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The Search for Islamic Bioethics Principles

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The earlier edition of *Principles of Health Care Ethics* (1994) included an article providing Islamic equivalents of the Four Principles of Western-American bioethics, namely, autonomy, nonmaleficence, beneficence (including utility) and justice expounded by Tom L. Beauchamp and James F. Childress in *Principles of Biomedical Ethics* (4th edition, 1994). For several reasons the article failed to provide Muslim assessment of the principles and arguments for specifically Islamic principles of bioethics in the Muslim cultural context. First and foremost, it is indispensable to assess the intellectual context of the Four Principles, including the secular and democratic political philosophy that informs much of the principle-based bioethics in the West. No enunciation of the bioethical principles is possible without articulating the presuppositions of the Islamic tradition about human action, its ontology, its ethical evaluation and the roles of moral reasoning and scriptural resources in resolving a practical quandary. There is a critical need to understand moral epistemology in Islam before searching for the equivalents of the secular bioethics in the Islamic legal ethics.

Muslim legal theorists were thoroughly aware of moral underpinnings of the religious duties that all Muslims were required to fulfil as members of the faith community. In fact, the validity of their research in the foundational sources of Islam (the Qur'an and the Tradition) for solutions to practical matters depended upon their substantial consideration of different moral facets of a case that could be discovered by considering conflicting claims, interests and responsibilities in the precedents preserved in these authoritative sources. What ensured the validity of their judicial decision regarding a specific instance was their ability to deduce the universal moral principles like 'there shall be no harm inflicted or reciprocated' (*lā ḍarar wa lā ḍirār*)[1] that flowed downward from their initial premise to support their particular conclusion without any dependence on the circumstances that would have rendered the conclusion circumstantial at the most. In their appraisal of a network of conflicting moral considerations in the new case that required a legal solution, theoretical arguments embedded in primary sources to derive a resolution functioned more as *ratio legis* ('*illa*) or the attribute common to both the new and the original case. The rule or the principle (*qā'ida* or *aṣl*) was attached to the original case, which due to similarity between the two cases was transferred from that case to the new case. As such, more attention was paid to the original rule and the *ratio legis* that also became the source of much debate among Muslim jurists and formed important part of the procedures used to resolve earlier problems and reapplying them in the new problematic situations (Hallaq, 2001). Practical solutions based on earlier precedents carry the burden of proof on how closely the present case resemble those of the earlier paradigm cases for which this particular type of argument was originally devised. However, the power of these conclusions depended on the ethical considerations deduced from the rules that were operative in the original cases and the agreement of the scholars about analogical deduction that sought to relate the new case to the original rationale as well as rules.

In Islamic jurisprudence ethical values are integral to the prescriptive action guide that the system provides to the community. No legal decisions are made without meticulous analysis of the various factors that determine the rightness or the wrongness of a case under consideration. The universal major premise provided by the scriptural sources – the

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[1] Literally, the principle translates: There shall be no harming, injuring, or hurting, [of one person by another] in the first instance, nor in return, or requital, in Islam (See: Lane EW. *An Arabic–English Lexicon*. Part V, p. 1775). In this work I will refer to this principle as the principle or the rule of 'No harm, no harassment'.

Qur'an and the Tradition (*sunna*) – that serves as known is part of the divine commandments regarding the good that must be obeyed and the evil that must be avoided. There is an inherent correlation between God's command in the revelation and the moral reasoning that undergirds the command that is acknowledged by reason as being good. The metaphysical backdrop of the Sharī'a – the religious law of Islam – is the discovery of God's purposes for humanity. Human reason is God's endowment to enable human intellect to fathom the supernatural by exploring the meanings of the revealed message through the Prophet.

Whereas I am a believer in universal moral values that have application across cultures, human conditions in specific social and political culture demand searching for principles and rules that provide cultural-specific guidance in Muslim societies to resolve practical quandaries. My working assumption in this chapter is that praxis precedes search for principles and rules. Customarily, when faced with a moral dilemma deliberations are geared towards a satisfactory resolution in which justifications are based on practical consequences, regardless of applicable principles. For instance, in deciding whether to allow dissection of the cadaver to retrieve a valuable object swallowed by the deceased, Muslim jurists have ruled the permission by simply looking at the consequence of forbidding such a procedure. The major moral consideration that outweighs the respect for the dignity of the dead is the ownership through inheritance of the swallowed object for the surviving orphan. Dissection of the cadaver is forbidden in Islam, and, yet, the case demands immediate solution that is based on consequential ethics. Or, in the case of a female patient who, as prescribed in the Sharī'a must be treated by a female physician, in emergency situation the practical demand is to override the prohibition because the rule of necessity (*ḍarūra*) extracted from the revealed texts outweighs the rule about the sexual segregation extracted from rational consideration. Hence, the rule of necessity determines the teleological solution and provides the incontestable rationale for the permission granted to a Muslim female patient to refer to a male physician not related to her. There are numerous instances that clearly show the cultural preferences in providing solutions to the pressing problems of health care in Muslim societies in which highly rated principle of autonomy in the West takes a back seat, while communitarian ethics considers the consequence of any medical decision on the family and community resources.

