

# LOAN'S LEGAL MAXIMS IN ISLAMIC FINANCIAL JURISPRUDENCE

**Ahmad Asad Mahmood Ibrahim, Bahrain Institute of Banking and Finance**

## ABSTRACT

*This paper aims at discussing the various legal maxims pertaining to the act of providing a loan by categorizing and analyzing their content. There is a great need to undertake such analysis since the issue of providing interest free loan is at the center of what distinguishes Shari'ah compliant transactions from those that are not, which is why a careful analysis of all related legal maxims is a must in order to firmly establish the Shari'ah ruling surrounding this matter. The methodology used in the paper is based on deducing legal maxims related to the provision of a loan from the juristic texts and the various studies related to its detailed provisions followed by clarifying the related rulings that can be extracted from such legal maxims. This paper contributed to the body of knowledge by categorizing and analyzing the various legal maxims related to the contract of loan by focusing on their meaning and Shari'ah basis to provide a comprehensive view of the topic under discussion.*

**Keywords:** Legal Maxims, Loan's, Islamic Financial Jurisprudence.

## INTRODUCTION

This research paper discusses the legal maxims pertaining to the loan, whereby the intrinsic of the legal maxim rule will be clarified, then the legal maxims related directly or indirectly to the loan will be investigated and extracted from the financial transactions chapter; I have begun recording legal maxims at the first phase, then I clarified the meaning of the legal maxims and their Shari'a basis. It is worth mentioning that research in legal maxims is vital due to its great status which is no less than any other Shari'a law, and this status is represented in the development and formation of jurisprudence talent (Allen, 2011). It also earns the jurist the ability to persevere in obtaining knowledge, in addition to record and regulate the scattered jurisprudence branches which are not restrained in complete laws. Among its other benefits, it helps the jurist to connect majors with minors and lessen the doctrinal differences between jurists. This research will address the status in particular for the legal maxims pertaining to the loan.

## RESEARCH METHODOLOGY

The research methodology is based on deducing the legal maxims of the loan from the jurisprudence texts and the studies related to its detailed provisions, with its restructuring, rearrangement and reformulation together with the Shari'a basis, and then clarifying the related rulings, since these rules are distributed in the sections of different legal maxims, and it is needed

for a study which combines its terminologies and present it in the form of a comprehensive, integrated and independent topic.

### **Concept of Legal Maxims**

Prior to explaining the legal maxims of the loan, it is necessary to initially define the rule as a terminology for the reader to be aware of the concept and have a clear understanding of the subject.

The rule(s) linguistically means the foundations and the origins of something, whether it is tangible such as a house's foundation, or intangible or moral such as the religion's rules as in its pillar (Altman, 1975).

In idiomatic expression, the jurisprudence rule was defined as:

1. A general judgment that applies to its parts to define its rulings.
2. General jurisprudence principles in a brief constitutional text which include general legislative provisions related to matters that fall under its topic.
3. A majority ruling or a majority issue that applies to most of its parts to define its rulings".
4. It is a holistic issue that applies to all its parts.
5. That thing: as the rules of the house, or morally: as the rules of religion, that is, its pillar In light of the previous definitions, we can define the legal maxim/jurisprudence rule as: A Shari'a ruling in a holistic issue which defines the provisions of what falls under its scope. The legal maxims are rules that contain a group of Shari'a rulings from different chapters linked by a common juristic aspect. The restriction Shari'a in the definition is an exception to the illegitimate rules (Non-Shari'a), and the second restriction holistic states that these rules are characterized by a majority status. Some branches may be driven from the main rules; however they do not change the general character of the rules and does not diminish their value.

After reviewing several definitions, the researcher believes that this definition is the idiomatic definition chosen for the jurisprudence rule (Schoeman, 1985).

### **The Relationship between Legal Maxims and Jurisprudence Theory**

After explaining the definition of the theory in the first chapter, and the definition of legal maxims, the researcher concludes that the relationship between theory and rules is a relationship that is part of whole since the Shari'a rules are not theories by themselves, but they are rulings for these theories, or they may be special rules for major rules. In some cases, a rule may arise as a special ruling for a specific aspect of the theory, such as the rule stating that "*the contract is explained based on purposes and meanings*" which governs a specific aspect in the theory of contract, in addition to other rules (Solove, 2002).

