



**Syariah Aspect of Business And Finance
(GIM6213)**

Legal Maxims

(Qawa'id Al-Fiqhiyyah)

Assoc. Prof. Dr. Mohd Fuad Mohd Salleh

8 March 2014

Legal Maxims

Definition

- × **Legal Maxims** is an established principle or proposition
- × **Legal Maxims** are statements of principles that are derived from the detailed reading of the rules of fiqh on various themes
- × **Legal Maxims** are designed to facilitate a better understanding of the Shari'ah and their development in a general sense is parallel with that of the fiqh itself.
- × **Legal Maxims** is the maqasid literature
- × These were developed mainly during the era of imitation (taqlid), as they are in the nature of extraction (takhrij) of guidelines from the detailed literature of fiqh that were contributed during the first three centuries of Islamic.

Introduction

- Legal Maxims plays an important role in Islamic law.
- They encapsulate concepts that can help the jurist to understanding details of law.
- It helps mujtahid to derive Islamic ruling by them where no explicit law exists.
- The actual wordings of the maxims are occasionally taken from the Qur'an or Ahadith but are more often the work of leading jurists and mujtahids that have subsequently been refined by others throughout the ages



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The five leading Legal Maxims are:

1. Acts are judged by their Goals and purposes. (*Al Umuru Bimakasidiha*) - الأمر بمقاصدها
2. Certainty is not to be overruled by doubt. (*Al yaqin la yuzal Bi al-shaq*)
اليقين لا يزال بالشك
3. Harm must be eliminated (*Al Darar Yuza*) – الضرر يزال
4. Hardship begets facility. (*Al Mashaqqah Tajlib Al Taysir*)
المشقة تجلب التيسير
5. Custom is basis of judgments. (*Al-Adah Muhakkamah*) - العادة محكمة

Acts are judged by their goals and purposes

(الأمور بمقاصدها)

- Evidence of the Maxim
- This maxim has its origin from the hadith of the Prophet (s.a.w.), which said that “Deeds are judged by intentions and every person is judged according to his intentions”.
- This hadith stated that all deeds are judged according to the intention.
- The legal implications of certain deeds are also based on the intention.
- Another hadith narrated by Anas r.a. the Prophet (s.a.w.) is reported to have said “There is no deed to those who have no intention

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- **According to the general meaning of the maxim, intention refers to the will directed towards an action, or the directing of the will towards the action of any human being.**
- **Some scholars have said that this maxim has implications for at least seventy different branches of knowledge while others have said about this Hadith that it comprises a third of all knowledge.**



Cont.

- Intention plays an important role in all actions of human being.
- 1. the element of intent often plays a crucial role in differentiating between a custom or personal habit (ibadah and adah).
- Some actions can be considered as personal habits if the action are performed without the proper intention to do it as a form of ibadah.
- **Example:** if a person refrains from eating and drinking from dawn until sunset without having the intention of fasting, the person is not considered as fasting.

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- This action is mere adah and will not be rewarded.
- The same action if done with the intention of fasting, it will be considered as ibadah and will be rewarded.
- 2. the other role of niyyah is to differentiate between one kind of ibadah and another.
- **Example:** in prayer, fasting, bath and hajj, there are different kinds of ibadah such as compulsory, highly recommended, nazar and others.
- Therefore, a person should specify the kind of ibadah he intends to perform whether it is compulsory or otherwise.

Conditions of the Maxim

- Many Muslim scholars have different views on the position of intention.
- The Shafii School held that it is recommended to pronounce the intention in order to support the intention in the heart.
- The Hanbalis' held that uttering of intention is not recommended and considered it as a form of bidah (innovation).
- The Malikis have different view in which they said uttering of intention is permitted but it is better not to utter it.
- If uttering of intention will distract the concentration of a person in performing ibadah, it is better not to practice it.
- If it can assist a person in backing his intention, then, it is recommended to utter it.



