JKAU: Islamic Econ., Vol. **29** No. 2, pp: 139-151 (July 2016)
DOI: 10.4197 / Islec. 29-2.12

The Legal Maxims of Islamic Law (Excluding Five Leading Legal Maxims) and Their Applications in Islamic Finance [1]

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Abstract. *Al-qawāʿid al-fiqhīyah* or legal maxims of Islamic Law are the general rules of *fiqh* that portray the goals and objectives of the Sharīʿah. They are applied in various cases that come under the common rulings and play a very important role in deducing many rules of *fiqh* since they provide a guideline to come up with particular *ḥukm*. There are five leading maxims, as reflected in the *Majallah*, such as, *al-umūr bi maqāṣidihā* (matters are determined according to intentions), *al-yaqīn la yazūl bi al-shakk* (certainty is not overruled by doubt), *al-mashaqqah tajlib al-taysīr* (hardship begets facility), *al- ḍarar yuzāl* (harm must be eliminated) and *al- ʿādah muḥakkamah* (custom is a basis for judgment). Other than these five leading maxims, which are applicable to a number of legal principles, there are other maxims, which are not as extensive as the main maxims, but nonetheless, address a number of more detailed issues in *fiqh*. Usually, the maxims incorporated in this category are either an extension of maxims derived from the five leading maxims or might be unrelated. This paper seeks to analyze those maxims, other than the leading maxims, which are related to Islamic finance and to understand their roles and applications in the Islamic banking and finance industry.

***Keywords*:** Legal maxims *(al-Qawāʿid al-fiqhīyah),* Islamic jurisprudence*, fiqh,* Sharīʿah*,* Islamic finance.

KAUJIE Classification: C3, C1, I0.

(1) The authors are deeply grateful to Dr. Abdul Azim Islahi (the chief editor) and the anonymous reviewers for their helpful comments which improved the quality of the paper greatly.

1. Introduction

Al-qawāʿid al-fiqhīyah or legal maxims are general rules of *fiqh*, which can be applied in various cases that come under the common rulings. A maxim can be defined as "a general rule, which applies to all of its related particulars" (Mahmassani, 1961). These legal maxims play an important role in the formulation of Islamic law, for they are used as principles to deduce many rules of *fiqh* (Laldin, 2014). Many cases can be referred to these maxims for solutions and, for instance, they can determine the validity of certain deeds. "Legal maxims are theoretical abstractions, usually in the form of short epithetic statements that are expressive, often in a few words, of the goals and objectives of Sharīʿah" (Kamali, 2012). They consist mainly of statement of principles derived from the detailed reading of the rules of *fiqh* on various themes.

Legal maxims (*al-qawāʿid al-fiqhīyah*) exist between the various schools and differences between the *madhāhib* are, in reality, not significant. *Al-qawāʿid al-fiqhīyah* are also closely related, and provide perceptive insights, into the objectives of the Sharīʿah (*maqāṣid* al-Sharīʿah), to the extent that sometimes they have been subsumed under the *maqāṣid* (Kamali, 2012). "Legal maxims represent the culmination, in many ways, of cumulative progress, which could not have been expected to take place at the formative stages of the development of *fiqh*" (Kamali, 2012). The words used or contained in a legal maxim are sometimes derived from the Qur'ān or *ḥadīth*, but typically those maxims were refined and further developed by jurists over time.

Unless they re-affirm a ruling of the Qur'ān or Sunnah, the legal maxims do not bind the jurist in delivering a judgment, but they do provide an important influence in exercising *ijtihād* in arriving at legal decisions (*ḥukm*) and opinions (*fatwá*). Legal maxims, like legal theories (*al-naẓarīyāt al-fiqhīyah*), are designed to elucidate a refined understanding of the subject matter rather than address enforcement. The legal maxims are not similar to *uṣūl al-fiqh* (principles of Islamic jurisprudence) since maxims are based on the *fiqh* itself and represent rules and principles that are derived from the detailed rules of *fiqh* on various issues. *Uṣūl al-fiqh* is concerned with the sources of law, the rules of interpretation, methodology of legal reasoning, dealing with the meaning and implication of commands and pro-hibitions and so on. On the other hand, a maxim is defined as "a general rule, which applies to all or most of its related particulars" (Kamali, 2012), which is a generally accepted definition attributed to Taj al-Din al-Subki (d.1370).

