

## ISLAMIC LAW MAXIMS: CONCEPT, SOURCES, TYPES AND ROLES

BY

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### 1. INTRODUCTION

Islamic Law Maxims are theoretical abstractions usually in the form of short epithetical statements that are expressive, often in a few words of the goals and the objectives of the *shari`ah*. This is so much so that many Islamic *ulama* (scholars) have treated them as a branch of the *maqasid* (goals and objectives) literature. The Islamic law maxims are statements of principles that are derived from the detailed reading of the rules of *fiqh* (knowledge of Islamic law) on various themes. The *fiqh* has generally been developed by individual jurists in relation to particular themes and issues in course of history and differs, in this sense, from modern statutory rules, which are concise and devoid of details. The detailed expositions of *fiqh* enabled the jurists at a later stage of development to reduce them into abstract statements of principles.

Islamic law maxims represent in many ways the apex of cumulative progress which could not have been expected to take place at the formative stages of the development of *fiqh*. The actual wording of the Maxims are occasionally taken from the *Qur`an* or *Ahadith* and *Mujtahids* (jurists) that have subsequently been refined by others throughout the ages. It has often been a matter of currency and usage that the wordings of certain Maxims are taken to greater refinement and perfection.

Works on the history of Islamic Law Maxims, either by Muslim or non-Muslim authors, have rarely mentioned the historical development of the Islamic Law Maxims literature<sup>1</sup>. Ali Al-Nadawi in his *Al-Qawaid Al-fiqhiyyah* labelled this as 'strange matter', Which led to works on the history of Islamic Law Maxims, either by

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<sup>1</sup> Al-Qattan, M., *Tarikh al-Tashri al-Islami*, 5<sup>th</sup> edn. (Cairo: Maktabat Wahbah, 2001), p 11-23.

Muslim or non-Muslim authors, difficulty and hardship for any researcher seeking to determine the exact era in which Islamic Law Maxims emerged<sup>2</sup>. Perhaps the reason was that Islamic Law Maxims are basically abstract legal statements, derived from the detailed reading of the *fiqh*, moreover, each *qa'idah* was formulated to encompass issue in law, which share a common legal idea in order to facilitate keeping them in the mind. Therefore, their historical development, in general, is parallel to that of the *fiqh* itself and, consequently, may not require separate consideration<sup>3</sup>.

The paper is divided into seven parts; part one deal with the introduction. Concept and meanings of Islamic law maxims generally has been discussed in the second part. Part three deals with types of islamic law maxims. while part four focuses on the sources of Islamic law maxims from lexical and technical points of view. Roles and historical evolution of Islamic law maxims has been discussed in parts five and six respectively. Finally part seven is conclusion and recommendations part.

## 2. CONCEPT AND MEANING OF ISLAMIC LAW MAXIMS

### 2.1 Concept of Islamic Law Maxims

Islamic jurisprudential maxims are being used by the Muslim jurists and judges since their formulations by the great four *Imams* of the Islamic schools of thought, these *imams* had attained the level of *ijtihad* and they exercises personal efforts to deduce the rules and juristic opinions from the primary sources of Islamic Law. These maxims were written down and used in order to solve the legal problems of their time. They were at the same time capable of solving present and future legal problems. This is because any maxim that is not capable of future use is not a maxim but a pronouncement or judgment.<sup>4</sup>

Many statements of a comprehensive nature have been reported and quoted from the very beginning of the development stages of *fiqh*. Some were *Qur'anic* verses, prophetic traditions or speeches of some of the companions, the followers and the leading *imams* of the schools of law whether or not some of these statements were deemed as Islamic Law Maxims in the technical sense. Thus, the treatment here will also include these statements but hopefully with a new methodological approach. Thus, in the present generation Islam is spreading very fast and its contact with various culture is increasing, new problems which requires legal solutions faces Muslim *umma* and with the guide of these maxims, the contemporary judges and scholars of Islamic law be able to find acceptable solution to them.

### 2.2 Meaning of Islamic Law Maxims

#### 2.2.1 Lexical Meaning

Lexically, *qawa'id* (Maxims) is the plural term of the word *qa'idah* (maxim) which has many lexical meaning in Arabic language, denoting foundation, stability, firmness<sup>5</sup>. In the holy Qur'an the plural form (*i.e qawa'id*) was mentioned in three

<sup>2</sup>Al-Nadawi, A., *Al-Qawa'id Al-Fiqhiyah: Mafhumuha, Nash'atuha, Tawaturuha, Dirasat Mafhamatuha, Adillatuha, Muhimmatuha, Tatbiqaha*, (Damascus: Darul Qalam, 1998), p 89.

<sup>3</sup>Shaban, F., 'Al-Qawa'id Al-Fiqhiyyah The Islamic Legal Maxims Concepts, Functions, History, Classifications, and Application to the Contemporary Medical Issues', (Ph.D thesis, University of Exeter 2012), p 177.

<sup>4</sup>Ibid

<sup>5</sup> As mentioned above *qawa'id* is the plural form of *qa'idah* which is the feminine active participle of the verbs (*qa-a-id*) the verb basically means to stay and to sit down. The verb is also used in the other

places; two of which were used to mean foundations <sup>6</sup> whereas the third refers to women who are past child-bearing age<sup>7</sup>.

In contrast, there is no mention of the singular form (*i.e qa'idah*) in any place in the holy Qur'an. As a term, the word *qa'idah* is synonymous with the terms of base, principle, maxim and the like, and is used as such in different contexts, religious, philosophical, political or legal.<sup>8</sup>

### 2.1.2 Technical Meaning

Technically, up to the eight *Hijra* century, jurists did not provide a definition for the term (*qa'idah*), which reflects the *fiqhi* perspective for the notion. Rather, they seem to adopt and endorse definitions provided by some authors, who specialized in terminology. For the term in general, which can be borrowed from the rules of many disciplines. For example, Al-Jujani <sup>9</sup> defines the term maxim as: "a comprehensive principle or law that is applicable to all of its particulars". The first jurist however, who provided a definition was Taj al-Din Ibn Al-Subki. <sup>10</sup> His definition is as follows: "a comprehensively valid rule which applies to many particulars, so that their legal determination can be comprehended from it." <sup>9</sup> Jurists were not in agreement over the extent of application of Islamic Law Maxims over their particulars. The majority thought that they are similar to the rules of other disciplines, such as *usul al-fiqh* (jurisprudence), *Kalam* (theology), *Mantiq* (logic), *Nahw* (grammar), e.t.c. In terms of being comprehensively applicable to their particulars without exception. Some *fuqaha* (jurists) on the other hand, believed that Islamic Law Maxims are only *Hukum Aghlabi* (predominantly valid rules) rather than comprehensive<sup>11</sup>

