing examples from the realm of *fiqh* and independent

legal interpretations, and particularly from Malikite fiqh, allow me to draw one example from the Sunnah as a means of further clarifying the foundation upon which the principle of *sadd al-dharā'i* rests. The example I will discuss has to do with the giving and acceptance of gifts. Now, the exchange of gifts among relatives, friends, neighbors and others is a legitimate practice. Indeed, it is even encouraged given the role it can play in fostering goodwill, familiarity and cooperation. However, a gift might be used as an expedient by means of which to achieve some unworthy aim, whether in the short term or the long term. Hence, we have a prophetic tradition in which there is a prohibition against employees' receiving gifts. In *Ṣaḥīḥ Muslim* we read that the Prophet once employed a man to collect the zakah. When the man returned (after completing the collection) he said, "This is for you, and this was given to me." Thereupon the Messenger of God rose and mounted the pulpit, and after uttering praises to God he said, "What is to be said about a worker whom I send out, and who then says, 'This is for you, and this was given to me'? If he had remained at home in his father's or his mother's house, would he have received such gifts? By the One who holds Muhammad's soul in His hand, no one among you will accept such a favor but that on the Day of Resurrection, he will come forth bearing it about his neck, be it a camel bellowing, a cow lowing, or a ewe bleating." He then raised his hands so high that we could see the darkest parts of his armpits and he twice repeated, "O God, has the message been heard?"

The Prophet's interpretation of the situation is clear, for the gifts concerned were not offered to this man for his own sake, nor on account of a special relationship between him and those who had offered them, nor because such gifts had been exchanged by them previously but, rather, because of the position which he held: "...in the hope that he might be of some service to us." And this, of course, is a type of corruption, abuse and favoritism which begins subtly and on a small scale, then spreads and grows increasingly more serious. A second-hand report is not the same as that of an eye-witness. What can be concluded, then, when the two are combined?!

About this Ibn al-Qayyim states,

...governors, judges, and ombudsmen are forbidden to receive gifts [from those whom they serve in these capacities]. This is the root of corruption, a vesting of authority in those who are not worthy thereof. The reason for this is simply that the acceptance of gifts from someone with whom it is not one's custom to exchange gifts may lead the recipient to meet the [gift giver's] need [for the wrong reason]. Your love for something can render you blind and deaf; and such love for things may generate a desire to fulfill the request of the person who gave the gift as a way of rewarding him...¹⁴²

It was on this basis that Malikite fiqh proceeded, just as the fiqh of 'Umar and his rightly guided policies had done before it. 'Umar did his utmost to prohibit any expedients or ruses which had the potential of leading to corruption or abuse and to curb unworthy objectives, seeking instead to preserve instead legitimate interests and the objectives of the Law. In fact, Mālik, as was confirmed later by al-Shāṭibī, was guided by the principle of *sadd al-dharā'ī* in most areas of fiqh.¹⁴³ This is also confirmed by Muhammad Hisham al-Burhani, author of the comprehensive study referred to above on the subject of *sadd al-dharā'ī*, who states,

Sadd al-dharā'ī is an important principle of juristic induction among the Malikites. Indeed, of the four prevailing schools of jurisprudence, and others as well, none has gone as far in the adoption of this principle as the Malikites, for whom consideration of unrestricted interests is a legislative fundamental in its own right. After all, *sadd al-dharā'ī* is nothing, in essence, but a practical application of consideration for human interests. Consequently, they [the Malikites] have counted it among their fundamentals and put it to use in their inductions and interpretations in all areas of fiqh, including the resolution of many practical questions. In fact, they have gone to such lengths in this effort that some jurisprudents have come to view *sadd al-dharā'ī* as a distinguishing characteristic of the school which began with the imam of the 'abode of *hijrah*.'¹⁴⁴

The areas of fiqh in which Mālik and the Malikites have relied most

heavily on the principle of *sadd al-dharā'i* are those pertaining to sales, penalties and marriage. In the first area, both the Malikites and the Ḥanbalites regard as null any commercial transaction in which there appears to be a corrupt intent in violation of the Lawgiver's objective. An example of such a transaction is that referred to as *bay' al-aynah*,* a type of sale on credit, because it leads to the corrupting practice of usury. Other examples include the sale of grapes to someone who manufactures wine, the sale of arms to the Muslims' enemies or to those engaged in sedition and hostilities etc., all of which may be clearly seen as leading to harm. As for the Ḥanafites and the Shafi'ites, they draw a distinction between the legal validity of a contract and the corruption which it entails; in their view, a contract is valid so long as it fulfills all outward conditions for validity, while the intent behind it is viewed as something which must be left for God to judge.