The word *'al-qawāʿid'* is the plural of *al-qāʿidah*, which means principles, and *fiqh* means Islamic law; therefore, generally *al-qawāʿid al-fiqhīyah* mean the principles of Islamic law (Laldin, 2014). Al-Zarqa defined *al-qawāʿid al-fiqhīyah* as "the general *fiqh* principles which are presented in a simple format consisting of the general rules of Sharīʿah in a particular field related to it" (al-Zarqa, 2007). The general meaning of this definition does not differ from the definition given by other prominent scholars of Islamic law. This definition means that *al-qawāʿid al-fiqhīyah* comprise statements involving general principles, derived from jurisprudent rulings, which can be applied to specific issues of *fiqh*.

There are five leading maxims (Sanusi, 2012), such as "matters are determined according to intentions" *(Majallah*, no.2), "certainty is not overruled by doubt" *(Majallah*, no.4), "hardship begets facility" *(Majallah*, no.17), "harm must be eliminated" *(Majallah*, no.20) and "custom is a basis for judgment" *(Majallah*, no.36). Other than these five leading maxims, what are their corollary maxims, which extensively cover a number of branches of *fiqh*, but are less extensive compared to the five leading maxims? How might we examine issues and applications for these maxims within Islamic finance? This research inevitably requires an understanding of the five main legal maxims, but the primary objectives are:

- To explore the potential of the other *al-qawāʿid al-fiqhīyah* in contemporary Islamic legal issues.
- To examine the application of the other *al-qawāʿid al-fiqhīyah* within the Islamic financial industry.

Accordingly, this paper is organized into five sections. This first section provides an introduction to our study. The second section provides our review of the literature on Sharīʿah legal maxims. The third section presents the classifications of legal maxims. The fourth section discusses the other maxims (except the five main maxims) and their applications in Islamic finance, and the fifth section provides some concluding remarks.

2. Review of Literature on Sharīʿah Legal Maxims

Although this study aims to discuss the other maxims (except the five main maxims) and their applications in Islamic finance, the present section seeks to review previously published research works carried out by the classical jurists and contemporary scholars on Sharīʿah maxims.

Al-qawāʿid al-fiqhīyah were not written all at once by a particular scholar, but were developed by jurists at the time of the resurgence of *fiqh*. Among the earliest of the jurists to develop most of the *fiqh* maxims are the jurists of the Ḥanafī School, although they were known at the time as principles (*uṣūl*) (al-Zarqa, 2014). As for the authors of these maxims, most of them are not known except for those maxims originally deduced from the sayings of the Prophet (pbuh) or attributed to particular scholars, such as Abu Yusuf (d.181H) (Laldin, 2014).

An early Iraqi jurist, Abu Tahir Muhammad bin Muhammad Sufyan al-Dabbas, collated the first 17 maxims, and his contemporary, Abu al-Hasan ‘Ubayd Allah ibn al-Husayn al-Karkhi (d. 951) increased these to 39. Al-Karkhi's work, entitled *Uṣūl-al-Karkhī*, is regarded as an authoritative Ḥanafī precursor on legal maxims, although some have regarded it as more of a work on *uṣūl al-fiqh*, as inferred from its title. In reality, the title was probably derived from the fact that each of the 39 legal maxims contained in the work was identified as an *aṣl* (principle, pl. *uṣūl*) (Kamali, 2012).

Al-Karkhi's collection commenced with the first *aṣl*: "what is proven with certainty is overruled by doubt," and it finished with the *aṣl* that "explanation to a speech is credible for as long as it is given at a time when it can be considered valid, but not otherwise". This may be illustrated as follows: Suppose a man divorces two of his wives in a single pronouncement such as: "you are both divorced". Later he elaborates that he only meant that one of them be divorced by triple *ṭalāq*. This explanation will be credible only during the probation time of *ʿiddah*, but it will not carry weight if it is given after that period (Kamali, 2012).

The collection of al-Karkhi, which is one of the oldest on record is not all articulated in the incisive and eloquent style that is typically associated with maxims. Some of his renderings tend to be verbose (al-Zarqa, 2014). His equivalent of the concise maxim "custom is a basis of judgment," for instance, uses 25 words to deliver the same message. Numerous scholars from various *madhāhib* added to legal maxims and in due course, the total number of *qawāʿid* and *ḍawābiṭ* eventually exceeded 3,000.

