

**APPRAISAL OF THE MAXIM OF *AL-IBĀḤAH AL-AṢLIYYAH*
(ORIGINAL LAWFULNESS) AND THE SCOPE OF ITS
APPLICATIONS**

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ABSTRACT

This paper appraised the maxim of original lawfulness which is often cited as a basis for legislating on matters upon which the Sharī'ah is silent. It demonstrates the easiness and simplicity of Sharī'ah as living law that benefits mankind. Using doctrinal methodology through hermeneutical and inductive approaches, the author analysed the maxim of original lawfulness, its legal basis and jurists' positions. The paper finds that the maxim is applicable to mundane or worldly matters only. The maxim is a source based that originates from the Qur'an and Sunnah. Majority of jurists have accepted it as the principle that governs matters upon which the law is silent. However, the maxim does not apply to spiritual acts (worship) or where the matter is harmful to human being. The paper recommends amongst other things that scholars must observe certain conditions in exploiting this maxim; the matter must be mundane. Silence of the law as well as its relative benefit must be considered.

1. INTRODUCTION:

The maxim of original lawfulness is one of the principles of Sharī'ah that symbolize its easiness and simplicity. However, some researchers have often times cited the maxim to justify some positions that they intend to promote regardless of the requirements and conditions upon which the applications of the maxim are build. This paper attempt to put this maxim in its appropriate spot through examination of its legal basis as well as, its areas of applications and limits. In the second section, the paper introduces the concept of maxims and specifically examine the meaning of the maxim and the implication of original lawfulness. Section three discusses the validity or otherwise of the maxim of original lawfulness as examined by various jurists who subscribe to different legal schools and thoughts. Validity of the maxim is of two categories which are: legal effect of things before the revelation of the law

and legal effect of things upon which the law is silent after its arrival. Both levels are addressed to reflect the objective of the maxim. Section four examined the scope of the maxim's applications. Here, the author casts light on the subject matter of the maxim as it is not open ended. This also shows that the maxim of original lawfulness is not as absolute as it is being portrayed in some works. Similarly, the limitations of the maxim were pointed out.

2. MAXIM OF ORIGINAL LAWFULNESS

Before discussion on the meaning and implications of maxim of original lawfulness, it will be appropriate to introduce the concept of legal maxims (*al-Qawā'id al-Fiqhiyyah*) in Islamic law.

2.1 Concept of *Al-Qawā'id Al-Fiqhiyyah* (Legal Maxims):

Legal maxims (*Al-Qawā'id Al-Fiqhiyyah*) are crucial in Islamic law (*fiqh*) as they encapsulate perceptions and precepts that can abet to figure out the essence of the Islamic Law in details. It is a handy tool for a *mujtahid* or *muftī* researchers who need to expand their grasp and understanding of content and objective of the law. More importantly, they ease to arrive at the appropriate ruling where there is no direct text available in a particular matter.¹ The word *al-Qawā'id* is a plural *qā'idah*, a derivative of *qa'ada* and literally has the meanings of fixation, consistency, and being well established.² *Qa'ida* on the other hand means base; and *Qawā'id* means foundation of a building as Allah, the Most High says:

﴿ وَإِذْ يَرْفَعُ إِبْرَاهِيمُ الْقَوَاعِدَ مِنَ الْبَيْتِ وَإِسْمَاعِيلُ رَبَّنَا تَقَبَّلْ مِنَّا إِنَّكَ أَنْتَ السَّمِيعُ

الْعَلِيمُ ﴿ سورة البقرة: ١٢٧ .

“And remember Ibrahim and Isma'il raised the foundations (*Qawa'id*) of the House.”³

¹ Shettima, M., Effects of the Legal Maxim: “No Harming and No Counter-Harming” on the Enforcement of Environmental Protection (2011) in 19 *IUMLJ* 291 @ 294

² Al-Dausarī, M. M. M., *Al-Mumti' fil Qawā'id al-Fiqhiyya*, (Riyadh, Dar Zidnī 1428H/2007), p. 10.

³ Qur'an 2:127

The relationship between *qā'idah* as a technical term and the verse's usage is that while injunctions are based on maxims, walls are built on foundations.⁴

Technically, it is a general rule applicable to all its related particulars. Sadr al-*Sharī'ah* has defined *Qawā'id* as general propositions.⁵ There are several *qawā'id* in that sense including *Qā'ida Nahwiyyah* (Rule of Grammar), *Qā'idah Mantiqiyya* (Rule of Logic), *Qā'ida Usūliyya* (Rule of Jurisprudence), etc. This makes it applicable to all disciplines that involve general propositions with varying particulars. *Fiqhiyya* (literally meaning of law) is the adjective of *Qāida* (maxim); a derivative of *fiqh* (law) which literally means deeper understanding and comprehension.⁶ *Fiqh* is a term that came to denote Muslim jurists' detailed study of practical aspect of the Divine ordainments. Imam Shafi'i has defined it as the knowledge of the practical injunctions of Shari'a acquired from its detailed evidences.⁷

The terminology, *al-Qawā'id al-Fiqhiyya*, referred hereinafter as Legal Maxims has several definitions. These definitions basically revolve around two points. The often quoted definition of legal maxims is that it is a general rule which applies to all of its related particulars.⁸ As this is an extension of the technical meaning of term *Qā'ida* in other discipline to the *Qā'ida* in law (*fiqh*), this definition has failed to encapsulate the concept of legal maxims and thus not reflective of its essence. Al-Hamawi has stated that *qā'ida* of legists (*fuqahā*) is different from *qā'ida* in other disciplines such as Grammar (*Nahwu*), Logic (*Mantiq*) and even Jurisprudence (*Usūlul Fiqh*). In these disciplines, it is a rule applicable to all its related particulars.⁹ Although there are several definitions of *al-Qawā'id al-Fiqhiyyah*, the most acceptable

⁴ Al-Bāhusain, Y. A., *Al-Qawā'id al-Fiqhiyyah: al-Mabādi' al-Muqawwimāt – al-Maṣādir – al-Dalīliyyah – al-Taṭawwur: Dirāsah Naẓariyyah – Taḥlīliyyah – Ta'ṣīliyyah – Tārīkhiyyah*, (Riyadh, Maktabat al-Rushd 1418H/1998), p. 15.

⁵ Al-Taftazāni, S. M. U., *Sharh Al-Talwīh 'alā Al-Taudīh li Matn Al-Tanqīh fī Usūl Al-Fiqh*, vol. 1, (Egypt, Dār Al-Kutub Al-Arabiyya 1327H), p. 20.

⁶ Cf Rohi Baalabaki, al-Mawrid: A Modern Arabic English Dictionary, (Dar El-Ilm lilmalayin, 1995), 832.

⁷ Ibn Al-Subkī, T. A. A., *Al-Muhalla fī Sharhil Jawāmi'*, vol. 1, (Dār Ihyā' Al-Kutub Al-Arabiyyah n.d.), p. 32, Al-Zuhaili, M. M., *Al-Qawā'id al-Fiqhiyya wa tatbiqatuha fil Madhahib al-Arba'a*, vol. 1, (Damascus, Dar El-Fikr 1427/2006), p. 16.

⁸ Kamali, M. H., *Qawā'id Al-Fiqh: The Legal Maxims of Islamic Law*, (UK, The Association of Muslim Lawyers, n.d.), p. 1.. Retrieved 28th November 2010 from <www.sunnah.org/fiqh/usul/Kamali_Qawaid_al-Fiqh.pdf>

⁹ Al-Hamawi, A. M. H., *Ghamzu Uyūnīl Basā'ir Sharhul Ashbāhi wan-Nazā'ir*, vol. 1, (Beirut, Dār Al-Kutub Al-Ilmiyyah 1405H/1985), p. 22.

definition of al-Qawā'id a-Fiqhiyyah states that it is a general proposition of law that applies to most of its related particulars.¹⁰

The reason for opting to this definition is that maxims do not apply to all particulars that seem related to it. The particulars that do not apply to a general principle are known as *mustathnayāt* (exceptions). These exceptions often represent independent or auxiliary maxims in themselves. The exceptions do not however negate the general application of maxims, as the principles of the maxim still represent application to majority; and exceptions are but of minority in all maxims.¹¹ In addition, these exceptions often represent conditions for the applications of the maxim contained in specific legal authorities.

2.2 *Al-Ibāhah al-Aṣliyyah* (The Maxim of Original Lawfulness)

The maxim of original lawfulness is rendered in several forms. The most popular of these is *Al-Aṣlu fī al-Ashyā'i al-ibāhah*.¹² Other formulations of the maxim from various works include the following:

- i. *Al-Ashyā'u alā al-Ibāhah hattā yarida al-shar'u bi al-man'i*¹³ (Things are presumed to be lawful until the law forbids them).
- ii. *Al-Aṣlu fī Al-Ashyā'i al-Hillu*¹⁴ (The Norm regarding things is lawfulness).
- iii. *Al-Aṣlu fī Al-A'yāni al-Hillu*¹⁵ (The Norm regarding entities is lawfulness).

¹⁰ Particulars (*Juz' iyyāt*) are the specific injunctions that apply to particular cases as provided in the detail of the law. Therefore, what is true to the general proposition is also true to the particular and this provision is also extended to most of the particulars that are related to it. (For several definitions, arguments and counter-arguments see: Al-Bāhusain's, *Al-Qawā'id Al-Fiqhiyyah: Al-Qawā'id'*, ibid, p. 9-54).

¹¹ Al-Zuhaili, Ibid, p. 24.

¹² Cf Ibn AbdulBarr, Ibid, vol. 4, p. 67, 142; vol. 6, p. 344-345; Al-Sarkhasi, Ibid, vol. 24, p. 77; Al-Shīrāzī, I. A. Y. F. A., *Al-Tabṣirah*, (Hīto, M. H. ed, 2nd edn, Damascus, Dār Al-Fikr 1403H), vol. 1, p. 353; Al-Suyūṭī, Ibid, p. 60.

¹³ Ibn AbdulBarr, Ibid, vol. 4, p. 142; vol. 17, p. 95, 114.

