



MAXIMS OF ISLAMIC JURISPRUDENCE

[In the Light of Hadiths of
Prophet (pbuh)]

Professor Dr.
Abu Reza Muhammad Nezamuddin Nadwi MP

القول في الفقه من الأصول
في ضوء الأحاديث النبوية

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ISLAMIC
JURISPRUDENCE

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Professor Dr. Abu Reza
Muhammad Nezamuddin Nadwi MP



Center for Research and Publication (CRP)
**International Islamic
University Chittagong.**



Allama Fazlullah Foundation
(An Organization for Welfare-Works, Islamic Research and Publication)

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By

Professor Dr. Abu Reza Muhammad Nezamuddin Nadwi MP

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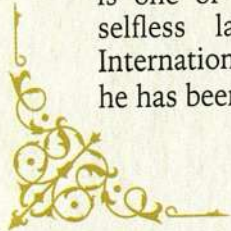
About The Author

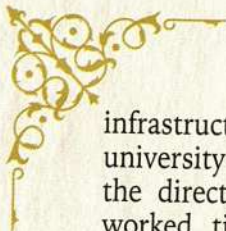
Professor Dr. Abu Reza Mohammad Nezamuddin Nadwi, is one of the pioneers of propagating moderate thought in Bangladesh, a top Islamic scholar and veteran politician. This Alem-e-din is talented, energetic, efficient, and well-known in multifaceted philanthropic activities. This talented workaholic person is relentlessly performing all the huge activities by sacrificing everything for the sake of religion, patriotism and the welfare of the nation.

He was born in the late sixties of the last century in famous Makkar Bari, a very aristocratic religious Muslim family in Satkania Upazila of Chittagong. His forefathers from Makkah Mukarramah, led by his eldest forefather, Sheikh Yassin Makki (R), came and settled here for the sake of propagating Islam, da'wah and preaching.

Mr. Nadwi successfully completed his Master's in Hadith from 'Al Jamia Al Islamia Patiya', a well-known ancient Islamic seminary in Chattogram. Then he got admitted to 'Jamia Darul Ulum Nadwatul Ulama', a famous institution situated in Lucknow, India, to acquire his higher education. There he became a disciple of Allama Syed Abul Hasan Ali Nadwi, one of the greatest Islamic thinkers of the twentieth century. From him, he acquired knowledge of different branches and lessons of deep Islamic thought. Dr. Abu Reza Nadwi completed his Master's Degree in Arabic Language and Literature from Dhaka University with great achievement and obtained his Doctorate Degree from Lucknow University.

Dr. Abu Reza Nadwi, with his conviction for necessary reforms in the Qawmi Madrasa Education System of Bangladesh, started his career as a teacher of Arabic Literature and Hadith in Jamia Darul Ma'arif Al Islamia founded in 1989 by the famous Arabic writer Allama Sultan Zauk Nadwi. Then in the year 1995, he was appointed as a lecturer in International Islamic University Chittagong. He was promoted to a professor at the same university in 2012. Dr. Abu Reza Mohammad Nezamuddin Nadwi is one of the foremost personalities, who has invested their selfless labor and talents behind the establishment of International Islamic University Chittagong. Since its inception, he has been deeply involved in every step of the overall academic,





infrastructural and educational development and progress of this university and his contribution is undeniable. During his tenure as the director of the university's foreign affairs department, he worked tirelessly day and night to strengthen relation and communication with the outside world.

In the 2014 parliamentary election, for the first time, he was elected as MP of Chittagong 15 constituency of Bangladesh Parliament. Then in the Eleventh Parliamentary Election of 2018, he was elected as a Member of Parliament of Bangladesh for the second time. He is currently in charge of several political and social organizations. He is a member of the Parliamentary Standing Committee on the Ministry of Industries; a member of the Bangladesh-Saudi Parliamentary Friendship Committee and a member of the Sheikh Zayed Bin Sultan al Nahyan Trust Bangladesh under the Ministry of Social Welfare.

Besides, he has formed numerous social, political, public welfare, economic, religious, educational organizations and institutions. Some of the notable ones are as follows:

1. Allama Fazlullah Foundation is a public welfare service organization. This foundation has laid the foundation of multi-faceted social service activities in Bangladesh on a formal institutional basis. Under this, about 6000 welfare oriented projects have been implemented in different parts of Bangladesh. The Foundation has set an outstanding example of transparency, accountability and trust in conducting philanthropic works.

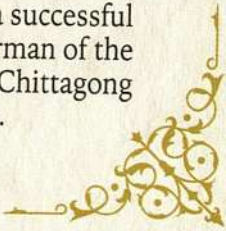
2. Arabian Leadership Madrasa

3. Chittagong International English School (CIS)

4. Majma`u Al-imārāt Al-ta`limī Al-khayrī

Dr. Abu Reza Nadwi is not just a traditional scholar or public servant. On the contrary, this versatile Islamic scholar, while conducting writings, research-discussions, lectures in meetings and seminars, and conducting multi-faceted da'wah activities, is constantly illuminating the light in the sector of da'wah across the world. He has participated in many international research seminars as a keynote speaker and researcher. He has published several research and educational books, translations, editorials and essays.

The Government of Bangladesh appointed Dr. Abu Reza Mohammad Nezamuddin Nadwi, the living talent and a successful man in education, culture and social arena, as the Chairman of the Board of Trustees of International Islamic University Chittagong in 2021, in recognition of his outstanding contribution.





MESSAGE

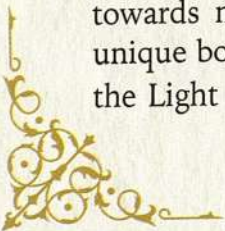
Professor Dr. Mohammad Abdul Gaffar Sharif

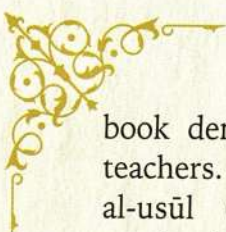
Ex Dean, Sharī'ah Faculty, Kuwait University

Secretary General, Kuwait 'Awqāf Public Foundation

Six years ago (1414 AH), I got introduced to Sheikh Abu Reza Mohammad Nezamuddin Nadwi at a festive gathering in Medina. Many more loved ones were present at the meeting. His righteous character, knowledge and the love for scholars touched my heart. In particular, his deep love for the renowned Dā'ī (Islamic preacher), the eminent scholar Sheikh Abul Hasan Ali Nadwi, was clearly noticeable. Just as his fondness for the Islamic call was remarkable, so his erudition in Arabic was astounding. He seemed to be an offspring of the Arab world. But I was not surprised, as he too has grown up in an environment that is fertile in the light of the prophetic guidance, of Bangladesh and India; where the scholars emphasize knowledge as well as deeds and concentrate on following all Islamic teachings.

Since my friend Abu Reza Nadwi had a positive attitude towards me, he asked me to express my opinion on his unique book entitled "Maxims of Islāmic Jurisprudence in the Light of Ḥadīths of Prophet (PBUH)". In my view, the





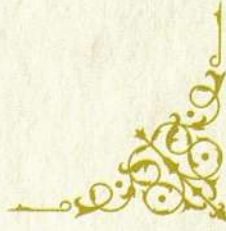
book demands equal importance for both students and teachers. This is because, most of the texts of Qawā'id al-usūl (Principles of Islamic Jurisprudence) do not emphasize the presentation of traditional evidence (Qur'ān, Ḥadīth, 'Ijmā', etc.) related to the principles. The reason for this is - perhaps the principles were so famous among the scholars concerned that the need for their authenticity was not felt even then; or they just considered rational evidence for the authenticity of the principle.

After looking at the different pages of the book, I think that the book will be very useful for the students and the readers who love Sharī'ah. Similarly, I believe that expert scholars will benefit from this book. Basically it is the equivalent of a note book, where each principle is presented to the reader with comprehensive descriptions. Descriptive documents have been cited in support of the principles and emphasis has been laid on enriching and clarifying the principles with various practical examples.

May Allah bless my friend Abu Reza to complete this long journey of knowledge and grant him and all of us the blessings of sincerity.

Dr. Mohammad Abdul Gaffar Sharif

13/04/1430 AH





OPINION OF

‘Allāmah Mufti Jahur Ahmed (R.)

Ex Head, ‘Ifṭā’ and Law Department, Dārul ‘Ulūm Nadwatul ‘Ulama, India

Praise be to Allah, the Lord of the worlds. May mercy and peace be upon Hazrat Muhammad (peace be upon him) and his family and all his Companions.

Mawlana Abu Reza Mohammad Nezamuddin Nadwi has prepared this research work through hard work and perseverance. He has relied heavily on books of Hadith and Fiqh and modern reference books. The title of this work is new and unique in terms of its distinctive beneficial features.

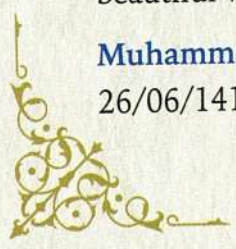
It was very important to find a solution to the modern mas’alas (problems of modern times) by presenting these ‘Usūl and Qawā’id (principles and rules) in a systematic and reliable way.

MashaAllah, the author of the present research work has made an effective effort to fill that void and he has expressed his willingness to expand and enhance its scope in future.

I am praying to Almighty Allah so that He might grant him the tawfiq to complete this great research work in a beautiful way. Ameen!

Muhammad Jahur Nadawi

26/06/1413 AH





M MESSAGE

Eminent Muhaddis and Scholar

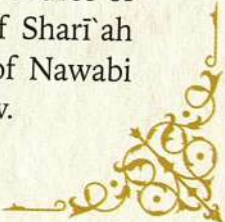
'Allāmah Sayyid Salman Al-Hussaini Nadwi

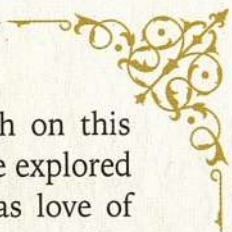
Ractor: Jameya Sayyad Ahmad Bin Irfan Al-Shahid,
Lucknow, India

Ex. Vice Dean, Shari'ah Faculty, Darul Ulum Nadwatul
Ulama, India

Beloved Dr. Abu Reza Mohammad Nezamuddin Nadwi has completed a research work or book entitled "Maxims of Islāmic Jurisprudence in the Light of Ḥadīths of Prophet (PBUH)" which is a very important and sophisticated work. It was the demand of time that such a worthy book be written. Basically, he took such a sophisticated and difficult subject under my advice and direction. In it, special emphasis has been laid on the narration of the Hadith source of the principles of Islamic jurisprudence. As a result, we can benefit from this research in two ways.

Firstly, the authenticity and reliability of the principles discussed in the text will be proved and the deep source of them will be proved with the second source of Shari'ah which is Sunnah. Secondly, there is the study of Nawabi Ḥadīth from the point of view of 'Usūl-Islamic law.





I have advised beloved Abu Reza to do research on this subtle 'Usūli (fundamental) matter because I have explored potentials in him. He possesses qualities such as love of knowledge, concentration to study, proficiency in mastering the curriculum, deep proficiency in Arabic language, sharp intellect and intelligence, perseverance and determination to pass sleepless nights if required to pursue his research.

I strongly believe, among those who have come to us from Bangladesh, I have found him to be the most knowledgeable, intelligent, and of good character. He is unique in having a deep knowledge of the subject to be studied and he has the capacity to write masterly on the topics he deals with.

My prayer to Allah is that He may grant this book the tawfiq of seeing the face of light, grant its acceptance to the scholars and benefit the scholars and seekers of knowledge from it. Finally, I sincerely pray to Allah to include this book in the Mizan of the author's good deeds. Amen!

Salman Al Hussaini Nadwi

26/12/1992





OPINION OF

Allama Shaykh Muhammad Sultan Zauk Nadwi

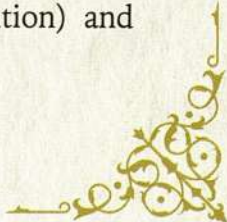
Eminent Arabic Litterateur and Islamic Scholar

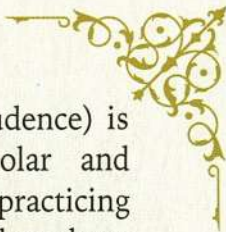
Founder Director and Shaikhul Hadith, Jamiah Darul Ma'arif
Al-Islamia, Chattogram

Chairman, Ittehadul Madaris Bangladesh (Qawmi Madrasa
Board)

All praise is to Allah, the Lord of the worlds. May peace and blessings be upon our beloved Prophet Muhammad ibn Abdullah (SAW), his family and all his Companions.

I am very happy to write briefly, although I am suffering from various ailments that have almost paralyzed me. Our very favourite talented face, proud student, Professor. Dr. Abu Reza Mohammad Nezamuddin Nadwi (current Member of Parliament and former teacher of Hadith and Arabic Literature in Jamia Darul Ma'arif Al Islamia, Chattogram) has requested me to write something about his book titled "Maxims of Islāmic Jurisprudence in the Light of Ḥadīths of Prophet (PBUH)". It is to be noted that after the first edition was published by the Ministry of Waqf and Religious Affairs of the Government of Kuwait, I became aware of the content of the book. The author gives a very strong and excellent account of the principles of Islamic jurisprudence and the rules of "iṣṭinbāt' (invention) and "istidlāl' (presentation of documents).





Qawā'id 'al- Fiqh (Principles of Islamic Jurisprudence) is such a branch of knowledge that no scholar and knowledge-seeking student in general and muftis practicing fiqh and fatwa in particular can neglect; rather, all are have to recognize its inevitability.

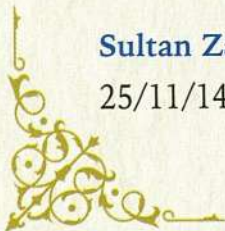
In the present version, a number of new principles have been added to the new form, along with its interpretation and analysis. So it has dimensional features. It is to be noted that the author has been able to achieve unique and foremost status in this special branch of knowledge; because, to my knowledge, no Bangladeshi scholar has written a separate book on this subject except "Qawā'id al-Fiqh" by Allama Mufti Amimul Ihsan. Therefore, the composition is really a new research work and new addition, which deserves a place in the Islamic knowledge repository and library in the international arena.

My best wishes for the beloved author. In fact, the Almighty has endowed him with such a keen intellect, perceptive power, Arabic language skills, punctuality and ability to take timely initiatives that he has surpassed all in education, writing and social service and politics. This is not at all surprising, because, he has been brought up in the house of knowledge, experience and literary culture. He is a worthy son of Allama Abul Barakat Mohammad Fazlullah and the successor of his ʿilm (knowledge).

Finally, I pray to Rabbe Karim to grant the book acceptance and to benefit the scholars and students who are thirsty for knowledge. I also pray that He may count this book on the Mizan of the author and give him the opportunity to serve him more and more. Ameen!

Sultan Zauk Nadwi

25/11/1441 AH





MESSAGE

Allama Shaykh Abdul Halim Bukhari (Rh.)

Shaikhul Hadith, Eminent Alem-E-Din

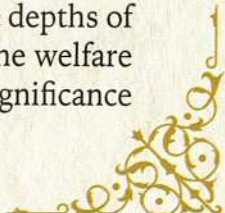
Ex. Mudir, Al Jamia Al-Islamia Patiya, Chattogram .

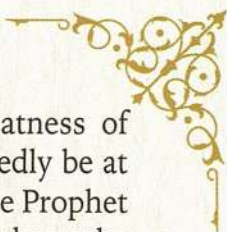
Secretary, Ittehadul Madaris Bangladesh (Qawmi Madrasa Education Board)

All praise is to Allah, the Lord of the worlds. May peace and blessings be upon our beloved Prophet Sayyidul Ambiya Muhammad (SAW), who was awarded the title of 'As-Sadiq and Al-Amin'. May blessings be upon his family, all the Companions and the future humanity who are devoted to following him.

There is no doubt that Islam naturally appeals to its followers to be wise and educated, because cultural poverty is far more terrible and deadly than spiritual poverty in terms of consequences. How will they carry and preserve the great message of Islam when there is ignorance and stupidity and emptiness of thought and knowledge in the nation? In the hadith narrated from the source of Hazrat Abu Umama (RA), the Prophet (SAW) said,

"The status of a scholar is the same as that of Abed, just as my status is above your generality." He added, "Surely Allah, His angels, and all the inhabitants of the heavens and the earth, even the ants in the holes and the fish in the depths of the sea, keep on praying for those who teach for the welfare of mankind." If such is the loftiness and significance

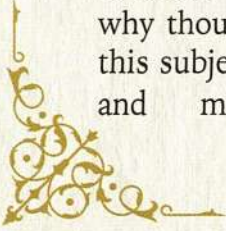


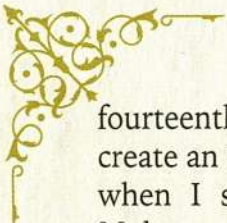


knowledge in general, then importance and greatness of Islamic jurisprudence (ʿilm al- fiqh) will undoubtedly be at the top of loftiness and significance. That is why the Prophet (SAW) said, "Allah (SWT) gives deep knowledge about the religion to those who He blesses."

It is apparent from that jurisprudence is a very wide-ranging and highly respected branch of knowledge, because with the help of this one can get the knowledge of halal-haram. That is why; it is specialized as a scripture that encompasses every sector of human life. The characteristic of this branch of knowledge is to be flexible and pragmatic in dealing with the newly emerged issues and problems. In fact, those who can acquire knowledge in this branch of knowledge can implement the commands and rules of Allah given in every sector of human life, so that it is possible to achieve good fortune and success in this world and in the hereafter.

Needless to say, when such a status or position of *ilmul fiqh* has been recognized and established for the Muslims, then undoubtedly special dignity and respect will be established for other ʿilm or branch of knowledge, derived from this. One of these branches is ʿIlmu Qawā'id al- Fiqh (Principles of Islamic Law). It is a branch of knowledge invented by the learned scholars of this Ummah, and thus it has been possible to formulate and integrate the various parts of Islamic jurisprudence into a very concise frame of articulation in order to formulate certain formulas or principles. It is in this way that this branch regulates Islamic jurisprudence and its rules and regulations in such a way that many subjects of this branch are woven into a single thread. This makes it easier for fiqh or Islamic jurists to master and memorize all matters, and for muftis to practice and issue fatwas. The importance of this branch is immense to those who have concentrated on writing books. That is why thousands of books and essays have been written on this subject in every school of thought (madhhab), ancient and modern. Even realizing its importance,





fourteenth-century scholars have made the utmost efforts to create an encyclopedia of Qawā'id 'al- Fiqh. I was overjoyed when I saw that our very talented student, Abu Reza Mohammad Nezamuddin Nadwi (current Member of Parliament and former teacher of Hadith and Arabic Literature of Jamia Darul Ma'arif Al Islamia, Chattogram) - May Allah grant him the grace to travel in the path of truth- has completed the book titled " Maxims of Islāmic Jurisprudence in the Light of Ḥadīths of Prophet (PBUH)".

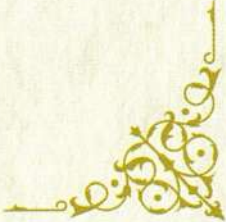
After looking at different parts of the book and its references, I think it is a very useful, informative, well-researched, simple and unique book. It can be said that by writing this book, Muhtaram author has given a wonderful opportunity to those who do not have mastery over the books of Qawā'id 'al- Fiqh and those who are not well-versed in the terminology of the field and its method. As a result, the time spent by the readers in understanding the various scriptural rules, principles and new terminology will be saved. He is highly skilled and successful in selecting all the principles that are suitable not only for students but also for expert scholars. Enrichment of the principles by the wise author's Qur'ān -Sunnah and other Sharī'ah documents has further enhanced the beauty and acceptability of the book. In fact, he wrote the book beautifully, which will comfort and soothe the heart of the reader.

I am not surprised by his talent because, he is the son of a worthy father like Allama Abul Barkat Muhammad Fazlullah (R), a prominent Arabic writer and poet.

Finally, I pray to Allah that He may accept the book, by which knowledge seekers may get benefitted, and at the same time may He grant this research of him as an Wasila of Najāt on the Day of Judgement. Ameen!

Muhammad Abdul Halim Bukhari

07/12/1441 AH





OPINION OF

Allama Farid Uddin Masood

Renowned Islamic scholar

Former DG, Islamic Foundation, Ministry of Religion, Bangladesh

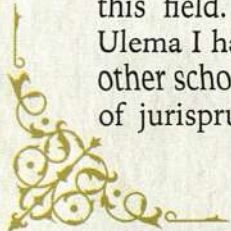
Founding Director, Jamia Ikra, Dhaka, Bangladesh

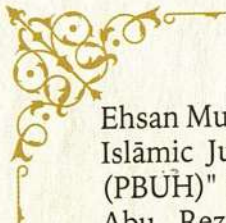
Chairman, Wifāq Al-Madāris Al-Dīniyyah, Bangladesh

Undoubtedly, 'Qawā'id al-Fiqh' (Principles of Islamic Jurisprudence) is a branch of knowledge which is considered as one of the most prestigious traditions and glorious achievements of the Islamic world. 'Qawā'id al-Fiqh' is one of the branches of knowledge that is considered to be pure Islamic. The composition of this scripture flourished in the hands of Muslims.

No such scripture can be found in the history of any nation's civilization. The Muslims' goal in inventing this unique branch of knowledge was to incorporate the interconnected branches of Islamic jurisprudence into a single thread so that the masalas can be easily mastered and understood and their interrelationships can be understood. As a result, a mujtahid (Islamic jurist) would be able to find out various practical examples of fiqh easily and he would be able to solve various new problems effortlessly. Moreover, he will be capable of understanding various provisions of the Shari'ah and the underlying motives, greatness and significance behind the composition. Thus, the level of error in the provision of Shari'ah solutions to new issues raised to him would be reduced.

That is why innumerable previous and contemporary scholars have spent their diligent efforts in composing various books in this field. However, considering the works of Bangladeshi Ulema I have not come across any book in this regard by any other scholar except the book Qawā'id 'al-Fiqh' (legal maxims of jurisprudence) written by Allama Mufti Sayyad Amimul





Ehsan Mujaddidi barkati (R.). Now, the book titled "Maxims of Islāmic Jurisprudence in the Light of Ḥadīths of Prophet (PBUH)" has appeared which is composed by Professor. Dr. Abu Reza Mohammad Nezamuddin Nadwi (Member of Parliament, Bangladesh & Professor, Department of Dawah and Islamic Studies, International Islamic University Chittagong).

Looking at the content of the book, it seems that the book will be very useful for the readers. The book is characterized by several qualities such as simple sentences, clear and fluent presentation method, content-based brief discussions and so on. The author has placed special emphasis on further clarifying the principles by presenting Shari'ah Nuṣūṣ (statement of Qur'ān and Sunnah) as evidence of every principle and various practical examples. The author has marked himself as a wise person through the selection of significant principles from among the many principles of jurisprudence. These principles are so important all students and teachers cannot but learn from these principles. As far as I know, no scholar in Bangladesh has written any book related to "Qawā'id al-Fiqhīyya" in this manner. He is the first and pioneer in this field. In the words of the author, I would like to say: "This research work is the first initiative, the first step in itself. Those who want progress and prosperity in this subject, this research work can be a milestone or roadmap for them."

I think students, especially those who practice fiqh and fatwa, the book will be very important for them. The book will enrich their knowledge about Fiqh (Islamic Law). As a result, they will get benefitted from other texts dealing with the same branch of knowledge.

The author really deserves heartfelt congratulations and special blessings for such an outstanding contribution to the present generation. I sincerely pray to Allah to spread the acceptance of this book among readers and to spread its benefits widely. I hope, Allah will continue this relentless pursuit of the author for the welfare of the present generation. Verily, He is the giver of success and tawfiq.

Fariduddin Masood

19/06/2020



MESSAGE

Mufti Shamsuddin Zia

Muhaddis and Mufti, Al-Jamia Al-Islamia Patiya, Bangladesh

Undoubtedly, 'Islamic jurisprudence and ethics' is a very useful branch of knowledge, which elevates its students to the highest peak of dignity. Therefore, Islamic scholars say: "One who does not have the foundational knowledge in any branch of knowledge, he cannot reach the destination of that branch". Basically, 'Islamic jurisprudence and ethics' is one of those fundamental branches of knowledge, without negotiating it a mufti or a judge cannot apply Sharī'ah rules and regulations. Even a *mujtahid* (Islamic law researcher) fails to achieve full capacity in unveiling Sharī'ah rules and regulations until he can achieve considerable advancement in this branch of knowledge. Because, the basis of the Sharī'ah /law is on this branch and through this, it is possible to become aware of the underlying motives of the Sharī'ah rules and regulations. That is why the previous and the later the scholars have given special importance to this branch. In fact, this branch is the closest ally to 'ijtihād. Therefore, mastering the principles of jurisprudence is better than mastering the rules of its branch.

Therefore, those who are dedicated to the study of jurisprudence, that is, Islamic law, should primarily spend their time in the study of the principles of fiqh. If Muslims were aware of the dignity and superiority of this knowledge, it would seem very easy and comfortable for them to spend time and effort behind it. Basically, 'Imām Shāfi'ī (R.) was the first to compose the principles of Islamic jurisprudence in a book. Then various books on this

subject, starting from short to medium and large extent began to be written. The scholars appeared in every age for penning on this branch. Everyone follows their own personal and institutional approach to writing. As a result, at one stage, innumerable books were written on this branch.

It is a matter of great regret that in spite of the existence of innumerable learned ulama kirams in Bangladesh, no one has taken the initiative to compile a book on this prestigious branch. So I am very delighted to know about the book titled “Maxims of Islāmic Jurisprudence in the Light of Ḥadīths of Prophet (PBUH)” by venerable Dr. Abu Reza Mohammad Nezamuddin Nadwi. As far as I know, the author is such a talented scholar who has a combination of God-gifted sharp intellect, keen memory, extraordinary perceptive power and an extraordinary knowledge in Arabic language. His ability to take initiatives rapidly and perform the task speedily has made him unique. That is why he is on the apex of excellence, leaving behind his contemporaries in the fields of politics, social service and knowledge.

Therefore, it will not be surprising if the excellence of the book written by him is established among the books dealing with the same branch of knowledge. And it must be so, as he has grown up in a glorious environment of knowledge and wisdom and acquired knowledge from the learned teachers and scholars home and abroad.

After looking at different pages including the table of contents of this book, I think that the book is excellent, easy to read and very useful. Its uniqueness is characterized by its presentation style,

language style etc. Hopefully, this book will be able to garner a lot of praise from readers and its benefits will be wide-ranging.

Therefore, I would like to appeal to the directors and officials of various Jamia and Madrasas to include this book in the syllabus. I sincerely pray to Allah for the acceptance of this book and may both students and teachers get benefits from this book. Hopefully, Allah will give him more and more tawfiq for this contribution to the glory of knowledge.

Mufti Shamsuddin Zia

17/08/2020

OPINION OF

Dr. Gias Uddin Talukder

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Expertise limits people to specific branch of knowledge. Instead of focusing on the overall fundamental matters, one has to focus on the fragmentary part of knowledge. Basically, it is nice to hear the concept of expertise and it is getting more and more popular. However, it is needless to say that it causes narrowness and clumsiness in the field of knowledge. This is because the expert's view is engaged in such tiny molecules that it often requires the magnifying glass to unveil the understanding. In fact, expertise means overlooking other essential horizons, and these modern crude ideas do not fit in at all with the liberal Sharī'ah coverage (way of life) of Islam. The source of this Sharī'ah is Qur'ān, which the omniscient Creator has referred to as "a clear explanation of everything." The flourishing of Sharī'ah has originated from such a lofty and sublime personality who has attained from Allah the all-encompassing revelation and his utterances speak to our hearts asserting "I have been gifted with knowledge of the former and the later."

The universality and totality of Islamic law is evident among our predecessors. For example, it was seen in the past that a mufassir was a philosopher, a philosopher was a doctor, a doctor was an Islamic jurist, an Islamic jurist was a mathematician, and a mathematician was a hadith scholar. Our conviction is that reverend Abu Reza Nadwi has shown his success through his

reflourishment of the lost but expected tradition of Islamic Ummah. His versatility is a proof it.

He is a university Professor having depth of knowledge in contemporary issues, a historian, frequent traveller, learned writer, a fierce debater, a courageous politician and a social worker devoted to the welfare of mankind. His book: "Maxims of Islāmic Jurisprudence in the Light of Ḥadīths of Prophet (PBUH)" is a very valuable and successful book. During the study of this book it seems that knowledge has regained its normal course, the dust of ambiguity and doubt has been removed, the mirage of ignorance has been vanished and the grossness and inertia of conscience seems to be slowly disappearing.

Some of the unique features of this book are:

- (1) The book is like a passcode, with the help of which, by travelling in this world, it is possible to reveal the reality by applying all the fiqh formulas and principles.
- (2) It is like a monitor where the various features of fiqh are clearly visible. The flexibility and usefulness of his approach to fiqh in problem solving at any time and place are noteworthy.
- (3) It sheds light on the legitimacy of Islamic law and proves the excellence of Islamic law over man-made law.
- (4) Clearly, it emphasizes analyzing the underlying motives of the Sharī'ah provisions, in addition to mentioning documents in support of every principle of Islamic jurisprudence.

(5) It is such a key that it unravels the mysteries of fiqh in such a manner that all the meritorious and the incompetent are able to comprehend.

(6) The sentences of the book are neat, pure and rhetorical. The narrative is not so long as to annoy and not so short to be flawed. The book is so simple that the reader can be able to memorize and assimilate it line-by-line.

(6) The book will be helpful for a *mujtahid* or a researcher to solve contemporary problems. It will play a unique role in providing Islamic solution, instead of solutions imported from the West.

Finally, I would like to say the same thing about this book which is said by the revered Abdul Gaffar Sharif at the beginning of the book: “Actually this book is a dictionary; and I hope that students, teachers, researchers, supervisors, advocates, judges and everyone can get benefitted from this book irrespective of being *Muqallid* (imitator) or *Mujtahid* (one who exercises independent reasoning - 'Ijtihād-).

Dr. Gias Uddin Talukder

Date: 03/06/2021

MESSAGE

Mufti Waliur Rahman Khan Al-Azhari

Muhaddith, Islamic Foundation

Khatib, Gaosul Azam Jame Mosque Uttara-13

The pursuit of Shari'ah knowledge is considered to be one of the most humane and benevolent gifts of Allah. The person who is blessed with the tawfiq of following the path of Allah, the pursuit of knowledge is considered as a blessing and an honor for him. And there is no doubt that the most honorable and important knowledge is "Al-Fiqhul Islami" (Islamic jurisprudence). The dignity of this branch of knowledge is proved by the infallible words of Allah. It is narrated: "Then why does not a party come out, so that they may acquire a deep knowledge of religion and warn their community; when they will return to them, so that they may be alert." [Sūrah Tawbah: 122]

On the other hand, the Prophet (peace and blessings of Allah be upon him) said, "If Allah wants welfare of anyone, He gives him fiqh (deep knowledge) of religion." Fiqh possesses special importance for the Muslim Ummah. That is why the Ṣaḥābah Kirām, Tābi'īn and Mujtahid Imāms were so devoted to this branch of knowledge that at one stage different schools of thought emerged based on fiqh (Islamic jurisprudence) and they spread all over the world. Therefore, when this branch of knowledge has progressively flourished and emerged as a distinct branch of knowledge, then various disciplines have grown out of it. "Ilmu Qawā'id Al-Fiqhīyya" (Principles of Islamic Law) is particularly noteworthy among them. The reason for the special significance of this branch of knowledge is it unifies a wide range of issues under a universal and objective principle.

This makes so mastery over those Mas'alas that while implementing fatwa, ijtiḥād or any Sharī'ah provision one's memory supports him profusely. In fact, this branch of knowledge has been of special importance in the world of knowledge since its inception. That is why, previously and later many books have been written on this on this branch of knowledge by wise scholars in every *Madhab* (school of thought). Among them the book titled "Principles of Islamic Jurisprudence in the Light of Hadith" is noteworthy. The author of the book is respected Abu Reza Mohammad Nezamuddin Nadwi (Hafī.) (Member of Parliament, Professor, Da'wah and Islamic Studies, International Islamic University Chittagong, Bangladesh). A closer look at a few pages of the book reveals some of its unique features. Special features of this book have been characterized by its expressive and simple language, impressive method of presentation and the expression of purpose in a clear way. The book is suitable for all levels of readers. Anyone can benefit from it and no one has to fall into the trap of ambiguity and obscurity. The author focuses on presenting Qur'ān -Sunnah statements and document-based discussions from various sources in support of each of the jurisprudential principles of the book. The narrative is not so long that the annoyance arises or it is not so short that the error occurs. He has shown his knowledgeable attitude by discussing the principles that are of indescribable importance in fiqh or Islamic jurisprudence. Needless to say, the author has been able to prove his excellence in the world of knowledge by composing this book. **Needless to say, he has already made his mark in the field of social service and politics. In particular, he played a leading role in the important work during his tenure as the Governor of the Islamic Foundation.**

Some of the notable works are the initiatives of various Islamic activities, innumerable da'wah activities, valuable direction in planning and implementation of social welfare projects, financial patronage etc. Let's not forget that all arrangements for the visit of Haramain-Sharifine's esteemed Imams to Bangladesh were taken under his sole supervision.

Finally, I pray to God to give the honorable writer good rewards in this world and in the hereafter for his service to knowledge. Hopefully in the future he will enrich the readers with such more benevolent gifts.

Mufti Waliur Rahman Khan Al-Azhari
10/08/2020

CONTENTS

Subject / Page

Preface / 36

The Lexical and Terminological Meaning of Qā'idah (Maxim) / 40

The difference between the maxims of Islāmic law (Qawā'id al-Fiqhīyya) and the legal principles/maxims (ḍawābiṭ al-Fiqhīyya) / 42

The difference between *Al-Qā'idah al-Fiqhīyya* (Islāmic legal maxim) and *Al-Qā'idah al-'Usūliyya* (Maxim of 'Usūl al-Fiqh' [principles of Islāmic jurisprudence]) / 43

A historical Overview of the Origin and Development of Qawā'id al-Fiqhīyya (legal maxims of Islāmic jurisprudence) / 45

Application areas of the Qawā'id al-Fiqh (legal maxims of jurisprudence) / 47

Evidence/probative force of Qawā'id al-Fiqh (legal maxims of jurisprudence) / 48

Chapter One

Qawā'id (maxims) starting with Arabic letter Alif (ا)

First Qā'idah (maxim): A Juristic inference ('Ijtihād) is not aside by similar 'Ijtihād / 49

Second Qā'idah (maxim): Actions are judged by intentions / 57

Third Qā'idah (maxim): Permissibility is the original ruling for everything that is beneficial / 63

Fourth Qā'idah (maxim): The basic principle of Sharī'ah is to relate the new event with the most recent past / 68

Fifth Qā'idah (maxim): When a mater tightens it will widen, and vice versa / 71

Sixth Qā'idah (maxim):-Islam is to prevail and is not to be prevailed over / 74

Seventh Qā'idah (maxim): Pressing necessity shall not annul the right of other / 76

Eighth Qā'idah (maxim): Exchange or transformation of wealth is not prohibited if Allah's right (haq) is with it / 78

Ninth Qā'idah (maxim): Conventional permission is at par with verbal permission / 79

Tenth Qā'idah (maxim): Argumentation from harmonious meaning / 82

Eleventh Qā'idah (maxim): Juristic deduction with opposite meaning / 86

Twelfth Qā'idah (maxim): The requirement of '*amr muṭlaq* (general command) is singularity or repetition / 98

Thirteenth Qā'idah (maxim): - Evidencing with *Ḥadīth al mursal* (where narrator/Sahabi is omitted in the chain of narration between successor and Prophet) / 102

Fourteenth Qā'idah (maxim):- Obligation is warranted by command / 105

Fifteenth Qā'idah (maxim): Ordinary '*Amr* (command) seeks immediate or delayed action / 107

Sixteenth Qā'idah (maxim): The underlying claim of '*Nahyī*' (prohibition) is invalidity or vanity / 109

Seventeenth Qā'idah (maxim): When ḥalāl and the ḥarām are confronted, the ḥarām will be dominant / 114

Eighteenth Qā'idah (maxim): When greater and lesser banes are in incompatibility, the lesser shall be committed. Severe harm is removed by the lesser harm. Less harmful option will be chosen between two harmful options / 121

Nineteenth Qā'idah (maxim):- The confession is a proof that automatically imposes an obligation. No judgement is required on its effectiveness / 123

Twentieth Qā'idah (maxim): When the root becomes void the substitute shall be sought / 125

Twenty-first Qā'idah (maxim): Spending under the direction of a judge is equivalent to spending under the direction of a father. Or Spending under the direction of a judge is like Spending under the direction of an owner / 127

Twenty-second Qā'idah (maxim): Kindness to the righteous people is more important than goodness to the wicked/ungodly / 128

Twenty-third Qā'idah (maxim): When two similar acts of worship ('ibādah) come together, one action penetrates the other and the action of one suffices for the other / 129

Twenty-fourth Qā'idah (maxim): The rulings of means (wasā'il) are same to the rulings of objectives (maqāsid). Anything fulfilling an obligation (Wājib) is also an obligation / 131

Chapter Two

Concerning Qawā'id (maxims) starting with Arabic letter با (bā')

First Qā'idah (maxim):- There is a presumption of continuity / 133

Second Qā'idah (maxim): *Actori incumbit onus probandi:* Evidence for the plaintiff and oath for the defendant / 136

Third Qā'idah (maxim):- The real provision is to be free from responsibility / 139

Fourth Qā'idah (maxim): - Evidence is an edequate proof and confession is an inadequate proof / 141

Chapter Three

Concerning Qawā'id (maxim) starting with Arabic letter تا (tā')

First Qā'idah (maxim): Disposition of people is contingent upon interest or Ruler's decisions must be in favour of the people / 143

Second Qā'idah (maxim): Delaying the explanation from the time when it is needed is not permissible / 147

Third Qā'idah (maxim):- Priority is not given on the basis of majority / 149

Fourth Qā'idah (maxim): The basic principle is that when two quoted texts converge on a single issue and conflict, but in one of them the words can be taken in their usual (applied) meanings, this text will be preferred / 152

Fifth Qā'idah (maxim): Changing the cause of the ownership is like changing the self / 153

Sixth Qā'idah (maxim): Circumvention vis-à-vis the unlawful is forbidden / 156

Seventh Qā'idah (maxim):- The prohibition of things is due to their impurity and harmfulness / 158

Eighth Qā'idah (maxim): Propriety takes the place of legal evidence when there is no evidence / 161

Ninth Qā'idah (maxim): Clash of Interest: the judicial acts must not be tainted by accusations levelled against judges / 164

Tenth Qā'idah (maxim):- Affiliation should follow its origin / 166

Chapter Four

Concerning Qawā'id (maxims) starting with Arabic letter ث (thā')

Qā'idah (maxim): The Evident by proof is like the evident as seen by your own eyes / 168

Chapter Five

Concerning Qawā'id (maxims) starting with Arabic letter ج (Jīm)

First Qā'idah (maxim): Good and bad in Ribā (usury) are alike, in some mas'alas defective objects are considered as good objects and in some masā'il (rulings) a sleeping person is like a waking person / 171

Second Qā'idah (maxim):- The crime of the domesticated animals does not require compensation / 172

Chapter Six

Concerning Qawā'id (maxims) starting with Arabic letter حاء (Ḥā')

First Qā'idah (maxim): Benefit of Doubt: Punishments are averted due to suspicions / 175

Second Qā'idah (maxim): No one's rights are revoked due to the passage of time / 178

Third Qā'idah (maxim): The Verdict invariably revolves with its causes in affirmation and negation / 179

Chapter Seven

Concerning Qawā'id (maxims) starting with Arabic letter خاء (khā')

First Qā'idah (maxim): If Khabar al-Wāḥid (solitary report) contradicts Sharī'ah recognized principles, it will be rejected / 181

Second Qā'idah (maxim): If the judge is wrong, the compensation will be borne by Baitul Maal (Islāmic State treasury). That is, the judge will not be liable for compensation / 185

Third Qā'idah (maxim): The right to profit is acquired on the condition of bearing (profit-loss) risk / 188

Chapter Eight

Concerning Qawā'id (maxims) starting with Arabic letter دال (dāl)

First Qā'idah (maxim): To Ḥanafī scholars, the general ('Ām) provision/inference is deemed irrefutable in all the issues under it / 191

Second Qā'idah (maxim): The General Provision/Inference, according to Shāfi'ī and Ḥanbalī schools of thoughts, is speculative/hypothetical for all the issues under it / 194

Chapter Nine

Concerning Qawā'id (maxims) starting with Arabic letter راء (Rā')

First Qā'idah (maxim): The Ḥadīth will not be acceptable if the narrator denies his narration or engages himself in the activities contrary to the Ḥadīth / 198

Second Qā'idah (maxim): The primary ruling of illegality is imposed again if the conditions allowing relaxation in Islāmic Sharī'ah is removed / 204

Chapter Ten

Concerning Qawā'id (maxims) starting with Arabic letter زاء (Zā')

Qā'idah (maxim): Any addition to the text is null and void to the Ḥanafī scholars while others accept the addition / 206

Chapter Eleven

Concerning Qawā'id (maxim) starting with Arabic letter ض (Ḍāḍ) - (There are three Qawā'id)

First Qā'idah (maxim): Harm will be warded off / 212

Second Qā'idah (maxim): Necessity renders prohibited things permissible. / 219

Third Qā'idah (maxim): Necessity shall be estimated proportionately / 224

Chapter Twelve

Concerning Qawā'id (maxim) starting with Arabic letter ع ('Ayn)

First Qā'idah (maxim): Social custom is authoritative; hence a source of law / 226

Second Qā'idah (maxim): In contracts, intentions and meaning, not words and structures, shall be taken into consideration / 233

Third Qā'idah (maxim): The general contextual requirement in terms of meaning / 235

Fourth Qā'idah (maxim): Actions to be on 'Khabr Wāḥid' (solitary report) if 'Khabr Wāḥid' (solitary report) and 'Qiyās' (rational reasoning) are found contradictory / 239

Fifth Qā'idah (maxim): The borrower will be liable till he returns what he has taken / 244

Sixth Qā'idah (maxim): Occasional descriptions/features are not reliable in principle / 247

Seventh Qā'idah (maxim): Consideration shall be given to the commonly predominant, not to the rare / 250

Chapter Thirteen

Concerning Qā'idah (maxim) starting with Arabic letter غين (Ghayn)

Qā'idah (maxim):— No return without risk / 251

Chapter Fourteen

Concerning Qā'idah (maxim) starting with Arabic letter فاء (Fā')

Qā'idah (maxim): Existing tradition to be meant in the nomenclature / 255

Chapter Fifteen

Concerning Qā'idah (maxim) Starting with Arabic letter ق (Qāf)

First Qā'idah (maxim): Accepting the solitary reports (khabr Wāḥid) against long established tradition of a society / 258

Second Qā'idah (maxim): Old thing will remain in its own condition. Or, That which existed from the time immemorial is to be left as it is. / 262

Chapter Sixteen

Concerning Qā'idah (maxim) Starting with Arabic letters ك (kāf)

First Qā'idah (maxim): Anything which is harmful is forbidden (Ḥarām) to eat and drink / 264

Second Qā'idah (maxim): Written Statement is Equivalent to Verbal Statement / 266

Third Qā'idah (maxim): Anything can be killed if it causes harm to human life or property / 268

Chapter Seventeen

Concerning Qā'idah (maxim) Starting with Arabic Letter ل (lām)

First Qā'idah (maxim): There is no room for 'Ijtihād where there is an authentic text / 270

Second Qā'idah (maxim): Tyrant vein sans any right: No right or authority is established if the act is followed by subjugation / 275

Third Qā'idah (maxim): It is not permissible for anyone to possess someone else's property without legitimate reason / 278

Fourth Qā'idah (maxim): No statement shall be attributed to a person who remains silent, but Remaining silent will be considered as affirmation when statement is inevitable / 280

Fifth Qā'idah (maxim): It is irrefutable that rulings change in accordance with the change of time / 284

Sixth Qā'idah (maxim): Indication (dalālah) is not taken into consideration in the presence of clear statement (Taṣrīḥ) / 287

Chapter Eighteen

Concerning Qā'idah (maxim) starting with Arabic letter م (Mīm)

First Qā'idah (maxim): What is established contrary to Qi'ās (analogy) shall not be used as Qi'ās / 289

Second Qā'idah (maxim): Difficulty causes the ease / 293

Third Qā'idah (maxim): The easy cannot be unwritten by difficult / 298

Fourth Qā'idah (maxim): The unknown in Sharī'ah is at par with the non-existent and the incognizable / 302

Fifth Qā'idah (maxim): What Muslims think good is considered good by Allah / 305

Sixth Qā'idah (maxim): We will not be asked about that which is invisible to us / 306

Seventh Qā'idah (maxim): Indirect speech is a safe way to avoid a lie / 309

Eighth Qā'idah (maxim): Sharī'ah Based Principles Get Preference Over Condition Based Principles / 312

Ninth Qā'idah (maxim): As the number of actions increases, so do its rewards / 316

Tenth Qā'idah (maxim): Anything that leads to the Ḥarām is also Ḥarām / 319

Eleventh Qā'idah (maxim): The wealth of Muslims does not become Ghanīmah (spoil of war) for other Muslims in any case / 322

Twelfth Qā'idah (maxim): What is illegal to accept is also illegal to give / 324

Thirteenth Qā'idah (maxim): What is prohibited to do is prohibited to demand / 324

Fourteenth Qā'idah (maxim): What is illegal to use is also illegal to accept / 324

Fifteenth Qā'idah (maxim): Conditions imposed on one's own willingly without force become mandatory on him/her / 327

Sixteenth Qā'idah (maxim):- The person is accountable for his confession / 329

Seventeenth Qā'idah (maxim):- Rights are clipped by conditions / 331

Chapter Nineteen

Concerning Qā'idah (maxim) starting with Arabic letter ن (Nūn)

First Qā'idah (maxim): It is permissible to abrogate the Qur'ān by the mashūr Ḥadīth (which refers to the Ḥadīth conveyed by three or more narrators but not considered *Mutawātir*) which has been accepted by the Ḥadīth experts / 332

Second Qā'idah (maxim): Absolute negation warrants prohibition / 333

Chapter Twenty

Concerning Qā'idah (maxim) starting with Arabic letter و (wāw)

Qā'idah (maxim): Special authority is more powerful than General authority / 335

Chapter Twenty-First

Concerning Qā'idah (maxim) starting with Arabic letter ي (Yā')

First Qā'idah (maxim):- Certainty is not removed by doubt / 339

Second Qā'idah (maxim): Departure from Mutual Disagreement is Preferable / 345

Third Qā'idah (maxim): Conditions must be complied with according to one's ability / 351

Fourth Qā'idah (maxim): Authority (Yad) proves the exercise of power but does not prove ownership / 354

Fifth Qā'idah (maxim): Personal loss must be borne in order to prevent the Collective loss, or committing the lesser of two harms / 356

Sixth Qā'idah (maxim) : In all administrations and management, priority will be given to those who are qualified for ensuring its interest and welfare / 358

Bibliography / 361

PREFACE

Praise is to the Lord of the worlds who guides His servants in a straight path. May peace and blessings be upon the last Prophet Muhammad Mustafa (SAW), who has been sent as a mercy for the whole world; who has firmly established the foundations of the principles of the religion and has eloquently embodied the wise Islamic way of life and its guidance. May peace be upon his family, the Companions and all those who sincerely follow him till the Day of Judgement.

Islamic Jurisprudence is one of the richest sources of knowledge that has been passed down from generation to generation and has been preserved in the pages of Islamic history, because every brick of human life depends on Islamic jurisprudence, on its expertise and on gaining knowledge in its details. This branch of knowledge is so great that it guarantees the good fortune of humanity. This is because the basic premise of the formulation of Islamic law, namely, the principle of "accruelement of benefit and avoidance of harm" is the subject matter of this branch of knowledge.

Needless to say, this branch of knowledge, collected from Shari'a documents, began to flourish in the time of the Mujtahid Imams, and its compilation and separate texts appeared gradually. In addition to this compilation process and innovation, jurists have discovered various methods in the development of Islamic jurisprudence. A great example of the great sacrifices and efforts made by jurists over the ages in the service of Islamic jurisprudence is the books and reference books of 'Usūl al- Fiqh (Islamic jurisprudence) in which 'Usūl and Fiqh scholars have

mentioned various aspects of 'Usūl and its various branches. The first compilation of the Islamic Jurisprudential Heritage is made up of books which are based on various methodological rules of Islamic jurisprudence. The second group is made up of various branches of Islamic jurisprudence or the details taken from the Qur'ān -Sunnah and the narrations of the Companions.

One of the results of the increasing proliferation and multidimensionality of issues is the origin of Al-qawā'id al-Fiqhīyya (Principles of Islamic Jurisprudence) in the world of knowledge and its manifestation as a distinct branch of knowledge. This is because Islamic jurists have discovered the essential principles through in-depth study of the Qur'ān and Sunnah, meticulous search of various disciplines/branches, and the underlying mysteries of the Shārī'ah rules and their practical application. Their studies occupy a significant place among the various branches on fiqh which flourished in fourteenth century.

After I decided to start a research project, I was suffering from quite a dilemma about the title of this work. After a long hesitation, the subject which, by the grace of Allah, was accepted by myself as the title of my research is: "Maxims of Islāmic Jurisprudence in the Light of Ḥadīths of Prophet (PBUH)". Because I was very careful and diligent about the subject of the research as I desired it to be suitable and well-deserving for research and pleasant as well. I hope the research work will be very useful for myself and the research community. Because, the research work covers two very important topics: One: Finding out the basics of Islamic

jurisprudence and its principles. Two: To quote those hadiths which are applicable to the mentioned principles.

I believe that no research on the above subject has been done in this manner before. When we look at the textbooks on Islamic jurisprudence and its principles, we see that they are merely a description of the principles, there is no quotation from the hadith in support of principles. Yes, in some cases, one or two hadiths are quoted, which are quite insignificant. For all these reasons, I can say that this research work is the first such initiative. For those who want progress and prosperity in this field, this research work can be a milestone or roadmap. I humbly pray to Allah, May He grant me to finish this small research work. May there be purity and fulfillment in every aspect of what I have written and compiled. The key to success is in the hands of Allah. He is the only guide.

The method I have adopted in composing this book is – first, I have quoted the principles alphabetically. Then I have given a simple explanation of the relatively difficult principles. In the second stage, I have brought quotations from those hadiths which are based on the doctrinal basis of the principles; because the principles are collected from the hadith. Then I have mentioned some branch masalas which are derived from that principle.

It is to be noted that my approach to this research is different from that of ordinary researchers. So, I have arranged the book in a different process without dividing it into different chapters and sections. For example, first, there is a preface, then there are descriptions related to the subject and also the historical context of

the rules or principles. Then there are twenty-one research topics (chapters) dealing with the main topic. Each of its chapters contains principles of Islamic jurisprudence and jurisprudence alphabetically. Then I have brought the quotations of those hadiths which are based on the documentary basis of the principle. In total, seventy-seven (7) rules (principles) have been illustrated.

Finally, I would like to express my gratitude to all those who have blessed me with their valuable advice and generous help in implementing this important task. In this case, I am especially remembering my teachers. I am so grateful to Ustad Salman Hussain Nadwi. I would like to express my gratitude to Darul Uloom Nadwatul Ulama for providing all possible assistance to me to accomplish this research. I would like to express my gratitude to my friend Dr. Mahmudul Hasan, a renowned Islamic scholar, who assisted me in reviewing the references and quoting the hadith. I am grateful to all those who have helped me directly or indirectly, and I sincerely pray to Allah to reward them with the best. Indeed, Allah is the All-Hearing and the All-Responsive.

Professor Dr. Abu Reza Mohammad Nezamuddin Nadwi

Chittagong, Bangladesh.

20/06/2008 AD.

The Lexical and Terminological Meaning of Qā'idah (Maxim)

Lexical Meaning of Qā'idah (maxim):

The word Qā'idah (قاعدة) lexically means base, foundation, column etc. Anything on which something else is based or founded is called Qā'idah. The word Qā'idah is the singular form of the Qawā'id (قواعد). And Qawā'id refers to the foundations or the bases of the perceptible object (for example, the pillar of the house) or insensible object (for example, the pillars and foundations of the religion).¹ There are a number of references to the word Qawā'id in the Holy Qur'ān.

Terminological Definition of Qā'idah:

The Fuqahā' (Islāmic jurists) define Qā'idah (maxim) in the following ways:

To some scholars, Qā'idah refers to a set of comprehensive principles to be applied to all the branches within.² Some other scholars define Qā'idah to be 'an integrative principle that permeates all branches of the discourse'.³ Muḥammad 'Alī Thānawī states that the scholars use the word Qā'idah as the synonym of base/foundation (al-'asl), legislation (qānūn), mas'alah, maxim (ḍābiṭ), and maqṣad (the under lying purpose). And he defines it to be 'an integrative issue that can be applied to all the branches lying within and it explains the rules and

¹Rāghib al-- Aṣṣafahānī, Al-Mufradāt fī gharīb al-Qur'ān, p.409; 'Alī Jum'ah, Al-madkhal 'ila dirāsāt al-mādhāhib al-fiqhiyyah, p.404

²Sharīf Al-jurzānī, Al-ta'rīfāt, p.171

³Abū al-Baqā al-Kafawī, al-Kulliyāt, p.728

regulations related to the branches.¹ 'Allāmah Taftazānī defines Qā'idah as 'the integrated rule and regulation that is applied to the branches within so that we can have a clear knowledge of the issues related to the branches of knowledge.'²

The lexical definitions above explain the terminological meaning of the - word and the use of this term permeates the whole of the subject as each of the subjects usually has some Qā'idah or foundations. And Qā'idah (maxim), according to common terminology of all the subjects, is a comprehensive principle that is applied to all the branches within. Some Qā'idah (maxim) are related to Islāmic Jurisprudence, some to law, and again some to the Arabic grammar and so on. For instance, Arabic grammar mandates the Subject of the sentence to be *Marfū'*, the object to be 'Manšūb' and the connectors to be 'Majrūr'. The legal theorists ('Usūliyyūn) believe that 'Sharī'ah rules are proclaimed for ensuring obligations and prohibitions are there to impose prevention. To summarize, Qā'idah (maxim) whether it be in Arabic Grammar, or Islāmic legal theory or any other subject will apply to and permeate all the branches of the respective areas with no option for any branch to let itself outside the applicability of the maxim (Qā'idah). However, if there is anomaly or preternatural (shādh) that will remain outside of the scope of maxim (Qā'idah). For there is no ruling made by anomaly or preternatural (shādh) and it cannot break any Qā'idah.

According to Muṣṭafā 'Aḥmad Al-Zarqā', Qā'idah- is a set of integrative statutory terms of Islāmic jurisprudence that includes all the rules and regulations of Sharī'ah in the issues and events that come under its subject matter.³

¹Muḥammad 'Alī al-tahānawī, *Kasshāf istilahāt al-funūn wa al-'ulūm*, 2/1295

²Al-Sa'd Al-taftazānī, *al-talwīḥ 'Alā al-tawḍīḥ*, v.1, p.20

³Muṣṭafā Al-Zarqā, *Al-Madkhal al- Fiqhī al-'ām*, v.1, p. 965

The difference between the maxims of Islāmic law (al-qawā'id al-Fiqhīyya) and the legal principles/maxims (al-ḍawābiṭ al-Fiqhīyya):

- 'Qā'idah includes all Mas'alah and practical examples of different chapters of fiqh while 'Ḍābiṭ' deals with the different Mas'alah and the practical examples of the specified area. So, 'Fiqhī Ḍābiṭ' is less pervasive in comparison to the Fiqhī Qā'idah. As its scope covers only various Fiqhī mas'alah related to a particular subject or a specified area while the Qā'idah is not limited to any specified area.¹
- Qā'idah has exceptional masā'il more than dawābiṭ. As 'Ḍābiṭ' is confined to the specified area of the Islāmic jurisprudence, hence, the scope of exceptional Mas'alah (case) addressed by 'Ḍābiṭ' are only few.

To summarize, the Qā'idah is more general and comprehensive than 'ḍābiṭ' in terms of accommodating more branches and pervasiveness/ comprehensiveness of meaning. The following example explains the extent of Qā'idah. "Actions are judged by the intentions" is applicable to different areas of fiqh such as worshipping ('ibādah), Islāmic criminal law (Jināyāt), the pacts and agreements ('Uqūd) etc. On the other hand, the following example elaborates the span of the 'Ḍābiṭ'. Narrated by 'Abdullāh Ibn 'Abbās, the Prophet (PBUH) says:

¹ Hāshiyatu al-Bannānī, 'Alā Sharḥi al-Jalāl Al-Maḥallī, v.2, p.290

“Any skin (animal) that is tanned has been purified”.¹ This Ḥadīth is an example of ‘Fiqhī Ḍābiṭ’ as its subject matter is definite and is concerned with a specified chapter of ‘Fiqh’.

The meaning of Ḍābiṭ has expressly accommodated the evolution of the meanings. Resultantly, many of the Islāmic scholars of the earlier times didn’t make difference between ‘Qā’idah’ and ‘Ḍābiṭ’.

However, ‘Qā’idah’ of Fiqh and ‘Ḍābiṭ’ of Fiqh have achieved separate status during the later periods as the Islāmic jurists and researchers accepted ‘Ḍābiṭ’ to be a separate ‘term’ for Fiqh. As a result, there is clear difference in the purview of the Fiqh.

The difference between *Al-Qā’idah al-Fiqhiyyah* (Islāmic legal maxim) and *Al-Qā’idah al-’Usūliyya* (Maxim of ’Usūl al-Fiqh [principles of Islāmic jurisprudence])

- Both difference and similarity permeate between Legal Maxims of Islāmic law (*al-Qawā’id al-Fiqhiyya*) and Maxims of ’Usūl al-Fiqh. The similarity is that both deal with the maxims having different branches and sub-branches of the subject and the dissimilarity lies in the fact that *Qawā’id al-’Usūl* (methodological principles) cover the detailed evidences of Sharī’ah and this principle facilitates the deduction and inference of rules of Sharī’ah. On the other hand, Islāmic Legal Maxims (*al-Qawā’id al-Fiqhiyya*) deal with the the different principles of fiqh that include various rules related to Islāmic jurisprudence, and a Mujtahid (one who exercises independent reasoning -’Ijtihād-) can achieve the

¹ Al-Tirmidhī, Al-Sunan, v.3, p.273, Ḥadīth no: 1728.

knowledge of those rules and regulations through principles of Islāmic Jurisprudence ('Usūl al-Fiqh).¹

- 'Imām Ibn Taymiyah (R) says, “- 'Usūl al-Fiqh is the collection of pervasive evidences while Al-Qawā'id al-Fiqhiyya is the collections of pervasive rules and regulations”.²
 - The science of 'Usūl 'al-Fiqh' is the criterion for fiqh (Islāmic jurisprudence) and also the principle of correct discovery of rules and regulations. As the 'Ilm al-naḥwu (Arabic Grammar) guides the rules and regulations of human speech and writing, thus, the evidences and the rules and regulations of Sharī'ah are guided by 'Usūl 'al-Fiqh'.
 - On other hand, Al-Qawā'id al-Fiqhiyya (legal maxims) of Islāmic law are the collective principles which divide into different Mas'alah of fiqh covering human actions.
 - Al-Qawā'id al-'Usūliyyah are the integrative principles applied to all of its branches while Qawā'id al—Fiqhiyya contrastively are the collective principles that are applicable to the majority of the branches with some Mas'alah remaining outside its purview.³
 - Al-Qawā'id al-'Usūliyyah are the formula for discovering the practical and pragmatic rules and regulations of Sharī'ah. On the other hand, al-Qawā'id al-Fiqhiyya are the collectively intra-similar legal aspects under one 'illah (legal or basic cause).⁴
- To conclude, Fiqh and 'Usūl al-Fiqh are two distinctive branches of knowledge, each of which runs as per some specific principles but are to function inseparably for the development, evolution and understanding of each other.

¹ 'Alī Jumu'ah, Al-Madkhal Ilā Dirāsah al-madhāhib al-Fiqhiyyah, p.412

² Ibn Taymiyyah, Majmū' al-Fatāwā, v.29, p.167

³ 'Alī Aḥmad Al-Nadwī, Al-Qawā'id al-Fiqhiyyah, p.68

⁴ Ibid., p. 69

A historical Overview of the Origin and Development of al-Qawā'id al-Fiqhīyya (legal maxims of Islāmic jurisprudence):

General maxims (Qawā'id Kulliyah) in the Islāmic Law (Al-Fiqh al-Islāmī) have not developed as the complete and well-designed branch of knowledge within any defined period of time, rather the contexts and the terminologies of these maxims are introduced with the progress and development of the Islāmic Law (Al-Fiqh al-Islāmī). The reason for this is these maxims have stemmed from the innumerable branches of Mas'alah and the ways of analyses of them. The insinuating meanings of the statements of Sharī'ah and general maxims of 'Usūl al-Fiqh may be taken as examples. The following Ḥadīths of the Prophet (PBUH) may explain the case well:

1. الْحَرَجُ بِالْضَّمَانِ - "The one who bears the burden of loss will eventually have the right to profit".¹
1. لَا ضَرَرَ وَلَا ضِرَارَ - "There is no scope of harming self and others".²
2. -الْبَيِّنَةُ عَلَى الْمُدَّعِي وَالْيَمِينُ عَلَى الْمُدَّعَى عَلَيْهِ - "the complainant is to present evidence and the defendant is to take oath".³

Besides these Ḥadīths, many more insinuating Ḥadīths of the Prophet (PBUH) have evolved to be distinctive basics in the field of Fiqhī Qawā'id.

