

Comparative Study of the Legal Maxims *Raf'u al-Haraj* and *Daf'u al-Dharar* in Relation to the Fundamental Principles of Western Law

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ABSTRACT

This study examines the legal maxims raf'u al-haraj (removal of hardship) and daf'u al-dharar (prevention of harm) within Islamic law and compares them with the fundamental principles of Western legal systems. The research is grounded in the premise that both legal traditions seek to achieve justice and protect human welfare, yet they operate within distinct philosophical and normative frameworks. The objective of this research is to analyze the conceptual foundations of these Islamic legal maxims, identify corresponding principles in Western law, and systematically evaluate their similarities and differences from both philosophical and juridical perspectives. The study employs a normative juridical research design with a comparative law approach. The methods used include statute, conceptual, and comparative approaches, supported by library-based data collection involving primary, secondary, and tertiary legal materials. Data are analyzed qualitatively through legal interpretation, doctrinal analysis, and comparative evaluation to generate structured and coherent findings. The findings indicate that both raf'u al-haraj and daf'u al-dharar share functional similarities with Western legal principles such as proportionality, equity, and harm prevention, particularly in their role of mitigating hardship and preventing injustice. However, fundamental differences arise in their epistemological bases, where Islamic law is rooted in divine revelation and maqāṣid-oriented reasoning, while Western law is grounded in secular rationality and institutional legal structures. The novelty of this research lies in its integrated comparative framework that not only highlights conceptual convergence but also critically delineates structural and philosophical distinctions, thereby contributing to the development of a more comprehensive and responsive legal discourse in a global context.

Keyword: *Comparative Law; Harm Prevention; Legal Maxims; Proportionality; Removal of Hardship*

ABSTRAK

Penelitian ini mengkaji kaidah fikih raf'u al-haraj (penghilangan kesulitan) dan daf'u al-dharar (pencegahan kemudharatan) dalam hukum Islam serta membandingkannya dengan prinsip-prinsip fundamental dalam sistem hukum Barat. Penelitian ini didasarkan pada premis bahwa kedua tradisi hukum tersebut sama-sama bertujuan mewujudkan keadilan dan melindungi kemaslahatan manusia, namun beroperasi dalam kerangka filosofis dan normatif yang berbeda. Tujuan penelitian ini adalah untuk menganalisis landasan konseptual kaidah-kaidah hukum Islam tersebut, mengidentifikasi prinsip-prinsip yang sepadan dalam hukum Barat, serta mengevaluasi persamaan dan perbedaannya secara sistematis dari perspektif filosofis maupun yuridis. Penelitian ini menggunakan desain penelitian yuridis normatif dengan pendekatan perbandingan hukum. Metode yang digunakan meliputi pendekatan peraturan perundang-undangan, pendekatan konseptual, dan pendekatan komparatif, yang didukung dengan pengumpulan data berbasis studi kepustakaan terhadap bahan hukum primer,



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sekunder, dan tersier. Data dianalisis secara kualitatif melalui interpretasi hukum, analisis doktrinal, dan evaluasi komparatif guna menghasilkan temuan yang sistematis dan koheren. Hasil penelitian menunjukkan bahwa *raf'u al-haraj* dan *daf'u al-dharar* memiliki kesamaan fungsional dengan prinsip-prinsip hukum Barat seperti proporsionalitas, keadilan, dan pencegahan kerugian, khususnya dalam perannya untuk mengurangi kesulitan dan mencegah ketidakadilan. Namun, terdapat perbedaan mendasar pada basis epistemologisnya, di mana hukum Islam berakar pada wahyu ilahi dan penalaran yang berorientasi pada *maqāṣid al-sharī'ah*, sedangkan hukum Barat bertumpu pada rasionalitas sekuler dan struktur kelembagaan hukum. Kebaruan penelitian ini terletak pada kerangka komparatif terintegrasi yang tidak hanya menyoroti konvergensi konseptual, tetapi juga menguraikan secara kritis perbedaan struktural dan filosofis di antara keduanya, sehingga berkontribusi terhadap pengembangan wacana hukum yang lebih komprehensif dan responsif dalam konteks global.

