



# DETERMINATION OF INDIVIDUALS' FREEDOM RANGE RELYING ON THE COMPARATIVE STUDY OF HARM PRINCIPLE IN WESTERN AND ISLAMIC LEGAL SYSTEMS

Ali Haddadzadeh Shakiba

*Doctor of Law, University of Qom, Iran*

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## ABSTRACT

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One of the most respected principles of human societies is the freedom of individuals' will in fulfilling their desired interests. Therefore, not only individuals but also public authorities cannot prevent the freedom of individuals from benefiting social and economic interests under any pretext. However, in some cases, the freedom of individuals in obtaining the greatest benefit, conflicts with each other, in such a way that the absolute freedom of someone to obtain more benefit, in some cases, makes harm the others. Therefore, it is very important to determine the limits and loopholes of individuals freedom and to establish a balance between it and the harm that may be caused to others due to this freedom. as this determination can have a wide impact on the comprehensive development of a state and the people living on it, Due to this necessity, many schools of thought throughout the history have commented on this issue including Islamic and Western schools of thought. The philosophical thoughts of these two schools, one of which is included in the Islamic rule of "no harm" and the other in the Western rule of "harm," has led this article to investigate the points of commonality and differences between these two rules in the shared interaction between them. This paper finally reached the conclusion that from the perspective of legal science, the freedom of individuals in fulfilling their interests is of special importance to ensure the maximum

social welfare of any society and its people. So governments, not only should not hinder people's activities, but also in their management, should first seek to combine the conflicted interests of individuals with each other and if it is not possible, in the second step, they should give priority to fulfilling the interests that have the most public function for the most people in the society.

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## INTRODUCTION

Throughout human history, people have always sought to achieve their goals to have a much better and happier life. In the same direction, many conflicts and quarrels have been taking place between them in determining the priority of their rights. Following the resolution of these conflicts, many schools of thought have expressed their opinion in this regard that the religion and school of thought of Islam, especially the Imami religion on it, based on its legal approach, has tried resolving the conflicts arising from the principle of respect for the freedom of individuals with the principle of necessity not to harm others in practice. In Islam by relying on the principle of "no harm" that says "There is No harm in Islam", no one can harm others without compensation. Hence who cause harm, must be compensated in any way. This principle explains how to resolve the conflict between the clash of legal rights of individuals in the spectrum of the principle of sanctity of action freedom and its limitations.<sup>1</sup>

The importance of dealing with this issue has not gone away from the eyes of Western thinkers so the principle of respecting individual freedom can be seen in the French Declaration of human rights and Citizenship in 1789. Nevertheless, perhaps the first person in the West who addressed this issue after the general statements of Bentham, Jean Locke, and Jean-Jacques Rousseau was John Stuart Mill, who in his book entitled "On Liberty" defined the principle of respecting the freedom of individuals actions and its limitations under the harm principle.<sup>2</sup>

Today, in modern human societies, paying attention to the scope of individuals' actions free-

dom to provide maximum social and economic benefits is an important necessity, which is definitely the criterion for determining the personal and general well-being of individuals in a society. Following this reason and philosophy, with the aim of determining the extent of individuals' freedom in exercising their legal rights and the limitations they face in their normal and professional life, this article, which is based on the comparative study of the Islamic legal system with the western model, tries to explain that There are differences in approach, philosophy, and hopes of the principle of "no harm" in Islamic law and the principle of "harm" in Western law, which is based on the thoughts of the English philosopher John Stuart Mill.<sup>3</sup>

It is worth mentioning that by this comparative study of the Islamic principle "no harm" which is based on many Islamic laws appeared in many Islamic countries, such as Iran, Egypt, and Iraq with the Western principle of "harm" which is based on many Western countries, such as the United States, England, and France that are based to some extent on The intellectual philosophy of John Stuart Mill, the dark spots of action freedom of individuals and its scope will be specified. In such a way that Western humanitarian variables, some of which are based on the principle of "harm" to life, are similar to Islamic human rights, which are based on the Islamic "no harm" principle, however, in some cases, compliance with one of them may lead to the violation of the other.

According to the comparative approach of the present paper in explaining the substantive differences and similarities between the Islamic "no harm" rule and the Western "harm" principle and the legal laws derived from them, it can be said that the present paper can present new points

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1 Bahrami, (2013), P. 124.

2 Humbruger, (1999), P. 42.

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3 Mill, (1895), P. 5.

that may be out of sight of Iranian and Western philosophers and writers. Therefore, according to these differences, the present paper, after giving a brief definition of each of these two Islamic and Western principles and their branches, will present a comparative study of the laws derived from the "no harm" rule with the Western laws derived from the "harm" principle and in last part it tries to show how The interaction of these two principles can help us in resolving the people rights conflicts caused by the principle of individuals freedom.

