Framework for Harm Elimination in Light of the Islamic Legal Maxims

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Abstract

Islamic legal maxims (*qawā ʿid fiqhiyyah*) provide necessary basis for extracting legal injunctions on the unprecedented cases (*fiqh al-nawāzil*) and make it possible for the jurists to forego the need of memorizing copious *fiqh* treatises. In light of this fact, this article attempts to design a framework for harm elimination, utilizing the related legal maxims, which will be arguably of great use in developing an outlook that enables a person to tackle the many challenges he or she finds in the course of removal of harm. After explaining the concept and definition of Islamic legal maxims in general, this research surveys in detail the universal legal maxim "harm must be eliminated", covering its role and significance in the theories of *fiqh* and its scope and application in contemporary issues. Employing descriptive, analytical and critical methods, this study categorizes the legal maxims related to the harm elimination into three: (1) maxims related to prevention of harm before its occurrence, (2) maxims related to elimination of harm after it has taken place and (3) maxims related to minimization of harm if complete removal is impractical. Likewise, this research analyses the sub-maxims of harm elimination, discussing their legal bases, various purposes for which they operate, related *uṣūlī* principles and legal examples, providing at the end a flowchart that represents a sequence of five steps useful in the course of removal of harm.

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Keywords: Islamic legal maxim, harm, elimination, prevention, minimization.

Introduction

The legal maxims, containing principles and the precepts of Islamic law, including its higher objectives, are meant, among others, to give the necessary scope for jurists to handle ethical issues, to fulfill the *maqāṣid al-Sharīʿah* (higher objectives of the *Sharīʿah*)[1] and most importantly, to revive the exercise of *ijtihād* (independent legal reasoning) in the modern era.[2] As al-Qarāfī (d. 1285) pointed out, the science of legal maxims is the essential genre of Islamic legal theory given it demonstrates a jurist's competence and showcases the splendour of *fiqh*; but above all, it enables a jurist to comprehend the variety and methods of legal interpretation.[3] By employing the methods of intensive and extensive induction of the particular cases of various *fiqh* chapters, the jurists frame the legal maxims in the form of inclusive tactics and universal values that are crucial in rationalizing the stand of Islamic law on any given scenario.[4]

Similarly, the legal maxims help to rearrange, restructure and systematize scattered legal cases of *fiqh* literature under various legal themes, which has proven to be indispensable in the codification of Islamic law.[5] When legal maxims are used to pass legal judgements on ethico-legal issues, they reflect ethical values ingrained in the legislative system of Islam.[6] Furthermore, these axioms are fashioned in succinct wordings and concise themes which unveil the overall predispositions and preferences of the *Sharīʿah* when in engagement with events and exigencies. They also manifest various aspects of interpersonal relationships, such as the relationship with the self, fellow human beings, other creatures and most importantly with the Creator. Considering that the ultimate goal of the *Sharīʿah* is to obtain the benefits and ward off injuries, the legal maxims are meant to facilitate such processes.[7]

Apparently, jurists give great importance to the legal maxim of elimination of harm and consider it as one of the five universal maxims.[8] In the view of some scholars it encompasses half of *fiqh* (Islamic jurisprudence) because all of the rulings it has provided are either for beneficence and non-maleficence.[9] Therefore, an analysis of the various aspects of this maxim aids in the creation of constructive policies that deal with many issues and prevent the different kinds of harms which people face in their daily life.

In *fiqh*, all injurious acts are considered as wrongful acts. One is not restricted in the enjoyment of his/her property as long as it does not harm others. If it poses harm to others, the benefit gained from using it is measured against the harm it inflicts upon others and a decision is taken based on whether the benefit outstrips the harm or vice-versa. If it is determined that the harm it inflicts upon others is greater, the person can be barred from using it, even if it is his own property.

In addition, literature has been procured related to the legal maxims. A majority of them are in the Arabic language. Many of them deal primarily with the importance of the legal maxims in Islamic jurisprudence and their authenticity based on textual evidence. The Islamic jurists have written widely about legal maxims, ranging from the scholars of the 4th century (AH) to the contemporary jurists. A limitation of these, however, is an insufficiency in describing the methods of applying the legal maxims to specific *fiqh* cases. The scholars of all the four schools have contributed hugely to the vast amount of literature on legal maxims, however the *Ḥanafī*s became more influential and involved in the area, followed by the *Shāfiʿī*s.[10]

One important work of literature on Islamic legal maxims in the 19th century is *Majallāt al-Ahkām al- Adliyyah*. In the modern times, the works of Muḥammad Al-Rūkī's *Naẓariyyat al-Taq īd al-Fiqhī wa Atharuhā fī Ikhtilāf al-Fuqahā"*[11] Alī al-Nadwī's *al-Qawā id al-Fiqhiyyah: Mafhūmuhā, Nash'atuhā, Taṭawwuruhā, Dirāsat Mu'allafātihā, Adillatuhā, Muhimmātuhā, Taṭbīqātuhā*,[12] Ya qūb al-Bāḥusayn's *al-Qawā id al-Fiqhiyyah: al-Mabādi', al-Muqawwimāt, al-Maṣādir, al-Dalīliyyah, al-Taṭawwur*,[13] Hashim Kamali's article entitled "Legal Maxims and Other Genres of Literature in Islamic Jurisprudence"[14] talks about the historical developments and the definition of the Islamic legal maxims and their relevance and legal meaning. Ṣāliḥ al-Sadlān's *al-Qawā id al-Fiqhiyyah al-Kubrā* provides a detailed analysis on the five universal legal maxims and their sister maxims.[15] The book *Qā idat al-Mashaqqat Tajlib al-Taysīr: Dirāsah Naẓariyyah, Ta'ṣīliyyah, Taṭbīqiyyah*[16] written by al-Bāḥusayn encapsulates the importance of the legal maxim "necessity begets facility" and its application in modern day issues.

Nevertheless, the significance of the current research is that it is among the first to deal exclusively with the legal maxims related to harm elimination in an attempt to streamline them so that they can be utilized in the course

of the decision-making process. For that purpose, after explaining the major themes of Islamic legal maxims in general, this research surveys in detail the universal legal maxim "harm must be eliminated", covering its role and significance in the theories of *fiqh* and its scope in contemporary issues. After that, this research categorizes the sub-maxims related to harm elimination into three: (1) maxims related to prevention of harm before its occurrence, (2) maxims related to elimination of harm after it has taken place and (3) maxims related to minimization of harm if complete removal is impractical. Likewise, this research analyses the sub-maxims of harm elimination, discussing their legal bases, various purposes for which they operate, related uṣūlī principles and legal examples.

Concept and Definition of Legal Maxim (*Qāʿidah Fiqhiyyah*)

Definition

The lexical meaning of *qāʿidah* (plural: *qawāʿid*) is foundation, base, wall[17] and firmness[18] while as a term it means maxim, rule and principle.[19] Meanwhile, the technical meaning of *qāʿidah* is "a comprehensive principle that is applicable to all of its particulars".[20] *Fiqh* literally means comprehension and understanding[21] and technically, it refers to "the science of the derived legal rules as required from their particular sources."[22] In the term "*qāʿidah fiqhiyyah*", the word '*fiqhiyyah'* is appended to distinguish it from other maxims, and means juristic or legal. As a combination of two terms, *qawāʿid fiqhiyyah* had been defined by al-Subkī in one of the earliest definitions as "a general rule which applies to many particulars (*juz'iyyātin kathīratin*) conducive to comprehend their legal assessments".[23] Until the 14th century AH, *qāʿidah fiqhiyyah* in its technical sense has appeared infrequently in Islamic legal literature.[24]

Ya qūb al-Bāḥusayn, a contemporary jurist, came up with a marginally different definition, in which "*qāʿidah fiqhiyyah* is a comprehensive juristic theorem whose particulars are also comprehensive juristic theorems".[25] In his view, this definition distinguishes between legal maxims and particular juristic rulings. Al-Zarqā defined it as "universal juristic principles, expressed in constitutional and succinct statements, which encompass general rulings on cases that come within their subjects."[26] The abovementioned definitions portray the character and scope of the application of legal maxims. In the juristic discourses, the implication of *qāʿidah* is also articulated with other terms like *aṣl* (base),

asās (foundation), *mabda'* (principle), *qānūn* (law), *mas'alah* (case), *ḍābiṭ* (standard), *qaḍiyyah* (issue), *dalīl* (evidence), *dustūr* (rule or constitution), *ḥukm* (ruling) and so on.

In their attempt to define the essence of *qawā id*, scholars used terms like general theorem (*qaḍiyyah kulliyyah*)[27], general rule (*ḥukm kulliyy*)[28], comprehensive decree (*al-amr al-kulliyy*)[29], statements about general structures (*ibārah an ṣuwarin kulliyatin*)[30], juristic principles (*uṣūl fiqhiyyah*)[31], and maxims and principles (*uṣūl wa mabādi'*).[32] After looking into several definitions, it is obvious that all of the scholars consistently agree on the generality and universality of maxims. However, when it comes to the scope of the application of legal maxims, jurists tend to disagree whether it is comprehensive (*kulliyy*) or preponderant (*aghlabī*). Considering the original position of the legal maxim, it is comprehensive[33] while taking the exceptions into account, it is preponderant.[34] Many scholars[35] described it as comprehensive because the exceptions often come under any of the other maxims[36], and the predominant matters are given in *fiqh* the status of definite things (*qaṭ ʿiyy*).[37] To use *qā idah* as comprehensive seems more appropriate, in the opinion of the researchers, because it conforms to the basic characteristics of the notion of *qā idah* and a few exceptions cannot undermine its state of generality.

Unlike the normal legal ruling (*ḥukm juz'iyy*)[38] which is applicable to a single issue, the legal maxim is applicable to many issues. In line of the above fact, some of the basic features of maxims are identified as comprehensiveness (*istīʿāb*), constancy (*iṭṭirād*), abstractness (*tajrīd*) and terseness (*iḥkām al-ṣiyāghah*).[39]

Legal Maxim as Basis of Ruling

In *qawāʿid* discourses, there is an ongoing debate regarding the issue whether the legal maxims are valid enough to be used as evidence or a base of juristic rulings. Some tend to regard the legal maxims as mere templates of the particular rulings which are predominant but not comprehensive or definite (*qaṭʿiyy*). That quality makes them unqualified to be taken as the evidence.[40] Other scholars assert that the maxims can be used as evidence and believe they are comprehensive and more preferable than analogy in terms of qualification.[41] In addition, in the view of al-Qarāfī, the juristic decision is to be reversed if it goes opposite of a commonly agreed

maxim.[42] Moreover, the grade of some maxims is definitely high as they are derived from the textual evidences.

If we study the view which argues that legal maxims are not qualified to be used as evidence, we can find mainly three reasons behind this position. Firstly, legal maxims are predominant and not comprehensive, thus there are exceptions to the application of maxims. We cannot overlook the possibility that the particular case we are dealing with is among the exceptions. Secondly, many of the maxims are obtained as a result of the inductive process of addressing several particular cases while some others are outputs of independent reasoning (*ijtihād*). In addition, some of them are not reliable enough to be given full confidence. Therefore, the derivation of legal rules based on maxims might fall short in terms of certainty, and it may be regarded as a sort of rashness. Thirdly, the legal maxims are derived after the induction of several legal cases. Thus, it is not logical to use the fruit of an action as its basis. [43]

Regarding the first reason to not qualify legal maxims as evidence, i.e. the exceptions of legal maxims, the basis of this argument emanates from the fact that the early jurists rarely rendered discussions on the conditions of the legal maxims as well as the conditions of their application. If we study further about the exception cases, we realize that they are not part of that specific maxim, rather due to some reasons they come under other maxims; thus, they are exceptions at a peripheral view and they are cases under other maxims in reality. As far as the certainty of legal maxims are concerned, the *ulamā'* did not criticize the usage of inductive outputs as comprehensive maxims and approved them as eligible for expounding the *Sharī ah* rulings.[44] The third reason is valid only if the maxim is used to derive rulings on particular cases from which this maxim is formulated and if otherwise there is nothing illogical.