An example of *bay' al-aynah* would be for someone to sell a piece of merchandise on credit for \$10.00, then to buy it back in cash for \$5.00. Al-Qāḍī Abū Bakr ibn al-ʿArabī, after expressing his support for a prohibition against this type of transaction, states,

If someone were to say, "You have prohibited this type of transaction for fear of ill intent on someone's part, yet you do not know the person's intent," we would reply that this is the very point behind the prohibition. In other words, given that ill intent is what is feared, a definitive position has been taken by prohibiting even its outward appearance precisely due to the impossibility of knowing people's intentions in such a situation. Hence, although Islamic Law bases its rulings on invisible, inward causes, it has allowed the outward and the visible to function in their place. An example of this phenomenon may be seen in the fact that the hardship involved in travel, which serves as the basis for certain relevant allowances, is replaced in Islamic legal rulings by the outward, visible fact of being on a journey, since the hardship itself is something which cannot be observed or measured.¹⁴⁵

In relation to marriage, the Malikites have relied on the principle of *sadd al-dharā'i* in many rulings. Thus, for example, they forbid a person who is terminally ill to marry, and if such a person does

marry, they forbid his widow to inherit from him. However, if a woman was divorced by her husband while the latter was terminally ill, they allow her to inherit from him even if the divorce was irrevocable. In the section of *al-Muwattaʿa* dealing with divorce from someone who is ill, Mālik relates statements made by ʿUthmān and ʿAlī, to the effect that inheritance is to be granted to a woman who had been irrevocably divorced by a husband who was terminally ill. Mālik then goes on to say,

If a terminally ill husband divorced his wife before the marriage had been consummated, she is entitled [upon his death] to half of the dowry as well as the inheritance and she is required to observe no waiting period before remarrying. If, on the other hand, he divorced her after the consummation of the marriage, the widow is entitled to the entire dowry and the inheritance. Moreover, the same applies whether, prior to the marriage, the woman had been previously unmarried, divorced, or widowed.¹⁴⁶

This approach to interpretations (of rulings relating to marriage), which was adopted by Mālik, the people of Madinah and the Companions before them, is founded upon the principle of *sadd al-dharāʿi* and the prevention of harm to the wife; in other words, it is founded on consideration for her best interests and rights.

Another example of the application of the principle of *sadd al-dharāʿi* in relation to rulings on marriage is that, relying on ʿUmar's independent interpretation, the Malikites impose a permanent prohibition on marriage between a man and a woman in a situation in which the man has married the woman before the termination of her waiting period from a previous marriage:

If the man consummated the marriage and enjoyed the woman physically before the end of the waiting period, he is thenceforth prohibited from marrying her. Moreover, this judgment requires no further ruling on the matter given the written ruling by ʿUmar ibn al-Khaṭṭāb on this very question, and which is the ruling most widely accepted and applied in the Malikite school. If, on the other hand, the husband nei-

ther consummated the marriage nor enjoyed the woman physically until after the termination of the waiting period, and if all that occurred during the waiting period was the conclusion of the marriage contract, then 'Umar's position on the matter is subject to more than one interpretation. There are, in addition, two widely accepted versions of what Mālik had to say on this matter.¹⁴⁷

Yet, despite this austere inclination in the Malikite school – the purpose of which is to close the door in the face of corruption and disregard for the rulings of the Law – the mufti concerned, that is Abū Sa'īd ibn Lubb, ruled that if the marriage was not consummated until after the end of the waiting period and if there is some need for the husband and wife to remain together, as when the woman has become pregnant or given birth to a child, the marriage should be considered lawful. This attenuated ruling illustrates another aspect of the interest-oriented perspective of the Malikite school based upon the principle of “consideration for differing points of view” (*murā'āt al-khilāf*). In other words, the mufti chose to rule in favor of deeming the marriage lawful in view of the human interest involved and in recognition of the fact that this is the position taken by most jurists of the other schools.