## 1. GENERALITIES AND CONCEPTS

Under this topic, the general introduction of the principle of "harm" in Western law and the principle of "harmless" in Islamic law will be discussed.

### 1.1. Brief Explanation of no Harm Principle in Western Law

John Stuart Mill says in his book "On Liberty" that humanity can only succeed in a society when each member of that society, from his personal point of view, lives a happy life. He says in this regard, everyone is free to create whatever he wants and do whatever he wants. This thought of John Stuart Mill is based on the principle of respecting the freedom of individuals. Therefore, He goes on to say, "Of course, sometimes an elderly woman sitting in her quiet garden conflicts with his/her young neighbor who enjoys listening to music loudly, in such a way that the freedom of the old woman with The action freedom of the young neighbor collides with each other and the freedom of one causes discomfort to the other, which must be solved in some way.

In order to resolve this conflict, he himself accepts that the freedom of individuals' actions should not cause harm to others. Therefore, he puts the principle of "harm" next to the principle of "freedom". He further says that "sometimes it is possible that Personal freedom of action brings joy to thousands of people, while another person's freedom of action brings joy to fewer people. Suppose a factory or a park will be opened in the area. In order

to open a factory or a park, it is necessary to buy people's houses to demolish them for building the factory or park. Everyone is free to sell his house to the government for the construction of the factory or park and he is also free to keep his house which may make someone feel relaxed and happy so that he is not willing to sell it even for billions of dollars. Of course, the opening of a park will make thousands of people happy, and the establishment of a factory will cause economic growth and the general well-being of a nation, and not selling a house will make just fewer people happy. Now, to resolve this conflict, which right has priority? In order to answer this question, he puts the principle of "Efficiency" next to two other principles and a principle will be born "The rule of freedom without harm on more people" and he continues "In the conflict between the freedom of individuals and the principle of harm, the one who can provide more happiness to more people is the first and prior." Therefore, in the realization of his hypothesis for the priority of a right, the element of power lacks validity and the determining criterion is the value and rule of "predominance of satisfaction". It means "the most happiness and satisfaction for the most people". Therefore, the government cannot prohibit people from their freedom just because it is powerful and strong unless its action is also in accordance with the principle of efficiency. The whole speech of John Stuart Mill is related to the conflict between legitimate freedoms, which is different according to the intellectual basis of each philosopher and school of thought. Therefore, no one can kill another, even if he is full of suffering and pain caused by illness, under the pretext that it will bring more happiness to those around him. Because in illegitimate freedoms, no right is defined at all until it can conflict with other rights and freedoms. On the one hand, from his point of view, in the conflict of rights, fundamental rights such as the right to live, take precedence over other rights, even though it includes According to the explanations given by John Stuart Mill in the first chapter of his book "On Liberty". he introduces the principle of harm as follows: "The only and only right that can be granted to society and public authorities to prevent individuals from performing their legitimate actions is the actions that cause illegal harm to others."<sup>4</sup>

4 Sutherland, (2003), P. 60.

## 1.2. Brief Explanation of the Harm Principle in Islamic Law

In Islam, specially Imami jurisprudence and law<sup>5</sup>, every person is free to act whatever he wants. This logical result is obtained from adherence to the rule of the sanctity of Muslim property and actions. Relying on this rule, we can reach this conclusion: a person is free to do anything. He can do what he wants and no one can stop him. Therefore, using the principle of "Ibahe",<sup>6</sup> a Muslim person is allowed to do whatever he wants to do, and due to the respect that his action has, no one from the public authorities or private individuals can prevent his actions.<sup>7</sup> so the Islamic jurists have stated about guaranteeing against the usurper and they say If a person becomes the guarantor of the debt of one of the usurpers against the owner of the property, when there is doubt as to which usurper he has become the guarantor of the debt, it will be the guaranty of the first usurper and his acquittal, and according to him, the other usurpers will also be released.<sup>8</sup> Therefore, in Islamic law, it can also be said that the scope of individuals' action freedom in exercising their right should be interpreted in such a way as to cause the greatest happiness for the greatest number of people. Therefore, from the point of view of many jurists, public authority can prevent the freedom of persons whose actions cause less happiness for the least people in order to satisfy the general interests of Islamic society and in order to obtain the greatest satisfaction for the greatest number of people. The overall harmony of the principle of respect for the freedom of action of individuals and the Islamic principle of "no harm" with its Western model should not cause doubt that there is no difference between the two, but the main difference between these

5 Imami jurisprudence is one of the schools of jurisprudence in Islam. This religion is also famous for Shia jurisprudence because its followers are Twelve Imam Shiites, and because it is closely related to the sayings attributed to Jafar Sadiq, the 6th Imam of Shiites, it is also known for Jafari jurisprudence. Shia is a special tendency in Islam based on a series of theological and historical opinions and analyses.