Contemporary moral discourse has been aptly described as 'a minefield of incommensurable disagreements'. Such disagreements are believed to be the result of secularization marked by a retreat of religion from the public arena. Privatization of religion has been regarded as a necessary condition for ethical pluralism. The essentially liberal vision of community founded on radical autonomy of the individual moral agent runs contrary to other-regarding communitarian values of shared ideas of justice and of public good. There is a sense that modern, secular, individualistic society is no longer a community founded on commonly held beliefs of social good and its relation to responsibilities and freedoms in a pluralistic society (Heyd, 1996). To provide the fundamentals of the Islamic ethical discourse which ultimately must guide our search in the complexity of bioethical pluralism in the Muslim world, in this chapter I intend to explore distinctly Islamic, and yet cross-culturally communicable, principle-rule based deontological–teleological ethics[2] that is operative in the Muslim legal–moral culture in assessing moral problems in Islamic biomedical ethics.

ISLAMIC ETHICAL DISCOURSE

When one considers the normative Islamic tradition for standards of conduct and character it becomes obvious that besides the scriptural sources like the Qur'an and the Tradition ascribed to the founder of Islam, which prescribe many rules of law and morality for humans, Muslim scholars recognized the value of decisions derived from specific human conditions as equally valid source for social ethics in Islam. Early on, the theologian-jurists conceded that the scriptural sources could not easily cover every situation that might arise, especially when Muslim political rule extended beyond the Arabian peninsula, and required rules for urban life, commerce and government in advanced countries. But how exactly was human intellectual endeavour to be directed to discover the *ratio legis* ('*illa*), the philosophy and the rationale behind certain original rulings (known as *aṣl*, plural *uṣūl*) provided in God's commandments, in order to utilize these to formulate rational deductive principles for future decisions?

The question had important implications for the administrators of justice who were faced with practical necessity to make justifiable legal rulings, which could be defended against accusations of making arbitrary decisions. There was a fear of reason in deriving the details of law. The fear was based on the presumption that if independent human reason could judge what is right and wrong, it could rule on what God could rightly prescribe for humans. In other words, human reasoning could arrogate the function that was in large measure within the jurisdiction of the revealed

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[2]Deontological ethical norm determines the rightness (or wrongness) of actions without regard to the consequences produced by performing such actions. By contrast, teleological norm determines the rightness (or wrongness) of actions on the basis of the consequences produced by performing these actions. Deontological norms can further be subdivided into objectivist and subjectivist norms: objectivist because the ethical value is intrinsic to the action independently of anyone's decision or opinion; subjectivist because the action derives value in relation to the view of a judge who decides its rightness (or wrongness). Hourani (1985) introduces the latter distinction in deontological norms.

texts. However, it was admitted that although the details of the revealed law can be known through reason and aid human beings in cultivating the moral life, human intelligence was not capable enough to discover what the rationale for a particular law is, let alone demonstrate the truth of a particular assertion embedded in the divine commandment. In fact, as these theologian–jurists asserted that the divine commandments, to which one must adhere if one is to achieve specific end prescribed in the revealed law, are not objectively accessible to human beings through reason. Moreover, judgements of reason were arbitrary, as demonstrated by the fact of their contradicting each other, and reflected personal desire of the legal expert confronted with conflicting claims and interests.

Besides the problem of resolving substantive role of reason in understanding the implicit rationale of a paradigm case and elaborating the juridical–ethical dimension of revealed text as it relates to the conduct of human affairs in public and private spheres, there was a problem of situating the credible religious authority empowered to provide validation to the ethical–legal reasoning associated with the derived philosophy behind legal rulings. On the one hand, following the lead of the Sunnī jurists like Muḥammad b. Idrīs al-Shāfiʿī and Aḥmad b. Ḥanbal in the tenth and eleventh centuries C.E., Sunnī Islam located that authority in the revealed texts – Qur'an and the Tradition. These scholars represented the predominant schools of Sunnī theology that held that in deciding questions of Islamic law one could work out an entire system based on juridical elaboration of Islamic revelation and the Tradition. On the other hand, following the line of thought maintained by the Shīʿite Imams, Shīʿite Islam located that authority in the rightful successors of the Prophet. The Shīʿite Imams maintained that there was an ongoing revelatory guidance available in the expository ability of human reason in comprehending the divine revelation exemplified by the solutions offered by the Shīʿite leadership.

