



Uncovering the Bedrock: A Primer on Islamic Legal Maxims

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Introduction

One's confidence in the reliability of a product is often largely dependent on one's confidence in the process that yielded the product. Substantive legal rulings similarly enjoy only as much confidence as is enjoyed by the process of legal reasoning that produced them. Muslims, a people who submit to the commandments of God, often find comfort and confidence in the fact that many Islamic commandments are the explicit instruction of the All-Knowing and Wise Creator of humanity and His divinely inspired Messenger, Prophet Muhammad

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However, the collection of legal rulings by which a Muslim lives includes rulings that involve the effort of human actors—i.e., qualified jurists (*fuqahā'*)—in ascertaining God's law. It is this human element that may open a door to doubt in the reliability and authoritative nature of legal rulings that make up the corpus of Islamic substantive law known as *fiqh*. This doubt may come in various forms. One of its forms is a view of Islamic law that paints it as the product of the arbitrary whims of jurists who haphazardly issue rulings based primarily on considerations of convenience and expediency. In other words, Islamic law is depicted as standing on thin rational ground and lacking in coherence and consistency. Some have painted the Muslim judge as one who “issued arbitrary, irrational, and expedient decisions without respect for general principles of law,”¹ and viewed justice in Islamic courts as lacking any “fixed rules of a formally rational law.”²

This view of Islamic law may have managed to taint the perception that some Muslims have of their own legal history and tradition. It is precisely this distorted image that this publication aims to rectify by relying on the sub-field of Islamic legal maxims (*al-qawā'id al-fiqhiyya*). Much has already been written about Islamic legal history and Islamic legal theory, all of which demonstrates a

¹ Intisar A. Rabb, “Against Kadijustiz: On the Negative Citation of Foreign Law,” *Suffolk University Law Review* 48, no. 343 (2015): 349.

² Max Weber, *Economy and Society*, trans. Ephraim Fischhof et al., ed. Guenther Roth and Claus Wittich (N.p., 1968), 806n40.

commitment to rational and coherent law-making on the part of Muslim jurists. However, while such defenses may require a certain level of technical knowledge in order for them to have their intended effect, legal maxims have an intuitive appeal that can quickly give insight into the coherent and principled nature of *fiqh*.

By becoming acquainted with Islamic legal maxims, one can appreciate the level of consistency and legal harmony that the jurists aimed to achieve in their *fiqhī* enterprise. It becomes apparent that they engaged in legal reasoning that adhered to principles of general application and strove to avoid legal absurdities and logical inconsistencies. Not only do these maxims reveal to us a strong commitment to principles, but they also give us insight into *what* principles guided Muslim jurists, such as the presumption of innocence and the determinative nature of custom. Knowledge of Islamic legal maxims aids in dismantling the view of Islamic law as a collection of arbitrary laws created by ancient men. The image painted by these maxims is one of sophisticated jurists who recognized the need for consistency in the law. As such, they made note of the foundational principles of law found in the Qur'an and Sunnah and treated them as cardinal rules. They also detected patterns in the law and, from those patterns, deduced principles which they then applied to analogous cases. By giving an overview and a commentary on some of the well-known Islamic legal maxims, I hope to foster a sense of conviction amongst the Muslim audience in the Islamic legal tradition.

What are maxims?

All of us can probably remember a situation in which their parents laid down a general rule, such as, “Never talk to strangers,” or, “As soon as it gets dark, come back home.” These rules that our parents laid down for us were not directed at one specific incident. Rather, they were general rules that saved our parents the trouble of repeating the same rule every time the rule became applicable. These rules were meant to be consistently applied whenever the necessary conditions for the applicability of these rules existed. In other words, these were “legal principles”—so to speak—in the legal regime of the household.

When rules of broad or general application are crafted into concise phrases, they are often labeled “maxims.” Maxims are intended to capture, in words, legal principles. The idea of legal principles is not unique to any particular system of law. As demonstrated above, humans have an intuitive appreciation for legal principles. The human being, with his or her natural sense of justice, recognizes that a system of law should enjoy a level of consistency such that similar cases are decided similarly. This natural inclination towards consistency gives rise to legal principles, as it allows those who apply the law to do so consistently. Such principles serve other important roles. They may obviate the need to formulate and rationalize a ruling from scratch for each new legal incident if the new incident perfectly and obviously fits under an established legal principle. Importantly, resort will be made to principles (especially those of a fundamental nature) when a specific legal incident lacks a clear and applicable legal ruling that addresses it. Principles, depending on their nature, may also serve as general qualifiers that set the parameters for how other legal rulings are to be applied. In other words, some may serve as “higher principles” to which all other principles or legal rulings are subject. For example, the principle that “There shall be no initiation of harm” may be used to set limits on conduct that otherwise is perfectly legal and permissible.

Islamic law, like other legal traditions, has produced a set of legal maxims that serve as helpful tools in understanding and capturing the basic principles that animate the law and its application. The maxims of *fiqh* are legal principles that enjoy a level of consistent application or that represent a consistent pattern of legal rulings. The Arabic word used to describe the principle or maxim is “*qā’ida*” (pl. *qawā’id*). The word literally means “base,” or “that upon which something rests or is built.” This points to the fact that these principles serve as a basis for more specific rulings that treat specific legal questions or apply to specific events. Examples of a *qā’ida* include “The evidentiary burden rests on the claimant,” (*al-bayyinatu ‘alā man idda’ā*) and “Necessity renders the impermissible permissible” (*al-ḍarūrāt tubīḥ al-maḥzūrāt*).

The historical origins of the *qawā'id*

No mature set of laws can exist without legal principles. Wherever there is law, there are principles. Although the study of *qawā'id* as an identifiable sub-field of study did not appear until centuries after the birth of Islam, legal principles, in substance, existed since the birth of Islamic law during the lifetime of Prophet Muhammad ﷺ. Some of the legal maxims of *fiqh* are, in fact, verbatim quotations of a Prophetic hadith. Although many hadiths record specific rulings to specific incidents laid down by Prophet Muhammad ﷺ, the Prophet ﷺ sometimes declared laws of general application which were to function as cardinal rules. The maxim that states “The evidentiary burden rests on the claimant,”³ is a Prophetic hadith, as is the maxim “There shall be no harm nor any reciprocation of harm.”⁴

The first known legal work that documented legal maxims is by the Ḥanafī jurist, Abū al-Ḥasan al-Karkhī (d. 340/952). This does not mean, however, that jurists before the 4th Hijrī century were not familiar with legal maxims. In fact, a cursory look at many of the legal works of early jurists reveals that they were acutely aware of legal principles. These jurists did not compile texts that collected those principles. Nonetheless, one can easily see that early jurists detected patterns in the law and deduced, from those patterns, legal principles to guide themselves and later jurists in applying the law. Even before the maturation of the field of *qawā'id* one can notice that early books of *fiqh* often transferred reasoning (and the ruling this reasoning produced) from one legal case to another, even though each of the two cases may have related to completely different areas of substantive law. In other words, jurists would often, by analogy, apply previously used reasoning to a new case when it seemed like the two cases were sufficiently similar. Reliance on analogous cases can be seen in some of the earliest works of *fiqh*. This may be traced back to the legal practice of early Kufan jurists who assessed the correctness of a legal opinion based on its consistency with analogous cases. In the recorded legal disagreements between Abū Ḥanīfa al-Nu'mān ibn Thābit (d. 150/767) and

³ See Maxim 11 below.

⁴ See Maxim 3 below.

his contemporary, Muḥammad ibn Abī Laylā (d. 148/765), one sees firsthand how an early jurist “was called out by his interlocutors if he ignored an important consideration, or if he treated a case in an unjustifiably different manner than his treatment of a similar case.”⁵ In his disagreement with Ibn Abī Laylā, Abū Ḥanīfā frequently demonstrated the error of his opponent by showing that his legal opinion violated a “high principle,” leading to an inconsistency on the part of his opponent.⁶

Although this method may have been pioneered and perfected by the jurists of Kufa, that certainly does not mean that other jurists in the formative period failed to root their legal reasoning in principles. In fact, Muḥammad ibn Idrīs al-Shāfi‘ī (d. 204/820), who was at odds with many aspects of Kufan law, exhibited a similar commitment to a harmonious legal system. The following debate, narrated by al-Shāfi‘ī, between himself and his Ḥanafī teacher, Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189/805), is revealing:

[al-Shaybānī] said: “What is your opinion about a man who misappropriates (*ghaṣaba*) a log from another man and builds on top of it a building, spending in the process one thousand dinars? Then the owner of the log appears, proving through two reliable witnesses that the man has misappropriated his log and built this building upon it. What would you decide in this [case]?” I said: “The value of [the log] is estimated. If [the owner] agrees, he is awarded the value of the log. And if he refuses and only wants his log, the building is taken down and his log is returned.” So he said to me: “What is your opinion about a man who misappropriates a silver thread and stitches up his own belly with it [after an injury or operation], then the owner of the thread appears and proves through two reliable witnesses that the man misappropriated the thread with which he stitched up his belly? Would you have the thread removed from his belly?” I said: “No.” He said: “God is great; you have abandoned your position!” And his followers exclaimed: “You have abandoned your position!” So I said: “Do not rush. Tell me: what if he had not misappropriated the log from anyone else and wanted to take down the building in order to build another one; would that be permissible or impermissible for him?” They said: “Permissible.” I said: “So what is your opinion (*afara’ayta*) if the thread

⁵ Sohail Hanif, “The Tale of Two Kufans: Abū Yūsuf’s Ikhtilāf Abī Ḥanīfā wa ibn Abī Laylā and Schacht’s Ancient Schools,” *Islamic Law and Society* 25 (2018): 200.

⁶ Hanif, “Tale of Two Kufans,” 200–1.

were his own and he wanted to remove it from his belly [thereby opening the wound again]; would this be permissible or impermissible for him?” They said: “Impermissible.” I said: “So how can you draw an analogy between that which is permissible and that which is not?”⁷

Much can be gleaned from this recorded debate. First, al-Shaybānī sought to demonstrate the error in al-Shāfi‘ī’s argument by alleging that his opinion had produced an inconsistency in rulings. That is, al-Shaybānī, after being informed of al-Shāfi‘ī’s opinion about the log, drew a supposedly analogous scenario with the aim of showing that al-Shāfi‘ī’s opinion on the log would produce one of two results: 1) either he would consistently apply his ruling which would result in a legal absurdity, or 2) he would abandon his legal position and fail to produce a coherent legal principle. All of this was to place al-Shāfi‘ī in a corner so that he would concede that his legal opinion failed the test of analogy and, consequently, consistency. Second, when al-Shāfi‘ī did not transfer his reasoning from the log to the case of the silver thread, the spectators took this as a clear sign of defeat. In other words, an inability to consistently apply a legal ruling was a sign of its error.

The debate also reveals the role that principles play in legal reasoning. In defending his position, al-Shāfi‘ī appeals to a principle that distinguishes the case of the log from the case of the silver thread. That principle is that the plaintiff who seeks the return of his specific property is within his rights to do so unless such a demand would require impermissible conduct. Seeking the return of the misappropriated log would not lead to any impermissible conduct, whereas the removal of the silver thread would. Of course, al-Shāfi‘ī did not explicitly declare this principle and did not craft it into a maxim. The point here is, however, that legal principles have an inherent and inescapable role that is often motivated by an innate affinity for consistency and aversion to absurdity and arbitrariness. It was later jurists who consciously compiled such principles in dedicated works and crafted them into maxims.

⁷ As translated in Ahmed El Shamsy, *The Canonization of Islamic Law* (Cambridge: Cambridge University Press, 2015), 23–24.

With that being said, jurists in the early period did in some cases craft maxims to represent what they believed to be cardinal rules. The student of Abū Ḥanīfa, Abū Yūsuf, deduced and crafted a number of legal principles in his book, *al-Kharāj*. The maxims he crafted include, “The *imām* is to prescribe punishment that is proportionate to the crime,” and “The *imām* is not to remove property from the hand of a person without a known and established right to do so.”⁸ The works of contemporaneous jurists are full of similar formulations in relation to various areas of law.⁹ During this early period, jurists did not dedicate works for the legal maxims, but their works do contain incidental mention of legal principles.

Following the formative period of Islamic law, as identifiable schools of law began to form, jurists began detecting legal patterns in the substantive legal rulings of their respective schools. The importance of these legal patterns lay in the fact that they allowed the jurists, through a process known as *takhrīj*, to extend their school’s legal position on a question to an unprecedented case so long as it was analogous to a case already decided by that school of law.¹⁰ These new analogous cases which were similar to previously decided cases were known as *naẓā’ir*. It is, therefore, no surprise that the later works that were dedicated to compiling legal maxims often contained the word *naẓā’ir* in their titles.

As mentioned above, the first work concerned with legal principles was that of the Ḥanafī jurist, Abū al-Ḥasan ‘Ubayd-Allāh al-Karkhī. However, this work is a brief list of legal principles that relate to both substantive law and legal theory. Over time, as the doctrines of the various schools of law became settled and established, scholars began authoring works whose aim was to collect and document the legal principles that form the basis of the rulings found in their respective schools of law. In such works, the authors would typically have the maxim as a heading, and then proceed to list the various specific rulings that fit under that maxim. These applications of the maxim are the analogous legal cases referred to earlier as *naẓā’ir*. Whereas jurists may have incidentally quoted maxims in the past or relied

⁸ Abū Yūsuf Ya‘qūb ibn Ibrāhīm, *Kitāb al-kharāj* (Beirut: Dār al-Ma‘rifā, 1979), 65–66.

