Rule No. 4: الضرر لايزال بمثله[54]

Harm is not removed through another of the same kind,

Or

Harm can not compensate Harm

The *Majallah* illustrates this maxim with the following example:

"If an ancient defect in the thing sold appears, while the thing has already become defective in the possession of purchaser, the right of the purchaser to return it to the seller no longer exists, but he has the right to demand a reduction in price".[55]

The maxim suggests that if the removal of harm is not possible, except by inflicting similar harm, then harm will not be removed in that way, but some other kind of compensation will be given to the one who has suffered harm. For example, if a defect emerges in the goods, while in possession of the buyer, and then he also discovers some old defect in it as well, now this new defect renders the return of goods impracticable, because such act will cause harm to the seller. He (buyer), however, has the right to claim compensation from the seller. The compensation in this case is that an amount equaling the value of defect will be returned to him by the seller.

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[54] *Sharḥ al-Qawā'id al-Fiqhiyyah*, op.cit. p. 141.
[55] *Al-Majallah*, op.cit. Article 345.

such cases, the act should be avoided, unless its permissibility is established with certainty.

When a person exercises a right which brings benefit to him but at the same time causes harm to someone else, he will be prevented from exercising that right.

The maxim has its roots in a number of *aḥādīth* of Holy Prophet (s.a.w.s). Some of such *aḥādīth* that provide evidential basis for this maxim are as follows:

"If I order you to abstain from a thing, avoid it and if I order you to do a thing, accomplish it according to your capacity".[51]

He also said: "Abandon that which is doubtful, adopt that which is doubtless".[52]

He also said: "Halāl is clear and Ḥarām is also clear and between them are certain doubtful things which many people do not recognize. He, who guards against doubtful things, keeps religion, honour blameless, but whoever indulges in them, falls into what is unlawful".[53]

The Maxim is generally applied to a situation where exercise of a legal right by a person causes harm to another person. In such a situation, preference will be given to avoidance of harm, even though the exercise of legal right benefits a party. Thus, a man is not allowed to install a furnace close to any residential area, because it harms the public. Under this principle, a *mubāḥ,* (permissible act or thing), can be prohibited by the state, if it carries some harm.

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[51] Al-Bayhaqī. op.cit. vol. 4, p. 419, Ḥadīth No. 8306.
[52] *Kanz al-'ummāl*, op.cit. vol. 1, p. 553, Ḥadīth No. 2477.
[53] Al-Bayhaqī, *Shu'ab al-īmān*, vol. 5, p. 50, Ḥadīth No. 5740.

analogy, Imām Mālik has ruled that if a person owns a grinding mill and it is the only mill in the town. If this person does not allow the people to use it, then the state can force him to rent it to the people, for which he will be paid standard rent. It can be concluded from the above example that in extraordinary circumstances, the government may resort to nationalization of factories, and assets, held in private ownership after payment of a reasonable compensation.

4. Hoarding *(Iḥtikār)*

As a general rule, hoarding is not recommended or allowed in *Sharī'ah*. But if circumstances warrant, the government in greater public interest (*Maṣlaḥah Mursalah)* may arrange hoarding, as a precautionary measure, in order to prudently prepare for any expected food shortage(s) or hard times ahead. The precedence for this is in Surah Yūsuf in the Qur'ān.

Rule No. 3: درء المفاسد أولى من جلب المصالح[49]

Repelling evil supercedes securing benefits

When a conflict arises between harm and a benefit, the avoidance of harm takes precedence over securing benefit, because Islamic law lays more emphasis on abstinence from prohibitions than to commission of obligations by an individual.[50]

Meaning of Maxim

- When a thing, or act, is doubtful with regard to permissibility and prohibition, such as it carries evidence that permits it, as well as evidence that prohibits it. In

[49] *Al-Qawā'id al-Fiqhiyyah*, op.cit. p. 170.
[50] *Al-Madkhal al-Fiqhī al-'āmm*, op.cit. vol. 2, p. 985.

trader violating these instructions, he should be penalized and be stopped from carrying out business.[47]

2. Taxation

As a general rule, taxation was not recommended in *Sharī'ah*. But when the financial resources of the government proved insufficient to carry out public welfare works, such as construction of roads and hospitals, or to meet the needs of poor and needy people, the *Sharī'ah* scholars, due to *Maṣlaḥah Mursalah,* allowed the government to levy taxes on those who are capable of paying taxes.

3. Sale against Will of Owner

Ordinarily, the government has no right to compel owner of a property to sell or lease it against his will. However, in case of famine, or scarcity of any food item(s), the government can compel the owner of foodstuff to sell it to the people.

