

**KINGDOM OF SAUDI ARABIA**  
Ministry of Higher Education  
**King Abdulaziz University**  
*Centre for Research in Islamic Economics*

**THE ECONOMIC RELEVANCE  
OF  
THE *SHARIA* MAXIMS  
(*al Qawaid al Fiqhiyah*)**

S.M. Hasanuzzaman

**Scientific Publishing Centre  
King Abdulaziz University  
Jeddah, Saudi Arabia**

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## FOREWORD

*al Qawaid* (maxims) enjoy an important place in Islamic jurisprudence. They encapsulate concepts and precepts that can help one understand details of Law as it stands. More important than that, they are capable of helping one in arriving at the appropriate ruling where no explicit law exists.

Islamic economists are frequently called upon to look into situations not covered by existing rules. They also need guide posts when charting the vast expanse of rules that are already there. They are, like all students of Islamic Law, in need of “maxims”.

The Centre was pleased to endorse Dr. S.M. Hasanuzzaman’s proposal of a study dealing exclusively with maxims relevant for economic issues. It is still more pleased to present the fruits of Dr. Hasanuzzaman’s labour to scholars. Credit goes to the author, for this is the first-ever work on this subject in English. However, it is only a beginning. In all humility it is being published to invite further deliberation and discussion. We are especially keen to discover more instances of modern applicability of these and other maxim.

Any contribution to the subject will be welcome.

Dr. Mohamed A. Elgari  
Director

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## ABSTRACT

The rules of the *Sharia* signify the set of principles determined with precision and their subordinate legal maxims which the great Muslim jurists have derived from the Quran and the *Sunna* to determine the Islamicity of any act, institution and policy. They are the systematic exposition of the spirit of the text which coincide and guide man towards different situations in human society throughout the ages. This study is an attempt at selecting the largely accepted rules (legal maxims) that are relevant to economic life of individuals and society, and applying them to contemporary situations. These maxims, if broadly classified, relate to claim and practice, doubt and certainty, eliminating detriment, the rules, of relaxation, give and take, benefit versus liability, public welfare vis-a-vis the discretion of the government, the role of custom and usage, and penalty for evasions. The study begins with a statement of limitations to restrict their liberal application.

The subject has been discussed in all major works of jurisprudence including some works dealing only with legal maxims. But it will be found that in almost all these works the scholars have confined themselves to applying these maxims either on rituals or on citing the precedents of the few economic activities which were prevalent in the medieval period. This study, while retaining this latter part, is an attempt at applying the maxims to contemporary economic activities, institutions and policies. Being perhaps the first attempt of its kind, the study does not include all the maxims that may possibly be applied on economic matters nor those which are controversial as judged by the majority of jurists.

# **THE ECONOMIC RELEVANCE OF THE SHARIA MAXIMS (*al Qawaid al Fiqhiyah*)\***

## **INTRODUCTION**

One of the proposed definitions of Islamic economics (*Journal of Research in Islamic Economics*, Vol. 1, No. 2) reads thus:

“Islamic economics is the knowledge and the application of the injunctions and the rules of the *Sharia* in regard to acquisition and disposal of the available resources for providing satisfaction to the individuals in order to enable them to perform their obligations to Allah’ and the society”

In this definition the word injunctions signifies the prescriptive and the prohibitive injunctions of the Qur’an and the *Sunna*. The rules of the *Sharia* used in the definition signify the set of principles determined with precision and their subordinate legal maxims<sup>(1)</sup> which the great Muslim jurists have derived from the Do’s and Don’ts, to ensure and to determine the Islamicity of any act, institution or policy. These rules are the systematic exposition of the spirit of the legal text (*nass*) intended to guide man towards

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\* The author is grateful to the two referees whose comments helped him a lot in revising the study.

different situations in human society throughout the ages. They provide broad contours within which policy making can be pursued and its validity judged. The legal maxims, on the other hand, are amenable to trade-offs and substitutions.

Before reproducing these rules and applying them, as far as possible, to contemporary economic situations and problems it is necessary to take care of the following precautions that are necessary to protect one from fallacious analogy, misleading over-confidence and lapse:

- (1) Recourse may be made to reasoning based on these rules only if the Qur'an and the *Sunna* do not provide guidance on an issue. Consensus of early jurists (*Ijma*) also commands priority over the legal maxims. Injunctions of the Qur'an and instructions of the holy Prophet are also to be taken as a whole. The method of deriving conclusions from them are known and should be followed. Legal decisions based on them are contained in the compilations made by great jurists and scholars.

Jurists have also recorded the judgements and the opinions that are based on the consensus (*Ijma*) of early '*u/ama*'. This leaves a large number of issues that require a decision keeping within the limits of the *Sharia*. For example, the legal opinion in regard to profit-sharing in a joint venture is that:

“Profit is to be distributed according to the agreement but loss is to be borne in proportion to capital contribution”.<sup>(2)</sup>



In this rule the ratio of the distribution of profit according to agreement can be reviewed in light of business conditions. It may be left to the partners to decide the ratios of profit-sharing or otherwise an Islamic government or central bank may fix a range within which the partners should share profits. The government may even lay down that, like losses, profit-sharing would also follow the ratio of respective capital contributions by different partners. The liability of loss, however, has to be borne strictly in proportion of capital contribution since this rule enjoys the consensus of the scholars. The government has no right to change this ratio nor can the business partners make an agreement that violates the rule. Similarly in *Bay 'sa'am* advance payment of cash is a condition that has been laid down by consensus of '*Ulama*'. Deferred payment or adjustment of price against loan is not permissible.<sup>(3)</sup> It is the consensus of '*Ulama*' that business partnerships/(*Shirka* and *Mudaraba*) are treated as legal forms of joint venture.<sup>(4)</sup> Thus there can be disagreement about forming a joint stock limited liability company, a trust, a cartel, a syndicate or a corporation but the legality of *Shirka* and *Mudaraba* may not be doubted.

- (2) It has to be fully kept in mind that all the injunctions of the *Sharia* seek to benefit human beings and eliminate harm. But those benefits and harms are not entirely left to the judgement of man. In a large number of cases those benefits and harms have been specified in the Qur'an and *Hadith* and should be made the criteria of judgement. In cases where benefits and harms are not pointed out human intellect will judge the virtue or vice of any act. Thus intellect would be guided by sound reasoning, experience, prevalent practice and sound judgement of scholars who have well understood the spirit of the *Sharia* and are scrupulous. Whether or not state trading should be allowed depends largely on experience. Should there be a difference in the wages of different workers and in

the pay-scales different categories of employees depends upon custom and prevalent practice. Should any industry be nationalized in the interest of the community depends upon sound judgement of competent persons. The *Sharia* prohibits those trades and activities that involve ignorance and uncertainty since they may lead to disputes, strife and animosity.\* It is sound judgement that will decide which forms of present day trades and activities should be prohibited and which should be allowed and protected by law.

- (3) The exigencies of the situation sometimes require that a lawful act should be disallowed for preservice of public interest. Similarly there are situations under which an unlawful act has to be tolerated during a short period of contingency. But of the two situations, allowing an unlawful act is much more serious than banning a lawful act. The safe and preferable way is to retain the essential illegality of the act even when it is unavoidable to have recourse to it under compulsion of circumstances. A government, for instance, may be compelled to pay interest on credit purchases of military hardware. Despite this compulsion, however, it should not be disregarded that payment of interest is unlawful and that serious thought should be given to eliminate that situation as quickly as possible.

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\* There may be institutions which are prohibited in the *Sharia* on account of their harmful effects on individuals or societies but they now do not seem to be harmful because of contemporary legal protection and games of chance and practice of interest. If legal protection is withdrawn these institutions would give rise to disputes and hostilities. Such practices cannot be accepted as lawful on the ground of becoming "prevalent" or "safe". The laws and rules to regulate them and to make people accustomed to them should be withdrawn and the institutions abolished even though these might be serving an apparently useful purpose of mobilizing financial resources

- (4) We are attempting here to identify only a few of the vast number of rules that the great jurists have laid down. Interpretation and application of these rules require thorough knowledge of Islamic law and jurisprudence. Emphasis on a single rule ignoring the total perspective, its scope, qualifications and limitations may often lead to a blunder. Such is the case that Muslim economists are advised to ignore these rules unless they are guided by reliable experts of *Sharia*. Nevertheless, possibility of error in interpretation and application by the author cannot be ruled out. The readers who may like to apply them ought to discuss their problems with scholars of authoritative competence on the subject rather than building upon this discussion.

With the above precautions the rules that seem to be relevant to economic policies and institutions may be briefly reproduced in the following pages. The discussion mostly contains the examples that early jurists have adduced. In some cases, however, examples of contemporary situations have also been added.

**(1) Claim and Practice:**

The Qur'an insists that Muslims should demonstrate consistency in faith and practice and in words and deeds (2:208; 24:51; 30:30; 33:70; 41:30; 61:2,3). It is this basic requirement that has led to the formation of a number of rules in the *Sharia* to determine and judge the relationship between intention and deed and between claims and acts.

The first legal maxim in this respect reads as following:

\* “*The basis of every order is the intention thereof a judgement based on an order should follow the intention and purpose of that order*”<sup>(5)</sup>.

الأمر بمقاصدها

يعني أن الحكم الذي يترتب على مقتضى ما هو المقصود من ذلك الأمر

The rule embodied in this maxim has been applied by early jurists mostly on acts of rituals,<sup>(6)</sup> but it is just as equally applicable to other spheres of activity. The liability of a person who finds somebody’s goods lying in the way and picks it up will be contingent upon the intention with which he has picked it up. If he intends to hand it over to the owner and has made it known to others he will be treated as a trustee and will not be required to indemnify the owner in case the property is destroyed while in his possession. But if he has kept it as owner he would be treated as a usurper, *Ghasib*, and will be required to indemnify the owner in case the property is destroyed.<sup>(7)</sup> The rule is also amenable to performance of visibly different acts leading to the achievement of the same object. Let us take an example from our own times. Nationalization of financial institutions in some countries may be the result of political ambitions while in some others it may aim at correcting mismanagement and regulating credit; and yet in some other countries it may be aimed at preventing foreign domination. Nationalization in socialist countries has a deep-rooted philosophical basis and underlying rationale quite different from the one which prompts nationalization of key industries in non-socialist countries. On the other hand, different actions by different

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\* Compare with CR. Tyser’s Translation (The Mejjelle, Reprint Lahore, 1967) “A judgement of an object is in accordance with what the object of an act maybe. That is to say, if a judgement shall be given about an act it will be in accordance with what the object of an act may be.”

countries by way of granting rebates on export, making available easy credit to exporters, fixation of import tariffs, laying down licencing procedures and quota restrictions in connection with imports etc., may aim at achieving a common cause of improving the balance of payments position. The relationship between intention and act could further be elaborated by the following examples:

- (A) A man makes an earning:
  - (1) for the satisfaction of his selfish urges.
  - (2) for personal consumption and demonstration effects
  - (3) for complying with the divine command to earn for the sake of survival and spending on noble causes.