⁹ ‘Alī Aḥmed al-Nadwī, *al-qawā‘id al-fiqhiyyah* (Damascus: Dār al-Qalam, 1994), 90–159.

¹⁰ See examples in El Shamsy, *Canonization of Islamic Law*, 179.

on *naẓā'ir* on an ad hoc basis, these works aimed to gather and group the *naẓā'ir* under their respective maxims. Such works were in many cases titled *al-Ashbāh wa-al-naẓā'ir* (“the similar and analogous cases”). In addition to listing the applications for each maxim, these works often cited the basis for the maxim from the Qur'an or Sunnah if it existed.

The first work dedicated to legal maxims and presenting them in a more “mature” form is *al-Ashbāh wa-al-naẓā'ir* by the Shāfi'ī jurist, Ṣadr al-Dīn ibn al-Wakīl (d. 716/1267). His work is considered to be the beginning of the sub-field and genre dedicated to legal maxims. His work was followed by contributions from jurists from all schools of law. In many cases, works on legal maxims included only maxims that were accepted by the school of law to which the author belonged, and similarly only included the legal rulings of that school. Many of the maxims, however, are accepted by some or all schools of law. As such, overlap frequently occurred. Islamic legal maxims were finally popularized by the codification of ninety-nine maxims in the Ottoman Civil Code, *Majallat al-aḥkām al-'adliyya*, in the late 19th century.

Where do the maxims come from?

As explained above, some maxims come directly from a Prophetic hadith. Such maxims, however, are few in number. Other maxims are deduced from the text of a Prophetic hadith(s) or verse(s) of the Qur'an. The principle that, “Certainty is not displaced by doubt,” is deduced from a Prophetic hadith (amongst other sources) in which the Prophet ﷺ informed a Companion that his ablution remained valid even if he felt doubt as to whether he had violated his state of ritual purity or not.¹¹ From this scholars deduced the general maxim that mere doubt cannot displace the established state of affairs. Maxims are also deduced from the rulings developed by jurists. As jurists develop the law and apply it to new and emerging circumstances, patterns are inevitably detected. These patterns eventually give rise to principles that are crafted into maxims.

¹¹ Muhammed ibn Ismā'īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī* (Damascus: Dār ibn Kathīr, 2002), *kitāb al-wuḍū'*, p. 48, ḥadīth no. 137.

How to understand maxims

1- The difference between the *qawā'id* and *uṣūl al-fiqh*

There is sometimes a conflation between *al-qawā'id al-fiqhiyya* and the field of legal theory (*uṣūl al-fiqh*). What may contribute to this conflation is the fact that *uṣūl al-fiqh* also has its own set of *qawā'id*. The confusion may be cleared by grasping the difference between *uṣūl al-fiqh* and *fiqh*.

Uṣūl al-fiqh is the science concerned with the methodology through which jurists extract rulings from the textual sources of Islamic law (i.e., the Qur'an and Sunnah). The maxims of legal theory (*al-qawā'id al-uṣūliyya*) are, therefore, principles that a jurist applies when interpreting and seeking to extract a ruling from the Qur'an and Sunnah. An example of such a maxim is: A command conveys an obligation (*al-amr li-al-wujūb*). This maxim tells the jurist that any command found in the Qur'an or Sunnah presumptively gives rise to an obligation (as opposed to recommended or merely permissible conduct). The maxim does not tell the jurist what the law is on any substantive legal question. Rather, the maxim forms part of the methodology that the jurist will employ when seeking to find a legal ruling in the Qur'an or Sunnah. Put differently, maxims of Islamic legal theory serve a role similar to that of the rules of statutory interpretation in common law jurisdictions.

Al-qawā'id al-fiqhiyya, on the other hand, deal directly with substantive matters. They are not rules of textual interpretation. Whereas the maxims of legal theory served as an intermediate step towards arriving at a legal ruling, maxims of *fiqh* point the jurist directly to the substantive legal ruling without explicit resort to the textual sources. In other words, *al-qawā'id al-fiqhiyya* tell the jurist *what* the law is whereas *al-qawā'id al-uṣūliyya* tell the jurist *how* to find the law.

2- The difference between a *qā'ida* and a *ḍābiṭ*

Qā'ida is generally used to refer to a legal principle and the maxim by which that principle is captured. A *ḍābiṭ* (pl. *ḍawābiṭ*) is similar in that it is a general principle of law. However, they are often differentiated on the basis that the former permeates various areas of substantive law while the latter deals with a specific legal subject.¹² For example, a principle that deals with the specific subject of property law or contract law would be considered a *ḍābiṭ*. However, one must note that this differentiation is not always consistently followed. Sometimes, a principle that relates to a specific area of law will be included in a work that is supposedly dedicated to collecting *qawā'id*. This inconsistency in usage may be due to the fact that such formal definitions often appear in later works that aimed to achieve a level of systemization in the use of terms and phrases. The temporal separation between the initial use of the terms and the appearance of the formal definitions often contributes to inconsistency in usage. Nonetheless, and although this formal differentiation is not entirely consistent, it is helpful to keep in mind that some principles permeate many areas of the law and are very broad in their application, while others are specific to one area of law or even a sub-area of law.

3- Maxims are not created equal

Some maxims are indispensable. Others are not. Maxims like, “Certainty is not displaced by doubt,” or “The evidentiary burden rests on the claimant,” are firmly grounded in Prophetic tradition and have numerous applications. Such maxims reflect firm legal principles that may even delimit the operation of other principles. This is also the case with maxims that are rules of logic or reason which, naturally, must be consistently applied. Similarly, maxims that are substantiated by doctrines across all schools of law can be seen as widely-accepted legal statements. Other maxims, on the other hand, may have so many exceptions that their status as

¹² Zayn al-Dīn ibn Nujaym, *al-Ashbāh wa al-naẓā'ir*, ed. Zakariyyā 'Umayrāt (Beirut: Dār al-Kutub al-'Ilmiyya, 1999), 137; Shihāb al-Dīn al-Ḥamawī, *Ghamz 'uyūn al-baṣā'ir* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1985), 31. Other scholars have affirmed this differentiation. See al-Nadwī, *al-qawā'id al-fiqhiyyah*, 46–48. *Ḍābiṭ* is also used to refer to qualifiers to other maxims or legal tests.

maxims or principles becomes questionable.¹³ Such maxims are typically deduced from a small number of legal rulings that are not explicitly endorsed in the textual sources of the law. As such, they rest on shaky ground and one cannot be confident that the principle applies with equal force in all areas of law.

One must also keep in mind that some maxims reflect the doctrine of a specific school of law and consequently are not reflective of a widely accepted principle. An example of this is the Ḥanafī maxim that states, “compensation and absolute liability cannot coexist” (*al-ajr wa-al-ḍamān lā yajtami ‘ān*).¹⁴ According to Ḥanafī law, one who is in possession of another’s property is not obligated to compensate the owner (i.e., pay rent) if that person is absolutely liable for any damage to the property. A person who is absolutely liable is one who bears the risk of damage to or destruction of the property regardless of fault. An example of such a person is the usurper (*ghāṣib*) of property. If this property is damaged or destroyed while in the possession of the usurper, even if through no fault of the usurper, the usurper will be liable for that damage or destruction. Therefore, according to this Ḥanafī maxim, one who usurps a property is only obligated to return the usurped property and does not have to compensate the owner for loss of use. Other schools of law do not adopt this maxim and require the usurper to both return the property and compensate the owner for loss of use.

There is sometimes an inverse relationship between the fundamental nature of the maxim and the maxim’s functionality, at least in relation to substantive law. That is because some maxims represent organizing principles or principles that capture the logic or aim of the law. For example, the maxim that states, “The *sharī‘a* is concerned with attaining benefit and repelling harm,” does very little by way of directly helping a jurist apply the law to a legal incident, especially in the presence of more specific evidence. This is not to say that this statement is useless. However, its function is mainly to bring to light a basic principle that animates the law. The statement informs us of the general aim of the *sharī‘a*. However, between

¹³ The maxims “Speech is not to be imputed to a silent person” (*lā yunsabu li sākitin qawl*) and “An event is attributed to the most recent of the proposed times” (*al-ḥadīth yuḍāf ilā aqrab awqātih*) are, in my respectful view, fraught with exceptions such that they can hardly be thought of as principles.

¹⁴ Aḥmed al-Zarqā, *Sharḥ al-qawā‘id al-fiqhiya* (Damascus: Dār al-Qalam, 1989), 431.

this statement and an ultimate legal ruling exists a long chain of legal reasoning. Additionally, in some cases, a maxim will function to guide the administration of justice (i.e., it will tell a judge how to perform his or her duties) to ensure the service of justice. Such maxims tend to relate to rules of evidence, the conduct of a judge, or procedural law. Although these maxims are important, especially if they are of a constitutional nature, they do not penetrate areas of substantive law.

Part of what makes maxims appealing is the fact that they appear in concise and snappy words that will often rhyme (in Arabic, at least). However, there is often a trade-off between the conciseness of a maxim (as well as its snappiness) and its legal precision. Take for example the well-known maxim, “Necessity renders the impermissible permissible,” (*al-ḍarūrāt tubīḥ al-maḥẓurāt*). The maxim is concise and memorable. However, the legal principle captured in this maxim is not ripe for application. It rather requires a number of qualifiers. Qualifiers for this principle include: the necessity must outweigh the impermissible action, one must have preponderant belief (*ghalabat al-ẓann*) that the necessity is at stake, the permissibility only exists to the extent needed to repel the harm, and necessity cannot suspend the rights of others. A maxim that has many qualifiers becomes a general title for a line of legal cases or rulings. This fact underscores the point that legal maxims do not obviate the need to turn to qualified jurists in order to arrive at a legal ruling.

4- The aversion to using maxims as a basis for rulings

Some jurists have stated that maxims should not be used as a basis for legal rulings.¹⁵ In their view, maxims are descriptive, not prescriptive. Such jurists see maxims as titles for a set of rulings that are bound by a common thread. The maxim simply serves as a means to help a student, jurist, or judge organize and classify legal rulings. At best, the maxims may serve as ex-post attestations (*shawāhid*) for the validity of a legal ruling.

¹⁵ Al-Ḥamawī, *Ghamz ‘uyūn al-baṣā’ir*, 37; al-Nadwī, *al-qawā’id al-fiqhiyya*, 329–31.

The reason for this aversion is that the principles enshrined in these maxims often have exceptions. By blindly applying maxims, a jurist may fall into error by applying a maxim to a legal matter which, in reality, fits under one of the exceptions. Not only do many maxims have exceptions, but they are in some cases, as mentioned earlier, not ripe for application as they are accompanied by qualifiers and legal tests.

This view of maxims, however, may seem to contradict what was said earlier about the use of legal principles in *fiqh* texts. That is, jurists from as far back as the formative period of Islamic law relied on legal maxims to assess the correctness of legal rulings, refute opponents, assert the superiority of their doctrine(s), and extend rulings to unprecedented cases. How can one accept this while also stating that maxims should not be used as the basis for legal rulings?

The seeming contradiction may in fact be reconciled. The maxims that were used in the ways mentioned above may have been of the “indispensable” type. A maxim that is an explicit Prophetic ḥadīth or a rule of logic can certainly be safely applied to legal questions. Second, the principles upon which jurists relied may have been closer to a *dābiṭ* that dealt with a certain area of law rather than a *qā’ida* that had applications across many areas of law. For example, a jurist who adopts a certain maxim in matters of ablution is probably justified in extending that maxim to another legal question on ablution. The applicability of a maxim becomes less and less certain, however, the more broad it becomes and as it starts to penetrate various areas of law since such breadth makes it more susceptible to exceptions.

Third, the warning against the use of maxims as the basis for rulings is mainly found in the works of later jurists whose time period saw a proliferation of legal maxims. Earlier periods may have been more conservative in crafting maxims, restricting maxims to principles that enjoyed general acceptance across legal schools, were more precise as they dealt with a specific area of law, were substantiated by a long line of analogous cases, or were rooted in hadith or rules of logic.¹⁶ Earlier works were not concerned with collecting maxims for their own

¹⁶ See al-Ḥamawī, *Ghamz ‘uyūn al-baṣā’ir*, 37.

sake. As a result, they probably restricted themselves to the obvious and apparent maxims which do not suffer from controversy or contestation. However, when maxims became an object of study and were sought after for their own sake, jurists began exerting a deliberate effort in deducing maxims. This effort may have produced maxims whose status and validity was contested and which did not enjoy broad support amongst jurists. It would certainly be natural, then, for jurists to not rush to legal maxims for quick answers.

Fourth, this aversion may relate specifically to already-decided cases to which schools of law have offered answers in their texts and legal manuals.¹⁷ In such cases, a maxim may point the jurist in the direction of the answer, but itself will not be the answer. Nor should it be, since there is no reason to risk entering into error when the legal ruling is readily available in the settled doctrine of the jurist's respective school. However, if an unprecedented legal question arises for which there is no known ruling, but the case is perfectly analogous to settled cases and fits within the purview of a legal maxim, then it may be that in such a scenario greater reliance can be placed on legal maxims.

All this is to say that one cannot, without qualification, say that legal maxims can or cannot be used as the basis for legal rulings. The statements and practices of jurists show support for both views. This is not a contradiction. Rather, it simply supports what was stated earlier that maxims are not created equal. Depending on the maxim and the legal question being addressed, reliance on a legal maxim may or may not be justified.

