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Disability in Islamic Law

Vardit Rispler-Chaim

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DISABILITY IN ISLAMIC LAW

by

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The book is dedicated to my husband Rachman, to my sons Netanel and Avner, and to the memory of my parents.

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FOREWORD

When I completed my book *Islamic Medical Ethics in the Twentieth Century*[1], I was aware that I had omitted certain topics that I would have to return to. One of these was the ethical treatment of disabilities and the disabled, and of handicaps and the handicapped.

Since responses to burning medical dilemmas within the wide field of medical ethics was the main focus of that book, it addressed ethical aspects of the doctor-patient relationship, and contemporary Islamic debates on issues such as birth control and abortion, artificial insemination, organ transplants, postmortem examinations and euthanasia. The main source material was 20th-century fatwas (legal responses) issued by various Middle Eastern muftis.

In this book I now wish to survey attitudes to the disabled and their disabilities as evinced by selected Sunni and Shi'i legal compilations throughout 1400 years of scholarly Islamic activity, but also through contemporary fatwas. The sources used for this book are a selection of medieval as well as modern legal writings, medical books and articles in Arabic, books and articles on medicine from an Islamic religious point of view, Prophetic medicine, and the Qur'an and medicine. I have scrutinized all these for their consideration of people with disabilities, and for the behavioral or social adjustments these people were offered, mainly through legal rulings.

From the texts of Islamic law I hope to be able to evoke the social atmosphere and the role or status that Islamic societies have assigned to their physically and mentally less fortunate members. As much as the Muslim world has always been versatile, comprised of a variety of ethnic and cultural communities, the Shari'a has nevertheless been a unifying force, and a source of guidance for all.

True, the interpretations and applications of the Shari'a have been influenced by time and place, and local circumstances have often left their imprints on the legal product, namely the fiqh (positive law). The Shari'a, as the core and ideal of normative Muslims' conduct and morals, was cherished in all Islamic societies as the foundation for all later legal developments. For the distinction between Shari'a and fiqh,

a complicated task that many jurists down Islamic history have debated, I find Abou El Fadl's summary quite helpful.

Shari'a, it was argued, is the Divine ideal, positioned as if suspended in mid-air, unaffected and uncorrupted by the vagaries of life. The fiqh is the human attempt to understand and apply the ideal. Therefore, Shari'a is immutable, immaculate, and flawless- fiqh is not.[2]

When I approached modern Islamic legal books or fatwas, I limited my research to those originating in the countries of the Middle East. This book's conclusions, therefore, depict attitudes to disabilities and the disabled as they emerge from legal literature in the larger Middle East. I have not attempted to cover the vast Islamic legal scholarship of Southeast Asia and Africa.

My study stems from an understanding that being "healthy" is the preferred human condition. Any deviation from the "healthy" is a disease, at times causing a certain degree of dysfunction (temporary or permanent, minor or major). Compared with "proper function", this "dysfunction", should it persist over time, may become an added characteristic of the person who bears it. Then, that part of society comprised of the "healthy" is called upon to relate to the "irregular" person. Social studies have observed that the "irregular" can be treated as a "regular", or with special care, or both combined. This was my goal in this research: to depict the Islamic social attitudes to the "irregular" person in terms of health, as manifested in various expressions of Islamic law from its infancy to the present. I could not tackle the main subject before devoting thought to basic terminology, in Arabic, the language of most of my sources, as well as English, the language of this monograph. Accordingly, a large portion of the "Introduction" to this book concerns terminology.

ACKNOWLEDGMENTS

It has taken just over three years to write this book, but research and collecting the material beforeshand stretched over more than ten years. The book is my own work, and I alone am responsible for its content. But some people helped me along the way and I wish to extend to them my sincere gratitude.

The English text would never have reached its present form without the intelligent editing work of Mr. Murray Rosovsky, and I thank him for that. I am grateful also to Mr. Haim Gal, director of the archives of the Arabic periodicals at the Moshe Dayan Center for Middle Eastern and African Studies at Tel Aviv University, who helped me through the abundance of periodicals and newspapers, and opened for me new avenues for research.

My brother, Dr. Shmuel Rispler M.D., was always willing to help in finding relevant medical data and the appropriate terminology. I thank him for that, and am happy that our seemingly remote fields of scholarship do have some meeting points.

I am grateful to the University of Haifa, my academic home, which allowed me a sabbatical leave in 2001/02, when most of the first draft was written, and to my own department, Arabic Language and Literature, which let me teach our students courses on people with disabilities in Islamic law. From that experience I became certain that the field was worth studying, extremely interesting, and deserving of a book.

I am indebted to the Department of Near Eastern Studies at the University of California at Berkeley, which hosted me during my sabbatical leave. Special thanks go to my esteemed teacher and advisor, Prof. W. Brinner of the University of California at Berkeley, who generously left me the keys to his office and provided me the perfect conditions for immersing myself in the writing of this book. Thereafter I could have no more excuses.

BIOGRAPHY

Dr. Vardit Rispler-Chaim is a graduate of UC Berkeley (Ph.D. 1985).

Since 1985 she has been teaching in the Department of Arabic Language and Literature at the University of Haifa, Israel. Her main fields of research and publication are human rights in Islam, Islamic medical ethics, Islamic law, and the status of women in Islamic law and society.

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INTRODUCTION

TERMINOLOGY, THE ORIGINS OF DISABILITY AND HUMAN RIGHTS

GENERAL TERMINOLOGY

What is meant by "disability" and who is considered "disabled"? The complexity shrouding the import of the terms "disability" and "disabled" and other related terminology in use, renders a brief reference to terms inevitable.

In English, several terms relate to a person who is unable to perform the normative physical and mental functions expected of a "healthy" human being.

According to the World Health Organization (WHO), "the concept of disability is classified as one of three: impairment, disability, and handicap. *Impairment* refers to the reduction or loss of normally existing physical, psychological or behavioral structures. *Disability* refers to the functional impairments resulting from primary damage, and the effect of the loss of function in daily life is thus the *handicap*".[3]

According to the United Nations Declaration on the Rights of Disabled Persons, proclaimed by the Geneva Assembly's Resolution 3447 of December 9, 1975, the term "disabled person" means "any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities".[4]

The International Labor Organization, on the other hand, asserts that "a disabled person means an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment".[5]

The definition of the ADA (The Americans with Disabilities Act, signed into law in 1990) of disability is this: "A person with disability is defined as

1. having a physical or mental impairment that substantially limits him or her in some major life activity, and
2. having experienced discrimination resulting from this physical or mental impairment".[6]

In traditional medical views, "the long term or permanent functional limitations produced by physical impairments are called disability".[7]

A similar definition states that: impairment is "lacking part or all of a limb, or having a defective limb, organ or mechanism of the body. Disablement is the loss or reduction of functional ability, and handicap is the disadvantage or restriction of activity caused by disability".[8]

According to the British Discrimination Act 1995, a person must have four elements to be considered "disabled":

a. There must be a physical or mental impairment.
b. The impairment must adversely affect the individual's capacity to carry out normal day to day activities.
c. The adverse affect must be substantial.
d. The adverse affect must be "long term".[9]

In a recent article by Jones,[10] the author, a retired pediatrician from London, challenges the usage of the three commonly applied terms: impairment, disability, and handicap. Handicap in his opinion is a discriminative term as it derives from "cap in hand", "implying that the disabled are expected to beg favors of the able". He blames the source of handicap on "the response of the able community to those with impairments and disabilities". He prefers the term disability, as adopted in a recent revision of the WHO classification, and combines the notions of disability and impairment. For Jones, handicap is the impairment in the attitude to disability which individuals in a society may have. He realizes that his view is somewhat revolutionary, but he believes this will lead to a holistic view towards people with disabilities, rather than to a stigmatized pitiful one.

Undoubtedly, the search for definition is primarily aimed at defining policies on the "disabled". In many societies and countries today, being disabled entails social and legal alleviations, and economic assistance by the state, either as direct financial support or as discounted services offered to the disabled but not to "healthy" persons. The definition of "who is disabled" is also utilized by politicians and against politicians in various political scenarios.[11] However, the definition of "what is disability" must always remain relative. In a society where the majority of girls are circumcised she who is not is "disabled", while in other societies to be circumcised equals being mutilated. In a society where many are undernourished, undernourishment is not considered a disability.[12] Women in sexist societies "are physically handicapped", in Iris Marion Young's assertion, since women in sexist societies are expected to lack the strength, skills and physical mobility that men are expected to have.[13] Of the many more examples of the relativity of disability, here we will briefly mention only cultural relativism.

Although impairments and disabilities in humans are recognized by archeologists to have existed ever since the Neanderthal period, each culture perceived of these disabilities in a different manner, and treated its disabled members accordingly. Therefore, what is and is not viewed as disability also depends on cultural criteria. Western society, including its Judeo-Christian offshoots, manifested clear bias against people with impairments before the introduction of capitalism. It is alleged that since Western civilization was built on Greek foundations, the Greeks' admiration for physical and mental fitness and the perfect body rendered all "imperfect"

persons doomed and social outcasts. Only the rise of capitalism in the 19th century improved social attitudes to the disabled.[14] From the foregoing, the rise of capitalism did not succeed in erasing discriminative attitudes to the disabled, although great progress in that direction was certainly made.

Butler and Parr (1999) have depicted two major models in the perception of disability: the medical and the social. The medical model grew out of the rise of medical science. It utilizes specific bodily and sensory "technologies" that can improve aspects of daily life for some people with impairments. But this model, they claim, has seldom paid attention to the complexity of disabled people's lives. The newly devised social model of disability tries to address the social issues that disabled people encounter, and it is "closely allied to political fights for anti-discrimination legislation and civil rights".[15] Following Dear et al. (1997), Butler and Parr welcome the expansion of the category of "disability" to include also substance abuse, HIV, psychological conditions and arthritis, as these imply that the human experiences of disability are "open to reinterpretation".[16] Butler and Parr do not see the "body space" as totally separated from the "mind space", but regard the two as interrelated and mutually important.[17] They conclude that any study of disability should follow a multidimensional view of disability, and would like to see the term "disability" as a catch-all category abandoned.[18] As will be shown later, it appears that Islamic law in most of its references to various disabilities, and naturally unaware of contemporary social theories, has always addressed each disability in respect of a specific, recognizable human action or behavior, never as a "catch-all category".

As for medical terminology, the medical textbooks contain many names for specific impairments and dysfunctions that lay persons are hardly aware of, or have never heard. For the purpose of the present survey I refer to the disabilities as they are recognized by the general public, using the term "disability" for most dysfunctional problems people may experience, and "impairment" for damages in an organ or a bodily mechanism that may lead to a disability. Scientific definitions are used only when necessary for clarification, to distinguish close terms, or in quotations.

TERMINOLOGY IN ARABIC

Turning now to examine Arabic terminology, we may often come across labels for bearers of specific disabilities such as the *a'ma* (blind), the *asamm* (deaf), the *abkam* or *akhras* (dumb, mute), the *a'raj* (lame), the *majnun* (insane) and the *khuntha* (hermaphrodite). There are also feminine forms for the same adjectives, such as *'amya'* (blind), *'arja'* (lame), *majnuna* (insane), etc., to indicate that the disabled person is a woman.

In classical Islamic sources I could not identify any single general term that would combine all people with disabilities as a group. This rendered my survey, as proposed, more difficult, but more interesting and challenging as well. The fact that no single term in Islamic law encompasses all disabilities might in itself teach us something about attitudes to the disabled in Islamic societies. I am reluctant, though, to jump to conclusions at this early stage of research. It is only in contemporary literature that we find somewhat generalized terms, such as *ashab al-'ahat* or *dhawu al-'ahat* ("owners" or bearers of impairments, defects), *mu'awwaqun* or *mu'aqun*

(literally, those held back by difficulty and limitations on their mental or physical functions[19]), and *'ajaza* or *'ajizun*, pl. of *'ajiz* (a weak person, unable to do things, like the old[20]).

The Arabic root *'a-j-z* was well known in early Islam, and often used in the Qur'an and in medieval texts in the sense of someone who is unable or caused to be unable to do something.[21] In a more specific usage it denoted a man "unable to perform sexual intercourse with women".[22] The latter is a reference to a real handicap that men may experience. But *'ajaza* or *'ajizun* as a social classification of a group of people, which might equal today's "the disabled", cannot be found in the Qur'an or in the fiqh. Even today *ashab al-'ahat*, *mu'aqun* or *mu'awwaqun* are more likely to appear. Seldom would severely handicapped or deformed persons be named *mushawwahun* (deformed). This adjective is reserved for impaired fetuses still in the womb (*ajinna mushawwaha*) or for newborns who suffer severe malformation or mental retardation.[23]

Only with regard to marriage do medieval fiqh scholars speak in a generalized manner of the *'uyub* (pl. of *'ayb*, translated as impairments, defects, deformities) which interfere with the proper flow of marital life. These are meticulously listed in the legal literature, and can befall the husband, the wife, or both. Separate chapters in almost all the fiqh compilations are allotted to these '*uyub*, adjacent to the chapters on marriage and divorce.

The *'uyub* there are discussed at length, because they are considered impediments to the contracting, consummation, or maintaining of a healthy marriage. I elaborate on these *'uyub* later in this book, in a separate chapter too. To my knowledge, this is the only generalization made in medieval fiqh for several disabilities which are distinctly grouped. It is worth pointing out here that the '*uyub* that are grouped as interfering with the course of marriage differ significantly. They are of mental, sexual or dermatological origin, but they all are bundled together in one group in the legal literature. To the contemporary person, who is accustomed to classified Western medicine, wherein diseases are usually addressed according to the organs they attack, this is a completely new mode of thinking. The Western medical classification of diseases by the damaged organ is thus challenged by another perception, the Islamic legal method, which classifies at least one group of disabilities by their overall social impacts.

Another term that could be considered to some extent inclusive of a wide range of disabilities is that of the *majnun* (madman).[24] Dols perceives of the *majnun* as encompassing the insane, the mentally disordered, the mentally deficient, the mentally disturbed, the mentally deranged, the lunatic, the imbecile, and the idiot. All the above disabilities belong to the range of mental health. I will return to address the *majnun* later.

One reservation about the above observation, that no one term in Arabic covers all persons with disabilities, must be made here. It has to do with the vague term *marid* pl. *marda* (in common use it implies a sick, or ill person) and *marad* (disease). In the Qur'an the term *marid* is used many times to mark the opposite of healthy, whole, in both the physical and the mental aspects. Infidels and hypocrites, for example are described as having a disease in their hearts (Qur'an **2**,10; **8**,49; **9**,125; **22**,53; **24**,50; **33**,12,32,60; **47**,20,29; **74**,31).

In the fiqh, the *marid* is mentioned almost in every chapter of the law; occasionally *marid* appears in the titles of subdivisions of legal chapters. We find, for example, *salat al-marid* (the prayer of the *marid*), *talaq al-marid* (the repudiation of the marid), *iqrar al-marid* (the testimony of the *marid*), *sawm al-marid* (the fasting of the *marid)*, *hajj al-marid* (the pilgrimage of the *marid*), jihad *al-marid* (the holy war of the *marid*), and more.

But what exactly the semantic field of the *marid* is in the fiqh remains obscure. Questions that may be asked with regard to the import of the term "*marid*", but that for the time being remain pending, are

1. Is it a short-term illness, or a permanent, chronic illness, hence bordering on what today would qualify as "disability"?
2. Does it refer to a disease that is curable, or to a terminal disease? The latter is sometimes specifically labeled "*marad al-mawt*" ("a disease of death"), to indicate an incurable disease which destines the ill person for death, or the state of dying.
3. Is the term restricted to physical difficulties only, or does it expand to include mental and emotional problems as well?

I find it worthwhile to raise these questions, because from examining several discussions in the fiqh I have come to suspect that the term *marid* was used more in a general manner that covers both the sick and the disabled. Certain aspects of *salat al-marid*, or *hajj al-marid*, for example, acknowledge human difficulties to bend over, to sit down and to stand up straight, and to walk. As much as these phenomena may be symptoms of a bad flu or a terminal illness, they can also be manifestations of severe spinal damage, paralysis, and so forth. In such disabling circumstances *marad*, I suggest, could qualify as disability, as impairment, and even as permanent handicap. If this hypothesis is true, then *marad* is the closest one can get to suggesting, within the canonical sources of Islamic law, a general term for a wide range of disabilities.

THE ORIGINS AND REASONS FOR DISEASES AND DISABILITIES

In the Greek world, obsessed with the beauty and strength of the human body, the birth of a child with a disability was interpreted as a punishment for his or her parents' sin. The parents were then pressured to "expose" the infant (to leave it unattended, far away from the community, to meet its fate).[25]

The Roman military society tended to see in any "irregular natural phenomenon" a bad omen for an impending disaster. "Monstrous births were a sign that the 'holy covenant' with the gods was broken. Monstrous births were interpreted as the wrath of the gods."[26] There too, handicapped babies had to be exposed, although there is no evidence that if parents chose to keep a handicapped infant they were punishable by the law. This unforgiving attitude to the disadvantaged eased toward the Christian era, probably with the growing influence of more humanitarian ideas based on Judeo-Christian teachings on the sanctity of human life.

The Mishna, the first part of the Talmud, the compilation of Jewish law, completed around 200 CE, portrays disability as "part of the grand order of God's creation", so no fault is attributed to the disabled persons themselves and the disability is not a punitive measure from God. Alternatively it is suggested in the Mishna that "sin leads to disability in that faculty which committed the sin". The reciprocity is explained as "measure for measure".[27] Since it is the sin that causes the disability in the sinning faculty, all that is needed is to know what the origins of the sin are, to conclude who is to blame (man, or God, or …?). This is a topic for lengthy theological debates in all monotheistic religions, and beyond the scope of the present work, except for a short reference to what is relevant to Islam's attitude to the origins of sickness and disability, as follows below.

In several Christian writings disabilities are explained as manifestations of a battle between good and evil.[28] Other Christians interpreted disabilities as evidence of sin, and the disabled as sinners or offspring of sinners. Church officials were often involved in diagnosing mental illnesses and other disabilities. At times they proceeded to punish and isolate the disabled persons from society and from the activities of the Church. Disabled persons could not be buried in church grounds, get married, or become priests and monks.[29]

If one was born without disabilities and later developed them, this was viewed as a punishment from God. Far harder to explain by the sin/punishment pattern was a disability from birth, for how could a newborn child have sinned?! Instead, this was viewed as an example of the variations in God's creation.[30] Some explained the birth of deformed infants as due to demons that conducted sexual encounters with sleeping people.[31]

Others report that the handicapped in the Christian world were viewed as the outcome of a Satanic curse (*la'na shaytaniyya*), and therefore they were often tied to trees, locked in isolated places, or left to their fate. This remained their situation, roughly speaking, until the end of the 18th century and the introduction into the Christian world of the ideas of freedom and equality by the French revolution.[32]

By contrast, in certain Christian sources, such as the book of Ecclesiastes, old age and the disabilities that often accompany it are portrayed as a natural process of physical decay. Roger Bacon in the thirteenth century emphasized this perception.[33] In the same spirit of theology, the Christian tradition, which is based on compassion and understanding, viewed people with disabilities as "innocent victims of misfortune".[34] Consequently, the Church's role was to be their protector and benefactor. In this regard, the Church contributed to the establishment of orphanages, hospitals, and shelters for those who had no means of sustenance.

Following clashes between the Church and the state, in which the Church was weakened and lost most of its influence over society, the status of the disabled declined, and giving charity was less viewed as a meritorious act. This was roughly the situation until the 18th century.[35] On the one hand, the Church saw in the disabled the example of what sin may lead to. At the same time, it offered the disabled spiritual comfort and financial support. The latter often came from charity collected from members of the parish who wished to distance themselves from that example.[36]

A'zami, when drawing the historic border between the two major Christian approaches to the disabled in the 18th century, may have overlooked the period of the

Renaissance (15th century on), which influenced the Enlightenment of the 18th century. The Renaissance marked the change in the perception of the human body. It was filled with an increasing knowledge of the bodily functions, and it enjoyed the advantages of the being able to present that information in print. From the Renaissance on, old Church perceptions had to give way to more humanistic approaches, from which the disabled benefited as well.[37]

Some of the disabilities in the Middle Ages were caused by lengthy bloody wars that left many people disabled and limbless. This started with the Crusaders. Those who became disabled through war won more respect and public recognition. The existence of large numbers of war-handicapped impelled the advance of battle-field surgery and the erection of hospitals.

To understand the Islamic perception of the origins of disability, it is worthwhile to dwell first on the Qur'anic stand on the origins of diseases. In the Qur'an, as mentioned above, *marad* is primarily a disease attributed to the heart and manifested in disbelief. Only in Qur'an **9**,91 does *marad* denote an illness that hinders one from participating in jihad. Qur'an **24**,61 emphasizes more that the disabled should not be segregated from social interactions. Other synonymous terms for illness in Arabic, but not found in the Qur'an, are *i'tilal* and *saqm*,[38] but the adjective *saqim* (sick) is mentioned in the Qur'an twice, in **37**,89 and **37**,145. Thus *marad* is the most frequent term for illness in the Qur'an. *Marad* is the opposite of *sihha* (health, wholeness, correctness). Health is one of Allah's benevolences which he commanded his servants to preserve, and forbade them to spoil or weaken by certain foods, beverages, alcohol and excessive exertion (Qur'an **5**,90 and **7**,157 set forth these prohibitions). In fact, the whole of human existence is a journey back and forth between the two poles of health and illness, well being and suffering. The source of both good health and recovery from illness is Allah alone. But what is the source of illness?

The traditional Islamic perception of a disease is of an unnatural condition which affects certain organs in the body. This condition is not caused by the stars, bad spirits or demons, as pre-Islamic Arabs, for example, used to believe.[39]

Disease is not perceived by Muslims as an expression of Allah's wrath or as punishment from heaven either,[40] but as a test which can atone for one's sins. Health and sickness become part of the continuum of being, and prayer remains the salvation in both health and sickness.[41] A Prophetic tradition asserts "Whoever dies in any illness is a martyr".[42] This attests that an illness may have some redeeming powers, such as atoning for sins and the like. On the other hand, it is never proclaimed that the disease is predestined by Allah so that the ill Muslim has an opportunity to repent, or that the disease is a way of punishment for certain sins. Nowhere in the Qur'an, Sunna, or fiqh is a clear causality established between Allah and the onset of a disease, and/or a disability, in believers.

Based on Qur'anic teaching, Rahman concludes that "humans alone are endowed with free choice, which neither nature nor angels possess. The guidance of the Qur'an leads to both spiritual (and psychological) and physical health".[43] The Qur'an declares God's function vis-à-vis humankind to be the preservation of human integrity which disappears from both individual and collective life with the removal of God from human consciousness (Qur'an **59**,18–19). The Hadith, according to Rahman, advocates pacifism and acceptance of the status quo, and discourages

activism.[44] Sunni theology, until the Mu'tazila movement started spreading its ideology in the 8th century, Rahman continues, was that of complete determinism and denial of human will. The Shi'a, influenced by Mu'tazili ideas, maintained that there is neither total free will nor total determinism, but there is something between the two.[45] A well known hadith asserts, "God has sent down a treatment for every ailment" (*likull da' dawa'*). It was never argued, claims Rahman, that since God is the source of the disease he can also send down the proper medication. What is meant by that hadith is that once the disease is present, God can bring forth the healing.

Disease, however, does exist as part of the Divine punishment for the unbelievers. However, God's mercy and God's justice do not contradict each other on this matter, because God's mercy is conditioned by his justice. "God's forgiveness, mercy and love are strictly for those who believe in Him and act aright".[46] However, several Qur'anic verses stress that "although God is merciful, it does not mean that the defiant ones will have any share of His mercy".[47] But the door to repentance is never totally closed. So when unbelievers are afflicted with disease it must be understood as punishment for their unbelief and for never evincing any remorse over it. But when Muslims suffer a disease its source should be sought elsewhere, not in God's will.

But even with regard to the unbelievers, Islamic theology lays part of the responsibility for their affliction upon themselves. This theology finds its origins in the Qur'anic language itself. "In their heart is a disease. And God has increased their disease: and grievous is the penalty they (incur). Because they are false to themselves" (Qur'an **2**,10).[48] In his translation Ali attributes all the destructive consequences to the insincere man himself. This is in agreement with most medieval Qur'an commentators. Ibn Kathir, for example, explains the "disease" as "doubt" (*shakk*) and "hypocrisy" (*nifaq*), not as a physical disease. Man is responsible for these, and only later does Allah add to them more "diseases".[49] On the other hand, al-Zamakhshari maintains that the disease might be either a real one, meaning pain, or metaphorical (*majaz*), meaning bad thoughts, jealousy, cowardice, and tendency to sin. The verse should be understood, then, that as much as the Muslims were gaining power and conquests, these people were getting filled with hatred, jealousy, and cowardice.[50]

From Qur'an **47**,23, again, it may be suggested that Allah is responsible for the unbelievers' disability. The verse states, "Such are the men whom God has cursed for he has made them deaf and blinded their sight" (Ali 1946). But Yusuf Ali explains, attached to his translation, that due to their misbehavior God deprived them of his grace. As a result, "what they hear is as if they had not heard and what they see is as if they had not seen". Ali does not understand the verse as a physical handicap inflicted upon them, but as a metaphor. Pickthall translates the same verse quite similarly: "Such are they whom Allah curseth so that he deafeneth them and maketh blind their eyes". In this translation the handicap appears indeed to be caused by Allah, but it is uncertain whether it is real or metaphorical.

Both modern translations incorporate the traditional Islamic commentaries in the respective verses.[51] The commentaries themselves echo the theological discussions of successive generations of Islamic scholarship on whether Allah is the direct cause of disability, or if calamities befalling humans are invited by negative human behavior.

Qur'an **6**,39 reads, "Those who reject our signs are deaf and dumb in the midst of darkness". Again, Yusuf Ali explains that the man himself is responsible for the state

of being like the deaf and the dumb, since it is a person's limited free will that is responsible for his or her behavior. Al-Zamakhshari explains that the Mu'tazili scholars do not accept causality in evil; only the Sunni scholars do. Therefore, only the sinner is to blame for the outcome of his sin, not Allah.[52] Ibn Kathir tries to mediate between the two poles and explains the verse as "in their ignorance and misunderstanding they are *like* the *asamm* who does not hear, *like* the *abkam* who does not speak, and *like* the *a'ma* who does not see – so what chances do they have to walk the straight path?"[53]

In his translation of the second part of the verse, Pickthall admits causality between God's will and the disability the unbelievers incur: "Whom Allah will he sendeth astray, and whom he will he placeth on a straight path". What remains unclear from this interpretation is whether "dumbness" and "deafness" are physical or metaphorical.

In his modern commentary to Qur'an **6**,39, Shaltut, Sheikh al-Azhar in the 1950s and early 1960s, explains that man has been endowed with reason, and therefore man has free will to choose how to behave. The fact that Allah knows in advance which course his servant will choose, (only) through the latter's free will, is in itself not coercion or predestination. Indeed Allah may deprive one forever of the ability to sin or the ability to obey, but this is not his habit with humans, to whom he gave reason and sent prophets.[54] The Quran attributes the source of the disease of pious Muslims to strong emotional reactions, such as fear, tension, and worries, which ensued from organic changes in the body (**73**,17; **33**,19).

Al-'Isawi, a professor of psychology at the universities of Alexandria and Beirut, supports this attitude when he maintains that all diseases have some psychological components, just as curing diseases, both bodily and mentally, depends on certain psychological variants. This is because the human being is a whole active unit, composed of body and soul, so the soul and body both influence and are influenced by one another.[55] Spiritual strength, it is asserted, can stop a physical disorder from becoming a mental problem.[56]

Natural causes of illnesses are recognized already in the early Islamic medical compilations. Early Muslim doctors, influenced by Greek medicine, explained many medical phenomena through chemistry, the balance of the elements (humors), and climatic, nutritional and environmental grounds.[57] This did not seem to contradict the fact that an illness may have also a divine purpose, such as testing people, especially if they endured their pains with patience.

Contemporary Islamic explanations for the origins of disabilities and diseases rely mainly on scientific medical literature. Dr. Abu Ghuda (1983) of the Ministry of Awqaf and Islamic Affairs in Kuweit explains that disabilities can be caused by genetic factors, health problems and diseases, traffic accidents, and war injuries. Another such scientific account of the causes of diseases is provided by a Muslim scholar from Nigeria. This is Dr. Oyebola, head of the Department of Special Education in the Faculty of Education at the University of Ibadan, Nigeria. He explains that part of the disabilities is congenital, and part is caused by neglect (hygienic, educational, or related to malnutrition and physical abuse), poverty, and religious beliefs that reject medications and immunizations. Other disabilities are caused by accidents, poor diet and climatic factors. Other reasons may be consanguineous marriages, drug consumption,

brain damage and industrial pollution. Local influences, such as the tse-tse fly bite, which causes river blindness in Central Nigeria, can be responsible for certain disabilities as well.[58] A physician explains that bodily disorders, such as paralysis, tuberculosis, blindness and malignant tumors, are caused when a bodily organ stops its function or when its ability to function diminishes, or when bacteria cause malfunction of an organ.[59] The above studies refrain from making any religious or theological assumptions on the origins of diseases. At a conference on vocational education of disabled children, held in Cairo in 1989, it was explained that physical disability is caused by lack of medical care, by complications during pregnancy or after birth, and by disturbances to bodily mechanisms due to genetic disorders, accidents, and war. Emergence of mental disabilities is attributed to genetics, chromosomal abnormality arising with the multiplication of the fertilized ovum, malnutrition, etc. Disability in one's senses is caused by an injury in the neurological system.[60]

Dr. Munjid explains the reasons for disabilities in fetuses in the womb as mainly hereditary, or internal, as she calls them, and these may go back several generations, not necessarily originating with one's parents. Then fetal diseases can result from diseases that befall the pregnant mother such as German measles and syphilis, or from certain medications she has consumed during pregnancy. Also, exposure of the pregnant mother to radiation or her consumption of alcohol, drugs and cigarettes can lead to fetal deformations and diseases, and more.[61]

There are nevertheless two major exceptions to the above universal scientific approach to the origins of diseases. These are represented in present-day religious Islamic attitudes to AIDS on the one hand, and to disabled children born out of wedlock on the other.

With regard to AIDS, despite the well established knowledge that the disease may be transmitted through several channels,[62] that innocent people may be inflicted, and that infants may contact the disease in the uterus through no fault of their own,[63] most muftis refer to AIDS as Allah's curse on sexual deviants. AIDS is believed to be God's punishment for homosexuality and adultery.[64] Regarding AIDS, Allah is definitely the source of the disease, though the "perverts", it is claimed, have sunk into misconduct beforehand, and AIDS is the inevitable punishment. AIDS, it is emphasized, should also serve as a warning for those who contemplate committing similar sins. This was the typical approach to AIDS patients until the end of the twentieth century. Since the beginning of the present century, through a few recent fatwas on the Internet, a slight change indicating more tolerance toward AIDS patients seems to be emerging.[65]

In a scientific publication from Iran,[66] the author, either a sociologist or a psychologist, explains that ignoring the laws concerning proper sexual conduct leads to the birth of retarded children. She asserts that there is no harsher punishment for parents than to raise a handicapped or retarded child,[67] but she is confident that they have "earned" this punishment for introducing a miserable child into society. The Qur'an, she claims, in chapter **17**,22 prohibits adultery, and those who do not follow this instruction risk giving birth to retarded children, and may even suffer mental problems themselves. The parents' genes are influenced by their emotions, thoughts, moods and actions, she continues,[68] so immoral behavior is bound to affect the fetus. She is adamant in her conclusion that extra-marital sex causes tensions, which

although unnoticed, affect the genes and bring about the birth of retarded children. Hijazi clearly sees causality between the parents' misconduct and their offspring's disability, and regards this outcome as a punishment from Allah.[69] Interestingly, she blames the religious leaders and society at large for not creating the proper atmosphere and setting the right example for licit sexual conduct, thus letting some people fall into adultery. Still, Francesca (2002) has noted that some leniency on the part of religious leaders toward HIV-positive people can already be detected in South Africa, Indonesia and Senegal, though not yet in Arab or Islamic Middle Eastern countries.

Aside from the two exceptions noted above, both related to sexual promiscuity, if we attempt to assess attitudes to those who happen to be sick, temporarily or permanently, we find that already in the Qur'an Allah grants them exemptions from or alleviations (*rukhsa pl. rukhas*)[70] in the religious duties that healthy Muslims are expected to perform. This may teach us that the state of being sick is as natural as the state of being healthy. The law addresses both states in conjunction, and often in the same sequence of verses. The overall perception is that one is sometimes well and at other times sick, but the belief in Allah and his *tawhid* (unity) is pre-eminent in both. The religious duties are essentially due and accepted from both the healthy and the sick, with the understanding that the sick may face hardship in fulfilling them. Therefore, attached to the ordinances of the law, not only in the Qur'an but also in the Sunna and the fiqh, are mentioned the alleviations (*rukhsa pl. rukhas*). These alleviations detail in what way disabled people should perform the commandments, or when they may consider themselves exempt. In a separate chapter I elaborate on the disabled as regards religious duties.

Since disease and disability of devout Muslims are not viewed as punishment for sins, and the situation of being sick is tolerated and accepted with the understanding that it is but natural, my next question would be whether this has any impact on the attitudes to them of "healthy" Muslims in society.

THE STATUS OF DISABLED PERSONS IN SOCIETY: A STUDY OF HUMAN RIGHTS

Social studies on disability emphasize that being disabled is a relative condition. Covey maintains, "culture plays an important role in defining, interpreting, and evaluating disabilities … A disability has a social character because culture and society define, and in some cases impair or impede people with disabilities from accomplishing their goals and objectives".[71] As a result of an accident some of us might find it hard to walk, to talk or to get dressed. Are we disabled? Are we not? Many people have some permanent limitation of one sort or another. Are they disabled? Thus it is appropriate to ask in what way "the disabled" are more disabled than the "healthy".[72] Are we more tolerant of the disabled in light of the fact that we are as vulnerable as they, and the occurrence of disability is a likelihood at any moment?

In his *A History of Disability*, Henry-Jacques Stiker [73] says of the disabled, "they are the tear in our being that reveals its open-endedness, its incompleteness, its

precariousness … They are the thorn in the side of the social group that prevents the folly of certainty and of identification with a single model. There is no mistaking it: the folly of the fit is exposed by the Down's syndrome child, the woman without arms, the worker in a wheelchair". If disability is indeed an "anomaly" to a norm,[74] the question is how a particular society treats its disabled. I agree with Stiker, that "whatever its effective empirical conduct, a society reveals just as much about itself by the way it speaks of a phenomenon".[75]

Judith Z. Abrams studies Jewish attitudes to disability in her *Judaism and Disability*, from the Bible through the Babylonian Talmud. She learned that the human body in Jewish sources is often used as a "metaphor for society and its values and beliefs".[76] If a person or a group of people fail to match the "standard metaphorical scheme", she set out to discover in her book whether these people "become incorporated or fail to be incorporated into that society". She too agrees that "culturally determined attitudes toward illness and disabilities are manifest in all cultures, and they can readily be seen in Jewish and non-Jewish sources".[77] She discerns that certain changes in the behavior of some disabled people, observed over time, due to the advancement of medicine and technology, made certain categories of disabled irrelevant. She refers to the invention of the Braille script to aid the blind and of advanced hearing aids to assist the deaf.[78] There are many more examples of such advances, which she does not describe, but which make this change, "the incorporation", possible.

Robert Garland, in *The Eye of the Beholder: Deformity and Disability in the Graeco Roman World*,[79] claims that no society has existed that did not discriminate against its deformed and disabled in some manner. He also predicts that abnormality will always draw our attention despite our acceptance of the "marginalized", since "prejudice is still very much alive today". He too attributes the various attitudes to "the different anomalies"[80] to cultural differences. According to his observation, no culture would ignore these "anomalies" altogether. Although he detected some profound differences between the Romans' and the Greeks' attitudes to their respective disabled, in both societies they were isolated, or made a mockery of, or killed, with or without physical abuse, or confined away from public sight. Certain deformations were reported to be of ethnic origin, and his research revealed that "the variety of monstrous races is extensive".[81] The Greeks are said to be those who initiated the idea of "stigma", which was at that time a physical mark intended to show that the person had something wrong and abnormal in his or her moral status. A slave, a criminal, and a traitor, for example, were tattooed so that the public would be apprised of their "faults" and would keep away from them at public events.[82]

In his *Social Perspectives of People with Disabilities in History*, Herbert C. Covey surveys a variety of known social attitudes to people with disabilities, including their being considered the following:

(1) "Subhuman": for example, based on the belief that speech (and reason) was what separated humans from animals, the deaf were likened to animals. People with leprosy in the Middle Ages were thought of more as animal than human. People with developmental disabilities were also deemed less than complete humans. Consequently, they were left untreated, sometimes exposed

to the elements, outside the family dwellings, since animals were believed to need less care and to be better enduring than humans to climatic hardships.[83]

(2) Specifically gifted and rewarded by nature, biology, or God, with added sensory powers, abilities, musical talents, foresight, etc. Insanity, for example, was linked to creativity. There is some modern evidence that some of the best works of art are created as a result of dramatic shifts from depression to manic states of mind.[84] Al-Sha'rawi, a famous 20th century Muslim scholar, also referred to the retarded and insane as "*hibat Allah*" (God's gift), and attributed rare and exceptional qualities to them, which healthy people do not often enjoy.[85]

(3) Evil: crippled individuals were portrayed as demonic. Shakespeare's Richard the Third is also described as a disabled person with an evil personality. In reality, the king was not disabled at all, but was depicted as such because in the public perception the crippled body meant that the person was of evil character. Shakespeare chose to portray the king thus, as one way of being "politically correct".[86]

(4) Deserving of pity and charity: in art it is often shown that people with disabilities are offered charity, or are begging for their necessities.

(5) Scapegoats: societies have blamed the disabled for droughts, wars, diseases, unexplained deaths, etc. The disabled were an easy target for such accusations, as they were hardly able to defend themselves.[87]

(6) Entertaining: shows featuring the insane or people with physical deformities were part of the common entertainment. Owners of asylums used to display their patients for a fee.[88] The exhibition of people increased in popularity from the 16th century, and reached its peak between 1850 and 1900. Especially in demand were microcephalic Africans, who were believed to embody the "missing link" between the apes and the human.[89]

(7) Child-like: this characterization especially suited the mentally retarded and those with developmental disabilities. This led to their being treated in a condescending and patronizing way.[90]

(8) Sinners and criminals: they were doomed and damned.

(9) Sexually hyperactive: restrictions on their movements and social interactions were applied.[91]

Regardless of the exact perception of the disabled in a particular society at a given time-period, all the above perceptions aimed to differentiate them from non-disabled people.[92]

It might be convenient, although it is not true, to think that abuse and discrimination of disabled persons were part of a dark past that exists no more. Marks has observed[93] that "disabled people share much with those who experience other oppressive forms of discrimination". Class or financial access to technical aids, she explains, may help overcome social barriers, and racial affiliation may also have an impact on the social status of a particular disabled person. Age may change the status of an individual, as children are often over-protected and sheltered from "healthy" society by an adult's decision. This is sometimes true of the elderly too. Disabled

people may be institutionalized for their own protection and thus be denied the opportunity to make decisions about their own fate. Gender is also likely to affect one's social status. Women are perceived as weak, vulnerable, and in need of protection, and men are viewed as strong and independent. The disabled are thus often associated with "womanly vulnerability", they are denied the role of a nurturer, especially if they themselves are seen to be in need of assistance. Disabled people are often believed to be asexual. All these forms of discrimination, according to Marks, lead to setting the social hierarchy of power and status. Those who are placed low on the scale are afforded less autonomy over their lives, are less respected, and are more controlled by others. These forms of discrimination are shared by several groups and are not exclusive to the disabled, but are inseparable from the experience of disabled people.

In a recent article Jones (2001) reports on laws that are still being passed in modern states such as Germany, for example, requiring people with disabilities in a community home or holiday resorts to remain indoors except during specific hours. This is so as not to spoil the vacation of their neighbors, or cause a fall in the prices that owners can charge for holiday accommodation on account of the presence of disabled persons who may be encountered on the premises.

An article published in the United Kingdom in 2000 is titled "Abused and disabled people: Vulnerability or social difference".[94] The author examines whether "the forms of abuse experienced by disabled people result from an individual vulnerability, or as a consequence of social attitudes toward disabled people". First she proves that disabled people are indeed abused and discriminated against in the modern Western world. But she concludes her article with the statement, "many survivors of abuse have problems because they need justice not therapy". The issue of the disabled, and their social discrimination, according to Calderbank, should be treated as one of civil rights. What she actually means is that the problem will be solved only with new legislation. Hence, as much as the status of the disabled is a topic for social research, it is nowadays also a legal topic within the human rights discourse.

The Universal Declaration of Human Rights (UDHR) of 1948, and the International Covenant of Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both of 1976, are considered by the United Nations as the International Bill of Rights.[95] The parts that have specific relevance for disabled persons, are the following:

Article 7 of the UDHR states that all are equal before the law and are entitled to equal protection against discrimination.
Article 23 speaks of an equal right to work and to be protected against unemployment.
Article 26 of UDHR and article 13 of ICESCR assert one's right to education.
Article 13 maintains the right to freedom of movement and residence.
Article 25 asserts the right to an adequate standard of living.
Article 16 protects the right to marry and establish a family.[96]

This is only a sketch of the human rights that pertain to disabled persons in particular, in light of their apparent discrimination. But all human rights pertain to disabled persons, as "they are human beings, and humans have rights".[97]

The Declaration on the Rights of Disabled Persons, proclaimed by the General Assembly of the United Nations on 9 December 1975, states, "human beings have worth just because they are human beings and not by virtue of their capacities".[98]

The Universal Islamic Declaration of Human Rights (UIDHR), issued in Paris on September 19, 1980, although using Islamic terminology, attributing authority to Allah and pledging loyalty to the Prophet Muhammad, guarantees the very same human rights as the UDHR.[99] The difference is that in Islam one is entitled to rights only if prior to claiming them one has fulfilled certain required duties.[100] But in content, most Muslims who well understand their religion accept the UDHR declaration.[101] As the preservation of human dignity (*karama*) is emphasized in both the Qur'an and Hadith, and is the goal of the UIDHR, there is no discrepancy between the Islamic and Universal declarations on human rights.[102] A similar claim is made by Ann Elizabeth Mayer.[103] She states, "the use of international rights standards as norms in critical examinations of Islamic human rights schemes and restrictions on human rights imposed by governments in the Muslim world does not necessarily reflect a racist assumption of Western superiority".

When Fu'ad A'zami writes on the handicapped in the UAE (1989) he refers to "rights issued by International and UN based agencies". Apparently he finds the International platform sufficient.

Traditional Islamic approaches to human rights contest their universality. In one such traditional approach the Islamic human rights system, as embodied by the pillar of *zakat* (duty of charity, almsgiving), is praised and highly valued, since it "equals, if not surpasses, any human rights theory developed in the West today".[104] Whether one agrees or not this position definitely opens the door to scholarly comparisons. For me it is an invitation to subject the fiqh data and modern fatwas pertaining to the disabled to evaluation also for their sensitivity to human rights, overtly or implicitly. Secular legislations of nations all over the world have been subject to similar evaluations for several decades.

BETWEEN LAW AND SOCIETY

The law with all its rulings, and the legal institutions which are founded to produce justice based on the law in any given society, are bound to be products of its social structure and cultural features. The legal product is thus influenced by the beliefs, rituals and customs that are cherished and practiced by members of that society.

The interdependency of social and legal norms has been demonstrated by many scholars, and with regard to various societies, including Islamic.

In one modern rather secular and cultural assessment of the sources and nature of the law – any law – Paul W. Kahn claims that "we have to remember that the rule of law is neither a matter of revealed truth nor of natural order. It is a way of organizing a society under a set of beliefs that are constitutive of the identity of the community and of its individual members. It is a way of understanding the unity of the community through time, and of the self as bearer of that history".[105] Elsewhere he maintains that "A social practice is not merely a set of prescribed actions. More importantly it

is the way of understanding self and others that makes these actions meaningful. We cannot separate action and belief when describing a social practice. Every action rests on some set of beliefs, every belief makes possible a range of actions".[106] Moreover, "Law creates a single identity in what would otherwise be a changing community, or communities, through time … Law thus points backwards and forwards at once".[107]

Devout Muslims would find it difficult to accept that Islamic law is not a "revealed truth", at least regarding the part of the Qur'an, Sunna and consensus, in setting the boundaries of the law. Others would stretch "Divine" inspiration to characterize the Shari'a too, as it is an ideal expression of the Divine will. For other scholars, the fiqh as well as modern "Islamic" legislation have been formulated by jurists (*ulama'*), and nothing is divine about them. The *ulama'*, they maintain, would like to pose as "the spokespeople for the Divine law", but they are not. They themselves create the ideas that they promote and interpret.[108] And even if viewed only as interpreters of Divine sources, they arrogate power to themselves, more than caring for the good of the community. According to Moosa, "the act of interpretation is an act of power (politics) in itself".[109]

Later developments in Islamic law, and the introduction of elements such as *maslaha* (public benefit), *'urf* (local custom) and fatwas (legal responsa), would better match Kahn's description of the law as projecting both backwards and forwards. Moosa, in reference to the law as a portrayal of an existing reality, shows that the law projects backwards. "Historically speaking, the general purpose of legal theory was not so much to generate new laws as it was to provide a post-hoc rationalization and justification for the legal practices that were already in circulation in the post-prophetic period".[110] A similar process was well described by Al-Azmeh.

> The science of legal theory, *usul al-fiqh* (the roots of law), was a retrospective construct which was designed from the time of Shafi'i, and with increasing theoretical refinement, to control the corpus of the detailed points of law that emerged from the Medinan, Iraqi, Syrian and other legal traditions, and to endow them with a theoretical coherence that would confer a Shar'i quality upon them. Indications are that *usul al-fiqh* was a manner of systematizing positive law that had already been arrived at largely as a result of local and other needs without necessary recourse to the *usul*.[111]

All this renders the study of the law a promising source of information for social realities in the relevant periods in time, since law and society are intertwined. This has already been done for many societies. Lawrence Rosen (1981) learned about Moroccan society by attending the court sessions of a qadi; Baber Johansen in "The valorization of the human body" (1996) described the correlation between social traditional and tribal commercial norms of exchange and how they were transformed into the laws of marriage and laws of purchase/sale of slaves. He used Hanafi medieval fiqh as his research material.

Many scholars have read into the Ottoman court records (*sijill*) to learn of aspects of social life in the Ottoman Empire. Others have researched the Maliki court records of Muslim Spain and North Africa to learn about daily life in those respective societies, and so on.

Can we learn about attitudes to the disabled from reading the law? My answer is unequivocally in the affirmative. In a 1988 book on disability Liachowitz maintains that "much of the inability to function that characterizes physically impaired people is

an outcome of political and social decisions rather than medical limitations.[112] The author argues that "disability is a result of the various social constructions that force handicapped individuals into a position of deviance".[113] She reaches her conclusions after examining modern American legislation, mainly, but not exclusively, that of the state of Pennsylvania. She also quotes Thomas Szasz, who asserts that those with power to label people "ill" gain power over people's lives, and by doing so they not only relieve the "ill" of responsibility for their actions, but also relieve society of the necessity to fully value them.[114] She concludes her book by stating that social policies help to create disability, and social policies can help to erase it.[115] In her opinion, the law is largely responsible for the social reality. Any social change is bound to start with legal reform. Contrary to Kahn's perception of mutuality between the law and the social reality, Liachowitz blames and credits the law alone for what the social reality is.

Hubertu Stroebel, vice-president for Europe of Rehabilitation International, in his opening remarks at the International Conference on Rehabilitation of Disabled Children held in Tallinn, Estonia, on 12–26 August 1989, asserted that "society's humanity can be judged by its attitude towards those citizens who are disabled or threatened by disability".[116] It is the duty of every social state based on the rule of law to create "a comprehensive legal basis which enables disabled individuals to assert their rights".[117] Once again we see that the finger points to state laws as being responsible for determining the status of the disabled in the society that abides by these laws and provides the atmosphere for their legislation.

True, it may be argued that not all existing laws are implemented and activated, so the fact that a law exists in the codices does not unfold the full social picture. By the same rationale, laws concerning the disabled may not portray the whole truth of their social reality. I would agree, but would add that the law as legislated, bound by time and place, is at least indicative of major social concerns, focuses and social vision.

This brings me back to the attempt to trace Islamic social attitudes to the disabled from various sources of Islamic legal scholarship.

CLASSIFICATION OF DISABILITIES

Several keys are used to classify disabilities: according to the duration of the problem, they may be classified as temporary, permanent, and intermittent (recurring on and off, such as epilepsy).[118]

The International World Health Organization classified disabilities according to the difficulties they create for their bearers: in behavior, in communication, in taking care of oneself, and in movement.[119]

Modern theories classify disabilities according to what caused them:

a. Congenital malformation: this is responsible for 25% of the congenital defects, and it originates with the father or the mother.
b. Genetic mutation: this is caused by radiation, medication, viral inflammations and malnutrition, and is the cause of 10% of all congenital defects.
c. Chromosomal aberration: this occurs on fertilization, and it is responsible for 15–28% of inborn defects.
d. Teratogenic agency.[120]

Marx writes that until the nineteenth century Rabbinic sources categorized disabilities in three groups: seeing disabled, hearing disabled, and mentally disabled.[121]

In this book I have chosen to analyze attitudes to groups of disabled persons according to the fields of law wherein they are addressed in the fiqh. The chapters are constructed as follows:

1. Disabilities that interfere with the optimal fulfillment of the five pillars of Islam, the essential duties that guide the relationship between man and God.
2. Disabilities that interfere with the duty to participate in jihad.
3. Disabilities that interfere with marriage, a major social institution.
4. Hermaphrodites, who usually occupy a chapter of their own in the fiqh.
5. Disabilities that are intentionally caused by the legal authorities to a person as part of administering criminal justice (*hudud*, *qisas*), and unintentionally caused disabilities that entail a monetary compensation to the victim (*diyat*).

Naturally not all existing disabilities known to medicine, and not all those recognized as "disabilities" by social welfare services and contemporary legislation, will be addressed in the following chapters. The book does not aim to serve as a manual on disabilities, but to present the main attitudes to people with disabilities as expressed through Islamic law past and present. Although Islamic law has its offshoots in areas such as South-East Asia, Africa, and more, and legal activity conducted by Muslims in those places undoubtedly deserves study, the primary literature for this book was compiled by authors and jurists from the Middle East. Since the fruits of Islamic legal activity harvested in the "Middle East" have often been imported and consumed by communities of Muslims outside the region as well, I believe that the present book conveys the main attitudes in Islamic law to people with disabilities wherever that law is followed.

1

PEOPLE WITH DISABILITIES AND THE PERFORMANCE OF RELIGIOUS DUTIES

The religious duties which a Muslim is expected to fulfill outnumber the well known "five pillars" of Islam. But to be concise, here I survey Islamic legal attitudes to people with disabilities only with regard to the daily prayers, the fast of Ramadan, the Hajj, and almsgiving, four of the five pillars of Islam. I assume that the reasoning behind these attitudes and the social concerns they reflect recur in most of the duties incumbent upon a Muslim, even if not covered here.

The major prerequisite for the validity of most of the religious engagements is that the believer maintains a state of purity and cleanliness, *tahara*.

TAHARA (CLEANLINESS, PURITY)

According to Qur'an **5**, 6, the human body should be kept in a state of cleanliness at all possible times, especially in order to be ready for prayer (or other religious duties). Extra cleansing should take place after ejaculation, menstruation, sexual intercourse and bodily discharges. All religious rituals have to be performed in a state of purity, which is normally achieved if preceded by acts of self-purification with water, called *wudu*' (partial ablution) or *ghusl* (washing of the whole body), or otherwise *tayammum* (purifying oneself with sand in stead of water).

Al-Ghazali, the Shafi'i jurist turned Sufi who died in 1111,[122] quotes several prophetic hadiths which encourage purity: "Religion is based on cleanliness"; "The key for prayer is purity"; "Purity is one half of the belief", and two Qur'anic verses in which it is recommended to keep pure because "Allah loveth the purifiers" (**9**, 108) (Pickthall) and "He would purify you and would perfect His grace upon you, that ye may give thanks" (**5**, 6) (Pickthall).