In all above cases the act is the same but the intention/object is different.

- (B) A man may grow and sell grapes to the consumer or to the manufacturer of wine.
- (C) A farmer may grow poppy for sale of seeds or to prepare opium or drugs. In all these cases it is the intention that determines the legality or illegality of the act of an individual.

The same is also true in the case of public policies. Inscription of sacred words on coins may intend to symbolize a distinctive feature or the inscription may be desecration of sacred words. The former may be acceptable but the latter would be treated to be offensive.<sup>(8)</sup>

In short it is the intention of the government in carrying out an act or in making policy that matters.

The relationship between an act and intention could take the following forms.

- (1) Acts/policies that are good in themselves and are actuated by good objectives/intentions. For example, a government might seek to promote public welfare through Zakat and charity funds, donations, government revenues and just and equitable taxes.
- (2) Acts and policies that are not good in themselves but are resorted to for achieving commendable objectives. The instances that immediately come to mind are winking over smuggling in order to allow some people to earn their livelihood or mobilising funds for charity by means of games of chance and by floating interest-bearing loans and bonds.
- (3) Acts and policies that are actuated by objectionable intentions but lead to good results. An example is the nationalization of an industry or of an industrial unit with a view to harassing or black-mailing one's political opponents but the step might result in providing job security to workers, reduction in the prices of products, elimination of cut-throat competition and waste, and standardisation of the products and avoidance of incongruent growth of industry.
- (4) Objectionable intentions with objectionable policies. The example is conniving at smuggling of wine into the country for use by Muslims.\*

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\* Example of all the four forms can also be found in individual life. For example, (a) earning may be taken as compliance of Allah's command. (b) one may set up a charitable organization with unlawful earning. (c) one may perform pilgrimage with the object of smuggling merchandise. (d) one may engage in wager with a view to bribe an officer.

It will be found that form No. 1 (good acts with good objectives) is an ideal situation and has to be pursued. Form No. 4 is to be rejected outright. In Nos. 2 and 3, the government has to make amendment of policy in the former and of objective in the latter. It should be noted that the announced phraseology of the policy sometime betrays the implicit objectives. The government may announce its policy of providing a house to each shelterless family but in practice it could be unaffordable by a shelterless man. It is actual acts and policies rather than proclamations that determine the intention. This is so because of a sub-rule which governs contractual obligations.

*\*\* “Contracts are to be understood in relation to their intention and substance, not by the words and phrases used’ so a bay bi ‘l-wafa’ will be held as a mortgage”.<sup>(9)</sup>*

العبرة في العقود للمقاصد والمعاني لا للألفاظ والمباني ولذا يجري حكم .  
الرهن في البيع بالوفاء

Suretyship (*kafala*) implies coextensive liability while transfer of debt (*hawala*) implies discharge of the principal debtor. If a contract of transfer of debt (*hawala*) is made with the condition to hold the principal debtor liable in case the transferee fails to discharge the debt, contract even though termed as a contract of *hawala* will be treated as a contract of *kafala*, suretyship. Similar will be the treatment of a contract of *kafala* in case the principal debtor is discharged after contract of surety ship is signed.<sup>(10)</sup>

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\* Tyser’s translation’s “In contracts, attention is given to the objectives and meanings, and not to the words and form. Therefore, in the case of Bay Bil Vefa (mortgage) it has the effect of Rehn (Pledge).

In case a government issues a licence to set up an industry, or start a trade or import some merchandise it will not be lawful to sell the licence because the object of the licence was the authorization to set up an industry or trade or purchase of goods but not to make the licence itself an article of trade.

Likewise if the banks declare their policy of financing their clients on non-interest bases it would be necessary to do so and not merely continue the same practice and seeking to rationalize it in Islamic terms by changing the relevant nomenclature such as calling it “buy-back” or “mark-up”.

It will not be permissible for the banks to practice *Shirka* and *Mudaraba* in such a way as to ensure a fixed rate of return for the banks while the liability of bearing loss or an uncertain amount of remaining profit is transferred to the working partner.

To take another case, if the government allots plots of land to individuals with the object of providing accommodation for themselves the allotted will be violating the implicit terms of the agreement by converting it into a commercial or industrial site or by treating it as merchandise.

In case the government allots agricultural land to a farmer for the purpose of cultivation, the land will have to be used for the purpose for which it was allotted. This allotment will not confer absolute right authorizing the allottee to claim the royalty of sub-soil wealth if it has been found on exploration, nor will he be allowed to convert it into a forest or a commercial or residential area because these objectives are not covered under the terms of allotment. Authorizing the possession and use would not be stretched to imply a use which the owner does not intend to allow. Leaving land unused deprives the allottee his right over land.



## 2. Doubt and Certainty:

The basic rule that resolves the conflict between doubt and certainty is contained in the principle:\* “A belief amounting to conviction cannot be caused to disappear by a doubt”.<sup>(11)</sup>

اليقين لا يزول بالشك

The rule is based on a Quranic verses: “Most of them follow naught but conjecture. Assuredly, conjecture can by no means take the place of truth” (10:37). The Prophet (peace by upon him) also rejected entertaining doubts in the face of valid abolition (*wudu*).<sup>(12)</sup> The rule thus discards the effect of doubt that disturbs the original position. This provides guidance where discretion or personal judgement and subjective evidence are relied upon; the rule is of great significance in the event of controversy on rights and obligations of contending parties in the absence of a proof on either side. The benefit of doubt arising out of a controversial position can never go to a person on whom the onus of proof lies; thus the position of an indebted person even after his death will not be affected by doubt as to a probable discharge of debt.

Similarly a claim as to the discharge of a debt will not be rejected on the basis of presumption to the contrary. A contract between two parties will be treated as binding even though there may be reasons to doubt its *Fait Du jour*. The rule, if read with its following subrules, provides a broader canvas of its application.

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\* Tyser’s translation: “With doubt certitude does not fade”

(a) \**“As to incorporeal matters that do not prove themselves, the basic principle (presumption) is that they do not exist”*: so that if between the active partner and the financier there be a dispute as to profit, the word of the active partner will be taken, and the financier may lead evidence to prove the actual profit”

الأصل في الصفات العارضة العدم ، مثلا اذا اختلف شريكا المضاربة في حصول الربح وعدمه ، فالقول للمضارب والبيئة على رب المال لاثبات الربح

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 an evidence to the contrary. Thus doubts of the assessee’s statement cannot be unilaterally or arbitrarily sustained unless the income statement filed by the assessee is proved to be containing discrepancies. Business partners whether individual or banks will also be required to accept it for purpose of sharing the profit. The rejection of this declaration would require convincing proof.

In the case of a dispute over a defective merchandise the above sub-rule requires presumption of defect occurrence after sale unless the buyer could prove prior presence thereof.

Similarly, a partner has no right to assume a minimum rate of profit earned by his business partner and claim his share in that profit as different from the amount stated to have been actually earned by the partner. The sub-rule provides that in case the

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\* Tyser’s translation: “As to attributes which may exist or not the presumption which there is, is that they do not exist. For example, in a Mudaraba 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.

working partner declares a certain amount of profit no more will be presumed unless the contrary is proved to be a fact

(b) The above sub-rule is further strengthened by another sub-rule that \**“no reliance (should be made) on mere imagination”*.<sup>(14)</sup>

لا عبرة للتوهم

(c) \*\*Another rule is that of *“freedom from obligation: so that if one destroys the property of another, and they differ as to the extent of damage, the word of the person destroying may be taken, but the owner of the property may bring evidence to prove the excess.”*<sup>(15)</sup>

الأصل براءة الذمة ، فاذا أتلف رجل مال آخر واختلفا في مقداره يكون القول للمتلف والبينة على صاحب المال لاثبات الزيادة . -

Thus in case of loss in business a partner cannot allege wilful neglect and require the latter to indemnify him for the loss, unless he proves the contrary. Failing this proof the partner will not be personally made liable to the loss nor to indemnify the other partner. Any doubt affecting his position of freedom from liability will be *untenable*. No arbitrary judgement of the contender would be acceptable.

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\* Tyser's translation: "To imagination without foundation in fact, no weight is given".

\*\* Tyser's translation: "freedom from indebtedness is to be presumed. Therefore, if someone wastes the property of another, if they have a difference as to the amount, what the person, who committed the waste, says, is taken as right, and the owner of the property has need of proving the excess of his claim".

### 3. Eliminating Detriment

\* “No wrong, no wrong-doing.”<sup>(16)</sup> لا ضرر ولا ضرار

This most important rule of the *Sharia* is based on a *Hadith* with similar wording.<sup>(17)</sup> This guiding rule, read with its sub-rule, “\*\*”wrong is to be undone”,<sup>(18)</sup> الضرر يزال provides a guideline to regulate the entire economic and financial system in such a way that prohibits harm imposition and discourages retaliation. This basic rule is treated as a pillar of Islamic law. The rule forms the basis of the laws of option, inhibition, return of defective merchandise, pre-emption, requittal, *Hudud*,<sup>(19)</sup> compensation and indemnity, etc.<sup>(20)</sup> This also allows individuals to act unilaterally to protect themselves or others from harm. It is, therefore, necessary that an Islamic state should legislate and manage in such a way that would plug the sources of causing harm or damage. It is on this basis that the government has a right to blacklist those traders who indulge in illegal and anti-social activities such as smuggling and adulteration.

It can also take action against those influential persons who provide support or give protection to unlawful practices or to miscreants.

It is on this basis that a landlord is not allowed to eject the tenant from the cropped land even on the expiry of the period of the contract of tenancy so that the cultivator is protected from the loss of his crop. The landlord is bound to extend the period of tenancy against payment of standard rent till the crop sown by the tenant is harvested.

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\* Tyser’s translation: “Damage and retaliation by damage is not allowed.”

\*\* Tyser’s translation: “Damage is put on end to.”

In case the buyer of perishable goods absents himself without taking possession of the purchased goods the seller, in order to protect himself and the buyer from loss, has a right to unilaterally revoke the contract of sale and sell the goods to some other party lest the commodity should perish.

