

القواعد والأصول الجامعة والفروق والتقسيم البديعة والنافعة
Al-Qawaa'id wal-Usool al-Jaami'ah wal-Furooq wat-Taqaaseem al-Badee'ah an-Naafi'ah.

The Basic Rulings and Principles of *Fiqh* – The Beneficial, Eloquent Classifications and Differentiations

القاعدة -12 Foundation -12

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(d. 1376 A.H./1956 C.E.)
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Discussion based upon:

مبنية على شروح الشيخ عبد الرحمن بن ناصر السعدي
وشيخنا محمد بن صالح العثيمين (رحمهما الله)
و شيخنا د. سامي بن محمد الصقير (حفظه الله)

1-Sh. Ibn Sa'di's original explanation

2-Our Sh. Muhammad ibn Saalih Al-'Uthaimeen's Commentary, and

3-Full explanation by our Sh. (Dr.) Sami ibn Muhammad As-Sghair (summer
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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

Basic Rulings and Foundations of Fiqh-12

All Praise is due to Allaah, and may the *salaah* and *salaam* be on Prophet Muhammad, his household, the noble companions, and those who follow them until the Day of Resurrection. This is a continuation of the explanation of *The Basic Rulings and Principles of Fiqh – The Beneficial, Eloquent Classifications and Differentiations* by Imaam ‘Abd ar-Rahman bin Naasir as-Sa’di (رحمه الله : rahimahullaah).

Foundation twelve is entitled:

“لا بد من التراضي في جميع عقود المعاوضات، و عقود التبرعات“

Mutual consent is required in all contracts involving compensation and donations.

This foundation is proven by the *Qur’aan*, the *Sunnah*, and the consensus of the scholars (*ijmaa’*).

Evidence from the *Qur’aan*

Allaah (ﷻ : *subhaanallaahu wa ta’aalaa*) stated concerning contracts involving compensation:

[يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِّنْكُمْ]

﴿O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent.﴾ Surah an-Nisa’ (4:29)

Trade is a comprehensive term that covers all transactions that aim for profit and earnings; consent between all parties involved is a condition.

Likewise, Allaah (ﷻ) said concerning donation contracts:

[وَأَتُوا النِّسَاءَ صَدَقَاتِهِنَّ نِحْلَةً فَإِنْ طِبْنَ لَكُمْ عَنْ شَيْءٍ مِّنْهُ نَفْسًا فَكُلُوهُ هَنِينًا مَّرِينًا]

﴿And give to the women (whom you marry) their *Mahr* (obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart, but if they, of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allaah has made it lawful).﴾ Surah an-Nisa’ (4:4)

The donation in the *ayah* is all or part of the *mahr* given by the wife to her husband. Allaah (ﷻ) has established that it must be given “of their own good pleasure”, which entails mutual consent. All types of donations follow the same rulings as this situation.

Rulings Covered by Foundation Twelve

Many matters are covered by this foundation including: transactions, securities, renting, hiring of employees for services, partnerships, bequeaths, marriage contracts, gifts, etc; all of these require mutual consent. Likewise, cancelling a contract is not completed until all parties consent. All of these matters entail transfer of property or rights from one person to another or a change in the previous condition. All of that necessitates consent. Whenever someone is compelled to enter into or cancel a contract, then this contract is invalid, and its existence is the same as its nonexistence.

Exception – Just Compulsion (اكراه بحق - *Ikraha bihaq*)

Just compulsion in either a contract or its cancellation is an exception to this foundation. If a person fails to perform an obligatory matter, either financial or non-financial, then he is to be compelled. Therefore, the condition for just compulsion is that the individual must be withholding from that which is obligated upon him.

Examples:

- 1) A person abandons the obligatory congregation prayer. It is just to compel him to attend.
- 2) Someone refuses to pay outstanding debts. It is just to compel him to repay these loans by selling some of his property.
- 3) An individual is negligent in purchasing that which is obligatory upon him from spending or clothing. As such, it is just to compel him to sell some of his property to cover these expenses.
- 4) The divorce of a woman is obligated on someone due to one of the obligating causes. If the husband refuses, then he will be compelled.
- 5) Freeing a slave becomes binding upon an individual as an expiation or due to a vow. If he refuses to free the slave, then he will be forced.

Division of Shared Property

Some shared property is indivisible except by harm. As such, the division of shared properties or partnerships is of two types:

- 1) Based upon consent – For shared property that is indivisible except by consent, whoever refuses is not to be compelled.

Example: A group of people jointly own a piece of property that is uneven (i.e. some parts are hilly while other parts are flat). Since this land can not be equitably divided into individual plots, division must be through compensation or consent. It is not permissible to have it compelled.

- 2) Based upon compelling – For shared property that is indivisible, all owners will be compelled to sell if one of the owners wants his share.

Examples:

- a. A piece of shared land exists that is level in all of its parameters. If one of the owners refuses to sell, then he is to be compelled
- b. Two people own a camel, and one of them asks for his share. There is no way to divide the shares, except by selling it. As such, its sale is obligatory in order to fulfill the rights of the other party.
- c. A house is two stories tall. It can not be divided except with harm. If one of the owners asks for his share and the other refuses, then the owner that refuses will be compelled to sell, and that is just.

Conclusion

In summary, this foundation covers all types of transactions and donations. However, there is exception of just compulsion when someone refuses to carry out an obligation upon him.

The twelfth foundation in Imaam ‘Abd ar-Rahman bin Naasir as-Sa’di’s book, *al-Qawaa'id wal-Usool al-Jaami'ah wal-Furooq wat-Taqaaseem al-Badee'ah an-Naafi'ah* (The Basic Rulings and Principles of *Fiqh* – The Beneficial, Eloquent Classifications and Differentiations), is entitled:

Mutual consent is required in all contracts involving compensation and donations.

All Praise is due to Allaah, and may the *salaah* and *salaam* be on Prophet Muhammad, his household, the noble companions and those who follow them until the Day of Resurrection.

Saleh As-Saleh
Unayzah, may Allaah Protect it,
17th Dhul Hijah, 1428.
Corresponding to Dec 27, 2007.