ISLAMIC LEGAL MAXIMS
(QAWA’ID FIQHIYYAH)

BY: ASST. PROF. DR. GHAZALI JAAPAR
Second Major Maxim: Hardship begets facility (al-Mashaqqah tajlibu al-taysir)

INTRODUCTION

- Rules of law have been so designed as to be general in nature, and thus to consider all situations and all individuals, and not merely particular situations or particular persons.

- This characteristic, however, renders the application of rules in certain circumstances very difficult to people, with the result that meticulous adherence to law turns into injury and injustice.
Introduction …

- As such, Islam as a universal religion and claim to be suitable to all times and climates has in its deposits, principles that lead to solve these situations;
- This maxim, among others, is an answer to this.
- No difficulty should be left without proper mechanism to ease it.
General meaning of the maxim

Any ruling whose implementation causes hardship to a person or the action is unable to be performed by a particular person for a specific acceptable reason then there are alternatives and way out that can be resorted to in order to overcome the difficulties and hardship.
Hardship?

- Hardship in this maxim refers to hardships that surpass the normal limit and ability of a person to perform them such as hardship of travel or sickness.

- The normal hardship that accompanies the implementation of every obligatory duty such as hardship in performing certain kinds of ibadah such as fasting, hajj, jihad, the consequences of different kinds of penalty imposed by the Shariah does not fall under this maxim.
Cont’d

- This is because this kind of hardship is bearable and is within the ability of a person to tolerate it.

- In addition, there will be no harm on a person who executes this kind of injunctions of the Shariah.
Al-Ghazali said, “Everything that exceeds its limit changes into its opposite”.

Thus it becomes necessary to lighten the people’s burden and to disregard general rules in certain exceptional circumstances if their application were to result in injury and hardship.
Other equivalent principles

- The Hanafi jurists gave expression to this principle in their plea of preference (*istihsan*), while the Malikis adopted the plea of public interest (*maslahah*);

Origins of the maxim

- The Qur’an says, “He has chosen you and has not laid upon you in religion any hardship” (22: 78);
- “But he who is driven thereto by necessity neither craving nor transgressing lo! then God is forgiving, merciful” (16: 115).
- A tradition of the Prophet says, “Religion is facility. The most beloved religion to God is tolerant orthodoxy”
All these verses indicate the fact that Allah does not intend to burden human beings with all the injunctions that He revealed.

If there exists any injunction which is difficult to perform for a valid reason, then there will always be an alternative.
“You have not been sent like those who have been given hardship. Rather you have been sent as those who have been given ease or facility”.

Surely Allah SWT introduced the din as easy, full with kindness and wide. He did not make it narrow.

Aishah r.a. said: “Whenever the Messenger of Allah (saw) was given choice between two things he chose the easier one unless it was a sin.
Origin of the maxim …

- The Prophet is said to have forbidden the penalty of cutting the hands of thieves if the thefts be committed in the course of a raid.
- By analogy interpreters of law ordered the suspension of penalties and punishments in enemy territory lest the convicts join the enemy.
Applications of the maxim

- If someone enters into a rental contract and later on he has to travel for certain reasons, he is allowed to cancel the rental contract.

- Under normal circumstances, a person is not allowed to cancel this type of contract unless it is agreed between the contracting parties beforehand.

- However, forcing a person to continue paying the rental when he is not occupying the premise will amount to hardship.
Application of this maxim

The general ruling related to the implementation of punishment towards a person convicted for any crimes is that the punishment should be carried out immediately upon conviction.

However, under certain exceptional conditions, such as if the criminal is sick, the punishment can be deferred to a later time.
The Majallah art. 18 provide “Latitude should be afforded in the case of difficulty, that is to say, upon the appearance of hardship in any particular matter, latitude and indulgence must be shown.”
Taking cognizance of all these illustrations the jurists established the maxim that “hardship begets facility”.

It is one of the four pillars mentioned by al-Qadi Husayn (al-Mawardi) as supporting the structure of jurisprudence.
Meaning of Hardship (*mashaqqqah*)

- The meaning of hardship that causes the giving of facility is the hardship the occurrence of which all the legal obligation will be lifted.
- However, hardship which does not cause the lifting of religious obligations has no effect whatsoever in the giving of facility or mitigating the burden.
A situation of necessity refers to a person’s striving to safeguard his religion, life, mind, offspring or property, from perdition.

A need refers to what is essential for the attainment of good life.

