



# **ISLAMIC LEGAL MAXIMS**

## **Certificate in Islamic Law**

### **Lecture 4**

**Asst. Prof. Dr. Ghazali bin Jaapar**



# Fourth Major Maxim

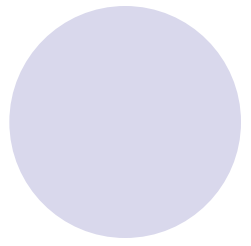
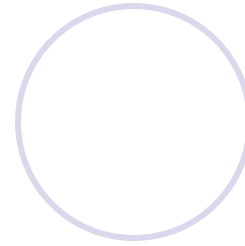
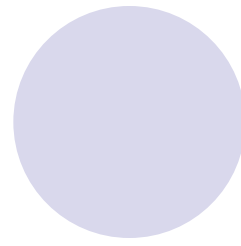
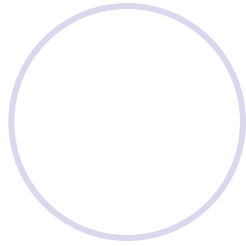
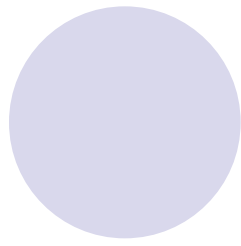
Injury must be removed (*al-darar yuzal*).

This maxim originated from the Tradition:

*La darar wala dirar* which is also considered as a maxim. It has two portions.


## Meaning:

- 1) *Darar*: To inflict harm/injury/damage to others, i.e. injury not to begin with.
- 2) *Dirar*: To retaliate on the same offender with the same injury/harm.

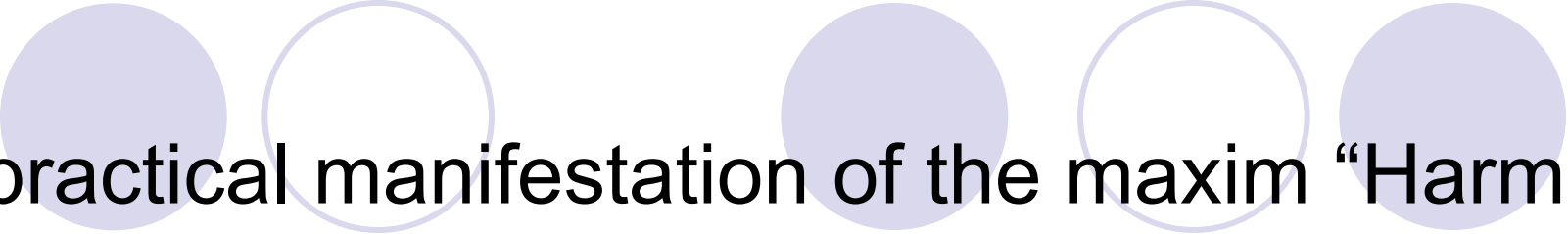


- *Darar* means inflicting harm to others absolutely; and *dirar* means inflicting harm to others not due to legally prescribed punishment.
- Allamah Ibn al-Athir said in his book *al-Nihayah*: *La darara* means: A person should not harm his friend, so that reducing some of his rights, and *al-dirar* means A person should not cause harm to another person in order to reciprocate the harm he has caused.

- ❖ This means that it is not proper for someone to cause harm on others, or his property, whether to begin or to retaliate it. It also means that when the judge wants to deliver a sentence, it should not be more or heavier than the offender did to the victim.
- ❖ This is because the harm is injustice/wrong and injustice is prohibited by all religions.

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- ❖ Harm is prohibited even when someone did the legitimate act such as A digs a well adjacent to his neighbour's wall, or A builds a wall which prevents lights or air from reaching his neighbour.
  - ❖ It is equally prohibited when someone did the illegitimate act such as to dig a hole on public road.

