Chapter Three

Jurisprudential Maxims, Fundamentalistic Maxims and Jurisprudential Canons

3.1. Jurisprudential Maxims: Historical Development

In his M.A. thesis on ***Al-Qawaa'i-dul-Fiqhiyah*** (Jurisprudential Maxims), An-Nadwi traces the history of jurisprudential maxims and their development in three phases.

3.1.1. Phase One: Creation and Formation

This phase refers to the message era or legislation era in which jurisprudential maxims subsume many derivative ones and represent what is called 'holistic maxims', القواعد الفقهية الكلية. For example, there are certain Prophetic sayings *hadiths* that have become later jurisprudential maxims, such as: *la dharara walaa dhiraar* " لا ضرر ولا ضرار", " Lit: No harm and no counter harm", the Prophetic saying: *al-'ujmaa"u jarhuha jubaar* " العجماءُ جرحها جُبار", "The beast's injury is squander", *al-kharaaju bi-l-dhamaan* "الخراجُ بالضمان", "Yield is guaranteed", and *al-bayinatu 'alaa man id'aa wa-l-yameenu 'alaa man ankar* "" "البيّنةُ على من ادّعى واليمينُ على من أنكر" Evidence is for him who claims and the oath for him who denies" among other sayings in (all-inclusive, concise expressions) جوامع الكلم of Prophet Mohammad. These and other maxims will be later elaborately discussed. This phase stretched over three centuries, then came phase two.

3.1.2. Phase Two: Growth and Recording

Jurisprudential maxims began to be treated within an autonomous discipline in the fourth century of Hijra, especially after the prevalence of *taqleed* (تقليد), imitation phenomenon and abatement of *ijtihaad* (اجتهاد), independent religio-legal judgment. We find now the maxims rely on and are derived from the four schools of jurisprudence. Historically, jurisprudents of Hanafi school were the first pioneers in this field. Imam Ad-Dabbas, one of the A.H. fourth century renowned jurisprudents had collected seventeen holistic jurisprudential maxims by Imam Abu-Hanifa.

The most famous basic maxims are :

1. Matters are judged by intentions. a*l- 'umooru bimqaasidiha.*

الامور بمقاصدها

2- Certainty shall not be warded off by doubt.

"اليقين لا يزول بالشك"

"al-yaqeenu la yazoolu bi-l-shak".

3- Hardship begets ease: "المشقة تجلب التيسير"

"al-mashaqqaatu tajlubu al-tayseer".

4- Harm shall be dispelled: "الضرر يزال"

" al-dhararu yuzaal".

5- Custom is an arbitrator: "العادة محكمة"

"a*l-'Aadatu Muhakkama*".

These maxims will be fully discussed later on.

3.1.3. Phase Three: Stability and Organization

Albeit the numerous efforts exerted in the previous two phases, jurisprudential maxims scattered until they had been stabilized and organized in a law-book called ***al-Mejella (Juristic Provisions Journal),*** مجلة الأحكام العدلية

"Mejelatu Al-ahkaami Al-'adliyah" by a committee of eminent jurisprudents in the reign of Ottoman Sultan *Abdul-Aziz Khan,* and started to be operative in the courts.

For example, one of the maxims in the law-book is the following famous one:

al-tasarufu 'alaa al-ra'iyeeti manootun bl-l-maslaha.

"التصرف على الرعية منوط بالمصلحة"

"Disposition of people is contingent on interest"

Another maxim is " The change of provisions shall not be denied by the change of the times" الزمان لا ينكر تغير الأحكام بتغير " *la yunkaru taghyeeru al-ahkaami bi-taghyeeri az-zamaan,* which means that the change of provisions due to the change of times shall not be denied.

A final maxim is: "No one shall not be permitted to dispose with someone's property without the latter's permission."

la yajoozu li-ahadin ann yatasarafa fi muliki ghayrhi bilaa ithnihi.

"لا يجوز لأحد أن يتصرّفَ في ملك غيره بلا إذنه"

3..2. Significance of Jurisprudential Maxims in Islamic life .

An-Nadwi (2000:327) delineates the significance of jurisprudential maxims through the following merits:

1) Jurisprudential maxims play a remarkable role in facilitating and integrating Islamic jurisprudence so as to organize many derivatives under one maxim without which provisions become scattered and which might be ostensibly contradictory.

2) The study of jurisprudential maxims helps to present and control many similar issues so that the maxims become a means to arrive at provisions.

3) Jurisprudential maxims create in the interested person what might be called (jurisprudence faculty) to enable him to be well-acquainted with the maxims of his own jurisprudence school.

4) They facilitate his pursuit of particulars and his aptitude to deduce them from different topics then limit them in one topic without excluding the exceptions of every maxim; thus he averts the contradiction of similar provisions.

5) Linking scattered provisions in one thread which denotes that these provisions are employed to achieve a closer or greater interest .