Al-Ghazali, loyal to his typical Sufi and didactic method of teaching, recognizes four stages of purification, each of which can be achieved by a different series of efforts and training. The fourth and most profound stage that he mentions is the hardest to fulfill and not expected of the lay believer. Al-Ghazali, however, concurs with

non-Sufi jurists that the first stage is the physical purity of one's organs, and this is required of every Muslim who intends to perform any religious duty. The most common means for physical purity is water, used in the *wudu*' or the *ghusl*.

People who suffer from certain ailments or disabilities could face difficulty in applying the regular methods of ablution. They will be able to perform the duties only if provided with alleviations and alternative methods of purification. I will elaborate on this point below.

Sanity is a prerequisite for the performance of *wudu*' and *ghusl*, as it is for all other religious duties. The insane (*majnun*), the epileptic (*masru'*), the mentally deficient (*ma'tuh*) and the unconscious (*maghmiyy 'alayhi*) are not liable for the performance of any religious duty. This means that as long as their disability persists, even if they have performed a duty they will win no religious merit for it. By the same logic, if they attempt a *wudu*' the duty performed following that *wudu*' is not counted as valid.

Only the Hanafis diverge on this issue and explain that the *ma'tuh*, being a harmless person who lacks reason, whose speech is confused, and whose actions are wrong, indeed does not have to perform *wudu*'. But if he has performed *wudu*' the duty fulfilled following it is considered valid, similarly to the ruling with regard to children.[123]

Wudu' involves washing one's hands to the elbows, one's face, and one's feet to above the ankles, and wiping one's head with wet hands. It has to be performed with the proper intention (*niya*). Once performed, there are certain elements that may violate the state of purity. These elements are urine, feces, bad odor emanating from the rectum or urinary tract, and blood.[124] More violations to the state of purity are anything that comes out of the body, such as pus from abscesses (*qayh kharaja min al-dummal*) and bleeding from wounds. The Hanbalis claim that anything that comes out of the body, in addition to what emerges from the rectum or the urethra, will break the state of purity if quantitatively large. What is "large" or "little", though, is to be determined in consideration of the weight and the body strength of each individual. A lot of bleeding from a skinny person's body may be violating the *wudu*', but will not influence the state of *wudu*' of a big heavy person.[125]

Another definition for what breaks the state of purity is "anything that comes out from the *sabilayn* (two openings)", referring to the rectum and the urinary tract. Added to this are vomiting (*qayh*) if it fills the mouth and blood if still flowing. Going through phases of loss of consciousness, fainting, and *junun* also require a repeated ablution.[126]

If one of the "two openings" is blocked, and another is created for discharges, that new opening should likewise be kept clean for ritual purposes.[127]

Losing mental coherence (*zawal al-'aql*) is considered as ruining the state of purity following a *wudu*'. The explanation given is that the mad man or woman may supposedly ejaculate or climax while insane, therefore after recovery he or she is advised (*mustahabb*) to perform *ghusl* as precaution.[128]

One of the major problems in maintaining purity, which has been known since early Islamic legal discussions, has to do with urine incontinence (*salas al-bawl*). One of the solutions to those so disabled is "to pray as it is" (*yusalli kadhalika*). This means that the person who suffers from this problem should pray normally, regardless of

what happens after ablution. Other options are to repeat the ablution after each prayer,[129] or to combine several prayers under one *wudu*'.[130]

Another source advises people who suffer from urine incontinence (*salas al-bawl*) and relaxedness of the testicles (*istirkha' al-unthayayn*) to wash themselves in readiness for each prayer. A female should close off her vagina with a ring or a thong (something done to mules too); a male should insert a piece of cotton (*qutna*) into the outer opening of the urethra (*ihlil*), and seal the cotton with a bandage or a band (*'isaba*). Then, if urine still escapes, the person should remove the cotton, wash it, and reinsert it for the next prayer.[131] The Shi'i Ayatollah al-Ha'iri[132] names these disabled people *maslus* (one with incontinence of urine) and *mabtun* (one with incontinence of fecal excretion). He advises the *maslus* to insert his penis into a plastic pouch or other waterproof material so that the urine does not touch the body or the clothes during prayer. He also recommends that this pouch contain also a wad of cotton for absorption. The *mabtun* is encouraged to use a *tashfir* (a sort of diaper).

Occasional loss of control of the urinary discharge is a major concern of elderly people, who fear that they can never be pure enough to perform duties such as ritual ablution, prayer, etc. In one recent fatwa it was recommended that a person with urine incontinence knot a bandage (ribat) on his penis right after ablution, pray, and then release the knot. That way, no urine will be discharged during prayer. If the urinary organs are totally beyond control, the person may pray as best he or she can, and the prayer will be valid regardless of the discharge.[133] A similar recommendation was given to the amnesic: "He should do whatever he can" (*falya'mal ma yastati'u*).[134]

Included in the same group of *salas al-bawl* are constant diarrhea or intestinal diseases (*marad al-am'a*') such as dysentery. The rule seems to be that who suffer from these illnesses should first seek medical treatment and then use any means they can to stop the flow of urine or feces, at least temporarily. If this does not help, they should go on with the religious duty. The *wudu*' which they previously performed is considered valid, regardless of what may escape the body afterwards.[135]

Water is a major element in the purification processes of both *wudu*' and *ghusl*. If a person cannot use water, for whatever reason, including having a wound or a disease that water may harm, rubbing the particular organs with sand or soil in a symbolic manner (*tayammum*) is the recommended alternative.[136]

The Maliki jurist Ibn Rushd was asked about the legitimacy of combining two methods of ablution, namely rubbing the turban (*al-mash 'ala al-'imama*) instead of wiping the head, due to a disease on it, but washing the rest of the body. He advised that one method only be applied, *tayammum*, for both the head and the body.[137] The Shafi'i al-Shirazi records another option prevalent among Shafi'is, and this was to purify the wound with sand (*tayammum*) and the rest of the body with water.[138]

In 1996 mufti 'Atiyya Saqr gave a fatwa in which he asserted that if a person who is paralyzed can find a helper to bring him or her water for ablution, he or she should perform *wudu*'. If, however, there is no help available for the paralyzed, they may resort to *tayammum*.

For the purpose of *wudu*', if one has two fingers connected, and they cannot be separated, they are treated in ablution as one finger.[139] Wounds should not be washed from the inside unless there is still bleeding, a case which requires *ghusl* (a complete wash).[140]

A superfluous foot (*qadam za'ida*) is treated exactly like a superfluous hand. Neither is subject to *mash* (wiping with water). The same is true also for any superfluous skin or flesh at the location which is subject to *mash:* no *mash* is in order. However, if the additional skin or flesh is believed to be part of the original organ, or if it is dubious whether it is original or a later addition, then the piece of flesh should be wiped together with the organ, as a measure of precaution.[141]

TAYAMMUM

The foundation of the permission to use sand or soil for purification, *tayammum*, can be found in Qur'an **4**, 43; **5**, 6 and **2**, 267. The fiqh literature elaborates on the types of soil that may be used and how to use it in place of *wudu*' or *ghusl*.[142] The use of *tayammum* is mandatory whenever a sickness or a disability prevents the use of water, or whenever the use of water might increase the illness and slow recovery from an illness, even though there is no fear that the use of water will cause death.[143]

If a person has one or both hands amputated, he or she is exempt from performing *tayammum* on the hands, but not from *tayammum* of the other organs subject to ablution.[144] This is similar to the requirement of *wudu*' when a person is missing a hand so that there is no organ to wash. Such a person is exempt from purifying this hand, but is advised (*mustahabb*)[145] that he or she put water on the remaining part of the arm so that the organ is not unpurified.[146]

If someone is missing a foot or a part of the foot (*qadam*), the part which is supposed to be wiped (*mash*) for ablution, he or she still has to wipe the place of the amputation or whatever is left of the heel, but does not have to resort to *tayammum*. If the heel or what is above it is amputated, it is recommended, but not mandatory, to wipe the place of amputation.[147]

Another issue that interferes with normal ablution with water is the existence of broken bones held with a *jabira* (splint). These may be boards and pieces of cloth bound to a broken bone, a cloth which is wound tightly around a painful organ, or an ointment spread over a broken or bruised organ or applied to ease rheumatic pains.[148] Several stipulations may differently influence the rulings on this issue. If the cast can be removed, the organ should be washed under the *jabira*. If not, it is enough to wipe over the cast. Others claim that it is sufficient to wash around the *jabira*, but consensus holds that the *jabira* itself should be wiped with water.[149]

If wiping the *ribat* (bandage or splint) is painful, the *ribat* should be covered with a clean piece of cloth, and the latter should be wiped (*mash*). The Shafi'is require that when *ghusl* is in order, all the healthy organs must be washed with water, and the part with the *jabira* be purified with soil or sand (*tayammum*).

The Hanafis, unlike the Malikis and Hanbalis, maintain that whoever cannot perform *tayammum* or a ritual *mash* (with water) on an open wound should not touch the wound, yet may pray and their prayer is valid, provided that after recovery they repeat that prayer. Even if they do not repeat it they deserve no punishment. The Malikis and Hanbalis rule that in the absence of some sort of purifying method the prayer is invalid.[150] Others claim that if a cast, or even only a bandage, is placed on an organ *tayammum* should be applied.[151]

SALAT (PRAYER)

Many verses in the Qur'an encourage the performance of prayer in conjunction with giving charity or fasting. For example, Qur'an **2**, 43 reads, "Establish worship [*salat*], pay the poor-due [*zakat*] and bow your heads with those who bow (in worship)". Qur'an **8**, 3 reads, "who establish worship and spend of what We have bestowed on them". Qur'an **23**, 9–11 reads, "… And who pay heed to their prayers. These are the heirs who will inherit Paradise. There they will abide". Qur'an **2**, 45 reads, "Seek help in patience and prayer; and truly it is hard save for the humble- minded" (Pickthall).

The number of the daily prayers (services) required by the Sunna is five, while the Qur'an speaks of prayers in the plural, but specifically names in **2**, 238 only an "intermediate prayer" (*al-salat al-wusta*). "Be guardians of your prayers, and of the midmost prayer". Al-Rawandi[152] and others explain that interpretations to Qur'an **30**, 17 by the Companions of the Prophet Muhammad show that the Qur'an speaks of five daily prayers. Qur'an **4**, 103 asserts that prayer is a duty connected to certain times of the day, but it is not limited to a particular posture of the human body. The believer may pray standing or sitting, or even reclining.

From the Sunna we learn that the Islamic prayers, whether performed individually or in a group (*jama'a*), whether the daily or the more solemn Friday and holidays prayers, whether optional or obligatory, are composed of a varying number of *rak'a*s (repetitive series of body movements and oral recitations), and must be conducted in a state of physical purity, as explained above in the section on *tahara*. This is one injunction wherein the sick and disabled may encounter hardship in performing prayers. Another difficulty may arise from the physical component of the *rak'as*, the stages of standing, bending over, kneeling and prostration, and proceeding from one to the next.

The ruling with regard to prayer is that anyone who is Muslim, sane, and mature, is obliged to pray, or make up with prayer at a later date for the missed prayers (*qada*').[153] According to another Shi'i jurist, a man who testified that he had been sick for four months, and therefore could not pray, was told that he need not repeat the missed prayers, because "*al-marid laysa kal-sahih*" (the sick person is not like the healthy one).[154] In other words, the requirements from each regarding the religious duties are different. But generally, the Shi'i jurists require that the sick pray similarly to the healthy, as long as they are sane. The Hanafis too exempt the unconscious and the insane from praying, if their health condition exceeds five prayer occasions. If it lasts less than that, and the person regains consciousness or sanity, he or she has to make up for the missed prayers. The Hanbalis require the belated completion of a prayer if *junun* (insanity) and *ighma*' (unconsciousness) occurred after the beginning of that service or just before its ending time.[155]

Indeed the posture of the sick while praying may vary. Qur'an **3**, 191, "Such as remember Allah, standing, sitting and reclining, and consider the creation of the heavens and the earth", has been explained as a license to perform prayer differently from the prescribed manner. If standing, sitting, and reclining are impossible, one should pray through nodding (*mumiyan*). One should start prayer by reciting "Allah Akbar" and reciting from the Qur'an. Then, instead of *ruku'* (kneeling), one should

close one's eyes. Instead of raising the head, one should open one's eyes, and instead of prostrating (*sujud*), one should close both eyes; instead of raising the head, one opens the eyes, and instead of the second prostration one closes the eyes again. Instead of raising the head again, the eyes should be reopened. In this manner the worshiper can complete the prayer. When good health and strength are regained, one should resume prayer as close as possible to the prescribed formula. This is based on Qur'an **4**, 103: "and when ye are in safety, observe proper worship".[156] With regard to the technicalities of the prayer of the disabled, the Hanafis rely on *salat al-marid* (the prayer of the sick), as mentioned in a tradition related by 'Ali: "The sick will pray standing, and if unable to do so, then sitting, and if unable to prostrate, they should nod the head and render the [sign of] prostration lower (deeper) than [that of] the kneeling".[157]

If one can stand, one ought to. If one cannot stand by oneself, but can if leaning against a wall or on a crutch or iron stick ('*ukkaz*), one should do so. Those unable to pray standing should pray sitting. If unable to prostrate themselves or kneel, they should pray from a sitting position. If unable to sit, one may lie on the right side of the body, and if unable to prostrate oneself from this position, one may make a sign with the head. If unable to lie on the side, one may lie supine and pray moving the head, then continue the *ruku*' and *sujud* by closing the eyes then opening them; closed eyes mark the beginning of the movement, and reopened eyes mark its end.[158]

The public Friday prayer, according to Shi'i jurists, is required of anyone who fulfills the following criteria: he is male, mature, *sane*, free, *healthy, not blind, not lame, not an old man who hardly moves about*, and not a traveler; and the distance from his residence to the Friday mosque does not exceed two *farsakh* (1 farsakh equals three miles).[159] Half the exceptions to the rule thus allude to people with disabilities, who consequently are not required to attend the Friday prayer in a mosque. But they are not totally exempt from prayer, since they are still expected to pray in their own places.

The duty to attend a prayer service in the mosque is waived on account of fear, unsafe roads, or sickness. As for health, one may omit going to the mosque if the effort to get there may jeopardize one's health, or when one is taking care of a sick relative, who might otherwise die. Justification for this is, "the preservation of a human being is preferable to the preservation of the public prayer" (*hifz al-adami afdal min hifz al-jama'a*).[160]

In a recent fatwa issued by the present Sheikh al-Azhar, Dr. Muhammad Sayyid Tantawi, he adopted a suggestion by the Egyptian Organization to Overcome Disability. During the Friday sermon (*khutba*) in the mosques, an interpreter in sign language (*ishara*) should sign the content of the *khutba* and the meaning of the Qur'anic verses for the benefit of the deaf and the dumb. Tantawi justified his permission with the argument that these disabled people should not be left uninformed and uneducated. Since there are about 25 million deaf and dumb Muslims in the world, two millions of them in Egypt alone, they cannot be ignored. This ruling by Tantawi replaced an earlier prohibition of signing for the deaf during the *khutba*. That prohibition drew on the fact that the interpreter's presence beside the *khatib* (the one giving the sermon) distracted the healthy praying people from concentrating on the sermon. The first exemplary signed sermon, based on Tantawi's fatwa, was given in Cairo, on June 30, 2000, in the mosque of al-Sayyida Zaynab. The experiment was a

success, and the deaf and dumb who were present reported an exuberant sensation of being able for the first time in their lives to understand the meaning of the *khutba*, contrary to just sitting there in complete ignorance.[161]

Prayer is valid if the worshiper faces Mecca (*istiqbal al-qibla*). Exempt from praying facing Mecca are the sick and those who have no one to direct them towards Mecca such as the blind. These should pray in any way they can, and their prayer is valid. They need not repeat the prayer if they later discover that they erred in determining the direction of Mecca.[162]

For those who pray supine, there is a scholarly debate whether they should pray with their feet towards Mecca, or leaning on their right hand, and thus facing Mecca.[163] If the sick have lost all strength and are unable to move, they still must pray with their hearts. However, they must observe the proper times of prayer.[164]

THE *IMAM*

Public prayer on the whole is more meritorious than an individual's prayer.[165] Two or more persons constitute a *jama'a* (group of praying people). In any *jama'a* one person should always step forward and lead the rest in prayer. For Friday prayer, the size of the group which is necessary to render the public prayer valid differs among the various schools of law: seven people including the imam, according to the Shi'a, thirteen people including the imam, according to the Malikis. Hanbalis and Shafi'is require that 40 people be present at the public prayer. The Hanafis allow the *jama'a* to be three people apart from the imam. Those present in the *jama'a* may be sick or even deaf, because such people are also qualified to serve as imams during Friday public prayers.[166]

Who may not serve as an *imam*? The Shi'is prefer that the *imam* is not blind or lame. Some of them say there is no harm if the *imam* is blind, as long as someone makes sure that the *imam* faces Mecca.[167] The Hanafis rank the *imama* (role of *imam*) of a blind person reprehensible, and al-Marghinani explains that this is because the *a'ma* (blind) is not aware of impurities. Also reprehensible is the *imama* of the *abras* (leper), the *majdhum* (one afflicted with elephantiasis), the *majbub* (one without a penis), the lame, one who has only one foot, and one whose arm is amputated.[168] The Shafi'is do not object to the *imama* of a blind man. The Hanbalis consider it reprehensible if the *imam* is blind, deaf, has no arms or legs or misses one of them, has a cut off nose, suffers frequent epileptic seizures, or has speech impediments so that he reiterates the sound *fa*' (*fa'fa*') or the sound *ta*' (*tamtam*), or if he speaks in a hurry so that he is hardly understood. The Shafi'is claim that a prayer led by an *altagh* (mispronouncing the letter *ra*') or an *aratt* (exchanging the letters *lam* and *ya*') or an *akhras* (dumb) *imam* is invalid.[169] The Malikis object to a permanent *imama* of a castrated man (*khasiyy*), although not to an occasional one, or to his *imama* during voluntary prayers. The blind may serve as an *imam*, according to Maliki law, though a seeing person is preferred.[170]

The *imama* of a *majnun* is invalid according to all schools of law.[171] An *imam* who suffers from urine incontinence or chronic diarrhea can lead the prayer of sick people like him, not of healthy people.[172] *Imam*s with speech impediments may lead the prayer of people like them.[173]

If the *imam* is seated, due to a sickness, the Shafi'is maintain that the rest of the public may remain standing behind him. The rule seems to be that each fulfills his duty "according to his or her ability" ('*ala hasab taqatihi*). If a person is able to stand, but unable to bend over for *ruku'* because of a back problem, he may remain standing and when time for *ruku'* comes, he should signify it with his head. A person may pray while seated if he or she experiences some hardship, not necessarily when they are completely disabled.[174]

In a fatwa by the Saudi Ibn Baz, a man whose leg was amputated following a car accident inquired whether he may replace the *imam* when the latter was absent. Ibn Baz responded that if the amputation did not prevent the man from praying while standing, he may serve as *imam*. The mufti recommended that he perform *mash* (as a measure of purification) if part of the foot remained. If the amputation was above the heel, however, no ablution or *mash* was required.[175]

Since the *imam* is a public figure and a model for lay believers in prayer, *imam*s' disabilities about which the jurists debated whether they invalidated the prayer were for the main part functional: can he stand, does he have arms, does he hear and speak, and can he pronounce correctly the oral recitations. Next the disabilities that matter involve bodily purity (not suffering from chronic dermatological illnesses or from loss of control of bowel movements), and having clear sex features (i.e., he is not a *khasiyy, majbub*, etc.). The insane person is unanimously disqualified, since all Islamic commandments require as a prerequisite full awareness and true intent for their fulfillment to be valid, much more so when the Muslim is in a spiritually leading position, an *imam*.

SALAT AL-MARID (THE PRAYER OF A SICK PERSON)

From the sources it appears that there is hardly ever a complete exemption of the sick person from prayer. The sick person is rather offered a variety of alleviations or alternative ways to express the spiritual devotion and true intent that underlie any prayer. Al-Nawawi, for example, maintains that it is not enough for the *marid* (*'adam al-iktifa'*) that his or her *sujud* is deeper than his *ruku'*. He or she has to bend down as deeply as he or she can.[176] The emphasis is on "*bima qadara 'alayhi*" (the best one can), as much as one can bend over, stand, or move.

Several contemporary fatwas also inquire about the prayer of the disabled and the sick.

The Egyptian mufti Makhluf summarizes the general principles of the prayer of the sick as follows:

Whoever finds hardship in the performance of prayer does not have to pray. Similarly exempt is one who fears that the prayer might cause deterioration in his state of health. Whoever cannot pray standing should pray sitting; if this is impossible, and also if *sujud* and *ruku'* are impossible, he may resort to moving the head only (*ima'*), so that *sujud* is deeper than *ruku'*. When one recovers from an illness, one has to make up for up to five prayers that have been missed. More than five missed prayers are considered too many to repeat.[177]

In another fatwa the Egyptian mufti ‘Atiyya Saqr was asked whether a man who had undergone surgery and was under the influence of anesthesia for several hours, hence missed his prayers, should repeat them later on. The answer was that whoever loses consciousness is exempt from making up the missed prayers, regardless of whether the unconsciousness lasted hours, days, or months.[178]

Unconsciousness is treated in Islamic law like insanity, implying that the former is a state of mind which “lifts” religious and criminal responsibility off the afflicted person. *Rufi‘a al-qalam*, “the pen is lifted [from convicting]” is the famous hadith often quoted in this regard.[179]

A similar waiver of the duty to make up for missed prayers was granted to a person who reported that he had been in a state of fainting, and was unconscious (*maghmiyy ‘alayhi*) for one month, and consequently could not pray during that period.[180]

In another fatwa, the Saudi mufti Ibn Baz explained that the deaf and the dumb youth is expected to pray from the age of 15 onward. His guardian should explain to him the duty to pray either by signs which the youth comprehends, or through writing, or by setting him an example to follow.[181]

Sheikh ‘Atiyya Saqr[182] was consulted as to how should the dumb person and one whose arms are amputated from the *‘adud* (upper arm, the part between the elbow and the shoulder blade) pray,[183] and whether they should make up missed prayers. The answer was that the dumb have to perform only the intent in the heart. They are not obligated to recite *al-Fatiha* (the first chapter of the Qur’an). As for the one whose arms are amputated, this person has to pray, but he is exempt from the duty of *wudu*’. Other than that, any missed prayer has to be made up, just as is expected of the healthy (*salim*).

On the other hand, a recent article published in a Saudi medical journal[184] reported that the Islamic prayer had been tested and found to have positive effects on “improving the muscular functions of geriatric demented disabled and patients in a rehabilitation program”. Reza and colleagues show how each of the movements in a *rak‘a*, including the verbal utterances, involve movement of certain bodily muscles or joints. Since prayer is practiced five times a day, in any setting convenient for the patient, the prayer proves helpful for both body and mind.

SAWM (FASTING)

The obligatory fasts are first and foremost the fast of Ramadan, then the fast of *kaffarat* (fasts as expiation or effacing of a wrong action),[185] and the pledged or vowed fasts (*siyam al-mandhur*). The most important of fasts, the fast of Ramadan, is also a *fard ‘ayn*, meaning that each individual owes the fast to Allah, unless legally exempt. The duty to fast is mentioned in such verses as **2**, 183: “O’ ye who believe! Fasting is prescribed for you” and **2**, 185 “The month of Ramadan in which was revealed the Qur’an” (Pickthall).

The fast of Ramadan, according to the Islamic tradition, was ordained on the tenth of the month of Sha‘ban, a year and a half after the Hijra, or 624 AD.[186]

The essence of *sawm* is abstaining from substances and actions that break the fast (*muftirat*). This is the joint Hanafi and Hanbali position. Shafi‘is and Malikis require

that a proper intention (*niya*) accompany the abstaining, and Shafi'is add that the very existence of a person who fasts is one of the essentials of the fast. The other schools of law assume that the existence of a *niya* and a *sa'im* (the person who fasts) is inevitable therefore they do not mention them but focus only on the act of abstaining.[187]

The duty to fast during the whole month of Ramadan is prescribed in Qur'an **2**, 184–5. Qur'an **2**, 187 elaborates on the length of the days of fasting and on what the fasting person has to abstain from food during the daytime hours of fasting, as against the nighttime hours, when such activities as eating, drinking, sexual intercourse, etc., become permissible again.

For the purpose of examining who is exempt from fasting, either temporarily, or permanently, verses **2**, 184–5 are essential:

> (Fast) a certain number of days; and (for) him who is sick among you, or on a journey, (the same) number of other days; and for those who can afford it there is a ransom: the feeding of a man in need. But whoso doeth good of his own accord, it is better for him: and that ye fast is better for you if ye did but know– The month of Ramadan in which was revealed the Qur'an, a guidance for mankind, and clear proofs of the guidance, and the criterion (of right and wrong). And whosoever of you is present, let him fast the month, and whosoever of you is sick or on a journey (let him fast the same) number of other days. Allah desireth for you ease, He desireth not hardship for you; and (He desireth) that ye should complete the period, and that ye should magnify Allah for having guided you, and that peradventure ye may be thankful.

The most relevant phrase in the verses that may allude to the disabled is probably the term "sick". Obviously it is recognized in the Qur'an that it is difficult to fast for a whole month. Those who cannot fast several days of this month, due to a temporary physical indisposition, may complete the total number of days of fasting later.

If one is sick during the whole month of Ramadan, which has 30 days, and chooses to make up for those days with another month of fasting, any whole month will suffice, even if it has only 29 days. This is justified in that the requirement is plainly to compensate for a month with another month. If a person suffers a sickness for years, and dies of it, his or her heirs should give as charity one *mudd* of food for each of 60 poor people.[188] The *mudd* equals one pint and a third.[189]

Those whose states of health or disability prevent them from ever fasting, or those in whom fasting may cause deterioration in an already fragile health condition, should not fast.[190] They should turn to the following alternatives: feeding the poor for each day of fasting that was missed, or giving charity of the same value. The principle is that the number of fasting days should be made up by other days of fasting or by redeeming the lost days through charity. The reason behind the law is that people should not endanger their well-being through obeying Allah's commandments, because Islam is a religion of ease, not hardship. Qur'an **22**, 78 is often quoted in this regard.

The Maliki jurists have debated whether a person may break the fast, or may not fast at all, if he only fears that the fast may weaken him. They were puzzled over whether the uncertainty of not knowing exactly how one's state of health will be affected by the fast should take precedence over God's commandments. After all, a religious duty must not be neglected because of a doubt (*la yatruk [yutrak] farida bishakk*). Eventually, the more lenient attitude triumphed. This concluded that the

sick, even if only labeled as "sick", can break the fast, in accordance with the wording of Qur'an **2**, 185 "and whosoever of you is sick".[191]

The chapters on *sawm* mention several stages in a woman's life, such as pregnancy, breast-feeding and menstruation, as times when she may be exempt from fasting. I do not refer to these stages, as they do not qualify as "sickness" or "disability" by any of the definitions in the Introduction above. This situation is best phrased by al-Tahawi: "*laysa al-marad kal-hayd"* (illness is not similar to menstruation), since menstruation is a normal recurring condition while illness is not. I apply this reasoning with regard to all regular or expected female physical states such as pregnancy, menstruation, breast-feeding and impurity after giving birth. They are not further discussed here.

Shurut al-wujub are the criteria that if met by a person render his or her duty to fast incontrovertible. They are the same as those for other religious duties: being a Muslim, maturity *(bulugh*), sanity (*'aql*), ability (*qudra*), physical purity (*tahara*), and staying in one place (*iqama*), contrary to traveling.[192]

Shurut al-sihha- the stipulations for the fast's legal validity are, according to the Shi'i jurists, that the fasting person should not have lapses into unconsciousness (*ighma'*) before he or she utters the intention to fast. He or she should be in a state of physical purity, should not be suffering from any disease and should not be so old that the fast might cause him or her harm or great hardship. Al-Hilli narrows down the prerequisites to two only, being a Muslim and *'aql*, which means that the Muslim should enjoy full sanity, and excludes stages of unconsciousness (*ighma'*).[193]

The Shafi'is, therefore, exempt from the duty to fast a child (*sabiyy*) aged under seven years (punishment for not fasting starts only with a child older than ten years) and the *majnun*. If a person has short lapses into unconsciousness, he or she has to complete later the days he or she has missed (*qada'*), after regaining consciousness (*ifaqa*).[194]

The Hanafis claim, with regard to the *majnun*, that if he is conscious during part of the month of Ramadan, he should fast that part, and complete later (*qada'*) the missed days of fasting. However, if he is defined as a *majnun* for the whole month, and regains sanity only after Ramadan has ended, he does not have to fast for that Ramadan. The same is true for one who is unconscious (*maghmiyy 'alayhi*) due to a disease.[195] The Malikis list the prerequisites for the duty to be valid as *bulugh* (having reached the age of maturity) and *al-qudra 'ala al-sawm* (the ability to fast).[196] The Hanbalis exempt from fasting the elderly and the sick who are not expected to recover. Sick people who do recover must resume the fast and fulfill the number of fast days by fasting after Ramadan.

As for old people (*shaykh kabir*), for whom the fast is too heavy a burden, or the incurably sick, there is a debate whether they owe *fidya*–redemption, usually required for the omission of certain religious duties, or not. The debate turns on the fact that their condition does not obligate them to fast, while *fidya* has a punitive value for those who are so obliged yet fail to fulfill the duty.[197] Those who due to continuous sickness have not managed to make up missed fast days from the past until the next Ramadan, are excused the duty to perform *qada'*, and according to most Shi'i jurists they should give charity instead. A few Shi'i jurists maintain in their case that *qada'* is nevertheless in order.[198]

WHAT RENDERS THE FAST INVALID?

When a person is qualified to fast, and indeed attempts to fulfill the duty, certain occurrences still may interfere with the proper way of fasting and render that day of fasting invalid.

In such cases, the fasting person is expected to repeat the fast of that day (*qada'*) after the month of Ramadan has ended. This holds true for cases where the fast was interrupted due to a human error, ignorance, or forgetfulness. If the interruption of the fast was caused by food consumption without a Shar'i justification such as illness or a journey, or by untimely sexual intercourse, the fast day has still to be repeated, but a *kaffara* (expiation, redeeming donation) is also due. This is the opinion of most Shi'i jurists.[199] Even if the person who had intercourse during the day of Ramadan later became ill, the *kaffara* is not revoked.[200]

Both *qada*' and *kaffara* are also due from anyone who forced himself or herself to vomit without having a Shar'i reason, yet swallowed the vomit (*qay*'). *Qada*' and *kaffara* are similarly required from anyone who purposely swallowed any liquid emanating from the mouth, the ear, the nose, or the eye.[201] Any substance that intentionally or unintentionally enters the stomach, whether liquid or other, whether from above or from below, is considered breaking the fast, and has to be followed by both *qada'* and *kaffara*. As for materials coming from the below upward – only those that pass through the body openings such as the rectum are considered as breaking the fast (*muftirat)*.

With regard to injections or enema (*huqna*), there is no consensus among the jurists on whether they constitute an interruption of the fast. According to al-Jaziri, they do not.[202] Shafi'i and Malik seem to require *qada'*, which means that the injection, especially of liquids, into the body (*jawf)*, and here the brain too qualifies as *jawf*, is an interruption of the fast. Abu Hanifa did not view an injection as interruption of the fast, while his disciple, Abu Yusuf (182H/798H), did.[203] Shi'i jurists also debate the two opinions on this issue, and preference is often given to the ruling that no *qada'* is required,[204] implying that injections do not break the fast. These rulings are relevant for people who suffer from chronic diseases that require daily injections, and for people who must be immunized during Ramadan.[205]

QADA' DUN KAFFARA (REPEATING THE FAST, BUT WITHOUT EXPIATION)

According to the Hanafis, if the fasting person consumes a substance which is not food, such as a medication, but it satisfies the appetite, he owes *qada'*. The same is true if someone needs to take a medication for a legitimate Shar'i reason, that is, if one is sick or treats a wound in the belly or in the head, and the medication enters the body or the brain. In most violations of the fast that are caused by ignorance and carelessness, or when the existence of intention (*ta'ammud*) is not beyond doubt, only *qada'* is in order.[206]

An attack of illness is one of the primary legitimate reasons to stop fasting. So if the fasting person becomes sick, or fears that the fast may delay his or her recovery, or is in pain, or suffers greatly from the fast in any other way, he or she may break the fast. This is a recommendation. However, if one fears major harm to one's health,

such as the loss of one of the senses, one must stop fasting as a prohibition, *haram* ruling is imposed on such people's fasting. People do vary in what they consider unbearable pain, but Hanafis, Shafi'is and Malikis allow them to break the fast (*yajuz*) in the face of "great harm". The Hanbalis are more lenient here and maintain that even if one claims that the fast causes him or her *mashaqqa shadida* (great hardship), yet no threat to life is involved, it is lawful to break the fast (*yasunn lahu*).[207] The Shi'is leave it to the individual to decide whether he or she is sick and cannot continue fasting; they assert that every human being is watchful for himself, and knows what he or she can endure (*al-insan 'ala nafsihi basira wahuwa a'lam bima yutiq*).[208]

The Hanbalis conclude that whoever cannot fast due to old age or incurable disease has to pay *fidya* (ransom) of one *mudd* of food for each fast day. He does not have to repeat the fast if he recovers later on. If, however, one has recovered but has not paid the *fidya*, one must repeat the fast (*qada'*). The Hanafis, Shafi'is and Malikis, as well as the Shi'is, maintain that the old and declining never owe *qada'*. Instead they have to pay *fidya*.[209] The Shi'i al-Rawandi emphasizes that only those among the old and the sick who can fast, albeit with difficulty, have to pay the *fidya* (in the form of *it'am miskin*, feeding of a poor man) if they break the fast. Those who are wholly unable to fast are a priori exempt from the duty; they do not owe *fidya* either. *Fidya*, he explains, comes as a compensation for ignorance or incomplete fulfillment of a religious duty (*taqsir*–negligence), while if someone is unable to fast at all (*la yutiq*) there is no *taqsir* on his or her part so no *fidya* is in order.[210]

A person who is afflicted with *junun* while fasting, even if for a moment only, does not have to continue the fast, since his fast is anyhow no longer valid. The schools of law debate, however, whether this person has to repeat the missed days of fasting. The Shafi'is maintain that if the *junun* was caused by a substance that the person intentionally consumed, then he or she owes *qada'*. The Hanbalis claim that if the *junun* lasted the whole day, no *qada'* is required; but if it lapsed during the same day on which it started *qada'* is in order. The Hanafis claim that if the *junun* continues for the whole month of Ramadan, the *majnun* does not owe *qada'*. Otherwise *qada'* is required. According to the Malikis, if a person is a *majnun* for a whole day or for part of it, but at the start of that day the same person was sane, or if a person becomes insane for half a day or less, *qada'* is necessary. Shi'i jurists conclude that if the *majnun* recovers during a day in Ramadan, he is exempt from fasting the rest of that day. If a sick person recovers, and has not consumed that day any substance that breaks the fast (*muftir*), it is recommended that he fasts the rest of that day so to be deserving of its religious merit.[211]

When a person recovers from a disease, owes *qada'*, but out of disrespect (*tahawun*) does not fulfill *qada'* for no legitimate Shar'i reason, he then owes *qada'* and *sadaqa* (charity) as well.[212] *Sadaqa*, in this case, is the equivalent of *fidya* in other sources, namely one *mudd* for each day of the fast, as determined by Qur'an **2**, 184.[213]

If a person who owed *qada'* dies before having fulfilled the missing fast days, even though he was able to do it, his heirs should feed the poor in his stead (*yut'am 'anhu*). Malik, however, claimed that no person can fast in place of another, and so did al-Shafi'i. A few jurists maintained that the owed *qada'* is like a debt against the bequest of the deceased and it must be paid off like any other debt. This is either

through fasting instead of the deceased or through charitable feeding of the poor.[214] The Shafi'i al-Nawawi is reported to have claimed that as with the rule for an uncompleted hajj, the heirs should fulfill the broken fast, or hire another person to do it for the deceased against a fee. The debate here stems from a disagreement among the jurists on the validity or soundness attributed to the Prophetic hadith which reads, "the guardian should not fast or pray for his protégé".[215] The Hanafis, who discredit this hadith, maintain that if a person who owed *qada'* died, and so willed it, his guardian must feed from his bequest one poor man for each day half a *sa'*[216] of *burr* (wheat) or a *sa'* of *sha'ir* (barley) or dates. This has to be deducted from the one third of his bequest which is legally fit to be willed (*wasiyya*).[217] The Shi'i jurists simply impose the duty of the unfulfilled *qada'* of a sick person who recovered on the deceased's guardian, provided that the deceased had been capable of *qada'* during his or her lifetime but continuously postponed it. If, however, the sick person died from the same sickness after *iftar* (breaking the fast), al-Tusi recommends that the oldest son *yaqdi* (perform) the missed days of fast for his father. This is only *mustahabb* (desirable, recommended), not obligatory.[218]

Whoever breaks the fast on purpose and without a legitimate reason, owes *qada'*, but also *kaffara*, which is defined as the setting free of a slave. If there are no slaves, the alternative is to feed 60 poor people, each receiving the same amount of food. According to the Malikis, this is one *mudd*, which equals two handfuls, with the hand not too spread out but not too closed either. Usually it is a *mudd* of wheat, which equals one and one third *rutl*, or one third of an Egyptian *qadah* (cup).[219] The Hanafis claim that two meals for 60 poor are sufficient, or a half *sa'* of wheat or its monetary value, or *sha'ir*, or raisins, or dates. Shafi'is and Hanbalis insist on one *mudd* of wheat (*qamh*),[220] or another fast of two consecutive months.[221]

What emerges from these juridical debates and rulings is that the sick are offered a wide range of alternatives to fasting, all entitling the believer to merit similar to that of the actual fast. The main disabilities named by the fiqh with regard to the fast are mental illnesses and diseases related to old age or incurable.

FAST OF RAMADAN

It is interesting that the recent fatwas concerning the fast still reflect the same difficulties long acknowledged by medieval fiqh that the sick and the elderly experience when they wish to fulfill the duty of the fast.

In a fatwa dating from January 1996, a person reported that he was sick. The previous year he had missed four days of the fast, which he later completed (*qada*'), but with difficulty. The doctor ordered him not to fast the following year. The man asked the mufti if he owed *qada*', and also in the case of his death (he was 76 at the time of *istifta*'(inquiry)) if any of his children would have to make up the fast in his place.

The Lajnat 'Ulama' al-Azhar (The Committee of al-Azhar Scholars) responded to his inquiry that from what he related he was entitled to an alleviation (*rukhsa*) to break the fast for two reasons: disease and old age. Therefore, he owed no *qada'* but he owed *fidya*, which meant feeding a poor man for each day not fasted. He was also exempt from fasting in the following years. In the event of his dying, no one could

fast in his stead, but his heirs would have to feed one poor person for any fast day omitted.[222]

In an earlier fatwa dated of 1987, which quoted another fatwa by Sheikh Hasanayn Makhluf, it was emphasized that old age in itself is not a good reason for *iftar*. It is the disability that often accompanies old age that renders *iftar* legitimate, and the person who cannot fast owes *fidya*, as mentioned.[223] Dr. Ahmad Shawqi Ibrahim, a Muslim physician practicing in London, explained in a lengthy article on "old age between medicine and Islam" that old age is but a natural stage that every living cell reaches; it is not a disease. Indeed, towards the end of life the human cells are destroyed and certain diseases can be diagnosed. Only then are illness and old age intertwined.[224]

The Egyptian mufti 'Abd al-Munsif Mahmud explains that for matters of *iftar*, diseases can be classified as:

a. Temporary, in which case missed fast days have to be completed after recovery, and not during Ramadan; or
b. Chronic, when there is no hope for recovery. In such cases, the person does not have to make up for the missed fast days, but must pay *fidya*: feed a poor person in compensation for each day of fast.[225] The al-Azhar Committee explains that there is no difference in this issue between the old man and an old woman.[226]

In a fatwa from Saudi Arabia, issued by al-Lajna al-Da'ima lil-Buhuth wal-Ifta' (The Permanent Committee of Research and *Ifta'*), a man asks about his 100-year-old father, whom he describes as bed-ridden, and who no longer prays or fasts. The son asks whether his father owes *kaffara*. The answer given was that as long as the old man's health is as described, he is entirely exempt from performing the religious duty.[227]

Another Egyptian fatwa of 1993 also emphasizes that the sick person who does not fast owes *qada*', but not *kaffara*.[228]

With regard to cardiac patients, they may fast as long as the levels of fluids, glucose, salt, etc. in their blood are balanced. Otherwise the fast might cause damage and should be stopped.[229] It is recommended that children who suffer from anemia do not fast, in order to prevent severe damage, especially to the liver.[230]

Paralyzed people are advised not to fast, since paralysis is often a result of high blood pressure and heart diseases. The intake of sufficient quantities of liquids and three daily meals with the right amounts of foods can help control the proper function of the heart muscle, of the digestive system, and of anti-clotting of the blood.[231]

Contrary to this, people who suffer from skin diseases are encouraged to fast because it might have a healing effect on them. Since the fast helps the body relax, some dermatological problems may vanish, especially those triggered by nervousness and tension, such as the neuro-eczema (*ikzima al-'asabiyya*).[232]

Those who suffer from kidney failure or diabetics, who should consume large quantities of liquids each day (for kidney failure and certain types of diabetics), or small but frequent quantities of food (for diabetics), are encouraged not to fast.[233] Makhluf[234] explains that not all diabetic patients will necessarily be harmed by the fast; for overweight patients, for example, the fast could be quite helpful. Therefore, it is up to an experienced physician to determine which patient may fast and which should not.

HAJJ (PILGRIMAGE TO MECCA)

The hajj is the most difficult duty that a Muslim is required to perform. The difficulty arises from the physical ability expected of the pilgrim on the way to Mecca, and when engaging in the rituals of hajj. It is also difficult due to the relative economic affluence one has to enjoy prior to embarking on the journey to Mecca, but this is beyond the focus of this chapter.

Even considering only the seven circumambulations (*tawaf*) of the Ka'ba, and the seven distances covered by the *sa'y* (running back and forth the distance between the two hills of Safa and Marwa), the pilgrim is expected to traverse several miles. This is a challenge for healthy people, much more so for the elderly, the sick and the disabled. The *wuquf* (standing on the plateau of 'Arafa), the *ramy* (stoning the three pillars in Mina), the sacrifice, and so on, may all add to the emotional and physical endeavor associated with the hajj.

It is no surprise then, that the hajj is a duty which it is obligatory to perform only once in a Muslim's lifetime. Even then it is only if the individual possesses the above abilities and if certain geopolitical conditions render the whole notion of a lengthy journey possible and safe.

Several verses in the Qur'an speak of the duty to perform the hajj. The two verses which establish the duty itself, **3**, 97 and **2**, 196, condition its performance on the physical and mental well-being of the prospective pilgrim. Qur'an **3**, 96–97, after reaffirming that Mecca is the destination of the prescribed pilgrimage, reads "And pilgrimage to the House is a duty unto Allah for mankind, **for him who can find a way thither** …" (Pickthall). The ability with regard to the way (***istita'at al-sabil***) is essential for understanding who is exempt a priori from the duty, and who is not.

Qur'an **2**, 196 refers to health problems that a pilgrim may encounter while on the way to Mecca, or while in Mecca and already engaged in the various rites that constitute the hajj:

> Perform the pilgrimage and the visit (to Mecca) for Allah, and if ye are prevented, then send such gifts as can be obtained with ease, and shave not your heads until the gifts have reached their destination. And whoever among you is sick, or hath an ailment of the head must pay a ransom [*fidya*] of fasting [*siyam*] or almsgiving [*sadaqa*] or offering *nusuk*] … (Pickthall).

Discussion of the disabilities that may interfere with the hajj therefore proceeds from these two verses, which represent two stages regarding the hajj:

a. Disabilities that deny a Muslim the ability (*istita'a*) to set out on road to the hajj; he or she is exempt from obeying the ordinance.
b. Disabilities that develop during any of the stages of performing the hajj and hinder the pilgrim from completing the duty in good health and or in the prescribed state of bodily purity.

ISTITA'A (ABILITY) WITH REGARD TO THE HAJJ

In order for one to be able to perform the hajj, the following conditions are but part of those that must exist: sanity, maturity and the ability to walk. The last-named

includes the ability to ride a beast. The insane are naturally exempt.[235] Al-Ghazali, who lists *'aql* (sanity) as one of the mandatory prerequisites for the hajj, also elaborates on the various components of the *istita'a*.[236]

Al-Ghazali divides the *istita'a* into *mubashira* (direct accessibility) and *ghayr mubashira* (indirect accessibility). Direct accessibility requires at the first place *sihha* (good health). But what is implied by *sihha*?

The Shi'i jurists do not consider the blind person, for example, sick (*marid*), as long as that person can afford to hire a companion to lead him or her around. The Malikis and Hanbalis likewise deem *mustati'* (possessing *istita'a*) the *a'ma* (blind person) who can walk and afford to hire a guide.[237] This is contrary to Abu Hanifa, who does not require the blind to perform the hajj at all. Similarly, the Shi'i jurists do not view the *safih* (mentally deficient) as sick, as long as the *safih*'s guardian can afford to pay another person to accompany the *safih*, lest the latter is tempted to spend excessively.[238]

According to al-Ghazali, any Muslim who is unable to go on the hajj, but has the financial ability to hire another to perform it on his or her behalf, is considered to have *istita'a*. If such a financially able person dies before accomplishing the duty of hajj, either in person or through a hired substitute, the heirs will have to pay for a substitute to accomplish a hajj from the deceased's inheritance, as they must do with regard to other debts of the deceased.[239] The Shafi'i al-Shirazi suggests that "health" be assessed according to whether a person can hold on to the beast used for riding without encountering much difficulty.[240]

For a Muslim who originally had *istita'a*, then for reasons of old age, illness, or the outbreak of hostilities did not manage to fulfill the duty, two legal rulings exist on the matter. One maintains that the person has to appoint a substitute to perform the hajj instead of him or her (*niyaba*). The other is inclined to exempt the person from the duty, because the *istita'a*, the basic prerequisite for the duty to be valid, is obviously absent.[241] Al-Shirazi claims that substitution (*niyaba*) is in order only for two categories of Muslims: one who died before having the opportunity to perform the hajj, though at one point had *istita'a*. The other category is those who cannot sit securely on a riding beast but suffer extreme distress, namely old and paralyzed people.[242] The chosen substitute himself or herself must enjoy full sanity (*kamal al-'aql*) so that the hajj he or she performs is counted as valid.[243]

DISEASES DURING THE HAJJ

Some jurists hold that a Muslim who had *istita'a*, then *ahrama* (entered the special state of purity called *ihram* which entails a number of prohibited actions[244]), and then *uhsira*, that is was in a state of *ihsar*[245], should exit the state of purity (*ihlal*) like any sick person. Others maintain that he or she should continue with their hajj, since *ihlal* (exiting the state of purity) will anyhow not lead to physical recovery.[246] The Hanafis believe that *ihlal* is meant to prevent the worsening of the disease, therefore, in case of *ihsar* it is permitted to exit the state of *ihram* for reason of sickness, not only because of an enemy. In all cases of *ihsar* a *hady* (animal to be sacrificed) should be sent to the Haram in Mecca with reliable people and slaughtered there; then it is legitimate for the pilgrim whose hajj was interrupted to exit *halat al-ihram* (state of purity).[247] The exact place and date for the slaughter of *hady al-ihsar* (sacrifice for an

interrupted hajj) is Mina, on the tenth of Dhu al-Hijja, the twelfth month in the Islamic calendar.[248]

Qur'an **2**, 196 portrays two medical scenarios that justify interruption of the ongoing hajj, that of the *marid* in general and that of one who suffers from "a disease of (in) the head". In al-Jalalayn's commentary to the Qur'an the disease of the head is identified as either *qaml* (lice) or *suda'* (headache). Al-Zamakhshari identifies the disease as *qaml* or open sore (*jiraha*).[249]

Ibn Kathir adds to the above possible diseases of the head *hawamm al-ra's* (insects of the head).[250] Sayyid Qutb depicts a linkage between *qaml* and long hair which is never combed.[251]

If a person completes the *tawaf* riding (instead of on foot), for a justified reason, or if one is carried by others, their hajj is still valid.[252] This ruling offers an alternative way of performing the hajj for those unable to walk. The Prophet Muhammad, it is reported, performed the hajj riding *liyarahu al-nas*, that is to be seen or to set an example for the public. Thus he created a precedent. Shi'i sources record that the Prophet performed both the *tawaf* and *sa'y* while riding.[253] However, if one is too weak to complete the *tawaf*, or if one skips parts of it, the *tawaf* is not valid.[254]

Shi'i jurists consider a *sa'y* valid if a pilgrim performs it riding a beast or carried on the back of another person, or even if someone else does the *sa'y* in his or her stead if the two previous methods are not feasible for a particular pilgrim.[255] The Malikis recommend, however, that the *sa'y* be performed in a state of purity "from the two main bodily discharges – the big and the small" (*min al-hadathayn al-asghar wal-akbar*).[256]

The ritual standing (*wuquf*), according to Shi'i and Hanafi jurists, requires merely the presence of the pilgrim in 'Arafa. It disregards the state of one's presence: awake or unconscious, sitting or standing, standing in one place or walking.[257] According to the Shafi'is, a *majnun* may not perform the *wuquf*. The unconscious are urged to maintain the state of *ihram* until they awake, as a precaution.[258]

As for the ritual stoning (*ramy*), it is permissible for another person to perform it in place of a sick or weak pilgrim, as long as the time designated for *ramy* or the physical problem has not yet passed.[259]

According to the Shi'i jurists, if a pilgrim is unable to execute the *ramy*, he or she should be carried to the site of stoning in Mina, and somebody should stone in their stead. If this is still too hard for them they may remain wherever they are, and another person should perform the stoning instead.[260]

The law on hajj has considered a variety of disabilities, temporary and permanent, that a pilgrim may face. The general attitude seems to be that as long as the pilgrim is conscious and aware of the import of the rituals and holiness of time and place (*'aqil*), he or she can successfully complete the duty of hajj. Being in need of one sort of assistance or another does not diminish the religious merit earned.

MODERN ISSUES CONCERNING THE HAJJ OF THE DISABLED

Most contemporary inquiries about the hajj concern the inability of individuals to perform its rituals, and whether someone else may perform the duty in their place. Apparently contemporary Muslims are eager to have the opportunity to perform the hajj, and regret it if they fail to do so.

The Egyptian mufti Makhluf related an inquiry from a Hanafi Muslim, about 60 years old, who suffered from diabetes. The man reported that his vision had weakened, his left arm and leg were paralyzed, and he walked with difficulty, even when supported by others. The man said he had not managed to go on the pilgrimage until then, and asked whether someone else could do it in his place. The mufti responded that whoever was capable of doing the hajj may not take a substitute. However, the Hanafis permit a substitute to anyone who at one point was able to perform the hajj but then became unable by reason of disease, imprisonment, and so on. It is stipulated, though, that the disability (*'ajz*) continues until death. Once the physical restriction is relieved, substitution is no longer legally valid. The "ex-disabled" must fulfill the duty in person. In any case, for substitution to be valid the substitute must have already performed the hajj for himself. In later rulings by mufti 'Atiyya Saqr[261] and by 'Abd al-Qadir (1993), relying on legal writings of Ibn Hanbal, even having recovered from the disabling disease, the ex-disabled whose hajj was performed by a substitute need not repeat the hajj. Other jurists conclude that the now recovered person ought to repeat the hajj, but only if financially able to afford it. In a recent Saudi fatwa,[262] mufti Ibn Baz did not exempt a blind woman from the hajj, and did not permit substitution for her own hajj as long as she was able to travel to Mecca by car, airplane, or another means of transportation, if she had enough resources to cover the costs of the journey and had a legitimate male companion. Blindness, it was asserted, is not a good reason (*'udhr*) for substitution. Death, old age, and physical weakness are legitimate reasons for substitution, but not blindness. Apparently blindness is not a disability as regards the ability to perform the hajj.

The physicians who treat Muslim patients are often called on to advise them, sometimes to make the decisions for them with regard to their fitness to go on hajj. The physician is actually asked to judge on the existence or absence of *istita'a*, at least from the medical point of view. The muftis, in turn, are invoked to legitimize the hajj of the disabled when it differs from the normal performance due to medical causes. Thus, a hajj undertaken by one with an artificial limb was ruled valid in 1991, as was a hajj performed by persons with aching feet wearing sandals (as against the preference of bare footedness). Hajj by a person wearing a hernia belt under the *ihram* (white seamless cloth wrap worn by the pilgrim) was ruled valid, even when the belt itself did have seams.[263] The muftis make many more allowances that enable chronic patients and disabled people to perform the hajj themselves.

