Textuality as a Linguistic Mechanism for Codifiying Legal Maxims in Islamic Criminal Law

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Abstract

Studying the works of medieval Qur'anic exegetes reveals that they explored approaches to interpreting the Qur'an based on the contextualization of Qur'anic principles and concepts. As this article will show, several of these approaches include the notions textuality, intertextuality, and hypertextuality. This article examines one such approach by focusing on the use of textuality as a linguistic mechanism to complement the juristic methodology of codifying legal maxims (*qawā'id fiqhīyah*) from Qur'anic exegesis. It explores a number of relevant Qur'anic exegeses and synthesizes how Muslim exegetes view the use of textuality with regard to the development of Islamic legal maxims. This article also notes that legal maxims codified by this approach are potentially subject to exception when applied to Islamic criminal law, although, as this article ultimately explains, the basic rule may be static. I also examine the claim that legal maxims codified directly from the sacred texts are unquestionable. This article concludes that the remit of legal maxims codified from textual revelations be done so directly or indirectly; however, this does not preclude their actual application from scrutiny.

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Introduction

Contemporary Muslim scholars have expressed concern as to who holds the ultimate authority to interpret the Qur'an in order to accommodate novel issues. In searching for the roots of emerging Islamic legal maxims (*qawā'id fiqhīyah*), analysis suggests that, intuitively, earlier Muslim exegetes have already explored some aspects of linguistic mechanisms. In-depth interpretation of Islamic legal texts reflects that a number of fatwas have been based purely on textuality.[1]

Studying these medieval exegetical works reveals that their authors explored approaches to interpreting the Qur'an based on the contextualization of Qur'anic principles and concepts.[2] Three linguistic notions of interest include *textuality* ("aspects of text micro-organisation which contribute to the overall effect of texts hanging together internally, reflecting coherence and cohesion and responding to context"),[3] *intertextuality* ("the way utterances relate to other utterances and ultimately to other texts performing relevant functions"),[4] and *hypertextuality* ("a matter of interconnection between different sets of text in a more or less coherent way").[5]

Islamic Legal Maxims

Islamic legal maxims, defined as "legal rules," are coined in concise statements that encompass general rulings in cases that fall under their subject matter.[6] One of Islamic law's secondary sources, they emerged late as an independent science and aphoristically subsume the Shari'ah's entire spectrum.

Muhammad Kamali observes that legal maxims are coined and codified to depict a "general picture of the nature, goals and objectives of the Shari'ah,"[7] especially the five basic legal maxims upon which the law's tenets are based.[8] This does not imply, however, that the codification of legal maxims has been sealed, as many others can be found in Islamic jurisprudential works. Some legal maxims may not be universally acknowledged, as they are confined to a particular Islamic school of jurisprudence (*madhhab*). Classically, Islamic legal maxims were codified by attributing their text to either the Qur'an or the Sunnah of the Prophet. Occasionally they were attributed to an earlier author, although the source might not have been provided.[9]

The above-mentioned argument has prompted contemporary Islamic scholars to adopt two distinctly different approaches to studying the sources of legal maxims: to adhere to classical Muslim methodology[10] or to discuss the sources of legal maxims and their derivation separately.[11] Their approach, based on the latter methodology, is not unique. Consider, for example, the dif-

ferent methodologies used by Rasheed al-Amiri[12] and al-Sawwati.[13] Al-Amiri, who holds that the legal maxims' sources can be studied from the researcher's academic perspective, divides them into two schools of thought: the opinions of independent *mujtahidūn* (legal experts in Islamic law) or of restricted *mujtahidūn*.[14] For al-Sawwati, however, their sources are studied according to six textual inferences: *naṣṣ* (text in the Qur'an and Sunnah of the Prophet), *ijmā'* (consensus), sayings of the Prophet's Companions and Followers, statements by the *mujtahidūn*, and extrapolation of the branch of legal issues that have the same legal consequences.[15] However, *qawā'id fiqhīyah* are generally derived from four main sources: the Qur'an, the hadith or prophetic tradition, *ijmā'*, and statements by the *mujtahidūn*.[16]

The Qur'an

According to Muslim jurists, the Qur'an is the most highly rated source from which *qawā'id fiqhīyah* can be derived[17] because, from a Muslim perspective, it is the Divine Word of Allah. Legal maxims derived either directly or indirectly from it are well-established, irrefutable, all-encompassing, and "carry greater authority."[18] In terms of codification, textuality refers to direct and intertextuality to indirect derivation.

In cases of direct derivation, Islamic scholars can easily understand the obvious correlation between the legal maxim and the Qur'anic text. For example, Q. 2:275, "*wa aḥalla Allāh al-bay'a wa ḥarrāma al-ribā* …" (But Allah permits trade and forbides usury/interest),[19] has become a universal legal maxim that supports the theory of transactions (*mu'āmalāt*). The verse was revealed to clarify to disputing non-believers what was legal or illegal in trade as well as to refute their claim that "*innamā al-bay' mithl al-ribā*" (Trade and usury [*ribā*] are alike).[20] In principle, this verse made *ribā* the main reason to prohibit all unlawful transactions by focusing on the purpose of Islamic law (*maqāṣid al-sharī'ah*).[21] Another verse that explicitly serves as a legal maxim is "*khudh al-'afw wa amur bi al-'urf wa a'riḍ 'an al-jāhilīn*" (Be humbly forgiving, enjoin what is right, and turn away from the ignorant) (Q. 7:199).[22]

Al-Qurtubi (d. 671/1273) deduces three maxims from this verse:

> This verse contains three Islamic principles that become the following legal maxims: *khudh al-'afw* commands that one be humbly merciful and forgiving, *wa amur bi al-'urf* commands that Muslims must enjoin what is right in all situations, and *wa a'riḍ 'an al-jāhilīn* commands that Muslims turn away from the ignorant or take no heed of ignorance.[23]

As well as being created directly from Qur'anic texts, however, legal maxims can also be deduced indirectly by reflecting upon the effective cause of the rule (*ḥukm*) with which the Qur'anic texts deal. This methodology is a common way to apply interpretation (*ijtihād*) to deduce legal maxims from the Qur'an. However, one can pursue this approach only if one is both conversant with the Qur'anic context and a scholarly authority on Islamic law. Therefore, before one may deduce legal maxims indirectly, one must have reached the level of a *mujtahid*. How one can deduce legal maxims from the Qur'an will be explained in the following section.

The Hadith

The hadith literature, also known as the prophetic tradition, is the second source of legal maxims.[24] Muslims generally believe that the Prophet dispensed concise but all-encompassing expressions that were rich in meaning.[25] Two types of legal maxims are thought to originate from the prophetic tradition. Some Muslim jurists regard a large number of prophetic expressions as *qawā'id fiqhīyah*[26] with or without any paraphrasing. One example, derived directly from the hadith, is "*kull muskir ḥarām*" (Any intoxicant is forbidden),[27] which reiterates that all substances that cause inebriation, whether obtained from grapes, dates, or other materials, are regarded as *ḥarām* because that is the sole effective cause for this ruling. Furthermore, by analogy, using cocaine or similar addictive substances is also forbidden.[28] In addition, the hadith "*lā ḍarar wa lā ḍirār*" (No harm shall be inflicted or reciprocated)[29] is a major maxim in Islamic jurisprudence. According to one interpretation, the Prophet said: "Do not harm anybody and do not reciprocate harm for harm."[30]

With regard to legal maxims derived indirectly, one notes that all five major legal maxims[31] are codified by means of intratextuality (intra-*āyah*) and intertextuality (inter-*naṣṣ*). Intratextuality means interpreting the Qur'an or formulating legal maxims from two or more Qur'anic verses, while intertextuality necessitates combining both Qur'anic and hadith texts. It is important, however, to acknowledge that the legal maxim "*al-mashaqqah tajlib al-taysīr*" (Hardship begets facility) is obtained by intertextualizing concepts from various Qur'anic verses and hadiths, which indicate the removal of hardship (*raf' al-ḥaraj*).[32] The fact that this maxim is codified using both inter- and intratextuality suggests that it is more broadly applicable with regard to novel contemporary issues.[33]

The majority of maxims derived directly from the Qur'an and prophetic tradition are generally restricted to particular issues and specific matters, be-

cause they emerged from within the cultural circumstances in which the text was formulated.

