

## THE RELEVANCE OF ISLAMIC LEGAL MAXIMS IN DETERMINING SOME CONTEMPORARY LEGAL ISSUES

Muhammad Shettima\*  
Dr. Hamma Adam Biu\*\*  
Muhammad Al-Amin Deribe\*\*\*

### ABSTRACT

This work intends to review how far the maxims of Islamic law (*al-Qawā'id al-Fiqhiyyah*) applies to emerging issues upon which there are no exclusive legal authorities. The work started by defining the concept of the maxim and its relationship to other genres of *fiqh*. It went on to discuss its importance, sources and classifications. An important aspect related to maxims of Islamic law is whether or not it qualifies to be a legal authority. The work has been able to show that maxims are appropriate legal authorities as their strength is based on the legal provisions that support them. Using inductive, doctrinal and hermeneutical methodologies, the authors have attempted to review several works and fatwas that have resorted to certain maxims in discussing legal issues related to several contemporary matters. The work is more significant for identifying conditions that should be followed in applying the maxims to contemporary issues. The work concluded by recommending that researchers should stick to these conditions while investigating maxims and their applications to contemporary issues.

**Keywords:** al-Qā'ida al-Fiqhiyyah (maxim of Islamic law), *ijtihad* (independent legal reasoning), legal authority, emerging legal issue.

---

\*1 Lecturer, Department of Sharia and Civil Law, Mohammed Goni College of Legal and Islamic Studies, Maiduguri, Borno State, Nigeria.

\*\*2 Lecturer, Department of Arabic and Islamic Studies, University of Maiduguri, Nigeria.

\*\*\*3 Lecturer, Department of Private Law, Faculty of Law, University of Maiduguri.

## KEPENTINGAN KAEDAH-KEDAH FIQHIYYAH DALAM PENENTUAN ISU-ISU PERUNDANGAN KONTEMPORARI

### ABSTRAK

Makalah ini bertujuan untuk mengulas sejauh mana penggunaan kaedah-kaedah Fiqh (al-Qawā'id al-Fiqhiyyah) di dalam menangani isu-isu semasa yang tidak mempunyai nas yang jelas dari al-Qur'an dan Hadis. Penulisan dimulakan dengan penerangan tentang apa yang dimaksudkan dengan kaedah-kaedah Fiqh dan bagaiman ianya berkait rapat dengan konsep-konsep fiqh yang lain. Kepentingan, rujukan utama serta klasifikasi Fiqh juga di berikan secara terperinci. Antara permasalahan yang timbul adalah samada kaedah-kaedah Fiqh ini boleh dijadikan sumber hukum yang kuat. Makalah ini jelas menunjukkan bahawa kaedah-kaedah Fiqh sememangnya boleh digunakan sebagai sumber hukum kerana kebanyakan kaedah-kaedah ini sememangnya berdasarkan sumber hukum asal, iaitu al-Qur'an dan Hadis. Para penulis telah mengulas bagaimana kaedah-kaedah ini terpakai kepada permasalahan kontemporari. Makalah ini merumuskan bahawa apabila mengguna pakai kaedah-kaedah Fiqh bagi menyelesaikan permasalahan baru, ahli Fiqah perlu memastikan segala syarat-syarat mestilah dipenuhi dalam mengaplikasi kaedah-kaedah ini kepada permasalahan tersebut.

**Kata Kunci:** al-Qaida, al-Fiqhiyyah (kaedah-kaedah Fiqh), ijtihad, kaedah perundangan, isu perundangan berbangkit

### INTRODUCTION

This work attempts to shed light on the genre of maxims in Islamic Law and the important role it plays in the legal analysis of emerging issues. The researcher gives a brief background into the genre of *al-Qawā'id al-Fiqhiyyah* as it is a legal discipline that has not received deserving attention from researchers especially in the English language. The definition of *Qawā'id*, its classification as well as its relationship with other genres of *fiqh* shall be discussed in brief. In addition, the research will look at the issue of whether or not a maxim can serve as a legal authority. The work concludes by stating the relevance of maxims to emerging legal issues. Hermeneutical methodology is adopted in the extraction of injunctions from verses

of the Qur'an and Prophetic Ahādīth that imply propositions of maxims and injunctions they postulate. This will show the link between the mujtahid's position on a particular legal issue along with the legal authorities relied upon for such a decision.

## THE CONCEPT OF LEGAL MAXIMS (*AL-QAWĀ'ID AL-FIQHIYYAH*), IMPORTANCE, CLASSIFICATIONS AND RELATIONSHIP WITH OTHER GENRES OF ISLAMIC LAW

### *Al-Qawā'id Al-Fiqhiyyah* (Legal Maxims): A Definition

Legal maxims (*al-Qawā'id al-Fiqhiyyah*) are crucial in Islamic law (*fiqh*) as they encapsulate perceptions and precepts that can abet in figuring out the factual essence of the Islamic Law in detail. It is a handy tool for researchers who need to expand their grasp and understanding of content and objective of the law. More importantly, they assist the mujtahid in arriving at the appropriate ruling where there is no direct text is available on a particular matter.<sup>4</sup>

The word *al-Qawā'id* is a plural *qā'idah*, a derivative of *qa'ada* and literally has the meanings of fixation, consistency, and being well established.<sup>5</sup> *Qa'ida* on the other hand means base; and *qawā'id* means a foundation. This lexical meaning can be found in the Qur'an in the Saying of Allah, the Most High says:

“And remember Ibrahim and Isma'il raised the foundations (*qawā'id*) of the House.”<sup>6</sup>

The relationship between *qā'idah* as a technical term and usage of *qā'idah* in the verse is that the *qā'idah* (base) for injunctions are maxims while the *qā'idah* (base) of a building is its foundation.<sup>7</sup> In

<sup>4</sup> Muhammad Shettima, "Effects of the Legal Maxim: *No Harming and No Counter-Harming* on the Enforcement of Environmental Protection" *IJUM Law Journal* 19 (2011): 294.

<sup>55</sup> Musallam bin M.M. Al-Dausarī, *Al-Mumti' fil Qawā'id al-Fiqhiyya*, (Riyadh: Dar Zidnī 1428H/2007), 10.

<sup>6</sup> Qur'an 2:127

<sup>7</sup> Ya'qub bin AbdulWahhab Al-Bāhusain, *Al-Qawā'id al-Fiqhiyyah: al-Mabādi' al-Muqawwimāt – al-Maṣādir – al-Dalīliyyah – al-Taṭawwur: Dirāsah Nazariyyah – Taḥliyyah – Ta'siliyyah – Tārīkhiyyah*, (Riyadh: Maktabat al-Rushd, 1418H/1998), 15.

other words, auxiliary injunctions stand on maxims just as buildings stand on their foundations.

Technically, it is a general rule applicable to all its related particulars. Sadrush Shari'ah defined *Qawā'id* as general propositions.<sup>8</sup> Examples are *Qā'ida Nahwiyyah* (Rule of Grammar), *Qā'idah Mantiqiyah* (Rule of Logic), *Qā'ida Usūliyya* (Rule of Jurisprudence), etc.

*Fiqhiyya* (lit. of law) is the adjective of *Qāida* (maxim); a derivative of *fiqh* (law) which literally means understanding. *Fiqh* is a term that came to denote Muslim jurists' detailed study of practical aspect of the Devine ordainments. Imam Shafi'i has defined it as the knowledge of the practical injunctions of Shari'ah acquired from its detailed evidences.<sup>9</sup>

The terminology, *al-Qawā'id al-Fiqhiyya*, referred herein as legal maxims has several definitions. These definitions basically revolve around two positions. The often quoted definition of legal maxims is that it is a general rule which applies to all of its related particulars.<sup>10</sup> As this is an extension of the technical meaning of term the *Qā'ida* in other discipline to the *Qā'ida* in law (*fiqh*), this definition has failed to encapsulate the concept of legal maxims and thus is not reflective of its essence. Al-Hamawi has stated that *qā'ida* of legists (*fuqahā*) is different from *qā'ida* in other disciplines such as grammar (*Nahwu*), logic (*Mantiq*) and even jurisprudence (*Usūlul Fiqh*). In these disciplines, it is a rule applicable to all its related particulars.<sup>11</sup> From the foregoing, we can say that a legal maxim is a general proposition of law that applies to most of its related particulars.<sup>12</sup>

<sup>8</sup> Mas'ūd bin Umar Al-Taftāzāni, *Sharh Al-Talbīh 'alā Al-Taudīh li Matn Al-Tanqīh fī Usūl Al-Fiqh*, vol. 1, (Egypt: Dār Al-Kutub Al-Arabiyya, 1327H), 20.

<sup>9</sup> Taj al-Deen AbdulWahhab bin Abdil Kaafi Ibn Al-Subkī Al-Shafi'i, *Al-Muhalla fī Sharhil Jawāmi'*, vol. 1, (Dār Ihyā' Al-Kutub Al-Arabiyyah, n.d.), 32; Muhammad Mustafa Al-Zuhaili, *Al-Qawā'id al-Fiqhiyya wa tatbiqatuhā fil Madhahib al-Arba'a*, vol. 1, (Damascus: Dar El-Fikr 1427H/2006), 16.

<sup>10</sup> Mohammad Hashim Kamali, *Qawā'id Al-Fiqh: The Legal Maxims of Islamic Law*, (UK, The Association of Muslim Lawyers, n.d.), 1. Accessed November 28, 2010, [www.sunnah.org/fiqh/usul/Kamali\\_Qawaid\\_al-Fiqh.pdf](http://www.sunnah.org/fiqh/usul/Kamali_Qawaid_al-Fiqh.pdf).

<sup>11</sup> Ahmad bin Muhammad Al-Hamawi, *Ghamz 'Uyūn al-Basā'ir Sharh al-Ashbāhi wa al-Nazā'ir*, vol. 1, (Beirut: Dār Al-Kutub Al-Ilmiyyah, 1405H/1985), 22.

<sup>12</sup> Particulars (*Juz'iyāt*) are the specific injunctions that apply to particular cases as provided in the detail of the law. Therefore what is true to the general proposition is also true to the particular and this provision is also extended to

The reason for opting for this definition is that maxims do not apply to all particulars that seem related to it. The particulars that do not apply to a general principle are known as exceptions (*mustathnayāt*). These exceptions often represent independent or auxiliary maxims in themselves. The exceptions do not however negate the general application of maxims, as the principles of the maxim still represent application to the majority; and exceptions are but a minority in all maxims.<sup>13</sup> In addition, these exceptions often represent conditions for the applications of the maxim contained in specific legal authorities.

*Qā'idah* has also been defined by Al-Bāhusain as a general proposition of fiqh whose particulars are general propositions.<sup>14</sup> This distinguishes a *qā'idah* from auxiliary injunctions which are also general propositions as can be seen in the following statement: "A husband's silence following his wife's delivery and his (acceptance of) congratulation (by others) is an admission that the child is his'; and thus, he cannot reject the child (afterwards)."<sup>15</sup> This statement is not a maxim but an auxiliary injunction whose particulars is every man that finds himself in similar circumstance.<sup>16</sup>

### Comparison of Legal Maxims to Other Genres of *Fiqh*

It is said that things become clearer when compared to their opposites. As a result, in this section we will attempt to clarify the concept of legal maxim by comparing it to other related genres of Islamic fiqh.

#### 1. *Legal Maxims (al-Qawā'id al-Fiqhiyya) and Maxims of Jurisprudence (Usūl al-Fiqh)*

While both legal maxims and jurisprudence deal with *fiqh*, the latter specifically concerns itself with rules of deducing and interpreting the contents of the law from its revealed sources and legal maxims are

---

most of the particulars that are related to it. (For several definitions, arguments and counter-arguments see: Al-Bāhusain *Al-Qawā'id*, 9-54).