Next to Ḥanafīs, are the Shāfiʿīs, and then following them, the Ḥanbalīs, and the Mālikīs, in this order, as al-Zarqa (2014) has noted, in adding their contributions to the literature on legal maxims. The popular Shāfiʿī scholar, ‘Izz al-Din ‘Abd al-Salam's (d.1262) *Qawāʿid al-Aḥkām fi Maṣāliḥ al-Anām*, is regarded as one of the more important contributions to this field, while ‘Abd Al-Rahman ibn Rajab al-Hanbali's (d. 1392) work *al-Qawāʿid,* has also been highly acclaimed. However, under the supervision of Ahmad Cevdet Pasha[2] (d.1895), the *Mejelle-i Aḥkām Adlīye* (*Majallah*)[3] was produced and represented the most advanced compilation of legal maxims. The introductory of *Majallah* included 1,850 articles including 99 legal maxims, which have been widely accepted in Sharīʿah courts, but in turn, have also been elaborated in many research works. The next major development on maxims that occurred during the Ottoman caliphate was by Mahmood bin Muhammad Naseeb of Damascus. He arranged the maxims according to the headings found in *fiqh* books and titled his work as *al-Farāʾid al-Bahīyah fi'l- Qawāʿid wa'l-Fawāʾid al-Fiqhīyah* (Kamali, 2014).

The development of this branch of *fiqh* is in many respects related to the general awareness of the *ʿulamāʾ* over the rather fragmented style of *fiqh* literature which, like the Roman juristic writings, is issue oriented and short of theoretical abstraction of the governing principles. The maxims filled the gap to

(2) Pasha was the Ottoman Minister of Justice in the 1870s.
(3) An Islamic civil law of the Ottoman Empire.

some extent and provided a set of general guidelines for an otherwise diverse discipline that combined an impressive variety of schools and influences into its fold. A useful bibliography of various works on Sharīʿah maxims can be found in Kamali's *Principles of Islamic Jurisprudence*, which also provides an extensive treatment of the sources of Islamic legal maxim and theory. Furthermore, in his essay *Qawāʿid al-Fiqh: The Legal Maxims*, Kamali provides a brief introduction and explanation to the background history of legal maxims. Other contemporary scholars who provided extensive analysis on the Sharīʿah maxims, include Mansoori's *Shari'ah Maxims: Modern Applications in Islamic Finance*, who mentioned the significance of the maxims and their vital role in *ijtihād*, and also highlighted, in particular, the role of intentional causes in the framework of contracts, with regard to the maxim: "In contracts, effect is given to the objectives and meanings, not to the words and phrases" (Mansoori, 2012). While discussing modern applications, he pointed out some defects and drawbacks that have arisen in terms of the buy-back practice, which has been a subject matter of significant criticism (Mansoori, 2012). This was further elaborated by Sanusi in *The Application of Qawāʿid al-Fiqhīyah in the Area of Islamic Economics*, who highlighted those maxims that emphasized the importance of risk and liability in striving to earn a lawful profit in Islamic economic transactions (Sanusi, 2012).

3. The Classifications of Legal Maxims

According to Kamali, there are two types of legal maxims (Kamali, 2012). Firstly, those which re-hash or reiterate a particular text of the Qur'ān or Sunnah in which case they carry greater authority. "Hardship is to be alleviated (*al-mashaqqah tajlib al-taysīr*)" *(Majallah*, no.17), for example, is a legal maxim of *fiqh,* which merely paraphrases parallel Qur'ānic dicta on the theme of removal of hardship (*rafʿ al-ḥaraj*). Another legal maxim, which provides, "actions are judged by their underlying intentions (*innamā al-aʿmāl bi al-nīyāt*)" *(Majallah*, no.1) reiterates the exact wording of a renowned *ḥadīth*.

According to Laldin, legal maxims (*al-qawāʿid al-fiqhīyah*) can be categorized into different classifications depending on the following two factors (Laldin, 2014):

1. The scope of the *qawāʿid* in terms of its application towards the issues of *fiqh*.
2. The acceptance of a particular maxim among the different schools of Islamic law.

According to its scope of application towards issues of *fiqh*, legal maxims can be categorized into the following:

1) The major maxims that cover various issues of *fiqh*. According to some scholars, almost all the subjects of *fiqh* are covered under these maxims. There are five maxims in this category. We shall explain them in a later section.
2) The types of legal maxims that cover a substantial amount of *fiqh* subjects, however, the coverage is lesser compared to the above category. This type is either the extended maxims from the major leading maxims or maxims that are not related to the five major maxims.

In terms of the acceptance of a particular maxim among the scholars, legal maxims are divided into the two following categories:

1) Maxims, which are accepted and utilized by all scholars from different schools of Islamic law (*madhhab*). Examples of this category are all the five leading maxims.
2) Legal maxims that are accepted by certain scholars from certain *madhhab*, but rejected by others. This kind of maxim is also called "*al-qawāʿid al-madhhabīyah*" (Laldin, 2014).