The legitimacy of such compulsory sale is established from a *ḥadīth,* narrated by Abū Dawūd in his Sunan: Samrah Ibn Jundub had a palm tree in the vacinity of a person from Anṣār. He used to visit it off and on, hence creating nuisance for Anṣārī and his family. The Anṣārī complained to the Prophet (s.a.w.s). The Holy Prophet (s.a.w.s) instructed Samrah to sell it to him, but he refused. Then he (s.a.w.s) asked him to uproot it, but he again refused. Finally, the Prophet (s.a.w.s) advised him to gift it to the Ansarī, and promised a reward of a similar tree in heaven, but he still refused. Then the Prophet (s.a.w.s) said: "You have caused harm to him" and ordered the Anṣārī to cut the tree of Samrah.[48] On the same

[47] Ibn al-Qayyim, *Al-Ṭuruq al-Ḥukmiyyah*, p. 299.
[48] *Sunan Abū-Dāwūd*, vol. 4, p. 50, Ḥadīth No. 3636.

ḥukm, in the pursuance of *maṣlaḥah*, outweighs the harm that might emerge from it. An example of plausible *maṣlaḥah*, according to Khallāf, would be to abolish the husband's right of *ṭalāq* by vesting it entirely into the court of law.

- The *Maṣlaḥah* must be general (*kulliyyah*), in that it secures benefit, or prevents harm, to the people as a whole, and not to a particular person, or group of persons.
- The *Maṣlaḥah* should not be in conflict with a principle, or value, which is upheld by the *Naṣṣ* or *Ijmā'*.[46]

The Muslim jurists have laid down certain rules, wherein, public interest, as opposed to private interest, has been taken care of. Some of such rules are as follows.

1. Tas'īr (Price-Fixation)

Tas'īr, or fixation of prices, by the government is not approved of by the *Sharī'ah*, under normal conditions. But in cases where traders manipulate market(s), and reap exorbitant profits, in a manner that the interest of the general public is seriously jeopardised, the government has the right to regulate prices, and profits, to protect the interest of the consumers. By doing so, the government will be preventing general harm by tolerating a particular harm. According to Imām Ibn Taymiyyah, it is the duty of the authorities responsible for affairs of the market to keep a watch over prices, fixing limits of profit for traders, and preventing them from crossing those limits. They should regularly inspect the market. If they find a

[46] *Principles of Islamic Jurisprudence*, op.cit. p. 346-347.

he will remain liable to pay the cost. Another application of the maxim is the discouragement of middlemanship. In the period of the Holy Prophet (s.a.w.s), middlemen used to purchase articles from suppliers before the latter reached the town-market. This adversely influenced free market operation and proved detrimental to the interests of bonafide sellers and consumers. With a view to protect the interest of both groups, the Holy Prophet (s.a.w.s) is reported to have disallowed the middlemen to bargain with visiting village suppliers before they reached the market.[44]

It is evident from the above examples that the maxim provides important choices between two harmful alternatives and suggests that lesser harm should be endured and greater harm be eliminated.

Rule No. 2: يتحمل الضرر الخاص لدفع الضرر العام[45]

Specific harm may be borne to prevent public harm

According to this maxim, if a conflict arises between a public injury and a private injury, the private injury is endured to ward off public injury. As such, the Muslim jurists acknowledge the right of the state to interfere in the economic activity of the people, if such interference is required and motivated by the greater public interest. It is worthy to note that a public interest, as opposed to private interest, is acknowledged in Islamic jurisprudence only when it fulfills certain conditions which apply to *Maṣlaḥah Mursalah*:

- It should be a genuine and real interest, i.e. *Maṣlaḥah*, as opposed to a plausible interest, i.e there must be a reasonable probability that the benefits of enacting a

[44] Ibid. p. 21.
[45] *Sharḥ al-Qawā'id al-Fiqhiyyah*, op.cit. p. 143.

the construction was complete, it transpired that the seller was not the rightful owner of that piece of land. Now, if value of the building is greater than the value of land, the purchaser can retain it, after making payment of its price to its real owner, even against his will. However, if it is of small value, he will return the land to its owner, and will get the cost of the building from him.

Another example of conflict between two harms is a case where a customer loses his coin in a slot machine. His coin may be allowed to go waste, rather than dismantling the machine, which has much greater value than the coin. But in case a very expensive piece of Jewellry is lost, in a less expensive washing machine of a laundry, its recovery, then, requires damage to the machine.[43]

Similar to it is a case where a person erected a building on a land which he had illegally occupied. Now, if the value of the land is greater than that of building, the building will be demolished and land will be handed over to its owner, but if the value of building is greater, then he will be asked to pay the cost of land to the owner.

Another case where lessor harm is endured to avoid greater harm, is interdiction placed by the government on an incompetent doctor, or on an impious *muftī*. As a result of this interdiction, incompetent doctor is disallowed to practice medical profession, and the *muftī* is refrained from issuing religious verdicts. This interdiction safeguards the public against a possible harm to their health and religion, even though such interdiction harms the interest of doctor and *Muftī*. On the same basis, a person dying of hunger is allowed to snatch food from another person, to save his life. However,

[43] Hasanuzzaman, *Economic Relevance of Sharī'ah Maxims*, p. 19.

lesser injury and a greater injury. In such a situation, preference would be made to remove the greater injury, even though this removal may cause commission of a lesser injury. Such a situation may also be termed as a clash of interests. Thus, the maxim suggests that if an interest clashes with another, more important interest, then comparatively the less important interest will be ignored.