Ibn Lubb was once asked about a man who had a daughter in the custody of his former wife. When the girl was ten years old, her father gave her in marriage to someone in order to remove her from her mother's custody and to exempt himself from paying child support. He replied,

Neither the mother's custody rights nor the husband's obligation to pay child support will be terminated until the girl's husband has consummated the marriage, and this [will only be permitted] when the girl has matured sufficiently to tolerate intercourse. The present legal situation [i.e., the mother's custody rights and the father's financial obligations toward the child] is not nullified merely by the fact that the girl has been legally married, nor does her husband have the right to approach her before she becomes able to tolerate intercourse, since this would be harmful to her. [This marriage contract has been concluded]

as an expedient (*dharrāh*) by means of which to deprive the mother of her custody rights. Hence, the girl may not be taken out of her mother's custody unless she is married and is old enough to tolerate intercourse.¹⁴⁸

In relation to cases in which a man elopes with a woman and cohabits with her illegally, after which he asks for her hand in marriage, a number of Malikite jurists have ruled that the woman concerned is to be deemed forbidden to this man for the rest of their lives. Al-^cAlamī states, "In keeping with the fundamentals of the Malikite school, they have issued such a ruling out of consideration for the principle of *sadd al-dharā'i'*^c and as a means of curbing corruption."¹⁴⁹

What strikes one as odd is that the most widely accepted ruling among the Malikites on such a situation is contrary to this (in other words, in favor of allowing the eloped couple to marry), despite the fact that forbidding¹⁵⁰ the couple to marry as long as they live would be a more appropriate ruling in this type of case than it would be in the case of a man who has married a woman and consummated the marriage before the end of her waiting period following a previous marriage. Consequently, the jurists who have ruled in favor of a permanent prohibition against the marriage of the persons involved in cases of elopement and cohabitation are being more consistent with the principles of the Malikite school than those who have adopted the more popular, and more lenient, ruling.

In the area of legal penalties, the Malikite school is the strictest of all the schools of jurisprudence and the one which goes to the greatest lengths to deter would-be criminals and to block all outlets to those who would commit aggression and spread corruption. In fact, al-Wansharīsī states, "Severe treatment of wrongdoers, the recalcitrant and the corrupt is a frequently adopted approach in relation to the Law and the school's guiding principles, and is well represented within the Malikite school. Indeed, I have recorded large numbers of this type of ruling."¹⁵¹ In so saying, al-Wansharīsī is referring to the Malikite fatwas of this type which he had collected in his encyclopedia, *al-Mi'yār*.

The Malikite school's severity in the area of penalties includes consideration for such penalties' primary aim, namely, to deter (would-be wrongdoers) and to uproot corruption and injustice to the greatest possible extent. I do not think that this area in particular needs to be illustrated with examples and quotations. For wherever one reads in the area of rulings on the legally prescribed penalties in Islam, retribution (for murder), discretionary punishments, and legal policy, this distinctively Malikite austerity will be clearly observable. However, what I would like to draw attention to, if only by way of reminder, is that this Malikite predisposition, if you will, likewise finds its roots in the fiqh, policies and legal rulings of 'Umar who was famed for the careful attention which he lent to deterrents and discretionary punishments, and for his severity toward the corrupt, the perverse and the unjust.

3) *Consideration for the Objectives of those Governed by the Law*

There is significant overlap between this principle and the one discussed before it, namely, *sadd al-dharā'i'*; the principle to be discussed now, however, is more general and inclusive. For in dealing with the principle of *sadd al-dharā'i'*, consideration may or may not be given to corrupt intent; in relation to this principle, however, we are dealing with consideration for human intentions overall, and the influence which they exert on people's conduct and the transactions which take place among them.

The principle which states, "Matters are to be judged according to their objectives" is viewed as a fundamental by virtually all the schools of jurisprudence. In fact, the *al-Aḥkām al-Adliyyah* magazine heads its list of ninety-nine principles with this one in particular, then follows it with its corollary, namely, "The crucial factor in a contract is its objectives and meanings, not its verbal content and outward forms." Despite such facts, however, and as will become clear shortly, the Malikite school remains the pioneer of the schools overall in relation to consideration for human objectives and basing rulings thereon.

As regards the relationship between consideration for human

objectives and consideration for the objectives of the Lawgiver, it may be observed in two ways. First, both of these principles have a common origin, namely, consideration for objectives and intentions and the refusal to stop at outward appearances and forms. Hence, whoever observes this principle when interpreting the words, rulings and conduct of the Lawgiver will likewise observe it when interpreting human beings' words, contracts and conduct, and whoever neglects one of these two principles will have neglected the other. Hence, the two together constitute a single perspective and single approach. As for the second way in which one may observe the relationship between human objectives and the objectives of the Lawgiver, I will leave it to al-Shāṭibī to make it clear at the appropriate point in our discussion.