The application of the rule has the following prerequisites) :

- (i) \* “*Let the ancient rest on its age.*”<sup>(21)</sup> القديم يترك على قدمه

Thus it is not permissible to close an age-old thoroughfare or to prevent the livestock from grazing in jungle or public pasture which has been in use since a long time. These rights have to be guaranteed unless their exercise is harmful to general interest. This is so because of the operation of another rule that

\*\* “*A wrong is a wrong even though it be ancient.*”<sup>(22)</sup>

الضرر لا يكون قديما

Thus if an age-old canal is causing water logging and salinity it should not be allowed -to flow simply on account of previously held rights.

If a well has become dangerous to the neighbouring population it will be levelled up even if it is very old.. The government may ban cycle rickshaws in case it is found to seriously impair the health of the rickshaw-pullers or in case it has become a nuisance to traffic. The government may also ban fishing on boats in high seas on account of high risk in case motor-operated boats are available. It can also order for shifting age-old noxious workshops and factories from congested areas. Thus ancientness

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\* Tyser’s translation: “What is from time immemorial will be kept in its ancient state.”

\*\* Tyser’s translation: “Damage does not become of time immemorial.”

would not be an excuse to continue a thing that has become hazardous.

- (ii) \**“Unlawful things are to be prevented irrespective of benefit”*.<sup>(23)</sup> *درء المفسد أولى من جلب المنافع*

There may be situations in which an act might have certain benefits while it produces corruption and inequity. In such a case the *Sharia* would ban that act despite the benefits that it might apparently yield.

Trading in unlawful items and earning with unlawful ways might provide employment to a large number of persons and bring substantial revenues to the government. Nonetheless the unlawful items in trading must be eliminated since the removal of corruption has priority over acquisition of benefits - economic, social or otherwise.

Gambling or wager might be an effective source of collecting funds for philanthropic objectives; nevertheless, they have to be avoided since the acquisition of benefits is less important from the viewpoint of the *Sharia* than the avoidance of corruption.

There may be situations in which a trade, technique or a policy is not unlawful but involves both benefit and harm, such situations are governed by the following subsidiary rules:

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Tyser's translation: "The repelling of mischief (*Mafasid*) is preferred to the acquisition of benefits"

- (a) *'injury is to be resisted to the extent possible.'*<sup>(24)</sup>

الضرر يدفع بقدر الامكان

This rule provides us with a guideline to adjust our policies in those situations which, although lawful, are fraught with risk and harm.

Automation would, in the short run, lead to unemployment. Industrialization may lead to pollution of atmosphere and overcrowding. Public expenditure on economic development may have an inflationary effect.

These risks or damages would not suggest that the efforts towards economic development should be discontinued. What the rule amounts to is that such effort should be continued with a serious effort to minimise the adverse effects as far as possible. The following further rules present the practical guidelines:

- (b) *\*\*"A wrong is not avoided by another of the same kind"*.<sup>(25)</sup>

الضرر لا يزال بمثله

The law of sustenance binds a person to provide to kinsmen if they are struck by hunger and want. But enforcing this requirement on a pauper who possesses a single meal would merely transfer the harm from one person to another. This is repelling a harm with a similar harm and is not recommended.

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\* Tyser's translation: "Damage (*Darar*) is repelled as far as possible"

\*\* Tyser's translation: "A Damage (*Darar*) is not put an end to by its like"

In case a buyer gets a faulty article he is given the option to return the goods. But if the purchased article has developed similar fault while in possession of the purchaser he will lose his option to return the goods because, in order to protect himself from harm, he will also be harming the seller. This would amount to repelling a harm by causing a similar harm.

The rule also lays down an important policy criterion for the government.

It is not lawful for any government to rob a person or a group in order to provide benefit to some other person or a group.

Thus it may not provide employment to some by denying it to others.

Likewise it may not irrigate some farms by drying up similar other farm.

In short, it is not allowed to use public property for the benefit of some at the cost of others' benefit.

(c) \* *A greater injury may be avoided (enduring) a lesser injury.*<sup>(26)</sup> الضرر الأشد يزال بالضرر الأخف

The principle is that one may not ordinarily compel a well-to-do person in order to distribute his income among the have-nots. But in situations where relatives are needy the government has a right to compel him under the law of sustenance to bear their expenses, as well, because the harm that is caused by the poverty of the poor relative is more serious than the harm caused by the

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\* Tyser's translation: "Severe Damage (*Darar*) is made to disappear by a lighter damage".



compulsory distribution of a portion of well-to-do's wealth among his near relatives.

Similarly, the government may compel a resourceful debtor to redeem the debt on stipulated time.

The rule also provides some important choices in order to endure a minor harm to counteract a major harm. For example, in case a customer loses his coin in a slot, his coin may be allowed to go waste rather than to dismantle the machine which has much greater value than the coin. But in case a very expensive piece of jewellery is lost in a less expensive washing machine of a laundry its recovery, then, requires damage to the machine; the same will be effected to recover the piece of jewellery that is more expensive than the machine.<sup>(27)</sup>

In all such cases where the choice is between two harmful alternatives the one fraught with less harm may be chosen.

- (d) The rule in the case of conflict between a particular harm and a general harm is that \**“To avoid public injury, a private injury may be suffered”*.<sup>(28)</sup>

يتحمل الضرر الخاص لدفع ضرر عام

The *Sharia* is inclined to allow free market operation and, under normal conditions, is disinclined to price-regulation. But in case traders manipulate the market and reap exorbitant profits in a manner that the interest of the consumers, i.e., the general public, is seriously jeopardised the government action is justified in regulating prices or profits to protect the interests of the consumers.

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\* Tyser's translation: "To repel a. public damage (*Zarar*) a private damage is preferred.

This is so because protecting public interests is more important than securing traders' interests. By doing so the government will be preventing the general harm by tolerating a particular harm.

It is this rule of lesser evil that guides a choice among alternative uses of economic resources. The question of theory needs to be decided by competent experts who should be guided by objective rather than subjective factors in their judgement.

It is this rule which guides inquiry into population planning, nationalization, price control and rationing, ceiling on using land for fanning, interlocking of directors of business firms and a large number of similar economic issues and policies. In addition, there is another rule which contains the same spirit but is laid down in different words. It reads as \* "*The lesser of two evils is to be chosen*".<sup>(29)</sup>

يختار أهون الشرين

Thus fiscal and monetary restrictions on incomes and borrowing are undesirable, but inflationary pressure caused by monetary expansion is all the more undesirable.

Ordinarily, it is not justifiable for the government to compel someone to sell, but it is all the more unjustifiable for the seller to hoard foodgrain.

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\* Tyser's translation: "The smaller of two harms (sherr) is chosen".

Price controls are generally undesirable but exploitation of the general public by making excessive profits on necessities like bread, milk, and medicines is much more undesirable.

In the Prophet's (peace be upon him) time middlemen used to purchase articles from suppliers before they reach the town-market. This had adversely influenced free market operation and proved to be detrimental to the interest of bonafide sellers and consumers. With a view to protecting the interest of both groups the holy Prophet (peace be upon him) is reported to have disallowed the middlemen to bargain with visiting village suppliers before they reached the market.<sup>(30)</sup>

Thus the rule of choosing lesser evil gives the government wide powers to impose restrictions and controls on traders and members of other professions, and to regulate ownership and consumption.

In all the above cases the occurrence of harm is real and calculable. There may be harm which has imaginary existence and has remote probability of occurrence. Such is not to be considered as a valid ground of policy choice as the rule is that there is \* "*no reliance on mere imagination*"<sup>(31)</sup> لا عبرة للتوهم

Hence production of grape or barley may not be banned simply on the presumption that it may lead traders to manufacture wine or beer.

The sale of molasses may not be banned for fear of its misuse by some manufacturers.<sup>(32)</sup>

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\* Tyser's translation: "To imagination without foundation in fact, no weight is given".

#### 4. THE RULES OF RELAXATION:

The Quranic policy is:

Allah desireth for you ease; He desireth not hardship for you.  
(2:185)

We hath chosen you and hath not laid upon you in religion  
any hardship. (22:78)

The Prophet (peace be upon him) is also reported to have insisted on the same point on a number of occasions.<sup>(33)</sup> This is one of the most misinterpreted and most misused rules for want of clarification. Hardship for physical persons as hinted in the Quran has been defined by jurists as a situation in which acting upon an injunction of the *Sharia* causes loss of life or limb or leads one to performance of a prohibited act. Islam insists that one should earn by lawful means alone and should only consume what is permissible. These restrictions may sometime lead a person to die of starvation for want of a lawful earning or availability of a permissible esculent. When a person is - placed in such dire circumstances the Islamic law permits the use of an unlawful item.

Muslims are prohibited from shedding the blood of their brethren. Thus if an aggressor on *dar-al-Islam*\* deploys Muslim soldiers on the front line. Islamic law considers it permissible to disregard the presence of Muslims in the front line of the enemy in repelling the attack even though that would entail the killing of innocent Muslims which, as a rule, is absolutely prohibited. In both cases the primary objective of the *Sharia* is the protection of Muslims and the defence of *dar-al-Islam*. Thus the obstacle that

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\* *Dar-a-Is/am* is a territory where Islam is the supreme law, enforced by Muslim rule.

confronts the achievement of this primary objective will have to be overcome by relaxing the two conditions.

There are cases in which the Quran and/or the *Hadith* have outlined the nature of hardship which forms the basis/cause of relief. In such cases no other hardship is taken into account for claiming similar or further relief.<sup>(34)</sup> There are, however, situations where the Quran and the *Hadith* have not laid down the hardship which calls for relief or relaxation while acting upon some injunctions. It is here that experts of high calibre may determine whether this really deserves relief. An important point that needs to be emphasised here is that the object of providing relief in case of a hardship consists of facilitating a more efficient achievement of the objective of the *Sharia*. This provision of relief is motivated by the spirit of compliance rather than escapance.

Similarly, there are situations in which the Quran or the *Hadith* grant a relaxation in principle. In such cases the relief is restricted to those laid down in the text and only to that extent, but no further.

It is prohibited to sell the fruits on the tree before they come to maturity.

It is also prohibited to sell foodgrain for the same quantity and specie of foodgrain for delivery in future. Moreover, the quantity sold should be determinable and not conjectural.<sup>(35)</sup> The *Hadith* relaxes this principle to the extent of 5 *wasqs* in the case of date and grape for those cultivators who need them but they have to wait long for their own produce. Those cultivators are allowed to sell conjecturally a quantity of their expected fresh produce for a quantity of dry produce available promptly.<sup>(36)</sup> The relaxation so granted cannot be further expanded in items, quantity or in situation.