On the basis of this maxim, the government can compel an affluent person to maintain his poor relatives, because the harm which is caused by the poverty of the relatives is more serious than the harm caused by the compulsory distribution of the affluent person's wealth among his poor relatives. The *Majallah* has dealt with the principle in Art. 902. It states:

"If any person is deprived of possession of his property due to some act of nature, such as a garden situated on a hill belonging to a person, collapsing on a garden of another person, situated below it. Now, in such a situation, owner of the property, which is greater in value, will compensate the owner of property which is of lessor value and will become owner of such property."[41]

Ibn Nujaym illustrates the maxim in the ruling regarding someone who took illegal possession of a particular piece of lumber in his building, if value of the building exceeds that of the lumber, then, the owner of the building will retain it after paying its due price to its owner. If, however, the lumber is more valuable than the building, then the ownership of the rightful possessor of the lumber is upheld.[42]

Similar to that is the case where a person constructed a building on the land that he acquired through purchase. After

[41] *Al-Majallah*, op.cit. Art. 902.

[42] Ibn Nujaym, *Al-Ashbāh wa al-Naẓā'ir*, p. 88.

impossible, becomes oppressive for the obligor, so as to threaten him with grave loss, it shall be permissible for the judge in accordance with the circumstances and after weighing up the interest of each party, to reduce the oppressive obligation to a reasonable level, if justice so requires and any agreement to the contrary shall be void".[39]

However, an obligor must fulfill certain conditions before he may ask the court to interfere and readjust the excessive obligation to a reasonable limit. These conditions are:

- It must be an exceptional circumstance of a general nature and not particular one.
- The circumstance must be unpredictable and unforeseeable.
- The circumstance must render the performance of an obligation so onerous that the obligor is threatened with exorbitant loss.

Rules for Redressal of Harm

Islamic Law prescribes certain rules which should be observed while redressing harm. These rules have been embodied in certain maxims. These maxims serve as controllers for the above mentioned maxims.

Rule No. 1: الضرر الأشدّ يزال بالضرر الأخفّ [40]

A greater harm may be avoided by enduring a lesser harm

This maxim deals with a situation where two injuries conflict with each other in a single case, such as the conflict between a

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[39] *Qanūn al-Mu'āmalāt al-Madaniyyah li Dawlah al Amārāt al-'Arabiyyah al-Muttahidah*, Art. 249.

[40] *Sharh al-Qawā'id al-Fiqhiyyah*, op.cit. p. 145.

or earthquake, then the contract can be terminated. In this regard, Ibn Rushd writes:

"In Mālik's opinion; if rain-fed land is leased and famine prevents its cultivation, or sowing, so that nothing grows in it due to the existence of famine, then the lease is revoked. Similarly, when it is flooded by rain, till such time that the season of sowing has lapsed, and the lessee is not able to cultivate it."[36]

Ibn Qudāmah, a prominent Hanbalī jurist, also regards extraordinary circumstances as a cause of premature termination of *Ijārah* contract. He writes:

"If there is a state of insecurity in the city, or the city is under siege by an enemy which prevents the lessee to go to his leased land for cultivation, then he has the right to revoke the contract, because he cannot benefit from that land in such situation".[37]

Similarly, if a woman is hired to breast feed a baby, but she subsequently falls ill, or the baby refuses to take her milk, then the contract of hiring is liable to termination. The Mālikī jurists consider natural calamity as a just cause (*'udhr*) for reducing the price in the sale of fruits (in *salam* contract).[38] The modern codes of civil law in Arab countries have also taken care of the principle of *force majeure,* and just cause, in their legislations: Art. 249 of UAE Civil Code states:

> "If exceptional circumstances of public nature, which could not have been foreseen occur, as a result of which performance of the contractual obligation, even if not

[36] ***Bidāyah al-Mujtahid***, tr. op.cit. vol. 2, p. 277.
[37] ***Al-Mughnī***. op.cit. vol. 6, p. 30.
[38] ***Bidāyah al-Mujtahid***, tr. op.cit. vol. 3, p. 183.

cancellation, of such deal when he arrives at the market".[35]

It is evident from these examples that these laws address a situation where harm has been caused to a party. The laws provide relief to him.

3. Premature Termination of Contract, and/or Re-fixation of Contractual Obligations, under Extraordinary Circumstances (*Force Majeure*).

An important area of the application of the Maxim is premature termination of contract, because of supervening impossibility of performance. In Islamic law, a contract may be prematurely terminated, when due to circumstances outside the control of obligor, contractual obligation becomes unreasonably burdensome on him and may constitute unfair loss, or harm to him. For example, a contract for the construction of a huge commercial complex was made with a construction company in which per square meter construction cost that included the cost of labour, as well as building material, was fixed at a certain price. Now, due to eruption of war, or floods, or earthquake, the price of building material tremendously increased. In such a case, Islamic Law allows the judge to reduce the oppressive obligation to a reasonable level, and to refix the price, or to terminate the contract completely. The Muslim jurists allow the termination of contracts under just cause. They allow termination of leasing contract under certain circumstances. For example, if the lessor due to immediate debt against him is forced to sell a leased asset and pays off his debts from the proceeds of the sale or, if benefit from the leased property has become impractical due to flood,

[35] Al-Bayhaqī, op.cit. vol. 5, p. 569, Ḥadith No. 11073.