6) The attainable knowledge of the maxims paves the way for one to be well-versed in different branches of jurisprudence.

3.3. Differences between Jurisprudential Maxims and Fundamentalistic Maxims

Fundamentalistic maxims are holistic maxims applicable to all particulars and topics, whereas jurisprudential maxims are applicable to the majority of the particulars. These maxims have their own exceptions. Besides, fundamentalistic maxims can generate practical religious judgments, since they constitute a group of similar judgments based on one cause. The purpose of these maxims is to explicate jurisprudential issues and make them easy to understand. These maxims deal with issues that have different sources of detailed proofs from which legislation is deduced , which differ from jurisprudential maxims that are concerned with issues subsuming jurisprudential judgments. Contrary to

jurisprudential maxims, fundamentalistic holistic maxims serve the general and special religious purposes and pave the way to arrive at the underlying principles of the judgments. For further details about the differences, see *An-Nadwi*, (2004:67-71) .

An example of fundamentalistic maxims is (Command denotes obligation and the forbidden denotes prohibition)

a*l-"amru yufeedu-l-wujoob wa an-nahyu yufeedu al-tahreem.*

الامر يفيد الوجوب ، والنهي يفيد التحريم

Such maxims will not be elaborated because they lie beyond the scope of the present book.

3.4. Maxims Deemed to be Both Jurisprudential and Fundamentalistic

Despite differences between jurisprudential maxims and fundamentalistic maxims, there are certain maxims that can be classified under both of them, since the fundamentalistic maxim is looked upon as a comprehensive proof from which a holistic judgment is derived, whereas a jurisprudential maxim is looked upon as a partial judgment on a certain act, for example:

al-ijtihaadu la yunqadhu bi-mithlihi.

الاجتهاد لا ينقض بمثله

The *Ijtihaad* shall not be revoked by a similitude.(Maxim 58)

al-asl baqaa"u maa kaana ‘alaa maa kaan.

الاصل بقاء ما كان على ما كان

The original state is what has once existed is(deemed) as persisted. (Maxim 63).(a*sl* ,plural *usool,* denotes origin, root, essence, basis, principle, or fundament.)

la yunsabu ilaa saaktiin qawlunl wa-laakna as-sukoot fi ma'radhi-l-haajati bayaan.

لا ينسب الى ساكت قول ولكن السكوت في معرض الحاجة بيان

"No utterance shall be imputed to a silent person, but silence in case of necessity is pronouncement." (Maxim 94)

3.5 Differences between Jurisprudential Maxims and Canons

A Jurisprudential maxim differs from a jurisprudential canon ضابط in that the scope of the latter is narrower than that of the former . The maxim deals with one jurisprudential topic as AL-Borno in An-Nadwi (2004:46) puts it : (The maxim is not restricted to one category, contrary to canon) . Likewise, Zeidan succinctly elucidates the difference between them as follows:

"The maxim comprehends derivatives from various categories, whereas the canon covers them as related to one topic ."

For example, the canon in the Prophetic Tradition (Any skin tanned is purified): *"ayima ihaabin dubigh faqad tahur.*

ايما اهاب دبغ فقد طهر.

Another example is: "The prayer of the one praying after *imam* is dependent on the *imam's* prayer", which means if the *imam's* prayer is nullified so shall be the one who prays after him as a follower . *inna salaata al-muqtadi muta'liqutun bi-salaati al-imaam.*

ان صلاة المقتدي متعلقة بصلاة الأمام.

An-Nadwi (2004:51) gives four differences between maxims and canons as follows:

1) Maxims are more general and comprehensive than canons as regards derivations and comprehensiveness of meaning.

2) Although some scholars do not distinguish between maxim and canon, Ibn Nujaim As–Siyuti and others distinguish one from the other .

3) Maxims have more exceptions than canons, because canons govern one topic that allows no exception .

4) The Arabic term *qa'ida (maxim,*lit:*rule)* has become very common to jurisprudents and authors in the Islamic jurisprudence, and there are differences between them in the jurisprudence domains

3.6. Differences between a Jurisprudential Maxim and a Jurisprudence Theory

An-Nadwi (2004: 64) sums up the differences between the two as follows:

1) The jurisprudential maxim includes in itself a jurisprudential judgment and that this judgment applies to the derivatives as in the maxim ☹ Certainty shall not be warded off by doubt) which includes jurisprudential judgments in every issue in which certainty and doubt co-occur , contrary to jurisprudence theory which does not include jurisprudential judgment in itself as in the theory of ownership and annulment.

2) The jurisprudential maxim does not subsume assumptions and conditions, contrary to jurisprudence theory which must include them Nevertheless, there are some jurisprudential maxims which share common characteristics with the jurisprudence theory, or their general topics can be subsumed under a certain theory such as :

la yunkaru taghyeeru-l-ahkaami bi-taghyeeri az-zamaan.