In this context, Al-Hamawi says: "maxims according to *fuqaha* is different from that grammarians and legal theorists. According to them, it is a predominant principle, rather than comprehensive....."<sup>12</sup> It is also said: "It is known that the *qawa'id Al-fiqh* are predominant"<sup>13</sup>

This disagreement among jurists was reflected in the definitions they provided for Islamic Law Maxims. The majority adopted definitions given to the term *qa'idah* in general (such as the above mentioned definition of Al-Jujani), on the grounds that a maxim is also applicable to its particulars either without or with a small amount of

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contexts as well, although all of its meanings denotes the sense of firmness, constantly, solidity, and durability. *Qa'idat al-fasilah* means the palm shoot because firm on the ground when it developed a strong trunk. The crippled person when is unable to walk or more properly is called *mu'qa'id*. *Qa'idah*, in this context, means a foundation, and *qawa'id al-bayt* are the foundation of a house. See for example the lexical meanings of the word *qa'idah*. Ibn Manzur, M., *Lisan Al-Arab* (Beirut: Dar Sadir littibah, 1968), p 14-18, Al-Qurtubi, I., *Al-Jami Lil-Ahkam Al-Qura'an*, (Cairo: Dar al-kutb al-Arabi, 1967), p 309. And Abu Hayyah, M., *Al-Muhit*, 2<sup>nd</sup> edn. (Beirut: Dar al-Fikr, 1938), P 473.

<sup>6</sup> Qur'an Chapter 2 verse 127 and Qur'an Chapter 16 Verse 28 Qur'anic translation we used Yusuf, A., *Holy Qur'an Text and Commentary*, 3<sup>rd</sup> edn. (Beirut: Darl Elfikr, 1989).

<sup>7</sup> Qur'an Chapter 24 verse 60.

<sup>8</sup> Al-Nadawi, A., *Al-Qawa'id Al-Fiqhiyyah* Op. Cit. P41. Luqman, Z., 'Application Of Legal Maxims in Islamic Criminal Law With Special Reference to Sharia'h in Northern Nigeria 1999-2007', (Ph.D thesis, University of Wales 2009) p 26 and Shaban Op. Cit. P 40.

<sup>9</sup> Al-Jurjani, A., *Al-Tarifati*, 1<sup>st</sup> edn., (Beirut: Darul kutub al-ilmiyyah, 1983), P 171.

<sup>10</sup> Al-Subki T., *Al-Ashbahu Wal-Nazahir*, (Beirut: Darul Kutub Al-Islamiya, 1991), P 1-11

<sup>11</sup> Al-Mayman, N., *Al-Qawa'id Wal-Dawabit Al-Fiqhiyyah 'Anda Ibn Taymiyyah*, 2<sup>nd</sup> edn., (Riyadh: Ummul al-Qura University Press 2005), P 122.

<sup>12</sup> Al-Hamawi, A., *Ghamz Uyun Al-Basa'ir*, (Beirut: Darul- Kutub al-Ilmiyyah 1985) p 1 - 51

<sup>13</sup> Al-Maliki, M. A., *Tahdhib Al-Furuq*, (Beirut: Alam Al-kutub Publishers, N D.) p 1 – 36.

exception. Whereas for those groups of jurists they provided definitions to reflect their own thought<sup>14</sup>.

Many authors of recent work on Islamic Law Maxims have recorded some observations about the definition given to this concept by the traditional *Fuqaha*. They attempted, instead, to provide alternative definitions that they thought to be more precise and comprehensive.<sup>15</sup> However, one may notice that some authors have shown exaggeration in dealing with the definitions, and in attempting to provide new ones. In a number of cases, authors may spend five or six pages mentioning the definitions of some traditional jurists and their observations and notes on them, and providing their own definitions, which are seemingly a mere paraphrasing of the definitions they criticized<sup>16</sup>.

Riyad Al-Khalifi, a contemporary researcher, mentioned a case where an author spent 44 pages in stating and criticizing the definitions, of other researchers<sup>17</sup>. Nevertheless, some researchers provided some good definitions, which were widely quoted. Mustafa Al-Zarqa for example, defined *qawa'id* as: "general *fiqh*, principles which are presented in a simple format, consisting of general legal rulings of the particulars related to it"<sup>18</sup>.

### 3. SOURCES OF ISLAMIC LAW MAXIMS

Legal conception of Islamic law maxims were known to the leading figures of the *madhabib* and their disciples. They used them often in justifying their *ikhtiyarat fiqhiyah* (preferred legal rulings) or *ijtihad*. However, final wording of maxims have emerged after long processes of refinement and modification in later centuries by scholars in different schools, especially those qualified as *ahl al-takhrij* (scholars who reached the position of extracting the laws from the sources and giving ascendancy to one evidence over others). Yet, tracing and ascribing each single maxim to the person, who first uttered or formulated it is a difficult task, and in many cases impossible. The exception to this are those maxims which are verbatim *Qur'anic* verses, prophetic traditions or authentic speech of a companion or a leading scholar.<sup>19</sup> Perhaps this was the reason behind neglecting such an area of research by those who wrote on this branch of law.<sup>20</sup>

Now, since each of the Islamic law maxims contains a general legal rulings, they should have been taken or extracted from the sources of the *Shari'ah* i.e the holy Qur'an, the *Sunnah*, *ijma* (the consensus) and *qiyas* (analogical deduction) or any subsidiary sources of *shari'ah*, like *istaslah* (considering *maslaha*, or public interest), *Istishab* (presumption of continuity) and other methods of *ijtihad*.<sup>21</sup> However, maxims can be generally classified into two major categories in this context: *Nassiyah*

<sup>14</sup> Shaban Op. Cit. P 42

<sup>15</sup> Al-Nadawi, A., *Al-Qawa'id Al-Fiqhiyyah* Op. Cit. p 43-45, Al-Ruqi, M., *Qawa'id Al-fiqh Al-Islam Min Khilal Kitab Al-Ishraf Alal Masa'il Al-khilaf*, (Damascus: Dar al-Qalam Littibah Wal-Nashr 1998), P 107 – 09. Al-sharif, M., *Al-Mujmu Al-Mutlib Fi Qawa'id Al-Madhabib*, (Riyadh: Wezarat Al-Awqaf 1994), p 38.