¹⁴ Al-Zarkashī, B. M. B., *Al-Manthūr fī Al-Qawā'id Al-Fiqhiyyah*, vol. 1, (Ismā'īl, M. H. ed, Beirut, Dār Al-Kutub 1421/2001), p. 306; Al-Mubārkaḥūrī, M. A. A., *Tuḥfat Al-Ahwadhī*, vol. 4, (Dār Al-Kutub Al-Ilmiyyah: n.d.), p. 331; Al-Nafrāwī, A. G. S., *Al-Fawākih Al-Dawānī alā Risālat Ibn Abi Zaid Al-Qairawānī*, vol. 2, (Beirut, Dār Al-Fikr 1415H), p. 284.

¹⁵ Al-Zarkashī, B. M. B. A., *Al-Bahr Al-Muḥīt fī Uṣūl al-Fiqh*, vol. 4, (Dār Al-Kutub Al-Ilmiyyah 1421H/2001), p. 325.

- iv. *Al-Umūr Aṣluha Al-Ibāḥah hattā yathbut al-Haḥru*¹⁶ (Matters are originally lawful until confirmation of prohibition).
- v. *Al-Aṣlu fī Al-Manāfi' al-Idhn wa fī al-Maḍārri al-man'u*¹⁷ (The norm regarding beneficial things is permission and harmful things is prohibition).

2.3 Meaning of the Maxim:

To understand the meaning of *al-Aṣl fī al-Ashyā'i al-Ibāḥah*, we have to know what these three words, *aṣl*, *ashyā'*, *ibāḥah*, that represent the core of the maxim actually mean:

a. The *term aṣl* literally means the bottom of a thing.¹⁸ Scholars of jurisprudence have defined its lexical meaning as 'source of a thing or that from which another thing sprang and needs it.'¹⁹ The preferred meaning is that which says *al-aṣl* is 'that upon which other things are raised'.²⁰ The reason of the preference of this meaning is that it combines all the earlier stated meanings of source of a thing or that from which another thing sprang from and/or needs it.²¹

On its technical sense, the following definitions of the term *aṣl* can be found among jurists:

- i. *Al-Aṣl* meaning the general rule (*al-Qā'idah al-Kulliyyah*) such that where it is said *Al-Qā'idah fī Al-Ashyā'i al-ibāḥah*, it means the general rule concerning things is that they are lawful. It also implies

¹⁶ Ibn AbdulBarr, *Ibid*, vol. 9, p. 205.

¹⁷ Al-Rāzī, M. U. H., *Al-Maḥṣūl*, vol. 6, (Al-Alwānī, T. J. F. ed, 1st edn, Riyadh, Imam Muhammad bin Su'ūd Islamic University 1400H), p. 131; Al-Zarkashī, BMBA, *Al-Baḥr Al-Muḥīt fī Uṣūl al-Fiqh*, vol. 4, (Dār Al-Kutub Al-Ilmiyyah 1421H/2001), p. 322.

¹⁸ Al-Bāhusain, Y. A., *Al-Mufaṣṣal fī Al-Qawā'id Al-Fiqhiyyah*, (Dār Al-Tadamuriyyah 1432H/2011), p. 62.

¹⁹ Al-Farrā', Q. A. M. H. H., *Al-'Uddah fī Uṣūl al-Fiqh*, vol. 1, (Mubarkī, A.A.S. ed., 2nd edn, Mu'assasat Al-Risālah 1410), p. 70; Al-Qarāfī, S. A. I. , *Sharh Tanqīh Al-Fuṣūl fī Ikhtisār Al-Maḥṣūl fī Al-Uṣūl*, (Dār Al-Fikr 1393H), p. 16; Al-Tahānawī, M. A. F., *Kashshāf Istīlāḥāt al-Funūn*, (Egypt, Al-Mu'assasah Al-Miṣriyyah Al-'Ammah litta'lif 1382H), p. 123.

²⁰ Al-Baṣārī, M. A. T., *Al-Mu'tamad fī Uṣūl al-Fiqh*, vol. 1, (Damascus, Al-Matba'a Al-Katholokiyyah 1384AH/1964), p. 6; Al-Bāhusain, Y. A., *Uṣūl Al-Fiqh: Al-hadd wa al-Mauḍū' wa al-Ghāyah*, (Maktabat Al-Rushd 1408H/1988), p. 35.

²¹ Al-Ḍuwaiḥī, A. A. M., *Qā'idat Al-Aṣlu fī Al-Ashyā'i al-Ibāḥah*, (KSA, Muhammad bin Su'ūd University 1428H/2007), p. 14.

that there could be exception to the general rule as is the case concerning most maxims.²²

- ii. *Al-Aṣl* meaning the preferred opinion (*al-rājih*) in case of two contradictory opinions; such as when there is a conflict between *qiyās* and provision of Qur'an, the Qur'an, which is the *aṣl*, preference shall be given to *aṣl* over *qiyās* (analogy).
- iii. *Al-Aṣl* meaning the continuous rule (*al-Qā'idah al-Mustamirrah*): a continues legal position or norm.²³
- iv. *Al-Aṣl* meaning presumption of continuance (*Al-Mustaṣ'hab*) such as the *aṣl* is that the status quo remains as it was before,²⁴ etc.

b. On the meaning of the term *ashyā'*, it is the plural of the word *shai'* literally translated as "a thing." It is described as that which can be known and be informed of; or it is that which is perceived to exist either by feeling it like physical entity or presumptively/presumably like speech.²⁵ It is technically defined as that which is definitively in existence in the real world.²⁶ *Ashyā'* thus consists of both physical entities and conducts or actions.²⁷ As Ibn Taimiyyah puts it while explaining the meaning of the Saying of Allah, the Most High:

﴿ وَقَدْ فَصَّلَ لَكُمْ مَا حَرَّمَ عَلَيْكُمْ ﴾ الأنعام: ١١٩ .

*"He hath explained to you in detail what is forbidden to you."*²⁸

It is generally referring to entities and actions.²⁹ In other words, "what is forbidden to you" refers to physical things whose enjoyment are prohibited as well as conducts whose undertaking is prohibited for a man even though he can do it by choice.

²² Al-Ḍuwaiḥī, Ibid, p.1 5.

²³ Al-Dausarī, Ibid, p. 124.

²⁴ Ibn Al-Subkī, Ibid, vol. 1, p. 13, Al-Suyutī, Ibid, p. 51,

²⁵ Al-Jurjani, A. M.S., *Al-Ta'arīfāt*, (Beirut, Dār Al-Kitāb Al-Arabi 1405H), p. 142.

²⁶ ibid.

²⁷ Al-Ḍuwaiḥī, Ibid, p. 18.

²⁸ Qur'an 6:119

²⁹ Al-Najdī, A. M. Q. A., *Majmū' Al-Fatāwā Ibn Taimiyya*, vol. 28, (Al-Ri'āṣah al-'Ammah lil-Haramain: n.d.), p. 386.

In addition, while quoting a statement of Abu Ya'lā on resolving disagreements on legal status of things before the revelation of the law, Ibn Taimiyyah said, "*this implies that it encompasses entities and actions.*"³⁰ By entities (*a'yān*), we are referring to all the physical things that can be seen like animals, plants and inanimate,³¹ while an action is anything that a human being carries out by choice although he can live without it.³² He also stated elsewhere that the term "explanation" in the verse, i.e. in the phrase "*He hath explained,*" means elaboration. It is clear that he has explained the prohibited things. That which is not explained to have been prohibited is therefore not prohibited; and that which is not prohibited is lawful as there is only *halāl* (lawful) and *harām* (unlawful).³³

c. Lexically, the word *ibāḥah* means to manifest and to clear. It is also used to mean permission or letting go of one's right. In its technical sense on the other hand, scholars of jurisprudence have discussed it extensively with varying consideration which is not within the scope of this discourse. However, modern jurists have summed up the meaning of *ibāḥah* as technical terms under two designations:

i. Absence of wrong (*raf' al-haraj*). This position is mostly taken by *mutazilah*; and they are of the view that lawfulness is a determination of human intellect. According to them absence of wrong is confirmed even before the revelation came; so it is not part of the revelation.³⁴

ii. That which the Sharī'ah has equated between doing and omitting. In other words, it is where the law has given the same effect between doing a thing and not doing it. Example is the saying of the Prophet, peace and blessing of Allah be upon him: "*If you like you fast and if you like you can break it.*"³⁵ This is the meaning of *ibāḥah* that could be understood from the statements of jurists and legists.³⁶ On his part, Al-Āmidī has captured the word *Ibāḥah*

³⁰ Al-Dimashqī, S. A. H., *Al-Musawwadah fī Uṣūl al-Fiqh*, (AbdulHamīd, M. M. ed, Beirut, Dār Al-Kitāb Al-Arabī n.d.), p. 486.

³¹ Al-Fattūhī, A. A. N., *Sharh al-Kaukab al-Munīr*, vol. 1, (King AbdulAzīz University 1400H), p. 322-325.

³² Al-Ḍuwaiḥī, Ibid, p. 22

³³ Al-Najdī, Ibid, vol. 21, p. 536.

³⁴ Al-Ghazālī, M. M., *Al-Mustasfā min Ilm al-Uṣūl*, vol. 1, (Dār Al-Kutub Al-Ilmiyyah. 1322H), p. 75; Al-Shātibī, I. M. M. L. G., *Al-Muwāfaqāt fī Uṣūl Al-Sharī'a*, vol. 1, (Dār Ibn 'Affān. 1417H/1997), p. 140; Al-Qarāfī, *Sharh*, Ibid, p. 70-71.

³⁵ Bukhārī, Hadith No. 1943; Muslim, Hadith No. 2681.

³⁶ Cf Ibn Qudāmah, M.A., *Rauḍat Al-Nāzīr wa Junnat al-Munāzīr*, vol. 1, (Al-Sa'īd, A.A. ed, Riyadh, Muhammad bin Su'ūd University 1399H) p. 37; Al-Juwainī, A. A. Y., *Al-*

in the following definition: "it is that which is implied by received legal authority (i.e. revelation) from the words of the Lawgiver and indicates an option between doing and not doing without substitute."³⁷ The qualifier "without substitute" in this definition makes it optional for the Muslim to do it as he wills;³⁸ for where there is a substitute such as in the option between water ablution and sand ablution, it is not described as lawful but a substituted obligation due to necessity, etc.