The methodology

In this commentary, I have selected a number of maxims that were codified in the Ottoman *Majallat al-aḥkām al-ʿadliyya*. Although the *Majalla* is a codification of Ḥanafī law, its maxims are generally accepted by all schools of law (with differences in application). In my commentary, I have generally relied on examples

¹⁷ Al-Nadwī, *al-qawāʿid al-fiqhiyya*, 331.

that find broad acceptance in most or all schools of law. Where the legal ruling cited is unique to a certain school, I have made note of that fact either in the body of the text or in the footnotes.

I have made sure to include the five grand maxims of *fiqh*. These five grand maxims are unanimously accepted and are considered to be foundational principles that permeate almost all areas of law. The five grand maxims are:

- 1- Matters are treated in accordance with their accompanying intention.
- 2- Certainty is not displaced by doubt.
- 3- Harm is to be removed.
- 4- Hardship calls for ease.
- 5- Custom is determinative.

In terms of organization, I have listed each maxim in its English translation as well as in the original Arabic. Each maxim is accompanied by a commentary. Some maxims are “secondary” whereas others are “primary.” I have chosen eleven primary maxims from the *Majalla* (including the Five Grand Maxims) and have identified each primary maxim with a number. I have listed the secondary maxims under the primary maxim with which they fit and have identified them by letters of the alphabet.

For clarity, I offer the following template:

- 1- [English translation of primary maxim]
 - a. [English translation of secondary maxim]
 - b. [Additional secondary maxim, if applicable]
- 2- [English translation of primary maxim]
 - a. ...
- 3- ...

1. Matters are treated in accordance with their accompanying intentions. (الأُمُور بِمَقَاصِدِهَا)

This maxim finds its basis in the Prophetic hadith, “Indeed, actions are [judged] by [their] intentions.”¹⁸ This validates the principle that an act is to be legally characterized and treated in accordance with the intention that accompanied that act. This maxim permeates many areas of law. Knowledge of this maxim and its applications is said to account for one third of Islamic knowledge.¹⁹

It may be helpful for the reader to examine ritual and non-ritual matters separately.

Ritual matters (‘ibādāt)

This category encompasses actions such as prayer and fasting. That is, actions that have been prescribed as a form of worship and that concern strictly the relationship between the human being and God. In such ritual matters, the presence of the correct intention is a necessary condition. In other words, one’s prayer is not valid, and no reward is attained, if one does not have the requisite intention. Therefore, some scholars have rephrased this maxim to say, “There is no reward or sin except with intention,” (*la thawāb wa-lā ‘iqāb illā bi-niyya*).

Rituals must be performed with the proper intention—the intention to worship God—in order to be valid and gain reward.²⁰ This intention is known as *niyyat al-taqarrub* (the intention of worship). One who performs an act of worship or performs a good deed that would typically be rewarded, but performs it for an ulterior objective, will not be rewarded. In fact, one who performs an act of

¹⁸ *Ṣaḥīḥ al-Bukhārī*, p. 24, ḥadīth no. 24.

¹⁹ Muhammed Muṣṭafā al-Zuhaylī, *al-qawā‘id al-fiqhiyya wa taḥqīqātuhā fī al-mathāhib al-arba‘a* (Damascus: Dār al-Fikr, 2006), 1:64.

²⁰ Scholars have examined the question of combining intentions (*tashrīk al-niyya*). I have omitted discussing this point. It suffices to know that one must intend to perform the action as a means to draw nearer to God (*taqarrub*).

worship may be deserving of God’s punishment if the person’s intention is malicious. A clear example of this is the case of the hypocrites (*munāfiqūn*) of Madina who built a mosque to rival Masjid Qubā’ that was established by the Prophet ﷺ. This action was condemned in the following verses of the Qur’an (9:107-108):

And [there are] those [hypocrites] who took for themselves a mosque to cause harm and disbelief and division among the believers and as a station for whoever had warred against Allah and His Messenger before. And they will surely swear, “We intended only the best.” And Allah testifies that indeed they are liars.

Do not stand [for prayer] within it ever. A mosque founded on righteousness from the first day is more worthy for you to stand in. Within it are men who love to purify themselves; and Allah loves those who purify themselves.

The hypocrites claimed they “intended only the best.” And certainly the act of building a mosque is an act of worship that is worthy of reward. However, when this act was accompanied by a harmful and malicious intent, it attracted the condemnation of God. In the same way that the presence of the correct intention attracts God’s reward, the presence of an evil intention attracts God’s punishment, even if the action takes the form of an act of worship.

At the same time, an action that is merely permissible (*mubāḥ*) may lead to reward if performed with the intention of drawing closer to God. For example, one may eat food with the intention of gaining energy to stand in night-prayers. Such an action, which typically would not be rewardable, may attract reward when accompanied with such an intention. Similarly, a permissible action, if performed with an evil intent, may be sinful.

There is another intention that must be present when performing acts of worship, and that is the intention to distinguish the ritual from an ordinary action or from another ritual. For example, one’s prayer may be an obligatory prayer or a voluntary one. The form of the two is identical. The only way the two may be

differentiated is by the accompanying intention. Therefore, one who performs prayer at dawn involving two cycles (*rak'āt*) must intend to pray the obligatory dawn prayer in order to satisfy that obligation. Otherwise, the obligatory prayer will still be outstanding. This intention, whose purpose is to distinguish one act from other acts, is known as *niyyat al-tamyīz* (the intention of distinguishment).²¹

The intention to distinguish one's action is unnecessary when the worship being performed is distinct by its nature.²² For example, reading the Qur'an is a distinct worship that has a unique form, as opposed to prayer which can be either obligatory or voluntary. Such distinct acts of worship do not require a special effort to acquire the requisite intention because the requisite intention to distinguish the act is inevitably and necessarily present by engaging in those distinct acts of worship.

Non-ritual matters (*mu'āmalāt*)

The above analysis deals with God's judgment based on the internal intentions of people. The analysis becomes a bit more complicated when we enter the territory of transactional and civil matters (*mu'āmalāt*). Ritual and non-ritual matters are judged by God alone when it comes down to assigning reward and sin. However, human beings, and judges in particular, also need to examine the (apparent) intention of human actors in transactional matters in order to assign legal rights and obligations. Rulings related to one's accountability to God are known as *ḥukm al-diyāna*, and rulings related to one's accountability in judicial proceedings are known as *ḥukm al-qaḍā'*. The role of each and the relationship between the two will become more clear as we go through some examples later in this explanation.

Intentions have a significant impact on assigning legal rights and obligations in this world. For example, two parties that mockingly agree to enter into a contract are

²¹ Al-Zuhaylī, *al-qawā'id al-fiqhiyya*, 1:68–69, 94; al-Ṣādiq ibn 'Abdulrahmān al-Gharyānī, *Taṭbīqāt al-qawā'id al-fiqh 'ind al-Mālikiyya min khilāl kitābayy Iḍāḥ al-masālik lil-Wansharīsī wa Sharḥ al-manhaj al-muntakhab lil-Manjūr* (Dubai: Dār al-Buḥūth lil-Dirāsāt al-Islāmiyya wa Ihya' al-Turāth, 2002), 447.

²² Ṣāleḥ ibn Ghānim al-Sadlān, *al-qawā'id al-fiqhiyya al-kubrā wa mā tafarra'a 'anhā* (Riyadh: Dār Balansiyya, 1996), 54, 90.

not legally bound by the terms of that contract. That is because the contract was not intended to be legally binding and was entered into mockingly (this is known as *hazl*).²³ Similarly, two individuals who enter into a sham contract (*muwāḍaʿa*) are also not bound by its terms and the contract is treated as void since it was never intended to possess any legal substance.²⁴ In both scenarios, the form of contract and the formalities of entering into a contract were all satisfied, but the absence of an intention to create legal rights and obligations on the part of the parties prevented the creation of a valid contract.

Additionally, a valid contract will be interpreted in accordance with the intention of the contracting parties. That is the case even when the intention of the parties does not conform with the plain and ordinary meaning of the words used.²⁵ For example, two merchants may enter into a contract (whether oral or written) and use certain terms that have a certain meaning in ordinary language, but a significantly different meaning in commercial custom. If the evidence establishes that the parties intended the customary meaning rather than the ordinary meaning (this is presumed), it is the customary meaning that will be given legal effect. In any transaction, rights and obligations will be determined based on the intention(s) of the parties.

Also, when one acts unilaterally, his or her action is legally characterized based on the accompanying intention. For example, if one picks up a stray item (*laqṭa*) with the intention of safeguarding it for its rightful owner, the person will be legally characterized as an *amīn*. The implication of being an *amīn* is that the person will only be liable for intentional or negligent damage (*taʿaddī* or *taqṣīr* respectively) to, or destruction of, the safeguarded property. If, however, the person's intention was to claim the property for him or herself, then the person will be characterized as a *ghāṣib*. The implication of such a characterization is that the person will be absolutely liable (*yad ḍamān*) for any damage to, or destruction of, the property. Whether one is characterized as an *amīn* or a *ghāṣib* will turn on the evidence

²³ Muṣṭafā al-Zarqā, *al-Madkhal al-fiqhī al-ʿām* (Damascus: Dār al-Qalam, 2004), 1:445–46.

²⁴ Al-Zarqā, *al-Madkhal al-fiqhī*, 1:441–42.

²⁵ Al-Zarqā, *al-Madkhal al-fiqhī*, 1:437.

available to a judge. However, it is presumed that the individual intended to safeguard the property until evidence proves otherwise.

Importantly, there may be a mismatch between the judicial ruling (*ḥukm al-qaḍā'*) and God's ruling (*ḥukm al-diyāna*). For example, a judge may find, based on the available evidence, that the person was an *amīn*, even though the person was truly a *ghāṣib*. Here, the judicial ruling is that the person is not absolutely liable. However, in the eyes of God, the person is absolutely liable and would be sinning if he does not remedy his wrongdoing. This is why scholars will often give two rulings on a legal question by saying that a certain action is valid in *qaḍā'* but sinful in *diyāna*.

Exceptions to the maxim

There are exceptions to this maxim in that there are cases in which the intention of a person is irrelevant. For example, the Prophet Muhammad ﷺ explicitly gave effect to certain statements of marriage or divorce even if they were declared mockingly.²⁶

Also, the law has tied certain legal causes (*asbāb*) to certain effects (*musabbabāt*) regardless of the present intention. For example, an impure garment that is inadvertently cleaned by someone becomes pure, even though the person had no intention of removing the impurity.²⁷ If a woman is unaware of her husband's death and her waiting period (*'idda*) lapses, she is permitted to marry another man even though she never was aware of her husband's death and never had the intention to go through the waiting period. That is because the law has simply made the lapsing of the waiting period a cause for the permissibility of the widow's marriage.

²⁶ Sulaymān Abū Dawūd al-Sijistānī, *Sunan Abī Dāwūd* (Damascus: Dār al-Kutub al-'Ālamiyya, 2009), 3:516, ḥadīth no. 2194.

²⁷ Ministry of Endowments and Islamic Affairs of Kuwait, *al-Mawsū'a al-fiqhiyya* (Cairo: Dār al-Ṣafwa, 1993), 29:95.

In homicide cases, even if the death is completely accidental, the responsible party must still pay blood money to the victim's family. In other words, a penalty is imposed on the responsible party despite the absence of an intention to cause death.

a. In contracts, consideration is given to the purposes and meanings, and not the words and phrases.

(العبرة في العقود للمقاصد والمعاني لا للألفاظ والمباني)

Contracts are to be classified and treated based on their legal substance which represents the intention of the parties rather than on a strict adherence to the words or terms used by the contracting parties. For example, one may say, "I lend you my home for a month in return for X dollars" (*a'artuka dāri li-shahr bi-kadhā*). The word *a'artuka* ("I lend you") would typically trigger a set of laws that relate to *i'āra* (a contract to borrow). However, when we look past the words used, we see that rights and obligations have been assigned in a way that yields nothing other than a contract for rent (*ijāra*).²⁸ That is because one party is offering possession and use of property, for a specific time period, in return for payment. Even though the parties may have used words that, on their face, do not refer to a rental contract, they assigned rights and obligations in a way that shows that they intended nothing other than a rental contract.

According to the maxim, strict adherence to the formal or dictionary definition of the words used in a contract is inappropriate, as such an approach will often be contrary to the common intention of the contracting parties. It is true that words are presumptively given their literal meaning. However, the factual matrix surrounding the formation of the contract may rebut this presumption as it will reveal the true purpose of the words used and the meaning they hold. This factual matrix may involve the apparent actions of the parties or commercial custom.²⁹ For example, if two parties enter into a contract and use certain terms that have a customary meaning in their trade or profession, this will rebut the presumption of a literal

²⁸ Al-Zarqā, *Sharḥ al-qawā'id*, 63.

²⁹ Al-Zarqā, *al-Madkhal al-fiqhī*, 1:437.

interpretation. Or, if a certain community or society customarily uses a word intending a meaning that does not conform to the dictionary definition of the word, it is the customary meaning that will be adopted when interpreting a contracting between two parties from that same community or society.³⁰

What the above establishes is that the words used in a contract will be interpreted in accordance with the intention of the parties. The intention can be ascertained by relying on surrounding circumstances such as commercial custom and the commercial context of the transaction. The allocation of rights and obligations will play an important role in determining what type of contract the parties intended to form. Up to this point, there is not much controversy. Jurists differ, however, as to whether intention plays a role beyond what is described above. For example, if two parties enter into a contract, or a series of contracts, for the purchase and sale of goods, with the intention of mirroring a transaction for an interest-bearing loan, does a jurist rule that the transaction is invalid? That is, does the fact that the parties intended to circumvent the prohibition of usury (*ribā*) have any relevance in determining whether the transaction is valid?