The collection and the arrangement had commenced after the demise of the Prophet (PBUH). The 'Imāms, scholars and researchers from the companions (ṣaḥabah) of the Prophet

¹Abū Dāwūd, Al-Sunan, V.3, P.284, Ḥadīth No: 3058-3510; Al-Tirmidhī, Al-Sunan, v.2, p.572-573, Ḥadīth No: 1285-86

²Mālik Bin Anas, Al-Muwatta, v.2, p.745, Ḥadīth No: 31; Al-Hākim. Al-Mustadrak, v.2, p.66, Ḥadīth No: 3345

³Al-Tirmidhī, Al-Sunan, v.3, p.19, Ḥadīth No:1341

(PBUH), the followers (Tābi'īn) and the followers of the followers (Tab'i-Tābi'īn) had focused on the Holy Qur'ān and Ḥadīths, the main sources of the Islāmic Sharī'ah, and on other supplementary documents for the sake of researches ('ijtihād) in order to develop the maxims and principles of fiqh. They had tried to develop the principles of Sharī'ah for the settlement of the new and novel issues. And in the process, the result is that a voluminous collection of Mas'alahis in the form of books on Islāmic Law (al-Fiqh al-Islāmī). During the first century of *Hijrah*, this journey continued and resultantly, Fiqh and Qawā'id al-Fiqh continued to develop and progress simultaneously resulting in the emergence of three categories of scholastic principles during the early period of the second century *Hijrah*.

First Category: The development of the rules and regulations of inference (istinbat) and independent reasoning ('Ijtihād) which is also known as maxims of the science of Islāmic jurisprudence (Qawā'idu 'Ilmu'Usūl Al- Fiqh).

Second Category: The rules of Ḥadīth extraction and authentication (Takhrīj) which evolved in the hands of a group of Ḥadīth scholars (Muḥaddith) and Ḥadīth Collectors. This process of assessing and validating a single Ḥadīth in later period was termed to be the 'Ilmu Muṣṭalah al-Ḥadīth.

Third Category: The rules and regulations of Sharī'ah, composed and framed by the 'Imāms and scholars of different schools of thought and their followers are the General Rules (Al-Qawā'id al-Kulliyah). This branch of knowledge gets its full scholastic shape in the fourth Century *Hijrah* and continued to be collected and entered in the books.

Application areas of the Qawā'id 'al- Fiqh' (legal maxims of jurisprudence)

Al-Qawā'id al-Fiqhīyya (Legal Maxims) refers to an established terminology of Fiqh covering some principles of Islāmic legal aspects and through these principles, the Fiqhī Madhabs (School of thought) developed the rules and regulations of Sharī'ah that facilitated the solutions to the newly developed issues, disputes and events. Accordingly, the following are the application fields of Qawā'id al-Fiqh:

- a. 'Ibādah (the hanbalest and sincerest actions of the people aimed at establishing relationship of their Creator Allah Subhana Allah. Ṣalāh, Ṣaum (fasting), Zakāt, Hajj and 'ūd-ḥiyyah (Qurbani/sacrifice) might be the examples of the 'ibādah).
- b. Mu'āmalāt (Mutual Transactions and treatment).
- c. Family Laws.
- d. Running the government of a country according to Sharī'ah (Al-siyāsah al-shar'iyyah).
- e. Laws of Punishment for the criminal acts ('uqūbāt).
- f. Moral character and Manners (Al-akhlāq wa al-'adab)
- g. Transactions with the foreign countries conducted under International Laws

The aforesaid seven issues are the discussion areas in Sharī'ah.

Evidence/probative force of Quwai'dul Fiqh (legal maxims of jurisprudence)

Fiqhī Qā'idah (the maxims of Islāmic jurisprudence) supported by the Qur'ān and the Ḥadīths should be accepted to be the rulings. And if the maxims are found not contradictory to the accepted rulings of Sharī'ah, they may be elevated to the status of Naṣṣ (The Qur'ān and the Ḥadīths), 'ijmā' (the rulings agreed to by the Islāmic legal experts) and Express Qiyās (Rational reasoning of an Islāmic scholar through research). And this is why any decision and ruling by the Judge (Qādī) contradictory to the Fiqhī Qā'idah (the maxims of Fiqh) will be rejected as such.

The Fiqhī Qā'idah (The legal maxims) might be of various categories:

- a. Basic Qā'idah based on the Qur'ān and the Ḥadīths.
- b. Qā'idah expressive of evidence of 'Usūl al-Fiqh
- c. Based on distinctively proved Ḥadīth

الأمور بمقاصدها - 'Actions are judged by the intentions' may be taken as an example for explaining the rule of Fiqhī Qā'idah. The Qā'idah mentioned is proved by the Ḥadīth, *إِنَّمَا الْأَعْمَالُ بِالنِّيَّاتِ*, "The reward of deeds depends upon the intentions". Similar examples are لا ضرر ولا ضرار "There is no scope of harming self and others" and البينة على المدعي واليمين على المدعى عليه "The complainant is to present the evidence and the defendant is to take oath".

Chapter One

Qawā'id (maxims) starting with Arabic letter Alif (ا)
(There are 24 Qawā'id (maxims))

First Qā'idah:

”الاجتهاد لا ينقضُ بمثله“

**A Juristic inference ('Ijtihād) is not set aside by
 similar 'Ijtihād¹**

The verb Naqdh (نَقَضَ) is the root of naqadha. Basic meaning of the verb is to break, to spoil or to prevent something. The antonym of the word naqd is 'Ibrām (إِبْرَام) meaning strengthening or consolidation. Therefore, naqd is destruction of something after it has been accomplished.²

For 'Allāmah Shāṭibī, the judge and the ruler as the representative of the Prophet Muḥammad (PBUH) are to get to the nation with the instructions of His commands and prohibitions. They will propagate the messages of the Prophet (PBUH) as the entrusted persons, not as the one with the Prophetic authority. As only the Prophet (PBUH) was authorized to compose the statutory laws, no rulers or judges can be compared equal to him in their authority. Besides, the rulers or the judges are prone to making mistakes while the Prophet was innocent through the shield of the divine guard and revelation.

¹ Majallah Al-Aḥkām Al-'Adaliyyah, p.20, section: 34. Imām al-Suyūṭī, Al-Ashbāh wa al-Naẓā'ir, p.143, Ibn Nujaym, p.149

² Ibn Fāris, Mu'jamu Maqāyīs al-lughah, v.5, p.450; Fayrūz 'abādī, Al-Qāmūs al-muḥīṭ, p.846

The discussion, thus, comes to the point that the rulers or the judges should follow the rulings of Sharī'ah in discharging their duties and all rulings by them will unanimously be considered null and void by the Islāmic scholars if the rulings are contradictory to Sharī'ah.¹ Furthermore, if the judge is found to be wrong in the ruling of any case, it must not go beyond two situations.

Firstly: The ruling must be related to 'Ijtihād (independent reasoning) based Mas'alah and the wrong ruling must not be against the Naṣṣ (The text from the Qur'ān and the Ḥadīths) or 'ijmā' (consensual ruling) but due to the mistake out of research output.

Secondly: The rulings by the judges found against the Naṣṣ or 'ijmā' would be null and void instantly.

In fact, acceptance or rejection of the rulings by the judges may fall into four categories:

Firstly, if the ruling is found contradictory to the Qur'ān, it will, unanimously, be considered 'cancelled' without fail as the Qur'ān is irrefutable source for all rulings while human judgments, however rational they seem, are conceptual evidences.

Secondly, the ruling will also be considered null and void if it is found against the Sunnah *Mutawātirah* (Ḥadīth with the uninterrupted chain of narrators) since like the Qur'ān, the Sunnah *Mutawātirah* is also considered unquestionably binding on the followers. But regarding the ruling, contradictory to the Sunnah 'āhādiyyah (the Ḥadīth narrated by one narrator only), be it

¹ Shāṭibī, Al-'i'tisām, v.2, p.502

Mashhūr or not, there is agreement among the scholars on the cancellation of the judge's ruling.

Thirdly, similarly any ruling against 'ijmā' will be counted 'null and void' in Islāmic jurisprudence. A number of Islāmic scholars echoed with 'Imām Shāṭibī's statement in this regard though some of them appended the conditions that the 'ijmā' should be irrefutable while some others do not consider the irrefutability of 'ijmā'.

Fourthly, there are two opinions of the scholars regarding the ruling of the judge if it is found contradictory to Qiy'ās (analogical reasoning):

- a. If the Qiy'ās (analogical reasoning) is apparent, the ruling by the judge would be cancelled.
- b. If the Qiy'ās (analogical reasoning) is apparent or disputable, the ruling will not be cancelled.

QĀ'IDAH AT A GLANCE

The aforementioned Qā'idah is distinctly important in fiqh with its relevance to judgmental and administrative perspective.

Lexically, the word '*Ijtihād* (diligence, also used to refer to interpretation and reasoning based on the sacred text) refers to striving most. This turns out to be 'the hardest endeavor to find out the principles, rules, regulations and the legal areas with proper investigative processes approved of in Islāmic Sharī'ah.¹

If any administrative or judgmental ruling is executed on the basis of *Ijtihād* under any circumstantially mandatory conditions, no new research findings can invalidate the applicability of the ruling

¹ Shawqānī, *Irshād al-Fuḥūl 'Ilā Taḥqīq al-Ḥaqqi Min 'Ilm al-Uṣūl*, v.1, p.18.

already given. *'Ijtihād* is the conceptual evidence in terms of its documentary status and according to the Qā'idah so far discussed, one conceptual evidence cannot negate another conceptual evidence of similar status. Besides, there remains another prospective challenge in the negation of one *'Ijtihād* by another new *'Ijtihād*. Such acceptance of negation will lead to continuous negation of the previous *'Ijtihād* based ruling by the new ones. If it is allowed, the circular reasoning and Infinite Regress will take place in Sharī'ah.¹

In addition, if negation of previous *'Ijtihād* by the new one is allowed, there will be uncertainty of rulings and the judges will lose credibility due to the dualistic rulings by them ending up in a chaotic situations and corruptions. Above all, social welfare expected of the judges through their fair and non-partial role in the judgment of public dispute will not be maintained.

‘Imām Muḥammad ibn al-Ḥasan al-Shaybānī rightly supports the proposition in his book *Al-Siyar Al-Kabīr* and says, “If the Amir (ruler) with his own discretion decides to distribute the spoils among the messengers and the issue is raised in the court, the judge is to pass his verdict in favor of the decision of the commander-in-chief even though his personal opinion goes against the official ruling given.”²

In the light of the discussion above, it is also said that if two persons go to the court with an issue and appeal for re-ruling on the issue which has already been settled in a particular court, the judge of the new court may accept the issue of re-ruling but will retain the previous ruling.³

¹ Abū Ḥāmid Al-Ghazālī. al-Muṣṭafā, v.2, p.383.

² Al-Sarakhasī, Sharhu Al-siyar al-Kabīr, v.3, p.111.

³ Al-Zarkashī, Al-Mansūr fī al-Qawā'id al-Fiqhiyyah, v.2, p.93.

Evidential Statements of the Companions of the Prophet (PBUH) in support of Qā'idah (maxim):

As mentioned before, the Islāmic scholars agree to applicability and acceptability of the basic principle of Qā'idah. Added to this, we find the 'ijmā' (unanimous agreement) of the companions of the Prophet (PBUH) on the issue.¹ Some examples of 'ijmā' are as cited below:

a. Some inhabitants of Najrān came to 'Alī (R) for re-ruling on the issue already settled in the court of Caliph 'Umar (R) during his caliphate. At their appeal for the reversal of the judgment of 'Umar (R), 'Alī (R) did not agree to budge and declared the verdict of 'Umar (R) valid by saying, **وَيُحْكُمُ! إِنَّ عُمَرَ كَانَ رَشِيدَ الْأَمْرِ** (Get lost. Certainly 'Umar (R) took right and just decision).²

b. In a ruling related to inheritance, 'Umar (R) did not give inheritance rights to the brothers and step brothers alike while in another case of similar type, he gave such right to both brothers and step brothers. When he was reminded of his previous ruling on the issue, he replied that the previous ruling would prevail as it was decided as per the 'Ijtihād at that time and present ruling will also be valid as it is the new 'Ijtihād now.³

There is another example from 'Umar (R). On hearing the verdict passed by 'Alī (R) and Zayd (R) from a man, 'Umar (R) replied that he would have passed the verdict differently. The man then asked him to pass his own verdict. 'Umar (R) then replied,

¹ Ibn Qudāmah. Al-Mugnī, v.10, p.51; Suyūfī Al-ashbāh wa al-naẓāyir, p.101.

² Ibn Qudāmah. Al-Mugnī, v.10, p.51; Bayḥaqī, Al-Sunan al-kubrā, v.10, p.205, Ḥadīth No- 20375.

³ Abdur Razzāq As-San'ānī, Al-Musannaf, Ch.10, p.249; Bayḥaqī, Al-Sunan al-kubrā, Ch.6, P.418, Ḥadīth No-12469.

”لَوْ كُنْتُ أَرُدُّكَ إِلَى كِتَابِ اللَّهِ أَوْ إِلَى سُنَّةِ نَبِيِّهِ ﷺ لَفَعَلْتُ، وَلَكِنِّي أَرُدُّكَ إِلَى رَأْيِي،
وَالرَّأْيُ مُشْتَرَكٌ“

‘If I could get back to the Qur’ān and the Sunnah of the Prophet (PBUH) for re-ruling on the issue, I would have done so but in this case, I am relying on my own understanding (’Ijtihād)”, and ’Ijtihād is a shared matter (where every mujtahid has scope for their own interpretation and understanding based on the sacred texts), ‘Umar (R) declared the ruling by ‘Alī (R) and Zayid (R) valid.¹

‘Umar (R) had also different verdicts on the ruling of inheritance (mirāth) from the grandfather. Ibn Sīrīn (Rah) reports ‘Umar (R) saying,

”إِنِّي قَضَيْتُ فِي الْجَدِّ قَضِيَّاتٍ مُخْتَلِفَةً لَمْ أَلْ فِيهَا عَنِ الْحَقِّ“

“There is no doubt that I passed different rulings on the inheritance from deceased grandfather because every time I tried to search the truth.² Allāmah Sadar Al-Shahīd (Rah) comments on the aforesaid statement of ‘Umar (R), “‘Umar’s (R) statement refers to the fact that a researcher maybe wrong or right in his effort to do justice. And it also concludes that any previous ’Ijtihād based ruling will not be invalidated by any new similar ’Ijtihād (interpretation and reasoning based on the sacred text)”.³

¹ Ibn al-Qayyim, ’I’lām al-Muwaqqi’īn ‘an Rabbi al-‘Ālamīn, v.1, P.65; Kamāl Ibn al-Humām, Fath al-Qadīr, v.7, p.304.

² Abdur Razzāq Al-San’ānī, Al-muṣannaf, v.10, p.262, Ḥadīth No-19045.

³ Khaṣṣāf, Sharḥ adab al-Qādī, v.1, p.179; Sharḥ al-Jalāl al-Mahallī ‘Alā Jam‘ī al-Jawāmi‘, v.2, p.430.

Al-Sha'bī (Rah) narrates,

“حفظت من عمرانه في الحد سبعين قضية لا يشبه بعضها بعضا”

“I collected seventy judgments on Hadd (punishment) from ‘Umar (R) and every case and ruling were different from one another”. This difference in giving ruling on punishment took place in front of other companions of the Prophet (PBUH) and none raised any questions about the difference. The aforementioned events and the statements during the time of companions of the Prophet (PBUH) prove that there was unanimous agreement on the validity and applicability of this Qā'idah (maxim) so far discussed. And also, Qā'idah was accepted and followed as legal maxim by the classical judges (Quḍāt). The Islāmic legal experts (Fuqahā) and jurists, therefore, are found to be of the same opinion.

The author of *Sharḥu Jam'u Al-Jawāmi'* says that the judgment delivered by the judge or by other authority in the issues requires diligence and 'Ijtihād will not be overturned even if the new research output contradicts the previous one.¹ This principle has to do with the past events in which the decision of the judge has been implemented. However, if similar incidents occur again the judge (Qādī) has to reissue a new verdict, and judge according to new research output.

¹ Sharḥ al-Jalāl al-Mahallī 'Alā Jam'ī al-Jawāmi', v.2, p.430.

Badr al-dīn Zarkashī states, the provision (that prohibits the removal of previous 'Ijtihād (research) with the subsequent 'Ijtihād) has to do with the rulings/events in the past. However, the future judgments/rulings may be changed due to the time, space, and context. His statement is supported by the historical letter of Caliph 'Umar to 'Abū Mūsā Al-'Ash'ariī. To quote from the letter,

”ولا يمنعك قضاء قضيت فيه اليوم فراجعت فيه رأيك فهديت فيه لرشدك أن تراجع فيه الحق، فإن الحق قديم لا يبطله شيء، ومراجعة الحق خير من التماذي في الباطل“

“If you find that your judgement yesterday warrants rethinking, accept the truth without hesitation. Because truth is always apparent and nothing can make it void. Since reverting to truth is better than impenitence in wrong”.¹

To summarize, if a judge (Qādī) passes a verdict on any case based on his 'Ijtihād (interpretation and reasoning based on sacred text) and later on, he comes up with a different 'Ijtihād in the similar case, he will pass the verdict according to the latest 'Ijtihād without nullifying the first verdict because a ruling on the basis of 'Ijtihād cannot be reversed by another new ruling on the same basis.

¹ Dāraqutnī, Al-Sunan, v.5, p.369-370, Ḥadīth No-4471-4472.

Second Qā'idah (maxim):

“الأُمُور بِمَقَاصِدِهَا”

Actions are judged by intentions.¹

Summary of the Qā'idah (maxim):

The subject matter of the Qā'idah: The worldly actions, behaviors and transactions of the people are judged by his intention as the validity and invalidity of the actions, the reward and punishment revolve around intention of the people. Noticeable in this Qā'idah is the two words; actions ('Amal) and intention (Al-niyyah) are replaced by the two separate words *Al-'umūr* (issues) and *Al-maqāṣid* (objective). In the lexical explanations of the wordplay, many scholars are of the opinion that 'Umur' refers to physical and intellectual human actions. On the other hand, 'amal only includes physical actions. Similarly, 'niyyah' is more defined than the *Qasd*. The Islāmic scholars emphasize the purification of 'niyyah' but didn't mandate it in the case of 'Qasd'. So, to some scholars, 'Qasd' is more pervasive than niyaat and the word 'maqāṣid' stems from Qaṣd'.

'Imām Shāfi'ī (Rah) states, 'one thirds of Islam is included in this Ḥadīth. Ibn Taymiyah (Rah) says, 'This Ḥadīth refers to the basic principle of *Dīn* (religion). 'Imām Ibn Al-Qayyim (Rah) states, "Niyaat is the basic and crux of the religion and it is also the driving force for 'Amal. And 'Amal (execution) follows intention. Elevation and demotion of dignity in this world and the world hereafter are according to the layers of niyaat".

¹Majallah Al-Aḥkām Al-'Adaliyyah, p.16, section: 16.

The Qā'idah under discussion carries significant weight in Fiqh. The Islāmic legal experts tend to focus on the detailed interpretation of this Qā'idah and took up measures to develop branches and sub-branches of knowledge from its discussion because a volume of rules and regulations of Sharī'ah center round this Qā'idah.

The Documentary Ḥadīths for the Qā'idah:

The foundation of this Qā'idah was laid down from the Ḥadīth of the Prophet (PBUH):

”إِنَّمَا الْأَعْمَالُ بِالنِّيَّاتِ، وَإِنَّمَا لِكُلِّ امْرِئٍ مَا نَوَى، فَمَنْ كَانَتْ هِجْرَتُهُ إِلَى دُنْيَا يُصِيبُهَا أَوْ إِلَى امْرَأَةٍ يَنْكِحُهَا، فَهِيَ هِجْرَتُهُ إِلَى مَا هَاجَرَ إِلَيْهِ“

“The reward of deeds depends upon the intentions and every person will get the reward according to what he has intended. So, whoever emigrated for worldly benefits or for a woman to marry, his emigration was for what he emigrated for”.¹

The reputed Ḥadīth scholar 'Imām Bukhārī included the Ḥadīth in different chapters in his famous compendium of Ḥadīths, one such chapter being “Chapter: On what has come about “Actions are by intentions” and “sincere expectation of reward and accountability”, and “every man will be rewarded for what he intends”. This includes belief, wadū', the prayer, Zakāt, hajj, fasting and ordinances.

The aforesaid title has clear reference to the subject matter of the Ḥadīth, different chapters and also ordinances stemming from the Ḥadīth. Besides this Ḥadīth, there are a number of Ḥadīths that

¹Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.1, p.6, Ḥadīth No-1.

justify the validity of this Qā'idah. We have mentioned some of those Ḥadīths below:

- a. 'Imām Bukhārī narrates from 'Abū Mūsā' Ash'arī, A man came to the Prophet (PBHU) and asked, "O Allah's Messenger (PBHU)! What kind of fighting is in Allah's cause? (I ask this), for some of us fight because of being enraged and angry and some for the sake of his pride and haughtiness." The Prophet (PBHU) raised his head (as the questioner was standing) and said, "He who fights so that Allah's Word (Islam) should be superior, then he fights in Allah's cause".¹

The Ḥadīth clearly shows how the Prophet (PBUH) stated the urgency of purity of intention regarding the 'Jihad in the way of Allah'. The Ḥadīth made it mandatory for the actions of the people to be 'pure' and free from showing off, credit, name and fame and also from seeking tribāl affiliations and pride. Ibn Ḥajar al-'Asqalāni (a classical Islāmic scholar and polymath), while interpreting the Ḥadīth mentioned above says, the Ḥadīth "A man fights..." expresses the multilayered meanings. And the Qā'idah "Actions are judged by the intentions" is supported by this Ḥadīth.²

- b. In support of the Qā'idah under discussion is the following Ḥadīth: **ثُمَّ يُبْعَثُونَ عَلَى نِيَّائِهِمْ** "And they will be resurrected on the Day of Judgment according to their intention"³ (this is just part of a long Ḥadīth in the Ṣaḥīḥ Al-Bukhārī).
- c. 'Imām Bukhārī reports in his Ṣaḥīḥ Al-Bukhārī that Sa'ad Bin 'Abī Waqqāṣ narrates from the Prophet (PBUH),

¹Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.1, p.36, Ḥadīth No-123.

²Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.1, p.6, Ḥadīth No-1.

³Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.1, p.64, Ḥadīth No-2118.

”إِنَّكَ لَنْ تُنْفِقَ نَفَقَةً تَبْتَغِي بِهَا وَجْهَ اللَّهِ إِلَّا أُجِرْتَ عَلَيْهَا، حَتَّى مَا تَجْعَلُ فِي فَمِ امْرَأَتِكَ“

“You will be rewarded for whatever amount you spend for the gratification of Allah. Even if you bring food for your wife, that will be rewarded.¹

- d. 'Imām Bayhaqī narrates from 'Anas Ibn Mālik (R),

”لَا عَمَلُ لِمَنْ لَا نِيَّةَ لَهُ“

“There is no reward for the man who does not have intention”.² We find another Ḥadīth on niyaat in the book Musnad al-Shihāb by 'Anas Bin Mālik (R):

”نِيَّةُ الْمُؤْمِنِ أَبْلَغُ مِنْ عَمَلِهِ“

“Intention of the believer is more important than his actions”.³

- e. 'Imām 'Aḥmad Bin Ḥanbal in his *Musnad* narrates the following Ḥadīth from 'Abdullah Ibn Mas'ūd,

”رَبِّ قَتِيلٍ بَيْنَ الصَّفَيْنِ اللَّهُ أَعْلَمُ بِنِيَّتِهِ“

“Only Allah knows the intention of many a man killed in the battles between the believers and non-believers”.⁴

- f. 'Abū Mas'ūd Badrī (R) narrates the Ḥadīth from the Prophet (PBUH),

”إِذَا أَنْفَقَ الرَّجُلُ عَلَى أَهْلِهِ يَحْتَسِبُهَا فَهُوَ لَهُ صَدَقَةٌ“

“Whenever a Muslim spends for their family in hope for reward from Allah, it is counted as ‘Ṣadaqah’ for him”.⁵

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.1, p.21, Ḥadīth No-56.

² Bayhaqī, Al-Sunan al-kubrā, v.1, p.67, Ḥadīth No-179.

³ Qudāī, Musnad Al-Shihāb, v.1, p.119, Ḥadīth No-147.

⁴ Aḥmad Ibn Ḥanbal, Al-musnad, v.6, p.314, Ḥadīth No-3772.

⁵ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.1, p.20, Ḥadīth No-55.

All the Ḥadīths mentioned and many more point to the urgency of existence of intention in the work and purity of intention during any efforts of the people. The basic Qā'idah under discussion is supported by the Ḥadīths mentioned and thus have contributed to the composition of rules and regulations of 'ibādah and transactions.

Under the basic *Qā'idah*, all the 'Imāms agree to the point that no reward can be expected without pure intention. But any effort without intention may be valid in Islāmic Sharī'ah. Some examples might explain the arguments. The urgency of intention is made mandatory in the 'ibādah such as Ṣalah, Ṣiyām, Zakāt, Hajj etc as the objectives of these 'ibādah are gratification of Allah and any 'ibādah for the gratification purpose should have intention in the process. So, the absence of intention is perceived to be the absence of gratification will of the believers and the absence of gratification will of the believers leads to futility and insignificance of the 'ibādah offered.

The absence of intention will not invalidate the 'ibādah not directly related to the gratification of Allah. For example, Wadū' (ablution) for the Ṣalah is an 'ibādah which is considered as the medium of the gratification of Allah, not direct gratification of Allah. So, intention is not mandatory in the work of Wadū'. Similarly, intention is not mandatory in actions and transactions such as the marriage, Ṭalāq, 'iddah, financial transactions, law suits, ownership of the forsaken properties, amanat and Ḥudūd (the punishment of the criminal acts), Qiṣāṣ (retribution) etc Because, these are not the gratification of Allah, but the mediums to gratification.

Now, the discussion so far proves that the Qā'idah discussed is one of the important ones among the five basic Qā'idahs in 'Ilm al-fīqh as the validity, acceptability and futility of any statement or action are evaluated by the principles of the Qā'idah discussed. And undoubtedly, this Qā'idah permeates the majority of the chapters for the settlement of the *Masā'il* in Fiqh.

Third Qā'idah (maxim):

“الأصل في الأشياء الإباحة”

Permissibility is the original ruling for everything that is beneficial.¹

Most of the scholars have supported the above-mentioned Qā'idah (maxim). Also, the central view in Ḥanafī school of thought regarding the general principle of a thing is that it has to be *ḥalāl* (permissible). The author of *Hidāhyah* says, “Permissibility is the basic principle. They (the Ḥanafī Jurists) also say, some of our 'Imāms, 'Imām Karkhī (R.), being one of them, have opined that permissibility is the general and basic principle for everything.”

The established basic principle of Islam is that whatever Allah has created for the comforts and privileges of mankind can be considered as *ḥalāl* (permissible). A thing can only be considered impermissible if it is not permitted by Allah and His Prophet (PBUH) clearly. If any statement related to Sharī'ah does not qualify itself to be 'Ṣaḥīḥ' for instance, weak (ḍa'īf), Ḥadīth or any statement that has no clear indication to impermissibility, will also be considered as permissible. Allah says, “He it is who created for you all that is on the earth”.² In another verse, Allah says, “Do you not see that Allah has subjugated to your use all things in the heavens and on earth, and Allah has made his bounties follow to you in exceeding measure, both seen and unseen”.³ He has not

¹ Shawqānī, *Irshād al-Fuḥūl 'Ilā Taḥqīq al-Ḥaqqi Min 'Ilm al-Uṣūl*, v. 2, p. 284; Ibn Nujaym, *Al-Ashbāh wa al-Naẓā'ir*, p.66; Suyūṭī, *Al-Ashbāh wa al-Naẓā'ir*, p.60.

² Sūrah Baqarah: 29.

³ Sūrah Luqmān: 20.

made anything impermissible without any special reason or inherent *hikmah* (wisdom).

It is worth mentioning, in particular, that the issue discussed here regarding basic principle of permissibility is not confined to things only; rather, except the ‘*ibādah*’, all activities are covered under the purview of this basic principle. Generally, these activities are known to us as ‘*ādah*’, i.e., customs and rituals, and ‘*Mu‘āmalāt*’, i.e., ‘dealings and transactions. So, the basic principle in social customs and transactions is permissibility without any condition, having no injunction of Sharī‘ah, against it. This view is apparent in the following verse: ﴿وَقَدْ فَصَّلَ لَكُمْ مَا حَرَّمَ عَلَيْكُمْ﴾ - “He has explained to you in details what is forbidden to you”.¹

This verse covers the basic principle regarding all things and human activities. But, ‘*ibādah*’ is different. Because it is an important matter of ‘*dīn*’ that if it is not revealed through ‘*waḥyī*’ (revelation) it is not acceptable. According to Shaykh al-Ḥadīth Ibn Taymiyah (R), the conversational and bodily activities of Human beings can be categorized into two:

- a) Some of them are ‘‘*ibādah*’ through which ‘*dīn*’ is purified and protected;
- b) Some of them are traditional social customs which people rely upon to carry out worldly life.

Through studying and exploring the principles of Sharī‘ah, it becomes evident that the compulsion of ‘‘*ibādah*’ cannot be proved without the clear directions of Sharī‘ah. That’s why ‘*Imām*

¹ Sūrah Al-‘An‘ām: 119.

'Aḥmad Ibn Ḥanbal (R) and other jurists of *'ahl al-Ḥadīth* used to say, "The basic principle of *'ibādah*' is *'al-tawqīf*' which is to remain confined within the boundary set by Allah (*shāri'u*). So, any act of *'ibādah*' will be acceptable if it is supported by *Sharī'ah*. Otherwise, we will be among the following category of people mentioned in the Qur'ānic verse:

﴿أَمْ لَهُمْ شُرَكَاءُ شَرَعُوا لَهُمْ مِّنَ الدِّينِ مَا لَمْ يَأْذَنَ بِهِ اللَّهُ﴾

"Or do they have associates who have instituted for them a Law (*Sharī'ah*) in the Religion that which Allah has not allowed?"¹

On the other hand, in *'ādah* (social customs/ traditions) the *Sharī'ah*-approved basic principle is to be generous and flexible. So, to declare any custom in the society impermissible, evidence from *Sharī'ah* is an obligation. Otherwise, we will have to face the warning of Allah stated in the following verse: "Have you seen what Allah has sent down for you of sustenance? Then you made (a part) of it unlawful and (a part) lawful"? Say: "Has Allah permitted you; or do you forge a lie against Allah"?²

The discussion concludes that in Islāmic *Sharī'ah*, the extent of impermissibility is very limited and the extent of permissibility is very broad and extensive because the authentic text (*Ṣaḥīḥ Naṣṣ*) supporting impermissibility is very small in number. Besides, Allah's generosity and flexibility will prevail over permissibility and impermissibility of the things where the statement of *Sharī'ah* is unavailable.³

¹ Sūrah al-shūrah: 21.

² Sūrah Yūnus: 59.

³ Yūsuf Qardāwī, *Al-Ḥalāl wa al-Ḥarām fī al-'Islām*, p.20-23.

Ḥadīths as proofs of *Qā'idah*

- ❖ The Prophet (PBUH) says, “What Allah has made lawful is lawful, what He has made unlawful is unlawful. Where He has maintained silence is forgiven/ allowable. So, you should come forward to be forgiven by Allah. Because Allah does not forget anything.”¹
- ❖ In another Ḥadīth, the Prophet (PBUH) says: “Certainly, Allah has made some rules compulsory which you must not disobey, has made certain things impermissible which you must not violate, he has set some boundaries which you should not transgress, and without being forgetful, has maintained silence over some issues. So do not search into them and you should refrain from discussing them”. In another statement it is said, “He has maintained silence over many issues which He has not forgotten. You are not forced regarding these issues. In fact, they are signs of Allah’s grace and bountiness and you should enjoy them.”²
- ❖ There is a Ḥadīth attributed to Salman al-Farsi (Rah). The Prophet (PBUH) was asked about cheese, butter and woolen or skin clothes. He said, “What Allah has declared lawful in his book is lawful and what Allah has declared unlawful in His book is unlawful. And, what he has said nothing about belongs to the things He ignores.”³

¹ Abū Dāūd, Al- Sunan, v.3, p. 354-355, Ha. 3800; Al-Barār, Al- Musnad, v.10, p. 26, Ḥadīth No- 4087; Tabrānī, Musnad al-Shāmiyyīn, v.3, p. 209. Ḥadīth No-2102.

² Tabrānī, Al-mu’jam al-waṣīat, v.8, p. 381, Ḥadīth No-. 8938; Dāruqutnī, Al-Sunan, v.5, p. 325-326, Ḥadīth No-4396.

³ Ibn Mājah, Al-Sunan, v.2, p.1117, Ḥadīth No- 3367; Tirmidhī, Al-Sunan, v.3, p. 272, Ḥadīth No-1726.

What is inferred from the Ḥadīths is that the Prophet (PBUH) did not intend to answer question in details; rather, he necessitated the basic principles that would guide them to differentiate between the lawful and unlawful. It is sufficient to know what Allah has declared unlawful and the rest will remain lawful.

In another Ḥadīth, The Prophet (PBUH) says, “The most sinful person among the Muslims is the one who asked about something which had not been prohibited, but was prohibited because of his asking.”¹

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.95, Ḥadīth No- 7289; Muslim Al-ṣaḥīḥ, v. 4, p.1831, Ḥadīth No- 2835

Fourth Qā'idah (maxim):

“الأصل إضافة الحادث إلى أقرب أوقاته”

The basic principle of Sharī'ah is to relate the new event with the most recent past.¹

The word 'Ḥadīth' means something that happens newly without any of its existence in the past. If controversy arises regarding the time and reason of new things, they should be associated with the most recent past. Contrarily, associating them with the remote past is doubtful. And, through doubts, certainty of anything cannot be established. In a word, the controversy regarding any unprecedented thing should be associated with the immediate past if it is proved that it had not emerged in the remote past. For example,

1. A Muslim male may get married to a *dhimmi* (a permanent non-Muslim tax-payer in an Islāmic state) and that woman might demand that she has converted to Islam before her husband's death and accordingly she may demand inheritance. But, on the other hand, the inheritors of the deceased may demand that she has converted after his death. In that case, the statement of the inheritors would be acceptable unless she can present any evidential proof.
2. There might be controversy between the buyer and the seller over a sold product. The buyer might demand that the product was defective while it was with the seller.² On the contrary, the seller might demand that the defects have been found after it is sold. In that case, the

¹ Majallah Al-Aḥkām Al-'Adaliyyah, p. 17, section 11; Ibn Nujaym, Al-Ashbāh wa al-Nazā'ir, p. 71.

² Majallah Al-Aḥkām Al-'Adaliyyah, p. 17, section 11.

demand of the seller would prevail. Because, the basic principle is that the new event should be associated with the immediate past. But, if the buyer can give any proof in his defense, his demand will be acceptable.

3. If anyone discovers impurity in his clothes just after offering *Ṣalāt* and if he does not know when the impurity got attached, in that case, he should recognize the impurity considering the latest time his clothes got impure. And, he has to offer the *salat* again considering the latest time of impurity. And, if anyone finds traces of semen and cannot remember his nocturnal emission, he must take obligatory bath. And, he has to say all the prayers again since he has slept last.
4. If a person hurts a pregnant woman and she later on gives birth to a healthy baby, but the child survives well for some time and dies thereafter, in that case, the offender will not have to expiate. Because, externally it appears that the child has died due to some other reasons. On the other hand, if the child dies immediately after the mother is hurt or within a short time after the offence, then the offender will have to pay '*diyyah*' (blood money).

The documentary Ḥadīths for the Qā'idah (maxim):

The above-mentioned Qā'idah has stemmed from '*Isthiṣḥāb*' (presumption of continuity) which is considered as complimentary support by the jurists. Or, this is referred to one of the famous principles of jurisprudence: "اليقين لا يزول بالشك" "Certainty shall not be warded off by doubt". So, the Ḥadīths compiled under this basic principle will be considered as the proofs for the mentioned Qā'idah. Among them, one Ḥadīth is cited here: It is narrated from the uncle of Abbad Ibn Tamim (R.) that, once, the Prophet (PBUH)

was asked about a person who felt something that happened to him during the *Ṣalāt*. In reply, the Prophet (PBUH) said,

”لا ينفتل ولا ينصرف حتى يسمع صوتا أو يجد ريحا“

“He should not leave his prayer unless he listens to the sound or smells something.”¹

¹ Bukhārī, *Al Jāmi‘ Al-ṣaḥīḥ*, v. 1, p. 39, Ḥadīth No-137.

Fifth Qā'idah (maxim):

“الأمر إذا ضاق اتسع وإذا اتسع الأمر ضاق”

When a matter tightens it will widen, and vice versa.¹

The above Qā'idah (maxim) has been extracted from 'Imām Shāfi'ī's discourses. In essence, it is considered as one of the branches of the main and holistic principles of Fiqh belonging to “المشقة تجلب التيسير”—‘Headship entails ease’.

This Qā'idah implies that if there is extreme difficulty over an issue, it gives rise to simplicity and broadness. When the difficulty is resolved, it becomes natural. So, there is a saying attributed to 'Imām Shāfi'ī: “When a matter tightens it will widen, and vice versa.” In fact, based on the principle, many easy and generous rules and regulations of Sharī'ah (Rukhṣah) can be justified.

The documentary Ḥadīths for the Qā'idah (maxim):

Earlier it is mentioned that the Qā'idah (maxim) is considered as one of the branches of the main and holistic principle of Fiqh belonging to “المشقة تجلب التيسير”—‘Headship entails ease’. So, the Ḥadīths supportive of the holistic approach of the Qā'idah (maxim) can be considered as documentary evidence for it. Some of them are mentioned here:

1. 'Imām Bukhārī in his book ‘Al-Ṣaḥīḥ’, has captioned a chapter as “Dīn is Simple”. The Prophet (PBUH) said, “Allah prefers the Dīn of sincerity and generosity”. In this regard, he has cited a Ḥadīth narrated by 'Abū Hurayrah where the Prophet (PBUH) says, “Religion

¹Majallah Al-Aḥkām Al-'Adaliyyah, p.18, section: 18.

is very easy and whoever overburdens himself in his religion will not be able to continue in that way. So, you should not be extremists, but try to be near to perfection and receive the good tidings that you will be rewarded; and gain strength by worshipping in the mornings, afternoons and during the last hours of the nights”.¹

2. Here is a Ḥadīth narrated by ‘Ā’ishah (R). She said, “The Prophet (PBUH) Used to order them (companions) the deeds which were easy for them to do (according to their strength and endurance)”.²
3. It is narrated in Sunnah that when poor people crowded Madinah out of poverty, the Prophet (PBUH) prohibited his companions to preserve the meat of Qurbani (’udhiyyah) for more than three days. Later, when of people got back their solvency, the Prophet (PBUH) asked his companions, ‘كلوا وادخروا ما شئتم’ -- “Now, you can eat and preserve.”

¹ Bukhārī, Al Jāmi’ Al-ṣaḥīḥ, v. 1, p. 16, Ḥadīth No-39.

² Bukhārī, Al Jāmi’ Al-ṣaḥīḥ, v. 1, p. 13, Ḥadīth No-20.

The Ḥadīth implies that when the Muslims faced scarcity, they were prohibited to preserve the meat of Qurbani ('udḥiyyah). But, when the crisis was over, the previous practice for preservation of meat was restored.

In fact, we can draw support for the Qā'idah from different verses of the holy Qur'ān. For example, Allah says, "Then whosoever is driven to extreme hunger not inclining willingly to sin, then surely Allah is oft-forgiving, Merciful."¹

Applicable examples:

1. Minors (Under-aged children) can be allowed to give witness for or against themselves. Because, through this their rights will be established and protected.
2. To determine the motherhood of a child, the witness of a midwife or a female doctor will be acceptable because, through this, the genealogy of the child will be established and protected.
3. Under the compulsion of scarcity, it is permissible to take the food of others without permission.
4. It is permissible to take salary in exchange of some "ibādah" such as teaching the Qur'ān, calling for prayer ('adhān) etc. The objective of these is to sustain the continuity of the practices of Dīn. Islāmic scholars have favored the view. But, if anyone comes forward to doing the things voluntarily, he/she cannot be paid.

¹ Sūrah Mā'idah: 3.

Sixth Qā'idah (maxim):

“الإسلام يعلو ولا يعلى”

Islam is to prevail and is not to be prevailed over.¹
(It is a Qur'ānic evidence, prophetic text, legal maxim,
natural truth, and rational proof).

In Islāmic Jurisprudence, the basic principle-Islam is always winner; it is never won- is significant. Realizing its significance, 'Imām Zuhurī (R) has said, “It is established by Sunnah that a non-Muslim does not have the right to enslave a Muslim.” In *Sharḥu Al-siyar al-Kabīr*, there is a statement declaring, “If a slave owned by a non-Muslim converts to Islam, the non-Muslim patron cannot keep him as a slave, but will be forced to sell him out”.² For this reason, if any of the spouses reverts to Islam, the children would be following the reverted and be considered Muslims.

The documentary Ḥadīths for the Qā'idah (maxim):

The Qā'idah mentioned above is a part of a Ḥadīth, which is included by 'Imām Bukhārī and Darakuthni in their compilations referring to the chain of narrators (sanad) starting from the Prophet (PBUH).³ In *Sunan* of 'Abū Dāwūd, the Ḥadīth is narrated as: *الإسلام يزید ولا ینقص* - “Islam flourishes, it does not decline.”

'Imām Bukhārī has narrated the Ḥadīth as follows: “Ḥasan, Shurayḥ, 'Ibrāhīm and Qatādah (R) have said, ‘if any of the spouses converts to Islam, the children would be staying with the converted. Ibn 'Abbās was with his mother who belonged to

¹ Sarakhasī, *Sharḥu Al-siyar al-Kabīr*, v.1, p.93.

² Sarakhasī, *Sharḥu Al-siyar al-Kabīr*, v.1, p.93

³ Dāraqutnī, *Al-sunan*, v.4, p.371, Ḥadīth No-3620.

‘Mustad‘afīn’ (weak and tortured). He was not identified with his father’s (‘Abbās) community. The Prophet (PBUH) says, ‘Islam is to prevail and is not to be prevailed over’.¹

Applicable examples:

1. Non-Muslims cannot rule over the Muslims. Similarly, a non-Muslim male cannot marry a Muslim female.
2. A non-Muslim will not be allowed to enslave a Muslim.
3. An agreement cannot be made based on the demands of the non-Muslims uncritically. Because, if it is done, the non-Muslims will find scopes to dominate the Muslims.
4. If parents belong to different religions, the children will be considered as the follower of the Muslim spouse.
5. Judges must be Muslims. So, the judicial matters of Muslims cannot be conducted by non-Muslims.
6. Islam, Judaism and Christianity cannot be equalized referring to the saying “W’āhādātul Adyan”, i.e. “All religions are same and identical.”²
7. The hostages are bound to follow the Islāmic rules and regulations where their religions have prohibited some activities; i.e., stealing, adulteries.
8. The graveyard of non-Muslims will remain separated from Muslim graveyards. So, any non-Muslim cannot be buried in Muslim graveyards.

¹ Bukhārī, Al Jāmi‘ Al-ṣaḥīḥ, v. 2, p. 93, Ḥadīth No-1353.

² ‘Ābid al-sufyānī, Qā‘idatu ‘Al-islāmu ya’lū wa lā yu’lā ‘alayhi dirāsātun ta’šīliyyatun wa taṭbīqatun, majjalatu Jāmiatu ‘Umm Al-Qurā li ‘Ulūm al-sharī‘ah, v.22, Rabī‘ al-awwal- 1422H.

Seventh Qā'idah (maxim):

“الاضطرار لا يبطل حق الغير”

Pressing necessity shall not annul the right of the other.¹

From the perspective of Sharī'ah, the above-mentioned Qā'idah (maxim) is very significant and meaningful. In many respects, the above maxim is applicable. For example, this maxim can be applied to the field of Da'wah and politics and information. According to the scholars of Jurisprudence, if anybody transgresses the boundary of Sharī'ah out of helplessness, he will be absolved. For example, if anybody takes food or drinks of others without permission out of the fear of death, he will have to compensate later. In fact, this Qā'idah (maxim) limits the expansive boundary of another Qā'idah, which is;

“الضرورة تبیح المحظورات” – ‘Necessities make the prohibited permissible’

In some cases, out of necessity some impermissible things become permissible; i.e., taking the meat of dead animals. Or, in some other cases, the sin is absolved, i.e., saying blasphemous statements. In both the cases, the transgressor is not privileged to destroy the rights of others. Otherwise, an offence will open the door for another offence which would go against the spirit of Sharī'ah.²

¹ Majallah Al-Ahkām Al-'Adaliyyah, p.19, section: 33; Aḥmad al-zarqā, Sharḥ al-Qawā'id al-fiqhiyyah, p.213.

² Muḥammad Ṣidqī 'āl brūnū, Kitāb Al-wajīz fī 'Idāḥ Qawā'id al-fiqh al-kullyyah, p.244.

One of the off-shoots of this Qā'idah (maxim) is: "If anyone takes the food of others out of hunger and helplessness, later he will have to compensate equivalent price of the food he has taken."¹

The Documentary Ḥadīths for the Qā'idah (maxim):

This Qā'idah has derived from the following statement of the Prophet (PBUH):

“إِنَّ دِمَاءَكُمْ وَأَمْوَالَكُمْ عَلَيْكُمْ حَرَامٌ”

“Verily, your blood, wealth and honor are for bidden to each other.”² In this regard, 'Imām al-Ṭahāwī says, “In the light of the statement of the Prophet (PBUH), “Verily, your blood, wealth and honor are for bidden to each other”, all Islamic jurists (fuqahā') have a consensus that a hungry and helpless man who had to take the food of others will have to compensate duly. So, the doctrine of necessity does not allow that someone's loss will go uncompensated.”³

¹ Majallah Al-Aḥkām Al-'Adaliyyah, p.19, section: 33.

² Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v. 1, p. 24, Ḥadīth No-67.

³ Al- Ṭaḥṭāwī, Mukhtaṣar ikhtilāf al-'Ulamā', v.3, p.404; Ḥadīth No- 1547.

Eighth Qā'idah (maxim):

“إن تعلق حق الله تعالى بالمال لا يمنع حق النقل والتحويل”

Exchange or transformation of wealth is not prohibited if Allah's right (haq) is with it.¹

(Adopted by Ḥanafī school of thought)

The documentary Ḥadīths for the Qā'idah (maxim):

There is a Ḥadīth narrated by 'Urwah al-Bārikī (R): “the Prophet (PBUH) sent him with a dinner to buy a sacrificial animal for him (or a goat in another narration). He bought two animals/goats for this dinar. Then, he sold one of them for one dinar and came to the Prophet with another goat and a dinar. Seeing this, the Prophet (PBUH) blessed him in his business.”²

From the Ḥadīth it is evident that the Prophet (PBUH) has permitted to sell the animal of sacrifice (al-'udḥiyyah) and prayed for blessings (barakah) in the business of 'Urwah (R).

¹ Qādī Khān, Sharḥ al-Ziyādāt, p.354; Al-Sarakhasī, Al-Mabsūṭ, v.2, p.173.

² Aḥmad Ibn Ḥanbal, Al-Musnad, v.32, p.100, Ḥadīth No- 19356; Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v. 4, p. 207, Ḥadīth No-3.

Ninth Qā'idah (maxim):

“الإذن العرفي يقوم مقام الإذن اللفظي”

Conventional permission is at par with verbal permission.

The explanation of the Qā'idah (maxim) is given here as follows: if a Muslim takes something from another Muslim or his friend without permission, it might be understood to be normal or conventional to take in that way in that society due to the generosity of the people. It might be that this type of taking is not taken seriously or quarreled over. It might be that the taker is aware of the assumed approval of the owner or he has the reasons to believe that it is not corruptible for him to take in that way. In all the cases, it is permissible to take in that way because conventional permission is understood as verbal permission. Even it might be that if the permission is sought, the owner might consider it as ungracious and a sign of distance in relation.

The general instruction in this regard is found from Qur'ānic verses. Allah (SWT) says, “There is no difficulty on the blind, or on the handicapped, or on the sick. Nor there is a difficulty on yourselves that you eat in your houses, or your fathers’ or your mothers’, or your brothers’, or your sisters’, or your paternal uncles’, or your paternal aunts’, or your maternal uncles’, or your maternal aunts’ houses, or what you possess the keys of, or at your friends.”¹

¹ Sūrah Nūr: 61.

Shaykh al-Islām 'Imām Ibn Taymiyah says, "It is permissible in Sharī'ah that two friends can mutually agree to use their wealth. So, among the salafs (the first three generations of Muslims and the rightly-guided 'Imāms), it was a common practice. Some of them used to enter the home of their friends and ate in their absence because it was a common understanding that the person who ate was quite sure that his friend would have given the full consent in his presence. As Allah says, "Or in your friends' home."¹

In '*Al-mawsū'ah al-Fiqhīyyah al-kuwaytiyyah*' it is noted that, "According to Shāfi'ī school of thought, a friend can eat in the garden or home of his friend in his absence. But it is to be ensured that the absent friend would not be displeased at that."²

But, in the above-mentioned context of relation only the small amount of wealth which the owner generally considers to give away would be allowable. On the other hand, if the amount of the wealth crosses the conventionally allowable limit, it would not be permissible. 'Allāmah Ibn Taymiyah in his '*Al-Qā'idah al-Nūrāniyyah*' says: "The conventional permission of the owner will act as verbal/unwritten permission in using his/her wealth, acting his/her replacement as owner or as an attorney to do the necessities regarding his/her wealth." Following this principle, the Prophet (PBUH) during *bay'ah al-riḍwān* (Pledge of Satisfaction) accepted bay'at in the absence of 'Uthmān (R) on his behalf. In the same way, he entered the houses of 'Abū Ṭalhah (R) and Jābir (R) with

¹Ibn Taymiyyah, *Al-Fatāwā al-Kubrā*, v.3, p.471.

²*Al-mawsū'ah al-fiqhiyyah al-kuwaytiyyah*, v.23, p.321.

the people of *Khandaq* (people who were engaged in the project of trench) without prior permission from 'Abū Ṭalhah (R) and Jābir (R) since he knew that their entrance had the full and happy consent of the house owners.”

The documentary Ḥadīths for the Qā'idah (maxim):

There is a Ḥadīth narrated by 'Urwah al-Bārikī (R): “the Prophet (PBUH) gave a dinar (golden coin) to him for buying a sacrificial animal (or a goat in another narration). He bought two animals/goats for this dinar. Then, he sold one of them for one dinar and came to the Prophet (PBUH) with another goat and a dinar. Seeing this, the Prophet (PBUH) blessed him in his business.”¹

¹ Abū Dāwūd, Sunan Abī Dāwūd, v.3, p.256, Ḥadīth No-3384.

Tenth Qā'idah (maxim):

“الاحتجاج بمفهوم الموافقة”

Argumentation from harmonious meaning.¹

‘Mafhūm’ or implied understanding has two divisions:

1. ‘Mafhūm Al-mu’āfaqah’ or Harmonious understanding
2. ‘Mafhūm Al-mukhālafah’ or Divergent Understanding or implementation of the contrary

The division is based on the fact that the understanding that lacks explicit directives of Sharī'ah would be similar or dissimilar with the clear directives suggestive of positive or negative principles. If they are similar with the clear directives of Sharī'ah, they will be considered as similar understanding. If they are dissimilar, they will be considered as dissimilar understanding. One of the classical scholars *Sayf Al-dīn 'Āmadī* has defined ‘Mafhūm Al-mu’āfaqah’ (harmonious understanding) in the following words: “When a ruling lacks explicit directive of Sharī'ah, its Mafhūm (understanding) would be Harmonious to the ruling that has explicit directives of Sharī'ah. They are also known as ‘Faḥwa al-Kitāb’ and ‘Laḥanal-Kitāb’². Similar understanding (Mafhūm Al-mu’āfaqah) is of two kinds. They are:

1. It is considerable where Sharī'ah-guided principle is more emphatically applicable to implied understanding than to main understanding stated directly.
2. Where ‘illah (cause and effect) of the unexpressed understanding and directly stated understanding remain parallel, Sharī'ah-guided

¹ Al-'āmadī, Al-'iḥkām fī 'Uṣūl al-aḥkām, v.3, p.250.

² Al-'āmadī, Al-'iḥkām fī 'Uṣūl al-aḥkām, v.3, p.66.

principle is equally applicable. It is called 'Laḥan al-Kitāb' or the basic understanding of Sharī'ah.

'Faḥwa al-Kitāb' is validated by the message of Allah:

﴿إِذَا يَبْلُغُنِ عِنْدَكَ الْكِبَرَ أَحَدُهُمَا أَوْ كِلَاهُمَا فَلَا تَقُلْ لَهَا أَفْ وَلَا تَنْهَرْهُمَا وَقُلْ لَهَا قَوْلًا مَّعْرُوفًا﴾

"If either of them or both reach old age in your presence, do not say 'Uff' (Any expression of disgust) to them and do not rebuff them, and speak to them with the utmost respect."¹ On the one hand in this verse, showing dissatisfaction and irritation towards parents and rebuking them have been forbidden, On the other hand, the similar and implied understanding of the verse indicates that the children must refrain from hurting their parents in any possible way. Though hurting and misbehaving are not directly stated in the verse, they are not less severe and torturing than the displeasing and irritating words. So, the prohibition of hurting and misbehavior is more pressing than irritation and rebuking.

Another example of 'Faḥw al-Khitāb' from the Qur'ān is:

﴿فَمَنْ يَعْمَلْ مِثْقَالَ ذَرَّةٍ خَيْرًا يَرَهُ - وَمَنْ يَعْمَلْ مِثْقَالَ ذَرَّةٍ شَرًّا يَرَهُ﴾

"So, whoever does an atom's weight of good shall see it; and whoever does an atom's weight of evil shall see it."²

The literal meaning of the verses is that the least amount of evil and virtuous deeds will not be left unaccountable. And, the implied understanding of the verses is that whereas the least amount of action will not be left unaccountable, the accountability of the bigger actions is to be more emphatically considered.

¹ Sūrah Al-'isrā': 23.

² Sūrah Al-zilzāl: 7-8.

Accordingly, 'laḥan al-kitāb' is validated by the message of Allah:

﴿إِنَّ الَّذِينَ يَأْكُلُونَ أَمْوَالَ الْيَتَامَىٰ ظُلْمًا إِنَّمَا يَأْكُلُونَ فِي بُطُونِهِمْ نَارًا وَهُمْ لَا يَبْصُرُونَ سَعِيرًا﴾

“Verily, those who unjustly eat up the property of the orphans eat up only fire into their bellies, and they soon shall be put into the Blazing Fire!”¹

In this verse, eating up the property of the orphans is clearly prohibited. But, the implied understanding from the verse is evident that it is prohibited to destroy or eat up the property of the orphans any way as there is a chance that the property of the orphans will be ruined through either of the ways.

From the above discussion it is evident that 'the proof of similar understanding' is an acknowledged basic principle of 'Usū al- fiqh. The four 'Imāms have consented to this. To them, the similarity of understanding is such an implied directive that can be considered as the documentary evidence for deductive principles. The application of this principle is visible in a number of Ḥadīths of the Prophet Muḥammad (PBUH).

One of the classical jurist *Sayf al-dīn 'Āmadī* says, the maxim of of 'Maḥmūd Al-mu'āfaqah' or Similar Understanding would be accepted as proof, for it is an acknowledged basic principle and acceptable documentary evidence in 'Usūl fiqh. Also, it has a vital role in deriving principles of Sharī'ah.²

The Documentary Ḥadīths for the Qā'idah (maxim):

Accepting *maḥmūd al-muwāfaqah* (harmonious meaning) as proof has been profusely seen in the Ḥadīths of Prophet (PBUH). For

¹ Sūrah Al-niSā': 10.

² Al-'āmadī, Al-'iḥkām fī 'Usūl al-aḥkām, v.3, p.250.

example, He says, 'Remember description of its container and the string with which it is tied'.¹

From the implied understanding of the Ḥadīth, it becomes clear that we have to preserve the dinar (gold coin) which is picked up from somewhere. In another Ḥadīth, emphasizing the return of conquered wealth, the Prophet (PBUH) says, "You should return a thread and a needle if these are conquered wealth (war prize)."²

The implied directive of the Ḥadīth is to ensure the return of wealth, money, and whatsoever taken illegally from war prizes. In this regard, the following Ḥadīth is mentionable: "If any person steals the stick of a Muslim, it is obligatory for him to return it."³ The implied directive of the Ḥadīth emphatically suggests that anything more important than the stick must be returned.

From the Ḥadīths stated above, it is clear that the 'proof of similar understanding' is one of the acknowledged and established principles of *'Usū al-fiqh*. It can be presented as a document to derive rulings from Sharī'ah.

¹ Bukhārī, *Al Jāmi' Al-ṣaḥīḥ*, v.3, p.124, Ḥadīth No-2427; Muslim, *Al-ṣaḥīḥ*, v.3, p.1346-1350, Ḥadīth No-1722.

² Aḥmad Ibn Ḥanbal, *Al-musnad*, v.38, p.371, Ḥadīth No- 22699; *Al-nasā'yī*, *Al-mujtabā min al-sunan*, v.7, p.131, Ḥadīth No- 4138.

³ *Al-'āmadī*, *Al-'iḥkām fī 'Uṣūl al-aḥkām*, v.3, p.68.

Eleventh Qā'idah (maxim):

“الاستدلال بمفهوم المخالفة”

Juristic deduction with opposite meaning.

Definition of *Mafhūm al-Mukhālafah* (the implication of opposite meaning):

It (*Mafhūm al-Mukhālafah*) is the indication to the negation of the absolute fixed judgment about the unpronounced subject because it does not contain any attribute of the explicit meaning. That is to say, the ruling of the subject which is unpronounced will be completely contrary to the ruling of the explicit meaning of the text. *Mafhūm al-Mukhālafah* or the implication of opposite meaning is also called *Dalīl al-Khitāb* (the parallel meaning). Most of the 'Imāms (Muslim jurists) accept it (the implication of opposite meaning) as a document (for evidence), though according to the Ḥanafī jurists, it is not considered as a Sharī'ah evidence. Those who believe that *Mafhūm al-Mukhālafah* is acceptable as a Sharī'ah evidence present the following documents in support of their claim.

One. Looking at the usage of the 'Arab expressions and their culture, it appears that when a provision is restricted by attributes or conditions or by a number or a limit, the application of the provision remains conditional. The application or inactiveness of the provision depends on the availability or disappearance of the conditions or limits. For example, if someone says: 'If your child passes the test, give him a watch'; the implicit meaning that the statement indicates- if he doesn't pass, do not give him any watch.

Two. There must be some meaningful or directional benefit behind the attributes or conditions that are imposed for a subject in a *Naṣṣ* (text of the Qur'ān or Ḥadīth adduced as justification for a legal ruling) or Sharī'ah discourse. Because the legislature cannot add any useless attribute or condition or limit or number to the provision. However, if it is proved by any indication that the purpose behind the imposition of certain features or conditions is not to make the provision specific or conditional; rather, the purpose is to reinforce the provision or to praise or condemn something, no evidence can be presented with such divergent meaning.

Three. The Prophet (PBUH) said: “في سائمة الغنم زكاة”

“Zakāt is obligatory on free grazing goats in the pastures”.

Notably, if the provision of the stall-fed livestock would not have been different from that of free grazing livestock in the pastures, then there is no need to mention the former animal in the Ḥadīth. So, the reference to the provision of giving Zakāt for animals roaming in the pasture gives this implicit idea that the animals that are not grown-up grazing will not be under the provision of giving Zakāt.

Mafhūm al-Mukhālafah (the implication of opposite meaning) is a recognized principle of 'Usūl al-Fiqh which is considered a Sharī'ah evidence by the Shāfi'ī, Mālikī and Ḥanbalī schools of thought. Therefore, they have established various Sharī'ah provisions with the support of all types of *Mafhūm al-Mukhālafah* except *Mafhūmal-Laqaḥ* (implication of the title/name).

