
ISLAMIC LEGAL MAXIMS

Certificate in Islamic Law Lecture 1

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Introduction

- Islamic legal maxims or Qawa'id Fiqhiyyah is a branch of Islamic Law.
- It is well established and almost all Islamic learning institution include ILM as one of the main components in their syllabus.

Shariah

Fiqh

Qawa'id al-Fiqhiyyah

Usul al-Fiqh

Introduction

- Qawa'id Fiqhiyyah can be translated as legal maxims of Fiqh or Islamic legal maxims;
- Comprised of two words qawa'id and fiqhiyyah

Introduction

- Qawa'id is the plural of qa'idah
- Literally it means foundation of the house or similar meaning as used by the Qur'an in Surah "Wa idh yarfa'u Ibrahimu al-qawa'id min al-baiti wa Isma'il [And remember Abraham and Ismail raised the foundations of the house (with this prayer)]
- To the Fuqaha' qawai'd means general rules applicable to most of cases relevant to it such as "al-umur bi maqasidiha"

Al-Qawa'id Al-Fiqhiyyah

- **Definition:** A general rule which applies to all its particulars.
- It is a general principle in Islamic jurisprudence contains general rules of I.L. which can be applied to cases or situations that fall under its rule.
- e.g. Matters are determined according to intention.

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- According to Ahmad al-Zarqa' qawa'id fiqhiyyah refer to "General principles of fiqh presented in precise texts which comprise of general rulings of Shariah on issues covered by them"

Related terms

a) *al-Fiqh* (Islamic Jurisprudence)

- The knowledge of practical Islamic legal rulings from its detailed evidences, e.g. killing is prohibited (haram).
- The legal maxims are based on the fiqh itself. A legal maxim is reflective of a consolidated reading of the fiqh

b) *Usul al-Fiqh* (Principles of I.J.)

- The methodology that the jurist employs in order to derive the Islamic legal rulings from its detailed evidences, e.g. analogy (al-Qiyas): liquor to drug, ecstasy, cigarette (cigar).
- UF is concerned with the methodology of legal reasoning and the rules of interpretation, the meaning and implication of commands and prohibitions, and so forth.

Position and Benefits of ILM

- Create a talent in understanding of *fiqh*, hence an ability to know the rules of particulars and apply them accordingly;
- Open up the conception and legal mind;
- Ability to identify new issue or question and apply it accordingly;

- Help the students, lawyers, judges, and jurists to reach to the correct decision; and
- By understanding the principles of ILM, will enable someone to appreciate the wisdom and beauty of its teaching where some of them are universal and inconformity with natural law or eternal law.

Relationship with other Islamic Disciplines

- ILM cannot be studied in isolation from other Islamic disciplines;
- It is a continuation of some other earlier or basic disciplines; hence advanced course;

Relationship with other Islamic Disciplines (cont.)

- One must understand Islamic Jurisprudence (*al-Fiqh*) and Principles of Islamic Jurisprudence (*Usul al-Fiqh*); hence, good command of both disciplines are required;

Relationship with other Islamic Disciplines (cont.)

- ILM covers all topics of Islamic Legal System; e.g. family, transaction, criminal, evidence etc;
- ILM also relates to Islamic *'aqidah* (system of belief) and *al-akhlaq* (ethics and morality); and

Relationship with other Islamic Disciplines (cont.)

- Islamic Legal maxim is part and parcel of one integrated and comprehensive Islamic legal system.

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- Legal Maxims represent an important area of fiqh literature, as their study imparts strategic knowledge of their subject matter and helps the reader gain insight into the general character and attributes of the Sharia.
 - They are particularly useful and inspiring in the vision they impart for the search particularly of new solutions through ijtihad.
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- Legal maxims are different from *usul al-fiqh* (sources of *fiqh*) in that the maxims are based on the *fiqh* itself and represent rules and principles that are derived from the reading of the detailed rules of *fiqh* on various themes.
 - The *usul al-fiqh* is concerned, on the other hand, with the sources of law. Rules of interpretation, methodology of legal reasoning, meaning and implication of command and prohibition and so forth.
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Examples:

