NECESSITY IN ISLAMIC LAW

BY

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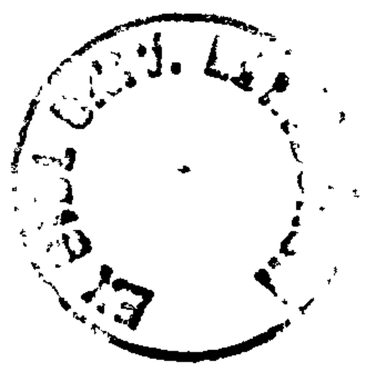

IN THE NAME OF ALLĀH, THE MOST MERCIFUL, THE MOST BENEFICENT

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DECLARATION

I hereby declare that this thesis has been composed by myself, the undersigned, and that it does not represent the work of any other person, and that every work which has been consulted is duly acknowledged.

Mansour Z. al-Mutairi

ABSTRACT

This study aims at exploring thewidely applied principle of necessity (darūrah) in Islamic law. Its main focus is to examine the legal definition and limitations of necessity.

It has been divided into five chapters, an introduction and a conclusion. In the first chapter, special attention has been given to the definition of necessity in Islamic classical and modern jurisprudence.

Since the maxims of necessity are an essential element of this topic, these have been explored in the second chapter.

The causes of the state of necessity are dealt with in the third chapter. In this regard, compulsion, legitimate defence, illness, change in circumstances have been discussed insofar as they related to necessity.

To give an accurate idea of the limitation of this principle, the conditions of necessity are the main concern of the fourth chapter.

In the fifth chapter, the discussion is concerned with the relation between necessity and other Islamic legal concepts particularly those concepts which are regarded as sources of law. The link between public interest (maslahah mursalah), blocking the means (sadd al-dharā'i') , istihsān and concession (rukhsah), and necessity on the other hand was found to be strong.

The conclusion, finally, summarizes the discussion previously made and presents the findings of this study.

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NOTE ON TRANSLITERATION

A. Constants.

B	ب	H	هـ
TH	ث	w	و
J	ج	Y	ي
Ḥ	ح		
KH	خ		
D	د	’	’ (not shown initially)
DH	ذ	ـه	(h) except when muḍāf; then (t)
R	ر		
Z	ز		
S	س		
SH	ش		
Ṣ	ص		
Ḍ	ض		
Ṭ	ط		
Ẓ	ظ		
‘	ع		
GH	غ		
F	ف		
Q	ق		
K	ك		
L	ل		
M	م		
N	ن		

B. Vowels.

U	ـُ
i	ـِ
a	ـَ
ā	ـَى/ـَا
ū	ـُو
aw	ـَو
Ī	ـِي
ay	ـَي

LIST OF ABBREVIATIONS

The following abbreviations are used to refer to the works which were frequently consulted throughout this study. Full bibliographical data of these works and others which were cited will be provided in the bibliography.

Aḥkām	Ibn al-'Arabī, Aḥkām al-Qur'ān.
ALQ	Arab Law Quarterly.
Ashbāh	al-Siyūṭī, al-Ashbāh wa al-Naẓā'ir fi al-Furū'.
'Awdah	'Abd al-Qādir 'Awdah , al-Tashrī' al-Jinā'i al-Islami Muqāranan bi al-Qānūn al-Wad'ī.
Bidāyah	Ibn Rushd, Bidāyat al-Mujtahid wa Nihāyat al- Muqtasid.
Dirāsāt	'Abd al-Wahāb Abū Sulaymān, Dirāsāt fi al- Fiqh al-Islāmī.
Durar	'Ali Ḥayder, Durar al-Ḥukkām Sharh Majallat al-Aḥkām.
Dawābit	al-Būṭī, Dawābit al-Maslahah fi al-Sharī'ah al-Islamiyyah.
Darūrah	Zaydān, Hālat al-Darūrah fi al-Sharī'ah al-Islamiyyah.

Falsafat	Maḥmmṣānī, Falsafat al-Tashrī' fi al-Islām.
al-Farā'id	Ibn al-Laḥām, al-Qawā'id wa al-Farā'id al-'Uṣūliyyah wa Mā Yta'laq Bihā min al-Aḥkām al-Far'iyyah.
Fatāwā	Ibn Taymiyyah, Majmū' Fatāwā Shaykh al- Islām Ahmad Ibn Taymiyyah.
Furūq	al-Qarāfī, al-Furūq.
Ghamz	al-Ḥamawī, Ghamz 'Uyūn al-Baṣā'ir Sharḥ Kitāb al-Ashbāh wa al-Naẓā'ir.
Hāshiyat	al-Dusūqi, Hāshiyat al-Dusūqi 'ala al-Sharḥ al-Kabīr.
Haraj	Ibn Ḥumayd, Raf' al-Haraj fi al-Sharī'ah al-Islāmiyyah, Dawābituhu wa Taṭbīqātuh.
I'lām	Ibn Qayyim al-Jawziyyah ; I'lām al-Muwaqi'īn 'an Rabb a l-'Ālamīn.
Ibn Kathīr	Ibn Kathīr, Tafsīr al-Qur'ān al-'Aẓīm.

Ibn Rajab	Ibn Rajab al-Ḥanbalī, al-Qawā'id fi al-Fiqh al- Islāmī.
Ibn al-Wakīl	Ibn al-Wakīl, al-Ashbāh wa al-Naẓā'ir.
Iḥkām	al-Āmidī, al-Iḥkām fī Uṣūl al-Aḥkām.
Jaṣṣāṣ	al-Jaṣṣāṣ, Aḥkām al-Qur'ān.
Jāmi'	al-Qurṭubī, al-Jāmi' li Aḥkām al-Qur'ān.
Kabīr	al-Dardīr, al-Sharḥ al-Kabīr.
Kashf	'Abd al-'Azīz al-Bukhāri, Kashf al-Asrār 'alā Uṣūl al-Bazdawī.
Khallāf	Khallāf, 'Ilm Uṣūl al-Fiqh.
Lisān	Ibn Manẓūr, Lisān al-'Arab.
Mabsūṭ	Al-Sarakhsī, al-Mabsūṭ.
Madkhal	Muṣṭafā al-Zarqā, al-Madkhal al-Fiqhī al-'Āmm .

Majmū'	al-Nawawī, al-Majmū': Sharḥ al-Muhadhdhab.
Manthūr	al-Zarkashī, al-Manthūr fi al-Qawā'id.
Mawāhib	al-Ḥaṭṭāb, Mawāhib al-Jalīl Sharh Mukhtaṣar Sīdī Khalīl.
Maḥṣūl	al-Rāzī, al-Maḥṣūl fī 'Ilm al-Uṣūl.
Mubārak	Jamīl Mubārk, Naẓariyyat al-Ḍarūrah al-Shar'iyyah.
Mughnī	Ibn Qudāmah, al-Mughnī.
Mustaṣfā	al-Ghazāli, al-Mustaṣfā min 'Ilm al-Uṣūl.
Muwaṭṭa'	Imām Mālik, al-Muwaṭṭa'.
Muwāfaqāt	al-Shāṭibī, al-Muwāfaqāt fi Uṣūl al-Sharī'ah.
Muḥtāj	al-Sharbīnī, Mughnī al-Muḥtāj ilā Ma'ānī Alfāẓ al-Minhāj.
Nadawī	'Alī al-Nadawī , al-Qawā'id al-Fiqhiyyah .

Naẓā'ir	Ibn Nujaym, al-Ashbāh wa al-Naẓā'ir.
Nihāyah	al-Ramlī, Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj.
Nūrāniyyah	IbnTaymiyyah, al-Qawā'id a l-Nūrāniyyah al- Fiqhiyyah .
Qawā'id	Ibn 'Abd al-Salām, Qawā'id al-Aḥkām fī Maṣāliḥ al-Anām.
Qāmūs	al-Fayrūzabādī, al-Qāmūs al-Muḥīt.
Radd	Ibn 'Ābidīn, Radd al-Muḥtār 'ala al-Durr al-Mukhtār.
Rawḍah	al-Ṭūfī, Sharḥ Mukhtaṣar al-Rawḍah.
Sarakhsī	al-Sarakhsī, Uṣūl al-Sarakhsī.
Saghīr	al-Dardīr, al-Sharh al-Saghīr.
Tafsīr	al-Rāzī, al-Tafsīr al-Kabīr: Mafātiḥ al-Ghayb.

al-'Ulūm	Ibn Rajab al-Ḥanbali, Jāmi' al-'ulūm wa al-Ḥikam fī Sharḥ Khamsūn Ḥadīthan min Jawām' al-Kalim.
Wahbah	Wahbah al-Zuḥaylī, Nazariyyat al-Ḍarūrah al-Shar'iyyah .
Wajīz	Muḥammad Alburnū, al-Wajīz fī Īdāḥ Qawā'id al-Fiqh al-Kuliyyah.
Zahrah	Abū Zahrah, Uṣūl al-Fiqh.
Zarqā'	Aḥmad al-Zarqā' , Sharḥ al-Qawā'id al-Fiqhiyyah .
Zayla'ī	al-Zayla 'ī , Tabyīn al-Ḥaqā'iq Sharḥ Kanz al-Daqā'iq.

INTRODUCTION

Life in general is subject to change. It has never been in a static position. The dynamics of life may affect societies as well as individuals. And in either case, the law has to tackle the problems resulting from such a change. Legal rules are mainly enacted to organize people's lives in normal conditions. However, whenever a change happens, the law has to take account of such a change whether by enacting a new rule or by modifying an existing one.

Islamic law as a comprehensive system takes accounts of the ever changing conditions as well as normal conditions. It has a set of principles and rules which are believed to tackle every aspect of life, whether devotional or secular.

Having said that, the state of necessity is an abnormal situation into which a person might fall, where he has either to break an existing law or endanger his life or property. Such a state has been accommodated and recognized by Islamic law. Certain limits and conditions were stipulated for the recognition of necessity in order for it not to be taken as a free licence for permitting prohibited matters and in order, on the other hand, not to make the law too rigid so that no legal solution would be adopted during a time of constraint.

There is a great need to explain the extent of the recognition of the principle of necessity by Islamic law.

This study is concerned with the definition, causes and limits of the principle of necessity within the boundaries of the science of the principles of Islamic law ('ilm uṣūl al- fiqh). This branch of Islamic knowledge is concerned with expounding the evidence and methods by which the rules of law (fiqh) are deduced from their sources. To illustrate this, examples from the law (fiqh) will be provided and expounded when appropriate.

Necessity has never been tackled by classical Muslim jurists in an independent chapter in their writings, and they never allocated a separate work to necessity. However, it has been dealt with, mainly, by the scholars of the science of the principles of jurisprudence ('ilm uṣūl al-fiqh) under the heading of concessions (rukhaṣ) and under the heading of public interest (maṣlahah) and it has also been discussed when scholars were talking about the proper attribute (al-waṣf al-munāsib) of the effective cause (al-'illah) in analogy (qiyās).

In addition, the principle of necessity has been dealt with in law (fiqh) by the jurists. It has been mentioned and invoked possibly in every chapter of Islamic law, particularly in the chapter of food and drink. Jurists who have written on maxims gave considerable space to the maxims of necessity.

Moreover, the commentators on the Qur'ān have tackled necessity when commenting on verses that allowed prohibited matters in the state of necessity.

In the light of the texts of the Sharī'ah and the observations of the classical jurists on necessity, contemporary Muslim jurists have dealt recently with the principle of necessity in separate writings allocated completely to necessity. The new attention paid to this principle was probably caused by the need to use it to justify legalizing a lot of matters which are associated with modern life. In this respect, necessity is regarded as a source of the law and a part of unrestricted interest (al-maslahah al-mursalah).

However, as a result of many people who are not expert in Islamic law or who tend to make a compromise in face of the secular tendency of current governments in the Islamic world using this principle, abuse may arise. The principle of necessity in this regard is similar to the principle of public interest (maslahah) which has been used by many to permit matters which are not compatible with the Sharī'ah texts.

Three distinguished studies, which have been written on necessity by contemporary Muslims jurists and researchers, are noteworthy:

The first one was a very brief but rich article compiled by the well-known jurist 'Abd al-Karīm Zaydān called " The State of Necessity in Islamic law " (Hālat al-Ḍarūrah fi al-Sharī'ah al-Islamiyyah). The problem

with this study is that it was very brief and failed to cover all the aspects of necessity.

The second one was a famous study by the famous jurists Wahbah al-Zuḥaylī called " The Theory of Necessity in Islamic Law " (Nazariyyat al-Darūrah al-Shar'iyyah). Great effort has been exerted in this pioneering study to collect the scattered materials related to necessity from all subjects and chapters in Islamic law. However, this study mixed cases related to different types of mitigations and concessions with those related to necessity. In another words, numerous cases of rukhsah were regarded as cases of necessity when in fact they are not. It is well-known among Muslims jurists that although necessity causes mitigation, mitigation in Islamic law is caused by a lot of factors other than necessity and one will make a mistake if one mixes the different types with each others.

The third study bears the title of " The Theory of Necessity in Islamic Law; Its Limitations and Conditions " (Nazariyyat al-Darūrah al-Shar'iyyah: Ḥudūduhā wa Ḍawābituhā) by Jamīl Mubārak. This study is a very fine piece of work and it is in my judgment the best study which has been conducted so far. The problem with this study is that certain important aspects of necessity have been neglected such as the effect of necessity in contracts. In addition to that, although the role of the maxims of necessity was well-understood by the author, they have not been given sufficient treatment.

No work on necessity written in English by a Muslim scholar has been found. However, a general and brief writing (in 4 pages) on necessity called ' Rule of Necessity and Need ' by Muḥammad Musleḥudīn has highlighted the importance of the principle of necessity and need, but it did not sufficiently explain its definition, limitations and applications. [1]

There is little treatment of the principle of necessity by Western scholars. There are only some brief words by Schacht on necessity. He viewed the principle of necessity as a means formulated by scholars to escape the ever-increasing corruption of contemporary conditions (fasād al-zamān). It is a means, in his opinion, created for applying the regulations of governments which are not in conformity with ideal religious theory. Although, he did not give an example which may support such a claim, the foundations of the principle of necessity are mentioned in the Qur'ān and the Sunnah of the Prophet which will help to ensure that no one tampers with this principle without violating its limits. [2]

Bernard Lewis was more precise when he mentioned the principle of necessity while talking about Muslims who live under the rule of non-Muslims. He said, " Necessity is a principle often invoked by Muslim jurists to justify the acceptance of situations which are in themselves unacceptable." [3] Although his definition is too general, he is aware of the limitations of the principle of necessity and successfully distinguishes between necessity which relates to individuals in which limits are clear and unequivocal and necessity related to the exigencies of social life in which limits are more subtle, more debated and of course more relevant. [4]

Although, this distinction has never been mentioned explicitly by Islamic jurists, they are aware of the differences between the nature of the constraints on individuals and the exigencies of the society while they may disagree as to whether a particular case would be deemed a case of necessity or not. They regarded the general need of the society as a state of necessity as the juristic maxim states " need, whether public or private is treated as a case of necessity ."

In this study, references will be made to the Qur'ān and the Tradition of the Prophet when it is required since they are the bedrock of Islam and they are the sources of legal and doctrinal principles. Consultation of these sources is encouraged by all Islamic jurists; however, they may disagree on the interpretation of particular verse or particular hadīth.

This study is confined to the main four Sunnī schools of law, and references will be made to the authoritative sources of every school, be these sources in law (fiqh) or in the principles of law (usūl al-fiqh) or in the juristic maxims (al-qawā'id al-fiqhiyyah). References will be made also to the contemporary Muslim jurists who have tackled aspects of necessity.

1- see, Muḥammad Muslehudīn, Islamic Jurisprudence and the Rule of Necessity and Need. Chapter: 6.

And: Philosophy of Islamic Law and the Orientalists, Chapter 17.

2- Joseph Schacht, An Introduction to Islamic Law, P: 84.

3- Bernard Lewis, The Political Language of Islam, P: 106.

4- Bernard Lewis, " Legal And Historical Reflections on The Position of Muslim Populations under Non-Muslim Rule " in " Muslims in Europe ", p: 3.

CHAPTER ONE

THE DEFINITION OF NECESSITY

1. NECESSITY IN THE ARABIC LANGUAGE:

When they define any legal term, Islāmic jurists start with the linguistic definition. This is because there is in most cases a connection between terms and their linguistic meaning. Necessity (darūrah) was so treated by Muslim jurists.

Darūrah in the Arabic language is derived from darar, which is an injury that cannot be avoided. Thus, the Arabs call any one who has lost his sight darīr because of his obvious injury. It can be also said that darar is the opposite of benefit (naf') or it is the pain which has within it no element of goodness that can outweigh such pain. So a bitter or awful medicine, for instance, is not described as harmful (dārr).[1] Darūrah also is the state of hardship (shiddat al-hāl), or as the Arabs would say : ' Necessity forces me to do such and such (hamalatni al-darūrah alā kadhā wa kadhā) '. Al-idtirār is the state of being in need of something (al-ihtiyāj ila al-shay') or being compelled to do something (al-iljā').[2] Ibn al-'Arabī (d. 543 A.H) said that al-mudtarr is the one who is forced and compelled to do something which he is able to do. So any one who is acting unwillingly (as a result of a physical or mental impediment) such as one who has trembling hands would not be described as " mudtarr " in the Arabic language. [3]

Al-mudtarr in the Arabic language is a homonym. It can denote one who receives an injury which makes him act or one who avoids an injury. So the one who was compelled by force by a tyrant to do something is a mudtarr insofar as he was forced to do it as a result of the harm he would have received, and the one who is selling his property is a mudtarr as well when he attempts to avoid an expected injury if he were to refrain from selling his house. Both meanings are recognised in a state where someone who was starving ate from a dead animal which was the only food available. So he was a mudtarr when he was suffering from the pain of the hunger. Also he will be called mudtarr when he decides to stop the hunger by eating such meat. [4]

In short, necessity (darūrah) in the Arabic language means:

1- Dire need for something (shiddat al-hājah).

2- The state in which one is being forced to do some thing (al-iljā').

3- The intensity of darar which is injury or harm.

This linguistic meaning is an essential part of the juristic technical definition of necessity as we will see later.

2. NECESSITY AS A JURISTIC TECHNICAL TERM:

A quick look into the writings of classical Muslim jurists and those of contemporary Muslim jurists, will give the impression that there is a clear division between the two groups in defining necessity. The classical jurists have given a very narrow definition while the contemporary jurists incline

to give a broader sense. Irrespective, however, of such a difference in the matter of the definition, they all apply the principle of necessity to the same situations and they understand it similarly.

This matter shall be explained in the following order: Necessity as defined by classical Muslim jurists, the criticism by contemporary Muslim jurists of such a definition and lastly necessity as defined by contemporary jurists.

A. NECESSITY AS DEFINED BY CLASSICAL JURISTS:

Abū Bakr al-Jaṣṣāṣ (d.370 A.H) from the Ḥanafī school has defined necessity as follows : " The meaning of necessity, here, is the fear of injury (darar) to one's life or some of one's organs if one refrained from eating." [5]

Al-Zarkashī (d.794 A.H), al-Siyūṭī (d. 911 A.H) and al-Ḥamawī al-Ḥanafī (d. 1098 A.H) have defined necessity as follows: It is a situation in which one reaches a limit where if one does not take a prohibited thing, one will die or be about to die. [6]

Al-Dardīr (d. 1201 A.H) from the Māliki school said: Necessity is preserving lives from being lost or from being greatly injured. [7]

Ibn Qudāmah (d. 630 A.H) has given a similar definition when he said: Permitting necessity is the state in which one fears losing one's life if one abstained from eating. [8]

All these definition have encompassed the following elements:

1- There must be a fear of losing life or a fear of severe injury to one's organs.

2- This fear is to be wiped out by eating a prohibited thing.

B. THE CRITICISM OF THIS DEFINITION:

Most contemporary jurists have criticized this definition by saying that it does not give a comprehensive definition of necessity; while classical jurists are fully aware of other causes of necessity which they have tackled extensively and explicitly included in the realm of necessity, they have limited the definition to preserving life by eating prohibited food. In their writings one can find a lot of examples in which they talked about preserving religious, financial and intellectual principles by committing an illegal act relying on necessity. [9] For instance, al-Zarkashī, in explaining the maxim " necessity permits prohibited matters ", has given examples for such a maxim pertaining to preserving property such as " ... Similar to that is taking back without his permission the property of a person who has refused to pay back his debt if that property is similar to what such a person has taken, " [10] and he explained further and mentioned another case ".. it is allowed to destroy the vegetation and the buildings of the enemy if the need (hājah) of fighting requires that." [11] He went on under the same heading ".. it

is allowed to exhume a dead person because of necessity in order to perform the major ritual ablution or to adjust his position towards the direction of the qiblah or to change his grave because the corpse has been buried in usurped land." [12] Also he mentioned the example that if a ruler appointed an incompetent judge, his decisions are to be carried out because of necessity. [13]

Al-Siyūṭī and Ibn Nujaym (d. 970 A.H) have mentioned under the same heading cases related to compulsion, the legitimate defence and preservation of property and other cases in which preserving life was not involved and necessity was the legal basis for such cases. [14]

It has been mentioned in al-Mabsūṭ that: The testimony of women alone is acceptable in matters which men are not able to see, since necessity is realised in such matters. The rules relating to such matters need to be clarified in the court in the case of dispute and where it is impossible to take the testimony of men since they are not aware of such matters. So the testimony of women alone in such a situation is necessary. [15]

In the chapter on funerals, al-Buhūtī (d.1051 A.H) mentioned the following case " It is prohibited for two dead bodies to be buried together in the same grave except in case of necessity or need such as when there is a large number of dead people." [16]

One can see from the foregoing examples that necessity has been used by the classical jurists to justify a lot of cases in which concessions were made to remove a hardship by adopting compassionate rulings. These cases are not limited to the preservation of life but they include cases related to the preservation of the five fundamentals (al-darūriyāt al-khams) and also related to so-called need (hajah).

One may speculate as to why the classical jurists' definition of necessity is not compatible with the examples which they give. It seems that it is definitely not because they did not conceive necessity precisely since they developed numerous legal rules relying on necessity as a legal proof. There are a number of reasons which may explain the way in which they define necessity. It can be said that they were explaining, but not defining, necessity in general when they explained the verses which deal with the necessity of a starving person to eat forbidden food. Consequently they had been defining and focusing on necessity which involved permission to eat prohibited food. It might be also because most of the texts of the Sharī'ah have explicitly tackled only the necessity caused by starvation.

Whatever the reason behind the difference between the classical definition of necessity and the wider usage of it, they were using necessity to justify the departure from the original rulings of certain cases in certain situations to easier rulings; and they formed a set of rules which regulate such a departure in order that it should not be a free licence for changing the law.

C. NECESSITY AS DEFINED BY CONTEMPORARY JURISTS:

Taking these set of rules into account, contemporary jurists have tried to formulate a technical definition:

'Abd al-Karīm Zaydān, who has written an article about necessity, thinks the more comprehensive definition of necessity is that which was suggested by 'Ali Ḥayder in his famous book Durar al-ḥukkām: Necessity, according to him, is a compelling situation where one has to commit an illegal act. [17]

M. al-Zarqā' defined necessity as: The state which would, if not satisfied, result in real danger, such as a total compulsion or the fear of death in case of starvation. [18]

W. al-Zuḥaylī said, after criticising classical definitions of necessity for failing to cover all aspects of necessity: Necessity is a new state of danger and severe hardship which comes to face a person and as a result he fears an injury to his life, his organs, his offspring, his reason or his property. In such a situation, committing an illegal act or neglecting or delaying an obligation becomes obligatory or permissible. On the ground of strong probability, to commit such an act to ward off his injury is within the boundaries of the Sharī'ah. [19] Such an attempt is a sort of explanation rather than an accurate definition since the legal decisions concerning the various types of necessity has been included in it, such as obligation and permissibility which are normally to be avoided in forming definitions. [20]

J. Mubārak has suggested a definition which seems to be sound, in which he said: It is the fear of death or of severe injury to one of the five fundamentals of oneself or of others if one did not repel what would certainly or very probably cause death or injury. [21]

Irrespective of whether one adheres to strict rules in forming a definition, it appears that there was in every attempt which has been mentioned certain elements to be included in every definition of necessity. Those elements are:

* There should be a compelling situation.

* There should be a genuine fear of death or of severe injury.

* Such an injury should be directed to one of the five fundamentals (al-darūriyat al-khams).

* Committing an illegal act is the only way out of such a situation.

To conclude the matter of definition, one can observe that contemporary Muslim jurists have widened the definition of necessity in two aspects:

1- The fear of death is not the only state of necessity. The state of necessity can exist if there was a genuine fear of injury to one of the five fundamentals.

2- The state of necessity is not caused only by starvation. It might be caused also by compulsion (ikrāh), aggression (siyāl), or change in circumstances in contracts (jawā'ih) etc..

3. SOME TERMS ASSOCIATED WITH NECESSITY:

There are some terms relating to necessity which are commonly used in discussing necessity. The meaning of such terms will be explained briefly in the following.

A. REMOVING HARDSHIP (raf' al-haraj):

This is a very important principle in the religion of Islam. Its main concern is to remove an unusual hardship which has come to face Muslims during the implementation of some rulings in a particular situation. The principle of removing hardship encompasses the maxim which states " hardship begets facility " and the other maxim which states " necessity permits prohibited matters " as well as all varieties of legal concessions (rukhas al-shar'iyyah).[22] So acting according to necessity is part of the principle of raf' al-haraj. Necessity is the highest degree of haraj, which means hardship. On the other hand, in the opinion of some Muslims writers, haraj is equated with need (hājah) since necessity is a stronger degree of hardship which would result in the loss of one of the five fundamentals, whereas haraj and hājah would cause a hardship without the resulting loss.[23] However, since there is no legal definition of haraj, the scope of its linguistic meaning covers all different types of hardship including necessity. [24]

B. NEED (hājah) :

Hājah means whatever is needed to ease and remove an existing difficulty. It is one of the different types of benefit (maslahah); it is in the

middle between necessary benefits (darūriyāt) and the luxurious benefits (tahsīniyyāt). Unlike necessary benefit, whose neglect leads to total disruption and chaos, the absence of hājiyyāt would not cause such a collapse in people's lives but it would cause difficulty and hardship.

Islāmic jurists have widely used necessity (darūrah) and need (hājah) in an interchangeable way. They may use necessity to include the state of need which is, in fact, less than necessity; and they may use need to include the state of necessity which is harder than need. Such usage is a matter of tolerance in language and it does not denote their similarity in legal effects. If someone, for example, were starving but did not fear injury or death, he would not be allowed to take prohibited things. However, if one was afraid of the loss of his life or a severe injury, he would be legally allowed to take prohibited food. The first instance is a case of need and the other one a case of necessity. It is obvious, from the previous example, that if the state of need continues, it will lead to a state of necessity.

C. FORCE MAJEURE (jā'ihah):

Jā'ihah is a calamity which would destroy one's wealth. Certain types of jā'ihah can cause the state of necessity. It has a wide implication in the realm of contract in Islamic law. And certain types of jā'ihah may cause a person to fall into a state of need (hājah) and then it may permit prohibited matters if the Sharī'ah evidence allows that. For example, acquiring money by way of begging is forbidden. It is permitted, however, in the case of a need which has been specified in the following hadīth:

" one of the Companions of the prophet called Qabīṣah said: " I was in debt and I came to the Prophet and asked him for help regarding it. He said: Wait till we receive Sadaqah, so that we may order that to be given to you. The Prophet again said: Qabīṣah, begging is not permissible except for one of three (classes) of people: one who has incurred debt, for him begging is permissible until he pays that off, after which he must stop; a man whose property has been destroyed by a calamity which has smitten him, for him begging is permissible until he receives enough sustenance, or reasonable subsistence; and a person who has been smitten by poverty, the genuineness of which is confirmed by three intelligent members of his people, for him begging is permissible till he receives that which will support him, or will provide him with subsistence. Qabīṣah, besides these three (every other reason) for begging is forbidden, and one who engages in such consumes that which is forbidden."[25]

D. COMPULSION (Ikrāh):

Compulsion has been defined as pressurizing a person without right to do something wrong to which he does not consent.[26] Some of the varieties of compulsion bring about a state of necessity and some of them do not.

E. THE FIVE FUNDAMENTAL BENEFITS " al-Darūriyyāt al-khams "

The major objective of the Sharī'ah has been analysed by Muslim jurists. It has been found that procuring benefits for and repelling injuries to

people, in this life and in the hereafter, is the greatest purpose of the Sharī'ah. And there are significant indications, in the sources of the Sharī'ah, which have shown that the Sharī'ah has been sent down for people's interests, so we find a number of verses in the Qur'ān which mention both the rules and their causes.[27] For instance, the following verse explained the purpose of sending prophets:

> " Apostles who gave good news as well as warning, that mankind after the apostles should have no plea against God " s:4, v:165.

Likewise, the following verse has accounted for the purpose of creating life:

> " He who created death and life, that he may try which of you is best in deed " S.67, v : 2.

In addition to that, the causes of the detailed rules were clarified in numerous places, as, for example, where the Qur'an mentioned after the verse on ablutions (wudū'):

> " God doth not wish to place you in difficulty, but to make you pure, and to complete his favour to you, that ye may be grateful " S.5 ,v: 7

And we find the objective of the fasting legislation in the following verse:

> " Ye who believe! fasting is prescribed for you as it was prescribed for those before you. That ye may learn self restraint " S.11.183

Thus, one can deduce the objective of many rules from the texts of the Qur'ān and the Traditions of the Prophet. We find Islamic jurists have researched this theme in various sections such as the causes in analogy (qiyās) or in the aims of the Sharī'ah (maqāṣid al-sharī'ah), as al-Shaṭibī

(d. 790 A.H) did, or in the juristic maxims as Ibn 'Abd al-Salām (d. 660 A.H) did.[28]

Having said that, Islamic jurists have classified benefits (masālih) in two ways:

Firstly: The benefits according to the consideration of the texts of the Sharī'ah. In this regard, they have been divided into three parts:

1- Considered benefits (masālih mu'tabarah) namely, the benefits which have been approved by legal evidence.

2 -Canceled benefits (masalih mulghāh) which mean the benefits that have been discarded by the texts of the Sharī'ah.