> ‘Aishah narrated that a man bought a male slave and made use of him after he had discovered a defect in him and then returned him [to the original owner]. He [the slave’s original owner] said: O Messenger of Allah! He has used my slave. The Messenger of Allah replied: “Revenue goes with liability” [*al-kharāj bi al-ḍamān*].”[34]

A hadith narrated by both al-Bukhari and Muslim from Ibn Abbas also reports that the Prophet said:

> If people have been given … of their claims, some people might have claimed the blood of men and their properties, but the onus of proof is on the one who claims and the oath is on the one who denies.[35]

These two legal maxims, derived directly from the Prophet’s utterances, are indeed specific to the matters of transaction and witness in Islamic jurisprudence. But the latter maxim can also be used in other matters that require bearing witness, such as commercial transactions, criminal investigations, and marriage contracts.

By and large, the quantum of legal maxims derived directly or indirectly from the two sources of Islamic law cannot be overstated. Ibn al-Qayyim reflects upon the important role text plays in deriving Islamic legal maxims:

> If the followers of the *madhāhib* [schools of Islamic jurisprudence] have the ability to regulate the opinions of their *madhāhib* by using certain general sayings that encompass what is lawful and what is not, in spite of their lack of eloquence compared to Allah and His Messenger, then Allah and His Messenger are more capable of achieving that. This is because the Prophet pronounces a comprehensive statement that is considered as a general principle and a universal proposition that encompasses endless detail.[36]

The directly or indirectly codified legal maxims could be branded as text-based. In this way, they become an invaluable indication of authenticity and authority as legal evidence.[37]

Ijmā‘ *and Statements by the* Mujtahidūn

Legal maxims can also emerge as a result of *ijmā‘* among the Prophet’s Companions. The maxim “*al-ijtihād lā yunqaḍ bi al-ijtihād*” (A ruling established

by means of *ijtihād* is not reversed by another *ijtihād*)[38] is said to have been attributed to Caliph Umar and supported by the Companions.[39] Maxims that emerged from this type of consensus are very rare. However, a number of legal maxims have resulted from statements made by the *mujtahidūn*[40] as a result of their thorough extrapolation of details from the sources of Islamic jurisprudence.

The expressions that form Islamic maxims could have stemmed either from a Companion or a Follower, or from jurists belonging to a particular Islamic school of jurisprudence (*fuqahā' madhāhib*). One of the most famous Islamic legal maxims abridged from a leading Islamic scholarly expression is "*lā yunsab li sākit kawlun*" (No statement is imputed to someone who keeps silent),[41] which was formulated from an expression by Imam al-Shafi'i (d. 820).[42] Another maxim, "*al-'ādah muḥakkamah*" (Custom has legal authority),[43] is reported to be rooted in a statement made by 'Ubaydullah al-Karhki (d. 340/951): "*al-aṣl anna al-su'āl yamḍī 'alā mā ta'ārafa kullu qawmin fī makānihim*" (The principle is that a question should be based on the understanding of people in their environment).[44]

In this way, Muslim jurists addressed the issue of legal maxims and their codifications. However, the overall study of legal maxims prompts scholars to diversify their approach to include linguistic mechanisms, which are perceived as pro-dynamic, instead of adhering solely to the existing traditional approach. The approach is open to more dynamic codifications of legal maxims designed to solve problematic issues in all spheres of present-day life. Moreover, this methodology is expected to encourage a broader and more intellectual vision that can help Muslim jurists understand how *ijtihād* can be achieved in today's environment without being derailed from the Shari'ah's unique message.

Textuality and Qur'anic Exegesis

Linguists across cultures have submersed themselves in the potentiality of texts and their illocutionary and perlocutionary acts to understand what a text and its texture are meant to achieve.[45] In order to avoid arriving at a pseudo-interpretation of a given text, especially when it is meant to mirror a divine ruling, textuality is considered an appropriate starting point from which to develop meaningful rulings. According to Francois Rastier, textuality is a "totality of the properties giving cohesion and coherence and that renders a text irreducible to just a succession of utterances."[46] Many discourses on poetic translation maintain that "contexts are real and that they are commonly

utilized by the language user as strategic configurations within which meanings are constructed."[47] Considering the context in which a text is uttered involves deconstructing all of its properties, including its lexical, rhetorical, and pragmatic elements.

In any meaningful text, one of three strands must be observed: expository, argumentative, and/or instructive text typologies.[48] When considering whether a text has been adequately explored, linguists acknowledge several basic standards of textuality, such as cohesion, coherence, situationality, intertextuality (both micro and macro), intentionality, acceptability, and informativity.[49] The first two standards are relevant to the textuality discussed in this article, whereas intentionality can also be germane to the notion of intertextuality between texts at the micro-level. The third and the fourth standards are advanced textuality mechanisms and adhere less to the paradigm of hypertextuality.[50] In other words, they are elements of intertexuality that will be discussed in a future article. The last three standards are elements of macro-textuality and can be branded as genres that are elementary to hypertexuality.

It is worth noting that an interpretative approach views a text from two angles. One approach takes a hermeneutical view, in which deconstructing or reading meaning into a text reduces its perceived divinity and sanctity.[51] This approach can be considered a hard-line interpretation, because understanding such texts in their literal sense would obscure their core meaning. The other approach takes a linguistic view, which sees text as "a stage of language that confines itself to generality," thereby endorsing an interpretative style that allows a "(re)construction of textual meaning through a typology of the text."[52] This can be seen as an open-ended approach, one that subjects divine texts to vulnerability in the sense that Divinity cannot control the texts.

Classical Muslim exegetes have shown tremendous interest in interpreting the Qur'an using textuality and other approaches. The most famous textuality-based exegeses to interpret (*tafāsīr*) the Qur'an are al-Zamakhshari's (d. 1144) *Al-Kashshāf* and Razi's (d. 1210) *Tafsīr Mafātīḥ al-Ghayb*.[53] Textuality in Qur'anic interpretation could also feature in body language, as Mahdi Arar elucidates.[54] Abdullah Saeed identifies four typologies of exegesis in Islamic hermeneutics, which he brands "traditional-based *tafāsīr*": interpretation of the Qur'an by means of the Qur'an, by the Prophet's sayings, and by those of the Companions and Followers.[55] All of these categories of *tafāsīr*, which are genres of intertextuality, can perhaps be understood as hypertextuality approaches in their modern contexts.

Saeed suggests another meaning for textualism: interpreting the Qur'an in connection with a text-tradition-based approach that strictly relies on linguistic mechanisms. In other words, textualism or a textualist approach suggests that the Qur'an's sociohistorical context be excluded from any interpretation.[56]

Studying the importance of textuality in Qur'anic exegesis in modern Muslim literature features in Abdel Haleem's *Understanding the Qur'an* (1999). He heralds the vibrant style of interpreting the Qur'an not only from the viewpoint of lexical structures, which includes textuality, but also in terms of the text's intertextual typology.[57] Combining the efforts of classical Muslim linguists and exegetes with modern approaches to interpreting the Qur'an, Abdel Haleem acknowledges that:

> The importance of rhetoric [*balāghah*], especially the science of meaning [*'ilm al-ma'ānī*] and the science of metaphorical language [*'ilm al-bayān*], for interpretation [*tafsīr*] in general is universally recognized, and attention paid to it by such commentators as Zamakhshari and Razi gives their work particular distinction.[58]

A specific aspect of *balāghah*, which helps scholars to identify the meaning of texts, is *'ilm al-ma'ānī*. This linguistic aspect contributes to encoding the texts and revamping their structure, which invokes the text's locutionary, illocutionary, and perlocutionary acts. Observing how this approach has contributed to Qur'anic exegesis, Abdel Haleem remarked that recognizing the concept *maqām* (context of situation) and how it helps to determine the function of utterance has given scholars of *balāghah* credibility.[59]

