

A STUDY OF THE HISTORY OF LEGAL MAXIMS OF ISLAMIC LAW

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Abstract:

This paper studies the history and use of legal maxims and principles in Islamic Jurisprudence for law making activities. In the most of the legal systems of the world, perhaps more frequently than in any other system, reference must be made to first principles and maxims. Although in Islamic law the Quran and the Sunnah are the primary sources of law, yet the use of maxims is also important. These legal maxims mostly have been derived from Quranic verses or from the sayings of the Holy Prophet of Islam. Islamic jurisprudence has two types of sources of law: Primary sources of Islamic law and Secondary sources of Islamic law. Legal and fiqhi principles are derived from both primary and secondary source. Learned scholars of Islamic jurisprudence have laid down these rules and regulations for deriving injunctions from these sources.

Key words: jurisprudence, maxims, Islamic fiqh, law, Quran, Sunnah, Qawā'id

Introduction:

In every legal system in the world, some elementary principles are formulated. Experts in law and courts recognize these common, basics of law. Literature of the science of jurisprudence contains many rules which are essential to deriving commandments. Some of those commandments pertain to customs and usages.

“Qawā'id kulliya” defined

Arabic lexicon enlightens us that *qā'ida* means the foundation (of a building). The capital of a state is also called *qā'ida*, because it also occupies a very significant place in the business of a government. The word *qā'ida* – in the Holy Qur'ān – signifies foundation, as the following verse bears witness:

وَأِذْ يَرْفَعُ إِبْرَاهِيمُ الْقَوَاعِدَ مِنَ الْبَيْتِ وَإِسْمَاعِيلُ .

“And when Abraham and Ishmael were raising the foundations of the House (Abraham prayed ...).

In the science of jurisprudence, the word *qā'ida* is employed in a sense different from other sciences. In sciences – such as *nahwa*, physics and mathematics – a *qā'ida* signifies a rule, or a formula, which is applicable to all the parts. For instance, a rule of *nahwa* has it that every *fā'il* is *marfū'* and every *maf'ūl* is *mansūb*. These rules encompass all types of *fā'il* and *maf'ūl*. That is why no *fā'il* or no *maf'ūl* contradicts these rules. In like manner, the formulas of physics and mathematics are always applicable to their parts. But the maxims of the science of jurisprudence carry a different nature.

Here a point is worth mentioning. A maxim of Islamic jurisprudence is not at all applicable in all cases and all circumstances. Rather it is applicable in most cases. Some cases simply do not fall under a certain rule. The definition of *qā'ida*, in sciences other than Islamic jurisprudence, is as follows:

“A comprehensive rule which is applicable to all the components, or parts, which fall under it, so that their injunctions might be learned through the rule.”

When we turn our attention to a maxim of Islamic jurisprudence, we learn that its application is true in most, not all, cases. Some definitions are cited below which illustrate this point:

1. “A *qā'ida* refers to a rule which is generally, but not always, applicable. This rule governs most cases which fall under it, so the fiqhi injunction of those cases might be established through it.”

2. “It is a rule which embraces most situations, and is true to majority of cases which fall under it.”

“It is a comprehensive or majority rule. It is formulated in order that the injunction of ingredients might be learned.”

Common to these definitions of *qā'ida* are two points:

1. *Qawā'id kulliya* are generally termed *kulliya* (meaning comprehensive), but generally they are not all-embracing maxims; they are commonly applicable.

2. These definitions benefit those people who are aware of *qawā'id kulliya*. Common people – with no background of science of jurisprudence – will find it hard to get them.

Mustafā Ahmad al-Zarqā' does not seem satisfied with the proceeding definitions. To his opinion, no definition is clear-cut, comprehensive, and enlightening to such an extent as it satisfies what *qawā'id kulliya* are. The definition has he coined appears better:

“(Qawā'id kulliya) are common maxims of science of jurisprudence. They are written in legal language. They comprise legal and fiqhi rules which deal with incidents and circumstances that fall under that subject.”

Fiqhi and legal status of *qawā'id kulliya*

An overwhelming majority of *qawā'id kulliya* – it has been noted already – are the maxims which are often applicable to their ingredients or parts. So it must be clear that these maxims are not permanent proofs of divine law; they can never be treated as sources of Islamic shari'a. The original sources of shari'a law are the Holy Qur'an, Sunnah, consensus of opinion, independent reasoning and analogy; they are recognized sources of law in the light of first two sources (ie the Qur'an and Sunnah.)

