

## Chapter 7

# Nonmaleficence

This is an important obligation in morality and medical ethics (doing no harm). It is associated with the maxim “*primum non nocere*,” above all do no harm. In Islamic teachings Prophet Muhammad (PBUH) said, “Doing harm and reciprocating harm is not allowed” [1]: “*La Dharar wa la Dhirar*.”

In Islamic jurisprudence axioms: “Avoiding harm takes precedence over bringing good.” It simply means if a certain action end in both good and harm, then it is preferable first to thwart off harm. However, if the benefit is much greater than the harm, then that action could be applied. Al Izz ibn Abdul Salam (d660H/1262 CE) a renowned Islamic jurist in his book “*Qawaeed AlAhkam*” “Basics of Rulings” said “The aim of medicine is to preserve health, restore it when it is lost; remove ailment or reduce its effect. To reach that goal it may be essential to accept the lesser harm, in order to ward off a greater harm, or lose a certain benefit to procure a greater one” [2].

He also said, “Medicine in the Sha’riah is regarded as a field that brings the benefits of health and wards off the harms of disease and ailments” [2].

The axioms of warding harm in Islamic jurisprudence are:

- (1) Doing harm and reciprocating harm is not allowed.
- (2) Harm should be warded and avoided as much as possible.
- (3) All that is harmful is prohibited in Sha’riah. That will involve medicines made from porcine material, alcohol, carrion (dead animals) or seeking remedy by amulets, sorcery, and divination. Any mode of treatment that causes harm without any good is not allowed. Similarly if the harm is more than the benefit, or even if the expected harm is equal to the expected good, it is not allowed. However, if the expected benefit is greater than the harm, then it is allowed. If a patient is having a gangrenous foot or limb, and the gangrene might increase and even kill the patient, then it is allowed to amputate the limb. Similarly if a woman is pregnant and continuation of pregnancy is threatening her life, then she is allowed to abort. If the continuation of pregnancy is going to endanger her health, but not her life, or the fetus is grossly malformed, then abortion is allowed prior to ensoulment, i.e., in the first **120 days** computed from time of fertilization of the ovum (i.e., conception) which is equivalent to **134 days** from last menstrual period

(LMP) which is used by obstetricians, and that is equivalent to **19 weeks + 1 day** [3]. But it is not allowed to have abortion after that date. Yet it is possible to have preterm delivery, e.g., 36 weeks or even less if deemed necessary.

- (4) If there is certain harm, then it should be removed.
- (5) Harm should not be removed by another harm, which is equivalent to the previous harm; or worse if it is removed and replaced by a worse harm. However, if the harm cannot be removed except by accepting a lesser harm, then the lesser harm is accepted. This follows the next axiom.
- (6) The greater harm could be replaced by a lesser harm. Examples of this in medicine is amputation of a limb, if gangrene is spreading; or accepting to use narcotics to relieve pain, even if morphine and its derivative have a double effect, i.e., the debilitated patient suffering from pain due to metastasis and chronic pulmonary disease where morphine and its derivatives is going to depress the respiratory center in the medulla in the brain stem, and therefore may end in respiratory failure. The serious side effect in such a patient would be accepted if the pain was not relieved except by the narcotic. The dose should be the minimum required to alleviate pain. Muslim jurists in the past brought the case of a man who adopted Islam. He was required to circumcise his prepuce, but if that was going to harm him (there was no proper anesthetic), then he was allowed to pray and do all the required worship of Islam without circumcision.

The balancing of harms is important in Islamic jurisprudence, and if it is impossible to thwart harm, without causing another harm, then the lesser harm should be accepted.

- (7) The prohibited things would be allowed if there is necessity. If a person is lost in the desert and he is thirsty and he finds only alcoholic beverages, e.g., wine, then he is allowed to drink it to quench his thirst. Similarly, if he has no food, and only finds pork or carrion (dead meat), or blood, then he is allowed to eat it to save his life. But he is not allowed to kill another human being (a child or diseased weak person) in order to save his life. He can kill any animal that he finds or even eat the corpse of an animal or, worse, the corpse a human if there is no alternative.