لا ينكر تغير الاحكام بتغير الزمان

"Change of judgements shall not be denied by change of times." (Maxim 94) . It means that judgments are based on conventions and customs, not on the text and evidence , which change with the change of conventions and customs on which they are based :

"inama tu'tabaru-l-'aadatu ithaa atradat aw ghalabat

انما تعتبر العادة اذا اطردت أو غلبت

Custom shall be deemed effective only when it is constant and predominant. (Maxim 77)

al-ma'roofu 'urfan ka-l-mashrooti shartan.

المعروف عرفا كالمشروط شرطا

What is commonly practiced is deemed as a stipulated condition. (Maxim 53)

al-ma'roofu bayna-l-tujaari ka-l-mashrooti baynahum.

المعروف بين التجار كالمشروط بينهم.

What is commonly practiced by merchants is deemed a stipulated condition. (Maxim 52)

al-ta'yeenu bi-l-'urfi ka-l-ta'yeen bi-n-nass.

التعيين بالعرف كالتعيين بالنص.

What is stipulated by convention is as stipulated by text (23)

al-*'aadatu muhakima*

العادة محكمة

Custom is an arbitrator. (Maxim 40)

ist'maalu an-naasi hujatun yajubu-l-'amlu bi-haa.

استعمال الناس حجة يجب العمل بها.

'People's common usage is an operative proof.'(Maxim 12)

Irrespective of different derivatives and particulars under each of them, the above commonly known jurisprudential maxims can all be subsumed under the topic of 'convention theory', simply because 'convention' is the general trait which comprehends all the aforesaid maxims.

ettlement or the sale is invalidated, the embedded acknowledgement and acquaintance between the contractors shall be null and void.

Another example, if someone says to another "I sell you my blood for 1000 and thereof he kills him, the killer shall be liable to retaliation (Qasaas) on the grounds that the permission for killing is originated by the sale of his blood, which is null and void, so is the permission which implies it.

Maxim 6

ithaa ta'aaradha al-maani'u wa-l-muqtadhi yuqadamu al-maani'

اذا تعارض المانع والمقتضي يُقدم المانع.

When the preclusive and the necessitated conflict, preference shall be given to the preclusive.

This maxim can also be rendered as follows: 'when the preclusion or the impediment and the requirement co-occur, the preclusion shall have the precedence.' It can be explained as follows: when there is conflict between abar or derrent to certain action and the necessity for such action, the bar or derrent will preevail.A mortgagor, for example, may not sell the mortgaged property so long as it is in the mortgagee's possession. This is based on the Prophetic *hadith*: *Maa nahaytukum 'anhu fa-ijtanibuh wa-maa amrtukum bihi fa-atoo minhu maa istaṭa'atum*

(ما نهيتكم عنه فأجتنبوه وما أمرتكم به فأتوا منه ما استطعتم)

Related by Muslim, the Prophet said, "Whatever I have forbidden you from committing avert it, and whatever I enjoined you to do, do it as far as possible". In the *Mejelle* (English Version, p.8) Art 47 expresses the above maxim as: "when an obstacle and a want have presented themselves, the obstacle is given precedence". The *Mejelle* cites the following instance: A man cannot sell to another his property which is pledged in the hands of his

creditor. Article (1192) speaks of the right of disposition by the owner as follows: Every person has the right of disposition of his property as he wishes, yet if the right of another person is attached to it, it prevents the owner from making any disposition of his property. For example, in a building wherein the upper storey is the property of one, and the lower storey is the property of another, the owner of the upper storey has the right to use the floor which is at the same time the ceiling of the lower storey, and the owner of the lower storey has the right to benefit from it. Hence, no one has the right to do anything without the other's permission.

Maxim 7

***ithaa* ta'aara*dh*at mafsadataani roo'iya a'*dh*amhumaa *dh*araran bi-irtikaabi akhafahumaa.**

اذا تعارضت مفسدتان روعي اعظمهما ضررا بأرتكارب اخفهما.

When greater and lesser banes are incompatible,

the lesser shall be committed.

The maxim stipulates that when two unlawful things occur in a contradictory manner, the lesser may be committed to avert the greater. It is found in Articles 46 and 41 in the Iraqi Civil Code. By way of exemplification, if a wounded man, while performing his prayer prostrates and this prostration will open his wound then he may perform his prayer sitting and using gestures because abandoning prostration makes his prayer easily performed. Another example, if a woman performs her prayer standing which entails revealing any part of her body that nullities the prayer and if she performs her prayer sitting which entails no revealing anything of her body, then she shall perform her prayer sitting . This maxim is also cited in the *Mejella (The English Version,p.6):* "When two wrongful acts (fesaad) meet, the remedy of the greater is sought by the doing of the less."

