A Comparison between the Judicial Precepts of Autonomy and 'Lack of Harm'

This paper will critically compare the precepts of autonomy (*qāʿida salṭana/tasālut*) and 'lack of harm' (*qāʿida lā ḍarar*). Part one will present the traditional discussion on the meaning and remit of each precept. Part two will examine the areas of conflict between the precepts and propose resolutions to the conflict.

The discussions will appreciate the precepts in their existential capacity[1] in order to aid reconciliation in the areas where they conflict.

The sources used in referencing this article are predominantly books written specifically on the judicial precepts that are being read and taught within the seminaries of Najaf and Qum. Occasionally references are provided from books of uṣūl and fiqh wherein the precepts are discussed in terms of either their applicative remits or a broader context.

The paper is written for a specialist audience and hence technical terms of uṣūl al-fiqh and fiqh are used with the assumption that the reader understands them in their precise technical context. This is also assumed with regard to certain jurisprudential and philosophical concepts that are required in treatment of the subject. Certain themes that are not central to the subject yet form a part of the overall treatment of the subject are mentioned in passing in order to not lengthen the paper unduly.

Finally, it should be noted that the precept of autonomy (*salṭana*) is considered in a context broader than Islam, whilst the precept of 'lack of harm' (*la ḍarar*) is discussed largely in the Islamic context of Sharia regulations, Sharia legal authority and Sharia state. This is because firstly, the word 'Islam' appears in the text of the evidence (*dalīl*) that conveys the precept of 'lack of harm'; and secondly, Sharia regulations are the point of focus of its applicative remit.[2]

The discussions will be divided into the following parts:

Part 1 – Discussions Relating to the Precepts of Autonomy and 'Lack of Harm'

Section 1 – The Precept of Autonomy

1:1:1 - Brief description of the precept and its nature

1:1:2 - The traditional sources of the precept

1:1:3 - The scope and limits of the precept

1:1:4 - The application of the precept

1:1:5 - Conclusion on the nature of the precept

Section 2 – The Precept of 'Lack of Harm'

1:2:1 - Brief description of the precept and its nature

[1] 'Existential capacity' refers to fact that they are rooted in existence and thus function in line with certain properties and principles of existence.

[2] The precept of 'lack of harm', as debated within the Islamic legal tradition, is not to be confused with the western legal notion of the 'harm principle'. Although both bear similarities in terms of curtailing the level of discretion of individuals when they result in harm to others, yet both are distinct in terms of their theoretical foundations and scope of application.

Part 1 – The Precepts of Autonomy and 'Lack of Harm'

Section 1 – The Precept of Autonomy

1:1:1 - Brief Description of the Precept and Its Meta-Legal Nature

The precept states that people have autonomy over their wealth, possessions, rights and bodies.[3] As such, the precept is an 'affirmative'[4] precept that is used across the chapters of jurisprudence to substantiate the right of an individual to dispense with or modify that which is within their personal ownership or belonging (which includes their bodies) within Sharia limits. Accordingly, the precept is one of 'personal autonomy' as opposed to 'autonomy per se'[5].

The notion of 'autonomy', like those of 'ownership' and 'right over possession', is a mental construct depicting a type of relationship an individual has with entities in his or her ownership and possession. The concepts of 'autonomy', 'ownership' and 'right over possession' are interrelated in a hierarchical fashion. They are not synonymous even though they may appear to be at first glance. It can be said that one has 'autonomy' because of the 'right over possession', or because one has 'ownership'; however, the notion of 'ownership' is a simple relation of two things to each other, whereas 'autonomy' signifies a right over a thing which, by implication, is owned in one way or another. Similarly, 'right over possession' conveys the idea of the general ability to dispense with or modify the owned thing; however, it does not, in an 'affirmative' manner, stipulate its remit and particulars, as does the notion of 'autonomy'[6]. Furthermore, unlike the notions of 'ownership' and 'right over possession', which are societal constructs and as such are not meaningful outside the collective context, 'autonomy' is more substantive as it is meaningful in itself at the exclusion of the social context. Thus, even though notionally 'autonomy' is an outcome of 'right over possession', which is itself a product of 'ownership', yet in principle it is directly rooted in individuality. Hypothetically, it is quite clear that even without the ideas of 'ownership' or 'belonging', an individual naturally feels a sense of autonomy over the things they have and their own person.

In essence, the precept of autonomy is a rational precept stemming from the nature of human existence.[7] What this means is that as humans, we intuitively and rationally feel that we have autonomy of doing what we want with our possessions and our bodies. Now since the precept is intuitive and rational, it follows that the stipulations of the limits of such autonomy must also be intuitive and rational[8]. Therefore, insofar as it is asserted by the '*adliya* that the Sharia regulations are

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[3] Muḥammad Kāẓim Muṣṭafawī, *Al-Qawāʿid: Qāʿida al-Ṣalṭana*, 7th ed. (Qum: Muʾassasat Nashr al-Islāmī, 2008), 136.

[4] It is 'affirmative' because it grants permissibility of individual discretion.

[5] 'Autonomy per se' is more general than 'personal autonomy'. The latter is restricted to one's own wealth, possessions, rights and body. The former includes one's autonomy over other than one's wealth and possessions (such as one's children and wives) and instances of autonomy over wealth, possessions, rights and persons that cannot be said to be 'one's own', that is joint or collective autonomy or the autonomy conferred by virtue of a legal or conventional position, such as head of community or state. All such instances of 'autonomy per se' do not fall under the discussions of 'personal autonomy', and hence will not be discussed in this paper.

[6] The usage of the word 'autonomy' in sentences is always accompanied with the sense of 'autonomy over *something'* (that is, its particulars or extensions) and the area or extent of autonomy (that is, its remit), both of which are either explicitly stated in sentences or implicitly understood from the context of discussions.

[7] Nāsir Makārim Shirāzī, *al-Qawāʿid al-Fiqhiyya*, 3rd ed. 2 vols. (Qum: Madrasat al-Imam Amīr al-Muʾminīn, 1991), 2:29.

[8] There are significant and important discussions pertaining to the exact nature of intuition and reason, and their role in determining the precise meaning of autonomy and its remit; however, they are beyond the scope of the present study, and hence will be dispensed with.

rationally based, then the Sharia, as an indirect expression of reason, can legitimately provide the precept with its restrictions, limits and remit.

The precept of autonomy functions as both a meta-legal principle and a judicial precept. As an 'affirmative' meta-legal principle (*aṣl al-aṣīl*), it informs the Sharia in the formulation of 'affirmative' rights over wealth, property and person within the Sharia's parameters of prohibitions. A point to note here is that the applicative remit of the precept cannot be exhausted by the 'affirmative' rights stipulated by the Sharia[9], since that would imply the impossible: that the Sharia has explicated every possible 'affirmative' right for every time and place with regards to wealth, possessions and persons[10]. Were this the case, it would, in principle, be inconsistent with the meta-legal nature of the precept[11]. Consequently, there would be no scope for the application of the precept in its judicial capacity[12], which is obviously not the case.

In light of this, a more apt description is that the precept of autonomy, in itself, is an ambiguous meta-legal principle that validates the natural autonomy of individuals over their wealth, possessions and person. Therefore, the Sharia has two roles in terms of its relationship with the precept: a substantive one and an explicative one. The substantive role of Sharia regulations is to indirectly provide the rational limits[13] of the precept and rid its ambiguity. Here, the role of the Sharia regulations, as expressions of rationally based judgements, is negational[14] because they provide the rational parameters that limit the applicative remit of the precept. On the other hand, the explicative role of the Sharia regulative norms and statuses (*ḥukm taklīfī wa waḍ'ī*)[15] is to provide 'affirmative' rights over wealth, possessions and person, that is, they merely specify the extensions of the precept and do not limit the remit of the precept in any way.

In its purely judicial capacity (*qā'ida fiqhiyya*), the precept of autonomy is an 'affirmative' precept that allows the jurist[16] to legitimise extensions of autonomy over wealth, possessions and person that have not been restricted by the Sharia regulative system.

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[9] 'Sharia' here means 'the Sharia of a particular time and place', such as seventh and eighth century Sharia of the blessed Prophet.

[10] That is, every possible extension of autonomy for all times and places cannot be delineated in a particular existential context.

[11] Meta-legal precepts, by definition, are universal principles (that is, they are beyond time and space) that govern, inform and guide the Sharia in its formulation of particular regulations and its specification of particular extensions of the various precepts. The regulations and extensions are, therefore, always context-bound. As there is no finality to the continual flux of time and space (or, in other words, existential contexts), it is impossible to delineate every possible particular extension of a meta-legal precept in one particular context; rather, meta-legal precepts will always facilitate the formulation of regulations and the specification of their extensions, as and when new contexts emerge.

[12] This is because all possible extensions of the precept would have been delineated. Hence, it would be impossible to apply the precept to ascertain new extensions.

[13] That is, such Sharia regulations never directly refer to the 'limits' or 'remit' of 'autonomy'. Prohibitions regarding certain objects or interactions 'indirectly' limit one's autonomy without any mention of 'autonomy', its limits or remit. An example is the prohibition to sell, buy and consume alcohol.

[14] 'Negational', as opposed to 'affirmative', refers to the negation of the permissibility of individual discretion.

[15] 'Sharia regulative norms and statuses' includes rational norms due to the fact that they are sanctioned by Sharia. Thus, rational norms will also specify the extensions of the precept.

[16] Application of the precept in its judicial capacity is not restricted to the 'jurist'; rather, it can be applied by any individual acquainted with the precept of autonomy, its remit and its Sharia-ordained extensions.

In summary, the precept of autonomy affords full autonomy over wealth, property and person unless otherwise stipulated by either the Sharia regulations derived from its textual sources or the accepted rational judgements and conventions (that is, the Sharia sanctioned rational norms).[17]

1:1:2 - The Traditional Sources of the Precept in its Judicial Capacity

a- Verses

There are no verses of the Qur'ān that directly mention the precept. At most, there are indirect references to the precept in terms of autonomy over wealth. In this respect, the main verse the scholars refer to is: "O you who believe! Do not consume each other's wealth wrongfully, except it be a transaction with mutual consent." (al-Nisā': 29)

It is understood from the verse that an individual can wilfully and by choice transact with his wealth howsoever he chooses, which is due to an individual's right to utilise their wealth as they wish. It can be argued, however, that such verses merely signify the lack of right to utilise another's wealth prior to their consent (otherwise, it would be tantamount to 'consuming' the other's wealth 'wrongfully') without the verse having any clear indication on the meaning of the precept.[18]

However, the precept can be substantiated from the verses encouraging people to spend their wealth in the way of Allah, as these verses clearly signify that people have the right over their wealth and have full discretion to either gift their wealth in the way of God or to retain it.[19]

b- Reports (*akhbār*)

There is a single report attributed to the blessed Prophet that conveys the meaning of the precept explicitly in terms of the right over possessions; however, the report is categorised as a 'hurried' report (*mursal*) due to the omission of some names in its chain of narrators[20]. The report states: "People have autonomy over their possessions."[21]

Aside from this, there are ample reports signifying the meaning of autonomy over one's wealth and possessions during one's lifetime, in addition to reports scattered across the chapters of transactions (*muʿāmalāt*) within the works of jurisprudence indirectly implying the meaning of autonomy as well.[22] In the interest of brevity, a single report from the first category will be provided. The sixth Imam has stated: "It is the right of the owner to do what he pleases with his

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[17] Nāsir Makārim Shirāzī, *al-Qawāʿid al-Fiqhiyya*, 3rd ed. 2 vols. (Qum: Madrasat al-Imam Amīr al-Muʾminīn, 1991), 2:34.

[18] Bāqir al-Iyrwānī, *Durūs Tamhidiyya fi al-Qawāʿid al-Fiqhiyya*, 2 vols. (Qum: Muʾassasat al-Fiqh, 1998), 2:100.

[19] See Qur'ān 4:4 and 4:29.

[20] According to Bāqir al-Iyrwānī, the report is considered as weak (*ḍaʿīf*). This is either due to its chain consisting of an unknown narrator [Iyrwānī refers to *ʿAwālī al-Laʾālī* where the author, ibn Abī Jamhūr al-Aḥsāʾī, quotes the report from four sources] or due to its hurried nature (*irsāl*) as stated in works of jurisprudence. Furthermore, he argues against the compensation (*injibār*) of the weakness of the chain of narrators through the 'frequency of the report' (*shuhra al-riwaiyya*) and the 'frequency of the opinion' (*shuhra al-fatwa'iyya*) stating that initially the report only appeared in a single work, and therefore the 'frequency of the report' has not occurred among the first rank of scholars, as is the requirement for compensation (*injibār*). See Bāqir al-Iyrwānī, *Durūs Tamhidiyya fi al-Qawāʿid al-Fiqhiyya*, 2 vols. (Qum: Muʾassasat al-Fiqh, 1998), 2:99.

