

The Application of *al-Qawā'id al-Fiqhiyyah* in the Area of Islamic Economics

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ABSTRACT

*This paper intends to examine the role and function of al-Qawā'id al-Fiqhiyyah or the legal maxims of Fiqh in Islamic Law of Mu'āmalat to validate or invalidate any transaction in the Islamic banking and finance business. The call for the need to fully implement and embody the general legal maxims of Law consonant with the requirement of Fiqh Mu'āmalat is necessary in any Islamic financial product and its legal documentation. This is done to avoid future legal disputes and misunderstanding about the true nature of Islamic banking and financial product which rest on the basis of justice, equity, fairness, avoidance of harming of other party and other principles of which we can be justly proud in front of the whole world. The Shar'iah has closed the door of illicit gain (al-Kasb al-Haram), riba, hoarding and gharar which is not based on the principle of Dāmān (liability) because its exploitation and injustice as such acts do not contain an added value nor a growing development but instead creates parasitical classes of people obtaining wealth and money without exerting any effort or bearing a risk and liability. Whilst, the Shar'iah through its general legal maxims has provided the correct alternative methods to achieve the principle of balance between the gain and risk as stated in the sayings of the Prophet (S.A.W) that “**The benefit is in proportion to the liability involved**” from which the jurists (Fuqaha') have formulated the qā'idah or maxim that “**Liability is an obligation accompanying gain**”. The application of Islamic general legal maxims of law in Mu'āmalat of Islamic financial products and its banking legal documentations are crucial as they serve as basic indicators of the continued validity of the transaction in question and its legal documentation which refers to the successful marketing of any Islamic investment fund and banking financial product. However, by not fully implementing the principles of Islamic legal maxims of fiqh in the Islamic financial products and its legal documentation will mean that such financial products and its legal documentations embrace the requirement of Fiqh Mu'āmalat on the exterior but fail to eradicate usury, injustice, gharar and exploitation of other people, which means that we are neglecting the objective of the lawgiver “Allah (S.W.T)” or Maqṣud al Shari' and the purpose of His Law. It is indicating that reference to the Islamic legal maxims has been regularly made to the Ottoman's Majallat al-Ahkām al-Adiliyyah and al Ashbāh wa al-Naza'ir by Jalāl al-Din al Suyuti and Taqi al Din al-Subki. Such legal maxims are constructed upon primary and external principles namely the principles of pure justice and genuine goodness.*

Keyword: *Qawā'id Fiqhiyyah. Maqasid al Shar'iah. Islamic Financial product. Islamic financial legal documentation.*

1.0 INTRODUCTION AND PROBLEMS

The practices in Islamic banking in some Muslim countries are creating a marked degree of confusion among the lay persons in understanding the wide and real difference between *Halal* and *Haram*. Consequently, objections have been raised against the application of the Islamic financial instruments as it is currently practiced which contravene the principles governing *Fiqh muamalat*. As an example, the study of *al-bai bithaman ajil* (BBA)/*murabahah* mechanism and legal documentation currently practiced by some Islamic banks constitutes *bay al-inah* which is considered as a legal device (*hilah*) and *Haram* in *Fiqh muamalat*. *Al-Inah* is one of the set of legal stratagems, whose prime function is to attain illegal ends through legal means. *Inah* is defined as the use of the contract of sale to render possible the loan of money for interest. Thus, such contract is invalid since unjustified enrichment (*fadl mal bila iwad*) violates the Islamic principles of justice and equity.

The BBA transaction constitutes two sales in one transaction. This situation has led to much confusion in the Islamic nominate contract (i.e. As to which set of contract rules to be followed?) such practice is considered forbidden, and violates the rules of Islamic Law transactions. The BBA transaction constitutes a Sale with condition contrary to the legal nature and purpose of the sale contract. By making the promise to purchase, binding is invalid. However to avoid the said objection, the promised agreement should be concluded in a separate agreement and not included in the main contract of BBA. This is to prevent making a contract of sale into two transactions or to attach an extra in valid condition with a sale contract¹.

It is also evident that BBA legal documentation involves a sale prior to taking complete ownership or possession by the bank while it is a requirement of a valid sale in Islamic Law that the seller (the bank) may not sell the goods purchased until they are in his real possession and transfer of ownership is complete ownership. The role of the Islamic bank is almost negative in BBA as practiced nowadays just limited to the act of delivering the various cheques and signing the legal documents, such a deal can no longer be a BBA but rather a loan with interest (*qard bi al faidah*), this is because in such agreement the Islamic bank is just lending money to the customer for a determined profit.). Lastly, the legal documentation of BBA shows that the Islamic banks does not held liable for any defect in the goods or manufactured item sold by the bank to the customer such practice is not in tune with Islamic of contract and it's legal maxims.

The rule is that any condition or clause to waive the responsibility of the seller from any defect in the commodity sold must be regarded as absolutely void. Thus, any clause by the Islamic banks to exclude their liability from any defect in the manufactured item shall be considered null and void. The logic of this rule is clear where nowadays BBA is concluded with articles involving high price and technology where any defect will lead to a huge financial loss.