Maxim 8

ithaa ta'ath*ara a'maalu al-kalaami yuhmal

إذا تعذّر أعمال الكلام يهمل.

trustworthy person if the custodian returns it or sends it by the trustworthy person and it perishes or lost before reaching the depositor without an infringement or negligence, then there shall be no compensation. The example of non-liability is what may be left undone from a religious standpoint. As for what is religiously permissible not to do, if a proxy in sale or purchase refrains from doing what he has been entrusted to do, in anticipation of a better sale or purchase, until such time when the goods for sale and the value has perished in his possession, in which case he is not liable to pay compensation. Or if a speculator retrains from working with the capital designated for speculation, after receiving it, in order to take his time and in anticipation of a favorable opportunity, and it perishes in his possession, then there shall be no liability incumbent on the proxy and the speculator because their refraining to do what they were entrusted to do is religiously permissible, and what is religiously permissible negates compensation. But if something perishes during passage in a public road, or in case one's animal damages something on the public road whilst he is riding or leading it, he then shall be liable to compensation because of his passage. Hence, albeit it is religiously permissible, it is restricted by the condition of safety.

Maxim 26

al-haajatu tanzilu manzilata al-dharoora 'aamatan aw khaasa.

الحاجة تنزل منزلة الضرورة عامة او خاصة

Need is ranked as necessity, be it public or private.

This maxim can be restated as follows: a need whether public or private assumes the character of a necessity. By "need" is meant anything that is below necessity in rank. The ranks, according to Islamic law, are of three kinds:

4. Necessity indicating that unless the prohibited thing is committed death occurs, as explicated in Maxim 38.

2. Need meaning that when it is not met no serious sequence like death is caused. For example, a man is not going to die if he does not eat, albeit hardship, in which case the prohibited is not permitted. There are some exceptions, like permission in breaking fast in Ramadhan.

The maxim can be traced in the National Civil Code of Syria, Iraq, and Jordan. These codes are still existing nowadays, and the jurisdiction in the above mentioned countries still depends on many of them.

3. Luxuries denoting things that are pleasant to have but not necessary; they provide comfort and an easy way of living. Among the applications of the maxim is the permissibility of wearing silk by a man to meet a hygienic need, as in the case of a mangy man.

Another example is the controversial permission of translation of the meanings of the *Qur'an* into foreign languages because of the people's need to know the Quranic provisions and commandments among other things. Explicitly, the meanings of the Qur'an are subject to different interpretations and various exegeses, which makes it mandatory to translate the particular exegist's interpretation.

Maxim 27

al-hudoodu tudra"u bi-l-shubuhaat.

الحدود تدرأ بالشبهات

Punishments shall be averted by doubtful matters.

Al-Hadd (pl. *hudud*) is a punishment specified by the *Shari'ah,* such as the punishments of adultery, fornication, theft, and drinking intoxicants (e.g., alcoholic drinking) The root of this maxim is Prophetic *hadith* related by Al-Tarmadhi on the authority of 'Aisha who said: the Messenger of Allah said "Avert punishments from Muslims as far as you can, and if you find a way out release the Muslim".

أخرج الترمذي عن عائشة – رضي الله عنها – قالت: قال رسول الله صلى الله عليه وسلم: " ادرأوا الحدود عن المسلمين ما استطعتم ، فان كان له مخرج فخلوا سبيله."

Maxim 32

al-su'' aalu mu'aadun fi al-jawaab.

السؤال معاد في الجواب

The question is reiterated in the reply.

This maxim means that a question is reflected in the answer thereof, i.e., the content of an honest question has the quality of an honest acknowledgemnt or admission in reply. It shows whatever said in the verified question is as though the verified replier had acknowledged it. If someone asks another "Have you divorced your wife?" and the other one replies "yes", he shall acknowledge what he has been questioned for. Another example of this maxim : If the judge says to the defendant, "The plaintiff claims that you owe him 1000 dinars for so-and-so, what do you say?". If the defendant says "yes" then he has acknowledged the 1000 dinars. But, if the judge says to the defendant "Are you **not** indebted with what the plaintiff claims on you?". If the answer is "yes", this shall not be a confession, because if the answer of the negative question is "indeed", it means positive, but if the answer is "yes" it means negative as though he said I have nothing for the plaintiff. Others say if the defendant's reply is "yes", then it shall be confession too, because confession is interpreted on convention, not on niceties of the Arabic language (In Zeidan, 2001:205).

Maxim 33

al-dhararu al-ashadu yuzaalu bi-l-adhara al-akhaf.

الضرر الاشد يزال بالضرر الاخف

A severe harm shall be removed by a lesser harm.

This maxim is also deemed as a derivative of Maxim 88 below, which is based on Prophetic *hadith*: "No harm shall be met by harm". It indicates that when two harms co-occur, one is greater than the other, the greater harm shall be warded off by the lesser harm. There are some cases for application:

1. A person usurps some timber and uses it in his construction; if the construction values more than the timber, the usurper may keep it after paying its worth. But if the value of the timber is more than that of the construction, the timber-owner shall have the right to claim its value.