[21] Muḥammad bin Zayn al-Dīn ibn Abī Jamhūr al-Aḥsāʾī, *ʿAwālī al-Laʾālī al-ʿAziza fi al-Aḥadīth al-Dīniyya*, 4 vols. (Qum: Dar Sayyid al-Shuhadāʾ, 1985), 1:222

[22] Muḥammad al-Ḥurr al-'Āmilī, *al-Wasā'il al-Shī'a*, Abwāb Mā Yuktasab Bihi, bāb.2 report.1; and Abwāb al-Bay' wa Shurūṭihi, bāb.1 report.3.

wealth for as long as he is alive. If he wishes, he can gift it. If he wants, he can give it away in charity or retain it until his death."[23]

This report appears to be reliable by traditional standards and is directly referring to the remit of the precept of autonomy in relation to one's wealth. It also mentions some of its Sharia ordained extensions.

c- Consensus (*ijmā'*) and Judicial Concurrence (*tasālum*)

According to Makārim Shirāzī, there is concurrence upon the precept by scholars who consider it as amongst 'the established principles' (*musallamāt*).[24] However, it is possible, as Bāqir al-Iyrwānī argues, that the consensus may have been the result of rational conventions (*sīrat al-'uqalā'*), as opposed to a textual evidence, or the tacit approval of a consensus by an Infallible (*ijmā' taqrīrī*), or a textual evidence signifying the participation of an Infallible with a consensus (*ijmā' madrakī*)[25].[26]

The judicial concurrence of scholars in applying the precept in their juristic reasoning is evident throughout the chapters of transactions (*mu'āmalāt*)[27], which demonstrates the unquestionable acceptance of the precept. However, such concurrence, in and of itself, is not sufficient as an evidence for the validity of the precept in the absence of either individual reports or other evidences, such as rational conventions.

d- Conduct of the Adherents of the Sharia (*sīrat al-mutasharri'a*)[28]

There is no doubt that the precept of autonomy underlies individual discretion on how and when to utilise one's wealth and possessions within the boundaries of the Sharia, and that the utilisation of one's wealth and property was the conduct of the followers of the Sharia historically. However, it is not possible to rule out with any certainty whatsoever that this conduct was not the result of the wealth of traditions explicating the regulations of permissibility of utilising one's wealth in particular instances. Therefore, it is unascertainable whether this convention was the result of adhering to the precept in an unrestricted and a universal capacity within the boundaries of the Sharia, or whether it was due to the multitude of particular instructions that were given for particular instances. The reason for such scepticism is due to the fact that numerous questions regarding the utility of one's own wealth were directed to the Infallible, which would not have been the case had the convention arisen from a universal declaration of permissibility from the Infallible.

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[23] Ibid. Abwāb Aḥkām al-Waṣīya, bāb.17 report.2

[24] Nāsir Makārim Shirāzī, *al-Qawāʿid al-Fiqhiyya*, 3rd ed. 2 vols. (Qum: Madrasat al-Imam Amīr al-Muʾminīn, 1991), 2:23.

[25] Among the Imāmiyya, only 'consensus by tacit approval' (*ijmā' taqrīrī*) and 'documented consensus [of participation]' (*ijmā' madrakī*) qualify as valid forms of consensus.

[26] Bāqir al-Iyrwānī, *Durūs Tamhidiyya fi al-Qawāʿid al-Fiqhiyya*, 2 vols. (Qum: Muʾassasat al-Fiqh, 1998), 2:100.

[27] See Nāsir Makārim Shirāzī, *al-Qawāʿid al-Fiqhiyya*, 3rd ed. 2 vols. (Qum: Madrasat al-Imam Amīr al-Muʾminīn, 1991), 2:23-29 and Muḥammad Kāẓim Muṣṭafawī, *Al- Qawāʿid: Qāʿida al-Ṣalṭana*, 7th ed. (Qum: Muʾassasat Nashr al-Islāmī, 2008), p137

[28] Bāqir al-Iyrwānī, *Durūs Tamhidiyya fi al-Qawāʿid al-Fiqhiyya*, 2 vols. (Qum: Muʾassasat al-Fiqh, 1998), 2:97.

However, it is possible that the followers of the Sharia were aware of the precept in its judicial capacity but were unsure of its limits and parameters, and hence were constantly posing questions to the Infallible.

e- Rational Convention (*sīrat al-'uqalā'*)

Undeniably, rational convention qua rational convention is the main source for the precept of autonomy, and as such it has not been refuted by the Infallibles, which in turn gives it credence by the traditional fallibilist (*mukhaṭṭa'a*) standards.[29] In fact, it has been argued, as indicated above, that reason and the nature of human existence are the actual bases for this precept and the other Sharia precepts.[30] Therefore, it is only natural that rational individuals as rational people (which includes individuals within the context of Islam and Sharia) automatically base their actions in accordance with the general dictates of the precept.[31] That is, the precept is taken as a forgone accepted fact in the process of asserting autonomy over one's possessions and person precisely because it is rationally and existentially based. Thus, the rational convention is that, in principle, people have full autonomy unless otherwise stipulated. It is only the scope and the remit of the precept that requires deliberation by rational standards.[32] The next section will deal with the scope and remit of the precept.

To conclude, the textual and non-textual traditional evidences – barring rational convention – do not adequately convey the precept. It is only with the aid of rational convention that we can substantiate the Sharia texts that pertain to the precept of autonomy. Thus, by traditional standards, the 'hurried' report of the Prophet has value only because it is in line with rational convention, which in turn is based upon reason and the tacit approval of the Infallible. Accordingly, the Sharia texts are merely supportive texts[33] and cannot be regarded as originally stipulating the precept. Therefore, in principle, reason and the rational conventions will determine the scope and limits of the precept (as indicated above), whereas the 'affirmative' Sharia texts merely point to the precept's extensions. The 'negational' Sharia texts are indirectly indicative of rationally based limits to autonomy. In light of this, the function of Sharia texts is instrumental in two respects: firstly, they are fundamental in setting absolute and non-absolute limits to the extent of autonomy when the precept is applied in its judicial capacity; and secondly, they provide certain extensions of the precept and exclude other extensions from its rational remit.

[29] Ibid.

[30] Nāsir Makārim Shirāzī, *al-Qawāʿid al-Fiqhiyya*, 3rd ed. 2 vols. (Qum: Madrasat al-Imam Amīr al-Muʾminīn, 1991), 2:29.

[31] Ibid.

[32] Muḥammad Kāẓim Muṣṭafawī, *Al- Qawāʿid: Qāʿida al-Ṣalṭana*, 7th ed. (Qum: Muʾassasat Nashr al-Islāmī, 2008), p.137

[33] That is, the textual evidences merely support and confirm the precept whose primary source is reason and the nature of existence. It should be noted that reason is rooted in existence, as will be discussed in this paper.

1:1:3- The Scope and Remit of the Precept

This section will include discussions on the extensions of autonomy, the extent of autonomy and the stipulated methods by which autonomy is exercised. Accordingly, the first discussion will deal with areas in which an individual can exercise autonomy; the second discussion will explore the restrictions to this autonomy in terms of how far an individual has the right of discretion in any given extension; and finally, the third discussion will examine the nature and basis of the stipulated methodological procedures for certain extensions that must be adhered to when exercising individual discretion.

a- Extensions of the Precept of Autonomy

The extensions of autonomy are delineated by either the rational conventions, all of which are tacitly approved (*taqrīr*), or the 'affirmative' Sharia texts. They are also determined through the application of the procedural principle of general permissibility (*ibāḥa*) in areas where Sharia texts are silent. They are:

I- Personal Wealth

Reason and rational convention, in principle, accords the right of discretion over one's personal wealth to utilise, gift, invest and waste to the point of extravagance that is socially and rationally acceptable. The Sharia also affirms this right by either tacit approval of it[34] or confirming it through 'affirmative' texts, such as the reports explicitly affirming the right of autonomy of an individual over one's wealth during one's lifetime.

II- Personal Property

For the same reasons as "Personal Wealth" above, individuals have discretion and autonomy over their possessions to utilise, modify, gift, sale and waste to the point of extravagance that is socially and rationally acceptable. The difference being that property can be 'modified', whereas wealth obviously cannot.

III- Rights

According to Shirāzī, autonomy over one's rights (*ḥuqūq*) is not substantiated by textual evidences but rather by rational convention (*sīrat al-'uqalā'*).[35] Scholars reason that if there is autonomy in the utilisation of wealth and possessions, then by priority individuals have the autonomy to forgo rights such as the right to revoke (*faskh*) a transaction or the right to purchase a jointly owned property (*shuf'a*).[36] Such rights can also be accorded to individuals by appealing to the procedural principle of general permissibility (*ibāḥa*). Contrary to this, Iyrwānī states that individuals can forgo their Sharia rights (*ḥuqūq shar'iyya*) by virtue of the same evidences granting them without needing to resort to the precept of autonomy.[37]

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[34] The Sharia tacitly approves all rational conventions by its non-rejection of them.

[35] Nāsir Makārim Shirāzī, *al-Qawāʿid al-Fiqhiyya*, 3rd ed. 2 vols. (Qum: Madrasat al-Imam Amīr al-Muʾminīn, 1991), 2:36.

[36] Ibid.

[37] Bāqir al-Iyrwānī, *Durūs Tamhidiyya fi al-Qawāʿid al-Fiqhiyya*, 2 vols. (Qum: Muʾassasat al-Fiqh, 1998), 2:107.

IV- Body and Person[38]

According to both rational conventions and Sharia regulative norms and statuses, a person can marry, hire out one's services and work voluntarily, free of charge. Aside from this, a person can make cosmetic bodily modifications for reasons of need and vanity. Furthermore, in accordance with the rational conventions today, an individual can gift or sale bodily parts in principle. In all such instances, people are afforded autonomy over their bodies – in principle – by both rational conventions and the procedural principle of general permissibility.

b- Extent of Autonomy

Since the precept of autonomy is rationally based, the general remit of autonomy over wealth, possessions and person would be determined by the rational conventions of what is 'acceptable' and 'unacceptable' in any given context. As for Sharia regulations, they play the fundamental role of stipulating the 'absolute' limits and the 'lesser than absolute' limits of autonomy in line with the dictum of God's wisdom. An example of the former is the prohibition of taking one's own life[39]. Examples of the latter include the prohibitions of certain forms of wastefulness (*isrāf*)[40] and harm (*ḍarar*).[41] In order to determine what actually constitutes the 'lesser than absolute' limits of, for instance, wastefulness and harm in any given context, the Sharia would make recourse to rational conventions. Thus, there may be variations of the 'lesser than absolute' limits in accordance with the differing rational conventions of particular times and places.[42] The remit of autonomy is also substantively curtailed by the proscriptions of the Sharia because they implicatively prohibit the use of wealth, possessions and person in all matters prohibited by the Sharia, such as the buying of alcohol, or assisting in the promotion of anything proscribed by the Sharia regulations due to one's exercise of autonomy.[43]

In addition, autonomy is curtailed by the laws of state, irrespective of whether the state is Muslim or not. This is because it is presumed that the parameters of autonomy stipulated by the state are the outcome of practical wisdom, accumulative experience and rational conventions.

The issue of the necessity to curtail autonomy in instances where autonomy may compromise the state by strengthening the enemy of the state or in cases where it compromises the rights of others is discussed in Part 2, which deals with the conflict and reconciliation between the precepts of autonomy and 'lack of harm'.

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[38] Just as autonomy over one's rights (*ḥuqūq*) is substantiated by rational convention (*sīrat al-'uqalā'*) as stated by Shirāzī (see Nāsir Makārim Shirāzī, *al-Qawāʿid al-Fiqhiyya*, 3rd ed. 2 vols. (Qum: Madrasat al-Imam Amīr al-Muʾminīn, 1991), 2:36.), similarly, rational convention substantiates the individual's autonomy over body and person.

[39] Quran 4:93

[40] Quran 17: 26-27

[41] Bāqir al-Iyrwānī, *Durūs Tamhidiyya fi al-Qawāʿid al-Fiqhiyya*, 2 vols. (Qum: Muʾassasat al-Fiqh, 1998), 2:104-106.

[42] See the transcript of the author's presentation at the Ijtihād conference [to be edited].

[43] Bāqir al-Iyrwānī, *Durūs Tamhidiyya fi al-Qawāʿid al-Fiqhiyya*, 2 vols. (Qum: Muʾassasat al-Fiqh, 1998), 2:104-106; Nāsir Makārim Shirāzī, *al-Qawāʿid al-Fiqhiyya*, 3rd ed. 2 vols. (Qum: Madrasat al-Imam Amīr al-Muʾminīn, 1991), 2:34-35.

c- Sharia Methodological Prescriptions Resulting in Restrictions to Autonomy

Both the Sharia and the state stipulate procedural methods that must be undertaken when exercising one's autonomy over wealth, possessions and person. In principle, such methodological procedures are there to curtail abuse that may result from the unregulated use of autonomy.[44] Therefore, autonomy is curtailed somewhat by the mere legal obligation to adhere to such methodological procedures. In the United Kingdom, for instance, property (such as a house or a car) cannot be gifted without undertaking the due processes involved in the transfer of ownership. Consequently, a person does not have unconditional autonomy to dispense with their property as and how they want to. It is obvious that such state or Sharia regulations and processes are based upon rational conventions ensuring the well-being of all individuals concerned. To put it in another way, they are the outcome of the precept of the 'lack of harm' (*lā ḍarar*), both in its judicial and meta-legal capacity, as will be explained in the next section.

It is important to note here that instances of curtailment of autonomy due to merely adhering to the state or Sharia regulated processes (such as the due processes involved in the transfer of ownership) are not instances of conflict between the precept of autonomy and 'lack of harm'. This is due to the fact that the state and Sharia regulated processes are already in place. However, the impetus for the original stipulation of the state or Sharia regulated processes would have been either hypothetical or real instances of conflict between the precepts. In light of all of this, they are more aptly described as methodological restrictions to autonomy.

1:1:4- Application of the Precept of Autonomy

As stated in the description section (see 1:1:1), the precept of autonomy is an 'affirmative' principle that is based on reason and intuition. It simply states what people naturally feel – that they have an unquestionable right of autonomy over their personal wealth, possessions and person. Moreover, the precept is one among many meta-legal principles in whose light rational conventions and Sharia regulations are formulated. The applicative remit of this 'affirmative' precept includes everything that has not been curtailed by the Sharia regulative system[45], and all methodological procedures that have not been stipulated (or excluded) by the state or Sharia as legal or religious processes for utilising wealth, possessions and person[46].

Imāmī scholarship has offered three interpretations of the applicative remit of the 'affirmative' precept within the Sharia stipulated parameters:

1- The precept unrestrictedly ordains both one's right over possessions and one's right of discretion over the means of transfer of property (*asbāb al-naql wa al-intiqāl*), such as non-verbal transactions.[47]

[44] For concrete examples of the methodological procedures outlined for all the diverse types of transactions, ranging from sale to gifting to marriage, refer to the books of fiqh pertaining to transactions (*mu'āmalāt*).