This said, let us return to consideration for human objectives in the Maliki school and the manner in which it has pioneered in this area. As we saw a bit earlier, the Malikites reject the validity of sales and marriages in which there appears to be a corrupt intent or aim. This, of course, is simply one aspect of the general principle which views contracts in light of the objectives and intentions of those who enter into them. Concerning this Ibn Taymiyah states,

As for contracts: There are people who consider the verbal phrases of which a contract consists, the words by means of which affirmation and consent are expressed, and the like, to be binding in and of themselves. As for the people of Madinah, their point of reference in relation to contracts was people's customary manner of doing and understanding things. Hence, whatever people considered to be a sale, was a sale, and whatever they considered to be a gift, was a gift. This approach is the one which is most in keeping with the Qur'an, the Sunnah, and fairness.¹⁵²

An example of the application of this principle to the realm of fiqh is what is known as "fixed price sale" (*mu'atāh*).^{*} Many small, ordinary sales fall into this category in that both parties to the transaction content themselves with a nonverbal exchange: Party 1 gives Party 2 the money, while Party 2 gives Party 1 the merchandise,

without a verbal offer or a verbal expression of acceptance or agreement. In such an exchange, one party might speak while the other remains silent, or it might take place without the exchange of any words at all or, at least, without a verbal exchange which would fulfill the conditions for a legal contract. On the validity or non-validity of this type of sale – which has become quite commonplace nowadays – there are three views:¹⁵³

(1) According to the Shafi‘ites, the Zahirites and the Shi‘ites, it is invalid due to the absence of a verbal offer and verbal acceptance which would serve as evidence of both parties’ agreement to the transaction.

(2) According to the Ḥanafites and the Ḥanbalites, it is valid provided that the price be fixed and known, and that neither of the parties to the transaction make any statement which would be incompatible with the contract.

(3) According to the Malikites, it is valid in all situations. Hence, the contract may be concluded through action or physical exchange whenever it is clear that there is mutual consent, and whether it is the commonly accepted custom or not. This view is broader than the two preceding ones, and easier for people to apply. Hence, whatever serves as evidence of sale, licensing, partnership, authorization for one to serve as another’s proxy or agent, and the like – with the exception of marriage – may serve as the basis for a valid contract, since the crucial factor is the presence of that which indicates both parties’ willingness to enter into and conclude the contract.¹⁵⁴ Commenting on the Shafi‘ite position on this type of transaction, al-Zuhayli states on p.70 of his book entitled *Nazariyyat al-Ḍarūrah al-Shar‘iyyah*, “If the truth be told, this is a superficial view.”

Al-Wansharīsī tells us that when al-Shāṭibī was asked once about this type of sale, he replied, “It was Mālik’s approach not to rely [solely] on the verbal content of a contract.”¹⁵⁵ Al-Qāḍī Abū Bakr ibn al-‘Arabī affirmed this Malikite principle even before al-Shāṭibī, saying,

Legal rulings are only tied to the words of which they consist to the extent that these words reflect the rulings’ actual objectives as related to

the points which they address. If they [the words] have an apparent meaning which is inconsistent with [what is known to be] their aim, they are not to be taken as a true reflection of the objectives of the ruling concerned. The concepts of selling and buying, for example, are associated with recognized terms and meanings. Even so, God Almighty declares, “Behold, God has bought of the believers their lives and their possessions, promising them paradise in return, [and so] they fight in God’s cause...” (9:111).¹⁵⁶

Hence, when the objectives of a given term or passage become apparent, they are taken into consideration and built upon, without undue importance being given to the words themselves. Moreover, when the words are of established reliability but have two or more possible interpretations, they are to be interpreted in a way which is consistent with the aim or intent behind them.

Another example of the same thing, taken also from Ibn al-‘Arabī, may be seen in his treatment of the verse in which God Almighty states, “Concerning [the inheritance of] your children, God enjoins this upon you” (Qur’an, 4:11). He inquires into the meaning of the term “children” in this verse, asking: Does it include one’s children’s children? If, when someone makes a bequest to his children, is it to be passed on to his children’s children as well? Or, if someone gives some of his money to his children as charity, is it limited to his actual children, or does it include their children, too? In answer to these questions, Ibn al-‘Arabī returns to the matter of objectives, saying, “What people say is tied to intentions and objectives. The intention underlying a bequest (*ḥabs*) is succession; hence, it includes one’s children’s children. The intention underlying charity, on the other hand, is to hand ownership over to someone else. Hence, it includes, specifically, those who are immediately related to the person giving the charity, whereas others would only be included if there is evidence to indicate their inclusion.”¹⁵⁷