Maḥḥūmal-Mukhālafah (the implicit meaning) is of six kinds. They are-

- (1) *Maḥḥūmal-ṣifah* or implication of the attribute.

﴿وَمَنْ لَمْ يَسْتَطِعْ مِنْكُمْ طَوْلًا أَنْ يَنْكِحَ الْمُحْصَنَاتِ الْمُؤْمِنَاتِ فَمِنْ مَّا مَلَكَتْ أَيْمَانُكُمْ مِّنْ فَتَيَاتِكُمُ الْمُؤْمِنَاتِ﴾

“And whoever of you is not able to afford to marry from the free, believing women, then he may marry from among your believing young concubines in your possession.”¹

- (2) *Maḥḥūmal-Sharṭ* or implication of the condition. For example- the word of Allah goes-

﴿وَإِنْ كُنَّ أُولَاتٍ حَمْلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّى يَضَعْنَ حَمْلَهُنَّ﴾

“And if they are loaded (pregnant), then spend on them (give their allowances) until they lay down their burden (until birth).”²

- (3) *Maḥḥūmal-Ghāyah* or implication of the extent. For example- the word of Allah

﴿وَكُلُوا وَاشْرَبُوا حَتَّى يَتَبَيَّنَ لَكُمُ الْخَيْطُ الْأَبْيَضُ مِنَ الْخَيْطِ الْأَسْوَدِ مِنَ الْفَجْرِ﴾

“Eat and drink until you see the white streak (of dawn in the horizon) distinctly from the black.”³

- (4) *Maḥḥūmal-‘adad* or implication of the stated number. For example- in the word of Allah-

﴿وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً﴾

“And for those who accuse chaste women, then cannot bring four witnesses, flog them with eighty stripes (that affects the skin only).”¹

¹ Sūrah Al-niSā’: 25.

² Sūrah Al-ṭalāq: 6.

³ Sūrah Al-baqarah: 187.

(5) *Mafhūmal-laqab* or nominal meaning (implication of the name).

One of the classical jurists, 'Abū Ḥasan 'āmadī presents a Ḥadīth to give an example of this type - where usury is forbidden in the case of six types of goods. The Ḥadīth is-

الدَّهَبُ بِالدَّهَبِ وَالْفِضَّةُ بِالْفِضَّةِ وَالْبُرُّ بِالْبُرِّ وَالشَّعِيرُ بِالشَّعِيرِ وَالْتَّمْرُ بِالتَّمْرِ وَالْمِلْحُ بِالْمِلْحِ
مِثْلًا بِمِثْلٍ سَوَاءٌ بِسَوَاءٍ يَدًا يَدًا فَإِذَا اخْتَلَفَتْ هَذِهِ الْأَصْنَافُ فَيُعْبَوُ كَيْفَ شِئْتُمْ إِذَا كَانَ يَدًا
يَبْدَقُمْنَ زَادَ أَوْ اسْتَزَادَ فَقَدْ أَرَبَى الْآخِذُ وَالْمُعْطِي فِيهِ سَوَاءٌ .

Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt, like for like and equal for equal, payment being made hand to hand. If these classes differ, then sell as you wish if payment is made hand to hand. He who made an addition to it, or asked for an addition, in fact dealt in usury. The receiver and the giver are equally guilty.²

(6) *Mafhūm al-Ḥaṣar* or implication of limiting.

This restriction is done with the help of prepositions like ما (Mā) and لا (illā) or إنما (innamā) etc. For example- Allah SWT says:

﴿إِنَّمَا الصَّدَقَاتُ لِلْفُقَرَاءِ وَالْمَسْكِينِ وَالْعَامِلِينَ عَلَيْهَا وَالْمُؤَلَّفَةِ قُلُوبُهُمْ وَفِي الرِّقَابِ
وَالْعَارِمِينَ وَفِي سَبِيلِ اللَّهِ وَأَبْنِ السَّبِيلِ﴾

“Zakāt is for the poor and for the needy and for those employed to collect (Zakāt). And for those whose hearts will be brought together (for Islam) and for slaves and for those in debt and for (those) on the Way of Allah and for the travelers”.³

¹ Sūrah Al-nūr: 4.

² Aḥmad Ibn Ḥanbal, Al-musnad, v.34, p.37, Ḥadīth No- 20395; Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.75, Ḥadīth No-2182; Al-nasā'yī, Al-mujtabā min al-sunan, v.7, p.280, Ḥadīth No- 4578.

³ Sūrah Al-tawbah:60.

The straight ruling of the verse is that the wealth of *Wājib Ṣadaqah* (required charity) or *Zakāt* will be distributed among the eight categories mentioned above. And *Maḥḥūm al-ḥaṣar* (implication of limiting) indicates that *Zakāt* cannot be distributed beyond the categories mentioned in the verse.

The bottom line is that according to the Shāfi'ī, Mālikī and Ḥanblī schools of thought, except for *Maḥḥūm al-Laqaḥ*, *Maḥḥūm al-Mukhālafaḥ* and all other types of evidence of *Maḥḥūm al-Mukhālafaḥ* (the opposite meaning) are considered as a principle. According to them, *Maḥḥūm al-Mukhālafaḥ* is a Sharī'ah argument which helps to know about the rules. On the other hand, according to the Ḥanafī'Imāms (jurists), *Maḥḥūm al-Mukhālafaḥ* is not a basic principle of 'Usūl or a Sharī'ah evidence.

The Ḥadīths supportive of the Qā'idah:

Those who accept *Maḥḥūm al-Mukhālafaḥ* as a Sharī'ah document present the following Ḥadīth-based evidence:

- (1) The perception of linguists: The Prophet (PBUH) said:

”لِيَ الْوَاجِدِ يُجَلَّ عِرْضُهُ وَعُقُوبَتُهُ“

“Delay in payment on the part of one who possesses means makes it lawful to dishonor and punish him.”¹

The eminent linguist 'Abū 'Ubayd al-Qāsim ibn Salām (may Allah be pleased with him) commented on the above-mentioned Ḥadīth-
“the Ḥadīth indicates that if a poor person delays in repaying a

¹ Aḥmad Ibn Ḥanbal, Al-musnad, v.29, p.465, Ḥadīth No- 17946; Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.118, Al-nasā'yī, Al-mujtabā min al-sunan, v.7, p.316, Ḥadīth No- 4689; Abū Dāwūd, Al-sunan, v.3, p.313, Ḥadīth No-3628.

loan, he cannot be punished". The language of another Ḥadīth of the Prophet (PBUH) is as follows:

“مطل الغني ظلم”

“It is an act of oppression on the part of a person to procrastinate in fulfilling his obligation (in repaying loans)”.¹

The explicit ruling of the Ḥadīth is that procrastination of the poor will not be regarded as unwarranted. There are many more such examples where it is apparent that linguists have taken the implicit understanding from various Sharī'ah statements.

- (2) The perception of the Prophet (PBUH): (may Allah be pleased with him) narrates, when the following words of Allah are revealed-

﴿اسْتَغْفِرْ لَهُمْ أَوْ لَا تَسْتَغْفِرْ لَهُمْ إِنْ تَسْتَغْفِرْ لَهُمْ سَبْعِينَ مَرَّةً فَلَنْ يَغْفِرَ اللَّهُ لَهُمْ﴾

(Whether you, O Muḥammad, ask forgiveness for them, or do not ask forgiveness for them, even if you ask forgiveness for them seventy times, Allah will not forgive them)²

Then the Prophet (PBUH) said: “Allah has given me the choice to pray or not. By Allah! I will (appeal to Allah for his sake) more than seventy times”.³

The Ḥadīth implies that the provision of asking for forgiveness more than seventy times will definitely be different from that of seventy times.

- (3) Realization of the Ṣaḥābah Kirām (the dignified companions of the Prophet): The Prophet (peace and blessings of Allah be upon

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.94, Ḥadīth No-2287.

² Sūrah Al-tawbah: 60.

³ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.6, p.67-68, Ḥadīth No-4670,4672.

him) said: الماء من الماء “The water (of the ghusl) is due to the water (of sexual emission).”

The Companions of the Prophet (may Allah be pleased with them all) agreed that the provision of that Ḥadīth has been abrogated by another Ḥadīth of the Prophet (PBUH).

”إِذَا التَّقَى الْخِتَائَانِ وَجَبَ الْغُسْلُ“

“When the circumcised meets the circumcised then Ghusl (bath) is required.”¹

Hence the Ḥadīth “Bathing is obligatory only after ejaculation” implies that if there is no ejaculation, bathing will be not be obligatory. If it did not carry the contrary meaning, it would not need to be abrogated by the next Ḥadīth.

Another example is narrated from Ya’lā ibn ‘Umayyah (may Allah be pleased with him) who said: I asked ‘Umar ibn al-Khaṭṭāb (may Allah be pleased with him) that Allah says (interpretation of the meaning):

﴿فَلَيْسَ عَلَيْكُمْ جُنَاحٌ أَنْ تَقْصُرُوا مِنَ الصَّلَاةِ إِنْ خِفْتُمْ أَنْ يَفْتِنَكُمُ الَّذِينَ كَفَرُوا﴾

“If you fear that the disbelievers will harm you, then there is nothing wrong with shortening (qaṣr) of prayers.”²

But now people have gained security. So, now, is there any need to shorten the prayers? On hearing this, ‘Umar ibn al-Khaṭṭāb (may Allah be pleased with him) said: ‘I wondered the same thing. (That means, I also could not find any rationale to shorten the

¹ Muslim, Al-ṣaḥīḥ, v.1, p.269, Ḥadīth No- 343; Ibn Mājah, Al-sunan, v.1, p.199, Ḥadīth No- 607; Abū Dāwūd, Al-sunan, v.1, p.55-56, Ḥadīth No-215, 217; Al-nasā’yī, Al-mujtabā min al-sunan, v.1, p.115, Ḥadīth No- 199; Al-tirmidhī, Al-sunan, v.1, p.171, Ḥadīth No- 110.

² Sūrah Al-nisā’: 101.

prayers). So, I asked the Messenger of Allah (PBUH) about that; He replied:

هي صدقة تصدق الله بها عليكم فاقبلوا صدقته

“This is a favor from Allah (SWT) to you. So, accept the Ṣadaqaḥh (favor) given by Him”.¹ It is noteworthy that both Ya’lā ibn’Umayyah (R.) and ‘Umar ibn al-Khaṭṭāb (R.) were apparently Arabs, yet they understood the opposite meaning from the verse. On the other hand, the Prophet (PBUH) supported the perception of ‘Umar (peace be upon him) and answered the related question.

Thus, from the above Ḥadīth and the related commentary of the pure speaking Ṣaḥābah (companions of the Prophet), it is well established that the evidence of *Maḥḥūm al-Mukhālāfah* (implication of opposite meaning) is not a fabricated baseless principle; rather, this principle is based apparently on the Ḥadīths of the Prophet (PBUH). Therefore, *Maḥḥūm al-Mukhālāfah* (implication of opposite meaning) is regarded by the majority of scholars/jurists as evidence for Sharī‘ah (Islāmic legal system) and an important principle of ‘Usūl al-Fiqh (principles of Islāmic Jurisprudence).² Ḥanafī ‘Imāms (school of thought), on the other hand, do not accept *Maḥḥūm al-Mukhālāfah* as evidence (for Sharī‘ah document).

It is noteworthy that the difference of opinion between the Ḥanafī jurists and other ‘Imāms regarding the evidence of the Qā‘idah (maxim) of the present discussion has had a profound effect on the

¹ Muslim, Al-ṣaḥīḥ, v.1, p.478, Ḥadīth No- 686; Ibn Mājah, Al-sunan, v.1, p.339, Ḥadīth No- 1065; Abū Dāwūd, Al-sunan, v.2, p.3, Ḥadīth No-1199; Al-nasā‘ī, Al-mujtabā min al-sunan, v.3, p.116, Ḥadīth No- 1433; Al-tirmidhī, Al-sunan, v.5, p.93, Ḥadīth No- 3034.

² Muṣṭafā Sa‘īd al-khīn, ‘Athar al-‘ikhtilāf fī al-Qawā‘id al-‘usūliyyah fī ‘ikhtilāf al-fuqahā, p.172,180.

various Masā'il (Islāmic Laws) of Fiqh (Islāmic jurisprudence). The following are some examples of such Masā'il:

- (a) Ruling of marrying a kitābī (one who believes in Judaism or Christianity) maid for a person who is solvent enough to marry a free (believing) woman
- (b) Ruling of marrying a biblical maid for those who are not in fear of committing adultery
- (c) Ruling of the fruit of the date palms if they are sold before *ta'bīr*, i.e., pollination (the transfer of pollen from a male date palm to a female date palm).
- (d) Regarding the obligation of providing a divorced woman (who is divorced by triple *ṭalaq*) with maintenance if she is not pregnant.
- (e) Ruling of commencing ṣalāt (prayers) with takbīr (reciting the phrase *Allahu 'Akbar*, i.e., Allah is great)
- (f) Ruling for marrying a grownup virgin daughter off by a father against her consent.
- (g) Prohibition of proposing marriage directly by a husbandless wife before the completion of her *'iddah* (waiting period).

As the Shāfi'ī, Mālikī and Ḥanblī schools of thought, accepted *Maṣḥūm al-Mukhālafah* as a principle of Sharī'ah (Islāmic law) as well as 'Usūl (principles), regarding the **first mas'alah**, they argue that it is not lawful for a person who is able to marry a free (believing) woman to marry a *kitābī* (one who believes in Judaism or Christianity) maid. Because Allah says:

﴿وَمَنْ لَمْ يَسْتَطِعْ مِنْكُمْ طَوْلًا أَنْ يَنْكِحَ الْمُحْصَنَاتِ الْمُؤْمِنَاتِ فَمِنْ مَّا مَلَكَتْ أَيْمَانُكُمْ مِّنْ فَتَيَاتِكُمُ الْمُؤْمِنَاتِ﴾

“And those of you who cannot afford to marry free, believing women (*muḥṣanāth*), then marry such believing women whom your right hands possess”.¹

Considering the opposite of the condition mentioned in the verse, it appears that for a person who is able to marry an independent believing woman will not be permissible to marry a *kitabi* (one who believes in Judaism or Christianity) maid.

On the other hand, according to the Ḥanafī jurists, such marriages are permissible.

Similarly, in the case of the **second mas’alah**, on the basis of the opposite direction of the same verse, to the Shāfi’ī, Mālikī and Hanbalī schools of thought, it is not permissible to marry a *kitabi* (Jews and Christians) maid for those who are not in fear of committing adultery. On the other hand, according to the Ḥanafī jurists (the learned of Islam), it is permissible to marry a *kitabi* maid, even if there is no fear of committing adultery.

The following are the verses of the Qur’ān and Ḥadīths which have the divergent meaning in regulating the rest of the masā’il:

Ḥadīth related to the third mas’alah: The words of the Prophet (PBUH) –

مَنْ بَاعَ تَحْلًا بَعْدَ أَنْ تُؤَيَّرَ فَتَمَرَّتْهَا لِلْبَائِعِ

"Whoever buys a date-palm tree after *ta’bīr*, i.e., pollination (the transfer of pollen from a male date palm to a female date palm), its fruits belong to the seller."²

The verse regarding the fourth mas’alah: Allah SWT says-

¹ Sūrah Al-niSā’: 25.

² Bukhārī, Al Jāmi’ Al-ṣaḥīḥ, v.3, p.115, Ḥadīth No-2379.

﴿وَإِنْ كُنَّ أُولَاتٍ حَمْلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّى يَضَعْنَ حَمْلَهُنَّ﴾

“And if they are loaded (pregnant), then spend on them (give their allowances) until they lay down their burden (until birth)”.¹

A Hadīth on the fifth mas’alah: a saying of the Prophet (PBUH) –

مِفْتَاحُ الصَّلَاةِ الطُّهُورُ، وَتَحْرِيمُهَا الْكَبِيرُ، وَتَحْلِيلُهَا التَّسْلِيمُ

“The key to ṣalāh (prayer) is purification, its opening is to say ‘Allahu Akbar’ and its closing is to say As-salamu ‘alaikum.”²

A Hadīth on the sixth mas’alah: The Messenger of Allah (peace be upon him) said–

الْثَّيْبُ أَحَقُّ بِنَفْسِهَا مِنْ وَلِيِّهَا

“A woman who has been previously married (Thayyib) has more rights (to decide on her marriage) to her person than her guardian.”³

The verse regarding the seventh mas’alah: Allah Ta’ala says–

﴿وَلَا جُنَاحَ عَلَيْكُمْ فِيمَا عَرَّضْتُمْ بِهِ مِنْ خِطْبَةِ النِّسَاءِ أَوْ أَكْتُمْتُمْ فِي أَنْفُسِكُمْ عَلِمَ اللَّهُ أَنَّكُمْ

سَتَذْكُرُوهُنَّ وَلَكِنْ لَا تَوَاعِدُوهُنَّ سِرًّا إِلَّا أَنْ تَقُولُوا قَوْلًا مَعْرُوفًا﴾

“And there is no sin on you if you make a hint of betrothal (to the women who are in the waiting-period) or conceal such a desire in yourself. Allah knows that you will remember them, but do not give them a promise in secret except (a hint of betrothal) that you

¹ Sūrah Al-ṭalāq: 25.

² Ibn Mājah, Al-sunan, v.1, p.101, Ḥadīth No- 275; Abū Dāwūd, Al-sunan, v.1, p.16, Ḥadīth No-61; Al-tirmidhī, Al-sunan, v.1, p.54, Ḥadīth No- 3.

³ Muslim, Al-ṣaḥīḥ, v.3, p.1037, Ḥadīth No- 1421; Ibn Mājah, Al-sunan, v.1, p.601, Ḥadīth No- 1870; Abū Dāwūd, Al-sunan, v.2, p.232, Ḥadīth No-2098-2099; Al-nasā’iy, Al-mujtabā min al-sunan, v.6, p.84, Ḥadīth No- 3260-3261; Al-tirmidhī, Al-sunan, v.2, p.407, Ḥadīth No- 1108.

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speak in a lawful manner (according to usage, on a reasonable basis)”.¹

According to the Shāfi’ī, Mālikī and Hanbaī ’Imāms, the implicit direction revealed in the above verses of the Qur’ān and Ḥadīths is actionable and documentable.² So, to them the evidence of the implicit meaning is recognized as an important Qā’idah (maxim) of *’Usū al-Fiqh* (principles of Islāmic jurisprudence).

¹ Sūrah Al-baqarah: 235.

² Muṣṭafā Sa’id al-khin, *’Athar al-’ikhtilāf fī al-Qawā’id al-’usūliyyah fī ’ikhtilāf al-fuqahā*, p.182,189.

Twelfth Qā'idah (maxim):

“اقتضاء الامر المطلق الوحدة أو التكرار”

The requirement of 'amr muṭlaq (general command) is singularity or repetition.

(A Qā'idah (maxim) of 'Usūl 'al-fiqh' regarding 'Amr or obligation)

According to 'Abū 'Ishāq al-'Isfarāyīnī (may Allah be pleased with him) of the Shāfi'ī school, this Qā'idah is an important Qā'idah of 'Usūl Fiqh. The Qā'idah has also been narrated from 'Imām Shāfi'ī. However, the word has changed slightly. That is, the word الاحتمال (probability) has been used instead of the word الامر المطلق يحمل التكرار- (demand/claim). As narrated-

“The absolute command carries the possibility of repetition”. That is why, *istithnā* (exclusion) is correct and implemented from the word 'Amr. For example, صم إلا يوم الخميس - 'Keep fasting except for Thursday'.

The Ḥadīths supportive of the Qā'idah:

'Abū Hurayrah (Allah be pleased with him) reported. “Allah's Messenger (PBUH) addressed us and said: 'O people, Allah has made Hajj obligatory for you; so, perform Hajj. Thereupon a person said: Messenger of Allah, (is it to be performed) every year? He (the Holy Prophet) kept quiet, and he repeated (these words) thrice, whereupon Allah's Messenger (PBUH) said: If I

were to say 'Yes', it would become obligatory (for you to perform it every year) and you would not be able to do it."¹

Ibn'Abbās directly mentioned the name of the questioner in his narration. As he stated, "The Messenger of Allah addressed us and said, "O people, Hajj is made obligatory for you. Thereupon, 'Aqra' bin Ḥābis Al-Tamīmī stood and said: 'Every year, O Messenger of Allah?' In reply to the question, Messenger of Allah said:

'If I said yes, it would become obligatory (for you to perform it every year). And if it were obligatory, then you would not obey and you would not be able to do it. Hajj is obligatory just for once; additional ones will be considered *asnafl* (supererogatory prayer)."²

The remarkable thing in the Ḥadīth is that if the questioner did not realize the possibility of performing the Hajj repeatedly from '*Amr*' (command) as assumed from aforementioned Ḥadīth, then his question would not make any sense and he would be reprimanded for that question.

Although the present Qā'idah (maxim) is a well-known fundamental maxim of 'Usūl al-fiqh, its effect does not differ much in the case of practical mas'alah. There could be two reasons:

First: All Islāmic jurists are unanimous that '*Amr*' (obligation) does not demand the re-practice of any work and does not even carry the

¹ 'Alā' al-dīn Al-Bukhārī, Kashf al-'Asrār Sharḥu 'Usūl al-bazdāwī, v.1, p.124, Muslim, Al-ṣaḥīḥ, v.2, p.975, Ḥadīth No- 1337

² Aḥmad Ibn Ḥanbal, Al-musnad, v.4, p.151, Ḥadīth No- 2304; Al-nasā'yī, Al-mujtabā min al-sunan, v.5, p.111, Ḥadīth No- 2620.

possibility. As a result of their totalitarian views, the field of disagreement has become much narrower.

Second: It is very rare that there is no sign or evidence related to the ruling of Sharī'ah, which indicates whether the ordered work must be repeated, or only once performed.

The following are some of the practical mas'alah in which various statements of the 'ulamā' (the dignified Islāmic scholars) are observed in the light of the above rules:

- (a) The ruling on multiple Farḍ ṣalāh (obligatory prayers) with *tayammum* (the cleansing of the body using a purified sand or dust before religious acts when there is no water available to perform *wudū'*, i.e., ablution): According to Shāfi'ī scholars, if a person performs *tayammum*, he is allowed to perform only one obligatory ṣalāh with that *tayammum*; however, he can perform nafl ṣalāt (supererogatory prayers) as he wishes. On the other hand, in the eyes of the Ḥanafī jurists, the *tayammum* performer can say the obligatory and supererogatory prayers as much as he pleases. Both schools present the evidence with the following words of Allah:

﴿يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا قُمْتُمْ إِلَى الصَّلَاةِ فَاغْسِلُوا وُجُوهَكُمْ وَأَيْدِيَكُمْ إِلَى الْمَرَافِقِ وَامْسَحُوا بِرُءُوسِكُمْ وَأَرْجُلَكُمْ إِلَى الْكَعْبَيْنِ. وَإِنْ كُنْتُمْ جُنُبًا فَاطْبُؤْا. وَإِنْ كُنْتُمْ مَرْضَى أَوْ عَلَى سَفَرٍ أَوْ جَاءَ أَحَدٌ مِنْكُمْ مِنَ الْغَائِطِ أَوْ لَسْتُمْ بِالْمَسَاءِ فَلَمْ تَجِدُوا مَاءً فَتَيَمَّمُوا صَعِيدًا طَيِّبًا﴾

﴿يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا قُمْتُمْ إِلَى الصَّلَاةِ فَاغْسِلُوا وُجُوهَكُمْ وَأَيْدِيَكُمْ إِلَى الْمَرَافِقِ وَامْسَحُوا بِرُءُوسِكُمْ وَأَرْجُلَكُمْ إِلَى الْكَعْبَيْنِ. وَإِنْ كُنْتُمْ جُنُبًا فَاطْبُؤْا. وَإِنْ كُنْتُمْ مَرْضَى أَوْ عَلَى سَفَرٍ أَوْ جَاءَ أَحَدٌ مِنْكُمْ مِنَ الْغَائِطِ أَوْ لَسْتُمْ بِالْمَسَاءِ فَلَمْ تَجِدُوا مَاءً فَتَيَمَّمُوا صَعِيدًا طَيِّبًا﴾

“O you who have believed, when you rise to perform prayer, wash your faces and your forearms to the elbows and wipe over your heads and wash your feet to the ankles. And if you are in a state of janābah (ritual impurity), purify yourselves (by taking a bath). But if you are ill or on a journey or one of you comes from the place of

relieving himself or you have contacted women and do not find water, then seek clean earth and wipe over your faces and hands with it".¹

The jurists who think that 'Amr or obligation does not demand re-practice of work, just as it is not necessary to perform ablution for every obligatory prayer; to them, it is not necessary to perform *tayammum*. On the other hand, according to those who say, 'Amr demands re-practice of work; to them, it is necessary to perform *wudū*', i.e., ablution and *tayammum* for every obligatory prayer; however, the ruling on repeated *wudū* (ablution) has been repealed.

- (b) If a man says to someone, "You divorce your wife," will he have the right to divorce once, or thrice? The same question may arise when someone tells his wife, you divorce yourself. According to those who think 'Amr (commanding) requires re-practice of work, the wife will be the owner of three divorces. On the other hand, according to those who think that 'Amr (commanding) does not require re-practice of work, she will get the right to divorce once only.²
- (c) Regarding the cutting off the left hand of a thief: based on the rules discussed under the aforementioned maxim, the Ḥanafī jurists say that if a thief steals for the second time, his left hand cannot be cut off. Because Allah SWT says:

﴿وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا﴾

"As for the thief -male or female - cut off the hands of both."³

In the above verse, there is no claim or possibility of repeatedly following the instructions to cut off the hand of the thief. So, the thief's right hand will be cut off.⁴

¹ Sūrah Al-mā'dah: 6.

² Muṣṭafā Sa'id al-khin, 'Athar al-'ikhtilāf fī al-Qawā'id al-'usūliyyah fī 'ikhtilāf al-fuqahā, p. 315, 319.

³ Sūrah Al-mā'dah: 38.

⁴ 'Alā' al-dīn Al-Bukhārī, Kashf al-'Asrār Sharḥu 'Usūl al-bazdawī, v.1, p.123,

Thirteenth Qā'idah (maxim):

“الاحتجاج بالحديث المرسل”

Evidencing with *Ḥadīth al-mursal* (where narrator/Sahabi is omitted in the chain of narration between successor and Prophet).

The meaning of Mursal Ḥadīth:

'Imām Nawawī (Rah.) said in his commentary on Ṣaḥīḥ Muslim: “According to a group of jurists, 'Usūl scholars, Khaṭīb Baghdādī and Muḥaddithīn (Ḥadīth scholars), Mursal is the category of Ḥadīth in which the name of a narrator is omitted at any level. In this sense, *Mursal* and *Munqati'* are synonymous in their eyes.¹ The author of Sharḥ al-Kaukab al-Munir said, “If any person who is not a Companion of the Prophet says that the Prophet (PBUH) said it, his statement will be considered as a mursal. This opinion has been narrated by scholars like, 'Imām Karkhī, 'Allāmah Jurzāni, some scholars of Shāfi'ī school of thought and few other '*Muḥaddithīn*'. Again, according to most of the '*Muḥaddithīn*' and the majority of Islāmic jurists, that definition is specific to 'Tābi'ī'. (That is, to say by any Tābi'ī excluding a Ṣaḥābah (from the narration)-“the Prophet (PBUH) said”).²

This is one of the basic maxims of Fiqh that the Ḥanafī jurists follow. Whereas, according to 'Imām Shāfi'ī (Rah.), Mursal Ḥadīth is not acceptable, 'Imām 'Abū Ḥanīfah (R.) considers this Ḥadīth as an authentic document. The effect of these differences is seen in the case of various practical mas'alah s.

¹ Badr Al-dīn Al-zarkashī, Al-nukat 'Ālā Muqaddimati Ibn Al-ṣalāh, v.1, p.447; Taqī Al-dīn Al-subkī, Al-'ibhāj fī Sharḥ al-minhāj, v.2, p.339.

² Sharḥ Al-kawkab Al-munir, v.2, p.30.

Some mas'alah s and related Mursal Ḥadīths are mentioned below:

- (a) The issue of breaking the ablution as a result of laughter in prayer:

In the light of the principle in discussion, the Ḥanafī 'Imāms consider laughing in prayer to be one of the reasons for breaking the ablution. The evidence for their opinion is the Ḥadīth that the Prophet (PBUH) instructed a person to perform ablution again as a result of laughter.¹

On the other hand, 'Imām Shāfi'ī and the majority of the scholars did not follow the Ḥadīth as the Ḥadīth is Mursal. However, Ḥanafī jurists follow the aforementioned Ḥadīth that is why the Qā'idah (maxim) in discussion is recognized by them.

- (a) If a person holds someone in custody so that another person can come and kill him, will the detainer be caught complicit in the murder?

According to experts in the Ḥanafī and Ḥanbalī school of thought, he will not be considered an accomplice in the murder; rather, the murderer will be given death penalty (for his murder) and the detainer will be given life imprisonment.² In this case, they present a Mursal Ḥadīth as evidence which is narrated from the Prophet (PBUH) on the authority of 'Abdullah ibn 'Umar (may Allah be pleased with him). He said:

¹ Al-zaylā'ī, Naṣbu Al-Rāyah li 'Aḥādith al-Hidāyah, v.1, p.47-76; Al-dārquṭnī, Al-sunan, v.1, p.298-300, Ḥadīth No-602-605.

² Ibn Ḥajar al-'asqalāni, Bulūgh Al-marām min Al-'adillah 'aḥkām, p.441, Ḥadīth No-1172.

إذا أمسك الرجل الرجل وقتله الآخر يقتل الذي قتل و يحبس الذي أمسك

“If the man holds someone in custody and the other kills the captive, the killer will be killed, and the detainer shall be imprisoned”.¹

On the other hand, 'Imām Mālik (Rah.) did not take the Ḥadīth into account.

¹Bayhaqī, Al- sunan al-kubrā, v.8, p.90, Ḥadīth No- 16029; Dāraqutnī, Al-sunan, v.5, p.165, Ḥadīth No- 3270.

Fourteenth Qā'idah:

“اقتضاء الأمر الوجوب”

Obligation is warranted by command.

Islāmic jurists agree that the purpose of the command (*'Amr*) is to impose obligations. This is supported by numerous statements in the Qur'ān and Ḥadīth. For example, it is narrated on the authority of 'Abū Hurayrah (may Allah be pleased with him) that he said, “Allah's Messenger (PBUH) addressed us and said:

أيها الناس قد فرض الله عليكم الحج فحجوا

“O people, Allah has enjoined Hajj upon you, so perform Hajj”.¹
Allah SWT says in the Qur'ān (in this regard):

﴿فَلْيَحْذَرِ الَّذِينَ يُخَالِفُونَ عَنْ أَمْرِهِ أَنْ تُصِيبَهُمْ فِتْنَةٌ أَوْ يُصِيبَهُمْ عَذَابٌ أَلِيمٌ﴾

“Therefore, let those who go against his order beware, lest a trial (Fitnah) should befall them, or a painful torment be inflicted on them”.²

Regarding the interpretation of the above verse, Shaykh Shanqīṭī (may Allah bless him) said in his famous book *'Adwā' al-Bayān*: “The scholars present this verse as proof that the real need of *'Amr* is to make a work obligatory, unless there is any contrary evidence or symptom. This is because in the verse in discussion, Allah threatens disobedience or painful punishment for those who disobey His command. This kind of intimidating statement bears

¹ Aḥmad Ibn Ḥanbal, Al-musnad, v.16, p.355, Ḥadīth No- 10607; Muslim Al-ṣaḥīḥ, v. 2, p.1337; Al-nasā'yī, Al-mujtabā min al-sunan, v.5, p.110, Ḥadīth No- 2619.

² Sūrah Al-nūr: 63.

witness to the fact that *'Amr* makes any action inviolable because there is no severe punishment for not performing any instruction that is not essential.

In short, the Ḥadīths in which *'Amr* (commanding word) has been used whether it is to impose any obligation or to refrain from prohibitions by Shari'ah, all will be counted as evidences to prove the validity of the existing maxim of Islāmic jurisprudence.

However, the condition in this case is that there should be no such symptoms which prevent *'Amr* from paying the obligation. Needless to say, the number of such Ḥadīths is many; there are also numerous verses in the Qur'ān which have been used to impose the obligation.

Fifteenth Qā'idah:

“اقتضاء الأمر المطلق الفور أو التراخي”

Ordinary 'Amr (command) seeks immediate or delayed action.

This Qā'idah includes two opinions. One is that the general requirement of 'Amr is non-delay. The other view is that there is room for delay in the execution of orders intended by 'Amr. The first view is that of the Ḥanbalī School of thoughts.

Most of the Ḥanafī Imāms say that 'Amr is usually intended to seek the implementation of an action. It has no time constraint. So, it is not clear whether a task needs to be implemented quickly or whether it can be done in relaxed time.

On the other hand, 'Imām Shāfi'ī (Rah) has given his opinion in favor of delaying performance. No Ḥadīth has been observed in support of the view that 'ordinary' 'Amr requires to get things done immediately. However, this statement is supported by various verses of the Qur'ān. As Allah (SWT) says:

﴿فَاسْتَبِقُوا الْحَيَاتِ﴾

“So, vie with one another in good works.”¹

Here is another verse:

﴿وَسَارِعُوا إِلَى مَغْفِرَةٍ مِّن رَّبِّكُمْ﴾

“And rush to forgiveness from your Lord.”²

On contrast, in the case of 'Amr, there is a support from the Ḥadīth to the effect that there is a respite for late performance. However,

¹Sūrah Al-baqarah: 148.

²Sūrah 'Āl-'imrān:133.

the supporting Ḥadīth is functional. For example, the ruling of Hajj was made obligatory in the sixth Hijri. But the Prophet (PBUH) performed Hajj in the tenth Hijri. He was accompanied by a number of Ṣaḥābah (companions of the Prophet) who did not perform Hajj before the tenth Hijri even though they could afford it. If performing Hajj was obligatory immediately, it would not be right to perform it late.

On the basis of the above Qā'idah (maxim), differences of opinion is observed among the Islāmic scholars on various issues. For example-

- (a) Whether Zakāt can be delayed after it has become obligatory.
- (b) If a person does not fast in Ramadan, will he be able to make up the fasts later?
- (c) Whether the obligatory Hajj can be delayed even after attaining the capacity.

Sixteenth Qā'idah:

“اقتضاء النهي الفساد والبطلان”

**The underlying claim of 'Nahyī' (prohibition) is
invalidity or vanity.**

This Qā'idah (maxim), being one of the most complex Qā'idahs (maxims) in the Nahyī (**prohibition**) chapter of 'Usūl al-Fiqh, demands a detailed discussion. 'Nahyī' has four conditions:

First condition: Nahyī (prohibition) to be applied in the general sense. That is to say, having no evidence or symptom to the effect that the work on which the prohibition has been imposed is self-inflicted due to external factors or for any ancillary reason.

Second condition: Prohibition on any work due to its entity or part: such as prohibition on sale by throwing pebbles (bay'al-ḥuṣāh), prohibition on sale of female embryos and pregnancy of the embryo.

Third condition: the imposition of prohibition on any work is not in the judgment of its entity; rather, due to the permanent feature attached to it, such as a ban on interest transactions.

Fourth condition: any work is fundamentally Sharī'ah compliant; but, due to the association of any external temporary issue, the ban was imposed. For example, it is forbidden to offer ṣalāt (prayers) on the occupied land.

It is to be noted that this Qā'idah (maxim) is considered as a valid Qā'idah (maxim) of 'Usūl Fiqh by all the jurists. However, there is a difference of opinions among them regarding the four conditions

of 'Nahyī' mentioned above. A detailed discussion on this issue is presented below.

First condition: All the 'Imāms have unanimously agreed that because of the 'Nahyī' used in the general sense, the prohibited act will be considered self-disapproving because of its own entity. But, the condition is that the forbidden act should be included in Sharī'ah prohibited activities like adultery. The work concerned shall be deemed void due to such prohibition, unless there is any indication to the effect that the prohibition on work has been applied to a trial of any permanent or temporary issue.

And if the forbidden act is not like the things which are inherently considered to be wrong and bad like fornication, and falls under the category of Sharī'ah supported or permitted acts like worship and transactions etc., then there are some opinions of the 'Imāms as to whether the act is fāsid (invalid) or bāṭil (void).

First opinion: The general prohibition on any Sharī'ah compliant act proves that the act is bāṭil (void) and fundamentally abhorrent unless there are signs to the contrary.

Most Shāfi'ī Imāms and a number of Mutakallimūn (philosophical theologians) hold this view. In this case, the Ḥadīth they refer to is that-the Prophet (PBUH) said- “من عمل عملاً ليس عليه أمرنا فهو رد”

“He who does something contrary to our way (i.e., Islam) will have it rejected.”¹

It is clear from the above-mentioned Ḥadīth that what the Sharī'ah forbids doing can never be in accordance with the Sharī'ah

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.69; Muslim Al-ṣaḥīḥ, v. 3, p.1443, Ḥadīth No- 1718.

compliance because no work can be prohibited and allowed at the same time. For this reason, according to the message of the Ḥadīth, it has been considered as rejected or invalid. Since there is no Sharī'ah basis for such work at all, no Sharī'ah -recognized work will result in it. Moreover, the companions of the Prophet and their successors (Tābi'ī) have cancelled many acts and agreements based on the prohibitions of Sharī'ah. For example, in the case of cancellation of a trade mixed with interest, they have accepted the following Ḥadīth as a document.

The Prophet (PBUH) said:

”لا تبيعوا الذهب بالذهب إلا مثلاً بمثل، ولا تُشَفُّوا بعضها على بعض، ولا تبيعوا الورق بالورق إلا مثلاً بمثل، ولا تُشَفُّوا بعضها على بعض، ولا تبيعوا منها غائباً بناجز“
 “Do not sell gold for gold unless equivalent in weight, and do not differentiate. Do not sell silver for silver unless equivalent in weight, and do not sell gold or silver (coin) that is not present during the exchange for gold or silver (coin) that is present.”¹

Second opinion: the imposition of a general prohibition on any Sharī'ah compliant work will result in the work being invalidated; but it will not be canceled (invalid). The Ḥanafī jurists and the scholars of the Shāfi'ī school have held this view.

Third opinion: in case of prayer, the corresponding act of prayers will be fāsid (invalid) due to general prohibition. On the other hand, in the case of a transaction, the transaction will not be void due to such restrictions. Shawkānī in his book titled *'Irshād al-Fuhūl* has linked this opinion to Ḥasan Al-Baṣrī, Abū Hāmid Al-

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.74, Ḥadīth No- 2177; Muslim Al-ṣaḥīḥ, v. 3, p.1208, Ḥadīth No- 1584.

Ghazālī, Fakhr Al-dīn Rāzī, Ibn al-Malāhimī, Aḥmad Ibn Raṣṣāṣ and others.¹

Second condition: If the prohibition on a work is applied to the judgment of its entity or part, the work concerned will be unanimously invalid. The work could irrespectively be considered both *fāsid* (invalid) and *bāṭil* (void).

Third condition: If a prohibition is imposed on a work in the judgment of its permanent quality, then the majority of the 'ulamā' opine that because of such prohibition, the concerned work will be invalid in both fundamental and qualitative terms. So the work being *fāsid* (invalid) means *bāṭil* (canceling).

On the other hand, the Ḥanafī 'ulamā' say that due to a kind of prohibition, the concerned work will be qualitatively *fāsid* (invalid); but basically, the legitimacy of the work will prevail. As a result, if the quality problem is removed, the work will be validated again.

¹ Shawqānī, Irshād al-Fuḥūl 'Ilā Taḥqīq al-Ḥaqqi Min 'Ilm al-Uṣūl, v.1, p.280.

Fourth condition: Any work is fundamentally Sharī'ah compliant; however, if the prohibition is imposed due to the association of any temporary issue with it, the concerned work will not be fāsid (invalid) orbāṭil (void); rather, it will remain valid, and the *intended result will be achieved as a result of its performance*. However, the performer will be guilty.

To Summarize, the Qā'idah—"the underlying claim of 'Nahyī' (prohibition) is unanimously applicable to the Islāmic jurists only when Nahyī' is applied in the general sense and the relevant work is included in the things which are inheritedly considered to be wrong and unlawful ('af'āl ḥissyyah). On the other hand, according to most of the Shāfī'ī jurists and some of the Mutakallimīn (scholastic theologians of Islam), the ruling will be the same if the work concerned is Sharī'ah compliant.

Seventeenth Qā'idah (maxim):

“إذا اجتمع الحلال والحرام غلب الحرام”

When ḥalāl and the ḥarām are confronted, the ḥarām will be dominant.

Discussions on the current Qā'idah (maxim) are very important. In fact, the relevance of this Qā'idah is widely observed in the chapters on *al-ta'āruḍ wa al-tarjīḥ* (conflicts of proofs and preference) and the discussion of ḥalāl-ḥarām. The Qā'idah (maxim) carries an important provision to be cautious (*iḥṭiyāt*) about religion. In the case of numerous rules and regulations, it is important to follow this Qā'idah (maxim). This is, because the Shari'ah gives more importance to the avoidance of prohibited provisions than to the observance of prescribed ones.¹

The Documentary Ḥadīths for the Qā'idah:

The following Ḥadīths are the supportive evidence of the Qā'idah in discussion:

1. The Messenger of Allah (peace and blessings be upon him) said:

الْحَلَالُ بَيِّنٌ وَالْحَرَامُ بَيِّنٌ وَبَيْنَهُمَا مُشَبَّهَاتٌ لَا يَعْلَمُهَا كَثِيرٌ مِّنَ النَّاسِ فَمَنْ اتَّقَى
الشُّبُهَاتِ اسْتَبْرَأَ لِدِينِهِ وَعَرْضِهِ وَمَنْ وَقَعَ فِي الشُّبُهَاتِ وَقَعَ فِي الْحَرَامِ كَالرَّاعِي يَرعى حَوْلَ
الْحِمَى يُوشِكُ أَنْ يُوَاقِعَهُ أَلَا وَإِنَّ لِكُلِّ مَلِكٍ حِمًى أَلَا إِنَّ حِمَى اللَّهِ تَحَارُمُهُ.

“Verily, the lawful is clear and the unlawful is clear, and between the two of them are doubtful matters about which many people do not know. Thus, he who avoids doubtful matters clears himself in regard to his religion and his honor, and he who falls into doubtful

¹ Al-Suyūfī, *Al-Ashbāh wa al-Nazā'ir*, p.105-106.

matters [eventually] falls into that which is unlawful, like the shepherd who pastures around a sanctuary, all but grazing therein. Truly every king has a sanctuary, and truly Allah's sanctuary is His prohibitions."¹

2. The Messenger of Allah (peace and blessings be upon him) said:

“دَعْ مَا يُرِيكَ إِلَى مَا لَا يُرِيكَ”

“Leave that which makes you doubt for that which does not make you doubt.”²

What is clear in the Ḥadīth is that if there is no definite knowledge about the validity of an object, it should be discarded. Needless to say, the Ḥadīth in discussion is one of those on which the basic principles regarding 'Ihtiyāṭ or exercising precaution in matters of religion is established.

3. There are innumerable narrations in the treasury of the Holy Sunnah (the deeds and sayings of the Prophet Muḥammad) which give clear instructions on how to exercise caution in matters of religion. For example, 'Aṭīyyah Al-Sa'dī (May Allah be pleased with him) reported:

“لا يبلغ العبد أن يكون من المتقين حتى يدع مالا بأس به حذرا لما به البأس”

"No one will attain complete righteousness until he abandons (certain) unobjectionable (but doubtful) things so as to remain on his guard against something objectionable."¹

¹ Aḥmad Ibn Ḥanbal, Al-musnad, v.30, p.324, Ḥadīth No- 18374; Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.53, Ḥadīth No- 2051; Muslim Al-ṣaḥīḥ, v. 3, p.1221, Ḥadīth No- 1599

² Al-nasā'yī, Al-mujtabā min al-sunan, v.8, p.327, Ḥadīth No- 5711.

4. In this regard, another Ḥadīth, which 'Imām Bukhārī mentions in his Ṣaḥīḥ, in the chapter titled 'Bābu Tafsīr al-Mushābbahāt' (Analysis of Suspicious Things) is noteworthy. 'Adiyy ibn Hātim (may Allah be pleased with him) reported: "I asked, "O Allah's Apostle! I release my dog by the name of Allah and find with it at the game another dog on which I have not mentioned the name of Allah, and I do not know which one of them caught the game." He said-

”لَا تَأْكُلْ، إِنَّمَا سَمَيْتَ عَلَى كَلْبِكَ وَلَمْ تُسَمِّ عَلَى الْآخَرِ“

“Don't eat it as you have mentioned the name of Allah on your dog and not on the other dog.”²

Narrated from 'Ibn Mas'ūd-

”إذا رمى أحدكم طائرا وهو على جبل فمات فلا يأكله فإني أخاف أن يكون قتله ترديه، أو وقع في ماء فمات فأخاف أن يكون قتله الماء“

“If you shoot an arrow at a bird and it falls off a cliff and dies, it cannot be eaten. Because there is a possibility of its death due to falling from above. Similarly, (after shooting an arrow) if it falls into the water and dies, it cannot be eaten because here too there is a possibility of its death by drowning.”

5. 'Uthmān (ra) was asked: What will be the provision for associating with two sisters in wedlock whose ownership has been acquired through purchase? He replied-

”أحلتها آية وحرمتها آية والتحريم أحب إلينا“

¹ Al-tirmidhī, Al-sunan, v.4, p.634, Ḥadīth No-2451; Ibn Mājah, Al-sunan, v.2, p.14009, Ḥadīth No-4215.

² Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.54, Ḥadīth No- 2054.

“It is permissible to associate with two sisters (in wedlock) according to one verse of the Qur’ān, but it is forbidden according to another verse. And the prohibitive ruling is better for us.”¹

6. Another point in support of the Qā’idah in discussion can be mentioned here. That is, ‘Imām Bukhārī (Rah.) narrates – Ibn ‘Abbās, Jarhad and Muḥammad Ibn Jahash (R) narrated from the Prophet (PBUH) that, “thighs are included in the *satar* (the part of the body that is obligatory to be made covered).” And ‘Anas (may Allah be pleased with him) said: The Prophet (PBUH) removed the cloth from his thigh. ‘Imām Bukhārī (may Allah have mercy on him) said in his commentary on these two narrations: “from the point of view of *sanad* (source of narration), the Ḥadīth of ‘Anas (may Allah be pleased with him) is Ṣaḥīḥ and the Ḥadīth of Jarhad is more precautionary. In this way we can avoid conflicts among the ummah.”²

From the above remarks of ‘Imām Bukhārī, it is clear that he has given priority to the Ḥadīth indicating prohibition over the Ḥadīth indicating legitimacy. Because it is a precautionary measure and an effective means of avoiding disagreement among the ummah - this is clear from his statement "The Ḥadīth of Jarhad is more cautious".

Here a statement in the famous book *Al-Manthūr Fī al-Qawā'id al-Fiqhīyah* by ‘Imām Zarkashī (Rah.) seems to be relevant. He said that the statement of the ‘Usūl scholars (legal theorists) "when the issues of ḥalāl and ḥarām are confronted in a matter, it is

¹ Mālik, *Al-mu'tta'*, v.2, p.538-539, Ḥadīth No-34.

² Bukhārī, *Al Jāmi' Al-ṣaḥīḥ*, v.1, p.83.

obligatory to reject the aspect of ḥalāl "-will be applied only when ḥalāl is intended to be *mubāh* or legitimate work. On the other hand, if wājib (obligatory) and prohibitive provisions are combined, then the aspect of wājib will be given priority.¹

A part of a long Ḥadīth of Bukhārī Narrated by 'Usā'mah Ibn Zayd (may Allah be pleased with him) can be mentioned here as a proof. The Prophet (PBUH) was passing by a gathering of Muslims, polytheists, idolaters, and Jews, among them was 'Abdullah ibn 'Ubayy ibn Sulūl. And 'Abdullah bin Rawāha (RA) was also present in this meeting. Then the Prophet (PBUH) greeted them with *Salām*.²

Shah Waliullah Dehlawī (may Allah have mercy on him) after quoting some Ḥadīths in this regard said: 'Sometimes in a mas'alah two opposing religious aspects come together: on the one hand it is valid, on the other hand it is forbidden. One of the reasons for this is that there may be two conflicting Sharī'ah documents such as two contradictory Ḥadīths or two contradictory *Qiyās* (jurisprudential decision of jurists) regarding the mas'alah. Another reason is the disagreement over the practical application of the principles prescribed by the Sharī'ah for determining ḥalāl and ḥarām. So, the relationship between Allah and His servant will be perfect only when the servant avoids such doubtful places and accepts the doubtless matters. Thus, when religiosity and Allah-fearing come into his heart, the light of faith will take place deep into his heart'.³

¹ Al-zarkashī, Al-manthūr fī al-Qawā'id Al-fiqhiyyah, v.1, p.132.

² Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.8, p.56, Ḥadīth No-6254.

³ Shah Waliullah Dehlawī, Ḥujjatullah Al-bālighah, v.2, p.156.

Finally, it is worth mentioning that there are several levels of abstinence and *'Iḥṭiyāt* (precaution) in religious matters. And in any case, *'Iḥṭiyāt* (precaution) is obligatory only when it opens the doors to getting involved in ḥarām. Because the scope of *'Iḥṭiyāt* (precaution) is so wide that innumerable mas'alas in relation to *'ibādah* (worship) and transactions are established. And in all cases and at all levels, *'Iḥṭiyāt* (precaution) is possible only for one who has attained the highest level of taqwa and abstinence.

Practical examples:

1. It will not be lawful to eat an animal such as a mule that was born from the intercourse of edible and inedible animals.
2. If the meat of slaughtered animals and dead animals is mixed together, it cannot be eaten from that mixture.
3. If a fire-worshiper associates with a Muslim in hunting or slaughtering an animal, that animal cannot be eaten.

Modern masā'il:

1. The joint companies whose core activities are lawful; but they sometimes deposit certain profit-keeping assets in different banks. The contemporary Islāmic scholars have differing views on what will be the provision for taking shares of the joint companies because though the companies operate lawful activities, they sometimes have profit taking deposits in the non-Sharī'ah compliant bank. In this case, the more preferable opinion is investing in these companies for the purpose of business or shares will not be legal. Because here, as a result of the mixture of ḥalāl and ḥarām, ḥarām will be dominant.
2. Drugs that are made from unhealthy, dirty and unclean substances will not be valid for treatment, according to a strong opinion. Here also ḥarām will be dominant.
3. The ruling for using drug, which is made from a mixture of heparinsecreted from the intestines of pigs with various chemicals, is also identical to previous ruling.

Eighteenth Qā'idah (maxim):

”إذا تعارض مفسدتان روعي أعظمهما ضررا بارتكاب أخفهما، الضرر
الأشد يزال بالضرر الأخف، يختار أهون الشرين“

**When greater and lesser banes are in incompatibility,
the lesser shall be committed.**

Severe harm is removed by the lesser harm.

**Less harmful option will be chosen between two
harmful options.¹**

Although the above three Qā'idahs (maxims) are different in terms of words, they are the same and indifferent in terms of meaning. Basically, these Qā'idahs are derived from one of the basic principles recognized by the Sharī'ah “جلب المصالح ودفع المفساد” (securing welfares and repelling banes).

The Documentary Ḥadīths for the Qā'idah (maxim):

- (1) Narrated Yahya Ibn Saeed, he heard 'Anas Ibn Mālik (may Allah be pleased with him) reported: Once a Bedouin urinated in the Masjid. Some of the persons shouted and stood up to reprimand him, but the Messenger of Allah (PBUH) said: 'Stop; don't interrupt him.' (The narrator said), and when he had finished, the Messenger of Allah (PBUH) called for a bucket of water and poured it over his urine.²
- (2) 'Anas b. Mālik narrated that an Arab (Bedouin) stood in a corner of the Masjid and urinated there. Some people (the Companions of the Prophet who were present there) stood to stop him, but the

¹ Majallah Al-Aḥkām Al-'Adaliyyah, p. 19, section: 28-29.

² Muslim, Al-ṣaḥīḥ, v. 1, p.236, Ḥadīth No-284.

Messenger of Allah (PBUH) said, 'Stop; don't interrupt whiel he urinates'.¹ 'Anas (may Allah be pleased with him) said: When he had finished, the Messenger of Allah (PBUH) ordered for a bucket of water and poured it over his urine.²

Explaining the Ḥadīth, 'Imām Nawawī said: The point of the Ḥadīth is to treat the ignorant person with humility, avoid harsh and painful behavior and educate him in necessary teachings especially when the person does not commit it out of arrogance and racklessness.

Another notable aspect of the Ḥadīth is that the serious case has been prevented by adopting a comparatively the minor one between the two parts. This is because the Prophet (PBUH) asked the Ṣaḥābah not to interrupt him from urinating for two reasons:

First: if the man were stopped urinating immediately, he would have suffered. Since the Masjid has already been defiled, increasing the level of defilement is considered milder than hurting the person.

Secondly: A small part of the mosque has become defiled due to urination. Now if this man is prevented from urinating in the middle, then his body and clothes will be defiled with urine and at the same time many places of the Masjid will become impure.³

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, p.80.

² Muslim, Al-ṣaḥīḥ, v. 1, p.236, Ḥadīth No-284

³ Al-Nawawī, Al-minhāj sharḥu ṣaḥīḥ Muslim bin Al-hajjāj, v.3, p.191.

Nineteenth Qā'idah (maxim):

“الإقرار حجة ملزمة بنفسه لا يحتاج فيه إلى القضاء”

The confession is a proof that automatically imposes an obligation. No judgement is required on its effectiveness.

According to the majority of jurists, the meaning of 'Iqrār (confession) is the informing people regarding the affirmation of rights of others over himself. It is clear from the statement of the Sharī'ah, (Islāmic legal system) that a confession is a document that automatically imposes an obligation. No decision is required on its effectiveness. Whenever the subject of *qaḍā'* or judgments associated with '*iqrār*' (endorsement), it will be considered in a metaphorical sense. In this case, the meaning of the *qaḍā'* (decision) will be the issuance of work order to realize what has been proved because of the confession ('*iqrār*'). Because the right is established only as a result of confession ('*iqrār*'), it has no place in the judicial process.¹

Moreover, all jurists agree that a judicial confession will be treated as separate evidence.² That is, the confession at this stage is so strong that if all the necessary conditions are found in it, it becomes inevitable for the confessor to act accordingly and it becomes necessary for the judge to give a verdict accordingly. As a result, Qāḍī (the judge) does not have the power to give his own judgment against such a confession. Because a judicial confession

¹ Mabādī al-qaḍā al-shar'ī fī Khamsīna 'āma, v.1, p.34.

² 'Ādam wahayb, Sharḥu Qānūn al-ithbāt, (Baghdād: Maṭba'ah al-ma'ārif, 1st edition, 1984), p.145.

is a document according to which it is obligatory for the confessor to execute the confession as it is the duty of the judge to take confession into account and settle the case. In this way, by establishing the rights, it will be possible to prove the legal status or legal reality of each opponent.¹ In the book *Mājahllah Al-Aḥkām Al-'Adaliyyah*, it is stated: The person can be forced according to his confession. So, if the confessor admits something, he will be forced to realize it. In this case, the judge will not interfere in any way; rather, his duty is to give judgment according to that confession.²

So, in a nutshell, the confession ('iqrār) is a confirmation about the establishment of right that forces the confessor to realise what has been confessed already. The historical events of stoning in the case of prophet's companion Mā'iz and the lady of Ghāmidiyya tribe could be taken as examples of the maxim, where the verdict of stoning given by the prophet due to the confession of adultery.

¹ Ibid. p.144.

² 'Abbāsī, 'ārif al-suwaydī, Sharḥu Majallah Al-Aḥkām Al-'Adaliyyah.

Twentieth Qā'idah (maxim):

”إِذَا بَطَلَ الْأَصْلُ يُضَارُّ إِلَى الْبَدَلِ“

When the root becomes void, the substitute shall be sought.¹

When the original subject is discarded, it is moved to the alternative.² An alternative is taken if the original is missing or if it is abolished for any other reason. The following statement of Ibn al-Qayyim (Rah.) supports the view: The basic principle of the Sharī'ah, is that branches and alternatives are resorted to only when the use of the original becomes difficult. The example might be the use of soil to achieve sanctity.³ Because, if you can afford, observing/performing the original is essential, the alternative is abandoned. Therefore, if the abducted object is in the hands of the abductor, it is essential (for him) to return it. In this, the return is completed in both literal and figurative sense. On the other hand, if an exchange or substitute (stolen object) is realized, it is metaphorically redeemed. And this method is only a means of impunity and an alternative to the necessary method. Alternatives are accepted only when the original is missing or rare.

It is also evident from the existing Qā'idah that the original must be repaid. Therefore, it is not permissible to pay the allowance without the consent of the owner of the money as long as the payment of the original is possible because in the presence of the original, it is not permissible to go for alternatives.⁴

¹ Majallah Al-Aḥkām Al-'Adaliyyah, section:53.

² Aḥmad al-zarqā, Sharḥ al-Qawā'id al-fiqhiyyah, p.227.

³ Ibn Al-Qayyim, 'i'lām al-mu'qqi'in, v.3, p.399.

⁴ 'Alī Haydar, Durar Al-ḥukkām Sharḥ Majallah Al-Aḥkām, v.1, p.49.

Practical examples:

- ❖ If the abductor has an abducted object in his hand, the judge will order it to be returned immediately. It will not be valid to decide to collect any other item as an alternative. However, if the stolen object does not exist in the hands of the abductor, the matter will remain under the consideration of the judge. If similar goods are readily available in the market, the judge will order the recovery of the same amount of goods as the stolen goods. And if similar goods are not readily available in the market, instruct to pay the same amount.
- ❖ Slaughter is the main provision in the case of animals. However, if the animal is not domesticated or falls into the well, alternative provisions will be adopted. And the alternative provision is to make blood flow from the body of the animal in the possible way.
- ❖ If there is a dispute between the husband and wife about the dower regarding the amount of the dower, the judgement will be given with a *mahr al-mithl* or an appropriate dower (A dower that is not pre-determined and that is determined by the bride's socio-economic and environmental considerations).¹

¹ Al-'atāsī, Sharḥu Al-majallah, v.1, p.129.

Twenty First Qā'idah (maxim):

”الْإِنْفَاقُ بِأَمْرِ الْقَاضِي كَالْإِنْفَاقِ بِأَمْرِ الْأَبِ أَوْ: الْإِنْفَاقُ بِأَمْرِ الْقَاضِي
كَالْإِنْفَاقِ بِأَمْرِ الْمَالِكِ“

**Spending under the direction of a judge is equivalent to spending under the direction of a father. Or
Spending under the direction of a judge is like
Spending under the direction of an owner.**

If the father does not spend for the children after the judge places the responsibility of the children's expenses on the shoulders of the father, then if the mother spends for the maintenance of the children with the loan as directed by the judge, the mother will get back all the spent amount. Because, spending for the children under the direction of the judge is like spending under the direction of the father.¹

If we focus deeply on the current Qā'idah, its indescribable importance and greatness becomes clear because of its principle to judge something. For example, a person found a lost goat, then took the cost of its food from his own wealth at the behest of the judge. If the owner of the goat turns up after the death of the goat, the person will get back from the owner all the spent amount for the goat because spending under the direction of the judge is equivalent to spending under the direction of the owner.²

¹ Al-ṣadar al-shahīd, Sharḥu 'Adab Al-Qādī, v.4, p.298.

² Al-ḥamzāwī, Al-fawā'id Al-bahīyyah, p.282.

Twenty Second Qā'idah (maxim):

“أَلْإِحْسَانُ إِلَى الْأَبْرَارِ أَوْلَى مِنَ الْإِحْسَانِ إِلَى الْفُجَّارِ”

Kindness to the righteous people is more important than goodness to the wicked/ungodly.

Sharī'ah-based documents for the Qā'idah (maxim):

The Prophet (PBUH) said:

لَا يَأْكُلُ طَعَامَكَ إِلَّا تَقِي

Do not serve your food except to one with Taqwa (fear of Allah).¹

Although it is lawful to give Zakāt to both the pious and the irreligious and immoral, the Muslim will get priority over the disbelievers because a virtuous Muslim is superior to a wicked and ungodly one.

When Ibn Taymiyah was asked about the payment of Zakāt to those who innovate (new things in Islam), he replied: “The giver of Zakāt should look for a pious person, who cares about the principles of the Sharī'ah. Zakāt should not be given to a sinful person who, if given Zakāt, increases his wickedness.”²

¹ Abū Dāwūd, Al-Sunan, v.4, p.259, Ḥadīth No: 4832; Al-tirmidhī, Al-sunan, v.4, p.600, Ḥadīth No-2395.