3- Unrestricted benefits (masalih mursalah) which mean whatever benefits have not been explicitly approved or discarded in the Sharī'ah texts.[29]

Secondly: Classification according to the strength of the considered benefits themselves. In this respect, benefits have been divided into three categories[30]:

i-Necessary benefits (Darūriyyāt). These are the basics of human existence from the Islamic jurists' point of view. Human life cannot continue without these benefits. It would become chaotic in their absence;

without them human existence would not continue. Islamic jurists have considered the benefits related to preserving religion, life, reason, offspring and material wealth as necessary benefits. [31]

For the preservation of religion, the Sharī'ah has, for example, legalized Jihād to deter whoever wants to fight the believers, and punishes those who become apostates. In addition, the Sharī'ah has forbidden innovation in religious rules as well as distortion. [32]

For the preservation of life, retaliation (qisās), blood money (diyāh) and expiation (kaffārah) have been imposed upon any one who impinges on another. Also committing suicide has been prohibited whatever the circumstance. [33]

For the preservation of mind, drinking wine or any kind of alcohol has been forbidden. [34]

For the preservation of offspring, punishment for adultery and false accusation of unchastity has been introduced. [35]

For the preservation of material wealth, the Sharī'ah has encouraged people to gain money by lawful means, and prohibited theft, deceit and taking or damaging others' possessions without cause. Moreover, usury has been prohibited. And the interdiction (ḥajr) upon the incompetent person, who are not capable of conducting his businesses has been allowed. On the

other hand, the Sharī'ah has established a firm punishment against thieves, and guarantees in case of trespass on others' belongings.[36]

The preservation of benefits must be through two parallel ways according to al-Shaṭibī:

1- supporting and ascertaining their principle.

2-Preventing anything which would cause imbalance between them or disturb their existence.[37]

ii-Complementary benefits (Hājiyyāt): The law recognises whatever benefits are needed for easing life and making it run smoothly, expanding people's activities and allowing them to live in reasonable conditions, absence of which, in contrast, would not make life become chaotic, as in the case of the absence of necessary benefits, but would cause hard and restricted conditions. They are needed to avoid inconvenient conditions.[38]

The Sharī'ah has introduced many rules which would make people's life convenient in worship, transactions and punishment. In worship, for instance, there are the legitimate concessions (rukhas) which mitigate hardship during travel or illness. In transactions, the Sharī'ah has permited many types of contracts and conducts such as a cropsharing contract over the lease of a plantation (musāgāh), a sleeping partnership (mudārabah) and forward buying (salam) and the like. Divorce is allowed when it is needed.[39]

In penal law, the demanding of blood money for unintentional homicide was imposed on the relatives of the killer (ʿāqilah). Punishment is to be avoided in the presence of doubts (shubuhāt), while the avenger of blood is given the right to disclaim retaliation.[40]

iii-Luxurious benefits (Taḥsīniyyāt): These are benefits which embellish an already comfortable life. They are neither necessary nor important for the smooth running and prosperity of people's lives. They highlight how to behave in a good manner and how to adopt advanced customs and culture. Thus they are additional ornaments to normal life: for example, cleanliness of body, clothes and place; or volunteering to give the poor money out of charity. [41]

Complementing elements: Every category has been accompanied by complementary elements which do not, in their absence, affect the benefits, but they complete the benefits by their existence. Al-Shāṭibi, who researched this area extensively, gave examples such as, in the case of necessary benefits, the prohibition of a little wine which would not cause intoxication since it blocks the way leading to drinking much more. In the same manner, looking intentionally at unrelated women is forbidden as a complement to the preservation of offspring.[42]

In the case of complementary benefits, he gave examples such as joining two prayars together in travel as a rule complementary to shortening prayer during travel.[43]

In the case of luxurious benefits he gave examples like the recommended methods of cleanliness, completing deeds which have already been started, even if they are not compulsory, and donating from the best quality of one material wealth. [44]

Al-Shāṭibī made a condition for consideration of the complementary elements. He believed that they must not abolish the original rules. So every complementary element which leads to the rejection of the original rule is null and void. Because if it led to rejecting the original rules, it clearly meant that it itself would be rejected for a greater reason. For instance, sale is necessary; preventing risk and uncertainty is a complementary element; however, if we stipulated avoiding risk completely, it would be hard to sell a lot of things, so a little risk is permissible. [45]

Certain points have to be mentioned here :

i-The necessary benefits are prior to the others because they are the origin of the others. That means complementary and luxurious benefits are considered as branches of the necessary benefits. For instance, if we suppose that the Sharī'ah prohibited sale, the consideration of the rules of risk or uncertainity would not make sense.[46]

ii-All these benefits are interdependent. That means each one of these categories must be preserved, as an imbalance in one of them would lead to an imbalance in the other. It is obvious that defect in the necessary benefits

would be far stronger than defect in the complementary benefits. and defect in the latter would be stronger than defect in the luxurious benefits.[47]

iii- Such distinction and points are very important in order to recognise the principle of necessity in Islamic law . Necessity, in its narrow sense, is confined within the necessary benefits category. That means it does not work within the complementary and luxurious benefits. But they are included in its broad sense which is extended to include hardship and difficulty. [48]

Whatever matter affects one of the five fundamentals is considered a condition of necessity and must be removed. For instance, to preserve religion, prayer must be performed and whatever prevents it from being carried out in the proper way is regarded as a condition affecting necessity in which case it is performed according to capacity. Also eating is essential in order to preserve life: if someone cannot find lawful food, it is permissible to eat prohibited food to remove the condition of necessity and preserve life. [49]

In other respects, the five fundamentals are not equal but some of them take precedence over others according to the proportion of their benefits and injuries. Thus, according to the Sharī'ah, the preservation of religion is prior to the other fundamentals, and preserving life follows that . But as to the others, the opinions of jurists vary. On the one hand we find al-Ghazālī (d. 505 A.H) putting them in the following order: religion (dīn), life (hayāh), reason ('aql), offspring (nasl) and material wealth (māl).[50]

On the other hand we find al-Shāṭibi organized them as follows: religion, life, offspring, and material wealth, with reason coming last. So he deferred reason whereas al-Ghazālī put it in third place.[51]

The advantage of such ordering within the principle of necessity is to set the most important before the less important at a time when there may be conflicting claims of the different fundamentals. For example, if preserving religion conflicts with preserving life, the first must take priority over the latter. Thus, preserving life would not be accepted as an excuse for remaining behind in the case of jihād. Similar is a case where reason may be affected by a necessary step to preserve life. The jurists gave the example of someone choking when there was nothing available except wine to remove that choking. Therefore one would have the right to drink the prohibited wine to preserve one's life even if one became intoxticated; it is not acceptable to say avoiding wine is essential for the preservation of reason because preserving reason is null and void in the case of a conflict with preserving life.

From another aspect, the principle of necessity may be applied within the branches of one of the five fundamentals. That is also in the case of conflict and according to the gauge of benefits and injuries which may come from either of them. For instance, preserving our own life is fundamental and preserving the lives of others is fundamental as well. But the life of others has a greater priority. So if someone thought he was compelled to kill other people or another person in order to save his own life, under no circumstances is this permissible. Such a man must refuse to kill because the

refusal to kill is , for the general public, a lesser evil than giving in to duress. If killing under duress was tolerated, it would be taken as a means to get rid of any person by forcing others to kill him, those persons claiming immunity on the grounds that the killing was done under compulsion.[52]

It is necessary to know the rank of the various benefits. Thus in the conflict between complementary benefits and necessary benefits, the latter will have priority; and the complemetary benefits have priority over luxurious benefits. In terms of this order we can understand why imbalance within necessary benefits is regarded as a condition of necessity, whereas imbalance within complemetary benefits is considered a condition of need (hājah).[53]

The distinction between necessity and need is restricted to two points :

i- Necessity legalizes the prohibitionwhether it affects individuals or groups. However, need does not legalize the prohibition unless it is concerned with the group, as the individual's needs are subject to change and variety and it is impossible to vary rules according to the private needs of individuals, whereas necessity is limited and restricted.

ii-The exceptional rule of necessity is a temporary allowance of something otherwise prohibited by the texts of the Sharī'ah. This allowance will no longer exist after the condition is removed. But the rules which arise in the case of need do not conflict with the texts of the Sharī'ah. However, they may be in conflict with general rules and qiyās, but nonetheless they

have taken their place in Islamic law as permanent rules and are not exclusive to unusual situations, and everyone benefits from them.

4. NECESSITY IN THE QUR'ĀN AND THE TRADITIONS OF THE PROPHET (Sunnah) :

There is a body of evidence in the Qur'ān and in the Traditions of the Prophet which lays down the foundations for the principle of necessity. Islamic jurists have relied on such evidence to elaborate the different aspects of necessity.

In the Qur'ān, there are numerous verses which explicitly or implicitly tackle this topic. The word injury (darar) has been mentioned, on different occasions and in different forms, seventy times in the Qur'ān.[54] We shall confine ourselves to six verses which explicitly mention and tackle necessity. They are as follows according to their order in the Qur'ān:

> 1- " He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of God. **But if one is forced by necessity, without wilful disobedience, nor transgressing due limits**,- then is one guiltless. For God is Oft-forgiving Most Merciful." S: 2, v:173.

> 2- " Forbidden to you (for food) are: dead meat, blood, the flesh of swine, and that on which hath been invoked the name of other than God; that which hath been killed by strangling, or by a violent blow, or by a headlong fall, or by being gored to death; that which hath been

(partly) eaten by a wild animal; unless ye are able to slaughter it (in due form); that which is sacrificed on stone (altars); (forbidden) also is the division (of meat) by raffling with arrows: that is impiety. This day have those who reject faith given up all hope of your religion: yet fear them not but fear Me. This day have I perfected your religion for you, completed My favour upon you, and have chosen for you Islam as your religion. **But if any is forced by hunger, with no inclination to transgression,** God is indeed Oft-forgiving, Most Merciful." S:5, v:3.

3- " Why should ye not eat of (meats) on which God's name hath been pronounced, **when He hath explained to you in detail what is forbiddento you - except under compulsion of necessity?** But many do mislead (men) by their appetites unchecked by knowledge. Thy Lord knoweth best those who transgress. " S. 6 v:119.

4- " Say: 'I find not in the message received by me by inspiration any (meat) forbidden to be eaten by one who wishes to eat it, unless it be dead meat, or blood poured forth, or the flesh of swine- for it is an abomination -, or, what is impious, (meat) on which a name has been invoked, other than God's '. But (even so), **if a person is forced by necessity, without wilful disobedience, nor transgressing due limits,**- thy Lord is Oft-forgiving, Most Merciful." S: 6, v:145.

5- " Any one who, after accepting faith in God, utters Unbelief,- **except under compulsion,** his heart remaining firm in Faith - but such as open their breast to Unbelief, on them is Wrath from God, and theirs will be a dreadful Penalty." s:16, v: 106.

6- " He has only forbidden you dead meat, and blood, and the flesh of swine, and any (food) over which the name of other than God has been invoked. **But if one is forced by necessity,** without wilful disobedience, nor transgressing due limits,- then God is Oft-Forgiving, Most Merciful." S: 16, v: 115.

A close observation of these verses will reveal that all of them except number five are to allow prohibited food in the case of necessity; the majority of these verses have repeated certain types of prohibited thing such as dead meat, blood, the flesh of swine and any food over which the name of other than Allah has been invoked, except verse number 3 where necessity was mentioned in the context of alluding to all prohibited food. Al-Jaṣṣāṣ said in his commentary on some of these verses, ' Allah has mentioned necessity in these verses, and He did not stipulate, in one verse, any conditions or attribute as to the permissibility of such food; that is in this verse ,

> " when He hath explained to you in detail what is forbidden to you - except under compulsion of necessity? "

that would entail the existence of permissibility wherever the necessity existed.' [55] He said also in another place: ' The necessity which has been mentioned in the verse embodies all varieties of prohibited matters; as to its link with dead animal and the like, it does not prevent taking for granted the generality of the other verse. In another respect, if the meaning behind allowing these prohibited things is to save life, this meaning is present in all varieties of prohibited matters. So it must take the same ruling in the case of an existing necessity.' [56]

Verse number 5 tackled a matter other than eating what is prohibited; it tackles the state of one's being compelled to renounce one's belief.

Islamic exegetes have discussed causes of necessity in their commentaries on some of the above verses, particularly the first one . Al-Qurṭubī (d. 671 A.H) said: ' being in a state of necessity is either because of a compulsion of an assailant or because of an extreme hunger.' [57] A similar statement was given by al-Rāzī (d. 606 A.H).[58] Al-Jaṣṣāṣ also said ' necessity could be caused by two things: if a person was in a place where nothing was available to him except a dead animal, or if there was lawful food but he was forced by another human being and was threatened with death or severe injury.' [59] Ibn al-'Arabī for his part thought necessity could be caused by the compulsion of an aggressor or by an extreme hunger or by poverty in which one does not find lawful food.[60]

The classical jurists, as we mentioned before, were discussing the necessity which is removed by eating from prohibited things; as a result of that, they restricted the causes of necessity to hunger, duress to eat the prohibited and poverty that would result in hunger. Such a narrow sense is not accurate since they themselves have discussed other aspects of necessity without including them in the definition or the causes of necessity.

The essence of necessity as understood from the jurists' elaboration of the different aspects of necessity is the state of being compelled to do something illegal; such a compulsion could be caused by an internal factor such as a pressing hunger or by an external factor such as duress, aggression,

changing circumstances etc.. In another respect, the reason for committing an illegal act is to save one's life, property or honour. And the illegal act which has to be committed in order to repel necessity could be eating or drinking, killing, committing adultery (i.e. rape) or taking the property of others as well as neglect of a duty or an obligation.

As to the Traditions of the Prophet, there are numerous traditions that have tackled the different aspects of necessity. They compose an important source for forming the principle of necessity. We shall mention some of these traditions.

1- " A man alighted at Harrah with his wife and children. Another man said (to him): My she-camel has strayed; if you find it, detain it. He found it, but did not find its owner, and it fell ill. His wife said: Slaughter it. But he refused and it died. She said: Skin it so that we may dry its fat and flesh and then eat them. He said: Let me ask the Apostle of Allah. So he came to him (the Prophet) and asked him. He said: Have you sufficient for your needs? He replied: No. He then said: Then eat it. Then its owner came and he told him the story. He said: Why did you not slaughter it? He replied: I was ashamed (or afraid) of you." Another version of this Ḥadīth states that " It saved their lives for the rest of that winter ".[61]

2- Abū Wāqid al-Laythī said:" I said to the Prophet: Messenger of Allah, we are living in a land where we are subjected to hunger; what is permissible for us from dead animals?. The Prophet said: If you did not drink milk in the morning and did not drink milk in the evening and did not store dates, then it is up to you to eat. " [62]

3- The Prophet said: " He who is killed while protecting his property is a martyr, and he who is killed while defending his family, or his blood, or his religion is a martyr." [63], [64]

4- " A person came to the Messenger of Allah and asked: What do you think if a man comes to me in order to appropriate my possession? The Prophet said: Don't surrender your possession to him. The inquirer asked: If he fights me? The Prophet remarked: Then fight (with him). The inquirer then asked: What do you think if I am killed? The Prophet observed: You would be a martyr: The inquirer said: What do you think of him, Messenger of Allah, if I kill him. The Prophet said: He would be in the Fire." [65]

5- " The Apostle of Allah was asked about hanging fruit. He replied: If a needy person takes some and does not take a supply away in his garment, he is not to be blamed.. " [66]

6- The Prophet is reported to have said " There shall be no injury nor reciprocating injury." [67]

These verses and traditions of the Prophet as well as others have laid down the foundations of the principle of necessity. Islamic jurists have induced from this evidence a number of juristic maxims which gather together and give order to the various legal rulings regarding necessity.

1- Ibn Fāris, Mu'jam maqāyīs al-lu'ah, word: ḍarr.

al-Jurjānī, al-Ta'arīf, word: ḍarūrah.

2- Lisān, word: ḍarar.

Qāmūs, the letter " r " with the letter " ḍ. "

3- Ahkām, vol.1, p. 55.

4- Ibid, p. 55.

5- Jassās, vol.1, p. 129.

6- Manthūr, vol.2, p. 319.

Ashbāh, p. 61.

Ghamz , vol.1, p. 277.

7- Saghīr, vol.2, p.183.

8- Mughnī, vol.8, p. 595.

9- Wahbah, p. 67,

Mubārak, p. 28.

Dirāsāt, p. 22.

10- Manthūr, vol.2, p. 317.

11- Ibid, p. 317.

12- Ibid, p. 318.

13- Ibid, p. 318. al-Zarkashī mentioned afterwards that it is a disputed matter. So some jurists had not accepted this decision, and there is no necessity, in their opinion, which forces one to accept the decision of such a judge.

14- Ashbāh, p. 60.

Nazā'ir, pp. 94, 95.

15- Mabsūt, vol. 16, p. 142.

16- al-Buhūtī, Sharh Muntahā al-Irādāt, vol.1, p. 354.

17- Durar, vol.1, p. 38.

Darūrah, p. 10.

18- Madkhal, vol. 2, p. 997.

19- Wahbah, pp. 67, 68.

20- Dirāsāt , p. 22.

21- Mubārak, p. 28.

22- Muwāfaqāt, vol.2, p. 122.

23- Haraj, p. 54.

24- Muwāfaqāt, vol. 2, p. 122

Mannā' al-Qaṭṭān, Raf' al-haraj, p. 18.

25- Qabīṣah ibn Mukhāriq al-Hilālii, Sahīh Muslim, Ḥadīth No: 2271.

Qawā'id, vol.2, p. 337.

26- Kashf , vol.4, p. 631.

27- Mustaṣfā, vol. 2, p. 482.

Ihkām, vol.3, p. 389.

Muwāfaqāt, vol.2, p. 8.

Mahṣūl, vol. 2, p. 328.

Rawḍah, vol.3, p.381.

Ḍawābiṭ, p. 73.

Zahrah, p. 340.

Khallāf, p.197.

28- Muwāfaqāt, vol.2, pp. 8 - 61.

Qawā'id , vo.1, p.10.

Sarakhsī, vol.1, p. 109.

29- Mustaṣfā, vol. 2, p. 478.

Ihkām, vol.4, p. 216.

Rawḍah, vol.3, p.211.

Mahṣūl, vol. 2, p. 578.

Ḍawābiṭ, pp. 119-120.

Zahrah, p. 261.

Khallāf, p.84.

30- Muwāfaqāt, vol.2, p. 8.

Mustaṣfā, vol. 2, p. 481.

Ihkām, vol. 3, pp.393-96.

Rawḍah, vol.3, pp. 206 - 09.

Mahṣūl, vol. 2, p. 578.

Zahrah, pp. 348-349.

Khallāf, pp. 198-99.

31- Ibid.

32- Muwāfaqāt, vol.2, p.8.

Khallāf, p. 200.

33- Muwāfaqāt, vol.2, p.10.

Khallāf, p. 201.

34- Iḥkām , vol. 3, p. 394.

Khallāf, p. 201.

35- Muwāfaqāt, vol.2, p.10.

Khallāf, p. 201.

36- Muwāfaqāt, vol.2, p.10.

Iḥkām, vol.3, p. 394.

Khallāf, p. 201.

37-Muwāfaqāt, vol.2, p.8.

38-Muwāfaqāt, vol.2, p.8.

Mustaṣfā, vol. 2, p. 481.

Iḥkām, vol. 3, pp. 393-96.

Rawḍah, vol.3, pp. 206 -9.

Maḥṣūl, vol. 2, p. 578.

Zahrah, pp. 348-49.

Khallāf, pp. 198-99.

39- Muwāfaqāt, vol.2, p.11.

Ḍawābiṭ, p. 120.

Zahrah, p. 349.

40-Muwāfaqāt, vol.2, p.11.

Khallāf, p. 202.

41- Muwāfaqāt, vol.2, p.11.

Ḍawābiṭ, p. 120.

Zahrah, p. 349.

42- Muwāfaqāt, vol.2, p.12.

43- Ibid, p.13.

44- Ibid, p.13.

45- Ibid, pp. 13-14.

46- see: Ibid, pp. 16-17.

47- see: Ibid, pp. 17-18.

48- Mubārak, p. 40.

49- Ibid, p. 40.

50- Al-Būṭī confirms that al-Ghazālī's order has been unanimously accepted by all Islamic jurists. Thus, al-Shāṭibī might not have intended to put them in their hierarchical order since

there is an agreement, for example, between jurists as to the following matter in which reason takes precedence over offspring; lashing an adulterer must not affect his senses and reason. As to the superiority of offspring over material wealth, it is clearly obvious from the prohibition of gaining money via prostitution which is clearly stated in the following verse " But force not your maids to prostitution when they desire chastity, in order that ye may make a gain in the goods of this life " S: 24, V: 33. Dawābiṭ, pp. 250- 257.

51- Muwāfaqāt, vol.2, p.10.

Mustaṣfā, vol. 2, p. 482.

52- Dawābiṭ, p. 249.

Mubārak, p. 40.

53- Muwāfaqāt, vol.2, p. 21.

54- I. al-Ibyāri, al-Mawsū'ah al-Qur'āniyah, vol.2, p. 366.

55- Jaṣṣās, vol. 1, p. 127.

56- Ibid, p. 129.

57- Jāmi', vol.2, p. 210.

58- Tafsīr, vol.5, p.12.

59- Jaṣṣās, vol. 1, p. 129.

60- Aḥkām, vol. 1, pp. 54-55.

61- This ḥadīth was reported by Jābir ibn Samurah. in Sunan Abū Dāwūd, ḥadīth no: 3816. And in Musnad Aḥmad ibn Ḥanbal, Musnad al-Baṣriyyīn ḥadīth no 20397.

62- Aḥmad ibn Ḥanbal, Musnad Aḥmad ibn Ḥanbal, Musnad al-Baṣriyyīn ḥadīth no: 21391 and 21394.

63- The implication of this ḥadīth as seen by Islamic scholars is to allow the act of defence even by way of killing if necessary against an aggressor since the Prophet has said that the defender who is killed is a martyr.

64- This ḥadīth was reported by Sa'īd ibn Zayd in Sunan Abū Dāwūd, ḥadīth no: 4772.

65- This ḥadīth was reported by Abū Hurayrah in Sahīh Muslim, ḥadīth no: 140.

66- This ḥadīth was reported by Abd allah ibn 'Amr ibn al-'āṣ. Sunan Abū Dāwūd, ḥadīth no: 1706.

67- Muwatta', no: 36.26.31. Reported by Yaḥyā al-Mazinī.

CHAPTER TWO

MAXIMS OF NECESSITY

INTRODUCTION:

A legal maxim (al- qā'idah al-fiqhiyyah) is defined as a general principle (hukm kullī) which assists in recognising the legal decisions of its particulars[1].

Its main concern is to give a general decision which would be applied to most of its related details which are scattered through a variety of legal subjects and chapters.[2] So, historically, most of these maxims have been composed after the details of the law became existent[3].

Islamic Jurists have paid considerable care to legal maxims. For they are a valuable means to group the legal rules in short eloquent phrases regardless of how broad or restricted those rules are. Such maxims are so designed to provide the Mujtahid as well as the student of Islamic law with easily attainable tools to obtain sufficient knowledge of Islamic law and to help them in recognising the objectives of the Sharī'ah without being confused by the enormous details of law. They have dedicated to legal maxims certain types of books called (al-ashbāh wa al-naẓā'ir) and (al-qawā'id al-fiqhiyyah)

In another respect, since legal maxims are applied to most but not all of their particulars, they cannot be used as a basis for giving a juristic decision (fatwa) or issuing a judicial verdict. That is also because their original role

is to bring together details and not to be used as legal evidence. However certain maxims can be used as legal evidence and subsequently fatāwā and judicial verdicts can be based on them. They are the maxims which are themselves legal evidence, i.e. they are either a part of the Qur'ān or a saying of the Prophet such as " the burden of proof is on him who alleges; the oath on him who denies " (al-bayyinah 'ala al-mudda'ī wa al-yamīn 'ala man ankar). And such as " profits follows responsibility " (al-kharāj bi al-damān)[4].

There are five fundamental maxims which are accepted by all juristic schools and applied to a very wide range of subjects in Islamic law; they are:

1- Matters are determined according to intention (al-umūr bi maqāsidihā).

2- Hardship begets facility (al-mashaqqah tajlib al-taysīr).

3- Injury is to be repaired (al-darar yuzāl).

4- Custom is to be taken into account (al-'ādah muḥakkamah).

5- Certainty is not affected by the occurrence of a new doubt (al-yaqīn lā yuzāl bi al-shakk).

There are also numerous maxims covering all the branches of Islamic law. But since they are outside the scope of this study, we shall confine ourselves to the Maxims which are related to necessity.

1- HARDSHIP BEGETS FACILITY (AL-MASHAQQAH TAJLIBU AL-TAYSIR):

This maxim is one of the maxims with the widest application in Islamic law since it includes a wide range of Islamic legal principles and rules. All

Islamic jurists have agreed on its validity and importance and it has been regarded as a fundamental maxim.[5]

The bases of this maxim are in numerous Qur'ānic verses and many traditions of the Prophet. Thus it has been regarded as a principle which has definitely been incorporated in the Sharī'ah.

The Qur'ānic bases for this maxim may be found in many verses which explain the general principle of removing hardship (raf' al-haraj) and which have established the rule of necessity such as the following verses:

1- " God intends every facility for you; he does not want to put you to difficulties "s:2. v:185.

2- " God doth wish to lighten your (difficulties) : for man was created weak (in flesh) " . S: 4. v: 28.

3- "But if any is forced by hunger, with no inclination to transgression, God is indeed oft-forgiving, merciful " S:5.v:4.

4- "God doth not wish to place you in a difficulty, but to make you clean , and to complete his favour to you that ye may be grateful " S:5. v:7.

5- " On no soul doth God place a burden greater than it can bear". S:2. v:286.

The context of each of these verses varies from one to another and each one of them has dealt with a different subject. However, the implication of each one is identical, that is: to ease difficulty and hardship whenever it

exists, and to limit the legal liability of the people who are legally responsible according to their ability. That indicates there is nothing in the Sharī'ah which cannot be performed or which overreaches the limited capacity of the feeble human being.[6]

There are also in the tradition of the Prophet many aḥādīth which emphasize the same principle such as :

1- It has been reported that the Prophet said " Religion is very easy and whoever overburdens himself in his religion will not be able to continue in that way. So you should not be extremists but try to be near to perfection.." [7]

2- The hadīth that reads " the best of your religion is that which brings ease to the people. " [8]

3- It has been reported by 'Āishah that: " Once the Prophet came while a woman was sitting with me. He said: ' Who is she? ' I replied ' she is so and so ' and told him about her excessive praying. He said disapprovingly : ' Do good deeds which are within your capacity (without being overtaxed) '." [9]

4- The Prophet said " Religion is facility. The most beloved religion to God is tolerant orthodoxy (al-ḥanīfiyyah al-samhah). " [10]

These bases and many others, though referring only to religion, cover the entire field of Islamic law, because this law as it is well-known embraces religious observances as well as what is understood as juridical rules in the west.

The general meaning of this maxim is that: Difficulty and hardship are regarded as a valid reason for facility and mitigation. And in the time of constraints and urgency, ease and latitude must be shown. It is understood that the normal rules of law have been designed to be general in nature and thus to consider all situations and all individuals and not merely particular situations or particular persons. However, in certain circumstances, the meticulous adherence to law turns into injury and injustice and it becomes necessary to mitigate people's difficulty and to disregard rules in certain exceptional circumstances if their application were to result in injury and hardship. [11]

HARDSHIP:

Hardship is the prominent element in the condition of necessity. Thus, wherever there is a state of necessity, there will be a sort of hardship. We shall examine, in the following, the effect of hardship on the rules in Islamic law, and whether all kinds of hardship are considered as relieving factors.

Hardship (mashaqqah) means in Arabic " all kinds of difficulties which range from inconvenient conditions to harsh conditions which may cause death or damage to some organs." [12]

It is important to make clear that choosing to suffer by doing hard deeds with the purpose of being rewarded in the Hereafter is not an Islamic norm. So deliberately to aim to face hardship in deeds is strongly rejected in Islam. Al-Shāṭibi has pointed out that: it is not up to competent people to inflict on

themselves strenuous and harsh burdens by doing exhausting deeds. But they must aim to perform legitimate deeds in order to be rewarded. [13]

Ibn 'Abd al-Salām has also stressed the same point and said: It is not right to choose hard and tiring deeds in order to be close to God in the Hereafter since the act of worship must be to glorify God and to praise him and onerous deeds are not a glorification or praise of God. [14]

This norm is based on a large number of traditions of the Prophet in which the Prophet has disapproved of inflicting any sort of torture on one's self for the purpose of worshipping God. Some of these traditions are the following :

1- It has been reported that " A group of three men came to the houses of the wives of the Prophet asking how the Prophet worshipped Allah and when they were informed about that, they considered their worship insufficient and said: ' Where are we in relation to the Prophet as his past and future sins have been forgiven ?' Then one of them said: ' I will offer the prayer throughout the night for ever.' The other said: 'I will observe a fast throughout the year and will not break my fast.' The third said: 'I will keep away from women and will not marry forever.' The Prophet came to them and said: 'Are you the same people who said so and so? By Allah, I am more submissive to Allah and more afraid of him than you; yet I observe the fast and also do not observe fast, I do pray and also do sleep, and I also marry women. So he who does not follow my path in religion is not from me (not one of my followers).' " [15]

2- It is narrated that: " Once the Prophet came in and saw a rope hanging between two pillars. He said: ' What is this rope ? '

The people said: ' This rope is for Zainab who , when she feels tired, holds it to keep standing for the prayer.' The Prophet said: ' Do not use it. Remove the rope. You should offer prayer as long as you feel active and when you get tired sit down.' " [16]

3- It has been narrated that: " The Prophet saw an old man holding on to his two sons. The Prophet asked: ' What is the matter with him? ' They said:' he made an oath to walk and not to ride.' The Prophet said: 'God is not in need of him torturing himself.' And he asked him to ride. "[17]

4- In al-Muwaṭṭa' it is reported that " The Messenger of Allah saw a man standing in the sun. The Messenger asked: ' What is wrong with him? ' The people said: ' He has vowed not to speak, not to seek shade from the sun, nor to sit and to fast.' The Messenger of Allah said : ' Go and tell him to speak, seek shade and sit, but let him complete his fast.' " [18]

It has been concluded from these tradition that the obligatory rules of the Sharī'ah, as Muslims see them, are not difficult to perform. In other words, they are within the limit of the ability of a human being.