3.1 The Five Leading Maxims and their Branches

The jurists agree that all the remaining maxims are a corollary or a commentary of these representative five primary maxims, and cover various issues of *fiqh*, although some scholars would argue that all the subjects of *fiqh* are covered under these main maxims. The five maxims are summarized in tables 1-5 (cross-referenced to the *Majallah*) and include: *al-umūr bi maqāṣidihā* (matters are determined according to intentions), *al-mashaqqah tajlib al-taysīr* (hardship begets facility), *al-ḍarar yuzāl* (harm must be eliminated), *al-yaqīn la yazūl bi al-shakk* (certainty is not overruled by doubt) and *al-ʿādah muḥakkamah* (custom is a basis for judgment).

Table (1). Branches of matters are determined according to their intentions.

Major maxim	Branches
Matters are determined according to intentions (no.2)	In contracts attention is given to intention and meaning and not words and form (no.3)

Table (2). Branches of hardship begets facility.

Major maxim	Branches
Hardship begets facility (no.17)	Where a matter is narrowed, it becomes wide (no.18)
	Necessity renders prohibited things permissible (no.21)
	Necessity is determined by the extent thereof (no.22)
	A matter permitted on account of an excuse becomes unlawful on cessation of the excuse (no.23)
	When the prohibition returns, the forbidden matter returns (no.24)

Table (3). Branches of harm must be eliminated.

Major maxim	Branches
Harm must be eliminated (no.20)	Harm may not be eliminated by its equivalent (no.25)
	To repel a public harm a private harm is preferred (no.26)
	A greater harm is eliminated by tolerating a lesser one (no.27)
	When two wrongful acts meet, the remedy of the greater is sought by the doing of the less (no.28)
	The smaller of two harms is chosen (no.29)
	The repelling of mischief is preferred to the acquisition of benefits (no.30)
	Harm is repelled as far as possible (no.31)

Table (4). Branches of certainty is not overruled by doubt.

Major maxim	Branches
Certainty is not overruled by doubt (no.4)	It is presumed that a matter shall remain as it was originally (no.5)
	Freedom from liability is presumed (no.8)
	The presumption for incorporeal matters is that they do not exist (no.9)
	What has been proven will remain until proven to the contrary (no.10)
	Where there is text there is no room for interpretation (no.12)
	No weight is given to arguments where there is a clear statement opposed to them (no.13)
	No weight is given to mere imagination (no.74)

Table (5). Branches of Custom is a basis for judgment.

Major maxim	Branches
Custom is a basis for judgment (no.36)	A thing made impossible by custom is as though it were in truth impossible (no.38)
	It cannot be denied that with a change of time the requirements of law change (no.39)
	In the presence of custom, no regard is paid to the literal meaning of a matter (no.40)
	Effect is only given to custom where it is of regular occurrence or when it is universally prevalent (no.41)
	Effect is given to what is commonly known, not to what happens infrequently (no.42)
	A matter recognized by custom is regarded as though it were a contractual obligation (no.43)
	A matter recognized by merchants is regarded as being a contractual obligation between them (no.44)
	A matter established by custom is like a matter established by law (no.45)

3.2 The Other Maxims

The other maxims (except the five main maxims) cover a substantial amount of *fiqh* subjects, but to a lesser extent compared to the above category. They are either a corollary to the leading maxims or are unrelated. For example, the maxim that says "*al-ḍarūrāt tubīḥ al-maḥẓūrāt*" (*Majallah*, no.21), which means "necessity renders prohibited things permissible" is derived from the major maxim mentioned above which says "*al-mashaqqah tajlib al-taysīr"* (hardship begets facility) (*Majallah*, no.17). While another maxim from this category is "*al-ijtihād la yunqaḍ bi al-ijtihād*" (*Majallah*, no.16), which means "*ijtihād* is not reversed by its equivalent", such that if a later jurist provides a different judgment on the same matter, then an earlier ruling is not invalidated because of it.

4. Some Other Maxims Related to Islamic Finance and Their Application in the Industry

The discussion of these other maxims will first list the six maxims, which are chosen from the ninety-nine maxims in the *Majallah,* excluding the five major maxims discussed earlier in the first category. Then we will discuss the general meaning of those maxims and how they are applied in Islamic finance. The six maxims are listed below:

- "In contracts, attention is given to the objects and meaning, and not to the words and form" (*Majallah*, no.3).
- "Necessities (*ḍarūrāt*) make forbidden things canonically harmless" (*Majallah*, no.21).
- "Severe damage (*ḍarar*) is made to disappear by a lighter damage" (*Majallah*, no.27).
- "When the receiving of a thing is forbidden the giving of it is also forbidden" (*Majallah*, no.24).
- "Reward begets risk" (*Majallah*, no.87).
- "What is permissible in law cannot be a cause for liability" (*Majallah*, no.91).