2.0 INTRODUCTION TO AL-QAWAID AL-FIQHIYYAH

Based on the above observations and problems it is crucial to go to the original foundation of Islamic law to look for a feasible solution based on the concept *al-adl* in Islam. An authentic approach to research on issues relating to Islamic study in all fields including the law which regulate the business transaction between one person and another; e.g., Law pertaining to loans, hire, selling and the likes that is to study these issues in the context of Fundamental principles of Islamic Law.

However to focus on purely legal matter of Islamic Law, it is necessary to adhere to the discipline of *Fiqh*, *Usul al-Fiqh* as well as *al-Qawaid al-Fiqhiyyah*.

Literally *Fiqh* means understanding. Technically, *Fiqh* is defined as “The knowledge of Shari *ahkam* (legal rules), with reference to conduct, that has been derived from its specific evidence”. *Usul al Fiqh* is a discipline that teaches us reasoning from general evidence procured from the sources of Islamic Law. It tells us what general evidences validly indicate to the *ahkam* of Allah. Thus *Usul al-Fiqh* was defined as follows, “they are the principles borne by the use of which the *mujtahid* arrives at the legal rules through the specific evidences”.

Furthermore, the general principles of Islamic Law are of two kinds. Those that govern interpretation are referred to as *qawaid usuliyyah*, and those that govern the Islamic Law are called *qawaid fiqhiyyah*. From Islamic perspective any research into Islamic Law including *Fiqh muamalat* that is conducted under the canopy of the *al-Qawaid al-Fiqhiyyah* which can be found in the words of the *Quran* and *Sunnah*, can provide an original decision that has a concrete foundation in Islamic Law and can provide clues on how best to identify problems and unacceptable practices.

It is also able to suggest appropriate remedies that are very much in the line with *maqasid al-Shariah*, since these principles of Islamic Law enjoy the acceptance of the muslim jurists. This is because such principles contain rules in this regard that can be universally applicable.

It is utmost importance to note that these latter principles; e.g. *Qawaid Fiqhiyyah* holds the ultimate aim of these paper to discuss, define, examine, and explain in the proceeding sections.

2.1 Definition of general legal Maxims or al-Qawai'd al-Fiqhiyyah

Al qawaid al-Fiqhiyyah al-Kulliyah is also known in popular term in English Law as general legal Maxims. The closely defined literal and simple meaning of *Qaidah* (*pl. Qawaid*) is Foundation, Essential and rudiment. As for as *al Qawaid al-Fiqhiyyah*, a number of juristic definitions were provided as follows:-

- **Al-Suyti**² for instance defines *Qawaid* as “a general rule which applies to all its particulars.”

- **Al-Burnu**³ defined it “as a universal legal ruling or proposition from which are understood the particular legal rulings that are derived from it.”
- **Sheikah Mustafa al-Zarqa**⁴ defines *Qawaid* as “the root maxim of *fiqh* dedicated in its concise text with regulatory nature, containing general rules of Law on this issues which transpired under its theme”.
- **Al Hamawi**⁵ defined it as “the predominant ruling which is applied to the greater part of its particular”.

However, even though the *Qawaid* have been literally worded differently, its meaning remains the same and essential.

It is noteworthy to bear in mind that the general legal Maxims are different from what is called *al-dabit* (the controller) which controls the particulars of one chapter only⁶. Thus, the latter are regarded as general principles grouping together most particulars which are based upon the majority.

On the whole, these legal maxims are precise and eloquent in expression. In both wording and meaning⁷ they are also a fertile source from which new ideas can be developed, tested and can eventually provide original results that are accurate with a solid foundation in Islamic Law.

Since these legal maxims are constructed upon primary and eternal principles, namely, the principles of pure justice and genuine goodness⁸, they have played a real part in organizing legal knowledge and principles. Unless misused, they are very useful for the purpose of legal evolution. They are the tools of thought, which law creates in order to organize and classify the detailed rules⁹. The *Sharaiih* came into being in conformity with these principles. Such maxims are destined to remain in existence until God (S.W.T) inherits the earth and its people¹⁰.

2.2 The advantages/benefits to be gained from the application of applying the legal maxims in every area of Islamic Law.

The end result of Islamic Law, is the protection of religion, life, lineage, mind, and property. This is unanimously agreed upon by all Muslims jurists, although it has not been mentioned in the *Quran* or the *sunnah* in these exact words. This agreement is achieved by way of deduction from all the judgment in the Islamic Legal sources¹¹. All the obligations and prohibitions of the *Shariah* were ordained for the achievement of these final end. These five basic aspects of human life, must carefully therefore be protected. Any transgression against one or more of them should be considered unlawful and if necessary punishable. However, neither the *Quran* nor the *sunnah* given, is expected to give, detailed Law to control every aspect of human life. The aims or intentions of the Law (*maqasid al-Sariah*) can be verified via investigation of the whole text of the *Quran* and the collection of *hadiths*. To realise the *maqasid* and by taking the basic objectives of the Law into consideration the muslim jurists based on juristic reasoning (*ijtihad*) and after consulting the texts of the *Quran* and the *hadith* of legal nature (*ahadith al-ahkam*) gradually developed the concept and wording of the legal

maxims. This process draws its sources from the general provision of Law (*nusus tashriyyah amah*), principles of Islamic jurisprudence (*usul al-Fiqh*), legal reasoning (*talil al-ahkam*) and logical reasoning (*muqarrarat aqliyyah*). Thus, these maxims or *al-Qawi'd Fiqiah* became a favorite mode of expression for the legal doctrines. They are not uniform as to provenance and period, but many were formulated during the first and the second century of the *hijra* and gradually most of them acquired the form of tradition.