Having said that, a sort of hardship would inevitably occur before or while doing legal obligations. This sort of hardship was the subject of discussion among Muslim jurists

They have distinguished between two kinds of hardship: usual hardship and unusual hardship. In respect of usual hardship, no rule in Islamic law is devoid of hardship, not to mention Islam itself, with regard to the fact that Islam is against whims so that every Muslim cannot act

according to his own wishes but must act according to Islamic instructions. The commandments of the Sharī'ah entail a commitment from believers to keep themselves from breaching them. Such a commitment demands from the believers efforts to confront their personal wishes that conflict with Islamic commandments; and it is hard to strive against your wishes.[19]

The Sharī'ah has disregarded this kind of hardship because every deed in our life requires effort which, undoubtedly, contains some sort of hardship regardless of its level. Thus, this kind of hardship and our daily life naturally come together; it is unavoidable hardship.[20] Moreover, hardship in lawful conduct varies according to the nature of the deeds and the circumstances surrounding their place and time. Thus hardship is not the same in prayer, fasting, pilgrimage and jihād; also hardship is different from time to time as in the dawn prayer and the noon prayer; or the ablution in the winter time and in the summer time. It is understandable that usual hardship, which does not require mitigation, has been joined with the nature of deeds so it is unacceptable, here, to say that hardship in jihād, for instance, is unusual hardship because the nature of war, at any where and any time, requires fighting which leads, inevitably, to killing or harm .[21]

UNUSUAL HARDSHIP:

Unusual hardship is caused by external factors, it does not come from the nature of rules . This kind of hardship has been divided into three types :

i- Excessive and significant hardship that causes fear of loss of life or damage to some organ; this type results in mitigation and allows the suspension of the legal prohibition.

ii- Light hardship such as a pain in a finger or a modest headache or a bad mood and so on, this type has no consideration in Islamic law.

iii-Intermediate hardship; this type takes account of the two previous rules, if the hardship was nearer to the excessive form, it would be considered as a mitigating factor; and if it was nearer to the easier one, it would not be regarded as a mitigating factor.[22]

It is very important to identify the criterion which determines precisely the type of hardship which causes mitigation. In this regard there are two kinds of hardship :

i- Hardship which has been connected with specific causes, by the texts of the Sharī'ah, insofar as the mitigation would have existed if the cause had existed and vice versa, such as linking mitigation with travel or compulsion or illness as we shall explain that later.

ii- Hardship which has been left by the texts of the Sharī'ah without restriction. About this type of hardship there is no consensus among Islamic jurists in determining the criterion which can confine hardship within an agreed definition . We find some of them have suggested custom ('urf) as a criterion indicating this type of hardship, as Ibn Taymiyyah (d. 728 A.H)

has said " The reference for any thing which has no limitation in the Arabic language or in the Sharī'ah is custom ."[23] But al- Qarāfī (d. 684 A.H.) has criticized the consideration of custom in this matter and has preferred the opinion of Ibn Abd al-Salām which suggested that Islamic jurists have to look at the general rules in Islam and bring the new events under the rule in which the Sharī'ah texts have considered hardship within the same type of act of worship ('ibādāt). For instance, the texts of the Sharī'ah have considered the harm caused by lice as an excuse for a person cutting his hair after entering into the state of ihrām for the hajj. Accordingly, any excuse which may cause hardship in the ihrām is estimated within the limit of the hardship caused by lice; i.e. any harm caused in ihrām that is greater than that caused by lice will give a person an excuse to avoid it but if it is less, there will be no excuse.[24]

With regard to voluntary deeds, it is not acceptable to invent any illegitimate practice which may or may not cause hardship as Imam Mālik (d. 179 A.H) pointed out in his comment on the previous mentioned hadīth [25] and said: The Prophet asked him to continue with what is an act of obedience to God, that is to fast, and the Prophet rejected what he was doing which were acts of disobedience when he asked him not to continue standing in the sun and asked him to speak and sit. [26] It is also disliked to exaggerate in such matters, particularly if such an exaggeration would result in either of the following:[27]

1- Getting bored with the act of worshipping which may result in disliking it or giving it up. This was indicated in the saying of the Prophet:

" Do those deeds which you can do easily, as Allah will not get tired (of giving rewards) till you get bored of performing religious deeds. " [28]

2- Being unable to make a balance between the various rights and obligations. Since competent people are asked to perform numerous obligations, it is not appropriate for someone to exaggerate in praying or fasting and consequently not able to do what he has to do in another aspect of life. This is indicated in the following hadīth which provides that :

" The Prophet made a bond of brotherhood between Salmān and Abū al-Dardā'. Salmān paid a visit to Abū al-Dardā' and found Umm al-Dardā' (the mother of Dardā') dressed in shabby clothes and asked her why she was in that state. She replied : ' Your brother Abū al-Dardā' is not interested in the luxuries of this world.' In the meantime Abū al-Dardā' came and prepared a meal for Salmān. Salmān requested Abū al-Dardā' to eat with him but Abū al-Dārdā' said: 'I am observing a fast.' Salmān said: 'I am not going to eat unless you eat.' So Abū al-Dardā' ate with Salmān. When it was night and a part of the night passed, Abū al-Dardā' got up to offer the voluntary night prayer but Salmān told him to sleep and Abū al-Dardā' slept. After some time he got up again but Salmān told him to sleep. When it was the last hour of the night, Salmān told him to get up then and both of them offered the prayer. Salmān told Abū al-Dardā': ' Your lord has a right on you, your own self has a right on you and your family has a right on you; so you should give the rights of all those who have a right on you.' Abū al-Dardā' came to the Prophet and narrated the whole story. The Prophet said: ' Salmān has spoken the truth.' " [29]

So whenever exaggeration results in getting bored or neglecting an obligation, it is disapproved.

In the same vein, if doing hard and unusual deeds would result in harming one's self, one must not do such a deed as it is reported that:

> " The Prophet was on a journey and saw a crowd of people and a man was being shaded by them. He asked, ' What is the matter with him?.' They said: 'He is observing the fast.' The Prophet said: 'It is not part of righteousness to observe fast on a journey.' " [30]

Similarly if one was in a state where he can not act properly because of a psychological difficulty, he should not act, as is understood from the saying of the Prophet which states that " The judge who is in a state of anger shall not adjudicate."[31] The state of anger and any thing which resembles anger in its effect such as extreme hunger and depression make it hard mentally to concentrate so that the judge would not be able to adjudicate adequately. This hardship is the cause of prohibiting adjudicating in the state of anger.[32]

2- <u>INJURY IS TO BE REPAIRED</u> : (<u>AL-DARAR YUZĀL</u>)

This maxim might also be formulated in the form of the saying of the Prophet which states that " no injury shall be inflicted or reciprocated" (<u>Lā darar wa la dirār</u>).[33] The jurists who used the expression that injury is to be repaired (<u>al-darar yuzāl</u>) [34] have used the foregoing saying of the Prophet as an evidence which supports this maxim, whereas other jurists

who used the saying of the Prophet as a form for the maxim believe that it is more appropriate to use the saying of the Prophet here because it serves as an evidence and a maxim at the same time.[35]

Notwithstanding the fact that this maxim in its two forms aims to disallow any sort of action causing harm, the meaning of the two forms is different, as al-Zarqã' pointed out.[36] The form which states that " no injury shall be inflicted or reciprocated " deals with the prohibition of inflicting injury or paying back the injury, so its prime concern is the act of harm before it had happened. Whereas the form which states that " injury is to be repaired " deals with removing harm after it had become existent, so its primary concern is removing the harm which has already been inflicted.

THE MEANING OF THIS MAXIM:

This maxim is a fundamental maxim which deals with prohibiting and preventing injury. It has three major aspects in this regard:

1- It negates the legitimacy of inflicting injury on any body. Thus, the meaning of la darar , as Ibn al-Athīr explains it, is that nobody shall harm anybody else or take any portion of his rights.[37] This, of course, is qualified by the penal law in which the criminal would endure severe harm since it is legitimate punishment aiming to preclude greater harm from being inflicted on society.[38]

2- It bans any one from returning the injury which has already been received. Ibn al-Athīr (d.606 A.H) has explained the meaning of (wa lā

dirār) and said: No one shall do harm in return to an earlier harm.[39] The aim of prohibiting an injury being reciprocated is to nullify the idea of personal retaliation (tha'r) which is, inevitably, to widen the injury to a greater extent, rather than to reduce it or remove it. Thus, if someone caused damage to another's property, the latter must not take revenge by destroying the property of the first person, since it would cause a wider damage with no benefit for any of the involved parties. Therefore it is wiser and better for the injured party to secure his rights by holding the other party liable for the damage he caused so that he would be obliged to pay compensation to the injured party. However, this is not the case in respect of injuries which are directed against the body, such as killing or causing damage to any part of the body. In such cases the law of qisās must be applied taking into account equality in the case of non-mortal injuries, for such a transgression, from the Islamic point of view, requires a similar and equal punishment (unless the injured party is willing to forgo that).[40]

3- It aims to remove any existing injury since such an injury is a transgression which should not be allowed or inflicted.

This maxim is supported explicitly by the foregoing saying of the Prophet " (la darar wa la dirār) no injury shall be inflicted or reciprocated. " Moreover, it has also been affirmed in many verses and other traditions of the Prophet. Al-Shāṭibī has made it clear that the implication of the previous hadīth is included in another fundamental principle in Islam, namely the prohibition of aggression in its various forms such as the prohibition on violating another's life, property or honour, and

the forbidding of all sorts of oppression and transgression.[41] Such a prohibition has widespread application within the various branches of the Sharī'ah. We shall provide some examples in which injuries were clearly prohibited:

1- The Qur'ān states as to the rights of a divorced woman:

> " Let the women live (in 'iddah) in the same style as ye live according to your means: annoy them not, so as to restrict them " S:65. V: 6.

This ruling is to prevent a selfish man who has divorced his wife from treating her unjustly, and while giving her residence and maintenance, from so restrict them as to make her life miserable.[42] This is forbidden and he must provide for her with the same degree as he provides for himself according to his status in life.

2- In the Qur'ān it says also:

> " But do not take them back to injure them or to take undue advantage. If any one does that, he wrongs his own soul ".
> s:2,v: 231.

This verse tackles the bad custom of the Arabs before the advent of Islam when a husband after divorcing his wife would take her back, not to live with her an equitable life but to inflict on her a great deal of injury by putting her in a situation where she is neither a divorced woman nor a married woman. This is also directed to Muslims, especially in practicing

their rights in divorce when the divorce is revocable before the third time. This prohibition is to prevent and remove injury in this aspect of life.[43]

3- Another verse states:

> " No mother shall be treated unfairly on account of her child, nor father on account of his child. " s:2. v: 233.

This verse requires divorced parents to treat their child fairly and with compassion and not to victimize it because of their disagreement. Al-Qurṭubī commented: "The meaning of this verse is that a mother should not refuse to feed her child unless her husband pays her a high wage, or to ask his father to hire a wet-nurse when he cannot afford it. And the father should not prevent the mother from feeding her child when she wants to."[44]

4- It has been stated in the Qur'ān:

> " To those weak of understanding make not over your property " s:4. v:5.

The implication of this verse is to avoid the financial injury which is anticipated in the case of a person who is mentally incapable of dealing with his property. Anyone who has a limited mental capacity should be prevented from controlling his property so as to keep such property from being wasted, and it should be held in trust with an honest guardian. Such a measure is for the benefit of a person who is incapable.[45]

5- As to the Traditions of the Prophet, it was reported:

> " A man had a tree in the land of someone else. The owner of the land was annoyed at the frequent visits and intrusions of the owner of the tree. He subsequently raised the matter before the Prophet. The Prophet asked the owner of the tree to take another tree nearer to his orchard instead of this tree. The man refused. The Prophet asked him to sell it to the landlord, but he refused again. Then the Prophet asked him to give it to the landlord and he refused that too. Then the Prophet said: ' What you are doing is to harm him.' So he asked the owner of the land to give him another tree."[46]

All the previous cases and many others have been legislated to prevent harm from being inflicted even on a very small scale, which confirms, as al-Shaṭibī noticed, that preventing and removing injury is a fundamental principle in Islamic law.

Al-Siyūṭī and Ibn Nujaym believe that countless legal subjects are built on this maxim such as the cancellation of a contract due to a defect in the subject matter of the contract, all the varieties of options in contract of sale (khiyār), the different types of limitation on someone's legal competence (hajr), preemption (shuf'ah), legitimate defence and many other legal rulings.[47]

We shall provide here some examples in detail which further illustrate the character of this maxim :

1- If someone rented his land to someone else to cultivate and the period of the lease was over before the harvest was due, he is obliged to wait until the tenant has harvested his produce, and he has no right to ask the tenant to terminate the contract and to leave the land. However, he is entitled to rent according to the current price. This is to prevent harm from being inflicted on the tenant if he was forced to leave the land before he could harvest his crop.[48]

2- Jurists of various schools have validated the interdiction on the ignorant physician, irresponsible muftī and bankrupt travel agent on the grounds of preventing harm to the people. In these examples, the harm which is being prevented is a general harm affecting people in general and not confined to a particular person. So harm should be removed whether it is private or general.[49]

3- If someone concluded a contract of sale and the subject matter was something which could not be preserved for a long time, such as fresh fruit, without being ruined, the vendor has the right to cancel the contract if the buyer disappears without paying the price and he fears that his product would be spoiled.[50]

4- In the case of someone who has designed an egress from his home through which the water pours out to a passage where people pass so that they would be affected by such a spout, he would be asked to adjust it or remove it if necessary.[51]

In a similar vein, if the branches of a tree cause a problem to someone's neighbor, they should be removed. Moreover, if someone has a window which overlooks his neighbours' private place so they can not move freely, he should alter or remove such a window.[52]

These instances affirm that the conduct of an individual with regard to his own possessions is permissible as long as he does not harm someone else.

This maxim has been qualified by the maxim which states that " an injury cannot be removed by the commission of a similar injury nor, a fortion, by a greater injury." It is not allowed, for instance, for a person who is compelled by starvation to take the food of another facing the same problem, since he would remove his injury by causing the same injury to another.

Similarly, if someone was being forced to kill another, he is not allowed to do so, regardless of the extent of the compulsion, since his life is equal to the life of others and it is not preferred to another's life.[53]

In the realm of transactions, if the object of the contract of sale was discovered later to be defective, but, in addition, having left the possession of the seller, a new defect occurred while it was in the possession of the buyer, the buyer is not entitled to the option based on defect (khiyār al-'ayb), which allows him to return the commodity to the seller and take his money back. This is due to the fact that new defect would be harmful to the seller if he was obliged to take his commodity back. The solution is to take due compensation from the seller vis-à-vis the old defect, which would be

the difference between the value of the object when it was intact and its value when it was defective with the old defect.[54]

The maxim which states that " A private injury is to be endured to avoid a general injury " is a qualification to the foregoing maxim which states that " injury cannot be removed by the commission of a similar injury." [55]

3- NECESSITY PERMITS PROHIBITED THINGS (AL-DARŪRĀT TUBIH AL-MAHZŪRĀT):

This is the central maxim of this study. Therefore here we shall neither explain the meaning of necessity nor provide evidence to supports the legal consideration of this maxim, nor we shall give examples since all these points are discussed extensively throughout this thesis. We shall instead concentrate here on the meaning of the permissibility of prohibited things.

This maxim has a strong link with the two previous fundamental maxims, namely " hardship begets facility " and " injury is to be repaired." Thus, we find that some jurists have regarded it as subordinate to the first one and have held that since it explicitly allows making a concession because of the state of necessity and it gives permission to ease hardship, it should, therefore, be subordinate to the maxim that deals with all the varieties of concessions and mitigation, that is " hardship begets facility. " [56] On the other hand other jurists made it subordinate to the latter, holding that the maxim of necessity aims to preclude an injury from being inflicted where a

necessity existed. Thus it is included in the maxim which deals with removing injury in its broad sense, that is " injury is to be repaired."[57]

The reality is that whether it follows one or the other, it makes no difference since it is a matter of form.

This maxim states clearly that any prohibited matter is to be permitted during a state of necessity. However, this is not an absolute principle but has been qualified by some cases where necessity has no effect.[58] The effect of necessity on prohibited things can be divided into three types:

Firstly: A concession which suggests the permissibility of prohibited things as long as the state of necessity is existent, such as what might be eaten or drunk in starvation or extreme thirst or under compulsion, such as the flesh of a dead animal or the meat of swine or an intoxicant drink. Such things are permissible in the state of necessity as stated in the Qur'ān " except under compulsion of necessity ". s:6- v:119.[59]

Secondly: A concession which has no effect on the prohibition of deeds but helps in removing blame or moral guilt (ithm) from being attached to the doer. An example of this is the saying of the word of disbelief or causing damage to the property of others under complete compulsion. Such acts remain prohibited acts in the time of necessity. However, the effect of necessity is only to free the doer from being treated as culpable.[60]

Thirdly: Deeds which are not susceptible to concession. Thus, necessity has no effect on the criminal act of killing or injuring any part of the body. A compelled person is not allowed under a threat of any sort to kill or injure anybody. As was explained previously, it is not allowed for a group on a boat to save themselves by throwing some of them into the sea in order to prevent the boat from sinking.[61]

4- NECESSITY IS ESTIMATED BY THE EXTENT THEREOF (AL-DARŪRAH TUQADDAR BI QADRIHĀ):

This maxim means that where necessity permits prohibited things, its rules should be treated as exceptional rules that are limited to the period and the degree of an existing necessity. Thus, any licence that may be regarded as necessary should not be absolute but should be to the extent required to meet the hardship.[62]

Such a meaning has been reaffirmed in other maxims such as the maxim which provides that " whatever becomes permissible owing to some valid excuse ceases to be so with the disappearance of that excuse. "[63] It should be noticed, here, that this maxim covers all varieties of concession (rukhsah) whether it is due to a state of necessity or otherwise. Moreover, it emphasizes the limit of time in which the exceptional rule operates, i.e. as long as necessity is existent, and it must cease as soon as the urgency is no longer existent.[64]

Similarly, the maxim which states that " injury is to be removed as far as possible " states that injury should be prevented from being inflicted and it should be removed if it had been inflicted by the least means available; in other words, by using the lesser of two available means. If one is able to defend one's life, for instance, by pushing the aggressor using a stick, then one should not use a gun in defending oneself.[65]

The general meaning of these maxims has been supported by the Qur'ānic verse which states that:

> " But if one is forced by necessity, without wilful disobedience nor transgressing due limits, then one is without guilt ". s:2. v:173.

The Arabic expression for " without disobedience nor transgressing limits " is (ghayr bāghī wa la 'ādin) which has been interpreted as follows:

Allowing oneself to eat from prohibited things more than is necessary. And eating from what has been prohibited when he is able to find something lawful to eat.
Or having a desire and inclination to eat from what has been prohibited. And to overstep the limit by eating excessively from prohibited things.[66]

Necessity according to this interpretation must be confined to its limits. It should be borne in mind that the dispensation which is being made vis-à-vis the state of necessity is to remove the hardship caused by such a situation. Thus it is not a free licence. For example, if the theft of a loaf of bread be

tolerated on a plea of extreme hunger, the theft of one ton of flour would not be so under any circumstances.[67]

5- NECESSITY DOES NOT INVALIDATE THE RIGHTS OF OTHERS (AL-DARŪRAH LA TUBĪḤ HAQQ AL-GHAYR):

Although a state of necessity renders prohibited things permissible, it does not override the rights of others.[68] Thus, if someone was forced, by an internal necessity such as starvation or by an external necessity such as compulsion, to infringe another person's property, such a person may not be legally blamed or punished. However, he should compensate the injured party for his loss. So necessity is a justification for committing an illegal act but it does not justify wasting the property of others without being responsible for making restitution. If no guarantee of restitution was imposed in such a situation, then the result would be removing an injury by the commission of a similar injury which is not acceptable.[69]

The basis for such a maxim is the saying of the Prophet: " It is unlawful to take the property of a Muslim without his express consent ", which indicates that compensation is required for damaging anyone's property except in the case where the owner of the property has shown his consent.[70]

As a corollary, it should be noticed that the owner of property who is not in dire need of that property, i.e. food, is obliged in Islamic law to give it to

anyone who is in extreme need for it to save his life. In other words, refraining from providing a compelled person with what he desperately needs is an offensive act contradicted clearly by the Qur'ānic command in this verse:

> " Help ye one another in righteousness and piety, but help ye not one another in sin and transgression ". s:5. v: 3.[71]

In addition, a compelled person has the right to use force in order to save his life if the owner of the property refused to provide him with what he needed, whether it was food, shelter or otherwise.[72] In this circumstance, certain conditions must be met before force can be justified:

1- There should be a refusal by the owner to give his property to the compelled person for the current market price or for free.

2- Taking such property should immediately ward off the necessity; as in the case of food to be eaten or shelter for protection from freezing weather. So it is not acceptable for a compelled person to take property with the intention of selling it in order to buy food, since there is no urgent necessity in such situation.

3- The owner of the property must not be in a similar situation. If this was the case, he is more entitled to his property than anybody else.[73]

Furthermore, anyone who was compelled to take the property of others because of extreme hunger is bound, according to this maxim, to pay its value to the owner. This view was held by the majority of jurists. Some

jurists have distinguished, in this regard, between a poor person who cannot afford to pay the value and a person who is able to pay it. They have held the latter liable to pay compensation but not the first. [74]

Ibn al-Qayyim (d. 751 A.H) has held that such a person in such a situation is not liable to pay compensation, for it is the duty of Muslims to preserve such a person's life and to provide help and comfort in such circumstances where altruism should be shown. [75]

In the case of killing an attacking animal in self defence, the Ḥanafī school requires, according to this maxim, that the killer pay compensation. [76] The other schools, however, disagree with this decision holding that no compensation need be paid because it is self-defence. [77] This is in accordance with another maxim mentioned by Ibn Rajab (d. 895 A.H) which states that " A person who destroys property to prevent an impending injury which might have resulted from that property is not liable to pay compensation. But if he destroys it while using it to prevent an injury from elsewhere, then he is obliged to pay compensation. " [78] According to this maxim a person who kills an attacking animal in self-defence is not liable to pay any sort of compensation, yet a person who kills an animal to ward off extreme hunger is bound to compensate the owner of that animal. [79]

In a situation where the crew of a ship threw the passengers' property into the sea to avoid sinking, the crew should guarantee the restitution of the value of such property. [80] However, al-Qarāfī has opined that compensation should be borne by all the people who were on board because such an action

was necessary to save the lives of all the people on board and was not for the benefit of a particular individual. [81]

6-THE LESSER OF TWO EVILS IS PREFERRED (YUKHTĀRU AHWANU AL-SHARRAYN): [82]

This maxim has different forms yet they have the same meaning. It may be formulated as "In the presence of two evils the one whose injury is greater is avoided by the commission of the lesser. " [83] And it might also be formulated as " severe injury is removed by lesser injury." [84] The meanings of these maxims are identical; that is, if a Muslim was forced to commit either of two actions which are prohibited, he should choose to commit the lesser one, since committing a prohibited act is not allowed except in the case of necessity, and there is no necessity in committing the greater injury as it is conceivable to minimize injury by committing the lesser one. [85]

This maxim stems originally from the well-known principle which refers to securing interests and repelling injuries that sums up the objectives of the Sharī'ah as a whole. Ibn Taymiyyah has explained such a principle and said " If injuries or benefits were in conflict, then we should incline toward the best for us. So if a command or a prohibition that is to secure benefit and to prevent injury respectively was opposed by a similar benefit or a similar injury, then the one which secures more benefits must be upheld as well as

the one which has lesser injuries. Nevertheless, the criterion of deciding the type and the degree of benefit and injury is the Sharī'ah itself. So whenever a Muslim is able to apply the text of the Sharī'ah, he is not allowed to disregard it, otherwise he is entitled to rely on his opinion to draw an analogy between similar cases. "[86] Ibn 'Abd Al-Salām also further explained " If injuries and benefits come together, we have to secure benefits and repel injuries inasmuch as possible according to the Qur'ānic verse that says ' So fear God as much as you can ' S:64. v:16. However, if securing benefit and repelling injury is hard to implement then repelling injury should be given precedence over securing benefit. In other words, securing benefit would be disregarded in order to repel an injury. " [87]

The notion of committing the lesser of two evils has been established clearly in the following verse

> " They ask thee concerning fighting in the prohibited month. Say fighting therein is a grave offence; but graver is it in the sight of God to prevent access to the path of God, to deny him, to prevent access to the sacred Mosque and drive out its members. Tumult and oppression are worse than slaughter " s:2. v:217.

This verse is to refute the claim of the pagans in Mecca that Muslims have violated the sacredness of the prohibited month by allowing themselves to fight in it. It explains that such a violation, which is an offence, is not as grave as what the pagans were doing, such as persecuting Muslims and their families, openly insulting and denying God, keeping out the Muslims from the sacred Mosque and exiling them. Such violence and intolerance are

deservedly deemed worse than slaughter. Thus, doing all that in the sacred month is worse than merely fighting in it which Muslims have to do so that they can defend themselves. In other words, Muslims have chosen the lesser of two evils, which is fighting in the sacred month, rather than being subjected to all types of persecution which might result in one becoming an unbeliever again.[88]

7- NEED, WHETHER PUBLIC OR PRIVATE, SHOULD BE TREATED AS A CASE OF NECESSITY (AL-ḤAJAH TUNAZZAL MANZILAT AL-DARŪRAH 'ĀMMATAN KĀNAT AW KHAṢṢAH):

Islamic jurists have distinguished between necessity and need. It has been held that necessity is a state where one must commit an illegal act otherwise one is in danger of losing one's life or any thing related to the five necessary benefits (darūriyyāt) on which the lives of people depend and whose neglect leads to total disruption and chaos. On the other hand, need is a state where one's life is not threatened but one would face hardship and inconvenience. [89]

What is meant by public need is the situation in which the whole community faces some sort of hardship due to certain social benefits being neglected.

What is meant by private need is the situation where the interests of certain groups such as carpenters, physicians, etc. are being disregarded or unsatisfied.[90]

Such a maxim does not deal with the need of individuals since it is inconceivable to tackle everybody's need, because such needs are subject to change and variety and it is impossible to enact rulings according to every individual's need.[91]

This maxim means that legally exceptional rulings are not confined to compelling necessity but are extended to needs of the community as well. Such needs require exceptional rulings to mitigate the hardship.

To illustrate this maxim we shall provide a few examples:

There are certain types of transactions which are exempted from the general rulings by the texts of the Sharī'ah in order to fulfil an urgent need of the society such as :

The validity of the contract of salam which involves selling a non-existent article which is generally prohibited by the Sharī'ah. However, selling a non-existent article for an advanced price is permitted by the Sharī'ah in order to meet the need of many people, particularly peasants, to have money before the harvest of their crops is due. Thus it was narrated that " the Prophet forbade the sale of an object which does not exist at the time of sale but permitted salam as an exception "[92]

The sale of 'āriyyah which is the sale of dates on the palm tree for their equivalent in dry dates was permitted despite the fact that it is in conflict with the rules of excess usury (ribā al-fadl). However, such a transaction

was permitted in response to the people's need to have fresh dates. It was narrated that " The Prophet permitted the sale of 'arāyā ".[93]

The contract for the manufacture of goods (istiṣnā')is allowed due to the need of people for such a transaction, and this is despite its being the sale of a non-existent article, for it is an order to a craftsman for certain goods to be made at a price which is determined at the time of the contract.[94]

Using public baths has been accepted despite the fact that there is no certain knowledge of how long the user is going to stay and how much water he is going to consume. However, it was allowed because of the need of the people.[95]

According to the Ḥanafī school, the sale of real property with the right of redemption (bay' bi al-wafā') is allowed. This was well-known in areas like Bukhārā and it was based on the need for such a transaction to avoid dealing with usury and to avoid the irrevocable sale of land.[96]

The distinction between necessity and need:

There are some differences between necessity and need which can be summarized as follows:

1- Necessity permits prohibited matters, whether they affect individuals or the community as a whole. On the other hand, need only permits prohibited matters that relate to the community or to particular groups such as physicians, etc. The need of each individual is not counted in this regard

since such needs vary and change from one individual to another and it is inconceivable to change the law according to the changing need of every individual. [97]

2- A state of necessity would result in permitting a forbidden act as an exceptional ruling. Such permission would cease to exist with the disappearance of the state of necessity and is confined to the compelled person alone, no one else having the privilege that has been given to the compelled person. However, need would result in most cases in permanent permissibility and is not confined to the people in need but is granted to the community as a whole.[98]

3- Necessity normally conflicts with an explicit text that prohibits certain matters, whereas need is in conflict with general rules or with analogy. Therefore, necessity would justify, for instance, taking the property of others but need would not. In this regard, al-Shafi'ī has stated clearly that " need does not allow anybody to take the property of others ". [99] Accordingly, we notice jurists on some occasions saying that need does not permit prohibited matters, which means need does not have a preference over the explicit text as in the case in necessity. [100]

Ibn al-Qayyim held the view that a matter prohibited as a preventive measure (sadd al-dharā'i') would be allowed in case of need. He cited some examples such as the contract of 'arāyā. Accordingly, he thought that the sale of golden ornaments for a heavier weight of unbeaten gold is permissible since most people need such a transaction and there is no point in

binding them to sell it for its equivalent weight since beaten gold has the advantage of being formed as an article in a special form by special skill needed by people. And the prohibition of excessive usury was to prevent the means of the sale of the same species on credit (ribā al-nasā').[101]

Similarly, Ibn Taymiyyah has criticized the majority of jurists who have prohibited the lease of land which contains fruit trees such as palm , orange etc., because such a contract contains two transactions, planting barren land and watering the existing trees, and in the latter there is a great deal of risk which is the sale of fruit before it exists. So they allow only the lease of land without such trees, or land which contains only a small number of trees.[102]

Ibn Taymiyyah thought forbidding such a transaction caused great deal of difficulty and hardship to the community. Some people, consequently, have used illegal tricks (hiyal ghayr shar'iyyah) to overcome such hardship. Some have resorted to such a contract due to their exigencies although they believed it was illegal . Others have avoided dealing with such transactions despite sustaining a great deal of injury. He thought that although it would be permissible for several people never to resort to such transactions, it would be impossible for the community as a whole to avoid such dealing without suffering a great loss which would never be accepted by the Sharī'ah. Thus such a prohibition causes corruption that would not be accepted in Islam. Nothing needed by the community in their daily life be forbidden except if it was created originally as a result of an act of disobedience. It should be noticed here that Ibn Taymiyyah in his rejection of such an opinion has based his opinion on several Traditions of the Prophet

and the Companions and this indicates that legislation according to need should be supported by legal evidences. [103]

1- al-Subkī, al-Ashbāh wa al-naẓā'ir, vol.1, P.11

Ghamz, vol.1, p. 51.

2- Ibid, vol.1, p. 51.

3- It has been noticed that in the time of the companions, their successors and the generation after them, many juristic maxims had been used and known such as the maxim which was introduced by Abū Yusuf (d. 181 A.H) in his book (al-Kharāj) which says " A ruler is not entitled to appropriate any property of any one except by a well-known and legitimate right ". In al-Umm by Imām al-Shāfi'ī many maxims have been found such as " In the case of necessity, what cannot be allowed in other situations may be allowed ". However, the first one to collect them was al- Karkhī (d. 340 A.H) then Abū Zayd al - Dabūsī (d. 432 A.H) in his book " Ta'sīs al-naẓar " which has been followed by a large number of treatises in the subject by scholars from all the jurisic schools.

See: Nadawī, pp. 79 to 230.

4- Durar, vol.1, p. 10.

Nadawī, p. 293.

al-Zarqā', Madkhal, vol.2, p. 949.

5- Muwāfaqāt , vol.2 , pp.136- 56.

Ashbāh , p. 55.

Nazā'ir, p. 84.