The jurists' efforts to codify legal maxims through textuality provides a better understanding of the law's basic tenets. For example, one can conclude initially that "*al-nikāh wājib*" (Marriage is obligatory) based on *fa ankiḥū mā ṭabā lakum* (Then marry women who please you) (Q. 4:3).[60] The phrase *fa ankiḥū* is an imperative, the fundamental principle of which, according to the majority of Islamic jurists, is obligation. The original imperative utterance denotes obligation: "*al-aṣl fī al-amr al-wujūb*."[61] This necessitates considering marriage as an obligatory act. Yet one can argue that prophetic tradition reports that the Prophet said "Marriage is his Sunnah"[62] may be alluding to *sunnah wājib* (obligatory practice sanctioned by tradition), as other hadiths resemble *sunnah* but are, in practice, obligatory. A counterargument might question that if the verse is thought to be a commanded obligation, then would the violator be punished, taking into account that, by definition, Islamic law rules that perpetrators are to be punished for failing to fulfil that which is commanded?[63] A succinct answer might be "*lā wājib ma'a la-'ajz*"

(There is no obligation in the face of incapacity).[64] This rule is not only relevant to the issue in question, but is also applicable to all other issues concerned with obligatory duties.[65]

Textuality in the Codification of Maxims Related to Criminal Law

There are many ways in which textuality can be used to codify legal maxims for Islamic criminal law. As stated above, knowledge of Arabic, including knowledge of lexical constructions and the pragmatics of utterance, is a central requirement. Qur'an 2:188, "*wa lā takulū amwālakum baynakum bi al-bāṭil*" (And do not consume one another's wealth unjustly), is meant to signify the prohibition of any activity involving corruption and the embezzlement of someone's property (e.g., theft, usurpation, adultery, and even unlawful killing), for all of these acts are considered tantamount to taking someone's property unlawfully (*bi al-bāṭil*).[66] Without paraphrasing to suit legal codification, the verse's structure explicitly outlaws any activity equated with "eating people's property without legal permission."[67] However, from this text one could also indirectly coin another legal maxim: "*kull ʿaqd bāṭil ḥarām*" (Every unjust contract is unlawful). Justification for such *ḥarām*-ization is based on an established rule in the principles of jurisprudence (*uṣūl al-fiqh*): "*Nahy yadullu ʿalā al-taḥrīm*" (Prohibition implies unlawfulness).[68]

Legal Maxim of Retroactivity in Islamic Criminal Law

Crimes and their punishments do not emerge in a vacuum. From an Islamic religious perspective, punishments result when egotism drives humans to perpetrate vicious acts. Throughout the Qur'an, Allah explains that human beings were created with two choices between which each individual must choose.[69] Thus, in order to establish natural justice, they are exonerated from any wrongdoing until an act is forbidden, as stated in the Qur'an: "*wa mā kunnā muʿadhdhibīn ḥattā nabʿatha rasūlan*" (and never would We punish until We sent a messenger [to give warning])" (Q. 17:15). Islamic criminal law states categorically that no one shall be criminalized if s/he is unaware of the law. In other words, ignorance of the law or its facts[70] affects the determination of the accused's criminal intent.

This rule was established under the legal maxim "*wa lā jarīmah wa lā ʿuqūbah illā bi al-naṣṣ*" (No crime and no punishment without textual evidence).[71] The textual evidence which justifies this maxim, among others, is

the above-mentioned Qur'anic verse 17:15, which is taken as explicit evidence for the law's non-retroactive nature. According to al-Qurtubi (d. 671/1273), this verse implies that due process must be followed in establishing rules.[72] Al-Shinqiti has progressively linked this verse with many others that allude to the phenomenon of retroactivity with regard to the law. For example: "*rusulan mubashshirīn wa mundhirīn li'alla yakūn li al-nās 'alā Allāh ḥujjat ba'd al-rusul*" [We sent] messengers as bearers of good news and to forewarn so that humanity will have no argument against Allah after the [coming of] messengers) (Q. 4:165) and "*dhālika an lam yakun rabbuk muhlik al-qurā bi ẓulm wa ahluhā ghāfilūn*" (This is because your Lord would not destroy the [populations of] towns for their wrong-doing while their people were unaware [that their action was forbidden]) (Q. 6:131, cf., 5:19, 6:155-57).

Without digressing into exegetical details about what these and related verses indicate, it is certain that punishments will be fair when unambiguous laws have been clearly established. It would be unjust to punish people for their actions in the absence of a clear injunction in Islamic law. The law of *ḥudūd* (predetermined punishments) is categorically stated in the Qur'an and further explained in the hadith literature. The same can be said of *qiṣāṣ* (retaliation), although its procedural implementation is open to many interpretations and thus can be adapted and reformed according to the circumstances.[73]

The natural phenomenon of non-retroactivity is replicated in almost all contemporary legal systems and is embedded in international human rights charters. Mashood Baderin observes that this principle is not a new phenomenon confined only to international human rights, but is also a fundamental principle in Islamic criminal law,[74] for, he writes, "The Qur'an had from its inception reflected the rule of non-retroactivity in some of its injunctions ...."[75]

Cherif Bassiouni lists twelve major principles of Islamic criminal justice and the rights of the accused in which the principles of "no crime without law," "no punishment without law," and "no retroactive application of criminal law" take first priority on the list.[76] He observes that the principles of non-criminality of humans stand as basic tenets in Islamic law, as confirmed by and extrapolated from the divine Qur'anic text (see Q. 17:15).

The notion of non-retroactivity is not restricted to a particular genre of crime in Islamic law, which contains three classifications of crimes: those that lead to *qiṣāṣ* (retaliatory punishments), *ḥudūd*, and *ta'zīr* (discretionary punishments).[77] According to Abu Zahra, all of these genres are subsumed under the legality of crime: no act shall be considered criminal, nor shall its perpetrator be punished, until legislation has been passed through due process and unequivocally made public knowledge.[78]

Textuality in the Verses on Qiṣāṣ

Qiṣāṣ crimes are those that claim lives or inflict bodily injury.[79] Textuality is featured in those verses that clearly prohibited killing and committing homicidal crimes, such as:

> O you who have believed, prescribed for you is legal retribution [*qiṣāṣ*] for those murdered: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother [or relatives, etc.] of the killed against blood money [*diyah*], then adhering to it with fairness and payment of blood money, to the heir should be made in fairness. This is an alleviation and a mercy from your Lord. But whoever after this transgresses [i.e.., kills the killer after taking blood money], will have a painful torment. And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become among the righteous [*al-muttaqūn*]. (Q. 2:178-80)

Based on this verse alone, the following legal maxim could be codified: "*al-aṣl fī al-qiṣāṣ al-musāwāt*" (The foundation of *qiṣāṣ* is based on equality). Based on this word's lexical meaning, al-Sa'di observes that its connotation indicates *al-musāwāt* (equity) in the process of retaliation, for a culprit would be compensated in exactly the same way he/she has committed a crime.[80] The law of *qiṣāṣ* is arguably contested among Muslim scholars due to the fact that other verses imply the inequality of human beings when it comes to executing the law.[81] The traditional paradigm is that Islam fosters justice and equality before the law. As Anwar Qadri affirms, the core principle of criminal law is that of justice, which incorporates equality before the law and protection of an individual's rights.[82] This affirmation calls for a further explanation as to why criminal law discriminates between punishments allotted to the slave and the freeman, to the Muslim and the non-believer.[83]

The above-mentioned verse implies that where there is discrepancy or inequality (e.g., gender, religious, or social) between the perpetrator and the victim in crimes involving homicide, then the rule of equity is invalidated. The majority of Muslim jurists (except the Hanifis) agree that if a freeman kills a slave or a Muslim kills a non-believer, then the rule of equity in retaliation is not applicable.[84] This article argues that Islamic law considers the prevailing norm of any existing generation. The equality alluded to in Q. 2:178-80 can be better understood when intertextuality and hypertextuality are explored to understand the context in which the verse is rooted.[85]

The verse's structural progression ostensibly indicates that *kutiba* does not necessarily mean *furiḍa*, which literally and apparently means "ordained or made compulsory," as meant in other ordinances such as in the use of *kutiba* in Q. 2:183. The explanation given to this shift in meaning is that if it were mandatory, the option of clemency would not have been given in the running of the verse which says: "*fa man 'ufiya lahu min akhihi*" (… but if the killer is forgiven by the brother [or relatives] of the killed against blood money).