There are, however, certain cases in which excessive loss of a party alone without fraud affects the contracts, such as the sale of *waqf* property, or the property of *bayt al-māl,* or the property of a minor, or of an insane person. If the property of these people and institutions is sold with *ghabn fāḥish,* i.e. at a much lower price as compared to its market value, the sale will be revoked.[32] According to Ḥanbalī jurists, *ghabn fāḥish* affects the contracts and makes them voidable at the option of the party which suffered lesion, irrespective of whether it is a result of fraud, or otherwise.[33] The Shāfi'ī jurists do not admit the right of revocation for the buyer. They say that the lesion has occurred because of the negligence of the buyer. Thus, he alone is responsible for the loss.[34]

(iv) *Talaqqī al-Rukbān*:

It is another form of fraud and misrepresentation which gives the defrauded party a right to revoke the contract. This happens when bedouin carries objects of prime and general necessity for sale. The shrewd city-dweller goes out of town to meet the Bedouin merchant and buys his goods at a cheap rate taking advantage of his ignorance, and depriving him of the opportunity of first surveying the market to acquaint him with the current market rate. The Holy Prophet (s.a.w.s.) said:

> "It is forbidden to meet the riders (i.e. the traders) on the road (for the purpose of taking undue advantage). Whosoever, meets a trader on road and buys goods from this trader, the vendor has the right of option and

[32] Ibid. Art. 356.
[33] Al-Shirbīnī, *Mughnī al-Muḥtāj*, vol. 2, p. 36.
[34] Al-Ṣan'ānī, *Subul al-Salām,* op.cit. vol. 3, p. 21.

(s.a.w.s) said: 'O people! With a view to bargaining with the people who come with their animals laden with commodities for sale, do not go to meet them (outside the town) and if a person is bargaining with another, do not interfere by bidding higher".[28]

Najash, or *Tanājush,* is a vitiating factor for a contract and renders it voidable. *Tanājush* gives a buyer, the right to revoke the contract. This is the viewpoint of majority of Muslim jurists. Shāfi'ī jurists do not acknowledge this right for the buyer.[29]

(iii) *Ghabn Fāḥish*:

Ghabn fāḥish means excessive loss suffered by a party to the contract, as a result of concealment, misrepresentation, deception or fraud practiced by the other.

Effects of *Ghabn Fāḥish*

The Hanafī jurists are of the view that excessive loss suffered by a party alone is not a cause of nuility of contract. It annuls the contract only when it is caused by a fraud, or misrepresentation. For example, A sells a watch worth Rs. 300/- for Rs. 600/- to B, claiming its market value as 700/- rupees. B, relying upon the words of A, purchases it for Rs. 600/-. B has suffered from *ghabn fāḥish*, which is a result of fraud. Such *ghabn fāḥish* gives him right to revoke the contract.[30] In this respect, the *Majallah* states:

> "If there is an excessive lesion without fraud in the sale, the person who has suffered loss cannot annul the sale".[31]

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[28] Al-Ṣan'ānī, *Subul al-Salām,* op.cit. vol. 3, p. 18.
[29] Al-Zuḥaylī, *al-Fiqh al-Islāmī wa adillatuhū,* vol. 4, p. 223.
[30] *Al-Durr al-Mukhtār*, op. cit. vol. 4, p. 166.
[31] *Al-Majallah*, op. cit. Art. 356.

(i) *Taṣriyah*:

It is to tie the udder of a she-camel, or sheep, to allow the animal's milk to accumulate in her udder, so as to give a false impression, to the intending buyer, of a very productive milk-yield. In this respect, the Holy Prophet (s.a.w.s) says:

> "Do not tie up the udder of she-camels and sheep. If any one among you buys a she-camel, or sheep, whose udders have been tied up, (the buyer) has option (of annulment) after milking it; either to retain it, or to return it, along with a measure of dates (in lieu of the milk consumed by the purchaser)".[25]

The act of *taṣriyah* renders the contract voidable, at the option of the buyer, who has suffered lesion from this fraud. This is the viewpoint of the majority.

Since the Hadith is allowing both options, to either retain, or return, Hanafi jurists clearly prefer the retention option, whilst allowing the defrauded party to claim undue increase from the seller.[26]

(ii) *Tanājush*:

It is to offer a high price for a commodity, without any intention to buy it, the sole aim being to cheat somebody else who really wanted to buy the commodity[27]. The Holy Prophet (s.a.w.s) has prohibited this practice. It is related on the authority of Abū Hurayrah (r.a.t.a) that the Prophet

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[25] Al-Ṣan'ānī, *Subul al-Salām*, vol. 3, p. 26.