<sup>16</sup> Al-Ruqi, M., *Nazariyat Al-Taqa'id Al-fiqhi*, (Beirut: Darul Qalam, 1994), p 42 – 46.

<sup>17</sup> Al-Khalifi, R., *Al-Qawaid Al-Fiqhiyah: Hujjiyyatuha Wa-Dawabit Al-istidlal Bihla*", in Majallat Al-Shari'ah Wal-Dirasat Al-Islamiyyah, (2003) 18, 55, p 290

<sup>18</sup> Laldin, M. A., *A Mini Guide to Shari'ah and Legal Maxims*, (second print cert. 2009) p 94.

<sup>19</sup> Al-Zarqa, *Sharhu Al-Qawa'id* Op. Cit. P 969.

<sup>20</sup> Shaban Op. Cit. P 61.

<sup>21</sup> Shubayar, M., Op. Cit. p 40. Al-Rugi, *Nazariyat* Op. Cit. P 85. Al-Zuhayli, Op. Cit. P 221. Al-Burnu, *Mausu'at Al-Qawa'id* Op. Cit. P 36.

(textual) and *Ghayr Nassiyyah* (non-textual).<sup>22</sup>The following is a detailed presentation of each category.

### 3.1 The Textual Maxims

Many *Qur'anic* verses and prophetic traditions carry myriad meanings in a few words. Some come in the form of common juristic principles, which express legal ideas identical to those of some maxims and meet the required criteria of the formation of maxims. Jurists, while coining particular maxims found that the words of such *nusus* are accurate statements, which express exclusively and exactly the legal idea of these maxims; so they preferred them over their (the jurists) own words. Other *nusus*, on the other hand, contain general legal rulings applicable to many particulars, but because they may not meet the criteria of maxims formation in one way or another; jurists deduce maxims from the *nusus*, which embody their legal idea in different wordings.<sup>23</sup>

#### 3.1. (a) Islamic Law Maxims Which are Verbatim Qur'anic Verses or Prophetic Traditions.

##### From The Holy Qur'an

- i. From the Qur'an: *wa'an laysa lil-insani illa ma sa'a*<sup>24</sup>(and that man can have nothing but what he does; good or bad). This comprehensive principle relates to Allah's reward or punishment of every single person in this world and in the hereafter, according to their deeds: good or bad.<sup>25</sup>
- ii. *Ya Ayyuha al-ladhina amanu awfu bil-uqud*<sup>26</sup>( "O you who believe! Fulfil (your obligations)"). This relates to fulfilling the contracts and commitments, which the whole society or individuals persons are bound to, being in trade, marriage or international relations.<sup>27</sup>
- iii. *Walahunna mithlu al-ladhi alayhinna bil – ma-aruf*<sup>28</sup> (and they (women) have rights (over their husbands) similar ( to those of their husbands) over them to what is reasonable). This regulates the relationship between spouses and, therefore, relates to chapters of family law, or what is called *al-ahwal al-shakh-siyyah* (personal status).<sup>29</sup>

#### 3.1. (b) From The Sunnah of The Prophet (Peace Be Upon Him)

- i. *Al –kharaju bil-daman*<sup>30</sup> (revenue goes with liability). That is to say that a person who obtains the benefit of a thing, takes upon himself also the loss from it. It is used as a controller in chapters, which relate to sale and trade.<sup>31</sup>

<sup>22</sup> Al-Burnu, *Mausu'at Al-Qawa'id* Op. Cit. P 36 – 43

<sup>23</sup> Al-Rugi M, *Nazariyat Al-Ta'qid Al-Fiqhi Wa-Athruhu Fi-ikhtilaf Al-fuqha*, (Beirut: Darul Qalam, 1994) p 87, Al-Bahusayn, *Al-Qawa'id Al-Fiqhiyah* Op. Cit. P 192, Bin Humayd Op. Cit. P 119.

<sup>24</sup> Qur'an Chapter 53 Verse 38.

<sup>25</sup> Al-Rugi *Nazariyat* Op. Cit. P 59.

<sup>26</sup> Qur'an Chapter 5 verse 1.

<sup>27</sup> Al-Burnu, *Mausu'at Al-Qawa'id* Op. Cit. P 38, Al-Rugi, *Nazariyat* Op. Cit. P 90.

<sup>28</sup> Qur'an Chapter 2 verse 228.

<sup>29</sup> Al-Rugi, *Nazariyat* Op. Cit.p 91. Al-zuhayli Op. Cit. P 130.

<sup>30</sup> Abu Dawud Suleiman Ibn al-Ash'at, '*Sunan Abi Dawud*', vol. 2, (Beirut: Dar al-Fikr, N. D.) p. 448 Al-Suyuti Op. Cit. P 135.

<sup>31</sup> Ibn Nujaym Op. Cit. P 175.

- ii. *'La darara wala dirara'* <sup>32</sup> (one should not cause harm, nor should he reciprocate harm with harm). This is a comprehensive principle applicable to most chapter of *fiqh*. It is the other version one of the five major Islamic law maxims. i.e *al-dararu yuzal* (harm must be eliminated).<sup>33</sup>
- iii. *'Al-bayyinatu alal – mudda'i wal yaminu ala man ankara'*<sup>34</sup> (The burden of proof is on him who alleges, the oath is on him who denies) this related to the judicial issues and evidence.<sup>35</sup>