² Ibn Taymiyyah, Majmū' Al-fatāwā, v.25, p.87.

Twenty Third Qā'idah (maxim):

”إِذَا اجْتَمَعَتْ عِبَادَتَانِ مِنْ جِنْسٍ وَاحِدٍ وَاسْتَوَتْ، تَدَاخَلَتْ أَفْعَالُهُمَا
وَكَتَفِي فِيهِمَا بِفِعْلِ وَاحِدٍ“

When two similar acts of worship (‘ibādah) come together, one action penetrates the other and the action of one suffices for the other.¹

The phenomenon can happen in two ways:

First: Performing two acts of worship with one action. In this case, according to the popular opinion, the condition is the niyyah (intention) for both acts of worship. For example-

- (A) If a person is obliged to take a bath again after the invalidation of his ablutions, then it will be sufficient for him to attain greater purity, that is, purity through taking a bath.²
- (B) If a person is appointed to perform Hajj and ‘Umrah together, according to the popular opinion, it will be enough for him to perform Ṭawāf (to walk around the Holy Ka‘bah) and Sa‘ī (the ritual of walking back and forth seven times between two small hills of Ṣafā and Marwā) once.³

¹ Ibn Rajab, Qawā'id fī al-fiqh al-'islāmī, p.23-24.

² Ibid. p.23.

³ Ibid.

Secondly, to make the intention of performing one of the two acts of worship (‘ibādah) and to abolish the provision of the other. For example-

- (A) If a person comes to the Masjid after ‘iqāmah’ i.e. standing for the obligatory congregation, the *Taḥiyyah al-Masjid* (the *Ṣalāt* of greeting the Masjid) will be revoked from him.
- (B) When the performer of ‘Umrah enters Makkah, he will start the work with *Ṭawāf al-‘Umrah* (the *Ṭawāf* that is carried out for ‘Umrah outside of the Hajj season); it is not necessary for him to perform *Ṭawāf qudūm* (The *Ṭawāf* of Arrival).

Twenty Fourth Qā'idah (maxim):

”أَحْكَامُ الْوَسَائِلِ كَأَحْكَامِ الْمَقَاصِدِ، وَمَا لَا يَتِمُّ الْوَاجِبُ إِلَّا بِهِ فَهُوَ وَاجِبٌ“

The ruling of means (wasā'il) are same to the rulings of objectives (maqāsid).

Anything fulfilling an obligation (Wājib) is also an obligation.¹

The above Qā'idah (maxim) is related to the maxim 'Al-'umūr bi maqāsidihā' (matters are judged according to intentions) by judgment of actions based on the purpose of the Qā'idah discussed earlier. The essence of the Qā'idah is that the ruling of the intended subject will be applicable to the respective means and materials. Therefore, in the eyes of the Sharī'ah, the purpose of which is Wājib (obligatory), its means it will be at the level of Wājib. And the purpose of which is Ḥarām (forbidden), its sources and materials will be at the level of Ḥarām. In other words, the same ruling applies to every means and materials, which is prescribed by the Sharī'ah, for the relevant purpose. For example, performing the obligatory prayers, fasting, Hajj, 'Umrah, the essential rights (such as the rights of Allah, the rights of parents, the rights of relatives, the rights of the wife, etc.). And all those matters except which the above rulings will not be fulfilled, those matters will also be at the level of Wājib (obligatory). For example, walking for the place of prayers, attaining purity for prayers, etc.

On the other hand, since the acts of worship such as nafl (supererogatory) prayers, ṣadaqahh (charity), etc. are Sunnah, their

¹ 'Alā'ī, Al-majmū' Al-madhahib, p.570.

means and materials will be at the Sunnah level. For example, crossing the road for the purpose of performing these deeds.

Similarly, prohibited matters such as *shirk*, murder, adultery, drinking alcohol, taking usury, etc. are also noteworthy. Every means and path that leads to such forbidden things is Ḥarām (forbidden). These things will include those tactics which are considered as a means of engaging in usury or any other Ḥarām matter. In this way, the means, and materials of Makrūh (indecent) will be Makrūh.

Similarly, one of the great purposes of the Sharī'ah, is to ensure the protection of human dignity from obscenity and wickedness. That is why, it is needless to say that the free movement of women and displaying their unabashed beauty is spreading obscenity in the name of entertainment and acting in the current films and various serial programs.

Chapter Two

Concerning Qawā'id (maxims) starting with Arabic letter باء (bā')
(There are four Qawā'id (maxims) under this chapter)

First Qā'idah (maxim):

“بِقَاءِ مَا كَانَ عَلَى مَا كَانَ”

There is a presumption of continuity.¹

Its origin is according to the jurisdiction of 'Imām 'Abū Ḥanīfah. This principle is known as *Al-'istiṣhāb* (presumption of continuity) in the terminology of Sharī'ah. This means: “To keep on maintaining the work that was done in the past decisively and not to allow the work that was previously in the state of disallowance. No change will be made in the previous provision until there is no valid document to change it.” And the principle called *'istiṣhāb* is regarded as a controversial document of Sharī'ah. Many 'Usūl scholars and jurists have favored adopting this principle at the time of Qiyās dilemma. If a mujtahid (a scholar with the capacity of independent reasoning) finds a dispute between the two Sunnahs (the deeds and sayings of the Prophet Muḥammad), then he can apply this rule to determine the provision in case he does not find any solution from Qiyās (rational reasoning) and statements of the companions of the Prophet in resolving the dispute. For example, the documents of the Sharī'ah, are contradictory in the Islāmic law about the left over water of the donkey. The jurists have opined that no impurity can be cleansed by such an animal and no sacred thing (based on precedent) can be defiled. They issued a ruling that the leftover water of donkeys and mules is suspicious. If water

¹ Majallah Al-Aḥkām Al-'Adaliyyah, p. 16, section: 5.

other than this is not available, then perform ablution with it and also perform tayammum.¹

The Documentary Ḥadīths for the Qā'idah (maxim):

'Imām Bukhārī (may Allah have mercy on him) narrated in his *Ṣaḥīḥ*, there was once a man who made a complaint to the Messenger of Allah (PBUH) that he hesitated as if he sensed something (fart) in his prayer (*Ṣalāt*). Allah's Apostle replied:

“لَا يَنْقُتِلْ - أَوْ لَا يَنْصَرِفْ - حَتَّى يَسْمَعَ صَوْتًا أَوْ يَجِدَ رِيحًا”

“He should not leave his prayers unless he hears sound or smells something.”²

This is, indeed, a very important principle. This proves that man cannot abandon a certain thing without another certain thing as its equivalent. The Messenger of Allah said:

“إِنَّ الدِّينَ يُسْرٌ، وَلَنْ يُشَادَّ الدِّينَ أَحَدٌ إِلَّا غَلَبَهُ، فَسَدِّدُوا وَقَارِبُوا وَأَبْشِرُوا”

“Indeed, this religion (of Islam) is easy, and whoever makes the religion a rigour, it will overpower him. So, follow a middle course (in worship); if you can't do this, do something near to it and give glad tidings”.³ Allah SWT says:

﴿وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ﴾

“Allah has not laid upon you any hardship in the Religion.”⁴

¹ Al-Qudurī, Al-Mukhtaṣar, p.16.

² Bukhārī, Al Jāmi' Al-ṣaḥīḥ, Ḥadīth No-137; Muslim Al-ṣaḥīḥ, Ḥadīth No- 361.

³ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, Ḥadīth No-39; Muslim Al-ṣaḥīḥ, Ḥadīth No- 2816.

⁴ Sūrah Al-ḥajj: 78.

Practical examples:

1. If a person feels sure about performing ablutions, (but he doubts of either farting or urinating or something else that makes the ablutions invalidated) he will remain pure.
2. If a person doubts about the fact that it is Fajr by eating at the end of the night, his fast will be purified. However, it is better not to eat in doubt.
3. If a divorced woman claims that her waiting period is not over, she is entitled to maintenance (by her husband) during the 'iddah (waiting period) because the real thing is to remain the waiting period unexpired.

Second Qā'idah (maxim):

“الْبَيِّنَةُ عَلَى الْمُدَّعِي وَالْيَمِينُ عَلَى الْمُدَّعَى عَلَيْهِ”

***Actori incumbit onus probandi: Evidence for the plaintiff and oath for the defendant.*¹**

This principle is one of the most important principles of the Sharī'ah, on which the judiciary depends. Without this rule, resolving disputes would have been extremely complicated for the judges. It is very important for the judge to know the real secret of the dispute between the two parties. The plaintiff, for example, claimed that the defendant had confiscated his property (and the nature of the assets is changeable). The defendant, on the other hand, denied the plaintiff's claim. In this situation, first of all, it is necessary to reveal the facts. Did there really happen to be a seizure of resources or not? To know this, the judge is subject to the general rule of taking evidence (from the plaintiff) and summoning the oath (to the defendant).² This is because it is impossible to know the facts without providing the information of the person present at the time of the incident or the credible statement of the property owner. This principle is directly related to the Ḥadīth of the Prophet (PBUH). And this Ḥadīth is considered a very important, more powerful and widely beneficial Ḥadīth. It is said of this principle that it is the best judgment (Faṣl al-Khiṭāb) given to the Prophet Dāūd (PBUH).

¹ Majallah Al-Aḥkām Al-'Adaliyyah, section: 28, 29.

² Shah Waliullah Dehlawī, Ḥujjatullah Al-bālighah, v.2, p.258.

The Documentary Ḥadīths for the Qā'idah:

The above-mentioned Qā'idah is taken from the following Ḥadīth of the Prophet (PBUH). He said:

لَوْ يُعْطَى النَّاسُ بِدَعْوَاهُمْ لَادَّعَى نَاسٌ دِمَاءَ رِجَالٍ وَأَمْوَالَهُمْ وَلَكِنَّ الْيَمِينَ عَلَى الْمُدَّعَى عَلَيْهِ.

If the people were given according to their claims, they would claim the lives of persons and their properties; but the taking of an oath is upon him who denies.¹

The plaintiff basically claims something contrary to the financial situation and claims something extra. On the other hand, the real thing is in the hands of the defendant, and he is the bearer of the thing considering the external situation.

The Prophet (PBUH) explained the reason behind making such a custom lawful in the aforementioned Ḥadīth. He says; "لَوْ يُعْطَى النَّاسُ" If the people were given according to their claims...then..." that means, the door to mutual oppression would have been open. So, the plaintiff must present evidence against his claim. And the witness who will be present as evidence must be honest and acceptable.²

¹ Aḥmad Ibn Ḥanbal, Al-musnad, v.5, p.266, Ḥadīth No-3188; Bukhārī, Al-Jāmi' Al-ṣaḥīḥ, v.6, p.35, Ḥadīth No-4552; Muslim Al-ṣaḥīḥ, v.3, p.1336, Ḥadīth No- 1711; Ibn Mājah, Al-Sunan, v.3, p.778, Ḥadīth No- 2321; Abū Dāūd, Al- Sunan, v.3, p. 311, Ḥadīth No: 3619; Tirmidhī, Al-Sunan, v.3, p. 19, Ḥadīth No-1342; Al-nasā'yī, Al-mujtabā min al-sunan, v.8, p. 248, Ḥadīth No: 5425.

² Shah Waliullah Dehlawī, Ḥujjatullah Al-bālighah, v.2, p.258.



Another reason given in the Ḥadīth is that the plaintiff's claim is weak. Because he is claiming the opposite of the external condition. So, in order to compensate for and counter act his weakness, he must present strong evidence. And the strongest evidence is the testimony. The opposing side (Defendant's side) is strong. Because the basic condition of the person is to be free from liability. So, it will be enough for him to present weak evidence which is taking an oath. This rule, which is indicated by the Ḥadīth of the Prophet, is very focused and sincere in providing security of human life and property in the Islāmic Sharī'ah. This is the principle that the Muslim person will be free from all grievances and faults. But yes, he can be convicted on the basis of concrete evidence.

Third Qā'idah (maxim):

“الأصل براءة الذمة”

The real provision is to be free from responsibility.¹

Islāmic juristic meaning of the Qā'idah: A general principle of Islāmic jurisdiction is that every person is intrinsically free from any liability, and the imposition of liability on him is contrary to the principle.² Therefore, in the case of imposition of duty on someone else, the testimony of only one person is not accepted, unless there is another witness or plaintiff's oath. For this, the statement of the defendant is taken with oath. Because (according to the principle) he has external precedent, or he is established on the basic condition.³ 'Abū al-Ḥasan al-Karakhī described the matter as follows: “The basic principle is that only those who have external precedent are acceptable and the evidence must be presented by the person who claims the opposite of external conditions.⁴ This principle is acceptable to all academicians. The Islāmic jurists, with the support of the Qur'ān, the Sunnah (the deeds and sayings of the Prophet Muḥammad), and the intellect, has presented strong evidence about the acceptability of this principle in the Sharī'ah (Islāmic legal system).

¹ Majallah Al-Aḥkām Al-'Adaliyyah, p.17, section: 8.

² Muḥammad Ṣidqī 'āl brūnū, Al-wajīz fī 'Idāḥ Qawā'id Al-fiqhi Al-killiyyah, p.179

³ Al-Suyūfī, Al-Ashbāh wa al-Nazā'ir, p.53, Ibn Nujaym, Al-Ashbāh wa al-Nazā'ir, p.59.

⁴ Al-karkhī, Al-'Usūl, p. 308, maxim:3.

The Documentary Ḥadīths for the Qā'idah (maxim):

The above Qā'idah is derived from the Ḥadīth of the Prophet. The Prophet (PBUH) said:

"الْبَيِّنَةُ عَلَى الْمُدَّعِي وَالْيَمِينُ عَلَى الْمُدَّعَى عَلَيْهِ"

"The proof is due from the claimant, and the oath is due from the one the claim is made against."¹

Practical examples:

- 1) The buyer is obliged to bear the witness to collect the price of the purchased goods, just as he has the right to enjoy the benefits of the purchased goods.
- 2) If someone claims that he owes a debt to another person and the defendant denies that claim, then the defendant's statement will be taken with an oath. Because the basic principle is to be free from liability. Yes, if the plaintiff can prove on the basis of evidence that he actually owes a debt, then it is different.
- 3) If there is a dispute between the two parties over the value of the damaged goods, then the statement of the person who caused damage will be accepted (the person who caused damage may be the borrower or the unjust depriver). Because he is claiming to be free from liability for the excess of the fixed price. And the principle is that people should be free from liability. Thus, his statement will be taken with oath.

¹ Majallah Al-Aḥkām Al-'Adaliyyah, section: 28, 29.

Fourth Qā'idah (maxim):

“الْبَيِّنَةُ حُجَّةٌ مُتَعَدِّيَةٌ وَالْإِقْرَارُ حُجَّةٌ قَاصِرَةٌ”

Evidence is an adequate proof and confession is an inadequate proof.¹

A confession ('iqrār) is a document that is confined to the confessor, not responsive to others. Presenting evidence (bayyinah), on the other hand, is a reactionary document. That is, it creates a reaction against the person against whom the evidence is presented and forces him to accept the claim. Because evidence (bayyinah) is not accepted as a document (hujjah) without a judge's decision. And the authority of the judge is absolute. Therefore, he reserves the right to implement his decision for all. Evidence (bayyinah) is a public document (hujjah). Allah SWT says:

﴿قَالَ يَا قَوْمِ أَرَأَيْتُمْ إِن كُنْتُ عَلَىٰ بَيِّنَةٍ مِّن رَّبِّي﴾

He (Ṣāliḥ) said, “O my people, have you seen (that) in case I (rely) on Supreme evidence from my Lord.”²

A confession ('iqrār), on the other hand, is a document based on the confessor's assumptions. And the confessor's assumptions cannot be a document for another.³ This is what 'Imām Karkhī highlighted in his speech. He said people's personal matters would be dealt with in accordance with their confession. But the confession of revoking the rights of others and imposing

¹ Sharḥ Majallah Al-Aḥkām Al-'Adaliyyah, p.68, section: 78; Al-wajīz, p.204.

² Sūrah Hūd: 63, 88.

³ Aḥmad al-zarqā, Sharḥ al-Qawā'id al-fiqhiyyah, p.327.

something on others will not be attested.¹ Again, in the terminology of the Shari'ah, the matter proved by the document is like the matter proven by the eyewitness. And the provisions proved on the basis of eyewitness apply to all. On the other hand, the authority of the confessor is limited to himself, he cannot exert authority over others. So, even though this document is strong, it will be limited to the confessor.²

Practical examples:

- 1) Someone claimed to owe a joint debt from him and another on behalf of both. Then his confession will be applicable for him alone, not for his partner. If his partner confesses or evidence is found, his confession will be taken into account.
- 2) If the owner of a land confesses that he is not the owner of the land, the owner is someoneelse. His confession will be accepted in his own case, not by the tenant or leaseholders (if that is under the lease). So, the lease will not be revoked. Ownership of the land will be decided for the actual owner after the lease period has expired.

¹ Al-karkhī, Al-'Usūl, p. 1120.

² Al-'atāsī, Sharḥu Al-Majallah, v.1, p.222; Al-maḥāsini, Sharḥu Al-Majallah, v.1, p.99.

Chapter Three

Concerning Qawā'id (maxim) starting with Arabic letter ta (تاء)
(There are ten Qawā'id (maxims) under this chapter)

First Qā'idah (maxim):

“التصرف على الرعية منوط بالمصلحة”

**Disposition of people is contingent upon interest or
Ruler's decisions must be in favour of the people.¹**

This Qā'idah is based on the school of 'Imām 'Abū Ḥanīfah (Rah.). In this regard, there are also statements from 'Imām Shāfi'ī (Rah.). He quotes, “the position of 'Imām to the people is like that of a *walī* or guardian for an orphan.”

This is a very important Qā'idah associated with the principles of Islāmic Sharī'ah, and Islāmic politics. This principle sets a definite limit and standard for all the activities of a judge. Similarly, a range of responsibilities of any responsible of the Muslim community is given here. 'Allāmah Tājuddīn Subkī (Rah.) has described the law in his commentary as follows: "One who interferes in the affairs of another must intervene with the purpose of welfare in mind."² Because the Khalīfah appoints the judges (administrators). And other officials, judges and administrators of the state are not free and independent to act like Khalīfah.

On the contrary, the administrators are the representatives of establishing justice, suppressing oppression, preserving human

¹ Majallah Al-Aḥkām Al-'Adaliyyah, p.66, section: 58.

² Al-subkī, Al-Ashbāh wa al-Nazā'ir, v.1, p.310; Ibn Nujaym, Al-Ashbāh wa al-Nazā'ir, p.145.

rights and character, maintaining peace and order, propagating knowledge and science, keeping the society free from anarchy, and conducting all the welfare activities of the Ummah in the best possible way. Their responsibility is to do a great deal of welfare activities for the betterment of the Ummah. This is called public interest.

The authentic Ḥadīths for the Qā'idah:

- 1) أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ " أَلَا كُلُّكُمْ رَاعٍ وَكُلُّكُمْ مَسْئُولٌ عَنْ رَعِيَّتِهِ فَالْأَمِيرُ الَّذِي عَلَى النَّاسِ رَاعٍ عَلَيْهِمْ وَهُوَ مَسْئُولٌ عَنْهُمْ وَالرَّجُلُ رَاعٍ عَلَى أَهْلِ بَيْتِهِ وَهُوَ مَسْئُولٌ عَنْهُمْ وَالْمَرْأَةُ رَاعِيَةٌ عَلَى بَيْتِ بَعْلِهَا وَوَلَدِهِ وَهِيَ مَسْئُولَةٌ عَنْهُمْ وَالْعَبْدُ رَاعٍ عَلَى مَالِ سَيِّدِهِ وَهُوَ مَسْئُولٌ عَنْهُ فَكُلُّكُمْ رَاعٍ وَكُلُّكُمْ مَسْئُولٌ عَنْ رَعِيَّتِهِ.

That the Prophet (PBUH) said: "Indeed, each of you is a shepherd and all of you will be questioned regarding your flock. The commander who is in authority over the Muslims is responsible and he will be questioned regarding his responsibility. The man is responsible over the inhabitants of his house, and he is the one who will be questioned about them. The wife is responsible in her husband's house, and she will be questioned about it. The slave is responsible regarding his master's property, and he will be questioned about it. Indeed, each of you is a shepherd and each of you will be questioned about his flock."¹

- 2) عَنْ مَعْقِلِ بْنِ يَسَارٍ، سَمِعْتُ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ: "مَا مِنْ عَبْدٍ اسْتَرْعَاهُ اللَّهُ رَعِيَّةً، فَلَمْ يَحْطَظْهَا بِنَصِيحَةٍ، إِلَّا لَمْ يَجِدْ رَاحِيَةَ الْجَنَّةِ.

Narrated by Ma'qil Ibn Yasār (R): I heard the Prophet (PBUH) saying, "Any man whom Allah has given the authority of ruling

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.2, p.5, Ḥadīth No-893.

some people and he does not look after them in an honest manner, will never feel even the smell of Paradise.”¹

In the first Ḥadīth, there is instruction to be conscious and active in performing one's duties ensuring welfare and the use of power judiciously. This is the interpretation of the second Ḥadīth because the ruler is ordered to take care of the welfare of the people on behalf of the legislator. He has been warned of severe punishment for any deviation.

- 3) The following narration quoted in the Sunan of Sa'īd Ibn Manṣūr (may Allah be pleased with him) can also be mentioned as evidence of this Qā'idah. He said:

حَدَّثَنَا أَبُو الْأَخْوَصِ، عَنْ أَبِي إِسْحَاقَ، عَنِ الْبَرَاءِ قَالَ: قَالَ لِي عُمَرُ، رَضِيَ اللَّهُ عَنْهُ: إِنِّي أَنْزَلْتُ نَفْسِي مِنْ مَالِ اللَّهِ بِمَنْزِلَةِ وَالِي الْيَتِيمِ، إِنْ احْتَجْتُ أَخَذْتُ مِنْهُ، فَإِذَا أَيْسَرْتُ رَدَدْتُهُ، وَإِنْ اسْتَغْنَيْتُ اسْتَعْفَفْتُ.

He narrated it from 'Abū al-Aswad 'Abū 'Ishāq from Barā Ibn 'āzib (may Allah be pleased with him) and said, 'Umar ibn al-Khaṭṭāb (may Allah be pleased with him) said, I place myself in the place of the guardian of the orphan in the matter of interfering in the property of Allah.” If need be, I take a reasonable amount from there. We will give it back later if we can afford. And if there is no shortage, I completely refrain from that wealth.²

- 4) This saying of the Prophet (PBUH) is also a proof of that rule. He says:

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.9, p.64, Ḥadīth No-7150.

² Sa'īd Ibn Mansūr, Sunan Sa'īd Ibn Mansūr, v.4, p.1538, Ḥadīth No-788.

مَا مِنْ أَمِيرٍ يَلِي أَمْرَ الْمُسْلِمِينَ ثُمَّ لَمْ يَجْهَدْ لَهُمْ وَنَصَحَ لَهُمْ كُنُصْحِهِ وَجَهْدِهِ لِنَفْسِهِ إِلَّا لَمْ
يَدْخُلْ مَعَهُمُ الْجَنَّةَ.

An 'Amīr (ruler) who is entrusted with the ruling power over the Muslims, then if he does not try to do good for them as for his own good, then Allah will not allow him to enter Paradise with them.¹

Practical examples:

1. When distributing Zakāt among the needy people, it will be Ḥarām to differentiate between the needy of the same kind.
2. Māwardī (Rah.) mentions, "It will not be permissible for the person in charge to appoint a fasiq (sinner) as an 'Imām (a leader for prayer) because even if the prayers led by him are pure, the prayer remains Makrūh (disliked). And the person in charge is accountable for the overall welfare of the people. There is no good in motivating people to do any act of Makrūh (reprehensible).²
3. It will not be valid for an administrator or a judge or a caretaker or a person in charge to donate waqf property or property of a kid. However, interference in waqf property or property of a child must be in the interest of welfare.³

¹ Muslim Al-ṣaḥīḥ, Kitāb Al-'īmān.

² Suyūtī, Al-ashbāh wa al-naẓāyir, p.121.

³ Muḥammad Ṣidqī 'Āl Būrnū, Al-wajīz fī 'īdāḥ Qawā'id Al-fiqhi Al-killiyyah, p.350.

Second Qā'idah (maxim):

“تأخير البيان عن وقت الحاجة لا يجوز”

Delaying the explanation from the time when it is needed is not permissible.¹

This Qā'idah (maxim) in Islāmic jurisprudence is so important as to be discussed in '*Sharḥu al-Siyaril al-Kabir*' and by other Islāmic jurisprudence scholars. The majority of Islāmic scholars have agreed on the veracity of this Qā'idah. The pattern of this maxim is that if someone says, "You will pray tomorrow." But without any clear direction on how to perform the prayers tomorrow, such an order is tantamount to shouldering the burden of impossible tasks.

If there is any word which is mentioned as *Muzmal* (short meaning) or *'Ām* (broad meaning) or *Majāz* (metaphorical) or '*Mushtarak*' (common or shared) or a *Fi'l* (verb) which has ambiguity between two things or *muṭlaq* (general meaning), every word of it is subject to description. Therefore, the disclosure of their details cannot be delayed because delaying the disclosure of details from the time of execution is burdensome. In such a case, the person in charge cannot properly understand the responsibility given to him. But after receiving the order, he is forced to perform his duties immediately. Therefore, on the basis of the consensus of the Islāmic scholars, it will not be lawful to delay the disclosure of the details during the time of necessity, because it becomes difficult to discharge the duty without a clear idea of the responsibility. It is like imposing *taklīf bimā lā uṭāq* or unbearable hardships, which is completely forbidden in Islāmic Sharī'ah.

¹ Sarakhasī, *Sharḥ Al-siyar al-Kabīr*, v.4, p.59.

The Documentary Ḥadīths for the Qā'idah:

The Prophet (PBUH) warned everyone (the usurper of war's booty) to burn the goods. However, he himself did not burn anyone's tour belongings. Therefore, it will not be lawful to burn the belongings (of the embezzler). Because it is unlawful to disclose the details after the required time.¹

¹ Ibid.

Third Qā'idah (maxim):

”الترجيح لا يكون بكثرة العدد“

Priority is not given on the basis of majority.¹

This principle has been given special importance by some 'Imāms because such disagreements are usually formed out of ambiguity regarding the 'āthār' or narrations containing the details of the actions of the Prophet (PBUH) on the battlefield. But that (i.e., the work of the Prophet, peace be upon him) is a public matter. Complaining about a person is more obvious than complaining that the two parties have done something wrong together, as observed in this mas'alah (Islāmic Law). In other words, as the principle indicates, the priority is not given on the basis of multiplicity of evidence and multiplicity of 'illah or executions.² In other words, in case of contradiction in the document, priority will be given based on effectiveness/ strength of cause, not in terms of majority.³ In other words, priority is given on the basis of strength of cause, not on the basis of the excess of cause.⁴ To put it in another way, preference is given due to the strength of cause, not the numerousness of cause.⁵ All these are the principles of fiqh (Islāmic jurisprudence).

These aforementioned maxims show one of the topics in which the Ḥanafīs (Ḥanafī school of thoughts) disagreed with the rest of the majority of theorists and Islāmic jurists of the other schools of thought. The point of contention is that if two news or narrations

¹ Ibid. v.1, p.159.

² Sharḥ Al-khatimah, p.29.

³ Al-sarakhasī, Al-mabsūṭ, v.20, p.138.

⁴ Ibn Al-Hummām, Fath Al-Qadīr Sharḥ Al-Hidāyah, v.8, p.275.

Al-Qawā'id wa al-ḥawābit, p.484.

are found to be contradictory and the number of narrators of one of the two is higher (due to being narrated in different sources), the number of narrators of the other is fewer; then all the 'Usūl scholars prefer the narration of the majority over the narration given in one source or in a smaller number of sources. It is if two reports or narrations contradict, whereas one of them has an increase in the number of narrators (due to the narrations from multiple sources) and the other was narrated from one source, then the majority of the 'Usūl scholars and Islāmic jurists prefer the narrations of the large number.' Ahnāf (Ḥanafī school of thoughts), on the other hand, said that no event can be given priority on the basis of having too many sources or too many narrators. Rather, precedence should be given to any narration based on the intensity of the effectiveness of the narration, i.e., based on the narrator's memory, taqwā (fear of Allah), justice or knowledge or such a predominant subject matter. The same is the case with *shahādah* or testimony.

The Documentary Ḥadīths for the Qā'idah (maxim):

Jābir (R.) has narrated,

أن النبي صلى الله عليه وسلم لم يصل على شهداء أحد.

“the Prophet (PBUH) did not offer funeral prayers for the Companions who were martyred in the battle of 'Uḥud. But most of the Companions have narrated that the Prophet (PBUH) offered the funeral prayer for them. Moreover, they have narrated:

أنه صلى على حمزة سبعين صلاة، كان موضوعا بين يدي رسول الله صلى الله عليه وسلم، كلما أتى برجل يصلي عليه وعلى حمزة معه.

“The Prophet (PBUH) performed the *janāzah* (funeral) prayers of Hamza (R.) 70 times. His body was placed in front of the Prophet. Whenever the body of a person was brought for *janāzah*, the body of Hamza remained next to it. In this way his *janāzah* has been performed 70 times.” On that day (the day of ‘Uḥud) Prophet’s companion Jābir’s father and uncle were martyred. He was busy with them. He could not attend the *janāzah* of the martyrs with the Prophet. In a narration it is found that Hazrat Jābir left for Madinah with the bodies of his father and uncle. On the way, the announcer of the Prophet (PBUH) announced loudly, ‘Bury the dead in the place where they were martyred’. Upon hearing the announcement, Jaber came back with the bodies. There is no doubt that it is not unreasonable for someone to be accused of misrepresentation.¹

Practical examples and mas’alah s (Islāmic Laws) of the Qā’idah (maxim):

The Ḥadīths of *raf’ al-yadayn* (raising hands during prayer) while performing *rukū’* (bowing of the head with the hands grasping the knees) and getting up from *rukū’* are examples of this Qā’idah (maxim). In this mas’alah, ‘Ahnāf (Ḥanafī school of thoughts) has accepted the Ḥadīth of Ibrahim. Ibrahim has narrated the Ḥadīth from ‘Alqamah who has taken it from Ibn Mas’ūd (R.) who said that the Prophet (PBUH) used to raise his hand only during the *Takbīr Tahrīmah* (the Takbeer of Prohibition/Opening/first takbeer of prayer). After that he would not raise his hand anymore.² Followers of other schools say that the Ḥadīth of raising the hands (*raf’u al-yadayn*) has been narrated by 43 narrators and most of its narrations have been narrated in Ṣaḥīḥ Bukhārī and Muslim.

¹ Sarakhasī, Sharḥ Al-siyar al-Kabīr, v.1, p.160.

² Al-sarakhasī, Al-mabsūt, v.1, p.24.

Fourth Qā'idah (maxim):

”الأصل أن التوفيقين إذا تلاقيا وتعارضا وفي أحدهما ترك اللفظين
على الحقيقة فهو أولى“

The basic principle is that when two quoted texts converge on a single issue and conflict, but in one of them the words can be taken in their usual (applied) meanings, this text will be preferred.¹

This Qā'idah basically provides a clear way to resolve a dispute between two texts. When two texts conflict on a single issue and after acting upon one of them, the application of both texts can be kept on reality; while acting upon the other text can keep the words of one text but omits the words of the other, then it is better to adopt the first method (following which can uphold the application of both texts). This is a brilliant way to reconcile the conflicting texts. This method is better than rejecting a text with precedence over the other.

The authentic Ḥadīths for the Qā'idah:

The example of this is found in the words of the Prophet (PBUH):

”المستحاضة تتوضأ لوقت كل صلاة“

“the woman with irregular menstruation has to perform wuḍū' (ablution) at the time of each prayer”,² and in another Ḥadīth, he says, “المستحاضة تتوضأ لكل صلاة” - “the woman with irregular menstruation has to perform wuḍū' (ablution) for each prayer.”³

The aforesaid Qā'idah applies to two such conflicting Ḥadīths. The Ḥanafī School of thought have acted upon both texts. They said that her ablution stretches over the duration of each prayer, because in the first Ḥadīth the word *waqt* (time) is mentioned, while the second Ḥadīth probably includes this meaning.

¹ Al-karkhī, Al-'Usūl, p. 317, maxim:37.

² Shawkānī, Nayl Al-'awṭār, v.1, p.322.

³ Abū Dāwūd, Al-sunan, v.1, p.71.

Fifth Qā'idah:

”تبدل سبب الملك قائم مقام تبدل الذات“

Changing the cause of the ownership is like changing the self.

In other words, “اختلاف الأسباب بمنزلة اختلاف الأعيان” -The differences of causes are like the differences of objects.¹

The interpretation of the Qā'idah: If the 'cause' or 'means' of ownership of a thing changes, legally that thing will also be deemed to have changed; although in reality the thing does not change. This means: changing the cause of the ownership is like changing the self. And the change of ownership is the same as the change of the original thing. The difference in cause is the same as the difference in being. Undoubtedly, the change in the cause of ownership is a substitute for the change in the entity (of the thing) and the law will be enacted accordingly.

As narrated in a Ḥadīth, The Prophet went to Barīrah (the freed slave-girl of 'Ā'ishah R. and her father) and she offered dates to the prophet as a snack. In the meantime, he saw the meat being cooked and boiled in a pot on a stove. Then the prophet asked:

ألا تجعلين لي نصيباً من اللحم؟

Will this meat have any part for me?

ف قالت: يا رسول الله، إنه لحم تصدق به علي-

¹ Majallah Al-Aḥkām Al-'Adaliyyah, v.28, section:98.

She replied, O Messenger of Allah! This meat has been given to me as ṣadaqah (charity). [But it is Ḥarām for you to take from charity].

فقال صلى الله عليه وسلم: لك صدقة ولنا هدية-

The Messenger of Allah said, “It is an object of charity for you but a gift if you offer it to me.”¹ That means, it was a charity when you received it, but it is not a thing of charity when it is in your possession. So, when you give it to me, it will be a gift from you to me. From this Ḥadīth, it is understood that the change of ownership necessitates the change of the essence of the original thing. And this is the occasion for the initiation of a Qā'idah (maxim) of Fiqh or principle. That Qā'idah (maxim) is,

تبدل سبب الملك قائم مقام تبدل الذات

“Changing the cause of the ownership is like changing the self.”

Practical examples of the Qā'idah:

- If a poor person receives goods of Zakāt or ṣadaqah, he donates them to a rich person or a person of Hashemite descent or gives them as a gift or sells the goods to them; then the goods will be valid for them. Because the entity has changed through the change of ownership.
- If a wealthy person donates ṣadaqah or Zakāt goods to one of his close relatives who dies after receiving the goods and the donated ṣadaqah is returned to the ṣadaqah donor by inheritance, then he

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.2, p.128, Ḥadīth No-1493. Muslim, Al-ṣaḥīḥ, v.2, p.755.

(the donor) will become the owner of them. But he will not miss the reward of ‘ṣadaqah’.

- The donor reserves the right to take back the donated items, subject to the consent of the receiver or by a judge’s decision, unless there is a hindrance. However, if the recipient sells the donated item or donates it to someone else, then the first donor no longer has the right to take back of the donation. Because, with the transfer of the item from the recipient’s ownership, it has legally achieved a new status. Even if the donated item is in the hands of the recipient through purchase or any other new ownership, the first donor will no longer have the right to take it back. Similarly, even if the recipient dies, the donor will not be able to take the donation back. That property will be transferred to the ownership of the recipient’s heirs.
- A seller sells a thing to another person. After the handover the buyer sells the item to another person. Then he bought the thing from the buyer again. After the purchase, the buyer noticed a defect in the product, which was also present during the purchase from the first seller. In such a situation, the buyer will not be able to return the product due to this defect. This is because the buyer’s current ownership is not being determined by the first seller.

Sixth Qā'idah (maxim):

“الْتَحَايِلُ عَلَى الْحَرَامِ حَرَامٌ”

Circumvention vis-à-vis the unlawful is forbidden.¹

The interpretation of the Qā'idah:

In Islam, just as it is forbidden to adopt external means that lead to Ḥarām, so it is also forbidden to adopt all hidden means and satanic tactics for the purpose of engaging in Ḥarām (forbidden). And this issue is known as ‘the use of tactics for the purpose of gaining Ḥarām (forbidden)’.

This Qā'idah has a deep connection with the important principle of the Sharī'ah, *Sadd al-Zarā'i'* (blocking the means which may lead to Ḥarām things). For this reason, the motive behind the prohibition of seeing, touching, meeting with the non-Mahram woman (who are allowed to be married with) privately, and women's uncontrolled movement without veil, etc., is to block the path of adultery forever. Because adopting Ḥarām (forbidden) *hīlah* (strategy) is like cheating with Allah. And it is Ḥarām to plot against Allah.

The bottom line is that the purpose of forbidding anything in the religion (Islam) is not to keep people in a corner; rather, to make social life more orderly and cohesive so that justice may be established, peace and security prevail, and the conduct of human beings may be orderly in social life.

The Documentary Ḥadīths for the Qā'idah (maxim):

- a) The Messenger of Allah said:

¹ Yūsuf Qardāwī, *Al-Ḥalāl wa al-Ḥarām fī al-'Islām*, p.32, Maxim No: 7.

لَا تَرْتَكِبُوا مَا ارْتَكَبَتِ الْيَهُودُ، وَتَسْتَحِلُّوا حَرَامَ اللَّهِ بِأَدْنَى الْحِيلِ

“Do not do the sin that the Jews have committed. Do not make lawful that which Allah has made unlawful by the least of your tactics”.¹

b) The Messenger of Allah said:

لَيَسْتَحِلَّنَّ طَائِفَةٌ مِنْ أُمَّتِي الْخَمْرَ يُسَمُّونَهَا بِغَيْرِ اسْمِهَا-

“Surely a group of people from my ummah will try to change the name of alcohol and make it ḥalāl”.²

c) In another saying of the Messenger of Allah:

يَأْتِي عَلَى النَّاسِ زَمَانٌ يَسْتَحِلُّونَ الرَّبَا بِاسْمِ الْبَيْعِ-

“There will come upon the people a time when they will think of usury as ḥalāl in the name of business”.³

In the first Ḥadīth, the prohibition of resemblance to the Jews is alluded to: Allah forbade fishing for the Jews on Saturdays. However, they were involved in this prohibited work through various techniques. They used to dig various trenches on Fridays so that fish could be stored in them on Saturdays. In this way they would catch that fish on Sunday. Basically, this method was Ḥarām. Because it was a subterfuge adopted for the purpose of achieving Ḥarām. Therefore, naming any Ḥarām object (for the purpose of making it ḥalāl) other than its original name would be considered as part of the heinous criminal tactics.

In this case, one of the amazing activities that are observed in the present time is to call dance and nudity as ‘art’ and ‘fine art’, to call wine as ‘spiritual drink’ and to call interest as ‘profit’.

¹ Ibn Al-Qayyim, ‘Ighāthah Al-lahfān fī Maṣā’id Al-shayṭān, v.1, p.348.

² Aḥmad Ibn Ḥanbal, Al-munad, v.37, p.537, Ḥadīth No: 22900; Abū Dāwūd, Al-sunan, v.3, p.329, Ḥadīth No: 3688, 3689.

³ Ibn Al-Qayyim, ‘Ighāthah Al-lahfān fī Maṣā’id Al-shayṭān, v.1, p.352.

Seventh Qā'idah (maxim):

“التَّحْرِيمُ يَتَّبِعُ الْخَبَثَ وَالضَّرَرَ”

The Prohibition of Things is due to their Impurity and Harmfulness.¹

The interpretation of the Qā'idah: Allah has created mankind. It is impossible to count the priceless blessings that He has bestowed upon mankind. Therefore, he has the right to make anything ḥalāl or Ḥarām for human beings. He has the right to declare any instruction or provision as an act of worship for them. In this case, the servants have no right to disobey any of Allah's commands or to object to any of His provisions. In fact, this is the demand of slavery to God. However, since Allah is the most merciful and infinitely kind hearted to His servants, He has formulated Ḥalāl or 'Ḥarām' provisions relating to any object in the light of logic. In this case, special emphasis has been laid on the overall welfare of the entire humanity. That is why He has made lawful for man only that which is pure, best, and beneficial, and that which He has made unlawful, that which is unholy, that which is evil.

It is true that Allah declared various sacred things forbidden for the Jews. It was actually a punishment for them. Because they disobeyed the commands and prohibitions of Allah and violated the limits of what is lawful and unlawful set by Him. For this reason, in the view of Islāmic jurisprudence, it is well-established that “the prohibition of an object is determined by focusing on its inherent inferiority and harm.” So, what is absolutely harmful has been identified as Ḥarām and what is absolutely beneficial has

¹Yūsuf Qardāwī, Al-Ḥalāl wa al-Ḥarām fī al-'Islām, p.27, Maxim No: 4.

been declared ḥalāl. And that which is more evil than good is forbidden. On the other hand, things that are more beneficial to the welfare are recognized as ḥalāl.

It is true that all that Allah has forbidden is evil or harmful. However, not all Muslims need to have a detailed knowledge of this subject. Because, in many cases, the provisions of a subject may be clear to one and may be vague to the other. It may be that the faults and harms of a thing may not be revealed now, but it will be revealed later. In this situation, it is the duty of a believer to believe in the rulings set by Allah and to always utter this 'āyah (verse) with a free heart:

سمعنا وأطعنا-

“We hear, and we obey.”¹

For example, when Allah declared pork to be Ḥarām, the Muslims realized that since pork is dirty and inferior, it is Ḥarām. However, with the advancement of knowledge and science in the course of time, it was discovered that pork contains a variety of deadly insects and destructive toxins. So, it is proved here that the thing which is forbidden in the Sharī'ah, must be dirty, inferior and harmful.

The undisputed reality that emerges from the above discussion is that the more science excels, and the newer scientific discoveries are unveiled, the more the real beauty and uniqueness of the rulings set by Islāmic Sharī'ah, on ḥalāl and Ḥarām will come to light. And Islam is definitely a *Dīn* which is the way of life

¹ Sūrah Al-nūr: 51.

bestowed by such an Entity Who is omniscient, wise, and merciful to his servants. Allah SWT says:

﴿وَاللَّهُ يَعْلَمُ الْمُفْسِدَ مِنَ الْمُصْلِحِ وَلَوْ شَاءَ اللَّهُ لَأَعْتَبَكُمْ إِنَّ اللَّهَ عَزِيزٌ حَكِيمٌ﴾

And Allāh knows the wrongdoers from the right-doers; and if Allah willed, He could have put you in hardship; and Allāh is All-Mighty, All-Wise.¹

The Authentic Ḥadīths for the Qā'idah:

The Messenger of Allah (PBUH) said:

اتَّقُوا الْمَلَأِينَ الثَّلَاثَ الْبَرَّازَ فِي الْمَوَارِدِ وَقَارِعَةَ الطَّرِيقِ وَالظِّلَّ.

“Guard against the three things which cause curse (i.e.) defecating at the watering places, on the roadbeds and in the shades.”²

In the early days, the meaning of this Ḥadīth was so limited that defecation in the three places mentioned is a very despicable act. Such work is totally against politeness, gentle scholarship, and sound conscience. However, with the development and advancement of science, we have come to know that this work is extremely harmful and risky for public health.

¹ Sūrah Al-Baqarah: 220.

² Ibn Mājah, Al-sunan, v.1, p.119, Ḥadīth No: 328; Abū Dāwūd, Al-sunan, v.1, p.7, Ḥadīth No: 26; Tirmidhī, Al-sunan, v.3, p.19, Ḥadīth No: 1342; Ḥākim, Al-mustadrak, v.1, p.273, Ḥadīth No: 594; Bayhaqī, Al-sunan al-kubrā, v.1, p.158, Ḥadīth No: 469.

Eighth Qā'idah (maxim):

”التَّحَرِّيُّ يَقُومُ مَقَامَ الدَّلِيلِ الشَّرْعِيِّ عِنْدَ انْعِدَامِ الْأَدِلَّةِ“

Propriety takes the place of legal evidence when there is no evidence.¹

The lexical meaning of the word التَّحَرِّيُّ (taḥarriyyu) is to search, to desire, to get, and so on. It is called in Arabic فلان يتحرى (fulan yataḥarra) “He is deliberately contemplating, wishing.” Another use is تحرى فلان بالمكان (taḥarrā fulān bi al-makān) meaning “he stopped or stayed in the place.” In this sense, the word of Allah is-

﴿فَأُولَٰئِكَ تَحَرَّوْا رَشَدًا﴾

(Now those who submit their wills)–“they have sought out (the path) of right conduct”.²

The eminent linguist 'Allāmah Jawharī in his interpretation of the word ‘تَحَرَّوْا’ mentioned in the verse says - تَوَحَّوْا وَعَمَدُوا - that is, they have aspirations and desires (of the right path).³

The jurists have given different definitions of ‘taḥarri’. Although their words are different, all the definitions carry the same meaning. 'Allāmah Naṣāfī said- “To grasp any one of the dubious aspects of a subject is called *Taḥarri*.”⁴ According to 'Imām Sarakhsī: “In the terminology of Sharī'ah, 'taḥarri' is when it becomes difficult to know the real state of an object, then try to know its real state on the basis of strong ideas. So *Taḥarri* is a document by which a general idea of a subject is acquired even if one has not acquired real knowledge about it.”⁵

¹ Al-kaSā'nī, Badā'i'u Al-ṣanā'i't, v.1, p.332.

² Sūrah Al-Al-jinn: 14.

³ Al-jawharī, Al-ṣiḥāḥ, v.6, p.2311.

⁴ Najm al-dīn NaSā'fī, ṭilbah Al-ṭalabah fī 'iṣṭilāḥ Al-fuqahā, p.90.

⁵ Al-sarakhsī, Al-mabsūṭ, v.10, p.185.

The authentic Ḥadīths for the Qā'idah:

The Messenger of Allah (PBUH) said:

“وَإِذَا شَكَّ أَحَدُكُمْ فِي صَلَاتِهِ فَلْيَتَحَرَّ الصَّوَابَ، فَلْيَتِمَّ عَلَيْهِ، ثُمَّ لِيُسَلِّمْ، ثُمَّ لِيَسْجُدْ سَجْدَتِي”

“When any one of you is in doubt about his prayer, he should cast his doubt aside and finish his prayer. Then he should perform two prostrations (of *Sahwū*) after salutations (*Taslīm*) to both sides”.¹

Practical examples:

If a worshiper misses the Zuhr (noon) and 'Asr (afternoon) prayers on two different days and fails to decide which one to do earlier, he will act as guided by propriety (*Taḥarrī*) as possible. Because it is so doubtful for him to determine the order of the two missed prayers that it will not be possible for him to reach a definite conclusion in this matter. In this case, he has no choice but to go to '*Taḥarrī*'. Therefore, in the absence of any other document, '*Taḥarrī*' will be regarded as Sharī'ah compliant.

In the same way, if a person has doubts about determining the Qiblah, then he should offer the prayer facing the direction to which his inclination is strongest. Needless to say, in this case, even if his heart is not sure about anything, such action of him will be considered as action based on Sharī'ah documents.

'Imām Muḥammad (Rah.) in his famous book '*Kitāb al-Aṣal*' said-
“It will also be lawful to go for *Taḥarrī* on matters which come to legitimacy in times of need.”²

¹ Bukhārī, *Al Jāmi' Al-ṣaḥīḥ*, v.1, p.82.

² *Al-kaSā'nī*, *Badā'i'u Al-ṣanā'i't*, v.1, p.373.

The following issues have been deduced by the scholars of jurisprudence from the Qā'idah in discussion:

- a) If a traveler has two vessels, one sacred and the other impure, then if he needs to drink water, he will do that from one of the vessels after going for *Taḥarrī* or well-thought-out decision. On the other hand, he will not go for *Taḥarrī* in case of performing the ablution. Because, in case of the ablution, if it is impossible to use water, soil can be used as an alternative. On the other hand, there is no substitute for drinking water.¹
- b) If a person fears that if he goes for ablution, his (obligatory) prayers will be missed or the Jumu'ah ṣalāt (Friday prayers) will be missed, then it will not be lawful for him to perform tayammum. Because there are alternatives to the two types of prayer mentioned above. On the other hand, if it is Eid or Janāzah (funeral) prayer, tayammum can be performed in the above situation. Because there is no scope to repeat them.²

¹ 'Umar Ibn Muḥammad Al-khabbāzī, *Al-mugnī fī 'Uṣūl al-fiqh*, p.225.

² *Ibid*, p.226.

Ninth Qā'idah (maxim):

“الْتُّهْمَةُ تَقْدَحُ فِي التَّصَرُّفَاتِ إِجْمَاعًا”

Clash of Interest: the judicial acts must not be tainted by accusations levelled against judges.¹

It is well known that in the eyes of Islam, judgment is a very important and risky term. It is through the application of justice that the mutual conflicts between the people living in the society are resolved, all avenues of harming each other are blocked, and the right of the creditor is guaranteed to be returned to him properly. The reason why it has become inevitable is that the judicial process will be conducted fairly and equitably and the basis for conducting it will be well-coordinated. In that process, there will not be the slightest trace of corruption and doubt. Basically, this aspect is the subject matter of Qā'idah (maxim).

While distinguishing between the issues which have the interference and authority of the administrator and the judge over the people and the issues which do not have the authority, 'Allāmah Qarāfī (Rah.) said: “Which is subject to the authority and interference of the administration and where Sharī'ah documents, 'Hujjah' (judicial documents) and external causes exist in support of the exercise of power, but since the judge (or administrator) is in danger of being questioned due to the decision such as giving the decision on his own, the judgment will be revoked. This is

¹ Al-Qarāfī, Al-furūq, v.4, p.43.

because, the Qā'idah (maxim) is that slander unanimously questions the functions of the judiciary."¹

There are several levels of slander in judicial proceedings. The highest level will be considered unanimously. For example, to pronounce judgment by the judge in his own favor. The lowest level will be inconclusive. In this case too, there is no disagreement. For example- to give judgment by the judge on behalf of his neighbor. The middle ground, however, is of disagreement.²

The Documentary Ḥadīth for the Qā'idah (maxim):

The Qā'idah in discussion is derived from the following words of the Prophet (PBUH). He said-

-لَا تَجُوزُ شَهَادَةُ خَصْمٍ وَلَا ظَنَيْنٍ-

"The testimony of the opponent and the accused is not admissible."³

¹ Ibid.

² Ibid.

³ Ibn Abī Shaybah, Al-muṣannaf, v.10, p.678-679.

Tenth Qā'idah (maxim):

“التَّابِعُ تَابِعٌ”

Affiliate should follow its origin.¹

An object, whose existence is directly or indirectly loyal to another, will follow the provision of the followed one because the loyal object has no existence of its own. Pointing to this, 'Allāmah Ḥamawī said: Affiliate should follow its origin i.e. it cannot be separated from the origin in terms of ruling.²

Practical examples:

- a) Since the calf is affiliated to the mother, the fetus will be included in the sale of the pregnant cow. In this case, the calf will not be sold at a different price.³
- b) The right of roadway and water irrigation at the time of sale of land will be subject to sale as ancillary matters. There is no need to sell these two rights separately in the pure opinion.⁴
- c) Anything added extra to the product after it is sold will be considered the property of the buyer. Although the product is not in the possession of the buyer yet.⁵
- d) What is considered in *Niyyah* (the exercise of the will) is the intention of the person to be followed, not of the follower. So,

¹ 'Alī Haydar, Durar Al-ḥkkām sharḥ Majallah Al-'aḥkām, v.1, p. 47.

² Al-ḥamawī, Ghamzu 'uyūn al-baṣā'ir sharḥ al-'Ashbāh wa al-Nazā'ir, v.1, p.154.

³ Suyūtī, Al-'Ashbāh wa al-Nazā'ir, p.117; Ibn Nujaym, Al-'Ashbāh wa al-Nazā'ir, p.133.

⁴ Ibn Nujaym, Al-'Ashbāh wa al-Nazā'ir, v.1, p.154.

⁵ 'Alī Haydar, Durar Al-ḥkkām sharḥ Majallah Al-'aḥkām, v.1, p. 47.

during travel, the intention of the owner will be enough for the slave and the intention of the husband will be enough for the wife. Similarly, the same rule applies to a person whose observance is obligatory for others. Such as- king, army chief etc. For, the provision of the one who is followed will be applicable to the subordinate.¹

¹ Al-kaSā'nī, Badā'i'u Al-ṣanā'i', v.1, p.290.

Chapter Four

Concerning Qawā'id (maxims) starting with Arabic letter ثاء (thaa)
(There is one Qā'idah under this chapter)

Qā'idah (maxims):

”الْثَّابِتُ بِالْبُرْهَانِ كَالثَّابِتِ بِالْعَيْنِ“

**The Evident by proof is like the evident as seen by
your own eyes.¹**

The meaning of Qā'idah (maxim) is that if a matter is proved by a Sharī'ah document, it will be considered as a proven matter of eyewitness. The word 'burhān' used in the Qā'idah (maxim) indicates the document pertaining to the judiciary, which is termed as *bayyinah* (documentary evidence). That is to say, if an incident is proved on the basis of Sharī'ah documents in the Judicial Council, it will be considered as a sensory real event seen with one's own eyes. As a result, the judge will announce the verdict on the basis of that evidence because it is the duty of the judge to give judgment on the basis of external evidence.

The documentary Ḥadīths for the Qā'idah (maxim):

- a) The Messenger of Allah (PBUH) said:

”الْبَيِّنَةُ عَلَى الْمُدَّعِي وَالْيَمِينُ عَلَى الْمُدَّعَى عَلَيْهِ“

"Actori incumbit onus probandi: The proof is due from the claimant, and the oath is due from the one the claim is made against."¹

¹ Majallah Al-'Aḥkām Al-'Adaliyyah, p.25, Section: 75; Muṣṭafā al-zarqā, al-madkhal al-fiqhī al-'ām, v.2, p.1054; Tirmidhī, Al-sunan, v.3, p. 18-19, Ḥadīth No: 1340-1342.

- b) "إِنَّمَا أَنَا بَشَرٌ، وَإِنَّكُمْ تَخْتَصِمُونَ إِلَيَّ، وَعَسَى أَنْ يَكُونَ بَعْضُكُمْ أَلْحَنَ بِحُجَّتِهِ عَنِ بَعْضِهِ، فَأَقْضِي لَهُ عَلَى نَحْوِ مَا أَسْمَعُ"

I am only a human being. Come to me for judgment in disputes. It is often seen that some of you are more skilled and eloquent than others (opponents) in presenting evidence. As a result, I decide in his favor according to what I hear externally.²

The main point to consider in both the Ḥadīths is that if *bayyinah* or the evidence produced before the Judicial Council was not considered as Sharī'ah document and was not in the place of eye evidence, then the Prophet (PBUH) would not have instructed to present *bayyinah*, swear, and give verdict accordingly. Therefore, it is clearly established that the matter proved by the Sharī'ah documents is like the matter proved as eyewitness. In this way, justice has been administered in order to make it easier for the people. Because, if any evidence other than eyewitness were not admissible, it would not be possible to guarantee the proper protection of human rights.

Practical examples related to the Qā'idah:

- a) One person said: "I am the guarantor of what you owe to such and such" and did not mention the exact amount of wealth in this case. Then, if there is a dispute between the two, the plaintiff submits the document to prove that he deserves one thousand takas, then the kafīl (guarantor) has to pay those one thousand

¹ Majallah Al-'Aḥkām Al-'Adaliyyah, section: 28, 29.

² Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.9, p.25, Ḥadīth No- 6968; Muslim, Al Jāmi' Al-ṣaḥīḥ, v.3, p.1337, Ḥadīth No- 1713.

takas. Because what is proved through documents is like the proven matter seen with one's own eyes.

Three results emerge from this principle:

- If the plaintiff is able to establish his claim with the documents, then the refusal of the defendant will not be accepted.
 - After the verdict is pronounced by the judge, no claim of the defendant will be accepted against the judgment unless there is a new source or reason for the claim.
 - The said documentary judgment will also be applied to other persons involved in the disputed case if they are subject to the same motive of the judgement. Therefore, the incident will be considered as proven in their trial as well.
- b) If two witnesses testify against someone to the effect that he has misappropriated or stolen another's property or forcibly abducted someone and the facts are proved on the basis of plausible evidence, if the judge gives a verdict against him in this case, then (as a defendant) neither his refusal will be acceptable nor any of his claims challenging the aforesaid verdict will be heard. The point to consider in this case is that if he sells or donates the abducted or stolen item to a third party, he will be asked to return it to the effect that the item is proven to be abducted or stolen.

Chapter Five

Concerning Qawā'id (maxims) starting with Arabic letter جيم (Jīm)
(There are two Qawā'id (maxims) under this chapter)

First Qā'idah:

”الْجَيِّدُ وَالرَّدِيءُ فِي الرِّبَا سَوَاءٌ، وَالزُّيُوفُ كَالْجَيَادِ فِي بَعْضِ الْمَسَائِلِ،
وَالنَّائِمُ كَالْمُسْتَيْقِظِ فِي بَعْضِ الْمَسَائِلِ“

Good and bad in Ribā (usury) are alike, in some mas'alas defective objects are considered as good objects and in some masā'il (rulings) a sleeping person is like a waking person.¹

The authentic Ḥadīth for the Qā'idah (maxim):

The jurists derive the above Qā'idah (maxim) from the following statement of the Messenger of Allah (SAW):

جَيِّدُهَا وَرَدِيئُهَا سَوَاءٌ

“These (the six objects mentioned in the Ḥadīth) are equal to good and evil.” The well-known book ‘Hidāyah’ mentions in the Ribā chapter- "The distinction between good and evil will not be taken into consideration in these objects. Because, according to the prevalence of the society, the difference between their good and bad is not significant. Moreover, if these insignificant differences are taken into account, the path of business transactions will be blocked forever.”²

¹ Ibn Nujaym, Al-'Ashbāh wa al-Naẓā'ir, p. 499.

² Al-mirgīnānī, Al-hidāyah, v.3, p.61-62; Ibn Ḥajar, Al-dirāya fī takhrīj 'Aḥādīth Al-Hidāyah, v.2, p.165. Ibn Ḥajar says, the Ḥadīth is not found with the mentioned words, However, 'Imām Muslim reported a Ḥadīth with the authority of 'Abū Sa'īd Khadrī that aligns with the meaning of the mentioned words; the Prophet (PBUH) says,

Second Qā'idah (maxims):

“جَنَایَةُ الْعَجَمَاءِ جُبَارٌ”

The crime of the domesticated animals does not require compensation.¹

The Qā'idah (**maxim**) means- If a domesticated animal harms someone's life or property on its own, then no one will be held responsible. This is because such activities of the animal did not occur due to any human action or error. The same ruling applies to all animals.

The Qā'idah (**maxim**) in discussion is one of the Qawā'id (**maxims**) that represents the principle of compensation in Islāmic jurisprudence. The word 'jināyah' means - an action which causes destruction or loss of life and property. 'Ajmā' means four-limbed animal. And *Jubār* means – vain/waste/squander. That is, no one can be held responsible for that.

In the interpretation of the Qā'idah (**maxim**), 'Imām ibn Daqīq al-ʿīd says, the word 'al-Jubār' means - in vain, an action that is not compensable. And 'Ajmā' is a mute animal.² Narrated from 'Imām Mālik, he said—"The meaning of the word Al-Jubār is that there is no *diyyah* (blood money) in the action."³

"Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, salt by salt, like by like, payment being made hand to hand. He who made an addition to it, or asked for an addition, in fact dealt in usury. The receiver and the giver are equally guilty." (Muslim, Al-ṣaḥīḥ, v.3, p.1221, Ḥadīth No- 1584).

¹ Majallah Al-'Aḥkām Al-'Adaliyyah, p. 27, section: 94.

² Ibn Daqīq Al-ʿīd, 'iḥkām al-'aḥkām Sharḥ 'umdaḥ al-'aḥkām, v.1, p.380.

³ Mālik Bin Anas, Al-Mu'aṭṭah, v.2, p.869, Ḥadīth No-12.

The main point of the Qā'idah (**maxim**) is that if a domestic animal causes damage to one's property, no one will be held responsible for it. So, the owner cannot be blamed if the animal destroys someone's field. However, in this case, a group of jurists have added the condition that if the animal is not under the control of the owner. And if it damages someone's property while in control, the owner has to bear the compensation. Because the owner was responsible for its maintenance and control. However, if the animal escapes from the owner, whether it is during the day or at night, the responsibility of compensation will not be on the owner in all cases. According to some scholars, the issue of day and night is considered here. Because, during the day, the responsibility of looking after and protecting the farm falls on the owner. On the other hand, there is no such provision 'at night'.

The Documentary Ḥadīth for the Qā'idah (maxim):

The aforesaid Qā'idah (**maxim**) is basically a reflection of a Ḥadīth. The Ḥadīth is-

جَنَایَةُ الْعَجْمَاءِ جُبَارٌ

“No compensation is payable for imprudent conduct of a domestic animal.”