The compilers of *Majallah* explained in the last part of Article 1 the reason for incorporating the general legal maxims and advantage accruing there from. They said:-

“Muslims jurists have grouped questions of jurisprudence under certain general rules each one of which embraces a large number of questions. These general rules are taken in the treatises on jurisprudence, as justification to prove these questions. The preliminary study of these rules facilities the comprehension of the question and serves to fix them in the min. consequently, ninety-nine rules of jurisprudence have been collected together. Although a few of them, taken alone, admit of certain exceptions, their general application is in no way invalidated thereby, since they are closely interrelated”¹². In other words, these maxims are but general principles grouping together most particulars and based upon the majority of them. Therefore a number of these maxims admit of exceptions and limitations. The existence of such exceptions or limitation does not undermine the general character of these rules”¹³.

In addition, for clearer understanding of these general legal maxims, the authors of these books who dealt with these maxims have added many examples and illustrations which have been taken from the classical books of Muslims schools and from *Fatwas* books of Muslim jurists. With these legal maxims the Muslim scholar and researcher in Islamic jurisprudence can seek in them a refuge in every case and matter whatsoever. Via means of them a man can make his conduct conform to the *Shariah* Law and its *maqasid* as far as possible.

Illuminating researching issues of Islamic Law based on these legal maxims can also contribute to the accuracy of decision making in the field of Islamic banking and Islamic work as they are generally applicable principles which relate to Islamic Law of transaction, usage and other field of Islamic jurisprudence which do not change as a result of changes in time, place or circumstances. For this reason the compilers of *Majallah al-Ahkam al-Adliyyah*, as far as the arrangement was concerned they decided to place the *Qawaid al-Fiqhiyyah* at the beginning of the *Majallah*. They did not arranged them under the title of Book or Chapter instead the *Qawaid* have been separated under an Introduction of the *Majallah* to indicate both its significance and important role in Islamic Law.

The legal maxims in the *Majallah* runs from article 2 up to article 100 and article 1 being the opening contains the nature of Islamic jurisprudence clearly spelt.

2.3 The authority or Legal status of the *Al-Qawaid al-Fiqhiyyah*.

In discussing the authority of *AL-Qawaid Al-Fiqhiyyh*. The compilers of the *Majallah* stated that:

“Although these general legal maxims alone are not sufficient to enable the Sharaiih judges to give a judgment in the absences of any more explicit authority i.e. Quran, Sunnah and Ijmah, they are netherless, of great value in connecting together the various questions of Islamic jurisprudence and persons who have studied these questions are able to settle them by means of proofs... By means of the Qawaid a man can make his conduct conform to the Shariah Law as far as possible.”¹⁴

In other words, according to the *Majallah* these legal maxims, are meant to facilitate the understanding of problems and principles. Therefore a judge may not give judgment upon them unless they are endorsed and supported by an explicit provisions in the *Shariah* text as in the case of the maxim **“The burden of proof is on him who alleges; the oath on him who denies”**. Or unless these maxims copied from the authoritative books of Muslims jurists.

On this basis many jurists accepted the importance of conducting Islamic work under the canopy of *Al-Qawaid* rules to conclude original results. According to Imam *al-Qarafi* (d684H) in his famous book known as *Al-Furuq* he says in relation to the legal status of *Al-Qawaid*:

“These general legal maxims are very important in the Fiqh as the level of their appreciation and use by a Faqih (jurist) determines how renown and respectable he becomes. They expose the beauty and understanding of fiqh and clarify the methodology of Fatwah... whoever depends on the use of specific or particular (juzi) and not general maxims (kulliyat) in his exposition of the branches of the Fiqh would be faced with contradictions. Whereas, whoever comprehends Fiqh in terms of its general maxims would not need to bother himself with memorization of the multitude of the particulars which are already embeded in the general legal maxims and he would have an integration of things on which other are facing contradictions and uniformity (tanasub).”¹⁵

In addition, *Al Qarafi* has stated the important of *Al-Qawaid* to derive proper Islamic rulings, he says: The general legal maxims of *Fiqh* is very important, as it comprises the essence of the *Shariah* and its rules. With it (*Qawaid*) the branches of the *Shariah* are controlled, their rules are understood and the objectives (*Maqasid*) of the *Shariah* are known... he further stated that; Any given judgment which contradict any authentic legal maxim (*Qaida*) will be met with a judgment that is reverse (*naqd al-hukum*).¹⁶