4.1 In contracts, attention is given to the objects and meaning, and not to the words and form

4.1.1 The general meaning of the maxim

The maxim clearly states that it is the underlying object and aim of a transaction, which will determine the legal position of that transaction. In the event of a difference between the wording of an expression and its meaning, consideration should be prior to the meaning and not to the literal wording, such that in determining the validity of a transaction, we should consider the economic substance over legal form. This maxim indicates this rule in the interpretation of contracts; this maxim is branch of "matters are determined according to intentions". For example, if a contemporary mode of finance involves the construction of legal transactions around an unlawful outcome, the end does not justify the means, and can be deemed illegal by blocking the lawful means to an evil outcome (*sadd al- dharā'iʿ*).

4.1.2 Application in Islamic finance and banking

Suretyship (*kafālah*) implies coextensive liability of a guarantor while the transfer of debt (*ḥawālah*) implies discharge of the principal debtor. If a contract for the transfer of a debt (*ḥawālah*) is entered into with the condition of holding the debtor liable if the transferee fails to discharge the debt, even though it is termed a *ḥawālah*, it would be regarded as a *kafālah*. "Similar will be the treatment of a contract of *kafālah* in case the principal debtor is discharged after contract of suretyship is signed" (Hasanuzzaman, 2007).

Likewise, if a banking institution declares to their customers that their financing policy is conducted on the basis of no interest, it must be genuinely the case, rather than merely continuing exactly the same practice and instead simply relying on legal form and referring to it as "buy-back" or "markup".

Bayʿ al-wafā' is generally not accepted by the majority of scholars, as it is deemed a legal device for *ribā* (Mansuri, 2010). Nonetheless, it is basically a sale of commodity on the condition that the seller be allowed to buy-back the commodity upon paying its price. Therefore, in *bayʿ al-wafā'*, the seller, by returning the price, can demand back the object sold and the buyer, by returning the object sold, can ask for the price to be reimbursed. Also, neither the seller nor the purchaser can sell to another an object sold by *bayʿ al-wafā'*. This transaction is perceived by the *Majallah* as a pledge contract, not due to the form reflected in the offer and acceptance, but rather the intention and substance as reflected in the earlier maxim. The relationship between the two contractual parties is not as a buyer and seller since the transfer of property and corresponding consideration is not final and ultimate. The contractual relationship would

rather be between mortgagor (seller) and mortgagee (buyer), and neither the seller nor the purchaser can sell to another an object sold by *bayʿ al-wafāʾ*. Ultimately, "the purchaser in this case is a creditor who benefits from the object held in his custody as pledge till the debtor pays him back the amount and retrieves his object…[however], the creditor is not entitled to make profit out of pledged property" (Mansuri, 2010), otherwise, it is *ribā*.

4.2 Necessities (*ḍarūrāt*) make forbidden things canonically harmless

4.2.1 The general meaning of the maxim

"Necessities (*ḍarūrāt*) make forbidden things canonically harmless" *(Majallah*, no.21) means that in extreme situations, prohibited things can be allowed as long as there are no other alternatives that can be chosen from. It is on this basis that the jurists validate demolition of an intervening house in order to prevent the spread of fire to adjacent buildings, just as they validate dumping of the cargo of an overloaded ship in order to prevent danger to the life of its passengers (Kamali, 2012). This particular maxim is a corollary of one of the five leading maxims mentioned above which says, "hardship begets facility" *(Majallah*, no.17). Although the branch maxim seems to be indistinguishable from its leading maxim, it is logical to say that the latter is the general form of the former. With regard to the term of necessity, it is important to know how wide the range can be applied to in different situations.

In the Qur'ān, Almighty Allah says:

"Say (O Muhammad): I find not in that which has been inspired to me anything forbidden to be eaten by one who wishes to eat it, unless it be *maytah* (a dead animal) or blood poured forth (by slaughtering or the like), or the flesh of swine, for that surely is impure, or impious (unlawful) meat (of an animal) which is slaughtered as a sacrifice for others than Allah. But whosoever is forced by necessity without willful disobedience, nor transgressing due limits, (for him) certainly, your Lord is Oft Forgiving, Most Merciful" (al-Qur'ān, 6:145).

From this verse of the Qur'ān, it is clear to see that human beings cannot just simply choose to eat whatever food they want to eat when they think it is necessary. Islam requires that earnings are derived by lawful means and consumption can only be from what is permissible. "These restrictions may sometime lead a person to die of starvation for want of a lawful earning or availability of a permissible esculent. When a person is placed in such dire circumstances the Islamic law permits the use of an unlawful item" (Hasanuzzaman, 2007).