In medicine the same rules may apply. Taking medicine made of porcine material or alcohol or poisonous snakes is allowed if there is no alternative medicament.

Similarly, autopsy and dissection of human bodies would be allowed in

- (i) Coroners' cases, i.e., medicolegal cases ordered by the magistrate in order to reveal the cause of death or help in identifying the perpetrator
- (ii) To teach anatomy, physiology, and pathology which are needed to bring up physicians and health providers [4].

It is allowed to take an organ from a living donor if such donation is not going to harm the donor seriously. The donor should be adult competent and donating by his free will [5].

If the person is deceased (brain dead), then organs could be taken if he had agreed during his lifetime to donate, or his family has agreed to donate after his death [5]. The consent should be informed and no selling or bargaining is involved. The government can encourage donation by giving medals, free medical services, or even a fixed amount of money. This is still debatable in the West, but it is practiced in Iran and Saudi Arabia [5].

- (8) As long as harm continues, it cannot be ignored. So long as the harmful effect is there, then it should be removed. Whatever system is there that involves harmful effects, then that harm should be removed out of the system. Otherwise the whole system should be changed. If in a certain community all foreigners officially residing in a country are not covered by health insurance or health services, that system should be changed.
- (9) The harm befalling a whole community is worse than the harm falling an individual. The general harm should be warded off first. If the general harm cannot be prevented unless it affects few, then the general harm should be prevented, even if it involves one or few individuals.
- (10) If there are two harms, then the lesser harm could be done if it is impossible to ward off both harms.
- (11) If there are two benefits, then the higher benefit should be obtained, even if it involves losing the lesser one.
- (12) If both harm and benefit are involved, then try to get the benefit and refuse the harm. If that is not possible and the benefit is much greater than the harm, then accept the lesser harm. However, if the harm is equal or even more than the benefit, then refuse the harm even if it means loss of the benefit.
- (13) "Legal permission negates tortious liability," except in cases of flagrant negligence. These rules have great bearing in medical practice from both the ethical and legal points of view. The law differentiates between crime and tort.

Crime is a legal wrong, the remedy of which is the punishment of the offender at the instance of the state. It can be defined also as a legal wrong that can be followed by criminal proceedings, which result in punishment [6].

Tort is the law of damages; the civil law of liability is not designed to punish anyone, punishment is the function of the criminal law, compensation is the function of civil law (tort) [7].

The Sha'riah combines both the civil law (tort) and the criminal law. An act can be either a civil wrong or a crime, or can be both [8].

Similarly, an act may be morally wrong but is not punishable by law.

Some moral philosophers combine nonmaleficence with beneficence in a simple principle. "William Frankena, for instance, divides the principle of beneficence into four general obligations, the first of which we identify as the obligation of

nonmaleficence and the other three of which we refer to as obligation of beneficence” as Beauchamp and Childress say in “Principles of Biomedical Ethics” [9]. These are:

- (1) One ought not to inflict evil or harm
- (2) One ought to prevent evil or harm
- (3) One ought to remove evil or harm
- (4) One ought to do or promote good

Frankena arranges these elements serially, so that other things are equal in a circumstance of conflict. The first takes precedence over the second, the second over the third, and the third over the fourth [9].

It is amazing to find a saying of Prophet Muhammad (PBUH) ordering Muslims to:

- (i) Do and promote good
- (ii) Remove evil or harm
- (iii) Prevent evil or harm and enjoin doing good and preventing harm, and
- (iv) The least thing one can do is not to inflict harm [10].

In another tradition, he told his companions not to stay in public way (roads or lanes), they said we have to stay there. He said if that is so then give the public way its rights. They exclaimed, “What are the rights of the way?,” he said: “Not to stare at people (passing by); do no harm, greet people, enjoin right and forbid wrong; guide those who lost their way and help those who are in need [11].”

Muslim jurists, as already mentioned, put thwarting harm, removing harm, and not doing harm as more important than bringing benefit (good), unless the benefit is so great that the harm could be accepted in order to obtain this great benefit.