<sup>13</sup> Al-Zuhaili, *al-Qawā'id*, 24.

<sup>14</sup> Al-Bāhusain, *Al-Qawā'id*, 54.

<sup>15</sup> Zainuddin bin Ibrahim Ibn Nujaim, *Al-Ashbāh wa Al-Nazā'ir*, (Beirut: Dār Al-Fikr, 1983), 115.

<sup>16</sup> Al-Bāhusain, Ya'qub bin AbdulWahhab, *Al-Ma'āyir al-Jaliyyah*, (Riyadh: Maktabat al-Rushd 142H/2008), 37, 41.

essentially an abridgement or abstraction of the law itself.<sup>17</sup> As a science of law, jurisprudence investigates the standard and methodology with which provisions of the revealed texts should be understood, analysed and interpreted. Maxims, on the other hand, are inductive (*istiqrā'iyya*) and analogical (*qiyāsiyya*), and its function is to make it easy for a legist (*faqīh*) to bring together scattered particulars and auxiliary injunctions of *Sharī'ah* law in simple abstract statements.<sup>18</sup>

Like the law (*fiqh*), jurisprudence (*usūl*) has its own principles which can also be referred to as jurisprudential maxims (*qawā'id usūliyyah*). Unlike legal maxims, jurisprudential maxims generally apply without any specification; while legal maxims, even though generally applicable to its related particulars, have many exceptions.<sup>19</sup>

However, both fields often have shared rules that differ in some detail. In such situations, the maxim of jurisprudence is regarded as general principles of deducting legal injunctions, while a maxim of law is regarded an injunction of a particular matter regulating actions of the adult Muslim.<sup>20</sup> The example of such rule is *ijtihād* is not undone by a similar *ijtihād* (*al-ijtihādu lā yanquḍu bi mithlihī*).<sup>21</sup> In *usūl al-fiqh*, it is a general principle of law that expresses the impermissibility of legal reasoning of judges and *muftis* to contradict each other on specific issues. While as legal maxim, it indicates an interpretation effort by a particular Judge or Mufti regarding a determinant issue to which he has pronounced legal opinion will not be cancelled by a subsequent *ijtihad* of his or of another judge or mufti.<sup>22</sup> Likewise, our maxim *al-aṣlu fī al-ashyā'i al-ibāhah* is of the same category as it is being used in both jurisprudence and law.<sup>23</sup> In

<sup>17</sup> Al-Zuhaili, *al-Qawā'id*, 24; Muhammad Sidqī bin Ahmad Al-Borno, *Al-Wajīz fī Iḍāh al-Qawā'id al-Fiqhi al-Kullīyya*, (Beirut: Mu'assasatur Risala 1416/1996), 19-20.

<sup>18</sup> Imād Ali Jumu'a, , *Al-Qawā'id al-Fiqhiyya al-Muyassara*, (Al-Waqfeyya 1427H), 12. Assessed May 12, 2013, <http://www.waqfeya.com/book.php?bid/5348>.

<sup>19</sup> Al-Zuhaili, *al-Qawā'id*, vol. 1, 24.

<sup>20</sup> Al-Borno, *al-Wajīz*, 21.

<sup>21</sup> Abdurrahman bin Abibakr Al-Suyūti, *Al-Ashbāh wa Al-Nazā'ir*, 201, Ibn Nujaim, *al-Ashbāh*, 115; Al-Borno, *al-Wajīz*, 384; Ahmad bin Muhammad Al-Zarqā, *Sharh al-Qawā'id al-Fiqhiyya*, (Damascus: Dar al-Qalam 1409H / 1989), 155.

<sup>22</sup> Al-Borno, *al-Wajīz*, 21-22.

<sup>23</sup> Ali Ahmad Al-Nadawī, *Mausū'at Al-Qawā'id wa Al-Dawābit Al-Fiqhiyyah*, vol. 1, (Riyadh: Al-Rajih Investment Bank 1999/1419H), 390.

jurisprudence it is discussed by jurists while discussing the general legal status of things upon which the law is silent as a form of *istiṣhāb* (presumption of continuance). On the part of legists (*fuqahā'*) too, the maxim is used in reference to the legality of specific issues upon which the law is silent and such things have not violated any provision of the law nor are they harmful.<sup>24</sup>

Another difference between jurisprudence and legal maxims is that to apply a rule of jurisprudence to a particular matter, one needs the supporting evidence; while a legal maxim can be directly applied to a specific conduct. An example is that the maxim "Certainty is not overruled by doubt" implies that whenever a person who is certain of his previous state of purity will ignore any suspicion raised in his heart that he may be impure. But a maxim of jurisprudence such as "A mere command devoid from any exception implies obligation" does not imply obligation of prayer or zakat but through supporting evidence like the Saying of Allah's orders:

"And establish Prayer and give Zakat"<sup>25</sup>.<sup>26</sup>

## 2. Legal Maxim (*Qā'ida Fiqhiyya*) and Resemblances and Similitudes (*al-Ashbāh wa al-Naẓā'ir*)

It can be noticed that some literatures dealing with legal maxims were titled *al-Ashbāh wa al-Naẓā'ir*. Earliest written book named thus is *Ta'sīs al-Naẓā'ir* by Abu al-Layth al-Samarqandī.<sup>27</sup> After this, it was in the eighth century of Hijri that Sadr al-Dīn ibn al-Wakīl wrote his *al-Ashbāh wan-Naẓā'ir*<sup>28</sup> as the first ever book with such title.<sup>29</sup>

Lexically, both the words *shabīh* (singular of *ashbāh*) and *naẓīr* (singular of *naẓā'ir*) are synonymous in their meanings; as both mean *similitude*. To jurists however, *shabīh* denotes greater similarity than *naẓīr*. Al-Suyūti in one of his *fatwas* states that *mushābaha* is the sharing several similarities; while even single similarity is referred to as *munāẓara*.<sup>30</sup> Therefore, *al-Ashbāh* which is described as facts that

<sup>24</sup> On the general distinction between the jurisprudential principle and maxim of law see Al-Qarāfī, Shihābuddīn Ahmad bin Idris Al-Malikī. *Anwār Al-Burūq fī anwā' al-Furūq*, vol. 1, (Mu'assasat al-Risālah 2003/1424), 62.

<sup>25</sup> Qur'an 2:43.

<sup>26</sup> Al-Dausari, *Al-Mumti'*, 23-24

<sup>27</sup> Al-Bāhusain, *Al-Qawā'id*, 318.

<sup>28</sup> *Ibid.*, 324.

<sup>29</sup> *Ibid.*, 489

<sup>30</sup> *Ibid.*, 91.

have similar forms and injunctions is another title of legal maxims (*Qawā'id al-Fiqhiyya*).<sup>31</sup> Aside from that *Nazā'ir* involves facts that are similar in form but have different injunctions. This is a role played by a different field of *fiqh* namely *al-Furūq al-Fiqhiyya* (Discordances).<sup>32</sup>

### 3. Legal Maxim (*Qa'ida Fiqhiyya*) and Controlling Rule (*Dābiṭ*)

A term closely related to a maxim (*Qā'ida*) is Controlling Rule (*dābiṭ*). While a maxim applies to most of its related particulars, which are scattered in various themes or chapters of *fiqh*, a *dābiṭ* applies to particulars under one theme or chapter. In other words, a *dābiṭ* is limited to one chapter and it provides a legal principle on injunctions of a particular chapter of *fiqh*. According to Al-Suyūṭi, a maxim collects auxiliaries from different chapters while *dābiṭ* collects auxiliaries of the same chapter.<sup>33</sup> An example of *dābiṭ* is: "Anything that will be considered in the prostration of Prayer will also be considered in the Prostration of Recitation" (*Kullu mā yu'tabar fī sujud al-salāti yu'tabar fī sujud al-tilāwah*). This *dābiṭ* is applicable to the chapter of prayer alone.<sup>34</sup> Likewise, the saying of Imam Malik, "No one inherits another through doubtful (cause)" (*Lā yarithu ahadun ahadan bil-Shakki*)<sup>35</sup> is another *dābiṭ* that only applies in the Chapter of Inheritance. Another example of *dābiṭ* applicable in contracts is: "every *māl* (property) that is *mutaqawwim* (legally valuable) can be an object of contract" (*kullu mā kāna mālan mutaqawwiman jāza an yakūna mahallan li al-'aqd*).<sup>36</sup> This *dābiṭ* is applicable to the chapter of contracts (*uqūd*).

### 4. Legal Maxim (*Qa'ida Fiqhiyya*) and Legal Theories (*Nazariyya Fiqhiyya*):

A recent development in the literature of Islamic jurisprudence has appeared in modern writings under the general designation of *al-naẓariyyah al-fiqhiyyah*, or legal theories. *Nazariyyah* in this context implies a self-contained and comprehensive treatment of an important

<sup>31</sup> Jumu'a, *al-Qawā'id*, 31.

<sup>32</sup> *Ibid.*, 31.

<sup>33</sup> Al-Bāhusain, *Al-Qawā'id*, 60.

<sup>34</sup> Jumu'a, *al-Qawā'id*, 12.

<sup>35</sup> Al-Bāhusain, *Al-Qawā'id*, 301.

<sup>36</sup> AbdulMajīd Abdullah Dayyah, *Al-Qawā'id wa al-Dawābiṭ al-Fiqhiyyah li Ahkām al-Mabī' fīsh-Sharī'at al-Islamiyyah* (Ph.D. Dissertation, University of Jordan 2002), 38.

area of law, such as *nazariyyat al-'aqd* (theory of contract), *nazariyyat al-milkiyyah* (theory of ownership), *nazariyyatu al-darūrah* (theory of necessity) and so forth.<sup>37</sup> While a maxim provides a general rule that brings together scattered matters from several themes, a *nazariyya* (legal theory) analyses all legal issues under a particular subject matter, which may include many maxims related to that theme. An example is a *nazariyyat al-'aqd* (theory of contract) which investigates legal principles, terms conditions, general legal injunctions related to different types of contracts by studying all aspects of contract as covered in various schools of thought in different chapters of *fiqh* and incorporation of modern *fatwās* and resolutions of Fiqh Academies (*Majāmi' Fiqhiyyah*) around the world.

### Importance of Legal Maxims

Shihābuddīn al-Qarāfī of the Maliki school of thought has eloquently captured the importance of maxims in the following statement:

These maxims are of great status and importance in jurisprudence; and the ability to encompass them is proportional to the status of a jurist. The beauty of *fiqh* becomes evident (with its knowledge) and the processes of *fatwā* will be clearer. Great scholars and the nobles have competed to reach its knowledge. The learned is distinguished from the layman and only the well versed wins its reach. He who extracts branches based on particular incidents without general rules to rely upon, will find his auxiliaries contradictory and his thoughts confused; and as a result will find himself depressed and hopeless. Such a man will need to memorise unending particulars and his life will end without reaching his objective. But he who encompasses jurisprudence with its maxims, will not need to memorise most particulars as they fall under the general principles. To him, contradictory statements of others will be in conformity with each other.<sup>38</sup>

Some of the notable importance of *Qawā'id* according to several jurists can be seen in the following:

- i. Legal maxim brings together widely scattered auxiliaries of *fiqh* into a simple abstract rule. It makes it easy for jurists,

<sup>37</sup> Kamali, *Qawā'id*, 5.