Hardship may be faced because of compulsion, distress and universal affliction (*ʿumūm balwá*), physical handicap, ignorance, forgetfulness, sickness and journey (Hasanuzzaman, 2007). For example, a man who is dying of starvation for want of permissible food is permitted to consume carrion or pork in a quantity required just to save his life.

With regard to necessity, jurists have laid down conditions, which should be met before any relaxation is sought, and include (Hasanuzzaman, 2007):

i. Necessity should actually exist and not be speculative or imaginative.

ii. No lawful alternative should be available other than that which requires relaxation.

iii. Any solution should not cause or lead to murder, apostasy, any usurpation of property (*ghaṣb*) or indulgence in unlawful sex (*zinā*).

iv. There must be a clear justification, such as the protection of life (*ḥifẓ al-nafs*), for relaxation with regard to consuming or performing something unlawful, and only to the extent that would actually avert any threat to life.

v. It should involve a genuine solution and the only effective remedy, such that anything else available would be ineffective.

vi. Additionally, "necessity does not destroy the rights of others: for example, one who is compelled to eat the food of another is still liable to pay the cost" *(Majallah*, no.33).

4.2.2 Application in Islamic finance and banking

Only under the above conditions is relaxation allowed in the main principle. But, where hardship is not necessarily extreme as to endanger life, it will not be regarded as *ḍarūrah.* It may be considered as *ḥājah,* which if faced individually or casually, will not justify any relaxation. However, if this *ḥājah* has become universal or general, such that the entire society, or a group of the society, is confronted with hardship, then this will call for relaxation (Hasanuzzaman, 2007).

It has been suggested that for this reason, the Prophet (pbuh) has permitted *bayʿ al-salam* and *istiṣnāʿ* even though they run counter to the rule of the sale of a non-existent commodity. The purpose of this relaxation is to overcome the obstacles in the smooth economic functioning of the society. However, any "relaxations that can be made for society on the basis of general need cannot be allowed in the case of individual needs" (Hasanuzzaman, 2007).

However, concerning the general rule in the *ḥadīth* that a person should "sell not what is not with you" (Abu Dawud, 1997), various scholars including Ibn Qayyim clarified that the subject matter of the sale (*maḥall al-ʿaqd*) is concerned with the sale of specified objects and not the sale by description of goods that are already available in the market (Abu Dawud, 1997; Kamali, 2000), thus permitting deferred sale of various kinds, which have certainly been validated by the Prophet (pbuh) to improve production, consumption and investment thereby improving the economic well-being of the people.

Of course, it is understood that a contract of sale must specify the quality and the nature of the merchandise on sale; failing which, the contract would be treated as void *(bāṭil)*. However, there are certain commodities whose quality cannot be guaranteed without the likelihood of damaging them. For example, a pomegranate cannot usually "be sold without skin. Removing the skin would be a damaging exposure. It is in such cases that the rule of precisely defining the content of the merchandise will be relaxed" (Hasanuzzaman, 2007).

Furthermore, a debtor is obliged to settle his debt on or before the stipulated date. "Default in timely discharge is not only sinful but also exposes the debtor to legal action. But there may be situations in which he is unable to pay the loan. This will require for deferment to a future date lest he should commit a sin by refusing to pay the loan" (Hasanuzzaman, 2007).

4.3 Severe damage (*ḍarar*) is made to disappear by a lighter damage

4.3.1 The general meaning of the maxim

This maxim is a branch of the leading maxim "harm must be eliminated" *(Majallah*, no.20). The meaning of this maxim is that if harm is unavoidable, one must choose the lighter harm as reflected in the maxim that states that the lesser of the two harms must be chosen *(Majallah*, no.29).

The maxim provides some important choices in order to endure a minor harm to counteract a major harm. The nature of guarantee in Islam, calls for a more well-off neighbor to come to the aid of a less well-off neighbor if his house or property has been damaged or destroyed, rendering him impoverished. Notwithstanding the provisions of any contemporary *takāful* policies, which may not be affordable to the poor, the harm that is caused by the poverty of the poor neighbor is more serious than the harm caused by the distribution of a portion of income from a well-off individual to his neighbor.

Therefore, in cases where the choice is between two harmful alternatives the one fraught with less harm may be chosen.

4.3.2 Application in Islamic finance and banking

This maxim, along with its closely related corollaries can be applied in the context of government intervention in the economy. It is true the Prophet (pbuh) has prohibited the fixing of ceiling prices. The scholars have agreed unanimously that the purpose of this rejection was to prevent injustice of the sellers' rights in gaining profit. However, in current monopolistic conditions, there is a need for protecting the buyers' rights, i.e. the public's rights. During the time of the generations after the companions, they have already agreed that it was permissible to set this maximum price in order to prevent injustice upon the buyers, where there was market distortion. Therefore, the greater injury is avoided by allowing the lesser injury to occur among the sellers.