Beauchamp and Childress [9] said: “Obligation not to harm others (e.g. those prohibiting theft, disablement and killing) are distinct from obligation to help others.”

“Obligation not to harm others are sometimes more stringent than obligations to help them, but obligations of beneficence are also sometimes more stringent than obligations of nonmaleficence.” The obligation to rescue an injured or dying person is definitely more important than giving alms to the needy or even if it involves doing a minor harm to a person.

Generally, nonmaleficence is more important than beneficence.

The authors (Beauchamp and Childress) put the following arrangement:

Nonmaleficence: [1] one ought not to inflict evil or harm.

Beneficence: [2] one ought to prevent evil or harm, [3] one ought to remove evil or harm (both 2 and 3 could be also included in nonmaleficence), [4] one ought to do or promote good

The Glorious Qur’an is full of verses ordering Muslims to enjoin what is right and forbidding what is wrong, e.g....

Surah 3/104: “And let there be from you a nation inviting to good, enjoining what is right and forbidding what is wrong; and those will be the successful.”

Surah 3/110: “You are the best nation produced for mankind. You enjoin what is right and forbid what is wrong and believe in Allah.”

Surah 3/114: Describes the believers, “They believe in Allah, and the Last Day, and enjoin what is right and forbid what is wrong and hasten to do good deeds. And those are among the righteous.”

Surah 16/90-91: “Indeed, Allah orders justice and good conduct, and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will be reminded. And fulfill the covenant of Allah you have taken and do not break oaths after their confirmation, while you have made Allah, over you, a security (i.e., witness). Indeed Allah knows what you do.”

Surah 2/177: “Righteousness is not that you turn your faces toward the East or West (in prayers), but (true) righteousness is one who believes in Allah, the Last Day, the Angels, the Books, and the Prophets and gives wealth in spite of love for it, to relatives, orphans, the needy, the traveler (way farer), those who ask (for help) and for freeing slaves; who fulfill their promise when they promise, and who are patient (i.e., forbear) in poverty, hardships and during battle. Those are the ones who have been true, and it is those who are righteous.”

Surah 31/17-19: “O my son, establish prayer, enjoin what is right, forbid what is wrong, and be patient over what befalls you ... and do not turn your cheek (in contempt) toward people, and do not walk through the earth exultantly. Indeed Allah does not like every one self deluded (conceited) and boastful. And be moderate in your pace, and lower your voice; indeed, the most disagreeable of sounds is the voice of donkeys.” Many other verses/ayas order enjoining the right and forbidding the wrong, e.g., Surah 7/157, Surah 9/71, Surah 29/45.

Preventing evil or harm and removing it when it is there can also be considered as a type of beneficence. Beneficence is not limited to doing or promoting good, but definitely will involve preventing or removing harm.

Harm is not limited to physical harm; it involves harm to reputation, property, privacy, and liberty. Omar ibn AlKhattab (the 2nd Caliph) ordered a poet called alHutta'ia to be imprisoned as he in one of his poems inflicted harm on alZubraqaan by saying, “Do not travel and toil to do the magnanimous act, but stay in your locality for food, drink and dress.” This was considered libel, and hence he was imprisoned. The Arabs considered libel worse than killing if it was said in poetry, as the Arabs were fond of poetry and learning it by heart; and the whole nation will know about it.

### Negligence and the Standard of Due Care

“Obligations of nonmaleficence are not only obligations of not inflicting harms, but also include obligation of not imposing risks of harm. A person can harm or place another person at risk without malicious or harmful intent” [9].

Unintended harm should be compensated in both Sha'riah and Civil Law, though there is no punishment. If a person aims at animal (game), but the bullet or arrow struck unintentionally a human being, then the perpetrator should pay a blood fine (100 camels or its value plus freeing a slave. If that is not available he should fast for two consecutive months). The blood fine should be paid by the Aqila, i.e., the male members of the tribe, as it is almost impossible to be paid by the perpetrator, unless he is wealthy. This system of Aqila changed at the time of Omar ibn

alKhatab, the second Caliph, as whole tribes were dispersed in different places fighting the Roman and Persian Empires. He created the Diwan, i.e., the registry, taking note of the people who live together and get their pay from one government source. The jurists of today accepted the insurance, as both the Aqila and Diwan are no more in existence [12].

