Applications of Legal Maxims in Islamic Criminal Law with Special Reference to *Sharī'ah* Law in Northern Nigeria (1999-2007)

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Abstract

The Subject of Islamic legal maxims is one of the sciences in Islamic jurisprudence which aphoristically subsumes all the spectrums that purpose of *Sharī'ah* is all about. There are six basic Islamic legal maxims agreed upon among the Islamic scholars on which the tenet of Islamic law is based. Each one of these six legal maxims has some sub-maxims which are either functioning as further explanation to the grand maxim or condition and restriction to it.

This thesis attempts to analyze those six legal maxims and their sub-maxims in relation to Islamic criminal law. Each maxim is theoretically and empirically studied. In doing so, the thesis emphasizes on the link between each legal maxim and the overall objectives of Islamic law in relation to criminal law. The maxims are: (1) the roles of intention in a criminal act (*al-'umūr bi maqāṣidihā*), (2) evaluation of evidence from its certainty and doubt (*al-yaqīn lā yazūl bi al-shakk*), (3) facility guaranteed in the face of hardship (*al-mashaqqah tajlib al-taysīr*), (4) preference of Islamic law in eliminating harm (*al-ḍarar yuzāl*), (5) the *locus standi* of custom (*al-'ādah muḥakkamah*) and (6) the effect of utterances (*'i'māl al-kalām awlā min ihmālihi*). Each one forms a chapter of the thesis and in addition, there is a first chapter which delves into the concepts of Islamic Legal Maxims (*al-Qawā'id al-Fiqhiyyah*).

In order to make the theory of these six legal maxims empirically visible, and to integrate the work of the past and the present, cases judged in Northern Nigeria *Sharī'ah* courts are critically illustrated in line with the overall objectives of Islamic Law (*Maqāṣid al-Sharī'ah*). The constant questions raised in the thesis are: Do judges consider core principles of these legal maxims when delivering verdicts? Do the verdicts corroborate/ commensurate/ extrapolate the tenet of Islamic Law? Is attention paid to the cardinal difference between the rights of God and the rights of mankind in evaluating crime brought before the judge before giving judgments?

Declaration/Statements

Declaration

This work has not previously been accepted in substances for any degree and is not being concurrently submitted in candidature for any degree.

Statement 1

This thesis is the result of my own investigation, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references. Any unpublished or unreported cases used in this thesis are referred to in the appendixes.

Statement 2

I hereby give consent for my thesis, if accepted, to be available for photocopying and inter-library loan, and for the summary to be made available to outside organisations.

Signed.....

Date.....3/7/09.....

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(Certainty cannot be removed with doubt)

Chapter Seven: Analysis of the Maxim of Effect of Utterances:

***I'māl al-kalām awlā min 'ihmālih* (A word should be construed as having some meaning, rather than disregarded)**

NOTES ON TRANSLITERATION

This work adopts the rules of transliteration used by *Encyclopedia of Islam,* with slight variations.

Consonant

ء	(hamza)	’	ض	(ḍād)	ḍ
ب	(bā’)	b	ط	(ṭā’)	ṭ
ت	(tā’)	t	ظ	(ẓā’)	ẓ
ث	(thā’)	th	ع	(‘ayn)	‘
ج	(jīm)	j	غ	(ghyn)	gh
ح	(ḥā’)	ḥ	ف	(fā’)	f
خ	(khā’)	kh	ق	(qāf)	q
د	(dāl)	d	ك	(kāf)	k
ذ	(dhāl)	dh	ل	(lām)	l
ر	(rā’)	r	م	(mīm)	m
ز	(zay)	z	ن	(nūn)	n
س	(sīn)	s	و	(wāw)	w
ش	(shīn)	sh	ه	(hā’)	h
ص	(ṣād)	ṣ	ي	(yā’)	y

Vowels

Short			Long
ـَ	(fatḥa)	a	ā
ـِ	(kasra)	i	ī
ـُ	(ḍammah)	u	ū

- *Tanwīn* ـً ـٍ ـٌ is represented by *an, in , un,* respectively
- *Tā' murbūtah* (ة) is represented by h at the end of word such as *shariah* except is the word is quoted from other source.
- Transliteration will involves only Arabic words, Others will be written in *italic*

-the *ḥamzah* will be ignored when it is *maftūḥ* or *maksūr* in the beginning of words such as , Ahamd

- The definite article "al" is generally written even though when it is used prior to sun letters and after vowels e.g. Abū al-Dardā' (not Abū d-Dardā' or Abū l-Dardā')

- The Arabic names are transliterated except those that have been used in English literature and familiar to English readers such as Allah and Islam

List of Cases Referred to

Introduction

Sharīᶜah, which simply means "Islamic law", has been defined in various ways. The word "*Sharīᶜah*" literally means a path to be followed.[1] Technically, *Sharīᶜah* is defined as 'the command of God revealed to Prophet Muhammad.[2] In other words, *Sharīᶜah* is the way of life and the principle guiding a Muslim's life, divinely ordained by God for mankind to follow, so that God will lead them to bliss and success in this world and in the hereafter. God says in the Holy Qur'an, "He hath ordained (*Sharīᶜah*) for you....." (Q. 45V. 18).

There is ongoing debate on traditional translation and interpretation of *Sharīᶜah* as Islamic law which denotes immutability of the law. Whereas the phrase 'Islamic law' is thought to consist of two components, one which is divine and immutable termed "*Sharīᶜah*" and the other, the understandings and interpretations of human beings in applying the *Sharīᶜah* which is termed *fiqh.*[3]

Indeed, following the strict traditional interpretation of *Sharīᶜah* as "Islamic law" will put a barrier to accessing the overall objectives of the *Sharīᶜah.* While it is unanimously agreed upon that *Sharīᶜah* is immutable, its understanding could be different depending on the concept and content in which the rule is applied. A way to make the concept of Islamic law universal and more dynamic is to consider the two components in application of any rule in Islamic law.

The primary source of Islamic law is from God, Who is the only Legislator. His revelation encompasses the religious and legal system. On this assertion, Mahmud Shaltut, a renowned Egyptian scholar, remarks that *Sharīᶜah* tends to guide the individual in his relationship to God, to his fellow Muslims, to his fellow human

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[1] Abdul Rahmãn I. Doi, *Sharĩ'ah : The Islamic Law*, (London: Ta Ha Publishers, 1997) p. 2,
[2] Muhammad Muslehuddĩn, *Philosophy of Islamic Law and The Orientalists (A comparative Study of Islamic Legal Study)*, (2nd edn. Lahore, Pakistan: Islamic Publications Ltd, 1980) .p.55.
[3] The term *fiqh* which literally means understanding (see Quran 9:87, Bukhari , hadith 71 and Muslim hadith 1037) will be explained later. See Mashood Baderin' s argument on the misconception of Sharĩa'h as "Islamic law" in Mashood Baderin, *International Human Rights and Islamic Law,(*Oxford: Oxford University Press 2005) pp. 32-34.

beings and the rest of the universe.[4] Furthermore, Al-Ashqar affirms the absolute sovereignty of God and His law:

> There is no other code which deserves to be called law except the *Sharī'ah* because it originates from the Lord of mankind who alone reserves the right to legislate for man... All man-made laws are false because they are enacted by those who have no right to make them.[5]

Even Western scholars acknowledge the all-encompassing nature of the *Sharī'ah.* For example, Joseph Schacht notes that "the *Sharī'ah* is the most typical manifestation of the Islamic way of life...the core and kernel of Islam itself,"[6] while Anderson also observes that the *Sharī'ah* is "explicit and assured in its enunciation of the quality of life which God requires of man and woman."[7]

The scope of Islamic Law is largely divided into two parts – *Ukhrāwiyyah,* which is otherwise called '*Ibādāt* (the rules that guide religious rites), and *Dunyāwiyyah* (the law that guides mankind in his day-to-day activities). The former covers religious observances, such as beliefs, prayers, almsgiving, fasting and pilgrimage, while the latter concerns the affairs of this world and is sub-divided into other aspects including criminal law, family law, the law of transaction, as well as political and international law.[8]

Traditionally, Islamic law is formed on the basis of divine revelation. Its source is supposedly divine in value. However, because of the universality of Islam, consideration is given to intellectualism that is based on guidance from that revelation. In other words, the use of intellectual input in Islamic Law should be consistent with the divine revelation. Thus, Islamic jurists, including the four *Sunni* Schools of Thought and the *Shī'ite* Schools, generally agree on four sources of

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[4] Mahmũd Shaltũt, *al-Islam,* (Cairo: Matba;at al-Azhar, 1959), p. 5.
[5] Umar Sulayman al-Ashqar, *al-Sharī'ah al-'Ilãhiyyah lã al-Qawãnĩn al-Jãhiliyyah,*(Kuwait: Dar al-Da'wah, 1983), p. 24.
[6] Josheph Schachat, *An Introduction to Islamic Law,*(Oxford: Oxford University Press, 1964) p.1.
[7] Anderson, J. N.D., 'The Legal Tradition' in J. Kritzeck and W. H. Lewis (eds.), *Islam in Africa,* (New York, n.p. 1969) p. 35.
[8] Subhi R. Mahmassani, *Falsafat al-Tashrī' fi al-Islam, (The Philosophy of Jurisprudence in Islam),* Trans. Farhat J. Ziadeh, (Kuala Lumpur, Malaysia: The Open Press, 2000) p. 10. Malik S.H.A, 'Sharĩa': A Legal System and a way of life', in Abdul-Rahmon M. Oloyede , (ed.), *Perspectives in Islamic Law and Jurisprudence,* (Ibadan, Nigeria: National Association f Muslim Law Students, 2001), pp.25-43 (pp. 25-26).

Islamic law.[9] These sources are the Qur'an (the Holy book revealed to Prophet Muhammad (Peace be upon him),[10] the *Ḥadīth* (the sayings and the tradition of the Prophet), *al-'Ijmā'* (the consensus of scholars) and *al-Qiyās* (analogical deduction), although some schools attached restrictions to the use of the last two sources.[11] These four sources are divided into primary and secondary sources, the primary sources being the Qur'an and the *Ḥadīth* of the Prophet, and the secondary sources being *al – 'Ijmā'* and *al-Qiyās*[12].

Islam, as a religion, gives an insight into the needs of human beings through the Qur'an and the *Ḥadīth*. These two books are the sources of its global perspective.[13] They stand as an encyclopaedia of Islamic knowledge. From them, in the prophetic period, the Islamic law was established. In other words, the only sources of Islamic law during the time of Prophet Muhammad were the Qur'an and the *Ḥadīth*. The *Ḥadīth* serves to explain and complement the Qur'an. It was during this period that the Quran and the *Ḥadīth* were unanimously accepted as the sources of the Islamic law, and both achieved the fundamental principles of life.[14]

The second period of Islamic law started from the passing away of the Prophet (11 AH / 632 AD) and lasted until the beginning of the era of the Abbasids (132 AH / 750 AD). However, this period comprised two separate regimes of different quality - the orthodox caliphs (11-40 AH/ 632-661 AD) and the Umayyah dynasty (41-132 AH/661-750 AD). During the time of the orthodox caliphs, *al-'Ijmā'* and *al-Qiyās* were resorted to as a solution to contemporary issues that arose as a result of the expansion of Islam to other cultures, races and environments. This expansion inevitably created jurisprudential problems about which the two divine sources made no explicit statement. The use of *al-'Ijmā'* which is "the unanimity of all the learned

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[9] Doi, A. R., *op. cit.* pp. 65-84, (the four *sunni* schools of thought are Hanafite, Malikite , Shafi'ite and Hanbalite. See pp. 4-6 below for the details of the schools), Hossein M. Tabataba'i, *An Introduction to Shī'i Law: A bibliographical study*, (London: Ithaca Press, 1984), p. 3. In the early works of Shī'a Legal Study, qiyās was not mentioned as a source of law, although it was in the earliest works, as noted by Tabatabai in footnote of the above book.

[10] This sentence which at times abbreviated as (PBUH) will not be repeated but shall be implied as repeated whenever Prophet Muhammad in mentioned as required by Islam.

[11] There is disagreement among Islamic scholars on the use of the last two sources.

[12] Doi, A. R., *op. cit.* pp. 64-78.

[13] Qur'an is the divine book revealed to Prophet Muhammad. *Hadith* is the collections of the sayings, deeds and tactic approval of the Prophet. The *hadith* stands as practical explanation of Qur'an.

[14] Muslehuddin, M., *op. cit.* pp. 67-68.

Muslims (Jurisconsults) of a particular age who have attained the rank of '*Mujtahidūn*,[15] was made to give support to the authority of the Prophet who was no longer alive.[16] The validity of *al-'Ijmāᶜ* was based on the saying of the Prophet, "My community shall never agree on an error",[17] while *al-Qiyās*, which is "the extension of a *Sharīᶜah* value from an original case or *'aṣl* to a new case, because the latter has the same effective cause as the former", [18] was to meet the demand of the novel jurisprudential dilemma. It is important to state here that the relationship between the two invented sources both came from *ijtihād* (personal reasoning), and not through the reasoning of unqualified persons. And any analogical deduction can become *ijmā'* if it is supported by general agreement of versed scholars.[19] It is worth noting that both *al-'Ijmāᶜ* and *al-Qiyās* are products of *al-ijtihād.* No matter could be arrived at by *al-'Ijmā'* and *al-Qiyās* without the means of *al-ijtihād.*

However, during the Ummayah period, the four sources were accepted to be the sources of Islamic law, although the period was criticized for providing inadequate reasoning on a number of issues. Thus, divine law in this epoch was subjected to reason 'which served to deform and distort it'.[20]

The third period emerged after the extinction of Umayyah and the seizing of power by the Abbasids in 132 - 656 AH (750-1258 AD). During the period of Abbasids, Islamic law attained great development. In this period - known in Islamic history as the golden age of Islam - a number of schools of Islamic law sprang up. The most notable and famous among the surviving *Sunni* schools are the Hanafite, Malikite, Shafiᶜite and Hanbalite schools, alongside Zāhir and Shīʿite, while other schools suffered extinction. During this period, the traditions of the Prophet and his companions were also collected while commentaries on the Qur'an were written. In addition, scientific sources were compiled and a number of other sources and methodologies were

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[15] Iyas A. Bello, 'The development of 'Ijmā' in Islamic Jurisprudence', in Abdul-Rahman M. Oloyede, *op. cit.* p. 162.
[16] Hasan A. *The Early Development of Islamic Jurisprudence*, (Islamabad: Islamic Research Institute, 1970) pp.156-157, Iyas A. Bello, *ibid.* p. 163.
[17] Ibn Mãjah, Sunan *Hadith* No. 3950.
[18] Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (2nd edn. Malaysia: Ilmiah Publishers, 2000) p. 167.
[19] Muslehiddin, M., *op. cit.* p. 69.
[20] Ibid. p. 73, cf. Coulson, Noel James, *A History of Islamic Law*, (Edinburgh: Edinburgh University Press, 1964) pp. 30-31.

applied to give rules on Islamic issues, although there were different opinions on their application.[21]

The first recognised school was that of Hanafite, which upheld the theorem of *ra'y* (rationalization). Its founder was Abū Ḥanīfah, Nu'mān Ibn Thābit (d.150 AH).[22] The school is well known for using *ra'y* and for the formulation of the theory called *al-Istiḥsān* (juristic preference) being credited to the founder.[23] It was followed by the Malikite school, named after the great scholar of Madinah, Imām Abū 'Abdullah, Mālik Ibn Anas (d.179 AH).[24] This school was known for its strict adherence to the tradition of the Prophet, which distinguishes it from *'ahl ray'* of Iraq. The scholars in the school are known as *'ahl al-ḥadīth* of Madinah. Imām Mālik developed a source called *al-maṣāliḥ al-mursalah* (unrestricted interest or public interest) and upheld the use of the customs of the people of Medina on the presumption that these customs were precedents from the Prophet, having been carried down from one age to another.[25]

The third school known in Islamic jurisprudence was the Shafi^{c}ite, founded by the erudite scholar of *uṣūl al-Fiqh* (the science of jurisprudence), Imām Muḥammad Ibn Idrīs (d. 204 AH). In his school, he struck the balance between the use of *qiyās* and *ra'y* of the Hanafite School and the use of tradition of the Malikite School. His *Risālah*[26] is a monumental work that depicts his vision and shows his vast legal knowledge.[27] He developed a mechanism for the study of jurisprudence "to a degree of competence and mastery which had never been achieved before and was hardly equalled and never surpassed after him".[28] The last among the surviving famous schools of *Sunni* was the Hanbalite, founded by Imām Aḥmad Ibn Ḥanbal (d.241 AH).[29] The Hanbalite School was known to adhere to tradition and was averse to *ra'y*. Ibn Ḥanbal believed that the proven Divine Law should be restricted to the texts

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[21] Subhi Mahmassani, *op. cit.* p. 17, Muhammad Muslehuddin, *op. cit* p. 74.
[22] Anwar A. Qadir, *Islamic Jurisprudence in the modern World*, (Delhi: Taj Company, 1986) p. 91.
[23] Muhammad Muslehuddin, *op. cit.* 74.
[24] Anwar A. Qadir, *op. cit.*
[25] Muhammad Muslehuddin, *op. cit.* p. 75.
[26] A book supposedlyfirst to be written on *usul-fiqh*
[27] *Ibid.* p.76.
[28] Joseph Schachat, *The Origin of Muhammadan Jurisprudence*, (Oxford: Oxford University Press, 1950) p.12.
[29] Subhi Mahmassani, *op. cit.* 30.

(the Qur'an and the *Ḥadīth*). For this reason he took a journey in quest of knowledge and amassed a collection of traditions. He acknowledged five sources: the text of the Qur'an and the Hadith – and the accompanying *fatāwās* (religious verdicts) that do not contradict the text, or are consistent with the text – namely, the *ḍa'īf* tradition (with a weak chain of transmission), the *mursal* traditions (with omission of some of the transmitters) and the *qiyās* (analogy), whenever it is necessary. [30] These are the surviving *Sunni* schools, although there were other *Sunni* schools, now extinct, such as al-'Awzā' (d. 157 AH), Dāwud al-Ẓāhirī (d. 270 AH) and Tabarī (d. 310 AH).[31]

However, these schools synthetically coded the term *fiqh* (jurisprudence) for their thinking to differentiate *fiqh* schools from dialectical schools of thought *(Madrasat ahl al-kalām)*. The term *fiqh* (the knowledge of the *ahkām al-shar'* - legal rulings - pertaining to conduct that has been derived from specific evidence)[32] originally included all the sciences in *Sharī'ah* namely, theological, spiritual, ethical and legal sciences.[33] Later, during the time of al-Ma'mūn (d. 218 AH), this was restricted to practical matters or problems relating to legal matters.[34]

Consequently, a new subject termed *uṣūl al-fiqh* emerged to regulate the deduction of rules from the concept of *fiqh*. In light of this subject, new technical terms evolved in the study of Islamic law, such as *wājib* (obligatory), *sunnah* (The tradition), *mustaḥabb* (deserable), *makrūh* (detestable), *ḥarām* (prohibition), *muṭlaq* (unrestricted), *muqayyad* (restricted), *naskh* (abrogation) and *mansūkh* (abrogated) etc. These technical terms help jurists to examine the legal consequences of any deed, and to decide whether it is punishable or attracts reward, lawful or unlawful.

Development continued until the schools reached their peak. It is pertinent to mention here that during this golden period, there was considerable achievement in the sciences of law and jurisprudence. However, this rapid progress fell apart and took a downward turn at the end of the Abbasids era. For fear of persecution, some *Sunni*

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[30] al-Jawzī, Ibn al-Qayyim, *'I'lām al-Muwaqqīn 'An Rabb al-'Alamīn* (Cairo, n.p., n.d.) pp. 23-26.
[31] Subhi Mahmassani, *op. cit.* pp.33-34, Muhammad Muslehuddin, *op. cit.* pp. 80-81.
[32] Imran A. Khan Nyazee, *Theories of Islamic Law (The Methodology of Ijtihād,* online at (www.nyazee.com December 7, 2000) p. 35.
[33] Ibid. p.34, Anwar *op. cit* p. 16.
[34] *Ibid.*

jurists campaigned for the closure of the door of *ijtihād* after the fall of Baghdad at the hands of Hulagu Khan in the middle of the 7th century AH (1258 AD). They also claimed that the four schools of *Sunni* were enough to cater for the needs of Muslims.[35] Thus people resorted to imitation by following their schools of thought without investigating the sources of their opinions.[36] This trend persisted until the dawn of the nineteenth century when many reformers emerged all over the Muslim territories, most especially when Islam spread to other countries in the West. Therefore, there emerged as a replacement for *taqlīd* (strict adherence to a particular school of jurisprudence), *takhayyur* (the selection of rules from the different schools mentioned above to solve new problems) and *talfīq* (the combination of elements of rules from the various schools to apply and solve a particular problem.[37]

Some of the achievements of this breakout were to simplify the understanding of Islamic jurisprudence, to unify the differences of thoughts, and to broaden the scope of the Islamic law on the identical *modus operandi* by the introduction of some disciplines. Among the disciplines introduced are: a study of the purpose of Islamic law (*maqāṣid Sharīᶜah*), and Legal Maxims (*qawā'id fiqhiyyah*). The former tends to look at the intention behind the revelation of law to mankind, and the goals and objectives they are expected to achieve on human beings. The latter, which is the focus of this thesis, is aimed at harmonizing the opinions of scholars in particular cases through the principles laid down in order to depict the aims and objectives of the *Sharīᶜah.*

i. Northern Nigeria and Implementation of the *Sharīᶜah* Penal Code

The implementation of full Islamic law in the Northern Nigeria did not only have political motivation but also historical inspiration. It was recorded that *Sharīᶜah* was fully implemented in the Kanem-Borno Empire, part of which is in the present day Nigeria, in 12th century C.E during the reign of Mai Biri Dunmani.[38] This reflects the

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[35] Subhi Mahmassani, *op.cit* p. 93.
[36] Muhammad Muslehuddin *op. cit.* 81.
[37] Wali Bashir, 'An Introduction to Islamic Legal Theory', in Abdul-Rahman M. Oloyede, (ed.), *op. cit.* p.92 cf. Subhi Mahmassani, *op. cit* p. 93 and Muhammad Muslehuddin, *op. cit.* p. 81.
[38] Muhib O. Opeloye, *The Sustainability of Sharīᶜah in a Pluralistic and Democratic Nigeria*, 5th Faculty of Arts Guest Lecture Series, delivered on 24th August, 2005 (Lagos State University), p.1,

acquaintance of the Fulani tribe to the phenomenon of the *Sharīᶜah* in their region. As regards the Hausaland, the Uthman Dan Fodio's *Jihād* in reforming the 'syncretic practices of the Hausa Muslims and abuse of *Sharīᶜah* stands as inherited system of administration between 1804 and 1903 before the British dismantled this heritage.[39]

This is not to say that all the elements of *Sharīᶜah* have disappeared in those regions since the British took over. There was agreement between the British colonial administrators and the Emirs on non-interference with the Muslims' religious freedom which means that the Islamic tradition would still be in operation including the judicial system. The Northern government led by the Sardauna of Sokoto, Sir Ahmadu Bello formed hybridised penal law with British colonial masters to cater for the interests of all ethnic groups in the North.[40] Not so long ago, some clauses were introduced into *Sharīᶜah* administration of justice which systematically eliminated some elements of Islamic rulings including punishments that were considered to be repugnant to natural justice and human dignity.

Before the reinforcement of full Islamic penal law, there were two sets of courts in the Northern States of Nigeria, viz; Magistrate Courts which stands for common law operating together with State High Court which stands as appellate court for it, Area Courts which operate on three level and stand for *Sharīᶜah* law. They entertain civil, personal and the 1959 Penal Code in criminal case. Immediately when the *Sharīᶜah* law was promulgated in Northern Nigeria, those levels of Area Courts were changed to *Sharīᶜah* Courts to become *Sharīᶜah* Lower Courts, *Sharīᶜah* Upper Courts and *Sharīᶜah* Courts of Appeal.[41]

In 1959 Personal Code was introduced to replace the *Sharīᶜah* in criminal matters. This was considered as the final departure of the *Sharīᶜah* legal system from the

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Ishaq Akintola, *Sharīᶜah in Nigeria: An Eschatological Desideratum,* (Ijebu-Ode Nigeria: Shebiotimo Publications, 2001) p.93

[39] Opeloye, Muhib, *ibid.* 1-2, Rudolph Peters, "The Re-Islamization of Criminal Law in Northern Nigeria and The Judiciary: The Safiyyatu Huussaini Case" in Muhammad Khalid Masud et al. *Dispensing Justice in Islam: Qadis and their Judgments,*(Leiden- Boston: Brill) p. 220

[40] Musa A. B. Gaiya, "Commentary " in Philip Ostien, et al. (eds) *Comparative Perspectives on Sharīᶜah in Nigeria,* (Ibadan, Nigeria: Spectrum Books Limited, 2005) pp. 168-169, see also Okpu, Ugbana, *Ethnic Minority Problems in Nigerian Politics: 1960-1965, (*Stockholm: Almqvist &Wilksell International 1977)

[41] Rudolph Peters, *Re-Islamization op. Cit.* p. 221

North. It is noted that the introduction of this Personal Code was politically motivated as a "response to the demand of the Northern non-Muslim minorities and the Southern political class" who considered *Sharī'ah* an infringement on fundamental human rights. Before the colonial masters handed over power, certain agreements which were stated in the operational constitution at independence in 1960 were reached. One is on the establishment of *Sharī'ah* court of Appeal through the law of Northern Regional Government and another is retaining the application of Islamic Law of Personal Status. These agreements were considered to be "great concessions'' made by the Muslims.[42]

In 1979, the Northerners agitated for expansion of the *Sharī'ah* beyond the scope left by the colonial masters. A recommendation was made by the Constitution Drafting Committee which provided for the establishment of Federal *Sharī'ah* Court of Appeal and for the right of any State of the Federation to establish *Sharī'ah* Court of Appeal. These recommendations were vehemently rejected and it indeed divided the Muslim and Christian members of the constituent Assembly. Consequently, the Muslim members walked out and the issue was left unresolved.[43]

In 1989, the issue was resuscitated by the Muslim members of the Constitution Assembly who demanded for the expansion of the scope of *Sharī'ah* while the Christian counterparts demanded for the removal of any mention of *Sharī'ah* in the constitution. The existing then Armed Forces Ruling Council led by General Abdul-Salaam (retired) intervened in the issue "by withdrawing from the Constitution Assembly jurisdiction over the clause dealing with *Sharī'ah*". In the final draft of the 1999 constitution, it was stated thus :

> The Sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal

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[42] Musa Gaiya *op. Cit* 170, Ostien, Philip, "An Opportunity Missed by Nigeria' s Christians: the *Shari'a* debate of 1976-78 revisited" in Benjamin Soares, (ed.) *Muslim-Christian Relations in Africa. Islam in Africa Series,* Volume 5, (Leiden -Boston: Brill 2005) p. 17,

[43] Opeloye, Muhib, *The Sustainability of Sharī'ah op. cit.* P. 2, Musa A. B. Gaiya, *Commentary op. Cit.* P.170

> law which the court is competent to decide in accordance with the provisions of section (2) of the section[44]

The ambiguous phrase which plunges controversy into the constitutionality of full implementation of *Sharī'ah* in Nigeria is the phrase "other jurisdiction" in the section quoted above. As Gaiya questioned, could that phrase be given interpretation of meaning "an area of jurisdiction within the "Islamic personal law" which was not included in the constitution?"[45] In other words, should the phrase be construed as power for the state to expand the jurisdiction of *Sharī'ah* to include criminal law and other facets of Islamic jurisprudence which were not enforced before 1999 constitution? This contentious and ill-phrased section has put conundrum on the constitutionality of the implementation of full *Sharī'ah* as initiated by Zamfara State Governor after his assumption of office as the first democratically elected governor of the state. Despite the uproar against the initiation, eleven out of twenty one States of the North have followed suit. Those states include Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Kastina, Kebbi, Niger, Sokoto, and Yobe.[46]

ii. Constitutionality of the full implementation of *Sharī'ah* in Northern Nigeria

One serious issue that has raised dust regarding full implementation of *Sharī'ah* in the Northern Nigeria is whether such is constitutional or unconstitutional. In the opinion of the majority of Muslims and some non-Muslim scholars, the provision of the Nigerian constitution of 1999 as contained in section 277 (1) has given any State of the Federation the authority to implement full *Sharī'ah* if its House of Assembly could pass a bill to that effect. Conversely, the majority of Nigerian Christians see the full implementation of *Sharī'ah* as unconstitutional. Interestingly, there were two opposing views among the legal practitioners as well. Former Attorney General of the

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[44] Constitution of Nigeria 1999 section 277(1) cf. The 1989 section 261(1) and the 1979 section 242 (1)

[45] Musa A.B. Gaiya, *op. Cit.* P. 170.

[46] Rudolph Peters, "Re-Islamization of Criminal Law in Northern Nigeria *op. Cit.* p. 220 note 4, Abdullahi A. An-Na'im, "The future of Shari'ah and the debate in Northern Nigeria", in Philip Ostien, *et al-. Comparative Perspectives on Shari'ah in Nigeria,* (Ibadan, Nigeria: Spectrum Books limited, 2005), p. 328, Human Rights Watch, *"Political Shari'a"? Human Rights and Islamic Law in Northern Nigeria* September, 2004 Vol. 16, No9 (A) p. 14

Federation, late Bola Ige endorsed the constitutionality of *Sharīᶜah*, while his successor, Kalu Agabi declared that the full implementation of *Sharīᶜah* was unconstitutional.[47]

The former argued that since Section 38 of the Federal Constitution has guaranteed freedom of religion, that freedom would be infringed if restriction is placed on it by allowing partial practice of the faith. Added to that, Section 227(1) of the Constitution has given States Houses of Assembly the power to expand the jurisdictional scope of the *Sharīᶜah* as the States wish. Furthermore, the late Chief Justice of the Federation, Hon. Justice Muhammed Bello, lending credence to the submission of Bola Ige also argued that Section 4 of the constitution empowers the states to make laws on matters not included in the exclusive lists (i.e lists of laws reserved exclusively for the Federation) and concurrent lists (i.e lists of laws that involve both the Federation and the States). Thus, *Sharīᶜah* falls within the residue and therefore a state has the constitutional power to make laws relating to *Sharīᶜah*.[48] Also, Section 6 empowers the states to establish Courts to exercise jurisdiction on matters in respect of which the House of Assembly of a state may make laws. In addition, Section 275 of the constitution also empowers any State of the Federation that requires *Sharīᶜah* Court of Appeal to establish it.

However, there are identifiable clauses in the Nigeria constitution which stand as obstacles to the constitutionality of full implementation of *Sharīᶜah*, Justice Muhammed Bello observed. The first obstacle is Section 1 which confirms the supremacy of the Federal constitution over any subordinate constitutions. The second is Section 36 (12) which renders an act non-offensive unless that offence is defined and the penalty therein is described in a written form. The third is Section 38 (1) which guarantees freedom of thought, conscience and freedom of religion including freedom to change one's religion which is a capital offence in Islam (the concept of *Ridda* (apostasy).

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[47] Opeloye, Muhib, *op. cit.* P. 5. Amazingly, both senior legal practitionals are non-Muslims.
[48] Justice Muhammed Bello, "Keynote Address at the National Seminar on Shariah organized by the Jama'tu Nasril Islam at Kaduna in Yakubu, A. M., et al. (eds.) *Understanding Shariah in Nigeria* (Ibadan, Nigeria: Spectrum Books Limited, 2000)

In order to overcome these obstacles, the governors of the States implementing *Sharī'ah* resounded their strong sense of loyalty and patriotism to the Federal constitution, they rallied round to get the members of Houses of Assembly on board to enact the law and ensured that apostasy which could be a violation to the provisions in Section 38 was not included in the list of capital offences.[49] They even called the Christian minorities to put forward their proposal for canon law if that would lay the debate on *Sharī'ah* to rest. Beyond that, Kaduna State, one of the states in Northern Nigeria, has created a body to take care of the Christians in the State. These efforts made no difference to those who believe that full implementation of *Sharī'ah* is unconstitutional. They argued that Section 10 of the Federal constitution which states that "The Government of the Federation or of a state shall not adopt any religion as State Religion" has prohibited any states of the Federation from adopting a state religion.[50] In response to this argument, the states implementing full *Sharī'ah* contend that implementing full *Sharī'ah* does not mean adopting state religion, rather, it amounts to exercising legal rights of making laws within the jurisdiction of legislative arm of the government which happens to have religious undertone.

Moreover, it will not be defendable to say that Nigeria or a state in Nigeria is not religious. Nigerians are religious people. While the Southern Nigeria is predominantly Christian, the Northern part is predominantly Muslims. The only interpretation that could be given to this Section therefore is that the state should be impartial and must give equal treatment to all religions.[51] And, this largely depends on the level of law abiding of the political leaders and their officers.

iii. Codification of Islamic Penal Law for *Sharī'ah* States in Northern Nigeria

In conformity with Section 36 (12) which demands that one shall not be convicted of a crime until that crime is defined and written in form of codification, all the affected states have enacted penal codes to legitimise their actions against any criminal offenders. The first state to have published its penal codes was Zamfara which was also the first to introduce full implementation of *Sharī'ah*. It is observed that most

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[49] Opeloye, Muhib O, *op. cit* p. 7
[50] *Ibid.*
[51] Musa A. G. Gaiya, *Commentary* on Professor Durham's Article in *Comparative Perspectives on Shari'ah in Nigeria op. Cit.* p. 168.

other states only replicated the Zamfara penal code with minor changes. Kano State distinctively enacted an independent *Sharī'ah* Penal Code, while Niger State followed the 1959 Penal Code for Northern Nigeria with some amendments.[52] References will be made to these Penal Codes when illustrating emerging cases in each state, arguing in support of its conformity with the legal maxims which subsume the *maqāṣid al-Sharī'ah.*

The school of jurisprudence adopted in the Northern Nigeria is the Malikite School.[53] Thus, Majority of the Penal Codes in the Northern States unequivocally declare that the *Sharī'ah* Penal Codes shall based on the *Ijtihād* of Malikite School of thought.[54] This narrow espousal contributes to the criticism levelled against full implementation of *Sharī'ah* in Northern Nigeria.

From the Human Rights perspectives, since there are divergent opinions on many issues arising from interpretation of *Sharī'ah,* it has been argued that there will be miscarriage of justice in some issues affecting citizens if, for instance a state sticks exclusively to a particular school of thought. For instance, only the Malikite School of thought accepts pregnancy as evidence of adultery. All other schools demand the strict evidence laid down in the prophetic tradition. As such, if a suspect of *zinā* (unlawful sexual intercourse) were tried in a state other than a Malikite state he/she would have been freed of accusation. Perhaps, his/her accuser might be even punished for *qadhf (*unproved accusation of illicit sexual intercourse leading to defamation of character).[55]

However, this should not be a serious problem; after all there are western countries such as the United States of America where different rules are applied to a particular crime depending on the law enacted in each state. Therefore, it may not be legally wrong for any of the Northern States in Nigeria operating on the *Sharī'ah* to adopt a

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[52] Rudolph Peters, "The Re-Islamization of Criminal Law in Northern Nigeria...*op. cit.* pp. 219-220
[53] See p. 5 note 23 above
[54] See Sokoto Sharia Penal Code (SSCP) section 94, Kano State of Nigeria Gazette, No. 3, Vol. 34, 28th February, 2002 p. A32, Kastina State Sharia Court Law 2000 section 8, Aliyu Musa Yewuri "issues in defending Safiyyatu Husseini and Aminal Law" in Jibrin Ibrahim, (ed.) *Sharia Penal and family Laws in Nigeria and in the Muslim World: Rights Based Approach* (Zaria, Nigeria: ABU Press Limited, 2004) *p.* 198), Northern Nigeria Law Report N.N.L.R. 2003 p. 143
[55] Abdullah Ahmed An-Na 'im, "The Future of *Shariah* and the Debate in Northern Nigeria" in Philip Ostien et al. *Comparative Perspective on Shari'ah in Nigeria op. Cit.*p333

particular school of jurisprudence while suspects are tried according to the existing rules in that state where the offence is committed.

iv. Human Rights concerns about the implementation of *Sharī'ah* in Nigeria.

Islamic law (*Sharī'ah*) has always been under strict surveillance for a considerable period of time, especially by those who are opposed to its implementation. There is hardly a country or state that attempted implementing full *Sharī'ah* that was not a target of attack and serious criticism from those who for one reason or another believe that the implementation of full *Sharī'ah* will automatically infringe on Human Rights. On the other hand, those who are cynical about the level of uprightness of those who claimed to be pioneers of the scheme have expressed scepticism, objection and refutation. Of the overall scope of the *Sharī'ah*, no other aspect has received greater attack than its criminal laws. Some aspects of Islamic penal law especially *ḥudūd* (offences that attract fixed punishments) and *Qiṣāṣ* (retaliation) have been branded as repugnant and antithetical to positive law[56]. The 1965 clauses to Northern Nigeria *Sharī'ah* law made by the British colonial authority is an ample testimony to this. Since the introduction of full implementation of *Sharī'ah* in the Northern Nigeria, many local, national and international bodies, both at the governmental and non-governmental levels have expressed misgivings and insinuations. This is the reason why any criticism or scrutiny from Western and International bodies is not heeded to by Muslims.

This, however, is not to say that there are no instances of miscarriage of justice since human beings who implement the divine law are not infallible. But, to reduce such instances to the barest level, certain guidelines which are to be strictly adhered to when dispensing justice under the *Sharī'ah* are laid down. Before judgment can be passed on any positive or negative action, the *Sharī'ah* requires that balanced survey

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[56] See Rudolph Peters, *Crime and Punishment in Islamic Law, op. cit.* p.119, Many negative attitudes towards Islamic law by Western countries are stated in Peters' book. See pp. 103-105, 110. See also Sanusi Lamido Sanusi, "The West and the Rest: Reflection on the intercultural dialogue about Shariah" in Philip Ostien, *et al,.* (eds.) *Comparative Perspectives on Shari'ah in Nigeria,* (Ibadan, Nigeria: Spectrum Books Limited, 2005), pp. 253-260 and Abdul Qadir Awdah, *al-Tashrī' al-Jinā'ī al-Islāmī,* 5th edn. (n. p. 1968/1388), pp. 12-13

must be carried out and constructive criticism and recommendations must be observed.

One of the International non- Governmental organisations whose job, *inter alia*, is to oversee and scrutinize the way justice is dispensed in the world is the Human Rights Watch.[57] This organisation, through its agents in Nigeria carried out researches on the allegations of injustice in the Northern Nigeria *Sharī'ah* legal system. The concern of Human Rights Watch is not to support or against implementation of *Sharī'ah* but to see that human rights are not violated as a result of the implementation of any legal system in any country. [58]

Thus, what Human Rights Watch sees as violation of human rights inherently constitutes what is termed *Sharī'ah* penal law including death penalty, amputation and flogging. Invariably and intuitively, there will be clash of view between those who implement the *Sharī'ah* and its opponents as a result of their ideological differences. The proponents of *Sharī'ah* submit that it is a divine living law which must be implemented in total; including its penal codes. But for the Human Rights activists, on the other hand, argue that the *Sharī'ah* penal laws are nothing but relics of the old which should, as such, be scrapped from every law including the *Sharī'ah*.

According to the report submitted to the organization's office in the United States, it is observed that the *Sharī'ah* legal system in the states where it is being implemented fall short in the areas highlighted below:

- Lack of respect for due process which has characterized many trials in *Sharī'ah* courts such as; lack of access to legal representation, failure to inform defendants of their rights; acceptance of statement extracted under torture etc.

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[57] The works of the organization are described on it websites thus: "Human Rights Watch is one of the world's leading independent organizations dedicated to defending and protecting human rights. By focusing international attention where human rights are violated, we give voice to the oppressed and hold oppressors accountable for their crimes. Our rigorous, objective investigations and strategic, targeted advocacy build intense pressure for action and raise the cost of human rights abuse. For 30 years, Human Rights Watch has worked tenaciously to lay the legal and moral groundwork for deep-rooted change and has fought to bring greater justice and security to people around the world." http:/www.hrw.org/en/about viewed last 16-04-2009 @09:00 am.

[58] See the Summary of Human Rights Watch "*Political Shariah? Human Rights and Islamic Law in Northern Nigeria* September 2004 vol. 16, no. 9 (A) pp. 1-6

- Most of the assumed harsh punishments might have been avoided, had the *Sharīᶜah* courts judges followed due process and had defendants been given full legal representations,
- It is also observed that since 2002, the application of *Sharīᶜah* appears to have been lost. Though there are functional tools in place but the political will to enforce the strict *Sharīᶜah* dictates have waned.
- Some political leaders who have purportedly gained reputation in the first place have shown reluctance to carry out some punishments in avoidance of further controversy.

Other observations on the full implementation of *Sharīᶜah* in the *Sharīᶜah* compliant states include miscarriage of justice by the *Sharīᶜah* judges; lack of proper training and acquaintance with the judicial procedures by the *Sharīᶜah* judges, giving the accused persons rights of defence, giving the accused benefits of doubt and not to base judgement on mere confession especially in *ḥudūd* related cases.[59]

v. Aims and Objectives of the Research

The main aims of this thesis is to analyse and discuss the application and applicability of Islamic Legal maxims "*al-Qawā'id al- Fiqhiyyah*" with particular reference to Islamic criminal law. To achieve this, the work concerns itself with how the Islamic legal maxims can shape the way criminal cases are being dealt with in the contemporary age particularly in the Northern Nigeria where Islamic penal law was reintroduced in 1999 after its systematic abolition by the British colonial administrators. The basis for choosing that particular region of Nigeria is because of the growing tension and strident criticism surrounding the full implementation of *Sharīᶜah* in that region. This thesis also looks at whether or not criminal justices have been carried out by the states implementing full *Sharīᶜah* in that region in accordance with the dictates of the principles of Islamic Law as fostered in Islamic legal maxims.

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[59] Human Rights Watch, *Political Shari'ah...op. cit.* Pp. 6-8

vi. Scope of the Research

This research is limited to analysis of the six basic legal maxims agreed upon among the Islamic scholars and some other related maxims which stand as conditions for and restrictions to or explanations for the basic ones. Those maxims are analyzed from Islamic criminal law perspectives while the Northern Nigeria *Sharīʿah* Penal Law and cases judged under the implementation of full *Sharīʿah* in those states between 1999 and 2007 are used for illustration. In some cases, references are made to other cases around the Muslim countries where strict Islamic criminal law is applied if there are parallels in those cases. In analyzing the legal maxims, I have restricted myself to the four *sunni* schools of Islamic thought because the countries whose cases are referred to are within the country (ies) that adopt the four schools.

vii. Problems encountered during the Research

During the course of this research, I encountered many envisaged and unexpected problems. Some of them were inevitable because of the nature of this project, while others were accidental. The following are some of these problems.

- Lack of sound knowledge about the importance of *al-qawāʿid al-fiqhiyyah* among the legal practitioners in the Northern Nigeria. Surprisingly, some even refuted the existence of legal maxims in Islamic law while some others undermined their importance.
- Majority of the cases in both the upper and lower *Sharīʿah* courts of Northern Nigeria are written in Hausa Language. Thus, the researcher who is inadequate in Hausa Language had to employ the service of official translators. Even with that, the translated cases were not up to standard because of poor translation and typographic errors.
- Lack of funds inhibited further investigations into some unpublished cases in those states.

viii. Literature Review

Studying and writing on the subject of *al-qawā'id al-fiqhiyyah* is said to have started very late due to the fact that during the lifetime of the Prophet and his companions, there was no need for extra sources to rely on in understanding the *Sharī'ah* of Islam. Even till the early fourth century of the Islamic calendar, the subject of Islamic legal maxims was not visible. This is not to say that there were no elements of use of legal maxims in the writings and expressions of scholars in those periods. The work of al-Qadi Abu Yusuf, (d. 182 AH), *Kitāb al-Kharāj* stands as a landmark work among the writings on Islamic legal maxim. The book contains evidence that the early Islamic scholars were acquainted with the subject. Similarly, discussion on the rule of discretionary punishment and the rights of leaders on dispositions of their subjects' properties can be found in *Kitāb al-Kharāj*.[60]. Another notable literature written in those times is the book of Muhammad Ibn al-Hasan al-Shaybani (d.189 AH) known as *Kitāb al-Aṣl*.[61]

The most reliable literatures on Islamic legal maxims written between the fourth and tenth centuries are; *al-ashbāh wa al-naẓā'ir* written by al- al-Suyūṭī and Ibn Nujaym, al- *al-manthūr fī al-qawā'id* written by al-Zarkashi and *al-qawā'id* written by Ibn Rajah. Those books are very useful in enumerating the Islamic legal maxims in general but are lacking in details of how to apply them to many fields of Islamic jurisprudence. Take for instance the books of al-Suyuti and Ibn Nujaym which are identical in title and arrangement, they enumerate the first five Islamic legal maxims agreed upon among the Islamic scholars in those days and succinctly mention their applications to different fields of Islamic jurisprudence. But they neither mentioned their application to Islamic criminal law nor examples of any current issues. The same can be said of al-Zarkashi and Ibn Rajab's books.

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[60] *Kitāb al-Kharāj* is a book written by al-Qadi Abu Yusuf. In the book, the author states many Islamic legal maxims among others are: *al-ta 'zīr ilā al-imām 'alā qadr 'aẓam al-jurm wa ṣigharh*- It is left to the leader/ judge to decide an appropriate discretionary punishment considering the proportionate (nature) of the offence; *laysa lil Imam an yakhruj shayanmin yad ahadin illā bi haqqin thābit ma'arūf*- It is not the right of the Imam (leader) to take away someone's property without an established and well-known right. See Ya'qub Ibn Ibrãhim Abu Yusũf, *Kitab al-Kharãj*,(6th edn. Cairo: al-Matbah al-Salafiyyah wa Maktabatuha 1397 A.H.) p. 180 and p. 71 respectively

[61] Muhammad Ibn al-Hasan Al-Shaybãnĩ, *Kitãb al-Asl*, ed. Abu al-Wafa' al-Afghani, (India: Matbah Dar al-Ma'arif al-'Uthmaniyyah n.d.) vol. 3, p. 45. Detailes of the content of the book can be found on page 44 of this thesis.

There are many resources on Islamic legal maxims with different dimensions from 13th century A.H/18th century AD onwards.[62] The most popular, published and widespread work on *al-qawā'id al-fiqhiyyah* from 19th AD. is The most widespread literature the *al-Majallah al-Aḥakam al-'Adliyyah* (referred to as *Majallah* herein after).[63] The *Majallah* has specific significant in studying Islamic legal maxims, not because it is comprehensive in nature but because it is the hallmark of an official legal codification in Islamic history. The *Majallah* contains 99 substantial legal codifications with noumerous explanations afterwards. Majority of these codifications are meant to address issues related to Islamic transaction.

Two books emerged from Ahmed al-Zarqa (1938 AD) and Mustafa al-Zarqa (1999 AD), (father and son respectively) which are commentaries on *Majallah.* Their significant to this research is on their futher explanations of and additional maxims on *Majallah.* Some other credits are given to al-Zarqa's for their rearrangement and additional information [64] al-Burnu is also a contemporary Islamic scholar who studied Islamic legal maxims from academic perspectives. His two books *al-wajīz fi 'iḍāḥ al-qawā'id al-fiqhiyyah al-kulliyyah* (a concise book on the explanation of Islamic legal maxims) and *Mawsū'a al-qawā'id al-fiqhiyyah* are invaluable resources for researching on Islamic legal maxims.[65] The significance of his contribution to Islamic legal maxims is characterized in his second book which serves as an encyclopaedia of the subject in question. In the book, al-Burnu extracts all legal maxims from different books of Islamic jurisprudence from different schools of thought. Similar contribution is also ascribed to Ali al-Nadwi.[66] In all, the approach of the two authors to the subject of Islamic legal maxims is theoretical detached from any empirical study.

Other dimensions have been explored in contemporary writings on *al-qawā'id al-fiqhiyyah.* These include:

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[62] Rashed Saud al-Amīri, *Legal Maxims in Islamic Jurisprudence: Their History, Characteristics and Significant.* (Birmingham UK.: Birmingham University, Ph.D. Thesis 2003), p. 158.
[63] The full account of the book can be found in chapter two pages 46-48
[64] See page 47 for more details.
[65] See page 48 and note 186 for the description of his book.
[66] See pages 47-48 for more details

- Researching of a particular Jurist's book. This is a situation whereby a particular work by a jurist is studied in such a way that all the maxims mentioned therein are extracted and thoroughly explained. This method appears in al-Nadwī's works entitled ' *al-qawā'id wa ḍawābiṭ al-mustakhlaṣ min al-Taḥrīr.* This work is a PhD thesis submitted to the Ummu al-Qurā University, Makkah Saudi Arabia. In it, the researcher extracted all maxims which Mahmud al-Hasiri (d. 1239 AH) cited in his book *al-Taḥrir.* [67]
- Researching all the books of a particular author. This is a situation whereby all legal maxims mentioned on a specific theme of *fiqh* in all books authored by a jurist will be collected. Examples of this method are al-Husayyin's *al-qawā'id wa al-ḍawābiṭ lil mu'āmalāt al-māliyyah inda Ibn Taymiyyah* and al-Sawwaṭ's *al-qawā'id wa al-ḍawābiṭ 'inda Ibn Taymiyyah fi fiqh al-usrah.* [68] In the former, all Islamic legal maxims related to Islamic monetary transactions and cited by Ibn Taymiyyah in his various books, are compiled and examined. In the latter, all Islamic legal maxims relating to Islamic family law and mentioned by Ibn Taymiyyah in his books, are compiled and examined.
- Researching a single maxim through the application of thorough examination and explanation. In this method, a particular Islamic legal maxim will be subjected to extensive examination. This method is adopted by Sālih al-Yusuf in his work entitled *al-mashaqqah tajlib al-taysīr*: *dirāsah naẓariyyah wa taṭbīqiyyah* (Hardship begets facility: theoretical and empirical study); and also by Mahmūd 'Armūsh in his work entitled *al*-Qā'*idah al-Kulliyyah*: '*Imāl al-Kalām awlā min ihmālih.* Both works are Masters' dissertations submitted at Imām Ibn Sa'ūd University, Riyadh, Saudi Arabia.[69]

It is pertinent to say that comprehensive writings on this subject in English language are very rare. Schacht did not see Islamic legal maxims as a science. In spite of having published books and articles on Islamic Law, he only took a few pages to summarize the subject of *al-qawā*'id *al-fiqhiyyah* without reflecting on its concept or its

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[67] Rashid Saud Amīrī, *op. cit.* p. 165.
[68] Both books are Masters' dissertations presented by the authors at Im Ibn Sa'ūd University, Riyadh, Saudi Arabia.
[69] Rashed Saud al-Amīrī *op.cit.* p. 166.

importance in Islamic law.[70] There are some Islamic writers who have included witty sections on legal maxims in English in their works, but these, at best, are only an introduction to the subject. Thus, there still exists a huge vacuum for an intensive, in-depth study of the science in English.[71] Two comprehensive, in-depth studies on the subject in English deserve some credit here. These are PhD theses by S.O. Rabiu and Rashed al-Amiri Saud.[72] The former maintains a somewhat practical approach, while the latter amounts to little more than a translation of previous works and adopts a theoretical approach to the subject.[73]

Thus, my aims in this thesis are to focus on how these legal maxims can be applied to Islamic criminal law and how they can be used to extrapolate the overall objectives of Islamic criminal law in protecting human rights in this contemporary age. To make it more interactive and empirical, criminal cases from courts in Northern Nigeria are being perused to see the extent of compliance of *Sharīʿah* courts in those states with these judicial apparatus (*al-qawāʿid al-fiqhiyyah*).

xi. Research Methodology

The method used in this thesis is qualitative which includes both descriptive and prescriptive approaches. The research exposes how the Islamic legal maxims had been applied in the past and to what extent are their values and importances to the Islamic jurists. On this hytothesis, theoretically, the research gives the account of the concept of the subject. It analyzes the six basic legal maxims and their relevance to the Islamic criminal law. Accordingly it questions why legal maxims have not been considered in some cases judged under Islamic law in Northern Nigeria courts.

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[70] Joseph Schacht, *The Origins of Muhammadan Jurisprudence, op. cit.* pp. 180-188, Joseph Schacht, *An introduction to Islamic Law op. cit.* . P.40.
[71] Such as Hashim Muhammad Kamali, *Qawaid al-Fiqh, op. cit*, Izze Dein Mawil, *op. cit.*
[72] Sulaiman O. Rabiu is a senior lecturer ain the department of Sharīʿah Uthman dan Fodio University, Sokoto, Nigeria and Rashed S. al-Amiri was a PhD student at the department of Theology and Religion, University of Birmingham, UK.
[73] Rabiu's work is somewhat empirical in the sense that some court cases are used to illustrate the maxims, although the maxims treated are restricted to the five major ones. By contrast, Rashed's work is purely theoretical in the sense that it only gives us the historical development of the subject, without giving any analysis or practical illustration of the maxims. In other words, it is more a translation of the works written in Arabic on the subject.

Empirically, the research studies some cases generated under the full implementation of *Sharī'ah* in the Northern States of Nigeria. To substantiate the originality of this research, apart from reported cases in local, national and international law reports, investigations were carried out in some states where some cases that generated heated argument and controversies were obtained. Because of the difficulties encountered in obtaining unreported cases, the few available cases are used in this thesis and they are attached as appendices for reference purpose.

In the concluding chapter, general survey of the cases judged in the Northern Nigerian *Sharī'ah* Implementation are critically evaluated in light of the Islamic legal maxim. There are many observasion raised and suggestion forwarded for better ways of making use of Islamic law maxims to make sure that

In illustrating the legal maxims treated in this thesis, the four *sunni* schools of Islamic jurisprudence are adhered to. That is because they all agree in principle on the maxims even if there are slight differences in their applications. Also, the Northern states of Nigeria as earlier established are malikites sharing the same ideology with the other *Sunni's* schools; that will reduce the level of argument in advocating for *talfīq* and *takhyīr* in codification of Islamic penal law.

x. Structure of the Thesis

This thesis comprises seven chapters with an introduction and a conclusion. The introduction reveals the systematic development of Islamic law and traces how different sciences, subjects and terminologies relating to Islamic Law emerged. It gives account on the emergence of different schools of Islamic jurisprudence and their roles in the development of Islamic jurisprudence. The introduction also touches on the reasons why there is a need for secondary sources for Islamic law to supplement the primary sources and the level of their usefulness. Also treated in the introduction is the systematic emergence of Islamic legal maxims as a distinctive mechanism to extrapolate the overall objectives of Islamic law from the thoughts of the schools of Islamic jurisprudence. Also discussed is the controversy surrounding the full implementation of *Sharī'ah* in the Northern Nigeria and the concerns of Human

Rights Organizations. Equally, the aims and objectives of the research, its scope, the problems faced by the researcher and the methods employed in the research are all enunciated in the introduction.

The first chapter follows the introduction with a discussion on the science of Islamic legal maxims, its concepts, historical development, its categories and its roles in Islamic legal system. The second chapter starts with the first Islamic legal maxim which centres on the role of action and intention in Islamic criminal law. Focus is made on the correlation and corroboration of the two elements and their effects in determining the guilt or innocence of an accused person.

The third chapter examines the rules of certainty and doubt in Islamic criminal procedures. Here, the maxim that says that certainty cannot be repelled with doubt is analyzed along side with other related maxims which are subsumed under the basic maxim. Chapter four looks into the facilities given by Islamic law in the face of hardship. The maxim which exposes this rules starts with *al-mashaqqah tajlib al-taysĭr* (hardship begets facility) while many related maxims which are subsumed under the basic one are also explored.

Chapter five opens discussion on the stand of Islam in eliminating of harm, whether aggressively inflicted or reciprocated. The maxim that deals with this rule is *lā ḍarar walā ḍirār* and few related others. Chapter six delves into the use of custom *al-'ādah* and *al-'urf*. Definitions of '*urf* and '*ādah* are concisely explained. The ambiguous use of the two terms is cleared while the effect of '*urf* in Islamic criminal law is emphasized. The issue of whether rules can change or not when time and circumstances change is critically debated.

The last chapter examines the effect of illocutionary acts of utterances particularly in criminal acts that involve expressions of the accused. The need to consider literal meaning first before pragmatic meaning is centrally discussed. The relatedness between literal and metaphorical meaning of an expression is also given attention. The thesis is rounded off with concluding remarks such as the summary of the whole

thesis, recommendation and suggestions and areas for further researches on the topic of Islamic legal maxims.

CHAPTER ONE

The Concept of *al-Qawā'id al-Fiqhiyyah* (Islamic Legal Maxims)

1.0 Introduction

This chapter examines the concept of *al-qawā'id al-fiqhiyyah.* The literal definition of *al-qawā'id al-fiqhiyyah* is given while its emergence as an independent subject in Islamic jurisprudence and its historical development are equally traced. An attempt is also made in this chapter to distinguish the features of *al-qawā'id al-fiqhiyyah* from those of other subjects and terminologies in Islamic law. This, to some extent, removes the speculation on the capacity of *al-qawā'id al-fiqhiyyah* to stand as an independent source on which legal verdicts can be based. Due to the fact that there are many legal maxims enunciated in classical books of Islamic jurisprudence, the chapter also explains the hierarchy of Islamic legal maxims and justifies the reasons why some maxims should be given general status as opposed to the five famous agreed upon among the classical Islamic scholars.

1.1 Definition of a*l-Qawā'id al-Fiqhiyyah* [74]

1.1.1 Literal Meaning of *al-Qawā'id al-Fiqhiyyah*

Al-Qawā'id al-Fiqhiyyah is a name given to a particular science in Islamic jurisprudence. It denotes a certain discipline in Islamic studies. The subject matter *al-qawā'id* al-*fiqhiyyah* cannot be accurately defined until the two component words are separately defined. The first word *al-qawā'id* is a plural noun of *al-qā'idah,* derived from the verb *qa'ada,* which has many lexical meanings in the Arabic language

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[74] The translation of *al-Qawā'id al-fiqhiyyah* as 'Islamic legal maxim' has almost become conventional in the writings of contemporary scholars, although there are some scholars who have translated it as just 'legal maxim' to form a parallel meaning with the term used by Western scholars. However, this latter translation will undermine the Islamic value of maxims since the value of legal maxims in the Islamic domain cannot merely be called legal maxim, as used in the Western term. This important difference will be explained in due course in discussion of the importance and the roles of legal maxims. It is worth noting that my translation of this subject matter in my Master's dissertation was 'Islamic juristic maxim', a rendering which I still maintain. This is because the word 'juristic' is wider than that of 'legal'. Of course, these maxims are useful not only to law practitioners, but also to those who issue religious verdict (*mufti*). However, I prefer to adopt the current translation here because the term 'Legal Maxim' is well understood to both Islamic modern scholars and Western lawyers, and because the area to which I want to relate the maxims is purely legal.

denoting stability, constancy and foundation[75]. The Arabs use *al-muq'ad* for a sick person who cannot move from one place to another because of his constancy in one place. They also call a married woman *qa'īdah al-rajul*[76]. From this meaning, the foundation of a house is called *qā'idah al-bayt.* The Qur'an in some of its verses refers to the latter meaning. An apt example is where God says in the Quran: *waidh yarfa'u 'Ibrāhim al-qawā'id minā al-bayt wa Ismā'il.....- And (remember) when Abraham and Isma'il were raising the foundations of the house....* [77]

In general terms, *qā'idah* synonymously means "base, principle, rudiment, maxim and precept."[78] Thus, *al-qā'idah* is the base, the foundation of something religious, philosophical, political or legal.[79]

1.1.2 Technical Meaning of *al-Qawā'id*

The general definition of *qā'idah* is that it is *qaḍiyyah kulliyyah munṭabiqah 'alā jamī' juz'iyyātihā*, "a general theorem which applies to all of its related particulars,[80] or *ḥukmun kullī yanṭabiq 'alā juz'iyyātih liyata'arraf 'aḥakāmuhā minh*, " a general rule which applies to its particulars to deduct rules from it." [81] The distinctive feature of the two definitions lies in the fact that the former is the definition of the scholars of logic, while the latter is ascribed to the scholars of *uṣūl* (the principle of jurisprudence). Both scholars agree on the generality of *qā'idah.* For a *qā'idah* to be universally accepted, it should be general, i.e. there should be no exception in applying it to its particulars.[82] The only difference in the two definitions is that from a linguistic point of view, 'maxim' is *qaḍiyyah* 'proposition', while the scholars of *uṣūl* deem a maxim as *ḥukm* 'a measure for extracting ruling'.

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[75] Muhammad Ibn Makram Ibn Manzur, *Lisan al-Arab*, Amin Muhammad Abdul al-Wahab and Muhammad Sadiq al- 'Ubayd, (eds.), (Beirut: Dar 'ihya' al-Turath al-Arabi and Muhassasah al-Tarikh al-arabi 1997/1418 entry 'Ayn, al-Mu 'jam al-Wasit entry Ayn.
[76] *Ibid.*, entry 'Ayn.
[77] Qur'an Chapter 2, verse 127.
[78] Munir al-Diin Al-Ba'labak, *al-Mawrid*, (8th edn, Beirut: Daru al-'Ilmi lil Mallayin, 1997) p. 844.
[79] Ahmad Ali al-Nadwi, a*l-Qawã'id al-Fiqhiyyah*,..(4th Damascus: Dar al-Qalam, 1998/1418) p. 39.
[80] Ali Ibn Muhammad Al-Jurjãni, *Kitãb al-Ta'rĩfãt*,(Beirut: Dar al-Kutub al-'Ilmiyyah, 1983/1403 p.171.
[81] al-Nadwi, *op. cit.* p. 40.
[82] Muhammad Ibn Ahmad al-Futũhĩ Ibn al-Najjar, *Sharh al-Kawkab al-Munĩr*, Dr. Muhammad al-Zuhayli, and Dr. Nazih Hummad, (eds), (Riyadh: Maktabah al- 'Ubaykan 1997/1418), vol. 1 p. 45.

However, the Islamic Jurists with regards to the definition of *al-qā'idah* are divided into two. The first are those who do not perceive any difference between what constitutes a maxim from the linguists' and the jurists' point of view. Thus, *al-qā'idah* to them is defined in the same way as it is defined by the linguists, the logician and the scholars of *uṣūl*.[83] The second are those who regarding the linguistic and juristic definitions discern some differences. [84]

There are those who assert that *al-qā'idah* is *ḥukm kulī*, a 'general rule' that relates to juristic norm and differs from that of *uṣūl* and logic. This view is expressed by al-Maqari (d.758 AH) thus: *"na'nī bi al-qawa'id kull kullī huwa 'akhaṣ minā al-uṣūl wasā'ir al-'aqliyyah al-āmmah...* – (translation: what we mean by *qā'idah*, is any general (rule) which is more specific than u*ṣūl* and other general rational...).'[85] The other view is the view of those who see *al-qā'idah* as *ḥukm 'aghlabī*, a 'preponderant rule', as noted by al-Hamawī thus:

> *inna al-qā'idah 'inda al-fuqahā' ghayrhā 'inda al-nuḥāh wa al-usuliyyīn, idh 'inda al-fuqahā' ḥukm aktharī -lākulī-yanṭabiq 'alā akthar juziyyātih liyuta'arraf aḥakāmuhu*
>
> The term *al-qā'idah* from the perspective of the jurists differs from what its meaning is in the perspective of the linguists and Usulists'. From the jurists' view, it is a preponderant rule- not general- which applies to many of its particulars to deduct their rules from it. [86]

The reason for these divergent views regarding the nature of *al-qā'idah* among the Islamic jurists stems from the fact that *al-qā'idah* –from its origin- is *kuliyyah,* in general. However, in some rare exceptional cases, some scholars have reservations regarding its generality. Nonetheless, it is safe to say that *al-qā'idah al-fiqhiyyah* is general in application, regardless of any exclusion that may occur from it for the following reasons. Firstly: to say *al-qā'idah* is *kuliyyah* (general) conforms to its original usage. Secondly: the fact that there are exceptions in some cases is not enough to impact greatly on the generality of the term because there is no formula that is without an exception in its rules or its applications. The third reason is that it is well established in Islamic jurisprudence, and it is an acceptable rule that any *ghālib*

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[83] Such as al-Subkī, Taj al-Dīn in his al-Ashbā wa al-Naẓā'r see al-Nadawī *op. cit.* p. 41.
[84] Muhammad Ibn Abdullah Al-Sawāt, *al-Qawā'id wa al-Dawābit al-Fiqhiyyah 'Inda Ibn Taymiyyah fi fiqh al-'Usrah*, (Ta'if, Saudi Arabia: Maktab Dar al-Bayan al-Hadithah 2001/1422) vol. 1 p. 88-
85 al-Nadwī *op. cit.* p. 41 quoted al-Muqri, *al-Qawā'id.*
86 Ahmad Ibn Muhammad Al-Hamawī, *Ghamz 'Uyūn al-Basā'ir Sharh al-Ashbā wa al-Nazā'ir*,(Cairo:Dar al-Tiba ' al-Amirah 1357) vol. 1 p. 22

aktharī, (preponderant majority) rule is regarded as *kullī muṭṭarid, (*consistent general rule) as al-Shaṭibī (d. 790 AH-1388 AD) observes:

> Even those *qawā'id* assumed to be less general might be 'general and consistent' in another way which we do not perceive, or, albeit, may not be maxims on their own because of insufficient conditions qualifying them to be called *qawā'id.* [87]

Of course, one of the accepted principles is that what is preponderant should be given the status of generality, in as much as it is consistent in many cases and it is of common occurrence. And the rule and effect is given to what is regular and universally prevailing.[88]

Having discussed the term *al-qā'idah*, the overall definition of *al-qawā'id al-fiqhiyyah* should now be broached. It is pertinent to briefly define *fiqh,* to which *al-qawā'*id is attributed. The word *fiqh,* comes from the root verb *faqiha* which means to know, to understand, to grasp and to comprehend.[89] The word *"fiqhiyyah"* in the subject matter is used as an adjective to qualify *al-qawā'id.* Moreover, *fiqh*, as a subject in Islamic studies, has been defined in different ways. The *Majallah al-'Adliyyah*, among others, defines it as "the knowledge of a practical legal question,'[90] but this definition does not give the complete nature of the term. The general definition of *fiqh,* however, states that it "is the science of the derived legal rules as required from their particular sources."[91]

It should however be noted that *al-qawā'id al-fiqhiyyah* in most medieval and contemporary works has only been defined as a term, and not as a subject. As already stated above, majority of medieval writers see *al-qawā'id* as a specific term in Islamic

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[87] Ibrahim Ibn Musa Al-Shãtibĩ, *al-Muwãfaqãt fi ũsũl al-Sharĩ'ah* ed. Abdullah Duraz, (Beirut: Dar al-Ma 'rifah, 1975) vol. 2 p. 53.
[88] *Al-Majallah al-Ahakãm al-Adliyyah,* Articles 40-41.
[89] Ahmad Ibn Muhammad Al-Fayũmĩ, *al-Misbãh al-Munĩr (*Beirut: al-Maktabah al-'Ilmiyah n.d.) p. 248.
[90] *Majallah op. cit.* Article 1.
[91] Ahmad Qadir Anwar, *op. cit.* p. 91, Subhi Mahmassani, *op.cit.* p. 8. There is a modern theory developed by some Islamic writers in which *fiqh* is deemed to be the the method by which the Islamic law is derived and applied. This attempt is sought to distinguish the term *sharī'ah* from *fiqh* but yet there is confusion in rendering the translation of the two terms into English language. In many cases both terms are translated as 'Islamic law' as Baderin asserts that the two terms are not technically synonymous (Baderin *op.cit.* p. 33). It seems that the pahrse 'Islamic Law' cannot be isolated from the two terms because the understating of Islamic Law *(fiqh)* cannot be drawn without recourse to the divine and quasi-divine revalation. *Sharī'ah)* However, it is safe to say that all what is termed *Sharī'ah* can be called Islamic Law (in terms of its immutability) not otherwise. (see Ramadan for further reading on the issue in Ramadan, S. , *Islamic Law:Its Scope and Equity (*London, Macmillan, 1970, pp.33-36)

jurisprudence and, as such, the function of this term is only defined. This approach is reiterated by many contemporary scholars. Subhi Mahmassani renders the definition of 'maxim' as "a general rule that applies to all its particulars".[92] This dogmatic approach does not help in the comprehension of the extreme nature of the subject matter. Failure to incorporate many features of the science has created a vacuum that has to be filled. Another contemporary writer, Izzi-Dien Mawil, defines 'maxims' as "principles and concepts that could be applied to a wide variety of cases."[93] This definition sounds attractive, but could be taken to task for its failure to recognize the cognizance of *al-qawā'id al-fiqhiyyah,* as opposed to any other *qawā'id.* Another interesting definition is that of Muhammad Kamali Hashim[94] who defines al-*qawā'id al-fiqhiyyah* as "statements of principles that are derived from the detailed reading of the rules of *fiqh* on various themes".[95] This definition, although credible because it recognizes some of the features of the *fiqh* maxim, fails to address its essence. Of course, maxims are said to be products of the extensive reading of the rules of *fiqh,* but the essence of this extrapolation is to apply this product to other cases that fall under their subject.

A more comprehensive definition of *al-qawā'id al-fiqhiyyah* has been given by both Mustafa al-Zarqā,[96] and Muhammad Ibn Abdullah al-Sawaat. [97] al-Zarqā says that Islamic legal maxims "are universal *fiqh* principles, expressed in legal, concise statements, that encompass general rulings in cases that fall under their subject."[98] Al- Sawwāt, however, defines *al-qawā'id al-fiqhiyyah* as "a study of the science of practical legal Islamic universal theorem and how they are applicable to their particulars". [99]

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[92]*Ibid.* p. 151, Mawil, *Islamic Law: from Historical foundations to contemporary practice.* (Notre Dame Ind: University of Notre Dame Press, 2004), Pp113-114.
[93] Mawil, *ibid.*
[94] Muhammad Hashim Kamali, *Qawã'id al-Fiqh: The legal maxims of Islamic law*, in Journal of the Association of Muslim Lawyers (UK) vol. 3 issue 2 October, 1998 online at(www.aml.org.uk/journal/ last viewed 21/06/2006 14:03 pm.) p. 1
[95] *Ibid.*
[96] Mustafa Ahmad al-Zarqã, *al-Madkhal al-Fiqhī al-'Āmm,* (7th edn. Damascus: Matba 'ah Jami'ah 1983/1383) vol. 2 p. 933
[97] al-Sawwāṭ, *op. cit.*
[98] al-Zarqã, M. *op. cit.*
[99] al-Sawwāṭ, *op. cit.*

A comparison of the leading definitions reveals two observations. One, the two definitions agree on the universality and generality of Islamic legal maxims. This conforms to the opinion of al-Shāṭibī, mentioned above. Two, the former sees *al-qawā'id al-fiqhiyyah* as rules or principles, *'aḥakām aw uṣūl*, while the latter views it as *qaḍyyah*, theorem. By and large, there is an important aspect that has been left unaddressed in the aforementioned definitions: namely, the end objectives of the legal maxim. This issue has been raised by both Kamali and Izzi Dien.[100] Kamali observes that one of the functions of Islamic legal maxims is to depict the "general picture of the nature, goals and objectives of the *Sharī'ah* and this is why many scholars have 'treated them as a branch of *maqāṣid* (goals and objectives literature)".[101] In light of this, the researcher submits that legal maxims are "legal rules, the majority of them universal, expressed in concise phraseology, depicting the nature and objectives of Islamic law and encompassing general rules in cases that fall under their subject."[102]

Hiya 'Ahkām fiqhiyyah 'Aktharhā kulliyyah maṣughah bi uslūbin mu'jaz tu'abbir 'an maqāsid al-sharī'ah watataḍamman 'ahkām tashrī 'iyyah 'āmmah fī al-ḥawadith allatī tadkhul taḥtahā

By exploring the words '*aḥkām* and *fiqhiyyah*, the definition distinguishes the subject matter from other maxims. The definition also preserves the importance of conciseness in formulating legal maxims. This is important because using lengthy and inarticulate phrases will render the nature of the maxims unattractive. Also, there is a sense of belonging that Islamic legal maxims are formulated to express the nature and value of the *Sharī'ah*. This will guide the application of the maxims in accordance with the spirit of Islamic law.

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[100] Kamali, *Qawaid al-Fiqh op. cit.* and Mawil, *op. cit.* p. 113.
[101] Kamali, *ibid.*
[102] This definition is based on, and formulated from, various opinions to include the ultimate goal of the subject.

1.1.3 Difference between *al-Qawā'id al-Fiqhiyyah* and *al-Qawā'id al-Uṣūliyyah*

The science of *al-qawā'id al-fiqihiyyah* is not the same as the science of *uṣūl al-fiqh* and its *qawā'id.* The maxims of *uṣūl* are assumed to be the same as the science of *uṣūl.* This is clearly indicated by Ibn al-Hājib (d.646 AH) when he defined *uṣūl al-fiqh* as: "a knowledge of *qawā'id* which could be used to infer branches of legal rulings from their general sources through the means of deduction."[103] Thus, it is possible to infer from the above definition that there is no independent science established for *al-qawā'id al-uṣūliyyah* as the science of *uṣūl al-fiqh* is *qā'idah* on its own.[104] This opinion is not well supported by majority of scholars. However, there is a clear difference between the science of *fiqh* and of *uṣūl,* despite the fact that there are some legal maxims that "are often cross-referenced and sectioned with those relating to *uṣūl al-fiqh.*"[105] Al-Ghazālī maintains that the science of *fiqh* focuses on the action of the individual in relation to legal orders, while the science of *uṣūl* focuses on the study of the meaning of words, and of definitions in order to deduce legal orders.[106] And each of the two sciences has its own independent *qawā'id,* as indicated above. But the *qawā'id* of *uṣūl* have never been separated from their source, as opposed to the *qawā'id* of *fiqh,* which have been treated as an independent science.

An in-depth study of the two sciences shows that there are similarities and differences between the two subjects and their maxims. The similarities are: (1) the maxims of both are general principles that apply to many branches of *fiqh* (2) there are some maxims that are interwoven between *uṣūl* and *fiqh*, such as the maxim of *'urf* (custom). If it is viewed from the point of its topic as legal evidence, it is deemed as being a maxim of *uṣūl* , but if it is seen as an act of *mukallaf* (sound mind), it is deemed as a maxim of *fiqh.*[107] However, the differences could be summarized as follows:

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[103] See al-Sawwāṭ, *op. cit.* vol. 1 p. 101.
[104] *Ibid.* vol. 1 p. 151.
[105] Mawil, *op. cit* p. 114.
[106] Muhammad , Abu Hāmid Al-Ghazālī, *al-Mustasfā mi 'Ilm al-Usūl* , (3rd edn. Beirut: Dar Ihya' al-Turath al-Arabi and Mu'assasah al-Ta'rikh al-Arabi, 1993/1414) vol. 1 p. 5.
[107] al-Nadwī, *op. cit.* p 70.

- Legal maxims are extended products from the legal sources, or an extrapolation of legal issues similar to each other. However, the maxims of *uṣūl* are derived from the same source as the science of *uṣūl,* which consist of Arabic linguistics, principles of religion etc.[108]
- Legal maxims are based on the *fiqh* itself, while *uṣūl* and its maxims are concerned with legal reasoning, the applied meaning of commands, prohibitions.[109]
- Legal maxims can be used directly to derive legal rulings, as opposed to the maxims of *uṣūl,* which can only be used to derive rulings through the source of Islamic law. To illustrate this difference, the maxims *'al-'amr yaqtaḍī al-wujūb'* (the imperative implies obligation), and *'al-'umūr bimaqāṣidihā'* (matters are judged according to intentions), are apt examples. The former is a maxim of *uṣūl,* which implies that prayer is an obligatory duty but that implied meaning cannot be directly and clearly understood without imploring the interpretation of some Qur'anic verses such as : *wa'aqīmū al-ṣalāt* (and observe prayer (Q. 2:43). It is from the imperative form of the verse that the obligatory status of prayer is derived. However, the latter, being a legal maxim, can supply the obligation of intention in all human acts.[110]
- The legal maxims are concerned with the acts of *mukallaf* (persons of sound mind), while the maxims of *uṣūl* are concerned with the legal sources. For example, the legal maxim: *al-yaqīn lā lazūl bi al-shakk* (certainty cannot be removed with doubt) gives a ruling on the certainty of the act of *mukallaf,* while the maxim of *uṣūl :al-'amr*

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[108] The derivation of *al-Usũl* from those sources is mentioned by many scholars. See al-Jurjãnĩ, *al-Burhãn* vol. 1 p. 47, al-Amidĩ, *al-'Ihkãm* ed. Dr. Sayyid al-Jumayli, (2nd edn. Beirut: Dar al-Kitab al-Arabi, 1986/1406) vol. 1 p. 78, Muhammad Ibn Bhadir, al-Zarkashĩ, *al-Bahr al-Muhĩṭ fi usul al-fiqh,* (Beirut: Dar al-Kutub al-'Ilmiyyah 2000) vol. 1 p. 28, Muhammad Ibn Ahmad al-Futũhĩ Ibn Najjar, *Sharh al-Kawkab al-Munĩr,* eds. Dr. Muhammad al-Zuhayli and Dr. Nazih Hummad, (Riyadh: Maktabah al-'Ubaykan 1997/1418) vol. 1 p. 48, al-Sawãṭ, *op. cit.* vol. 1 p. 102.

[109] Kamali, *Qawaid al-Fiqh, op. cit.*p. 1, al-Sawwãṭ, *op. cit* vol. 1. pp. 102-103, Khaleel Muhammad, *The Islamic Law Maxims* in Journal of Islamic Studies, vol. 44, no. 2, 1426/2005 p. 194.

[110] Abdul al-Kareem Zaydãn, *al-Wajĩz fi Sharh al-Qawã'id al-Fiqhiyyah fi al-Sharĩ'ah al-Islãmiyyah,* p. 188, Khaleel M, *op. cit.* 194, al-Sawãṭ, *op. cit.* vol. 1 p. 103.

yaqtaḍī al-wujūb (imperative implies obligation) is all about any legal rule that is obligatory.[111] .

- The maxim of *uṣūl al-fiqh* is without exception; it is always general, whereas a legal maxim is not always general, as in some cases there are exceptions.[112]

1.1.4 Difference between al-*Qawā'id al-Fiqhiyyah* and *al-Ḍawābiṭ al-Fiqhiyyah*

The term *al-ḍawābiṭ* is sometimes used interchangeably with the term al-*qāwa'id. al-Ḍawābiṭ* is plural of *al-ḍābiṭ* which literally means controller.[113] It is a verbal noun from *ḍabaṭa* which means to tie or to control something. In general, the term *ḍābiṭ* differs somewhat from *qā'idah*. This is due to the distinctiveness of the scope of each term. However, from the Islamic jurists' perspective, there are two opinions on the use of the term. There are some classical and contemporary scholars who assume that the term *ḍābiṭ* is a sister of *qā'idah*. In effect, they perceive no difference between the two terms.[114] In sharp contrast, there are other scholars who behold a difference between the two terms.[115] The distinctive factor that differentiates the two terms can only be seen in the scope in which the two terms operate. It is observed that *ḍābiṭ*'s scope is limited to a particular subject or chapter of Islamic jurisprudence and, as such, has very limited exceptions. By contrast, *qā'idah* does not have any restriction regarding any theme or particular subject of *fiqh*. This is enunciated and clarified in Hashyah al-Bannāhi, thus: "legal maxim, unlike *ḍābiṭ*, is not peculiar to a subject".[116] To this, al-Suyūtī emphasizes that the fundamental principle is that *qā'idah*

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[111] al-Sawwãṭ, *op. cit.* vol. 1 p. 102.
[112] al-Nadwī, *op. cit.* p. 68.
[113] Muni r Ba'alabaki, *al-Mawrid: A modern Arabic-English Dictionary*, (8th edn. Cairo: Daru El-Ilm Lil Mallayin 1997) p. 706. The term 'dabit' can also be translated into 'regulator' because it also regulates the issue discussed from various points of view in particular topics of Islamic jurisprudence.
[114] Such as Ibn Umãm (d. 861 A.H) cf. al-Tahrir with its Sharh on Taqrīr wa Tahrīr by Ibn Amīr al-Hãj vol. 1p. 29. Among the contemporary scholars who do not perceive differences between the two terms is al-Zuhayli, Wahbah. See *al-Nazariyyah,* p. 199.
[115] Abdul Rahman Ibn Abi Bakr Al-Suyũṭī, *al-Ashbãh wa al-Nazã'ir fi al-Nahw* ed. Taha Abdul Rauuf Sa'd (Cairo: Sharkah al-Tiba'ah al-Fanniyyah 1975/1395) vol. 1 p. 9, Zayn al-'Abidin Ibn Ibrahim, Ibn Nujaym, *al-Ashbãh wa al-Nazã'ir*..(Beirut: Daru al-Kutub al- 'Ilmiyyah 1993/1413) p. 197, al-Burnũ, *al-Wajīz fi 'Ihdãh al-Qawã'id al-Fiqhiyyah al-Kulliyyah*, (4th edn. Beirut: Mu'assasah al-Risalah 1996/1416), p.47.
[116], Abdul al-Rahman Ibn Jãd Allah Al-Bannãnī, *Hãshiyah al-Bannãnī 'Alã Sharh al-Jalãl al-Muhallã Alã Jam' al-Jawãmi'* (Misra: Matba' Isaa al-Babi al-Halabi 1913/1336) vol. 2. p. 290. See also al-Nadwī, *op.cit.* p.46.

encompasses branches of various chapters of *fiqh,* while *ḍābit* is confined to individual chapters,[117] such as those on cleanliness (*ṭahārah*) and marriage (*nikāḥ*). To illustrate this argument, an example of *ḍābiṭ* is the statement of the jurists: "when water reaches two feet, it does not carry dirt." An example of a legal maxim of *fiqh* is the statement: "The affairs of the Imam concerning his people are judged by reference to *maṣlaḥah* (benefit)".[118] The formal statement is confined to the topic of cleanliness and does not apply to other topics, while the latter is more general and wider in scope. It is not specific to any person's affairs, be it transaction, administration, or spiritual.

From the foregoing discussion, it is safe to define the term *ḍābiṭ,* following the view of those who have distinguished between it, and *qā'idah* thus: that *ḍābiṭ* is "a general rule that applies to branches of a particular theme."[119] This definition establishes a new term and it allows room for the evolution of knowledge, as *al-ta'sīs 'awlā mina al-ta'kīd,* "establishing a new norm is better than making emphasis."[120] However, it cannot be ruled out that there is a corollary between the two terms. Of course, both have been defined as a general legal ruling '*ḥukmu kulli fiqhi*', and both are applicable to issues in the Islamic legal framework. It is also noted in the work of al-Subkī that both can be called *qā'idah,* but with different adjectives. The one with wider scope could be called *qawā'd 'āmmah,* 'general legal maxims', while the one with lesser scope could be called '*qawā'id khaṣṣah,* 'peculiar legal maxims.'[121]

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[117] al-Suyūṭī, *op. cit.* Vol. 1 p. 7, Ibn Nujaym, *op. cit.* p. 192.
[118] Kamali, *Qawã'id al-Fiqh, op. cit.* p. 1.
[119] Ibn Nujaym, *op. cit.* p. 192 Al-Sawwāṭ, *op. cit.* vol.1 p. 96.
[120] al-Sawwāṭ, *ibid.*
[121] al-Nadwī, *op. cit.* p. 51, quoting al-Shubkī from his book al-Ashbã wa al-Nazã'ir, part three, under discussion on al-qawã'id al-khãssah –('peculiar legal maxims').

In sum, there are divergent opinions on the use of the term *ḍābiṭ* to mean *qā'idah.* But as opined above, giving *ḍābiṭ'* a separate meaning establishes a new term, without necessarily using it as a synonym of *qā'idah.* It is noted that both can be used interchangeably, especially if they are used in different ways. But if they are used together, there should be an external meaning for each. In other words, all *ḍawābiṭ'* (controllers) are *qawā'id* (maxims) but not vice versa.