The researchers favour the second opinion that legal maxims are qualified as evidence and a basis for juristic rulings because of the strength of its evidence and its conformity with the *maqāṣid* and public benefit (*maṣāliḥ*) of the people. In addition, the earlier scholars applied them as evidence and in the modern times there is a pressing need to rely on them as a '*Sharī ah* framework' to deal with modern issues. However, the application has to be according to certain conditions[45], which are as follows:

1. The maxims should have their bases in the Quran and Sunnah and correspond to textual statements. In addition, the legal maxims are sufficient to be taken as evidence if they are extracted through proper *ijtihād* or induction which provides a certainty or predominance.
2. In dealing with particular cases, there should not be any contradiction between the legal maxims and, the Quran and Sunnah. If they clash with each other, the maxims are considered to be unqualified to be relied upon in that particular situation.
3. The inference by *qā idah* is only allowed if the case in question is corresponding to and identical with the maxim. Otherwise the maxim is not applicable.
4. The jurist should be qualified for *ijtihād*.

The Universal Legal Maxim "Harm Must Be Eliminated"

Through surveying traditional texts of the four *sunnī madhāhib*, we can find many cases in which jurists analysed the definitions of harm (*ḍarar*).[46] Among many, the major indications of *ḍarar* could be summarized as opposite of benefit[47], infliction of harm on others[48] and infringement of others' rights.[49] Notably, some other scholars also viewed harm as including the infliction of emotional distress for the reason that pain is a common element in all sorts of harm.[50] Incorporating the various implications of harm, the contemporary scholar Aḥmad Mawāfī defined it as "the violation of the legitimate interests (*maṣlaḥah mashrū ah*) of one's own or of others caused by the infringement of rights, abuse of power or due to negligence on the part of others".[51]

Not all harms are worth consideration, rather jurists have posited certain conditions to decide whether an action or inaction is a considerable harm or not. The major conditions are as follows:

1. The harm should be real.[52]
2. The harm should be excessive (*fāḥish*).[53]
3. The infliction should occur as a result of infringement or arbitrariness or negligence.[54]
4. Infliction of the harm is on a legitimate benefit owned by the right owner.[55]

The *Sharīʿah* posits restrictions when people engage in activities or participate in procedures that impose risks on others. In Islamic law, the command of harm elimination falls in the category of being obligatory, and it is actualized by its prevention before its occurrence and by its elimination after its occurrence. The 'no harm' maxim embraces mainly four elements; (1) non-infliction of injury, (2) prevention of harm, (3) removal of harm and (4) minimization of harm.[56] The mentioned hierarchical order is notable in handling conflicting interests.[57] Accordingly, for example, killing a dying patient is not an ethical choice to benefit or obtain his or her organs for the purpose of saving others, as per the maxim "repulsion of an evil is preferable than achieving a benefit".[58] Likewise, if somebody damages the property of someone else, the harmed party has no right to damage the same property of the wrongdoer, because it spreads harms. He can instead hold the wrongdoer liable for loss and injury. On the other hand, when someone transgresses the limits set by the law, he will be punished by retaliation or compensation even though these punishments could cause personal harms, which is according to the maxim "inflicting private harms to prevent public harms is permitted".[59]

Prohibition of something results from the *Sharīʿah*'s recognition of its harmful effects. As a general rule of thumb, whatever is prohibited by the *Sharīʿah* is inevitably considered as harmful. A widely accepted theory in *fiqh* is that harmful situations result from the performing of that which is prohibited and from the negligence of performing that which is commanded.[60] How does the *Sharīʿah* recognize different levels of harms and how do people determine the degree of severity of different harms in order to deal with them appropriately? It is based on the text of the Quran and the Sunnah. For example, the seven major sins are considered as causing significant harms.

The 'no harm' maxim is embedded with several distinct obligations and priorities; they change according to the situation. In Islamic law, the duty of non-maleficence tends to be preferred to beneficence in many occasions. However, there are situations in which the opposite is also applicable.

The maxim of harm elimination governs innumerable juristic cases and scenarios. Some of them include the option to return an object of sale to the seller due to a defect in it (*khiyār bi al-ghayb*)[61], retaliation (*qiṣāṣ*), various forms of interdiction for consumer protection (*ḥajr*), liability for destruction (*ḍamān*), right of pre-emption in sale transactions for the safety

of the neighbour and the partner (*shuf ah*), atonement fee (*kaffārah*), annulment of marriage contract due to physical deficiencies such as impotency and financial shortcomings such as bankruptcy and so on.[62]

Though the maxim in its final wording, which is *al-ḍarar yuzāl*[63] (harm must be eliminated) is not found in earlier *fiqh* texts, the jurists had explicated that the 'avoidance of harm' is a justification for allowing certain acts in their legal rulings.[64] According to some reports, al-Qāḍī Ḥusayn al-Marrūzī is the first known person to formulate this maxim in its final wordings.[65]

One of the most important evidences for the maxim on harm elimination is the ḥadīth which states that "no harm shall be inflicted (*ḍarar*) or reciprocated (*ḍirār*)".[66] This ḥadīth enables us to draw multiple interpretations with living relevance to modern times. Regarding the difference between '*ḍarar*' and '*ḍirār*', some scholars are of the view that the latter is an emphasis of the former while a significant number of scholars hold that the latter has a different meaning altogether because giving it a new meaning is preferred over emphasizing on an already existing meaning. The diverse range of scholarly views could be classified under one of the following interpretations. (1) Both are synonyms and the latter is corroborative with the former.[67] (2) *Ḍarar* refers to a single kind of harm while *ḍirār* refers to multiple kinds of harms.[68] (3) *Ḍarar* refers to initiating harm while *ḍirār* refers to reciprocating with harm.[69] (4) *Ḍarar* is infliction of harm without intention while *ḍirār* is that with intention.[70] (5) *Ḍarar* is used as a noun while *ḍirār* is used as a verb,[71] and (6) *ḍarar* is used when harm begets benefit and *ḍirār* is used when neither the oppressor nor the victim gains benefit out of the infliction of the harm.[72]

Two phrases are most often cited when referring to harm elimination. They are (1) "Harms must be eliminated" [73] and (2) "No harm shall be inflicted or reciprocated".[74] Some scholars refer to "Harms must be eliminated" as the main maxim on harm elimination and consider the ḥadīth "No harm shall be inflicted or reciprocated" as legal evidence for it. Other scholars consider the ḥadith as the universal maxim on harm elimination and the other phrase as its sub-maxim, because the ḥadith serves as a maxim as well as the evidence, simultaneously. Furthermore, the ḥadith prohibits harm in its entirety and in all of its forms by using the terms infliction and reciprocation. Though both statements prohibit the infliction of harm in all of its forms, a closer scrutiny of these two phrases would reveal that the

ḥadith emphasizes on the prevention of the harm before its occurrence while the other phrase refers to the removal of the harm after its infliction.[75]

This maxim ultimately stresses the aspect that human beings are highly honoured by their Creator in a way that elevates them from being illegitimately inflicted of any harm.[76] Negligence in taking steps to remove an existing harm implies an implicit endorsement of the infliction of the harm, which is incontrovertibly prohibited in Islam.

Furthermore, al-Shaṭibī has categorized the legitimate acts, using the benchmark of its involvement of harm, into eight types and explained their legal rulings; the details are as follows.[77] Obviously, (1) the legally valid and non-maleficent act, which is meant for either achieving benefit or preventing evil, is allowed categorically. However, if it involves harming others, the intention of the doer becomes the deciding factor, (2) so if the doer has the intention of inflicting harm, it is prohibited unless he is compelled to do so and he has no other way to deal with the situation. Afterwards, if the doer had no intention of inflicting harm, the type of harm that can befall others becomes crucial. (3) So if it affects the general public, it is prohibited and (4) if it is a private harm and the doer is doing it out of self-defense, then it is allowed. If it is not for self-defense, then the ruling is dependent on the probability of the occurrence of the harm; (5) if the result of the conduct is certainly harm, it is prohibited, (6) if the result is rarely harm, it is allowed. Finally, if it is probable, the degree of probability of harm is regarded; (7) if it is of high probability, it is prohibited according to sound opinion and (8) if it is of low probability; it is allowed according to the Shāfi ī *madhhab* and prohibited according to the Mālikī *madhhab*.

The sub-maxims (also called sister maxims or auxiliary maxims) are classified based on the functions they perform into restrictive maxims, emphasizer maxims, and representatives of an aspect of the main maxim. Having studied the maxims relevant to harm elimination, the researchers divide all maxims concerning harm elimination into three types. It is worth mentioning here that some maxims fall into more than one category and they are employed according to the need and the context. The categories are as follows:

1. Maxims relevant to the prevention of harms before their occurrence.
2. Maxims relevant to the elimination of harms after their occurrence.
3. Maxims relevant to the minimization of harms in unavoidable circumstances.

Sub-Maxims related to the Prevention of Harm before Occurrence

In the light of texts from the Quran and Prophetic tradition, the earlier jurists paid considerable attention to the aspect of prevention of harm and extracted many rulings and *fatāwā* to realize it. Several legal rules ensure the prevention of harms before their occurrence, for example, the right of *Shuf'ah* (the right of the neighbor to take possession of the house and the land under certain conditions) is decreed to prevent harms that the neighbor or a partner may be inflicted with as a consequence of a sale. Likewise, the Quran prohibits authorizing a child the management of property, because of the high possibility of the destruction of the property or exploitation (*al-Nisā'*:5). The interdiction of insolvent is another example, which is meant to prevent harms to creditors.[78]

The Islamic penal code serves as a deterrent measure to prevent corrupt individuals from indulging in nefarious activities. Though the implementation of penalties, harms are inflicted on the oppressor as harms prevented by the implementation of it far outstrip the benefits gained by the oppressor from the non-implementation of it. Furthermore, the public does not owe the oppressor any rights as the Prophet said: "a transgressor has no rights".[79]

Prevention is part of *sadd al-dharā'i* (blocking the means) which refers to eliminating all possibilities of potential or impending harms. It is considered as a preventive measure or a deterrent action that is undertaken against the potential harmful consequences of the actions of an individual even if the actions were permissible originally.

Two important maxims that deal with the prevention of harm before its occurrence are discussed below:

- **Harm should be avoided as much as possible**

The sub-maxim 'harm should be avoided as much as possible' (*al-Ḍarar Yudfa bi Qadr al-Imkān*[80]) commands people to take all possible actions in advance as preemptory measures against possible harms. This maxim is compelling evidence for the *Sharī ah*'s deep concern for the safety and security of the people. Implementation of this maxim is done through adopting precautionary measures against impending harms and, eliminating the possibility of the occurrence and recurrence of harms.[81] In this maxim, the phrase "as much as possible" underlines two significant practical considerations. Firstly, the preventive actions are required as per one's maximum capacity as the Quran says, "Allah does not burden any human being with a responsibility heavier than he can bear" [*al-Baqarah*: 286]. Secondly, if complete prevention of harm is not feasible, then the duty is to prevent as much harm as possible and the rest of the harm is to be dealt with through elimination of harm or its minimization.