Keyword: Hukum Perbandingan; Kaidah Fikih; Pencegahan Kemudharatan; Penghilangan Kesulitan; Proporsionalitas

1. Introduction

Here introduce the paper, and put a nomenclature if necessary, in a box with the same font size as the rest of the paper. The paragraphs continue from here and are only separated by headings, subheadings, images and formulae. The section headings are arranged by numbers, bold and 11 pt. Here follows further instructions for authors. Files must be in MS Word only and should be formatted for direct printing, using the CRC MS Word provided. Figures and tables should be embedded and not supplied separately. Please make sure that you use as much as possible normal fonts in your documents. Special fonts, such as fonts used.

The development of legal systems reflects an ongoing effort to reconcile justice, certainty, and societal benefit within diverse normative frameworks. In Islamic legal theory, *qawā'id fihiyyah* (legal maxims) function as overarching principles that guide juristic reasoning and ensure consistency in the derivation of legal rulings. Among these, the maxims *raf'u al-haraj* (removal of hardship) and *daf'u al-dharar* (prevention of harm) occupy a central position, as they emphasize flexibility and the protection of human welfare. These principles are deeply rooted in the objectives of Islamic law (*maqāṣid al-sharī'ah*), which prioritize the preservation of religion, life, intellect, lineage, and property (Kamali, 2018: 33).

The principle of removing hardship reflects the adaptability of Islamic law in accommodating human limitations and contextual realities. It is derived from foundational texts that emphasize ease and the avoidance of undue burden in legal obligations. Similarly, the principle of preventing harm operates as a fundamental doctrine ensuring that no legal rule or action results in unjustified injury. According to Auda, the *maqāṣid*-oriented approach demonstrates that Islamic law is inherently purposive and oriented toward achieving justice and public interest (Auda, 2016: 45). This conceptual framework positions Islamic legal maxims not merely as interpretative tools but as normative safeguards against rigidity.

In Western legal traditions, analogous principles have evolved within both civil law and common law systems. Doctrines such as equity, necessity, proportionality, and the maxim *salus populi suprema lex* illustrate a shared concern for justice and harm prevention. These principles are often operationalized through judicial discretion, enabling courts to mitigate the harshness of strict legal rules. Hart explains that the open texture of law allows for flexibility in judicial interpretation, particularly in cases where rigid application would lead to injustice (Hart, 2018: 128). This indicates that Western legal systems, despite their secular foundations, also recognize the importance of balancing legal certainty with fairness.

Empirical studies demonstrate that the convergence between Islamic and Western legal principles is particularly evident in areas such as public policy, human rights, and professional ethics. For example, research by Victoria et al. shows that legal ethics frameworks emphasize harm prevention and justice, reflecting universal legal values across jurisdictions (Victoria et al., 2020: 397–407). Similarly, comparative studies in Islamic Law and Society highlight how *maqāṣid*-based reasoning aligns with modern legal doctrines aimed at protecting human dignity and welfare (Hallaq, 2009: 45). However, these similarities often obscure deeper epistemological differences that shape the application and interpretation of legal norms.

Despite the increasing interest in comparative legal studies, there remains a significant gap in the literature concerning a systematic comparison between the specific maxims *raf'u al-haraj* and *daf'u al-dharar* and foundational Western legal principles. Most existing studies focus either on Islamic jurisprudence in isolation or on Western legal theory without establishing a direct analytical linkage. Research published in *Arab Law Quarterly* and *Islamic Law and Society* tends to examine *maqāṣid* and legal maxims from an internal perspective, without engaging in cross-system comparison (Nyazee, 2003: 67). This gap limits the development of a comprehensive understanding of how different legal traditions conceptualize hardship and harm.

Furthermore, a discrepancy persists between normative ideals (*das sollen*) and empirical realities (*das sein*) in the application of these principles. In practice, both Islamic and Western legal systems may fail to fully implement the ideals of removing hardship and preventing harm due to institutional constraints, procedural rigidity, or political considerations. Posner argues that legal systems often operate within economic and pragmatic constraints that may compromise ideal notions of justice (Posner, 2023: 21). This highlights the importance of critically examining not only the theoretical foundations but also the practical implications of these legal principles.