1.1.5 Difference between al-*Qawā'id al-Fiqhiyyah* and *al-Naẓariyyah al-Fiqhiyyah*

Having distinguished between *qawā'id* and *ḍawābiṭ*, it is also useful to shed light on a newly-developed term in Islamic jurisprudence, namely *al-naẓariyyah al-fiqhiyyah,* (the theory of *fiqh*). This modern terminology is aimed at treating a particular important area of Islamic law in order to make a thematic and comprehensive framework of the said area of law. Examples of these are *naẓariyyah al'aqd*, (the theory of contract), and *naẓariyyah al-ithbāt* (the theory of proof). The theoretic landmark of this term serves as a departure from the old style of writing on Islamic jurisprudence where topics were not well articulated in a suitably formulaic way. [122]

The word *al- naẓariyyah* is derived from *naẓar*, which means an in-depth look into something visible. It also denotes thought, observation and reasoning.[123] According to the scholars of *al-uṣūl*, *al-naẓar* is a reasoning aimed at attaining a particular knowledge.[124] It is assumed that the term *al-naẓariyyah* and the style of writing on it was borrowed from Western scholars by a number of Islamic modern writers who, in one way or the other, have had contact with Western orientation.[125] As such, there are some scholars who are cynical about its use in Islamic jurisprudence. The reason, as al-Burnu notes, is that the theory of *al-naẓariyyah* springs from human reasoning which is not infallible, while Islamic law has its source from divine texts.[126] Al-

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[122] Kamali, *Qawaid al-Fqh op. cit.* p. 5.
[123] Ibn Manzũr, *Lisãn al-Arab op. cit.* vol. 5 p. 215.
[124] al-Amidĩ, *op. cit.*, vol. 1 p. 10, al-Zarkashĩ, *op.c it.*, vol. 1 p. 42, Muhammad Ibn Ali al-Shawkãnĩ, *Irshād al-fuḥūl ilā 'Iḥqāq al-Haqq min 'Ilmi al-Uṣūl*, (Beirut: Dar al-Fikr 1413) p. 20.
[125] al-Nadawĩ, *op. cit.* p. 63.
[126] al-Burnũ, *Muwsũ'a al-Qawã'id al-Fiqhiyyah* (n.p. 1416) vol. 1 pp. 96-102.

Sawwāṭ remarks that if the issues treated under the term *al-naẓariyyah al-fiqhiyyah* is of the nature of *ijtihād* (personal effort), the use of the term is justified, regardless of where the term is derived.[127] This, of course, is a balanced opinion on the fact that knowledge is knowledge and it should be admired regardless of where it is originated, as long as it does not contradict or devalue Islamic morals.

However, *al-naẓariyyah* inserts a philosophical contribution to knowledge that deserves an in-depth examination. It is defined as a theory of a "number of topics of Islamic jurisprudence which contain legal issues based on rules and conditions and bound together under a subject unit."[128] Therefore, *al-naẓariyyah* is a collection of a particular subject of *fiqh* where sub-sections are inter-related, as for example, in the theory of ownership and the theory of contract. This newly invented terminology emerges in the contemporary style of writing on *fiqh,* exemplified by Abu Sannah in his *al- Naẓariyah al-'Ammah li al-Mu'āmalāt fi al-Sharī'ah al-Islāmiyyah* - (The Theory of Transactions in Islamic Law).[129] But during its development and incorporation into Islamic jurisprudential terms, some scholars assumed that it is the same as the term *al-qawā'id.* One modern scholar who inclines to that assumption is Abu Zaharah. He says: "it is important to distinguish between the knowledge of *uṣūl al-fiqh* and *al-qawā'id* which embodies branches of legal rules. This *al-qawā'id* is best called *al-naẓariyyāt al-'āmmah* (general theories such as *qawā'id al-milkiyyah*-maxims of ownership)."[130] This view is antithetical to the prevailing opinion of the majority of Islamic writers.[131] *Al-qawā'id* is said to be a separate science while *al-naẓariyyah* is a separate style. However, there could be traces of similarity in the way both terms work. For instance, there are fragments of *al-qawā'id* and *al-ḍawābiṭ* which form *al-naẓariyyah,* in maxims related to *'urf* such as : (1) custom is authoritative (2) public usage is an evidence for which action must be taken in accordance therewith (3) it is undeniable that rules (based on *'urf*) change with time (4) effect is given to custom where it is of regular occurrence or when it is universally

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[127] al-Sawãţ, *op. cit.* p. 106 (footnote).
[128] al-Nadawī, *op. cit.* p. 63.
[129] Abu Sannah, *al-Nazariyyah al-'Ammah li al-Mu'ãmalãt fi al-Sharī'ah al-Islamiyyah*, p. 44.
[130] Muhammad Abu Zahrah, *Usũl al-Fiqh*, (Cairo: Dar al-Fikr al-Arabi, 1997), p. 10. The same view is emphasized by al-Khaţãbī, Abu Tãhir Ahmad in his introduction to the edition of *Idãh al-Masãlik* by al-Wanshirīsī p. 111.
[131] Such as Mustafa al-Zarqa in *al-Madkhal al-Fiqh al-Amm op. cit.* vol. 1 p. 235.

prevailing.[132] These and other related maxims can be called *naẓariyyah al-'urf,* regardless of the details of each of these maxims. This is because the prevailing and most obvious of all the aforementioned maxims is the theme of *'urf.*[133] The same practice can be applied to the maxims related to confession - when they are treated together they can be called *naẓariyyah al-'iqrār,* or 'theory of confession'. This is why the work of *al-Majallah* is perceived to be of a *naẓariyyah* nature because its predominant focus is on transaction.

However, there are many ways, listed below, in which the two terms differ significantly from each other:

- *Naẓariyyah* of *fiqh* deals with details of particular themes in Islamic jurisprudence. As such, it is lengthy in scope and in construction, whereas *al-qawā'id al-fiqhiyyah* is very precise in its wording and style, yet comprehensive in application to various branches of different topics of *fiqh,* although it is not aimed at detailing all their particulars.[134]

- A legal maxim is not defined with its own basic elements or conditions, as opposed to *al-naẓariyyah,* whose theme has to be defined with all its details.[135]

- It is possible to say that *al-naẓariyyah* is wider in scope than *al-qawā'id.* A *qā'idah* can serve as *ḍābiṭ* under the theme of *naẓariyyah,* as in, for example, the maxim *al-'aṣl fī al-'uqūd riḍā al-muta'āqidayn* - the fundamental principle of contracts is the consent of the two contractual parties. The maxim forms a *ḍābiṭ* (controller) under *naẓariyyah* of 'a*qd,* although this is not a common fact, as *qawā'id* can be wider than *naẓariyyah* in other ways. The maxim of *al-'umūr bimaqāṣidihā-* matters are judged according to intentions - is widely applicable not only to '*aqd,* but also to all facets of Islamic jurisprudence.[136]

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[132] *Majallah,* Articles 36, 37, 39 and 41 respectively.
[133] al-Nadwī *op. cit.* p. 65.
[134] *Ibid.* p. 66.
[135] *Ibid.* p. 65, al-Sawãṭ, *op. cit.* vol. p. 108.
[136] al-Suyũṭī, *al-Ashbã' wa Nazã'ir* (b) (Beirut: Daru al-Kutub al-Ilmiyyah 1403). p. 47, al-Sawwãṭ, *op. cit.* vol. 1 p. 108.

1.2 Historical Development of *Al-Qawā'id al-Fiqhiyyah*

In the modern age of Islamic scholarship, many subjects have undergone rearrangement. To make learning convenient, some subjects have been broken up from others. Historically, there are divergent opinions and misconceptions about whether *al-qawā'id al-fiqhiyyah* is an independent subject or part and parcel of *uṣūl al-fiqh*. This is due to the assumption of some classical Islamic writers who wrote about the subject. In the works of Imam al -'Alaī (d. 761 AH) in his book *al-Majmu'*, Imam Ibn 'l-Wakil (d. 716 AH), Ibn Subki, al-Suyyuti (d. 911 AH) and Ibn Nujaym's (d. 970 AH) *al-ashbāh wan naẓahir,* for example, the two subjects are confused together.[137] Because of this misconception, it is difficult to give precise dates for the emergence of *al-qawā'id al-fiqhiyyah* as a separate subject in Islamic jurisprudence. However, it is observed that *al-qawā'id al-fiqhiyyah* has gone through three stages of development - primitive, florescence and mature.

1.2.1 The Primitive Stage of *al-Qawā'id al-Fiqhiyyah*

The first stage of the emergence of *al-qawā'id al-fiqhiyyah* can be traced back to the era of the Prophet and to the early period of the *Tābi'* (the followers of the companions of the Prophet).[138] The Prophet was endowed with the use of precise yet comprehensive and inclusive expression (*jawāmi' al-kalim*). His traditions are full of expressions of legal maxims. In spite of the status of his traditions as one of the sources of Islamic law, those expressions also form an integral part of the formulation of the Islamic legal maxims. For instance, the *Ahadith* "*al-kharāj bi al-ḍamān*" (revenue and responsibility go together, i.e. a government that takes tax from its subject must guarantee safety for the subject);[139] "*lā ḍara walā ḍirār*"(do not harm or exchange harm with harm);[140] "*mā askarahu kathīruhu, faqalīluhu ḥarām*" (any substance whose large quantity intoxicates, its small quantity is also prohibited); [141] "*al-bayyinah 'alā al-mudda'ī wa al-yamīn 'alā man ankar*"(The burden of proof is on

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[137] al-Nadwi, Ali Ahmad, *op. cit.* pp. 39-40.
[138] al-Burnũ, Muhammad Sadiqqī, *Mawsũ'a al-Qawã'id al-Fiqhiyyah, op. cit.* p.12.
[139] Ibn Majah, Muhmmad Ibn Yazīd, *Sunan Ibn Majah*, Hadith no. 2243 vol. 3 p. 753.
[140] al-Nadwi, *op. cit.* p. 90.
[141] Muhammad Abdul al-Raũf Al-Munãwī, *Faydh al-Qadir Sharh al-Jãmī' al-Saghīr* (2nd edn. Beirut: Dar al-Ma'rifah li al-Tiba' 1972/1391) vol. 5 p. 420. See also, al-Tirmidh in *Sunan bab al-Shurbah.*

the claimant and the oath is on the one who denies) are few of those prophetic expressions that emerged as legal maxims.[142] Remarking on the nature of the *hadith's* statement regarding the prohibition of small quantities of intoxicating substances, al-Nadwi observes that the hadith is a maxim laid down by the Prophet for the prohibition of any intoxicating substance.[143] Of course, this prophetic axiom can be used in determining the legal status of some contemporary substances that contain intoxicating ingredients, once the *'illah'* (cause) of prohibition has been found in such a substance. It was also reported by al-Bukhari on different occasions that the Prophet said: "*Inna liṣāḥib al-ḥaqq maqāl"* (indeed, the owner of the right has a say).[144] This *hadith*, as precise as it is, makes a huge contribution to the law of claim and legal procedure. Conversely, without any reservation, there are many examples of the Prophet's *'Ahadith* that, without any refinement or rewording, stand as legal maxims and are applicable to many issues in this contemporary age.

In the period of the *Ṣahābah* (the Companions' generation after the demise of the Prophet) it was reported that Abdullah ibn 'Abbas said: "*kullu shayin fī al-qurān aw, aw, fahuwa mukhayyar"* (in the Qur'an, every injunction in which many things are joined together with the conjunctive particle 'or' (Arabic: *aw*) is an indication that a free choice is allowed among these things).[145] It is also reported that Ali ibn Abi Talib said: "*man qāsam al-ribḥ falā ḍamān 'alayhi"* (A profit shareholder is not held responsible for loss).[146] The former statement stands for the maxim of atonement in Islamic jurisprudence, while the latter stands for the maxim of partnership in Islamic transaction.[147]

Subsequently, in the era of the *Tābi'* (the generation after the companions of the Prophet) Imam al-Qadi, Shuraih Ibn al-Harith al-Kindi (d.76 AH) demonstrated his juristic talent with statements that were recognized as maxims in the judicial arm of government. He said: "*man sharaṭ 'alā nafsihi ṭā'i'an ghayr mukrah fahuwa 'alayhi"*

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[142] Ibn Hajar al-'Asqalãnĩ, *Bulũgh al-Marãm* with translation Hadith No. 1210, p. 498.
[143] al-Nadwi, *op. cit* p. 90.
[144] al-Bukhãrĩ, Muhammad Ibn Ismã'il ... *Sahĩh al-Bukhãrĩ Hadith* No. 2183.
[145] Abdul Rasãq Bn. Human al-San 'aani, *Musannaf Abdu al-Rasãq* ed. Habeeb al-Rahman al-A'azami, (Beirut : Mataabi' Dar al-Qalam n.d.) vol. 4, p. 395. This maxim is inferred from chapter 2, verse 196, of the Qur'an.
[146] Ibid. vol. 8, p. 253.
[147] al-Nadwi, *op. cit*. p. 92.

(he who willingly gives a condition binding himself without compulsion shall be held responsible for it).[148] He also says: "*al-nātij awlā mina al-'ārif*" (The producer of something is more entitled to its profit than the claimant (of the ownership).[149] The first *qā'idah* denotes a maxim of agreement so that if someone willingly signed an agreement to supply goods at a specified time and failed to do so without genuine reason, he shall be held responsible for any damage caused by the breach. The second *qā'idah* stresses the maxim of making a claim for ownership.

In the second century of Hijrah, tremendous efforts were made by leading Islamic jurists. This period was a landmark in the emergence of Islamic jurisprudence as many legal maxims were traced to the works of the Islamic jurists. One of the early works of Islamic legal maxims of that period was *kitāb al-kharāj* by al-Qādī, Abu Yusuf (d. 182AH.). This can be found in his discussion of the rule of discretionary punishment and the divergent opinions on it within his school of jurisprudence. He states: "*al-ta'zīr ilā al-imām 'alā qadr 'aẓam al-jurm wa ṣigharh*" (it is left to the leader/ judge to decide an appropriate discretionary punishment considering the proportionate (nature) of the offence).[150] Without doubt, this pronouncement establishes a unique maxim that can be used to determine the punishment to be awarded for a crime of a *t'azĩr* nature and who determines such punishment.

In the same book, Abu Yusuf also addresses the statement that establishes the legitimate authority of leaders over their subjects. He says: "*laysa lil Imam an yakhruj shayan min yad ahadin illā bi haqqin thābit ma'arūf*" (it is not the right of the Imam (leader) to take away someone's property without an established and well-known right).[151] This statement has been refined to conform with the conventional norm of coding maxims, thus: "*lā yunza 'shayun min yadi ahadin illā bi haqq thaībit ma 'arūf*" (nothing should be stripped from someone without legal right). [152] The latter is more general than the former as it includes guardians, legal representatives, judges and leaders.

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[148] al-Bukhãrĩ, with explanation by al-Karmãnĩ in chapter on condition of dowry in the contract of marriage, vol. 19, p. 111.
[149] Abdu al-Razãq, *op. cit.* vol. 8, p. 277.
[150] Ya'qub Ibn Ibrãhim Abu Yusũf, *Kitab al-Kharãj*,(6th edn. Cairo: al-Matbah al-Salafiyyah wa Maktabatuha 1397 A.H.) p. 180.
[151] *Ibid.* p. 71.
[152] al-Zarqã M., *op. cit.* 2, p. 982.

Another work that has contributed to the development of Islamic legal maxims is *Kitāb al 'Aṣl*, written by Muhammad Ibn al-Hasan ash-Shaybāni (d. 189 AH). In this book, al-Shaybāni made many statements that later formed the basis of legal maxims in Islamic jurisprudence. He says, for example: "*lā yujma' al-ajr wa al-ḍamān*" (the wage and responsibility cannot be combined). [153] This statement has formed a maxim in the *Majallah,* but with little rearrangement.[154] It reads thus: "*al-ajr wa al-ḍamān lā yajtami'ān*" (the wage and responsibility cannot come toghter). The books of Imam Shāfi', (d. 204 AH) al-*Risalah* and *al-ummu,* are also recognized as sources for the formulation of legal maxims. Among many of Imam Shāfi'i's statements are: "*al-rukhaṣ lā yata'addā mawāḍi'ihā*" (facilities should not be taken beyond their premises);[155] and "*lā yunsab ilā sākit qawlu qā'il walā 'amal 'āmil, innamā yunsab ilā kullin qawlihi wa 'amalihi*" (no statement or action should be imputed to someone who is silent , but a statement and action should be imputed to the one who made the statement or did the action).[156] There remain many other examples of maxims that could be extracted from numerous books written during this stage, but the examples given here should suffice. [157]

The extent of the development of *al-qawā'id al-fiqhiyyah* at its primitive stage could be summarized as follows:

- It is observed that the name *qawā'id* or *qā'idah* was not specifically mentioned in the expressions of the Prophet, or in those of the companions and scholars of this period.
- The Islamic legal maxims were scattered in various works of the early Islamic scholars and there was no single separate book basically on Islamic maxims.
- The majority of maxims were memorized by heart and used when needed.
- Some expressions of maxims are lengthy and do not conform to the general principles of codification of maxims.

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[153] Muhammad Ibn al-Hasan Al-Shaybānī, *Kitāb al-Asl*, ed. Abu al-Wafa' al-Afghani, (India: Matbah Dar al-Ma'arif al-'Uthmaniyyah n.d.) vol. 3, p. 45
[154] See *Majallah,* Article 86.
[155] Muhammad Bn Idris Al-Shāf'i, *Kitāb al-Umm*, (Beirut: Dar al-Ma'rifah 1381 A.H.) vol. 3, p. 246.
[156] *Ibid.*
[157] For the comprehensive notes, see al-Nadwī, *op. cit.* pp. 90-132.

1.2.2 The Florescence Stage

As explained in the previous section, an independent book on the wording of legal maxims was never written in the first stage of the development of *al-qawā'id al-fiqhiyyah*. Part of the reason for this was the lack of necessity, since there was no need for the formulation of a school of *fiqh* during the period of the Prophet and the companions. It was also the case that during the time of the emerging schools, those scholars were extremely well endowed with knowledge and their *ijtihād* was constructed on sound sources. There was therefore no need for *taqlīd* (imitation) during this period.

Al-Qawā'id al-Fīqhiyyah began to gain popularity in the middle of the fourth century of *Hijrah* and beyond when it became recognized as a separate subject from *uṣūl al-fiqh*. The reason for this advancement was that when the idea of imitation (*al-taqlīd*) emerged in the fourth century of *Hijrah*, the spirit of *ijtihād* (independent reason) was on the brink of extinction.[158] Some Islamic jurists then became concerned as to how they should harmonize the various issues that were discussed in a number of books that shared similar views on the subject. They were also concerned with the clarification of some issues concerning differences in judgement that these books expressed.[159]

Without prejudice, there is an agreement among contemporary Islamic scholars that the early generation of Hanafite jurists had precedence in the field of *al-qawā'id al-fiqhiyyah.*[160] One of the first visible works on the legal maxims is *uṣūl al-Karkhī,* written by a Hanafite scholar, Ibn al-Hasan al-Karkhī (d. 340 AH /951AD).[161] It is claimed apocryphally, however, that the work of al-Karkhi was an additional effort in the collection of Abu Tahir al-Dabbās, who lived between the 3rd and 4th century AH. It is reported that al-Dabbās, one of the Hanafite scholars and a contemporary of al-Karkhī', compiled seventeen legal maxims, including the five major maxims from the Hanafite school of law. Later, al-Karkhi expanded them to thirty-nine and put them in

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[158] This is the prevailing view, at least in a general sense. However, there were some Islamic scholars who maintained the status of *Ijtihād* in that period, such as Abu Ja'far, Muhammad Ibn Jarīr al-Tabarī (d. 310) al-Tahāwī (d. 321), and a host of others. See al-Nadwī *op. cit.* p. 133 note 1.
[159] al-Burnū, al-*Wajīz* , *op. cit.* p. 59, al-Nadwī, *op. cit.* p. 133.
[160] al-Nadwī, *ibid.*, p. 135.
[161] *Ibid.* p. 136, Khaleel Muhammad , *The Islamic Law Maxims, op. cit.* p. 196.

the form of a book. However, as there is no real evidence on the precedence of al-Dabbās over al-Karkhĩ, Abu al-Hasan al-Karkhĩ is assumed to be the first person to write an independent book on the Islamic legal maxims.[162]

Having said that, it is worth mentioning that the contributions of jurists from other schools to this field during this period are of immesurable significance. One of the Malikite scholars, Muhammad Ibn al-Harith al-Khushni (d. 361 AH), wrote a valuable book entitled *uṣūl al-futyāh*, in which he discussed many maxims of *fiqh*.[163] In the fifth century, Abu Zaid al-Dabūsi (d. 430 AH) developed the work of al-Karkhĩ in his book *ta'sīs al-naẓar*. One important point to note about the work of this century is that the term *al-qawā'id* was not used. Instead, the term *al- aṣl* or *al-uṣūl* was used as shown in a phrase of *ta'sīs al-naẓar:* "*al-'aṣl 'indā Abī Hanīfah*" (the principle with Abu Hanifah is ....). [164]

From the seventh to the ninth century of *Hijrah*, an incredible number of works emerged on Islamic legal maxims. Unfortunately, these cannot be enumerated here due to the constraints on space. Among these were works by Al-Sahlaki (d. 613AH) and Ibn Abdul al-Salām Izz Dĩn (d. 660 AH), both from Shafi'ite's school. The book of al-Sahlaki is solely on Shafi'ites school, while that of Izz Dĩn Abdul Salām is a general work on Islamic jurisprudence.[165] Another author was al-Bakri al-Qafsi (d. 680 AH), who wrote a book on Islamic legal maxims from the Malikite's viewpoint.[166]

Moreover, in the eighth to tenth centuries, there appeared many books with different titles from notable scholars of various schools. Among the notable Islamic scholars who contributed to the development of *al-qawā'id al-fiqhiyyah* in that period were Ibn al-Wakĩl,(d. 716 AH), al-Maqarrĩ al-Mālikĩ, (d. 758 AH), al-'Alāĩ al-Shāfi'ĩ (d. 761 AH), Tāj Dĩn al-Subkĩ (d. 771 AH), al-Isnawĩ (d. 772 AH), al-Zarkashĩ (d. 794 AH), Ibn Rajab al-Hanbalĩ (d. 795 AH), al-Ghazzĩ (d. 799 AH), Ibn al-Mulaqqin (d. 804

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[162] al-Suyũţĩ, *op. cit.* p. 7, Ibn Nujaym, *op. cit.* pp. 10-11.
[163] al-Nadwĩ, *op. cit.* p. 136.
[164] Ubaydullah Bn Umar Abu Zayd Al-Dabũsĩ, *Ta'sĩs al-Naẓar* (Cairo: Matba'ah al-Imam n.d.) p. 21.
[165] al-Sahlakĩ named his book *al-Qawã'id fi Furũ' al-Shãfi'I* while Izz al-Din named his book *Qawã'id al-Ahkãm fi masãlih al-Anãm.*
[166] al-Nadwĩ, *op. cit.* p. 138.

AH), al-Zubayrī (d. 808 AH), al-Maqdisī (d. 815 AH), al-Hisnī (d. 829 AH), al-Suyūtī (d. 910 AH), al-Tujībī al-Mālikī (d. 912 AH), and Ibn Nujaym al-Hanafī (d. 970 AH).[167]

It is worth noting that there were many other famous scholars who did not write specific books on the subject, but contributed to its development. Many expressions relating to *al-qawā'id al-fiqhiyyah* are found in the works of Islamic jurists such as al-Qarrafī (d. 684 AH), Ibn Taymiyyah (d. 728 AH), and Ibn al-Qayyim al-Jawzī (d. 751 AH). Al-Qarrāfī, in one of his discussions on cleanliness, stated: "*al-aṣl allā yubnā al-ahkām illā 'alā al-'ilm...*" (the principle is that rules should only be based on real knowledge.[168] This expression formed the maxim of 'certainty' and gave it preference over 'doubt'. Ibn Taymiyyah used to explore maxims in support of his arguments. On one occasion he stated: "*al-ḥukm idhā thabata bi 'illah zāla bi zawālihā*" (a rule that is established by virtue of '*Illah* (cause) shall expire when the cause expires).[169] Ibn al-Qayyim also said: "*min qawā'id al-shar'i al-kulliyyah :annahu lā wājib ma' al-'ajz walā ḥaram ma' ḍarūrah*" (among the general legal maxims (of Islamic Law is that) there is no obligation in the face of incapability and there is no prohibition in the face of necessity).[170] This is the maxim he used to explain the situation where a man could not find someone to stand beside him at the back of the Imam and could not penetrate into the formed and completed line. Ibn al-Qayyim thus asserted that such a man's prayer was valid. This lengthy expression establishes, indeed, the validity of action in the face of necessity.

Some of the features of *al-qawā'id al-fiqhiyyah* during the second stage of its development are as follows:

- The term *al-qawā'id* was prevalent in most of the titles, as in *qawā'id al-'Anām* by Izzu Dīn, *kitāb al-qawā'id* by al-Maqqarī, *al-manthūr fi al- qawā'id* by al-Zarkashi and *al-qawā'id* by Ibn Rajab.

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[167] The names of those contributors are briefly and chronologically mentioned because of their less significant to this project

[168] Ahmad Ibn Idris al-Qarrafi, *al-Dakhirah,* ed. Muhammad Haji, Dar al-Gharb,(Beirut: 1994) vol. 1, pp. 212-213.

[169] Ahmad Bn Abdul al-Haleem, Ibn Taymiyyah al-Harrani, *Mujmū' al-Fatāwā,* (Riyadh: Mitbaa' al-Riyadh 1381 A.H.) vol. 21, pp. 312-313.

[170] Muhammad Bn. Abi Bakr, Ibn al-Qayyim al-Jawzī, *'I'lām al-Muwaqq'īn an Rabb al-'Ālāmīn,* ed. Muhammad Muhiddiin Abdul al-Hameed (Misra: Matbah al-Sa'adah 1955/1374) vol. 2, p. 48.

- There were other names given to *al-qawā'id* such as *al-ashbāh wa al-naẓā'ir* (the similitude and resemblance) as seen in the title of *al-ashbāh wa al-naẓā'ir* by al-Subkī, al-Isnawī, al-Suyūtī and Ibn Nujaym.
- Some scholars of this period were concerned with writing legal maxims on the opinion of their schools, without considering other schools' opinions, as in *Ïḍāḥ al-masālik 'ilā qawā*'id *al-imām Mālik* by al-Winsharīsī (d. 914 AH) and *al-majmū' al-mudhhab fi qawā'id al-madhhab* by al-'Alā'ī (d. 761 AH)
- It has been observed that many of the works of this stage were either repetitions of the works of the first stage, or expansions or interpretations of them, as in *al-qawā'id* by Ibn al-Mulaqqin, and *al-ashbā'* by Ibn Nujaym. Both were extracted from the works of Ibn Subki's and others.[171] Al-Suyūtī extracted some maxims from al-'Alāī, al-Subki and al-Zarkashi to form his book *al-ashbā'*, and al-Tujībī (d. 912 AH) compiled his book on *al-qawā'id al-fiqhiyyah* from various books of Malikite. [172]
- At the beginning of this stage some of the *qawā'id* expressions were rendered in excessively long sentences. For example, in the *al-uṣūl* by al-Karikh there is a *qā'idah* stated thus: "*al-aṣl anna al-mar' yu 'āmil fī ḥaqq nafsihi kamā aqarr bihi, walā yuṣaddiq 'alā ibṭāl ḥaqq al-ghayr aw ilzām al-ghayr ḥaqqan*" (the fundamental principle is that a man will be held responsible for what he confessed to in a matter related to his right and he shall not be believed (in his confession) on the nullification of the right of another person or on the imposition of a right on another person).[173] However, this maxim was later reconstructed in a shorter form, thus: "*al-iqrar ḥujjah qāṣirah*" (confession 'of guilt' is a binding proof only on the confessor).[174]
- In many cases *al-qawā'id al-fiqhiyyah* were often mixed up with *al-qawā'id al-uṣūliyyah.*
- Scholars were given the right of expression and codification to reframe or rearrange what they saw as inconsistent in the earlier works on the subject.

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[171] al-Nadwī, *op. cit.* p. 139.
[172] *Ibid.* p. 140.
[173] Ubaydllah Bn al-Husayn Al-Karkhī, *Usūl al-Karkhī,with Tasis al-Nazar (*Cairo Matba al-Imam n.d.) p. 112.
[174] *Majallah* Article 78.

1.2.3 Stage of Maturity

The last stage of the development of *al-qawā'id al-fiqhiyyah* began from around the 13th century AH/18th century AD. One of the distinctive features of this stage is the establishment of maxims as a separate science in Islamic jurisprudence, while at the same time the formula for their codification was standardized. Just as Hanafites were instrumental in the development of *al-qawā'id*, they were also the pioneers of this last stage. The first treatises written on *al-qawā'id al-fiqhiyyah* were both by Hanafite scholars: Muhammad al-Khadimi (d. 1762 AD) and Mustafa al-Kuzilhisari (d.1800 AD). The former wrote *majāmi' al-ḥaqā'q* in which 154 maxims were appended, and the latter ran commentaries on the former's book, entitled: *manāfi' al-daqā'q fi sharh majām' al-ḫaqā'q*. Sulayman al-Qarqaghājī (d.1870 AD) and Mustafa Hashim also followed suit in writing commentaries on *majām'*. Respective works, believed to have been published in 1822 and 1878, were not found in circulation.[175] The work of Mahmūd Ibn Hamza (d. 1304 AH/1887AD), the then mufti of Damascus and a Hanafite scholar, is also notable. The title of his work is *al-farā'id al-bahiyyah fi al-qawā'id wa al-fawāi'd al-fiqhiyyah.*[176]

The most popular work in the 19th century on Islamic legal maxims was the *al-Majallah al-Aḥakạm al-'Adliyyah.* The *Majallah* was presented by a seven-man committee named "the *Majallah* Commission" during the era of Sultan al-Ghazi Abdul Azeez of Ottoman Empire.[177] This Commission was chaired by the then Minister of Justice, Ahmed Cevedah (d.1895 AD).[178] The aim of the Commission was to codify civil rules consistent with Islamic Jurisprudence in accordance with the Hanafite School. The book was named under the royal decree as *Ahkame Adliyah* - The Corpus of Juridical Rules. The *Majallah* Commission explained the reason behind the book in these words:

> Lawyers who have studied the fiqh have converted the propositions of the fiqh into a number of universal rules. Each of these, while embracing and containing many propositions, is taken as evidence for the proof of these propositions being from the admitted truths in the sacred law

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[175] al-Burnũ, *al-Wajĩz, op. cit.* p. 104.
[176] al-Amĩri, R. S., *Legal Maxims in Islamic Jurisprudence: Their History, Characteriristics and Significant.* (Birmingham UK.: Birmingham University, P.hD. Thesis 2003), p. 158.
[177] al-Nadwi, *al-Qawā'id al-Fiqhiyyah, op. cit.* pp.178-179.
[178] Mahmassani, *Falsafat al-Tashri' fi al-Islami (philosophy of Islamic Jurisprudence).* Trans. Farhat J. Ziadeh, (Leiden E.J. Brill: 1961), pp. 42-43.

> books. And, in the first place, the understanding of these rules gives familiarity with the propositions in mind. Therefore, ninety-nine rules of fiqh have been collected, and brought forward to form the second part of the preface. [179]

Despite its shortcomings, the *Majallah* has filled many gaps in the field of Islamic jurisprudence and it has been a very useful resource book in Islamic jurisprudence. However, it is observed that the book is rather one-sided, as the maxims and the opinions illustrated in it are from the Hanafite point of view only. It is also observed that the majority of the maxims stated in the book are related only to the field of transaction (*al-mu'āmalāt*), this being only one field in Islamic jurisprudence.[180]

After the *Majallah*, many commentaries emerged from both Muslim and non-Muslim jurists. Slaim Baz (d.1920 AD), a Christian Lawyer from Lebanon, wrote a commentary on the *Majallah* entitled *Shar al-Majallah*. Another commentary, written in Turkish by Ali Haydar and translated into Arabic by Fahmi al-Husaini, also emerged. However, the most popular and widespread commentary is the work of Ahmed al-Zarqā (d. 1938 AD). al-Zarqa's work has gained credibility through its well-arranged and extensive explanations, and contains additional maxims to those included in the *Majallah*.[181] al-Zarqa's son, Mustafa al-Zarqa (d. 1999 AD), also followed suit. In his work, he observed that the *Majallah's* maxims are not consistent and that many of the maxims dealing with one topic are scattered throughout the book. He therefore rearranged these maxims by dividing all the maxims into two groups - basic universal maxims, of which there are forty in number, and subsidiary legal maxims, of which there are fifty-nine.[182]

However, due to the shortcomings of the *Majallah* mentioned above, and the fact that the majority of the books written on legal maxims from their earliest conception failed to adopt an academic approach, there exist vacuums that need to be filled. Al-Burnu was one of the first contemporary Islamic scholars to pay attention to the study of Islamic legal maxims. When the *Sharī'ah* Faculty in Imām Ibn Sa'ūd University first introduced the subject of *al-qawā'id al-fiqhiyyah* into its curriculum, al-Burnu was the

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[179] *Majallah* Article 1.
[180] Khaleel Muhammad, *op. cit.* p. 197, al-Nadwī, *op. cit.* p. 156.
[181] See his book *Sharh al-Qawā'id* p. 102, 267.
[182] al-Zarqā, M., *op. cit.* vol. 2, pp. 977-979.

one assigned to design a teaching curriculum for it. However, he was unsuccessful in his search for a suitable publication to be used as an academic handbook. This prompted him to write his book entitled *al-wajĩz fi ĩḍāḥ al-qawā'id al-fiqhiyyah al-kulliyyah* (a concise book on the explanation of the basic general Islamic legal maxims).[183] The majority of the maxims included in his book are from the *Majallah*, while others are from various books written on the subject that emanated from different *madhāhib* (schools). He divided legal maxims into two units.[184]

Another authority in the field of legal maxims is Ali al-Nadwi, who has published two books on the subject[185]. His first published book was *al-qawā'id al'-fiqhiyyyah, mafhūmihā, nash'atuah, taṭawwurhā dirāsatu mu'allafātuhā adillatuhā muhimmatuhā* wa *taṭbīqātuha* Islamic legal maxims, their concept, emergence, development, and study of their treaties, their evidence, importance and application).[186] The second book is *mawsū'ah al-qawā'd wa ḍawābiṭ al-fiqhiyyah al-ḥākimah li al-mu'āmalāt al-māliyyah fi al-fiqh al-Islamĩ* (an encyclopedia of Islamic legal maxims and *dawabit,* governing monetary transactions in Islamic Jurisprudence). In this, he collected 3107 legal maxims on transactions. In the first book, al-Nadwĩ focuses on the historical development of *al-qawā'id al-fiqhiyyah* and his approach to the subject is more or less a theoretical one.[187] Another substantial work on *al-qawā'id al-fiqhiyyah* is the ongoing project initiated in 1995 by the Islamic Fiqh Academy, a subsidiary of the Organization of Islamic Conference (OIC).[188] The aim of the project is to collect legal maxims from various books of

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[183] al-Burnũ, *al-Wajĩz, op. cit.* pp. 7-9. The approach of the author in this book is unique and unprecedented. In it, a maxim is mentioned and followed by its evidence, its importance and its application. Occasionally, the anomaly of the maxim is mentioned and the reason for that is given.

[184] In this book al-Burnũ divides Islamic legal maxims into two units. The first unit consists of six maxims. The author describes the six maxims as general and grand legal maxims, including the five agreed upon among all scholars. The additional one is the maxim ' A word should be construed as having some meaning rather than disregarded' (Article 60 of *Majallah*). However, inclusion of this sixth maxim to the general and grand maxims has been proved by the author. The second unit called 'General legal maxims lesser than the former', consists of twenty five maxims.

[185] As far as I know, though other books from the author might have been published but not in circulation.

[186] This book was originally a dissertation presented by the author for his Master's degree at Ummu al-Qurã university, Makkah, Saudi Arabia.

[187] For the first book, see the author's introduction and his objectives pp. 25-34. The second book is published by the same author. In it, it is clear that the author's focus is on Islamic business transactions. This, and al-Sawwãṭ's work on Islamic family aspects of Legal Maxims, prompted me to look at the criminal aspects of the subject.

[188] This project is entitled '*al-Ma'lamah al-Qawã'id al-Fiqhiyyah.* See Amĩri *op. cit.* pp.163-164.

Islamic jurisprudence. Other dimension emerged in contemporary writing on Islamic legal maxims as detailed in the last chapter.[189]

Some of the distinctive features of this third stage in the development of *al-qawā'id al-fiqhiyyah* as a subject can be summarized as follows: (1) Most of the expressions used in the previous stages are re-arranged and reconstructed. (2) The *qawā'id* can be easily memorized because of their short, precise expressions. (3) Some scholars have chosen to research on particular maxims in a practical manner, as opposed to the prevailing norm.

1.3 The sources of *al-Qawā'id al-Fiqhiyyah*

To justify any idea in Islamic jurisprudence, the source of that idea must be traced and its authenticity confirmed. The same applies to *al-qawā'id al-fiqhiyyah* being an important aspect of Islamic Law. By source of *al-qawā'id*, it is meant the fount from where the *qawā'id* are formulated. In the writing of medieval authors, no special attention is paid to the narration of the sources of any legal maxim. This is because at that time the subject had not been well established. Rather, the system adopted was to name a maxim and to state its root from the Qur'an or the *Sunnah*. Sometimes, maxims were attributed to an earlier author without stating the source from where he formulated or derived the *qawā'id*. [190]

However, this approach prompted contemporary researchers to adopt a different approach in studying the sources of legal maxims. There are two distinctive ways by which contemporary Islamic scholars deal with this issue. The first is to follow the medieval method, and the second is to provide a separate section for a discussion of the sources of legal maxims and their derivation.[191] The approach of Islamic writers to *al-qawā'id al-fiqhiyyah* in the latter method is not unique. For example, the approach of Rasheed al-Amiri differs from that of al-Sawwat. From the former's perspective, the sources of *al-qawā'id al-fiqhiyyah* are studied from the status of their author.

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[189] See pages 19-21.
[190] Cf. Suyūṭī's and Ibn Nujaym's approaches on the sources of Islamic legal maxims in their al-*Ashbāh wa Nazā'ir. op. cit.*
[191] Such as Mustafa al-Zarqā *al-Madhkal op. cit.* vol. 2 p. 969 and al-Burnū see *al-Wajīz op.c it.* .

Thus, Rasheed divides the sources of *al-qawā'id al-fiqhiyyah* into two: namely, the sources of *al-qawā'id al-fiqhiyyah* according to independent *mujtahid;* and the sources *of al-qawā'id al-fiqhiyyah* according to restricted *mujtahid.* [192] The latter asserts that the sources of *al-qawā'id al-fiqhiyyah* are six in number namely; the *naṣṣ* (text of the Holy Qur'an and the *Sunnah* of the Prophet), *ijmā'* (consensus), statements of the companions of the Prophet, statements of the *tābi'ī* (the generation after the generation of the companions), the statement of the *mujtahid* and the extrapolation of the branch of legal issues that have the same legal consequence.[193]

However, generally, there are four main sources from which *al-qawā'id al-fiqhiyyah* can be derived, namely: the *Qur'an*, the *Hadith, al-Ijmā'* and the statements of *Mujtahidīn.*[194]

1.3.1 The Holy Qur'an

The Holy Qur'an is the most highly rated source of all the sources from which the *qawā'id* are derived. This is because it is the word of God. The maxims that are deduced from the Qur'an are well established, irrefutable and all encompassing. There are two ways in which legal maxims could be derived from the Holy Qur'an- direct and indirect. Legal maxims can be derived from the Qur'an directly without any extra effort. In such cases a layman can easily understand the obvious and direct correlation between the legal maxim and the Qur'anic text. Examples of this are: the Qur'anic text "*wa aḥalla Allah al-bay'a wa ḥarrama al-ribā*" (And God has permitted trade and forbidden usury) (Qur'an 2:275). This verse, which became a universal maxim guiding the theory of *mu'āmalāt* (transactions), was revealed so that disputing unbelievers would realize the legal position of what is lawful and what is unlawful in trade. It is made to refute their claim that "Trade and Usury are alike."[195] As a principle, the verse has prohibited all unlawful transactions. It has made *ribā* the main

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[192] al-Sawwāṭ, *op. cit.* vol. 1 pp.114-121, cf, Rashed S. al-Amiri *op. cit.* pp. 32-45.
[193] al-Sawwāṭ, *ibid.* pp. 114-120.
[194] It is possible to adopt another way of classifying the sources of Islamic legal maxims since there is no dogma in terminology.
[195] Qur'an 2, verse 275.

reason for the prohibition by looking at the *maqāṣid al-Sharī'ah* (the purpose of the Islamic law) as a yardstick to establish that.[196]

Another Qur'anic verse that explicitly serves as an Islamic maxim is: "*khudh al-'afw wa'mur bi al-'urf wa'arḍ 'an al-jāhiliyyah*" (Hold for forgiveness, command what is Right and turn away from the foolish) (Qur'an 7:199). al-Qurtubī deduces three maxims from this verse. He says:

> This verse of three sentences consists of Islamic principles of command and forbidden viz *khudh al-'afw* "hold forgiveness" is a maxim for having forgiveness. *wa'mur bi al-'urf* "Command what is right" ...Muslims are to command and enjoin what is right, no matter the condition. *wa'arḍ 'an al-jāhiliyyah* "Turn away from the foolish." No attention should be paid to ignorance.[197]

Another Qur'anic text that stands as a general legal maxim is the saying of God: "... *mā 'alā al-muḥsinīn min sabīl*" (...No ground (of complaint) can there be against the good-doers....) (Qur'an 9:91). Ibn al-'Arabī comments on this part of the verse by saying: "This is an indisputable general maxim of *Sharī'ah* which declares that neither complaint nor punishment should be inflicted on a good-doer."[198]

However, apart from forming maxims directly from the wording of the Qur'anic text, Islamic legal maxims can also be deduced indirectly from the Qur'an. This can be achieved by considering the effective cause of the *ḥukm* (the rule) with which the texts deal. This method is deemed to be among the ways of using *ijtihād* for deducing legal maxims. Using *ijtihād* to deduce legal maxims from the Holy Qur'an is very common but one needs to be conversant with the context of the Qur'anic text. Therefore, before one can deduce legal maxims indirectly from the texts, one must have reached the level of *ijtihād*. An example of how legal maxims are deduced from the Qur'an is given in the next section.

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[196] Kamali, *The legal maxims of Islamic law, op. cit.* p. 3.
[197] Muhammad bn. Ahmad al-Ansari, Al-Qurṭubī, *al-jām' li al-'Ahkām al-Qurān,*(2nd edn. Cairo Matba'ah Dar al-Kutub al-Misriyyah 1937) vol. 7 p. 344.
[198] Muhammad bn. Abdullah Ibn al-'Arabī, *'Ahkām al-Qurān ed.* Muhammad 'Ataa, (Lebanon: Dar al-Fikr: n.d.) vol. 2, p. 249.

1.3.2 The *Hadīth*

The *hadith*, (the sayings of the Prophet), is the second source of Islamic legal maxims. The Prophet, as discussed previously, was endowed with the ability to dispense expressions that are concise, but conveying rich and encompassing meanings. To some Muslim jurists, some of those expressions are regarded as *qawā'id.* Deriving legal maxims from the *hadith* of the Prophet can also be secured in two forms. There are a large number of prophetic expressions that stand as legal maxims, with or without any paraphrasing. Some examples of direct maxims from the *hadith* of the Prophet are: "*kull muskirin ḥarām"* (Any intoxicant is forbidden).[199] This maxim is a reiteration of the *hadith* which states that all substances that inebriate are regarded as *ḥarām*, be they from grapes, dates or from other substances, since the sole effective cause of prohibition in this *hadith* is inebriety. From that, it is also analogically accepted that the consumption of cocaine and other similar substances is forbidden.[200]

In addition, the *hadith "lā ḍarar walā ḍirār*" (Do not harm others and do not exchange harm)[201] is one of the major maxims in Islamic jurisprudence. The Prophet, according to one interpretation, said: "Do not harm anybody and do not reciprocate harm for harm".[202] Another *hadith* that is considered as a legal maxim is the saying of the Prophet: "*laysa li 'irq ẓālim ḥaqq*" (No right for unjust root). [203] This *hadith* has been used in detailing with similar issues of its occurrence in Islamic jurisprudence. Al-Zarqa Jr. (d. 1999 AD) remarks that this *hadith* is a fundamental principle that establishes the nullification of the right of any aggressor, not only in the particular case that brought the *hadith,* but also in any case that involves usurpation.[204]

As regards the indirect way of deriving legal maxims from the Qur'an and the Hadith, the legal maxim: "*al-mashaqqah tajlib al-taysīr"*(Hardship begets facility)[205] is an apt example. This aforementioned Islamic legal maxim is coded from intertextualizing the

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[199] Ibn Majah, *Sunan Ibn Majah*, vol. 4 p. 68, Hadith No. 3388.
[200] al-Burnũ, *al-Wajĩz op. cit* p. 32.
[201] Ibn Mãjah, *op. cit.* vol. 3 p. 107, Hadith No. 2340.
[202] al-Burnũ, *al-Wajĩz, op. cit.* p. 32.
[203] Abũ Dãwud, *Sunan Abi Dãwud,* vol. 4 p. 24, Hadith No. 3594.
[204] al-Zarqã, *Al-Madkhal, op. cit.* vol. 2 p. 1090.
[205] Muhammad bn. Bahadir bn. Abdullah al-Zarkashĩ, *al-Manthur fi al-Qawaid,* ed. Taysir F. A. Muhamuud (2nd edn. Kuwait: Ministry of Endowment and Islamic affairs, 1405), vol. 3 p. 169.

concepts of various Qur'anic verses and traditions of the Prophet. The maxim is said to have been inferred from the following texts: the verses in which God says: "...*yurīd Allah bikum al-yusr walā yurīd bikum al-'usr*" (...God intends for you ease, and He does not want to make things difficult for you...) (Qur'an 2: 185); "*lā yukallif Allah nafsan illā wus'ahā*" (God burdens not a person beyond his scope...) (Qur'an 2:286); and "*yurīd Allah an yukhaffīf 'ankum*"(God wishes to lighten the burden for you ...) (Qur'an 4:28); and also from the *hadith* of the Prophet: "*yassirū walā tu'assirū wabashshirū walā tunaffirū*" (Make things easy for people, and do not make things difficult for them, and give them good tidings and do not make them run away).[206] From all of these quotations, their leading inference is that the tenet of Islamic law is to give facility in the face of hardship or difficulty.

By and large, the quantum of legal maxims being derived directly or indirectly from the two sources of Islamic law cannot be overstressed. Ibn al-Qayyim reflects on the importance of the texts in deriving Islamic legal maxims and remarks as follows:

> If the followers of the *madhāhib* (different schools of thought) have the ability to regulate the opinions of their *madhāhab* by using some general sayings that encompass what is lawful and what is not, in spite of their lack of eloquence compared to God and His messenger, then God and His messenger are more capable of achieving that. This is because the Prophet pronounces a comprehensive statement that is considered as a general principle and a universal proposition that encompasses endless detail. [207]

1.3.3 *Ijmā'* (Consensus)

The maxim "*al-ijtihād lā yunqaḍ bi al-ijtihād*" (A ruling established by the means of *ijtihād* is not reversible by another *ijtihād*)[208] is said to have been attributed to a statement of the Caliph 'Umar ibn al-Khattāb and is also supported by *al-ijmā'* (the consensus) of *Ṣaḥābah* (the companions of the Prophet).[209] The maxim that emerged from this type of consensus is very rare. However, due to the scope of the discussion in this area, the analysis and the application of the above maxim will be dealt with in due course.

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[206] al-Bukhārī, S*ahīh al-Bukhārī,* Hadith No. 69, Muslim, *Sahih Muslim,* Hadith No. 1732.
[207] Ibn al-Qayyim al-Jawzī, *'I'lām al-Muwaqqīn, op.cit.* vol. 1, p. 251.
[208] al-Suyūṭī, *op. cit.* p. 201, Ibn Nujaym, *al-Ashbāh wa al-Nazā'ir*, p. 115, *Majallah* Article 16.
[209] Muhammad Hashim Kamali, *Qawaid al-Fiqh:The legal Maxims of Islamic law op. cit.* p. 4.

1.3.4 Expressions of *Mujtahidūn* (Islamic Scholars)

There are a certain number of maxims that emerged from *mujtahidūn.*[210] This is as a result of thorough investigation into details of the sources of Islamic jurisprudence. The expressions that form Islamic maxims could be from one of the *Sahābah*, or from the *Tābi'* (the generation after the Companions of the Prophet), or from the *Fuqahā'* of *Madhāhib* (the jurists of Islamic schools of jurisprudence). One of the most famous maxims abridged from leading Islamic scholars' expressions is: "*lā yunsab lisākin kawlun....*" (No statement is imputed to someone who keeps silent...).[211] This maxim is formulated from an expression by Imam Shāfi'. [212] Another maxim, "*al-'ādah muḥakkam*" (Custom has legal authority)[213] is reported to have been coded from the saying of 'Ubaydllah al-Karkhĩ (d. 340 AH/951 AD), as follows : "*al-aṣl ann al-su'āl yamḍī 'alā mā ta'ārafa kull qawm fī makānihim*" (The principle is that a question should be based on how people understand it in their domain).[214]

1.4 Categories of *al-Qawā'id al-Fiqhiyyah*

During the early stage of the development of *al-qawā'id al-Fiqhiyyah*, the notion of categorizing the *qawā'id* did not occur. Later, it appears in some works, especially of the late Islamic writers. From that, *al-qawā'id al-fiqhiyyah* can now be classified into different categories. In general, legal maxims can be viewed in three ways: (1) The scope of the maxims and the extent of their applications to branches and issues in Islamic jurisprudence (2) The stand of Islamic scholars on the content of the maxims in terms of whether there is agreement upon them or not. (3) Whether a maxim is an independent one or is a subsidiary of the general one.[215] The first classification is more relevant in this thesis as the two other classifications fall under it; and because

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[210] *al-Mujtahid* is one who is capable of giving Islamic verdicts from his his personal opinion. He must have attained that status of being capable to do so according to the rules and regulations laid down with regard to the status.
[211] al-Zarkashĩ, *al-Manthur fi al-Qawaid, op. cit.* vol. 2 p. 206, al-Suyũṭĩ, (b) *op. cit.* p. 260, *Majallah* Article 67.
[212] Muhammad Ibn. Idris Al-Shãfi', al-*Ummu*, (Beirut: Dar al-Ma'rifah 1393 A.H.) vol. 1, p. 275.
[213] *Majallah* Article 36.
[214] al-Bũrnũ, al-*Wajĩz, op. cit.* p. 84.
[215] See al-Burnũ, *Mawsũa' op. cit.* vol. 1, p. 32 and cf Muhammad Hashim's and Khaleel Muhammad's and al-Sawwat's approaches in this regard.

the discussion on the applications of the subject matter in relation to criminal cases is to be based on it.

1.4.1 In Terms of the Scope

The majority of Islamic scholars have divided *al-qawā'id* into three categories based on their scope: (1) Those maxims that are wider in scope and far more applicable to all branches of *fiqh.* These are called *al-qawā'id al-fiqhiyyah al-kulliyyah* (The basic general legal maxims). (2) The maxims that are general and universal in nature but are not applicable to all issues of Islamic jurisprudence. These maxims are called *al-qawā 'id al-fiqhiyyah al-kulliyyah al-mustaqillah* (Independent general legal maxims) and (3) the maxims that control a specific chapter of the *fiqh.* These can be called *al-ḍawābiṭ al-fiqhiyyah* (Controllers).[216]

1.4.1.1 *al-Qawā'id al-Fiqhiyyah al-Kulliyyah* (The Basic General Legal Maxims)

The basic general legal maxims are the maxims that can be described as comprehensive and stand as the pillars of Islamic jurisprudence. These maxims in their nature contain numerous sub-maxims.[217] Some of the distinctive features of this category are:[218]

i. It must be acceptable to all schools of jurisprudence.
ii. It must cover all or most of the scope of *fiqh.*
iii. It must have subsidiary maxims that are either to become conditions or restrictions for the grand one.
iv. It must be based on one of the three sources of Islamic law i. e. the *Qur'an*, *Sunnah*, and *Ijmā'*.

However, the numbers of these maxims are between five and seven. The early Islamic scholars unanimously agreed upon five, while the remaining two are stated in Suyuti's

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[216] The term *al-Dawãbiṭ* is used here to encompass those maxims that control peculiar themes in particular schools, as well as in different schools. It is stated that *dãbiṭ* is assumed to be a principle that controls similar issues in one school. However, in this thesis it is meant to be any maxim that controls peculiar themes or subjects in Islamic jurisprudence, regardless of which school adopts the maxim.
[217] These sub-maxims can be conditional clauses for the major or independent maxims, or exceptions, such as 'necessity should be proportional' *al-ḍarar tuqaddir bi qadarihā*, which stands as condition for the maxim 'hardship should be eliminated' *al-ḍarar yuzāl*, or 'necessity makes prohibited things permissible' *al-ḍarūrāt tubīḥ al-maḥẓūrāt.*
[218] al-Suyũṭī, *al-Ashbãh op. cit. p. 6.*

work, *al-ashbāh wa al-naẓāhir.* [219] The five generally agreed upon maxims are (1) *al-'umūr bi maqāṣidihā* (Actions are judged according to the intention). (2) *al-yaqīn lā yazūl bi al-shakk* (Certainty is not overruled by doubt). (3) *al-mashaqqah tajlib al-taysīr* (Hardship begets facility). (4) *al-ḍarar yuzāl* (Harm must be eliminated). (5) *al-'ādah muhakkamah* (Custom is a legal authority). [220] However, al-Burnu contends that the maxim which studies the effects of expression "*I'māl al-kalām awlā min ihmālih*" (A word should be construed as having some meaning, rather than disregarded)[221] should be classified among the basic general maxims.[222] This is because it has the same features like others and it will be very hard not to refer to it in the book of jurisprudence. In other words, it has comprehensive nature to elevate it to the status of basic general maxim. This research will consider the legal maxim and its sisters as one of the basic general maxim a*l-qawā'id al-fiqhiyyah* not only for the reasons given by al-Burnu, but because of other reasons *inter alia*:

- The legal maxim of effect of expression plays vital roles in Islamic criminal law.
- It gives clue on what to be given effect when there is ambiguity in expression.
- It also reflects the stand of Islamic law in giving custom of people consideration in their daily utterances.

1.4.1.2 a*l-Qawā'id al-Fiqhiyyah al-Mustaqillah* (Independent General Legal Maxims)

[219] *Ibid.* p. 83, al-Burnũ, *al-Wajĩz, op. cit* p. 27, Kamali, *op. cit.* p. 2.
[220] Cf. al-Suyũṭĩ, *al-Ashbãh op. cit.* pp. 88-196, Ibn Nujaym, *al-Ashbãh, op. cit.* pp. 140112, al-Nadwĩ, *al-Qawã'id al-Fiqhiyyah...op. cit.* p. 351. Except al-Burnũ who includes the maxim *'I'ãml al-Kalãm awlã min 'Ihãmlih*, to form a sixth, arguing that the maxim is generally and widely applicable to many subjects and issues in Islamic jurisprudence. See al-Burnũ, *al-wajĩz op. cit.* p. 314.
[221] al-Suyuti, *al-Ashbah* p. 128, Ibn Nujaym, *al-Ashbah* p. 130
[222] al-Burnu, *op. cit.* pp. 314-315

These are the independent maxims that do not belong to the above category.[223] The differences between them and those in the previous category are that they attract more exceptions than the exceptions accorded to the previous category; and that there is no common ground on their acceptability among the schools of *fiqh*. Some of the maxims under this category are:[224] *al-taṣarruf 'alā al-ra'iyyah manūṭ bi al-maṣlaḥah* (Governance should be of the public interest),[225] and *mā ḥaruma isti'māluhu ḥaruma ittikhādhuhu* (When its utility is forbidden, its possession is also forbidden). [226]

1.4.1.3 *Ḍawābiṭ al-Fiqhiyyah.* (Controllers or Topical Maxims)

The maxims that are classified under the *ḍawābiṭ* are maxims that are peculiar to certain topics of *fiqh*. For example, in the chapter of *ibādāt* (acts of worship), there are different topics subsumed under it. The work of *ḍābiṭ* in regard to those topics is to regulate the divergent opinions among Islamic scholars on the issue in question, within one school of Islamic jurisprudence. For example the maxim *al-'ibrah fī al-'uqūd li al-maqāṣid wa al-ma'ānī lā li al-alfāẓ wa al-mabānī* (The effect is given to intention and meaning, not to literalness and structure). This maxim is peculiar to the theme of contract which applies in Hanafite's school. This is the general opinion on the concept of *ḍawābiṭ*.[227] However, *ḍawābiṭ* are not only maxims controlling the rulings of one particular school.They also control particular themes which though attract discussion among the different schools but do not, with regard to authenticity, enjoy agreement among them. Examples are: *al-ḥudūd tudra' bi al-shubhāt* (*hudūd* punishments are averted in the face of doubt),[228] and *al-tazīr ilā al-imām biqadir al-jurm* (The discretionary punishment is left to the Imam, and to be decided according to the weight of the offence). [229] These two maxims can be better classified as *ḍawābiṭ*

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[223] They are not up to the grand general maxim but they are also widely applicable to many subjects and issues in Islamic Jurisprudence. See al-Barnũ, *al-Wajĩz op. cit.* pp. 330-409, al-Sawãṭ, *op. cit.* vol. 1 p. 109, al-Nadawĩ, *op. cit.* p. 351.
[224] al-Suyũṭĩ, *op. cit* pp. 95 and 103.
[225] Article 58 of the *Majjallah*, cf Al-Suyyũṭĩ, *op. cit.* p. 21
[226] al-Zarqã, M., *al-Madkhal al-Fiqh al-Amm op. cit.*.vol. 2, p. 235, al-Nadawĩ *op. cit.* p.64, al-Ahmad al- Zarqa,. *Sharh al-Qawā'id* al-*Fiqhiyyah* (2nd ed. Damascus: Dar al-Qalam 1989/1409) p. 55, al-*Majallah Article* 3.
[227] al-Sawwãṭ, *op. cit.* vol. 1 p. 110.
[228] al-Suyũṭĩ, *op. cit.* p. 236, Ibn Nujaym, *op. cit.* p. 142, al-Zarkashĩ, *al-Manthur, op. cit.* vol. 2. pp. 40 and 225.
[229] Abu Yusũf, Ya'qũb Ibn Ibrahĩm, *Kitãb al-Kharãj op. cit.* p. 180.

of punishment on the theme of criminal law, and yet they attract discussion from all schools of Islamic jurisprudence.

1.5. Importance and Roles of *al-Qawā'id al- Fiqhiyyah*

1.5.1. Importance of *al-Qawā'id al- Fiqhiyyah*

Life is comprehensive in nature. Therefore, there must be rules and principles to guide such comprehensiveness. Law is an essential tool in regulating human life. The importance of *al-qawā'id al- fiqhiyyah* cannot be overemphasized because of its connection with *Sharī'ah* and with the maxim that says: *al-far' lahu ḥukm al-'aṣl* (The branch shares the same rule as the origin). In Western Schools of law, maxims play a vital role in the process of judgment. The importance and the roles of legal maxims in Western law are observed thus:

> A general principle; a leading truth so called, *quia maxima est ejus dignitas et certissima auctoritas atque quod maxime omnibus probetur* – because its dignity is the greatest and its authority the most certain, and because it is universally approved by all.[230]

By contrast, there are other modern English jurists who have disagreed with this opinion. They hold the belief that those legal maxims "... are rather minims than maxims, for they give not a particularly great, but a particularly small, amount of information".[231] They (the Latin Maxims) 'are almost invariably misleading' and 'mostly bad abstract' in law. [232] The cause of this disagreement stems from the fact that most Western legal maxims are based on common sense - and common sense is subject to criticism and liable to objection.[233] More importantly, they do not have principal references. This is not to say that those maxims are not useful in the modern era. Indeed, because of the growth in law and its complexity, the usefulness of maxims is increasing and "they bring back the mind to first principles."[234] However, the value of Islamic legal maxims cannot be underestimated because the Islamic legal maxims directly and indirectly originated from the divine sources of the Qur'an and *Hadith*. It becomes *sine qua non* for any Islamic jurist and judge today to master a

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[230] Jowitt Early and Clifford Walsh, *Jowitt's Dictionary of English Law.* Vol. 2 p. 1164.
[231] *Ibid.* quoting Mr. Justice Stephen in History of Criminal Law, 94.
[232] *Ibid.*
[233] David M. Walker, *The Oxford Companion to Law,* p. 181.
[234] The Lawbook, Exchange Ltd. *Latin for Lawyers,* p.

certain level of *al-qawā'id* in order to be able to dispense Islamic verdicts and to pass accurate judgment. It is also essential to master and memorize large sections of the Qur'an and *Hadith*. The intensive attention of Islamic authors on this subject since the third century of *Hijrah* clearly emphasizes the importance attached to it. Moreover, the utterances of scholars on it show the significance accredited to the subject. Imam al-Qarrafi (d. 684 A.H) affirms thus:

> These maxims are very important in Islamic jurisprudence, great knowledge. By it, the value of a jurist is measured. Through it, the beauty of Fiqh is shown and known. With it, the methods of Fatwa are clearly understood. ...Whoever knows Fiqh with its maxims (*qawā'id*) shall be in no need of memorizing most of the subordinate parts "of Fiqh" because of their inclusion under the general maxims.[235]

1.5.2 Roles of *al-Qawā'id al- Fiqhiyyah* in Islamic Jurisprudence

From a broad study of the concepts of *al-qawā'id al-fiqhiyyah*, it is possible to highlight their roles in Islamic jurisprudence as follows:

- Islamic jurisprudence is a vast discipline with many branches, and *al-qawā'id al- fiqhiyyah* help to bind related cases and issues of these branches together through the use of single expressions that enable jurists to understand the rulings of *fiqh* with less difficulty. It is noted that during the development of *fiqh*, many of the Islamic jurists produced *fiqh* literatures in piecemeal form and in fragmented styles. This was because the majority of those writers produced their works independently, without the influence of any government or institution that could unify the style of their presentation. From such lack of monitoring, allied with many other factors that could be considered as reasons for the wide diversity of opinion in jurisprudence literature, *al-qawā'id al-fiqhiyyah* emerged to produce general guidelines that articulated the scattered theoretical abstracts among the various schools of Islamic jurisprudence.[236]

  Remarking on this important role of *al-qawā'id al- fiqhiyyah*, al-Zarqā Jr. (d. 1322/1999) observed that "were it not for the legal maxims, the rules would have remained dispersed without any ideational connection."[237] This role aids judges in comprehending the basic tenets of Islamic law on any contentious

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[235] Ahmad Al-Qarafī, *al-Furūq,* vol. 1 p. 3, al-Nadwī, *op. cit.* P. 326.
[236] Kamali, *The legal maxims of Islamic Law. op. cit.* p. 4.
[237] al-Zarqã, M., *al-Madkhal op. cit.* vol. 2, p. 935.

issue. For instance, if it is established in the mind of a judge that *ḥudūd* (a fixed punishment) is to be averted in the face of doubt, this will stand as significant value in identifying the aim of Islamic law in offences related to *ḥudūd.* Exploring this opportunity would also give scholars, judges and jurists of Islamic law the ability to deliver sound and just legal judgments. [238]

- The knowledge of *qawā'id* equally gives a student of *fiqh* the ability to enjoy the concept of *fiqh* on intellectual grounds. Al-Zarkashī submits that if detailed issues that are scattered in the books of Islamic law are controlled 'by the legal maxims', it will make them easy for memorization and comprehension. [239]
- The generality of the *qawā'id* gives room to compare and contrast between past and present occurrences. Thus, *al-qawā'id al-fiqhiyyah* helps to give judgment on other events that did not occur in the past.[240] For example, the issue of interest is linked with similar judgments on usury – *ribā.* However, the system of interest today is different from the operation of *ribā* in the past, although the reason for prohibiting *ribā* is still present in the modern system of banking: *wa al-far'u lahu ḥukm al-aṣl* (The branch has the same rule as the origin). In addition, cocaine's prohibition as an intoxicant can be justified on the basis of the maxim: *al-tābi' tābi'* (The accessory shares the same rule of the root.)[241]
- Since the majority of *qawā'id* is agreed upon among Islamic scholars, this agreement could give researchers a broad knowledge of the genesis of disagreement on issues relevant to the various schools of Islamic jurisprudence. It also helps them to grasp the rationale behind these differences. Moreover, it could enrich knowledge of the similar opinions of various schools.
- Nevertheless, the subject of *al-Qawā'id* creates awareness of how far Islam has gone in coding terminologies, principles, rulings and legal techniques before the existence of the common law.
- Last but not least, exploiting the maxims, especially the maxim of arbitration and enforcement of custom, will accommodate the existence of non-Muslims

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[238] Mawil, I, *op. cit.* p. 114, Kamali, *op. cit.* pp. 1-2.
[239] al-Zarkashī, *al-Manthur op. cit.* vol.1 pp. 69-70.
[240] al-Suyūṭī, *op. cit.* p. 31, al-Sawāṭ, *op. cit.* vol. 1, p. 128.
[241] al-Suyūṭī, *ibid.* p. 117, Ibn Nujaym, *al-Ashbāh op. cit.* p. 120, *al-Majallah* Article 47.

in a state governed by Islamic law. In other words, considering maxim of custom, *inter alia*, will emphasize the universality of Islam and the possibility of ruling any society in a just manner.

However, there is speculation surrounding the extent of the importance of the legal maxim. The *Majallah* asserts that the essence of legal maxims is to facilitate a better understanding of the *Sharī'ah*,[242] and that the judge may not base his judgment on them unless the maxim in question is derived from either the Qur'an or the *Sunnah*. This assertion is to some extent justified in the sense that if the use of maxims is restricted, it will curb any prejudice against *Sharī'ah* in cases where maxims are initiated in support of one's whim. Nevertheless, this statement is deemed as undermining the general usefulness of the subject. Contrary to this, al-Qarrāfī maintains that a judicial decision can be reversed if it contains a violation of the generally accepted maxim.[243] To harmonize between the two views, we would like to submit that if a legal maxim is derived directly or indirectly from the texts, or from sound consensus or completed analogy, there is no doubt that it is sufficient to be used as basis of judgment. However, if it is obtained from a mere general reading of the details, then this kind of maxim needs to be endorsed by the schools. Moreover, if the maxim is peculiar to one school of law and does not enjoy the support of any other school, it is not enough to rely or base judgment on such maxim. Therefore, it is not totally acceptable for jurist and law practitioners to depend on these principles as a primary source of evidence or to use them solely as a proof, because the majority of those maxims have certain exceptions. Islamic jurists are enjoined firstly to give judgment on the basis of the primary source i.e. the Qur'an, *Sunnah*, or *Ijmā'* before they can make use of *qawa'id* independently. But if there is no primary source, then *qawa'id* can be utilised.[244]

It is worth stating that having coded Islamic legal maxims from generations after generations, that does not mean that coding legal maxims has ended. Indeed, legal maxims can be coded from time to time or the previous ones can be recoded if there is need as *Majallah* did to some medieval Islamic legal maxims. In this generation, new

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[242] Ali Haydar, *Durar al-Hukkām Sharh al-Majallah*..ed. Fahmi al-Husaini (Beirut: Dar al-Kutub al-'Ilmiyyah n.d) vol. 1, p. 10, al-Zarqā, Jnr. *op. cit.* vol. 2, p. 949.
[243] al-Qarrafī, *op. cit.* vol. 4, p. 40.
[244] al-Nadwī, *op. cit.* pp. 323-347.

or modified Islamic legal maxims can be created to cater for and to cover novel issues. That could be done through intertextualizing and hypertextualizing the concept and context of Islamic texts to extrapolate the tenet of the overall objectives of the Islamic law.

1.6 Summary of the chapter

In summary, this chapter that forms the theoretical part of the thesis has introduced the subject matter *al-qawā'id al-fiqhiyyah* to the readers. In it, the concepts, historical development, and the importance of the role of *al-qawā'id al-fiqhiyyah* have been demonstrated. During the discussion, it is clear that this is a subject that needs more attention and an in-depth study of its practical value - which this thesis aims to fill part of it. It is established in this chapter the systematic developments that the subject matter has gone through. The traditional phenomenon is that the basic legal maxims agreed upon are five. However, this chapter claims that what al-Burnu sees to be the sixth basic maxim is worth to be considered.

The next chapters will focus on the analysis of the six Islamic legal maxims and their application in criminal cases, using information on some of the criminal cases reported and unreported in the Northern Nigerian *Sharī'ah* courts.

Chapter Two

Analysis of Legal Maxim: a*l-'Umūr bi maqāṣidiha* (Actions are considered together with their intentions). [245]

2.0 Introduction: Action (*al-'amal)* and Intention (*al-niyyah)* in Islamic Criminal Law

In Islamic Law, intention is an important criterion for determining whether or not a criminal act is punishable or pardonable, or whether the punishment for such a crime is predetermined – *ḥadd* - or discretionary – *ta'zīr.* No criminal can be found guilty until his intention in committing the crime has been considered. The same is true of Western criminal procedure as the use of *mens rea* (mental element) alone is not sufficient to establish the guilt of the accused person if it is not accompanied by *actus reus* (physical element).[246] According to Lord Kenyon C.J. in Flower *v.* Padget: "It is a principle of natural justice and of our law, that *actus non facit reum nisi mens sit rea* - The intent and the act must both concur to constitute the crime."[247] The Islamic criminal system examines the action of the accused before considering his intention.

However, there is no way a man's intention can be investigated unless through knowledge of the elements with which the crime is committed, or through the state of mind of the alleged criminal. According to the Islamic legal maxim cited above, the establishment of intention alongside the action is given paramount consideration. We shall, in what follows, deal with those maxims in relation to criminal offences.

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[245] Abdu al-Rahman Ibn Abu Bakar Al-Suyūṭi *al-Ashbāh wa al-Naẓā'ir,* (Beirut: Daru al-Kutub al-'Ilmiyyah.,1403), p.8, Zayn al-'Ābidīn Ibn Ibrahīm Ibn Nujaym, , *al-Ashbāh wa la-Naẓā'ir 'Alā madhhab Abī Hanīfah al-Nu'mān,* (Beirut: Daru al-Kutub al-'Ilmiyyah, 1993/1413), p.27, al-Ḥamawi, Ahmad Ibn Muhammad, *Ghamz 'Uyūn al-Baṣā'I Sharh al-Ashbā' wa al-Naẓāir,* (Beirut: Daru al-Kutub al-'Ilmiyyah 1985/1405) vol.1 p.37, *al-Majallah,* Article 2, Ali Haydar, *Durar al-Ḥukkām Sharh Majallah al-Aḥkām,* ed. Fahm al-Ḥusayni, (Beirut: Daru al-Kutub al-'Ilmiyyah, n.d.) vol. 1p.17, Ahmad Ibn Shaykh al-Zarqā, *Sharh al-Qawā'id al-Fiqhiyyah,* (2th edn. Damascus: Dār al-Qalam, 1989/1409) p. 47, Hereinafter, the translation of *al-umūr bi maqāṣidihā-* will be used except if there is need to mention the maxim in its Arabic form

[246] Sobhi R. Muhamassani,, *Falsafat al-Tashrī' fī al-Islām,* (The Philosophy of Jurisprudence in Islam) translated by Farhat J. Ziadeh, (Kuala Lumpur :The Open Press, 2000), p.160.

[247] Turner ,JWC and All Armitage, *Cases on Criminal Law,* (3rd edn. Cambridge: Cambridge University Press, 1964), p. 1.

2.1. Definition and Interpretation of the Maxim *al-Umūr bi Maqāṣidihā*

This maxim is one the basic general maxims agreed upon by Islamic scholars because of its consistency with, and relevance to, Islamic jurisprudence. It implies that any action, whether it is done physically or verbally, should be considered and judged according to the intentions of the doer. In fact, the whole sphere of *fiqh* is concerned with the rules or judgement of matters, not its essence.[248] The appropriate interpretation of this maxim should therefore be that the rulings to be made for or against a case should be in conformity with the intention of the person concerned with the case.

There is no branch of *fiqh* that does not consider the *niyyah,* (intention) behind an act a *sine qua non* for the validity of any action. Though, while intention is considered to have an impact on the validity and gravity of any action, "weighing intentions would be a system of strict liability."[249] Strict liability in Islamic criminal law subsumes what is termed as quasi-intentional and unintentional bodily injuries which incur *diyah*.[250] Indeed, intention is the fundamental concept of the whole Islamic Religious Law.[251] It significantly figures "in Muslim approaches to acts in general, and to religious act in particular."[252]

Two distinctive words constitute the elements of the maxim: action and intention. Without considering the two elements, criminal justice cannot be carried out. The first word, which is *umūr,* plural of *'amr*, is literally translated as a matter, issue, act, physical or verbal.[253] According to al-Asfahānī, the word *'amr*, encompasses both action and utterances as the Qur'an says : *wa mā 'amr fir'awn bi rashīd* 'the command of Pharaoh was not the right guide." (Qur'an 11, verse 97). This refers to

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[248] al-Zarqa *Sharḥ al-Qawā'id..op.cit.*

[249] Paul R. Powers, *Intent in Islamic Law, Motive and Meaning in Medieval Sunnī fiqh,* (Leiden-Boston: Brill, 2006), p. 173.

[250] *Ibid.*

[251] Schacht, J, An *Introduction to Islamic Law*, (Oxford: Oxford University Press, 1964). P.

[252] Brinkley Messick, "Indexing the Self: Intent and Expression in Islamic Legal acts" in David S. Powers, ed. *Islamic Law and Society* (Leiden, The Netherlads: Brill, 2001), vol. 8, pp.153-

[253] Ibn Mandhūr, Muhammad, *Lisan al-'Arab* (Beirut: Daru Ṣādir , n.d) vol., 1 p.96, al-Raghib al-alAsfahānī : *al-Mufradād fī gharīb ial-Qurān* ed. Muhammad Sayyid Kaylani (Lebanon: Dar al-Ma'rifah n.d.) explained the meaning of 'Amr in verses 97and123, 154, of Suwar al-Hūd, al-Imran, respectively. See Muhammad Siddiq Ibn Ahmad al-Burnuu, *Mawsū'ah al-Qawā'id al-fiqhiyyah* n.p.1416) vol. 1, p.133.

his utterances and actions.[254] The second word is *al-maqāṣid*, plural of *maqṣad*, which literally means willing, the determination to do something for a purpose.[255] It is also synonymously used as *niyyah*.[256] The maxim simply means that rulings on matters, whether they are physical or verbal actions, shall be determined by the purpose for which they are carried out.[257] In other words, rulings on all actions of *mukallaf* (a man of sound mind), whether physical or verbal, shall be in accordance with the objective and goals for which he carried out the action. Thus, an action can be described as culpable and punishable only when the purpose of the perpetrator is known.

2. 2 Source of the Maxim

There are many textual evidences invoked by Islamic jurists to justify the legality of this maxim. The most authentic and direct evidence is the *hadith* reported by many traditionalists, particularly by al-Bukhari and Muslim, the two authors of the most authoritative hadith books, in which the Prophet is reported to have said: *innamā al-'a'māl bi al-niyyāt* (Actions are judged according to intentions).[258] There are also many verses of the Qur'an and the *'Ahadith* of the Prophet that emphasize sincerity in all Muslims' endeavours, although most of these refer to the reward for acts that are in accordance with sincere intention in the hereafter.[259] This is not to say that the *hadith* is not useful in determining the punishment of a criminal act concordant with *mens rea*. On the contrary, the *hadith* has implications for any action -devotional, social, political and commercial.[260] For many interpreters, the hadith of *niyyah* cannot be undermined as it is said to serve as one-third of Islamic knowledge.[261]

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[254] al-Asfahani, *op. cit.* pp.24-25.
[255] Ibn Mandhur, *op. cit.*.
[256] Ahmad Ibn Faaris al-Raazi, *Mu'jam Maqāyīs al-Lughah* (ed. Abdul Salaam M. Harun (Beirut: Dar Ihya' al-Kutub al-Arabiyyah n.d.) entry *nawā*.
[257] Muhammad Khalid Al-Atasi and Muhammad Tahir al-Atasi, *Shar al-Majallah* (Damuscus , Hams press 1349), vol.1 p.13, al-Burnu, *al-Mawsū'a op.cit.* vol. 1 p. 124.
[258] al-Bukhari, *Sahih*, *hadith* no.1, Muslim, *Sahih* hadith no.1599.
[259] al-Burnu, *Muawsu'at op.cit.* vol. 1 p. 133. See Qur'an 4, verses 100, 134, Qur'an 17, verse 19, Qur'an 30, verse 39 and also al-Bukhar, Shahih al-Bukhari Hadith No. 1356, 1737.
[260] Abdul Rahman Ibn Ahmad Ibn Rajab, *Jami' al-Ulūm wa al-Ḥikam* (2nd edn. Cairo: Matba ' Mustafa al-Halabi, 1369) p.5.
[261] See al-Suyūṭī *op. cit.* Ibn Nujaym, *op. cit.* al-Zarqā, M., *al-Madkhal al-Fiqhiyy al-'Ām* (5th edn. Damuscus: Matba ' al-Jami ' al-Suriyyah, 1377) p. 96, Muhammad Siddiq al-Burnu, *al-Wajīz fī 'Īḍāḥ qawā'id al-fiqhiyyah al-kulliyyah* (5th edn. Beirut: Muhassasah al-Risālah 2002/1425) pp.122-125. Ahmad Ibn Ḥajar al-'Asqalānī, *Fath al-Bārī Sharh Sahih al-Bukhari* (Beirut: Daru al-Ma'rifah, n.d.), vol. 1 p.p. 11-13, Yahya Ibn Sharaf, Abu Zakariya, al-Nawawi, *Sharh al-Nawawi 'Alā Sahih Muslim*, (2nd edn. Beirut:Dar Ihyā' al-Turath al-Arabī n.d.)

2.3 Corroboration of Action with Intention in Islamic Criminal Law

The use of this maxim relates to matters where the legal ruling is based on both action and intention. Conversely, in the Islamic religious framework, there are rulings that can be established with only intention - such as having the inner intention of apostasy, or willingness to perform ritual duties. For instance, if someone died with the intention of apostasy, or failed to actually perform the ritual duties, he would be rewarded according to his or her intention, even if the intention is not overtly expressed. This, in fact, implies that intention can be considered without the involvement of action. However, in most cases, or as a fundamental principle, the essence of intention is ostensibly effective when it is coupled with action. Al-Sarkhasī emphasizes that "*al-Aṣl 'ann al-niyyah idhā tajarrad 'an al-'amal lā takun mu'aththirah (fī al-'umūr al-duniyāwiyyah)*" (fundamentally there is no effect (in worldly matters) on intention devoid of act).[262] This is because the intention is not being overtly expressed or physically executed and is applicable only to mundane matters.[263] Thus, if an action is coupled with intention, that act will be judged according to the intention. From the Islamic theological point of view, if someone has the intention of apostasy, it is believed that such a person has become apostate.[264] But even then, there is no worldly punishment for him since he did not utter the statement or act upon it.

On the other hand, there are rulings that can be established by action without intention. For example, if someone pronounces triple divorce on his wife, his action will be considered as *ṭalāq bā'in* (complete divorce), even if the statement is not intended. Similarly, if a contract is concluded in the past form, it does not require intention.[265] However, there are legal rulings that heavily rely on both action and intention before judgement can be reached. Generally speaking, the importance of intention corroborated with action in criminal cases is undoubted. Therefore, a criminal act in most cases cannot be justifiably established without considering the criminal intent of the accused. For instance, if someone takes a property that does not

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[262] Muhammad Ibn Ahmad Al-Sarakhasi, *al-Mabsut*, (Beirut : Dar al-Ma'rifah 1986) vol. 1 p.239.
[263] al-Burnu, *Mawsuu'ah op.cit.* vol.1 p.159.
[264] Ibn Nujaym, *al- Ashba op.cit.* pp.15-21.
[265] Ibn Nujaym, *ibid.*. p.18, al-Nadwi, *al-qawā'id al-fiqhiyyah: mafhumiah...*(2nd edn. Damuscus: Dar al-Qalam, 1998/1418) p.398.

belong to him in a public domain, before his action can be considered as a criminal offence, his intention must be inquired into. The intention could be to save the property for the owner, or to acquire it illegally. Regarding the former, it can be said that he acted as a trustee, while for the latter it can be assumed that he committed the crime of theft.[266] In Western criminal terminology, *actus reus* (a guilty act) is a physical act (or unlawful omission) by the defendant.[267] It is also a collective element rather than a mental element, while *mens rea* (guilty mind) is the state of mind or intent of the defendant at the time of his act.[268] Before one can be charged to have committed a crime, there must be concurrence of the 'physical act and the mental state existing at the same time'. In Islamic law, *mens rea* ('*amd* or *qaṣda janāī)* may not have effect before one is being prosecuted once the act has been done, that is in strict liability. For example, if a person killed someone and stood firmly by the fact that he killed him, then the act has overridden the intention.[269] The classification of criminal liability into *actus reus* and *men rea* in the Western criminal law is for the convenience of exposition only, as observed by Smith and Hogan.[270]

2.4 Correlation between Intention and Action in Islamic Criminal Law

The intention of the defendant in a murder case, for example, must concur with the act that constitutes the crime in question before he can be convicted of murder. There are two important conditions in considering the concurrence of *mens rea* and *actus reus*. Firstly, the intent must have driven the act. For instance, if A intended to kill B by gun and locked him (B) in a stuffy room, while he went to fetch the gun, but then before A returns, B dies, it cannot be said that a causal relationship exists between A's intention and B's death. The death of B does not concur with the intent of A, but from his recklessness or negligence. As such, A will rather be liable for manslaughter. Secondly, if the *actus reus* is a continuing act, it is enough that the *mens rea* exists during its continuance, although not necessarily at the accomplishment of the *actus reus*. For example, if A intended to kill B by inducing him with poison, but B did not

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[266] *Majallah* , *op. cit.* Article 769 Ahmad al-Zarqa, *Sharh al-Qawā'id op. cit.* p. 49, Mahmasani , *op. cit.* p.160.
[267] Nyazee, A. Khan, *General Principles of Criminal Law* (Islam and Western) online at info@nyazee.com December 7, 2000, p. 80.
[268] *Ibid.*
[269] *Ibid.*
[270] See Nyazee *ibid* quoting Smith and Hogan Criminal Law 30.

die immediately from the poison and was rushed to hospital only to arrive and found no space for admission, and then died after a while from the poison. It can be said that although, the poison did not kill him instantly, it is the *actus reus* which caused the death.[271]

In Islamic law, the external standard followed to determine whether the action concurs with intention in homicide crimes is the object in use. To determine the inner intention of an accused is not only very difficult, it is, in fact, prohibited in some cases to investigate such an intention.[272] Thus, the only safe measure is to look at the object with which the crime is committed. This standard has no direct textual basis; it is arrived at by text-based deduction. Islamic criminal law differentiates between what is intentionally done (*'amd*), what is done by mistake (*khta'*) and quasi intention (*shibhu 'amd*). The Prophetic tradition states thus that "*al-qawd bi al-sayf*" (*al-qawd* should be by sword).[273] There are two interpretations of this statement. The first is that when *qiṣāṣ* punishment is due to an offender, it has to be executed by sword. The second relevant interpretation here is that any homicide crime caused by a sword attracts *qiṣāṣ* (retaliation).[274] The use of a sword in homicide as interpreted here stands as an external standard to determine the intention of the perpetrator. To be sure, a sword is an instrument for killing and, as such, it can be inferred from the instrumental object that the defendant did intend to commit the crime of homicide. From this tradition, Islamic jurists established a standard for intentional homicide. According to the Hanafites, "*mens rea* of murder is found when the offender uses an instrument designed for killing."[275] This covers the use of swords, guns, knives, arrows, poison and lethal weapons of all kinds.[276] However, a blunt instrument such as a wooden club cannot lead to the conviction of someone of *qatl 'amd,* but only to *shib 'amd,*

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[271] Nyazee, *ibid.* 97. This theory will be expanded in the discussion on direct or indirect causation.
[272] Especially in matters related to *ḥudūd* (in which the punishment of the crime is solely the right of God). See Ibn Muflih, *al-Ādab al-Shar'iyyah*: (eds.) Shu 'ayb al-Arnaut and Umar al-Qayyum, 2nd edn. (Beirut: Mu'assasah al-Risalah, 1997/1417) vol. 1, pp. 277-300
[273] Ali Ibn 'Umar al-Dāraquṭni, *Sunan al-Dāraquṭni* ed. Sayyid Abdullah Hashim al-Madani, (Beirut: Dar al-Ma 'rifah 1966/1386) vol.3, p. 107 *hadith* 89, Ali Ibn Ahmad Ibn Hazm, *al-Mahallah,* ed. Lajnah Ihya' al-Turath al-Arabi, (Beirut: Dar al-Afaq al-Jadid n.d.) vol. 10 p. 372, Ahmad 'Ayni, *'Umdah al-Qārī (Beirut:* Dar 'Ihya' al-Turath al-Arabi n.d.) vol. 24, p.39.
[274] Nyazee, *op.cit.*
[275] al-Sarakhasi, *al-Mabsut op.cit.* vol. 26 p. 104, Ahmad Ibn Ali al-Jassas, *Ahkam al-Quran* (Beirut: Dar 'Iyah al-Tutath al-Arabi), vol. 3, p. 199-2001.
[276] Nyazee *op. cit.* p. 99.

according to Abu Hanifah.[277] Thus, the ruling of Islamic jurists that whoever kills a person with a stick has to pay *diyah* of 100 camels is apt evidence to infer that using a stick does not indicate intentional killing, but rather to inflicting "grievous hurt".[278] Indeed, an ordinary stick is not meant to cause death but if it does cause it, then the act can be assumed not to be intentional, but a mistake. The pertinent question here is: can we use only the standard measure stated by the traditions to set an external standard for determining *mens rea*? It is a well-established principle that Islamic law is universal and suitable to any generation and norm. But it is necessary to prove this universality in light of modern technology. Thus, if someone targets another person with a chemical weapon, as a result of which the victim dies, the perpetrator will be charged for his murderous act, even if there is no external force that necessitate the action.