The basis of this maxim is found in the verse of the Quran: "Hence, make ready against them whatever force and war mounts you are able to muster," [*al-Anfāl*: 60]. Here, Allah commands the believers to take pre-emptive measures against impending threats of enemies and any foreseen undesirable circumstances.[82] Based on the principles of *maṣlaḥah mursalah* (unrestricted public interest[83]), and *siyāsah shar iyyah* (*Sharī ah* oriented policy[84]), the authorized people take decisions and enact rules which are intended to prevent harms and to attain benefits for the social benefits and thus fortify the system.[85] Likewise, the primary objective of the deterrent and discretionary penalties is to discourage thoughts of inflicting harm in the minds of people and thus to preempt the possibilities of the infliction of harms.

Moreover, this maxim propels every individual to defend himself, his household and other possessions from all endangering situations. In the course of defence, he is not held liable for any damage inflicted on the offender as long as it is done in proportion. This maxim applies to a wide range of issues where a man's rights or essentials are endangered by the aggressor; the prevention is needed according to the capacity of oppressed.[86]

The commands are of two types, namely, commands for the sake of fulfillment of the commanded subject itself and commands as a means for

achieving a legal interest. The same classification applies to prohibitions as well. The second category of commands and prohibitions plays a pivotal role in the application of this maxim.[87] Therefore, among the many *uṣūlī* principles that are instrumental in the realization of this maxim, *sadd al-dharāi* (blocking the means) plays an important role in the application of this maxim. This principle largely applies to circumstances when the practice of a legally permissible action has the possibility of leading to an impermissible consequence.

Asking permission before entering someone else's house is a stringent ruling intended to protect the gaze from unwarranted sights and to respect the privacy of others. The privacy of others should not be infringed upon, and preventive measures are taken to enforce it. In the modern era, many new technologies are used to assure the prevention of harm. An example is the CCTV which is used to deter criminals from triggering dangers among the public and to trace them once they violate the rules.

- **Repelling evil is preferable over attaining benefits**

If evil and benefit are in conflict with each other in the execution of an act, the avoidance of harm takes precedence over the attainment of benefits (*dar' al-mafāsid awlā min jalb al-maṣāliḥ*[88]). This is because Islamic law is very emphatic regarding the preference of avoiding forbidden things over practising commands which are permissible. In addition, achievement of benefits is also legalized mainly for repelling the harms given that the avoidance of beneficial things will largely result in infliction of harm.[89] This sub-maxim proffers the jurists the principle of proportionality for careful analysis and moral reasoning.

Maṣlaḥah is described in texts with words like *khayr* (good), *ḥasanat* (upright) and *naf'* (benefit) while *mafsadah* is described with words like *sharr* (evil), *ḍarar* (harmful) and *sayyi'ah* (bad).[90] Izz al-Dīn bin Abd al-Salam expounded that the command of attaining benefits and repelling harms is well grounded. He explained that when one has to choose between attaining different benefits, he should choose the most beneficial first, then what is next to it in terms of benefit. Similarly, in the elimination of harms, the greatest harm should be eliminated first and then what is next to it in terms of harm.[91] The scholars explained that this policy was extracted from the following verse of the Quran, "Therefore fear Allah as much as possible" (*al-Thaghābun*: 16).[92]

When *maṣlaḥah* (benefit) and *mafsadah* (evil) occur together, people should discard them both if they are unable to extract the benefit without inflicting the harm. The ruling on the elimination of harms at the cost of attaining benefits is applicable only when the benefits and the harms occur in equal measure. If that is not the case, the benefit is pursued or the harm is eliminated depending on which is greater in magnitude.[93] The situations, where the benefits and evils are mixed, are categorized into three[94]: Table 1 Situations where the benefits and evils are mixed and their rulings:

No	Situation	Ruling
1.	Harm is preponderant than benefit	Repelling evil is preferable to securing benefit
2.	Benefit is greater than harm	Achievement of benefit is preferred to warding off harm
3.	Benefit and harm are equal	Either individual choice or suspending judgement (*tawaqquf*) are applied

This policy is evident in the following Quranic verse: "They ask you about drinking and gambling. Say, "There is great harm in both, though there is some benefit also for the people. But the harm of the sin thereof is far greater than their benefit" [*al-Baqarah*: 219]. In this verse, Allah commands us to prevent evils contained in alcohol and gambling at the expense of not pursuing the benefit that they contain. The benefit of wine comprises of the business with it and making profits while its harms are made of the disruption of the intellect, collapse of the health and creation of discord in the family and society, etc.[95] In another place, the Quran says: "and do not insult those who invoke other than Allah, lest they insult Allah in enmity without knowledge." [*al-An ām*: 108]. If the preachers of Islam use harsh statements against the belief systems of other religions and offend their belief systems, though it may help to lay bare the contradictions and the incoherencies in their belief systems, doing so could result in adverse consequences, such as the people of other faiths distancing themselves from Islam out of hatred and anger towards it. In this case, the harm caused is much greater than the benefit accrued, which is one of the reasons why the *Sharī ah* has forbidden it. This maxim is well supported by the ḥadith which says that, "If I ask you to do something, do of it as much as you can, but if I forbid you from doing something, you should refrain from it".[96] Commenting on this ḥadīth, the scholars opined that, "It is a highly inclusive statement and the source of innumerable

rulings including regarding the Sharī ah's concern in eliminating evils then accomplishing benefits."[97] The nature of evil in terms of spreading and expansion is of epidemics and fire, so any lenient approach will culminate in engulfment by evil.[98]

However, if the benefit is preponderant than evil, achievement of benefit is preferred. Izz bin Abd al-Salām identified 63 places where achievement of benefit is preferred to repulsion of harm. For example, under coercion, to pronounce the statements of infidelity is allowed in order to save life, as long as the person holds *īmān* in the heart.[99]

The benchmark for assessing harm and benefit is the Quran and Sunnah whenever possible. If a situation arises which is not explicitly dealt with in the texts, then one has to use his reasoning to arrive at a conclusion based on resemblances to circumstances already discussed in the texts. In other words, the *Sharī ah*'s yardstick should be the criterion to determine whether harm should be eliminated or the benefit should be accrued when benefit and harm are mixed together.[100] Personal whims and material interests have nothing to do with this benchmark, as the Quran points out "But if the Truth had followed their inclinations, the heavens and the earth and whoever is in them would have been ruined" (*al-Mu'minūn*: 71). Another maxim also points to a similar meaning: *Idhā ijtama a al-ḥalāl wa al-ḥarām ghulliba al-ḥarām*[101] ("Elimination of the unlawful is preferred if the lawful and the unlawful are mixed").

Sub-Maxims related to the Elimination of Harm after Occurrence

When people commit mistakes intentionally or accidently, the right course of action is to correct them, which is the objective of this maxim. The main objective of criminal law is to solidify the code of ethics and morality in society and to counter impermissible and devious attitudes which can stem from a diverse range of sources. This maxim helps in attaining benefits because elimination of evil is also considered a benefit (*maṣlaḥah*). If the actions of an offender are left uncorrected, it largely leads to the repetition of the mistake and increases the risk of the harm it causes. The removal of harms happens in one of four forms, which are illustrated in the table below.

Table 2: Various forms of removal of harms and their consequences

	Consequences	Ruling
Removal of Harms	without leaving any other harm	accepted and appreciated
	by leaving lessor harms	accepted and appreciated
	by leaving similar harms	not accepted and prohibited
	by leaving severe harms	not accepted and prohibited

The first situation, in which harm is removed without causing any other harm is undoubtedly permitted and highly desirable. In the second situation in which a harm is removed by causing a lesser harm, it is also accepted in line with the principle "a major harm should be removed with a minor harm".[102] It is because of this reason that surgery is allowed as it helps in eliminating the greater harm suffered by the patient. However, if harm can be removed only by inflicting a similar harm, it is not permissible as the maxim "harm is not to be removed by a similar harm" emphasizes.[103] Consequently, during a time of extreme food shortage, giving one's food to someone else who is hungry like himself/herself is not permissible because it entails inflicting a similar harm on oneself. Similarly, when the removal of a harm entails causing a greater harm, it is impermissible because it causes an effect opposite to that which is desired, i.e. alleviating a greater harm by permitting a lesser harm to occur. As a result, killing a patient to alleviate his/her pain is not allowed.

As part of the elimination of harms, the *Sharī ah* has decreed liability for the aggressors. If a person usurps someone else's property and destroys it, he is held liable and has to incur the costs of replacing it with an identical item if it is fungible or with something of the same value if it is non-fungible. The Quran prohibits men from swearing not to have sex with their wives as it inflicts harms on wives (*al-Baqarah* :226-227). In this case, the *Sharī ah* eliminates the harm by giving the husband four months to retract his vow. If he refuses to retract it, the *Sharī ah* eliminates the harm by facilitating divorce for his wife.

In the case of harm occurrence, its removal and repair of its problems are obligatory because harm is mischief and to allow its continuance is another

mischief. Harm elimination could be done through many ways. Some of them are as follows:

1. Removal of the harmful material

Injurious materials and circumstances should be removed if the harm originates out of them in order to bring back the pre-harm condition. Sometimes, harm is inflicted as a result of actions and at other times, inactions turn out to be the reasons of harm. Likewise, harm happens through articulations as well as conducts, as in the case of the wording of invalid transactions and the construction of buildings in public places respectively. An example of causing harm through inaction is hoarding, thus the hoarder is forced to sell his/her property with reasonable prices. In all these circumstances, harm elimination is done by removing the injurious material or situation.[104]

2. Tort liability

At times, the doer of a harmful act is held liable for the loss, thus harm elimination is carried out with compensation and through imposing liability. *Ḍamān* means financial responsibility owed to the victim.[105] Regarding the compensation, the Quran says, "Therefore, if anyone transgresses a prohibition by attacking you, you may do likewise" [al-Baqarah: 194]. For bodily injury, if it causes loss of life or major injury, the injured person or his relative is compensated by blood money or expenses for full treatment. For a minor injury, the compensation is decided at the discretion of the experts. Moreover, the injurer has to incur the loss of income of the injured during the period of injury.

3. Legal punishments

The punishments against harm are categorized into three, namely prescribed punishments, retribution with compensation and discretionary penalties. The punishments are meant to either remove the effects of harm or eliminate the chances of repeating the same or both.

The size and structure of prescribed punishments are set by Allah (also known as Allah's restrictive ordinances[106]), which include stoning to death for adultery, amputation for theft and flogging for slander. Retribution is used against the harm against the body or one's organs, which is imposed equally to the injury inflicted. Likewise, the injurer has to incur

compensation if the retaliation is not executable or the victim pardons the offender. The sizes of discretionary penalties are left to the decision of the judge who has to consider many factors because there are no written penalties, which are largely used against ordinary torts like attacks on religion, human life, body, property, safety, ethics and decency. These include fines, bodily reprimand, custody and so on.