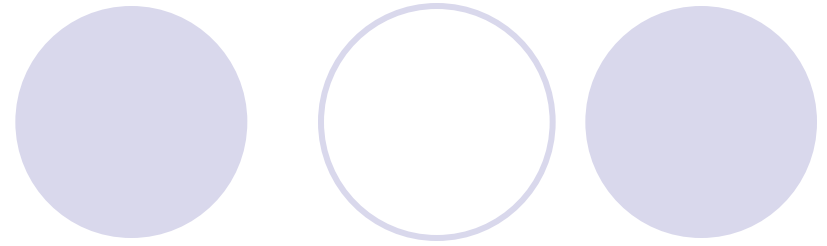
- ❖ No retaliation of harm with harm. This is the meaning of *la dirar*. The wrong party should take his case to the authority for compensation or the like.
- ❖ No self-help.
- ❖ Application
  - The buyer may return the goods to the seller if the goods is defect.

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- A practical manifestation of the maxim “Harm must be eliminated” is the validation of the option of defect (*khiyar al-‘ayb*) in Islamic law, which is designed to protect the buyer against harm.
  - Thus when A buys a car and then discovers that it is substantially defective, he has the option to revoke the contract. For there is a legal presumption under the *Shari‘ah* that the buyer concluded the contract on condition that the object of sale was not defective.


- Suspend the license of the medical practitioner.
- Stop the *sapih* (unsound mind) from transaction.
- Nullification of the marriage because of *aib* (short coming/defect).
- Do not cause harm to your client/customer i.e. heavy penalty/ unnecessary burden or the like.
- The jurists say no *ribhan fahishan* (ugly profit).
- Discussion.



# Al-Dararu Yuzal



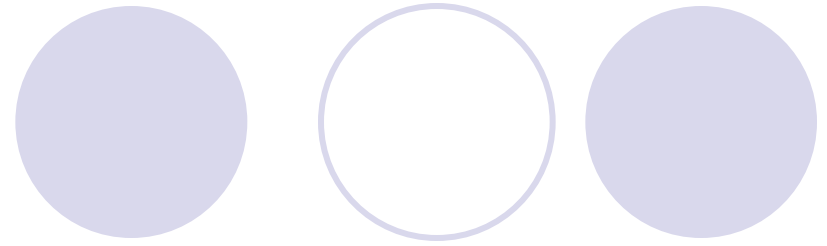
- Some of the variant renderings of the maxim *Ad-dararu yuzal* read as follows: “Harm must be eliminated but not by means of another harm” (*Ad-dararu yuzalu wa lakin la bi-darar*); and “Harm is not eliminated by another harm” (*Ad-dararu la yuzalu bid-darar*).

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- Anyone who destroys someone else property, his property should not be destroyed as a retaliation, because it could only cause greater injury without any benefit accrued from it. It is better to demand compensation in terms of equivalent values of what he has destroyed. Because by imposing compensation it gives benefit to the person his property was destroyed.

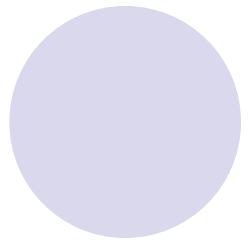
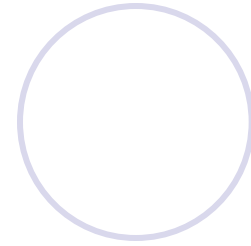
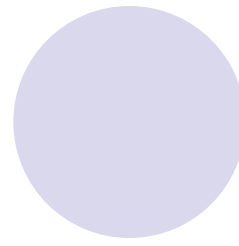
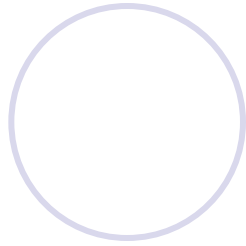
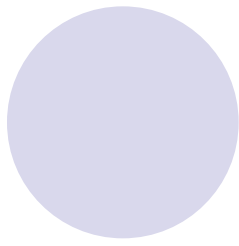
# Harm must be eliminated

- The *hadith* under discussion has provided the basis of numerous other maxims on the subject of *darar*, including for example,
- “A specific harm is tolerated in order to prevent a more general one” (*Yutahammal ad-darar al-khaas li-daf’al-darar al ‘aam*),
- “Harm is eliminated to the extent that is possible” (*Ad-dararu yudfa‘u bi-qadr al-imkaan*) and
- “A greater harm is eliminated by means of a lesser harm” (*Yuzal ad-darar al-ashaddu bid-darar al-akhaff*)