<sup>38</sup> Al-Qarāfī, *al-Furūq*, vol. 1, 61-62.

researchers and students to find specific injunctions saving time in research. That is why, according Al-Suyūti, some jurists refer to *fiqh* as knowledge of similitudes. Therefore, *qawā'id* makes it easier to diagnose juristic injunctions, comprehend and memorise auxiliaries and particulars of the law.<sup>39</sup> Sheikh Al-Zarqā asserts that, if not because of these maxims, injunctions of Sharī'ah would have remained scattered auxiliaries that seemingly contradict each other with no common root that bind them together.<sup>40</sup> Therefore, studying one maxim will take one to several injunctions of the *fiqh* which are of different themes that the reader may not be aware of.

- ii. A learner's mental capability is developed to comprehend *fiqh* making it possible for one to link matters together and know Sharī'ah injunctions of arising matters that have no explicit legal provision. This was the reason why al-Qarāfī described as "*continuously supplying (knowledge)*."<sup>41</sup> This is because the knowledge of the common link between various injunctions makes a reader aware of the basis or rationale behind such injunction.
- iii. Because legal maxims, the five universal ones in particular, are a representation of objectives (*maqāsid*) of Sharī'ah, they are considered conducive tools for *ijtihād*, and they may as well be utilised by a Judge and a *Mujtahid* as a basis for deducing rules or legal injunctions of *nawāzil* (new occurrences). In fact, Ibn Nujaim affirmed that a jurist will only reach status of *mujtahid* with the knowledge of Maxims as it is the ladder for reaching the top even in *fatwas*.<sup>42</sup> In the same way, Al-Qarāfī described it as "*constituent of the secrets and wisdoms of the Sharī'ah*."<sup>43</sup> Ibn AbdulBarr described them thus, "*the functions of these principles have become obvious. So apply (their implications to) cases that have similar meaning with them and you will be accurate by*

<sup>39</sup> Al-Suyūti, *al-Ashbāh*, 6.

<sup>40</sup> Mustafā Ahmad Al-Zarqā, *Al-Madkhal Al-Fiqhi Al-Āmm*, vol. 2, (Damascus, Dār Al-Qalam 1998/1418), 943.

<sup>41</sup> Al-Qarāfī, *al-Furūq*, 62.

<sup>42</sup> Muhammad Abdurrahman Al-Mar'ashli, *Tatawwur al-Qawā'idil Fiqhiyya min Zāhira ilā 'Ilm wa Atharu dhalika fil Fiqh Islamiyy*, 23. Accessed November 17, 2012, [elibrary.mediu.edu.my/books/MAL04930.PDF](http://elibrary.mediu.edu.my/books/MAL04930.PDF) on 17/11/2012.

<sup>43</sup> Al-Qarāfī, *al-Furūq*, vol. 1, 62.

*the will of Allah; as they are principles that have closely intertwined meanings, take note of its principle.”*<sup>44</sup>

Ibn al-Qayyim also said that what made a jurist unique is that whenever an incident happens he will quickly realise under which general injunction, that both he and other jurists know, put such an incident.<sup>45</sup>

- iv. It saves a learner from falling into the pit of contradiction; for if one keeps looking for auxiliary injunctions alone without attributing them to collective principles, it will be easy for one to slip and contradict himself.<sup>46</sup>
- v. It also makes it easy for lawyers and judges who are not experts in Islamic law to take a glimpse into its spirit and constituent.<sup>47</sup> The reason is that within the duration of the study of lawyers and judges, there is no time to treat most themes of fiqh but through brief and abridged methodologies. The knowledge of maxims will enhance this methodology by bringing together scattered injunctions under abstract principles that can be easily memorised.

## SOURCES OF LEGAL MAXIMS

Sources of Legal Maxims are of three categories:

### a. The Holy Qur'an

The noble Qur'an consists of general principles, rules and injunctions in its provisions; and these became the starting point for scholars to derive legal maxims that encompass the objectives of the Law Giver. Because of its status as the main source of Islamic law, maxims that are direct texts of Qur'an are of the highest authority. Verses in the Qur'an employed by jurists as maxims include:

<sup>44</sup> AbdulBarr, Y. A. M. Q., *Al-Tamhīd li mā fī Al-Muwaṭṭa' min al-Ma'ānī wa Al-Asānīd*, vol. 20, (Mu'assasat Al-Risālah: n.d.), 61.

<sup>45</sup> Muhammad bin Abibakar Ibn al-Qayyim al-Jauziyya, *Ighāthatul Lahfān*, vol. 2, (Beirut: Dār Al-Kutub Al-Ilmiyyah, n.d.), 120.

<sup>46</sup> Ibid, 3.

<sup>47</sup> Su'ād Auhāb, *Al-Masā'il al-Mustathnāh min al-Qawa'id al-Fihiyyatil Āmmah wa asbāb istiṭhnā'ihā*, (Masters Theses, University of Algeria 1426H/2005), 94; Azeeza Akūsh, A., *Al-Qawa'id al-Fihiyya al-Mustakhlasa min Kitāb Usool al-Fityaa li al-Khushanī*, (LL.M Theses, University of Algeria 1422H/2001), 144.

i. Surah 2:275:

And Allah hath permitted trade and forbidden usury.<sup>48</sup>

Despite its abstract nature, these words brought all permissible forms of trade and secluded the forbidden ones in a general provision.<sup>49</sup>

ii. Surah 7:199

Hold to forgiveness; command what is right; but turn away from the ignorant.<sup>50</sup>

According to al-Qurtubi, this verse is a constituent of basic *Shari'ah* rules regarding permissible and prohibited acts in three simple sentences. It is also a general rule for good character or morality.<sup>51</sup>

iii. The Saying of Allah, Most High:

And do not eat up your property among yourselves for vanities.<sup>52</sup>

This verse is also a comprehensive rule that forbids any action or transaction that leads to misappropriation of peoples' money, spending it in a manner not approved by Allah and His Messenger, such as theft, misappropriation, illegal enrichment, etc.<sup>53</sup>

Other verses also serve as an inspiration and supporting evidence for many other maxims. The following examples may be cited:

iv. The verse:

<sup>48</sup> al-Qur'an 2:275.

<sup>49</sup> Muhammad Sidqī bin Ahmad Al-Borno, *Mausu'at al-Qawa'id al-Fiqhiyya*, vol. 1, (Beirut: Resalah Publishers, 1424H/2003), 36.

<sup>50</sup> al-Qur'an 7:199.

<sup>51</sup> Al-Qurtubi, M. A. A. F. A., *Al-Jami' li Ahkām al-Qur'an*, vol. 7, (Beirut, Darul Kitāb al-Arabi 1387H), 344. See also: Al-Biqā'i, B. A. I. U., *Nuzmu al-Durar fi Tanāsib al-Āyāti wa al-Suwar*, vol. 9, (Cairo, Maktabat Ibn Taimiyya 1389H), 203.

<sup>52</sup> al-Qur'an 2:188.

<sup>53</sup> Al-Borno, *Mausū'ah*, vol. 1, 36.

But most of them follow nothing but Conjecture: truly Conjecture can be of no avail against truth.<sup>54</sup>

This verse is used as a supporting evidence of the maxim “Certainty is not overruled by doubt.”

v. The verse 2:282

Let him who incurs the liability dictate.<sup>55</sup>

This verse is used as a supporting verse for the maxim: “A person is bound by his own admission” (*Al-mar’u mu’ākhadhun bi iqrārih*).<sup>56</sup>

vi. The verse:

... and (Allah) has imposed no difficulties on you in religion.<sup>57</sup>

This verse is one of the inspirations of the maxim: “*Hardship begets facility.*”

vii. The maxim: “*Inception into an Act of Worship obliges concluding it*” (*Ash-shurū’u fil Ibādati yūjibu itmāmuhā*)<sup>58</sup> is also derived from the saying of Almighty Allah:

O you who believe! Obey Allah, and obey the Messenger, and make not vain your deeds!<sup>59</sup>

## b. Sunnah: the Prophetic traditions

Like the Holy Qur’an, the Prophetic traditions are also rendered as maxims just as they serve as inspiration of many other maxims. It is a known fact that the Prophet, peace and blessing of Allah be upon him, has said in a Hadith narrated by Abu Huraira, may Allah be pleased

<sup>54</sup> al-Qur’an 53:28.

<sup>55</sup> al-Qur’an 2:282.

<sup>56</sup> The Othoman Turkish defunct Mejlle on Civil Law, Art. 78, Al-Zuhaili, *al-Qawā’id*, vol. 1, 574; Al-Zarqā, A. M., *Sharh Al-Qawā’id Al-Fiqhiyyah*, (Dār Al-Qalam 1409H/1989), 401,

<sup>57</sup> Qur’an 22:78.

<sup>58</sup> Muhammad Al-Rūki, *Nazariyyatut Taq’id Al-Fiqhi*, (Al-Najāh Al-Jadīda, Casablanca 1994) 394.

<sup>59</sup> Qur’an 47:33.

with him: “*I am sent with collective expressions.*”<sup>60</sup> These are abstract rhetoric sentences, few words that consists of several Islamic lessons. The following prophetic ahādīth consist of general rules of the law used as legal maxims by jurists:

- i. The Prophetic tradition that says: “*Every intoxicant is forbidden.*”<sup>61</sup> It means that every substance, whether naturally occurring or artificially created, that intoxicates the mind is forbidden in Islam.
- ii. “*No harming and no counter-harming.*”<sup>62</sup> This Hadith, employed as one of the five universal Islamic maxims, forbids all actions that cause illegal detriments to the other, either by form of initiation or as a reprisal for a similar harm.
- iii. “*Muslims are to oblige unto conditions they agreed between themselves*” (*Al-Muslimūna 'alā shurūṭihim*).<sup>63</sup> The Hadith means that all terms and conditions agreed upon by contracting parties must be obliged to, with the exception of those conditions that permits what Allah has forbidden or

<sup>60</sup> Muhammad bin Isma'il bin Ibrahim bin al-Muhghīrah Al-Bukhārī, *Sahīh Al-Musnad al-Sahīh*, vol. 4, (Riyadh, Darussalam 1997), Hadīth No. 2977, 54; and Muslim bin al-Hajjāj bin Muslim al-Qushairī al-Naisābūrī, *Al-Jāmi' al-Sahīh*, Hadīth No. 523, vol. 1, 371. *Jawāmi'ul Kalim* (lit. Collective expressions) are simple words that encompass several meanings and different injunctions that Almighty Allah has endowed His Prophet, peace and blessing of Allah be upon him. (See: Al-Bukhārī, 'A. A. A., *Kashf Al-Asrār 'an Uṣūl Fakhr Al-Islām Al-Bazdawī*, vol. 3, (Dār Al-Kutub Al-'Arabīyyh 1414H/1994), 117).

<sup>61</sup> Transmitted by Muslim and Dar-Qutni from Ibn Umar. Also transmitted by Ahmad, Muslim and in the following words: “every intoxicant is an alcohol and every alcohol is forbidden”. It is also narrated from prophet’s companions like Anas bin Malik, Umar bin Khattab, Qurrah bin Iyas, Maimuna, Abu Musa al-Ash’arī, etc, may Allah be pleased with them. They narrators of this hadith has reached up to twenty six companions of the Prophet as stated in *Tuhfat al-Fuqaha’*. Wabbah Al-Zuhailī, *Al-Fiqh al-Islamiyy wa Adillatuhu*, vol. 7, (Dār Al-Fikr: 2007), 5486.