According to al-Qurtubi, the meaning of *kutiba* does not imply an obligatory resolution, but rather suggests that if the victim's relatives and the culprit's family fail to resolve the matter, then the last resort will be retaliation.[86] The interpretation of *kutiba* takes on another dimension in al-Tabari's exegesis (d. 310/923): the meaning of *kutiba* in the verse indicates the rule of equity in retaliation. In his effort to articulate that the verse's structural elements are cohesive and comply with cooperative rules of utterance, he states:

> *Fa in qāla qā'il: afarḍ 'alā waliyyī al-qatīl al-qiṣāṣ min qāti waliyyihi? Qīla lā, wa lākinnahu mubāḥ lahu dhālik, wa al-'afw wa akhdh al-diyah, fa in qāla wa kayfa qāla: "kutiba 'alaykum al-qiṣāṣ"? Qīla: Inna ma'nā dhālik 'alā khilāf mā dhahabta ilayhi, wa innamā ma'nāhu: yā ayyuh alladhīna āmanū kutiba 'alaykum qiṣāṣ fī al-qatlā [...] ay anna al-ḥurr 'idhā qatala al-ḥurra, fa damu al-qātil kuf' li dami al-qatīl wa al-qiṣāṣ minhu dūna ghayrihi min al-nās, fa lā tatajāwazū bi al-qatl ilā ghayrihi mimman lām yaqtul, fa hinnahu ḥarām 'alaykum an taqtulū bi qatīlikum ghayr qātilihi [...] "lā an-nahu wajaba 'alaynā al-qiṣāṣ farḍ wujūb farḍ al-ṣalāt wa al-ṣiyām.*[87]

A close translation of the verse follows:

> If someone asks: Is it imperative on the relative of the victim [the deceased] to take retaliation from the one who killed his relative? The answer is "no"; however, it is permissible for him to do so as it is permissible for him to forgive and to take blood money. If he asks [further], "But why did Allah say: 'Retaliation is ordained on you?," it will be said [in reply] that, indeed, the meaning of it [*kutiba*] is not as you opine. Indeed, the meaning is: "O you who believe! The law of retaliation is ordained on you ... that is if a freeman killed a freeman, the blood of the killer is equal to the blood of the one killed in retaliation from him and not from any other person. Thus do not transgress by obtaining retaliation from someone else who did not kill. It is indeed unlawful for you to do so ...."

Therefore retaliation, unlike prayer and fasting, is not compulsory.

This logical interpretation, which considers the verse's lexical structure and syntax, confirms the notion of equity as regards *qiṣāṣ*. Otherwise, the verse's final segment, which encourages forgiveness, would be a contradiction.[88] Based on this disagreement over the perlocutionary act of *kutiba*, another non-imperative legal maxim can be invoked: "*hal al-aṣl fī al-qiṣāṣ al-wujūb aw al-nadb?*" (Does the fundamental principle of *qiṣāṣ* indicate obligation or commendation?). This question implies that opinions differ, especially when killing is intentional. Two dichotomous views on this issue exist. In Abu Hanifa's opinion, and based on this verse, when an intentional homicidal crime has been committed, *qiṣāṣ* must be awarded to the culprit without the option of clemency. From the verse itself, al-Shafi'i and other jurisprudential schools infer that the victim's relatives should be given the option to choose between *qiṣāṣ* or *diyah*, depending on their circumstances and preference.[89]

Qadri offers a balance between these opinions: *qiṣāṣ* does not necessarily mean that punishment must be meted out on the culprit. In contrast, the victim's relatives are encouraged to consider accepting compensation.[90] Conceivably, the Qur'anic verse that forms the basis for enacting the law of retaliation: "*fa man 'ufiya lahu min akhīhi*" (but if the killer is forgiven by the brother of the victim" (Q. 2:178), suggests clemency. The perlocution of this verse was translated into action when Umar pardoned a man who, convicted of homicide as *qiṣāṣ*, was about to be executed. According to Awdah and a host of other classical Muslim jurists, when the accussed was brought to Umar to receive his punishment, a female relative who had the right to retaliation stood up and renounced her right to exercise this judgment. Umar glorified God, saying: "The culprit has been freed from death."[91] This decision emphasizes the fact that although the law of retaliation is an important deterrent, clemency is a core element of love, tranquility, and fraternity on Earth.

Another issue that merits closer examination in terms of the justification of inequality is the case of a group who kills individual. There is an unresolved discrepancy among Muslim jurists as to whether a group can be punished for taking a life and/or committing bodily injury. According to the majority of Muslim jurists, all perpetrators are to be held responsible, depending on their intentions (*qaṣd*).[92] For example, if a group intentionally sets fire to a house, thereby damaging the property and killing its inhabitants, then all of its members must repay the house's value and be subjected to *qiṣāṣ*. This ruling is based on the Umar's reported statement: "If all the people in San'a' [in Yemen] are involved in killing him, I will kill them all."[93]

It is also germane to the spirit of Islamic law to enact *qiṣāṣ* so that no one will subvert the law.[94] The Zahiri school, however, opposes this view on the grounds that there is no justice in killing a group to retaliate for the death of one person, because the law of retaliation is based on equity and killing many people for the sake of one person is antithetical to equity.[95] One point that should be made clear at this juncture is that although equity is advocated in the law of retaliation, one should note that *qiṣāṣ* is enacted for another reason, such as retribution and deterrence. Even if the victim or the victim's relative shows clemency, the law of retaliation still imposes a penalty to secure one of its aspects, as set out in Q. 2:178. That is to say, the established rule in criminal law is that a guilty person shall not go free. This can be textually derived from:

> *Wa mā kāna li mu'min an yaqtula mu'minan illā khaṭa'an, wa man qatala mu'min khaṭa' fa taḥrīr raqabat mu'minah wa diyah musallamah ilā ahlihi*. (And never is it for a believer to kill a believer except by mistake. And whosoever kills a believer by mistake, then he must set free a believing slave and give compensation [*diyah*] to the deceased's family, unless they remit it.) (Q. 4:92)

A legal maxim, "*al-diyah taḥull maḥalla al-qiṣāṣ kullamā imtana' al-qiṣāṣ*" (Recourse to blood money shall be sought in case of any impediment to implement retaliation),[96] derived from this verse is at the center of discussion around criminal liability. This rule that allows forgiveness and mercy toward the accused takes into consideration not only the culprit's interest and rights, but also those of the victim, in particular, and of the public at large.

Texuality in the Verses of Ḥudūd

Ḥudūd crimes are those offenses for which punishments have been specifically predetermined and recorded in texts. Punishment cannot be altered once such a crime has been reported and the accused individual(s) convicted.[97] In-depth study of the structures of the relevant verses apparently reveals that these punishments are based on equity. For example, there is no disparity as to the degree of the punishment to be applied with respect to gender, inasmuch as there is equality in one's personal status in terms of maturity and matrimony.[98] When examining the verse that sets punishment for theft (*sariqah*), the emphasis is clearly placed on the verdict (viz., amputation of the hand) regardless of the perpetrator's gender: "*wa al-sāriq wa al-sāriqah fa aqṭa'ū aydiyahumā jazā'a*

bi mā kasabā ([As for] the thief, male and female, amputate their hands [from the wrist joint] in recompense for what they committed" (Q. 5:38). This is also true of the verse on adultery (*zinā*):

> *Al-zānīyah wa al-zānī fa ajlidū kull wāḥid minhumā mi'ah jaldah wa lā ta'khudhkum bi himā ra'fah fī dīn Allāh […] wa liyashhad 'adhābahumā ṭā'ifah min al-mu'minīn.* (The [unmarried] woman or [unmarried] man found guilty of sexual intercourse, flog each of them with a hundred lashes. Do not pity them in a punishment prescribed by Allah […] and let a party of the believers witness their punishment). (Q. 24:2)

From the clear structure of the texts, which contain no ambiguity or exertion, a legal maxim could thus be codified: "*al-ḥadd mubnīy 'alā al-musāwāt*" (The *ḥadd* punishment is based on equality). Thus, a woman cannot be given a lesser punishment for theft or illegal sexual intercourse on the grounds of her gender.[99] But this does not, however, suggest that there are no other circumstances in which disparity does apply, especially in the case of adultery.