If a financial institution is forced to lay-off some employees or close branches to remain in business, it may do so since the harm of an insolvent institution is more severe than the suffering of a smaller number of employees (Dusuki and Abdullah, 2007). Alternatively, rescuing banks that are deemed 'too big to fail' with bailouts involving tax-payers' money, might be considered a better alternative to an institution whose insolvency would result in systemic risk to financial markets and the real economy.

4.4 When the receiving of a thing is forbidden the giving of it is also forbidden

4.4.1 The general meaning of the maxim

A corollary of the above maxim that governs giving and taking, is another similar maxim, which states, "What is *ḥarām* to perform is *ḥarām* to request its performance" *(Majallah*, no.35).

The maxim along with its corollary is relevant not only for financial transactions like the taking of interest, and illegal gratifications, and so on, but also, apply for non-financial transactions relating to professions that are rejected in the Sharīʿah (Dusuki and Abdullah, 2007). For example, those professions that have vacancies available in the employment market, which are not permissible in Islam. In reality, society should also reflect as to why these positions are available in the first place. By applying this maxim, a Muslim society should be aware that if a particular profession that is not Sharīʿah compliant, then it should not at all exist as part of the economy. For example, with regard to the presence of a private commercial (conventional) bank, which is seeking employees to conduct retail or corporate financing on a conventional basis.

4.4.2 Application in Islamic finance and banking

As mentioned above, this maxim is applicable to financial transactions like taking of interest, and illegal gratifications etc. But if banks and insurance companies are to allow them and not take this issue as something important to Islam, then somehow it will affect the public, directly or indirectly since the available money will be circulating and thus, incomes of the people will surely be mixed with interest. The following verse shows the prohibition of *ribā* in the Qur'ān:

"And for their taking interest (*ribā*) even though it was forbidden for them, and their wrongful appropriation of other people's property, We have prepared for those among them who reject faith a grievous punishment" (Qur'ān, 4:161).

While the following *ḥadīth* in *Sahih Muslim* shows the Prophet's (pbuh) view on the giving or taking of *ribā*:

"From Jabir: The Prophet, may peace be upon him, cursed the receiver and the payer of interest, the one who records it and the two witnesses to the transaction and said: They are all alike (in guilt)" (Muslim, *Kitāb al-Musāqāh, Bāb laʿana ākil al-ribā wa mu'kilahu*; also in *Tirmidhi* and *Musnad Ahmad* cited by Chapra, 2008).

This maxim also applies to the giving or receiving of bribes. Bribery (*rashwah*) means giving money (with or without an intermediary) to someone through whom a person takes something that he has no right to, such as bribing a judge to judge in his favor wrongfully, or bribing an official to give him preference over others, or to give him something to which he is not entitled. This has been strictly prohibited in the Qur'ān and the *ḥadīth*:

"And eat up not one another's property unjustly (in any illegal way e.g. stealing, robbing, deceiving, etc.), nor give bribery to the rulers (judges before presenting your cases) that you may knowingly eat up a part of the property of others sinfully" (Qur'ān, 2:188).

"The Prophet (pbuh) said, "May the curse of Allah be upon the one who pays a bribe and the one who takes it" (Ibn Majah, *Sunan*, 2313, cited by Shaikh Abdullah al-Faisal, 2014).

4.5 Reward Begets Risk

4.5.1 The general meaning of the maxim

The legal maxim *al-ghurm bi al-ghunm* means, "reward begets risk" *(Majallah*, no.87), and is related to "gain begets liability" *(Majallah*, no.85), and "benefit and burden is proportional" *(Majallah*, no.88). This maxim means that man cannot expect to earn a profit without assuming loss or risk in his whatever undertakings. It is a way of life that business is associated with rewards, profits, risk and uncertainties (Rosly, 2005). To sum up, there shall be no reward without risk-taking.

4.5.2 Application in Islamic finance and banking

Al-bayʿ is a contract of sale, and no sale in Islam is free from risks. Profit from sale is an outcome of risk-taking, as the seller takes the risk to make sure that the market for the good exists, the price is right, and the goods are in good condition. He will lose money if the goods are destroyed by natural causes, or if the market price dropped below cost. This legitimate way to earn a lawful profit (*ribḥ*), involves *ghurm*, which from an economics perspective means accepting price and market risk and changes in price, and in finance it refers to systematic risks (Rosly, 2005).