On the meaning of *mubāh* (lawful) on the other hand, it is used in the description of a thing upon which the law is silent or where the law has given option between doing and not doing and the received authority (*dalīl sam'ī*) or revelation has implied that there is no wrong between doing and not doing.³⁹ In a nutshell, *mubāh* (lawful) is the effect of the application of *ibāhah* (lawfulness). Jurists have also used other terms like *halāl* and *jā'iz* (permissible) in their description of the lawful.⁴⁰

Mubāh is one of the five defining rules (*al-hukm al-taklīfī*) in Islamic Jurisprudence. The famous classification of *mubāh* has divided it into three types as follows:

- i. A thing which the Lawgiver has given an option of either doing or omitting. An example is the saying of the Prophet, peace and blessing of Allah be upon him, to a traveller: "If you like you fast and if you like you break your fast."⁴¹
- ii. That upon which the Law did not give option of either doing or omitting but dismissed any wrong for either doing or omitting it. As in the Saying of Allah Ta'ālā regarding a woman freeing herself from the bond of marriage by compensating the husband:

﴿ فَلَا جُنَاحَ عَلَيْهِمَا فِيهَا أَفْتَدَتْ بِهِ ﴾ سورة البقرة: ٢٢٩ .

Burhān fī Uṣūl al-Fiqh, vol. 1, (Al-Dīb, M. A. ed, 4th edn, Egypt, Dār Al-Wafā' 1418H) p. 216; Al-Ghazālī, *Ibid*, p. 74.

³⁷ Al-Amidī, A. M., *Al-Ihkām fī Uṣūl al-Ahkām*, vol. 1, (Afifī, A. ed, 2nd edn, Al-Maktab al-Islāmī 1402H), p. 123.

³⁸ Al-Duwaihi, *Ibid*, p. 26.

³⁹ Al-Dimashqī, *Ibid*, p. 36; Al-Zarkashī, *Al-Bahr*, *Ibid*, vol. 1, p. 222; Al-Shātibī, *Ibid*, vol. 1, p. 140.

⁴⁰ Al-Bāhusain, *Al-Hukm* (n 111), p. 371.

⁴¹ Bukhari, Hadith No. 1943; and Muslim, Hadith No. 2681.

*"There is no blame on either of them if she gives something for her freedom."*⁴²

In other words, there is no wrong upon a woman to free herself from the bond of marriage by compensating the husband. This means such an action is lawful for her.

iii. That upon which the *Sharī'ah* is silent; which shall then remain on the original non-liability (*al-barā'ah al-aṣliyyah*).⁴³ In other words, there is no religious or legal liability for undertaking what the *Sharī'ah* is silent on as it remains lawful.

From the above elucidations, it can be stated that the maxim of original lawfulness means that the presumed legal position of things and conducts before the revelation, or after it where there was a silence regarding it or where the *mukallaf* (an adult Muslim) is ignorant of the position of *Sharī'ah* (where he has the legally recognised excuse) is: permission and absence of wrong until confirmation of prohibition.⁴⁴ The maxim does not apply to things that are explicitly prohibited by *Sharī'ah* such as alcohol; or harmful things, like smoking cigarettes.

2.4 The Maxim's Relationship with *Istishāb*:

From the above description of the meaning of *ibāḥah*, we can conclude that the word means anything that the law has not directly or indirectly sanctioned or explicitly prohibited it; or the law has been silent upon it. The purpose or the implication of the maxim is referring to the presumption of the continuation of this status until otherwise suggested by the provision of the *Sharī'ah*. Such presumption is referred to as *istiṣ'hāb*. It is considered to be one of the secondary sources of law, *Istishāb* has been defined as the presumption of continuity of a matter based on its previously established state. The previously confirmed state may either be legal or rational. This maxim represents a form of *Istishāb* which is: accompanying what the law has confirmed to have existed in the past into the present; such as a person who bought a piece of land is presumed to still own it until something that negates the presumption is proved.⁴⁵ This type of *Istishāb* applies in cases

⁴² Qur'an 2:229.

⁴³ Al-Bāhusain, *Al-Hukm*, Ibid, p. 371.

⁴⁴ Al-Duwaiḥī, Ibid, p. 154.

⁴⁵ Al-Namla, A. A. M., *Al-Jāmi' li Masā'ili Usūlil Fiqh wa Tatbīqātuhā alal Madhhabir Rājih*, (Riyadh, Maktabat Al-Rushd 1420H/2000) p. 376. See also: Al-Dausari, *Ibid*, p. 126.

such as presumption of continuation of ownership after execution of a contract; the liability of a person who damaged another's property remains until indemnified; and the existence of a liability on an indebted person where the loan is confirmed.⁴⁶

3. VALIDITY AND AUTHORITATIVENESS OF THE MAXIM:

The validity or otherwise of the maxim is treated by various jurists on two levels. These are:

- i. Legal effect of things before the law was revealed.
- ii. Legal effect of things upon which the law is silent after its arrival.

i. Legal Effect of things before the Law was Revealed:

On the first level, several opinions can be found among various jurists depending on their varying ideological and/or methodological inclination. These opinions can be summarised as follows:

The legal injunction or effect of things is lawfulness. Those who took this view have different approaches for their reason of taking this opinion. While most Mu'tazilites are of the opinion that the fact that everything is lawful in Islam is known through human reason and intellect,⁴⁷ the majority of jurists are of the position that such lawfulness is known through the provisions of *Sharī'ah*. In fact, this can be inferred from the Sunni jurists of Hanafī, Maliki, Shafī'i and Hanbali Schools.⁴⁸

- ii. The second opinion is the one that takes the view that things are originally prohibited. This opinion is a position held by a minority of jurists represented

⁴⁶ Al-Atāsī, M. T., *Sharhu Majallatil Ahkām*, vol. 1, (Matba'atu Hums 1349H), p. 20.

⁴⁷ Al-Sam'ānī, A. M. M. A., *Qawāti' Al-Adillah fī Al-Uṣūl*, vol. 2, (Al-Shafī'i, M. H. ed, Dār Al-Kutub Al-Ilmiyyah 1418H/1997), p. 48; Al-Qarāfī, *Sharh*, Ibid, p. 92, 88; Al-Zarkashī, *Al-Bahr*, vol. 1, p. 124.

⁴⁸ Al-Anṣārī, A. M. N., *Fawātiḥ Al-Rahmūt Sharh Musallam Al-Thabūt*, vol. 1, (Dār Al-Kutub Al-Ilmiyyah 1322H), p. 49.

by Baghdad mu'tazilites,⁴⁹ Imami Shi'ites,⁵⁰ some Hanafis,⁵¹ Abubakar Al-Abhurī of the Maliki School,⁵² some Shafi'is⁵³ and some Hanbalis.⁵⁴ Like the case with those who took the view that things are lawful before the arrival of the law, these scholars were also divided into two regarding the basis of original or presumed prohibition. Those who took the view that such prohibition is known through the human intellect are the mu'tazlites,⁵⁵ while those who are of the view that it is based on the received law, i.e. the revelation, are the majority.⁵⁶ Among the several verses presented by this category of jurists is the Saying of Allah:

﴿ أَمْ لَهُمْ شُرَكَتُؤُا شَرَعُوا لَهُمْ مِّنَ الدِّينِ مَا لَمْ يَأْذَنَ بِهِ اللَّهُ وَوَلَّآ كَلِمَةً الْفَصْلَ
لَقَضِيَ بَيْنَهُمُ وَإِنَّ الظَّالِمِينَ لَهُمْ عَذَابٌ أَلِيمٌ ﴿٢١﴾ سورة الشورى: ٢١ .

*“What! Have they partners (in godhead), who have established for them some religion without the permission of Allah.”*⁵⁷

According to them, this verse criticises a person who claims that something is lawful without Allah's permission.⁵⁸ However, the such inference has been criticised by other jurists. they stated that “*that which is not permitted by Allah*” is a reference to associating Allah with partners.⁵⁹

⁴⁹ Cf Al-Farrā, *Ibid*, vol. 4, p. 1240; Al-Baghdādī, A. A. A. M. A., *Al-Wāḍih fī Uṣūl al-Fiqh*, vol. 5, (Al-Turkī, A. ed, 1st edn, Mu'assasat Al-Risālah 1420H/1999), p. 260; Al-Zarkashī, *Al-Bahr*, *Ibid*, vol. 1, p. 121.

⁵⁰ Al-Farrā, *Ibid*, vol.4, p. 1240; Al-Baghdādī, *Ibid*, vol. 5, p. 260; Ibn Al-Subkī A.A., Ibn Al-Subkī, T. A. A., *Al-Ibhāj fī Sharh Al-Minhāj*, vol. 1 (Maktabat Al-Kulliyyāt Al-Azhariyyah 1401), p. 421.

⁵¹ Al-Zarkashī, *Al-Bahr*, *Ibid*, vol. 1, p. 121.

⁵² Al-Bājī, A. W., *Ihkām Al-Fuṣūl fī Ahkām Al-Fuṣūl*, (Al-Turkī, A. ed, 2nd edn, Dār Al-Maghrib Al-Islāmī 1408H/1986), p. 681.

⁵³ Including Abu Ali bin Abi Hurairah, Abu Abdullah Al-Zubairi. See: Al-Zarkashī, *Al-Bahr*, *Ibid*, vol. 1, p. 121; Al-Sam'ānī, *Ibid*, vol. 2, p. 48.

⁵⁴ Including Al-Hasan bin Hāmid. See: Al-Farrā, *Ibid*, vol. 4, p. 1238; Al-Baghdādī, *Ibid*, vol. 5, p. 260; Ibn Qudāmah, *Ibid*, vol. 1, p. 39.

⁵⁵ Al-Amidī, *Ibid*, vol. 1, p. 92; Ibn Al-Subkī, *Al-Ibhāj*, *Ibid*, vol. 1, p. 143.

⁵⁶ Al-Qarāfī, *Sharh*, *Ibid*, p. 92; Al-Zarkashī, *Al-Bahr*, *Ibid*, vol. 1, p. 124; Al-Anṣārī, A. M. N., *Fawātih Al-Rahmūt Sharh Musallam Al-Thabūt* with Al-Ghazālī, *Ibid*, vol. 1, p. 49.