[26] Ibn 'Ābidīn, *al-Durr al-Mukhtār*, vol. 4, p. 101.

[27] Hence, participating in open bidding auctions, without intention of buying is also forbidden. Reportedly, some sellers wrongly utilize 'facilitators', to help bid up the price.

- Premature Termination of a Contract under Exceptional Circumstances (*Force Majeure*).

1. Option of Defect (*Khiyār al-'Ayb*)

It is a right, given to a purchaser, in a sale to cancel the contract if he discovers that the object acquired has some defect diminishing its value.[22] This option has been prescribed by the law and the parties do not have to stipulate it in the contract. By virtue of this option, the buyer discovering defect in the article purchased, is at liberty to return it to the seller, unless he was aware of the defect before hand. However, if the seller specifically states that he is not responsible for any defect, then the buyer acts at his own risk and in such case goods cannot be rejected.

The option is based on the following traditions:

- "He who defrauds another is not from amongst us".[23]
- "It is not permitted for the seller to sell things which are defective, unless he, (the seller), points it out to him, (the purchaser)".[24]

The contract with the option of defect is revocable. The purchaser of an object with defect has the right to confirm the sale, or to cancel it, unless its cancellation is rendered impracticable by any change in the article, in which case, he is entitled to a reasonable compensation.

2. Option of Fraudulent Lesion (*Khāyār al-Ghabn*)

This option can be exercised in the following situations:

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[22] Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. 5, p. 247.

[23] Abū 'Īsā bin Saurah, *Sunan al-Tirmidhī*, vol. 3, p. 606, Ḥadīth No. 1315.

[24] *Kanz al-'ummāl*, op.cit. vol. 4, p. 61, Ḥadīth No. 9514.

Maxim: الضرر يزال[18]

Harm has to be Redressed

A number of Qur'ānic verses provide evidential basis for this maxim.

(i) "Do not take them back to *injure* them".[19]

(ii) "No mother shall be treated unfairly on account of her child".[20]

(iii) "*Annoy* them not so as to restrict them" (not to make her life miserable).[21]

Meaning of Maxim

The maxim provides that if harm occurs, then appropriate measures should be taken to redress it. The maxim provides relief and remedy to a party which has suffered some injury at the hand of some individual. Unlike the preceding maxim, the present maxim addresses a situation when the harm has actually occurred. Thus, it suggests measures for redressal of that harm.

Applications of the Maxim

The maxim has been taken care of in a number of *Sharī'ah* rulings and laws relating to contracts and business transactions. Some of the rulings which embody this rule are as follows:

- Option of Defect
- Option of Fraudulent Lesion

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[18] *Sharḥ al-Qawā'id al-Fiqhiyyah*, op.cit. p. 125.
[19] Qur'ān 2:231
[20] 2:233
[21] 65:6

This rule is based on a ruling given by some Mālikī jurists, who say that if a debtor is asked to pay an additional amount in case of default, it is not allowed by *Sharī'ah*, because it amounts to charging interest. However, in order to assure the creditor of prompt payment, the debtor may undertake to give some amount in charity in case of default.[16]

The State Bank of Pakistan also favours this solution. The guidelines relating to *Murābaḥah* provide:

> "It can be stipulated while entering into the agreement, that in case of late payment or default by the client, he shall be liable to pay penalty calculated at a certain percentage, per day, or per annum, that will go to the charity fund constituted by the bank. The amount of penalty cannot be taken to be a source of further return to the bank, (the seller of the goods), but shall be used for charitable purpose. The bank can also approach competent courts for award of solatium, which shall be determined by the courts at their discretion, on the basis of direct and indirect costs incurred, other than opportunity cost".[17]

From this discussion, it can be concluded that AAOIFI's ruling on penalty for default is an effective measure for the redressal of an expected harm to the Islamic banks. It is an effective mechanism to deter the delinquent debtors from intentional and deliberate default that causes harm to the financial institutions.

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[16] This is the opinion of Moḥammad bin Ibrāhīm bin Dinār. See, Haṭṭāb al-Mālikī, *Taḥrīr al-Kalām fī Masā'il al-Iltizām*.

State Bank of Pakistan, 2004. p. 3.

another resolution, adopted in 2000, it reaffirmed the above, but added: "It is permissible to include a Penalty Provision in all financial contracts, except, when the original commitment is a debt. Imposing a Penalty Provision in debt contract is usury in the strict sense". It also provides that the loss that may be compensated includes actual financial loss incurred by the partner, or any other material loss, and the certainly obtainable gain that he misses as a result of his partner's default, or delay. It does not include moral loss. These resolutions provide some relief to those affected by default in fulfillment of *salam/istiṣnā'* obligations. The amounts owed in installment sales, and *murābaḥah* sales, having become debts, remain outside their purview.