The foregoing instances epitomize the importance attributed to the hajj as a religious duty and to its immense religious and spiritual values. On the other hand, they attest to the understanding that as long as one wishes and tries to perform the hajj in person, all necessary aid should be provided by the medical staff, and be sympathetically approved by such religious authorities as the muftis, unless clear violation of doctrine is involved.

Zakat (Almsgiving)

Zakat (almsgiving) is primarily a financial duty. It is based on several Qur'anic verses which encourage the combination of prayer with almsgiving (**2**, 43, 110; **24**,

56; **73**, 20; etc.). The *zakat* is a tax collected even from the money of a child or a *majnun*, according to some Shi'i, Maliki, Shafi'i, and Hanbali jurists.[264] Contrary to them, Abu Hanifa asserted that the assets of a *majnun*, like those of a child, are exempt from taxation, and therefore, the guardian of the *majnun* is not required to pay anything on behalf of his protégé.[265] The core of the debate among the jurists is whether the person is to be taxed or whether the assets one owns are to be taxed. If the former, then the child, and for that matter the mentally ill person too, who are both considered legally not responsible for their deeds, should not be held accountable for paying dues of any sort, including the *zakat*. If the assets, not the owner, are subject to taxation, the disability or legal incapacity of the owner is disregarded.

With regard to the *majnun*, the Shi'i al-Tusi differentiates between profits he gained from monetary investments, which are exempt from *zakat*, and income he collected on crops and livestock (*ghalla*), on which he owes *zakat*.[266] Another Shi'i, al-Hilli, knows of Shi'i jurists who argue with those who equate the child to the *majnun* and consequently exempt both from paying the tax. Al-Hilli explains that the analogy drawn may be incorrect, since the child eventually matures, while the *majnun* does not always recover. Therefore, as al-Hilli states, those jurists maintain that children are exempt, but *majanin* (pl. of *majnun*) are not.

The safest, according to al-Hilli, is to exempt both, in accordance with the famous prophetic hadith which lifts all legal liability from the insane until he is cured, the sleeping until he awakes, and the child until he reaches puberty (*rufi'a al-qalam 'an thalatha* – the pen has been lifted from [convicting] three).[267] This view stands in contradiction to the legal opinions of three of the Sunni schools of law, as mentioned.

DISTRIBUTION OF *ZAKAT* RESOURCES

Qur'an **9**, 60 speaks of eight categories of people who may be eligible for receiving financial aid from the funds collected under *zakat* taxation The first two categories, *fuqara'* and *masakin*, are relevant to the subject of disabled people. In modern Arabic *fuqara*' are understood as financially poor and *masakin* as miserable. Both then have little to do with disability. However, one jurist identified *masakin* as people being in a state of *sukun*, immobility, contrary to *haraka* – movement, mobility. This could refer to people with disabilities that inhibit their moving about, so they cannot make a living and provide for their families.[268] Another explanation, attributed to the trustworthy Companion of the prophet Qatada, identifies the *fuqara'* as elderly and paralyzed people who are needy, while the *masakin* are identified as needy but healthy.[269] If "poor" is understood as synonymous with "poor due to disability", then the law of *zakat* indeed also covers those who have fallen destitute through physical handicaps. Another explanation for the term *miskin* is that it is *not* he who begs people and is satisfied with a piece of bread or two, or a date or two. *Miskin* is he who owns less than 50 dirham or its equivalent in gold. Others claim that the *miskin* has enough to eat and live on, with a minimum of 40 dirhams.[270] Most jurists conclude that the *miskin* is all in all in a worse situation than the *faqir*. The *faqir* is *al-zamin al-muhtaj* (needy and deteriorating), and the *miskin* is al-*sahih al-muhtaj* (a needy healthy person).[271] Both *miskin* and *faqir* would under certain interpretations of the respective terms be

associated with disability. Allocation of *zakat* resources to the *fuqara'* and *masakin* could then also be viewed as a kind of financial aid for people with disabilities.

CONCERNS OF MODERN TIMES

One of the typical questions in recent decades about *zakat* is whether the mentally ill person has to pay it from his or her personal funds. The question arises since a prerequisite for any duty required of one under Islamic law is '*aql* (sanity). The late Sheikh al-Azhar, Jad al-Haqq, in a fatwa issued in 1981 and published in 1983, relied on a scholarly majority, namely Malik, al-Shafi'i, and Ahmad b. Hanbal, who determined that it is one's wealth which owes the tax. Consequently, the mentally ill person's guardian should pay the tax on his or her behalf. Only Abu Hanifa, Jad al-Haqq continued, contested this view, and exempted that person from the duty. The fatwa of Jad al-Haqq, though not an innovation, actually reiterated a majority ruling dating back to the 8th and 9th centuries. It is worth reminding the reader here that the Hanafis constitute a majority among Sunni Muslims today, hence Abu Hanifa's opinion is the practical norm.

2

PEOPLE WITH DISABILITIES AND JIHAD

The importance of the duty to engage in jihad is emphasized in several verses in the Qur'an. Qur'an **22**, 78, **9**, 73, **66**, 9, and **61**, 11 use the verb *jahada* (to participate in jihad) itself. But many more verses use other verbs synonymous with *jahada* which urge Muslims to engage in battle against certain groups of people who are enemies of Islam. Other verses list the benefits awaiting those Muslims who take part in jihad. But what does the term *jihad* mean?

According to Malik b. Anas there are four types of jihad: jihad with one's heart (*bil-qalb*), with one's tongue (*bil-lisan*), with one's hand (*bil-yad*), and with a sword (*bil-sayf*).[272] He explains that a jihad with the heart means to defeat the *shaytan* (devil) and oppress one's lust and bestial desires. Jihad with the tongue means to command the morally good and prohibit the morally reprehensible; jihad with the hand means to administer justice, educate those who do not perform the religious duties, and punish those who violate the criminal law. Only the fourth type of jihad, with the sword, refers to engaging in battle wielding weapons.

Hasan al-Bana (1906–1949), the founder of the Muslim Brethren (al-Ikhwan al-Muslimun) movement in Egypt, refutes the common tendency to equate jihad with war. He asserts that the term for "war" in Arabic is rather *harb*, not jihad, and the two are quite different concepts. *Harb* is waged to win power, dominance, and material benefits for the ruler or his subjects. Jihad is always waged *fi sabil Allah* (for the promotion of religious purposes as prescribed by Allah), and not for material gains. Thus, jihad may sometimes involve the use of power, but at other times it may require spiritual indoctrination and the spread of the Islamic mores in non-violent ways. Jihad aims primarily to instate justice among people.[273] This is the goal of both the military and the spiritual notions of jihad. Sheikh al-Azhar Mahmud (d. 1945) emphasizes that the military *jihad* was instituted by the Shari'a only as means of self-defense, to fight injustice, to eradicate despotism, to liberate peoples, and to encourage the call to the true path. All these, he claims, are summarized in Qur'an **39**, 49.[274]

Qur'an **8**, 60 refers to jihad in both the military and the spiritual notions of the concept, and recommends that one prepare oneself for either type **as much as one**

can. The verse reads, "Make ready for them all thou canst of (armed) force and of horses tethered, that thereby ye may dismay the enemy of Allah and your enemy, and others beside them whom ye know not". In Pickthall's translation the readiness is stipulated by "all thou canst". This is his understanding of the Arabic term *istita'a* which lexically denotes "ability" but legally is a more complex term. Jihad is obligatory on those who have *istita'a*. *Istita'a*, then, is the key concept in depicting who ought to participate in jihad. Sheikh al-Azhar 'Abd al-Halim Mahmud claims that *istita'a* has neither boundaries nor definition, therefore the preparation for jihad is an endless process.[275] What he conveys is that *istita'a* (ability) has to be measured relatively for each individual, and for the time and place under consideration.

The Qur'an commentator al-Zamakhshari (d. 1144) explains the Arabic word *quwwa* (force) as the ability to shoot, or (the erection of) fortresses.[276] The Qur'an commentator al-Baydawi[277] explains *quwwa* as anything that can strengthen the enemy at war (*ma yataqawwa bihi fi al-harb*), thus leaving it open to military or other means that may be used to win a war. Sheikh al-Azhar Rida explains that Muslims are urged in the verse to prepare for the future. As for the "ability" mentioned in the verse, he explains that this varies in time and place. In modern times, he adds, *ramy* (shooting) may be expanded to include the use of tanks, guns, naval vessels, aircraft, and so on, since shooting arrows, the traditional meaning of *ramy* in the Middle Ages, will not serve the purpose today. A similar emphasis on the need to strengthen the Muslims in the military sphere is provided by the Shi'i Ayatullah Fadl Allah of Lebanon.[278]

Qur'an **9**, 81 speaks of jihad as both fighting and spending money in the interests of the Islamic Umma as against staying at home and not participating in any form in the Islamic endeavor.[279]

Yet most people, Muslims and non-Muslims alike, when they come across the term jihad think of the military duty; therefore, jihad is often referred to as "holy war".

The basis of the duty to fight the enemies of Islam is found in Qur'an **2**, 216: "Warfare (*qital*) is ordained for you, though it is hateful unto you".[280] The verbal noun *qital* is undoubtedly used here in the sense of combat.

Jihad is a duty which is classified in the Shari'a as a *fard kifaya* (a communal duty), namely the obligation upon individuals in the community to join jihad remains until a sufficient number of Muslims for a specific task have been recruited. At that point the rest of the community may see themselves exempt and free to go on with their routine. Only if each and every person in the community is needed to join a certain battle or mission does the duty become a *fard 'ayn* (an individual's duty).[281] Even then, as the jurist Ibn Hanbal asserted in the ninth century, the duty is incumbent only upon males, free, legally responsible (*mukallaf*) and capable (*mustati'*). From the perspective of health, according to one Hanbali source exempt are the blind (*a'ma*), the paralyzed (*ashall*), amputees of a hand, a leg, the thumbs and most of the fingers, or those who cannot use a hand or a leg. The lame are exempt only if they cannot walk or ride.[282]

These exemptions are shown to be mentioned in Qur'an **24**, 61, which specifies "the blind, the sick and the crippled"[283] who may "stay home", contrary to those who must join a jihad. This verse is believed to hold a few exemptions from the rule to join a jihad. Yet it is interesting to note that at least one Shi'i scholar, al-Qummi, interprets this verse differently, and as totally unrelated to matters of jihad. He claims that the license to eat with the blind, the lame, and the sick, which appears in the verse, is

meant to refute a norm of behavior that was prevalent in the town of Medina before its inhabitants adopted Islam.[284] This latter source is an exception. Most jurists refer to Qur'an **24**, 61 in relation to exemptions from jihad.

Others who are exempt are women, children, old people, and the mentally ill.[285] Those who are exempt because of disabilities are called in **4**, 95 '*ulu darar* (people with a damage, an impairment), or those who may be afflicted with an injury that might worsen their state of health if they join a jihad.[286] According to Qur'an **4**, 95 the disabled are always higher ranked and differentiated from those who are able-bodied but do not join a jihad. The verse reads, "Those of the believers who sit still, other than those who have a hurt (disability) are not on an equality with those who strive in the way of Allah with their wealth and lives" (Pickthall).

Fadl Allah[287] refers to '*ulu darar* in the verse as owners of "*nuqsan*" – a handicap, a weakness. The rest of the verse implies that those who cannot join a jihad because of a handicap are nevertheless rewarded by Allah, contrary to those who refrain from joining out of fear, laziness, and self indulgence.[288]

In one Shi'i source we find seven criteria that render joining a jihad mandatory. Among them, and relevant to our discussion, are health (*sihha*), good mental health (*kamal al-'aql*), and not being an old person who moves with difficulty.[289] Sanity is sometimes listed in the law prior to physical fitness, possibly implying that sanity is more important than other qualities in the warrior. Malik b. Anas listed six prerequisites for jihad to be obligatory, among them *istita'a bisihhat al-badan* (the ability derived from a healthy body) which he associated with financial ability.[290] As for the "healthy body", Malik provides no further explanation, nor does he describe what disabilities render a body legally "unhealthy".

Al-Jalalayn's medieval commentary on the Qur'an,[291] which is still in use in schools in Egypt today, explains that in Qur'an **9**, 91 the "weak" (*du'afa'*) are the elderly, and the "sick" (*marda*) are those such as the blind and the *zumna* or *zamin*, "those affected with a malady of long continuance", the crippled, and the chronically ill.[292] It appears that "the sick" is rather a large category encompassing various sorts of disability.

In the Shi'i al-Hilli's (d. 1422) account the *a'ma* is specifically mentioned as exempt of jihad.[293] Other jurists emphasize sanity (*'aql*) as a prerequisite to join jihad, because *'aql* is mandatory to establish *taklif* (legal responsibility). The *majnun* (the insane) is lacking in the domain of *taklif*,[294] therefore he is obviously exempt. The Shi'i jurist al-Tusi even troubled to elaborate on how to test if a person is sane (*'aqil*), by examining if he can demonstrate moral evaluation of what is good as against evil, what is the cause of things as against their effect, what is helpful as against harmful, whether he has any life experience at all, and so on.[295] He concludes that even the *ahmaq* (one with "unsoundness in the intellect or understanding[296]), the *ghabiyy* (unintelligent, heedless, stupid) and the *sadhij* (simple, characterized by "plainness of mind and manners"[297]), who are mentally deficient, though not "insane", are also to be exempted from joining a jihad since they are not considered *'uqala'* , that is, they do not enjoy *kamal al-'aql* (full mental capacity).[298]

Regarding physical well being, al-Tusi is quoted as mentioning the following impediments to joining a jihad: exempt are the *a'ma*, but not the *a'war* (blind in one eye) or the *a'sha* (one suffering night blindness). The *a'raj* (lame) is exempt if he is unable to run or ride. Others claim that if the lame person can ride a horse he is not

exempt. The *marid* is exempt, and as stated so is one in a state of *i'sar*, namely possessing little strength (or wealth), so that joining battle could weaken his state of health.

The ruling for jihad purposes appears to follow the same guidelines as applied in determining who is excused from fasting when sick: those whose state of health may be jeopardized or whose recovery may be delayed by fasting. It is recognized that a sickness can be severe, as with a chronic *huma* or *humma* (a sickness in which the body temperature falls below its normal level: intense cold) or *birsam* (pleurisy), which entitles a man to exemption. However, if the disease is light, such as an occasional *huma*, toothache, headache, and so on, the man is not exempt.[299]

The consensus is that old men and sick men should not join battle. But not every old man is relieved, only he who is classified as *himm* (decrepit old man). Likewise, not every sick man is excluded; only he who as a result of a disease may be described as '*ajiz* (incapable, disabled) is freed from the duty to join combat.

A *khuntha mushkal* (ungendered hermaphrodite), who cannot be clearly classified as either male or female, is exempt too; only males are given the duty of jihad, and the *khuntha mushkal* in this regard is like a woman, hence exempt.[300] A *khuntha* who can be legally classified as a male on the basis of male bodily characteristics, must join the jihad. The rule for women seems to be that they are not totally banned from joining a jihad, as some sources record that they have participated in the jihad since the time of the Prophet Muhammad as nurses and in other auxiliary duties. But a married woman needs first to obtain her husband's permission to do so.[301]

For the modern period, the disabilities that pertain to jihad may slightly change. Weapons are so advanced, it is argued, that one might be able to handle certain types, regardless of a disability. The lame, for example, may fight from within a tank and on board an aircraft, so that disability does not automatically constitute a waiver from jihad. On the other hand, not all instrumental aids render the disabled person a fit soldier. For example, even if the blind finds a guide to lead him, and the paralyzed finds someone to carry him, they are still considered unfit for jihad.[302]

What is the ruling for the one who becomes disabled during a jihad? Despite debates among the jurists, the majority maintains that a man may withdraw from the battlefield if he is lamed or becomes sick, unless he has a unique military function whose termination may imperil the Muslim army with defeat.[303] It is promised in several prophetic traditions that those wounded during jihad will attend the Day of Judgment with all their organs whole, and their appearance will be exactly as it was on the day of their injury.[304] This proves that on the Day of Judgment justice will be redone, but it also conveys that being whole and healthy is the better human condition.

Jizya is the poll-tax collected only from non-Muslim subjects of an Islamic government (*ahl dhimma*). It should not be collected from the mentally ill, *balih* ("weak in intellect"[305]) and *harim* (old and having a deteriorating state of health), since they are not viewed as potential enemies of the Islamic state.[306] The Hanbali position is that boys, women, the mentally insane, the *zamin*, and the blind are exempt from paying *jizya*.[307] This view is supposedly shared by the Hanafis, Shafi'is, and Malikis.[308] Others report that al-Shafi'i distinguished two types of old-aged: those who are harmless to the Muslims, and consequently may be exempt; and those who can plan a war and in this respect may be more dangerous for the Muslims than warriors in combat: these should not be exempted.[309]

Abu Hanifa apparently stipulated that if the blind, the *zamin* and the *muq'ad* were affluent they had to be taxed.[310] If a person sank into insanity and has "awoken", at the end of the year he will usually be taxed on that part of the year in which he was a *mufiq* (awake, aware, conscious).[311] Abu Hanifa is said to have ruled that the *majnun* who shifts back and forth between sanity and insanity is judged according to the more recurrent of the two conditions (*aghlab halatayhi*)[312]: if he is insane most of the time he is exempt. The Shafi'is sum the periods of sanity, and once they have reached a full year the person will be taxed for one year only, though two or more chronological years may have passed. Thus, if he was insane one day out of three, he will have to pay tax for one year out of three.[313]

This manifests the interesting correlation established by Islamic law between Muslims who are potential jihad participants and non-Muslims who are potential enemies of Islam. That is, non-Muslims who if they were Muslims would qualify to join a jihad are also they from whom the tax is to be collected. This holds true as long as they remain non-Muslims and the Islamic state cannot expect their services in a jihad. Moreover, the Islamic state must fight them until they surrender and agree to pay the poll tax. Good health, sanity, and relative young age are some of the essential prerequisites on both sides for the respective laws (to join the jihad for Muslims or to pay the *jizya* for non-Muslims) to apply.

Muslim soldiers are instructed not to kill the insane, women, and children during war, unless it is required to win victory.[314] The blind, the *muq'ad* (having a disease which constrains one to remain sitting, "deprived of the power of motion" or a lame man, or having "a disease depriving him of the power to walk"[315]), and the elderly should not be killed either unless they participated in battle themselves or advised the heretics on war strategies, thereby helping them against Muslims.[316]

With regard to prisoners of war, it is claimed that the Shar'i instruction to treat prisoners of war humanely, to feed them, and give them shelter as prescribed by Qur'an **76**, 8–9 coincides with articles 13–14 of the Geneva Convention of August 12, 1949 and with the general spirit of international law.[317] Women and children may be killed after falling in captivity only if they have actively taken part in battle. The Hanafis, however, forbid the killing of captive women and children and the mentally deficient (*ma'tuh la ya'qil*) no matter what they have done, because the Hanafis view killing after falling into captivity as a punishment, while these groups of people do not deserve a punishment. If people are killed during battle it is understood as a means to stop their evil purposes from materializing; after the war they should never be killed.[318] Islamic law draws a clear line between the enemy's combatants and others, namely women, children, the disabled – blind, senile, old, and those whose movement is restricted.[319] The Hanbalis do not permit taking *'ajaza* (disabled persons) as captives (*sabaya*); *sabaya* were often treated as slaves. Shafi'is, Hanafis, Zaydis, and Malikis do not have such an objection. Al-Zuhayli concludes that disabled persons should not be taken as slaves because "disability is a natural prison which often impedes a person from sound thinking, although on the surface they may seem to mingle with people".[320]

The law of jihad also encourages providing treatment for the sick and the wounded of enemy subjects taken captive.[321] In the laws concerning attitudes to non-Muslims, being disabled is portrayed as a weakness. But since disabled people are seldom believed capable of harming the status and strength of the Islamic state their weakness "buys" them mercy in both war and captivity.

3

PEOPLE WITH DISABILITIES AND MARRIAGE

According to al-Ghazali (d.1111), a Shafi'i scholar whose *Ihya' 'Ulum al-Din*[322], a major fiqh compilation, represents the main stream of Sunni legal tradition to the present day, marriage has five main purposes: bearing children, satisfying the sexual drive, establishing a household and a family, companionship, and providing for women in a humane manner.

The Maliki jurist al-Shatibi (d.1388)[323] adds to these benefits of marriage enjoyment of the beauty and good qualities of the wife, avoidance of falling into the sin of illicit sexual conduct, embodied in the concept of *ihsan* (chastity of the married spouses),[324] peace of mind, and cooperation with the wife on both material and spiritual matters. Another purpose of marriage reiterated in recent polemics is increase in the number of Muslims in the world thereby adding strength to the Islamic peoples.

As much as marriage is not contracted solely for the purpose of bearing children, it is considered a blessing when a marriage does produce offspring. More pivotal for the preservation of marital relations than bearing a child seems to be that the couple are both healthy enough to be able to engage in physical and emotional intimacy and in sexual intercourse whenever the husband wishes and it is not forbidden on certain religious/legal grounds. This means that no impediments interfere, such as physical impurity of the wife (*hayd* – menstruation, *nifas* – bleeding after giving birth, etc.) or of the husband, or the sanctity of the time and place (e.g., fast of Ramadan or pilgrimage to Mecca).

In the Shi'i lexicon[325] the term *nikah* in Arabic, which is used for marriage, is equivalent to *wat'*, which means sexual intercourse between a man and a woman sanctioned by the marital contract (*'aqd*). Hence the main purpose of marriage is already embedded in the terminology.

The dower or bridal gift *(mahr*) is a sum of money or its value in goods which a man pays to the woman partially prior to the consummation of their marriage. Most of it is an obligation to be paid to the woman by the husband or from his assets at the termination of marriage through divorce or the death of either spouse. Payment of the dower entitles the husband primarily to enjoy the body of his wife in any

legitimate manner he chooses and is agreeable to her, and to enjoy her companionship and other household services as well. The wife, who owes submission and obedience (*ta'a*) to her husband from the moment she agrees to the contract and has received her first part of the dower,[326] is entitled to certain rights as well, and these guarantee that her emotional, material, sexual, and financial needs are met.

Thus the duties of one spouse are actually the rights of the other. The various fiqh books often devote an entire chapter to the duties of the wife to her husband (*ta'at al-zawja lizawjiha*) or the duties of the husband to his wife *(ta'at al-zawj lilzawja*). Any departure from these rules is labeled *nushuz* (disobedience) and is punishable by Islamic law. The severity of the *nushuz* has to be assessed by a qadi and due punishment then ensues. In practice it is the wife who is charged with disobedience more often than the husband, although the Qur'an, for example, addresses in only one verse each type of *nushuz*.[327]

Marriage entitles both spouses to physical proximity with one another and to licit sexual intercourse. Outside the marital bond the segregation of sexes, the veiling of women and the protection of their chastity render the above privileges social and legal taboos. The human body thus exercises a crucial impact on various aspects of marriage. Islamic law on marriage and divorce is concerned, for example, with whether the spouse's body is or is not healthy or disabled, and if it is impaired, in what manner. The law pays heed to whether the spouse's body is accessible to the other spouse or not, and whether it is equipped with a sound mind.

I examine the impact of disabilities on marriage according to the following points:

Kafa'a – suitability for marriage.
Disabilities befalling women only.
Disabilities befalling men only.
Disabilities befalling both men and women.
A note on *junun* (insanity).
Talaq al-ma'tuh (divorce of a mentally deficient man).
Talaq al-marid wakhul' al-marida (divorce of a sick man and of a sick woman ransoming herself out of marriage)
Talaq al-akhras (divorce of a dumb man)

KAFA'A

The wife having received the advance portion of the dower (*mahr mu'ajjal*) is obligated to avail herself physically to her husband (*taslim nafsiha*). From that point on sexual intercourse between them is licit, provided that no Shar'i restrictions apply.

The body of each spouse and its state of health becomes an issue to be tested and subject to examination by the other. The fate of the marriage may depend, according to the jurists, on the ability or inability of the spouses' respective bodies to function. At the same time, the *kafa'a*, suitability for marriage, which according to the jurists is a mandatory prerequisite for contracting to marry, hardly considers the health and physical states of either partner. Although *kafa'a* is sometimes believed to be the basis for an egalitarian and successful match, what it actually ensures is that the husband is not lesser religiously, socially, and economically than the wife. There is no

harm if the wife is lesser than her husband in these aspects. The reason is that if the husband is lesser than his wife, her family's and her own honor are violated; while a well-to-do husband can only elevate his wife's status.[328]

In the medieval legal literature *kafa'a* usually consists of two components: *din* – religious affiliation, and *mansib* – status. Status is composed of *nasab* (lineage) and *hasab* (good reputation earned by honorable qualities or deeds). This was the position of Ahmad b. Hanbal. According to a second report[329] Ibn Hanbal listed three more elements, these being *hurriyya* (freedom), (*sina'a*) trade or occupation, and *yasar* (affluence).

The Hanafis have a similar five-point requirement.[330] Later generations of Hanafi jurists have debated whether *'aql* – mental health, versus *junun* – insanity, should be also considered for *kafa'a* purposes, though the early Hanafis did not mention it.[331]

Malik b. Anas is reported to have deemed *din* to hold the primary place. His students also debated other elements such as *nasab/hasab*, *jamal* (beauty, external appearance), and *mal* (affluence, economic status). They relied on the Prophetic hadith, "A woman should be married for her religion, beauty, money and social status, but if you marry a woman with (the right) religion, your hand will be rich and full" (*taribat yaminuka*).[332]

The element of beauty may be taken to imply health and lack of impairments.[333] Al-Shafi'i supported Malik according to one report, and according to another he listed the five elements as mentioned by Ibn Hanbal, with the addition of a sixth: *al-salama min al-'uyub al-arba'a* ("being free of the four defects"). Though he does not elaborate what these four defects may be, he may have thought of *judham* (elephantiasis), *burs* (leprosy),[334] *'unna* (impotence), and *junun* (insanity), which are recognized in most of the fiqh books as grounds for requesting a divorce. These four are nowhere listed, however, as influencing the *kafa'a*. Ibn Hanbal disagreed with this "sixth" stipulation, because he held that only the wife was entitled to demand dissolution of marriage on grounds of her husband's impairments, hence the symmetry that *kafa'a* normally implies is missing. Ibn Hanbal argues that a woman's guardian may prevent her from marrying only the *abras* (leper), the *majdhum* (sick with elephantiasis), and the *majnun* (insane). Any other disease or impairment is not counted for evaluating a *kafa'a*.[335]

In the Shi'i sources, the two praiseworthy advantages of a woman are that she requires few material goods (*khiffat mu'natiha*) and that she gives birth easily. A woman should not be desired in marriage for her money and beauty, but for her religious devotion. However, when she is married for her religious devotion, Allah bestows upon her husband both money and beauty.[336] This is similar to the Maliki attitude. The term *kafa'a* is used by Shi'i jurists less than by their Sunni counterparts, and the criteria examined in the partners to marriage seem to be mainly religious: the type of religion and the level of piety professed. There is hardly anything in the domain of physical build or capabilities of either spouse.[337]

Normally the *mahr* (bridal gift), which is actually the *mahr musamma* ("specified *mahr*") depends on beauty, financial situation, vocation, the bride's age, fertility, virginity, education, and so on. *Mahr al-mithl* ("*mahr* of the like")[338] is the means to estimate the value of the dower whenever the *mahr* is not specified at all in the contract, or has been wrongly calculated. *Mahr al-mithl* would be the qadi's prerogative

to rule whenever disputes between the couple arise in the course of their married life. The wife would aim for the most she can get, and the husband would seek to pay her the least, claiming that his early agreement was based on misleading information in the wide domain of "beauty". A call to apply *mahr al-mithl* would usually be activated upon divorce or death of either spouse. Inadequacies and disabilities which were not reported, though they existed prior to marriage, may then incite a demand to apply *mahr al-mithl*.[339] But again, in the language of the medieval law no disabilities whatsoever are specified as influencing either the *mahr* or *mahr al-mithl*.

Modern legislation in the Arab world also seldom mentions beauty or health as influencing the *mahr* or *kafa'a*. An example is the Lebanese Family Law, band 49.[340] Yet health issues are nevertheless grounds for divorce disputes.

In discussing the qualifications of a *muhsan* or a *muhsana* (a chaste male or female spouse), one finds that one of the most important factors establishing *ihsan* is that each of the spouses is capable of intercourse (*yasihh minhu al-jima'*). That is, the husband is capable of penetration and the wife is penetrable. Each of the spouses, through their own sexual performance, renders the other *muhsan* or *muhsana*. If the wife's vagina is blocked (*ratqa'*), for example, her husband cannot become *muhsan*. Likewise if the husband is impotent his wife never becomes *muhsana* either. There is a debate among the Maliki jurists whether *'aql* (reason, sanity) is one of the qualifications for *ihsan* (chastity). Some stipulate that the man at least should be sane. Others say that a sane spouse can render only himself/herself *muhsan/muhsana*, but not the other spouse. Another group of scholars claims that if intercourse (*wat'*) has taken place the mental state is disregarded: both are held to be *muhsanayn*. The category of *ihsan* is particularly relevant for questions relating to criminal offenses and their punishments in conjunction with adultery (*zina*) and defamation of a woman regarding her chastity (*qadhf*).[341]

If we examine the chapters on divorce in the Islamic legal literature, we find several specific health problems which might constitute grounds for divorce. These are physical and mental conditions that are either considered impediments to maintaining normal marital life, namely sexual performance within marriage, or are contagious and hence life threatening or a health hazard to the healthy spouse and to their future expected offspring. This implies that even when not overtly stated, *kafa'a* usually assumes *shart al-salama* (the unstated yet understood stipulation that the prospective partners are healthy) upon signing the contract, unless otherwise admitted.

A health problem in one partner that existed before the signing of the contract but was not reported to the other is considered a deception with regard to *shart al-salama*. The impact of such a revelation on the fate of the marriage will depend on the type of health problem, and also on the stage when it was discovered: before or after the advanced payment of dower, or before or after consummation of marriage.

Even when the disability does not dramatically affect the fate of the marriage it might reflect on the value of the *mahr*, and possibly lead to a call to apply *mahr al-mithl* instead, as explained above. Once again we realize that the health situation is an important factor in the estimation of the *mahr*.

Why then is the state of health not listed explicitly among the major parameters of *kafa'a*? Is it because most of the handicaps were not viewed as having impact on marriage? Or was it naturally assumed that people admit to their disabilities once

they have them, being reluctant to lie on such sensitive matters and risk damaging their reputation? Was it commonly understood that most disabilities are obvious and hard to disguise?

These are only speculative questions and I have no definitive answer. From the legal literature it is evident that deceptions nevertheless occurred, and the jurists had to contemplate possible solutions to fraud cases.

One solution to cases where the deception (*tadlis*) was on the part of the wife and discovered by the husband before consummation is "sending her back to her parents' home" (*turadd*). The marital contract is voided and the husband may take back all the gifts and money invested by him until then. The handicaps not reported prior to marriage and for which a wife may be sent back are only leprosy, elephantiasis, insanity, and having a non-penetrable vagina (*qarn* and '*afl*), which means that she will never be able to bear children. But she can be sent back only if consummation has not taken place. Once consummated, the marriage cannot be voided.[342] In another tradition, the blind wife *('amya'*), the leper, one with elephantiasis, and the lame *('arja'*) may be "sent back to their parents". This means that the contract is rendered as if it never existed. Note that only in Sh'i sources do blindness and lameness of the wife constitute grounds for the nullification of marriage, but also, only if there is no consummation. If there is, no further grounds for annulment (*radd)* exist, since consummation is legally viewed as an expression of satisfaction or acceptance of the bride as she is.[343]

If the man did not know of his bride's disabilities and consummated the marriage, yet he wishes to divorce her because of her disability, he owes the wife her dower for the *dukhul* (penetration) which he performed. However, he may try to retrieve the dower already paid to the bride from her *waliyy* (guardian), who is held responsible for the *tadlis*, if the latter knew of her disability.[344] In any case this will not be a *radd*. In the Shi'i sources, divorce can be achieved through two main mechanisms:

a. *khul'* – This is based on Qur'an **2**, 229. The wife wishes to be released from the marital bond and is willing to give the husband a sum of money *('iwad*) in exchange for his consent to divorce her. This becomes an irrevocable divorce.
b. *Mubarat* – the release, keeping "clear each of the other".[345] This is another type of *khul'*, where the two detest each other and they agree that the husband divorces the wife against her willingness to compensate him. This is an irrevocable divorce too.[346]

Generally, it emerges from most of the legal sources that disabilities per se were not considered marriage inhibitors. Only in modern times do we encounter discussions on whether the handicapped should marry at all, and on the need to make permission to marry conditional on medical examinations.

Umar Rida Kahala,[347] for example, referring to "physicians", concludes that whoever suffers from a contagious disease or chronic illness, and cannot recover from it, may not marry. He even suggests that proper legislation be enacted on this subject. Kahala enumerates the following diseases as marriage bars: *al-sayalan al-sadidi* (gonorrhea), *al-zuhari* (syphilis), *al-sill al-ri'awi* (pulmonary tuberculosis), alcoholism, nervous diseases, defects in the reproductive organs, a too narrow vagina, physical deformations, heart, liver, and kidney diseases, and cancer. In his view,

every couple should be tested prior to getting married, and of course avoid marriage if one of them suffers from any of the above diseases. Kahala is envious of Norway, England, and several states in the US that require of a couple to furnish health certificates before they register to marry. In Kahala's view, the absence of such a document renders the marriage legally invalid.[348]

Dr. Muhammad Kamal al-Din Imam, a professor of Islamic law at the universities of Beirut and Alexandria, claims that the head of state has the legal right to intervene and introduce into modern legislation the stipulation that anyone who wishes to marry has to undergo medical tests to verify that he or she is not afflicted with a contagious disease which is genetically transmitted.[349] Syrian family law indeed includes such a clause.[350]

In a fatwa from Gaza (1998) Sheikh Muhammad Dib Qusa is asked whether retarded people may marry at all. He concludes that they may, only if they evince attraction to members of the opposite sex. He explains that sanity *('aql*) is not a prerequisite for marriage.

In an Egyptian fatwa[351] the mufti distinguishes between *'atah* (mental deficiency) and *junun* (insanity), claiming that *'atah* is a quiet insanity and *junun* is a violent extrovert insanity. He permits the marriage of a *ma'tuh* (one who has *'atah)* only as long as he or she can differentiate between good and evil, and if they have their guardian's consent to marry. *'Atah*, contrary to *junun*, is believed to be less hazardous to the partner.

In another fatwa dated June 24, 1981, the mufti Jad al-Haqq declares an existing marriage void considering that the husband has been continuously insane since 1968 – namely prior to the marriage, which was in 1978. This is also grounded in Egyptian law no. 462 of 1955, which asserts, in the Hanafi spirit of the law, that if both partners are not sane when the contract is made the marriage is void.

Sanity is also required of those acting as witnesses to the validity of marriage (*shuhud*). This is so because "It is too serious a contract" to be jeopardized by the presence of the insane and their like" (minors, for example).[352]

The reality is that handicapped people have difficulty finding a match, as is evident from an article published in Egypt on June 13, 1996. The reporter, 'Izza Bayumi, asks, "Why do young men refrain from marrying a disabled young woman?"[353] In her opinion, being physically handicapped should not prevent the girl from studying and working, then from marrying and conducting good life. It is the family, though, that often objects to a marriage with a disabled partner, be it a man or a woman. Bayumi recommends that people distinguish between physical and mental disabilities, and object to marriage only in the case of the latter. She quotes a Prophetic hadith according to which each person is entitled to choose his or her spouse because "this world is a pleasurable place, and the best of its pleasures is a good, decent wife (*saliha*)".[354] She understands *saliha* as having good internal qualities and disposition, not as referring to appearance and beauty.

Bayumi also quotes Dr. Suhayr 'Abd al-'Aziz, a professor of sociology at al-Azhar University, who asserts that when disabled people marry they hardly ever divorce.[355] Besides, the sociologist explains, divorce often results from non-physical problems between spouses.

In the same vein Islamic law encourages each side prior to signing the contract to observe the other for any possible impairments, and mainly to find out whether they like the other as regards appearance. Agreement to enter into the marital contract implies acceptance of the spouse, including his or her impairments. Excluded of course are the disabilities deliberately hidden before signing the contract, meaning that the healthy spouse has been misled. Cases of fraud have to be treated in court, because the value of *mahr* fixed in the contract was assessed based on information that after marriage appears to be false.[356] Let us bear in mind, though, that even "observing" the prospective spouse prior to marriage may produce only partial information. The chastity code of Muslim women allows them to expose to strangers only their faces, the palms of their hands, and their feet.

Let us recall that in sexually conservative societies, such as most of the Islamic ones, which follow strict chastity rules and gender segregation to one degree or another, most of a person's impairments, especially those in women, will not surface by themselves. It is therefore the decency and honesty of the parties that is at issue when they report or fail to report a disability.

True, not all disabilities have an impact on the quality of marital life. Muslim jurists, influenced by their legal school of affiliation, refer only to those disabilities that do make such an impact.

DISABILITIES BEFALLING WOMEN ONLY

In most of the medieval fiqh books, the impairments which a man may discover in his wife after marriage and which consequently annul marriage (*radd* or *faskh*) are as follows:

'afl – (scrotal hernia), a piece of flesh coming forth in her vulva similarly to a man's hernia.[357]

Qarn – a protruding tissue or bone that blocks the vagina.

Ratq – the meatus of the vagina is sealed by a tissue which prevents penetration[358] or the absence of an aperture except the *mabal* (meatus urinarius, urinary tract); or the *farj* (vagina) being so drawn together that the *dhakar* (penis) can hardly pass or cannot pass at all.[359]

Ifda' – the uterine tract and the urine tract are intertwined[360]; or *fatq* – the vagina and the rectal tract are one.[361]

Bakhr – bad odor is released from the vagina.

Faskh, in the sense of annulment, sometimes called *radd*, is a rare option, restricted to a few cases of disabilities on account of which the marriage was never consummated. Mostly the term *faskh* implies dissolution of marriage by a qadi's ruling, which in modern legal literature is often replaced by the term *tafriq*.[362]

The Maliki jurist al-Wansharisi states bluntly that since marriage is a type of "hire contract" (*ijara*) a man may annul or cancel the marriage (*radd*) as soon as he finds out that his wife is a *majnuna* who cannot offer him appropriate companionship and intimacy (*mu'ashara*), or that since she has leprosy or elephantiasis, intercourse with her is detestable or unsafe for his health.[363] Al-Wansharisi even justified *radd* if the wife has no breasts.[364]

The Hanbali Ibn Qudama equates marriage to a sale contract (*bay'*), in which the *mahr* is the *'iwad* (price) and the wife is the *mu'awwad* (the purchased goods). He says that on discovery of the impairment the husband should at once make a claim for *mahr al-mithl*, an alternative lower price, since the first price agreed was wrongly assessed. Otherwise it might be asserted that the *talaf* (damage to the merchandise) – the disability – occurred at the hands of the "buyer" (the husband).[365] Hence, later on the husband will not be able to complain of the wife's impairment and be compensated for it.

According to al-Jaziri, the first three of the five impairments mentioned above are rare today, since modern surgery is capable of correcting them. As for the "bad odor", sometimes perfumes can improve the condition. But generally the problem lies with a perforation in the tissue that covers the stomach, and although it can be treated by diet or surgery, it is a difficult one.

Unlike the Hanafi jurists who believe a man should stay by his wife when she is disabled and try cure her, if it is possible, the Malikis support the husband's demand for *faskh al-'aqd* (annulment of contract) due to her disabilities, but with the following stipulations:

a. The husband was not aware of her disability prior to contracting to marry her.
b. The husband did not express acceptance of this impairment after the marriage, by words or by engagement in sexual intercourse with her.
c. The two of them do not enjoy one another's physical nearness by touching, kissing, etc.[366]

If the wife becomes *majnuna* after consummation or even beforehand, the Malikis do not allow the husband the right to *faskh* (dissolution of marriage).[367] He can always exercise his right of *talaq* (repudiation). Besides, he may still have pleasure from her sexually and otherwise. The fact that the husband may still experience *istimta'* (enjoyment, pleasure)[368] despite certain disabilities of his wife changes the legal situation in her favor. His wish to dissolve the marriage in the latter scenario would be denied, because the purpose of marriage, *istimta'*, is still viewed as fulfilled.

If before the contract was signed the woman suffered from leprosy or insanity, and the husband was not notified of it, she will be allotted by the qadi a one-year deferment to be cured. She can be compelled to undergo surgery or other treatments since they are medically successful procedures today. In past generations a distinction was drawn between inborn (harder to treat) and "newly" developing disabilities (easier to cure). Today there is no need for that classification.[369]

Any husband who suffers from his wife's disability is advised to resort to *talaq* (repudiation) rather than make her health condition a public affair (*tashhir*) by pleading before the court for dissolution.[370] According to the Hanbalis, if a marriage is terminated (*faskh*) after consummation, the woman will be given the full amount of dower as specified in the contract, whether it was she or her husband who initiated the request for dissolution. This is compensation for the *khalwa* (seclusion)[371] which took place between the two spouses. If the husband was not in a state of *khalwa* with her, according to the Hanafis she will receive one half of the *mahr*.[372]

In all cases, if the husband still feels after consummation that he was tricked into the marriage he may sue the one who introduced the woman to him (her *waliyy*) for the amount of *mahr* he paid her.[373] The *waliyy* is usually a close relative of the wife, a father or a brother, and is expected to know if she is disabled or not, and therefore he

may be sued as indicated. If the *waliyy* is a distant relative, such as a cousin, who claims that he was not aware of her disability, there is no one to sue.[374]

In a recent fatwa,[375] the mufti was asked about an impairment that both the woman and her guardian were not aware of. From whom should the misled husband request reimbursement of the dower? The answer provided was that if the *waliyy* did not know, the woman is required to compensate. However, if she did not know either, then no one is at fault and there is no one to sue.

The rule seems to be that the one who knew of her disability should compensate for his or her deception. If the woman and her *waliyy* shared the deception they will bear the *daman* (compensation) on a fifty-fifty basis.[376]

As early as the 15th century al-Wansharisi was asked about a case in which the husband charged the wife with being a leper, and her father claimed "she only had *luma'at fi jasadiha* " (bright spots in her body). The husband probably intended to claim that the impairment existed prior to the contract, in order to prove that he was tricked into marriage. The burden of proof lay on him. In the absence of such proof the wife's guardian should testify that the impairment was not there prior to marriage, and consequently *tafriq* (dissolution by court) would not be applicable. Only if the impairment was in her sexual organs and penetration was impossible should the wife be returned to her father (*radd*).[377]

According to most Shi'i jurists blindness and lameness are disabilities for which a man can annul the marriage if he finds them in his new bride.[378] The Shi'i jurists thus count seven or eight disabilities pertinent to women only, as against the Sunnis who count five. For these a man may request annulment of marriage as long as consummation has not taken place, he was not aware of her disabilities before marriage, and he did not pronounce or show satisfaction with the marriage after becoming aware of the disability.

According to the Hanafi law, *radd*, cancellation of the contract due to the discovery of an impairment in the wife, can take place only before *khalwa* and *dukhul* (penetration), and it does not entitle the wife to any monetary compensation. Moreover, the man may legally demand his *mahr* back.[379]

DISABILITIES BEFALLING MEN ONLY

These include:

Jabb – amputation, extirpation or cutting off of the penis (and/or the testicles). The man is then a *majbub*.[380]

'*Unna* – impotence (too small or too large a penis, and therefore unable to penetrate), or lack of erection[381]; one who does not go in to women by reason of impotence.[382] The man is then an '*innin*.

Khisa' – when a man has no testicles, is castrated.[383] The man is then a *khasiyy*.

According to the Hanafis, the wife is entitled to *faskh*, dissolution of marriage by the qadi, if the man suffers from any one of the above three disabilities.[384]

Faskh, dissolution of marriage by the court, is irrevocable, contrary to *talaq* (repudiation) by the husband, which may under certain circumstances be revocable.[385]

In all other situations, as difficult as it might be for the wife to stay with her husband, she may not request dissolution, because the Hanafis believe that marriage is contracted for "better and worse", and one should stick by a sick spouse take care of him or her. This is sometimes a harsh verdict against the wife, because in cases such as the husband's leprosy her own health is in jeopardy and she has no way of divorcing him.[386] *Jabb, 'unna*, and *khisa*' are exceptions to the above rule because in their presence the primary purpose of marriage, namely sexual intercourse, is denied. This is intolerable in the eyes of the law, because wives have the right to *wat*' (*dukhul* – penetration). Men who are not able to function sexually like men are likened to women, and a woman is forbidden to marry another woman. Therefore these three handicaps entitle the wife to request dissolution of marriage according to Hanafi law.[387] However, in modern times seeking a medical cure for impotence is permitted since it is like any other disease; but the following reservations apply:

a. The cure must not result in graver damage or death, considering that some medications for impotence could lead to that.
b. The medications must not contain forbidden ingredients such as wine (alcohol) or pork.
c. The disclosure of private parts of the body should remain within the Shar'i norms.
d. The medications should be taken after consultation with a trustworthy physician.[388]

With regard to the *khasiyy*, the Malikis distinguish two categories: he produces an erection with sperm; he produces an erection without sperm. Only the second is considered a handicap. If the husband falls into the first category, the wife may not request *radd* (annulment of '*aqd*) on account of his handicap because legally no handicap exists. If the man suffers from lack of erection *(i'tirad*) due to a disease or to some other cause, the wife has the right to request dissolution (*faskh*), provided that she did not know of this handicap prior to the '*aqd*.[389]

According to the Malikis, even if the man is inflicted with *junun*, and this developed after consummation, the wife is entitled to request *faskh* (dissolution).[390] The husband is not entitled to the same right if the wife becomes a *majnuna* after consummation. This way the woman's "physical weakness" and her being "homebound" are compensated by the law with a ruling in her favor.

In Maliki law the wife may request *faskh* if the man suffers from *judham* (elephantiasis, a form of leprosy). It is called *judham* because the flesh becomes detached and falls off. It is the cracking of the skin and a gradual falling off of the flesh.[391] The wife may make her request whether the condition occurred before or after the '*aqd*, even if it is not severe, but definitely if it is severe. The man does not have a similar option for disabilities that appeared in his wife after the '*aqd*. He may always resort to his right to *talaq* (unilateral repudiation).[392]

If *after* the contract is signed the man gets impaired with *judham, burs*, or *junun*, to prevent the wife from harm the court will afford the sick man one lunar year apart from his wife to verify whether he is cured or not. During this year the wife is entitled to *nafaqa* (the maintenance fee of a married wife). Likewise, the maintenance fee will be allotted to a wife whose husband was given a one-year deferment by court to examine whether he is cured of lack of erection *('adam al-intisab*).[393] In Shi'i law

it is explained that the one-year extension is meant to let four seasons pass, so that if the impotence is affected by seasonal climate, it has a fair chance of being remedied under different weather conditions.[394] This is also a Hanafi opinion.[395]

If there is no chance of cure, as with a *majbub* or a *khasiyy* who has no sperm, or with an '*innin* whose penis is too small to perform penetration, no deferment is granted because the deferment is meant to allow the medical professionals to try to cure the condition.

The wife may never bring any claims against her husband regarding his sexual performance if the impairment appeared after consummation and if the husband had intercourse with her only once. This includes cases in which the husband becomes impotent as a result of disease, accident, or old age.[396]

The wife may sue for dissolution of marriage in cases of *irtikha*' (softening of the penis) even if the husband is able to rub himself against her vagina (*musahaqa*) and even if he ejaculates as a result. This is so because her legal right is to enjoy in marriage a *wat*', a vaginal penetration. Moreover, the wife is entitled to the full value of dower if her marriage to a man so disabled is dissolved, because she upheld her obligation to the contract, that is, *taslim* – making herself physically available to her husband.[397]

Even if prior to marriage she knew of his disability, yet agreed to the marriage, was often in a state of *khalwa* (seclusion) with him, and shared the bed with him, she does not lose her right to request dissolution of marriage. Her willingness for intimacy with him was meant to help him get used to her and eventually to succeed sexually. She had good intentions, while it was the man who failed.[398] She will lose her right to demand *faskh* (dissolution of marriage by court) ever again if she refuses to testify before the court that she does not engage in any intimacy with her husband, after the court has given her the choice to do so *(khiyar*), if the one-year deferment has not produced a cure to his impotence.

The term *radd*,-annulment of the '*aqd* before consummation, because of a wife's pre-existing disabilities, is an option reserved in Sunni legal literature mostly to husbands.

In the Shi'i law a man may be "sent back home" *(radd*) too, and the marriage contract cancelled, because of *junun* and '*unna*. The existence of *junun* can be proved if the man appears unaware of the times of daily prayers. If he is aware of them, there is no ground for the wife's request of dissolution of marriage. When the man is defined as *majnun*, and the wife opts to dissolve the marriage (she is not obliged to), her husband's guardian has to divorce her in place of the *majnun*.[399]

DISABILITIES THAT BEFALL BOTH MEN AND WOMEN

These, in all schools of law, include *junun* (madness), *burs* (leprosy), and *judham* (elephantiasis).[400] The first has to do with mental problems, and the last two then refer to contagious skin diseases. With regard to the leper, there is a famous Prophetic tradition that advises one to flee from the leper as one would from the lion, implying that any one who associates with the leper is risking his or her life.[401]

Other disabilities occasionally mentioned in the fiqh are '*ama* (blindness), *shalal* (paralysis, unsoundness in a hand or an arm),[402] *qira*' (ring-worm or baldness), and *al-sharah fi al-akl* (excessive eating)[403].

The Malikis list the following male and female disabilities: *junun, judham, burs, salas al-bawl* (inability to retain urine), and *al-khara'a 'inda al-wat'* (incontinence of excrement during intercourse), sometimes called '*adhyata*. The Hanbalis name the last *al-ishal al-da'im* (chronic diarrhea).

The Malikis allow either spouse to request dissolution of marriage when the other suffers from the above, even when he or she may have the same disease. The reason provided is that a spouse might detest in the other a condition that he or she can tolerate in himself or herself. This is also the dominant position among Shafi'i jurists.[404]

With *junun* too it is left to each spouse to legally choose (*khiyar*) to stay in the marriage or leave it through a qadi's verdict.[405] The Malikis include under the term *junun* epilepsy and *waswas* (melancholia, delirium, confusion of the intellect). It depends, however, on when the *junun* first occurred. If it was before the contract, and the other spouse was not aware of it, each has the right to request *radd* (annulment of contract), whether the revelation of the disability came before or after consummation, assuming that a spouse's *junun* harms the other spouse physically, financially, and so on. If it is a periodic *junun*, with intermissions of sanity, such as epilepsy (*sar'*), then no grounds for *radd* can be furnished.[406] It is worth noting here that epilepsy in the medieval period was viewed as a sort of insanity, unlike today, when it is treated as a neurological disorder which can be largely controlled with medications.

The Malikis claim that '*adhyata* constitutes grounds for *radd* if it existed in either spouse before the contract. After '*aqd*- some say it can never be grounds for *faskh* (dissolution of marriage), detestable as the condition may be. A few allow the wife only to request *faskh*, but not the husband. Wetting in bed or during intercourse, and farting, are not grounds for request of *faskh* on either side.[407]

As grounds for *faskh* the Hanbalis add *quruh sayyala fi farj al-mar'a wadhakar al-rajul* (open sores or ulcers in the woman's vagina or in the man's penis); syphilis and gonorrhea may fit this description. *Basur* (hemorrhoids, a disease arising in the anus),[408] *nasur* (a disease in the inner angles of the eyes with an incessant defluxion therefrom, or around the anus, or in the gums, or deep ulcers in the anus),[409] *qira' al-ra's* (ringworm in the skull),[410] with bad odor, bad mouth odor, and *khunutha wadiha* (a hermaphrodite who is absolutely impossible to gender) are all grounds to annul the marriage contract.