⁵⁷ Qur'an 42:21

⁵⁸ Al-Farrā, *Ibid*, vol. 4, p. 1255.

⁵⁹ Al-Duwaihi, *Ibid*, p. 64.

iii. A third opinion takes the view that it is improper to delve into legal injunction of things before the arrival of the law. This opinion is also taken by the majority of jurists among Ash'aris,⁶⁰ Theologians,⁶¹ Zāhiris⁶² according to Ibn Ḥazm, some Mu'tazilas,⁶³ Imami Shi'ites,⁶⁴ many Malikis,⁶⁵ Shafi'is⁶⁶ and some Hanbalis.⁶⁷ Some of those jurists have attributed this position to the fact that their rulings are unknown.; and others are saying that it is because these things have no rulings before the law came.⁶⁸ This later category relied on several verses, among which is the saying of Allah, the Most High:

﴿ قُلْ أَرَأَيْتُمْ مَا أَنْزَلَ اللَّهُ لَكُمْ مِنْ رِزْقٍ فَجَعَلْتُمْ مِنْهُ حَرَامًا وَحَلَلًا قُلْ ءَلَا إِلَهَ إِلَّا اللَّهُ أَدْرَبَ لَكُمْ أَمْرًا عَلَى اللَّهِ تَفْتَرُونَ ﴾ سورة يونس: ٥٩ .

“Say: “See ye what things Allah hath sent down to you for sustenance? Yet ye hold forbidden some things thereof and (some things) lawful.” Say: “Hath Allah indeed permitted you, or do ye invent (things) to attribute to Allah.”⁶⁹

Thus, whoever that claims that a thing is either prohibited or lawful before the law's arrival is attributing things which he does not know to Allah.⁷⁰

Nevertheless, because the law is already here, these arguments do not have any practical application but theories and hypothesis of *ahl a-kalām* (theologians) with insignificant legal implication. As Imam Shāṭibī has rightly observed, any issue of jurisprudence that cannot be a basis of auxiliary legal injunctions or *Shari'ah* etiquettes or does not help in these, placing them

⁶⁰ Including Abu Al-Hasan Al-Ash'arī. See: Al-Sam'anī, Ibid, vol. 2, p. 48.

⁶¹ Al-Sam'anī, Ibid, vol. 2, p. 48; Al-Zarkashī, *Al-Bahr*, Ibid, vol. 1, p. 122.

⁶² Ibn Hazm, A. A.A., *Al-Ihkām*, vol. 1, (1st edn, Cairo, Dār Al-Hadīth 1404H), p. 52.

⁶³ Cf Al-Zarkashī, *Al-Bahr*, Ibid, vol. 1, p. 122.

⁶⁴ ibid

⁶⁵ Al-Bājī, Ibid, p. 681; Al-Furūq, *Sharh Tanqīh*, p. 88.

⁶⁶ Al-Sam'anī, Ibid, vol. 2, p. 48; Ibn Al-Subkī, *Al-Ibhāj*, Ibid, vol. 1, p. 142-143.

⁶⁷ Al-Farrā', Ibid, vol. 4, p. 1242; Ibn Qudāmah, Ibid, vol. 2, p. 38.

⁶⁸ Al-Zarkashī, *Al-Bahr*, Ibid, vol. 1, p. 123; Al-Ghazālī, Ibid, p. 65.

⁶⁹ Qur'an 10:59

⁷⁰ Al-Sam'anī, Ibid, vol. 2, p. 54.

into confines of *uṣūl al-fiqh* is pointless.⁷¹ It is for this reason, the focus shall be on the legal injunction of things upon which the law is silent.

⁷¹ Al-Shātibī, *Ibid*, vol. 1, p. 37.

ii. Legal effect of things upon which the law is silent

This is a reference to legal status of things and conducts regarding which there is no specific textual provision. The reason why the jurists have focused upon this legal issue is because we know that textual provisions are limited and incidental occurrences are many, continuous and unending. There are several things and conducts regarding which the law has not expressed any of the five defining rules⁷² on them.⁷³

It is however worth mentioning here that the question of whether silence of the law on anything is a point of dispute among jurists. Some are of the opinion that it is possible for the *Sharī'ah* to be completely silent on the legal status of anything⁷⁴ and others are of the view that although such silence is logically possible but it is impossible in *Sharī'ah*. This opinion has been preferred by Imam Al-Ghazālī as the companions of the Prophet have never made such utterances nor have they ever said that a certain matter has no *Sharī'ah* injunction.⁷⁵ A third opinion preferred by Ibn Suraij of the Shafī'i School states it is both logical and legal for the injunction of *Sharī'ah* to be absent regarding certain matters.⁷⁶

According to Shāṭibī, the above statement implied that a thing can either be explicitly stated in textual provision or applied through analogy of the textual provision; and analogy is a recognised source of law. As a result, it makes it impossible for us to say that something has no legal injunction in *Sharī'ah*.⁷⁷

Nevertheless, the preferred opinion among these is the opinion that says it is logically possible for a thing to be devoid from *Sharī'ah* injunction but that's impossible in *Sharī'ah*. This does not however mean that there is no such thing upon which the *Sharī'ah* is silent as this is confirmed in the Qur'an and several Ahādīth has implied that. Thus, the Saying of Allah the Most High:

⁷² *Al-Hukm al-Taklīfī* (Defining Rule) is a jurisprudential term that means legal status of matters as they relate to an individual or group of persons. There are five defining rules in Islam law. These are: *wājib* (obligatory), *mandūb* (recommended), *harām* (prohibited), *makrūh* (abominable or disliked) and *mubāḥ* (lawful). See: (Al-Bahusain, Y.A., *Al-Hukm al-Sharī*, (Maktabat al-Rushd 1431H/2010), p. 161-387).

⁷³ Al-Duwaihi, *ibid* p. 93

⁷⁴ Al-Shāṭibī, *Ibid*, vol. 1, p. 173; Al-Zarkashī, *Al-Bahr*, *Ibid*, vol. 1, p. 129.

⁷⁵ Al-Zarkashī, *Al-Bahr*, *Ibid*, vol. 1, p. 129.

⁷⁶ *ibid*.

⁷⁷ *Al-Shāṭibī*, *Ibid*, vol. 1, p. 173.

﴿يَتَأْتِيهَا الَّذِينَ ءَامَنُوا لَا تَسْأَلُوا عَنْ أَشْيَاءَ إِن تُبَدَّ لَكُمْ تَسْؤُكُمْ﴾ سورة المائدة: ١٠١.

*“O ye who believe! Ask not questions about things which, if made plain to you, may cause you trouble.”*⁷⁸

In other words, it is because the Sharī‘ah is silent upon such matter which the companions are proscribed from asking. If the Sharī‘ah is not silent upon these things, there is no reason to warn the companions against asking such question.

In the Sunnah too, there are several ahādīth of the Prophet, peace and blessing of Allah be upon him on this issue that implies that there are things upon which the Sharī‘ah is silent. The most explicit of such is his saying:

*“And He was silent on some things as mercy to you and not out of forgetfulness. So do not enquire of it.”*⁷⁹

In another Hadīth narrated by Abu Tha‘labata al-Khushani, the Prophet, peace and blessing of Allah be upon him also said:

*“Allah the Almighty has laid down religious duties; do not neglect them. He has set boundaries, so do not over step them. He has prohibited some things, so do not violate them; He was silent about some things out of compassion for you, not forgetfulness, so seek not after them.”*⁸⁰

Thus, while all the jurists acknowledge that there are certain issues upon which the *Sharī‘ah* is explicitly silent on, they are however of the view that there is an injunction of Allah regarding these issues. These issues can be joined to similar issues upon which the text has specifically addressed.⁸¹ There are however other issues that have no similitude in the available textual

⁷⁸ Qur'an 5:101.

⁷⁹ Al-Dār Qutnī, A. U. A. B., *Sunan Dār Qutnī*, vol. 2, (Yamānī, A. H. ed, Dār Al-Ma‘rifah 1386H/1966), p. 183-184; Al-Hākim, M. A. A., *Al-Mustadrak alā Al-Sahīhain*, vol. 4, (Aleppo, Syria Al-Maṭbū‘āt Al-Islāmiyyah, n.d.), p. 115; According to Al-Haithamī, its narrators are authentic. See: Mujma' Al-Zawā'id, vol. 1, p. 171.

⁸⁰ Dar Qutnī, Ibid, vol. 4 p. 183-184; Al-Ṭabarānī, S. A. A., *Al-Mu'jam Al-Kabīr*, (Al-Salafī, H. A. ed, Cairo, Maktabat Ibn Taimiyyah, n.d.), Hadīth No. 589.

⁸¹ Al-Duwaiḥī, Ibid, p. 95.

provisions and these are the subject matter of this maxim; and therefore, the opinion taken by majority of jurists is that they are lawful.

This is the position taken by most Mu'tazilah,⁸² most Hanafis,⁸³ some Shafi'is,⁸⁴ most Hanbalis, and Abu Al-Faraj of the Maliki School.⁸⁵ These jurists have relied on the following legal authorities for their positions:

﴿ هُوَ الَّذِي خَلَقَ لَكُمْ مَا فِي الْأَرْضِ جَمِيعًا ﴾ سورة البقرة: ٢٩.

“It is He Who hath created for you all things that are on earth”⁸⁶

﴿ قَالَ رَبُّنَا الَّذِي أَعْطَى كُلَّ شَيْءٍ حَلْفَهُ ثُمَّ هَدَى ﴾ سورة طه: ٥٠.

“Our Lord is He Who gave to each (created) thing its form and nature, and further, gave (it) guidance.”⁸⁷

﴿ وَسَخَّرَ لَكُمْ مَّا فِي السَّمَوَاتِ وَمَا فِي الْأَرْضِ جَمِيعًا مِّنْهُ إِنَّ فِي ذَلِكَ لَآيَاتٍ لِّقَوْمٍ

يَتَفَكَّرُونَ ﴾ سورة الجاثية: ١٣.

“And He has subjected to you, as from Him, all that is in the heavens and on earth”⁸⁸.