Another area of jurisprudence in which the Malikites have labored consistently to apply the principle of objectives and intentions is that of oaths and the obligations which they may entail. Judge and jurist Abū al-Walīd ibn Ruṣd was once asked about a

woman whose husband, the town mayor, had died. She had been living with her husband in the official mayor's residence and, following his death, she swore solemnly that she would never live in that house again and that if she did, she would have to perform certain actions (by way of atonement). Following this, the new mayor married her and, since he was now living in the mayor's residence, he obliged her to live there with him. What, then, would be the legal ruling concerning her situation? Ibn Rushd replied,

This woman is not guilty of breaking her oath due to her having gone back to live in the official mayor's residence with her new husband, now the mayor of that town, since it is clear that she did not wish to return to it under circumstances other than those in which she had been with her deceased husband [that is, as an unmarried woman]. Consequently, nothing is required of her on account of her having returned there as a married woman, since she did not swear never to return under circumstances such as these. This is my view of the situation, and for which I accept responsibility, since an oath is to be understood on the basis of the situation which led to it and what is understood to have been the oath-taker's intention, not merely on the basis of what would be entailed by its verbal content. This is the principle adhered to by Mālik's school, may God have mercy on him.¹⁵⁸

Ibn Rushd supported his fatwa with analogous fatwas which had been issued by Mālik and his disciple, Ibn al-Qāsim. Then he said,

The scholars of Iraq disagree on this, holding that a person who has taken an oath is guilty of having broken his oath if he later acts contrary to the literal meaning of the words which he uttered. In other words, they give no consideration to the person's intention, the situation which gave rise to the oath, or the [deeper] meaning of what the person said. This, however, leads to manifest errors in their legal decisions, since rulings are to be based not on oaths' superficial meanings, but rather, on the true significations of the words uttered and a thorough understanding of the oath and the circumstances surrounding it. Indeed, if oaths were all taken at face value without regard for their

underlying meanings, Islam would revert to unbelief, and religion to a mere pastime.¹⁵⁹

Then, in illustration of the ignominious end to which devotion to appearances and neglect of intentions are bound to lead, he quotes the words of the Qur'an, "...worship whatever you please instead of Him" (Qur'an, 39:15). After all, if this 'command' were taken at face value, it would lead to denial of the truth and idolatry! However, the intent behind these words is to prohibit and warn. Ibn Rushd also mentions other, comparable verses from the Qur'an to illustrate the same point.

As in the case of oaths, so also in the case of vows or solemn pledges, Mālik does not consider them to be valid based on mere words devoid of serious intention. An example of such is found in an account related by Ibn Ḥabīb, who tells of a desert Arab whose she-camel bolted and fled. Speaking to the camel, he said, "I swear, I'll sacrifice you as an offering on the pilgrimage to Makkah!" The man then came to Mālik and asked him about the matter.

In order to confirm what the man's intent had been before issuing a fatwa, Mālik asked him, "Did you say this in order to scold her?"

"Yes," the man replied.

"Nothing is required of you, then."

"Rightly have you spoken, son of Anas!" the man replied.

Commenting on this fatwa of Mālik's, Ibn Rushd states, "[Mālik] did not require the man to offer the she-camel as a sacrifice, since this had not been the intent behind his words. Rather, his intent had been simply to upbraid the animal, not to draw near to God by offering it up as a sacrifice. This is the most appropriate understanding of the situation. As the Prophet said, 'Actions are to be judged based on their underlying intentions'."¹⁶⁰

Among the legal rulings which the Malikites base upon a consideration for human intentions is their invalidation of the type of marriage referred to as *nikāḥ al-muḥallil*.* (On this matter the Malikites disagree with the Hanafites and the Shafi'ites.) The reason for the Malikites' stance on this type of marriage is that the intention behind it is a corrupt one, that is, it is not in keeping with the purposes and

objectives of valid matrimony. Ibn Taymiyah states,

There can be no doubt that the scholars of Madinah who denied the validity of both *nikāḥ al-muḥallil* and *nikāḥ al-shighār** were more faithful to the Sunnah than the scholars of Iraq who did not do so. For it is firmly established that the Prophet pronounced a curse upon both the man who marries a divorced woman with the intention of dismissing her in order for her first husband to take her back (referred to in Arabic as *al-muḥallil*), as well as the first husband who takes back his divorced wife (*al-muḥallal labu*) by this means. It is also an established fact that the Prophet's Companions, such as ʿUmar, ʿUthmān, ʿAlī, Ibn Masʿūd, Ibn ʿUmar and Ibn ʿAbbās prohibited this practice, and none of them is known to have made any concession on this point. This, moreover, is in keeping with the principles adhered to by the scholars of Madinah, since one of their fundamentals is that 'intentions are of the essence of a contract.'¹⁶¹