Ibn Arafa (d. 803H) maintains the same view as *Qarafi*. “He has rightly stated that the Legal maxims which affirm and reiterate a ruling of the *Quran* or *Sunnah* do bind the judges and jurists in their formulation of judicial decision and *ijtihad*, by saying that: Given a judgment based on legal maxim (*Qaida*) which does not contradict a clear authoritative texts is considered as valid judgment (*Hukum Sahih*)”.¹⁷

Finally, it is necessary to mention that the above views are nearest to the spirit of Islamic Law and the *Maqasid al-Shariah*. It can be said that, it is permissible to use the general legal maxims as evidence in the formulation of judicial decisions and *ijtihad* on the following conditions¹⁸:

1. That the *Qawaid Fiqhiyyah* should be based on explicit authority of the *Quran* or *Sunnah* or *Ijma*.
2. That the *Qawaid Fiqhiyyah* should not contradict a clear authoritative texts from the *Quran* or *Sunnah* or *Ijma*.

Accordingly, the *Qawaid Fiqhiyyah* which is originally from the *Quran* or prophetic *Sunnah* or which are based on a sound authority from the *Quran* or *Sunnah* or *Ijma* will be considered as sources upon which it can serve as basis in deduction of evidence. Authentic reference to them accrues them authority upon which they are based. For example the legal maxim which provides “**Matters are to be considered in light of their objectives**” such legal maxim based on authoritative *Sunnah* in the Prophets (s.a.w) saying “**actions are judged by the intention behind them (innama al-amal bi alniyyat)**” such legal maxims enjoy the acceptance of the vast majority of jurists, and recourse to these legal maxims will make it easy for Islamic Law researchers to quickly identify unacceptable views and practices that have come into existence only because of the lack of understanding, ignorance, or personal predilections.

3.0 Application of general legal maxims to Law of Muamalat

The economic system of Islam is based upon solid foundations and Divine instructions. It is measured by the standard of religious and moral rules, the basic tenets on economic (including banking and finance) has been laid down in the *nusus tashriyyah* (divine texts) pertaining to fair dealing, prohibition of *riba*, prohibition of uncertainty, the concern for equality of two parties, the concern for the just mean or average (*mithl*), the concept of absolute ownership by *Allah (s.w.t)* and so on. The Law of transactions (*Muamalat*) enjoy a great deal of attention in Islam. Honest trade is permitted and blessed by God. This may be carried out through individuals, banks, companies, agencies and the like. But all business deals should be concluded with frankness and honesty. Cheating, hiding defects of merchandise, exploiting the needs of customers, monopoly to force up prices, are all sinful acts in Islam. The question of rights and obligation is always an important element in *Fiqh Muamalat*. In this respect, the issue of justice, equality and fairness is vitally important.

Justice has a special position in the *Shariah* and has to be regarded seriously. Transgression against the right of others is strongly prohibited. The *Shariah* has laid down certain specific guidelines towards achieving it. For a better understanding of this rule, the Muslim jurists has formulate and developed legal maxims to achieve the same end. As an example article 97 reads: “**no person may take another person’s property without any legal reason**” and article 96 illustrated that no person may deal with the property of another held in absolute ownership without such person’s permission.

On the concept of justice and straight forwardness in all dealings and transaction. The *Quran* says:-

“Woe to those who deal in fraud, those who, when they have to receive by measure from others, exact full measure, but when they have to give by measure or weight to others give less than due. Do they not think that they will be called to account on a Mighty Day, a Day when (all) mankind will stand before the Lord of the Worlds”.
(*Quran*, 83:1-6)

Besides that, there are numerous quotations from leading jurists clearly considered that Justices as one of the most fundamental in the value system of Islam. ***Ibn Qayyim al-Jawziyyah*** (d751H) has expressed concern over Justice by saying that:

“The foundation of Shariah is wisdom and the safeguarding of people’s interests in this world and the next. In its entirety it is justice, mercy and wisdom. Every rule which transcends justice to tyranny, mercy to its opposite, the good to the evil, and wisdom to triviality does not belong to the Shariah although it might have been introduced therein by implication. The shariah is God’s justice and mercy amongst His people. Life, nutrition, medicine, light, recuperation and virtue are made possible by it. Every good that exists is derived from it, and every deficiency in being results from its loss and dissipation... For the shariah, which God entrusted His prophet to transmit, is the pillar of the world and the key success and happiness in this world and the next”¹⁹.

Ibn Taymiyyah (d728H) has substantially upheld the same view. He stated that:-

“ The Shariah always contemplates realization and accomplishment of benefits (al-masalih) for the people; it also aims at minimizing corruption and harm (al-mafasid) which is why the Shariah is fit to be applied to all times and places”²⁰.