From the above verses, the jurists have noted that Allah, the Most High has reminded His servants of the favours he has bestowed upon them through the things He created. The implication of this is that they are lawful for them. In

⁸² Al-Juwainī, Ibid, vol. 1, p. 86-87; Al-Rāzī, M. U. H., *Al-Maḥṣūl*, vol. 1, (Al-Alwānī, T. J. F. ed, 1st edn, Riyadh, Imam Muhammad bin Su'ūd Islamic University 1400H), p. 209; Al-Amidī, Ibid, vol. 1, p. 92.

⁸³ Al-Dabbūsī, A. U. U., *Taqwīm Al-Adillah fī Uṣūl al-Fiqh*, (Beirut, Al-Mais, K.M. ed, 1st edn., Dār Al-Kutub Al-Ilmiyyah 1421H/2001), p. 458; Amīr Badshāh, M. A., *Taisīr Al-Tahrīr*, vol. 1, (Alī Subaih: n.d.), p. 172; Al-Anṣārī, Ibid, vol. 1, p. 49.

⁸⁴ Al-Sam'ānī, Ibid, vol. 2, p. 48; Al-Zarkashī, *Al-Bahr*, Ibid, vol. 1, p. 121.

⁸⁵ Al-Bājī, Ibid, p. 681; Al-Qarāfī, *Sharh Tanqīh*, Ibid, p. 88.

⁸⁶ Qur'an 2:29

⁸⁷ Qur'an 20:50.

⁸⁸ Qur'an 45:13

other words, the meaning of His Saying: “*He created for you*” is that he created them for your benefit.⁸⁹

However, some jurists have argued that the fact that Allah has said He has created it for us does not mean that he has legalised it for us; rather He is telling us that He created them for us to ponder over them to deduce His oneness from them as this is the context in which the verses were rendered.⁹⁰ They cited the following verse as justification of their position:

﴿ قُلْ مَنْ حَرَّمَ زِينَةَ اللَّهِ الَّتِي أَخْرَجَ لِعِبَادِهِ وَالطَّيِّبَاتِ مِنَ الرِّزْقِ قُلْ هِيَ لِلَّذِينَ ءَامَنُوا فِي الْحَيَاةِ الدُّنْيَا خَالِصَةً يَوْمَ الْقِيَامَةِ كَذَلِكَ نُفَصِّلُ الْآيَاتِ لِقَوْمٍ يَعْلَمُونَ ﴾ (الأعراف:

.٣٢

“*Say: Who hath forbidden the beautiful (gifts) of Allah, which He hath produced for His servants, and the things, clean and pure, (which He hath provided) for sustenance?*”⁹¹

By criticizing whoever that forbids the beautiful (gifts) of Allah and things that are clean and pure, this verse is indicative of the fact that things are originally presumed to be lawful. In addition, this verse is also an authority against those who claim that things are originally presumed to be prohibited as the source of prohibition is the law. The reason is that the verse is specifically revealed against those who nakedly circumambulate the *ka'ba* and prohibit things based on their own rationales and mindsets.⁹² Likewise, its expressed implication (*manṭūq*) is also indicative of the fact, it is not permissible for anyone to prohibit a thing by his vain desire as the source of prohibition is the *Sharī'ah* itself.⁹³ Based on the provision of this verse, we can also conclude that clothes, beautiful (ornaments) and good sources of sustenance are all lawful after the arrival of the law and not before it.⁹⁴

⁸⁹ Al-Qurṭubī, Tafsīr, vol. 1, p. 250; Al-Ṭūfī, N.S.A., *Sharh Mukhtaṣar Al-Raudah*, vol. 1, (Al-Turkī, A. ed, 1st edn, Mu'assasat Al-Risālah 1410H), p. 399-400.

⁹⁰ Al-Qurṭubī, A.M.A., *Al-Jāmi' li Ahkām al-Qur'an Tafsīr*, vol. 1, (Dar al-Kātib al-Arabī 1387H/1967), p. 251; Al-Dimashqī, *Ibid*, p. 476; Al-Sam'ānī, *Ibid*, vol. 2, p. 57.

⁹¹ Qur'an 7:32.

⁹² Al-Sam'ānī, *Ibid*, vol. 2, p. 54-55.

⁹³ Ibn Al-Subkī, *ibhāj*, *Ibid*, p. 148.

⁹⁴ Al-Duwaiḥī, p. 55.

A second opinion that did not agree with the proposition that things upon which the law is silent is lawful; rather it is prohibition.⁹⁵ This opinion is taken by Baghdad Mu'tazilites,⁹⁶ some scholars of Hadīth,⁹⁷ Imami Shi'ites,⁹⁸ Abubakar Al-Abhuri⁹⁹ of the Maliki School and some Hanbalis.¹⁰⁰ These categories of jurists who opined that things upon which the law is silent is prohibition have also relied on some authorities. Examples of such authorities include:

﴿ أَمْ لَهُمْ شُرَكَاءُ شَرَعُوا لَهُمْ مِنَ الدِّينِ مَا لَمْ يَأْذَنْ بِهِ اللَّهُ وَلَوْلَا كَلِمَةُ الْفَصْلِ لَقُضِيَ بَيْنَهُمْ وَإِنَّ الظَّالِمِينَ لَهُمْ عَذَابٌ أَلِيمٌ ﴾

“What! Have they partners (in godhead), who have established for them some religion without the permission of Allah.”¹⁰¹

Nevertheless, it has been argued that the above verse is an evidence against their position. The reason is that prohibiting a thing without explicit evidence is doing something in religion without Allah's permission.¹⁰² In other words, prohibiting something without legal backing is like legislating within the religion without Allah's permission.

Other authorities cited by this group have also been faced with similar argument; and therefore, this proposition does not have the strength or authoritativeness of the previous positions taken by the majority of jurists.

A third position on whether or not things upon which the law is silent is lawful, is that properties (*amwāl*) are lawful while (violation of sanctity of) life and organs (of human) are prohibited. This is a position taken by some Hanafis. Narrating from Abd Al-Yusr Al-Bazdawī, 'Alā'uddīn Al-Bukhārī has stated a consensus (*ijmā'*) over this position. On their position that all property is lawful, they based it on the saying of Allah:

⁹⁵ Cf Al-Duwaihi, Ibid, p. 113.

⁹⁶ Al-Farrā', Ibid, vol. 4, p. 1240;

⁹⁷ Ibn Nujaim, Ibid, p. 66.

⁹⁸ Al-Farrā', Ibid, vol. 4, p. 1240.

⁹⁹ Al-Qarāfi, *Sharh*, ibid, p. 88.

¹⁰⁰ Al-Farrā', Ibid, vol.4, p. 1238, 1243; Ibn Qudāmah, Ibid, vol. 1, p. 39; Al-Dimashqī, Ibid, p. 474.

¹⁰¹ Qur'an 42:21

¹⁰² Al-Farrā', Ibid, vol. 4, p. 1255.

﴿هُوَ الَّذِي خَلَقَ لَكُمْ مَّا فِي الْأَرْضِ جَمِيعًا﴾ سورة البقرة: ٢٩.

“It is He Who hath created for you all things that are on earth.”¹⁰³

This authority is the same as the authority of those who opined that everything that the law is silent upon is lawful as earlier discussed. On their position that lives and organs are prohibited, they based it on the fact that Allah has obliged His servants to worship him and such worship is impossible without protection from damage to their bodies. This sort of protection can only be achieved through prohibition of violation of damage to life and all organs.¹⁰⁴ This position is not in any way in contradiction with the majority view that whenever the *Shari'ah* is silent upon something it is lawful. Because the *Shari'ah* is not silent regarding damage to life and organs as it has explicitly prohibited its violation. It is in consonance with the view taken by the majority of jurists.¹⁰⁵ In addition, it is generally accepted fact that maxims do not negate that which has been declared exceptional or specific through textual provision rather confirms it.¹⁰⁶ Therefore, one exception does not negate the general application of a maxim.

Another position taken by Imam Al-Rāzī, Al-Baiḍāwī and Al-Asnawī states that the norm of beneficial things is permission and of harmful things is prohibition.¹⁰⁷ Along with other authorities, this opinion has also relied on the following Saying of Allah:

﴿هُوَ الَّذِي خَلَقَ لَكُمْ مَّا فِي الْأَرْضِ جَمِيعًا﴾ سورة البقرة: ٢٩.

“It is He Who hath created for you all things that are on earth.”¹⁰⁸

According to Al-Rāzī, the phrase “created for you” is specifically referring to the beneficial ones.¹⁰⁹

¹⁰³ Qur'an 2:29

¹⁰⁴ Al-Bukhārī, A. A. A., *Kashf Al-Asrār 'an Uṣūl Fakhr Al-Islām Al-Bazdawī*, vol. 3, (Dār Al-Kutub Al-'Arabiyyh 1414H/1994), p. 195.

¹⁰⁵ Al-Duwaiḥī, *Ibid*, p. 121.

¹⁰⁶ Al-Shāṭibī, *Al-Muwāfaqāt*, *ibid*, 2:53

¹⁰⁷ *Ibid*.

¹⁰⁸ Qur'an 2:29

¹⁰⁹ Al-Rāzī, *Ibid*, vol. 1, p. 209.