The intention and the outward expression

- The maxim gives rise to the question of the difference between the intention and the outward expression.
- In the event of such differences, the judgment should be in accordance with the intention.
- In the event of a difference between the wording of an expression and its meaning, consideration should be given to the meaning and not to the literal wording.
- If there is inconsistency between the intention and the outward connotation and there is difficulty in determining the intention, effect should be given to the outward connotation



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- There is a hadith which explains this situation that reads : “ We give judgment on the basis of the apparent, Allah takes care of the inward intention”.
- The Majallah says, “ In obscure matters the proof of a thing stands in the place of such thing. That is to say, obscure matters in which it is difficult to discover the truth are judged according to the obvious proof concerning their outward connotation.”



Application of the maxim

- The rules captured in this maxim has been applied by early jurists mostly in different applications:
- **Example.**
- The liability of a person who finds somebody's goods lying in the way and picks it up will be contingent upon the intention with which he has picked it up.
- If he intends to hand it over to the owner and has made it known to others he will be treated as a trustee and will not be required to indemnify the owner in case the property is destroyed while in his possession.
- But if he has kept it as owner he would be treated as a usurper, Ghasib, and will be required to indemnify the owner in case the property is destroyed.

Cont.

- An Act of any human being is judged in the light of the intention or the purpose it seeks to have effect.
- This means that the effect to be given to any particular action or transaction must be in accordance with the intent underlying such action or transaction.
- This maxim could be applied in the interpretation of contracts.
- In contracts, effect is given to intention and meaning and not words and forms.
- For example, it is known that a contract for the use of a thing is called a contract of hire if remuneration is stipulated in consideration of such a use, and is called a contract of iarah if no such remuneration is stipulated.

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- If two persons concluded a contract apparently a specific rental is provided for, the contract would be regarded as a contract of hire as its real meaning indicates, and not a contract of loan as the wording of the contract would suggest.
- The relationship between intention and act could further be elaborated by the following examples:
 - A man makes an earning:
 - 1. For the satisfaction of his selfish urges.
 - 2. For personal consumption
 - 3. For complying with the divine command to earn for the sake of survival and spending on noble causes.
 - In all above cases the act is the same but the intention/object is different.

Cont.

- II. A man may grow and sell grapes to the consumer or to the manufacturer of wine.
- III. A farmer may grow poppy for sale of seeds or to prepare opium or drugs.
- In all these cases it is the intention that determines the legality or illegality of the act or an individual

Certainty is not to be overruled by doubt

(اليقين لايزال بالشك)

- This maxim provide the guidance in respect of the principle, which should be adopted in addressing prevailing issue that arises due to the existence of doubt in the underlying facts of the matter.
- In essence, rules of law that are established with proven evidence will remain applicable and relevant and will only be superseded with a new ruling that is established with a stronger evidence.
- The relevancy of these rules shall not be disputed mainly due to the element of doubt that arises surrounding the fact of the issues encountered by any person.

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- The prevailing certainty shall be accepted to remove or reject the element of doubt that coexists in the matters under consideration.
- Practices that are established with certainty will continue to be relevant and applicable until it is concretely proven otherwise.
- This is due to the fact that the foundation of doubt that existed in the presence of certainty is in a weaker position to nullify the latter, which was established based on substantive evidence.

Evidence and Meaning of the Maxim

- This maxim was developed and formulated based on several verses of the Quran and Sunnah. Among others are:
- “But most of them follow nothing but fancy: truly fancy can be of no avail against truth” (Yunus:36)
- This verse indicates and emphasize that the unbelievers continue to be in the state of doubtful.
- The doubt that they encounter will not prevail over the truth or certainty on a particular matters.
- Therefore, those who follow al-zann or doubtful will never be successful and whatever they follow will never lead them to the right path.



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- The Prophet S.A.W said: “If anyone of you feels anything in his or her stomach then he is confused of whether anything has come out of it or not, he should not go out of the mosque unless he hears any sound or gets any smell”.
- Imam al-Nawawi explained that this hadith remarked that it is a great maxim of Islamic law, that is the affairs should be judged to be on their original condition unless the opposite is certainly proved.
- If any doubt arises later this doubt would not hamper the certainty that had been originally established for those affairs.



