



Objective Jurisprudential Research Papers

***Qawā'id al-Istinbāt
(Rules of Derivation)***

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**In the Name of Allāh,
the Most Merciful, the Most Compassionate**
**All praise is due to Allāh and blessings and peace upon the
Messenger of Allāh (peace and blessings be upon him). Since then:**

***Qawā'id al-Istinbāt* (Rules of Derivation)**

Part One: *Maqāṣid al-Sharī'ah al-Āmmah* (The General Objectives of the *Sharī'ah*)

Maqāṣid al-Sharī'ah (objectives of the *Sharī'ah*) are the purposes for which Allāh legislated the divine laws. The *gharaḍ* (purpose) is that which brings about benefit and privilege for the legally accountable person in his worldly life and Hereafter. The foundational legal maxim for this concept is: “All the laws of Allāh are founded upon wisdom, justice, and benefit for creation.”

Categories of Human Interests:

Ḍarūriyyāt

Ḥājiyyāt

Taḥsīniyyāt

1. *Ḍarūriyyāt* (Essentials):

These are the matters indispensable for the sustenance of religious and worldly life. Without them, the worldly order cannot be maintained in a sound manner.

Scholars of *fiqh* and *kalām* have differed regarding the number of universal essentials:

- Some have limited them to five: *dīn* (religion), *nafs* (life), *'aql* (intellect), *māl* (wealth), and *'ird* (honor).
- Others, like Ibn 'Āshūr, added a sixth: *nasab* (lineage).
- Some expanded the list further, including additional meanings such as freedom, social justice, the development of the earth, and acquisition of knowledge. Ibn Taymiyyah included the objective of *wilāyah* (political authority), *jihād*, and contravening the polytheists.

1. Preservation of Religion:

The intended religion here is the final religion—al-Islām—and religions like Judaism in the time of Mūsā were included.

Islām abrogates all previous religions, even if their names remain without their effective legislations.

Means of preserving religion include:

- Acting upon it
- *Jihād* in its cause
- *Da'wah* (calling to it)
- Judging by it
- Refuting everything that contradicts it

Al-Shāṭibī said: “Preserving religion is essentially achieved through three elements: Islām, 'Imān, and 'Iḥsān. Their foundation is in the Qur'ān, their exposition in the Sunnah, and their completion through three means: calling to it with encouragement and warning, fighting those who oppose or seek to corrupt it, and addressing any deficiencies that emerge in its fundamentals.”

2. Preservation of Life:

Here, life refers to lives protected by Islām, a treaty, or a pact. It includes both body and soul.

Means of preserving life:

- Prohibiting transgression against life
- Blocking the means that lead to taking life, such as: “Whoever carries arms against us is not of us,” “Abusing a Muslim is disobedience and fighting him is disbelief.”
- *Ḥudūd* (prescribed legal punishments), such as *qiṣāṣ* (legal retaliation) and penal laws
- Permitting forbidden things when necessary to preserve life
- Lifting hardship in acts of worship

3. Preservation of Intellect:

That is, from anything that corrupts or disorders it.

The corrupting agents are:

- Tangible: such as intoxicants
- Intangible: such as corrupt and destructive ideologies

Means of preserving the intellect:

- Forbidding intoxicants, wine and substances that alter the mind
- Encouraging contemplation and reflection
- Encouraging the pursuit of knowledge, which nourishes the intellect

4. Preservation of Wealth:

This includes all forms of property that a person may possess—movable or immovable—not limited to currency alone.

A nation in poverty becomes vulnerable to enemies, susceptible to internal turmoil, and falls behind in progress.

Wealth is also a means to obey Allāh, as found in the *ḥadīth qudsī*: “Indeed, We have sent down wealth for the establishment of *ṣalāh* and the giving of *zakāh*...” Narrated from the *ḥadīth* of Abū Wāqid al-Laythī.

Means of preserving wealth:

- Encouraging its acquisition
- Prohibiting transgression against it
- Prohibiting extravagance and waste
- *Ḥudūd* such as theft and highway robbery
- Liability for damages
- Legislating self-defense to protect one’s wealth
- Numerous rulings concerning wealth, such as *zakāh*, charity, *luqāṭah* (found property), sales, etc.

5. Preservation of Lineage:

Scholars differed on what is actually meant here: *nasab* (lineage), *nasl* (progeny), or *budʿ* (women's private parts).