### 3.1. (C) Maxims Derived From The Qur'an or The Sunnah in Different Wordings.

- i. *'Al-Umuru bi-maqasidiha'* (matters are judged in the light of intention behind them ); one of the five major *qawa'id*. This is extracted from the famous tradition narrated by Al-Buhari and Muslim and other scholars of sunnah; that is “indeed, actions are judged by the intentions”.<sup>36</sup>
- ii. *Al- yaqinu la yazalu bil-shakh* (certainty is not overruled by doubt). This is taken from the Qur'anic verse that says: (And most of them (the disbelievers) follows nothing but conjecture. Certainly, conjecture can be of no avail against the truth). <sup>37</sup> It is also derived from the prophetic tradition, narrated by al-Bukhari, in which the prophet (Peace Be Upon Him) rejected entertaining doubts in the face of valid *wudu* (ablution). That is: A man asked Allah's messenger about a person who imagined to have passed wind during the prayer. Allah's messenger replied: “He should not leave his prayers unless he hears sound or smells something”.<sup>38</sup>
- iii. *Al-mashaqqatu Tajlibu al-taysir'* (hardship begets facility). This has been extracted from many *nusus* from the Qur'an. For example: “Allah intends for you ease, and He does not want to make things difficult for you”.<sup>39</sup> The Qur'an also provides “Allah wishes to lighten (the burden) for you”. <sup>40</sup> In another verse Allah said: “And (He) has no laid upon you in religion any hardship”.<sup>41</sup>
- iv. *Al-Hududu Tudra'u Bil-Shubuhah* (*Hudud* punishments are to be warded off if doubt persist). This mentioned almost verbatim in the tradition narrated by Al-Tirmidhi and others, which says; “prevent the application of *hadd* punishment (as much as you can) whenever any doubt persists”.<sup>42</sup>

<sup>32</sup> Abu Abdullahi ibn Mahjah, *Sunan Ibn Majah*, vol. 2, (Beirut: Darul Kutub Al-Ilmiyah 2008) p. 180. Al-Suyuti Op. Cit. P 85.

<sup>33</sup> Al-Sadlan, *Al-qawa'id Al-fiqhiyyah* Op. Cit. P 493. Al-Bahusayn, *Qa'idat Al-Adah* Op. Cit. P 195. Al-Zarqa, *Sharhul Qawa'id* Op. Cit. P 90.

<sup>34</sup> Ibn Mahjah Op. Cit. P 354. Muslim B. A. A., *Sahih Muslim*, Vol. 3, (Beirut: Dar Al-Kutub Al-Ilmiyah, 2010) p 126

<sup>35</sup> Al-Zarqa M, *Al-Madkhal Al-Fiqhi*, 1<sup>st</sup> edn., (Beirut: Dar al-Qalam, 1998), P 369-89

<sup>36</sup> Annawawi, I. A. M., *Riyadul Salihin*, (Beirut: Darul Kutub Al-Ilmiyah, 2005), P 7. Muslim Op. Cit. P 231. Al-Rugi, *Qawa'id al-Fiqhi* Op. Cit. P 93.

<sup>37</sup> Qur'an Chapter 10 Verse 38.

<sup>38</sup> Al-Bukhari, M. I., *Al-Jami Al-Sahih*, 3<sup>rd</sup> edn. (Beirut: Dar Ibn Kathir, 1987), P 238. Al-suyuti Op. Cit. PP 50 – 51, Ibn Nujaym Op. Cit. P 60.

<sup>39</sup> Qur'an Chapter 2 verse 185.

<sup>40</sup> Qur'an Chapter 110 verse 28

<sup>41</sup> Qur'an Chapter 22 verse 78.

<sup>42</sup> Al-Tirmizi, M. I., *English translation of Jami Al-Tirmizi*, Vol. 4, (Beirut: Darul Salam, 2007) P 231. Al-suyuti Op. Cit. P 122. Ibn Nujaym Op. Cit. P 142.

There, are also some Islamic law maxims that are non-textual which were either formulated or deduced based on rulings whose sources are *ijma*, or have been extracted through the different methods of *ijtihad*, such as *qiyas*, *istishab*, *maslaha* <sup>43</sup> and other secondary and subsidiary sources of Islamic law.

### 3. TYPES OF ISLAMIC LAW MAXIMS

Islamic Law Maxims are not of one type, nor are they in one level of importance in the *fiqh* thought, rather, they are vary according to several aspects. However, the considerations which the authors on Islamic Law Maxims have presented are many in this context. Yet, perhaps the most important amongst them are three; namely: scope of application, being agreed upon or not, and being independent or subsidiaries<sup>44</sup>. The following is a detailed section on these classifications.

First, with respect to the scope of the application, Islamic law maxims can be classified into three categories as follows:

#### 3.1 Maxims which are applicable to all chapters of *fiqh* without specification.

There are five major Islamic law maxims under this category known as *Al-qawa'id Al-khams Al-kubra* (the five major Islamic law maxims). It is said that the whole *fiqh* is based on these *qawa'id*, and the essence of the *shari'ah* as a whole is grasped between them, and the rest of the *qawa'id* are simply an elaboration of them <sup>45</sup>. These maxims are as follows: *Al-umuru bi Maqasidiha* (matters are judged in light of the intention behind them), *Al-yaqinu la yazalu bil-shakk* (certainty is not overruled by doubt), *Al-Mashaqqatu Tajlibu Al-taysir* (hardship begets facility), *Al-Dararu Yuzal* (Harm must be eliminated) and *Al-Adatu Muhakkamah* (Custom can be the basis of judgement).<sup>46</sup>

#### 3.2 Maxims that apply to many chapters of *fiqh*, yet they are not as comprehensive in their application as the five major Islamic law maxims.

Al-Subki<sup>47</sup> called this type: *Al-qawa'id Al-Ammah* (the general maxims), whereas Al-Suyuti and Ibn Nujaym called them: *kulliyat* (comprehensive) that apply to limitless particulars<sup>48</sup>. Al-subki mentioned twenty six maxims under this category, while Al-Suyuti raised the number to forty. Ibn Nujaym, apparently considering the Hanafi School of law only, counted only nineteen <sup>49</sup>. Example of these are: *Imalu Al-Kalami awla min ihmalihi* (a word should be construed as having some meaning, rather than being disregarded), *Al-Kharaju Bi-l-Dhaman* (gain accompanies liability for loss), *Ma Haruma Filuhu Haruma Talabuhu* (when it is forbidden to perform an act it is also forbidden to request

<sup>43</sup> Al-Zarqa, *Sharhul Qawa'id* Op. Cit. P 69.