Similarly a contract to sell a commodity which one does not possess at the time of making the sale contract is not lawful.<sup>(37)</sup> *Bay' Sa'am* which technically means prompt payment for a commodity that the seller does not possess is permissible in the case of producers who need finance for inputs. If finance is not forthcoming at the time of sowing, production will cease which will be harmful for the entire community. To ensure productive activity is not hampered the cultivator is allowed to sell his expected produce against advance payment. In this particular case, however, the Prophet (peace be upon him) made a relaxation in the law of sale of goods. Thus the relaxation in the principle of "sale before possession" will remain confined to *Bay' Sa'am* only and cannot be used in other sale transactions.

In contracts of hire and commission one party agrees to pay for a benefit (hire) or a part of the proceeds (commission) which does not exist at the time of making the contract. In principle this absence of the consideration should have nullified the contract but it was the rule of universal need that such contracts were permitted.

While elaborating this application, early scholars have cited a number of examples applicable to economic life:

Hardship may be faced because of compulsion, distress and universal affliction (*umum balwa*), physical handicap, ignorance, forgetfulness, sickness and journey.<sup>(38)</sup> The relaxations that are granted in many of these situations take a variety of forms, for example:

- (a) Relaxation (*Suqut*). The Quran prescribes eight different heads of expenditure of *Zakat* proceeds (9:60). In view of practical difficulties that an Islamic state would face in allocating *Zakat* proceeds among all the heads together it has been made optional to set priorities and neglect some of the heads.

It is because of this factor or hardship that Hanafites absolve the *sahib mal* (owner of wealth) from paying *Zakat* if his Zakatable property is destroyed.

The doctors who are in favour of levying *Zakat* on all the items of land-produce exempt vegetable produce from the levy. The probable reason is the hardship in their prompt distribution among the beneficiaries in a wholesome condition because they are perishable and cannot generally be stored. Moreover, there is also hardship in managing daily collection of *Zakat* on a large number of items of vegetables which are picked up every day.

A contract of sale must precisely specify the quality and the nature of merchandise on sale; failing, the contract would be treated as void. Yet, there are certain commodities whose quality cannot be ensured without damaging them. Pomegranate or uncooked egg, for example, cannot normally be sold without skin. Removing the skin would be a damaging exposure. It is in such cases that the rule of precisely defining the content of merchandise will be relaxed.<sup>(39)</sup>

- (b) Decrease (*tanqis*). The Quran ordains Muslims to fulfil their promises / contracts (5:1; 17:34; 23:8). This does not accept nullification even though the conditions laid down become impracticable or injurious to either or both the parties. It is in view of this hardship that a large number of commercial contracts have been made revokable (*aqd qhayr lazim*).

The rate of levy of *Sadaqa* on land produce is 10% (*Ushr*). In view of hardship that a farmer has to face in irrigating his land as compared with rain-irrigated lands, the Prophet (peace be upon him) has reduced the rate of levy on irrigated produce to 5%.

- (c) Advancing (*taqdim*). *Sadaqa* or *Zakat* is due on the completion of a full year or on harvest. In case the government is in desperate need for *Zakat* funds it may request the payer to pay the same in advance of its becoming due. Advance payment of price in the case of *bay salam* and *bay istisna*\* are also examples with the object of meeting the need of the cultivator or craftsman.
- (d) Postponement (*Ta'khir*). A debtor is morally bound to settle his debt on or before the stipulated date. Default in timely discharge is not only sinful but also exposes the debtor to legal action. But there may be situations in which he is unable to pay the loan. This will require for deferment to a future date lest he should commit a sin by refusing to pay the loan.
- (e) Permission (*tarkhis*). The Quran prohibits consumption of wine, pork, and carrion. But in case water is not available one is allowed to use wine for swallowing down if he fears death from choke-throat. The reason is protection of one's life from sure death.

Similarly a man who is dying of starvation for want of permissible food is permitted to use carrion or pork in a quantity required just to save his life.

It should be noted that permission to act on this basis is restricted by time and extent in the sense that this permission is purely temporary and the quantity consumed or act rendered should be the barest minimum sufficient to save one from death or irreparable damage. This qualification is applicable in the case of

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\* *Bay' salam* is deferred sale of unpossessed goods on advance payment. *Bay' istisna* is a contract to sell an article after manufacture.



permission for all unlawful items and acts. The restriction is explained by the Quran in the following words:

“But he who is driven by necessity, neither craving nor transgressing, it is no sin for him. Lo; Allah is Forgiving, Merciful. (2: 173)”

It will be found from the above discussion that all these relaxations are amenable to the situation of necessity. But any necessity cannot qualify for relaxation. This requires defining the *Sharia* concept of necessity which plays a very important role in elaborating the main rule. The concept not only forms the basis of many subsidiary rules but also lays down the limitations within which the main rule has to operate. The rule “necessities (*ad-darurat*) justify that which may be unlawful”<sup>(40)</sup> is the most important principle that provides us with guideline to bypass the impasse in practising upon the principles of the *Sharia*. The scholars, while defining necessity, have distinguished between *darura* (compulsive necessity), and *haja* (need). For them *darura* is an indispensable necessity which, if not met, may cause severe hardship resulting in loss of life -- known or suspected. *Haja* on the other hand, is a need which when unsatisfied, does not cause hardship. It affects convenience and efficient performance of an act.\*

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\* Readers are warned not to compare this classification with contemporary economic classification of wants. The modern classification of wants into necessities, comforts and luxuries is only apparently comparable with the Muslim jurists classification of *darura*, *haja* and *tashiniyya* meaning thereby necessity, need, and refinement (Shatibi, 2, B et seq). It will however, be found that the contemporary classification in economic literature is relevant to human wants and points to the standard of consumption while the Islamic legal classification of *darura*, *haja* and *tahsiniyya* refers to the standard of performance as required in the *Sharia*. According to *fuqaha*' these refer to

(Contd.....)

In addition to the compulsive character of necessity jurists have laid down certain conditions which should be met before relaxation is sought. These conditions include:<sup>(41)</sup>

- (i) The necessity should be *in esse* but not speculative or imaginative.
- (ii) No lawful alternative should be available to the suffering person than the one which calls for relaxation.
- (iii) The solution should not infringe the inviolable rights of the people leading to homicide, apostasy, usurpation of property (*ghasb*) or indulgence in unlawful sex.<sup>(42)</sup>
- (iv) There should be a very strong justification such as the protection of life or limb, for relaxation to the extent of consuming an unlawful thing or performing an unlawful act. The relaxation is made only to the barest extent that may avert the threat to life or limb.
- (v) In view of experts it should be a genuine solution and the only one available. For example, in the case of medical treatment, only an expert physician is competent to pronounce whether liquor alone is the available remedy for disease and that nothing else would be effective .

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(from last page)

rituals, habits transactions and criminal offences. Human behaviour that comes under the category of *darura* guarantees protections of religious life, intellect, posterity and wealth. *Haja* on the other, ensures facility and ease, while *tahsiniyya* introduces refinement in the lives of men. The two concepts are thus poles apart from each other. It will be interesting to point out that some Muslim jurists (Al-Suyuti, 85) have extended the classification to five in place of three: *darura*, *haja*, *manfaa*, *zeena* and *fudul*, meaning thereby compulsive necessity, ordinary necessity, usefulness, adornment and redundance, respectively.

(vi) In addition to the above, a very important condition of permitting an act under constraint or compulsion is that

\* “*necessity does not destroy the right of others: for example one who is compelled to eat the food of another is still liable to pay the cost*”

الاضطرار لا يبطل حق الغير ، يتفرع على هذه القاعدة أنه لو اضطر انسان من  
الجوع فأكل طعام الآخر يضمن قيمته

A government may compulsorily take over the property of other persons if it is necessary for achievement of important social and national objectives but it will be required to pay fair compensation.

It is under the above conditions that relaxation is allowed in the main principle. In case, however, the hardship is not so extreme as to endanger life or limb it will no longer be termed *darura*. It may be termed as *haja* which, if faced casually or by individuals, will not justify any relaxation. However, if this *haja* has become general or universal and the entire society or a group of the society is confronted with hardship, this will call for relaxation.<sup>(45)</sup> It is because of this consideration that the Prophet (peace be upon him) has allowed such as hire, *bay salam* and *istisna* even though they run counter to the rule of the sale of non existent commodity. The object of relaxation is to overcome the impediments in the smooth economic functioning of the society. Thus the relaxations that can be made for the society on the ground of general need cannot be allowed in the case of individual needs. As an example the general principle is that a person is allowed to use only what he owns.

\* Tyser’s translation: “Constraint (*iztirar*) does not destroy the right of another. Consequently, if a man when he is hungry eats someone’s bread, the payment of its value is necessary”.

In case the entire society is made to rigidly follow this principle economic activities would be confined to those actuated by purely selfish motives and would become altogether bereft of benevolence and mutual cooperation. No entrepreneur would like to offer his skill to the saver (*mudaraba* contract). No businessman would join the other to carry on joint business (*shirka* contract), nobody would borrow for his personal and business needs, nobody would sell on deferred delivery basis (*bay salam*) or take an advance for manufacturing an article (*istisna*) or rendering a service (*ujra*). An individual can do without all such contracts but if the entire society is made to refrain from such contracts it will drastically curtail production, consumption and investment and ultimately may ruin the economic structure of the Islamic state and might undermine the economic well-being of the people. The *Sharia*, in order to remove such impediments, has legalized a number of contracts which are likely to expand the scope of economic activity and promote economic cooperation; Thus in certain cases, what is an ordinary need, *haja*, of the individuals becomes an indispensable need, *darura*, of the society.

Some scholars have classified the degrees of permission (*tarkhis*) taking into account the urgency of the situation and the benefit (*maslaha*) which the *Sharia* intends to achieve. According to them on some occasions the permission to do an unlawful act might become obligatory while at some other time it might only be recommended. While in some other situations it would simply be treated as optional. (46) These three degrees can be made equally applicable to the individual acts as well as to government policies. Applying this classification to individuals it becomes obligatory if human life is at stake. For example, if a person is dying of choke-throat but has nothing to swallow except with wine, he is obligated to use it and save his life.

The example of a recommended permission is transfer of the liability of debt (*hawala*) to a non-borrower. Optional permission lies in allowing the patient of scabies to wear silken attire which otherwise is prohibited for men.

A trustee of an orphan's or an insane's property, compelled by necessity, has the option to utilize the property to the extent of his service to the owner.

Relaxation in the case of society or government becomes obligatory when the community feels that it would suffer an irreparable loss. Payment of interest is not permissible for any Muslim including the Islamic State. But in case it is unable to make prompt payment for military hardware to prepare itself for the defence of *dar-al-Islam* it must make credit purchase even though the credit is available only at interest.

