

## THE ROLE OF THE LEGAL MAXIMS OF ISLAMIC JURISPRUDENCE IN THE LEGISLATION PROCESS IN QATAR

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### **Abstract**

This submission attempted to establish the role of the legal maxims of Islamic jurisprudence in the legislation process in Qatar. The analysis was conducted by using descriptive and analytical methods to draw out the role played by these maxims in the legislation process in Qatar. The results revealed pieces of evidence of the legal maxims of Islamic jurisprudence in the Qatari laws as Sharia law is considered a material source that the legislator must refer to and not permissible for him to violate its provisions according to the Constitution of the State of Qatar issued in 2004. It also revealed that Islamic law is an official backup source that can only be resorted to in the absence of a legislative text as stipulated in the Qatari Civil Code No. 22 of 2004. It is noted that the Qatari Family Law and the like are considered legislations even though they were originally taken from Sharia.

The analysis also suggested that articles deduced from the legal maxims of Islamic jurisprudence in the Qatari laws include Article (171) of Civil Law No. 22 of 2004, Article 40 of the Qatari constitution, Article 39 of the Qatari constitution, Article 970 of Civil Law No. 22 of 2004.

**Keywords:** legal maxims of Islamic jurisprudence, Qatar legislation, shariah law.

## Introduction

The title of this submission is “The role of the legal maxims of Islamic jurisprudence in the legislation process in Qatar” and we are mainly answering two basic questions in this case. The first one is concerned with the pieces of evidence of the legal maxims of Islamic jurisprudence in the Qatari laws and the second is about the legal rules that were obtained from the legal maxims of Islamic jurisprudence in Qatari laws.

Comparative law commentators classify the main legal families into three: the Latin family, to which most Arab legislations belong including Qatari law, the Anglo-Saxon family, and the Islamic law which for twelve centuries remained a major source of legislation, governance, culture, and all aspects of life. The Islamic law produced during that period flexible and rich laws that consciously interacted with people’s peculiarities, met their interests and achieved their aspirations. What distinguishes Islamic law is that it

has a devotional and educational function, then comes its legal, social, and political functions...etc.

In this submission, the researcher will shed light on the role of the legal maxims of Islamic jurisprudence in the legislation process in Qatar.

### **1. The most important Qatari legislative texts that consider Islamic law:**

- 1.1. The Constitution of the State of Qatar issued in 2004 stipulates in its first article that: “Qatar is an independent and sovereign Arab state. Its religion is Islam, and Islamic Sharia is a major source of its legislation.... etc. Based on this, Islamic Sharia law is considered a material source according to this text that the legislator must refer to and it is not permissible for him to violate its provisions after that. The principles of

Islamic Sharia are also considered constitutional principles

- 1.2. Article one of the Qatari Civil Code No. 22 of 2004 stipulated in the second paragraph that: "If there is no legislative text, the judge shall rule in accordance with Islamic law, and if there is no judgment, he rules according to custom, if otherwise, according to the rules of justice". Based on this text: Islamic law is an official backup source that can only be resorted to in the absence of a legislative text. What is meant here are principles not the detailed rules. As for the legal rules stipulated in the Qatari Family Law and the like, they are considered legislation, even though they were originally taken from Sharia.

The text aims at the "principles of Sharia law" in a number of Arab constitutions not to adhere to a particular school of thought in Islamic jurisprudence, as all schools can be benefited from and referred to in order to avoid conflicts that are the shovel of demolition in building society.

## 2. The most important trends in the interpretation of Islamic Sharia principles:

- 2.1. Abdul Razzaq Al-Sanhouri interpreted the principles of Islamic law as "its general principles that are not in dispute among the jurists" (Al Sanhouri, 2009). These principles can be represented by charity, facility, wisdom, cooperation, solidarity, removing difficulties, observing instinct or human nature ... etc. There is no doubt that this level is steeped in generality from which a legislator cannot benefit much.
- 2.2. The Egyptian Supreme Constitutional Court interpreted the principles of Islamic law as "Shari'ah rulings that are definitive and definite." The singular of rulings (Ahkam) is a ruling (Al Hukum) and refers to Allah's speech related to the actions of those assigned with a requirement, a choice, or a situation, and this level is immersed in partiality, except that the court elevated it by texting two descriptions "unequivocally proven and indicative," such as the Almighty's saying in the holy Quran, "o you who believe, abide by your obligations" (Al-Ma'idah 5: 1). And His saying: "And do not devour your wealth among yourselves unjustly (Al-Baqarh 2:188)." And His saying: "And consult them in a matter (Al-Imran 3:159)." Accordingly, some definitive and definite ruling can be benefited, such as a person's guilt is not borne by others, fulfillment of obligations, the sanctity of others' wealth, consultation...etc. There is no doubt that the principles mentioned here are considered and appreciated, and a legislator can benefit from them directly and they should be built upon.
- 2.3. Article (209) of the Egyptian Constitution issued in 2012, interpreted the principles of Islamic Sharia as: "Its comprehensive shreds of evidence, fundamental and jurisprudential rules, and its reliable sources in the

doctrines of Ahlu-Sunnah wal-Jama'ah ( Egyptian const. art. CCVI. Issued 2012).