[45] Sharia regulative system includes all regulations and regulative statuses that are in conformity with the meta-legal principles.

[46] The precept of autonomy, in itself, is purely 'affirmative', and, as such, cannot modify the limits of its own remit. Rather, it will be modified by contextual rational conventions that delineate the 'lesser than absolute' limits of the Sharia (and other rational 'negational' or 'restrictive' precepts). A consequence of this is that the extent of autonomy may vary from region to region and era to era.

[47] Muḥammad Ḥasan al-Najafī, *Jawāhir al-Kalām*, 7th ed. 43 vols. (Qum: Dār al-Iḥyā' al-Turāth al-'Arabī, 1977), 22:218.

2- The precept unrestrictedly ordains only one's right over possessions, such as utility, sale and gifting of possession (*haq al-naql wa al-intiqal*), and not one's right of discretion over the means of transfer of property. Thus, the applicative remit is restricted to the right over the possessions only and does not include discretion over the means of transfer beyond Sharia procedural methods.[48]
3- The precept merely signifies the owner's autonomy to utilise, sale and gift possessions or wealth without requiring the consent of another, and the lack of any legal impediment (*nafy al-hajr*) therein. This is a more restricted interpretation in that the precept cannot ordain either new extensions of autonomy or unstipulated procedural methods of utility, sale or gifting.[49]

The first interpretation 'affirmatively' states that the precept can substantiate un-ordained methods of transfer (as long as they are not prohibited). This interpretation presupposes that the precept, in its meta-legal capacity, affords the fullest extent of autonomy, which consequently allows for a variety of applications at the judicial level in terms of both un-ordained extensions and procedural methods within Sharia stipulated boundaries[50]. Thus, at the level of individual discretion, the precept grants autonomy not only within the parameters of Sharia regulations but also in areas where the Sharia is silent (as long as it does not infringe on any other Sharia ordinances). For instance, any form of sale would be considered as accurate as long as: firstly, it is not prohibited by the Sharia or the state; secondly, it qualifies as a "sale" according to convention; and finally, the Sharia or the state have not confined "sale" to particular extensions only.[51]

1:1:5 Conclusion on the Nature of the Precept

It is clear from the above deliberations that the precept is a product of human nature and as such is intuitively known. Thus, the 'affirmative' rights of the individual over one's person, rights, possessions, and wealth are attested by human reason as valid. In this respect, the Sharia is subordinate to, and corroborative of, human reason. Its function is to point out the extensions and limits of autonomy in any given context.

For the consumption of Muslims, the precept of autonomy comes into effect in areas where the Sharia or the state has remained silent with regard to any of its extensions. In addition to the Sharia, the remit of the precept can be curtailed by the rational conventions of any given era and place.

The precept operates at two levels: as a meta-legal principle and a judicial precept. As a meta-legal principle, the Sharia uses it (together with other meta-legal principles) specifically in its formulation of 'affirmative' rights of autonomy over person, possessions, wealth and rights, and more generally in its formulation of regulations and regulative statuses. As a judicial precept, it can legitimise un-ordained instances, extensions and methodological processes of autonomy.

[48] Murtaḍā al-Anṣārī, *Kitāb al-Makāsib*, 3 vols. (Qum: Majma' al-Fikr al-Islāmī, 1997), 3:41.
[49] Muḥammad Kāẓim Khūrāsānī, *Ḥāshiya Kitāb al-Makāsib*, (Tehran: Wizārat Irshād Islāmī, 1985), 12-14.
[50] To reiterate, the Sharia stipulated boundaries constitute the absolute limits legislated by the Sharia (such as the prohibition of taking one's own life) and the 'lesser than absolute' limits of the prohibition of harm (based on the precept of 'lack of harm'), wastefulness and extravagance. The exact Sharia extensions of the latter will be informed by the rational conventions of waste, extravagance and harm in given contexts.
[51] It should be noted that the other two interpretations do not accord the precept of autonomy any real capacity qua fiqhī precept as there is no scope for its application beyond the stipulations of the Infallibles.

Part two of this paper will present the discussions, and reconciliation, of the conflict between this ‘affirmative’ precept, in both its meta-legal and judicial capacities, and the ‘negational’ and ‘restrictive’ elements of the precept of ‘lack of harm’.

Part 1

Section 2 - The Precept of 'Lack of Harm'

1:2:1 Brief Description of the Precept and Its Nature

The precept (*qā'ida lā ḍarar wa lā ḍirār fi-l-islām*) is a verbatim portion of a report of the blessed Prophet. It states that neither harm (*ḍarar*) nor injury unto others (*ḍirār*) is condoned in Islam.[52] It is a 'negational' and a 'restrictive' precept in contrast to the precept of autonomy, which is an 'affirmative' principle. In its meta-legal capacity, the precept dictates that every Sharia regulation in itself must not be harmful to the individual nor to the community. The exceptions to this are regulations that necessarily entail either harm to the self or injury to others in order to protect the individual or community, such as regulations pertaining to the defence of the self, family and country. In addition to safeguarding regulations from being harmful, the precept dictates that rights accorded by the Sharia must not be injurious to others.

In its judicial capacity the precept has two functions: firstly, to negate regulations in cases where the adherence to a regulation will cause harm to the individual; and secondly, to restrict the extent of autonomy in cases where it causes injury to others regardless of whether that extent was ordained by the Sharia or whether it was justified by the application of the procedural principle of general permissibility. According to the prevalent view in Imāmī scholarship, the application of the precept to instances of harm – caused, or potentially caused, by either the adherence to a regulation or the exercising of one's right – produces actual secondary regulations (*ḥukm thānawī*) by nullifying the primary injunctions (*ḥukm awwalī*) of the Sharia through a process of authoritative modification (*ḥukūma*).[53]

Several Imāmī scholars have extensively discussed the meaning of the precept in its judicial capacity. The format usually includes an analysis of each word of the precept. Such technical discussions assist in determining the exact meaning of the precept, and its applicative remit within the corpus of established Sharia regulations and rights. The text of the precept – "*lā ḍarar wa lā ḍirār fi-l-islām*"[54] ("there is no harm and injury within Islam") – consists of three components that have been the subject of rigorous analysis in Imāmī scholarship. These are: the particle '*lā*', and the nouns '*ḍarar*' and '*ḍirār*'.

The particle '*lā*' denotes a generic negation (*nafy al-jins*) of the indefinite noun or nouns that immediately follow it. The remaining content of the sentence, which in the text of the precept is "*fi-l-islām*", provides additional information regarding the generic negation. Accordingly, the meaning of the statement is: "there is absolutely no harm or injury within Islam". There are two main interpretations of the exact referent of the negation of harm: that of Shaykh Anṣārī and Ākhūnd Khūrāsānī. According to Shaykh Anṣārī, the particle signifies the negation of regulations as and when they result in harm[55]; that is, stipulated regulations are nullified for the person in whom they cause harm. Therefore, the particle signifies a real negation (*nafy ḥaqīqī*) of regulations in instances of harm. On the other hand, the opinion of Ākhūnd Khurāsānī is that the particle signifies negation of the subject of the regulation.[56] That is, regulations are not stipulated in the first place for the person or

[52] Muḥammad Kāẓim Muṣṭafawī, *Al-Qawāʿid: Qāʿida lā darar*, 7th ed. (Qum: Muʾassasat Nashr al-Islāmī, 2008), 243.
[53] Murtaḍā al-Anṣārī, *Rasā'il Fiqhiyya*, (Qum: Mu'assasat al-Kalām, 1993), 112-113.
[54] See footnote no. 2 in Murtaḍā al-Anṣārī, *Rasā'il Fiqhiyya*, (Qum: Mu'assasat al-Kalām, 1993), 111.
[55] Murtaḍā al-Anṣārī, *Rasā'il Fiqhiyya*, (Qum: Mu'assasat al-Kalām, 1993), 115.
[56] Muḥammad Kāẓim Khūrāsānī, *Kifāyat al-Uṣūl*, 2nd ed. (Beirut: Muʾassasat Āl al-Bayt li-Iḥyā' al-Turāth, 1991), 381 -382.

subject in whom they cause harm. Consequently, the issue of nullification doesn't even arise. Therefore, the particle signifies a presumptive negation (*nafy iddi'ā'i*) of harm from all stipulated regulations. Another interpretation is that the particle of negation signifies the fact that there is no harm or injury that cannot be compensated for (*ghayr al-mutadārak*).[57] Finally, a less popular interpretation is that the particle '*lā*' denotes prohibition (*nahī*) as opposed to generic negation.[58]

The root noun (*ism maṣdar*) '*ḍarar*' is the opposite of '*naf"*, which means 'profit' or 'gain'. Accordingly, '*ḍarar*' means 'loss' or 'damage'. Therefore, the sentence '*la ḍarar*' has four interpretations in light of the aforementioned four significations of the particle '*lā*': firstly, "the regulation that causes detriment to the individual is negated in relation to that individual"; secondly, "there is no stipulated regulation that leads to damage"; thirdly, "there is no regulation whose potential damage cannot be compensated for"; and finally, "do not cause harm to yourself". As for the root word (*maṣdar*) '*ḍirār*', it can mean the following: reciprocal injury or damage; or repeated injury or damage to another. On the basis of the usage of the word '*ḍirār*' in the particular context of the statement, it is clear that the intended signification is 'injury and damage to others'. Accordingly, '*ḍirār*' refers to situations where the exercise of one's rights results in damage to others. Thus, the four interpretations of the precept are:

a- Every regulation resulting in harm to the self, and every Sharia right which when exercised causes injury to another, is nullified and void in instances of harm and injury respectively.

The first clause (*ḍarar*) of this interpretation states that the duty to comply with regulations that cause harm to the self is negated. The second part nullifies or curtails rights whose exercise leads to injury to another. Moreover, the second part also allows for the possibility to nullify one's right to injure oneself[59].

b- For an individual or a subject (*mawḍū'*), there are neither stipulated regulations which when adhered to lead to injury to the self, nor rights whose exercise is detrimental to others or the self.

This interpretation is based on the presupposition that stipulated duties qua Sharia-ordained regulations can never be harmful and injurious to the subjects of those duties, and the exercise of sanctioned rights qua Sharia-ordained rights can never be harmful and injurious to another or one's own self.

c- In Islam, there are neither regulations nor rights whose potential harm and injury cannot be compensated for.

The implication of this interpretation is that there may be instances when duties or rights cause harm to the self or injury to others to a degree; however, the detriment or injury is always compensated for in one way or another.

[57] See footnote no. 1 in Murtaḍā al-Anṣārī, *Rasā'il Fiqhiyya*, (Qum: Mu'assasat al-Kalām, 1993), 114.
[58] See footnote no. 4 in Murtaḍā al-Anṣārī, *Rasā'il Fiqhiyya*, (Qum: Mu'assasat al-Kalām, 1993), 113.
[59] This is because the body can be viewed as 'other' due to the fact that it is the possession of God and not the self's per se.

d- Do not cause harm to yourself or injury to others.

According to this interpretation, it is prohibited to either comply with any regulation that leads to harm to the self or exercise any right that is injurious to others.

In the traditional Imāmī discourse, these interpretations of the precept have been seen as distinct and disparate from one another resulting in theorists and jurists having to choose one over the others. This is in spite of the fact that scholars have recognised all of them as valid descriptions of the precept; however, they have been unable to explain exactly how all of the interpretations relate to the precept, and thus how all are in fact accurate. The solution is the recognition that such precepts have meta-legal and judicial aspects, and that therefore all of the interpretations of this precept of 'lack of harm' are descriptions of it in terms of either its meta-legal or judicial capacities. Thus, the first interpretation is delineating the precept in terms of its judicial capacity, whereas the second and third are describing the precept in its meta-legal capacity. The fourth interpretation is a regulative norm and does not recognise the statement as a meta-legal principle that governs, guides and informs the stipulation of regulations; however, as a regulation it is able to function as a judicial precept.

The following is a summary of meta-legal principles and judicial precepts[60]: a meta-legal principle (*aṣl al-aṣīl*) operates on the vertical level[61] as opposed to a judicial precept which operates on the horizontal level[62]. It is in the light of the meta-legal principles that the Sharia formulates its regulations as primary actual regulations. Thus, they have a vertical relationship with the actual regulations, that is, they govern, inform and guide the formulation process of regulations. In contrast to this, a judicial precept operates on the horizontal plane, that is, alongside the actual stipulated regulations. They are able to override actual regulations by providing either secondary actual regulations or apparent regulations (*ḥukm ẓāhirī*) in the absence of Sharia regulations.

The precept of 'lack of harm' is operative in both capacities: as a meta-legal principle and a judicial precept. In its capacity as a judicial precept, it enjoys the 'authority to modify' (*ḥukūma*) the primary regulation in cases of either harm to the self or detriment to another. The precept's 'authority to modify' is discerned from the evidence (*dalīl*) containing the precept. The evidence reports a case of adjudication in which injury was being caused to another by an individual exercising their basic right. The blessed Prophet's decision to nullify that particular basic right was based upon the precept; that is, the precept was both the cause and justification for the nullification. In addition to substantiating the precept's 'authority to modify', the evidence also serves as a proof of the precept's efficaciousness at the horizontal level in general; that is, the fact that its applicability is predicated upon the existence of primary actual regulations or rights that are harmful or injurious, or have the potential to cause harm or injury, in certain circumstances.