In general, Muslim theologian-jurists paid more attention to the nature of God's creation and human beings' relation to God as the Creator, Lawgiver and Judge. They were also interested to understand the extent of God's power and human freedom of will as it affected the search for a right prescription for human behaviour. In the final analysis, in view of the absence of the institutionalized religious body (resembling the church in Christianity) that could provide the necessary validation of the legal–moral decisions on all matters pertaining to human existence, the problem of determining the Sacred Lawgiver's intent behind juridical–ethical rulings that had direct relevance to the social life of the community was not an easy task. The entire intellectual

activity related to Islamic juridical–ethical tradition can be summed up as a jurist–theologian's attempt to relate specific moral–legal rulings (*aḥkām*, singular *ḥukm*) to the divine purposes expressed in the form of norms and rules preserved in the original cases in the Qur'an and the Tradition, not without ambiguities though. In view of incomplete state of their knowledge about present circumstances and future contingencies of human conditions, in most cases of ethical judgement, the jurists proceeded with a cautious attitude on the basis of what seemed most likely (*ẓann*) to be the case. Such ethical judgements were normally appended with a clear, pious statement that the ruling lacked certainty (*ʿilm* or *qaṭ*) because it was only God, who being aware about the circumstances and consequences affecting human beings, was the most knowledgeable about the true state of affairs.[3]

In due course, the jurists were able to identify two methods for understanding the justification behind a legal–ethical decision. Sometimes the rationale that discovered the rulings was derived directly from the explicit statements of the Qur'an and the Tradition that set forth the purpose of legislation. At other times, human reason discovered the relationship between the ruling and the effective cause, in order to provide sound theoretical basis for jurisprudence. However, the jurists admitted and determined the substantive role of human reasoning in making valid legal or moral decision. Moreover, it depended upon the jurist's comprehension of the nature of ethical knowledge and the means by which humans can access information about good and evil. In other words, it depended upon the way the human act was defined in terms of human ethical discernment about good and evil and the relation of human act to God's will. In an important way, any advocacy of reason as a substantive rather than formal source for procuring moral–legal verdicts required authorization derived from revealed texts like the Qur'an and the Tradition. In the Qur'an, a teleological view of human beings with the very ability to use reason to discover God's will is possible to maintain, more particularly when the revelation itself endorses reflection on the reasons for revealed laws as well as obeying them. It is important to keep in mind that all the jurist–theologians, belonging to the Sunnī or Shīʿite schools of thought, maintained that without the endorsement of the revelation reason could not become an independent source of moral–legal decisions.

This precautious attitude towards reason has its roots in the belief that God's knowledge of the circumstances and of the consequences in any situation of ethical dilemma confronted by human existence is exhaustive and infallible. In fact, there were a number of the rulings in the Qur'an and the Tradition which were expressed simply as God's

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[3]The usual practice among Muslim jurists is to end their judicial opinion (*fatwā*) with a statement *allāh ʿalim*, that is 'God knows best', indicating that the opinion was given on the basis of what seemed most likely to be the case (*ẓann*), rather than claiming that this was an absolute and unrebuttable (*qaṭ*) opinion, which could be derived only from the revelatory sources like the Qur'an and the Traditions.

commands which had to be obeyed without knowing the reasons behind them. The commandments were simply part of God's prerogative as the Creator to demand unquestioning obedience to them. To act in a manner contrary to divine commands is to act both immorally and unlawfully. The major issue in legal thought, then, was related to the defining of the admissibility and the parameters of human reasoning as a substantive source for legal–moral decisions. Can reason discover the divine will in confronting emerging legal–ethical issues without succumbing to human self-interest?

THE RATIONALIST AND TRADITIONALIST ETHICAL REASONING IN THE REVELATION

The use of 'rationalist' and 'traditionalist' in this section conforms to the general identification of the two major trends in Islamic theological–ethical discourse above. Based on their admittance of or cautious attitude towards reason as a substantive source for ethical–legal judgments, the Sunnī Mu'tazilites and the Shī'ite fall under the 'rationalist' group, and the Sunnī Ash'arites fall under the 'traditionalist' group. The process of formulating the methodology for deriving sound ethical–legal decision was undertaken with a clear view of providing principles and rules for deriving predictable judgements in all matters of interpersonal relationship. Central to this discussion was the analytical treatment of the twin concepts of justice ('adāla, usually defined as 'putting something in its appropriate place') and obligation (wujūb, sometimes defined as 'promulgation of divine command and prohibition'). The concept of justice provided a theoretical stance on the question of human obedience to divine commands and the extent of human capacity in carrying out the moral–religious obligations (takālif shar'iyya). The concept of obligation defined the nature of divine command and provided deontological grounds for complying with it. The commandments have reasons of their own that can be explained in terms of the function they fulfil for the good of humankind.

Gradually, two responses emerged from the pressing need of providing consistent and authentic guidance in the matter of social ethics. Some prominent jurists of the tenth and 11th centuries C.E. maintained that in deciding questions on which there was no specific guidance available from the normative sources of Islamic law and ethics, judges and lawyers had to make their own rational judgements independently of the revealed texts. This was certainly the case when the law, being stated in general terms, did not provide for the peculiarity of situations. This was the rationalist group. Other jurists disapproved of this rational method not adequately anchored in the normative sources, and insisted that no legal or moral judgement was valid if not based on the authoritative religious texts, both the Qur'an and the Tradition. There was no way for

humanity to know the meaning of justice outside the revealed texts. In fact, they contended, justice is nothing but carrying out the requirements of the revealed law. This was the traditionalist camp. In addition, they argued that it was the revealed law, the Sharī'a, that provided the scales for justice in all those actions that were declared as morally and legally obligatory (wājib, farḍ). At the end of the day, the latter group's traditionalist thesis became the standard view held by the majority of the Sunnī Muslims. Some Sunnī and the majority of the Shī'ite Muslims, on the contrary, maintained the rationalist thesis with some adjustment in conformity to their doctrine about supreme religious authority of the Imam.