On the prohibition of all harmful things according to al-Rāzī, he defined harming (*ḍarar*) causing loss of benefit or violation of individual's interests which includes emotional pain, insult and belittling (of another) along with physical harm and based its prohibition on the saying of the Prophet, peace and blessing of Allah be upon him:

*“No harming and no counter-harming in Islam.”*¹¹⁰

Accordingly, this opinion is not in contradiction with the opinion stated by the majority of jurists on the lawfulness of that upon which the law is silent as it is an exception of harmful in the general provision of the maxim.¹¹¹ Ibn Ḥazm has rightly noted the following while commenting on the verse, he said:

*“If we allow the evident meaning of this verse, everything on earth would have been lawful. But out of all that is on earth, Allah has prohibited some things as exception from that which he declared as generally lawful.”*¹¹²

A fourth opinion has preferred halting on making any judgement on whether a thing upon which the law is silent is lawful or not. This view is taken by some comrades of Abu Hanīfah and Al-Ash‘arīs according to Imam Al-Shaukānī. It is also the view of Abubakar Al-Sairafī as well as one of the opinions contained in the Shafī’i School which Al-Nawawi validated. It is also the preference by Al-Qāḍī AbdulWahhāb who attributed it to the majority of jurists.¹¹³ To halt in issuing any judgement means it is unknown whether such a thing upon which the law is silent has any injunction or not.¹¹⁴ The basis of this position is following saying of the Prophet, peace and blessing of Allah be upon him:

*“The lawful is clear and the prohibited is clear; and believers stop regarding those unclear things.”*¹¹⁵

In this Hadith, the Prophet, peace and blessing of Allah be upon him, has mentioned things that are clearly declared as lawful in *Shari’ah* and those that are clearly stipulated as prohibited and a third category that are ambiguous because they are unclear. These unclear things can neither be described as

¹¹⁰ Al-Shaibānī, *Ibid*, vol. 1, p. 313; Ibn Mājah, *Ibid*, Hadith No. 2340, p. 784, Dar Qutni, *Ibid*, vol. 3, p. 77.

¹¹¹ Cf Al-Duwaihī, *Ibid*, p. 125.

¹¹² Ibn Hazm, *Ibid*, vol. 7, p. 345.

¹¹³ Al-Zarkashī, *Al-Bahr*, *Ibid*, vol. 4, p. 322.

¹¹⁴ *Ibid*; Al-Shaukānī, *Irshād*, *Ibid*, p. 285.

¹¹⁵ Ibn Nujaim, *Ibid*, p. 66.

lawful or unlawful; and therefore, it is preferable to desist from issuing injunctions regarding them.¹¹⁶

It has however been argued that those things that are seen as unclear are those things which the *Sharī'ah* has not clearly show which of the categories of lawful and forbidden it will be attributed to; due to, perhaps, contradictory authorities. Thus, this distinguishes it from what the law is silent on. But those issues, upon which the law is silent, are lawful as they are pardons from Allah Ta'ālā.¹¹⁷

From the above arguments and counter-arguments against the proposition that things upon which the law is silent are lawful, it is clear that the authorities of the earlier jurists who asserts that things upon which the law is silent are lawful are more encompassing than the later ones. Most of the arguments supplied by the later jurists can be recognised as qualifiers of the maxim or conditions for its application; and at certain instances, they are but exceptions of the general rule which all the jurists have agreed. This opinion has been adopted by several independent *mujtahid* jurists and expressed its authoritativeness due to the strength of arguments behind them. Some of these jurists include: Al-Karkhī, Ibn AbdulBarr, Ibn Al-Qayyim, and Ibn Al-Najjār Al-Fattūhī.¹¹⁸

4. SCOPE AND LIMITS OF THE MAXIM OF ORIGINAL LAWFULNESS:

4.1 Areas of the Maxim's Applications

As the above limits of the maxim of original lawfulness has shown, it can only apply on matters that are worldly or temporal in nature, beneficial as well as day-to-day human activities such as contracts and transactions. Although the maxim of original lawfulness has several auxiliaries, two of these auxiliaries has stand out as embodiment of its scope of applications. These are *al-Aṣlu fī Al-'Adāt al-Ibāḥah* (the norm of *Sharī'ah* regarding customs is lawfulness) and *Al-Aṣlu fī Al-Manāfi' al-Idhn* (The norm of *Sharī'ah* regarding Benefits is Permission). These two maxims can be elaborated in the following paragraphs.

¹¹⁶ Al-Duwaiḥī, *Ibid*, p. 126.

¹¹⁷ Al-Shaukānī, *Irshād*, *Ibid*, p. 286.

¹¹⁸ Ibn Nujaim, *Ibid*, p. 66; Ibn AbdulBarr, *Ibid*, vol. 4, p. 142, vol. 17, p. 114; Ibn al-Qayyim, *I'lām*, *Ibid*, vol. 1, p. 387; Al-Fattūhī, *Ibid*, vol. 1, p. 355.

***i. Al-Aṣlu fī Al-'Adāt al-Ibāhah* (The norm of Sharī'ah regarding customs is lawfulness)**

The general meaning of 'ādah is that it refers to any human conduct that does not form part or not intended as an act of worship. These are things that people are accustomed to and do it without thinking of it as an act worship like prayers or fasting. Examples include forms of clothing, foods, drinks, social engagements, etc. These actions are generally presumed to be lawful unless the Sharī'ah has prohibited them or they are harmful. The relationship between this maxim and the maxim of original lawfulness is that it qualified those things which the main maxim is applied upon.

Religiously, the word *al-'ādah* as embodied in this maxim means any conduct that is not an act of worship. Technically, *al-'Ādah* has been described as a conduct that has been repeatedly done, established amidst the people and accepted by them.¹¹⁹ A related term usually mentioned together or used synonymously is *al-'urf*. *Al-Urf* is defined as any usage, expression or otherwise, known to a particular group of people who are comfortable with it and has not been despised by those with good conscience.¹²⁰ It is also defined as what is established among people, seen as good or normal and accepted by the conscience and they have continued with it; and although it is not brought by the *Sharī'ah*, it has approved it.¹²¹

From the above definitions, we can see that both '*Urf and Ādah* are synonymous in referring people's practice. However, in '*Urf* emphasis is on the knowledge of it among the people as well as its regulation of conducts while on *Ādah*, the emphasis is on its repetitiveness; and both have to be approved by good conscience.¹²² This is the reason why the definition by Ibn Amīr Al-Hājj of '*Ādah* that it is a matter that occurs repeatedly without being planned¹²³ better reflects the legal applications of '*ādah* in works of jurisprudence.¹²⁴ In other words, it is that which continuously happens without being organised or decided in the mind. Such repetitiveness can either be from an individual or a group as the case may be; and whether its root is nature as in the case of heat and coldness or whether being the cause for

¹¹⁹ Al-Sadlān, S. G., *Al-Qawā'id Al-Fiqhiyyah Al-Kubrā, wa mā tafarra'a anhā*, (Riyadh, Dar Bilansiyyah 1417H) p. 333.

¹²⁰ *ibid*, p. 335.

¹²¹ Iwad, S. S., *Athar al-Urf fi al-Tashri' al-Islami*, (Dār al-Kitāb al-Arabī, n.d.), p. 52.

¹²² For more on '*Urf* and '*Ādah*, see Al-Sadlān, *Ibid*, pp. 326-389

¹²³ Alhājj, I. A., *Al-Taqrīr wa Al-Tahbīr*, vol. 1, (2nd ed, Dār al-Kutub al-Ilmiyyah 1403H), p. 282.

¹²⁴ Cf Al-Bāhusain, Y. A., *Qā'idatu Al-'Adatu Muhakkamah*, (Riyadh, Maktabat Al-Rushd 1433AH/2012), p. 26-27.

hastening the age of puberty or slowing it down or it is out of desire and lust as in misappropriating public funds without just cause.¹²⁵

There are a range of legal issues that are referred to custom in Islamic law. It is what people are accustomed to in their day to day lives based on their needs such as eating, drinking, costumes, dispositions, transactions and contracts.

These customs do evolve from simple lawfulness in the eyes of the *Sharī'ah* to the strength of authoritativeness where certain legal issues are referred to it for regulation. “*Custom is Authoritative*” is the fifth Universal Maxim of Islamic Law and it implies that a custom, general or specific, is regarded as authoritative with legal force provided it does not contradict an express textual provision (*naṣṣ*). The basis of this maxim is a statement of Abdullah bin Mas'ūd in a suspended (*mauqūf*)¹²⁶ Hadith:

*“what the Muslims deem to be good is good in the sight of Allah.”*¹²⁷

Though the hadīth is *mauqūf*, it has the status of *marfū'*;¹²⁸ because companions of the Prophet, peace and blessing of Allah be upon him will not utter important assertion of this magnitude by reliance on their opinions.¹²⁹

Customs, whether good or evil, have great importance in the life of man. When it is formed and accustomed to, it will be hard to let it go. The human soul, as Ibn Khaldun puts it, when used to something becomes part of its formation and nature.¹³⁰ This is why it is known as the second nature. We know that the *Sharī'ah* does not intend to create hardship to the people by obliging that which is difficult.¹³¹ This is the reason why customs that are accepted by the good conscience are considered as lawful.

¹²⁵ Al-Bāhusain, *Ibid*, p. 27.

¹²⁶ Hadith is said to be *mauqūf* (suspended) is a narration from a Companion only, i.e. he did not explicitly attribute it to the Prophet, peace and blessing of Allah be upon him. (Al-Ghaurī, S. A., *Al-Madkhal ilā Dirāsāt Ilm al-Hadīth*, (Damascus, Dār Ibn Kathīr 1430H/2009), p. 715.

¹²⁷ Al-Shaibānī, A. H., *Al-Musnad*, vol. 1, (Al-Maktab Al-Islāmī: n.d.), p. 379. According to Al-Haithamī, its narrators are trusted men. (Al-Haithamī, vol. 1, *Mujma' al-Zawā'id*, (Al-Qudsī: n.d.), p. 177-178.

¹²⁸ Al-Sadlān, *Ibid*, p. 333.

¹²⁹ Al-Sadlān, *ibid* p. 337; Al-Zarqa, A. M. *Sharh al-Qawa'id al-Fiqhiyya*, (Damascus, Dar al-Qalam 1409H/1989), p. 219,

¹³⁰ Ibn Khaldūn, A. M., *Al-Muqaddimah*, (Egypt, Al-Bahiyah, n.d.), p. 219.

¹³¹ Al-Bāhusain, Y.A., *Qā'idatu Al-Mashaqqatu Tajlib al-Taisīr*, (Riyadh, Maktabat al-Rushd 1424H/2003), p. 355.