According to ***al-Shatibi*** (d790H) in his treatise *al-Muwafaqt fi usul al-Shariah*, maintained that, “the rules of Shariah concerning civil transaction and customary rule (*muamalat wa adat*) follow the benefits (*masalih*) which they contemplate. We note, for instance, that the *Shariah* may forbid something because it is devoid of benefit, but it permits the same when it secures a benefit. A deferred sale, for example, of a dirham for dirham is forbidden because of the fear of usury (*riba*) therein, but a period loan is permitted because it secures *al- maslaha* (deferment is harmful in one and beneficial in the other). Similarly, fresh dates may not be sold for dry dates for fear of uncertainty (*gharar*) and usury (*riba*) but the Prophet (s.a.w) permitted this transaction, known as *araya* because of the people’s need and *maslahah*”.²¹

This is to guide Muslims adhere to the Islamic legislations on economic relations and commerce to introduce a high morality to the world of business and enforce the Law of God (S.W.T) in all dealings and transactions because the economic life of Islam is not merely a spiritual formula but a complete system of life in all its perspective. At this point, the Muslims jurists through Islamic jurisprudence has laid down abundant rules governing the economic system and commercial transactions. To further reinforce these rules and adhere to the *Shariah* injunctions, values and its objectives (*maqasid*) as

contained in the *Quran*, the Muslims scholars upon investigating issues, in a religious light, derive and formulate legal juristic principles and guidelines each of which contains a rule having mostly the nature of generalization. However, these juristic principles (*Qawaid Fiqhiyyah*) were not included in Islamic jurisprudence by known scholars during a specified time. Their concept were formed and their expressions were formulated gradually during the ages of prosperity and Renaissance of the Islamic jurisprudence. Such legal maxim relating to *Fiqh Muamalate* represent an important area and its study would probably help regulate peoples transactions and define their rights. Further more these legal maxims will be to identify and determine unacceptable practices found in business transactions that have come about only due to a lack of knowledge, understanding or personal benefit.

Given all of the above, it would only seem appropriate to quote the following selected well-known legal maxims on which have been generally agreed among the Muslim Scholars.

4.0 The Prominent Legal maxims

In *al-Ashbah wa al-Nazair*, Al-suyuti(d911H) has identified five most prominent legal maxim namely.

1. **A matters are determined according to intention (art2) (*Al-umur bi-maqasidih*)**
2. **Certainty is not dispelled by doubt (art.4) (*Al-yaqin la yazulu bi-alshakk*)**
3. **Hardship begets facility (art.17) (*Al-mashaqqatu tujlab al-taysir*)**
4. **Injury is removed (art.20) (*Al-dara yuzalr*)**
5. **Custom is authoritative (art.36) (*Al-‘Addah muhakkamah*)**

From these five legal maxims, Muslims jurists have branch out to Other various legal maxims considered as subsidiary to the primary above mentioned maxims. Generally speaking, thses maxims are applicable to all branches of Islamic jurisprudence including that of *ibadat, munakahat, jinayat, muamalat* etc. Thus, they can be interchangeable and applied in any of these areas as long as the relevance could be determined and established.

The objective of this paper is to highlight several selected legal maxims governing *Fiqh muamalat*, however, it is not the primary goal of this paper to discuss the details of these maxims which deal with contracts and business. They are to be found in *Al-Ashbah wa Al-Nazair* and in the introductory part to the *Majallah*:-

- *Any act which does not achieve what it is intended for is considered void ab initio.*
- *In contract, effects are given to meaning and intention, and not to words and forms.*
- *Injury should not be met by injury.*
- *Injury is to be repaired.*
- *An injury cannot be removed by the commission of a similar injury.*
- *When the original fails is restored to.*
- *A gift becomes complete only by way of delivery.*
- *Management of citizens affairs is dependent upon public welfare.*
- *Private trusteeship is more effective than public trusteeship.*
- *Something without which an obligation cannot be discharged is also obligatory.*

- *Everything which leads to a forbidden thing is forbidden.*
- *No statement is imputed to a man who keeps silence, but silence is tantamount to a statement where there is an absolute necessity for speech.*
- *Correspondence resembles conversation.*
- *The recognized signs of a dumb person take the place of a statement by word of mouth.*
- *No validity is attached to conjecture which is obviously tainted by error.*
- *Anything dependent upon a condition precedent is established on the happening of the condition.*
- *A condition must be fulfilled as far as possible.*
- *Promises dependent upon a condition precedent are irrevocable.*
- *Remuneration and liability do not run together.*
- *The responsibility for an act falls upon the author thereof; it does not fall upon the person ordering such act, provided that such person does not compel the commission thereof*
- *In the presence of the direct author of an act and the person who is the cause thereof, the first alone responsible therefore.*
- *Legal permission is incompatible liability.*
- *Liability lies on the direct author of an act, even though acting unintentionally.*
- *No liability lies on a person who is cause of an act unless he has acted intentionally.*
- *Liability is an obligation accompanying gain.*
- *Any order given for dealing with the property of others is void.*
- *No person may deal with the property of another person unless by his permission or acting as his trustee.*
- *No person may take another person's property without legal cause.*

By carefully scrutinizing the above mentioned legal maxims, we can safely say that the latter are purely intended to serve as a definite guideline for the overall transactional requirements and its sole purpose. In addition, each of them contain rules possessing mostly the nature of generalization. By applying its provisions to specific cases consonant with the transaction rules, the end result will, be in line with the spirit of the *shariah* which can safeguard the people from injustice and exploitation. Thus, whoever depend on utilizing the legal maxims in his research on the field of transactions will not be plagued with contradictions with the principle of the *shariah*. This is because it comprises the essence of the *Shariah* and its rule. With the legal maxims, the branches of the *shariah* are controlled and their rule understood, and the objective of the *shariah* known. Therefore, the legal maxims are necessary components for any innovative transactions on a non-usury banks.