However, the role of ethical norms in deriving moral judgements was articulated in greater detail by the theologians who, too, were divided on the same lines as the jurists: those who supported the substantive role of reason in knowing what is right and obligatory, and those who argued in favour of the Tradition as the primary source of ethical knowledge. In other words, moral reasoning was placed under the authority of the revealed texts that provide the justification for doing or avoiding a particular task. Ethical objectivism or deontological theory, with its thesis that human beings can know much of what is right and wrong because of the intrinsic goodness or badness of actions, is connected with the rationalist theologians, that is, the Mu'tazilite and the Shī'ite; whereas ethical voluntarism, the traditionalist ethics, which denied anything objective in human acts themselves that would make them right or wrong, is connected with Ash'arite theologians (Hourani, 1971).

The traditionalist reactions to the rationalist ethics corroborated the jurists' apprehension of reason in deriving judicial decisions. The arbitrariness of human reason, as the traditionalists pointed out, could not guarantee a right solution to the complex moral dilemmas faced by human beings in everyday situation. Moreover, if reason was capable of reaching right ethical judgement unaided by the revelation, then what is the need for God's guidance through the revelation? Hence, according to the upholders of traditionalist ethics, it was more accurate to maintain that God's command in the form of revelation is not only the primary source of the moral–religious law; it is also the sole guarantee for avoiding contradictions that stem from reason's arrogation of the function of revelation (Madkur, 1960).

This cautious and even negative evaluation of reason in the traditionalist ethics had a parallel in the systematization of juridical theory among the Muslim jurists. The ethical–legal problem-resolving device was in search of a fundamental principle that could function as a template for the formulation of emerging ethical–legal decisions. The expansion of Muslim political rule beyond Arabia raised questions about the application of the rulings provided by the revealed sources. The jurists were quick to realize that

such absolute application without considering specific social and cultural context of these rulings was not without a problem. After all, the rulings provided by the revelation brought into focus specific human conditions related to custom, everyday human behaviour and ordinary language used to convey moral precepts and attitudes to life in the Arabian society. In other words, even when the moral law is wholly promulgated through divine legislation in the form of the Qur'an and the Tradition, such a law is objective because of the diversity that can be observed among human beings.

Very early on scholars of jurisprudence were led to distinguish between duties to God ('ibādāt = 'ritual duties') and duties to fellow human beings (mu'āmalāt = 'social transactions'). 'Ritual duties' were not conditioned by specific human conditions, and hence were absolutely binding. 'Social transactions' were necessarily conditioned by human existence in specific social and political context, and, hence, adjustable to the needs of time. It was in the latter sphere of interpersonal relations that the jurists needed to provide fresh rulings generated by the changing human conditions. The entire area of social ethics in Islam falls under the mu'āmalāt sections of jurisprudence. However, authoritative decisions in matters of social ethics could not be derived without first determining the nature of human acts under obligation (taklīf). The divine command, understood in terms of religious–moral obligation (taklīf), provided the entire ethical code of conduct and a teleological view of humans and the world. More pertinently, violation of divine command, as Muslim jurists taught, is immoral on the grounds that it interferes with the pursuit of human goal of achieving perfection that would guarantee salvation in the Hereafter. Ultimately, human salvation is directly connected with human conduct – the subject matter of legal–theological ethics.

ISLAMIC PRINCIPLES OF BIOETHICS

There was no unanimity among the representatives of four major Sunnī legal thought (Mālikī, Ḥanafī, Shāfi'ī, and Ḥanbalī) regarding the principles nor that these principles were derived from foundational, rationalistically established moral theories from which other principles and legal–moral judgements were deduced. Rather scholars from different legal schools identified several principles extracted from original cases, often but not always the same ones. Since the language of Sharī'a is the language of obligation or duty the primary principles (qawā'id uṣūl) and rules (qawā'id fiqhī) in Islamic ethics are stated as obligations and their derivatives, respectively. Some jurists have identified principles to encompass both principles and rules and have indicated the primary and the subsidiary distinction in their application to particular cases.

Two such intellectual sources in Muslim jurisprudence were istiḥsān (prioritization of two or more equally valid judgements through juristic practice) and istiṣlāḥ (promoting and securing benefits and preventing and removing harms in public sphere). These represented independent juristic judgement of expedience or public utility. However, the legitimacy of employing these reason-based sources depended upon their assimilation into the textual sources.