2. If a hen swallows a pearl, the more valuable shall be taken into consideration, so as the higher worth shall secure the lower.

3. The permissibility to cut open the abdomen of a dead pregnant in order to save the life of a foetus if its life is hoped to be saved.

4. The preemptor may possess anything that the vendor has made in the premises for its due value and he shall not remove it off.

Articles 27 and 65 of the Jordanian Civil Code and Articles 23/1 and 214/1 of the Iraqi Civil Code contain that maxim as follows:

"Severe injury is removed by lesser injury."

Maxim 34

al-dhararu laa yuzaalu bi-mithilihi

الضرر لا يزال بمثله

Harm shall not be warded off by a similitude .

This maxim simply means any harm or wrong-doing shall not be averted by another harm or wrong-doing, and acts as an illustrative specification and limitation of the maxim 'Harm shall be warded off', because it is a kind of injustice, wrong-doing, evil and mischief. Nevertheless, it must not be dispelled by causing another harm in return for the dispelled harm. It is cited in Article 25 of the Jordanian Civil Code : "An injury cannot be removed by the commission of a similar injury" (Nasir, 1990: 27) .

Here are three cases for application as furnished by the *Mejella*:

1. If the vendor discovers a defect is found to be an old one, the vendor has no right to return it with that old defect, instead he may demand only reduction of the price, simply because incurring harm to the seller is not permissible as a means of dispelling harm from the vendor

by causing another harm to the seller. This is because harm shall be dispelled as much as possible, as will be explained in the next maxim bellow.

2. A starving person shall not be permitted to eat the food of another starving person under the circumstance of necessity.

3. If setting up a shop causes reduction or loss of the profit of an adjacent shop-keeper, the new shop may not be closed because harm shall not be warded by a similar harm.

Maxim 35

al-dhararu laa yakonu qadeeman.

الضرر لا يكون قديما

Harm is not justified by being old.

This maxim is related to the maxims concerning harm. *Zarar* denotes harm, damage, injury or wrong and demonstrates that there shall be no attention given to anything old or ancient, i.e., from time immemorial that contravenes the Islamic law. Harm can take the form of nuisances as in the example of damage done to a passer-by like the balconies that are above a public road which must be removed if they cause harm even if they are old. This maxim, which affirms that an injury or wrong is injury or wrong albeit being old, seems to be a restriction of the maxim "The old shall be deemed old."(cf. the examples provided in that maxim.)

Maxim 36

al-dhararu yudfa'u bi-qadar al-imkaan.

الضرر يدفع بقدر الامكان

Harm shall be warded off as much as possible.

This maxim demonstrates that harm or injury is to be pushed off or resisated to any possible extent ; it is like Maxims 35 and 37 are derived from the Prophetic *hadith*, i.e.

Also the removal of a tannery that causes some harm to the neighbor is an act of warding off harm.

Maxim 38

al-dharooraatu tubeehu al-mahzooraat.

الضرورات تبيح المحظورات

Necessities render prohibited things permissible.

Literally: necessities permit prohibitions, i.e., necessity justifies that which is religiously unlawful or prohibited. This maxim can be seen in an English proverb. "Necessity knows no law" or "necessity knows no limits". This maxim is based on the following Quranic *ayas*:

إنما حَرَّم عليكُمُ الميتةَ والدَّم ولحم الخنزير وما أُهِلَّ به لغير الله فمن اضطر غير باغ ولا عادٍ فلا أثم عليه.(البقرة:173)

He (Allah) has forbidden dead meat or carrion, blood, the flesh of swine, and that which is slaughtered on which Allah's name is not mentioned, but if someone is forced by necessity without willful disobedience nor transgressing due to limits then there is no sin on him. The second *Aya* is:

من كَفَرَ بالله من بعد ايمانه الا من أكره وقلبه مطمئن بالأيمان ولكن من شَرَحَ بالكفر صدراً فعليهم غضب من الله ولهم عذاب عظيم .(النحل:106)

'Anyone who (after believing) utters unbelief except under compulsion, his heart still remains firm in his belief, but whosoever's chest is open to unbelief, on them falls the wrath of Allah, and there awaits them severe chastisement.'

The exception refers to a case like that of Ammar, whose father Yaser and mother Sumayya, were subjected to unspeakable tortures for their belief in Islam, but never recanted, Ammar suffering under tortures himself and his mind acted by the sufferings of his parents, uttered a word construed as recantations though his heart never wavered and he came back at once to the Prophet, who consoled him for his pain and confirmed his faith. (Ali, 1991:665; note:2145) This explicates that uttering unbelief under the necessity of compulsion is permissible to avert death or torture.