All Sunni schools of law agree that once consummated, the marriage can be dissolved, if at all, only by a qadi's ruling, and the wife will be entitled to receive her dower as specified in the contract. If the husband believes a deception took place and he was tricked into marriage with an already disabled woman, another legal procedure could follow, according to certain jurists, to retrieve the husband's expenses. Most of the Shafi'is however, deny the husband the right to demand the *mahr* back, either the *musamma* (the dower as fixed in the contract) or the *mahr al-mithl* (the estimated dower), explaining that after consummation the husband is believed to have received what he had paid for. He cannot ask for his money back when he has already used the "merchandise" (his wife's genitalia).[411] The Malikis recognize the deceived husband's right to demand most of his dower back, from the wife or her guardian. They also recognize the right of the wife who waived her monetary rights in order to be released from marriage to a disabled husband (*khul'*), and later learned that he knew of his disability prior to marriage, to demand her money back because of his deception.[412]

According to Shi'i sources, dissolution of marriage does not require any involvement of a qadi, regardless of whether the plaintiff is the husband or the wife. Only in cases of '*unna*, where a qadi has to rule a year's extension, and then weigh the results of this "probation" period, do Shi'i jurists regard the qadi's intervention as necessary.[413]

Acceptance by a spouse of any disability in the other, after the first appearance or discovery of that disability, eliminates for ever the option to request *faskh*.[414]

Other disabilities that may befall men and women, after consummation, such as *suwad* or *siwad* (a fatal disease of the liver causing the person's skin to turn yellowish),[415] *qira*', '*ama*,'*awar* (blindness in one eye), '*araj* (lameness), *shalal* (paralysis), and food obsession, never constitute grounds for request of dissolution of marriage, unless one of the spouses has purposely specified in the marriage contract that the other must be free of that particular disability.[416]

DISABILITIES IN MODERN TIMES

There are two "new" groups of disabilities that Muslims seem to be most concerned about in recent decades, as is evident from Middle Eastern *fatwas*.

A. Genetic disorders in one of the spouses, or in both, which result in the birth of deformed and handicapped babies.
B. Infertility *('uqm*) of either the husband or the wife.

In "The Right Not to Be Born"[417] I summarized the main opinions of muftis as regards fetuses that are already diagnosed as disabled. The general attitude that emerged was that abortion of a disabled fetus is a crime, especially if it takes place after ensoulment, namely later than 120 days into the pregnancy. The rationale provided was that every human being is God's creation, and no one may "play God" and decide of the termination of another human's life. Besides, happiness and the quality of life are subjective terms, and no one can speak for the retarded, quadriplegic, blind, and the like, and claim that their lives are worthless. Very few muftis were supportive of abortion of fetuses with severe disabilities "who will not be able to lead dignified lives". Moreover, most recent fatwas reiterate that one should never despair of seeking a cure for a disabled fetus,[418] even one severely disabled (with hemorrhage in the brain).[419] The state is encouraged to establish institutions to care for those born disabled, since this is part of the social solidarity that Islam cherishes.[420] Parents are urged to persevere, in the hope that Allah will cure their fetus no matter how badly impaired it may be.[421]

In recent years some change in the foregoing attitude of muftis can also be found. If the deformed or disabled fetus has an incurable disease, and has not completed 120 days in the womb so that the soul has not yet been inspired into it, meaning that it is not a human being with full rights, it could be aborted.[422] This permission is granted especially when the disabled fetus is also diagnosed, preferably by trustworthy Muslim physicians, as endangering the mother's life.[423]

Sterilization of carriers of genetic diseases is also subject to reservations by the muftis, and it is condoned, if at all, only after a couple have already begot sick children.

GENETIC DISORDERS

What is the fate of a marriage when one of the spouses carries a genetic disorder?

From the fatwas it is recommended that the marriage continues despite the discovery of a hereditary disorder in one of the spouses. It is asserted that the wish to prevent the birth of sick offspring is not sufficient reason to annul or dissolve (*faskh*) a marriage.[424]

The problem is more often with genetic disorders that although known to the carrier of those disorders before marriage were hidden from the other spouse. The secret is revealed when a deformed or retarded child is born. Here, in addition to the sad medical revelation, the healthy spouse feels deceived. What can or should be done?

The principle is that no one can force a healthy spouse to divorce or request divorce on the basis of genetic disorders present in the other. The husband may always exercise his right to repudiation (*talaq*). The wife may request the dissolution of their marriage only if she feels that her husband's handicap betrays the purpose of marriage (*wat'*- penetration), and she risks harm the longer she continues living with him.[425]

The Prophet Muhammad encouraged marriage "from afar", that is, avoidance of consanguineous marriages, so as to prevent congenital disorders.[426] If applied, this recommendation is one way to help reduce congenital birth defects by the preventive method. The fact that marriages of first cousins and other arranged marriages among members of the same family are still popular in Islamic societies proves that the Prophet's recommendation has not been fully comprehended. Genetic counseling is relatively a new means that Muslims in various societies are learning to utilize in order to prevent pregnancies whenever the parents are at high risk to transmit genetic disorders to their offspring.[427] As a rule, the muftis are more eager to advocate preventive methods than abortion of sick fetuses.

Still, a recent study conducted in Tunisia, which has an Arab Muslim population,[428] showed that when genetic disorders were discovered in their fetuses, 90 out of 95 families opted for termination of pregnancy. The above research did not encounter any religious objection to genetic screening or steps recommended by its results.

'UQM – INFERTILITY

Infertility *('uqm*) is as ancient a phenomenon as the human experience. The difference between modern and ancient times is that then it could be detected mostly by its results: the fact that a couple did not bear children. Also, the available treatments for infertility were more folkloristic than scientific.

Nowadays medicine can identify some of the causes of infertility even before a couple marry, and obviously after they fail to bear children within marriage. Several effective methods have been developed to help childless parents have children. Since adoption is prohibited by Islamic law, Muslims, more than members of the other monotheistic religions, have to rely on medical achievements in the field of assisted procreation in order to produce a child. Medical intervention is encouraged culturally and socially because childless couples in Islamic societies often find themselves under pressure from friends and relatives to produce offspring. Infertile people

may be pushed into a position of shame or guilt, and in extreme cases they may become the target of abuse.[429] Marcia Claire Inhorn conducted a socio-medical study of infertility in Alexandria, Egypt. She concluded that women who cannot bear children suffer from lack of gender identity and sexual identity due to being infertile in a society which expects of women to become mothers. The self-fulfillment of an adult in Egypt is linked to the ability to produce children. A woman who is infertile is missing part of her personhood.[430] The problem for infertile women is enhanced by the fact that there is no option to become a parent through adoption in Islam.[431]

The popular Egyptian Sheikh al-Sha'rawi (d.1998) was approached by a young man who had been told by physicians that he would not be able to beget children. The man inquired of the mufti whether he may marry at all. Al-Sha'rawi's answer was that if the prospective spouse were informed of his disability prior to signing the marital contract, and she consented, then he may. There were many happy couples who had no children, the mufti concluded, and bearing children was only an expression of Allah's will.[432]

Most questions that muftis receive in the domain of infertility, center on the rights of the healthy spouse to end marriage to an infertile spouse. Men are freer to act in such scenarios, as their right of repudiation (*talaq*) is always available if the marriage is unsatisfying to them. They need no explanation. If the marriage has been consummated they may never request dissolution (*tafriq, faskh*) of the marriage, and they always have to pay the wife the full amount of dower specified in the marital contract. Men also have the option to marry additional wives, up to four at a time, wherever it is permitted by law, and beget offspring by them.

More problematic is the case where a woman realizes that her husband is infertile. Often she makes the discovery after consummation, so the purpose of the marriage is legally considered fulfilled, and she does not have a right to divorce her husband on her own initiative. She might try obtain the court's permission to dissolve the marriage, but her chances are slim. This is well demonstrated by a fatwa issued by the Kuwaiti mufti Manna'.[433] Manna' advised a woman not to sue for dissolution of marriage on grounds of her husband's infertility, since '*uqm* is not recognized by the Shari'a as one of the disabilities in a man that impede marriage and therefore entitle his wife to request dissolution. The only option Manna' left for that wife was *khul'*, meaning her waiver of all monetary rights in the marriage in return for her husband's consent to divorce her. Similar relief for a wife's misery was suggested by the Egyptian mufti Mahmud, who explained that bearing children or not is not up to the wife or the husband, but is God's will to determine. No one is to blame for a childless marriage, and requests for dissolution of that marriage because of infertility are not in order.[434]

An opposite answer was provided by a Saudi mufti, al-'Uthaymin, in 1995. The wife inquired whether she could request dissolution of her marriage to an infertile husband, and the answer was positive. Al-'Uthaymin asserted that women marry in order to bear children, and if this goal is not achieved because of the husband's disability, the wife should ask to have the marriage dissolved.[435] That year too the Saudi mufti al-Jibrin gave a similar fatwa, making the permission to the wife conditional on her not having known prior to signing the contract that their marriage would not produce offspring. If she knew of his disability in advance of the marriage, and went into

it nevertheless, she would lose all legal grounds to request dissolution later, on the basis of that particular disability.[436] In 2000 Mufti ʻAfana of the al-Quds University permitted the wife of an infertile husband to ask him to divorce her if he was ʻ*aqim*, and if he refused, she was encouraged to appeal to the court and thus obtain dissolution of their marriage. This ruling was justified on the grounds that every wife has a right to have children and become a mother.

The difference between the two above attitudes arises from the absence of the mention of ʻ*uqm* in any fiqh source as a disability that impedes normal marital life. Although ʻ*uqm* practically results in a childless marriage, similarly to the case of a man's ʻ*unna* (impotence), the two cannot be compared. ʻ*Unna* implies that a man was never capable of penetrating his wife's vagina. If he succeeded penetrating her just once, he will never deserve the title of ʼ*innin*, even if he has never been able to repeat *dukhul* with her.[437] Most infertile men are able to perform sexual intercourse, and ejaculate, but no pregnancy ensues.

Law no. 25 in Egypt, 1920, states that the wife may request dissolution of her marriage if the husband suffers an incurable disease. The problem with ʻ*unna* is that the physicians debate whether it is a temporary and curable or a permanent and incurable problem.[438] If ʻ*unna* is caused by psychological factors it is impossible to determine that it is eternal.[439] While ʻ*unna* is accepted, not without some difficulty, as an impediment to marital life, to ʻ*uqm* it is even harder to accord the status of an impediment to marital life. Hence the wife is hardly ever awarded the option to request dissolution of her marriage with the infertile husband.

In recent years a change may be detected, as there has been a growing tendency among modern religious scholars to view ʻ*uqm* as a type of ʻ*unna* due to the element of *darar* (harm)[440] they both inflict upon the wife. Consequently, if the ʻ*uqm* is medically diagnosed as permanent, she will have the right to request dissolution of that marriage, provided she had no inkling of the man's existing ʻ*uqm* prior to consenting to marry him.[441]

At the same time, there is increasing awareness of various medical treatments for ʻ*uqm*. Any medication that trustworthy physicians find helpful, and contains no forbidden ingredients by Islamic standards, is endorsed.

Artificial insemination (*talqih sinaʻi* or *talqih istinaʻi*) is largely approved by the muftis, as long as the sperm is the husband's and the ovum is the wife's. A few muftis even assent to artificial insemination of the wife with the sperm of her late husband during the ʻ*idda* (waiting period) following his death. The reason given is that the status of marriage, and all its rights and obligations, do not lapse until the end of the ʻ*idda*. The ʻ*idda* of the widow is a period of four months and ten days starting from the date of her husband's death.

True, any child born to a widow during the ʻ*idda* is considered a legitimate child to her late husband. Moreover, any pregnancy which can be shown to have started during the ʻ*idda* would produce, according to all schools of law, a legitimate child to the mother's late husband. Using a deceased husband's sperm after the ʻ*idda* has ended is outlawed for fear that this could become a common means to cover up illicit sexual relations that lead to children being born to widowed mothers months and years after their husbands have died. Sheikh ʻAtiyya Saqr[442] prohibited the insemination of the wife with her husband's sperm after the ʻ*idda* (the waiting period) has

ended. He explained that as she regains her right to marry, her deceased husband is like a "foreigner" with respect to their relationship. She may not insert his sperm into her womb. Even before the '*idda* is over Saqr views the wife as a divorcee in a terminal divorce (*talaq ba'in*) who cannot go back to her husband. Therefore, she cannot use his sperm either.

In practice, sperm banks in Egypt, for example, do exist. But the rule is that shortly after the announcement of the death of its owner, his sperm kept in the bank is destroyed lest it is requested for use with strangers and in illicit sexual ties.[443]

Test-tube fertilization (IVF), leading to the birth of test-tube babies (*atfal al-anabib*), is acceptable with the same stipulation that the sperm is the husband's and the ovum is the wife's. In both cases of fertilization, strict precautions must be taken by trustworthy medical personnel lest the sperm of a man unite with the ovum of a woman who is not his legitimate wife.[444] In test-tube fertilization it is emphasized that the fertilized ovum must be returned to the womb of its original donor. Any deviation from these guidelines exposes the participants to charges of adultery (*zina*). The Libyan law no. 175 of December 7, 1972, prohibits artificial insemination out of fear that it always may involve *zina* (adultery). Articles 403A and 403B list the punishments for all concerned: the husband, the wife, and the physician who arranges the procedure.[445]

Questions have been raised recently of the legitimacy of a cure for infertility through transplant of reproductive organs. Muftis and physicians appear to be unanimous against the transplant of testicles and ovaries, which are believed to carry the genetic code, hence the lineage (*nasab*). There is no such objection to the transplant of fallopian tubes and uterus.[446]

OTHER DISABILITIES

In a fatwa dated December 13, 1996, Dr. Muhammad Zannati 'Abd al-Rahman, a professor of Qur'anic studies in the faculty of Islamic Studies at al-Azhar University, denied the right of a wife to request dissolution of her marriage because "several days after marriage" she discovered that her husband was epileptic. What the wife possibly intended was to claim that the husband had deceived her prior to marriage, so she was entitled after marriage to sue for dissolution of marriage (*tafriq*). The mufti in this case recommended that she not request a *tafriq*, because "today epilepsy is medically treatable, and the wife should rather help her husband". In Dr. Zannati's opinion, a medically treatable disease cannot furnish legal grounds for request of dissolution. In the Middle Ages epilepsy was indeed classified with *junun* (insanity), but this is not true today. Advances in medicine, particularly neurology, render some medieval legal rulings inapplicable today.

A wife's frigidity is another handicap that is not deemed to justify dissolution of marriage to her. Dr. al-Tikriti claims that nowadays psychological as well as surgical methods are available to treat the problem. A frigid woman may marry and even bear children.[447] In other words, frigidity resembles none of the legal impediments to marital life in women, according to Islamic criteria. A husband will sue in vain for dissolution of marriage on grounds of his wife's frigidity.

In a more recent book, Dr. Wasfi expands the range of diseases which he views as harmful to the continuation of marriage, so they might qualify as legal grounds for a request of dissolution of the marriage by either partner.[448] He states that liver cirrhosis as well as certain heart diseases may have a fatal impact on their carriers right after marriage. Tuberculosis (*sill*) is curable, but it is harmful to the spouse and to their children. *Al-Zuhari* (syphilis) is very dangerous and gradually destroys all organs, external and internal, the nervous system and the brain, and leads to complete paralysis. Deformations of the body caused by leprosy, elephantiasis, but also by blindness, justify requests for divorce. Dr. Wasfi mentions in his list also hereditary mental disorders, such as masochism and sadism, sexual fetishism, and other mental deviations related to love and intimacy that in his opinion justify the dissolution of marriage. Here the medical data seem to overshadow the Shar'i guidelines for what may and may not disturb the course of marital life.

A NOTE ON *JUNUN*

This is one of the most severe disabilities that all fiqh books, regardless of *madhhab* (school of law) affiliation, list among the impediments either to contracting a marriage or to maintaining an ongoing one. The *majnun*, or rather his mental health, are relevant in most fields of law, but in none is it as influential on other people besides the *majnun* himself as within the framework of marital relations.

The husband or the wife might be afflicted with *junun*, but the consequences for the marriage are not necessarily the same for both. Dols[449] argued that the title *majnun* (insane) was often a social decision more than a clinical one. Therefore, as Dols explains, physicians did not have a monopoly in diagnosing *junun*. What exactly is implied by the term *junun* is a crucial question if we want to assess society's attitudes to the *majnun*, and the legal issues arising from these attitudes.

The Islamic legal literature is not concerned with analyzing the source of insanity or methods to cure it. There is hardly any classification of types of *junun*, although certain close or related terms, such as *ma'tuh* (mentally deficient), *safih* (fool), *masru'* (epileptic), and so on, signify a variety of disabilities that have at least one common denominator: deviation from human behavior guided by reason (*'aql*).

The *majnun* lacks reason, like the child and the senile person, and therefore he or she is not accountable for his or her deeds and cannot be punished for criminal acts performed at a time of *junun*. This is supported by a famous Prophetic tradition: "The pen does not record [evil actions] against the sleeper until he awakes, or against a boy until he reaches puberty, or against the madman until he recovers his wits".[450]

Since the *majnun* is unaccountable for his acts, he should be accompanied by a guardian in all his interactions with other people or with legal and state institutions.

Al-Shafi'i (d. 240/820), who does not define "insanity", explains that the *majnun* is the opposite of the *rashid* (rightly guided).[451] Al-Sarakhsi (d.483/1090), a Hanafi jurist, defines *majnun* as *'adim al-'aql* (lacking reason), and *ma'tuh* as *naqis al-'aql* (deficient in reason, an idiot). Another Hanafi jurist, al-Kasani (d.587/1191), adds the category of *ghafil* (imbecile) to those listed above.[452]

The Malikis did not add other definitions or terms in the domain of insanity to those of the Hanafis and Shafi'is. They were more preoccupied with whose right it

was to interdict *(hajr*) on the *majnun*, and consequently established the following hierarchy: the parents, if they lived; by default the judge; and by default the consensus of the community. In practice, the judge had the power to declare a person insane, based on the testimony of two adult Muslim witnesses. In this respect the Malikis were the only school of law requiring a judicial ruling that a person was insane.[453] The Hanbalis, such as Ibn Qudama (d.620/1223), did not require a judge's intervention in deciding that a person was insane. Ibn Qudama claimed that insanity was so obvious that it required no intellectual effort (*ijtihad*) to discover it.[454]

Majnun, according to Dols, seems to be a general socio-cultural term, not necessarily a medical-scientific term,[455] for all sorts of mental problems which result in a behavior not guided by reason. The *majnun*, according to al-Issa, even in contemporary Islamic societies, is not only the "hospitalized patient", but anyone "who deviates from cultural norms or manifests unacceptable behavior".[456] So when we deal with *junun* in Islamic societies, we should be very careful in assessing whether we indeed face a medical problem or a social expression of non-conformism. Either situation places a stigma on the *majnun*.

In the realm of marriage, the behaviors of a *majnun*, violent or non-violent, are considered immediately harmful, or having the potential later to become life-threatening to the healthy spouse. It is the well-being, mental and physical, of the healthy spouse and of the children, born or not yet born, that the Islamic law of marriage seeks to protect.

TALAQ AL-MA'TUH

Among other qualities, for a man to be considered capable or legally fit to pronounce the formula of divorce, and legally to terminate his marriage, he must be an *'aqil* (equipped with a sound mind). A *majnun* or a *ma'tuh*, who are not the same, but who both lack reason, may not pronounce the *talaq* formula, according to the Hanafis and Imami Shi'is.[457] The *safih* differs from the *majnun* and *ma'tuh* in that he may pronounce the formula of divorce, but may not, for example, receive money for his consenting to *khul'* initiated by his wife.[458] It is explained that the *safih*'s legal capacity is limited. His liability is shifted to his guardian (*waliyy*) whenever monetary transactions are at stake. For other purposes, such as the pronouncement of a divorce, he may act on his own.

KHUL' AL-MAJNUNA

The Hanbalis maintain that the *majnuna* (insane woman) may not initiate a *khul*' because it is a voluntary transaction, and also a guardian is not allowed by law to act on behalf of his protégé in voluntary transactions.[459] Others say that with her guardian's permission the wife may initiate a *khul*' if it is to her benefit, or if the continuation of marriage is harmful to her.[460]

This is a typical example showing that the jurists pay heed to the quality of marital life of the mentally disabled, not only of the sane. The *waliyy* is a legal appointee empowered to represent the insane person in certain legal procedures; but the jurists

have restricted the authority of the guardians, and thus protected the mentally disabled against any possible abuse or embezzlement by their own guardians.

TALAQ AL-MARID

With regard to the validity of a divorce, one of the dilemmas is whether the repudiation by a *marid* is legally valid. Although it is not overtly stated or medically assessed, the sickness implied seems to be a sickness leading to death. It is also probable that the *marid* is aware of his approaching death, because questions pertaining to inheritance often follow.

The jurists are aware that a man on his deathbed, knowing that his days are numbered, might be coerced by others to violate his wife's rights, to express anger and hostility, and take revenge on her for various reasons, to divorce her, and thus deprive her of the legal rights due to a widow. The repudiation may also be performed in a moment of impaired consciousness.

The majority of Sunni jurists seem to conclude that if the man died within the *'idda* (waiting period) following a divorce, the wife may inherit from him, similarly to a widow.[461] Al-Shafi'i, by contrast, is reported to have stated, "The sick and the healthy are alike", meaning that even if the husband dies within the divorcee's waiting period she will not inherit, because marital life between them has already ended.[462] According to a tradition attributed to 'Aisha, the Prophet's most beloved wife, if a man repudiates his wife three times and she has completed her *'idda*, the rights of inheritance between both of them lapse.[463] Most of the Hanafis explain that if the repudiation is revocable (*talaq raj'i*) the state of marriage is ongoing, and she may inherit from her deceased husband. But if the divorce is irrevocable all marital rights between them are terminated. She may not inherit. This is also the position of several Imami jurists.[464]

Other Shi'is do not consider the repudiation of a *marid* valid at all, although if the same *marid* were to contract a marriage it would be valid. They maintain that even if he divorced his wife irrevocably she may still inherit from him on the following conditions: he died within one year of the moment of *talaq*; she did not remarry before his death; he never recovered from that *marad* that eventually led to his death; and she never asked him to divorce her.[465]

Another possible scenario might be that the husband divorces his wife out of generosity and love, in order to be able to will to her a greater share of the inheritance than she would be entitled to as his widow. Note here that one may will no more than one third of one's assets to the person of one's choice; except for the will, a bequest must be divided only according to strict Qur'anic guidelines. In such a scenario, the husband tries to circumvent the law in favor of his wife. Most of the Hanafi jurists conclude that in the latter event, the wife will receive the lesser of the two sums (that of the widow and that of the "willed" person).[466]

If it was the wife who asked her husband to divorce her, or if she used the *khul'* option (she returned her dower and possibly more in return for his consent to divorce her), she is not entitled to his inheritance, according to al-Shafi'i and Abu Hanifa. According to Malik, any divorce during the husband's fatal sickness entitles the wife to part of his inheritance; the case that she was the one who asked for the divorce should not be excluded.

Those who deny the wife the right to inherit if she initiated the divorce, and then her ex-husband died, justify their position by claiming that obviously the husband himself did not try "escape" from her and deprive her from getting a share of his bequest; she also knew well what the consequences might be.[467] Those who approve of her right to inherit, even if she was the one to initiate the divorce, do so in order to "take precautions" (*sadd al-dhara'i'*), to be on the safe side. They maintain that once the husband has died it is difficult to conclude what exactly made him divorce her; perhaps he did try to cut her off from his bequest.[468]

KHUL' AL-MARIDA

The woman who suffers from *marad al-mawt* (a disease leading to death) may initiate a *khul'* type of divorce, but only so that the compensation to her husband, as required by the *khul'*, does not exceed one third of her assets. Here too, with regard to her bequest, she may will only one third to whomsoever she wishes.[469] If the sum she gives as compensation exceeds *mahr al-mithl* (the dower of her like), the minimum amount of dower for which a woman may be eligible, this is considered a *tabarru'* (voluntary gift). *Mahr al-mithl* must never exceed the value of one third of her assets. No problem arises if the compensation she offers as *khul'* is greater than *mahr al-mithl* yet lower than one third of her assets. If the compensation is more than one third of her assets she may not offer it, as this is in violation of the laws of willing (*wasiyya*).[470] Thus even on her deathbed, a woman may handle her property and assign parts of it as she wishes, as long as the rights of her lawful heirs are secured.

TALAQ AL-AKHRAS

The act of unilateral repudiation by the husband becomes valid if certain oral formulas are pronounced, and if the husband pronounces them with sincere intention in the presence of witnesses. The question asked with regard to the *akhras* (dumb) is in what way will his wish to divorce his wife be understood.

The preferred way for him, according to the jurists, is writing in detail the name of his wife (he may have more than one), the reason for his intention to divorce her, and that he sincerely means to divorce her. This is applicable only if he has writing skills. If he is illiterate he may resort to signing with his recognized signs. According to the Hanafis he may not use such signs if he is capable of writing, since writing conveys the message more conclusively. Moreover, healthy husbands may freely use the writing option to repudiate their wives, according to most Sunni jurists, but not according to the Imami Shi'is.[471] Writing, then, in Sunni law, is an accepted reliable channel for issuing a divorce, and the *akhras* needs no exceptions to the law to be created for his sake. Malik and al-Shafi'i allow the *akhras* to choose between writing and using signs when he wishes to repudiate his wife.[472]

SUMMARY

All the foregoing attests to much leniency, consideration, and compassion in the law of marriage regarding people with disabilities.

When either spouse is granted a deferment to attend to his or her medical problems, and hopefully to cure them, the days are counted with such precision so as not to miss a moment.

The law dictates that the days on which one is sick with another disease, when one is impure, or when one is engaged in religious devotion should be added to the final counting of the days of the "year's" extension. It is so because it is impossible to receive medical treatment when one is away for the hajj, or during the wife's menstrual cycle, etc.

In case of disagreement between the spouses at the end of the deferment as to the results of the medical treatment, another legal procedure exists. This calls for witnesses, in recent years physicians, to give their opinion[473] if there is no admission by the sick partner or proof furnished by the healthy partner against the sick one. This is crucial especially in the case of an *'innin* who is married to a virgin. If after the one year's deferment he claims that he has engaged in sexual intercourse with her, and she denies it, "experienced" women should examine her. If they conclude that she is still a virgin the man is obviously lying. If the women conclude that she is "not a virgin" the husband must testify that he is the one who had intercourse with her, and she can have no further claim against him. She loses her right to *takhyir* (the choice to stay within marriage or not). If he refuses to testify, she retains her right of *takhyir*.[474]

The Shi'is suggest a more "accurate" test for a husband who claims that he is no longer an *'innin*, a fact which the wife denies. They order the wife to insert into her vagina a *khaluq* (a compound of saffron and other substances which have yellow and red colors); then they order the husband to have intercourse with her. If he succeeds and the traces of the *khaluq* are seen on his penis, he is found truthful and she is accused of lying. If there is no such trace she is declared trustworthy and he a liar.[475]

A child born to the wife after dissolution of the marriage will be associated with her ex-husband. This follows the socio-legal principle of *al-walad lilfirash* (the newborn belongs, or is affiliated genealogically to the marital bed of its legally married parents), even though the father had been considered *'innin*. The outcome, namely the newborn child, is accepted proof of the lapse of her husband's impotence. The child is protected thereby from the stigma of illegitimacy (*walad zina*) and the mother against charges of adultery.

The law departs from the understanding that the spouses are healthy on marriage if it is not otherwise reported. Therefore, either spouse who accuses the other of being disabled must bear the burden of proof. This is especially useful in cases where the healthy spouse blames the disabled one of deception; that is, that the disability was known to the disabled partner, but disguised from the other, before marriage. The partner that denies charges of deception against him or her has only to take an oath *(yamin*) that he or she is trustworthy.[476] Since the assumption is that the spouses are healthy on marriage, any spouse who doubts the "wholeness" (*sihha*) of the other must also provide the proof. This, to my mind, offers great protection to the vulnerable, people with disabilities who are already married.

As for divorce, all possibilities are weighed in order to retain the *marid*, the *akhras*, and even the *ma'tuh* and the *majnuna* under the shelter of the law. The main philosophy which permeates the law of marriage and divorce seems to be to grant everyone their rights, but not at the expense of others or of society at large.

4

THE *KHUNTHA*

The only disability allotted an independent chapter in the fiqh compilations is the *khunutha* (being a hermaphrodite). The chapter titles often consist of the word for the disabled person, not the disability itself: *Kitab al-khuntha* (chapter on the *khuntha*) or *Al-khuntha* alone. *Khunutha* is a congenital impairment, in which an infant cannot be identified upon birth as male or female. The reason is that he or she has both female and male sexual organs, or has no sexual organs whatsoever.[477]

The *khuntha* should not be confused with the *mukhannath*, a term used for a man who chooses to behave and dress like a woman (an effeminate man), but is clearly identifiable as sexually male.

Although the *khuntha* is sometimes discussed in the context of other legal fields, such as prayer, marriage, jihad, inheritance, and so on, more often it stands as a legal topic in its own right. This by itself is an interesting phenomenon from various aspects. First, according to medical statistics one in every 25,000 births is diagnosed with this disability,[478] which is a low rate.[479] Other statistics quote ratios of 1 in 60,000, 1 in 20,000, and 1 in 12,500.[480] Evidently the likelihood of a lay person in the community encountering a *khuntha* on a daily basis is very slight. Second, with the high mortality rates of infants in medieval times,[481] those born as *khuntha*, and perhaps having health complications as a result, had less chance of survival to adulthood than babies seemingly born healthy. Again, this suggests that at any given period in history they were not so many as to make a social difference.

The third aspect that should be considered is that the disability is manifest in a human being's sexual organs, and these are normally kept private and covered from the public eye in healthy persons; how much the more in people physically abnormal. How then is *khunutha* treated as a daily occurrence and "obvious to all"?

All these questions should be juxtaposed to the realization that the blind and the lame, the deaf and the dumb, whose disabilities are detected in higher percentages in both infants and adults, and are evident, have never been allotted separate chapters and are only sporadically discussed in the fiqh.

Islamic law addresses men and women differently with regard to certain duties and prohibitions, due to their different sexual build, hence their sexual identities. Since religious obligations are incumbent upon all Muslims, men and women are required to fulfill them, but each in a unique manner, due to limitations and alleviations that arise from their respective genders. Socially it is even more obvious that men and women will function in separate domains and will be in charge of different human activities. Traditionally, women are more active around the house and take care of the family, the children's education, and the emotional well-being of all family members. The men are they who go back and forth mediating between the social and economic institutions of the community and their family. Many fields of human engagement, such as jihad, giving testimony, leading the community (as qadi, imam, mufti), and more, are open to men but hardly ever to women. In all these vast subtleties of human conduct that Islamic law covers and attempts to guide Muslims ethically through, where should the *khuntha* fit in? Is it with the men or with the women? After all, no third option is imaginable. There are few legal fields in the Shari'a in which a person's gender does not count. This, to my mind, explains why the *khuntha*, who represents the harshest deviation from the simple man/woman classification, received so much attention in the fiqh. It is theologically, and less so socially, as I hope to prove, an unbearable ambiguous situation when a person lacks a clear gender identity.

A variety of methods to solve this problem have been explored in the past and in recent years as well, always with the aim of showing the *khuntha* as fitting into one of the two known genders by certain criteria, if in any way possible.

CLASSICAL SOURCES

To underline the importance of knowing one's gender, let us ponder just a few of the daily activities which pious Muslims conduct. In prayer, if not privately performed, it is mandatory to join members of one's same gender. Men pray with men and women with women, the latter always behind the rows of men; so how can a *khuntha* practice the public prayer?

With regard to the fast of Ramadan, women are forbidden to fast during their menstruation (*hayd*) or during the period of bleeding after giving birth *(nifas*), and so on. Women may be exempted from fasting while pregnant or breast-feeding. Men have no such permanent alleviations due to their physique. Should the *khuntha* be entitled to the woman's alleviations, or not?

Testimony is accepted from qualified trustworthy men (*'adl*) on all issues. Women's testimony is accepted only on "non-emotional" issues. Since they are viewed as easily swept up by emotion, they are held unreliable witnesses for matters related to marriage, divorce and criminal justice. Even when accepted, their testimony often equals one half that of a man. Could a *khuntha*'s testimony qualify at all?

The performance of the duty of hajj requires the pilgrim to maintain a state of purity, which women by nature do not always enjoy. Even just embarking on the way to perform the hajj involves stipulations for women, with regard to who may escort them on the long journey to and from Mecca (*dhu mahrim*), who may be secluded with them, and so forth. How can the *khuntha* perform the hajj under such limitations?

In the law of inheritance, one's gender is crucial, as women usually inherit one half of what a man with the same relationship to the deceased inherits. If one of the heirs happens to be a *khuntha*, this might influence not only the *khuntha*'s economic rights, but also the rights of the "gendered" healthy heirs. In this field the jurists have exhibited the utmost originality in the solutions they have suggested in inheritance cases where one of the heirs is a *khuntha mushkal*. Ibn Qudama[482] emphasizes that only if one of the heirs is indeed a *khuntha mushkal* does the problem arise. In cases where the *khuntha* can be shown to be male or female, albeit through a single physical characteristic, the problem ceases to exist for all legal purposes.

Many more examples can be furnished to prove that determining one's gender is an issue of high priority in Islamic law, for the sake of both the individual and the surrounding society.

Therefore, in medieval Islam, the moment a child was born and diagnosed with *khunutha*, several "experimental" tests were performed in an attempt to determine which of the two genders dominated or outweighed the other, in bodily characteristics or functions. This would define the child's gender for all legal purposes. One of the commonest tests was to find out with which organ the *khuntha* urinated. If he/she had two organs for urination, the test would detect which was the first to start to discharge, and if this could not be determined the examiners tested for the organ that discharged quantitatively more. In puberty the tests searched for sexual characteristics such as the growing of a beard and sperm ejaculation, or alternatively the appearance of breasts, menstruation, pregnancy, child-delivery, and the like.[483] The Hanbali Ibn Qudama records another test, where the hermaphrodite would be placed next to a wall and then observed for whether he urinated as a man or hitched up his/her clothes to urinate as a woman. Another suggestion was to count the *khuntha*'s ribs, assuming that a man would always have one less, as related in the Qur'anic account of the Creation.[484]

A hermaphrodite who could not be classified as male or female despite all these tests and observations was designated *khuntha mushkal*. This meant that his or her *khunutha* was too complicated to solve or was wholly unsolvable. This *khuntha*'s situation remained hard to treat from both a social and a medical standpoint. But legally the jurists deemed it their duty even here to offer pragmatic solutions for dealing with *khuntha mushkal*, since he/she was a person who lived and needed to function within society, and society may not ignore his/her presence. Despite the fact that the *khuntha mushkal* are statistically few, the legal effort invested by the jurists to accommodate them, especially in matters of inheritance, is astonishing and commendable. Even if the legal effort as indicated above was not real but hypothetical, and invented for the purpose of legal training, the jurists' depth and creativity deserve nevertheless to be acknowledged.

With regard to the matter of inheritance, we can witness the compassion felt towards this disabled person, as well as the intention to do justice and not further deprive a person who had already been deprived of the essentials of human identity, his or her gender. In the division of an inheritance among heirs, one of whom was a *khuntha mushkal*, one suggestion was to postpone the process of division until the hermaphrodite matures and sexual characteristics appear. This would be at the expense of the rights of the other heirs, who are thus required to await their share for an unknown period.

To avoid such a delay, another method applied was to grant the *khuntha mushkal* half the share of a man and half the share of a woman, and adjustments would be made when the truth emerged. That is, if he/she turns into a man, he will receive more, from the amount already distributed to the other heirs. If he/she becomes a woman, she will have to reimburse the other heirs from the excess portion of the inheritance that she received.

By another sophisticated method it was claimed that the *khuntha mushkal* is at least deserving of a woman's share, so for the purpose of immediate distribution he/she will be counted as a woman and given a portion as one. A sum of money will remain undivided among the heirs in trust until it is finally ruled whether he/she is male or female, and then it will be divided accordingly.[485] The calculations and fractions employed in the last method are more complex than would be necessary in most inheritance cases. Needless to say, both methods involve a delay and possibly a temporary loss of funds to the majority of the healthy heirs.

The complexity of the situation of the *khuntha mushkal* also led to some esoteric discussions such as who would perform circumcision if he/she had a penis, who was eligible to wash his/ her body in preparation for burial, and more.[486]

MODERN SOURCES

In an article about the *khuntha* from both medical and Shar'i perspectives, Dr. Al-Jammas[487] explains that soon after the discovery of the existence of chromosomes and genes, doctors hastened to determine the gender according to the chromosomes. Thus, an xx chromosome carrier was identified as female and an xy chromosome carrier as male. This finding at times created confusion and complications as regards the Shari'a. He refers to the fact that throughout its history the Shari'a has judged the gender of a person by external characters, not by chromosomal combinations. He further explains that there are cases which are "false male *khunutha*" (*al-khunutha al-kadhibat al-dhakar*), wherein the chromosomes are indeed xy while the external organs are those of a female. The physician, relying on science, would probably regard that person as male,[488] while from a Shar'i standpoint the person was a female, and could even be married as such.

However, Dr. al-Jammas continues, as the study of genetics advanced, it became clear that the chromosomes are only one of six factors that should be considered in the determination of the gender of the *khuntha mushkal*. He reports that at least 50 "full men" were discovered until 1993 whose chromosomal structure was xx, usually associated with a female. Scientifically this is possible because the embryo in the first six or seven weeks of its life has double sets of sexual organs, both female and male. After that stage, because of influential genes within its cells, one set continues to develop and the other recedes. *Khunutha* occurs when the function of those genes, or the organs that the genes are supposed to affect, are impaired. Several chromosomal processes that can lead to the creation of "ambiguous genitalia" are known in medical textbooks today.[489]

The process of turning the reproductive mechanism into a male one is more complex, from the genetic and hormonal perspectives, than turning it into a female one.

This helps explain why the chromosomes may read xy, while the existing organs will indicate a female. The y chromosome in such cases does not contain male genes, or if it does, they are probably inactive. This only proves that a chromosomal test is not a sufficient indicator for the gender of the hermaphrodite.

The "false male" (pseudomale hermaphroditism) is the most typical kind of *khunutha*, namely the chromosomes are xy while the external organs appear female. When the embryo develops female organs with xx chromosomes, but later grows male organs as well, this could be attributed to an impairment caused by an external source that triggers the release of the male hormone in puberty, hence the clitoris takes the shape of a penis. This condition is easily discovered, and is called "false female" (pseudofemale hermaphroditism) *khunutha*. The person is really a female, and if treated with cortisone she can be cured, and even get pregnant and give birth. What the fiqh labeled as "real" *khunutha* (*khuntha mushkal*) (true hermaphroditism) is rare[490]. In such a case two complete reproductive organs exist, either side by side or with their tissues connected. Here the treatment is often surgical. It is often the penis that is removed, especially if the testicles are in the abdomen and may turn cancerous, and if emotionally the person leans to the female. Since 1962 science has known of men with a chromosomal structure of xx. This is possible, according to the most prevalent explanations, because the x chromosome of the man's sperm has male genes as a result of deformation that has occurred during the splitting of the sperm cells. Thus, instead of male genes settling on the y chromosome they became attached to the x chromosome. This is but another proof that besides the chromosomes, the external organs as well as psychological and emotional inclinations and hormonal levels should be consulted too, in determining gender.

Today, Dr. al-Jammas concludes, most cases of *khunutha* are medically solvable. When the female reproductive organs are healthy, surgeons often prefer to remove the penis by plastic surgery than to operate on the female organs. The former technique has better chances of success. Only "real" *khunutha* (*khuntha mushkal*) justifies the removal of the female sexual organs in order to turn that person into a male, without risking the appearance of cancerous tumors in the future, provided that the testicles are located in the *safn* or *safan* (the man's scrotum).[491] Infertility, however, in these rare cases, is unavoidable.

Since the 1980s, the muftis have been aware that sex-change operations may be successful in turning a *khuntha mushkal* into a person with a clear gender identity. The late Sheikh al-Azhar, Jad al-Haqq 'Ali Jad al-Haqq (d.1999),[492] was approached by a German from Stuttgart who unfolded his agonizing but failed attempts to obtain a clear gender identity. This person, who was born as *khuntha* with both female and male organs, tried at first to become male, then to become female, and because of various medical complications was unsuccessful both times. According to this *khuntha*'s report he/she had no sperm or erection, but did have breasts, a delicate body, and dressed and behaved like a woman; however, he/she had no sexual drive whatsoever. The bodily characteristics suggest that this was a case of a *khuntha mushkal*. The mufti was consulted as to whom this person should study Qur'an with, men or women, in preparation for conversion to Islam. In the fatwa the mufti left it to the physicians to decide the *khuntha*'s real gender, and meanwhile he forbade him/her to mix with men or women. But the mufti did not leave the *khuntha*'s inquiry unanswered,

and instructed him/her to sit in the study session behind the rows of men, but in front of the women. This solution is in keeping with the prohibition against women mingling with foreign men (those not connected to them by marriage or blood ties) and vice versa. It is also the practical legal solution since medieval times regarding the right place for the *khuntha* who wishes to pray in the mosque.

In earlier fatwas, dating back to 1981 and 1983, Jad al-Haqq maintains that sex-change operations in both directions are permissible, if certain conditions are fulfilled and when it is an inevitable necessity (*darura*). The Permanent Scientific Committee for Research and Ifta' (*Al-Lajna al-Da'ima lilBuhuth al-'Ilmiyya wal-Ifta'*) in Saudi Arabia reiterated this concept in 1990, stipulating that the surgery might indeed help the person to be transformed into "a full man" or "a full woman", and that a trustworthy physician testify that the surgery is mandatory and has good chances of succeeding. It remains obscure in this ruling what exactly constitutes a "full man" and a "full woman", and whether fertility is one of the components in either.

One of the leading Iranian Shi'i scholars, Ayatollah al-Khamina'i,[493] gave permission for sex-change operations for *khuntha*s and for males who emotionally and sexually incline toward female behavior or appearance, with an obscure reservation that "prohibited acts should be avoided in the process".

Not all sex-change operations have been so well received. Mufti 'Atiyya Saqr, in 1988, made public his fierce objection to an operation which transformed the male student Sayyid 'Abd Allah into a woman named "Sally". The mufti claimed that Sayyid 'Abd Allah had only felt inclined to femininity while he was really a man. But after his penis was removed in surgery he failed to become a "full woman", and actually ended up as a *khuntha mushkal*, lacking either sexual identity, and being in a far worse situation than before.[494] In a recent fatwa[495] Dr. Sabri 'Abd al-Ra'uf blames some sex change operations as leading to the creation of a third sex, neither male nor female. It allows male perverts who become females to be penetrated as women, and thereby disguise their perversion (probably their hidden homosexuality).

Sex-change operations involve a change introduced into the structure of the human body, and furthermore they are performed on the organs that determine gender. The gender is normally believed to be divinely ordained, namely one of Allah's prerogatives. The fact that some muftis legitimize sex-change operations today is therefore an indication of empathy with the human suffering experienced by those "ungendered" in Islamic society, sometimes at the expense of other counter-theological considerations. The muftis' leniency also derives from the recognition that the science of medicine has the ability at present to help in such physical problems, which were hopeless in the past.

Since medicine can nowadays scientifically explain why some people are born as *khuntha*, and that it is nobody's fault that they are "ungendered", their social condition is bound to improve. It is worth emphasizing here that even in medieval times, never was there any tone of reprimand or demand of punishment against the *khuntha*, especially the *khuntha mushkal*. Monstrous characteristics were never attributed to the *khuntha mushkal*.

Neither classical nor modern sources ever demanded the expulsion or ban of the *khuntha* since they did not fit existing social rubrics. On the contrary, the case of the *khuntha* pushed the jurists to seek innovative ways to let that person participate in the community, yet not at the price of violating Islamic taboos.

5

DISABILITIES CAUSED BY HUMANS: INTENTIONAL AND UNINTENTIONAL INJURIES

The general Islamic ethics of life as it emerges from the Qur'an and the Sunna, and the spirit of Islamic law, emphasize the importance of the preservation of the wholeness and dignity of the human body. From a theological point of view a person's body is considered a trust (*amana* or *wadi'a*) that Allah has placed in his or her custody. Trusts, as taught by Islamic law, must be protected against any harm by their keepers, for whatever duration needed, so that they can be returned safe and sound in due time to their owners. Analogously to the Islamic legal transaction "trust" the human body must be preserved from birth till death by the person who uses it, but who has only temporary ownership over it. Then the body is to be "returned" to Allah in the best possible shape. This return is somewhat metaphoric, since the dead body has to be buried in a grave through a Shar'i funeral, and it is the soul that is believed to ascend to heaven and become "close" to Allah, if terms of physical proximity may at all be used with regard to the divinity. The Islamic prohibitions against suicide and self-mutilation stem from this same awareness that a trust must never be destroyed or damaged by its keeper.

It is astonishing, therefore, that in certain legal scenarios Islamic law prescribes, contrary to the above perception and to the general ethics of life, the deliberate violation of the wholeness and dignity of the human body as means of physical punishment. This implies that the law not only tolerates but indeed requires the creation of disabilities in certain people who were born healthy, and thus punishes them for deeds which society abhors.

The planned creation of a disability in another human can be a sort of punishment; it may also take the form of injuries that some people intentionally choose to inflict upon others out of anger, vengeance, and hatred. The former are a group of punishments listed in the legal literature. The latter result from poisoned interpersonal encounters. Here we will dwell on the former only.

Intentionally caused disabilities, which are part of the official Islamic corporal punishment system, may appear in two groups of crimes:

(a) *Hudud crimes* – Among these are especially the crimes of theft (*sariqa*) and highway robbery (*qat' al-tariq*). For both, according to the Shari'a, the

criminal must be punished with measures such as amputations of hands, or the palms of hands, and/or legs. Forms of administering this justice are the amputation of the thief's hand, and the robber's hand and opposite leg. For highway robbery other punishments may be applied, including killing and crucifying, depending on the nature and severity of the offense; our present discussion omits capital punishments. Only theft and highway robbery will be discussed since both crimes are punished by bodily mutilations. The result of these bodily punishments is that a healthy criminal becomes a handicapped person. Paradoxically, the mutilation of organs in his or her body is believed to be a healing measure for the criminal and the society to which he or she belongs.

(b) *Qisas* – retaliation. When a person intentionally kills another, the general rule is that the murderer must be killed; when a person intentionally caused damage to another's bodily organs or faculties, the former should be punished by becoming disabled similarly to his or her victim, to the extent that it is possible and feasible to achieve this symmetry. This is practically an extension of the biblical *lex talionis*, "an eye for an eye and a tooth for a tooth", and the Qur'anic instruction in **5**, 45: "the life for the life, and the eye for the eye, and the nose for the nose, and the ear for the ear, and the tooth for the tooth, and for wounds retaliation".[496] If maintaining the symmetry between the crime and punishment is impossible, financial compensation of the victim must replace physical retaliation.

THE *HUDUD*

Hudud or *hudud Allah* is the collective title for five severe crimes, the punishments for which are laid down in Qur'anic verses, then elaborated in the Sunna. The term *hudud* indicates borders and limits of Allah, because these punishments are meant to bar and prevent people from falling into crime. Despite the theological claim that the *hudud* aim to protect the rights of Allah (*huquq Allah*), contrary to other punishments that normally protect the rights of humans (*huquq al-adamin*), *hudud Allah* actually protect society at large. By means of certain deterrent physical punishments the safety and stability of the individual's life, his or her mental and physical integrity, as well as the safety of their property are believed to be protected from harm.[497]

In the fiqh literature the five crimes listed under *hudud* are fornication (*zina*), slandering a woman for immoral sexual conduct (*qadhf*), alcohol consumption (*shurb al-khamr*), theft (*sariqa*), and armed or highway robbery (*haraba* or *qat' al-tariq*). The general Muslim public may sometimes count among the *hudud* eight groups of crimes rather than the five traditionally mentioned by the fiqh. The three additional crimes are political insurrection (*baghy*), apostasy (*ridda*), and intentional killing (*al-qatl al-'amad*) which requires a *qisas*.[498]

As noted above, and as relevant to the present discussion, here I dwell only on the crimes of theft and robbery which are punishable by amputation of arms and legs, and on the intentional injuring of a person's organs, which, when feasible, is punishable through inflicting on the criminal a similar injury to what he or she has previously caused (*qisas*). If it is impossible to uphold this symmetry, for various reasons

that will be addressed below, financial compensation to the victim by the criminal is in order (*diya*).

These physical punishments attest that in certain circumstances Islamic law licenses a person to create a disability in another's body, and consequently leave him or her handicapped for the rest of his or her life. This rule stands in contradiction to the theological principle that the human body is no one's private property, and that one may not abuse or cause damage to one's own body, still less to the body of another person. The sanctity deriving from the creation of the human in God's image is purposely violated, and under religious license.

Physical punishments for the above crimes are still applied today in certain Islamic and Arab countries. In some of them these practices are accompanied by an ongoing public debate over their legitimacy in light of the human rights discourse and the guidelines of international law. What all this means is that the discussion on the legitimacy and rightness of intentionally caused bodily handicaps has exceeded the academic level.

In defense of physical punishment it is often recalled in both traditional and modern Islamic sources that the physical punishment is not an aim in itself. It is rather the last resort to curing and reforming the conduct of an individual and a society, after all previously tried measures, such as education and admonition, have failed.[499] Physical punishments are likewise stated to be more effective than non-physical punishments in deterring the prospective criminal from even contemplating a crime.[500] Physical punishment also serves as a warning to others in the community to refrain from engaging in similar criminal acts.[501] The punishments, it is explained, are in the interest of society at large (*maslaha*) since society is the prime sufferer from the existence of crime.[502] Consequently, society has the duty as well as the right to administer justice.

Being aware of the irreversibility of most physical punishments, they must not be executed if there appears even a slight doubt in the witnesses' testimony or the confession of the criminal himself or herself, as regards the committing of the crime, the perpetrator, the place of the crime, etc. This is based on the famous hadith "*idra'u al-hudud bil-shubuhat*" (push away [do not execute] the *hudud* [physical punishment] because of [the existence of] doubts).[503]

In defense of physical punishment, in its cruelty and irreversibility, it is also argued that such punishments deter the criminal from ever repeating the crime. The effectiveness of physical punishments over non-physical measures such as imprisonment and "light beating" is supposedly unmatched. Current statistics from Saudi Arabia, and from Sudan and Pakistan in the 1980s, are often cited to prove that there is a clear link between the enforcement of physical punishments and the low crime rates in the given society.[504] Contrary to that, it is shown that advanced countries such as the United States and Britain, which hardly resort to physical punishment, suffer an ever increasing crime rate.[505]

In any case, the defense continues, Islamic law rules that a criminal's youth, lack of *tamyiz* (conscious perception, good judgement or discrimination[506]), or insanity are among the conditions that will stay the application of physical punishment.[507]

This should speak for the leniency and justness professed by Islamic law since those deemed "legally irresponsible" (*'adim al-tamyiz*) are exempt from undergoing the prescribed punishments for such crimes. At the same time, the victims of crime

must by all means be compensated for injury to their bodies, for loss of life, or for damages inflicted upon their property even by one who is "legally irresponsible". When the status of "legally irresponsible" is established in favor of the perpetrator, the victims of the crime remain eligible in the eyes of the law for certain guaranteed human rights (*huquq al-'ibad*); the victims should be compensated whether at the time of crime the criminal was responsible or not. Jurists are unanimous that the victim should always be compensated, but they differ on the question of whence the compensation should derive: the personal funds owned by the legally irresponsible person, the funds of his or her *'aqila* ("blood group"), or the public treasury (*bayt al-mal*).[508]

THEFT AND ROBBERY

With regard to theft, Qur'an **5**,38 reads: "As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, and exemplary punishment from Allah".[509]

This verse establishes the duty of the Muslim head of state or leader to amputate the hands of thieves, a step which would render the latter disabled as a punishment for the crime of stealing.

Qur'an **5**, 33 reads: "The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off or will be expelled out of the land. Such will be their degradation in the world, and in the Hereafter theirs will be an awful doom".[510]

So the punishment for those who cause political and social unrest, who spread violence and terror in the community, may also be the amputation of an arm and a leg, or all four limbs, depending on the severity of crime. Still, this is to be seen as a lesser punishment than the death sentence or death by crucifixion handed down to other criminals.

In the case of theft, amputation is due only if the stolen goods exceed in amount or value the legal minimum (*nisab*). But there is no scholarly unanimity on what this "minimum" is.[511]

The Shafi'i al-Qaffal cites the Zahiris, who claim that the minimum or maximum value of the stolen goods is immaterial for the criminal to deserve amputation.[512] This Zahiri attitude renders amputation mandatory for any amount stolen, and for any motivation that might have led to it, disregarding all possible extenuating circumstances. The Zahiri position overlooks the probability that theft of small food items is sometimes driven by hunger and extreme poverty, for which other schools of law completely exempt the thief from criminal intention, hence from the punishment of amputation. Moreover, in cases of theft driven by hunger and poverty, other schools often condemn the society that allowed its members to fall to such a level of destitution.