- **Harms should not be replaced with another harm or with the same harm**

This maxim has been articulated through various phrases such as "harm is not repelled by its alike" (*al-ḍarar lā yuzāl bi mithlihi*[107]) and "harm is not repelled with harm" (*al-ḍarar lā yuzāl bi al-ḍarar*[108]). This is because removal of harm with harm is not considered as removal of harm, rather infliction of a new harm which is impermissible.[109] Thus, destroying someone else's property as retaliation is impermissible.[110]
This maxim does not go against the rule of "retribution with a penalty similar to that which has been inflicted" because that is meant to pre-empt the infliction of bigger harms by the criminal if he is left unpunished and to establish justice on earth. This point is stressed in the Quran when it says, "O men of understanding. There is security of life for you in the law of retribution" [*al-Baqarah*: 179].

The application of this maxim is seen in the decision of the Prophet, as he did not take action against a group of hypocrites including Abd Allah bin Ubayy bin Salūl, because the elimination of that harm could have been construed as the Prophet being vengeful against his own people which would have been the infliction of a similar or a bigger harm. On another occasion, the Prophet advised his companions not to protest against an unjust ruler but to be obedient to him, as long as he did not violate any of the fundamental pillars of Islam. This is because protesting against him would lead to the infliction of even greater harms than the one they were trying to eliminate in the first place, such as severe social turmoil, violence and bloodshed.[111] In the light of this maxim, to consume other's property in order to save human life from any danger is allowed. Killing a human being without a valid justification is strictly prohibited in Islam, even under conditions of duress, because it leads to the repulsion of harm with harm.[112]

- **Lapse of time cannot justify continuation of harm**

Being a regulator for harm elimination, the maxim "Lapse of time cannot justify continuation of harm" (*al-ḍarar lā yakūnu qadīman*[113]) stresses that the long duration of a harm does not warrant the justification of its furtherance and the *Sharī ah* does not concede damage at any cost, even if the harm is old. Thus, the materials and reasons for harms which have existed for a long time are to be removed; all the same, they are very old and people are mostly silent about them. This maxim is a condition particularly for the maxim, "the old should be kept as it is", because the consideration of the "oldness" is only when it is in accordance with the *Sharī ah* and does not cause danger to others. Aḥmad Zarqā' distinguishes the ruling on old harms, that if it happens as part of an utilization of one's right, its precedence and long span are considered and it is not removed. However, if the inflictor has no right in its usage, then it is a significant harm and needs to be eliminated, no matter how long the duration of existence of the harm.

Sub-Maxims related to the Minimization of Harms in Unavoidable Circumstances

The maxims concerning the minimization of harms become relevant only when the complete elimination of harms turns out to be impossible. When the complete elimination of harms becomes impossible, priority should be given to the elimination of the greater harms first.[114] Al-Qarāfī asserted that the *ummah* agreed unanimously that the greater benefit is preferred at the expense of the lesser benefit.[115] The universal maxim is to eliminate harm categorically whenever possible, but in the event one has to choose between two contending harms, and the complete elimination of harms is not feasible, one should prevent the occurrence of the greater harm by permitting the lesser harm. This maxim has two major components: (1) the greater harm should be prevented by committing the lesser harm and (2) personal injury should be incurred to prevent general injury.

- **The greater harm should be prevented by committing the lesser harm**

This maxim has been coined using many different phrases. Some of them are as follows:

1. *Al-Ḍarar al-ashadd Yudfa bi al-ḍarar al-Akhaff*[116] (The greater injury should be prevented by committing the lesser injury).
2. *Yukhtār Ahwan al-Sharrayn or Akhaff al-ḍararayn*[117] (The lesser evil or injury should be preferred).
3. *Idhā ta āraḍat al-mafsadatān rū iya a ẓamuhumā ḍararan bi irtikāb akhaffuhumā*[118] (If two evils clash, the greater one should be prevented by committing the lesser one).

Although these maxims are different in their wording, they convey the same meaning. According to this maxim, if a person is faced with choosing between two equal harms, he is free to choose between them. If they are not similar in their severity, committing the lesser harm to prevent the greater harm is religiously binding.[119] Abū Ḥāmid al-Ghazālī observed that in certain circumstances the degree of severity of the greater harm entails committing the lesser harm obligatory. For example, if consuming alcohol becomes the only way to save someone's life, consuming it becomes obligatory in that situation.[120]

An incident that transpired during the life of the Prophet sheds light on the application of this maxim. A Bedouin urinated in the mosque of the Prophet, which angered the companions and they severely reprimanded him. The Prophet however said to them, "Do not put a halt to his urinating, but instead leave him".[121] Afterwards, the Prophet ordered that a bucket of water be poured over the urinated area. Commenting on this incident, al-Nawawī remarked that the Prophet's actions prevented the occurrence of a bigger harm by permitting a lesser harm. Since the masjid had already been defiled with impurity (*najas*), stopping him from urinating would not have benefitted anyone then and would have only caused him harm by preventing him from urinating. Moreover, since he urinated in a small part of the masjid, preventing him from urinating could have enabled the spreading of the urine to other parts of the masjid and caused him to defile his clothes.[122]

The story of Prophet Musa and Khiḍr, which is narrated in the Chapter of *Al-Kahf*, portrays some models of prevention of greater harm through compromising the lower harm. Khiḍr made a hole in a boat in order to protect the people from an unjust king who used to seize every good boat, and he saved their wealth from being looted (the Quran, *Al-Kahf*: 79). Likewise, Khiḍr slew a boy in order to protect his parents, who were believers, "from bitter grief upon them by [his] overweening wickedness and denial of all truth" (the Quran, *Al-Kahf*: 80). Among others, the second incident exposes that injury upon true faith outweighs the injury upon human life.[123]

According to this maxim, harm to the embellishments (*taḥsīniyyāt* category in the *maqāṣid*) are tolerated in order to prevent harms to the needs (*ḥāajiyyāt* category) and to the essentials (*ḍarūriyyāt* category). Similarly, harms to the 'needs' are tolerated in order to prevent harms to the 'essentials'. There are many instances which highlight the application of this maxim. Lying to protect oneself during a battle is permitted although it is harmful to the aspect of telling the truth, which is among the embellishments. Dumping people's property in the sea while aboard a ship is permitted if they are deemed harmful to the lives of the people in the ship although it is harmful to the aspect of protection of property which is among the 'needs'. Joining the military is deemed necessary if the country needs to be protected from adversaries, even though it can inflict harms to the body and the person's family, since the attainment of public benefits takes precedence over the attainment of private benefits. If dangers are inflicted on the *ḍarūriyyāt*, the harms to the religion are prevented by permitting harms to the body and wealth, and harms to wealth are tolerated to prevent harms to the body. Within the category of essentials, the order of preference for preventing harm among them is religion, body, progeny, intellect and wealth. Inflicting harms on the life of a human being is a relatively bigger harm than the harms caused by the severing of a severely infectious organ. Therefore, committing one of the lesser harms is permitted to prevent harms to the life of a human being.[124]

Therefore, based on this maxim, it is permitted to prevent that which is prohibited (*ḥarām*) by permitting that which is discouraged (*karāhat*). This maxim should be appended with two other maxims when deemed necessary. They are: (1) committing that which is prohibited is not allowed except in the case of dire necessity, and (2) necessity never requires obligating that which is inessential or optional.

The law of repudiation permits harm to the perpetrator to prevent the infliction of the greater harm of the perpetrator harming the public safety. In the event of the death of the mother during childbirth, operating on her is permitted if it can result in saving the foetus' life.[125] If a person's life is threatened and he is forced to choose between being killed and jumping off a cliff from the top of a mountain, according to Abū Ḥanīfah, he/she has the freedom to choose between the two. However, according to Muḥammad and Abū Yūsuf, he should not jump because it is similar to committing suicide and a Muslim is not allowed to choose to kill himself/herself. The second opinion seems to be more in line with promoting *maṣlaḥah*, putting trust in Allah, and because it does not bear any resemblance to suicide.

The magnitude of harm is further divided into major harm and minor harm. The minor risks are acceptable because they are risks that are almost zero in likelihood if there is a one in a million probability of that risk occurring. The risk is tolerated if the probable outcomes are more beneficial, as in the case of surgeries, the pains and expenses are justified by the big benefit of relief from severe diseases.

- **Personal injury should be incurred to prevent general injury**

This maxim (*yutahammal al-ḍarar al-Khāṣṣ li al-daf al-ḍarar al-āmm*[126]) means that inflicting private harms to prevent public harms is permitted. It reflects the concern of the *Sharī ah* for protection of the best interests of the public. Here, the public refers to the wider community or a large group of people while private refers to a single individual or a small group of people. This maxim is relevant to the *maqāṣid* theory that states that public benefit takes precedence over private benefit.[127] Furthermore, secular theories also acknowledge the preponderance of public benefit in contrast to the private benefit, in line with the maxim "no one shall be deprived of his possessions except in the public interest."

When harms are imposed on a private stakeholder to prevent harms to the public, it should be noted that if the harm is of a permanent nature and is not transient, that individual has to be given due compensation in lieu.[128] According to al-Shāṭibī, if the land of a person was taken over for the benefit of the public, such as being used to construct a *masjid*, then he/she must be compensated with another land or with an appropriate amount of

money. Using his land without compensating him inflicts harms on him, which is prohibited.[129]

The legality of many deterrent punishments in the Islamic penal code stems from the prevention and elimination of public harms. The majority of the public benefits from the implementation of the Islamic penal code, though at times it may inflict harms on private entities. The ḥadīth "no one hoards but a sinner"[130] illustrates the gravity of the harm that hoarding inflicts on the public interest. Al-Nawawī reiterated that hoarding is prohibited considering the benefit for the public.[131] Moreover, at times, people are barred from enjoying some of their private rights due to the harms they cause to the public. It is for this reason that the Prophet prohibited Abu al-Haitham from slaughtering a pregnant goat on the account of the benefit for the public by it being kept alive.[132]

Many prophetic traditions point to the application of this maxim. For instance, the Prophet says in a ḥadīth, "Whoever eats garlic or onion, let him not come near our mosque for angels are offended by the same things that offend the sons of Adam".[133] Although the bad odor caused by eating garlic is not a significant harm, the fact that the *Sharīʿah* took steps to prevent it from irritating others highlights the concern it has for upholding the public interest. The jurists have derived two maxims from the above ḥadith. The first is the prevention of the harm before its occurrence by prohibiting those who eat garlic to come to the *masjid* to prevent irritation from their bad breath among other worshippers. The second is permitting the private harm of depriving a person the reward of congregational prayer to prevent the public harm of the worshippers being irritated from his/her bad breath.

Based on this maxim, unqualified doctors, ineligible jurists and magicians are blocked from doing their jobs because they are placing the public at stake though they personally benefit by their works.[134] This maxim requires that the agents weigh two harms and their consequences and remove severe harms to preserve better interests. Based on this maxim, the interest of the society is capable of overriding the individual interest. Therefore, in biomedical issues for example, dangerous researches on human subjects are sometimes allowed if their potential benefits to the society outweigh the individual risks.

Other relevant Sub-Maxims in the Elimination of Harm

Some other sub-maxims function as either regulators or conditions for the application of the harm elimination maxims in appropriate ways. They are as follows:

- **The necessity does not invalidate the rights of others**

This maxim (*al-iḍṭirār lā yubṭilu ḥaqq al-ghayr*[135]) expounds that commission of prohibited and avoidance of required due to the necessity are allowed with a condition that it should not be harmful to others. For the preservation of the essentials, Islamic law allows prohibited things to be committed but only to replace the state of necessity. However, necessity does not invalidate the rights of others, though it tolerates breaching certain rulings on the condition that a liability is owed to the harmed. For example, in order to overcome a hardship, the *Sharī ah* allows using others' property but with the liability of returning something similar to it or its price, otherwise it may culminate to harming the owner while "harm is not removed with harm". Logically, if there is no liability such an action turns out to be harmful to the owner of the property.