6 The principle of ibahe means that whenever we doubt whether something is allowed or forbidden, the principle and rule is that it is not forbidden.

7 Sadouq, (2000), P. 250.

8 Tousi, (1967), P. 251/3.

two rules lies in the explanation of the concepts of "harm" and "non-harm" in this rules. In any case, in general, the common meaning of both rules is as follows: "Everyone is free to do whatever he wants as long as he does not harm others". Therefore, in the following, the interpretation of the concepts hidden in these two principles will be discussed in each of the two Western and Islamic models.

## 2. CONCEPTS

Under this topic, the influential concepts in the principle of Western "harm" and Islamic "no harm" will be discussed.

### 2.1. The Concept of "Freedom" and "Harm" in the Western Rule

John Stuart Mill's main goal in his book "On Liberty" is to ensure the freedom of individuals' actions against the public forces, i.e. the government. In reaching this goal, he tries to identify all the prerequisites that may cause conflicts between the freedom of individuals' actions and the policy of governments and resolve the conflict between them. Therefore, he believes that people are free to do whatever they want by observing moral principles. Therefore, he who belongs to the "natural rights" school, warned the governments against passing laws in opposition to the principle "free will" of individuals and he considers the laws against the principle of individuals' actions freedom as invalid. According to what has been said, the basis of the freedom of action of individuals from John Stuart Mill's point of view is the non-contradiction of these freedoms with natural rights, the most important example of which is not to harm others. Of course, from the point of his view, harm has a special meaning that should be clarified. So, harm refers to actions that are directly and intentionally done by a person against the will of another. In addition, such an action is considered a loss for the other person only if it is considered unfair according to the general situation. Therefore, when two boxers enter the field of battle, even though one of them strikes his opponent against the other's will, this blow and the

subsequent loss will not be unfair.<sup>9</sup> Because, first of all, the participation in the competition and, as a result, the fatal blow, was with the initial consent of the person, and secondly, it was done in the process of the sports law. Therefore, the main scope of the concept of harm, from the point of view of desire, is based on its opposition to the consent of individuals. In the notes on the theory of desire, it is stated that the truth of the title of loss is actually the creation of a disorderly and complicated situation that puts a person in a worse situation than his previous situation.

On this occasion, John Stuart Mill in the definition of civil responsibility says; "Actions that directly and intentionally cause a person to be in a worse situation than his original situation". Therefore, from his point of view, in order to count an action as a loss to limit the freedom of individuals actions, it must always contain three fundamental elements:

1. The persons freedom of action should directly cause harm to another;
2. Only intentional actions can cause harm;
3. The loss should be unfair. Therefore, he believes that failure to perform an action can never cause harm. So, the comfort and convenience of a person, in the desire not to perform an action, cannot be limited by imposing a loss against another. In this regard, he believes that actions can only be limited on the pretext of harm to others, which causes the civil liability of "tort".<sup>10</sup>

In the scope of his philosophical thought, John Mill believes that non-material and non-physical titles are not included in the conceptual spectrum of "harm", but he includes non-material losses under another title, that is the "offense principle" which can never lead to freedom. hence, sometimes the individuals' actions freedom may shock or provoke public feelings, which of course, from the point of his view, is necessary for the communal life of humans and is inevitable, and due to the ambiguity in placing such actions under the title of harm and due to the difficulty in their recognition and measurement, it is not possible to limit people's freedom of action with these excuses. So, a person who wears inappropriate clothes in the

summer cannot be restricted because he disturbs the psychological security of society. Finally, he comes to the conclusion that the "harm principle" only prevents actions that directly harm the material assets of others. While the "offense principle" is not reprehensible and cannot be used as a reason to limit the freedom of action of individuals.

## 2.2. The Concept of "Freedom" and "Harm" in Islamic Law

In Islamic jurisprudence books, the sanctity of the freedom of individuals' actions is mentioned and emphasized, except where something lawful becomes forbidden or something forbidden becomes lawful. Therefore, the freedom of individuals' actions in Islamic law is a divine value, and of course, one of its most important limits is not to harm others (Koleini, 1986, 292/25).