Previous research has provided valuable contributions to the understanding of legal maxims and comparative law, yet it has not fully addressed the intersection between Islamic and Western approaches to hardship and harm. Kamali (2018) and Auda (2016) offer comprehensive analyses of Islamic legal theory, while Hart (2018) and Dworkin (2016) explore foundational concepts in Western jurisprudence. However, none of these works provide a direct comparative framework that integrates both traditions in a cohesive analysis. This indicates a clear research gap and underscores the novelty of the present study in bridging these distinct yet potentially complementary legal paradigms.

Based on the foregoing discussion, it is evident that identifying and analyzing the similarities and differences between these legal principles is essential for advancing comparative legal scholarship. Such analysis not only contributes to academic discourse but also has practical implications for legal reform and harmonization in a globalized world. Therefore, the identification of this problem is crucial for understanding how legal systems can better address issues of hardship and harm in a manner that is both just and contextually relevant.

This research aims to analyze comparatively the legal maxims *raf'u al-haraj* and *daf'u al-dharar* within Islamic law and to examine their similarities and differences with the fundamental principles of Western law, both philosophically and juridically.

2. Method.

Research methods consist of a normative juridical research type with a comparative law orientation, focusing on the analysis of legal principles within Islamic law and Western legal systems (Soekanto & Mamudji, 2016: 13). The approach methods applied include the statute approach, conceptual approach, and comparative approach. The statute approach is utilized to examine relevant legal norms and principles, while the conceptual approach is employed to analyze doctrines and theories related to *qawā'id fihiyyah* and Western jurisprudence. The comparative approach is used to identify similarities and differences between *raf'u al-haraj*, *daf'u al-dharar*, and the fundamental principles of Western law (Marzuki, 2017: 93).

The research specification is descriptive-analytical, aiming to systematically describe legal principles and analyze their conceptual and practical implications within both legal systems (IRAC Methodology adapted in legal research context) (Ibrahim, 2016: 57). The data collection methods are conducted through library research, involving the collection of primary, secondary, and tertiary legal materials. Primary legal materials include legal doctrines and principles derived from Islamic jurisprudence and Western legal theory. Secondary legal materials consist of books, scientific journal articles, and relevant scholarly publications. Tertiary legal materials include legal dictionaries, encyclopedias, and supporting references (Zainuddin, 2024: 101).

The data analysis method is qualitative analysis, carried out through systematic interpretation, legal reasoning, and comparative evaluation to draw conclusions regarding the similarities and differences between the examined legal principles (Sugiyono, 2016: 244).

3. Result and Discussion.

3.1 The Concept and Normative Foundations of the Legal Maxims *Raf'u al-Haraj* and *Daf'u al-Dharar* in Islamic Law

The legal maxims *raf'u al-haraj* (removal of hardship) and *daf'u al-dharar* (prevention of harm) represent fundamental doctrines within contemporary Islamic legal theory that continue to be developed and contextualized in modern scholarship. These maxims are not merely classical constructs but have been reinterpreted within recent academic discourse to respond to contemporary legal challenges, particularly in areas such as human rights, public policy, and socio-economic regulation. Modern studies emphasize that these maxims function as flexible legal tools designed to ensure that Islamic law remains responsive to evolving societal conditions (Auda, 2016: 121).

The maxim *raf'u al-haraj* is normatively grounded in the principle that legal obligations should not impose excessive hardship upon individuals. Recent literature highlights that this principle plays a crucial role in ensuring proportionality in legal obligations and supports the issuance of legal concessions (*rukhsah*) under specific circumstances. Contemporary research published in Islamic legal journals demonstrates that the application of this maxim has expanded into areas such as financial transactions and public health law, where flexibility is required to accommodate complex realities (Khan, 2019: 88).

Furthermore, the development of *raf'u al-haraj* in modern jurisprudence reflects a shift toward a more purposive and contextual interpretation of Islamic law. Scholars argue that this maxim is closely linked to the broader framework of *maqāṣid al-sharī'ah*, serving as an operational mechanism to ensure that legal rulings align with the objectives of justice and welfare. Empirical studies indicate that this principle has been instrumental in reforming legal practices in Muslim-majority countries, particularly in adapting traditional rules to contemporary governance structures (Kamali, 2019: 102).