The latest response to the challenge came from the Accounting and Auditing organization of Islamic Financial Institutions (AAOIFI), Bahrain. This response makes a penalty for default automatic. AAOIFI has suggested a self-imposed penalty on the customer. The *Sharī'ah* standards of AAOIFI, which represent an attempt by the contemporary Muslim scholars at harmonization and standardization of *Sharī'ah* views on Islamic banking, have suggested that: 'The contract of *murābaḥah* should consist of an undertaking from the customer to pay an amount of money, or a percentage of the debt, to be donated to charitable causes in the event of a delay on his part, in paying installments on their due date(s). The *Sharī'ah* supervisory board of the Financial Institution must have full knowledge that any such amount is indeed spent on charitable causes, and not for the benefit of the Financial Institution itself.'[15]

[15] Sharī'ah Standard No. 8, Murābaḥah to the Purchase Orderer, Article 5/6, p. 126.

the payment of his dues without a valid cause. In a well-known *ḥadīth*, he has said:

> "The well-off person who delays the payment of his debt, subjects himself to punishment and disgrace".[12]

This *Ḥadīth* allows corporal punishment for the delinquent debtor, as well as blacklisting such customers and exposing them in the public. This ruling, however, does not apply to the case of genuine default. The financial institution, therefore, should verify the causes of default. If it is established that the default of the customer is due to poverty, no penalty or compensation should be charged, or claimed, from him, rather he should be given respite until he is able to pay[13]. The Holy Qur'ān says: "And if he (the debtor) is in difficulty, then he must be given respite, until he is well off."[14]

Some contemporary scholars have suggested that some fine i.e. a certain quantity of money should be imposed on the defaulter. Such a fine can be proportional to the sum of money involved. It can also be related to the actual period of delay. But this proposal has not been accepted by the majority of Muslim jurists because it makes the fine similar to *ribā*. The International *Fiqh* Academy of OIC has also rejected this proposal. In its judgment in 1990, it held: "If the buyer/debtor delays the payment of installments after the specified date, it is not permissible to charge any amount in addition to its principal liability, whether it is made a precondition in the contract, or it is claimed without a previous agreement, because it is *ribā*, hence, it is prohibited in *Sharī'ah*". In

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[12] Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī Sharḥ Saḥīḥ al-Bukhārī*, p. 134-135, Ḥadīth no. 2400.

[13] Muhammad Taqī 'Usmānī, *An Introduction to Islamic Finance*, p. 33.

[14] Qur'ān 2:80

calamity and act of nature. The reason for this ruling is that adopting the rule of non-liability for paying compensation by craftsmen, whose trustworthiness is taken for granted, may make them negligent about the goods in their custody, with the result that the owners may have to suffer great loss. They may abuse the trust and misuse the facility. Now, through this new ruling, the burden of proof was shifted to the craftsman, who had to show the absence of negligence. Thus, in the interest of people, the craftsmen were held liable for paying compensation.[11]

5. Penalty for Default in *Murābaḥah* and *Ijārah* Financing

In Conventional Banking, where interest-based loans are advanced to the customers, the amount of interest on loan keeps on increasing, according to the period of default. On the other hand, in *Murābaḥah* and *Ijārah* financing, the two major financing products in Islamic banks, once the price is fixed, it cannot be increased. However, this restriction is sometimes exploited by dishonest customers, who may deliberately avoid paying the price or rental, at its due date, because he knows that he will not have to pay any additional amount on account of default, or late payment.

In order to resolve this issue, some contemporary scholars have suggested that the dishonest customers who default deliberately should be made liable to pay compensation/penal charges to the financial institution for the loss it may have suffered on account of such default.

It is argued in favor of charging compensation that the Holy Prophet (PBUH) has condemned the person who delays

[11]See, Hashim Kamālī, *Al-Qiyās (Analogy) and its Modern Applications*, p. 108.

3. Continuation of Crop-sharing Contract till Harvesting

According to the established rules of *Fiqh*, the contract of *muzāra'ah* terminates with the death of both, or one of the contracting parties. This rule, however, has been set aside in the event where the owner of an agricultural property dies when the crop is still growing. Keeping in view the possible harm which may be caused by termination of the contract, the Muslim jurists have ruled that such a contract will remain in force till the harvest is taken, for otherwise, the farmer is likely to suffer harm and there may be no one to take care of the crops.

Additionally, a landlord is not allowed to eject the tenant from the cropped land, even on the expiry of the period of contract, so that the cultivator is protected from the loss of his crop. The landlord is bound to extend the period of the tenancy against payment of standard rent (*ujrat al-mithl*), till the crop sown by the tenant is harvested.[10]

4. Liability of Craftsmen

As a general rule, an *amīn* (trustee) is not liable for the loss of *amānah* (trust) property if the loss occurs without any fault and negligence on the part of the trustee. But in case of craftsmen and tradesmen, such as tailors, goldsmiths and shoemakers, the Muslim jurists have ruled that they will be held liable for compensation of the goods which are lost or destroyed in their custody. Thus, if a tailor received a piece of cloth from his customer and while in his custody some loss occurred to it, the tailor will be held liable to compensate the loss, unless he proves that the loss was a result of some