<sup>62</sup> Muhammad bin Yazīd bin Mājah al-Qazwīnī, *Sunanu Ibn Mājah*, (Dar al-Fikr 1424H/2003), 542, Hadīth No. 2340; Ahmad bin Hanbal Al-Shaibānī, *Al-Musnad*, vol. 5, (Al-Maktab Al-Islāmī: n.d.), 326-327; but its chain of narration is weak. However, the hadith has several other supporting authorities which strengthen each other and for this it was declared authentic by several scholars. (Al-Hāfīz Abu al-Faraj Ibn Rajab al-Hanbalī, *Jāmi' al-'Ulūm wa al-Hikam fī Sharh Khamsīna Hadīthan min Jawāmi' al-Kalim*, vol. 2, (Al-Arnā'ūt, S.; Bājis, I., ed, Beirut, Mu'assasat al-Risālah 1411H/1991), 207-211.

<sup>63</sup> Al-Tirmidhī, Muhammad bin Isā Al-Salamī, *Al-Sunan*, vol. 3, (Dār Ihyā Al-Turāth Al-Arabī: n.d.), 635. See also: Ibn Mājah, *Sunan*, Hadīth No. 2353.

forbids what Allah permits as another version of the Hadith has indicated.<sup>64</sup>

Other Prophetic traditions that inspire maxims include:

- i. The maxim: “*The feasible is not dropped by the difficult*”<sup>65</sup> (*Al-maisūru la yasquṭu bi al-ma’sūr*). According to Al-Subkī, it is one of the celebrated maxims drawn from the saying of the Prophet, peace and blessing of Allah be upon him, “*If I command you with something do it to your ability*.”<sup>66</sup>
- ii. “*Harm be removed*” (*Al-dararu yuzāl*)<sup>67</sup> is derived from the saying of the Prophet, peace and blessing of Allah be upon him, “*No harming and no counter-harming*.”<sup>68</sup>

### c. *Ijtihād* (Independent legal reasoning)

Maxims are also derived through extraction of general rules based on the previous primary sources of Islamic law and through other means such as principles of Arabic language and logical inferences. *Istiqrā* (induction) is the methodology employed to analyse particulars that resemble each other to understand the relationship between them.<sup>69</sup> This sort of extraction represents the bedrock of the derivation of legal maxims; and in fact, all other general rules.<sup>70</sup> That is the injunctions of the particulars will be the basis for the general rule a maxim provides.<sup>71</sup>

Examples maxims derived by *ijtihād* include:

<sup>64</sup> Al-Nadawi, *Mausū’at*, 86-87.

<sup>65</sup> Taj al-Deen AbdulWahhab bin Abdil Kaafi Ibn Al-Subki As-Shafi’i *Al-Ashbāh wa al-Nazā’ir*, vol. 1, (Beirut: Dar al-Kutub al-Ilmiyya 2011), 155, Saleh bin Ghānim Al-Sadlān, *Al-Qawā’id Al-Fiqhiyyah Al-Kubrā, wa mā tafarra’a anhā*, (Riyadh, Dar Bilansiyyah 1417H), 310; Al-Borno, *Mausū’ah*, vol. 11, 1155.

<sup>66</sup> Al-Subki, *al-Ashbāh*, 155. The Hadith is narrated by Bukhari Hadith No. 7288, vol. 9, 94.

<sup>67</sup> Majalla, Art. 19.

<sup>68</sup> Ibn Mājah, *Sunan.*, Hadith No. 2340.

<sup>69</sup> Al-Bāhusain, *Al-Qawā’id*, 211; Ya’qub bin AbdulWahhab Al-Bāhusain, *Turuq al-Istidlāl wa Muqaddimatuhā inda al-Fuqahā’i wa al-Uşūliyyīn*, (Riyadh, Maktabat Al-Rushd 1422H/2001), 289.

<sup>70</sup> Al-Bāhusain, *Al-Qawā’id*, 211.

<sup>71</sup> Karīm Mattā, *Al-Mantiq*, (Baghdad, Matba’at Al-Rashīd 1970), 146.

- i. “*Hardship begets facility*” (*Al-Mashaqqatu tajlibut Taisir*)<sup>72</sup>: This is one of the universal maxims that has been applied to many particulars in Shari’ah.<sup>73</sup> It is also considered one of the five universal maxims of *fiqh*. Its foundations are the texts that provide lifting difficulties and easing in cases of hardships. These include breaking the fast of a sick and a traveller, to fast at a later time, reduction of number of units of prayer and praying two prayers at the same time, permitting a person pushed by necessity to eat a dead meat,<sup>74</sup> etc, as can be seen later in this work.
- ii. “*Certainty is not overruled by doubt.*”<sup>75</sup> This maxim is deduced along with other textual provisions from the statement of Prophet, peace and blessing of Allah be upon him that a man complained to the Prophet, peace and blessing of Allah be upon him that he gets a feeling of something exiting his body. The Prophet, peace and blessing of Allah be upon him told him, he should not live (his prayers) until he hears a sound or smells the gas).<sup>76</sup> Another authority which implied it is the saying of Allah:

Truly conjecture can be of no avail against truth.<sup>77</sup>

- iii. No *ijtihad* is valid in the availability of (evident) text (*Lā ijtihāda fī maurid al-Naşş*).<sup>78</sup> This maxim forbids any *ijtihad* to make a law in the availability of clear and explicit text from the Qur’an and Sunnah. Such *ijtihad* will be judged null and void.

<sup>72</sup> Majalla, Art. 16; Izzuddin AbdulAziz bin Abdussalam, *Qawā'id al-Ahkām fī Işlāh al-Anām*, vol. 2, (Hamād, N.K., Dumairiyah, U.J. eds, Damascus, Dar al-Qalam 1421H/2000), 2-14; Ibn Al-Subki, *Al-Ashbāh* 48-49, Al-Suyutī, 76, Ibn Nujaim, *al-Ashbāh*, 75, Al-Zarqā, *Sharh*, 105.

<sup>73</sup> Al-Bāhusain, *Al-Qawā'id*, 211.

<sup>74</sup> Ibid.

<sup>75</sup> Ibn Al-Subkī, *Al-Ashbāh*, 50, Ibn Nujaim, *Al-Ashbāh*, 55, Majalla, Art. 5; Al-Borno, *Al-Wajiz*, 166.

<sup>76</sup> Muslim, Ibid vol. 1, 276, Hadith No. 362.

<sup>77</sup> Qur'an 10:36.

<sup>78</sup> Al-Borno, *al-Wajiz*, 381; Al-Zarqā, *Sharh*, 147.

## Classification of Maxims

Depending on their scope or comprehensiveness, legal maxims are classified into the following categories:

### ***1. Universal Legal Maxims (Al-Qawā'id al-Fiqhiyyah al-Kubra)***

The most comprehensive and broadly based of all maxims are known as "*al-Qawā'id al-Fiqhiyyah al-Kubrā*", or the universal legal maxims, and they apply to the entire range of *fiqh*. The four schools of Islamic jurisprudence are generally in agreement over them though they have differed in some particulars. The early 'ulamā have singled out about five of these to say that they grasp between them the essence of the Shari'ah as a whole, and the rest are simply an elaboration of these.<sup>79</sup> These are: "*Matters are (judged) by their intents*" (*Al-Umūru bi-maqāsidihā*),<sup>80</sup> "*Certainty is not be overruled by doubt*" (*Al-Yaqīnu la yazūlu bish-shakki*),<sup>81</sup> "*Hardship begets facility*" (*Al-Mashaqqatu tajlibu Al-Taisīr*),<sup>82</sup> "*No harming and no counter-harming*" (*Lā darara wa lā dirara*),<sup>83</sup> and "*Custom is Authoritative*" (*Al-'Ādatu Muhakkamah*).<sup>84</sup>

### ***General Legal Maxims (Al-qawā'id al-Fiqhiyyah al-Kulliyya)***

These are maxims that have wide application in many chapters of *fiqh*. All the schools of thoughts are in agreement regarding them, but are not as comprehensive as the universal maxims.<sup>85</sup> Examples are "*The enjoyment of a thing is the compensating factor for any liability attaching thereto*"<sup>86</sup> (*al-kharāju bi al-damān*) and "*An accessory which is attached to an object in fact is also attached to it in law*" (*Al-Tābi'u tābi'un*).<sup>87</sup> Some of these maxims are auxiliaries of the

<sup>79</sup> Kamali, *Qawā'id*.

<sup>80</sup> Al-Sarakhsi, Abubakar, Muhammad bin Ahmad *Al-Mabsūt fil Fiqh al-Hanafī*, vol. 6, (Beirut: Dar al-Ma'rifa 1406H), 59 and vol. 19, 139.

<sup>81</sup> Ibn Al-Subki, *al-Ashbāh*, 50; Ibn Nujaim, *al-Ashbāh*, 55; Majalla, Art. 5; Al-Borno, *Al-Wajīz*, 166.

<sup>82</sup> Abdussalam, I.A., *Qawā'id al-Ahkām fi Islāh al-Anām*, vol. 2, (Hamād, N.K., Dumairiyah, U.J. eds, Damascus, Dar al-Qalam 1421/2000), 13-21; Ibn Al-Subki, *Al-Ashbāh*, vol. 1, 48-49;

<sup>83</sup> Al-Borno, *Al-Wajīz*, 251; and Al-Borno, *Al-Mausū'ah*, vol. 8, 873.

<sup>84</sup> Ibn Al-Subki, *al-Ashbāh*, 50-54.

<sup>85</sup> Al-Zuhāili, *al-Qawā'id*, 32.

<sup>86</sup> Majalla, Art. 85.

<sup>87</sup> Majalla, Art. 47.

universal maxims such as the maxim “necessity renders prohibited things permissible (*Al-darūrātu tubīḥ al-mahzūrāt*)”.<sup>88</sup>

Most of the maxims the Ottoman Turkish Law of 1293H/1876, *Majallat al-Ahkām al-Adliyyah*<sup>89</sup> are of this category. They may also have their own auxiliary maxims.<sup>90</sup> The maxim of original lawfulness, *al-aşlu fī al-ashyā'i al-ibāhah* is under this category.<sup>91</sup>

### ***Auxiliary Legal Maxims (Qawā'id Far'iyyah)***

These are maxims that are directly related to universal or general maxims. They are also not standalone maxims. Examples are:

1. The maxim: "*In contracts, effect is given to intention and meaning and not words and forms*" (*Al-'ibratu fil uqūdi lil maqāsidi wal ma'ānī lā lil alfāzi wal mabānī*) which is related to the universal maxim: Matters are judged by their intents.
2. The maxim "*The norm is that the status quo remains as it was before*", (*Al-Aşlu baqā'u mā kāna alā mā kāna*)<sup>92</sup> is auxiliary to the maxim: Certainty is not overruled by doubt.
3. The maxim "*Harm should be removed*" is auxiliary of the universal maxim: *No Harming and No Counter-harming*.
4. The maxim: "*A reference to a part of an indivisible thing is regarded as a reference to the whole*" (*Dhikru ba'di mā lā yatajazza' ka dhikrihi kullih*)<sup>93</sup> is Auxiliary to the general

<sup>88</sup> Majalla, Art. 21.