<sup>44</sup> Al-zuhayli, M., *Al-Qawa'id Al-Fiqhiyya Wa-tatbiqatunha Fil Madhahib Al-Arbah*, (Beirut: Dar al-Fikr, 2006) p 31-33. Al-Bahusayn, Y., *Al-Qawa'id Al-Fiqhiyyah: Al-Mabadih, Al-Muqawwimat, Al-Masadir, Al-Daliliyya, Al-Tawatur*, (Riyadh: Maktabat Al-Rushd, 2006) p 118-132. Al-Burnu, M. S., *Mawsu'at Al-Qawa'id Al-Fiqhiyyah*, (Beirut: Mu'assasat Al-Risalah, 1993) P 32-36. Bin Homayd, A., *The Introduction of Al-Qawa'id of Al-Maqqari al-Maliki*, (Beirut: Markaz Ihya Al-Turath Al-Islami, 1996) P 110-112.

<sup>45</sup> Al-Suyuti, J., *Al-Ashbah Wal-Nazahir*, (Beirut: Darul Kutub Al-Islamiya, 1983), P 4. Al-Zuhayli M., *Al-Qawa'id Al-Fiqhiyya Wa-tatbiqatunha Fil Madhahib Al-Arbah*, (Beirut: Dar al-Fikr, 2006) P 32.

<sup>46</sup> Al-subki Op. Cit. P 1-12. Al-Hisni, A., *Kitab Al-Qawa'id*, 1<sup>st</sup> edn. (Riyadh: Maktabat al-Rushd, 1997), P 203 -207. Al-suyuti Op. Cit. P 118. Al-Sadlan, S., *Al-Qawa'id Al-Fiqhiyyah Al-Kubra*, 1<sup>st</sup> edn., (Riyadh: Dar Balansiyah, 1417 A. H.) P 9.

<sup>47</sup> Al-subki Op. Cit. P 94.

<sup>48</sup> Ibn Nujaym, A., *Al-Ashbah Wal-Nazahir*, (Beirut: Darul Kutub Al-Ilmiyyah, 1980) 4.

<sup>49</sup> Al-Bahusayn, *Al-Qawa'id Al-Fiqhiyyah*, Op. Cit. P 119. Al-Jaza'iri, A., *Al-Qawa'id Al-Fiqhiyyah Al-Mustakhrajah Min Kitab Ilal-Muwaqq'in*, 1<sup>st</sup> edn. (Riyadh: Dar Ibn al-Qayyim, N D), p 195.

it performance) and *Al- Tabi-Tabi* (an accessory which is attached to an object in reality is also attached to it in law)<sup>50</sup>.

- 3.3 Islamic law maxims which are abstractions of the rules of *fiqh* on specific themes and chapters, such as the chapters of prayer, fasting, marriage, etc this kind of maxims is called *dawabit* (controllers)<sup>51</sup>. Examples of *dawabit* are: *Kullu Maytatin Najisatun Illa Al-samk wal- Jarad* (all the dead animals are impure except fish and locusts), *Kullu Hayyin Tahirun* (every living thing is pure), *Al-Mar'u Mu'akhadun Bi-iqrarihi* (a person is bound by his own admission) and *Al- Hududu Tudra'u Bi- l Shubuhah* (the punishments of *Hudud* with not be imposed when there is doubt).<sup>52</sup> What is worth mentioning in this context is that Al-Subki called this kind of maxims : *Alqawa'id Al-khassah* (the special maxims).<sup>53</sup>

Second, with respect to them being agreed upon or not, *qawa'id* are of two categories;

- 1 Agreed upon maxims: this refers to the maxims, which the schools of law are in agreement over them, regardless of the various opinions with respects to their application to certain issues. This category includes, in the first place. The above mentioned five major Islamic law maxims and also include many of the maxims which al-Suyuti and Ibn Nujaym described, as mentioned earlier, as *Al-kulliyat*.<sup>54</sup>
- 2 Maxims which the schools of law are not in agreement upon. They are called *qawa'id al-khilaf*.<sup>55</sup> They in turn are also of two categories as follows:
  - a. Maxims upon which scholars of a particular school are in agreement, yet they may not as such in the other schools. Examples of these are: *Al-Ibratu Fi-l-uqudi li-l-Maqasid wa Al-Mani la li-l-Alfazi wa-l- Mabani* (in contracts effect is given to intention and meaning and not to words and forms). This maxim is not accepted according to the shafi school of law, while it is so in the other three schools and *Al-Ajru wa-l-Damanu la yaj-ta'mi'ani* (remuneration and liability do not run together). This *qa'idah* is accepted only in the Hanafi School.<sup>56</sup>
  - b. Maxims upon which the scholar of even a particular school are not in agreement. They usually begin with a question mark, which indicates the diversity of opinions regarding their consideration.<sup>57</sup> An example of this type is as follows: Maliki scholars are not in agreement whether or not what often happens has the same legal ruling with what always happens. For example, they disagreed on the validity of the ablution (*wudu*) if one uses the left over water of an animal or a bird, which always uses and eat dirt, yet on that occasion dirt is not seen in its mouth. According to Ibn Rushd an

<sup>50</sup>Shaban Op. Cit. Pp 207-70 .

<sup>51</sup> Al- Subki Op. P Cit.11.

<sup>52</sup> Al-Ghiryani, A., *Tatbiqat Qawa'id Al-Fiqh Inda Al-Malikiyah*, (Beirut: Mansurat Jami'at Al-Fathi, 2007), p 10.

<sup>53</sup> Al-Subki Op. Cit. P 200.

<sup>54</sup> Al-zuhayli Op. Cit. P 32 Al-Burnu, *Mawsu'at al-Qawa'id* Op. Cit. P 32 – 33.

<sup>55</sup> Bin Humayd Op. Cit. P 111, Al-Bahusayn, Y., *Qa'idat Al-Adah Muhakkamah, Dirasah Nazariyyah Tasiliyyah Tatbiqiyyah*, 1<sup>st</sup> edn. (Riyadh: Maktabat Al-Rush, 2002). P 124. Al-Zuhayli ibid P 33.

<sup>56</sup> Al-Jaza'iri Op. Cit. P 112. Al-Bahusayn, *Qa'idat Al-adah* Op. Cit. P 125 – 26, Al-zuhayli Op. Cit. PP 32 – 33.