Al-Shinqiti contends that the generality of the above verse, with regard to a guilty female slave, has been specified in Q. 4:25: If a female slave commits *zinā*, she should be given half the punishment of a free woman (*muḥṣinah*).[100] Conceivably, problems might arise as to the appropriate punishment for a married female slave. It is unclear whether a conflict would arise between the rule of full versus half punishments in the case of stoning to death (*rajm*), as stated earlier.[101]

Inequality also exists in *ḥudūd* law in the claims of rape (attempted or actual). When a woman claims to have been raped, her claim will be heeded; but when a man claims to have been sexually assaulted by a woman, his claim will be dismissed.[102] According to the Hanbalis, as women do not forcibly coerce men into sexual acts, any such claims must be rejected and the *ḥadd* punishment applied.[103] The Hanbalis argue that *zinā* cannot occur without the man's consent and desire.[104] However, in this regard, all other Sunni legal schools overtly or covertly consider a man's claim of coercion.[105] According to the Hanifis, a man's claim of coercion is subject to doubt and, according to prophetic tradition, *ḥudūd* law should be averted in the face of doubt.[106]

Going beyond the spirit of equality, reflection on the structure of verses related to *ḥudūd* punishment also suggests that the law is deeply concerned with deterrence and not only with imposing the mandated punishments. With regard to *zinā*, Q. 24:2, presented several paragraphs earlier, affirms the im-

portance of witnessing as a deterrent to this sort of punishment. Sa'd Zufayr observes that a punishment inflicted in secret would only affect the culprit.[107] From an Islamic legal point of view, however, a punishment carried out in public serves as a deterrent as well as a lesson.[108] The product of the above discussion, in relation to codification, is the emergence of a legal maxim: "*al-ḥudūd aw al-'uqūbat al-muqaddarah sharī'an mabnīyan 'alā al-zajir*" (*Ḥudūd* punishments are based on deterrence).[109] The method of achieving said deterrence could vary depending upon the nature of the crime committed. Such variations can only be discussed, however, when Islamic texts are studied using an intra- and an intertextual methodology.[110]

The role of Islamic penal law, which serves both preventive and curative purposes, is naturally multifaceted. Nasir Mehemeed observes that these punishments are designed to protect society from the acts of aggressors as well as purify their souls "and [to] put a stop to [further] aggression and crime."[111] This simplicity of generalization might be misconstrued in the sense that all punishments must be carried out. He argues that justice can be achieved only by punishing convicted criminals.[112] Similarly, Majid Khadduri proclaims that while individuals have legal rights, each individual must also bear the legal consequences of their omission.[113] While this position is true to some extent with regard to various aspects of criminal penalties, there are many areas in which clemency is espoused, as explained above.

Textuality in Qur'anic discourse can also be found in the three-stage prohibition of alcohol (*khamr*): while the use of alcohol is sinful, it might prove slightly beneficial for some people (Q. 2:219); the consumption of alcohol is prohibited due its abuse in certain situations (Q. 4:43); and its clear and total prohibition due to its being an evil inspiration (Q. 5:90-91). However, when applying textuality to derive maxims from these three revelations, each one must be examined in isolation. This could, perhaps, result in a wrong presumption and thus engender a faulty fatwa.

For example, examining Q. 2:219 in isolation might give one the impression that consuming alcohol could be slightly benefical. Thus an argument for consuming it could be made on the grounds of necessity, although the hadith literature states that the Prophet saw no such medicinal use in it.[114] The fact of the matter is that if other texts are brought into the loop using inter- and hyper-textuality, one might suggest that the dictates of necessity allow the use of a substance containing a miniscule amount of alcohol. This conclusion may be drawn when using intertextuality to study other texts in which certain prohibited materials are allowed for a certain reason.

Therefore, one can arguably codify the following maxim: "*mā lam yukhāmir fa laysa bi khamr*" (What does not intoxicate is not alcohol). It is therefore prudent to question the cause (*'illah*) behind alcohol's prohibition: Is it the substance itself or its effect that warrants prohibition? In terms of its efficacy, must we insist on arguing its pre- or proscription when we can treat dying patients with drugs in an alcoholic solution after all other treatments have failed? Controversial opinions on this issue abound.[115] However, especially in the field of modern medicine, prohibiting medicinal substances tainted to some degree by alcohol would be practically impossible.

Qur'an 4:43 might suggest that this Islamic injunction is based on alochol's ability to intoxicate, as the prophetic hadith explicitly indicates that "*kull muskrin ḥarām*" (Any substance that intoxicates is prohibited).[116] As this is a legal maxim in its own right, one might question whether using an inherently non-intoxicating or a pre-fermented substance is permitted, even though excessive consumption might lead to intoxication.

Qur'an 5:90-91 ends this debate by declaring alcohol *ḥarām*. But if taken literally in isolation, this might well serve as a hard-line interpretation of Islamic law, one from which the legal maxim "*al-khamr ḥarām*" (Alcohol is prohibited) could be derived. Here, one might ask that if alcohol is *ḥarām*, can it be used in such products as perfume? Scholars who study *uṣūl al-fiqh* have asserted that alcohol is *ḥarām* in all of its ramifications (e.g., edible, cosmetic, and medicinal), because the phrase used in the hadith literature is general (*'āmm*) and therefore imparts a sense of generality upon the rulings.[117]

Textuality in Ta'zīrāt

In Islamic criminal law, *ta'zīr* punishments are discretionary, awarded by the ruler or his/her representative, and enacted either by law or decree.[118] These penalties are decreed for crimes for which the texts mention no specific punishments, even though they are considered to be crimes or offensive acts against Allah's rule or involve public disorder,[119] as shown in Q. 5:3.

> Forbidden to you [for food] are *al-maytah* (dead animals, cattle, beast not properly slaughtered), blood, the flesh of swine, and that on which Allah's Name has not been mentioned while slaughtering, [that which has been slaughtered as a sacrifice for others than Allah, or has been slaughtered for idols] and that which has been killed by strangling, or by a violent blow, or by a headlong fall, or by the goring of horns – and that which has been [partly] eaten by a wild animal – unless it has been slaughtered before its

> death – and that which is sacrificed [slaughtered] on stone altars (*nuṣub*). [Forbidden] also is to use arrows seeking luck or decision; [all] that is *fisq* [disobedience to Allah and sinful].

This verse enumerates what foods are prohibited. Breaching this injunction could lead to violations of the Islamic rule, for which a discretionary punishment could be enacted. In the absence of a specific punishment laid down by the texts against particular offensive acts, the ruler or his/her representative has the right to legislate rulings that stipulate the punishments for such acts. In this light, Abu Yusuf (d. 182/798) in his *Kitāb al-Kharāj* says: "*al-ta'zīr ilā al-imām 'alā qadr 'aẓam al-jurm wa ṣigharh*" (It is left to the leader/judge to decide an appropriate discretionary punishment considering the proportionate [nature] of the offence).[120] Thus, one can conclude that any offence that has no prescribed punishment attracts a discretionary punishment, one that will presumably cause the perpetrator to think twice before repeating the crime. It also serves a warning for the general public, for knowledge of its existence will help maintain public order and protect the individual's rights, safety, and security.

Textuality in Ḍamān

The Qur'anic verse verse "*wa lā ta'zīr wāzirah wizra ukhrā*" (One should not be convicted of the crime of another) (Q. 35:18), a legal maxim directly codified from the Qur'an, has been consistently applied in criminal law. The only exception is when, in the case of homicide, the culprit's blood relatives (*'aqīlāt*)[121] share the responsibility for compensation on his/her behalf. Awdah explains some of the reasons for this "inconsistency," which does not conform to the notion of justice that Islamic law seeks to achieve.