<sup>89</sup> The Mejlle is the first ever codification of Islamic law enacted during the Turkish Ottoman Empire in *Majallatul Ahkām Al-Adliyya* (a.k.a. the *Mejlle*). It came into force in 1293H (1876G). It consists of 1851 Articles starting with definition and classification of *fiqh* in article (1) followed by ninety-nine maxims from Article (2) to (99) based on preferred opinions of the Hanafi school of thought. It was applied in the territories under the Turkish Empire where it was also taught in high Institutions. Even though the *Mejlle* has ceased to exist as a binding law, it has continued to attract a significant attention from modern researchers of Islamic law. This may be due to the fact that it has not been adulterated by desires of secular leaders yielding to pressures of western powers as is the case in many contemporary codifications. Al-Zuhailī, M. *Al-Qawā'id al-Fiqhiyyah wa Taḥiqāt fī Al-Madhāhib Al-Arba'ah*, (Damascus, Dār al-Fikr 1427H/2006), 5-6.; Al-Zarqā, *Sharh*, 41.

<sup>90</sup> Al-Zuhaili, *al-Qawā'id*, 32.

<sup>91</sup> Al-Borno, *Al-Wajīz*, 191-197; Al-Dausarī, *Al-Mumtī'*, 141-144.

<sup>92</sup> Ibn Al-Subki, *al-Ashbāh*, 13, Al-Suyūṭī, *al-Ashbāh*, 51.

<sup>93</sup> Ibn Al-Subkī, *al-Ashbāh*, vol. 2, 154; Al-Suyūṭī, *al-Ashbāh*, 297, Ibn Nujaim, *al-Ashbāh*, 189; Al-Zarqā, *Sharh*, 322; Al-Borno, *Al-Wajīz*, 323,

maxim: “a *Statement should be construed as having some meaning, rather than disregarded*” (*I’ mālul Kalāmi aulā min ihmālih*).<sup>94</sup>

Where auxiliary maxims only applies in specific chapters of *fiqh* they are *ḍābiṭ* (controlling rule) but if they apply to different chapters they remain *qawā'id* (maxims).<sup>95</sup>

### ***Maxims ascribed to Certain Schools of thought (Qawā'id Madh'habiyah)***

Apart from the general maxims which all schools subscribe to, there are also maxims that are only exclusive to some schools. These are of two types according to Al-Zuhaili: maxims agreed upon within a school of thought and the second are maxims to which there are disagreements regarding them in the particular school of thought. For example the maxim: “*In contracts, effect is given to intention and meaning and not words and forms*” (*al-ibratu fi al-uqūdi li al-maqāsidi wal ma'ānī lā lil alfāzi wal mabāni*)<sup>96</sup> is generally applied in both Maliki and Hanafi schools of thought, but of minor applications in the Shafi'i school. Also the maxim: “*Any one, who hastens the accomplishment of a thing before its due time, is punished by being deprived thereof*” (*Man ista'jala shai'an qabla awānihī 'uqiba bihirmānihī*)<sup>97</sup> is also generally applicable in Hanafi, Maliki and Hanbali schools of thought, but rarely applied in Shafii. Likewise, the maxim: “*Facility is not obtained through sinful acts*” (*al-Rukhaṣu lā tunaṭu bi al-ma'āṣi*)<sup>98</sup> is widely used in Shafi'i and Hanbali, but not as much in Hanafi; while in Malikiyya there are conditions for its applications.<sup>99</sup>

### **Maxims as Legal Authority**

Scholars are unanimously in agreement that maxims whose origin is from the Noble Qur'an and Sunnah can be used as legal authority to prove injunctions (*ahkām*). The authority of these maxims emanates

<sup>94</sup> Mejelle, Art. 59, Al-Zuhaili, vol. 1, 356.

<sup>95</sup> Akūsh, *al-Qawā'id*, 133.

<sup>96</sup> Mejelle, Art. 3.

<sup>97</sup> Mejelle Art. 99.

<sup>98</sup> Al-Zuhaili, *al-Qawā'id*, 721.

<sup>99</sup> Ibid, vol. 1, 33.

from their sources, the Qur'an and Sunnah. In other words, they are legal authorities before they became maxims. Example of such maxim is the maxim: "*Matters are (judged) by their intentions.*" Its authority emanates from the prophet's traditions in which he said: "Actions are (judged) by their intentions".<sup>100</sup>

But other maxims that were as a result of jurists' usage of inductive (*istiqrā*) method to extract injunctions of such matters, most scholars only accept it as persuasive evidence or testimony to certify their decisions. The Ottoman Turkish Majallah for example asserts that "*Unless they have other clear supporting evidence from revealed text, do not totally depend in their judgement on a single maxim.*"<sup>101</sup>

A second group of jurists have however fully embraced legal maxims as legal authorities or source of law for injunctions (*ahkām*), despite what is been said of some of its particulars being exceptions.<sup>102</sup> This is mostly seen among jurists of Malikiyya. Al-Qarāfi, for example, has indicated legal maxims as a source of *Shari'ah* law, as he made it a counter-part of principles of Jurisprudence (*Qawa'id Usūliyyah*). He specifically pointed its importance in *fatwa* and judgement: A judgement that contradicts an established *qā'idah* should be set aside. He put forward an example in the circular<sup>103</sup> case of Suraijiyya<sup>104</sup> because it contradicted a famous maxim: "*One of the conditions (for the validity) of a stipulation is its co-existence with that which it stipulated*" (*Min shart al-Shart*

<sup>100</sup> Akūsh, *al-Qawā'id*, 97; Jumu'ah, *al-Qawā'id.*, 10; Al-Bahusain, *Al-Qawa'id*, 265.

<sup>101</sup> *Majjalat al-Ahkam al-Adliyya*, 11.

<sup>102</sup> Akūsh, *al-Qawā'id*, 97.

<sup>103</sup> Its circular nature is that whenever he divorces her, then there were three divorces before it; and if there were three divorces then this later one is invalid because it is ineffective. The existence of the earlier negates the later [Taj al-Deen AbdulWahhab bin Abdil Kaafi Ibn Al-Subkī Al-Shafi'i, *Ṭabaqātu al-Shafi'iyyat al-Kubrā*, vol. 9, (Beirut, Dar al-Ma'rifah n.d.), 246-247.

<sup>104</sup> This is a case attributed to Abu al-Abbās Ahmad bin Umar bin Suraj (d. 306H), a Shafi'i Jurist. In the case he was asked if a man proclaims to his wife that whenever I divorce you once, then it is a divorce preceded by three divorces. Ibn Suraj's *fatwā* was that a divorce does not occur. Ibn Taimiyya in his *Al-Qawa'id Al-Nuraniyya* narrated consensus of Muslim jurists that divorce has indeed occurred in the case (See ibn Taimiyya, *Al-Qawa'id Al-Nuraniyya* on his quashing of the Suraijiyya *fatwa*, 283-284. The reason of those who effect the divorce is that anything whose presence negates its existence is invalid. As a result, such stipulation is invalid and regarded as even not uttered and divorce occurs (See: Al-Borno, *Mausū'a*, vol. 11, 1014).

*Ijtimā'uhu ma'a al-Mashrūf*);<sup>105</sup> and the Suraijiyya condition will never coexist with its stipulation.<sup>106</sup> Therefore, the following points can be noted based on this opinion:

1. Where a maxim is related to a provision of the text (Qur'an and Hadith) or the consensus of Muslim scholars (*ijmā'*), then it is binding legal evidence that can be relied upon. It will be regarded thus not because it is a maxim but because it is a legal evidence dependent on the text.
2. A legal maxim is persuasive evidence along with the provisions of the text as injunction to a newly occurring incident as analogy to the recorded incident.
3. A legal maxim can be legal evidence where there is no legal provision of the text. It is however conditional that the person who uses it in such manner should be a jurist who comprehends its applications and exceptions as well as the reason for that.
4. It is a legal evidence for a student for the injunction of *fiqh* to be in his memory.<sup>107</sup>

### Conditions for the Application of Maxims on Specific Issues

The validity of maxim to serve as legal authority is nevertheless regulated by several conditions. The jurists are of the opinion that these conditions will ensure the validity of any inference in which a maxim is used.

- i. The validity of the *qā'idah* intended to regulate a specific matter must be established through induction (*istiqrā'*). This will guarantee that a principle based on illusion that has no *Sharī'ah* basis shall not be used in regulating facts.<sup>108</sup>

<sup>105</sup> Al-Qarāfī, *Al-Furūq*, vol. 1, 75; Al-Borno, *Mausū'ah*, vol. 1, 1014.

<sup>106</sup> Al-Bāhusain, *Al-Qawā'id*, 269.

<sup>107</sup> Al-Dausarī, *Al-Mumtī'*, 65.

<sup>108</sup> Muhammad bin Zain al-'Abidīn, Rustum, "I'māl al-Qawā'id al-Fiqhiyyah li-stinbāt Hukm al-Qaḍāyā al-Fiqhiyyah al-Mustajiddah", *A paper presented at a Conference "Towards the Original Method in the Study of Contemporary Legal Issues"* (Markaz Al-Tamayyuz Al-Bahthī (Centre for Specialized Research) at the Imam Muhammad bin Su'ūd Islamic University, Riyadh, from 13-14/05/1431H), p. 837. Retrieved from: <<http://www.saa'id.net/book/open.php?cat/96&book/10040>> on 12/05/2011. See also: Al-Bāhusain, *Al-Qawā'id*, 175-178; Al-Borno, *Al-Wajīz*, p. 34.

- ii. A maxim is not an authority by itself, rather it relies upon established sources of the law such as al-Qur'an, Hadīth and recognised *Ijmā'* and *Qiyās*. Thus, whenever an implication of maxim contradicts with the provision of stronger authority, the implication of the later will have priority.<sup>109</sup>
- iii. Only a jurist that has fulfilled conditions required of *ijtihād* can establish that a particular legal issue falls under the scope of certain maxim.<sup>110</sup>
- iv. Specific conditions required in particular emerging legal issues must be found for the maxim to apply perfectly. For instance, for the maxim "*Hardship begets Facility*" (*al-mashaqqatu tajlib al-taysīr*) to apply on a specific issue, the hardship must be real, above normal and it should not be the sort of hardship the *Sharī'ah* has as its objective in the matter and that applying it should not lead to missing something more important.<sup>111</sup>

### Relevance of Maxims to Emerging Legal Issues

Contemporary jurists have recognised the importance of maxims in their *ijtihād* considering the legal status of several contemporary legal issues. Relevance of maxims to emerging issues become more prominent in modern *ijtihād* concerning contemporary matters like commercial and financial transactions, medical practices such as organ transplant, plastic surgeries, post-mortem examination, etc. These are mainly issues that the classical jurists have not necessarily discussed during their times. The following will serve as examples thereto:

- i. Where the intention for the applications of human genome project is aimed at investigating hereditary and nonhereditary diseases to find their cure, it will be lawful based on the maxim: *Al-umūr bi maqāṣidihā* "matters are judged by their objectives." But where the intention is to prevent certain individuals from their right of work due to either because him carrying a particular disease or he can potentially succumb to such illness, the same maxim implies that it is

---

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

an unlawful investigation and its application, is therefore not well founded.<sup>112</sup>

The maxim *Al-umūru bi maqāsidihā*<sup>113</sup> (*Matters are judged by their intentions*) is considered as the most comprehensive of all maxims. It is first of the five universal maxims and applies in all themes of fiqh. The basis of the maxim is the popular Prophetic tradition narrated by Sayyiduna Umar, may Allah be pleased with in which the Prophet said: "*Actions are but by intention. Every man shall only have that which he intended.*"<sup>114</sup>

Another supporting authority for the maxim is the Saying of Allah, the Most High:

Allah knows the man who means mischief from the man who means good.<sup>115</sup>

According to Imam Al-Suyūti, the above verse is a basis for the maxim "*Actions are judged according to their intentions.*" A conduct is regarded permissible due to a particular intention and forbidden as a result of another intention.<sup>116</sup>

There is unanimous agreement between jurists over its validity. It means that an injunction applicable to a particular conduct depends on the intention behind that issue.<sup>117</sup> For instance, if A gives money to B, depending on their intention, such an act will have varying legal descriptions. This conduct can be an act of charity, like gift, a loan, entrustment, discharge of liability, and each has its own specific legal

<sup>112</sup> Ahmad bin Abdullah bin Muhammad Al-Ḍuwaiḥī, Athar Al-Qawā'id Al-Fiqhiyyah fī Bayān Ahkām Al-Jirāhāt Al-Tajmīliyyah, (Part of Conference Proceedings on the Applications of Legal Maxims on Medical Issues), 52-53 Accessed May 5, 2011, <http://www.saa'id.net/book/open.php?cat/96&book/4328>.