<sup>57</sup> Bin Humayd Op. Cit. P 111, Al- Bahusayn, *Al-Qawa'id Al-Fiqhiyyah*, Op. Cit. P 124, Al-Zuhayli Op. Cit. P 33.



outstanding Maliki scholar, water is still pure because every living being is pure and because dirt was not seen in the bird's mouth; consequently, *wudu* is valid. Many other scholars, on the other hand argued that water should not be used for *wudu*; because such animal use dirt predominantly, and what is of predominantly occurrence is equal legally to what happens invariably. For this disagreement among scholars on the legal ruling of such a problem and it's like, a maxim has been coined implying the diversity of views it says: *Hal Al-Ghalib Ka-l-Muhaqqaq?* ( is what is a predominant occurrence equal legally to what occurs invariably?).<sup>58</sup>

Third, with respect to them being independent or mere subsidiary, maxims are also of two categories:

1. Independent maxims. This refers to the essentials Maxims, each of which has been coined to reflect a major legal idea.<sup>59</sup> The five major Islamic law maxims are given example of independent maxims. Other example for this categories are the following: *I'mal al-kalam Awla Min Ihmalih* (a word should be construed as having some meaning, rather than being disregarded), *Al-Kharaju Bil-Daman* (the enjoyment of a thing is the compensating factor for any liability attaching thereto) and *Al-wilayatu al-khassah aqwa Min Al-wilayati Al-Ammah* (special trusteeship is more effective than general trusteeship).<sup>60</sup>
2. Subsidiary maxims: These are the principles which were derived from more general principle to serve them in one of two approaches.
  - a. First, to represent one of the aspects i.e to be the application of the general maxims to certain fields. For example a maxim which stipulates that a matter recognized by custom among merchants is regarded as if stipulated by agreement (*al-ma'arufu bayna al-tujjar, kal-mashruti baynahum*)- is actually an application in a certain field of the major maxim which reads: *al-adatu muhakkamah* (custom can be the basis of judgment).
  - b. Second, to be an exception, a condition on a provision within another maxims for example, a maxim which says: *Al-darau la yuzahu bi-muthlih* (a harm cannot be removed by a similar harm) is a provision within a major maxim which says: *Al-dararu yuzal* (harm must be eliminated) <sup>61</sup>. on the other hand, maxim which read *al-sukutu inda al-hajatu bayan* (silence is tantamount to a statement where there is a necessity for speech) is an exception to another maxim which stipulates that: no statement is imputed to a men who keeps silence: (*La yunsabu ila sakitin qawl*).<sup>62</sup>

#### 4. ROLES OF ISLAMIC LAW MAXIMS.

The roles of Islamic law maxims are numerous, and they are actively present in a number of areas, the following will show in details their most important roles.

<sup>58</sup> Al-Ghirani, *Tatbiqat Qawa'id Al-Fiqhiyah* Op. Cit. P 36, Al-Zuhayhi Op.Cit. P 866.

<sup>59</sup> Al-Bahusayn, *Al-Qawa'id Al-Fiqhiyyah* Op. Cit. P 126. Shobayar, M., *Al-Qawa'id Al-kulliyah Wal-Dawabit Al-fiqhiyyah*, 2<sup>nd</sup> edn. (Amman: Dal Al-Fa'is, 2007), P 23

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Shaban Op. Cit. PP 60-61.

#### 4.1 Categorizing *Fiqh* Cases in General Principles

The primary important role of Islamic law maxims mentioned<sup>63</sup> is that they have enabled the jurists to have adequate knowledge of the different chapters of *fiqh* without the need to memorize all of the particulars. They achieve the role of categorizing cases of *fiqh*, which have similar legal determination; so much so, that were it not for them, *fiqh* would have remained scattered cases, without ideational connection between them.<sup>64</sup>

Al-Qarafi, explaining the role and functions of Islamic law maxims: in categorizing *fiqh* particulars said:

“These maxims are very significant in *fiqh* and very useful... through them, beauty of *fiqh* becomes distinct and known, and approaches of *Fatwa* are revealed ... the more a jurist comprehends them the more he becomes distinguished and honourable... and whoever comprehends *fiqh* through it. Maxims does not need to memorize most of particulars, as they are embodied in the islamic law maxims.”<sup>65</sup>

Ibn Rajb Al-Hambali, focusing also on this function said:

“ These are important maxims and great benefits , they control principles of the *madhab* for jurists, and enable them to discover what might be hidden in the sources of *fiqh*. They also bring together for jurists the scattered issues in one place.....”<sup>66</sup>

Muhammad Hashim Kamali, in the same context, said:

“These genres of *fiqh* literature seek, on the whole, to consolidate the vast and sometimes unmanageable jurist corpus of *fiqh* into brief theoretical statements. They provide concise entries into their respective themes that help to facilitate the task of both the students and practitioners of Islamic law”.<sup>67</sup>

#### 3.4 A Means To *Ijtihad*

*Ijtihad* has been defined as: “the effort made by the *mujtahid* in seeking knowledge of the *ahkam* (rules) of the *Shari`ah* through the interpretation”.<sup>68</sup> It is also defined as the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of *shari`ah* from their detailed evidence in the source.<sup>69</sup>

*Ijtihad*, however, is very broad source of Islamic law, as most sources rather than the *Qur`an*, the *sunnah* and *ijma* ( consensus of jurists) such as *Qiyas* (analogical deduction) , *Istislah* (consideration of *maslaha*, or public interests) e.t.c are its manifestations; although its validity as a source of *fiqh*(knowledge of *shari`ah*) is required from the *Qur`an* and the *Sunnah*, as many verses and traditions are quoted in

<sup>63</sup> Al –Rugi, *Al-Qawa`id Al-Fiqhiyyah*, Op. Cit. P 327 – 28. Al-Bahusayn, *Al-Qawa`id Al-Fiqhiyyah*, Op. Cit. P 115.

<sup>64</sup> Al-Zarqa, *Sharhul Al-Qawa`id* Op. Cit. P 267.

<sup>65</sup> Al-Qarafi, S., *Al-Furuq*, (Beirut: Darul Ma`arif, N.D.), P 3.

<sup>66</sup> Ibn Rjab, A., *Al-Qawa`id*, Beirut: Darul Ma`arif, N.D.), P 3.

<sup>67</sup> Kamali, *Shari`ah Law* Op. Cit. P 142.

<sup>68</sup> Bambale, Y. Y., *An Outline of Islamic Jurisprudence*, (Lagos: Malthouse press Limited, 2007), P 56

Al-Khudari S. M., ‘*Usul al-Fiqh*’, 7<sup>th</sup> edn, (Beirut: Dar al-Fikr, 1958) P 367.