Another example: telling lies is strictly forbidden in Islam and when it is in the case of ʼearing an oath it is deemed strict prohibition. Nevertheless it is permissible under cessity of rescuing an innocent soul from death or a woman from fornication.

If, for example, an unjust transgressor chasing an innocent person with the intention of lling him or desiring to commit fornication with a woman and the chased person or the ɔman took hiding in someone's premises, the latter is permitted to deny their hiding and en to swear on that.

The very same jurisprudential maxim is cited in the Iraqi (Art .212) and Jordanian (Art. 2) civil codes.

Maxim 39

al-dharooraatu tuqadaru bi-qadarihaa.

الضرورات تقدر بقدرها

Necessity shall be estimated by the extent thereof.

This maxim, which indicates that the extent of necessities limits any act thereunder, is an ustration and restriction to the above maxim (No.38). As an application of the maxim if meone opens a window in the wall of his house overlooking the place where neighbour ɔmen frequent, he shall be obliged to remove this damage on his neighbour in such a way at the vision on them is blocked, but he shall not be obliged to wall up the whole window.

Maxim 40

al-ʻaadatu muhakimatun.

العادة محكمة

Custom is an Arbitrator.

Custom *(ʻaadah*) whether it is public or private acts as an arbitrator to validate a legal ligious judgment. It is a significant source of judical decision to establish the ruke of law. denotes the repetition of something so as to be deeply rooted in man's soul and be ceptable to it . Pertinent to custom is convention (*urf*), but in case there is a textual

that because the effect of the admission does not remain by reason of its having been found to be false by the judgment of the judge". (The *Mejella*, 2003: 267).

Maxim 50

al-mashaqatu tajilbu al-tayseer.

المشقة تجلب التيسير

Hardship begets ease.

This maxim means it is mandatory to make easy that which is difficult to bear,i.e., to soften a hardship and to relax that which is too strict. It is also rendered by Nasir (1990:26) as: "Difficulty begets facility". This maxim is based on the following Qur'anic *aya* :

(يريدُ الله بكم اليسر ولا يريد بكم العُسر) (البقرة :185)

(Allah intends ease for you, and does not desire any hardship for you) (Al-Baqara.185). It is and also based on the following Prophetic *hadith.*

(إن الدين يُسر، ولن يشادّ الدين أحد الا غلبه)

(Religion is ease, and whoever overburdens himself in religion, but will be overpowered by it).

This maxim is cited in the *Mejella* under Art.17 which is translated as "Hardship causes the giving of facilities",[sic]. On this maxim, a wide spectrum of the jurisprudential maxims dealing with the religious permissions and mitigations are based, especially those related to debt, transfer of obligations, restraint on competency, etc., by which lessening of burdens in compliance eith the *sahri'a* (of transactions *mu'amatat*) has been brought about by the jurist . The same maxim is worded differently in (Art. 18) as "Latitude should be afforded in the case of difficulty" (Nasir' ibid).

Maxim 51

attributes. In other words, evidence is by the purchaser, and the seller must take an oath to validate his claim. This maxim has the following exceptions:

a- A husband makes use of his wife's yield, then she is dead, thereupon he claims that he has had her permission to do so but the heirs have denied, so the say is his by swearing an oath, albeit the origin is not to have the permission from his wife.

b- If the speculator brings a sum of money, claiming that it is the main capital with profit. And the property owner claims that this sum of money is the main capital so the say is the speculator's even though the non-existent profit is the origin.

c- If a woman asks for her young children alimony after the judge has assigned this alimony to them and the father claims that he has spent money on them, the say is hers y swearing an oath, albeit the origin is not to spend money on them.

Maxim 68

al-aslu fi-l-madhaari al-tahreem.

الاصل في المضار التحريم

The Basic Principle: whatever is harmful is prohibited

The maxim can be translated as: 'The essence oe the basic principle *asl* is the prohibition of harm'. Many Muslim jurisprudents and jurists judge that whatever is conducive to prohibition, *haraam,* such as harm is itself prohibited. In the Qur'an there are many *ayas* which forbid inflicting harm or damage to others, such as:

"ولا تمسكوهنّ ضرار لتعتدوا ومن يفعل ذلك فقد ظلم نفسه" (البقرة 231)

"But do not retain them against their will in order to hurt them; and whoever does that, he has indeed wronged himself" (Qur'an, 2: 231)

Another example:

"ولا تضاروهنّ لتضيّقوا عليهنّ " (الطلاق 6)

"Do not harass them so as to make life difficult for them" (Qur'an,65: 6). This maxim is also related to the maxims dealing with harm, such as Maxim 88 "No harm shall be met by harm"; Maxim 37 "Harm shall be warded off", among others.

جناية العجماء جبار

The beast's injury is squander.