To further clarify what has been said so far about the important bearing of *al-Qawaid* pertaining to commercial transactions or *Fiqh muamalat*, it may be helpful to illustrate the ensuing example:-

One of the leading maxims of the *Majallah* says,

Matters are determined according to intentions. The basis of this maxim is the tradition of the Prophet (s.a.w) which reads: "Deeds are judged by intention and

every person is judge according to his intentions”. This is to say that an act is judged in the light of the intention or the purpose it seek to effectuate. As a result the Majallah has adopted this leading maxim in the interpretation of contracts as quoted “In contracts effect is given to intention, and meaning and not words and forms” (art.3)²².

According to this maxim the effect that is to be attributed to any particular transactions must be in accordance with the intent underlying such transaction²³. For example if two persons conclude a contract ostensibly of a loan but compensation through which a specific rental is provided for, the contract would be regarded as a contract of hire as its real meaning implies and not a contract of loan as the wording of the contract would suggest, the purpose is to derive a proper Islamic ruling for any situation we encounter. This when the words and forms conflict with the intentions, due consideration should be given to the intention and not to its literal wording.

It is crystal clear from the foregoing that the knowledge of intention is important in business transactions because it determines the correct rule and the harmonization of the Shariah interpretations in the area of *Fiqh Muamalat*. Furthermore, it is necessary to embody the general legal maxims consonant with the rules of *Fiqh muamalat* to any particular transactions as they priority serve as basic indicators for a continued validity of such existing transaction. The proceeding section will discuss some of the current practice of Islamic Financial product and its legal documentation which contradict to the principle of Islamic Legal maxims.

Undoubtedly any financial instruments and its legal documentations that are in conflict with the Islamic legal maxim (i.e. have been developed by Muslim jurists to provide an accurate and consistent basis for ruling of the commercial transactions) are deemed unlawful according to the *Shariah* ruling and it is *Maqasid al-Shariah*. This salient point can be illustrated via a number of equitable legal maxims or *Qawaid Fiqhiyyah* as quoted in the ensuing:

The legal maxims that says: (a) “Any act which does not achieve what it is intended for is considered void ab initio”, (b) “In contract, effects are given to meaning and intention, and not to words and forms”, (c) “Liability is and obligation accompanying gain” and (d) “Everything which leads to a forbidden thing is forbidden”

These legal maxims have formulated legal rules which has establish a criterion for the general character and attribute of *Fiqh muamalat* and to identify the unacceptable practices that have recently surfaced in the practices of Islamic Banks. The Legal maxims in question imply that contracting is not just a matter for parties to pursue their self-interest but it is subject to the religious and moral constrains in moulding economic activities. Thus, anyone who seeks to obtain from the rules of *Shariah* something which is contrary to its purpose has verily violated the *Shariah* and as a result his actions interpreted as null and void²⁴. Furthermore, any form of business dealings without bearing any risks and liability is forbidden. Therefore the failure to recognize the general principles of Islamic Law and its objectives which is contained in the *Quran* and *Sunnah* would render one’s practices void and unacceptable by *Allah* (swt) and the worst scenario is that one might be construing what is forbidden by *Allah* (swt) without realizing it. In

this context researching issues relating to Islamic Banks and finance should be expedited in the context of various legal maxims so as to avoid future legal disputes and misunderstanding about the true nature of Islamic banking and financial instruments which rest solely on the basis of justice and equity. The proceeding section will discuss the Islamic view of profit in the context of the legal maxims of Islamic Law.

5.0 Al-Oawa'id Al-Fiqhiyyah: its relevance to entitlement to profit

The legal maxim *“The right to gain is obtained sometimes through the introduction of capital, sometimes through the introduction of work and sometimes, through introduction of responsibility (liability).”* (Article 1347) *Majallah* further stated that, *“When there is no introduction of one of the abovementioned three things, the right to gain does not exist.”* (Article 1348) Is rephrasing of the hadith reported by ‘*Attab ibn Usyed*, that the Prophet (SAW) *when he sent him to Mecca said, “Prohibit them the sale of which they have not possessed and the profit of that for which they are not liable”*

In the light of the forgoing legal maxims it can be said that profit, gain or revenue in Islamic perspective is closely related to introduction of work or introduction of capital (*naqid*) or to introduction to responsibility, liability and risk.