The same rule will apply in case the country is witnessing a famine and is threatened by the loss of a large number of lives. Ordinarily, the government is not allowed to compel traders to sell their goods or fix their prices. However, in the event of scarcity of bare necessities, their hoarding and mal distribution justifies the government intervention to control supply and price of the commodities concerned.

Relaxation becomes recommended when the original injunction implies some procedural difficulties. The element of *gharar* makes a contract/transaction void. But this does not affect the enforceability of an unilateral offer of gratuitous payment. It would be advisable for government to announce the award of suitable prizes on good performance by its citizens.

As a general rule a trustee is not liable for the loss of trust property. But in the case of general misbehaviour of the trustee it may be recommended to make him liable for the loss of property inflicted on account of trustee's negligence.

Normally the government has no right to exact money from the people even though as a compulsory loan. But in order to relieve inflationary pressure and restrict the expansion of money it will be desirable to bind the wealthy individuals and financial institutions to compulsorily subscribe to contractionary loans/bonds floated by the government.

Wages are to be determined by contracts freely made between the concerned parties. But in case the government finds that one of the two contracting parties is, due to superior resources or bargaining power, inclined to exploit the other party by dictating unfair terms, it is desirable for it to fix minimum / normal wages.

Similarly, there may be situations in which it would be advisable for the government to freeze wages and salaries.

There are some situation in which relaxation is simply optional but not compulsory or desirable. It would be optional for the government, for instance, to fix prices of certain commodities and rents of some categories of premises at some places and to impose credit ceilings for financial institutions.

It may also fix the crops that should be grown in some regions and may put a ban on the manufacture of certain items provided that it finds those actions to be in the interest of some particular class or community rather than the community as a whole.

It should be noted carefully that there is a basic difference between the extent of relaxation on account of *darura* and on account of *haja*. Similarly, there is a difference between relaxation for individuals and for society. Hardship falling in the category of *darura* facing individuals involves loss of life or limb, and hence rightly calls for relaxation in basic principles of the Quran or *Sunna*. On the other hand, hardship faced by society which is not of the class of *darura* but is treated as *haja* is less severe and only affects smooth and efficient performance of social institutions. It does not claim relaxation in subsidiary rules that are based on analogical reasoning of the *fuqaha*. The former relaxation is purely temporary and ends with relief in hardship. The later relaxation continues for as long as it is found beneficial to the society.<sup>(47)</sup>

While the rule\* “*necessities justify that which may be unlawful*”<sup>(48)</sup>

الضرورات تبيح المحظورات

broadens the scope of activity there are counter-rules to prevent the misuse of the permissibility and relaxation. One such counter-rule, as laid down by some jurists, reads as \*\* “*permission when exceeds will be narrowed down*”.<sup>(49)</sup>

ذكر بعضهم أن الأمر إذا ضاق اتسع وإذا اتسع ضاق  
( كلما تجاوز عن حده انعكس الى ضده )

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- \* Tyser's translation: “Necessities (darurat) make forbidden things canonically harmless”.
- \*\* Tyser's translation: “When a matter is narrow it becomes wide, that is to say, so far as hardship (Meshaqqaat) is experienced in a business, latitude and indulgence are shown.

This rule, though not discussed generally, has in fact been in practice since the earliest days of Islam\* and provides us with significant policy guidelines.

According to most of the *fuqaha* an indebted person is exempt from *Zakat* on his non apparent wealth (*mal batin*) to the extent of his liability of debt. Presently this exemption could be misused by a large number of wealthy businessmen and industrialists. In Pakistan the use of the above quoted counter-rule led the *Zakat* and *Ushr* ordinance 1980 to discriminate between different categories of debt and narrowed down the legal exemption.

The holy Prophet (peace be upon him) permitted betting on horses with the object of encouraging horse rearing which was the most important riding animal during *Jihad*. As horses are of lesser importance in modern warfare, the entire sport of racing involving stakes needs to be reviewed in the light of the counter-rule.

Indiscriminate sale of birth control devices leading to their misuse also recommends for application of the counter-rule.

The use of platinum jewellery by men which is much more expensive than the prohibited gold jewellery and of much more expensive dress than silken which is not permitted for men need to be reviewed on the same ground.

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\* It was because of this consideration that Caliph 'Umar at one stage prohibited Muslims to acquire estates in the conquered territories. On this very basis he levied a tax on horses, which were reportedly exempted by the holy Prophet, from the levy of *Zakar*. A trustee is not liable to the owner for loss of deposited goods, incurred without his negligence. But in case the rule was misused, the washermen, dyers, and goldsmiths were made liable to indemnify the owner of the loss of cloth and gold in their trust.



Similar is the case of practising a large number of financing techniques adopted by contemporary interest-free banks. Techniques of joint trading could be expanded into a number of interest-free modes of financing by banks. But in case these modes are made into a device for ensuring a fixed return, it will be necessary to impose restrictions to prevent their misuse.

The holy Prophet (peace be upon him) has allowed the right of tilling the unclaimed barren land to the one who reclaims it.<sup>(50)</sup> The point to see is if the general licence to occupy in this way would not be misused by the resourceful persons.

The situations where the relaxations of the *Sharia* seem to have been surpassed to an embarrassing extent are many and varied and need to be carefully examined by the jurists. Should the customary withdrawal of a daughter from her right to inheritance in landed property be taken on its face value?

Should an orphan be deprived of all rights in the inheritance of a grand-father?

Should mineral wealth hidden deep beneath the land be treated as a right of the person who possesses that land for cultivation?

Should state land be unconditionally leased out to individuals for very long periods?

Should all the revocable contracts and irrevocable ones be retained as they are treated *fiqh* literature?

Should “spoils of war” now left by vanquished enemy in the battle field be distributed among fighters?\*

These and such issues need to be resolved in the light of the rule “*permission when exceeds will be narrowed down*”. The second counter-rule to relaxation lies in the maxim.\*\* “*The extent of necessities limits action thereunder*”.

### الضرورات تقدر بقدرها

This maxim aims at restricting the scope of relaxation only to the extent and nature of necessity. One is not allowed to extend this relaxation to cover situations that are not really necessary. In consumption, for example, as stated above a person may be allowed to save his life by eating an unclean stuff, but this permission is restricted to the extent of eating a quantity that may save him from death but not eating to his fill.

Everybody has a right to dispose of his property in any lawful manner he chooses. As a general principle he cannot be deprived of this right. But under the rule of necessity government may freeze or

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\* In earliest Islamic period a large part of spoils of war was distributed among the soldiers who offered their services voluntarily and relied on their own weapons, training, riding animals and daily provision. The booty also generally comprised weapons, riding animals and articles of consumption in addition to jewellery and precious metals. Later on change in the voluntary character of the Muslim army did not bring about a change in our *fiqh* literature, in the fighters entitlement to booty except that land was retained for the state. The nature of fighters, weapons, warfare, and booty has now absolutely changed. This calls for a recognition of a change in the policy towards distribution of booty which, practically, is being adopted everywhere.

\*\* Tyser's translation: Necessities (*darurat*) are estimated according to their quantity". (*The Mejelle: Art 22*).

seize the properties of a defaulter who fails to discharge government claims or personal or institutional debts, in order to adjust the claims with the defaulter's frozen accounts or seized properties. But the maxim that "the extent of necessities limits action thereunder" binds a government to attach only as much property as is sufficient to adjust the claims, not more than that. It will be offensive to deprive the defaulter of all his fixed and transportable property or to stop him from exercising his normal business operations that exceed the extent of claims.

Another counter-rule that prevents the misuse of the permissibility or relaxation provides that *"What is lawful for a reason becomes invalid when such reason disappears"*<sup>(51)</sup>

### ماجاز لعذر بطل بزواله

The maxim is equally applicable to individuals as to society and government. Individuals may, sometimes, be compelled to carry on their living through a job that is not religiously clean. When they get an opportunity to join a clean profession it will not remain permissible for them to continue their unclean job.

There was a time when, in some regions scrupulous lenders were not willing to advance loans to traders unless they had an axe to grind. It was on account of this excuse that "*Ulama*" in those regions legalised *bay` bi`! wafa`* (buy-back arrangement) so that the traders had not to suffer due to lack of funds. The situation has now changed. The largest and the most organised source of finance are banks which mobilise and allocate most of national savings. Credit policy is controlled and monitored by central bank keeping

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\* Tyser's translation: "A thing permitted on account of an excuse (*Uzr*) becomes unlawful on the cessation of the excuse".

in view the overall public interest. This has discarded the refusal of scrupulous money lender for not financing the needy producer or trader. The central bank may impose controls to ensure supply of funds to all the priority sectors or neglected sectors on terms and conditions that are in consonance with the Islamic principles of finance, on the one hand, and attractive to both the parties on the other. Thus the legality of *bay 'bi'l-wafa* will no longer remain permissible.

On higher level a government has the authority to levy tax for meeting budgetary requirements for public welfare projects only when it is short of public resources. In cases such as compensation for earthquake victims, the justification would cease after rehabilitation work is completed. Special purpose taxes thus need to be spent exclusively for those purposes. Any infringement would amount to a breach of trust. As soon as the purpose is achieved, the permissibility of the tax would cease.

## 5. GIVE AND TAKE:

The rule that governs giving and taking is governed by the principle: \**“What is haram to take is haram to give”*.

ما حرم أخذه حرم اعطاؤه

As a corollary of the above, another rule is that \*\**“What is haram to do is haram to demand”*.<sup>(52)</sup>

ما حرم فعله حرم طلبه

\* Tyser's translation: “When the receiving of a thing is forbidden the giving of it is also forbidden.”

\*\* Tyser's translation: “When it is forbidden that a thing should be done, it is also forbidden that it should be asked for.”

The rule alongwith its corollary is relevant not only for financial transactions like taking of interest, and illegal gratifications etc., but also for non-financial transactions like adopting professions that are rejected in the *Sharia*. The import of these rules is clear for individuals but requires some elaboration in regard to actions and policies of the government. It may be argued that the injunctions of the *Sharia* are addressed to individuals and have no effect on corporate bodies and government. Thus what is obligatory for the Muslim individuals is not binding on Muslim governments. For example, Muslims are required to offer prayers, pay *Zakat* and perform *hajj* but the government as such is not supposed to do nor can it do all that. Similarly it is the individuals who are required to refrain from engaging in interest but not the government or other legal persons. But the argument can be rejected on ground of the following Quranic verses:

Those who, if We give them power in the land, establish worship and pay *Zakat* and enjoin virtue (*maruj*) and forbid iniquity (*munkar*) (22:41).