[10] Moḥammad Ṣidqī al-Burnū, *al-Wajīz fī īḍāḥ Qawā'id al-Fiqh al-Kulliyyah*, p. 79.

sold all of Mu'ādh's property to pay off his debts, to the extent that he had nothing left.[8]

2. Law of Pre-emption:

The word *'Shuf'ah'* means merging, adding and strengthening. Technically, it is the right to compel the buyer of immovable property to transfer the ownership to the claimant, on the terms and conditions on which he bought it.[9] It is a right by which a person having such right (called the pre-emptor), is substituted in place of the vendee of some immovable property, by reason of exercising such right. In other words, it means a right to acquire some immovable property by compulsory purchase, in preference to all other persons by reason of such right.

This right belongs to the co-owner, as well as the neighbour, according to the Ḥanafīs. The majority of jurists maintain that the right belongs to the co-owner alone, and not to the neighbour. The four *sunnī* schools maintain that such a right may be exercised in immovable property alone, but the Ẓahirīs hold that it operates in movable property as well. The major purpose of acknowledging the right of pre-emption, is to prevent any harm that may be caused to the co-owner, or neighbour, by the entry of an outsider into the property. As many things are shared in common by co-owners, or neighbours, like the right of way and water, they have been given the first right to buy the property when it is sold.

The ground of justification for the right of pre-emption is the hardship and inconvenience which may be caused to a joint owner, or neighbour, by the entry of a stranger vendee.

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[8] Al-Bayhaqī, op.cit. vol. 6, p. 75, Ḥadīth no. 11441.

[9] Nyazee, Imran Ahsan Khan, *Outlines of Islamic Jurisprudence*, p. 309-310.

(b) **Transactions with Counter Value:** If his disposition is with counter-value, and is not in favor to any one as, for instance, it is a sale at the market value; such disposition will be valid and effective in the lifetime of *marīḍ maraḍ al-mawt*. The creditor and his heirs will have no right to nullify it after his death because the rights of the *marīḍ maraḍ al-mawt* have priority over their rights. It will be assumed that this disposition is for the imperative needs of the *marīḍ maraḍ al-mawt* like food, drink, and treatment. It is all the same whether the disposition, which involves no favour, is meant for himself, or any of his heirs.

- *Taflīs* (Bankruptcy):

A person is considered bankrupt when his debts exceed his assets, and the court on the demand of his creditors, passes a prohibitory order, restraining all alienations by him, and directs the sale of his property for the benefit of his creditors. The majority of Muslim jurists, maintain that the judge has the right to sell his property, and from the proceeds of sale, he is to satisfy his creditors.[7] The purpose of this *al-ḥajr* (interdiction), is to restrict *al-muflis* (bankrupt) from exercising the right of disposal of his property is to safeguard and protect the rights of the creditors and to prevent him from carrying out transactions detrimental to his creditors. The precedent for such regulation was set by the Prophet (s.a.w.s). It is narrated that Mu'ādh ibn Jabal was a generous man and always gave his possessions away. He was always in debt. His debts were more than his property. So, he came to the Prophet (s.a.w.s) and requested him to ask his creditors to withdraw their claims on the debts. They, however, refused. The Prophet (s.a.w.s), later,

[7] *Bidāyat al-Mujtahid*, tr. op.cit. vol. 2, p. 341.

she is a female, provided, the patient dies in such condition before a year has passed."[5]

Death-illness is considered one of the impediments to disposition made, to protect a specific public benefit, such as, prohibiting the pledgee from disposing of the property pledged as security with him, in the interest of debtor.

Transactions of *Marīḍ Maraḍ al-Mawt*:

Transactions undertaken by a person on his deathbed are of two types:

(a) Transactions without a Counter Value: A person seized with a death illness is prohibited from disposing of his property in excess of one third of his wealth. This is stipulated in order to protect the interest of heirs, because his dispositions without counter-value such as donation, *waqf*, alms are treated as a bequest, which is permissible to the extent of one third of wealth only. If he is in debt, he is prohibited to donate his property, for it is needed to pay his debt. He is, however, allowed to dispose of property exceeding debt on the condition that it is taken out of one-third of the property; failing which his heirs have the right to nullify it.[6] But if he is not in debt, or his debt is less than his estate, these dispositions will not be effective with respect to his heirs, except within one-third of the whole legacy, if there is no debt, or within one-third of the remaining property, after the payment of debts. The reason is that these dispositions are treated as will, or bequest, from that patient.

[5] Ahmad Hasan, *Principles of Islamic Jurisprudence*, p. 323.
[6] *An Introduction to the Study of Islamic Law*, op.cit. p. 373.