Thus, for instance, the duty to avoid literal enforcement of the existing law, which may prove detrimental in certain situations, has given rise to the principle of 'juristic preference' (Kamali, 1991). This juridical method of prioritization of legal rulings taking into account the concrete circumstances of a case at hand has played a significant role in providing the necessary adaptability to Islamic law to meet the changing needs of society. However, the methodology is founded upon an important principle derived from the directive of 'circumventing of hardship' stated in the Qur'an in no uncertain terms: 'God intends facility for you, and He does not want to put you in hardship'(2:185). This directive is further reinforced by the tradition that states 'The best of your law (dīn) is that which brings ease to the people'. In other words, the principle of 'juristic preference' allows formulating a decision that side steps an established precedent in order to uphold a higher obligation of implementing the ideals of fairness and justice without causing unnecessary hardship to the people involved. The obvious conclusion to be drawn from God's intention to provide facility and remove hardship is that the essence of these principles is their adaptability to meet the exigencies of every time and place on the basis of public interest. In the absence of any textual injunction in the Qur'an and the Tradition, the principle of 'Necessity (ḍarūra) overrides prohibition' furnishes an authoritative basis for deriving a fresh ruling.

The limited scope of the chapter does not permit us to undertake to identify all the principles that are applied to make juridical decisions in various fields of interpersonal relations in Islamic law. What seems to be most useful and feasible is to identify a number of fundamental Islamic principles that are in some direct and indirect ways discerned through the general principle of maṣlaḥa, that is, 'public good'. This principle is evoked in providing solutions to the majority of novel issues in biomedical ethics. The rational obligation to weigh and balance an action's possible benefits against its cost and possible harms is central to social transactions in general and biomedical ethics in particular.

The principles to be elaborated in this chapter are not necessarily the same in priority or significance as recognized, for instance, in the Western bioethics, namely, respect for autonomy, nonmaleficence, beneficence (including utility) and justice. In comparison, Islamic principles overlap in important respects but differ in others. For instance, the two distinct obligations of beneficence and nonmaleficence in some Western systems are viewed as a single principle

of nonmaleficence in Islam on the basis of the overlapping between the two obligations in the principle of 'No harm, no harassment'. Moreover, the principle of 'Protection against distress and constriction' ('*usr wa al-ḥaraj*) applies to social relations and transactions which although, they must be performed in good faith, are independent of religion. There are also a number of rules based on some precedents in the revealed texts, which are important parts of the Islamic system that are usually underemphasized in the Western secular bioethics. Thus the rule of consultation (*shūrā*) as part of the Islamic ethics functions as a substitute for the dominant principle of autonomy based on the liberal individualism.

Moreover, although this research is based on the bioethical rulings compiled from four major Sunnī and one Shī'ite legal schools, I have attempted to identify only the most commonly referred principles or rules in the biomedical jurisprudence without necessarily attributing them to one or the other school except when there has been fundamental disagreement on their inclusion in one or the other legal theory. These are the principles that have provided resolutions to the moral quandaries in bioethics by seeking to identify and balance risks and benefits to derive probable conclusions in order to protect the society from harms. In the last two decades jurists belonging to all the Muslim legal schools have met regularly under the auspices of the ministry of health of their respective countries to formulate their decisions as a collective body. Some of these new rulings have been published under the auspices of *Majma' al-fiqhī al-islāmī* (Islamic Juridical Council). A close examination of the juridical decisions made in this council reveal the balancing of likely benefits and harms to society as a whole. In addition, these decisions indicate the search for proportionality (*tanāsub*) between individual and social interests of the community and the need, in certain cases, to allow collective interests to override individual interests and rights. The inherent tension in such decisions is sometimes resolved by reference to a critical principle regarding the right of an individual to reject harm and harassment ('No harm, no harassment'), which constrains unlimited application of the principle of common good.

THE PRINCIPLE OF PUBLIC INTEREST/ COMMON GOOD (*MAṢLAḤA*)

Consideration of public interest or common good of the people has been an important principle utilized by Muslim jurist–ethicists for accommodating and incorporating new issues confronting the community. *Maṣlaḥa* has been admitted as a principle of reasoning to derive new rulings or as a method of suspending earlier rulings out of consideration for the interest and welfare of the community. However, its

admission as an independent source for legislation has been contested by some Sunnī and Shī'ite legal scholars. To be sure, *maṣlaḥa* is based on the notion that the ultimate goal of the Sharī'a necessitates doing justice and preserving people's best interest in this and the next world. But who defines justice and what is the most salutary for the people? Here theological ethics defines the parameters of *maṣlaḥa*.

Looking at the majority of the Muslims who belong to the Sunnī-Ash'arī school of thought in its understanding of God's plan for humanity, one needs to understand the Ash'arite view of what is the best for people. The Ash'arites, who maintained the divine command ethics (the theistic subjectivism), confined the derivation of *maṣlaḥa* strictly from the revealed texts. Abū Ḥāmid al-Ghazzālī (d. 1111), as an Ash'arī theologian–jurist, elucidates this position in his legal theory:

> *Maṣlaḥa* is actually an expression for bringing about benefit (*manfa'a*) or forestalling harm (*maḍarra*). We do not consider [*maṣlaḥa*] in the meaning of bringing about benefit or forestalling harm as part of [God's] purposes for the people or [God's] concern for the people, in order for them to achieve those purposes. Rather, we take *maṣlaḥa* in the meaning of protecting the ends of the Revelation (*al-shar'*). The ends of the Revelation for the people are five: To protect for them: (1) their religion, (2) their lives (*nufūs*), (3) their reason (*'uqūl*), (4) their lineage (*nasl*) and (5) their property (*māl*). All that guarantees the protection of these five purposes is *maṣlaḥa*, and all that undermines these purposes is *mafasada* (a source of detriment) (Ghazzā).