<sup>113</sup> Majalla al-Ahkām al-Adliyyah, Art. 2, Al-Sarakhsi, *Al-Mabsūṭ*, 59, Al-Subki, *Al-Ashbāh*, 54, 94, Al-Suyūti, *Al-Ashbāh*, p. 8, Ibn Nujaim, *Al-Ashbāh*, 27.

<sup>114</sup> Transmitted by the six Hadith transmitters namely: Bukhari, Hadith No. 1, Muslim, Hadith No. 1907 and Abu Dawud, Hadith No. 2203. Others have also transmitted it such as: Ibn Khuzaimah in his *Sahih*, Imam Ahmad in *Musnad*, Humaidi also in his *Musnad* and Dar Qutni in Sunan, etc. (See Al-Borno, *Mausu'at*, vol. 1, 130).

<sup>115</sup> Surat al-Baqara: 2:220

<sup>116</sup> Abdurrahman bin Abibakr Al-Suyūti, *Al-Iklīl fī Istīnbat al-Tanzīl*, (Beirut, Dar Kitāb al-Arabī, n.d.) 43.

<sup>117</sup> Al-Atāsi, Muhammad Tahir, *Sharh Majallat al-Ahkām*, vol. 1, (Hums, Matba'atu Hums 1349H), 13.

status. if A intends the money to be a charity or gift his action is an obedience to Allah and he will be rewarded for it. Shari'ah obligations regarding gift (*hibah*) or charity (*sadaqa*) will thus apply to it. If the intention is to give a loan (*dayn*) or entrustment (*wadi'ah*), then A has the right to be reimbursed and B will be obliged to return what is entrusted to him. It will be guaranteed if it is a loan and an entrustment or deposit without consideration will not be guaranteed in case of lost without negligence or misappropriation. If the intention of giving the money to B is however payment of debt then it is a discharge of his liability and a return of another's right<sup>118</sup>. But if the intention was to pay bribe in order to secure benefit, then it is a prohibited conduct.

Thus, the basis of the opinion of the above author, can be seen through authorities from which the maxim derived. Where there is a good motive for investigation, it will be recognized as lawful; and if it is bad or intended to be discriminate against certain group, such investigation shall be prohibited in Islam. Inference based on the maxim of judging matters by intention is stronger than other authorities that could have been used. In addition, it proves that the maxim of intention applies to all conducts of a man and not only limited to matters of devotion as those authorities may imply.

ii. Based on the maxim "*In Conducts and Contracts, effect is given to intention and meaning and not words and forms*" (*Al-'Ibratu fi al-'uqūdi li al-maqāṣidi wal al-ma'ānī lā li al-Alfāzi wa al-Mabānī*),<sup>119</sup> the legal injunction of depositing money in banks and saving funds under the nomenclature of *wadi'ah* (deposit) open to demand at all times is still that of *qard* (credit). Just because it was called *wadi'ah*, legal effects of *wadi'a* does not necessary apply to it. The reason is that if it were the real *wadi'ah* based on the Islamic law terminology, it would not have been permissible for the banks to invest those deposits nor exploit them as *wadi'a* must be kept and not to be disposed in. Likewise, the *muwadda'* (the person under whose control the deposit is made) is considered a trustee who shall not be liable in case of damage to the entrustment without negligence from him. However, banks guarantee these deposits and return same amount on demand which gives it the legal effect of loan (*qard*). This

<sup>118</sup> Al-Borno, *al-Wajīz*, 164.

<sup>119</sup> Al-Subkī, *Al-Ashbah*, 347; Al-Zarkashī, Badruddīn Muhammad bin Bahādir Al-Shāfi'i, *Al-Manthūr fi Al-Qawā'id*, vol. 2, (Ministry of Endowments and Religious Affairs, Kuwait: 1402H/1982), 371.

is in agreement with the maxim "*al-'ibratu fī al-'uqūd li al-ma'ānī.*" Therefore, the interests paid by banks in saving funds are unlawful as they are regarded as the prohibited *ribā*. Merely changing the nomenclature does not change the legal effect as regards is given to the meaning.<sup>120</sup>

The meaning of the maxim "*In conducts and contracts, effect is given to intention and meaning and not words and forms*" (*Al-'Ibratu fī al-'uqūdi li al-maqāšidi wal al-ma'ānī lā li al-alfāzi wa al-mabānī*) generally is that whenever a contract is formed, not only the terms used by the parties in concluding the contract will be considered rather than real objective or intention from their statement shall be considered. This is because the terms are merely templates for meanings and these meanings are the real objectives of the speaker.<sup>121</sup>

The presumption is thus, terms are used in expressing their original meanings and not metaphors. Although some terms are often used to infer non-original meaning or metaphorical meanings or the term may have more than a meaning; or the speaker makes a mistake by using a different term from his intention. In other words, if one erroneously uses a particular term without intending it, if it is impossible to correlate between the expressed term and intention; effect shall be given to intention and the real meaning. The reason is that words are meant to express that which is in mind and it should therefore agree with it else such a declaration is false. If it can however be correlated and used then both intention and term should be recognized.<sup>122</sup>

This maxim is also related to the above maxim of intention and they are supported by similar legal authorities. The saying of the Prophet, peace be upon him: "*Actions are but by intention. Every man shall only have that which he intended.*"<sup>123</sup> This implies that actions,

<sup>120</sup> Al-Nadawī, *Mausū'at*, vol. 1, 531-532.

<sup>121</sup> Al-Borno, *Al-Wajīz*, 148.

<sup>122</sup> Muhammad bin Abī Bakr Ibn Al-Qayyim Al-Jauziyyah, *I'lām al-Muwaqqi'īn an Rabb Al-Ālamīn*, vol. 2, (Dār Al-Jīl, Beirut: 1973), 119.

<sup>123</sup> Transmitted by the six Hadith transmitters namely: Bukhari, Hadith No. 1, Muslim, Hadith No. 1907, Abu Dawud, Hadith No. 2203, Tirmidhi, *Sunan*, Hadith No. Nasa'i, and Ibn Majah. Others have also transmitted it such as: Ibn Khuzaimah in his *Sahih*, Imam Ahmad in *Musnad*, Humaidi also in his *Musnad* and Dar Qutni in *Sunan*, etc. (See Al-Borno, *Mausū'at*, 130).

which also cover expressions in Islam,<sup>124</sup> are interpreted in accordance with the speaker's intention. Intention in conducts is usually known through external factors like the nature of the person contracting, the purpose of the contract as well as motive for the contracting which the either party is aware of; or the contractor himself is aware.

iii. A doctor's decision that a patient is brain dead is not conclusive legal proof for the *Sharī'ah* obligations regarding a person's death to be executed because the norm is that he is still alive until certainty of his death is proven.<sup>125</sup> This is based on the maxim, Certainty is not overruled by doubt (*al-yaqīnu lā yazūlu bil-shakk*).<sup>126</sup>

*Al-Yaqīnu lā yazūlu bil-Shakk* is one of the earliest to appear in the field of derivation of legal maxims<sup>127</sup>. The earliest reference to it was made by Imam Shafi'i while talking about admission/confession. He said:

the basis of what I say is that I will always hold people by what is certain, drop the doubtful and use that which is most probable.

Legally, certainty (*yaqīn*) is defined as the knowledge that a fact has either definitely occurred or not. Doubt (*shakk*), which is the opposite of certainty (*yaqīn*),<sup>128</sup> is a vacillation over the occurrence and non-occurrence of a fact. Meaning none between the two possibilities is of high probability. But if either has greater probability, the doubt seizes and it is thus certain (*yaqīn*) in the usage of legists. In law, therefore, certainty is the most probable assumption.

According to Imam Al-Nawawi, whenever legists (*fuqahā'*) mention doubt in their works, they mean indecisiveness (or confusion) between the existence and non-existence of a fact; whether these two probabilities weigh equally or one is weightier than the

<sup>124</sup> Hamad bin Hamdi Al-Sā'idī, *Qā'idat Al-Tarku fi'lun wa mā yata'allaqu bihi min al-Masā'il al-Uṣūliyyah wa Taḥbīqātuhā al-Far'iyyah*, (Mecca, Umm al-Qurā University 1434H/2013), 22.

<sup>125</sup> Resolution No. 181 of the Grand Scholars Council of the Kingdom of Saudi Arabia, 12/4/1417H.

<sup>126</sup> Al-Bāhusain, *al-Qawā'id*, p. 140-161.

<sup>127</sup> Al-Dausari, *Al-Mumti'*, 114.

<sup>128</sup> Ya'qub bin AbdulWahhab Al-Bāhusain, *Qā'idatu Al-Yaqīnu Lā Yazūlu bish-Shakk*, (Riyadh, Maktabat Al-Rushaid 2000), 46.

other. Among jurists (*Usūliyyūn*) however, if the two possibilities weigh equally then it is doubtful (*shakk*), if not, the weightier (or the most likely) is conjecture (*ẓann*)<sup>129</sup> and the outweighed (*marjūh*) is illusion (*wahm*). The statement of the jurists is in agreement with the linguistic definition.

The basis of the maxim is the saying of Allah, the Most High:

But most of them follow nothing but conjecture (*ẓann*): truly Conjecture can be of no avail against truth. Verily Allah is well aware of all that they do.<sup>130</sup>

One of the meanings of *ẓann* (lit. conjecture) is illusion, i.e. where what is believed to apply to a particular matter does not in reality apply to it. In such a situation, such conjecture will not overrule what was known for certain.<sup>131</sup>

Also from *Sunnah*, the *Hadith* narrated by Abbād bin Tamīm from his uncle (Abdullahi bin Zaid bin Asim) from the Messenger, peace be upon him in which a man complained to the Prophet, peace be upon him of feeling something (departing) his body. The Prophet, peace be upon him told him not leave (his prayers) until he hears a sound or smells (of the farting).<sup>132</sup> The hadith means that one should

<sup>129</sup> The term *Ẓann* which literally means conjecture is less than certainty in the language of jurists and Logicians. To them, Certainty (*Yaqīn*) is belief that a particular matter is so-and-so and that it cannot be but so-and-so in manner consistent with its reality. In other words, it is the perfect knowledge free from error. This definition is not as encompassing as the definition of legists (*Fuqahā*). In addition to the jurists' definition, they added that it also include a matter whose existence is probable; as injunctions of Sharia are applicable to what is obvious (*ẓahir*). (See Al-Bāhusain, *Turuq al-Istidlālī*, 36-37, 39). This is because there are issues which the Sharia may have considered them as certain but can in reality be wrong. Example is a testimony by witnesses on a fact before a Court is considered a legal certainty, though it is possible that they are telling lies. Al-Qarāfi says that necessity is the reason why *ẓann* is regarded as certain in Sharia for absolute certainty may not be achieved. Possibility of erring in such *ẓann* is lesser. But the doubtful cannot be a basis for a judgement (*Al-Dhakhīra*, vol. 1, p. 177). This is the reason why scholars of Malikiyya school of thought did not refer to this maxim in the above phrase, that is Certainty is not overruled by doubt, rather their preferred phrase is: *The Norm of Sharia is that Injunctions are but based on knowledge and that which is in doubt is not considered* [Shihābuddīn Ahmad bin Idris al-Qarāfi, *Al-Dhakhīrah*, vol. 1, (Beirut: Dar al-Gharb al-Islāmī), 177].