- When he is able to perform his religious duties properly;
- When he behaves reasonably in his personal affairs;
- When he abstains from everything that brings him reproach; and
- When he is not a spendthrift, i.e. he does not waste his wealth by allowing himself to be deceived in commercial transactions, by obvious fraud.[3]

The court has the power to give absolute, or limited, authorization to a *safih,* to handle his affairs, whether wholly, or in part. In special cases, it may require the *safih* to give account of his affairs. The court may also restrain, or withdraw, this authorization, if it sees just grounds for doing so.[4]

A *safih,* who has been given permission to administer personal affairs, also has capacity to enter into transactions out of the bounds of that permission set by the court especially for him.

- Death-illness (*Maraḍ al-Mawt*)

Death-illness has been defined as follows:

> "Death-illness is that form of illness from which death is to be apprehended in most cases, and illness which disables the patient from looking after affairs outside his house, if he is a male, and the affairs within her home, if

[3] Nawawī, Muḥiyyuddīn Abū Zakariyyah, *Minhāj al-Ṭālibīn*, translated into English by: E.C. Howard, p. 167.
[4] Ibid. 103.

- Insolvency

- ***Safah* (Prodigality)**

Safah, i.e. prodigality, is one of the causes of interdiction, according to majority of Muslim jurists. The legitimacy of interdiction on a *Safih* is established by the verse 4 of *Sūrah al-Nisā* which states: "And make trial of orphans, till they reach age of marriage. If then you find sound judgment (*rushd*) in them, then, release their property to them." (4:6). The verse provides that a person who lacks sound judgment, remains under interdiction even though he has attained puberty.

Safah, in Islamic law, refers to disposition of a person in his property, contrary to the dictates of the intellect and *Sharī'ah,* by spending it without righteous purpose. It means squandering, and using of more of it than necessary, despite the persistence of one's intellect in reality. A *safih* undertakes financial transactions carelessly and in a manner that a prudent person is likely to avoid.[2] *Safah* is opposite of the word *rushd.* The latter signifies the handling of financial matters in accordance with the dictates of reason. Thus, *rashīd,* according to the majority, is a person who can identify avenues of profit, as well as loss, and acts accordingly, to preserve his wealth. The Shāfi'ī Jurists, maintain that *rushd* is maturity of actions, not only with regard to financial matters but also in matter(s) of *dīn.* Thus, a person who attains puberty, and handles his business sensibly, but doesn't abide by the rules and prohibitions of the Lawgiver, is not *rashīd* in the opinion of Imām Shāfi'ī. Imām Nawawī, an eminent Shāfi'ī jurist, declares *rushd* to be present in a person in the following circumstances:

[2] Ḥusain Ḥāmid Ḥassān, ***al-Ḥukm al-Sharʿī 'ind al-Uṣūliyyīn***, p. 210.

with injury. It suggests that a person, who has suffered some grievance, should not inflict the grievance as he had suffered. Thus, if a person destroys the property of another, the victim is not allowed to destroy the property of the offender in retaliation. If he does so, he will be liable to compensate the loss he has caused. Thus, the maxim forbids and disallows retaliatory harm.

Applications of the Maxim

The maxim is applicable to a considerable number of provisions and rulings of Islamic law. These rulings generally serve as a precautionary measure against a possible occurrence of harm and to prevent it before it happens. Some of the applications of this maxim are: (i) Law of Inhibition (*ḥajr*) (ii) Law of pre-emption *(Ḥaqq al-shuf'ah)* (iii) Continuation of crop-sharing contract till harvesting (iv) Liability of craftsmen. (v) Penalty for default in *Murābaḥah* and *Ijarah* financing.

1. Law of Inhibition (*ḥajr*).

The Islamic law has imposed restriction on the contractual capacity of a party, whose dispositions and transactions are likely to prove harmful for other people. The act of preventing a person from making transactions is called *ḥajr* (interdiction or inhibition) in Islamic law. *Ḥajr* is to restrain a particular person from disposing of his property at his will. The law of interdiction is prescribed in *Sharī'ah* to safeguard the rights and interests of people on whom it is imposed, as well as rights and interests of people, who may be affected by the dispositions of a particular category of persons. The important causes of inhibition are:

- *Safah* or prodigality
- Death illness

Concept of Elimination of Detriment

The objective of *Sharī'ah* in relation to people is to secure their interest and avert harm from them. This objective has been taken care of in various *aḥkām* of Islamic law. These *aḥkām* provide a mechanism to an individual to protect himself against the actual, as well as expected, harm. The principle of elimination of detriment has been especially observed in the sphere of contracts and business transactions. This is also embodied in *Sharī'ah* maxims. The maxims relevant to this area and their applications are discussed below.

Redress of harm

Maxim: لا ضرر و لا ضرار[1]

Harm and retaliation by harm is not allowed

This is a famous *ḥadīth* of the Holy Prophet (s.a.w.s) which also serves as a maxim of Islamic law. It has been interpreted in two ways:

- Harm is not allowed, whether as an initiative, nor in response.
- No harm should be caused, and none should be suffered.

Meaning of the Maxim:

The meaning of the maxim is that no injury be done to any body, in any circumstance, and that injury should not be met

[1] *Sharḥ al-Qawā'id al-Fiqhiyyah*, op.cit. p. 113