Now some light is shed on the status of *qawā'id kulliya*. They elaborate Islamic ideology as well as the science of jurisprudence. Also, they enable one to grasp the Islamic line of thought on a certain topic; they enlighten one on a certain issue. Many rules of Islamic jurisprudence – directly or indirectly – are derived from the Holy Qur'an and Sunnah. In a similar way, maxims of science of jurisprudence are also derived from the Book and Sunnah. No such maxim is worth consideration that contradicts an injunction of a divine law.

In Western law, the same status is accorded to "legal maxims". They are neither sources of law nor law. They serve only the purpose of developing the understanding of the Western legal system. These legal maxims are like sayings which are popular with the masses. Sayings of a particular nation, or area, help one to understand their ways of thinking. Likewise, legal maxims enable one to understand the Western legal structure. That is why when statutory law and legal maxims are contradictory, it is always the statutory law which is preferred. It is so because legal maxims are not law; they are a means to understand them, and they serve the purpose of explanation as well. But it must not be thought that it is always wrong to derive a point on the basis of a maxim.

Here a question might be raised that when a maxim is neither a law nor a source of law nor can it help one to derive rules from it, then what purpose does it serve and what need does it fulfil? Why did scholars of the science of jurisprudence pay so great attention to them?

These maxims, to put in the words of Mustafā Ahmad al-Zarqā', are for making fiqhi rules, and helping one to understand Islamic jurisprudence better. That they are not the bases of judicial decisions does not lessen their significance.

The authors of *Majalla al-Ahkām al-'Adliyya* jotted down ninety nine maxims in the first chapter. The very first article explains the benefits and need of maxims. The advantages of maxims, in the view of the writers and compilers of *Majalla*, are as follows.

1. These maxims are reliable and agreed upon rules. Knowing them in order to be more aware of the method of how *fuqahā* employ them to derive injunctions is a must.
2. In order to be familiar with injunctions of Islamic jurisprudence together with their background, their study is indispensable.
3. Through their study, one develops a sort of bond with the injunctions of Islamic jurisprudence.
4. Their study blesses one with an in-depth understanding of Islamic sciences.

5. Maxims are significant, if one wants to compile various sciences of Islamic jurisprudence and to transform them into law.
6. There are many, many minor and subtle issues which are illusive; it is hard to retain them in memory. If one learns maxims plus their sources and proofs – one will be able to apply them in a lot of situation.
7. After understanding maxims well, one can comparatively easily understand everyday issues of *sharī'a* and one can behave in their light.
8. A conformist (*muqallid*), even if not a *faqih*, who pays attention to maxims, is granted light and insight which reveal to him the arguments of *sharī'a*. But a person not well acquainted with them has no right to issue a legal decree by just observing the apparent meaning of maxims. Sometimes it so happens that a certain situation develops and a certain maxim can be applied; but only a savant, with deep knowledge, will see that some other maxim is the real solution to the problem.

The compilers of *Majalla al-Ahkām al-'Adliyya* have clearly stated that decisions cannot be made, neither can a legal judgment be issued, just on the authority of maxims; the Holy Qur'ān, the tradition of the Holy Prophet and some evidence from Islamic jurisprudence should be relied on. The commentators of *Majalla* also held the same view.

'Allāma Yūsuf Āaaf holds a different view. If no clear-cut command is available in a certain situation, a maxim is good enough for deciding the issue.

Exceptions in *qawā'id kulliya*

No doubt *qawā'id kulliya* encompass most cases. But it is also relevant to mention that many exceptions to those maxims also do exist. The exceptions occur due to a number of reasons. At times a situation, it appears should be dealt with according to a certain maxim, but depth of knowledge and analysis requires that it should be solved according to some another maxim. That is why sometimes a *mujtahid* – keeping in view preference, analogy or some other rule – makes use of a maxim which may not appear relevant but which really is. So the application of a maxim is restricted, because of justice, public interest, avoidance of harm, et cetera.

On the existence of exceptions in large numbers, one must not be misled that their intellectual and fiqhi status is questionable. Despite exceptions in the books of science of jurisprudence, the intellectual significance of the maxims, their standing in Islamic jurisprudence and their role in training in one to acquire the ability of a *mujtahid* are evident – all these matters establish that maxims are of great benefit. Scholars who, disregarding maxims, study Islamic fiqh find, to their great loss, that all the treasure of fiqh is loosely structured and poorly compiled. Then rules and regulations also seem entirely confusing. A well-known scholar of Imām Mālik's school of law, 'Allāma Abū al-'Abbās al-Qarafi (d. 684 AH) writes that maxims carry great significance in the whole body of Islamic jurisprudence. Their

intellectual role cannot be denied. The greater understanding of, and insight into, maxims, the greater comprehension of Islamic *sharī'a*. If anybody turns his eyes away from maxims and starts learning issues, he will simply invite hardships and complications. Also, he will have to memorize issues which have no end.