On the other hand, to maintain justice, if someone mistakenly kills another person, the killer will not be punished with *qiṣāṣ* because of the absence of intention. However, before a claim of error can be entertained, the tool used in committing the action must be examined.[279] In recognizing quasi intention in a crime of homicide, the tool used in the crime stands as a measure for determining the allegation. If someone is struck and dies as a result, the action will be considered as *shibh 'amd,* as the Prophet was reported to have said: "Lo, the quasi intentional killing is what occurred by strip, stone and wood".[280] However, this is not to say that there is no criminal liability. In the case of *shibh 'amd*, for example, the perpetrator would be liable for *diyah mughallaẓah,* (a heavy blood money) according to the part of the hadith mentioned above.[281]

Similarly, if a professional medical doctor made a mistake in his profession that led to the death or injury on his patient, he would not be given *qiṣāṣ* because of the absence of criminal intent. Rather, *diyya* would be awarded to the victim or his heir from the

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[277] al-Zarakhasi, *op. cit.* Nyazee *ibid.*
[278] Nyazee ,*ibid.* p.98.
[279] Muhammad Ibn Ahmad Ibn Rushd, *Bidayah al-Mujtahid wa Nihayah al-Muqtaṣid* (Beirut: Dar al-al-Ma'rifah 1982) vol. 2 p.
[280] Sulayman Ibn al-Ash'ath Abu Dawud, *al- Sunan* (Cairo: Matba'at al-Sa 'ada 1950) *hadith* no. 4588, Muhammad Ibn Yazid Ibn Majah, *al-Sunan,* ed. Muhammad Fu'ad Abdul –Baqi, (Beirut: Dar al-Fikr n.d.) *Kitab al-Diyaat hadith* no. 2627.
[281] At the end, it is mentioned that if the case of homicide is quasi intentional, the penalty will be heavily imposed. See *hadith* of note 36.

government treasury. This is not the case with a non-professional medical doctor who commits such a crime. For him, the punishment would be *diyah mughallaẓah,* as the Prophet was reported to have said: "Whoever practices surgery without the proper knowledge will be liable for compensation."[282] This is because of carelessness and inexcusable negligence, although intent to kill may not be concluded, except if it is established by other means.

2.5 Contradiction between Intention and Action

Basically, an action, whether physical or verbal, is enough to reach a verdict in criminal cases as explained above, as opposed to an act of devotion in which the action is of no consequence unless it is coupled with intention. However, before mere action can be used as the basis of a verdict in a criminal act, such an action should have a degree of clarity and coherence so as to leave no doubt that it is intended by the perpetrator. For example, if someone tied another and then knifed him –and his action cannot be attributed to any external force such as legal impediments, insanity or coercion - it is sufficient to take that action as deliberate murder. There are cases however, where contradiction exists between what could be the intent of the perpetrator and his action. For example, if a parent struck his child with a stick – which normally does not lead to death - and the child eventually died, the action of the parent cannot be said to have been intentional murder since the tool in use does not ordinarily cause death. Convicting the parent without considering the intention would amount to injustice. Thus, it is necessary to investigate the intention in any such case.

2.6 Physical and Verbal Action

Generally speaking, before any conclusion can be made to determine whether a crime is committed intentionally or unintentionally, the tool and the felicity that circumstantiates the occurrence of the criminal act will be given consideration, particularly if the action is physical. However, if the action is verbal, the meaning and connotation of the outward expression is considered. In a case where there is a

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[282] Abu Dawud *op.cit. kitab diyaat hadith* no 4586, and Ahmad Ibn Su'ayb al-Nasahi, *al-Sunan kitab al-qasamah bab shibh al-amd* ed. Abdul –Ghaffar Sulayman and Sayyid Kasrawi (Beirut: Dar al-Kutub al-'Ilmiyyah 1991)

contradiction between the physical criminal act and the intention, the tool in use or the circumstances in which the crime is committed will stand as a measure to judge the accused. An example of a physical act and intention in a murderous case would be if someone fired at someone else with a rifle which usually does not kill, but eventually did kill; the intention could be assumingly inferred from the tool, given that the accused did not intend to kill because the tool being used was not meant to kill. This is only in the case where the accused denies the charge. But if he confesses during investigation that he intended to kill his victim with the tool, then there would no contradiction again as to whether the intention was to kill or not. This is because the right of an individual is involved and, therefore, legal liability is placed on the accused. If the intention to kill is established, coupled with his action, the crime is branded as *qatl 'amd* (intentional murder) which incurs *qiṣās.* But if the intention is not to kill and a killing does take place, the crime is said to be *shibu qatl 'amd* (quasi intentional murder), as opposed to *qatl khat'* (unintentional murder). The former incurs normal *diyah* compensation, while the latter attracts *diyah mughallaẓah.* The legal consequence in this particular issue is not to acquit the accused completely from punishment, but to reduce that punishment from capital *qiṣāṣ* (retaliation) to *diyah* (blood money) that can be paid by his '*ãqilah*, (solidarity).

However, there is a situation when intention outweighs action in some murder cases. One such situation is when the action is proved to be unintentional and there is no reason to believe otherwise. An example of this is when a person shoots against a wall or into the sky and accidentally hits someone, killing that person. This action is said to be *qatl khat'* (a mistake) which incurs *diyah* (not as heavy as *shibh 'amd*).

In criminal offences, if the verbal action accords with intention, then there is no doubt that the appropriate punishment will be meted out to the person who made the utterance. For instance, if someone said to another person 'You are a bastard' or 'You bastard' or 'You are an adulterer, (*zani'*), or 'I reject Islam', then these expressions would be taken as being explicit enough to reach a verdict, except where there is a legal impediment that could render the utterance ineffective and absolve the accused person of committing defamation or apostasy. In the case of defamation, the expression is sufficient to convict the accused because the right of man is involved

except, of course, if what the accused said turns out to be true. However, the same is not true in the case of apostasy where clarification needs to be sought before the fact of the matter can be established, such as giving the person time to re-consider his utterance. This is because the case is absolute right of God as opposed to the case of defamation.

2.7 Factors that render Action Non-Concurrent with Intention

There are factors that render action inconsistent with intention, and in effect, a verdict may not be reached because of these factors. Some of these factors will be discussed here: namely, *jahl* (ignorance); *Ikrãh* (coercion); *nisyãn* (forgetfulness); and *ṣighar* (puberty).

2.7.1 Ignorance (*Jahl)*

Ignorance of the law or of the fact of the law[283] has an effect in determining the criminal intent of the accused. Thus, Islam recognizes the effect of this detriment in three people: a person who is asleep, an infant, and an insane person, as the Prophet is reported to have said: "Recording of deed is closed for a sleeping person till he wakes up, and an infant till he attains the age of puberty, and an insane person till he regains his sense." [284] For example, if fat man sleeps besides a small baby and rolls over on him, and thus suffocates him to death, the act shall not be considered as intentional homicide because the act cannot be assumed to have been committed intentionally. Any crime committed while one is asleep, or in the state of insanity or immaturity, shall not be deemed as intentional, because of lack of criminal intent.[285] It is reported that Ubaidullah, son of Umar committed *zina* with a woman while she was asleep, and the offender was punished while the woman was acquitted.[286]

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[283] Ignorance of the law can only be an excuse in Islamic law for someone who is a new convert or those who are living in non-Muslim territories. This include to some extent, those who are living in a remote area which knowledge of Islam has not been spread to, as opposed to ignorance of the fact of law which can be claimed by all and sundry of Muslims. See for details Awda, *op.cit.* vol. 1 p. 430

[284] Abu Dawd *al-Sunan op. cit. Kitab al-Huduud,* hadith no. 4398, Muhammad Ibn 'Isa al-Trimithi, *Sunan al-Tirmithi* , ed. Hisham al-Bukhari, (Beirut: Dar Ihua' al-Turath al-Arabi, 1995) *hadith* no. 1446, Ibn Majah *al-Sunan op. cit, hadith* no 2041.

[285] Abu Zayd Al-Qayrawani, *al-Risalah* (Beirut: Dar alFikr n.d) pp.121-131, Abdul Rahman Doi, *Shariah:The Islamic Law,* (London: Ta Ha Publishers 1984/1404), p. 227.

[286] Abdul Rahman, *ibid.*

2.7.2 Coercion (*'Ikrāh*)

Action committed under duress is considered to be out of intention. This is based on the tradition of the Prophet: "My *Ummah* (nation) will be forgiven for crimes it commits under duress, in error, or as a result of forgetfulness."[287] Thus, if someone is duressed to commit any crime, it is generally assumed to be unintentional, and as such, no legal responsibility shall be placed on the actor/doer. However, acts committed under duress can be categorized in two ways: a crime involving the right of man, and a crime involving the right of God. In the case of the former, no one should allow himself to be coerced into an act, especially if that act is capable of terminating life, as no person's life is more precious than another. However, if the action does not involve eliminating life, the duressed can act upon what he was asked to do, especially if his life is in danger. However, he, or the duresser, or both, shall be legally responsible for the damage caused. The reason why the duressed is not allowed to act upon the threat of the duresser, and is held to be partly or wholly responsible for the damage, is that according to Islamic jurists, duress is of two kinds: *ikrāh mulji'*, and *ikrāh ghayr muliji*. The *ikrāh mulji* is a kind of duress where the duressed has no option other than to act upon the request, as failure to do so could endanger his life, with the assurance that the life of the third party is not involved. In such a case, if the duressed acts, his action shall not be considered intentional and any crime resulting from that - if it is solely the right of God - means that he will be acquitted. But if the right of man is involved, he, or the duresser, or both, will be responsible for the damage. But no *ḥadd*, if the crime attracts *ḥadd*, shall be awarded to the duressed.

However, in the case of *'Ikrah ghayr mulji'*, where the person being coerced has the choice to either accept or reject the demand placed on him, or where his life is not in danger, if in such a case he should then choose to succumb to the pressure, his action would be regarded as being intentional. In that context, both he and the one who coerced him will be considered responsible.[288] In general, there are debates on whether the claim of those legal impediments can sufficiently render the accused unpunished. The fact is that if any crime is committed and one of those impediments

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[287] Ibn Majah, a*l-Sunan op. cit. hadith* no. 2045,
[288] Doi, *op. cit.* 227-228.

is involved, there are two ways to prosecute the offender. First, if the crime involves the absolute right of God, then the claim of ignorance, coercion and forgetfulness could at least commute the punishment of *ḥadd* to *ta'zīr*. However, if the crime involves the right of an individual, compensation may be given in order to balance between the two individuals. For example, if the crime originally attracts *qiṣāṣ* in the case of criminal intent being established, the *qiṣāṣ* may be reduced to *diyah*, simply because of these legal impediments.

Consideration of intention in placing criminal liability is observed in the Zamfara State Penal Code Law (SPCL 2000). In section 63 of the said code, it is stated that "there shall be no criminal responsibility unless an unlawful act or omission is done intentionally or negligently". The words 'intentionally' and 'negligently', in that provision, have rendered any criminal act, in which intention or negligence of the perpetrator cannot be established, not chargeable. This includes any crime of *ḥudūd*, *qiṣās* and *ta'zīr*. However, the provision does not specify what criteria from which intention can be inferred, or what the elements that constitute intention are.

However, common knowledge of the 'material fact' proves the intentionality of criminal acts, unless there is other evidence that makes it ineffective. For example, if a person knows that *zina* is a crime punishable with *ḥadd*, but has no knowledge of what constitutes the legal definition of *zina* because such knowledge is not common knowledge, then that person may not be punished with *ḥadd* of *zina*, but rather, *ta'zīr* may be accorded. In that case, if Safiyyatu in Safiyyatu v. Sokoto State of Nigeria, as a villager, claims ignorance of the details or legal connotation of *zina*, her conviction can be dropped or reversed, although she may be awarded *ta'zīr* and she may not depend on her previous status. The basis for this assertion is the *hadith* of the Prophet, in which the Prophet apparently casts doubt on the intentionality and acquaintance of Ma'iz to the crime he confessed to.[289]

The Zamafara SPCL 2000 section 64 observes this fact and states thus:

[289] Cf Muhammad al-Amin al-Shinqiti, *Aḍwā' al-bayān* (Beirut: Dar al-Fikr, 1995/1415), vol. 5 p. 386,

> A person is presumed, unless the contrary is proved, to have knowledge of any material fact if such fact is a matter of common knowledge.[290]

Any crime committed by negligence is presumed to have been committed intentionally, unless that negligence is formed involuntarily. For instance, a person committing unlawful sexual intercourse, theft, defamation, or murder when in a state of voluntary intoxication will be presumed to have committed those crimes intentionally. However, if that negligence is involuntary, such as one who is drugged and commits criminal offences in that state of inducement, then that person will not be originally convicted of those offences because of the absence of intention, in accordance with the *hadith* mentioned above. Thus, an induced person who has lost his consciousness, by analogy, is like an insane person, or one who is asleep.

2.7.3 Mistake (*Khaṭa'*) and Forgetfulness (*Nisyān*[291])

By mistake or by accident: a mistake also constitutes the assumption of unintentionality of a criminal act, if the accused is believed to have committed it in good faith. For instance, take the case of a man and woman who have sexual intercourse together before 'proper marriage', believing that the consent of their parents regarding the affair is enough proof for the legality of their relationship – despite the fact that they are cognisant of the fact that *zina* is punishable with *ḥadd.* Their action shall be construed as 'a mistake of the fact', according to Zamafara SPCL 2000, section 66. A 'mistake of the fact', but not a 'mistake of the law' renders an act inoffensive or innocuous. It states thus:

> Nothing is an offence that is done by any person who is justified by Law, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it. (cf. section 69 Zamafara SPCL 2000)

Thus, if someone drinks a substance that he believes to be lawful, but it turns out to be an intoxicant, or if a man meets a woman on his bed and by mistake sleeps with her and has sexual intercourse with her, both such actions will not be punished with *ḥadd.*

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[290] Shariah Penal Code Law of Zamfara State of Nigeria 2000, (Gasikiya Corporation Limited Zaria , Nigeria 15th June 2000) vol. 3.

[291] Forgetfulness is though considered as one of the impediments to ascertain criminal intent, that is in the crime solely involved God's right and also removes the punishment of the hereafter. However, forgetfulness cannot be an excuse for committing crimes that incur punishment for the perpetrator. This is because open such door will prejudice the rights of public and will also render law inactive. See Awda, *op. cit.* vol. Pp. 430-440, Ibn al-Qayyim, *I'lām al-Muwaqqi'īn, op. cit.,* vol. 2 p. 140 and al-Ghazali, *al-Mustṣfā* vol. 1 p. 84 for more details.

In the latter case, however, *mahr al-mithl, a* 'fair dowry', may be imposed because of the right of the woman involved. Similarly, if one intends to throw an arrow at an animal but by mistake, it hurts a person and causes his death, the thrower shall not be given *qiṣāṣ* as it was a mistake and the killing was unintentional. In the case of a doctor whose patient dies as a result of the drug prescribed for him, then the doctor shall not be convicted of murder, if that drug was prescribed in good faith, with proper care and caution. This is because there was no criminal intention in the act of the doctor.[292]

2.7.4 Puberty as factor renders action non-concurrent with intention

As for puberty, a criminal act committed by a minor or anyone below the age of puberty, is believed to have been committed unintentionally, based on the *hadith* quoted at the outset of the discussion. However, in *ḥudūd* related cases, if there is no right of the individual involved, the minor accused shall not be punished with *ḥadd,* but *ta'zīr* may be adjudged instead. But, if individual right is attached, then compensation such as *diyah,* in the case of homicide, and an equivalent value in the case of *sariqah* (theft) will be imposed.[293]

These are the general rulings in which an unintentional criminal act can be assumed. However, there will be concerns over section 81 of the (SPCL) in which it is stated that if an act is intentionally committed and causes slight injury, and such injury is not ordinarily significant enough to be complained about, the accused has not committed any offence. The concern in this matter is that if the injury caused involves an individual's right and the plaintiff complains, is the right of the individual still then valid? The fact is that if an injury is caused and it involves an individual right, Islamic law emphasizes the establishing of justice and the protection of people's rights by returning each right to the original owner, especially if it is requested, no matter how trifling it may be. Thus, that particular section, as stated, may prejudice the establishment of justice and jeopardize the rights of people. For that reason, section 82 counterbalances the above section by stating that "nothing contained in the provisions

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[292] Cf. Sec. 69 of Zamafara SPCL 2000.
[293] See Sect. 71(a) and (b) of the Zamafara SPCL 2000.

of section 66-99 shall prejudice the right of (giving) *diyah* or (of) damage in appropriate cases."[294]

2.8 Some Related Maxims under the Maxim of Action and Intention.

From the above-stated basic general maxim, scholars deduced a number of sub-maxims that incorporate intent in human being's activities. The sub-maxims that are most relevant to this research will be analyzed as follows:

(A) *Ahl al-'ibrah li al-maqāṣid wa al-ma'ānī aw li al-alfādh wa al-mabānī*
(Should effect be given to intentions and meanings or the words and forms).[295]

This maxim as a sub-maxim addresses the effect of the meanings and the intentions of utterances in order to make a clear statement before a court of law. What a person utters before a court is assumed to be his intention, as if not; the illocutionary act of the utterance will be valueless. In other words, the utterance made by a litigant during oath taking should mean what is outwardly said according to the understanding of the judge and the other litigants whose rights depend upon the outward meaning of the oath. The Prophet says: "An oath must conform to the intention of the party tendering it."[296] As the right of the other party, be it defendant or offender, should be protected by law, and because any means to obstruct the course of justice should be prevented, the litigant is obliged to utter an explicit statement that concurs with the agreed-upon

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[294] See *ibid.* @http://www.zamfaraonline.com/sharia/schedule.html viewed last 25/05/09 10:20am. In Zamfara Shariah Penal Code Law, 2000, section 82 it is stated that "nothing contained in the provisions of sections 66-69" will prejudize the right of *diyah*. This seems to a typographic error to which the website of the state government has corrected as stated above. The same error has been committed in Kastina State Shari 'ah Penal Law as well in section 82.

[295] This maxim is re-coined from the maxim " *al-'Ibrah fī al-'Uqūd bi al-maqāṣid wa al-ma'ānī lā bi al-Alfādh wa al-mabānī* - "Effect is given to intents and meaning in contracts, not words and forms", as agreed upon to by Hanafites and Malikites, (see Ibn Nujaym, *al-Ashba op. cit* 207, *al-Majallah* article 3) as opposed to Shafi'ites' and Hanbalites' view that gives a different opinion, depending on the matter arisen. At times, effect is given to the meaning, while at other times it is given to the word. (See Muhammad Shams al-Diin al-Ramali, *Nihāyah al-Muḥtāj* (Beirut: Dar al-Fikr 1984/1404), vol. 6 p. 242,) , Mansur Ibn Yunus al-Buhūṭi, *Kashshāf al-Qinā* (Beirut: Dar al-Fikr, 1402 A.H.), vol. 3 p. 446. I incline to the opinion of separation between one issue and another in application of this maxim since there is no uniqueness in the forms that different issues take.

[296] Muslim, *Sahih Muslim, Hadith* no1653.

meaning of the statement, rather than an implicit one that hides the meaning and could lead to confusion in giving judgement.[297]

Fundamentally, the effect of an utterance is based on the intended meaning of the speaker in any matter. There is agreement among scholars on the above-stated position, but because of the exceptional case of the requirements in a court of law, majority of the schools, including the Malikites and Shafites, assert that the effect of the utterance should be based on the intention of the one who seeks an oath (the judge).[298] However, the Hanafites, and an inference from the Hanbalites agree on the position in principle, but they disagree in practice. They state that if the one giving an oath is the plaintiff, the oath will be based on his intention, whereas if he is the defendant, the oath will be based on the intention of the judge.[299] For example, if a person is asked by the judge to give an oath in litigation involving a third party, then the statements made by the person taking the oath will be considered as understood by the judge, and by the other party involved, as opined by Malikites and Shafi'ites, and by a version in Hanbalite's school. This is because, as observed by Ibn al-Qayyim, giving illusive and dissimulative expression in these matters will contradict the rules of Islamic law that are aimed to establish justice, and will jeopardise the right of litigant parties whose right is attached to the oath.[300] However, in the opinion of the Hanafites and Hanbalites, the meaning of the oath will only be understood by the status of the one who takes the oath. If he is the plaintiff, the meaning of the oath will be based on what he intends, but if otherwise, the meaning of the oath will be based on the understanding of the judge.[301]

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[297] Muhamassani, *op. cit.* 161, al-Nawawi, states that if the oath is taken outside the court or there is no right of man attached to it, then the effect will be given to the intention of the one taking the oath, not to the mere word and form of the expression uttered. Thus, this indicates that in Shafi' opinion, their question mark attached to the maxim is only relevant in issues related to man's right. If there is no right of man attached thus, their view agrees with the Hanafites and Malikites (al-Nawawi, *Sharh al-Nawawi ala Sahih Muslim, op. cit.* vol 1 p. 117).

[298] Muhammad Ibn Ahmad al-Jizzi, *al-Qawanin al-fiqhiyyah* n.p. n.d p334, al-Suyuti, *al-Ashba, op. cit.* p. 44, Mahmassani, *op. cit.* p.161, al-Burnu *al-Wajiz op. cit.* p. 158.

[299] Ibn Nujaym, *al-Ashbah op. cit.* p. 53, Ahmad Ibn Muhammad al-Hamawi, *Ghamz Uyun al-Basa'r* (Beirut: Dar al-Kutub al- 'Ilmiyyah 1405) . p. 81, Ibrahim al- Dawyaan, *Manar al-Sabil fi Sharh al-Dalil*, ed. 'Isaam al-Qal'aaji, (Riyadh, Maktabah al-Mu'aarif n.d.) vol. 2, p. 440.

[300] Muhammad Ibn Abi Bakr Ibn al-Qayyim al-Jawzi, *'Ilām al-Muwaqqi'īn an Rabb al-'Ālamīn,* ed.Taha Abdu al-Rahuuf, (Beirut: Dar al- Jiil, Beirut 1973), vol. 3, p. 119.

[301] In some aspects Hanafites do not agree with the opinion of other schools. It is clearly stated by al-Karkhi in Risalah that "fundamental consideration is given to the intention of the two litigants, not their apparent "expression" ' (See Ahamd al-Zarqa *Sharh al-Qawa'id op.cit.* p.64 and al-Hamawi, *Ghamz op. cit.* vol.2, p. 268) From this, it could be inferred that sometimes the opposite may be applied, as in the discussion above. (For a general view on this matter, see Ibn Nujaym, *al-Ashba op.*

The only way to determine the compliance of the meaning with the intention is to refer to its denotative usage in the society where the litigation is held. Where there is no harmony between the connotative meaning and denotative meaning of the oath, a sub-maxim is coded thus: *hal al-aymãn mabniyyah 'alā al-'urf* - "Is oath based on custom?"[302] If there is no particular form of the expression of the oath in Islamic legal procedure, the effect is based on the '*urf*. In principle, this is generally accepted by the schools of law.[303] The conventional norm of that particular society is paramount. However, if an oath is being taken under compulsion and duress, some scholars have approved dissimulation in such a circumstance.[304]

(B) *Idhā ijtama' al-amrāqam min jins wāḥid, walam yakhtalif al-maqṣūd dakhal 'aḥadhimā fī al-ākhar ghaliban* (When two matters emerge from one class, group or category, and the purpose does not differ, in most cases, one integrates into another).[305]

The relevance of this maxim to the basic general maxim is to investigating the intention in prescribing a punishment for a particular criminal act. When two or more criminal acts are committed, whether by a single person or more, the term used in Islamic criminal law is *tadākhul*, (integration). The rule of *tadākhul* (the integration of punishment) arises to study what is the intention of the Legislator in prescribing such punishment. If the objective to be derived in two punishments is unique and the perpetrator or the recipient of those punishments is a single person, scholars look into how those punishments could be integrated. According to al-Jurjani, (d.816 AH) *al-tadākhul* is the blending of something into something else, without any increase in

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cit. 207, Muhammad Ibn Bahadir al-Zarkashi, *al-Manthur fi al-Qawaid* ed. Dr. Taysir Fa'iq Ahmad Mahmud (Kuwait: Ministry of endowment and Islamic Affairs, 1404) vol. 2, p. 371, Ali Haydar *Durar al-Hukkam op. cit.* vol. 1, p. 18, al- Suyuti, *al-Ashba op. cit.* 166, Abdul Rahman Abu al-Faraj Ibn Rajab, *al-Qawa'id fi al-Fiqh al-Islami* , (Beirut: Dar al-Kutub al-'Ilmiyyah 1992/1413), p. 37, Abu Bakr Ibn Mas'uud Ibn Ahmad *al-Kasaani, Bada'i' al-Sanaa'i'i fi Tartib al-Shara'i'i.* (Cairo: Matba'at Sharkat al-Matbū'āt al-'Ilmiyyah 1327) vol. 4, p. 134.)

[302] Ibn Rajab, *al-Qawaid article 121 op. cit.* pp. 263-267, Ibrahim al-Dawyan, *Manar al-Sabil op. cit.* vol. 2, p. 442.

[303] Abdu al-Rahman Zadah, , *Majma' al-anhar* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1998/1419), vol. 1, p. 548, Ali Ibn Sulayman al-Mardaawi, , *al-Ifṣāḥ* ed. Muhammad al-Faqi, (Beirut: Dar 'Ihya al-Turaath al-Arabii, n.d.). vol. 2, p. 327.

[304] Ibn Nujaym *al-Ashba op. cit.* p.21, Mahmasani *op. cit.* p. 161.

[305] Ibn Nujaym, *al-Ashba'* p.132-134.

size or value.[306] *Tadākhul* or "integration", in Islamic criminal law is applied in a situation where punishments of the same class of crimes are combined in a way that only one punishment is imposed, rather than multiple punishments, because of their identical class and purpose.[307] Before such procedure can be taken, it is conditional that the punishment of the first crime should not have been executed. Thus, if it has been executed, there could be no more integration in punishment.[308]

The use of this rule is applicable to most aspects of Islamic jurisprudence. However, its importance to Islamic criminal law cannot be undervalued. The reason for this is because there are situations in which a culprit might have committed several crimes and each one of the crimes has its own punishment. In these crimes, there certainly must be a right of either God (*ḥuqūq* Allah) or the rights of man (*ḥuqūq dami*). It is reasonable to say that if several crimes are committed by a wrongdoer, each punishment due must be meted out to the convicted person. However, consideration must be given regarding the purpose of each punishment allotted to each crime. Is the purpose of punishing a culprit for such crimes only to deter him or to establish justice among the litigants - or is it for both? Surely there are some punishments enacted for the deterrence, retribution and reformation of a culprit, while some are to establish justice among litigant parties.[309] In any crime where the objectives of the punishment are to deter or reform the culprit, advocating for the intergradation of punishment of the same class is rational. However, if the purpose differs from that mentioned earlier, then canvassing in support of the intergradation of punishment will not serve any purpose.

This is the reason why classical Islamic scholars have made an extensive study into what class of punishment can be interpenetrated into another, and what sort of punishments cannot. In doing so, they all largely agree that if crimes are not of the same class or if the purpose of their due punishments are the same, there is no *tadākhul* ruling over their punishments. However, if there is a similarity in the nature of the crimes committed by a single person, and the purpose of the punishment ascribed to each one of those crimes is identical, intergradation can be resorted to.

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[306] al-Jurjani, *Kitab al-Ta'rifat* ed. Ibrahim al-Abyari, (Beirut: Dar al-Kutub al-Arabi, 1405), p. 76.
[307] Awdah, *op. cit.* vol. 2, pp. 442-443.
[308] *Ibid.* vol. 2, p443.
[309] El-Awa, *Punishment in Islamic Law*, *op. cit.*, pp. 25, 29, 34, 85-90.

Regarding the former, if Mr. A committed unlawful sexual intercourse and theft before the punishments were executed, he has committed defamation. Each punishment must be meted on him starting from the least severe upward. This is because the class of one punishment differs from another. Regarding the latter, if Mr. A committed a crime of *qiṣāṣ*, by intentionally killing someone and committing unlawful sexual intercourse (while being unmarried), the punishment for unlawful sexual intercourse would be embedded into the punishment of homicide, and that of the homicide would be given preference. The former is aimed at deterring the public from committing such crimes with different measures of punishments, while the latter is meant for deterrence. One is God's right and the other is man's right. However, because the right of God is based on forgiveness, as opposed to the right of man, the latter is given preference in order to establish justice between the defendant and offender.[310]

However, if a crime of unlawful sexual intercourse is committed twice, and in the first instance the offender was unmarried (*bikr*) and in the second instance he was married (*muḥṣana*), should one punishment of *ḥadd* be imposed due to the fact that both offences are of the same class (*zina*) and the purpose is the same (*zajr,* deterrence)? Based on the hypothesis established above, and according to al-Shafi's assertion that the two crimes and their punishments are identically the same, but only the causes are different (*ikhtilāf al-mawjib)*, a single punishment would be appropriate. However, if we have submitted that the two punishments can be unified, which of these should be given preference? Is it *rajm* (stoning to death) or *jald* (lashing)? It is intuitive and ostensible that the weightier and greater one will be given preference because the lesser one is only dropped for purpose, otherwise both should have been imposed.[311]

The Islamic scholars also determine the punishment that can be fused together from studying the nature of who the punishment is attached to. They recognize that if

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[310] al-Sarkhasi, *al-Mubsut, op. cit.,* vol. 9, p. 196, Ibn Taymiyyah al-Harrani, *al-Muharrir fi al-fiqh,* (2nd edn. Riyadh: Dar al- Ma'arif ,1404) vol. 2, p. 165, Ibn Jizzii, *al-Qawaniin al-fiqhiyyah* vol. 1, p.237, Ibn Qudamah, a*l-Mughni,* vol. 8, pp. 249, vol. 9 p. 75, Ibn al-Muflih, *al-Mubdi',* vol. 9, pp. 54-57, Ali Ibn Sulayman, 'Ala' al-Din al- Mardaawi, *al-Insaf fi Ma 'rifah al-Rajih min al-Khilaf 'Ala Madhhab al-Imam Ahmad Ibn Hanbal,* ed. Muhammad al-Faqi (Cairo: Matba'i al-Sunnah al-Muhammadiyyah, 1955/1374) vol. 10, p. 164, al-Zarkashi, *al-Manthur fi al-Qawa'id, op. Cit.,* vol. 1, pp. 270-276, Awdah, *al-Tashri,* vol. 1, pp.744-751, 2/248-250, 492, 505-507, 628,659.

[311] al-Zarkashi, *ibid.* vol. 1, pp. 270-276, al-Hamawi, *Ghamz, op. cit.* vol. 1, pp. 397-398.

punishments are due as God's rights, it is possible to coalesce and unify them. This is because the right of God is based on the virtue of forgiveness and extenuation. Thus, if someone commits multiple adulteries, drunkenness and theft, one punishment would be enough to implement the purpose of the due punishment.[312]

There is a dissenting view reported from 'Uqail of the Hanbalite's School on whether the punishment of *sariqah* (theft) can be combined[313] based on his assumption that the punishment of *sariqah* is the right of a human being. However, the ruling practice in the Hanbalite's School suggests otherwise. Ibn Qudamah states that if such a crime occurs in multiples, a single punishment is enough (amputation of right hand) because it is a right of God.[314] It seems that the view of 'Uqail is based on a crime of theft committed on different occasions against different people. If each of them asked for their right at different times, then a hand must be cut for each person. For example, Mr. A steals properties from Mr. B, C, and D and all report the matter to the authority and request that their right should be reclaimed. This could be admitted, if we have agreed that part of God's right and part of man's right is attached to the crime of theft. However, there was an occasion when the Prophet commented on theft being the right of God. This was when a noble woman from the tribe of Makhzumi committed theft and one of the Companions was hired to intercede. The Prophet said, "Do you want to intercede in one of the Rights of God''?[315] This virtually indicates that the punishment of theft is God's right.

Another divisive opinion is observed in the issue of defamation. Defaming someone of unchastity is deemed on the one hand as the right of man and as the right of God on the other. This is because, in the former, the integrity of the defamed person has been tarnished, while in the latter, the punishment is fixed by God. However, according to the majority of Islamic scholars, if defamation is made by one person on one or more persons on a single occasion, then one punishment is deemed enough because it is the right of God. This is the opinion of the Hanafites, Malikites and Shafi'ites.[316]

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[312] al-Mardaawi, *Insaf,* vol. 10, p. 164, Ibn Taymiyyah, *al-Muharri fi al-Fiqh,* vol. 2, p. 16, Ibn Qudamah, *al-Mughni, op. Cit.,*.

[313] Ibn al-Muflih, *al-Mubdi'* vol. 9, p. 54, al-Mardaawi, *al-Insaf, ibid* Ibn Qudamah, *al-Mughni, ibid.*

[314] Ibn Qudamah, *ibid.,*. vol. 9, p. 107.

[315] al-Bukhar *Sahih Kitab al-Hudud Hadith* No. 6406).

[316] Ibn al-Jizzi, *al-Qawanin al-Fiqhiyyah, op. cit.,* vol. 1, p. 237, al-Qarrafi, Ahmad Ibn Idris, *al-Dakhirah* ed. Muhammad Haji, (Beirut: Dar al-Gharb, 1994), vol 12, p. 105.

However, the Hanbalites claim that the punishment of *qadhf* cannot be merged because it is man's right.[317] al-Ghazali (d. 505) of Shafi'ite suggests that if there is a gap between one defamation and another, or if it has occurred on a separate occasion against different people, then multiple *ḥadd* can be inflicted.[318] The root of this disagreement stems from the fact that the crime lies midway between the right of God and the right of man. To determine which right supersedes, the effect of the crime has to be investigated. It is obvious that the most affected persons are those whose integrities have been tarnished by the defamatory utterances. At the same time, the purpose of the punishment has to be considered, the aim of which is to restore the stained dignity of the victims and to deter people from committing such a crime in the future. However, it can be said that a single punishment can serve this purpose, thus, the view of the majority is commensurate with the purpose of Islamic law.

Another debatable issue surrounding the unification of the punishment of multiple crimes is when there is a mixture of rights in the crimes. For instance, someone may have committed unlawful sexual intercourse, drunkenness, defamation, and cut off someone hand. In this case, there are rights of God, which are punishments of *ḥudūd* due for unlawful sexual intercourse and drunkenness, while the right of man is punishment for cutting off of someone's hand. According to majority of Islamic scholars, the right of man will initiate the punishment procedure, as such all the punishments that are due to the offender, starting with the less severe one, will be allotted. Thus, the culprit's hand will be cut off first because it is solely the right of man. This is then followed by the *ḥadd* of *qadhf,* then drunkenness and finally the *ḥadd* of *zinā.* It is observed that these punishments must be carried out in the order given above because if the punishment of *unlawful sexual intercourse* is started with, the culprit may die therefore jeopardising all other rights.[319] The execution of these punishments is also conditional on time. The bruises and wounds sustained from each punishment must be allowed to heal before another is inflicted. This is to reduce the culprit's pains and sufferings while at the same time, ensuring justice for the victim by

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[317] Ibn Qudamah al-*Mughni*, vol (?). p. 107.
[318] al-Ghazālī, *al-Wāsiṭ*, ed. Ahmad Mahmood,and Muhammad Tamir, (Cairo: Dar al-Salaam, 1417), vol. 6, p. 456.
[319] al-Murdāwi *op. cit* vol. 10, p. 165, Ibn al-Muflih ,*op. cit.* vol. 9, p. 55, Ibn Taymiyyah, *al-Muḥarrir, op. cit.* vol. 2, p.165.

not allowing the termination of the culprit's life before all punishments are fully executed.

Furthermore, in any multiple crimes in which God's right and man's rights are involved, the execution procedures are as follows:

1. If there is no death penalty in the punishments, each punishment will be executed, beginning from the lesser to the greater.
2. If there is a death penalty, the right of God will be embedded in the punishment, whether the death penalty is due as *ḥudūd* of God, such as being stoned to death for adultery if committed by a married man and woman, or if it is of man's right, such as *qiṣāṣ,* retaliation. Therefore, other punishments will be executed first, such as those for defamation, drunkenness, and theft, then retaliation.
3. If two rights are due for one person and they are both for death penalty, as explained above, the right of man will supersede the right of God. Thus, retaliation will be executed for *qiṣāṣ* and stoning.[320]

Furthermore, another question that may arises is: should the accused still be stoned for committing adultery which has been merged with the punishment of retaliation if the heirs of the victim who demanded retaliation then forgive the accused and opt for *diyah* instead, Or should he be freed and escape the death punishments for the two crimes? It seems that the former would be more appropriate in such instance, because if the accused is not punished, people might not be deterred from committing crimes and consequently, there could be break down of law and order in the society. Added to that is the fact that *diyah* is not considered as a punishment, although it can be considered as a remedy for the victim or the victim's relatives as it can also be dropped by its owner. Peters observes that "One of the indications that blood-money (*diyah*) is not a form of punishment is the fact that as a rule it is not to be paid by the

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[320] Ibn al-Muflih, *op. cit.* vol. 9, pp. 55-56, Ibn Taymiyyah, *al-Muḥarrir, op. cit.* vol. 2, pp. 165-167.

perpetrator but by his solidarity group (*'āqilah*)."[321] Moreover, *diyah* can be paid not only by the victim to impact on him, but also by his *'āqilah.*

Another interesting debate is on the unification of punishments in a situation where one person intentionally kills another two people. There is no disagreement among Islamic scholars that one death penalty suffices if the relatives of the two victims demand retaliation. After all, it is practically impossible to kill one person twice. An exception is the dissenting and impracticable view reported from al-Shafi'ī that the convicted culprit should be killed for every one of the victims.[322] However, another controversy is in case the heirs of a victim demands *diyah* while the heirs of the other victim demands for *qiṣāṣ.* According to the Hanafites and Malikites, the two relatives of the two victims have no option other than *qiṣāṣ* because of the legal entanglement that may occur if there are different demands. This view is very close to justice, not only for the culprit but also for the other party who chooses *qiṣāṣ.* If a culprit commits one class of crime *'jins wāḥid'*, then the purpose of the punishment is one *qaṣd wāḥi* (if the crime of homicide is intentional). Therefore, the punishment due for each crime should be fused and combined.[323] However, the Hanbalites assert that each relative of the victims has the right to choose what they find suitable. Thus, if one demands *diyah* and one demands *qiṣāṣ,* both will be imposed on the culprit. This opinion is based on the hadith of the Prophet in which he says: "If someone is killed, his relative has two options, either demanding for *diyah* (bloodmoney) or *qawd* (death sentence)."[324] From this hadith, it is understood that Islam vests the choice of option on the relative of a victim, without any imposition. Thus, to divest this right from the owner will be antithetic to the purpose of Islamic law. After all, if a crime is committed unintentionally and another, intentionally, there is no noticeable disagreement among Islamic scholars on the fact that each one will be entitled to their due right. The punishment due for an unintentional crime - *diyah* - will be automatically imposed along with *qiṣāṣ* due for the intentional one. This same spirit holds for the situation in question.

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[321] Peters, R. *Crime and Punishment, op. cit.* p. 49.
[322] Hamawi, *Ghazu, op. cit.* vol. 1, pp.397-398, al-Zarkashi al-*Manthur, op. cit.* vol. 11, p. 270.
[323] Ibn Qudamah, *al-Mughni, op. cit.* vol. 8, p. 249.
[324] al-Bukhari *Shahih kitab al-diyaat, Hadith* No. 2302, Muslim *Sahih Kitab al-Hajj, Hadith* No. 1355.

Furthermore, we want to say that it is very easy to rebuke the latter argument. Indeed, the example given is of a different issue. There is no cardinal relationship between what is legislated as remedy and what is legislated for retaliation. In other words, *diyah,* as mentioned above, is a measure of remedy, while *qiṣāṣ* is for retribution and reformation, thus they are of different purpose. Both are, admittedly, of the same class, namely, *qatl* (killing), but the purposes of punishment (*maqsūd al-'iqāb)* are not the same. It is pertinent to state that the issue in question here is that crimes of the same class and the punishments that are due for them are meant for the same purpose. Thus, to fuse the punishments and not allow an option for the respective plaintiffs is of paramount importance- a point that emphasizes the justice of Islamic law.

In most cases where the punishments are of '*diyah*' or '*arsh*'(compensation), for example in bodily injuries such as an injury to the hand that affects fingers, an injury to the head that affects hair, an injury to the fingers that affects nails, and so on - in all these circumstances, one *diyah* will be imposed on the accused.[325] The yardstick to determine whether one injury interlocks into another or not, *inter alia,* is if one is fixed and the other is not, or whether both are fixed. In the situation where one is fixed and the other is not, the fixed *diyah* will be enough. However, if both are fixed, then each *diyah* that is due for each crime shall be imposed on the accused.[326] Another yardstick proposed by the Malikites is that if the intention of a culprit in inflicting the bodily injuries on his victim is to cause mutilation, then he would be punished for each of the offences (injury and mutilation). For instance, if someone cuts the top joint of another person's finger and subsequently cuts the second joint of the same finger, the criminal's two joints, according to the Malikites suggestion, must be cut, one by one.[327] In this particular case, the Hanafites, Shafi'ites and Hanbalites are however opposed to separation of the punishments. In other words, they see *tadākhul* (intergradations) in the punishment. The Hanafite further suggests that one joint should be cut off for the first offence and *arsh* (compensation) should be paid for the second one, while others, including Abu Yusuf and Muhammad of the Hanafites Schools, consider the time of the commission of the two offences. If the second cut occurred before the first one has healed, the two offences are considered as one, but if

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[325] al-Zarkashi, *al-Manthur*,vol. 1, pp. 275-276.
[326] *Ibid.*
[327] al-Dardair *al-Sharḥ al-Kabīr, op. cit.* vol. 4, p. 236, Kāsānī, *Badā'i' op. cit.* vol. 7, p. 301.

the second cut occurred after the first cut heals, then the two offences are separate and a separate punishment should be inflicted on the perpetrator.[328]

Another issue to be discussed on the maxim of integration of punishments is if the crime consists of *ḥirābah* (banditry) and other crimes. The majority of Islamic scholars agree that there is integration in the punishment due for the crime of banditry, on the condition that the crimes committed are of the same nature. However, if the crimes committed are different, the most severe punishment will be imposed. This is based on the Qur'anic provision that allows four optional punishments for the criminal namely: death penalty, crucifixion, amputation and banishment.[329] Abu Hanifah suggests that if the crimes were committed at separate times and they were established, a separate punishment can be awarded for each crime. For example, if someone committed theft at one time and then committed homicide at another time, but committed the latter before the punishment for the former was due, then the culprit can be given the punishment for the theft first, followed by the punishment for homicide. Malik opposes this view based on the fact that the Qur'an does not state that if one crime is committed in banditry and another is committed separately, that a punishment should be imposed. Thus, if the nature of the crimes committed at the scene of the banditry is different, the most severe punishment will be awarded. From the explicit text mentioned above, the Zahirĩ argues that the kind of punishment to be awarded in this case should be left for the ruler or judge to decide, regardless of whether it is severe or not.[330]

However, the question here is that if the crime of homicide is first committed before the crime of theft, should the culprit be given the punishment of homicide before the other one? It is absolutely irrational for anyone to suggest that, because once death penalty has been executed, there is no effect for the punishment of theft. Thus, the *raison d'etre* for the separation of punishment in this case is baseless. The cause of disagreement between Abu Hanifah and Malik, and between the majority of the scholars and Zahiri, stems from the function of the word "*aw*" (or) in verse 33 of Qur'an 5. Abu Hanifah construes it as an explanation, while Malik and Zahir interpret

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[328] al-Kāsānī, *ibid.*
[329] Qur'an5, verse 33.
[330] Awdah, *al-Tashri op. cit.* vol. 2, p 659.

it as optional. Abu Hanifah's view is that a contradiction may arise if one is forced to choose between which punishments are to be executed first. On the other hand, if the opinion of Zahir were to be accepted, there may be injustice in some cases where a less severe punishment is opted for, and the rights of people are perfidiously marred. However, this is antithetic to the spirit of Islamic Law. Thus, the only option left is to accept the view of Malik that is endorsed by the majority, because if the most severe punishment is opted for, the spirit (*maqsūd*) of Islamic law will have been achieved by reforming a criminal and deterring people from committing crimes. At the same time the culprit has been proportionally, but not excessively, punished.[331]

2.9 Summary of the Chapter

This chapter has addressed the importance of intention in Islamic criminal law. It establishes the stand of Islam in considering the intention of an accused before his/her criminal act can be established and the type of punishment to be awarded. Action has to be concurrent and correlated with intention. Any dissenting view on the corroboration of the two elements in criminal case will render the case discreditable or the punishment attached to the offence abated as we have mentioned in the above cases.

There are discussions on the effect of expression and intention. Should effect be given to the intention of the locutor or the explicit form of the expression? To decide that, the rights of one against whom the crime is committed must be established. If the right involved is God's right, then the effect may be given to the intention of the speaker but if the right involved is of human, then the explicit expression will be considered especially where the expression is demanded before the court of law.

In some cases where it could be very difficult to establish criminal intention, but where there are clues to suggest the involvement of the accused person in the alleged crime, the stand of Islam is to avert the punishment when there is any iota of doubt. The following chapter will shed light of this important aspect.

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[331] *Ibid.*. vol. 2, pp. 443 and 659.

Chapter Three

Analysis of the Legal Maxim: *al-Yaqīn lā yazūl bi al-shakk*

(Certainty shall not be removed with doubt) [332]

3.0 Introduction

Certainty and Doubt play vital roles in Islamic criminal law. The maxims to be treated under these terms will concentrate on how criminal justice could be established through the phenomenon of certainty and elimination of doubt. The leading maxim is the second among the basic general legal maxims agreed upon in principle by the Islamic scholars, even though there may be discrepancies in the manner of its applications. This maxim reflects the ease and beauty of Islam by creating a conducive atmosphere for Muslims with regard to the implications of their actions.[333] According to al-Zariqa snr.: "The importance of this maxim is unlimited because there is no part of *fiqh* to which it is not applicable.[334] The maxim was first credited to al-Karikh in his book *Tasīs*, in which he said: "*mā thabat bi al-yaqīn lā yazāl bi al-shakk*"(indeed, whatever is established by certainty cannot be removed by doubt).[335]

3.1 Definition and Interpretation of the Legal Maxim

Two contrasting words form the basis of the maxim: *yaqīn* (certainty) and *shakk*, (doubt). *Yaqīn* literally means undoubted knowledge of something that satisfies the soul.[336] But there is no consensus among scholars on its technical meaning. For scholars of *uṣūl* (*Usulists*),[337] *yaqīn*, is a strong belief that corroborates with virtual occurrence. This implies that probability or apparent probability cannot be regarded as

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[332] al-Suyuti *al-Ashba'op. cit.* p. 55. Ibn Nujaym *al-Ashba' op. cit.* p. 59, *Majallah* Article 4, Ahmad al-Zarqa, A., *Sharh al-Qawa'id op. cit.* 79, al-Zarqa, M. *al-Madkhal op. cit.* 574, al-Burnu, *al-Wajiz op. cit.*, p. 166.

[333] al-Nadwi *al-qawa'id al-Fiqhiyyah.. op. cit.* p. 354.

[334] al-Zarqa, A. *op. cit.* Pp. 78-80.

[335] 'Ubaydllah Ibn Umar Ibn Isa Al-Dabuusi, *Kitab Ta'sīs al-Nadhr* (Cairo: Matba' al-Imam n. d.), p.110, al-Burnu *al-Wajiz op. cit.* p. 166.

[336] Ibn Mandhur, *Lisān op. cit.* vol. 13 p. 457, Muhammad Ibn Abi Bakr Ibn Abdul Qadir al-Razi, *Mukhtar al-Shihāh,* (Beirut: Mu'assasah al-Risalah n.d.) vol. 6 p. 2219, al-Jurjānī, *T*a'rīfāt op. cit. p.116.

[337] The term usulists here refers to the scholars who are experts in the field of *uṣūl al-fiqh.* It is not necessary that all usulists are jurists, but it is necessary that all jurists (*faqahāhi)* are usulist.

yaqĩn. In the view of the jurists *(fuqahãhi)*, however, probability, can be accepted as *yaqĩn* because most legal rulings are based on apparent probability. In most cases in Islamic legal procedure, something is assumed to be certain even if it can be reasonably doubted, such as the evidence of a witness that is accepted as substantive proof, even though the evidence may be fictitious. In the case of unlawful sexual intercourse, for instance, it is highly unlikely that the testimonies of four witnesses will be wrong, and, as such, that evidence becomes very hard to turn down.

Contrary to their definition of *yaqĩn*, jurists are in agreement with *usulists* that if a man and a woman who are not legally married emerge from a room in a condition that suggests that they have had sexual intimacy, this is not in itself enough to claim that they have committed unlawful sexual intercourse. Even if it might be assumed that there is little probability that they have not had sexual intercourse, the fact is that since the case does not infringe on individual right, and no claim by anybody is attached to it, the accusation of unlawful sexual intercourse will be regarded as unfounded.[338] Besides, because of the strict standards laid down in the *Sharĩ'ah* for the accusation of such crime, it is unlikely that someone will be convicted on the basis of that probability. However, *ta'zĩr* may be imposed for misconduct on the accused persons. Thus, the Islamic jurists comply with the definition of *yaqĩn,* as stated by scholars of *usũl* as in any case of *ḥudūd*

Al-Shakk, (doubt), on the other hand, the opposite of *yaqĩn,* is defined as hesitation regarding a decision between two things. Both the jurists and *Usulists* agree on this definition. However, the *Usulists* assert that if the mind tends to dwell on one of the things more than the other, the knowledge of such things is called *ẓann* (probable), and the knowledge of the thing considered less likely is called *wahm* (illusion). Thus, the categories of knowledge of such things in the Islamic legal system are *yaqĩn*

[338] In some cases, the right of man can be involved in the case of *zinā* when the husband reported that his wife has been raped or she has committed adultery. In the former, case will be dealt with as mornal by producing four witnesses or by using modern technology to investigate the allegation against the raper if he could not get four witnesses (that is in my opinion because of the right of man involved). For the later, the case will be dealt with as mormal against his wife if he could produce four witnesses. However, if he could not produce four witnesses, the case will be resolved with *li'ān* (five oaths taken by both couples to clear the allegation. See Quran 24:6-9 and Doi, *op. cit.* pp. 170-171, 189, Peters, *Crime and Punishment, op. cit.* p.63

(certainty), *ẓann* (probability), *ghalabah al-ẓann* (most probable), *shakk* (doubt), and *waham* (illusion). [339]

Jurists and Usulists agree that *yaqīn* is unreservedly acceptable as the basis for rulings. *Ẓann* and *ghalabah ẓann* are mostly used in deciding on issues that are apparently or probably certain. However, *shakk*, is used to describe the situation when there are two things about which there is no preference for one over the other. There are some scholars who claim that *shakk* and *ẓann* are of the same connotation in the use of Islamic jurists. But this claim has been rebutted by al-Zarkash, thus: "That they (the Islamic jurists) do not differentiate between the two terms in the subject of impurity, whereas they have distinguished between them in many places."[340] In this case, *shakk* is not acceptable as a basis for establishing a ruling, especially in criminal cases, talk less of *waham*.

The importance of this discussion lies in the fact that most of the rulings in Islamic law are based on probability, because it is difficult, if not impossible, to base all judgments on absolute certainty (*yaqĩn)*. Thus, recourse to probability is inevitable. The Qur'an also indicates that certainty could also be based on probability. In other words, *ẓann* or *ghalabat al-ẓann,* could be upgraded to *yaqĩn* in the absence of the latter. The Qur'an says: "Those who know certainly that they will meet their Lord."[341] For instance, Islamic law requires that the proof of a crime should be convincing enough to establish the guilt of the accused. Because crimes vary in their gravity, the evidence required to prove one particular crime will obviously not be the same as the proof required for another crime.

In some cases such as homicide and unlawful sexual intercourse, the required evidence is so difficult to obtain because of the harshness of the punishment

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[339] Ibn Manzur, *Lisan op. cit.* vol. 13, p. 457, al-Hamawi, *Ghamz Uyũn al-Basãir op. cit.* vol. 1, p.84, Muhammad Ibn Husayn al-Razi, *al-l-Mahsũl fi 'Ilm al-Usũl* ed. Husain Ali al-Yadri, (Amman: Dar al-Bayariq, 1999/1420), vol. 1, p. 101, al-Zarkashĩ, *al-Manthũr fi al-Qawã'id op. cit.* vol. 2, p. 255, Yahyah Ibn Sharaf al-Nawawi, *al-Majmũ' Shar al-Muhadhadhab* (Beirut: Dar al-Fikr, 1997), vol. 1, p. 223, Ahmad al-Zarqã, *Sharh al-Qawã'id op. cit.* p. 80.

[340] Al-Zarkashi, *al-manthur op. cit.* vol. 2, p.255, Ibn Nujaym *al-Ashba' op. cit.* p. 82, al-Nawawi, *al-Majmu al-muhadhdhab op. cit.*

[341] Qur'an 2:46 . The word *yadhunn* is interpreted as *yatayaqqan*. See Mahmuud B. Umar, al-Zamakhshari, *al-Kashshaaf ed.* Abdu al-Rasaq, (Beirut: Dar 'Ihya al-Turath al-Arabi, n. d.) vol. 1, p. 163.

prescribed for those crimes. Nevertheless, the two crimes have different requirements. In the case of homicide, because the right of an individual is involved, Islamic law requires at least the most probable certainty (*ghalabah al-ẓann*) that corroborates with other circumstantial evidence to convict an accused person. These include two witnesses who have seen the act of slaying, as well as circumstantial evidence such as video recordings or DNA[342] to corroborate the evidence given by the witnesses. On the strength of the combination of these evidences, the accused will be convicted of murder. However, if mere *ẓann* is presented as evidence, the accusation will be unfounded until it is coupled with circumstantial evidence. An example of this situation is when someone is found standing beside a slain person with a knife in his hand. The suspicion may be that the bystander slew the dead person, but the assumption cannot be admitted until it is strengthened with other evidence.

In the case of unlawful sexual intercourse on the other hand, since no right of man is involved, one of the standards of proof required to establish the guilt of the accused person is virtual certainty, embodying *inter alia*: four witnesses who have seen the act of unlawful sexual intercourse being committed; a description of the act in a detailed, explicit statement; and agreement in the statements of all the witnesses. Failure to fulfil these requirements will render the accusation unfounded, based on lack of certainty.[343] That is why it is rather surprising to find that in the cases of Safiyyatu vs. Sokoto State of Nigeria and Amina vs. Kastina State of Nigeria respectively, the two women were pronounced guilty of adultery by the Shariah Upper courts in the two states, even though the above-mentioned requirements were not met. Undoubtedly, there were some obvious grounds on which the accused women were found guilty,

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[342] DNA means Deoxyribonucleic acid's which is a chemical that is found in the human body's cell. It determines human trait. It was developed in the United Kingdom by Sir Alec Jefferys, a Professor at the University of Leicester in 1984. For more details see http://www.sceintific.org?tutorials/articles/riley/reliy.html. DNA is considerd to be a circumstantial evidence in Islamic law. Though, there are divergent opinions among the contemporary scholars on the strength of such evidence. Most Islamic scholars consider any evidence branded as *qara'in* (circumstantial) as incapable to use in rulings related to *ḥudūd* and *qiṣāṣ*. (see Muhammad Ibn Ma'juz, *Wasa'il al-Ithbat fi al-Fqh al-Islami,* (al-Dar al-Bayda, 1984) pp. 13-14, Sayed Sikandar Shah Haneef, *Modern Means of Proof: Legal Basis for its accommodation in Islamic Law,* (Leiden Brill: Arab Law Quarterly, 20, 4,) pp. 344-345

[343] Peters, R., *Crime and Punishment in Islamic Law Theory and Practice from the sixteenth to the Twenth-Fist Century*, (Cambridge, Cambridge University Press 2005) p. 13, cf. pp. 59-62.

such as the appearance of pregnancy and confession. But the evidence of appearance of pregnancy is subject to disagreement among scholars.[344]

In large measure, while absolute certainty is required to prosecute and convict an accused in some cases, probabilities and circumstantial evidence are sufficient in others. However, under no circumstance is *shakk* (uncertainty) acceptable, regardless of whether the right of individual or the right of God is involved.

Thus, the general interpretation of the maxim, according to Islamic jurists, is that what is established by the virtue of sound and conclusive evidence can only be aborted or terminated by equally conclusive or probable evidence. This is because it is illogical that uncertainty should terminate certainty.[345]

3.2 The Sources of the Maxim

The maxim is rooted in the Qur'an and the tradition of the Prophet. The Qur'an says: "And most of them follow nothing but conjecture, certainly conjecture can be of no avail against the truth."[346] It is reported that Abdullah bin Yazid al-Ansari asked God's Messenger (SAW) about a person who he thought had passed wind during the Prayer (*ṣalāt*). God's messenger replied: "He should not leave his *ṣalāt* unless he hears sound or smells something."[347] Al-Nawawi in his comment on this *hadith* remarks that this *hadith* serves as one of the pillars of Islam and is an important maxim of Islamic jurisprudence. It indicates that things remain in their original status until otherwise established, and that there is no case for any accidental doubt.[348]

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[344] Ladan Muhammad Tawfiq and others, *A Handbook on Sharia Implementation in Northern Nigeria: Women and Children's Rights Focus*. (Kaduna, Nigeria, LEADS Nigeria, 2005) pp.107-120.
[345] Muhammad Khalid and Muhammad Tahir al-Atasi, *Sharh al-Majallah op.cit.*vol. 1, p. 18, al-Zarqa, M., al-*Madkhal op. cit* 96.
[346] Qur'an 10, verse 36.
[347] al-Bukhari, *Sahih Kitab al-Wudu* hadith no. 137, Muslim *Sahih* hadith no. 362.
[348] al-Nawawī, *Sharh Sahih Muslim op. cit.*vol. 4, pp. 49-50 cf. Hadith Abi Hurairah in Muslim 4/51.

3.3 Some subsumed Maxims under the Maxim of Certainty and Doubt

3.3.1 *al-'aṣl barā' al-dhimmah* (The fundamental principle is freedom of liability) or *al-'aṣl al-'adam*- (the fundamental principle is the non –existence of something).[349]

It is fundamentally established in Islam that one cannot be held responsible for any claim, or be said to have obligation to others, until it is proved. All litigations have two sides - the one claiming the existence of the right over something, and the one refuting the claim. There is no justice in accepting the mere claim of the *muthbit* (the one making the claim) until the claim is proven. The assumption in justice is that a claim does not exist until it is proven. This position appears to be in favour of the offender. If someone lays claim to a piece of jewellery in the possession of a jewellery seller, it is apparent that the seller holds the *aṣl* (fundamental proof) and the claimant needs to argue his case with another proof .[350]

Sometimes, there may be a contradiction between what is fundamental *aṣl,* and what is apparent, (*ẓāhir*). When such contradiction occurs, the *ẓāhir* may be considered because it is closer to the right intention. Take the example of an impotent man who claims to have had a sexual affair with his virgin woman, and it is discovered that the woman has lost her virginity. The man's claim in this case will be considered. However, his claim that he has had an affair with her is a new occurrence that did not exist originally, '*aṣl.* But because the woman's condition has changed, as demonstrated by the loss of her virginity, the *ẓāhir* (i.e the man's claim) will have to be considered.[351] Similarly, if four witnesses testify that a man has committed unlawful sexual intercourse with a virgin woman and it turns out after investigation that the woman is a virgin, the testimony that has been regarded as *aṣl* will then be disregarded because of its contradiction with *ẓāhir*, which is the state of virginity.

Another example is that of an injured person claiming to have sustained a higher degree of injury than what is acknowledged by the causer of the injury. In this case, the latter's confession will be upheld because he holds the *aṣl.* However, if an

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[349] al-Suyuti, *al-Ashba'* i op. cit., 52, Ibn Nujaym, *al-Ashba' op. cit.* p. 59, al-Majallah, Article 8.
[350] al-Zarqa, A., *op. cit.* pp.107-100.
[351] *Ibid.* p. 110

offender refuses to take an oath in a case where the plaintiff has established his proof, he would not be convicted until the plaintiff is asked to take the oath himself, because he holds the *aṣl* - this being a case of freedom from liability of the accusation until otherwise proven. Furthermore, where two witnesses are required to establish a claim, one witness would not be accepted because of the non-existence of the claim. And before the claim could be established, there must be proof.[352]

If four men witnessed against a woman that she committed *zina,* while at the same time, a number of trustworthy women witnessed that she is a virgin, no *ḥadd* punishment would be applied to her, or to the four male witnesses. This is because there is an element of doubt in their testimony. The accused cannot be convicted because *al-ḥudūd tudra' bi al-shubhāt*, (*Ḥudūd* punishment shall be averted in the face of doubt). The doubt in this case is the assertion of the trustworthy women that the accused is still a virgin. As for the witnesses, they are not to be awarded *ḥadd* punishment for *qadhf (*defamation*)* since they have fulfilled the legal requirement of four witnesses in such a case. This is the opinion of the Shafi'ites and Hanbalites, as well as some other scholars. However, Malikites jurist reject the witness of the trustworthy females in this case, claiming that the punishment for unlawful sexual intercourse should be accorded. Although women are not allowed to give witness in cases involving *ḥadd*, in this particular case, there is a need for a female to testify as only a woman is permitted to investigate the privacy of another woman.[353] Similarly, if four male witnesses testify against a man accused of having committed unlawful sexual intercourse, and another group of four male witnesses testify that the first group of four men were the ones that rather committed *zina*, no *ḥadd* punishment would be imposed on the two parties. This, according to the Hanifites and Hanbalites schools, is because the reputation of the first group of four witnesses has been stained, while the second group is open to suspicion, and as such, the *ḥadd* should be dropped.[354]

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[352] al-Suyuti, *al-Ashba'h op. cit.* p.52.
[353] Abdullah Ibn Ahmad Ibn Qudamah, .*al-Mughni li Ibn Qudamah,* ed. 'Abdullah al-Turki and Abdul Fattah al-Hilu, (Riyadh, Dar 'alam al-Kutub 1999) vol. 12, p. 274
[354] *Ibid.* vol. 12, p 376.

3.3.2 *al-'aṣl baqā' mā kān 'alā mā kanā "ḥattā yaqūm al-dalīl 'alā kilāf"* (Affairs remain lawful, the status quo "until otherwise proved"). [355]

This maxim emphasises that a known certainty continues to be recognized until the emergence of a greater certainty overrides the earlier certainty. For instance, if two parties dispute on an issue, judgement on that issue shall be made on the basis of what is already known about the issue before the occurrence of the dispute, until either of the parties produces other facts that can override what is already known.

The effect of the maxim in criminal cases is that one should not be convicted on any allegation until the required evidence is found. However, there are cases where minimum or circumstantial evidence may be sufficient to prove an accused person guilty. Such will be the situation where the right of man is involved, where it is very difficult to obtain the substantive required evidence. In other words, a crime can be established with circumstantial evidence in cases of liabilities, but not in *ḥudūd.*

3.3.3 *al-'aṣl iḍāfah al-ḥādith ilā aqrab awqātih* (The fundamental principle is to ascribe an event to its nearest point in time). [356]

This maxim explains the previous one, and shows that the fundamental status of any occurrence is to ascribe it to its nearest point in time, because the nearest time is certain and it can be traced. Thus, if there is a dispute between two parties concerning the occurrence of damage, the last party to have contact with that incident will be held liable for the occurrence of the damage.[357]

Thus, if any defect occurs on an article after it has been bought, and the seller claims that the defect occurred in the custody of buyer, while the buyer claims otherwise, the judgement shall be in favour of the person who was last to have contact with it – in this case, the buyer. Thus, the defect shall be ascribed to the buyer. The buyer has no

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[355] al-Suyuti, *op. cit.* 251, Ibn Nujaym, *op. cit.* 57, *Majallah*, Article 5, al-Zarqa, A. *op. cit.* 87, al-Burnu, *al-Wajiz op. cit.* 172. al-Atasi, *Sharh al-Majallah op. cit.* 20

[356] Ibn Nujaym, *op. cit.* p. 64, Ali, Haydar, *Durar al-Hukkãm Sharh al-Majallah*..ed. Fahm al-Husayni, (Beirut: Dar al-Kutub al-'Ilmiyyah n.d) vol. 1, p. 25, al-Atasi, *op. cit* vol. 1, p. 32.

[357] al-Burnu, *al-Wajiz op. cit.* p. 187.

legal right to breach the term of the agreement unless the seller refuses to take an oath.[358]

Furthermore, if someone strikes a pregnant woman and she delivers a premature baby, and the baby dies a short time afterwards, in this case, the offender would not be responsible for the death of the baby because it is possible that the death was caused by some other means. It could be argued that the most current actor in this case is the one who struck the pregnant woman and caused the early delivery. However, as the baby was delivered alive, the offender will not be held responsible for his death. By contrast, if the baby was delivered dead and the offender claims that the baby could have died in the womb, this claim should not be accepted. This is because the offender is the nearest actor regarding the premature delivery of the pregnancy.

3.3.4 *Idhā ijtama' al-mubāshir wa al-mutasabbib, yuḍāf al-ḥukm ilā al-mubasir* (In the presence of the direct author of an act and the person who is the causer, the direct author is responsible thereof).[359]

On the surface level, the maxim of causation stands as a characteristic feature of justice in the Islamic criminal law. Distinguishing between the direct causation of an act and the indirect causation is inevitable in criminal cases where the aim is to strike a balance of justice between the two perpetrators and the victim.

In order to determine the certainty of a criminal act and to eliminate grain of doubt, Islamic jurists have extensively studied who is responsible for the liability of the consequence of an action involving direct and indirect causers. In turn, there is no unanimous agreement upon who is solely responsible for a murderous act involving two persons or multi-accused. The reason for this disagreement is in order to give the indirect actor the benefit of the doubt. However, from the view of those who excuse him from liability, the reason given is to deter the occurrence of such an act, while from the view of those who opine the imposition of liability on both direct and

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[358] *Ibid.*

[359] Ibn Qudamah, *al-Mughni, op. cit.* vol. 8, pp. 214, 271, *Majallah* Article 90, Haydar, *Durar op. cit.*vol. 1, p. 80, Muhammad Ibn Ghanim al-Baghdad,, *Mujma' al-Dhamanat..* (Beirut: Alam al-Kutub, 1987/1407), vol. 1, p. 405, al-Zarkashi, *al-Manthur op. cit.* vol. 1, p. 136, al-Hamawi, *Ghamz op. cit.* vol. 1, p. 466.

indirect causers, this is to maintain a balance among the accused culprits. Finally, from the view of those who distinguish the liability of the direct accused from the indirect accused, this is to seek a fair outcome.

Al-Mubāshir, (direct causer) in criminal cases, is something or someone who physically and directly commits a crime, regardless of the reason or the cause behind it, while the *al-mutasabbib* is something or someone, who for one reason or another, is indirectly involved in committing the act. For example, if someone dug a well on a public domain without legal permission, and another person pushed someone into it who consequently died. The person who pushed the other person is the *mubāshir* who would be responsible for the commission of the death. However, as digging a well on a public domain is an offensive act, the digger is the *mutasabbib* who might be discretionarily punished as deemed by the authority. However, pushing someone into the well is considered as a direct criminal offence that is tantamount to retaliatory punishment if the person, as a result of the action, dies. The *mubāshir* in this case was the effective cause of the death, as opposed to the *mutasabbib,* who dug the well. Thus, the *mubāshir* will be held responsible for the consequence of his action.

However, if someone accidentally fell into the well without any agent, the rule would then work the other way. In that case, the *mutasabbib* would be held responsible. The punishment accorded to his action would differ from the one given to the *mubāshir* above because of the absence of intention to kill in the action above. Hence, instead of *qiṣās, diyah* would be accorded. This is in a situation where the digger of the well dug it illegally, as stated above. However, if he did dig with permission, or legally on his property, in both cases there would be no liability on him because of *al-jawāz al-shari'ī yunāfī al-ḍamān* (legal permission invalidates liability).[360]

A criminal act can be committed individually or collectively. In collective criminal acts, one can be the prime accused and another secondary, or both can be prime accused, depending on the involvement of each of them in the act. The proportion of a secondary accused could be in terms of assistance, encouragement, or even corroboration in the commission of the crime but the quota of his involvement is

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[360] *Majallah* Article 91.

minor. However, the prime accused who directly commits the crime is the *mubāshir,* while the one who is indirectly involved is the *mutasabbib*.[361]

One of the surprising approaches of Islamic classical scholars is that they vest so much effort in discussing the rules of *al-mubāshir,* but neglect the responsibilities of *al-mutasabbib,* as apparently induced in the maxim in question. The reasons for this as Awdah observes are:

- Because they are too concerned about the crimes that constitute fixed punishment and that of *qiṣās* - these punishments being unchangeable - as opposed to the discretionary punishments, the sphere of which is unlimited.
- Because it is an established norm in Islam that fixed punishments can only be inflicted on those who are directly involved in the crime, except in some circumstances where the majority of scholars, except Abu Hanifah, consider an indirect causer in a crime that involves life and bodily injury as a co-accused. This is because the latter may be responsible for the consequence of the act; thus, an act may occur collaboratively between *al-mubāshir* and *al-mutasabbib*.[362]

The maxim of causation can be divided into two: (1) direct causation -who physically does the act. An example is where someone solely commits theft without the assistance of any other agent. (2) Indirect causation - who is indirectly and supportively involved in the act. An example of this is where someone leads another person to a location where he can steal a property. The direct causation can also be divided into single/individual causation and group/multiple causation.

For direct single causation, it has no connection with the maxim in question. For direct multiple causation, the controversy among Islamic Jurists is on whether or not a group of people can be punished for the crime of life and bodily injury. According to the majority of Islamic scholars, all the perpetrators in *qiṣās* and *diyah* crimes will be

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[361] Muhammad Ibn Abdu al-Baqi al-Zarqani, *Sharh al-Muwatta* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1411), vol. 8, p10, Awda, *al-Tashri'* vol. 1, p.357.

[362] Abu Hanifa consistently applies this maxim in all criminal acts by ascribing criminal liability to *al-mubashir.* Thus, in Abu Hanifah's view, if there is any crime of *ḥudūd* and *qiṣāṣ*, the *al-mubāshir* will be responsible, as opposed to the majority view, including Malik, Shafi' and Ahmad in their version. To them, in *qiṣāṣ* crimes *al-mutasabbib* may be held responsible for a criminal act if the criminal procedure proves that. See Awdah, *al-Tashri* vol. 1, p.358.

held responsible, depending on the intention of the individuals involved. For example, if a group of people all intentionally set fire on a house that consequently damages property and takes the lives of its inhabitants, all will be responsible for repaying the value of the house and would also be given *qiṣāṣ.* An exception however exists only in a situation where the perpetrators claim that they are not aware of people's presence in the house. In that case, *diyah* will be proportionally shared on them. This is the opinion of the Malikites, based on the statement of Umar Ibn Khatab in which he was reported to have said: "If all people of San^{c}a' (in Yemen) are involved in killing him, I will kill all of them."[363] However, other scholars oppose this view on the basis that there is no justice in killing multiple people to retaliate the death of one person, because the law of retaliation is based on equity and comparing multiple killings to just one killing is antithetical to equity. One point that should be made clear at this juncture is that though equity is advocated in the law of retaliation, yet, it should be noted that the law is enacted for some other reasons such as retribution and deterrence. In Scottish criminal law, the general rule is that each person is only responsible for criminal liability unless it is proved beyond reasonable doubt that a group of people acted together 'in pursuance of a common criminal enterprise or purpose.' In such cases, all would then be punished.[364] The view of other Islamic Jurists is that the type of punishment to be allocated can vary. However, in the situation given earlier in which *qiṣāṣ* should be dropped for *diyah,* which will then be shared among the perpetrators, it is assumed that there is a *shubhah* (doubt). Thus, the latter view does not disagree with the maxim in principle, but it does so in practice.

Conversely, all Islamic scholars agree that if the crime is of *ḥudūd,* such as a group of people involved in raping a woman, all will be given *ḥadd,*[365] except in situations where there is a substantial *shubha,* such as the involvement of the raped woman's father in the crime or a lack of legal definition of a criminal act. Regarding the involvement of the raped woman's father in the crime, the *ḥadd* will be dropped because of the relationship of the raped women with the father, as there is a strand of inheritance between them.[366] Regarding the lack of legal definition of a criminal act, if

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[363] al-Zarqani,*Sharh al-Muwatta op. cit.,*vol. 4, p. 250.
[364] Crimes against the person p. 68, quoting O'Connel v. HM Advocate 1987, SCCR 459 at 460 and Sinclair v. HM Advocate (4 May 1990, unreported) CCA).
[365] Awdah, *op. cit.* vol. 1, p. 360.
[366] *Ibid.* Vol. 1, Pp. 360, 363-364

a group of people stole a property and shared it among themselves so that the value of what eventually got to each of them would not reach the requirement of the crime of theft, then *ḥadd* punishment could be dropped. But yet, each of the perpetrators will be given *ta'zīr* as deemed by the authority.[367]

However, if causation is involved in a crime committed by a single or multiple perpetrators, and if a crime is of a *ḥadd* nature, all Islamic scholars agree that *al-mubāshir* is the only prime accused and the only one to be responsible for the consequences of the act in line with the maxim in question. For example, if someone commits an unlawful sexual intercourse involving rape, or if someone breaks into another's house and steals property while in both cases another person stood by as guard, the prime accused will be the direct rapist and direct house breaker and will be given *ḥadd.* However, the other two *mutasabbib* could be given *ta'zīr* by discretion of the authority for indulging wrongdoing.[368] Another example is if someone asked another to insult the Prophet or to defame another person. In such cases, therefore, the direct perpetrator will be held responsible because one is not allowed to infringe on another's rights without legal permission.

On the other hand, if a crime is of *qiṣāṣ* nature, Abu Hanifah maintains that the sole person responsible is *al-mubāshir* (the direct causer), thus *al-mutasabbib* would be freed. However, majority of Islamic scholars oppose this view. To them, *al-mutasabbib* would be held responsible according to the proportion of his or their involvement in the crime. We however wish to remark that the latter view is more

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[367] Peters, *Crime and Punishment op. Cit.,* p. 28, Awdah, *op. cit.* vol. 1, p. 363, al-Ramali, *Nihaya al-Muhtaj op. cit.,* vol. 7, pp. 261, 263, al-Shirazi, *al-Muhadhdhib* , *op. cit.,* vol. 2, p. 7116, al-Dardair, *al-Sharh al-Kabir, op. cit.,* vol. 4, p. 217, Ibn Qudamah, *al-Mughni*, vol. 9, p.366.

[368] It is not clear in the judgement of the general court of Riyadh in regard to the case of Abdul Rahman Ibn Saeed al-Zahrani and Abdul Rahman Ibn Qassim al-Feefi whether both were sentenced to death based on the involvement of other in indulging wrongdoing. It is reported that two of the soldiers stopped a 20-year-old expatriate woman driving with her father in Riyadh. One of the two soldiers took her to a desert area and raped her while the other one stood with her father and threatening to kill him. In their case, it will be assumed that one is a direct causer of the raping while the other is a mutasabbib. By the maxim in question, it will be assumed that the direct causer should be given death penalty if it is established that he is married man while the second soldier should be given tazir lesser than the raper. But the judgement may only be based on *hirabah* rathan than to be based on *zina* and *ightisab* as stated in the report that the first soldier was convicted on kidnapping and raping the woman and the second soldier was convicted on helping his colleague to kidnap and rape, and threatening to murder see the full report of the case online at www.arabnews.com/?page=1&section=0&article=109140&d=20&m=4&y=2008 viewed last 21/04/2008)

practical in cases where there is complicity in the crime. For instance, if a car is parked in an unauthorized public place, and an incoming car accidentally crashes into the parked car, causing the parked car to roll towards a building and hit it, and subsequently the building collapses on a by- passer and kills him. According to the majority of Islamic scholars, the person that parked the car is responsible for illegal parking, while the car crasher is responsible for the collapse of the building and the death of the by-passer. Thus both are involved in the subsequent crimes and each one should be responsible for his quota in the damage caused by his particular action.

3.3.4.1 Conditions for holding the *Mubāshir* liable

The Jurists unanimously agree that a murderer who is responsible for homicide and subjected to retaliation, *qiṣāṣ,* should be sane, must have attained puberty and possess the free will to act directly and without participation from any other agent in the act. There is an instance in which *al-mutasabbib* could be held solely or collectively responsible for the act committed by *al-mubāshir.* This is in cases where there is a lack of criminal intent of *al-mubāshir,* such as a minor who is given a knife to kill someone. If he does, the person who gave him the knife will be responsible. Also, *al-mutasabbib* will become the prime accused, prosecuted and be responsible if he coerces someone to kill another person. According to the majority of Islamic scholars, a commander and a coercer are considered as the prime accused because of the lack of criminal intent of the *mubāshir.* As such, he (the *mubāshir*) is like a tool used by the coercer for the purpose of killing.[369] There is a contrary view reported from each of the four Imams (leaders of the four *Sunni* schools of thought) on the issue of *al-mukrih* (the coercer) and *al-mukrah* (the coerced person). Malik and Shafi', in one version, opine that there is retaliation for both, while Abu Hanifa and Shafi', in another version, are both of the opinion that there is no retaliation for *mubāshir* with regard to complete coercion (*ikrāh tāmm*), because he is like a tool, rather, the retaliation will be imposed on *mutasabbib mukrih* because he is the actual cause of the crime. Abu Yusuf of the Hanafi school also hold that there is no *qiṣāṣ* for both because of *shubhah,* and that *diyah* should rather be resorted to. Zufar of Hanafi asserts that *qiṣāṣ* should be imposed on *mubāshir,* whether it is complete or not, based

[369] Ibn Qudamah, *al-Mughni,* vol. 9, p. 331, al-Shirazi, *al-Muhadhdhib,* vol. 2, p. 189, al-Dardir *al-Sharh al-Kabir,* vol. 7, p. 216, Ibn Rushd, *Bidayah,* vol. 2, p.479.

on the maxim in question.[370] Thus, the problem of contradiction stems from whether the *ikrāh* is complete or incomplete. If it is incomplete, the majority of scholars impose punishment on the *mubāshir* because his life is not more important than the life of others, and thus he has no right to preserve his life at the expense of others.

A typical case is if someone holds another person so that he might to be killed by someone else and this is done, the direct killer will be responsible, according to the opinion of Abu Hanifah, Shafi' and a version of Ahmad while the Malik and Ahmad in another version deem both as killers responsible for the murder. This is because, though one is *mubāshir* and the other is *mutasabbib*, the quota of involvement of both is equal in the consequence of the act.[371]

Also, if an animal causes damage to a property or harm to a person, the rule is that the animal cannot be prosecuted based on the fact that it has no sense of belonging. The owner will not be responsible either because he did not directly damage the property or cause harm to the person. This is because of the tradition of the Prophet that states that damage caused by an animal is in vain.[372] This can only be construed if the animal is stationary in an authorized place, while it is also the norm that people should keep their property in the daytime, as mentioned in the discussion on *'urf* and *'ādah.*[373] However, if the owner of the animal has mounted it or has negligently stationed it in an unauthorized place, he will then be responsible for the damage the animal caused, although he is *mutasabbib and* not *mubāshir.* However, he is held responsible for the damage because it is his responsibility to take care of his animal while the animal is in use. [374]

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[370] al-Kasani, *Bada' 'i*, vol. 7, pp. 178-180.
[371] Ibn Nujaym, *al-Bahr al-Rahiq op. cit.,* vol. 8, p. 345, al-Ramali, *Nihayah al-Muhtaj op. cit.,*vol. 7, p. 244, al-Dardari, *al-Sharh al-Kabir,* vol. 4, p. 217 Awdad, *op. cit.* vol. 1, pp. 373-377, cf with the rule of art and part liability in Scots law in Ferguson P.W. , Crimes against the Person (Edinburgh: Butterworths, 1990) p. 68. In it, it is stated that if A supplies B with a gun with which to shoot and kill C, A is liable for the murder along with B. cf. HM Advocate v. Lappen 1956, SLT 109 at 110, per Lord Patrick.
[372] al-Bukhari, *al-Sahih hadith* no. 6514.
[373] See notes 545 and 557.
[374] al-Hattab, *Mawahib al-jalil, op. cit.,* vol. 6, p. 244.

3.3.4.2 Complicity of Causation in Islamic Criminal Law

Causation can also be complex in many cases. The following case earlier cited is an apt example: Someone parks his car in an unauthorized place and another car hits the parked car, causing the car to roll towards a building, striking it and destroying it in the process. In so doing, the building then accidentally falls on a passer-by and he dies. Who is responsible? In this case, according to a fictional example in the Hanafis School, the owner of the car that hit the illegally parked car will be responsible for all damages, including the death of the passer-by. This is because he is the direct cause of the accident, although the owner of the illegally parked car may be prosecuted for illegal parking, but not for the consequence of the accident. However, if we suppose that the illegally parked car rolled without any involvement of any other person – perhaps, a very severe wind set it in motion - then the entire responsibility would fall on the owner of the illegally parked car as he is the causer of the accident.

Another intricate issue in accessing direct and indirect causation is if a person is seriously injured by someone else to the extent that the injury proves fatal. The injured person is taken to a hospital where all necessary fees are paid, but after surgical treatment, the victim dies by virtue of medical negligence. Thus, if the maxim is to be applied at its surface level, the authority of the hospital should be held responsible. But in fairness to the issue, the perpetrator must be held responsible for the *diyah* of the injury, while the hospital authority will be responsible for the *diyah* of the death. However, if the hospital has carried out all its duties responsibly, but the victim eventually dies, should the *mutasabbib* be held responsible for the death or just for the injury? It can be inferred from the general rule of direct and indirect causation that if *al-mubāshir* becomes impossible to be held responsible, *al-mutasabbib* wiil be resorted to. Though, *al-mutasabbib* in this case did not intend killing, but his action led to the death of his victim, thus he will be liable for *diyah.*

Another example of complexity of causation is found in a situation where one of the killers in a case of homicide is an intentional perpetrator and the other is not. For the *mukhti'* (unintentional perpetrator), there is consensus among Islamic scholars that there is no *qiṣās* on him, based on the texts that exempt him from that. However, for the *'āmid,* (intentional perpetrator), the majority suggest that no *qiṣāṣ* should be

imposed on him because the issue has become complicated, and now resembles a quasi-intentional crime which none of the scholars suggest *qiṣāṣ* for. This is the opinion of Hanafites, Shafi'ites and majority of the Hanbalites. However, the Malikites and a version of Ahmad proclaim *qiṣāṣ* for the *'āmid* because his action is identified as intentional and he is responsible for his action.[375]

From the foregoing discussion on this maxim, it is easy enough to figure out the *raison d'etre* behind the disagreements and inconsistencies of the Islamic scholars in applying this maxim. The fact is that the Islamic scholars realize the importance of protecting not only the victims but also the accused and the need to ensure that justice is done to both parties involved. In cases like this where there is no right of any human being attached to the crime, the basic rule is that the *mubāshir* will be considered as prime and should, as such, take sole responsibility for any damage caused by his action. Thus, if the prosecution has failed to establish the prime accused in these cases, the punishment would then be dropped. However, if there is a right of man in any crime, it is realized that restricting the responsibility to the *mubāshir* could render the right of man in vain. Thus, the majority of Islamic scholars, including Abu Hanifah, in cases of complete coercion, extend liability to the *mutasabbib* to ensure that the right of man is claimed and justice is established.

Another reason for the differences among Islamic scholars regarding this maxim stems from what Awda[376] believes to be priority of one's causation over another. This can be summarized thus:

- A situation where cause supersedes perpetration, such as in a situation where one falsely witnesses against another, which leads to a conviction, and then to a death penalty. The cause of the death originates from the false witness. Thus this cause supersedes the execution of the victim, because if there were no false witness, the death penalty would not be imposed. Although a false witness does not directly execute the victim, his false testimony certainly contributes greatly to it.[377]

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[375] Ibn Qudamah, *al-Mughni, op. cit.* vol. 8, p. 236.
[376] Awdah, *op. cit.,* vol. 1, p. 370.
[377] al-Hattab, *Mawahib al-jalil, op. cit.,* vol. 6, p.241.

