

A Pursuit to Human Cloning in view of the Legal Maxims of Sharī'ah (Qawā'id al-Fiqhiyyāh)

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Abstract

The legal Maxims of Islamic law or “Qawā'id al-Fiqhiyyāh” are the guiding principles for enactment, application and functioning of the legal rules concerning the lives of the followers. Most of the times they are derived from the verses of the Qur'ān or the words of the Prophet Muhammad P.B.U.H. Owing to be based upon such a solid foundation they provide sound logic and reasoning for the solution of the problems faced by the followers in their economic, social, moral, personal, bioethical or any other area of life. Five of these maxims are the most famous ones considering their universality in scope and application. Under this research work the issue of human Reproductive and Therapeutic cloning has been evaluated in the light of five major legal maxims and also their relevant subsidiary maxims extracted from themselves. For this purpose these five maxims are first explained so that their meaning, scope and application can be made clear and then human cloning is critically analyzed in their perspective. The Reproductive type of human cloning as the name denotes; is supposed to reproduce by asexual method of reproduction, does not hold a favorable viewpoint if evaluated in their light but therapeutic cloning or the type of cloning for the treatment and diagnosis of severe diseases and organ formation, owing to its remedial nature might be capable of having permissibility if does not prove contrary to the injunctions of the Qur'ān or Sunnah or any other source of Sharī'ah including the Legal Maxims or the Ijtehad.

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A Pursuit to Human Cloning in view of the Legal Maxims of Shari'ah (Qawā'id al-Fiqhiyyāh)

Introduction

The Islamic legal discourse is considered to be incomplete if the significant and remarkable role played by Al-Qawā'id al-Fiqhiyyah in its evolution, development and growth is not given due value and regard.¹ A brief definition of Qawā'id can be:

“Legal maxims are theoretical abstracts, usually in the form of short statements, that are expressive, often in a few words, of the goals and objectives of the Shari'ah. The actual wordings of the maxims are occasionally taken from the Holy Qur'ān or Ḥadīth, but are more often the work of leading jurists. It needs to be noted that some of the maxims are basically a reiteration of some of the broad principles that are found either in the Holy Qur'ān or Ḥadīth compilations.”²

They are a vital source of consultation for the solution of the novel issues in almost all fields of life of the followers. This attribute gives them a great place in the Fiqh, in the modern era. As they emerge in the shape of settled principles, they attract attention, they are striking, useful, practical, functional and appealing for the jurists in the process of conducting Ijtihad or striving for the solution of the challenges or new problems not addressed

¹ Abul Fadl Mohsin Ebrahim, “Vaccination in the Context of Al-Maqāsid Al-Shari'ah (Objectives Of Divine Law) and Islamic Medical Jurisprudence.” *Arabian Journal Of Business and Management Review* Vol. 3, 10 (2014): 54

² Ibid.

to in the Qur'ān or Sunnah. These are the most functional tools in the hands of the jurists to extract and dig out the legal rulings.¹

The Islamic law contains numerous legal maxims with a variation in their nature, type, and level of importance possessed by each in Islamic jurisprudence. The jurists differentiate between them considering a number of considerations. The scope and extent of application of the maxims, their nature specifying if they are agreed upon or not and their being independent or subsidiary are the most important considerations differentiating each type from the other one.²

Qawā'id al-Fiqhiyyah: Literal and Technical Meanings

The Arabic word "Qā'idah" (Plural: Qawā'id) has a number of literal inferences and meanings, like; steadiness, stability, firmness and foundation. The word Qawā'id has been mentioned in the Qur'ān for no less than three times where it denotes the meaning of "foundations" at two places and the third meaning is attributed to the "women who are past child-bearing age." But the word "Qā'idah" (in singular form) has not been cited in the Qur'ān. This word has different uses and applications in different contexts such as Political, Legal, Religious or Philosophical etc owing to its versatility in meaning and application when used as synonymous to terms such as principle, maxim, code or base etc.³

It was not up to the 8 A.H that the jurists illustrated a specific Fiqhi definition for the term "Qā'idah," while they have been using and

¹ Imran Ahsan Khan Nyazee, *Legal Maxims in Islamic law* (Rawalpindi: Federal Law House), 06

² Muhammad Al-Zuhayli, *Al-Qawā'id al-Fiqhiyyah Wa Tatbiqatuha fi-l-Madhahib al-Arbaah* (Damascus: Dar al-Fikr, 2006), 31-33.