The above Qā'idah is derived from this Ḥadīth. Here are some practical examples of this rule:

1. If a domestic animal eats the crops of a settlement while under the control of the owner, he will have to bear the compensation as it was with him. On the other hand, if the owner is not with the animal, then he cannot be held responsible for the conduct. However, if the incident took place at night, the provisions would be different. (That is, under no circumstances will compensation be levied on the owner.)
2. If two people tie their horses in a place prepared for this. Then if one horse kills the other, then there will be no compensation for the owner of the horse that killed.

Chapter Six

Concerning Qawā'id (maxims) starting with Arabic letter **حاء**
(haa)

(There are three Qawā'id (maxims) under this chapter.)

First Qā'idah:

”الْحُدُودُ تَسْقُطُ بِالشُّبُهَاتِ“

Benefit of Doubt: Punishments are averted due to suspicions.¹

The explanation of the Qā'idah is that if there is any doubt about the proof of a crime, then the *hadd* (punishment prescribed by Sharī'ah,) will be abolished. (In such a case), it would be assumed that the crime did not take place. The Qā'idah (**maxim**) is also described in other words. For example-

الْحُدُودُ تَنْدَرِيءُ بِالشُّبُهَاتِ-

"Ḥudūd is invalidated by suspicion."

This is because Islam emphasizes the need to abolish the 'hadd' (punishment prescribed by Sharī'ah) as much as possible. The Qā'idah (**maxim**) in discussion is one of the (**maxims**) that are most important in Islāmic jurisprudence. Because the indescribable greatness of the Islāmic Sharī'ah, which emphasizes the overall welfare of the servant and the simultaneous elimination of all evils, is manifested through this Qā'idah (**maxim**). If there is the slightest suspicion of conviction for any reason, such as whipping, 'qiṣāṣ' (killing or injuring a person for killing or injuring another), then the *hadd* cannot be applied to the offender. Therefore, for a person to be punished by bleeding, flogging or mutilation, etc., the

¹ Suyūṭī, Al-Ashbāh wa al-Nazā'ir, p.122.

crime must be proved by irrefutable documents where there is no trace of suspicion. It seems appropriate to mention the famous Ḥadīth of Mā'iz Aslamī in this context. The Prophet (PBUH) repeatedly told him to return from his (adultery) confession. It is clear from this that the withdrawal of his confession raises such suspicions that the '*hadd*' is inevitably invalidated. What the jurists have deduced from this Ḥadīth is that it is better for the judge to suggest the confessor that it is better to repent to Allah than to confess in public. In the Prophetic Sunnah (verbal and action oriented) of the Prophet, we find the guidance of this principle.

The Authentic Ḥadīths Related to the Qā'idah:

a) Narrated from Ibn 'Abbās (R.); he said: The Messenger of Allah (PBUH) said:

إِذْرَوْا الْحُدُودَ بِالشُّبُهَاتِ

"Avert '*hadd*' (implementing a serious penalty) if there are suspicions".¹

b) Narrated 'Abū Hurayrah that the Messenger of Allah (PBUH) said:

إِدْفَعُوا الْحُدُودَ مَا اسْتَطَعْتُمْ

"Avert '*hadd*' (implementing a serious penalty) as much as possible."²

¹ Al-Hārithī, Musnad al-'imām al-a'zam Abī Ḥanīfah Al-nu'mān, v.1, p.184-185, Ḥadīth No- 127.

² Ibn Mājah, Al-sunan, v.2, p. 850, Ḥadīth No- 2545.

c) Narrated 'Ā'ishah (R.) that the Messenger of Allah (PBUH) said:

“إِدْفَعُوا الْحُدُودَ عَنِ الْمُسْلِمِينَ مَا اسْتَطَعْتُمْ، فَإِنْ وَجَدْتُمْ لِمُسْلِمٍ مَخْرَجًا فَخَلُّوا سَبِيلَهُ”

“Avert the legal penalties from the Muslims as much as possible, if you find a way out for a Muslim, leave his way.”¹

d) Narrated from Abdullah Ibn Mas'ūd (R.) in Ḥasan Sanad (the chain of narrators):

إِذْرَوْا الْحُدُودَ بِالشُّبْهَةِ-

“In case of doubt, avert ‘hadd’ (implementing a serious penalty).”²

e) 'Umar (R.) said-

لَأَنْ أُسْقِطَ الْحَدَّ بِشُبْهَةٍ أَوْ لِي مِنْ أَنْ أُقِيمَهُ-

“It is preferable to me to avert ‘hadd’ (implementing a serious penalty) than to enforce it on suspicion.”

¹ Tirmidhī, Al-sunan, v.3, p.185, Ḥadīth No-142; Al-Ḥākim Al-mustadrak, v.4, p.426, Ḥadīth no-8163; Bayhaqī, Al-sunan al-kubrā, v.8, p.413, Ḥadīth No-17057.

² Musaddad, Al-musnad, p.132.

Second Qā'idah (maxim):

“الْحَقُّ لَا تَسْقُطُ بِتَقَادِمِ الزَّمَانِ وَإِنْ طَالَتِ الْمُدَّةُ”

No one's rights are revoked due to the passage of time.

The basic principle of the entire divine law, especially the Islāmic law, is that no one's rights are revoked as a result of the passage of time because human rights are a permanent truth and the ownership acquired based on this right is given by Allah, the Sovereign. He gives power to whom He wills and takes away power from whom He wills. Islāmic jurists considered prolonging the time as a principle only because it shuts the door for raising new demands on the rights established over a certain period. Not to revoke an established right due to the prolongation of the time. Because, if the flow of time is prolonged, no Ḥarām object becomes ḥalāl. So, the original ownership will remain in the custody of the owner. However, some scholars of the Ḥanafī school think that the 'hadd' has been abolished due to the passage of time. The following statement of 'Umar (RA) proves that the right is not revoked as a result of the passage of time. He said-

الْحَقُّ قَدِيمٌ لَا يُبْطِلُهُ شَيْءٌ

“The truth is eternal; nothing can invalidate it”.¹

On this basis, one of the universally accepted principles of Islāmic law is the exclusive right of Qiṣāṣ (retaliation) and *diyyah* (blood donation) of the slave. And this right will be revoked either by pardon or by compromise in exchange for money.

¹ Ibn Taymiyyah, Minhāj Al-sunnah, v.6, p.71; Al-dhahabī, Al-muhadhdhab, v.8, p.4154; Ibn Al-Qayyim, 'i'lām al-mu'qqi'īn, v.1, p.89; Ibn Kathīr, Musnad Al-fārūq, v.2, p.547.

Third Qā'idah (maxim):

“الْحُكْمُ يَدُورُ مَعَ عِلَّتِهِ وَجُوداً وَعَدَمًا”

The Verdict invariably revolves with its causes in affirmation and negation.

Explanation for the Qā'idah (maxim):

There are two types of Sharī'ah law: **First:** There is a definite reason behind the formulation of a ruling, the reason which can be ascertained from 'Naṣṣ' (Qur'ān and Ḥadīth) or thoughtful study. Ibn al-Qayyim (may Allah be pleased with him) said: If the legislator associates a provision with 'sabab' (cause) or 'illah' (causation), then the provision will be abolished in the absence of that 'sabab' or 'illaat'. For example, since alcohol is an intoxicating substance, 'hadd' (implementing a serious penalty) has been made for it to be considered impure and limited. If the intoxication is removed and the alcohol is converted into vinegar, then the above two provisions will be repealed. Similarly, as a result of the association with 'Fisk' (sinful deeds); the testimony and Ḥadīth narration of the person concerned will not be accepted. However, if this defect is removed, both the relevant provisions will be repealed.¹

Second: Rulings we do not know their causes, and they are called *ta'abbudī* (the rulings beyond human reasoning or the rulings of solid worships). Since the causation of such rulings is unknown, their existence or non-existence will not be associated with causation. For example, determining the number of *raka'ah* (a single iteration of prescribed movements and supplications

¹ Ibn Al-Qayyim, 'i'lām al-mu'aqqi'īn, v.5, p. 538.

performed by Muslims) of the five daily prayers, determining the amount of the wealth payable as Zakāt (the exemption limit for the payment of Zakāt).¹ It should be noted that most of the rulings are of the first type.

The Authentic Documents for the Qā'idah (maxim):

The causation of any ruling is taken from the Sharī'ah, documents.

The Messenger of Allah (PBUH) said:

إِنَّهَا مِنَ الطَّوَافِينَ عَلَيْكُمْ وَالطَّوَافَاتِ

(The cats are not impure), rather they are among the males and females (animals) who go around among you."² In the same way, the word of Allah-

﴿كَى لَا يَكُونُ دَوْلَةٌ بَيْنَ الْأَغْنِيَاءِ مِنْكُمْ﴾

(Allah has ordained *ḥalāl* for a specific class), "so that the (wealth) should not circulate (only) among your rich people."³

Examples Concerning the Qā'idah (maxim):

- 1) The Prophet (PBUH) forbade eating *jallālah* (pets that are accustomed to eating unclean food). If such an animal is kept confined for a certain period of time and accustomed to eating clean food, it will be unanimously *ḥalāl*. Because the reason for the prohibition of Ḥadīth was centered on impurity. Once the cause was removed, and the ruling of prohibition was also abolished.
- 2) It is universally acknowledged that alcohol, if converted into vinegar on its own merits, is considered sacred. Because, if the impurity is removed in any way, the relevant ruling will also be repealed.

¹ 'Abd Al-wahhāb Khallāf, 'ilmu 'usūl al-fiqh, p.62.

² Al-nasā'yī, Al -sunan, v.1, p.55, Ḥadīth No- 68; Al-Dārimī, Al -sunan, v.1, p.571, Ḥadīth No-763.

³ Sūrah al-Ḥashr: 7.

Chapter Seven

Concerning Qawā'id (maxims) starting with Arabic letter خاء (kha)
(There are three Qawā'id (maxims) under this chapter.)

First Qā'idah (maxim):

“خَبْرُ الْوَاحِدِ إِذَا وَرَدَ مُخَالِفًا لِنَفْسِ الْأَصُولِ لَمْ يُقْبَلْ”

**If Khabar al-Wāḥid (solitary report) contradicts
Sharī'ah recognized principles, it will be rejected.¹**

Khabar al-Wāḥid (solitary report) did not achieve the status of *mutawātir* (successive narration), or *mashhūr* (that is; it has only one or a few (from two to five) transmitters in every *ṭabaqa* of its 'isnād).

The meaning of Qā'idah (maxim): In the eyes of the Ḥanafīs, if Khabar al-wāḥid (solitary report) contradicts any general principle recognized by Sharī'ah, it will be unacceptable. The overall principle recognized by the Sharī'ah, has been referred to as 'nafsul 'usūl' in the Qā'idah (maxim). It is to be noted that among the issues on which there are differences of opinion between the Ḥanafīs and other 'Imāms, the issue under discussion is significant. Therefore, the Khabar al-wāḥid (solitary report) that will be contrary to any general principle recognized by Sharī'ah, even if it is Ṣaḥīḥ (authentic) in terms of narrative, will not be valid in the eyes of Ḥanafīs. This is because the Ḥadīth which is narrated from the Prophet (PBUH) in the Ṣaḥīḥ source will be considered as a self-established principle. So, it must be followed.

With this Qā'idah in mind, the Ḥanafī 'ulamā' (scholars) did not accept the Ḥadīth regarding Muṣarrah (an animal whose breasts

¹ Al-Dābūsī, Ta'sīs al-nazar, p.156.

have been inflated with milk), where it is said that one should give one *Sā'* (weighs approximately 2kg) of dates as compensation for the milk that has been tapped. Because the Ḥadīth is against the overall principle of Sharī'ah. Such a statement is narrated from 'Allāmah Dābūsī, ¹ basically, this Ḥadīth was identified as contradicting the verses of the Qur'ān and the famous Ḥadīth. The verses are:

﴿فَمَنْ اعْتَدَىٰ عَلَيْكُمْ فَاعْتَدُوا عَلَيْهِ بِمِثْلِ مَا اعْتَدَىٰ عَلَيْكُمْ﴾

“Then he who transgresses against you, punish him for his transgression to the extent he has transgressed against you.”²

And this is the famous Ḥadīth: *الْخَرَجُ بِالصَّمَانِ* “Any profit goes to the one who bears responsibility.” It is to be noted that if Khabar al-wāḥid (solitary report) contradicts the principles of Sharī'ah, in material matters and legal matters, it will be rejected. On the other hand, in the religious affairs (for the purpose of pure worship) it will be practicable. As is the Qā'idah:

خَبَرُ الْوَاحِدِ حُجَّةٌ لِلْعَمَلِ بِهِ فِي بَابِ الدِّينِ-

In the case of religious affairs, Khabar al-wāḥid (solitary report) will be considered a document as practicable. Needless to say, this is a specific *madhhab* (school of thought) centered Qā'idah, on the basis of which the Ḥanafīs have rejected the Ḥadīth regarding '*Muṣarrah*'. Other 'Imāms, on the other hand, hold different views. According to them, the Ḥadīth will be implemented in the

¹ Ibn Nujaym, *Al-'ashbāh wa al-Naẓā'ir*, p.499; *Al-dābūsī, Ta'sīs al-naẓar*, p.156.

² *Sūrah al-baqarah*: 194.

way it has been narrated. As narrated by 'Abū Hurayrah (R), the Messenger of Allah (PBUH) said:

“مَنْ اشْتَرَى مُصْرَءَةً فَهُوَ بِالْخِيَارِ إِذَا حَلَبَهَا، إِنْ شَاءَ رَدَّهَا وَرَدَّ مَعَهَا صَاعًا مِنَ التَّمْرِ”

“If anybody buys *Muṣarrah* (an animal whose breasts have been inflated with milk), he has the liberty (to cancel the purchase). If he wants, he can give it back after milking. However, he has to give one *Sā'* (approximately 2kg) of dates with it”.¹

The Authentic Ḥadīth for the Qā'idah:

The Messenger of Allah (PBUH) said:

الْخَرَجُ بِالْضَّمَانِ-

“Any profit goes to the one who bears responsibility.”² There are other sources in the Ḥadīth- “A man bought a slave, and he remained with him for a few days. He then found defect in him. He brought the case to the Prophet (PBUH). At that time, he (PBUH) returned the slave to his seller. The man said: Messenger of Allah, this man has been benefited by my slave. In reply, the Prophet (PBUH) said, “The one who took the risk of maintaining will get the profit.” It is to be noted that this statement of the Ḥanafī school of thought (if the *Khabar al-wāḥid* (solitary report) contradicts the overall principles of *Sharī'ah*, it will not be accepted) will be taken into legal consideration. On the other hand, though the *Khabar al-*

¹ Al-tirmidhī, Al-sunan, v.3, p.553.

² Ibn Ḥanbal, Al-munad, v.40, p.272, Ḥadīth No-24224; Ibn Mājah, Al-sunan, v.2, p.754; Abū Dāwūd, Al-sunan, v.3, p.284, Ḥadīth No: 3508-3510; Tirmidhī, Al-sunan, v.2, p.572-573, Ḥadīth No: 1285-1286; Al-naSā'ī, al-sunan, v.7, p.254, Ḥadīth No:4490; Ibn Ḥibbān, Al-musnad al-ṣaḥīḥ, v.11, p.298, Ḥadīth No: 4927.

wāḥid iscontrary to the general principles of Sharīʿah, in the case of *diyānah* or religious matters (for the purpose of pure worship) it is practicable. (That is, the judge will not be able to give a verdict on basis of the Khabar al-wāḥid (solitary report), but at personal level one can follow for the purpose of worship).

Second Qā'idah (maxim):

“خَطَأُ الْقَاضِي فِي بَيْتِ الْمَالِ، أَيْ غَيْرُ مَضْمُونٍ عَلَيْهِ”

If the judge is wrong, the compensation will be borne by Baitul Maal (Islāmic State treasury). That is, the judge will not be liable for compensation.¹

It is the most important Qā'idah (maxim) related to the judiciary. Because its role in handling various crisis situations from administrators and judges is undeniable. 'Imām Jamāl Al-dīn Al-Ḥuṣayrī (RA.) said, “If there is any mistake in the judgment, the judge will not have to bear the compensation because, he has been appointed as a representative of Sharī'ah, to perform work in the interest of others. In this case, it is not possible for him to be completely free from mistakes.

On the one hand, it is definitely impossible for the judiciary to be flawless. So, if there is any mistake to be compensated, then the position of the judge will be tarnished in the eyes of the people. As a result, people will refrain from taking this position. Then the implementation of the rules and regulations and the protection of the public interest will be hampered and above all the major responsibilities like the establishment of the rights of the Sharī'ah, will become ineffective. Therefore, if the responsibility of compensation does not fall on the shoulders of the judge, then it should fall on the shoulders of the person in whose interest the decision was made for a justifiable reason. Because, on his behalf, the judge acted as a lawyer or a representative.

¹ Muḥamūd 'Āfendī Hamzah, Al-farā'id al-bahiyyah fī al-qawā'id al-fiqhiyyah, p.319.

Needless to say that the duties that are attached to the lawyer while performing the assigned duties (financial matters) are returned to him by the client or the employer. However, since the proceedings are conducted in the interest of the common people (instead of a specific person), the state treasury will bear all the losses incurred in this case as the property of treasury is the property of the people.¹

The Documentary Ḥadīth for the Qā'idah (maxim):

The Ḥadīth that can be used to substantiate the above rule is as follows:

The Prophet (PBUH) says,

”إِذَا حَكَمَ الْحَاكِمُ فَاجْتَهَدَ ثُمَّ أَصَابَ فَلَهُ أَجْرَانِ، وَإِذَا حَكَمَ فَاجْتَهَدَ ثُمَّ أَخْطَأَ فَلَهُ أَجْرٌ.”
 “When a judge utilizes his skill of judgement and comes to a right decision, he will have a double reward, but when he uses his judgement and commits a mistake, he will have a single reward.”²

It is clear from the Ḥadīth that if the administrator or the judge makes a mistake in giving the verdict, they will not be forced to pay compensation for it. The discussion on this Qā'idah has been mentioned more than once in the book titled '*Qawā'id al-'Ahkām fī maṣāliḥ al-'Anām*' by 'Imām 'Izzuddīn. Here are two examples from this book, where the discussion of this Qā'idah takes place.

First: In case of loss of life or property by the 'Imām or the judge (due to wrong decision) while doing the work of the people, the

¹ Jamal Al-dīn al-ḥuṣayrī, Al-taḥrīr sharh al-jāmi' al-kabīr; 'Alī Aḥmad Al-nadwī, Al-qawā'id wa al-ḥawābiṭ al-fiqhiyyah al-wāridah fī al-taḥrīr sharh al-jāmi' al-kabīr, p.205.

² Muslim, Al-ṣaḥīḥ, v.3, p.1342, Ḥadīth No: 1712.

responsibility will be on state treasury; neither the 'Imām nor the judge will be responsible for the loss. Because, since they are engaged in the work of the Muslims, their mistakes will be considered as the mistakes of the people. Moreover, if the judge is held responsible for the wrong decisions in the judiciary, he will face severe consequences.

Second: It is a compensable offense to exert influence on a property without the consent of the owner. However, such a provision is not applicable in the case of a judge or his representative. Even if a judge or his representative interferes with someone's property, they will not be held liable, even if it is proved wrong from a judicial point of view. Because compensation or fines will be so difficult for them that they will refrain from taking the responsibility of looking after human resources.¹

¹ Ibn 'Abd al-salām, *Qawā'id Al-'ahkām fī mašāliḥ al-'anām*, v.2, p.194-196.

Third Qā'idah (maxim):

“الْخَرَجُ بِالْضَّمَانِ”

The right to profit is acquired on the condition of bearing (profit-loss) risk.¹

The explanation of the Qā'idah (maxim):

The income or crop that comes from human ownership is called 'Kharāj', such as- crop of land, milk, or baby of an animal, rent of land etc. Ibn Nuzaym said in his book *Al-'ashbāh wa al-naẓā'ir*: "Anything that comes out of an object is called 'Kharāj' of that object. So, the fruit produced from the tree is its *Kharāj*, the milk and the offspring from animals are also *Kharāj*. In short, the profit derived from the object is its 'Kharāj'. And the word 'ḍamān' means to take responsibility for expenses or maintenance. For example, taking care of animals and bearing the cost of cultivating land."

'Alī 'Aḥmad Nadwī, in his book *Al- Qawā'id -al-Fiqhīyyah*, quotes 'Allāmah Zarkashī as saying: "The assets, profits, and crops produced from the goods sold will be the property of the buyer, since he has borne the risk and responsibility for the profit and loss of that product. In addition, he would be responsible for the damage of the product sold. However, he will also enjoy the benefits." Because the basic principle is – "Profit will be determined on the basis of risk-taking loss."²

¹ Majallah Al-'Aḥkām Al-'Adaliyyah, p.26, section: 85; Ibn Nujaym, *Al-'ashbāh wa al-Naẓā'ir*, p.175; Suyūṭī *Al-ashbāh wa al-naẓāyir*, p.135.

² Majallah Al-'Aḥkām Al-'Adaliyyah, p.26, section: 87.

The Documentary Ḥadīth for the Qā'idah (maxim):

The Messenger of Allah (PBUH) said: **الْخَرَجُ بِالصَّمَانِ**

“Any profit goes to the one who bears responsibility.” There are other sources in the Ḥadīth- “A man bought a slave, and he remained with him for a few days. He then found defect in him. He brought the case to the Prophet (PBUH). At that time, he (PBUH) returned the slave to his seller. The man said: Messenger of Allah, this man has been benefited by my slave. The Messenger of Allah (PBHU) then said: In reply, the Prophet (PBUH) said, “The one who took the risk of maintaining it will get the profit.”¹

In the words of Muḥammad Ṭahir al-Atāsī, the essence of the Ḥadīth is: “When the expense of an item is under the responsibility of a person; if there is any damage to the item, the responsibility will be on him. It is said: - **‘إِنَّهُ فِي صَمَانِهِ’** - which means, his responsibility will be included in his custody. On the other hand, all the profits of that object will be fixed for him, whether he will benefit directly from it or will benefit from it by reaping the harvest.”

¹ Ibn Ḥanbal, Al-munad, v.40, p.272, Ḥadīth No-24224; Ibn Mājah, Al-sunan, v.2, p.754; Abū Dāwūd, Al-sunan, v.3, p.284, Ḥadīth No: 3508-3510; Tirmidhī, Al-sunan, v.2, p.572-573, Ḥadīth No: 1285-1286; Al-naSā'ī, al-sunan, v.7, p.254, Ḥadīth No:4490; Ibn Ḥibbān, Al-musnad al-ṣaḥīḥ, v.11, p.298, Ḥadīth No: 4927.

Examples of concerning Qā'idah:

- If the buyer returns a vehicle on the basis of 'Khiyār al-'ayb' (jurisdiction to return the goods due to defect), he will not have to pay the rent even if he has already used it for some time. Because, if the vehicle was damaged before the return, it would be assumed that it was damaged from his assets. In short, if someone takes responsibility and risk for something, all its profits will be owned by the person who has borne the responsibility and risk. It is to be noted that if the goods sold are damaged after the buyer becomes aware of the defect, then the jurisdiction to return the goods will no longer remain.
- A person buys an animal and uses it for his own use. If any defect is found in the animal after a few days, the buyer can return it and get the full price back. On the other hand, the seller will not get anything back except the animal.

Chapter Eight

Concerning Qawā'id (maxims) starting with Arabic letter دال (dāl)
(There are two Qā'idahs)

First Qā'idah (maxim):

“دَلَالَةُ الْعَامِّ عَلَى أَفْرَادِهِ قَطْعِيَّةٌ عِنْدَ الْأَحْنَفِ”

To the Ḥanafī scholars, the general (‘Ām) provision/inference is deemed irrefutable in all the issues under it.

The aforesaid principle has assumed the status of a ‘disputable’ one due to the differing and contrasting outlooks by the Islāmic jurisprudence scholars as they added different attributes and conditions to the principle, and the result is, the principle is not an absolutely acceptable one.

It is important to note that the maxim in the discussion, though not unanimously accepted to all scholars, plays a vital role in the practical mas’alas of Islāmic jurisprudence. Islāmic Jurists derived these practical masā’il (*furū’*) from the detailed proof (*al-’adillah al-tafṣīliyyah*) of Sharī’ah based on fundamental maxim in the discussion.

The Ḥanafī scholars accept the general instruction to be irrefutable in all issues under it. As the General Instruction in the Qur’ān and the Sunnah (Sunnah Mutawātir) is irrefutable proof and evidence, it is not legal to invalidate the general instruction by any hypothetical proof such as Khabr Wāḥid (solitary reports) or Qiyās. The Ḥanafīs base their ruling on irrefutability of the General Instruction on the basic linguistic style of word formation

for expressing the meanings. As the 'General Instruction' refers to the inclusion of integrative meaning, it will be accepted indisputably regarding all the issues under the principle.¹

As all the Arabic words expressing the integrative meanings may again be used to give 'defined and limited meanings', the Arabic word for General Instruction ('Ām), if made limited, is sure to create confusions for the users. Under the circumstances, the diction of 'Ām (General Instruction) will be responsible for misleading the audiences, the listeners or the readers will fail to understand the real meanings and objectives behind the use of the 'Āmword(s). Besides, majority of the statements and rulings in Islāmic Sharī'ah is general ('Ām) and this is why it is not acceptable to limit the inclusiveness of General Instruction of Sharī'ah, without any authentic evidence and proofs.²

¹ 'Alā al-dīn al-Bukhārī, Kashf al-'Asrār sharḥ 'Uṣūl al-bazdawī, v.1, p.305; Muḥammad al-khuḍarī, 'Uṣūl al-fiqh, v.1, p.40.

² Al-maḥbūbī, Sharḥ al-talwīḥ 'alā al-tawḍīḥ, v.1, p.40.

Evidential Ḥadīths for the Principle:

The Ḥanafī scholars mention ‘Umar’s (R) statement about Fāṭimah Bint Qays (R). It is narrated that Fāṭimah Bint Qays (R) says, “The Prophet (PBUH) did not pass ruling for providing the sustenance after she was divorced.” Upon hearing this, ‘Umar (R) said, “We cannot avoid following the instructions in the Qur’ān and the Sunnah depending on the statement of the woman. She could not remember the Ḥadīth or might have forgotten it”.¹ The General Instruction (‘Ām) is she would be entitled to lodging and sustenance after her divorce.” Islāmic jurists conclude that ‘Umar’s (R) statement did not limit the inclusiveness of the Qur’ānic verse:

﴿أَسْكِنُوهُمْ مِّنْ حَيْثُ سَكَنْتُمْ مِّنْ وَّجْدِكُمْ﴾

“Let them live where you live ‘during their waiting period’, according to your means.”²

¹ Muslim Al-ṣaḥīḥ, v. 2, p.1118, Ḥadīth No- 1480.

² Sūrah al-ṭalāq: 6.

Second Qā'idah (maxim):

”دَلَالَةُ الْعَامِّ عَلَى أَفْرَادِهِ ظَنِّيَّةٌ عِنْدَ الشَّوَافِعِ وَالْحَنَابِلَةِ“

The General Provision/Inference, according to Shāfi'ī and Ḥanbalī schools of thoughts, is speculative/ hypothetical for all the issues under it.

The majority of the 'Imāms consider the General Instruction ('Ām) to be speculative/ hypothetical for the issues under it.¹ Their opinion is the speculative proofs (dalil zanni) such as Khabr Wāḥid (solitary report) and Qiyās can limit the inclusiveness of 'Ām. And therefore, the ruling out of General Instruction along with the issues under it will not be definitive or absolute. They argue that no confirmed ruling can be passed where any question of probability does exist. As commonly found, most of the general statements of the Qur'ān and the Sunnah are defined and limited. Even they claim that all the general statements or instructions are found to be defined and limited on some issues.

Evidential Proofs of the Qā'idah:

The Shāfi'ī and Ḥanbalī'Imāms claim that there was common agreement among the Companions of the Prophet (PBUH) regarding specification of the General Instructions ('Ām) in the Qur'ān by the Khabr Wāḥid (solitary reports). And this practice of specification and limiting was common among them without any objection from any corner, and this unbarred practice of specification proves their consent to the agreement.

¹ Abī Zuhrah, 'Uṣūl al-fiqh, p.158.

For example, the following specification of the Qur'ānic text by the Ḥadīth may be examined to prove the claim of the Shāfi'ī and Ḥanbalī'Imāms. The Qur'ān says,

“وَأَحِلَّ لَكُمْ مَا وَرَاءَ ذَلِكَ”

“Besides these, it is lawful for you to marry other women”.¹ The general instruction of this Qur'ān is limited, defined and specified by the following Ḥadīth by 'Abū Hurayrah (R):

“لَا تُنكِحُ الْمَرْأَةَ عَلَى عَمَّتِهَا وَلَا خَالَتِهَا”

“Do not marry the woman when you are married to her paternal or maternal aunts.”²

Another example may be the specification of the following 'General Instruction' in the Qur'ān by the Ḥadīth. The Qur'ān declares,

﴿وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا﴾

“As for the thief -male or female - cut off the hands of both.”³ The Companions of the Prophet (PBUH) limited the General Instruction ('Ām) by the following Ḥadīth:

“لَا قَطْعَ إِلَّا فِي رُبْعِ دِينَارٍ فَصَاعِدًا” “You cannot cut off the hands of the thief unless he steals more than one fourth of the Dinar (Golden coin) or more”.⁴

¹ Sūrah al-nSā': 24.

² Muslim Al-ṣaḥiḥ, v. 2, p.10298, Ḥadīth No- 1408.

³ Sūrah al-Mā'idah: 38.

⁴ Bukhārī, Al Jāmi' Al-ṣaḥiḥ, v.8, p.160, Ḥadīth No: 6789-6790; Muslim, Al-ṣaḥiḥ, v. 3, p.1312-1313, Ḥadīth No- 1684.

Some Practical Examples of the Qā'idah (maxim):

- **Regarding the ruling of the animals slaughtered without the name of Allah.**

The Ḥanafī school of thought, following their ruling on the acceptability of the General Instruction (‘Ām), is of the opinion that the animals slaughtered intentionally without the name of Allah is not allowed to be eaten. They follow the Qur’ānic statement,

﴿وَلَا تَأْكُلُوا مِمَّا لَمْ يُذَكِّرْ اسْمُ اللَّهِ عَلَيْهِ وَإِنَّهُ لَفِسْقٌ﴾ “And do not eat that on which Allah’s name has not been mentioned, and indeed that is disobedience”.¹

The clear instruction of the text of the Qur’ān is it is not religiously allowed to eat the meat of the animals slaughtered without pronouncing the name of Allah, be the slaughterer a Muslim or non-Muslim, be there the exclusion of the name of Allah intentional or unintentional. They base their ruling on the acceptability of the General Instruction (‘Ām) in all the issues covered by it.

On the other hand, the Shāfi‘ī and Ḥanbalīs schools of thought state that it is Sunnah to pronounce the name of Allah. Therefore, if any animal is slaughtered without the pronouncement of the name of Allah, it is religiously allowed to be eatable. They claim that the generality and commonness of the mentioned verse is specified by the Ḥadīths based on their maxim “the general instruction (‘Ām) is

¹ Sūrah al-‘an‘ām: 121.

commonly speculative”. Hence, it is permissible to be specified and limited by hypothetical evidence.

▪ **Regarding safety of life to the person taking shelter in the Ḥarām (Holy Place)**

The Ḥanafī scholars state that Qiṣāṣ (death penalty) is not to be meted out to the person taking shelter inside the Holy Place of Makkah. The authority should wait until the killer himself comes out of the place, and death penalty can be implemented on the killer when he is found outside the Ḥarām. Despite proven criminal action, he is entitled to the temporary safety of life as the Qur’ān ensures his safety in the following line: ﴿وَمَنْ نَحْنُ لَهُ كَافٍ﴾

“Whoever seeks refuge therein will be protected by the laws of amnesty.”¹

On the other hand, ‘Imām al-Shāfi‘ī limits and specifies the rulings of the Qur’ānic statement by the Qiyās (Rational Reasoning), since Shāfi‘ī school of thought considers the General Instruction (‘Ām) to be hypothetical and hence can be specified by the Qiyās (Rational Reasoning).

¹ Sūrah ‘āl-‘imrān: 97.

Chapter Nine

Concerning Qawā'id (maxims) starting with Arabic letter راء (RĀ')
(There are two Qā'idah)

First Qā'idah:

”رد الحديث لإنكار الراوي له أو لعمله بخلافه“

The Ḥadīth will not be acceptable if the narrator denies his narration or engages himself in the activities contrary to the Ḥadīth.¹

Shaykh 'Abūl Ḥasan Al-Karkhī, a group of Ḥanafī scholars and 'Imām 'Aḥmad support this basic principle. If the narrator of the Ḥadīth is found hesitant about his narration saying that he cannot remember having narrated the Ḥadīth, the action according to the Ḥadīth will not be acceptable; rather the Ḥadīth itself will be negated. 'Imām Shāfi'ī (Rah) and 'Imām Mālik (Rah.) say that in the case of authentic narrator, even though the main narrator denies narration, any narrator in the narration chain will be acceptable and the action according to the Ḥadīth is acceptable. The Ḥadīth of 'Dhul yadayn' (ذو اليدين) is a good instance of this principle. The Prophet (PBUH) did not accept the inquiry by 'Dhul yadayn' (ذو اليدين) when he asked the Prophet (PBUH),

”أقصرت الصلاة أم نسيت يا رسول الله؟“ ("Has the prayer been reduced or have you forgotten?") The prophet (PBUH) replied, "neither happened". Then 'Dhul yadayn' (ذو اليدين) repeated, "something must have happened", then, the Prophet (PBUH) asked 'Abū Bakar and 'Umar (R), "is it true what Dhul yadayn says?" they replied,

¹ Al-sarkhasī, Al-'Uṣūl, v.2.p.3.

“Yes!”¹ At this point, the Prophet (PBUH) changed his mind after consultation.

Many Ḥadīth Scholars also accept this type of Ḥadīth. Suhayl Bin 'Abū Ṣāliḥ from his father and he narrated from 'Abū Hurayrah,

“أن رسول الله صلى الله عليه وسلم قضى بالشاهد واليمين”

“The Messenger of Allah judged based on a witness and an oath.”²

The Ḥadīth is narrated by Rabī'ah from Suhayl but Suhail later told Rabī'ah, “I cannot remember narrating the Ḥadīth”. Though Suhayl forgot the narration, he used to quote the Ḥadīth saying, “Rabī'ah narrated the Ḥadīth from me and me from my father”.³

Based on this principle, differences of opinion on the following issues (Masa'lah) are seen among the Islāmic jurisprudence scholars:

Marriage without the consent of the guardians, inheritance decision through witness and oath, washing of the pots licked by the dog, breastfeeding of the grown-up child and the breast milk of wife during the sexual intercourse with the husband.

¹ Ibn Mājah, Al-sunan, v.1, p.383-384, Ḥadīth No: 1214-1215.

² Ibn Mājah, Al-sunan, v.2, p.793, Ḥadīth No: 2368; Abū Dāwūd, Al-sunan, v.3, p.309, Ḥadīth No: 3610; Tirmidhī, Al-sunan, v.3, p.20, Ḥadīth No:1343.

³ Abū Al-thanā' Al-'aṣbahānī, Bayān al-mukhtaṣar Sharḥ Mukhtaṣar Ibn al-ḥāḥib, v.1, p.739.

Evidential Ḥadīths on the Qā'idah (maxim):

The principle that a Ḥadīth will be invalid due to the denial or forgetfulness of the main/ first narrator in the chain of narrations', is substantiated by the Ḥadīth narrated by 'Ammār Ibn Yāsir (R) but denied by 'Umar (R). In the Ḥadīth, 'Ammār (R) said to 'Umar (R),

أما تذكر؟ إذ أنا وأنت في سرية، فأجنبنا فلم نجد ماء، فأما أنت فلم تصل، وأما أنا فتمعكت في التراب وصليت، فقال النبي صلى الله عليه وسلم: "إنما يكفيك أن تضرب بيدك الأرض، ثم تنفخ، ثم تمسح بهما وجهك وكفيك." فقال عمر: اتق الله يا عمار! قال: إن شئت لم أحدث به.

"Do you remember that you and I (became Junub while both of us) were together on a journey and you didn't pray but I rolled myself on the ground and prayed? I informed the Prophet about it and he said, 'It would have been sufficient for you to do like this.' The Prophet then stroked lightly the earth with his hands and then blew off the dust and passed his hands over his face and hands". At this point, 'Umar (R) said, 'Ammār, Fear Allah" and 'Ammār replied, "If you want, I will not narrate the Ḥadīth in future."¹

It is to be noted that 'Umar (R) did not accept the Ḥadīth by 'Ammār (R) though 'Ammār (R) was an authentic and reliable narrator of the Ḥadīth. And 'Umar (R) followed his decision that جنب (ritually impure person due to seminal discharge) will not have Tayammum for purity, rather wait for the availability of water. This issue proves that the Ḥadīth denied by the main narrator will

¹ Muslim Al-ṣaḥīḥ, v. 1, p. 280, Ḥadīth No- 368.

not be acceptable even the secondary narrator is authentic and reliable.¹

Differences of opinion are found in the following two cases as well:

- If the narrator denies his own narration.
- If the narrator acted contrary to the Ḥadīths he narrated.

The difference of opinion among the scholars is only under the condition when the narrator acts opposite to Ḥadīth after he has narrated but if his contrasting action is before the narration of the Ḥadīth, the Ḥadīth is agreed on to be acceptable.

One of the disputed issues based on this maxim is the marriage without the consent of the guardians. Majority of the Islāmic jurisprudence scholars are of the opinion that this type of marriage is null and void according to the Ḥadīth by 'Ā'ishah (R). She narrates, the Messenger of Allah said,

“أبى امرأة نكحت بغير إذن وليها فنكاحها باطل، فنكاحها باطل، فنكاحها باطل”

“If any woman marries without the consent of her guardians, her marriage is deemed ‘null and void’”.²

But majority of the Ḥanafī scholars say, “The marriage without the consent of the guardians will be valid”. They support their claim by the Ḥadīth of the Prophet (PBUH) -“الأيام أحق بنفسها من وليها” -The

¹ 'Alā al-dīn al-Bukhārī, Kashf al-'Asrār sharḥ 'Uṣūl al-bazdawī, v.3, p.61.

² Aḥmad Ibn Ḥanbal, Al-munad, v.43, p.199, Ḥadīth No:25326; Ibn Mājah, Al-sunan, v.1, p.605, Ḥadīth No: 1879; Abū Dāwūd, Al-sunan, v.2, p.229, Ḥadīth No: 2083; Tirmidhī, Al-sunan, v.2, p.398, Ḥadīth No: 1102.

adult woman have more rights than her guardians to her own marriage.”¹

Ḥanafī scholars preferred the aforementioned Ḥadīth to ‘Ā’ishah’s (R) Ḥadīth as she was found to have acted contrary to her narration. And the issue of negation of narration by the narrator himself is available in ‘Ā’ishah’s case. The Ḥadīth by ‘Ā’ishah (R) passed down through the narrator chains of ‘Ā’ishah (R), ‘Urwah (R) and Zuhri (R). But in response to Juhri’s query by Ibn Jurayj (R), Juhri (R) denied narrating the Ḥadīth.²

Another issue of dispute related to this principle is the washing decision of the pot licked by the dog. ‘Imām Mālik (Rah.), ‘Imām ‘Aḥmad (Rah.) and ‘Imām Shāfi‘ī (Rah.) agree that seven-time washing is required to ritually purify the dog licked pots. The statement by the three ‘Imāms is supported by the Ḥadīth by ‘Abū Hurayrah (R):

”إذا ولغ الكلب في إناء أحدكم فليرقه ثم ليغسله سبع مرات“

“The things in the dog licked pot should be thrown away and the pot is to be washed seven times”. But the scholars did not accept this Ḥadīth by ‘Abū Hurayrah since the narrator of the Ḥadīth acted contrary to the statement in the Ḥadīth. A Ḥadīth narrated by ‘Imām Ṭahāwī and Dāru Qutnī (Rah.) shows that ‘Abū Hurayrah himself used to wash the dog licked pot three times³-

”أنه يغسل من ولو غه ثلاث مرات“

¹ Muslim Al-ṣaḥīḥ, v. 2, p.1037, Ḥadīth No-1421.

² Shawkānī, Nayl Al-’awṭār, v.2, p.142.

³ Ibid., v.1, p.51.

An important issue of this category is the ruling on the breastmilk of a woman. The issue is whether the husband, father and grandfather of the husband of a woman who breastfeed a female child can marry the female child at her grown age. Or the prohibition is limited to only the sons' and relatives of breastfeeding mothers's previous relation (husband).

Majority scholars are of the opinion that it is 'Ḥarām' for the husband, the father and the grandfather of the husband of a woman who breastfed a female child to marry her at her adult age. Even it applies to the sons of the woman from her previous marriages. This ruling is supported by the Ḥadīth by 'Ā'ishah (R):

”أن أفلح أخا أبي القعيس جاء يستأذن عليها، وهو عمها من الرضاعة، بعد أن نزل الحجاب، قالت: فأبيت أن أذن له، فلما جاء رسول الله صلى الله عليه وسلم أخبرته بالذي صنعت، فأمرني أن أذن له“.

“After the revelation of the veil verses of the Qur'ān, 'Aflah, brother of 'Abūl Qays who is 'Ā'ishah's (R) cousin in terms of breastfeeding relatedness, asks for permission to enter her house. 'Ā'ishah (R) refused the permission. Upon informing the Messenger of Allah (PBUH), he asked me to allow 'Aflah inside the house.”¹ The Ḥadīth shows that 'Ā'ishah (R) contradicted her narration of Ḥadīth in her action.

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.8, p.10, Ḥadīth No: 5103; Muslim, Al-ṣaḥīḥ, v. 3, p.1059, Ḥadīth No- 1445; Ibn Mājah, Al-sunan, v.1, p.627, Ḥadīth No: 1948.

Second Qā'idah (maxim):

”الأصل أن الرخص تراعى فيها شرائطها التي وقعت لها الإباحة، فمهما
أخل بشيء منها عاد الأمر إلى التحريم الأصلي، وهذا باب كبير من
العلم“

The primary ruling of illegality is imposed again if the conditions allowing relaxation in Islāmic Sharī'ah is removed.
(It is an important chapter of Knowledge)

'Imām Khaṭṭābī mentioned the principle in the interpretation of the following Ḥadīth of the Prophet (PBUH):

”إذا وقعت رميتك في ماء فغرق فمات، فلا تأكل“

“Do not eat your prey if it drowns and dies” and this proves that this Ḥadīth is the evidential proof of the Qā'idah (maxim).¹

'Imām Khaṭṭābī's basic argument is that the Prophet (PBUH) forbade eating the dead animal found in water because the animal might have drowned and died due to it. Similarly, it is forbidden to eat the dead animal without having any sign of the arrow on the dead body. And the principle is that in the case of the relaxation of Sharī'ah, the conditions under which the relaxation was allowed should be followed strictly.”²

The discussion above points to the fact that the imported meat would be considered legally uneatable in the light of Islāmic

¹ Abū Dāwūd, Al-sunan, v.3, p.109, Ḥadīth No: 2850; Bukhārī, Al Jāmi' Al-ṣaḥīḥ, Ḥadīth No:5484; Muslim, Al-ṣaḥīḥ, v. 3, p.1531, Ḥadīth No- 1929; Tirmidhī, Al-sunan, Ḥadīth No: 1469.

² Al-khaṭṭābī, Ma'ālim al-sunan, v.4, p.125.

Sharī'ah if the slaughterer of the animal is non-Muslim or not *Ahl Kitāb* (Jewish or Christian), or the religious identity of the slaughterer remains undisclosed.

The imported meat may be legally eatable (Ḥalāl) in Islāmic Sharī'ah, if the majority of the people of the country (the meat is imported from) are Muslims or *Ahl Kitāb* or are used to slaughtering the animal according to Sharī'ah. But if the people follow the system not compliant with Islāmic Sharī'ah, the imported meat is 'Ḥarām' (uneatable). For example, killing animals by suffocation, by striking the head with hard metals or by electric shock makes the meat of the animal 'Ḥarām'. Even the ignorance of the system of slaughtering the animal ends up in making the imported meat uneatable according to Islam.

Chapter Ten

Concerning Qawā'id (maxims) starting with Arabic letter زاء (Zā')
(There is One Qā'idah (maxim))

First Qā'idah (maxim):

”الزيادة على النص تعتبر نسخا عند الأحناف، ولا تعتبر نسخا عند الآخرين“

Any addition to the text is null and void to the Ḥanafī scholars while others accept the addition.

Any addition to the evidence of Sharī'ah, might be acceptably independent or heterogeneous. For example, preference to the payment of *Zakāh* to the prayer shall not be taken to be nullifying. The Islāmic scholars agree to the fact that any addition of 'ibādah to another 'ibādah does not abrogate the addition. If the addition is found homogenous, it shall not abrogate the principle of 'ibāda according to the majority of the scholars. The example might be addition of optional prayer to the obligatory five-time prayers. But there are three types of opinions among the scholars on the ruling of addition to the evidence of Sharī'ah, if the addition is found dependent:

1. The addition is valid as thought by the Shāfi'ī, Mālikī and Ḥanbalī scholars.
2. This category of addition will be treated 'abrogated'. Sarakhsī in his *Al-'Usūl* states, "It is abrogated due to its addition to the text. We think it so because it explains the text but abrogates the meaning and ruling, be the addition to the text or to the

interpretation of the text and the resultant ruling as per the addition.¹

3. If the addition to the text nullifies the contrasting text of similar status, the addition shall be considered 'void'. The Ḥadīth regarding the essentiality of the payment of Zakāh on the domestic and non-domestic goats maybe an example. The Ḥadīth - "في سائمة الغنم زكاة" "The payment of Zakāh of the non-domestic goats is obligatory"² is invalid as it invalidates the contrasting Ḥadīth obliging the payment of the domestic goats.

Evidential Ḥadīths for the Qā'idah:

A number of Ḥadīths from among the vast collection of ones in support of the Qā'idah (maxim) are discussed below:

'Imām Shāfi'ī, 'Imām 'Aḥmad and the other scholars are of the opinion that the addition to the text shall never be nullified if the addition is not independent. In the light of this principle, maintaining chronology in the ritual of ablution is obligatory to them.

The Ḥadīth "ابدؤوا بما بدأ الله به" - "Maintain the sequences in the actions as dictated by Allah"³ is followed by the 'Imāms though the aforesaid Ḥadīth was relevant to the Hajj. And the practices of the Prophet (PBUH) in the rituals of ablution also support maintaining the sequences. If maintaining the sequences was not obligatory, he would have given it up, or there would be a

¹ Al-sarkhasī, Al-'Uṣūl, v.2, p.82.

² Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.2, p. 123-124.

³ Dāruquṭnī, Al- Sunan, v.3, p. 289, Ḥadīth No: 2579; Al-nasā'yī, Al-mujtabā min al-sunan, v.5, p.236, Ḥadīth No: 2962.

statement of permissibility in this regard as there is a statement on three-time washings. The Prophet (PBUH), having maintained the sequences in the ritual of ablution, said,

"هذا وضوء لا يقبل الله الصلاة إلا به"

"This is the ritual of ablution and Allah never accepts any prayer without this ritual".¹

'Imām 'Abū Ḥanīfah (Rah) and his followers supported their ruling "Any addition to the text of Sharī'ah, shall be invalid" and in the light of this ruling, they considered the sequencing of the actions in the ritual of ablution to be Sunnah only. According to them, the Qur'ānic texts instructing to wash only four parts of the body can only be abrogated by other Qur'ānic texts. So, the addition of the Ḥadīths to the Qur'ānic text for maintaining sequence in the ablution procedures cannot be proved to be obligatory. The continuous actions of the Prophet (PBUH) without pause and relaxation are Sunnah. Gurgling and pouring water into nostril are deemed 'Sunnah' as these two are the continuous and uninterrupted actions by the Prophet (PBUH) in the ritual of ablution. And the sequencing actions by the Prophet (PBUH) in the pursuit of the gratification of Allah are generally proved to be *mustahab* (preferred), not obligatory.

In the same way, addition to the text of Sharī'ah, shall not be invalid if the addition is dependent and discontinued. On the basis of this principle, 'Imām Shāfi'ī (R) accepted two categories of additions to the text. Addition to the Qur'ānic text by the Ḥadīth (Khābr Wāḥid) and to the text of the Ḥadīth by similar Ḥadīth is

¹ Ibn Mājah, Al-sunan, v.1, p.145, Ḥadīth No:419.

acceptable to 'Imām Shāfi'ī (R). In support of this principle, he cited a number of Ḥadīths in the realm of Islāmic jurisprudence. One such Ḥadīth is the following one in the ṣaḥīḥ Bukhārī and Muslim narrated by 'Ubādah Ibn Ṣāmit (R)-

“لا صلاة لمن لم يقرأ بفاتحة الكتاب”

“No prayer shall be acceptable if anyone does not recite the Sūrah Fātiḥah”.¹

'Imām Shāfi'ī (Rah.) made the recitation of Sūrah Fātiḥah mandatory in the light of this Ḥadīth. 'Imām 'Aḥmad (Rah.) also supports this ruling of the essentiality of Sūrah Fātiḥah in the prayer. They cite a Ḥadīth from the Ṣaḥīḥ Muslim narrated by 'Abū Hurayrah (R). The Messenger of Allah (PBUH) says,

“من صلى صلاة لم يقرأ فيها بأم القرآن فهي خداج”

“Whoever performs a prayer in which he does not recite 'umm al-Qur'ān' (Sūrah Fātiḥah), it is deficient; not complete. He repeated the statement three times. 'Abū Hurayrah (R), when asked, “sometimes we are behind the 'Imām”, he replied, “recite it yourself”.²

Ḥanafī scholars do not accept the ruling mandating the recitation of the Sūrah Fātiḥah ḥas this obligation is an addition to the following Qur'ānic text:

“فأقروا ما تيسر من القرآن”

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.1, p.151, Ḥadīth No: 756; Muslim, Al-ṣaḥīḥ, v. 1, p.295, Ḥadīth No- 394.

²Muslim, Al-ṣaḥīḥ, v. 1, p.296, Ḥadīth No- 395.

“Recite whatever part from the Qur’ān seems easier for you”.¹ According to the Ḥanafī school of thought, no addition to the Qur’ānic text by the Ḥadīth (khabr Wāḥid) is acceptable and in this particular case, the Qur’ānic text “فاقرءوا ما تيسر من القرآن” “Recite whatever part from the Qur’ān seems easier for you” does not accept any addition to it from the Ḥadīth-

“من صلى صلاة لم يقرأ فيها بأم القرآن فهي خداج”

“Whoever has prayed without reciting Sūrah Fātiḥah in the prayer could not fulfill the conditions of the prayer”. The aforementioned Ḥadīth narrated by ‘Abū Hurayrah (R) is referenced in support of the ruling regarding the issue. In that Ḥadīth, the Prophet (PBUH) continued,

“إذا قمت إلى الصلاة فأسبغ الوضوء، ثم استقبل القبلة فكبر، ثم اقرأ ما تيسر معك من القرآن”

“When you intend to perform Ṣalāh, complete your ablution ritual, stand facing the Qiblah (House of Allah), recite Allahu’Akbar (Allah is the Greatest) and finally recite whatever Surah from the Qur’ān seems easier for you”.²

In the same way, the Ḥadīth also refers to the issue of the shortcomings in the prayer. In one of the Ḥadīths, the Prophet (PBUH) says,

“فإذا فعلت هذا فقد تمت صلاتك، وما انتقصت من هذا، فقد انتقصته من صلاتك”

¹ Sūrah al-muzzammil: 20.

² Muslim, Al-ṣaḥīḥ, Ḥadīth No- 395.

“Your prayer is complete if you pray like this and your prayer remains defective if you do not fulfill all the requirements of the prayer”.¹

The Ḥadīth shows that the Prophet (PBUH) acknowledged the prayer of the Bedouin (nomadic person) despite his prayer did not fulfill all the requirements and was defective.” He (Prophet) did not make the ‘steadfastness’ in the prayer obligatory on the basis of the addition of the Ḥadīth to the Qur’ānic text because addition to the Qur’ānic text by the Ḥadīth, according to the Ḥanafī scholars, is not acceptable.

The Ḥanafī scholars in line with the ruling above recommends whipping the unmarried fornicators just one hundred times without rendering them the punishment of banishment as the basic principle in the Ḥanafī school of thought, as proved so far, is any addition to the Qur’ānic text shall not be valid in Islāmic Sharī’ah. There is a supportive event from the life of ‘Umar (R) for the principle. Rabī’ah ibn ‘Umayyah, having been banished by ‘Umar (R) to Khaybar on charge of drinking wine, joined Heracles and converted to Christianity. Afterwards ‘Umar (R) said, “I will not pass the ruling of banishment against anyone”. Now, the agreed principle is if the banishment was essential part of Sharī’ah, ‘Umar (R) did not have the right to forsake the principle.

¹ Abū Dāwūd, Al-sunan, v.1, p.226, Ḥadīth No: 856.

Chapter Eleven

Concerning Qawā'id (maxims) starting with Arabic letter ض (Daad)
(There are three Qawā'id)

First Qā'idah:

“الضرر يزال”

Harm will be warded off.¹

الضرر (*ḍarar*) lexically means ‘to harm anyone and الضرر (*ḍirār*) refers to ‘to take harmful action against the harmful actions inflicted illegally or beyond Sharī'ah. 'Allāmah Ibn al-'Athīr in his book '*Al-Nihāyya Fī Gharībal-ḥadīth wa al-'āthār*' says, لَا ضَرَرَ (lā ḍarara) means ‘none can harm his brother nor can he deprive his brother of his rights’. On the other hand, the word *al-ḍirāru* (الضِرَارُ) stems from the root (ضَرَّ) *ḍurr* on the scale of (فَعَال). To elaborate, as per the statement of the Ḥadīths, “**no harm can be counteracted by another harm**”.

The aforesaid Qā'idah (maxim) is one of the most significant ones as this Qā'idah (maxim) is applied to various areas and aspects of Islāmic Jurisprudence. As a result, many Islāmic Jurisprudential maxims have been based on the Qā'idah mentioned. The Qā'idah, for example, covers returning the goods due to the defects, all types of choices related to buy-sale agreements, Ḥajr (Prohibition of signing the agreement) and *Shuf'ah* (pre-emptive purchase rights).²

Evidential Ḥadīths for the Qā'idah:

¹ Majallah Al-Aḥkām Al-'Adaliyyah, p.18, section: 20.

² Ibn Nujaym, Al-'Ashbāh wa al-Nazā'ir, p.107.

The Prophet (PBUH) says, (لَا ضَرَرَ وَلَا ضِرَارَ) - “There should be neither harming nor reciprocating harm”. This Ḥadīth bases one of the basic and pervasive Qā’idah (maxim) in Islāmic Jurisprudence. ‘Imām Ḥākim and many other Ḥadīth scholars narrate On the authority of ‘Abū Sa’īd al-Khudrī (R) that the Prophet (PBUH) says,

“لَا ضَرَرَ وَلَا ضِرَارَ، وَمَنْ ضَارَّ ضَارَّهُ اللَّهُ، وَمَنْ شَاقَّ شَاقَّ اللَّهُ عَلَيْهِ”

“None is allowed to inflict harm on himself and on others. The one who harms others will be counteracted as such by Allah and the one who puts to inflictions on others without legal rights will also be treated as such by Allah Allah.”¹

The last part of the Ḥadīth is narrated in the Ṣaḥīḥ Al-Bukhārī in the following phrasing,

“مَنْ يُشَاقِقْ يُشَاقِقْهُ اللَّهُ عَلَيْهِ يَوْمَ الْقِيَامَةِ” - “whoever puts the people into difficulties, Allah will put him into difficulties on the Day of Resurrection.”²

‘Imām al-ṭabrānī states that ‘Imām Ibn Zuhayr Al-Tustarī narrates on the authority of ‘Ishāq Ibn Shahīn, “وَمَنْ يُشَاقِقْ يُشَاقِقْهُ اللَّهُ عَلَيْهِ” - “Whoever shows hardship to others will face the same from Allah”. Naṣafī narrates the Ḥadīth, “مَنْ شَقَّ شَقَّ اللَّهُ عَلَيْهِ” - “Whoever inflicts troubles on others, Allah counteracts the same on him.” All the aforesaid Ḥadīths reflect the same and similar meanings and interpretations- “Whoever inflicts troubles on others, Allah counteracts the same on him.”

¹ Tirmidhī, Al-sunan, v.3, p.396, Ḥadīth No: 1040; Ḥākim, Al-mustadrak, v.2, p.66, Ḥadīth No: 2354.

² Bukhārī, Al Jāmi’ Al-ṣaḥīḥ, v.9, p.64, Ḥadīth No: 7152.

The aforesaid Qā'idah (maxim) is supported by many evidential documents from the Qur'ān and Sunnah. In addition to the Ḥadīths hitherto mentioned and discussed, 'Imām Shāṭibī rightly points out, despite its status as speculative evidential document, the Ḥadīth- "لَا ضَرَرَ وَلَا ضِرَارَ" is regarded to be one of the irrefutable basic maxims as the Ḥadīth and its spirit- Harming Self and others is not allowed in Islāmic Shari'ah is substantiated by many basic principles and relevant referential events. For example, the following verses from the Qur'ān might be cited:

﴿وَلَا تُمَسِّكُوهُمْ ضِرَارًا لِّتَعْتَدُوا﴾

"And do not keep them, intending harm, to transgress [against them]".¹

"And do not harm them in order to oppress them".²

"No mother should be harmed through her child".³

As the Ḥadīth that bars all types of harm against life, property, human dignity, transgress, embezzlement, physical and intellectual coercion and universalizes the illegality of all of categories of 'harmful actions' against humanity must be ranked to be the basic principle of Islāmic Shari'ah. The research on *Khabr Wāḥid* also provides the same and similar results.⁴

¹ Sūrah Al-Baqarah: 231.

² Sūrah Al-ṭalāq: 6.

³ Sūrah Al-Baqarah: 232.

⁴ Al-Shāṭibī, al-muwāfaqāt, v.3.p.185-186.

The Sunnah of the Prophet Muḥammad (PBUH) also supports the fact that his verdicts were also based on this principle of ‘not harming self and others’. The following Ḥadīth narrated in the books of Ḥadīths (Sunan), for example, substantiates the spirit of the Ḥadīth discussed: “There was a date tree of a person in the garden of another one. The owner of the garden felt troubles due to the frequent visits of the owner of the tree to the garden. Once the case was brought to the Prophet (PBUH), the Prophet (PBUH) asked the tree owner to sell or donate the tree to the garden owner. When the tree owner did not agree to the verdict of the Prophet (PBUH), he allowed the garden owner to root out the tree by commenting for the tree owner, ‘I see you are the troublemonger’.”¹

The narration is retold by ‘Imām ‘Abū Dāwūd in a long Ḥadīth with rephrasing. He identified the tree owner to be ‘Samurah Ibn Jundub (R) and the garden owner ‘a companion to the Prophet (PBUH) from the ‘Anṣār community’. The Prophet (PBUH) said, “Samurah, I see you are trouble monger”. Then the Prophet (PBUH) told the ‘Anṣār Companion to root out the tree.”²

‘Abū dhar (R) narrates the Prophet (PBUH) says, “Allah says,

“يَا عِبَادِي، إِنِّي حَرَمْتُ الظُّلْمَ عَلَى نَفْسِي، وَجَعَلْتُهُ بَيْنَكُمْ مُحَرَّمًا، فَلَا تَظَالُمُوا”-

“O My servants, I have forbidden oppression for Myself and have made it forbidden amongst you, so do not oppress one another”.³

‘Abū Bakr (R) narrates, the Prophet (PBUH) says,

¹ Ibn Taymiyyah, Majmū‘ al-fatāwā, v.27, p.104.

² Abū Dāwūd, Al-sunan, v.3, p. 315, Ḥadīth No: 3636.

³ Muslim Al-ṣaḥīḥ, Ḥadīth No- 2677.