5.1 Introduction of work (Participation in the actual business activities)

Each individual, group or institution, has the freedom to increase his/her wealth but, within the Islamic legal limits. According to the theory of Islam concerning the increasing of wealth, it interferences in the manner in which it is increased and the dealings connected with the increase of the wealth. Islam does not give absolute freedom to the owner of the wealth to manage it in this respect just as he/them wishes, since beyond the welfare of the individual, group or institution is the welfare/interest of the community with which he/them deals.

Islam forbids dishonest dealings or attaining monopoly over things people needed or lend out his wealth for usury without working at all, other then simply by becoming the owner of the wealth or exploiting weak people by giving them little and demanding a lot in return. Thus appropriates unjustly the result of their effort and labours.

Islam sanctifies work and makes it the basic cause for increasing wealth and entitlement to profit.

It is obvious that work is the true cause for entitlement do profit, which is understood to be a gain resulting from the management of the wealth which does not grow by itself. Islam cannot tolerate someone gaining wealth while sitting inactively or wealth begetting wealth. Rather, work begets wealth or the wealth is forbidden. Thus Islam forbids it.

Therefore, work of all types and kinds, is one of the means of acquiring the right to profit in Islam, thus a just (*Adil*) relationship between the effort and the reward. On the basis of this view which sanctifies work, Islam sanctifies the right of the worker to his wage and

also has demanded from him for this part to do his work well and thoroughly for every right has a corresponding duty in Islam. General principle is that ;**There is no gain without effort and no effort without reward.**” “

5.2 Introduction to Liability, risk

The legal maxim “**Right to profit through a corresponding liability for loss**” (*al-Kharaj bi-al-daman*) is a direct rendering of a *hadith* of the Prophet (*SAW*) in identical words. This maxim help explain the right to derive full profit in Islamic view. Thus, if a party of the sale contract derives the full profit from an object, then that party should bear the risks /liabilities of the true owner.

According to this legal maxim profit are positively viewed when associated with the risks of ownership of known productive property: risks either of that property’s future profitability due to its yield or to market movement or of its continued existence. Thus, when one party do not expose to the danger of losses and escapes risks altogether, profits come under the rules of *riba*.

Ibn Rushd (d 1198), who stated that in the book of *Istihqaq* (Restitution) “*If he (the possessor) was liable for usufruct of the claimed property through a semblance of ownership (shubhat al milk), there is no disagreement that the usufruct belongs to the possessor. I mean, by liability, that it would have been his loss had it perished (Halakat) in his possession.*”

For other contracts, such as agency, deposit and pledge, (gratuitous, contract) usually do not permit the party holding property (the agent, the bailee, the pledge) to derive benefit from it. In such cases, the holder not having profit also does not bear the risk of loss or *daman*, and remains an *amin*, trustee, liable not for misadventures but only to abide by the contract and to exercise due care. In the partnerships the partner is only an *amin* as to partnership beyond his share.

In contrast, in a lease (*ijara*), since the user has to pay a rental in return for reaping the benefits from property, the owner continues to bear the risk of loss. Here the rent is seen as the profit, and the risk of loss stays with the lessor; thus the maxim “**rent and liability for loss do not coincide**” (*al-ajr wa-al-daman la yajtami’an*) Article 86. Suggest that profit is morally justified only when one faces risk to secure it, while reckless profit is unjust.

These rules affect Islamic banking and finance most in leases and in partnerships. If, for example, the working partner in *mudraba* agrees to guarantee the capital of the non-working capital partners, that agreement is void. Since the capital partners’ investments yields profit, then it must be also liable for any losses. The working partner risks only his labour. He becomes liable for capital loss only if he is shown to have been negligent or to have breached the agreement between the parties. Since in leases the tenant cannot be made to bear risk of loss of the property, the provision commonly found in conventional financial leases that imposes all risks on the lessee is unacceptable.

5.3 Introduction of capital

The view of Islam regarding capital is clearly revealed in the legal maxim that the capitalist did not determine a right for money to obtain any profit unless the money (capital) is joined, in a partnership; with work (actually human effort) regardless of whether the result of the partnership is profitable or a loss, thus, capital does not grow except by investment, because money does not breed money. Rather, the growth of money is resulting from the investment of such money in a business activities.

Muhammed Ibn Ashur (d1973) in his famous book *Maqasid al-Shariah* writes “*Financial capital enables the continuation of labour to increase one’s wealth. It consists of savings that are spent in a way that produces profit. Indeed, financial capital has been considered among the basic sources of wealth, for it is essential for the continuation of work. If financial capital is lacking, labourers might be unable to continue their work and thus their earnings would come to an end. Obviously, means of work, such as engines, steam-driven machines, electrical equipment, and even animals used for packing and ploughing, would constitute part of capital.*”.

Islam instructs people to moderate in the pursuit of profit, behave in the prescribed way, and acquire only the legitimate not the maximum. Full compliance with the Islamic legal maxim, the concept of justice and responsiveness to the welfare of others would be constrained from profit maximization which becomes the feature of the conventional economic system which deviates from Islamic principles and violate the Islamic goals of social and economic justice and equitable distribution of income and wealth.