- Ar-Rāzī, Ibn Qudāmah, Al-Bayḍāwī, Al-Qarāfī, Ṣadr al-Sharīʿah al-Ḥanafī, Al-Ṭūfī, and others held that it refers to lineage.
- Al-Ghazālī, Al-ʿĀmidī, Ibn al-Ḥāḥib, Al-ʿĪjī, Al-Shāṭibī, Al-Zarkashī, Al-Shawkānī, and others said it refers to progeny.
- Al-Juwaynī and others held that it refers to private parts or chastity.

Those who argued for progeny said that progeny guarantees the continuity of life and the succession of humanity on earth. Those who argued for lineage noted that mixing of lineages corrupts progeny. Those who argued for women's private parts pointed to the legal *ḥudūd* associated with *zinā* (fornication) and *qadhf* (false accusation of unchastity).

Means of preserving progeny:

- Encouraging procreation
- Regulating marriage, divorce, and custody
- Permitting polygamy, which is a potential source of progeny
- Prohibiting unjustified abortion
- Mandating care for children

Means of preserving lineage:

- Legitimizing marriage
- Prohibiting *zinā*
- Rules of proving lineage such as “*al-walad lil-firāsh*” (the child belongs to the bed)
- *Ḥadd* of *liʿān* (oath of condemnation)
- Prohibiting seclusion with non-*maḥram* individuals

Means of preserving honor:

- Prohibiting *qadhf* (false accusation of unchastity)
- Rules of *ʿiddah* (waiting period)

2. *Hājiyyāt* (Needs):

These refer to what is needed to remove hardship, distress, or difficulty, or to bring ease in matters where benefits are otherwise not obtained.

The difference between a *darūrah* (essential/necessity) and a *hājah* (need) is that losing a necessity leads to corruption, while losing a need causes hardship and discomfort.

Hardship and difficulty are lifted in both acts of worship and other domains:

- **Worship:** such as shortening prayer during travel and breaking fast for the sick or traveler
- **Transactions:** such as the permissibility of leasing, *salam* (advance sales), *qirāḍ* (profit-sharing), and *musāqāh* (sharecropping)¹, even if there is some *gharar* (uncertainty)
- **Criminal Law:** such as assigning *diyah* (blood money) for accidental killing to the *‘āqilah* (close relatives), and avoiding *hudūd* in cases of doubt

3. *Tahsīniyyāt* (Enhancements):

These are not rooted in necessity or need but are intended for enhancement and refinement, such as types of clothing, modes of transport, housing, food, drink, and so forth.

Types of enhancements:

- **First:** That which does not contradict any *Shar‘ī* principle
 - Example: cleanliness of the body, clothes, and place; adornment; manners of eating and drinking
- **Second:** That which appears to contradict a *Shar‘ī* principle but is nevertheless needed
 - **Example:** *Mukātabah* (a contract for emancipation of a slave through payment in installments)

¹ To appoint someone to look after one’s trees in return for a defined portion of its fruits.

[The point of contradiction is that, in legal custom, a slave is owned by his master, and what he earns belongs to his master. So, if he writes a *mukātabah* contract, it is as if he is paying his master from his master's own wealth, because he does not have his own wealth]. It is thus like someone selling his own property for his own property. Also, a valid contract requires two separate parties, and the slave is legally part of his master—so it is as if one party is contracting with itself.



Part Two: *Al-Qawā'id al-Kulliyyah al-Hākimah* (The Governing Universal Legal Maxims)

Linguistically, *qā'idah* means foundation.

Terminologically, it refers to a dominant legal rule that applies to most of its particulars.

These are concise expressions that include general legal rulings relevant to various incidents and emerging issues.

However, these rulings are mostly dominant and do not apply universally to every case. What falls outside them is called an *mustathnā* (exception) from the legal maxim.

Al-Amīr said: "It is known that most legal maxims in *fiqh* are dominant."

Examples of major universal legal maxims:

1. Actions are judged by their intentions. It is derived from the *ḥadīth*: "Indeed, actions are by intentions." Meaning: The ruling upon an action is based on the underlying intent.
 - **Example:** If someone picks up a *luqatah* (lost item) intending to safeguard it, he is not liable unless negligent. But if he intended to usurp it, he is liable if it is damaged.
2. Contracts are judged by their objectives and meanings, not by their words and forms. If one uses other than "I sold" or "I bought" in a transaction but the meaning is clear and customary, the contract is valid—e.g., "take it" or "I will take it."
3. Harm must be eliminated. For example: A man holding onto his wife solely to cause her harm.
4. Custom is authoritative. Including: "Recognized custom is like a stipulated condition."
5. Certainty is not overruled by doubt
6. Hardship begets ease