# Basis of the maxim

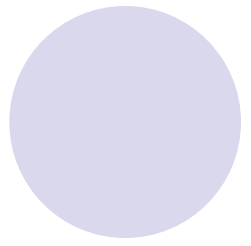
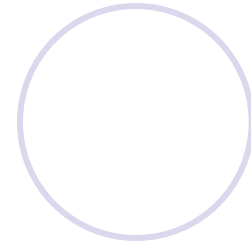
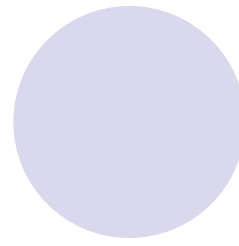
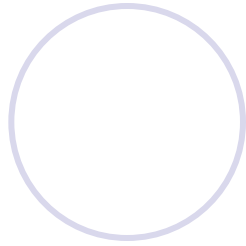
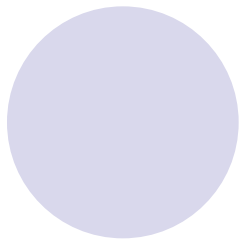


- The Messenger of Allah said: “*La darara wala dirar. Man darra darrahu Allah, waman shaqqa shaqqa Allah ‘alayhi*” [No harm should be inflicted, nor reciprocated. Anyone who cause harm, Allah will do harm to him, and anyone who cause hardship to people, Allah will do the same to him.]”

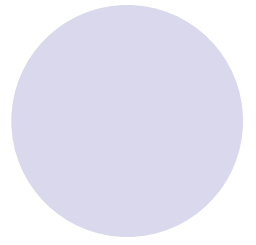
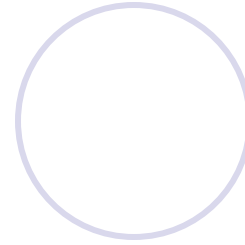
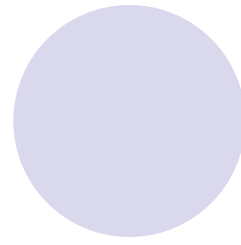
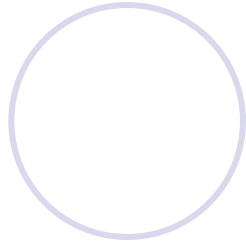
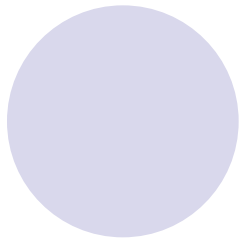


- The Qur'an says:

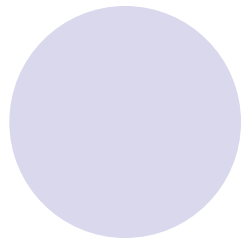
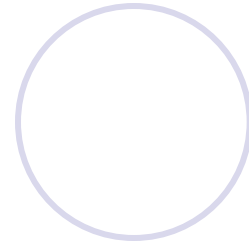
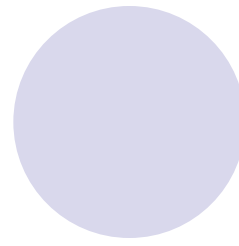
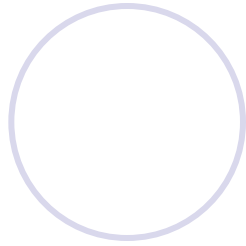
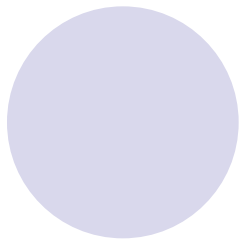
*“Annoy them not, so as to restrict them. [Al-Talaq: 6] A selfish man, because he has divorced his wife, may, in the probationary period before the divorce becomes absolute, treat her with contumely, and while giving her residence and maintenance, may so restrict it as to make her life miserable. This is forbidden. She must be provided on the same scale as he is, according to his status in life. There is still hope for reconciliation, and if not, yet the parting must be honourable.”*



- No mother shall be treated unfairly (with harm) on account of her child. Nor father on account his child. [Al-Baqarah: 233]
- When you divorce women, and they (are about to) fulfil the term of their ('iddat), either take them on equitable terms or set them free on equitable term: But do not take them back to injure them, or to take undue advantage; [Al-Baqarah: 231]



- A divorce is only permissible twice; after that the parties should either hold together on equitable terms, or separate with kindness. [Al-Baqarah: 229]



- The prohibition of darar was well established in almost all rulings. This is also evident in the following verse “Do not give your property to those weak of understanding.” [Al-Nisa’: 5]
- The author of *Taysir al-Tahrir* says: “In this verse there is indication on preventing from harm, that is in order that he will not destroy the property.”