Commencement and history of *qawā'id kulliya*

The work of the formulation of maxims started during the time of the Companions of the Holy Prophet. But great progress was made only during the time of their disciples who are called Successors.

It may strike odd, but it is logical, that principles of Islamic jurisprudence and maxims came into being before fiqh itself. The Companions of the Holy Prophet themselves laid down many principles of Islamic jurisprudence. An example is cited below.

The Holy Qur'ān says the women of deceased husbands shall wait for four months and ten days. During this period, they cannot marry.

وَالَّذِينَ يُتَوَفَّوْنَ مِنْكُمْ وَيَذَرُونَ أَزْوَاجًا يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا.

“Such of you as die and leave behind them wives, they (the wives) shall wait, keeping themselves apart, four months and ten days.”

When 'Abd Allāh b. Mas'ūd was made the chief justice of Kufa, an issue of the duration of the *'idda* for the woman whose husband passed while she was pregnant was brought. He gave legal judgment, and based his opinion on *Sūra Talāq* (which during the age of the Companions and the Successors was called small *Sūra al-Nisā'*). He cited the following verse:

وَأُولَاتُ الْأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ.

“And for those (women) with child, their period shall be till they bring forth their burden.”

and gave his legal opinion that the period of *'idda* of the woman was until she gave birth to her baby, instead of four months and ten days.

He proclaimed:

“I bear witness that small *Sūra al-Nisā'* was revealed after big *Sūra al-Nisā'*.”

Here, he gave a principle that the later injunction supersedes the earlier one, and the later injunction can add to, or specify, the meaning of the former as well.

So every later decision should be studied and put into action in the light of the earlier one. This principle of law was given by a Companion, but today it is recognized the world over.

At the beginning of the second century AH (seventh century AD), when *mujtahid Imāms* were busy with compiling principles of Islamic jurisprudence, and lifting veils from the subtle injunctions of the Holy Qur'ān and sunna, *qawā'id kulliya* were also being laid down. Imām Yūsuf (d. 182 AH), Imām Muhammad b. al-Hasan al-Shaybāni (d. 189 AH) and Imām Muhammad b. Idris al-Shafi'ī (d. 204 AH) and many other great scholars – their writings were interspersed with legal maxims. The later *fuqahā* compiled them and thus *qawā'id kulliya* grew.

The legal maxims were not coined by a few persons in a few days; nor did they emerge in a single phase. They grew, like legal maxims of Roman law. From the dawn of Islamic history, eminent scholars worked on them for centuries.

First legal maxims were collected and later on they were compartmentalized. There are some maxims which are derived from the words of a tradition (*Hadīth*), and some others are attributed to a *faqīh* or a *mujtahid*; but they (attributed to a *faqīh* or a *mujtahid*) are not many.

Some legal maxims are derived from the words or implication of the Prophetic traditions.

1. "Matters go with their aims and objectives."
2. "Neither suffer loss nor (in retaliation) cause others to suffer loss."
3. "When the lawful and the unlawful gather together, the unlawful will be considered dominant."
4. "By one's indulging in something unlawful, no unlawful thing can rise to the level of lawfulness."
5. "*Hudūd* (punishments that are fixed for certain crimes) are suspended where suspicion creeps."
6. "The responsibility of paying a penalty lies on the shoulders of the one who benefits."

Some important books on *qawā'id kulliya*

Books on *qawā'id kulliya* and related issues were first produced by Hanafī savants. The first ever writing created on this issue was jotted down by Imām Muhammad b. al-Hasan al-Shaybāni (d. 189 AH). His books include *al-Jāmi' al-Kabir*, *Kitāb al-Asl* and *Kitāb Hujja 'alā Ahl al-Madina*.

Now some books on *qawā'id kulliya* are mentioned which came after Imām Muhammad b. al-Hasan al-Shaybāni.

1. *Usūl al-Karakhi*

Usūl al-Karakhi was written by Imām Abū al-Hasan ‘Ubayd b. al-Husayn al-Karakhi (d. 340). The author of this book is a Hanafī scholar.

2. *Ta’sis al-Nazr*

It was penned by Imām Abū Zayd ‘Ubayd b. ‘Umar Dabūsi (d. 430 AH). He gave legal maxims and illustrated them through examples.