Health providers should pay compensation if their actions of medical or surgical treatment resulted in harm. However, if side effects of the management occur, then the competent physician should be considered not liable. The legal Islamic axiom "Legal Permission negates tortuous liability." Ibn alQayim in his book "Tibbi Nabawi" (The Medicine of the Prophet) [13] said: The Practitioner (attabib) who is well trained, alert, and keen is the one who has done his job well. He was authorized by the state and had the consent of the patient. Despite that his patient succumbed or there was damage to a part or to one or more of his senses, such a practitioner is not liable. This is the view of almost all jurists (fuqaha) of all the schools of Islamic fiqh (jurisprudence). Ibn AlQayim then brings the position of the person who claims to be a physician, but he neither had proper training nor had been authorized to practice medicine. Then he should be liable according to the saying of the PBUH. "That who practices medicine without due knowledge is liable." But if the patient knew that he is not authorized to practice and gave him consent, then the patient himself is responsible of the outcome. However, if the patient thought he is an authorized physician then that person (the quack) is liable. AbdulMalik ibn Habib alBeiri (Andalusia) said: "Not only he should be liable and pay the compensation but he should be punished for practicing without due knowledge and not being authorized" [14].

If the person is qualified to practice medicine, but he did not obtain consent from his patient or his guardian (if he is incompetent or a minor), then he may be liable unless it is an emergency to save a life or a limb or thwart a serious damage. However, ibn alQayim thinks it may be said he is (i.e., the practitioner) is only trying to do good and God says, "There is no blame for those doing good (or intending to do good)," [Surah 9/91] as God is Forgiving and Merciful.

However, the other jurists agree that if the practitioner caused harm (unintentionally), then he is liable and should compensate. If the compensation is 1/3 of the Diyah (blood fine: the value of 100 camels), then it should be paid by the practitioner himself, but if it is more than 1/3 of the Diyah, then it should be paid by the Aqila, or if not available, then it should be paid from the public funds. Jurists of today agree to a type of insurance [12].

All jurists agree that if there is blatant negligence, even if the practitioner is a highly qualified and well-known physician, then he will be liable.

Negligence is the absence of due care. In the profession of medicine, it involves a departure from the standard care. The more senior the person, the more responsible he becomes and if a minor mistake is forgiven from a junior, such a mistake may not be forgiven for a consultant. Negligence usually occurs due to lack of proper care, and therefore, considered unintentional (inadvertent). However reckless, blatant negligence is considered in the civil law as intentional (advertent). Thus, for example, the mistake that occurs in the case of operating on the normal

limb instead of the diseased one, or operating in the normal eye or ear instead of the diseased one. Forgetting surgical instruments, cotton, or swabs in the wound without removing it and stitching over it resulting in serious sequelae. Such practices are not very rare and hence the perpetrator is liable and compensation (indemnity) is required. Other disciplinary measures may be taken, e.g., suspension of the authorization of practice, or even canceling it completely if the horrible mistake is repeated by the same person. Surgeons who perform surgery after drinking alcohol are more liable to succumb to these horrendous mistakes.

Professional malpractice is an instance of negligence. If the physician does not follow the professional standards, he may be considered liable. However, if there is harm despite the health provider following the standard care required by his profession, then he is not liable. Negligence cannot be imputed because a cure is not affected. The practitioner should put his effort and knowledge to cure the disease, if possible, but he cannot guarantee cure, or even improvement of the malady, even if the disease is known to be curable. The patient's immune system may be weak, the microorganism may be more virulent, or the drug used caused an unexpected side effect or allergic reaction.

The practitioner has to do his duty by providing required care, and by following the standards of the profession. The implied contract with the patient does not include a promise to effect a cure; and negligence cannot be imputed because cure is not effected [9].