# RELATED MAXIMS/BRANCHES.

## Choice between Conflicting Interests

❖ In the case of conflicting interests, the rule is :

“The lesser of two evils is preferred.” (art. 29)

The rule is compatible with the Tradition of ‘*Aishah* as has been discussed earlier.




❖ Many rules stem from this maxim such as:

**a) Ward off public injury**


This means that “a private injury is tolerated in order to ward off a public injury.” (art. 26)

This is because Islamic law tends to protect/preserve public interest rather than private though it cause some injury to him (private).

The text is decorated with five circles at the top. The first, third, and fifth circles are solid light purple. The second and fourth circles are white with a light purple outline. The text is black and reads: ❖ The majority of the Muslim jurists thus permit the state/authority to interfere the affairs of individuals if such interference is required by the public interest.

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For instance, the prohibition from practice of an incompetent physician, though it is harm to him, pulling down a house to prevent the spreading of fire, price control/



fixing the price of commodities in situation of monopoly or any other situation where the authority sees fit and proper.

Forcing monopolists to sell his stocks in case of need. Prohibition of transportation of some commodities from one place to the other if it is going to increase the price by so doing. Pulling down the leaning wall.

# Example:

- Should fire break out in any particular place and should any person pull down a house without the permission of the owner thereof, and the fire is stopped, such person is not liable to make good the loss occasioned thereby, provided he has pulled down the house by order of the authorities. If he pulls down the house on his own initiative, however, he must make good the loss. [Art. 919]



# Example:

- The law permits interdiction on an adult and competent person, including an ignorant physician, or a fraudulent lawyer, in order to protect the public, notwithstanding the harm this might inflict on such individuals



## **b) Ward off evil**

As you know the objective of legislation is to ward off evil and securing a benefit to people. Usually, things are mixed up between the two. In case of a conflict between the two the rule is:

“Repelling an evil is preferable to securing a benefit.” (art. 30)

- ❖ This is because Islamic law tends to give more consideration to prohibition rather than commandments.
- ❖ The Hanafi school built upon this principle the *theory of the abuse of right*. It provides that a person may be denied the exercise of his right if such exercise should result in excessive injury to others.



## Example:


- The upper storey of a building is owned in absolute ownership by A and the lower storey similarly by B. A has a right of support from B and B has a right to be protected from sun and rain. Neither may perform any act which will prejudice the other without obtaining permission from him, and neither may pull down his part of the building. [Art. 1192]




## **c) Preference for the lesser injury**

- The Majallah says: In the presence of two evils: The one whose injury is greater is avoided by the commission of the lesser (art. 28); and “severe injury is removed by lesser injury.” (art. 27)

- A killer in self-defense may be excused. Defense of human life is given preference over defense of animals or property though Islam respects them.
- Application and scale of priorities of the five objectives of al-Shar'ah.
- A classical example by the majority of Muslims jurists is that if a ship with passengers on board was in danger of capsizing, it would be legitimate to throw




overboard all goods or animals with a view to saving human life, because the evil resulting from the loss of those properties is less than the evil resulting from the loss of human lives. It is not permissible, however, under such circumstances to throw one of the passengers into the sea in order to save the others, ...(cont.)

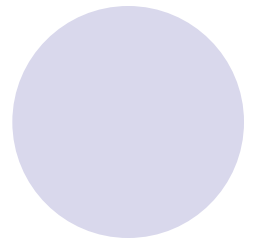
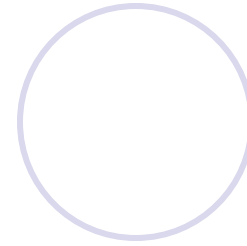
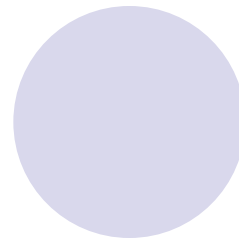
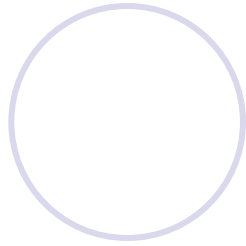
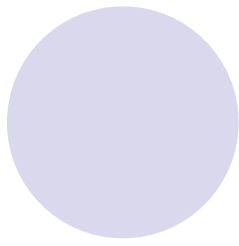
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...because all passengers are equal in inviolability(*'ismah*), and because the evil here is counter balanced by no lesser an evil. Preferential treatment therefore is unwarranted.