“مَلْعُونٌ مَنْ ضَارَّ مُؤْمِنًا أَوْ مَكَرَ بِهِ” - “The one who harms any believer or conspires against him will be cursed”.¹

The aforementioned judgmental decisions and Ḥadīths by the Prophet (PBUH) consolidate his Ḥadīth “لَا ضَرَرَ وَلَا ضِرَارَ”. Islāmic Sharī‘ah not only forbids the people to harm other people, it also orders humans to treat even the animals with kindness. The Prophet (PBUH) in this regard says,

”إِنَّ اللَّهَ كَتَبَ الْإِحْسَانَ عَلَى كُلِّ شَيْءٍ فَإِذَا قَتَلْتُمْ فَأَحْسِنُوا الْقِتْلَةَ وَإِذَا ذَبَحْتُمْ فَأَحْسِنُوا الذَّبْحَةَ وَلْيُجِدْ أَعْدَكُمْ شَفَرَتُهُ وَلْيُرَخَّ ذَبِيحَتُهُ“

“Verily, Allah has made it mandatory to show kindness (الإحسان) to all things. So, if you kill, then kill with kindness; and if you slaughter, then slaughter with kindness. (While slaughtering the animals), let each one of you sharpen your blade so that the animals to be slaughtered have the least sufferings.”²

Some scholars consider the maxim of ‘*lāḍarara walāḍirār*’ (no one is allowed to inflict the harm on himself and others) as one of the five major maxims in the place of ‘*al-ḍararu yuzāl*’ (harm shall be warded off) though both the Qā‘idah (maxims) reflect the same and similar connotations. And the under the light of these two Qā‘idahs, two rulings are going to be elaborated below:

First Ruling: None is to be subjugated to any harm since putting anyone to troubles is deemed *dhulm* (injustice), and any type of injustice to anyone is strictly forbidden in Islāmic Sharī‘ah. To be

¹ Tirmidhī, Al-sunan, Ḥadīth No: 1864.

² Al-nasā‘yī, Al-mujtabā min al-sunan, v.7, p. 227-229, Ḥadīth No: 4405,4412.

precise, harming anyone is illegal and all the divine books and religions and schools of thoughts invalidate and condemn injustice of any category.

Some Instances Relating to the First ruling:

- A person (Khaled for instance) cannot deprive another one (Zayed for instance) of the rights to the use of walking route if the latter one gets any rights to the route owned by the former one.
- No commodity can legally be sold without mentioning the defect of the commodity as the defect is sure to put the buyer to the troubles resulting in being harmed.
- No community can legally refuse to allow anyone to live among them on the plea that they do not feel comfortable with him since this prevention causes harm to the man barred and Islāmic Sharī'ah doesn't allow any harmful actions.
- Though keeping the doors or windows of the houses open is legal but if it is not allowed if it causes troubles and discomfort to the females of the families living nearby on the basis of the maxim so far discussed.

**Second Ruling:**

No harmful action can be counteracted by other similar actions. If any person, for example, is subjected to loss of life and property, the affected person is not allowed to cause similar afflictions to his torturer. The affected person, rather, is advised to seek remedy from the competent legal authority. This Islāmic maxim reflects the nobility, humanity and sympathy towards the people in the society. Above all, establishing justice and humanity in the society through eliminating all types of disparity is the objective of Islāmic maxims. So, it proves obligatory to implement the maxim of "الضَّرَرُ يُزَالُ" – "Harm will be eliminated".

Second Qā'idah (maxim):

“الضَّرُورَاتُ تُبَيِّحُ الْمَحْظُورَاتِ”

Necessity renders prohibited things permissible.¹

The Qā'idah clarifies that the actions and activities illegal and forbidden under normalcy might be allowed and are not deemed illegal under the unavoidable circumstances. For example, eating the dead animals or other's food without permission is not considered illegal for someone suffering from prolonged hunger. Even uttering disbelieving words orally under pressure or death threat with belief in heart is also legal under this Qā'idah (maxim).

Detailed Description of Qā'idah:

Rukhṣah (رخصة) is often-quoted term in the interpretative discussion of the Qā'idah (maxim) (الضَّرُورَاتُ تُبَيِّحُ الْمَحْظُورَاتِ). In Islāmic Sharī'ah, *Rukhṣah* (رخصة) refers to and approves of relaxation of illegality of the specific things and actions under specific unavoidable circumstances. And so, allillegal things and actions are not allowed under necessity (الضَّرُورَاتِ).

Types of Rukhṣah-Relaxation:

First Category: The illegal things and actions are allowable to a certain extent under the term Rukhṣah till the unavoidable circumstances continue but as and when theunavoidable circumstances (الْمَحْظُورَاتِ) get removed, relaxation (رخصة) is also invalid. For example, eating the dead animals or the pork or drinking wine as alternative to water when water is unavailable are

¹ Majallah Al-'Aḥkām Al-'Adaliyyah, p. 18, section: 21.

actions allowable to the extent that one cannot survive without eating them or drinking it. Similarly, any believer may eat them or drink it under the principle of Shāfi'ī only when he is forced to.

Second Category: The relaxed things and actions continue to be forbidden. Islāmī Sharī'ah only allows the believer to do the illegal action of this category under necessity for specific conditions. For example, if someone is forced to destroy the property of another one, the destroyer is to compensate for the harm caused.

Third Category: There are certain aspects of things and actions that are never allowed under any circumstances. To be precise, *Rukhsah* is completely invalidated in Islāmic Sharī'ah in some specific cases and actions. For example, the criminal actions such as killing or amputation of any believer, fornication of any type, beating either of the parents are not allowed under the principle of *Rukhsah* under any conditions. The sins of these heinous actions will never be forgiven.

In fact, the aforesaid Qā'idah (maxim) covers the five of the following essential aspects of human life:

1. Preservation (hifz) of the *dīn* (religion).
2. Preservation of life
3. Preservation of dignity
4. Preservation of conscience
5. Preservation of the property

All the divine books have offered guarantee to the safety of these five issues. And for ensuring the very safety to them, actions as per the maxim “Necessity renders prohibited things permissible” (الضَّرُورَاتُ تُبَيِّحُ الْمَحْظُورَاتِ) is allowed.

The Ḥadīths supporting the Qā'idah (maxim):

The Qā'idah (maxim) is based on the basic and integrative Qā'idah “المَشَقَّةُ تَجْلِبُ التَّيْسِيرَ” - “The hardship begets ease”. The Ḥadīths in support of this basic Qā'idah (maxim) are considered as the foundation of evidential proofs in the Qā'idah (maxim) under discussion. The important Ḥadīths are as follow: 'Imām Bukhārī narrates from 'Anas (R), the Prophet (PBUH) says,

“يَسِّرُوا وَلَا تُعَسِّرُوا، وَبَيِّرُوا وَلَا تُنْفِرُوا”

“Facilitate things to people (concerning religious matters), and do not make it hard for them and give them good tidings and do not make them run away (from Islam).”¹

'Ā'ishah (R) narrates, “The Prophet (PBUH) used to instruct his Companions to do anything as per their capabilities”.²

Some verses of the Qur'ān may also be mentioned in support of this:

- ﴿فَمَنْ اضْطُرَّ فِي مَخْمَصَةٍ غَيْرِ مُتَجَانِفٍ لِإِثْمِهِ، فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ﴾

“But whoever is forced by severe hunger with no inclination to sin - then indeed, Allah is Forgiving and Merciful.”³

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.1, p.25, Ḥadīth No: 69.

² Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.1, p.13, Ḥadīth No: 20.

³ Sūrah al-Mā'dah: 3.

- ﴿إِلَّا مَنْ أُكْرِهَ وَقَلْبُهُ مُطْمَئِنٌّ بِالْإِيمَانِ﴾

Except for one who is forced [to renounce his religion] while his heart is secure in faith.¹

- ﴿إِنَّ مَعَ الْعُسْرِ يُسْرًا﴾

For indeed, with hardship [will be] ease [i.e., relief].²

- ﴿فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ﴾

But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit], there is no sin upon him³

The poet rightly points out:

إِذَا اشْتَدَّتْ بِكَ الْعُسْرَى فَفَكِّرْ فِي أَلَمِ نَشْرَحٍ = فَعُسْرٌ بَيْنَ يُسْرَيْنِ إِذَا فَكَّرْتَهُ فَافْرَحَ

“When hardship beyond tolerance engulfs you, think of the *Sūrah* ‘*Alam Naṣhrah*, there are twofold reliefs against one hardship in the *Sūrah* and it will give you immense peace in mind.”

The verses of the Qur’ān and the Ḥadīths clearly explicate that Islam does not tend to burden the believers with the hardship of rules and regulations; rather prefers them to follow the easier ones to the hard ones. And the urgency of applicability of the appropriate Qā’idah (maxim) is substantiated by the Qur’ānic verses and the Ḥadīths. In fact, Islam is a way of life that offers privilege for the believers to follow the easier rules and regulations without an iota of transgression but with all the efforts to refrain from any relaxation or deviation. Even though the Orientalists have

¹ Sūrah al-Naḥl: 106.

² Sūrah al-sharḥ: 6.

³ Sūrah al-baqarah: 173.

long been working hard to debase and degrade Islam and, in the process, to prove it complex and complicated, Islam remains to be moderate religion among all the religions with its inherent simplicity in the case of application of the rules and regulations.

Allah says,

- ﴿يُرِيدُ اللَّهُ بِكُمُ الْيُسْرَ وَلَا يُرِيدُ بِكُمُ الْعُسْرَ﴾

-Allah intends for you ease and does not intend for you hardship.¹

- ﴿يُرِيدُ اللَّهُ أَنْ يُخَفِّفَ عَنْكُمْ ۖ وَخَلَقَ الْإِنْسَانَ ضَعِيفًا﴾

- And Allah wants to lighten for you [your difficulties]; and mankind was created weak.²

¹ Sūrah al-baqarah: 185.

² Sūrah al-nisā': 28.

Third Qā'idah (maxim):

“الضَّرُورَاتُ تُقَدَّرُ بِقَدْرِهَا”

Necessity shall be estimated proportionately.¹

The Qā'idah encapsulates the idea that the use of the illegal is allowed in Islam to the extent that fulfills the requirement only. So, the amount is used to the life-saving extent only. For example, it is allowed to eat the dead body of the animals if only life is at stake without it and to the extent that saves life only. But on the plea of necessity, none is allowed to take the false oath; but 'tawriah' (a form of homonymy or less equivalent to double meanings. (See: A dictionary of Arabic Terms and Devices) and 'ta'rīd' (it is recognized as one kind of metonymy, it means to speak indirectly and implicitly) both may be resorted to.

Islāmic jurisprudence scholars chalk out some basic principles for the rules and regulations of Islāmic Sharī'ah. The concept of necessity is deemed to be exception and based on this exception, many forbidden issues are considered legal, valid and allowed as per this exception. But in all cases, this necessity should be determined and regulated by the basic principle "الضَّرُورَاتُ تُبَيِّحُ" (Necessity renders prohibited things permissible). The book *Durar Al-ḥkkām sharḥ Mājahllah Al-'aḥkām* states, "What is made valid for the cause of necessity would remain valid to the extent of necessity only. Any excess in the use of it would be illegal in the eyes of Islāmic Sharī'ah.

¹ Majallah Al-'Aḥkām Al-'Adaliyyah, p. 18, section: 22.

The Evidential Ḥadīths for the Qā'idah:

This Qā'idah (maxim) has also evolved from the basic integrative Qā'idah (maxim)

“المُسْقَةُ تَجْلِبُ التَّيْسِيرَ” - “Hardship begets ease”. The very verses of the Qur'ān and the Ḥadīths in support of the Qā'idah are also the evidential foundations of the third Qā'idah (maxim).

Chapter Twelve

Concerning Qawā'id (maxim) starting with Arabic letter ع ('Ayn)
(There are seven Qawā'id [maxims])

First Qā'idah (maxim):

“الْعَادَةُ مُحَكَّمَةٌ”

Social custom is authoritative; hence a source of law.¹

This is one of the maxims based on the Qur'ān and Sunnah. As the changes and evolutions in the social customs and traditions contribute to the modifications and improvements of rules and regulations in Islam, many rules of Islāmic Sharī'ah and verdicts of Islāmic jurisprudence center round this Qā'idah (maxim).²

Basics of the Qā'idah (maxim): Social customs and traditions may be considered for formulating rules of Sharī'ah, if no texts or references regarding the issue are available but when the texts or references are available, the rules would be formulated as per the texts or references because no texts can never be replaced by any customs or traditions. The Sharī' texts are undoubtedly stronger than customs, for, customs are grounded sometimes on wrong basis or falsehood.

Customs: 'Customs' ('ādah) according to Islāmic Jurists, refer to repeated human activities forming the human habits manifested in the daily activities of a sound human being.

¹ Majallah Al-'Aḥkām Al-'Adaliyyah, p. 20, section: 36.

² Ibn Nujaym, Al-'ashbāh wa al-Nazā'ir, p.116.

'Urf: Social Tradition ('urf) are the activities emanating from the guided habits of the best of the conscience.

Muhakkamah: The Arabic word 'Muḥakkamah' (محكمة) stemming from *taḥkīm* (التحكيم) means 'to judge' or to pass official verdict among the disputing parties. The customs and the social traditions may be adopted to be one of the criteria for the resolution of disputes among the people or for judgmental purposes with the condition that if the former does not go against any of the texts of the Qur'ān and Sunnah or there are no agreements, written or whatsoever, against the customs and traditions.

Evidential Proofs of the Qā'idah (maxim):

Some evidential proofs regarding the acceptability of customs and traditions in the judgmental procedures are cited from the Ḥadīths:

- “الْوَزْنُ وَزْنُ أَهْلِ مَكَّةَ وَالْيَكْيَالُ يَكْيَالُ أَهْلِ الْمَدِينَةِ”

(The standard weight is the weight of the people of Makkah while the standard measurement is that of the people of Madinah).¹

'Imām Ṣalāḥ al-dīn Al-'Alā'ī, the author of *Al-Majmū' al-Mudhhib Fī Qawā'id al-Madhab* states, “The authentic Ḥadīths prove that the Prophet (PBUH) determined 'kayl' as the measuring tool for the people of Madina as per their custom and traditions since they used to grow dates and agricultural products. On the other hand, the Prophet (PBUH) decided the weighing tool for the Makkans as per their custom and tradition. So, the decision was while giving away Zakāt, Ṣadaqahtul Fitr, and expiatory compensation etc, the

¹ Al-nasā'ī, Al-mujtabā min al-sunan, v.5, p.54, Ḥadīth No: 2520; v.7, p. 284, Ḥadīth No: 4594.

Makkans would pay in weighing tool (wazan) and the people from Madina would pay them in measurement (kayl)”.¹

‘Ā’ishah (R) narrates, “Hind Bint ‘Utbah says, ‘O Prophet (PBUH), ‘Abū Sufian is a miserly person. He does not give us as much sustenance as necessary for me and my children unless I take something from his procession without his knowledge. The Prophet (PBUH) replies, “خُذِي مَا يَكْفِيكَ وَوَلَدَكَ بِالْمَعْرُوفِ” (You may legally take only as much as is sufficient for you and your children).²

‘Allāmah ‘Aynī (Rah) says, “The Ḥadīth shows that existing tradition is a considerably allowed issue.³ Ibn al-Baṭṭāl (Rah.) is of the opinion that social tradition is accepted and implementable action according to the Islāmic jurists.⁴

Abdullah Bin Mas‘ūd (R) narrates that among the souls of the creations, Allah judges the soul of the Prophet (PBUH) to be the best one. Therefore, the collective decision and the judgment of the Muslims are considered good to Allah.⁵

The following judgment of the Prophet (PBUH) might be an evidential proof of the Qā’idah: Ḥarām Ibn Muhayyasah (Rah) on the authority of his father narrates that once a female camel owned by Al-Barā’ Ibn ‘āzib (R) enters the garden of a man and destroys the crops. Regarding the issue, the Prophet (PBUH) passes judgment that during the daytime, it is the duty of the garden

¹ Al-‘Alā’ī, Al-Majmū’ al-Mudhhib Fī Qawā’id al-Madhab, v.2, p. 405.

² Bukhārī, Al-Jāmi’ Al-ṣaḥīḥ, v.1, p.65.

³ Ba’d al-dīn ‘Aynī, ‘Umadah al-Qāri Sharḥu Ṣaḥīḥ al-Bukhārī, v.12, p.16-18.

⁴ Ibid.

⁵ ‘Imām Ahmad, Al-musnad, v.1, p.379.

owner to take care of the garden and during the night time, camel owner is to take care of his animal.¹ And this is why the camel owner will pay compensation for the destruction caused during the night.²

Based on the Ḥadīth, Islāmic jurisprudence scholars are of the opinion the animal owner is exempted from the obligation of paying any compensation for the harm and destruction caused by the animal during daytime; but compensation is made obligatory if done during the night-time. 'Imām Sulaiman Al-Khaṭṭābī refers to the existing social custom and tradition of taking care of the farms and gardens during the daytime by the owners through the employment of caretakers or guards. On the other hand, the social custom and tradition allow the animal owners to let their animals graze freely on grass field during the daytime, but they must take the animals back to their living places during nighttime. So, whoever disregards the social custom and tradition will be held responsible for the negligence of social duty and is to compensate for any loss, harm or destruction thus caused. Similarly, if anyone takes away the valuables found unguarded on the streets shall not be judged 'thief' and 'the punishment of cutting the cuff' will not be applicable in the case³ as the social custom and tradition do not allow anyone to keep the valuables unguarded on the streets.

In fact, for the solution and resolution of the disputing issues in the Sharī'ah, the Prophet (PBUH) has set the maxims and principles to

¹ Abū Dāwūd, Al-sunan, v.3, p. 781, Ḥadīth No: 2332.

² Ibn Mājah, Al-sunan, v.2, p.119, Ḥadīth No: 328; Abū Dāwūd, Al-sunan, v.3, p. 298, Ḥadīth No: 3569.

³ Al-khaṭṭābī, Ma'ālim al-sunan, v.3, p.178-179.

be followed by the judges of Sharī'ah court. And following the social custom and tradition is one of best maxims. The Ḥadīth resolving the issue between camel owner and garden owner might be the best example in this regard. The prophet (PBUH) judged according to the known customs that the owners of gardens are responsible for guarding them by day and the owners of animals are responsible for guarding them by night.

The solution to the internal and physical conditions of the women (i.e. menstruation, post-natal bleeding period and the *'Istihādha*) is also provided on the basis of the tradition. *Ḥamunah Bint Jahsh*, therefore, is instructed by the Prophet (PBUH), *”فَتَحَيِّضِي سِتَّةَ أَيَّامٍ أَوْ سَبْعَةَ أَيَّامٍ”* (You may calculate the menstruation period to be six or seven days).¹ She was instructed as such on her query about the excessive menstrual bleeding and the instruction was in line with the existing tradition of the time.

The issue was supported by 'Imām 'Abū Sulaymān Al-Khaṭṭābī in his book *Ma'ālim al-Sunan*. The 'Imām explains that the Prophet (PBUH) offered the solution to the menstrual bleeding based on the existing tradition among the women of the time. Similarly, the idea of menstrual bleeding once in a month was also taken into consideration in the case of *Ḥamunah* (R). The Prophet's (PBUH) statement that “the way the women calculate their menstrual period and the purity period”² best points to his acceptance and approval of the social custom and tradition in the case as well.

¹ Tirmidhī, *Al-sunan*, v.1, p.179, Ḥadīth No: 128.

² Al-khaṭṭābī, *Ma'ālim al-sunan*, v.1, p.88.

The concept of acceptability of the custom and tradition is also supported in the following Ḥadīth by 'Imām Bukhārī (Rah.): 'Ā'ishah (R) narrates, "Fātimah Bint 'Abū Hubaysh asked the Prophet (PBUH) whether she would avoid offering prayer during her *istihādha* (persistent bleeding) period. The Prophet (PBUH) replied,

“لَا، إِنْ ذَلِكَ عِرْقٌ، وَلَكِنْ دَعِيَ الصَّلَاةَ فَذَرِ الْأَيَّامَ الَّتِي كُنْتَ تَحِيضِينَ فِيهَا، ثُمَّ اغْتَسِلِي وَصَلِّيْ”

“No, don't give up praying as it is bleeding of illness. Do not pray during the days of your usual menstrual period only, then have a shower and offer your prayers.”¹ The statement 'days of your usual menstrual period only' explains the fact that the Prophet (PBUH) counted the period of menstruation on the usual and traditional rules among the women.

Another evidential proof might be the Ḥadīth narrated by 'Abū Dāwūd (R) with the authority of Sa'ad (R), he says, “When the Messenger of Allah (SWAS) took the oath of allegiance from woman, a woman of high rank, who seemed to be one of the women of Mudar, rose and said Prophet of Allah (SWAS), we are dependant on our parents, our sons. ('Abū Dāwūd said I think (this version) has the word “and our husbands”). So what part of their property can be spent lawfully? He said Fresh food which you eat and give as a present. 'Abū Dāwūd said, “The Arabic word *ratb* means bread, vegetables and fresh dates.”²

The Prophet (PBUH) specified it as earning the daily eatables (bread, dates, vegetables etc.). 'Imām 'Abū Sulaymān Al-Khaṭṭābī

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.1, p.72, Ḥadīth No: 325.

² Abū Dāwūd, Al-sunan, v.2, p. 131, Ḥadīth No: 1686.

(Rah) thinks that the 'raṭab' is accepted to be the rights on the basis of the tradition of the society. He adds, exchange of cooked foods, fresh fruits, foods and entertaining the guests were the social traditions among the Arabs and the Ḥadīth, therefore, accepted the tradition and allowed the women to receive and use the 'ratab' without even the permission of the husbands.¹

The Qā'idah is based on the texts and references hitherto focused on and many issues of Sharī'ah, are related to and founded on this Qā'idah (maxim). 'Imām Qāḍī Shurayḥ's (R) statement that 'your customs and traditions are among yourselves' during the time of 'Umar (R) may be referred to as an applicable criterion of Sharī'ah. Ba'dr al-dīn 'Aynī (Rah) in his *'Umadah al-Qāri Sharḥu Ṣaḥiḥ al-Bukhārī* explains 'Imām Qāḍī Shurayḥ's (R) statement as "your customs and traditions are accepted norms among yourselves."²

¹ Al-khaṭṭābī, Ma'ālim al-sunan, v.2, p.79.

² Ba'dr al-dīn 'Aynī, 'Umadah al-Qāri Sharḥu Ṣaḥiḥ al-Bukhārī, v.12, p.16.

Second Qā'idah (maxim):

“الْعِبْرَةُ فِي الْعُقُودِ لِلْمَقْصِدِ وَالْمَعْنَى لَا لِلْأَلْفَاظِ وَالْمَبَانِي”

In contracts, intentions and meaning, not words and structures, shall be taken into consideration.¹

Short Introduction to the Qā'idah (maxim):

In the agreements and transactions, the intention, meaning and objective are considered important and applicable. The diction and the symbols if contradictory or vague are not taken into consideration.

'Imām Ibn al-Qayyim Al-Zawziyyah in his book *'i'lām al-Muwaqqi'in 'an Rabb al-'Ālamīn* says, “The insightful observers of the Sharī'ah, will discover the fact that the words expressing no clear objective of the Sharī'ah, are disregarded in formulating any rules and regulations. The maxims or principles that cannot be declared null and void are the ones based on objectives. So, the rules and regulations on the agreements and transactions are formulated from the texts expressing clear objectives and meaning. We may find such examples in the case of our maxims in our 'ibādah and sacrificial rituals.²

In fact, the inner meanings in the case are acceptable; not the words or the surface meanings of the words or the texts.³ 'Imām Ibn Taymiyah (Rah) mentions the following Ḥadīth for substantiating the argument: “إِنَّمَا الْأَعْمَالُ بِالنِّيَّاتِ، وَإِنَّمَا لِامْرِئٍ مَّا نَوَىٰ”

¹ Majallah Al-'Aḥkām Al-'Adaliyyah, p. 16, section:3.

² Ibn al-Qayyim, *'i'lām al-Muwaqqi'in 'an Rabbi al-'Ālamīn*, v.3, P.78-88.

³ Muḥammad Abū Bakar Ismā'īl, *Al-Qawā'id al-fiqhiyyah bayna al-'aṣālah wa al-tawjīh*, p.39.

(Human actions are judged and rewarded by the purity of his intentions). 'Imām Bukhārī (Rah) cites the Ḥadīth for invalidation of the ill intention of the human actions.¹

On the other hand, many seemingly right and valid agreements and the transactions are declared null and void by Islāmic Sharī'ah based on this Qā'idah (maxim), since the inner meanings and the objectives of the texts and the references go beyond the surface meanings and are pointers to the invalidity of the agreements. For example- "بَيْعُ الْعَيْنَةِ" (The buy back by the seller at lower prices after the sale of the things). This 'buy back at lower price' is the worst category of fraudulent financial trick that initiates the 'interest based financial transactions forbidden by Allah.²

'Abū Hurayrah (R) narrates from the Prophet (PBUH),

“لَا تَرْكَبُوا مَا ارْتَكَبَتِ الْيَهُودُ، فَتَسْتَحِلُّوا حَرَامَ اللَّهِ بِأَدْنَى الْحَيْلِ”

(Do not commit what Jews had committed that you permit what Allah has banned using devious tactics).³

The Evidential Ḥadīths for the Qā'idah (maxim):

It is to be noted that this Qā'idah (maxim) stems from the basic Qā'idah (maxim) “الْأُمُورُ بِمَقَاصِدِهَا” - “Acts are judged by the intentions behind them or take the will for the deed.” Therefore, the Ḥadīths cited as the evidential proofs for the Qā'idah (maxim) are considered the proofs for this Qā'idah (maxim) as well.

¹ Muttafaq 'alayh, al-tadābīr al-wāqī'ah, v.4, p.122.

² Muḥammad Abū Bakar Ismā'īl, bayna Al-sā'ili wa al-faqīh, p.49; Al-zayla'ī, Naṣb al-rāyah, v.4, p.42.

³ Ibn Taymīyah, Maimū' al-Fatāwā, v.29, p.29.

Third Qā'idah (maxim):

”عُمُومُ الْمُقْتَضَى“

The general contextual requirement in terms of meaning.

'Imām Sa'ad al-dīn Taftazānī in his book *Sharḥ al-talwīḥ 'alā al-tawḍīḥ* ascribes this principle to 'Imām Shāfi'ī' (Rah.),¹ he says, “

”إِنَّ الْمُقْتَضَى بِمَنْزِلَةِ الْمَنْصُوصِ فِي ثُبُوتِ الْحُكْمِ، حَتَّى كَانَ الْحُكْمُ الثَّابِتُ بِهِ كَالثَّابِتِ
بِالنَّصِّ، لَا بِالْقِيَاسِ، فَكَذَلِكَ فِي إِثْبَاتِ صِفَةِ الْعُمُومِ فِيهِ، فَيَجْعَلُ كَالْمَنْصُوصِ“.

“In the case of establishing a principle in Islāmic Sharī'ah, the right and the applicability of the principles implied are as strong as the statement expressed clearly in the 'naṣṣ' except for the principle set up by Qiyās (reasonable perception). Similarly, the expanse and extent of applicability of common principle are widely accepted like the one supported by the authentic texts and references.”²

Evidential Proofs of the Ḥadīths:

The concept of 'umūm al-muqtaḍā' (The general contextual requirement in terms of meaning) is supported by the following Ḥadīth of the Prophet (PBUH):

”إِنَّ اللَّهَ تَجَاوَزَ عَنْ أُمَّتِي الْخَطَأَ وَالنَّسْيَانَ وَمَا اسْتَكْرِهُوا عَلَيْهِ“

“My follower Muslims are exempted from the liability of the mistakes committed unintentionally or forgetfully or under certain forced conditions”.³

¹ Al-taftazānī, *Sharḥ al-talwīḥ 'alā al-tawḍīḥ*, v.1, p.264.

² Sarakhasī, *Al-'Usūl*, v.1, p.248.

³ Ibn Mājah, *Al-sunan*, v.1, p.609, Ḥadīth No: 2043-2045.

The statement made in the Ḥadīth seems problematic as it has exempted the believers from the liabilities of the mistakes committed, which is impractical and impossible. So, the meaning of the Ḥadīth is to be understood contextually in line with other identical and similar texts or Ḥadīths and in this particular case, the meaning should be clarified under the light of the following Ḥadīth of the Prophet (PBUH): *إِنَّمَا الْأَعْمَالُ بِالنِّيَّاتِ*, Actions are counteracted on the basis of intention of the actions.¹ This Ḥadīth also indicates that ‘the general contextual requirement’ is a Sharī‘ah evidence for deriving the rules in Islāmic Sharī‘ah.

Shāfi‘ī, Mālikī and Ḥanbalī schools of thoughts base their fatwa on the mistakes in the prayer on this Ḥadīth and state that mistake or unintentional talk while praying does not invalidate the prayer and this statement is substantiated by the following Ḥadīth:

”...رَفَعَ عَنْ أُمَّتِي الْخَطَأَ وَالنَّسْيَانَ“

“The believers are exempted from the liability of the mistakes committed unintentionally or forgetfully ...”. In addition to that, they narrate the Ḥadīth with the ‘ḥukm’ and assume the word as general, that include ‘worldly judgement’ (al-ḥukm al-dunyuwī) and ‘afterwordly judgement’ (al- ḥukm al-’ukhruwī).

The schools also support this principle of Sharī‘ah, by the Ḥadīth narrated by ‘Abū Hurayrah (R) in the *Ṣaḥīḥ Muslim*:

¹ Bukhārī, Al Jāmi‘ Al-ṣaḥīḥ, v.1, p.6; Ḥadīth No: 1.

عن أبي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُ يَقُولُ: صَلَّى لَنَا رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ صَلَاةً فِي رَكْعَتَيْنِ، فَقَامَ ذُو الْيَدَيْنِ فَقَالَ: أَقْصِرَتِ الصَّلَاةُ أَمْ نَسِيتَ يَا رَسُولَ اللَّهِ؟ فَأَقْبَلَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَلَى النَّاسِ فَقَالَ: «أَصَدَقَ ذُو الْيَدَيْنِ؟» فَقَالُوا: نَعَمْ، فَأَتَمَّ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ مَا بَقِيَ مِنَ الصَّلَاةِ ثُمَّ سَجَدَ سَجْدَتَيْنِ وَهُوَ جَالِسٌ بَعْدَ النَّسْلِيمِ.

“He says, the Prophet (PBUH) led the ‘Asr prayer with us but finished the prayer after two *raka’ah*. Dhul Yadan stood up and asked the Prophet (PBUH) whether the ‘Asr prayer was reduced from four to two *raka’ah* or the Prophet (PBUH) forgot to pray the four *raka’ah*. The Prophet (PBUH) replied, neither of these two happened. On *Dhulyadayn*’s reaffirmation of two *raka’ah* of ‘Asr Prayer, the Prophet (PBUH) asked the people to say whether what *Dhul yadayn* was saying really happened. The people affirmed and the Prophet (PBUH) completed the four usual *raka’ah* of the ‘Asr prayer with two additional *sujūd* (prostration) at the end.¹

Ḥāfiẓ Ibn Ḥajr al-‘Asqalānī, in his *Fatḥ al-bārī* (an interpretative book on Ṣaḥīḥ Al-Bukhārī) says, “The Ḥadīth –

“رَفَعَ عَنْ أُمَّتِي الْخَطَأَ وَالنِّسْيَانَ” (my followers are exempted from unintentional mistakes and forgetfulness)- in the true sense of term means the exemption is related to the sin out of the actions, but there is no way to accept the mistakes or forgetfulness in the usual way of prayers or any other ‘ibādah (worship).²

¹ ‘Imām al-Shāfi‘ī, al-‘umm, v.1, p.147; Muslim Al-ṣaḥīḥ, v. 1, p.403-404, Ḥadīth No-573.

² Ibn Ḥajr al-‘Asqalānī, *Fatḥ al-Bārī Sharḥ ṣaḥīḥ Al- Bukhārī*, v.3, p.102.

As such, the Shāfi'ī school of thought as well as many other scholars is of the opinion that *niyyah* (intention) in ablution is obligatory like other obligations, i.e. they consider the *niyyah* (intention) a condition for the validation of ablution.¹ These scholars also refer to the Ḥadīth of 'Actions are dependent on the purity of intention'.²

However, in *Faṭḥ al-bārī*, the idea of applying the Ḥadīth randomly on the merit of its surface meaning has been negated. Since many actions are validly available and acceptable in Islāmic Sharī'ah, requiring no intention, the Ḥadīth seeks to mean the purity of intention behind the actions, not the negation of actions. Also, negating the purity and correctness of the action is more appropriate, because it is similar to negating the same action.³

¹ Ibn Qudāmah, *Al-mughnī*, v.1, p.110.

² Bukhārī, *Al Jāmi' Al-ṣaḥīḥ*, v.1, p.2, Ḥadīth No:1.

³ Ibn Hajar al-'Asqalānī, *Faṭḥ al-Bārī Sharḥ ṣaḥīḥ Al- Bukhārī*, v.1, p.13.

Fourth Qā'idah (maxim):

“الْعَمَلُ بِخَبَرِ الْوَاحِدِ إِذَا خَالَفَ الْقِيَاسَ”

Actions to be on ‘Khabr Wāḥid’ (solitary report) if ‘Khabr Wāḥid’ and ‘Qiyās’ (rational reasoning) are found contradictory.

‘Khabr Wāḥid’ (solitary report): The Ḥadīth scholars say, ‘Khabr Wāḥid’ (solitary report) is the Ḥadīth that does not fulfill the criteria of the *Mutawātir* (successive) with disregard to the number of narrators of the Ḥadīth. The theorists (‘Usūliyyūn) confirm that ‘Khabr Wāḥid’ (solitary report) does not attain the status of ‘*Mutawātir*’ (successive).

‘Qiyās’ (rational reasoning): ‘Qiyās’ is the rational judgment of any issue based on the similar judgment in the case of similar issue. Because the issues and conditions are found identical and corresponding, the judgments are also passed and accepted as such.

It is notable that in the presentation of the evidential proofs, the Ḥadīths are given priority over the collective conscience (‘ijmā’) and Perceived Decision (Qiyās) as the former is the second most important and authentic source of Islāmic Sharī’ah and the interpretation of the Qur’ān.

This is a methodological approach to the maxims in Islāmic Sharī’ah. ‘Imām Shāfi‘ī, ‘Imām ‘Aḥmad Ibn Ḥanbal and the majority of the Ḥadīth scholars have accepted this methodological approach. They did not consider whether the narrator of the Ḥadīths is a scholar or Islāmic jurist, as ‘Khabr Wāḥid’ (solitary report) is an authentic text and the ‘Qiyās’ (rational reasoning) is an

opinion, research output or judgment based on the text. 'Naṣṣ' (text) is prioritized over the research, and even if the Ḥadīth is not 'Mutawātir' (successive), it would have priority in taking decision in Islāmic Sharī'ah over 'Qiyās' (rational reasoning).

The Ḥadīth gets accepted in the judgmental procedures in Islāmic Sharī'ah on the truthfulness, dependability and justice authenticity of the narrators. The companions of the Prophet (PBUH) and the narrators, in general, were just and they exactly transmitted the texts of the Ḥadīths as they heard them from the Prophet (PBUH).

The scholars from the Ḥanafī school of thought accepted this principle but with condition that the narrators should be experts in Islāmic jurisprudence, just and the good memorizers of the Ḥadīths narrated.

'Khabr Wāḥid' (solitary report) and 'Qiyās' (rational reasoning) may be contradictory under two conditions:

- a. Fully contradictory and opposite, the former invalidating the latter.
- b. Not fully contradictory and opposite but any aspect or part of the former does not match with the latter, hence the former limiting the scope and extent of acceptability of the latter.

If the 'Khabr Wāḥid' (solitary report) and 'Qiyās' (rational reasoning) are completely contradictory, the acceptability of the Ḥadīth will be preferred according to 'Imām Shāfi'ī, 'Aḥmad Bin Ḥanbal, Kurkhī and many other Islāmic jurists. But Mālikī school of thought prioritizes the 'Qiyās' against the Ḥadīth. 'Isa Ibn 'Ābān states a condition that the Ḥadīth will get preference if the

narrator is well-educated and the good memorizer of the Ḥadīth with no negligence towards memorization. If ‘Khabr Wāḥid’ (solitary report) and ‘Qiyās’ (rational reasoning) are not contradictory but convey the same message and meaning, then, the Ḥadīth (Khabr Wāḥid) will be taken to be acceptable according to all the schools of thought.

The Evidential Ḥadīth for the Qā’idah:

The following Ḥadīth is the evidential proof of the Qā’idah under discussion: When the Messenger of Allah (PBUH) intended to send Mu’ādh ibn Jabal to the Yemen, he asked, “How will you judge when the occasion of deciding a case arises? He replied: I shall judge in accordance with Allah's Book. He asked: (What will you do) if you do not find any guidance in Allah's Book? He replied: (I shall act) in accordance with the Sunnah of the Messenger of Allah (PBUH). He asked: (What will you do) if you do not find any guidance in the Sunnah of the Messenger of Allah (PBUH) and in Allah's Book? He replied: I shall do my best to form an opinion and I shall spare no effort. The Messenger of Allah (PBUH) then patted him on the breast and said: Praise be to Allah Who has helped the messenger of the Messenger of Allah to find something which pleases the Messenger of Allah.¹

In this Ḥadīth, Mu’ādh ibn Jabal (R) preferred to the Ḥadīths to ‘Qiyās’ without categorizing the Ḥadīths in terms of *Mutawātir* or *Khabr Wāḥid* and the Prophet (PBUH) approved of and consented to his intention. This Qā’idah (maxim) is one of the basic ones

¹ Aḥmad Ibn Ḥanbal, Al-munad, v.32, p.328, Ḥadīth No: 22061; Abū Dāwūd, Al-sunan, v.3, p.303, Ḥadīth No: 3592; Tirmidhī, Al-sunan, v.3, p.9, Ḥadīth No: 1327.

responsible for the differences of opinion on the various religious issues (Mas'alah) and sub-issues. Some might be mentioned for clarification:

- a. On the sale of the animal with fraudulent 'Swollen' udder: the majority of the Islāmic jurists are of the opinion that after having milked the animal if the buyer of the animal can realize that the udder of the animal was intentionally kept 'Swollen' to cheat the buyer, he has the right to keep the animal or to return it with one *Ṣā'* (measuring tool) of date in place of milk.

They cite the Ḥadīth narrated by 'Abū Hurayrah (R). The Messenger of Allah says, "Do not keep the udder of the camels and goats burdened with the milk before you sell them. If someone does this type of action, the buyer has the right to keep the animal or to return it with one *Ṣā'* of date in place of milk".¹

But Ḥanafī scholars are of the opinion that the sold animals cannot be returned on the plea of keeping the udder 'swollen' and an additional one *Ṣā'* of date is not to be given because the narrator of the Ḥadīth is not an expert in Islāmic jurisprudence like Abdullh Ibn Mas'ūd and the Ḥadīth itself goes against rational reasoning (*Qiyās*).

- b. The choice during the buy-sale agreements: According to the 'Imām Shāfi'ī, 'Aḥmad and Ḥadīth -scholars, on the basis of the mentioned theoretical *Qā'idah* (maxim), '*khiyār al-majlis*' (the choice of the sellers and the buyers in the matter of transaction) is allowed. Either of the parties may opt out of the buy-sale

¹ Bukhārī, *Al Jāmi' Al-ṣaḥīḥ*, v.3, p.81, Ḥadīth No:2150; Muslim *Al-ṣaḥīḥ*, v. 3, p.1155, Ḥadīth No- 1515; Abū Dāwūd, *Al-sunan*, v.3, p.270, Ḥadīth No: 3443.

procedures and decide as per their choices until the agreement has been reached. In a Ḥadīth narrated by Ibn 'Umar (R). The Prophet (PBUH) said,

“Both the buyer and the seller have the option of canceling or confirming the bargain, as long as they are still together: and unless they separate or one of them gives the other the option of keeping or returning the things and a decision is concluded then, in which case the bargain is considered final”.¹

'Imām Mālik, 'Imām 'Abū Ḥanīfah and their followers did not base their fatwā on the Ḥadīth as the Ḥadīth goes against the 'Qiyās' (rational reasoning).

- c. The preference of 'Khabr Wāḥid' (solitary report) to 'Qiyās' (rational reasoning) is proved by the fact that 'Umar (R) acted on the Ḥadīth from 'Ḍaḥḥāq Bin Sufwān'. As per his Ḥadīth, 'Umar (R) distributed the inheritance to woman from the blood money (diyyah) of her deceased husband.²

This has not been done in accordance with 'Qiyās'. As per the 'Qiyās', the property owned by the dead person during his lifetime is to be distributed among the inheritors, but the amount of blood money and its distribution are decided after the death of the person. On top of that, from *Dhahḥāq* (R), the narrator of the Ḥadīth, was not from expert companions of the Prophet (PBUH) in Isamic jurisprudence.

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.64, Ḥadīth No:2112; Muslim Al-ṣaḥīḥ, v. 3, p.1163, Ḥadīth No: 1531.

² Abū Dāwūd, Al-sunan, v.3, p.129, Ḥadīth No: 2927; Tirmidhī, Al-sunan, v.4, p.27, Ḥadīth No: 14150.

Fifth Qā'idah (maxim):

“عَلَى الْيَدِ مَا أَخَذْتُ حَتَّى تُؤَدِّيَهُ”

The borrower will be liable till he returns what he has taken.¹

This Qā'idah (maxim) is an excerpt from a Ḥadīth narrated in 'Musnad 'Aḥmad', four books of Sunan and 'Mustadrak Ḥākīm'. The Ḥadīth reported from Samura Ibn Jundab (R) by all of the narrators is termed 'Ḥasan' by 'Imām al-Tirmidhī.

Principles of the Qā'idah:

The sentence formulating the Qā'idah could have better explained the idea once it is rephrased to be-

“أَنَّ الَّذِي أَخَذْتَهُ الْيَدُ ثَابِتٌ أَوْ مُسْتَقَرٌّ عَلَى الْيَدِ لَا يَرْتَفِعُ عَنْهَا إِلَّا بِالْأَدَاءِ” – “If any person borrows anything, he will be held liable for the thing till he returns the borrowed thing. Therefore, the borrowed thing remains under the care and responsibility of the borrower and the deadline of the care and responsibility continue till he returns it. If the thing borrowed or taken forcibly gets damaged due to natural calamity or even the thing is discovered to be having defects or technical issues, the borrower or the taker must offer equal compensation for the thing.

¹ Sarakhasī, Sharḥ Al-siyar al-Kabīr, v.3, p.130; Ibn Mājah, Al-sunan, v.2, p.802; Aḥmad Ibn Ḥanbal, Al-munad, v.5, p.8.

Basic Principle of the Qā'idah:

“إِحْتِرَامُ مَالِ الْمُسْلِمِ”- “Respecting the property of the Muslims” is a strong principle supporting the Qā'idah under discussion. These categories of principles prove that none but the owners is allowed to have legal right or claim to the property and if the property borrowed or forcibly taken under control gets damaged, the owner of the property must be given ample compensation.

To be precise, as killing a Muslim by another Muslim is illegal in Islāmic Sharī'ah, so is the case with the property extortion. Even the property of a non-Muslim is illegal to be taken possession of without legal authority. As the main objective of Islāmic Sharī'ah is to respect human life, property, inheritance, dignity, religion and even the right to free speech and thought, the protection of the property proves to be the most important part to be taken care of.

Examples of Qā'idah:

1. Settling any dispute by money or anyother exchanges of 'things':If anyone settles any dispute with exchange of money or something else and does not have any benefit in this settlement, he must return what he has received in the process.
2. If anyone gives away any portion of property considering it as the refund/return of the debt and can later remember that he actually does not owe anything, his property should be given back though it was given away intentionally.
3. If someone picks anything and keeps it with him, he will be held responsible for the thing till he returns it to the owner. The principle supporting the rule is

“لَا يَجُوزُ التَّصَرُّفُ فِي مَالٍ غَيْرِهِ بِغَيْرِ إِذْنٍ مِنْهُ أَوْ وِلَايَةٍ”

It is illegal to possess other's property without ownership or the permission of the owner.¹

Evidential Ḥadīths for the Qā'idah:

This Qā'idah (maxim) stems from the aforementioned Ḥadīth narrated in Musnade 'Aḥmad, four books of Sunan and Mustadrak Ḥakim. The Ḥadīth termed 'Ḥasan' by 'Imām Tirmidhī is reported from *Samurah Ibn Jundub* (R) by all of the narrators.

¹ Muṣṭafā Al-Zarqā, *Al-Madkhal al- Fiqhī al- 'ām*, v.1, p.977.

Sixth Qā'idah (maxim):

“الْعَدَمُ هُوَ الْأَصْلُ فِي الصِّفَاتِ الْغَارِضَةِ”

Occasional descriptions/features are not reliable in principle.¹

This Qā'idah (maxim) is inseparably related to the basic principle-

“الْيَقِينُ لَا يَزُولُ بِالشَّكِّ” –Certainty is not overruled by doubt.

Explanation of the Qā'idah (maxim):

Let us have a lexical approach to understanding the principle. The Arabic word 'al-'aslu' (الأصل) means the existing and original condition of the things, 'al-ṣifah' (الصفة) means the characteristics added to the originality of the thing such as color, movement and sound etc., 'al-aridah' (الغارضة) means transient and 'al-'adamu' (العدم) means the condition of non-existence.²

The optional or transient characteristics of the thing means that the characteristics will gradually cease to exist whereas the original characteristics of the thing will continue to exist. Under this principle, if there is disagreement regarding the existence of optional features of a thing, the opinion disapproving of the characteristics will be accepted without requiring to present any evidence. But, in the case of the optional features, the claimant of the existence of feature will have to prove his claim through presenting the proof.³

¹ Majallah Al-'Aḥkām Al-'Adaliyyah, p. 17, section 11.

² Abū al- Baqā' Ayyūb Ibn Mūsā Al-Ḥusaynī Al-Kafawī, Al-kulliyāt.

³ Durar Al-ḥkām sharḥ Mājahllah Al-'aḥkām, section: 9, v.1, p.23.

Evidently, the characteristics of the things are of two categories:

1. Basic characteristics is inherently available in the thing from its existence. For example, the commodity for sale would be in good condition, and the money/wealth would remain free from loss or gain before its investment.
2. Occasional Characteristics that do not lie with the thing from its existence, rather, it is added later on. For example, the sold commodity is found to be defective, profit-loss in the wealth of 'Mudārabah'.¹

Evidential Ḥadīths for Qā'idah (maxim):

As mentioned earlier, this Qā'idah is founded on another basic Qā'idah-

“الْيَقِينُ لَا يُرْوَلُ بِالشَّكِّ”

“Certainty is not overruled by doubt”. So, the Ḥadīths prove that basic Qā'idah may be consulted as the examples of this Qā'idah (maxim). It is recommended to revise the chapter of the maxim “Certainty is not overruled by doubt” in detail for better understanding of the Qā'idah (maxim) ‘Occasional descriptions/features are not reliable in principle’.

The Examples of the Qā'idah:

1. If the buyer and seller have a dispute over the defect of the horse or the vehicle already sold and the buyer claims to have found the defect after he has bought it while the seller denies the accusation and both of them have no proof for or against any claim or

¹ Muḥammad Siddīq 'āl būrnū, Kitāb Al-wajīz fī 'idāḥ Qawā'id al-fiqh al-kulyyah, p.184.

accusation, the seller's claim will be given preference only after his oaths taken in the name of Allah. Since 'being free from defects is original or natural feature of the thing while having defects is optional or added features, the one claiming against original feature of the thing must have the proof.¹

2. If someone admits having taken any amount of loan from another person and refunded the loan taken, the debtor must prove that he has paid back the loan as the 'loan' is considered the original feature of the issue, the creditor's claim is to be given preference. So, the debtor must refund the loan until and unless he can show the proof of his having refunded.²

Under the condition that someone eats the food of other person saying that he has the permission from the owner of the food while the owner denies giving permission, the owner's claim will be accepted because the claim of the owner is the original and natural feature of the issue while the permission is an added feature.³

¹ Suyūṭī, Al-'Ashbāh wa al-Nazā'ir, p.58; Ibn Nujaym, Al-Ashbāh wa al-Nazā'ir, v.1, p.115; Sharḥ al-majallah, p.23; Muḥammad Ṣidqī 'āl brūnū, Kitāb Al-wajīz fī 'idāḥ Qawā'id al-fiqh al-kulyyah, p.184

² Suyūṭī, Al-'Ashbāh wa al-Nazā'ir, p.58; Ibn Nujaym, Al-Ashbāh wa al-Nazā'ir, v.1, p.115.

³ Suyūṭī, Al-'Ashbāh wa al-Nazā'ir, p.58.

Seventh Qā'idah (maxim):

“الْعِبْرَةُ بِالْغَالِبِ وَلَا عِبْرَةٌ بِالنَّادِرِ”

Consideration shall be given to the commonly predominant, not to the rare.

If any ruling of Sharī'ah develops from the decision of the majority of the people, it is usually applicable to all. The generality of the ruling is not hampered or barred even if the ruling remains inapplicable for a few people or for some time.

This Qā'idah (maxim) is deeply related to another Qā'idah (maxim);

“إِنَّمَا تُعْتَبَرُ الْعَادَةُ إِذَا إِطْرَدَتْ أَوْ عُلِبَتْ” - (Custom shall be deemed effective only when it is constant and predominant). So, the common attitude and prevailing habit is *Hujjah* (proof). Islāmic Jurisdiction accepts the ruling by the majority, not by a few.

In the light of the discussion above, Islāmic Sharī'ah has accepted many options while someone is on his travel. For example, 'Qaṣar Prayer' (reducing the four *raka'ah* of prayer to two *raka'ah*), praying prayers of the two schedules together, delaying the fasting for the day when someone is in a long journey, etc. As the travel is troublesome for the majority of the people, the options are open for all and on the basis of this ruling, the traveler can avail himself of the relaxed options even when he does not feel exhausted during his travel on fasting.

Chapter Thirteen

Concerning Qā'idah (maxim) starting with Arabic letter

'Ghayn' (غين)

(There is one Qā'idah [maxim])

Qā'idah (maxim):

“الْغُرْمُ بِالْغُنْمِ”

No return without risk.¹

This Qā'idah has also been rephrased in the following words,

“مَنْ لَهُ الْغُنْمُ عَلَيْهِ الْغُرْمُ” - “The one wishing to have the share of the profit will also have the equal share of loss”.

Meaning and Explanation of the Qā'idah (maxim):

The Arabic word “الْغُنْمُ” (al-gunum) means to succeed, to benefit and to get profit from. And the word “الْغُرْمُ” (al-gurumu) lexically means to give back the necessary things owed to a person or to compensate for the loss of life and property.

The statement “الْغُرْمُ بِالْغُنْمِ” (al-ghurumu bi al-ghunumi) or “مَنْ لَهُ الْغُنْمُ عَلَيْهِ الْغُرْمُ” or “يَقْدِرُ النَّفْعَةُ النِّعْمَةُ” (As you sow, so shall you reap) or the likes have the similar connotations. The person to be benefitted will have to take risk of loss as well. For example, each one will have to bear the risk of loss proportionate to the profit as per investment in the joint venture or transactions. And the person being benefitted as approved of by Sharī'ah, from the thing will have to bear the expense and loss of the thing.

This Qā'idah (maxim) of significance points to another Qā'idah (maxim) of similar type- “الْخَرَاJ بِالضَّمَانِ” (Mortgage begets profit).

¹Majallah Al-'Aḥkām Al-'Adaliyyah, p.26, section: 87.

Though these two Qā'idahs are different in terms of meaning and context but the objectives of both lead to the same contextual meaning that the person will have the responsibilities as per the extent and amount of profit and privileges he enjoys. To be precise, the rights and privileges are made proportionate and thus both the Qā'idahs (maxim) seek to establish justice, equality and equity in Islāmic Sharī'ah.

The maxim “الْعُرْمُ بِالْغُنْمِ” (No return without risk) being applicable to the mortgage related agreements invalidates the existing capitalistic policy and principle of “الإثراء بلا سببٍ” - enrichment without valid reason.

The Ḥadīthin support of the Qā'idah (maxim):

The Qā'idah bases itself on the connotation of the Ḥadīth “الخراج بالضمان” (Mortgage begets profit).¹ Shaykh Waliullah Dehlawī is of the opinion, “الْعُرْمُ بِالْغُنْمِ” is one of the principles that contribute to many rulings in Islāmic Sharī'ah. He refers to the following Ḥadīths as the foundations of the Qā'idah (maxim) being discussed:

1. The judgmental Ḥadīth of the Prophet (PBUH) “الخراج بالضمان” (Mortgage begets profit).²
2. The Ḥadīth of the Prophet (PBUH):

“لَا يَغْلَقُ الرَّهْنُ مِنْ صَاحِبِهِ الَّذِي رَهْنَهُ، لَهُ غُنْمُهُ وَعَلَيْهِ غُرْمُهُ”

(The owner of the thing mortgaged cannot be deprived of its profit and the loss).¹

¹ Abū Dāwūd, Al-Sunan, V.3, P.284, Ḥadīth No: 3058-3510; Al-Tirmidhī, Al-Sunan, v.2, P.572-573, Ḥadīth No: 1285-86

² Shah Waliullah Dehlawī, Ḥujjatullah Al-bālighah, v.2, p.262.

In the text of the Ḥadīth, غنم (ghunumu) refers to the produced or increased profit from the thing mortgaged and غُرْمُهُ (ghurumu) gives the impression of reduction. So, the Ḥadīth makes it mandatory to compensate for any kind of loss and destruction of the things mortgaged, rented or deposited.

3. Another Ḥadīth by 'Anaṣ (R) also reflects the Qā'idah (maxim).
 “‘Umar (R) gave him compensation for the thing deposited with ‘Umar (R) even though the thing deposited had been stolen.”²

‘Imām Bayhaqī (Rah) explains that ‘Umar (R) compensated for the negligence in taking care of the thing kept with him. But except negligence, if the thing deposited gets damaged, lost or forcibly taken away, there is no compulsion for the compensation for the thing since the Messenger of Allah (PBUH) said, “No compensation is mandatory for the person if he is entrusted with anything”.³

¹ The Ḥadīth is narrated by ‘Imām Shaf’ī and Dāruquṭnī, they consider the Ḥadīth as *Ḥasan Muttaṣil* (Ḥadīth No: 1406), *Al-‘Ibānī, ‘irwā al-ghalīl fī takhrīj ‘aḥādīth manār al-sabīl*, p.239.

² *Sharḥ al-zarkashī ‘alā mukhtaṣar al-kharkī fī al-fiqhī ‘alā madhhab Aḥmad Ibn Ḥanbal*.

³ Dāruquṭnī, *Al- Sunan*, p. 306; Bayhaqī, v.6, p.289.

Applicability of the Qā'idah:

1. The borrower shall bear all the expenses in the process of returning the thing borrowed as he has benefited from the thing borrowed.
2. The depositor shall bear the expenses involved with returning process as his deposit has supposedly benefited him.
3. The buyer shall bear the expenses involved with the buy-sale or agreement process as the transaction is done for his benefit.
4. The repairing cost of the shared property shall be borne by the shareholders as per the proportion of the share one holds.¹

¹ Muṣṭafā al-zuhaylī, *Al-Qawā'id al-Fiqhiyyah wa taṭbīqātuhā fī al-madhāhib al-'arba'ah*, p.543.

Chapter Fourteen

Concerning Qā'idah (maxim) starting with Arabic letter Fā' (فاء)
(There is one Qā'idah [maxim] in this chapter)

Qā'idah (maxim):

”فِي إِطْلَاقِ الْإِسْمِ إِعْتِبَارُ الْعُرْفِ“

Existing tradition to be meant in the nomenclature.¹

Meaning and Explanation of the Qā'idah:

The Qā'idah (maxim) emphasizes the social custom, tradition and the familiar ruling known to the people. From this perspective, it belongs to general principle ”الْعَادَةُ مُحْكَمَةٌ“ (Existing tradition is to be accepted).

عُرْف (‘Urf) refers to the decisions taken and tradition accepted by the people on the basis of social logic² and it may also mean the statement or the action of the majority of the people.³

Evidential Ḥadīth for the Qā'idah (maxim):

The Qā'idah stems from is the following Ḥadīth:

أَنَّ رَجُلًا سَأَلَ ابْنَ عُمَرَ رَضِيَ اللَّهُ عَنْهُ، قَالَ: إِنَّ صَاحِبًا لَنَا أَوْجَبَ بَدَنَةً، أَفَتُجْزِيهِ الْبَقْرَةَ؟ فَقَالَ: مِمَّ صَاحِبُكُمْ؟ فَقَالَ: مِنْ بَنِي رَبَاحٍ، فَقَالَ: وَمَتَى أَفْتَنَتْ بَنُو رَبَاحٍ الْبَقْرَةَ؟ إِنَّمَا وَهَمَ صَاحِبُكُمْ الْإِبِلَ.

“A person asked Ibn ‘Umar (R), one of our friends took sacrificial oath of بَدَنَةً (big animal like camel etc.), now will he sacrifice a cow? “Which tribe does your friend belong to Ibn ‘Umar (R) inquired. The man replied, “He is from the Rabāh tribe”. Ibn

¹ Al-barakatī, Qawā'id al-fiqh, p.96, maxim: 202.

² Jurjānī, al-ta'rīfāt, p.193.

³ Muṣṭafā Al-Zarqā, Al-Madkhal al- Fiqhī al-‘ām, v.2, p.872.

‘Umar (R) said, “He will sacrifice camel since cow is not available among the peope of the Rabāh tribe.”¹

Examples of the Qā’idah (maxim):

1. Sustenance of wife is to be paid according to the tradition. The Holy Qur’ān says, ﴿وَعَايِشُوهُنَّ بِالْمَعْرُوفِ﴾

(Live with your wives in complete justice).²

Allah declares the rights of the wives, ﴿وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ﴾

The wives also have the equal and just rights over you as you do have the same over them.³

The Qur’ān states,

﴿وَعَلَى آلِئُولَئِكَ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ﴾

“The father of the child must bear the sustenance of the mother of the child in the rightful manner”.⁴

2. The use of the property of the orphans as allowed in the Qur’ān:

﴿وَمَنْ كَانَ غَنِيًّا فَلْيَسْتَعْفِفْ وَمَنْ كَانَ فَقِيرًا فَلْيَأْكُلْ بِالْمَعْرُوفِ﴾

And (the financial guardians of the orphans) shall refrain from the use of the property of the orphans but if the guardian is poor, he may legally enjoy the rightful portion of the property of the orphans.”⁵

Ibn Taymiyah (Rah) is of the opinion that Islāmic scholars agree to the point that the sustenance of the wife is decided according to the social traditions. The issue of the amount of sustenance of wife is

¹ Sarakhasī, Sharḥ Al-siyar al-Kabīr, v.5, p.78.

² Sūrah Al-nsā’:19.

³ Sūrah al-Baqarah: 228.

⁴ Sūrah al-Baqarah: 233.

⁵ Sūrah Al-nisā’: 6.

not decided by Sharī'ah; but by place, time, context and the financial condition of the wife and the husband."¹

3. If anyone takes a holy oath that he would ride a دَابَّة (animal) and دَابَّة (animal) is understood to be any animal in his society, he must not ride horse or donkey, rather riding any animal such as the cow or the camel will fulfill the condition of his oath.

If anyone takes an oath that he will sacrifice بَكَنَّة (badana: big animal like camel, etc.) he can sacrifice camel or she-camel if these animals are available in his tribe. And the person belonging to a tribe that is familiar with only cow as animal must sacrifice cow. His sacrifice of camel is considered invalid in Sharī'ah, as it goes against the tradition.

¹ Ibn Taymiyyah, Majmū' al-Fatāwā, v.24, p.83.

Chapter Fifteen

Concerning Qā'idah (maxim) Starting with Arabic letter ق (Qāf)

There are two Qā'idah (maxims)

First Qā'idah:

“قبول خبر الواحد فيما تعم به البلوى”

Accepting the solitary reports (khabr Wāḥid) against long established tradition of a society.

It is a Qā'idah (maxim) of 'Usūl al-Fiqh. According to 'Imām Mālik, Shāfi'ī and Ibn Ḥanbal (R), solitary report can be accepted. But, according to the classical Ḥanafī scholar 'Imām kurkhī and later Ḥanafī Scholars, solitary reports (khabr' āḥād) cannot be accepted against long established tradition, and it cannot be followed.¹

Ḥadīths as proofs of Qā'idah:

Proofs of Qā'idah (maxim) are those authentic Ḥadīths (solitary reports) without differentiating whether the matter is a common plight ('umūm al-balwā) or not. For example:

A Ḥadīth narrated by Ibn 'Umar: “He says, we had been leasing our land for last forty years and we did not consider it illegitimate. In the meantime, *Rāfi' bin Khadīj* (R) narrated to me the Ḥadīth that the Prophet (PBUH) had forbidden it. We stopped doing it as soon as we heard that.”²

There is another example. There was a debate among the companions whether bathing becomes obligatory (Wājib) for the

¹ Al-'āmadī, Al-'iḥkām fī 'Uṣūl al-aḥkām, v.2, p.112.