Manthūr , vol.3, p.170.

6- Muwāfaqāt, vol.2, p.119.

Qawā'id, p.192.

7- This hadīth was reported by Abū Hurayrah in Sahīh al-Bukhārī, Chapter of (religion is very easy) vol.1, hadīth no: 38.

8- Aḥmad ibn Ḥanbal, Musnad Aḥmad ibn Ḥanbal, vol.5, p. 479.

9- al-Bukhārī, Sahīh al-Bukhārī, Chapter of (the good righteous deed loved by Allah is that which is done regularly), vol. 1, hadīth no: 41.

10- Aḥmad ibn Ḥanbal, Musnad Aḥmad ibn Ḥanbal, musnad ibn 'Abbās, vol.5, p. 69.

11- Ashbāh, p. 55.

Nazā'ir, p.84.

Nadawī, p.265

Qawā'id , p.105.

Falsafat, p.153.

Durar, vol.1, p. 35.

12- Muwāfaqāt, vol. 2, P.119.

13- Ibid, vol. 2, p. 129.

14- Qawā'id , p. 30.

15- This hadīth was reported by Anas ibn Mālik in Sahīh al-Bukhārī, (chapter of wedlock : Kitāb al-nikāh), vol.7, hadīth no : 1.

16- This hadīth was reported by Anas ibn Mālik in Sahīh al-Bukhārī, (chapter of: It is disliked to exaggerate in matters of worship), vol. 2, ḥadīth no: 251.

17- This hadīth was reported by Anas ibn Mālik in Sahīh al-Bukhārī, vol.3, hadīth no: 88.

18- It was Reported by Ḥumayd ibn Qays and Thawr ibn Zayd in al-Muwatta', 22.4.6.

19- I'lām, vol. 2, p. 131 .

20- Qawā'id , vol. 2, p. 193.

21- Ibid, vol. 2, p. 194.

22- Ibid,vol.2, pp.193-94 .

Furūq, vol.1, pp. 118-9.

Ashbāh, pp. 58 -9.

Nazā'ir, pp.90 -1.

23- Fatāwā - vol. 24, p. 40 .

24- Furūq, vol.1, p. 120.

Ashbāh, p.58.

Qawā'id, pp. 198 -9 .

25- See P. 36. This covers the Prophet's attitude to the man who was adding greater difficulties to his fast by not seeking shade from the sun, not sitting and not t speaking.

26- Muwāfaqāt, vol.2, p. 133

27- Ibid, p. 136.

28- It was reported by 'Ā'ishah in Sahīh al-Bukhārī, vol.1, hadīth no:41.

29- It was reported by Abū Juḥayfah in Sahīh al-Bukhārī, (chapter of : If someone forces his Muslim brother to break his fast by swearing), vol.3, hadīth no: 189.

30- It was reported by Jabir ibn 'Abd Allah in Sahīh al-Bukhārī, vol.3, p. 167.

31- It was reported by 'Abd al-Raḥmān ibn Bakrān in Sunan Abū Dawūd, vol.3, ḥadīth no: 3582.

32-Muwāfaqāt, vol.2, p. 141.

33- Madkhal, vol.2, p. 977.

Durar, vol.1, p.36.

Wajīz, p. 192.

34- Ashbāh, p.59.

Nazā'ir, p. 94.

Nadawī, p. 252.

35-Wajīz, p.192.

36- Zarqā', p.114.

37- Ibn al-'Athīr, al-Nihāyah fi gharīb al-ḥadīth, vol-3, p. 81.

38- Jāmi', p. 267.

Durar, vol.1, P. 36.

Madkhal, vol.2, P. 978.

39- Ibn al-'Athīr, al-Nihāyah fi gharīb al-Ḥadīth vol.3, p. 81.

40-Madkhal, vol.2, pp. 978-9

Durar, vol.1, p.37.

41-Muwāfaqāt, vol.3, pp. 9-10.

42- Jami', vol.3 , p. 156.

43- Ibid, vol.3 , p. 156.

44-Ibid, vol.3 , p.167.

Ibn Kathīr, vol. 1, p. 503.

45- Ibid, vol. 2, p. 203.

Tafsīr, vol.9, P.183.

46- It was reported by Jābir ibn Samurah in Sunan Abū Dāwūd, vol.3, ḥadīth no: 3629. And see different versions of this ḥadīth in Ibn Rajab, al-'Ulūm, p. 270.

47- Nazā'ir, P. 94.

Ashbāh, P. 60.

48- Mudkhal, vo.2 , P. 979.

Wajīz, p. 169.

49- Zayla'ī, vol.5, p.193

Nazā'ir, P. 96.

Durar, vol.1,p. 40.

50- Mudkhal, vo.2 , P. 979-80

51- Ibid, p. 982

52- Durar, vol.1, p. 37.

53- Nazā'ir, p. 96.

Ashbāh, p. 61.

Durar, vol.1, p. 40.

54- Mudkhal, vo.2 , P. 983.

55- Durar, vol.1, p. 40.

56- Wajīz, p. 175.

Zarqā', p. 131.

Mudkhal, vo.2 , p. 995.

57- Nazā'ir, p. 94.

Ashbāh, p. 60.

58- Durar, vol.1, p. 38.

59- Nazā'ir, p. 94.

Ashbāh, p. 60.

Wajīz, p. 176.

60- Wajīz, p. 176.

Durar, vol.1, p. 38.

61- Ashbāh, p. 60.

Nazā'ir, p.95.

Mudkhal, vo.2 , p.995

Wajīz, p.177.

Durar, vol.1, p. 38.

62- Manthūr, vol.2, p. 320

Ashbāh, p. 60.

Nazā'ir, p.95.

Durar, vol.1, p. 38.

Zarqā', p. 133.

63- Nazā'ir, p. 95.

Durar, vol.1, p. 39.

Zarqā', p. 135.

64- Zarqā', p. 135.

65- Durar, vol.1, p. 42.

66- Jāmi', vol.2, p.124.

Aḥkām, vol.1, p. 57.

al-Sāyis, Tafsīr āyāt al-aḥkām, vol.1, p. 42.

67- Ashbāh, p. 60.

Naẓā'ir, p. 95.

Durar, vol.1, p. 38.

Falsafat, p. 12.

68- Manthūr, vol.2, p. 331.

Ibn Rajab, p. 36.

Ibn 'Ābdīn, al-Dur al-mukhtār, vol. 6, p. 338.

Muḥtāj, vol.4, p. 308.

Mawāhib, vol.3, p. 234.

Furūq, vol.1, p. 196.

Durar, vol.1, p. 42.

Zarqā', p. 159.

Mudkhal, vo.2 , p. 996.

69- Wajīz, pp. 185-86.

Durar, vol.1, p. 43.

Zarqā', p. 159.

70- Furūq, vol. 1, p. 195.

71- Mughnī, vol.8 , p. 601.

Majmū',vol.9, p.37.

72- Mughnī, vol.8, p. 602.

Majmū',vol.9, p.43.

Kabīr, vol.2, p. 116.

Ashbāh, p. 61.

'Awdah, vol.1, p. 579.

73- Darūrah, p. 67.

'Awdah., vol.1, pp. 578-79.

74- Hāshiyah,vol.2, p. 126.

Darūrah, p. 65.

75- I'lām ,vol.3, p.23

76- Zayla'ī, vol.6, p. 110.

Durar, vol.1, p. 43.

Zarqā', p. 159.

77- Mawāhib, vol.6, p. 323.

Furūq, vol. 4, P. 185.

Muhtāj, vol.4, p. 21.

Manthūr, vol.2, p. 329.

78- Ibn Rajab, p. 36.

79- Manthūr, vol.2, p. 329.

Ibn Rajab, p. 36.

80- Ibn Rajab, p. 36.

81- Furūq, vol. 4, p. 8.

82- Durar, vol.1, p. 41.

83- Nazā'ir, p.98.

Ashbāh, p. 62.

84- Durar, vol.1, p. 40.

85- Nazā'ir, p.98.

Nadawī, pp. 350-51.

Wajīz, p. 203.

86- Fatāwā, vol.28, p.129.

87- Qawā'id, vol.2, p.74.

88- Ahkām , vol.1, p.147.

al-Sāyis, Tafsīr āyāt al-ahkām, vol.1, p. 117.

Nadawī, p. 277.

89- Ashbāh, pp. 61-2.

Nazā'ir, p.100.

Durar, vol.1, pp. 38- 42.

Zarqā', p. 155.

Madkhal, vol.2 , p. 997.

90- Madkhal, vol.2 , p.997.

91- Ibid vol.2 , p. 999.

92- Nazā'ir, p.100.

Durar, vol.1, p.42.

Madkhal, vol. 2 , p. 998.

93- Wahbah, p. 264.

94- Nazā'ir, p. 100.

Durar, vol.1, p.42.

Zarqā', p. 157.

95- Nazā'ir, p.100.

Durar, vol.1, p. 42.

Madkhal, vol. 2 , p. 998.

Zarqā', p. 157.

96-Nazā'ir, p.100.

Durar, vol.1, p.42.

97-Madkhal, vol.2 , p.998.

98- Ibid, vol-2 , p.998.

Wahbah, p. 274.

99- al-Shafi'ī, al-Umm,vol.2, p.77.

Nadawī, p. 92.

100- Madkhal, vol.2 , p.999.

101- I'lām, vol.2, p.142.

102- Naūrāniyah, pp. 159-165.

103- Ibid, pp. 164-165.

CHAPTER THREE

CAUSES OF NECESSITY [1]

1- COMPULSION

A. DEFINITION OF COMPULSION IN ISLAMIC LAW:

Compulsion has been defined as follows: Forcing a person to act or to say something without his consent and against his freedom of choice, meaning that he would not do such an act if he was left alone.[2]

There are other attempts to define compulsion more precisely,[3] yet there is no uniform legal definition of compulsion; suffice it here to mention the elements which have been intended to be included in the definition of compulsion :

1- THE USE OF FORCE BY THE COMPELLER : The jurists mean by force the ability of the compeller to create a considerable fear in the mind of the compelled and the ability to execute his threat. It is not stipulated, however, that the compeller should have started actually executing his threat.[4] Such a state of fear can be created by the threat of death, damage to limb, excessive or light beating which causes grave injury or a long time of imprisonment in bad conditions. Islamic jurists disputed among themselves whether certain types of threats could cause a state of compulsion or not. For example, most jurists held that an act of public humiliation like a slap on

the face for a respected figure could be compulsion.[5] Muslim jurists also debated the threat of harm to a third party particularly if it was directed to relatives. [6] Additionally, in certain situations, a threat can exist without an explicit warning being uttered; it can be in a form of an order from those who are in authority as al-Sarakhsī explains " It is the habit of the oppressors, because of their arrogance, not to explicitly threaten to kill people. But in reality they issue orders, and then if they are not obeyed, they always punish by death those who disobey them. Therefore, if this is common practice, then a simple order might be considered an explicit threat...".[7] As to whether every act would allow the compelled to give in to the threat will be explained later.

2- THE ACT OF THE COMPELLED: It includes verbal acts such as recognition of rights or confession of guilt, and physical acts, such as killing, or destruction of property or signing a contract etc. [8] In another respect, the act of the compelled should be proportional to the threat of the compeller. In other words, the compelled cannot commit more damage than the situation requires, and he is held liable for excessive behaviour or over-reaction. Moreover, the compelled cannot commit a greater harm to avoid a lesser harm; he has to choose the lesser of the evils he encounters. Al-Sarakhsī (d. 490 A. H) explained such a principle " And if it is said: ' an ill-treated person has a right to resist injustice in whatever way he can', we say: ' yes, but an unjustly treated person cannot commit injustice against others '.." [9]

3- UNJUST COMPULSION: This element has been mentioned to distinguish between two kinds of compulsion: The legitimate, which is usually imposed by the authorities, and illegitimate compulsion[10].Thus the following cases, for instance, have not been considered as compulsion since they are legitimate compulsion:

i - If a judge forces the debtor to sell his possessions to pay back the creditor.

ii - If a judge forces the mortgagee to sell the mortgage .

iii - If a judge forces the husband to divorce his wife in case of his sexual inadequacy.[11]

4-WITHOUT CONSENT: Jurists mean by consent carrying out an act while one is satisfied with one's decision. Such an acceptance and satisfaction, nevertheless, is often absent even without duress or with minimal duress such as in the case of a person who might not be happy with his decision to divorce his beautiful wife but he does it because he thinks it is necessary. Therefore, any amount of compulsion is liable to negate consent.[12]

5- WITHOUT CHOICE: Jurists mean by choice the process of preferring doing something to not doing it or vice versa. So the compelled, who was forced to destroy the property of others otherwise he would be killed, would practice a kind of choice when he chose the act of destruction, but it is an invalid choice (ikhtiyār fāsid) because one can choose to die, for example, whether one is happy with the decision or not. But, if the compulsion is powerful enough then the choice, although is present, is spoiled. Although

choice always exists even if compulsion present, only serious compulsion will vitiate choice. [13]

The distinction between consent and choice is the view of the Ḥanafī school whereas the other schools do not differentiate between them.[14]

B. THE CONDITIONS FOR THE CONSIDERATION OF COMPULSION:

1- The compeller must be able to execute his threat. For no compulsion in reality exists if the threatening person is unable to carry out his threat.
2- The compelled must be aware of the fact that the compeller is likely to execute his threat if he does not do what has been demanded.
3- The threat must be compelling, namely that which would result in killing or damaging an organ or causing great harm. In this regard, the lesser of two evils should be committed.
4- There must not be any way, other than submission to the threat, which may help to avoid the threat. [15]

D. TYPES OF COMPULSION:

Islamic jurists have taken two methods to examine the types of compulsion:

Firstly , they have talked about the classification of compulsion according to its strength.

Secondly, they have talked about the different rules governing compelled deeds.

In respect of the first classification, compulsion has been divided into two types according to the Ḥanafī school: a complete compulsion and an incomplete compulsion. [16] They mean by complete compulsion forcing a person to do something by threatening him with death or damage to one of his limbs or severe assault, so that he cannot escape from doing what he has been told to, namely he would choose to act according to the will of the compeller. However, such a choice remains an invalid choice. [17]

The incomplete compulsion has been expounded by the Ḥanafī school as the threat which would not cause loss of life or damage to one of the limbs such as the threat of being put in custody or of a light beating. [18]

Since the compelled is affected by the condition of his relatives, especially his parents and his children, some Ḥanafī jurists have attached the threat of harming one of the relatives such as father, mother etc., to the incomplete compulsion. This type is against the consent of the compelled but it does not vitiate the compelled's choice as he would be physically able to bear the consequences of the threat. [19]

In spite of the fact that the other schools have divided compulsion into two types taking the foregoing names, namely complete and incomplete compulsion, they have defined them in different ways. They mean by " complete ", the situation which will not be avoided in any case whatsoever.

For instance, if some one was pushed down from a high place to fall on another person . Or taking someone's thumb print by force as a sign of agreement to a contract etc., Or tying up a woman to be raped.[20]

It is clear that the compelled in this type of compulsion has no consent and no choice whatsoever to accept or not the consequence of the compulsion. So all Islamic jurists agree that the full responsibility is on the compeller.

Incomplete compulsion has been explained as follows: the condition which would not be avoided unless the compelled chose to bear what has been threatened. This type includes the threat of killing or damaging limbs or putting in custody, etc. [21]

It is obvious that the two types of compulsion which have been given by the Ḥanafī school are included in the incomplete compulsion type according to the classification of the majority of the 'ulamā'.

In order to determine the validity of the conduct of the compelled, Islamic jurists have held another classification that attempts to make clear the effect of compulsion on conduct. According to them, there are two types of conduct: verbal conduct and physical conduct. [22].

The majority of the jurists have held the opinion that all the verbal conduct of the compelled is null and void since it requires consent to be taken as effective and there is no consent for the compelled party. So, whether the

compulsion is complete or incomplete, there are no legitimate effects for the verbal conduct of the compelled. Ibn al-Qayyim (d. 751 A.H) stressed this point by saying ' whoever noticed carefully the Sharī'ah evidences, would recognize that the Sharī'ah has cancelled all utterances when the speaker does not intend their actual meaning since they come out without his intention as when asleep, forgetful, drunk, ignorant, compelled or mistaken.' [23]

The following verse has been used as an evidence of the foregoing rule :

> " Any one who, after accepting faith in God, utters unbelief, except under compulsion, his heart remaining firm in faith , but such as open their breast to unbelief, on them is wrath from God, and theirs will be a dreadful penalty " S:6, v:106.

Al-Qurṭubī comments in this regard and explains that if God allows saying the word of unbelief under compulsion which is against the basis of the Sharī'ah, all branches of the Sharī'ah will inevitably be included in this rule.[24]

The Ḥanafī school have a different approach, they distinguish between two kinds of verbal conduct according to the liability of revocation:

1- If conduct liable to withdrawal, such as sale, lease etc., was established under compulsion, the agreement would be eventually up to the compelled to reject or accept.

2- Conduct not liable to withdrawal, such as divorce , marriage and oath, would not be affected by compulsion. Accordingly, it would be regarded as

valid conduct. For they believe that the intent is not an essential element in such conduct, as such conduct is liable to be established by acting in jest as well as by uttering them seriously. Therefore, they have concluded that the absence of the compelled's intent does not invalidate such conduct[25] as has been indicated in the saying of the prophet:

> " there are three things which whether undertaken seriously or in jest are treated as serious: marriage, divorce and taking back a wife after divorce which is not final. " [26]

The majority of Islamic jurists have totally rejected the Ḥanafī opinion, as there is no similarity between compulsion and joking. Accordingly, the foregoing saying of the prophet deals basically with the act of jest in specific cases which are very sensitive and have to be treated strictly. On the other hand, another Tradition of the Prophet narrated by 'Ā'ishah has indicated the rules of compulsion in divorce. He is reported to have said:

> " There is no divorce or emancipation in case of constraint or duress (ighlāq). " [27]

Abū Dāwūd (d. 275 A.H) thinks that ighlaq means anger,[28] but Ibn Qutaybah (d. 276 A.H) said it means compulsion, whereas some of scholars said it comprises compulsion, anger and madness.[29]

The rules for the deeds of the compelled differ according to their variety. Some of them such as drinking wine and eating pork are permissible under complete compulsion since they are permissible in the case of necessity as it is clarified in this verse

> ".. when he hath explained to you in detail what is forbidden to you except under compulsion of necessity " s.6 v. 119.[30]

In spite of the fact that committing such an act under an incomplete compulsion is considered as prohibited, the majority of the jurists have held that the (hadd) punishments would not be applied in such cases.[31]

There are other kind of conduct which would have remained prohibited. However, in in the case of such conduct, the state of compulsion would only remove the moral guilt. This conduct can be illustrated by the saying of the words of unbelief, which is against the very basis of Islam. However, it is permissible to make such an utterance under complete compulsion to avoid its consequences.[32]

In contrast with the forgoing rules which are affected by the degree of compulsion, certain conduct such as killing, damaging limbs, beating parents or committing adultery are sinful and would not be affected by the state of compulsion. [33] However, there are various opinions as to whether the punishment (hadd) must be implemented in the case of complete compulsion that results in killing or committing adultery.

In the case of killing, Abu Ḥanīfah has held the view that the law of qisās does not apply to the compelled; however, he must receive a discretionary penalty (ta'zīr) to be imposed by the judge. On the other hand, the law of qisās may be inflicted on the compeller as he is the actual doer, whereas the compelled is nothing but a tool.[34]

The majority of the jurists have said that the law of qisās must be implemented on both the compelled and the compeller since the compelled has himself committed killing, whereas the compeller is the cause of the killing. [35]

In the case of adultery, if the compelled was a woman, the punishment (hadd) would not be applied in either complete or incomplete compulsion as the vast majority of jurists believe, since the following verse has indicated that no sin is incurred by the compelled woman and the hadd would not be inflicted as a result,

> " But force not your maids to prostitution when they desire chastity, in order that ye may make a gain in the goods of this life. But if any one compels them yet after such compulsion, is God oft-forgiving, most merciful " s:24, v:33.[36]

On the other hand, if the compelled was a man and the compulsion was complete, the punishment would not be implemented according to Ḥanafī school because the ḥudūd are not carried out in doubtful circumstances (shubuhāt) as the prophet is reported to have said:

> " Remit (idra'ū) the ḥudūd from Muslims as much as you can because that the judge (imām) should commit mistakes in excusing the penalty is indeed far better than that he should commit a mistake in enforcing the penalty. "[37]

The Mālikī and the Ḥanbalī schools have held the view that such an act would not have inherently occurred without choice and desire so the ḥudūd should be applied in such a case.[38]

In the case of vandalism, if some one was coerced to vandalize the property of others, such as by setting fire to it, compensation must be given to the aggrieved party. Either the compelled or the compeller must pay the compensation according to two different views in Islamic jurisprudence.[39]

As it has been already explained, the Ḥanafi school distinguished between two kinds of compulsion which are complete and incomplete compulsion, and the rules of the compulsion differ accordingly. On the other hand, no such division has been mentioned in other schools. They have talked about compulsion in general in which rules of all sorts of compulsion have been included as well as the fact that they observed the degrees of compulsion. Thus, when the majority of jurists talked about compulsion, they meant both types.

Practically, the Ḥanafī school has made a distinction between complete and incomplete compulsion by restricting the understanding of incomplete compulsion to verbal conduct only, excluding physical conduct.[40] So if someone was threatened with imprisonment or beating unless he set fire to a property of another person and he did so, it would not be considered compulsion and he would be liable for any destruction resulting from his act. However the case will be different if he was threatened with death or damage to a limb, as that will be considered a state of complete compulsion, and in such a case the full responsibility is on the compeller.[41]

Unlike incomplete compulsion, complete compulsion is applicable in both verbal and physical conduct.[42]

There is no fixed extent as to the minimum required for the act of compulsion to be regarded as a bringing about compulsion. However, Islamic jurists generalize this issue by considering every act resulting in harm to life or relatives or material wealth or in grief and sorrow as an act of compulsion, yet they have stressed that people are not identical in strength, patience, dignity and position and the judge must take these things into consideration.[43]

As a step towards explaining the link between necessity and compulsion, it is of great importance to shed light upon the rules of compelled deeds in respect of the religious point of view that concerns retribution in the hereafter and not about the legal point of view which has already been mentioned. In this regard the deeds that the compelled was forced to do are in three categories: [44]

1- Deeds which change under compulsion, namely their rules and merits will be different from their original rules and merits as long as the state of compulsion remains. Such deeds can be illustrated in the case of complete compulsion by eating pork or carrion or drinking wine; it is an obligation to do such deeds in such cases and it will be sinful to bear the threat since destruction of life is more grave as the Qur'ān said:

> " and make not your own hands contribute to your destruction"
> s:11. v:195.

However, the rules of such deeds are not affected by incomplete compulsion.

2- Deeds that remain prohibited which nevertheless can be committed under complete compulsion as a sort of legal concession (rukhsah). These deeds can be illustrated by vandalism or by saying words of unbelief or defamation which are a sin although there is no moral guilt (ithm) in such cases because of the complete compulsion. Thus the effect of compulsion is to eliminate moral guilt in such a state but not to legalize it.

The distinction between the first category and the second category is that in the second category, the compelled can bear the threat and he will be rewarded for that. He can choose not to vandalize or not to say words of unbelief or not to slander. This is unlike the first category where doing these sorts of deeds is an obligation.

> It was narrated that two companions of the Prophet were captured by Musaylamah who asked one of them ' What do you think about Muḥammad? ' The Companion said that ' He is the messenger of God.' Musaylamah said ' What do you think about me? ' The Companion said ' And you too.' Then Musaylamah asked the other companion ' What do you think about Muḥammad?' the Companion said ' He is the messenger of God.' Musaylamah said ' What do you think about me? ' The Companion said ' I'm deaf, I can not hear you.' The question and the answer were repeated three times, then Musaylamah killed the companion. When the Prophet Mohammed heard about that he said ' The first one took the concession (rukhsah) of God, and the second one declared the truth and it is all for the good.' [45]

It is obvious from this tradition that to bear the threat in such case is permissible and it may be better to do so as it was understood from the commendation of the second companion by the Prophet.

Because 'Ammār Ibn Yāsir had been under compulsion when he slandered the Prophet, the Prophet told him that he was allowed to do it again if the unbelievers Mecca repeated their behaviour.[46]

3- Deeds which under no circumstances are allowed whether compulsion was incomplete or complete, and remain prohibited and sinful even though they have been done under compulsion. These deeds, such as killing or damaging a limb or beating parents or adultery,[47] are considered of the highest degree of prohibition.[48]

From the foregoing explanation compulsion that causes the state of necessity is restricted within the first and the second categories. Nevertheless there is no state of necessity within the third category of the foregoing division.

In addition, the state of necessity is confined to complete compulsion, although, some sorts of complete compulsion are not considered as a state of necessity as we have stated in the third category.

Moreover, no state of necessity is caused by incomplete compulsion, since there is enough room for choice, which is in conflict with necessity.

1- Some of the causes of necessity will be discussed in this chapter. Other causes such as extreme hunger will be mentioned briefly in other chapters.

2- Kashf, vol. 4, p. 631-32.

Durar, vol. 2, p. 658.

3- Mabsūt, vol.24, p. 38.

Ibn Ḥajar al-'Asqalānī, Fath al-bārī fi sharh sahīh al-Bukhārī, vol. 12, p. 311.

Mawāhib, vol.4, p. 45.

Ahkām, vol.3, p. 1177.

Zayla'ī, vol.5, p. 181.

4- Radd, vol.5, p. 80.

Hāshiyah, vol.2, p.368

Mughnī, vol.7, p. 384.

al-Nawawī, Rawdat al-Tālibīn, vol.8, p. 60.

Ashbāh, p. 136.

Ghamz, vol.3, p. 203.

5- Mughnī, vol.7, p. 384

Ashbāh, p. 136.

Hāshiyah, vol.2, p. 368.

'Awdah, vol.1, p. 565.

6- Ibn al-Humām, Fath al-Qadīr, vol.7, p.293.

Hāshiyah, vol.2, p. 368.

Nihāyah, vol.7, p.447.

Mughnī, vol.7, p. 384

7- Mabsūt, vol.24, p. 76-7.

See: I'lām, vol.4, p. 53.

Ghamz, vol.3, p.203.

8- Kashf, vol. 4, pp. 631-32.

Durar, vol. 2, p.651.

9- Mughnī, vol.7, p. 384

al-Kāsānī, Badā'i' al-sanā'i', vol.7, p.181.

al-Sarakhsī, Sharh al-Siyar al-kabīr, vol.4, p.222.

10- Manthūr, vol.1, p.194.

11- Durar, vol. 2, p. 659.

12- kashf, vol. 4, p. 639.

13- Ibid

14- See: Ibid, p. 631.

Durar , vol. 2, p. 659.

Wazārat al-Awqāf al-Kuwaitiyyah, al- Mawsū'ah al-Fiqhiyyah, vol. 6, p. 101.

14 - Mabsūt, vol. 24, p. 39.

Mughnī, vol.7, p. 120.

Ashbāh, pp.136-37.

Durar, vol. 2, p. 727 .

Kashf, vol. 4, p. 632 .

'Awdah, vol.1, pp. 565-66.

Wazārat al-Awqāf al-Kuwaitiyyah, al- Mawsū'ah al-Fiqhiyyah, vol. 6, pp. 101-03.

16- Mabsūt, vol. 23, p. 40.

al-Kāsānī, Badā'i' al-Sanā'i', vol.7, p.175.

Kashf, vol. 4, p. 632 .

Durar, vol. 2, pp. 660-61.

'Awdah, vol.1, pp. 563-64.

17- Kashf, vol. 4, p. 637 .

Durar, vol. 2, p. 660.

18- Kashf, vol. 4, p. 651 .

Ghamz, vol.3, p. 203.

Durar, vol. 2, p. 661.

18- Kashf, vol. 4, p. 632 .

Hāshiyah, vol. 2, p. 328.

Mughnī, vol.7, p. 348.

Wazārat al-Awqāf al-Kuwaitiyyah, al- Mawsū'ah al-Fiqhiyyah, vol. 6, p. 100.

Farā'id, p. 48.

20- Hāshiyah, vol. 2, p. 368.

al-'Ulūm, p. 329.

21- al-'Ulūm, p. 329.

Haraj, p. 245.

22- Durar, vol. 2, pp.732-45.

Ghamz, vol. 3, p. 203.

23- I'lām, vol. 3, p. 107.

Hāshiyah, vol.2, p. 239.

Ibn al-Wakīl, vol.2, p.356.

Ashbāh, p.134.

24- Jami', vol. 3, p. 107.

25- Kashf, vol. 4, p. 644.

Durar, vol. 2, pp. 732-33.

Ghamz, vol. 3, p. 203.

Mubārak, p. 101.

26- Abū Dāwūd, Sunan Abū Dāwūd, vol. 2, hadīth no: 2189.

27- Ibid, vol. 2, hadīth no: 2188.

28- Ibid, vol.2, p. 590.

29- I'lām, vol. 4, p. 50-51.

al-Zuḥaylī, al-Fiqh al-'Islāmī wa Adilatuh vol. 5, p. 405

30- Saghīr, vol.2, p. 549.

Ibn al-Wakīl, vol.2, p. 358.

Ashbāh, p.135.

Farā'id, p. 46.

31- al-Zuḥaylī, al-Fiqh al-Islāmī wa Adilatuh, vol. 5, p. 396.

32- Manthūr, vol.1, p.188.

Ibn al-Wakīl, vol.2, p. 358.

33- Jāmi', vol.10, p.183 .

al-'Ulūm, p. 354.

Qawā'id, p. 279.

Ibn al-Wakīl, vol.2, p.358.

34- al-Kāsānī, Badā'i' al-ṣanā'i', vol.7, p.177.

Ibn al-Humām, Fath al-Qadīr, vol.7, p.302.

Durar, vol. 2, p.747.

35-Mughnī, vol.8, pp. 266-67.

Hāshiyah, vol.2, p. 369

Ashbāh, p.134.

36- Mughnī, vol.9, pp. 59-60.

Hāshiyah, vol.2, pp. 369-70.

Ashbāh, p.134.

Qawā'id, p. 47.

37- al-Shawkānī, Nayl al-Awṭār, vol. 7, pp. 271-72.

Kashf, vol. 4, p. 664.

38- Kabīr, vol.4, p. 318

Mughnī, vol.6, p. 187

39- Ibn Rajab, p. 309.

Ashbāh, p.134.

Farā'id, p. 43 .

40- Ghamz, vol. 3, p. 203.

41- This is the view of the Ḥanafī school and some of the Ḥanbalī jurists. But the Mālikī school, some of the Shāfi'ī and some of the Ḥanbalī jurists are of the opinion that the responsibility in such a case is on the compelled, as this is similar to the case of one who was compelled by starvation to eat the food of others. However , the responsibility for the replacement of what he has eaten is an obligation on him even though it is permissible to eat. Ibn Rajab said: the analogy (qiyās) in this case is wrong because the one who was compelled by starvation is acting alone and no one forces him to do so. Accordingly no one can guarantee the consequence of his act . " Ibn Rajab, p. 309. Farā'id, p. 43.