³ Fawzy Shaban Elgariani, "Al- Qawā'id al-Fiqhiyyah (Legal Maxims in Islamic law): Concept, Functions, History, Classifications and Application to Contemporary Medical Issues." *The University of Exeter* (2012): 40.

endorsing the general meanings and definitions of the term set by the specialized authors in the past. This term had the most common use while denoting the “Rules and Principles” in any discipline. “Al- Ta’rīfāt” by Al-Jurjani defines the term in the words:

“A comprehensive principle or law that is applicable to all of its particulars.”¹

Taj al-Din Ibn al-Subki is the pioneer among the jurists to define this term concisely and precisely, he goes on to say:

“A comprehensively valid rule which applies to many particulars, so that their legal determinations can be comprehended from it.”²

While discussing the Qawā‘id with respect to their scope of operation and application the most important category is “Qawā‘id which are thought to be applied over all chapters of Fīqh” without specification, or they are the general maxims. Five major Qawā‘id fall under this category which are known as “Al-Qawā‘id Al-Khāms Al-Kūbra” (the five universal or major legal maxims). Most of the jurists perceive that if not the all, most of the Islamic jurisprudence is based upon or derived from these Qawā‘id. Most of the jurists are of the view that they have acquired such an important place in Islamic jurisprudence that the rest of the Qawā‘id are only an expansion or elaboration of them. The five major Qawā‘id are:

- i) Al-Umūr bi-Maqāsidihā. “The matters are according to the goals behind them”.
- ii) Al-Yaqīnu Lā Yazūlu bi al-Shakk: “Certainty is not removed by doubt.”

¹ Al-Sharif Al-Jurjani, *Al- Taarifat* (Beirut: Dār al-Kutub Al’ilmīyāh, 1983), 171.

² Taj al-Din ibn al-Subki, *al-Ashbah wal-Nazair* (Beirut: Dār al-Kutub al-’ilmīyāh, 1991), 12.

iii) Al-Mashaqqatu Tajlib Al-Taysir: “Hardship gets facility.”

iv) Al-Dararu Yuzal: “Harm is to be removed.”

v) Al-‘Ādatu Muhakkamatun: “Custom is to be enforced.”¹

Subsidiary Qawā‘id are those maxims which have been “derived from the independent or general Qawā‘id.” They are subsidiary in nature thus most of the times they describe the application of the main or independent Qawā‘id to certain fields or elaborate one or more aspects of them.²

The Applicability of Islamic legal Maxims on Cloning

It goes without saying that the five universal Qawā‘id are applicable over all chapters of Fiqh, they provide rules for the solution of the medical and bioethical issues as well. Even though being a novel issue the issue of human cloning has not been addressed by any particular category of Qawā‘id exclusively yet a number of maxims can be applied over it considering their nature and scope. All of the above mentioned five universal maxims can be applied over the issue of human cloning as well as some subsidiary maxims derived out of these five maxims can also be applied over this issue in order to make an analysis and careful investigation over the issue.³

1. Al-Umūr bi-Maqāṣidihā: “The Matters are according to the Goals behind them.”

This Qā‘idah holds a significant place on the discussion and matters of the concept of “Niyyah” or intent or when its importance is to be determined. In all matters surrounding religion whether be of worship or socialization,

¹ Al-Imam Jalaluddin Abdurehman Al-Suyuti, *Al-Ashbah Wa-Nazair* (Beirut: Dārūl-Kutb-al-‘ilmīyyāh, 1993), 35.

² Al-Bahusayn, *Al-Qawā‘id āl-Fīqhiyyāh*, 117.