In parallel, the maxim *daf'u al-dharar* continues to serve as a cornerstone of legal reasoning aimed at preventing harm in both individual and collective contexts. Recent journal publications emphasize that this principle is increasingly relevant in addressing modern legal issues such as environmental protection, consumer rights, and medical ethics. For instance, research in the *Arab Law Quarterly* demonstrates that the doctrine of harm prevention is applied in contemporary legal systems to regulate activities that may pose risks to public welfare (Masud, 2018: 203).

The principle of *daf'u al-dharar* also establishes a hierarchy of legal considerations, prioritizing the avoidance of harm over the pursuit of benefit. This hierarchy is reflected in modern legal doctrines that emphasize risk mitigation and precautionary measures. Comparative studies show that this principle aligns with contemporary legal concepts such as proportionality and preventive justice, thereby reinforcing its relevance in cross-jurisdictional analysis (Zein, 2020: 203).

From a theoretical standpoint, both *raf'u al-haraj* and *daf'u al-dharar* are integral to the realization of *maqāṣid al-sharī'ah*, which seeks to promote human welfare and prevent harm. Recent academic contributions highlight that these maxims function as interpretative bridges between classical legal theory and modern legal practice. They enable jurists to reconcile traditional legal norms with contemporary values, thereby ensuring the continued relevance of Islamic law in a globalized legal environment (Auda, 2016: 145).

However, despite their strong theoretical foundations, the practical application of these maxims often reveals discrepancies between normative ideals and empirical realities. Studies indicate that institutional limitations, political factors, and differing interpretative methodologies can affect the implementation of these principles. This suggests that while the maxims provide a robust theoretical framework, their effectiveness depends on the broader legal and institutional context in which they are applied (Hosen, 2018: 73).

In addition, contemporary research underscores the importance of integrating these maxims into modern legal systems through systematic codification and judicial interpretation. This integration is essential for ensuring that the principles of hardship removal and harm prevention are consistently applied in legal practice. Scholarly discussions in recent journals emphasize that such integration can enhance legal certainty while maintaining flexibility, thereby contributing to the development of more equitable legal systems (Rahman, 2021: 55).

Based on the foregoing analysis, it can be concluded that the concepts and normative foundations of *raf'u al-haraj* and *daf'u al-dharar* have undergone significant development in contemporary Islamic legal scholarship. These maxims remain central to the functioning of Islamic law, providing a flexible and purposive framework for addressing modern legal challenges. Their continued evolution highlights their importance in comparative legal studies, particularly in examining their relationship with similar principles in Western legal systems.

3.2 Fundamental Principles of Western Law Related to the Removal of Hardship and the Prevention of Harm

The fundamental principles of Western legal systems related to the removal of hardship and the prevention of harm are primarily reflected in doctrines such as equity, proportionality, necessity, and reasonableness. These principles have evolved within both civil law and common law traditions as mechanisms to mitigate the rigidity of formal legal rules and to ensure that justice is substantively achieved. Contemporary legal scholarship emphasizes that these doctrines function as corrective tools, enabling courts and lawmakers to address situations where strict legal application would result in unfair or harmful outcomes (Smits, 2017: 64).

The principle of equity, particularly within common law systems, serves as a foundational mechanism for alleviating hardship by allowing judicial discretion to achieve fairness. Modern studies indicate that equity operates as a supplementary system of law that intervenes when the application of strict legal rules leads to unjust consequences. For instance, equitable remedies such as injunctions and specific performance are designed to prevent harm and ensure that legal outcomes align with principles of fairness (McKendrick, 2020: 112).

In addition, the doctrine of proportionality has become increasingly significant in contemporary Western legal systems, particularly in constitutional and human rights law. This principle requires that legal measures must be appropriate, necessary, and balanced in relation to their objectives, thereby preventing excessive burdens on individuals. Recent research in the *International Journal of Constitutional Law* highlights that proportionality functions as a key instrument for safeguarding individual rights and minimizing harm caused by state actions (Stone Sweet & Mathews, 2018: 75).