According to him, this departure guarantees that the *diyah* is paid regardless of the circumstances. The culprit's relative is considered to be an indirect contributor to the crime because he/she neglected to perform his/her duty as individual, which demonstrates a lack of moral acumen to society. Close relatives are responsible for an individual's upbringing and, by extension, the government is responsible for ensuring the society's moral uprightness. In addition, imposing *diyah* on the culprit's relative is, in a broader sense, held to be the realization of this societal cooperation, namely, the mutual assistance that creates love and unity among all members of society.[122]

A consideration of Q. 5:33-34, in which the penalty for commissioning banditry (*ḥirābah*) is enacted, reveals that although the first verse condemns

banditry as abhorrent and brands culprit(s) as waging war against Allah and the Prophet, milder penalties are sometimes given in cases of repentance and forgiveness. Such exceptions are linked to the second verse, which grants forgiveness before the perpetrator is apprehended.

Awdah gives a tentative reason for how the spirit of Islamic law can make such allowances. He writes that perhaps the Legislator (Allah) intends that this exceptional principle to encourage perpetrator(s) [of such crimes] to repent and forego committing such grave and dangerous crimes.[123] Thus, a legal maxim emerges that says "*al-ʻafw min ʻuqūba [al-ḥirābah] qabla al-qabḍ jāʼiz*" (Clemency for the punishment of banditry is allowed before apprehension). The extrapolation of this maxim excludes other crimes but raises questions as to whether such leniency could pertain to other crimes as well. The schools of jurisprudence and exegesis hold differing opinions on this issue. Awdah asserts that this rule could be extended to any crime that has not yet been given a specific punishment. In such cases, discretionary punishments would be awarded as the authority sees fit.[124]

Conclusion

This article has asserted that legal maxims can be textually extrapolated from Qur'anic texts either hermeneutically by deconstructing the text, or by rendering the text itself. My examination of this linguistic mechanism, with an eye to the legal paradigm of codification, has shown that legal maxims can be applied to Islamic criminal law as well as related to contemporary issues. While this study in no way claims to be exhaustive, its exposition does seek to suggest to students and scholars of Islamic law alike its relevance with regard to the classical Islamic rendition of legal maxims and modern practices.

This article's focus is germane for how criminal justice can be established by extrapolating the *maqāṣid al-sharīʻah* from textual evidence by considering all of the textual ingredients (e.g., cohesion, coherence, situationality, and intentionality). Simply put, one can argue that when textuality is used to codify legal maxims, their application appears to be subject to exceptions and reservations, especially with regard to human rights issues. Therefore, necessity challenges us to look beyond textuality in order to accommodate dynamism into the application of Islamic legal maxims to contemporary issues.

Endnotes

1. See Abu al-Hasan al-Akhfash (d. 215 AH), *Tafsīr al-Akhfash: Ma'ānī al-Qur'ān* (Cairo: Maktabah al-Kanaji, 1990/1411); Muhammad ibn Jarir al-Tabari (d. 310 AH), *Jām'i al-Bayān fī Ta'wīl al-Qur'ān*, ed. Abdullah ibn Turki (Cairo: Hijira, 2001/1422), 3:94-95 or (Beirut: Dar al-Kutub al-'Ilmiyah, 1999/1420), 2:107-15); Ali ibn Ahmad al-Wahidi, *Al-Wajīz fī Tafsīr al-Kitāb al-'Azīz* (Beirut and Damascus: Dar al-Qalam, 1415 AH) and a host of others.
2. See Hussein Abdul-Raof, *Schools of Qur'anic Exegesis, Genesis, and Development* (London and New York: Routledge, 2010), 28-32, and especially 111-46; Salwa M. S. El-Awa, *Textual Relations in the Qur'an: Relevance, Coherence, and Structure* (London and New York: Routledge, 2006), 9-17.
3. Basil Hatim, *Teaching and Researching Translation* (United Kingdom: Pearson Education Ltd., 2001), 234.
4. Ibid., 117; cf., Julia Kristeva, *Desire in Language: A Semiotic Approach to Literature and Art* (1941), ed. Leon S. Roudiez; tr. G. Thomas, J. Alice, and S. R. Leon (New York: Columbia University Press, 1980), 36.
5. Tanja Oblak, "The Lack of Interactivity and Hypertextuality in Online Media," *Gazette* 67, no. 1 (2005): 96; Gerard Genette, *Palimpsests* (1930), tr. Channa Newmane and Claude Doubinsky (Lincoln: University of Nebraska Press, 1997), 1-10.
6. Mustafa al-Zarqa, *Al-Madkhal al-Fiqhī al-'Āmm*, 7th ed. (Damascus: Matba'ah Jami'ah, 1983/1383), 2:933.
7. Muhammad Hashim Kamali, "*Qawā'id al-Fiqh*: The Legal Maxims of Islamic Law," *Journal of the Association of Muslim Lawyers in Britain* 3, no. 2 (1998) at www.aml.org.uk.journalviewed (last accessed: 21/06/2006); cf., Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburgh: Edinburgh University Press, 2004), 113-14.
8. These are "Actions are judged according to one's intentions," "Certainty cannot be repelled with doubt," "Hardship begets facility," "Harm must be eliminated," and "Custom is authoritative." See al-Suyuti, *Al-Ashbā' wa al-Naẓā'ir* (Beirut: Dar al-Kutub al-'Ilmiyah, 1403 AH) and Ibn Nujaym, *Al-Ashbā' wa al-Naẓā'ir 'alā Madhhab Abī Hanīfah al-Nu'mān* (Beirut: Dar al-Kutub al-'Ilmiyah, 1993/1413).
9. Cf. Ibid., The approaches of al-Suyuti and Ibn Nujaym on the sources of Islamic legal maxims in their *Al-Ashbah*.
10. Cf. Ibid., such as the methodology used by Al-Suyuti and Ibn Nujaym in their *Al-Ashbah* , as well as that adopted by Muhammad Siddiq Ahmad al-Burnu, *Al-Wajīz fī 'Iḍah al-Qawā'id al-Fiqhīyah al-Kullīyah*, 5th ed. (Beirut: Mu'assasah al-Risalah, 2002/1422); and Ahmad ibn Shaykh al-Zarqa, *Sharḥ al-Qawā'id al-Fiqhīyah*, 2d ed. (Damascus: Dar al-Qalam, 1989/1409).
11. Such as M. al-Zarqa, *Al-Madkhal*, 969; Al-Burnu, *Al-Wajīz*.

12. Rasheed S. al-Amiri, *Legal Maxims in Islamic Jurisprudence: Their History, Characteristics, and Significant* (Birmingham UK: Birmingham University, Ph.D. Dissertation, 2003).
13. Muhammad ibn Abdullah al-Sawwati, *Al-Qawā'id wa al-Ḍawābit al-Fiqhīyah 'inda Ibn Taymīyah fī Fiqh al-Usrah* (Ta'if: Dar al-Bayan al-Hadithah, 2001/1422).
14. Ibid., pp. 14-121; cf., al-Amiri, *Legal Maxims in Islamic Jurisprudence,* 32-45, note 12.
15. Al-Sawwati, *Al-Qawā'id*, 114-20, note 13.
16. It is possible to adopt another way of classifying the sources of Islamic legal maxims, since there is no dogma in terminology.
17. See Mohammad Hashmi Kamali, "Legal Maxims and Other Genres of Literature in Islamic Jurisprudence," *Arab Law Quarterly* 20, no. 1 (2006): 80.
18. Ibid., 80.
19. Al-Burnu, *Al-Wajīz*, 30.
20. Qur'an 2:275.
21. Kamali, "*Qawā'id al-Fiqh*," 3. What constitutes *ribā* in classical definitions and its application in our contemporary age is contentious. For details, see Abdullah Saeed, *Islamic Banking and Interest: A Study of the Prohibition of* Ribā *and Its Contemporary Interpretation* (Leiden: Brill, 1996).
22. Al-Burnu, *Al-Wajīz*, 30.
23. Al-Qurtubi, *Al-Jāmi' li-Aḥkām al-Qur'ān* (Cairo: Dar al-Sh'abi, n.d.), 7:344.
24. Kamali, "Legal Maxims," 80; Al-Burnu, *Al-Wajīz*, 32; Ali Ahmad al-Nadwi, *Al-Qawā'id al-Fiqhīyah Mafhūmihā, Nash'atuhā, Taṭawwurhā, Dirāsatuhā, Mu'allafatuhā, 'Adillatuhā, Muhimmatuhā, Taṭbīquhā*, 4th ed. (Damascus: Dar al-Qalam, 1998/1418 AH), 276.
25. Al-Burnu, *Al-Wajīz*, 32.
26. Al-Nadwi, *Al-Wajīz*, 276-77.
27. Ibn Majah, *Sunan Ibn Mājah*, 4:68, hadith no. 3388.
28. Al-Burnu, *Al-Wajīz*, 32.
29. Ibn Majah, *Sunan,* 3:107, hadith no. 2340. See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3d ed. (Cambridge UK: The Islamic Texts Society, 2003), 105.
30. Al-Burnu, *Al-Wajīz*, 32.
31. The maxims are, on order, as follows: "Matters are considered according to intentions behind them," "Certainty cannot be repelled with doubt," "Hardship begets facility," "Harm must be removed," and "Custom is authoritative." See details in Al-Suyuti, *Al-Ashbā'* , 8; Ibn Nujaym, *Al-Ashbā' wa al-Naẓā'ir*, 27; Ahmad ibn Muhammad al-Hamawi, *Ghamz 'Uyūn al-Basā'i Sharḥ al-Ashbā' wa al-Naẓā'ir* (Beirut: Dar al-Kutub al-'Ilmiyah, 1985/1405 AH), 1:37; Ali Haydar, *Durar al-Ḥukkām Sharḥ Mahallah al-Aḥkām*, ed. Fahm al-Husayni (Beirut: Dar al-Kutub al-'Ilmiyah, n.d.), 1:17; A. al-Zarqa, *Sharḥ*, 47.
32. Kamali, "Legal Maxims," 80.