This maxim demonstrates that any harm or injury caused by a dumb animal is not a crime, but a sort of waste *jubaar* It refers to the damage caused by animals, where (جناية) literally means "offence" which includes the damage or harm done by animals. This maxim is based on a Prophetic *hadith* related by Muslim on the authority of Abu Huraira who narrated that the messenger of Allah said, "There is no compensation for the one who is killed or wounded by an animal or by falling in a well, or because of working in mines" (*Sahih Muslim*: 524)

Maxim 81

dar"u –l-mafaasidi awlaa min jalbi al-manaaf'i'

درء المفاسد اولى من جلب المنافع

Repelling banes is better than securing benefits.

This maxim asserts that unlawful things are to be prevented, irrespective of benefits,which can be demonstrated that if a bane and a benefit are incompatible, repelling the bane has the priority, because religion is more concerned with prohibitions than with obligations based on the Prophetic *hadith*: "If I order you to do anything do it as much as you can, but if I forbid you from doing anything you must avert it " narrated by Al-Bukhari and Muslim) .

" اذا أمرتكم بشيئ فأتوا منه ما استطعتم واذا نهيتكم عن شيئ فدعوه" (رواه البخاري ومسلم)

Here are some applications of the maxim :

1) A person is forbidden to dispose of his property if this disposition harms his neighbour, because repelling such banes from his neighbour is preferable to securing benefits to himself.

2) Imposing interdiction on prodigal person.

3) A person must not open a window overlooking private places of his neighbour nor must he make anything in his property which can cause a bane to his neighbour.

axim is cited in Articles 30 and 64 in Jordanian Civil Code and Article 6 in Iraqi Civil

Maxim 82

daleelu ash-shay""i fi-l-imoori al-baatinati yaqoomu maqaamahu.

دليل الشيء في الامور الباطنة يقوم مقامه

In indiscernible matters, the clue of the thing stands in for it

natters which do not appear, evidence of the thing stands in place of that thing. (The *'a*, 2003:11) Differently phrased, in indevernible or invisible matters, inference of a has validity, i.e., one can judge by appearance where it is difficult to ascertain tha fact. : maxim demonstrates that evidence which points to the existence of something which erwise indiscernible shall stand in place of that thing. The Islamic law *(shari'ah)* :cts those legal precepts which are based on causes and indiscernible attributes to ptible causes which, if found to exist, are considered to be a sufficient evidence that the :ernible attribute exists. In explication of this maxim, in the law of retaliation (qisaas) ng to intentional killing, the presence of intention - which is an indiscernible attribute- nsidered to exist if the instrument used on the killed is a tool which, in normal mstances, is used to cause death. When this is found to be the case, the killer shall face onsequences of the law of retaliation (Cf. Art. 68, *Mejella*).

application of this maxim is the discernment of consent on the part of a purchase vis- an old fault by the fact that he uses the goods freely whilst it is in his possession. The equence is that he loses the option to return the goods (cf. Art. 344, The *Mejella*).

milarly, with respect to the payment of dowry – a requirement on the husband after ummation – the husband is obligated to pay the dowry the moment he and his bride are)mplete isolation together, since isolation becomes the causal factor in place of intimacy :h is not a discernible event.

Maxim 83

thikru ba'dh maa laa yatajaz " ka-thikri kulihi.

atements, that judgement shall be valid, and the two witnesses shall be bound to comply ith the judgement

Maxim 88

laa dharara walaa dhiraar.

لا ضرر ولا ضرار

No harm shall be met by harm.

iterally: **"No harm and no counter-harm ".** This maxim, like Maxim 85 above, is an osolute *Hadith* in terms of form and content. This authentic Prophetic *hadith* expounds a ura'nic ruling as evinced in the following *aya*:

" وجزاءوا سيئة سيئة مثلها ، فمن عفا واصلح فأجره على الله " (الشورى: 40)

The recompense for an evil act must be an evil act proportionate to it. Yet anyone who orgives and becomes reconciled, his reward is due from Allah ",

Qur'an, 42:40). In his translation, Asad (1980: 746) interpretatively renders the above *aya* s follows: 'But (remember that an attempt at) requiting evil may (lit: is), too, become an vil: hence, whoever pardons (his foes) and makes peace, his reward rests with God'. 'Ali 1991; Note: 4581; p.1257) asserts: 'You must not seek a compensation greater than the njury suffered. The most you can do is to redress, i.e., a harm equivalent to the harm done o you.'

The maxim comprises two provisions: first, "No harm" denotes no one shall cause any iarm to himself, to his kinship, to his property and to others, because this harm is a kind of wrong-doing which is prohibited in Islam. An example is: someone who constructs a wall adjacent to his neighbour which will entirely block the light to his neighbour. His act in his own house is permissible but in so far as not to incur serious harm to his neighbour. Second, 'no counter harm" states that no harm shall be in return for a harm. Instead, the recipient of the harm shall resort to courts to demand recompense for the harm incurred on him. Hence, the one whose property is damaged by someone else must not damage the latter's in return; instead he must sue him for the damage. Article (19) of *Mejella (the English version,p.6)*

states: "Damage and retaliation by damage is not allowed", which can be succinctly stated as: "No harm shall be caused nor shall be met by harm ".