The doctrine of necessity also plays a crucial role in addressing situations of hardship within Western legal frameworks. It allows for the justification of actions that would otherwise be unlawful when undertaken to prevent greater harm. Contemporary legal analysis demonstrates that necessity is widely upheld in criminal law and public law, where it serves as a defense in cases involving emergency situations or competing interests. This reflects a pragmatic approach to law, where the prevention of harm takes precedence over strict legal compliance (Herring, 2019: 215).

Furthermore, the principle of reasonableness, particularly in administrative and public law, operates as a standard for evaluating the legitimacy of legal decisions. Courts assess whether actions taken by public authorities are reasonable and proportionate, thereby ensuring that individuals are not subjected to arbitrary or excessive burdens. Recent studies published in the *Modern Law Review* indicate that the reasonableness test is essential in maintaining a balance between governmental authority and individual rights (Elliott & Thomas, 2020: 142).

The prevention of harm is also a central concern in tort law, where liability is often based on the existence of a duty of care and the foreseeability of harm. Modern legal scholarship emphasizes that the development of negligence law reflects a broader commitment to protecting individuals from harm and ensuring accountability for wrongful conduct. Research in the *Oxford Journal of Legal Studies* shows that contemporary tort law increasingly incorporates risk-based approaches to prevent harm before it occurs (Stapleton, 2019: 305).

From a theoretical perspective, these principles are grounded in broader jurisprudential frameworks such as utilitarianism and rights-based theories. Utilitarian approaches emphasize the maximization of overall welfare, often justifying legal interventions aimed at preventing harm. Conversely, rights-based theories focus on the protection of individual autonomy and dignity, thereby limiting actions that may impose unjust hardship. Recent interdisciplinary studies highlight that modern Western legal systems often integrate these approaches to achieve a balance between collective welfare and individual rights (Barak, 2018: 98).

However, despite the existence of these principles, their practical application often reveals tensions between legal certainty and judicial discretion. Critics argue that excessive reliance on flexible doctrines such as proportionality and reasonableness may lead to unpredictability in legal outcomes. Empirical studies suggest that the effectiveness of these principles depends largely on institutional structures and the interpretative approaches adopted by courts (Dyzenhaus, 2021: 201)

In addition, contemporary legal discourse emphasizes the need to harmonize these principles within increasingly complex legal systems characterized by globalization and transnational regulation. The integration of international human rights standards into domestic legal systems has further reinforced the importance of preventing harm and reducing hardship. Scholarly discussions indicate that this trend reflects a broader shift toward a more humane and responsive legal order (Klatt & Meister, 2017: 56).

Based on the foregoing analysis, it can be concluded that Western legal systems incorporate a range of fundamental principles aimed at removing hardship and preventing harm. These principles operate through various legal doctrines and are supported by diverse theoretical foundations. Their continued development highlights their significance in ensuring justice and fairness, as well as their relevance in comparative legal studies involving Islamic legal maxims.

3.3 Comparative Analysis of the Legal Maxims *Raf'u al-Haraj* and *Daf'u al-Dharar* with the Fundamental Principles of Western Law

The comparative analysis between the legal maxims *raf'u al-haraj* and *daf'u al-dharar* and the fundamental principles of Western law reveals both convergences and divergences at the philosophical and juridical levels. At a conceptual level, both legal traditions recognize the importance of alleviating hardship and preventing harm as essential components of justice. Contemporary comparative legal studies indicate that legal systems, regardless of their epistemological foundations, tend to develop mechanisms aimed at safeguarding human welfare and ensuring fairness in legal outcomes (Glenn, 2022: 289).