If the jurist's focus is to determine the legal substance of the contract, once the jurist determines that the parties intended to enter into a sale-purchase agreement, the jurist will stop there and will not go any further. For such a jurist, the role of intention is to discover the rights and obligations that the contract assigns and, on that basis, whether the contract is valid or invalid. Such a jurist is not concerned with the ultimate objective or motivation behind the formation of the contract. Another jurist, however, may extend the role of intention and take into account the economic motivation behind the formation of the contract. Such a jurist may invalidate an otherwise valid contract because it was entered into for the purpose of achieving a prohibited economic result, such as a usurious loan. This all boils down to the question of the letter vs. spirit of the law and is closely related to the issue of legal stratagems (*hiyal*).

³⁰ Al-Zarqā, *Sharḥ al-qawā'id*, 80.

Al-Shāfi‘ī was famously of the opinion that a judge cannot treat transactions except based on apparent objective evidence. In other words, a judge cannot invalidate a contract because he or she suspects that one party (or both) had a malicious intent or intended to achieve a prohibited result through legal contractual means.³¹ So long as a transaction is permitted by law and is valid on its face, it cannot be invalidated by a judge even if there are signs that indicate the presence of a malicious intent.³² This does not mean that the individual is free of sin. In the world of *diyāna* the individual may be in a state of sin. However, in the world of *qaḍā’*, with which al-Shāfi‘ī was concerned, the transaction cannot be invalidated. The reasoning here seems to be that it would be dangerous to invite judges to ascertain the subjective intentions of transacting parties as this would lead to the invalidation of many valid and *bona fide* transactions. The validation of malicious transactions is, presumably, the tax paid in order to ensure the protection of valid *bona fide* contracts.

2. Certainty is not displaced by doubt.

(اليقين لا يزول بالشك)

This is also one of the five grand maxims of *fiqh*. According to Imām al-Suyūṭī, this maxim permeates the entirety of *fiqh*.³³

“Certainty” (*yaqīn*) is defined as, “knowledge that does not suffer from hesitation.”

³⁴ This does not mean that certainty only exists when someone is “100% sure,” since it is rare for matters to enjoy such a level of certainty. Rather, certainty refers to a level of knowledge that renders a matter to be deemed true or established, such that one can comfortably act upon it without hesitation. “Doubt” (*shakk*) is a state

³¹ Muhammed ibn Idrīs al-Shāfi‘ī, *al-Umm*, ed. Rif‘at Fawzī ‘Abd al-Muṭṭalib (Mansoura: Dār al-Wafā’, 2001) 7:492–94.

³² al-Shāfi‘ī, *al-Umm*, 9:66–67.

³³ Jalāl al-Dīn al-Suyūṭī, *al-Ashbāh wa al-naẓā’ir fī qawā’id wa furū‘ fiqh al-Shāfi‘ī* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1983), 51.

³⁴ Al-Nadwī, *al-qawā’id al-fiqhiyya*, 358, 362.

in which the possibilities are of equal likelihood. That is, one cannot say whether a matter is more likely to be true than untrue, or vice versa.³⁵

The application of the maxim

The effect of this maxim is: once a matter has been the subject of *yaqīn*, a subsequent doubt as to the existence of an event that negates the *yaqīn* has no effect. For example, and according to the vast majority of scholars, if one is certain that they performed ablution and they subsequently enter into a state of doubt (*shakk*) as to whether or not they violated their state of ritual purity, they may safely assume that they are still in a state of ritual purity and they will not have to redo their ablution.³⁶

This maxim may understandably cause some confusion. It may occur to some, “If there is doubt as to the existence of a matter, then it can’t be certain in the first place!” This is a common cause of confusion. This can be remedied by realizing that this maxim deals with doubt that arises *after* certainty is established—not in the course of establishing whether a matter is certain or not.³⁷ In the above example, the person is certain that they performed ablution and entered a state of ritual purity. There is no doubt about that. The doubt that subsequently arose is in relation to a new event—the violation of the state of ritual purity. The person here is doubtful as to whether they violated that state or not. This degree of knowledge (i.e., doubt) is not sufficient to negate the certain matter. This is distinct from a situation in which the person is doubtful as to whether they even entered a state of ritual purity in the first place. If the person is doubtful about whether they correctly performed ablution (i.e., they cannot say that it is more likely than not that they

³⁵ Badr al-Dīn ibn Muhammad ibn Bahādir al-Zarkashī, *al-Manthūr fī al-qawā'id*, ed. Taysīr Fā'iḳ Aḥmed Maḥmūd (Kuwait: Ministry of Endowments and Islamic Affairs, 1985), 2:255; al-Ḥamawī, *Ghamz 'uyūn al-baṣā'ir*, 193; al-Zuhaylī, *al-qawā'id al-fiqhiyya*, 1:97; al-Zarqā, *al-Madkhal al-fiqhī*, 2:989; al-Zarqā, *Sharḥ al-qawā'id*, 80.

³⁶ Taqī al-Dīn al-Ḥiṣnī, *Kitāb al-qawā'id* (Riyadh: Sharikat al-Riyādh, 1997), 279; 'Ubaydullah 'Umar ibn 'Isā al-Dabbūsī, *Ta'sīs al-nathar* (Beirut: Dār ibn Zaydūn, n.d.), 17; Yaḥyā ibn Sharaf al-Nawawī, *Kitāb al-majmū'*, ed. Muhammed Najīb al-Muṭay'ī (Jeddah: Maktabat al-Irshād, n.d.), 1:258.

³⁷ Muhammed ibn 'Umar Ṣadr al-Dīn ibn al-Wakīl, *al-Ashbāh wa al-naẓā'ir fī fiqh al-Shāfi'ī* (Beirut: Dār al-Kutub al-'Ilmiyya, 2002), 269; Ibn Nujaym, *al-Ashbāh wa al-naẓā'ir*, 48; al-Ḥamawī, *Ghamz 'uyūn al-baṣā'ir*, 197; al-Nawawī, *Kitāb al-majmū'*, 1:238; al-Zarkashī, *al-Manthūr*, 2:286.

correctly performed ablution), the person must redo the ritual. This itself has been crafted into a maxim which states, “doubt inhibits the ruling but does not displace it” (*al-shakk yamna ‘ al-ḥukm wa-lā yarfa ‘uh*).³⁸

The following are examples of this maxim’s application:

- I. If the presence of a contract is established, having doubt as to whether it has been rescinded is inconsequential. The contract remains in effect until it is proven to be rescinded.³⁹
- II. If a purchaser seeks to return a product to the seller on the grounds that it is faulty, and the testimony of expert witnesses does not satisfy the judge that it is more likely than not that the product is faulty, the purchaser cannot return the item on these grounds.⁴⁰ That is because it is presumed that the product sold by the seller is free of faults until the claimant proves otherwise.
- III. If it is established that one is in a state of ritual impurity and one subsequently enters into a state of doubt as to whether he or she subsequently entered into a state of purity, the state of impurity remains.⁴¹
- IV. If one is fasting and is in doubt as to whether the sun has set or not, they cannot break their fast. That is because the last established matter is the presence of daytime. Conversely, if one is awaiting dawn to begin one’s fast and is in doubt as to whether the sun has risen or not, they may continue to eat and drink since the night is presumed to continue until the presumption is rebutted by sufficient knowledge.⁴²

³⁸ Al-Zarqā, *Sharḥ al-qawā‘id*, 84.

³⁹ ‘Izzat ‘Ubayd al-Da‘ās, *al-Qawāw‘id al-fiqhiyya ma‘ al-sharḥ al-wajīz* (Damascus: Dār al-Tirmidhī, 1989), 17.

⁴⁰ Muhammed Amīn ibn Abdīn, *Radd al-muḥtār ‘alā al-Durr al-mukhtār* (Riyadh: Dār ‘Ālam al-Kutub, 2003), 7:170.

⁴¹ Al-Zarkashī, *al-Manthūr*, 3:135; al-Suyūṭī, *al-Ashbāh wa al-naẓā‘ir*, 51; al-Dabbūsī, *Ta’sīs al-nathar*, 17.

⁴² Al-Suyūṭī, *al-Ashbāh wa al-naẓā‘ir*, 52.

- V. According to Ḥanafī doctrine, if one travels, leaving behind his family, and the family hears no news of him for a prolonged period of time (such a person is classified as a *mafqūd*), the heirs are not permitted to assume the person's death and embark on dividing the estate. That is because the person is presumed to remain alive until proven to be dead.⁴³
- VI. If a party proves a debt against another, the debt is presumed to remain until the debtor proves its satisfaction.
- VII. If a wife sues her husband claiming outstanding spousal support (*nafaqa*), her word is believed and it is presumed that the husband owes the claimed amount until he proves payment.
- VIII. If one proves ownership of property, it is presumed to remain under his or her ownership until proven otherwise.⁴⁴

There is a common thread running through the above examples: doubt is not enough to rebut certain presumptions. A higher burden of proof is needed. That is, there are certain things that are presumed to be true until sufficient evidence proves otherwise. These presumptions can originate from human action: e.g., one who performs ablution—and has *yaqīn* that they performed it—is presumed to be in a state of ritual purity until sufficient evidence rebuts this presumption. Some presumptions are simply recognized as the natural state of affairs: e.g., people are presumed to be innocent and free of liability until sufficient evidence proves otherwise. Simply having doubt as to a person's liability cannot justify imposing on them a legal obligation and nor can mere doubt as to one's criminality justify imposing criminal punishment.

⁴³ 'Alī Ḥaydar, *Durar al-hukkām sharḥ Majallat al-aḥkām* (Beirut: Dār al-Kutub al-'Ilmiyya), 23.

⁴⁴ Al-Zuhaylī, *al-qawā'id al-fiqhiyya*, 1:135.

a. Transient matters are presumed to be non-existent.

(الأصل في الأمور العارضة العدم)

Transient attributes are those whose presence is non-existent in the natural state of affairs, such as the presence of a flaw in a good. They are attributes that are brought into existence from non-existence. Such transient attributes are presumed to be non-existent until evidence establishes their existence. This is in contrast to attributes that exist in the natural state of affairs, such as a person's innocence from any wrongdoing. Such attributes are presumed to exist until evidence shows otherwise.

One who makes a claim against another must tender sufficient evidence to show the existence of the transient matters upon which his claim rests. For example, if one alleges breach of contract, the claimant must first prove that a contractual relationship existed. We cannot presume the existence of such a relationship. Rather, the presumption is that people are not bound by any contractual relationship. The onus is on the claimant to rebut the presumption. However, if the claimant proves the existence of the contract, then it is presumed that the contract is valid, because validity is the natural state of contracts. It is the opposing party that bears the burden of proving that the contract is void (*bāṭil*) or voidable (*fāsid*); that is because flaws that render the contract voidable are transient attributes.

b. The absence of liability is presumed. (الأصل براءة الذمة)

People are presumed to be not liable nor to have any legal obligation to others. We know with certainty that people are born without any liability or legal obligation to others. As such, this reality is presumed to remain true until sufficient evidence proves the contrary. In other words, one who makes a legal claim against another bears the burden of proving the liability of the defendant. This maxim may be thought of as an application of the maxim on “transient attributes,” since liability is a transient attribute that is, in the default state of affairs, non-existent.

This presumption can be rebutted in various ways, including: direct evidence (*bayyina*),⁴⁵ circumstantial evidence (*qarā'in*), admission (*iqrār*), and the defendant's refusal to take the oath of denial (*nukūl*).⁴⁶ The one seeking to rebut this presumption (i.e., the claimant) bears the burden of proving the necessary facts that give rise to liability, using the means listed above, and the defendant is not required to produce any evidence to prove his or her innocence.

For example, a claimant who claims that the defendant failed to deliver certain goods under a contract, or that the goods delivered were damaged, will have to prove the existence of a contract between the parties along with all other necessary facts. Proving such a fact is necessary for a finding of liability. This does not mean that the claimant bears the burden of proving every fact. That is because there are presumptions relating to certain matters that may be in the claimant's favor. For example, a contract is presumed to be valid. Therefore, as soon as the claimant proves that a contract exists between the parties, it is the defendant that bears the burden of proving that the contract is void or voidable.⁴⁷ That is because contracts, once proven to exist, are presumed to be valid.⁴⁸

Zāhir evidence

Prima facie evidence (*zāhir*), is evidence rooted in the apparent circumstances at the time of the legal dispute. The evidence may be used to assess the likelihood of a claim. For example, a judge will look at the customarily accepted dowry amount in assessing a wife's claim that her husband has not paid her full dowry. If the customary amount is above what she has received, the judge will, on a *prima facie*

⁴⁵ There is also what is known as "definitive circumstantial evidence" (*al-qarīna al-qāṭi'a*) as well as "compelling apparent evidence" (*al-zāhir al-qawī*). They refer to definitive circumstantial evidence that brings an end to the factual dispute and cannot be rebutted by any other evidence. For example, a defect in purchased livestock that definitely existed before the purchase, such as a birth defect, falls under this type of evidence. The circumstantial evidence leaves no room for the possibility that the flaw occurred after the purchase and no other evidence, such as testimony or *nukūl* can prove the contrary. See al-Zarqā, *al-Madkhal al-fiqhī*, 2:1072.

⁴⁶ Al-Zarqā, *Sharḥ al-qawā'id*, 111.

⁴⁷ Al-Zarqā, *al-Madkhal al-fiqhī*, 2:1064, 1066; al-Zarqā, *Sharḥ al-qawā'id*, 106.