Ideally, there should be no harm; but should any harm be caused, it shall entail compensation equal in degree to the harm caused. This is adopted in Article 216 of the Iraqi Civil Code, Article 62 of the Jordanian Civil Code and Article 19 in the *Mejella*: "No injury shall be committed nor shall be met by injury" (Nasir,1990:27).

Maxim 89

laa 'ibrata bi-l-ẓanni al-bayni khaṭa" uhu.

لا عبرة بالظن البيّن خطوه

The apparently erroneous supposition

is not to be taken into consideration.

This maxim means that there is no reliance on any supposition which is apparently defective. It is related to maxims concerning "certainty and doubt". It means that the apparently erroneous suspicion must not be depended upon; rather it shall be overlooked and deemed non-existent. Any judgment based on it shall be void. Here are some applications:

a- When a man thinks that he has owed a debt, then the contrary is proven, he shall be entitled to recover the money he has paid.

b- A man says to another, "You owe me 1000 dinars". The other says, "If you swear that I owe you that sum of money, I will pay you". The first takes an oath and the second pays it to him, thinking that he is committed by the oath. Then he shall have the right to take it back.

c- If a man pays something he is not bound to pay, he can take it back, unless it is given as a gift, and the payee has spent the money.

Maxim 90

laa 'ibrata f-l-dalaalati fi muqaabalti al-tasreeh.

لا عبرة في الدلالة في مقابلة التصريح

Indication is not taken into consideration

a- The person who purchases a house shall shall acquire the means of access thereto., e.g., shall be the owner of the road that leads to it.

b- The purchaser of a lock shall be the owner of its key.

c- The purchaser of a cow for a purpose of milking it shall be the owner of its calf.

Maxim 108

yutahamlu al-dhararu al-khaasu li-daf'i al-dharari al-'aam.

يتحمل الضرر الخاص لدفع الضرر العام

Private harm shall be tolerated to dispel public harm.

This maxim means: to avert public harm or injury, a private harm or injury may be suffered, and signifies that the public harm inflicts people in general as being all exposed to it, whereas the private harm inflicts a particular person or a small group of people. The public harm is more effective than the private harm. For this reason, it requires dispelling it by tolerating the private harm. Here are some applications to this maxim:

Demolishing a wall slanting in the direction of the public road; deposing an impudent *mufti* or an unqualified physician; the interdiction of prodigal person, and forbidding a person establishing a kitchen in a drapers' market-place, among others. This maxim is also cited in Article 26 in the Jordanian Civil Code .

Maxim 109

yukhtaaru ahwana ash-sharayani.

يختار اهون الشرين

The lesser of two evils shall be chosen.

This maxim is similar to the previous ones. It indicates when someone is inflicted with two calamities or misfortunes that are equal, he may take any of them; but if they are not equal he may choose the lesser. An example of the former case is for the person who is aboard a burning ship, in which case if he stays on board he is burnt to death and if he

throws himself into water he drowns as he does not know how to swim; here the man has the right to choose the way of death. In the latter case if the unbelievers siege some Muslims who cannot repel them, they may pay a certain amount of money which would lead to end the siege, in which case paying money is deemed as a lesser evil.

Maxim 110

yudhaafu al-fi'lu ilaa al-faa'ili laa aamri maa lam yakun mujabaran.

يضاف الفعل الى الفاعل لا الامر ما لم يكن مجبراً

An action shall be ascribed to its 'actant'

not to the commander, unless coerced.

The maxim simply means : the actual doer or the agent is responsible for his action and not the person under whose order he acts, unless there is some sort of compulsion,.i.e., the judgment for an act is made to fall on the person who does it, but it does not fall on the person who gives the order, as long as he does not complete the doing of the act (The *Mejella* 2003:14). It means that ascription of an action shall be to its subject rather than the one instructing unless he is coerced.

An action is judged to have been committed by its subject in the Islamic law *shari'sh,* because the subject is the agent of that action. The action is not ascribed to the one who instructed the action based on the maxim, 'Instruction to use and dispose of the property of another is not valid' (Cf. Maxim 22). Since the instruction is invalid, compensation is not due from the one instructing. If, however, the one instructing the subject of an action does so, using coercion, in that instance the subject is no more than an instrument in the hand of the instructor, thus ascription of the action shall be to the instructor in this case.

For example, if person *A* instructs another, *B*, to destroy the wealth of someone else, *C*, or to kill *C*, and *B* complies with the instruction, then compensation or retribution is the lot of *B*. The exception is when *A* has coerced *B* to transgress against *C*: in this case, *A* is held responsible.

Maxim 111