From a jurisprudential point of view, there are many cases where the action of individuals is a violation of the "offense principle", but the freedom of individuals' actions cannot be hindered by the ruling of Sharia. For example, in the buying and selling of ancient artifacts by the people who find them, although selling them is reprehensible and violates norms until it is not prohibited by the competent authority of the Islamic government, the freedom of action of people cannot be prevented. Therefore, the determining source of the concept of forbidden is not the extra-governmental laws of natural rights, but the rules that the righteous Islamic government imposes. So, the scope of people's freedom of action in Islam is based on divine laws and according to the opinion of vali Faqih and Sharia ruler, the most important scope of which is not to harm others.<sup>11</sup>

By referring to the principles governing Islamic rational sciences, the concept of harm is included in three formats. **1** – Sometimes the concept of loss is hidden in the creation of emotional deficiency in a person. For example, a person prevents another from participating in the university entrance exam due to achieving his goals, and this causes him to be deprived of graduate education. In fact, when someone is admitted to the university, this is considered a personal perfection for him and

9 Mill,(1895), P.112.

10 Sutherland, (2003), P.150.

11 Mousavi Khomeini, (1999), P.31,1.



now that he is not admitted to the university, he has suffered a loss. **2** – Sometimes the harm is due to the suitability of an action to the human soul, which also varies according to the suitability of humans. Like listening to loud music, sometimes it is pleasant for a person because it gives him sensual pleasure. However, the same act causes him emotional resentment due to another person's emotional compatibility with it **3** – In some cases, the concept of harm lies in the abundance and scarcity of praise and condemnation from others. For example, the exercise of the right by a person who conflicts with the exercise of the right by another person, if it is condemned by the general society, this issue is a sign of the realization of the title of loss against the entitled person. For example, when a person exercises his right to build a cattle farm in a residential area. Considering that this act is ugly from the point of view of the public, therefore, the identification of the ugly by the public can also be considered as an indication of the harmfulness of that act.<sup>12</sup>

Contrary to the perception of the concept of harm in the first meaning, which is the same for everyone, harm in the other two concepts varies according to people's tastes, so the concept of harm in the first meaning, which is certain for everyone, can certainly be a valid limit for the freedom of individuals actions.<sup>13</sup>

However, harm in its second and third meaning only has a meaning and limitation for the freedom of action of others if it is understood through general reason and not partial reason. For example; Suppose that two rights are in conflict with each other, preventing an action from being done by another contrary action to it, a person will suffer a loss only when his fundamental rights, which are proven by general and universal reason, are violated. Therefore, according to the "no harm" rule, by applying it, contrary to the western "harm" rule, rather than seeking to make people happy, we are seeking to prevent them from enduring suffering actions, according to common sense and not false excuses. Therefore, an elderly person sitting by the garden of his house brings him sensual perfection (joyfulness), if it is said that listening to loud music by a young neighbor prevents this sensual perfec-

tion in him – harm in the first sense that prevents freedom People's actions – it is not impossible to prevent his actions. Hence, in the conflict between two rights, when one is based on a general rule of reason and the other is based on a partial rule of reason (such as people's taste), the first right takes precedence. Hence, in the ruling of many Islamic jurists, it has been stated that, in order to observe social justice as a general benefit, houses should be destroyed on the way to the construction of factories, highways, or parks, even if their owners are not satisfied.

On the other hand, the image of the concept of harm in Islam is not only a momentary matter, but the continuity of time is very important in its recognition. Therefore, no one believes that preventing people from committing suicide will limit their freedom and causes harm to them. Because even though something may be considered a harm at the outset of the matter, but considering its consequences, it is not only not a harm, but it will also have benefits. Hence, it is not possible to prevent a person who is engaged in scientific experiments on his private property on the pretext of being harmful. Because this initial loss is not a loss at all compared to the general public benefits that may one day be obtained from these experiments.

The interpretations of the concept of harm in Islam can also be seen in the opinions of jurists and legal rulings. For example, in the conflict between the owners' right to have skylights and the feeling of insecurity due to the visibility of privacy, Islamic jurists have said that the second owner cannot deprive the first owner of having skylights, but he must simply draw the curtain to remove the damage from himself.

As it is known, the perception of the harm concept in the Western and the Islamic rule are different from each other in some cases. This difference can be drawn in one word; "John Stuart Mill believes that an action against the will of another, when it is direct, intentional and unjust, should be considered a harmful action and can hinder the freedom of action of individuals". However, from Islam's point of view, considering the title of harm lies in a rational concept and has nothing to do with people's personal tastes and desires. Rather, it is rooted in the general inference of reason. Therefore, in Islam, the freedom of action of individuals

12 Mozafar,(2013), P.385/1.

13 Shirvani, (2013), P.262

against the will of others can be limited only when it causes oppression against another based on the general inference of reason and there is no difference whether it is direct or indirect, fair or unfair, intentional or unintentional.