⁴⁸ This scenario is described as "the conflict between two presumptions" (*ta'arūḍ bayn aṣṭayn*). In such cases, the presumption that is most directly tied to the question being decided is applied. In the case of a contract's validity, the presumption of validity is directly tied to the question and is more specific than the presumption of the absence of liability. See al-Zarqā, *al-Madkhal al-fiqhī*, 2:1068.

basis, accept her claim.⁴⁹ In this scenario, the prevalent custom is the *ẓāhir* evidence. The burden will fall on the husband to prove that they agreed to a dowry that is less than the customary amount.

It is important to note that such evidence is rarely the basis for the final adjudication of disputes. As *prima facie* evidence, such evidence simply sets the stage for the judge's more detailed assessment of other evidence, such as the testimony of witnesses.⁵⁰ This evidence is known as "initial probers" (*murajjihāt awwaliyya*).⁵¹ Nonetheless, if one's claim is supported by the *ẓāhir*, the presumed absence of liability will be initially rebutted, and the tactical burden will shift to the defendant. If the defendant fails to rebut the claim, the one relying on the *ẓāhir* will have to take an oath in support of their *ẓāhir*-based claim before a judge can rule in their favor.⁵² In the case of the wife who claims the remainder of her dowry, if the prevalent custom (which is *ẓāhir* evidence) is in her favor, and the husband fails to tender sufficient evidence to the contrary, she will have to take an oath in support of her claim before a judge rules in her favor.

3. There shall be no initiation of harm, nor any reciprocation of harm. (لا ضرر ولا ضرار)

This is the Prophetic hadith quoted verbatim.⁵³ This maxim is a fundamental principle that has far reaching implications. It establishes that the law is concerned with preventing, eliminating, and minimizing harm. This maxim, which is nothing less than a Prophetic command, aids jurists in determining rulings for scenarios that involve conduct that is not explicitly addressed in the Qur'an or Sunnah. Consider the following examples:

⁴⁹ Al-Zarqā, *Sharḥ al-qawā'id*, 108.

⁵⁰ Al-Zarqā, *Sharḥ al-qawā'id*, 112–113.

⁵¹ Al-Zarqā, *Sharḥ al-qawā'id*, 110, 113.

⁵² This is what is meant by the principle that states "The *bayyina* is to prove what is contrary to the *ẓāhir*, and the oath is to affirm it." See al-Zarqā, *al-Madkhal al-fiqhī*, 2:1056, 1067, 1069–71.

⁵³ Muhammed ibn Yazīd al-Qazwīnī, *Sunan Ibn Māja*, ed. Muhammed Fu'ād 'Abdulbāqī (Dār Ihīyā' al-Kutub al-'Arabiyya, n.d.), p. 784, ḥadīth no. 2340.

- 1) One who rents farmland and is unable to complete the harvest before the end of the term may extend the term to the extent needed without the consent of the owner. Otherwise, undue harm would befall the tenant who invested effort and resources in his farming operation.⁵⁴ The owner is not being unduly harmed because he rented out his farmland for the express purpose of farming. He should expect that the tenant will require the land until the harvest season ends.
- 2) The bankrupt is prevented from selling or disposing of his property so as to not harm the creditors.
- 3) A lessee of a property may immediately terminate the lease upon discovering a flaw in the property and does not have to seek the consent of the lessor or a judicial ruling. That is because forcing the lessee to wait would cause the lease payments to rack up in the meantime.⁵⁵
- 4) A person may not sell property that is under his possession which is the subject of a legal dispute. Even though the property is apparently still under his ownership, its sale would harm the claimant who may be described as a “contingent” owner of the property.
- 5) If a person erects a structure on his or her land which blocks off sunlight from the property of the neighbor, the person will be ordered to remove that structure as it causes harm to the neighbor.
- 6) A judge is prevented from ruling on a case where there exists hostility between him and one of the parties. A person also has the right to seek the reversal of a judge’s ruling on the grounds that there exists a personal

⁵⁴ Al-Zarqā, *Sharḥ al-qawā'id*, 167. Query as to whether any consideration is given to the tenant’s recklessness in commencing a farming operation that he or she knows will not be complete by the end of the rent’s term. *Majalla*, section 526.

⁵⁵ Query as to whether this means that the lessee may terminate the lease based on the mere assertion that there is a flaw in the property. Arguably, this is harmful to the owner as it robs him or her of any certainty or stability, since the lessee can terminate at any time on dubious grounds.

hostility between him and the judge, which places the impartiality of the ruling in question. All this is to prevent the harm that results from a lack of impartiality in judicial proceedings.⁵⁶

- 7) An incompetent physician (*al-ṭabīb al-jāhil*) is to be prevented from offering medical services or advice due to the harm that his incompetence will cause.

⁵⁷

The above are examples of rulings developed by jurists that are not explicitly established by the Qur'an or Sunnah. Rather, they are rulings that apply the general rule laid down by the Prophet Muhammed ﷺ, which outlaws all forms of harm and seeks its reduction and elimination to the extent possible.

There are plenty of other examples that could have been listed. However, they have been reserved for the maxims below that branch out of this basic maxim. Hopefully, the maxims above gave an idea as to the role this maxim plays in finding appropriate rulings in scenarios not explicitly addressed by the Qur'an or Sunnah.

The second portion of the maxim, “there shall be no reciprocation of harm,” states that harm is not to be met with harm. It would not be permissible, for example, for a person suffering from his neighbor's nuisance to reciprocate with nuisance.

a. Harm is to be repelled to the extent possible.

(الضرر يدفع بقدر الإمكان)

This maxim can be understood as saying that a harm is to be remedied to the extent possible even if a full remedy is not possible.⁵⁸ For example, an insolvent debtor is required to pay his creditor to the extent possible, even if the full amount of the debt cannot be satisfied.

⁵⁶ ‘Alā’ al-Dīn al-Ṭarābulusī, *Mu‘īn al-ḥukkām fī mā yataraddad bayna al-khaṣmayn min al-aḥkām*, ed. ‘Uthmān ibn Jum‘a Ḍumariyya (Damascus: Dār al-Qalam, 2018), 1:248.

⁵⁷ Ibn Nujaym, *al-Ashbāh wa al-naẓā’ir*, 75.

⁵⁸ Al-Zarqā, *Sharḥ al-qawā’id*, 207.

On another reading, this maxim refers to the principle that harm is to be repelled before it occurs. For example, some jurists have ruled that an insolvent person is to be prevented from dealing in his or her property in order to prevent the person from fraudulently diverting assets away from his or her creditors.⁵⁹ Put differently, if there is a substantial risk of harm, jurists may rule that certain action is permitted or required in order to prevent that harm from occurring.

b. Harm is to be removed. (الضرر يزال)

This maxim refers to the need to remove harm after it has been inflicted. Harm may be removed in a number of ways, including: compensation (*ḍamān*), specific performance, or injunction.

Where one destroys or damages the property of another, the tortfeasor is required to compensate the innocent party for the loss of value suffered (*ḍamān al-qīma*).⁶⁰ Also, where one causes bodily harm to another, the tortfeasor must compensate the innocent party by paying a monetary value (*arsh*).⁶¹ Also, in cases of deceit or fraudulent misrepresentation (*taghrīr*), the tortfeasor compensates the innocent party for whatever loss was suffered as a result of the deceit (*ḍamān al-taghrīr*).⁶² For example, if one instructs another, “Dig a well for me in my yard,” and it later turns out that the property did not belong to the former, the latter may seek compensation from the former if he was held liable by the true owner of the property.

Specific performance will be required of the tortfeasor in certain circumstances. For example, where a tortfeasor usurps the property of another, reversal of the harm will simply entail return of the usurped property so long as it exists

⁵⁹ Al-Zarqā, *al-Madkhal al-fiqhī*, 2:839–40

⁶⁰ ‘Alī al-Khafīf, *al-Ḍamān fī al-fiqh al-Islāmī* (Cairo: Dār al-Fikr al-‘Arabī, 2015), 95.

⁶¹ See al-Khafīf, *al-Ḍamān fī al-fiqh al-Islāmī*, 333–37 and al-Zarqā, *al-Madkhal al-fiqhī*, 2:683–84.

⁶² See examples in al-Zarqā, *Sharḥ al-qawā‘id*, 180–83.

(otherwise, resort is made to *ḍamān al-qīma*).⁶³ Also, where the tortfeasor destroys fungible property belonging to the innocent party (*māl mithlī*), such as wheat or sugar, the tortfeasor will be required to compensate the innocent party in kind so long as the property is available in the market.⁶⁴

Where the harm takes the form of a continuous action, such as a nuisance being caused by a neighbor, the removal of the harm will involve preventing the action from continuing.⁶⁵ Such is the case of one who erects a structure on his land that blocks off all light from his neighbor's property, or one who keeps bees on his property that cause harm to the property of his neighbor. Preventing someone from committing a certain action (or requiring positive action) is known in the common law as an "injunction."

c. Harm is not to be removed by an equivalent harm.

(الضرر لا يزال بمثله)

This restricts the application of the previous maxim. For example, if X's property is releasing harmful substances onto Y's property, Y cannot remove the harm by diverting the substances to Z's property. Nor can one avert death by killing another person.⁶⁶ The maxim does not rule out criminal punishment or monetary compensation—which are harms from the perspective of the liable party. Rather, the maxim simply refers to the principle that one cannot harm innocent parties in order to protect oneself against harm.

⁶³ Al-Khafīf, *al-Ḍamān fī al-fiqh al-Islāmī*, 92. In addition to returning the usurped property *in specie*, the tortfeasor may be required to compensate the innocent party for the loss of value suffered during the time of deprivation. In other words, the tortfeasor may be required to make rent payments, at fair market value, for the time during which the property was in his or her possession. This, however, is subject to juristic disagreement as the Ḥanafī school of law does not accept that rent be paid for the time during which the usurper was in possession of the usurped property. For more on this, see Muṣṭafā al-Zarqā, *Nathariyat al-iltizamāt al-‘amma fī al-fiqh al-Islāmī* (Damascus: Dār al-Qalam, 2012), 216–18.

⁶⁴ Al-Khafīf, *al-Ḍamān fī al-fiqh al-Islāmī*, 95.

⁶⁵ Ḥaydar, *Durar al-hukkām*, 1:37.

⁶⁶ Al-Da‘ās, *al-Qawāw‘id al-fiqhiyya*, 32.

d. That which existed from time immemorial is to be left as it is. (القديم يترك على قدمه)

This maxim is referring to realities whose date of origination is unknown to anyone. That is what is meant by a thing that “existed from time immemorial.” Such realities are assumed to have been instituted legally, and are thus left as they are. For example, if the gutter of one’s home passes through the property of his neighbor, and the gutter has been there for as long the parties can remember, such that it predates them and they do not know when it was instituted, it is assumed that this gutter was lawfully instituted.⁶⁷ The owner of the property from which the gutter runs will not be burdened with proving that this easement was legally instituted. Rather, the burden falls on the one seeking the removal of the gutter to show that it was not legally instituted.

e. Harm cannot exist from time immemorial. (الضرر لا يكون قديما)

This maxim restricts the application of the previous one. The previous maxim created a presumption that a matter that existed from time immemorial was lawfully instituted. However, and as this maxim provides, the presumption does not include harmful conduct. For example, if X’s property releases sewage into the property of Y, and this reality existed from time immemorial, the harm must nonetheless be removed.⁶⁸ The *Majalla* differentiated between gross harm (*ḍarar fāḥish*) and harm simpliciter such that only gross harm is covered by this maxim. With regards to harm to physical structures, the *Majalla* defined gross harm as that which prevents the necessary enjoyment of the structure for the original purpose for which it was built.⁶⁹ Al-Zarqā refined the legal test for what is a gross harm by defining it as “that which cannot be acquired through any legal means.”⁷⁰ That is, gross harm would include that which cannot be inflicted by operation of contract.

⁶⁷ Haydar, *Durar al-hukkām*, 1:19.

⁶⁸ Al-Zarqā, *Sharḥ al-qawā'id*, 102.

⁶⁹ Haydar, *Durar al-hukkām*, 3:201, section 1199.

⁷⁰ Al-Zarqā, *Sharḥ al-qawā'id*, 103.

4. Hardship calls for ease. (المشقة تجلب التيسير)

This maxim is firmly rooted in the text of the Qur'an and the Sunnah of the Prophet Muhammad ﷺ. In the Qur'an, Allah says, "God intends ease for you and does not intend hardship" (2: 185) and, "He has not placed upon you in religion any hardship" (22:78). There are also Qur'anic rulings which offer exemptions from certain rituals in certain circumstances. For example, the ill and those who are traveling are exempt from the Ramadan fast so long as those circumstances prevail. The Prophet Muhammed ﷺ also permitted prayers to be shortened during travel. All this is to grant ease in circumstances of undue hardship. Such accommodations are known as a legal license (*rukḥṣa*).⁷¹

The essence of this maxim is the balancing of benefits and harms. That is because ease is offered whenever the hardship involved in performing a religious command is disproportionate to the command. For example, the risk to one's health is enough to offer an ill person an exemption from the Ramadan fast. It is, at the end of the day, a weighing of harms and benefits such that accommodation is offered to the extent that the harm exceeds the benefit. In the case of the Ramadan fast, the law has done the work for us and explicitly informed us that the harm to one's health outweighs the duty to perform the Ramadan fast. In situations where the law does not explicitly tell us which side of the scale is weightier, a jurist will have to assess the circumstances to determine whether this maxim is triggered or not.