<sup>130</sup> Qur'an 10:36.

<sup>131</sup> Al-Dausarī, *Al-Mumti'*, 117.

<sup>132</sup> Muslim Hadith No. 362, vol. 1, 276.

not ignore the certain, which is the state purity before prayer, in favour of what he was not certain of, i.e. the feeling that something has departed his body. Therefore, such doubt will not overrule the original certainty.

While commenting on the above Hadith, Imam Al-Nawawi states that: This Hadith is a basic source and a great principle<sup>133</sup>

among the principles of fiqh, which is that things are judged to remain on their original forms until the certainty of the contrary is established, a subsequent doubt will thus not harm it.<sup>134</sup>

One application of the maxim *al-yaqīnu lā yazūlu bil-shakki* is that if a man is lost at a situation believed to mostly leading to death such as at the battle field, drowning or ship wreck, such a man is presumed to be alive until confirmation of the certainty of his death or when the time where all his agemates are dead comes.

Although some scholars have opined that declaration of a patient as brain dead is conclusive, the above opinion which cited as its basis has also relied on a principle of jurisprudence to arrive at this conclusion. This principle is known as *istiṣhāb*. *Al-Istiṣhāb* refers to a legal principle that accompanies previous status of things into the current moment because the presumption that the status quo remains as it was before.<sup>135</sup> In other words, a man who was known to be alive shall continue to be alive until certainty of his death. There is certainty that a vital organ like heart is still functioning and doubt is that death of brain alone does not immediately lead to the collapse of the other organs.<sup>136</sup> Another maxim confirming this opinion is *al-aṣlu baqā'u mā kāna alā mā kāna* (The status quo remains as it was

<sup>133</sup> Even though the subject of the Hadith relates to a particular case, Al-Nawawi refers to it as a principle or rule (*qa'ida*). This is an established methodology in Islamic jurisprudence that injunctions of particulars provided in Sharia are not only meant to regulate the particular case, rather they are intended to be a general rule applicable to all cases that may be related to them. (See Ibn Taimiyya's *Majmū'ul Fatāwā*, vol. 29, 153; *Al-Qawā'idul Usūliyya inda Ibn Taimiyya*, p. 299). Such are achieved through *ijtihād* by jurists and this process is known as *Tahqīqul Manāt* (verifying the legal nature of matter at hand).

<sup>134</sup> Yahya Sharafuddin al-Nawawī, *Sharh Sahih Muslim*, vol. 4, (Beirut: Dār Al-Khair 1414H), 49.

<sup>135</sup> Al-Zuhailī, *al-Qawā'id*, 859.

<sup>136</sup> Saleh bin Ali Al-Shamrānī, "Athar al-Qaul bi'tibār al-Maut al-Dimāghī mautan Haqīqiyyan alā al-Ahkām al-Fiqhiyyah" *Majallat Buhūth al-Fiqhiyyah al-Mu'āshirah*, 22 (2006) 16.

before). This means a man known to be alive continues to be alive until certainty of his death. Therefore, the doctor whose opinion is that brain death is the end of life does not lift our shakk (doubt) that a living person continues to be alive until certainty devoid of any doubt of the death in accordance with the general provisions of the Sharī'ah. In addition, the fact that even scientific community is not in total agreement over finality of brain death<sup>137</sup> obliges upon us to presume to continuation of previous condition which is being alive based on the implication of this maxim.

iv. Based on the maxim *Al-darūrāt tubīh al-mahzūrāt* (necessity renders prohibited things lawful<sup>138</sup>), it is lawful for a doctor to inspect even parts of patients that are otherwise designated as *'aurah*. Such necessities are however determined to the extent needed and as a result parts of the body that are not needed in the treatment remains prohibited.<sup>139</sup> This is because it is prohibited for a Muslim to expose his nakedness or to see another person's nakedness. However, due to the necessity of health care and perhaps, saving one's life which is among the objectives of *Sharī'ah*, it was considered as lawful for a doctor to see areas necessitated by the medication.

The maxim *al-darūrāt tubīh al-mahzūrāt* has its basis from several authorities from the Qur'an and Sunnah.

Therefore, clarity of inference from the maxim *al-darūrāt tubīh al-Mahzūrāt* suggests that its implication is true to the matter whose is injunction is sought. If necessity did not make it legal to insect areas that are otherwise unlawful to be seen, it would have led to serious difficulty for an individual; which is contradiction with the Lawgiver's objectives. Allah, the Most High has said:

... and (Allah) has imposed no difficulties on you in religion.<sup>140</sup>

In other words, His injunctions are not meant to cause difficulties. Therefore, the strict application of the provision that a Muslim should not expose his nakedness if in cases of necessity such as treatment of

<sup>137</sup> Celso Galli Coimbra, "Doctor to Tell Brain Death Conference Removing Organs from 'Brain Dead' Patients Tantamount to Murder," accessed November 19, 2016, <https://biodireitomedicina.wordpress.com/2009/02/18/doctor-to-tell-brain-death-conference-removing-organs-from-brain-dead-patients-tantamount-to-murder>.

<sup>138</sup> Majalla Art. 33, Al-Borno, *Al-Wajīz*, 185; Al-Borno, *Al-Mausū'ah*, vol. 2, 208.

<sup>139</sup> Rustum, *I'māl*, 746.

<sup>140</sup> Qur'an Chapter 22 verse 78.

life-threatening sickness will be imposition of difficulty in the religion which is contrary to its objectives.

v. Injunctions and *fatwās* that were based on *ijtihād* and change in customs does change with changing time to be substituted with new injunctions as the need requires.<sup>141</sup> This is based on the provision of the maxim "*Need, whether of a public or private nature, is treated as necessity*" (*al-hājah tunazzalu manzilat al-darūrat 'āmmatan kānat au khāṣṣah*).<sup>142</sup> For example, there are several things that were not recognised as properties in the past, but now recognised and dealt in due to need (*hajah*). These include certain laboratory mice, insects as well as certain poisons as valuable for their use in scientific and medical research are deemed lawful properties in contemporary fatwas due to the need in them.<sup>143</sup> In the same way, intellectual property right is one of the issues that have their root in contemporary customs whose justification is based on the need to protect them from infringement.<sup>144</sup>

The term *hājah* implies missing something or the need thereto.<sup>145</sup> Perhaps the earliest definition of *hājah* is that which is attributed to Imam al-Haramain, may Allah bestow His mercy him, in which he said, "prevention of harm and continuation of man on that which strengthen basics (of their lives)."<sup>146</sup> On his part, Imam al-Shāṭibī has defined it as that which is needed as way of affluence (*tausi'ah*) and lifting of a difficulty that usually leads to hardship linked to losing one's interest. If it is not taken into cognizance, the person is usually inflicted with difficulty and hardship.<sup>147</sup> In its technical sense, majority of jurists have classified grades of human interest which the Shari'ah protects into *darūrah* (*necessity*), *hājah* (*need or complement*) and *taḥsīniyy* (*embellishment*).<sup>148</sup>

<sup>141</sup> Al-Sadlān, *al-Qawā'id*, 295.

<sup>142</sup> Majalla Art. 32; Al-Zuhaili, *al-Qawā'id*, vol. 1, 288; Al-Suyuti, *al-Ashbāh*, 88; Ibn Nujaim, *al-Ashbāh*, 91; Al-Borno, *Al-Wajīz*, 242.

<sup>143</sup> 'Adil AbdulQādir bin Muhammad Waliyy Qūtah, *Al-'Urf: Hujjiyatuahu wa Atharuhu fī Fiqh al-Mu'āmalāt inda al-Hanābilah*, vol. 1, (Mecca, Al-Maktabah Al-Makkiyyah 1418H), 351-353.

<sup>144</sup> Ibid, 198-199.

<sup>145</sup> Ya'qub bin AbdulWahhab Al-Bāhusain, *Al-Mufaṣṣal fī Al-Qawā'id Al-Fiqhiyyah*, (Riyadh: Dār Al-Tadamuriyyah, 1432H/2011), 259.

<sup>146</sup> Ghiyāth al-Umam fī al-Thabāt al-ḥukm, 346.

<sup>147</sup> Al-Muwāfaqāt, vol. 2, 10-11.

<sup>148</sup> Al-Ghazālī, *Al-Mustashfā*, vol. 1, p. 636; Al-āmidī, *Al-Ihkām*, vol. 3, 300-302; Sharh Tanqīh al-Fuṣūl, 391.

Sheikh Ahmad al-Zarqā describes *hājah* as a state of affair that requires easing or facilitation in order to reach a goal. Thus, it is less than necessity in that regard although the injunction that is attached to *hājah* is continuous while that which is attached to necessity (*ḍarūrah*) is temporary.<sup>149</sup> The maxim of treating necessity has its basis from the Qur'an. Allah the Most High has said:

Allah intends every facility for you; He does not want to put to difficulties.<sup>150</sup>

He has also said:

... and (Allah) has imposed no difficulties on you in religion<sup>151</sup>

"Allah do not wish to place you in a difficulty, but to make you clean" Qur'an 5:20.

While commenting on the above verse, Al-Jaṣṣāṣ, may Allah have mercy upon him,

"as difficulty is hardship; and Allah, Most High, has negated intending difficulty for us, it is appropriate for us to infer from this verse in negating hardship and confirmation of easiness in all the revelation".

Thus, whoever that says anything that requires hardship and difficulty shall be confronted with the evident provision of this verse.<sup>152</sup> And difficulty is established if need is not taken into cognizance just as working based on the implication of need is a confirmation of wideness or easiness of the Sharī'ah. Therefore, the general implication of this verse implies that the Sharī'ah takes need into cognizance.<sup>153</sup>

Public need means the entire people is in need of it; and private need is where the need is for a peculiar town, group or profession and

<sup>149</sup> Sharh al-Qawā'id al-Fiqhiyyah, 209.

<sup>150</sup> al-Qur'an 2:185.

<sup>151</sup> al-Qur'an 22:78.

<sup>152</sup> Ahkām al-Qur'an, vol. 2, 550.

<sup>153</sup> Al-Rashīd, Ahmad bin Abdurrahman bin Nāṣir, Al-Hājah wa Atharuhā fī al-Ahkām: Dirāsah Nazariyyah Taṭbīqiyyah, (Riyadh, Dar Kunūz Ishbīliya, 1429H/2008), 161.

not necessarily individuals except in very rare situations.<sup>154</sup> An example of this maxim is the permissibility to enter a lavatory in return for a specific amount even though neither the amount of time nor the water that will be used is known. This is comparable to an Islamic injunction in which it is allowed to hire a breast-feeding mother to feed a child, because neither of the parties knows the exact quantity of milk.<sup>155</sup> According to Ibn Taimiyyah, the basis of this is that transactions that people need which are not prohibited unless the Book and the Sunnah have indicated its prohibition.