The difference between the rule and theory can be illustrated in two matters:

1. The rule includes a Shari'a ruling, unlike theory, which does not.
2. The Shari'a rule does not include principles and conditions, unlike the jurisprudence theory, where it is a must.

## Shari'a Rulings Related to Loan and their Classification

Legal maxims may be classified according to their relationship to the loan, as follows:  
Legal Maxims Dealing directly with Loans which are:

1. Any loan that generates a benefit is *Riba*.
2. Any loan that stipulates an excess to the lender is prohibited (*haram*).
3. The amount of loan that is due is equivalent to the principal amount.
4. The loan is guaranteed by the borrower, and the guarantee is valid only if the guarantee on the principle is required.
5. Rights, such as debt and loan, are not nullified by the destruction of money.
6. Every excess required by the lender on the borrower is *Riba*.
7. Every loan is guaranteed by a similar wealth if any, otherwise by equivalent value.

It is clear that these legal maxims deal with two topics: the first is the condition in the loan and the second is the guarantee of the loan (Solove, 2008).

### Legal Maxims Prohibiting the Condition in the Loan

What is meant here is that it is impermissible to stipulate conditions that are contradictory to the rulings of contracts, because if it contradicts the original intention of the contract, it leads to its invalidation, such as imposing the payment of an amount of money by the borrower to the lender, which is an invalid condition that must not be fulfilled, which is pre-Islamic *Riba*, prohibited by the Qur'an.

The Shari'a basis for this rule: the hadith of Anas and Aisha, May Allah (swt) be pleased with them that the prophet (pbuh) said: "*a condition that is not from the holly book of Allah (Qur'an) is invalid - the Muslims are bound to their conditions as long as these conform to the truth and justice.*"

### Legal Maxims Dealing with the Guarantee of the Loan

The meaning of these legal maxims is that the loan must be repaid in same kind if it is available, with no defect, and that the lender must accept. But if the loan is a fungible wealth, it should be repaid in similar wealth, and if it is valuable it should be repaid in equivalent value.

The Shari'a basis for this rule: the prophet (pbuh) borrowed a young camel and repaid it with an older camel, and in his *hadith* of the six categories: "*Gold by Gold, Silver by Silver, Wheat by Wheat, Barley by Barley, Dates by Dates and Salt by Salt, same kind, value and quantity, and you may trade different categories as long as it has same value*". It is understood from this hadith that equality is required in loans, but value should be considered to protect the lender's right (Tamás 2002).

### Legal Maxims Dealing Indirectly with Loans Provisions

Legal maxims that deal indirectly with the loan, i.e. without using the term "*loan*" - can be divided into eight sections, classified as follow by topic: Section 1: The legal maxims related to repayment of loan, which are:

1. All loans can be repaid from all types of wealth.

2. The repayment deadline (term) of the loan is the rule, and the deferring is an exception unless it is proved unconditional.
3. The due loan cannot be deferred.
4. Every fungible wealth shall be repaid equally, if its overdue then its value shall be repaid.
5. The value is used only in case a similar wealth is unavailable, which is the easiest and the best way in terms of exchange.
6. In properties, the value is used only if the similar is unavailable.
7. Whoever owes a loan (debt) is obliged to repay it and deserve punishment if he refused to fulfill his obligation.
8. If similar wealth for a debt is unavailable, its equivalent value is due.
9. If similar wealth for a debt is unavailable, its value shall be considered at the time of its destruction not unavailability.
10. Whoever owes a debt can repay it from any wealth he wishes.
11. Discharge from debt is based on loans owed rather than kinds in hand.
12. If a wealth cannot be named, the use of value is required.
13. If main kind of wealth for a debt is unavailable, the use of similar kind is required.
14. If a debt cannot be repaid with similar kind, the use of value is required.
15. If a debt cannot be repaid with similar wealth, equivalent value is due.
16. Rules applies on the appearance of things if cannot be named or defined.

The meaning of these legal maxims is that the debt is repaid with similar kind, and if cannot be named, the use of value is required.

The Shari'a basis: It is possible to attach these legal maxims to the previous legal maxims related to the guarantee of loan, because they share the same content and meaning, and therefore the hadith of the six categories can be considered as a Shari'a basis for these legal maxims as well (Warren & Brandeis, 1890).

#### Section 2: The legal maxims dealing with the intention to repay the loan, which are:

1. Difference in names means difference in meanings.
2. Consideration is for the meanings.
3. Changing names is evidence of the change of meanings.
4. Matters are considered based on purposes.
5. Any path that leads to selling a dirham for another on deferred basis is prohibited.