- A situation where *mubāshir* supersedes the *mutasabbib,* such as in the case of someone who throws someone else into a deep well from which he cannot survive without rescue. However, another person, instead of rescuing him, uses a tool to stab him and consequently kills him. The act of *mutasabbib* might be deemed a murderous act if the victim is left there and dies. However, because another person has contributed to it, it has shifted the responsibility unto the last actor. This is because of the maxim "*yuḍāf al-'amr ilā aqrab al-waqt* (matter is attributed to the closest time of the event).[378] In another example, if someone stabbed or cut the hand of a person, and yet another person came and stabbed the victim in the stomach and he died, the last perpetrator would be charged with murder, while the former would be charged for injury.[379]

- Lastly, in a situation where the involvement of the two actors is equal. An example of this is where someone is coerced to kill another. The opinions of Islamic scholars as earlier explained above differ on this.

3.3.5 *al-'aṣl fī al'ashya' al-ḥibāhah "ḥattā yard al-dalīl 'alā taḥrīmihā*

(The Fundamental Principle is that things are lawful for use until there comes a proof of prohibition).[380]

This maxim is very important to human daily activities and offers a relief from the burden many people may encounter in their lives. The connection between this sub-maxim and the grand one is that *aṣl* connotes *yaqīn* -certainty. Islam establishes that things are created for the use of human beings, except for a few things that are made unlawful. In the Qur'an, God says: "It is He who hath created for you all things that are on earth" [381] The Qur'an further states: "Say: Who hath forbidden the beautiful (gifts) of God which He hath produced for His servants and the things that clean and pure for sustenance."[382] In another verse, God emphatically explains what He has forbidden for man: "Say: I find not in the message received by me by inspiration any

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[378] See *Majallah* Article 10, al- Burnu, *al-Wajiz,* p. 187.
[379] al-Hattabi, *Mawahib al-Jalil, op. cit.,* vol. 6 p. 241.
[380] al-Suyuti, *op. cit.* p. 60, Ibn Nujaym, *op. cit.* p. 66, al-Zarkashi, al-*Manthur op. cit.* vol. 1, p. 176.
[381] Qur'an 2, verse 29.
[382] Qur'an 7, verse 32.

forbidden to be eaten by one who wishes to eat it. Unless it be dead meat or blood poured ..."[383] al-Shawkani, in buttressing his support for the maxim, states that: "He (the Exalted) made the fundamental provision to be lawful and exempted some from being unlawful."[384]

There are two other opinions that contradict this principle. The first of these is ascribed to Abu Hanifah - as opposed to general opinion of the Hanafites - and some Hanbalites. They opine that the fundamental principle means that things are forbidden, until otherwise stated.[385] The second opinion professes the cessation, "*al-tawaqquf*", of anything until there is evidence of whether it is lawful or unlawful.[386] However, every indication seems to suggest that God has created everything for the use and benefits of human beings. He (SWT) guides mankind through revelation and inspiration regarding the use of them. Thus, there must be a principle that will generally bind all human beings together in their actions - hence the fundamental principle should bring favour and facility for all. One way of facilitating this is to uphold that things should be fundamentally permitted (*mubāḥah*) rather than to be prohibited (*maḥẓūrah*). Things that can be said to be permitted should be those that are large and unspecified in the Holy Qur'an and the Prophetic tradition, while those made unlawful for use should be smaller in number and should be specified.

The relevance of this maxim to criminal law is that everything that is clearly stated as lawful in the texts should continually be given legitimacy with regard to their lawfulness, while everything described in the texts as illegal should remain as such. Thus, any criminal act stipulated in law such as unlawful sexual intercourse, alcohol consumption, and the unjustified killing of people are fundamentally *ḥarām*.

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[383] Qur'an 6 , verse 145.
[384] Muhammad Ibn Ali al-Shawkani, *Irshād al-fuḥūl ilā 'Iḥqāq al-Haqq min 'Ilmi al-Uṣūl* , ed. Muhammad Sa'id al-Badr (Beirut: Dar al-Fikr 1992/1412), p. 286.
[385] al-Suyuti ascribes this opinion to Abu Hanifa,while Ibn Qudamah reports that Ibn Hamid (d 403 A.H) and al-Qadi Abu Ya'la (d. 458), both Hanbalites, profess the same opinion, though the majority of Hanafites incline to the first opinion. See al-Suyuti, *al-Ashba' op. cit.* p. 60, Ibn Nujaym *op. cit.* P.66, Abdullah Ibn Ahmad Ibn Qudamah, *Rawḍah al-Nāẓir wa Jannah al-Munāẓir* ed. Abdul Azeez Abdu al-Rahman al-Said, (2nd edn. Riyadh: Imam Muhammad Ibn Su'ud University 1399) vol. 1, p. 245. Their opinion is based on the Qur'an 16, verse 116, which prohibits saying something falsely e.g. that this is lawful and this is unlawful, in order to invent lies against God. But there is no indication that the verse provides clear evidence in support of their claim. In fact, it can be argued that the other opinion is not said through whim or caprice.
[386] This opinion is ascribed to some Hanafis and some Hanbalites (see al-Burnu *al-Wajiz* p. 196).

Paradoxically, if the view of the majority who profess the legalilty of all things is loosely construed, one may assume that, based on this maxim, committing other offences that are not stated in the texts is legal. However, if through analogical deduction, it is proven that what is stated in the text and what is enacted by analogy are similar; the latter would share the status of the former. For example, in cases such as intoxicant, homosexual, murder etc., it is possible for jurists by applying the principle of analogy to establish illegality; and once any of these is established, it becomes illegal.

3.3.6. *al-ḥudūd tusqaṭ bi al-shubhāt* (Fixed Punishments should be averted in the case of doubt/suspicion).[387]

According to the Islamic Jurists, Islamic penology (*al-'Uqūbāt al-Shar'iyyah*) is divided into three: *ḥudūd* (fixed punishments), *qiṣāṣ* (retaliation), and *ta'zīr* (discretionary punishment). The maxim above mentions the *ḥudūd* punishments and what can be construed as impediments to their implementation. Before giving details of how *shubhāt* can be excuses for the establishment of the crime of *ḥudūd*, it is pertinent to briefly explain the meaning of the two words, *ḥudūd* and *shubhā*, as explained by Islamic jurists.

The word *ḥudūd* is a plural form of *ḥadd* which means boundary, standard, penalty, prevention and inhibition.[388] Remarking on the reflective purpose of punishment in Islam to the linguistic meaning of *ḥadd*, Abdul Rahman Doi says that punishment is called *ḥadd* because it is " a restrictive and preventive ordinance, or statute of God concerning things (that are) lawful (*ḥalāl*) and things (that are) unlawful (*ḥarām*)."[389]

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[387] al-Suyuti, *al-Ashba op. cit*, p.123, Ibn Nujaym, *al-Ashba, op. cit.* p. 127, al-Hamawi, *Ghamz Uyuni op. cit* , Haydar, A, *Durar op. cit.* p. al-Zarkashi, *al-Manthur op. cit.* vol. 1, p. 400. Almost all schools of Islamic jurisprudence accept the maxim in principle and apply it in different ways and various locations. The exception is Zahiri, who object to it based on their rejection of the *hadith*, reported in respect of the maxim (see Ibn Abdul -Barr, *al-Tamhīd limā fī al-Mu'aṭṭa' mina al-Ma'ānī wa al-Asānīd*, ed. Mustafa Ahmad al-Alawi (Morocco: Ministry of endowment and Islamic Affairs 1387), vol. 15, p. 34, Muhammad al-Amin al-Shinqiti, *Adwa' al-Bayan, op. cit.* vol. 5, p. 392, al-Sarakhasi, *al-Mabsut, op. cit.* vol 18, p. 127, Ibn Qudamah, *al-Mughni, op. cit.* vol. 9, pp. 116-119, 123, 259, Ibn Hazm al-Zahiri, *al-Mahalla op. cit* vol. 11, pp. 153-156

[388] Munir al-Din Al-Ba'labak, *al-Mawrid*, (8th edn, Beirut: Daru al-'Ilmi lil Mallayin, 1997) pp..455-456, Ibn Manzūr, *Lisān al-Arab op. cit.* vol. 4 p. 93.

[389] Doi, A. R., *Shari'ah Islamic Law op. cit.* p. 221.

Technically, the word *ḥudūd* has been viewed in two dimensions: it is represented by the fact that it is fixed; and by consideration of whose right is affected. Regarding the former, *ḥudūd* is limited to punishments for crimes mentioned and fixed by the Holy Qur'an or the *Sunnah* of the Prophet, while other punishments called *ta'zīr* are left to the discretion of the *qāḍī* (judge) or the *ḥākim* (ruler). [390] The implication of this view is that the crimes that are classified under *ḥudūd* include some that are called *qiṣāṣ*, these having distinct characteristics. Doi enumerates seven crimes whose punishments are prescribed in the Qur'an and the *Sunnah*:

> Penalties exacted for committing murder, manslaughter or bodily harm, punishment for theft by amputation of a hand, punishment for fornication or adultery –stoning for a married person, and hundred lashes for an unmarried person, punishment for slander by eighty lashes, punishment for apostasy by death, punishment for inebriation by eighty lashes, and punishment for highway robbery, *qaṭa' al-tarīq*) by death, cutting off a leg and arm from the opposite direction, or an exile according to the seriousness of the crime."[391]

This enumeration is compatible with al-Māwardī's (d. 450 AH) definition of crimes and in line with the majority of the classical Jurists, including the Malikites, Shafi'ites and Hanbalites. However, the Hanafites exclude the last two crimes from *ḥadd*[392]

The second dimension that views *ḥadd* as penalties prescribed as the rights of God, excludes the crime of murder and manslaughter, as well as injuries from *ḥudūd,* on the ground that their punishments which are *qiṣāṣ* or *diyah,* are rights of men (*ḥaqq al-ādamī*). The proponents of this dimension consist of some contemporary scholars, including Abu Zahrah and 'Abd al-Qadir 'Awdah. They argue that *ḥudūd* have distinctive features that make them different from other punishments such as *qiṣāṣ, diyah* and *ta'zīr.* These distinctive features are that *ḥudūd* are enacted primarily as the rights of God with a view to maintaining public order. In addition, *ḥadd* punishment cannot be lightened or increased, nor can it be pardoned or waived by anyone, whether victim or ruler, once it has been reported to the judge.[393] According to this

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[390] *Ibid* P. 221.
[391] *Ibid.* p. 225.
[392] Ali Ibn Muhammad Ibn Habeeb al-Mawardi, *al-Ahkām al-Sultaniyyah* tran. Yate A. 1996 p. 218-223, Ibn Rushd, *Bidayah al-Mujtahid op. cit.* vol. 2, pp. 424-449, Ibrahim Ibn Ali al-Shirāzī *al-Muhadhdhab* (Beirut: Dar al-Fikr n.d.), vol. 2, pp. 266-289, Ibn al-Qayyim, *al-Turuq* al-*Hukmiyyah op. cit.* pp106-107, Abdu al-Qadir al-'Awdah, *al-Tashrī' al-Jinā ī al-Islāmī muqāranan bi al-qawānīn al-waḍa'ī* (Beirut: Dar al-Kitab al-Arabi 1968/1388) vol. 2 p. 345, vol. 1, p. 105-107, Abu Bakr 'Ala' al-Din al-Kasani, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* (Beirut: Dar al-Kitab al-Arabi 1982) vol. 7, pp. 33-97.
[393] El-Awa, *Punishment in Islamic law,* (Plainfield: American Trust Publications 2000), pp. 1-2,

view, murder and manslaughter are excluded from *ḥudūd* because the punishment (*diyah*) can be sought for it in lieu of *qiṣāṣ,* if the relative of the victim in a murder crime demands it.

It is observed that even crimes that are punished with *ḥudūd,* such as slander and theft, can be pardoned by the victims prior to being reported. However, to define *ḥudūd* crimes as the rights of God aimed at maintaining public order will be to exclude many crimes mentioned in *ḥudūd.* In other words, while only a few crimes can be classified as the rights of God, as in the case of apostasy, unlawful sexual intercourse and drinking, the punishment for drinking alcohol is not fixed by the Qur'an. In fact, even its status in the Sunnah is not consistent. The alternative way of assessing the meaning of the words of *ḥudūd* in the maxim is to follow the definition of the classical jurist, as maintained by Doi. This considers murder as part of *ḥudūd* crimes because *qiṣāṣ* can also be averted in the face of doubt. This means that *ḥudūd* crimes include *qiṣāṣ* and *diyah*, but not *ta'zīr.* This is in line with al-Māwardi's classification of crimes as *ḥudūd* and *ta'zīr.* [394]

In general, it seems that the use of *ḥudūd* in the maxim above does not have the strict meaning of *ḥudūd,* according to the two dimensions discussed above. However, the *ḥudūd* which can be averted in the face of doubt, includes all penalties mentioned in the texts, regardless of whether they are the rights of God or the rights of man. That is to say that the word *ḥudūd* means al-*'uqūbāt* al-*muqaddar shar'an* (legally fixed punishments) which distinguishes it from non- fixed punishments, *ta'zīr* or *siyāsah.* This asserts that any penalty ascribed to any crime in Islamic law can be averted by doubt, as will be illustrated below.

The maxim of averting *ḥudūd* in the face of doubt covers all fixed punishments mentioned in the Qur'an and the Hadith. Thus, the verses in which God says: "this is the *ḥudūd* of God" can be interpreted to cover all facets of fixed punishments, thus : these are the punishments prescribed by God as preventive and protective measures for mankind. So they should not be changed or be influenced by any rulers. In response to the argument that *qiṣāṣ* can be changed by the relatives of the heirs to

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[394] al-Mawaridi, *al-Ahakam al-Sultaniyyah ,op. cit.* p 220.

diyah, it can be held that the changing of *qiṣāṣ* to *diyah* also constitutes *ḥudūd* of God which have been stipulated by the Legislator.[395]

3.3.6.1 Legality of the Maxim *al-Ḥudūd tusqaṭ bi al-Shubhāt*

The maxim that *ḥudūd* should be averted in the face of doubt is generally acceptable among the four schools of Islamic jurisprudence. It is mostly used in criminal procedures of the Islamic criminal justice system. It is reported that the Prophet said: "Avert *ḥudūd* (punishment) when there are doubts (*shubhāt*)."[396] There are many instances to justify the legality of this maxim from the practice of the Prophet and his companions. Ibn Humam observes that when Ma'iz confessed to the Prophet, the latter said to him, "Maybe you kissed her" and "Maybe you touched her."[397] All these interpretations from the Prophet are nothing but a means to eliminate doubt and to allow Ma'iz to retract his confession, thereby casting doubts on the crime he confessed to and, by extension, to remove its conviction. Certainly, the Prophet never suggested to anyone who had confessed guilt over a right of debt that the debt was probably a trust as he did in the case related to the rights of God. This indicates that caution should be taken in the execution of *ḥudūd*.[398] Umar Ibn Khattab is reported to have said: "For me to commit an error in averting the punishment of *ḥudūd* is preferable than to execute it in the face of *shubhāt*."[399]

3.3.6.2 Correlation between *al-Shubhah* (doubt) and *Shakk* (suspicion)

The maxim here is brought to address the rules of *shubhah* in Islamic criminal law. However, it is pertinent to examine the relationship between the word *shubhah* and the word *shakk* in the grand maxim under which this maxim is subsumed. *Shakk* (uncertainty) has been defined above as an antonym of *yaqīn* (certainty). What

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[395] As mentioned in the Quran 4:92

[396] The *hadith* is reported in various ways, although all the chains of its narration have been criticized. According to al-Shawkani, the hadith is better considered as *mawquuf,* untraceable. (See al-Shawkani, *Nayl al-Awtar* (Cairo:Mustafa al-Halabi, vol. 7 p. 118, However, it is reported as *marfu'* from Ibn Abbas, in Musnad Abi Huthayfa *hadith* no 4, *kitab al-Huduud*, p. 32. According to al-Nadwi, the narration of Ibn Abbas is authentic. This clarifies the ambiguity surrounding the acceptability of the Hadith. See al-Nadwi, *al-Qawaid al-Fiqhiyyah.. op. cit.* P. 278

[397] al-Bukhari, *Sahih, hadith* 6438.

[398] Muhammad Ibn Abdu al-Wahid Ibn Humam, *Fatḥ al-Qadīr Sharḥ al-Hidāyah* (Cairo: al-Amiriyyah Press, 1336), vol. 4, p. 139-140.

[399] al-Shawkani, *op. cit.* vol. 7, p. 118.

remains here is to define the word *shubha* and its relevance in this discussion. *Shubhah* is a noun of *shabiha* and *ishtabaha,* 'to resemble'; that is, when something resembles another. It has been technically defined as something whose status is ambiguous, in the sense that one does not know for sure whether or not it is lawful or true. Thus, the difference between *shakk* and *shubhah* is that in the case of *shakk,* there is no evidence that the crime is committed by the accused and, as such, punishment cannot be apportioned. Whereas, in the case of *shubhah,* there is some indication that the crime is committed by the accused, but the evidence put forward to establish the allegation is untenable, or the motive for the crime is contentious and contestable.

Thus, *shubhah,* 'doubt', which is the reverse of certainty, has a vital role in Islamic criminology. In Islamic criminal law, emphasis is placed on the need to prove beyond any iota of doubt that a particular accusation is genuine. This is because, any doubt suspected in litigation will be considered as an impediment to the validity of the suit and so provide grounds as to why guilt cannot be established against the accused person.

In *ḥudūd,* in particular, it is important that *shubhah* should be given more consideration, and that the innocence of the accused should be presumed until otherwise proven. The reason for this is that some of the punishments that are due as a result of the commission of any of *ḥudūd* crimes are irreversible once they have been carried out. In other words, credible and authentic *shubhah* is the way to avoid the punishment of *ḥudūd* in cases where the rights of God are involved.[400]

Shubhah in Islamic law is what seems to be proven, but is, in fact, not.[401] One of the instances in which criminal cases are considered to be unproven is that of a man charged with committing sodomy with his wife. Since this is an act that was originally interpreted as one that only occurred between members of the same sex, the act is considered to be doubtful, meaning that *ḥadd* punishment will be averted.[402] Another

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[400] al-Sarakhasi, *al-Mabsut op. cit.* vol. 9, pp. 151-156.
[401] Ibn Humam, *Fathi al-qadir, op. cit.* vol. 4, p. 140.
[402] This act is deplorable in Islam, but because of the shubha contained in it, and as the couple have the legitimate right to sexual intercourse, it is not certain whether reference to such instances of anal

example is when a person retracts his confession in a case where there is no other evidence than that of the confession.[403] The same can be said in a case where there is no other proof than that provided by witnesses who eventually withdraw their witness statements.

In the case of adultery, Malik, Shafi' and Ahmad assert that if a man met a woman in his bed and had sexual intercourse with her assuming that she was his wife, the *ḥadd* would not be accorded to him, because of the *shubhah* involved.[404] However, Abu Hanifah refuted such a claim on the ground that there is no *shubhah* in question because although a man can sleep in a relative's bed, having sexual intercourse with a female relative is emphatically prohibited.[405] Stealing trivial things and things that are the basic essentials of life was originally permissible, and in Abu Hanifa's opinion, should not attract the *ḥadd* of theft. This is because people do not attach the same importance to them. Also, in the case of hunting animals and stealing water, there is *shubhah* in their prohibition. As such, stealing sand would not attract *ḥadd.*

On the other hand, the majority of scholars do not accept Abu Hanifa's assumption because no *shubhah* is involved in those cases. In their opinion, if a worthless thing attains the *niṣāb* (minimum value), or if water or an animal is stolen under somebody's possession, *ḥadd* punishment must be imposed.[406]

3.3.6.3 Classification of *Shubhah*

It is relevant to discuss the extent to which the Islamic Jurists consider the implication of *shubhah* in order to establish justice between litigants. The Hanafites and Shafi'ites schools of jurisprudence attempt to classify *shubhah* into various grades, while the Malikites and Hanbalites conceive of *shubhah* as one. In the Hanafite view, *shubhah* is divided into three parts. First: s*hubhah fil-fi'l* (doubt in action). This is when someone does not know whether an act is prohibited or not, because there is no

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intercourse is based on the Qur'an 2, verse 223. See al-Shinqiti, *Adwa' al-Bayan op. cit.* vol 1, p. 94, al-Suyuti, *al-Durr al-Manthur* Dar al-Fikr Beirut 1993, vol. 1, p. 638.

[403] Ibn Qudamah, *al-Mughni op. cit.* vol 9, p. 119, Ibn Hazm, *al-Muhallaa op. cit.* vol. 8, p. 252.

[404] Ibn Qudamah *Al-Mughni, op. cit.* vol. 10, p. 155.

[405] Ibn Humam *op. cit.* vol. 4, p. 147.

[406] Ibn Humam, *ibid.* vol. 4, p. 327, al-Zarqani, *Sharh al-Qawaid op. cit.* p. 95, Ibn Qudama, *al-Mughni op. cit.* vol. 10, p. 247.

explicit and precise textual evidence on the issue. In this case, whoever commits such an offence with excuse of no explicit proof will not be punished with *ḥadd.* An example of this is an act of sexual intercourse with an irrevocably divorced wife while she is still in '*iddah* (the period of purification). [407] But, if such a person is aware of the evidence in any way and still commits the offence, then that person will be punished.

The second *shubhah* is *shubhah fi al-maḥall*, or *shubhah al-milk* (doubt of ownership). This class is a condition where two texts appear to be seemingly contradictory, such as the verse that stipulates that the punishment for theft should be the cutting off of the thief's hand, and a hadith which says a father owns the property of his son. Thus, if a father steals his son's property, he will not be punished with *ḥadd*, because of the doubt inherent in the legitimacy or illegitimacy of the property.[408] In the application of this *shubhah*, the Hanafites determinedly hold the view that a *shubhah* of *maḥall* is applicable in any case where there is 'legitimate evidence that nullifies the invalidity of the act at issue.'[409]

The third *shubhah* is *shubhah fi al-'aqd* (doubt in contract). This view is solely attributed to Abu Hanifah and is refuted by his companions. In this case, if a man has sexual intercourse with his *maḥārim* (Relatives or in-law which as stipulated in the Qur'an 4:23, or in other parts of the prophetic hadith), he should not be punished with *ḥadd.* However, all these Hanafites proposals, including Abu Hanifahs' one, are rejected by other schools.[410]

On the other hand, Shafi'i divides *shubhah* into three parts: *Shubhah fi al-maḥall* (doubt of the place of the act), *Shubhah fi al-fā'il* (doubt from the angle of the actor), and *Shubhah fi al-Jihah* (doubt of the legality or illegality of the act). *Shubhah fi al-maḥall* is typified by the case of a man who has had sexual intercourse with his legitimate wife during her menstruation, or when she was fasting, or if he had anal sex with her. These acts revolve around the place of the act. Although the man has the right to have intercourse with his wife, he is not allowed to do so in certain

[407] al-Kasani, *Bada'i' op. cit.* vol. 7, p. 37.
[408] Awdah, *op. cit.* vol. 2, p. 214.
[409] *Ibid.* al-Kasani, *op cit.*
[410] *Ibid.*

circumstances. *Shubhah fi al-fā'il* (doubt from the angle of the actor) can be explained by the example of a man who was presented with a lady as his wife and with whom he had intercourse. Such a man will not be punished by *ḥadd* because of his doubt and ignorance of the act. However, if he does have such knowledge, there will be punishment by *ḥadd.*[411] *Shubhah fi al-Jihah* (doubt of the legality or illegality of the act) is described as a legal dispute among scholars on a particular issue. For example, Ibn Abbas supported, at one time, the legality of *muti'a* (temporary marriage) while the majority of scholars disapproved of it. Abu Hanifah permitted a marriage contract that was concluded without the consent of *waliyyi* (the legal guardian of the bride),[412] while Malik allowed a marriage contract without witnesses. In all of these cases, if someone has sexual intercourse with his wife within any of the above mentioned marriages, he will not be held liable for adultery. In fact, even if the perpetrator believes that it is prohibited, his belief is not considered because of the *shubhah* of disagreement among scholars.[413]

One of the aspects of Islamic criminal justice is the level of scrutiny it attaches to unravelling the cause of any crime and the consideration it gives to the right of the victim. Hence, Islamic scholars coined a maxim thus: *al-shubhah tamna' wujūb al-ḥadd walā tamna' wujūb al-māl* - Doubt interdicts only infliction of *ḥadd* punishment, but it does not interdict due financial compensation.[414]

Doubt is given tremendous value in waiving *ḥadd* for the culprit. Nevertheless, in maintaining justice between two litigants, compensation for the victim is emphasised. Moreover, the cause of *shubhah* in criminal acts sometimes cannot be comprehended. However, the fact is that justice must be done. If any criminal case fails to be established for any legal reason bordering on doubt, it is incumbent to identify whether or not what is involved is the right of God. If it involves the rights of God, then there will be no *ḥadd* and no compensation. If it involves either the rights of God and man, or solely the right of man, the *ḥadd* involved will be dropped, but compensation has to be given. The question may be asked: what is the need for compensation when the accusation has been quashed? The answer is that even though

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[411] al-Shiribini, *Mughni al-Muhtaj op. cit* vol. 4, pp. 160-170.
[412] al-Kasani, *op. cit.* vol. 7, p. 35.
[413] Awdah *op. cit.* vol. 2, p. 213.
[414] al-Kasani *op. cit.* Vol. 7 p. 81

the allegation is interdicted, *ḥadd* is dropped in that case because (1) the *ḥadd* is a right of God, and the violation of the right of God is open to forgiveness, especially if there is doubt in the case. (2) The right of man involved is undeniable because there is an element of truth in the case. Thus, if a stolen property is found in someone's possession and the person in whose possession the property is found claims that the property was found somewhere else and that he is only keeping it, such a person would be exempted from *ḥadd.* However, the goods must be returned to the owner. If he has made use of it, he must pay compensation.

A similar situation would arise if someone slept with a woman who is not legally married to him and he then claims that the occurrence was a mistake. If legal procedure fails because of *shubhah*, then *mahr al-mithli (*an equivalent value of dowry) must be paid to the woman. The same applies to homicide cases where the guilt of the intentionality of the accused cannot be established. In such cases, *diyah* will be resorted to because *al-shubhah tamna' wujūb al-ḥadd wa lā tamna' wujūb al-māl* (doubt only interdicts the implementation of *ḥadd,* but not monetary compensation).[415]

3.4.0. Yaqīn (certainty) and *Shakk* (doubt) and the Means of Proof in Islamic Criminal Law

Islamic law looks at the nature of a human being and presumed him innocent of any unusual alleged accusation placed on him. It does not suspect him or assume that the accusation he is charged with suggests that his nature is antithetic to humanity. This is because, according to the principle of a human being's nature, 'the fundamental principle is non-liability'. Anything that may change this principle must be proved beyond any reasonable doubt. However, if a person has known connections to culpable action, the benefit of doubt given to him will be lesser than someone who is known to be pious.

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[415] al-Kasani, *Bada'i ' op. cit* vol. 7, p. 81, Ibrahim Ibn Shams al-Din Ibn Farhun, *Tabṣirah al-Ḥukkām fī Uṣūl al-Aqḍiyah wa Manāhij al-Aḥkām.* (Beirut: Dar al-Kutub al-'Ilmiyyah and Cairo: al-Amiriyyah Press, Cairo 1301), vol. 2, pp.119-125,

There are many means of proof set out in Islamic criminal law. Some are substantial and scholars of Islamic jurisprudence agree on their authenticity such as eyewitnesses and confession; while some are circumstantial and their acceptability is controversial depending on the nature of the case brought before the court of justice.[416] There are two substantial means of proof in Islamic law namely *bayyinah* (evidence or eyewitness in a limited translation) and *iqrār* (confession). Thus in this sections, the two means will be treated separately. The circumstantial means will be treated under *al-bayyinah.*

3.4.1 *al-Bayyinah* as Proof to establish Certainty in Criminal Cases

(a) *al-Bayyinah 'alā al-mudda'ī wa al-yamīn 'alā man ankar*

(The burden of proof is on him who alleges and the oath is on him who denies).[417]

The maxim mentioned above is one of the maxims coded directly from the statement of Prophet Muhammad. Its authenticity is unanimously agreed upon among the traditionalists.[418] The maxim is widely applicable in establishing the genuineness of a claim between litigant parties. According to the maxim, the normal procedure of giving evidence before the court is that the onus of proof is on the plaintiff to establish what he alleges to be truth, while the oath is on the defendant who denies the claim. The mechanism of proof is to produce evidence as reflected in the first word of the maxim, *al-bayyinah*. There is an inconclusive debate among Islamic scholars as to the meaning of *bayyinah* in this maxim. The majority of classical Islamic Jurists hold that the meaning of *bayyinah* in the hadith that formed the maxim is restricted to witnesses alone. This is the view of the Hanafites, Malikites, Shafi'ites and the majority of Hanbalites.[419] They argue that in most cases in the Qur'an or the *Hadith*, the word 'witness' or *shahādah,* is used where evidence is required, as in the Qur'an chapter 2, verse 282 and chapter 24, verse 4, as well as in the Hadith narrated by Anas Ibn

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[416] See details of acceptability of other circumstantial eveidences in Islamic law in Sayed Sikanadar Sha Haneef "Modern Means of Proof: Legal Basis for its accommodation in Islamic Law" in Arab Law Quarterly, 20, 4, (Leiden: Brill NV., 2006).

[417] *Majallah* Article 76.

[418] al-Trimith, *Sunan al-Trimidhi, hadith* nos. 1342 and 1356, al-Daraqutni, *Sunan hadith* no. 98, al-Bayhaqī, *Sunan, hadith* no. 11892, Ibn Mājah, *Sunan hadith* no. 2321, Bukhari, *kitāb al-Shahādat Bāb "al-Bayyinah ala al-mudda'i.*

[419] al-Ramalī, *Nihājah al-Muḥtāj* vol. 8, p. 314, al-Shirīybīnī, *Mughnī al-Muḥtāj* vol. 4, p.461, al-Buhūtī, *Kashshāf al-Qinā,* vol. 6, p. 378, al-Mardāwī, *al-Inṣāf* vol. 11, p. 369.

Mālik, in which he said, "The first case of *li'ān* (repudiation) that occurred in Islam was when Hilāl Ibn Umayyah accused his wife in the presence of the Prophet of having committed unlawful sexual intercourse with Sharīk Ibn Samhā. The Prophet said to him, "You have to produce *bayyinah* (construed as 'witness' because the acceptable evidence in the case of *zina* is four witnesses), otherwise you will receive *ḥadd* punishment on your back". He said, "O the Prophet! When one of us sees a man having intercourse with his wife, should he go and seek for witnesses (*bayyinah*)". But the Prophet insisted, saying: "You must produce evidence or you must receive *ḥadd* punishment on your back". Hilāl then said, "On Him who sent you with truth I am speaking truth, may God send down something that will free my back from *ḥadd* punishment."[420] It is argued that the meaning of '*bayyinah*' which the Prophet referred to in this *hadith* is 'witnesses' based on the Quranic verse that states that four witnesses are required in the case of *zina*.[410]

However, Ibn Taymiyyah (d. 728 AH), Ibn al-Qayyimal-Jawzi (d.751 AH), Ibn Farḥūn, Ibn Hajar al-'Asqalānī (d. 852 AH), and a host of contemporary Islamic scholars, affirm that the word *bayyinah* in Islamic jurisprudence has a wider meaning than 'witness'. The word *bayyinah* is any means that can be used to prove a claim. And to restrict its meaning to two or four witnesses would undermine the connotation of the word. Ibn al-Qayyim asserts that the word *bayyinah,* as expressed in the Qur'an 6:57 and 57:25, does not only imply eye-witnesses in any case, but also indicates or means proof and clear signs.[421] Accordingly, it is argued that the word *shahādah* (witness) is one of the means of *bayyinah* (evidence), and *bayyinah* is a conclusive proof that clarifies truth.[422] In other words, *bayyinah* is wider than *shahādah*, the latter being one of the *bayyinah,* but not all *bayyiyah* are necessarily *shahādah.*[423]

From the foregoing discussion, it is safe to say that not limiting the meaning of *bayyinah* in this context complies with the purpose of the *Sharī'ah,* namely, to establish justice on the earth. To give rights to their owners is one of the most visible

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[420] al-Bukhāri, *kitāb al-Tafsīr hadith* no,. 4747, Abu Dawud, *Sunan, hadith* no. 2254, al-Trimith *Sunan hadith* No. 3179, Ibn Majah, *Sunan, hadith* no. 2067.
[421] Ibn al-Qayyim, *al-Turuq al-Ḥukmiyyah*, p.15.
[422] al-Ḥusarī, Aḥamd, *'Ilm al-Qaḍā* (Dar al-Kitab al-'Arabī n.d.) vol. 1 p. 11
[423] Ibn al-Qayyim, *'I'lām al-Muwaqqi'īn an Rabbi al-'Ālamīn* vol. 1, p. 90, Ibn Farhuun, *Tabṣirah al-Ḥukkām,* vol. 1, p 161.

ways of establishing justice. Of course, by extending the connotation of the *bayyinah* to include any other means of evidence such as signs, DNA, forensic evidence, and photography would clearly enhance the establishment of justice. However, if *bayyinah* is restricted to only eye-witnesses, it will pervert the course of justice, and render many rights of men in vain.

However, from a critical evaluation of the argument of the opinion of those who restrict *bayyinah* to mean only eye-witnesses, it is observed that the hadith on which their argument is based turns out to be on the side of the second opinion. In the Hadith, it is reported that the angel Jibrīl revealed to the Prophet the verse: "And for those who accuse their wives, but have no witness except them....". The Qur'an 24, verse 6, considers *liān* (an oath of condemnation of the accusation of adultery between couple) as evidence to prove the genuineness of the plaintiff's claim and to prove the innocence of the defendant. Additionally, there were many ways in which claims had been proven during the life of the Prophet. It is reported that the Prophet had used *qasāmah* (a legal procedure in which fifty people were asked to take an oath), *qafāh* (a system to establish the parenthood of a child) and *qur'ah,* (drawing lots) as means of evidence to prove cases.[424] This intuitively indicates that a claim can be proved by any just means of evidence, be it conclusive or circumstantial evidence, depending on the enormity and gravity of the matter. Of course, there are many means of evidence adventured in this contemporary age (such as photography, autopsy, forensic and DNA) whose efficiency is more reliable than a personal testimony that could be based on falsehood. Mahmassani remarks that because of the unreliability of eyewitnesses in their testimony, the modern legal system has been undermined.[425]

The argument here is not to undermine the orthodox ways of proof. However, it is possible to say that *bayyinah* (evidence) could be restricted to eye-witnesses in cases that involve criminal acts, and stand as conclusive evidence if the requirements are fulfilled and more specifically so in cases that are solely the rights of God. However, in any other criminal case in which the rights of men are sought to be protected, eye-witnesses would be primarily sought for. If efforts to secure eye-witnesses are unsuccessful, circumstantial evidence could be resorted to as a secondary means of

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[424] al-Zahrāni, *op. cit.* p.29.
[425] Mahmassānī, S. *Falsafah al-Tashrī' fī al-Islām, op. cit.*, P. 176.

proof. Thus, the discussion in this section will consider this maxim in terms of its *bayyinah,* with regard to testimony, oath and circumstantial evidence.

3.4.1.1 *Shahādah* (testimony of witness) as Evidence in Criminal Cases.

(b) *al-Thābit bi al-burhān ka al-thābit bi al-'iyān* (What is established by convincing and just evidence is as what is established by an eyewitness).[426]

One of the means of evidence to prove claims in general, and in criminal liability in particular, is one that is considered to be conclusive - *Shahādah* (witness). The legality of *shahādah* is based on the Qur'an, *Sunnah* and consensus.[427] It is reported that a man from Hadramawt and a man from the tribe of Kindah submitted a dispute to the Prophet, who said, "*Shahidāk aw yaminihi.*"[428] This *hadith* testifies to the fact that the use of testimony is universally accepted from the epoch of the Prophet.[429] The word *shahādah* connotes many meanings in the Arabic language. Amongst them are *mu'āyanah* (viewing),[430] *al-huḍūr* (presence), as in the Qur'an 2, verse 185, *al-'Ilm* (knowledge), as in the Qur'an 3, verse 18, *al-ḥalf* (swearing), as in the Qur'an 63, verse 1 and *al-'Ikhbār* (information).[431] *Shahādah* is the giving of truthful information for the purpose of substantiating a legal right before a court of law.[432] The majority of Islamic scholars pay attention to the articulation of the phrase *ashhad,* "I witness", while some scholars, including Abu Hanifah, the Malikites, and apparently Ahmad Ibn Hanbal, Ibn Taymiyyah, and Ibn al-Qayyim, amongst others, do not consider any specific word to convey testimony.[433]

It is generally considered as obligatory to stand as a witness in litigation involving the claims of men, and also in criminal cases that involve the rights of God. However, one is not morally or legally obliged to give testimony. This is especially so in the case of

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[426] *Majallah* Article 75, Haydar, *Ḍurar* vol. 1, p. 65, al-Zarqa, *ibid.* p. 367.
[427] Qur'an 2, verses 282-283 and Qur'an 4, verse 135, Qur'an 65, verses 1-2.
[428] al-Bukhārī, *Ṣaḥīḥ* Hadith No. 2380, Muslim, *Ṣaḥīḥ*, Hadith No. 138.
[429] al-Ramlī, *Nihāyah al-Muhtāj,* vol. 8, p. 292, Ibn Qudamah, *al-Mughnī,* vol. 9, p. 120.
[430] See Sayyid Sābiq, *Fiqh* al-*Sunnah* 3/26).
[431] Ahmad Ibrahim, *Ṭurq al-Ithbāt fī al-Sharī'ah al-Islāmiyyah,* (Cairo: al-Matba' al-Salafiyyah, n.d.) p. 28 and al-Zaharānī, *Ṭarā'iq al-Ḥukm,* p. 34.
[432] Ibn Humam, *Fath al-Qadīr* vol.3, p 364, Ibn Farhuum, *Tabṣirah al-Ḥukkām* vol. 1, p. 164.
[433] al-Kasānī *Badā'i,* vol. 6, p. 273, Ibn Humām, *Sharḥ fatḥ al-Qadīr* vol. 7, p 375 , al-Dasuqi, *Hāshiya al-Dasūqī on al-Shar al-Kabīr,* vol. 4, p. 165, Ibn Farhūn *Tabsir al-Hukkām* vol. 1, p.209, Ibrahim Ibn Abdullah Ibn Abī al-Dam, *Adab al-Qadā'*, (*al-Manẓumāt fī al-Aqḍiyah wa al-Ḥukūmāt),* ed. Muhammad M. Al-Ruhayli, (Damascus: Dar al-Fikr, n.d.) p. 383, Ibn Qudāmah, *al-Mughnī* vol. 9/216, Ibn al-Qayyim, *al-Turq al-Huqmiyyah,* pp. 272-273.

sexual intercourse, where it is often thought commendable neither to report nor to witness in such a case. This is because in cases involving the rights of God, to protect and conceal (*satar*) a Muslim's defect is better than to expose him. This is based on the case of Mā'iz when the Prophet said to *Huzāl,* "Why not condone/cover him with your garment?" (*hallaa satartah bi ridā'ik*)[434] The rights of men, on the other hand, need to be retrieved from the accused in order to protect people's properties.[435]

The general conditions regarding the acceptability of the testimony of witnesses are puberty, sanity, liberty, sight, and faculty of speech, probity, trustworthiness, vigilance, precision, memory, and Islam. [436] In addition, some scholars opine that a testimony should be proclaimed in the courtroom in specific language, although this view is opposed by the Malikites and some Shafi'ites. [437]

However, in criminal cases, in order to establish certainty and to remove any bit of doubt, there are certain conditions stipulated for the acceptance of witnesses, depending on the nature of the crime. Among the controversial conditions that attract the attention of human rights' activists across the world is the masculinity of witnesses (*dhkūriyyah*). The opinion of the majority of classical Islamic scholars, including the Hanafites, is that witnesses in cases of *ḥadd* and *qiṣāṣ* should be restricted to males[438]. They argue that the verse of the Qur'an that allows the witness of females in financial cases states that the reason why two females should be sought for, as equivalent to one man, is because of their forgetfulness (*an taḍillah*). This would necessitate a *shubhah*, *ḥudūd* and *qiṣāṣ* penalty thus, in turn, would be revocable by any credible *shubhah*. Thus, to accept a female in such cases would cast doubt on the claim of the plaintiff and may render his claim invalid. Another reason put forward to justify the rejection of female witness in *ḥadd* and *qiṣāṣ* cases is that

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[434] Ahmad, *al-Musnad* Hadith No. 21940, al-Bayhaqī, *Sunan al-Bayhaqī al-Kubra, hadith* no 16735. See also, Ibn Farhun, *Tabṣira, op. cit.* vol 1, p. 176, Izz al-Din Abdu al-Salaam, *Qawā 'id al-Aḥakām fī Maṣāliḥ al-Anām (*Beirut: Dar al-Kutub al-Ilmiyyah, n.d.) vol 1, p. 160, al-Shinqiti, *Adwa' al-Bayan* vol. 8, p. 297.

[435] Ibn Farhūn, *Tabṣirah al-Ḥukkām,* vol.1, p. 165.

[436] al-Kasāni, *Badā'i' al-*Ṣanā'i' vol. 6, p. 266, al-Qarāfī, *al-Furūq,* vol. 4, p.97, Ibn Qudāma, *al-Mughni,* Vol. 9, pp. 164-165, Ibn Taymiyyah, *Majmū' al-fatāwa,* vol. 35, p. 409, Ibn Rushd, *Bidāya al- Mujtahid,* vol. 2 p.452.

[437] al-Daridair, *al-Shar al-Kabir* vol. 4, p. 164-165.

[438] Ibn Abdu al-Barr, *al-Kāfī* vol. 2 p.906, Ibn Rushd, *Bidāyah al-Mujtahid,* vol. 2, P. 448, Ibn Qudamah, *al-Mughnī,* vol. 9. P. 222, Ibn Humam, *Sharḥ Fatiḥ al-Qadīr,* vol. 7, pp. 369-370, Ibn Nujaym, *al-Baḥr al-Rā'iq* vol. 7 p. 62

women do not normally witness gatherings where such crimes occur. Hence, their testimony should not be admitted. Lastly, female testimony is resorted to as a last option when there are not a sufficient number of men to witness.[439] Thus, if women are allowed to witness in cases of *ḥudūd* and *qiṣāṣ*, claims may well be rendered in vain.

However, Ibn Hazm al-Zahiri and a host of others accept the testimony of women in all cases, including *ḥadd* and *qiṣāṣ*. They argue that as the Qur'an has accepted their testimony in financial cases, there should be no difference in cases regarding criminal offences. In response to the argument of the first opinion, it is argued that since the Qur'an has accepted women's testimonies in financial cases, despite envisaging *subhah*, the acceptance of their testimonies in other cases is undeniable. Also, the Qur'an does not completely nullify the acceptability of women's testimony, rather it conditions it with two women in lieu of one man, and this can also be applied in *ḥadd* and *qiṣāṣ* cases. In the case of a woman who was reported to have committed *zinā*, the Prophet said that if she admitted "*aqarrat*", then *ḥadd* should be inflicted on her for her sin.[440] If the Prophet accepted the witness of a woman in the case of *ḥadd*, then their testimonies should as well be allowed in other cases.

As regards the excuse that women do not normally witness such offences, it can be argued that the unavailability of women in criminal gatherings was in the olden days. The truth is that nowadays it is possible that women witness such incidents and it will be wrong not to allow or accept their testimony over incidents to which they are witnesses. Moreover, to say that a woman's testimony is fraught with doubt, and as such, her testimony should be dismissed, is just not tenable in the modern age. There are women who are very intelligent, and who have excellent memories and who would excel in giving witness. Therefore, why should such women be denied the opportunity to witness in a case that they may have full knowledge of? If the acceptability of women's testimonies in cases of *ḥudūd* and *qiṣāṣ* could be

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[439] al-Kasani, *al-Bada'i* ' vol. 6, pp. 268 and 279, al-Dardir, *al-Sharh al-Kabir* vol. 4, pp. 185-189, Ibn Abdul al-Barr, *al-Kāfī* (Beirut: Dar al-Kutub al-Ilmiyyah, 1407) vol. 2, p. 906, Ibn Rushd, *Bidayah* Vol. 2, p. 448, Ibn Qudamah, *al-Mughni*, vol. 4, p. 222.

[440] al-Bukhari, *Sahih al-Bukhari*, *hadith* no 2190, 2549 and Muslim, *Sahih Muslim hadith* no 1697 1698.

established, perhaps many cases could have been won through the testimony of such women.

Having said that, the reason why majority of classical Islamic jurists refuse the testimony of female in the cases of *ḥudūd* and *qiṣaṣ* is not to degrade the status of female but to protect both the rights of the accuser and the accused. Since it is possible to revoke punishment of *ḥudūd* and *qiṣaṣ* where there is a credible doubt and female testimony has been described as having possible doubt which is forgetfulness "*an taḍillah iḥdāhumā.*" Any of the litigants can use that element of doubt as an excuse to jeopardize the right of his opponent.

It can be concluded on this discussion that if the penalty of a crime involves rights of God or the requirement of evidence is higher so that no iota of doubt should be allowed, witness of women may not be allowed because from Islamic legal point of view, that will allow inscribing doubt into evidence which will render the case abated. That will be adverse on either the plaintiff or defendant. However, if the case involves rights of men and testimony is needed to establish that right, recourse to the testimony of women is paramount.[441]

The number of witnesses required in criminal cases differs according to each crime committed. The comparative danger of the crime necessitates the number of witnesses required. These numbers range from one to four depending on the nature of the case.

3.4.1.1.1 Number of Witnesses in Islamic Criminal Case

(a) Four witnesses

Generally, there is an agreement among scholars that four male witnesses are required for the offence of *zinā*, based on the Qur'an 4, verse 15 and the Qur'an 24, verses 4 and 13, and in the *Sunnah,* where it is reported the Prophet said: "Present four witnesses or you receive *ḥadd* punishment on your back"[442] Ibn Qudamah reports that Muslims are in consensus that less than four witnesses in the case of *zinā* is not

[441] al-Marghinani, *al-Hidāyah,* vol. 7 p. 33-96, See Baderin, A. Mashood, *Intertional Human Rights and Islamic Law, op. cit.* 102-103, for other ways of interpreting the text which equates two women to one man in witness.
[442] See Abu Dawud *sunun, hadith* no 2254

acceptable.[443] This requirement is sought for to set higher degree of certainty in such crime.

However, the question of how many witnesses are required to testify adultery case established by the confession of the offender has to be addressed. Abu Hanifa, Ibn Hazm, some Malikites, Shafi'ites and one version of Ahmad Ibn Hanbal, all approve of two witnesses, based on the general agreement on the numbers of witnesses in confession. However, in another version of Hanbalite, some Malikites and Shafi'ite opine that four witnesses are required for confession. They argue that if confession in the case of *zinā* is required to be uttered four times before it can be accepted, then by analogy, witnesses to the confession should number four. Moreover, if *ḥadd* punishment cannot be executed other than by four confessions, then *ḥadd* cannot be executed unless there are four witnesses to that confession.[444] There is an extraneous view reported by al-Hasan al-Basri in which the distinguished scholar opines that four witnesses are required in the case of *qiṣāṣ*. This is because of the severity of the punishment; and by analogy, the same should apply to the offence of *zinā* which can also lead to capital punishment (*itlāf nafs*). The type of testimony required in the crime of *zinā*, therefore, should also be applied to the prosecution of murder.

(b) Two witnesses

The majority of Islamic jurists add crimes such as the false accusation of adultery, wine-drinking, defamation, theft, brigandage, highway-robbery, armed rebellion, apostasy, and the case of murder that leads to *qiṣāṣ*, to the list of cases that can only be proved by two witnesses who have fulfilled the aforementioned general requirements. This is the opinion of the Hanafites, Malikites, Shafi'ites and Hanbalites.[445]

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[443] Ibn Qudamah, *al-Mughni* vol. 9, p. 148. Ibn al-Qayyim, *al-Turq al-Hukmiyyah* p. 126.
[444] Ibn al-Qayyim, *ibid.* p. 127.
[445] al-Kasānī, *al-Bada'i'* vol. 7, pp. 33-96, Ibn Humam, *Sharḥ Fatḥ al-Qadīr,* vol. 7, pp. 370-372, Malik, *al-Mudawwan,* vol. 16, p. 443, al-Zarqanī, *Sharḥ al-Muwaṭṭa'* vol. 4, p.178 al-Shafi', *al-Ummu,* vol.6, pp. 16-19, Ibn Qudamah, *al-Mughni* vol. 8, pp. 230-236. (See also Ibn Nujaym, *al-Baḥr al-Rāiq*, vol. 7 p. 62 and 66, Ibn al-Juzay', *al-Qawanin,* p.298, Ibn al-Humam , *Sharḥ Fatḥ al-Qadīr,* vol. 7 pp. 369-370, al- Shawkani, *Nayl al-Awtar,* vol. 7 pp. 181-183, al-Bahūtī , *Kashshāf al-Qinā* vol. 6 p. 434.

The admissibility of two witnesses is based on the Qur'an and the *Hadith*. The Qur'an says: " ...And get two witnesses among your own men..."[446] It is also reported that the Prophet said in two litigations to the plaintiff: "*shāhidāk aw yamīnihi*" ('provide' your two witnesses or you take an oath). [447] In this category, the admission of female witnesses is contentious based on the disagreement on the legality of the admissibility of females in *ḥudūd* and *qiṣāṣ* offences. Accordingly, those who would allow the testimony of females in any case suggest that two females would be accepted in lieu of one male, in line with the verse that states "...one man and two women."[448] It is reported that 'Atā' Ibn Rabāh and Hammād Ibn Sulaymān accept three male and two female witnesses in a crime of adultery.[449] In the case of murder punishable by *qiṣāṣ,* Ibn Hazim, of the Zahiri school allows two trustworthy Muslim males, or one Muslim male with two females, or four females, arguing that such flexibility is as acceptable as the composition of witnesses in cases of financial compensation.[450]

The fundamental question in this provision is why should two women equal one man? Is there, in fact, any equality of rights in Islamic legal procedure, as professed by Islam? The fact is that as Islam acknowledges the equality of men and women as human beings, and ensures its enshrinement in all facets of human life, it does not, as Baderin observes, "Advocate absolute equality of roles between them."[451] Baderin further maintains that the equality of women is recognized in Islam on the principle of "equal, but not equivalent."[452]

It is also argued that except in the case of contractual matters, where Islamic law requires two women in lieu of a man, there is no other section of the text in which this

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[446] Qur'an 2, verse 282, cf. Qur'an 5, verse 106, Qur'an 65 verse 2.
[447] al-Bukhari, *Shahih, hadith* No. 2380, Muslim, *Sahih, hadith* No. 138,And in criminal liability, al-Nasai, *Sunan, hadith* No. 5992, al-Bayhaqi, *Sunan* al-*Kubra, hadith* No. 20995, both in financial litigation.
[448] Qur'an 2, verse 282.
[449] Ibn Qudamah, a*l-Mughni* vol. 8, pp. 198-199.
[450] Ibn Hazm, *al-Muhallah* vol. 11 p. 143. This opinion is ascribed to al-Awzā'ī (d. 157 A.H). Sufyān al- Thawrī (d.161 A.H). and 'Atā (d.114.) see al-Shawkāni, *Nayli al-Awtār op. cit.* vol. 7, p. 182, Ibn al-Qudamah, *al-Mughnī, op. cit.* vol. 8, pp. 97- 98, Ibn al-Qayyim, *al-Turq al-Hukmiyyah* p. 133.
[451] Baderin, M., *International Human Rights, op. cit.* p. 60.
[452] *Ibid.* A similar view has been echoed by Qutb M. *Islam, the misunderstood Religion* (Dacca: Adhunik Prokashani, 1978), p. 129,and al-Faruqi I. R. and al-Faruqi L.L. See *The Cultural Atlas of Islam* (New York: Macmillan, 1986), p. 150.

restriction is mentioned. This indicates that female witnesses should not be conditioned to the provision made in contractual matters. El-Bahnassawi submits thus:

> It should be borne in mind that Islam attributed this differentiation between the sexes to their respective natural disposition, though it had acknowledged their creation from the same origin and essence. It is not indicative of woman's inferiority but touches directly on people's interest and the safeguarding of justice.[453]

In general, women are allowed to stand as witnesses in cases that involve bodily injuries that are not punishable with *qiṣāṣ*. According to Malikites doctrine, women can bear witness in cases of non-intentional homicide and intentional bodily injuries because both only incur pecuniary compensation as *arsh*. As such, if women testify with men in the crime of *al-munaqqilah* (an injury whereby a bone is displaced) and *al-ma'mūmah* (a head wound reaching the cerebral membrane), their testimony will be accepted because the outcome of the punishment of the two commissions, with regard to their being an intentional or an unintentional act, is the same.[454] Thus, one man and two females are accepted in such crimes with testimonies that include the plaintiff's exculpatory oath.[455]

(c) One witness with oath

Generally, the minimum standard of witness is two witnesses. However, because of the abnormal situation that demands that justice has to be established, one witness coupled with his oath is advocated. There are two different opinions on whether this standard should be accepted in judicial procedure. Islamic jurists unanimously agree that one witness and his oath is not acceptable in any case of strict *ḥudūd* as it involves the right God. However, Malikites, Shafi'ites and Hanbalites accept one witness and his oath[456] based on the opinion of Ibn Abbas, in which it is reported that the Prophet adjudicated with one witness and his oath.[457] However, Hanafites

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[453] El-Bahnassawi, S., *Women between Islam and World Legislation,* (Safa: Dar-ul-Qalam, 1985), p. 132. See also other contributors to this matter, Doi. A. R. *Woman in Shariah* (London: Taha Publishers, 1987, al-Faruqi, L., *Women, Muslim Society and Islam,*(Indianapolis: American Trust Publications, 1988).

[454] Ibn Abd Al-Barr, *al-Kāfī,* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1407), vol. 2, pp. 906-911

[455] Ibn Rushd, *Bidayah,* vol. 2 p. 453, al-Qarafī, *al-Furuq* vol. 4 pp. 87-91.

[456] Ibn Farḥūn, *Tabṣirah,* vol. 1, p. 215, al-Qarafi, *ibid.,* vol. 4, p. 146, al-Shiribini, *Mughni al-Muḥtāj* vol. 4, p. 443, Ibn Qudamah, *al-Mughni,* vol. 9, p. 151.

[457] Muslim, *Sahih, hadith* No. 1712, Abu Dawud, *Sunan, hadith* No. 3610.

maintain that one witness and his oath cannot be admitted in any case because the Qur'an has never stated that and the authentic *hadith* does not require the plaintiff to take an oath. Rather it is the defendant who is supposed to take the oath.[458] It is not possible to accept the stand of the Hanafites on this issue since there is a sound hadith that indicates that one witness can be accepted, coupled with his oath. It is an acceptable principle in *uṣūl* that a text that is deemed to contradict another text can be merged with its contradicting text. If possible, that does not indicate the abrogation of any text but it stands rather as extra evidence.[459] Al-Qarafi and Ibn Farhun of the Malikite School enumerate cases in which one witness and his oath can be admitted. Some of these are: in pecuniary claims including *sariqah,* (theft), *ghaṣb* (usurpation), *iqrār* (confession), *wakālah* (warrants) or 'sureties', *qiṣāṣ,* (retaliation) in bodily injuries, and *al-khulṭ,* (a financial transaction), as in trade.[460]

3.4.1.2 Oath

An oath is one of the means of settling disputes between the litigant parties in the Islamic legal system. Its legality is derived from various Qur'anic verses such as 5:89 and 2:77; and from the *ahadith* of the Prophet. Among the *ahadith* is the *hadith* of Ibn 'Abbās in which he said that the Prophet of God stated: "If every people have been given their claim (without evidence), some people might have claimed other people's properties, but the oath is on the defendant."[461] There are five ways in which an oath can be applied. (1) An oath is used as a defence for an accused in cases where the plaintiff has no evidence (i.e. no witnesses). (2) An oath can also be used to rectify a claim of *da'wā,* (claims) such as an oath taken by the plaintiff with one or two males or two female witnesses. (3) An oath that is taken by the plaintiff after the refusal (*nukūl*) of the defendant. (4) An oath taken by the plaintiff after full evidence in order to finalize the judgment. (5) An oath taken by the defendant as *qasāmah* where the defendant has no conclusive evidence but only circumstantial evidence *(al-lawth).*[462]

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[458] al-Kasani, *Bad'i '* vol. 6, p. 225.
[459] al-Amidi, *al-Ihkam fi Usul al-Ahkam,* vol. 4, p. 175.
[460] al-Qarafi, *al-Furūq* vol. 4, p. 90, Ibn Farhun, *Tabsirah,* vol. 1, p. 215.
[461] al-Bukhari, *Sahih al-Bukhari, hadith* no. 2477.
[462] Ibn Farhun, *Tabsir al-Hukkam,* vol. 1, p. 147, al-Zahrani, *Tara'iq al-Hukm op. cit.* p 192.

The first is unanimously agreed upon among the scholars as the principle in question states. The second procedure has been debated between the majority of Islamic jurists who support it in some matters but the Hanifites reject it, arguing that the hadith that supports its legality is weak.[463] But the majority of scholars assert that the *hadith* of Ibn Abass mentioned above, in which it is reported that the Prophet gave judgement with one witness and oath (of the plaintiff), is authentic and does not invalidate the normal procedure, but is an additional way of establishing fact.[464] The third is also contended between the majority of Islamic scholars and the Hanafites. The majority of Islamic scholars approve of it, while the Hanafites disprove it based on their argument in the second procedure mentioned above.[465] However, this procedure is only applicable in matters with testimony that clearly involves the rights of men. On the other hand, there has been a long debate on the legality concerning a fourth way of taking an oath in the Islamic legal system i.e taking an oath by the plaintiff after he has presented two witnesses. However, the conclusion is that this system is totally unacceptable in *ḥudūd,* and as they are absolutely the rights of God, neither the plaintiff nor the defendant should be asked to take an oath.[466]

However, if there is suspicion surrounding a claim that involved the rights of men - for example, if someone claims that his property has been stolen and provides fake evidence, or if someone claims that someone else committed adultery with her slave in order to take her dowry, the plaintiff would be asked to take an oath. For example, Ali Ibn Abi Talib asked a plaintiff to swear an oath beside his two witnesses. When he refused, Ali said, " I will not adjudicate to you for which you do not take an oath."[467] It is reported that judge Shurayh asked the plaintiff to take an oath due to the dissemination of an allegation. When people asked him on what basis he innovated such procedure, he replied that because people had innovated novel problems, he had to contrive a new means of evidence.[468] Ibn al-Qayyim (d. 751) remarks that this

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[463] al-Shawkani *Nayl al-Awtar* vol. 9, p. 191.
[464] al-Shawkani *ibid* vol. 9, p.195, Ibn Farhun, *Tabsirah* vol. 1, p.215.
[465] al-Sahafi' *al-Umm* vol. 6, p. 241, Ibn Farhun, *ibid.,* vol. 1, pp. 154 –155 Ibn Qudamah, al-*Mughni* vol. 9, p. 235.
[466] Ibn Qudamah, *ibid.,* vol. 9, p238, Kasani, *Bada'i'* vol. 6, p. 226, al-Gazali, *al-Wajiz,* vol. 2, p. 159, Ibn Farhun, *Tabsir,* vol. 1, p.157.
[467] Ibn al-Qayyim, *al-Turq al-Hukmiyyah* p. 113.
[468] Ibn al-Qayyim, *ibid.* p. 113.

procedure is not too far from the precept (spirit) of *Sharī'ah*, particularly in the case of probability of indictment.[469]

However, none of the scholars approve of such a procedure in any case of *ḥudūd* and *qiṣāṣ,* especially in cases that are absolutely the right of God, such as those dealing with adultery and drinking alcohol. If someone confesses and then retracts that confession, no punishment will be inflicted on him and he will not be asked for any oath. Therefore, not to ask for such an oath would be preferable in cases where there is no confession,[470] unless in monetary disputes, as there are disagreements among the scholars on its legality.[471]

3.4.1.3 *Qasāmah*

The legal procedure before a judge is that the defendant has first to prove that his case is genuine, while the accused is responsible for the damage, according to the maxim in question. However, if the accused denies all the charges, then he will take an oath to exculpate himself. However, there are circumstances in which the procedural system changes. These are in cases where the defendant is asked to take an oath but refuses, or where the plaintiff has no proof, but only suspicion based on some factual elements – such as a deceased person being found in the company of a group of people, where, although no one is arrested, there is existing enmity between the two groups. This is called *qasāmah fi dimā'* (*qasāmah* of blood), as in a case where armed robbers storm a house and loot what is in the house in the presence of witnesses, although these witnesses do not see exactly what is taken from the house. This is called *al-qasāmah fī al-amwāl (qasāmah* in a financial claim or property claim.). Ibn al-Qayyim argues for the legality of the latter so that if *qasāmah* in the case of homicide can be established because of *lawth* (circumstantial evidence), then, this should also be accepted, as it is even more conclusive than the former. That is because there are witnesses for the commission of the offence, and only the details are absent.

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[469] *Ibid* p. 113.
[470] Ibn Qudamah, *al-Mughni*, vol. 9, p. 238.
[471] Ibn al-Qudamah, *ibid.*, vol. 9, p. 238, al-Zahrani, *Tarāhiq al-hukm* p. 205.

In this situation, any means can be used to substantiate the genuineness of the claim.[472]

The meaning of *qasāmah,* which was known and practised in the life time of the Prophet, is a number of multiple oaths used to substantiate or refute claims of homicide that corroborate with *lawth* (circumstantial evidence).[473] It is a method of proof in *Jāhiliyyah* (the period before the advent of Islam), which the Prophet applied in the case of Huwaisa. The Majority of Islamic Jurists including the Hanifites, Malikites, Shafi'ites and Hanbalites approve it as legal procedure in a case of murder where there is no substantial evidence, but only circumstantial, although[474] it is opposed by some Islamic scholars.[475]

The legal ground for this system is the Hadith reported by Sahl Ibn Abi Hathmah in which the Prophet said to them: "Would you take an oath and entitle you to the blood of your fellow?"[476] The antagonists of this system argue that this procedure contradicts well-established norms of the Islamic legal system that require the plaintiff to give evidence. They argue that *qasāmah* is not *bayyinah* (evidence) to prove a claim.[477] As such, the use of *qasāmah* should not be admitted. However, it can be said that *qasāmah* is not conclusive evidence, and, but for the fact that the Prophet used it as an adjudication in that case, it may not have become an additional means of adjudication in Islam. Further, the claim of homicide is not conceivable solely with *qasāmah,* except if there is *lawth* (circumstantial evidence that leads to suspicion regarding the genuineness of the case). Conversely, if *qasāmah* is to establish justice among litigants –especially in a matter involving men's rights-there is no doubt that it is in the spirit of Islam to accept such a system.

However, because of insufficient proof that hinders the use of *qasāmah*, the legal procedure should be changed, according to the majority of scholars, including the

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[472] Ibn al-Qayyim, *al-Turq al-hukmiyyah*, pp. 110-112
[473] Ibn Hajar al-Asqalani, *Fatih al-Bari* vol. 7, p.156.
[474] Kasani, *Badā'i'*, vol.7, p.286, Malik, al-Muwaṭṭa, vol. 5, pp.186-187, al-Shiribini , *Mughnī al-Muḥtāj,* Vol. 4, p. 101, al-Bahūtī, *Kashāf* al-*Qinā'*, vol. 6, p. 74.
[475] al-Shawkānī, *Nayl* al-Awtār, vol. 7, p. 186.
[476] al-Bukhar, *Sahih, haidith* no. 6898.
[477] al-Zahrani, *Tarā'q* al-*Ḥukm,* p. 218.

Malikites, Shafi'ites and Hanbalites.[478] The procedural norm is that the oaths of 50 men will be shared by the relatives of the victim, and that the offenders involved in the death of their relative will be entitled to the following, as stated by the Prophet: *taḥlifūn khamsīn yamīn wa tastaḥiqqūn dam ṣāḥibikum aw qātilkum*' (You take 50 oaths and you will be entitled to the blood of your accused or those who killed (your relative).[479]

The Hanafites hold a contrary view. They stand by the normal procedure that the defendant has to take an oath. They even support their stance with another version of the hadith, saying: "You will bring evidence against those who killed him," to which the reply was, "We do not have *bayyinah* (an eye-witness). The Prophet then said they should take oaths. The reply was that they were not pleased with the oath of the Jews - and, because the Prophet did not want the right to go in vain, he adjudicated a hundred camels for them.[480]. It is inferred from this that the defendant did not take an oath and thus the normal procedure should be adhered to.[481] The fact that the oath was not taken as proposed by the Prophet in this case does not imply that it is not legal to use the procedure.

3.4.1.4 Other circumstantial evidences

It is worth noting that *qasāmah* procedure cannot be administered unless there is circumstantial evidence, as exemplified above. However, what constitutes circumstantial evidence in such a situation has no unified definition among the Islamic scholars.[482] But it can be said that any circumstantial evidence such as photography, fingerprints, tape recordings, confidential documents, and DNA can be used in a number of criminal cases to support substantive evidence that lacks the necessary legal requirements. Nevertheless, it is a fundamental principle that the use of circumstantial evidence in any *ḥudūd* crime that is absolutely the right of God is not accepted, because the rights of God are based on forgiveness and are pardonable if

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[478] Malik, *Muwatta,*, al-Shiribini, *Mughni al-Muhtaj,* vol. 4, p114, Ibn Qudamah, *al-Mughni,* vol. 8, p. 65, Khalil. Ibn Ishaq , *Mukhtaṣar al-Khiraqī,* ed. Ahmad al-Harakat, (Beirut: Dar al-Fikr,1415), p.186.
[479] al-Bukhari, *Sahih, hadith* nos. 3002 and 6769, Muslim, *Sahih, hadith* No. 1669.
[480] al-Bukhari, *Sahih, hadith* No. 6502.
[481] al-Kasani, *Bada'i'* vol.7, p. 287.
[482] al-Kasani, *ibid.*,vol. 7, pp. 287-288, al-Sarkhasi, *al-Mabsūṭ,* vol. 26, p. 108 Malik, *al-Muwaṭṭa',* vol. 5, p. 187, Shafi', *al-Umm,* vol. 6, p. 79, Ibn Qudamah, *al-Mughni,* vol. 8, p. 68.

they are not reported to the authority. However, if the crime is partly the right of God and partly the right of men, circumstantial evidence can then be used to establish the right of men. If the legal consequence is mainly pecuniary, such as *diyah,* circumstantial evidence can be used inasmuch as the plaintiff can present some substantial evidence that needs to be elevated to a higher requirement. However, if the legal consequence is punitive, as in the case of *sariqah*, *qadhf*, and even *qiṣāṣ* – according to Hanafites, but contrary to the majority view- then circumstantial evidence cannot be used for fixed punishments. In other words, circumstantial evidence cannot be used to inflict *ḥadd* and *qiṣāṣ* punishments, although it can be used to award discretionary punishments.

Another burning issue surrounding the admittance of circumstantial evidence concerns the appearance of pregnancy as an item of circumstantial evidence. It is reported that Umar Ibn Khatab affirmed that pregnancy is one of the yardsticks for convicting an unmarried woman of adultery. In his documented reports he states: " I fear if time passes and one said: we do not see stoning (to death) in the Book of God and consequently they will go astray by abolishing obligation revealed by God. Lo! Indeed, stoning (to death) is a right (of God) on any one who committed adultery and he/she is *muḥsin* (married -before) if there is *bayyinnah* (witness) or pregnancy (appeared) or confession established."[483] Remarking on this assertive opinion, al-Suyuti said: "Using the appearance of pregnancy as a factor for determining the adulterous status of a woman is attributed to Umar and adopted by Malik."[484] This is contrary to the opinion of the majority of Islamic scholars, including Hanafites, Shafi'ites and Hanbalites, because it is not necessarily the case that once a woman becomes impregnated through sexual intercourse that it be deemed as adultery. It could be through insemination, or by other means known to the modern age. In fact, the woman could have been sexually abused or raped while she was asleep. In all of these cases, there is agreement that a woman cannot be punished with *ḥadd* because of the *shubhah* involved and as a principle, *ḥudūd* should be averted in the face of *shubhah.*[485] A woman is said to have been brought before Umar accused of adultery because of her pregnancy while she was unmarried. The woman explained that she

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[483] al-Bukhari, *Sahih, hadith* Nos 6441, 6829.
[484] al-Shinqiti, *Adwa al-Bayan,* vol. 5, pp. 319-321
[485] al-Tirmidhi, *Sunan, hadith* No 1456. See al-Shinqiti, *ibid.*

was asleep while a man raped her, thus she was acquitted. In another story, a woman was brought before him for the same reason and she explained that she was coerced, and thus she was acquitted.[486] This is the reason why criticism has been heaped on the judgement of the Shariah court of Sokoto and Kastina States of Nigeria, in which Safiyyatu and Amina were convicted of adultery because of the appearance of pregnancy, while not legally married.

To sum up the stand of Islamic scholars on acceptable evidence, it is clear that *bayyinah* is not only restricted to witnesses, as perceived by the majority of Islamic scholars. It is also the case that witnessing by any suitable means to establish justice among litigants can be deemed as evidence. In general, female testimonies are not acceptable in crimes that are solely the rights of God because women are often assumed, *inter alia*, not to be present at such criminal scenes. Regarding these rights, concealment of the wrongdoing and admonition of the wrongdoer is encouraged. In any criminal case in which female witnesses are accepted, two women are equivalent to one man if we draw from the textual evidence prescribing that. However, in cases where male witnesses cannot be found, a woman's evidence is admissible in corroboration with other circumstantial evidence.

It is a debatable point among classical and contemporary Islamic scholars whether circumstantial evidence and modern investigative technology can be used in Islamic law in general, and in Islamic criminal law in particular. The majority of Islamic scholars approve any circumstantial evidence that is sought to establish justice in general,[487] as opposed to Ibn Nujaym and al-Ramli, who opine that circumstantial evidence is not admissible.[488]

It is argued in support of the acceptability of circumstantial evidence that, at times, circumstantial evidence could be stronger than traditional substantive evidence. An example of this could be in a case where four witnesses claim that someone

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[486] al-Shinqiti, *ibid.* p. 392.

[487] Ali Ibn Khalil al-Tarabilsi, *Mu'īn al-Ḥukkām fīmā yataraddad bayna al-Khaṣimayn minā al-Aḥkām*, (Cairo: Matba ' al-Halabi, 1393) p. 166, Ibn 'Abidin, *Hashiya Ibn 'Abidiin* , vol. 5 p.354, Ibn Farhun, *Tabsira al-Hukkaam* , vol. 2 p. 93, al-Qarrafi, *al- Furuq*, vol. 4 p. 167, Izz al-Din Abdul al-Salaam, *Qawā'id al-Ahkām.* Vol. 2 p. 107, Ibn Qayyim, *al-Turq al-Ḥukmiyyah* p.4, and *'Ilām al-Muwaqqīn* vol. 1p. 103.

[488] Ibn Nujaym, *al-Ashba'*, p. 248,

committed adultery, but eventually it is proved that the woman concerned is a virgin. There may also be other stronger evidence proving the claims of the witnesses to be false. In that case, circumstantial evidence will render the claim abated.[489]

Generally speaking, there are cases where it is necessary to resort to circumstantial evidence. These cases include all human rights cases that claim to be divested from the owner or any case where aggression is meted unjustly on human beings. In such cases, resorting to circumstantial evidence in the absence of substantive evidence, or in corroboration with it, is deemed paramount. This is because Islam's intention is to establish justice among mankind and any means of achieving that can be considered. However, there are some cases where such investigations are not necessarily required. Such cases include any case involving an absolute right of God, such as a case of adultery or drinking alcohol. Other uses of circumstantial evidence are generally acceptable in cases of civil liability, in claims of rights and in cases of *tazirart*, where the use of fingerprints, autopsies, DNA, photographs, and audio recordings have become established. All such technologies can be used in cases in which the aversion of punishment by the means of doubt is not required.[490]

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[489] al-Zahrani, *Tara'iq al-Hukm* p. 341. See also Ibn Farhun, *Tabsira*, vol. 2 p. 93, Ibn al-Qayyim, *al-Turq al-Hukmiyyah*, pp. 26, 83-84.

[490] For further references on witness, oath and circumstantial evidence, see al-Alwani, T.J. 'Judiciary and Rights of the accused in Islamic Criminal law' in Mahmood, T. et. Al., (ed.s) *Criminal Law in Islam and the Muslim World* (Delhi, Institute of Objective Studies, 1996) pp. 256-263, Lippman M. et. Al. (eds.) *Islamic criminal law and procedure: an Introduction*, (New York: Praeger Publishers, 1988), Ibn al-Qayyim, *al-Turuq al-Hukmiyyah, op. cit.* p. 218, al-Māwarid, *al-Aḥkām al-Sulṭāniyyah*, trans. Yate A. 1996, pp. 69-73, Awad A.M. 'The rights of the accused under Islamic Criminal procedure' in Bassiouni M.C ed. *The Islamic Criminal Justice system*, (New York: Oceana Publications, 1982), pp. 91-107 see also Baderin, *International Human rights and Islamic law*' 97 and Peters, Rudolph, *Crime and Punishment in Islamic Law..op. cit* pp. 12-19

3.4.2 Confession as a Means of Proof in Islamic Criminal Law

(a) *al-Iqrār ḥujjah qāṣirah* (Confession is an intransitive evidence). [491]

(b) *al-Mar' mu'ākhadh bi iqrārihi* (One is responsible for his confession).[492]

Confession is one of the *prima facie* to establish the liability of a criminal act, especially if the crime is of disclosure. In fact it is believed to be the highest evidence of guilt. [493] The culprit is said to be innocent until it is proved beyond any reasonable doubt that he is guilty of the alleged crime, *actori incumbit onus probandi.*[494] However, to establish justice and at the same time, to balance the right of the defendant and the offender, Islamic law enacts the legality of confession. There are many cases in which evidence can be somewhat unattainable. These cases could involve both the rights of God and men. In the right of God, confession may not be commendable as the right of God is based on forgiveness and is pardonable. However, in the rights of men, confession is seen as paramount and as an indispensable means of proof, especially where there is a deadlock of evidence. By confessing, the confessor is bound by it and retraction from it is only accepted in claims that absolutely involve the rights of God, such as a claim of adultery and drinking, or those that are partly the rights of God and the rights of men such as theft. In the former, a dowry is mandatory while for the latter; compensation of the value of the stolen property is accorded to the plaintiff.[495] Thus, the maxim above indicates that one is legally held responsible for one's confession and that confession stands as legally effective evidence that cannot be refuted in the rule of law.

The legality of confession is based on the Qur'an,[496] the *hadith*, and on consensus and rationality. It is reported that Ma'iz and Ghamidi confessed to adultery during the life time of the Prophet and punishments were inflicted on them on the basis of their

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[491] Ibn Nujaym, *al-Ashba'* p.255, al-Sarakhasi, *al-Mabsut*, vol. 4, pp. 225-226, *Majallah* Article 78, al-Zarqa, *al-Madkhal*, p. 667.

[492] *Majallah* Article 79, Haydar, *D{urar,* vol. 1, p. 70, Ibn Hajar, *Fathi al-Bari*, vol. 8, p. 476, al-Zarqa *Sharh al-Qawa'id* p. 401, and similar codification in Suyuti, *al-Ashba'*, p. 464.

[493] Peter Mirfield, *Confession,* (London: Sweet and Maxwell, 1985) p.49

[494] Islamic Law emphasizes on this principle under the doctrine of *istiṣḥāb* (presumption of continuity). See Kamali, M.H. *Principles of Islamic Jurisprudence op. Cit.* pp. 297-309, Baderin, M.A. *International HumanRights and Islamic Law, op. Cit.* p. 103

[495] Ibn Qudamah, *al-Mughni* vol. 5, p.164, Ibn Farhun, *Tabṣirah al-Ḥukkām* vol. 2, p.54.

[496] Qur'an 3, verse 81, Qur'an 4, verse 135 and Qur'an 9, verse 102.

confession.[497] There is no disagreement among Islamic scholars on the general acceptability and legality of confession. By analogy, if witnesses can be accepted, then confession is more acceptable and reliable than a witness. It is irrational that someone would confess against himself when knowing the severe consequence of that confession.[498] To eliminate the benefit of doubt in the validity of confession, Islam stipulates some conditions, these being: the confessor must have reached puberty, be sane, and of sound mind. Thus the confession of a minor, an insane person or a person who has been coerced is not valid. Moreover, the confessor must not be under suspicion in his confession and the statement of confession must be explicit. If someone is to confess to adultery he must use the legal terms of adultery such as, "I had sexual intercourse with her" as opposed to "I slept with her" or in the case of theft "I stole the property of a person"[499] as opposed to "I took the property."

Confession is defined linguistically and technically as a piece of information given by a person to state his involvement in an alleged offence; and someone has a right on him.[500] This definition comprehends a civil right and criminal liability. By stating involvement in the offensive act, that person indicates he is liable for the consequence of the offence. By stating that a person's right is in his own hands indicates the liability to return the property. This nature of evidence is the most highly proven before the court. However, there are many maxims of confession discussed in different ways in different jurisprudence books, all of which could be summarized under a few headings. We will quote primarily from the ones included in the book of maxims, with reference to other maxims mentioned in other books. We shall try to bind up those maxims in such a way that will be easy to analyze.

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[497] See note on *hadith* of Maiz and Ghamidi in al-Naysaburi, Muhammad Ibn Abdullah , *al-Mustadrak 'ala Sahihayn,* ed. Mustafa A. Ata' (Beirut: Dar al-Kutub al-'Ilmiyyah, 1990/1411) *hadith* no. 8077, vol. 4 p. 402.

[498] al-Burnu, *Mawsua' al-Qawa 'id al-fiqhiyyah* vol. 2, p227.

[499] Ibn Qudam, *al-Mughni* vol. 5, p 149, al-Kasan, *Bada'i'* vol. 7 p. 222, al-Shiribini, *Muhgni al-Muhtaj,* vol. 2 p. 245, al-Sawi, Ahmad Ibn Muhammad, *Bulghat al-Sālik* vo. 2 p. 176, al-Dardair, *al-Sharh al-Kabir,* vol. 3 p. 397, Abdu al-Karim Zaydan, *Niẓām al-Qaḍā' fī al-Sharīah al-Islamiyyah,* (Baghdad: Matba' al- 'Ānī, 1404) p.157 and Taraiq al-Hukm, p. 173.

[500] al-Rāzī, Muhammad Ibn Abi Bakr, *Mukhtasar al- Ṣihaah* ed. Muhammad Khatir, (Beirut: Maktabah Lebanon, 1995/1415) , p. 529, al-Fayyumi, Ahmad Muhammad, *al-Misbāḥ al-Munīr* (Beirut: Maktabah al-Ilmiyyah, n.d.), vol.2, p. 681, al-Fayrusabadi, Muhammad, al-*Qamus al-muhiit* (Beirut: Muhassasah al-Risalah, n.d.), p. 593, Ibn Farhun, *Tabsirah,* vol. 2, p. 53, cf. With English definations of confession, see Kaufman, Fred, *The Admissibility of Confession,* (3rd edn. Toronto, Canada: Carswell Company Limited, 1979), pp. 4-5, cf. Fred Kaufman, *The Admissibility of Confession,* (3rd Toronto, Canada: Carswell Company Limited, 1979), 4-5.

As confession stands as evidence and a way of testimony in the court, it is assumed that the confessor is being truthful with regard to what actually happened. For that reason, he is bound by his own admission. This admission is not transferable to any other accused. For instance, two persons or more were being accused of murder. In the first instance all denied the charges. Later, one of them came forward and confessed his involvement in the crime - without any duress or circumstance beyond his capacity- and said that the offence was actually committed by him and some other people. In such a case, his confession would be taken on his own account, so that the other co-accused would not be convicted by that confession until some other proof emerged to establish their involvement. However, if the offence is adultery and he confessed his and others' involvement in it – and it later turned out that his incrimination of the others was untrue - he would be punished for the said offence and for the offence of *qadhf*.

One of the reasons for convicting Safiyyatu and Amina Lawal of the Sokoto and Kastina States Governments respectively was that the accused confessed to committing the alleged crime of adultery. However, the questions posed regarding this conviction are: were their confessions made under duress or not? Did they willingly confess or were they forced to do so? What was the procedural ground for their confession? All of these questions will be clarified by the maxim below.

3.4.2.1 Condition binding Acceptability of Confession

(c) Maxim: *al-Ikrāh yamna' ṣiḥḥah al-iqrār* (Coercion prevents the validity of Confession).[501]

It is generally acceptable that a healthy confession made without force, or any other unusual condition, shall be accepted. However, a question arises on whether or not a confession made under coercion and by any other means of compulsion should be acceptable as proof in court. The opinions of scholars differ. The majority of jurists hold the view that confession should be made voluntarily and any confession subject

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[501] Ibn Humam al-Haj, *al-Taqrir wa al-Tahbir* (Beirut: Dar al-Fikr,1996/1417) vol. 2, p. 42, cf. al-Nafrawi, Ahmad, *al-Fawakih al-Dani,*(Beirut: Dar al-Fikr, 1415), vol. 2, p. 178.

to coercion, duress or any conditional forces is invalid[502]. This opinion is based on the Qur'an, the *hadith* and logical conclusion.

In the Qur'an, God says: "Except under compulsion his heart remains firm in faith".[503] Al-Shiribini in his commentary canvasses that if an utterance made under compulsion is not regarded as the nullification of one's faith, then the same should be applied to confession made under coercion.[504] God also calls Muslims to witness, even if it is against their own selves: "Ye who believe! Stand firmly for justice, as witness to God even as against yourselves".[505] The words used in the verse 'witness ...against yourselves' refer to confession. It is unanimously agreed upon among scholars that any false witness is unacceptable in establishing fact, thus a confession made under compulsion should not be considered as it could be false.[506]

In the *hadith*, the Prophet says that "God will ignore what men think in their minds to do till they do it or talk about it, and also He will leave out of the reckoning, man's acts under compulsion."[507] The hadith categorically dismisses any act of compulsion. Thus, any confession made under coercion shall not be accepted. From a logical perspective, confession is regarded as one of the valid forms of evidence that should not proportionally contain errors, if it is based on the natural will of the confessor. However, if it is based on coercion, there is a probability that the confessor may lie, which will not serve the purpose it is meant for.

However, a few jurists hold the view that confession in any case should be accepted. This is based on the fact that the woman who Hatib bn Abi Balta'ah sent to the pagans of Makkah with a letter, was compelled and forced to produce the letter after her denial. Against this latter opinion, it could be argued that the evidence that the woman carried a letter was a divine revelation from God to His messenger. This revelation cannot be denied by any human being and is accepted by all faithful Muslims. That is why those whom the Prophet sent to her had taken all measures to secure the fact.

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[502] Peters, R., *Crime and Punishment, op. cit.* P.9
[503] Qur'an 16, verse 106.
[504] al-Shiribini, *Mughni al-Muhtaj,* vol. 2, pp. 240-241.
[505] Qur'an 4, verse 134.
[506] al-Kasani, *Bada'i'* vol. 7, p. 223. See also, Inban F. F. And Reid J. E. *Criminal interrogation and Confession,* (Baltimore USA: The Williams and Wilkins Company 1967), p. 143
[507] Ibn Majah, *Sunan, hadith* No. 2043, cf. al-Bukhari, *Sahih, hadith* No. 4968.

In the case of Safiyyatu, the first procedural error that led to her confession was that someone reported the case to the police, though concealment is recommended in such case. It is reported by Ibn Umar that God's messenger said: "Avoid these filthy things which God has forbidden, and if anyone commits any of them, he should conceal himself with God's most High Veil and turn to God in repentance..."[508]

Thus, the interrogation of someone regarding the crime of adultery is questionable. This is because all the adultery offences in the life of the Prophet had punishments that were based on voluntary confession, rather than enforcement or imposition. In addition, if someone confesses to this crime, the benefit of doubt should be given – and that is absent in the case of Safiyyatu. It is reported on the authority of Imran Ibn Husain that a woman of Juhaina (tribe) came to the Prophet when she was pregnant due to fornication, and said, "O God's messenger, I have committed something for which a prescribed punishment is due, so execute it on me." God's messenger called her guardian and said, "Treat her well and when she delivers, bring her to me". It is also reported in the hadith reported by Abu Hurarah that a man among a group of Muslims came to the Prophet in the mosque and called, "O God's messenger, I have committed adultery." The Prophet turned away from him. The man confessed to that four times and when four people witnessed his claim, the Prophet asked him, "Are you insane?" The man replied, "No", and then the Prophet asked him, "Have you been married before?" He replied, "Yes", and then the Prophet ordered him to be stoned.[509] From the two traditions, it is clear that in such situations, it is the right of the confessor to be given the benefit of the doubt and it is the responsibility of the judge not to admit the confession in the first instance.