³ Ibid, 10.

dealing and interaction with human, a fundamental place has been held by “intent.” Being a fundamental component of every legal action, it leaves a great impact on the performance of the acts and duties of the human beings. Niyah plays a crucial role in both moral and legal spheres. The inner motive of an individual is imperative to categorize and differentiate his acts as approved or rejected/ redundant by Allāh S.W.T as each of the statuses and consequences give rise to different rewards. The reward of worship is more relevant with the eternal life. Whereas the legal role and status of the individuals is determined after considering few other key factors including the consciousness of an individual or its absence and his mental awareness and motive for the performance of any act.¹

Many traditions of the Prophet Muḥammad P.B.U.H have originated the foundation of this Qā'idah. The following Ḥadīth illustrates one of the famous traditions in the words:

“Deeds (their correctness and rewards) depend upon intentions, and every person gets but what he has intended. So, whoever emigrated for Allāh and His Messenger, his emigration is for Allāh and His Messenger, and whoever emigrated for worldly benefits or for a woman to marry, his emigration is for what he emigrated for.”²

Scores of the jurists opine that this Ḥadīth is considered to be one of the fundamental traditions providing base for the whole spectrum of the knowledge of Sharī'ah and shaping its growth and development.

Application on Human Cloning

While applying the diversity of meaning and vastness of the application of this Qā'idah on human cloning many inferences can be deduced. For

¹ Elgariani, “Al- Qawā'id al-Fiqhiyyah”, 50.

² Al-Bukhari, *Sahih Al-Bukhari*, vol 01, Ḥadīth No. 01.

instance: If the basic fundamentals of Islamic teachings or their pursuits are ignored by the scientists or any other party intending for the human cloning it can not be endorsed. The reason behind such a finding is that in such a situation they tend to allow human cloning considering it beneficial from the scientific purpose only and a strive for the new knowledge is their intention. They want to have a maximum benefit for themselves by the application of this technology. As far as the therapeutic cloning is considered, it becomes permissible while it is carried out with the intention of any constructive purpose behind; such as organ formation or diagnosis or treatment of the diseases. Here the intension must clearly address the genuine need of the human beings and strive to find out its solution should be the objective.¹

1.1 Subsidiary Qawā'id which can be Applied over Human Cloning

Many significant subsidiary Qawā'id have been driven from this Qā'idah. Such subsidiary rules make its scope and application wide, extensive and broad. Moreover they tend to highlight the hidden and unseen sides of this Qā'idah and explore it intensely. Even though a number of the subsidiary rules can be quoted here to examine and evaluate human cloning but, only two most important ones are mentioned. They will analyze the suitability or non-acceptability of the human cloning. For this purpose they have been evaluated from general perspective first and then the evaluation of human cloning in their light is conducted.

¹ I. Sharfuddin, "Toward an Islamic administrative theory." *The American Journal of Islamic Social Science* 4, no. 2 (1987): 239.

- i) **“No Afterlife Rewards (for the deeds) without examining the Intention behind them.”**
- ii) **“In Contracts, effect is given to Intention and Meaning and not Words and Forms.”**

It can be observed by the analysis of the application of these subsidiary maxims on human cloning that such an act could be allowed from the jurisprudential and philosophical perspectives when its legal status is clarified for this world as well as hereafter. While performing human reproductive cloning even though one may indicate by words that he is opting it just for his/her own satisfaction but the truth is that it is perfumed with a deceptive belief that science has power to perform any act even the act of reproduction hence it supersedes the true creator, Allāh S.W.T. It is not the case with only reproductive type of cloning but therapeutic cloning would also be considered forbidden if any kind of dishonesty or dishonesty by the clients or the medical practitioners is done, as it will deprive them of the reward in hereafter. Likewise, when the plain analysis of the therapeutic cloning may present it apparently a beneficial and justifiable act for the mankind, deception of intent will ruin it by making it unapproved from the Akhirah perspective.

2. Al-Yaqīnu Lā Yazūlu bi al-Shakk: “Certainty is not Removed by Doubt.”

“Al-Yaqīn” or certainty is considered to be one of the essentials while beliefs are studied in Islamic law and practices of the followers. The Qur’ān also signifies the worth of certainty at quite abundance. Yaqīn is the foremost and obligatory requisite of the beliefs. Even for the testimony

of “Shahadah” that no other God exists except Allāh S.W.T and that Muḥammad P.B.U.H is His last messenger” Yaqīn is the basic ingredient for acceptance.¹ This belief must be certified with full and true intention supported by the convincing will of the follower otherwise he will be considered a Munafiq (hypocrite) if he doubts it. The Qur’ān elaborates it as follows:

“Only those are Believers who have believed in Allāh and His Messenger, and have never since doubted, but have striven with their belongings and their persons in the Cause of Allāh: Such are the sincere ones.”²