### 2.3. Explanation of the Concept of "Other" in the Western Rule

From John Mill's point of view, the scope of individuals actions freedom in exercising their right is to avoid harming others. Therefore, it is important to explain the concept and examples of "other" in order to determine the limits and loopholes of this rule. Mill says in a general rule; "Other" refers to someone who actually exists in the outside world. Therefore, abstract concepts that do not exist in the outside world and in the material environment of humans, are not considered "other" at all, which harming them can prevent the freedom of real persons actions.<sup>14</sup> So, he believes that concepts such as God, homeland, nature, human dignity, and like these do not fit into "other" concept. Therefore, they cannot create a restriction on the freedom of individuals' actions, unless these concepts are only an indirect intermediary for the realization of direct harm against individuals and if it causes direct harm to people's lives or property, only then can it be considered a limitation and obstacle. to realize direct harm against individuals in such a way that although the concept of human dignity as indirect harm cannot limit the freedom of individuals' actions, we should say just if it counts as direct damage to the life or property of individuals, only then can it be considered a limitation and obstacle. On this basis, from his point of view, causing harm against the dead, the future generation, issues that have not yet found external existence; Like a sperm in a mother's womb, credit values such as currency and... are not considered "other". So, it is not possible to restrict the freedom of individuals' actions due to the fact that an action causes disrespect to a dead person or a one-month-old sperm. Hence, the mother's freedom to live happily, which lies in abortion, cannot be limited under the pretext of honoring the fetus. Therefore, he who defines the concept of "other"

only as a living real person, also excludes the examples of legal entities from under it, unless the harm to the legal person directly requires harm to the natural person.

### 2.4. Explanation of the Concept of "Other" in the Islamic Rule

As mentioned earlier, in Islamic law, the jurisprudential principle of "no harm" determines the scope of the freedom of individuals' actions and by checking it, the concept of "other" can be obtained.

Extracting another concept from the rule of "no harm" depends on two hypotheses:

**1.** Either the word has a contextual meaning so that it can be said that the word "no" is in the context of the principle. So, it should be said "there is no uncompensated harm in Islam" **2.** It should be said that the sentence has meaning with the presupposition of the realization of the premises of wisdom. Therefore, when it is said that "there is no harm in Islam", it means neither Islamic subjects nor Islamic laws seek to limit the freedom of individuals' actions in a harmful sense and do not allow anyone to do so. Therefore, first of all, there is no subject of harm in Islam. Because what may be a disadvantage at the outset, it has a benefit when all aspects are considered. Secondly, wherever harm occurs, it is reprehensible from the point of view of Islam. So, the important issue is the non-realization of harm, whether it is against humans, animals, credit, God, human honor, homeland, etc. This high-level ruling, which came centuries ago in Islam and Western law is still unable to present it, is obtained in this way when it comes to the non-existence of a title, regardless of its examples. That title can never be realized in any example from the outside world, so if someone acts against this fundamental principle and wants to create an example of the title of harm, Islamic laws will prevent him and limit his freedom of action. Because in Islam, there is neither the issue of harm nor the ruling of harm. So, the late Naini's and Sheikh Ansari's interpretations of the rule of "no harm" are both incomplete, because the late Naini believes that there is no issue of harm in Islam and Sheikh Ansari believes that there is no ruling on harm in it, while it was said, Islam rejects

14 Wood, (2009), P. 250).

both cases.<sup>15</sup> Therefore, the concept of "self" is also an example of the title "other" and no one can kill himself or set his car on fire or even cause damage to natural resources, a real person, or the psychological security of others due to his freedom of action.

These explanations were specifically for the word "no harm" which was said to be a general concept that negates the existence of any kind of harm. In the continuation of the rule, there is the phrase that says two parties should not harm each other. Since the participative aspect is only dependent on the human will and does not include others, this part of the rule is clearly established for humans that shows well the special attention of Islam to the ugliness of harmful actions of real persons against each other.

### 3. HOW TO RESOLVE CONFLICTS IN THE EXERCISE OF RIGHTS

According to what has come so far, it is clear that the freedom of individuals' actions sometimes causes conflict between them, and how to resolve this conflict is one of the most important benefits arising from the difference between Western and Islamic rules. On this occasion, in the following, the difference between Western and Islamic rules will be explained.