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[508] Ibn Hajar al-'Asqalaani, *Bulugh al-Maram* hadith no. 1048.
[509] al-Bukhari, *Sahih* Hadith no 6747, Muslim, *Sahih* Hadith no. 1691.

3.4.2.2 Retraction of Confession

(d) *al-Iqrār fī ḥuqūq al-'ibād lā yaḥtamil al-rūju'* (Retraction of confession is not allowed in rights of men).[510]

The retraction of confession is one of the interesting issues deliberated under the rule of confession in Islamic criminal law. It emphasizes the importance of establishing criminal justice in Islam to protect the rights of victims, and at the same time to prevent inflicting severe punishment on an innocent accused. In the realm of confession and its retraction, it is fundamentally important to identify the nature of the crime and the punishment accorded to it. In doing so, it will be easy to decide whether retraction is allowed or not and when it is allowed.

By looking into the nature of the liability involved, crimes are separated into three categories.

One: Crimes that solely involve the violation of the right of man, (*ḥaqq al-ādamī*) e.g. as in murder and defamation. This kind of crime means that the victim or his relatives may pardon the culprit, and this pardon will be efficacious. Regarding this, the jurists unanimously agree that once a confession is made in such a sensitive case, the culprit has no right to retraction. Of course, if the confession is made through his own free will without any force and all requirements are met, thus, retraction is ineffective. This is because if it were to be allowed, there would be a prejudice against the people's rights and justice would not be established.[511] For example, if someone confessed that he had killed someone and later retracted his confession, his retraction would not be heard because of the right of the individual involved and the acceptability of retraction in such a situation would jeopardize criminal liability.

Two: Crimes that solely involve the violation of the right of God, (*ḥaqq* Allah), such as for example, adultery and intoxication. There is disagreement among scholars on the acceptability of retraction in this category. Most scholars approve of the retraction

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[510] al-Kasani, *Bada'i'* vol. 7, pp. 216-233.
[511] al-Kasani, *ibid.* vol. 7, p. 61, al-Ramali, *Nihayah op. cit.* vol. 7, p. 431, Ibn Qudamah, *al-Mughni,* vol. 5, p. 288, al-Sarkhasi, *al-Mabsut,* vol. 17, p. 189.

of confession if the crimes solely involve the violation of the rights of God. They argue that:

- When Ma'iz ibn Malik came to the Prophet confessing his commission ofadultery, the Prophet said to him: "Probably you only kissed (the lady) or winked or looked at her!" He replied, "No, O God's apostle!"[512] It can be inferred from the Prophet's question that he meant to give Ma'iz a chance of retracting his confession.[513]

- When Ma'iz fled and was caught and stoned to death, the Prophet was heard to say: "Why didn't you leave him? Perhaps he may repent and God will forgive him."[514] This comment from the Prophet denotes that repentance made after a confession stands as a retraction.

- Because confession is an information that involves truth and falsehood. For a person to retract shows a contradiction, and contradiction raises doubt, while the principle is to avert *ḥadd* punishment if doubt exists.[515] Ibn Abdu al-Barr (d. 463) reports that there is consensus among Islamic jurists on the invalidity of a confession or testimony that has been retracted in any *ḥudūd* punishment.[516]

Another opinion claims that when a crime solely involves the violation of the right of God, then retraction is not accepted. They claim that:

- If retraction is allowed, the companion must have been ordered by the Prophet to pay *diyah* compensation for the killing of Mu'iz. Thus, the absence of such judgment indicates that retracting a confession is not acceptable.[517]

- It is reported by Abu Hurayrah that a father accused a woman of committing adultery with his son. The Prophet said to Unays: "O Unays, go to this woman

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[512] al-Naysaburi, *al-Mustadrak ala Sahihayn*, *hadith* No. 8077, vol. 4, p. 402.
[513] al-Kasani, *op. cit.* vol. 7, p. 233, al-Shiribini, *op. cit.* vol. 4, p. 150.
[514] al-Nasai, *Sunan, hadith* No. 7207, al-Darimi 'Abdullah Ibn 'Abdu al-Rahman, *al-Sunan* ed. Fawwaz Ahmad and Khalil al-Alami, (Beirut: Dar al-Kitab al- 'Arabi, 1407), *hadith* No. 2318.
[515] al-Sarakhasi, *al-Mabsut*, vol. 9, p. 49, al-Bahuti, *Kashshaf*, vol. 6, p. 85, Ibn Humam, *Sharh Fatih al-Qadir*, vol. 5, p. 408.
[516] Ibn Abdu al-Barr , *al-Istidhkar* ed. Salim M. Ata, (Beirut: Dar al-Kutub al-Ilmiyyah, 2000), vol. 7, p. 503.
[517] Ibn Qudamah, *al-Mughni*, vol. 10, p. 167.

in the morning and if she makes a confession then stone her".[518] It is canvassed that if a retraction is accepted the Prophet must have explained that to Unays, as there is probability that the woman might want to retract her confession.

- If retraction is not allowed in the crimes involving man's right, then logically it should not be allowed in the crimes involving the right of God.[519]

However, it can be said that the argument for the latter opinion is by no means unacceptable, as in the first claim the Prophet must have asked them to pay *diyah.* However, the Prophet did not ask them because Ma'iz had not made clear his retraction and, as such, we cannot assume that his running away from the punishment denotes his retraction. In the second claim, there is a probability that the Prophet did not tell him about the retraction as he might have known all the conditions relating to confession, including that of retraction. The last claim can be rebutted on the basis that the two rights are very different in principle. The right of God is based on forgiveness and remission, while the right of man is based on contention. Therefore, in the right of God, one can escape its punishment by means of repentance and forgiveness from God, while in the right of man; an effort must be made to balance justice among mankind. Furthermore, one is not obliged to make a confession in any crime involving the right of God, as opposed to the right of man, in which a confession is favorably required. [520]

In the case of Safiyyatu, it is argued that she retracted her confession and thus she should have been acquitted on that ground. However, the retraction of Safiyyatu is said to have been made not by herself, but by her legal representative. Based on that, her retraction was undermined. Moreover, the State counsel argued that the retraction of a confession can only be made in the case of *qiṣāṣ,* according to section 166 and 188, (1), (2) of the SCPC. But this is not true. According to the maxim above, retraction is only unacceptable in cases that involve man's right, and the case in question is the absolute right of God.

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[518] al-Bukhari, *Sahih, hadith* No. 2190, Muslim, *Sahih, hadith* No. 1697.
[519] al-Sarakhasi, *al-Mabsut*, vol. 9, p. 49.
[520] al-Māwaridi, *al-Hawi al-Kabir,* vol.13, pp. 210-211.

Three: crimes that involve the violation of both the Right of God and right of man. Due to the disagreement on the legality of retracting confession in the category discussed above, there is a slight disagreement as to whether retraction is allowed in crimes involving both the right of God and the right of man. This disagreement could be summarized as follows:

If retraction is made in a crime involving both rights, the *ḥadd* punishment should be dropped. This is because of the *shubhah* that is embedded in it. But the right of man should be claimed back from the confessor if it can be established that his confession was made when he was of sound mind, and that the confession was not extracted by means of force. However, if the crime is of *qadhf* (an accusation of unchasteness), his retraction stands as the reclamation of the accused's reputation, and as a kind of *ta'zir* that can be accorded to the proclaimer of the defamation.[521]

Examples of crimes that can be classified as involving the rights of both God and man are defamation and theft. According to the majority of Islamic scholars, if someone confesses to defamation, the punishment due for the crime must be meted out and no retraction should be accepted. This is because the right of man prevails in that crime. However, if the accused confesses to theft and later retracts the confession, it is agreed that the punishment will be dropped, not only because it is the right of God, but also because that retraction has constituted *shubhah* in that confession, and thus the accused cannot be justly convicted. However, the right of man that is involved in this matter has to be reclaimed from the confessor, because the right of man cannot be undermined and, as the confessor is not forced to confess, he is thus responsible for the claim.

Another important issue to round off the discussion on confession is that the effect of confession is only binding on the confessor. This means that if someone confesses on himself and on another person, the effect would be given to the confessor alone, and not on the co-accused. This is because the evidence of a confession is supposed to be made voluntarily, but obviously this is not so in the case of the co-accused. For

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[521] Ibn Muflih, *al-Mubdi'* vol. 10, p. 368, al-Kasani, *Bada'i* ' vol. 7, pp 232-234.

example, if someone admitted to killing someone but claimed that another person was involved in it, his confession will take effect on him alone, but not on the alleged co-accused. However, the co-accused may be found guilty in the case from another source of evidence but not by the alleged confession forced on him by the confessor.[522]

This maxim has been observed in the case of Safiyyatu and her co-accused (Yakubu Abubakar) in which the Upper Shariah court of Sokoto State of Nigeria turned down the alleged accusation of Safiyyatu that Yakubu was the one who impregnated her, and thus Yakubu was acquitted.[523] Although it could be argued that since the prime accused (Safiyyatu) implicated another party in this same accusation, it is the right of the authority to summon the co-accused and investigate the allegation thoroughly. Indeed, the authority did summon Yakubu regarding this allegation - which Yakubu denied - but there is no doubt that the authority failed to carry out a sufficiently thorough investigation.

Another way of turning the case to balance the equation is to regard the matter as one involving *shubhah* and thus a *ḥudūd* punishment can be averted. This is because in the crime of adultery, as pointed out earlier, a single person cannot commit such a crime. This is one of the reasons why the Qur'an mentions both genders when prescribing the punishment, although it can be said that a confessor of adultery during the period of the Prophet was punished on his own, without any questioning of his co-accused. This indicates that a single person can be punished for adultery. Of course, Mu'iz and al-Ghamidi were punished on their own, and the Prophet did not question their co-accused as they had already voluntarily confessed and did not allege that anyone else was involved. Thus, their cases are quite different from the case of Safiyyatu and Yakubu

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[522] See, Muhammad Waqar-ul-Haqq, *Islamic Criminal Laws (Hudood laws and Rules with up to date commentary)* (Lahore, Pakistan: Nadeem Law Book House, 1994) p. 152, al-Burnu, *al-Mawsu'a* vol. 1, p. 233.
[523] See the report of Safiyyatu's case in WACOL, 2003.

3.5 Summary of the Chapter

Legal maxims of certainty and doubt and its related maxims are very important in Islamic criminal law. Indeed they are the core element from which criminal justice can be achieved. In this Chapter, the maxim and its related ones have been extensively treated. The central message in all the discussions is that human being is assumed to be innocent of any accusation until the otherwise is proven. Any allegation that lacks credible evidence shall not be entertained. Any iota of doubt plunged into evidence shall render such evidence invalid. Confession as one of the substantial evidences can be considered valid in as much as the confessor has not retracted it especially where the crime is of *ḥadd* nature and involves solely the right of God. This is because the right of God is based on forgiveness. However, it may be difficult to attain certainty in all cases, thus, where a case involves the right of human being, it is espoused that circumstantial evidence should be sought for in order to regain the right of the human being involved.

In most of the cases judged in the Northern Nigeria *Sharī'ah* saga from 1999 to 2007, many flaws are noticeable in the legal procedures. These flaws are more prominent in all the cases of theft exposed in this chapter. It is observed that the rule of certainty in all ramifications is undermined. This could be as a result of inexperience of the judges in the courts of first instances (Lower Sharia Court and Upper Sharia Courts); or that those cases have political undertone. Thus we want to suggest that in cases involving *ḥudūd,* proper steps must be followed so that the *Sharī'ah* is not made a target of criticism.

Chapter Four

Analysis of the Maxim: *al-Mashaqqah tajlib al-Taysīr* (Hardship begets Facility).[524]

4.0 Introduction

One of the beauties of Islamic law is its recognition of fallibility of human beings in carrying out their spiritual and mundane activities. In addition, it comprehends the difficulties they will face in achieving both spiritual and mundane objectives. Thus, Islamic law endorses breaching some certain rules in any dire necessity. The maxim which establishes this and supported by sound evidences from the Quran, *hadith* and consensus is *al-mashaqqah tajlib al-taysīr*.

4.1 Definition and Interpretation of the Maxim *al-Mashaqqah tajlib al-Taysīr*

The maxim "hardship begets facility" is one of the basic general maxims agreed upon among Islamic jurists. It is applicable to almost all issues and branches of Islamic jurisprudence. Because of its important role in Islamic law, it is now being recognized as a fundamental maxim.[525] It is a maxim used as a legal concession for any recognized hardship in Islamic law. Thus, it serves the purpose of Islamic law in lessening and removing burdens from people.[526]

The origin of the maxim is derived from a deep study of the Islamic textual injunctions of removing hardship, (*raf' al-ḥaraj*). It is clearly stated in many Qur'anic and traditional texts that Islam enjoins facility and leniency in any case that leads to difficulty. God states in the Qur'an: "God intends for you ease, and He does not want to make things difficult for you..."[527] He further states in another verse: "...and (He)

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[524] al-Suyuti, *al-Ashba' wa al-Naza'r op. cit.* p. 76. Ibn Nujaym, *al-Ashba' wa al-Naza'ir op. cit.* p. 74, al-Zarkashi *al-Manthur fi al-Qawa'id op. cit.*, vol. 3, p. 169, Ahmad al-Zarqa, *Sharh al-Qawa'id* p. 157, Mustafa al-Zarqa *al- Madkhal.* Par 598, Mahmassani , *Falsafah al-Tashri'..op. cit.* p. 152.
[525] Ibrahim Ibn Musa al-Shatibī, *al-Muwafaqāt fī Uṣūl al-Sharī'ah* ed. 'Abdullah Duraz, (Beirut: Dar al-Ma'rifah 1975) vol. 2, pp. 136-156, al-Suyūtī *al-Ashbāh op. cit.* p.55, Ibn Nujaym *al-Ashbāh op. cit.* p. 84, al-Zarkhashī *al-Manthur op. cit.* vol. 3, p 170.
[526] Ibn Nujaym, *op. cit.* p. 85.
[527] Qur'an 2, verse 185.

has not laid upon you in religion any hardship..."[528] and "God wishes to lighten (the burden) for you; and man was created weak"[529] There are many other verses that give Muslims a way out of any difficulty.[530] Although the verses are different in context, they are identical in implication, which is to ease difficulty and hardship whenever it exists and to make the legal ability of human beings commensurate with their legal responsibility. Thus, their similarity lies in the fact that there is nothing in Islamic law that goes beyond the capacity of human beings.[531] The Prophet is reported to have said: "The religion is very easy and whoever overburdens himself in his religion will not be able to continue in that way."[532]

Conversely, of course, some of the legislation in Islamic criminology may appear hard and severe for mankind. But that is not enough reason to brand them as 'barbaric' or 'relics of antiquity'. This is because the majority of daily human activities such as eating, drinking, having affairs with one's legal wife etc. may not be perceived as hardships to mankind because of the enjoyment derived from those activities, but yet there are proportions of hardships in them.[533]

The relevance of this maxim to Islamic criminal justice lies in the fact that even if there is no excuse in committing crimes such as adultery - because Islam has provided alternative ways of relieving one's sexual motivation; intentional homicide - because it is utterly prohibited; and theft - because it is someone else's property, it is, however, permitted to drink alcohol in an extreme situation or to take food if in dire need. Nevertheless, if a fundamental rule is broken due to necessity and the right of an individual is involved, compensation is recommended. One of the proofs that if in a dire circumstance a rule can be breached is what happened during the period of Umar Ibn Khatab. It is reported that Umar Ibn Khatab suspended the punishment of *ḥadd* during the period of famine in Madina. This does not mean that the crime is legalised

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[528] Qur'an 22, verse 78.
[529] Qur'an 4, verse 28.
[530] cf. Qur'an 5, verse 7 and Qur'an 2, verse 286.
[531] Ibrahim Ibn Musa al-Shatibi , *al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, ed. 'Abdullah Daruz, (Beirut: Dar al-Ma'rifah 1975) vol. 2, p. 119.
[532] al-Bukhari, Sahih Kitab al-Iman, hadith no 39.
[533] al-Shatibi, *op. cit.* vol. 2, pp. 425 and 434.

or 'fiscalised', but that the punishment is waived or reduced, depending on the circumstances of the perpetrator.[534]

Most of the verses that stand as legal evidence for breaching rulings in the state of hardship are related to forbidden edible property. However, this does not mean that what can be breached in the state of necessity is restricted to food alone. Al-Jassas (d 370 AH) remarks that if the wisdom behind allowing prohibited things in the state of necessity is to save life, then this wisdom is present in all kinds of prohibited matters. Thus, the ruling must include all cases of existing necessity.[535] It can be inferred from this remarkable statement that the rules that can be breached when illegal acts are committed in order to repel necessity subsume the commission of prohibited acts and the omission of obligatory acts.

Therefore, the maxim implies that for any of the Islamic obligations that in some cases cause hardship and inconvenience, the *Sharī'ah* has given facility for such hardship. There are two kinds of hardship envisaged in human beings' activities. The first one is the hardship caused due to the natural limitations of mankind. This is the hardship that is inseparable from '*Ibādah* (an act of devotion). It is compulsory to endure such hardship, like striving to acquire spiritual reward, striving to seek for knowledge, performing prayer in a standing and posture and fasting during hot weather. These hardships are not given facilities as they do not pose a threat to life. In other words, they are the inexorable and inevitable hardships of human beings. The second hardship is the type that extends beyond the capacity of human beings. This varies from one person to another. [536] The recognized *mashaqqah* in the latter category is the one that can claim lives, or inflict permanent disability on the body.[537]

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[534] Doi, *op. cit.* 225.
[535] Abu Bakr Ahmad Ibn Ali al-Razi, al-Jassas, *Ahkām al-Quran* ed. Muhammad Sadiq al-Qamhawi, (Beirut: Dar 'Ihya al-Turath al-Arabi, 1405) vol. 1, p. 129.
[536] al-Nadwi, Ali Ahmad, *al-Qawa 'id.. op. cit.* p 428,Umar Ibn Muhammad al-Khabbasi, *al-Mughni fi Usul al-Fiqh*, ed. Muhammad Mudhhar Baqaa, (Makkah: Ummu al-Qura University Press, n.d.), p. 225.
[537] al-Suyuti *al-Ashba' op. cit.* p.80, Ibn Nujaym, *al-Ashba' op. cit.* p. 82.

4.2 Hardship recognized in Islamic Law and their Facilities

It is noted that all facilities provided in Islamic law are based on this maxim. Suyuti (d. 911AH) refers all facilities that are legally approved in Islamic law to seven reasons[538], each of which is applicable to some subjects of Islamic jurisprudence.

4.2.1 *al-Safar* (Journey)

Journeys attract facilities on religious duties in the form of reduction in the number of *raka'āt* (pillars of prayers) to be said. For example, this might change four *raka'āt* prayers to two, such as *ẓuhr* (noon prayer), '*aṣr* (afternoon prayer) and '*ishā'* (night prayers). It also allows for travellers to break their fast in Ramadan, to wipe wet hands over their socks instead of washing their feet during ablution, to leave *Jum'ah* (Friday prayer) and to eat an animal slaughtered in an unlawful manner.

This facility is hardly applicable in Islamic criminal theory. Indeed, a traveller does not enjoy any facility when he commits a crime that attracts the punishment of retaliation *qiṣāṣ.* No one, whether on a journey or at a residence, is allowed to kill another person, as the texts prohibiting killing give no exception in that regard. Thus, if some people are on a journey and they encounter the hardship of starvation, or are attacked by armed robbers, they cannot ward off that hardship by sacrificing any member of the group. In addition, it is not acceptable in the spirit of Islam for a group to throw one of its members out of a boat in order to guarantee the safety of others. If such an action is committed, all those involved in the criminal act will pay *diyah.* [539]

However, while on a journey, one is permitted under legal concession (*rukhṣah)* to drink alcohol, eat unlawful animals, and use other people's belongings without their consent, but only in dire circumstances. In such cases, one will not be charged or accused of committing religious offences or criminal acts inasmuch as those acts are committed in good faith and within the limits of the allowance given to the

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[538] The seven reasons are, *safar* (journey), *maraḍ* (illiness), *ikrāh* (cocercion), *nisyān* (forgetfulness), *jahl* (ignorance), *naqṣ* (defect/disability) and *'usr wa humūm al-balwā* (difficulty and general necessity). *Nisyan* and *jahli* have been treated under the maxim of intention and action. Thus, the remaining five will be mentioned here to avoid repetition.

[539] al-Suyuti, *al-Ashba' op. cit.* p.77.

perpetrator. In some cases where the commission of an act involves man's right, as a standard rule, the perpetrator will be asked to pay compensation to the owner of the damaged property. This is because, according to the maxim, *al-iḍrār lā yubṭil ḥaqq al-ghayr* (Necessity does not invalidate the right of others)[540] as opposed to the right of God which, if violated as a result of *mashaqqah*, will attract no penalty because the right of God is based on forgiveness and is pardonable.

However, the question arises whether it is possible to say that the facility given to travelers could be extended to also allow adultery and false accusation. There is no suggestion that such an act is permissible, whether by classical Islamic jurists or contemporary ones. However, what can be termed as adultery that is excusable on the part of the perpetrator is when a female traveler intends to marry, but has no parents or legal relative who can stand as her *waliyy,* as required by law. It is allowed in this situation under the rule of hardship for such a woman to marry in the absence of any of her parents, although she has to have a male representative among her co-travelers. To this question, Al-Shafi'i responded that it is possible because *idhā ḍāq al-'amr ittasa'* (When a matter becomes difficult, its rule becomes expanded).[541]

4.2.2 *al-Maraḍ* (Illness)

Illness is also counted as one of the reasons for which facilities can be given in Islamic law. If someone is ailing, there are a number of religious rites that can be reduced, suspended or replaced with alternative ones due to health reasons. These facilities include performing sand ablution in lieu of water, particularly if the latter could cause severe damage or increase the sickness; leaving congregational prayers; breaking or leaving fasting while paying back the missed days at a later date or by giving another person sustainable food for each day in the case of an elderly person, or replacing the missed days by fasting after regaining full health. *Ḥajj* and '*Umrah*, can also be performed by proxy. Similarly, healing can be performed with impure substances and alcohol, while, according to some schools, it is legal for a male doctor

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[540] Ibn Rajab, *al-Qawa'id op. cit* p. 36 article 26, *Majallah* article 33, Mustafa al-Zarqa *Al-Madkhal.* Para. 602.
[541] Ibn Nujaym *op. cit* 84, al-Suyuti, *al-Ashbah, op. cit.* p. 83.

to carry out a medical investigation on the private parts of a woman and vice versa. These are all included in this facility.[542]

In Islamic criminal law, the use of illness as an excuse to commit crimes has little credibility, even though there are some ways in which sickness can be considered as an impediment to the conviction of someone for committing a crime. In a classical example, using alcohol for medication is an inconclusive issue among scholars. Some Hanafites approve of the use of alcohol for healing during dire situations, while another version disapproves of it.[543] In fact, illness can cause a murder conviction to be averted if such an illness causes insanity in the accused. However, such claims have to be verified by experts to ensure that the rights of victims are not jeopardized. In any case, the claim cannot invalidate the right of the victim.

By and large, there are other ways in which illness can be used as a legal reason to give facility in religious offences committed by people. For instance, it is prohibited for a male, even a doctor, to look at the private parts of a foreign woman, but if there is no female to do the task, then employing the service of an unknown male, possibly a doctor, to carry out the task is permissible under the facility of illness.[544]

4.2.3 *al-Ikrāh* (Coercion)

Ikrāh literally means coercion, a compelling force that makes a person do what he would ordinarily not do.[545] *Ikrāh* has been recognized as a legal reason to justify the commission of offences, or of the omission of obligatory duties. In Islamic criminal law, the effect of *ikrāh* is a subject of controversy, especially in crimes involving men's rights. In crimes that warrant *qiṣāṣ*, *ikrāh* is not seen as a convincing excuse for killing or injuring anyone. Thus, if someone is compelled to kill another person, if he chooses to kill, he, as the direct actor, and the other who forced him to kill, would both be executed in line with *qiṣāṣ*. This is the view of the majority of Islamic

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[542] al-Suyuti, *ibid.* p.77.
[543] Ibn Nujaym, *ibid* p. 75.
[544] Ibn Nujaym *ibid* t. In this case, there must be maximum precautions taken to block any chance of an offence being committed. Thus, if a male doctor has to treat a female in that way, it is recommended that the husband of the woman or a male relative male should be with them.
[545] Mansur Ibn Yunus Al-Bahuti, *Kashshāf al-Qinā ' An Matn al-Iqnā '* ed. Hilal Muslihi Hilal, (Beirut: Dar al-Fikr 1402 A.H) vol. 4, pp. 1631-1632.

scholars. They assert that the compelled is held responsible for committing the killing in circumstances where he could do otherwise, and that the compeller, who is the cause of that killing, should also be held responsible.[546] This is because no one's life is considered more valuable than anyone else's. However, Abu Hanifah maintains that no *qiṣāṣ* should be accorded to the compelled, rather that he should receive a discretionary punishment, while the compeller must be held responsible. He based his argument on the fact that the compelled was made to act against his willl; he was like a tool used for the killing and the compeller is the doer.[547] These views are based on a situation where the coercion is a complete one (*ikrāh tām*). But if the compulsion is a mere threat, there is no doubt that the direct causer of the killing (the compelled) will be fully responsible.

In the case of someone who is compelled to destroy another's property, and then chooses to do so - whether the compulsion is complete one or not - both he and the compeller, or the compeller alone, will be held responsible for the damage. This is because the preservation of life is more important than that of property.[548]

However, in *ḥudūd* crimes, there are certain cases in which *ikrāh* can lead a person to violate legal rules. For instance, if a woman claims to have been raped or sexually abused, she will be acquitted from adultery. This is in light of the Qur'an 24, verse 33 that states that no sin is incurred by a compelled women.[549] She may claim she consented in order to escape punishment. This is enough reason to treat the case as having been infiltrated with *shubhah,* "doubt" based on the legal maxim: "*al-ḥudūd tudra' bi al-shubhāt* "*ḥudūd*" (punishment should be averted in the face of doubt).

Despite the legal rule which commutes the *ḥudūd* punishment in the face of doubt, the Malikites do not accept such a claim completely. They assert that the woman's claim should be substantiated with convincing evidence, such as her screaming or shouting while she was being raped, or by traces of bleeding on her body to show mutilation of her vagina. It is reasonable to assume that rape would not be committed in an open

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[546] Ibn Qudamah *al-Mughni op. cit* vol. 8 pp. 266-267, al-Suyuti, *op. cit.* p. 13.
[547] al-Kasanī, *Bada'i ' op. cit* vol. 7, p. 177, Ibn Humām *Fath al-Qadīr op. cit.* vol. 7, p. 307.
[548] Al-Bahuti, *op. cit* vol. 4, p. 639, Ibn Rajab, *al-Qawa'id op. cit.* p.309, al-Suyuti, *al-Ashba' op. cit.*p.134.
[549] Ibn Qudamah, *al-Mughni op. cit.*, vol. 9, pp. 59-60.

place. Thus, it may be suggested that some modern means of detection could be used to ascertain the claim. But because there is no right of man involved, there is perhaps no need to employ such means. However, if the victim accuses someone of having committed the rape, clarification is then required to establish the accusation. In such cases, the accused may deny the authenticity of the modern tool, and, in that case, *ta'zīr* instead of *ḥudūd* may be awarded to him.

By nature, women do not forcibly coerce men into raping them. However, if by chance men are forced to commit adultery and the coercion is complete, no *ḥadd* punishment will be accorded, according to the Hanafites. They argue that the claim of coercion in that case has rendered it doubtful and *ḥudūd,* according to the hadith of the Prophet, should be averted in the face of doubt.[550] However, the Malikites and Hanbalites maintain that men should be given *ḥadd* punishment because such an act would not have occurred without the choice and desire of men.[551] This view is ill-conceived as there are many occasions in which men can become victims of rape, particularly in the modern age. There is a general mentality, perhaps the relic of an older generation that tends to believe that a female cannot take sexual advantage of a man, but recent history has proved otherwise. In the case of Debbie Lane (offender) *v.* Scottish CSC, the Sheriff observed that a "prison-based sex offender programme had been designed for men". As such, he sentenced Lane to one hundred hours of community work instead of sending her to jail for the sexual harassment of a 13-year-old boy.[552] This mentality has been criticised by Alayne Frankson-Wallece, a UN prosecutor who objects thus:

> It is too naïve to suggest that a woman cannot be the perpetrator of acts of sexual violence against a man. Further, that women have not, and do not take sexual advantage of men in situations where the question of consent has been nullified by the operative circumstances," she said. "Similarly, an act of rape, in the sense of non-consensual sexual intercourse, can be committed by woman against woman and man against man.[553]

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[550] *Hadith* remit the *hadd* from Muslims as much as possible, because if a judge were to commit a mistake in executing the punishment, that would be far better than committing a mistake in enforcing the penalty. Cf. with note 316.
[551] Ibn Qudama, *al-Mughni op. cit.* vol. 6, p. 187.
[552] Reported in Scottish Metro, March 8, 2007, p. 11. The same mentality is enshrined in most world legislations, see Priya Patel vs. Justices Arijit Pasayat and S.H. Kapadia. The hornourable justices refer to section 375 of the IPC which emphatically states that "rape can be committed only by a man" thus, Priya was acquitted of the charge of gang rape on the basis of this section. See www.hind.com/2006/07/14/stories .
[553] See www.jamaicaobserver.co./news, last viewed 14th March, 2007 at 16:14 pm.

The honourable prosecutor's submission on the issue presents the need for reformation of such an outlook.

Ikrāh can also necessitate, in any way, a violation of the rights of God in as much as the coerced has a sound and firm faith. The Qur'an says: "...except him who is forced thereto and his heart is at rest with faith...."[554] Thus, if one is compelled to make a statement revoking Islam, which forms the crime of apostasy, he will not be considered an apostate and will not be punished. The same applies to drinking alcohol. If someone is compelled to make a confession, that confession will not be admitted in a court of law. Recognizing whose right is involved in crimes committed under duress is very important. Of course, the rights of men are undeniable and incontestable, but the rights of God are based on forgiveness. Al-Sarakhasī (d.490 AH) explains: "And if it is said 'an ill treated person has a right to resist injustice in whatever way he can, 'we say: yes, but an unjustly treated person cannot commit injustice against others'."[555] This indicates, as we shall explain in detail later, that one's right is protected by all means, and no necessity can invalidate it according to the maxim *al-Iḍrār la yubṭil ḥaqq al-ghayr* (Necessity cannot invalidate the rights of others).

4.2.4 *al-Naqṣ* (Defect or Disability)

Defect or disability attracts facilities such as not imposing *ṣalāt* on infants; not compelling women to pray in the mosque; exempting old people from fasting during Ramadan etc.[556] However, because of disability or a natural defect, should a minor, or an insane person commit any criminal offence, in Islam there will be no *ḥadd* or *qiṣāṣ* adjudged for them. In the case of adultery, *qadhf*, drinking alcohol and related offences, there is also no *ḥadd*. However, in the case of *ḥudūd* offences, a minor may be given *ta'zīr* to reprimand him and to reprobate the act in case of future occurrences. But the proportional punishment commensurate with the gravity of the offence is left to the authority to decide. Although there is no *qiṣāṣ* in the case of a minor or insane person who commits a murder, *diyah* must be paid to the relative of

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[554] Qur'an 14, verse 106.
[555] Ibn Qudamah, *al-Mughni* vol. 7, p. 384, al- Kasānī, *al-Badā'i'* vol. 7, p. 181.
[556] al-Suyuti, *al-Ashbah op. cit.* p. 76.

the victim by the solidarity of the criminal (*al-'āqilah*) . Being female is also a factor for which facility can be sought under the terms of disability or defect. Thus, females are not required by law to share in the blood money of their relative who commits a murderous crime, whether the blood money is due as a result of unintentional killing by an adult, or as a result of intentional killing by an infant or an insane person.[557]

4.2.5 *al-'Usr wa Humūm al-Balwā* Difficulty and General Necessity)

The broad use of facility subsumes under general necessity and insurmountable difficulty. Islam recognizes the nature of life and realizes that life is full of ups and downs. Provision is made for situations where there is pressing difficulty and where a man may have to commit an act or omit a religious rite to surmount enormous difficulty. This comes under the rule of *al-mashaqqah* of which *'usr* and *humūm al-balwā* are among the causes. Caution should be exercised to ensure that this provision is restricted to what is permitted under the law. Al-Burnu observes that difficulty and general necessity are only considered where there is no text.[558] Of course, to make a law effective, some restriction has to be made in the use of concession. What is considered to be difficult in one situation may not be so in another. Taking this into consideration, *humūm al-balwā,* (general necessity), is incorporated to expand the facility given to mankind.

Many of the legislations enacted in Islam, whether from direct texts or implied meaning, are based on this concession.[559] In the criminal aspect of the law, it is allowed for a destitute person to take the minimum portion of any unlawful thing to sustain his life. A male doctor is allowed to examine the private parts of his female patient if there is no alternative. Also, a man is allowed to look at his proposed wife before agreement on marriage can be decided.[560]

Imam Abu Hanifah extensively expands the use of this facility to cover the permissibility of marrying a girl without her *waliyy,* and without fulfilling the

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[557] al-Zarqa, *Sharh al-Qawaid op. cit.* p. 161.
[558] al-Burnu, *al-Wajiz op. cit.* p. 228.
[559] *Ibid.*
[560] Ibn Nujaym *op. cit.* p. 80.

condition of '*adālah* (trustworthiness) of the witnesses.[561] In addition, the Hanafites, as opposed to other schools, do not stipulate any specific marriage formula during the consummation of the marriage rite, expressly to prevent the occurrence of an allegation of adultery.[562] Based on the facility given to general necessity, judges are pardoned for any mistake they commit as a result of their personal opinion, *ijtihād.* This is because if they were to be held responsible for their mistakes, other people's rights would be jeopardized as, in some cases; it is difficult to obtain conclusive evidence. The same is applicable to professional doctors when they commit surgical mistakes.

Furthermore, under difficulty, which is the bedrock of necessity, the witness of women can be admitted in matters that are traditionally exclusive to women, such as when someone accused of raping a virgin girl denies the accusation and claims that he only caressed her. In such a case, the testimony of a woman who examines the virginity of the girl will be taken into consideration, although other circumstantial evidence may be used to strengthen the testimony in order to make the case potentially tenable in a court of law.

In all cases that provide legal reasons for breaching the rules in Islamic criminal law, the concessions allowed range from abolishment, reduction, substitution and advancement, to deferment and alteration of the punishment.[563] In the case of *qiṣāṣ*, if someone commits any criminal offence, then a reduction, substitution, alteration or abolishment of punishment can be applied. Thus, if one kills by mistake, *qiṣāṣ* punishment will be abolished and substituted with *diyah*. It is even possible that the *diyah* may be abolished in consonance with the verse that enjoins people to forgive others in such a situation "*Whoever forgives his brother of any (of the punishment) shall follow it with kindness.*"[564]

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[561] *Ibid.*
[562] *Ibid.*
[563] al-Suyuti, *op. cit.*
[564] Qur'an 2, verse 178, Ibn Nujaym, *op. cit.*

4.3 Subsidiary Maxims under the Maxim of Hardship and Facility.

There are many maxims that, in one way or the other, form subsidiaries of the basic general maxim. Some of them are explanations of, expansions to, or conditions for the basic one. However, in this section, we shall discuss those maxims in light of their relevance to criminal offences in Islamic law.[565]

4.3.1 ***'Idhā ḍāq al-'amr ittasa' wa idhā ittasa' ḍāq*** (Whenever the circle of an affair narrows, it is widened and whenever it widens it is narrowed). [566]

This maxim is a further explanation of the grand maxim that facility should not be abused. The two sentences are very close to each other. They lay emphasis on the grand maxim and give more information on how it is to be applied. The summary of this maxim is that if there is an apparent *mashaqqah* (hardship) in any matter, there should be facility for it. And as soon as that *mashaqqah* disappears, the matter should reverse to its original rule. As al-Zarqa snr. (d.1357 AD) puts it in this way: "If necessity and hardship cause facility, the facility should be enjoyed till the condition changes, then one should revert to the normal rule".[567].

The first part of the maxim is more or less the meaning of the general maxim and the subsidiary maxim to be discussed below. And all that has been mentioned with respect to the applications of the above maxim are also applicable to this. al-Shafi'i (d. 204) has been credited with the coinage of the maxim when a female who had lost her guardian while on a journey asked him if she could appoint another man to be her guardian "*waliyy*". Al-Shafi'i agreed saying: "because if the circle of matter narrows, it is widened." This indicates that one of the aims of Islam is to make things easy for its adherents and to make them avail of the facility when there is difficulty.[568] The

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[565] There is no consistency in the classification of these maxims. There are some maxims mentioned here that are classified under the following grand maxim. This is because of the correlation between the two grand maxims in terms of the issue both are dealing with. In this research I see al-Burnu's classification as sensible and cohesive to my need. Cf. al-Burnu, *al-Wajiz* pp.230250, Ibn Nujaym, pp.77-84.

[566] al-Suyiti *al-Ashbah* p. 83, Ibn Nujaym *op. cit.* p.84. al-Majallah mentioned the first part of the maxim in article 18, Al-Zarqa *Sharh al-Qawaid* p. 165 al-Zarqa *al-Madkhal* Para. 599 al-Burnu, *al-Wajīz* p. 230.

[567] al-Zarqa *Sharh al-Qawaid,* p163, al-Burnu al-*Wajīz* p. 230.

[568] al-Zarqa. al-*Madkhal* para. 599, al-Burnu, al-*Wajīz* 230.

second part of the maxim concerning the extent to which a breach of rules can be legally accepted under the room of necessity will be dealt with after the next subsidiary maxim.

It is clearly expressed in the Qur'an that in the wake of difficulty during war, Muslims are allowed to shorten their obligatory prayers, so that four *rakā'at* (pillars of prayer) can be reduced to two. But if the situation no longer exists, the prayer should be performed as normal. (Q 4: 101-103). It is also reported that the Prophet prohibited the storage of the meat of *'aḍḥā* (the festival) for more than three days because of villagers who came to visit the people of Madina. But when that situation had ceased, they were allowed to store it for a longer period.[569]

It can be deduced from the Qur'anic verse and the Prophetic tradition referred to above that when there is difficulty facing the public in any of their daily activities or in the legislation, it is in the spirit of the Islamic law to find a way out for the masses. Although the references mentioned above are particular to certain issues in Islamic jurisprudence, their applications are not restricted to those issues because *al-'Ibra bi umuūm al-lafẓ lā bi khuṣūṣ al-sabab* (Consideration is given to the generality of the word, not the peculiarity of the cause (of revelation).[570] Those references form the basis for the legality of ensuring facility for the public, and once the difficulty ceases, the rule returns to the status quo.[571]

4.3.2 *al-Ḍarūrāt tubīḥu al-Maḥẓūrāt* (Necessities make Unlawful Things Lawful).[572]

This maxim is itself a broad principle in spite of its being classified under the grand maxim and as a popular maxim among the jurists. Its interpretation is not very different from that of the grand maxim stated above. However, its popularity, together

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[569] Muslim, *Sahih, hadith* No. 1971, Abu Dawd, *Sunan, hadith* 2812, 2813, al-Nasāī, *Sunan, hadith* 2032.
[570] al-Shinqiti, *Adwa' al-Bayan op. cit.* vol. 2, pp. 302, 360, Muhammad Ibn Yusuf Abu Hayyan al-Andalusi,, *Tafsir al-Bahr al-Muhit*, ed. Adil Ahmad, (Beirut: Dar al-Kutub al-'Ilmiyyah, 2001/1422), vol. 3, p505, Shihab al-Din al-Alusi, *Ruh al-Ma'ani,* (Beirut: Dar 'Ihya al-Turath al-Arabi, n.d.0 vol 6, p.p 120-122,Muhammad Ibn Muhammad Abu Hamid al-Ghazali, *al-Mustasfa* (Beirut: Dar al-Kutub al-'Ilmiyyah 1413), vol. 1, p.236, Muhammad Ibn Bahadir al-Zarkashi, *al-Baḥr al-Muḥīt fī Uṣūl al-Fiqh*, (Beirut: Dar al-Kutub al-'Ilmiyyah 2000/1421) vol. 2, p.367.
[571] al-Burnu *al-Wajīz* p. 232.
[572] al-Suyūtī, *al-Ashba'* p. 83, Ibn Nujaym, *al-Ashba'* p. 85, *Majallah* Article 21, al-Zarqa *Sharh al-Qawa'id* P.185, al-Burnu, *al-Wajiz,* p. 234.

with the grand maxim, is connected to the fact that they derive their sources from the Qur'an. God says: "... He (God) hath explained to you in detail what is forbidden to you except under compulsion of necessity.[573]

When man is faced with necessity, he is allowed to use what is forbidden until he secures a lawful one. Broadly speaking, the necessity recognised by *Sharī'ah* could be of three categories.

First: The necessity that can change the legal status of an action from forbidden to permissible, such as eating dead meat and pork. In this situation, one is permitted to take unlawful meat; else he may be punished if he refuses to do so for the safety of his life.

Second: The necessity that cannot change the rule but that can be carried out when the condition warrants, such as taking a fellow's property without his permission. This can be done, provided that the harm caused to the owner of the property is less than the harm caused to the perpetrator if he does not act that way. However, compensation must be given to the owner of the property because the principle of necessity cannot nullify another person's right (*al'iḍṭirār lā yubṭil ḥaqq al-ghayr).*

Third: The necessity that is not recognized in Islam and permission is not given to take such a facility, such as the killing of a fellow Muslim under the pretext of compulsion, or committing adultery under the pretext of sexual emotion. These offences cannot be legally justified. [574]

The attention given to this maxim by both classical and contemporary Islamic scholars should not be underestimated. However, what is controversial about it is whether it is a subdivision of the grand maxim *al-mashaqqah tajlib al-taysir,* or that of the grand maxim *al-ḍarar yuzāl-* a question that will be discussed later. This is because the word *ḍarūrah* in this maxim is used interchangeably with *al-mashaqqah* and *al-ḍarar.* To the classical Islamic jurists, the maxim of *al-ḍarūrah* is a subdivision

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[573] Qur'an 6, verses 119, 140, Qur'an 5, verse 3, Qur'an 2, verse 173.
[574] al-Burnu, *al-Wajiz* pp.236-237

of the maxim *lā ḍarar,* while the maxim *lā ḍarar* and al-*mashaqqah* are synonymous or interwoven "*mutadākhil* and *muttaḥid*". However, al-Burnu affirms that there is no unity between the two legal maxims but that, rather, they are interwoven. He observes that the legal maxim *al-ḍarūrāt* emerged to affirm the legality of *taysīr* (facility) in the face of difficulty. Thus, it is appropriate to consider it as a sister of the maxim *al-mashaqqah*. On the other hand, the maxim of *lā ḍarar* or *al-ḍarar* is an independent maxim, which explains the need for eliminating any *ḍarar* (harm) posed by someone against another. Although al-Burnu recognizes the interchangeability of the two grand maxims, he asserts that one maxim focuses on general difficulty encountered by mankind, while the other concentrates on the prohibition of initiating harm or inflicting it on another. Furthermore, if such harm is forced on someone by another, the maxim states the rules for eliminating it without prejudice.[575] Therefore, the maxim of *al-mashaqqah* and its sisters are more applicable to the facility given to natural difficulties that are not necessarily caused by any human being, whereas the maxim of *al-ḍarar juzāl* is specific to any *ḍarar* caused by human transgression on a person's life, body or property.

However, there are difficulties, although with different causes, in both maxims. The effect of the maxim of *al-ḍarūrat* in both is that the elimination of that hardship or harm is legally approved if all conditions laid down for their elimination are observed and adhered to. It is allowed for one to drink alcohol during the *mashaqqah*, provided there is nothing else to drink, while it is also allowed for someone to kill or injure a burglar in the defence of his property and family under the maxim of eliminating *ḍarar.*

4.3.2.1 Definition of *Ḍarūrat* and its Application in Islamic Criminal Law

Ḍarūrāt is the plural noun of *ḍarūrah* or *ḍarar* which means unavoidable injury, hardship and harm. *Ḍarar* is the opposite of *nafi'* (benefit), and *al-muḍṭarr* is the one who is forced and compelled to do something that he does not wish to do or is capable of doing. So, if someone acts unwillingly (as a result of a physical or mental impediment), such as someone with trembling hands, he would not be called or

[575] *Ibid.* p. 234.

described as *muḍṭarr* in the Arabic language.[576] Only someone who sustains an injury that leads him to act unusually, or someone who avoids injury is so called. [577]

Furthermore, *ḍarar* can also be a situation whereby someone reaches a limit where, if he does not take a prohibited thing, he will apparently die or almost die.[578] In addition, *ḍarar* is also described as a way of preserving lives from being lost or from being badly injured.[579] These definitions have been criticized as having been narrowed down to preserving life alone, whereas the factors of necessity are more than that. According to contemporary Islamic scholars, *ḍarar* (necessity) is beyond preserving lives. To them, *ḍarar,* which makes someone act contrary to the law, can also be applied to the preservation of lives, religion, offspring, material wealth, and reason. Thus *ḍarar* is defined as "a compelling situation where one has to commit an illegal act" to preserve the five fundamental necessities.[580]

The disparity between the classical and contemporary definition of *ḍarar* is that the classical state of necessity is restricted to the preservation of life which the contemporary Islamic jurists say includes the other four states of necessity stated in their definition above. The excuse that can be given for this restriction of the classical definition is either that it defines necessity only in the context of the discussion, or because *ḍarar,*'necessity', is discussed in the Qur'an mostly in connection with the issue of starvation.[581] This is not to say that the progenitors were ignorant of the fact that the state of necessity goes beyond preserving life alone. Many of the classical Islamic jurists have discussed the sate of necessity in a wider scope than is defined in the Qur'anic context. Al-Ghazali (d. 505 AH) has discussed the state of necessity in his various books in which he includes all of these five preserved necessities.[582]

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[576] Muhammad Ibn Abdullah Ibn al-'Arabī: *Ahkām al-Quran*, ed. Muhammad Ata' (Lebanon: Dar al-Fikr, n.d. and Beirut: Dar al-Ma'rifah, 1972) vol. 1, p.55.
[577] *Ibid.*
[578] al-Zarkashī, *al-Manthur* vol. 2, p319, al-Suyutī, *al-Ashbā*, p. 61.
[579] al-Dardir, *al-Sharh al-al-Kabir* ed. Muhammad Ulaysh, (Beirut: Dar al-Fikr n. d.), vol. 2, p. 183, Ibn Qudamah ,*al-Mughnī* vol. 8, p.595.
[580] Haydar, A., *Durar al-Hukkām op. cit.* vol. 1 p. 38, al-Zarqā *al-Madkhal.* vol. 2, p. 997, Wahbah al-Zuhaylī *Nazariyyah darura* pp. 67-68.
[581] Mansour Al-Mutairi, *Necessity in Islamic Law*, (Edinburgh UK: University of Edinburgh, PhD Thesis, 1997) p. 13.
[582] al-Ghazali, *al-Mustasfa*, vol. 1, p. 174. Not only has he mentioned this. There are a host of classical Islamic scholars who, to a lesser or greater extent, have discussed it and included all five as paramount necessities to be preserved. See Mahmud al-'Ayni, (d.855) *Umdah al-Qari*, (Beirut: Dar 'Ihya al-Turath al-Arabi, n.d.), vol. 2, p. 85.

There are some controversial issues surrounding the use of this maxim in Islamic criminal cases. Among them is the issue of committing adultery in the face of *ḍarar,* caused by starvation. For instance, can a destitute woman whose life is in danger commit adultery with a man who uses that as a condition for helping her? It is reported that Umar Ibn Khattaab pardoned a woman who committed adultery under a similar circumstance.[583] However, there is no classical or contemporary Islamic scholar who approves of this illegitimate practice. Although this is a possible scenario, allowing such an excuse could open the door to *fasād,* illicit practices. In addition, it is certain that there are many other ways that remedy could be sought for such situation rather than adultery. Such a woman could find a job to do, even if that violates her matrimonial status, she could also solicit help from the government. At worst, she could take out a loan, even if she has to pay interest under the principle of lesser evil. All of these avenues could be exploited instead of committing such a grave offence. This, of course, depends on the faith of the actor to choose what is appropriate for his or her faith.

Another contemporary issue concerning the application of this maxim is the question of whether it is allowed for a pregnant woman to terminate her pregnancy because of difficulty. This claim has been interpreted by some in this generation as incapacity to feed the baby after birth, a genetic disease affecting the baby, (such as sickle cell disease), incapacity of the woman to deliver the pregnancy successfully, and fear for the unborn baby's life. The position of the law on the termination of pregnancy is that it is a prohibited act if the termination takes place after 120 days of conception.[584] However, before this period, it may be terminated on condition that the termination poses no danger to the health of the mother. Moreover, using unfounded excuses as an

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[583] See Ashhab Ahmed, *Criminal liability in Islamic law*, (Tripoli, Libya: The World Islamic Call Society, 1994/1404) pp.185-186. The author quotes Bahnasi, Ahmed Fathi in Criminal liability p. 257. According to the report a woman was brought to Omar, having been accused of committing adultery 'because she was thirsty and saw a shepherd, who refused to give her a drink till she committed adultery, and she did." Omar consulted people to decide whether he should penalise her (by stoning). Ali said: (")This woman was (is) in case of necessity and (she) should be released. (And) Omar released her."If the report is true it may be accepted as *ijma'* of shahabah, which at the time was an evidence, as discussed in *usul* It is possible to accept it under necessity but the question is, does preserving her life supersede her act of adultery? This will be referred to in the hierarchy of preserving the five necessities, as suggested by al-Ghazali.

[584] al-Burnu, *al-wajīz* p. 240. This is because after that period the foetus has completely formed into a human being and terminating it at that stage is considered to be a grave sin. See Qur'an 17, verse 41. al-Bukhar Sahih kitab Bad' al-Khalq hadith no. 3036, Muslim, *Sahih, kitab al-Qadar hadith* no. 2643.

excuse for the termination of pregnancy is unacceptable in Islam. This is the reason why the termination of pregnancies for such reasons could lead to criminal charges.

4.3.3 *Mā ubīḥa li al-ḍarūrāt yuqaddar bi qadarihā* (What is permitted by the virtue of necessity should be estimated according to its quantity).[585] Or *al-ḍarūrāt tuqaddar bi qadarihā* (Necessities are estimated according to their quantity).[586]

The two maxims are phrased differently but denote the same meaning. The former was coined by classical Islamic jurists, while the latter was rephrased from the former by modern jurists. The two maxims are set as conditions and restrictions to regulate the use of the provision of facility in the case of necessity. As mentioned above, the Qur'an has categorically stated that the only acceptable excuse for breaking rules is reasonable and genuine necessity "*ghayra bāghin walā 'ādin*" (without willful disobedience, or transgressing due limits)[587] Thus, any facility given should be minimized, as some people may abuse the facility under the pretext of necessity. This is an indication that he who abuses the chance will be guilty of disobedience. Where conditions warrant that the law would be breached, there must be a mechanism in place to block the occurrence of evil. For example, if a male doctor has to be used as a midwife in the absence of a female, a female assistant should be with him under the rule of *sadd al-dhrī'a* (blocking evil). Failure to provide a female assistant in such a situation could lead to a criminal offence in Islam that attracts a discretionary punishment. The same applies to using a male doctor who has access to a woman patient's private parts in the absence of a competent female doctor. This should however not be unduly exploited. Under the proportionality of necessity, if someone is allowed to drink or eat a prohibited substance, then that person is not allowed to take the substance in excess because of *al-ḍarūrah tuqaddar bi qadrihā*. Moreover, it is not permitted for a person to steal a large quantity of flour on the ground of necessity, whereas the same is not true for someone who steals a loaf of bread because of extreme hunger. The former is not allowed and not legally justifiable because his robbery went beyond the limit of necessity, while the latter is excusable under the rule

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[585] al-Suyūtī *al-Ashba; op. cit.* p. 83, Ibn Nujaym, *op. cit.* p.86.
[586] *al-Majallah* article 22, al-Zarqa , *al-Madkha*l para. 601, al-Burnu, *al-Wajiz* p.239.
[587] Cf. Qur'an 2:173, 6:145, 16:115.

of necessity.[588] The yardstick for determining the proportion of the facility to be granted under the pretext of necessity is what is recognized by law, namely, the five necessities of religion, life, dignity, offspring and property, and what would be required to preserve them.[589] However, it is also worth noting that the amount to be taken from these prohibited things in order to protect these five necessities is relative. What is deemed to be a sustainable portion for one may not be sustainable for another.

4.3.4 *Mā jāz li 'udhur baṭala bi zawālihi* (What is permissible by the virtue of excuse becomes invalid with the expiration of the excuse).[590]

This maxim is similar to the above but its focus is on the duration of the licence given to break the rules. The duration set for the expiration of the reprieve granted to break the law in the face of necessity is when that hardship or the cause of the hardship disappears. The phrase used in the verses of the Qur'an on the permissibility of unlawful things in the face of necessity is "neither craving nor transgressing" and, as such, has placed a clear limitation on the exploitation of the provision. Thus, this indicates, as al-Razi (d.604 AH) states: "If the reason for the permission contained in the verses legalising a violation of rules ceases to exist, the permission is no more."[591] Thus, if one is given facility to drink alcohol in the wake of thirst, or to eat unlawful animals in the wake of starvation, then when that thirst and starvation cease to exist is the point at which the law returns to its *status quo*. This is because *mā jāz li 'udhr baṭala bi zawālih.* Based on this maxim, it is allowed to admit a witness on behalf of one who is not present, but that permission ceases the moment the right person returns.

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[588] Mahmassani,*Falsafa op. cit* p. 155.
[589] See al-Ghazali, *al-Mustasfa op. cit.* vol. 1, p. 139-140, Muhammad Muslehuddin, *Philosophy of Islamic Law and The Orientalists'* (2nd edn. Lahore Pakistan: Islamic Publications Ltd.1980) ,p. 163.
[590] al-Suyuti *op. cit.* p.85, Ibn Nujaym, *op. cit.* p. 86, *Majallah* Article 23.
[591] Fakhar al-Din Razi , *al-Tafsir al-Kabir*, (Beirut: Dar al-Kutub al-'Ilmiyyah n.d.) vol. 2, p. 13.

4.3.5 *al-ḥājah tunazzil manzila al-ḍarūrah, ʻāmah kānat aw khāṣṣah*

(Need, whether of public or private nature, is considered as necessity).[592]

The previous maxims are on necessity. The maxim here includes any other need, be it an individual or public one. Thus, the meaning of *al-ḥājah* is a need which is a lesser degree than necessity. Strictly, what Islam aims to provide for humanity can be classified into three:

One: What is termed *al-ḍarūrah,* (necessity). *al-ḍarūrah* is a situation where if a person were to refuse to commit an unlawful act, then his life, dignity, religion, offspring, and property would be endangered. For this, he is allowed to violate the rules to protect those things.[593]

Two: What is termed as *al-ḥājah* (needs). This is a situation whereby a person could be in difficulty or hardship if he does not commit what is unlawful, although his life may not be in danger. It is recommended that that difficulty should be prevented by committing what is unlawful. Ibn Qayyim (d. 751 AH), in an attempt to draw a demarcation between *ḍarūrah* and *ḥājah,* opined that *al-ḥājah* is what is prohibited as a preventive measure - *"sadd al-dhari"*- becomes permissible in the public interest, while what is prohibited with definite purpose can only be permissible by virtue of necessity. [594] However, according to the maxim in question, *ḥājah* is regarded as *ḍarūrah* in some circumstances.[595]

Three: What is termed as *al-kamāliyyah* or *al-taḥsīniyyah* (a luxury). This is exemplified by a situation in which a person seeks something excessive to maximize the enjoyment of his life. In criminal law, looking at a foreign

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[592] al-Suyūtī, *al-Ashba' op. cit.* p.88, Ibn Nujaym p.*al-Ashba' op. cit.* 91, *Majallah*, Article 32, al Burnu, *al-Wajiz, op. cit.* p. 242.
[593] Ali Haydar, *Durar al-Hukkam,* op. cit. vol. 1, p. 38, al-Zarqa, *al-Madkhal* vol. 2, p. 997, Wahbah al Zuhayli, *Nazariyyat al-Darura al-Shariyyah* pp. 67-68.
[594] Ibn Qayyim, *'Ilam op. cit.* vol. 3, p. 119.
[595] Cf. al-Shatibi, *al-Muwafaqat* vol. 2, p. 8, al-Ghazali, *al-Mustasfa* vol. 2, p. 481, Ali Ibn Muhammad al-Amidi , *al-'Iḥkām fī uṣūl al-'Aḥkām* ed. Sayyidi al-Jumayli, (Beirut: Dar al-Kitab al-Arabi 1404), vol. 3, p. 393-396, Muhammad Ibn Husayn Fakar al-Din al-Razi, *al-Maḥṣūl fī 'Ilm al-Uṣūl* ed. Taha Jabir al-'Alawani (Riyadh: Imam Muhammad Ibn Su'ud Islamic University, 1399) , vol. 2, p. 578.

> woman outside one's own family is prohibited in order to complement the preservation of offspring and to complement the enforcement of that law.[596]

The first and the second categories are the rights protected by Islam, and facilities are enacted for them. The last category, however, is not for discussion. Thus, if a law is broken in order to enhance a life of luxury, the perpetrator will be subjected to criminal charges.

In considering *al-ḥājah* 'needs' as a supportive element of necessity, if a situation becomes problematic, either publicly or privately, facility can be given to redeem the situation. The only marked difference between *al-ḥājah* and *al-ḍarūra* is that in the case of the latter, the commission of an unlawful act to prevent envisaged damage or injury is obligatory, whereas in the former, one can choose not to prevent it. It is pertinent to remark that in any case of necessity or need, it is not allowed for a person to choose what will harm and endanger his life, or affect any other preserved rights of his life. Al-Shatibi stresses that "it is not the right of a capable person to inflict on himself strenuous and harsh burdens by doing exhausting deeds. But he should aim to perform legitimate deeds in order to be rewarded."[597] Choosing a difficult deed that could be injurious to life in order to be close to God is not part of religion. Ibn Abdu al-Salaam observes that such strenuous deeds are not considered as a glorification of God and that engaging in one renders the act non-rewardable.[598]

4.3.6 *al-'Iḍṭirār lā yubṭil Ḥaqq al-Ghayr* (Necessity does not invalidate the Right of Others). [599]

Another measure designed to curb the abusive use of the provision of facility is the protection of people's rights. Despite the fact that it is allowed for someone to damage or use other people's property in the state of necessity - provided that the damage would not result in equal or greater harm for the owner - Islamic law does not divest the right of people. The Qur'an categorically denounces all ways of taking people's

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[596] al-Shatibi, *op. cit* vol. 2, p12..
[597] *Ibidi* vol. 2, p. 119, Ibn Abdul Salaam, *Qawā'id al-Aḥkām op. cit,* p.30.
[598] Ibn Abdu al-Salaam , *ibid.*
[599] Ibn Rajab, *al-Qawa'id op .cit.* p.26, *Majallah* Article 33 al-Zarqa, *al-Madkhal* para 602, al-Burnu, *al-Wajiz* p.244.

property illegally (Q. 2:188, Q, 4:2, 28,). Whether the reason for breaching the ruling is of natural (*samawī*) hardship, such as starvation, or in defence of one's rights, or because of a non-natural cause, such as complete compulsion, the rights of the affected fellow are always protected under Islamic law. The Prophet is reported to have said: "It is unlawful to take the property of a Muslim without his express consent."[600] Thus, if someone takes another person's belongings in order to save himself from dying, it is incumbent on him to restitute the value of what was taken. Restitution of the value could be paid by the perpetrator himself, as held by the majority of Islamic scholars or by the guardian of the perpetrator, or from the treasury of the government if the person cannot afford to pay. Ibn al-Qayyim (d. 751 AH) affirms that the restitution should be borne by the government because it is the responsibility of the Muslim *Ummah* to preserve the life of the populace. In other words, because it is the duty of the Islamic government to cater for its people when one of them is in such a situation as to warrant taking another person's belongings, it is the responsibility of the government to refund what has been taken. The only waiver given to the perpetrator is that he can plead not guilty of stealing. The right of the owner, therefore, cannot be in vain. This is because the property is his right and depriving him of his right would contradict the fundamental principle of Islamic justice. By divesting people's belongings without any restitution, even if the reason is to rescue someone else's life, would amount to eliminating harm with harm, which is antithetic to the spirit of Islam.[601]

4.4 Summary of the Chapter

In this Chapter, we have explained the stand of Islam in considering hardship which constitutes necessity as *raison d'etre* in creating facility for human beings. The chapter also not only enunciates those factors that necessitate giving facility, but also demonstrates how these factors can be utilized in criminal cases. In any case, the emphasis in this chapter is that in any dire situation, there is facility for redemption not only for the victim but also for the culprit.

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[600] Cf. Muslim, Sahih kitab al-Iman hadith no. 108, and Muhammad Abadi, *Awn al-Ma'abud bab fi al-Sulh* (D2nd edn. Beirut: Dar al-Kutub al-'Ilmiyyah 1995), vol 9, pp. 373-374.
[601] al-Burnu, *al-Wajiz op. cit.*p. 244.

The right of a victim can never go in vain because *al-iḍṭirār lā yubṭil ḥaqq al-ghayr* (necessity does not invalidate the right of other). However, if the right of other was violated because of *ḍarūrah,* generally the perpetrator would not be punished under the provision of *al-ḍarūrāt tubīḥ al-maḥẓūrāt* (necessities render unlawful things lawful). However, any excessive use of this provision will warrant incriminating the perpetrator because *al-ḍarūṛah tuqaddar bi qadarihā* (necessity is estimated according to its quantity). While there are three categories of provisions aimed to facilitate lives of human being viz; necessity, needs and luxury, the second one is graded to the level of necessity for both individual and public because at times they are inseparable.

Chapter Five

Analysis of maxim of Prohibition and Elimination of Harm:

Lā ḍarar wa lā ḍirār (No injury or harm shall be inflicted or reciprocated).[602]

5.0 Introduction

The fourth maxim, which is a tradition of the Prophet and which is considered to be one of the basic general maxims, is the maxim of the prohibition and elimination of *ḍarar*. It encompasses many subjects of Islamic law and is widely applicable to any matter relating to the occurrence, the averting and elimination of harm in Islamic obligatory duties. Of course, the rules of Islamic jurisprudence are laid down to attract benefits and to repel hardship.[603] This includes repelling hardship in order to protect the five necessities recognized by Islam - religion, life, offspring, property and reputation.[604] The maxim emphasises the purpose of *Sharī'ah* and the actualisation of these purposes by means of averting all evils, or minimising their occurrence.[605]

5.1 Definition and Interpretation of the Maxim *Lā ḍarar wa lā ḍirār*

Some Islamic scholars prefer to coin the maxim thus: *al- ḍarar* yuzãl (Harm should be removed) citing the above maxim as a legal evidence.[606] Others scholars make the tradition the grand maxim, and other maxims its subdivisions.[607] The reason for this, according to al-Burnu, is that the tradition encompasses all ways of inflicting *ḍarar,* whether by transgression or in reciprocation. And in fact, using the tradition as a maxim strengthens its status. [608] Al-Zarqa snr. distinguishes between the two maxims thus: "The maxim stated by the tradition of the Prophet stands as a prohibition of

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[602] *Majallah* Article 19, al-Atasi, *Sharh al-Majallah op. cit.* vol. 1, p. 52, al-Zarqa, *al-Madkhal op. cit.* P. 586, al-Suyuti, *al-Ashbah op. cit.*, p.83, Ibn Nujaym, *al-Ashbah op. cit.* p. 85.
[603] al-Nadwi, *op. cit.* p.287.
[604] al-Shatibi, *al-Muwafaqat op. cit..*
[605] Ibn Najjar, *Sharh al-Kawkab al-Munir op. cit.* vol. 4, p
[606] al-Suyūtī *al-Ashba, op. cit.* p. 83, Ibn Nujaym *op. cit.* p. 85.
[607] cf. *Majallah* Article 19, al-Zarqa, *Sharh al-Qawaid,* p. 165, al-Zarqa, *al-Madkhal* p. 586, al-Burnu, *al-Wajiz, op. cit.* p.251.
[608] al-Burnu, *ibid.* p. 251.

inflicting *ḍarar* and the other one indicates that if *ḍarar* occurs for one reason or another, it should be removed."[609] Thus, the two maxims are characteristically distinct.

Preventing harm is a fundamental principle generally agreed upon and widely applied in Islamic jurisprudence. The Qur'an prohibits giving property to an infant who cannot manage his affairs in order not to cause harm to him in the future as he might destroy the property before attaining puberty.[610]

Furthermore, on many occasions, God has warned against causing harm to another without justification. He, the Exalted One says: ".... After payment of legacies and debts, so that no loss (harm) is caused (to any one)."[611] He further states: "But do not take them back to injure (harm) them." [612] In addition, He states: "No mother shall be treated unfairly (cause harm) on account of her child, nor father on account of his child."[613]

It is reported that a man came to the Prophet complaining about another man who had planted a tree on his land, thus causing harm to the owner of the land. Because of this, the Prophet asked the man to pay compensation to the owner of the land or to give that plant to the owner of the land as a gift. The man refused both options and the Prophet asked the owner of the land to destroy the plant and said to the owner of the plant, "You are harming someone."[614]

This maxim has been interpreted in different ways. Some scholars interpret the two words as synonyms, asserting that the latter is nothing more than an emphasis on the former, while some scholars hold that the two words have a different meaning because establishing a new meaning is preferable than emphasising *"al-ta'sīs awlā mina al-ta'kīd"*. However, there is no unique interpretation given to each of the two

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[609] al-Zarqa, *op.cit.* p.166.
[610] Qur'an 4, verse 5.
[611] Qur'an 4, verse 12.
[612] Qur'an 4, verse 12.
[613] Qur'an 2, verse 233.
[614] Abu Dawuod, *Sunan with Sharh* vol. 15, pp. 321-322, Ibn Taymiyah, *Majmu' al-Fatawa*, *op. cit.* vol. 4, p. 479, vol. 28, p. 104, Ibrahim Muhammad Ibn Muflih, *al-Furu'* ed. Abu Zahra Hazim (Beirut : Dar al-Kutub al-'Ilmiyyah 1418), vol. 4, p. 219.

words. The most common interpretation states thus: the word *ḍarar* means inflicting harm on another person, while *ḍirār* means inflicting harm on another person, beyond what is legally approved. In order words, *ḍarar* is to harm someone who does not harm you, and *ḍirār* is to harm someone who could have harmed you.[615] Ibn Abdul Barr (d.463) in *Tamhīd* gives an interesting distinction between the two words: "*ḍarar* is harm inflicted on another and from which the perpetrator derives benefit, while *ḍirār* is harm inflicted on another from which no one benefits."[616]

Drawing from theses different interpretations two ways of inflicting *ḍarar* on someone can be inferred. (1) Inflicting *ḍarar* on someone without any legal reason or justification. (2) Inflicting *ḍarar* on someone with legal reason or justification. The former is further divided into: (a) *ḍarar* that has no benefit other than mere intentional transgression, such as killing people at random, which stems from a whim or caprice. This sort of practice is utterly abhorrent in Islam and anyone who perpetrates such an act will be prosecuted. (b) *ḍarar* from which the perpetrator derives benefit, such as one who sets fire to his garden and accidentally hurts a neighbour, despite having taken every precaution. Such an action is not considered as criminal act but compensation has to be paid to the victim. However, if there is negligence from the side of the actor, the actor will be prosecuted for the damage and *ta'zīr* could be awarded.

Even where harm is legally justified, opinions differ on the types of harm. There are measures in the form of punishments that are meant to deter malicious people from committing crimes. These punishments include the following: the death penalty for intentional homicide and banditry; stoning to death for adultery when committed by a married person; the amputation of hands for theft; the flogging for fornication committed by an unmarried person, or for alcohol consumption, or for the defamation of a chaste person. The implementation of these fixed punishments is also harmful as they could result in severe injury. However, despite there being a margin of injury in these punishments, they are not recognized as an injury that should be eliminated or prevented. Rather, they are preventive measures against harm as required by *Sharī'ah*

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[615] al-Hamawi, *Ghamz 'Uyūn op. cit.* p118, al-Burnu, *al-Wajiz* p.252.
[616] Ibn Abdu, al-Barr, *al-Tamhid*, ed. Mustafa Ahmad al-Alawi, (Morocco: Ministry of Endowment and Islamic Affairs, 1387) , vol. 20, p. 158.

law in order to protect citizens from further occurrences of *ḍarar* emanating from vicious and wicked people. Thus, to interpret the word *wa lā ḍirār* as "and not harm in reciprocation" could be misleading. This is because an offender who is punished for his crime could come under the prohibition of reciprocation. However, since the harm to be prevented by applying the punishment is greater than the benefit to be gained if an offender is left undeterred, no legal system would exempt an offender from punishment, though there could be discrepancies on the amount or severity of the punishment to be accorded. This is because the benefit sought in inflicting injury to an offender is to prevent and protect the public, as the convicted criminal is an individual who poses a threat to the public. To secure public security and protect people's lives is the paramount task of the government. That is why Islam recognizes this public interest and enacts appropriate punishment to that end.

In addition, the one who initiates harm and injury deserves punishment. Although, the traditional maxim states that *wa lā ḍirār* "and not reciprocate *ḍarar*" (for those who hold that interpretation), that does not contradict the rules laid down to protect the masses, for the following reasons: (1) Someone should not inflict injury by himself in revenge for harm received from another person. That is why Islam advocates recourse to the authority so that people do not take the law into their hands. (2) Someone who poses a threat to the public deserves no protection. The Prophet states: "*laysa li 'irq ẓālim ḥaqq*" (A transgressor has no right).[617] Lastly, (3) in some cases, Islam recommends settlement through the payment of blood money in lieu of revenge in cases of *qiṣāṣ,* as stated in the Qur'an 2, verse 178. It also encourages forgiveness in cases related to defamation, as contained in the Qur'an 24, verse 22, and recommends that people's mistakes in any situation that attracts *ḥudūd* should be concealed.[618] This does not contradict bringing wrongdoers to justice, as, particularly in cases related to God's right, there is room for forgiveness if the offence is concealed and even if the wrongdoer is subsequently punished, that punishment will serve as expiation.[619]

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[617] Muhammad Ibn Isa Al-Trimith, *Sunan al-Tirmidh or al-Jāmi' al-Ṣaghīr* ed. Hisham al-Bukhari (Beirut: Dar Ihya' al-Turath al-Arabi 1995) *hadith* no. 1394, Abu Dawud, *al-Sunan hadith* no. 3073.
[618] Al-Bukhar, *Sahih, hadith* no. 2310, Ibn Majah, *Sunan kitab al-Huduud, hadith* no. 2544, Abu Dawuod *Sunan, hadith* no. 4893.
[619] al-Zarqa, *al-Madkhal op. cit.*, p. 586, al-Burnu, *al-Wajiz,* p.255.

Be that as it may, on the basis of this maxim, according to various interpretations, there are three ways by which harm could be prevented. First, one should not allow oneself to be harmed, but in any situation that harm does occur, it should not be repelled as to cause harm to another. Second, if one is harmed by any means, revenge should not exceed the proportion of the original harm. Third, it is legally allowed to avert anticipated harm, but that is subject to the two conditions stated above. But even if harm is revenged, it is recommended that it should be minimised. In his comment on the hadith, Al-Shatibi says that, although the *hadith* is not sound enough, it embodies all kinds of harms that are prohibited in Islam. Other prohibitions include aggression against lives, properties, reputation and offspring.[620]

5.2 Some Maxims subsumed under the Maxim of Prohibition and Elimination of Harm.

5.2.1 *al-Ḍarar yuzā* (Injury should be removed).[621]

The basic general maxim discussed above prohibits unjustified harm against fellow human beings. The present maxim addresses the position of the law when the harm has occurred. It is intuitive that not every human being adheres to rules, thus, if *ḍarar* occurs by someone against another, whether the occurrence of that *ḍarar* harms the public at large or an individual, it is required by law that the *ḍarar* should be eliminated. For instance, if someone builds a house on a public path that could cause danger to passers-by, or affect neighbours, the government has the authority to demolish such a house.[622] All legislation enacted to facilitate the smooth running of people's lives is included in this maxim. If the *ḍarar* has occurred, it must be eliminated within the limits of the law. However, in the process of doing that, certain conditions have to be observed, these being the focus of the following maxims.

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[620] al-Shatibi, *al-Muwafaqat op. cit.*.
[621] al-Suyuti, *al-Ashba* p. 83, Ibn Nujaym, *al-Ashba* p. 85, *Majallah* Article 20. al-Hamawi, *Ghamz*, vol. 1, p. 37.
[622] al-Burnu, *al-Wajiz* P. 258.

5.2.2 *al-Ḍarar yudf'a bi qadr al-'imkān* (*Ḍarar* should be prevented as much as Possible).[623]

It is one of the fundamental principles of Islamic law that any means to prevent the occurrence of *ḍarar* should be sought. This is because it is better to prevent than to cure harm. It is legally preferable to eliminate *ḍarar* without causing any further *ḍarar*, but should that prove difficult to achieve then the harm must be proportionate. Preventing *ḍarar* as indicated in this maxim could be achieved in two ways: first, by preventing its occurrence in the first place, and second, by preventing further occurrences of it if it has already occurred. Islamic criminal law legislates that any of the stipulated offences referred to in the texts should not be committed as a means of preventing harm, while the style of the textual injunctions indicates the seriousness of the offences. In addition, it enacts all precautionary measures to dissuade people from committing that offence. For instance, looking at the face of a women outwith one's own family, or even being in seclusion with her, is prohibited. In the same way, the production of alcohol is prohibited. The former could lead to adultery and the latter to alcoholism. In order to prevent further occurrences, Islam prescribes certain punishments for each of the offences. Some of these punishments are severe and some are light, depending on the gravity of the crime. Thus, *ḥadd* (punishment) of stoning is enacted for married couples who commit adultery because of the serious consequences that can be brought on society. Discretionary punishments are prescribed for common errors, perhaps because of their insignificance.

Measures put in place to prevent the occurrence of *ḍarar* should be in accordance with the principle of public interest that conforms to the spirit of Islam.[624] The Qur'an directs Muslim leaders to fortify themselves with any means of power in order to prevent any harm that enemies can cause. This evidently shows that it is in the best interests of Islam that a person should prevent any occurrence of harm being inflicted on him. To that end, all measures to prevent the occurrence of crimes have to be sought both by the government and the citizens. In fact, this maxim is considered in the Islamic principle of jurisprudence as *sadd al-dharī'ah* (blocking means of evils)

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[623] *Majallah* Article 31, al-Zarqa, *al-Madkhal* p. 587, al-Burnu, *al-Wajiz*, p. 256.
[624] al-Burnu, *al- Wajiz, op. cit* p. 256.

Based on this maxim, it is allowed for someone to defend himself against any aggression that could endanger his life or inflict damage on his body or his property. In the process of pursuing this defence, any damage caused to the aggressor would not be considered, as long as it was proportionate. It is reported that the Prophet said: "Whoever unsheathe a sword against Muslims has made his blood unprotected."[625] It is certain that such action is harmful and dangerous, and it is for the attacked person to defend himself, even if that brings harm to the aggressor.

The same applies to a person who is subjected to rape, as if she prevents the rape by killing the rapist she will not be convicted of murder, based on the rule of preventing *ḍarar.* Although it might be said that killing is worse than rape, in fact there are two dangers in the action of the rapist. First, the unlawful action that involves adultery and *baghy* (spreading evil on the earth) and second, taking another by force, which includes the violation of that person's right. In that case, there is no protection for such a person in Islam.[626]

It is worth observing that the maxim under consideration differs from the sub-maxim *al-ḍarūrah tuqaddar bi qadariha.* The latter is peculiar to the measure of allowance given for eliminating natural difficulty, while the maxim here deals with the proportion of allowance given to someone to be used for eliminating the *ḍarar* placed on him by another person.

It is legally preferable that harm does not occur in the first place. But where it does, any measure to prevent it in accordance with Islamic Law is recommended and is, indeed, preferable to having to cope with its aftermath. For instance, the use of CCTV to check vehicles speeding is to prevent the occurrence of an accident that could claim the lives of people; thus, arresting a suspect to prevent information being divulged, or detaining an alleged criminal can all be justified under this maxim. It may be that these measures constitute justice, while posing restrictions on people's liberty on the one hand, but they (the criminals) also violate the fundamental principle of Islamic

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[625] Zadah, Abdu al-Rahman, *Muntaqa al-Abhur fi Sharḥ Multaqā al-Abḥur* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1998/1419), vol. 4. p. 320.
[626] al-Trimidh *Sunan, hadith* 1394, and 1396, Abu Dawd *Sunan hadith* 3073, Ibn Rushd, *Bidaya, op. cit.*, vol. 2, p.

law on the other. The Qur'an says on this: "O ye who believe! Avoid being overly suspicious..."[627] Yet, it has become apparent that leaving a suspect unchecked may trigger grave danger to society. Thus, if there is a high probability of danger to the public, it is in the interests of Islamic law to prevent such an occurrence, even if it inflicts some damage on a minor right. We can infer from the above verse that some suspicions are sins. This, pragmatically, presupposes that some may not be sinful. It is reported that Hatib Ibn Abi Balta'a, a companion of the Prophet, gave a letter to a woman to give to his relative in Makkah in which he divulged the plan of Muslims to conquer Makkah. The Prophet sent Ali Ibn Abi Talib, Zubayr and al-Miqdad to stop the woman and to retrieve the letter from her. When they met her on her way, they searched her thoroughly until the letter was retrieved.[628] From this story it can be inferred that someone can be suspected and investigated if there is high degree of suspicion, although in this case as the Prophet was given inspiration regarding Hatib's letter, perhaps this should not have been considered as suspicion. Abu Hurayra also narrated that after a father had accused a woman of committing adultery with his son, the prophet sent Unays to investigate the allegation.[629]

However, if suspicion and investigation are justified in the circumstance of eliminating *ḍarār*, it should be proportional to justify such a fundamental principle in Islamic law. But if the allegation turns out to be false, the right of the accused has to be protected. This could be achieved by compensating the accused if the mistake was committed by the government, as no single person could be held responsible for that. Furthermore, if the allegation is of a type that could lead to a *ḥadd* punishment, the accuser must then be punished by obliging him to compensate the accused, given that there is no specific punishment laid down in Islam.[630]

However, if the accusation leads to another crime, such as suspecting one wrongly of adultery, the accuser will be awarded the punishment of defamation. This can be

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[627] Qur'an 49, verse 12.
[628] al-Bukhari *Sahih, hadith* 6540.
[629] al-Bukhari, *Sahih hadith* no. 2549, 2575, 6466, Muslim, *Sahih. hadith* no. 1697, 1698, al-Trimith, *Sunan, hadith* nos. 1454, 1458.
[630] Baderin, M. *International Human Rights and Islamic Law*, (Oxford: Oxford University Press, 2005), pp.109-110, see al-Alwani, T.J., 'Judiciary and Rights of accused in Islamic Criminal law' in Mahmood T., et.al. (eds.) *Criminal law in Islam and the Muslim World* (Delhi: Institute of Objective Studies, 1996), pp. 256-263.

inferred from Abu Hurayra's narration cited above. According to al-Nawawi (d. 676), the investigation of the accusation was not to punish the accused (because such an accusation is not admissible in Islam), but, rather, it was conducted to establish the false accusation against a chaste woman in that malicious act.[631]

In any case, under no circumstances does Islam recommend that someone should be suspected or accused of any crime that is duly and solely a right of God. This is because God's right is open to forgiveness and pardon. This by no means suggests that Islam condones sins; rather, it secures privacy and protects mankind. At the same time, Islam condemns any act of evil and denounces any spread of malice on the earth. Thus, if one is suspected of harbouring women in a house for the purpose of prostitution, or there is the odour of alcohol on someone's breath, or the sound of screaming emerges from a house where there is presumed to be an incident of rape, or murder, then it is acceptable to suspect the occurrence of such actions in order to prevent a taboo.[632] The Prophet is reported to have said: "Whoever commits sin (of a right of God) should keep it secret to himself. If he discloses it we will impose the *ḥadd* punishment of God on him."[633]

In any case, the maxim of preventing harm in as many cases as possible is widely applicable to many matters in which there is an occurrence of harm, or danger, as well as to the elimination of it after the occurrence. Based on this, it is allowed for someone to defend himself and his family in the case where a bandit forcibly enters his house and attempts to kill any member of his household. In such a case, a person would be exempted from compensation, or would not be subjected to punishment. The Prophet said: "*man shahar alā al-muslimīn sayfan faqd aḥalla damuh*" (Whoever draws a sword on Muslims his blood has become legal).[634]

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[631] Yahya Ibn Sharaf al-Nawawi, *Sharh Sahih Muslim* (Beirut: Dar Ihya al-Turath al-Arabi, 1392) vol. 11, p. 207.
[632] al-Mawarid, *al-Ahkam al-Sultaniyyah op. cit.* p.314.
[633] Malik, *al-Muwatta op. cit.* vol. 4, p. 146, Ahmad Ibn al-Husayn al-Bayhaqi, *al-Sunan al-Kubra*, ed. Muhammad Abdul Qadir, Ata, (Makka: Maktabat Dar al-Baz, 1994) vol. 8, p. 326.
[634] See the above note 235.

5.2.3 *al-Ḍarar lā yuzāl bi Mithlihi* (Harm is not repelled by its Like).[635] or *al-Ḍarar lā yuzāl bi al-Ḍarar* Harm is not repelled with Harm).[636]

In the course of eliminating *ḍarar*, one important measure should be considered, namely, that the means of averting *ḍarar* should not cause another *ḍarar*. However, causing another *ḍarar* can exceed the present *ḍarar*, or, in fact, cause an equivalent *ḍarar*. The maxim in question particularly emphasizes the aversion of an equivalent *ḍarar*. It stands as a check and balance for the legality of eliminating *ḍarar*.

However, in the course of eliminating *ḍarar*, it is expected that – in one way or another- *ḍarar* is likely to emerge from it. The two are harmful, but one has a higher degree of harm than the other. If the two evils or harms are of the same degree, an actor is given the choice to select which is suitable for him, provided no other person's right is affected. But if one of the two is lesser than the other, the lesser one should be committed in order to avoid the greater one, as the next maxim will demonstrate.[637]

It would appear that the law of retaliation in Islamic penal law contradicts this maxim if the word *qiṣāṣ* is translated as meaning "retaliation with equivalence." It is stated in the Qur'an thus: "O you who believe retaliation is prescribed for you concerning murder; the freeman for freeman, the slave for slave; and the female for female...."[638] Some scholars assert that retaliation in intentional homicide should be executed in the same way as the crime was committed, while others oppose this view.[639] In either of the two views, there is equivalent harm in punishing the criminal, although Shaltut holds a contrary view to the Malikites and others who claim complete equivalence. For him, any means that could lessen the pain of killing should be adopted.[640]

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[635] al-Suyuti, *al-Ashba'* p. 86, Ibn Nujaym, p. 87, Ibrahim Ibn Muhammad Ibn Muflih, *al-Mubdi' Sharh al-Muqni* ' (Beirut: Dar al-Maktab al-Islami 1400), vol. 4, p. 301, al-Zarkashi, *al-Manthur*, *op. cit.* vol. 2, p. 321, Ibn Taymiyah, *Majmu' al-Fatawa* vol. 29, p. 189.
[636] *Majallah* Article 23, al-Zarqa, *al-Madkhal* p. 589.
[637] Haydar Ali, *Sharh al-Majallah,* vol. 1, p35, al-Ataasi, *Durar op. cit.,*vol. 1, p.63.
[638] Qur'an 2, verse 178.
[639] Regarding the manner of retaliation, the Malikites, Shafi'ites and Zahiri schools assert that the killing should be in the same manner that the victim was killed, as opposed to the Hanafites and Hanbalites schools. See Malik *al- Mudawwa* vol. 4 pp. 495-496, al-Shafi', *al-Umm* vol. 6 p 54, Ibn Hazm , *al-Muhalla* vol. 10 pp. 370-373 al-Jassas, *Ihkam al-Qur'an* vol. 1, pp. 160-161.
[640] Muhmud Shaltut, *Islam 'Aqida wa al-Shari'ah* p. 383, cited by Mohammed S.El-Awa *Punishment in Islamic law,op. cit.* p. 72.