Islam enjoins market agents to take risks in their business arrangements. This legal maxim invokes to invite people to participate in ventures involving both risks and reward such as *bayʿ, ijārah, salam, muḍārabah* and *mushārakah*. Hence, the essence of Islamic investment is the risk and uncertainty about profit creation that nobody knows for sure, only Allah (Rosly, 2005).

Take *al-ijārah* as example, the risk elements in *al-ijārah* consists of the following (Rosly, 2005):

i. Market risk: the lessor must own the rental property. In this manner, the property is subject to price risk. The value of the property may drop, causing the owner capital depreciation.

ii. Operational risk: the lessor must pay for maintenance cost, even though it may surpass the rental on some occasions.

Thus, even though the rental is fixed, there is no guarantee that the lessor receives capital protection or a return on investment, which therefore contrasts with the financial lease in conventional transactions.

4.6 What is permissible in law cannot be a cause for liability

4.6.1 The general meaning of the maxim

The relationship between the right to enjoy benefit from a property and the liability to incur loss due to proprietorship is governed by a number of rules that carry great significance in transactions of commercial nature (Hasanuzzaman, 2007). In cases where commercial nature is not involved, the plain rule is that "What is permissible in law cannot be a cause for liability" (*Majallah*, no.91).

This maxim covers the concept of benefit versus liability. It means that whenever there is a law allowing some activities to one party, then if a loss occurs to another party, the former cannot be held liable for paying any compensation to the latter. For example, if an owner is allowed by law to dig a well in his garden, then if another person's animal falls in that well and is drowned, the owner cannot be asked to pay for the loss.

4.6.2 Application in Islamic finance and banking

An Islamic government provides the best available transport facility to its citizens, to construct dams for irrigation and electricity, to devalue or revalue its currency in the national interest, and to carry out development projects for the benefit of its people. If somehow an individual is harmed by these developments, the government will not be bound to compensate that person. The same rule is applied when government expenditure on development creates inflationary pressures; any fall in the value of the buyers' money caused by this action cannot hold the government liable for any compensation because the action was taken initially for the citizen's wellbeing (Hasanuzzaman, 2007).

Now in case somebody is run over by a train due to his own fault or is carried in an air-crash, or is carried away along with his property by floods caused by breaches in the dam, the government will not be legally liable to compensate for the loss.

5. Conclusion

In conclusion, this paper has discussed the legal maxims, which are related to Islamic finance and banking, their general meanings and their applications in the industry. All the legal maxims have been a great source of the basis for the Islamic rulings. The history of legal maxims clearly shows that they have been regularly applied, not just in the laws of *ʿibādah* and family law, but also extended to the rules of finance. The development in Islamic banking, finance and insurance has also witnessed a revival of the Sharīʿah laws of *muʿāmalāt*. Especially in the current financial situation, there is a substantial need for these maxims to play their role in strengthening Islamic finance. Islamic jurists have surely contributed enormously and continue to provide an important role, given their considerable knowledge of *fiqh* and competency in deriving rulings that involve these important legal maxims, after the primary sources - the Qur'ān and Sunnah.

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القواعد الفقهية - عدا القواعد الخمس الكبرى – وتطبيقاتها في التمويل الإسلامي

برهان سيتي و آدم عبدالله

أستاذان مساعدان في التمويل الإسلامي - الجامعة الإسلامية العالمية بماليزيا

المستخلص. القواعد الفقهية في الشريعة الإسلامية هي القواعد العامة التي تصور مقاصد الشريعة. تُطَبّق هذه القواعد في حالات عديدة تجمعها أحكام مشتركة، وتلعب دورًا مهمًا في استنباط كثير من الأحكام الفقهية، وذلك لأنها تمثل ضوابط استخراج هذه الأحكام. هناك خمس قواعد كبرى بيَّنَتْها مجلة الأحكام العدلية وهي: "الأمور بمقاصدها"، و"اليقين لا يزول بالشك"، و"المشقة تجلِب التيسير"، و"الضرر يزال"، و"العادة محكمة". وبجانب هذه القواعد الكبرى، التي تشمل تطبيقاتها عددا من المبادئ القانونية، هناك قواعد أخرى، ليست بسعة وشمول القواعد الكبرى، ولكنها تتطرق لموضوعات فقهية أكثر تفصيلاً. هذه القواعد التي تُصَنَّف تحت هذا النوع قد تكون امتدادًا للقواعد الكبرى وقد لا تكون كذلك. هذه الورقة البحثية تسعى لتحليل القواعد الفقهية التي لا تصنف ضمن القواعد الكبرى، والتي ترتبط بالتمويل الإسلامي، وتسعى كذلك لفهم أدوار وتطبيقات هذه القواعد في مجال التمويل والصيرفة الإسلامية.

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