<sup>69</sup> Ibid

support of it. Yet, since the function of *mujtahid* (jurist) is to give Islamic law flexibility to treat and tackle new situations and issues where no clear text from the Qur'an and the *Sunnah* is available, practicing it needs competent jurists, who have certain qualifications to achieve the intended goals.<sup>70</sup>

Islamic law maxims also play an important role in the area of *ijtihad*. They have enabled jurists to be capable of extracting rulings for unwritten and novel questions, as well as the legal determinations of the infinite future issues through their analogical nature.<sup>71</sup>

Therefore, the analogical nature of Islamic law maxims designed to significantly reduce the effort of *mujtahid* in extracting legal rulings for new issues, which have not occurred in the past. To explain this, a *mujtahid* when practising *qiyas* (legal reasoning) in order to extract a proper legal ruling-needs to consider two things: first, he needs to recognise the *illah* (effect cause) of the legal ruling of an original case which is already known and regulated by a given *nass* (a clear text from the Qur'an or the *Sunnah*) in order to apply it to a new case; and second, he needs to verify whether or not this *illah* is present in the new case, whose legal ruling is being extracted. Inferring a legal ruling from a maxim, in contrast, requires only checking whether or not the new case is in the domain of the maxim, which is similar to the second of the above mentioned steps in the practice of *qiyas*.<sup>72</sup>

For this reason, some scholars argued that Islamic law maxims are even to be given priority over *qiyas*. According to them, *qiyas* originally is to attach a single issue (which has no clear legal determination) to another single issue (whose legal status has already been determined by the Qur'an, the *Sunnah* etc.), whereas the nature of Islamic law maxims is to attach a single issue to several other issues, which already have legal status.<sup>73</sup>

Al-suyuti in this regard said:

“Know that *Al-Ashbah wal-Naza'ir*, under which Islamic law maxims are embodied, is a great sort of art. Through it, facts and secrets of *fiqh* can be learned, and a jurist becomes talented in remembering and understanding it, (i.e *fiqh*). He would also be able to extract rulings for unwritten issues and the infinite events”.<sup>74</sup>

<sup>70</sup> For this reason, Scholars laid some requirements that a jurists must satisfy in order to practice *ijtihad* in the proper way. Amongst them are the following : 1. Mastery of the Arabic Language. 2. A profound knowledge of the Qur'an and the *sunnah* and capability of distinguishing strong from weak evidence. 3. An adequate knowledge of the issues upon which scholars agreed, i.e *ijma*. 4. A comprehensive knowledge of the interpretative principles of legal language (e.g. the imperative, ambiguous, metaphorical, general, and particular) and the methods of investigating the authenticity and transmission of texts, particularly *hadith* (prophetic traditions). 5. Knowledge of the theory of abrogation (*al-nasikh wal-mansukh*), which includes a discussion as to whether and what text repeal others. 6. Understanding of *maqasid* (objectives) of the *shari'ah* and *maslaha* (public interests). 7. Knowledge of one's own society and *urf* (custom). 8. Knowledge of legal maxims. 9. *Al-adalah wa al-wara* (piety and devotion)

<sup>71</sup> Shaban Op. Cit. P 68 .

<sup>72</sup> Al-Miremi Op. Cit. P 85.

<sup>73</sup> Al-khalifi Op. Cit. PP 311-14.

<sup>74</sup> Al-suyuti Op. Cit. P 6.

### 3.5 Help To Have Knowledge About Objectives of *Shari`ah*

This means that islamic law maxims helps jurists hold considered knowledge of *maqasid al-shari`ah* (the intentions and goals of the *Shari`ah*). Many of them are expressive, usually in a few words, of these *maqasid*, which might not be achieved when dealing with the particulars separately.<sup>75</sup>

To give some example; let us examine two of the five major islamic law maxims. The first says: *al-Mashaqqah Tajlib al-Taysir* (hardship begets facility), and the other says: '*La darara wa la dirar*') (one should not cause harm, nor should he reciprocate harm with harm). Considering this, one can come to a conclusion that reducing hardship for the individuals- whenever it occurs -is intended by the lawgiver, either when performing the different *ibadat* (acts of worship) or when dealing with others for the worldly daily life. Likewise, whenever and wherever it occurs, harm must be eliminated.

### 3.6 Embody Many principles And Values of The *Shari`ah*

Islamic law maxims embody within their sphere many of the *Shari`ah* principles and values. As such, amongst it is the maxim, which reads: - '*al-Adah Muhakkamah*' (custom can be the basis of judgements). This maxim is on *Urf* (Custom), which Islamic legal theory granted a formal status, recognizing it as a legal principle of *Shari`ah* and a valid basis of judicial decision.<sup>76</sup> Thus, a judge is authorised to base his verdict on custom on issues which are not regulated by a *nass* (clear text from *Qur'an* or the *Sunnah*).<sup>77</sup> Shacht said:

"Custom (*Urf*, *Adah*) is recognised as a restrictiveelement in dispositions and contracts and as a principle in interpreting declaration; it is also servesoccasionally as the basis of *istihsan* or *istislah*".<sup>78</sup>

Muhammad Kamali Hashim said also in this regard:

"The legal theory of *usul* also recognizes approved custom (*Urf*) as a proof of *Shari`ah* and a valid basis of judicial decisions, especially in the area of *mu`amalat* (transactions), custom is essentially pragmatic as it is moulded directly by the experience, needs and conditions of society. Custom and *maslaha* also constitute the motivating factors behind many ruling of *Ijma* and *ijtihad*".<sup>79</sup>

Likewise, the theory of *istishab* has been expressed by a number of maxims, which are all included under the remit of the second major islamic law maxims which says: '*al-Yaqinu la Yazalu Bil-shakh*' (certainty is not overruled by doubt). *Istishab* (the continuation of the situation of a matter), whose existence or non-existence had been proven in the past, and which are presumed to remain so for lack of evidence to establish any change.<sup>80</sup> Take for example the following two subsidiary maxims:

<sup>75</sup> Ibn Ashur, M., *Maqasid Al-Sharia`h Al-Islamiyyah*, (Tunis: Al-Sharikah Al-Tunissiyyah Lil-Tawzi 1978) P 6. Al-Bahusayn, *Al-Qawa'id Al-Fiqhiyyah* Op. Cit. P 117. Kamali, M. H., *Sharia`h Law: An Introduction*, (Oxford: Oneworld publication 2008) P 147.