However, the reality is that execution, though painful and harmful, is set to prevent the furthering of harm that could erupt from leaving a criminal unpunished proportionately, or if the relative of the victim has not been given satisfied justice. That is why God has said: " *walakum fi al-qiṣāṣ ḥāyatun*" - There is life for you in the law of *qiṣāṣ* ….[641]

Is it permissible for a group of people aboard a ship to throw a member of the group into the sea in order to save the lives of the rest out of fear that injury may occur because the ship is in danger of capsizing? The majority of Islamic scholars oppose such a measure for a variety of reasons. First, there is no certainty that the ship will capsize. Second, there is no guarantee that if one of the people on the ship were thrown overboard the danger would be averted. Third, there is no preference of one life over another. Thus, it is not permissible to eliminate *ḍarar,* presumed of its occurrence, as it is not acceptable to eliminate *ḍarar* with equivalent harm.

Similarly, if one is aboard a burning ship and cannot swim, he is left with two options – to stay on the ship, or to jump into the water. In this case the actor, if he dies, would not be deemed to have committed suicide - whichever option he chooses - because the two evils are equal and neither one has preference over the other. Moreover, if a pregnant woman is told that one of the two unborn babies in her womb should be terminated before she can deliver, or else both would die; it is not permissible for her to consent to the request because one life is not superior to the other. However, if she is told that if the pregnancy is not terminated, her life would be in danger, there are divergent opinions on whether she can abort the pregnancy. The bone of contention is whether the life of the mother is preferred to that of the unborn baby, or whether both lives are equal.

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[641] This is a truth that cannot be undermined. The cases of Hunter and Robert McCartney testify to this. Despite all the efforts to pacify the family of Robert, the relatives of the victim have demanded equal justice that could mean executing the perpetrator as well. In fact, many Western countries, including the US, see retaliation by execution as an equitable and just punishment. The jury in the case of Rahna Arshad stated thus:"The jury have convicted you on overwhelming evidence of the brutal and horrific murder of your wife and children," Mr Justice Clarke said. "The only sentence permitted by law is life imprisonment on each count. You killed your entire family in circumstances of great brutality. Life imprisonment in your case means life." (See www.guardian.co.uk/crime/article last visited 16/03/07 at 11:55.) This statement could indicate that if there was a severe enough alternative in punishment allowed by British law it would have been inflicted on the defendant.

The sensitivity of this issue lies in the fact that Islam denounces all ways of ending life, including unborn lives, once they have been adjudged to be human beings. [642] However, the life of the mother is known and active, while the life of an unborn baby is unknown, thus preventing the death of a known and existing life is preferred logically. Thus, one evil cannot repel another. In any case, the woman would not be held responsible for not consenting to the request if both babies die.[643]

5.2.4 *al-Ḍarar al-'Ashadd yuzāl bi al-Ḍarar al-'Akhaff* (Greater Injury should be prevented by committing Lesser Injury).[644] or

***Yukhtār 'Ahwan al-Sharrayn aw 'Akhaff al-Ḍararayn* (Lesser evil or injury should be preferred).[645] or**

***Idhā ta'āraḍat Mafsadatān rū'iya A'ẓamahumā Ḍararan bi irtikāb Akhaffuhuma* (If Two Evils clash, the Greater One should be prevented by committing the Lesser One).[646]**

As discussed above, harm should not be removed with the same harm. The only legal way to eliminate harm in the face of necessity is to consider which of the two evils- *ḍarar*- is lesser. When the lesser is identified, it becomes legally binding on the actor to choose the lesser evil in order to repel the greater one. The maxims quoted above are identical and point to the same rule. That is, if there is a situation that constitutes two harms or hardship, and one is greater than other, the legal solution is to commit the lesser one in order to prevent the greater one. One reason for this is that what is prohibited becomes permissible in a dangerous situation, provided it is used proportionately, and does not exceed the margin of allowance.[647]

The Qur'an unequivocally states thus:

> They ask you concerning fighting in the sacred month. Say, fighting therein is a great (transgression) but greater (transgression) with God is to prevent mankind from following the

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[642] Omran, A. R. *Family Planning in the Legacy of Islam* ,(London, Routledge, 1992) , pp.8-9

[643] al-Zarqa, *Sharh*, p. 196. Giving mothers choice of selecting "unwanted pregnancy" is emphasized in the CEDAW Committee (Convention on the Elimination of All Forms of Discremination Against Women. See Joseph S, Schultz, J. And Castan, M. *The International Convenant on Civil and Political Rights, Materials, and Commentary, 2000* p. 137 This is contrary to the Islamic view that prohibits abortion in certain period of gestation. See Omran above and Baderin 2003 p. 74

[644] Ibn Nujaym, *op. cit.* p. 88, *Majallah* Article 28.

[645] *Majallah* Article 29.

[646] al-Suyuti, *al-Ashba' op. cit.* 87, Ibn Nujaym, *op. cit.* 89, *Majallah*, Article 28, Ibn Rajab, *al-Qawa'id* p. 112.

[647] Ibn Nujaym, *op. cit.* p. 89, al-Atasĩ , *op. cit.* vol. 1, p. 68, Haydar Ali, *op. cit,*.vol. 1, p36.

> way of God to disbelieve in Him to prevent access to the sacred mosque and to drive out its inhabitants and oppression is worse than killing (Q. 2:217)

The verse came as a refutation of the claim of Makkan pagans that Muslims had violated the sacred month by fighting in that period. But the Qur'an draws comparison between the two offensive acts - fighting in the sacred months, and persecution and oppression. Thus it concludes that violating the sacred month is a lesser offence than oppression.[648]

From the above, it can be deduced that if someone is forcibly ordered to drink alcohol or to commit adultery, then according to this maxim it is preferable to drink alcohol. This is because, for a number of reasons, the crime of drinking alcohol is lesser than that of committing adultery. Among these is that the punishment for drinking is less severe than the punishment for adultery. Also, there is no right of man affected by drinking alcohol, whereas committing adultery involves the violation of the right a person committed adultery with. This example applies to any of the criminal acts prohibited in Islam. However, it can be further argued that, if someone takes a drink, he may lose control of his senses and thus commit a second greater crime. That is a possibility, but the fact remains that the commission of the greater crime is uncertain, whereas the present situation demands choosing one out of the two.

It is also allowed to throw heavy luggage from a ship into the sea to save the lives of those on board, should the ship be about to sink. However, compensation has to be made to the owners of the destroyed property, because necessity does not invalidate people's rights.[649]

Contrarily, if a group of people are on a journey and face difficulty through starvation, and their only solution is to kill a member of the group, this would be illegal. It is a criminal offence if they do so because such a situation does not warrant that such a crime should be committed, there being no disparity between the lives of any of the

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[648] Mansour al-Mutairi, *Necessity in Islamic Law*, (Edinburgh, Edinburgh University PhD. Thesis 1997) p. 66.
[649] *Ibid.* p.56, al-Burnu, *al-Wajiz op. cit.* p. 261.

group members, as stated in Regina *v.* Dudley and Stephens[650] and U.S. v. Holmes, 1 Wallace Junior 1.[651]

The question might be asked as to what to do if someone is asked to either jump from a height, or to be killed. Is there any difference between the two harms? The opinions of scholars differ. Abu Hanifa suggests that he has a choice – to jump as instructed, or to disobey, even if he is killed. To him (Abu Hanifah) the harms are equal and one cannot be committed to repel another. However, Abu Yusuf, one of Abu Hanifah's companions, asserts that it is better to refuse to jump and be killed than to throw oneself to one's death because opting for the second option would constitute suicide, which is a greater sin than to be killed.[652] The latter opinion is deemed to be in line with the objectives of Islamic law. If someone is killed, there is a legal liability placed on the killer, unlike in a situation where it is difficult to decide whether an act is one of suicide or indirect homicide. Therefore, the legal liability of the act is between the issuer of the threat and the one threatened.[653]

However, if someone faces hardship and has to commit a prohibited act to secure one of the five fundamentals preserved in Islam, it is important that he gives preference to one over another. For example, it is also allowed under this maxim to pay a ransom to free a Muslim captive. Leaving the captive with the enemy is considered to be a grave evil as the right of the captive Muslim may not be protected. Lastly, it is permissible to operate on a woman so as to deliver her baby, given that she has experienced difficulty in delivering the baby by herself. This is because the envisaged damage, if the baby is left in her womb, is greater than that envisaged in the operation. Although the life of the woman is at risk, and that of the baby, there is a probability that the operation would be successful, but there is no guarantee that she would be able to deliver the baby safely.[654]

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[650] L.R. 14, Q.B.D. 273, quoted in Mahmassani, *op. cit.* p. 158.
[651] Mahmassani *ibid.*
[652] Ibn Nujaym, *op. cit.* p. 90.
[653] *Ibid.* al-Burnu, *op. cit.* p. 262.
[654] al-Burnu, *al-Wajiz op. cit.* p. 261.

5.2.5 *Yutaḥammal al-Ḍarar al-Khāṣ li daf' Ḍarar 'Ām* (Personal Injury should be incurred to prevent General Injury).[655]

The harm to be repelled could be lesser or greater or it could be general or peculiar. The previous maxim, in section 52.4, addresses the rules of lesser and greater forms of harm. However, the present maxim aims to explain the rules of general and peculiar forms of harm The generality and peculiarity of *ḍarar* depends on the number of people to be affected if the harm is repelled or the crime is committed. The purpose of *Sharī'ah* is to protect the fundamental principles – these being the necessities of life. Thus, when a conflict arises as to which of these necessities should be protected first, a choice has to be made on the basis of quantity. As the maxim indicates, it is allowed to kill a Muslim who is used as a shield by unbelievers.[656]

Furthermore, the maxim can be applied to the legality of prohibiting all criminal acts of *ḥudūd* and *qiṣāṣ,* as the consequence of committing any one of these crimes could endanger the public. For instance, *zina* is prohibited and a severe punishment is prescribed for it in order to prevent the spread of disease that could kill millions of people. Thus, punishing an individual who commits such a crime, if proven, is preferable to endangering the public health.

The same applies to the legislation of retaliation, this being decreed to prevent the spread of killing and enmity among mankind. This also encompasses any restriction deemed by the government to protect the public interest, even if individual interests will be infringed. Thus, the government can outlaw the consumption of some products or some acts if they are proved to be harmful to the public. In this regard, cigarettes and the like can be banned to protect public health. Although there is no precise or affirmative prohibition against smoking, it is in the best interests of Islam to protect the public against danger and harm. Thus, if someone violates a smoking ban he should be punished under *ta'zīr.*

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[655] Ibn Nujaym, *al-Ashba' op. cit.* p. 87, *Majallah* Article 26, Haydar Ali. *op. cit.* vol. 1, p. 36.
[656] Ibn Nujaym, *ibid.* p. 87.

5.2.6 *Dar'u al-Mafāsid awlā min jalb al-Maṣāliḥ* (Preventing evils is better than attracting Benefits).[657]

The discussion on the previous maxim focused on situations of conflicting evils. However, the maxim here deals with the question of preference in situations where both *maṣlaḥ* (benefit) and *mafsadah* (harm) exist. According to the maxim in question, preference is given to warding off evil over the acquisition of benefit. The Qur'an states the reason for the prohibition of alcohol thus:

> If they ask you (O Muhammad SAW) concerning alcoholic drink and gambling, say: "In them is a great sin, and (some) benefits for men, but the sin of them is greater than their benefit"....
> (Q.: 2:219)

This verse stands as evidence that if there are evils (which is inferred from the word *ithm*) and benefits (*manāfi'*), the evil should be obviated by not acquiring the benefit, except where the benefit is greater than the evil. This is because the verse explains that the *ithm* is greater than the *manāfi'*.[658] Ibn Taymiyyah (d.728 AH) sheds light on this maxim by saying that if an injury or benefit contradicts each other, then the better of the two should be sought. If commands or prohibitions meant to benefit mankind or to prevent injuries are in conflict, the one that secures more benefit or has lesser injury must be upheld. The criterion for choosing the most beneficial or the least harmful should be sought from *Sharī'ah.* Therefore, the Islamic texts should be considered when deciding on these issues.[659]

Islam attaches more importance to what is prohibited, *al-manhiyāt,* than what is required to be done, *al-ma'mūrāt.* In the words of the Prophet: "If I ask you to do something, do of it as much as you can, but if I forbid you something, you should refrain from it." [660]

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[657] al-Suyuti, *al-Ashba' op. cit.* p. 78, Ibn Nujaym, *al-Ashba' op. cit.* p. 90, *Majallah,* Article 30, al-Zarkashi, *al-Manthur, op. cit.* vol. 1, p. 348, cf. *Majallah* Article 46, al-Qarafi, *Anwar al-Buruq fi anwa' al-Furuq* ed. Khalil Mansur, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1998/1418), vol. 4, p. 369, al-Shatibi, *al-Muwafaqat op. cit.* vol. 3, p. 190.
[658] al-Burnu, *al-Wajiz* , p. 275.
[659] Mansour , *Necessity op. cit.* p 65.
[660] al-Bukhari, *Sahih, hadith* no 6858, Muslim *Sahih, hadith* no. 1337.

5.2.7 *Idhā ta'āraḍ al-Māni' wa al-Muqtaḍiā yuqaddim al-Māni' illā idhā kāna al-Muqtaḍā A'aẓam* (If a Prohibitive Injunction contradicts with what seems to be Permissible, the Prohibitive is given Preference over the Permissible).[661] or

Idhā ijtama' al-Ḥalāl wa al-Ḥarām aw al-Mubīḥ wa al-Muḥarrim ghullib al-Ḥarām (If Lawful and Unlawful Things conjure, Preference will be given to the Unlawful).[662]

Similar maxims to the one discussed above are the maxims of the preference between obligation and recommendation. The aim of the maxims here is to look at the imperative statement of the texts in contrast with the negative instruction. There could be a situation where a man faces some difficulty in obeying a textual order. In that case what should be the yardstick for acting upon the contradicting orders? To make it clearer, one text may forbid drinking alcohol and another may allow it in the face of necessity. The preference will be given to the one that prohibits it, except, as mentioned above, in a dire need. In fact, the maxim reflects what is known as precaution in Islam. One is not allowed to excessively exploit any provision given in exceptional circumstances.

Regarding this, it is prohibited for merchants to trade in any prohibited substance such as alcohol, harmful drugs, and so on, even though there is benefit in them for traders, and Islam does recommend trading.[663] However, because there is a text prohibiting their consumption, it is not allowed to take that advantage over the prohibitive text. The same applies to a situation where someone cannot identify who it is lawful for him to marry among a set of women. Here, it is in the best interests of the actor not to attempt to marry any of them, even though it is his right to marry.[664] However, because there is a text prohibiting marriage with certain women,[665] it is said to be preferable not to marry any of the unidentified women.[666] Presumably, if a person

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[661] al-Zarkashi, *al-Manthur, op. cit.* vol. 1 p. 348, *Majallah* article 46, al-Zarqa, *al-Madkhal*, par. 595.
[662] al-Zarkashi, *ibid.* vol 1, p. 125, al-Suyuti, *al-Ashba'op. cit.* 105, Ibn Nujaym, *op. cit.* 109.
[663] Qur'an 2, verse 275.
[664] Qur'an 4, verse 3.
[665] Qur'an 4, verses 22-24.
[666] al-Burnu, *al-Wajiz* p. 267.

prefers the recommended rather than the prohibited, he could be warned by means of a *ta'zīr* for violating a prohibited thing.

However, these maxims cannot be applied to all situations. There are cases where more benefits are derived if prohibition is given preference over recommendation. For example, if someone's properties are mixed between what is lawful and unlawful, it is suggested that if the quantity of what is lawful is more than what is unlawful, the owner can make use of them. This is because if he were to give up all the properties, then he could be put into a difficult situation, and Islam has recommended that in a difficult situation one is given facility. Having said that, it is also recommended that one should take all precautions to extract what is unlawful from the properties.[667] In addition to the exception made from the maxim, a person is allowed to tell a lie to settle a dispute between two litigants based on the hadith of the Prophet. This states that one cannot be branded *kadhdhāb* for telling one party a story different from what he tells another, if his aim is to settle a dispute. [668] Based on this, if one were to be faced with a transgression from a usurper who demands to take properties entrusted to him, it is the right of the trustee to tell a lie in order to protect the properties.[669]

5.3 Summary of the Chapter

This chapter has elucidated the stand of Islam in prohibition and elimination of *ḍarar* whether in terms of aggression or in reciprocal. It is a settled rule in Islam that harm must be removed. In removing it, there are two major conditions that must be observed. (1) *ḍarar* must not be removed by its like (2) greater *ḍarar* must be prevented by committing lesser *ḍarar*

However, if there are two things and the *ḍarar* in both is of the same level, the other way to decide which one should be given preference is to look at the structure of them. If one is a prohibitive injuction and other is a permissible, preference will be given to prohibitive one over the persmisible as the maxim states thus : *idhā ta 'āraḍ al-māni' wa al-muqtaḍī yuqaddam al-māni'* This is because, in Islamic law, it is an

[667] *Ibid.*
[668] al-Bukhar, *Shahi al-Bukhari kitab al-Sulh, hadith* no 2546, Muslim, *Sahih Muslim, kitab al-birr, hadith* no. 2605.
[669] Haydar Ali, *Durar al-Hukkam.*

established principle that "preventing evils is better than acquiring benefit" (*dar' al-mafāsid awlā min jalb al-maṣāliḥ)*

In spite of this principle, there are undermining attitude towards this provision by some *Sharī'ah* judges in those states implementing Islamic law in Northern Nigeria. This cases in which elimination of *ḍarar* is absent and which subscqucntly lcads to inflicting unjust *ḍarar* and imposing undue punishment on accused persons will be exposed in the concluding chapter of this thesis.

Chapter Six

Analysis of the Maxim: *al-'ādah muhakkamah*

(Custom is authoritative).[670]

6.0 Introduction

Customary usage is recognized in Islamic law as an authority on which judgment can be based. Despite the number of books written on Islamic jurisprudence, it seems there is no book devoted to the effect of *'ādah* and *'urf* in criminal law. The recourse to custom dates back to the epoch of the Prophet and was later exploited by the Companions and others. There are many cases reported in which rulings in Islamic law are based on the customs of the people. Malik Ibn Anas considered the *'urf* of the people of Madinah (*'amal ahal al-Madinah*) as the source of Islamic law whenever there was a dispute in law making. Though, Malik view on *'aml ahal al-madinah* suggests that *'amal ahal al-Madinah* is not only *'urf* of people of the Madinah but a practical exercise of what the Prophet left behind which no one should go against it.[671] But the fact of the matter is that while Madinan's scholars enjoyed originality by receiving knowledge directly from the Prophet and his companions, there is continuum of issues that were based on the *ijtihād* (personal reasons) of people of Madinah.[672]

In addition, al-Shafi'ĩ had no option than to change his opinion in Egypt, contrary to his view in Iraq, because of the disparity in the customs and circumstances met in

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[670] al-Suyuti, al-*Ashba'* p. 89, Ibn Nujaym, al-*Ashba* p. 92, *Majallah*, Article 36, Haydar Ali, *Durar al-Hukkam op. cit.* vol. 1, p. 40, al-Zarkashi, *al-Manthūr,* vol. 2, p. 356, al-Zarqa, Ahmad, *Sharh, op. cit.* p. 219, al-Zarqa, Mustafa, *al-Madkhal op. cit.*, p. 604, al-Hamawi, *Ghamz, op. cit.* vol. 1, p. 37.

[671] See Yasin Dutton, *The Origins of Islamic Law, The Qur'an, the Muwaṭṭa' and Madinah 'amal,* (Richmond, UK: Curzon, 1999), pp. 39-41.

[672] *'Amal ahal al-madinah* has different connotations. Malik used two terms to indicate what constitue *'amal ahal al-Madinah; sunnah* and *amr.* When *Sunna* is used it could be refered to "that derives from a normative practice of the Prophet" "or sometimes a pre-Islamic Madinah custom endorsed by the Prophet (without any element of later *ijtihād*)." Whereas *'amr* is used sometimes to refer to what originates in the "practice of the Prophet, nevertheless contains at least some element of later *ijtihād.*"*Ibid,* pp.39-41

Egypt.[673]. Undoubtedly, *'ādah/'urf* is considered as an authority in all legal systems.[674]

6.1 Definition and Interpretation of the Maxim *al-'Ādah Muhakkamah*

'Ādah (Practice) or *'urf* (custom), are used synonymously and interchangeably in Islamic jurisprudence. *'Ādah* is derived from the Arabic letters *ayn*, *waw*, and *dal* which means "return". It also denotes the custom, manner, and habit that people constantly return to, time after time.[675] It is defined as "practices that have been penetrated deep among people by recurrence and are acceptable to people of sound nature,"[676] or as "a repeated matter which has no connection with reason".[677]

'Urf on the other hand is said to be synonymous of *'ādah* as they resemble each other in definition and concept. *'Urf* is a noun form derived from the verb *'arafa*, which means to know.[678] It is technically defined as "what is established in life from reason and acceptable by sound natural disposition."[679] al-Zarqa jnr. in his effort to distinguish between *'ādah* and *'urf*, describes *'urf* as "the behaviour of a group of people in their saying and doings."[680] From this, *'urf* can be viewed as lesser in scope than *'ādah* because it is a custom of a group, although, for *'ādah*, it could be a custom of individuals, such as the custom of menstruation in women, or in groups of people, such as the terms used in a large set of people. So it can be said that all *'urf* is *'ādah*, but not all *'ādah* is *'urf*.[681]

As expressed above, the use of *'ādah* and *'urf* is controversial. However, one can categorically say that they are often used interchangeably. Ibn 'Abidin, (d.1252 AH), remarks that habit is derived from frequency and recurrence because it happens

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[673] Abu Zaharah, Muhammad, *Usūl al-Fiqh* [Cairo: Dar al-Fikr al-Arabi, n.d.] p.128, 90, Kamali, Hashim , *Principle of Islamic jurisprudence op. cit.*p. 361.
[674] Mustafa al-Zarqa, *al-Madkhal* 1/132.
[675] al-Husayn Ibn Muhammad al-Raghib al-Isfahānī, ial-*Mufradāt fī Gharīb al-Qurān* ed. Muhammad S. al-Kaylani, (Lebanon: Dar al-Ma'rifah n.d.) p.302.
[676] al-Zarqa, M., *al-madkhal* 2/838.
[677] Abu Sannah, al-*'Urf wa al-'Adah fi ra'y al-fuqha* 1992, p. 8, al-Jurjani, al-*ta'rifat op. cit.* 1988, p. 149.
[678] Ibn al-Manzhur, *Lisan al-Arab op.cit.* vol. 9 p239, al-Fayruzabadi, Muhammad Ibn Ya 'qub, al-*Qamus al-Muhiit* [Beirut, Muhassasah al-Risalah, 1996) vol. 3, p. 179.
[679] al-Jurjānī, *Tarifā op. cit.* p.154.
[680] al-Zarqa, M., *al-Madkhal* vol. 1p. 131.
[681] Mohmad Akram Laldin, *The Theory and application of 'Urf in Islamic Law,* (Edinburgh, University of Edinburgh, PhD Thesis, 1995), p. 22.

frequently and in succession. This then becomes well known and becomes a well-established practice in souls and minds. It is received without any connection and factual evidence as a customary fact. '*Ādah* and *'urf* imply the same meaning despite their conceptual dissimilarity. It is also important to state that for *'urf* to be accepted and applied in Islam, it should be of sound nature as not all custom, especially in the modern age, can be accommodated in Islam.

Giving custom a legal ruling in Islam is inevitable due to the nature of its law. Islamic laws that deal with universal mankind and the norms of ethnicity vary considerably, however. This is an inevitable consequence of custom being intuitively rooted in people's lives, and in their daily activities and utterances. Thus, judges need to have recourse to the customs of people before giving any conclusive verdict in any case of litigation.

6.2 *Ḥujiyyah* (Legality) of the Use of (*al-'Ādah)* Custom in Islamic Law

Many Islamic jurists recognize *'ãdah* and *'urf* as supportive sources of Islamic law. The justification for the legality of *'ãdah* is traced in the texts, although there is nothing in these texts that stands as direct justified evidence for the purpose. However, there are derivative statements that form inferences for the recognition of custom. There are various sections in the Qur'an and the *Hadith* of the Prophet in which the use of custom could be inferred. In the Qur'an 7, verse 199, for example, God enjoins four things as *'urf* (literally translated as good). According to Ibn 'Arabĩ (d.543/1148), the meanings of *'urf* in this verse indicate what it is meant in this context.[682] There are four interpretations given to the meaning of *'urf* in the verse. 1-it is synonymous of *ma'rūf,* kindness; 2-it means there is no god except God; 3-anything known to be part of religion 4-anything that is good, not rejected by people and endorsed by *Sharī'ah.*[683] Al-Qurtubĩ further explains the relevance of the word in question saying, "*'urf, ma'rūf* and *marfah* is anything that is good and is approved of

[682] Muhammad Ibn Abdullah Ibn al-Arabi, *Ahkām al-Quran* ed. Muhammad Ata', (Lebanon:: Dar al-Fikr, n.d.), vol. 2, p. 823
[683] cf. Ibn Qutaybah d. 276 A.H *Tawil Mushkil al-Quran* p.4 .

by reason and acceptable by mankind[684] Al-Zarqa Jnr. maintains that the word *'urf* in this verse forms the proof for the legality of *'urf* in this context, because the customary practice of people is normally a good practice and reasonable accepted.[685] In Qur'an 4, verse 19 the word *ma'ruf*, as an objective noun of *'urf,* is used to indicate the authority of custom and culture in the Islamic legal framework. Ibn Kathir, (d. 774) in his commentary on this verse also canvasses that *ma'rūf* here is a custom of any good character that is reasonable and satisfactory to the soul.[686] Regarding this verse, al-Nadwi also observes that God enjoins both couples to live together and give each other their due rights based on their custom and culture. Such interpretations, therefore, certainly change according to different nations and different people.[687]

In another verse, custom is referred to with regard to the father of a child whose mother was being divorced. (2:233 Qur'an) This indicates that where there are no established limits, the custom and practice of people should be the yardstick.[688] Another typical example of *'urf* legality is the verse in the Qur'an which reads thus:

> O you who believe, Let your slaves and slave-girl, and those among you who have not come to the age of puberty, ask your permission (before they come to your presence) on three occasions: before *fajr* (morning) prayer, and while you put off your clothes for noonday, and after the *'isha* (night) prayer. These three times are of privacy for you..." (Qur'an 24:58)

What can be inferred from this verse is that those three specific times were times when people of that era used to take off their clothes, and that custom was to be adhered to at that time. Intuitively, the ruling is based on the people's customs and culture.[689]

In many traditions of the Prophet, there are instances of giving customs authority and arbitration. The adjudication of custom can be found in the case of Barra' Ibn 'Azib's who came to the Prophet and asked about a camel entering the garden of a man and

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[684] Muhammad Ibn Ahmad al-Ansari al-Qurtubī, *al-Jāmi' li Aḥakām al-Qur'ān* (Cairo: Dar al-Sh'abi, n. d.) vol. 7, p. 344, The same opinion is expressed by al-Qarafī (d. 684/1285). (See *al-Furūq* 3/149, and Abu Sannah al-*'urf* wa al-*'ãdah fi Ra'y al-Fuqāh* p.29)
[685] al-Zarqa, M., *al-Madkhal* vol. 1 p.137, Kamali, *Principle of Islamic jurisprudence* p. 37.
[686] Ismail Abu al-Fida Ibn Kakhir, *Tafsir al-Quran al-Azim*, (Beirut: Dar al-Fikr 1401), vol. 1, p. 466
[687] al-Nadwi, *op. cit.* 294.
[688] Ibn Abdu al-Salaam, *Qawa'id al-Ahkam fi masalih al-Anam op. cit.*, vol.1, p. 61.
[689] al-Nadwi *op. cit.* p. 297, Muhammad Ib Ahmad al-Qurtubi, *al-Jāmi' li Aḥkām al-Qur'ān,* (Cairo: Dar al-Kutub al-Misriyyah, 1936), vol. 12, p. 304.

destroying it. The Prophet said: "The safety of the property is to be borne by the owner of the property in the day and the safety of the animal is to be borne by the owner of the animal in the night." In another version he said: ".... And the owner of the animal must be responsible for what their animals destroy in the night."[690]

From these two narrations, the jurists adjudicate that if animals destroy property in the day there is no liability on their owner, but if property is destroyed during the night, the owner will bear the liability. This is because the existing custom of that time was that the owners of animals used to leave their animals to look for food during the day. However, acting contrary to that norm will lead to an imposition of compensation on the perpetrator.[691] Remarking on the effect of this hadith, Ibn-Najjar says: "This is the cogent and best ever proof of considering '*ãdah* in Islamic rules."[692]

Undoubtedly, Islam gives room for custom, whenever there is no explicit text, or even where there is a text, but there is no precise limit to the application of that text, or if there is divergent interpretation of it in the language. This is evident in the advice given to a woman by the Prophet when she asked him about the inconsistency of her menstruation. The Prophet referred her to the custom of her contemporary female companions and with what she was used to before the inconsistency.[693] Another *hadith* directive that has attracted controversy regarding its authenticity is the *hadith* in which it is reported that the Prophet said: "What the Muslims deem to be good is good in the sight of God."[694] Scholars have disputed the authenticity of the *hadith*. For example, some say that it is *mawqūf,* (the *hadith* that the chain stops at the companion and is not attributed to the Prophet). However, al-Amidĩ and al-Suyuti claim the

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[690] al-Nasai', *Sunan, hadith*, no. 5785, Abu Dawd, *Sunan, hadith* no. 3570, al-Bayhaqi, *Sunan, hadith* no.17461, 'Ali Ibn 'Umar al-Daraqutini, *al-Sunan, hadith* no. 217, ed. Sayyid Abdullah Hashim al-Madani, (Beirut: Dar al-Ma'rifah 1966/1386), vol. 3, p. 155, Ahmad Ibn Anbal, *Al-Musnad, hadith* no. 18629, (Cairo: Muassasah Qurtub, n. d.),vol. 4, p. 295.

[691] Ibn Abdu al-Barr, *al-Tamhid, op. cit* vol. 11, p. 89, Muhammad Shams al-Din Abadi, *Awnu al-Ma'bud Sharh Sunan Abi Dawud,* (2nd edn. Beirut: Dar al-Kutub al-'Ilmiyyah , 1995), vol. 9, p. 350, Muhammad Ibn Ismail al-San'ani, *Subl al-Salām Sharḥ Bulūgh al-Marām,* ed. Muhammad al-Khawli, (4th Beirut: Dar 'Ihya al-Turath al-Arabi, 1379), vol. 3, p. 264.

[692] Ibn Najjar, *al-Kawkab al-Munir op. cit.,* vol. 4, p. 40.

[693] al-Shawkani, Muhammad, *Nayl al-Awtar*, (Beirut: Dar al-Jil, 1973) vol. 1 p. 341, al-San'an, *Subul al-Salam op.cCit. hadith* no. 118.

[694] Ahmad, al-*Musnad op.cit.* vol. 1, p.379, Mahmud Ibn Ahmad al-Ayni, *'Umdah al-Qārĩ Sharḥ Ṣaḥĩḥ al-Bukhārĩ*, (Beirut: Muhammad Amin Damj, n.d.) vol. 23, p. 266.

hadith to be *muttasi,* (attributed to the Prophet).[695] Whether it is *mawqūf* or *muttasil,* the implication of the *hadith* confirms the authority of *'ãdah* and *'urf* in Islamic law. The Companions of the Prophet were trusted and deemed to be rightly guided ones, so for them to invoke what contradicts the text undermines their status. It is also narrated by Aisha that Hind, the daughter of 'Utbah, wife of Abū Sufyān, came to report her husband for being a miser. The Prophet advised her to take what was enough to maintain herself and her son according to *'urf.*[696]

Furthermore, the legality of *'urf* and *'ādah* is also established by the consensus of both classical and contemporary Islamic scholars. They all agree in principle that *'ãdah* and *'urf* are important sources in solving problems that arise in Islamic law.[697] The formulation of maxims related to *'ãdah* by those scholars signifies the form of *Ijmā'* on the authority and legality of *'ãdah* and *'urf.* [698]

Thus, however, there are many ways in which customs can be admitted as authority in Islamic law. Among others these are:

- Giving judgments on issues where explicit evidence cannot be found in the primary source of the *Sharī'ah,* as what is established by the virtue of custom is akin to that established by text.[699]
- Specifying the meaning of text or exerting a restriction on the absolute *nass* (text).[700]
- Establishing legal rules and conditions regarding people's daily interactions, and utilising presumptive indications in settling disputes among people on certain matters that are pre-dominated by *'urf.*[701]

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[695] al-Amidī, *al-Ihkam, op.cit,* vol. 4, p. 166, Ibn Hazm, *al-Ihkam,* vol. 6, p. 194, al- Suyutī, *al-Ashbāh* p. 89.
[696] al_Bukhari, *Kitab al-Nafaqat* and Muslim, *kitab al-Aqdiyah* hadith no 5049, Ibn Majah, *hadith* no. 2293. See the remark of Ibn Hajar al-Asqalānī. d.975/1567 on this *hadith* in *Fath al-Bari sharh sahih al-bukhar*i vol. 9 pp. 509-510.
[697] Badran *Usul* p 226, Kamali, Hashim, *Principle of Islamic Jurisprudence op. cit.* p. 372, Abdul al-Kareem Al-Zaydan, *al-Wajīz fi Sharh al-Qawã'id al-Fiqhiyyah fi al Sharī'ah al-Islãmiyyah,* (Beirut, Mu'assasah al-Risalah 1997) p. 254.
[698] Cf. al-Ramali of Shafi' *Nihayah al-Muhtaj* Dar al-Fikr Beirut 1984/1404 vol. 8, p. 42, Ibn Abidin, of Hanafis, *Hashiyah,* Dar al-Fikr Beirut 2000/1421, vol. 6, p. 423, Haydar Ali, *Durar al-Hukkam op. cit* vol. 1, p. 40, al-Dasuqi al-Maliki, Muhammad Arafa, *Hasiyah,* ed. Muhammad Ulaysh, (Beirut: Dar al-Fikr n.d.) vol. 2, p. 4al-Shatibi, *al-Muwafaqat op. cit.* vol. 2, p. 142, al-Qarafī, *Sharh Tanqih al-Fusūl* p.322.
[699] *Majallah* Article 45.
[700] 'Awda, A. S. *Atharal-'Urf fi al-Tashri' al-Islami,* 1997, pp. 348-367, al-Zarqah, *al-Madkhal,* p. 893
[701] Muhammad Al-Shalabi, *Usul al-Fiqh al-Islami,* 1968, p. 326.

There are many maxims that are classified as subdivisions of the grand maxim. Some are relevant to our focus in this thesis, while others are not. Thus, in this section those that are relevant will be dealt with.

6.3. Some related maxims of custom and its effect.

6.3.1 *Isti'māl al-nās ḥujjah yaghib al-'amal bihā* (People's practice is authoritative and should be reckoned with).[702]

Generally, custom and the practices of people have to be given consideration in any matter that is not detailed, or if its verdict is based on the *'urf* and *'ãdah* of the people who use it. In regulating the extent of the application of *'urf* in Islamic law, jurists have unanimously agreed that if custom contradicts the explicit *naṣṣ* (text of the Qur'an and *hadith*), then that customary rule should be discarded. Thus, custom is of no use when there is a factual text.

However, the relevance of the above maxim is to widen the authority of enforcing custom in Islamic law. If a custom does not contradict a text, then it is enforceable. Of course, the maxim also includes all kinds of *'urf,* be they general, individual, practical or verbal custom. The Islamic jurists unanimously agree that if a custom is general it means that it is not restricted to a particular set of people, place or time. An example of this is in the contract of manufacturing, (*istisnā'*). This type of contract contradicts the general principle of Islamic contracts, but it is allowed because it is a custom known to the people since the first epoch of Islam.[703] Contrary to the general practice of *'urf* and *'ãdah*, there is disagreement among scholars on the effect of an individual *'ãdah 'urfiyyah* - the practice which is known to a particular region, or to a set of experts.[704] The majority of Islamic jurists, including Hanafites and Shafi'ites, do not consider individual custom as specifying general principle. Individual *'urf,* therefore, has no effect in identifying the meaning of a text or of the general principles of Islamic law. This is because if the individual *'urf* of one particular region is considered to be specific to the text, the other individual custom would be

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[702] Ibn Rajab, *al-Qawa'id* pp. 121-122, *Majallah* Article 37, al-Zarqa *al-Madkhal* p. 60, al-Burnu, *al-Wajiz,* p. 292.
[703] al-Burnu, *al-Wajiz*, p. 277.
[704] *Ibid.* p. 278.

undermined. However, it can be asserted that if the individual custom has to be given effect in specifying a text, the use of it should be restricted to the people involved, and it will not become a binding rule on the other region where there is another custom in place.

6.3.2 *al-'ādah aw al-'urf 'amalī* (Practical Custom):

(a) *al-ma'rūf 'urfan ka al-mashrūt shartan.* (What is known by the virtue of custom is as a stipulated condition). [705]

(b) *al-ta'yīn bi al-'urfu ka al-ta'yīn bi al-naṣ.* (What is stipulated by the virtue of *'urf* is as what is stipulated by the text).[706]

Custom can also be practical, that is, it can be a physical action. The two maxims above consider the effect of such *'urf* on people's activities. Thus, they consider *'urf* as a measure to determine the conditions that bind a human's activities and engagements with other people of the same custom, even if those conditions are not stipulated at the time of the engagements. For example, if a visitor eats his host's food, he should not be charged with theft, if it is customarily known that a visitor has been given the right to utilize his host's property without permission. It is also the case that the *'urf* of some regions stipulate that a dowry is divided or suspended until a specific time known to them. This stands as a condition, even if it is not expressed as such during a marriage engagement. Thus, if one of the inhabitants of that region conducted a marriage without the full dowry being paid, his marriage should not be invalidated, and any affair between the couple will not be deemed as adultery.

However, the Hanafites consider practical or physical customs to be specifying texts if the custom is a general custom, as opposed to the majority who do not endorse *'urf* to be specifying texts, unless that *'urf* is verbal.[707] It is pertinent to mention here that if there is an indication of another stipulating condition contrary to the known custom during or before the initiation of a contract, then effect will be given to that new specific condition. For example, if a host specifies that his visitor should not use his

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[705] al-Suyuti, *al-Ashbah,* p. 92, Ibn Nujaym, *al-Ashbah,* p. 99, *Majallah,* Article 43, al-Burnu, *al-Wajiz,* p. 306.
[706] *Majallh,* Article 45, al-Zarqa, *al-Madkhal* p. 612 al-Burnu, *al-Wajiz,* p. 306.
[707] al-Burnu, *ibid.* p. 280.

phone but he does, then his visitor has breached the condition of hospitality and will be liable to pay compensation of some kind.

6.3.3. *al-'Ādah aw al-'Urf al-Qawlī* (Verbal Practice)

(a) *al-Ḥaqīqah tutrak bi Dalālah al-'Ādah* (Real Meaning shall be left out for Denotation of *al-'Ādah*).[708]

(b) *al-Kitāb ka al-Khiṭāb* (A Written Document is like an Expression).[709]

(c) *al-'Ishārāt al-Ma'hūdah li al-Akhras ka al-Bayān bi al-Lisān* (A recognized Indication of a Dumb Person is considered as an Explicit Expression).[710]

Having explained the practical custom, the opposite of it is verbal or expressed custom. The *'urf qawlī* is a conventional term used by a group of people for a specific meaning, which when it is used is intuitively understood among the people who use it without any linguistic indication. In other words, the verbal custom is a custom that is used in lieu of the original language, while often the original word and real meaning has become obsolete and derelict.[711] There are four types of *ḥaqīqah; lughawiyyah,* (linguistic) *shari'iyyah,* (legal), *'urfiyyah 'āmmah,* (general custom), and *'urfiyyah khāsah,* (particular/individual custom). The first maxim indicates that if there is a contradiction between the language in use and the *'urf,* then preference will be given to the indicative customary meaning. An apt example is the use of *dirham* and *dinar* today as opposed to its use in former days. Moreover, the language that constitutes defamation can be considered as *'urf qawli*. Thus, if the language in use is regarded as defamation in one norm, and as otherwise in another norm, the outcome will be affected by where it is considered to be offensive. Thus, someone can be charged for insulting if he uses language that is deemed to be offensive in one place, though it may not be deemed offensive in another.

However, the second maxim considers the effect of what is written, compared to what is expressed. As the verbal *'urf* is considered to be effective in giving legal verdicts, it is also important to consider what is written for those, as many people find it difficult to express their thoughts clearly in the legal system. Before a written document can be

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[708] *Majallah,* article 40.
[709] al-Suyuti, *al-Ashba' op. cit.,* p. 308, *Majallah,* article 69.
[710] Ibn Nujaym, *al-Ashba' op. cit.* p. 343, *Majallah,* article 70.
[711] al-Burnu ,*al-Wajiz* p. 281.

legally tenable it should be clearly understood, and the handwriting of the presenter should be known.[712] Thus, if someone wrote a statement deemed to be insulting and offensive, even if such person is dumb, his writing can be admitted as evidence of committing an offensive statement. As such, his written document is tenable as evidence in legal procedure.

Another sign representing expression is the recognized sign of a dumb person and this stands as a clear statement, verbally expressed. To recognize this sign is one of the ways of establishing justice in human activities. This is because custom - as in the way a dumb person expresses his thoughts - is recognized and thus a legal effect is attached to it. This sign is considered in confession, witness, contracts, swearing, defamation, apostasy, and so on.

However, the sign of a dumb person is not given status in a case that involves the absolute rights of God. This is because of the doubt attached to it and because of the maxim that says, "*al-ḥudūd tudra' bi al-shubhāt*" (a fixed punishment should be averted by means of doubt). If a dumb person commits a crime that involved the absolute right of God, he should not be punished, and if he claims or witnesses that someone else committed the crime that constitutes *ḥadd*, then, as such, *ḥadd* would not be executed because of the averting of *ḥudūd* in the face of *shubhah*.

6.3.4 Maxims stand as Conditions binding the Enforcement of Custom

It has already been stated that an acceptable custom has to be reasonably endorsed by people of good and sound behaviour, but there are other conditions that have to be met before custom can be authoritative and acceptable as a supportive source of Islamic law. Thus, the sub-maxims below stand as conditional maxims regulating the enforcement of custom.

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[712] al-Atāsī, S*harh al –Majallah,op. cit.*, vol. 1 p.190 al-Burnu, *al-Wajiz op. cit.*, p. 302.

(a) *Inna al-'Ādah tuḥkam fimā lā Ḍabṭ lahu Shar'an* ('*Ādah* is enforced where there is no Legal Detail).[713]

(b) *Innamā tu'tabar al-'Ādah idhā iṭṭaradat aw ghalabat* (Effect is only given to '*Ādah* that is Regularly Occurring and Universally Prevailing).[714]

(c) *Al-'Ibrah li al-Ghālib al-Shā'i' lā al-Nadir* (Effect is only given to a Prevailing Widespreading Custom, not a Rare One).[715]

(d) *Lā 'Ibrah li al-'urf al-ṭāri'* (No effect for an Emergent Custom).[716]

The four maxims above include some of the conditions to be considered before custom can be authoritatively enforced. The four maxims as conditional criteria of the enforcement of custom can be divided into two parts: One: custom and texts. Two: the nature of acceptable custom. Regarding the former, the ostensible and uncontroversial condition set for the legality of *'ãdah* and *'urf* is that there should not be contradiction between it and the explicit texts. However, there are many ways in which *'ãdah* and *'urf* can contradict texts or what is established through texts. First, when '*ãdah* contradicts a text in any form, such as in the '*ãdah* regarding nudity in some parts of the world; the engaging in usury in most of the banks of the world; the legalization of manufacturing and drinking alcohol; the legality of prostitution in some countries of the world. All of these '*ãdãt* and *a'arãf* are vehemently prohibited in Islamic countries so that if anyone engages in any of the above customs in a region where Islamic law is being practised, he shall be deemed to have committed a sinful act, punishable under Islamic law. Second, when '*ãdah* or '*urf* contradicts a text in some way, such as a general text and the ruling derived from it through means of analogy. In this case, if *'urf* is general it can be considered against the text as *'urf* '*ãmm* that explain the general text. Third, when there is a text that has a ruling based on '*ãdah* and *'urf*. There are some scholars who opine that such a text can be left for '*urf*, if the *'urf* has changed,[717] although others opine that it cannot be changed.[718] Fouth,

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[713] al-Zarkashi, al-*Manthur op. cit.*, vol. 2, p. 356 al-Burnu, *op. cit.*, p.282.
[714] al-Suyuti, *al-Ashbah* p.93, Ibn Nujaym, *al-Ashbah* p.99, *Majallah,* Article 41-42, al-Zarqa, *al-Madkha,* pp. 606-607, al-Burnu, *op. cit.*, p. 295.
[715] *Majallah* Article 42, al-Zarqa, *al- Madkhal* p. 607, al-Burnu, *op. cit.*, p. 295.
[716] al-Burnu, *ibid.*,p. 297 cf. al-Suyuti, *al-Ashba' op. cit.* p. 96, Ibn Nujaym, *al-Ashba' op. cit.*, p. 101.
[717] Ibn Qudamah, *al-Mughn, iop. cit.*, vol. 2, p.66, Ibn Muflih Muhammad, *al-Furū' op. cit.*, vol. 4, p. 157.
[718] See Ibn Qudamah, *op. cit.*, vol. 2, p.64, al-Ramalī, *Nihayah op. cit.*, vol. 3, p. 417.

when' *'urf* contradicts issues that have been established by *ijtihad* of Islamic scholars, that verdict would then be changed according to the change in the custom.[719]

Another way in which *'urf* can contradict text is when the language - not the whole text - of a text contradicts the language of *'urf*. In such cases, if the meaning of a word of *'urf* denotes a different meaning in the sense of the text; one should consider whether the word in the text has any legal effect, if not, *'urf* may then supersede it. This is apparently applicable in the swearing of oaths. The language used in an oath will be given consideration in a court of law according to the *'urf* of that language because oaths are based on the custom of the one taking the oath.[720] For example, if someone swears not to do something, but the word has to do with a legal ruling such as to swear not to pray - and the accused had recited a prayer known in Islam - then the legal usage will be enforced.

There are three conditions that can be inferred from the last three maxims, namely: *al-Idtrād,* continuity, *al-ghlabah,* predominant, and *al-shuyū'*, prevailing of *'ãdah.* Before custom can be authoritative, the three conditions have to be fulfilled. An enforced custom must be constantly in use. This means it should be generally in practice. If it is a common and constant custom of a tribe to delay the dowry of a married woman during her marriage ceremony until a particular time, this will be enforced and cannot be considered as *nikāh bāṭil,* 'invalid marriage', as this could be construed as adultery. However, in a case where the woman or her guardian pronounced a contrary condition, and if marriage or sexual intercourse occurred before the specified condition was met, it may constitute an adultery that is legally punishable. In addition, before a custom can be considered to be binding in any event, it should be predominant and prevailing i.e. the custom must be well known to the majority of people who are affected by that custom.[721]

The essence of these conditions lies in the fact that if a custom is *āmm* 'general', even though it is prevailing, it may not be practised by the majority of people. Thus, relying on this prevalent nature may not be admitted in giving legal judgment. On the other

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[719] This issue will be elaborated under the maxim *lā yunkar taghayyur al-ahkām bi taghayyur al-azmān.*
[720] al-Burnu, *al-Wajiz*, p. 287.
[721] al-Suyūtī, *al-Ashbā*, p. 92.

hand, however, if a custom is *khāṣ,* 'personal/individual', despite it is not being prevailing and predominant, but is common and recurrent among certain people or professionals, it may then be given consideration when there is a dispute among the people who use it. By and large, these conditions are set to balance justice among litigants in issues that are based on *'urf.* For instance, if someone is accused of offences that are recognized as offences in one place but not in another, difficulty will arise in determining the yardstick to apply in giving a legal ruling. The dilemma would be whether the norm of the accused should be considered or the custom of the accuser. However, the only way to settle such a matter is to disregard the custom and to give no ground to the case.

Another condition that confines the use of custom is that it should be consistent, commonly known and prevailing among the users. If a custom is not well known or is sometimes not in use, then recourse to it will be confined to those who use it. For example, if it is the custom of a particular society that the payment of the dowry be suspended during the marriage until it is convenient for the groom to pay, then this custom has to be known to every adherent of that custom. It should also be commonly in use. If this condition lapses and the marriage is conducted without a dowry, it could be regarded as adultery and become punishable. However, if the *'ãdah* and *'urf* conform to the texts, it is mandatory to enforce it, as in that case it is the text that is given enforcement, and the *'urf* serves only as reference.[722]

In some cases, an offence may have occurred in the distant past, prior to the case being brought to court. In this instance, if the *'urf* of the past is no longer in use, and the accused has already admitted to having committed the crime in accordance with the past *'urf,* the authoritative custom would concern the past *'urf, and* not the present one. For example, if a person admitted that he stole a hundred pounds 20 years ago, naturally, the value of the stolen property would not be the same as at the time of confession. His admission would then be based on the value of the stolen sum at the time of the offence, and this would have no connection to any present-day custom.

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[722] al-Burnu, *al-Wajiz,* p. 282.

In summary, the effect of the custom and culture of people does count in deciding the nature of a crime not stipulated in the text. Some of these customs include criminal offences legislated to controlling security and the safety of public, and their punishments are discretionary ones. Customs also take into account the nature of historic offences, where often the punishment was predetermined by texts, but custom was left to determine the legal requirements before such acts could be deemed criminal. An example of this can be seen in what is considered as *ḥirz* (a well-fortified place), in which, before a theft charge can be arraigned, the amount of money stolen, and the circumstances, have to be considered first.

Custom also determines the equivalent of the amount stipulated in *sunnah* for the *diyah*. Thus, what is considered to be the equivalent of one hundred camels in one country may be different from the amount in another.[723] In *ḥudūd* crimes, *'ādah* determines whether someone has committed adultery in a case where a dowry or marriage ceremony, (*walīmah*), is concerned, or in a case where one of the requirements of *'aqd nikāḥ*, (the marriage contract), is not fulfilled. . The same applies in the crime of defamation *'urf qawlī* determines the offence of defamation, and of apostasy. Finally, *'urf* and *'ādah* can be used to determine an appropriate discretionary punishment.

One can now ask: can custom change rulings in Islamic law? To pose the question slightly differently, can Islamic rulings change or be changed because of changes in the custom of the adherents of Islam? The maxim below will reveal detailed accounts of what has been said and represented as fact in certain aspects of criminal Islamic law.

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[723] Johonson Barbe, 'Legal literature and the problem of change: The case of the Land rent' in Chibil Mallat (ed.), *Islam and Public Law:Classical and Contemporary Studies,* (London: Graham and Trotman, 1993), pp. 29-47, Weal B. Hallaq, *Authority, Continuity and Change in Islamic Law*, (Cambridge: Cambridge University Press, 2001), pp. 166- 235.

6.3.5 Changing of Rulings to Effect Changing in Custom:

Lā yunkar taghayyur al-Aḥkām bi taghayyur al-Azmān **(It is undeniable that Rules change as Times change).** [724]

The Islamic law (*Sharī'ah*) is said to be universal. One aspect of its universality is that it is flexible and rigid. Its flexibility lies in the fact that some of its rulings can be changed according to changes in time, place, circumstance and culture, while its rigidity lies in the fact that some of its rulings cannot be changed, castrated, altered or mutilated. These rulings have been fixed and ordained, with consideration given to their fitness in all circumstances.

One of the unresolved controversies between the Islamic orthodox school and reformists is whether the rulings of Islamic law - regardless of them being fixed or deducted from text - can be changed. The question often posed is: does Islamic law need to be reformed or changed as time changes? This question involves the codification of the maxim in question. This maxim first appeared in the form quoted above in the Majallah of Ottoman Empire, article 39. But some of its interpreters have inserted the words *'urfiyyah* or *ijtihãdiyyah* into it to make it safe from criticism.[725]

Nevertheless, the maxim of a change of rules according to changes in time has faced criticism from different angles. This is because of a loss in the codification of the dictum *ab initio*, as we shall explain in the next paragraph. Muslihudeen is one of its critics who expresses that the maxim cannot be taken at its face value.[726] He argues that any rules derived from the Qur'an and the sound *hadith*, or deducted by analogy based on the two sources, are everlasting. He further explains that if laws based on the aforementioned sources are subjected to change "the law would have ceased to exist long ago." On this hypothesis, Muslehuddin asserts that "no changes in rulings" that are derived from the texts.[727]

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[724] *Majallah* Article 39, Haydar, *Durar al-Hukkãm, op. cit.*, vol. 1 p. 43, Fakhr al-Din Uthman al-Zayla'i,, *Tabyin al-Haqa'iq* , (Cairo: Dar al-Kutub al-Islamiyyah, 1313), vol. 1, p. 140, al-Zarqa, *Sharh al- Qawa'id al-Fiqhiyyah, op. cit.* pp. 227-229, Al-Nadwi, *al-Qawa'id al-Fiqhiyyah*, p. 158, al-Burnu *al- Wajīz* p. 310.
[725] Haydar Ali, *Durar op. cit.*, al-Zarqa *Sharh al-Qawa'id op. cit.* al-Nadwi, *op. cit.*.
[726] Muhammad, Muslihuddin, *Philosophy of Islamic Law and The Orientalists,* (2nd edn.Lahore, Pakistan Islamic Publications Ltd, 1980) p. 176.
[727] *Ibid.*

However, to some extent, what Muslihudeen has said is a fact that cannot be belittled, although there have been some rules derived from the Qur'an and *hadith* that are subject to change as times, places and customs change. An apt example to illustrate this fact is that of the verse of the Qur'an which reads thus: "O you who believe! Let your slaves and slave girls and those among you who have not come to the age of puberty ask your permission..."[728] There is also the *hadith* in which the Prophet is reported to have said: "It is the responsibility of the owners of properties to take care of them in the day and the responsibility of the owners of animals to restitute for what their animals destroyed in the night."[729]

However, if the custom or time has changed, or if existing rules in another nation differ from the one set in both the sources, can the rules be changed? Saeed Ramadan in his book *Ḍawābiṭu al-Maslah,*[730] and Muslihudeen in the Philosophy of Islamic law[731] point out that a ruling that can be changed is restricted to custom. However, they fail to admit that that customary ruling could be based on the Qur'an, *hadith* or, by analogy that based on both. Muslihudeen also asserts that Islamic law cannot be changed but "yet (it) is possessed of amazing capacity to accommodate change."[732] And in referring to Moore's contribution on the subject matter, he posits that any change in rules can only be met on the basis of the rule of necessity and need. Thus, any invention, new discovery or cultural contract that necessitates changes in the rules can be accommodated, as in a welfare society, under the rules of necessity and need.[733]

By and large, taking the maxim above at its face value may create the impression that all rulings of Islamic law can be changed. Nevertheless, it is certain that the condition, needs and circumstances of mankind cannot be static. There must be dynamic recycling in life as generations recycle. Thus, the preceding rulings have to be

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[728] Qur'an 24, verse 58.
[729] Ibn Majah, *Al-Sunan, hadith* no. 2332, Abu Dawud, *al-Sunan, hadith* no. 3569, Malik, *al-Muwatta, hadith* no 677.
[730] Muhammad Saheed Ramadam al-Buti, *Dawabit al-Maslah fi al-Shari 'a al Islamiyyah,* (4th edn. Beirut, Mu'assasat al-Risala,1982/1402) pp.411-413,
[731] Muslehuddin, M., *op. cit.,*
[732] *Ibid.* pp. 242-243.
[733] *Ibid.* p. 243.

compatible with the phenomenon of life. Having said that, Islam has emphasized that its religion and the facets that go with it have been completed and perfected.[734] It also affirms that revelation leaves nothing, without it having been explained.[735] If that is the case, why do the preceding rulings have to be changed? In order to strike a balance between canvassing for change and campaigning against it, it is important to state that there are some rulings that cannot be changed because they are explicitly ordained. These include explicit rulings on prohibited acts in Islam, the number of lashes due for the *ḥadd* of adultery, and accusations of unchasteness made against innocent people. All such rulings cannot be changed in any circumstance and cannot be rationalized because they are irrationally ordained "*ghayr ma'qulah al-ma'na"*. Of course, there are other rulings that can be subjected to change as time and circumstances change. Ibn al-Qayyim emphatically canvasses that "*Ahkām* are of two types: a type that does not change from one state ...regardless of time, location or the *ijtihad* of four Imams, and another type that changes according to time, location and circumstances".[736]

The rulings that change according to changes in time and circumstances can be found in two forms. One is ruling based on custom and culture, and the other is based on personal exertion, *ijtihad.*

6.3.5.1 Rulings based on Custom *'Urf* and *'Ādah*

If a ruling is based or enacted according to the custom, then that ruling can be changed if the custom changes. In other words, if a ruling in the texts considered customary value in its enactment thus, those rulings can be changed. However, reconstructing the maxim to alter what it is coded for will delineate and delimitate the extent to which one can apply the maxim. Thus, it will be appropriate before any further illustration to add the word "*'urfiyyah"* (customary) or the word "*ijtihādiyyah"* (personal exertion). That is to say: *lā yunkar taghayyur al-aḥkām al-'urfiyyah aw al-ijtihādyyah bi taghayyur al-azmān* (changing rulings based on customs or personal exertion with changes in times or circumstances cannot be

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[734] Qur'an 5, verse 3.
[735] Qur'an 6, verse 38.
[736] Muhammad Al-Zar'i *Ighath al-Lahfat,* ed. Muhammad Hamid al-Faqi, (Beirut: Dar al-Ma'rifah, 1975/1395) ,vol. 1, p. 330-331.

denied).[737] Of course, it is emphatically stated in *Durar al-Ḥukkām Shariḥ al-Majallah* that the meaning of the maxim with regard to changes in rulings is peculiar to the rulings based on *'urf* and *'ãdah*, but 'firm rules based on the text shall not be changed'.[738] This additional inclusion will eliminate misuse of the maxim.

The reason why rules based on customs and culture must be changed as times change is that as times change, the needs of people change as well. If law is constructed to be static it will create hardship and constraint in the lives of people. Examples are given in the classical books to illustrate the effect of this maxim. For example, in the past the inspection of a house similar to the one a person proposes to buy, was enough, and such an inspection stood almost as a guarantee that the actual house would be bought. This is because, in general, houses were built in the same way, but in this contemporary age houses are built in different styles, so a prospective buyer would prefer to view the particular property he wishes to buy. Other examples include the private and public recommendations of witnesses, the imposition of compensation on the usurper of an orphan's property and endowment, and the closing of mosques for fear of thieves.[739] Emphatically, there are verses of the Qur'an and the traditions of the Prophet in which rulings were based on the custom of the generation of revelation. As exemplified above[740]

It is worth noting that to preserve the divinity of the text, and to curtail the open-ended mutilation of divine rulings, the text that is categorized as *muḥkam* (unambiguity), should not be subdued nor be subservient to the customs and culture of people. However, there are some instances provisionally legalized in Islamic law for the changing of rulings, as in the cases of necessity and need that emerged from hardship and difficulties – as, for example, when Umar ibn Khatab suspended the punishment of theft in a time of drought. As explained in the discussion on maxims of necessity, these situations cannot be construed as the changing of rulings but not the wording of the divine texts.

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[737] al-Nadwi's observation in *al-Qawaid al-fiqhiyyah*, *op. cit.*, as opposed to al-Burnu. See *al-Wajiz*, p. 311.
[738] Haydar Ali, *Durar,* vol 1, p. 43.
[739] *Ibid.* al-Zayla' *Tabyin al-Haqa'iq op. cit.* vol. 1, p. 140, Ahmad Ibn Hajar al-Asqalani, *Fath al-Bari Sharh Sahih al-Bukhari,*.ed. Muhibb al-Din al-Khatib (Beirut: Dar al-Ma 'rifah, n.d.), vol. 2, p. 450
[740] See pages 209 and 210, and notes 726-729

6.3.5.2 Rulings based on Ijtihād

The second way in which rulings can be changed is when a ruling is established by *ijtihād, or* personal exertion, whether this exertion is deduced directly from the texts or indirectly. For example, what constitutes prohibited wine is debatable between the Hanafites and the majority of the *fuqahā'*. Hanafites hold that prohibited wine is the wine brewed from grapes; thus, drinking any amount of wine fermented from grapes is prohibited, but in any other wine the intoxicating amount only is prohibited. By contrast, the majority of Islamic scholars maintain that all kind of intoxicating drinks are prohibited as they take into account the general implication of the verse and the tradition that supports the prohibition of all intoxicants.

Islamic scholars use personal exertion to arrive at verdicts, and these verdicts may or may not have become consensus. If the *ijtihād* has reached consensus and the '*illah,* (the cause effect) on which the *ijithād* is based is no longer effective, or needs to be changed, the rulings arrived from that *ijtihād* have to be changed. For example, Umar Ibn al-Khatāb initiated paying the *diyah* of the culprit from the Diwān, (public treasury) which was contrary to the existing practice in the era of the Prophet and Abu Bakr. Normally, the *diyah* was paid by the heir or solidarity of the culprit's *āqilah.* The practice of Umar has become consensus because the '*illah,* for the '*āqilah* no longer exists.[741]

Rulings may also be from an *ijtihād* of scholars extrapolated from the purpose of *Sharī'ah.* One such ruling was invented by the two companions of Abu Hanifah, namely Abu Yusuf and Muhammad. Their ruling concerned the recommendation of witnesses and opposed the ruling upheld by Abu Hanifah during his time.[742]

In the field of Islamic criminal law, there are ways, including those mentioned above, in which rulings could be changed to suit the needs of the public. Indeed, there are large numbers of punishments in Islamic law that are left to the authorities to deal

[741] This is the view of Hanafites . However, there are other opinions regarding the use of diwan for the *diyah.* See al-Sarkhasī, *al-Mabsūt, op. cit.,* vol. 27, pp. 124-125, Wahbah al-Zuhaylī, *al-Fiqh al-Islami wa Adillatuhu* (4th edn. Damascus: Dar al-Fikr, 1997), vol. 6, pp. 322-323.
[742] al-Burnu, *al-Wajiz*, p. 312.

with due to variations of time and place. This can be seen as a sign that Islamic criminal law acknowledges these changes and renders it possible to accommodate them. *Ta'zīr* punishments also vary due to changes in time, place and circumstance. A *ta'zīr* punishment enacted in one place may not be appropriate in another place. However, there is a bone of contention regarding some substantive law issues, such as the number of lashes, stoning to death, etc., can they be substituted with other measures of punishment like imprisonment in lieu of *jald*, due to changes in time and circumstance? It is outrightly rejected by all scholars that any substantive punishment can be removed or changed. But, interestingly, it is reported that Umar held a moratorium on the penalty for theft in a time of drought, although it is said that it was based on necessity. However, that necessity was as a result of changes in the behaviour of people, or of changes in the circumstances of the period.

It is worth emphasizing that the maxim of changing of rulings was first introduced in the Ottoman Majallah. This forms the basis for the criticism of innovation in Islam and the systematic derogation of divine Law to suit the whims and caprices of the Ottoman regime.[743] However, there were a number of innovations in the Ottoman Criminal Code (OCC) that indicated a positive suspicion of this maxim. It is reported in the OCC that instead of flogging, a fine should be imposed. This is according to Articles 20 and 67, which state:

> If (a person) kisses (another) person's son or approaches him on his way and addresses (indecent words) to him, (the *qadi*) shall chastise (him) severely and a fine of one *akce* shall be collected for each stroke.
> If (a person) steals a purse or a turban or towels-unless his hand is to be cut off, the *cadi* shall chastise (him) and a fine of one *akce* shall be collected for (every) stroke (or one *akce* shall be collected for each stroke).[744]

This gives the notion that *Sharī'ah* had been derogated or *'fiscalised'*. However, from the two articles mentioned above it can be inferred that the purpose of the articles does not support that claim. Rather, as Peters observes from the latter article, it is meant "to regulate a case in which a person has stolen, but cannot be sentenced to the fixed punishment for theft", and to legislate for any other offences that the *Sharī'ah*

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[743] Peter, Rudolph, *Crime and Punishment in Islamic Law op. cit.* pp.69-74.
[744] *Ibid.* p. 74.

does not specify punishment for.[745] The OCC article 67 has a condition therein stating that unless the hand of the convicted person is to be cut off, once the charge is proved and the accused is convicted, only the punishment of *ta'zīr* will be inflicted. This removes the misconstruction that any Islamic regime can twist the fixed Islamic law. And because Islamic fixed penalties were rarely enforced during that regime does not necessarily mean that the *ḥudūd* offences were abolished, or that they had become superannuated and outdated. However, they are still active and suitable for all generations.

6.4 Summary of the Chapter

Chapter six has explained the legality of custom in the Islamic legal system and how it affects the way legal rulings change according to the time and circumstances. It is discussed in this chapter that custom that is given authoritative could be '*amalī* or *qawlī* (practical or verbal respectively) some maxims are explored to that effect. In any case, whether custom is practical or verbal, there are certain conditions to be met before custom can be given significant effect, *inter alia*; it must not contradict explicit texts, it must be regularly occurrence and universally prevailing.

To explore customary provision in the full implementation of *Sharī'ah* in Northern Nigeria, it could be argued that some practices, which became unlawful and punishable in penal codes of the states implementing *Sharī'ah* were the prevailing custom and practices of some people in those states such as consenting for sexual intercourse before marriage, utterance of some expressions deemed defamatory offence and the taking of someone's property without intending theft. Thus, people need to be enlightened before enforcing the penal codes.[746]

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[745] *Ibid.* pp. 72, 74.

[746] The in-depth study of the cases in which customary practices were ignored under the full implementation of *Sharī'ah* in the Northern Nigeria can be found in pp. 239-240

Chapter Seven

Analysis of the Maxim of Effect of Utterances

I'māl al-kalām awlā min ihmālih (A Word should be construed as having Some Meaning, rather than disregarded).[746]

7.0 Introduction

The maxim of the pragmatic value of an expression is considered to be one of the most famous maxims in Islamic jurisprudence, as it is cited in many of the books of Islamic legal maxims. This probably explains why al-Burnu considers it one of the basic general legal maxims. He asserts that because of the many applications to which the maxim is put in Islamic jurisprudence, most Islamic scholars agreed upon its content. al-Burnu also said that this maxim has many subdivisions and deals with all human activities, and because it is much more concerned with the perlocutionary acts of *mukallaf,* (legally responsible person), it deserves to be included among the basic general maxims.[747]

Since all Muslims' activities are based on either physical or verbal actions, to diminish this maxim will be tantamount to diminishing half of the Muslims' actions. Thus, I concur with al-Burnu's view on this maxim and based on that, I consider the maxim the sixth among the agreed upon maxims in Islamic jurisprudence.

7.1 Interpretation of the Maxim

In general, speech is meant to serve a purpose. This purpose can be meaningful to the recipient or not. In the first instance, the recipient ought to look for the meaningful purpose of the illocutionary acts of utterances. According to this maxim, it is in the best interests of Islamic legal rules to identify the illocutionary and perlocutionary

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[746] al-Suyuti, *al-Ashbah* p. 128, Ibn Nujaym, *al-Ashbah* p. 130, al-Zarkashi, *al-Manthur, op. cit.*vol. 1 p. 183, *Majallah*, Article 60, al-Burnu, *al-Wajiz, op. cit.* p. 314.
[747] al-Burnu, *op. cit.* pp. 314-315.

acts and to act upon them, as required, rather than to neglect them, especially if the speech is uttered by a mindful person.[748]

There could be a multitude of meanings embedded within every speech. In that case, the most useful meaning has to be enforced. Let us assume that someone is asked as to whether a certain item in his possession is a stolen item and he replied by saying: "as alleged." Such a reply, if misused could jeopardize the claim of the accuser. Thus, it will be assumed that the accused person has confessed to the allegation. This is in a case where someone's right is attached to the locution. However, it is said that the purpose of the utterance should rather be determined by the intention of the speaker. But in this regard, there is an exception which is emphasized and that is: if the utterance is demanded before a court of law, the effect will be given to the purpose of the question *maqāṣid al-lafẓ 'alā niyyah al-lāfẓ illā 'inda al-qādhī* (The purpose of utterance is based on the intention of the locator, except if it is demanded before the court).[749] This is opposed to the effect that would be given to a speech where there is no right of man attached and caution is needed. For example, if someone accused of adultery is asked whether the allegation is true on not and he replies in the manner aforementioned, then the perlocutionary act of the utterance would be disregarded. The reply may sound positive, but caution is required in such a case.

All legal texts regarding criminal issues have to be handled as stated. For example, the words *"fajlid" "faqṭ'"* have to be construed as "flogging" and "amputating" respectively, without substitute or dereliction. Although where is an external factor necessitating that the words are given another interpretation such as when there is lack of evidence that may be done. On the other hand, the expression required from a witness in an adultery case must be explicit for it to be admissible. Thus, a statement such as, "I saw him putting his penis into her private part," is admissible rather than, "I saw him sleeping with her", which has no legal effect in an adultery case. This is because there is no right of man attached to the offence and the situation requires it to be concealed. [750]

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[748] al-Burnu, *ibid.*. p. 135.
[749] al-Suyuti, *al-Ashba' op. cit.,* p. 44, al-Zarkashi, *al-Manthur op. cit.,* vol. 3, p. 312, Muhammad Ibn Yusuf, *al-Tāj wa al-Iklīl li Mukhtaṣar al-Khalīl,* (2nd edn. Beirut: Dar al-Fikr, 1398), vol. 3, p. 287.
[750] Peters, R., o*p. cit.,* pp. 13-15.

However, Islamic jurists have spoken of some maxims that are deemed as subdivisions under the above maxim. These maxims will be discussed as their relevance to the pragmatic value of speech in Islamic criminal law is explored.

7.2 Some Maxims Related to the Maxim of Effects of Utterances

7.2.1 *al-Aṣl fī al-Kalām al-Ḥaqīqah* (The Original Condition of Speech is that of Being the Real Meaning.[751]

In any speech there are two locutionary acts from which the utterance can be understood. One is the real meaning of the locution and the other is its metaphoric meaning. *Al-ḥaqīqah* in linguistic terms is a word meant to denote the meaning given to it originally,[752] as opposed to *al-majāz,* which has another meaning.[753] According to the maxim herein, the normal thing is to first construe a word to have its real meaning, rather than giving it the metaphorical meaning. Thus, any utterance of the Lawgiver, contractual parties or any oath taken should be construed as real meaning, if there is no other indication that suggests otherwise. For instance, the word *fajlid* should not be construed as *faḍrib*. The former literally means "flogging" while the latter means "beating". The implication of shifting the real meaning from its original to the metaphorical sense is that the punishment could be changed from flogging to imprisonment, meaning the divine law would be degraded, commuted or distorted. Moreover, if someone said to another person, "You are an adulterer," and failed to prove it as required by law, the speech would be considered as *qdhf* (defamation), until otherwise proven.

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[751] al-Suyuti, *op. cit.* p. 62, Ibn Nujaym, *op. cit.* p. 69, *Majallah* Article 12, al-Qarrafi, Ahmad Ibn Idris, *al-Amniyyah fi Idrak al-Niyyah*, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1984/1404) , p. 11, al-Razi, Muhammad Ibn al-Husayn, *al-Maḥsūl fī 'Ilm al-'Uṣūl* ,ed. Taha J al-Alawani, (Riyadh, Imam Muhammad Ibn, Suud University, 1400), vol. 1, p. 475.
[752] al-Jurjani, Ali, *Kitab al-Ta'rifat*, *op. cit.*, p. 121.
[753] *Ibid.* p. 257.

7.2.2 *Idhā ta'adhdhar al-Ḥaqīqah yuṣār ilā al-Majāz* (If a Real Meaning becomes Impossible, the Metaphoric Meaning should be Resorted to.[754]

As stated regarding the last maxim, a word can have a real meaning or be a metaphorical one, and it is established that the real meaning should be considered first before the metaphorical. Metaphor linguistically means "a figure of speech in which a word or phrase literally denoting one kind of object or idea is used in place of another to suggest likeness or analogy between them."[755] For instance, if someone said to a man, "You slept with a woman," the meaning of this utterance could be real or metaphoric. In the first instance, the real meaning should be considered, (which is accusation of adultery) except if the locutor denies real meaning and explains instead what he means by the utterance. Because the right of others is involved on the one hand which is the allegation of unlawful sexual intercourse, and because of the severe consequence the speech carries on the other, Islamic law seeks for a balance between the two meanings. Thus, even if *ḥudūd* is averted, as in the case of the example mentioned above, discretionary punishment could be meted out to caution the accused of the sensitivity of such a statement.

7.2.3 *Idha ta'adhdhar I'māl al-Kalām yuhmal* (If Giving an Effect to a Speech becomes Impossible in Any Way it will be Neglected.[756]

The original condition of utterances is that the real meaning or the metaphorical meaning should be given an effect, rather than consider the utterance redundant. However, according to the sub-maxim in question, if it becomes impossible for an utterance to be effective in any of the two ways mentioned above, then negligence becomes paramount. The occasions when this occurs are as follows: if the intention of the locutor cannot be inferred from the two meanings "real and metaphorical meaning"; if the word consists of two meanings and one has no one preference over the other; if the utterance is invalid in law; if the utterance is flawed and contradicts what is apparent, as in "ẓā*hir*" - such as a person who pronounced a statement of

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[754] Ibn Nujaym, *op. cit.*, p. 135, *Majallah* Article 61, al-Zarqa, al- *Madkhal op. cit.*, p. 617, al-Burnu, *al-Wajiz, op. cit.*, p.319.
[755] al-Jurjani, *op. cit.* p. 257, *Webster's Ninth New Collegiate Dictionary* (Massachustts, U.S.A., Merriam-Webster Inc. Publishers, 1991) , p.746.
[756] *Majallah* Article 62, al-Burnu,*al-Wajiz, op. cit.* p 321

apostasy, but who still prays and observes all obligatory duties, or a person who claims that someone stole his property, and then the property is found in the claimant's possession. All of these statements should be disregarded because of their inconsistency with the apparent situation. Another way of considering a statement to be flawed is if it contradicts, or is not in compliance with the rule of law, such as the statement of one who accuses someone else of adultery, but whose statement is not in compliance with the requirements of the law. In the case of the latter, the accuser will be charged with another offence, particularly if the case requires the concealment of the accusation.

7.2.4 *Dhikr Ba'd Mā Lā Yatajazz' Ka Dhakr Kullih* (Pronouncing Part of an Indivisible Statement is Like Pronouncing the Whole.[757]

The essence of this maxim lies in the fact that some statements may be intended as whole, while others may not. In the former, someone may confess to manslaughter, but not murder, or confess to wrongdoing for example, being secluded with a woman but not having sexual intercourse or even a sexual romance with her. In this case, his confession would be effective for the part he confessed to, but he would not be found guilty of adultery if there were no substantial evidence to prove the accusation, or if the case were the absolute right of God. In such a case, the statement cannot be split, but has to be taken as a whole.

Al-Zarkashi (d.794 AH) referred to such a situation by saying that there can be no division of a statement, as admitting part of it is deemed as admitting the whole, and renouncing part of it is the same as renouncing the whole.[758] The effect of this view is that any statement deemed indivisible and made before a court of law shall be considered as a whole statement and making any exception from it is invalid. For instance, if someone admits killing half of a person, or admits having half illegal sexual intercourse with a woman, such admissions would not be accepted because the acts are not divisible.

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[757] al-Zarkashi, *al-Manthur op. cit.*, vol. 1, p. 153, al-Suyuti, *op. cit.* p. 160, Ibn Nujaym, *op. cit.* 162, *Majallah,* Article 63.
[758] al-Zarkashi, *al-Manthur*, *op. cit.* vol. 3, p. 153.

However, the case of pecuniary liability is an exception to this maxim. For instance, if a person is accused of defamation, can such a person be given partial punishment because his victim forgave him part of the punishment? From the Shafi'ites point of view, there is no division in the punishment of defamation, although other schools see it differently. The basis of the dispute stems from whether the punishment for defamation is solely a right of God or a right of man (the accuser). From Shafi'ites point of view, the punishment of defamation is seen as absolutely a right of God.[759]

7.2.5 *al-Muṭlaq Yajrī 'Alā Iṭlāqih Mā Lam Yaqum Dalīl al-Taqyīd Naṣṣan aw Dalālah* (An Unrestricted Word Should Remain as it is, Unless the Evidence of Restriction is Textual or Connotative. [760]

Al-Muṭlaq is a word or group of words in which its implication is unrestricted, as opposed to *al-muqayyad,* in which its implication is restricted.[761] This maxim is invoked by the Hanafites School, and is more applicable and acceptable, in particular, to Abu Yusuf and Muhammad, the two companions of Abu Hanifah.[762]

The general meaning of the maxim is that a general word or phrase should be given a wide capacity of implication and application unless elements of restriction are applied to it. This restriction could be explicit, textual, or connotative and denotative evidence. Abu Hanifah did not accept customary indication as an evidence for restriction. By and large, the essence of the maxim to criminal law is more apparent in many utterances of Islamic textual evidence in the course of criminalizing some actions deemed as offences, and punishing the perpetrators. Take, for instance, all the words in the phrases "*al-zāniyah wa zānī fajlid kulla wāḥid minhumā m'iah jaldah"* in the Qur'an chapter 24, verse 2 and the phrases *"wa al-sāriq wa al-sāriqah faqṭ'ū aydiyahumā*" in the Qur'an chapter 5, verse 38. These should be given unrestrictive effect in application unless there is evidence of restriction. In the former, the words

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[759] Ibrahim Ibn Ali Al-Shirazi, *al-Muhadhdhib* (Beirut : Dar al-Fikr, n.d.), vol. 2, pp. 272-274. The same opinion has been expressed by Malik. See Malik Ibn Ana, *al-Mudawwanah al-Kubra,* (Beirut: Dar Sadir, n.d.) vol. 16, pp. 224-225.
[760] *Majallah*, Article 64, al-Zarqa, *Sharḥ al-Qawā'id al-Fiqhiyyah, op. cit.* P. 323.
[761] al-Shawkani, Muhammad Ibn Ali, *Irshād al-Fuḥūl* ed. Muhammad Said al-Badri, (Beirut: Dar al-Fikr, 1992/1412), p. 278, Ibn Qudamah, Abdullah Ibn Ahmad, *Rawḍah al-Nāẓir wa Jannah al-Munāẓir,* ed. Abdu al-Aziz Abdu al-Rahman al-Said, (2nd edn. Riyadh: Imam Ibn Su'ud University, 1399), p. 259.
[762] al-Burnu, *al-Wajīz*, p. 324,

"*al-zāniyah*" and "*al-zānī*", "an adulteress" and "an adulterer," should be understood from the denotative meaning, whether legally, linguistically, or customarily. Regarding Islamic legal definition, an adulterous action is when there is complete sexual intercourse between two members of different sexes who are not legally married. Thus, any practice other than that will not be regarded as *zina*.[763] Furthermore, *jald* (lashed), can only be construed as denoted in the language, as giving it another meaning will undermine the explicitness of the text. Thus, *jald* cannot be construed as *ḍarb,* (beating), because beating is different from lashing. Lashing has a restrictive meaning as opposed to beating, in which the tool for beating can be anything. Furthermore, the words "*al-sāriq*" and "*al-sāriqah*", "a male thief" and "a female thief", have to be construed as defined by law. And before one can be branded as *sāriq* or *sāriqah,* there are conditions stipulated by law that have to be strictly followed.[764]

An example of applying unrestricted words or phrases in criminal law is if someone said to his visitor, "You are free to take anything in my house," and the visitor went further into the household's storage and took the owner's valuable property. In this case, the expression used by the host denotes an unrestrictive future. However, should the visitor be considered a thief? From the maxim set by the two Hanafite scholars it seems that the act of the visitor is "illegal". However, it can also be deduced from the maxim that if the custom of the society considered the act as theft, the action would then be classified as theft, unless the customs of the two parties are different. This is opposed to the view of Abu Hanifah who did not see custom as having any effect in restricting an unrestricted phrase. Thus, in the example given above, the perpetrator would not be considered as a thief, unless the action was suspicious or deemed a breach of trust.

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[763] As stated in most of the *Shariah* criminal codes of Zamfara State, Kastina State, (SPCL 2001 section 124) Kano State (SPCL 2000, section 124) and a host of other states who implement *Shariah* penal law.

[764] For the general condition of theft see Doi, A. R. I, *Shariah the Islamic Law op. cit.*, p. 257, El-Awa, *Punishment in Islamic law op. cit.*, p. 2-5, Peter, Rudolph, *Crime and Punishment in Islamic law,op. cit.*, p.55.

7.2.6 *al-Su'āl Ma'ād fī al-Jawāb ...aw ka al-Ma'ād fī al-Jawāb* (An Inquiry Should be Concurrent to the Answer).[765]

The concurrence of an answer to a question is useful in settling disputes between litigants before the court. Inconsistency or dissimulation will on occasion render the process of justice unachievable. That is why Islamic law considers deception as an offence on its own, especially in oath taking. The Prophet is reported to have said: "An oath must conform to the intentions of the party tendering it."[766] Thus, if someone is asked, "Did you kill a person?" and he replied, "Yes", his response would be held as confession to the alleged crime, except if the confession is obtained under duress. In that case, his reply would be regarded not as a reflection of his wish but rather as a result of the duress. The same applies to any criminal interrogation in which fact is sought to establish justice or to settle a dispute.

7.2.7 *Lā Yunsab Qawlun Ilā Sākit- Walākinna al-Sukūt Fi Ma'raḍ al-Bayān Bayān* (Word shall not be Imputed to One who is Silent---but a Silence where Explanation is required is Considered as an Explanation.[767]

The first part of this maxim is the fundamental principle in any activity, except in activities where a clear expression of consent is very necessary, whether for clarity of the ambiguity involved, in which silence may be an obstruction to the realization of facts, or for purpose other than that. Thus, if a person saw someone stealing property, his silence should not be taken as permission for such an act, although he is required to inform the authorities about the crime in order that he is not charged with complicity.[768] The silence considered herein is subject to the ability of someone to talk, although he may choose not to talk for one reason and another, as in the case of a *thayyib* (a previously-married woman), who has the right to express her own consent to a proposed marriage. In such a case, her silence is considered rejection of the proposal. This is opposed to the second statement in which silence is deemed *bayān*, 'a declaration' of consent, as in the case of *bikr* (a previously unmarried woman)

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[765] al-Suyuti, *al-Ashba* p. 141, Ibn Nujaym,*op .cit.*, p. 153, *Majallah*, Article 66.
[766] Muslim, *al-Sahih* 5/87 and al-Nawawi, *Sharh* 11/117.
[767] al-Suyuti, *op. cit* p. 142, Ibn Nujaym, *op. cit.* p. 254, al-Zarkashi, al-*Manthur* vol. 2, p. 206, *Majallah,* Article 67.
[768] al-Zarqa,*Sharh al-Qawa'id al-Fiqhiyyah,* p.337.

whose chastity impedes her wish to express herself. Her silence is considered a declaration of her consent, as reported by Aisha who said to the Prophet: "O the message of God the unmarried woman shies", to which the Prophet replied, "Her silence is her consent."[769]

Thus, in criminal cases, if an accused is silent when he is being asked to take an oath as defendant, his silence will be deemed a declaration of acceptance of the alleged claim. This is the view of Abu Hanifah and Ahmad.[770] However, Malik and al-Shafi'i[771] oppose that view and assert that the defendant's silence is deemed an objection to the claim. The former opinion considers the silence of the accused a declaration and acceptance of the allegation because the situation warrants an objection to the accusation that the accused is expected to respond to. It is also assumed that the accused is not an introvert who just cannot express himself. In addition, the tradition of the Prophet has laid down the procedure in such cases that the onus of proof is on the one who claims, while in the case of an oath the onus is on the one who denies.[772]

However, the latter view considers the fundamental principle that for someone to be responsible for an action, especially in a criminal case; his expression has to be ascertained. In addition to that, because of the sensitivity of criminal liability, silence is not considered an admission of guilt in criminal cases. Similarly, a dumb person will not be convicted of an accusation, except if he has shown noticeable or identifiable signs that denote his admission. This is referred to by another maxim that states: *Ishārah al-ma'hūdah li al akharas ka al-bayān bi al-lisān* (an identifiable sign of a dumb person is like a declaration with tongue).[773]

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[769] Muslim, *Sahih, hadith* no. 1421, Ibn Hajar al-'Asqalani, *Fath al-Baar, op. cit.*, vol. 9, pp. 199-200.
[770] al-Sarakhasi, *al-Mabsut, op. cit.*, vol. 17 p. 29, al-Kasaani, *Badaa'i' op. cit.*, vol. 6, pp. 224-225, Ibn al-Muflih, *al-Furu' op. cit.* vol. 16, p. 58, Ibn Qudamah, *al-Kafi fi Fiqh Imam Ibn Hanbal* (2nd edn. Beirut: al-Maktab al-Islami 1979), vol. 4, p. 465.
[771] Salih Abdu al-Sami' Al-Azhar, *al-Thamar al-Dānī, Sharh Risālah al-Qayrawānī* (Beirut: al-Maktabah al-Thaqafi, n.d.), p. 605, Muhammad Ibn Ahmad al-Khatib al-Shiribini, *al-Iqna fi Hall Alfaz Abi Shujja ' i* (Cairo : ar al-Ma'arif , n.d.), vol. 2, p. 628.
[772] Malik, *al-Muwatta* Hadith 844.
[773] *Majallah,* Article 70.