- 1) Drug case
 - UF – through the application of Qiyas.
 - Maxim – based on the maxim ;al-dararu yuzal.
 - 2) Mixed companies
 - UF – based on maslahah
 - Maxim – Umum al-Balwa – hardship begets facility.
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- Legal maxim are theoretical abstractions in the form, usually, of short epithetical statements that are expressive, often in a few words, of the goals and objectives of Shariah.
 - They consist mainly of statements of principles that are derived from the detailed reading of the rules of fiqh on various theme.
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- The fiqh has generally been developed by individual jurists in relationship to particular themes and issues which differ from modern statutory law rules, which are concise and devoid of detail.
 - The detailed expositions of fiqh in turn enable the jurists at a later stage to reduce them into abstract statements of principles.
 - The actual wording of the maxim is occasionally taken from the Quran or hadith but are more often the work of leading jurists.
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- It is stated in the Mejjelle that legal maxims are designed to facilitate better understanding of the Shariah, and the judge may not base his judgment on them unless the maxim in question is derived from the Quran or hadith or supported by other evidence.
 - However, al-Qarafi held that a judicial decision is reversible if it violates a generally accepted maxim.
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Conclusion

- The ulama' have generally considered the maxims of fiqh to be significantly conducive to ijtiḥād and they may naturally be utilized by the judge and mujtahid as persuasive evidence, it is just that they are broad guidelines, whereas judicial orders need to be founded in specific evidence that is directly relevant to the subject of adjudication.
 - Since most of the legal maxim are expounded in the form of generalized statements they hardly apply in an exclusive sense, and often admit exceptions and particularisation.
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Historical Development

- Legal maxims were developed gradually, the history of their development is parallel with that fiqh itself.
- These were developed mainly during the era of imitation (taqlid)
- The actual wordings of the maxims are occasionally taken from the Qur'an or Ahadith but are more often the work of leading jurists and mujtahids that have subsequently been refined by others throughout the ages.

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- Historically, the Hanafi jurists are the first to formulate legal maxims;
 - An early Iraqi jurists, Sufyan ibn Tahir al-Dabbas, collated the first 17 maxims;
 - Abu al-Hassan al-Karkhi (d. 340) increased the number to 39.

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- Many scholars from various schools added to these over time and the total number of qawa'id and dawabit eventually exceeded 1200.
 - Next to Hanafi, the Shafii's and following them, the Hanbalis, then the Malikis have added their contributions to the literature on legal maxims.

- The leading Shafii scholar, ‘Izz al-Din Abd Salam (d. 660H) in Qawa’id al-Ahkam fi Masalih al-Anam is noted as one of the salient contributions to this field.
- And so ‘Abd Rahman ibn Rajab al-Hanbali’s (d. 795H) work al-Qawa’id, both of which have been highly acclaimed;
- The Mejelle Ahkam Adliyye collection, written in the 1870’s by a group of Turkish scholars represents the most advanced stage in the compilation of legal maxims.

Sources of Legal Maxims

- The Quran;
- The Sunnah;
- Traditions of the Rightly Guided Caliphs; and
- Writings, fatawa, and opinions of the leading Muslim jurists (*al-ijtihad*)

In the Qur'an

- Al-Maidah: 3
- “Anyone who is obliged to do so while (he is) starving, yet without deliberately sinning (will find) Allah is forgiving and merciful”.
- Al-Baqarah: 220
- “Allah distinguishes the plunder from the improver”.

In the Qur'an

- Al-Baqarah: 188
- “And do not eat up your property among yourself for vanities...”
- Al-Hajj: 78
- “He has chosen you, and has imposed no difficulties on you in religion”
- Al-Maidah: 6
- “Allah does not wish to place you in a difficulty”

In the Sunnah

- La darara wala dirar
- [Harm should not be inflicted nor tolerated]
- Matlu al-ghaniyyi zulm
- [The delay to pay the debt by a rich person is unjust]
- Al-walad li al- firash
- [The child belongs to the marriage bed]

In the Sunnah

- Innama al-a'mal bi al-niyyat
- [Verily all deeds are based on intention]
- Al-Kharaj bi al-daman
- [Profits follows responsibility]
- Al-Ajma' jarhuha jubar
- [There is no compensation for one killed or wounded by an animal]
- Al-Kharaj la yughlaq
- [The security is not forfeited]

Characteristics of the maxims

- Precise in their form (wording); normally formulated in two or three words;
- Generality in their meaning;
- Widely applied to many branches of fiqh.

Five Major ILM

- Matters are determined according to intention;
- Hardship begets facility;
- Certainty is not dispelled by doubt;
- Injury must be removed; and
- Custom is authoritative.