However, the term "comprehensive shreds of evidence" is inaccurate. Rather, the correct one is the overall evidence, which is the Book (Quran), the Sunnah, consensus, analogy ... etc. As for the fundamental rules, they are the tools of ijthad that the mujtahid uses when performing ijthad. As for the "reputable sources in the doctrines of Ahl al-Sunnah wal-Jama'ah" it is a repetition of the overall evidence, and the purpose of mentioning "the doctrines of Ahl al-Sunnah wal-Jama'ah" is to bring out the Shiite, Ibathwi, and Zahiri schools of thought. But the text on the jurisprudence rules is appreciated and can be used and built upon.

## 3. All these explanations in general, miss the following:

1. "Principles" cannot be detailed provisions, nor can they be so general that it is not possible to benefit from them in deducing partial provisions.
2. Principles do not include rulings, but rulings require principles.
3. The intended principles must on one hand form a link between these comprehensive "moral and social values...etc.", and "partial judgments" on the other hand.

Therefore, I think that the principles include beyond what the Egyptian Constitutional Court concluded, the specific purposes of Sharia, and the undisputed legal maxims:

What is meant by the objectives of Sharia, as defined by Muhammad Saeed Al-Youbi: "The meanings, rules, and the like that the legislator (Allah) took into account in legislation generally and specifically in order to achieve the interests of the people" (Al-yuubi, 1996). The general objectives include the value system: justice, consultation, equality, freedom, benevolence, facilitation, wisdom, cooperation...etc. It also includes the legal system: such as preserving the religion, the soul, the mind, honor, and wealth.

However, this level of objectives is "observed in every religion" and sane people do not disagree with it, as it includes doctrinal conceptions, innate mental faculties, and moral values, and has ensured the laying of the philosophical basis of reference from which Islamic legislation emanates. As for specific objectives, it means the goals that Sharia seeks to achieve in a special field of life, such as the family field "al ahwal al shaqswiyyah" or the political, and economic field such as promoting food and facilitating its consumption, nullifying Gharar ( uncertainty) in exchanges, clarity, storage, documentation...etc.

Based on the former, "general objectives" are merely theoretical reports, while "specific objectives" can be worked on using the induction methodology mentioned by Al-Shatibi to trace the intertwined texts, and the steady effective causes to elicit principles.

What is meant by the Al Qawaid al Fiqhiyyah as defined by Al-Maqari is that: every universal principle is more specific than the fundamental and other general logical meanings, it's also more general than contracts and the set of specific jurisprudential

controls. Or, it is a total ruling that applies to all its parts in order to know their rulings from it (Al-maqarri, 2012).

The jurisprudential rule is characterized by generality and abstraction, summary, brevity, and the regulation of human behavior, and includes a legal ruling.

#### 4. As for the answer to the second question related to recognizing the legal rules deduced from the Islamic jurisprudence maxims in Qatari laws.

I have tried to extrapolate the texts of Qatari laws to find out, including what was stipulated in Article 1 of the Qatari Civil Law No. 22 of 2004 that: If there is no legislative text, the judge shall rule according to Islamic law, if there is no ruling, according to custom, otherwise according to the rules of justice".

##### 4.1. The rule of custom

Custom is a reserve source of law, and it comes in rank after the principles of Islamic law, although Sharia makes it among its sources. What is meant by custom: is the tendency of people to engage in a certain behavior with the belief that this behavior is binding on them, and that violating it entails forcing them to follow it. From this definition, the custom is based on two main pillars:

1. Material, which is the tendency of people to follow certain behavior.
2. Moral, the belief that this behavior is obligatory, and this is what distinguishes custom from habit.

The conditions for custom in conventional law are that the custom must be general, old, steady, invariable, and not contrary to public order and morals. As for custom in Islamic law, it is one of its sources when there is no legal text. The jurists have established a universal rule which is "**Customary usage is the determining factor**", and it means as Hafez al-Din al-Nasafi said: "What has settled in souls from the logical point of view, and accepted by sound minds" (Al-nasafi, 1432).

Thus, the custom in the principles of Islamic jurisprudence differs from that in conventional law. Because the moral pillar, which is the feeling of obligation, is not considered by the sources of Islamic jurisprudence scholars, because it is an effect or a result of considering it a law, and the distinction mentioned by the jurists of conventional law between custom and habits is very difficult and similar in practice.

To consider custom and practices in the principles of Islamic jurisprudence, it is required that the custom be consistent or predominant. And that the custom to be applied should be present at the time of the creation of the disposition, and should not be contrary to a legal text, not be an express agreement between the contracting parties to exclude it because there is no use to indicate in presence of a proclamation especially if the two contracting parties state that, it is not considered.