All hath promised such of you as believe and do good works that He will surely make them to succeed (the present rulers) in the earth even as He caused those who were before them to succeed (others); and that He will surely establish for them their religion which He hath approved for them, and will give them, in exchange safety after fear. They serve Me. They ascribe nothing as partner unto Me. Those who disbelieve henceforth, they are the miscreants. Establish worship and pay *Zakat* and obey the messenger that haply ye may find mercy. (24:55, 56).

These verses not only point out the obligatory functions of an Islamic state but also emphasise the importance of making religious norms and values prevail in the human life. An Islamic government, for obvious reasons, may not be able to perform the rites of worship. It is, however, under the obligation to establish institutions that are conducive to their performance by all those Muslims who are capable of so' doing. Moreover, its duty is to ensure that virtue, *maruf* is enjoined and vice, *munkar* is being forbidden (Q. 22:41). Hence the government may not legalize for itself an act which it prevents under its jurisdiction. This is what has been laid down in the above quoted rules. The Quran and the *Hadith* disapprove incomes arising out of interest, illegal gratification, or obscene professions, and of all those acts that are prohibited.<sup>(53)</sup> As a consequence, it is obligatory for the Islamic state to ban the sources of such incomes. In case the government bans these incomes and professions for individuals, but exempts itself from doing so, the ultimate benefit and effect of the same will directly and indirectly pass on to those individuals because the government expends its incomes on their welfare. This will be in addition to creating the undesirable moral, spiritual and social effects that such practices are likely to bring about.

It needs to be pointed out that the above mentioned rules lay down the practical scope of the unlawful items and acts. In case of lawful acts, however, a distinction has to be made between the rights and powers of the government (*Imam*) and those of individuals. It is the prerogative of the Islamic government only to levy and collect taxes but not of individuals. The (*Imam*) alone can declare *Jihad* against an enemy but not an individual. *Hudud* can be enforced only by an Islamic government, not by individuals.

## 6. THE RULES ABOUT BENEFIT VERSUS LIABILITY:

The relationship between the right to enjoy benefit from a property and the liability to incur loss due to proprietorship is governed by a number of rules that carry great significance in transactions of commercial nature. In cases where commercial nature is not involved the plain rule is that \* “*What is permissible in law cannot be a cause for liability*”<sup>(54)</sup> الجواز الشرعي ينافي الضمان

Thus if a person digs a well in his farm and somebody's animal falls in it and is drowned the owner of the well will not be liable to compensate for the loss because he is allowed to get a well dug at his farm.

Similarly it is presumed an Islamic government provides the best available transport facility to its citizens, to construct dams for irrigation and electricity, to devalue or revalue its currency in the national interest, and to carry on development projects for the benefit of its people. Now in case somebody is run over by a train due to his own fault or is killed in an air-crash, or is carried away alongwith his property by floods caused by breaches in the dam, the government will not be legally liable to compensate for the loss.

If a government expenditure on development creates inflationary pressures the government would not be bound to compensate the buyers for a fall in value of their money caused by this action.

Another rule dealing with non-commercial transactions is governed by the Prophet's (peace be upon him) saying that:

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\* Tyser's translation: “Pennision by Cannon Law excludes the liability to make compensations”.

“There is no indemnity on usufructuary who does not breach (the terms) nor on depositary who does not breach (the terms)”.<sup>(55)</sup>

ليس على المستعير غير المغل ضمان ولا على المستودع غير المغل ضمان

Liability to indemnify the aggrieved party arises in a large number of non-commercial transactions like usurpation, slander, crime, found property, agency, marriage, sustenance, etc., under conditions of infringement of one's rights and negligence of duties and responsibilities. In cases, however, where commercial considerations are involved the rule provides that \**“Damage and benefit go together. That is to say that a person who obtains the benefit of a thing, takes upon himself also the loss from it”*.<sup>(56)</sup> الغرم بالغنم

This general rule is based on the Prophet's (peace be upon him) saying:

*“Al-kharaj bi'd-daman”*<sup>(57)</sup> (*“Revenue goes with liability”*).\*

الخارج بالضمان

Another legal maxim that also has the same bearing is:

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\* Tyser's translation: “The detriment is as a return for the benefit. That is to say, the person who obtains the benefit of a thing takes upon himself also the loss from it.”

\*\* Tyser's translation: “The benefit of a thing is a return for the liability for loss from that thing”.



\* “The blessings of a thing are in proportion to the evils thereof and vice versa”.<sup>(58)</sup> النعمة بقدر النقمة

Thus when the thing used is destroyed while in the possession of the user compensation for use will be included in relation to its value; for example, if the buyer of an animal returns it because of a defect, after using it for a period, he is not liable to pay for the use of the animal, since if it had died before being returned, it would have died as his property. These rules imply that if the merchandise not yet possessed by the buyer is lost, it is the seller but not the buyer who would have to bear the loss because the former enjoys possession.

Or, in case the price of purchased goods still in possession of the seller increases, the increase will benefit the one who is deemed to be liable to suffer from an adverse fluctuation in price of the goods.

Contrarily, in a contract of *Shirka* a condition under which one party is entitled to a share in profit only while the other party is made liable to the entire loss alongwith his share in profit would contradict the above rule.\*\*

Similarly renting out one's house on the condition that the tenant would be liable to the value of the house if the same is damaged due to flood or earthquake is also a contravention of the rule because the owner who is earning its rent should also bear the loss.

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\* Tyser's translation: “The burden is in proportion to the benefit and the benefit in proportion to the burden”.

\*\* The rule is equally applicable to situations where one of the partners in a *Shirka* can exercise the right to reduce his share of liability by passing it on to the other partners, which the other partners do not enjoy. This contravenes the conditions of similarity in rights and liabilities of the contracting partners. An example of such a defective condition can be found in Participation Team Certificates (PTCs) which are in practice in the banks of Pakistan.

The depositary who is liable to return the deposit is entitled to take away the profit of the deposit if the same has been invested, even though the permission (express or implicit) has been given by the depositor.

But if the depositor lays down the condition of transferring profits to him he will have to bear the loss, when incurred, on these investments.

The depositor is liable to bear the expenditure of safe-keeping because it is he who benefits from this safety.

These rules are to be made applicable to all situations where an owner earns benefit from the property which he has transferred or intends to transfer fully or partially to others under a contract of sale, hire, lease, tenancy, agency, etc; or joins with another person with a view to earning through partnership (*Shirka* or *Mudaraba*) or sharecropping (*Muzaraa*). The rule guides us to decide whether all the partners in a partnership business will be similarly entitled to a return and liable to losses or a discrimination may be made between different partners on the basis of the time or amount of their deposits in assigning their shares in profit and loss? Can some share-holders be issued debentures or preference shares ensuring a fixed return while some others only ordinary shares whose owners are liable to bear the entire loss? Can an underwriter be treated differently in sharing the profit and loss in business? Which of the parties to a contract of leasing or hire purchase will be responsible for bearing the expenses of maintenance, repair and insurance? Can any set of terms and conditions of rent, hire or lease between a lessor and lessee be validly settled? To what extent a guarantee may be claimed from a partner, and against which kind of losses? The answers to these and similar questions should be judged on the basis of the criteria provided by the above mentioned rules.

## 7. PUBLIC WELFARE VIS-A-VIS THE DISCRETION OF THE GOVERNMENT

Respect for ownership of property is a distinctive feature of the Islamic economic system. The objective of the *Sharia* seeks, inter alia, to protect the earning and property (*mal*) of people. This objective can be achieved only when the legal system prevailing in a society prevents violation of the properties of people. The holy Prophet (peace be upon him) has emphasized this point on a number of occasions. He is reported to have said:

“It is not permissible for a man to take away the stick of his brother without the latter's Will”.<sup>(59)</sup>

“The property of a Muslim person is not lawful (for anyone) except with his free Will”.<sup>(60)</sup>

The spirit implicit in such traditions led to the formulation of the following rules in regard to the use of property by others. \* “*No one may dispose of the property of another, without the latter's permission*”.<sup>(61)</sup>

لا يجوز لأحد أن يتصرف في ملك الغير بلا اذنه

\*\* “*An order by one person to dispose of (Tasarruf) the property of another is null and void*”.<sup>(62)</sup>

الأمر بالتصرف في ملك الغير باطل

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\* Tyser's translation: “The dealing by one person with the property of another without his leave, is not lawful”.

\*\* Tyser's translation: “To make an order for the disposition or the property of another is of no effect”.

*Tasarruf* (use or disposal) may be under or without a contract. Contractual *tasarruf* would imply that a person makes an agreement or authorizes someone to sell, gift, mortgage, hire, deposit or lend another's property without the owner's consent. *Tasaruf* or use without contract implies disposing of somebody's property without his permission. An agreement made to this effect is normally deemed to be legally ineffective while he who uses it without permission is liable to indemnify the owner. Absence of a licence, or permission to make such act renders it to be null and void. This right, however, does not deny the right of lawful claimants, where this provision is incorporated in the following rule:

\* “No one may take the property of another, except for a lawful reason”.<sup>(63)</sup>

لا يجوز لأحد أن يأخذ مال أحد بلا سبب شرعي

The clause except for a lawful apparent reason makes this maxim applicable not only to authorization made by the owner but also to that laid down by law or reason. The authorization provided by law lies in levy or penalties by government which justifies the latter's claim on the owner's property or a part of it. This does not require the owner's wilful consent.

Reason sometime allows a -non-owner to dispose of the property of the owner to save him from loss or damage. The manager of a poultry farm, for instance, who is not authorized to sell the chicken, may dispose of the whole stock *for* fear of the owner's loss, let us say, due to the spread of an epidemic in case it is not possible to expeditiously obtain the permission of the owner for \_\_\_\_\_

\* Tyser's translation: “Without legal cause it is not allowed for anyone to take the property of another”.

one reason or another within time. Fire fighters may drench, destroy or dismantle inflammable erections lying in the vicinity of a burning object, without seeking the permission of the owner.

The authority of disposal on legal or rational grounds is equally enjoyed by the government under a different rule which reads as follows:

\* “*Power in respect of the people's property must be exercised for the public benefit*”.<sup>(64)</sup> التصرف على الرعاية منوط بالمصلحة

The rule confers wide powers in the government to control. or regulate the acquisition and use of a private property by the owner subject to the following conditions:

- (1) The action so taken by the government should aim at achieving public interest and general welfare; for the government officials are supposed to act on behalf of the entire ‘*Umma* for achieving public interest through maintaining justice, eliminating corruption in society and using all available resources for the sake of achieving what deems to be in the interest of the ‘*Umma* in the present and the future.<sup>(65)</sup> Thus the action by the government officials should not be in conflict with these objectives.<sup>(66)</sup>
- (2) In case the government thus needs to acquire private property it should pay just compensation to the owner because of the rule already discussed above.<sup>(67)</sup>

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\* Tyser's translation: “The exercise of control over Rayah’s that is to say, over subjects, depends on what is right to be done.”