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- The Prophet S.A.W said: “if forgetfulness arises to anyone of you in his or her salah or prayers and he or she has doubt or not certain of whether he or she has prayed one rak’ah or two rak’ahs, he or she should consider that they have performed one rak’ah. Likewise, if a person is not certain of whether he or she has prayed three rak’ahs or four rak’ahs, he or she should consider that they have performed the salah for three rak’ahs.

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- A person should prostrate twice before he or she completed his prayer by saying the greeting (salam).
- This hadith provided the basis that certainty cannot be removed by doubt.
- In the case of performing specific ibadah that is salah, for instance, a person shall accept that he has prayed at least one rak'ah in the event where they are not sure or having doubt whether they have actually performed the prayer either one rak'ah or two rak'ahs during the salah.
- The certainty of having prayed one rak'ah, therefore, cannot be removed by doubt that has arisen regarding the second rak'ah.

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- In the second case it is certain that this person has at least prayed completed two rak'ahs of his salah.
- The certainty of praying two rak'ahs, is therefore cannot be removed by the doubt that arose for the third rak'ah.
- Similarly in the third case where this person is also certain that he has prayed at least three rak'ahs,
- Therefore, should not be removed by the doubt that arose regarding the fourth rak ah.
- This hadith essentially highlighted that there is no room for doubt and if a person is in doubt of anything, then he should disregard the doubt and be affirmed on certainties in the matters under consideration.

Conditions of the Maxim

- Element of certainties that existed in the issue under consideration is fundamentally a stronger element than doubt as the doubt over the original matter normally arises as a subsequent event or secondary issue.
- The certainty in the primary matter shall always prevail over the secondary matter in view that it is more reliable.
- Certainty element that existed in a particular matter shall not be removed merely by doubt and therefore decisions shall be upheld based on certainty in the underlying issue under consideration.



Application of the maxim

- The maxim is directly applicable in the context of Ibadah and other matter as well:
- a) In the case of performing the ablution, the maxim emphasizes that the status of ablution undertaken or carried out by a person is considered to remain valid unless there is evidence or indication showing otherwise.
- The state of ablution of that person shall not be disputed or ceased to be valid primarily due to the doubt that arises on the matter.
- The decision on the invalidity of ablution shall only be supported by strong evidence.

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- b) In the case where a person who has doubt in terms of the number of rak'ah that he he has performed during salah, the Prophet SAW informed that the issue shall be resolved based on certainty of the fact on the matter.
- The person has to accept the number of rak'ah in which he has strongly believes in with greater certainty.
- The hadith propagates that decision or judgment shall be driven based on certainty element in the matters under consideration as opposed to giving focus on doubt that exist with the absence of strong evidence.

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- c) In the case of loan contract, a person shall consider that he or she is still indebted to the lender in the event where he or she is unable to provide the evidence of payment.
- This is due to the fact that the outstanding amount of loan will remain valid and certain as stipulated under the contract and will only reduced by the settlement amount.
- It is known facts that loan of financing transaction executed with financial institutions are supported with written evidence and proper documentation.
- d) In respect of the contract of marriage, a husband and wife relationship shall remain valid unless a strong evidence for the pronouncement of divorce is presented.

Harm must be eliminated Al Darar Yuzal

- This maxim has its origin from the hadith of the Prophet (s.a.w.), which said that : “There must be neither harm nor the imposition of harm.”
- This maxim is one of the pillars of Islamic law.
- The rule forms the basis of the laws of option, return of defective merchandise, compensation and indemnity, etc.
- It is necessary that an Islamic state should legislate and manage in such a way that would plug the sources of causing harm or damage.
- It is on this basis that the government has a right to blacklist those traders who indulge in illegal and anti-social activities such as smuggling.