7.3 Summary of the chapter

Chapter Seven, being the last chapter, focuses on the effect of utterances in Islamic criminal law. It explains the importance of making expression effective rather than disregarding it. It establishes that the norm is to construe perlocutionary act of speech to have carried real meaning and metaphoric meaning is to be resorted to only if real meaning becomes impossible. And speech becomes derelict if it is impossible to be effected. In any circumstance where speech carries general meaning (*muṭlaq*), that meaning should be stuck to until otherwise proven.

The chapter also explains the norm in Islamic law regarding the implication of speech in a situation whereby one is requested to respond to a question before the court of law. It is a settled rule that an answer should correspond to the question. Though word should not be imputed into the mouth of someone who is silent, but silence where explanation is demanded shall be considered as an explanation. Verdict can be pronounced against or in support of one who is silent where he/she is expected to answer to a question posed to him/her before the court of law.

CONCLUSION

i. General Summary of the Thesis

Islamic law as a subject developed gradually through the emergence of the schools of jurisprudence notably the four *Sunni* and *Shi'a* schools of thought. The primary sources of this law in the first half of the era of Islam were Qur'an and Sunnah. This does not mean that other sources were not resorted to as reported in the narration of Mu'az Ibn Jabal when the Prophet sent him to Yemen as a judge.

Sticking to the literal meaning of the two sources deemed to be hard-line to the idea of universality of the Islamic law. Thus the scholars of Islamic jurisprudence had recourse to other sources such as *'Ijmā'*,(consensus) and *Qiyās*,(analogy) based on and derived from the two sources. Moreover, other terms emerged through extrapolation of the aims and objectives of Islamic law *(Maqāṣid al-Sharī'ah)* to solve novel issues such as *'istiḥsān, maṣlaḥa al-mursalah* etc

The emergence of the subject of *'Usul al-Fiqh* in which many technical terms emerged was an addition hallmark to the intellectuality of the Islamic scholars in those days. These technical apparatus were undoubtedly essential tools devised to solve many of the novel issues in Islamic law. Consequently, Islamic Legal Maxims emerged later as a subject and another intellectual apparatus to unify the scattered thoughts of different schools in their various literatures.

The nitty-gritty of concept of *al-Qawā'id al-Fiqhiyyah* dominates the discussion in chapter two; historical development, the legality, the roles and importance of the subject are extensively analyzed. It is asserted that though *al-Qawā'id al-Fiqhiyyah* have been varied defined by many classical and medieval scholars and their successors but it has been observed that there is no link between their definitions and the core role of the subject. It is not until recent time when, both Kamali and Mawil herald that *al-Qawā'id al-Fiqhiyyah* are to serve the overall of Islamic law (*Maqāṣid al-Sharī'ah)*. This insight create new dimension of how legal maxims could be applied

to the novel contemporary issues which will, without deserting divine texts, foster the tenet of Islamic law.

During the course of discussion on the concept of *al-Qawā'id al-Fiqhiyyah* it is established that the science of *al-Qawā'id al-Fiqhiyyah* is an independent subject of its own as opposed to the view that it is part of science of '*Uṣūl al-Fiqh.* There are other terms and subjects that create illusion to the subject of *al-Qawā'id al-Fiqhiyyah inter alia* are; *ḍābiṭ* and *naẓariyyah.* The former is, though occasionally used synonymous of *qā'idah,* said to be less applicable to some issues in Islamic jurisprudence as it is a principle meant to control a particular subject in Islamic jurisprudence as opposed to *qā'idah* which can be applied to many, if not all subjects and issues in Islamic jurisprudence. As regard to the latter term, the cardinal difference between it and *qawā'id* is that *qawā'id* are coined in a precise phraseology and their particulars need not to be detailed. However, *al-Naẓariyyah* is a novel style of writing details of a particular theme (topic) of Islamic jurisprudence.

Furthermore, the chapter looks at the emergence and development of the subject-matter. It reveals that *qawā'id fiqhiyyah* went through three stages before it became an established subject viz; primitive, florescence and mature stages. In the primitive stage, though there were expressions reported from the Prophet and his companions which later developed into maxims, but these were neither treated as independent maxims nor recorded down as such. Rather, the *Qawā'id* were only memorized by scholars. The second stage is described as landmark in the establishment of the subject, due to the widespread of *taqlīd* (dogmatism or following one school of thought blindly) while the spirit of '*ijtihād* was on the brink of extinction. From there, the subject of *al-Qawā'id al-Fiqhiyyah* was enshrined and literatures on it sprang in different dimensions. The last stage consolidates the efforts of its preceding stages with standardization of the subject.

Though it is claimed that the subject has reached the peak, there are however many vacuums still left unfilled. These vacuums include; studying the subject academically and empirically. The Ottoman Civil Codes (*al-Majallah al-'Ahkām al-'Adliyyah*) appears to be an empirical study of the subject but lacks of academic protocol.

The chapter also enumerates the sources, categories, roles and importance of Islamic legal maxims. The sources of legal maxims are Qur'an, Hadith, *'Ijmā'* and expressions of *Mujtahidun* (scholars who have attained level of *'ijtihād*). Having various sources from which legal maxims are derived necessitate having different categories of legal maxims viz: The grand general maxims (*al-Qawā'id al-Fiqhiyyah al-Kulliyyah),* independent general maxims (*al-Qawā'id al–Kulliyyah al-Mustaqillah)* and topical legal maxims (*ḍawābiṭ)*. We however wish to contend that the topical legal maxims could be classified as legal maxims subsumed under both grand general and general independent maxims as opposed to the prevailing idea of separating *ḍawābiṭ* from others. It is also asserted that the more sources are explored to codify legal maxims, the more the maxim will be powerful and encompassing. It is further established that any maxim derived from the Qur'an and Hadith is regarded as authoritative though it may not enjoy the status of encompassment.

Lastly, in the first chapter, the roles and importance of Islamic legal maxims are firmly resonated. Islamic scholars unanimously agree that Islamic legal maxims play vital role in grasping many issues scattered in the books of jurisprudence and aiding judges in comprehending the basic tenet of Islamic law on any contentious issues; yet whether or not legal maxims could be used as primary evidence in giving verdict in Islamic law has for long been an issue generating heated debate among them. Our submission is that if a legal maxim is derived directly or indirectly from the texts (i.e Qur'an and authentic *hadith*), or from sound consensus or completed analogy, there is no doubt that such maxim is sufficient to be used as basis of judgment.

The contents of chapter two to seven constitute the central part of this research. The emphasis in chapter two is the need to examine the intention of a culprit before passing verdict and awarding punishment to him. Failure to consider the intention in Islamic criminal law could lead to injustice being perpetrated against the innocent.

Intentionality in Islamic criminal law ranges from overt expressed utterances of perpetrators which could be in forms of confession, defamation and blasphemy to physical objects used for committing a crime. For the overt expression, there is need

for further clarification in the case of straight forward and clear grammatical usages. Problem would only arise when the language used to express criminal act is ambiguous. In that case, to determination of commission of a *ḥudūd* or *qiṣāṣ* crime would also become a matter of controversy.

The question generated from the object form of criminal intent is that since the object mentioned in the tradition of the Prophet confined stick as a yardstick to infer criminal intent of alleged perpetrator in homicide crime, can this be extended to cover other modern means of killing such as chemical weapons, gun, missiles etc? The opinion given in this thesis is that since Islam is a universal religion and its law is universal, it should accommodate all means of killing since the aim and the result are the same.

There are some tactics used to make criminal offences doubtful such as *jahālah* (ignorance), *'ikrāh* (duress), *nisyān* (forgetfulness) etc. All these tactics are imbed in the discussion on maxims in chapter three

The third chapter examines the effect of doubt in certainty. It is affirmatively propounded that certainty cannot be repelled with doubt. In the doctrines of scholars of *fiqh* and *'uṣūl, al-yaqīn* is considered as a strong proof while *al-shakk* is lower than that of *yaqīn*. Though scholars of *fiqh* attempt to elevate *al-ẓann* (probability) which is a category between *al-yaqīn* and *al-shakk* to the position of *al-yaqīn* since it is unlikely to obtain certainty in all cases. However, *al-ẓann* cannot be accepted as substantive evidence in criminal cases which involve solely the rights of God.

In criminal cases where there is contradiction between certainty (termed *al-Aṣl)* and apparent (termed *al-ẓahir)*, apparent may take the rule because it is closer to justice and the spirit of Islamic law. The ruling of certainty should be given continuity until otherwise is proved. This elucidates the maxim referred to as *actori incumbit onus probandi* or principle of presumption of continuity. That is why it is inline with natural justice to ascribe criminal occurrence to its nearest point in time.

Under the rule of certainty, there is unresolved issue on the originality of things; are they originally permitted or prohibited? The position of scholars is of three varying

folds namely: permissibility, prohibition and middle course (*tawaqquf*). The relevance of discussion on this issue is to identify what is '*aṣl* (certainty) which if committed would not amount to incrimination. If it is accepted that the fundamental principle is that things are originally permissible (*mubāḥ*), then it follows that the commission or omission of any action other than the one explicitly prohibited or made compulsory by texts would not be criminalized.

Shubha (doubt) is also said to be another mechanism in diminishing the strength of *ḥudūd* punishment as the maxim states *al-ḥudūd tudra' bi al-shubhāt* (capital punishment should be averted in the face of doubt). It is argued in this thesis that not only the predetermined punishments (*ḥudūd*) could be averted in the face of doubt but also the *qiṣāṣ* (retaliation) because both have serious damaging effect on the alleged culprit.

One is assumed to be innocent of any accusation until otherwise will be proven. Any allegation that lacks of credible evidence shall not be entertained. Any iota of doubt plunged into evidence shall render such evidence invalid. However, it may be difficult to attain certainty in all cases, thus, where a case involves the right of a person, it is espoused that circumstantial evidence should be sought for in order to regain the right of a person involved.

Chapter four details the stand of Islam in considering hardship as *raison d'etre* in creating facility for human beings. The chapter enunciates not only those factors that necessitate giving facility, but also demonstrates how these factors can be utilized in criminal cases. In any case, the emphasis in this chapter is that in any dire situation, there is facility to redeem the right of not only the victim but also the culprit.

The right of a victim can never go in vain because *al-iḍṭirār lā yubṭil ḥaqq al-ghayr* (necessity does not invalidate the right of other). However, if another person's right is violated because of *ḍarūrah,* generally the perpetrator would not be punished under the provision of *al-ḍarūrāt tubīḥ al-maḥẓūrāt* (necessities render unlawful things lawful. However, any excessive use of this provision will necessitate incriminating the perpetrator because *al-ḍarūrah tuqaddar bi qadarihā* (necessity is estimated according

to its quantity). While there are three categories of provisions aimed to facilitate lives of human being viz; necessity, need and luxury, the second one is graded to the level of necessity for both individual and public because at times they are inseparable.

Chapter five has elucidated the position of Islam in prohibition and elimination of *ḍarar* whether in terms of aggression or in reciprocal. It is a settled rule in Islam that harm must be removed. In removing it, there are two major conditions that must be observed. (1) *ḍarar* must not be removed by its like (2) greater *ḍarar* could be prevented by committing lesser *ḍarar.*

However, if there are two things and the *ḍarar* in both is of the same level, the other way to decide which one to be given preference is to look at their structure. If one is of prohibitive injunction and other is of permissible, thus, preference will be given to prohibitive one over the permissible based on the maxim that says: *idhā ta 'āraḍ al-māni' wa al-muqtaḍī yuqaddam al-māni'* This is because, in Islamic law, it is an established principle that "preventing evils is better than acquiring benefit" (*Dar' al-mafāsid awlā min jalb al-maṣāliḥ)*

Chapter six explains the legality of custom in Islamic legal system and how it affects the way legal rulings change according to the time and circumstances. It is discussed in this chapter that the custom given authority could be '*amalī* or *qawlī* (practical or verbal respectively) and that some maxims are explored to that effect. In any case, whether custom is practical or verbal, there are certain conditions which must be met before custom can be given significant effect. The conditions are that the custom must not contradict explicit texts while it must enjoy regular occurrence and must be universally prevailing.

The last chapter focuses on the effect of utterances in Islamic criminal law. It explains the importance of making expression effective rather than disregarding it. It establishes that the fundamental principle is to construe locution of speech to have carried real meaning and metaphoric and that metaphoric meaning is to be resorted to only if real meaning becomes impossible; and that speech becomes derelict if it is

impossible to be effected. In any circumstance where speech carries general meaning (*muṭlaq*), that meaning should be stuck to until otherwise is proven.

The chapter also explains the norm in Islamic law regarding the illocutionary act of speech in a situation whereby one is requested to respond to a question before the court of law. It is a settled rule that an answer should be correspondent to the question. Though words should not be imputed into the mouth of someone who is silent, but silence where explanation is demanded shall be considered as an explanation. Verdict can be pronounced against or in support of one who is silent where he/she is expected to respond to a question posed to him/her before the court of law.

In the cause of carrying out this research, certain observations are made which require suggestions and recommendations for future and further researches. Such observations and our recommendations are as follow:

- There are insufficient English materials on Islamic Legal Maxims. Even the available ones have disparity and deficiency in translation. Thus, it will be of general advantage to standardize the translation of Islamic Legal Maxims.
- There is need for application of Islamic Legal Maxim to some other field of Islamic jurisprudence such as Islamic family law, Islamic politics and Islamic Transactions. We here wish to acknowledge the efforts of al-Sawat and al-Nadwi who have both written books on the applications of legal Maxims in Islamic family law and Islamic transactions respectively. Yet, those books do not enjoy wide readers because they are mainly in Arabic while they also do not consider contemporary issues in their application. This is a very serious vacuum that needs be filled
- In many Islamic countries that implement full or part of Islamic law, there is need to consider the overall objectives of Islamic Law (*Maqāṣid al-Sharī'ah*) in dealing with some sensitive issues posed on Islamic law either internally or externally. Some of the ways in doing so is to inter-textualize the textual evidence of Islamic law to extrapolate the wisdom of Islam and its overall objectives in legislation. Undoubtedly, Islamic legal Maxims have some of

these features and undermining them will be deemed as undermining very useful tools in achieving this noble goal.

ii. General Survey of the Cases Judged in the Northern Nigerian *Sharī'ah* Implementation in Lights of Islamic Legal Maxims

This research has exposed some criminal cases worth investigating and criticizing in the light of the Islamic legal apparatus "*al-Qawā'id al-Fiqhiyyali*" (Islamic legal maxims). Our finding has revealed that some scholars and judges in Northern Nigeria refute the existence of legal maxims in Islamic law. This has contributed to some irregularities and miscarriage of justice in some cases brought to the *Sharī'ah* courts.

The seven basic legal maxims treated in this thesis pose question of whether the overall of the objectives of *Sharī'ah* has be observed in the criminal procedures of the cases brought before the *Sharī'ah* courts of those states implementing *Sharī'ah*. The first legal maxim is the corroboration of intention with action. Without doubt Islamic criminal law attaches importance to the assessment of the intention of an accused person before an appropriate punishment can be decided. This is because if one were to be punished unlawfully, it is possible that the punishment may cause irreparable damage.

The cases of Amina lawal *v.* Katsina, Safiyyatu Husseini *v.* Sokoto and Bariya Magadisu *v.* Zamfara States of Nigeria[775] could be argued on the basis of lack of intentionality in committing the alleged offence. This is because they live in a society where traditional practices, norms and values have significantly intertwined with the Islamic Legal tenets and produced sometimes legal results which are fundamentally outside Islamic law.

The accused persons were villagers and as such, they might not have intention of violating the Islamic rules, but rather, following the dictate of the society they live in. It is the responsibility of the courts as representative of the Government to verify this core objective of Islamic Law; criminal intent before passing any *ḥadd* punishment on

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[775] See Amina Lawal vs. Kastina State Government in Northern Nigeria Law Report 2003 p. 496, Human Rights Watch, *Political Shari'ah op. Cit.* p. 35, Safaiyyah vs. Sokoto State Government case can be found in Human Rights Watch , *ibid*. p. 34 See Bariya's case at Human Rights Wath, *ibid.* P.61, and appendix 9. The first two accused were eventually acquitted while the last accused was flogged in public. Among the reasons for acquitting the two accused women was that they were ignorant of the fact of the law, as will be explained in the following maxim.

them.[775] Had criminal intention been investigated properly, those accused women might not have been convicted in the first instance; moreover, Section 63(2) of Kastina State Sharia Penal Code Law 2001 provides that one shall not be found guilt of an offence without criminal intention.

In the case of Attorney General of Zamfara State (complainant) *v.* Lawal Akwata R/Doruwa (defendant), the defendant was charged on suspicion of committing defamation against one Ibrahim Sabo which is an offence under section 323 of Sharia penal code of Zamfara State. During the trial, the locutionary act of the defendant could not be ascertained; this is because the two witnesses could not establish the abusive phrases. Thus, his intention to have allegedly abused the offended person is uncertain. However, upon that, the Upper Sharia Court handed its judgment by convicting the defendant and sentenced him to six months imprisonment or #10,000.00 (Ten Thousand Naira). The justification for the ill-conviction is doubtful and unknown.[776]

The reports of Human Rights Watch that dozens of theft related cases have been judged in some of the Northern States of Nigeria during the period of re-enforcement of *Sharī'ah*[777]. According to the Human Rights Watch reports and a hard copy of the case obtained by the researcher, Jangebe, who was convicted for theft, refused to employ the service of a lawyer. He adamantly wanted the amputation of his hand to be executed. All efforts by the Governor to relieve him of the punishment were to no avail.[778] In situations such as this, it becomes pertinent to ascertain the sanity of the accused. Sanity is one of the criteria to be looked at to identify intentionality of a criminal act. In Buba Bello Jangebe's case, it could be strange materially that one in his right senses will commit a crime and yet confess to it knowing full well that its consequence is permanent deformation. But in actual fact, it is believed in Islam that for one to be punished of his/her crime in this world prevents him/her to be punished in the hereafter. However, failure of the court to ascertain the mental status of the

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[775] See Aliyu Musa, *issues in defending Safiyyatu Husaini and Amina Lawal* in Jibrin Ibrahim *op. cit.* p. 201 and the submission of the counsel to Amina Lawal see NNLR 2003 p. 496 where it is reported that Amina claimed to have been deceived by her cohabitant. Having claimed deception in committing the alleged act has rendered the action unintentional.
[776] See appendix 6 for the details of the case.
[777] Human Rights Watch *op. Cit.* p.36.
[778] *Ibid.* P. 38

accused puts detriment on the validity of the conviction. Albeit, Jangebe's case was one of the first cases tested under the re-enforcement of full *Sharī'ah* penal law in the Northern Nigeria; and that perhaps might account for why all these strategies were not taken cognisance of.

In contrast, intentionality in committing theft was observed in Isiya Alh. Aliyu and others *v.* State (Zamfara). The said accused persons were convicted of stealing 3½ sacks of Millet from Alhaji Danjimma' s house. During the first trial, the accused were convicted of theft and sentenced to amputation of their right hands by Upper Sharia Court, Gummi, Zamfara State. The accused persons appealed and their appeal was successful on many grounds *inter alia* that the prime accused (Isiya) has been given free access to the house where the property was claimed to have been stolen. Thus, perhaps, he may think that the prior permission stands as authorization to take from his friend' belongings and as such, that assumption rendered his action unintentional.[779]

The second legal maxim is the implications of *shakk* and *shubhah* to certainty in Islamic criminal law. This can be found in many discussions on criminal penalties and liabilities in Islamic literature. Although the approach of each school in applying the maxim may be different, there are some aspects that are common to all of them. In the case of defamation, for example, if someone accuses another falsely of being unchaste and the accused denies this but refuses to take an oath before the court, the accused will not be punished with *ḥadd* because the issue attracts *ḥadd* and the fundamental principle is the innocence of the accused.[780]

In the case of Shalla and others *v.* State, the accused were found guilty of murdering their victim; Abudullahi Alhaji Umaru on a mere information that the victim insulted the Prophet. The utterance of insulting the Holy Prophet was not said in the presence of appellants (Shalla and others who lodged appeal against the decision of High Court of Kebbi State). In other words, there was no certainty in what appellants considered to be defamation of the Prophet before they assailed the man and murdered him.[781]

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[779] See Appendix 1
[780] Ibn Qudamah, *al-Mughni op. cit.* vol. 12, p. 409.
[781] Weekly Law Report of Nigeria 30, August 2004 p. 47

To emphasize on the importance of certainty in Islamic criminal law, the learned Judges in the above case affirmed that:

> It is also a settled law that a provocation act or utterance offered or reported by one person cannot be a ground or jurisdiction (justification) for killing a third party (or person) who did not offer the act or was not heard to have uttered the alleged words against the accused person.[782]

Of course, it is a principle in Islam that information spread against someone must be ascertained before action can be taken against the accused.

If a group of people steals a property, the *ḥadd* punishment will be dropped because of *shubhah*. The *shubhah* in this case is that if they were all to be punished with *ḥadd*, there would be an injustice because if the value of the stolen property were to be shared equally among the thieves, what each of them would gain would be less than the minimum value of stolen property that is adjudged to attract *ḥadd* under the law. If one of the thieves were punished, then he would be a victim of injustice.

It is a settled rule in Islamic criminal law that if group of people involved in stealing a property and the share of each one of them in the value of the property is less that the *niṣāb*, *ḥadd* punishment should not be applied but rather, *ta'zīr*. This is because of uncertainty of whether the accused persons have committed a crime attracted *ḥadd* punishment. This is the opinion of Hanafites, supported by Ibn Qudamah of Hanbali school, while other Hanbalites hold the view that all should be punished with *ḥadd*.[783]

In most theft cases judged under the full implementation of *Sharī'ah* in the Northern States of Nigeria, there were absence of certainty in the value of *niṣāb* before the courts declared the amputation of the thieves' right hands. Take for instance the case of Hashimu Galadima Maberaya (complainant) *v.* Abdul-Rahman Isahaka and two others (defendants). In that case, it is observed that the total amount of the allegedly stolen property by the accused persons was #12,328.00 which was equivalent to $102. The value of gold then was $862.15 of which its ¼ was $215.53. The exchange rate of dollar was $1 = #120. Thus the *niṣāb* for which one can be convicted of theft in

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[782] *Ibid.* p. 51
[783] *Ibid.* vol. 12, p. 468.

Islamic law then would be $215.53 multiplied by #120 (Naira) which is equal to #25,863.6 (twenty five thousand, eight hundred and sixty three Naira, six kobo). Thus, this figure shows that the total amount of the value of the stolen stuff had not reached *niṣāb* for theft in Islamic law for a single person not to say two accused if the amount were to be divided. Despite that the accused were put in the prison between 20th of February 2002 to 6th July, 2002 and subsequently, their rights hands were chopped off. Indeed, if the certainty of the value of the stolen stuff were thoroughly investigated, their hands should not have been amputated.[784]

In contrast, the case of Jamilu Isaka (complainant) v. Abukakar Abdullahi Kaura (defendant)[785] reveals that showing the investigating officers where the stolen property was kept, and indeed retrieving the property where it was kept constitutes element of certainty that the accused person intentionally committed the act of theft which is punishable in Islamic law with amputation. But, what may not be ascertained in this case is whether the accused was tortured before his confession.

Undoubtedly criminal investigation is necessary in this case because it involves right on human being. But when the right of man has been returned, is it necessary to carry the prescribed punishment? It could be said that all the provisos for convicting the accused are being fulfilled; the stolen goods were recovered from where the accused kept them, photography was taken while he was retrieving the goods, two police officers testified to his confession during the interrogation and the amount of the stolen property reached *niṣāb;* #30,350.00 (thirty thousand, three hundred and fifty Naira) which is equivalent to $252.91. Thus, the judges convicted the accused person and his co-offender under the provision of section 144 punishable under section 145 of Zamfara State Sharia Penal Code 1999 (ZSSPC 1999)

In Attorney General (Zamfara State) *v.* Surajo Mohammed's case, there are similar irregularities, not only on the basis of lack of requirement of *niṣāb* but also on the procedural error. Surajo Mohammed was accused of stealing a she-goat worth

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[784] See Appendix 7 for the details of the case. The same argument is observed in Attorney General (Zamfara State) *v.* Ibrahim Suleiman. The accused person is convicted of theft under section 144 punishable under section 145 of ZSSPC 1999) The total amount of what it was reported to have been stolen was #21000.00 equivelent to $175 while the *nisab* was estimated as $215.53.

[785] See Appendix 2 for the details of the case.

#2,200.00 (two thousand and two hundred Naira only) by the first valuer and #1,800.00 (one thousand and eight hundred Naira only) by the second valuer.[787] The decision of Upper Sharia Court (USC) of Gusau Zamfara State of Nigeria was taken to the appeal court. During the appeal, it was learnt that the appellant was suffering from mental derangement. Beside, his lawyer observed that criminal procedures were violated during his cross-examination. The counsel for the appellant submitted that the USC erred in law for not producing witness for the confessional statement on which the conviction was based. But the respondent counsel rejected the submission on the ground that witness to confession is only needed in civil matter and not in criminal matter as stated in the book of Islamic jurisprudence of Malikite school.[788]

Since the conviction was based only on confessional statement which has been considered non-compliant with rule of justice, it would be suggested that the appeal should be granted in accordance with the traditional statement which states thus: *you should avoid executing judgement if there exist doubt no matter how minute.*[789] We however wish to commend the wisdom of the Honourable Kadis of the Sharia Court of Appeal, Gusau, Zamfara State, who vividly studied the argument of each party and concluded that there were irregularities in the procedures of the USC and thus quashed its decision.

Some modern Islamic writers have suggested that modern methods of crime detection such as DNA, laboratory analysis, photography and sound recording could be used in establishing criminal offences, instead of claiming *shubhah*. They claim that those means are more reliable and efficient than verbal testimony.[790] One of the reasons on which this assertion is based is that the means of securing the objectives of Islamic law are 'flexible and remain open to consideration.' This hypothesis could be used in the case of Amina Lawal, Safiyyatu Husseini and Bariya Magadisu. Since the crime

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[787] See Appendix 4 for the details of the case.
[788] As stated in al-Adawi p. 307.
[789] See appendix 4 p 6, Cf. Dahiru Gambo (Appellant) *v.* State (Respondent) (Kano) where the value of the stolen property was valued at #3000.00 (three thousand naira) and the Upper Sharia court sentenced the accused to 2 years imprisonment and 50 lashes. However, the convicted person appeal against the judgement and his appeal was succeeded (see Appendix 10)
[790] Noorslawat, Sabtu, *The Basic Principle of Shari'a for the enforcement of hadd punishment for theft* (Birmingham UK, Birmingham University, M. A. dissertation 1977) pp. 16-17.

of adultery can never be committed unilaterally, and the co-accused persons in the three cases denied their involvements in the allegation, it would be worthwhile to suggest using modern evidence to ascertain the genuineness of the allegation; and not ascribe *ḥadd* punishment indiscriminately on these helpless women.

In Bariya's case, the learned judges based their verdict on her confession and appearance of pregnancy. The first point of observation is whether pregnancy can be used to convict a single lady of fornication or not.[790] As earlier argued, there is no evidence to support acceptability of pregnancy as reliable evidence for fornication. Among the schools of jurisprudence, only Malikites accept such circumstantial evidence as proof of fornication while others have contrary view.[791] The reasons why pregnancy cannot be accepted as evidence for fornication among others are: it only proves evidence of intercourse not of consent because; a woman could be raped while she was conscious or unconscious. She may even have impression that that contract is legitimate as temporary marriage which is considered lawful by some *shī'ah* and as reported by Ibn Abbas. It may also be that she is one who does not consider the consent of the guardian as a condition for the validity of marriage contract, thus she gave herself for marriage without the consent of her guardian (*waliyy)*. Or, she became pregnant without coitus in which case a man's sperm goes through her vagina by means other than sexual intercourse as debated on Nigerian Television Authority (NTA)' Newsline of Sunday 18th March 2001 where a ten year old virgin girl was said to be pregnant.[792] All these constitute *shubhah* against the acceptability of pregnancy as sole evidence to convict a woman of committing adultery or fornication.

The second point of observation of the learned judges in Bariya's case is whether in such case, the confession of an accused person could be taken without given right of retraction or benefit of doubt. It is reported that the Prophet gave Ma'iz the chance to retract his confession as well as *al-Ghamidi* when both came to him confessing their guilt of adultery. Throughout Bariya's case, there was nowhere the judges

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[790] Class gender and the political economy of Sharia...online at http://www.nigerdeltacongress.com/carticles/class%20gender%20and%20the %...03/05/04) p. 4 of 7)
[791] Ibn Qudamah *al-Mughni* vol 10 p. 192, M. Abu Hasaan, *Ahkam al-Jareemah wa al-'Uqubah fi al-Shari'ah al-Islamiyyah* pp. 257-258.
[792] Class Gender and the Political economy of Sharia *op. cit.* p. 5 of 7

systematically gave her the benefit of doubt or introduced to her right of retraction as the Prophet did for the two companions.

Third, if the co-accused persons have denied their involvements in the alleged crime, should Bariya alone be convicted based on the two evidences knowing full well that a single person could not commit such crime. To this, it could be said that during the life of the Prophet, there were many instances that single persons were punished for adulterous acts. The bottom line is that, it is possible to convict a single person on the ground of valid evidence of which confession is one. But, since there is allegation of doubt in the procedure from which the confession was deduced, thus, the verdict is considered invalid.

In Safiyyatu's case, one of the reasons given by her counsels was that the actual date, time and where the offence was committed were not stated in the court procedure. This legal procedural error and others cast gnawing doubt on the credibility of the verdict.[793] Also, the issue of acceptability of pregnancy as evidence to convict an accused is contestable and tainted with doubt. Even in Malikite school of thought, one may conceive pregnancy lasting for seven years, thus, Safiyyatu might have conceived her pregnancy when she was in the custody of her former husband and there was no evidence to prove otherwise before the court handed its judgment.[794] In other word, it is possible that the baby which Safiyyah gave birth to could be fathered by her former husband. All these constitute what the *Sharī'ah* terms as *shubhah* which must be considered in averting *ḥadd* punishment.

In Aminal Lawal *v.* State, there is a contention on whether a retraction of confession made by accused/defendant representative is acceptable or not. It is reported that the representative of Amina Lawal made retraction of her confession at Upper Sharia Court, Funtua. But this retraction was dismissed on the ground that it is made not by the accused /appellant. This disagreement will lead us to inquire into the *locus standi* of legal representative and his action, and to investigate whether retraction can be made even at the last minute before the execution of the sentence. For the latter, it can

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[793] Aliyu Musa Yawuri, "issues in defending Safiyyatu Husseini and Amina Lawal", in Jibrin Ibrahim (ed.) *Sharia Penal and Family Laws in Nigeria and in the Muslim World: Rights Based Approach,* (Nigeria: ABU Press Limited, 2004) p.196 .
[794] Peters Rudolph, *re-Islamization, op. Cit.* p. 236,.

be inferred from the word of the Prophet when Ma'iz was chased by his executors, "why not you leave him, perhaps, he may repent" that retraction of confession in such case (adultery) is acceptable. For the former, the action of legal representatives is as if it is done by the sole concerned person and restricting acceptability of retraction of confession to the accused alone will undermine the essence of legal representative.

Albeit, as a result of the arguments that trail the basis for Amina's conviction, the judges should have taken cognizance of the objective of Islam and as such consider the allegation doubtful and consequently avert the *ḥadd* punishment.[796]

Furthermore, the legal procedure followed in Amina's case also casts doubt on the credibility of the allegation. In the response of the Sharia court of Appeal, Kastina, the learned judge poses some credible questions to discredit this allegation:

i. Why did these police men, who witnessed an offence being committed before their eyes failed to arrest the accused until after 11 months? (This is inferred from the case filed against the two accused persons, in which it is stated that they were in cohabitation for 11 months)
ii. Notwithstanding the knowledge of the policemen that Amina and Yahaya committed the alleged offence for a period spanning 11 months, did the accusers catch them in the actual act of (ZINA) or were they informed? [797]

It is remarkable to state that doubt may be created in an admission where the admission has lost any of its validity.

It is important in Islamic Criminal law and its procedure to call for witness in the case where confessional statement is the sole evidence in convicting accused person. This is referred to in Isiya and others *v.* State[798] where the USC relied on their confession. The accused persons denied the confession, thus the evidence deduced from it was nullified on the basis that the USC failed to call for witnesses during the trial as

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[796] Northern Nigerian Law Report (NNLR 2003, p. 498
[797] See NNLR 2003, pp. 498-499
[798] See Appendix 1 for the details of the case

required by law. In rejecting the decision of USC, the learned judges referred to what is stated in *Bahaja* vol. 1 p. 137: "Conviction of an accused cannot stand without the testimony of just witnesses." Not only this, inconsistency in what is written in the court procedural book p.5 para 14 casts doubt on the evidence relied upon in convicting the accused persons.

The third legal maxim considers the effect of hardship in criminal law and the provision of facility given to the perpetrator. As discussed earlier that, under the maxim of giving hardship provision of facility, illness and general necessity among others are factors that warrant facility for the perpetrator in Islamic criminal law. These factors are undermined in some cases judged under the full implementation of *Sharī'ah* in Northern Nigeria. Take for instance, in the case of Abukakar Abdullahi Kaura (defendant) *v.* Jamilu Isaka B/Magagi (complainant), the Upper Sharia Court K/Namoda found the defendant guilty of theft. It was reported that the said accused, on the 20th of November 2000 at about 3:30 am, broke into a shop belonging to the complainant and stole stuff of clothes worth #30.350.00 (thirty thousand, three hundred and fifty Naira). But however, in this case, it is observed that the accused person would have been given lesser punishment (*ta'zīr*) instead of amputation of his right hand, as decided by the court, because of his conditions. He explained before the court that he was ex-prisoner and a family man without means of sustenance; and perhaps, he might have had mental ailment as a result of his long stay in prison. All these constitute what could be termed as hardship that warrants facility in Islamic criminal law.[798]

Similarly in the case of Commissioner of Police (Zamfara State as Complainant) *v.* Buba Bello Jangebe (Defendant), facility given to ignorance of the fact of law was undermined. The accused person was convicted of theft of a cow in the earlier years of re-introduction of Islamic penal law in the Northern Nigeria. On 21st February, 2000 he was charged for conspiracy and stealing of a cow belonging to one Dan Mande Matuna. It is astonishing that, the accused person was arrested by vigilante group not by the owner of the cow. Also, it was policeman Shafi Garba who prosecuted him instead of the owner of the cow. If the theft crime will be considered

[798] See Appendix 2 for the details.

as right of man, it will be legally inappropriate for the accused to be charged since no one complains of the crime. However, if the crime were to be accessed as right of God, then, the property needs not to be returned, and perhaps, punishment would not be meted. But, in digesting the case, it is not clear in which way, the case is viewed.

Our observation concerning the case is that, since the case was one of the first cases tried under full implementation of Islamic penal law, there were irregularities in the legal procedures from the outset which account for many erroneous judgments. Apart from that, it was claimed that the herdsman was ignorant of the fact of the law, which is one of the factors that render punishments of offences of that nature abated. In addition to that, there were no adequate infrastructures in place to enlighten the public on the severity of the punishment as a result of their confession to such crimes. The poverty level of the people in the society before the re-enforcement of *sharī'ah* could also be a justification for the claim of necessity leading to the commission of the crime. If sanity had fully returned to the society before the introduction of the penal codes, perhaps people like Jangebe and others might have not embarked on such vicious crimes.[799]

The prohibition and elimination of *ḍarar* in Islamic criminal law is also given less consideration in some of the cases judged under Northern *Sharī'ah* Law. Islam denounces any unnecessary infliction of harm and injury. It prohibits any unjust affliction of punishment and penalty on human beings. It also strives to eliminate the occurrence of such *ḍarar* whether it occurs through aggression or in reciprocal. If that is one of the overall objectives of Islam, some of the cases judged in the Northern Nigeria during the re-enforcement of full *Sharī'ah* will be subject to criticism.

In the case of Attorney General of Zamfara State (complainant) *v.* Lawal Akwata R/Doruwa (defendant), from the literal meaning of the maxim and it source, this case could be considered as inflicting unnecessary harm on someone. The prosecutor was not directly involved in the dispute. The direct victim has forgiven his accused person.

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[799] See Appendix 8 for the details of the case and Opeloye, Muhib O. , *The Sustainability of Shariah in a Pluralistic and Democratic Nigeria,* 5th Faculty of Arts Guest Lecture Series, (Lagos State University 24th August 2005)

In fact, he did not initiate any case but rather, one Lawali Sani Dauda on behalf of commissioner for justice Attorney General of Zamfara State that lodged the case. At the end of the trial, the Upper Sharia Court found the accused guilty of the offence and sentenced him to six months imprisonment or #10,000.00 (ten thousand Naira = $83.33). However, putting the suspect in prison for such a petty offence is another unjust inflicting of harm on a person.[800]

Similarly, in the case of Hashimu Galadima Maberaya (complainant) *v.* Abdul-Rahman Isahaka and two others (defendants), it is observed that the total amount of what those accused persons were alleged to be stolen was #12,328.00 (equivalent to $102). Putting those accused in the prison between 20th of February 2002 to 6th July 2002 and the judgement of amputation does not commensurate with their offence. Thus the handed punishments are considered as inflicting unjust punishment on them.[801]

In the case of Bariya, to eliminate the harm she might have suffered as a result of allegation of defamation imposed on her and the demands of her co-accused, alleging them of fornication; it could be worthwhile to consider DNA. Of course, to determine the right of human being which attached to the case would be in the best interest of Islam in establishing justice among mankind. Thus, DNA must be accepted to clear the air for Bariya not to be convicted of *qadhf.*

When there is contradiction between *al-yaqīn* (certainty) and *al-ẓāhir*, (apparent) such as the appearance of pregnancy and a claim of the absence of four eye witnesses in the case of adultery, the best interest of Islam would be to establish whose rights are involved in this case. If there is no allegation of rape in such a case, the higher proof would be accepted; that is four eye witness in order to eliminate the *ḍarar* in executing the *ḥadd* punishment. That is why, to me, considering pregnancies in cases of adultery is less privileged to Islamic law since no human right is attached to the crime.

Also investigating cases like adultery, drinking alcoholic and apostasy - if they were not committed publicly - can be considered as infringing on human rights since those

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[800] See Appendix 6
[801] See Appendix 7

offences do not affect human beings directly. In other words, any crime that does not directly involve human rights is not subject to investigation, and investigating it is considered as inflicting undue *ḍarar* on the accused. In Bariya v. Zamfara police, Safiyyatu v. Sokoto State and Amina Lawal v. Kastina, the way their cases were reported was considered to be impinging on the rights of the accused persons, which is considered to be inflicting harm on them.[803]

It is argued that challenging Amina Lawal of conceiving pregnancy is an act of inflicting unwarranted harm on her, since it is a settled law even in Malikite school that "a woman may carry pregnancy for five years before delivery."[804] Thus, Amina Lawal divorced her former husband less than five years ago, (at the time of the case) it gives her the provision of benefit of doubt.

The fifth legal maxim centralizes on authoritativeness and effects of custom in Islamic criminal law, if an accused believes that the custom of the land permits him to take certain amount of goods from his/her host's property without intending an offensive act, he shall not be convicted of a criminal act. In Isiya and others, (appellants) *v.* State, (Zamfara, as respondant), the appellants believed to have been given free access to the accuser's house. This is one of the arguments put forward to the appeal court before the appeal was granted.[805]

Under the use of language in a particular custom, it was argued that since Safiyyatu Huseini is a Hausa native speaker, it is the responsibility of the court to explain the meaning of *zina* and its conditions and what the *Sharĩ'ah* penal code says about it and the consequence of committing the offence. In other words, since Safiyyatu does not speak Arabic, to justify the validity of the verdict, the word must be interpreted into her customary language.

But this has been rebutted by the co-judge in Amina *v.* State where it was remarked that the term *zina* "is no longer an Arabic word. It is basically Hausa word. As such

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[803] See the submission of Safiyyatu Husaini's counsel in Rudolph Peters, *Re-Islamization.. op. cit* p. 241

[804] See NNLR 2003 p. 496

[805] See Appendix 1

Hausa people have no suitable word than this."[806] Of course, the word *zina* has been localized and it could be very hard to prove that Muslims do not know the connotation of the term. However, it could also be argued that while the term is known literally, the legal ingredients and consequences may be unknown to the vast majority of Nigeria Muslims.

In Amina Lawal's case, there is the assumption that Amina accepted sexual intercourse with Yakubu[807] in the belief that custom allowed it. The *modul operands* before the full implementation of *Sharī'ah* was to give consent before proper marriage[808]

The last maxim studies the stand of Islamic law on the effect of locution. There are many ways to explore the maxims of effect of expression in Islamic Criminal law especially in the scenarios of implementing penal codes of Islamic law in Northern Nigeria. Before the implementing full *Sharī'ah* law in this region, it could be assumed that the *Sharī'ah* legal terms had faded out in domain and that people might not be *au fait* with consequence of crimes committed. Take for instance the cases of Safiyyatu Husseini, Bariya Magadisu and Amina Law, it was reported that the accused women confessed to the adulterous crime in the trials of first instance. In addition, they all claimed to know the meaning of *zina.* That statement of confession and claim of knowledge of the meaning of *zina* must be effected by the judges and indeed that was what happened. For the courts to decline the statements and render the claims ineffective, will form the basis for a bad judicial precedent. In page 2 para 3, of Bariya case, it is stated that when Bariya was asked whether she understood the charge "she said I heard what they said and it was true I was pregnant and it was Ado Mamman Sani and Hamisu that committed adultery with me."[809] And in para 6 of the same report, the court asked Bariya whether she understood the meaning of *zina* and she replied "Yes I know."[810] Her utterance locutionarily denotes a statement of confession which must be taken into an account by the court. But, her co-accused

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[806] See NNLR, 2003, p. 513
[807] Her co-accused who later denied the accusation and was discharged on unfounded evidence to convict him)
[808] See Aliyu Musa, *Issues in defending Safiyyatu Husaini and Amina Lawal, op. cit.* p.197
[809] Appendix 9 p. 2
[810] *Ibid.* P. 2 para 7

persons denied the accusation. When one of the co-accused was asked whether he understood the charge against him he replied "I heard but it is no true, I did not commit adultery with her."[811] The maxim says "*lā yunsab li al-sākit qawlun*" (word shall not be imputed to one who is silent...). That is why it was difficult to convict all the co-accused.

However, in an in-depth study of the case, Bariya did not unequivocally say that she committed adultery. Rather, what she said was that she was pregnant; "It was true that I am carrying pregnancy."[812] This also negates the maxim prohibiting imputing word of confession into her mouth because *lā yunsab li al-sākit qawlun* (No word shall be imputed to one who is silent...).

However, while the court considered the implication of her statements, knowing that a single person cannot commit such crime, it should have considered the invalidity of her statement based on the fact that *idhā ta'adhdhara 'ihmāl al-kalām yuhmdal* (If giving an effect to a speech becomes impossible in any way it will be disregarded). Thus, the way to establish justice in this case is to cast doubt into the evidence so as to mitigate the punishment of *zina* when all the co-accused persons could not be convicted.

Furthermore, in the case of Shalla *v.* State, in which some people were accused of murder of one Abdullahi Alhaji Umar of Ranadali Village in Kebbi Local Government, Kebbi state because of a rumour that the victim (Abdullahi) insulted or defamed the Holy Prophet. At the High court of Kebbi State the people were charged with criminal conspiracy, abetting and culpable homicide punishable with death contrary to sect 85, 97, and 221(a) of the Penal Code of the Federation. The convicted culprits appealed against the judgement of the High Court. One of the bases of their appeal was that the High Court failed to consider the claims of justification and provocation available to the appellants before convicting them. In rejecting this ground of appeal, the learned judges dismissed issue of provocation because the claim of provocation is only acceptable if the act or utterance by the deceased was made directly against the appellants. It is a settled rule in Islamic criminal law that to rule

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[811] *Ibid.* P. 2 para 4
[812] Appendix 9 p. 2 para 3

against someone for insulting God, His Prophet or any angel, the meaning of his utterances must be verified to determine the gravity of the offence. Sometime, the utterance may necessitate killing and sometime it may only require chastisement for correction or may not attract any punishment at all.[813]

Under the maxim of *lā yunsab li al-sākit kawlun*, it is observed that the murderers acted on rumour that their victim has defamed or insulted the Holy Prophet. Neither the exact utterance nor the source of information or rumour was ascertained. Perhaps, the locutionary act of the deceased may not warrant the punishment they meted on him.

Similarly, the case of Attorney General (complainant) *v.* Lawal Akwata (defendant), shows lack of respect for the effect of expression. When the wording of the defamation was not established in the case, the *locus standi* for the court to reach verdict in this case is arguable. Though, the punishment awarded to him is of *ta'zīr* nature (six months imprisonment or #10,000.00), however, the argument is that the case has no *locus standi.* If the case was brought to the court as public disorder offence, the two persons involved in the case should have been prosecuted. But, rather only one accused person was convicted. [814]

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[813] Shalla *v.* State Weekly Law report of Nigeria (WLRN) (2004) 35, p 54-55)
[814] See Appendix 6 for the details

iii. Recommendations

In writing this thesis critical analysis, observations and evaluations have been made. There is a need for "intertextualizing" and "hypertexualizing" the concepts and the contexts of Islamic texts in order to bring about a comprehensive codification which will cater for the novel issues in this generation. It is time to depart from sticking to one *madhhab* by adopting the systems of *talfiq* and *takhyir* –the two systems incorporate the broad range of strategies required to deal with the sensitive issues which may arise in any state adopting full implementation of *Sharī'ah* (Islamic Law).

There is a need for highly qualified Islamic jurists in Islamic *Sharī'ah* courts and Legislative assemblies. There is a need to appoint dynamic, broad minded jurists who can view issues in their broader context. This should help reduce the level of criticism about the suitability of Islamic law in the modern age.

There are many ways of achieving criminal justice in Islamic law

- Applications of legal maxims which are based on the tenet of *Maqasid Sharī'ah* (the overall objectives of Islamic law).
- Evaluations of the socio-economic status of the accused before he/she can be convicted of the accusation.
- Evaluations of the socio-political context of the accusation to determine both the benefits and the evil underlying the prosecution of the accused. The Prophet exemplified for us two different ways of dealing with two similar issues in different contexts. In al-Makhzum's case she was reported to have stolen someone's property and, because of her tribes status in the society, an intercessor was sought to plead with the Prophet not to prosecute her. The Prophet vehemently refused the plea and said: "if Fatima the daughter of the message of Allah stole, the Prophet will cut her hand (amputate her hand according to *Sharī'ah*). And yet, in another scenario, The Prophet refused the confession of Ma'iz in the first instance in order to give him the chance to repent.

The seven basic legal maxims have summoned Islamic criminal jurists and judges to

establish the overall objectives of *Sharī'ah* in a quest for justice in each criminal case. This is because the ultimate goal of Islamic law is to "promote the benevolent nature of Islam, especially where the reasoning for such ...is commensurate with prevalent needs of social justice and human well-being."[815]

Nigerian *Sharī'ah* council needs to establish different arms in order that each can act as a counter balance to and keep watch over the activities of the other. Justice can be achieved through judicial professionalism and qualified judges. It is expected that professional and qualified judges "demonstrate a clear rational perspective of issues based on evidence placed before them and not on to be biased by emotions and zealousness."[816] These different arms would, to some extent, help curb miscarriages of justice and block blind criticism of the legal system of the states.

As we have seen through a detailed analysis of cases judged in the states implementing full *Sharī'ah* law in northern Nigeria, some of those cases were quashed when they were brought to the appeal courts. Had the defendants sought not to apply to the appeal court, they would have been unjustly punished. It is a settled rule in Islamic law that a judge who has used his personal exertion to deliver a judgment, based on what his exertion dictates for him, should be rewarded. If the judgment subsequently turns out to be wrong, however, and consequently affects the rights of human beings, the remedy should be provided for the affected person from the government who employed the service of the judge. This would ensure that while the judge is not held responsible for any miscarriage of justice because of his fallibility, justice would be done to the victim of the miscarriage of justice.

Equally, there is a need for all *Sharī'ah* implementing States to ensure that all infrastructures are put in place before embarking on full implementation of *Sharī'ah*. That would accord with the practice and strategy of the Prophet in transmitting *Sharī'ah* from purifying stage to punitive. The social welfare of the members of the states is paramount to minimizing their criminal activities. As Sanusi notes, *Sharī'ah* critics point out that in the absence of any change in the "material living conditions of

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[815] Baderin, M. A, *International Human right and Islamic law*, *op. cit.* p. 220
[816] *Ibid.* P. 224

the masses of the population"..."all appearances of change are cosmetic"[817]

To justify the execution of criminal convictions, there must be an extension of justice to government officials. If Islamic states allow malpractice in public office such as the embezzlement of public funds and no action is taken against the government officials responsible, then undoubtedly there will be more criticism of *Sharī'ah* from all spectrums of the world.

Human rights watch and human rights activists should understand that while there may be miscarriages of justice in some cases, human beings are not infallible. Thus, imperfection in their actions is inevitable. This does not mean that there should be no criticism at all. Indeed, with constructive criticism based on good intentions, imperfections could be put right and it is not permissible to leave an imperfection to prevail in the mistaken belief that there is no way of redressing it.

The negative attitude expressed when describing Muslim legal codes such as the punishment of adultery, theft, etc., and the undermining approach of "cultural relativism" towards Islamic doctrines will stand as a blockade against admitting constructive criticism given by *Sharī'ah* opponents. As Sanusi observes, those negative descriptions "are considered value-judgments reflecting certain elements of cultural arrogance and unacceptable claims of superiority...(which make) dialogue difficult if not impossible."[818]

I am not esprit de corps with those who try to use *Sharī'ah* as a political weapon to destabilize the regime of Obasanjo, but I do believe that miscarriages of justice occurred in some criminal cases, in their first judgments in lower *Sharī'ah* courts. If we are ever to get a clear picture of what is really going on, political vendettas and journalistic smearing need to be set aside when criticizing any element of Islamic law.

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[817] Sanusi Lamido Sanusi, "The West and the Rest: Reflection on the Intercultural Dialogue about *Shari'ah*, in Ostien, Philip, *et. al.* (eds) *Comparative Perspectives on Shariah in Nigeria op. cit.* p. 255
[818] *Ibid*, P. 262.

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Glossary of Arabic Terms

‘Ādah -Custom/Practice.
‘Ādah aw ‘urf Qawlī -Verbal practice.
‘Ādah aw ‘urf ‘amalī -Practical custom.
‘Aḍḥā -the Muslim festival celebrated on the 10th of dhul Hijj of Islamic calcndar.
‘Adālah – Trustworthiness.
‘Amal –Action.
‘Amal/urf ahal al-Madinah – the custom/practice of the pcoplc of Madina.
‘Amd –Intentional.
‘Āmid- Intentional perpetrator.
‘Āqilah –Solidarity/blood relatives.
Aṣl –Fundamental.
Bayyinah –Evidence.
Bikr Unmarried before.
Ḍarar – Harm/ injury.
Ḍarūrah (pl. Ḍarūrāt) - Necessity.
Ḍirār -Inflicting harm on another person, beyond what is legally approved.
Da‘wā, -Claim.
Ḍa’īf- Weak chain.
Ḍābiṭ (pl. Ḍawābiṭ)– Maxim that controls particular subject.
Dhkūriyyah- Masculinity.
Diyah- Blood money.
Diyah mughallaẓ -Heavy blood money.
Fasād -Illicit practices.
Fiqh - Islamic jurisprudence.
Ghalabah al-ẓann -Most probable.
Ghālib aktharī- Preponderant majority rule.
Ghayr ma‘qulah al-ma‘na –Irrationalized.
Ghalabah, Predominant.
Ḥājah – Needs.
Ḥaqīqah - A word meant to denote the meaning given to it originally.
Majāz- A word which has another meaning.
Ḥadd (pl. Ḥudūd) – Fixed punishment.
haqiqah lughawi: Linguistic meaning.
Ḥarām –Prohibition.
Ḥirābah –Banditry.
Ḥirz, -A well-fortified place.
Ḥuḍūr –Presence.
Ḥudūd God- God’s rights.
Ḥukm –Ruling.
Ḥukm Aghlabī preponderant ruling.

Humūm al-Balwā- General necessity.
Ḥuqūq al-Ādamī - Rights of Human Being.
Ibādah -An act of devotion.
Idtrād, -Continuity.
Ijmā' – Consensus.
Ijtihād Personal exertion.
Ijtihādiyyah- Personal exertion.
Ikhbār – Information.
Ikhtilāf al-Mawjib -Difference in the cause.
Ikrāh ghayr mulji- Incomplete coercion.
Ikrāh mulj – Complete coercion.
Ikrāh – Coercion.
Ikrāh tām.- Complete coercion.
'Illah- Cause.
'Ilm – knowledge.
Iqrār- Confession.
Istiḥsān – Preference.
Istisnā'- Contract of manufacturing.
Itlāf nafs- Capital punishment.
Jahl –Ignorance.
Jald –Flogging.
Jins Wāḥid -Same group.
kamāliyyah (or) al-taḥsīniyyah- A luxury.
khāṣ, -Personal/individual.
Khaṭ' –Mistake.
Kullī Muṭṭarid -Consistent general rule.
Lawth -Circumstantial evidence.
Li'ān – Repudiation.
Ma'mūmah -A head wound reaching the cerebral membrane.
Ma'mūrāt – Commandments.
Mahr al-mithl -A fair dowry.
Makrū' –Detestable.
Manhiyāt,-Prohibited.
Mansūk, Abrogated.
Maqasid al- Sharī'ah - Overall objectives of Shari'ah.
Maqṣad (Maqāṣid) -Purpose, Willing.
Maqṣūd al-'Iqāb – Purpose of Punishment.
Maraḍ –Illness.
Maṣlaḥ –Benefit.
Mafsadah -Harm.
Mashaqqah - Hardship.
Mu'āmalāt –Transactions.
Mubāḥah –Permitted.

Mubāshir -Direct causer.
Muḥkam - Unambiguity).
Muḥṣana -Married before woman.
Mukallaf Sound mind/ legal responsible person.
Mukhṭ' – Unintentional perpetrator.
Mukrah -Coerced person.
Mukrih -Coercer.
Munaqqilah -An injury whereby a bone is displaced.
Muqayyad – Restricted.
Mursal - Omission of some of the transmitter.
Mustaḥabb –Desirable.
Mut'a -Temporary marriage.
Mutasabbib -Indirect causer.
Muthbit -One who makes the claim.
Muṭlaq – Unrestricted.
Nafy –Exile.
Naqṣ - Defect or Disability.
Nask ,- Abrogation.
Naẓariyyah – Theorem.
Naẓariyyah al-fiqhiyyah – Theorem of Islamic Jurisprudence.
Nikā baṭil, -Invalid marriage.
Nisab -Minimum value.
Nisyān Forgetfulness.
Niyyah –Intention.
Nukūl –Refusal to take oath.
Qadhf –Defamation.
Qadi judge.
Qaḍiyyah Proposition/theorem.
Qafāh -A means used to establish the parenthood of a child.
qasāmah fi dimā' -Qasāmah in blood.
qasāmah fi al-amwāl -Qasāmah in a financial claim or property claim.
Qasāmah -A legal procedure involves 50 oaths to establish involvement of an accused person in homicide crime.
Qaṣd wāḥid – Same intention/ purpose.
Qaṭi' al-ṭarīq –Robbery.
Qatl Khat' –Unintentional murder.
Qawā'id āmmah -General Maxim.
Qawā'id (sing. Qā'idah) –Legal Maxims.
Qawā'id al-Usuliyyah – Maxims that relate to principles of Islamic jurisprudence.
Qawā'id al-fiqhyyah - Islamic legal maxims.
Qawa id khāṣah -Peculiar maxims.
Qiyās - Analogy.
Qur'ah - Drawing lots.

Ra'y –Rationalization.
Raf' al-ḥaraj - Removing hardship.
Rajm- Stoning to death.
Rakā't -Pillars of prayers.
Ridda –Apostasy.
Sadd al-dharī'a – Blocking evil.
Safar – Journey.
Sarqah –Theft.
Shahādah, - Witness.
Shakk –Doubt/ suspicion.
Shari'ī, Legal.
Shibu 'amd -Quasi intention.
Shubha fī al-'aqd - Doubt in contract.
Shubha fī al-jihah -Doubt of the legality or illegality of the act.
Shubha fī al-mahall (or) shubha al-milk -Doubt of ownership.
Shubha fī al—fi'l - Doubt in action.
Shubhah fī al-fā'if -Doubt fro the angle of the actor.
Shuyū'- Prevailing.
Siyāsah –Politics.
Sunnah –Tradition of the Prophet.
Ṭalāq bā'in -Complete divorce.
Ta'zīr – Discretionary Punishment.
Tadākhul, -Integration of.
Takhayyur - Selection of rules from difference schools.
Talfīq -Combination of elements of rules from various schools.
Taqlīd -Sticking to a particular school of thought.
Tawaqquf - Cessation.
Taysīr – Facility.
Uqūbat al-muqaddar shari'ah Legally fixed punishments.
Uqūbāt al-Shar'iyyah -Islamic penology.
'Urf 'Āmm -General custom.
'Urf khāsah -Particular/individual custom.
'Urf Qawli- Verbal custom.
'Urf- Custom.
'Urfiyyah – Has to do with customary norm.
'Usr- Difficulty.
Uṣūl al-Fiqh - Science of Islamic jurisprudence.
Wahm – Illusion.
Wājib, Obligatory.
Waliyy -Legal guardian.
Yaqīn –Certainty.
Ẓāhir –Apparent.
Zajr –Deterrence.

Ẓann –Probable.
Zinā -Adultery.

Appendices

Appendix (A)

List of Legal Maxims Mentioned in the Thesis

1- *Idhā ḍāq al-'amr ittasa' wa idhā ittasa' ḍāq* "Whenever the circle of an affair narrows it is widened and whenever it widens it is narrowed. 157, 267.

2- *al- 'Ibrah fī al-'uqūd li al-maqāṣid wa al-ma'ānī lā li al-lfāẓ wa al-mabānī* - The effect is given to intention and meaning not to literalness and structure. 57, 267.

3- *al-'Ādah Muḥakkam* - Custom has legal authority. 54, 56, 188, 267

4- *al-'Aṣl fī al-'uqūd riḍā al-muta'āqidayn* - the fundamental principle of contracts is the consent of the two contractual parties. 37, 267.

5- *al-'Ibra bi umūm al-lafẓ lā bi khuṣūṣ al-sabab* - Consideration is given to the generality of the word, not the peculiarity of the cause (of revelation). 158, 267.

6- *al-'ibrah li al-ghālib al-shā'i' lā al-nadir* - Effect is only given to a prevailing widespreading custom, not a rare one. 198, 267.

7- *al-'Umūr bi maqāṣidiha*- Actions are considered together with their intentions. 56, 63, 267.

8- *al-'Aṣl 'ann al-niyyah idhā tajarrad 'an al-'amal lā takun mu'aththirah (fī al-'umūr al-duniyāwiyyah)* - fundamentally there is no effect (in worldly matters) on intention devoid of act. 66, 267.

9- *al-'Aṣl al-'adam*- the fundamental principle is the non - existence of something. 94, 267.

10- *al-'Aṣl allā yubnā al-ahkām illā 'alā al-'ilm.* - The principle is that rules should only be based on real knowledge. 44, 267.

11- *al-'Aṣl ann al-su'āl yamḍī 'alā mā ta 'ārafa kull qawm fī makānihim* - The principle is that a question should be based on how people understand it in their domain. 54, 267.

12- *al-'Aṣl baqā' mā kān 'alā mā kanā "ḥattā yaqūm al-dalīl 'alā kilāf* - Affairs remain lawful, the status quo (until otherwise proved). 96, 267.

13- *al-'Aṣl barā' al-dhimmah* -The fundamental principle is freedom of liability. 94, 268

14- *al-'Aṣl fī al'ashya' al-ḥibāhah "ḥattā yard al-dalīl 'alā taḥrīmihā* - The Fundamental Principle is that things are lawful for use until there comes a proof of prohibition. 106, 268.

15- *al-'Aṣl fī al-kalām al-ḥaqīqah* - The fundamental principle of speech is real meaning. 221, 268.

16- *al-'Aṣl iḍāfah al-ḥādith ilā aqrab awqātih* - The fundamental principle is to ascribe an event to its nearest point in time. 96, 268.

17- *al-'Iḍṭirār lā yubṭil ḥaqq al-ghayr* Necessity does not invalidate the right of the other. 150, 168, 181, 223, 268.

18- *al-'Ishārāt al-ma'hūdah li al-akhras ka al-bayān bi al-lisān* – A recognized indication of a dumb person is considered as an explicit expression. 196, 268.

19- *al-Bayyinah 'alā al-mudda'ī wa al-yamīn 'alā man ankar* -The burden of proof is on him who alleges and the oath is on him who denies. 38, 117, 268.

20- *al-Ḍarar al-'ashadd yuzāl bi al-ḍarar al-'akhaff*- Greater injury should be prevented by committing lesser injury. 180, 268.

21- *al-Ḍarar lā yuzāl bi al-ḍarar* - Harm is not repelled with harm. 178, 268.

22- *al-Ḍarar lā yuzāl bi mithlihi* - Harm is not repelled by its like. 178, 268.

23- *al-Ḍarar yudf'a bi qadr al-'imkān* –Harm/injury should be prevented as much as possible. 56, 173, 268.

24- *al-Ḍarar yuzāl*- Injury should be removed. 56, 173, 268.

25- *al-Ḍarūrāt tubīḥ al-maḥẓūrāt* -Necessities render unlawful things lawful. 168, 223, 268.

26- *al-Ḍarūrāt tuqaddar bi qadarihā* - Necessities are estimated according to their quantity. 163, 268

27- *al-Ḍarūrah tuqaddar bi qadarihā* -Necessity is estimated according to its quantity. 168, 223, 268.

28- *al-Ḥājah tunazzal manzila al-ḍarūrah, 'āmah kānat aw khāṣṣah* –Need, whether of public or private nature, is considered as necessity. 165, 268.

29- *al-Ḥaqīqah tutrak bi dalālah al-'ādah* Real meaning shall be left out for denotation of *al-'ādah*. 196, 268.

30- *al-Ḥudūd tudra' bi shubhāt* - a fixed punishment should be averted by means of doubt. 111, 152, 197, 223, 269.

31- *al-Ḥudūd tusqaṭ bi al-shubhāt* (Fixed Punishments should be averted in the case of doubt/suspicion.108, 269.

32- *al-Ḥukm idhā thabata bi 'illah zāla bi zawālihā* - A Rule that is established by virtue of *'Illah* (cause) shall expire when the cause expires. 44, 269.

33- *al-Ijtihād lā yuqad bi al-ijtihād* - A ruling established by the means of ijtihād is not reversed by another *ijtihād.* 53, 269.

34- *al-Ikrāh yamna' ṣiḥḥah al-iqrār* - Coercion prevents the validity of Confession. 137, 269.

35- *al-Iqrār fī ḥuqūq al-'ibād lā yaḥtamil al-rūju'* - Retraction of confession is not allowed in rights of men. 140, 269.

36- *al-Iqrār ḥujjah qāṣirah* - Confession is an intransitive evidence. 45, 135, 269.

37- *al-Jawāz al-shari'ī yunāfī al-ḍamān* - legal permission invalidates liability. 98, 269.

38- *al-kharāj bi al-ḍamān* - Revenue and responsibility go together. 38, 269.

39- *al-Kitāb ka al-khiṭāb* - A written document is like an expression. 196, 269.

40- *al-Ma'rūf 'urfan ka al-mashrūt shartan* - What is known by the virtue of custom is as a stipulated condition. 195, 269.

41- *al-Mar' mu'ākhadh bi iqrārihi-* One is responsible for his confession. 135, 269.

42- *al-Mashaqqah tajlib al-taysīr* - Hardship begets facility. 23, 52, 56, 146, 269.

43- *al-Muṭlaq yajrī 'alā iṭlāqih mā lam yaqum dalīl al-taqyīd naṣṣan aw dalālah* - An unrestricted word should remain as it is, if the evidence of restriction is not textual or connotative. 214, 269.

44- *al-Nātij awlā mina al-'ārif* - The producer of something is more entitled to its profit than the claimant (of the ownership). 40, 269.

45- *al-Rukhaṣ lā yata'addā mawāḍi'ihā* - Facilities should not be taken beyond their premises. 41, 269.

46- *al-Shubah tamna' wujūb al-ḥadd wa lā tamna' wujūb al-māl* - Doubt only interdicts the implementation of ḥ*add*, but not monetary compensation. 116, 269.

47- *al-Su'āl ma'ād fī al-jawāb ...aw ka al-ma'ād fī al-jawāb* - An inquiry should be concurrent to the answer. 216, 269.

48- *al-Ta'yīn bi al-'urf ka al-ta'yīn bi al-naṣ* - What is stipulated by the virtue of *'urf* is as what is stipulated by the text. 195, 270.

49- *al-Ta'sīs awlā mina al-ta'kīd* -establishing a new meaning is preferable than emphasising. 170, 270.

50- *al-Ta'zīr ilā al-imām 'alā qadr 'aẓam al-jurm wa ṣigharh*- It is left to the leader/ judge to decide an appropriate discretionary punishment considering the proportionate (nature) of the offence. 40, 270.

51- *al-Tābi' tābi'* - The accessory shares the same rule of the root. 60, 270.

52- *al-Taṣarruf 'alā al-ra'iyyah manūṭ bi al-maṣlaḥah*- Governance should be of the public interest. 57, 270.

53- *al-Thābit bi al-burhān ka al-thābit bi al-'iyān* -What is established by convincing and just evidence is as what is established by an eyewitness. 120, 270.

54- *al-Yaqīn lā yazūl bi al-shakk* -Certainty shall not be overruled by doubt. 56, 87, 270.

55- *Dar' al-mafāsid awlā min jalb al-maṣāliḥ*- Preventing evils is better than attracting/acquiring benefits. 184, 187, 224, 270.

56- *Dhikr ba'd mā lā yatajazz' ka dhakr kullih* - Pronouncing what is undivided is the same as pronouncing the whole. 213, 270.

57- *Hal al-'ibrah li al-maqāṣid wa al-ma'ānī aw li al-alfāẓ wa al-mabānī* - Should effect be given to intentions and meanings or the words and forms. 77, 270.

58- *Hal al-aymān mabniyyah 'alā al-'urf*- "Is oath based on custom? 78, 270.

59- *I'māl al-kalām awlā min ihmālih* - A word should be construed as having some meaning, rather than disregarded. 56, 209, 270.

60- *Idha ta'adhdhar 'I'māl al-kalām yuhmal* - If giving an effect to a speech becomes impossible in any way it will be derelict. 212, 270.

61- *Idhā ḍāq al-'amr ittasa'* - "Where a matter is narrow it becomes wide ... 157, 270.

62- *Idhā ijtama' al-amrāqam min jins wāḥid, walam yakhtalif al-maqṣūd dakhal aḥadhimā fī al-ākhar ghaliban* - When two matters emerge from one class,

group or category, and the purpose does not differ, in most cases, one intergradates into another. 79, 270.

63- *Idhā ijtama' al-ḥalāl wa al-ḥarām aw al-mubīḥ wa al-muḥarrim ghullib al-ḥarām*-If lawful and unlawful things conjure, preference will be given to the Unlawful. 189, 270.

64- *Idhā ijtama' al-mubāshir wa al-mutasabbib, yuḍāf al-ḥukm ilā al-mubasir*- In the presence of the direct author of an act and the person who is the causer, the direct author is responsible thereof. 97, 271.

65- *Idhā ta'āraḍ al-māni' wa al-muqtaḍiā yuqaddim al-māni' illā idhā kāna al-muqtaḍā a'aẓam* – If a prohibitive injunction contradicts with what seems to be permissible, the prohibitive is given preference over the permissible. 185, 271.

66- *Idhā ta'āraḍat mafsadatān rū'iya a'ẓamahumā ḍararan bi irtikāb akhaffuhuma* -If two evils clash, the greater one should be prevented by committing the lesser one. 180, 271.

67- *Idhā ta'adhdhar al-ḥaqīqah yuṣār ilā al-majāz* - If a real meaning becomes impossible, the metaphoric meaning should be resorted to. 212, 271.

68- *Inna al-'ādah tuḥkam fimā lā ḍabṭ lahu shar'an*- Custom only is enforced where there is no legal detail. 198, 271.

69- *Innamā tu'tabar al-'ādah idhā iṭṭaradat aw ghalabat* – Effect is only given to 'ãdah that is regularly occurring and universally prevailing. 198, 271.

70- *Ishārah al-ma'hūdah li al akharas ka al-bayān bi al-lisān* - an identifiable sign of a dumb person is like a declaration with tongue. 217, 271.

71- *Isti'māl al-nās ḥujjah yaghib al-'amal bihā*- People's practice is authoritative and should be reckoned with. 194, 271.

72- *Kull muskirin ḥarām* - "Any intoxicant is forbidden. 55, 271.

73- *Kullu shayin fī al-qurān aw, aw, fahuwa mukhayyar* - "In the Qur'an, every injunction in which many things are joined together with the conjunctive particle 'or' (Arabic: aw) is an indication that a free choice is allowed among these things. 39, 271.

74- *Lā 'ibrah li al-'urf al-ṭāri'* - No effect for an emergent custom. 198, 271.

75- Lā ḍarar wa lā ḍirār- No injury or harm shall be inflicted or reciprocated/ Do not harm others and do not exchange harm. 23, 56, 169, 271.

76- *Lā yujma' al-ajr wa al-ḍamān* - The wage and responsibility cannot be combined. 41, 271.

77- *Lā yunkar taghayyur al-aḥkām al-'urfiyyah aw al-ijtihādyyah bi taghayyur al-azmān* - Changing rulings based on customs or personal opinion with changes in times or circumstances cannot be denied. 204, 271.

78- *Lā yunkar taghayyur al-aḥkām bi taghayyur al-azmān* – It is undeniable that rules change as times change. 36, 202, 272.

79- *Lā yunsab ilā sākit qawlu qā'il walā 'ama 'āmil, innamā yunsab ilā kullin qawlihi wa 'amalihi* - No statement or action should be imputed to someone who is silent , but a statement and action should be imputed to the one who made the statement or did the action. 54, 272.

80- Lā yunsab li al-sākit qawlun –No word shall be imputed to one who is silent.. 216, 272.

81- *Lā yunza 'shayun min yadi ahadin illā bi haqq thaībit ma 'arūf*- Nothing should be stripped from someone without legal right. 40, 272.

82- *Lā yusab qawlun ilā sākit- walākinna al-sukūt fī ma'raḍ al-bayān bayān* Word shall not be imputed to one who is silent---- but a silence where explanation is required is considered as an explanation. 216, 272.

83- *Laysa li 'irq ẓālim ḥaqq* - No right for unjust root. 52, 272.

84- *Laysa lil Imam an yakhruj shayanmin yad ahadin illā bi haqqin thābit ma'arūf* - It is not the right of the Imam (leader) to take away someone's property without an established and well-known right. 40, 272.

85- *Mā askarahu kathīruhu, faqalīluhu ḥarām*- "Any substance whose large quantity intoxicates, its small quantity is also prohibited. 38, 272.

86- *Mā ḥaruma isti'māluhu ḥaruma ittikhādhuhu* - When its utility is forbidden, its possession is also forbidden. 57, 272.

87- *Mā jāz li 'udhur baṭala bi zawālihi* – What is permissible by the virtue of excuse, becomes invalid with the expiring of the excuse. 164, 272.

88- *Mā thabat bi al-yaqīn lā yazāl bi al-shakk* – "indeed, whatever is established by certainty cannot be removed by doubt. 89, 272.

89- *Mā ubīḥa li al-ḍarūrāt yuqaddar bi qadarihā* -What is permitted by the virtue of necessity should be estimated according to its quantity. 163, 272.

90- *Man qāsam al-ribḥ falā ḍamān 'alayhi* - "A profit sharcholdcr is not hcld responsible for loss. 39, 272.

91- *Man sharaṭ 'alā nafsihi ṭā'i'an ghayr mukrah fahuwa 'alayhi* - Hc who willingly gives a condition binding himself without compulsion shall bc hcld responsible for it. 39-40, 272.

92- *Maqāṣid al-lafẓ 'alā niyyah al-lāfẓ illā 'inda al-qādhī* -Thc purposc of utterance is based on the intention of the locator, cxccpt if it is dcmandcd before the court. 210, 273.

93- *Min qawā'id al-shar'i al-kulliyyah :annahu lā wājib ma' al-'ajz walā ḥaram ma' ḍarūrah* - Among the general legal maxims (of Islamic Law is that) there is no obligation in the face of incapability and there is no prohibition in the face of necessity. 44, 273.

94- *Yuḍāf al-'amr ilā aqrab al-waqt* - matter is attributed to the closest time of the event. 106, 273.

95- *Yukhtār 'ahwan al-sharrayn aw 'akhaff al-ḍararayn* – Lesser evil or injury should be preferred. 180, 273.

96- *Yutaḥammal al-ḍarar al-khāṣ li daf' ḍarar 'āmí* – Personal injury should bc incurred to prevent general injury. 183, 273.

(B) List of Unreported Cases referred to in the Thesis

Appendix 1

IN THE SHARI'A COURT OF APPEAL SITTING IN GUSAU ZAMFARA STATE

CASE NO. SCA/GM/H/001/05
DATE: 28 – 9 - 05

BETWEEN: -
ISIYA ALH. ALIYU & OR .....APPELLANT
AND
A.G. ZAMFARA STATE .....RESPONDENT

JUDGMENT

The appellant were charged with offences under S. 123, 184 and 146 S.P.C. and were convicted to a jail term of 3 ½ years in prison by the Upper Sharia court Gummi on the grounds that the prosecution one Idris Adamu prosecuted Abubakar Shehu and Isiya Alh. Aliyu on the above stated offences.

The prosecution told the court that, on 30/1/2005 at about 2:00PM the accused conspired and broke into the house of one Alh. Danjimma of Daki Takwas and made away with 3 and ½ sacks of millet valued at ₦17, 500.00; which were sold at Danko market.

The accused confessed the commission of the offence before the court, but there were believed to be the course boys to the victim, because they used to enter into his house freely.

The prosecution too is aware of that fact. The 3rd accused person by name Gwangwani the prosecution failed to establish

the offence against him for wants of evidence. Based on justifiable stand of the provision of S. 155 SCPC and Sharia C.P.C. The court is satisfied that, the accused committed the said offences but the 3rd accused was discharge for want of evidence under S. 157 SCPC.

The appellants were not satisfied with this decision and appealed to this court. Sharia Court of Appeal Gusau, Zamfara State. Their grounds of appeal are: -

1. They are not satisfied with the judgment of U.S.C. Gummi due to the reason that, they told the court that they have witnessed to bringing to defend them, but the judge refused to give them that right. They prayed to this court to give them fair hearing by permitting them to produce their witnesses. Though not represented by a lawyer, yet the first appellant Isiya gave more reasons to their appeal. That he was a barrow pusher who was engaged to render service by one of the victims boys a (co-accused) Abubakar from a filling station and was paid the amount agreed. Later he was arrested and charged with that offence just like that.

The 2nd appellant too explained that, he is an okada rider, he saw the said Gwagwani at that filling station with 3 ½ bags. He asked me to light the sacks for him, I said no I cannot carry the whole, I only took the ½ for him to grains market he pleaded with me to get a barrow pusher for him from there. I called on Isiyaka I directed him to the filling station where Gwangwani was waiting for him with 3 sacks I don't know whether he went or not.

Barely after two months of this incidence we were called and charged with Isiyaka that, we were the one that lifted the sacks from filling station for Gwangwani to sell in the market. Despite the confessional statement of Muh'd Gwangwani that he was the one that paid us to convey the goods to him in good faith, yet the judge went on to convict each one of us to a 3 years 6 months jail terms whereas the said Muh'd Gwangwani was discharged. Again the said confession which was said we made before the court was not true, we have never confessed that we stole anything. Likewise, the 2nd appellant denied making any confession that was alleged he made before the trial court.

On this note, the counsel to A.G. Rabi Bashir contended that, the charge was read over to the accused persons. All of them heard and understood the charge, they later confessed committing the offence. Moreso, each of the accused gave detailed information as to how they committed the offence as can be found in page 7 paragraphs 20 of the copy of proceedings. The same applies to Isiyaka at page 7 paragraphs 21 – 27 of the said copy.

What we should consider, is that whoever make any voluntary confessional statement freely, there is no need for the court to call any witness in defence. Because non of them denied committing the offence and nobody retract his confession. Again, they never denied committing the offence even in their grounds of appeal, as such, this court can act, the same way the trial judge acted. Again by looking at page 5-6 of copy of proceedings up to the point of judgment. It is settled Islamic law that, when an

accused made confessional statement voluntarily, or informed the court in detail, of how he committed an offence, then the statement is enough to convict him, as it was stated in the book of MUWAHIBUL –JALIL vol. C at page 420. The same could be found in HUKAMIYYA which carries the commentary of Grand Kadi Usman Moh'd Katsina.

On this note, we are urging the court to strike out this appeal and confirm the judgment of the trial court (U.S.C Gummi).

With these submissions of both counsels we the Hon. Kadis considered the issue to comes to an end, after careful perusal of the copy of proceedings.

COURT OPINION

In considering the admission of an offence which the state counsel Rabi Bashir contested in which she sought to rely in what was obtained in page 2 paragraph 10 – 27 which was also relied by the trial court.

It is fundamental under Sharia Islamic law in confessional statement of this nature to support it with just witness for it to be used in convicting the accused, as it was said in the book of BAHAJA vol. 1 page 137 (new edition) where it was stated.

Meaning: -

"Conviction of an accused cannot stand without the testimony of just witnesses"

1. This authority shows categorically that, the court is mandated to support this type of confession with just witnesses

for any conviction to stand. The lower court failed to observe that, and since the accused denied making it, the conviction creates doubt and suspicion of injustice.

2. Also, the provision of S. 155 SCPC of Zamfara State made it very clear that when an accused appeared before a court and confessed committing the offence before judgment; the court will presume that he understood the charge against him. Yet, it is mandatory for the court to explain to him that, he can retract his confession if he so desires.

The trial court fails to observe that and went a head in haste and convict them. If we look at page 5 paragraph (14) the court said to the accused do you have anything to say? But surprisingly something different was written instead of the exact words used by the accused. That, they have committed the offence despite the fact that they were trustful servants to the victim yet they stole the items. After this, they were also asked whether they have any defence, they said non. This also contravened what the section provide, and entirely creates injustice in an offence of this magnitude.

We therefore found no merit in the judgment of the trial court, because the entire proceedings contravened the rule of law and the available law under Sharia Islamic law, with this the appeal must succeeds, since the entire proceedings was not conducted from the grass root, we agreed that injustice has been done to the accused.

With respect to what transpired above we, the Hon. Kadis of this court SCA Gusau Zamfara State, we set aside the judgment of the Upper Sharia Court Gummi which convicted the accused Isiya Alh. Aliyu and Abubakar Shehu to a 3 ½ years jail term each with payment of compensation of ₦17, 500.00 for not complying to the provisions of Sharia Islamic laws and the constitution of the Federal Republic of Nigeria. We discharged the 2 accused. The appeal succeeds.

SIGNED

The Hon. Alh. Muh'd A.A. Gummi- Kadi
4/10/05

SIGNED

The Hon. Alh. Ibrahim A.R/Dorawa - Kadi
4/10/05

Translated by

Mahmud M. Labaran
Ministry of Justice, Gusau.

Appendix 2

CR/FI/8/2002
24 – 1 – 2002

COURT: - Upper Shari'a Court K/Namoda

JUDGE: - Hon. Alh. Ibrahim Abubakar Zurmi

COMPAINANT: - Jamilu Isaka B/Magaji

DEFENDANT: - Abubakar Abdullahi Kaura

NATURE OF OFFENCE: - Theft.

STATEMENT OF COMPLAINT

I, Jamilu Isaka B/Magaji wish to lodge this complaint against Abubakar Abdullahi Kaura, because on the 20th of Nov, 2000 at about 3:30AM you broke and entered into my shop from behind, where you took away the following items: -

1. Nine bundles of shadda brocade.

2. Children wears, all of which were valued at ₦30, 350.00. That is why you are suspected to have committed the above stated offence.

Court. - To Abubakar Abdullahi you heard the complaint against you. Is it true.

Ans. - Abubakar Abdullahi, I heard the complaint, but it is not true.

Court. - To Isaka Jamilu, you heard the suspect denied the allegation; do you have witness to produce?

Ans. - Jamilu Isaka, yes I have witness!

Court. - To Jamilu Isaka, are the witnesses available now.

Ans. - Jamilu Isaka, they are not available now, and we are urging the court to summon them.

Court. - Gave directives that, the witnesses be summoned to appear on 31/1/02, the case is adjourned to that date.

Court. - The court resumes sitting today 31/1/2002 for continuation of this case.

Court. - Enter the P.W.I. Sgt Isah N.P.F. B/Magaji out post, No. 131063, a 33 years old, what do you know in this case, to God who made you.

Ans. - P.W.I. Sgt. Isah, what is that on 20/10/2002 at about 10:00AM one Jamilu Isaka, respondent of B/Magaji came to police station B/Magaji and reported that, his shop was broken from behind and took away his 9 bundles of shadda miro and some children wears. One policeman was assigned by name Muhammadu Abubakar to investigate; we went there with the D.P.O. and Copl. Hamidu, we saw how the building was burgled. When we returned to the office, we got information that, there was one strange person who visited his friend known as Abubakar Abdullahi. We went B/Magaji because we got information that, they used to steal together. We directed the vigilante group members to arrest the said suspect and bring him to our office. The two people where brought to our office, we took them to D.P.O'S office where they were thoroughly investigated. In the course of our investigation

Abubakar Abdullahi told us that they were the people that committed the offence. We demanded to know where they kept the property, he told us that, the properties were kept in one 6 maize-bunch in the farm. When we went to the said place Abubakar Abdullahi, opened up, the said bunch and we packed the property to the police station. That is all I know.

Court. - To Abubakar Abdullahi you heard what P.W.I said, do you agree or you have question or objection.

Ans. - Abubakar Abdullahi, I have question and objection.

1st Ques.- Sgt, did you hear me admitting the offence when you were investigating us?

Ans. - Sgt. Isah, of course, I heard you confessing that you committed the offence.

2nd Ques.- Sgt. Isah, before we admit committing the offence, did you torture us or not?

Ans. - Nobody ever torture you, and if at all you were tortured, how could you be able to show where the items were kept, and we snapped your pictures at the venue.

Court. - To Abubakar, you heard him, do you have more question?

Ans. - There is no more.

Court. - To Jamilu Isaka do you have any question.

Ans. - Jamilu Isaka, there is non.

Court. - To Copl, Hamidu Nuhu, a Nigeran Police force B/Magaji NO. 152722, a 26years old, what do you know to God who made you.

Ans. - Copl. Hamidu Nuhu, what I know is that, one Jamilu reported at the B/Magaji police station, that, his shop was burgled and made away with 9 bundles of shadda mirrow and children wears; when we received the report we embark on investigation to discover the hoodlums, we invited people with relevant information, we gathered that, there was one man called Mustapha who kept a stranger in his house known as "Kowa a dogo" we apprehended the said Mustapha he told us that his visitor is known as "Kowa a dogo" from K/Namoda, police went and arrested the said "Kowa a dogo", we continue our investigation but they denied the allegation; our D.P.O at that time Adeji, directed that, search warrant should be executed to the house of Mustapha, we went and found nothing incriminating, at the police station, the said Abubakar Abdullahi confessed that they took the said properties, when we demanded to know where they kept the properties, they said in the farm, we went together they shows us the properties, we parked all back to police station and later Abdullahi confessed that he was the one that broke into the shop, we took both of them to the broken shop, where we snapped their pictures we returned back to

the police station and charged them with the offence of theft, where the complainant valued the stolen property at ₦30, 350.00. We later took them to High Sharia Court B/Magaji I was the prosecutor at that time and I have some copies of the pictures.