3. *al-Ashbāh wal-Nazā’ir*

A Hanafī scholar, Zayn al-‘Ābidin Ibrāhim b. Nujaym of Egypt (d. 970 AH), worked on legal maxims, following in the foot steps of the bygone doctors of jurisprudence.

He divided the book into seven parts. And every section he termed *fann*. In his book, he cited six key principles which are the foundation of Islamic jurisprudence.

4. *Majalla al-Ahkām al-‘Adliyya*

Majalla al-Ahkām al-‘Adliyya played a major role in developing *qawā’id kulliya*. The pearls of earlier *fuqahā* – dispersed in various books – were collected in one place: ninety nine they are. The work, running in volumes, was prepared by a team of scholars. The beauty of expression, brevity, comprehensiveness – these qualities marked out *Majalla al-Ahkām al-‘Adliyya*.

So famous is this book as several commentaries of the book have been produced.

5. *al-Fawā’id al-Bahiyya fī al-Qawā’id wal-Fawā’id al-Fiqhiyya*

It was produced by Shaykh Mahmūd Hamza whose family belonged to Damascus. The number of *qawā’id kulliya* in his book is 250.

6. *Anwār al-Barūq fil Anwā’ al-Furūq*

Among scholars the book is commonly known as *al-Furūq*. Abū al-‘Abbās al-Shihāb al-Din Ahmad b. Idris al-Māliki al-Qarāfi (d. 684 AH) is its author. He mentioned 274 *furūq* in the work.

7. *al-Qawā’id*

Abū ‘Abd Allāh b. Muhamamd b. Ahmad Miqqari (d. 758 AH) was a scholar of Mālikī *fiqh*. He not only compiled principles of *fiqh*, but also coined new ones. He wrote down brief but comprehensive maxims.

8. *Qawā’id al-Ahkām fī Masālih al-Anām*

The first book of Shafi‘ī school of thought which rose to popularity was authored by Shaykh al-Islām ‘Izz al-Din b. ‘Abd al-Salām (d. 660 AH). The book is divided into two parts. It is not always easy to grasp.

9. *al-Ashbāh wal-Nazā‘ir* by al-Suyūṭī

This book gained international popularity. It impressed the *fuqahā* of the whole Islamic world. Jalāl al-Dīn Abū al-Fazl ‘Abd al-Rahmān b. Abī Bakr al-Suyūṭī (d. 911 AH) wrote this book. The book is divided into seven parts.

Kinds of *qawā‘id*

The *qawā‘id* can be divided into the following five classes.

1. *Al qawā‘id kulliya*;
2. The *qawā‘id* common to various chapters of Islamic jurisprudence;
3. The *qawā‘id* which are common to issues of Islamic jurisprudence, for instance, service or dealings;
4. The *qawā‘id* which are specific to a certain chapter of Islamic jurisprudence.

With reference to type and subject matter, *qawā‘id* are classed into various groups:

1. *Usūli qawā‘id*
2. *Kalāmi qawā‘id*
3. *Lughawi qawā‘id*
4. *Fiqhi qawā‘id*

Experts in Islamic law have discussed each kind of *qawā‘id* in detail. But we shall throw light on the first type, *Usūli qawā‘id*, is the requirement of the topic.

Usūli qawā‘id kulliya

Shaykh al-Islām ‘Izz al-Din b. ‘Abd al-Salām (d. 660 AH) divided all maxims into two classes: acquiring benefit and removing harm.

There are scholars who divided all the principles into four and others into five. Still other servants six original maxims.

Imām Tāj al-Din al-Subki (d. 771 AH) reduced all maxims of Islamic jurisprudence into five:

1. "Doubt does not make an end of certainty."
2. "Hardship pulls ease."
3. "Harm should be removed."
4. "Injunction will be issued in accordance with the habit."
5. "Deeds are judged by aims and objectives"

Imām Jalāl al-Dīn al-Suyūṭī (d. 911 AH) – emulating the path of Imām Tāj al-Din al-Subki – mentioned five maxims.

Fiqhi qawā'id of 'urf and 'ādat

Fuqahā presented maxims and they arranged their order and fixed the number according to their own school of thought.

Conclusion

In Islamic jurisprudence juristic principles are used for law making activities. The jurists and legal experts must have a good command over these legal maxims. These maxims and principles have been derived from the fundamental sources of Islamic jurisprudence. Without having a command over legal maxims one cannot be a good jurist and law expert.