- It is for this reason that the majority does not accept the view of *Ibn Hazm* who says that the poor and hungry,



may fight the rich if the latter declines to feed him to avoid dying of hunger. The case will be different if the owner is also in need. For, as has been mentioned earlier, necessity will not invalidate the right of another, otherwise, it will create havoc, chaos, and the right of individuals is in the state of jeopardy.



- If the harm cannot be removed by similar harm, it can be removed by committing a lesser harm or injury.
- the jurists are of the view that to imprison the father who refuse to give maintenance to his small child; the harm that he will suffer is lesser compared to those children left without food and cloth (*nafaqah*)

# Injury cannot exist from time immemorial.”

- Anything which causes great injury to passers by on the public highway may be removed, such as low projecting balconies and resting places, even though they have been there for a long period of time. [Art. 1214]
- Waste disposal that pollutes a public passage should be stopped regardless as to how long it has been tolerated.
- Lapse of time, in other words, cannot justify tolerance of a darar.




## Fifth Major Maxim

Custom is authoritative (*al-'adah muhakkamah*)

### Meaning:

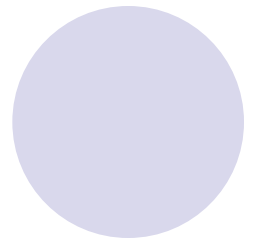
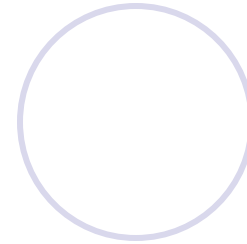
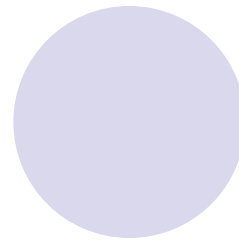
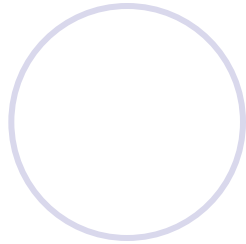
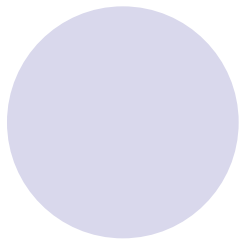
- ❖ Custom: Those securing practices which are acceptable to people of sound nature. Customs are either general and of universal acceptance or belong to a particular country or a particular generation.



‘*Urf*: Something that has widely known by individuals or society and they usually followed and respect it either by word, action or something that people abstain from it.

❖ The custom whether general or specific shall become ***reference*** in the absence of the text.

- ❖ There are six categories of *'Urf*:  
general, specific, *qawli* (words), *fi'li* (action), good and bad.
- ❖ Adat perpatih?  
inheritance, etc.
- ❖ Position of Islam *vis-à-vis* Arabic customs.
- ❖ When Islam came, some are upheld, modify, or abolish.



- The Prophet himself had on numerous occasion upheld customary practices of the Arabian society.
- The court is accordingly authorised to base its judgment on custom in matters which are not regulated by the text, provided that the custom at issue is current, predominant among people and is not in conflict with the principles of Shariah.

# Evidences:

Al-Qur'an:


Hold to forgiveness; command what is right ('Urf); but turn away from the ignorant.

(Al-A'raf; 7;199)

The Sunnah:

“What the Muslims see/think right, it is also right in the sight of God.”

(Mauquf to Ibn Abbas or Marfu')

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- ❖ This Sunnah actually serves as the evidence of consensus (*al-ijma'*). But it can be used when the consensus was based on good *'urf*.
  - ❖ *Amal ahl al-Madinah*- Imam Malik.

# Conditions/Requirements:

1. It must not be against the text;
2. It has been practiced by the society;
3. It has been practiced before the particular case is referred; and
4. No contradiction, words or actions, to the '*urf*', i.e. the parties to the contract expressly set aside the existing '*urf*'.