- (3) According to some scholars the actions taken to achieve public interest should enjoy the support of the people.<sup>(68)</sup>

The above conditions of the rule require that an Islamic government should clearly define the duration of ownership and the rights of disposal.

It should so legislate as to prevent others from misuse of public or private property. The administrative machinery should be competent to enforce the law in a just and honest manner. In case the government needs to acquire the property owned by some of its citizens it should publicize the contents of the property, the purpose of acquiring it and the rate of just compensation that it intends to pay. It should be ensured that the purpose for which the property is to be acquired enjoys the support of the people who can impartially judge the validity or otherwise of the purpose for which the government intends to take over somebody's property.

## **8. THE ROLE OF CUSTOM AND USAGE ‘URF AND ADA’**

The Holy Prophet (peace be upon him) is reported to have declared:

“If we appoint anybody on a job and pay him his subsistence and he then takes anything in addition to it, this is embezzlement”.<sup>(69)</sup>

What constitutes the level of subsistence is a point that needs to be decided on the basis of custom and usage. Another *Hadith* that seems to be more specific than the above is reported by Abu Ubayd which is conveyed in the following words:

“Whoever gets an office in our administration he may marry if he is unmarried; he may get a house if he does not possess it; he may have a riding animal if he does not own any; he keep a servant if he does not have one. But if anybody hoards wealth and rears a flock of camels (with government funds) Allah shall make him rise up as the one who misappropriates or cheats us.”<sup>(70)</sup>

It will be noticed that the *Hadith* does not provide for food, clothing, medical facility and education. The probable reasons seem to be that:

- (i) Salary system as adopted later was not introduced by the Prophet (peace be upon him). Officials were often required to voluntarily perform government jobs. They were paid some sort of honorarium if the government had resources.
- (ii) Education and medical facility had not yet been made available in an organized form nor was anything charged for it if it was provided in any form.
- (iii) The two *Hadiths* can complement each other with the interpretation that the former *Hadith* provides for subsistence or for current or consumption expenditure while the latter *Hadith* lays down the extent of allowing for capital expenditure.

In all the above cases what comes out is that the nature of payment depended upon custom and usage.

The most important jobs that could be assigned to an official were *Jihad* and collection of *Zakat* and *Jizya* which called for journey to remote places and hence the necessity of a personal riding animal and an attendant. This would not necessitate providing any such facility in the case of one who performs desk

work as is quite common these days. Thus in all such matters it is the custom and usage that has a bearing on interpreting the application of the principles of the *Sharia*. The rule is that \* “*Custom is a source of judicial decisions: custom whether general or private is to be taken as a judicial decision to establish a rule of law*”.<sup>(71)</sup>

#### العادة محكمة

يعني أن العادة عامة كانت أو خاصة تجعل حكما لاثبات حكم شرعي

But the conditions that qualify custom and usage to have a decisive force are:

- (1) *The custom and usage should not be in defiance of the injunctions of the Sharia.* The practice of charging interest on loan has a universal usage, but it is prohibited and cannot be recognized.

The practice of share-cropping on the basis of fixed produce for the land-owner may be prevalent at many places but since it has been categorically prohibited by the *Sharia*, it cannot be cited as an evidence in support.

Raffle and prizes on Bonds involve *qimar* and interest and cannot be recognized.

The condition of non-refundment of earnest money in the event of repudiation of a contract or of the non-acceptance of a tender is against the spirit of the *Sharia*.

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\* Tyser's translation: “Custom is of force. That is to say, common use and custom, whether it be general or special, is made the arbitrator for the establishment of a *Shar'* judgment”.



The practice of forcing a borrower to work at sub-standard wage by virtue of his indebtedness is also exploitative and hence prohibited.

Parents taking possession of dower money (*mahr*) of the daughter without passing it on to her which is still prevalent at quite a few places is also not acceptable according to the *Sharia*.<sup>(72)</sup>

The practice of paying fixed amounts by way of bribe to officials are not permissible notwithstanding that custom and usage support them.

- (2) \* “*The custom which is most widely prevalent and operative is to be relied upon*”.<sup>(73)</sup>

### انما تعتبر العادة اذا اطردت أو غلبت

Foodgrain that was traded in the early Islamic period was measured in terms of *mudd* and *sa'*. But it is now universally weighed, but not measured. Thus all calculations whether for trading or for purposes of payment of '*Ushr* or *Sadaqa* or atonement (*kaffara*) will be made in terms of the prevalent units of weight.

Bimetallic standard has now been universally replaced by paper currency and should be validly subjected to all *Sharia* injunctions regarding receipt, payments, calculation of *Zakat* on wealth, repayment of loan, etc., in the same manner as when the bimetallic standard was prevalent.

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\* Tyser's translation: “Custom is only given effect to, when it is continuous and preponderant”.

- (3) \* *“Credence is to be given to that which is publicly and generally operative, and not to what is rare (or little seen).”*<sup>(74)</sup>

### العبرة للغالب الشائع لا للنادر

It seldom happens that some parents present to their daughters returnable gifts. But the regular custom is to provide dowry for good. In case of any dispute on the point of ownership it is the , predominant custom that will be made a precedent.<sup>(75)</sup>

Subject to the conditions laid down above the main rule *“Custom is a source of judicial decisions”* shall be made applicable. Thus \*\* *“what is a matter of common practice has the same effect as an express condition.”*<sup>(76)</sup>

### المعروف عرفا كالمشروط شرطا

In case a person authorizes another to sell something on his behalf without laying down conditions as to sale price and unit of currency, the agent will be treated to be bound by conventional rules of charging a reasonable price and prevalent currency.

An attorney would be expected to rent his principal's house, machinery or workshop on the terms and conditions customarily prevalent in the market.

An owner can sell the fruits of his trees when they mature but cannot compel the purchaser to collect them before these are customarily usable.

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\* Tyser's translation: “That is esteemed preponderant which is commonly known and not that which rarely happens”.

\*\* Tyser's translation: “A thing known by common usage is like a stipulation which has been made”.

A contractor is expected to erect the premises of a standard which is customarily acceptable.

In none of the above cases the detail understood by common usage would need to be mentioned.<sup>(77)</sup> Another rule supplementing the above lays down: \* “*Custom has force to make void a fact*”.<sup>(78)</sup>

الحقيقة تدرك بدلالة العادة

It would be pertinent to clarify at this stage that general prevalence and universality do not necessarily involve the entire population, in regard to all the customs and usages. Different groups may have their customs and usages that unconcerned people are not supposed to know. For example, merchants may have their customs which all of them respect and follow. As a result \*\* “*Matter of common practice amongst merchants has the same effect as express conditions between them*”.<sup>(79)</sup>

المعروف بين التجار كالمشروط بينهم

This will not, however, bind non-merchants to follow the custom, nor allow them to make any claim on that ground.

Gestures, signals and code words in the stock exchange/commodity exchange may amount to a contract among brokers, but this may not be an effective mode of contract for others.

Sale by auction may have different techniques at different places, and those techniques might be given the force of law.

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\* Tyser's translation: “Under the guidance of custom the true meaning is abandoned”.

\*\* Tyser's translation: “A thing known amongst merchants is as though fixed by stipulation between them”.

It is this rule that allows a government to take into account contemporary standards to determine the cost of living and subsistence level, to define the cost of production and to lay down exemption limit for taxation and fix salaries and wages.

## 9. PENALTY FOR EVASION

The Rule that \* *“He who hastens an event in order to acquire a thing before its time will be punished by being denied that thing.”*<sup>(80)</sup>

من استعجل الشيء قبل أوانه عوقب بحرمانه

provides the government with wide powers to penalize evasions \* \* and circumventions through legal devices. Thus withdrawals of deposits to evade deduction of *Zakat*, transferring or gifting of property to the successors to escape land reforms, cordoning plots of land to qualify for grant of free/low priced land to the bonafide occupants and all such acts that are aimed at taking undue advantage of legal provisions and thus defeating the purpose of a law or an institution can be set aside by the government provided that the malafide of the person is proved.

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\* Tyser's translation: "Any person who hastens a thing before its time is punished by being deprived of it."

\*\* Among the examples of such escape as cited by the jurists is a man's divorce to his wife, while on his death bed, with a view to depriving her of her share in bequest. This, according to Hanafites is *talaq firar* under which the widow is not deprived of her share. Another example is a legatee's killing of his legator to hasten the possession of his property. Such a killer is deprived of his share in the bequest (*Zarqa*, 1008-09).

## 10. LIMITATIONS

### (1) As to analogy

In the forgoing pages a number of instances have been adduced in order to show the practices and institutions which have been approved on account of necessity which otherwise could not be permissible under the ordinal) rules of the *Sharia*. This explains the legality of *mudaraba*, *muzaraa*, *bay salam*, etc. Contracts like *bay' salam* may be adduced by some to support the existing practices of mark-up or *murabaha* etc., in which the sale takes place without possessing the goods actually being transferred and without the seller even having the capacity to deliver the goods. The legal maxim that determines the *Sharia* position of such contracts is contained in the rule \* “*What is proved to be opposed to qiyas (analogy) cannot form the basis of further qiyas.*”<sup>(81)</sup>

ما ثبت علمه خلاف القياس فغيره عليه لا يقاس

In other words if a contract / transaction is legalized in defiance of the basic principles of the *Sharia* the legality of such transaction / contract shall not be adduced by way of analogy in support of a similar other contract. The contracts like *mudaraba*, *bay' salam* etc., which cannot be otherwise justified on the basis of analogy were allowed by the Prophet (peace be upon him). The legality of these transactions is of an exceptional character and hence it may not be cited as an evidence for supporting any other contracts.

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\* Tyser's translation: “A thing established contrary to legal analogy (*Qiyas*) cannot be used as an analogy for other things”.

(2) As to tricky device (*hila*)

Concluding the above discussion it seems relevant to make a hint at the technique of adopting a tricky device, *hila*, to circumvent a prohibition. The early *fuqaha*' ingeniously devised some techniques in case somebody got in trouble for want of a legal solution to his problem. Some unscrupulous persons at later times misused the technique to tread upon the prohibited path. When the financiers in some cities refuse to extend loans to traders, the *fuqaha*' devised the technique of buy-back (*bay' bi'l-wafa'*) which implied an incomplete sale transaction. The goods sold by the trader was treated as a mortgage with the purchaser and returnable after the price paid by the purchaser was returned to him. The transaction of a sale authorized the purchaser to benefit from the purchased goods which could not be permissible in the case of direct mortgage. In a lawful device, an indirect, and sometimes doubtful technique is adopted to achieve a lawful object. But if the object itself is unlawful the technique, even though legally permissible, would be condemned. Even in the case of lawful device and object the point that needs to be remembered is that such devices' are resorted to only for individuals in order to get out of an impasse and are confined to a very short period. Thus *hila* cannot be adopted as bases for the policies of states, the Muslim societies, and social institutions and become a regular *modus operandi* on a permanent basis.