A Ḥadīth of the Prophet Muḥammad P.B.U.H mentioned in the Sahih Bukhari also indicates that:

“The servant meeting Allāh having testified that there is no deity worthy of worship except Allāh and that I am the Messenger of Allāh, not doubting them shall enter the Jannah (paradise).”³

Muslims are discouraged to hold dubious beliefs which are based upon uncertainty and lie. The Qur’ān does not recommend any idea to be adopted if it is not approved by the sound evidence or reasoning. The Qur’ān quotes:

“And pursue not that of which thou hast no knowledge; for every act of hearing, or of seeing or of (feeling in) the heart will be enquired into (on the Day of Reckoning).”⁴

At another place it says:

¹ Al-Suyuti, *Al-Ashbah wa-Nazair*, 123.

² Al-Qur’ān 49:15.

³ Al-Bukhari, *Sahih Al-Bukhari*, vol 01, Ḥadīth No. 14.

⁴ Al-Qur’ān 17:36.

“But most of them follow nothing but fancy: truly fancy can be of no avail against truth. Verily Allāh is well aware of all that they do.”¹

Al-Nawawi illustrates the theory and meaning of this Qā‘idah in the below mentioned words:

“Things are legally assumed to remain as they are unless and until it is established with certainty that they are otherwise; and that extraneous doubts are of no consequence.”²

Application on Human Cloning

The clarity of lineage is one of primary conditions to be fulfilled by the spouses while they tie a marriage knot. Sharī‘ah does not approve any method or technology in reproductive science which may involve the intervention of any third party, like in the case of sperm and egg donation, Artificial Insemination, surrogacy or any other method of ARTs. All doubts associated with the procedure and nature of human reproductive or therapeutic cloning make it a forbidden or prohibited act. Human cloning may give a birth to different kinds of doubts in the minds of the parties concerned including the supremacy of science and technology over the will and command of God, deviation from the natural mode of reproduction by ignoring the prescribed way of marriage and still believing to have offspring by the use of technology etc are the few instances tending to expose the non-acceptance of human cloning according to this maxim of Islamic law.

2.1 Subsidiary Qā‘idah which can be Applied over Human Cloning

¹ Al-Qur’ān 10:36.

² Yahya ibn Sharaf al-Nawawi, *Sharah Sahih Muslim* (Dammam: Dār ibn Al-Jouzi) 4:49.

i) **“The Basic Rule is that a thing shall remain as it was originally.”**

While applying this maxim over human cloning issue, it can be analyzed that when a perplexity takes place between the approval and non-approval of the human cloning, it can be presumed that it is prohibited because no clear evidence proves it to be permissible. Only the natural way of reproduction i-e with the help of preservation of institution of marriage should be promoted in such a case. Likewise if therapeutic cloning tends to bring any type of change in the status of the reproduction cycle and its sanctity or preservation of family life it would also be considered forbidden according to the analysis and interpretation of these legal maxims.¹

3. Al-Mashaqqatu Tajlib al-Taysīr: “Hardship gets Facility.”

Sharī‘ah is a unique type of law which has some of the astonishing features which can never be observed in any other form of law in the world. It is notable in character for its attribute of flexibility as well, which is one of the most distinctive features of it as makes it suitable and valid for all ages, periods of time and courses. It is worth mentioning that “Raf al-Haraj” is an important principle for the removal of adversity and hardship, adding one of the finest features to Sharī‘ah. It is basically categorized under the general concept of Maslahāh or Public interest and welfare. Just like other legislative systems, Sharī‘ah also imposes some obligations and duties upon its followers. But, It is important to mention that no excessive or untrue obligation has been imposed upon the followers causing any peculiar austerity or difficulty.²

¹ Ibid

² Muḥammad Hashim Kamali, “Legal maxims and other genres of literature in Islamic jurisprudence.” *Arab Law Quarterly* 20, no. 1 (2006): 80.