##### 4.2. The legal rule "the contract is the law of the contracting parties"

Article (171) of Civil Law No. 22 of 2004 stipulates: "The contract is the law of the contracting parties. It may not be rescinded or modified except with the agreement of the two parties or for

reasons determined by law". This is an application of the principle of the autonomy of will and the Islamic jurisprudence rule that "there is no justification for ijthad in the presence of a text" (Article 12 of the magazine), and "there is no use to indicate in presence of a proclamation", (Article 13 of the magazine), and "The criterion in (the construction of) contracts is intentions and meanings and not words and form" (Article 3 of the magazine).

This means that: The contract determines the obligations of the parties that have been agreed upon, and this does not deviate from the meaning required by Sharia.

##### 4.3. The legal rule: "There is no crime or punishment without the text".

Article 40 of the Qatari constitution stipulates: "There is no crime or punishment except by law. There is no punishment except for the acts following its implementation. The penalty is personal. The provisions of the laws only apply to what occurs from the date of their implementation and have no effect on what happened before them. However, in matters other than criminal matters, by a two-thirds majority of the members of the Shura Council, it may be stipulated otherwise (Qatar const. art XL).

One of the jurisprudential rules is that "the principle in things is permissibility." Unless there is a text prohibiting it, there is no responsibility on the one who does it or the one who leaves it, so there is no objection before the text is received in performing the act or leaving it.

Likewise, they said: "There is no ruling on the actions of the wise before the initiation of the law." That is: the actions are under the principle rule neither prohibited nor permitted; Therefore, there is nothing wrong with doing it or leaving it until there is a text or evidence for its prohibition or permissibility.

##### 4.4. The accused is innocent until proven guilty

Article 39 of the Qatari constitution stipulates that "the accused is innocent until proven guilty before the judiciary in a trial in which he is provided with the necessary guarantees to exercise the right of defense."

Allah said: "**Most of them follow nothing but speculations, and speculations can in no way replace the truth. Allah is fully aware of what they do**" (Yunus 10:36)

The rule (the accused is innocent until proven guilty) is an old and general rule in conventional and religious law, and it is one of the most important principles of criminal justice and is considered one of the most important principles of human rights and one of the titles of freedom and a guarantee present in all the constitutions of the world. it was launched in modern legal thought as a constitutional principle and became an international norm that cannot be denied or ignored after it was stipulated in the Universal Declaration of Human Rights of 1948 AD by saying that (every person accused of a crime is considered innocent until proven guilty by law, in which public guarantees are secured, AD 11/1). From this rule, the principle (**doubt is explained in favor of the accused**) is derived from (**The principal rule is freedom from responsibility and preoccupation is precarious**). One of the most

important results of the principle of innocence (**placing the burden of proof being on the authority of accusation**).

Scholars have emphasized that Islamic Sharia considers the source of the first rule of “**doubt is explained in favor of the accused,**” which can be traced back to the noble Prophet’s hadith: “**Avoid the punishments for Muslims as much as you can.**”

On this basis, the jurists based the principle of innocence based on the concept of *istishab*, that is, there is a presumption of continuance. Meaning the judgment will remain affirmation and denial until the changing evidence emerges. Based on this foundation, Islamic jurisprudence deduced the rule that “what is established with certainty cannot be removed except with a certainty like it”. “Things are ruled by remaining on their origins until it is certain otherwise, and doubt about it does not harm it” as Al-Nawawi said.

#### 4.5. The legal rule: “**possession in movable property is a title deed.**”

Article 970 of Civil Law No. 22 of 2004 stipulates that “Whoever acquires in a valid cause, movable or a right to movable, or property in kind of a financial instrument from its bearer, he becomes the owner of it if he had good faith at the time of his possession.” If good faith and the right reason were available to the possessor in considering the thing free from costs and in-kind restrictions, then he acquires ownership free of it.

Article 971: “Possession is in itself a presumption of the existence of the correct cause and good faith unless there is evidence to the contrary.”

There is a rule in Ibadhi jurisprudence that “what is transferred is transferred” and it means that the possessor of the movable in good faith is considered a valid possession, for example, if he buys it from someone other than its owner without knowing that he is not an owner, he is considered the owner of this movable.

In conclusion, I pray to Allah for acceptance and success, and praise is to Him first and last.

## Conclusion

The purpose of this article was to demonstrate the role of the legal maxims of Islamic jurisprudence in the legislation process in Qatar. The discussion indicated that legal maxims of Islamic jurisprudence like “**Customary usage a determining factor**”, “what is transferred is transferred”, “The principal rule is freedom from responsibility and preoccupation is precarious”, and “the principle in things is permissibility” and “The criterion in (the construction of) contracts is intentions and meanings and not words and form” played a crucial role in the Qatari legislation process.

The article also concluded that sharia is considered both a material and a backup source in the legislation process in Qatar and articles such as Article (171) of Civil Law No. 22 of 2004, Article 40 of the Qatari constitution, Article 39 of the Qatari constitution, Article 970 of Civil Law No. 22 of 2004 were deduced from the legal maxims of Islamic jurisprudence.

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