As for the punishment itself, the rule seems to be that for the first offense of theft the right hand is amputated. If the crime is repeated the left leg has to be amputated. Another opinion, based on Qur'an **5**, 38, maintains that both hands have to be amputated for the first and second offenses.[513] For the third offense 'Ali is reported to have

recommended imprisonment because he said, "I am ashamed of Allah not to leave for him [the thief] one hand for eating and one leg for walking on". Others maintain that for the third incident of theft the left hand must be amputated, and the right leg for the fourth.[514] Al-Shafi'i is reported to have maintained that two hands and two legs may be amputated for four consecutive crimes. Then, if a fifth crime is committed, imprisonment is in order.[515]

If the stolen goods are returned to the owner before the thief is brought to trial there is no reason for amputation. Returning the goods is viewed as a sort of repentance (*tawba*). This is in accordance with a central legal principle concerning the *hudud*: as long as charges have not been brought before the authorities or the court, *hudud* crimes may be forgiven by the victim or victim's family; once charges have been officially pressed, any appeal to withdraw the claim is unacceptable.

Once the verdict to amputate is issued, Muslim jurists envisage various interesting scenarios that may complicate or even hinder the execution of the punishment. For example, if the left hand is missing two fingers, the right hand cannot be amputated as punishment for theft. The reason is that the left hand (with only three fingers) is viewed as a paralyzed hand, and the jurists refrain from a sentence that would leave the thief without a useful hand.

Likewise, if the thumb of either hand is already cut off, the ruling is that no amputation may take place since the power of action of either hand (*quwwat al-batsh*) is already considered absent. That is, no extra "deterrent value" will accrue from the amputation of the remaining fingers, and the criminal is already suffering, so there is no need for the act of amputation itself.

The absence of one finger, but not of the thumb, is not believed to reduce the strength of the hand; so the other hand may be amputated. The Shafi'is allow the amputation of the right hand even when the left is already cut off or missing parts or fingers in a way that diminishes most of its functioning (*manfa'atuha*). This is in clear contrast to Abu Hanifa's ruling.[516] Likewise, if one is missing two toes on the left foot no amputation can take place, because obviously that person cannot walk on the injured foot, and amputating the other "will deprive him or her of the ability to walk altogether" (*tafwit manfa'at al-mashy 'alayhi*).[517]

According to the Hanafis, if the thief has a paralyzed right hand while the left hand is healthy, the right hand can still be amputated, because if the right hand were healthy it should be cut off for the crime of stealing: all the more when it is paralyzed. Contrary to that, if the left hand is paralyzed the right hand must not be cut off, because the stipulation is that the criminal does not lose the strength and vitality of a hand. If the left hand is healthy, cutting off the right hand does not deprive the criminal of the ability to use the strength of the remaining hand. In such a case the left leg should not be cut off either, because this would deny the criminal the ability to walk. If the left hand is paralyzed and the left leg is paralyzed too, the criminal is unable to walk with a cane, contrary to when his or her left hand is healthy. Also, when his or her right leg is paralyzed, the right hand, not the left leg, is to be amputated, so that he or she is not deprived of the ability to walk with a cane.[518]

Even when several goods are stolen only one hand must be cut off; it is explained that the purpose, that is, deterring the criminal against future crimes, is already achieved with the amputation of one hand.

As for robbery,[519] the opposite hand and leg must be amputated for stolen goods or money. But if the robber is charged with killing he or she should be killed, and no amputation applies. It emerges that the amputation as a measure of punishment in *hudud* crimes is connected to offenses against property, and is meant to stop the hands and legs, the vehicles of movement and action, from rendering such crimes operable.[520] Nevertheless, the law always takes into consideration that the opposite hand and leg be amputated so that the criminal never loses completely the ability to eat, walk, and cleanse himself or herself.[521] Despite the severity of punishment, the jurists take care that the criminal is not totally deprived of a certain degree of human dignity. Thus, if the *muharib* (robber) has earlier lost his right hand, and only his left leg remains, or he has lost his left leg but his right hand is still there, two opinions prevail among the Shafi'is: the first states that only the remaining limb is to be cut off. The second rules that an existing limb should replace the missing one, and therefore the amputation should shift to the right leg (instead of the missing left) and to the left hand (instead of the missing right).[522] According to the Malikis, in keeping with verse **5**, 33, if one hand is missing or paralyzed, the opposite leg that was supposed to be amputated along with it, according to the wording of the verse, is left untouched. The amputation will move instead to the other hand, which has an opposite healthy leg, so that both are cut off, as ruled by the verse.[523] If the robber repents before he is brought to justice he escapes the amputation of the leg, but there is still a scholarly debate on whether his hand should be spared as well. Those who do not waive the need to amputate the hand equate the crime of robbery with *sariqa* (theft). But according to the Shafi'is, amputation of the hand is not to be waived even when the thief has repented before being captured since the hand that stole the property must still be amputated in punishment.[524]

THE HAND AND THE LEG: THE PARTS THAT SHOULD BE AMPUTATED

The hand (*yad*) is usually a respected organ in the body. The right hand (*yamin*) is especially important, as it is used in eating, and it is also the hand used when taking an oath, which is also termed in Arabic *yamin*. The amputation of a hand is therefore primarily an attempt to degrade the owner of the hand, to bring upon the thief humiliation and shame (*'ar, khizy*).

A contemporary scholar, citing Ibn Qayyim (d.1350), equates the human hands with the wings of a bird which enable it to fly. Amputation of the hand, like the clipping of the wing, renders his/its owner weaker (and vulnerable) in facing his/its enemy.[525] Therefore, the organ that committed the crime has to be removed so that the rest of society may regain peacefulness and security in their daily life.[526] The problem is that there is no scholarly unanimity on what exact parts of the hand or the leg should be amputated according to Islamic law.

As for the hand, some claim that the *kaff* (palm of the hand) is the part that should be amputated. 'Ali is reported to have required an amputation from the *mafsil* (joint).[527] Ibn Abi Shayban related that the Prophet Muhammad amputated from the *mafsil*. Another tradition relates that the Prophet amputated rather from the *rusgh*

(ankle).[528] One more opinion asserts that the amputation of the hand is from the *ku'* (elbow), or that it only involves the fingers. The amputation of the leg is from *mafsil al-qadam* (the joint of the foot), or from *ma'qid al-shirak* (the place where the shoelaces are tied), while the heel is left in tact.[529]

The Kharijis required an amputation from the *mankib* (the connection of the arm to the shoulder), because they understood *yad* to be the body part that extends between the tips of the fingers and the armpit.[530] This is a maximal definition of "hand". Other jurists, like 'Ali, demanded the amputation of the fingers only, with the explanation that the fingers were involved in the crime and therefore have to be removed in order to prevent its repetition.

The debate among the scholars over what exactly should be amputated arises from the vagueness in the Qur'anic verse on theft, which mentions the general term *yad*, and the verse on armed robbery which speaks of *yad* (hand, arm) and *rijl* (leg), but provides no further guidelines to the precise anatomical parts in the above organs that are intended.

THE EXECUTIONER

Islamic law emphasizes that no one person is allowed to take the liberty of performing *qisas* by himself or herself. It is the duty of the ruler (*sultan*) or another person appointed by the sultan. The *qisas* in punishment for murder is execution by a very sharp sword, in the presence of the ruler or his deputy and in the presence of the witnesses, in a special place prepared for execution: the criminal's genitals as well as his eyes, are covered.[531] The stroke of a sword is believed to be the fastest means to bring about death. This method of killing the criminal is preferred to the manner of the murder that was committed, even though the term *qisas* literally requires this. Some jurists explained that the *qisas*, if performed with similar instruments as used in the crime itself – a stone, a stick, imprisonment, drowning, fire, etc., could cause a more painful and slower death, which would in any case necessitate a *coup de grace* by the sword. This would double the punishment on the criminal, and consequently violate the so important symmetry between crime and punishment.[532]

The person assigned to execute the sentences of the various amputations is the *jallad* (executioner). It is acceptable for another person to perform the amputation only if that person is authorized to do so by a legal order. If no such order to amputate has been given, yet an amputation has taken place, retaliation (*qisas*) is due if the amputation was done purposely. Monetary compensation is due if the amputation was done unintentionally prior to the issuing of a qadi's sentence.

If the amputation was meant to be part of a *hadd* punishment (such as theft), but an unauthorized person has performed it, as mentioned above, the thief is exempt from additional amputations because having already a hand or a leg amputated he or she may not undergo an additional amputation.[533]

If the criminal offers to amputate his hand by himself, several scholars approve of the procedure, and others oppose it. Those who oppose a self-inflicted amputation equate the case with cases in which one is not permitted to perform *qisas* against oneself.[534]

Since the purpose of amputations is to serve as a deterrent and a warning (*zajiran*), the executioner or the ruler is cautioned not to cause death (*mutlifan*) when performing the amputation. Amputation, it is advised, must not take place in extremely cold or hot weather, and not while the criminal is sick. The purpose of these precautions is to reduce as much as possible the risk of causing death to the criminal. The executioner must also stop the bleeding (*hasm*) right after the amputation in order to prevent excessive blood loss that might prove fatal.[535]

The legal instructions for the executioner state that the stump must be sealed with oil and fire (scorched) to prevent bleeding and further damage. The Hanafis explain that the stump must be seared according to the Prophetic hadith, "cut it off and stop the bleeding". Another method used in the past was to dip the wound in oil that had been boiled beforehand. The cost of the oil and the other expenses connected to the procedure of *hasm* are all to be covered by the thief, according to the Hanafis. The Shafi'is and Ibn Hanbal ruled that the amputated hand should hang from the criminal's neck to be seen by all. The Hanafis do not enforce this but leave it to the imam's (the ruler's) discretion to decide each case *ad hoc*.[536]

A MODERN DILEMMA

An interesting question was raised to the *majma'al-fiqh al-Islami* International Islamic Fiqh Council (IFC) at its conference in Jedda, Saudi Arabia, on 14–20 March 1990. It was whether an amputated organ (the result of legal punishment) may be transplanted back onto its original body.

The response was negative, since the scholars felt this could diminish the seriousness and effectiveness of the punishment. The only cases wherein the scholars ruled it permissible were:

1. When the victim of the crime approved that the organ be restored.
2. The victim himself or herself had successfully regained the organ that had been lost.
3. If the organ was removed from the criminal as a result of an error in the sentence or its execution.[537]

Obviously, advances in recent decades in organ transplantation have given rise to hopes of the successful restoration of amputated organs to the body from which they were lost. Yet the medical possibility of the procedure does not guarantee that from an ethical point of view it would become welcome. If the punished criminal does not live a life of pain and suffering, doubt arises as to whether the purpose of punishment has at all been served. This is the reason for all the above stipulations concerning retransplant of the amputated organ. Nevertheless, this notion was not totally outlawed, a factor that may be regarded as another expression of leniency and compassion in Islamic law.

QISAS

Qisas (retaliation) is the punishment for intentional killing or for intentional physical injury to another, when neither attack is legally justified. The purpose of the law of

qisas is explained in Qur'an **2**, 179: "And there is life for you in retaliation, O men of understanding, that ye may ward off (evil)".[538] From the verse it emerges that after the infliction of the punishment for intentional killing, and putting an end to the criminal's evil acts, society at large is relieved of his or her threat and danger. Members of society may resume their safe lives.[539]

The *qisas* epitomizes the importance and sacredness attributed to human life in the Shari'a. According to Qur'an **5**, 32, whoever kills one soul which does not legally deserve to be killed is likened to one who has killed the whole of humankind.[540] *Qisas* is a deterrent against the crime of murder. Knowing that for an intentional murder one will be punished with *qisas*, one refrains from murder, and thereby two souls are saved: that of the prospective victim and also that of the prospective murderer, who escapes being subjected to *qisas*.[541] Also, *qisas* controls the blood-feud so that only the murderer himself or herself will be killed, but not other innocent members of the criminal's family. The chain of killings is thus stopped.[542] The jurists debate about whose life is equal to whose, so that retaliation can justly take place. Abu Hanifa maintained that a freeman may be killed for murdering a freeman or a slave, while al-Shafi'i, for example, ruled that a freeman must not be killed for murdering a slave; he concluded that a freeman will be killed for a freeman, and a slave for a slave.[543] Similarly, when another debate arose over "equality" with regard to retaliation of a Muslim and a *dhimmi* (Jew or Christian), Abu Hanifa stated that a Muslim may be killed for murdering a *dhimmi* while al-Shafi'i rejected this opinion. Abu Hanifa based his opinion on the fact that the *dhimmi* is *ma'sum al-dam* or *mahqun al-dam* (literally, "his blood is protected"), implying that the Islamic state, upon agreement to strike a *dhimma* contract (*'aqd al-dhimma*) with an individual or a community, is legally responsible for the safety of their lives and property.

According to Abu Hanifa, a man can be killed in retaliation for the murder of a woman; an old man can be killed for the murder of a minor; a healthy man can be killed for the murder of a blind man, and a senile (*zamin*) man who lacks a leg or an arm (*naqis al-atraf*) can be killed for the murder of an insane person.[544] In all the above cases retaliation is possible because a sort of legal "equality" (*musawat*) between the murderer and the victim is assumed. Pre-existing disabilities in the victims do not undermine their basic right to life. Hence, when killed by a healthy or another handicapped person, their death is retaliated. Excluded are the cases where the killer is a madman who committed the murder in a state of insanity, while held not responsible for his deeds in the eye of the law.

If the killer reaches a reconciling agreement (*sulh*) with members of the victim's family (*awliya'al-maqtul*), with the aim of avoiding *qisas* and sparing the killer's life, a monetary compensation by the killer is due right away, no matter how large the sum of money. The sum of money is immediately due since it is like a debt that the criminal owes the victim's family. The option to replace *qisas* with a financial payment is based primarily on Qur'an **2**, 178: "O ye who believe! Retaliation is prescribed for you in the matter of the murdered; the freeman for the freeman, and the slave for the slave, and the female for the female. And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness".[545] This is also based on a hadith that leaves the choice with the relatives of the murdered person, to demand *qisas* or settle for financial compensation.[546]

An intended injury that does not end in killing or loss of life (*al-qisas fima dun al-nafs* – retaliations for less than the life) means that the intended injury has destroyed an organ or several organs, but no death ensued. For this Qur'an **2**, 194 reads: "And one who attacketh you, attack him in like manner as he attacked you. Observe your duty to Allah, and know that Allah is with those who ward off (evil)".[547] The rule is that for each organ that was intentionally injured, the same organ in the criminal must be injured or amputated, if this "equality" can be followed. This is an implementation of the biblical law of "an eye for an eye and a tooth for a tooth".

For a victim's eye that was put out, for example, it is suggested that wet cotton be placed on the equivalent eye of the criminal, and a hot mirror be pressed against it until the eye loses its sight.[548]

Two legal opinions exist regarding the timing of the performance of *qisas* on organs. The Hanafis advised waiting some time to let the victim's wound heal. Only then can the real damage be assessed; or the wound might later result in death, which changes the legal case from injury to the more serious charge of killing. Only then can *qisas* be performed. Al-Shafi'i insisted that *qisas* must be performed right after the injury.

If the wound has healed and has left no trace, Abu Hanifa required no compensation (*arsh,* indemnity). He explains that a wound that heals is like a blow that causes pain but does not leave a mark, hence no indemnity is in order. Abu Hanifa's disciple, Abu Yusuf, required indemnity for the pain, and his other disciple, Muhammad al-Shaybani, required indemnity that covers the fee of the physician. Actually, indemnity for the pain is the cost of the medical treatment, so Abu Yusuf and Muhammad are in no disagreement.[549] The difference between Abu Hanifa and his disciples regarding the injury that has healed stems from Abu Hanifa's judging according to the outcome, namely no disability remains so he sees no need for indemnity. His disciples rule that the process of healing, or in today's parlance the temporary disability created by the injury, must not be overlooked, even though eventually full health has been regained. The payment of compensation to cover the costs of the process of recovery is also in agreement with contemporary attitudes to temporary disabilities caused by intended or unintended injurious behavior.

Precision in executing the punishment is mandatory to maintain the equilibrium between the victim's lost or injured organ and the extracted or damaged organ of the offender. If this equilibrium is violated in favor of either party, justice has not been served, and remuneration to the deprived party is in order. Sometimes it is not easy to maintain this symmetry between the crime and its punishment, and Islamic law therefore offers additional solutions for the more complicated scenarios.

According to Malik, for example, there is no *qisas* for a lost right eye by the blinding of the criminal's left eye, nor for the left eye by blinding a right eye. This is true for cases in which the criminal who put out another's eye is missing the same eye himself or herself.

Likewise concerning the teeth: the exact same tooth that was intentionally pulled out should be extracted in retaliation: a second for a second, an upper for an upper, and so on; right hand for right hand, and any finger for its exact counterpart.[550] Also, a healthy organ can be amputated only for another healthy organ; a healthy hand, for example, cannot be amputated for a previously damaged paralyzed hand.[551] When an

exact *qisas* cannot be performed, for technical difficulties with maintaining accuracy, for example, or because that organ in the criminal is missing, physical punishment is replaced by financial compensation to the victim (*diya*).[552] I will elaborate below on the values of *diya* for the various organs.

According to Malik, where death results even from an intended stroke or blow, or a hit with a stone or a stick, or from tripping someone by the leg that causes him to fall and die – any of these ways leading to the death of a victim calls for *qisas*. By contrast, if one pulls another's leg during a game and the latter falls and dies this is not viewed as intentional, hence monetary compensation (*diya*) will be required but not *qisas*.[553] If as a result of a blow a person becomes bed-ridden (*sahib firash*), and later dies as a result of that blow, the one who beat him is held responsible for the death; he or she is a killer that can be subject to *qisas*.[554]

There are organs and bodily faculties against which no retaliation can ever be exercised. Such are the flesh of the arm and the thighs, the flesh of the cheeks, of the back, and of the stomach. Also included here are the skin of the skull and that of the hands, etc. This is so either because precision in injuring only a specified organ, or part of it, cannot be guaranteed, hence the previously mentioned "equilibrium" (*istifa' al-mithl*, "achieving symmetry") will undoubtedly not be achieved; or because additional organs to the one intended might also be injured in the process of retaliation.[555] Again, to avoid injustice (even vis-à-vis a convicted criminal) the retaliation will not be performed. Consider for this matter the loss of the senses of smelling or hearing, and the loss of internal organs such as the spleen or a section of the stomach. It is impossible to enact retaliation against such organs without harming neighboring organs and possibly causing the criminal's death, while the desired legal goal is to amputate and cause damage and pain, but not to kill.

In cases such as the above, the criminal escapes becoming handicapped not because he or she does not deserve the punishment but because the law aims at justice, and any doubt or another inequality that the punishment might entail are legally and morally intolerable. Any doubt as regards the intention of the criminal, or the performance of the crime, will prevent the judge from issuing a *qisas* sentence.

For the same reason the law largely maintains that bones cannot undergo *qisas* unless they are the teeth. This is based on a hadith that clearly states, "there is no *qisas* for bones", and on another tradition attributed to Umar and Ibn Mas'ud that teeth are the only bones which may be subject to *qisas*.[556] This probably stems from a lack of proficiency in the Middle Ages in setting broken bones, or cutting through them in a way that did not cause further breakage. Only teeth were believed to be bones whose extraction could be successfully controlled without harming other bones or organs. Teeth could be filed with a *mibrad* (file) to the desired size.

On the other hand, we are informed that the medieval physicians were not unanimous on whether teeth are bones at all, because teeth continue to grow after having reached their full form, and also because they seem to soften in vinegar. Thus, it was speculated that teeth may not be bones, hence they need not be distinguished from other bones, and consequently teeth must not undergo *qisas*. Those who did not consider teeth as bones viewed them as dry edges of nerves.[557]

Also, regarding a criminal cutting off an arm from the middle of the *sa'id* (forearm), or causing a *ja'ifa* (internal wounds), or cutting off a person's tongue or penis

(unless it was the *hashafa* – glans that was cut off), none of these organs may be subject to *qisas*. The reason might be fear that the criminal will bleed to death. This, again, is not the purpose of punishment by *qisas* on organs. Likewise, if the same hand in the criminal is paralyzed or lacks fingers, or in cases of a fractured skull, if the attacker has a bigger or a smaller skull (*ra's al-shajj*) no retaliation will take place, and financial compensation will be required instead.[558]

According to the Hanbali Ibn Qudama, if an eye was struck and lost its sight, or if the ears were struck and lost the ability to hear, elaborate tests on the victim were conducted in order to define the percentages of disability, or the loss of proper functioning, compared with a healthy person's functioning. The amount of *diya* (blood money, fiscal compensation) was then calculated based on the percentages of disability, and the attacker would reimburse the victim. No physical retaliation was to take place.

One such "sight test" from the Middle Ages is reported as follows: an egg was placed at several ever greater distances from the victim's location, until the victim reported he could not see it at all. The test was repeated several times, and with different locations of the egg, to verify the percentage of loss of vision. Hearing tests were also conducted at several places and distances from the plaintiff, so as to verify that the latter was telling the truth and not lying in order to enlarge future compensations.[559]

WHO CANNOT BE PUNISHED BY *QISAS*?

Malik gives the age of a youth who may be subject to amputation as the age of *ihtilam* (sexual maturation).[560] The Hanafis stipulate that like the insane, the child (*sabiyy*) must not undergo *qisas*, and they give roughly the same age as Malik does.[561] Both apparently associate age with being responsible and aware of the severity of the crime. Both rely on the tradition that underlies legal responsibility in Islamic law (or rather lack of it) "*rufi'a al-qalam*" (the pen has been lifted).

As for the *akhras* (dumb), if, for example, he was involved in a theft, and there are witnesses, he can be subject to amputation. If he himself confessed to the crime and his confession is understood, he may undergo amputation. If none of the above was the case, that is, there was no confession nor sufficient testimony against him, he will not be amputated.[562]

The insane are exempt from punishment if the crime was committed when the perpetrator was in state of insanity. If the criminal was in a state of sanity at the time of the crime, but later became insane, the execution of punishment must be postponed until the *majnun* regains sanity, at least temporarily.

The *majnun* who experiences lapses into sanity, who put out another person's eye, or who cut off another person's hand, is held eligible to undergo *qisas* if he committed the crime while at a state of awareness, sanity (*mufiq* – "awake"). The execution of punishment, if required, must always await a period of awareness.[563]

The rule is that children and the insane, two groups that fit the definition used by Abu al-Khayr (1994), '*adim al-tamyiz* (literally: those lacking the ability to distinguish between good and evil), are not subject to *hudud* punishments, since the intent

to commit the crime, in their case, is absent, although a crime was nevertheless committed by them. In the event of crimes committed against the property of others, the '*aqila* (the "blood-group", or those liable for the criminal), or, in their absence, the treasury (*bayt al-mal*), should compensate the victim or the victim's family instead of the criminal.[564]

If '*adim al-tamyiz* caused the loss of life of another person, this cannot be qualified as an intentional killing, namely murder, since the lack of reason attributed to him is interpreted as lack of intention. Even if the *majnun* intended to kill someone, his act is not viewed by the law as intentional ('*amad*), since he is unable reasonably to assess the outcome of his act. Exceptions to this are the Shafi'is, who claim that '*adim al-tamyiz*'s killing of another person may be viewed an intentional act, but his disability relieves him of the punishment for murder normally awaiting a responsible sane adult, as prescribed by law. The intent, they claim, exists, even in the absence of understanding on the part of the insane person (*idrak*) of the outcome of the crime. In such cases, therefore, no *qisas* would be applicable. A lesser punishment, such as *ta'zir* (non-fixed punishment),[565] instead of *qisas*, as suggested by al-Shafi'i, was rejected by the Hanafi al-Sarakhsi; the latter stated that this is largely like beating a beast with a stick; it might teach it how to behave in the future, but will not serve as punishment for an act of the past.[566] *Diyat al-'amad* (blood money for an intentional killing), if required of the child and the insane, is not accepted by the Hanafis, since they do not view the concept of *diya* as punishment at all, but as a reconciliation between the criminal and the victim and their respective families. The child and the insane are unable to comprehend the idea of reconciliation. Therefore, the *diya* is not applicable in their respective cases. If it were a punishment, they continue, it would never be subject to negotiation, or at other times it would be completely waived.

THE *DIYA* (BLOOD MONEY)

Diya is the title for the amount of money which must be paid for an attack against a soul (*nafs*) or against what is less than a soul (*ma dun al-nafs*), namely against certain organs.[567] This means that *diya* is the compensation paid by the attacker to the victim, or the victim's family or heirs if the victim has lost his or her life, or has suffered an injury to one or more of his or her organs. It is compensation intended to replace vengeance.[568] Both types of attack, whether ending in death or in partial injury, must be viewed as unintentional so that compensation through *diya* be considered an option. Another term for *diya* is '*aql* (tying, a knot), either because the money paid to the injured party stops or ties off the blood flowing from an otherwise ongoing blood feud, or because the *diya* originally entailed camels that had to be tied together before being led to the family of the killed or injured person.[569] The law inscribing the *diya* is founded on Qur'an **4**, 92: "It is not for a believer to kill a believer unless (it be) mistake. He who hath killed a believer by mistake must set free a believing slave, and pay the blood-money to the family of the slain, unless they permit it as a charity".[570] The injured party does not have to be mature (*baligh*) or sane ('*aqil*) to qualify for receiving the compensation. The injured party does not have to be a Muslim either. Any person who is *ma'sum al-dam* ('one whose blood is protected',

i.e., a person protected by the Islamic state), is also eligible for receiving *diya* when injured or killed.[571] The value of the compensation paid as *diya* would differ of course according to the type of injury and the social/legal status of the injured person (free-man or slave, man or woman, child or fetus).

The value of a full *diya* for males has been fixed in the fiqh at one hundred camels, or one thousand *dinar* (gold coins), or 12,000 *dirham* (silver coins). For the woman's *diya*, the sums are usually half those prescribed for a man, "not because the woman is less valued but due to a whole set of financial laws in Islamic law".[572] For organs which are injured, the Malikis and Shafi'is claim that the reduction to half in the compensation for the injuries of a woman is only in those cases where the expected *diya* exceeds one third of a full *diya*. For less than a third of *diya*, a man and a woman are compensated equally.[573] In principle, the full amount of *diya* is the lawful compensation for the loss of life, and also for loss of organs that are single in the body, such as the nose, the tongue, the urinary tract, the rectal tract, the penis, etc. However, the jurists, even when adhering to the same school of law, are not always unanimous on the application of the above principle.

With regard to the nose, there are some other legal opinions: according to Muhammad al-Shaybani, the qadi has to rule (*hukumat 'adl* – "ruling of justice"[574]) on amputation or compensation. If the nose was cut off and the sense of smell was destroyed as well a full *diya* is due. The way to test whether the sense of smell was destroyed or not is to insert a stinking object in the property of the plaintiff; if he shows disgust, obviously he can smell. Another opinion states that the one whose nose is cut off may choose between demanding a *qisas* or *diya* for the nose.[575]

With regard to the tongue, some stipulate that full *diya* be paid when a part of the tongue was amputated and the ability to talk was completely lost. If part of the ability to speak was spared, the *diya* will be calculated so as to cover the ability lost. If half of the ability to speak was lost, half a *diya* is the proper compensation. The ability preserved is to be calculated relative to the 28 letters of the alphabet: if, for example, one can pronounce 21 out of the 28 letters, the loss amounts to one quarter of the ability to speak, and one quarter of the *diya* is due. Another method suggested to assess speech disability was to test the sounds that can be pronounced by the tongue only (*lisani* – lingual-trill), but not those pronounced in the throat (*halqi* – guttural), by the lips (*shafahi* – labial) and by breathing (*hawa'i* – aspirated).[576] It is explained that *qisas* on a tongue is impossible to perform, since the tongue stretches and shrinks, and the exact size of the amputated part is hard to tell. As for the tongue of the mute which was injured, the solution is *hukumat 'adl* (up to a qadi's discretion).[577]

A full *diya* is also due on any paired organ, such as the eyes, the ears, the hands, the legs, the lips, the breasts, the testicles, etc. Whoever has caused the loss to one of the pair, such as one eye or one hand, will have to pay one half of a full *diya* as compensation.

If loss is caused to a double-paired organ, such as eyelids or eyelashes, the *diya* will amount to one fourth of a *diya* for each. For each finger there is one tenth of a *diya*, which according to one reasoning is ten camels or their equivalent in money.[578] According to another, not all the fingers are of equal importance in the human hand, therefore each has a different value and calls for a different amount of *diya*. The caliph 'Umar is reported to have ruled for the thumb and the

index finger one half of a *diya* (25 camels), for the middle finger ten camels, for the ring finger nine camels, and for the little finger six; together they amount to fifty camels, which is the *diya* for one hand.[579] According to another tradition, attributed to the Companion Mujahid, the distribution of the *diya* due for one hand goes as follows: fifteen camels for the thumb, ten for the index finger, ten for the middle finger, eight for the ring finger, and seven for the little finger.[580] Again, the *diya* for the loss of all five fingers may not exceed fifty camels. The loss of all ten fingers, according to the two methods of reasoning as shown above, always amounts to one full *diya*, that is, one hundred camels or their equivalent in currency.

A similar discussion, analogous to the one concerning the fingers, takes place among the jurists concerning the loss of teeth. According to one opinion, each tooth is valued at five camels, or five percent of the full *diya*. According to another, not all teeth are of the same value vis-à-vis the *diya*; hence the front teeth are valued higher than the teeth farther back and the molars.[581]

Full *diya* is required also for the loss of a bodily faculty, even when the organs, at least from the outside, appear unharmed. Thus, full *diya* is the compensation for the loss of mental capacity, the loss of the ability to speak, the loss of the ability to engage in sexual intercourse and to discharge semen, the loss of one's senses of hearing and vision, etc.[582]

Other injuries are also estimated in comparison with, or relative to the full amount of *diya*. Such are the *ja'ifa* (a wound to the interior of the body) and the *ma'muma* (a wound pertaining to the brain); both deserve one third of a full *diya*. The *mudiha* (a wound which leaves the bone exposed) entitles the victim to five camels, and the *munaqqila* (a fractured or displaced bone) to fifteen camels.[583] For all other injuries, when a precise amount of *diya* is not prescribed by the law[584] the judge has to apply *hukumat 'adl* (ruling of justice), namely an independent assessment of the harm caused. In any case, compensation should not exceed the amount of a full *diya* for each type of organ.[585] Injuries to several of a man's organs can amount to more than one *diya*. Also, if someone has lost both ears and the faculty of hearing, he or she is entitled to two *diya*s. The ears and the hearing are two separate functions, hence they entail two *diya*s. By contrast, if someone has put out another's eyes, and the latter has lost his ability to see, only one *diya* is due, since vision derives from the eyes.[586] The rule seems to be that if the ability (*manfa'a*) and its place of origin are damaged (like the eyes and the vision), there is only one *diya*. But if there is an injury of a separate faculty and an organ (such as the pelvis and the ability to stand) two *diya*s are in order.[587]

When the request of *qisas* is waived by all the victim's relatives, or the *qisas* sentence is not applicable for other reasons, *qisas* is substituted by *diya*. Possible scenarios where *qisas* may not be applicable are: if the offender has died, or has himself or herself lost the organ subject to retaliation; when the killing was committed with an instrument not necessarily with the purpose of killing; if the crime has not been proven beyond doubt; when *qisas* is supposed to be inflicted on broken bones or severed bodily faculties that are not easily located. In all cases where it is suspected that more damage than required by law will be caused to the attacker, the law encourages resorting to *diya*, not to *qisas*.[588]

DIYA OR *QISAS* WHEN EITHER THE VICTIM OR THE OFFENDER IS ALREADY DISABLED

This is a two-fold question, as it deals with scenarios in which either the criminal (who must suffer punishment by some sort of amputation or injury) or the victim of a bodily injury has already been injured and disabled before. For the victim, the most recent injury may have aggravated the previously existing disability. In these circumstances a new set of questions and dilemmas arises for the jurists.

For example, if a person with only one eye (*a'war*) was attacked and that one eye was put out, should he receive the *diya* for one eye, at the normal compensation of 50 camels? Or should he receive the full *diya* for two eyes – 100 camels, which is the usual compensation for two eyes as well as for the loss of the faculty of vision? After all, the one eye that he lost served him like two eyes in a healthy person, providing 100 percent of his sight; therefore, its loss should be worth the full *diya*.[589] Both attitudes are reasoned by the jurists. The Hanafis, for example, prefer the full *diya* solution, while Abu Hanifa himself and al-Shafi'i ruled in favor of the half-*diya*. Al-Qaffal states that the eye of the *a'war* is like the eye of anybody else.[590] This means that for him the eye is always worth 50 camels. Other jurists maintain that for an only eye (*'ayn 'awra'*) that was put out (*qal'*) there is no compensation in the form of *diya* but only through a *hukumat 'adl*.[591]

Likewise, in cases where *qisas* is normally due the jurists debate a case such as where the criminal himself had only one healthy eye (*a'war*), the right one, and he put out (*faqa'a*) the right eye of another person. According to the principle of *qisas*, the equivalent organ as that removed by the attacker should be removed in retaliatory punishment: the criminal's right eye has to be extracted. However, in such an event the criminal will be left without any ability to see; should *qisas* still be enacted? Most jurists would shift in such a case to *diya*, and spare the criminal's only eye.[592] al-Shafi'i, though, demanded *qisas*, so as to follow the rule of "an eye for an eye", and Malik left it for the qadi to decide. According to the Hanafi Abu Yusuf no *qisas* exists between a squinting (*ahwal*) and a healthy eye because no equality in their functioning exists, hence their respective values cannot be the same. Since, as he argues, the squinting eye is already disabled, an eye that has a defect (*naqs*), only *diya* might apply as this can reflect the percentages of the vision lost.[593]

If a person who cut off another's arm, say the right one, has a paralyzed opposite arm (his left), should his healthy right arm be cut off so that he will be left with only the paralyzed arm, hence with no useful arm?

An attacker amputated another's finger, and this in turn caused paralysis to the whole hand; what type of punishment is in order? Malik states that as a *qisas*, the criminal's finger should be cut off. In addition, the punishment has to be delayed to verify whether the paralysis passes in time or not. If it does, *diya* will be estimated for the period of paralysis.[594] No further advice is provided for what step to take if the paralysis endures.

An attacker A cut two fingers off the hand of victim B, and A underwent *qisas*. Then came C and intentionally cut the three remaining fingers off the same hand of B: should C be sentenced to the *qisas* or only to paying a *diya*? Malik ruled for a *qisas* of the palm of C's hand. Malik in this case did not distinguish between the thumbs and other fingers.[595] Malik was consulted about calculating the *diya* in a case

in which a man unintentionally cut off the palm of a hand which had only one or two fingers on it: should it be one fifth, or more, or less? His answer was that the *diya* should be calculated proportionally to what was left of the hand, probably through *hukumat 'adl*.[596] Abu Hanifa ruled that for the amputation of the palm of a hand with one finger, one tenth of a *diya* was due, and if there were two fingers on it, – one fifth of a *diya* was due. No additional payment was required for the palm itself (*kaff*). Abu Hanifa's two disciples, Abu Yusuf and Muhammad al-Shaybani, ruled for a *diya* that is the larger sum between the *diya* of the palm of a hand and the *diya* of the lost fingers; the smaller amount is included in the larger.[597]

For the cutting off of a paralyzed hand (*al-yad al-shalla*'), according to the Hanbalis the compensation is equal to one third of a *diya*. But they stipulate that the hand be cut off at least from the elbow (*ku*').[598] This is a prerequisite for application of the term *yad* as mentioned in the Qur'anic law (**5**, 38), hence for enforcing the *qisas* or the *diya*.

As for the unhealthy leg of a lame person (*rijl al-a'raj*), this is often treated as a healthy leg for purposes of considering *qisas* or *diya*.[599]

With regard to the tongue of a mute (*lisan al-akhras*), if someone cuts it off some jurists claim that *hukumat 'adl* be applied to fix the compensation.[600] The explanation is that if there is no *qisas* on *lisan al-akhras*, *diya*, the substitute for *qisas*, is not an option either. Therefore, *hukumat 'adl* is the only option left. Malik b. Anas gives the term *ijtihad* (independent reasoning) to *hukumat 'adl*,[601] thus leaving it open to the qadi's discretion. A minority of scholars nevertheless demanded *diya*.[602] The reason is that cutting off the tongue of a mute does not harm any ability to speak as none existed in the first place.

However, if the sense of taste is destroyed with the removal of the tongue, full *diya* is due.[603] This sense is supposedly responsible for identifying the following five tastes: sweetness (*halawa*), sourness (*humuda*), bitterness (*marara*), saltiness (*muluha*), and tastefulness ('*udhuba*). If all are missing, full *diya* is in order. If one or more of the tastes are absent, compensation will equal one or more fifths of the full *diya*.[604]

If as a result of cutting off the tongue one loses the ability to speak, and the loss is total, full *diya* is due. If the loss of speech is partial, some suggest that the compensation be calculated relative to the number of letters one still can utter compared to those one cannot, and that the *diya* be proportional to that. Others suggest distinguishing the letters (*huruf*) pronounced by the tongue (*lisaniyy*) from those pronounced by the throat (*halqiyy*), the lips (*shafahiyy*), or aspirated (*hawa'iyy*), and verifying what exactly the disability involves.[605] The Malikis counsel reliance on the *ijtihad* of experts on matters of speech, not counting the letters, because the letters are not all pronounced similarly; some are harder to utter than others. Similar investigations should be performed when speech is damaged even though the tongue remains intact.[606]

Also, if a boy loses a tooth, time is allowed to pass to see whether a new tooth grows underneath it: if it does, no compensation is in order.[607] If an adult loses a tooth as a result of a blow, but a new one grows in its place, Abu Hanifa requires no *diya*, while his two disciples do require it.[608] If the tooth that is knocked out through a violent act against its owner was at the onset of crime black (implying that it was not a healthy tooth), the *diya* for the tooth would be the full amount of *diya* for a tooth. If the tooth was healthy before the man was assaulted, and it became black or red or yellowish afterwards, Malik b. Anas is reported to have referred only to the one which

turned black, and allotted it the full *diya*. As a result of the blow the tooth may become loose: if it is very loose this should be compensated with a full *diya*, but if it is only slightly loose it should be compensated proportionally to that. In any case, a year should elapse to verify the fate of that tooth which is very loose.[609]

Within a year it is believed that the condition of the tooth will become clear: whether it falls out, changes color, remains firm, or is loose. A tooth which is broken off at the root should receive the full *diya*, even though the root might still be intact. This means that the *diya* for a tooth is due even when it breaks and only the external part is missing.[610]

If a person had false teeth made of gold, iron, or bone, and these were knocked out, there is no *diya* on them. However, if the flesh has already grown around them, indicating that the false tooth was well received and was close to the proper function in chewing and cutting, then the offender who caused its uprooting is subject to *ta'zir*. There is no *diya* for an additional tooth which grows behind the regular teeth (*shaghiya*), but *hukumat 'adl* is in order.[611]

If someone hits another's *mudiha* (an exposed bone), and as a result the latter loses the sense of hearing and his sanity, then three *diya*s are due.

If hearing and sanity are regained, there will be a monetary compensation (*'aql*).[612] Since it is not specified, it is difficult to assess the punishment for striking a *mudiha*. As mentioned earlier, for causing a *mudiha* there is an assigned *diya* of five camels. But additional damages caused to an already existing *mudiha* are not elaborated.

WHEN IS THE *DIYA* NOT APPLICABLE?

If the injured organ is restored to its condition before the injury, no *diya* is in order. But if it does not heal to perfection ('*athl*), or if the nose, for example, is not straight as it used to be, the demand for *diya* by the injured person is valid.[613] Similarly, if a broken pelvis (*sulb*) heals no *diya* should be paid. But if the bone is not properly in place, or the person limps, the proportional *diya* is calculated by the qadi based on the severity of the disability incurred (*hukumat 'adl*).[614]

A person may be born with a disability, or may have incurred one through an accident or a disease; this chapter, by contrast, has shown that disabilities can also be intentionally inflicted upon people by people, as punishments, under the Islamic legal system which aims at administering justice. These human-caused disabilities are prescribed in the Qur'an. But within what appears to be a harsh and uncompromising legal system, some humane considerations are nevertheless observed. The physical punishments are formulated so as always to leave the criminal with a minimal measure of human dignity. As cruel as they may seem, the physical punishments are devoid of sadistic motivations, and the welfare of the criminal after being punished is a concern of the jurists as well. The message conveyed by the laws of *hudud* and *qisas* is that criminals must pay their dues so that there be a better quality of life for society as a whole. Some criminals indeed merit capital punishment. But the rehabilitated criminal, who has already paid his or her dues to society, either by a painful punishment or by compensating the victim, can become again an effective member of it.

SUMMARY

A large variety of disabilities are mentioned in Islamic legal literature. The disabilities which are relevant to each legal subject are listed, in addition to suggested ways for how that particular disabled person can participate in a given field of human activity addressed by the law. But the disabilities are always mentioned as a matter of fact, as part of the reality that people are meant to live in, as a result of the divine wisdom and planning with which Allah manages the creation. No emotional attitude, such as remorse, anger, despair, or disappointment, accompanies any of the discussions of disabilities within the legal literature.

The mood that prevails over the law with regard to disabled persons is that they are an integral part of society, they are never social outcasts. But since they are people with special needs, the law addresses them in addition to its addressing the healthy. The difference between healthy and disabled persons is that people with disabilities are granted by the law some alleviations in the religious duties in consideration of their particular difficulties. Once the difficulty, mental or physical, is overcome, the law grants no further alleviations. Whether the disability has vanished or not, is often a conscientious matter, or a matter between man and God, and no state authority has been granted license by law to interfere with it. The responsibility to shift from a disabled mode of conduct to a healthy mode of conduct remains the individual's. If, on the other hand, with old age and the course of illness the difficulty becomes chronic, more alleviations apply, under the Qur'anic principle stating that the religion aims at ease (*yusr*), not at hardship (*'usr*) for the believer, and that saving a human's life is always first priority.

The general attitude to the disabled in Islamic law has been marked by tolerance, acceptance, accommodation, and forgiveness regarding the fulfillment of the religious duties, or not fulfilling them, as well as in matters of criminal justice. This overall positive attitude may derive from the "no-fault" attitude in Islamic scriptures to bearers of impairments or diseases.[615] Since the ill are not perceived as punished people who "invited" the punishment upon themselves by sins they may have committed, the disability is viewed rather as a trial from Allah, which the religiously hence spiritually strong will be able to withstand. The disabled are looked upon as people in a stage of

testing, but never as condemned or sinful. Sometimes added to this attitude is the understanding or the consolation that if one is disabled in one way, he or she may have been rewarded by God with extra talents and abilities in other ways.

I have not studied in this book the state of the disabled throughout Islamic history, as this would be beyond its scope. Therefore, it is possible that the legal attitudes I have depicted so far do not provide an accurate picture of the social attitudes to the disabled at all points in time and at all geographic locations. Indeed there is often a gap between the law, which to some extent draws an ideal, and reality. Regarding disability in Judaism, for example, Marx speaks of "the discrepancy between expectation and reality in society's treatment of the disabled", between compassion for the disabled on one hand and their rejection on the other. He explains that in neglecting the disabled, the "able-bodied" are driven by denial, guilt, and fear, and that the ongoing suffering of the disabled helps the able-bodied cope with their own fears of sin and punishment.[616]

I argue that even if reality is not perfect this does not detract from the importance and value of the law itself. On the other hand, one should not ignore the fact that the law develops in a particular society, absorbs from its culture and ideology, and thus necessarily mirrors, at least partially, some of its outlook and traits. In this respect, I argue that Islamic law does provide an insight into the basic perceptions of people with disabilities in those societies that follow the Islamic path.

The study of the history of disabilities and how the disabled were treated in the various historic periods under Islamic rule deserves perhaps a book by itself. One example showing that the law may differ from the social reality is the case of the *majnun*. Against Dols's critique of Islamic society's overall positive treatment of the mentally disabled, one characterized with tolerance and humanism, Shoshan,[617] Shefer,[618] and others relate that in the late Middle Ages madmen were often confined in small cells or even domestic cages, sometimes chained and whipped. Based on medieval Arab historians such as al-Maqrizi, Ibn Iyas, and Ibn Furat, we learn that in 1265–66, for example, the Mamluk sultan in Egypt decreed that "all invalids (*ashab al-'ahat*) in Cairo be assembled and transferred to al-Fayyum". In 1392 the Sultan decreed that no leper or invalid could stay in Cairo, and those who disobeyed must be punished.[619] Therefore, Shoshan argues that the social attitudes to the disabled in Islamic societies were not always colored by tolerance and acceptance, but sometimes tainted by exclusion and cruelty.

A more balanced account is given by al-Issa, who claims that those restrained in the hospitals were those patients who posed a danger to themselves or to others. The non-violent mentally ill were treated by family members in their homes. Society at large, he continues, was reluctant to send away the ill to hospitals, even though the hospitals themselves were located in the center of the cities, frequented by visitors and relatives, and not secluded on the outskirts of town.[620]

Both attitudes to the mentally ill, the tolerant and the less tolerant, developed in Islamic societies where Islamic law was known and applied. The explanation for the differences between tolerance and intolerance in practice should perhaps be sought in the political and social atmosphere that prevailed at a particular time or place. But this, as noted, I will leave for historians to pursue.

As far as human rights are concerned, Islamic law in its many references to disabled persons has taken care of several issues that fall today within "human

rights". In marriage, it has been shown that the right of an individual to marry is not influenced by his or her disability. Likewise, there are only a few disabilities that justify the termination of marriage. These usually involve situations in which one of the spouses bears a contagious disease, hazardous to the other spouse or to their offspring, or health conditions that impede the consummation of marriage, hence defeat the main purpose of marriage. Termination of marriage on the basis of a contagious disease defends one's right to live and maintain good health. The termination of marriage justified by a continuous failure to consummate it safeguards one's right to enjoyment and to having children.

With regards to the *khuntha* (hermaphrodite), the law has guaranteed his/her rights to live, to marry, to participate in communal and religious life, and to properly own and inherit property. In recent years the legitimization of sex-change operations has also promoted the *khuntha*'s right to happiness and perhaps to receive medical care.

As for religious duties, people with disabilities have been granted the right to participate in public services, fulfilling the duty to the extent that their individual condition allows. Alleviations sometime require that other members of the community assist the person with disability, in such ways as carrying them during the hajj rites, helping them find the proper direction of prayer if they are blind, and so on. A sense of equality of all members of the Islamic community and solidarity, which is prescribed by the law, permeates the discussions of the jurists on the disabled and their participation in the performance of religious duties.

Although physical punishments do not qualify in the modern person's mind as benevolent actions towards humans, the attitudes of Muslim jurists to Muslim criminals who must be physically punished are paradoxically attentive to the criminals' human rights. The punishment must not be executed before full justice has been administered; that is, the crime has been proven beyond doubt, it is verified that the criminal was aware of his or her deeds, and was not minor, nor insane, at the time of crime. This may be linked to the modern perception that every human has the right to a just trial, and that all are equal before the law. If the punishment is not capital punishment, and the enforcement of the punishment calls for amputations, the law urges preservation of the dignity of the criminal, ensuring his or her life expectancy after punishment, leaving the criminal at least one working limb of each sort, a leg and an arm, and encouraging his or her speedy return to normalcy (indeed as a disabled person) within the family and the community.

The laws concerning people with disabilities demonstrate a very advanced social outlook, to judge from the considerations the Muslim jurists express and the argumentation they utilize. This outlook, which draws on the Qur'an and the Sunna, is furthermore emphasized in the legal compilations from the beginning of the 9th century onward. This progressive outlook of Muslim jurists towards the disabled coincides with that demonstrated also by the laws on the socio-economic duty of charity (*zakat* or *sadaqa*) and their aim to care for the economically weak members of society; it also agrees with the ideology behind the Islamic laws that define the tolerant treatment of religious minorities within the Islamic state (especially the *jizya* – poll tax). Against the abusive attitudes to the disabled in the Roman and Byzantine empires, as well as during the dark Middle Ages in Europe, the attitudes in Islamic law were in every way enlightened and farseeing.

APPENDIX: CONTEMPORARY FATWAS ON PEOPLE WITH DISABILITIES

Ibn 'Uthaymin,[621] *"The error of those who claim that children born to consanguineous marriages are disabled"*

> *In Al-Lu'lu' al-Thamin min Fatawa al-Mu'awwaqin (answered by a group of scholars, and prepared by 'Abd Allah al-Shayi'). Riyad: Dar al-Sumay'i lilNashr wal-Tiba'a 1997, v. 1: 21–2.*

This opinion that I have heard from a physician is not true. It is not an axiom that consanguineous marriages produce deformed children; as in other types of marriage, the issue is in the hands of Allah; besides, deformation can be due to other reasons.

Some scholars prefer (*istahabba*) men to marry non-relatives, since this is healthier for the prospective child, but the opposite is true.

The main issue is religion and morality. The prophet PBUH[622] said: "A woman should be married for her qualities: her property, her blood-lineage, her beauty and her religion. If you are lucky to find a religious woman then you are victorious". He PBUH also said: "If you meet someone whose religion and morals satisfy you, then marry him/her; if you do not do so there will be chaos and great destruction on earth".

There are many men who married the daughters of their paternal uncles and prospered, for example, 'Ali b. Abi Talib, ABSH,[623] who married Fatima, the daughter of the messenger of Allah PBUH, the daughter of his paternal uncle, and they gave birth to the two leaders of the youth of paradise, al-Hasan and al-Husayn ABSH. The prophet PBUH said about al-Hasan: "This son of mine will be a leader, and Allah will reconcile with him between two groups of Muslims".

The bottom line is that if your paternal cousin is of good religion and personality, you [the woman] should marry him, and do not worry regarding these things which are spread by ignorance; the issue is in Allah's hand, may He be exalted, and He brings success.

Ibn Jibrin,[624] *"The error of those who hide their disabled children from others"*

> *In Al-Lu'lu' al-Thamin min Fatawa al-Mu'awwaqin (answered by a group of scholars, and prepared by 'Abd Allah al-Shayi'). Riyad: Dar al-Sumay'i lilNashr wal-Tiba'a 1997, v. 1: 36–7.*

Question: Some fathers or mothers, when they have a disabled child, tend to hide him or her from people. They do not attend social events, and they keep the child at home; they try to conceal from people the fact that they have a disabled child. What is your opinion?

Answer: This is a mistake. The child is a creation of Allah and His ruling, and they have no choice. Allah, the Exalted, has wisdom in His creation and planning, and they must submit to the ruling and fate; they will be rewarded for their patience. They should take the child out in public so that healthy people see him or her and consequently praise their Lord for the grace of perfect creation. Allah, the Exalted, differentiated among creatures by completeness and incompleteness, so they may thank Allah for His duties and grace; there is no harm in taking him or her [the disabled child out] or in other people seeing him or her.

An exception is if they have difficulty carrying and moving the child around: then it is legitimate to leave him or her [at home] to ease things [for the child's family].

Ibn Jibrin, "The decision on surgery to sterilize people who suffer severe genetic diseases"

> *In Al-Lu'lu' al-Thamin min Fatawa al-Mu'awwaqin (answered by a group of scholars, and prepared by 'Abd Allah al-Shayi'). Riyad: Dar al-Sumay'i lilNashr wal-Tiba'a 1997, v. 1: 39–40.*

Question: What is the decision concerning surgery to sterilize people inflicted with severe genetic diseases, which are certain to be transferred from one generation to the next, in the knowledge that the surgery will not interfere with their daily routine or [adversely] influence their bodies or minds?

Answer: These genetic diseases should be examined; if the disease is severe to an extent that it disables them to perform duties for this world or for the hereafter, or if it afflicts the body with a harsh disease that causes weakness to the body and pain to the nerves or the bones, or damage to the senses such as the sense of smell, taste, or vision, and it is difficult to treat the disease or it is untreatable, and it also risks transfer to friends and family, and it is certain that the disease will be carried to the offspring: in such cases it is permissible to sterilize those people in order to stop their procreation so that society is not burdened with offspring that carry those serious diseases, that render them unable to work, and that damage their bodies or minds so that they become a millstone on society. This should be done despite the belief that Allah's predestination prevails, that the sterilization may not succeed, since there are many sterilized people who produced children. The prophet PBUH permitted *coitus interruptus* (*'azl*), and said: "do not abstain, because any soul that is created, Allah is its creator". Allah, the Exalted, knows the number of people who eventually will be born, and who will be born until the Day of Judgment. However, this surgery must not interfere with their daily activities or damage their bodies or minds.