33. See Al-Nadwi, *Al-Qawā'id al-Fiqhīyah*, 302.
34. Ibn Majah, *Sunan*, hadith no. 2243.
35. Al-Bukhari, *Ṣaḥīḥ al-Bukhārī*, hadith no. 4552; Muslim, *Ṣaḥīḥ al-Muslim*, hadith no. 1711.
36. Ibn Qayyim al-Jawziyah, *'Alām al-Muwaqqi'īn 'an Rabb al-'Alamīn* (Beirut: Dar al-Kutub al-'Ilmiyah, 1991/1411 AH), 1:251.
37. Al-Nadwi, *Al-Qawā'id al-Fiqhīyah*, 271.
38. Al-Suyuti, *Al-Ashbā'*, 201; Ibn Nujaym, *Al-Ashbā' wa al-Naẓā'ir*, 115.
39. Al-Suyuti, *Al-Ashbā'*, 101; Ibn Nujaym, *Al-Ashbā' wa al-Naẓā'ir*, 105; Kamali, "*Qawā'id al-Fiqh*," 4.
40. A *mujtahid* is an individual who is qualified to give Islamic verdicts based on personal opinion. He must have attained that status and proved himself learned according to the rules and regulations laid down. See Kamali, *Principles*, 468-70.
41. Al-Zarkashi, *Al-Manthūr fī l-Qawā'id*, 2d ed., ed. Taysir F. A. Mahmud (Kuwait: Ministry of Endowment and Islamic Affairs, 1405 AH), 2:206; Al-Suyuti, *Al-Ashbā'*, 260.
42. Al-Shafi'i, *Al-'Umm* (Beirut: Dar al-Qalam, 1990/1410), 1:178.
43. The *Mejelle*, being an English translation of *Majallahel-Ahkam-l-Adliya* and a complete code on Islamic civil law. tr. C. R. Tyser et al. (Lahore: Punjab Educational Press, 1967), article 36.
44. Al-Burnu, *Al-Wajīz*, 84.
45. Hatim, *Teaching*, 32-33, 116; Teun A. Van Dijk, *Text and Context Explorations in Semantic and Pragmatic Discourse* (London and New York: Longman, 1977), 189-203; Donald A. Burquest, "An Introduction to the Use of Aspect in Hausa Narrative," in *Language in Context Essays for Robert E. Longacre*, ed. Shin Ja J. Hwang and William R. Merrifield (Texas: Summer Institutes of Linguistics Inc., 1992), 393-417.
46. Francois Rastier, *Meaning and Textuality* (Toronto: University of Toronto Press, 1997), 265.
47. Hatim, *Teaching*, 31.
48. Ibid., 179, 233.
49. "… cohesion (the diverse relations which hold among the words, phrases and sentences of a text); coherence (the range of conceptual relations underlying surface continuity); situationality (the way utterances relate to situations); intertextuality (the way utterances relates to other utterances); micro intertextuality (and ultimately to other texts); macro-intertextuality; intentionality (the purposes for which utterances are used); acceptability (text receiver's response) and informativity (the extent to which texts or parts of texts may be expected or unexpected, known or unknown, etc.). See Robert de Beaugrand and Wolfgang Dessler, *Introduction to Text Linguistics* (London and New York: Longman, 1981), 3-12; Basil Hatim and Jeremy Munday, *Translation: An Advanced Resource Book* (United Kingdom and New York: Routledge, 2004), 68.

50. See, "hypertextuality" – " a matter of interconnection between different sets of text in a more or less coherent way" in Oblak, "The Lack of Interactivity," 96; Genette, *Palimpsests*, 1-10.
51. Malory Nye, *Religion: The Basics*, 2d ed. (London and New York: Routledge, 2008), 152-80.
52. Rastier, *Meaning*, 19.
53. Mohammed A. S. Abdel Haleem, "Context and Interrelationships: Keys to Qur'anic Exegesis. A Study of *Sūrat al-Raḥmān* (Qur'an, chapter 55)," in *Approaches to the Qur'an*, ed. G. R. Hawting and A-K. A. Shareef (London and New York: Routledge, 2003), 72.
54. Arar Mahdi, "Body-language in the Qur'an: An Overview with Selected Examples," *Journal of Qur'anic Studies* 10, no. 1 (2008): 168-201, especially the example on 179.
55. Abdullha Saeed, *Interpreting the Qur'an: Towards a Contemporary Approach* (London and New York: Routledge, 2006), 42-43.
56. Ibid., 50.
57. Mohammad Abdel Haleem, *Understanding the Qur'an: Themes and Styles* (London and New York: I.B. Tauris, 1999), 159-60.
58. Ibid., 159.
59. Ibid., 160.
60. Q. 4:3.
61. Abdul Hameed Ahmad ibn Abdul Haleem al-Taymiyah, *Al-Muswaddah fi Uṣūl al-Fiqh*, ed. Muhammad Muhiddeen Abdul Hameed (Cairo: Dar al-Kitab al-'Arabi, n.d.), 4.
62. See Al-Tirmidhi, *Sunan*, hadith no. 1846.
63. See Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1999), 190-91.
64. 'Abd al-Rahman ibn Nasir ibn Abdullah al-Sa'di, *Taysīr al-Karīm al-Raḥmān fi Tafsīr al-Kalām al-Mannār*, ed. Abdul Rahman ibn Ma'lla al-Luwayhaq (n.p:. Mu'assasah al-Risalah, 2000/1420), 285.
65. Muhammad ibn 'Uthaymin, *Al-Sharḥ al-Mumti' 'alā Zād al-Mustanqa'* (Saudi Arabia: Dar Ibn al-Jawzi, 1425 AH), 2:185.
66. Al-Burnu, *Al-Wajīz*, 30.
67. Ibid.
68. Ibn Qudamah, *Rawḍat al-Nāẓir wa Jannat al-Munāẓir*, ed. Abdul Azeez ibn Abdul Rahman al-Sa'eed (Riyadh: Imam Ibn Sa'ud University, 1399 AH), 217.
69. See Q. 91:7-10.
70. Ignorance of the law can only be an excuse in Islamic law for a new convert or for someone living in a non-Muslim territory. This includes, to some extent, those who are living in a remote area unreached by Islam, as opposed to ignorance of the fact of law which can be claimed by all Muslims. For details, see Abd al-Qadir Awdah, *Al-Tashrī' al-Jinā'i al-Islāmī: Muqāranan bi al-Qānūn al-Waḍ'i* (Beirut: Dar al-Kutub al-'Arabi, n.d.), 1:430.