In conclusion, if it is accepted within the traditional uṣūlī framework that the evidence is indicative of the precept's capacity to override pre-existing primary injunctions (*ḥukm awwalī*) through the juristic process of authoritative modification (*ḥukūma*), then the evidence is a verification of the accuracy of Anṣārī's interpretation. The other two interpretations (Ākhūnd Khurāsānī's and the third) are merely descriptions of the precept qua a meta-legal principle; hence, it is impossible for them qua descriptions of the meta-legal principle to conflict with primary regulations. As for the final interpretation in which the particle '*lā*' is assumed to signify prohibition, the precept of 'lack of harm' qua a prohibitive regulation will have authority to modify primary regulations, and therefore act in

[60] For a fuller discussion on meta-legal principles (*aṣl al-aṣīl*), refer to the author's paper on fasting – Arif Abdulhussain, *Rethinking the Regulation of Fasting*, 2016, http://shaykharif.com/work/fasting (Birmingham: AMI Press, forthcoming).
[61] That is, at the level of the stipulation of regulations.
[62] That is, at the level of human life and interactions, i.e. on a case by case basis.

the capacity of a judicial precept; but it qua a prohibitive regulation will not have the capacity to function as a meta-legal principle. Despite these differences, it is still possible to conceive of a conflict between each of the four interpretations of the precept of 'lack of harm' and the precept of autonomy.

1:2:2- The Traditional Sources of the Precept

a- Verses

Scholars, such as Makārim Shirāzī, cite numerous verses of the Qur'ān that contain the word '*ḍarr*'. However, none of them substantiate the meaning of the precept.[63]

b- Reports (*akhbār*)

Reports containing the statement of the Prophet – "*lā ḍarar wa lā ḍirār fi-l-islām*" – are used as the sources or bases of the precept; that is, to both substantiate its validity and confer authority upon it. Other pertinent reports of the Imāms may be described as applications of the Prophetic statement. Furthermore, there are numerous reports within the tradition-literature of the mainstream[64] that make reference to the above statement. For the purpose of this paper, one famous instance in the life of the Prophet will be cited that conveys the precept and the context of its application. It is the case of Samura Ibn Jundab and an Anṣārī, which has been narrated in several reports in *al-Kāfī* and *Man lā Yaḥḍuruhu-l-Faqīh*. The narration (paraphrased in part) states that:

> Samura had a tree that was located within the vicinity of an Anṣarī household. He would access it without seeking their permission. This became a cause of distress for the family of the Anṣarī since their privacy was being compromised. The Anṣarī eventually complained to the Prophet and subsequently the Prophet asked Samura to seek the permission of, or give notice to, the Anṣarī prior to accessing his tree. This would have resolved the issue by ensuring Samura's right of access to his date tree and maintaining the privacy of the people residing near the tree; however, Samura did not agree to this. Generous offers were made to compensate Samura for his tree but Samura was adamant in his refusal. Finally, the Prophet instructed that the tree be uprooted and given to Samura, stating, "*anta rajul muḍārr wa lā ḍarar wa lā ḍirār*", with the possible addition of, "*fi-l-islām*"; that is, "you are a detrimental person; there is neither harm nor injury in Islam."[65]

The Prophet tried to maintain a balance between the autonomy (*salṭana*) of Samura and the privacy of the Anṣarī. Failing this, offers of compensation were made to Samura whereby he could relinquish his right over the tree without undermining his autonomy. As a final resort, the Prophet overruled Samura's right citing the precept of 'lack of harm' as both the source of, and justification for, overriding his right. The wording of the Prophetic statement in the context of the conflict scenario aptly conveys the sense of the precept in both its judicial and meta-legal capacity. This is because the Prophet's action of overriding Samura's autonomy conveys the application of the

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[63] Nāsir Makārim Shirāzī, *al-Qawāʿid al-Fiqhiyya*, 3rd ed. 2 vols. (Qum: Madrasat al-Imam Amīr al-Muʾminīn, 1991), 1:29-30.

[64] That is, the Sunnī corpus of traditions.

[65] For references of the report in *al-Kāfī* and *Man lā Yaḥḍuruhu-l-Faqīh*, see Nāsir Makārim Shirāzī, *al-Qawāʿid al-Fiqhiyya*, 3rd ed. 2 vols. (Qum: Madrasat al-Imam Amīr al-Muʾminīn, 1991), 1:30-33.

precept in its judicial capacity, and the phraseology of the maxim, "the absolute lack of harm or injury in Islam", conveys a universal principle, that is, a meta-legal principle.

It is important to note, however, that the action of the Prophet did not merely curtail the autonomy of Samura; rather, it also resulted in injury to Samura. This undermines the meaning of the precept because the precept states that there cannot be any regulation that leads to detriment nor any right that leads to the injury of others. Contrary to this, the prophetic action was injurious to Samura. The response of some Imāmī scholars is to state that the Prophet was acting in the capacity of a head of state. Therefore, his action does not necessarily have to be in conformity with the precept.[66] This explanation is unsatisfactory because on the one hand the statement was uttered to justify his own action, and on the other hand one has to go beyond the Prophet's own justification in order to justify him. On examining the Prophet's action, it is clear that it presupposes that ownership of land is not absolute. That is, in the era of the Prophet, all land was deemed public until and unless it was being utilised by someone. Thus, utility of land equated to ownership. However, it would seem that such ownership was always contingent upon conditions; one of which was non-harassment to others. In contrast to this, Samura's right over his tree was absolute. Thus, the Prophet ordered the relocation of the date tree because Samura's right to the land was nullified; however, Samura was free to relocate his tree to any other public location of his choice.

In conclusion, therefore, the precept in its judicial capacity can operate at two levels: individual application to cases of harm resulting from Sharia regulations; and applications by a Sharia state (that is, the courts of law) or a Sharia authority when reference is made to either regarding instances of injury due to another's exercise of autonomy. Both levels will be discussed later.

c- Reason (*'aql*) and Human Convention (*'urf*)

Rationally and existentially based[67] human conventions originate, evolve and operate on the basis of the precept of 'lack of harm' in terms of both its meta-legal and judicial capacities; that is, their formulations and applications presuppose the necessity of their congruence with the precept. Thus, by priority the precept must be rational as well[68]. Stated another way, the normative practice of rational people presupposes the precept of 'lack of harm'; hence, it is 'rational'[69]. However, the verification of the precept, both in terms of its validity and authority, is adequately supplied by the numerous Prophetic reports, such as the conflict between Samura and the Anṣarī. Hence, reason and convention, in this instance, merely act as supportive and corroborative evidences in those respects. The substantive function of reason and convention is in determining the scope and remit of the precept, and in providing a resolution at the level of conflict between the precepts of 'lack of harm' and autonomy (*salṭana*).

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[66] Rūḥullah Khumaynī, *Badā'i' al-Durar fī Qā'ida Nafy al-Ḍarar*, 3rd ed. (Tehran: Muʾassasat Tanẓīm wa Nashrī Āthār al-Imām Khumaynī, 1989), 105.

[67] As stated in part 1, section 1, such conventions are rationally and existentially (*wujūdiyya*) based in principle.

[68] Nāsir Makārim Shirāzī, *al-Qawāʿid al-Fiqhiyya*, 3rd ed. 2 vols. (Qum: Madrasat al-Imam Amīr al-Muʾminīn, 1991), 1:28.

[69] In the existential framework, a precept is deemed as 'existential' as long as it is intuitively discernible and rationally justifiable. This means that existential principles will be intuited by virtue of human existence. Human reason will subsequently be able to explain the existential congruity of such intuitions, define them as precepts, outline their respective applicative remits and state their instances in differing contexts. Since this is the case with the precept of 'lack of harm', it qualifies as 'rational' in the existential framework.

1:2:3- The Precise Meaning of the Precept

In order to gain a better appreciation of the precept, it is worth contrasting it with the precept of 'lack of hardship' (*nafy al-ḥaraj*). The precept of 'lack of hardship' is derived from numerous verses of the Quran[70] and, as explained in the paper on the timings of fast[71], it is both a meta-legal principle in whose light Sharia regulations are formulated and a judicial precept that overrides primary regulations during times of hardship. In other words, it too is operative on both the vertical axis as a meta-legal principle supplying primary regulations, and the horizontal axis as a judicial precept overriding the primary regulations and supplying secondary ones in their stead.

The precepts of 'lack of hardship' and 'lack of harm' differ with respect to their evidences, which confer validity and authority upon each. Their applicative remits are common in one respect and different in another. Upon analysis of their respective evidences in light of their contexts[72], this sharing of and difference between their applicative remits is understood: the domain of governance and application of the precept of 'lack of hardship' is the Sharia regulative norms and statuses when they cause hardship; this is also the domain of the *ḍarar* (that is, harm to the self) component of the precept of 'lack of harm' (as alluded to above); and the domain of governance and application of the *ḍirār* component of the precept of 'lack of harm' is injury to another due to the exercise of autonomy, which is afforded to individuals by Sharia or state regulative statuses and extensions, or rational conventions. Thus, the precept of 'lack of hardship' and the *ḍarar* part of the precept of 'lack of harm' share the same applicative remit, that is, the Sharia regulations and statuses.

In terms of meaning, there is a semantic overlap between the terms 'hardship' and 'harm'. The term 'hardship' can be designated upon any action that is psychologically or physically difficult without necessarily causing detriment. In contrast to this, the word 'harm' can be designated upon any action that causes psychological or physical detriment, without necessarily causing psychological or physical difficulty. Thus 'harm' may entail 'hardship' and vice versa, and 'harm' can exist independently of 'hardship' and vice versa. An implication of the fact that both share a common domain of application[73], and the fact that certain instances of 'harm' and 'hardship' belong to the area where there is overlap between the two terms, is that the juristic discussions pertaining to the validity and rewardability of performed actions that entail 'hardship' would also apply to the *ḍarar* part of the precept of 'lack of harm' to a certain extent, which will be discussed later.

To summarise thus far, due to the usage of the words *ḍarar* and *ḍirār*, the precept of 'lack of harm' conveys two separate meanings and, consequently, two different applicative remits. *Lā ḍarar*, in similar fashion to *lā ḥaraj*, nullifies harm and detriment resulting from the established Sharia regulative norms in which potential harm is unwarranted[74]. *Lā ḍirār* curtails individual rights and autonomy that result from regulative norms and statuses or rational conventions when the exercise of such rights cause injury to another. It is important to note, however, that there is an overlap between the applications of the *ḍarar* and *ḍirār* components in cases of harm and injury inflicted by the individual upon their own self or belongings. Here, the *ḍarar* component could be applied to curtail the regulative norm of permissibility to do with one's self and belongings as one wills; and the *ḍirār*

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[70] Muḥammad Kāẓim Muṣṭafawī, *Al-Qawāʿid: Qāʿida Nafy al-ʿUsr wa-l-Ḥaraj*, 7th ed. (Qum: Muʾassasat Nashr al-Islāmī, 2008), 296-297.

[71] For more discussion on the precept of 'lack of hardship', refer to the author's paper on fasting – Arif Abdulhussain, *Rethinking the Regulation of Fasting*, 2016, http://shaykharif.com/work/fasting (Birmingham: AMI Press, forthcoming).

[72] That is, reports that include the applications of the precepts by an Infallible.

[73] That is, the Sharia regulative norms and statuses.

[74] Obviously, there are regulations in which harm is warranted, such as regulations pertaining to the defence of country. In such instances, harm is taken into consideration at the stage of the formulation of regulations.

component could be employed to curtail the autonomy derived from Sharia regulative statuses to do with one's self or belongings as one wills. The reason for the latter's application to cases of self-harm is due to the fact that one's body and belongings are actually the possessions of God, and hence are not to be abused to an unacceptable level in spite of the natural autonomy people enjoy over their person and belongings.

From the above deliberations, it is clear that the most accurate translation of "*lā ḍarar wa lā ḍirār fi-l-islām*" is "there is no harm to the self and injury to another in Islam". This means that any harm resulting from Sharia regulations is unacceptable in Islam, and any exercise of autonomy is prohibited when it is injurious. Therefore, the precept is 'negational' when applying its *ḍarar* component (like *lā ḥaraj*) to negate harmful Sharia regulations and statuses, and 'restrictive' when its *ḍirār* component is applied to restrict the autonomy to exercise rights when they injure others.

Returning back to the discussion of the meaning of the precept, according to Imāmī scholars, the 'negational' *ḍarar* component of the precept is similar to the precept of 'lack of hardship' in that its stipulation in part is a favour or grace (*imtinān*) from God upon the individual self.[75] This presupposes that the Lawgiver recognises two categories of harm: irrevocable or 'absolute' harm[76]; and non-irrevocable or 'bearable' harm. The *ḍarar* component is to be considered as a favour from God when applied to cases of 'bearable' harm. In contrast to this, the purpose of the 'restrictive' component of *ḍirār* is to ensure societal well-being. This being the case, the status of favour (*imtinān*) bestowed upon the *ḍarar* component implicitly gives an individual a certain level of autonomy in the performance of harmful actions that are deemed as 'bearable' and not irrevocably detrimental to that individual. The individual can wilfully discharge a duty in spite of the harm it may cause as long as the individual cannot ascertain the displeasure of God with the performance of that duty. The decision to incur 'bearable' harm may also be extended to include certain cases of *ḍirār*. In such cases, the individual decides to incur 'bearable' or non-irrevocable injury to one's own person or belongings due to another's exercise of autonomy. This decision would be acceptable so long as the individual cannot ascertain the displeasure of God.

It is worth mentioning that Bujnūrdī cites the opinion of his teacher and Shaykh Anṣārī: that both the precepts of 'lack of harm' and 'lack of hardship' have the capacity to unequivocally nullify obligations and duties.[77] He argues against this stating that based upon the evidences, the capacity to unequivocally nullify regulations may only be said to be true of the precept of 'lack of harm'; whereas the precept of 'lack of hardship' does not have the capacity to unequivocally nullify regulations because there is always scope to discharge regulations that entail 'hardship'. Moreover, it may even be commendable to do so in light of the prophetic narration: "the best devotions are those that entail hardship"[78]. In fact, Bujnūrdī goes further and even expresses scepticism about the capacity of the precept of 'lack of harm' to unequivocally nullify all cases of harmful regulations stating that individuals have the option to perform those regulations that entail lesser degrees of harm, that is, 'bearable' harm.[79]

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[75] Muḥammad Ḥasan Bujnūrdī, *Al-Qawā'id al-Fiqhiyya*, 7 vols. (Qum: Wizārat al-Thaqāfat wa-l-Irshād al-Islāmī, 1998), 1:255 and 260.