Therefore, in an attempt to establish validity of intellectual property right under Islamic law, one author has linked the maxim "*Need, whether of a public or private nature, is treated as necessity*" (*al-hājah tunazzalu manzilat al-darūrat 'āmmatan kānat au khāṣṣah*)<sup>156</sup> to the recognition of the need to protect intellectual compositions. Need as a cause for easing things is a recognised doctrine in Islamic law as a form of necessity, and more often than not, the basis of certain injunctions.<sup>157</sup>

Several contemporary fatwas have recognised this position and issued opinions obliging its protection.<sup>158</sup> Based on this conception therefore, intellectual property can be said to be a child of need necessitated by modern economic realities that heavily relied on scientific research which are jealously protected by its owners as they do exploit it as potential property. Countries the world over, have recognised the importance of protecting intellectual properties in all its forms and its effect on the world economy and that it is a pressing necessity to encourage scientific, literary and artistic creations as well as industrial and scientific discoveries and innovation. This necessitated holding conferences and concluded international and

<sup>154</sup> Al-Zuhaili, *al-Qawā'id*, 289.

<sup>155</sup> Jumu'a, *al-Qawā'id*, 49.

<sup>156</sup> Majalla Art. 32, Al-Zuhaili, *al-Qawā'id*, 288, Al-Suyūti, *al-Ashbāh*, 88; Ibn Nujaim, *al-Qawā'id*, 91; Al-Borno, *al-Ashbāh*., 242.

<sup>157</sup> Ahmad bin Abdurrahman bin Nāṣir Al-Rashīd, *Al-Hājah wa Atharuhā fī al-Aḥkām: Dirāsah Nazariyyah Tatbīqiyyah*, vol. 1, (Riyadh, Kunūz Ishbīliyyah 1429H/2008), 205.

<sup>158</sup> Fatwa No. 18453 by Hai'at Kibār Al-Ulamā (Council of Grand Scholars) in Saudi Arabia on 2/1/1417H; Resolution No. 5 on Intellectual Property by Academy of Islamic Fiqh, Jeddah, held from 1-6 Jumādā al-Ulā 1409H/10-15 December 1988; Resolution No. (5) D5/09/88 on Intellectual Properties by the Academy of Islamic Fiqh in Kuwait 1-6 Jumada al-Ula, 1409H 10 to 15 December 1988; Resolution No. 181 of the Grand Scholars Council of Saudi Arabia on 12/4/1417H.

global agreements to enact laws and regulations to protect these rights.<sup>159</sup>

vi. While ruling on the validity of sales by instalmental payment which has become a common form of contract in this era, contemporary ijtihād has stipulated certain limitations like the one contained in the maxim, "that which is legalised due to necessity shall only be recognised to the extent of necessity" (*Mā ubīha li al-Ḍarūratī tuqaddaru biqadarihā*). In addition, our religion is based on easing which justifies facilitation to the poor. Another related maxim provides that, "Hardship begets facility" (*Al-Mashaqqatu tajlib al-Taisīr*). All these imply that where there is no suspicion of *ribā* (usury), *gharar* (uncertainty) or *jahālah* (ambiguity) in such contracts, jurists are in agreement that it is valid. This is the decision reached by the Fiqh Academy of Jeddah.<sup>160</sup>

The basis of this opinion can be seen from the legal authorities of the maxim *Mā ubīha li al-Ḍarūratī tuqaddaru biqadarihā* or its popular formula: *al-Ḍarūrātu tuqaddaru bi qadarihā*.

"But if one is forced by necessity, without wilful disobedience, nor transgressing due limits, then is he guiltless. For Allah is Oft-forgiving Most Merciful."<sup>161</sup>

Another authority is also the Saying of Allah Ta'ālā:

"But (even so), if a person is forced by necessity, without wilful disobedience, nor transgressing due limits,- thy Lord is Oft-forgiving, Most Merciful."<sup>162</sup>

The above verses imply that things that are unusual are only permitted due to necessity on a condition that a person pushed by necessity is not willfully pursuing that which is prohibited in Islam. In other words, a person shall not exceed his need from legalization due to necessity and should be moderate while dealing with such facilitations or easements of the Sharī'ah. Therefore, if one has ability to pay at ones, it is preferable for him to pay and not engage the

<sup>159</sup> Nasir bin Muhammad bin Mashrī Al-Ghāmīdī, *Himāyat al-Milkiyyah al-Fikriyyah fī Al-Fiqh al-Islāmī wa Al-āthār al-Iqtisādiyyah al-Mutarattabah alaihā*. (shamela.ws/rep.php/book/4050: n.d.), j. Retrieved on 26/12/2014.

<sup>160</sup> Rustum, *I'māl*, 750.

<sup>161</sup> al-Qur'an 2:173.

<sup>162</sup> al-Qur'an 6:145

instalmental payment model as its legality is exception from the usual. The normal form of contract is that it is either fully debt or fully paid.

vii. The Islamic Fiqh Academy in Jeddah has also passed the resolution that abiding by modern road traffic rules and regulations contained in State directives and legislations is obligatory based on the doctrine of *maṣālih al-mursalah*. It also resolved that the *jināyāt* (torts) that are inflicted in road traffic accident should be based on the *Sharī'ah* injunctions concerning tort as well as holding the driver liable for harmful and accidental actions.<sup>163</sup> Discussing the basis of this resolution, Al-Qaḥṭānī has stated that beside the doctrine of *maṣlaha al-mursala* being the basis of this decision, the Prophet's saying: "No harming and no counter-harming" which is a general principle (*qā'idah kulliyah*) is among the principles of *Sharī'ah* that obliges lifting of harm and prohibition of harming others. The Hadith/maxim also obliges liability for any such harm according to him.<sup>164</sup>

One of the major objectives of Shari'ah law is facilitation of human being's acquisition of benefits and repelling of evil; and thus, this maxim embodies a large chunk of Islamic law (*fiqh*). This maxim is considered a constituent of half of fiqh by some scholars. This is because the whole of Shari'ah law is either for securing benefits or repelling evils and this maxim is primarily intended to repel and protect from evils.<sup>165</sup> In a nutshell, the maxim prohibits *darar* and *dirār*. *Darar* means inflicting harm against any one initially whereas *dirār* means harming in retaliation or retribution,<sup>166</sup> i.e. countering his harm with harm.

It also has other supporting evidence in the Qur'an and Sunnah.<sup>167</sup> These include the following verse which says:

Deal not unjustly, and ye shall not be dealt with unjustly.<sup>168</sup>

<sup>163</sup> Resolution of the Islamic Fiqh Academy No. 71 at its 8<sup>th</sup> Round 1414H as quoted in Misfar bin Ali bin Muhammad Al-Qaḥṭānī, *Manhaj Istinbāt Ahkām Al-Nawāzil Al-Fiqhiyyah Al-Mu'āṣirah*, (1st edn, Jeddah, *Dār Al-Andalus Al-Khaḍrā'* 1424H), 671.

<sup>164</sup> Al-Qaḥṭānī, *Ibid*, 672.

<sup>165</sup> Al-Dausarī, *al-Mumtī'*, 209

<sup>166</sup> Al-Zarqa, *Sharh*, 165.

<sup>167</sup> See Qur'an 2:233, 2:282, 65:6.

<sup>168</sup> Qur'an 2:279.

This verse prohibits taking usury after repentance and that one is only entitled to what he has given in debt.

Also the saying of Almighty Allah:

... but do not take them back to harm them.<sup>169</sup>

This verse clearly forbids returning wife back for the purpose of harming her.

He also said:

No mother shall be treated unfairly on account of her child.<sup>170</sup>

This verse also forbids both parties, i.e. the former spouses, from harming each other. It forbids the mother from refusing to breastfeed the child to harm the father, her former husband and the father too is forbidden from taking the child away and preventing her from breastfeeding him with the intention of harming her.

Although the above verses are on particular issues, but its induction indicates the Law-giver's objective of prohibiting all sorts of harm.<sup>171</sup> Prohibition of harms is also not limited to the term harm (*ḍarar*) alone; but encompasses all forms of detriment. This is the reason why we see Fakhrudīn al-Rāzī reasoning on the prohibition of harm with the following verse:

Do no mischief on the earth, after it hath been set in order<sup>172</sup>.

There is also a consensus among Muslim jurists on the principle of prohibition of harm. We do not know of anyone who has differed according to al-Bāhusain.<sup>173</sup> The Shari'ah has also directed that where there is harm, such a harm should be removed as implied by an auxiliary maxim, *al-dararu yuzāl*.<sup>174</sup> In other words, if a person has harmed another one in a traffic accident, there shall be liability upon

<sup>169</sup> Qur'an 2:231.

<sup>170</sup> Qur'an 2:233.

<sup>171</sup> Al-Bāhusain, Y. A., *Qā'idatu al-Mashaqqatu Tajlib al-Taisīr: Dirāsah Nazariyyah – Ta'şīliyyah – Taḥbīqīyyah*, (Riyadh, Maktabat Al-Rushd 1424H), 441.

<sup>172</sup> Qur'an 7:56, Al-Bāhusain.

<sup>173</sup> Ibid, 443.

<sup>174</sup> Majalla, Art. 19.

him in accordance with the harm created. This is based on the saying of Allah Ta'ālā:

"If then any one transgresses the prohibition against you, Transgress ye likewise against him" <sup>175</sup>

From these legal authorities therefore, one can see the link between the inflictions caused due to road traffic accident and the maxim "*no harming and no counter-harming*." This demonstrates clarity of its effect on all types of harm prohibited by the *Sharī'ah*.

## CONCLUSION

Conclusively, over the last few years, maxims of Islamic law has increasingly demonstrated the dynamism of Islamic law in remaining relevant to the lives of Muslims at all times and places. As we have seen in some of the above contemporary application of maxims on emerging legal issues suggesting importance of maxims for jurists, legists and students as a means and guide in understanding the objective and implications of the law on those issues which the law has not specifically touched.

The jurists have, over the years, identified several important elements that maxims possess. These include, bringing together several particulars under one platform, develops mental ability of a legist in understanding the basis of injunctions, embody objectives of the *Sharī'ah*, teaches a learner how to avoid contradiction among several auxiliary injunctions, as well as helping lawyers and judges take a glimpse at the essence and nature of fiqh.

Maxims are mainly sourced from the *Qur'an*, *Hadith* and *ijtihād*. Most jurists have recognized the usage of maxims as legal authorities and that can be noticed in their works. While maxims whose sources are the *Qur'an* and *Hadith* are recognized as strongest in authority, others are recognized as persuasive evidences.

In order to avoid falling into the pit of exceptions of maxims, there are conditions which a jurists should take cognizance of while extracting injunction from a maxim. These include, the maxims implication must be proved through inductive method, it should not contradict a stronger authority, only the qualified jurist should

---

<sup>175</sup> Qur'ān 2:194

determine whether a particular falls under the implication of a maxim and fulfillment of specific conditions required in each maxim.

The work concludes by reviewing several instances in which contemporary jurists have relied on maxims in identifying legal injunctions of several novel matters. These include intention in the study of human genes, determination of the death of a patient declared as brain dead, the extend of doctor's ability to inspect his patient, injunctions that change with time such as recognition of intellectual property rights, sales by instalmental payment, looking at essence of contracts rather than terms used and issues related to torts and liabilities under Islamic law. All this was done by studying the legal basis of the maxims and their relationship to the instances addressed in the injunctions and fatwas reviewed.

Finally, the authors will like to recommend that academics, researchers and students to give more time to investigating maxims and their applications to emerging legal issues. Researchers should also take into cognisance the conditions for the applications of maxims to particulars so that one will not be taken by slippery slope and fall into unmistakened error.