71. Abu Zahra, Muhammad, *Al-Jarīmah wa al-'Uqūbah fī al-Fiqh al-Islāmī* (Cairo: Dar al-Fikr al-Arabi, 1998), 133-43.
72. Al-Qurtubi, *Al-Jāmi' li Aḥkām al-Qur'ān* (Beirut: Dar al-Fikr, 1998/1419), 9:209.
73. See Awdah, *Al-Tashrī' al-Jinā'i al-Islāmī*, 124-25, 128, 133, 165.
74. Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2005), 112.
75. Ibid.
76. Cherif M. Bassiouni, "Crimes and the Criminal Process," *Arab Law Quarterly* 12, no. 3 (September 1997): 271.
77. Sa'd ibn Muhammad ibn Ali Sufayr, *Ijrā'āt Jinā'iyah fi-Jarā'im al-Ḥudūd fi al-Mamlakah al-'Arabīyah al-Sa'ūdīyah* (Saudi Arabia: King Fahd National Library Catalogue, 1995/1415), 28.
78. Abu Zahra, supra note 71 at 133-43.
79. Gamil Muhammed Hussein, "Basic Guarantees in the Islamic Criminal Justice System," in *Criminal Justice in Islam: Judicial Procedure in the Shari'ah*, ed. Muhammad Abdel Haleem, Adel Omar Sherif, and Kate Daniels (London and New York: I.B. Tauris, 2003), 43-44; also see Adel Omar Sherif, "Generalities on Criminal Procedure under Islamic Shari'a," in Muhammed Abdel Haleem (Ed.), Ibid., 6.
80. Al-Sa'di, *Taysīr al-Karīm,* 274.
81. See discussion of this inequality in the application of *qiṣāṣ* for cross-gender, free man and slave, as well as Muslim and non-Muslim issues, in Al-Shinqiti, supra note 71 at 388.
82. Anwar Ahmad Qadri, *Islamic Jurisprudence in the Modern World*, 2d ed. (Lahore: Ashraf Press, 1973), 38.
83. See al-Tabari, *Jāmi' al-Bayān* (Beirut: Dar al-Kutub al-'Ilmiyah, 1999/1420), 2:107-15; Al-Qurtubi, *Al-Jāmi'*, 2:231.
84. See Wahba al-Zuayli, *Al-Fiqh al-Islāmī wa 'Adillatuh*, 3d ed. (Damascus: Dar al-Fikr, 1989/1409), 6:269-70. See Hanifi opinions and their strong evidence in Abu Kabr al-Kasani, *Badā'i' al-Sanā'i* (Beirut: Dar al-Fikr, 1996/1417), 7:345-47.
85. See the report of Sha'bi and Qatada in al-Qurtubi, *Al-Jāmi'*, 2:239, on the context in which this verse was revealed. Cf., Q. 6:45 for Abu Hanifah's argument on killing a group of people for the murder of an individual. Al-Qurtubi, *Al-Jāmi'*, 235.
86. Al-Qurtubi, *Al-Jāmi'*, 2:239.
87. Al-Tabari, *Jāmi' al-Bayān 'an Ta'wīl ay al-Qur'ān*, ed. Abdullah ibn Turki (Cairo: Hijira, 2001/1422), 3:94-95.
88. Ibid., 3:94.
89. Al-Din al-Razi, *Al-Tafsīr al-Kabīr*, parts 5 and 6 (Beirut: Dar al-Kutub al-'Ilmiyah, 1990/1411), 5:42-48.
90. Qadri, supra note 82 at 288.

91. Al-Kasani, supra note 84 at 304; ibn Qudamah, *Al-Mughnī* (Beirut: Dar al-Fikr, 1983/1405), 9:472; Muhammad ibn Muhammad Abd al-Rahman al-Hattab, *Mawāhib al-Jalīl* (Beirut: Dar al-Ma'rifah, 1398 AH), 5:86-87; Awdah, supra note 70 at 160.
92. Abu Zahra, supra note 71 at 294.
93. Malik ibn Anas al-Madani, *Al-Mudawwanah* (Beirut: Dar al-Kutub al-'Ilmiyah,1994/1415), 4:554; Ibn Qudamah, supra note 91 at 290.
94. Abu Zahra, supra note 71 at 294.
95. Ibid.
96. Awdah, *Al-Tashrī' al-Jinā'i al-Islāmī*, 1:270.
97. Muhammad Abdel Haleem, "Compensation for Homicide in Islamic Shari'a," in *Criminal Justice in Islam*, ed. Muhammad Abdel Haleem et al., 103; Gamil Muhammed Hussein, supra note 79 at 37-43.
98. Ibn Qudamah, supra note 91 at 55.
99. Al-Shinqiti, *Adwā' al-Bayān* (Beirut: Dar al-Fikr li-Tiba'ah, 1995/1415), 5:366.
100. Ibid.
101. Ibid., 5:366-416. See al-Shinqiti for other debates and juristic discussions on this matter.
102. Ibn Qudamah, supra note 91 at p. 57.
103. Ibid.
104. Ibid.
105. See Ahmad ibn Idris al-Qarrafi, *Al-Dakhīrah fi Furū' al-Malikīyah* (Beirut: Dar al-Kutub al-'Ilmiyah, 2001/1422): 9:342; Al-Shirbini, *Mughnī al-Muḥtāj ilā Alfāẓ al-Minhāj*, ed. Ali Muhammad and Adil Ahmad Abdul Mawjud (Beirut: Dar al-Kutub al-'Ilmiyah, 2000/1421), 5:444.
106. Hadith remit the *ḥadd* from Muslims as much as possible, because if a judge were to commit a mistake in executing the punishment, that would be far better than committing a mistake in enforcing the penalty.
107. Sa'd ibn Muhammad Zufayir, *Al-Ijrā'āt al-Jinā'īyah fi Jarā'im al-Ḥudūd fi al-Mamlakah al-'Arabīyah al-Sa'ūdīyah* (n.p.: 1994/1415), 1:69.
108. Ibid.
109. See Awdah, *Al-Tashrī' al-Jinā'i al-Islāmī*, 296.
110. This will be discussed in the forthcoming article on the study of "Intertextuality and Hypertextuality in the Codification of Islamic Legal Maxims."
111. Nasir bin Ibrahim Mehemeed, "Criminal Justice in Islamic Shari'ah: Concepts and Precepts," in *Criminal Justice in Islam*, ed. Muhammad Abdel Haleem et al., 31.
112. Ibid.
113. Majid Khadduri, *The Islamic Conception of Justice* (Baltimore: John Hopkins University Press, 1984), 160.
114. See Abu Dawud, *Sunan Abī Dāwūd*, hadith no. 3873.
115. See Muhammad Rida for supporting the use of alcohol for medication in Muhammad Rida, *Tafsīr al-Manār* (Cairo: Al-Hay'at al-Misriyat al-'Ammah li

al-Kitab,1990), 7:93; and al-Shinqiti for opposition against its usage in al-Shinqiti, *Adwā' al-Bayān*, 1:70.

116. See Ibn Majah, *Sunan*, hadith no. 3406; Al-Nasa'i, *Sunan*, hadith no. 3686.
117. See al-Shinqiti's opinion in al-Shinqiti, *Adwā' al-Bayān,* 2:98-99.
118. Sherif, supra note 79 at 6; Baderin, supra note 74 at 78-79.
119. Baderin, ibid.; Zufayir, supra note 107 at 30.
120. Ya'qub ibn Ibrahim Abu Yusuf, *Kitāb al-Kharāj*, 6th ed. (Cairo: Al-Matbah al-Salafiyah wa Maktabatuha, 1397 AH), 180.
121. By extension, the government or employer is considered to be *'aqīlah*, as Umar was. Muslims have followed this example ever since.
122. Awdah, *Al-Tashrī' al-Jinā'i al-Islāmī*, 2:236-40.
123. Ibid., 2:17.
124. Ibid., 1:353, 468-69. See §327 for discussion on the scholars' opinions on this issue.