- **Hardship begets facility**

Hardship (*mashaqqah*) means an unusual difficulty. The usual hardships are inescapable in many meritorious actions and even in unavoidable daily routines we exercise; they however do not pose any reasonable risk to people. These minimal hardships are excluded from the scope of this maxim. Rather, the hardship in question surrounds the kind that poses a threat to the life or that is capable of inflicting permanent disability and the like. In situations of significant hardship, the *Sharī ah* facilitates a person with easier alternatives that are operated either by omission of the obligatory or commission of the forbidden deed.

The maxim hardship begets facility (*al-mashaqqatu tajlib al-taysīr*[136]) is one among the five universal maxims; however, some scholars include it in the subsidiaries of the harm maxim. The difference between the harm maxim and the hardship maxim is that the former is applied when its elimination or prevention is feasible while the latter is used by begetting facility to remove obstacles and to ease the burden of lives. The application of the hardship maxim is restricted by another maxim "whatever is

permissible owing to some excuse ceases to be permissible with the disappearance of that excuse." It means that facilitation is valid only in the presence of the impediment, and once it is removed, the original ruling is restored to full effect. The maxim "necessity is to be assessed and treated proportionally" (*al-ḍarūrat tuqaddaru bi qadrihā*)[137] is considered to be a constraint to the hardship maxim. This maxim strictly stipulates that any permitted thing in the face of extreme necessity should not go beyond the parameters of necessity. This maxim is supplemented by the maxim "necessities render the prohibited permissible".[138] The maxim of necessity has been legislated in order to eliminate the harms during a necessity and to save the *ummah* from its predicaments.

Conclusion

The maxim regarding the elimination of harm is construed as prohibition of all actions and inactions that carry the notions of wronging, infringing on other's rights, as well as frustrating, overpowering, or setting back some party's interests. The prohibition on the infliction of harms extends to harming oneself, harming others and becoming causative of harms. The maxim of harm elimination is deemed as a key principle employed for legal derivation especially in dealing with social ethics and interpersonal relationships in Islam. Likewise, it is among the main references for deducing the legal rulings on modern issues. The scope of this maxim in terms of its applications is very broad and is relevant to almost all areas of *fiqh*.

This principle is not absolute, rather it is accompanied by limits, as if a harm is inflicted to prevent bigger harm, it is treated as justifiable. Thus, there are situations in which harms are taken as justified or compromised considering their consequences if they are not carried out, as in the case of punishment with legitimate retaliation or legal demotion of an employee for a valid reason or disciplinary action.

The aspect of prevention is given preference as it thwarts the ramifications of the harm and governs in line with the widely recognized principle 'prevention is better than cure'. However, the prevention of harms is not always feasible because of the inherent differences in the priorities of human beings, which inevitably results in the infliction of harms on others, intentionally or unintentionally, directly or indirectly. In these circumstances, the elimination of the harm after its occurrence becomes

obligatory to mitigate the difficulties and to prevent its future occurrence. Likewise, the complete elimination of harms is not always times within the capacity of human beings. Addressing this issue, the final aspect involves minimizing the adverse effects of the harm on the people and the system as much as possible.

In light of the previous detailed discussion, a flowchart that represents a sequence of five steps is derived, which are beneficial to be taken into consideration in the course of harm elimination. The details are as follows:

Step 1: Ascertain that the consequence of his decision averts a considerable harm. An action or inaction is regarded as considerable harm if it meets following conditions:

a) Harm is real.
b) Harm is serious.
c) Harm is inflicted in an illegitimate way.
d) Harm is inflicted on a valid benefit.

Step 2: Make the arrangements of harm elimination according to the agreeable hierarchy, which is as follows:

Prevention ⟹ Elimination ⟹ Minimization

Step 3: Three governing principles must be in the hearts of agents when they apply the maxims of prevention of harm before its occurrence, they are:

a) "No harm shall be inflicted or reciprocated". E.g. the health worker should be neither initiating any harm nor reciprocating with any harm.
b) 'Harm should be avoided as much as possible'. E.g. the healthcare professional exerts his best possible efforts to prevent as much harm as possible.
c) Repelling harm is preferred to the achievement of benefits.

Step 4: Eliminate the harm if the harm has already happened as per the maxim "harm must be eliminated". One of the governing principles in this stage is "harms should not be replaced with another harm". As a result, removal of harms without leaving any other harm and/or leaving lesser

harms are only accepted. Likewise, the maxim "lapse of time cannot justify the continuation of harm" emphasizes that the materials and reasons for harm, which have existed for a long time, are to be removed and there is no regard for their long duration of existence.

Step 5: Minimize the harms if they are unavoidable. Two governing principles are noteworthy in this stage; they are:

a) The greater harm should be prevented by committing the lesser harm.
b) Personal injury should be incurred to prevent general injury.

Step 6: Take the decision which is harm-free or with the least possible harm in unavoidable situations. Also, for the most appropriate and valid harm elimination procedures the professionals should keep in mind the maxims below:

1. Committing that which is prohibited is not allowed except in the case of dire necessity.
2. Necessity never requires obligating that which is inessential or optional.
3. The necessity does not invalidate the rights of others.
4. Hardship begets facility.

References

[1] Abū Ḥāmid al-Ghazālī, *al-Mustaṣfā fī Ilm al-Uṣūl*, (Beirut: Dār al-Kutub al-Ilmiyyah, 1413H), 1: 174. *Maqāṣid* are also consensually perceived as the five universal legal purposes, namely the protection of religion, body, intellect, progeny and wealth. Noticeably, all nations and communities have acknowledged the importance of these five foundational objectives. *Maqāṣid* is defined as 'modalities intended by the *Sharī ah* for people to achieve beneficial purposes or to save the interests of the public in their specific actions'. Al-Allāl al-Fāṣī, *Maqāṣid al-Sharī ah,* 7. Concisely, *maqāṣid* are 'underlying values and purposes of the Islamic law'. Jasser Auda, *Maqasid al-Sharī ah as Philosophy of Islamic Law; A Systems Approach*, (London, Washington: IIIT, 2008), xxiv.

[2] Al-Suyūṭī, *al-Ashbāh wa al-Naẓā'ir*, 6; Intisar Rabb, "Islamic Legal Maxims as Substantive Canons of Construction: Ḥudūd-Avoidance in Cases of Doubt", *Islamic Law and Society*, Vol. 17, No. 1 (2010): 63.

[3] Shihāb al-Dīn al-Qarāfī, *Anwār al-Burūq fī Anwā' al-Furūq*, ed. Muḥammad Rawās Qal ajī (Beirut: Dār al-Ma rifah, n.d.), 1: 3.

[4]Jalāl al-Dīn al-Suyūṭī, *al-Ashbāh wa al-Naẓā'ir* (Beirut: Dār al-Kutub al-Ilmiyyah, 1983), 6; Zayn al-Dīn bin Nujaym, *al-Ashbāh wa al-Naẓā'ir* (Damascus: Dār al-Fikr, 1405 AH) 15; Ibn Rajab al-Ḥanbalī, *al-Qawā id fī al-Fiqh al-Islāmī* (Beirut: Dār al-Ma rifah, 2004), 3; Muḥammad bin Bahā al-Dīn al-Zarkashī, *al-Manthūr fī al-Qawā id*, ed. Taysīr Maḥmūd (Kuwait: Ministry of Endowment and Islamic Affairs, 2nd ed., 1405 AH) 1:70; Mohammad Hashim Kamali, ''Legal Maxims and Other Genres of Literature in Islamic Jurisprudence'', *Arab Law Quarterly*, Vol. 20, No. 1, (2006): 78; Khaleel, "The Islamic Law Maxims"*, Islamic Studies,* Vol. 44, No. 2 (Summer 2005). 91.

[5] Muṣṭafā al-Zarqā, *al-Madkhal al-Fiqhī al-Āmm* (Damascus: Dār al-Qalam, 1998), 2:297.

[6] Fawzy Shaban Elgariani, "Al-Qawā id al-Fiqhiyyah (Islamic Legal Maxims): Concept, Functions, History, Classifications and Application to Contemporary Medical Issues" (Ph.D. thesis, University of Exeter, 2012), 100; Omar Hasan Kasule, "Medical Ethics: Theories And Principles", *i-epistemology.net*, http://i-epistemology.net/v1/omar-hasan-kasule/25-medical-ethics--theories-and-principles.html (accessed 31 August, 2016).

[7] Al-Bābartī al-Ḥanafī viewed that the number of *fiqh* issues at his time, 8th century Hijrah, accounted into one million, one hundred and seventy thousand

in Ḥanafī *madhhab* alone. Arguably, in the view of some contemporary scholars, Abū Ḥanīfah dealt with 500000 juristic cases in his lifetime alone. See Ya qūb bin Abd al-Wahhāb al-Bāḥusayn, *al-Qawā id al-Fiqhiyyah: al-Mabādi', al-Muqawwimāt, al-Maṣādir, al-Dalīliyyah, al-Taṭawwur* (Riyāḍ: Makthabat al-Rushd, 1998), 115.

[8] In the *qawā id* genre, the five universal legal maxims[8] (or normative legal maxims) are most important due to their comprehensiveness and their relevance not only to the entire parts of *fiqh* but also to entire aspects of life in terms of coverage and application. Moreover, they are acceptable to all scholars regardless of various schools of Islamic law. They represent the *Sharī ah* as a whole and embody the general concept of *maṣlaḥah* in particular. Five major *qawā id* are (1) "matters are judged by their objectives (intention)", (2) "certainty cannot be overruled by doubt", (3) "hardship begets facility", (4) "harm must be eliminated" and (5) "custom is authoritative". Some scholars view, that the entirety of *fiqh* is based on these five, and the rest is a kind of explanation of them. Al-Suyūṭī, *al-Ashbāh wa al-Naẓā'ir*, 4; Wahbah al-Zuḥaylī, *al-Qawā id al-Fiqhiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arba ah* (Damascus: Dār al-Fikr, 2006), 32.

[9] Alā' al-Dīn Abū al-Ḥasan al-Mardāwī, *al-Taḥbīr Sharḥ al-Taḥrīr* (Riyadh: Maktabat Rushd, 2000), 8: 2846.

[10] Muṣṭafā al-Zarqā, *al-Madkhal al-Fiqhī Āmm*, 2:974.

[11] Muḥammad Al-Rūkī, *Naẓariyyat al-Taq īd al-Fiqhī wa Atharuhā fī Ikhtilāf al-Fuqahā'* (Rabat: Kulliyat al-Ādāb wa al- Ulūm al-Insāniyyah, 1994).

[12] Alī al-Nadwī, *al-Qawā id al-Fiqhiyyah: Mafhūmuhā, Nash'atuhā, Taṭawwuruhā, Dirāsat Mu'allafātihā, Adillatuhā, Muhimmātuhā, Taṭbīqātuhā* (Damascus: Dār al-Qalam, 1998).

[13] Ya qūb bin Abd al-Wahhāb al-Bāḥusayn, *al-Qawā id al-Fiqhiyyah: al-Mabādi', al-Muqawwimāt, al-Maṣādir, al-Dalīliyyah, al-Taṭawwur* (Riyāḍ: Makthabat al-Rushd, 1998).

[14] Mohammad Hashim Kamali, "Legal Maxims and Other Genres of Literature in Islamic Jurisprudence", *Arab Law Quarterly* 20,1 (2006), pp 76-101.