The Permanent Committee for Scientific Research and Legal Consultation (Ifta') "It is permissible to use the zakat funds for the care of the disabled?"

In Al-Lu'lu' al-Thamin min Fatawa al-Mu'awwaqin (answered by a group of scholars, and prepared by 'Abd Allah al-Shayi'). Riyad: Dar al-Sumay'i lilNashr wal-Tiba'a 1997, v. 1: 46–7.

Question: we wish to inform you that the association of caring for the disabled children in Riyad is the first project that was established by the charitable association for disabled children in Riyad. It is a private non-profit organization that has an independent testing policy, relying for its income on donations and charitable gifts from citizens, companies, and organizations.

This association treats, supervises, and trains disabled children from birth and until they are 12. It distributes to them, free of charge, the necessary food, drink, accommodation, and clothing for as long as they remain at the building, which belongs to the association, knowing that most of the children come from poor and low income families that are entitled to charity (*sadaqa*). Therefore our question is as follows: Is it legal for the association to withdraw from the *zakat* funds and spend it on cures, treatment and training this group of disabled and poor children who need care and attention? Please be kind to read and answer, and may Allah reward you.

Answer: There is no objection to extract from *zakat* funds for whatever concerns the poor and disabled.

May Allah grant success, and may He pray for our prophet Muhammad, his family and companions, and grant him peace.

Sheikh Muhammad Khatir,[625] "The law concerning the paralyzed man (ashall) leading prayer" (serving as imam)

In Fatawa Islamiyya min Dar al-Ifta' al-Misriyya 1981, v. 5:1715–16.

Prayer following an imam who is paralyzed in one leg is valid by law, but a healthy imam is preferable according to the Shari'a.

Question: Mr. 'Abd al-Radi Muhammad Hasan sent request no. 368 in 1970: Mr. Mahmud 'Ali leads the Friday prayer but he suffers from a handicap, namely he is paralyzed in one of his legs and is unable to walk without leaning on his cane. Due to this paralysis he is uncomfortable in his kneeling and prostration, unlike a healthy imam, and praying while seated he is uncomfortable also; moreover, he sits bent over due to the paralysis in his hip; when standing in prayer he stands on the tips of the toes of his healthy leg. Now there are other people in town who can perform the prayer properly and according to the Shar'i guidelines, including the sender of this question. The sender asks, what is the Shar'i rule concerning such an imam leading the prayer, and is the prayer led by him legally valid or not?

Answer: The Hanafi law concerning leading a prayer instructs that the hunchback can lead the standing person as well as the sitting person. This appears in *al-Dhakhira*[626] and *al-Khaniya*; in *al-Nazm* it says that if the standing of the imam can be differentiated from his kneeling, it is permitted by most jurists. And if not – this according to both of them,[627] and this was the position of the scholars contrary to

Muhammad [al-Shaybani], may Allah have mercy on him. This appears in *al-Kifaya*.[628] If there is a distortion in the imam's foot and he stands on part of it, his leading the prayer is permissible, but another imam is preferable. This appears in *al-Tabyin*. Please refer to the first volume of *al-Fatawa al-Hindiyya*,[629] p. 85. From all that is stated, praying following an imam as described in the question is permissible by law. However, another imam who has a healthy body, who suffers no disability, and who can perform the prayer to perfection, is preferable by law. From here you can learn the answer to the question asked above. And Allah the Blessed and Exalted knows best.

The Permanent Committee for Scientific Research and Legal Consultation (Ifta'), "The purification and prayer of a person who cannot move"

> *In Al-Lu'lu' al-Thamin min Fatawa al-Mu'awwaqin (answered by a group of scholars, and prepared by 'Abd Allah al-Shayi'). Riyad: Dar al-Sumay'i lilNashr wal-Tiba'a 1997, v. 1: 55–6.*

Question: I am bedridden and cannot move, so how can I perform ablution for prayer, and how shall I pray?

Answer: Praise be to God, and Prayer and Peace upon His messenger, his family and companions,

Now to the point:

First, as for purification, a Muslim must cleanse himself/herself with water, and if unable to use water because of a sickness or another reason, he/she should cleanse himself/herself with clean sand. If he/she is unable to do even that, the duty to purify is waived, and the Muslim may pray as much as his/her condition allows. Allah the Exalted said: "So keep your duty to Allah as best ye can." (Qur'an 64,16). He, may His memory be exalted, also said: "and hath not laid upon you in religion any hardship" (Qur'an 22, 78). As for discharges such as urine and excrement, it is sufficient to use a stone or hardened mud or clear handkerchiefs, to wipe the place of discharge three or more times until the place is cleaned.

Second, with regard to the prayer, the sick has to pray standing, and if unable, then sitting, and if unable, then on his/her side, based on a hadith by 'Imran b. Husayn,[630] that the prophet PBUH said: "Pray standing, and if unable, then sitting, and if unable, then on the side", and on the Qur'anic verse, "Keep your duty to Allah as best ye can" (64,16).

May Allah grant success, and pray for the prophet Muhammad, his family and companions, and grant them peace. Success is with Allah.

Jad al-Haqq 'Ali Jad al-Haqq,[631] "The fast of a cardiac patient" (11 February 1979)

> *In Fatawa Islamiyya min Dar al-Ifta' al-Misriyya 1982, v. 8:2781–4*

1. The cardiac patient or any other patient must seek the opinion of doctors about whether the fast will harm him or her, or if he or she will endure the fast with no harm.

2. The patient who can be cured must repeat the days which he or she did not fast. But if his or her disease is incurable and there is no hope for his or her recovery, he or she should feed one poor person for any missed day of the fast.

Question: Should a cardiac patient fast?

Answer: The fast of the month of Ramadan is among the foundations of Islam. Allah the Exalted said in *Surat al-Baqara* (The chapter of the Cow): "O ye who believe! Fasting is prescribed for you, even as it was prescribed for those before you, that ye may ward off (evil); (Fast) a certain number of days; and (for) him who is sick among you, or on a journey, (the same) number of other days". (Qur'an 2, 183, 184, 185).

And the Messenger of Allah PBUH said: Islam is based on five: the testimony that there is no God but Allah and that Muhammad is the messenger of Allah, prayer, giving alms, the fast of Ramadan, and the *hajj* (pilgrimage to Mecca). Muslims have no doubt about the obligation of the fast of the month of Ramadan for every Muslim who is mature, sane, and capable of fasting. The trustworthy and sound traditions and reports have related the advantages of the fast, that it is important and carries great reward. It is reported by the hadith that the Prophet PBUH reported from his Lord: "Allah the Exalted says: 'Every action of a human being is for that human being, except for the fast- which I am rewarded with' ". Allah preferred the fast to the rest of the religious duties in two aspects:

a. The fast prohibits the pleasures and desires of the soul, unlike the rest of the duties.
b. The fast is a secret between the Muslim individual and his or her Lord, and no one except Allah is aware of it, therefore He required the fast for Himself. As for other duties, these are performed overtly, and hypocrisy and pretence may permeate them.

The purpose of duties in Islam is to train the Muslim and improve his or her behavior in the religious and temporal life. With Allah's commandments and prohibitions came His mercy for His servants. If a mishap has prevented a Muslim from performing any of the religious duties, or he/she has been forced to do a forbidden act, the prohibition becomes permitted due to necessity. Allah, may He be exalted, said: "But he who is driven by necessity neither craving nor transgressing, it is no sin for him." (Qur'an 2, 173)

And with regard to the fast of Ramadan, Allah says, after issuing the duty to fast: "And whosoever of you is present, let him fast the month." (Qur'an 2, 185), and He attached to it the permission to break the fast for people in certain extenuating circumstances. He said: "And (for) him who is sick among you, or on a journey, (the same) number of other days. Allah desireth for you ease; He desireth not hardship for you" (Qur'an 2, 185). Likewise He permitted the use of sand for purification before prayer (*tayammum*) for those who might be harmed by the use of water.

The sick in Ramadan may belong to one of two categories:

a. He or she must not fast at all if he or she cannot endure the fast, or if there is a good chance that the fast will cause him or her death or severe harm.
b. He or she can fast but with some harm and with great difficulty. A patient like this may break the fast, and he or she may opt for that, according to the

> rulings of Hanafi, Shafi'i, and Maliki jurists. According to Ahmad b. Hanbal, such a person is obliged to stop the fast, and the fast with regard to him or her is reprehensible (*makruh*). This is if the Muslim is indeed sick. However, for a well Muslim (*tabi'i*), if he or she only suspects that a severe disease may be caused, the Maliki jurists ruled that whosoever suspects that the fast of Ramadan will cause him or her harm, or even death, must break the fast like a sick person.

The Hanbali jurists said that it is legal for such a person to break the fast as if he or she were a sick person, and it is reprehensible that he or she fast. The Hanafi jurists ruled that if a person is convinced that the fast might cause him or her to become sick, it is permitted for him or her to break the fast. The Shafi'i jurists claimed that if the person is normally healthy, and he or she fears that with the fast he/she will become sick, he or she may not break the fast, as long as he or she has not started the fast and realized beyond doubt that it indeed harms him or her.

It becomes clear from all the above that the sick person is granted permission to break the fast during Ramadan due to the above-mentioned criteria; likewise a healthy person who fears that fasting might cause him or her harm, as detailed in the rulings of the jurists of each respective school of law.

Yet what is the disease that compels one to break the fast, or renders it permissible? It is obvious that the holy Qur'anic text that permitted the sick to break the fast during the month of Ramadan, spoke of "sickness" as a general term, and therefore the jurists needed to debate its definition. Most of them claimed that this sickness must be painful, harmful, and such that the fasting person fears the worsening of the disease, or that the disease can delay recovery. Without doubt, the disease that permits the breaking of the fast does not include light sicknesses that do not entail hardship during fasting. Therefore, a group of jurists concluded that the fast may be broken only by one forced by the exigencies of the disease to do so. When the stress is still bearable, and no harm or damage [to the fasting person] is involved, the person must not break the fast.

From here we can deduce that the criteria of disease that allows or obligates one to break the fast, as explained above, are individual criteria. This means that only the person himself or herself should assess to what extent they may or must break the fast; each person himself or herself must consult a devoted Muslim physician, and follow his or her advice on whether he or she must break the fast, or that the fast presents no harm for him or her.

We learn from this that the cardiac patient, or any other patient, must consult doctors on whether the fast is harmful for him or her, or he or she can endure the fast without harm.

A Muslim must know that Allah who ordered to fast also granted permission to break the fast when one was ill. If the Muslim broke the fast but his or her disease is curable, they should repeat the missed days. However, if his or her disease is chronic and incurable, he or she should feed one poor person (*miskin*) for every missed day of fast. Among the reasons that permit women to break the fast are pregnancy and breast-feeding. According to the Hanafi law, if a pregnant or a breast-feeding woman fears that the fast be harmful, she may break the fast, whether the fear concerns the

woman and the [nursing] child and the fetus, or only one of them. A pregnant and nursing mother must repeat the missing days, whenever they can, without ransom (*fidya*) or extension of the number of days; there is no difference with regard to the breast-feeding woman if she is the biological mother or a hired wet-nurse. Likewise, it does not matter whether she was appointed to be a wet-nurse or not. This is because the mother is bound to nurse according to the religion, and the wet-nurse is bound to nurse by the [hiring] contract.

In Maliki law, the pregnant and breast-feeding woman, whether the latter is hired or is the baby's biological mother, may break the fast if they fear that their lives are at risk, or if the child or the pregnancy are at risk due to the fast. They must make up the missed days of the fast. The pregnant woman, contrary to the breast-feeding woman, does not owe a ransom (*fidya*). But if both fear death or severe injury to themselves or the child, they must break the fast. The breast-feeding woman may break the fast if appointed to this task.

The Hanbali jurists permitted the pregnant and the breast-feeding woman to break the fast if they fear harm to themselves, the child, and the fetus, or if they only worry for themselves. In both cases all they have to do is make up the missed days. However, if the worry concerning the fast is about the child, they may break the fast, but they have to make up the missed days and pay a ransom (*fidya*).

The Shafi'i jurists required pregnant and breast-feeding women to break the fast of Ramadan if they expected the fast to cause unbearable harm to themselves and to the child, or only to themselves. In these two cases they must only make up the missed days; but if they worry only for the child they have to make up the missing days of fast and pay a ransom.

Moreover, Allah made worship of Him easy, and Praise to Him, He said: "So keep your duty to Allah as best you can." (Qur'an 64, 16), and Allah questions every Muslim on the truthfulness of the worship and trusts that a Muslim has kept or destroyed, and Allah knows the intentions that one pays for. Therefore, every Muslim should fear Allah and fulfill the duties that Allah had imposed upon him or her, and he or she should not invent nonexistent excuses in order to be freed from performing a religious duty. Allah says the truth and He guides to the right path, and He brings success to truth and goodness.

Ibn Jibrin, "The rule concerning the seclusion of a woman with a blind man"

> *In Al-Lu'lu' al-Thamin min Fatawa al-Mu'awwaqin (answered by a group of scholars, and prepared by 'Abd Allah al-Shayi'). Riyad: Dar al-Sumay'i lilNashr wal-Tiba'a 1997, v. 1: 79–80.*

Question: Is it permissible for a woman to uncover her face or to look at a blind man, or to be in seclusion with him?

Answer: There is no harm in her uncovering her face in front of a blind man, because he does not see her, and no temptation is therefore to be feared from his glance. However, she must not look at him, because the woman's glancing at men is totally forbidden, regardless if they are seeing or blind. The best condition is if the woman does not look at men, nor is she seen by them. Because of Allah's saying, "And tell

the believing women to lower their gaze" (Qur'an 24, 31); lowering the gaze means that she does not stare at men, even though they are blind, and she may not be in seclusion with a blind man if he is aware of her.

Ibn Jibrin, "The use of dogs to guide the blind"

> *In Al-Lu'lu' al-Thamin min Fatawa al-Mu'awwaqin (answered by a group of scholars, and prepared by 'Abd Allah al-Shayi'). Riyad: Dar al-Sumay'i lilNashr wal-Tiba'a 1997, v. 1:86–7.*

Question: What is the rule about a blind man who uses a dog or another person to guide him while moving about?

Answer: It is not permissible to use a dog in guiding the blind, although its advantage has been proven. The dog is a beast that does not comprehend what we tell it, although it may understand some things by signaling. It was prohibited to purchase dogs except for hunting and guarding the sheep, and that whoever purchased dogs for another purpose, [the reward for] his good deeds is reduced each day by one *qirat* (carat).[632]

Therefore, it is illegitimate to use the dog as a guide; it might lead the blind to the dump or to place of carcasses and dirt. As for other beasts, such as the sheep, the donkey, and the camel, it is impossible to be guided by them, because if a person walks behind them he might fall into a pit, or stumble on a heap or a rock, etc. He has to hire a person to lead him, if he does not have a son or a relative who will undertake to guide him to where he needs to be, or he has to go, such as mosques, houses, and God knows best.

Ibn Jibrin, "The suitable way for the blind man to get information about the description of the woman he is engaged to.

> *In Al-Lu'lu' al-Thamin min Fatawa al-Mu'awwaqin (answered by a group of scholars, and prepared by 'Abd Allah al-Shayi'). Riyad: Dar al-Sumay'i lilNashr wal-Tiba'a 1997, v. 1: 100–01.*

Question: Honorable Sheikh, a blind man wishes to get married, and he wants to know the description of the woman (fiancée) as regards her beauty and physical appearance. Is it legitimate for him to touch the woman's body, such as hand, leg, etc.? What is the best way to obtain a description of the prospective wife?

Answer: It is not permissible to touch, since the woman is still foreign [in terms of blood relations] and touching and feeling is reserved for the woman who is one's permitted [legitimate] wife or a woman of such a blood relation that would never allow that man to marry her (*maharim*). And since touching often arouses desire, and precedes intercourse, unlike gazing, it is sometimes not enough to touch in order to learn of beauty and adornment; the woman might use ointments and soften her face, hands and legs with creams that would soften what originally is rough skin. The proper way for him is to hear her voice, and thus learn of her age and suitability, and she should speak normally, without fawning; he should send one of his women to see her

and check her suitability, and this should suffice to decide whether he likes her in marriage or not. And Allah grants success.

Ibn Jibrin, "Should a woman cover herself in front of a retarded man?"

> *In Al-Lu'lu' al-Thamin min Fatawa al-Mu'awwaqin (Answered by a group of scholars, and prepared by 'Abd Allah al-Shayi'). Riyad: Dar al-Sumay'i lilNashr wal-Tiba'a 1997, v.1: 123–4.*

Question: Should women cover themselves in front of a mature retarded man?

Answer: If the retardation is severe, so that the man does not comprehend or understand or perceive ideas, and he lacks the desire that makes him stare [at women], touch, and so on, and he has no interest in women, but he is rather like a child or less, there is no need to cover up in his presence, and he belongs to those defined by Allah the Exalted: "or male attendants who lack vigor" (Qur'an 24,31).

However, if he comprehends some of the above, and has attraction to women, and it shows from his sayings that he feels desire, then he should not be allowed to enter the women's domain, and they should cover themselves from him, based on the story of that effeminate man who told the brother of Umm Salama,[633] "if you conquer al-Ta'if, I will lead you to the daughter of Ghilan who has four 'tires' of fat in the front of her body, and eight in the back". The prophet, PBUH said: "I see that this man knows these things – he must not enter unto you [your rooms]". This was reported by al-Bukhari and others, and Allah knows best.

Ibn Jibrin, "It is illegitimate to use music in educational programs"

> *In Al-Lu'lu' al-Thamin min Fatawa al-Mu'awwaqin (answered by a group of scholars, and prepared by 'Abd Allah al-Shayi'). Riyad: Dar al-Sumay'i lilNashr wal-Tiba'a 1997, v. 1: 33.*

Question: Is it permissible to use musical instruments in the educational programs designed for the disabled?

Answer: It is impossible. Music and other means of entertainment are forbidden by the Shari'a, and it is not permissible to use them in the programs; Allah did not permit a cure for the *umma* through something that He prohibited. There must exist an alternative that brings tranquility to them in the educational programs, such as reading and reciting the Qur'an, and so on.

Dr. Ahmad al-Sharabasi,[634] "The law concerning a khuntha (hermaphrodite) who became a woman"

In: *Yas'alunaka fi al-Din wal-Hayat*. Beirut: Dar al-Jil 1977, v.5:98.

Question: What is the position of Islam regarding the *khuntha* who through surgery became a woman?

The *khuntha*, as argued by the jurist al-Nawawi[635] in his book *Tahdhib al-Asma' wal-Lughat* is of two types. The first is a person who was born with the vagina of a female and the penis of a male; the second is a person born without either of the two

organs mentioned above, but who has an opening for the discharge of urine and other materials that is not like either of the two above organs.

There are special rules concerning the *khuntha* in the extensive Islamic legal books. If indeed there is a *khuntha* who after surgery became a woman, she has to be treated as a woman concerning all the legal issues, since she has become one of the women.

And Allah, the Blessed and Exalted, knows best.

Dr. Ahmad al-Sharabasi, "The blind man and jihad"

In *Yas'alunaka fi al-Din wal-Hayat*. Beirut: Dar al-Jil 1977, v. 5:321–4.

The Hanafi School

Jihad is not mandatory for the blind man, because of his disability. Allah, the Blessed and Exalted, said: "No blame is there upon the blind" (Qur'an 24,61). This verse was revealed on the subject of people with extenuating conditions.

The Maliki School

The blind man is exempt of jihad.

The Shafi'i School

It is mentioned in *al-Majmu'*[636]: The blind man does not belong to the warriors, but he does to the pilgrims. In *al-Ashbah wal-Naza'ir*[637] it is said that no jihad is obligatory for the blind man.

The Hanbali School

It is mentioned in *al-Mughni*[638]: One of the prerequisites for the duty of jihad to be valid is being healthy from all ills, including not suffering from blindness, based on Qur'an 24,61 "No blame is there upon the blind". It is well known that blindness is a handicap which hinders joining the jihad.

In the book *al-Siyasa al-Shar'iyya* Ibn Taymiya[639] says: The legitimate war is jihad; its purpose is to spread the religion of Allah to all, so that Allah's word is the highest. Therefore, whoever prevents this from happening has to be fought by the consensus of Muslims. However, whoever does not fight or oppose Muslims, such as women and children, and monks, old people, blind and chronically ill people (handicapped), etc., according to all scholars of law must not be killed, unless he or she fights [against Muslims] in word or deed. A few scholars allow the killing of all [including handicapped] just because they qualify as kafirs [heretics] except women and children, who become owned by Muslims; but the first view is the correct one.

In *al-Mughni*: The blind man must not be killed in jihad because he is not considered a combatant, but it is legitimate to kill him if he fights, or if he helps [the enemies] with his advice during the war.

The Zahiri School

Ibn Hazm[640] in his book *al-Muhalla* said: It is legal to kill the blind who is *mushrik* [idol worshipper] during war, but it is also legal to spare his life, because Allah the Blessed and Exalted, said: "Slay the idolaters wherever ye find them, and take them (captive) and besiege them, and prepare for them each ambush. But if they repent and establish worship and pay the poor-due, then leave their way free" (Qur'an 9,5). Allah, the Great and Mighty, included every idolater in the command to fight them, unless he adopted Islam. Ibn Hazm brought the proofs of those who oppose this view, as well as the criticism of their position.

The Zaydi School

Al-Shawkani[641], in *Nayl al-Awtar*, mentioned those whom the messenger of Allah PBUH recommended not to kill in war, such as the old, women, and children. After surveying the traditions that refer to this, he said: This generalization of the text – on those who do not help and do not harm – refers to whoever is paralyzed, or blind, or of this sort, who are not expected to help or harm in the future.

The Imami Ja'fari School

It is mentioned in *al-Rawda al-Bahiyya*[642]: "It is stipulated that the one who must join jihad is able to see. It is not an obligation for the blind man, even though he might have found a guide and a riding beast; this is true for a jihad against idolaters who are invoked to adopt Islam. However, in jihad against heretics who are stronger than the Muslims, and the Muslims are afraid they might conquer their lands and rob them of their property, and so on – as unlikely as it is to happen, everyone who has ability must defend, whether male or female, healthy or blind, the sick and the slave, and others.

The book *al-Mukhtasar al-Nafi'*[643] lists among the stipulations rendering [joining] the jihad mandatory that one is not blind.

The Permanent Committee for Scientific Research and Legal Consultation (Ifta'), "A deaf and mute woman who does not understand – is she legally liable (mukallafa)?"

> *In Al-Lu'lu' al-Thamin min Fatawa al-Mu'awwaqin (answered by a group of scholars, and prepared by 'Abd Allah al-Shayi'). Riyad: Dar al-Sumay'i lilNashr wal-Tiba'a 1997, v. 1: 115–16.*

Question: I have a wife who is deaf and cannot hear, and mute and cannot speak. She understands what people say to her only by signs, but only in selected issues. She

prays, but sometimes she adds to it and sometimes she omits from it, because she does not understand from what we teach her how to pray and how to fast. She fasts because she sees other people fast. However, if Ramadan ends and she has to make up [for missed days of fast] she refuses to fast the days that she missed, because she does not see anybody else fast. We do not manage to teach her, because she does not understand this. Please instruct us as to how should she perform the religious duties, and whether she is responsible for all the religious duties like a sane person, since she does not understand what is said.

Answer: When it is time for prayer, let her pray along with another woman whom she can imitate. As for the fast, she may also fast with other women who have to make up for missed fasting days (*qada'*). If no woman in the house owes *qada'*, then one of the men or the women of the family, out of those who fast Mondays and Thursdays, can volunteer and be her model. This will be an act of good will, and Allah prescribed good will in his verse "and do good. Lo! Allah loveth the beneficent"(Qur'an 2, 195).

If it is impossible to find someone to fast with her, it is recommended that someone prepare for her the meal that starts the fast and the meal that breaks the fast, and give her the impression that this person is fasting with her, even if he or she does not intend to; but that person should not eat or drink in her presence during day hours; he or she should hide the fact that they are eating or drinking, so that she is not misled to eat and drink during the day.

Success lies with Allah, and may He pray for our prophet Muhammad, his family, and companions, and bring them peace.

'Abd al-Hamid Kishk,[644] *"A person who suffers from excessive unintentional urine discharge, especially during winter, is his or her wudu' (rite of purification) violated? Does he or she have to purify his or her clothes each time urine is discharged in the above manner?"*

> In *Fatawa al-Sheikh Kishk, Humum al-Muslim al-Yawmiyya*. Cairo: al-Mukhtar al-Islami 1988, v. 1/3: 111–13.

Urine discharge, even one drop, is violating the *wudu'*, based on a hadith related by Abu Hurayra[645] who said, the messenger of Allah PBUH said: "Allah will not accept the prayer of anyone who discharges excrement until he purifies himself".

However, if the discharge is continuous and he cannot stop it (which is known as urine incontinence *salas al-bawl*), this is a reason to relax [the rule], since necessities render the prohibited permissible, and the condition calls for relief.

The rule concerning those who suffer similar difficulties, such as diarrhea,uncontrolled flatulence, and continuous bleeding from the nose or from a wound, is the same as that of the *mustahada* (a woman who menstruates a little or much longer than the normal, or who menstruates much longer than the normal after birthing a baby (*nifas*), or who bleeds more than her normal menstruation or *nifas*, and much longer than the maximum in both, or if she is pregnant or in menopause).

The Hanafis ruled that such a woman should purify herself prior to the time of each religious duty, not prior to every voluntary duty or devotional act. She should say the obligatory and voluntary prayers at the proper time as much as she can, and when

[blood] is discharged, her *wudu'* is violated, according to Abu Hanifa and Muhammad [al-Shaybani], and she should resume her *wudu'* in readiness for another time of prayer. Likewise, one who suffers urine incontinence or similar problems it is stipulated that for the relaxation of the rule to apply, the condition has to persist throughout all the times of prayer without a break at the time the *wudu'* and the prayer should occupy. A short break is like non-existence [of the condition]. And the stipulation for its persistence and continuation afterwards is that it exists at least once out of the full duration of the times of prayer. It is considered "broken" only if it ceases for the entire duration.

As for a garment that is contaminated on account of the condition, it is said that it should not be washed, as the smallest of defilements is forgiven. The volume of liquid defilement is estimated as the quantity held in one cupped hand, or analogously more. Since the condition is not considered violating *wudu'*, and is not considered impure by law, some say that whatever exceeds the measurement which is forgiven, should be washed, if he or she reaches the ablution without the problem recurring again and again. If it does, he or she does not have to repeat purifying himself or herself as long as the problem persists. This was the [opinion] chosen by the leading Hanafi scholars, and it was confirmed in *al-Bada'i*'.[646]

Ibn Qudama stated in *al-Mughni*: "the *mustahada* should wash her vagina and place a wrap on it and perform *wudu'* toward the time of each prayer and say the prayers that she wants; likewise, one who suffers urine incontinence, discharge of sperm, and bad odor, or a bleeding wound or a constant bleeding from the nose –; these people may combine two prayers [under one *wudu'*], and perform the duties that they have missed and the voluntary acts after the end of the designated time [for the performance of these duties]. Purification is linked to the set time if it is a mandatory purification, so that if one performed *wudu'*, then had a discharge from one's body, the *wudu'* is violated. If one performed *wudu'* after the propr time assigned to a religious duty has started, it is acceptable; the discharge is not considered, and any new discharge that cannot be prevented does not affect the *wudu'*. If the time for the religious duty has passed, the *wudu'* is canceled".

The Shafi'is maintain (as in *al-Majmu*', and *Sharh al-Minhaj*[647]) that the rule in establishing a relaxation is continuity and persistence [of the condition], and it is mandatory for [establishing a state of] *istihada* (unusual, untimely bleeding). The rule then is that impurity has to be washed and the place should be bound with a sort of bandage after the washing (*ghusl*); the *wudu'* should be performed prior to each religious duty after the bandaging – at the time of prayer and not beforehand since this is a mandatory ablution and it is restricted to the right timing, similarly to *tayammum* and starting prayer after *wudu'*, unless there is a special circumstance related to the prayer, such as awaiting the gathering of a quorum for prayer in a group (*jama 'a*); the obligatory prayer will be performed under this *wudu'*, as well as the preceding and following voluntary prayers. No other obligatory prayer can be performed unless a [new] *wudu'* is performed. The *wudu'* and the prayer are not violated if an accident (discharge) occurs during either of them.

According to the Malikis, as mentioned in *Sharh al-Khalil*,[648] there are two methods:

A. The disability does not completely violate the *wudu'*, and the prayer is not violated either, but it is recommended that whoever suffers from this disability

perform *wudu'* before each prayer, unless he or she may be harmed by the cold.

B. This opinion belongs to Ibn Rushd,[649] and it states that neither the *wudu'* nor the prayer are violated if the person has maintained purity for at least half of the duration of prayer. It is recommended that one perform *wudu'* if one stays pure for half the time or more, not if one stays [pure] all along. *wudu'* is violated if one stays pure less than half the duration of prayer, and one has to perform *wudu'* prior to each prayer.

According to the Zahiris and Ibn Hazm (as mentioned in his law compilation *al-Muhalla*), whoever suffers from urine incontinence, whom Ibn Hazm calls "*al-mustankah*", i.e., one taken over, flooded, must, after washing the place as thoroughly as possible, with no harm or difficulty, perform *wudu'* prior to each prayer, obligatory or voluntary; this person should perform a *wudu'* for the duty, then another *wudu'* for the voluntary prayer; then he or she is not responsible for whatever exits his or her body afterwards during prayer, or in the time between the *wudu'* and the prayer. It is mandatory that the *wudu'* take place as close as possible to the prayer itself.

To sum up, all the jurists drew an analogy between people with disabilities and the *mustahada*, since in her case there is a defined ruling in the holy texts. The Hanafis and Hanbalis concluded that she is ordered to perform a *wudu'* toward the time of each prayer.

The Shafi'is ruled that she is obligated to perform *wudu'* prior to every religious duty, and the Malikis did not require of her to perform *wudu'* at all, in either case. They reached in their ruling concerning people with disabilities as we have explained, by analogy (*qiyas*).

From all this it emerges that merely the copious discharge of urine, as presented in the question, is not considered a disability that justifies the above-mentioned relaxation of the rules. For this to be applied, the discharge has to be continuous and recurrent, as explained by the schools of law. The most considerate toward people with disabilities are perhaps the Hanafi and Hanbali ways. The ignorant person should follow it, although he or she might be a follower of another school of law. And Allah knows best.

Muhammad b. Salih al-'Uthaymin, "Is it legitimate for a person who suffers from urine incontinence to perform some of the religious duties, such as prayer, reading the Qur'an, and circumambulation of the Ka'ba (tawaf), under one wudu'?"

In Muhammad b. Salih al-'Uthaymin, *Durus waFatawa fi al-Haram al-Makki*. Riyad: Maktabat Uli al-Nuha, Beirut: Dar Khidr 1990, p. 111.

Question: May a person who suffers from urine incontinence perform some of the religious duties, such as prayer, reading the Qur'an, and circumambulation, under one *wudu*'?

Answer: It is recognized among the jurists that whoever suffers urine incontinence should perform the *wudu'* for the prayer after the time for this prayer has started. If

he or she performs *wudu'* once the time for the prayer has come, he or she remains pure until the time for this prayer has elapsed. After that, if he or she wants to accomplish another religious duty that must be performed in purity, there is nothing for it but another ablution.

Thus, if he or she has performed *wudu'* for the evening prayer, after the *adhan* (call) for the evening prayer was heard, then the time for the night prayer comes, the man must go out and perform [another] ablution if anything has been discharged from his body. However, if nothing was discharged from his body during that period of time, there is no need to repeat the *wudu'*. If he or she was able to perform *wudu'* in readiness for the dawn prayer after the call for that prayer was sounded, he or she remains pure until sunrise. If one performs *tawaf* (circumambulation) before sunrise, one's *tawaf* is valid. But if one performs *tawaf* after sunrise, one must repeat the *wudu*'.

Dr. Husam al-Din 'Afana,[650] *"It is prohibited to abort a handicapped fetus"*

In Husam al-Din 'Afana, *Yasalunaka*. Amman: Maktabat Dundis 2000, v. 1: 184–5.

Question from a woman: She is five months pregnant, and the physician has concluded that the fetus will be born handicapped.

Is it permissible for her to abort this fetus?

Answer: Scholars have concluded that abortion is not permissible after four months of pregnancy, that is, after 120 nights, since soul has been blown into the fetus, based on a tradition by 'Abd Allah b. Mas'ud.[651] He said: The Messenger of Allah PBUH, who is trustworthy and truth-teller, said: "Each of you is created in his mother's womb as a drop of semen (*nutfa*) for forty days, then he becomes a blood-clot (*'alaqa*) for the same duration, then he becomes a piece of flesh the size of a bite (*mudgha*) for the same duration. Then the angel is sent to it and blows the soul into it, and he is ordered to utter four words. Then [the angel] registers his sustenance, his life-span, his profession, and whether he will be happy or suffering". This [tradition] was related by al-Bukhari and Muslim.

Among the jurists there are those who prohibit abortion even before the end of the four months. This is the law, if Allah so desires, and a Muslim woman may not abort her child unless it had been established beyond doubt that the mother's life is at risk, and the judgment as to the existence of such risk must come from a trustworthy and expert physician.

If the physician states that the fetus will be born handicapped, this does not permit abortion. That woman has to persevere, and she will be rewarded.

If she initiated an abortion, it is considered a crime and the payment of a *ghurra* is mandatory; this is the blood money for the fetus, because it is the murder of a protected soul; according to some jurists she must also pay the expiation (*kaffara*) normally due for an unintentional killing.

It is recommended that the physicians fear Allah regarding Muslim women, and that they should not be quick to perform abortions for them, unless it is a life-threatening situation for the mother. Performing abortions might open the door to corruption too wide, and inflict heavy damage on Islamic society.

Dr. Husam al-Din 'Afana, "The rule concerning abortion of a deformed fetus"

In Husam al-Din 'Afana, *Yasalunaka*. Amman: Maktabat Dundis 2000, v. 4: 424–7.

A questioner: His wife is pregnant and the doctors have concluded that the fetus is deformed and advised her to abort it. What is the rule on this matter?

Answer: First we have to define what in general is the position on abortion, before we turn to speak about the abortion of a deformed fetus.

The jurists are unanimous on the prohibition to abort after 120 days of pregnancy. Many jurists hold that the soul is blown into the fetus after that period has passed, based on a trustworthy tradition by 'Abd Allah b. Mas'ud, ABPH, who said: The Messenger of Allah, PBUH, who is trustworthy and a truth-teller, said: "Each of you is created in his mother's womb for forty days, then he becomes a blood-clot (*'alaqa*) for the same duration, then he becomes a piece of flesh the size of a bite (*mudgha*) for the same duration. Then Allah sends the angel and he orders four issues: his sustenance, his life span, his profession, and whether he will be happy or suffering. Then he blows the soul into it".

There is only one exception to this rule, and that is if a committee of reliable and specialist doctors testifies that the continuation of the pregnancy poses certain danger to the mother's life; then it is permitted to abort the fetus.

A report of the International Islamic Fiqh Council (IFC) (al-Majma' al-Fiqhi al-Islami), which belongs to the Islamic World League (Rabitat al-'Alam al-Islami) in blessed Mecca, states:

If the pregnancy has passed 120 days, it is illegal to abort it, even though a medical diagnosis shows that the fetus is physically deformed, unless a medical committee of experts issues a report that the fetus's remaining in the womb is hazardous to the mother's life; then it is permissible to abort it, regardless of whether it is deformed or not, in order to prevent the severer of the two problems. (The decisions of al-Majma' al-Fiqhi al-Islami, p. 123).

On abortion earlier than 120 days of pregnancy the jurists are divided; most maintain that it is prohibited to abort just because pregnancy is there, unless there exists a Shar'i justification. This position is held by the Malikis and the Shafi'i scholar al-Ghazali. It is the way chosen by Sheikh al-Islam Ibn Taymiya, as well as the opinion of some of the Hanafis, the Hanbalis, and the Zahiris.

This position was also adopted by many of the contemporary scholars such as Sheikhs Mahmud Shaltut,[652] al-Qaradawi,[653] al-Zuhayli,[654] and others. This is also my view, with which I am comfortable.

As for the abortion of a deformed fetus, it is mandatory to prove beyond doubt that the fetus is deformed. The available tests today do not always allow a sure diagnosis and confirmation of handicaps in the first weeks of pregnancy. However, after 16 weeks of pregnancy, most of the fatal disorders in the fetus can be diagnosed, and then it is possible to decisively detect disorders in the heart, the brain and other organs.

Fetal disorders can be identified by a gynecologist or a radiologist who uses ultrasound, etc. Fetal disorders can be classified into three groups:

1. Disorders that do not affect the life of the fetus.
2. Disorders with which the fetus can live after birth. Some of these disorders can be corrected after birth, such as disorders of the stomach and the intestines.

Some disorders deteriorate in severity in the period after birth, such as hydrocephaly (*istisqa' al-ra's*),[655] which may be mild or severe, as the child may be born alive, but die within days or months afterwards. Also the child who is born mentally deranged or who suffers partial paralysis: such children can go on living, like a child born with one kidney who survives on the other one.

3. There are disorders that leave no hope for fetal life after birth, and the newborn is destined to die right at birth or shortly afterwards. (See the book *Qadaya Tibbiya Mu'asira fi Daw' al-Shari'a al-Islamiyya*, pp. 274–80.)[656]

It is worth knowing that sometimes the damage of abortion might be much worse than any expected damage from the continuation of pregnancy, as doctors claim; and early medical intervention can be risky in certain cases. If we compare and weigh up the likelihood of possible problems that will result from the termination of pregnancy between weeks 16 and 24, whether by regular medications or by abortion, against problems that might arise for mothers who continue pregnancy till natural birth, we find that the expected problems for the mother are much greater in cases of early intervention than of natural births. See the book *Qadaya Tibbiya Mu'asira fi Daw' al-Shari'a al-Islamiyya*, p. 275.

If this is clear, jurists have allowed abortion of the fetus that is severely deformed before 120 days of pregnancy. Among the decisions of al-Majma' al-Fiqhi al-Islami we find this:

> Before 120 days of pregnancy have passed, if it is concluded by a report of a special trustworthy medical committee, and based on advanced tests conducted with laboratory equipment, that the fetus is severely handicapped, unable to be cured, and if left in the womb to develop until its birth at term, its life will be miserable and painful to itself and its family, then it is permissible to abort it, based on both parents' request. When the Council so decides, it encourages doctors and parents to fear Allah and be cautious in this issue (The decisions of al-Majma' al-Fiqhi al-Islami, p. 123).

Finally we must warn that some women rush to abort the fetus based on only one doctor's evaluation that the fetus is handicapped. This is a dangerous issue, and the opinion of one doctor alone is not acceptable, because there is always the chance that the doctor has erred. A committee combined of at least three trustworthy honest specialists should decide before an abortion is executed.

Finally, I call upon the doctors' union, and other health organizations, to form an expanded committee of specialists in gynecology and obstetrics, and other specialists concerned with this problem, to lay the foundations and the general rules for cases considered severe disorders in the fetus that would render its life hopeless; this is needed so that the issue will not be guided by guesswork on the part of several doctors, something that could result in harm and corruption.

Dr. Husam al-Din 'Afana, "A wife's request for a divorce because of her husband's sterility"

> In Husam al-Din 'Afana, *Yasalunaka*. Amman: Maktabat Dundis 2000, v .2: 386–7.

Question from a woman: The doctors are certain that her husband is sterile and will beget no children. They have been married for years and she has a strong desire to bear children. Is it legitimate for her to ask to be divorced by her husband?

Answer: A woman may ask her husband to divorce her if it is obvious and certain that he is sterile and cannot beget children. If the husband refuses to divorce her, the wife may appeal to the qadi for a ruling on the dissolution of the marriage. This is the most prevalent juridical opinion on the problem, since sterility is one of the disabilities which prevents a purpose of marriage from being fully accomplished; the wife has the right to have children, and she has a strong desire to become a mother. Therefore, ‘Umar b. al-Khattab, ABPH, said to a castrated man who married: “Did you inform her that you are sterile?” He said he had not. ‘Umar said: “Go and inform her, and let her choose”. It was reported by ‘Abd al-Razzaq in *al-Musannaf*,[657] and the people [mentioned in its chain of transmission] are trustworthy (*thiqat*).

‘Umar, ABPH, left the choice to the wife; thus, if she has accepted her husband’s sterility, it is up to her, while as if she has not accepted it she may ask him to be divorced.

Despite all the above, a woman should not hasten to request a divorce from her husband who cannot produce children, and the husband should strive to seek treatment, especially in our day, when the science of medicine has advanced so far, especially in treating infertility.

The best reaction by this wife would have been to resign herself to whatever Allah has granted her, and be satisfied with her sterile husband, because Allah has a reason for it. Allah, the Exalted, says: “Unto Allah belongeth the sovereignty of the heavens and the earth. He createth what He will. He bestoweth female (offspring) upon whom He will, and bestoweth male (offspring) upon whom He will. Or He mingleth them, males and females, and He maketh barren whom He will, Lo! He is Knower, Powerful” (Qur’an 42, 49–50). But if she does not accept this, then, as I said before, she has the right to ask to be divorced.

‘Abd al-Halim Mahmud,[658] “About a man who wishes to divorce his wife because of his illness”

In *Fatawa al-Imam ‘Abd al-Halim Mahmud*. Cairo: Dar al-Ma‘rifa 1985, v. 2: 138

Illness of a husband is not a compelling reason for him to divorce his wife. The wife of the ill man, with whom she may have children, may calm her conscience and feel good about the sacrifice. And sacrifice is a pleasure, when a woman resolves to dedicate her life to raising her children and comforting her husband who did not harm her when he was healthy and who acknowledges her good care of him when he is sick.

Divorce in such a case does not therefore arise as a religious duty, but as the wife’s desire and the husband’s conscientious attitude to her.

If the wife wishes to pursue [marital] life, the husband should praise Allah and praise his wife for her generous behavior. However, if she wishes to be divorced he should release her understandingly and forgive her, finding comfort in Allah’s verdict, and his patience will be rewarded.

Allah does not waste the reward of those who persevere. Allah is with the persevering.

Dr. Husam al-Din ʻAfana, "A lame fiancé who is religiously devout"

In Husam al-Din ʻAfana, *Yasalunaka*. Amman: Maktabat Dundis 2000, v. 1: 143–4.

Question from a woman: She is a young woman of marriageable age. A religious young man who is also lame has asked her to marry him. Her family has refused, even though she likes this man. What is the Shar'i rule about such cases?

Answer: Islam grants the woman the right to choose her husband. She can accept or reject a prospective fiancé, and her family should not fulfill this role instead of her. Islam grants the right to apply reason in the choice of either spouse. For example, the selection of a suitable husband will not depend on money, fame, or appearance alone, but on the quality of being God-fearing and obeying commandments – namely, the man is pious. It is mentioned in the hadith, related by Abu Hurayra, may Allah be pleased with him, that he said: The Messenger of Allah PBUH said: "If a man proposes to a woman, and you like his religious attitude and morals, let him marry her. If you refrain from doing so, there will accrue chaos and great corruption on earth". This was related by al-Tirmidhi,[659] and it is a sound (*hasan*) tradition.

In another tradition, attributed to Abu al-Hatim al-Muzani, he said: The Messenger of Allah said: "If a man proposes to a woman, and you like his religious attitude and morals, let him marry her, and if you refrain from doing so, there will accrue chaos and great corruption on earth". They said: "Oh Messenger of Allah! And if there is something in him?" He said three times: "If a man proposes to a woman, and you like his religious attitude and morals, let him marry her". This was related by al-Tirmidhi, and it is a sound tradition as reported by Sheikh al-Albani.[660]

So the idea is that if there is a defect in the man in other aspects, such as physical appearance, family reputation, lineage, etc., and this lame fellow, if he is religiously devout, as the woman questioner claims, her family must not reject him, especially since she likes him.

Their objection to this fiancé is out of obstinacy and paternalism, and their view of things is incorrect. There are many lame, blind, and people with disabilities, and if these and people like them do not marry, it will bring a disaster upon society.

It is well known that many people approach marriage as a pure material issue, and they impose on their daughter's fiancé certain material conditions, for example, that he should possess wealth, or a high position, or be of an aristocratic family, and they pay no attention to elementary issues such as religiosity and morals. He may indeed be poor, but still better than a rich man. It is mentioned in the Hadith, on the authority of Sahl b. Saʻad, who said: A man passed by the messenger of Allah, PBUH, and said: What do you think of this? They said: It is worthwhile that if he proposes he will be married, if he speaks well of someone it will be accepted, and if he speaks he will be listened to. He said: then he was silent. Then passed by one of the poor Muslims, and he said: What do you think of him? They said: It is worthwhile that if he proposes he will not be married, if he speaks well of someone it will not be accepted, and if he speaks he will not be listened to. The messenger of Allah PBUH then said: "This one is better than the land being full of that one". This was related by al-Bukhari.

Our words do not call one to ignore the material aspects, but the foundation must be religion and morals, and then other aspects could be considered.

Prof. Rif'at Fawzi[661]*, "Breaking up an engagement because of the sterility of the fiancé"*

IslamOnline, January 28, 2001
http://www.islam-online.net/fatwa/arabic/FatwaDisplay.asp?hFatwaID=25598

Question: I was engaged to a young man for a few months. As the date of completing the contract and the wedding approached, he confided to me that he was suffering from a venereal disease, because of which he was unable to produce children; he begged me to proceed with the wedding because this gave him hope in life, and he might be cured of his disease. Should I stay by his side, proceed with the wedding and be satisfied with whatever life gives me, or what should I do? Please inform me, and whether I am considered a sinner if I cancel this engagement.

Answer: Allah, the Exalted, says: "And Allah hath given you wives of your own kind, and hath given you, from your wives, sons and grandsons, and hath made provision of good things for you" (Qur'an 16, 72).

Allah is gracious to His servants by rendering their marriage productive of children and grandchildren as they progress in age and these children mature.

This is the way of life that Allah made people accustomed to, and the living are made to feel the need for procreation and children. Allah, may He be exalted, said: "O mankind! Be careful of your duty to your Lord Who created you from a single soul and from it created its mate and from them twain hath spread abroad a multitude of men and women" (Qur'an 4,1).

The Shari'a rules that the engagement be without a contract and without a commitment of one of the two sides to the other, so that each of them may examine his/her interests and search for aspects that will help in maintaining a happy and fruitful family life.

I do not think that realizing the marriage in the light of the existence of this disease will lead to its endurance and happiness; rather, many problems may result from this.

Jurists have dealt with situations like the above on the basis of legal texts, and concluded that the marriage of one who carries such a disease is reprehensible, since it harms the other partner and deprives him or her of a gift that Allah would normally grant a spouse, that is, the gift of producing children, which men and women have an equally strong desire to obtain. Islamic law says: "No harm and no harming" (*la darar wala dirar*), which means that we should not act in a way that would cause harm to ourselves or to others.

Based on this, I advise the woman who asked the question to cancel the engagement so that she does not start a marriage that contains seeds of dispute and many problems. May Allah grant her a husband who will produce children with her, and she will be able to accomplish the natural purpose of marriage which is the blessing of sons or daughters.

May Allah cure this sick man, and he will find a righteous wife with whom he will live normal life, and He will grant him also the power of producing children. We appeal to Allah for his and for her sake. And success is with Allah.

'Ujayl al-Nashmi,[662] *"A wife who abstains from her husband because of his bad odor"*

IslamOnline, March 21, 2001
http://www.islam-online.net/fatwa/arabic/FatwaDisplay.asp?hFatwaID=30192

Question: Is a wife who abstains from [sexual relations with] her husband because of his bad odor considered a sinner, an evildoer, or a rebellious wife according to Islamic law?

Answer: Praise to Allah, and greetings to the Messenger of Allah.

If what the wife reports is true, she may abstain if the smell is unbearable to her. She is not considered a sinner or an evildoer then. The jurists concluded that if the wife avoids sexual intercourse [with her husband] because of a strong bad odor, and she is thereby harmed in a way that normally would not be bearable, she is not considered rebellious. The duty of the husband is to treat himself for any disease that may befall him, or he should take care of his hygiene, if the cause of the bad odor is neglect on his part. As much as the husband wants his wife to be clean and pretty, the wife expects the same from her husband.

The jurists stated that the wife must remove whatever makes her ugly or repulsive, and Bakka the daughter of 'Uqba related that she had asked 'A'isha, ABPH, about plucking the eyebrows (*hifaf*), and she said: "If you have a husband, and you can pluck your eyes (*tantazi'i muqlatayki*) and make them more beautiful than they are, then do it" (Muslim 8, 326).

The same is true for the husband regarding his wife, based on a tradition by Ibn 'Abbas ABPH and his father: I like to adorn myself for the woman – the wife – as much as I like her to adorn herself for me, because Allah the Exalted said: "And they (women) have rights similar to those (of men) over them in kindness" (Qur'an 2, 228).

Dr. Ahmad Muhammad Kan'an,[663] *"Impotence, amputation of the penis, and sexual frigidity"*

IslamOnline, May 15, 2001
http://www.islam-online.net/fatwa/arabic/FatwaDisplay.asp?hFatwaID=36918

Question: What is the difference between *'unna* (impotence), *jabb* (being amputated of the penis), and *burud jinsi* (sexual frigidity), and what are the laws concerning them?

Answer: Praise to Allah, and greetings to the Messenger of Allah.

There is no doubt that Islam has shown concern for relations between spouses and guaranteed the continuation of their relations by lawful methods and moral and material restraints. Intercourse between spouses, to satisfy the sexual needs of both, is one of the foundations of the success of marital life. Impotence, amputation of the penis, and sexual frigidity are obstacles to marital life, so we find that Islamic law did not ignore these things.

Dr. Ahmad Kan'an says: *'Unna* (asynodia) is the man's inability to penetrate a woman, and often the reason is psychological, such as shame or revulsion, but the reasons might also be pathological; note that castration rarely causes *'unna*, and that castrated men can often penetrate.

As for *jabb*, which is the amputation of the penis, it is not termed impotence, because the organ of penetration is completely absent, or because whatever is left of it does not suffice for penetration.

If the cause of *'unna* is psychological: the man might be impotent with one woman but not with another. If the *'unna* is pathological, it does not change with various women.

A husband's *'unna* grants the wife the right to request the dissolution of marriage, although some jurists say that the husband is granted one year's deferment if there is not an obvious reason for impotence. If there is an obvious [medical] cause that the man cannot be cured of, such as paralysis and similar conditions, there is no deferment and the wife may have the choice [to remain or be divorced]. But if the husband has penetrated his wife, even if only once, but then he was inflicted with impotence, most jurists maintained that the wife does not have the right to choose, because the wife by that act of intercourse has been given what is her due from the purposes of marriage. Others ruled that the husband be granted a year's deferment, because he might be cured.

The existence of *'Unna* is established either by the husband's confessing that he is unable to penetrate, or by proofs, for example, the wife has remained virgin and an expert physician or midwife testifies to that; it can also be proved by a medical examination. *'Unna* can also be proved by a claim of the wife against her husband, and by asking him consequently to take an oath; if he declines to take an oath his disability is proved. Most jurists do not release the wife from the observation of *'idda* (waiting period), as the impotent's wife has to observe the *'idda* required by Islamic law. The husband may not return his wife during the *'idda* or afterwards. But Shafi'i jurists maintain that she need not observe the *'idda* as long as her husband has not penetrated her.

As for the parallel situation to impotence in men, namely sexual frigidity in women: the latter is not considered a handicap and it is not grounds for the husband to request cancellation (dissolution) of marriage, since it does not prevent the husband from fulfilling the purposes of marriage, nor does it deprive him of enjoying sexual intercourse. And Allah knows best.

Jad al-Haqq 'Ali Jad al-Haqq, "The impact of impotence ('unna) on the marital contract" (July 26 1981)

In *Fatawa Islamiyya min Dar al-Ifta' al-Misriyya 1982, v.8:3010–13.*

1. *'Unna* is a disability that permits the wife to request dissolution of marriage between herself and her husband.
2. The wife's admission that her husband had intercourse with her prevents her from ever suing him for being impotent.
3. If the husband has penetrated his wife in the vagina even once only, the dissolution of their marriage is not permitted, regardless of the type of disease that might have afflicted him and prevented him from accomplishing penetration.
4. The wife is entitled to the rights of a married woman by virtue of one act of sexual intercourse, or more. This is a religious, not a legal entitlement. The husband is a sinner if he stubbornly avoids intercourse with her despite the fact that he is sexually capable.