Having explored these fundamental conceptions for entitlement to profit in Islamic perspectives, it is necessary to discuss the legitimate and illegitimate profit in the next section.

6.0 Legitimate and illegitimate profit in Islamic perspective

The profit in general, falls into two categories according to the Muslim Jurists (*Fuqha*’);

1) Permissible or legitimate profit

The legitimate profit in buying and selling is the profit that is gained from a legitimate and permissible contract based on mutual consent between the contracting parties with pure and sincere intention regardless of the amount, be it big or small.

It has been proved and reasoned by the Muslim jurist based on the Quran and also the Sunnah.

The holy *Quran*, in *Surah An-Nisa*’, verse 29;

“O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you.”

The verse states that a condition of allowing or permitting a business is a mutual agreement. Hence, what has been agreed by both parties from the profit is allowed and permissible in Islam whether it’s in small or big amount.

While from the *Sunnah*, its narrated that, the Prophet (*SAW*) said, “***Muslim’s wealth is unlawful (to gain) except with pure and sincere intention from it.***” Thus, the profit that has been agreed by both parties with mutual consent and pure intention is lawful no matter if it’s little or much.

2) Illegitimate or forbidden profit

The illegitimate profit includes

- 1) All the profit gained from the forbidden contracts such a usury or interest (*riba*’), monopoly, compulsion or inevitable (*idhtirar*) and exploitation (*istighlal*).
- 2) The profits gained from valid contracts which contains and involves dishonest dealings such as cheating (*ghish*), or misrepresentation (*tadlis*) or exploitation and injustice (*dhulum*) on one of the contracting parties. Thus, casting doubt on the lawfulness of the profit and legality of the entire transaction.
- 3) Any profit earned by the seller more than one-third or one-sixth of the original value of the thing sold is considered illegitimate. This has been deduced from *Shariah* rulings on the determination of minimum and maximum profit limits. This ruling is analogous to what is reported from hadith of the Prophet (*SAW*) saying, “***one-third, and one-sixth is too much.***” However, with the true mutual consent (*taradin*) of both parties it is seen as legitimate profit according to some Muslim Jurists whom approve it.

7.0 Final Remarks.

Al-Qawaid Al-Fiqhiyyh or general principles of Islamic Law represent an important area of *fiqh* and *usul al-Fiqh* and their study imparts strategic knowledge of their subject matter and assists the researcher to gain a better insight into the general character and attributes of the *Shariah*. They are particularly useful for deriving proper Islamic rulings (*fatwas*) and new solutions through *ijtihad*, hence promoting the understanding of what the *Shariah* aims to achieve. The Muslims scholar consider *al Qawai’d al-Fiqiyyah* as an innate and systematic characteristics of Islamic law which can be hardly altered without changing the whole structure of Islamic law.

Notes

1. al-Suyuti, *al-Ashbah wa al-Nazair*, p.5.
 2. al-Burnu, *al-Wajiz fi al-Qawaid al-Fiqhiyyal al-Kulliyyah*, p.16.
 3. Mustafa a;-Zarqa, *Sharh Qawa'id Fiqhiyyah*, pp. 33-34
 4. al-Hamawi, *Ghamz al-^cUyun al-Basair*, vol.1, p. 51
 5. Ibn Nujim, *al-Ashbah wa al Nazair*, p.166
 6. Mahmassani, *Falsafat al-Tashr^ci fi al-Islam*, p.52
 7. Ibid, p.149,
 8. al-Shatibi, *Muwafaqat fi Usul al-Shar^fah* vol.2, p.298 and vol. 3, p.22
 9. Qadri, *Islamic Jurisprudence in the Modern World* p.264
 10. al-Shatibi., vol.2, p.298.
 11. al-Shatibi., vol.1, p. 38 and vol.2.p.10
 12. *Majallah al-Ahkam al-Adliyah*, p.11,
 13. *Majallah*, p.11
 14. al-Qarafi, *Kitab al Furuq*, vol.4, p.40 and pp.74-75,
 15. Ibid, vol.4, pp.74-75,
 16. Hattab, *Mawahib al-Jalil li Sharh Mukhtasar Khalil*, vol.1, p.38
 17. al-Atasi, *Sharh al Majallah*, vol.1, p.12
 18. Ibn Qayyim, *I^clam al-Muwqqi^cin*, vol.3, p.1
 19. Ibn Taymiyyah, *Minhaj al-Sunnah al-Nabawiyyah* vol.1, p.147/
 20. Shatibi, vol.2, p.305
 21. For further discussion on this rule, see Mahmassani *al-Nazariyah al-^cAmah li-al-Mujabat wa al-^cUqud Fi al-Shariah al-Islamiyah*, vol.2, pp. 28-31
 22. The purpose of the contract is taken into account because it may affect its validity, invalidity. Under it, any consideration or cause whose object cannot be attained is not legal. For more detail see Shatibi. *Muwafaqat*, vol.2. p.327; Ibn Qayyim, *I^clam* vol.3, p.96.
 23. al-Shatibi, op.cit. vol.2, p.331
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