Other relevant Maxim

- This maxim requires the following conditions are observed:
- **1. “Let the ancient rest on its age”**
- Thus it is not permissible to close an old public road or to prevent the livestock from grazing in jungle or public pasture which has been in use since a long time.
- These rights have to be guaranteed unless their exercise is harmful to general interest.

- **2. “A wrong is a wrong even though it be ancient”**
- Thus if an age-old canal is causing water logging it should not be allowed to flow simply on account of previously held rights.
- If a well has become dangerous to the neighbouring population it will be levelled up even if it is very old.

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- 3. “Unlawful things are to be prevented irrespective of benefit”
- There may be situations in which an act might have certain benefits while it produces corruption and inequity.
- In such a case Sharia would ban that act despite the benefits that it might apparently yield.
- Trading in unlawful items and earning with unlawful ways might provide employment to a large number of persons and bring substantial revenues to the government.
- The unlawful items in trading must be eliminated since the removal of harm has priority over acquisition of benefits - economic, social or otherwise.



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- Gambling might be an effective source of collecting funds for philanthropic objectives; nevertheless, they have to be avoided since the acquisition of benefits is less important from the viewpoint of the Sharia than the avoidance of corruption.



Application of the maxim

- This maxim is applied in the validation of the option of defect (khiyar al-‘ayb) in Islamic law, which is designed to protect the buyer against harm.
- When A buys a car and then discovers that it is substantially defective, he has the option to revoke the contract.
- For there is a legal presumption under the Shari‘ah that the buyer concluded the contract on condition that the object of sale was not defective”.

Hardship begets facility

Al Mashaqqah Tajlib Al Taysir

- This maxim has its origin from the Quran: “We have chosen you and have not laid upon you in religion any hardship” (22:78)
- Hardship for physical persons has been defined by jurists as a situation in which acting upon an injunction of the Sharia causes loss of life or limb or leads one to performance of a prohibited act.
- This maxim is related to necessity.
- Scholars have distinguished between darura (compulsive necessity), and haja (need).
- Darura is an indispensable necessity which, if not met, may cause severe hardship resulting in loss of life known or suspected.
- Haja on the other hand, is a need which when unsatisfied, does not cause hardship.



Conditions of the Maxim

- Hardship may be faced because of compulsion, distress and universal affliction (umum balwa), physical handicap, ignorance, forgetfulness, sickness and journey but are conditioned on:
 - (i) The necessity should not speculative or imaginative.
 - (ii) No lawful alternative should be available to the suffering person than the one which calls for relaxation.
 - (iii) The solution should not infringe the inviolable rights of the people leading to homicide, or indulgence in unlawful sex.

Cont.

- (iv) There should be a very strong justification such as the protection of life or limb, to the extent of consuming an unlawful thing or performing an unlawful act.
- (v) In view of experts it should be a genuine solution and the only one available.
- For example, in the case of medical treatment, only an expert who can pronounce whether liquor alone is the available remedy for disease and that nothing else would be effective .
- (vi) a very important condition of permitting an act under constraint or compulsion is that “necessity does not destroy the right of others.

**Custom is basis of judgments
(Al-Adah Muhakkamah)**

- This maxim has its origin from the Quran: Keep to forgiveness, enjoy urf and turn away from the ignorant – Al'araf 199
- Ibn Masoud said: "What the Muslims determine to be good is good with Allah."
- Urf is a noun which means to know. `Urf is a very important term in fiqh as many of the rulings (fatwas) issued by a mujtahid on different issues are based on `urf.
- Urf is what the shari'ah considers to be good, and not what human reason or the prevalent practices consider to be good.

Cont.

- Urf refers to the norms of the majority of a society whether applied in speech or deed.
- It is considered as ‘adat jama`iyah (customs that are collectively acceptable) and can be used as a legal basis so long as it does not contradict the Syara’.
- In the context of the Islamic market, `urf tijari refers to customary practices in businesses that are considered a basis for guidance and hukm.
- The word `urf is usually associated with the word ma`ruf (good) in the texts.