References:

The Holy Quran

al-Āmidī, Sayf al-Dīn. 1968. *al-Ihkām fīṣūl al-ahkām*. Cairo: Matba' Muhammad Ali Subayh

al-Bukhārī, Muhammad b. Ismā'īl. 1928. *Sahīh*. 7 vols. Cairo: Idārat al-Tība'a al-Muniriyya.

Eccel, A. Charis. 1984. *Egypt: Islam and Social Change*. Berlin: Klaus Schwarz.

Al-Fatāwā al-Alāmgiriyy ai-ma'rūfa bi'l- Fatāwā al-hindiyya. 1892-1893. 6 vols. Quetta: Maktaba Rashīdiyya.

Haddad, Yvonne Y. 1983. "Sayyid Qutb: Ideologue of Islamic Revival," in John L. Esposito (ed.), *Voices of Resurgent Islam*. New York: Oxford University Press.

- Hajjī Khalīfa. 1941-1955. *Kashf al-zunūn ‘an asāmī al-kutub wa’l-funūn*. 7 vols. Istanbul: Maarif Matbaasi
- Hallaq, Wael B. 1990. “Logic, Formal Arguments and Formalization of Arguments in Sunni Jurisprudence.” *Arabica*, 37:315-358
- Al-Haskafī, ‘Alā al-Dīn. 1979. *al-Durr al-mukhtār*. Quetta: Majīdiyya
- Ibn ‘Ābidīn, Muhammad Amīn. 1300/1883. *al-‘Uqūd al-durriyya*. New ed. Beirut; Dār ai-Ma’rifa.
- Ibn ‘Ābidīn, Zain al-Dīn. 1925. *al-Ashbāh wa’l-nazā’ir*. Karachi: Qaumī Kutub Khānā.
- Ibn Manzūr, Muhammad b. Mukarram. 1979. *Lisān al-‘Arab*. 15 vols. Beirut: Dār Sādir.
- Ibn al-Qayyam al-Jawziyya, Muhammad b. Abī Bakr. 1969. *I’lam al-muwaqqīn an rabb al-ālamīn*. 4 vols. Cairo: Dār al-Kutub al-Hadītha.
- Ibn Qudāma, Abū Muhammad Abd Allāh b. Ahmad b. Muhammad. 1983. *al-Mughnī wa-yaliṯhi al-sharh al-kabīr*. 12 vols. Beirut: Dār al-Kitāb al-‘Arabi.
- Ibn Taymiyya, Ahmad b. Abd al-Halīm. 1381/1961. *Majmū‘ al-fatāwā*. Riyādh: Matābi al-Riyādh.
- al-Isnawī, Jamāl al-Dīn. 1899. *Nihayat al-sūl fī sharh minhāj al-wusūl ilā ‘ilm al-usūl li’l Qādī al-Baydāwī*. 3 vols. Būlāq: al-Matba’a al-Kubrā al-Amīriyya.
- Maudoodi, Syed Abul ‘Ala. 1950-1961. *Rasa’il o Masa’il*. 4 vols. Lahore: Islamic Publications.
- al-Māwardī, Abū al-Hasan ‘Ali b. Muhammad b. Habīb. 1971-1972. *Adab al-Qādī*. 2 vols. Baghdad: Mataba ‘at al-Irshād.
- Muslim b. Hajjāj al-Qushayrī. 1955. *Sahīh*. Ed. Muhammad Fu’ād Abd al-Bāqī 5 vols. Cairo: Dār Ihyā’ al-Kutub al-‘Arabiyya.
- al-Qarāfī, Ahmad b. Idrīs. 1344/1925-1926. *al-Furūq*. 4 vols. Mecca: Dār Ihyā’ al-Kutub al-‘Arabiyya.
- al-Shāfī, Muhammad b. Idrīs. 1325/1907-1908. *Kitāb al-umm*. 7 vols. Būlāq: al-Matba’a al-Kubrā al-Amīriyya.
- al-Shātībī, Abū Ishāq Ibrāhīm b. Mūsā. 1969-1970. *al-Muwāfaqāt fī Usūl al-Ahkām*. 4 vols. Cairo: Matba’ Muhammad Ali Subayh.
- al-Suyūtī, Jalāl al-Dīn. n.d. *al-Ashbāh wa’l-nazā’ir*. Cairo: Matba’at ‘Isā al-Bābī al-Halabī.
- al-Zarqā, Mstafā. 1968. *al-Madkhal al-fiqhī al-‘āmm*. 10th ed. 3 vols. Damascus: Matba’at Tirbīn.