[76] Henceforth, the expression "'absolute' harm" will be used to refer to this category. As mentioned, this category includes instances of irrevocable harm or damage to person or persons.

[77] Muḥammad Ḥasan Bujnūrdī, *Al-Qawā'id al-Fiqhiyya*, 7 vols. (Qum: Wizārat al-Thaqāfat wa-l-Irshād al-Islāmī, 1998), 1:260.

[78] Muḥammad Bāqir Majlisī, *Biḥar al-Anwār*, 3rd ed. 110 vols. (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1983), 67:237.

[79] Muḥammad Ḥasan Bujnūrdī, *Al-Qawā'id al-Fiqhiyya*, 7 vols. (Qum: Wizārat al-Thaqāfat wa-l-Irshād al-Islāmī, 1998), 1:260-261.

Upon analysis, either of the precepts of 'lack of harm' and 'lack of hardship' can be applied to cases in which both 'hardship' and 'harm' are experienced simultaneously, as long as the latter is 'bearable'; that is, to cases that belong to the area of overlap between the two terms. Within this domain of overlap, the precepts are indistinguishable for all intents and purposes. In cases where the performance of regulations causes irrevocable physical or psychological detriment, that is, 'absolute' harm, the precept of 'lack of harm' will nullify the regulation in question together with all individual discretion. Finally, in cases where the performance of regulative norms entail either hardship or 'bearable' harm (that is, cases where only one of the two is experienced), then the respective precept must be appealed to, albeit yielding the same result: the nullification of the regulation as a favour from God whereby the individual still retains the option to perform it nonetheless so long as the performance cannot be said to entail the displeasure of God. Therefore, individuals have the liberty to exercise their personal discretion in all genres of harm that are neither irrevocably detrimental nor absolutely prohibited by the Sharia, rational conventions or the Sharia state[80]. Similarly, individuals also have the discretion to forgo their right to curtail the Sharia-sanctioned autonomy of another that is causing injury to them. For instance, in the case of the Anṣarī and Samura, the Anṣarī could have decided not to refer the case to the Prophet and 'bear' the nuisance caused by the toing and froing of Samura[81].

In conclusion, the precise meaning of the precept of 'lack of harm' in its judicial capacity is as follows: It is the nullification of the duties of Sharia regulative norms and statuses when they result in harm to one's self to a degree that is prohibited by the Sharia, the Sharia state or rational conventions. Also, it is the restriction of one's own or another's autonomy that is conferred by Sharia statuses or otherwise when it results in injury to a degree that is prohibited by the Sharia, the Sharia state or rational conventions. However, in cases of 'bearable' harm and 'bearable' injury that have not been prohibited by the Sharia, the Sharia state or rational conventions, the nullification of duty and the restriction of autonomy will be at the discretion of the one affected.

1:2:4- Validity of Nullified Regulations if Performed, and Restricted Autonomy in Application of the Precept

The issue of 'the validity of the nullified regulations when adhered to nonetheless' is a preliminary discussion to the following sub-section, which deals the scope and remit of the precept of 'lack of harm'. Furthermore, it will clarify the nature of the precept in its judicial capacity. This issue is normally discussed in *al-Qawāʿid al-Fiqhiyya* under the heading of "real or anticipated harm" (*ḍarar wāqiʿī aw ʿilmī*).[82] The debate centres around the example of a real or anticipated harm caused by the utilisation of water during ritual ablutions. It usually includes the scenario of one who believes that they are vested with responsibility to perform ablutions with water whilst being unaware of the detrimental effects of the water upon their person. Here a question is posed: would God consider the act of ablution in such a situation as valid and rewardable? The issue at hand is the following: since the

[80] This is based on the fact that the *ḍarar* component, in part, has been stipulated as a favour to alleviate 'bearable' harm. Hence it is non-binding as long as the performance of the 'bearable' harm does not entail the displeasure of God.

[81] To reiterate, the decision to perform 'bearable' harmful duties or the decision to 'bear' injury caused by another is only permitted in areas where the Sharia or Sharia state has not absolutely negated instances of harmful duties nor absolutely curtailed injurious instances of autonomy. In such areas, individuals have the discretion to apply the precept in order to nullify duties or to refer to the courts of law when another's exercise of autonomy causes, or may cause, injury. Hence in such areas, the applications of the precepts of 'lack of harm' and 'lack of hardship' are discretionary.

[82] Bāqir al-Iyrwānī, *Durūs Tamhidiyya fi al-Qawāʿid al-Fiqhiyya*, 2 vols. (Qum: Muʾassasat al-Fiqh, 1998), 1:154.

obligation of ablution with water is nullified due to its harmful effects as per the precept of 'lack of harm', it follows that the permissibility to perform the action must also be nullified. Hence, if its performance is not permissible, then the action ought to be neither valid nor rewardable. Some scholars contend that in such cases in which there is unawareness of the detrimental effects of water, the ablutions are valid and rewardable, and a host of justifications are offered for their validity and rewardability.[83] However, scholars agree that in cases where the individual has knowledge of the nullification of the regulation as per the precept of 'lack of harm', the adherence to it nonetheless would be impermissible and its performance invalid and not rewardable. This is because the performance of the action in question would tantamount to the introduction of an unsanctioned and unwarranted action into the Sharia (*tashrīʿ*).

As accurate as this position appears, it gives the false impression that:

a- The precept nullifies every harmful Sharia ordinance and restricts every injurious instance of the exercise of autonomy, and consequently confers upon them all the status of prohibition;
b- Being prohibited, all such acts would procure the displeasure of God;
c- Thus, they cannot serve as means to gain proximity to Him and, accordingly, are invalid and not-rewardable if performed.

This is not entirely accurate because the application of the precept by the individual, Sharia authority or state only unequivocally nullifies certain levels of harm and only unequivocally restricts certain levels of injury. To assert that the application of the precept unequivocally nullifies every harm, that is, it nullifies every case of harm in an absolute (*muṭlaq*) sense, is counter-intuitive to the appreciation of the precept in its everydayness; hence such 'absolute' (*iṭlāq*) application to every case of harm would be unnatural. Therefore, as a rational and an existential precept, it is to be appreciated within a natural existential context. In light of this, the sure limit (*qadr mutayaqqan*) of the precept's unequivocal negation of individual discretion is restricted to instances of certain levels of harm and injury only; that is, in cases of 'absolute' harm or injury. It does not negate individual discretion in instances of harm and injury below those levels; that is, in cases of 'bearable' harm or injury.

Therefore, the precept allows a certain level of discretion both in deciding to perform regulations that are harmful and in consenting to incur injury due to another's exercise of autonomy. Discretion in the former is due to the *ḍarar* component being, in part, a favour from God whereby regulations that are harmful to a level below 'absolute' harm may be nullified if one so chooses. Discretion in the latter is due to the *ḍirār* component granting one the right to curtail the autonomy of another when it results in injury that is below the level of 'absolute' or unbearable injury. Accordingly, there are limits to the levels of harm and injury that individuals have discretion over. Beyond those limits, the Sharia will intervene. It will nullify regulations and restrict individual autonomy, such as in cases of loss of life or irreparable damage that result from one's own or another's exercise of autonomy. In lesser cases of harm or injury, the precept merely states that it is neither mandatory to discharge the 'harmful' Sharia duty in question nor to sustain injury from another. This means that an individual is at liberty to apply the precept in its capacity to either nullify Sharia duties or restrict the autonomy of another as in the case of the Anṣarī and Samura.

In the domain of devotions (*ibādāt*), if an instance of detriment is discerned as not being to the degree that it displeases God, then knowingly performing the devotional act ought to deem it valid and rewardable. This is because the dispensation is a favour from God in such instances and not an obligation. Thus, its performance is not inconsistent with the pleasure of God. The criterion for the

[83] Bāqir al-Iyrwānī, *Durūs Tamhidiyya fi al-Qawāʿid al-Fiqhiyya*, 2 vols. (Qum: Muʾassasat al-Fiqh, 1998), 1:155-162.

validity of devotions is the ascertainment of the pleasure of God. In cases where potentially harmful devotions are performed, the pleasure of God is ascertained through the non-ascertainment of His displeasure. In the domain of transactions (*muʿāmalāt*), the precept gives the right to nullify transactions that result in injury when no provision exists within the corpus of regulations prohibiting such instances of injurious transactions. In such cases, the party affected can wilfully bear the injury and endorse the transaction if they so choose provided that the Sharia or state has not outlawed that genre of injury.

In conclusion, the precept of 'lack of harm' merely conveys the displeasure of God both in the performance of acts that are absolutely harmful and in acquiescing to another's autonomy that results in irreparable injury. In lesser cases of harm and injury, the displeasure of God cannot be ascertained, and hence there is discretion in the application of precept. Here, the performance of regulations or allowing the other to exercise their autonomy may not distance the individual from God (*mubʿid*) at all. Moreover, they may actually serve a means of gaining proximity to God (*muqarrib*). In the language of the '*adliya* school, 'bearably harmful' devotional acts continue to be legitimate means of proximity to God because the benefits in light of which they were originally stipulated may still be procured by their performance; and, similarly, acquiescing to the other's right of autonomy by exercising forbearance may result in spiritual benefits[84].

1:2:5 The Scope and Remit of the Precept of 'Lack of Harm'[85]

In its judicial capacity, that is, its operation on the horizontal axis of the primary actual regulations, the precept of 'lack of harm' has a broad scope of application that comprises the cross-section of regulations in their individual and generic capacities. Imāmī scholars have conducted detailed discussions outlining the categories of regulations that fall within the remit of the precept and the technicalities through which the precept overrules the variety of regulations. The following is a critical summary of the domains in which the precept can be applied. This is crucial for a precise understanding of the areas of conflict between the precepts of autonomy and 'lack of harm', and their resolution in the next part.

a- Regulative Norms (*ḥukm taklīfī*) and Regulative Statuses (*ḥukm waḍʿī*)

The precept addresses harm or injury resulting from both regulative norms, such as fasting and ablutions, and predicative rights[86], that is, the predicates (*maḥmūl*) of regulatory statuses. According to scholars such as Bujnurdi, the application of the precept to situations of injury (*ḍirār*) is more straight forward than its application to situations of harm (*ḍarar*). This is because injuries caused to one of the parties due to the exercising of predicative rights, such as situations where the binding nature of a contract (*luzūm*) necessarily entails injury to one party, will be definitively

[84] It should be noted that there are scholars who maintain that the words 'harm' and 'injury' in the precept refer to certain 'unbearable' instances and extensions expressed in the Sharia and by rational conventions. The discussions of the precept in this paper categorises such instances and extensions as 'absolute' harms, which the precept unequivocally nullifies together with individual discretion. In addition to this, this paper also recognises the precept's capacity to apply to cases of 'lesser than absolute' or 'bearable' harms and injury in light of the precept being a favour (*imtinān*) from God. In such cases, individuals retain the option to 'bear' the harm or injury.

[85] Discussions about the 'scope' and 'applicative remit' of the precept are only applicable in its functioning as a judicial precept.

[86] That is, the rights issuing from the regulatory statuses.

apparent (in an objective manner) to any one observing the case; whereas the harm or potential harm to an individual resulting from adhering to regulative norms will often be subjective, and hence the application of the precept in all such cases will be based upon individual discretion.[87]

b- Positive (*wujūdī*) [88] Regulations and Rights, and Non-Conferred (*'admī*)[89] Rights

According to the Imāmī jurists, the precept undoubtedly nullifies 'positive' regulations and rights when they are harmful. An example is the obligation of ablution. However, they differ as to whether the precept applies to the category of 'non-conferred' rights; that is, rights that do not exist in the Sharia or state. A traditional fiqhī example of such a right is the wife's 'right to divorce'. Here, the husband does not provide for his wife resulting in injury to her. In such a case, no individual or institution except the husband has the 'right to divorce' his wife in order to remove her from the injury caused by him. That is, the 'right to divorce' doesn't exist for the wife whereby she, the Sharia authority or the state can apply the precept because the application of the precept is predicated upon the existence of either a regulation or a right. Under such circumstances, can the precept be applied whereby the 'right to divorce', which is exclusively enjoyed by the husband and no one else, is granted to a third party to release the wife from her husband?[90]

It is evident that the precept includes such instances, even though the 'right to divorce' doesn't exist for the wife. This is because in its conventional application and everyday understanding, the precept negates harm by nullifying harmful primary regulations and restricts injury by curtailing the scope of an individual's autonomy (*salṭana*) that is injurious to another. That being said, there is a difference in the procedural application of the precept between cases of harm or injury caused by 'positive' regulations and rights, and cases of injury caused by 'non-conferred' rights. In cases pertaining to the former, the precept can be appealed to by the individual, Sharia authority or state. In cases pertaining to 'non-conferred' rights, that is, situations of injury in which rights don't explicitly exist (*'admī*) for the injured party, the precept will be applied by the court system in the capacity of a civil authority; that is, by the Sharia authority or the state as was demonstrated by the intervention of the Prophet when a deadlock ensued between the Anṣarī and Samura. In the above case of divorce, the exclusivity of the 'right to divorce' enjoyed by the husband is revoked, and the court of law in its legal capacity procures the 'right to divorce' due to the harm caused to the wife. Similarly, in the case of a freeman being detained against his will, the court of law would compensate the detainee with the wealth of the detainer by revoking the exclusivity of the 'right over one's own wealth' enjoyed by the detainer by appealing to the precept of 'lack of harm'.

From the traditional uṣūlī perspective, it may be argued, as Bāqir al-Iyrwānī has, that the meaning of "harmful primary regulations", which are nullified by the precept, is not harmful "primary regulations" per se; rather, it is harmful "primary regulations" qua "Sharia positions" (*mawāqif shar'iyya*) in general. Hence in the above case of divorce, the harm resulting from the Sharia were it not to grant the 'right to divorce' to other than the husband would classify as harm due to a

[87] Muḥammad Ḥasan Bujnūrdī, *Al-Qawā'id al-Fiqhiyya*, 7 vols. (Qum: Wizārat al-Thaqāfat wa-l-Irshād al-Islāmī, 1998), 1:235.