5. Spouses must obey the laws of Allah, may He be praised, by amicable cohabitation; and if cohabitation is impossible, and there is no legal basis for the dissolution of the marriage, it is proper for both that the wife ransom herself [to exit the marriage].

Question: a request no. 46, year 1981, was presented by lawyer M.A.Q. He asks for a Shar'i ruling on a woman who married a man 17 years her senior. During that marriage she gave birth to a boy and a girl. Since the birth of the girl, 16 years before, her husband never had sexual relations with her, explaining that he had a heart problem. The man was examined by many physicians, who found no physiological disorder preventing him from having sexual relations. Due to her sexual dissatisfaction the wife became very sick, so she asked her husband to divorce her, but he refused. The question is does she have the right to request to be divorced on these grounds?

Answer: The jurists of Islamic law have concluded that the husband's being free of disabilities is a basic stipulation for maintaining the marriage, as far as the wife is concerned. This means that if the wife learns that the husband has a disability she has the right to place a claim with the court and ask for dissolution of the marriage. The jurists, though divided over the determination of these disabilities, unanimously concluded that *'unna* is a condition that permits the wife to sue for the dissolution of her marriage. *'Unna* or *'anna – i'tirad* (impotence), from the Arabic root *'-n-n* – is in the passive form of the verb. Lexically, *'innin* is someone who is unable to penetrate; in legal terms, his penis is unable to enter his wife's vagina. Most jurists maintain that if the wife has admitted that she has had intercourse with her husband he cannot be considered *'innin*. If she later claims that her husband is impotent her complaint will not be accepted, and the husband will not be assigned probation. This opinion was held by Abu Hanifa and his disciples, Malik, al- Shafi'i, Ahmad b. Hanbal, 'Ata', Tawus, al-Awza'i, al-Layth b. Sa'ad, al-Hasan b. Yahya, Shurayh, 'Amru b. Dinar, and Abu 'Ubayd. The result is that if the husband managed vaginal intercourse with his wife even once, their marriage will not be dissolved no matter what disease afflicts him to prevent him from repeating intercourse with her. This was also reported as the opinion of 'Ali b. Abi Talib, ABPH. He said: The wife should persevere if the illness is temporary, and if they have had sexual intercourse. The Hanafi jurists ruled on this point: "If he married her and consummated the marriage, but later became unable to penetrate, hence an impotent, she has no grounds for a lawsuit. Similarly, if he became insane after having one act of intercourse with her, or he became *'innin*, their marriage will not be dissolved, because by that act she has been given what he owes her. Any additional intercourse would be considered her right by religion, not by law. He could be blamed only if he stubbornly neglected the religious norm even though he was able to penetrate. The rulings of this school of law are applied whenever the issue of dissolution due to the husband's impotence is at issue, and generally when flaws of the genitalia are at issue. The explanatory note to law no. 25 of 1920 and to law 25 of 1929 proves this, in reference to the Article 5: " It is worth mentioning that [regarding] dissolution by divorce due to *li'an* (sworn allegation of adultery), or *'unna*, or the refusal of the husband to adopt Islam when his wife has already adopted it, the verdict goes according to the Hanafi school of law". Therefore, the ruling of the ninth article of law 25 of 1929 is not applicable to the claim of impotence, as indicated by the above-mentioned explanatory note.

Since the situation is as explained, and the husband had intercourse with this wife and she gave birth to a boy and a girl who are at different educational levels, then he stopped having intercourse with her ever since she gave birth to their daughter who is at present sixteen years old, this husband cannot be considered "*'innin*" (impotent), and the wife has no right to sue for legal dissolution of their marriage due to impotence. Her rights have been fulfilled by the sexual relations between them and by her giving birth, although in religious terms the husband is guilty of obstinately infringing the sexual contact with her, despite the fact that he is able to perform sexually.

Despite everything said, according to traditions related by 'Ali b. Abi Talib, may Allah honor his face, the best advice to this wife, according to him, is to persevere and be patient, and seek cure to her situation and bodily desires in fasting, as the Prophet PBUH advised in his noble Hadith: "O young men! Whoever among you is capable of sexual intercourse let him marry, since marriage causes one's eyes to drop [so as not to look at women he should not look at], it protects one's genitals, and whoever cannot marry should seek the cure in fasting". The spouses should follow Allah the Exalted's words: "Divorce must be pronounced twice and then (a woman) must be retained in honor or released in kindness. And it is not lawful for you that ye take from women aught of that which ye have given them; except (in the case) when both fear that they may not be able to keep within the limits (imposed by) Allah. And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the woman ransom herself. These are the limits (imposed by) Allah. Transgress them not" (Qur'an 2, 229) until His words: "Retain them not to their hurt so that ye transgress (the limits). The spouses must obey Allah's commandments, may He be praised, as appear in the noble Qur'an, that is to cohabit in kindness, and if companionship is impossible and there is no Shar'i legal grounds for dissolution of the marriage, then Allah, the Blessed, encouraged in the noble Qur'an to solve the marital bond in His words: "And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the woman ransom herself." (Qur'an 2, 229). And Allah the Exalted and Blessed knows best.

Sayyid Sabiq,[664] "The marriage of a leper and disabilities that annul the contract"

IslamOnline, December 23, 1999
http://www.islam-online.net/fatwa/arabic/FatwaDisplay.asp?hFatwaID = 4127

Question: May the leper marry, and what are the disabilities that are grounds for the annulment of the contract?

Answer: Marital life, which is based on tranquility, affection, and compassion, cannot prevail and be realized as long as there are defects and illnesses in one spouse that the other spouse detests. There are certain defects and illnesses by which the purposes of marriage are not fulfilled. This is why Islamic law allows either of the prospective spouses to choose to accept or reject the other for marriage.

Ibn Qayyim's investigation should be considered in this matter. He said: Blindness, deafness and dumbness, and her being amputated both hands or legs, or one of them, or the fact that a man is like that, are indeed repelling conditions, and remaining silent about them is extremely deceptive and misleading, and this is against the religion.

The Commander of the Believers, ‘Umar b. al-Khattab, ABPH, said to a man who married a woman when he was infertile: Let her know that you are sterile (*‘aqim*), and let her choose. What would he have said of the disabilities of a woman who seems healthy with no defects?

He said: The analogy should be that every flaw that the other spouse detests, and that betrays the aims of marriage, such as compassion and affection, from being achieved, must be subject to [the other’s] choosing. It is more deserving than in a sale, and the terms of marriage must be fulfilled more than the terms of a sale. Allah and His messenger never obliged a deceived or a misled person to do what he was deceived or unjustly led to do.

Whoever contemplates the purposes of marriage, its origins and sources, its justice and wisdom, and all the benefits it involves, cannot overlook the validity of this statement and its suitability to the principles of the Shari‘a.

Yahya b. Sa‘id al-Ansari related on the authority of Ibn al-Musayyab, ABPH, who said: ‘Umar, ABPH, said: Any woman who suffers madness, or elephantiasis, or leprosy, and marries, and the man penetrated her and then noticed this, may receive her full dowry due to his penetrating her, and her guardian should pay back the dower [to the husband] because of the deception he let happen.

Al-Sha‘bi related, on the authority of ‘Ali, Allah will bless him, the husband of any woman who marries when she has madness, leprosy, elephantiasis, or a blocked vagina, her husband may choose to stay married or to divorce, as long as no penetration has taken place. If it has, she deserves the dower since the husband was given permission to penetrate her vagina.

Waki‘ said: On the authority of Sufyan al-Thawri, from Yahya b. Sa‘id, from Sa‘id b. al-Musayyab, from ‘Umar b. al-Khattab, ABPH, who said: “If he married her while she was a leper or blind, and penetrated her, she deserves the dower, and he should retrieve the sum from whomever deceived him”.

He said: Now this shows that ‘Umar did not mention the above-mentioned disabilities meaning only them and nothing except them. The same was the ruling of qadi al-Islam Shurayh, ABPH, who is often used as a model of knowledge, piety, and wisdom.

‘Abd al-Razzaq said: On the authority of Mu‘ammar, from Ayyub, from Ibn Sirin, ABPH, that a man sued another man in front of Shurayh, and said: This man told me: I am going to marry you to the most beautiful of people. But he brought me a blind woman. Shurayh said: If he deceived you with a disability, it is impermissible.

Consider this ruling and his statement “If he deceived you with a disability”. Does this mean that every disability that the wife has withheld from the husband leaves the latter with the option to cancel [the marriage] (*radd*)?

Al-Zuhri ABPH said: Marriage can be canceled for every incurable disease. He said: Whoever surveys the rulings of the Companions and the scholars of the past finds that they did not specify that cancellation of marriage depends on a particular disability only, except for a tradition attributed to ‘Umar: “Women should be returned (*radd*) [i.e., the marriage to them annulled] for four disabilities: madness, elephantiasis, leprosy, and diseases of the vagina”. But this tradition we know only through one chain of reporters, namely Asbagh, and Ibn Wahab relating from ‘Umar and ‘Ali, Allah be pleased with both.

This message was also reported by Ibn ʻAbbas with a sound chain of transmitters. This is if the husband opted to divorce.

However, if the husband stipulated [in the contract] that she be healthy, or that she must be pretty, and she turned out ugly, or if he stipulated that she be young, and she turned out old, or he stipulated that she be white and she turned out black, or if he expected a virgin and she was not a virgin – in all these cases he has the right to cancel the marriage. If it happened before consummation no dower is due, and if after consummation she deserves the dower. The husband can consider her guardian his debtor if the latter has deceived him.

If the woman is the deceiver she loses her dower, or she is sued for its return if she has already received it. Ahmad b. Hanbal gave this ruling in one of the two traditions attributed to him on this matter. And this is more logical and suited to Ibn Hanbal's principles of law for when the husband had stipulations [prior to marriage].

His disciples said: If she stipulated that the husband have some characteristic, and he proved to have the opposite, she has no choice unless what is at stake is the article on freedom; if the husband turned out to be a slave she does have a choice.

As for genealogy, if this proves the opposite of what was expected, there are two options. One approach rules that there is no difference whether it was the husband or the wife who made the stipulations. The other permits the wife to choose if her stipulation was not met, since she is unable to initiate a divorce.

If the husband can annul the marriage, even though he may initiate a divorce, how much the moreso that she may annul it since she cannot initiate a divorce. If the wife may annul the marriage when the husband turns out to be of lowly occupation, she does not put his religion or honor to shame when she only avoids her full enjoyment of him.

If she stipulated that he be young, handsome, and healthy, and he turned out to be old, disabled and blind, deaf and dumb, and black – how can she stay by him and forgo annulment?

This is wholly absurd and contradictory to analogy and to the principles of the Shariʻa.

He said: How come one of the spouses may annul because of leprosy as small as a bean, but not because of chronic eczema (*jarab*), which is much more contagious than that little spot of leprosy? Similarly is the case with other incurable diseases.

Since the Prophet prohibited the vendor from hiding defects of the merchandise, and he forbade one who knew of such defects to hide them from the buyer, so much the more with defects in marriage.

The prophet PBUH said to Fatima bint Qays, when she consulted him about marrying either Muʻawiya or Abu Jahm: "Muʻawiya is a beggar with no money, while Abu Jahm does not put aside his cane". He made clear by that that it is more important and necessary to disclose the fact that one is flawed.

How can the hiding and deception and forbidden trickery justify compliance with such a marriage? And how can the handicapped person be like a chain on the neck of the other spouse, who despises him or her, especially if the healthy spouse had stipulated [in the marital contract] health in the other spouse, the opposite of what he or she received in reality?

This proves beyond doubt that the ways and rulings of the Shariʻa reject it, and Allah knows best.

Abu Muhammad b. Hazm ruled that if the husband had stipulated that the wife be free of handicaps, but he finds a handicap, the marriage is considered void, as if never contracted to start with. He has no alternatives, no extenuating circumstances, no maintenance, no inheritance rights. He said: It is as if the woman introduced to him is not the one he married, as he contracted to marry a healthy not a disabled woman. If he has married the disabled woman, no marital bonds exist between them.

What happens today in the courts?

The courts today rule according to article. 9 of the law of 1920. "The wife deserves this right if the handicap is permanent and incurable, or could be cured after a long while, or if she could not cohabit with the husband without being endangered, whatever the disability may be: madness, elephantiasis, and leprosy, and whether the handicap existed with the husband before the contract, and she did not know of it or it appeared after the contract and she did not resign herself to it. If she married the man knowing of his disability, or if the disability appeared after the contract and she overtly or evidently expressed acceptance of the fact, after having learned of it, she may not ask for dissolution. Dissolution in such cases is like a terminal divorce (*talaq ba'in*), and experts have to be consulted on the type of disability, and its hazardous impact".[665] This is the end of the Sheikh's words.

In summary, if one of the spouses knew of the other's disabilities and consented, there is no problem with this marriage. However, if one of the spouses deceived the other, this is unbearable, and the detailed steps mentioned above then apply.

Dr. Musa al-Basit:[666] The Rights of the Physically and Mentally Challenged in the Islamic Shari'a. Um El-Fahem: The Center for Contemporary Studies (CCS), 2000

Introduction

Blessed be Allah Who "created man of the best stature"[667] [Qur'an 95,4], and shaped him in the best shape, and may the head of messengers [the prophet Muhammad] be blessed with peace.

The message of Islam is the message of the man, and aims to grant him all the goodness, to care for his well being and improvement, and to try to achieve his happiness and progress.

While Islam attends to this dignified creature, it does not distance itself [from man] or discriminate. The divine criteria of justice govern the interactions of humans; these criteria are just and not injurious; they are reassuring, not frightening.

The *mu'awwaq* [disabled person] is a one who suffers from what has barred him from reaching what the healthy person may reach, something that has led in the past, and until recently, to the loss and deprivation of his rights.

It is possible that people have overlooked the fair attitude of Islam to the disabled person and to granting him his full rights. Some might claim that others have preceded Islam in this attitude. In this study I wish to clarify the subject, by explaining all the types of treatment and care that Islam has provided for the *mu'wwaq*, psychological, moral and material, how Islam from its infancy has dealt with problems of disability, and defined it. I conclude that the just Islamic outlook on the disabled

allowed Islamic society throughout its history to produce important [and famous] people from among the disabled.

Who Is a Disabled person (mu'awwaq)?

Al-Mu'awwaq is a term derived from the verb *'aqahu 'an shay'* (he held him back from something), *yu'awwiquhu 'awqan* (it delays him), used when something distances one and holds one back. *'Awq* means a troublesome issue. *'Awa'iq al-dahr* is an idiom for disturbing thoughts on life events.

Other derivatives of the verb *'aqa* are *'a'iq*, and *'aqatni al-'awa'iq* (obstacles have hindered me); the singular is *'a'iqa* (an obstacle).

Al-mu'awwiq is like al-*muthabbit* (delaying), and in the Qur'an one finds "Allah knoweth those of you who hinder" [33, 18]. *Mu'awwaq* is a passive participle form, similarly to *mu'aq*, someone who has a handicap that hinders his movement, paralyzes him, and prevents him from independently fulfilling his needs; moreover, it renders him in need of help from another person.

Some definitions of the *mu'aq* are these: "A person who suffers permanently from one or more handicaps, which reduce his ability and render him in great need of external assistance".[668] Or "Someone who has lost the ability to pursue his work or to perform another job, due to a physical or mental inability, regardless of whether this disability resulted from a disease, an accident, or was inborn".[669]

In the Islamic tradition we find another expression used for the disabled, namely *al-zamna*, meaning those with chronic diseases and permanent disabilities. A *zamin* is a decrepit man in *zamana* (a state of deterioration), i.e. disability. The plural is *zamna*, on the morphological pattern of *fa'la*. It is the prototype of disasters that people may encounter, or be inflicted with against their will. This was Ibn Manzur's assertion,[670] and this is a realistic and accurate definition.

The Variety of Disabilities

Despite progress in the fields of science and medicine that we have witnessed in the modern era, we also observe an increase in the types of existing disabilities, largely due to loss of trust in oneself, one's fellow-men, and the environment. The reasons for these disabilities are the numerous and diverse accidents. They may be road accidents and related events, accidents involving industrial machinery, falling from heights, bullet wounds, or mines exploding in war or its aftermath. Disabilities can also be inflicted through torture and abuse, which result in broken limbs. You may see a person whose leg has been amputated, or who has lost one or both of his hands to a mine, a machine, or a tool. We may see a person whose eye was put out by a gunshot, or who became paralyzed by a bullet that penetrated his spine.

On the other hand we find people who at birth or due to hereditary illnesses suffer deformations in their hands, legs, senses, and brain.

How has Islam treated people with disabilities? What are their rights in Islam? Did Islam only pity them? What was real life for people with disabilities in Islamic societies? Plato's attitude is that there is no place for people with disabilities in society, and that we have to help society get rid of them. I suspect that Plato's

attitude has been and still is applied in one form or another in the contemporary civilizations![671]

Allah said, "Verily we have honored the children of Adam. We carry them on the land and the sea, and have made provision of good things for them, and have preferred them above many of those whom We created with a marked preferment" [Qur'an 17, 70].

Accordingly, Islam through its great laws has insisted on providing a good life to man, and special care for certain groups of people, by providing them with extra rights. At the same time it releases them from some duties, so that eventually an equilibrium is reached between the natural qualities and abilities of each person. This equilibrium between the rights and duties of these groups of people was not achieved through pressure imposed by organizations or unions.

Every human being in advanced societies is anguished at the sight of demonstrations by handicapped people, demanding their right to reach the level of life with respect. Where is human dignity, and where is the dignity of the disabled person?

Before I survey the rights of the disabled in Islamic law, I will mention the principles that guided Islam's treatment and care for this group of people.

A. The source of Islamic legislation is Allah the Creator, who knows what is helpful for man; therefore, applying Allah's laws will ensure happiness to all parts of society, the healthy and the disabled alike.
B. When we plant in the heart the belief in direct responsibility to Allah, and in personal accountability for any negligence or violation of the laws, then the performance of Islamic law is part of special duties aimed at winning Allah's satisfaction; Islam considers care for the handicapped a religious duty, regarding which man may either be punished or rewarded.
C. Allah, may He be exalted, chose important principles, which He inserted into His laws and into people's relations. These are justice and the good deed. Justice requires equality among men, but justice alone is not enough and it does not release one from personal commitment. There is no escape from according the good deed to those for whose care justice alone is not enough. The handicapped person is sometimes unable to face the healthy and compete with them. The good deed is mandatory, and the well being of society comes with it. "Allah loveth those whose deeds are good" [Qur'an 3, 148].
D. Islamic law rules that simply by being human, every human being deserves human rights. The freedom of man is protected. The justice of the legal system should not be violated, no matter how different the rivals are. In the epistle of Umar to Abu Musa al-Ash'ari he said, "Do justice between the rivals".[672]

The necessities of life, on which the sustenance and life of each person depend, must be provided to everyone in need. In the noble Prophetic Hadith it is said: "Feed the hungry and care for the sick, and release from bondage the sufferer", that is, the captive.[673]

As much as people differ in their abilities to earn a living, Islam insisted on a unique system of social welfare that ensures sustenance and provides the basic needs for each person. The teachings of Islam have granted each person natural rights which must not be disregarded; such are the right to live, the right to freedom, the

right to education, the right to human dignity, and the right to own property. Islam considers all Muslims as one body, so if one of its organs is ailing the rest are summoned to watch over it and protect it.

One of the great qualities of Islam is that it proclaims the principle of social solidarity, raises this banner, and encourages Muslims to apply this principle in all fields of life. Allah, may He be exalted, said: "help ye one another unto righteousness and pious duty. Help not one another unto sin and transgression".[674] He obligated the wealthy to spend on the poor and on those relatives who are unable to earn a living. Social solidarity was thus achieved within the framework of the family.

He also made it mandatory for the people of every neighborhood, village, and town, to live in cooperation and solidarity. The hadith of the Prophet (PBUH) can be quoted in this regard: "Allah will remove his protection from the people of an area who allow one hungry person wander amongst them".[675] This is true for both villages and towns.

The state is also responsible for satisfying the wants of its needy, its disabled, and its handicapped.

The Messenger of Allah (PBUH) would guarantee that the needs of the needy and the poor are met. Certainly, it is the duty of the state to take responsibility for providing for the needs of these disabled, the needy and decrepit people … from the treasury.

Duties and Liability of the Disabled Person

Islam views man as owning full liability of all kinds. However, Islam, which is divine legislation, based on compassion and care for the state of man in all possible circumstances, lessens the duties expected of the disabled person. Moreover, in its mercy it frees the disabled from performing the duties in certain scenarios. It does not order a person who is mentally ill to perform duties. The Prophet says: "The [convicting] pen is passed over [the head of] three", and among the three he lists the mentally ill, until he regains reason.[676]

Among disabilities there are some that require relief, and reduction and alleviation of difficulty by means of the "licenses" (*rukhas*) that Allah enacted. A glance at the texts of the Qur'an and the Sunna will elucidate this clearly. Allah, may He be exalted, said: "Allah desireth for you ease; He desireth not hardship for you".[677] He also said: "and hath not laid upon you in religion any hardship".[678]

The Messenger of Allah (PBUH) said: "The most desired religion to Allah is the monotheistic and lenient".[679] Allah said: "No one should be charged beyond his capacity".[680] He likewise said: "Allah asketh naught of any soul save that which He hath given it".[681] Jurists have learned from the Qur'an and the Sunna many of the legal principles that lighten the duties incumbent on the disabled, out of compassion for them, not out of disrespect. Some of these principles are "Hardship leads to ease"; "When the issue becomes narrow, then it becomes wide"; and more.

In his commentary on the Qur'anic verse "No blame is there upon the blind nor any blame upon the lame nor any blame upon the sick"[682] Dr. 'Abd al-Sattar Abu Ghuda says:[683] "These are three distinct forms of disability, and they are like models representing all types of disability: the handicapped are represented by blindness, the mishaps are represented by lameness, and the verse ends with sickness, which

encompasses all other disabilities. This verse refutes the blame, which entails refutation of sin or liability".

Al-Qurtubi summarizes the verse: "Allah lifted the blame from upon the blind person with regard to duties whose performance requires seeing; similarly for the lame, with regard to duties that involve walking, and all activities that cannot be performed with lameness; and for the sick, for whatever influences the sickness, by canceling the activity at that stage and postponing it to another date, or finding an alternative; another option is to waive some of the prerequisites and principles of the worship, as is evident in the prayer of the sick. There is no blame on them in all the acts as long as the impediment so dictates.[684]

There are texts that rule that [mentally] handicapped persons are saved from the cruelties of war, since their deficiency serves as immunity, regardless of the disabled person's religious belief.

In the orders of Abu Bakr to his army commanders there is a prohibition against killing the blind, the decrepit, or a dying old man, as well as against the killing of anyone who suffers a paralyzing disease or has another impediment.[685]

The Islamic Way of Preventing Handicaps

First, Islam strives to reduce the cases of disability, and to eliminate the causes of disability as much as possible.

If we survey the causes of disabilities we see that they are mainly three: some are inborn handicaps, some have resulted from contagious or chronic diseases, while most of them are caused by road or other accidents, or by war injuries, as we stated above. With a more accurate classification we can attribute disabilities to genetics, diseases, or criminal behavior.

In the face of all these causes Islam adopts an attitude of prevention and reduction.

As for the first two causes, genetics and health condition, Islam's approach is to encourage the protection of one's health and treat it preventively; it encourages seeking cure and avoiding the disease before it happens; moreover, it calls for seeking to marry outsiders [as against blood relatives] so that one's progeny will not be weak, and to avoid the spread of inborn disabilities which often result from consanguineous marriages. This is best demonstrated by Umar's saying: "Keep distant in order that you do not become skinny". This means that, in order not to produce skinny children, who are weak, do not marry close relatives as such marriages produce skinny, weak bodied, and defective children.[686]

Since Islam prohibits the consumption of alcohol and drug addiction, which can cause fetal malformation during pregnancy, this prevents or greatly reduces the rate of inborn disabilities.

As for criminal causes of disability, any intentional criminal act has been handled best by the proactive legislation of the Islamic punitive system: an eye for an eye, and a tooth for a tooth; retaliation for injury is through *qisas*. Allah rightly stated: "And there is life for you in retaliation, O men of understanding, that ye may ward off (evil)".[687] While in cases where reconciliation or forgiveness of the *qisas* was achieved, the noble Islamic law prescribes the payment of huge sums of money as *diya* [blood money] for the senses [faculties] to be paid by the one who was the cause of the disability.

In contemporary civilizations we witness continual warfare, with human parts shattered and severe disabilities caused by mines laid by combatants. These injuries are inflicted not only upon the warring sides but also on women, children, and disabled persons.

Note too the means of punishment and torture and of breaking bones in the interrogations of POWs.

Islamic law of war does not approve of such methods; it prohibits the abuse and mutilation of [enemy] bodies.

The Shari'a forbade certain types of torture, which Arabs and other peoples commonly practiced in their pre-civilized periods.

Among the additional causes of disability are road accidents, resulting from disregard and ignorance of many people of traffic signs. How cheap has human life become! How cheap are his or her limbs, as long as the driver has paid his or her car insurance dues! Insurance coverage is mandatory, so afterwards the driver could not care less if he causes an injury, of whatever type.

Islam requires the Muslim to obey traffic rules, not only to respect them, since this protects life and property. The foundation of Islamic law is to preserve good causes and remove bad ones … [*hifz al-masalih and dar' al-mafasid*].

Religious scholars provide examples of how Islam set severe precautions to reduce the causes of disability in society, among them the following:

The Messenger of Allah prohibited *hadhf*, which is stoning an animal or a human being with small pebbles or the like as a game or in order to hurt.

Likewise, the Messenger of Allah PBUH forbade the brandishing of a weapon in public, for fear that someone might be injured and disabled as a result ("Whosoever points a metal bar at his brother will be cursed by the angels").[688]

Likewise with regard to carrying weapons such as a sword or its like in crowded places ("If anyone passes through a gathering place or a market with an arrow in his hand, he should hold his hand on its tip") so that it does not injure anyone.[689]

The Prophet PBUH encouraged removing obstacles from the road and anything which disturbs the passage of people or exposes them to the danger of accidents. He called this "the minimal level of belief", and said: "Belief includes more than 70 levels, the highest of which is the testimony that there is no God except Allah, and the lowest is the removal of obstacles from the road".[690]

He issued legislation concerning public hazards and how to reduce or prevent them.

Thus, Islam insisted on removing the causes of disability and blocking the ways that lead to disability, as much as it insisted on seeking cures for disability and on eliminating its causes.

However, if these causes of disability are unavoidable, the impact of disability should be removed by whatever means Allah has provided, whether self-restraint and perseverance, or through communal care with help and encouragement to carry on normal life, in which solidarity prevails, but without charity or harm.[691]

Moral Care of People with Disabilities

We have already mentioned that Islam follows general principles that guide it in its unique and positive attitude to people with handicaps and disabilities; some of these principles address explicitly people with disabilities.

Let us ponder Allah's saying, "Lo! The noblest of you, in the sight of Allah, is the best in conduct".[692] The verse implies that the "noble" one is not only the healthy and perfect in body. The noble person may be a blind, deaf, lame, or paralyzed. This is an important message in the esteem and respect for man; none of the philosophies on which modern civilizations are based rises to Islam's level of respect for man. This is similar to the messenger of Allah's (PBUH) saying: "Allah does not examine your images and bodies, but He examines your hearts and deeds".[693]

In its laws and customs Islam prohibited anything that violates the dignity of man, who is dignified by being human. It also prohibited mockery, contempt, and calling people names. All these are considered by Islam grave crimes; they are forbidden, and Islam warns against them. Allah, may He be exalted, says: [694] "… Let not a folk deride a folk who may be better than they (are), nor let women (deride) women who may be better than they are; neither defame one another, nor insult one another by nicknames".

Islam prohibits the violation of the dignity of the disabled person or the handicapped by mockery or by attributing degrading nicknames.

Islamic society views people with disabilities with honor and appreciation, not as imperfect or despicable. Abu Hurayra related a hadith on the authority of the Messenger of Allah (PBUH): "Do not envy one another … until he [the Prophet] said about the relationship of one Muslim with another: he must not violate his rights, and he must not desert him or despise his family origins. It is bad manners to despise one's brother". The meaning is that he must not belittle him or degrade him.[695]

It is sufficient to follow the divine instructions to the Prophet (PBUH), when Allah admonished him on the matter of the "blind". Allah said: "he frowned and turned away because the blind man came unto him. What could inform thee but that he might grow (in grace). Or take heed and so the reminder might avail him?"[696]

The verse was revealed with regard to a blind man, Ibn Umm Maktum, who came to the messenger of Allah (PBUH) and asked him to teach him from what Allah taught the messenger, but the messenger of Allah (PBUH) was preoccupied with something concerning the leaders of Quraysh, persuading them to join Islam. He disliked the request of Ibn Umm Maktum, and turned away his face, and turned his back on him. The chapter of the Qur'an was then revealed, opening with fierce reproof of the messenger thereby to teach the necessity to follow the divine lessons of how to treat the disabled person. See how the Qur'an dedicates great importance to the care of the disabled, the preservation of their rights, humanity, and dignity.

Islamic belief and ethics, on which a Muslim is raised, teach never denouncing or being denounced for something beyond one's control, such as extreme shortness, deformity, etc.

There was a man who pointed a finger at al-Ahnaf b. Qays, who was known for his perseverance and patience, with which Allah blessed him, but who had several handicaps. Al-Ahnaf reached a high status in his tribe; the person pointing at him said: "It is better for you to hear al-Mu'idi than to see him". Al-Ahnaf said: "What are you denouncing me for, my nephew?" He replied: "Ugliness and shortness". Al-Ahnaf said: "You condemn me for what is beyond my control or for something on which my opinion was not requested". Islam instructs people in a different conduct with Allah, may He be exalted; this is that when a person sees another person with a disability, he should recall the grace of Allah, may He be exalted, and consequently thank Him for the blessing of good health and say: "Praise be to Allah who kept me

healthy against all testing times, and preferred me – that is, preferred man in general, over many that He created". Man is aware of the types of pleasure he has enjoyed only when he loses these pleasures, or some of them.

The Spiritual and Psychological Care of People with Disabilities

The best cure that Islam can offer for disabilities is mental treatment as inspired by the Islamic belief; it is belief in Allah and the Last Day, and belief in fate. This belief is absorbed by the heart of the believer. First, the person with a disability or a handicap believes that whatever has befallen him does not render him a sinner.

A person's mistakes are not what made him handicapped; he is not angry, nor does he lose hope and interest in life. Rather, he believes based on the guidance of the Islamic Shari'a – that all is for the better, and it is up to him, that if he enjoys good fortune he should thank [Allah] and this is in his favor. If he endures hardship he should persevere, and this is in his favor too.

Without doubt, disability is a misfortune, but the disabled should view it as encompassing good [as well], based on Allah's saying: "Who say when misfortune striketh them: Lo! We are Allah's and lo! Unto him we are returning. Such are they on who are blessings from their Lord, and mercy. Such are the rightly guided".[697]

The Prophet PBUH said: "If a Muslim is afflicted with a disease or another harm, Allah will drop his bad deeds because of that, as a tree drops its leaves".[698]

Do you wonder about the status of the person suffering from a handicap? The only cure available for the disabled is perseverance and carrying on his or her life. He or she will have abundant reward on the Day of Resurrection. The handicapped feels that whatever has befallen him or her is Allah's testing to His servant's belief.

"Allah never tests a servant unless this misfortune becomes a purifying expiation, as long as the misfortune was indeed caused by Allah, and as long as the afflicted person prays to Allah alone to remove the misfortune".[699]

And remember the *hadith qudsi*: "If I test my servant via his two beloved ones, i.e., his eyes, I will compensate him for both with paradise".[700]

Moreover, sometimes the handicapped or the one who lost one of his or her limbs may believe that that limb has already reached paradise, and this helps him persevere, and he finds consolation in his belief and in Allah's reward to him.

Let us review together this story in the biography of the noble *tabi'i* 'Urwa b. al-Zubayr, as related by his son Hisham: "My brother Muhammad fell off the roof in the stable of al-Walid. The beasts kicked him and killed him. A man came to 'Urwa to offer condolences, after 'Urwa himself had had his leg amputated, and he said: 'If you [wish to] comfort me for my leg, I have already been rewarded for it'. He said: 'No, I come to comfort you for your son Muhammad'. 'What has happened to him?' The man told him. Then said 'Urwa: 'O Lord, you have taken a limb, and you have left limbs. You took a son but you left sons'.

Despite the disability that befell 'Urwa, we see that people appreciated 'Urwa. When the disability struck him, Ibrahim b. Muhammad b. Talha comforted him with the following: "I swear to Allah that you have no need of walking and no desire of running; one of your organs and one of your sons have already reached paradise, and the whole is following the part, if Allah so desires. Allah has already left of you to us

what we are in need of, which is your knowledge and your opinion, and Allah will reward you, as you deserve".[701]

Admirable is the consolation through belief and imagination that Islam offers to the person with disability; it is as if Islam lets him or her drink comfort by which he or she recovers. It helps him endure the trouble, and it elevates perseverance to be of the qualities of the prophets, of the characteristics of noble men, and of the ethics of the purified. Allah selects from among His creation groups of people whom He adorns with this decoration.

Perseverance can be against harm, sorrow, disaster, or suffering from disability. The disaster might be a trial from Allah the Mighty, the Victorious, to test the true belief of His servant. It might also be a hastened punishment to someone who deserves it in this world, by which Allah will receive atonement for a crime he has performed, since there is no punishment without crime, and Allah is distant from injustice.

As much as suffering might be harsh, some people consider it a great benevolence and rejoice over it and enjoy its hardship, because they know that Allah is watching them, loves them, and therefore He is testing them, in order to hear their prayer and supplication. "And verily We shall try you till We know those of you who strive hard (for the cause of Allah) and the steadfast"[702]

The disabled person who perseveres becomes a perfect example that will be added to the pure and shining examples, which become patience, satisfaction, acceptance, and joy over the gifts of the lover to his beloved. Whoever is satisfied receives satisfaction; and whoever is angry receives anger.

This way of thinking influenced the edification of the following examples, until they became high peaks and outstanding monuments in Islamic history.

Leading and Outstanding Persons with Disabilities

Disability has never been an obstacle to achieving desired goals. This is so even though Islam reduces for the disabled the duties incumbent on the healthy due to the former's condition. Accordingly the disabled person is exempt from jihad, for example, based on Allah's verse: "There is no blame for the blind, nor is there blame for the lame, nor is there blame for the sick (that they go not forth to war) … "[703]

But history stresses the amazing heroism of a companion of the prophet, named 'Amru b. al-Jumuh, who was lame, when he said to the messenger of Allah (PBUH): "O Messenger of Allah! What do you think – if I fight until I am killed for the sake of Allah, will you see me in paradise walking on my lame leg as if it is healthy?" The Prophet said yes. The companion was indeed killed in the battle of Uhud [625 CE]. The prophet PBUH walked by him and said: "I can see you walking on this leg in paradise, and it is healthy".[704]

The legend of this companion, described as lame, has remained recorded in history to light the way for the disabled and the healthy alike, and to prove that disability does not stop the wheel of history. It does not end [the act of] giving, and exalted virtues can be reached by desires and wishes, which are not harmed by disability.

Disabled Persons in High Positions

It is not trivial that we witness in Islamic history examples supported by the Islamic environment. It reached the utmost in good treatment and care, and in the provision of the rights of people with disabilities. These examples have no equal in human history, and I do not exaggerate when I say so.

Whenever the Messenger of Allah (PBUH) saw this blind man, 'Abd Allah b. Umm Maktum, he said: " Greetings to the one because of whom I was reproached by my Lord". The Prophet appointed him governor of Medina throughout all his military expeditions, to be the obeyed commander, and to lead the public in prayer. He indeed appointed Ibn Umm Maktum 13 times: in al-Abwa', Buwat, Dhi al-'Ushayra … and for military expeditions and other travels such as the expeditions of Uhud, Hamra' al-Asad, Najran, Dhat al-Ruqa'[705]. Likewise he appointed him to lead his PBUH campaigns to the Farewell Pilgrimage and to Badr.

Al-Zubayr b. Bikar reported that Ibn Umm Maktum led the campaign of Qadisiyya,[706] participated on the battlefield and fell in battle while holding the flag.

May Allah bless Ibn Umm Maktum, the disabled commander, the appointed, and the fighter, who performed the role which healthy people were unable to perform.[707]

Material Care of People with Disabilities

We have already spoken of the duty of the Islamic *umma* (nation, collective), represented by the state, to provide a minimal level of sustenance for its subjects. We mentioned in general terms the guidelines that Islam has laid down for the various systems of social solidarity, which are related to worship and belief.

As for the disabled, Islam imposes the duty to assist people with disabilities and handicaps, and defines this as *fard kifaya*, namely a collective duty performed by those who have ability who hence release from responsibility the majority of the members of the community. It is therefore a mandatory duty upon the whole *umma*.

We have already mentioned the Islamic principles and texts that through Qur'anic verses and prophetic sayings urge protection and care for the disabled.

We wish to add here the Prophet's PBUH saying: "Allah assists a servant [of God] as long as the servant assists his brother".[708] Another of his sayings is: "Your smiling toward your brother is charity (*sadaqa*); your commanding good and forbidding evil is charity; guiding a man in the land of straying is charity; your sight on behalf of a person with vision impairment is charity, and removal of thorns and bones from the road is counted for you as charity".[709]

Thus, Islam views services rendered to the disabled and assisting them as good deeds, which help one to get closer to the Exalted, the Almighty, and as charity, which deserves a reward.

The Prophet PBUH also said: "Those who are merciful, Allah will have mercy upon them; have compassion to those on earth and the One in heaven will be compassionate with you".[710] He also said: "One is not considered a believer until one desires for one's brother what one desires for oneself".[711]

Islam prohibited torture, whether it inflicted a disability or not. The prophet PBUH said: "Allah will torture those who torture on earth".[712]

Among the jurists we find those who claim that whoever sees a person on the verge of danger and does not rescue him even though he can do so, is liable for the losses and damages caused, because his passive approach and letting the damage occur render him a criminal.[713]

The Cultural Aspect of Material Care of the Disabled

Islamic societies invested special care for the disabled in houses called *al-bimaristan* (hospital) which provided shelter for the disabled and catered to their needs. These "hospitals" were scattered in all the cities of the Islamic empire, and relied on the institution of *waqf khayri* (charitable endowment) which made use of charity endowed to public causes.

[The historians] al-Maqrizi [d.1441] and Ibn al-Athir [d.1234] reported regarding these "hospitals" that were inhabited by those disabled, that they were places for treatment and living at the same time, and this was the case since they were first established by the caliph al-Walid b. 'Abd al-Malik [705–715]. He hired physicians for the hospitals and paid their salaries, and he allotted financial aid to those sick with elephantiasis and the blind.[714] Al-Tabari [d.923] mentioned that al-Walid thus ensured enough sustenance for the disabled, and have forbidden them to beg. He also provided every handicapped person with an aide, and every blind person with a guide.[715]

Through its various fiscal apparatuses Islam strives to provide sufficient sustenance for the disabled; this has been applied all along Islamic history. The most prominent of its fiscal institutions, and which achieve this goal without begging, are the apparatuses of *zakat* and the one fifth of the spoils of war (*khums al-ghana'im*).

The jurists of Islam envision that the disabled should always have enough for living, and that he or she never falls as a burden on society. If the disabled person has a profession, which is possible today with the spread of programs to train the handicapped, as well as the progress of advanced professions which do not require physical effort, it is possible with *zakat* funding to purchase equipment for that profession, regardless of the cost; moreover, it is possible to buy property for the disabled so that they can lease them and live decently on the rental. Islam, with its noble principles, recognizes that the disabled have full spiritual and material rights. It urges training the disabled for a profession and creating opportunities for their employment so that they are guaranteed a dignified life and do not need to beg.

Islam takes care of those who are totally unable to work through the establishment of centers and associations for social, medical, and psychological care, in which all services are provided with the aim of guaranteeing a dignified tranquil life.[716]

Eternal Islam, which is the source of human rights, preserves human dignity, and gives humans more than they hoped for or expected. It cares first and foremost for the weak and needy, the handicapped and the disabled.[717]

Surveying the history of Islamic civilization, we find many outstanding and famous figures who reached high positions in Islamic societies even though they suffered from a variety of chronic disabilities and handicaps.

Their physical condition did not prevent them from becoming leaders and heads of states, scholars, and judges; if all this proves anything, it is that Islam and Islamic society cared for them until they attained their high status.

Let us read together al-Jahiz's [d.868] statement about distinguished people with disabilities who attained respectable positions in Islamic societies: "There are many lame among the notables, may Allah grant you longevity, and there are many blind among the notables". Then he said: "A few of them achieved, with the disability, what all the healthy people could not achieve. And with blindness they achieved what most of those with good sight did not achieve".[718] Several authors have focused on outstanding people with disabilities, have written about them, their biographies, their lives, and their innovations. Among these is al-Jahiz in his great book that he titled *The lepers, the lame, and the blind, and the cross-eyed*.

Another author is Salah al-Din al-Safadi [d.1362] in his book *Nakt al-Himyan fi Nukat al-'Umyan* (emptying the pockets for anecdotes about blind people).

About al-Safadi's book, al-Samira'i reports the story of one successful blind man, Zayn al-Din 'Ali b. Ahmad al-Amidi (d.712 H), who invented a method by which fruit stones are made into reading means for the blind, as reported by Dr. 'Abd al-Sattar Abu Ghuda.[719]

Al-Safadi says, in respect to the originality of al-Amidi: "In addition to his knowledge, he used to trade in books. He could pick out the desired volume, touch the book and determine the number of its pages; he would touch the page and determine how many lines it had, the type of script and its color, and he knew the prices of the books".

NOTES

[1] Leiden: E.J. Brill 1993.
[2] Abou El Fadl 2001–2, 96.
[3] Lagerwall et al. 1991, 217.
[4] Gaff 1994, 6.
[5] Ibid., 67, 75.
[6] Hardman 2002, 12–13.
[7] Liachowitz 1988, 3; 12.
[8] Brattgard 1974, 7–9.
[9] Diesfeld 2001.
[10] Jones 2001.
[11] Wendell 1996, 11–12.
[12] Ibid., 14.
[13] Ibid., 15.
[14] Barnes 1996, 43–60. Hardman (2002, 9) also noted a "humanitarian reform" in the attitude to people with disabilities, beginning with the second half of the 18th century, but that reform did not stop others from discriminating against them well into the 19th century, and beyond.
[15] Butler and Parr 1999, 3.
[16] Ibid., 1999, 9.
[17] Ibid., 1999, 14.
[18] Ibid., 15.
[19] Lane 5, 2198–200.
[20] Ibid., 1959–62.
[21] Al-Zabidi 4, 48–53.
[22] Ibn Manzur 7, 236–40.
[23] Munjid 2002, 122–4; 315–24.
[24] According to M. Dols 1992.
[25] Garland 1995, 13–15.
[26] Ibid., 72.
[27] Abrams 1998, 87.
[28] Ibid., 111.
[29] Covey 1998, 31.
[30] Abrams 119.
[31] Covey 27.
[32] A'zami 1989, 7.
[33] Covey 30.
[34] Ibid., 31.
[35] Ibid., 32.
[36] Ibid., 33–4.
[37] Ibid., 34.
[38] Al-Khatib et al., 1989, 35.

[39] Ibid., 36.

[40] Dols 1983, 913 observed with regard to leprosy in medieval Islam that it was not perceived as a divine punishment, and therefore lepers were isolated in their special quarters to prevent the spread of the disease, but not as social outcasts or scapegoats ("separated but not stigmatized", p. 914).

[41] Rasool 2000, 8.

[42] Rahman 1987, 46.

[43] Rahman 20.

[44] Ibid., 23.

[45] Ibid., 25.

[46] Marshall 1999, 82, citing Rahbar 1960, 158–9.

[47] Rahbar 1960, 164–6.

[48] Translation of Yusuf Ali 1946.

[49] Ibn Kathir n.d., v. 1, p. 48.

[50] Al-Zamakhshari 1995, v .1, 67.

[51] Ibn Kathir n.d., v. 4, 179, who in the 14th century quotes several earlier Sunni commentators, explains that man is responsible for the outcome of his conduct, and only after the bad conduct does the curse come in the form of Allah's blinding and deafening the sinner. Causality between the resulting handicap and God's actions is nevertheless established. The handicap may be real or metaphoric.

[52] Al-Zamakhshari 1995, v. 2, 20–21.

[53] Ibn Kathir n.d., v. 2, 131–2.

[54] Shaltut 1960, v. 1, 396–7.

[55] Al-'Isawi 1988, 10.

[56] Al-Khatib 1989, 44.

[57] Ullman 1978.

[58] Oyebola 1997, 12–13,16.

[59] Al-Khatib 1989, 42.

[60] Al-Taqwim al-Mihni 1996, 20–5.

[61] Munjid 2002, 316–19.

[62] In a fatwa issued by Majma' al-Fiqh al-Islami (no date is mentioned), but quoted in *Fatawa al-Tibb wal-Tadawi* 2004, 161–2, under the title "the law concerning those inflicted with AIDS and those who on purpose aim to transmit it", the means to transmit the AIDS disease are listed as: any form of sexual contact, transfer of contaminated blood or blood derivatives, the use of contaminated needles, especially among drug edicts, contaminated barbers' razors, and the transfer of the disease from mother to child during pregnancy and birth. The intended transfer of the disease in order to bring the illness upon one individual or a whole society is mentioned as an option as well.

[63] Idris 1993, 84–156.

[64] Rispler-Chaim 1993, 100–2; Francesca 2002.

[65] In IslamOnline.net of July 11, 2004 , people are encouraged not to isolate those infected with AIDS, and not to fear normal day-to-day conduct with them, such as handshake, breathing near them or eating of their foods. In another fatwa on the same site, dated November 25, 2004, it is asserted that stigmatizing AIDS patients is not an Islamic trait. Instead of blaming them for something they may not be responsible for, Muslims are urged to pray for their recovery and ask that Allah's mercy be shed upon them.

[66] Hijazi 1982.

[67] Ibid., 398.

[68] Ibid., 403.

[69] Ibid., 422.

[70] *Rukhsa* is defined as "a release after prohibition (*'itlaq ba'da hazr*), because of a good reason to make [life] easier (*li'udhr taysiran*)"; or changing an order from hardship to ease due to a good reason"; or "despite the fact that the prohibited remains prohibited, the responsible person receives more choices in performing the order because of a justified reason". *Rukhsa* is often classified into two main groups: *rukhsat tarfih* (license that creates ease or luxury) which aims to make life easier, such as breaking the fast when traveling; and *rukhsat 'isqat* (license to drop parts of the commandment) such as the permission to cut the prayer shorter when traveling (Al-Tahanawi 1998, v. 2, 221–5). Al-'Ajam 1998

explains *rukhsa* as doing an action despite the fact that it is known to all that the Shari'a is against it (*ma'a ishtihar al-mani' minhu shar'an*) because it removes hardship [from the believer].

[71] Covey 1998, 3.
[72] Townsend 1974.
[73] Stiker 1999, 10.
[74] Ibid., 137.
[75] Ibid., 46.
[76] Abrams 1998, 73.
[77] Ibid., 105.
[78] Ibid., 204.
[79] Garland 1995, x.
[80] Ibid., 2.
[81] Ibid., 159.
[82] Goffman 1974.
[83] Covey 1998, 6–8.
[84] Ibid., 9.
[85] Fawzi 1994, 59–65.
[86] Covey 1998, 10.
[87] Ibid., 12.
[88] Ibid., 14–15.
[89] Ibid., 15.
[90] Ibid., 23.
[91] Ibid., 24.
[92] Ibid., 25.
[93] Marks 1999, 89–93.
[94] Calderbank 2000.
[95] Gaff 1994, 15.
[96] Gaff 1994.
[97] Moosa 2000–2001, 190.
[98] Diesfeld 2001, 388.
[99] The content of the UIDHR can be found, for example, in Etienne 1987, 353–62.
[100] Moosa 2000–2001, 196–7.
[101] Ibid., 200.
[102] Uthman 1982, 14; Tabaliyya 1984, 605–11.
[103] Mayer 1991, xvii.
[104] Tokhais 1982, 236.
[105] Kahn 1999, 6.
[106] Ibid., 37.
[107] Ibid., 47.
[108] Abou El Fadl 2001–2, 72.
[109] Moosa 2001–2, 44.
[110] Ibid., 8.
[111] Al-Azmeh 1988, 251.
[112] Liachowitz 1988, Preface.
[113] Ibid., 5.
[114] Ibid., 2; 11.
[115] Ibid., 107.
[116] Lagerwall et al. 1991, 1.
[117] Ibid., 3.
[118] Oyebola 1997.
[119] A'zami 1989, 241.
[120] Garland 1995, 144.

[121] Marx 2002, 96.
[122] Al-Ghazali 1967, 1, 170.
[123] Al-Jaziri 1998, v. 1, 119.
[124] Ibid., 156–7.
[125] Ibid., 164.
[126] Al-Marghinani 1997, v. 1–2, 17–18.
[127] Al-Shirazi 1992, v .1, 95.
[128] Ibid., 97.
[129] Al-Hilli 1983, v. 1, 87.
[130] Al-Ha'iri 1972, v. 1–3, 83.
[131] Al-Juwayni 1994, 39.
[132] Al-Ha'iri 1972, v. 1–3, 82–83.
[133] Saqr in *Minbar al-Islam* April 1995, 122
[134] Ibid., 93
[135] Al-Jaziri 1998, v. 1, 179–82.
[136] Al-Ghazali 1967, v. 1, 184; 'Abd al-Rahman in *al-Nur* April 14, 1993, 9.
[137] Al-Talili 1987, v. 2, 1065–68.
[138] Al-Shirazi 1992 v. 1, 135.
[139] Al-Juwayni 1994, 42.
[140] Ibid., 43.
[141] Mu'assasat Da'irat Ma'arif al-Fiqh al-Islami 1996, v. 6, 339.
[142] Al-Hilli 1983 v. 1, 130–35.
[143] Mu'assasat Da'irat Ma'arif al-Fiqh al-Islami 1996, v. 2, 125.
[144] Ibid., 146.
[145] *Mustahabb* is also called *mandub*, recommended. It is not mandatory but optional. Sometimes it is also called *mustahsan*, in the sense that it is desirable and considered good. In the Shari'a it refers to acts of the Prophet that he occasionally performed and at other times refrained from doing. Therefore, these acts never became a *sunna mu'akkada* (a reaffirmed mode of behavior). See al-Tahanawi 1963, v. 2, p. 7.
[146] Al-Shirazi 1992, v. 1, 78.
[147] Mu'assasat Da'irat Ma'arif al-Fiqh al-Islami 1996, v. 6, 338–9.
[148] Al-Jaziri 1998, v. 1, 255.
[149] Mu'assasat Da'irat Ma'arif al-Fiqh al-Islami 1996, v. 6, 346–7.
[150] Al-Jaziri 1998, v. 1, 256.
[151] Mu'assasat Da'irat Ma'arif al-Fiqh al-Islami 1996, v. 6, 348–9.
[152] Al-Rawandi 1976, v. 1, 84.
[153] Ibid., 123.
[154] Al-Bahbudi 1987, 48.
[155] Al-Jaziri 1998, v. 1, 629–30.
[156] Al-Rawandi 1976, v. 1, 121.
[157] Al-Marghinani 1997, v. 1–2, 93.
[158] Al-Tusi 1970, 128–9.
[159] Al-Rawandi 1976, v. 1, 133.
[160] Al-Shirazi 1992, v. 1, 311.
[161] 'Abd al-Hamid, July 14, 2000, 18.
[162] Al-Jaziri 1998, v. 1, 304.
[163] Al-Juwayni 1994, 104.
[164] Ibid., 105.
[165] Al-Qurtubi (1993, v. 1, 326–9) in his commentary to Qur'an **2**,43, and based on several hadiths, asserts that although the individual's prayer in most cases is accepted and permissible (*jazat*), the public prayer is more meritorious (*afdal*).
[166] Al-Jaziri 1998, v. 1, 524.
[167] Al-Tusi 1970, 112.