[15] Ṣāliḥ al-Sadlān, *al-Qawā id al-Fiqhiyyah al-Kubrā* (Riyādh: Dār Balansiyah, 1417 AH).

[16] Ya qūb bin Abd al-Wahhāb al-Bāḥusayn, *Qā idat al-Mashaqqat Tajlib al-Taysīr: Dirāsah Naẓariyyah, Ta'ṣīliyyah, Taṭbīqiyyah* (Riyadh: Maktabat al-Rushd, 2004).

[17] The Quran uses *qawā id* for foundations in the verse "when Abraham was raising the foundations of the House and [with him] Ishmael" (*al-Baqarah*: 127).

[18] Muḥammad bin Mukarram bin Manẓūr, *Lisān al- Arab*, ed. Amīn Muḥammad Abd al-Wahhāb and Muḥammad Ṣādiq al- Ubayd (Beirut: Dār Iḥyā al-Turāth al- Arabī, 1997), 12: 149.

[19] Munīr al-Ba labakī, *al-Mawrid* (Beirut: Dār al- Ilm li la-Malāyīn, 8th edn., 1997), 844; Alī al-Nadwī, *al-Qawā id al-Fiqhiyyah: Mafhūmuhā, Nash'atuhā, Taṭawwuruhā, Dirāsat Mu'allafātihā, Adillatuhā, Muhimmātuhā, Taṭbīqātuhā* (Damascus: Dār al-Qalam, 1998), 39.

[20] Al-Sharīf al-Jurjānī, *al-Ta rīfāt* (Beirut: Dār al-Kutub al- Ilmiyyah, 1983), 171.

[21] Al-Fayūmī, *al-Miṣbāḥ al-Munīr*, (Beirut: al-Maktabah al- Ilmiyyah, n.d.), 248.

[22] Abū Mundhir Maḥmūd al-Manyāwī, *al-Tamhīd*, (Egypt: al-Maktabah al-Shāmilah, 2011), 1: 5.

[23] Tāj al-Dīn al-Subkī, *al-Ashbāh wa al-Naẓā'ir* (Beirut: Dār al-Kutub al-Ilmiyyah, 1991), 1: 11.

[24] Ibn al-Subkī, *al-Ashbāh wa al-Naẓā'ir*, 1: 11-12; Al-Bāḥusayn, *al-Qawā id al-Fiqhiyyah,* 274; khadiga Musa, "Legal Maxims as a Genre of Islamic Law: Origins, Development and Significance of Al-Qawā'id al-Fiqhiyya", *Islamic Law and Society*, 21 (2014): 326.

[25] Al-Bāḥusayn, *al-Qawā id al-Fiqhiyyah,* 54.

[26] Mustafa Ahmad al-Zarqā, *al-Madkhal al-Fiqhī al- Āmm*, (Damascus: Matba ah Jami ah, 7th ed., 1983) 2: 933.

[27] Al-Jurjānī, *al-Ta rīfāt*, 174; Jalāl al-Dīn al-Maḥallī, *al-Badr al-Lāmi fī Ḥall Jam al-Jawāmi* (Beirut: Mu'assasat al-Risālah, 1426 AH), 1: 21-22; Sulaymān Najm al-Dīn al-Ṭūfī, *Sharḥ Mukhtaṣar al-Rawḍah* (Beirut: Mu'assasat al-

Risālah, 19878), 1: 120; Muḥammad Unays Ubādah, *Tārīkh al-Fiqh al-Islāmī* (Cairo: Dār al-Ṭabā ah Muḥammadiyyah, 1965) 1: 107.

[28] Al-Taftāzānī, *al-Talwīḥ alāal-Tawḍīḥ*, (Riyadh: Maktab Ṣanāyi , 1310 AH), 1: 37; Muḥammad Muṣtafā al-Khādimī, *Manāfi al-Daqā'iq sharḥ Majāmi al-Ḥaqā'iq*, (Cairo: Dār al-Ṭabā ah al- Āmiriyyah, 1852), 305.

[29] Ibn al-Subkī, *al-Ashbāh wa al-Naẓā'ir*, 1: 16; al-Bahūtī, *Kashshāf al-Qannā* (Beirut: Dār al-kutub al- Ilmiyyah, 1403 AH), 1: 16.

[30] Ibn Najjār, *Sharḥ al-Kawkab al-Munīr* (KSA: Maktabat al- Abīqān, 1418 AH), 1: 44.

[31] Muṣṭafā Aḥmad al-Zarqā, *al-Madkhal al-Fiqhī al- Āmm*, 556.

[32] Muḥammad Muṣṭafā al-Shalabī, *al-Madkhal fī al-Ta rīf bi al-Fiqh al-Islāmī* (Beirut: al-Dār al-Jāmi iyyah. 10th ed., 1985), 324.

[33] Muḥammad ibn Aḥmad al-Najjār, *Sharḥ al-Kawkab al-Munīr,* ed. Muḥammad al-Zuḥaylī (Damascus: Dār al-Fikr, 1980), 1: 45.

[34] The different views regarding the scope of application is also influenced by the approaches. From the perspective of linguists and *Usūliyyūn*, maxim is of general rule while from juristic point of view it is of preponderant rule. Luqman Zakariyah, "Applications of Legal Maxims in Islamic Criminal Law with Special Reference to Sharī ah Law in Northern Nigeria (1999-2007)" (PhD Thesis, University of Wales, Lampeter, 2009), 27.

[35] Al-Jurjānī, *al-Ta rīfāt*, 174; al-Maḥallī, *al-Badr al-Lāmi fī Ḥall Jam al-Jawāmi* 1: 21-22; al-Khādimī, *Manāfi al-Daqā'iq*, 305.

[36] Few exceptions do not invalidate the comprehensiveness of the maxim and sometimes exclude things are not in line with the conditions of maxims. Abū Iṣḥāq al-Shāṭibī, *al-Muwāfaqāt* (Cairo: Dār al-Fikr al- Arabī, 2004), 2: 53. Likewise, excluded things do not constitute another maxim, but they are included in the latitude of other maxims; this fact is also in favour of the comprehensiveness of the maxim. Alī Ḥaydar, *Durar al-Ḥukkām Sharḥ Majallat al-Ahkām*, Translation to Arabic by Fahmī al-Ḥusaynī (Beirut: Dār al-Kutub al- Ilmiyyah, 1991), 1: 15; Wolfhart Heinrichs, "Qawā id as a Genre of Legal Literature", *Studies in Islamic Law and Society*, Vol. 15: Studies in Islamic Legal Theory, ed. Bernard G. Weiss, (Leiden: Brill, 2002), 368.

[37] Al-Nadwī, *al-Qawā id*, 44.

[38] Al-Bāḥusayn posited two conditions for legal ruling, that it should be definite and categorical. See Al-Bāḥusayn, *al-Qawā id*, 174.

[39] Muḥammad Al-Rūkī, *Naẓariyyat al-Taq īd al-Fiqhī wa Atharuhā fī Ikhtilāf al-Fuqahā'* (Rabat: Kulliyat al-Ādāb wa al- Ulūm al-Insāniyyah, 1994), 60-68.

[40] Imām al-Ḥaramyn, *Ghiyāth al-Umam fī Iltiyāth al-Ẓulam* (Egypt: Dār al-Da wah, 1979), 260; Majallat al-Aḥkām al- Adliyyah, 11.

[41] Burhān al-Dīn ibn Farḥūn, *al-Dībāj al-Madhhab fī Ma rifat Ulamā' A yān al-Madhhab* (Beirut: Dār al-Maktabah al- Ilmiyyah, 1996), 88.

[42] Al-Qarāfī, *al-Furūq*, 4: 40.

[43] Al-Bāḥusayn, *al-Qawā id*, 272-273; al-Nadwī, *al-Qawā id*, 294; [43] al-Burnū, *al-Wajīz fī Īḍāḥ al-Qawā id al-Fiqh al-Kulliyyah* (Riyadh: Maktbat al-Ma ārif, 2nd edn, 1990), 32.

[44] Jalāl al-Dīn al-Maḥallī, *Sharḥ Jam al-Jawāmi bi Ḥāhiyat al-Bannānī* (Egypt: Dār Iḥyā' al-Kutub al- Arabiyyah, n.d.) 2: 347; Taqiyy al-Dīn bin al-Subkī, *al-Ibhāj fī Sharḥ al-Minhāj*, (Beirut: Dār al-Kutub al- Ilmiyyah, 1995) 3: 173; Taqiyy al-Dīn bin al-Najjār al-Ḥanbalī, *Mukhtaṣar al-Taḥrīr sharḥ al-Kawkab al-Munīr*, (Riyadh: Maktabat al- Abīqān, 1997) 2: 42.

[45] Al-Nadwī, *al-Qawā id*, 323-347.

[46] Regarding the opposite of benefit, we can find statements in: Fakhr al-Dīn al-Zayla ī, *Tabyīn al-Ḥaqā'iq sharḥ Kanz al-Daqā'iq* (Cairo: Dār al-Kitāb al-Islāmī, 1313 AH) 6: 142; Ibn Abd al-Barr, *al-Tamhīd*, 20: 161; Shihāb al-Dīn al-Ramlī, *Nihāyat al-Muḥtāj li Sharaḥ al-Minhāj* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, n.d.), 15: 343 & 352; Ibn Qudāmah, *al-Mughnī* (Beirut: Dār al-Kutub al- Ilmiyyah, 2009) 5: 33-34. In terms of the infliction of harms on others, we can see expressions in: al-Sarakhsī, *al-Mabsūṭ*, 23: 188; Ibn Farḥūn, *al- Aqd al-Munaẓẓam li al-Ḥukkām bi Hāmish Tabṣirat al-Ḥukkām*, (Beirut: Dār al-Kutub al- Ilmiyyah, 1301 AH), 2: 84; Zakariyā al-Anṣārī, *Asnā al-Maṭālib fī Sharḥ Rawḍah al-Ṭālib* (Cairo: al-Maṭba at al-Maymaniyyah, 1313), 2: 446; Ibn Qudāmah, *al-Mughnī*, 5: 51. Related to the infringement of others' rights, we can get statements in: al-Sarakhsī, *al-Mabsūṭ*, 22: 173; Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, 2: 257; Abū Bakr al-Shāshī al-Qaffāl, *Ḥilyat al- Ulamā'* (Beirut: Mu'assasat al-Risālah, 1980), 5: 517-518; Abū Abd Allah Muḥammad bin Mufliḥ, *al-Furū fī Fiqh al-Ḥanbalī* (Beirut: Ālam al-Kutub, 4th ed., 1985), 4: 285-286.

[47] Ibn al- Arabī, *Aḥkām al-Qur'ān*, Muḥammad al-Bajāwī (ed.), (Beirut: Dār al-Ma rifah 1392 AH) 1: 54-55; Similar definitions are found in some other scholars writings. Some of them are; al-Shawkānī, *Nayl al-Awṭār*, 6: 359; Ibn Ḥajr al-Haytamī, *Fatḥ al-Mubīn li Sharḥ al-Arba īn*, 237.

[48] Al-Mubīn al-Mu īn li fahm al-Arba īn, 183, Ibn Ḥajar al-Haytamī, *al-Fatḥ al-Mubīn*, 237.

[49] *Fayḍ al-Qadīr Sharḥ Jāmi' al-Ṣaghīr*, 6: 431; al-Sayyid Muḥammad Ḥasan Bajnūradī, *al-Qawā id al-Fiqhiyyah*, 1: 178; *al-Futūḥāt al-Wahabiyyah*, 242.