#### 3.1. Resolving Conflict from the Perspective of Western Law

In case of conflicting freedom of individuals actions, in the first place, in order to resolve the conflict, it is necessary to pay attention to the variable of the possibility of freeing the victim from that situation. Therefore, John Mill says, when the neighbor's young man uses his right to listen to loud music, the first solution is for the neighbor to cover his ears or equip his house in such a way that the sound from it does not pass.<sup>16</sup> If the neighbor's action is not possible in removing the loss due to the situation he has with regard to his fellows, these two should deal with each other through a friendly agreement. For example, they should agree

15 Tabatabaie, (1987), P. 450.

16 Kayakan,(2016), P.18.

that the young man should listen to music in a quiet voice during the hours when the old man next door is resting. If an agreement is reached between the two, in fact, the freedom of action of both is guaranteed and the best result has been achieved. If the agreement between the persons is such that each of them does not give up their freedom to a certain extent for peaceful coexistence, the help of the public authorities should be sought to prevent the persons from their harmful actions, in such a way that only to the extent of eliminating the harm. For example, a person who has the right to build a factory, in case of conflict with the rights of other people regarding the noise pollution caused by it, the government cannot prevent him from building a factory or demolishing it, but must only take measures to eliminate the noise pollution of the factory. The last step to resolve the conflict, if there is no other way to resolve it between the freedom of individuals' actions, is to prohibit the action of one of the parties, the criteria for distinguishing it from the point of view of human desire is to include more satisfaction for the most people from the society. (principle of functionalism).<sup>17</sup> Therefore, in the conflict between the right of people to build a factory and the building of a residential property, the right to build a factory takes precedence over the right to build a property, which only brings happiness to a few people.

#### 3.2. Resolving Conflict from the Perspective of Islamic Law

From the perspective of Islamic law, the free will of individuals in what they want to do is considered one of the highest divine values. Therefore, when the freedom of individuals will in the actions they want to perform, it should be acted in such a way that both rights can be considered enforceable as much as possible.<sup>18</sup> Therefore, paying attention to the basic philosophy of the "no harm" rule can be helpful in this field. The principle of "no harm" in Islamic jurisprudence is derived from the case of "Samra bin Jundab" <sup>19</sup>and is about the conflict be-

17 Humbruger,(1999), P.85.

18 Mohaghegh Damad,(1988),P. 507.

19 Samra bin Jundab bin Hilal bin Harij was a descendant of Bani Shamakh bin Fazareh. He lost his father when he was a child. His mother entered Madinah and married one of



tween the ownership and freedom of action of the owner of a tree against the ownership and freedom of action of the owner of another person's right to own the house in such a way that the owner of the tree whenever If he wanted, he would enter the house and cause the owner's resentment.<sup>20</sup> Paying attention to the judgment of the Holy Prophet (Mohammad) can be a guide to explaining the Islamic rule of eliminating conflict of rights.

**1.** The Holy Prophet did not forbid Samara bin Jundab from taking care of his tree because taking care of his tree would lead to his violation of another's right [to come to another's house]. Since taking care of his tree was his natural right. Therefore, the Prophet could say that he has no right to enter another's property to take care of his tree and end the dispute. So, from the perspective of Islamic laws, individuals do not need to limit their freedom for the convenience of others, although, from the perspective of Islamic ethics, it is very desirable to do so. **2** – At the time of resolving the conflict, the Holy Prophet was in a position of judgment, not a request from Samra bin Jundab. Therefore, he could tell him that you should cut down your tree and take it away. While they asked him to sell his tree in exchange for worldly or hereafter. So, according to Islamic rule, in the conflict of freedom of wills, the right is not the one who brings more happiness to more people, but it is the prohibition of an action that brings more and greater harm than the benefit of that action. Therefore, unlike its western model, the harmless rule is harm-oriented, not benefit-oriented. It means that the priority is to avoid losses, not to create benefits. **3** – After asking Samra and rejecting all the requests on his part, the Prophet ordered him to tin his tree and said "There is no harm in Islam". Therefore, the first step in resolving conflict in Islam is to act accord-

ing to God's (Allah) code, not to oblige the parties to reach an agreement.

in the western rule, the goal is to harmonize the freedom of individuals by establishing a balance between them. In Islam, the goal is to remove the loss from the shoulders of the victim, so the victim, either according to Islamic law, can avert the loss, which he is required to do, so there is no need for an agreement, or the other party has not waived his right and the aggrieved party cannot also avert the loss. Therefore, if the rightful party waives his right in front of a substitute, it is obligatory for the injured party to pay the substitute if It is possible and he should remove the loss from himself. If the right holder is not willing to give up his action, even in the face of receiving compensation, it is not unlikely that his freedom of action has been violated according to the rule of action freedom and not only should he be deprived of his action, but instead of being deprived He will not be given a change. According to the explanations that came, the result of how to resolve the conflicts between the freedom of individuals' will in Islam is as follows: when rights conflict with each other, the person who is harmed by the legal act of another person is initially responsible, therefore, he must pay for it at his own expense.<sup>21</sup> because the principle of will freedom is very respected and important in Islam. At the stage where the payment of compensation is not responsible for the individual's loss, the injured party must somehow force the beneficiary to stop acting, otherwise, by paying the compensation, he will ask the public authorities to stop him from his action, just If it is done in good faith and for his needs and necessity. Otherwise, if the bad faith of the rightful is proved, it is not unlikely that it will be said in addition to restricting the free will of the rightful, he will not be entitled to compensation in return for his restriction.