Hence, justice, according to the Ash'arites, lies in the commission and application of what God had declared to be good and the avoidance of that which God had forbidden in these sacred sources. Moreover, ruling an action good or evil depends on the consideration of the general principles derived from the original cases in the revealed texts. Consequently, human responsibility is confined to the course ordained by God by seeking to institute what God declares good and shunning what God declares evil. In addition, as far as the solution to the new cases is concerned, the Ash'arites maintain that the principle of *maṣlaḥa* is internally operational in the rulings that show with certainty that in legislating them God has the welfare of humankind in mind (Shāṭibī).

In contrast, the estimation of the Mu'tazilite Sunnī thinkers, who maintained objectivist rationalist ethics, was understandably at variance with the Ash'arites. Their thesis was founded upon human reason as capable of knowing *maṣlaḥa* – the consideration of public interest that promoted benefit and prevented harm. For them, *maṣlaḥa* was an inductive principle for the resolution of the new cases in the area where the scriptural sources provided little or no guidance at all, and where judgements had to balance different claims, interests and responsibilities by acknowledging conflicting considerations involving human situations.

In the context of matters connected with social ethics, which deal with everyday contingencies of human life, it is important to keep in mind that regardless whether the principle of common good originates internally in the primary religious sources or externally through intuitive reason, no jurist questions the conclusion that legal–ethical judgements are founded upon concern for human welfare and in order to protect people from corruption and harm. In other words, they maintain that God provides the guidance with a purpose of doing the most salutary for people, even when the exact method of deducing this general principle is in dispute (Subkī).

THE TYPES OF ISSUES COVERED UNDER THE PRINCIPLE OF PUBLIC GOOD

In view of the above explanation about public good the principle comprises each and every benefit that has been made known by the purposes stated in the divine revelation, (Muḥammad Said), and because some jurists have essentially regarded public good as safeguarding the God's purposes for humanity, (Ghaza) the jurists have discussed the principle both in terms of types and the purposes they serve. Some have classified public good in terms of types, while others have resorted to purposes for classification. For instance, among the Sunnī jurists, Shāṭibī has treated the principle and its corollaries in great detail in his legal theory by pointing out that religious duties have been imposed on the people for their own good in view of the fulfillment of God's purposes for them. These purposes are discussed under three headings in that order:

1. *The Essentials or the Primary Needs (al-ḍarūriyāt):* These are things that are promulgated for the good of this and the next world in such a way that without them one cannot acquire the benefits such as providing healthcare to the poor and downtrodden in society (Ibn Amīr).
2. *The General Needs (al-ḥājiyāt):* These are things that enable human beings to improve their life and to remove those conditions which lead to chaos in one's familial and societal life in order to achieve higher standards of living, even though these necessities do not reach the level of essentials (*Al-Muwāfiqāt*).
3. *The Secondary Needs (al-taḥsīnāt):* These are the things that are commonly regarded as praiseworthy in society, which also lead to the avoidance of those things that are regarded as blameworthy. They are also known as 'Noble Virtues' (Shāṭibī).

In terms of the principle's application a number of beneficial or corruptive aspects converge or public good and corruption appear in the same instance. In such cases the balancing of the conflicting considerations becomes indispensable for a just solution about the common good. For example, one of the issues in the Muslim world is relating to prenatal genetic diagnosis (PGD), which inevitably leads to sex selection. Because of cultural or financial reasons, some Muslim parents prefer one sex above the other. Some jurists have argued in favour of sex selection, as long as no one, including the resulting child, is harmed. However, others have disputed the claim that no harm will be done. They point to violations of divine law, natural justice, and the inherent dignity of all human beings. More importantly, permitting sex selection for nonmedical reasons involves or leads to unacceptable discrimination on grounds of sex and disability, potential psychological damage to the resulting children, and an inability to prevent a slide down the slippery slope towards permitting designer babies. In such cases, it becomes critical to assess the important criteria for the public good, or to prioritize criteria that lead to public good or corruption, and provide the requisite ruling.