There may be another interpretation to the principle of “Raf āl -Haraj” or removal of hardship. It illustrates that at the time of difficulty to perform or follow any specific ruling of law any suitable possible alternative can be opted by the followers. This distinguished feature of this particular maxim has made it a major source of all “Rukhsas” or the concessions i-e the special considerations awarded to the individuals at the time of dire need when the actual rule can not be followed in true letter and spirit. For instance, it is permissible for a traveler to combine or merge his prayers during his journey or to make his prayers short, owing to the difficulties and hardships endured by him during the travel. Similarly the old, disabled and sick individuals can opt for any practicable method helping them to offer their prayers. Tayāmmūm is an other concession granted to ones unable to find water for ablution. Such concessions may be proved to be permissible with the help of the following verses from the Qur’ān:

1. “Allāh doth wish to lighten your (difficulties): For man was created Weak (in flesh).”¹
2. “Allāh intends every facility for you; He does not want to put to difficulties.”²
3. “But if ye are ill, or on a journey, or one of you cometh from offices of nature, or ye have been in contact with women, and ye find no water, then take for yourselves clean sand or earth, and rub therewith your faces and hands, Allāh doth not wish to place you in a difficulty, but to make you clean, and to complete his favour to you, that ye may be grateful.”³

¹ Al-Qur’ān 04:28.

² Al-Qur’ān 02:185.

³ Al-Qur’ān 05:06.

A saying of the Prophet Muḥammad (P.B.U.H) can also be quoted to support this viewpoint in the words:

“God did not send me to be harsh, or cause harm, but He has sent me to teach and make things easy.”¹

Hazrat Aishah R.A, the wife of Prophet P.B.U.H also reported that:

“Whenever he, the Prophet, has a choice between two matters, he would choose the easiest, unless it is (a) sinful (act).”²

Application on Human Cloning

This is a matchless maxim owing to its scope and immensity in application. It has many applications hence opens new ways and gives rise to the innovative methodologies for the jurists to strive and adjudicate new rulings. This rule can be more practically and effectively used by the Muslim jurists when they want to determine the status and position of therapeutic cloning. All over the world, humans are in great need of having new organs to replace the affected or damaged ones. This is indeed a dire need giving rise to organ formation and transplantation. Even though humans have been implanted with the plastic or animals organs but their adaptability remains a big issue. Most of the times they are rejected by the body even if they have been donated by the human beings including the blood relatives of the patient. Such a problem can be resolved with the help of therapeutic cloning. If a man can reproduce his organ himself his body would definitely accept it and such a big problem will be eliminated. The humanity will be benefited a lot this way.

¹ Al-Bukhari, *Sahih Al-Bukhari*, vol 04, Ḥadīth No. 3506.

² Al-Bukhari, *Sahih Al-Bukhari*, vol 01, Ḥadīth No. 101.

3.1 Subsidiary Qawā'id which can be Applied over Human Cloning

i) **“Necessity makes the unlawful Lawful.”**

ii) **“Necessity does not invalidate the Rights of another.”**

On the issues related to bioethics like human cloning these subsidiary maxims can play a great role as they can pave way for the permissibility of the new innovations and applications concerning human body and their moral and social impacts on human beings. As far as cloning for the medical and research purposes i-e therapeutic cloning is concerned it can be inferred that it would be considered permissible and lawful if needed for the welfare of the individuals or the society then there is no harm in its application but this connotation can not be applied over the reproductive cloning as there is no need to make it permissible or practice it. Likewise mixing or addition of any third person in the process of reproduction which is a private act between the spouses is Harām or forbidden act which is no exception to the general rule hence does not justify to be declared as permissible on the basis of the principle of necessity. Similarly, when it is perceived that if human reproductive cloning is allowed there will be dismay and disorder in society a ban over it would be allowed. Likewise the legislative and constitutional bans over the reproductive cloning can be recommended as human cloning can not be considered permitted while applying these subsidiary maxims of Sharī'ah.¹

4. Al-Ḍararu Yuzāl: “Harm is to be Removed.”

Sharī'ah is based upon several important principles which provide guideline for shaping the legislation on the questions, concerns and the

¹ Ibid

problems faced by the followers. “Elimination of harm” is one of those guiding principles of Sharī‘ah. According to Izzuddin ibn Abd al-Salam, a renowned jurist the foremost and underlying principle of Sharī‘ah is to “attract the benefit/interest” and “eliminate harm.” Al-Shatibi also holds the same opinion and expressed his views in the following words:

“The basic purpose of the religious ordinances is to secure the welfare and public interest of human beings (maslahāh) and to protect them against harm (mafsadāh)”¹