A statement by Mālik in his *al-Muwattaʿa*' on the subject of retribution for murder also illustrates his consideration for human intentions. He states,

Concerning a man who apprehends someone in order for another man to beat him, after which the man beaten dies from the beating, we say: If he apprehends the victim with the realization that the third man wants to murder him, then both of them [i.e., the man who apprehended the victim, and the one who killed him] are to be put to death on this account. If, on the other hand, he apprehends the victim on the understanding that the other man does not intend to murder him, but simply wants to give him a disciplinary beating, then the murderer is to be put to death, while the person who did the apprehending is to be given the severest punishment and imprisoned for a year for apprehending the victim, but not receive the penalty for murdering him.

Once again, we see that considering the objectives and intentions behind people's actions and words rather than taking them at face value was the approach adopted by ʿUmar and the Prophet's

Companions in general. In *al-Muwattaʿa*, Mālik relates that “during the days of ʿUmar ibn al-Khaṭṭāb, two men got into an argument and began exchanging insults. One of them said to the other, ‘Well, my father isn’t an adulterer, and my mother isn’t an adulterous!’ ʿUmar was then consulted about the matter and someone said, ‘The man was simply paying a compliment to his mother and father.’ Others, however, said, ‘There are other ways he could have complimented his mother and father. In our view, you should flog the man the prescribed number of times [for the crime of *qadhḥ**].’ And in fact, ʿUmar gave instructions for the man to receive eighty lashes.”

Mālik said, “We prescribe no punishment for negation (*naḥy*), falsely accusing someone of unchastity (*qadhḥ*) or innuendo (*taʿrīḍ*)* unless it is believed that the person who made the relevant statement actually had slanderous intentions. As for those who did have such intentions in what they said, they are to receive the prescribed punishment in full.”¹⁶²

This passage sums up what I have been seeking to make clear in this chapter, and which may be stated as follows:

- Mālik’s teachings grew out of an already existent school: “We prescribe no punishment...”
- The Malikite school shows special concern to prohibit evasive legal devices.
- The Malikite school looks to the objectives and intentions behind people’s words and actions and does not stop at their superficial meaning.
- This school originated with ʿUmar and his actions.
- ʿUmar relied upon the views of the other Companions with whom he consulted.
- In general, people belong to one of two groups when it comes to their manner of looking at things: Those who stop at the superficial meaning of others’ words and actions (“... and someone said,...”), and those who look to the inner realities of things, including objectives and intentions (“Others, however, said,...”). This division existed among the Companions just as it does among all other people; however, ʿUmar and the majority of the

Companions belonged to the second group, with only one of them (if he was, in fact, a Companion) belonging to the first category.

In his major work on the principles of fiqh, the great Malikiite scholar Abū ʿAbd Allāh al-Maqqarī has compiled a list of rules which embody aspects of the Malikiite orientation with respect to consideration for objectives and intentions.¹⁶³ These rules include the following:

RULE NO. §296: Questions should be dealt with in a manner which serves to counter corrupt intentions, as in prohibiting a murderer from inheriting (from his/her victim), or allowing an irrevocably divorced woman to inherit (from her former husband) if he died of a terminal illness.

RULE NO. §723: The basis for interpreting a statement which has been uttered or written with the intention of exaggeration or allusion is not its actual words, but its meaning.

RULE NO. §1082: Unlike the other schools, the Malikiites consider what a person or statement appears to be saying to be no less important than what is being said literally.

In conclusion, despite what we have said earlier about the true origins of the Malikiite school, I do not consider Abd Allah al-Dawudi to be speaking as a biased proponent of a particular school and its imam when he describes Mālik as,

the eminent scholar of Islamic jurisprudence, the one who served as imam by virtue of his preeminence in the realms of Hadith and traditions attributed to the Prophet's Companions, as well as his widely attested leadership in independent reasoning and inquiry. Indeed, he shed the light of his knowledge of the objectives and wise purposes of Islamic Law upon both the jurists of his own day and those of later generations.¹⁶⁴