THE PRINCIPLE OF 'NO HARM, NO HARASSMENT'

'No harm, no harassment'" has a long history in Islamic jurisprudence. The principle is anchored in the primary sources going back to the Prophet himself. 'No harm, no harassment' is regarded as one of the most fundamental principles for deducing rulings dealing with social ethics in Islam. Muslim jurists have discussed and debated on the validity of this principle because it is regarded as one of the critical proofs in support of numerous decisions involving resolution of cases that involve conflict of interests, claims, and responsibilities. However, what renders the principle authoritative in such cases is its ascription to the Prophet himself. Hence, whether from the point of its transmission or from the congruity in the sense conveyed by it, the jurists have endorsed its admission among the principles that are employed in making all decisions that pertain to social and political life of the community. In fact, the Shāfi'ī-Sunnī jurist, Suyūṭī regards the tradition in which the principle of 'No harm, no harassment' is embedded as one of the five major traditions on which depended the derivation of legal–ethical decisions in the Sharī'a (Suyūṭ). In addition, he affirms that the majority of juridical rubrics were founded on the rule of 'No harm, no harassment', and that closely related to this rule are a number of other rules among which is: 'Necessities make forbidden permissible, as long as it does not lead to any detriment (Suyūṭ)' The rule has played a major role in Islamic jurisprudence when one considers the way jurists have taken up the 'No harm, no harassment' as a general principle that speaks clearly about no harm should be inflicted or reciprocated. Some jurists include it among

the five major principles that have extracted from the original cases that can be possibly utilized to deduce the new rulings in the area of interpersonal relations. These five principles are as follows:

1. 'Action depends upon intention'. This rule is deduced from the tradition related by the Prophet: 'Indeed, actions depend upon intentions'.
2. 'Hardship necessitates relief'. This rule is inferred from the tradition that says: 'The best of your law (*dīn*) is that which brings ease to the people'.
3. 'One needs certainty'. To continue an action requires linking the present situation with the past.
4. 'No harm should be inflicted or reciprocated'. This rule is deduced on the basis of the need to promote benefit and institute it in order to remove causes of corruption or reduce their harmful impact upon the possibility of having to choose the lesser of the two evils.
5. 'Custom determines course of action'. The rule acknowledges the need to take local custom into account when making relevant rulings (Shahīd).

'No harm, no harassment' functions both as a principle and a source for the rule that states 'hardship necessitates relief'. As such, it connotes that there can be no legislation, promulgation or execution of any law that leads to harm of anyone in society. For that reason, in derivation of a legal–ethical judgement the rule is given priority over all primary obligations in the Sharī'a. In fact, it functions as a check on all other ordinances to make sure that their fulfilment does not lead to harm. In case of dispute in any situation, the final resolution is derived by applying the rule of 'No harm, no harassment'. For instance, the primary obligation of seeking medical treatment becomes prohibited if it aggravates the affliction suffered under certain medical condition.

In the Sharī'a, definition of harm and harassment in negative sense depends upon custom (*al-'urf*), which determines its parameters. Custom also establishes whether harm to oneself or to another party has been done in a given situation. If custom does not construe a matter to be harmful, then it cannot be admitted as such by applying the principle itself, nor can it be considered as forbidden according to the Sharī'a, even if the matter is lexically designated as 'harmful'. It is important to keep in mind that ultimately it is the Sacred Lawgiver who defines the parameters of harm. However, if custom regards something to be harmful for which there is no specific evidence from the revealed texts, the harm in that situation becomes more broadly defined as conditions that mediate injustice and violation of someone's rights. Moreover, harm differs in accord with causes that include self-harming conditions as well as the actions of another party. Hence, one's social status, culture and time in which one lives play a role in defining harm. Harm is relative to the person who experiences it. Therefore, what appears to be wrong *prima facie* and is regarded by one party as a harmful act may not be considered wrong or unjustified by another. Human experience, although subjective, attains considerable importance in the evaluation of the kind of harm that is to be rejected in the rule of 'No harm, no harassment'. The context in which the Prophet gave the rule clearly leaves the matter of harm to be determined by the situation. In the report that speaks about the harm caused by an inconsiderate neighbour who violated the privacy of his neighbour, it was a case of harmful invasion by one party of another's interest. To be sure, the principle of 'No harm, no harassment' allows for the ruling that one must reject becoming a cause for harm.[4]

The application of the ruling to reject harm has no bearing on the assessment of the actual situation when a person is going through the setbacks to his interests. Nor does the Lawgiver's admission of harm in certain situations as a mediating causation for some rulings that require reparation or compensation render harm as a valid claim. In the final analysis, it is the personal assessment of harm that functions as an important consideration in determining related obligations. Hence, for instance, when a person is sick, she determines whether she can keep the fast of Ramadan as required by the Sharī'a in consideration of the harm that fasting can cause. Regardless of the criteria one applies to determine the level of harm, whether it is less or more, once custom establishes its existence then the Sharī'a endorses it as equally so, even when there might be a difference of opinion whether some forms of harm are more detrimental than other. In any case, when such a difference of opinion occurs, the law requires following the decision that leads to least harm and that causes the least damage to one's total well–being. Hence, in the case of a terminally ill patient, if the decision to prolong life leads to more harm for the patient and his immediate family, then to continue to insist on keeping him on life-saving equipment is regarded as causing further harm to the patient's and his family's well-being and hence, forbidden.

REFERENCES

Al-Muwāfiqāt, Vol. 2, p. 9. Other jurists have mentioned these categories in different order, with different examples in each category. See, for instance: al-Ghazālī, *al-Mustasfā*, p. 175.

Hourani (1985) introduces the latter distinction in deontological norms.