# Application:


- ❖ Change of the rules with the change of time.
- ❖ Abu Hanifah's view on *'adalah zahirah*.
- ❖ Imam Shafi'i's view on *al-qadim* and *al-jadid*.
- ❖ The wages on teaching the Qur'an, imam, *mu'azzin* etc.
- ❖ The lost camel. Saydina Uthman changes the rule for the "corrupt of the time".
- ❖ Changed vs. unchanged rules.



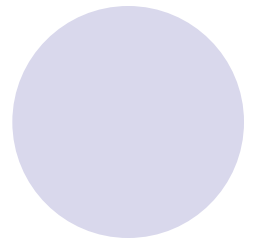
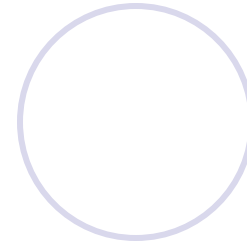
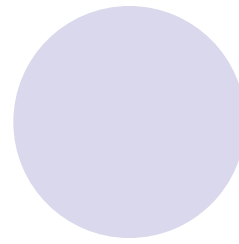
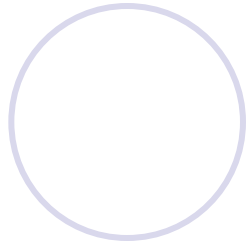
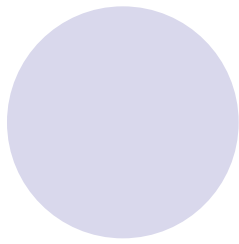


## Related Maxims/Branches


- ❖ Public usage is conclusive and action must be taken in accordance therewith.  
(art. 37);
- ❖ A matter recognized by custom is regarded as if stipulated by agreement.  
(art. 43);

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- ❖ A matter recognized as customary amongst merchants is regarded as if agreed upon among them. (art. 44); and
  - ❖ A matter established by custom is like a matter established by a legal text. (art. 45)
  - ❖ The two contracting parties have the right to option (*khiyar al-majlis*) so long as they do not separated.

( Related by two Imams)



- Similarly, when someone rents a house or a car, he should use it according to what is customary and familiar, even if the detailed manner of its use is not regulated in the contract.
- When a father of a bride gives her a wedding gift of a set of furniture, and later claims that it was a temporary loan ('ariya) and not a gift (hibah) and there is no evidence to prove the claim, credibility would be given to the prevailing custom.
- If it is found that the father customarily gave such items as gifts on such occasions, it would be counted as a gift, even if the father claimed otherwise.

- 
- ❖ Whoever revives the land (dead/uncultivated), it belongs to him.

(Related by Abu Dawud and al-Tirmidhi)

- ❖ This Tradition urges the Muslims to work and not to leave the land or any other property unutilised.



❖ God says:

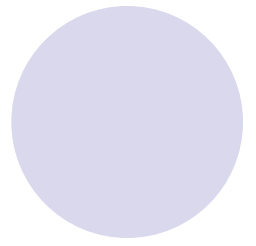
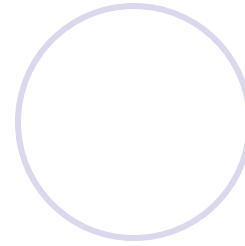
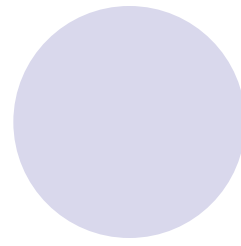
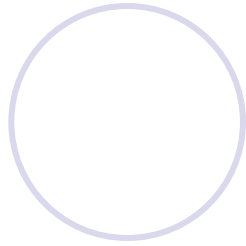
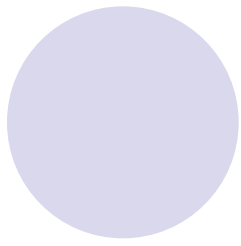
“ For divorced women maintenance  
(should be provided) on a reasonable  
(scale). This is a duty on the righteous”.

(Q.,al-Baqarah, 2:241)



## Conclusion

- 1) All the rules that can be changed are usually involves with branches and not fundamental teachings or rulings;
- 2) The prevailing view among the jurists is that it is permissible to contradict the text in the case of necessity; and
- 3) The change of the rule by *ijtihad* should not contradict the spirit of *al-Shariah*.



Thank you  
May God bless you  
See you in the final!