42- Ghamz, vol.3, p. 203.

43 - Durar , vol. 2, p. 662.

Farā'id, p. 48.

44- See: Ashbāh, p.135.

Ibn al-Wakīl, vol. 2, p. 358. Kashf, vol. 4, pp. 664-66.

45- Jāmi', vol.10, p. 182.

46- This incident was mentioned in al-Ṭabarī, Tafsīr al-Ṭabarī, vol.14, p.182.

47- Ibn al- 'Arabī from the Mālikī school held a different view regarding committing adultery under complete compulsion: he believed that it is permissible to commit adultery under complete compulsion as a sort of repelling the greatest injury by committing the lighter one. Aḥkām, vol.3, pp.1177-78.

48- Unbelief is under the highest degree of prohibition and under no circumstances will it be allowed whether under compulsion or anything else. Thus the state of necessity will not affect belief. However, necessity may affect saying the words of unbelief when accompanied by firmness of true faith. Thus what is permissible is imitating the words of unbelief not unbelief itself. Amīr Bādshāh, Taysīr al-Taḥrayīr, vol.2, p. 214. Mubārak, pp.161-63.

2-LEGITIMATE DEFENCE:

A. DEFINITION OF LEGITIMATE DEFENCE.

Legitimate defence is a contemporary term which has been used by contemporary Muslim jurists. However, the classical Muslim jurists extensively studied the same area coverd by that term in what they called (daf' al-sā'il) which literally means pushing aside the aggressor. They mean by siyāl aggression or attacking other people without legitimate right; by masūl 'alayhi the aggrieved party; and by daf' al-sā'il the act of defence against the aggressor.[1]

Aggression against innocent people is a grave offence. Therefore it is prohibited in Islam as the Qur'ān mentions in the following verse

> " But do not transgress the limits. For God loveth not transgressors " s.11. v:190.

And the prophet said:

> " The life, wealth and honour of the Muslim are prohibited to other Muslims. "[2]

In addition, the Sharī'ah gives anyone who has been subjected to aggression the right to deter the aggressor. That is what is now called legitimate defence.

The classical Muslim jurists have not defined the term ' legitimate defence ' as they did not employ it. Moreover, they paid little attention to the definition of (daf' al-ṣā'il) as it is self-evident, and it was enough for them to explain what the meaning of siyāl is in the Arabic language.[3]

Aggression (siyāl) can be seditious armed rebellion (baghiy) [4] or high way robbery (harābah) [5] or any other sort of transgression whether it comes from people or animals.

Contemporary Muslim jurists have defined legitimate defence as follows:

The duty of the human being to defend his life or the life of others, and his right to defend his property or that of others, against any instant illegitimate aggression on the condition that there must be balance between the degree of the defence and of the aggression .[6]

However , it has been found that the legitimate defence of life is not obligatory in all cases, as some traditionists have held the opinion that it is permissible and not obligatory to defend yourself in the case of tumult between two groups of Muslims where the right path is not known.[7]

It will have been understood from the aforesaid definition that legitimate defence is a precautionary right that enables people to repel instant danger. Since this right is not for retaliation or spite but repelling danger, the act of repelling must be in proportion to the degree of the danger.

Moreover, it has been understood that there is no liability on the defender. However, there will be a liability in case of exceeding the limits by the defender.

B. CONDITIONS FOR LEGITIMATE DEFENCE:

From the aforesaid definition it is clear that the essential elements of legitimate defence are danger and the actual act of defence. There are conditions which must be fulfilled in order to establish the right which entitles people to repel such danger:[8]

1- The danger must be illegitimate and threaten rights preserved by the Sharī'ah, namely life, honour and property. However, there are legitimate dangers such as disciplinary punishment inflicted on a son by his father, or the implementation of hudūd. Illegitimate danger is realised regardless of where the danger comes from. It can come from a human being, whether a believer or an unbeliever, a woman or a man, an adult or a child, sane or insane, and it can come from an animal as well.

No minimum limit has been established with regard to the danger that allows the act of defending. However, every illegitimate danger allows the act of defence even though it is an insignificant one, such as taking a small portion of money or threatening with a stick or kissing a woman to whom one is legally banned as she is not one's wife nor relative.[9]

In addition to that, the defender has the right to repel the danger before it is inflicted on him, i.e. when the defender was scared that his life or honour or his property might be affected. Al-Shāfi'ī has expressed that by saying: If it enters a person's mind that the aggressor will hit him, the defender has the right to hit him first. [10]

Moreover, the danger may come from committing an actual crime such as attempting to kill, theft and adultery as well as from abstaining from certain actions such as preventing somebody from having food and drink with the intention that he should be killed. [11]

2- The danger must be immediately likely. If the danger was merely potential or was tantamount to a threat, it would not open the way to legitimate defence unless the danger would proceed instantly. However, it is not a proviso that the danger must actually be inflicted on the defender to establish the right of legitimate defence. It suffices the defender to have a high expectation that the danger is about to proceed. For example, if the aggressor was loading his gun, or pulling out his sword, or picking up a knife and so on. [12]

The right of legitimate defence ceases when the danger is over. Similarly if the defender had controlled the aggressor, or the aggressor had failed in his intention for any reason, such as the fact that it was impossible for him to execute what he wanted because of, for instance, the existence of a river or a hole or a door being locked or the aggressor having broken his leg or hand as a result of falling to the ground and so on .

Additionally , the right of legitimate defence will not exist if the aggressor retreats because of conscience or fear, or in the case where he has already executed his intention and all is over. In such a case, the fixed punishment would be implemented if the crime was confirmed but there would be no right for the defender to pursue the aggressor after the crime was over and the aggressor had left, as legitimate defence is a deterrent measure which expires with the end of the danger.

3- There must be no available way for the aggrieved party to escape the aggression except by repelling the aggressor. That means if there is no alternative solution, such as escaping or drawing the attention of other people by shouting or other means, or blocking the way by locking the door, the defence will be not only permissible but also obligatory in the case of aggression against life.

There are different views among jurists on fleeing from an aggressor. The majority of them have held the opinion that if one is able to flee or to resort to a safe place or a group of people and so on, one must do so and has no right to fight because one is supposed to eliminate the danger in the easiest possible way. However, the Mālikīs and the Shafi'īs have held this opinion on condition that no hardship faces him in fleeing as well as stipulating the assurance of safety. Otherwise it is not obligatory to flee.

A second opinion has been held by some of the Shāfi'ī and Ḥanbalī jurists Who say that the attacked party has no obligation to flee even if he can do it.[13]

4- The actual act of defence must be in proportion to the degree of the danger. That means the following:

i- repelling the danger must be by the least means available. Therefore, if the aggressor can be repelled away by admonition or shouting, beating is not permissible. Also if beating alone could end the aggression, damaging a limb or killing is prohibited. Moreover, if the aggressor was overpowered as a result of a severe blow, the defender must stop any further hitting immediately.[14]

The reason for imposing such gradual steps is that the act of defence has been legitimized only to repel the danger. So if using the least means available would be sufficient in this regard, using any stronger means would be unwarranted. Additionally, it would change the act of defence into an aggressive act. This point has been stressed by all Islamic juristic schools.[15]

ii- Proportion between the act of defence and the degree of danger means precisely using the least means available. That means that the act of the aggressor, who wants to kill, does not necessitate killing as the only means of defence available to the defender. On the other hand, the act of an aggressor who wants to take a quantity of money does not prohibit the act of killing as a means of defence. Similarly a great danger, such as the danger of

being killed, could be removed by a simple act of defence such as shouting and so on. Moreover, a minor danger, such as taking a small amount of money, may not be able to be repelled without resorting to strong force that may result in killing. [16]

iii- The criterion that assists in deciding which is the suitable action for defending a certain danger is what the defender thinks most likely to be sufficient to repel the danger according to the circumstances. [17]

iv- The gradual process of having recourse to the least means available in order to repel the danger is not taken into consideration in the case of fear of the aggressor's taking the initiative to inflict his aggression. Therefore, if the defender perceived that the aggressor is going to kill him unless he kills him first, there is no obligation to take into consideration such gradual steps. The defender may ignore such gradual steps if they engaged in battle and there is no chance of withholding oneself let alone controlling the aggressor. [18]

C. THE AREA OF LEGITIMATE DEFENCE

Legitimate defence can be against aggression against life, property and the honour of a person as well as of others.

THE RULE OF SELF DEFENCE:

The views of Islamic jurists have differed on whether self defence is a permissible right, namely, whether the defender has the right to defend

himself as well as to give up defending himself; or whether it is an obligatory right that the defender must defend himself and it would be sinful to give up defending himself. In the case of someone being attacked with the intention that he should be killed or harmed, regardless of whether the attacker was a human being or an animal, there are three juristic views:

1- The majority of jurists have viewed self defence as an obligatory matter and there is no permission to give up defending, because of the following legal proofs in the Qur'ān :

> " And make not your own hands contribute to your destruction " s.2, v:195.

In another verse :

> " Nor kill (or destroy) yourselves " s. 4, v: 29.

It is obvious that giving up defending against the aggression is a contribution to killing oneself.[19] In addition, the Prophet said

> " Anyone who was killed because of defending his life is a martyr. " [20]

2- Some of the jurists have held the opinion that it is permissible to defend oneself and not obligatory.[21] They depended on the saying of the Prophet :

> " Be like the two sons of Adam: the killer in hell and the murdered in paradise." [22]

3- The Ḥanbalī and Shafi'ī schools have expressed detailed opinions on this. The Ḥanbalī school have held that self defence is obligatory in normal conditions. However, it is permissible in the case of commotion because of the prophetic Traditions which have cautioned Muslims from taking part in

such a cicumstance.[23] The aforesaid proof, which is " Be like the two sons of Adam " was one such tradition. It refers to Abel who was killed by his brother Cain. Abel did not resist and was unjustly killed. The Prophet Muḥammad means that it is better to avoid fighting during a period of civil commotion. This is clear when we look at the context because it was an answer to a question by a Companion about civil commotion. However, this does not apply in normal conditions where one should try to protect one's life and fight the enemy. This tradition refers to abnormal conditions where one may prefer to be killed rather than fight and kindle the fire of turmoil and general slaughter, as when 'Uthmān ibn 'Affān prevented the Companions from intervening in order to protect him.[24]

DEFENDING HONOUR:

All Islamic jurists have agreed that women must defend themselves against any aggressor who wants to attack them and they have the right to defend themselves by killing if using lesser means available will not succeed. Moreover, a woman must be assisted by any one who has noticed the event and if killing the aggressor is the only means of defence the person assisting may do so. This ruling is supported by traditions of the Prophet and the Companions, such as the tradition that the Prophet had said " Anyone killed defending his honour is a martyr. "[25] And it was narrated that a man was a guest of the people of Hudhayl and he attacked a woman. She threw a stone at him and he died as a result. 'Umar Ibn al-Khaṭṭāb refused to give his family the blood money (diyah). In support of giving help to the aggrieved party, the jurists quote the hadīth from the Prophet which says " Support your brother whether he is unjust or ill-treated ".[26] It

is explained by the Prophet that while support of " your brother " while he is oppressed (mazlūm) is clear, the support given to " your brother " when he is an oppressor (zālim) is to prevent him from doing wrong.

The privacy of the home is protected in Islam against unsolicited inquisitiveness. Therefore, asking for permission when entering a private dwelling is essential, as is stated in these verses:

> " O ye who believe: enter not houses other than your own until ye have asked permission and saluted those in them .That is best for you .... If ye find no one in the house enter not until permission is given to you. If ye are asked to go back go back " s:24. v: 27 - 28.

The prophet has indicated the cause of this ruling in his saying :

> " permission is required because of (the possibility of) inquisitiveness. " [27]

Thus it is to prevent inquisitivness about the private life of others without their permission.

As a result of what has already been stated, there arises a controversy between Islamic jurists on whether the defender is accountable if he gouges out the eye of someone who was peeping into his private home through a hole or crack in the door without his permission. The Shafi'ī and the Ḥanbalī schools have held the opinion that there is no civil or criminal liability on the one who defends his privacy in such a case, namely there is no qiṣāṣ or diyah (blood money). They have based their opinion on the hadīth which provides that

> " If a person were to cast a glance in your house without permission, and you had in your hand a staff and you thrust it in his eyes, there is no wrongdoing." In another version of this

hadīth the Prophet is reported to have said " It is permissible to put out the eyes of him who peeps into the house of people without their consent ." [28]

The Ḥanafī and the Mālikī schools ,on the other hand, have opined that the defender has a civil and criminal liability because it has been mentioned in the Qur'ān that the law of qisās demands " an eye for an eye " s:5. v: 48. Also the Prophet has said:

" Half of the diyah is due in the case of damaging an eye." [29]

They also said the wrongdoing should not be punished by another wrongdoing. [30]

As to the foregoing hadīth which permits throwing a stone at someone who looks intentionally and secretly into the privacy of others, they have said that the Prophet meant by this hadīth and its versions to warn emphatically against such conduct and to magnify the prohibition on doing so, not to legalize such an act of defence. The jurists have agreed that if someone came into the house through the open door and looked around without his permission, no such act of defence would be allowed. [31]

Ibn al-Qayyim refuted the preceding deduction of the Ḥanafīs and said: an eye for an eye when there is a criminal act from the doer against the victim. However, in the immediately preceding case no criminal conduct has been committed by the doer. In contrast the criminal is the other party who commits a crime by looking into the privacy of others. Nevertheless, there is no similarity between the act of looking through an open door and the act of looking through a hole where doors and windows are closed. In

the former, leaving the door open is a sort of negligence from the dweller. However, this is not the case when looking through a hole where there is no negligence but there is deliberate aggression.[32] Moreover, as Ibn Qudāmah commented: Privacy can be restored once what is going on has been noticed (and the door is shut). However, one who looks through a hole would not usually be noticed.[33]

DEFENDING PROPERTY :

The majority of jurists have viewed the defence of property against an aggressor as a permissible act whether the property is large or small, as the Prophet has said,

> " Whoever has been killed defending his property is a martyr."[34] Abu Hurayrah has narrated that " A person came to the Prophet and asked ' what do you think if a man comes to me in order to appropriate my possession? ' The Prophet said: ' Don't surrender your possession to him '. He (the inquirer) said: ' If he fights me? ' The Prophet remarked:' Then fight (with him) '. He again said: ' What do you think if I am killed?' The Prophet observed: ' You would be a martyr.' He said: ' What do you think of him (Messenger of Allah) if I kill him.' The Prophet said: ' He would be in the Fire.' "[35]

Al-Shawkānī (d. 1250 A.H) has said these prophetic Traditions do not distinguish between a large or a small amount of property.[36]

The distinction between the obligation to defend life and the permissibility of defending property is , according to the view of the majority, because of the fact that property can be taken and given by the permission of its owner whereas there can be no such permission to give or take life.

The Shāfi'ī school have held that it is obligatory to defend against the aggressor if the property was a trust or a mortgage (rahn)or any sort of property that related to the rights of others.[37]

D. THE EFFECT OF LEGITIMATE DEFENCE:

All Islamic jurists have agreed on the point that there is no civil or criminal responsibility on the defender as long as the least means available in repelling the aggressor has been observed. [38]

However, the Ḥanafī school have the view that if the aggressor is a minor or insane or an animal, the defender has a civil liability; namely, he would be asked to pay the blood money in case of killing a minor and a lunatic and would have to pay the value of the animal. The reason for holding such an opinion is that the act of a minor, a lunatic or an animal cannot be described as a crime because they are not legally responsible. The act that allows legitimate defence must, in their view, be a crime. However, they do not apply the law of qiṣās on this occasion , only diyah, because of the necessity of repelling their aggression.[39]

The majority of jurists have said on that point that the act of defence on such occasions is a legitimate act and legitimacy cancels responsibility. Moreover, there is no state of necessity, in its narrow sense, because the victim here was the cause of the danger. This means that the danger in legitimate defence is initiated by another party and not by the defender, whereas the danger in the state of necessity, in its narrow sense, is intiated by

an internal factor coming from inside the person subject to compulsion, such as hunger.[40]

E. PROVING THE STATE OF LEGITIMATE DEFENCE :

Islamic jurists are in agreement regarding thepoint that the defender is obliged to confirm his state of defence before the judge in order to avoid legal responsibility, by testimony of witnesses or by confession of the other party in the case of killing or injuries, otherwise he is subject to the law of qisās. Therefore if someone was witnessed entering the home of the aggrieved party and carrying arms and he was killed or injured as a consequence, no qisās would be applied. But if he was witnessed entering that home without arms, qisās might not lapse because he may have entered that home for a permissible reason, and his entering alone is not sufficient to prove his aggression.[41]

F. EXCEEDING THE LIMIT OF DEFENCE:

As we stated before, the defender has no right to use unnecessary measures to repel the aggressor. This means that he defender is legally responsible for conduct that does not conform to legitimate defence. So if the aggressor had been repelled by the act of beating but it was possible to repel him by warning, the defender is accountable for the act of beating. If beating was sufficient to terminate the aggression, causing greater damage to the aggressor than beating is exceeding the legitimate limits. Likewise if the aggression would have been ended by causing injury, but, nevertheless, the

aggressor was killed , the defender is held to be a murderer and subject to the law of qisās.[42]

In conclusion, it will be observed that there is a firm link between the act of defence and the act of aggression as the legitimacy of the former is caused by the existence of the latter. The period of legitimate defence begins with the beginning of the aggression, and it is no longer legitimate after the aggression ends. However, the aggression is not deemed terminated if the aggressor escapes with property. In such a case, the defender has the right to pursue him to take back his property, even though that may result in killing as a necessary measure.[43]

1- Lisān, word: ṣāl.

2- Reported by Abū Hurayrah in Sunan al-Termidhī, vol.4, Ḥadīth No: 325.

3- See: Muḥtāj, vol.4, P. 194.

Mubārak, p.107.

Dawūd al-'Aṭṭār-, al-Difā' al-shar'ī, pp.15 -7.

Wahbah, p.143.

4- Bughāh, according to the majority of jurists, are " a group of Muslim rebels who are against the legitimate ruler and reject his constitutional authority, and either cease to submit to him or prevent him from performing a duty using arms against him, putting forward (illegitimate) pretexts (to remove him) and (install)an (alternative but illegitimate) ruler (in his place) even when the (legitimate) ruler is unjust." al- Māwardī, al-Aḥkām al-Sulṭāniyyah, pp: 57-58.

5- Brigandage or ḥarābah is defined as: rebellious insurgence for the illicit acquisition of property, or murder or to terrorize the public depending on force in a remote area where no relief is accessible or attainable. The factor of intimidation and making the highway unsafe is crucial in this context. Some jurists extended this to apply to terrorism not only on the highway or in the countryside but in populated cities.

al-Shāfi'ī, al-Umm, v. 6, p. 19.

al-Māwardī, al-Aḥkām al-Sulṭāniyyah, p. 62.

Bidāyah, vol. 2, p. 455 .

6- 'Awdah, vol. 1, p. 473.

7- Mughnī, vol.9, p.164.

al-Shawkānī, Nayl al-Awṭār, vol. 5, pp. 328 -9 .

8- See: Mughnī, vol.9, pp. 181-2

al-Shīrāzī, al-Muhdhdhab, vol.18, p. 29.

'Awdah, vol. 1, pp. 478-486.

9- al-Shawkānī, Nayl al-Awṭār, vol. 5, p . 326 .

10- al-Shāfi'ī, al-Umm, vol.6, p. 237.

11- Abū Ḥanīfah did not hold the same opinion. He believes that abstaining from certain actions is not regarded as killing because the death is caused by hunger, thirst or cold.

Mughnī, vol.9, p. 329.

Kabīr, vol.4, p. 215.

'Awdah, vol. 1, p. 87.

12- 'Awdah, vol.1, p. 278.

13- Ibn 'Abdīn, Hāshiyat Ibn 'Abidīn, vol.5, p. 351.

Mughnī, vol.8, p. 331.

Muḥtāj, vol.4, p. 197.

Mawāhib, vol.6, p. 323.

14- Ibid.

15- al-Shīrāzī, al-Muhadhdhab, vol. 2, p. 225.

al-Nawawī, al-Minhāj, vol. 9, p. 53.

Hāshiyah, vol.4, p. 357.

al-Khurshī, Sharḥ al-Khurashī 'ala Mukhtaṣar sīdī Khlīl, vol.8, p.112.

Mughnī, vol. 9, p.194 .

Farā'id, p.9 .

Ibn Ḥazm, al-Muḥallā, vol.11, p. 314 .

16- Hāshiyah, vol.4, p. 357.

Mughnī, vol. 8, p. 329.

17-Ibid.

18- Mabsūṭ, vol. 24, pp. 50-51.

Hāshiyah, vol.4, p. 357.

Muḥtāj, vol. 7, p. 178.

al-Ḥajjāwi, al-Iqnā', vol.4, p. 390.

19- Ibn 'Abdīn, Hāshiyat Ibn'Abdīn, vol.5, p. 351.

Mawāhib, vol. 6, p. 323.

20- Narrated by Sa'īd ibn Zayd, reported in Sunan al-Tirmidhī; vol.4, Ḥadīth No: 40

21- Furūq, vol.4, p.184.

22- Narrated by Sa'd ibn Abi Waqāṣ, reported in Sunan al-Tirmidhī; vol.4, Ḥadīth No: 486.

23- Mughnī, vol. 8, p. 331.

Muḥtāj, vol.4, p. 197.

24- Mughnī, vol. 8, p. 331.

25- Narrated by Sa'īd ibn Zayd, reported in Sunan al-Tirmidhī; vol.4, Ḥadīth No: 40

26- The rest of this Ḥadīth states that the Companions said: We would support him if he was ill-treated but why should we support him if he was unjust ?. The prophet said: To deter him from doing injustice. al-Bukhāri, Sahīh al-Bukhāri, vol.9, hadīth no: 84.

Muqhnī, vol. 10, pp. 352-53.

27- Muslim, Sahīh Muslim, Ḥadīth no: 375.

28- Mughnī, vol. 8, p.335.

Muhtāj, vol.4, p. 197.

I'lām, vol. 2, p. 336

29- al-Ṣan'ānī, Subul al-Salām, vol.3, p. 244.

30-Furūq, vol. 4, p. 184.

31- Zayla'ī, vol.6, p. 110.

32- I'lām, vol. 2, p.336.

33- Mughnī, vol. 10, p. 356.

34- This ḥadīth was reported by Sa'īd ibn Zayd in Sunan Abū Dāwūd, ḥadīth no: 4772.

35- Muslim, Sahīh Muslim, Ḥadīth No: 140.

36- al-Shawkānī, Nayl al-Awtār, vol.5, p. 326.

Mughnī, vol. 10, p. 352.

37- Muhtāj, vol. 4, p. 195.

Wahbah, p. 152.

Wazārat al-Awqāf al-Kuwaytīyah, Al-Mawsū'ah al-Fiqhīyah, vol. 28, p. 111.

Dawūd al-'Aṭṭār-, al-Difā' al-shar'ī, p. 123.

38-Mughnī, vol. 10, p.352.

39- Ibn 'Abdīn, Hāshiyat Ibn'Abdīn, vol. 5, p. 351.

40- Mughnī, vol. 10, p. 351.

Ibn Rajab, p. 36.

Muhtāj, vol. 4, p. 195.

Hāshiyah, vol.4, p. 357.

41- Mughnī, vol. 10, p. 354.

al-Shīrāzī, al-Muhadhdhab, vol. 2, p. 225.

al-Ḥajjāwī, al-Iqnā', vol. 4, p. 290.

Hāshiyah, vol. 4, p. 357.

42- Taking security measures around the home such as setting a trap to prevent any sort of aggression that might occur from theives or the like, is a permissible act according to Abū Ḥanīfah, al-Shāfi'ī and Ibn Ḥanbal. So no legal responsibility falls on the owner in the case of someone being trapped or harmed, as he was defending his own property, and the other party was an agressor because he entered the dwelling of another without justification. However, Imām Mālik has stipulated that there must be a need for such a measure and the owner is responsible for what would happens if there was no need for such a measure.
Ibn 'Ābidīn , Hāshiyat Ibn 'Ābidīn, vol-5, p: 524.

Mughnī , vol. 5, p. 571.

Mawāhib, vol. 6, p. 241.

43- Ibn 'Ābidīn, Hāshiyat Ibn 'Ābidīn, vol. 5, p. 274.

3- ILLNESS

Illness is an apparent factor which leads to the possibility of reducing the rigour with which legal rulings are be implemented in Islamic law. It has been decided that " if a sick person is unable to commit himself to a certain ruling in Islamic law because doing it would cause severe pain or increase the illness or because of fear of delay in the recovery or damage to an organ, he is required to do it in a way that will not harm him as this has been granted by the rules of legal concession (rukhsah)." [1]

A number of evidences from the Qur'ān and the Sunnah have been quoted to support the foregoing such as the following verses:[2]

1- In the realm of fasting , the Qur'ān has said:

" every one of you who is present at his home during that month should spend it in fasting , but if any one is ill or on a journey the prescribed period should be made up by days later " S.2, v:185.

2 - In the realm of hajj, it has been mentioned that :

" And if any of you is ill or has an ailment in his scalp necessitating shaving he should in compensation either fast or feed the poor or offer sacrifice " S :2, v:196.

3 - Regarding ablution the Qur'ān has mentioned:

" If ye are ill or on a journey or one of you cometh from offices of nature or ye have been in contact with women and ye find no water then take for yourselves clean sand or earth and rub therewith your faces and hands " S: 4, v:43.

The foregoing verses have indicated that illness is one of the factors that lead to mitigation. Such mitigation has various forms; it occasionally takes the form of delaying all the rules till the time in which the person who was ill can do it, as is understood from the first mentioned verse. In addition to that, mitigation can be through implementing another ruling instead of the original ruling, as is illustrated in the second and the third mentioned verses.[3]

Mitigation for ill persons is evident in the following hadīth which provides that,

> Umrān Ibn al-Ḥuṣayn said " I was affected by hemorrhoids, and I asked the prophet what to do in prayer and he said: ' Pray standing but if you can not do so, pray sitting and if you can not do so, pray lying down on your side.' " [4]

However, not every sort of illness relieves one of implementing the existing rules. In the following, we will discuss what kind of illnesses cause the facilitation of legal injunctions:

Sick persons can abandon existing rulings in favour of a ruling that is easier to do when illness has affected such a person and he cannot do what he has to do as it has been prescribed by legal texts, that is when he suffers from severe pain or he fears delay in recovering or spreading the illness to another part of the body.[5]

A sick person is to judge whether his sickness will affect him or not in the performance of his duty, and that is by taking into account the signs and the experience which he has had on such occasions; or if a reliable doctor has decided that such illness would affect him if he did such an act. Imam Aḥmad ibn Ḥanbal (d.241 A.H) said, explaining when the ill person may pray sitting : " If his standing is weakening him, he is to pray sitting. "[6]

Many rulings which have been mentioned in the texts of Islamic law have been legislated as alternatives where an excuse such as illness exists, particularly in the realm of devotional matters ('ibādāt). That can be illustrated in the following examples:

1 - Ablution with clean sand / earth (tayammum) in the event that a sick person is afraid of becoming worse by using water.

2 - Prayer is to be performed according to the ability of a sick person to the extent that he may be allowed not to move any part of his body but only to recite.

3 - The fasting of Ramaḍān can be delayed to a convenient time in case of illness.[7]

In another respect, illness may necessitate breaking the existing law in non-devotional matters. In the following, some cases which illustrate the state of necessity caused by illness will be expounded.

These are :

Fatal Illness (marad al-mūt).

Medication by unlawful substances.

Organ transplantation .

A. FATAL ILLNESS :

Fatal illness has been defined as follows: It is a sickness in which a person will not be able to pursue his usual work and which results in death within one year with the level of pain either remaining the same or increasing. However, if the illness is continuously increasing in severity, it is also deemed a fatal illness, even if it continues for a long time.[8]

Two attributes must be ascertained in such an illness :

1- The disease must be incurable and death is most likely to be the consequence of the disease.

2- Death must be connected with the illness even if it is caused by another accident such as drowning, burning or killing during the period of illness. In other words, it will not be deemed a fatal illness if one died after recovering from such an illness. And likewise if the illness continues for more than one year without increasing: it would be regarded then as a long term illness which is legaly treated differently from fatal illness. [9]

During his final illness a sick person has the right to conclude bargains and make trade contracts. However, Islamic law takes into account the fact that such an illness is a pointer to the state of death in which legal capacity is finally terminated and new rulings would be applied such as the distribution of inheritance and the settlement of debts. That means in such an illness, the

rights of the debtors and heirs must be protected, which necessitates limiting the legal capacity of such an ill person in the area of voluntary expenditure such as entailment on a charitable institution (waqf) and gift (hibah).[10]

To protect the rights of debtors, Islamic jurists have taken into consideration two different forms of debt :

1- Where the wealth of the debtor is less than the amount of the debt .

2- Where the wealth of the debtor is more than the amount of the debt .

Regarding the first state, an ill person is banned from any sort of voluntary disbursements. If he does so, it is deemed invalid except in the case where the creditors give their approval. Thus, if he entails property on a charitable institution (waqf), the creditors have the right to stop such waqf and they can sell it in order to get back their debt. Likewise if the debtor gave a gift to an heir of some of his property. [11] The same ruling has been applied in the case of discounting others' debt to him, and in the case of making a sale well below market price (bay' bi al-muḥābāh) in order to let someone else benefit from such a deal. [12]

On the other hand, if the property of the patient is more than his debt there is no restriction on his conduct unless such conduct affects the rights of the heirs. In this regard, two rules must be observed :

1- A gift by the patient during his last illness is restricted within the limit of a third of his property. Accordingly no voluntary disbursement is

allowed to exceed one third except where the consent of the heirs has been obtained.