[88] Positive (*wujūdī*) regulations and rights are those that exist; that is, they are stipulated by the Sharia, state or rational conventions. Thus, there is scope for the Sharia or Sharia authority to forcibly remove harm or injury from certain situations by nullifying existing regulations and exercising or restricting existing rights.

[89] Non-conferred (*'admī*) rights are those that do not exist; that is, they have not been stipulated by the Sharia, state or contextual rational conventions. Hence no such rights exist whereby the Sharia or Sharia authority can forcibly remove harm or injury from certain situations by exercising or restricting rights. An example is a wife's 'right to divorce'. No such right exists within the traditional corpus of Sharia regulations and rights.

[90] Bāqir al-Iyrwānī, *Durūs Tamhidiyya fi al-Qawāʿid al-Fiqhiyya*, 2 vols. (Qum: Muʾassasat al-Fiqh, 1998), 1:144.

"Sharia position", and consequently fall within the remit of the precept. Therefore, the applicative remit of the precept includes "Sharia positions" (*mawāqif sharʿiyya*) in general.

c- Nullification of Primary Regulations, and Autonomy in Individual Instances (*shakhṣī*) and in Generic Capacity (*nawʿī*)

Imāmī scholars agree that the precept can be applied to situations of 'bearable' harm by individuals themselves utilising their own discretion in their individual capacities. This is because the application of the precept is a favour and mercy from God upon the individual in cases where the performance of Sharia regulations results in 'bearable' harms. In such cases, the precept will nullify the regulation for the individuals in question. This individualistic and subjective element in the application of the *ḍarar* component of the precept has led the jurists to conclude that the precept cannot to be applied in a generic capacity and is restricted to individual application only. It is reasoned that any generic application would tantamount to extending an individual and subjective decision of what is 'harmful' upon others, in spite of the fact that they may not regard that particular regulation as 'harmful' in any way.

However, the precept can be applied meaningfully in a generic capacity and nullify regulations for a collectivity based on utilitarian principles when the majority face harm due to either a particular regulation or a specific situation of conflict of rights. An example of the former is if the majority were to suffer from skin ailments due to the utility of water during ablutions. In such a case, the precept would nullify the obligation of ablutions from all persons in light of the detriment and harm caused to the majority. An example of the latter would be the case of Samura's tree. Such a case can set a legal precedent (that is, it can establish a rule or principle that can be applied to other similar cases) whereby the court of law can enforce the removal of the tree upon the complaint of a plaintiff. Moreover, if cases of conflict of rights similar to that of Samura's tree are commonplace, then – on the basis of the precept and utilitarian principles – a law can be legislated to the effect that such trees ought to be relocated or compensated for.

The application of the precept in a generic capacity can be justified by extending the rationale provided by Bāqir al-Ṣadr in his reconciliation between the actual and the apparent regulations (*ḥukm wāqiʿī wa ẓāhirī*).[91] Accordingly, cases of generic application of the precept would be tantamount to giving preference to an actual prohibition (*ḥurma wāqiʿiyya*) over an actual permissible (*ibāḥa wāqiʿiyya*) or obligation (*wujūb wāqiʿiyya*) on the basis of utility. In other words, the basis for the supersession of an actual permissible or obligation by a prohibition resulting from the application of the precept in its generic capacity is the consideration of the theoretical criteria of benefit and harm in light of utilitarian principles in the mind of God[92].

[91] Muḥammad Bāqir al-Ṣadr, *Durūs fī ʿIlm al-Uṣūl*, 3rd ed. 2 vols. (Qum: Markaz al-Ibḥāth wa al-Dirāsāt al-takhaṣṣūṣiyya li-l-Shahīd al-Ṣadr, 2005), 2:25-31.

[92] Utilitarian principles are meta-legal in nature because the Sharia takes them into consideration during its formulations of the primary actual regulations.

1:2:6- The Application of the Precept: Nullification of regulations, Autonomy of the Individual, and Discretions of the Sharia Authority and the Sharia State

a- Individuals can apply the precept in their individual capacity:

i- By utilising their personal discretion in the domain of devotional acts when instances of devotional acts cannot be discharged without resulting in 'bearable' harm. For instance, when the time taken to fulfil the obligatory pilgrimage to Makkah for Ḥajj entails great loss of earnings.

ii- By reference to the legal system in situations of conflict of rights of different parties. For instance, the case of the Anṣarī's family being affected by Samura's toing and froing of his tree.

b- The precept can be applied to nullify Sharia regulations or rights in a generic capacity for a collectivity by:

i- The Sharia legal authority when he or she observes recurring situations of harm to a majority due to certain devotional acts or their prerequisites, and subsequently applies the precept to nullify them. For instance, the nullification of the obligation to perform Ḥajj or the obligation to be at the specified place of consecration for Ḥajj when either results in 'unbearable' harm for the majority of people of certain regions (hypothetically speaking). However, if some people decide to uphold and discharge the regulations nonetheless, their devotional acts would be deemed as valid and rewardable by God. The justification for the validity and rewardability is that a generic nullification based on harm to the majority is not necessarily 'irrevocably' harmful for each and every individual. Thus, those who perform the generically nullified obligations will have discharged their duties in the eyes of God. This justification is the same for the case mentioned above of people performing ritual ablutions whilst knowing that it will result in 'bearable' harm. This justification also applies to the exercising of autonomy in performing certain types of contracts in spite of them being generically nullified by the Sharia legal authority. For instance, Sayyid Muḥsin al-Ḥakīm's edict prohibiting marriages between Sādāt and non-Sādāt of Pakistan due to the societal constraints of the time. Yet those that did marry nonetheless were considered to be in a legitimate relationship. The reason for this is that a generic nullification of a Sharia authority stipulated in light of the harm to a society is not necessarily harmful for each and every individual of that society. Hence, the generically nullified act or contract is valid for those who uphold it provided it is deemed permissible by the state, and the displeasure of God is unascertainable.

ii- The Sharia state. In the case of human dealings (*mu'āmalāt*), if a Sharia state bans a form of transaction, then such a transaction cannot be enacted and will remain invalid if performed. The reason for this is that the validity of contracts and transactions is dependent upon state-ratification. Hence, if a form of marriage is prohibited by the state, then it cannot be deemed as valid if performed[93]. However, the case is quite different if a Sharia state prohibits a devotional act (*'ibādāt*) for the purposes of national security, international relations, protection of its citizens or otherwise. An example is the decision of the Islamic republic of Iran to prohibit pilgrimage to Makkah for Ḥajj during times of political disputes. In such cases, those who perform the generically nullified devotional

[93] This is in contrast to the prohibition of a form of marriage by a Sharia authority (at the exclusion of the state) because it will be valid if performed nonetheless as long as it is deemed permissible by the state, and the displeasure of God is unascertainable.

act will have discharged their duties in the eyes of God. This is because the validity of a devotional act is not dependent upon the State's ratification of it; rather its validity is dependent upon God's acceptance of it. Hence, a generic nullification of devotional acts stipulated by the state in light of the harm to the state qua state or its citizens has no bearing on their validity if performed nonetheless.

1:2:7 Limitations of the Precept

An argument against the broad applicative remit of the precept in its judicial capacity is that there are many instances of regulations that were originally ordained with harm in mind. As such, they are beyond the scope of the precept and therefore cannot be nullified by the precept. Technically, this is termed as 'the exemption of the majority of cases' (*takhṣīṣ al-akthar*) from the applicative remit of the precept of 'lack of harm'. If this is accepted, then the validity of the precept in terms of its unrestricted application along the horizontal axis is problematic. To reiterate, the precept was issued to nullify regulations resulting in harm through authoritative modification (*ḥukūma*). This ought to allow the precept universal applicability. However according to *takhṣīṣ al-akthar*, the vast majority of regulations were stipulated with harm in mind and hence are beyond the remit of the precept. Thus, there is a conflict between the universal nature of the precept in its judicial capacity on the one hand, and the assertion that the majority of the regulations are beyond its remit on the other.

Scholars have offered several responses to justify the phenomenon of *takhṣīṣ al-akthar* especially since it was the blessed Prophet who expressed the precept both as a universal principle and a judicial precept; however, none qualify as substantive justifications beyond mere descriptions. The most apt of these descriptions states that those regulations that are considered as exempted from the remit of the precept are actually self-excluded (*takhaṣṣuṣ*); that is, they do not fall within its remit in the first instance. This explanation offers no more than a mere description of the fact that some regulations are formulated with harm in mind, and hence are self-excluded. Thus, the question remains as to the purpose, or wisdom, of issuing such a precept in line with the existential property[94] of 'ease'[95] when the majority of the regulations are excluded from its remit? For undoubtedly, there will always be extenuating situations in which instances of harm will occur due to the adherence to regulations, and hence, in such situations, adherence to them will be directly contravening this property of 'ease'.

The only justification for the relatively few regulations that are excluded from the remit of the precept is a rational, meta-legal principle known as 'the least detriment' (*aqall al-ḍarar*), commonly termed as 'the lesser of the two detriments' (*aqall al-ḍararayn*) in fiqhī discourse. Accordingly, regulations formulated with potential harm in mind are excluded from the remit of the precept due to the 'higher degree of harm' entailed in their being nullified in comparison to the 'lesser degree of harm' entailed with their performance; that is, the nullification or non-existence of such regulations would entail

[94] Existential properties are the fundamental principles or facts of existence, such as: 'existence is in continual flux', 'existence has no finality' and 'existence is in a continual process of growth from weakness to strength'. Therefore, existential properties or facts are more fundamental than meta-legal principles. The latter must be in conformity with the existential properties.

[95] The existential property of 'ease' is based upon the fact that existence is in continuous motion from weakness to strength, and that this motion is natural and 'efficient'. In the domain of the human being, growth is best facilitated, or most 'efficient', when regulations are formulated in line with the existential property of 'ease'. The existential property of 'ease' is merely a translation of the existential property of 'efficiency' when applied to the domain of regulations for humankind. This is corroborated by verses of the Qur'ān that state the fact that God intends 'ease' for people and not 'hardship' (see Qur'ān 2:185, 5:6 and 22:78). It should be noted that the meta-legal principles of 'lack of hardship' and 'lack of harm' presuppose the existential property of 'ease' and are derived from it.

more harm than the adherence to or existence of such regulations. The distinguishing factor in the formulation of such regulations is that the Lawgiver has formulated them in light of both the property of 'ease'[96] and the meta-legal principle of 'the least detriment' together, due to the superior knowledge of benefits and harms in the mind of God. In contrast to this, all other regulations are formulated in light of simply the property of 'ease' because they are not detrimental or harmful in themselves. Hence in extenuating circumstances when the adherence to such regulations (which are formulated in light of the property of 'ease' only) result in harm, they may be nullified through the application of the precept of 'lack of harm' by either individual discretion, the Sharia authority or the state.

Furthermore, the notion of 'the least detriment' also serves as a justification for the generic nullification of a regulation by the Sharia authority or the state. The generic application of the precept results in the generic nullification of a regulation that was harmful to the majority. Prior to this generic nullification, the regulation was causing more harm (that is, a 'higher degree of detriment' was being caused) than after its nullification. Some 'lesser' detriment may still exist after the generic nullification due to the regulation being nullified for the minority who were unaffected by the adherence to it, and possibly due to the loss of benefits inherent in the nullified regulation. Thus, the justification for generic nullification is based on the fact that it causes 'the least detriment' overall in comparison to the situation prior to the generic nullification that was causing a 'higher degree of detriment'. In cases of generic nullification, harms caused by regulative norms and rights are viewed in light of the majority, which is either 'the faithful' from the perspective of a Sharia authority or 'citizens' from the perspective of a state. After their deliberations, the Sharia authority or state can decide to either exclude the regulation in question from 'the applicative remit of the precept in its generic capacity' or apply 'the precept in its generic capacity' in order to nullify the regulation.

1:2:8 - Conclusion on the Nature of the Precept

The precept of 'lack of harm' is a 'negational' and a 'restrictive' precept. It is 'negational' in its essence and both 'negational' and 'restrictive' in its application. In other words, in its meta-legal capacity, the precept is a 'negational' principle in whose light Sharia regulations are formulated. In its judicial capacity, the 'negational' aspect serves to nullify existing regulations when they are actually or potentially harmful. Through its 'restrictive' aspect, the judicial precept curtails the rights and autonomy of the individual when they lead to injury to another or one's own self. Accordingly, the precept has two components: *ḍarar*, which signifies harm to one's own person or belongings due to existing Sharia regulations; and *ḍirār*, which signifies injury to another resulting from the exercise of one's autonomy. The juristic mechanism employed by the precept of 'lack of harm' whereby it gains precedence over primary Sharia regulations or individual rights is that of authoritative modification (*ḥukūma*).

Contrary to the traditional appreciation of the scope of the precept, this paper demonstrates that the application of the precept can be extended to nullify harm in a generic capacity (*naw'ī*) and injury resulting from 'non-conferred' rights (*'admī*). Moreover, this paper interprets the applicative remit of the precept in terms of harms and injuries that are either 'absolute' or 'bearable'. The 'absolute' harms, which are negated by the precept unconditionally, are determined by either the categorical Sharia regulations or the Sharia state ordinances. The category of 'bearable' harms includes all

[96] Regulations are always formulated in light of meta-legal principles, which are themselves based upon existential properties or facts. The existential property of 'ease' is the basis for the meta-legal principles of 'lack of hardship', 'lack of harm' and 'the least detriment'.

instances of harm that do not classify as 'absolute' harms. The category is defined more clearly in terms of both of the components of the precept:

a- 'Bearable' harms are the subject of the *ḍarar* component when they are instances of actual or potential harm to the individual's self or property as a result of adhering to regulations. In such instances, the individual has the choice to enact the regulations as long as God's displeasure cannot be ascertained. This discretion is due to the fact that the *ḍarar* component is, in part, a favour from God (*imtinān*).
b- 'Bearable' harms are the subject of the *ḍirār* component when they are instances of actual or potential injury to an individual due to another's exercise of autonomy. In all such instances, individuals can decide to forgo their rights and sustain injury as long as the injury sustained is not prohibited by the categorical Sharia regulations or the Sharia state.