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the residents of Madinah on the condition that he would also take care of Samrah until he reaches puberty. Samra had a palm tree in the garden of one of the Ansar. He would enter the garden without asking permission. The Ansari man asked Samara for permission to enter the garden, but he refused. The Ansari man complained to the Prophet. The Prophet asked Samra to ask for permission when entering the garden. But Samra did not accept. The Prophet offered him to sell the tree or give it to him in exchange for a tree in Paradise, which he rejected. Finally, the Prophet told to the Ansari to go and uproot his palm tree; Because in Islam it is forbidden to make losses.

20 Maghribi, (1963), P.5.

#### 4. COMPARATIVE STUDY OF THE LAWS DERIVED FROM THE PRINCIPLE OF "FREEDOM" AND "HARM"

In this topic, the paper tries to express the benefits of the theoretical topics, pragmatically, under the rules of legal systems. the practical effect of

21 Katouzian, (2009), P.86.

the philosophical rules of "no harm" and "harm" in the legal laws of the countries on how to eliminate the conflict between the freedom of action of individuals and determining the scope of their freedom will be determined. Therefore, in the following, the procedure of the countries under the Common Law legal system, written legal systems and Iran will be briefly examined in relation to the effectiveness of these laws on the principle of harm and no harm and how to resolve the conflict between the interests of individuals.

#### 4.1. The Degree of Effectiveness of the Principle of Harm and the Way to Resolve the Conflict of Interests in the Common Law Legal System

According to what is customary in the legal system of common law countries like the USA and England, there is basically no written law that shows the principle of damage and how to resolve the conflict between rights. But if there is a conflict between the interests of people, the management system and the courts of these cases are required to observe a series of legal principles in order to promote one of the rights of the other, which shows the extent of adherence to these legal systems to the principle of "harm" by John Stuart Mill, which it will follow.

In case of conflicts between the interests of individuals, in order to decide on the priority of one right over another, administrative organizations and courts in the common legal system must observe the following principles:

**1. To serve the public interest:** in case of conflicts between the interests of individuals, there is a priority interest that can provide more trust and public interest for society. Therefore, the action that is more consistent with the law and in line with the public goals is the one that comes first.<sup>22</sup>

**2. The transparency of the goal and the ability to trust it:** the freedom of persons actions whose behavior is more transparent in achieving the goal, in such a way that one can hope for the realization of the goal, if the result is obtained according to his situation, he is prior to other freedom of aimless actions.<sup>23</sup>

22 Toolkit by OECD, (2005), P.34.

23 Crown, (2017), P.3.

**3. Coherence and integrity:** the freedom of individuals' actions based on the aggregation of public and personal interests will precede actions that are solely for personal gain. (Principle of Functionalism).

**4. Legitimacy:** The freedom of persons' actions who have more legitimacy compared to other actions, from the public's point of view, comes first.<sup>24</sup>

**5. Justice:** the freedom of actions that are in accordance with general and fair egalitarian behaviors precede the actions that are based on the prejudice of riotous behaviors.

**6. Effectiveness:** Behaviors that have the best, greatest, and most effective on the progress of social foundations are ahead of other behaviors.

As it is clear, the countries subject to the common law system have not absolutely followed the theory of "harm" because nowadays in these legal and management systems, the restriction of individuals' actions freedom is not only limited to not harming others but includes harming public interests.

#### 4.2. The Effectiveness of the "Harm" Principle and How to Manage Benefits Conflicts in Written Legal Systems

since the French legal system is considered as a leading system in written legal, the review of the existing laws in this legal system makes it unnecessary to review other written legal systems. In the third chapter of the French Civil Code under the title "In relation to property and their owners", in Article 537, it is stated that people are free to dispose of their property subject to compliance with the adjustments made by the law on this principle of freedom.<sup>25</sup> In Article 544 of the second title of this law<sup>26</sup>, under the topic "Ownership", in the definition of ownership, it is said that "Ownership is a right that allows the owner to use any type of property, provided that it is not limited by laws or legal rules." In the continuation of the same section under Article 545, it is stated that "no one can

24 Mill, (1895), P.25.

25 L'article 537: les particuliers ont la libre disposition des biens ... sous les modifications de la loi.

26 L'article 544: la propriété est le droit de jouir et disposer des choses de la manière...

be forced to forfeit their property rights except for public purposes and justice"<sup>27</sup>. In Article 815-2 of this law<sup>28</sup>, one of the obstacles to the freedom of individuals' actions is limited to respecting the interests of third parties, which in Article 549 is subject to the existence of good faith in the act.