Non-essentials apply to such things as “decoration or amelioration”.
Meaning of facility (taysir)

- Facility means legal mitigation on account of hardship as an exception to the general rule. Hardships refer to necessity and need and not to a non-essential interest (luxury).

- Usul al-fiqh discusses the facility under the rule of rukhsah, which refers to exception to the rules when performing it cause difficulty.
Majallah

- The *Majallah* has incorporated this principle: “Hardship begets facility; that is to say difficulty is the cause for easiness, and in time of urgency latitude must be shown.

- Many legal rules, such as loans, transfer of debts, and incapacity, are derived from this principle and the leniency and indulgence shown by jurists in their rulings are all based upon this rule” (Article 17)
Qur’anic evidence

- Allâh intends for you ease, and He does not want to make things difficult for you. [al-Baqarah 2: 187]
- Allâh burdens not a person beyond his scope. He gets reward for that (good) which he has earned, and he is punished for that (evil) which he has earned. [al-Baqarah 2: 286]
Qur’anic evidence

- Allâh wishes to lighten (the burden) for you; and man was created weak (cannot be patient to leave sexual intercourse with woman). [al-Nisa’ 4: 28]

- Allâh does not want to place you in difficulty. [al-Maidah 4: 6]
“O you who believe! When you intend to offer As-Salât (the prayer), wash your faces and your hands (forearms) up to the elbows, rub (by passing wet hands over) your heads, and (wash) your feet up to ankles. If you are in a state of Janâba (i.e. had a sexual discharge), purify yourself (bathe your whole body). But if you are ill or on a journey or any of you comes from answering the call of nature, or you have been in contact with women (i.e. sexual intercourse) and you find no water, then perform Tayammum with clean earth and rub therewith your faces and hands. Allâh does not want to place you in difficulty, but He wants to purify you, and to complete His Favour on you that you may be thankful.”
“he releases them from their heavy burdens (of Allâh's Covenant), and from the fetters (bindings) that were upon them. So those who believe in him (Muhammad SAW), honour him, help him, and follow the light (the Qur’ân) which has been sent down with him, it is they who will be successful.” [al-A’raf 7: 157]
Rukhsah

- Facility can be given by way of:
  - Omission (fasting of the weak)
  - Reduction (qasr prayer)
  - Combining (jam’ prayer)
  - Delay (fasting); prayer (jam’ ta’khir)
  - To perform in advance (jam’ taqdim)
  - Make the unlawful lawful (food consumption)
Reason of facility

- Incapacity
- Traveling
- Sickness
- Compulsion
- Forgetfulness
- Ignorance
- Difficulty and 'umum al-balwa (general difficulty)
Incapacity

- Children are not burdened with responsibility
- Women are not obliged to performed jihad or juma’at prayer
- Insane persons are exempted from any responsibility.
Sickness

- Transferring the duty of giving the testimony from another person in cases other than hudud and qisas;
- To delay the execution of hadd punishment on the sick person other than stoning;
- To perform tayammum when using water can cause further illness;
- It is permissible to seek help from other people to wash him when performing wudu’ or major ablution;
Sickness

- Performing salat in sitting position or giving sermon in the same position;
- Combining two salahs according to the view preferred by al-Nawawi, al-Subki, al-Asnawi and al-Bulqini, based on the authentic hadith and this is the preferred view;
- Coming late to the congregational prayer or Juma’at prayer while having the same reward;
Sickness

- Break the fasting of Ramadan, or not to fast from the very beginning due to old age but with the payment of fidyah;
- To prefer feeding the needy to the fasting in the case of kaffarah;
- To ask another person to perform hajj or to complete his stoning the jamrah;
Sickness

- The permissibility to use small quantity of wine or impure thing for medication;
- The permissibility to use wine to release oneself from choking;
- The permissibility to look into the aurat for treatment.
Compulsion

- Permitted to commit prohibited act
- Permitted to say the word of shirk to save life

[al-Nahl: 106] “Anyone who after accepting faith in Allah, utters unbelief, except under compulsion, his heart remaining firm in faith – ….”
Forgetfulness

- Anyone who eats or drinks while he forgets that he is fasting, he should continue with his fasting.