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[4]There is a sustained discussion among jurists about the nature of harm that this tradition conveys. Undoubtedly, *ḍarar* refers to general forms of harm that include setbacks to reputation, property, privacy, and specific ones that include setbacks to physical and psychological needs. See: 'Alī al-Ḥusaynī al-Sīstānī, *Qā'ida lā ḍarar wa lā ḍirār* (Qumm: Lithographie Ḥamīd, 1414/1993), pp. 134–141.

Ghaza.li., *Mustaṣfa*., Vol. 1, p. 286–7.

Ghaza.li., *al-Mustaṣfa*., p. 174.

Hallaq WB. *Authority, Continuity and Change in Islamic Law.* Cambridge: Cambridge University Press, 2001; pp. 131ff. Lists the manner in which preponderance was determined in terms of which rule or rationale had the force of settling the dispute about the probable outcome of the quandary.

Heyd D, ed. *Toleration: An Elusive Virtue*. Princeton: Princeton University Press, 1996.

Hourani GF. *Islamic Rationalism: The Ethics of ʿAbd al-Jabbar.* Oxford: Clarendon Press, 1971. Calls the Muʿtazilite theory of ethics 'rationalist objectivism' because natural human reason is capable of knowing real characteristic of the acts, without the aid of revelation. Fakhry M. *Ethical Theories of Islam.* Leiden: E. J. Brill, 1991; pp. 35–43 regards this as quasi-deontological theory of right and wrong in which the instrinsic goodness or badness of actions can be established on purely rational grounds. Hourani calls the Ashʿarite theory of ethics 'theistic subjectivism' rather than 'ethical voluntarism' because the value of action is defined by God as the judge and observer. However, since it is the divine will that is the determinant of right and wrong it would be more meaningful to retain 'voluntarism' in this particular type of divine command ethical theory. See: Fakhry M. The Muʿtazilite view of man. *Philosophy, Dogma and the Impact of Greek Thought in Islam.* Varior: um, 1994, pp. 107–21, and his *Ethical Theories*; pp. 46–55. Further refinement in specifying the Ashʿarite theory on the basis of Fakhry's discussions is provided by Frank RM. Moral obligation in classical muslim theology. *J Religious Ethics* 1983; **II**: p. 207, where he regards Ashʿarite ethics 'a very pure kind of voluntaristic occasionalism'.

Hourani GF. *Reason and Tradition in Islamic Ethics*. New York: Cambridge University Press, 1985; p. 17.

Ibn Amīr Ḥāj, *al-Taqrīr wa al-taḥbīr*, Vol. 3, p. 213; Shāṭibī, *al-Muwāfiqāt*, Vol. 2, pp. 7-8. Regards performance of all duties under the category of God-human relationship (ʿibādāt) as fulfilling the need to protect one's religion; eating and drinking as fulfilling the need to protect one's life; performance of all duties under the category of interhuman relationship (muʿāmalāt) as fulfilling the need to protect future generation and wealth; and implementation of penal code and laws of retribution and restitution as fulfilling the need to protect all five essentials.

Kamali MH. *Principles of Islamic Jurisprudence*. Cambridge: Islamic Texts Society, 1991; Chapter 12.

Madkur MS. *Mabahith al-hukm ʿinda al-usuliyyin*, Vol. 1. Cairo: Dar al-Nahda al-ʿArabiyya, 1960; p. 169.

Muḥammad Saʾīd Ramaḍān al-Būṭī, *Ḍawābit al-maṣlaḥa fī al-sharīʾat al-islāmiyya* (Beirut: Muʾassasa al-Risa.la, 1410/1990), Vol. 3, p. 288

Shāṭibī, *al-Muwāfiqāt*. Vol. 2, pp. 4–5. Believes that essentially legislating laws and promulgating religions have the welfare of humanity as their main purpose. Furthermore, he maintains that even when theologians have disputed this doctrine pointing out, as the Ashʿarite theologian Rāzī has done, that God's actions are not informed by any purpose, the same scholars in their discussions on legal theory have conceded to the notion, however in different terms that divine injunctions are informed by God's purpose for humanity. Shāṭibī clearly indicates that deduction of divine injunctions provides evidence about their being founded upon the doctrine of human welfare, to which Rāzī. and other Ashʿarites are not opposed.

Shāṭibī, *al-Muwāfiqāt*, Vol. 2, p. 9.

Shahi.d Awwal, *al-Qawāʿid*, Vol. 1, pp. 27–28.

Subkī, *al-Ibhāj fī sharḥ al-minhāj*. Beirut: Dār al-kutub al-ʿilmiya. 1404/19, Vol. 3, p. 62.

Suyūṭī, *Tanwīr al-Ḥawālik: isʾāf al-mubatta' bi-rijāl al-Muwaṭṭa'* (Beirut: al-Maktaba al-Thiqāfi.ya, 1969), Vol. 2, pp. 122, 218.

Suyūṭī, *al-Ashbāh wa al-naẓāʾir fi. qawāʿid wa furu' fiqh al-Shāfi'īya* (Mekkah: Maktabat Niza.r Muṣṭafa. al-Bāz, 1990), p. 92.