Court. - To Abubakar Abdullahi you heard what PW2 says do you have question or objection?

Ans. - Abubakar Abdullahi, I heard him I have question which is, when you were interrogating us did I confessed committing the offence?

Ans. - Copl. Hamidu, you yourself told us that you did steal the properties.

Obj. - My objection is that Hamidu is a police officer, he will never be happy if I am freed. That is all.

Court. - To Hamidu you heard him?

Ans. - Hamidu he knows I knew him before now, I ..... in Kaura for 3 years and 7 months and he has no any business apart from stealing.

Court. - Jamilu do you have any question to your witness.

Ans. - Jamilu , none.

Court. - To PW3, Shiba, Hausa, Vigilante member, 37 years, what do you know to God who made you.

Ans. - Shiba, what I know to God who made me is that, the B/Magaji Police stated that, a shop was broken open and property were stolen from it, they investigated one man called Bako, they traced his house, they apprehended him and he led them to the house of Mustapha. When we got to the house, the house wife

informed me that, he was not in the house I demanded to know the where about of the person that entered in now, she said nobody. I told her that, I was following him now, I forced myself in, I saw him taking forage, her husband Mustapha was at the extreme end of the room hiding attempting to jump over the wall, I saw him and told him I am looking for him, he demand to know why, I told him my D.P.O. wishes to see him, we turn back to the entrance I asked him of his friend, he says he has no friend, I said look Mallam, come out, he came out, I said you told you told me that, you have no friend who is that, he told me, he don't know the time he enters I told them D.P.O. wish to see them, on our way, we met my friend a vigilante man I told him those are the people. We also met Sgt. Isah on the road, I handed them over to him, when we reach police station, they urged them to lead them to where they hide the stolen property in the bush, we went together and back to police station with the discovered property. That is all I know.

Court. - To Abubakar Abdullahi you heard what the witness says do you have any question or objection?

Ans. - Abubakar Abdullahi Najiya I have no objection, and I did not say I stole the said property.

Court. - Jamilu Isahaka do you have any question to your witness?

Ans. - Jamilu, no.

Court. - To Abubakar Abdullahi is Almustapha you friend.

Ans. - Abubakar Abdullahi when we were taken to court, the court sentence him to 6 months imprisonment only.

Court. - To Jamilu where are the stolen property?

Ans. - Jamilu when the case was disposed the trial Judge handed over the property to me and I have already sold them out.

Court. - The court ordered that the accused continue to remain in prison custody, till the adjourned date.

CHARGE

I, Sharia Court Judge of Upper Sharia Court K/Namoda, charge you the 1st accused Abubakar Abdullahi with the offence of theft of 9 brokade with 2 children wears valued at ₦30, 350.00 belonging to Jamilu Ishaka as a result of the broken off his shop together with your friend you stole his property and hide them in a bush, you committed this offence at B/Magaji. I therefore charge you with this offence under the provision of section 144 punishable under section 145 of Zamfara State Sharia Penal Code 1999.

EXPLANATION OF CHARGE

Court. - To Abubakar Abdullahi Kaura, now listen to the charge and if it is established you will be punished.

Court. - To Abubakar Abdullahi, the meaning of a charge is that you voluntarily in your capacity as an adult person sane and sober agreed to break into Jamilu's shop and took away his property, which is an offence punishable with amputation of your right hand, if it is established against you.

Court. - To Abubakar Abdullahi, do you understand the meaning of this charge?

Ans. - Abubakar Abdullahi, I understood

Court. - Abubakar Abdullahi, do you agree that you committed the said offence?

Ans. - Abubakar Abdullahi, I did not commit the said offence.

Court. - To Abubakar Abdullahi, do you have any defence witness?

Ans. - Abubakar Abdullahi, I have no witness because, nobody knows that I did not commit the offence.

Court. - Do you have anything to say before the court pass it's decision.

Ans. - Abubakar Abdullahi, yes I would like the court to do lenient with me and do justice to me.

FOUND GUILTY

I, the Upper Sharia Court Judge K/Namoda Alh. Ibrahim Maigandi Abubakar Zurmi, found you guilty Abubakar Abdullahi with the offence of theft of (9) pieces brocades together with some children wears valued at ₦30, 350.00. Because I am satisfied that

you committed the said offence, due to the fact that, the stolen items were found in your possession together with the witnesses that testified that you and your friend led them to the venue you hide the said properties. A picture was snapped at the venue, for this reasons and the witnesses available and the discovery of the said properties under your possession, I found you guilty for the commission of that offence, the offence is established, because you have no locus or any relationship with the owner that would make you break into his shop and took away the said properties it was stated in the book of IHKAMUL-AHKAM at page 5 that a judge can convict on the basis of getting witnesses as it was agreed by all the Jurists. For this, the offence is established against you.

EVIDENCE OF CHARACTER

Court. - To the prosecution, Musa PC and Musa Dan Agaji, do you know the accused before or this is his first time of committing this similar offence.

Ans. - Musa P.c, I am aware that, he was once arraigned before the court, but I don't know the type of punishment he receives.

Court. - To Abubakar Abdullahi, do you do you have anything to say on that?

Ans. - Abubakar Abdullahi, it was a case of debt and I was sentence to 2 months imprisonment, for this I am

appealing for the mercy of this honourable court, my friend with whom we committed the offence together was sentence to 6 months imprisonment by B/Magaji High Sharia Court, due to the influence he has in the area. I am a stranger, with no money and I don't know anybody, that is why my punishment differs. Moreso, I have family, my mother is too old, nobody close to her but myself and God and I would like the court to take cognizance of my long stay in prison. That is all, this is my first criminal offence.

JUDGMENT

I, Upper Sharia Court Judge of Upper Sharia Court K/Namoda Alh. Ibrahim Maigandi Abubakar due to the reasons that, I found you guilty you Abubakar Abdullahi, Kaura, with the offence of theft of 9 bundles of brocades together with 2 pieces of children wears, valued at ₦30, 350.00 which were in the proper custody of someone and, the value is aggregate with the Nisab that can warrant, the amputation of a right hand of the offender.

On your capacity, as a Muslim, you voluntarily agreed to commit the offence; for that I ordered that, your right hand be amputated, as it was contained in the provision of section 145 Zamfara State Sharia Penal Code, which is also equivalent to what God (SWA) said in the Holy Quran at Suratul – Maidah verse 39 –41 which states: -

Meaning

"For Male thief and Female thief cut off their right hands each at the joint. If they steal property worth Rubu" dinnar and whatever is above that, that is the reward of their deeds and it is ordained by God, God is unbeatable in His creation that he made this important punishment very clearly.

In the attempt of reducing the level of thief in the society if this punishment is being carried out according to God's instruction, thief would have reduced drastically and whoever repents to God Allah would forgive him. Because He is forgiven and merciful"

RIGHT OF APPEAL

There is right of appeal to Sharia Court of Appeal Gusau within 30 days to whoever is not satisfied. The case is disposed off today 14/2/2002.

SIGNED.

Translated by

Mahmud Labaran Gusau
Min. Of Justice
Gusau

Appendix 3

IN THE UPPER SHARIA COURT I GUSAU

SITTING AT GUSAU BY THE HONOURABLE

JUDGE ALH. MUHKTAR UMAR GUNMI

CASE NO CR/FI/03/2003

COMPLAINANT:- ATTORNEY GENERAL

DEFENDANT:- IBRAHIM SULEIMAN

CAUSE OF ACTION:- THEFT

DATE OF HEARING:- 15TH -01-2003

STATEMENT OF CLAIM

I Hashimu Moh'd on behalf of commissioner and attorney general Zamfara State I am sueing you Ibrahim Suleiman that on 10th day of January 2003 at about 2.30 that one Mansur Muh'd a resident of Tudun Wada area Gusau come to police station and lodged a complainant against you in the same day at about 1.50 you went to his shop at Tudun Wada area Gusau you open his shop with the master key and stealed his tape recorder estimated to cost N1000.00 and 2 tins of Nido estimated to cost N1000.00 and one soap at the rate of N25.00 and cash worth N19, 000.00 that is why you are suspected to commit the above mentioned offence under section 145 of Sharia penal code.

COURT:- Court had accepted the case and ordered the parties to appear Immediately.

COURT:- Court read the statement of claim to the suspect and he said he understand the contents.

COURT:- To the suspect you heard the claim of the complainant what do you have to say?

ANS:- Yes it is true and I agreed that I have committed the offence. I entered his shop and use a key, which I open it. I stealed a bag containing N19,000.00 and 2 tins of Nido milk, and bathing soap and one tape recorder without the owners consent and permission and he is not my relation and no body had permitted me to entered his shop and carried away the properties out of its custody.

COURT:- To the suspect do you have any reason of stealing.

ANS:- No.

COURT:- To the complainant you heard what he said what do you have to say?

ANS:- I am appealing to the court to grant me permission to forward the exhibits.

COURT:- To the prosecution, you are permitted to bring the exhibits to the court.

ANS:- Here is the stolen exhibits

COURT:- The exhibits received are as follows:

1 One piece of soap

2 One radio 1 cassette recorder (Socoo type) with registration number SG. 730.

3 Two tins of peak milk

4 One handbag with <u>VEDAN GLUTAMATE SAE</u> SONING WRITTEN at the back. These are the items stolen inside the shop after the shop was broken with master key and brought out the properties from its custody.

COURT:- To the suspect have you seen the exhibits?

ANS:- Yes I have seen it.

COURT:- To the suspect what do you have to say?

ANS:- It is true that are the properties I steale from a shop at Tudun Wada Gusau.

COURT:- Do you have anything to say?

ANS:- I plead for court mercy.

COURT:- To the prosecution do you have any thing more to say?

ANS:- Yes here are 8 bunched of keys tide together which he uses and committed theft.

COURT:- Court had shown the keys to the accused person.

COURT:- To the suspect what do you have to say?

ANS:- Yes it is true that they are the master keys I used and open the shop and stealed the properties.

COURT:- To the suspect do you have any additional explanation to make before judgment?

ANS:- No.

COURT:- To the suspect how old are you?

ANS:- I am 18 years old.

FOUND GUILTY

The complainant HashimU Moh'd on behalf of Commissioner of Justice and Attorney general Zamfara State sued Ibrahim Suleiman age 20 years on 10th day of January 2003 at about 2.30 that one Mansur Moh'd at Tudun Wada market reported that you Ibrahim Suleiman use one master key at Mansur Moh'd shop Tudun Wada market Gusau without the

owner's consent and permission and which you stealed one set of tape recorder, one piece of soap, 2 tins of peak milk and hand bag containing the sum of N19, 000. 00 the tape recorder was estimated to cost N1000.00 two tins of peak milk cost at N1000.00 and one piece of soap cost N25.00. The accused person confessed to the Commission of the crime under section 145 of Sharia penal code that he used a master key and open the shop and stealed the above mentioned items without the owner's permission the prosecution had tendered exhibits of the stolen items before the court where the accused person confirmed the exhibits he also show 8 bunches of keys which the accused used to steal peoples properties and which the accused person did not denied in the end court had requested the accused whether he has a defence in the action and which he said he has no defence. What court had consider here is that since Ibrahim Sulieman make a confessional statement that he committed theft of N19, 000.00, two tins of peak milk, one piece of soap, one hand bag and which have exceeded ¼ of Dinar, the theft was committed inside (Hirz) (Safe custody) he entered the place without permission, he entered and carried out the property in owner's custody, he is adult because he is 18 years old, he could not defend himself, he has no right over the property stolen he make the confession freely and knowing fully that judgment will be pass against him, he is same and aan adult member. Therefore based on the Islamic principles and section 144 of Sharia penal code Ibrahim Sulieman is found guilty of committing theft a punishment which will amount to amputation of right hand under section 145 of Sharia penal code also as provided by

Risalaah thamaruddani page 599-600 where it says

.....

.....

MEANING

Who ever steal property amounted to ¼ of Dinar or estimated to be 3 Dirham his punishment is amputation of hand".

Based on court observation and considering the above ground. I found you Ibrahim Suleman of committing the offence of theft under section 144 and punishable under section 145 Sharia penal code based on your confessional statement under section 155 of Sharia penal code.

COURT:- To the accused person what did you say?

ANS:- I seek for court mercy.

EVIDENCE OF CHARACTER

COURT:- To the prosecution did the accused person committed similar offence?

ANS:- The accused is first time offender from my record.

SENTENCE

Because I found you Ibrahim Suleiman guilty of committing theft I sentence you to be amputated on your right hand side in accordance with the provision of Holy Quran in the verse of maidah as it says:-

MEANING-

As to the thief, male or female cut off his or her hands. A punishment by way of example from God. For there crime, and God is exalted in power wise.

Based on the above provision, today in God wishes I sentenced you Ibrahim Sulieman to cut off your right hand side from the wrist to your fingers in accordance with section 145 of Sharia penal code and I ordered the return of the properties to the owner after 30 days.

RIGHT OF APPEAL

The aggrieved party has right of appeal to Sharia court of appeal Gusau within 30 days.

Finished today 15/01/2003
The Hon. Judge
Alh. Muhutar Umar Gunmi
3/2/2005

TRANSLATED BY:-
HAYATU WADATAU BUNGUDU
PRINCIPAL REGISTRAR
HIGH COURT OF JUSTICE GUSAU.

Appendix 4 (a)

IN THE UPPER SHARIA COURT I GUSAU
SITTING AT GUSAU BY THE HON. JUDGE
ALHAJI MUHTAR UMAR GUMMI
CASE NO CR/TR/17/2003
COMPLAINANT:- ATTORNEY GENERAL ZAMFARA STATE
ACCUSED:- SURAJO MOHAMMAD
CAUSE OF ACTION:- THEFT SECTION 148 SPC
DATE OF HEARING:- 20-02-2003

STATEMENT OF CLAIM

I Hashimu Mohammed on behalf of Commissioner of Zamfara State I am sueing you Surajo Mohammed suspected you to have committed theft that on 3/2/2003 at about 9.00 am that one Sani Lawali of unguwar gwaza Gusau came to Tudun Wada Gusau police station brought a complainant against Mohammed of Dogon Kade village of Kasuwar Daji Local Government area on the same date at about 5.00 am that you did entered his house and stealed his goat estimated to cost N2, 200.00 therefore you are suspected to have committed the offence.

COURT:- Court accepted the case and ordered all parties to appear in court. Court read the statement of claim to the suspect and he said he understand.

COURT:- You heard what you are suspected to have committed what do you have to say?

ANS:- It is true that I stoled his goat I went and entered Sani Lawali's house and I stoled the goat estimated to cost N2000 I bought it out of the house to a nearby bush at unguwar Gwaza area is my first time to committed theft and I am physically fit and I am not in poverty that will

warrant me to streal peoples property it is an act of God and I pray for court to do mercy for God sake.

COURT:- To the complainant/prosecution you heard, what do you have to say?

ANS:- Since he agreed and he confessed to the commission of the crime, the court should proceed to Judgment and that court should order me to present the exhibit ie (goat)

PROSECUTION:- The prosecution presented she goat and court show it to the suspect.

COURT:- Court consider that the she goat is very small and the estimated made earlier N2000.00 is in correct and therefore another valuer should be contacted for new estimate.

COURT:- To the suspect what do you have to say?

ANS:- Yes it was the goat I stealed from Sani Lwali's house which I brought it out and later I was arrested.

COURT:- Court adjourned the case until 19/3/2003 for the goat to be estimated.

COURT:- Today 19/3/2003 both parties in court.

COURT:- To the prosecution were able to get the valuer and has he valued it?

ANS:- Yes, Sarkin fawa Aiti is the new valuer and he had estimated the goat to cost N1,800.00 and Sarkin fawa Alti is here present.

COURT:- To the suspect you heard what do you have to say?

ANTS:- I agreed.

COURT:- To the complainant do you have anything to say?

ANS:- No.

COURT:- To the suspect do you have anything to say?

ANS:- No.

COURT:- To the suspect do you have anything to say in addition to what you have said earlier?

ANS:- No

COURT:- To the defendant/suspect do you have any defence or any reason which will prevent the court to punish you?

ANS:- No I have no defence.

FOUND GUILTY/CONVICTION

That the prosecution Hashimu Mohammed who filed the case on behalf of the commission of Sharia Zamfara State against you Surajo Moh'd who is 30 years old charged with the offence of theft contrary to section 148 of Sharia penal code that on 3/2/2003 at about 9.00 am one Sani Lawali of unguwar Gwaza Gusau came to tudun wada police station reported that you Surajo Mohammed of Dogon Kade town of kasuwar Daji Local Government area of Zamfara State that on the same day at about 5.00 am you entered his house and stealed a goat estimated to cost N2,200.00 and that is why you are suspected to have committed the above offence.

Sdurajo Mohammed confessed to have stoled the goat "surely I have stolen his goat" that I entered Sani Lawali's house and bring out the goat valued at N2000 I even took it to unguwar Gwaza Gusau nearby a bush where I was arrested and I have

never committed theft through out my life I am not in State of difficulty or in a place of poverty that will warrant me to commit stealing but it is an act of God.

The prosecution then presented the goat as an exhibit ie a female goat, short red in colour before the court estimated to cost N2000.00 and the suspect confirmed the stolen goat the expert on estimated (valuer) Named Sarkin fawa Alti estimated the goat to cost N1, 800.00 and all parties concerned in the matter was present. Court had asked the suspect whether he has any defence to the action and he replied "No defence".

On the court finding court is satisfied that the suspect had committed the offence of theft based on his confessional statement only and now left for the court to pass judgment as it says in SHARHUT TANUDI VOLUME I page 125

.....

.....

MEANING:-

Confession is strong than calling witnesses. The confession should be made on the following conditions.

1. The thieves should be Adult and sane
2. Safe custody (Hirz) ie (inside the house)
3. Estimated to cost N1,800.00 exceeding ¼ of Dinar
4. Carrying away the property outside its custody
5. He took out the property without a genue reason provided under Islamic law.
6. The accused person is a Muslim.

7. He confessed to the Commissioner of the crime without undue influence compulsion or promise.

8. He did not withdraw his confession.

9. He entered the house without lawful authority.

10. He is not under the control of the property stolen.

11. Considering the above facts these what is called theft under Islamic law as it is stated in the Holy Quran in SURATUL- MAIDAH where it says:- .....

.....

MEANING:-

As to the thieve Male or female cut off his or her right hand a punishment by way of example from God, for Gad is exalted power wise".

Therefore the offence of theft has been established only left for sentence as it is provided under section 145 of Sharia penal code of Zamfara State Imam ib Asimim says in Tuhfa page 117 where it say:-.....

.....

MEANING:-

The hand of a thieve is to be cut off if he confessed to the commission of the crime or where there is two male Adult and pious witnesses.

Therefore the offence of theft has been established and the cutting off hand is to be enforced.

COURT:- To the accused person do you have anything to says?

ANS:- I seek for court mercy.

ALLOCUTUS

COURT:- To the prosecution has he ever found guilty of committing similar offence?

ANS:- No, this is the first time.

SENTENCE

Because I found you guilty, I hereby ordered you Surajo Mohammed to be amputated at your right heard side under section 145 of Sharia penal code and section 144 of the same Sharia penal code.

I ordered the goat to be return to the owner under section 101 of Sharia penal code.

RIGHT OF APPEAL

The aggrieved party can appeal to Sharia court of appeal Gusau within 30 days.

Disposed today
3/4/2003
THE HONOURABLE JUDGE
ALH. MUHTAR UMAR HUMM

CERTIFIED TRUE COPY

TRANSLATED BY
HAYATU WADATAU BUNGUDU
PRINCIPAL REGISTRAR
HIGH COURT OF JUSTICE GUSAU.

Appendix 4(D)

IN THE SHARI'A COURT OF APPEAL SITTING IN GUSAU ZAMFARA STATE

BEFORE: - 1. HON. ALH. MUH'D BELLO ALKANCI
2. HON ALH. MUH'D BALARABE ANKA
3. HON. ALH. IBRAHIM RUFAI IMAM
4. HON. ALH. MUH'D A.A. GUMMI
5. HON. ALH. IBRAHIM A. R/DORAWA

BETWEEN: -
SIRAJO MUH'D .....APPELLANT
AND
A.G. ZAMFARA STATE .....RESPONDENT

CASE NO. SCA/GS/H/9/03

JUDGMENT

This is an appeal from the decision of Upper Sharia court I Gusau to this court, (Sharia court of Appeal) Gusau Zamfara State.

The appellant Sirajo Muh'd was arraigned on a charge of theft on 3/2/03 at about 9:00AM. That on that same date at 5:00AM the accused broke into the house of one Sani Lawal of Unguwar Gwaza and made away with a she – goat valued at ₦2, 200.00.

The accused was said to have admitted committing the offence from the said House, I really stole the said she-goat valued at ₦2, 200.00. I took it from that house, and was arrested at outskirt of Unguwar Gwaza. I have never steal anybody's property. This is the first time the accused was believed to have the physical ability to find his lawful means, he has no any

deformity or poverty, it is just a fate against me. I am pleading with the court to be lenient with me.

After cross-examining the prosecution and the accused, the court found the accused guilty of the offence of stealing a she-goat valued at ₦1, 800.00 and ordered that, the right hand the accused be amputated by relying on his voluntary confession, the court stood by the word of Allah SWA.

For that, the court convicted the accused under the provisions of S. 145 SPC law of Zamfara State since he confessed as detailed in tuhufa page 117. which says: -

Meaning

"The hand of a thief can be amputated on his own confession or by two just witnesses, there is no doubt on this"

On this the court ordered that the accused right hand be amputated under the provision of S. 145 SPC law of Zamfara State.

The accused was dissatisfied with this decision and appealed to this court (Sharia Court of Appeal) Gusau Zamfara State.

In his grounds of appeal before this court, he stated that, he was not satisfied with the decision of the court for the injustice done by ordering that, his right hand be amputated. Secondly, he informed the court that he was suffering with insanity ever before Id-el-Kabir, he left family and never return, his families are still looking for him.

He introduced his lawyer one Abubakar Garba Gajam who adds 2 more grounds where he stated that, (3) The court erred in law in the conduct of the proceedings entirely, it violates the provision of S. 155. SCPC (4) the court made mistake in taking the plea of the accused on baseless confession in accordance with Islamic laws.

He made detailed submission one after another. The provision of S. 154 made detailed procedure on taking the plea of an accused person not as it was obtained in the present case.

The question of reading the complaint to the accused and asking him to reply violate the procedure as contained in S. 154 SCPC law of Zamfara State.

The question put to him by the trial court preclude him from telling the court he was insane. And if we critically look at the copy of the proceedings at page 3 at precisely paragraph 14 - 19 we could notice that, the question put to the accused whether he has anything to say or to defend him from court punishment. The accused told the court he has nothing to say. This is not a pleading. The only reliable procedure acceptable to Sharia laws is by way of producing 2 just witnesses to testify against the accused, as it was enshrined in IHKAMIL – AHILAM page 21 which it says.

It also adds that, any judgment without proper plea is a nullity. Again the reasons that the lower court relied upon in convicting the accused on his confessional statement, at page 5 of the copy of proceedings are above ten reasons

1. The court state that, being a mature and sane person, his confession is reliable. Which method did the court adopt to determine that he is sane. Again the law permits an accused to retract his confession see TABSIRATUL HUKAMI page 41

The law permits him to withdraw his confession especially those related to adultery and theft. Again the provision of section 155 SCPC has not been followed strictly to enable the accused benefit from it's criteria rather it was turned down against him, which occasioned injustice.

We therefore urge this Hon. Court to quash this decision for the interest of justice, as it was enshrined in the book of DASUKI in MUHTASAR commentary vol. 4 P. 83. The respondent counsel Abubakar Umar disagreed with all of the appellant counsel's submission.

At first he submitted that, the lower court adhered strictly to what was obtained in S. 154 SCPC. When we look at page 3 paragraphs 17 of the proceedings, where the court asked the accused, whether he has anything to defend himself to escape the punishment of the court. This sort of questions shows that, the court complied with the provision of S. 155 SCPC.

The appellant counsel also submitted that, the lower court did not establish the confessional statement with 2 witnesses. This is not acceptable considering the nature of the confession, see ADAWI page 307, where it was stated "It is only in civil cases that the requirement of witnesses arise not in criminal cases".

This submission is weak that may warrant the court to quash the judgment as prayed in the appellant counsel.

2. The saying that al- lizari has not been done is not true, because it was conducted where the court asked the accused to give it reasons of defence that would exonerate him from liability.

3. With respect to the age of the accused, there is nowhere that the court is mandated to enquire about the age of the accused. Apart, his age has been stated in the F.I.R.

4. The last point raised by the appellant that the accused was insane I wish to draw the attention of the court in the interest of justice to the provision of S. 50 of Sharia Court Laws 1999 and S. 251 of SCPC which requires the courts not to interfere with it's proceedings, in the course of justice.

He finally prayed the court to dismiss the appeal and affirmed the decision of the trial court.

1. In his first ground of appeal, the appellant contended that he was insane. If we look at S. 281 SCPC sub section 24 (i) it was provided that when the court observe in the course of it's proceedings that the accused was insane or is mad which incapacitate him to defend himself. The court is required to investigate the cause and nature of that insanity.

Because, the responses of the accused in the present case, create doubt and suspicion for the failure of the court to take necessary steps to investigate the unsanity.

2 The second grounds of the appellant that, there was a total deviation from the provisions of S. 155 SCPC. Because when we look at page 2, the first witness at the end of page 3, the court asked the accused do you have anything to say he responded "NO".

This shows that, the court did injustice for it's failure to consider the conditions enshrined in S. 155. The section provides that, when an accused appeared before the court, and admitted committing an offence, before the court could convict him, it must satisfy itself that, the accused understand the nature of the offence charged and the consequences of his confession and the right given to him to withdraw or retract his confessional statement. The court failed to observe all of these benefits to the accused. This confirmed that, there were irregularities in the entire criminal proceedings of the Zamfara State SCPC. And lack of following these procedures create injustice and suspicion. Prophet Muhammad (S.A.W) said in FIKIHUL-WALIHI vol. 2 page 628 that: -

"You should avoid executing judgment, if there exist doubt no matter how minute"

The detention of the accused over a period of one year and four months in prison custody over the theft of a she-goat valued at ₦1, 800.00 and the total failure of the trial court to consider certain fundamental criteria in it's proceedings as it was stated in BAHAJA at page 158.

Meaning

Jurists unanimously agreed that the confessional statement of a person with insanity and detained based on such confession, on an offence which he confessed to have committed due to his detention or torture, the majority jurists agreed that, he should only be made to pay the amount equal to what he stole but his hand would not be amputated.

In this wise, the long detention of the accused in prison custody, is enough to stand as a ta'azir to him as it was contained in the provision of S. 148 SCPC.

With regards to what transpired above, we the Hon. Kadis of Sharia court of appeal Gusau, Zamfara State, due to a lot of irregularities, we observe in the entire proceeding of U.S.C. Gusau, we quashed the decision of the court and discharge the accused accordingly. The appeal succeeds.

SIGNED

1. The Hon. Alh. Muh'd Balarabe Anka G/Kadi
   Sharia Court of Appeal Gusau
   Date..,.....

SIGNED

2. The Hon. Alh. Muh'd Awwal A.A. Gummi- P/Kadi
   Sharia Court of Appeal Gusau
   Date.....

Translated by

Mahmud M. Labaran
Ministry of Justice, Gusau.

Appendix 5

Comp No. 106/2004
Case No. 106/2004
8/11/2004

UPPER SHARIA'A COURT DUTSINMA

Judge: - Bello Usman Daura
Members: - 1. A. Suleiman Buhari D/Ma
2. Mal. Umar Muhammad D/Ma
3. Mal. Mustafa Nuhu K.T
Plaintiff: - Commissioner of Police Katsina
Accused: - 1. Ibrahim Rabi'u Yalle
2. Lawal Sama
Claim: - Accused of Conspiracy and Stealing of (2) Two Cows.

Statement of plaintiff

I Cpl. Suleiman Lawal Force No. 199732 N.P.F, D/Ma on behalf of C.O of police Katsina state command, I present these two people (1) Ibrahim Rabi'u who is well known as Yalle who is residing at Dabawa (2) Lawal Sama who is well known as Jan Barume all of them are residing at Dabawa in Dutsinma Local Government Area accused of conspiracy and stealing of two cows.

Because on 1/11/2004 at about 1:00pm somebody named Bala Na'aiya and 1 other residence of Shema village in D/ma came to D/ma Police Station and reported that about 9 days ago you Ibrahim Rab'u and Lawal Sama you conspire and entered plaintiff's house Bala Na'aiya at Shema village and steal (2) two male cows valued at ₦150,000.00 which at the time you are driving this 2 cows you pass in front of somebody named Musa Sani's house where he saw you with those 2 cows, therefore you are accused and summoned before the court under section 120/133 Katsina State Shari' a Panel Code.

Court to Accused Person No. 1

Q you heard the statement of Cpl. Suleiman?
A Yes I heard.
Q Do you understand?
A Yes.
Q How far it is true?
A No, I don't agree.

Court to Accused Person No. 2

Q you heard the allegation made against you?

A Yes I heard.
Q Do you understand?
A Yes.
Q How far it is true?
A No, I don't agree.

Court to Prosecutor

Q Cpl. Suleiman you heard the accused persons denied, do you have witnesses?
A Yes, I will call the witnesses.

The court adjourned and the accused persons are kept under prison custody until 15/11/2004.

Parties are in court for continuation of hearing statement of P.W.

Court to Prosecutor

Q Cpl. Suleiman do you come with your witnesses?
A Yes, they are around.

Court to PW. No. 1

Name: - Musa Sani Age: -35yrs.
Q The court summoned you to testify about this issue will you swera or promise to tell the truth?
A I promise to tell the truth about what I knew.
Q What do you knew?
A What I knew for the sake of Allah is at Saturday night next morning of Sunday at about 12:00pm I saw Yalle driving cows I came to stream in order to get water he was together with somebody that is all I saw. But here is a counsel to represent accused Ibrahim Yalle.
Q Mr. Jerry you heard the testimony of PW?
A Yes I heard.
Q Do you understand?
A Yes.
Q How far it is true?
A It is not true?
Q Do you have question?
A Yes.
Q What is the question?
A My question is the time he saw Yalle on what condition did he saw him?

Court to PW. No. 1

Q You heard counsel's question?
A At that time it was in the morning.
Q Mr. Jerry you heard his reply?

A I heard
Q Do you have another question?
A Yes, what time did they make Sahur?

Court to PW. No. 1

Q You heard counsel's question?
A At about 4: am
Q You heard his answer?
Q Do you have another question?
A Yes, what is the color of Bala's cows?

Court to PW. No. 1

Q Dou heard counsel's question?
A I heard
Q Do you have any question?
A didn't you saw the other person?
A No, I did not saw him.
Q Mr. Jerry you heard his reply?
A I heard and there is question.

Court to PW. No. 1

q The time you saw Yalle what is the distance between you and Yalle?
A Just like here to Aminu Makera's house.

Court to counsel of accused

Q You heard his reply?
A I have another question.

Court to PW. No. 1

Q I know you knew Yalle very well before you saw him?
A I knew him last year he stole my cows.
Q Mr. Jerry you heard his reply?
A Yes, I heard.
Q Witness what are you going to do since you know he is a thief?
A Until I went back home

Court to prosecutor

Q You herd the statement of your witness do you have question?
A I heard and I will ask him question
Q Witness these cows are the male or females cows?
A Female cows
Q Prosecutor you have heard his reply?
A Yes, I heard

Court to PW. No. 2

Name: - Baushe Rabe: - Age 42 yrs.

Q Baushe Rabe the court summoned you to testify will you take oath or promise to tell the truth?
A I will promise to tell the truth
Q For the sake of Allah what do you know?
A What I know for the sake of Allah is I saw Yalle driving Bala's cows together with a small boy who I don't know, I was sitting down clearing my gun, after I return home I heard shouting (ihu) I told BAla it was Yalle who stole his cows , that is all I knew about this issue.

Court to counsel of accused

q You heard the statement of PW No. 2?
A Yes, I heard.
Q Do you understand?
A Yes
Q How far it is true?
A No, we have question?
Q What is your question?
A From the first information report of the police you are not among those who saw Yalle?
Q Baushe you heard counsel's question?
A That time it was 10:00 of the month of Islam I saw the cows.
Q Baushe which time do you saw them?
A I don't have watch I relied upon stars to have my (Sahur).
Q Mr. Jerry you heard his reply?
A Yes.
Q Baushe the time you saw them is it the time of (Sahur)?
A I went home and ordered for food also I heard calling for prayer.
Q Mr. Jerry counsel you hear?
A I heard this is my question.
Q Baushe since you said that you saw Yalle what type of cloth he wore?
A Black cloth.
Q Mr. Jerry you heard his reply?
A I heard.
Q Baushe what is your relationship with bala?
A I am related with him
Q Mr. Jerry you heard his reply?
A I heard there is another question
Q Baushe what is the distance between Bala's house and the place you saw Yalle with 2 cows?
A About 2 kilometers.
Q Baushe the time you saw Yalle what do you do as evidence that you saw a thief?

A I was alone and they are 2 I did not say anything.
Q Mr. Jerry you heard his reply?
A I heard.
Q Baushe can you recognize the person you saw together with Yalle?
A No, I can't recognize him.
Q Mr Jerry you heard the answer of your question?
A Yes I heard.

Court to Prosecutor

Q you heard the testimony of your witness?
A I heard.
Q Do you understand?
A Yes.
Q Do you agree?
A Yes.
Q Do you have question to ask the witness?
A Yes.
Q Baushe is the cows male or females?
A Male cows.
Q Cpl. Suleiman you heard his reply?
A Yes I have another question.
Q Baushe Rabi'u do you initially knew Yalle
A Yes, I knew him.
Q Baushe between your village and that of Yalle what is the distance?
A It is not very far.

Court to Prosecutor

Q Cpl. Suleiman you heard his reply?
A Yes I heard.
Q Do you have additional witness?
A No.

Court to Counsel of Accused

Q You heard the statement of PW No. 1 and 11 do you have anything to say?
A I have nothing to say.

Court to DW No. 1

Name: - Muhammad Sani Age: -22yrs
Q Muhammad Sani the court summoned you to testify will you swear or promise to tell the truth?
A I will promise to tell the truth.
Q What do you know.

A What I knew for the sa'e of Allah is we are together with Yalle 3 of us at Tashar Bara'u on Friday myself, Yalle and Bukadi up to 12:30 am, Bukadi drive his motor cycle myself drive bicycle a d went home that is all I knew.
Q Mr. Jerry do you hear the statement of your witness?
A Yes I heard.
Q Do you agree?
A Yes, I agree.
Q Are you satisfied?
A yes.
Q Do you have question?
A No.
Q Cp.l Suleiman you heard the statement of D.W?
A I heard.
Q Do you understand?
A Yes.
Q How far it is truth?
A Yes it is true.
Q Do you have question?
A Yes.
Q Muhammad Sani you said it was on Friday how many days ago?
A Above 20 days.
Q Cpl. you heard his reply?
A I heard
Q Do you have another question?
A No.
Q Mr. Jerry do you have additional witnesses to present?
A No.

The court adjourned till on 2/10/04 for judgment.

Court to Counsel of Accused

Today being 2/12/04 both parties are present before the court.
q You heard the proceedings of the court what do you wish to say?
A I heard but there is contradiction between the statement of PW No. 1 and that of PW No. 2
Q Is this statement told by Mr. Jerry as his last statement i.e. Al Izari?
A Yes.

The court adjourned till on 9/12/2004.

Today being 9/12/2004 both parties are in court.

Q Barrister do you anything to say?
A Yes, the court explained that the prison Authority said that, they have picture of the accused person and there is contradiction between the statement of PW No. 1 and No. 2.

Court to Prosecutor

Q Do you wish to say anything?
A The witnesses are enough because the accused person is habitual criminal

Court opinion

I Mal. Bello Usman U.S.C Judge D/ma and court members, we charge you Ibrahim Rabi,u Yalle residence of Dabawa village with conspiracy and stealing of 2 cows, because on 11/11/04 at about 1:00 pm in the afternoon somebody named Bala who is residency of Shema district of D/ma came to police station and reported that about 9 days ago you Ibrahim Rabi,u Yalle and you Lawal Sama is who is well known as Jan Barume whom all you are residence of same village you conspire and entered Bala's house and stole 2 male cows valued at ₦150,000.00.

Based on the opinion of this court and testimonies of witnesses you are hereby charged with stealing as provided in a book called "IHKAMUL AHKAM" page where it was said a judge pass judgment based on the light of witnesses and Nassi provided in "FATAHUL JAWAD" page 101.

Izari

Q Barrister Nasiru do you have anything to say?
A Yes, there is contradiction between the testimonies of PW No. 1 and No. 2.

JUDGMENT

I Mal. Bello Usman U.S.C Judge D/ma and court members we ordered that you should be remained in prison custody fro 2 years i.e. Ibrahim Rabi'u based on Nassi adduced above.

Right of appeal

Any aggrieved party can file appeal to H/C D/ma within 30 days from today.

Appendix 6

COURT:- UPPER SHARIA COURT MARU
JUDGE:- ALH. IBRAAHIM AHMED K/KOSHI
COMPLAINANT:- ATTORNEY GENERAL
DEFENDANT:- LAWALI AKWATA R/DORUWA
CAUSE OF ACTION:- DEFAMATION OF CHARACTER

STATEMENT OF CLAIM

I Lawali Sani Dauda on behalf of commissioner for Justice Attorney general of Zamfara State I am sueing you Lawali Dauda Akwata Ruwan Doruwa before this court for suspecting you to have committed th offence of defamation of chracter under section 323 of sharia penal code that two weeks ago you Lawali Akwata Ruwa Doruwa of Maru Local Government area when you came back from kazaure that somebody inform you that one Ibrahim Sabo that he will never reconciled with anybody or any member of P.D.P from there you abused Ibrahim Sabo and on this ground I am suspecting you to have committed the offence.

COURT:- Court had accepted the case under section 141 (b) of sharia civil procedure code.

COURT:- To the suspect Lawali Akwata you heard what you are being sued what do you have to say?

ANS:- It was not true I did not abuse him.

COURT:- To the complainant Lawali who knows he had abuse Ibrahim Sabo?

ANS:- The complainant said yes there is witnesses they are (1) Yusuf Driver (2) Danindo Driver (3) Sanusi Mande that is all.

COURT:- Court had adjourned the case until 9/12/04 in order to summon the witnesses and the suspect is ordered to be in Maru prison custody unless he produce reasonable sureties to stand for his bail in order to avoid anarchy and confussion.

COURT:- Court had resume duty today 9/12/04 and both parties present including witnesses.

COURT:- PW1 Yusuf Driver are going to swear or you are going to take affirmation?

ANS:- That in good faith I was repairing motor vehicle I heard Lawali abusing Ibrahim Sabo I came and talk to Lawali he refused to stop then Ibrahim turned and met Lawali, I told him to leave him he said I can not abuse your parents but I live him to God that is all what I know.

COURT:- To the complainant you heard what the witness had said do you have anything to say?

ANS:- The complainant Lawali said since he heard that Lawali had abused Ibrahim Sabo that is all.

COURT:- To the suspect you heard what the witness had said do you agreed?

ANS:- Yes I heard but I disagreed.

COURT:- To the suspect do you have any question or objection to make?

ANS:- I have no question but PW1 is a motor mechanic to Ibrahim Sabo.

COURT:- To the PW1 you heard that you are motor mechanic to Ibrahim Sabo what do you have to say?

ANS:- I am in the side of Lawali and not Ibrahim Sabo.

COURT:- To the suspect Lawali you heard do you have any additional objection?

ANS:- To be sincere I don't have any objection again,

COURT:- PW 2 is called to give evidence he is Dan indo he said what I know in good faith I came to repair my car at Yusuf's garriage then Lawali started abusing Alh. Ibrahim Sabo at that material time my attention was in my car I did not heard the abused words he used on reply Alh. Ibrahim said he can not abuse him rather he left him to God. That is all I know.

COURT:- To the suspect Lawali you heard what PW 2 stated do you agreed?

ANS:- I did not agreed, because he is not a hausa man by tribe.

COURT:- To PW 2 you heard what he said?

ANS:- PW 2 said I am a hausa man by tribe.

COURT:- To Lawali you heard what do you say?

ANS:- I heard but which type of abuses words I pronounced?

ANS:- PW 2 said at that material time my attention was in my car.

COURT:- PW 3 is called to give evidence by name Sanusi Mande you summon to give evidence in respect of what happened between Lawali and Ibrahim what did you know in good faith?

ANS:- When they started the fighting I was not around but at the time I came I met people advising Lawali to stop fighting, I met him and told him why cant you stop the fighting from there he turned and live the place. Ibrahim Sabo said he abused him but he leave him to God that is all what I know.

COURT:- To the suspect Lawali you heard what PW 3 had stated do you agreed?

ANS:- Yes I agreed.

COURT:- To the complainant do you have any additional witnesses?

ANS:- That is all my witnesses.

CONCLUSION

Based on what had happened in this case where PW 1 and PW 2 give evidence that they heard Lawali had abuses Ibrahim Sabo but they did not know the abuses words he uses because their attention was to repair their cars.

Court had informed the accused person on what the witnesses but he disagreed with there testimonies and he did not discredit their evidence. Therefore on this ground court had found Lawali guilty of abusing Ibrahim as stated by the witnesses although they did not informed the court the abusive words uttered to Ibrahim by Lawali and on that ground court had found Lawali guilty of committing the offence.

Therefore if Lawali can swear an oath that he did not abuse Ibrahim court will discharge him as it is provided in the Book of Tuhfa page where it says_ .....

.....

MEANING

Where there is strong suspicions the accused person can take an oath and it can not to be rebert to another.

COURT:- To the suspect Lawali Akwata can you take an oath, that you did not abuse Ibrahim Sabo and where you refused to take the oath a Judgment will be pass on you in accordance with Islamic principles..

ANS:- I can not take an oath but I agreed with what ever sentence that the court will enforce on me.

COURT:- To the complainant since the accused person had refused to take oath has he committed similar offence?

ANS:- The complainant said No he is a first time offender.

SENTENCE

I Alhaji Ibrahim Ahmed upper Sharia court Judge of upper Sharia court Maru after I have considered the above stated facts I am satistfied that you Lawali you did abuse Alhaji Ibrahim Sabo as testified by the witnesses although they did not know the words used for abusing him and on that ground you were asked to take an oath that you did not abuse Alh. Ibrahim and in which court found you guilty under section 323 of Sharia penal code.

COURT:- To the accused person do you need to say something before court pass judgment on you?

ANS:- The accused Lawali said I plead for court mercy.

SENTENCE

Considering the fact that Lawali had plead for mercy and that he is first time offender I sentenced Lawali to six months Imprisonment or N10, 000.00 to serve as deterrence to others.

Dispersed off today

Alh. Ibrahim Ahmed
KOTORKOSHI
UPPER SHARIA COURT
JUDGE.

CERTIFIED TRUE COPY

TRANSLATED BY
HAYATU WADATAU BUNGUDU
PRINCIPAL REGISTRAR
HIGH COURT OF JUSTICE GUSAU.

Appendix 7

CASE NO-CR/FI/02/2002
DATE- 20th –02-2002

COURT – Upper Sharia Court Shinkafi
JUDGE – Alhaji Labaran Suleman Gusau
COMPLAINANT – Hashimu Galadima Maberaya
DEFENDANT – Abdul- Rahman Isahaka and 2 others
CAUSE OF ACTION – Theft under section 144 sharia penal Code Law
DATE OF HEARING –27-02-2002.

STATEMENT OF CLAIM

I Hashimu Galadima Maberaya I am sueing Abdul- Rahman Isahaka Abdullahi Abubakar and Halilu Usman all of them resided in maberaya town, this is because on 7th day of January 2002 at about 3.00 am they went and open my shop by force and they stoled my properties as follows:-

1. One sack of sugar valued at N2, 800.00
2. One packet of soap valued at N900.00
3. One tailor head valued at N3, 600.00
4. One tape recorder valued at N1, 400.00
5. Two pieces of long key soap valued at N120.00
6. Two packets of chewing gum valued at N140.00
7. One packets of touch light battery at N150.00
8. One packets of mixed items valued at N180.00
9. One packets of cigarette valued at N260.00
10. Four packets of biscuits valued at N280.00
11. Seven pieces of saletives valued at N140.00
12. Two packets valued N20.00
13. One packets of electric bulbs at N120.00
14. 5 pieces bottles of cream valued at N130.00
15. 3 pieces of shoes for children valued at N450.00

16. 5 thread of pieces of tailor thread valued at N50.00
17. Bathing soap valued at the cost of N25.00
18. One sack of pear of shoes valued N1, 920.00
19. Shoes 30 pears valued at 1,350.00
20. Yards (two bundles) all valued at N14, 335.00 this is what I am sueing for.

COURT:- Court had had received the case which was transferred from shinkafi on the ground that the court lack Jurisdiction to here the case.

COURT:- Both the complainant and the suspects had appeared in court ie Hashinu Galadima complaint and Abdul-Rahman Isahaka Abubakar and Halidu Usman today 28/2/2004.

COURT:- Court had read the compliant to the suspects Abdul-Rahm,an Ishahka, Abdullahi Abubakar and Halidu Usman as contained above.

COURT:- To the suspect number (1) Abdul-rahman Abubakar Abdullahi and Halidu have you head on the charge sheet read over to you?

ANS:- The 1st suspect said I heard and I understand-

The 2nd suspect said I heard and I understand-

The 3rd suspect said yes I heard and I understand

COURT:- To the suspects Abdul- Rahman, Abdullahi and Halidu Usman is it true that you have committed the offence as Stated by the complainant?

ANS:- The 1st suspect bdul-Rahman Ishaka yes it was true-

That Hashimus shop was broken and it was my self Abdullahi and Halilu aforementioned properties, we

Brought the properties to my house at maberaya, we stoled the properties from his shop. After we keep the properties later Abubakar bdullahi came and took one items from the stolen goods to shinkafi town where he and myself were arrested and suspected to have stoled the properties. I and Halilu went and brought out the remaining properties and that is all I know.

ANS:- The 2nd suspect Abdullahi Abubakar said yes it was true that myself and Abdul-Rahman Ishaka aand Halilu Usman we went and broke down the shop of Hashimu Galadima and took out properties for the huge sum of money we brought the properties to Abdul-Rahman's house for having safe keeping- after one day myself and Abdul-Rahman decided to bring out some for sale to Shinkafi market. I brought but I was arrested by a member of Vigilante group and he took me to their office for interrogation and that he is suspecting me to have stolen the properties and he ordered for the arrest of Halilu and Abdul – Rahman and that is all what happened.

ANS:- The 3rd. suspect Halilu stated that I saw Abdul-Rahman breaking the shop and brought out properties from the shop and handed over them to Abubakar Abdullahi and Abubakar bdullahi forwarded it to me where I took them to the field and keep them there after we gathered them all together, we took them to Abdul-Rahman house and keep them there and we came out from the house in the

mid night. And from there we departed to our various place of residence.

COURT:- To the 3rd suspect Halilu do you know the properties that was been stolen in the shop? And it was together with you that this properties was took out from the shop and given to you and which you took it to a certain field and put it there do you know the purpose of doing such thing or you don't know?

ANS:- Halilu said yes I know we agreed to conspired and break the shop of Hashimu Galadima in the night of that faithful day we went there in the midnight Abdul-Rahman brought out a knife and put it inside the locker of the door and break down the door of the shop and he entered inside and he brought out properties to us we took them and put it a certain field. After the operation we carried the properties to Abdul-Rahman's house for safekeeping.

COURT:- To Usman Hassan and the representative of Hisbah commissioner you heard confessional statement of Abdul-Rahman; Halilu and Abdullahi in respect of the suspected stolen properties.

ANS:- Usman Hassan said yes I heard the confessional statement of Abdul- Rahman Halilu, and Abdullahi of stolen the properties where they went in the midnight and break down the shop and took away properties worth Hundreds of Naira.

COURT:- To Aminu Ibrahim of upper shairia court shinkafi you heard what Halilu, Abdul-Rahman and Abdullahi and Abubakar did.

ANS:- Aminu Ibrahim said I heard that Abdul-Rahman Abdullahi Abubakar and Halilu had made a confessional statement that they went in the midnight and break the shop of Hashimu Galadima and went away with properties of large sum of money.

COURT:- To the registrar of the court said the man who received the stolen properties was summon to appear on Wednesday and the properties stolen was already estimated in accordance with sharia principles.

COURT:- Court had adjourned the matter to 14/3/2002 for continuation of hearing.

COURT:- Court resume sitting today 14/3/2002 the complainant Hashimu Galadima and the suspects Abdul-Rahman Abdullahi and Halilu Usman all appeared in court.

COURT:- To the Registrar where is the man who estimated the items in present of the suspects.

ANS:- The Registrar Yusuf said here is the estimate as follows:-

1 Sweet ½ carton estimated to cost N130.00

2 Cream ½ carton estimated to cost N120.00

3 Battery one carton estimated to cost N130.00

4 Four packets of carbin biscuits estimated to cost N280.00

5 One packet of marches estimated to cost N120.00

6 One packet of excel cigarette estimated to cost N280.00

7 Two packets of chewing gum estimated to cost N150.00

8 One carton of electric bulbs estimated to cost N160.00

9 One packet of pen cow estimated to cost N70.00

10 One packet of Mix medicine to cost N90.00

11 10 pieces of solative estimated to cost N200.00

12 Two pieces of long key soap estimated to cost N130.00

13 Six pieces of Giv soap (bathing soap) estimated to cost N120.00

14 Five pieces of tailor thread estimated to cost N50.00

15 White key soap one carton estimated to cost N800.00

16 Six dozen of soso shoes and one pear estimate to cost N2433.00

17 Three pears of Dunlop slipper shoes estimated to cost N240.00

18 One sack of Dangote sugar estimated to cost N2, 700

19 One tailor head estimated to cost N2, 500.00

20 One tape recorder estimated to cost N1250.00

21 Two yards (with kobo circle) estimated to cost N300.00

Grand Total N12, 328.00

The above items are the properties estimated which was found in the possession of Abdul-Raman Abdullahi and Halilu Usman after Hashimu's shop was broken and properties was packed out.

COURT:- To the valuer malam Usman in good faith is it the current price of the properties?

ANS:- The valuer malam Usman said in good faith this is the current market price of the properties.

COURT:- To the suspects Abdul-Rahman, Abdullahi and Halilu Usman you heard the estimated cost of the properties found in the possession belonging to Hashimu Galadima

ANS:- Abdul-Rahman said yes, it is true.

Abdullahi said yes, it is true

Halilu Usman yes, it is true

COURT:- Court had ordered the suspects to be remanded in prison custody until 6/6/2002.

COURT:- Court had resume sitting today 6/6/2002 the complainant malam Hashimu and the suspects Abdul-Rahman, Abdullahi and Halilu both parties appeared in court.

PLEADING

COURT:- To the suspects Abdul-Rahman, Abdullahi and Halilu Usman do you have anything to say?

ANS:- The 1st suspect Abdul-Rahman said I have nothing to say I only plead for justice in respect of the theft.

ANS:- The 2nd suspect Abdullahi said I have nothing to say I only plead for court mercy.

ANS:- The 3rd suspect Halilu Usman said I have nothing to say I only plead for justice in respect of the theft.

CONVICTION

I Labaran Suleiman upper Sharia court Judge Grade II Shinkafi of upper Shaira court I based on the case brought by Hashimu against Abdul-Rahman, Abdullahi and Halilu that in midnight you went and break the shop and carried away packets of provisions as follows:-

1 ½ carton of sweets at the cost of N260.00

2 ½ dozen of cream at the cost of N120.00

3 One packet of battery at the cost of N130.00

4 Four packet of carbin biscuits at the cost of N280.00

5 Marches one packet at the cost of N120.00

6 Packet of excel cigarette at the cost of 280.00

7 Two packet of chewing gum at the rate of N150.00

8 One packet of electric bulbs at the rate of N160.00

9 Packet of pen cow at the rate of N70.00

10 One packet of mixed medicine cost at N90.00

11 Ten pieces of solutive at the rate of N200.00

12 Two long key soap at the rate of N130.00

13 Six pieces of Giv soap at the rate of N120.00

14 Five pieces of tailor threads at the rate of N50.00

15 One carton of white key soap cost at N800.00

16 Six dozen of soso shoes and one pear cost at N2, 433.00

17 Three pieces of Dunlop shoes cost at the rate of N240.00

18 One sack of Dangote sugar cost at N2, 700.00

19 One tailor head cost at N2, 500.00

20 One tape recorder cost at N1, 250.00

21 Two yards (with kobo circle) cost at N300.00

With grand total of N12, 328.00

This means that each of the accused person had stoled properties valued at the rate of N3,400.00 and which have reached ¼ of DINAR NISAB a minimum amount required under Islamic Law and all of them have confessed to the commission of the offence that they went and entered this shop after they have breaked down the door and put the properties in packets and brought it out of the shop and hide the properties some where

and which they later decided to carry it to Abdul-Rahman, Abdullahi and Halilu made confessional statement and that all of you are male Adult and sane and what you stealed was inside a custody (Hirz) both of you agreed to entered and steal the properties of Hashimu in the 12.00 mid night valued at N3,400.00 each with grand total of N12,323.00 and that after they stealed the properties they later decided to take the properties to Abdul-Rahman's house on that ground I convicted you Abdul-Rahman of committing theft under section 144 of sharia penal code law, and you Halilu I also convicted you of the offence of committing theft under section 144 of sharia penal code as it is provided under Islamic sharia in the book of ASAHALUL MADARIKI VOL III page 187 where it says:-

MEANING

"Judgment can be based on confessional statement of an accused person either he is big or small what it means here also a hand of a thieve can be amputated if the properties stolen amounted to NISAB ie ¼ Dinar and either the property are cash or kind".

JUDGMENT

I Labaran Suliemam upper sharia court judge Shinkafi of shinkafi upper sharia court based on the above facts where the accused person were found guilty of committing theft and which if the accused were found guilty their punishment is amputation of right hand side from the whist and because this is the first time for the accused person to have committed the offence of theft under section 144 of sharia penal code. Therefore

considering the fact that Abdul-Rahman, Abdullahi and Halilu Usman were found guilty of breaking a shop at around 2.00 mid night and the properties stolen have exceeded to ¼ of Dinar (NISAB) ie N3,400.00 and also in addition Abdullahi made confessional statement that he went together with Abdul-Rahman and breaked Hashimu's shop and removed the property and you have no any connection or relationship with him in what ever form. Likewise I found Halilu Usman guilty of committing theft under section 144 of sharia penal code based on his confessional statement that he went together with Abdul-Rahman and Abubakar at round 2.00 mid night and break Hashimu shop and remove the property there in and being him an adult and some and the property stolen have exceeded ¼ Diner (NISAB) IE n3,400.00.

Therefore because they were found guilty of committing theft under section 144 of sharia penal code of Zamfara Sate. I Labaran Suleiman Gusau I. sentenced you Abndul-Rahman, Abdullaahi and Halilu to be amputated on your right hand from wrist to the fingers in accordance with Islamic law principles in the book of ASHAHAALUL MADARIKI VOL III page 187 and section 144 of sharia penal code in Ashahalul madariki it says:

.....

.....

RIGHT OF APPEAL

The aggrieved party has right of appeal to sharia court of appeal Gusau within 30 days from today.

Finished today
6/6/2002
Judge Signature & Stamp

TRANSLATED BY:-
HAYATU WADATAU BUNGUDU
PRINCIPAL REGISTRAR
HIGH COURT OF JUSTICE GUSAU

Appendix 8

Case NO. USC/TM/CR/006/2000
21 – 2 – 2000

COURT: Upper Sharia Court Talata Mafara

JUDGE: Alh. Ibrahim Maigandi Abubakar

COMPAINANT: - Commissioner of police

DEFENDANT: - Buba Bello Jangebe

NATURE OF OFFENCE: - Conspiracy and theft contrary to S. 123 & 145. S.P.C.

CHARGE

I, P.C. Shafi Garba, force NO. 2001, on behalf of Commissioner of police Zamfara State wish to lodge this complaint against you Buba Bello Mashaya of Jangebe with the offence of conspiracy and theft under the provision of section 123 and 145 S.P.C.

That on 14/2/2000 at about 2:30PM one Haruna Kofa of Jangebe who is a head of vigilante group & 4 ors went your house situate at Masaya of Jangebe arrested you and took you to police station of Jangebe over alleged theft of a cow valued at ₦22, 700.00 in connivance with your friend by name Ali of Tureta area of Sokoto State where you conspired and steal at Dan Mande Matuna House at Kagara Village T/Mafara Local government.

You were hereby suspected to have committed the above stated offence.

Court. - Buba Bello Jangebe you heard the allegation against you. Is it true that you commit the said offence of stealing a cow valued at ₦22, 700.00 which belonged to Dan Mande Matuna?

Ans. - Buba Bello, yes it is true that Ali took a cow to my house. Haruna & ors met me at my house, and brought me to police station together with the said cow. But since the said Ali is at large I will be responsible for the offence.

Court. - To Buba Bello are you a Muslim?

Ans. - Buba Bello of course I belonged to Muslim faith, and I will like to inform the court that, the said cow belonged to Dan Mande.

FOUND GUILTY

I, Upper Sharia Court Judge T/Mafara Hon. Alh. Ibrahim Maigandi Abubakar duly satisfied that you Buba Bello Jangebe committed the above-alleged offence of theft of a cow valued at ₦22, 700.00, belonging to Dan Mande Matuna which you stole at his house, which also contravene the provision of S. 145 SPC. You also made voluntary confession to the court that you was the one that committed the offence and the said cow was found in your house.

Court. - P.C Shafiu has the accused been convicted before?

Ans. - Sahafiu he was once convicted at Jangebe on the same offence of theft of a bicycle, he was sentenced to 6 months imprisonment.

Court. - To the accused Buba Bello do you have anything to say?

Ans. - Bello Buba I am praying for leniency.

JUDGEMENT

I, Upper Sharia Court Judge T/Mafara U.S.C Alh. Ibrahim Maigandi Abubakar Zurmi, due to the court finding of guilt, you Buba Bello Jangebe I found you guilty with the theft of a cow valued at ₦22, 700.00 which is more than 94 of dinar as a result of your confessional statement that you committed the said offence. I therefore ordered that your right hand be amputated in line with the provision of S. 145 S.P.C. which also corresponds with chapter (Al- Maldah) verse 37 –38 of Holy Quran where Allah (S.A.W) said: -

RIGHT OF APPEAL

Court. - There is a right of appeal to Sharia Court of Appeal Gusau Zamfara State within 30 days from today. The Case is disposed off today 21/2/2000.

SIGNED

Translated by

Mohammed M. Labaran
Ministry of Justice.

Appendix 9

CASE NO JC/148/2000

DATE:- 24/7/2000

COURT:- HIGHER SHARIA COURT TSAFE

JUDGE:- ALHAJI IDRIS USMAN GUSAU

COMPLAINANT:- POLICE

DEFENDANTS:- BARIYA & 3 OTHERS

FIRST INFORMATION REPORT

I CPL Aminu Sule with police force registration number 128025 that I bought this case on behalf of commissioner of police Zamfara State sueing Bariya Ibrahim Ado Alh. Moh'd Moh'd Sani and Hamisu Sani all of them residence nearby Magazu town in Tsafe Local Government area of Zamfara State that they are suspected to have committed Adultery (ZINA) which is an offence under Islamic Sharia of Zamfara State ie Sharia penal code section 127.

That on 22/7/2000 at about 8.40 one Alh. Lawali Mohammed a residence of Magazu town who is a member of Islamic Sharia monitoring group of Tsafe town arraigned the above suspects at Tsafe police station that on 21/7/2002 Sharia monitoring group of nearby magazu town brought this complainant that some time back since from the first month of this year (she) Bariya committed Adultery which presently she has pregnancy and she explained to us that it was Ado Alh. Moh'd Moh'd Sani and Hamisu did commit adultery with her and

make her conceived and that is why they are suspected to have committed the above-mentioned offence.

COURT:- Court had received the case in order to go ahead with the hearing and here is their explanation as follows:-

BARIYA:- She said I heard what they said and it was true I am carrying pregnancy and it was Ado Mamman Sani and Hamisu that did committed adultery with me.

ADO:- I heard but it is not true I did not commit Adultery with her.

MOH'D:- I heard but it is not true , I did not commit Adultery.

COURT:- Do you know what is the meaning of Zina (Adultery)?

BARIYA:- Yes I know.

COURT:- Do you know the punishment under Islamic Sharia?

ANS:- Said it is Illegal.

COURT:- To Bariya you know it is illegal under Islamic law and you committed the offence after you know that you area Muslim. Is it with your consent or are you compelled?

ANS:- Bariya said no they persuaded me while I was selling they called me inside their house and make me pregnant.

COURT:- That based on this suit field before this court I am satisfied that Briya had committed Adultery based

on her confessional statement and the appearance of pregnancy on her and she has no reason of doing so under Sharia as it was provided in KAWAHINUL-FIKILIYA page 233 where it says: ..

.....

Then, with regards to the 3 suspects which Bariya alleges that they committed Adultery with her, because they denied the allegation there is need to bring evidence and on that ground court adjourned the matter to 28/7/2000 and court had ordered the 3 suspects to be remanded in prison custody until that day, while court ordered Bariya to be remanded in their village at village head's house until adjourned date.

COURT:- Today 3/8/2000 is the resume date the prosecution cpl Aminu and the 3 accused persons both present in court the prosecution said Bariya had informed me that there are six witnesses they include 1. Alh. Lawali Moh'd 2. Salisu Manta 3. Isah Alh. Bala 4. Sani Abubakar 5. Abdul mumin 6. Magaji Magazu. Therefore I pray to the court to allow them to give their evidence of what they know.

COURT:- Court invited PW1 Alh.Lawali Moh'd 31 years old, a civil servant reside at tsafe town I asked him what he know in respect of this matter?

PW1 said it is true that we went and took the accused person's to police station and I gave my

statement to police and that it was Sharia monitoring group of Magazu met me in my house together with Shuiaibu Isah and Moh'd and explained to me that they were suspected to have committed Adultery with Bariya. Before the case came to me for the past two weeks during the Investigation and that parties are going to settled the matter amicable at the end the sharia monitoring group informed me that the case was settled and they agreed to have committed the offence and the case was settled between Magaji Gari (village head) the accused persons and the Girl's parent and if the agreed they should provide money for medicine in order to committed abortion on the pregnancy and one of the accused had even agreed to marry her after this has been done in village head house later Sharia monitoring group disagreed with the settlement because people will expect that we were given money and that is why they invite us for the settlement to be made in our presence and when they suggested the matter to be refer to police station for investigation. That is all I know.

COURT:- Do you know that the accused persons did commit adultery with Bariya?

ANS:- No I have no knowledge about the accused person committing adultery with her they were only brought before me because I am the chairman of

Sharia monitoring group and in which I forwarded the matter to the police.

COURT:- Court had invited PW2 Salisu Musa 28 years, farming by occupation residing at Magazu he was asked to state you know and he sated as follows:- What I know as a chairman of Sharia Monitoring committee of Jamiatul Izalatul Bidia wa ikamatus Sunnah in Magazu town one day the village head of Magazu invited me to his house where he informed me that Bariya had committee adultery and was pregnanted by Ado Moh'd Sani and Hamisu as he heard and therefore I should give him my co-operation in order to settle the matter amicably because it is very shameful that this type of crime starting in our village and on hearing this information I advised them to follow the matter logically on 21/7/2000 at about 10.00 pm he sent for me that I should see him in his house I come and we entered Mua'zu telas shop together with the accused persons also along with Bariya Salisu Alh. Bala Abdulmunin Sani Abubakar Alh. Musa & Sule them Magaji told me the reason why I called all of you Sharia monitoring group) is to hand over the accused person to you and if they escape is left to us he told me that they have settled the matter amicably and one of the accused person had agreed to marry her they told us there is no problem but we should go and met the chairman

from there we brought the accused person to the chairman Alh. Lawali Tsafe at about 11.00 pm after we explained to him he referred us to police station. That is all I know.

COURT:- Court invited PW3 Isah Alh. Bala, 32 years farming by occupation who is residing at Magazu he was asked to state what he knows who stated as follow That on Friday at about 10.00 pm Magaji Gari (village head) called me in his house in respect of Bariya case who committed Adultery and was pregnated by Ado, Moh'd Sani and Hamisu as I was told by the village head and that they requested him for amicably settlement in the matter and he said the matter was beyond his power since it has reached tsafe town we said we have nothing to do the accused person rather than to forward them to our chairman we transport them to tsafe town and to our chairman Alh. Lawali informing him what the accused had done who instructed us to take the accused to the police station that is all.

COURT:- Because of time factor court adjourned the matte to 7/8/2000.

COURT:- Today 7/8/2000 both parties in court for continuation of the case.

PROSECUTION:- Today the 7/8/2000 the case is stated for hearing and the remaining witnesses are in court.

COURT:- Court had invited PW4 Sani Abubakar who is 2 years old a civil servant residing at Magazu town who testified as follows:-

We were called by Magajin gari (village head) in his house at about 10.00 pm after our meeting, when we came we meet Ado Hamisu and Sani, Abdulmunin, Isiya, Lawali Salisu and ALH. Musa telling us that their matter has arising now that they are suspected to have committed Adultery and pregnated Bariya Ibrahim he invited them for amicably settlement and that is why he invited us to met our chairman at tsafe town and one of the accused person had agreed to marry the victim. When we come to tsafe we met our chairman and together with him we went to police station and we explained the case to the police they ordered us to come back on Monday and when we came back there was closed discussion between the father of the girl Salisu and the chairman but we don't know what they discuss because we were outside we saw when they took the girl to the hospital and from there we are asked to come back on Monday and that is all I know.

COURT:- PW5 Shehu 30 year old who reside at Magazu he stated as follows:-

What I know was that on Friday at about 10.00 pm the village head (Magaji) Invited me to his town and showed the accused person to me ie Ado, Sani and

Hamisu he instructed us to forward them to police station after showing him to our chairman and from there we are ordered to resume back on Monday for unward transmitting the case to the court that is all I know.

COURT:- PW 6 Magaji, 46 years who reside at Magazu stated that what I know Alhaji Musa and Labaran come to my house along with the girl known as Bariya that she is pregnant through Adultery, when she was asked on how does she get the pregnancy she said it was Ado, Sani and Haruna that committed Adultery with her I instructed them to go back home until tomorrow, when they come back on the following morning I repeated what they stated yesterday, they denied the allegation against them I ordered Lbaran to go back with the suggested until tomorrow again when the came back on the following day I still asked them whether they committed the offence they objection to the commission of the crime when I heard that the matter was spreader in the town I called the attention of Sharia monitoring group committee whether they are aware of what is happening in the town they told me yes they are aware I then told Salisu, Musa, Sani, Isah, Abdulmumin and Isiya that this matter is beyond my power and therefore they should report back tomorrow for possible

settlement before the Sharia monitoring committee that is all I know.

COURT:- To the prosecution is that all your witness.

ANS:- That is all for my witnesses but I am praying to the court to ask the accused person to give explanation on how the incident happened.

COURT:- To the 2nd, 3rd, 4th accused persons do you need to make any explanation to the court but is not compulsory unless you wish to do so.

ANS:- The 2nd accused Ado my explanation is that Magaji (village head) invited me to his house I asked what happened he said complainant was brought against me when I was there Hamisu came and met me from there Magaji called me inside his sitting room together with the girl (Bariya) he said to me this girl said you and 2 others have pregnated her I told him it was not true them he informed Hamisu the same, Hamisu denied the allegation, he told the girl what we have replied she said we are not the only people because Moh'd Sani also is included them Moh'd Sani DanAlhaji was called who also denied the allegation.

After all this had happened the elder brother to her father Labaran was also called who informed us that if we did not accept the blame we are to be sent to C.I.D Gusau I still denied the allegation and from there Magaji instructed us to go back home until tomorrow and when we came back he

still interrogated us on whether we have committed the offence we told him that non of us had committed the offence, he later invited the girl's parent whether the parent of the girl said one of us should marry the girl and whether we have agreed or not since the matter have reached tsafe town and that Salisu Musa should take us to police station we told him to take us where ever he want knowing that we did not committed the offence, there and then he gathered all of us in his palace that he want the matter to be settle amicably in agreement with Sharia monitoring committee and that there was rumour in the village that village head had collected money and that is why he want the matter to be settle out of trial and on that ground he forwarded us to the committee of tsafe town for what ever settlement might have been done the committee then transport us to tsafe police station where we were remanded and later presented us to the court on money series of deliberation by the committee. That is all I know.

COURT:- Court adjourned the case until 8/8/2000 because of the time factor.

COURT:- Today 8/8/2000 court resume sitting both the prosecution and the accused person were in court the 3rd accused person Moh'd Sani stated as follows:-

Moh'd Sani:- My explanation is the same of what Ado had stated yesterday.

COURT:- To the 4th accused Hamisu do you have any explanation to make?

Hamisu:- I relied on Ado explanation made yesterday.

ANS:- I seek court permission to allow me invite pw 7 Ibrahim who is now present in court

COURT:- Permission is granted to the prosecution to called pw7 Ibrahim Moh'd in order to give evidence he is 33 years old a farmer by occupation residing at Magazu town who gave his testimony as follows:
That I am the father of Bariya and we are not the people that sued in this matter it was one Alhaji Musa and Labaran that sued in this case and they did not consult me neither do they seek my wife consent before they took the matter to the prosecution do you have any thing to present?

ANS:- I still seek court permission to called more additional witness whom are yet o appear in court.

COURT:- Permission granted on the prosecution to summons the remaining witness to appear on 4/9/2000.

COURT:- Today 6/9/2000 both parties are present in court for continuation of hearing prosecution witnesses.

PROSECUTION:- Presently my witness is yet to appear in court and for this reason I still crave the indulgence of this Hon. Court to kindly adjourned the matter for

me to another date in order to enable me summon the remaining witness.

COURT:- Case adjourned to 8/9/2000

COURT:- Today 8/9/2000 both parties are in court together with the witness of the prosecution.

PW7: PW7 said I know is that Ibrahim is my younger brother who gave birth to Bariya one day we invited Bariya after we heard rumour that she had conceived pregnancy we asked her on what happened and she told us that she used to visit some boy's ie Ado, Hamisu and Sani we took the matter to Magaji the village head of Magazu and narrated him the story that is all I know.

COURT:- To the prosecution is that all for your witnesses?

ANS:- Yes that is all.

COURT:- Therefore since the prosecution have closed it case the court will fixed the case for judgment.

PLEADING

COURT:- To the parties in this case do you need to say something before court decided to pass judgment?

PROSECUTION:- I have nothing more to say.

ADO 2ND ACCUSED:- I have nothing to say, but she only defamed our character.

SANI 3RD ACCUSED:- I have nothing to say.

HAMISU 4TH ACCUSED:- I have nothing to say.

COURT:- Court adjourned the case to 9/9/2000 for judgment.

COURT:- Today 9/9/2000 both parties are court and here is court judgment.

COURT OBSERVATION:-

Based on these case field by C.P.C Aminu Sule of tsafe central police station dated 24/2/2000 which from the content of the F.I.R they are suspected Ado Sani and Hamisu with the offence of committed Adultery with Bariya an offence contrary to section 127 of Zamfare Sharia penal code he also suspected Ado Sani and Hamisu to have committed sexual inter course with Bariya and as a result she became pregnant Bariya confessed to have committed the offence and that it was the 3 accused person did commit adultery with her and became pregnant. Therefore based on the finding made under Islamic principles court is satisfied that she committed the offence willingly without undue influence and without ignorance of law. On this the commission of Adultery by Bariya has been established two grounds ie 1. The existence of pregnancy 2. Her confessional statement as it is provided in the book of KAWANINUL-FLKHIYAL page 233 where it says:-

.....

.....

Likewise another ground exist in the book of Ashahnul Madariki Volume (III) where it say: .....

.....

MEANING:-

Hadd punishment can only be inflicted on either one or on the following:-

1. Confessional statement.
2. The existence or appearance of pregnancy to unmarried woman.
3. Producing four male adult just unimpeachable witness who have seen the culprit committing Adultery at the same time.

And with regard to Ado, Sani and Hamisu they denied the allegation while Bariya confessed to the commission of the crime and the witnesses must to be produced as it was provided in the Holy Quran in Suratal Nur verse 14 where it says:-

.....

.....

MEANING:-

Those who accused chaste woman for committing Adultery shall produced four male credible witness if they refused flog them 80 lashes."Therefore I have confirmed the punishment of gazaf as it provided in the book of Al-figh-aal mazahibil-arbaa volume 5 page 233 where it says:-.....

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MEANING:-

All jurists have unanimously agreed that who ever Defamed another persons character in the presence of a judge and that person defamed was not there at that particular time and it became mandatory for the judge to confirm their right. On

this ground I confirm the right of Ado, Sani and Hamisu for being defamed of their character as they stated as follows:-

ADO:- Yes I am seeking my right

Sani:- Yes likewise me I did not forgive her.

Hamisu:- Myself, the something.

COURT:- To Bariya can you prove your case beyond reasonable doubt that the accused person had committed the offence in order to exonerate your self from Hadd punishment of 80 lashes for defaming the accused person character as it says in the book of AL-FGH-AL ISLAMIC volume 7 page 5419 where it says:-.....

.....

MEANING:-

If the victim of defamation produced witnesses or whether the accused make confessional statement for the commission of the crime or where witnesses confirmed his confessional statement before the court of law then is such situation the punishment shall be for Zina (Adultery) and not defamation.

And on this ground I asked Bariya if she can confirm it.

ANS:- No I have no witnesses who was an eye witness at the time we are committing the Adultery.

JUDGMENT

Idris Usman Gusau upper Sharia court Judge tsafe of upper Sharia court tsafe based on the above reasons I am satisfied that you Bariya had committed Adultery (Zani) based on your conceived and your confessional statement.

I therefore ordered you to be stroke 100 lashes in presence of public as it says in SURATUL-NUR verse 2 where it says:-

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And the authority from ASHALAL-MADARILA volume 3 page 162 where it says .....

Likewise in Sharia penal code of Zamfara State section 127 it also stated in the book of Ashalul- Madarila volume 3 page 174 where it says:-.....

.....

Also as it was provided under section 142 of Sharia penal code of Zamfara State and I ordered you to be under the care of your village head of Magazu (Magaji) until when you are physically fit and delivered and to received your Hadd punishment ie (100 lashes).

RIGHT OF APPEAL

The aggrieved party can appeal to Sharia court of appeal Gusau within 30 days from today.

Sign
Idris Usman Gusau
HON. JUDGE
9/9/2000

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TRANSLATED BY
HAYATU WADATAAU BUNGUDU
PRINCIPAL REGISTRAR
HIGH COURT OF JUSTICE GUSAU

Appendix 1D

IN THE SHARIA COURT OF APPEAL
DIVISION I, KANO.

BEFORE:

HON. GRAND KHADI ALH. DAHIRU RABI'U.....(PRISIDING)
HON. KHADI ALH. MUHAMMAD KHALIL.....(WRITER)
HON. KHADI ALH. MUSA ADAMU ZAKIRAI.

SCA/CR/KN/1/2005

20 – 2 – 1426 AH
30 – 3 – 2005

DAHIRU GAMBO.....APPELLANT

AND

THE STATE.....RESPONDENT

This case originates from upper sharia court Rano in their case No. CR/2/2005 Commissioner of Police vs. Dahiru Gambo which was presented before the court on 1/2/2005 in an allegation of theft under section 136 S. P. C. 2000, from Sgt. Yahaya Dan kadi the prosecutor. He says that; Dahiru Gambo has entered the house of one Sabi'u Sule and stole Guinea corn valued at the sum of ₦3, 000.00k (Three Thousand Naira only). After reading the first information report to him, the court then immediately asked him.

COURT - ACCUSED PERSON: - Did you hear the statement of the complain made against you, did you understand it and did you agree that you have committed the offence?

ANS – I – Yes, I heard it and I admit that I have committed the offence.

COURT - ACCUSED PERSON: - Look at this guinea corn, is it the subject matter in question?

ANS – I – Yes, it is the one. The court then appointed witnesses to witness his admission, the court them called on both parties to conclude their evidence. It them proceed ahead and writes it's Judgment. It has given details of the complain and the admission made by the accused person in it is Judgment. Finally in page 2 of the record of proceedings of the lower court, the hand written one line 8 by the bottom, it says that; "therefore, you Dahiru Gambo, I hereby found you guilty of committing this offence of theft based on the admission you made with your own mouth, in view of that, I hereby sentence

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TRANSLATED BY Abdulkadir Dahiru
16/2/06

you to two (2) years imprisonment with fifty 50 lashes under section 136 S. P. C. because court can punish a person on the basis of the admission he made with his own month just as it has been provided in Risala, where it says;

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The said Dahiru has started serving his prison term since on 1 – 2 – 2005, he then got a chance of filing his appeal on 28 – 2 – 2005.

During the appeal session of Division I of the Sharia court of appeal at Kibiya the court has started hearing the matter. The appellant who is in prison was produced before the court, but the court on that date adjourned the matter to 23/3/05 because of the late coming of the state counsel. The appellant was also produced before the Kano state session and that a state counsel M. Yakubu Bako Sulaiman also appears, the court then read the appellant's grounds of appeal:

1. I didn't agreed with the Judgment passed by upper sharia court Rano because there is no Justice in due to it's resticted enquiry.
2. That, it didn't give details, whether the guinea corn in question is one sack or one Mudu. It just valued the corn at ₦3, 000.00k (Three Thousand).
3. That, doing this has violated the Islamic law procedure because the Judgment passed by the court is too severe – 2 years prison term with fifty lashes.
4. That, I am urging this court to Quash the Judgment of the trial court by way of substituting it with a sentence of fine.

COURT – APPELLANT: - Do you have additional grounds or address to make?

ANS, I - These are my only ground.

COURT – STATE COUNSEL: - Do you have objection or address to make?

ANS. FROM M. YAKUBU: I am having objection against the grounds presented by the appellant because: -

(a) The Judgment passed by upper a sharia court Rano was passed in the interest of Justice under the law because it was based on the admission made by the appellant in open court. The court has read the accusation made against him over to him after which he told that court that he understood it and he then confirmed to the trial court that he has committed the offence as has been shown in the record of proceedings of the trial court in page one second paragraph. The lower

court has passed it's Judgment in line with section 289 P. C. Sharia law amendment 2000.

After that, the court has already called on him to conclude his evidence before passing it's Judgment for the sake of achieving Justice, and that the admission made by the Appellant voluntarily before the court, the court did not force him to do it. The court passed it's Judgment under the provisions of Tulufa – Guidance for judges, item No. 1543, page 554 in which he finally said that; "the court has relied on the investigation made by the police which was presented before the court and for the sake of it's Justice in which the court sentenced the appellant to prison term in stead of a sentence of amputation of his hand," This is why we are urging this court to affirm the Judgment of the lower court against the appellant.

After the court has refered to appellant on the objection made by the state counsel, he then says that; "I am urging the court to mitigate the sentence which was passed against me by the lower court". The court them called on appellant and Respondent to conclude their evidence before passing it's Judgment. This call is made in the presence of witnesses: M. Hassan and Tafida messenger. It then fixed the 30 – 3 – 2005 for passing it's Judgment which Khadi Muhammad Khalil will write.

JUDGMENT

After this court has studied the grounds of appeal filed by the appellant and has also studied the length of response made by the state counsel. It then studied the record of proceedings of the lower court. It hereby deliver it's Judgment as follows:

1. The appellant Dahiru Gambo who was prosecuted for the offence of theft pursuant to which the accused person was sentenced to two years imprisonment and fifty (50) lashes. He then challenged that Judgment in his grounds of appeal, particularly in his 2nd and 3rd grounds of appeal in which he alledged that the lower trial court has restricted it's enquiry and that it has not ascertain the exact quantity of the guinea corn which was said to have been stolen or it's value.

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2. We have noticed that after the trial court – Upper Sharia Court Rano has read the contents of the accusation over to the accused person / appellant and he then admitted it for the first time before the court and in the presence of admission witnesses, it then administer the call for conclusion of evidence and pass it's Judgment and sentence immediately.

(a) The meaning of admission it that: the accused person to agree that he has committed the offence, and that the admission to satisfy the conditions of an admission, and that the person making the admission has to poses the required legal capacity with regard to his or her age and mental condition, the contents of the admission will have to be devoid of ambiguity, and that the person making the admission should do it voluntarily, therefore that admission is the type which is in line with the provisions of Tabisirat Al-Hukkam Hashiyatt Batahu Al-Ali Al-Malik, Volume 2, page 39.

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(b) What the state counsel M. Yakubu Bako Sulaiman was saying in his presentation is true, that is by the time when he was chellenging the appellant's grounds of appeal by submitting that the trial court has relied on the admission made by the appellant before it and which he made voluntarily and that the strenth of an admission in legal proceedings is more than the strenth of an evidence given by witness this is correct. But it is compulsory that, before an accused person is call upon to make an admission of an offence or after he has made an admission of an offence that court must fully explain to him details ~~of~~ the ~~of~~ offence in respect of which he is facing prosecution particularly the details of the quence qunces of his admission through questions and explanation. We saw that the record of proceedings of this trial court has shown that, after the content of the accusation has been read over to the accused person, the court has then asked him.

"COURT – ACCUSED PERSON: - Did you hear the accusation against you, did you understand it, and did you agree that you have committed the offence?

ANS. I – Yes, it is like that, I heard it and I agreed that I have committed that offence.

COUER – ACCUSED PERSON: - Look at this guinea corn, is it the subject matter in question?

ANS. I – Yes, it is"

Record of proceedings of the trial court – the hand written one, page 1, 10th line from

the bottom.

(c) An admission under the Islamic Law, it is having four ingredients, out of which there is: how to say it – that is the wordings to be use in uttering it, Imam Al-Dasuki has narrated I his commentary of Mukhtasar that; "It is compulsory in making on admission that the wordings must clearly mention the offence, but if it did not mention it, that admission it then defective.

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Dasuki – the commentary of Mukhtasar volume 3, page 402.

The wordings of the admission made by the appellant Dahiru as show in the record of proceedings of the trial court did not contain a stright forward statement like: "It is like that, I entred Sabi'u Sale's house and stole away guinea corn from so so place". This has originated from the gap left by the trial court because of it's refusal to ask the accused person some questions on his admission.

3. We have also observed that in the first information report read before the court by the prosecutor, he has mentioned that the accused person Dahiru is being accused for the offence of theft under section 136 S. P. C. 2000, which if it is prove^d against him, he can then be sentence to amputation of the hand, but after that court becomes satisfied that the accused person has admitted committing the offence it then just sentence him to two (2) years imprisonment and fifty lashes. What that court ought to do under such a situation which the complain did not satisfy the conditions of theft in which sentence of amputation of the hand can be passed is that, it should first of all determine the value of the subject matter of the theft to find out whether the value has reach the minimum value as required by the law or not. And that, was the subject matter stolen away from a secured place if it's minimum value did not reach the legal requirement or was it stolen from an unsecured place? For example; the accused person has entered some body's house, the owner of the house then takes a sack of corn and put it on him and then alledged that he has stolen it. Or that, he just put his own property on the accused person and then accuses him of stealing the property. All these has protected the accused person from receiving a sentence of amputation of the hand, he can

only receive another type of punishment lesser than amputation. The court is to use section 208 C. P. C. which section 410 (1) C. P. C. amendment law 2000 cap 37 gave it the power to substitute the offence contained in the police first information report with another offence, the court can then proceed and pass Judgment by sentencing him to a lesser sentence than amputation of the hand under the new substituted offence.

4. This court satisfied with the appellant's ground of appeal No. 2 which says that, the lower court has restricted it's enquiry, this is because of the Islamic law provision derived from the Tradition of Prophet which was mentioned by A'isha may Allah agree with her. That tradition was narrated by Turmizi in which he says; "it will be better for a Judge to mistakely release a criminal who has committed an offence than to mistakely sentenced someone who has not committed an offence.

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Sheik Al-Turmizi, the commentary of Tuhfa Al-Ahawaziyya, vol. 4, page 688.

In view of the above mentioned analysis, this court hereby release Dahiru Gambo under order 8 (1) (9) upper Sharia court of Appeal rules 2000.

This appeal succeeds

Whoever is dissatisfied can appeal against it within three months from today 30/3/2005.

SGN
HON. GRAND KHADI
ALH. DAHIRU RABI'U
30 – 3 – 2005

SGN.
HON. KHADI
ALH. MUSA ADAMU ZAKIRAI
30 – 3 – 2005

SGN.
HON. KHADI
ALH. MUHAMMAD KHALIL
30 – 3 – 2005

Translation fee – ₦120.00k

16/2/06

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CERTIFIED TRUE TRANSLATION
TRANSLATED BY Abdulkadir Dalhatu
DATE 16.2.06
PRINCIPAL REGISTRAR,
HIGH COURT OF JUSTICE,
KANO.