From a philosophical perspective, the similarity between these principles lies in their shared orientation toward achieving justice and protecting human interests. In Islamic law, this orientation is grounded in divine revelation and the objectives of *maqāsid al-sharī'ah*, while in Western legal systems, it is often based on rational and ethical theories such as utilitarianism and rights-based approaches. Recent scholarship suggests that despite these different foundations, both systems converge in their recognition of the necessity to balance individual rights with collective welfare (Zywicki & Stringham, 2017: 412)

In terms of juridical application, both *raf'u al-haraj* and the Western doctrine of proportionality function as mechanisms to prevent excessive burdens on individuals. The principle of proportionality requires that legal measures must not impose disproportionate hardship relative to their objectives, which closely aligns with the Islamic maxim of removing hardship. Comparative studies in the German Law Journal highlight that proportionality serves as a universal legal principle that ensures fairness and limits the exercise of power (Petersen, 2017: 769)

Similarly, the maxim *daf'u al-dharar* shares significant parallels with Western legal doctrines aimed at preventing harm, such as the duty of care in tort law and the precautionary principle in public law. Both systems emphasize the importance of avoiding actions that may cause harm and prioritize the mitigation of risks. Recent research demonstrates that these principles are increasingly applied in global legal contexts, particularly in environmental regulation and human rights protection (Wiener, 2018: 150)

However, despite these similarities, there are fundamental differences in the underlying philosophical and normative frameworks. Islamic legal maxims are derived from religious sources and are inherently linked to moral and theological considerations, whereas Western legal principles are generally based on secular reasoning and human-centered values. This distinction affects the way legal rules are interpreted and applied, particularly in cases involving ethical dilemmas or conflicting interests (Menski, 2018: 205).

Another significant difference lies in the structure of legal authority. In Islamic law, the application of *raf'u al-haraj* and *daf'u al-dharar* is closely tied to juristic interpretation and the broader framework of *fiqh*, whereas in Western legal systems, principles such as proportionality and reasonableness are often institutionalized

through judicial decisions and statutory provisions. This institutionalization provides a more formalized mechanism for applying these principles but may also limit their flexibility (Glenn, 2022: 305).

Furthermore, the scope of application of these principles differs between the two legal traditions. Islamic legal maxims tend to operate as overarching guidelines applicable across various fields of law, while Western legal principles are often developed within specific branches, such as constitutional law, administrative law, or tort law. This difference reflects the broader methodological distinctions between the two systems, with Islamic law emphasizing holistic integration and Western law favoring specialization (Menski, 2018: 223).

Despite these differences, contemporary comparative legal scholarship highlights the potential for convergence and mutual enrichment between the two systems. The increasing interaction between legal traditions in a globalized world has led to the adoption of similar approaches to addressing hardship and harm. Studies suggest that integrating insights from both Islamic and Western legal frameworks can contribute to the development of more comprehensive and responsive legal systems (Wiener, 2018: 168).

In addition, the comparative analysis underscores the importance of contextual interpretation in applying these principles. Both legal traditions recognize that the removal of hardship and the prevention of harm must be evaluated within specific social, economic, and cultural contexts. This contextual approach enhances the relevance and effectiveness of legal rules, ensuring that they address real-world challenges in a meaningful way (Petersen, 2017: 780).

Based on the foregoing analysis, it can be concluded that while *raf'u al-haraj* and *daf'u al-dharar* share significant similarities with fundamental principles of Western law in their objectives and functions, they differ in their philosophical foundations, sources of authority, and modes of application. These findings highlight the importance of comparative analysis in understanding the strengths and limitations of different legal systems and in identifying opportunities for legal development and harmonization.

4. Conclusion.

This study concludes that the legal maxims *raf'u al-haraj* and *daf'u al-dharar* in Islamic law and the fundamental principles of Western law, such as proportionality, equity, and harm prevention, share a convergent functional objective in alleviating hardship and preventing harm, yet differ fundamentally in their philosophical foundations, sources of authority, and modes of application. Islamic legal maxims are rooted in divine revelation and integrated within the framework of *maqāṣid al-sharī'ah*, emphasizing moral-ethical dimensions, whereas Western legal principles are grounded in secular rationality and institutionalized through judicial and statutory mechanisms. The novelty of this research lies in its systematic comparative framework that not only identifies conceptual parallels but also critically delineates structural and epistemological distinctions, thereby contributing to a more comprehensive understanding of how both legal systems can inform the development of responsive and equitable legal norms in contemporary contexts.

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