Importantly, the undue hardship that attracts ease must be a valid one. That is, it must be one that the law recognizes as justifying accommodation. One cannot, for example, claim that abstaining from consuming alcohol in western societies imposes a hardship by preventing the Muslim from "fitting in" or from engaging in many social activities, or that it deprives them from making valuable connections in the workplace. Such an inconvenience is not one that the law recognizes as giving rise to a *rukḥṣa*. Some hardships are inextricably linked to a divine

⁷¹ Ibrāhīm ibn Mūsā al-Shāṭibī, *al-Muwāfaqāt*, ed. Mashhūr ibn Ḥasan Āl Salmān (Khobar: Dār Ibn 'Affān, 1997), 1:466.

command. For example, the hardship involved in the hunger and thirst during the Ramadan fast is inextricably linked to performing the fast. Such hardships cannot serve as the basis for a *rukḥṣa*.⁷² The risk to one's life, on the other hand, is explicitly endorsed as a legitimate ground for accommodation and will justify the consumption of alcohol. Jurists have examined the cases in which the divine law offers exemptions and accommodations in order to determine whether a *rukḥṣa* is to be offered in cases that are not explicitly addressed in the Qur'an and Sunnah.

a. Necessities render the impermissible permissible.

(الضرورات تبيح المحظورات)

This is a specific application of the broader maxim regarding hardship attracting ease. This maxim is specifically concerned with situations in which impermissible actions become permissible due to a necessity. The result of this maxim is the availability of a *rukḥṣa*.

It finds its roots in the following verses:

He has forbidden upon you carrion, blood, flesh of swine, and that which has been immolated to (the name of) any other than Allah. But he who is driven by necessity, neither craving nor transgressing, it is no sin for him. Indeed, Allah is Forgiving, Merciful. (2:173)

Prohibited to you are dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah, and [those animals] killed by strangling or by a violent blow or by a head-long fall or by the goring of horns, and those from which a wild animal has eaten, except what you [are able to] slaughter [before its death], and those which are sacrificed on stone altars...But whoever is forced by severe hunger with no inclination to sin—then indeed, Allah is Forgiving and Merciful. (5:3)

⁷² Al-Shāṭibī, *al-Muwāfaqāt*, 2:269–70.

Say, “I do not find within that which was revealed to me [anything] forbidden to one who would eat it unless it be a dead animal or blood spilled out or the flesh of swine—for indeed, it is impure—or it be [that slaughtered in] disobedience, dedicated to other than Allah. But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit], then indeed, your Lord is Forgiving and Merciful.” (6:145)

Whoever disbelieves in Allah after his belief... except for one who is forced [to renounce his religion] while his heart is secure in faith. But those who [willingly] open their breasts to disbelief, upon them is wrath from Allah, and for them is a great punishment. (16:106)

He has only forbidden to you dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah. But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit]—then indeed, Allah is Forgiving and Merciful. (16:115)

Typically, the necessity to which this maxim refers is one where one’s life or bodily integrity is at stake.⁷³ In such cases, one is permitted to engage in impermissible conduct without facing punishment. However, there are restrictions to the application of this maxim. The legal test is as follows:

- 1) There must be a necessity at stake; e.g., preservation of life or limb;
- 2) The impermissible action must be the only means to preserve the necessity;
- 3) The danger must be a real and likely possibility; and
- 4) The necessity at stake must be weightier than the impermissible action, such that the contemplated conduct does not involve forgoing a weightier or equal benefit.⁷⁴

⁷³ Ḥaydar, *Durar al-ḥukkām*, 1:33.

⁷⁴ Al-Zarqā, *al-Madkhal al-fiqhī*, 2:1004; al-Zuhaylī, *al-qawāʿid al-fiqhiyya*, 1:276; Ḥaydar, *Durar al-ḥukkām*, 1:33.

An obvious example can be found in the verses quoted above. The consumption of carrion is prohibited. However, verse 2:173, for example, explicitly excuses those who find themselves in the face of necessity. On that basis, jurists have ruled on the permissibility of certain actions in the face of necessity (while taking into account the conditions listed above). For example, jurists have ruled that, under the threat of death, one is permitted to steal the property of another.⁷⁵ However, one is not permitted to kill another to escape death, as this would fail the third condition listed above (i.e., that the action cannot compromise a weightier or equal benefit).⁷⁶ When one acts on the basis of a valid *rukḥṣa*, they cannot be punished for engaging in the prohibited act. One cannot, for example, be punished for theft if they stole in order to escape death.

b. That which is permitted due to a necessity is only permitted to the extent of the necessity.

(الضرورات تقدر بمقدارها)

This maxim serves to place a restriction on the availability of a *rukḥṣa*. That is, a *rukḥṣa* is only available to the extent needed to escape the state of necessity. For example, a starving individual facing the risk of the death may steal from the property of another to avert death, but only to the extent needed to eliminate the risk of the death.⁷⁷

c. That which has been permitted for an excuse no longer remains permitted with the disappearance of the excuse.

(ما جاز لعذر بطل بزواله)

⁷⁵ Al-Zarqā, *al-Madkhal al-fiqhī*, 2:1004; Ḥaydar, *Durar al-ḥukkām*, 1:33.

⁷⁶ Al-Zarqā, *al-Madkhal al-fiqhī*, 2:1004; Ḥaydar, *Durar al-ḥukkām*, 1:33.

⁷⁷ Al-Zarqā, *Sharḥ al-qawā'id*, 188; al-Zuḥaylī, *al-qawā'id al-fiqhiyya*, 1:281–82; Ḥaydar, *Durar al-ḥukkām*, 1:33. Although, Mālik ibn Anas was of the opinion that one steal to fully satiate his hunger. See Mālik ibn Anas, *al-Muwatta'a* (Abu Dhabi: Mu'assasat Zāyid ibn Sulṭān Āl Nahyān, 2004), 713.

If that which is impermissible is made permissible due to the presence of an excuse, then it is only natural that the ruling of impermissibility will return upon the disappearance of the excuse.⁷⁸ Hearsay evidence, for example, is typically inadmissible in court but may be admitted if the declarant of the statement cannot be brought to court to testify. If, however, the declarant becomes available, then the hearsay evidence will not be admitted.⁷⁹

d. Necessity does not suspend the rights of others.

(الإضرار لا يبطل حق الغير)

In explaining the previous maxim, it was stated that one cannot, even in the face of a necessity, perform an impermissible action that entails forgoing an equal or greater interest. Consequently, one is not permitted to kill another in order to escape death. The rights of others are no less valuable than the rights of the person who is under threat. Thus, one cannot escape a necessity by infringing an equal or greater right of another. Even when one is permitted to steal from the property of another, the person is obligated to compensate the person from whom they stole once they have the ability to do so (unless the owner waives their right).⁸⁰ However, if the necessity was due to coercion on the part of another person, then the coercer is liable and not the coerced individual.⁸¹

5. Custom is determinative. (العادة محكمة)

The effect of this maxim is of extreme importance as it allows for rulings to be reached on a legal question that is not determined by the Qur'an or Sunnah directly. In such cases, the Qur'an and Sunnah empower custom to be a source of legal rulings. Since custom is empowered in those scenarios in which there is no

⁷⁸ See Muhammed ibn Idrīs al-Shāfi'ī, *al-Umm* (Beirut: Dār al-Ma'rifa, 1973), 4:362.

⁷⁹ Haydar, *Durar al-hukkām*, 1:34.

⁸⁰ Al-Zarqā, *Sharḥ al-qawā'id*, 213.

⁸¹ Al-Zarqā, *al-Madkhal al-fiqhī*, 2:1005.

clear ruling found in the Qur'an and Sunnah, it goes without saying that custom cannot be used to contradict a ruling found in the Qur'an or Sunnah.

The power of custom finds its source in the Qur'an and Sunnah, which have delegated to it a degree of authority. The Qur'an has explicitly deferred certain matters to custom as in the verse, "And due to the wives is like that which is expected of them in accordance with *ma'rūf*," (2:228). Similarly the Qur'an states in another verse, "And cohabit [with your wives] in accordance with *ma'rūf*," (4:19). The word *ma'rūf* is a reference to what is customarily considered to be acceptable. The verses have, therefore, given legitimacy to that which has been accepted by people as good or commendable character. The Qur'an, instead of defining in explicit terms what constitutes acceptable behavior, deferred the definition to custom such that what is customarily considered good and praiseworthy would fall under the ambit of the verse.

The Prophet Muhammad ﷺ relied on the concept of *ma'rūf* when Hind bint 'Utba, the wife of Abū Sufyān, complained that her husband did not provide adequate financial support. He told her to take from his money for herself and children in accordance with *ma'rūf*. It is said that this stands for the proposition that custom is authoritative in the *sharī'a*.⁸²

This maxim, by stating that custom is "determinative," points to the fact that custom will determine questions that otherwise cannot be determined. According to Jamāl al-Dīn al-Isnawī (d.772/1370), "anything that has no definition in the law or in language is referred back to custom."⁸³ This often is the case with legal standards, *prima facie* evidence, and contractual interpretation. In fact, Shams al-Dīn Muḥammad ibn Qayyim al-Jawziyya (d. 751/1350) considered it imperative (*wājib*) to rely on custom in judicial proceedings.⁸⁴

⁸² Badr al-Dīn ibn Ahmed al-'Aynī, *Umdat al-qārī sharḥ Saḥīḥ al-Bukhārī* (Beirut: Dār al-Fikr, 2001), 12:16–17.

⁸³ Jamāl al-Dīn al-Isnawī, *Tamhīd takhrīj al-furū' 'alā al-uṣūl* (Beirut: Mu'assasat al-Risāla, 1981), 230; al-Suyūṭī, *al-Ashbāh wa al-naẓā'ir*, 98.

⁸⁴ Shams al-Dīn Muḥammad ibn Abī Bakr, *al-Turuq al-ḥukmiyya fī al-siyāsa al-shar'iyya* (Beirut: Maktabat al-Mu'ayyad, 1989), 81.

Legal rulings will often hinge on the application of legal standards which are determined by custom. For example, in Ḥanafī law, the amount a husband owes to his wife in spousal support is determined based on what is customary. This is determined by examining the customary spousal support paid to women in the same social class.⁸⁵ Similarly, a judge is not permitted to accept any gifts (to ensure impartiality) except from those who are customarily expected to gift him irrespective of his position as a judge (such as his siblings). However, such gifts must not exceed in value what is customary.⁸⁶ Also, in determining what is considered a “fault” in a purchased good, commercial custom will play a role since what may be a fault in one time and place may not be so in another.

In legal proceedings, there are often questions of fact that do not enjoy a rich collection of evidence upon which the judge can make factual findings. In such cases, the judge will rely on *prima facie* evidence (*ẓāhir*) in order to at least establish a factual baseline. Custom will often play a determinative role in such cases. For example, a father may bring a lawsuit against his daughter claiming that the jewelry and clothing he gave to his daughter on her wedding day was a loan rather than a gift, and that he now seeks its return. The daughter, obviously, will claim that it was a gift that transferred ownership to her. The judge will set a factual baseline based on the prevalent custom. If the prevalent custom is that a father gifts the jewelry and clothing that the daughter wears on her wedding day to her, then that will be the factual baseline. That is, it will be assumed, on a *prima facie* basis, that said property was a gift—until the father is able to prove the contrary (this is known in the common law as the presumption of advancement). If, however, it is customary for such property to be only lent to the daughter, and it is unusual for it to be gifted to her, the judge will presume that the property was lent to the daughter—unless the daughter proves the contrary.⁸⁷

This use of custom, as *prima facie* evidence, finds its precedent in the Sunnah. Ḥarām ibn Muḥayṣa complained to the Prophet ﷺ that the camel of al-Barā’ ibn

⁸⁵ Al-Zarqā, *al-Madkhal al-fiqhī*, 2:885.

⁸⁶ Ibn Nujaym, *al-Ashbāh wa al-naẓā’ir*, 80.

⁸⁷ Ibn Nujaym, *al-Ashbāh wa al-naẓā’ir*, 85.

‘Āzib damaged his property. The Prophet ﷺ consequently ruled that owners of livestock are liable for any damage caused by their livestock at night, while property owners bear the risk of damage to their property during the day.⁸⁸ That is because it was customary for property owners to protect their property (by hiring guards) during the day when animals were set free to graze, while it was customary for owners of livestock to confine their livestock at night and when property owners let down their guard.⁸⁹ As such, the Prophet ﷺ ruled that if an animal causes damage to property at night, this was *prima facie* evidence of the livestock owner’s negligence and he will be liable unless he proves that he took necessary precautions and the animal caused the damage by no fault of his owner.

Custom may also be used as the basis for dismissing a legal suit for having no merit. Ibn al-Qayyim, in his work on judicial procedure, states that any legal claim that is based on a factual assertion that violates custom is to be dismissed and not heard by the judge—unless, of course, the plaintiff has at least some evidence to support the factual assertion.⁹⁰ Ibn al-Qayyim illustrates the example of one who is in possession of a home and is seen, for an extended number of years, using and enjoying the home as would an owner. If another individual has seen this happen for an extended period of time, and decides after years to bring a suit claiming that the home belongs to him, the judge may dismiss the claim outright as lacking in merit.⁹¹ That is because it is not customary for one who has a claim in a property to observe this state of affairs and remain silent for such an extended number of years before bringing a suit.