To win a negligence case it is necessary to prove the duty of care, the standard of care given (should be acceptable by professional peers), and the injury that was caused by the failure to practice properly [15].

Beauchamp and Childress [9] put the following essential elements to prove negligence:

- (1) The professional must have a duty to the affected party.
- (2) The professional must breach that duty.
- (3) The affected party must experience harm.
- (4) The harm must be caused by the breach of duty.

The question of end-of-life treatment will be discussed in a separate chapter in detail. The salient points in this regard are:

- (a) It is not imperative on a Muslim to seek remedy except in life-saving situations, and where the illness is due to infectious bugs (microorganisms) for which treatment is available. The patient should be treated, even against his will, if he is going to infect other people.
- (b) Stopping (withdrawing) or not starting (withholding) certain types of management are allowed in the following cases:
  - (i) Brain dead cases firmly diagnosed;
  - (ii) If the treating physicians find a certain modality of treatment useless (futile), or going to increase the suffering of the patient;
  - (iii) Stopping certain measure that support life (withdrawing) or not starting these measures (withholding), e.g., Do Not Resuscitate or Do Not

Intubate measures are accepted if the decision is reached by at least three competent specialist physicians as ordered by the Fatwa of the Permanent Commission for Research and Endowment No. 12086 dated 28/3/1409 (1989) which allowed withholding and withdrawing life support if decided by at least three competent specialist physicians. This medical decision should be fully explained to the family, but it remains a medical decision [16].

The question of artificial feeding of comatose or persistent vegetative states, by intravenous or by nasogastric tube, is a point of contestation in the West. There are many who considered it as a type of treatment, and hence could be futile. Many courts allowed stopping sustenance technology (i.e., nutrition and hydration by artificial means). The first one was the New Jersey Supreme Court in 1976 that it was permissible for a guardian to disconnect Karen Ann Quinlan from respirator and allow her to die. However, she lived for 10 years after disconnection of respirator, but continued her sustenance (nutrition and hydration) by tubes [9].

Several Roman Catholic moral theologians advised the relatives that they were not morally required to continue medically administered nutrition and hydration (MN & H) or antibiotics to fight infections.

The New Jersey Supreme Court allowed withdrawal of MN & H in 1985 from an 84-old person in a nursing home suffering from debilitated disease who had been on artificial feeding for many years.

A Massachusetts court reached a similar decision in Brophy case, a 49-year-old man who was in persistent vegetative states for 3 years in 1986 [17]. Courts since then viewed MN & H as a medical procedure subject to the same evaluative standards as other medical procedures, and thus allowed stopping sustenance (nutrition and hydration) and letting the patient die.

It is a horrible type of death as it takes 10 to 14 days to die suffering from hunger and thirst. These poor patients do not die in peace, as alleged by the perpetrators, and it would be less painful by injecting drugs that would end the suffering in a few minutes.

We are not endorsing euthanasia, but this type of dying is worse than euthanasia, as they will not suffer the agony of being deprived of nutrition and hydration.

In Islamic jurisprudence preventing nutrition and hydration, is a clear case of murder, that would be punished by Qisas (capital punishment unless the awliya agree to pardon or take blood fine, i.e., diya).

The case of Theresa Schiavo (Born December 1963 and died by stopping nutrition and hydration March 31, 2005). She was married to Michael Schiavo in 1984, suffered cardiac arrest in 1990 and as sequelae suffered from brain damage (persistent vegetative state). The court appointed Michael Schiavo her husband as Terri's guardian. Michael Schiavo received \$250,000 in an out of court settlement with a physician for malpractice. A trust fund was set up for her treatment \$750,000, and Michael Schiavo received another \$300,000 for loss of consortium.

The Schindlers, her parents, attempted to remove Michael Schiavo as Terri's guardian, but failed (1993). Michael Schiavo filed a petition with the court to have



PEG (for feeding and fluids) tube removed. The Schindlers (the parents) opposed the petition.