2- No gift is allowed to any one of the heirs whether it is from the third of the estate or not unless the rest of the heirs have agreed to it. That is in accordance with the saying of the prophet which states:

> " God has assigned a portion to all who are entitled. Hence there shall be no bequest to legal heirs. " [13]

B. MEDICATION BY UNLAWFUL SUBSTANCES :

Islamic jurists have studied medication by unlawful substances from the legal point of view. They have rarely talked about medication by prohibited substances other than medication by wine and any substance that contains alcohol among its ingredients.[14]

Certain texts attributed to the Prophet are the basis on which the rules of medication by unlawful cure in Islamic law are established. These aḥādīth are:

> Abū al-Dardā' reported that the Prophet said " Allah has sent down both the disease and the cure, and he has appointed a cure for every disease, so treat yourselves medically but use nothing unlawful." [15]

Ṭāriq Ibn Suwayd asked the Prophet about wine but he forbade it. He again asked him but he forbade him. He said to

him: " Prophet of Allah, it is a medicine ". The Prophet said: " No it is a disease ".[16]

Abū Hurayrah said: the Apostle of Allah prohibited unclean (khabīth) medication. [17]

The majority of Islamic jurists have relied on these Islamic legal evidences in prohibiting a cure that consists of pure alcohol. The Mālikī and the Ḥanblī schools have stressed the prohibition of medication by any sort of intoxicant drink even in the case of necessity.[18] However, some Mālikī jurists have excepted the case of necessity from such a prohibition, for example al-Qurṭubi, who commented on these aḥādīth saying " This is likely to be qualified by the state of necessity. "[19]

In addition to these prophetic Traditions, the majority of jurists support their view by rational argument saying: The prohibition of wine is due to its bad effects on reason, and it is unsuitable to cure the body at the expense of reason. Moreover, the prohibition of wine entails avoiding direct contact with it, and curing by wine entails intimate contact with it; this contradicts the objective of the prohibition.[20]

Some jurists, such as Ibn Ḥazm and some prominent modern jurists such as Muḥammed 'Abduh and his disciple shaykh Rashīd Riḍa, have held the opinion that it is permissible to use wine in medication because it is a state of necessity. Regarding the foregoing aḥādith which prohibit using wine in medication, they said it is confined to normal conditions where there is no necessity, yet in the state of necessity it is permissible to use it in medication

as it resembles the prohibition of wearing silk which, however, was allowed to 'Abd al-Raḥmān Ibn 'Auf and al-Zubayr ibn al-'Awām due to an itch they had.[21]

In addition, forbidding medication by unlawful substances is applicable when there is no evidence proving their effectiveness in recovery, and when it was proven effective but there is lawful medication available which can be used instead.[22]

The Shāfi'ī school has forbidden medication by pure wine or alcohol. However, they allow them if they have been mixed with a lawful medicine or substance.[23]

C. ORGAN TRANSPLANTATION:

Islam pays great attention and respect to the dignity and sanctity of the human body whether alive or dead. the violation of a human body is a great sin, whether by taking life or by inflicting any sort of harm on it as well as defiling it when dead, unless a person has committed a crime which allows certain punishments that violate his sanctity, such as killing, otherwise no harm whatsoever is allowed to befall him as the Prophet said:

> " Your blood, property and honour must be regarded by you as sacred ..."[24] He also said " Breaking a dead man's bone is like breaking it when he is alive ."[25]

That is the fundamental rule on the basis of which any treatment of the body should be based and should be observed. However, there is another

fundamental rule which should always be taken into account, which is the balancing between the interest and harm of the human being, as well as its consequent rule, which is committing the lesser of two harmful acts to preclude the worse of them, or the sacrifice of the lesser of two interests to implement the greater one. [26]

Contemporary Islamic jurists have based their search for the Islamic legal rule concerning organ transplants on these two fundamental rules.

It has not been found that the classical Islamic jurists have studied such a topic, namely the transferring of organs from one body to the other. The reason for such an attitude is very obvious, which is that the transplantation of body organs, which is associated with advancements in the field of medical science as it exists nowadays, was totally unknown to them[27]. However, some issues pertaining to actions concerning the human body have been discussed.

Because of what we have already stated regarding the sanctity of the human body, Islamic scholars are very conservative with regard to permitting any acts concerning the human body, either in life or death. Thus, in their view it is forbidden to utilize parts of the human body whether such an act occurs through sale or otherwise. Al-Kāsānī (d. 587 A.H) says " Human bones and hair should not be permitted to be sold, not because of their uncleanliness, as such parts are deemed to be clean in the prophetic tradition, but out of respect for human organs; the degrading of such human organs through their sale is a form of humiliation. "[28] And al-Mīrghanānī

(d. 593 A.H) says " It is not permitted to sell a human being's hair or utilize it in any way, because humans are highly dignified therefore no part of them should be undignified or degraded. "[29] Al-Shirbīnī (d. 1326 A.H) says that " It is forbidden to exploit any part of the human body, because of its dignity and worth ."[30] Ibn Qudāmah stipulates that the sale of organs from the human body that have been cut out or amputated is forbidden because such organs can not be utilized. [31]

These and similar texts indicate that the fundamental rule (al-asl) is the prohibition of benefiting from or exploiting the parts of the human body, either because of its dignity and value, or because no beneficial use can be made of the parts. In spite of that, there are a few exceptions to such a rule in which jurists permit certain acts pertaining to the human body which lead to utilizing and exploiting some parts of the human body. However, all such acts are bound by the state of necessity. [32]

In the following, some of these issues will be mentioned :

THE SALE OF MATERNAL MILK:

This is a controversial matter; thus we find scholars belonging to the Mālikī, the Shāfi'ī and the Ḥanbalī schools who have allowed the trading in maternal milk, when that milk is not fed to the child by the process of breas-tfeeding. They support their argument for this ruling by saying that it is clean (tāhir) and beneficial. Ibn Qudāmah has summed up the arguments regarding this matter by saying that " as for the selling of maternal milk, it is hateful to Aḥmad. Scholars have argued over this point; apparently, al-

Khiraqī (d. 334 A.H) permits it in his words ' everything that is beneficial ' and so does al-Shāfi'ī. Other scholars, however, have forbidden its sale, particularly the Ḥanafī school, because it is a part of the human body, just like any other part ." [33] Ibn Qudāmah, however, chooses to permit its sale just like the sale of the milk of sheep. He also permitted the receipt of compensation for it if used to satisfy a person's thirst. He, however, forbade the sale of dismembered parts of the body as these were of no benefit. [34]

After analyzing this text , Jamīl Mubārak has concluded that :

1- Everything which has a benefit which is countenanced by the Sharī'ah, is permitted to be sold.

2- Maternal milk is permitted to be sold as it is beneficial.

3 - Other parts of the body, like maternal milk, are permitted to be sold.[35]

4 - The dismembered parts of the body, nowadays, can be utilized therefore they can be sold. This can be understood from the explanation that Ibn Qudāmah has given for forbidding the sale of the dismembered parts of the body when he said " as these were of no benefit ". It is clear that he was considering the extent of medical knowledge in his age. [36]

The Ḥanafī school, on the contrary, go so far as to forbid the sale of maternal milk separately from the mother. They support their argument by pointing out that maternal milk is part of the human body which is a

dignified and worthy entity and therefore no part of it should be demeaned and humiliated.[37]

CUTTING OPEN A DEAD PERSON'S ABDOMEN :

The classical Islamic scholars have argued over cutting open the womb of a dead woman in order to extract a foetus that may be living .The Ḥanafī and the Shafi'ī schools and some of the Mālikī scholars have held the opinion that it is permissible to cut open a dead woman's abdomen to extract a foetus. They have relied on the argument that by doing so the foreseeable life of the foetus is being maintained athough the sanctity of the dead body is being disregarded. That means attaining the greater of two conflicting interests by rejecting the worse of two wrongs, and that resembles the state of someone who was compelled to eat a dead person's flesh .[38]

On the other hand, the Ḥanbalī school and some Mālikī scholars have opposed this. Ibn Qudāmah has summarized their argument by saying:

" Such a foetus does not usually live, hence it is not allowed to tamper with the sanctity of the dead for something that is illusory. The Prophet Muhammad said ' the breaking of the bones of a dead person is just like the breaking of the bones of the living, This is the mutilation (muthlah) which the Prophet has ordered us to desist from ." [39]

In another respect, the majority of Islamic jurists have agreed on the point that it is allowed to cut open the abdomen of a dead person to extract money belonging to someone else that has been swallowed, on the condition

that it must be valuable and not negligible. Ibn 'Abd al-Salām has supported this view relying on the argument that the sanctity of the money of the living being is greater than the sanctity of the dead. [40]

From the aforementioned debate, it becomes clear that the opinion which opposes cutting open a dead woman's womb in order to extract her foetus relies on two pretexts :

1 - Such an action is a disfigurement which is prohibited in Islam .

2 - The foetus is not going to live after being extracted from her abdomen. That means that its life is a mere illusory matter and such an illusion does not justify violating the dignity of the dead woman. That is clearly understood from Ibn Qudāmah's words " Such a foetus does not usually live ", and it can be concluded that it is permissible to extract the foetus if it will usually live after being extracted, as Ibn Qudāmah says: " it is likely to be permissible to cut open the womb if the foetus is likely going to live. " [41]

It becomes clear now that the disagreement between jurists upon this matter is not a real one since they disagreed with each other over whether the foetus was going to live or not. Therefore, if it is likely to live, there is no disagreement between them, since all of them apply the legal principle that shows the sacrificing of the lesser of the two interests in order to bring about the greater of the two. Islamic jurists relied upon such a principle when they allowed cutting open the abdomen of the dead to extract valuable money that had been swallowed by him . One may make a hasty judgment by saying that the classical Islamic jurists have considered the priority of the

money over the dignity of the human being since we find them allowing cutting open the abdomen to extract money but not to extract the foetus. Deep thought indicates that in such a matter they looked to the sort of interests resulting from such an action, and therefore they found that such interest is materialized in the former but is illusory in the latter, as those who held such an opinion thought that the life of the foetus is not possible due to their medical knowledge in that age, and consequently they believed that such an operation is a sort of violation of the dignity of the human body without obtaining a benefit. [42]

When contemporary Islamic jurists discuss this matter, namely organ transplantation, they have been influenced by such debates. Moreover they have taken for granted the foregoing maxim which organizes the interests and the injuries in cases of conflict. Thus on several occasions they have decided the following :

Firstly : Autopsy must be looked at in the light of the aforementioned maxims, namely committing the lesser of two harmful acts to preclude the worse of them, and sacrificing the lesser of two interests to implement the greater one. It is obvious that when the interest of keeping the dignity of a dead person is in conflict with the interest of his relatives, such as in the case of confirming the involvement of the accused in a crime, or in conflict with the interest of the community, such as in the case of discovering the cause of an epidemic which concerns the community, or in conflict with the accused's interest, such as in the case of confirming his innocence, it is clear that in

such circumstances the priority is for autopsy over keeping the dignity of the dead. However, contemporary Islamic jurists stipulated the following :

1- Autopsy must be the only available means that performs the specified interest .

2 - The interest must be certain.

3 - Autopsy must be combined with a great deal of respect to the dead , so that it is not allowed, for example, to walk over or to tamper with his organs.[43]

Secondly : The donation of organs which are to be given to some one else who is in dire need of such organs, is permissible, whether such an organ is taken from a living or a dead person, as long as it is absolutely the only means for keeping away a greater harm from the recipient than that occurring to the donor because of the donation of his organ. This means rejecting a greater harm with respect to the right of Allah pertaining to the body of the would- be recipient by shouldering a somewhat lesser harm befalling the right of Allah in the body of the donor.[44]

Contemporary Islamic Jurists have stipulated certain conditions as to such a permission in order to confine such an act to the state of necessity and need.[45]

1 - In order to weigh the interests and the harm resulting from the implementation of the transplant and those resulting from leaving things as

they are, scientists and doctors must determine a valid and reliable scientific measure for assessing the following :

i-The harm befalling the recipient of the donated organ is in relation to the condition of his health. The effects of such an operation in the present and the future should be taken into consideration as well.

ii-The interest occurring to the recipient as a result of transplantation of the donated organ to his body .

iii -The results of the process of comparing the interests and harm resulting from the implementation of the transplant and those resulting from leaving things as they are. It should clearly show the superiority of donation to just leaving things as they are. Thus, if such an operation would harm the donor so that his normal life is largely affected, such an operation should not be performed since harm in Islamic law should not replaced by another similar or stronger harm as has been decided in juristic maxims.

2 - Operations for taking and transplanting an organ should have a reasonable expectation of success.

3 - The transplant of an organ must be the only way to save the recipient from his misery, and if there are any other means available, then transplantation should not be conducted. The reason is that in Islamic law the application of the rule urging the choice of the lesser of two harms is void if both harms can be avoided as was explained by Ibn 'Abd al-Salām in his words " If we have two harms or more at the same time, we should avoid all of them if it is possible, but if it is not, then we should try to reject the

strongest one. This can be illustrated in the case of forcing someone to kill someone else, (when)otherwise he is going to be killed." [46]

4 - The permission of the donor must be obtained and he must posses full mental capacity, so that an offer to donate an organ by a minor, an insane or mentally retarded person is not acceptable, even though it may come from their guardian. Also, with regard to the dead person, his permission must be obtained while he is alive. [47]

5 - Although the donor is allowed to take compensation, the act of donation should not be used to demean human dignity. This is the case if the organ is donated to a party who probably conducts a trade in human organs and exploits the need of patients as a way of making profits, because human organs can not be evaluated in terms of financial gain. This area must be seen as a sort of human solidarity .[48]

1- Qawā'id, vol. 2, p.192.

Ibn Ḥajar al-'asqalāni, Fatḥ al-Bārī, vol. 8, p. 179.

al-Buhūti , Kashshāf al-qinā', vol.1, p. 588.

2- Qawā'id , vol. 2, p.192.

Haraj, p. 194.

3- Ashbāh, p. 59.

Nazā'ir, p. 92.

4- al-Bukhāri, Sahīh al-Bukhāri, vol.2, p.41

Ibn Mājah, Sunan ibn Mājah, vol.1, p. 386. Ḥadīth No:1223.

al-Shawkānī, Nayl al-awtār, vol.3, p. 224.

5 -Qawā'id, vol. 2, p.192.

Ibn al-Wakīl, vol.2, p. 353.

Ashbāh, p. 59.

Nazā'ir, p. 91.

Haraj, p. 194.

6 - Ibn Ḥajar al-Haythamī, Tuhfat al-Muhtāj, vol. 2, p. 404.

Ashbāh, p. 59.

Nazā'ir, p. 91.

Ibn al-Wakīl, vol.2, P. 354.

Qawā'id, vol. 2, p.194.

7- Ashbāh, p. 59.

Nazā'ir, p. 91.

Ibn al-Wakīl, vol.2, p. 354.

Qawā'id, vol. 2, p.194.

8- Durar, vol.4, pp. 136-37.

Kashf, vol.4, p. 500.

Ahkām, vol.1, p. 332.

9- Kashf, vol.4, p.500.

Durar, vol.4, pp. 136-37.

10- Muḥammad Khān al-Bukhārī, al-Rawḍah al-Nadiyyah Sharḥ al-Durar al-Bahiyyah, vol.2, p. 677.

Aḥkām, vol.1, p. 351.

Kashf, vol.4, pp. 500-01.

11- Aḥkām, vol.1, p. 351.

Kashf, vol.4, pp. 500-01.

Madkhal, vol. 2, pp:.805-06 .

al-Zuḥaylī, al-Fiqh al-Islāmī wa Adillatuh, vol.4,pp. 133-37.

12- Aḥkām, vol.1, pp. 351-52.

Durar, vol.1, p.427.

13- This ḥadīth was reported by Abū Hurarah in Sunan Abū Dāwūd, vol.2, hadīth no: 2864.

Bidāyah, vol.2,pp. 334-35.

Kashf, vol.4, pp. 500-02.

Madkhal, vol. 2, pp. 805-06 .

al-Zuḥaylī, al-Fiqh al-Islāmī wa Adillatuh, vol.4, pp.133-37.

Maḥmaṣānī Sobḥī, The general theory of the law of obligation and contract under Islamic law, vol.2, pp. 139-40

14- See, for example,: Aḥkām, vol.1, p. 59.

Bidāyah, vol.1, p. 476.

Ibn al-Qayyim, Zād al-Ma'ād fi Hady Khayr al-'Ibād vol.4, pp. 156-57.

15- Abū Dāwūd, Sunan Abū Dāwūd, (chapter of medicine) hadīth no: 3874.

16- Muslim Ibn al-Ḥajāj, Sahīh Muslim. hadīth no: 1984.

17- Abū Dāwūd, Sunan Abū Dāwūd, hadīth no: 3870.

al-Tirmidhī, Sunan al-Tirmidhī, hadīth no: 2046.

18- Aḥkām, vol.1, p. 59.

Ibn al-Qayyim, Zād al-Ma'ād fi Hady Khayr al-'Ibād vol.4, pp.156-57.

Kabīr, vol.4, pp. 353-54.

19- Jāmi', vol. 2, p. 231.

20- Ibn al-Qayyim, Zād al-Ma'ād fi Hady Khayr al-'Ibād vol.4, pp.156-57.

21 - Ibn 'Abdīn, Hashiyat Ibn 'Ābidīn, vol.5, p. 228.

Ibn Ḥazm, al-Muḥallā, vol.1, p. 174.

Rashīd Riḍā, Tafsīr al-Manār, vol.7, p. 76.

22 - Ibn 'Ābidīn, Hashiyat Ibn 'Ābidīn,, vol.5, p. 228.

23- Muḥtāj, vol. 4, p. 188.

24 - Mishkāt al-Maṣābīḥ , ḥadith no : 2670 .

25- Reported by 'A'ishah umm al-Mu'minīn, in Sunan Abū Dawūd, ḥadith no: 3201. And in al-Muwaṭṭa, No: 16.15.45.

26- See: Muḥammed Naeem Yāseen, " **The rulings for the donation of the human organs** " , A L Q. (1990, part . 5) pp. 55-6.

Muḥammad al-Shanqīṭī, Aḥkām al-jirāḥah al-ṭibīyah, pp. 97-125.

27- With regard to the achievement of Muslim doctors in the field of medicine and surgery, see: Muḥammad al-Shanqīṭī, Aḥkām al-jirāḥah al-ṭibīyah, pp. 49-65.

28 - al-Kāsānī , Badā'i' al-Ṣanā'i', vol. 5, p. 142.

29 - al-Mīrghanānī , al-Hidayah , vol. 3 , p. 34 .

30 - Muḥtāj, vol. 1, p. 191.

31 - Mughnī, vol. 4, p. 304.

32- See: Muḥammad Naeem Yaseen, " **The rulings for the donation of the human organs** ", A L Q , (1990 , part. 5), pp. 51-2.

33-Mughnī , vol. 4, p. 304 .

34 - Ibid, vol. 4, p. 304 .

Furūq , vol.3, pp. 240-41.

Mawāhib, vol. 4, p. 265 .

Bidāyah, vol.2, p. 138 .

Farā'id, p. 195 .

35- Contemporary Muslim jurists have warned repeatedly of exposing the parts of human body to trade lest they be taken as means of exploitation. However, some of them do not prevent a donor from taking money given to him for his donation. see: Muḥammad Naeem Yaseen , " **The rulings for the donation of the human organs** ", A L Q, (1990, part: 5), p. 83. Mubārak, p. 455.

36 - Mubārak, p. 454

37 - al-Kāsānī , Bdā'i' al-ṣanā'i', vol. 5, p. 145 .

38 - Scholars of the Shāfi'i school and other scholars permitted eating the flesh of the dead for survival but only under extreme duress or under the compulsion of hunger. They supported their position by saying that the sanctity of the living is greater than that of the dead. The harm or damage incurred in eating the flesh of a corpse is less than that of losing the life of a living human being. On the other hand , all other scholars forbid eating a corpse relying on the dignity of human beings, dead or alive.

39 - Mughnī, vol. 2, p. 413.

Qawā'id, vol. 1, p. 77.

Naẓā'ir, p. 88.

40 - Qawā'id, vol. 1, p. 77.

41 - Mughnī , vol. 2 , p. 410

42 - Mubārak , p. 449.

43 - Ibid, p. 450 .

Abḥāth Hay'at Kibār al-'Ulamā' fi al-Sa'udiyyah (The research Works of the Commitee of the Grand Jurists in Saudi Arabia), vol. 2, p. 63 .

44 - The right of Allah and the right of the individual are involved in this matter; the right of Allah is an expression which has been used by Islamic jurists to mean the right of the community. Ibn al-Qayyim explains in his words: " Rights are of two kinds: the right of Allah and the right of the individual. The right of Allah does not allow any form of compromise .... The right of the individual permits compromise , waiving , and compensation" . I'lām ,vol. 1, p. 108.

Al-Qarāfī said " The right of Allah is the fulfillment of his comandment and prohibition . And the right of the individual is his interest ... we mean by the right of the individual that any right that if one chooses to waive, it is legally approved. Generally there is no right of the individual which does not involve the right of Allah Almighty that is it must be delivered to its true recipient ... the right of the individual is recognized by the validity of abandonment. Everything that an individual can waive is the right of the individual, and any thing that an individual cannot waive is the right of the almighty Allah " Furūq , vol-: 1, pp: 140-41.

It must be noticed that these two rights overlap each other in most cases as Ibn 'Abd al-Salām pointed out : " There are hardly any individual rights which they may waive that do not involve the right of Allah as well, this is the right of Allah to be obeyed and affirmed " Qawā'id, p. 121.

The act of a human being vis-à-vis his body is linked with the two rights and that can be illustrated in the following rulings:

1- The ruling of the Sharī'ah to forbid suicide as well as considering suicide as one of the deadliest sins " al-kabā'ir ". Ibn Abd al-Salām expounded that in his words " The crime of a person against his own body or organs varies in its sinfulness in accordance with his personal loss, and the losses and injustices that may befall others as a result of his

actions ... no one has the right to destroy any part of himself, as this is a joint right shared by the individual and his God .." Qawā'id , p. 96.

2 - The right of the individual vis-à-vis his body and organs appears clearly in the ruling that in the case of killing or causing bodily harm and injury in a deliberate and unjust way, the injured party or the heirs of the victim have the right to choose either of three things: retaliation " qisās ", taking a payment of compensation " diyah " or pardoning the perpetrator of the crime. It is noteworthy that giving the victim or his heirs the right to grant pardon signifies that the transgression occurred against an individual right. If this was not so, pardon would not be the right of the individual, since the rights of God cannot possibly be pardoned by a human being.

45- Qararāt Majma' al-fiqh al-Islami (The resolutions of the Council of Islamic Jurisprudence), round 8, resolution no: 1.

Muḥammad Naeem Yaseen, " **The Rulings for the Donation of the Human Organs** ", A L Q, (1990, part:. 5), p. 67.

Mubārak, p. 455.

Muḥammad al-Shanqīṭī, Ahkām al-Jirāḥah al-Tibīyyah, pp.102-25.

46 - Qawā'id , vol.1, pp. 71-4.

47 - Qararāt Majma' al-fiqh al-Islami (The resolutions of the Council of Islamic Jurisprudence), round 8, resolution no: 1 .

48- Muḥammad Naeem Yaseen , " **The Rulings for the Donation of the Human Organs** ", A L Q, (1990 , part . 5), p. 67 .

Mubārak, p. 455 .

4-CHANGE IN CIRCUMSTANCES:

A. INTRODUCTION:

In the law of contract, the two contracting parties are bound to fulfil their agreement. Muslims are told through a Qur'ānic injunction to keep their promises and obligations,

" O you who believe, fulfil all obligations " S. 5, v:1.

A similar command has been stated in another verse in the Qur'ān :

" And fulfil every engagement, for every engagement will be inquired into (on the Day of Reckoning) " S.17, v:34.

This is, as Muslims see it, an order from God to fulfil a promise, whether it be a contract ('aqd) or an agreement or obligation created by any means. The traditions of the Prophet Muḥammed also express the general precept that believers must observe their commitments. This has been embodied in the maxim, al-muslimūn 'ala shurūṭihim " Muslims are bound by their stipulations. "[1] The necessity of fulfilling a contract is also understood from the literal meaning of the Arabic word 'aqd which is knot, bond or tie; so 'aqd al-bay', for instance, means an act of putting a tie to a bargain.[2]

Contractual obligations can be terminated in several ways such as performance, when the object is accomplished; or by the expiry of the term, for example, in hire or lease contracts; or by sulh which means mutual agreement or reconciliation; or by the transfer of the obligation (hawālah) in cases of debt; or by a fundamental breach which relieves the other party of his obligations under the contract.

Terminating or adjusting a contract may be necessitated by some events and changed circumstances which cannot be controlled by the parties. So the obligor is responsible for a breach of contract unless he can establish that his failure to perform was caused by external causes outside his control.

The aim of the following pages is to cast light on the nature, scope and the legal consequences of such events which are known in classical Islamic jurisprudence as jawā'ih the plural of jā'ihah.

B. DEFINITION OF JAWA'IH.

Al-jā'ihah literally means a calamity which eradicates the entire wealth of a person, whether it was a disaster caused by drought or diseases or caused by turmoil and civil riots.[3]

Muslim jurists have defined jawā'ih as " a heavenly event which cannot be avoided or controlled." [4] Al-Shāfi'ī (d. 204 A.H) has defined it as " every event which destroys all the fruit or part of it and which happens without any action by a human being. " [5] Ibn Qudāmah has defined it in a similar terms, that is " every calamity which no human being had any role in causing. " [6] Ibn Taymiyyah also defined it as follows: " It is a heavenly disaster for which no human being can be held responsible."[7] Al-Mutī'ī thinks that " jā'ihah is the calamity which destroys the fruit." [8]

It is obvious that some of these definitions are as general as the literal meaning of jawā'ih in the Arabic language; and some of them indicate that they are confined to the disasters which affected fruit, and some of them exclude an act by human beings who can not be held responsible such as the destruction caused by armies. Some of these definitions did not mention the case of causing defects but not destruction. All these things which have been omitted in these definitions are included in the commentaries written later by the same scholars.

Dr . al-Thunayyān thinks that these prominent scholars did not pay great attention to the technical definition of jawā'ih because they relied on their explanation afterwards which determines the objective of such a definition. So he suggests the following definition " every event which cannot be avoided or controlled and for which no one can be held responsible if this event affected the exchange value ('iwad) through destruction or defect before it has been fully delivered." In this definition Dr. al-Thunayyān supports the opinion that theft, for instance, is not a jā'ihah because it can be avoided and the thief can be held responsible. Also the action of a human being which cannot be avoided but for which it is possible to hold him responsible such as the actions of gangs who can not be fought by individuals whereas the authorities are able to bring them to justice and force them to guarantee the loss.

He thinks Jawā'ih include misfortune from heaven (āfah samāwiyyah) and every action of human beings which can not be avoided or for which no one can be held responsible, such as the actions of armies. A

jā'ihah could be considered to be every event which causes either destruction or defect to either the price or the merchandise provided that it happened before the full delivery; since if it happened after delivery, the general maxim which states that responsibility follows ownership would be applied. In other words, the contract would then be concluded and the burden of the loss would be borne by the owner of the property at the time the loss occurred.[9]

Āfah samāwiyyah (calamity or misfortune from heaven) as well as amrun min allah (act of God) means events such as rain, cold, drought, wind or incurable diseases. They are part of jawā'ih. However, they are not the only part since the view of the majority within the Mālikī school and the preferred of two opinions in the Ḥanbali school is to consider the activity of armies as a disastrous calamity (jā'iḥah) which is irresistible and resembles cold, rain, etc. Ibn Taymiyyah has explained the reason behind such an opinion and said: " The essence of the matter is the possibility of invoking liability and it is impossible to hold the army liable in such a matter. "[10]

C. THE EFFECT OF JAWĀ'IH :

The Mālikī and Ḥanbalī schools have recognized the concept of jawā'ih. According to them if the sale of a crop or fruits on trees happened to be after they had started to ripen and an irresistible blight damaged or destroyed the fruits before they had been picked, the seller should bear the loss and give discount to the buyer. However, the concept of al-jawā'ih is held to apply, according to the Mālikī view, only when at least one-third or more of the crop or fruit was affected when it would validate the buyer's

claim for reduction in price. In other words, if the damage to the crop is less than one-third, the buyer should bear the loss and the seller should not give him any discount.[11] In Muwatta' : " Mālik had heard that 'Umar ibn 'Abd al-'Aziz decided in a certain case to make a reduction for crop damage. Malik said: ' This is what we do in this situation.' He added: ' Crop damage is whatever causes loss of a third or more for the purchaser; anything less is not counted as crop damage.' " [12]

The Ḥanbalī school and some other scholars did not set a minimum level above which a buyer may be entitled to a reduction in the price of crops or fruit destroyed by blight. They rely on the following ḥadith,

> " the Prophet said: If you sell fruit to your brother (and Jābir ibn 'Abd Allah reported through another chain of narrators: If you were to sell fruit to your brother) and these are stricken with calamity, it is not permissible for you to get anything from him. Why do you get the wealth of your brother without justification?." Jabir b. 'Abd Allah said also: " The Prophet commanded that unforeseen loss be remitted in respect of what is affected by blight."

Ibn Qudāmah commented on this matter and said: " These Traditions of the Prophet are general and not qualified by any percentage whether it was a third or a fifth or a quarter. However, the buyer shall bear the loss which is trivial as it is determined by custom. "[13]

Islamic jurists have distinguished between several phases within the realm of contracts that consist of exchange of value (mu'āwadāt) such as sale and hire. During these phases disastrous events may occur and accordingly a different ruling would be applied. These phases are:

1- If the object of the contract is damaged by calamity after concluding the contract but before taking possession of that subject matter. In such cases the contract would be rescinded and the buyer, for instance, would be released from his duty. In other words, the liability here is on the seller because it is still in his possession.[14]

2 - If the object is damaged after concluding the contract and after taking possession of that object. The contract of sale would not be rescinded and the buyer would be liable for the damage as it is under his ownership. However, in the contract of hire, the contract would be terminated but the lessor should pay the rent for the period in which he takes advantage from the leased object.[15]

3 - If the object was destroyed or damaged during a period in which it needed to be kept in the same place and in which the seller cut his relations with it. As we mentioned earlier this covers the sale of fruits and crops on trees after they have begun to ripen but which need to stay on the trees until their ripening is complete.

In this situation we have mentioned above the opinions of the Mālikī and Ḥanbalī school. According to them the buyer has the right to claim a reduction of the price equivalent to what he has lost the fruit. Both schools accept that if all the crops were destroyed the sales contract would be terminated.

The Ḥanafī and Shafi'ī schools are in disagreement with the others. They have held the opinion that in this situation the contract is completed and the liability is on the buyer as he is obliged, according to the Ḥanafī view, to harvest the fruit or the crop immediately after concluding the contract. [16] They relied also on the following Traditions :

1- It has been narrated in al-Muwatta that: A man bought the fruit of an enclosed orchard in the time of the Messenger of Allah and he tended it while staying on the land. It became clear to him that there was going to be some loss. He asked the owner of the orchard to reduce the price for him or to revoke the sale, but the owner made an oath that he would not do so. The mother of the buyer went to the Messenger of Allah and told him about it. The Messenger of Allah said: " By this oath, he has sworn not to do good." The owner of the orchard heard about it and went to the Messenger of Allah and said, " Messenger of Allah, the choice is his." [17] It is understood from the saying of the Prophet " by this oath he has sworn not to do good " that if the loss caused by disastrous events has to be remitted, the Prophet would force him to do so whether he made an oath or not because he would be bound to fullfil his obligations.