Custom will also be determinative in contractual interpretation. The words and phrases used in a contract will be given meaning in light of the surrounding

⁸⁸ See discussion of this hadith in Yūsuf ibn ‘Abd al-Bar al-Andalusī, *al-Tamhīd lima fī al-Muwaṭṭa’ min ma’ānī wā asānīd* (Morocco: Ministry of Religious Endowments, 1985) 11:87. Ibn ‘Abd al-Bar’s commentary on this ḥadīth states that the owner of the livestock is liable for overnight damage if he was negligent (*ithā farraṭ*) and that he would not be liable if the animal was stray or was untamable (*illā an takūn al-māshiya ḍālla aw nāfira, fala yatahayya’ li šāḥibihā ḍammahā walā raddahā ilā makānihā*). In other words, the owner is presumed to be negligent if the animal caused damage at night, unless the owner proves that the matter was beyond his or her control.

⁸⁹ Ibn ‘Abd al-Bar, *al-Tamhīd*, 11:86–88.

⁹⁰ Ibn al-Qayyim, *al-Ṭuruq al-ḥukmiyya*, 79, 100.

⁹¹ Ibn al-Qayyim, *al-Ṭuruq al-ḥukmiyya*, 100.

prevalent custom. Take for example a contract that requires payment to be made in “dollars” but does not specify whether those dollars are Canadian or American. If the contract was entered into in a foreign market in a tourism context, for example, the term “dollars” is most likely a reference to American dollars.⁹² Not only is custom helpful in interpreting the words used in a contract, but it is also helpful in determining the intention of the parties in the absence of words. For example, a contract for lease may not state the forms of prohibited activity in which the lessee may not engage within the leased property—or it may fail to exhaustively list such activities. Nonetheless, and even in the absence of such explicit stipulation, the lessee will not be permitted to engage in activity that would customarily be considered prohibited.⁹³ For example, one may not use residential property to engage in metalwork without the permission of the landlord, as it is not customary for such activity to be permitted without explicit permission.

Custom has served as a powerful legal tool for all schools of Islamic law. The cases in which custom determined the content of a legal ruling would fill volumes. The above examples simply give the reader an idea as to the nature of the role of custom in legal matters that may be the subject of legal proceedings. The following maxims will offer further specificity and clarification as to the role of custom and will bring along with them further examples.

a. Popular usage is an authority that must be acted upon.

(إستعمال الناس حجة يجب العمل بها)

This maxim offers the same meaning as “custom is determinative.” However, its wording directs the mind towards custom as it relates language rather than practical custom.

Sometimes a community customarily uses a word to convey a certain meaning but that usage does not correspond with the linguistic meaning of that word. In this

⁹² Ibn Nujaym, *al-Ashbāh wa al-naẓā'ir*, 81; Muṣṭafā al-Zarqā, *‘Aqd al-bay’* (Damascus: Dār al-Qalam, 2012), 85–87.

⁹³ Al-Zarqā, *al-Madkhal al-fiqhī*, 2:886. See an analogous case in Ḥaydar, *Durar al-ḥukkām*, 1:581–82, section 555.

situation, there is a conflict between the customary and linguistic meanings of the word. For example, a community may use the word “meat” (*lahm*) to refer to the meat of animals to the exclusion of seafood despite the fact that, linguistically, seafood is captured by the word. Whenever a member of this community uses this word, the law will give effect to the customary meaning of the word rather than its linguistic meaning unless evidence points to the contrary.⁹⁴ This has important implications. Take the case of one who swears that he shall not eat meat. If in his community the word “meat” customarily excludes seafood, this person would not be in violation of his oath if he eats seafood.⁹⁵

This maxim also applies when the customary meaning does not conform with the meaning employed in the text of the Qur’an and Sunnah. For example, if one swears that he will not use a *sirāj* (lamp), he would not violate his oath by relying on the light of the sun even though the Qur’an refers to the sun as a *sirāj*.⁹⁶

b. That which is customarily known is like that which is explicitly stipulated in a contract.

(المعروف عرفا كالمشروط شرطا)

This is a crucial maxim that relates to the law of contract. It provides that a matter that is customarily known will be treated like a stipulated condition in a contract unless the contracting parties state otherwise. For example, in determining what is included in a sale and what is not, custom will have an authoritative role. In the sale of a car, it may be customary for the car mats to be included along with the car. If so, it will be included in the sale even if the parties to the contract do not expressly stipulate that the mats are included.⁹⁷ That is because what is known to be a condition by virtue of custom is as if it was explicitly stated. In the sale of real

⁹⁴ Ibn Nujiyam, *al-Ashbāh wa al-naẓā'ir*, 83–84.

⁹⁵ This is, of course, the legal ruling based on what is apparent. If, in his mind, the individual intended to include seafood in his statement, he would be in violation of his oath. However, absent explicit declaration, this will not be known to be anyone but himself, and so God will be the only one to hold him to account.

⁹⁶ Ibn Nujiyam, *al-Ashbāh wa al-naẓā'ir*, 82.

⁹⁷ Al-Zarqā, *al-Madkhal al-fiqhī*, 2:891.

property, easements will be included in the sale if custom so dictates.⁹⁸ If parties to a contract for rent do not specify how compensation will be paid (upfront, in installments, or at the end of the term), custom will dictate the matter.⁹⁹

c. There is no objection to the change in rulings along with the change in times. (لا ينكر تغير الأحكام بتغير الأزمان)

Naturally, when rulings hinge on custom, they will change to the extent the relevant custom changes. Throughout the history of Islamic law, jurists adapted rulings that were originally based on a certain custom after that custom changed. Examples of this nature are numerous. For instance, at a time when homes were constructed with identical rooms, a prospective purchaser's right to inspect a home (*khayār al-ru'yā*) was ruled by jurists to be satisfied if the purchaser viewed only a few rooms of the home; that is, the purchaser did not have to inspect all rooms of the home. However, when this was no longer the case and homes were constructed with unique rooms, the purchaser's right to inspect the property was ruled to not be satisfied unless the purchaser viewed each room.¹⁰⁰ Similarly, with all the examples listed earlier under the preceding maxims, the rulings in each of those cases would change if the custom upon which each hinges changes.

This is hardly a point of contention. Rather, it is something that jurists have emphasized in order to prevent custom-based rulings from being frozen in time, thus yielding impractical results. The Damascene scholar, Muḥammad Amīn ibn 'Ābidīn (d. 1836) states, in relation to this question, that many rulings developed by the past master jurists (*mujtahid*) are based on:

the custom of his time, such that if he was present at the time of the newly-emerging custom he would have ruled in a manner contrary to his original ruling. That is why it has been said that among the conditions for [attaining the rank of] *ijtihād* is knowledge of the customs of people. For many of the rulings differ in accordance with differences in time due to

⁹⁸ Al-Zarqā, *al-Madkhal al-fiqhī*, 2:891.

⁹⁹ Al-Zarqā, *al-Madkhal al-fiqhī*, 2:892.

¹⁰⁰ Al-Zarqā, *Sharḥ al-qawā'id*, 227.

changes in the custom of the people, or the emergence of a necessity, or the corruption of people, such that if the ruling remained in its original form it would have necessarily brought about hardship and harm to the people; and it would have contravened the principles of the Shariah that are based on decreasing hardship, facilitating ease, and removing harm and damage so that the world may run in accordance with the most perfect system and the best of laws. This is why you see many scholars of the *madhhab* [i.e., the Ḥanafī school of law] have contradicted what has been stated by the *mujtahid* [i.e., Abū Ḥanīfa] on many points [of law] which he based on what existed during his time—due to their knowledge that if he existed during their time he would have ruled as they did in accordance with the principles of his own *madhhab*.

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Imām Shihāb al-Dīn al-Qarāfī (d. 684/1285), addressed this matter in response to a hypothetical interlocutor who asks:

We practice deference to the teachings of the master jurists, and we lack the authority to introduce a new rule on account of the fact that we do not have the capacity to engage in independent legal interpretation[.] Should we then give legal opinions in accordance with what is in the books containing the transmitted views of the master jurists?¹⁰²

In response, al-Qarāfī declared that failing to change a custom-based ruling when the custom has changed as being “contrary to [scholarly] consensus” (*khilāf al-ijmāʿ*) and “ignorance in religion” (*jahāla fī al-dīn*). He continued to say, “Rather, the revealed law that is derived from customs and usages changes when the customs and usages underlying such rules change so that the rule is made to conform with the new custom and usage.”¹⁰³

¹⁰¹ Muḥammad Amīn Afandī, *Majmūʿat rasāʾil Ibn ʿAbedīn* (N.p., n.d.), 2:125.

¹⁰² Mohamed Fadel, trans., *The Criterion for Distinguishing Legal Opinions from Judicial Rulings and Administrative Acts of Judges and Rulers* (New Haven and London: Yale University Press, 2017), 226. The original Arabic text can be found in Shihāb al-Dīn Ahmad ibn Idrīs al-Qarāfī, *al-Iḥkām fī tamyīz al-fatāwā ʿan al-aḥkām wa ṭasarruḥāt al-qāḍī wa al-imām*, ed. ʿAbd al-Fattāḥ Abū-Ghuddah (Beirut: Dār al-Bashāʾir al-Islāmīyah, 1995), 218–19. See also al-Qarāfī, *al-Furūq* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2009), 4:238.

¹⁰³ Fadel, *Criterion*, 226.

Ibn al-Qayyim emphasized the importance of being aware of the role of custom in the Shariah, stating:

This is a chapter of great benefit, ignorance of which has caused great error against the Shariah, which has imposed difficulties, hardships, and obligations that cannot be fulfilled, all of which are known to be things that cannot be brought about by the marvelous Shariah which is the highest rank of benefits.¹⁰⁴

6. One *ijtihād* cannot invalidate another.

(الاجتهاد لا ينقض بمثله)

There are instances in which a judge may rule on a matter in contradiction to a previous analogous case. This may happen when the judge's position on a legal question changes. Importantly, however, the new ruling cannot be retroactively applied to those previously decided cases so as to reverse or invalidate them.¹⁰⁵ That is because those cases were decided on an equally valid interpretation of the Qur'an and Sunnah, and the new interpretation cannot invalidate an equally valid previous interpretation. This was a principle applied by 'Umar ibn al-Khaṭṭāb who, after changing his legal position on a matter, said: "The previous case remains on how we previously ruled, and this case is [adjudicated] based on the current ruling."¹⁰⁶ However, if the previous cases were decided on the basis of an interpretation that is in clear violation of the Qur'an, Sunnah, or scholarly consensus, then it may be reversed.¹⁰⁷

This maxim can also be understood as preventing abuse of process by barring litigants from seeking to nullify the judgment of a judge by re-litigating the case before another judge. The principle of finality is a foundational judicial principle that facilitates respect and adherence to court judgments. The integrity of a judicial

¹⁰⁴ Shams al-Dīn Muḥammad ibn Abī Bakr ibn al-Qayyim al-Jawziyya, *I'lām al-muwaqqi'īn 'an rabb al-'ālamīn* (Jeddah: Dār ibn al-Jawzī, 2002), 3:11.

¹⁰⁵ Ibn Nujaym, *al-Ashbāh wa al-naẓā'ir*, 89–90.

¹⁰⁶ Al-Ḥamawī, *Ghamz 'uyūn al-baṣā'ir*, 327–28.

¹⁰⁷ Ibn Nujaym, *al-Ashbāh wa al-naẓā'ir*, 90.

system requires that its judgments not be second-guessed once a final judgment has been rendered. This maxim, therefore, can be understood as affirming this principle.

This maxim and the explanation offered above is in relation to cases that have been adjudicated and whose legal ruling *has taken effect*. This is distinct from a situation, in the modern context, in which a decision of a judge is being appealed to a higher court. In such a situation, the lower court decision has not taken effect and so the higher court, in the event it overturns the lower court decision, would not be invalidating an effective decision. Rather, it would be correcting a decision that awaits approval before it takes legal effect. In fact, appeals to courts of review did exist in Islamic history and manuals on Islamic judicial procedure do allow certain judicial decisions to be reversed when certain types of error occur.¹⁰⁸

7. Gains correspond to the risk of loss. (الخراج بالضمان)

This maxim is a Prophetic hadith.¹⁰⁹ When one bears the risk of loss of property, the risk will, on the flip side, entitle the person to whatever gains that property generates such as rent or derivative property (e.g., the fruits of a tree).¹¹⁰ If one purchases an item and generates gains from it, but then returns the item to the seller for a legitimate reason, the purchaser gets to retain the gains it generated. That is because during the time the gains were generated, the purchaser bore the risk of loss of the property. To phrase this maxim differently: risk must be matched by reward.

¹⁰⁸ Al-Ṭarābulusī, *Muʿīn al-ḥukkām*, 248–51.

¹⁰⁹ Ibn Māja, *Sunan Ibn Māja*, p. 754, ḥadīth no. 2243.

¹¹⁰ Al-Zarkashī, *al-Manthūr*, 2:119; Ibn Nujaym, *al-Ashbāh wa al-naẓāʾir*, 127.

8. The risk of loss is contingent upon the possibility of gain. (الغرم بالغرم)

This is the corollary to the preceding maxim. It states that the one who enjoys the possibility of gain must also bear a corresponding risk of loss. As such, one who borrows property from another must assume the cost involved in acquiring from and returning the property to the owner. That is because the borrower is the one seeking a benefit by borrowing the property and must, therefore, assume the cost involved.¹¹¹ Similarly, each joint owner of a property must assume the cost of maintaining the property in proportion to his or her stake in the property.¹¹²

9. It is impermissible for anyone to act with the property of another without permission.

(لا يجوز لأحد أن يتصرف في ملك الغير بلا إذنه)

The Sharia protects private property. The protection of people's ownership rights is a theme present in the Qur'an and Sunnah. The Qur'an states: "O you who have belief, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent," (4:29). The Prophet Muhammed ﷺ stated, "The property of a Muslim is forbidden upon his brother except upon [the former's] consent."¹¹³ This maxim can also be found in one of the oldest legal texts: Abū Yūsuf's *al-Kharāj*. In this text, Abū Yūsuf, the student of Abū Ḥanīfa and the Chief Judge of the Abbasid Empire, stated: "The *Imām* [head of state] may not remove the property from the possession of an owner without an established and known right."