² Narrated by Al-'āmadī in “Al-'iḥkām fī 'Uṣūl al-aḥkām”, v.2, p.112; also by Bukhārī and Muslim.

sexual intercourse without ejaculation. But, in this regard, as soon as they came to know a Ḥadīth by 'Ā'ishah (R) (solitary report), they agreed to take bathing as obligatory (Wājib) in this case. The Ḥadīth by 'Ā'ishah (R) is: "If two sex organs intersect, bathing will become obligatory (Wājib). It happened between me and the Prophet (PBUH), we bathed."¹

Based on the scholarly agreements regarding the above-mentioned Qā'idah (maxim), scholars differed in many practical masā'il (furu') in different chapters of Islāmic jurisprudence. Some of them have been stated below:

1. Invalidation of ablution (wudū') through the touch of male sex organ:

On the basis of the 'Usūli Qā'idah (maxim) stated above, according to reputed scholars including 'Imām al-Shāfi'ī, if male sex organ is touched, ablution will be invalidated. They have presented the evidence of a Ḥadīth narrated by Bushrā Bint Ṣafwān (R). The Prophet (PBUH) says, "Whoever touches his penis should not perform salah until he performs Wadū'"²

According to Ḥanafī Scholars, ablution will not be invalidated through touching the penis. They have referred to the Ḥadīth narrated by Qays Ibn Ṭalq (R). He (Qays) referring to his father Ṭalaq Ibn 'Alī (R) narrates, "He asked the Prophet (PBUH) whether he needed to do ablution after touching penis. In reply, the

¹ Ibn Mājah, Al-sunan, v.1, p.199, Ḥadīth No: 608; Al-'āmadī, Al-'iḥkām fī 'Uṣūl al-aḥkām, v.2, p.112.

² Ibn Mājah, Al-sunan, v.1, p.161, Ḥadīth No: 479; Abū Dāwūd, Al-sunan, v.1, p.46, Ḥadīth No: 181; Tirmidhī, Al-sunan, v.1, p.139, Ḥadīth No: 82; Al-nasā'ī, Al-mujtabā min al-sunan, v.1, p.100, Ḥadīth No: 163-164.

logical reason. If for a long time, someone's sewerage water passes by someone's house, someone's walks or on someone else's road, someone's room leans or on someone else's wall, they would not have to be removed, but would remain in that condition. Because the continuation of anything for a long time based on the good perception about the Muslims is a proof of legitimacy. Removing them is essentially a violation of the long-standing right. In this Qā'idah, Qā'dīm (القديم) implies the old legal objects. And if the old object is an illegitimate one, then it will be refuted by another Qā'idah (maxim) "الضرر لا يكون قديماً" "Harm does not establish a precedent" or "Harm must not be sustained."

The documentary Ḥadīth of the maxim (Qā'idah):

Since this Qā'idah (maxim) is derived from a basic comprehensive Qā'idah (maxim): "Certainty is not removed by doubts". So, the Ḥadīths of that Qā'idah (maxim) will be regarded as evidence of this branch Qā'idah. To know more about the evidential documents, the basic Qā'idah (maxim) "Certainty is not removed by doubts" can be revisited.

Chapter Sixteen

Concerning Qawā'id (maxim) Starting with Arabic letter ك (kāf)
(There are three Qawā'id (maxims) under this chapter)

First Qā'idah (maxim):

“كل ما يضر فأكله و شربه حرام”

Anything which is harmful is forbidden (Ḥarām) to eat and drink.¹

A Brief Description of the Qā'idah:

It is not permissible for a Muslim to consume any food or drink which will kill him quickly or slowly. For example, taking any kind of poison that will harm or pain him. Because a Muslim is not owner of his own life and existence, rather he is considered the caretaker of his activities, religion, health and wealth. These are the blessings of Allah he is entrusted with.

Qur'ānic basis of the Qā'idah (maxim):

1. Allah says: “Don't kill yourself. Surely, Allah is Merciful to you.”² Allah also says: “Do not push yourself towards destruction. Pray for the blessings. Surely, Allah loves the seekers of blessings.”³

¹ Yūsuf Qardāwī, Al-Ḥalāl wa al-Ḥarām fī al-'Islām, p. 71.

² Sūrah Al-nṣā':29.

³ Sūrah Al-Baqarah: 195.

Ḥadīth as proof of the Qā'idah:

The Ḥadīth from which this Qā'idah is collected is the narration of Ḥadīth scholar Hakim al-nisapuri and others including Hakim. 'Abū Sa'id Khudrī (R) reported, the Prophet (PBUH) said, "Do not cause harm or return harm. Whoever harms others, Allah will harm him, whoever is harsh with others. Allah will be harsh with him."¹

Applied/ Pragmatic Examples of the Qā'idah:

In the light of this Qā'idah (maxim), we can say that since smoking (smoking) is proven to be harmful to the health of the smoker, it is *Ḥarām* and illegal; especially, when a specialist doctor decides it for a person. Besides, even if the health damage is not observed by smoking, it is an act of destroying wealth, an act that benefits us neither in the life Here nor Hereafter. It is to be mentioned that the Prophet (PBUH) has forbidden the destruction of wealth.²

¹ Ḥākim, Al-mustadrak, v.2, p. 66, Ḥadīth No: 2345.

² Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.121; Abū Dāwūd, Al-sunan, v.1, p.192, Ḥadīth No: 722.

Second Qā'idah (maxim):

“الكتاب كالخطاب”

Written Statement is Equivalent to Verbal Statement.¹

The description of the Qā'idah:

The written statement of the two persons or the two parties (in their absence) will be treated as the verbal statement of two persons or the two parties. Because a pen is one of the two tools used to make a statement. Prophet (PBUH) was ordained to deliver the message of *risālah* to the mankind. He has written that message at some point and sent to many tribes, leaders and rulers inviting them to Islam, also, sometimes, he would provide verbal statement to notify and update on many rulings.

There are two requirements for confirmation of a ruling from a written document:

Firstly, the writing should be clear. On the other hand, it is not acceptable which is written on the surface of the water, air or anything like that. **Secondly**, writing must be official. It means that it must be written in the acceptable rules and methods practiced by the people. It must have titles, the names of the senders and receivers. The practical examples of which are as follows:

¹ Majallah Al-'Aḥkām Al-'Adaliyyah, p. 69.

The Proof of the Qā'idah (maxim):

1. 'Ā'ishah (R) reported that the Prophet (PBUH) said,
 "There are five animals, each of which is a fāsiq (evil-doer). The ones which can be killed in the Ḥarām (the holy site) are: crows, hawks, scorpions, rats, mad dogs."¹
2. There is a narration in the *Ṣaḥiḥ Muslim*:
 "It is permissible to kill five harmful animals in *Hill* and in *Ḥarām*."

¹ Bukhārī, *Al Jāmi' Al-ṣaḥiḥ*, v.4, p.129; Muslim *Al-ṣaḥiḥ*, v. 2, p.857, Ḥadīth No- 1198; Taqī al-dīn, *'umdaḥ al- 'aḥkām*, p.156, p.380; Ḥadīth No- 227.

Chapter Seventeen

Concerning Qā'idah (maxim) Starting with Arabic Letter ل (lām)
(There are six Qawā'id (maxims) under this chapter).

First Qā'idah:

“لا مسأغة للاجتهاام في موراء النص”

There is no room for 'Ijtihād where there is an authentic text.¹

It is a Qā'idah (maxim) whose importance and greatness, usefulness and subtlety are much emphasized. That is why, Islāmic scholars of all ages have been attaching great importance to this Qā'idah (maxim).

The simple meaning of the Qā'idah can be understood in the following way. When Alalh says, “Allah has made business permissible and *ribā* impermissible”,² there is no scope to do the opposite of which is clearly stated in the verse.

The scope of the Qā'idah (maxim):

Where the clear statements of Qur'ān-Sunnah exist, it is not permissible to give any personal or Qi'ās-based (logical) opinion to frame a ruling. Where a clear *Naşş* (clear commentary in the Qur'ān-Ḥadīth) exists, it will not be permissible to interpret the text after deviating it from its original meaning.

It is to be noted that the prohibition of 'Ijtihād (interpretation and reasoning based on the sacred text) is an imperative when a clear *Naşş* (text) is available that demands no explanation. The best

¹ Majallah Al-'Aḥkām Al-'Adaliyyah, p. 17, section: 14.

² Sūrah Al-Baqarah: 275.

example of this Qā'idah (maxim) might be like this: if a person does not claim from the plaintiff to produce witness and proof; rather, makes it imperative for the defendant to produce proof or makes the plaintiff swear even when he/she has produced witness and proof, then this kind of 'Ijtihād will be rejected. Because it goes against the statement of a Ḥadīth: "The plaintiff has to produce witness and proof and swearing is to be taken from the defendant."¹ The Ḥadīth makes it obligatory for the plaintiff to produce witness and proof.

The Detailed Description of the Qā'idah (maxim):

If *Naṣṣ* (clear commentary in the Qur'ān-Ḥadīth) exists, then there is no scope for 'Ijtihād (interpretation and reasoning based on the sacred text). In other words, 'Ijtihād cannot replace *Naṣ*. Here, *naṣ* (text) refers to the Qur'ān, pure *sunnah* and 'ijmā' (consensus of the scholars). The *naṣ* (text) requiring no 'Ijtihād must be a clear explanatory text from the Qur'ān and Sunnah (*Mufassar*) or unambiguous quotes (*Muḥkam*). On the other hand, the *Naṣṣ* (text) which cannot be considered as *Mufassar* (unequivocal) and *Muḥkam* (perspicuous) remains open to be interpreted. The matter will be more evident in the following discussion:

Ḥanafī school of thought divides the verbal evidence according to the derivation of rules into four categories:

1. Al-ẓāhir (الظاهر): The meaning of which is expressed through

¹ Aḥmad Ibn Ḥanbal, Al-musnad, v.5, p.266, Ḥadīth No-3188; Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.6, p.35, Ḥadīth No-4552; Muslim Al-ṣaḥīḥ, v.3, p.1336, Ḥadīth No-1711; Ibn Mājah, Al-Sunan, v.3, p.778, Ḥadīth No- 2321; Abū Dāūd, Al- Sunan, v.3, p. 311, Ḥadīth No: 3619; Tirmidhī, Al-Sunan, v.3, p. 19, Ḥadīth No-1342; Al-nasā'yī, Al-mujtabā min al-sunan, v.8, p. 248, Ḥadīth No: 5425.

words, but the space for interpretation exists.

2. Al-naṣ (النص): (From the application of the words) the meaning of which is more revealing than Jahri. However, the space for interpretation exists here also.
3. Al-mufassar (المفسر): Meaning is so obvious from Naṣṣ (text) that there is no room for explanation. However, there is a possibility of abrogation.
4. Al-Muḥkam (المحكم): The meaning of which is so clear and precise that there is no possibility of its explanation or abrogation.

Therefore, we can say that since there is room for explanation in the first two, there is also scope for *'Ijtihād* (interpretation and reasoning based on the sacred text) in the two cases. The last two require no explanation; so, there is no scope for *'Ijtihād*. In fact, *'Ijtihād* is not applicable to *mufassar* (unequivocal) and *Muḥkam* (perspicuous).

***'Ijtihād* is again of two types:**

First: *'Ijtihād* by *fuqahā* (Islāmic jurists) to understand the legislative text from Qur'ān and *Sunnah*. It is to make attempts to know the rulings from Sharī'ah evidence or documents.

Second: *'Ijtihād* by *fuqahā* regarding *Qi'ās* (rational reasoning) of ruling (ḥukm) on matters not having Sharī'ah references based on the matters having Sharī'ah references.

Both types of *'Ijtihād* are very urgent and important. However, *'Ijtihād* in *Qi'ās* will be applicable only when the *Naṣṣ* does not exist. Then *naẓīr* (similar case) is essentially required to compare with *naẓīr* (similar case). Similarly, *'Ijtihād* is not required where

Naş is perceived, but if the *Naşş* is ambiguous and its explanations are varied, then the case is different. In fact, if the *Naşş* is clear enough, no *'Ijtihād* is required.

On the other hand, the Qā'idah (maxim) - "There is no scope for *'Ijtihād* if there is a decisive text (*Naşş*)" means that Sharī'ah rules are derived from and proved by *Naşş*. And, hardly any attempt is required to derive rules from *Naşş*. Because the rule is very clear and evident in the *Naşş*. Besides, *'Ijtihād* is *ẓannī* (Speculative or conceptual). And, rules derived from *'Ijtihād* is also conceptual. On the contrary, *Naşş* is *qaṭ'ī* (decisive) and *yaqīnī* (undoubted) and its rules are also *qaṭ'ī* (decisive). So, a certain thing cannot be rejected by a conceptual thing.

Ḥadīths as the Proof of the Qā'idah (maxim):

One of the proofs of this Qā'idah is the Ḥadīth narrated by Mu'ādh ibn Jabal (R). According to the narration, when the Prophet (PBUH) wished to send him to Yemen as a judge and teacher, He told him:

“How will you judge when you will have to give a verdict?” Then he said, “I will judge by Allah’s Book.” He (PBUH) said, “If you cannot do it by the Book of Allah?” He said, “I will do it according to the Sunnah of the Messenger of Allah.” He said, “What if it is not found in the Sunnah of the Messenger of Allah?” Then he said, “I will try my best to give my opinion. And I will try my best.” Mu'ādh (R) said, “The Prophet (PBUH) put his hand on my chest and said ‘I praise Allah who gifted the messenger of the Prophet this wisdom which pleases the messenger of Allah’.”¹ 'Abū Bakr (R) and 'Umar (R) narrated the same.

The following verse can be taken as the supportive document for the Qā'idah (maxim):

“When Allah and His Messenger (PBUH) decides anything, then no believer can have any authority or desire of his/her own.”² 'Ijmā' (consensus of the scholars) and *Qi'ās* (rational reasoning) prove the same spirit.

¹ Aḥmad Ibn Ḥanbal, Al-munad, v.36, p.333, Ḥadīth No: 22007; v.36, p.416, Ḥadīth No: 22100.

² Sūrah al-'aḥzāb: 36.

Second Qā'idah (maxim):

“ليس لعرق ظالم حق”

Tyrant vein sans any right: No right or authority is established if the act is followed by subjugation.¹

The Theme of the Qā'idah (maxim):

Oppression or tyranny does not establish any authority for the oppressor. 'Al-'irqu al-zālim' (العرق الظالم) means that if a person comes to grab the cultivated land of another person and plant trees or crops or builds any structure on the land, the grabber will be treated as a tyrant or oppressor because he is not the owner of the land where he has planted trees. Thus he will be treated as a grabber and oppressor. In this case, the law is that his planted trees and crops should be uprooted and his structures should be destroyed. But, if the original owner of the land agrees to keep the trees, plants and structures and give the cost of these to the grabber, it is also permissible.

Ḥadīths as the Proof of the Qā'idah (maxim):

The above-mentioned Qā'idah is an important part of a prophets' Ḥadīth which is narrated by 'Imām Muslim, 'Abū Dāwūd, Tirmidhī, and Naṣā'ī. It is also included in '*Al Kharāj*' by Yaḥyā Ibn Al -qurashī, and as a book chapter named '*Ihyāwu Mawātī al-'Arḍ*' in *Al-'Amwāl* by 'Abū ubayd Al-qāsim. Before that, it was included in '*Al Kharāj*' by 'Imām 'Abū Yūsuf (R).

¹ Abū Yūsuf, *Al-kharāj*, p.77.

1. The Ḥadīth is : من أحيأ أرضاً ميتة فهي له-

“If anyone revives a dead land it belongs to him, and the unjust root has no right.”¹

Basically, the Ḥadīth is a proof of the Qā'idah (maxim) that “An oppressor or a grabber cannot establish his/her right through forcing.” On the other hand, a person who forcibly grabs someone's land, plant crops or trees, or builds an installation will not be able to establish the right to possess those things on the land. If the original owner of the land decides otherwise, that will be a different matter. Because, one's property cannot be legitimate for another without any Sharī'ah ground.

'Imām Mālik (R) said, 'العرق الظالم' (Al-'irqu al-ẓālim) "the unjust root" implies those things which are taken, dug or planted illegally". Also "the unjust root" in the Ḥadīth is presented as oppressor, which represents the owner of the 'root' (tree). The Ḥadīth states, possessing anything unjustly through force or might does not legalize the rights of the oppressor.

2. 'Imām 'Abū Dāwūd, Thirmidi, Ibn Mājah, and other Ḥadīth scholars narrated a Ḥadīth with reference to Rafī Ibn Khadj. The Prophet (PBUH) said: “A person who grows crops in the land of a community without their permission has no right to any of the crops. But he may have what it cost him”. Shaykh al-Albaani said the Ḥadīth is authentic (*Ṣaḥīḥ*) and according to Shaykh Ibn Bāz it is Ḥasan.

¹ Abū Yūsuf, Al-kharāj, p.77, Yaḥyā ibn 'ādam al-Qarshi, Al-kharāj, p.80-84, 266-279; Abū 'ubayd Ibn Sallām, Al-'amwāl, p.363-364, Ḥadīth No: 704-707; Aḥmad Ibn Ḥanbal, Al-munad, v.37, p.438; Abū Dāwūd, Al-sunan, v.3, p.178, Ḥadīth No: 3073; Tirmidhī, Al-sunan, v.3, p.55, Ḥadīth No: 1378.

Third Qā'idah (maxim):

“لا يجوز لأحد أن يأخذ مال أحد بلا سبب شرعي”

It is not permissible for anyone to possess someone else's property without legitimate reason.¹

Without any Sharī'ah (legitimate) reason, a person cannot possess another person's property; even it so happensthat the person is another person's son, father or wife. Because property of a person is illegitimate for another person. If anybody possesses another's property without any legitimate reason, the possessor will remain liable for the illegal action. But, with legitimate reason, it is permissible to possess even when the owner of property does not agree.

Sharī'ah (legitimate) reasons to be the owner or consumer/destroyer of property:

Sharī'ah (legitimate) reasons are those which Allah, the law giver, has determined to possess or consume the property. For example: *mīrāth*, *wasiyyah*, *hibah*, buying and selling etc. It is permissible for the head of state to acquire others' assets on bail/security if there is any need. The term 'possession' is used in the Qā'idah in a wider sense. The possession may either be by oppression, by grabbing or by theft. Many *mas'alahs* have been mentioned in the book '*Sharḥu As-Sayyar Al-Kabri*' dealing with issue. One of the *mas'alahs* is stated below:

If the Amir or the ruler thinks it reasonable to take lease of a cargo for carrying the war prize (*ghanīmah*), then he will pay the lease-

¹ Majallah Al-Aḥkām Al-'Adaliyyah, p.27, section: 97.

money before he takes *Khumus* (one fifth of the war prize which is allotted for Allah and His Messenger- allotted for the public welfare). Because, the welfare of the owner of the war prize lies in this lease. This is similar to the (labor) lease for goats and troop. The rights of the vehicle owners will not be hindered by this lease. Because, the rights of *Mujahidin* (Warriors) are not established before the preservation and distribution. It should be noted that the ownership of the property may be an obstacle to the legitimacy of this lease, not the ownership of the rights or entitlements. For example, assets in *state treasury*. Everybody has a right there but not the ownership. It doesn't matter if the vehicle owners agree or refuse it if they are not dependent on the vehicles. Then they will be considered as fraud through this denial. Because their welfare lies in this lease as they will benefit from the rent of the lease, which is not possible without this lease. In the same way, there lie benefits for *Mujahidin* (fighters for Allah's cause). In that case, their denial will be considered as deception. And the judge will not consider their deception. However, if necessary, such a lease is legitimate for others. In this case, it is more legitimate for the 'Amīr (ruler).

If the contract for ship or steamer charter (for specified period) is over but the ship or steamer remains in the deep sea, or if the owner of the vessels dies, then the rent will remain same as before the expiration of the term. It will be a circumstantial necessity. Similarly, it will be applicable in the case of *war prize* when it is appropriate there. Yes, but if the Amir is able to carry the goods

alternatively, then he will not force them to carry. Because then there will be no proof of necessity.¹

The Ḥadīths Cited as the Proofs for the Qā'idah (maxim):

The prophet (PBUH) said: "Taking the wealth of any Muslim will not be legitimate, if he/she does not give it out of satisfaction."²

The prophet (PBUH) also said, "Anyone who revives a dead land, it belongs to him, and the unjust root has no right."³

¹Sarakhasī, Sharḥ Al-siyar al-Kabīr, v.3, p. 138-139.

² Aḥmad Ibn Ḥanbal, Al-munad, v.34, p.299, Ḥadīth No:20695; Dāruqutnī, Al- Sunan, v.3, p. 424, Ḥadīth No:2886,

³ Abū Yūsuf, Al-kharāj, p.77, Yaḥyā ibn 'ādam al-Qarshi, Al-kharāj, p.80-84, 266-279; Abū 'ubayd Ibn Sallām, Al-'amwāl, p.363-364, Ḥadīth No: 704-707; Aḥmad Ibn Ḥanbal, Al-munad, v.37, p.438; Abū Dāwūd, Al-sunan, v.3, p.178, Ḥadīth No: 3073; Tirmidhī, Al-sunan, v.3, p.55, Ḥadīth No: 1378.

Fourth Qā'idah (maxim):

”لا ينسب إلى ساكت قول (يعني أنه لا يقال لساكت: إنه قال كذا)، و لكن السكوت في معرض الحاجة بيان (بمعني أن السكوت فيما يلزم التكلم به إقرار وبيان)“

No statement shall be attributed to a person who remains silent, but remaining silent will be considered as affirmation when statement is inevitable.¹

The Qā'idah (maxim) has two parts: Firstly, the basic principle in *Sharī'ah*, is to associate human activities with their statements which they will say purposely. On the other hand, *Sharī'ah* does not associate 'silence' with any rules and regulations as it relates 'human statement' with rules.

This is a *Fiqhī Qā'idah* (maxim) documented by 'Imām Shāfi'ī (R). He said, "It cannot be said of a person who is silent, that he is giving permission in such a matter, or has given recognition in such a matter."

Second one, it is contrary to the first one, this one is exceptional. The Ḥanafī jurists have referred to this. They have considered silence equivalent to statements depending on the contexts where statements deem inevitable. Different meanings and rules are derived from the statements and narration and in the same way, rules are derived from silence when there are evidential reasons for doing so. In fact, according to Ḥanafī Jurists, this Qā'idah (maxim) is a one of the kinds of '*bayān al-ḍarūrah*' (statement of necessity).

¹ Majallah Al-Aḥkām Al-'Adaliyyah, p.24, section: 68.

Regarding the second statement, “Kashf al-‘Asrār Sharḥu’ Usūl al-Bazdawī” states that “It (the derivation of rule from silence out of necessity) is that some condition of silence can be proved corresponding to the mode or context of the speaker.”¹ Thus, it can be said that the second part of the *Qā’idah* (maxim) is a ‘*Qā’idah*’ *Usūliyyah*’ (a principle or maxim which is related to identifying a rule and also tells us on how to derive a ‘ḥukm’ [ruling]). In the Prophetic statement, his silence after seeing an act or listening to something is deemed as his acknowledgement regarding the matter. The silence of the Prophet in the face of anything is equivalent to his approving statements. Because, the Prophet is not supposed to remain silent in the face of any event that would be regarded impermissible. Therefore, the Fuqahā’s (Jurists) have considered the silence of the Prophet (PBUH) as statement.

The Ḥadīth/s as the Proof of the Qā’idah (maxim):

There are several examples supportive of this *Qā’idah* (maxim). For example, ‘Adhān for *Ṣalatul Eid*, Prophet’s (PBUH) silence regarding utterance of ‘*Iqāmah*, etc.

One of the examples of this *Qā’idah* (maxim) is the silence of an unmarried adult girl when permission is sought from her for marriage. In this case, her silence is considered as a sign of affirmative statement. This is because due to decency or modesty she feels embarrassed to express her opinion clearly.

¹ ‘Alā’ al-dīn Al-Bukhārī, *Kashf al-‘Asrār Sharḥu’ Usūl al-bazdawī*, v.3, p.147.

In the same way, if the *Shafī'* (the claimant of the right of pre-emption) knows about selling of his goods but remains silent, then his silence will be considered as withdrawal of his right of pre-emption ('Haqq al-Shuf'ah). In this way, we can say that it is a fundamental juristic maxim (Qā'idah).

It is to be noted that the first part of the maxim is the basic principle. Because, the activities of the people are dependent on the agreements and clear statements. For this reason, there is no limit to the number of branches included under the maxim. The second part of the maxim is different. The matters related to it are limited and countable.

Examples of the First Part of the Qā'idah (maxim):

1. If someone sells someone else's goods in his presence, and the owner does not prohibit it but remains silent, then his silence will not be considered as permission to sell.
2. If a person is informed that a *fudūlī* (a curious person who is not responsible) has sold his goods, then if he maintains silence, then his silence will not be considered as permission.
3. If someone destroys someone else's property in front of him and he is silent, then his silence will not be considered as permission.

Examples of the Second Part of the Qā'idah (maxim):

1. In the case of permission from an adult woman regarding marriage, her silence will be considered as consent as she is understood to be so modest as not express her mind.

2. According to 'Imām 'Abū Ḥanīfah and 'Imām 'Aḥmad Ibn Ḥanbal, reluctance of a person to swear will be considered as the confession of the accusation. But, according to, 'Imām Mālik and 'Imām Shāfi'ī, reluctance of a person to swear and his/her silence will be considered his/her denial or rejection.
3. The silence of the seller while the buyer takes his/her goods will be considered permission for the buyer.

In the same way, despite being aware of selling, if *Shafi'* (the claimant of right of pre-emption) remains silent, his silence will be considered withdrawal of his pre-emption in this claim.

Fifth Qā'idah (maxim):

“لا ينكر تغير الأحكام بتغير الزمان”

It is irrefutable that rulings change in accordance with the change of time.

Almighty Allah has bestowed His ultimate grace on the followers of this religion who are extremely patient. He has gifted them a perfect and complete code of life which is suitable for every age. No event of life is excluded in this code of life. There will be no new problem which cannot be properly resolved in this Sharī'ah. That is why, whenever any problem has arisen, the Fuqahā' (Islāmic jurists) have found a proper solution in the light of revealed texts (nuṣuṣ) and their aims and objectives, and it will continue till the doomsday, inshā Allah.

However, the things which have been settled undoubtedly (*thawābit*) and are widely accepted, they are nor changeable. And, these are well-proved issues by the Qur'ān and the Ṣaḥīḥ Ḥadīths. Therefore, the purpose of this Qā'idah and fatwās (rulings provided by a qualified scholar [expert in legal issues] on any point of Islāmic law) is subject to change depending on the context of space, time and person.

According to Ibn al-Qayyum (R) the Sharī'ah rules are of two types, namely:

1. All that is unchangeable, i.e., not changeable considering space, time and person and they remain same in all conditions. For example, the irrevocable obligations and *Ḥarām* provisions in the

Sharī'ah, and the law of punishment in the Sharī'ah for various crimes, etc.

2. The rules and regulations which are subject to change depending on the time, space, context and person for the welfare of mankind have specific policy for application.

Some Examples of the Qā'idah (maxim) that are Representative Proofs of the Qā'idah:

- It is narrated about 'Umar and 'Uthmān (R). 'Umar (R) had excused the banishment for unmarried adulterer. He was afraid of the gradual weakness of Iman of the banished person during his stay in Dār al-ḥarb (territory of war: i.e. non-believers). Because, 'Imān of a person gets weakened due to the change of time and space.

Similarly, 'Uthmān (R) had also passed the verdict to sell the camel found by chance and keep the price preserved for the owner. But, it is forbidden in the Ḥadīth. He passed the verdict because he sensed the debasement of human character and responsibility with the passage of time. So, he gave this verdict.

- The Islāmic jurists have imposed security on the artisans. But, the basic premise in Islam is that carpenters, blacksmiths, tailors, etc. do not have to give security. But if they cross the limit or make mistakes, then the case is different. However, when the Prophet's Companions and the Islāmic jurists observed that the people were losing their sense of responsibility, they issued a fatwa imposing security on the artisans in order to preserve the wealth of the people.

- Due to defects in the product, buyers and sellers are allowed to refuse the sale contract in Islam. This is an unchangeable provision. But, the condition of defects is subject to change in space, time and circumstance.¹

In fact, the *Sharī'ah*, rules concerning activities, habits and practices of human beings are for the welfare and well-being of human beings. It can be seen that in the course of time, the sense of human welfare undergoes changes due to contextual necessity. Therefore, whenever there is a change in human interest and human welfare, there should be a reasonable change in rule corresponding to the contextual necessity.

¹ Majallah Al-Aḥkām Al-'Adaliyyah, p.24, section: 67.

Sixth Qā'idah (maxim):

“لا عبارة للدلالة في مقابلة التصريح”

Indication (dalālah) is not taken into consideration in the presence of clear statement (Taṣrīḥ).¹

Taṣrīḥ (تصريح): Taṣrīḥ is the clear and sufficient statement. It may either be direct or symbolic.²

Dalālah (دلالة): Dalālah does not give clear meaning; rather, it has to be understood from contextual conditions like practices, indications etc.

The substance of the Qā'idah (maxim):

This is a very fundamental maxim (which is used to understand the indications [dalālah] and implications of texts [nuṣuṣ]). When comparing, Taṣrīḥ (clear statement) is stronger than Dalālah (indication). But, when they contradict each other, then in the face of Taṣrīḥ, dalālah cannot be justified. If they do not contradict, dalālah can be followed. In this regard, some jurists opine, “The proofs of Dalālah (indication) can be similar to the proofs justified by Taṣrīḥ (clear statement).”³

Some Examples of the Qā'idah (maxim):

1. If a person enters someone else's house in order to drink water and gets the drinking pot broken while drinking, then no compensation will be imposed on him. Because the owner of the house has not

¹ Sharḥ Majallah Al-Aḥkām Al-'Adaliyyah, p.28, section: 13; Al-zuhaylī, Al-Qawā'id al-Fiqhiyyah wa taṭbīqātuhā fī al-madhāhib al-'arba'ah, v.1, p.154.

² Al-nasafī, al-manār bisharhi fath al-ghifār li ibn Nujaym, v.2, p.835.

³ Abū Muhammad al-khabbāzi, Al-mughnī fī 'Usūl al-fiqh, p.247.

forbidden him to drink water. So, his drinking of water is considered permitted as *dalālah* (silent approval). And, there will be no compensation when it is permissible by *Sharī'ah*. Yes, if the owner of the house forbids him to drink and he gets it broken, then he will have to compensate. Because clear forbidding has made 'dalālah' null and void. So, in the face of *Taṣrīḥ*, 'dalālah' will remain null and void.¹

2. The trustee/custodian is allowed to travel with the trusted goods. But, if the depositor forbids him to travel, then it is not permissible for the trustee to travel. If the trustee travels after he is forbidden to do so and trusted goods are destroyed, then the trustee will have to compensate. Because, *Taṣrīḥ* (clear statement) is more strong/preferable to *dalālah* (implied statement).²
3. The expenditure categories of 'waqf' (endowment) property can be inferred from the dealings of previous executives engaged in the project. However, if there is an authentic written statement by the endower found explaining the categories, the dealings of previous executives will be taken into consideration.³

¹ Al-zuhaylī, Al-Qawā'id al-Fiqhiyyah wa taṭbīqātuhā fī al-madhāhib al-'arba'ah, v.1, p.154.

² Al-'atāsī, Sharḥu Al-majallah, v.1, p.129.

³ Aḥmad al-zarqā, Sharḥ al-Qawā'id al-fiqhiyyah, p.98.

Chapter Eighteen

Concerning Qā'idah (maxim) starting with Arabic letter م (Mīm)
(There are 17 Qawā'id (maxims) under this fundamental maxim)

First Qā'idah (maxim):

“ما ثبت على خلاف القياس فغيره لا يقاس عليه”

What is established contrary to Qi'ās (analogy) shall not be used as Qi'ās.¹

It is mentionable that Qi'ās is the fourth basis of the four primary sources of Sharī'ah law. It is proved by the Qur'ān and Sunnah. Qi'ās is the process of measuring or estimating *fara'* (a branch mas'alah- where direct Sharī'ah ruling is absent) with *al-'asl* (where direct Sharī'ah ruling is present) because of a common cause between them.

For Qi'ās (rational reasoning), the following four conditions are applicable:

1. Not to be conflicting with any stronger evidence/document.
2. The ruling of the *al-'asl* (where direct Sharī'ah ruling is present) regarding matters relating to Sharī'ah has to be proved by Sharī'ah text (clear evidence from the Qur'ān and Sunnah) or *ijmā'*; if it is proved by Qi'ās, then it is not correct to make Qi'ās (rational reasoning) on it.
3. For the ruling of the *al-'asl* to prevail, there should be accepted reason ('illah) so that there can be a logical analogy between *al-'asl* and *Fara'*. So, if the ruling of the *al-'asl* is purely 'ibādah-

¹ Majallah Al-Ahkām Al-'Adaliyyah, p.17, section: 15.

centric (Ta'abbudī), then deriving Qi'ās from it will not be justified.

4. 'illah (reason) has to be based on such meaning which conforms to (ruling) Ḥukm and acknowledged by Sharī'ah maxims or principles. On the other hand, any Fara' cannot be considered for Qi'ās over any *fara'*. The *fara'* has to be based on Qi'ās referring to 'al-'Asal'. Similarly, the ruling which is against Qi'ās cannot be considered for any Qi'ās. For example, the obligatory ablution after eating meat of a camel, violation of fasting because of ejecting of blood through a tube (Hijāmah) etc. 'Imām Bukhārī (R) says, Ibn 'Abbās and 'Ikramah say, in the case fasting, injecting anything into body not pouring anything out of body has to be considered.

Basically, it is a Qā'idah (maxim) which traces its roots back to the principles of Islāmic jurisprudence. The conditions (shurut) related to the 'ḥukm' (ruling) of al-'asl is explained in the chapter of 'Qi'ās'. One of the inevitable conditions that must be met for the validity of Qi'ās is that the ruling (ḥukm) of al-'asl is not to be deviated from the norms of 'Qi'ās' (rational reasoning). Because, when norms or criteria are missed, it loses the potentiality of analogical reasoning too. Because, the intended purpose was not achieved. The objective of the ruling (ḥukm) of 'asl is to give the same ruling (ḥukm) in *fara'* in a comparative way. When the ruling (ḥukm) of 'asl goes beyond *qi'ās*, then another *qi'ās* cannot be drawn upon that. Because, it is impossible to prove something by what claims itself as unproven.

The Ḥadīth/s as the Proof of the Qā'idah (maxim):

The applied example for this Qā'idah (maxim) provided by the jurists is the 'Bay' Salām' (it is an Islāmic contract where total payment is given in advance for specific goods to be delivered in later period). Such dealings tend to be forbidden on the basis of Qi'ās (rational analogy) because the product remains unknown during the contract here. How a selling contract is possible on an unknown product? This Qi'ās or contract has been rejected because of the text (the direct reference from the Ḥadīth). The Prophet (PBUH) said, "Those who pay in advance for anything must do so for a specified measures and weight with a specified time fixed."¹

Similarly, another business which is against Qi'ās is the 'Bay' al-'iṣṭinā'' (it refers to a sale by order of any good or property that is to be built /produced/ manufactured and delivered later at a specified date). It is like- "A person will order a manufacturer of shocks to manufacture for him a pair of shocks at the price of this amount, and, he will tell him the quality and quantity, and the manufacturer will agree to this."² This business is made permissible through consensus ('ijmā') as a contextual necessity of human beings. But, this is against Qi'ās or reason. Because, the buying and selling of absent things are forbidden.

So, anything else cannot be compared with the previous mas'alah and gets the permissibility. For example, it is not permissible to say by someone that, based on the *Bay' Salām'* and *Bay' iṣṭinā'*, the fruits of a tree which have not yet been visible can be sold. Because, the reference regarding permissibility of advance

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.75, Ḥadīth No: 2239-2240.

² Al-kasānī, Badā'i' al-ṣanā'i' fī tartīb al-sharā'i', v.5, p.2.

payment contract (*Bay' Salām*) or *Bay' 'iṣṭinā'* (sale by order of good/property) is against *Qi'ās* or (analogy).¹

Shaykh Muṣṭafā Zarqānī, the author of “*Sharḥ al-Qawā'id al-Fiqhīya*” says, “There are so many *shar'ī* rulings which are against *Qi'ās* or reason. So, those rulings will remain confined to the text (the direct reference of the *Qur'ān* and *Sunnah*). Other things cannot be compared with them.”

The following issues are included in this rule:

1. The severing of hand for theft is an obligatory ruling of Islam. But, it cannot be compared with the theft of coffin clothes.
2. Similarly, leasing or renting is a selling of unseen benefits. And, selling of anything which is not seen is forbidden. But, in the case of extreme necessity, it is permissible. Needless to say, reason is avoidable in the case of necessity. So, this ruling will remain confined to the case of necessity. It cannot be compared in different cases.
3. Swearing of both the parties: It is proved in selling contract when dispute arises after receiving the product. On the other hand, Marriage (*Nikāh*) cannot be compared with that. But, before receiving the product, it is acceptable.

¹ Al-nasafī, *Kashf al-'asrār sharḥ al-muṣannif 'alā al-manār*, v.2, p.146.

Second Qā'idah (maxim):

“المشقة تجلب التيسير”

Difficulty causes the ease.¹

It is fundamental and important Fiqhī Qā'idah (maxim) and a great referential document in the principles of Islāmic jurisprudence ('Usūl al-fiqh). It was originated by the tradition of 'Imām 'Abū Ḥanīfah (R). Most of the relaxing rulings of Islam (Shāfi'ī) have been derived from it. It is one of the foundational pillars of Islāmic artifice of Fiqh. Simultaneously, it is a Fiqhī (jurisprudential) and 'Usūli (methodological/ fundamental) Qā'idah (maxim). It is a principle based on so many evidences. Many Fiqhī rulings have been derived from it. For example- debt, guarantor, injunction etc. The relaxing rulings (rukḥṣah) and facilitated (takhfīf) of Sharī'ah rulings approved by the jurists have been derived from it. Some of them are- 'Qaṣar' prayers during travel (praying two rakah of ṣalāh for four rak'ah), doing taimmum, saying prayer with permissible or little impurity etc. Because, Islāmic Sharī'ah does not give a person such a responsibility which is beyond their capacity, which will bring troubles for them or which is goes against his innate nature and incompatible with his instincts. Thus, relax, facilitation and generosity are expected from the law giver (shāri') Allah.

The pains that involve relaxing ruling:

The pains that involve relaxing ruling are those pains that hamper 'ibādah greatly. For example- where there is the fear of death, or where there is the possibility of increased illness or delay of

¹ Majallah Al-'Aḥkām Al-'Adaliyyah, p.18, section: 17.

recovery or possibility of increased pains. On the other hand, there will be no relax in regular or ordinary pains. For example- little influenza or little pains.

Some examples of the Qā'idah (maxim):

1. *Taimmum* is permissible for a sick person if there is the possibility of severing illness or delay of recovery because of ablution.
2. The special cases when it is permissible or better to combine two prayers (*jamā'ah bayna al-ṣalātayn*). For example- due to the travel, sickness or rain when there is the apprehension of wetting clothes.

Some reasons for relaxing or facilitation in Islam:

- Sickness
- Travel
- Enforcement
- Ignorance
- Mistakes

In all the cases of ineligibilities; for example- madness, under age, menstruation etc.

(The following) branch-maxims are associated with the forediscussed maxim 'Difficulty cause the ease' (المشقة تجلب التيسير).

First: الضرورة تبيح المحظورات – "Necessities legalize prohibitions".

Second: الضرورات تُقَدَّرُ بِقَدْرِهَا – "Necessity shall be estimated by the extent thereof".

Third: الأمر إذا ضاق اتسع وإذا اتسع ضاق - "When a matter tightens it will widen, and vice versa".

Fourth: لا واجب مع العجز - "There is no obligation when there is inability".

Fifth: الميسور لا يسقط بالمعسور - "An unfeasible matter cannot entirely overwhelm a feasible one".

The Ḥadīth/s as the Proof of the Qā'idah (maxim):

In a Ḥadīth narrated by 'Usāmah Ibn Shāriq, it is said, "I came to Prophet (PBUH) and there was the pin-drop silence among his companions. Bedouins came to him to ask questions regarding some issues. They asked, is there any harm in such and such? He said, Oh! Servants of Allah, Allah has withdrawn pains and discomforts. But if a Muslim deals with another Muslim unjustly, then it is a matter that leads to destruction."¹

'Imām Bhukari in his "Al-Jāmi' Al-Ṣaḥiḥ" made a chapter titled 'Certainly, dīn is easy' (إن الدين يسر) - and the Prophet (PBUH) says, "To Allah, the most favorite religion is 'Al-Ḥanafīyyah al-samha (easygoing religion)". He has included the following Ḥadīth under this chapter: 'Abū Hurayrah reported that the Prophet (PBUH) said, "The religion is ease, but if anyone overdoes it it gets the better of him; so keep to the right course, approximate to perfection, rejoice, and ask help in the morning, the evening, and some of the latter part of the night."²

¹ Abū Dāwūd al-ṭayālīsī, Al-musnad, v.2, p.559; Abū Dāwūd al-sunan, Al-musnad, v.2, p.211, Ḥadīth No: 2015.

² Bukhārī, Al Jāmi' Al-ṣaḥiḥ, v.1, p.16, Ḥadīth No: 39.

Similarly, 'Imām Bukhārī narrated a Ḥadīth referring to 'Anas (R). He says, "Make things easy, do not make them difficult. Cheer up the people by covering glad tidings to them and do not repuls."¹ A Ḥadīth narrated by 'Ā'ishah (R.) says, "When the Prophet (PBUH) ordered anybody to do anything, He (SM) ordered it corresponding to the capacity of the person."²

Another Ḥadīth narrated by Jābir (R.) says, "He says, once the Prophet (PBUH) was travelling; he saw a crowd; he saw a man was being shaded; then He (PBUH) asked, what is happening? They said, he is fasting. Then he said, it is not righteous to fast while travelling."³

In another statement, he says; "You should accept relaxations (Shāfi'ī) granted by Allah."⁴ Similarly, the Prophet (PBUH) says, "If I thought that it would not be painful for the believers,"⁵ In another statement "on my followers, I would have ordered them to do *miswāk* before every prayer."⁶

In the explanation of this Ḥadīth, *Shah Waliullah Muḥaddith Dehlawi* says, "It means that if it had not been considered painful, then doing *miswak* would have been made compulsory for prayers (*Ṣalāt*) like ablution. There are a number of Ḥadīths that clearly show the influence of '*Ijtihād*' over the rulings of Sharī'ah by the Prophet (PBUH). Surely, those Ḥadīths clarify the objectives behind the '*Ijtihād*', and 'removing the hardship' (*raf'ul haraj*) is

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.1, p.25, Ḥadīth No: 69.

² Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.1, p.13, Ḥadīth No: 20.

³ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.34, Ḥadīth No: 1946.

⁴ Muslim, Al Jāmi' Al-ṣaḥīḥ, v. 2, p.786, Ḥadīth No- 1115.

⁵ Muslim, Al Jāmi' Al-ṣaḥīḥ, v. 1, p.220, Ḥadīth No- 252.

⁶ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.9, p.85, Ḥadīth No: 7240.

one of the principles which Islāmic Sharī'ah is based on.¹ And also, there is another Ḥadīth "Some villagers of desert once came to the Prophet (PBUH) in Madina on the day of Eid al-Adha. He said, preserve meat for three days and then give the rest as 'ṣadaqah' (alms)", and then he said at the end, eat, give, ṣadqah and present.²

The aforescussed points present a brief presentation of some authentic (Ṣaḥīḥ) Ḥadīth dealing with the theme of the chapter. Every Ḥadīth is a proof of relaxing and facilitating. And they clearly verify the Qā'idah (maxim) "Difficulty causes the ease."

¹ Shah Waliullah Dehlawī, Ḥujjatullah Al-bālighah, v.1, p.310.

² Muslim, Al Jāmi' Al-ṣaḥīḥ, v. 3, p.1561, Ḥadīth No- 1971; Abū Dāwūd, al-sunan, v.3.p.99, Ḥadīth No- 2812.

Third Qā'idah (maxim):

“الميسور لا يسقط بالمعسور”

The easy cannot be unwritten by difficult.

This is one of the important Fiqhī Qā'idahs (maxim). Most of the jurists have accepted this. Facilitation (taysīr) and simplification (takhfīf) are the main focuses of this Qā'idah (maxim).

The substance of the Qā'idah (maxim):

The action that is easy to do for the *Mukallif* (A Muslim, pubescent, sane, obligated and accountable for abiding by Sharī'ah guidance) shall not be waived by the difficult thing (action beyond his capacity). Because, the person is obligated to do any portion of the difficult thing corresponding to his capacity, He will not be responsible for not being able to do the whole difficult thing.

It is one of the important maxims of Islāmic jurisprudence that is related with the central purpose of Islāmic Sharī'ah. And, it is that – “In Islam, conferring responsibility corresponds to capacity and doing the easy one of the actions when not capable is a norm.”

It is compatible with the principle (maxim) of “simplification and removing hardship.” So many Fiqhī problems are covered by this Qā'idah (maxim). Most of them related with “‘ibādah and Sharī'ah administration.” In fact, this Qā'idah (maxim) compliments the Qā'idah- “Hardships begets the ease.”

The Ḥadīths as the Proof of the Qā'idah (maxim):

The jurists have derived the Qā'idah (maxim) from the last part of the following Ḥadīth:

'Abū Hurraira (R.) narrated, "I have heard the Prophet (PBUH) saying, try to abstain completely from what I have forbidden you to do and try to perform as much as possible what I have asked you to do."¹

Similarly, Imran Ibn Hossain (R.) narrated a Ḥadīth. He says, "I was suffering from piles, and I asked the Prophet (PBUH) about this. Then, he said, perform salah standing and if you fail to stand then perform sitting; and if you fail to sit then perform sideways."²

It can be derived from the Ḥadīth that "the easy thing shall not be waived by the difficult thing." Because the obligation of salah depends on the maturity or *'aqal* (consciousness). So, as long as *'aqal* (consciousness) is operative, the obligatory thing will remain imperative. For example- *Rukū'* and *sujūd* will not be excused because of the failure to stand. So, from the above statement, it is clear that if one is incapable of doing the best option and capable of doing the relatively less permissible one, then it will be allowed and considered.

Similarly, there is another Ḥadīth by the Prophet (PBUH). He says, "If a person among you observes any injustice, he should prevent it by his own hand. If he fails to do so, he should prevent it orally.

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.9, p.94, Ḥadīth No: 7288; Muslim, Al Jāmi' Al-ṣaḥīḥ, v. 2, p.975, Ḥadīth No: 1337.

² Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.2, p. 48, Ḥadīth No: 1117.

And, if he fails to do it orally, he should hate the injustice in heart. And, the last one is the weakest level of Iman.”¹

The role of heart is to hate and refuse injustice through all means of expressions and signs. For example, pouring down forbidden drinks and disassociate with the drunk man, that can be done by anyone and that is why these things cannot be escaped by anyone. From the above discussion, it is clear that “whatever Allah has made compulsory for men is subject to the capacity of the men. On the other hand, Allah does not impose duties beyond the capacity of a person.

Similarly, ‘Umar Ibn Khaṭṭāb and ‘Ammār Ibn Yaāsir (R) narrated a Ḥadīth which is included in Ṣaḥīḥ Bukhārī and Muslim, “coming to ‘Umar (R) a person said, I am so impure that I have to do obligatory bath, but I did not touch water. Then, ‘Ammār (R) said to ‘Umar (R), “Do you remember? You and I were on a journey, and you did not say prayer (Ṣalat) in that situation. And, I was tumbling on the soil and then offered my prayer (Ṣalāt). When I reported this incident to the Prophet (PBUH), he said, “You were right to do so”. Then, the prophet (PBUH), touched the soil by his own hands and blew the soil away and then made ‘*mash*’ (wipe) of his face and hands.”

¹ Muslim, Al Jāmi‘ Al-ṣaḥīḥ, v. 1, p.69, Ḥadīth No: 49.

In this Ḥadīth, there are clear directives to the maxim in discussion. The prophet (PBUH) had acknowledged the act of ‘Ammār, and He (PBUH) has shown the right way of *tayammum*. Thus, it is understood that “an unfeasible matter cannot entirely overwhelm a feasible one”.

Some examples of the Qā’idah (maxim):

- ❖ If anyone cuts the head of his finger, he has to wash the rest of the part.
- ❖ The person who fails to cover the whole ‘*satar*’ (private parts of the body that shall be covered by a Muslim) should cover the largest possible ‘*satar*’ (private part).
- ❖ The person who can recite atleast some verses of ‘*sūrah fātiha*’ has to recite it according to consensus of scholars.
- ❖ If anyone is without ablution and he has some ‘*najāsah*’ (physical and material impurity) and he has water only sufficient enough to remove ‘*najāsah*’ (physical and material stains), then he has to remove the ‘*najāsah*’.
- ❖ The person whose arms are amputated at the elbows has to wash the bones at the top of the elbows.

Fourth Qā'idah (maxim):

“الْمَجْهُولُ فِي الشَّرِيعَةِ كَالْمَعْدُومِ وَالْمَعْجُوزِ عَنْهُ”

The unknown in Sharī'ah is at par with the non-existent and the incognizable.¹

It is one of those Qawā'id (maxims) that deal with the “Principle of Simplification and removing hardship”. Imām Ibn Taymiyah referred to the Qā'idah (maxim) in many places. In the words of Ibn Rajab al-Ḥanbalī the structure of the Qawā'id (maxims) is as follows:

يَنْزِلُ الْمَجْهُولُ مَنْزِلَةَ الْمَعْدُومِ، وَإِنْ كَانَ الْأَصْلُ بَقَاءَهُ، إِذَا يَتَسَّرَ مِنَ الْوُقُوفِ عَلَيْهِ أَوْ شَقَّ إَعْتِبَارُهُ.

“The unknown is considered to be in the place of non-existent matter - although its existence is fundamental - when it is frustrating to be aware of it, or its existence is difficult to consider.”²

The authentic Ḥadīths for the Qā'idah (maxim):

Imām Ibn Taymiyah (may Allah be pleased with him) has presented several documents in support of the Qā'idah. The following Ḥadīth is one of them: The Prophet (PBUH) said: “And if I order you to do something, then do it as much as you can.”³

Regarding the explanation of the Ḥadīth, the Prophet (PBUH) spoke about the picked-up things which were lost by somebody. He says,

﴿فَإِذَا وَجَدَ صَاحِبَهَا فَلْيُرَدِّهَا عَلَيْهِ وَإِلَّا فَهِيَ مَالُ اللَّهِ يُؤْتِيهِ مَنْ يَشَاءُ﴾

¹ Ibn Taymiyyah, Majmū' Al-fatāwā, v.29, p. 322.

² Ibn Rajab Al-Ḥanbalī, Al-Qawā'id, p.237.

³ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.9, p.94-95, Ḥadīth No: 7288; Muslim, Al Jāmi' Al-ṣaḥīḥ, v. 2, p.975, Ḥadīth No: 1337.

“If its owner comes, give it to him. It is Allah’s wealth that He will give to whom He wills.”

The goods found in this way were the property of the owner, which was lost from him. Regarding the situation when it became difficult to know who the owner of this wealth was- The Prophet (PBUH) said, “It belongs to Allah (SWT), who gives it to whomsoever He wills.”

The Ḥadīth clarifies that Allah wants to take away his ownership of this wealth and give it to the person who got it. There is no disagreement among the religious scholars that it is permissible for a person to give the picked-up things in charity or to enjoy it (to be the owner) if he himself is poor and also looked for the real owner for many days.¹

Also, based on the aforementioned maxim, “If a person dies and no heir is known, his inherited wealth can be spent for the welfare of Muslims, even if in reality his unknown heir does not exist. However, in this case, if the heir is found, then the property has to be handed over to him.”²

¹ Ibn Taymiyyah, Majmū’ Al-fatāwā, v.29, p. 322.

² Ibn Taymiyyah, Majmū’ Al-fatāwā, v.29, p. 322.

Elsewhere, he refers to the Qā'idah (maxim) as saying, "If the owner of any property is not found, we will be free from the liability of returning the property to him. Therefore, it can be spent for the welfare of the Muslim community. It is known that ṣadaqahh (charity) is one of the charitable deeds of Muslims. It is a general principle (Qā'idah) that applies to the assets of all anonymous owners. Because, in such case it is difficult to pay the real owner. Such as: in case of forcibly acquired assets, borrowed assets, depository assets (when the owner cannot be found). So, it can be spent in the welfare of Muslim community according to 'Imām Mālik, 'Aḥmad and 'Abū Ḥanīfah and other scholars."¹

¹ Ibid.

Fifth Qā'idah (maxim):

“مَا رَأَى الْمُسْلِمُونَ حَسَنًا فَهُوَ عِنْدَ اللَّهِ حَسَنٌ”

What Muslims think good is considered good by Allah.¹

That is to say, if the Muslims collectively agree on any verdict or opinion that it will be good, then it will be considered as good in the sight of Allah. Therefore, it is important to accept it and show support for it.

The documentary *Ḥadīths* for the Qā'idah (maxim):

This is the quote of the Abdullah Ibn Mas'ūd (R) which has been quoted by the Ḥadīth scholars like 'Imām 'Aḥmad, Bazār and ṭabarānī respectively in the famous Ḥadīth scriptures. And the narrators of the Ḥadīth are also reliable. As he says-

وَلَا بَأْسَ بِأَنْ يُقْلَدَ الْخَيْلُ فِي أَعْنَاقِهَا فِي الْحَرْبِ وَغَيْرِ الْحَرْبِ. لِأَنَّ ذَلِكَ مِنْ صُنْعِ الْمُبَارِزِينَ

وَعَبِيرِهِمْ وَمِمَّنْ يَرْكَبُ الْخَيْلَ، وَمَا رَأَى الْمُسْلِمُونَ حَسَنًا فَهُوَ عِنْدَ اللَّهِ حَسَنٌ.

“There is no objection to wearing a qilādah (necklace) around the neck of a horse in war or outside the war. Because, it is a general rule for those who face an opponent in battle or who usually ride a horse. And “what Muslims think good is also good in the sight of Allah.”²

¹ Sarakhasī, Sharḥ Al-siyar al-Kabīr, v.4, p.217; Al-barakatī, Fiqh al-sunan wa al-'āthār, p.7.

² Aḥmad Ibn Ḥanbal, Al-munad, v.6, p.84, Ḥadīth No:3600; Al-bazzār, Al-munad, v.5, p.212-213, Ḥadīth No:1816; Al-ṭabrānī, al-mu'jam al-wasīṭ, v.4, p.58; Sarakhasī, Sharḥ Al-siyar al-Kabīr, v.4, p.217; Al-barakatī, Fiqh al-sunan wa al-'āthār, p.7.

Sixth Qā'idah (maxim):

“مَا غَابَ عَنَّا لَا نُسْأَلُ عَنْهُ”

We will not be asked about that which is invisible to us.¹

Explanation of the Qā'idah (maxim):

“It is not good for a Muslim to inquire about what is invisible to the naked eye. So, in the case of a slaughtered animal, it is not his duty to make these inquiries: How has it been slaughtered? What conditions have been found in it? Has Bismillah been recited or not on slaughtered animals? Rather, the animal slaughtered by a Muslim, even if he is ignorant, a transgressor or ahl al-kitāb (true Jew or Christian) is completely ḥalāl. However, this Qā'idah (maxim) is applicable according to the Shāfi'ī school of thought.

The authentic Ḥadīths for the Qā'idah (maxim):

In a Ḥadīth quoted by 'Imām Bukhārī, it is said that a group of Companions (Ṣaḥābahs) asked the Prophet,

يَا رَسُولَ اللَّهِ إِنَّ قَوْمًا يَأْتُونَنَا بِاللَّحْمِ لَا نَدْرِي أَذَكَرُوا اسْمَ اللَّهِ عَلَيْهِ أَمْ لَا، فَقَالَ رَسُولُ اللَّهِ ﷺ: سَمُوا اللَّهَ عَلَيْهِ وَكُلُوهُ -

“O Allah's Messenger! Meat is brought to us by some people, and we are not sure whether the name of Allah has been mentioned on it or not (at the time of slaughtering the animals).” Allah's Messenger (PBUH) said (to them), "Mention the name of Allah and eat it.”²

¹ Yūsuf Qardāwī, Al-Ḥalāl wa al-Ḥarām fī al-'Islām, p.60.

² Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.54; Ḥadīth No: 2054.

Regarding this Ḥadīth, the scholars have said that it is clear from this Ḥadīth that the actions and deeds of a person will be considered as correct and sound until there is no authentic document on its invalidity and in correctness. Thus, 'Imām Ibn Ḥazm has extracted this Qā'idah (maxim) from this Ḥadīth.

- 1) It is narrated on the authority of 'Umar ibn al-Khaṭṭāb (R) that he was crossing the road at one time when suddenly water fell on him through the mijab (roof drain). He had another friend with him. He asked the owner of the *mijāb*, "is your water pure or not?" Then 'Umar (R.) requested the owner of the mijab, "Do not tell us about this. Surely we are forbidden to do artificial (unnecessary) suffering."
- 2) In the same way, the Prophet accepted the invitation of a Jew and also ate his food. But he did not ask whether the food was ḥalāl or not, and the vessel was sacred or not.
- 3) He and his companions used to wear and use the clothes and utensils made by the disbelievers.
- 4) In the same way, they used to distribute and use the clothes and utensils found in the spoils of war. There is also proof that they have used drinking water from the shared goblet.
- 5) On the other hand, there is a group which is in favor of adopting austerity in it. Their evidence is that the following Ḥadīth: The Prophet (PBUH) was asked about the vessels of the People of the Book (Judeo-Christian) in which they ate meat and drank wine in thanksgiving. Then he said-

“إِنْ لَمْ تَجِدُوا غَيْرَ آيَتِهِمْ فَاعْسِلُوهَا، ثُمَّ كُلُوا فِيهَا”

“If you do not find any other pot, wash it with water, then eat in it.”

According to Ibn Rajab al-Ḥanblī, “from this Ḥadīth, one can deduce the issue of the activities of a person whose wealth is mixed with ḥalāl and Ḥarām. If most of his wealth is Ḥarām, as ‘Imām ‘Aḥmad says, it is better to abstain from it. But in the case of a small thing or an unknown thing, the scholars of Ḥanbalī School disagrees that it is Makrūh (reprehensible) or forbidden. Both statements exist. And if most of his wealth is ḥalāl, then it is permissible to trade with him and take from his wealth. The Prophet’s (PBUH) companion Al-ḥārith narrated with the authority of ‘Alī Ibn Abī Ṭālib, he said about the king’s gifts - there is no problem in taking this gift. Because what he gives from ḥalāl wealth is many times more than what he gives from Ḥarām wealth. Similarly, the Prophet and his Companions dealt with the polytheists and the People of the Book. But they knew that they would not avoid all Ḥarām”.¹

¹ Yūsuf Qardāwī, Fiqh al-‘awlawiyyāt- Dirāsah Jadīdah fī ḍaw’i al-Qur’ān wa al-Sunnah.

Seventh Qā'idah (maxim):

“مَعَارِضُ الْكَلَامِ مَنُذُوحَةٌ عَنِ الْكُذِبِ”

Indirect speech is a safe way to avoid a lie.¹

Explanation of the Qā'idah (maxim):

The word ‘ma’ārīd’ (مَعَارِضُ) is plural of ‘mi’rād’ (مِعْرَاضُ). The word is derieved from ‘*Al-ta’rīd fi al-qawl*’ (التَّعْرِیْضُ فِي الْقَوْلِ) meaning ‘the opposite statement of a clear commentary’. That is to say, pointing to a (hidden) truth by concealing a (public) truth. Raghīb Al-aṣṣfahānī, a well-known linguist, says that ‘*ta’rīd*’ is a statement which has two meanings, true-false or overt-invisible. In ‘Allāmah ‘Aynī’s words, *ta’rīd* is a kind of indication as opposed to a denotative statement. The purpose of *ta’rīd* is to prevent the speaker from making false statements.

The meaning of the word ‘mandūhatun’ (مَنْذُوحَةٌ) is breadth or leisure. It is said, *nadahat al-shay’* (نَدَحَتْ الشَّيْءَ) means ‘when it is widened’. Thus, the root is used also to say: ‘You are saved from such lies’ (وَإِنَّكَ لَفِي نَذْحَةٍ وَمَنْذُوحَةٌ مِنْ كُذَا).

That is to say, there is such a wide range of scope with *ta’rīd* that a person can easily escape from intentional lying.

‘Imām Bukhārī has brought a chapter in Ṣaḥīḥ al-Bukhārī entitled “Indirect Speech Relieves False Speech: Its (*ta’rīd*) technical meaning is that speaking in such a way that the listener will understand a denotative meaning, but the speaker will have a different (connotative) meaning in the utterance.

¹ Sarakhasī, Sharḥ Al-siyar al-Kabīr, v.5, p.215.

The documentary narrations of Ṣaḥabah (Prophet's companions) of the Qā'idah (maxim):

- a) 'Umar (R) says, **إِنَّ مَعَارِضَ الْكَلَامِ مَنْذُوحَةٌ عَنِ الْكَذِبِ** "Indirect speech is a safe way to avoid a lie."