In the modern discourse of novel issues and challenges this rule has the ability to work as a criterion to set the standards of actions and to strive and formulate the legal rulings. Sharī‘ah, in its nature and style, is more concerned and apprehensive for the elimination of harm from the social, political, religious, familial, medical and economic spheres as presence of it is sufficient to cause instability in any sector of life.²

The need and quest to serve the purpose of bringing and promoting more ease and relieve to the lives of the followers the theory of “Raf al-Darār” or eliminating harm was developed by the jurists over the period of time and history. Several evidences from the Qur’ān and the Sunnah give indication to the prohibition of harm to others and one’s own self and promote every kind of possible ease and facility have given rise to promulgation of this theory. On the chapter of the theory of Raf al-Darār, this maxim holds a significant place. Darār can be defined as:

“A detriment caused to the interests of oneself or of others.”³

¹ Abbu Ishaq Al-Shatibi, *Al-Muwafaqat fi Al-asool al- Sharī‘ah* (Tunisia: Dawlat Al-Tunisia), 29

² Nyazee, *Legal Maxims in Islamic law*, 65.

³ Ibid, 35.

Raf al-Darār also extends its meaning and scope by including stopping of harm from happening and its elimination by every possible means if it occurs.

Sharī'ah gives an incredible importance to safeguard and secure the lives of the people and their sanctity.

Avoidance and removal of everything dangerous and harmful is necessary for the protection of life or its quality. For instance, a sick person is supposed to act upon the instructions of his medical practitioners. He must avoid everything contrary to the advice of his doctor or detriment to his health. Likewise the believers are not permitted bring any harm to themselves or others by their acts or omissions. It can be understood from the instance where someone wants more air or light and intends to open a window in his neighbor's premises, such an act is undoubtedly detrimental and harmful with respect to the rights of his neighbor including his right to privacy.¹

Application on Human Cloning

This maxim has paved a way for the permissibility of many medical and scientific innovations as well as novel medical treatments. It works to remove and eliminate the hardships from healthcare and medical sectors. Considering such a characteristic of it therapeutic cloning is allowed by majority of the jurists. Muslim jurists opine that if such type of human cloning is declared prohibited, a great deal of loss and harm will be given to the humanity, as a potential method for the diagnose and treatment of the diseases and formation of the human organs will be closed down before reaching a ripe.

¹ Mashood Baderin, "Understanding Islamic law in theory and practice." *Legal Information Management* 9, no. 3 (2009): 188.

4.1 Subsidiary Qawā'id which can be Applied over Human Cloning

- i) **“A Harm may not be eliminated by its equivalent.”**
- ii) **“A Lesser Ḍarar is to be tolerated in order to eliminate a Greater one.”**
- iii) **“A Private injury is tolerated in order to prevent a Public injury.”**

While applying this maxim on the issue of human cloning it can be analyze that the reproductive cloning may accompany some of the benefits to an individual, yet it is dangerous and destructive for the community or public at large, hence it can not permitted as it will bring the religious, moral and ethical, social and economic losses to the public.

5. Al-‘Ādatu Muhakkamatun: “Custom is to be Enforced.”¹

Customs are one of the integral and primary components of law in every legal system of the world no matter be a religious or secular. A pursuit to the legal histories of the world is evident of the fact that customs have been playing a vital role in the evolution and development of the legal systems. Sharī‘ah is also no exception to the role of the custom in Islamic legal system. It gives recognition to the formal status of the customs and acknowledges their credit as a source of law and foundation of the legal principles. It has been a credible and convincing basis for the judicial reasoning and decisions. It is noteworthy that if custom is appropriate, fitting and proper it will surely provide a base to the judicial bodies to rely his ruling upon, which is called the customary norm. A close observation of the custom tends to reveal the fact that a significant number of rulings

¹ Al-Suyuti, *Al-Ashbah wa-Nazair*, 209.

determined on the basis of Ijtihad are actually formulated keeping in view the prevailing customs, where a Mujtahid is unable to find out an evidence from the Qur'ān or the Sunnah. Interestingly, many jurists stipulate that it is a mandatory requisite to be possessed by the jurists that they should have a comprehensive knowledge of the prevailing customs in a particular region when they need to carry out Ījtehād or issue Fatāwā on a certain problem. They extend the view that such a requisite is mandatory to be possessed by them. Even though customs are not categorized as the formal source of Sharī'ah still they are considered to be of great supplementary value by operating alongside the formal sources and principles of Islamic law.¹