Nevertheless, as one of the conditions of maxim of original lawfulness shows, such custom must not be harmful. Where it is proved to be harmful either to an individual or the society at large; and such harm has the basis from Shari'ah, the 'ādah shall not be validated by the Shari'ah.

ii. *Al-Aṣlu fī Al-Manāfi' al-Idhn* (The norm of Shari'ah regarding Benefits is Permission)

Another essential feature of the maxim of original lawfulness that a thing shall only be lawful if its beneficial. This is embodied in the maxim, *Al-Aṣlu fī Al-Manāfi' al-Idhn*¹³² (The norm of *Sharī'ah* regarding benefits is permission). This means everything beneficial to human being and the law is silent regarding it is lawful. The word *manfa'a* is synonymous to *maṣlahah* as implied by the Kuwaiti Encyclopaedia of *fiqh*¹³³ and can be translated as usefulness, benefit or profit.¹³⁴ *Maṣlahah* has been defined as the benefit (*manfa'a*) which the Lawgiver has intended for His servants in protection of their religion, souls, minds, lineage and properties based on predetermined arrangement between them.¹³⁵ This is what the term *manfa'a* encompasses in Islamic law. This maxim limits the general provision contained in the maxim of original lawfulness. In other words, the provision that all things are lawful in *Sharī'ah* is limited to things that are beneficial. In addition, the maxim shows Islam's inclination towards easiness, consideration of people's welfare and interest by recognizing norms and behaviours that do not contradict direct texts or objectives of the *Sharī'ah*.

This qualification of the maxim of original basis has its basis from the Qur'an and Sunnah. Some of these authorities can be seen in the following:

﴿الْيَوْمَ أُحِلَّ لَكُمْ الطَّيِّبَاتُ﴾ سورة المائدة: ٥.

" This day are (all) things good and pure (*al-ṭayyibāt*) made lawful unto you."¹³⁶

¹³² Al-Rāzī, vol. 6, p. 131; Al-Zarkashī, Ibid, vol. 4, p. 322; Al-Armawī, M.H.A, *Al-Hāsil min al-Maḥṣūl*, vol. 2, (Abu Nājī ed, Benghazi, University of Qaryunus 1994), p. 1033; Al-Qarāfi, S., *Al-Dhakhīrah*, vol. 1, (Beirut, Dār Al-Gharb 1994), p. 148; Al-Bāhusain, *Al-Yaqīnu*, Ibid, p. 141.

¹³³ Kuwaiti Ministry of Endowments and Religious Affairs, *Al-Mausū'ah Al-Fiqhiyyah*, vol. 8, (Kuwait, Dhāt al-Salāsīl 1412H/1992), p. 25. See also: Al-Bāhusain, *Al-Mashaqqā*, Ibid, p. 281.

¹³⁴ Baalabaki, R., *Al-Mawrid*, (7th ed, Beirut, Dar el-Ilm lilmalayin 1995), p. 1127.

¹³⁵ Al-Būṭī, M.S.R, *Ḍawābit al-Maṣlahah*, (Damascus, Matba'at al-'Ilm 1967), p. 23.

¹³⁶ Qur'an 5:4.

The word *al-tayyibāt* (good and pure things) is not synonymous to the lawful as this will imply repetition. It, therefore, necessitates interpreting it as that which is naturally enjoyed, i.e. not detested by the good conscience.¹³⁷ As a result, this justifies lawfulness of all that is beneficial.

﴿هُوَ الَّذِي خَلَقَ لَكُمْ مَّا فِي الْأَرْضِ جَمِيعًا﴾ سورة البقرة: ٢٩.

"It is He Who hath created for you all things that are on earth."¹³⁸

The point of the inference in this verse is that Allah is mentioning His favours upon His servants although He does not list an impermissible thing as favour.¹³⁹ According to Al-Isnawī, Allah is informing us that all the things that are on earth are for the enjoyment of His servants. The pronoun: *mā* (translated here as all things) is a general term (or universal quantifier) confirmed by the word *lakum* (for you) which implies exclusivity in the interest of those at whom the speech is directed.¹⁴⁰ In the opinion of Muhammad Rashīd al-Riḍā, this verse is a definite authority of the maxim.¹⁴¹ But such absoluteness is to be taken with caution as there are several arguments and counter-arguments regarding the reasoning that this verse serves as a backing authority of our *qā'idah*.¹⁴²

From the traditions of the Prophet, peace and blessing of Allah be upon him we can quote the following authorities:

The Prophet, peace and blessing of Allah be upon him is reported to have said:

*"The lawful is that which has been declared lawful by Allah in His Book; and the prohibited is that which is prohibited; But that upon which He is silent is among those things that He has pardoned you."*¹⁴³

¹³⁷ Al-Rāzī, Ibid, vol. 2, p. 545

¹³⁸ Qur'an 2:29

¹³⁹ Al-Mahallī, J. M. A., *Sharhu Jam' Al-Jawāmi' bi Hāshiyat Al-Banānī*, vol. 2, (Beirut, Dār Ihyā' Al-Kutub Al-Maṣriyyah n.d.), p. 353.

¹⁴⁰ Al-Asnawī, J. A. A., *Nihāyat Al-Sūl Sharh Minhāj Al-Uṣūl*, vol. 4, (Egypt, Matba'at Muhammad Ali Subaih 1389H/1969), p. 353, 354.

¹⁴¹ Al-Qalamūnī, M. R. A. R., *Tafsīr Al-Qur'ān Al-Hakīm - Al-Manār*, vol. 1, (Matba'at Al-Manār 1346H), p. 247.

¹⁴² Al-Asnawī, Ibid, p. 357,358.

¹⁴³ Transmitted by Ibn Mājah (Hadith No. 2367) and Tirmidhī (Hadith No. 1726) as well as Al-Hākīm in *Al-Mustadrak*. However, among Ibn Majah's chain of narrators is Saif

The inference of this Hadīth is clear. It explicitly states that anything upon which the law is silent is a pardon. A thing is said to be pardoned when there is no wrong in doing it. This should however be only applicable to things that are beneficial and not harmful which the law has absolutely prohibited¹⁴⁴ as we can see in the next chapter.

It should however be noted that being beneficial is relative. According to Imam al-Shāṭibī there is no absolutely beneficial or absolutely harmful thing. But they are generally relative depending on circumstances, persons and times.¹⁴⁵ As a thing can be beneficial and detrimental at the same time, its effects and outcomes form the basis of determining which of its two aspects shall be noted in judging its lawfulness or not. The rule is that whenever there is a conflict between the benefit and harm on the same thing, preference shall be given to the most obvious or grave one as al-Shāṭibī himself confirmed.¹⁴⁶ It is also worth pointing out that none of those who agree that beneficial things are lawful has claimed that there is a beneficial thing that is absolutely free from any harm. Such a thing that can be described as absolutely beneficial can only be of the Hereafter. It does not also imply acquisition of benefit even if it is faced by graver harm.¹⁴⁷ The above argument could best be understood when applied to a chemical compound of an insecticide or herbicide for instance. Such compound while lethal on the intended target is beneficial for the human being. It can however be harmful to man at the same time. Thus, the law of lawfulness and its benefit shall apply when it is used judiciously; but when it is used in a manner that is harmful to human being or his rights, the norm of prohibition of harms applied.

It is worth mention that one will not know if the law is silent on a particular issue but through exhaustive search. As they say, *istiṣhāb* from which our maxim of original lawfulness is also rooted, is the last resort of fatwa, it cannot be resorted to until a mujtahid has exhausted himself in pursuit of relevant authority.¹⁴⁸ Thus, a learner should live no stone unturned in the investigation of the provisions of the law concerning a legal issue that he

bin Hārūn Al-Burjamī who is weak and his narrations are not recognised. (See: Al-Shaukānī, M. A., *Nail Al-Auṭār Sharh Muntaqā Al-Akhhār*, vol. 8, (Mustafā Al-Bābī Al-Halabī n.d.), p. 110, 111). On Hākim's transmission, its chain of narration is sound according to Al-Bazzār and authenticated by Hākim himself. (See: Al-Shaukānī, Ibid, p. 111; Al-Asqalānī, A. S. A. A., *Fath Al-Bārī bi Sharh Sahīh Abī Abdullah Muhammad bin Ismā'īl Al-Bukhārī*, vol. 17, (Ibn Bāz, A., ed, Idārāt Al-Buhūt Al-Ilmiyyah n.d.), p. 24).

¹⁴⁴ Al-Bāhusain, *Al-Yaqīnu*, Ibid, p. 148.

¹⁴⁵ Al-Shāṭibī, I. M. M. *Al-Muwāfaqāt fī Usūl Al-Sharī'a*, vol. 2, (Dār Ibn 'Affān 1417H/1997), p. 40-41.

¹⁴⁶ Al-Bāhusain, Ibid, p. 153.

¹⁴⁷ ibid.

¹⁴⁸ Bāi, H., *Al-Uṣūl al-Ijtihādiyyah allatī yubnā alaiḥā al-Madhab al-Mālikī*, (Kuwait, Al-Wa'yu al-Islāmī 1432H/2011), p. 680.

faces. There are several works in the nature of encyclopaedia of subject matters treated by the Qur'an or Hadith as well as works on their vocabularies that could be resorted to in order to ease search of legal authorities.¹⁴⁹ In addition, one should also not shy away from asking Muslim scholars that sacrificed the entirety of their life in the pursuit of Islamic Knowledge. Allah knows best.

4.2 Limitations of the Maxim of Original Lawfulness

As the above arguments have shown, the maxim is not as absolute as it means, there are numerous exceptions to its proposition. In other words, while the maxim has been formulated as the norm of everything upon which the law is silent is lawfulness, there are numerous things upon which the law is silent but are not lawful. In this section, analysis to show instances where the norm of Sharī'ah regarding things is lawfulness as well as things are recognised as lawful whenever the law is silent are displayed.

1. The Norm (of *Sharī'ah*) regarding acts of Worship (*Ibaadah*) is Prohibition or to Refrain (*Al-Aṣlu fī al-Ibādāt al-Tahrīm or al-Tauqīf*).¹⁵⁰ In other words, any claim that a particular act of worship must be based on provision of Sharī'ah. For example, any claim that there is a sixth obligatory prayer in Islam will be presumed as prohibited as it's the norm regarding acts of worship is prohibition.