The precept can also be applied by the courts of law in cases where another's exercise of autonomy is injurious to the plaintiff. The person affected would need to make recourse to the courts of law in order to curtail the other's autonomy or to negotiate a settlement.

Finally, it should be evident that it is the 'restrictive' or *ḍirār* component of the precept that will conflict with the precept of autonomy; that is, injury inflicted upon an individual due to another's exercise of autonomy. That being said, it is possible to envisage a real conflict between the *ḍarar* component and the precept of autonomy as well, in spite of the fact that it[97] is usually employed in cases of harm to one's self resulting from the adherence to regulations. This is because there is a conflict between the precepts of autonomy and 'lack of harm' in cases where one's right over one's person and belongings to do with as one wills (*salṭana*) results in harm to one's own self or belongings (*lā ḍarar*). This will be discussed more fully in the next part.

[97] That is, the *ḍarar* component.

Part 2 – The Conflict between the Precepts of Autonomy and 'Lack of Harm'

From the discussions in Part 1 of this paper, it is clear that there is a natural state of conflict between the precepts of autonomy and 'lack of harm'. This is because the precept of autonomy is 'affirmative', conferring the right of discretion to individuals, whereas the precept of 'lack of harm' is 'restrictive', curtailing the scope of individual discretion.

2:1 - Areas of Conflict between the Precepts of Autonomy and 'Lack of Harm'

The first section of Part 1 stated that the 'affirmative' precept of autonomy is effective in areas where the Sharia has not negated individual discretion. The preceding section discussed the two components of the precept of 'lack of harm' in its judicial capacity. The precept's 'negational' component unequivocally nullifies ordained duties when they result in 'absolute' harm as long as they were not originally formulated with possible harm in mind. Therefore, in its capacity as a precept that unequivocally negates every instance of 'absolute' harm, the precept of 'lack of harm' does not conflict with the precept of autonomy. However, there is a conflict between its 'restrictive' component and the precept of autonomy. This is because its 'restrictive' component seeks to curtail the right of discretion and autonomy when the exercise of autonomy is injurious in areas where the Sharia has not negated autonomy. Hence, there is a direct and 'real' conflict between the precepts of autonomy and the *ḍirār* component of 'lack of harm'[98]; that is, in cases of injury to an individual due to another's exercise of autonomy. Therefore, it is clear that the precept of autonomy will conflict with the 'restrictive' *ḍirār* aspect of the precept of 'lack of harm' – the function of which is to curtail autonomy – and not with the 'negational' *ḍarar* aspect, which negates Sharia ordinances in situations when they result, or may result, in 'absolute' harm[99].

Individual discretion also exists, however, in the domain of 'bearable' harms that are, or may be, caused by the performance of Sharia ordinances in certain situations. In such cases, individuals can decide not to apply the *ḍarar* component of the precept to alleviate the 'bearable' harm and opt to perform the Sharia ordinances. This was discerned in light of the fact that the *ḍarar* component – in all cases of 'bearable' harm – is a favour (*imtinān*) from God exactly like the precept of lack of hardship (*lā ḥaraj*). Thus, on the one hand the aspect of *ḍarar*, due to its being a favour from God, allows the precept of autonomy to bestow discretion upon individuals to uphold Sharia regulations despite their potential or actual 'bearable' harm; and on the other, it simultaneously seeks to 'restrict' one's autonomy to bear such potential harm. Hence, in all such cases, it seeks to function exactly like its *ḍirār* counterpart. The difference being that *ḍarar* seeks to restrict an individual's autonomy to sustain 'bearable' self-injury, whereas *ḍirār* restricts an individual's autonomy to inflict injury upon another. The reason why the conflict between autonomy and *ḍarar* is 'real' in cases of 'bearable' harm is precisely because the Sharia has not negated autonomy to engage in 'bearable' harms, just as it has

[98] This is because on the one hand the precept of autonomy is bestowing upon the individual the right to act if they so choose in areas where the Sharia has not negated autonomy, and on the other the *ḍirār* component is expressing the lack of right to act if there is injury to another despite the fact that the Sharia has not explicitly negated such autonomy. Thus, there exists a real conflict here where one can meaningfully ask: 'which one takes precedence over the other?'

[99] In the case of 'absolute' or irrevocable harm to an individual resulting from the adherence to a Sharia ordinance, there is no conflict between the precept of autonomy and the *ḍarar* component – that is, between the individual's right to choose to perform the Sharia ordinance in question and the *ḍarar* component – because the *ḍarar* component unequivocally nullifies all instances of regulations causing 'absolute' harm. Thus, the individual is categorically prohibited from adhering to such regulations.

not negated the exercise of autonomy that is injurious to the other. Consequently, a conflict can be conceived between the precept of autonomy and the 'negational' aspect of the precept of 'lack of harm' because the 'negational' aspect in all instances of 'bearable' harm seeks to 'restrict' one's own autonomy to engage in Sharia ordinances that result in 'bearable' self-harm[100]. An example of this conflict is the scenario of ritual ablution exacerbating a fever. Here, as long as God's displeasure cannot be ascertained with the performance of such an ablution, a 'real' conflict will exist between the individual's discretion and the *ḍarar* component of the precept.

It should be noted that the individual's discretion to incur 'bearable' detriment also applies to cases of *ḍirār* where the one being injured by another's exercise of autonomy can decide to forgo their right to not be injured (as long as it is a 'bearable' injury) and sustain the injury wilfully. Here too, there is a 'real' conflict between one's autonomy to sustain 'bearable' injury from another and the *ḍirār* component of the precept that seeks to restrict such autonomy. An example of this conflict is the scenario of a person making an extension to their property whereby the neighbour's natural sunlight is blocked. Here, as long as God's displeasure cannot be ascertained with the individual's decision to forgo their right to sunlight, a conflict will exist between the neighbour's right to sustain self-injury and the *ḍirār* component of the precept.

Therefore, in all cases of injury due to another's exercise of autonomy, the *ḍirār* component will always conflict in a 'real' sense with:

- Either the autonomy of the party that is willing to incur injury
- Or the autonomy of the individual to exercise his right, which will entail injury to the other, should the other decide to invoke the precept.

This 'real' conflict between the precepts of autonomy and both components of 'lack of harm', that is, when the harm or injury to a person or belongings is 'bearable', will include cases of cosmetic modifications and organ donations.

In conclusion, the conflict between the precepts of autonomy and 'lack of harm' can be envisaged in terms of both the *ḍarar* and *ḍirār* components. More precisely, conflict with the former component is due to it being bestowed with the status of 'favour' from God. This status allows the precept of autonomy to confer discretion upon an individual to perform 'bearable' regulative norms that are harmful, whilst simultaneously offering to curb 'bearable' harm. In light of this, the *ḍarar* component functions in exactly the same manner as its *ḍirār* counterpart because it also seeks to 'restrict' autonomy, albeit the autonomy to self-harm. Finally, since all instances and extensions of autonomy result from regulative statuses[101], the conflict will always be between instances and extensions of autonomy resulting from regulative statuses, and the two components of the precept of 'lack of harm'.

[100] In such cases, the precept of autonomy together with the *imtināن* status of *ḍarar* bestows upon the individual the right to sustain 'bearable' harm if they so choose because the Sharia has not negated autonomy to engage in Sharia regulations when they result in 'bearable' harm. Simultaneously however, the *ḍarar* component is expressing the lack of right to sustain 'bearable' harm, albeit as a favour from God. Thus, there exists a real conflict here where one can meaningfully ask: 'which precept takes precedence over the other?'

[101] One's autonomy is always in relation to some 'other' object that is 'mine', including one's own body. Thus, autonomy is contingent upon regulative statuses that are bestowed upon certain relations between the individual and its objects whereby they become 'mine'; that is, the individual has autonomy towards those objects by virtue of the relationships conferred by the regulative statuses.

2:2 - The Basis of Preference of One Precept over the Other in any given Instance and Extension

At the level of conflict, a resolution will be sought by preferring one of the precepts over the other. As for the answers to the questions of 'which one will preside?', and 'to what extent?', and 'in which instances?', these are subject to fluctuate from one genre and case of harm or injury to another because their precise articulation is dependent upon a particular genre and case of harm or injury. That being said, the general principle or the underlying basis that will determine the preference of one precept over the other in any given case of harm or injury can be stated.

It will be recalled that at the meta-legal level – that is, at the level of the formulation of duties – regulations are stipulated, and rights are conferred in accordance with what is most beneficial and least detrimental existentially. Thus, it can be said that all regulations and rights are stipulated and conferred in light of the meta-legal principles of 'the most benefit' and 'the least detriment' (*aqall al-ḍarar*). This is exemplified and iterated in the Qur'ān as well, for it is minimalistic in its declarations of Sharia ordinances, and states in several verses that Islam, as an ordained sharia system, is a 'religion of ease' that is most beneficial for mankind[102]; the latter point is also mentioned in the ḥadīth literature[103]. Thus, in areas of conflict between the precepts of autonomy and 'lack of harm', the general principle that will inform the process of preferring one precept over the other must be based upon and in line with the meta-legal principles of 'the most benefit' and 'the least detriment'. Accordingly, the general principle is that 'precedence must be given to the precept that causes the least detriment overall'. The pivotal role of the principle of 'the least detriment' was mentioned in Part 1, Section 2, where even regulations that were formulated with harm and injury in mind (such as defence of oneself or the pilgrimage to Makkah for ḥajj) had to be in line with the principle of 'the least detriment'. Such regulations that include the consideration of the meta-legal principle of 'the least detriment' in their formulations signify that their non-issuance would cause greater detriment to the individual and community than the potential or actual harm presupposed in their issuance.

That being said, in the majority of the cases of conflict encountered by the Sharia and Sharia state, preference will be given to the precept of 'lack of harm' over autonomy because the application of its 'negational' or 'restrictive' components almost inevitably yields results that are in accordance with the meta-legal principles of 'the least detriment' and 'the most benefit'. This requires explanation. The nullification of a primary Sharia regulation will always entail the forfeiting of its intrinsic benefits[104]. However, when the performance of a regulation entails a degree of harm that outweighs the possible benefits that accompany its performance, which is true for the majority of cases of conflict, then there is 'greater benefit' for the individual with the non-performance of that regulation; that is, the non-performance of the regulation is 'less detrimental' than its performance. Also, in every case of conflict in which the precept of 'lack of harm' is preferred and applied, harm is inevitable for the individual whose autonomy is being 'restricted'. This is because the curtailment of individual autonomy in itself is a type of harm for the individual. In all such cases, however, the harm caused by curtailing the individual's autonomy will be less than the harm and injury caused by the individual's exercise of autonomy, and hence on the basis of the principle of 'the least detriment', autonomy must be curtailed.

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[102] In fact, the Qur'ān (5:101) exhorts the believers not to ask about that which the revelation and the blessed Prophet have not mentioned or discussed. Muḥammad Bāqir al-Ṣadr has defined the area where the Sharia is silent, using the example of a society's economy, as 'the area of neutrality' (*manṭaqat al-farāqh*) – see Muḥammad Bāqir al-Ṣadr, *Iqtiṣādunā*, 2nd ed. (Qum: al-Majma' al-'ilmī li-l-Shahīd al-Ṣadr, 1987), 721-728. Also see Qur'ān 2:185, 5:6 and 22:78 for reference to 'ease' in religion.

[103] Muḥammad Kāẓim Muṣṭafawī, *Al-Qawā'id: Qā'ida Nafy al-'Usr wa-l-Ḥaraj*, 7th ed. (Qum: Mu'assasat Nashr al-Islāmī, 2008), 297.

[104] This is in accordance with the *'adliya* presumption of value-based regulations.

It should be noted that the Sunni juristic devices of *sad al-ḏarā'i'* (curtailing the means of corruption) and *maṣlaḥa al-mursala* (generic benefit) are rooted in the precept of 'lack of harm'. They are predominantly applied to cases in which two harms co-exist. The results of their applications are based on the principle of opting for the lesser of two harms (*aqall al-ḍararayn*), which is itself based upon the precept of 'lack of harm' as discussed in Part 1, Section 2. They operate at the societal level in exactly the same manner as the Shī'ī precept of 'lack of harm' in its generic capacity. However, their applicative remit is restricted to regulations and regulative statuses that do not belong to the category of 'absolute regulations' (*al-ḥukm al-ilzāmī*) [105].

In conclusion, the principles of 'the least detriment' and 'the most benefit' will be the criteria for determining which of the precepts takes precedence in any given instance of conflict.

2:3 - Possible Areas of Conflict

The Sharia has stipulated both the absolute limits of the precept of autonomy, albeit indirectly, such as the prohibition of taking one's own life, and its non-absolute limits, such as the prohibition of excessive waste and extravagance. It has also prohibited certain forms and methods of transactions, which also curtail the precept's applicative remit. On the other hand, the Sharia confers rights and autonomy by stipulating regulative statuses whereby individuals can choose to act in accordance with those rights. However, there are areas of human life where the Sharia is silent. These unregulated areas are 'affirmative' spaces in which the precept of autonomy confers discretion upon individuals. The Sharia is also silent when regulative norms result in 'bearable' harms to one's self and when the exercise of an individual's autonomy results in 'bearable' injury to another.

Based on this, the domain of conflict between the two precepts is restricted to areas in which either the Sharia is silent or it has conferred rights and autonomy (that is, in cases pertaining to the last three of the six areas[106] delineated in the paragraph above). This is because it is in these areas that the individual is able to exercise the autonomy resulting from either the regulative statuses or the precept of autonomy. It follows, therefore, that the possibility of harm to one's self, or injury to another, due to the exercise of autonomy only exists in these areas.