Two terms “Urf” and “Adah” are used to denote custom in Arabic language. The jurists differ on the point if both of these terms have similar connotations or they are used with different implications. The group of the jurists who consider them of distinctive nature from each other opine that urf is “a collective practice” carried out by a large number of people, while adah is “a repeated practice” of an individual or a group only.²

Keeping in view such a meaning, Adah can be defined as:

“a recurring matter without a rational association”, or “recurring practices which are acceptable to people of sound nature.”³

Likewise Urf, can be defined in the words:

“The verbal or non verbal habitual practices of the majority of people within a community.”¹

¹ Luqman Zakariyah, “Custom and Society in Islamic Criminal Law: A Critical Appraisal of the Maxim al-‘Ādah Muḥakkamah (Custom is Authoritative) and its Sisters in Islamic Legal Procedures.” *Arab Law Quarterly* 26, no. 1 (2012): 78.

² Zakariyah, “A Critical Appraisal of the Maxim al-‘Ādah Muḥakkamah”, 76.

³ Ibn-Nujjam, Al-Ashbahah, 10.

Application on Human Cloning

While evaluating the human cloning technique in the light of the customary practices it becomes clear that the institutions of marriage and family still hold a respectable and strong position in a society, particularly in a Muslim society. The social trends and customary practices in a Muslim society give no approval to human reproductive cloning at any cost owing to its detrimental nature against the practice of marital tie.

5.1 Subsidiary Qawā'id which can be Applied over Human Cloning

Some of the important subsidiary Qawā'id derived from this Qā'idah can be applied over the issue of human cloning. Few of them are listed below. These maxims are also included in "Majāllāt al-Aḥkām al-Adliyyāh."

- i) "Public usage is conclusive and action must be taken in accordance to."
- ii) "A thing that is regarded impossible customary is considered impossible in fact."
- iii) "The original (real) meaning is to be abandoned in favour of that established by custom."
- iv) "A matter recognized by custom is regarded as if stipulated by agreement."
- v) "A matter established by custom is like a matter established by a legal text."²

These subsidiary maxims give an inference to the importance of customs, their practice and public usage of them. Human reproductive cloning holds no place in the society if analyzed in the light of customary practices thus stands rejected. Moreover when a custom rejects a particular thing, that

¹ Mustafa Ahmad Al-Zarqa, *Al-Madkhal Al-Fiqh Al-Aam* (Damascus: Dar al-Fikr, 2006), 20.

² Al-Zarqa, *Sharah Al-Qawā'id*, 223-241.

will be considered rejected by the laws too. It will have the affect of being redundant by the agreement and the legal documents enacted by the legal authorities. A disapproval and censure by the custom would amount to same by a legal document or text. It is also pertinent to mention that the absence of any legislation on the prohibition of human reproductive cloning does not amount to its permissibility as it is already nullified by the customary practices.

It is important to mention that the legal maxims of Sharī‘ah are abundant in number hence they offer a vast application and scope. There are so many other Qawā‘id which can be applied over the issue of human cloning with quite ease and effectiveness. The jurists or the researchers can acquire marvelous results while applying them over the theory and practice of human cloning. Some of them are as following:

“All affairs must be judged on the basis of their consequences”, “Utility, welfare of the greatest number”, “The initial rule (or presumption) for all things is “permissibility,”¹ “The initial presumption is that a thing continues to exist in its original state”, “Injury is never ancient (beyond memory)”, “The initial presumption is that there is no liability”, “The initial presumption is that new attributes have not occurred”, “Hardship invokes ease”, “Under duress the rules are relaxed”, “Necessity is limited by its extent”, “When an obstacle preventing a prohibition is removed the prohibition is revised”, “An injury can not be removed by causing similar injury”, “A private injury is borne to ward off a public injury”, “Major injury is removed by a minor injury”, “In case of conflict between the

¹ Nyazee, *Legal Maxims in Islamic law*, 115

bearing of two injuries the lighter injury is borne of the lesser”, “The easier of two actions is to be chosen”, “A change in rules with the passage of time is not to be denied”, “Repelling an injury is preferred over the securing of a benefit” and “Injury is to be repelled to the extent possible.”¹

¹ Ibid, 305.