2 - It has been narrated in the Sahīh Muslim that: In the time of Allah's Messenger a man suffered loss in fruits which he had bought and his debt increased; so Allah's Messenger told (the people) to give him charity and they gave him charity, but that was not enough to pay the debt in full, whereupon Allah's Messenger said to his creditors: "Take what you find, you will have nothing but alms." In this case the prophet gave all the property of the man to his creditors without making any reduction with regard to his loss . [18]

The Mālikī and Ḥanbalī schools have held that these two Traditions of the Prophet are not appropriate as a basis for such an opinion because of the following :

1- There is no indication in the first Tradition which would confirm that the loss was because of jā'iḥah. All that has been said is that there was a loss which could have been caused by many causes, jā'iḥah or otherwise, and it is not acceptable to confine it to jā'iḥah without a proof confirming that it was. [19] In addition to that, this Tradition is a mursal (a disconnected ḥadīth at the level of the companions) and the disconnected ḥadīth is, as al-Shāfi'ī said, not acceptable from the people of ḥadīth and from us as well. [20]

2 - With regard to the second Tradition it does not indicate any sort of jā'ihah. All that has been said is that a man suffered loss in fruits he had bought and his debt increased and that could be owing to a low price or theft or something else. [21]

3 - It is not appropriate to reject the clear text, as it is in the two Traditons of Jābir, in favour of an unclear one as in the previous two traditions. A firm and unequivocal meaning in the two Traditions of Jābir affirms the remission of the loss caused by disastrous events. [22]

As to the authenticity of the Traditions which prove the reduction of jawā'ih, al-Shawkānī said " It is not right to say they were not heard from the Prophet, they have been heard and transmitted through Jābir and

Anas." [23] Al-Ṭaḥāwi (d. 311 A.H), from the Ḥanafī school, said: ' these Traditions are authentic and we do not reject them because of that but we have another interpretation.' [24] Commenting on al-Shāfi'ī's remark about the authenticity of the Traditions that established the rules of jawā'iḥ when al-Shāfi'ī said if the ḥadīth was authentic I would recognize jawā'iḥ without regard to its level, which means he would not set a minimum level above which the reduction would be applied, Ibn Taymiyyah said these Traditions are recognized by all the people of the ḥadīth as authentic and no one of them has doubted their authenticity.[25]

D. AL-'UDHR (excuse):

Al-'udhr is the second manifestation of a change in circumstances which affects the sanctity of contracts in Islamic law. The concept of 'udhr was held to apply exclusively to the contract of hire (ijārah) which includes both the hiring of property and the contract for services.

It should be made clear that Islamic jurists other than Ḥanafī jurists do not recognize 'udhr (excuse) unless it has prevented the use of the usufruct of the leased object or reduced it or damaged it. So it is a part of jawā'iḥ and therefore we find Ibn Rushd, for instance, discussing these matters under the heading of tawāri' (change in circumstances).[26] And also Ibn Taymiyyah discussed them under the heading of jawā'iḥ al-ijārah.[27] However, although the Ḥanafī school does not recognize jawā'iḥ, they exclusively recognized 'udhr and they extended it to mean any excuse which makes the

contracting party unable to conclude his contract unless he suffers unwarranted harm, which was not envisaged in the contract, whether it is inflicted on himself or his property. [28]

i. GENERAL EXCUSES :

General excuses are meant to be any sort of excuse which affects the entire people of a city or province etc., and which stop the lessor from making use of the leased object such as the siege of a village whereupon it is impossible to get to the rented land outside the village; or in the case of hiring a vehicle for travelling when the road has been cut by the enemy; or in the case of a general fear which prevents one from living in certain area. In such cases, the lease contract is cancelled in the view of the Ḥanafī, Mālikī and Ḥanbalī schools because in such cases the problem affects the whole people and it is general. [29] Ibn Qudāmah made it clear that the generality of the excuse is the cause for cancellation. Therefore he did not see the fear of the individual as a valid excuse for termination of the contract since it is a private excuse which resembles his illness. [30]

The Shafi'ī school have held the opinion that such excuses do not justify the termination of the lease contract because the leased object has not been affected by such events and as long as it is intact no cancellation is warranted. [31]

ii- PRIVATE EXCUSES :

Privateexcuses mean events which render continuing performance of a contract harmful for one of the contracting parties without causing

harm to other people and which do not affect the object of the lease.[32] Examples have been given such as the death of one of the contracting parties, or his bankruptcy, or his getting into heavy debt, or his goods in his leased shop being destroyed by fire or theft. Such excuses render the contract voidable in the opinion of the Ḥanafī school. They have argued that need requires the contract to be terminated because if the contract was binding in such cases, unjustified harm would be inflicted on the injured party.[33]

There are three kinds of excuse in the opinion of the Ḥanafī jurists. The first arises on the part of the lessee, for example his bankruptcy, or change of profession or craft such as changing his career as a farmer to work in a factory and the suchalike, or if he moved to another city.

The second is that which might affect the lessor, for example he may revoke the contract because he incurs a debt which he can pay only by the sale of the leased object. However, if he decided, for instance, to leave his city, he may not revoke the contract because no harm would be inflicted on him from such a move.

The third is that which might affect the object of the lease. If, for example, a person rents a bathhouse in a village for a stipulated period of time and a general exodus of people from the village takes place, the bath-house may be returned to the owner and there is no obligation to pay the rental. [34]

Article 443 of al-Majallah provides that " if any event happens whereby the reason for the conclusion of the contract disappears, so that the contract cannot be performed, such a contract is voidable." Examples are: A cook is hired for a wedding party then one of the spouses dies. The contract of hire is terminated. Also, a person suffering from a toothache makes a contract with a dentist to remove his tooth for a certain fee. However if the pain ceases , then the contract is voidable. [35]

The majority of the Mālikī , Shafi'ī and Ḥanbalī jurists have disagreed with the Ḥanafī school on the point that a private excuse which relates only to the contracting parties, such as the death of one of them or his bankruptcy and so on, allows either of them to revoke the contract. The only excuse which, in the view of the majority, constitutes a legitimate basis for cancelling the contract is that which affects the object of the lease contract such as damage which prevents the leased object being used, or a defect which reduces the usufruct of it; and no cancellation of the contract due to the excuse of the contracting parties is acceptable. A wide variety of examples have been mentioned such as which cultivated land has been hired, then it is flooded with water from a river or rain to the extent that it is impossible for the tenant to cultivate it; or when an animal or a vehicle has been hired but it dies or breakes down; or when a house is rented and it collapses. In the case of a person who is seeking a wet-nurse and dies, the contract of hire is not cancelled. But upon the death of the child or the wet-nurse, such a contract is canceled. [36]

The main difference between the majority of jurists and the Ḥanafī school is that the excuses which relate to the contracting parties in respect of either their person or their property constitute a sufficient reason for rescission of the contract in the Ḥanafī jurists' opinion. However, it does not constitute a sufficient reason for rescission in the view of the majority of jurists. On the other hand, they all agree that any excuse which is related to the subject matter of the contract and makes the performance impossible or onerous for one of the contracting parties is a sufficient reason for rescission. An excellent example, in addition to the above, which has been mentioned in al-Mughnī and other texts demonstrates this case: [37]

> " A contract of hire for the digging of a well is valid, but it is essential that the work to be done be defined in terms either of a period of time or of a specific job. If the employer defines the work by a period of time saying that ' I hire you for a month to dig a well for me ' the contractor does not need to know the amount of work to be done, but he does need to know the ground in which he is going to dig because the ground is different in terms of how hard and easy it is which will affect the process of digging. Moreover, if the employer chooses to hire him to do a specific job of digging (such as digging fifty meters), it is absolutely necessary for the contractor to have knowledge of the site by inspection, to see whether it is easy or difficult, and furthermore, he must know the depth of the well in order to realise the volume of work involved. Should the contractor strike hard rock or mineral or any thing which makes normal digging impossible then he is not bound to continue the dig, because this is a situation different to that which was anticipated from his inspection of the terrain. The inspection of the terrain applies only to the obvious difference between sites. Should underground water

be encountered and render normal digging impossible, the situation is analogous to the striking of hard rock and is to be regulated upon the same principles. "

E. MODERN CONTRACTS :

Contemporary Islamic jurists have discussed the nature of contracts in modern times and its implications for contractual commitments.

It is obvious that early Islamic society was simple and the transactions were generally not as complex as they are nowadays. Many of the contracts nowadays are subject to factors and events which often make fulfilling the obligations impossible or at least onerous. The ease of travelling around the world and communicating with people in any country in the world make it easy to conclude any type of contract whether it is in trade or in industry, or something else, or whether it is between individuals or between governments and irrespective of the differences between religions, government policies, and the customs and laws of the two contracting parties. Any change in these factors and others such as the transmission of the exchange values may result in inflicting injury on one or both of the contracting parties and make loss-making events likely to happen. [38]

In addition to that a large number of contracts in modern times are very complicated. They need equipment, capital and time for execution, i.e. the construction of airports, seaports, hospitals, factories, roads and so on. The nature of these contracts make it possible for disastrous events to happen. Some cases will be mentioned here to demonstrate what we have said :

1- In the case of Taskiroglon co . v. Noblee & Thort Gmb H. [39] The two parties had concluded a contract according to which the seller had to ship Sudanese ground nuts within three months to Hamburg in Germany. Both parties expected that the shipment would be made from Port Sudan and proceed via the Suez Canal as usual. While the seller did everything on time, the war between Egypt and Israel in 1956 lead to the closure of the Suez Canal to international shipping, which was something unexpected. Therefore, the seller failed to ship the nuts claiming that the closure of the Suez Canal frustrated the contract and so relieved him of his obligation to ship the ground nuts. Whereas the buyer claimed that the route was not part of the contract. So it was not terminated by the closure of the Suez Canal simply because there is an alternative route around the Cape of Good Hope even if it is more expensive, more dangerous and not a normal route for commercial shipping.

2 - This example is a case which came before the Syrian Court of cassation.[40] In this case, a seller concluded a contract with the Department of Foreign Trade whereby he agreed to supply the latter with rice imported from Taiwan. The contract was concluded the provision that the rice was required to be from the 1979 harvest. In March 1979, after the seller had deposited the required security, the Taiwanese Finance Ministry issued a decree prohibiting the export of rice abroad, whereupon the seller demanded the termination of the contract and the return of the security deposited. This request was refused by the Department of Foreign Trade .

3- In 1972 and 1973 a contracting company concluded a contract with the Ministry of Communications in Saudi Arabia whereby the company agreed to build and pave a road between two towns for the amount of S.R.72 millions. After the company had started the work, the prices of the materials, services and the wages of the workers began to increase sharply and continuously in an unprecedented manner which affected the company's production . Accordingly the company succeeded in finishing only 60% of the work and failed to finish the whole work on time. Both parties agreed that the gross increase of the prices affected all the phases of the project. As a result of that, the company brought the case to the court asking for the contract to be adjusted according to the new circumstances in order to survive and fulfil its obligation. [41]

Such circumstances which affect contracts which need time to be concluded, such as supply, tenders, hire etc., have been recognized by modern Arab codes.Two theories have dealt with the intervening circumstances:

Firstly : Al-quwah al-qāhirah (force majeure). According to the civil codes of many Arab countries force majeure justifies breaching the contract and no liability is then inflicted on the wrongdoer.Thus, articles in the Egyptian, Libyan, Yemeni, Algerian, Kuwaiti, Iraqi, Jordanian, Qatari and U. A . E. Civil Codes are identical and say : " In the absence of a provision of law or an agreement to the contrary, a person is not liable to make reparation, if he proves that the damage occurred from a cause beyond his control, such as cas fortuit (al-hawādith al-istithnā'iyyah), force

majeure (al-quwah al-qāhirah), the act of the injured party or of the third party. " [42]

Any event should acquire the following elements in order to be treated as quwah qāhirah :

1- The event must be unforeseeable. It must not be anticipated at the time of concluding the contract.

2- The event also must be unavoidable. It must not be possible to avoid or prevent the occurrence of the event or its consequences by taking all the necessary steps to stop the event from occurring or to prevent its consequences .

3- The event must make the conclusion of the contract impossible. [43]

The legal effect of al-quwah al-qāhirah in the civil codes of many Arab countries is to terminate the affected contract. Identical Civil Codes say " An obligation is extinguished if the obligor proves that its performance has become impossible by reason of causes beyond his control. " [44]

Secondly: al-ḥawādith al-ṭāri'ah. Articles in the Egyptian, Iraqi, Syrian, Sudanese, Jordanian, Kuwaiti, Qatari and Yemeni Civil Codes provide identical provisions which say: " However, due to exceptional, general and unforeseen events, the conclusion of the contractual obligation, without being impossible, becomes onerous on the obligor, with the result of

threatening him with exorbitant loss; the judge may, after taking into account the surrounding circumstances and the interests of both parties to the contract, adjust the onerous obligation to a reasonable level. Any agreement to the contrary is null and void. "[45]

The essential elements necessary for applying the doctrine of al-hawādith al-tāri'ah or al-zurūf al-istithnā'iyyah (change in circumstances), which has been provided in many Arab codes, are :

1- The event should be exceptional. In other words, such an event should be rare and occur infrequently. The question of whether an event is exceptional or not is left to the surrounding circumstances of each case in the time of its occurrence.

2- The event should be unforeseeable. That is, neither of the contracting parties could predict that such an event was going to happen.

3- The event should be general in character. That is, it should affect not only the contracting parties but also a wide section of people . [46]

The legal effects of al-hawādith al-tāri'ah is to adjust the onerous obligations either by reducing the obligation of the injured party or by increasing the obligation of the other party. This adjustment would be made according to the interest of both parties and the circumstances around each case.[47]

After discussing these theories which occur in modern Arab codes, a contemporary Muslim jurist Dr. Zuḥaylī, and the great legal author Dr. al-Sanhūri have concluded that there is no such theory in classical Islamic law. However, that does not mean such intervening circumstances have not been dealt with in the principles of Islamic law or in the work of the Islamic jurists. Change in circumstances has been taken into account when dealing with several matters and the foremost of them are the reduction of price because of jawā'ih and the termination of the lease contract because of excuse ('udhr).[48] Dr. al-Sanhūri believes there are two reasons which may explain why Islamic law has not established a complete theory dealing with such circumstances as is the case in the modern codes.

1- General theories are not a manifestation of Islamic law, not only in change in circumstances (the theories of force majeure and cas fortuit) but with all other legal theories. The usual way of dealing with legal matters in Islamic law is to establish a legal ruling for every single matter by taking into account the principle of justice. However, there is a legal logic that brings similar matters together and the duty of the jurist is to look for such a logic.

2- The theory of force majeure was established in western law, which influenced modern Arab laws, when the binding obligation of the contract had been exaggerated to the extent that justice was sought to mitigate the binding obligation of the contract. However, this is not the case in Islamic law where the principle of justice has a superior rank over the binding

obligation of the contract. For this reason, judges were able to adjust the contract without the need to establish such a theory. [49]

Dr.Mohammad Qabbāni believes that there is no difference between the theory of al-ḥawādith al-ṭāri'ah in modern Arab codes and the rulings of jawā'iḥ and general excuses (al-a'dhār al-'āmmah) in Islamic law.[50] If we looked at the conditions for applying al-ḥawādith al-ṭāri'ah in the modern Arab codes, we would find that these conditions are constitutive elements of jawā'iḥ and 'udhr. To confirm this he made a comparison between the conditions of jawā'iḥ and 'udhr on the one hand and these of al-ḥawādith ṭāri'ah on the other. So he reached the following conclusion:

1- It is stipulated in the theory of al-ḥawādith al-ṭāri'ah in modern Arab codes that the contract to which the theory would apply shall be relaxed, that is they need time for execution, such as the contract of supply. This condition is also stipulated in jawā'iḥ and 'udhr where their application is confined only to the contracts of lease or of sharecropping or of the sale in which the subject matter of the contract needs time before delivery is due, such as the sale of the fruit on trees. These contracts could not be executed immediately after the conclusion of the contract but, by their nature, need more time .[51]

2- The events which disturb the performance of the contract in modern Arab codes should be exceptional and general, such as earthquakes or strikes or a sudden and sharp increase in prices and such like. With regard to 'udhr and jawā'iḥ in Islamic law, the generality of the event is recognized

by all schools.[52] The Ḥanafī school has recognized the private excuse as well as the general excuse whereas the other schools have not recognized the private excuse but have stipulated that the excuse should be general in order to be recognized. This is clearly understood from the examples that have been given by the jurists, such as what has been stated by Ibn Rushd (d. 595 A.H) in Bidāyat al-Mujtahid where he said: The opinion of Mālik over the rent of cultivated land which is watered by rain, is that the contract of rent would be canceled if the rain had not fallen during the period of cultivation. And it would be canceled also if the land had been flooded with water so that it is impossible to be cultivated.[53]

Ibn Qudāmah has stated that: " If there was a general fear which prevents people from living in the area where the leased object existed, the contract of lease would be voidable since it is a general excuse preventing the use of the leased object. "[54]

In the case of jawā'iḥ, it is stipulated by the Mālikī and Ḥanbalī schools that the event which causes the loss shall be general. That it should be a general event is understood from the examples which have been given to illustrate jawā'iḥ, such as locusts, cold, flood, insects, drought and the acts of armies and so on in which the event will not only affect the contracting parties.[55]

3- In modern Arab codes the events shall be unforseeable and unavoidable. This stipulation is not fully consistent with the norm of excuse in the Ḥanafī school, since an excuse may not be predictable, such as a debt

which may be incurred by the lessor, or may be predictable as in the case of hiring a boy through his guardian to do certain work and during the contract time the boy reaches the legal age and decides to quit. However, this condition is fully consistent with al-jawā'ih as it is the nature of general disasters not to be predictable.[56]

4- It is stipulated in modern Arab codes that such events shall render the conclusion of the contract onerous but not impossible. This condition is an explicit element in the definition of excuse by the Ḥanafī school, that is: any excuse which makes the contracting party unable to perform the contract unless he suffers unwarranted harm. Such an excuse would cause hardship for the contracting party but it does not make the performance of the contract impossible. And paying the value of the fruit which has been affected by jawā'ih is onerous to the buyer since he would receive nothing for the money paid.[57]

Dr. Qabbāni has concluded that the theory of al-ḥawādith al-ṭāri'ah in modern Arab codes resembles in many aspects the rulings of excuse and jawā'ih in Islamic law. However, Islamic maxims and principles would shape their own rulings with regard to the intervening circumstances. [58]

The maxims and principles which are related to intervening circumstances in Islamic jurisprudence and which would shape the rulings of such events have been mentioned by Dr.al-Thunayyān and by the Assembly of Islamic Jurisprudence (Majma' al-Fiqh al-Islāmi) as being as follows.[59]

1- The Tradition of the Prophet which was narrated by Jābir and which states that

" The Prophet commanded that unforeseen loss be remitted in respect of what is affected by blight."

2- The saying of the Prophet which states

" No injury shall be inflicted or reciprocated " (La darar wa la dirār).

Jurists have relied on this hadith to establish uncountable rulings which aim to remove injuries. And it is deemed one of the major maxims in Islamic jurisprudence.[60]

3- The maxim which says " Hardship begets facility " (al-mashaqqah tajlib al-taysīr), taking into account the fact that not every hardship is counted.

4- The ruling that the leasing contract is terminated when the usufruct of the leased object is prevented or disappears.

5- The object of the salam contract should be made available to the purchaser at a future date. However, a question arises as to the state in which the object of the salam contract can not be delivered because of its discontinuation or its destruction by calamity. In this matter, the majority of jurists have held the opinion that the purchaser has to choose either to wait until the objec of the contract is made available or to terminate the contract and take back the price which he had paid if it still existed or its value if it is no longer available.[61]

6- The ruling that the creditor should wait until the insolvent debtor gets enough money and can pay the debt back.

7- In the event of repaying the value of the currency instead of repaying the currency itself when the currency becomes obsolete or has been banned by order of the authorities. This can be illustrated as follows:

i- The case of selling an object in exchange for a currency which had become disused after the conclusion of the contract but before the buyer received it. In such a case Abū Ḥanifah held the opinion that such a sale is revoked and the buyer should return the object of the sale to the seller if it is extant or, otherwise, the equivalent (al-mithl).[62] However, his two disciples (Muḥammad and Abū Yūsuf), al-Shāfi'ī and Ibn Ḥanbal do not nullify the contract. They thought that the buyer should pay the value of the disused currency without needing to cancel the contract since the contract in itself is valid; but the delivery of the price becomes impracticable as result of it being in disuse; as if fresh dates was the price of something else but it could not be obtained in its season, all jurists agreed that the buyer is entitled either to the value of the dates or to wait until the next season; and so also in the case under discussion.[63]

ii- The general ruling as to the repayment of a loan (qard) is to give back the equivalent (al-mithl). With regard to the borrowed article being currency which has become disused or banned by the authorities, there are two opinions:

The first is to give the like. It is held by Abū Ḥanīfah and the Shāfi'ī school, and it is the preferred opinion in the Mālikī school; for them the reason is that the loaned currency has not suffered a defect but a decrease in value.

The second is to give the value of the loaned currency. It is held by the two distinguished disciples of Abū Ḥanīfah (Muḥammad and Abū Yūsuf) and the Ḥanbali school on the ground that the borrowed currency is deemed to have suffered a defect while it is in the possession of the borrower or according to the rule which says that the borrower should give back the like but if that is not possible then he should give back the value. [64]

As to whether the value should be assessed at the time the loan takes place or at the time the currency had become obsolete, it is a matter which is used differently by different scholars.

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On the ground of the previous legal maxims and principles,the Assembly of Islamic Jurisprudence reached the conclusion that:[65]

1- In ' relaxed ' contracts which need time for execution such as supplies,constructing works and undertakings etc., the judge has the right to adjust the contract in a way which would divide the amount of loss between

the contracting parties and he has the right to terminate the remaining part of the contract if he believes that termination is the equitable solution provided that he gives just compensation for the party who asks for the conclusion of the contract so as to mitigate the loss inflicted on him without causing hardship to the other party. The judge, moreover, should rely on the trustworthiness of experts to form a just balance.This ruling should apply only if the circumstances in which the contract was concluded have undergone a considerable change where general and unforeseeable events have caused exorbitant and unusual losses and made fulfilling the obligation extremely onerous, providing that such losses were not a result of negligence and shortcomings by either of the parties.

2- It is the right of the judge to ignore the case if he finds that the intervening contingencies are going to disappear.

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1 - The Prophet said: Conciliation between Muslims is permissible. The narrator Amad Ibn Ḥanbal added in his version: " except the conciliation which makes lawful unlawful and unlawful lawful. " Sulaymān ibn Dāwūd added: The Apostle of Allah said: Muslims are bound by their stipulations. Narrated by Abu Hurayrah in **Sunan Abū Dāwūd**. hadīth no: 3587

2 - al- Fayyūmī, **al-Miṣbāh al-Munīr** , vol. 2, p. 575.

3 - **Lisān**, vol. 2, pp. 431-32.

4- **Saghīr**, vol. 2, p. 88.

5- al-Shāfi'ī, **al-Umm**, vol. 3, p. 58.

6- **Mughnī**, vol. 4, p.119.

7- **Fatāwā**, vol. 30, p. 278.

8- al-Muṭī'ī, **Takmilat al-Majmū'** , vol. 12, p. 103.

9- al-Thunayyān, **al-Jawā'ḥ wa Aḥkāmuhā**, pp. 28-9.

10 - **Bidāyah**, vol. 2, p. 187.

Fatāwā, vol. 30, p. 278.

11- **Bidāyah**, vol. 2, pp.186-88.

Kabīr, vol. 3, p.182.

12 - **Muwaṭṭ'**, p. 252.

13 - **Mughnī**, vol. 4, p. 118.

Fatāwā, vol. 30, p. 273.

I'lām, vol. 2, pp.338-39.

14- al-Kāsānī , **Badā'i' al-Ṣanā'i'**, vol.5, p. 238.

Bidāyah, vol. 2, pp. 144-45.

Mughnī, vol.4 , pp.121-23 .

15 - al-Kāsānī, **Badā'i' al-Ṣanā'i'**, vol. 5, p. 239.

Mughnī, vol. 4, pp. 121- 123.

Fatāwā,Ibid , vol.30 , p. 288 .

16 - al- Kāsānī , **Badā'i' al-Ṣanā'i'**, vol. 5 , p. 173.

17 - **Muwatta'**, hadīth no: 31.10.15 .

18 - Muslim, **Ṣaḥīḥ Muslim** , hadīth no. 3777

Ibn Ḥazm, **al-Muḥallā** , vol. 8 , p. 385.

19- **Mughnī**, vol.4, p. 118.

Fatāwā, vol.30, p. 273.

20 - al- Shāfi'ī, al-Umm, vol. 3, pp. 56-75.

21 - Fatāwā, vol.30, p. 273.

Bidāyah, vol.2 , p. 187.

22 - I'lām, vol. 2, p. 339.

23 - al-Shawkānī, Nayl al-Autār, vol. 5, p. 178.

24 - al-Ṭaḥāwī, **Sharḥ Ma'ānī al-Athār**, vol. 4, p. 35.

25- Fatāwā, vol. 30, p. 270-71.

26- Bidāyah, vol. 2, p. 229.

27- Fatāwā, vol. 30, p. 288.

28- Zayla'ī, vol. 5, p. 145.

Ibn 'Ābdīn, Radd al-Muhtār, vol. 5, p. 55.

29- Mabsūt, vol.16, p. 4.

Saghīr, vol. 2, p. 280.

Mughnī, vol. 5, p. 25.

30- Mughnī, vol.5, p. 29.

31- Muhtāj, vol. 2, p. 358.

32- al-Kāsānī, Badā'i' al-Sanā'i', vol. 4, p. 197.

al-Thunayyān , al-Jawā'ih wa Ahkāmuhā , p. 262.

33- Zayla'ī, vol. 5, pp. 145-47.

al-Kāsānī , Badā'i' al-Sanā'i',, vol.4, p. 197.

34- al-Kāsānī, Badā'i' al-Sanā'i', vol.4, p. 197.

Mabsūt, vol.16, p. 2.

Durar, vol.1, p. 487.

Zayla'i, vol. 5, p. 145.

35- Durar, vol.1, pp. 486-87.

36- Bidāyah, vol. 2, pp. 229-30.

al-Nawawī, Rawdat al-Tālibīn, vol. 5, p. 329.

Mughnī, vol. 5, pp. 27-42

Muhtāj, vol. 5, p. 317.

37- Mughnī, vol.5, p. 35.

See also, Noel J. Coulson, Commercial Law in the Gulf States pp. 84-85

38- El-Ḥassan , " **Freedom of contract, the doctrine of Frustration ..**," A L Q. (1985, vol.1), p. 58

The resolutions of Mujma' al-Fiqh al-Islāmi , in: Majallat al-Majma' al-Fiqhī, resolution no: 2, 1408 A.H, p. 224.

39- Sayd Ḥassan Amin, Islamic law in the contemporary world p. 61.[1962] A.C.93.

40- Majallat al-Qānūn, (no- 1-4, 1983), pp: 260-62. opt.cit, Adnan Amkhan, " **Force Majeure And Impossibility of Performance in Arab Contract Law** ", (vol. 6, 1991) A L Q. p. 304

41-Dīwān al-Maẓālim in Saudi Arabia, Majmū'at al-Mabādi' al-Shar'iyyah wa al-Niẓāmiyyah 1397, 1399 A.H., pp. 91-103

42- **Articales 165, 168, 127, 233, 211, 261and 287 of the Egyptian, Libyan, Syrian, Yemeni, Kuwati, Iraqi, and Jordanian civil codes respectivly.**

43- al-Sanhūrī, Maṣādir al-Haqq, vol. 6, pp. 129-30.

44- **Articales: 373, 374, 379, 437,472, 448, 307, 435, 425 and 119 of the Egyptian, Syrian, Libyan, Kuwaiti, U . A . E, Jordanian, Algerian, Yemeni, Iraqi and Qatari civil codes respectivly .**

45- **Articales: 147(2), 148(2), 147(2), 117(1),48, 214, 146(2) and 205 of the Egyptian, Syrian, Libyan, Sudanese, Algerian, Qatari, Yemeni Iraqi and Jordanian civil codes respectively.**

46- al-Sanhūrī , Maṣādir al-haqq, vol. 6, pp. 129-30.

Adnān Amkhan, " **The effect of change in circumstancesin Arab Contract law** ", in: ALQ- (1994 - vol. 9, part. 3.), pp. 262.

47 - al-Sanhūrī , Maṣādir al-haqq , vol. 6 , p. 27 .

Adnan Amkhan, " **The effect of change in circumstancesin Arab Contract law** ", in: ALQ- (1994 - vol. 9, part. 3.),, P. 269.

48 - **Wahbah**, P. 320 .

al-Sanhūriī, Maṣādir al-haqq, vol. 6, p.91.

49- **Ibid**, p. 90 .

50- Qabbāni- Mohammad Rashīd, " **Naẓariyyat al-ẓurūf al-Ṭāri'ah fi al-Fiqh al Islāmī wa al-Qanūn al-Waḍ'ī** ". in: Majallat al-Majma' al-Fiqhī (part. 2, 1408 A. H .), pp. 134.

51- **Ibid**, P.129).

52- Ibid, P. 130.

53- Bidāyah, vol.2, p.231.

54- Mughnī, vol. 6, P. 30.

55- Qabbāni , " Naẓariyyat al-ẓurūf al-Ṭāri'ah fi al-Fiqh al-Islāmī wa al Qanūn al-Waḍ'ī ". in: Majallat al-Majma' al-Fiqhī (part. 2, 1408 A. H.), p.131.

56- Ibid, P.131.

57- Ibid, P. 132.

58- Ibid, P. 134.

59- al-Thunayyān, al-Jawā'ih wa Ahkāmuhā, P. 268.

Majallat al-Majma' al-Fiqhī (part: 2, 1408 A.H.), pp. 224-26.

60- al-'Ulūm, pp. 266-272.

61- Bidāyah, vol. 2, p. 205.

62- al-Kāsānī, Badā'i' al-Ṣanā'i', vol.7, p. 395

63- Mughnī, vol. 4, pp. 357-360.

al-Maṣrī, al-Jāmi' fi Uṣūl al-Ribā, p. 236.

64- Mughnī , vol. 4 , p. 360 .

Ibn Juzay', al-Qawānīn al-Fiqhiyah, p. 316.

al-Kāsānī , Badā'i' al-Ṣanā'i', vol. 7 , p. 395.

65- Majallat al- Majma' al-Fiqhī (part:2, 1408 A.H.) pp. 223-227.