<sup>76</sup> Ibid P 54

<sup>77</sup> ibid

<sup>78</sup> Schacht, J., *Introduction to Islamic Law*, (Oxford: University Press 1964) P 62.

<sup>79</sup> Kamali, *Sharia`h Law* Op. Cit. P 54.

<sup>80</sup> Ibid p. 259.

- a. *Al-al-Aslu Bara'atu al-Dhimmah* (freedom from liability is a fundamental principles).
- b. *Al-Al-Aslu Baqa'u Ma-kana Ala-ma-kan* (it is a fundamental principle that a thing shall remain as it was originally).

### 3.7 Embody Ethical Values

Islamic law maxims embody ethical values, substantially intended by the *Shari'ah*. In this context, the main ideas of Islamic law maxims are mainly ethical and they are integral to the general Islamic concept of *maslaha*, besides- of course - their legal functions. This may reflect the strong relationship between law and morality in Islam. In this respect, *Shari'ah* is seen to be based on a system of morality and can, therefore, handle many moral problems that arise in different fields from a legal perspective.<sup>81</sup>

Take for example, the first major maxim which says: '*al-Umuru bi-Maqasidiha*' (matters are judged in light of the intention behind them). This maxim concerns the *niyyah* (intent), which is a fundamental concept of the whole Islamic law. *Niyyah* plays dual role: legal and moral. The former concerns the realization by the heart of the action to be done, which results in discharging the actor from a duty if it is intended, and vice versa.<sup>82</sup> The moral role, on the other hand, is the actor's inner motive for their actions, based on which he may or may not gain *qabul* (acceptance) by Allah of his actions, and subsequently His reward in the afterlife. Therefore, the moral function relates *niyyah* to *Ikhlass* (Sincerity), which leads to Allah's pleasures. Accordingly, a matter, be it an action or an utterance, is accepted only if it is performed with proper intention, not on the bases of its outer appearance. It is valueless when it is done with ill-intention, even if it is good in nature and performed in complete accordance with the precept of law.<sup>83</sup>

### 3.8 Preserve *Shari'ah* In The Society

Islamic law maxims based on our own observations, play a remarkable role in preserving *Shari'ah* in Islamic society and helps secure greater support for the law. Many maxims - especially those which embody ethical connotations-have, in, different wording a noticeable presence in the speech of individuals, and seemingly play the role of proverbs, in term of encouraging people to do pleasant things or acquire good manners.

Furthermore, in many situations an individual may cite a popular saying, which is similar to or might be originally a *qa'idah fiqhiyah* (a maxim base on legal theory) to justify an action or to support an idea. For example, for explanation of enjoying an easier duty, be it related to the law or to daily life activities, individuals often say: '*al-Din Yusr*' (literally means: religion is easy), which is a mere paraphrasing of the major maxims which says: '*al-Mashaqaah Tajlib al-Taysir*' (hardship begets facility).

Likewise, sometimes an individuals in a Muslim society will like to justify doing an action which resulted in liked or disliked consequences-they say: '*Innama al-a-*

<sup>81</sup> Hassan, O. K., 'Medical Ethnic from maqasid Al-sharia'h' <<http://www.islamthroughout.worldpress.com/2008/medical=ethic-from-mayasio-at-shariahE2%80%9D>>accessed on 15th November, 2014.

<sup>82</sup> Shaban Op. Cit. P 100.

<sup>83</sup> Al-Ghazali, A. H., '*Al-Mutasfa Min Il-Mul Usul*', 1<sup>st</sup> edn., (Beirut: Dar Al-Kutub Al-Ilmiyah, 1413 A. H.) P 362.

*Mal Bil-Niyyat* (indeed all actions are based on intention behind them) to indicate that their motivation was sincere.

Moreover, Islamic law maxims have a significant roles in explaining procedure or situations, where *adat* or *Urf* (custom) are the basis of a judgement. *Hadha Huwa al-Urf* (this is according to custom), for example, is a statement which is often heard in the sessions of marriage contracts when discussing the amount of dowry which is to be given to the wife; this refers to the fifth of the major *qawa'id*, which says: *al-Adah Muhakkamah* (custom can be the basis of judgment).

One can, however, guess the reasons behind the popularity of many Islamic law maxims in the Muslim society. First, the large presence of the preachers and religious figures in these societies who use, in their ceremonies, maxims and other sorts of legal and ethical principles for teaching and *da'awah* (call to adhere to Islam) purposes. Second, the ethical connotation that these maxims embody, created wide acceptance for them among individuals. Third, their brief and precise wordings make remembering them easy. Fourth, maxims may be in the midway between *fiqh* (which includes a large number of particulars that is beyond grasp, especially for those who are not specialized in legal studies), and *Maqasid al-sharia'h* (a discipline which requires special considerations and qualities). Fifth, the tendency of individuals to seek a decisive argument, to support or justify their speeches, situations and actions with pieces of evidence, which embody religious connotation.<sup>84</sup>

## CONCLUSION AND RECOMMENDATIONS

The knowledge of Islamic law maxims is one of the fundamental Islamic sciences. It is concerned with the law maxims and fundamental juristic principles and their scope of application the *juz'iyat* (particulars). The Islamic law maxims being principles that contain general legal rulings have extracted from the primary source of the *shari'ah*, i.e the Qur'an and the *sunnah* of the holy prophet (Peace Be Upon Him) its help the jurists to have considered knowledge of *maqasid al-shari'ah* (the intentions and goals of the *shari'ah*). Which might not be as such when dealing with particulars separately.

Moreover, it has been mentioned that the analogical nature of the role of the Islamic law maxims have significantly saved the effort of the *mujtahid* (a person entitled to perform *ijtihad*) to extract legal rulings and judgement for new issues as done by the classical jurists. These maxims also encompass within their remit many of the *shari'ah* values and principles, such as *urf*, *sad al-dhara'i* and *istishab*, and many of them convey ethical connotation.

It was mentioned herein that presently it may be difficult, if not impossible, for one to reach the status of *Mujtahid* due to the stringent conditions attached to it, but this does not preclude one from striving and acquiring necessary knowledge to bring him nearer to the level of a *Mujtahid*. Therefore, one of the ways to achieve this is to acquire the knowledge of the major Islamic law maxims.

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<sup>84</sup> Shaban Op. Cit. P 102.