These legal maxims are among the basic rules mentioned by scholars in their books, where they consider them as the principle rules since they determine the validity or corruption of human work. Furthermore, they are the basis of Shari'a rulings function as it means that the intention is considered in every work performed by a rational person, and together they make the work valid or corrupted, permissible or prohibited.

The Shari'a basis: The Prophet (pbuh) said: *“every work is based on intentions, and everyone gets what he intended to”*.

It is possible to deduce the jurisprudence branches of this rule regarding the loan, if the lender lends the borrower to sell him; this is considered as a trick since the trade will be favored because of the loan, like he sells him a one hundred value commodity for one hundred and fifty under the loan. It is also a trick to provide a benefit for the lender to defraud Riba, and the lender accepting the gift from the borrower in order to delay the repayment of loan.

#### Section 3: The legal maxims dealing with the usage of loans, which are:

1. Discharge from debt is based on loans owed rather than assets in hand.
2. Loans cannot be the subject-matter of ownership and exchange contracts, and no one can own the subject-matter of the loan other than the borrower.

These legal maxims mean that the lender cannot transfer the ownership of the subject-matter of the loan to someone other than the borrower, except for the hawala (transfer) which provisions will be discussed later, whether with or without replacement. The reason for that is the inability to deliver, since it is compulsory for the validity of a sale or loan contract the ability of delivery and receipt between the seller/lender and the buyer/borrower.

The Shari'a basis: The Prophet (pbhu) prohibited the sale of whatsoever that has not been received.

#### Section 4: The legal maxims dealing with the terms of the loan, which are

1. Donation is complete only after receipt.
2. The financial contracts are in principle based on mutual consent.

These legal maxims mean that if a donation contract is made without full acquisition, the beneficiary of the donation has the right to claim for delivery; in this case the donation becomes a contract of guarantee. Therefore, the delivery of the subject-matter is a must in the contract of loan and all asset-based contracts, such as lease and deposit, and not only an execution part of it. Hence, most probably, this is how the contracts of kind got named as such. Also, unlike other contracts, verbal offer and acceptance is insufficient.

The Shari'a bases of these legal maxims are the heritage of the prophet companions. Like when the companion Abu Bakr gifted his daughter Aisha, and after falling sick he told her: "*I wish you took it*". And like what companion Omar Ibn Al Khattab told : "*gift is not accomplished until received by the gifted person*", and so said the other companions Othman, Ibn Omar, Ibn Abbas, Anas and Aisha with no known objection, and since it is a contract of *Irfaq* (attachment) where the acceptance is required, it lacks the condition of receipt such as in loan and other gifts, and if the gift is sent and then returned before reaching the gifted person, the latter loses the right of its ownership.

#### Section 5: The legal maxims that prevent tricks of *Riba*, and they are:

1. The loan cannot be sold for a loan, be it a due or deferred loan.
2. The sale of loan for a loan is invalid.
3. Exchange and donation cannot be combined in one transaction.

This legal maxim mean that any way agreed between two parties of a contract, whether clearly expressed or hidden, for the purpose to sell money for money to a given term, is prohibited, because the means to perform any prohibited are themselves prohibited. The Shari'a rule stipulates: the means fall by the fall of aims. As application of this rule, the prohibition of the sale of loan and the sale of "*Aina*" since they are a sale of owed money without actual immediate exchange.

The Shari'a basis of this rule: "*O you who believe! Fear God, and forgo what remains of usury, if you are believers.*", this verse of Quran is a general prohibition of *Riba* and did not mention a specific mean. Also, the Prophet (pbuh) said: "*every work is based on intentions*". This hadith clearly explain that every man's work is valid or corrupted based on intention and

this is a general rule which applies in worships or transactions. Another hadith of the Prophet (pbuh) says: “*do not sell what you do not own*” which applies on the loan.

Section 6: Valid and Invalid conditions, the legal maxims are:

1. The deadlines are fixed in the contracts only by condition.
2. The deadline requires part of the compensation.
3. The rules/provisions exist only with the presence of causes and conditions and disappear by the existence of prohibitions and the absence of causes and conditions.
4. A permissible work means permissible condition.
5. Any means leading to a sale of money for money at a term is prohibited.