[50] al-Subkī, *al-Ibhāj fī Sharḥ al-Minhāj*, (Beirut: Dār al-Kutub al- Ilmiyyah, 1404 AH), 3: 166; al-Asnawi, *Nihāyat al-Sawl fī Sharḥ al-Minhāj* (Beirut: Dār al-Kutub al- Ilmiyyah,), 3: 19; al-Manāwī, *al-Fayḍ al-Qadīr*, 6: 431; al-Ṭāhir bin Āshūr, *Kashf al-Mughṭī fī al-Maānī wa al-Alfāẓ al-Wāqi at fī al-Muwaṭṭa'*, (Tunis: AL-Sharikah al-Tūnisiyyah, 1976), 39.

[51] Aḥmad Mawāfī, *al-Ḍarar fī al-Fiqh al-Islāmī: Ta rīfuhu, Anwā uhu Alāqātuhu, Ḍawābituhu, Jazā'uhu* (Saudi Arabia: Dār Ibn Affān li al-Nahsr wa al-Tawzī , 1997), 97.

[52] Ibn al- Āṣim, *Tuḥfat al-Ḥukkām bi Hāmish al-Bahjah*, 2: 335; Sulaim Rustam, *Sharḥ al-Majallah*, 2: 109; al-Tasūlī, *al-Bahjah Sharḥ al-Tuḥfah*, 2: 335; Alī Ḥaydar, *Durar al-Ḥukkām Sharḥ Majallat al-Ahkām*, Translation to Arabic by Fahmī al-Ḥusaynī (Beirut: Dār al-Kutub al- Ilmiyyah, 1991), 1: 73; Wahbah Zuhaylī, al-Fiqh al-Islāmī wa Adillatuhu, 4: 35.

[53] Fatḥ al-Qadīr, 7: 326; Jāmi al-fuṣūlayn, 2: 194; Ḥāshiyat Radd al-Muḥtār, 5: 448; Ibn Farḥūn, *Tabṣirat al-Ḥukkām*,2: 250-251; Mawāq, *al-Tāj wa al-Iklīl Sharḥ Mukhtaṣar Khalīl*, 5: 165; Ḥāshiyat Shibramullasī alā Nihāyat al-Muḥtāj, 4: 392; Fatḥ al-Mubīn, 238-239; al-Bujayrimi, Tuḥfat al-Ḥabīb alā Sharḥ al-Khaṭīb, 398; al-Nawawī, *al-Rawḍah*, 9: 319; *Kashāf al-Qannā* , 3: 408.; Sharḥ Muntahā al-Irādāt, 2: 270.

[54] Ibn Abd al-Barr, *Al-Tamhīd*, 20: 160; al-Kamal bin al-Humām, *Fatḥ al-Qadīr*, 7: 326; Ibn Rajab, *Jāmi al- Ulūm wa al-Ḥikam*, 299; al-Mabsūṭ, 23: 186-187; Lisān al-Ḥukkām, 410; al-Shāṭibī, *al-Muwāfaqāt*, 2: 357; Ibn Ḥajar al-Haytamī, *Fatḥ al-Mubīn*, 239; al-Nawawī, *al-Rawḍah*, 9: 239 & 319; Nihāyat al-Muḥtāj, 7: 353; al-Bujayrimī, *Tuḥfat al-Ḥabīb alā al-Khaṭīb*, 3:197-398; Ibn al-Mufliḥ. *Al-Furū* , 3: 285; Ibn Qudāmah, *al-Mughnī*, 5: 453.

[55] Mawāfī, *al-Ḍarar fī fiqh al-Islāmī*, 821-826; al-Marghīnānī, *al-Hidāyah*, 9: 367; Ibn Ābidīn, *al-Durr*, 6: 212; Ibn Abd al-Barr, *al-Kāfī*, 2: 327; Aliyy bin

Aḥmad al- Adwā, *Ḥāshiyat al- Adwā alā al-Kharsh* (Berirut: Dār Ṣādir, n.d) 6: 135; Ibn Qudāmah, *al-Mughnī*, 5: 444-449; al-Bahūtī, *Kashshāf al-Qannā* , 4: 132.

[56] In the secular ethical concepts, some philosophers include the removal of harm under non-maleficence and prevention of harm under beneficence. Beauchamp and Childress, *Principles of Biomedical Ethics*, 2001: 115.

[57] However, this hierarchical order is not universally endorsed in secular morality or ethical theory. Beauchamp and Walters, *Contemporary Issues in Bioethics*, 30.

[58] Al-Suyūṭī, *al-Ashbāh wa al-Naẓā'ir*,78; Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, 90; al-Zarkashī, *al-Manthūr*, 1: 348; al-Qarāfī, *Anwār al-Burūq fī Anwā' al-Furūq*, 4: 369; al-Shāṭibī, *al-Muwāfaqāt*, 3: 190.

[59] Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, 87; Al-Zarqā, *al-Madkhal*, 593.

[60] Anwar Ahmad Qadri, *Islamic Jurisprudence in the Modern World* (Lahore: Taj Company, 1973), 285.

[61] "Harm is an excuse to annul any binding contract", Muḥammad bin Aḥmad al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-Ma rifah, 1993) 23: 26.

[62] Al-Burnū, *al-Wajīz*, 257; Shubayr, *al-Qawā id al-Kulliyyah*, 168-183; al-Sadlān, *al-Qawā id al-Fiqhiyyah*, 502-503.

[63] Al-Suyūṭī, *al-Ashbāh wa al-Naẓā'ir*, 83; Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, 85; al-Ḥamawī, *Ghamz*, 1: 37; Abū Sa īd al-Khādimī, *Manāfi al-Daqā'iq* (Istanbul: al-Ṭabā at al- Āmirah, 1308), 323;

[64] Mālik bin Anas, *al-Mudawwanah* (Cairo: Dār al-Kutub al- Ilmiyyah, 1994) 4: 182, 231 & 5: 459; Muḥammad bin Idrīs al-Shāfi ī, *al-Umm* (Beirut: Dār al-Ma rifah, 1990), 1: 43, 3: 208 and 4: 116.

[65] Al-Suyūṭī, *al-Ashbāh wal-Naẓā'ir*, 7.

[66] Mālik bin Anas, *Muwaṭṭa'* (Egypt: Dar Iḥyā' al-Turāth al- Arabi, 1203 AH), 2: 745.

[67] Taqiyy al-Dīn al-Haṣnī, *Kitāb al-Qawā id* (Riyadh: Maktabat al-Rushd, 1997)1: 334; al-Jawharī, Mukhtār al-Ṣiḥāḥ, 403.

[68] Muḥammad bin Alī al-Shawkānī, *Nayl al-Awṭār Sharḥ Muntaqā al-Akhbār* (Egypt: Maktabat al-Kulliyāt al-Azhariyyah, 1978), 312. Muḥammad al-Manāwī, *Fayḍ al-Qadīr Sharḥ al-Jāmi al-Ṣaghīr* (Egypt: Maṭba at Muṣṭafā Muḥammad, 1356 AH) 6: 32.

[69] Majd al-Dīn al-Mubārak bin al-Athīr, *al-Nihāyah fī Gharīb al-Ḥadīth wa al-Athar* (Beirut: al-Maktabat al- Ilmiyyah, 1973), 1: 82; Yaḥyā bin Sharaf al-Nawawī, *Sharḥ matn al-Arba īn al-Nawawiyyah fī al-Aḥādīth al-Nabawiyyah* (Giza: Maktabat Awlād al-Shaykh li al-Turāth, n.d.), 341.

[70] Burhān al-Dīn al-Shabarkhīytī, *al-Futūḥāt al-Wahbiyyah bi Sharḥ al-Arba īn al-Nawawiyyah* (Saudi Arabia: Dār al-Ṣāmi ī, 2007), 568.

[71] Zayn al-Dīn Abū al-Faraj bin Rajab, *Jāmi al- Ulūm wa al-Ḥikam* (Saudi Arabia: Mu'assasat al-Kutub al-Thaqāfiyyah), 267.

[72] Abū Umar Yūsuf bin Abd Allah ibn Abd al-Barr, *al-Istidkār al-Jāmi li Madhhab Fuqahā' al-Amṣār wa Ulamā' al-Aqṭār fīmā Taẓmanuhu al-Muwaṭṭa' min Ma ānī al-Ra'y wa al-Āthār* (Damascus: Dār Qutaybah li al-Ṭabā ah wa al-Nashr, 1414 AH), 22: 222; Ibn Abd al-Barr, *al-Tamhīd limā fī al-Muwaṭṭa'min al-Ma ānī wa al-Asānīd* (Saudi Arabia: Mu'assasat Qurṭubah, 1387 AH) 20: 157; Abū Ḥafṣ Tāj al-Dīn al-Fākihānī, *al-Manhaj al-Mubīn fī Sharḥ al-Arba īn*, ed. Abū Abd al-Raḥmān bin Shawkat, (Saudi Arabia: Dār al-Ṣāmī ī, 2007), 482.

[73] Al-Suyūṭī, *al-Ashbāh wal-Naẓā'ir* , 83; Ibn Nujaym, *al-Ashbāh wal-Naẓā'ir*, 94; Ibn al-Subkī, *al-Ashbāh wal-Naẓā'ir*, 1:41; Taqiyy al-Dīn al-Ḥisnī, *Kitāb al-Qawā id* (Riyadh: Maktabat al-Rushd, 1997), 1:333; Ibn al-Qayyim, *I lām al-Muwaqqi īn*, 3:372.

[74] Al-Suyūṭī, *al-Ashbāh wa al-Naẓā'ir*, 86. Aḥmad al-Zarqā'

[75] Aḥmad al-Zarqā', *Sharĺ al-Qawā id al-Fiqhiyyah*, 66.

[76] Ibn Qudāmah, *Mughnī fī al-Fiqh al-Ḥanbalī* (Beirut: Dār Ālam al-Kutub, 1405), 7:635.

[77] Al-Shāṭibī, *al-Muwāfaqāt*, 3:57.

[78] Manṣūr al-Bahūtī, *Kashāf al-Qannā* (Riyadh: Maktabat al-Naṣr al-Ḥadīthah), 3:423.

[79] Abū Dāwūd Sulayman bin al-Ash ath, *Sunan Abī Dāwūd* (Beirut: Dār al-Kitāb al- Arabī 2011), 3: 142

[80] Al-Zarqā, *al-Madkhal*, 587; al-Burnū, *al-Wajīz*, 256.

[81] Umar Abd Allāh Kāmil, *al-Qawā id al-Fiqhiyyah al-Kubrā wa Atharuhā fī al-Mu āmalāt al-Māliyyah* (Cairo: Dār al-Kutub, 2000) 1:206.

[82] Imām al-Ḥaramayn al-Juwaynī, *Ghiyāth al-Umam fī Iltiyāth al-Ẓulam* (Cairo: Dār al-Da wah, 2nd edn, 1401), 1:517.

[83] *Maslaḥah mursalah* means unrestricted public interest which means benefits on which canonical texts have neither upheld nor nullified. *Maslaḥah* should be genuine, general and not in conflict to any clear text but should be in full harmony to the spirit of Islamic law.