## NOTES AND REFERENCES

1. Distinction should be made between principle (*as!*), rule (*qaida*) and regulation (*dabit*). Principle, in context of the subject is drivable from the Qur'an and the *Sunna*; rule, though not equally comprehensive and authoritative, covers a number of diverse acts; regulation may be based on a rule but it covers a single sphere of activity.
2. Passim. Some jurists opine that profit also should be shared in proportion to capital contribution (the *Shaft i Al-Ramali*, Vol. 5, p. 11). However this is not emphasised by majority of jurists.
3. Passim. Delay in advance payment by a couple of days or so is acceptable according to Malik (Ibn Rushd, 2, 202).
4. Passim.
5. *Majalla*, Art 2, Also Ibn Nujaym, p. 10. Here and hereafter English translation of these legal maxims as rendered by the late Mr. Justice A.R. Cornelius has been relied upon (PLD No. 1, Vol. XVIII, Journal of Supreme Court of Pakistan), unless otherwise stated. C.R. Tyser's translation is reproduced in the margin for comparison.
6. Ibn Nujaym, pp. 10-12; Suyuti p. 8, sqq.
7. *Majalla*, Arts. 769-770.
8. Ibn Nujaym 12. *Majallah*, Art. 648-49.
9. *Majalla*, Art. 3.

10. *Majalla*, Art. 648-49.
11. *Majalla*, Art. 4.
12. Ibn Nujaym, pp. 34-35.
13. *Majalla*, Art. 9.
14. *Majalla*, Art. 74.
15. *Majalla*, Art. 8.
16. *Majalla*, Art. 19.
17. Ibn Maja, *Sunan, Kitab al-Ahkam (man banaji haqqihi ...)*.
18. *Majalla*, Art. 20.
19. *Hudud* are punishments for killing, theft, fornication, dacoity, and rebellion as prescribed in the Qur'an.
20. Ibn Nujaym, 58.
21. *Majalla*, Art. 6.
22. *Majalla*, Art. 7.
23. *Majalla*, Art. 30.
24. *Majalla*, Art. 31.
25. *Majalla*, Art. 25.



26. *Majalla*, Art. 27.
27. Anyhow, in case the piece of jewellery was lost due to neglect of the owner himself the machine will not be damaged.
28. *Majalla*, Art. 26.
29. *Majalla*, Art. 29.
30. Bukhari, *Kitab-al-Buyu*, (Chapter, *hal yabi hadir li bad.*)
31. *Majalla*, Art. 74.
32. Some scholars (Az-Zuhayli, 4,35) have treated birth control as a device based on the imaginary fear of the scarcity of resources that Allah has promised (Qur'an 5:66; 7:96).
33. The holy Prophet (peace be upon him) is reported to have said: "The religion is easy" and, "Before Allah the best way is adjustment and allowance" (See Bukhari *Kitab-al-Iman*). He has also said: "Facilitate but do not make difficult". Bukhari *Kai-Im*.
34. For details of such hardships and relaxations c.f Ibn Nujaym p. 50, *sqq.*
35. For both conditions c.f. Bukhari, *Kitab-al-Buyu*, (Chapter *Bay' Zabid - - -*).
36. Bukhari, *Kitab-al-Buyu*, (Chapter *Bay Thamar ala ru'us - -*).
37. Bukhari, *Kitab-al-Buyu*, (Chapter *Bay al-taam qabl- - -*).

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38. Ibn Nujaym, 50, 51.
39. This, however, does not approve of transactions involving *gharar* (uncertainty), for example the sale of foetus in the womb which has been disapproved by the holy Prophet (peace be upon him).
40. *Majalla*, Art. 21.
41. Az-Zuhayli, 3, 516-17.
42. This is Zuhayli's list but the permissibility of the act of killing under compulsion is not supported by all the jurists. Similarly the violation of the right to one's property is not unqualified.
43. Also *Majalla*, Arts. 22, 23, 24.
44. *Majalla*, Art. 33.
45. *Majalla*, Art. 32.
46. As-Sulami, Vol. 1,9.
47. Zarqa, 2, 993.
48. *Majalla*, Art. 21.
49. Ibn Nujaym, 57, *Majalla*, Art. 18 (brief).
50. Bukhari, *Kitab al-Wikala*, (Chapter on *man ahya ardan mawatan*).
51. *Majalla*, Art. 23.

- 51A. *Majalla*, Art. 34.
52. *Majalla*, Art. 35.
53. The Qur'an: Against interest 2:275, 278; against theft and robbery 5:33,38; against wine 2:219; against obscenity 6:152; 7:33; 16:90; against breach of trust 8:27; against corruption, immorality and disorder (*fasad*), 2:27; 2:204, 205).
54. *Majalla*, Art. 91.
55. c.f. Az-Zuhayli, 5,66. The *Hadith* could not be available in well-known compilations.
56. *Majalla*, Art. 87.
57. Al-Nasai: *Sunan*. (*K-al-bay*). Also Ibn Maja: *Sunan*, Chapter on *tijarat*. Also *Majalla*, Art.85 (translation mine). The background of the *Hadith* is narrated to be a dispute between a buyer and a seller of a slave whose defect was detected after the buyer had benefited himself from his service for quite sometime. When the buyer returned the slave the seller claimed the share of slave's earning that the buyer had acquired during the period. The holy Prophet (peace be upon him) ruled that the seller had no right to claim this earning because the benefit of a thing is (a return) for the liability for loss (from that thing). This meant that had the slave caused a loss to the buyer, the latter alone would have been the sufferer and could not make the seller liable to this loss. It should be noted that the rule governs the return that is contributed by human effort but not physical growth or that produced by nature which is governed by a different rule. The translation of another *Hadith* conveying the same sense is: "*The sale of what is not in your possession is not permissible nor the profit*

*arising from something which is not in one 's charge (Ibn Maja, Chapter on “tjariat”).*

58. *Majalla*, Art. 88. according to some the rule is derivable from a *Hadith* providing that a mortgage will not be fore-closed for the one who has mortgaged it. He shall have its benefit and shall suffer its loss (c.f. Az-Zuhayli, 5,258).
59. Bayhaqi: *Sunan Kubra, Kitab-al-Ghasb, man ghasaba lawhan*
60. *Ibid.*
61. *Majalla*, Art. 96.
62. *Majalla*, Art. 95.
63. *Majalla*, Art. 97.
64. *Majalla*, Art. 58.
65. Al-Zarqa, 1044.
66. Thus every act or disposition arbitrarily made by government functionaries superceding the above mentioned objectives or any action leading to harm or corruption (*fasad*) is unlawful. Al-Zarqa has listed the following dispositions which cannot be made by officials:
  - Abrogation or pardon of punishments awarded under Qur’anic law (*hadd*) or penal law. This may encourage commission of crimes.

- Refusing personal rights of the aggrieved party or setting aside the decree of the judges.
  - Refusing the audit of public property.
  - Allowing unlawful practices on the pretext of earning revenues through taxes.
  - Appointment of dishonest or incompetent persons to public offices. (Al-Zarqa, pp. 1044-45).
67. The legal maxim is: “*Constraint does not destroy the right-Of others*”  
 ( الاضطراب لا يبطل حق الغير )
68. Abu Daud, *Sunan, Kitab al-Kharaj* . . . (Chapter *ji arzaq al ‘Ummal*).
70. Abu IUbayd, Para 651.
71. *Majalla*, Art. 36.
72. Distinction should be made between *mahr* which is the exclusive right of bride and presents and gifts that are presented to the children on different social functions and ceremonies which the parents may dispose of according to custom. (*Majalla*, Art. 876).
73. *Majalla*, Art. 41.
74. *Majalla*, Art. 41.
75. *Majalla*, Art. 69.

76. *Majalla*, Art. 43.

77. Al-Sulami,2,126-27.

78. *Majalla*, Art. 40.

79. *Majalla*, Art. 44.

80. *Majalla*, Art. 99.

81. *Majalla*, Art. 15.

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**APPENDIX****LEGAL MAXIMS USED IN THE STUDY**

الأمر بمقاصدها

العبرة في العقود للمقاصد والمعاني لا للألفاظ والمباني

اليقين لا يزول بالشك

القديم يترك على قدمه

الضرر لا يكون قديما

الأصل براءة الذمة

الأصل في الصفات العارضة العدم

لا مساغ للاجتهاد في مورد النص

ما ثبت على خلاف القياس فغيره عليه لا يقاس

المشقة تجلب التيسير

الأمر إذا ضاق اتسع (وإذا اتسع ضاق)

لا ضرر ولا ضرار

الضرر يزال .

الضرورات تبيح المحظورات

الضرورات تقدر بقدرها

ما جاز لعذر بطل بزواله

الضرر لا يزال بمثله

يتحمل الضرر الخاص لدفع ضرر عام

الضرر الأشد يزال بالضرر الأخف

إذا تعارضت مفسدتان روعي أعظمهما ضرراً بارتكاب أخفهما

يختار أهون الشرين

درء المفسد أولى من جلب المنافع

الضرر يدفع بقدر الإمكان

الحاجة تنزل منزلة الضرورة عامة أو خاصة

الاضطرار لا يبطل حق الغير

ما حرم أخذه حرم إعطاؤه

ما حرم فعله حرم طلبه

العادة محكمة

الحقيقة تدرك بدلالة العادة

العبرة للغالب الشائع لا للنادر

المعروف عرفا كالمشروط شرطا

المعروف بين التجار كالمشروط بينهم

التعين بالعرف كالتعين بالنص

التصرف على الرعية منوط بالمصلحة

لا عبرة للترحم

الخراج بالضمان

الأجر والضمان لا يجتمعان

## الغرم بالغنم

النعمة بقدر النعمة والنعمة بقدر النعمة

الجواز الشرعي ينافي الضمان

الأمر بالتصرف في ملك الغير باطل

لا يجوز لأحد أن يتصرف في ملك الغير بلا إذنه

لا يجوز لأحد أن يأخذ مال أحد بلا سبب شرعي

من استعجل الشيء قبل أوانه عوقب بحرمانه