These legal maxims mean that if the condition is against the principles of Shari’a like the condition of Riba and other, it shall be invalid, but the contract is valid. However, if the condition is against the purpose of the contract itself, such as the condition not to sell or donate the subject-matter by the buyer after a contract of sale, the condition is invalid and so is the contract.

The jurisprudence branches of this rule related to the loan are

1. If the condition is against the Shari’a, such as the condition of Riba, then the loan is valid, but the condition is invalid.
2. If the condition is against the purpose of the contract, such as the condition of sub-contract under the loan contract like the loan with the condition of sale, this invalidates both the condition and the contract.

The Shari’a basis of this rule: It is possible to attach these legal maxims to the First Rules under chapter 2 and consider the same Shari’a basis “*a condition that is not from the holly book of Allah (Qur’an)...*”.

Section 7: The legal maxims prohibiting the combination of Exchange and Donation. The rule is: “*Exchange and Donation cannot be combined*”.

This rule means that exchange (payment of money with counter-part like in sale of lease) and donation (payment of money without counter-part) like in loan or gift) cannot be combined; otherwise it is prohibited such as combining loan with sale in a single transaction.

The Shari’a basis of this rule: hadith of the Prophet (pbuh): “*loan together with sale is not halal*”<sup>76</sup> and this is because the intention of donation was for exchange and not pure donation and becomes part of the exchange. As an example, someone who gives a person a loan of one thousand and sell him a commodity worth five hundred with the price of one thousand, the seller will not accept giving the loan unless the other person accepts buying with the increased price. At the end the seller gave a loan and commodity with a total of two thousand which is a trick to Riba.

Section 8: The legal maxims indicating the dispute between the lender and the borrower. The legal maxims are:

1. In case of dispute between the payer (borrower) and the receiver (lender), the payer has the say amongst them.
2. In case of dispute between the borrower and the lender about the value, the borrower has the stronger say amongst them.

The meaning of these two legal maxims is as follows: if the borrower refuses to settle a debt established on his liability in lieu of receiving money from a sale or loan, then his word would be accepted. This is because if a debt is established on his liability in lieu of what he has obtained under his possession, then his wealth is established by virtue of what he owns, i.e. his ability to settle the debt with what has become under his possession. In other words, whoever claims a matter is considered a claimant and the burden of proof is on him, and the denier is considered the defendant whose word would be accepted under oath. As per the Encyclopedia of Jurisprudence (269/3): “*in case of dispute between the lender and the borrower without evidence, the borrower has the say (with swearing), on the kind and value*”. And Al Zarkashi Said: “in case of dispute between the lender and the borrower on the value, the borrower has the say since the rule is that he is discharged from any excess (Westin, 1967).

Based on the above, the borrower is not bound with more than what he admitted, since any excess needs to be proved.

The Shari’a basis of this rule: *hadith* of the Prophet (pbuh): “*the burden of proof on the plaintiff, and the oath/swear (to deny it) is on the defendant*”.

Section 9: The legal maxims dealing with the penalty for a delaying debtor. The legal maxims are:

1. Whoever owes a loan (debt) is obliged to repay it and deserve punishment if he refused to fulfill his obligation.
2. Whoever owes a debt and can fulfill it and refrain from it, is punished until he fulfills it.

These legal maxims mean the penalty for delaying fulfillment of loan is the imprisonment, and this is a punishment for his delay and protection of the lender’s right. The imprisonment has no specific period and is left to the decision of the judge.

The Shari’a basis of these legal maxims: *hadith* of the Prophet (pbuh): “*whoever takes money with the intention of repayment Allah helps him to fulfill, and whoever takes it to spoil it, Allah spoils him*”. Ibn Hijr said: Allah spoils him at his lifetime, in his wealth or body. And it is said that the meaning of spoil is the afterlife punishment.

## CONCLUSION

This research paper attempted to conduct a holistic analysis of various legal maxims related to the contract of loan. It classified these legal maxims into two types. The first type mentions the word “*loan*” explicitly and mainly focuses on two issues, the prohibition of stipulating a condition in the loan contract and the guarantee of the loan. The second type addresses the rulings of the loan contract indirectly, which can be further divided into eight types. The research paper listed the legal maxims that come under each of these categories and provided a summary of their general meaning and Sharī‘ah basis. In short, this research paper contributed to the body of knowledge by categorizing and analyzing the various legal maxims related to the contract of loan.

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