- S. Umar reported that the Messenger of Allah said: “My community will be forgiven for the commission of an act by mistake, forgetful or under compulsion.”
Traveling

- Transferring the duty of giving the testimony from another person in cases other than hudud and qisas;
- The permissibility of selling his friend’s property, and to safe keep its proceeds in order to deliver it to his heirs without authorization or will when the latter died while he is in traveling, and no authority available to take care the property;
- The permissibility to revoke the contract of ijarah (hire) because of traveling;
Traveling

- The distant wali (guardian) is permitted to ask the minor to marry a non-kufu’ husband respecting the view of near wali who is traveling;
- It is permissible for a *mudarib* to spend the mudarabah property for himself in traveling;
- It is permissible for a judge to write to another judge serving in the place of the defendant about the testimony of the plaintiff.
Ignorance (*al-jahl*)

- Committing mistake in prayer, such as talking, making excessive movement
  [Allowed for a limited time but must commit to learning]
General difficulty (*Umum al-balwa*)

- Dirt on the road
- Those who suffer from illness such as difficulty in controlling their urination
- *Salat al-khauf*
- The right of option for three days
- Contract of salam (deferred in delivery)
- Wearing silk for men due to illness or during the war
Categories of facility

- Obligatory to choose: to eat carrion for those who are hungry (extreme);
- Recommended: shortening the prayers; to look at a woman for engagement
- Permitted: Bay’ al-salam
- Better not do: Break the fasting for those who are not facing excessive hunger
- Abominable: shortening the prayer for traveling less than 3 marhalah.
1) *Latitude should be afforded in the case of difficulty*, that is to say, upon the appearance of hardship in any particular matter, latitude and indulgence must be shown;

2) Where a matter is narrowed, it becomes wide.

3) When the difficulty has been removed, the rule should revert to the original;
Examples:

- The option of stipulation (khiyar al-shart). There is a hadith which validates such an option for three days, that is, if the buyer wishes to reserve for himself this amount of time before rectifying a sale.

- The jurists have then reasoned that this period may be extended to weeks or even months depending on the type of goods that are bought and the need of the buyer, who may need a longer period for investigation.
Examples:

1) A debtor who accedes to his obligation, but is unable to pay, must be given time if this would enable him to clear his debt.

2) Killing a violent thief if a lesser threat or action is not likely to put stop to his evil.

3) The judge may admit the best available witnesses, even if some doubt as to their uprightness (adalah) persists, if this is deemed to facilitate justice in stressful situations.
Branches of the Maxim

1) Al-Darurat tubih al-mahzurat (Necessity renders all prohibited things permissible)

- Some ulama’ discuss this maxim under “al-darar yuzal”
- Probably it is more appropriate to discuss under mashaqqah.
- Eg. A person is allowed to consume prohibited food in order to survive under extreme situations provided no other food is available.
Origins of the maxim

Qur’an, Al-An’am 6: 119: Why should you not eat of (meats) on which Allah’s name has been pronounced, when he has explained to you in detail what is forbidden to you – except under compulsion of necessity…”

Qur’an, Al-Baqarah 2: 173: “But if one is forced by necessity, without willful disobedience, nor transgressing due limits, then he is guiltless. For Allah is Oft-forgiving Most Merciful.”
Origins…

- Al-Qur’an, al-Maidah: 3: “But if any is forced by hunger, with no inclination to transgression, Allah is indeed oft-forgiving, Most Merciful.”
Types of facilities from this maxim

n Permissible, committing it incurs no sin, such as eating dead meat, pork, taking wine due to thirsty (extreme necessity);

n Sometimes permissibility changes to obligatory, in case of refraining from it can lead to death.
Types...

2. The rule of unlawfulness remains, but allowed to be committed. Refraining from it is preferable, such as to destroy property of a Muslim, accusing Muslim for committing zina, or uttering the word of shirk.
Types...

Not allowed to do. Exception to this maxim; such as killing another person to satisfy his extreme hunger, cutting off the limb of another Muslim, committing zina, causing harm to one’s parents; Committing these acts even under compulsion will not relieve the doers from liability or sins: “Necessity does not invalidate the right of another”
In the presence of two evils the one whose injury is greater is avoided by the commission of the lesser.
Restriction of the maxim

- There are several maxims which restrict the usage of this maxim:
  - A) Necessities are estimated according to their quantity. (al-Darurah tuqaddaru biqadariha)
  - B) A thing permitted on the account of an excuse becomes unlawful on the cessation of the excuse
  - C) When the prohibition has faded away, the forbidden thing returns.
Art 24 “When a prohibition is removed the thing to which such prohibition attaches reverts to its former status of legality”

Eg: if a person is interdicted because of madness, the interdiction is lifted upon his recovery.
Third Major Maxim

Certainty is not dispelled by doubt (al-yaqin layuzalu bi al-shak)

Meaning:
Something that has been certain, cannot be replaced by mere doubt, but it will be replaced by the same certainty. This means that when something is certain (yaqin),
suddenly the doubt comes in to erase it, the rule is, that certainty remains, until it really certain to replace it. In other words, certainty and its ruling cannot be set aside with doubt.