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¹¹¹ Al-Zarqā, *al-Madkhal al-fiqhī*, 2:1038.

¹¹² Ḥaydar, *Durar al-ḥukkām*, 1:83–84.

¹¹³ Aḥmed ibn Ḥanbal, *Musnad Aḥmed*, ed. Shu'aib al-Arna'ot (Beirut: Mu'assasat al-Risāla), 24:239, ḥadīth no. 15488.

¹¹⁴ Abū Yūsuf, *Kitāb al-kharāj*, 65–66.

As such, no one is permitted to use, deal in, or act in any way with the property of another without permission. One who uses the property of another and consumes it or part of it (if it is consumable) or causes damage to it must compensate the owner for the loss suffered. One who usurps the property of another must return the property to the owner.

One who deals in the property of another without the owner's permission (e.g., by selling the property without authorization) must compensate the owner for the loss. However, if the contract is not performed (i.e., the property has not yet been transferred) the contract is simply suspended until the owner either voids it or ratifies it after the fact (*ijāza*).¹¹⁵

It should be noted that the permission of the owner is not always necessary. The law may allow one to use the property of another without the owner's permission. For example, a guardian may deal in the property belonging to the party that is under the guardianship without the consent or permission of that party.¹¹⁶ Similarly, the state may compel a citizen to sell their property in order to make way for a public project. The state may also compel the sale of a citizen's property in order to ensure the repayment of the citizen's creditor(s).

10. The validity of public actions hinges on their benefit. (التصرف على الرعية منوط بالمصلحة)

This maxim is rooted in the view that the public officials are given power to act over and on behalf of the population so that they may pursue what is in the best interests of the population. It is this duty, to achieve that which yields utility for the public, that justifies the grant of authority. As such, public actions are valid to the extent they serve the interest of the public. The position of a public official is often compared to that of an orphan's guardian. That is, in the same way a guardian over an orphan can only deal in the property of an orphan in pursuit of the orphan's best

¹¹⁵ Al-Zarqā, *Sharḥ al-qawā'id*, 461–63.

¹¹⁶ Ḥaydar, *Durar al-ḥukkām*, 89–90.

interests, the Caliph is similarly constrained to practicing his authority in pursuit of the best interest of the public.¹¹⁷ His jurisdiction is circumscribed by the interests of the Muslim community. An action that harms the interests of the Muslim community would be, therefore, an action that is excess of the Caliph's jurisdiction and would be invalid.

This maxim can be read as affirming the fiduciary nature of the relationship between public officials and the population over which they practice authority. The Syrian jurist, 'Izz al-Dīn ibn 'Abd al-Salām (d. 660/1262) made the case for this maxim, stating:

Public officials and their agents must pursue actions that are in the best interest of those over whom they practice authority—in order to repel harm and corruption and attain benefit and guidance. No public official may restrict his pursuit to what is simply beneficial in the presence of that which is more beneficial, unless pursuing that which is more beneficial will bring about undue hardship. The proof for this is His words: “And do not draw near to the property of the orphan except in the best of ways.” And if this is the case with the rights of orphans, then it applies, *a fortiori*, to the rights of the Muslim public over which public officials practice authority by using public property. That is because the Divine Law's concern over public matters is greater than its concern over private matters. And every action that attracts a harm or repels a benefit is prohibited.¹¹⁸

Ibn 'Abd al-Salām saw this maxim as one rooted in the Qur'anic command that the guardian of the orphan must act in accordance with the orphan's best interest. By an *a fortiori* argument, he extended this command to public officials who, effectively, act as guardians over the Muslim population. It is no surprise that the maxim appears in slightly different wording as: Anyone who practices authority over another must act in their best interest.¹¹⁹

¹¹⁷ This is also a maxim attributed to Imām al-Shāfi'ī. See al-Zarkāshī, *al-Manthūr*, 1:309.

¹¹⁸ *qawā'id al-aḥkām*, 2:143–44.

¹¹⁹ Al-Subkī, *al-Ashbāh wa al-naẓā'ir*, 1:310.

Consequently, a public official, acting in the capacity of a public guardian in the absence of a private guardian, may not pardon a murderer.¹²⁰ Also, a sale of public property for a price that is significantly below market value is invalid.¹²¹ Similarly, a public official may not allow himself or anyone to use public funds in a non-official capacity.¹²² Nor is a public official entitled to waive a right on behalf of a citizen.¹²³

An important question that is not addressed by jurists who have discussed this maxim is: who decides what is a utility-yielding action and what is not? This is an important question because many public actions are a matter of discretionary public policy for which there is no clear right or wrong answer. The words of Ibn ‘Abd al-Salām are certainly attractive, but they do not tell us who gets to decide what is a beneficial (and consequently, valid) public action and what is a harmful (and consequently, invalid) public action? Is the government not entitled to a high degree of deference on public policy matters? And if it is, does that not heavily decrease the power of this maxim? Or are jurists allowed to second-guess the government whenever it acts and declare its action invalid if they find it to be harmful? And does this invalidity entitle citizens to non-compliance? Or does the invalidity simply mean that the public officials are living in a state of sin, but citizens are nonetheless required to comply? These are all important questions worthy of investigation.

11. The claimant is burdened with tendering evidence; the defendant is burdened with the oath.

(البينة على المدعي واليمين على من أنكر)

This maxim establishes the principle dealing with the burden of proof in legal suits. People are presumed to be free of liability until the contrary is proven. As such, it

¹²⁰ Al-Zarqā, *Sharḥ al-qawā‘id*, 309.

¹²¹ Ḥaydar, *Durar al-ḥukkām*, 1:53.

¹²² Al-Nadwī, *al-qawā‘id al-fiqhiyya*, 404.

¹²³ Al-Zarqā, *Sharḥ al-qawā‘id*, 310.

is the plaintiff in a suit who bears the burden of proving the facts necessary to give rise to the defendant's liability. The in-court evidence tendered to prove liability is known as *bayyina*. If the claimant fails to satisfy the evidentiary burden, the defendant does not automatically escape liability. Rather, the defendant must at that point take an oath (*yamīn*) denying the plaintiff's claim. In order for the oath to be valid, it must be requested by the plaintiff and must be administered by the judge.¹²⁴ If the defendant refuses to take this oath (*nukūl*), this will be a sign of his or her liability and the judge will consequently rule in favor of the plaintiff. However, the defendant does not have to take this oath if he or she rebuts the plaintiff's claim with opposing evidence.¹²⁵

The Mālikī school does not require that the defendant take the oath of denial if the claimant's suit is completely lacking in merit (e.g., there is no known prior contact between the claimant and the defendant).¹²⁶ The wisdom of this position lies in the notion that innocent parties should not be dragged to court and forced to prove their innocence by taking an oath. The mere fact of being sued and being compelled to take the oath of denial, in and of itself, may subject a completely innocent person to the skepticism and ill-thought of community members. To avoid this societal harm, and in reliance on precedent from the Companions, the Mālikī school has saved defendants from the burden of taking the oath when the claim against them is completely void of merit.¹²⁷

Unlike the Ḥanafī school of law, the Shāfi'ī and Mālikī schools of law do not find in favor of the plaintiff by the mere refusal of the defendant to take the oath of denial. Rather, a ruling is rendered in favor of the plaintiff only after he or she also takes an oath affirming the truth of their claim.¹²⁸ Also, the Shāfi'ī, Mālikī, and Ḥanbalī schools allow a plaintiff to prove a property-related claim through the

¹²⁴ Al-Zarqā, *Sharḥ al-qawā'id*, 374.

¹²⁵ Al-Zarqā, *Sharḥ al-qawā'id*, 373–74. This is restricted (at least in Ḥanafī law) to cases in which the defendant, in order to prevent a finding of liability, seeks to prove the existence of a thing (*amran wujūdiyyan*) rather than its nonexistence (*al-naḥī al-mahḍ*).

¹²⁶ Ibn al-Qayyim, *al-Ṭuruq al-ḥukmiyya*, 78.

¹²⁷ Ibn al-Qayyim, *al-Ṭuruq al-ḥukmiyya*, 79–80.

¹²⁸ Al-Zuhaylī, *al-qawā'id al-fiqhiyya wa taṭbīqātuhā fī al-mathhab al-Shāfi'ī*, 2:137; al-Zuhaylī, *al-Qaḍā' al-shar'ī*, 1:511.

testimony of one credible witness along with the plaintiff's oath affirming the truth of his or her claim (*shāhid wa-yamīn*).¹²⁹ In such property-related claims, however, the plaintiff may escape taking the affirming oath if he or she produces one credible witness and requests that the defendant take the oath of denial and the defendant refuses (thus performing *nukūl*). This combination of one credible witness and *nukūl* will be enough to rule against the defendant.¹³⁰

Conclusion

The maxims of *fiqh* are far greater in number than what has been included in this paper. What this paper aimed to do is serve as a primer on *al-qawā'id al-fiqhiyya*. This primer, however, was not aimed at simply introducing maxims to the reader for their own sake. Rather, introductory commentary on the basic legal maxims allows the reader to gain some insight into the reasoning behind some of the legal rulings that Muslims confront in their lives. As stated in the introduction of this commentary, knowledge of these maxims helps in appreciating that Islamic law rests on a bedrock of principles, some of which were explicitly laid down by Prophet Muhammad ﷺ. Muslim jurists were acutely aware of the importance of consistency in the law. They recognized that principles were key to achieving consistency and coherence, which are hallmarks of justice. Muslim jurists strove to abide by the principles of Islamic law. They similarly strove to deduce principles from the primary Islamic texts (the Qur'an and Sunnah) as well as from the corpus of legal doctrines developed by earlier jurists. This effort yielded a vast number of maxims, a small sliver of which were the subject of this commentary. By presenting these maxims and their substantive applications, I hope to have helped the reader to appreciate the Islamic legal tradition as a tradition rooted in rational thought and principled reasoning which are themselves rooted in the Qur'an and Sunnah. Far from being an arbitrary system of law, the development of Islamic law was guided by principles and the application of analogical reasoning—through

¹²⁹ Al-Zuhaylī, *al-qawā'id al-fiqhiyya wa taṭbīqātuhā fī al-mathhab al-Shāfi'i*, 2:138; Muhammed al-Zuhaylī, *al-Qaḍā' al-shar'i* (Damascus: Dār al-Fikr, 2018), 1:518.

¹³⁰ Al-Zuhaylī, *al-Qaḍā' al-shar'i*, 1:511.

naẓā'ir—which were rooted in an innate recognition that like cases should be treated alike.

Finally, this commentary—I hope—has also given the reader a glimpse of the principles which Muslim jurists deduced and applied in their work. That is, I hope to have given a sample of the meanings (*ma'ānī*) which Islamic law has endorsed and protected. Knowing that Islamic law respects and empowers local custom, that it seeks to offer ease in scenarios of hardship, and that it cherishes the presumption of innocence is of great value to the Muslim. This knowledge is certainly important as an intellectual matter. More importantly, however, knowledge of one's faith is an expression of love. Just as a person strives to learn about the one whom he or she loves—simply out of love, so does the Muslim strive to learn about his or her faith—simply, out of love for the faith. I pray that this humble effort helps my fellow Muslims to express their love for, and conviction in, their faith.

Further Reading:

This paper covered only a sliver of the Islamic legal maxims. Not only are the Islamic legal maxims far greater in number than what has been included in this paper, but much more can be said even about those maxims which have been included. For those interested in further reading, the following texts are recommended:

A Treasure of Sacred Maxims: A Commentary on Islamic Legal Principles, by Shahrul Hussain

This is an easy-to-read and very accessible text that includes many more maxims than what has been covered in this paper and includes many more examples and applications under each maxim. The book also derives spiritual lessons from the maxims.

Sharḥ al-qawā'id al-fiqhiyya, by Sh. Aḥmad al-Zarqā

This is an Arabic commentary on the 99 maxims of the Ottoman *Majalla*. The author is Sheikh Aḥmad al-Zarqā who was one of the greatest Ḥanafī jurists of

the 19th century. The book was expanded and refined by his son, Sheikh Muṣṭafā al-Zarqā who was also one of the most renowned jurists of the last century.

Al-qawā'id al-fiqhiyya, by Sh. 'Alī Aḥmad al-Nadwī

This book, in Arabic, not only offers a commentary on numerous maxims, but also goes through a detailed history of legal maxims. The book not only canvasses the maxims of the *Majalla*, but also the maxims that can be found in some of the earliest books of *fiqh*. The book is uniquely comprehensive and thorough in its analysis.

Sections 2-100 of *Durar al-ḥukkām Sharḥ Majallat al-aḥkām*, by 'Alī Ḥaydar Pasha

'Alī Ḥaydar Pasha was the Justice Minister for the Ottoman Empire and was the head of its highest court. His commentary of the *Majalla* gained broad acceptance amongst the scholarly community and served as the basis for most later commentaries. Sections 2-100 of his commentary covers the 99 legal maxims and offers a concise and clear explanation of the maxims. The commentary was translated from Ottoman Turkish to Arabic by Fahmī al-Ḥusaynī, a Palestinian-Ottoman lawyer who served as mayor of Gaza in the early 20th century.