[84] *Siyāsah Shari iyyah* is a "broad doctrine of Islamic law which authorizes the ruler to determine the manner in which the Shariah should be administered", or it could be introduced as the policies based on canonical texts for administration based on justice. See Muhammad Hashim Kamali, "*Siyāsah Shari iyyah* or the Policies of Islamic Government", *The American Journal of Islamic Social Sciences*, vol. 6, No. 1, (1989): 59-80.

[85] Al- Sadlān, *al-Qawā id al-Fiqhiyyah al-Kubrā*, 508.

[86] Ahmad al-Zarqā, *Sharḥ al-Qawā id al-Fiqhiyyah*, 153.

[87] Ibn Qayyim al-Jawziyyah, *I lām al-Muwaqqi īn an Rabb al- Ālamīn*, 3: 171.

[88] Al-Suyūṭī, *al-Ashbāh wa al-Naẓā'ir*,78; Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, 90; al-Zarkashī, *al-Manthūr*, 1: 348; al-Qarāfī, *Anwār al-Burūq fī Anwā' al-Furūq*, 4: 369; al-Shāṭibī, *al-Muwāfaqāt*, 3: 190.

[89] Muḥammad Muṣṭafā al-Zuḥaylī, *al-Qawā id al-Fiqhiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arba ah* (Damascus: Dār al-Fikr, 2006), 199.

[90] The Quran uses the term *al-ḥasanāt* for referring to the *maṣlaḥah* and *al-sayyi'at* for *mafsadah*, for example, al-Ḥūd: 114. See Izz bin Abd al-Salām, *al-Qawā id al-Aḥkām fī Maṣāliḥ al-Anām* (Cairo: Dār al-Sharq li al-Ṭabā ah), 1:5.

[91] Izz bin Abd al-Salām, *Qawā id al-Aḥkām fī Maṣāliḥ al-Anām*, 1: 5, 7 &17.

[92] Ibid., 1:98.

[93] Al-Ṭūfī, *Sharḥ Mukhtaṣar al-Rawḍah* (Lebanon: Mu'assasat al-Risālah, 1410 AH), 3:214.

[94] al- Alā'ī, *al-Majmū al-Mudhhab*, 388.

[95] Izz bin Abd al-Salām, *Qawā id al-Aḥkām fī Maṣāliḥ al-Anām*, 1: 98; Ibn Ashūr, *Maqāṣid al-Sharī ah al-Islāmiyyah*, 178; Rashīd Riḍā, *Tafsīr al-Qur'ān al-Ḥakīm*, 2: 232.

[96] Abū al-Ḥusayn Muslim bin al-Ḥajjāj, *Ṣaḥīḥ Muslim*, (Beirut: Dār al-Jīl wa Dār al-Āfāq al-Jadīdah, 2011), 7: 91.

[97] Abū Zakariya Yaḥyā bin Sharaf, *al-Minhāj Sharḥ Muslim bin al-Ḥajjāj*, (Beirut: Dār Iḥyā' al-Turāth al- Arabī, 1392 AH), 8: 78.

[98] Muṣṭafā Aḥmad al-Zarqā', *al-Madkhal al-Fiqhī al- Āmm ila al-Ḥuqūq al-Madaniyyah*, (Dimashq: Maṭba at Jāmi ah al-Ṣūriyyah, 1377 AH), 2:985-986. For example, if a woman needs to take the obligatory bath but could not find a place except where males are present, then she should not take the bath although it is beneficial. In addition, a decree ordained by Allah, in order to prevent the gaze of males falling on her, thus to arrest infliction of harms, needs to be preferred over the benefit of purity by taking bath.

[99] Izz bin Abd al-Salām, *Qawā id al-Aḥkām fī Maṣāliḥ al-Anām*, 1:98-123.

[100] Ibn Taymiyyah, *Majmū al-Fatāwā* (Saudi Arabia: al-Ri'āsat al- Āmmah li al-Iftā' bi al-Sa ūdiyyah), 8:129; Al-Shāṭibī, *al-Muwāfaqāt*, 2:25.

[101] al-Zarkashi, *al-Manthūr*, 1: 348; Al-Suyūṭī, *al-Ashbāh wa al-Naẓā'ir*, 105; Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, 109. Another maxim also points to a similar meaning, which is *Idhā Ta āraḍa al-Māni wa al-Muqtaḍī yaqaddam al-Māni illā idhā kāna al-Muqtaḍā A ẓam* (If a Prohibitive Injunction contradicts with what seems to be Permissible, the Prohibitive is given Preference over the Permissible), al-Zarkashi, *al-Manthūr*, 1: 348; al-Zarqā, *al-Madkhal*, 595, Zakariyah, Zakariyah, "Applications of Legal Maxims…", 185.

[102] Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, 88. Majallah, 27.
[103]Al-Khādimī, *Manāfi al-Daqā'iq* 321; Lajnah min Fuqahā' al-Dawlah al-Uthmāniyyah, *Majallat al-Aḥkām al- Adliyyah*, (Istanbul: Maṭba at Uthmāniyyah, 1303) Māddah 25; Al-Zarqā', *al-Madkhal al-Fiqhī al- Āmm* 589.

[104] Al-Dasūqī, *Ḥāshiyah,* 3:369; Alī bin Abd al-Salām al-Tusūlī, *al-Bahjaj Sharḥ al-Tuḥfah* (Beirut: Dār al-Kutub al- Ilmiyyah, 1998), 2: 235; Abū al-

Walīd Sulaymān al-Bājī, *al-Muntaqā Sharḥ al-Muwaṭa'* (Cairo: Maṭba at al-Sa ādah, 1332 AH), 6: 60.

[105] Al-Ghazālī, *al-Wajīz*, 1: 207; al-Zarqā, *al-Madkhal al-Fiqhī*, 2: 1032.

[106] Joseph Schacht. *An Introduction to Islamic Law*, 175.

[107]Al-Khādimī, *Manāfī al-Daqā'iq* 321; Lajnah min Fuqahā' al-Dawlah al-Uthmāniyyah, *Majallat al-Aḥkām al- Adliyyah*, (Istanbul: Maṭba at Uthmāniyyah, 1303) Māddah 25; Al-Zarqā', *al-Madkhal al-Fiqhī al- Āmm* 589.

[108] Al-Suyūṭī, *al-Ashbāh wa al-Naẓā'ir*, 86. Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, 87.

[109] *Injuria non excusat injuriam* is a Latin phrase that means that one wrong does not justify another.

[110]Al-Subkī, *al-Ashbāh wa al-Naẓā'ir*, 1: 49.

[111] Al-Nawawī, *Sharḥ Muslim*, 2: 229.

[112] Al-Suyūṭī, *al-Ashbāh wa al-Naẓā'ir*, 86; Alī Ḥaydar, *Sharḥ Majallat al-Aḥkām al- Adliyyah*, 36.

[113] Majallat al-Aḥkām, 7; al-Zarqā, *al-Madkhal al-Fiqhī*, 596.

[114] Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, 90; Al-Suyūṭī, *al-Ashbāh wal-Naẓā'ir*, 87; Alī Ḥaydar, *Durar al-Ḥukkām*, 1: 37.

[115] Al-Qarāfī, *al-Dhakhīrah* (Beirut: Dār al-Gharb al-Islāmī, 1994), 13: 322.

[116] Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, 88. Majallah, 27.

[117] Majallah, 29.

[118] Abū Iltibās AÍmad bin Yaḥyā Wānsharīsi, *Īḍāḥ al-Masālik fīQawā id al-Imām Mālik*, (Rabat: al-Lajnat al-Mushtarikah bayna Dawlatay Maghrib wa al-Imārāt, 1400), 370.

[119] Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, 89.

[120] Abū Ḥāmid Muḥammad al-Ghazālī, *Mustaṣfā min Ilm al-Uṣūl*(Cairo: Dār al-Kutub al- Ilmiyyah, 1993), 71.

[121] Abū al-Ḥusayn Muslim bin al-Ḥajjāj, *Ṣaḥīḥ Muslim*, (Beirut: Dār al-Jīl wa Dār al-Āfāq al-Jadīdah, 2011), 1: 163.

[122] Al-Nawawī, *Sharḥ Muslim*, 1: 163.

[123] Izz bin Abd al-Salām, *al-Qawā id al-Aḥkām*, 1: 129; Abd al-Raḥmān Nāṣir al-Sa dī, *al-Qawā id wa al-Uṣūl al-Jāmi ah wa al-Furūq wa al-Taqāsīm al-Jāmi ah*, (Saudi Arabia: Dār bin al-Jawzī, 1421 AH), 66.

[124] Abd al- Azīz bin Abd al-Salām al-Silmī, *al-Fawā'id fī ikhtiṣār al-Maqāṣid*, 46; Al-Ṭūfī, *Sharḥ Mukhtaṣar al-Rawḍah*, 4: 474; Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, 91; Al-Suyūṭī, *al-Ashbāh wal-Naẓā'ir*, 88.

[125] Izz bin Abd al-Salām, *al-Qawā id al-Aḥkām fī Maṣāliḥ al-Anām*, 1: 122.

[126] Ibn Nujaym, *al-Ashbāh wa al-Naẓā'ir*, 87; Al-Zarqā, *al-Madkhal*, 593.

[127] Al-Ḥamadī, *Ghamz Uyūn al-Baṣā'ir Sharḥ Kitāb al-Ashbāh wa al-Naẓā'ir* (Lebanon: Dār al-Kutub al- Ilmiyyah, 1405 AH), 1:280; Adnān Jumu ah, *Raf al-Ḥaraj fī al-Sharī ah al-Islāmiyyah* (Dār al-Imām al-Bukhārī, 1979), 25-35; al-Būrnū, *al-Wajīz fī Īḍāḥ*, 84.

[128] Al-Shāṭibī, *al-Muwāfaqāt*, 2: 349.

[129] Ibid.

[130] Abū al-Ḥusayn Muslim bin al-Ḥajjāj, *Ṣaḥīḥ Muslim*, (Beirut: Dār al-Jīl wa Dār al-Āfāq al-Jadīdah, 2011), 5: 56.

[131] Al-Nawawī, *Sharḥ Muslim*, 5: 482.

[132] Abū al-Ḥusayn Muslim bin al-Ḥajjāj, *Ṣaḥīḥ Muslim*, (Beirut: Dār al-Jīl wa Dār al-Āfāq al-Jadīdah, 2011), 6: 116.

[133] Abū al-Ḥusayn Muslim bin al-Ḥajjāj, *Ṣaḥīḥ Muslim*, (Beirut: Dār al-Jīl wa Dār al-Āfāq al-Jadīdah, 2011), 2: 79.

[134] al-Zarqā', *al-Madkhal al-Fiqhī al- Āmm*, 2:984-985.

[135] al-Zarqā, *al-Madkhal al-Fiqhī*, 602; al-Khādimī, *Manāfi al-Daqā'iq*, 331; *Majallat al-Aḥkām*, 33; Ibn Rajab, *Qawā id*, 26.

[136] Al-Suyūṭī, *al-Ashbāh wa al-Naẓā'ir*, 76; Ibn Nujaym, *al-Ashbāh wal-Naẓā'ir*, 74; al-Zarqā, *al-Madkhal al-Fiqhī*, 598; *Majallat al-Aḥkām*, 17.

[137] Al-Suyūṭī, *al-Ashbāh wal-Naẓā'ir*, 84; Ibn Nujaym, *al-Ashbāh wal-Naẓā'ir*, 78; Muḥammad al-Zuḥaylī, *al-Qawā id al-Fiqhiyyah*, 1: 226.

[138] Ibn Nujaym, *al-Ashbāh wal-Naẓā'ir*, 85.