After a long battle in which President Bush and his brother Jeb Bush (the Governor of Florida) and the Pope tried hard to continue hydration and nutrition of Terry Schiavo; the court insisted on removing the feeding tube and Terry Schiavo died after 2 weeks. Her death was announced on March 31, 2005.

Michael Schiavo got 1 million dollars in life insurance of his deceased wife.

On January 26, 2006, Michael Schiavo married his girlfriend with whom he had two children.

The ethical, moral, and legal problems are mounting due to this policy of stopping hydration and nutrition to patients in persistent vegetative state, or terminally ill patients.

They will soon find that euthanasia is less painful and less harmful than this drastic inhumane death by stopping nutrition and hydration, and they will resort to it.

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## Notes and References

1. This Hadith (saying of the Prophet [PBUH]) is narrated by Abu Saeed alKhoder. (The companion of the Prophet). It is in Sunan ibn Maja, and Sunan alDarqutni, and Abu Daood. The chain of narrators is good. Imam Malik ibn Anas narrated it in AlMu'wata without mentioning the companion of the Prophet (PBUH) (Abu Saeed alKhodri)
2. al Izz ibn AbdulSalam (2000) Qaweed al Ahkam commented by Nazih Hammad and Othman Dhamariyah. Dar alQalam Damascus 1:8
3. Fatwa of Islamic Jurisprudence of Makkah on abortion 12th Session 10–17 Feb 1990 Decision No. 4 on Abortion of Congenitally Malformed Fetus
4. Fatwa of Islamic Jurisprudence of Makkah on Autopsy 10th Session 17–21 Oct 1987. Decision on Dissection of Dead Bodies. Book of Decisions. Majma alFiqh alIslami. Makkah AlMukaramah
5. Fatwas on Organ Transplantation. Corneal transplantation was allowed by Sheikh Hasson Ma'moon (Grand Mufti of Egypt) in 1959 followed by Fatwa of Sheikh Hureidi (Grand Mufti of Egypt) in 1966, allowing taking organs from cadavers. All the Fatwas were discussed in: Mohammed Albar: Organ Transplantation A'Sunni Perspective. Saudi Journal of Kidney Diseases and Transplantation 2012, 23(4):817–822
6. Williams G (1983) Textbook of criminal law, vol 2. Stevens and Sons, London, p 27
7. Winfield: Textbook of the Law of Tort, 1948, p1 and Atiyah: The Damages Lottery, 1997, pp 3–6
8. Ahmed Abdel Aziz Yacoub: The Fiqh of Medicine, 2001, Taha Public, London, p 64
9. Beauchamp T, Childress J (2001) Principles of biomedical ethics, 5th edn. Oxford University Press, New York, p 114
10. There are many Hadiths in this issue, He ordered his companions to give alms daily. They said, "Who can do that?" He said, "Removing thorny tree or bone or dirt from the way (street), show the right path for those lost, enjoy right and forbid wrong, help those who are inefficient in their work". The companion said, "What if I did not do any of these?" He said, "At least do no harm to others". Narrated by AlBokhari and Muslim, and ibn Hibban and by alHaitham in

Majuna AlZawayed, p 31107. The Hadith is authentic narrated by Abu Huraira, (the companion of the Prophet PBUH)

11. Sunan Abu Da'ood, vol 7/160, 161
12. Fatwa of International Islamic Jurisprudence Council on Medical Insurance, Decision No. 149 (7/16): 9–14 Apr 2004, Session 16, Dubai
13. Ibn alQayim: Attib alNabawi, Dar al Torath, Cairo 1978, pp 202–214
14. Ibn Habib alAlbairi aTibbi Nabawi, commented by M. Albar, Dar alQalam, Damascus 1993, pp 165–174
15. Montgomery J (1997) Healthcare law. Clarendon, Oxford, p 166
16. Albar MA (2007) Seeking remedy, abstaining from therapy and resuscitation: an Islamic perspective. Saudi J Kidney Dis Transplant 18(4):629–637
17. Brophy V (1986) New England Sinai Hospital, Inc., 398 Mass 417 NE, 2nd edn. 626