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- Ma'ruf, which literally means 'known' is, in its Qur'anic usage, is equated with good, while its opposite, the munkar, or strange, is equated with evil.
- Khallaf defined it as “what is established and practised by people from their saying and doing or not doing”.
- Al Zarqa defined it as the behaviour of a group of people in their saying or doing.
- Badran, `urf is what is established and common in a group of people (jumhur) from their sayings and doings and it is consistently repeated until it influences them and is therefore accepted by their reason.



Conditions of the Maxim

- In order for the urf to constitute a valid basis for legal decision it must be the consistent practice of a group of people.
- The practice of individual is not an `urf but it is a personal habit.
- Urf must be sound, acceptable and reasonable.
- Urf it is what the shari'ah considers to be good, and not what human reason or the prevalent practices consider to be good.
- If some of these practices are approved by the shari'ah, then, they are acceptable to the law.
- The process of approval prior to acceptance is necessary.



Cont.

- 1. The custom and usage should not be in defiance of the injunctions of the Sharia.
- The practice of charging interest on loan has a universal usage but it is prohibited and cannot be recognized.
- The practice of forcing a borrower to work at sub- standard wage by virtue of his indebtedness is also exploitative and hence prohibited.
- Parents taking possession of dowry (mahr) of the daughter without passing it on to her is not acceptable according to the Sharia.
- The practice of paying fixed amounts by way of bribe to officials are not permissible.

Cont.

- 2. "The custom which is most widely prevalent and operative is to be relied upon".
- Food grain that was traded in the early Islamic period was measured in terms of mudd and sa'.
- But it is now universally weighed, but not measured.
- Thus all calculations whether for trading or for purposes of payment of will be made in terms of the prevalent units of weight.



Cont.

- 3: The custom must be in existence at the time the transaction is concluded.
- In order for 'urf to be considered as a basis for shariah decisions, the practice must be prevalent at the time the transaction is concluded and not an extinct customary practice.
- This condition is particularly relevant to the interpretation of documents or sayings, which are to be understood in the light of the custom that prevailed at the time they were written.
- If the customary meaning changes after the transaction has been concluded and if there arises a problem concerning the interpretations and implications of the transaction, it must be referred to the customary meaning when the transaction was concluded and not the customary meaning that occurred later.

Cont.

- 4. Credence is to be given to that which is publicly and generally operative, and not to what is rare.
- It seldom happens that some parents present to their daughters returnable gifts.
- But the regular custom is to provide dowry for good.
- In case of any dispute on the point of ownership it is the predominant custom that will be made a precedent.
- the main rule "**Custom is a source of judicial decisions**" shall be made applicable.
- Thus "**what is a matter of common practice has the same effect-as an express condition** .

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- In case a person authorizes another to sell something on his behalf without laying down conditions as to sale price and unit of currency, the agent will be treated to be bound by conventional rules of charging a reasonable price and prevalent currency.
- An attorney would be expected to rent his principal's house, machinery or workshop on the terms and conditions customarily prevalent in the market.
- In none of the above cases the detail understood by common usage would need to be mentioned

Cont.

- Different groups may have their customs and usages that unconcerned people are not supposed to know.
- For example, merchants may have their customs which all of them respect and follow.
- As a result "A latter of common practice amongst merchants has the same effect as express conditions between them".
- This will not, bind non-merchants to follow the custom, nor allow them to make any claim on that ground.
- Sale by auction may have different techniques at different places, and those techniques might be given the force of law.
- **5. The custom must not contravene the clear stipulation of an agreement.**
- A custom can only be applied if there is no contractual agreement made in a particular transaction.
- It will not be valid if it is contrary to an explicit condition

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- The general rule is that contractual agreements prevail over customs.
- Should there arise a conflict between them, it will normally be determined in the favor of the former.
- An example is that the costs of formal registration in the sale of a real property according to the custom are payable by the purchaser.
- But if there is a stipulation in the contract that specifically requires the vendor to bear these costs, then the custom would be of no avail and the purchaser would not be required to pay these costs.

*Thank You
&
Wassalam*