[168] Al-Marghinani 1997, v. 1–2, 69.
[169] Al-Nawawi 1996, v. 2, 501.
[170] Al-Jaziri 1998, v. 1, 567–70.
[171] Ibid., v. 1, 548.
[172] Ibid., 548–9.
[173] Ibid., 550–51.
[174] Al-Juwayni 1994, 100–1.
[175] Ibn Baz 1991, 296–97.
[176] Al-Nawawi 1996, v. 2, 506.
[177] Makhluf 1971, v. 1, 253–55.
[178] Saqr March-April 1996, 104.
[179] See for example Al-Tirmidhi 1998, v. 3, 93–4. It is attested there that the tradition is mentioned by many scholars, including Ahmad b. Hanbal, Abu Da'wud al-Tayalisi, Ibn Majah, al-Nasa'i, al-Bayhaqi, al-Daruqtani, and more. Multiple recordings usually indicates the soundness of the tradition. As the tradition goes, legal responsibility is waived from the sleeping person until he awakes, the child until he becomes a young man, and the mentally deficient until he becomes sane. Other versions of the same hadith add "from the boy until he is sexually mature (*yahtalim*)".
[180] Al-Lajna al-Da'ima 1988/9, v. 26, 128.
[181] Ibn Baz October 12–18, 1996, 6.
[182] Saqr November 1994, 119.
[183] Lane 1956, 5, 2072.
[184] Reza et al. 2002.
[185] Lane 1956, 7, 2622.
[186] Al-Jaziri 1998, v. 1, 705.
[187] Ibid., 704–6.
[188] Al-Tahawi 1995, v. 2, 35.
[189] Lane 1956, v. 7, 2697.
[190] Al-Hilli 1983, v. 1, 373.
[191] Ibn Rushd 1999, v. 8, 2762–3.
[192] Al-Shirazi 1992, v. 2, 586.
[193] Al-Hilli 1983, v. 1, 370–71.
[194] Al-Jaziri 1998, v. 1, 706.
[195] Ibid.707.
[196] Ibid., 708.
[197] Al-Shirazi 1992, v. 2, 589.
[198] Al-Hilli 1983, v. 1, 380–81.
[199] Al-Jaziri 1998, v. 1, 728–29.
[200] Ibid., 731.
[201] Ibid., 731.
[201] Ibid., 732.
[203] Al-Tahawi 1995, v. 2, 36.
[204] Al-Hilli 1983, v. 1, 367.
[205] Al-Jaziri 1998, v. 1, 732.
[206] Al-Jaziri, v. 1, 734.
[207] Ibid., 740–41.
[208] Al-Bahbudi 1987, 98.
[209] Al-Jaziri, 1998, v. 1, 746; Al-Bahbudi , 98.
[210] Al-Rawandi 1976, v. 1, 183–4.
[211] Al-Jaziri 1998, v. 1, 747.
[212] Al-Hilli 1983, v. 1, 381.
[213] Ibid., 382.
[214] Al-Tahawi 1995, v. 2, 45–47; Al-Shirazi 1992, v. 2, 625.

[215] This exact wording cannot not be found in the canonical Hadith collections, but a more general phrase does exist, and based on a hadith by ʻAbdAllah b. ʻUmar it maintains that "no one will pray for another person and no one will fast for another person". See Malik b. Anas 1983, pp. 245–6.

[216] *Sa'* is a measure for grain which equaled four *mudd*s in Medina. The Prophet laid down the measure of *sa'* in the year 2H/623–4 as the amount of *zakat al-fitr* (almsgiving following the fast of Ramadan) owed by each member of the family. There is no precision in this measure, but the *sa'* according to the jurists is equivalent to $26\frac{2}{3}$ *ritl*s or *ratl*s. Or it can be measured with the hands held together half open with the palms upwards. (EI)

[217] Al-Marghinani 1997, v. 1–2, 152–3.

[218] Al-Tusi 1970, 157.

[219] Al-Jaziri 1998, v. 1, 754.

[220] Ibid., 754.

[221] Ibid., 751–2.

[222] *Al-Liwa' al-Islami* January 25, 1996, 7.

[223] *Al-Ahram* May 8, 1987, 14.

[224] *Al-Liwa' al-Islami* May 30 1996, 14.

[225] Ibid., February 8, 1996, 7.

[226] Ibid., January 25, 1996, 7.

[227] Al-Lajna al- Da'ima 1984/5, v. 14, 128.

[228] Al-Saqa 1993.

[229] *Al-Ahrar*, January 15, 1997, 7.

[230] Ibid., January 19, 1997, 7.

[231] Ibid., January 24, 1997, 7.

[232] Ibid., February 3, 1997, 7

[233] Rispler-Chaim 1993, 56.

[234] Makhluf 1971, v. 1, 307–10.

[235] Al-Hilli 1983, v. 1, 413.

[236] Al-Ghazali 1967, v. 1, 321.

[237] Al-Jaziri 1998, v. 1, 818.

[238] *Mu'assasat Da'irat Ma'arif al-Fiqh al-Islami* 1996, v. 2, 248.

[239] Al-Shirazi 1992, v. 2, 673.

[240] Ibid., 664.

[241] Al-Hilli 1983, v. 1, 415–16.

[242] Al-Shirazi 1992, v. 2, 674.

[243] Mu'assasat Da'irat Ma'arif al-Fiqh al-Islami 1996, v. 2, 260.

[244] Lane 1956, 2, 554. According to *EI* "*ihram*" is "an act of declaring (or making) sacred or forbidden", the opposite of *ihlal*, "an act of declaring permitted". It became a technical term for the state of temporary consecration of someone who is performing the hajj or *'umra*. For the purpose of hajj one may enter the state of *ihram* during the months of Shawwal, Dhu al-Qa'da, and the beginning of Dhu al-Hijja. For the *'umra* it may take place at any time of the year, except the middle days of the hajj. *Ihram* is also the name for the special white garment men wear during the hajj. While in a state of ihram the pilgrim must refrain from arguments, hunting, sexual intercourse, cutting the hair of the head or the body and the nails. All the prohibitions end with the return to normal life following the act of cutting hair and the resumption of normal clothes.

[245] Which means that he or she is hindered from completing the duty because of sickness that broke out, or because of an enemy, as the verse continues. Al-Zamakhshari 1972, v. 1, 177.

[246] Al-Shirazi 1992, v. 2, 818.

[247] Al-Marghinani 1997, v. 1–2, 213.

[248] Al-Tusi 1970, 281.

[249] Al-Zamakhshari 1995, v. 1, 238

[250] Ibn Kathir n.d., v. 1, 232–3.

[251] Qutb 1961, v. 1, 116.

[252] Al-Mirdawi 1997, v. 4, 12.
[253] Al-Bahbudi 1987, 149.
[254] Al-Mirdawi 1997, v. 4, 14.
[255] Al-Jaziri, 1998, v. 1, 862.
[256] Ibid., 866.
[257] Ibid., 867; 875; 876.
[258] Ibid., 874.
[259] Mu'assasat Da'irat Ma'arif al-Fiqh al-Islami 1996, v. 2, 327; Al-Jaziri 1998, v. 1, 884.
[260] Al-Bahbudi 1987, 170.
[261] Saqr May-June, 1994.
[262] Al-Tayyar 1993, v. 5:2, 65–66.
[263] Rispler-Chaim 1993, 54.
[264] Al-Shirazi 1992, v. 1, 459; Ibn Rushd 1999, v. 8, 2787.
[265] Al-Jaziri 1998, v. 1, 768–9.
[266] Al-Tusi 1970, 174.
[267] Al-Hilli 1983, v. 1, 297.
[268] Al-Shirazi 1992, v. 1, 562. See also al-Tahanawi 1998 v. 2, 421.
[269] Al-Rawandi 1976, v.1, 226.
[270] Al-Bukhari, Abu al-Tayyib 1984, v. 2, 474.
[271] Al-Tahanawi 1998, v. 3, 430.
[272] Ibn Anas 1994, v. 5, 178–9.
[273] Al-Bana 1977, 271.
[274] Mahmud 1983, 21.
[275] Ibid., 17.
[276] Al-Zamakhshari 1995, v. 2, 224.
[277] Al-Baydawi 1996, v. 3, 118.
[278] Fadl Allah 1998, v. 10, 408–9.
[279] Al-Zamakhshari 1995, v. 5, 286.
[280] Pickthall n.d.
[281] Al-Bana 1977, 80.
[282] Al-Mirdawi 1997, v. 4, 105.
[283] Khadduri 1940, 33.
[284] Al-Qummi 1991, v. 2, 84.
[285] Al-Tusi 1970, 289.
[286] Al-Rawandi 1976, v. 1, 235.
[287] Fadl-Allah 1997, v. 7, 410.
[288] Ibid., 411–12.
[289] Al-Rawandi 1976, v. 1, 235.
[290] Ibn Anas 1994, v. 5, 184–5.
[291] Al-Jalalayn n.d., 256.
[292] Lane 1956, v. 3, 1253–54.
[293] Al-Hilli 1983, v. 1, 568.
[294] Makki 1997, 271; Haykal 1993, v. 2, 995.
[295] Makki 1997, 272.
[296] Lane 1956, v. 2, 646.
[297] Ibid., v. 4, 1330.
[298] Makki, 1997, 274.
[299] Ibid., 275.
[300] Ibid., 265–6.
[301] Ibid., 269.
[302] Ibid., 274–9.
[303] Ibid., 357–8.

[304] Ibn Abi ‘Asim 1989, v. 2, 593–5.
[305] Lane 1956, v. 1, 253.
[306] Al-Hilli 1983, v. 1, 575.
[307] Al-Mirdawi 1997, v. 4, 209–210.
[308] Haykal 1993, v. 3, 1465.
[309] Al-Mawardi 1994, v. 14, 310.
[310] Abu Yusuf 1962, 122.
[311] Al-Mirdawi 1997, v. 4, 213.
[312] Al-Mawardi 1994, v. 14, 308.
[313] Ibid., 308.
[314] Mu’assasat Da’irat Ma‘arif al-Fiqh al-Islami 1996, v. 2, 220.
[315] Lane 1956, v. 7, 2547.
[316] Mu’assasat Da’irat Ma‘arif al-Fiqh al-Islami 1996, v. 2, 221.
[317] Al-‘Umar 1996, 203–5.
[318] Al-Zuhayli 1992, 419; al-’Umar 1996, 207.
[319] Al-Zuhayli 1992, 417, 428.
[320] Ibid., 429.
[321] Al-‘Umar 1996, 222.
[322] Al-Ghazali 1967, v. 4, 102.
[323] Al-Shatibi n.d., v. 3, 396.
[324] *Ihsan* literally means prevention or avoiding. In marriage *ihsan* means that the person has married and thus has prevented himself or herself from the sin of adultery (*zina*). *Ihsan* is a prerequisite for applying the punishment of stoning (*rajm*) upon adulterers. According to the Hanafis, the pre-existing conditions that establish *ihsan* are sanity *(‘aql*), maturity (*bulugh*), freedom (*huriyya*), being a Muslim and a valid marriage. Both husband and wife must fulfill these conditions and their marriage must have been consummated. Abu Yusuf does not stipulate being a Muslim, so a Muslim married to a *kitabiyya* (a Jewish or Christian woman) is *muhsan* (enjoying *ihsan*) as well. The Malikis add to the above conditions that while in *ihsan* intercourse is permitted (but not during the fast or menstruation of the wife) and the wife is physically capable of participating in intercourse even when not mature. The Shafi‘is mention four conditions only, *bulugh*, *‘aql*, *huriyya*, and *nikah sahih* (a valid marriage). They do not consider being a Muslim a prerequisite to establish *ihsan*, based on the tradition that the Prophet Muhammad stoned to death two Jews who committed adultery (Mawsu‘at Jamal ‘Abd al-Nasir v. 4, 22–32).
[325] Mu’assasat Da‘irat Ma‘arif al-Fiqh al-Islami 1996, v. 6, 115.
[326] Bianquis 1966.
[327] Rispler-Chaim 1992.
[328] Badran 1970, 162.
[329] Ibn Qudama 1989, v. 9, 391.
[330] Al-Sarakhsi 1978, v. 5, 22–30; Al-Marghinani 1997 v. 1–2, 235–6
[331] Al-Jaziri 1998, v. 4, 87.
[332] Lane 1956, v. 1, 300.
[333] Ibn Rushd 1995, v. 3, 961–2.
[334] Dols (1983) has found that *judham* and *burs* (*baras* according to Dols) may have been different names for one and the same disease. While *judham* means “mutilation”, *baras* means “to be white or shiny”, and was used for leprosy in its early stages. (p.893). Al-Jahiz treated *baras* as an ailment that encompassed a wide variety of nonmalignant skin disorders which often caused “an alteration of the skin and a loss of pigmentation”(p.902). In the 19th century, the German consul in Damascus reported that *baras* and *judham* was the same disease, while judham was a term used by the more educated inhabitants. (p. 911).
[335] Ibn Qudama 1989, v. 9, 395.
[336] Al-Bahbudi 1987, 270
[337] Mu‘assasat Da’irat Ma‘arif al-Fiqh al-Islami 1996, v. 6, 159.

[338] *EI* "*mahr*" by O. Spies
[339] Al-Jaziri 1998, v. 4, 192–3.
[340] Badran 1970, 165.
[341] Al-Baji 1999, v. 5, 134–6
[342] Al-Bahbudi 1987, 280.
[343] Ibid.
[344] Al-Tusi 1970, 485–6.
[345] Lane 1956, v. 1, 178.
[346] Al-Rawandi 1976, v. 2, 193–6. Layish (1991, 43) claims that only in the Hanafi sources are *khul'* and *mubara'a* synonymous. Other schools of law distinguish the two and explain that *mubara'a* does not involve compensation.
[347] 1905–1988. Kahala was born and died in Damascus. He was a member of the Iraqi Scientific Council (Majma' al-'Ilm al-Iraqi) and also of Majma' al-Buhuth al-Islamiyya at Al-Azhar. See: al-'Alawna 1998, 142–3.
[348] Kahala 1977, 1, 201–3.
[349] Imam 1996, 79.
[350] Sirkis 1985, 93.
[351] Jad al-Haqq June 4, 1981.
[352] Sha'ban 1964, 20.
[353] *Al-Liwa' al-Islami* June 13, 1996, p.17.
[354] Al-Nawawi 1978, v. 1–2, 233.
[355] Although it is not mentioned whether the sociologist relied on any scientific survey in either claim, both claims obviously serve her purpose to encourage men to marry women with disabilities.
[356] Al-Qa'imi 1996, 382–5.
[357] Lane 1956, v. 1, 2092.
[358] Al-Jaziri 1998, v. 4, 249.
[359] Lane 1956, v. 1, 1027.
[360] This could be a medieval description for what is gynecologically known as VVF (Vesico-Vaginal Fistula), that is a fistulous communication between the bladder and the vagina; this problem may involve a tiny size fistula, or the destruction of the whole base of the bladder. The symptoms are leakage of urine from the vagina, at times a dribble, at other times a constant flow. VVF is also accompanied by ammoniacal odor. It could be caused by a difficult delivery or after an operation. (Jones 1981, 362).
[361] Lane 1956, v.1, 2414; Al-Jaziri 1998 v.4, 256. This could be the medieval description for what is known today in medicine as RVF (Recto-Vaginal Fistula). RVF is the most typical form of VFF (Vaginal-Fecal Fistula). The symptoms of this medical problem are the escape of gas or fecal matter from the vagina, irritation, and bad odor. RVF often results from irradiation, obstetrical trauma, and surgery. The solution is usually vaginal surgery (Jones 1981, 365).
[362] On *faskh* in the sense of dissolution by court, and on the legal grounds for this procedure in Maliki law, see Layish 1991, 80.
[363] Al-Wansharisi 1981 v. 3, 141–59.
[364] Ibid., 139.
[365] Ibn Qudama 1972, v. 8, 23.
[366] Al-Jaziri, 1998 v. 4, 244.
[367] The Malikis maintain that whenever it is not certain that the marriage is *fasid* (invalid) or not, *talaq* (repudiation) may take place. When it is certain (*mujma'an 'alayhi*) that the marriage is invalid (*fasid*), it should be dissolved (*yufsakh*) without *talaq*. According to the Hanbalis only a qadi may exercise *faskh* (*wala yafsakh illa hakim*) (Al-Jaziri 1990, v. 4, 381–3.
[368] Al-Jaziri, 1998 v. 4, 242.
[369] Ibid., 245
[370] Ibid., 248.
[371] *Khalwa sahiha* (true seclusion) is achieved when a man and a woman meet in a place where no impediment to intercourse exists. This means that no one can watch them without their permission, and the

place has locked doors and windows. A road that is not traveled during certain hours can provide a *khalwa sahiha* as well (Al-Jaziri 1990, v. 4, 17–18).

372 Al-Halabi 1989, v. 1, 288.

373 Al-Jaziri, 1998 v. 4, 256; Al-Halabi 1989 v. 1, 290.

374 Isma'il 1990, v. 8, 157.

375 Al-Sa'adi 1995.

376 Al-Mirdawi 1986, V. 8, 204.

377 Al-Wansharisi 1981 v. 3, 177–8.

378 Al-Jaziri, 1998 v. 4, 261.

379 Al-Kasani 1960, v. 5, 2205.

380 Lane 1956, v. 1, 370.

381 Al-Jaziri 1998, v. 4, 249.

382 Lane 1956, v. 1, 2166.

383 Ibid., 752.

384 In a fatwa by Dr. 'Abd al-Fattah 'Abd al-Karim, a professor of philosophy and theology at Al-Azhar University (in: *al-Liwa' al-Islami* September 12, 2002, 16), he advises a woman who complains that she has remained virgin after five years of marriage due to a sexual disorder in her husband, to appeal to the court to obtain dissolution of their marriage, because obviously her husband is disabled, and she could have done it already after a year of marriage with the same situation. The wife in the fatwa expressed her reluctance to disclose "bedroom secrets" in her claim, but apparently she could tolerate the situation no longer.

385 Isma'il 1990, v. 8, 156–9.

386 Al-Jaziri 1998, v. 4, 241.

387 Al-Jaziri 1998, v. 4, 241; Al-Marghinani 1975, v. 2, 26. Layish (1991, 23) relates that in the Kabyle Mountains of Libya the father of the bride used to compel the impotent husband to divorce his wife and thus avoid the shame of bringing the case to court and making the disability public.

388 *Fatawa al-Tibb wal-Tadawi* 2004, 34–35.

389 Al-Jaziri 1998 v. 4, 243–4.

390 Ibid., 242.

391 Lane 1956, v. 1, 398.
Al-Tahanawi (1998, v. 1, 347) explains that the disease is caused by the spread of black bile (*murra sawda*') in the body. It destroys the equilibrium of the organs, sometimes ending in their falling apart. It takes various forms, typically blisters of the skin.

392 Al-Jaziri 1998, v .4, 243.

393 Ibid., 245.

394 Ibid., 259.

395 Al-Marghinani 1975, v. 2, 26

396 Al-Jaziri 1998, v. 4, 246.

397 Al-Marghinani 1970, v. 1, 205.

398 Al-Jaziri 1998, v. 4, 250.

399 Al-Tusi 1970, 486.

400 Jacquart and Thomasset (1985) claim that "lepromatose leprosy, the form that we imagine, appeared under the name of elephantiasis in the Graeco-Latin world" (p. 183). They conclude that leprosy and elephantiasis were roughly the same disease in the ancient civilization, and that leprosy did not become a scourge until the fall of the Roman Empire. It emerges though that at the time of the Islamic empires the two diseases were already distinct and separable. Dols (1983, p. 893) explains that *judham* means that the body is mutilated or suffers from disfigurements, as the Arabic root *jadhama* is used for amputees as well – *ajdham*. While *burs* means "to be white or shiny", and could describe leprosy in its early stages, it may have also referred to other skin disorders.

401 Dols 1983, 895.

402 Lane 1956, v. 4, 1591.

403 Al-Jaziri 1998, v. 4, 249.

[404] Al-Nawawi 1996, v. 2, 26.
[405] Al-Jaziri 1998, v. 4, 242.
[406] Ibid., 242.
[407] Ibid., 243.
[408] Lane 1956, v. 1, 203.
[409] Ibid., v. 8, 2790.
[410] Spiro 1973.
[411] Al-Nawawi 1996, v. 2, 27.
[412] Ibn Shas 1995, v. 2, 75.
[413] Al-Jaziri 1998, 4, 262.
[414] Ibn Taymiyah, 1983, 230.
[415] Lane 1956, v. 4, 1462.
[416] Al-Jaziri 1998, v. 4, 248; Ibn Shas 1995, v. 2, 71.
[417] Rispler-Chaim 1999.
[418] *Al-Liwa' al-Islami* Februaru 26, 2004, Dr. 'Ali Jum'a October 7, 2004
[419] Dr. Misbah Hamad, a professor of Islamic law and depute chair of the College of Shari'a in *al-Liwa' al-Islami* October 31, 2002, 14.
[420] Al-Mut'ini, February 19, 2004
[421] *Fatawa al-Tibb wal-Tadawi* 2004, 208.
[422] Dr.Nasr Farid Wasil (the previous mufti of Egypt) 2002, 5. The fact that the fetus has heartbeat beginning from the fourth week of pregnancy, does not indicate that the soul has been inspired into it, and therefore it does not yet have the "quality as human being" until the age of 120 days (Krawietz 2003), definitely eases the permission to abort it due to a severe disability or due to another legitimate cause. See also al-Daqr 1997, 167–75, who comes to the linkage between heartbeat and life from discussing the end of life and euthanasia.
[423] *Fatawa al-Tibb wal-Tadawi* 2004, 107. Dr. 'Ali Jum'a 2003, 7. In another fatwa the abortion was permitted to take place in the sixth month of pregnancy, since the fetus was jeopardizing the mother's health. (al-Tayyib 2003, p.7). In a fatwa by Abu al-Wafa Mahmud, a member of the fatwa committee at al-Azhar, he permitted to abort a fetus of five months, based on the medical report of Muslim physicians who confirmed a severe deformation of the fetus's limbs and dysfunction of its limphatic glands.
[424] *Al-Haqiqa*, April 30, 1994, 7.
[425] Saqr, August 1998, 136; Al-'Askalani, August 1, 1996, 16.
[426] Rispler-Chaim 1998. Although in a fatwa by Sheikh Salih al-Fawzan he denied the linkage between consanguineous marriages and the birth of handicapped or retarded children. He claimed that scientists attribute congenital disorders to consanguineous marriages, but this is a false claim (*Fatawa al-Tibb wal-Tadawi* 2004, 96–97.
[427] Dr. al-Hashimi (1995, 113–116) explains that in-vitro fertilization allows the examination of the embryo for genetic disorders while it is only eight cells in size. If it is diagnosed as sick, it will not be transplanted back into the woman's womb. In this way both abortion and the birth of a sick baby are prevented. A permission to test the zygotes and destroy them if they are found sick or "superfluous" as far as their parents' need for them, can be found also in Yasin 2000, 121.
[428] Chaabouni et al. 2001.
[429] Al-Tikriti 1981, 284.
[430] Inhorn 1996, 56–65; Ghanim 2003, 217–19.
[431] Adoption is prohibited in Islamic law, contrary to the situation in pre-Islamic Arabia. But there are means to circumvent parts of the prohibition by becoming a fostering parent or a guardian. In Egypt today the only children that may be adopted are those who were deserted at a very young age so that they do not know their name (*nasab* – lineage) and those deserted due to unusual birth circumstances, such as *walad zina*. The parents of an "adopted" child are only his or her guardians and need a court certificate to prove this. (Sonbol 1995).
[432] Al-Sha'rawi n.d., 72.
[433] Rispler-Chaim 1995.

[434] Mahmud, April 4, 1996, 7.
[435] Al-'Uthaymin 1995, v. 2, 750–1.
[436] Al-Jibrin 1995, 143.
[437] Jad al-Haqq 1981.
[438] 'Abd al-Hamid 1966, 314–16.
[439] Al-Tikriti 1981, 369–72.
[440] There is a whole theoretical discussion in the fiqh concerning *darar*. *Darura* is derived from *darar*. Therefore, *darura* is the fear of physical destruction of bodily organs (*halak*), or the fear of death, whether it is based on knowledge ('*ilm*) or on speculation (*zann*). No one should stand still and await death. *Darura* is a situation that may involve danger to a person's life, or a great hardship that might lead to harming one's life, one's organs, honor, mental health or property (Al-Zuhayli 1997, 64). Basically, any *darar* should be removed (*al-darar yuzal*). *Darar* is related to the principle "necessities render the prohibited permitted". Also, *al-darar la yuzal bidarar* (one harm cannot be removed by an equal harm). A personal *darar* should be tolerated for the prevention of a public *darar*, etc. (Al-'Ajam 1998, v.1, 863–4).
[441] Hamza 2001, 139–41.
[442] Saqr, *Minbar al-Islam* November 1999, v. 8, 134.
[443] Rizq 2001.
[444] Rispler-Chaim 1993, 19–27.
[445] Mayer 1980, 287–313.
[446] Hamza 2001, chap. 4. There is an objection to the donation of a uterus from a living woman to another woman because it is similar to a man's amputation of his own penis or testicles, which is forbidden. It is permissible to harvest the womb of a woman who died and transplant it in another woman, because bearing children is a natural instinct in mankind (Al-'Askalani, May 4, 2000, 16).
[447] Al-Tikriti 1981, 372–3.
[448] Wasfi 1995, 156–61.
[449] Dols 1992, 4.
[450] Translated by Dols 1992, 434. An exception to this rule can be found in the Maliki law on blasphemy, where "madness" could not save one from the death penalty (Dols 1992, 447).
[451] Dols 1992, 436.
[452] Ibid., 437.
[453] Ibid., 439.
[454] Ibid., 437.
[455] Shoshan 2003 explains, "in the Renaissance medical discourses were also muted and secondary compared with legal apparatus". In England, for example, it took until the 19th century for medical doctors to gain "monopolistic power" in diagnosing and treating mentally ill persons (p.333).
[456] Al-Issa 1999, xv.
[457] Al-Bahbudi 1987, 296.
[458] Al-Jaziri 1998, v. 4, 476.
[459] Ibid., 481.
[460] Ibid., 481.
[461] *Al-Mabsut* v. 6, 154, and *al-Mudawwana al-Kubra* v. 2, 391, are quoted in al-Tahawi 1995 v. 2, 432–3.
[462] Al-Tahawi 1995, v. 2, 432.
[463] Ibid., 433.
[464] Al-Jaziri 1998, v. 4, 543.
[465] Al-Bahbudi, 1987, 304; Al-Jaziri 1998, v. 4, 544.
[466] Al-Marghinani 1997, v. 1, 291.
[467] Ibn Rushd 1995, v. 3, 1081–2; al-Tahawi 1995, v. 2, 434.
[468] Ibn Rushd 1995, v. 3, 1081.
[469] Al-Jaziri 1998, v. 4, 481.
[470] Ibid.
[471] Badran 1970, 323–4.
[472] Al-Tahawi 1995, v. 2, 451.

[473] Al-Jaziri 1998, v. 4, 252.
[474] Al-Marghinani 1975, v. 2, 26.
[475] Al-Tusi 1970, 487.
[476] Al-Jaziri 1998, v. 4, 262.
[477] Al-Zabidi 1969, v. 5, 242; Ibn Manzur 1955, v. 2, 145; Lane 1956, v. 2, 815; Sabiq 1972, v. 3, 454.
[478] Saunders 1991.
[479] Dreger (1998, 24) mentions that all along the period between 1860–1915 in France and Britain, there have been 300 accounts of human hermaphroditism published in medical and scientific literature, and they pertain to roughly 200 cases of hermaphroditism. Even if we assume that not all cases of hermaphroditism became known to medical personnel and could be reported, the number of hermaphrodites in the large populations of France and Britain was still very small.
[480] Dreger 1998, 40.
[481] Giladi 1992.
[482] Ibn Qudama 1972, v. 7, 115.
[483] Al-Marghinani 1975, v. 4, 266; Al-Sarakhsi 1978, v. 5, 104; al-Halabi 1989 v. 2, 334–36.
[484] Ibn Qudama 1972, v. 7, 115.
[485] Ibn Qudama 1972, v. 7, 115–18.
[486] Al-Kasani 1960, v.1, 4831; Al-Mirdawi 1986, v. 1, 451.
[487] Al-Jammas 1993, 109–17
[488] Ghanim 2003, (469–473), speaks of this possible confusion, but asserts that modern medicine knows for certain the sex of the fetus, at least after four months of pregnancy, but sometimes earlier, if using amniosynthesis.
[489] Dreger 1998, 37–40.
[490] Dreger 1998, 37.
[491] Lane 1956, v. 4, 1702–3.
[492] Jad al-Haqq, Feb-March 1994.
[493] Al-Khamina'i 1999, v. 2, 73.
[494] Dupret (2002) analyzes all the legal stages that the Sayyid/Sally case has gone through, since the operation on january 29, 1988, until Sally established her status as a female in November 1989, and until September 1999, when the court ordered al-Azhar University to admit Sally to the Faculty of Medicine for Women. Even then this was not the end of this legal case, but the rest had to do with Sally's "immoral" conduct as a woman, not with her being originally a *khuntha*.
[495] *Al-Liwa' al-Islami*, September 12, 2002, 16.
[496] Translated according to Pickthall.
[497] Al-Zuhayli 1989, v. 9, 678–9.
[498] Ibid., 680; Zaydan 1998, 10, mentions the same eight groups, but emphasizes that the Hanafis al-Kasani and Ibn 'Abidin did not count *baghy* among the *hudud*.
[499] Al-Zuhayli 1989, v. 9, 682–3.
[500] Zaydan 1998, 15–16.
[501] Al-Zuhayli 1989, v. 9, 693; Al-'Abudi 1409H, 313.
[502] Al-Husayni 1991, 93.
[503] Al-Zuhayli 1989, v. 9, 686.
[504] Ibid., v. 9, 702
[505] Ibid., 706.
[506] Lane 1956, v. 1, p.2747: *tamyiz* "is the age of discrimination, or a faculty in the brain whereby meanings are elicited".
[507] Al-Zuhayli 1989, v. 9, 718; Zaydan 1998, 40.
[508] Abu al-Khayr 1994, 39–43.
[509] Pickthall.
[510] Pickthall.
[511] Based on al-Sarakhsi 2001, v. 9 160–1, Hanafis claim that the *nisab* equals 10 dirhams or 1 dinar; al-Shafi'i states a quarter of a dinar; Malik states 3 dirhams; Ibn Abi Layla states 5 dirhams; 'Ikrima states 4 dirhams; Abu Hurayra and Abu Sa'id al-Khidri state 40 dirhams; etc.

[512] Al-Qaffal 1988, v. 8, 51.
[513] Ibid., 73.
[514] Al-Sarakhsi 2001, v. 9, 166–7.
[515] Ibid., 197.
[516] Al-Qaffal 1988, v. 8, 74.
[517] Al-Sarakhsi 2001, v. 9, 208.
[518] Ibid., 206.
[519] While theft is an offence mainly against property, and is punishable by amputations of hands and legs, pending on the recurrence of the crime. Robbery (highway robbery, or "fatal theft" or *haraba*) may involve a variety of violent attacks on people: either a threat by weapons (without robbery), or/and a confrontation accompanied by inflicting injuries to the threatened persons, or/and murder of the threatened, or all the above combined; while all these forms of violence aim at the unlawful usurpation of property or money from its rightful owner, property is not always usurped. The punishments for robbery vary according to the severity of the confrontation, as mentioned above, and Qur'an 5, 33 lists among the available punishments the amputation, the crucifixtions, exile or execution. Mansour 1982, 195–201.
[520] Ibid., 233.
[521] Al-Hanafi 1997, v. 5, 114.
[522] Al-Qaffal 1988, v. 8, 86.
[523] Ibn Anas 1994, v. 4, 556.
[524] Al-Qaffal 1988, v. 8, 88.
[525] Al-'Abudi 1409H, 313.
[526] Ibid., 317. Al-Sayyid Sabiq explains that the hand that committed the crime is considered a sick organ that needs to be cut off in order for the body to recover (ibid., 320).
[527] *Mafsil* is any place of juncture of two bones of the body and limbs, a joint such as the elbow, the knee, or the knuckle. Lane 1956, v. 6, 2407.
[528] *Rusgh* is the ankle. See Lane 1956, v. 3, 1080. According to al-Qaffal (1988, v. 8, 74), *rusgh* is the part between the ankle and the foot. Sometimes it is called *misht al-qadam* (metatarsus, metatarsal bones, the slender bones spread upon the foot, exclusively of the toes).
[529] Al-Qaffal 1988, v. 8, 74.
[530] Al-Sarakhsi 2001, v. 9, 156.
[531] Bahnasi 1964, 164–5.
[532] Ibid.,166–72.
[533] Al-Hanafi 1997, v. 5, 104–5.
[534] Al-Qaffal 1988, v. 8, 77.
[535] Al-Sarakhsi 2001, v. 9, 199.
[536] Al-Hanafi 1997, v. 5, 103.
[537] Al-Zuhayli 1989, v. 9, 583–4.
[538] Pickthall.
[539] Al-Halabi 1989, v. 2, 282.
[540] Zaydan 1998, 131–2.
[541] Ibid., 133.
[542] Ibid., 135–6.
[543] Al-Hanafi, 1997, v. 9, 19.
[544] Ibid., 21.
[545] Translated by Pickthall.
[546] Al-Hanafi 1997, v. 9, 44.
[547] Pickthall.
[548] Al-Halabi 1989, v. 2, 288.
[549] Bahnasi 1964, 172–3.
[550] Zaydan 1998, 144.
[551] Ibid., 145.

[552] Ibn Anas 1994, v. 4, 637.
[553] Ibid., v. 4, 560.
[554] Al-Hanafi 1997, v. 9, 67.
[555] Zaydan 1998, 145.
[556] Al-Hanafi 1997, v. 9, 37.
[557] Ibid.
[558] Al-Halabi 1989, v. 2, 289; see also Ibn Qudama on the issue in Zaydan 1998, 164.
[559] Ibn Anas 1994, v. 4, 638–9.
[560] Ibid., 550.
[561] Al-Halabi 1989, v. 2, 286.
[562] Ibn Anas 1994, v. 4, 550.
[563] Ibid., 630.
[564] Abu al-Khayr 1994, 82–5.
[565] The *ta'zir* pl. *ta'azir* are non-fixed punishments. The qadi can choose as *ta'zir* from a wide spectrum of possible punishments according to the case, the subject of his jurisdiction, and depending on the personality of the criminal and the public interest of the time. The qadi may demand the minimal or the maximal punishment, and according to most jurists he even can decide on the death penalty or on mutilations. However, *ta'zir* is believed to be mainly for educating the criminal, and it aims to preserve the latter's life. Al-Husayni 1991, 74; 184.
[566] Abu al-Khayr 1994, 142–9.
[567] Kan'an 2000, 468–9.
[568] EI^2 "Diya".
[569] *Al-Mawsu'a al-Fiqhiyya*,1992, pp. 44–95 "*Diyat*".
[570] Pickthall.
[571] *Al-Mawsu'a al-Fiqhiyya*, "diyat", 47.
[572] Kan'an 2000, 469.
[573] EI^2 "diya".
[574] *Hukumat 'adl* is the compensation for the pain suffered by the victim when *qisas* is impossible to enforce. *Hukumat 'adl* differs from *arsh* in that *arsh* is a portion of *diya*, and its amount is known from the legal texts, while *hukumat 'adl* has no fixed value and the qadi is free to rule on it. It does not mean that *hukumat 'adl* may not speak in terms of portions of *diya* (in percentages), but it necessitates that *hukumat 'adl* can never exceed the amount of *diya* assigned by law to any particular organ. Several Hanafis claim that *hukumat 'adl* amounts to the cost of the medical treatment and the medicines purchased by the injured party. See: Bahnasi 1964, 137–8.
[575] Al-Hanafi 1997, v. 9, 80.
[576] Linguistic terminology can be found in Baalbaki 1990.
[577] Al-Hanafi 1997, v. 9, 81.
[578] Kan'an 2000, 469. According to Ibn Rushd (n.d.) v. 2, 351, this line of reasoning is supported by Abu Hanifa, Malik, al-Shafi'i, and others.
[579] Ibn Rushd (n.d.) v. 2, 351–2.
[580] Ibid., 352.
[581] Ibid., 352.
[582] Kan'an 2000, 469.
[583] EI^2 "Diya"; Ibn Rushd (n.d.) v. 2, 349; Al-Shawkani 1357H, v. 7, 57.
[584] A detailed list of injuries and their respective compensations as portions of the full *diya*, see: al-Jawaziri 1994, 120–40.
[585] EI^2 "Diya"; *al-Mawsu'a al-Fiqhiyya*, "diyat", 72.
[586] *Ibid.*, 81, 86.
[587] Ibid., 88; Al-Shawkani 1357H, v. 7, 623.
[588] Ja'far 1997, 56–60.
[589] Ibn Anas 1994, v. 4, 638; *Al-Mawsu'a al-Fiqhiyya*, "diyat", 69.
[590] Bahnasi 1964, 121; al-Qaffal 1988, v. 7, 558.

[591] *Al-Mawsu'a al-Fiqhiyya*, "diyat", 69.
[592] Ibn Anas 1994, v. 4, 637; Bahnasi 1964, 120–2.
[593] Ibid., 120.
[594] Ibn Anas 1994, v. 4, 639.
[595] Ibid., 572.
[596] Ibid., 572.
[597] Al-Halabi 1989, v. 2, 298.
[598] *Al-Mawsu'a al-Fiqhiyya*, "diyat", 71.
[599] Ibid., 74; Ibn Anas 1994, v. 4, 569.
[600] Al-Hanafi 1997, v. 9, 81.
[601] Ibn Anas 1994, v. 4, 569.
[602] Bahnasi 1964, 127.
[603] *Al-Mawsu'a al-Fiqhiyya*, "diyat", 66.
[604] Ibid., 81.
[605] See Baalbaki 1990 on linguistic terminology.
[606] *Al-Mawsu'a al-Fiqhiyya*, "diyat", 80.
[607] Ibn Anas 1994, v. 4, 638–9; al-Halabi 1989, v.2, 298.
[608] Ibid., 298.
[609] Ibn Anas 1994, v. 4, 570; *al-Mawsu'a al-Fiqhiyya*, "diyat",78.
[610] Ibid., 78–9.
[611] Ibid., 78.
[612] Ibn Anas 1994, v. 4, 638–9.
[613] Ibid., 560.
[614] Ibid., 563.
[615] Dols (1983) has observed a similar attitude of tolerance with regard to lepers during the Islamic Middle Ages, for example, and especially if compared to the situation in Europe at the same time (p. 915).
[616] Marx 2002, 244.
[617] Shoshan 2003.
[618] Shefer 2000.
[619] Shoshan 2003.
[620] Al-Issa 1999, 57.
[621] Muhammad b. Salih al-Uthaymin, 1926–2001, one of the great muftis of Saudi Arabia, a disciple of Sheikh Ibn Baz. He was the director of the school of Islamic law at the Imam Muhammad b. Saud Islamic University in al-Qasim, Saudi Arabia and served as a member of the Supreme Council of Ulama in Saudi Arabia. He wrote books on Islamic law and theology, and commentaries on the Qur'an.
[622] Peace be upon Him.
[623] Allah be satisfied with him/her.
[624] 'Abd Allah b. Jibrin (1930–) He was a teacher of Shar'i studies at the Imam al-Da'wa Institute in Saudi Arabia, and a professor of theology and contemporary thought at the College of Islamic Law. He joined the Board of Research and Ifta' in Saudi Arabia in 1986, the same year that he obtained a Ph.D degree. Through his work many fatwas are associated with him.
[625] Muhammad Khatir Muhammad al-Shaykh was born in 1913 in the province of Diqhaliyya in Egypt. He graduated from al-Azhar College of Shari'a in 1939, and received the license of a Shar'i qadi in 1941. He remained a qadi in Cairo from 1946 until he was appointed legal inspector in the Ministry of Justice. Then he combined the religious courts and the civil courts, and he held several positions until he was appointed attorney for the general prosecution. On 31 October 1970 he was appointed Mufti al-Diyar al-Misriyya, and held that position until his retirement. On his retirement he was elected chairman of the Shar'i Institute of Inspection at the Faysal Islamic Bank and the Islamic Investment Company.
[626] *Al-Dhakhira*, a fiqh book by Shihab al-Din Ahmad b. Idris al-Qarafi (684/1285).
[627] Often referring to Abu Hanifa's two disciples Abu Yusuf and Muhammad al-Shaybani.
[628] Probably *al-Kifaya fi 'Ilm al-Riwaya* by al-Khatib al-Baghdadi (d.463).

[629] A Hanafi compilation also called *al-Fatawa al-'Alamkiriyya*, authored by al-Hammam Mawlana al-Shaykh Nazam.

[630] 'Imran b. Husayn b. 'Ubayd b. Khalaf, a Companion of the Prophet, who reported from him several hadiths. He and his father converted in 7H. 'Imran fought several battles at the Prophet's side, and he served as a qadi in Basra.

[631] Jad al-Haqq 'Ali Jad al-Haqq 1917–1997. In 1945 he received a diploma in Shar'i law, and was appointed qadi in 1954. He was appointed *Mufti Al-Diyar Al-Misriyya* (prime mufti of Egypt) in 1978, Minister of Religious Endowments in 1983, and was Sheikh Al-Azhar from 1982 until his death. His fatwas are published in *Al-Fatawa Al-Islamiyya* volumes 8,9,10. There is also a collection of his works, *Buhuth waFatawa Islamiyya fi Qadaya Mu'asira*. 1995. Cairo: Al-Azhar al-Sharif, al-Amana al-'Amma lillajna al-'Ulya lilDa'wa al-Islamiyya.

[632] A weight equal to four grains or the 24th part of a dinar.

[633] One of the wives of the Prophet Muhammad, who previously was the widow of Abu Salama, the Prophet's cousin, who fell in battle. She reached the age of 84, and died in 59 H.

[634] Dr. Ahmad al-Sharabasi is a professor at al-Azhar University.

[635] A Shafi'i jurist, d. 772/1370.

[636] A law book by Al-Nawawi.

[637] A book by Jalal al-Din al-Suyuti.

[638] A law book by the Hanbali jurist Ibn Qudama (d. 1223).

[639] A Hanbali jurist (d. 1328).

[640] Ibn Hazm, 'Ali b. Ahmad, was an Andalusian Zahiri jurist; also a poet, a philosopher, and a historian (994–1064).

[641] A Yemenite jurist (d.1834). He lived in San'a and served as a qadi there; he is known for his originality.

[642] *Al-Rawda al-Bahiyya fi Sharh al-Lum'a al-Dimashqiyya*, a book by Zayn al-Din al-Jab'i al-'Amili (911–965H).

[643] *Al-Mukhtasar al-Nafi' fi Fiqh al-Imamiyya*, a book by the Shi'i jurist al-Muhaqqiq al-Hilli (Abu al-Qasim Najm al-Din) (d.1277/6).

[644] 'Abd al-Hamid Kishk (1933–1996), born in al-Buhayra province in Egypt, was blind in one eye, and had weak vision in the other; a graduate of Alexandria Institute of Religion, he was a mufti and a teacher at al-Azhar University, wrote many books, and spread his ideas on tape-recordings as well.

[645] Abu Hurayra, 'Abd al-Rahman al-Azdi, one of the most respected companions of the Prophet Muhammad, died in Medina 59/678.

[646] A law compilation by the Hanafi jurist al-Kasani (587H/1191).

[647] Another law book by al-Nawawi.

[648] *Mawahib al-Jalil liSharh Mukhtasar al-Khalil*, by Abu 'AbdAllah Muhammad b. Muhammad b. 'Abd al-Rahman al-Maghribi, also known as al-Hattab al-Ra'ini (d. 954H).

[649] A Maliki Andalusian jurist (d. 1198).

[650] He is the author of the column "Yas'alunaka" (you are asked) in the Palestinian newspaper *al-Quds*, where he answers questions sent by the readers.

[651] A famous companion of the Prophet, who spent a long time with the Prophet and reported many hadiths from him (d. 652).

[652] Mahmud Shaltut 1893–1963

Born to a peasant family in Egypt, he was educated at Al-Azhar. He graduated in 1918. He worked as a lawyer at the Shari'a courts and in journalism, and held several positions at Al-Azhar until he was declared Sheikh Al-Azhar in 1958 at the age of 65. During his rectorship he received visitors from all over the world. He saw importance in independent thought and is considered a reformist among the religious scholars. His Al-Fatawa collection (an edited volume of fatwas published in daily newspapers and over the radio) is widely read and often quoted. Al-Fatawa. 1974. Cairo: Dar al-Shuruq.

[653] Al-Qaradawi (1926–), a famous and prolific mufti and scholar, who was influenced by the philosophy of the Muslim Brethren, and currently resides in Qatar.

654 Dr. Wahba al-Zuhayli (1932–) is a professor of Islamic law in the department of Shari‘a studies at the University of Damascus.

655 This disease is also called *al-istisqa’ al-dimaghi*, and it involves an excessive increase in the quantity of fluid in the brain (*al-sai’l al-shawki*- cerebrospinal fluid, according to Hitti 1967) that cannot be absorbed. Sometimes the fluid blocks the brain channels, and results in a large circumference of the head (55–70 cm.). Because of this accumulation of fluid, some of the brain tissues are damaged, and this leads to retardation. Only seldom, and only in mild cases, is medical treatment helpful. See Dr. ‘Abd al-Salam ‘Abd al-Ghaffar and Dr. Yusuf Mahmud al-Shaykh, *Sikulujiyyat al-Tifl Ghayr al-‘Adi wal-Tarbiyya al-Khassa*, Cairo: ‘Ayn Shams University 1966. pp. 62–63.

656 The book was published on behalf of the Jordanian Doctors Union, Amman: Dar al-Bashir, 1995.

657 ‘Abd al-Razzaq b. Hammam al-Himyari (d.827?) is the author of *al-Musannaf*, a collection of traditions.

658 Abd Al-Halim Mahmud 1910–1978. He served as Sheikh Al-Azhar between 1973 and 1978, the successor of Shaltut. He was a sincere Sufi (follower of mystical Islam), an Al-Azhar graduate, and he also gained a PhD degree in France in1940. He taught Philosophy in the Islamic Religion Department, and also at universities in Tunisia, Libya, Iraq, and Sudan. He believed in the need to apply the Shar‘i law in all fields of life in Egypt. His fatwa collection is titled *Fatawa ‘Abd al-Halim Mahmud*, 1986. Cairo: Dar al-Ma‘arif.

659 Abu ‘Isa Muhammad al-Tirmidhi (d. 862) was a leading scholar of Hadith, and a collection of Hadith is named after him.

660 Muhammad Nasir al-Din al-Albani, one of the most outstanding scholars of the modern era. He was born in 1914 in Ashkudra, then the capital of Albania to a poor but educated family. He migrated to Damascus with his father after the king of Albania moved the country toward secularism. Al-Albani received most of his Hanafi education from his father, who also trained him to be a watch-maker like himself. He was most interested in Hadith studies, and was influenced by the writings of Rashid Rida in *al-Manar*. He adopted a Salafi attitude, influenced by the books of Ibn Taymiya and Ibn Qayyim. He confronted the leaders of the Sufi circles in Damascus over “innovations” and legends, while other scholars encouraged him to continue his *da‘wa*. He traveled extensively in Syria and in Jordan, before he moved and settled there. In the 60s he was arrested by the Syrian regime several times for his religious activism. He was offered several university positions abroad, which he refused for a variety of reasons. He wrote many books, and in 1999 was granted the King Faysal prize for his efforts in the field of Hadith. Al-Albani passed away in 1999.

661 Prof. Rif ‘at Fawzi (1940–) was previously the chairperson of the Department of Islamic law in Dar al-‘Ulum (Faculty of Sciences) at the University of Cairo.

662 Prof. ‘Ujayl al-Nashmi, a Kuwaiti mufti. He is a member of Majma‘ al-Fiqh al-Islami (located in Saudi Arabia), a professor of Islamic Law, and served previously as the Dean of the Faculty of Islamic Law in Kuwait.

663 A Syrian physician and jurist.

664 Sayyid Sabiq (1915–2000). An Egyptian jurist, a graduate of al-Azhar, who joined the Muslim Brethren. He obtained a PhD from al-Azhar in 1947, then served as a professor at the University of Umm al-Qura in Mecca. He is considered the first to simplify the fiqh in a way that gave it great exposure.

665 The law is quoted in Dr. Ahmad al-Hajji al-Karawi, *Faskh al-Zawaj: Bahth Muqarin bayna al-Shari‘a al-Islamiyya wal-Shari‘atayn al-Masihiyya wal-Yahudiyya wal-Qawanin al- ‘Arabiyya*. Beirut: al-Yamama LilTiba‘a wal-Nashr 1990, pp. 336–7.

666 I am grateful to Dr. al-Basit for granting me permission to translate a portion of his book into English. Dr. al-Basit is the rector of the Da‘wa Islamic Studies College in Um El Fahem, Israel.

667 The translation of Qur’anic verses is according to Mohammed Marmaduke Pickthall, *The Meaning of the Glorious Koran*. References are translated literally from Dr. al-Basit’s original.

668 Muhammad ‘Abd al-Mun‘im Nur, *al-Khidma al-Ijtima‘iyya al-Tibbiyya wal-Ta’hil*, 157.

669 Samu’il Wishk, *Kayfa tara Tiflaka al-Mu‘awwaq*, 16.

670 Ibn Manzur, *Lisan al-‘Arab*, v. “*zamin*”.

671 Al-‘Amayra, Muhammad Hasan. *Usul al-Tarbiya al-Ta’rikhiyya wal-Ijtima‘iyya wal-Nafsiyya wal-Falsafiyya*. Amman: Dar al-Masira 1999, 121.

672 [Sunan al-Bayhaqi, 10, 15,2135].
673 Al-Bukhari, 4/8.
674 Qur'an 5,2.
675 Ahmad b. Hanbal, *Musnad*, 2/33. Al-Mundhiri, *al-Targhib wal-Tarhib*, 2/582.
676 Ahmad, 1/166, 155, 158.
677 Qur'an 2, 185.
678 Qur'an 22, 78.
679 Ahmad quoted this in the *Musnad* no. 2108; Al-Bukhari commented on this in his *Sahih*, chapter on belief, no. 29.
680 Qur'an 2, 233.
681 Qur'an 65,7.
682 Qur'an 24, 61.
683 Abu Ghuda, "Ri'ayat al-Mu'awwaqin fi al-Islam". *Majallat al-Muslim al-Mu'asir*. February 1983. 34, 114 [111–120]
684 Al-Qurtubi, *al-Jami' liAhkam al-Qur'an*, 7, 4705.
685 Abu Ghuda, 114.
686 Ibn Manzur, *Lisan al-'Arab*. V. "d-w-a".
687 Qur'an 2, 179.
688 Muslim, 2616.
689 Muslim 2615.
690 Muslim 35.
691 Abu Ghuda, 34:114.
692 Qur'an 49,13.
693 Muslim 26.
694 Qur'an 49,11.
695 Muslim, 2564.
696 Qur'an 80, 1–4.
697 Qur'an 2, 156.
698 Muslim 2571.
699 Al-Mundhiri, *al-Targhib wal-Tarhib*, Dar al-Fikr 4/280.
700 Al-Bayhaqi, 3/375. Beirut: Dar al-Ma'rifa.
701 Al-Dhahabi, *Siyar A'lam al-Nubala'* Mu'assasat al-Risala 4/334.
702 Qur'an 47, 31.
703 Qur'an 48, 17.
704 Ibn Hajar, Ahmad b, 'Ali, *Al-Isaba fi Tamyiz al-Sahaba*, 2/529.
705 All these battles are mentioned in Ibn Hisham *al-Sira al-Nabawiyya*, Beirut: al-Maktaba al-'Asriyya 1998, vols. 2 and 4.
706 In 635 the Muslim army won victory over the Sassanians near Qadisiyya, located west of Najaf in today's Iraq.
707 Ibn Hajar, 2/523.
708 Muslim 2699, Ahmad 2/274.
709 Al-Tirmidhi, 1956.
710 Al-Bayhaqi 9/141.
711 Al-Bukhari 1/10.
712 Muslim 2613.
713 Abu Ghuda, v. 34/118.
714 Ibn al-Athir, *al-Kamil* 4/219; al-Maqrizi, *al-Mawa'iz wal-I' tibar* 2/405.
715 Al-Tabari, Muhammad b. Jarir, *Ta'rikh al-Umam wal-Muluk*. Dar al-Fikr, 7/337–8.
716 Al-Dabu Ibrahim, *al-Daman al-Ijtima'i fi al-Islam*,
717 Marwan al-Qadumi, "Huquq al-mu'aq fi al-Shari'a al-Islamiyya". *Majallat Jami'at al-Qur'an*, 1998, 4/149.
718 Al-Jahiz, *al-Bursan wal-'Urjan wal-'Umyan wal-Hawlan*, Mu'assasat al-Risala, 7.
719 Abu Ghuda, 34/114.

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