﴿ أَمْ لَهُمْ شُرَكَاءُ شَرَعُوا لَهُمْ مِنَ الدِّينِ مَا لَمْ يَأْذَنْ بِهِ اللَّهُ وَلَوْلَا كَلِمَةُ الْفَصْلِ
لَفُضِيَ بَيْنَهُمْ وَإِنَّ الظَّالِمِينَ لَهُمْ عَذَابٌ أَلِيمٌ ﴾

*"What! have they partners (in godhead), who have established for them some religion without the permission of Allah."*¹⁵¹

According to Ibn al-Qayyim, the norm of Sharī'ah regarding 'ibādāt is being void unless there is a textual provision thereto.¹⁵²

¹⁴⁹ Cf Al-Utaibī, A. M., *Al-Qawā'id al-Ta'ṣiliyyah: Dalīl l-Mutafaqqihīn ilā Ḍabṭi al-Ma'arīf al-Fiḥiyyah*, (Beirut, Dār Ibn Hazm 1423H/2002) p. 21, 24.

¹⁵⁰ Al-Zuhaili, M. M., *Al-Qawā'id al-Fiḥiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arba'ah*, vol. 2, (Daral-Fikr, 2006), p. 769; Al-Najdī, A. M. Q. A., *Majmū' Al-Fatāwā Ibn Taimiyya*, vol. 29, (Al-Ri'āsah al-'Ammah lil-Haramain: n.d.), p. 17.

¹⁵¹ Qur'an 42:21

¹⁵² Ibn al-Qayyim, I'lām al-Muwaqqi'in, *ibid*, 1:344.

2. The norm (of *Shari'ah*) regarding Pudenda is prohibition (*Al-Aṣlu fī al-Abḍā'i al-Tahrīm*).¹⁵³ In other words, all sexual intercourse are prohibited with the exception of those that are declared lawful by Allah and His messenger.¹⁵⁴

وَالَّذِينَ هُمْ لِأَفْئِدَتِهِمْ أَحْفَظُونَ ﴿٧﴾ إِلَّا عَلَىٰ أَزْوَاجِهِمْ أَوْ مَا مَلَكَتْ أَيْمَانُهُمْ فَإِنَّهُمْ غَيْرُ
مَلُومِينَ ﴿٨﴾ فَمَنْ ابْتَغَىٰ وَرَاءَ ذَلِكَ فَأُولَٰئِكَ هُمُ الْعَادُونَ ﴿٩﴾ المؤمنون: ٧-٩.

*And they who guard their private parts except from their wives or those their right hands possess, for indeed, they will not be blamed.*¹⁵⁵

This verse and other similar verses indicated that the norm (*aṣl*) regarding the position of *Shari'ah* on private parts is prohibition and lawfulness is but exception. This is because lawfulness of private parts to another is limited to marriage or ownership in the case of slave.¹⁵⁶ As a result, there is a consensus among Muslim jurists that every sexual intercourse is prohibited unless there is a valid marriage with its numerous conditions or a legitimate slave woman which the *Shari'ah* has approved. Any other intercourse besides these two exceptions is prohibited.¹⁵⁷

3. The norm of law regarding harms is prohibition (*Al-Aṣlu fī Al-Maḍārri al-Tahrīm*).¹⁵⁸ In other words, the position of *Shari'ah* regarding anything that is harmful is prohibited and shall not be protected by the law. This is contrary to the argument contained in the maxim of original lawfulness which said that everything upon which the law is silent is lawful. This maxim has however qualified it further. It is to the effect that if a thing is harmful, it shall not be

¹⁵³ Al-Suyūṭī, *Ibid*, p. 60; Ibn Nujaim, *Al-Ashbāh*, *Ibid*, p. 67; Al-Zarkashi, *al-Manthūr*, *Ibid*, vol. 1, p. 177; Al-Borno, *Al-Wajīz*, *Op. Cit*, p. 199.

¹⁵⁴ Al-Nawawī, Y. S., *Al-Majmū' Sharh Al-Muhadhdhab*, vol. 2, (Dar al-Fikr, n.d.), p. 44.

¹⁵⁵ Qur'an 23:5-7.

¹⁵⁶ Ibn Taimiyyah, *Bayān al-Dalīl*, 505.

¹⁵⁷ Ibn Taimiyyah, *Bayān al-Dalīl*, 495; Al-'Alā'ī, *al-Majmū' al-Mudhahhab*, 1:304; Al-Ḥiṣnī, *al-Qawā'id*, 271.

¹⁵⁸ Al-Rāzī, F. M. U. Al., *Al-Mahsūl fī Uṣūl al-Fiqh*, vol. 6, (Al-'Alwānī, T. J. F. ed, 1st edn, Riyadh, Muhammad bin Su'ūd Islamic University, 1399H), p. 131; Ibn Al-Subkī, Ali A., Ibn Al-Subkī, A. A., *Al-Ibhāj fī Sharh al-Minhāj*, vol. 3, (Ismā'īl, S. M. ed, 1st edn, Egypt, Maktabat al-Kulliyāt al-Ilmiyyah 1401H), p. 177.

lawful even if the *Sharī'ah* is silent regarding it.¹⁵⁹ The basis of this position is the saying of the Prophet, peace be upon him:

“No harming and no counter-harming.”¹⁶⁰

In another Hadith narrated by Abu Sirma, the Prophet, peace and blessing of Allah be upon him has said that:

“Allah will harm whoever that harms and will make it hard for whoever that hardens (against others).”¹⁶¹

4. The Norm of *Sharī'ah* regarding Properties is Prohibition or Protection (*Al-Aṣl fī Al-Amwāl Al-Tahrīm*).¹⁶² This means the *Sharī'ah* has protected private property from all infringement, it prohibited whoever that has no title over it to disturb the enjoyment of its rightful owner. This proposition in this maxim is also in contradiction with the maxim of original lawfulness; and therefore, any private property owned by someone, even if the law is silent upon it is not lawful for anyone to transgress upon it.¹⁶³

5. The norm regarding life and limbs is prohibition (*Al-Aṣlu fī al-Anfus wa al-Atrāf al-Hurmah*).¹⁶⁴ This means any violation of sanctity of human life or any part of the body through injury, etc, is prohibited. This is based on the saying of the Prophet, peace be upon him: “Surely, your blood and properties are prohibited for each other.”¹⁶⁵ This is the reason why the *Sharī'ah* obliges retributions (*qiṣās*), compensations or blood money (*diyyah*) as well as

¹⁵⁹ Al-Duwaiḥī, Ibid, p. 145.

¹⁶⁰ Ibn Mājah, A. A. Y. Q., *Sunanu Ibn Mājah*, (Dar al-Fikr 1424H/2003), p. 542, Hadith No. 2340; Al-Shaibānī, A. H., *Al-Musnad*, vol. 5, (Al-Maktab Al-Islāmī: n.d.), p. 326-327; but its chain of narration is weak. However, the hadith has several other supporting authorities which strengthen each other and for this it was declared authentic by several scholars. (Ibn Rajab, Z. A. H., *Jāmi' al-'Ulūm wa al-Hikam fī Sharḥ Khamsīna Hadīthan min Jawāmi' al-Kalim*, vol. 2, (Al-Arnā'ūt, S.; Bājis, I., ed, Beirut, Mu'assasat al-Risālah 1411H/1991), p. 207-211.

¹⁶¹ Al-'Asqalānī, I. H., *Bulugh al-Marām min Adillat Al-Ahkām*, (Riyadh, Dar-us-Salaam 1416H/1996), p. 527. Tirmidhi, Hadith No. 1940; and Abu Dawud Hadith No. 3635 without the mention of the word “Muslim”.

¹⁶² Ibn Al-Subkī, *Al-Ibhāj*, Ibid, vol. 3, p. 180; Al-Zarkashī, B. M. B. A., *Al-Bahr Al-Muḥīṭ fī Uṣūl al-Fiqh*, vol. 4, (Dār Al-Kutub Al-Ilmiyyah 1421H/2001), p. 325.

¹⁶³ Cf Al-Duwaiḥī, Ibid, p. 150-151.

¹⁶⁴ Al-Kāsānī, A. M. A., *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, vol. 2, (Al-Matbū'āt Al-Ilmiyyah 1327H), p. 274.

¹⁶⁵ Bukhari, Hadith No. 1652;

expiation (*kaffārah*) for violation and whether or not there is intention in transgressing against body or life.¹⁶⁶

As one can observe in the above stated particulars along with authorities from Qur'an and Sunnah, even if the Sharī'ah is silent upon these things, the maxim of original lawfulness does not make it lawful.

5. CONCLUSION

Maxims are necessary tools for every mujtahid or muftī who need to expand his grasp and understanding of content and objective of the law. It is particularly essential in reaching an appropriate ruling of Sharī'ah where there is no direct text is available on a particular matter. One of the maxims that clearly represent this feature is the maxim of original lawfulness (*al-Ibāḥah al-Aṣliyyah*). It is one of the indicators of the dynamism of Sharī'ah. It adapts to the needs of mankind in all times and places. The maxim *al-Aṣlu fī al-Ashyā'i al-Ibāḥah* is among the most important principles of Islamic law that embody easiness and flexibility of *Sharī'ah* law. It has the effect that whatever the law is silent upon and has not contradicted any direct or implied provision of the law is lawful. Maxim of original lawfulness has basis from the Qur'an and Sunnah as well as agreement of majority of jurists (*ijma*).

The maxim only applies on matters that regulate relationships between individuals while its scope does not cover the relationship between man and his creator. Thus, customary practices and habituations like clothing, foods, drinks, social engagements along things that are generally considered as beneficial are covered by the maxim. However, the maxim does not apply where the matter is an act of worship unless the law has prescribed or legislated upon it. Similarly, the maxim does not apply on sexual intercourses unless the Sharī'ah has specifically declares such as lawful. Other matters that are beyond the insinuation of the maxim include, harmful conducts or matters, properties of others, human body or organs, etc are all prohibited unless the law has specifically allowed for an action against them.

Thus, a mujtahid or mufti must be careful of what he can declare as within the scope of the maxim as silence of Sharī'ah regarding a matter can only be determined through persistent research. Thus, a researcher must not be quick in declaring a matter as lawful based on this maxim until he is certain that the conditions required in the maxim are met and there are no specific textual provisions or general provisions that cover it.

¹⁶⁶ Bukhari, *Kashfa al-Asrār*, ibid, 3:195.