Categories of Legal Maxims

- Ibn Nujaym divided the legal maxims into two categories;
- 1) Normative, or leading legal maxims
- 2) Subsidiary maxims.

Normative legal maxims

- Apply to the entire range of fiqh without any specification.
- All schools of law are in agreement over them.
- Ibn Nujaym placed six under the normative maxims which is “No spiritual reward accrues without intention” (la thawaba illa bi al-niyyah)

One: Matters are determined according to intention

- This means that any act of a human being must have come from his will and intention.
- The origin of this maxim comes from the Hadith:

“Actions are but by intention and every man should have but that which he intended...”

(Related by *Bukhari* and Muslim on the authority of *Umar I*)

Matters are Determined According to Intention

- Introduction:
- A great maxim that covers almost all aspects of Islamic law including devotional matters, commercial transaction and crimes.
- For example: If a person fires a shot at another with the intention of hitting him and does hit him, the perpetrator is said to have willed the action of firing and intended to hit the other person.

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- On the other hand, a person might fire towards a certain object and accidentally hit a person.
 - The fact that the shooting is not directed to the person indicates the intention of the person in not shooting towards the person, but it happened accidentally or unintentionally.

One: Matters are determined according to intention (cont.)

- Thus, the Islamic rules on human actions/deed will be decided in accordance with his intention, and so the ruling (*al-hukm*) will also be judged in accordance with his intention.

One: Matters are determined according to intention (cont)

- The Prophet is reported to have said:

“Deeds are judged by intentions and every person is judged according to his intentions.”

(Sahih al-Bukhari)

One: Matters are determined according to intention (cont.)

- For example, if someone finds something (valuable) on the road, and he picks it up in order to return it to the owner, he is considered as *amin* (a trustee), hence no liability/ compensation can be charged on him if that thing is damaged/destroyed without any wrongdoing from him on that matter.

One: Matters are determined according to intention (cont)

- However, if he has the intention to keep it for himself, he is considered as *ghasib*, wrongfully appropriating it, hence, he is liable to pay compensation, if it is destroyed even without his transgression on that property.

One: Matters are determined according to intention (cont)

- Therefore, both acts are identical, but the ruling is different because of the intention.
- The same ruling with the act of marriage.

One: Matters are determined according to intention (cont)

- For instance, If he married someone in order to establish new family, following the sunnah(the way) of the Prophet (SAW), he will be blessed and rewarded. On the contrary, if he married in order to punish or torture her, or for some other bad intentions, he will be liable for sin and punishment.

One: Matters are determined according to intention (cont)

- But intention alone with no action followed, there will be no ruling, e.g. someone intends to divorce his wife, or to sell, to make a gift (*hibah*) his house.
- Intention also makes one deed differ from '*adat* (custom) and *ibadat*, e.g. to eat, sleep, rest in the mosque etc.

One: Matters are determined according to intention (cont)

- We can apply this maxim to all sorts of human activity, e.g. donation etc.
- Finally, remember both means and ends must be legally acceptable to Islam. Shari'ah compliance.
- Robin Hood (means justify the ends).
- Machiavelli theory.

Related maxim/Branches

In contracts, effect is given to meaning and intention, and not to words and forms.

- Contract is very wide area of human activity/transaction. It depends largely on the will and manner of contracting parties. Hence, “The contract is a legislation of the contracting parties.”

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- The text on the subject is limited, thus the area of *ijtihad* is so immense.
 - For instance, God says:

But Allah has permitted trade
and forbidden *riba* (usury).

Q., al-Baqarah, 2 : 275.

- In reading the contract, in the event of a divergence btw. the wording of an expression and its meaning, consideration should be given to the meaning rather than literal wording.

- E.g. deed of gift with remuneration is selling.
- **A says to B:** I make a gift this horse with RM 500.00 and B accepts it. The contract is not a gift but a sale even though the word gift is used.

- **Lending with remuneration is rent:**

e.g. A says to B: I lend you my Kancil with RM 50.00 for you to go to J.B. and B accepts it, the contract is renting not lending. For, lending does not involved payment, even A used the word lending.

- This however, if the contract does not involve the right of the third party. If it does, we should construe the apparent meaning. This is in order to protect the right of others, or to avoid injury to the others.

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- If there is no means to know the intention, we should go for the appearance.
 - The rule is:

“We (only) judge on the basis of apparent (outward/peripheral) whereas God takes care of the inward intention.”

(the meaning of al-Hadith)