In written legal systems, the principle of harm to John Mill has not been followed absolutely, because one of the limitations of the principle of individuals freedom, in addition to not harming others, should not harm public interests, which John Mill did not believe in. In the French legal system, in case of conflicting interests, the freedom that is based on goodwill and in line with the public interest takes precedence over other interests.<sup>29</sup> This means that Western countries have absolutely accepted the functionalism principle of John Stuart Mill.

### 4.3. The Degree of Effectiveness of the "No Harm" Rule and How to Resolve the Conflict of Interests in Iran's Legal System

According to Article 40 of the Iran Constitution, "no one can make the exercise of his rights a means of harming others or public interests". In the interpretation of this principle, it should be said that this legal principle is a condition for another fundamental principle. Because this conclusion must have an obligatory premise, if it is rejected, the concept of this principle is also rejected. Therefore, as long as people do not have absolute freedom of action, it does not make sense to say that no one should exercise his right as a means of harming others or public interests. The interpretation of this principle has another subtlety so it should be interpreted along with civil law. Because according to civil law, harm is interpreted when a person has bad intentions and if he has good intentions in exercising his legitimate right, his action does not constitute harm at all so that it can be prevented. Therefore, according to a general rule, it should be said: "In Iranian law, everyone is free to do whatever he wants, unless he harms

others out of bad faith, or even though his actions are in accordance with good intentions, he does not compensate the victim." So, the person who opens the door to the neighbor's house through the wall of his house surely has bad intentions and should be prevented from doing so. On the other hand, if he opens a loophole, he does not have malicious intent, and only if he causes damage to his neighbor, he must compensate him, and he cannot be deprived of his freedom of action in any way. On this basis, in Iran's legal system, which is based on the rule of "no harm", the freedom of individuals' actions has both limitations of not harming others and public interests, which is in full compliance with the rule of "no harm" in Islam, and in case of conflicting rights, the interests come first which are based on good faith and the criterion of compliance with public interests is placed in the second stage. Therefore, legal actions that are not based on good faith, even if they are in accordance with the public interests, will not have priority.

## CONCLUSION

The basic concept of the principle of "no harm" in Islamic jurisprudence is almost similar to the principle of "harm" in Western law. Because both principles believe that everyone is free to do whatever they want as long as they do not harm others. But the difference between these two principles lies in the interpretation, which is one of the concepts and words inside these two rules, such as "harm" and "other". The concept of "harm and damage" from the point of view of the western rule, includes only direct, intentional, and unfair losses in such a way that non-material and abstract losses are not included under it. On the other hand, the spectral range of "harm" from the Western perspective only includes real persons. Therefore, in the western rule, "other" means only human, while in the Islamic model, "harm" includes any kind of loss, both material and non-material, in such a way that the concept of "other" also includes man, God, self, homeland and animals and so on.

The examination of the procedure and laws of the Western legal system showed that this system has not absolutely followed the principle of "harm" to life, because in this system, the freedom

27 L'article 545: Nul ne peut être contraint de céder sa propriété ...

28 L'article 815-2: Tout indivisaire peut prendre les mesures nécessaires à la conservation des biens individuelle...

29 Ogien,(2016), P.156.

of individuals' actions not only harms others but also harms the public interest, it is limited, while John Mill only considers the possibility of restricting the freedom of action of individuals in case of harming others, not the public interest.

Contrary to Western laws, Iran's laws are in line with the Islamic "no harm" rule in such a way that according to the negation of any harm according to this rule, in Islam, the freedom of individuals' actions is not only limited to not harming others but also to public interests. In order to manage the people's conflicts of interest in society to achieve the greatest social welfare, as it was said, the governments should first seek to gather the legitimate interests of individuals with each other and should not in any way hinder the dynamic activities of individuals, due to the conflict of their activities with

the interests of others. except if it is not possible to collect the interests of individuals with each other in an objective and practical way, in which case priority should be given to those legitimate interests that have the most function for the most people in society. Therefore, in the event of a conflict between the interests of the creditor of a factory in seizing it, in order to get his debt and the economic benefits arising from its continued operation, the government must first combine the conflicting interests, and if it is not possible to combine the interests, the continued operation of the factory and its appropriation, with Paying attention to the fact that it causes more benefits for more people and the macroeconomy of the society than the interests of the creditor should be prioritized.

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