- **Evidences:**
  
  **Al-Qur‘an:**
“But most of them follow nothing but fancy: truly fancy can be of no avail against truth. Verily God is well aware of all that they do.”

(Yunus, 10:36)

- **Al-Sunnah**

- On the authority of Abu Hurayrah (RA) who said: The Prophet SAW (may the blessings and peace of God be upon him) said:
If someone feels something in his stomach, and he doubts whether something has came out or not. He should not go out from the mosque (and stop praying) until he listens or smells something.

(Related by Muslim)
Example:

- If a person has taken ablution (wudu’) and knows that with certainty, but doubts occur to him later as to the continuity of his wudu’ the certainty prevails over doubt and his wudu’ is deemed to be intact.

- When the judge adjudicates on the basis of certainty but later it appears that he might have erred in his judgment, if his initial decision is based on clear text and consensus, it would not be subjected to review on the basis of mere probability.
Example:

- A missing person of unknown whereabouts is presumed to be alive, as this is the certainty that is known about him before his disappearance.

- The certainty here shall prevail, and no claim of his death would validate distribution of his assets among his heirs until his death is proven by clear evidence.

- A doubtful claim of his death thus not allowed to overrule what is deemed to be certain.
On the authority of Abu Said al-Khudri (RA) who said: The Prophet (SAW) said:

If someone has doubt while praying whether he has performed three or four *raka‘ah* (cycles), set aside the doubt, and continue on the number of *raka‘ah* that he certains.

(Related by Muslim)
Related Maxims/branches

1) It is a fundamental principle that a thing shall remain as it was originally. (Al-Asl baqa’ makana ala makana.)

Application:

Whoever certains on his *taharah* (purification), ablution, and doubt over it, he is considered as in the state of *taharah* or ablution.
✓ The same applies to his dress and place.
✓ Who had a late night dinner and doubted about the dawn, his fasting is lawful since he had a dinner at night.
✓ Freedom from liability is a fundamental principle.
✓ The wife’s right to maintenance which the Sharia has determined, when claims that her husband failed to maintain her, her claim will command credibility. For the norm here is her continued entitlement to maintenance for as long as she remains married to him.
✓ When one of the contracting parties claims that the contract was concluded under duress, and the other denies this, the latter claim will be upheld because absence of duress is the normal state or status quo, which can only be rebutted by evidence.

2) Originally, man has no liability.(Al-Asl bara’at al-zimmah)
   - Presumption on innocent. Man is innocent until proves guilty.
Application:

- When the prosecutor fails to submit the evidence, the defendant will be asked to take the oath, if he refused, he can not be held responsible for refusal to take the oath since he is originally innocent.

- A claims B on certain debt, B denied. A has to furnish an evidence since B originally has no liability. Unless A can prove otherwise.
In a mudarabah partnership, if there is a dispute as to whether there be profit or not, because its non-existence is the presumption, the statement of the mudarib is taken to be correct, the owner of the partnership property has need of evidence that there was profit.

In case a firm declares a particular amount of income during the year this will have to be accepted by the income tax authorities in the absence of evidence to the contrary. Business partners whether individual or banks will also be required to accept it for purpose of sharing profit. The rejection of this declaration would require convincing proof.
3) “The norm in regard to things is that of permissibility” (Al-Asl fil ashya’ al-ibahah).

Originally things are considered permissible until they are prohibited.

Permissibility is the natural state and will prevail until there is evidence to warrant a departure from that position.

- Application

All things (food, drink, dress, action) are permissible until there exist evidences to prohibit them.
Basis of this maxim:

- The Quran: “God Most High has created all in the earth for your benefit” (2:29)
- The Hadith: Whatever God has made halal is halal and whatever that he rendered haram is haram and whatever concerning which He has remained silent is forgiven”.
- We are allowed to utilized the resources of the earth for our benefit and unless something is specifically declared forbidden, it is presumed to be permissible.
This is the rule of Shafi‘I school

But for the act of worship, originally, it is prohibited until there is an evidence to command for it.

4) The speculation whose error is obvious cannot be taken into consideration (La ibrah lizann allazi yatabayyanu khatahu)

Eg. In ibadah if someone is uncertain on the purity of water used for ablution, but later appear to be clean, his ablution is valid if prayer was not yet performed, Otherwise, prayer must be repeated.
Thank you.