This is explained by 'Imām Muḥammad in his book as follows: "This (Ta'rīd) is speaking in a way that has a denotative meaning, but the speaker intends to have another meaning in contrast to the public meaning. As 'Alī (R) said on the day of the trench warfare when 'Amr Ibn 'Abd Wadd came face to face with him, "Did you not give me this guarantee that you would not take any help against me?" So, who are these people you are calling? 'Alī (R) then turned his attention to him, as if it were irrelevant. Then he hit him on the ankle in such a way that his leg was cut off. It is a tactic that (the commander) will say something that will make the listener think that it has a victory for them or something that will bring back the morale of his comrades. But that is not the case in reality. But the statement must be expressed in such a way that he will not be considered a blatant liar in his statement."¹

- b) Narrated from 'Imrān Ibn Ḥusyn (R), the Prophet (PBUH) said:

“إِنَّ فِي الْمَعَارِضِ لَمَنْذُوحَةً عَنِ الْكَذِبِ”

“Indirect allusions give ample scope to avoid lying.”²

- c) 'Asmā bint Yazīd narrated that the Messenger of Allah said:

“لَا يَحِلُّ الْكَذِبُ إِلَّا فِي ثَلَاثٍ: يُحَدِّثُ الرَّجُلُ امْرَأَتَهُ لِيَرْضِيَهَا، وَالْكَذِبُ فِي الْحَرْبِ، وَالْكَذِبُ

لِيُصْلِحَ بَيْنَ النَّاسِ”

¹ Sarakhasī, Sharḥ Al-siyar al-Kabīr, v.1, p.85-86.

² Ibn Abī Shaybah, Al-muṣannaf, v.5, p.282, Ḥadīth No: 26092, Bukhārī, Al-'adab al-mufrad, v.1, p.297, Ḥadīth No: 857.

“It is not lawful to lie except in three cases: Something the man tells his wife to please her, to lie during the war, and to lie in order to bring peace between the people.”¹

d) Similarly, what happened in the way of Hijrah (migration).

An enemy meets 'Abū Bakr and asks him, “Who is the man in front of you?” He then replied, “This is the man who guides me.”² In fact, the legitimacy of *ta'rīdīn* in certain cases bears witness to the flexibility, dynamism and generosity of the Islāmic Sharī'ah.

¹ Aḥmad Ibn Ḥanbal, *Al-munad*, v.6, p.454; Tirmidhī, *Al-sunan*, Ḥadīth No: 1939.

² Ibn 'Abd Al-bar, *'Uyūn Al-'athar*, v.1, p.246; Mubārakpūrī, *Al-raḥīq Al-makhtūm*, p.123.

Eighth Qā'idah (maxim):

“مَا ثَبَّتَ بِالشَّرْعِ مُقَدَّمٌ عَلَى مَا ثَبَّتَ بِالشَّرْطِ”
(وَبِمَعْنَاهَا كُلُّ شَرْطٍ بَغَيْرِ حُكْمِ الشَّرْعِ بَاطِلٌ)

**Sharī'ah Based Principles Get Preference Over
Condition Based Principles.**

**(Alternative Version: All Conditions without
Sharī'ah-Direction Deem Baseless).¹**

Interpretation of the maxim:

Al-shar'u (الشَّرْع) or Sharī'ah means wide-ranging moral and broad ethical principles that Allah (SWT) has designed and instructed human beings to follow.²

This theory centers on giving preference in case of contradictory principles. The essence of this proposition affirms that the rulings that are established by Allah take precedence over what is established by the condition when there is a conflict. This is one of the significant principles of Islam, the application of which is continuous in many chapters of fiqh. The rationale behind this theory is that Allah (SWT) has designed laws to ensure welfare for human beings here and hereafter so that a balanced society free from injustice and oppression is developed.

The maxim suggests that any condition or pact of an agreement that contradicts with the fundamentals of Sharī'ah will be regarded null and void. For example, any pact that says that in marriage husband and wife are not legitimate to each other for physical relationship for the time being or any pact for either seller or buyer

¹ Imām al-Suyūtī, Al-Ashbāh wa al-Nazā'ir, p.149.

² Al-mawsū'ah al-fiqhiyyah al-kuwaytiyyah, v.26, p.17.

that creates obstacles in getting benefit for the sold goods. Elaborately saying pacts or treaties such as a marriage with a condition of no physical relationship or a seller imposing a condition on sold goods or a pact barring a wife not to be with her husband during tour contradict the fundamentals of Sharī'ah, so pacts or treaties would be valid but conditions would be null and void.

Ḥadīths in support of the Maxim (Qā'idah):

The Prophet (PBUH) says, "All conditions that are not available in the Books of Allah (Qur'ān) will be regarded cancelled and non-functional."¹ Being not available in the Book of Allah means being contradictory to Qur'ān and Sunnah and recognized Sharī'ah Laws. So agreements, pacts, or conditions contradictory to Qur'ān and Sunnah will be cancelled.

In above-mentioned Ḥadīth 'Book of Allah' (كِتَابُ اللَّهِ) does not mean only the holy Qur'ān, rather, it includes all the rulings and compulsories ordained for human beings from Allah. Briefly saying Allah-gifted Sharī'ah or laws. Etymologically, the word 'Al Kitāb' or kitāb (كِتَابُ) is a root used as a passive participle which means 'Al Maktūb' or 'Written Laws or Decrees'. The following verse from Qur'ān exemplifies the use,

﴿إِنَّ الصَّلَاةَ كَانَتْ عَلَى الْمُؤْمِنِينَ كِتَابًا مَوْقُوتًا﴾ - (Meaning: Indeed, prayer has been decreed upon the believers a decree of specified times.) Here Kitāb is used as Maktūb.²

¹ Al-bazzār, Al-munad, v.11, p.30; Al-ṭabrānī, Al-mu'jam Al-kabīr, v.11, p.11.

² Sūrah Al-nsā':103.

The following Ḥadīth part is taken from the Ḥadīth of Barira (R) in which her Owner imposed conditions to 'Ā'ishah (R) before selling her (as a slave) to 'Ā'ishah (R). 'Imām Bukhārī narrated a Ḥadīth (which is an explanatory example of this maxim) in his Ṣaḥīḥ under the chapter:

“مَا يَجُوزُ مِنْ شُرُوطِ الْمُكَاتِبِ وَمَنْ اشْتَرَطَ شَرْطًا لَيْسَ فِي كِتَابِ اللَّهِ”

(What is permissible from the conditions of Al-mukātib (the slave who earned his/her freedom with a condition of making a future payment to the master) and whoever stipulates a condition that is not in the Book of Allah). In the Ḥadīth, the Prophet (PBUH) said to 'Ā'ishah (R) regarding the freeing Barirah (R), “Purchase her (freedom) and set her free, for the right of inheritance belongs only to the one who sets a person free. Then He stood up and said: What is the matter with people who make conditions which are not in Allah's Book! If anyone makes a condition which is not in Allah's Book has no right to it.”

Examples of this Qā'idah (maxim):

- Vows (نَذْر - nadhar) cannot be made on Obligations (وَأَجِب - Wājib). Obligation (وَأَجِب) is proven and destined by Sharī'ah and 'vows' (نَذْر) become must upon decision. So 'vows' cannot be made on already destined Obligations. In brief, vows on Wājibs is not permissible. For example: Ṣalatul Jum'ah, five times compulsory Ṣalah.
- In a married relationship, if the husband says, 'I am giving you divorce in exchange of thousand taka on the condition of the power of making her return (رَجْعَةٌ). Here, in this agreement, the exchange of money will be omitted. But 'ṭalāq al-raj'ī' or Revocable Divorce will be in effect. The reason behind is that the exchange of money is conditional whereas the return (رَجْعَةٌ) is Sharī'ah based law. So, it is stronger.
- Fastening 'ihrām for supererogatory Hajj (Nafl Hajj) or vows-based Hajj (Manat/nadhar) in case of not performing Mandatory Hajj will be considered Obligatory Hajj (Farḍ Hajj).

Ninth Qā'idah (maxim):

”مَا كَانَ أَكْثَرُ فِعْلًا كَانَ أَكْثَرُ فَضْلًا“

As the number of actions increases, so do its rewards.¹

A condition that is a must for the Qā'idah (maxim) to be applied:

Two things compared need to be equal in quality and value.

Ḥadīths in support of the principle:

The basic principle was formulated by 'Imām Shāfi'ī (R) on the basis of the saying of the Prophet (peace be upon him):

”أَجْرُكَ عَلَى قَدْرِ نَصَبِكَ“ - “Your reward will be the amount of your sufferings (in activities).”²

In the light of the maxim, some practical mas'alah:

1. It is better to perform the *Witr* prayers separately (in two sections: two *rak'ah* (rakat) first and then adding one *rak'ah*) than to perform together (three *rak'ah*) due to the additional intention (Niyyah), takbīr and Salam associated with the separate *witr*. Because, there are two methods of performing *witr* prayer.

a. Three *rak'ah* (rakat) in one *tashahhud* (testimony of faith- it is recited when a person sits or kneels down during second or last *rak'ah* of prayer).

b. Performing *witr* separately. This is practiced by the Prophet (PBUH), that is, after reciting two *rak'ahs*, one will say *tashahhud*

¹ Al-Suyūfī, Al-Ashbāh wa al-Nazā'ir, p.143.

² Muslim Al-ṣaḥīḥ, v. 2, p.876, Ḥadīth No- 1211.

and *salam*, and afterwards perform the third rak'ah. Here, the maxim mentioned above will be properly applied. That is,

“ما كَانَ أَكْثَرَ فِعْلاً كَانَ أَكْثَرَ فَضْلاً” “more activities result in more rewards.”

What is more in this method is *takbīr*, intention (*niyyah*), *tashahhud* and *salam*. Performing witr separately means standing for the third rak'ah with intention (*niyyah*), reciting the takbeer tahreema and then reciting the surah, and finally finishing the prayers with the second *tashahhud* and *salam*. Therefore, intention (*niyyah*) is added with *takbīr tahrīmah*. And, *tashahhud* and *salam* are also added, and these extra deeds will bring in extra reward. Therefore, it can be said that as the number of actions increases, so do its rewards. The condition, however, is that both actions must be equal.

2. The reward of the one who performs the supererogatory (Nafil) prayers standing will be greater than those who do so while sitting. Likewise, those who perform the supererogatory (Nafil) prayers sitting will be greater than those who do so while lying down.

3. It is better after having some portion of the sacrificial animal as a Barakah or blessings to give the rest of it as *ṣadaqah* than to give the whole of the sacrificial animal as *ṣadaqah*.

4. It is better to fast in summer than to fast in winter. This is because the days are relatively longer in summer and the heat and hardship are more intense in summer than in winter. That is why the Prophet (peace and blessings of Allaah be upon him) said: "Your reward will be determined by your suffering and your expenses."

5. The virtue of performing *tahajjud* in the later part of the night is more than performing in the earlier part since the Prophet (PBUH) used to do the same.

6. Witr prayer in latter part of the night is better than the earlier part. That is why the Prophet (PBUH) said: "Make 'Witr' as your last prayer at night."

'Imām Suyūṭī mentions that it is better to perform Hajj and 'Umrah separately than in one 'iḥrām. This was the view of Abū Bakr, 'Umar and 'Uthmān.

Tenth Qā'idah (maxim):

“مَا أَدَّى إِلَى الْحَرَامِ فَهُوَ حَرَامٌ”

Anything that leads to the Ḥarām is also Ḥarām.¹

Interpretation of the Maxim:

One of the issues in the legal system of Islam is that when Islam declares an object as Ḥarām or illegal, it equally forbids all means that lead to an illegal object. For example, when Islam forbade adultery, it also forbade all the roles and means that lead to adultery such as: un-Islāmic showing off beauty and appearance, sinful solitude, free mixing, nude pictures, nude literature and obscene music, etc. On the basis of these issues, the jurists formulated the principle:

“what leads to Ḥarām is also Ḥarām.” - “مَا أَدَّى إِلَى الْحَرَامِ فَهُوَ حَرَامٌ”

In the real sense - legalizing the illegitimate as legitimate or vice versa is the companion of *shirk* (disobedience to Allah). The matter is therefore extremely dangerous. Allah Almighty says:

﴿ قُلْ إِنَّمَا حَرَّمَ رَبِّيَ الْفَوَاحِشَ مَا ظَهَرَ مِنْهَا وَمَا بَطَنَ وَالْإِثْمَ وَالْبَغْيَ بِغَيْرِ الْحَقِّ وَأَنْ تُشْرِكُوا بِاللَّهِ مَا لَمْ يُنَزَّلْ بِهِ سُلْطَانًا وَأَنْ تَقُولُوا عَلَى اللَّهِ مَا لَا تَعْلَمُونَ ﴾

Say (O Muḥammad): “(But) the things that my Lord has indeed forbidden are Al-Fawaḥyīsh (great evil sins, every kind of unlawful sexual intercourse, etc.) whether committed openly or secretly, sins (of all kinds), unrighteous oppression, joining partners (in worship) with Allah for which He has given no

¹ Yūsuf Qardāwī, Al-Ḥalāl wa al-Ḥarām fī al-'Islām, p.31.

authority, and saying things about Allah of which you have no knowledge.”¹

Even some scholars said: In fact, the root of immorality in religion is to speak about Allah (rule) without proper knowledge. And all things that lead to Ḥarām are also Ḥarām. With the above in mind ‘sadd al-dharī’ah’ (سَدُّ الدَّرِيْعَةِ) the principle of ‘preventing the means of Ḥarām’ comes as a provision which many modernists today do not like. We say: Yes, whoever exaggerates and forbids what Allah has made lawful in the name of ‘blocking the means’ (سَدُّ الدَّرِيْعَةِ). So if someone says: Traveling outside the home is not legal for women. Because, the present time is the era of *fitnah* (dissention, temptation, and treachery). We will say: the matter is unacceptable, and thus, rejected. Because, in the time of the Prophet (PBUH) women used to go out. Moreover, there is no obstacle for a woman to meet her relatives. Therefore (سَدُّ الدَّرِيْعَةِ) the principle of the prohibition must be proved or supported by Sharī’ah.

¹ Sūrah al-’a’rāf: 33.

Ḥadīth in support of the maxim:

All the Ḥadīths concerning (سَدُّ الدَّرِيْعَةِ) blocking the means of the forbidden object/things and also prohibition on getting close to forbidden objects are in support of this maxim.

The words of the Prophet (PBUH) are in this regard,

”الْحَلَالُ بَيِّنٌ وَالْحَرَامُ بَيِّنٌ وَبَيْنَ ذَلِكَ أُمُورٌ مُشْتَبِهَاتٌ لَا يَذَرِي كَثِيرٌ مِنَ النَّاسِ أَمِنَ الْحَلَالِ هِيَ أَمَ مِنَ الْحَرَامِ فَمَنْ تَرَكَهَا اسْتَبْرَأَ لِدِينِهِ وَعِرْضِهِ فَقَدْ سَلِمَ وَمَنْ وَقَعَ شَيْئًا مِنْهَا يُوشِكُ أَنْ يُوَاقِعَ الْحَرَامَ كَمَا أَنَّ مَنْ يَرْعَى حَوْلَ الْحِمَى يُوشِكُ أَنْ يُوَاقِعَهُ أَلَا وَإِنَّ لِكُلِّ مَلِكٍ حِمًى أَلَا وَإِنَّ حِمَى اللَّهِ مُحَارَمَةٌ“

“The lawful is clear and the unlawful is clear, and between that are matters that are doubtful (not clear); many of the people do not know whether it is lawful or unlawful. So whoever leaves it to protect his religion and his honor, then he will be safe, and whoever falls into something from them, then he soon will have fallen into the unlawful. Just like if someone grazes (his animals) around a sanctuary, he would soon wind up in it. Indeed for every king has a sanctuary (pasture), and indeed Allah’s sanctuary is what He made unlawful.”¹

¹ Bukhārī, Al Jāmi’ Al-ṣaḥīḥ, v.3, p.53; Muslim Al-ṣaḥīḥ, v. 3, p.1221, Ḥadīth No- 1599; Tirmidhī, Al-sunan, v.2, p.502, Ḥadīth No: 1205.

Eleventh Qā'idah (maxim):

“مَالُ الْمُسْلِمِينَ لَا يَصِيرُ غَنِيمَةً لِلْمُسْلِمِينَ بِحَالٍ”

The wealth of Muslims does not become Ghanīmah (spoil of war) for other Muslims in any case.¹

The authenticity of the Qā'idah under discussion lies in the practices of the Companions (Ṣaḥābahs): It is narrated that when a prisoner of war was brought to 'Alī (R) in the battle of Ṣiffīn, he (the prisoner) said, “Do not kill me.” 'Alī (R) replied: “I will not kill you in such a situation because I fear God. On the other hand, the man who captured the prisoner was given his weapon. Of course, he did this to be victorious and stronger over the enemy. When the war finally ended, the weapon would be returned to his owner or the prisoner if he was alive and to his heirs if he died. This is also the interpretation of the statement narrated from 'Imām al-Sha'bī. He says, 'Alī (R) did not accept any property other than the war vehicles and swords of the warriors who came to the battle of Ṣiffīn as Ganimah (booty).

¹ Sarakhasī, Sharhu Al-siyar al-Kabīr, v.3, p.131.

The explanation of the statement stands:

‘Alī (R) has only handed it over (war vehicles and swords) to those who have captured them to be victorious and stronger over the enemy. He did not give them ownership. This rationale is that the wealth of a Muslim does not in any case become the legitimate wealth of another Muslim. One must note that in the described war he did not distribute any wealth on a one-fifth policy. In addition, when the participants in the war demanded the distribution of the war-earned wealth among them, he replied: Do you want to get ‘Ā’ishah (R) as war prize? Therefore, he (the friend) in whose hands he handed over the weapon (that day) so that he can continue the fight with the weapon of special need. Later, when the fighting subsided, the weapon was returned to its rightful owner. On the other hand, when victory is achieved over a pagan community in Arabia, the victors must have taken (from the enemy) arms or agreement to accept Islam from their men (warriors), and nothing else as we explained earlier.¹

¹ Sarakhasī, *Sharhu Al-siyar al-Kabīr*, v.3, p.131-132.

Twelfth Qā'idah (maxim):

“ما حرم أخذه حرم إعطاؤه”

What is illegal to accept is also illegal to give.¹

Thirteenth Qā'idah:

“ما حرم فعله حرم طلبه”

What is prohibited to do is prohibited to demand.²

Fourteenth Qā'idah:

“ما حرم استعماله حرم اتخاذه”

What is illegal to use is also illegal to accept.³

These three principles are almost synonymous. They ensure all the doors of every Ḥarām or forbidden object, whether it is in case of accepting and giving, performing and demanding, using and accepting.

Ḥadīths in support of these three Qawā'id (maxims):

In substantiating the principles, the following Ḥadīth of the Prophet (PBUH) is relevant:

”لُعِنَتْ الْخَمْرُ عَلَى عَشْرَةِ أَوْجُهٍ: بِعَيْنِهَا وَعَاصِرُهَا، وَمُعْتَصِرُهَا، وَبَائِعُهَا، وَمُبْتَاعُهَا، وَحَامِلُهَا، وَالْمَحْمُولَةُ لَهُ، وَآكِلُ ثَمَنِهَا، وَشَارِبُهَا، وَسَاقِيهَا“

“Wine is cursed from ten angles: The wine itself, the one who squeezes (the grapes etc), the one for whom it is squeezed, the one who sells it, the one who buys it, the one who carries it, the one to whom it is carried, the one who consumes its price, the one who

¹ Majallah Al-Aḥkām Al-'Adaliyyah, p.20, section: 24.

² Majallah Al-Aḥkām Al-'Adaliyyah, p.20, section: 35.

³ Al-Ashbāh wa al-Naẓā'ir, p.150.

drinks it and the one who pours it.”¹ According to another narration, the Prophet (PBUH) cursed ten things equally about alcohol.² In the words of 'Imām 'Abū Dāwūd, “Allah Almighty Himself has cursed the wine.”³ In another Ḥadīth, the Prophet (PBUH) said:

”لَعَنَ اللَّهُ الْيَهُودَ، حُرِّمَتْ عَلَيْهِمُ الشُّحُومُ فَحَمَلُوهَا فَبَاعُوهَا“

“May Allah curse the Jews for, though they were forbidden (to eat) fat, they liquefied it and sold it. It means “May Allah Almighty curse the Jewish nation. For them (cow, goat) fat is forbidden but they used to melt it and sell it.”⁴

Here are some examples of the three Qā'idah (maxim) discussed:

- Accepting and paying interest is illegal. The Prophet (PBUH) said: “Allah curses the usurer, the usury giver, his witness and the accountant of usury.”⁵
- Illegal income of an adulteress, income of a fortune teller, exchange of bribes, exchange of professional crying ladies, income of flute. Accepting and giving money through all these means are illegal.

¹ Ibn Mājah, Al-sunan, v.2, p.1121, Ḥadīth No: 3380.

² Ibn Mājah, Al-sunan, v.2, p.1121, Ḥadīth No: 3381.

³ Abū Dāwūd, Al-sunan, v.3, p.326, Ḥadīth No: 3674.

⁴ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.4, p.170; Ḥadīth No- 3460; Muslim Al-ṣaḥīḥ, v. 3, p.1207, Ḥadīth No- 1582; Ibn Mājah, Al-sunan, v.2, p.1122, Ḥadīth No: 3383.

⁵ Aḥmad Ibn Ḥanbal, Al-munad, v.2, p.27, Ḥadīth No: 3725; Ibn Mājah, Al-sunan, v.2, p.764, Ḥadīth No: 2277; Abū Dāwūd, Al-sunan, v.3, p.244, Ḥadīth No: 3333; Tirmidhī, Al-sunan, v.2, p.503, Ḥadīth No: 1206.

- Just as alcohol, adultery, murder, etc. are prohibited, so is the appeal to do such things to others. Because it is illegal to do forbidden things and to give instructions as well.
- When the use of gold and silver utensils is forbidden upon the Prophet's (PBUH) explicit instruction on banning the use of them, acquisition and preservation of these utensils has also been prohibited so that the preservation of these does not become a means of use.
- Similarly, it is forbidden to keep a dog for a person who does not hunt or who does not want to look after the cattle or the farm.
- The adoption and preservation of musical instruments is also prohibited under the same regulations.
- It is not lawful to give Ṣadaqahh to a person who is capable of earning. Because the person is not allowed to accept it. According to the following Ḥadīth commentary,

“لَا تَحِلُّ الصَّدَقَةُ لِعَنِيٍّ وَلَا لِذِي مِرَّةٍ قَوِيٍّ أَوْ سَوِيٍّ”

“Ṣadaqah may not be given to a rich man or to one who has strength and is robust and who is sound in limbs”.¹

¹Aḥmad Ibn Ḥanbal, Al-munad, v.11, p.84, Ḥadīth No: 6530; Abū Dāwūd, Al-sunan, v.2, p.118, Ḥadīth No: 163; Ibn Mājah, Al-sunan, v.1, p.589, Ḥadīth No: 1839; Tirmidhī, Al-sunan, v.2, p.35, Ḥadīth No: 652.

Fifteenth Qā'idah (maxim):

“من شرط على نفسه طائعا غير مكره فهو عليه”

Conditions imposed on one's own willingly without force become mandatory on him/her.

The above text is a well-known saying which takes the form of a Qā'idah (maxim). 'Imām Bukhārī and others narrated it from the chief Qāḍī (justice) Shurayh that Ibn Shīrīn narrated: “A person said to the vehicle renter,” I will rent your car. Even if I do not go with you on such and such day, you will have a hundred coins as a rent. Later he did not travel on those days”. When this issue was brought before Qāḍī (justice) Shurayh he uttered the following statement: Conditions imposed on one's own willingly without force become mandatory on him/her.¹

In the various statements of the cotemporary judges of that time the issue came forth. The description is as follows: -

Some people filed a case in the court of Qāḍī (justice) Shurayh against a man who rented a vehicle from a person. The man said, “If I can't get out or use your vehicle on that day, your rent will be on me.” He did not go out on rent or use the vehicle that day, so the owner arrested him and lodged a complaint against him before Qāḍī (justice) Shurayh and he uttered the statement that whoever imposes conditions on one's own willingly without force, we apply those conditions on him/her.²

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.198.

² Al-Ṣan'ānī, Al-muṣannaf, v.8, p.59; Wakī' Al-ḡabbī, 'Akhhbār Al-Quḍāt, v.2, p.339.

In this case, Qāḍī (justice) *Shurayh* gives a judgment to give legitimacy to human-assisted conditions in any kind of lawful contract which is considered as a principle, and the conditions are undoubtedly proved to be effective in various laws and decisions of the contract. Moreover, the basic principle is the saying of the Prophet (PBUH): *المُسْلِمُونَ عِنْدَ شُرُوطِهِمْ* – “Muslims are liable to self-imposed conditions.”¹

¹ Abū Dāwūd, *Al-sunan*, v.3, and p.304, Ḥadīth No: 3594; Ḥākim, *Al-mustadrak*, v.2, p.57, Ḥadīth No: 2309.

Sixteenth Qā'idah (maxim):

“الْمَرْءُ مُوَاحِدٌ بِإِقْرَارِهِ”

The person is accountable for his confession.¹

In Islāmic Sharī'ah terminology, *'iqrār* (confession) means: - Acknowledging the responsibilities and rights of others on oneself. The word *'iqrār* (إقرار) is the opposite of the word *Juḥūd* (جُحُود), which means to deny.² In Qur'ān and Sunnah this maxim has been substantiated. The following verses of the Qur'ān is indicative of so that gives the instructions for consolidating debt-based or remaining transactions through written agreements: “And let the borrower tell the subject of writing and fear his Allah and not write anything less.”³ So if the confession had not been accepted, there would have been no point in writing it down.⁴ Because, the the step of writing any statement down is followed by its oral acknowledgement.

Similarly, another verse says,

﴿يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَى أَنْفُسِكُمْ﴾

“O you who believe! Stand firm in justice, and you will testify against God, even if it is against yourselves.”⁵ The verse also contains a kind of instruction on the importance of the existing Qā'idah (maxim).

¹ Majallah Al-Aḥkām Al-'Adaliyyah, p.79.

² Al-zayla'ī, Tabyīn Al-Ḥaqā'iq, v.5, p.3.

³ Sūrah Al-Baqarah: 282.

⁴ Al-zayla'ī, Tabyīn Al-Ḥaqā'iq, v.5, p.3.

⁵ Sūrah Al-Nsā':19.

However, the above discussed Qā'idah (maxim) is well-established in terms of logic. Because, a sensible person cannot testify by lying to himself and cannot push himself towards obvious loss. [Because the person is liable to his own confession]

Some issues/ regulations/ Masa'il of the Qā'idah (problems and solutions)

1. If someone acknowledges that he has a loan of a certain amount of money from someone, then it will not be accepted to claim that he was wrong in calculation or he made a mistake later, because the person is responsible for his own confession.¹
2. When the land owner takes the rent and admitted the matter, but later claimed that the coins/ money he had taken was counterfeit, his claim would not be accepted.² [Because he admitted it before].

¹ Al-'atāsī, Sharḥu Al-majallah, v.1, p.227.

² 'Alī Haydar, Durar Al-ḥkkām sharḥ Majallah Al-'aḥkām, v.1, p. 70.

Seventeenth Qā'idah (maxim):

“مقاطع الحقوق عند الشروط”

Rights are clipped by conditions.

The maxim is a direct statement of Umar (R) proved by the Qur'ān and Sunnah.

Interpretation of the Qā'idah (maxim):

The final settlement of a debt or right shall be in accordance with the conditions set by both parties to the agreement. By the self-made conditions in a contract both parties (basically) bind themselves to the terms. As a result, all will fulfill the conditions set.¹

The Sunnah also has a basis for the condition, as in the famous Ḥadīth of the Prophet (PBUH), ‘المسلمون عند شروطهم’ “Muslims are always accountable for the conditions they have set.”²

¹ Mawsū'atu al-Būrñū, v.5, p.809-810.

² Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.3, p.92; Ḥākim, Al-mustadrak, v.2, p.57, Ḥadīth No: 2310.

Chapter Nineteen

Concerning Qā'idah (maxim) starting with Arabic letter ن (Nūn)
(There are two Qawā'id (maxims) under this chapter)

First Qā'idah (maxim):

“نسخ الكتاب بالسنة المشهورة التي تلقىها العلماء بالقبول جائز”

It is permissible to abrogate the Qur'ān by the mashūr Ḥadīth (which refers to the Ḥadīth conveyed by three or more narrators but not considered *Mutawātir*) which has been accepted by the Ḥadīth experts.¹

The Ḥadīth that is presented as a proof and example of the principle is that the Prophet (PBUH) fought with the people of *ṭā'if* on the seventh day of the month of *Muḥarram* and aimed weapons at them while Allah the Almighty says,

﴿فإذا انسلخ الأشهر الحرم فاقتلوا المشركين.....﴾

“Then, after the forbidden month has passed, kill the polytheists (wherever you find them).”²

¹ Sarakhasī, Sharhu Al-siyar al-Kabīr, v.1, p.61.

² Sūrah Al-Tawbah:5.

Second Qā'idah (maxim):

“النهي عند الاطلاق يقتضي التحريم”

Absolute negation warrants prohibition.

All mujtahids have agreed to recognize this principle of Islāmic jurisprudence.

'Imām Shāfi'ī (R) expressed this Qā'idah (maxim) in the famous book 'Al-'Umm' (الأم). Basically the words indicating prohibition refer to total prohibition. He said: All the prohibitions from the Prophet (PBUH) have their true meaning: It would indicate “The matter is completely forbidden.” So, what the Prophet (PBUH) forbade to do contextually is completely forbidden, until the final proof is found against it.¹

Basis of the maxim:

Allah (SWT) says in the Holy Qur'ān;

﴿وَمَا آتَاكُمُ الرَّسُولُ فَخُذُوهُ وَمَا نَهَاكُمْ عَنْهُ فَانْتَهُوا﴾

“Accept what the Prophet (PBUH) has given you and refrain from what he forbids.”²

Of course, the words of most of the prohibitions revealed in the Qur'ān-Sunnah is prohibitive, and the prohibitive word proves that an object is completely prohibited if there is no metaphorical underlying meaning. Another saying of the Prophet (PBUH):

“من عمل عملاً ليس عليه أمرنا فهو رد”

“Anyone who does something that does not belong to our religion is unhesitatingly rejected.” Therefore, both the Qur'ān and the

¹ 'Imām al-Shāfi'ī, al-'umm, v.8, p.305.

² Sūrah Al-Ḥashr: 7.

Ḥadīth clearly prove that prohibition instruction (whether it is prohibitive words or in other ways related) referring to debarment indicates the final prohibition, whether the action is Sharī'ah prohibited such as adultery, murder, drinking wine or Sharī'ah supported activities such as fasting, prayer, etc. For a detailed understanding of this discussion, Qā'idah (maxim)-

“اقتضاء النهي الفساد أو البطلان” – “The demand of ‘Nahyī’ (prohibition) is to make an action invalid or imparfect” can be revisited.

Chapter Twenty

Concerning Qā'idah (maxim) starting with Arabic letter و
(waw)

(There is One Qā'idah (maxim) under this chapter)

Qā'idah (maxim):

”الولاية الخاصة أقوى من الولاية العامة“

Special authority is more powerful than General authority.¹

* This principle is in accordance with the madhhab of 'Imām 'Abū Hanīfah.

The meaning of 'al-walāyah' (الولاية) is to help and 'Al-wilāyah' means authority and leadership.

In the terminology of Islāmic jurisprudence (fiqh) 'Al-wilāyah' means the exercise of right and authority over others willingly or unwillingly. That is, it is used in the second sense (*authority and leadership*). Because an authoritative guardian has the right to exercise authority in the work assigned to him without the permission of anyone. The maxim in the discussion is deeply connected to 'maqāsid al-Sharī'ah,' (the higher objectives of Sharī'ah). So the maxim becomes subject to Sharī'ah-based governance in two respects:

One: In ensuring favourable environment for the guardian to shoulder the assigned guardianship.

Two: Protection of present and future interests and benefits for the guardian in exchange of guardianship. These could be related to

¹ Majallah Al-Ahkām Al-'Adaliyyah, p.23, section: 59; Imām al-Suyūtī, Al-'Ashbāh wa al-Nazā'ir, p.154, Ibn Nujaym, Al-'Ashbāh wa al-Nazā'ir, 133.

urgent matters or general necessity or something else. This subject matter is recognized in modern planning under the principle of—

”توزيع الصلاحيات والمسؤوليات والتدرج في ذلك“

“Distribution of resources, responsibilities and grades in this category”. Lower Planning and management of such kind is usually practiced by administrative organizations.

‘Al-wilāyah al-‘Āmmah’ (الولاية العامة) Public supervision or guardianship is: Gaining the special power to exercise authority over the other and applying force on him due to authority without their authorization. And Wilāyah ‘Āmmah (Guardianship) extends to the worldly affairs of a person, in religion, in life and wealth. And it is associated with the benefits of various aspects of the way of life through the attainment of all the welfares (maṣāliḥ) good things of the nation and the removal of all the harmful things.

Again, there are many layers of guardianship staring from the great statesman to his executives and to monitoring his representatives. The supervision or guardianship of his executive and delegation. The guardianship includes preparing military, border defense, establishment of rules and regulations, protection of the basic infrastructure of the religion, collection of state resources from their respective places and distribution in appropriate places, appointment of judges, formation of experienced individuals and factions, suppression of insurgents and rioters, final settlement of adversaries, dispute management, establishment and auditing of persons in charge and various officials, arranging marriages of unaccompanied boys and girls and all that are necessary for

ensuring security provisions and through which God's law can be applied in governance.

General supervision or guardianship applies equally to life and property together, and only to the property. For two reasons, special guardianship (al-wilāya al-khāṣṣah) is considered stronger than general guardianship (al-wilāyah al-'Āmmah):

1. The intimate relationship with a relatively special object will be more influential than the general relationship with the same object.
2. In this case, consideration of qualities will be given priority over consideration of rank and dignity. Thus special guardianship (al-wilāya al-khāṣṣah) acquires uniqueness in some attributes which, to a large extent (al-wilayah al-'Āmmah), do not exist sufficiently in general guardianship.

The following examples make the points more explicit.

- A ruler cannot marry a boy off in the presence of the guardian, because the love and affection of the child's father and grandfather on their children is a clear issue.
- In case of an orphan with a guardian, a Judge has no right to exercise his authority over his issues or property. Besides, a judge cannot marry off an orphan boy or a girl having a guardian.

Ḥadīth in support of the Qā'idah (maxim):

'Imām Tirmidhī has narrated in his Sunan from 'Ā'ishah (R) in the 'Marriage Chapter' titled 'Marriage without a guardian is not valid':

أن رسول الله صلى الله عليه وسلم قال: أيما امرأة نكحت بغير إذن وليها فنكاحها باطل...
فإن اشتجروا فالسلطان ولي من لا ولي له.

The Messenger of Allah (PBUH) said: "If any woman marries without the consent of her guardian her marriage is void, her marriage is void, and her marriage is void. If there is cohabitation, she gets her dower for the intercourse her husband has had. If there is a dispute, the sultan is the guardian of one who has none."¹
'Imām Tirmidhī (R) said, the Ḥadīth is *Ḥasan* and Albānī (R) said, the Ḥadīth is *Ṣaḥīḥ* (authentic).

¹ Aḥmad Ibn Ḥanbal, Al-munad, v.42, p.199, Ḥadīth No: 25326; Al-Dārimī, Al-sunan, v.3, p.1397, Ḥadīth No: 2230; Ibn Mājah, Al-sunan, v.1, p.605, Ḥadīth No: 1879; Abū Dāwūd, Al-sunan, v.2, p.229, Ḥadīth No: 2083; Tirmidhī, Al-sunan, v.2, p.398, Ḥadīth No: 1102.

Chapter Twenty-First

Concerning Qā'idah (maxim) starting with Arabic letter ي (YA)

(There are six Qawā'id (maxims) placed under this chapter)

First Qā'idah (maxim):

”اليقين لا يزول بالشك“

Certainty is not removed by doubt.¹

‘Yaqīn’ (اليقين) means stability, the word ‘Yaqīn’ is taken from ”يقن الماء في الحوض“. The sentence is used when the water is still in the tub. So in the present Qā'idah (maxim), the word ‘Yaqīn’ means knowledge beyond doubt. The suggestive meaning is: peace of soul and knowledge that settles in the soul. In other words ‘firm belief’.

The gist of the Qā'idah (maxim):

When a person has doubts but has a preconceived notion, he will not flinch at the raised doubts; rather, discarding hesitation in decision-making one will go back to preconceived notions and convictions.

The maxim in discussion is a very important one from the point of view of Sharī'ah. On which many jurisprudential provisions depend. In Islāmic law, the principle is apparent manifestation of easiness and empathy in dealing with issues. In places where trust is final, the maxim will act as an essence to solve problems in a self-evident manner and resolve doubts that often arise from evil or negative instigation. Especially in the case of Ṣalat and Ṭahārah (purifications) this principle plays an important role. It is well-

¹ Ibn Nujaym, Al-Ashbāh wa al-Nazā'ir, p.47.

known that skepticism is a serious disorder, when it becomes rooted with an individual, and it is hard to remove. As a result, a responsible adult person if plagued with problems, finds difficulty in shouldering the responsibilities. In this way, in all those problems and matters of jurisprudence, one gets relief when the maxim is applied. Therefore, based on the maxim under discussion, it can be said that a person who believes that he is maintaining Ṭahārah (holiness) but is skeptical of impurity, is definitely pure.

Ḥadīth in support of the Qā'idah (maxim):

'Imām Bukhārī in Ṣaḥīḥ al-Bukhārī, under the chapter titled 'Waḍū' included the Ḥadīth of 'Ibād bin Tamīm that he narrated from his uncle, he complained to the Prophet, to whom it seemed that something happened in the middle of the prayers. The Prophet (PBUH) replied: he should not leave the prayer. That is, he will continue praying until he hears no sound of emission or smells anything."¹

The same Ḥadīth is also narrated from 'Abdullah bin Zayd. He said: The Prophet (PBUH) was complained about a man who thought that something had happened during the prayer. The Prophet (PBUH) said: "He will not leave the prayer until he hears a sound or smells something."²

Explaining the Ḥadīth of Abdullah bin Zayd, 'Imām Nawawī said: "This Ḥadīth is one of the self-evident fundamental maxims of

¹ Bukhārī, Al Jāmi' Al-ṣaḥīḥ, v.1, p.39, Ḥadīth No: 138; Muslim Al-ṣaḥīḥ, v. 1, p.276, Ḥadīth No- 361-362.

² Muslim Al-ṣaḥīḥ, v.1, p.276, Ḥadīth No- 361.

Islam and one of the most important principles of Islāmic jurisprudence. It is decided that any object remains on its own principle until the opposite is proved conclusively. And the suspicion cast on it cannot deviate it from the ultimate principle of matter.”¹

The person who is confident in his holiness and then suspects that he might be spoiled should perform the prayers considering that he is holy and should not act on the suspicion of temporary impurity. And 'Abū Hurayrah (R) in line with the two Ḥadīths on disregarding the sense of temporary impurity on the basis of doubt narrated that the Prophet (PBUH) said: “When one of you feels a disturbance in his stomach and he suspects that whether something has come out of his stomach or not, the person will not leave the mosque at all, unless he has heard a direct sound or smelled it.”²

Narrated by 'Abū Sa'īd al-khudrī, the Prophet (PBUH) said: When someone doubts regarding the number of rak'ah (rakat) he has performed, three rak'ahs or four rak'ahs? In this case, he will throw away the doubt (not flinch) and will fulfill the rest as much as he is sure of it.”³

'Imām Tirmizi Narrated on the authority of 'Abdur Rahmān bin 'Awf (R), he said, “I heard the Prophet (PBUH) said, “When one of you forgets in his prayer whether he performed one rak'ah or two rak'ahs, he will complete the second rak'ah (rakat) with one rak'ah. And if not sure whether two rak'ahs or three rak'ahs, then

¹ Al-nawawī, Al-minhāj sharḥu ṣaḥīḥ Muslim bin Al-hajjāj, v.4, p.49.

² Muslim Al-ṣaḥīḥ, v.1, p.276, Ḥadīth No- 362.

³ Muslim Al-ṣaḥīḥ, v.2, p.84; Tirmidhī, al-sunan, v.2, p.193.

he will perform the third rak'ah with two rak'ahs and if he does not know whether three rak'ahs or four rak'ahs, then, he should complete the fourth rak'ah on the basis of performing three *rak'ahs*, but he must perform two sujūds (sijda Sahwū) before the last salam.¹

The fuqahā' (jurists) relied on the Ḥadīths narrated in deriving the maxim in question. And it is certain that the Ḥadīths are clear proof of the purity of the prayers until the issue of impurity and air exhaustion has taken root. However, the Ḥadīths are not limited to the narration of this aspect; Rather, the Ḥadīths extend to all the meanings and interpretation related to this subject. The essence of all these Ḥadīths will be pervaded to the perfect rule of adoption through the process of Qiyās (rational reasoning) and *Ta'līl* (it suggests the balanced application of causation). Therefore, the jurists have decided to apply the ruling and principles derived from the Ḥadīth in all the matters which are considered as related in the causation and suggestive matters.

Ibn Ḥajar Al-Askalani narrating from 'Imām 'Abū Sulaymān Al Khaṭṭābī said "But the point is not that both issues are final,² because, when the meaning of a word is wider than the word, the decision goes in favor of the meaning."³

The importance of this Qā'idah (maxim) is clearly shown to us in the previous narration, and the primordial extension of the Qā'idah (maxim) is revealed in Islāmic jurisprudence and its principles.

¹ Al-nawawī, Al-majmū' Sharḥ Al-muhadhdhab, v.4, p.39.

² The Ṣalah is valid until he is confifird of air exhaustion.

³ Ibn Ḥajar al-'Asqalānī, Faṭḥ al-Bārī Sharḥ ṣaḥīḥ Al- Bukhārī, v.1, p.238; Al-Khaṭṭābī, 'A'lām Al-Ḥadīth fī sharḥ Ṣaḥīḥ Al-Bukharī, v.1, 228-229.

This is because almost in all the chapters of jurisprudence such as: 'Ibādat, transactions, penal rules and regulations, and in all the chapters on justice and judgment this Qā'idah (maxim) is applied. Moreover, the importance of this principle is recognized equally by Islāmic Jurist (fuqahā') and theorist ('Usūliyyūn). 'Imām Qarāfī (R) mentioned, "It is a principle on which scholars unanimously agreed that all doubtful matters will be treated as ultimately extinct."¹

Here are some examples of the principle:

1. The person who believes in holiness and is skeptical of impurity again must be steadfast in his decision of holiness.
2. The person who doubts about a prayer whether he performed or not, it is necessary and essential to perform the prayer, because the doubt in the performance of the prayer is self-generated, and the doubt centers around not performing the prayer at all, so his responsibility from the prayer cannot be avoided until he performs the prayers. However, a person who is obsessed with suspicion is not to be considered or judged under this principle. Such suspicions cannot be taken notice of.

¹ Al-Qarāfī, Al-furūq, v.1, p.111.

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3. When a person travels to a distant country and his news is missing for a long time, the disappearance or the disconnection of the news can be considered a doubt about his survival, but such doubt does not rule out a final issue or certainty, namely survival. So it will not be lawful for his heirs to divide the person's wealth among themselves.
4. Conversely; if a ship sinks in the deep sea and the persons on board are declared dead, then the death is very certain. On this certain idea, the wealth left by the person (strongly assumed dead) can be distributed.

Second Qā'idah (maxim):

“يستحب الخروج من الخلاف”

Departure from Mutual Disagreement is Preferable.¹

This is an important maxim that should be adhered to. Many jurists have discussed it in detail in the text books of Qawā'id (maxims). Because the ultimate result is carefulness and spreading love in the practice of religion and building love and solidarity of various souls by avoiding disagreement in matters where the dangers are minimal. Therefore, when some *mustahabb* abandonment leads to the best interest and resolution of disagreements, then such *mustahabb* abandonment is necessary if the source of evidence of the opposition is strong.

And if there were no such traditional principles that show generosity in the Islāmic way of life, mankind would be in dire straits and in serious dilemmas. For this reason, since ancient times, experts have been unanimous in their views on the validity of the prayers of a Ḥanafī or a person with the opposite view behind a Shāfi'ī, even though, 'Imām Shāfi'ī and 'Imām 'Abū Ḥanīfah have differing views on the issue of breaking the *Waḍū'*, in the same way as in the case of wiping the head (*mash*) and other practical *mas'alah*. In fact, this is the practice continuing from the time of the Companions (Ṣaḥābahs) to the time of classical Islāmic scholars and beyond. In this context, the history books are full of innumerable descriptions.

¹ 'Alī Aḥmad Al-Nadwī, Al-Qawā'id al-Fiqhiyyah, p.68

Among them, 'Imām 'Aḥmad bin Ḥanbal considered *Waḍū'* necessary due to bleeding of the nose and hijama or trumpeting. Once he was asked: If the 'Imām is bleeding but he has not performed *Waḍū'*, will you pray behind him? He replied: "Why not? Will I not pray behind 'Imām Mālik and Sa'īd Ibn al-Musayyib?"¹

'Imām Tājuddīn Al-Subkī said: The importance of coming out of disagreement is not only for the purpose of proving a prominent course of action. Rather, it is for the sake of opting extra caution in the following religion and avoiding something with the fear that it might be a deviance of religion. And this is the principle Sharī'ah advocates for. Therefore, the issue of 'departure from dissent' is proved on the basis of universality and its basis is extreme God fearing nature that Sharī'ah desires from a person. So the person who thinks that playing chess is ḥalāl but avoids it with the fear of it being Ḥarām or prohibited, he is surely following a righteous path out of fear of Allah. Departure from disagreement refers refraining oneself from the things on which there are differences of opinion regarding their illegality or being Ḥarām, and using or allowing the things on which there are differences of opinion regarding their illegality or being Ḥalāl.²

'Imām Badruddīn Al-Zarkashī mentions under the title of "Disagreement" the same explanation of departure from disagreement. "If I say, every mujtahid has come to the right conclusion, because only *Mujtahid* can come to the right

¹ Shah Waliullāh Al Dehlawī, Al-'Inṣāf Fī Bayān 'Asbāb Al-'Ikhtilāf, p.110.

² Al-subkī- Al-'ashbāh wa al-Nazā'ir, v.1, p.112.

conclusion. If I say thus: Only one will come to the right conclusion; This is because when a mujtahid approves of something contrary to his strong ideas and perceptions and (contrary to his own research) he continues to meditate deeply on the authentic sources and research works of other mujtahids. He starts his research thinking that research based opposite opinions surely have a valid ground. Therefore, evaluating their research work is appropriate course to undertake for him with a view to strengthening the sources of evidence the opponents have used or nullifying or not accepting them if found baseless or weak, especially when the observance is found against an authentic and established *sunnah* of the Prophet (PBUH). For example: When someone says raising the hand inside the prayer (*Raf' Yadayn*) ruins the prayer we cannot accept this difference of opinion, as it becomes contradictory to innumerable Ḥadīths.”

Also, the essence of this maxim in discussion does not mean following it violating any consensus over an issue. A relevant example is narrated from *Ibn Surayz*: He used to wash both the ears with his face in *Waḍū'* and then rub both of them with his head, then he used to wash the two ears separately. In defending such practice someone opined: “The two ears are either part of the head or two separate parts from the head. In this case, however, the issue is against the consensus. Since no one (experts) has mentioned the combination of washing and anointing.”¹

Al-Zarkashī also mentions, “sometimes departure from disagreement becomes hard when it results into not performing an

¹ Al-zarkashī, *Al-manthūr fī al-Qawā'id Al-fiqhiyyah*, v.2, p.127-131.

‘ibādah in case the differing opinions considering it Makrūh or detestable. For example, it is Makrūh (reprehensible) for the followers of ‘Imām Mālik to perform ‘Umrah more than once in the same year. Similarly, for the Ḥanafīs: It is Makrūh (reprehensible) only for the locals during the months of Hajj. And it is better according to ‘Imām Shāfi‘ī to do it twice or thrice in the same month. ‘Imām Shāfi‘ī does not consider aforesaid opinions of Ḥanafī and Mālikī school of thought and stop doing what he thinks better in order to get out of the principle ‘departure from disagreement.’ Because it will deprive him of many deeds and acts of ‘ibādah or worship. Yes, when the matter is not at that stage, then the disagreement should be avoided, especially when it will have extra worship and extra caution.”¹

Ḥadīth in support of the principle:

In this connection, the Ḥadīth narrated from the Prophet (PBUH), he says,

“O ‘Ā’ishah! Had not your people been still close to the pre-Islāmic period of ignorance (infidelity)! I would have dismantled the Ka‘bah and would have made two doors in it; one for entrance and the other for exit.”²

Similarly, Ibn Mas‘ūd (R) opposed the complete performance of prayer (Ṣalah) during a visit with ‘Uthmān (R). He then turned his back and prayed complete prayers behind ‘Uthmān and said:

¹ Al-zarkashī, Al-manthūr fī al-Qawā‘id Al-fiqhiyyah, v.2, p.132-133.

² Bukhārī, Al Jāmi‘ Al-ṣaḥīḥ, v.1, p.37, Ḥadīth No:126.

‘Disagreement is unhealthy’. In a different narration, he said: ‘I actually hate dissent.’¹

Of course consensus (‘ijmā‘) is a unique proof of Sharī‘ah. Mālikī scholar ‘Imām Mazni expressed his views on the formation of consensus (‘ijmā‘) on the principles under discussion, he says: “Scholars have unanimously agreed that walking away from khilāf (disagreement) is recommended (mustahab).”²

Some of the practical issues derived from the above maxim are:

- In mandatory bathing and *wadū* gargling and taking water through nose is considered Mandub or likeable in Sharī‘ah as it is obligatory (Wājib) in mandatory bathing according to the Ḥanafīs and in the *wadū* and bathing obligatory according to the Ḥanbalīs.
- According to Ḥanbalīs, it is required to wash a pot seven times as a result of licking it by a dog.
- Performing Niyaah (intention) of Nafl ṣawm (fasting) in the middle of the night as it is obligatory according to ‘Imām Mālik.

¹ Ibn Ḥajar al-‘Asqalānī, *Fatḥ al-Bārī Sharḥ ṣaḥīḥ Al- Bukhārī*, v.2, p.564.

² Al-‘is’āf bi Al-ṭib, p.51; Ahmad bin Al-manjūr, *Mukhtaṣar Sharḥ Al-manhaj al-Muntakhab fī Qawā‘id Madhhab al-‘imām Mālik*.

- Similarly, a person who performs Hajj and 'Umrah together will perform two Ṭawāf and two sa'ī in line with the opinion of 'Imām 'Abū Ḥanīfah.
- It is mustahab to rub and wipe the whole head in order to attain holiness and to maintain continuity in performing the various left off (qaḍā') prayers in the light of the aforesaid principle according to the scholars. This ruling is in the interest of those who say these are obligatory (Wājib) following the principle of departure from disagreement.

Third Qā'idah (maxim):

“يلزم مراعاة الشرط بقدر الإمكان”

Conditions must be complied with according to one's ability.¹

The essence of the maxim:

Of course, the conditions must be complied with according to one's ability. And it is not necessary to maintain something beyond one's capacity. And it is not even expected. The basis in terms of conditions is to consider compliance as much as possible.

If the depositor puts a condition that the deposit should be in your hands, nowhere else under any circumstances. Later, if he keeps it in his house, it will not be considered a deviation from the condition. In such case, he will not be held liable if the deposit kept in the house and gets ruined, because the condition the depositor made on him was naturally beyond his capability. If the condition is as such that the custodian will not leave the city with the deposit but he leaves with it to another city and the object is destroyed, then he will be held liable of the destruction of the deposit. On the other hand, when he has to move from one city to another on compulsion of work or due to shifting of the family, and the deposit is destroyed, he will not be held responsible because the conditions have to be maintained as much as one could. He has no control over what is beyond his reach, and in such case, he will not be held responsible.

¹ Majallah Al-'Aḥkām Al-'Adaliyyah, p.62, section: 83; Muṣṭafā Al-Zarqā, Al-Madkhal al- Fiqhī al-'ām, v.2, p.1034.

The principles in question is 'applied conditions' i.e. mandatory or obligatory conditions which must be maintained, not the dependent condition. Dependent conditions and obligatory conditions which are the essences of the mentioned principle need to be understood especially the difference between the two.

Dependent conditions suggest that the decision will be delayed until the condition is realized. And when realized, the decision will be dependent on the condition (the first issue) as the basis of *jazā'* (the second issue) or outcome.

On the other hand, in obligatory condition the decision is immediately issued. For example, someone rents a house on the condition that the rent has to be paid in advance. In this case, the agreement will be valid and the tenant will be obliged to meet the conditions. One needs to keep in mind that the conditions that must be observed must be Sharī'ah compliant, not a condition of any kind.

Ḥadīth in support of the principle:

Holy words of the Prophet (PBUH): “Muslims must keep to the conditions they have made, except for a condition which makes unlawful something which is lawful, or makes lawful something which is unlawful.”¹

Some examples of this maxim:

1. If the sale is on the condition that the buyer would mortgage a particular item to the seller or appoint a guarantor of the price, the sale will be valid and the conditions will be accepted.
2. If the sale is on the condition that the goods sold will remain the property of the buyer, then the condition is valid and pure. Because it is also a demand for sale or transaction.

Or if the seller keeps the goods for himself until the value of it is realised then this condition is also valid. Because it is basically just describing the claim and application of the contract.

¹ Abū Dāwūd, Al-sunan, v.3, p.304, Ḥadīth No: 3594; Ḥākim, Al-mustadrak, v.2, p.57, Ḥadīth No: 2309.

Fourth Qā'idah (maxim):

“اليد توجب إثبات التصرف، ولا توجب إثبات الملك”

Authority (Yad) proves the exercise of power but does not prove ownership.¹

The essence of the maxim:

In principle, the meaning of hand (Yad) is: the opportunity and possibility of exercising rights. The reason for expressing the matter with 'hands' is that the hand symbolizes means of exercising rights. Keeping hands on an immovable or movable object does not prove the right of possession on them. Ownership of the object is not established if it is under one's hand. The exercise of authority over the object, the ability to benefit from it and the right to enjoy its benefits do not prove ownership over it. But it is a different matter if there is proof of real ownership in the original object. (That is, there is no barrier in proving ownership).

¹ Alī Aḥmad Al-Nadwī, Al-Qawā'id al-Fiqhiyyah, p.383.

Some examples of the maxims in question and solutions to some problems:

1. Immovable property in the hands of a person: Having a house or real estate in which he lives or cultivates, investment in them does not prove that he is the owner of the land in his hands; Because the proof of ownership is either through documents or the means of gaining recognition in the judgment of the judge. It may be that he is the tenant of what the man has in his hand. In other words, he is using it as a lower case Tenant.
2. Someone has a car. He drives it, but it does not prove he owns the car. Because there is a possibility that he is using it as a rent or it came to him through borrowing, stealing or looting. Ownership will be proved only through official documents of the object.

Fifth Qā'idah (maxim):

“يتحمل الضرر الخاص لمنع الضرر العام”

Personal loss must be borne in order to prevent the Collective loss, or committing the lesser of two harms.

The maxim is stated in the following language in the book 'Taysīr al-Taḥrīr';

“دفع الضرر العام واجب بإثبات الضرر الخاص”

‘It is essential to eliminate the collective loss through bearing personal loss.’¹ It is one of the maxims of Islāmic Sharī'ah. The jurists (fuqahā') have derived the principle from various narrations in the Qur'ān and Sunnah.

Some practical examples of the maxim:

1. Some Fiqh expert have issued Fatwa or verdict for inexperienced doctors on the ground of physical harm, humorous and hilarious muftīs (i.e. those who teach hilarity to the common man) on the ground of religious harm, the moneyless tenants (i.e. those who do not own the rented goods but exact the rent) on the ground of property loss to stop pursuing their respective professions.²

¹ Taysīr al-Taḥrīr Fī 'Usūl Al-fiqh, v.2, p.301.

² 'Amīr Bādshah, Taysīr al-Taḥrīr, v.2, p.301.

2. Killing harmful sorcerers and misleading infidels as the first person will hypnotize the common people and the second person will call people to disbelief and destroy their religion. Therefore, in order to reduce the loss of the people, the loss of the individual will have to be borne / accepted.
3. When the installation is on the verge of collapse, its proprietor will be forced to demolish it lest it should fall on the passers-by.¹
4. Determining the value of the required material. Valuation is valid to prevent the formation of a syndicate of merchants on the sale of essential commodities under the guise of fraud and deception.²

¹ Durar Al-Ḥukkām, v.1, p.36.

² Al-Maḥāsini, Sharḥu Al-majallah, v.1,p.56; Ibn Nujaym, Al-Ashbāh wa al-Nazā'ir, p.96.

Sixth Qā'idah (maxim):

“يقدم في كل ولاية من هو أقوم بمصالحها”

In all administrations and management, priority will be given to those who are qualified for ensuring its interest and welfare.¹

This maxim is a part of Sharī'ah-based governance. The principle takes its root from a fundamental principle of Islāmic Sharī'ah “جلب المنافع و درء الفاسد” - ‘Acquisition of all that is good and elimination of all that is bad.’ Based on it, solutions to different significant ‘Mas’alas’ are derived.

Also based on the aforementioned maxim, in legal affairs, preference will be given to the comparatively vigilant in the position of a judge who has more prudent approach to the various ways of arguing, and governing the opponent. Thus, in Islāmic Jurisprudence, preference will be given to the person who is skilled in legal affairs.

In military affairs, priority will be given to the wise in warfare tactics and to the more knowledgeable in the rule of war related affairs who has exemplary bravery and skill to exercise and maintain command over military.

In government secretariats, priority will be given to those who are well-versed in the management of orphans and the growth of their wealth. In the cases of legal opinions; those who are more God-fearing and more knowledgeable about fiqh and its principles. Often the person who has priority in one case may be backward in

¹ Al-Qarāfi, Al-furūq, v.3, p.102, 206.

another case. For example, some people were given priority in war and leadership while they were left behind in terms of upbringing. The reason why women are given priority over men is because of increased tolerance towards children.¹

In line with this trend, a faqih (jurist) is given priority over a mere reciter. Because, he has more knowledge about the proper establishment of Ṣalah, its rulings, proper application of ahkam (rulings) and errors in salah (prayer). And for the public interest, the state leader (ʿImām) is given priority over the common man as (the state leader being custodian of public) interests and benefits of public are always given priority over the personal/individual interests.²

Some important maxims:

1. The customs/traditions of people will be considered as proof or evidence whose consideration /application is essential.³
2. It is irrefutable that rulings (based on customs and public interest) change in accordance with the change of time.⁴
3. Custom shall be deemed effective only when it is constant and predominant.⁵
4. What is known as common practice or norm is similar to stipulated condition.⁶
5. The things known to the merchants as common are like the imposed conditions on them.⁷

¹ Al-zarkashī, Al-manthūr fī al-Qawāʿid Al-fiqhiyyah, v.1, p.388.

² Ibid., 388-389.

³ Majallah Al-Aḥkām Al-ʿAdaliyyah, p.20, section: 37.

⁴ Majallah Al-Aḥkām Al-ʿAdaliyyah, p.20, section: 39.

⁵ Majallah Al-Aḥkām Al-ʿAdaliyyah, p.20, section: 41.

⁶ Majallah Al-Aḥkām Al-ʿAdaliyyah, p.21, section: 43.

⁷ Majallah Al-Aḥkām Al-ʿAdaliyyah, p.21, section: 44.

6. An obligation under custom has the same force as an expressly stipulated condition.¹

This is a set of known Islāmic juristic principles (Qawā'id). Under each of these there are many branches and particulars. The six principles mentioned above can be replace under the title of 'Theory of custom' (نظرية العرف) or 'Custom is defined as law' (العادة محكمة). Because, the 'custom' ('Urf) is the general nature of all the menttioned maxims. There is no gainsaying that, after profound study and research in the same vein, it can be possible for us to collect many more of these maxims under 'some more well-defined principles' or 'specific theories'.

¹ Majallah Al-Ahkām Al-'Adaliyyah, p.21, section: 45.

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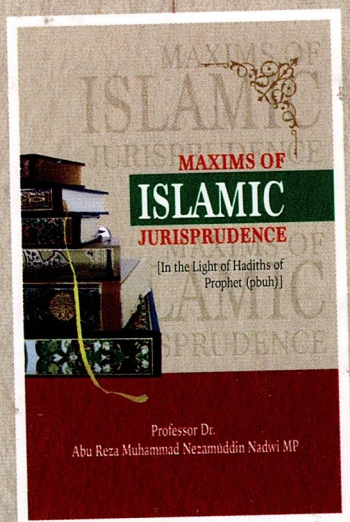
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