It must be noted that since the Sharia is always operating within an existential framework, it is always subject to its existential context, which is in a continual state of flux. This means that the relations of things to other things, or in other words their statuses, are continually subject to change. The implication here is that the 'absolute limits', such as the prohibition of taking one's own life or another's, are only "absolute limits" under normal circumstances. Therefore, it could be argued that in today's context people should have the autonomy to practice forms of euthanasia in extenuating circumstances, which would obviously entail the taking of one's own or another's life. The continual flux of existential contexts also means that the exact specification of what constitutes 'waste' and 'extravagance' for 'the non-absolute limits of excessive waste and extravagance' will be discerned by the particular rational conventions of the varying existential contexts. This is also true for the proscribed and prescribed procedures and methods of transactions because they too are essentially the outcome of the rational conventions of fluctuating existential contexts. Even though there is

[105] That is, the applications of *sad al-ḏarā'i'* (curtailing the means of corruption) and *maṣlaḥa al-mursala* (generic benefit) are restricted to the categories of the 'permissible', 'recommended' and 'reprehensible' regulations.

[106] The six areas are: the absolute limits of the Sharia, the non-absolute limits of the Sharia, the proscribed and prescribed methodological procedures of the Sharia, the regulative statuses and rights of the Sharia, the unregulated areas or silence of the Sharia, and the absence of regulation or silence of the Sharia regarding 'bearable' harms and injury.

mutability in the absolute limits, the non-absolute limits, and the proscribed and prescribed transactions and procedures, at any given time and place they would be defined, determined and fixed in accordance with their respective existential contexts. Hence the precept of autonomy cannot operate in these areas despite their mutability, and thus there is no scope for conflict between the precepts in these areas.

In conclusion, the conflict between the precepts of autonomy and 'lack of harm' is only possible in the last three areas mentioned above: the area of rights and autonomy conferred upon individuals by the regulative statuses; unregulated areas wherein autonomy is conferred upon individuals by the precept of autonomy; and the area of 'bearable' harms and injuries wherein autonomy is conferred upon individuals by the precept of autonomy.

2:4 - Resolution in Areas of Conflict between the Precepts by Preference of One over the Other

In light of what has been stated above, the precept of autonomy is restricted by Sharia stipulations on the basis of the meta-legal principles of 'the least detriment' and 'the most benefit' in the following areas:

1- Where the Sharia sets an absolute limit to the application of the precept of autonomy, such as the prohibition of taking one's own life or another's.
2- Where the Sharia's non-absolute limits to the application of the precept of autonomy are contextually specified by the rational conventions of time and place, such as the prohibitions of excessive waste, extravagance and 'unbearable' harm and injury.
3- Where the Sharia has prohibited certain forms of transactions and interactions.

The following are the resolutions in the areas of conflict delineated in the previous section, which entail the precept of 'lack of harm' having precedence over the precept of autonomy and restricting it:

4- Where the Sharia authority and/or Sharia state issue(s) restrictions or prohibitions based upon the application of the precept of 'lack of harm' in its generic capacity as explained above. This includes the generic prohibition of a specific extension of autonomy within a particular transaction-type that is causing injury to the other in a particular societal context and the Sharia is silent about such injury.
5- Where the precept of 'lack of harm' confers discretion upon the individual to nullify Sharia regulative norms and statuses that entail 'bearable' harm, and the individual chooses to exercise this discretion.
6- Where the precept of 'lack of harm' confers the right upon the individual to curtail the autonomy of another when the other's exercising of rights causes 'bearable' injury to the individual, and the individual chooses to exercise this right by referring to the courts of law.

Therefore, it is only in the areas of 'bearable' harm and injury that individuals have the autonomy either to incur the 'bearable' harm resulting from regulations and 'bearable' injury resulting from another's autonomy, or to invoke and enforce the precept of 'lack of harm'. Choosing the latter would nullify the harmful regulation and restrict the other's autonomy.

In conclusion, three broad areas exist in which an individual has the autonomy to incur 'bearable' harm and injury:

1- Wealth, property, body and person.

An individual has autonomy to utilise wealth, property, body and person even if it classifies as 'bearable' harm and injury; that is, as long as it is sustainable, less than extravagant or wasteful, and it is not irreparably detrimental. This includes gifting, buying, modification of property, cosmetic bodily modifications, organ donations and lifestyle. Such autonomy is conferred upon the individual by regulative statuses or the application of the precept of autonomy in unregulated areas.

2- Instances of Sharia regulations that cause 'bearable' harm and injury.

An individual has the autonomy to execute Sharia regulations that will cause 'bearable' harm and injury as long as the displeasure of God cannot be ascertained. Examples include the performance of ablutions in cases where the usage of water may exacerbate existing medical conditions, and the decision to incur 'bearable' injury by forgoing one's right to curtail the other's exercise of autonomy.

3- Proscriptions of the generic application of the precept of 'lack of harm'.

An individual has the autonomy to perform regulations or acquire regulative statuses that have been generically proscribed[107] by the Sharia authority or state; however, this autonomy only exists as long as the displeasure of God cannot be ascertained and/or the ratification of the action or status is not dependent upon the state. Examples include Iran's decision to suspend the major pilgrimage for a number of years, and Sayyid Muḥsin al-Ḥakīm's edict prohibiting marriages between the Sādāt and the non-Sādāt in Pakistan.

[107] That is, generic proscriptions are the result of the application of the precept of 'lack of harm' in its generic capacity.

2:5 - A Final Note

From the above deliberations, it is evident that in the majority of the cases of conflict between the precepts of autonomy and 'lack of harm', preference is given to latter. This is because the precept of 'lack of harm' and the underlying principle of 'giving precedence to the precept resulting in the least detriment overall' have the common purpose of alleviating difficulty. In fact, both are predicated upon the existential property of 'ease', and the meta-legal principles of the 'the least detriment' and 'the most benefit'. However, the general principle of 'giving precedence to the precept resulting in the least detriment overall' only applies to instances of conflict between the precepts of autonomy and 'lack of harm', and not to other types of conflict, such as instances of conflict between two autonomies or instances of conflict between two harms. Therefore, assessment must be made of every instance that is a prima facie conflict between the precepts of autonomy and 'lack of harm'. This is because closer scrutiny may reveal that the conflict is not between them at all but between other types of conflict that require different means of resolution.

With this in mind, consider the scenario of a person who wishes to add or has added an extension to his property that could compromise or has compromised the level of sunlight of the neighbour. In such cases, a local authority may have legislation in place that allows for certain levels of extensions to be built at the owner's discretion; whereas extensions beyond the stipulated level require the decision of legal authorities to either endorse or block such extensions. Yet, other local authorities may leave it to the discretion of the affected parties to either endorse certain levels of extensions or refer to the courts to demolish or compensate extensions built without the permission of their neighbours.

The guiding principle for all these alternatives is the precept of 'lack of harm'. When a local authority stipulates a certain legal limit to extensions, it has taken the rights of both parties into account: the one wishing to extend his property and the neighbour. The autonomy of the former is contrasted with the neighbour's right to sunlight (assuming it is only the neighbour's sunlight that is being affected). In such cases, the person will be permitted to extend their property to the level that does not compromise the neighbour's sunlight. The basis for this limitation is the precedence of the precept of 'lack of harm', which seeks to prevent harm to the neighbour by safeguarding their right to sunlight, over the other's autonomy to extend his property. As explained above, the precept of 'lack of harm' achieves this through the juristic process of authoritative modification.

Some local authorities stipulate that certain levels of extensions must be authorised by the local council. This is to ensure that the level of blockage of sunlight is acceptable and not significant. Other local authorities stipulate that prior permission must be sought from the neighbour for extensions that are beyond certain limits. Such regulations presuppose that the building of extensions beyond the defined limit will block sunlight and cause injury to the neighbour; however, the neighbour has the autonomy to forgo their right to sunlight. Should an extension be built without the neighbour's prior consent, the neighbour has the right to appeal to the courts of law for either compensation or authorisation to demolish the illegitimate portion of the extension. This is based on their right to invoke and enfore the precept of 'lack of harm', which takes precedence over and restricts the precept of autonomy. However, if the neighbour consents to an extension that compromises his sunlight and then sells the house, the new owner of the house does not have the right to challenge the extension. This is because the new owner bought house in light of its surrounding conditions. The exception here is if the new owner demonstrates that the original owner was somehow deceived or coerced into consenting to the extension; however, such cases in which deception or coercion is provable are not instances of the conflict of between the precepts of autonomy and 'lack of harm'. Returning to the original neighbour, prior to consenting to the extension that will compromise his sunlight, the neighbour can opt to negotiate a settlement in return for forgoing his right to sunlight as long as the

legislation allows for this. Therefore, should the neighbour be inclined to permit the extension beyond the sanctioned level, the neighbour has two choices: firstly, to either forgo his right to sunlight and 'bear' the harm caused by the diminished sunlight; and secondly, to sell his right to sunlight for a price that either outweighs the harm or compensates it in full. Such instances of deciding to incur harm fall within the category of 'bearable' harm as explained previously.

Hypothetically, if a local authority does not have any legislation about extensions and a person builds an extension that curtails the light of his neighbour who then makes reference to the courts of law, such a case is not an instance of conflict between the precepts of autonomy and 'lack of harm'. This is because the extension is already built, and hence such a case will be treated as a mutual conflict of harms: demolishing the extension is harmful to its owner and the current situation is detrimental to the neighbour. The resolution of such a conflict entails calculating the levels of detriment to each party and contrasting them with each other. If the levels are equal, then no preference can be given to one party over the other; however, the neighbour will be compensated by the state becuase the harm incurred is the result of the state's failure to legislate. If the harm incurred by one party is greater than the other, then preference will be given to the former. Thus, if there is lesser harm to the neighbour, then he will forgo his right to sunlight; and if there is lesser harm to the owner of the extension, then he will be obliged to demolish the extension to the extent that it does not cause harm to the neighbour. However, the party incurring the lesser harm will be compensated by the state because the lesser harm is the result of the state's failure to legislate. Therefore, in cases of mutual conflict of harms, the underlying basis for the preference of one party over the other is 'to prefer the party that causes the least detriment overall', that is, opting for 'the lesser detriment'. It should be noted that in many cases of mutual conflict of harms due to a lack of legislation, resolution is possible through compromise (*ṣulḥ*) and does not necessarily entail preferring one party over the other on the basis of the principle of 'the least detriment'.

There are also situations in which, if both parties exercise their autonomy, it would result in reciprocal harm. For instance, a builder uses the materials belonging to another person to build a house for a third-party. In this example, if both the owner of the materials and the owner of the house decide to exercise their autonomy, then it would result in reciprocal harm to both. The owner of the materials has the right to demand the owner of the house to either return the materials or pay an appropriate sum of money as compensation; the latter being significantly more than just the cost of the materials. Agreeing to either of these demands would result in detriment to the owner of the house. Conversely, the owner of the house has the right to refuse both demands and continue to utilise the house because the fault lies with the builder. This would be harmful to the owner of the materials. In this particular example, the conflict that exists between the rights of both the owner of the materials and the owner of the house is a by-product of the actions of the builder. Hence the resolution of the conflict in this example would be either a two-way or a three-way compromise in which the builder bears liabilities to both owners.

In the works of fiqh and uṣūl, there is the ingenious hypothetical scenario of a camel's head being trapped in a big pot. It is unascertainable as to which of the two owners is at fault: the owner of the camel for not tying the animal properly or the owner of the pot for leaving it in an unsafe place.[108] If the owner of the camel breaks the pot on the basis of his right to safeguard his property, then it would be detrimental to the owner of the pot. Likewise, if the owner of the pot severs the head of the camel in order to safeguard his property, which is his right, then it would be detrimental to the owner of the camel. Thus, a conflict exists between the autonomy of both owners because both result in reciprocal harm. According to Bujnūrdī, it is not possible to apply the principle of 'the least detriment' to resolve

[108] Muḥammad Ḥasan Bujnūrdī, *Al-Qawā'id al-Fiqhiyya*, 7 vols. (Qum: Wizārat al-Thaqāfat wa-l-Irshād al-Islāmī, 1998), 1:238.

the conflict in this example; that is, on the basis of opting for lesser harm. This is because it is unascertainable which owner would incur greater harm. Since the degree of harm incurred by each party is equal, preferring the autonomy of one owner over the other on the basis of the principle of 'the least detriment' is not possible; rather, the reciprocal harms would merely nullify the autonomy of both owners.[109]

According to the thesis propounded in this paper, the meta-legal principle of 'the least detriment' is the basis for curtailing 'the greater harm' along both the vertical and horizontal axes. Therefore, in the example of the conflict between the autonomy of both the owner of the camel and the owner of the pot, preference will be given to the autonomy that results in 'the least detriment' overall. If both the camel and pot are valued merely as possessions qua property, then preference on the basis of the principle of 'the least detriment' will not be possible because the harms incurred to both parties will be the same; that is, both parties will incur injury due to loss of a possession qua property. This means that preferential factors cannot be identified in order to resolve the conflict, and hence its resolution lies in mutual compromise. On the other hand, if the camel is not regarded as merely a possession qua property but as a possession qua 'an animal with certain rights', then the pot-owner's exercise of autonomy would cause greater injury to the camel-owner than the camel-owner's exercise of autonomy would to the pot-owner, and hence the former's autonomy would be negated. To reiterate, if the levels of reciprocal harm are unascertainable or equal, then preferential factors cannot be identified in order to resolve such cases of conflict. Hence, their resolution will lie in mutual compromise.

[109] Muḥammad Ḥasan Bujnūrdī, *Al-Qawā'id al-Fiqhiyya*, 7 vols. (Qum: Wizārat al-Thaqāfat wa-l-Irshād al-Islāmī, 1998), 1:238-239.