CHAPTER FOUR

CONDITIONS OF NECESSITY

1. ACTING ACCORDING TO NECESSITY MUST BE COMPATIBLE WITH THE OBJECTIVES OF THE SHARĪ'AH:

Consideration of necessity is an integral part of Islamic law. Such consideration bears the same merits and characteristics as the other parts of Islamic law. This principle, in reality, is a sort of compromise between an ideal legislation that, on the one hand, aims to uplift mankind morally, spiritually and socially in order to achieve success in this life and the hereafter, and that, on the other hand, acts to intervene in and attenuate circumstances which cannot be avoided. In other words, the principle of necessity contributes to preserving the objectives of the Sharī'ah by making a balance between the two extremes without the law becoming to be too rigid or too loose.[1] It is to repel injury and to procure interest. Interest in Islamic law is the preservation of the objectives of the Sharī'ah and injury is an action that would result in violating such objectives.[2] The state of necessity has been recognized by the texts of the Sharī'ah as a justification for committing a prohibited act. It confirms the departure from a normal law in the cas of an exception where that does not go against the objectives of the Sharī'ah. It acknowledges a departure from one text or evidence in a particular situation in order to act according to another text in the case of necessity

> " when He hath explained to you in detail what is forbidden to you except under compulsion of necessity " S:6- V:119.

Such a departure is justified to preserve a vital interest which cannot be secured unless one leave the normal rulings.[3] Thus, necessity is not a free licence to commit prohibited actions. It must be in conformity with other proofs. For example, the punishment for theft according to the Sharī'ah is the cutting off of the thief's hand. This has been stated clearly in the Qur'ān which says

> " As to the thief, male or female, cut off his or her hands: a punishment by way of example, from God, for their crime " s:5 - v:38.

The Traditions of the Prophet confirmed this ruling in words and deeds. 'Umar, however, did not apply this ruling in the year of famine because he thought that such a ruling is not applicable in such a situation since famine had forced people to do so, and a compelled person has the right to save his life even if he takes someone else's property without his permission. So 'Umar has been reported as saying on one occasion when he did not apply this ruling " By God, if I had not known that you have used those boys and subjected them to hunger to the extent that if one of them had eaten what Allah has prohibited, it would be lawful for him, I would have cut off their hands."[4] Such a decision is not an arbitrary decision. It is a decision which is consistent with the objectives of the Sharī'ah and was based on other proofs such as the foregoing verse which says:

> " When He hath explained to you in detail what is forbidden to you except under compulsion of necessity " S: 6. V:119.

And such is the hadīth which states:

> " Remit the legal punishments (hudūd) from Muslims as much as you can, because, verily, that the judge should commit mistakes in pardoning the punishment is indeed far better than that he should commit a mistake in enforcing the penalty ".

During years of famine there would be plenty of hungry and needy people and it is difficult in most cases to distinguish between them and real thieves. Because of such a possibility of doubt and such a necessity, 'Umar suspended the penalty for theft. [5]

Having said that, the right of acting according to necessity is not granted, in the view of the majority of jurists, to a disobedient person. [6] So if some one has set out on a journey to commit a prohibited act such as killing some one else or to rebel against the legitimate ruler etc., he is not entitled to any sort of concession during his travel. That means he is not allowed to take, for instance, the property of others to ward off his extreme hunger which would certainly lead to his death. And he is also not allowed to shorten his prayer or to enjoy any other dispensations. The basis for such an opinion is that concessions were granted for removing hardship, which is a sort of help, and a traveling person who intends to kill or to steal etc. does not deserve any help whatsoever since he is a transgressor and transgression does not give him the right to act according to necessity because it has been stipulated in the Qur'ān " without wilful disobedience nor transgressing limits. " Thus to ward off his extreme hunger, he must repent first, then he will be granted dispensation .[7]

Other jurists held the opinion that acting according to necessity is a right granted to anyone who happens to face a condition of necessity, whether he was a traveller or not and whether he was a good or a bad person.[8] Accordingly, the meaning of " without wilful disobedience and

transgressing due limit" is to have a vehement desire for doing what is forbidden or to overstep the limits of necessity. [9]

In addition to that, preventing such a person from eating something prohibited, would lead to the loss of his life, which is a sinful act greater than what he is intending to do. [10]

'Abd al-'Azīz al-Bukhārī (d. 730 A.H) from the Ḥanafī school criticized the first opinion and wrote: " This is a very empty fatwā because no highway robber or any one else who knows he is disobeying the law will take it seriously because at the time when such a person is able to stop transgression or highway robbery without being harmed and he does not do so, how can one imagine that such a person will obey the law in case of necessity when his life is in real danger." [11]

A contemporary Muslim writer thought that the previous verse is not a proper proof in this case for either opinion since its main concern is to negate the sin from anyone who resorted to a prohibited act because of a necessity when such a person was not transgressing due limits. However, this verse does not prevent a person who transgresses due limits from removing his necessity. Thus, if the transgression mentioned in the verse was interpreted as rebelling against the legitimate ruler or against Muslims or as overstepping the limits of necessity, anyone who does so and falls into a state of necessity has the right to remove his necessity and save his life but he is committing a sin because of his transgression. [12]

The prohibited things are prohibited because of the harm or evil (mafsadah) which is expected from them. Such harm or injury, from the Islamic point of view, is always connected with such things. They cannot be separated from each other. [13] This will lead to the following points:

1- Acting according to necessity is to secure a mere momentary interest and is never intended to be permanent, otherwise it would be the general rule but not the exception. So whenever such a momentary interest has been achieved and the ability to act according to the original ruling has been restored, such an exceptional interest will return to its previous ruling. It is no longer an interest but a mere harmful act.

2- Such a connection would make a competent person very keen to get rid of such an exceptional rule and to return as soon as possible to the original ruling, since the nature of such an act is still evil but it was allowed and his sin was forgiven in order to preserve a more vital interest.[14]

That means taking preventive measures against a necessity before it comes into existence.

2. NECESSITY MUST BE GENUINE :

This condition contains three elements which are:

1- Acting according to the original rulings would result in a situation where one's religion, life, offspring, reason, or property would be lost or partially damaged. In such a situation, one is faced with compelling

circumstances which entail taking exceptional rulings as indicated in the maxim which says 'injury must be repaired '. [15]

2- The loss of one of these five essential values must certainly or most likely be the result of a current attenuating circumstance, that is, in opposition to a mere suspicion or specious conjecture (tawahum) which is not a proper ground for taking the exceptional ruleing. [16]

To distinguish between a genuine necessity and an unreal one, there should be an obvious explanation of what is the meaning of certainty and strong probability on the one hand, and what is the meaning of specious conjecture on the other.

In this regard, certainty means that a compelling state in which one is involved or enduring when there are no lawful means to help in escaping such necessity, such as an existing extreme hunger that is being endured and there is nothing lawful available to remove such hunger so that one is allowed, subsequently, to eat a prohibited thing. Or if someone is sick and he cannot observe the fast, when he is allowed not to observe it. [17]

Strong probability in this regard is the state in which the loss of one of the five essential values would most likely be the result of an intended action. For example, if someone knew, because of previous experience or according to the opinion of a reliable doctor, that if he observed fasting he would be subjected to a severe sickness, such a person would be entitled not to observe fasting and he is also not required to try fasting so that he would see

whether he would fall sick or not. Thus the meaning of strong probability is the existence of the signs of compelling conditions and not merely to the assumption of a coming difficulty. [18]

Specious conjecture is where there is no real sign that indicates a real danger. All that one has is a difficult situation which can be overcome by more effort and with firm faith.[19] This can be illustrated by the following verses which provide that ,

> " When angels take the souls of those who die in sin against their souls, they say: ' In what (plight) were ye?' They reply: ' Weak and oppressed were we in the earth.' They say: ' Was not the earth of God spacious enough for you to move yourselves away (from evil)?' Such men will find their abode in Hell,- What an evil refuge! -Except those who are (really) weak and oppressed - men, women, and children - who have no means in their power, nor (a guide-post) to their way " S:4-V:97 - 98.

The excuse of being weak and oppressed in the earth is rejected in this verse because it is possible for such oppressed people to migrate to another place where they can worship God safely without being persecuted. Although they find it hard to leave their lands or countries, this is deemed a normal hardship which does not constitute a valid excuse for staying where they face persecution. Al-Rāzī commented " a person may think that he is not able to emigrate but the reality is the opposite, particularly in the emigration from one's beloved country. Since it is emotionally hard to leave the country, one might think that one is not able to leave it but in reality one is able to do that. " [20] The real necessity is mentioned in the second verse where God has accepted the excuse of certain people, namely those who are really weak and

have, in addition, no means available to them whatsoever. Such people were forgiven for staying in a hostile environment.

3- There must be no lawful means available which one can resort to. In other words, there must be an existing injury which could not be removed unless one breaks the existing law. Thus if a compelled person was able to remove injury by either of two methods one of which is lawful while the other is not, he does not face a state of necessity since he can act legally by choosing lawful means. [21]

We shall provide an example where necessity is not genuine:

* <u>INTEREST IN THE MODERN MONETARY SYSTEM</u> :

Interest as practiced in the modern banking system has been subjected to extensive research in the contemporary Muslim world in order to reach a conclusion as to its legality or illegality. The overwhelming majority of Muslim jurists have come to the conclusion that such interest is pure usury and it is prohibited in Islam. Nevertheless, some jurists, economists and politicians have thought that interest in a modern banking system is lawful either because it is not usury at all so it is not prohibited or because it is essentially prohibited as a type of usury but the general need of the society for such a system makes it lawful since the economic system of any country in the world nowadays would not meet even minimum success without interest being at the core of such an economy. This study shall confine itself to the latter opinion which has been based on necessity and need since the first opinion is outside the scope of this study.

'Abd al-Razzāq al-Sanhūrī, the famous Egyptian legal writer, held the opinion that interest as known in the modern banking system is a type of usury, so it is clearly prohibited in Islam. However, it can be legalized on the ground of general need. He formed his opinion as follows:

1- In principle all types of interest are prohibited whether compound interest such as pre-Islamic usury, a usury by way of deferment (ribā al-nasī'ah), usury by way of increase (ribā al-fadl) or by lending with interest (ribā al-qard). Usury is prohibited, as al-Sanhūrī believes, for the following considerations:

i- Preventing foodstuffs from being hoarded.

ii- Protecting the value of the currency from being tampered with.

iii- Ensuring injustice and exploitation is not being inflicted on people.

2- The most indecent type of usury, as al-Sanhūrī held, is compound interest (ribā al-jāhilīyah) which was commonly used by pre-Islamic Arabs, when the creditor will ask the debtor to repay his due debt or otherwise he will increase it. This type of usury is prohibited for its harmful nature which would financially destroy the debtor and sharply increase the wealth of the interest taker. Such interest cannot be justified by any means; even the state of necessity that would allow one to eat a dead animal cannot justify dealing in such usury. Not only that ,but necessity cannot be imagined at all on the part of the creditor. It can be imagined from the part of the debtor if it is supposed that one was in dire need of money to save one's life and one

could not acquire such money by any lawful means except by a loan on the condition of excessive interest.

3- All other types of interest such as lending with light interest , usury by way of deferment and usury by way of excess are prohibited as a preventive measure so that dealing in them should not lead to dealing in compound interest. There is no question about their prohibition but they are to be allowed in the case of need whether it is a private or public need.

'Abd al-Razzāq al-Sanhūrī thought that in the prevailing capitalism, which is distinguished by capital being owned by individuals, establishments and banks but not owned by the state, general need requires saving money in order to generate a large amount of capital which will eventually be lent and invested. [22]

This opinion is takes full note of the usurious nature of interest as practiced in modern banks and never questioned such a nature. Thus it has been explicitly stated by Sanhūri that the need for such interest would cease to exist if capitalism was abandoned; then interest would become prohibited again. [23]

Such alleged need or necessity has not been accepted by the overwhelming majority of Muslim jurists. They think it is not a genuine necessity for the following reasons:

i- The role of interest in economics has been severely criticized by a number of Muslim [24] and non-Muslim economists [25] alike. They think that

the great harmful effects of interest on the general economy cannot be compared with its trivial beneficial effects. Some of this harmful effect was put by a Muslim economist as follows " In the olden days, production could not be expanded owing to lack of capital. But now in a number of rich countries there is superabundance of savings and large sums of money are simply lying idle. We find simultaneously with this superabundance of capital a very large class of unemployed persons. People are unemployed because the capitalists do not find it worth their while to invest their funds in the fields where the rate of return is less than the current rate of interest. For instance, if the current rate is 4% and money is invested in irrigation works which directly yield only 3%, then according to the capitalistic view, irrigation is unproductive. The money will not be invested in irrigation works, however useful these may be for society. The result is that the capital remains idle on the one hand while the resources remain undeveloped on the other. All public works, however conducive they may be for the benefit of society, remain undone in an interest economy if the yield from such works is less than the current rate of interest. Had there been no predetermined notion of fixed rates of interest many more useful things would have been done." [26]

ii- Muslim jurists and economists are not against the institution of banking. They argue that the present banks can be allowed Islamically to continue with two modifications:

1- They should not pay any interest to their depositors.

2- The banks should not charge any interest to their clients.

This can be achieved only if the banks instead of becoming the creditors of industry, trade, business and commerce, become their partners. Islam prohibits interest but allows profits and partnership.[27] If the banks instead of allowing loans to businessmen and businesswomen, become their partners and share the loss and profit with them, there is no objection against such banks in the Islamic system.

iii- Acquiring capital can be satisfied by means other than interest. One of the most important alternatives, in addition to other varieties of partnership, is the sleeping partnership (mudārabah), which is a contract based on the principle of profit sharing where one person gives his capital to another to do business and both parties share any profit or loss. It is thus a partnership between the supplier of capital, on the one hand, and its user who would provide the labour, entrepreneurial skill and managerial ability on the other. Contemporary Muslim authors and thinkers have argued that interest -free banks are an ideal alternative to the existing banking system. Their main objective is to mobilize funds from the public on the basis of a mudārabah partnership, as well as other kinds of partnership, and to provide funds to entrepreneurs.[28]

It is obvious from the previous discussion that governments or people who make the economic policies in Islamic countries have not given sufficient attention to the use of means other than the current interest system. As long as lawful means exist, there would be no case of necessity or need. Abū Zahrah said, in this regard, " Have the doors to lawful production been

closed? Or have we tried every lawful means possible so that we can resort to interest ? Obviously not." [29]

Moreover, the state of necessity, which might be recognized in this regard, is that where the monetary system, which is Islamically acceptable, led to a situation where necessity or general need require dealing with interest. An obvious example of that is mentioned by Ibn al-Qayyim regard to selling golden ornaments for a heavier weight of unbeaten gold since the general need of the society at that time required such a transaction otherwise people would resort to legal tricks which are not acceptable since the rules of necessity and need encompass such a situation. [30] But in the case under discussion, the need for interest, if there is any, was caused by establishing a new banking system which is not recognized from the beginning by Islam since the interest of the people can be met without such a system. [31]

3. REMOVING NECESSITY SHOULD NOT RESULT IN A SIMILAR OR GREATER INJURY:

Since removing acondition of necessity is intended to eliminate an injury, such an elimination must not inflict a similar or a greater injury on oneself or on any one else. Thus, the condition of committing a prohibited act in order to ward off a state of necessity is that such a commission must reduce the existing danger or harm so that people benefit from such an exceptional rule. [32]

Such a condition implies the assumption that the benefits and injuries according to the rules of the Sharī'ah have been classified in a hierarchical way. Such an assumption is absolutely accurate. Benefits according to the Sharī'ah have different degrees. [33] Thus if we wanted to know the range of importance of the benefits involved, we have to take into consideration three aspects:

1- The levels of interests in terms of their actual values.

2- The consideration of their scope.

3-The consideration of the possibility of their realisation. [34]

With regard to the actual values of interests, the Sharī'ah put preserving religion in the first place, preserving life in the second, then the preservation of intellect third, then in the fourth place the preservation of offspring and lastly the preservation of property. So in the case of conflict, rulings that support religion will take preference over rulings that preserve life, and rulings that aim to preserve life have priority over rulings that aim to preserve intellect in the case of conflict. Preserving the intellect also will come first if it conflicts with preserving offspring, which comes before preserving property if one has to choose between the two. [35]

In another regard, the preservation of every one of the previous five general benefits requires the distinction between various degrees within every one of the five benefits since there are three degrees in every general benefit. These are necessary benefits (darūriyyāt), complementary benefits (hājiyyāt) and luxurious benefits (tahsīniyyāt). According to the rules of the

Sharī'ah, necessary benefits precede complementary benefits in a case of conflict and complementary benefits have priority over luxurious benefits. Thus, for instance, if preserving life, which is necessary conflicts with a complementary benefit such as eating from lawful food, one had to disregard eating from lawful food to preserve one's life. So if a prohibited food was the only food available to one, one would not be obliged to refrain from eating the prohibited food if one's life was in real danger. One has to keep one's life free from danger by disregarding the rule which prohibits such food, since eating lawful food is a complementary benefit but preserving one's life is a necessary benefit which is a higher degree from the point of view of the Sharī'ah.[36]

If there is a conflict between two rulings concerning a general benefit such as religion or life or reason etc., then the aspect of the scope of the benefit should be taken into account. For instance, if the public interest requires widening a road or a mosque or a graveyard, such an interest takes precedence over private ownership; that means, for example, that private land, for example will be confiscated for a public interest provided that the owner receives fair compensation. Another example is that Muslim prisoners of war may be killed to protect the Muslim community if such prisoners have been used as a shield to protect the enemy in their advance, and there is no alternative.[37]

In addition there must be certainty or a strong probability with regard to the realization of the benefits. So a benefit that might not materialize or about whose realization there was reasonable doubt must not take priority

over another benefit which certainly, or very probably, is going to materialize.

Similarly, removing one's necessity should not be through inflicting a similar necessity on others. It is not allowed for a compelled person to kill another one so that his life would be saved. And it is not allowed for a starving person to take the food of another starving person. [38]

4. WHAT BECOMES PERMISSIBLE BY NECESSITY MUST BE LIMITED TO THE EXTENT OF SUCH NECESSITY:

Since the purpose of the exceptional rules of necessity is to remove hardship and mitigate difficulties, such exceptional rules are to operate as long as hardship is existent and cease to operate once the hardship is over.[39]

To illustrate this condition, we shall give the following example:

In the case of extreme starvation which will, if not satisfied, certainly cause death, and where no lawful food is available, one is allowed to eat from prohibited food such as a dead animal; but one should only eat, in the view of the majority of jurists, from such food the amount which enables one to stay alive until one finds lawful food and one is not allowed to eat excessively. [40] This is because prohibited food was allowed in such a case to ward off necessity and there is no necessity after eating such an amount since

the fear of death no longer exists. The Mālikī school, however, held the opinion that one is allowed to eat until one feels full. [41] They argue that necessity makes prohibited things permissible, which indicates that it is like lawful food which one can eat in small or large amount. However, what is meant by the extent of necessity, in this regard, which must be taken into account, is that it starts from the moment when there was no lawful food available until the moment in which one finds lawful food. [42] Ibn Qudāmah chose to distinguish between two cases. In his opinion, if the state of necessity is a continuing state which is going to affect one for a long time, one is allowed to eat freely because in such a situation if one was restricted to eating a small amount of prohibited food necessity would affect again such a person a short time later since it is a continuing necessity. However, if it is thought the state of necessity will be over in a short time, one is only allowed to eat what will help one to stay alive till one find slawful food.[43]

Similar to continuing necessity, which has been discussed is the hypothetical case, by several jurists, is the prevalence of illegal marketing and dealings and the dominance of prohibited businesses in certain areas where no one can live without being involved in such prohibited acts and no lawful dealings are accessible. In such a situation, people are allowed, if they cannot leave such an area for a better place or cannot change the situation, to deal with such an illegal dealing to ward off their necessity. Not only that but they are permitted to extend further the conduct of their businesses so that they can satisfy their needs (hājāt) because their life would not be secure and they would continue to suffer hardship if they limited themselves only to the

extent of necessity. However, they are not allowed to exceed the limits of need (hājāt) to luxurious and extravagant dealings. [44]

Furthermore, a Muslim is asked to exert all his effort to get rid of the state of necessity sooner rather than later. This has been illustrated by Ibn Taymiyyah as follows: ' even though an incompetent ruler may be recognized as a legitimate ruler, as a matter of necessity, if he is the best candidate available, society must work hard to restore conditions to their best so that everything needed is made right, particularly matters related to power and authority. In the same vein, an insolvent person must work hard to repay his debt even though he is not accountable beyond his ability.' [45]

Questions lead a competent person to perceive the state of necessity so that he can avoid misjudging his situation:

Is the legal evidence which prohibits a certain matter existent, explicit and must it be obeyed?
If yes... then

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Does it cause injury releating to the five principles if one has acted according to such evidence?
If yes...then

↓

Is such harm certainly or very probabley going to materialize ?
If yes...then

↓

Is there any lawful means available which can prevent such harm from being inflicted without breaching the law? If no... then

↓

Does ignoring the existing rulings lead to a similar or bigger harm ?
If no... then

↓

A competent person has the right to commit the prohibited act, provided that he limits himself to the extent of removing necessity, but no more.

1- Dirāsāt, p. 37.

2- Mustasfā, vol. 2, p. 482.

Muwāfaqāt, vol. 2, p. 8.

Dawābid, pp. 119-127.

3- Sarakhsī, vol.2, p. 203.

Dirāsāt, pp. 18 - 19.

Mubārak, pp. 207-9

4- I'lām, vol.3, pp. 22-3.

5- Ibid, pp. 22-3.

Falsafah, p.112.

6- Bidāyah, vo.1, p. 387.

Ahkām, vol.1, p. 58

Jāmi', vol.2 , p.215.

Mughnī, vol.11, p. 75.

Muhtāj, vol.8, p.22.

7- Ahkām, vol.1, p. 58.

Jāmi', vol.2 , p.215.

8- Jassās, vol.1, p. 156.

Ssrakhsī, vol.1, p. 92.

Jāmi', vol.2 , p. 215.

9- Kashf, vol.4, pp. 622-623.

Jassās, vol.1, pp.158.

10- Jāmi', vol.2 , p. 215.

11- Kashf, vol.4, p. 623.

12- Mubārak, p. 114.

13-Qawā'id, vol.1, p. 6. vol.2, p.205.

Muwafaqāt, vol. 2, pp. 315-316.

Mustasfā, vol. 1, p. 177.

14- Mubārak, pp. 202-204.

15- Nazā'ir, p. 94.

Ashbāh, p. 60.

Wahbah p. 69.

'Awdah,, vol.1, p. 577.

Wazārat al-Awqāf al-kuwaitiyyah, al-Mawsū'ah al-fiqhiyyah, vol. 28, p. 194.

16- Mughnī, vol.9, p. 426.

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37- Naẓā'ir, p. 96.

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CHAPTER FIVE

NECESSITY IN CONNECTION WITH OTHER ISLAMIC JURIDICAL CONCEPTS.

1. THE LINK BETWEEN AL-MASLAHAH AL-MURSALAH AND NECESSITY.

A. INTRODUCTION.

Before discussing al-maslahah al-mursalah, we shall give a brief explanation about the objectives of the Sharī'ah as seen by Islamic jurists. In chapter one under the heading of the five fundamentals, we have elaborated this topic. Suffice it here to bring back the crux of that topic as a preliminary to expounding al-muslahah al-mursalah.

The majority of Islamic jurists have held the opInion that the Sharī'ah aims, in its various rulings, to secure the welfare of the people by enacting rulings which promote their interests or protect them against harm.[1] As in any law in this world, the goal of the Sharī'ah is to preserve the belief, life, reason, offspring and material wealth of the people. So we find scholars like al-Ghazālī, Ibn al-Qayyim and al-Shāṭibī giving statements confirming this matter. Al-Ghazālī said in this regard: " Maslahah in its literal meaning is procuring benefit and repelling harm. However, that is not meant here since procuring benefit and repelling harm is the goal of human beings; and the interest of human beings is in achieving their goals. Maslahah means here

preserving the objectives of the Sharī'ah with regard to man which are five: It preserves their religion, life, reason, offspring and their property . Everything which partakes in keeping these five principles is a benefit and everything which disturbs their existence is an injury and to drive away such a disturbing thing is also a benefit." [2]

Ibn al-Qayyim made the same observation and held that preserving benefits should be by the adoption of a Sharī'ah oriented policy since he observed that " siyāsah shar'iyyah comprises all steps that lead people to be close to well-being (salāh) and move them away from corruption (fasād) even if no authority is found for them in the Qur'ān and the Sunnah of the Prophet. " [3] He quoted the saying of Ibn 'Aqīl (d. 513 A.H) that " Policy is whatever action brings people close to welfare and distances them from corruption even if it has not been mentioned clearly in the revelation. It is not right to say that no policy should be adopted except those policies which have been mentioned clearly by the revelation since it is a mistake and leads to describing as mistaken the Companions who legislated many rulings relying on the public interests, such as burning the various manuscripts of the Qur'ān (tahrīq al-masāhif). However, it is essential to say that policy must not contradict what has been revealed in the Qur'ān and the Sunnah of the Prophet." [4]

Al-Shāṭibī has confirmed this meaning throughout the second volume of al-Muwāfaqāt in which he begins by stating that: " Before starting our discussion, we shall state the axiom that the Sharī'ah has been established to preserve the interests of the people in both this life and the hereafter ." [5]

Beyond this, Islamic jurists have divided maṣālih, in terms of its validation by the Sharī'ah texts, into three types: [6]

1- The first type is recognized interest (maṣālih mu'tabarah). They are the interests which have been accredited by the texts of the Sharī'ah, such as the interests of preserving the essential and necessary fundamentals of life, religion, offspring, reason and material wealth. Also such other interests which are not necessary but complementary (hajiyyāt) or luxurious (tahsīniyyāt).

2- The second type is abolished interest (maslahah mulghāh). They are the interests which have been nullified directly or indirectly by the Sharī'ah. This can be illustrated by the following instance: To attempt to legalize giving the son and the daughter an equal share in inheritance on the pretext that such a legislation is securing a public interest is discredited since it is in direct conflict with a clear evidence in the Qur'ān,

> " God directs you as regards your children's inheritance: to the male, a portion equal to that of two females. " s:4, v:11.

which gives the son double the share of that of the daughter.[7]

3- The third type is unrestricted interest (maslahah mursalah). It is understood from the word mursalah that such interests are not covered by any text of the Sharī'ah since mursal means to set loose from such texts.

Maslahah mursalah has been defined by scholars who recognise it as every interest which falls within the objectives of the Sharī'ah and which has

not been regulated by the texts of the Sharī'ah. In other words there is no specific evidence in the texts which can confirm or deny its validity.[8]

Maslahah mursalah is not the only title for such a principle. Some scholars call it istiṣlāh, others call it istidlāl mursal and others call it munāsib mursal.[9] Every term focuses on a certain aspect of the same thing. Those who use the term maslahah mursalah have focused on the interest itself which is not regulated by the texts. And those who call it istislah or istidlāl mursal have focused on the process of the legislation of such an undefined interest, namely taking into consideration such an interest. And those who call it munāsib mursal have been concentrating on the proper and harmonious meaning which qualifies such an interest as falling within the scope of the Sharī'ah.[10]

B. THE VALIDITY OF AL-MAṢĀLIḤ AL-MURSALAH :

The Malikī and the Ḥanbalī schools recognise al-maslahah al-mursalah as a source of law. They believe that life brings new events every day. Such events are uncountable, evolving and absolutely unlimited. In addition to that, social life, culture and the interests themselves vary from place to place and time to time. It is unrealistic to expect that every single event in any time has been regulated specifically by the Sharī'ah texts. Such an attitude would lead to making the Sharī'ah unable to organise and protect people interests and it would be, in the end, a burden which stands against people's interests. This is against the flexibility of the Sharī'ah which is well-

known and against the purpose of the Sharī'ah which has been described in many texts such as the verse in sūrat al-Anbiyā' where the purpose of the prophethood of Muḥammed is described in the following terms,

> " We sent thee not, but as a Mercy for all creatures. " S: 21, v:107.

In this context the saying of the Prophet which provides that " No harm shall be inflicted or reciprocated in Islam " is of great relevance here.[11]

Furthermore, looking at the rulings which have been legislated by the Companions of the Prophet and the righteous predecessors of the Muslims, we find that a great number of them was legalised according to masālih alone. So al-Qarāfī said: The Companions of the Prophet have done things according to interest alone and not according to an existing text. The Caliph Abū Bakr, for example, collected and compiled the scattered records of the Qur'ān in a single volume. Similarly, 'Umar ibn al-Khaṭṭāb regarded his officials as accountable for the wealth they had collected during their office in abuse thereof and expropriated such wealth.[12]

Other jurists do not consider maslahah mursalah as proper grounds for legislation. The reason for such an opinion is that they fear that the Sharī'ah rulings would be changed according to the whim and arbitrary desire of rulers and scholars who have weak faith. Moreover, they held that the Sharī'ah is capable of handling new events which require legislation without recourse to masālih mursalah. The generality of the Sharī'ah evidences, maxims and analogy based on them will cover all the aspects of life.[13]

The reality, in this regard, is that all leading jurists such as Abū Ḥanīfah and al-Shāfi'ī have resorted to maṣāliḥ mursalah in one way or another as long as it falls within the objectives and the intent of the Sharī'ah. They do not regard it as an independent proof in its own right. Abū Ḥanīfah approves maṣlahah mursalah as a variety of Istiḥsān. Al-Shāfi'ī also validated it only within the general scope of qiyās. Al-Qarāfī, from the Malikī school, was aware of this fact when he explained " In respect of maṣlahah mursalah other schools deny its validity. However, we find them justifying a solution for new matters through maṣlahah only and they do not specify the textual proof for such a consideration when they weigh the similarities and differences between two matters, but rather they are content with mere suitability which is none other than maṣlahah mursalah. "[14]

C. THE CONDITIONS OF THE CONSIDERATION OF AL-MAṢĀLIḤ AL-MURSALAH :

The following conditions must be fulfilled so that muṣlahah mursalah does not become a means for arbitrary legislation and in order to ensure that every ruling, based on a consideration of interest, is compatible with the objectives of the Sharī'ah :

1- The interest must be in harmony with the spirit of the Sharī'ah and must not be in conflict with any one of its sources whether it is the Qur'ān or the Tradition of the Prophet or consensus or analogy (qiyās).

2- The interest should be rational (ma'qūlah) and acceptable to people of sound intellect. It is meant here that the interest should be pertaining to matters such as transactions so that the interest related to them would be based on reason. The case under review should not be one relating to devotional matters ('ibādāt).

3- The interest under review must be genuine (haqīqiyyah), as opposed to specious (wahmiyyah). In other words, such interest must not be in conflict with another superior interest, and its benefit must outweigh the harms that might accrue from it.

4- The interest must be general (kulliyyah).That means it should secure benefit or prevent harm to the people as a whole, and not to a particular class or to a few individuals.

5- The interest should be necessary (maslahah darūriyyah) or it should remove hardship (haraj) from the people. [15]

These conditions are measures which, in theory, prevent using such a principle for legalising things which are not included within the objectives of the Sharī'ah, and keep the rulings of the Sharī'ah free from being tamper.

Examples will be provided here to illustrate this source of Islamic law.

First: During the lifetime of the Prophet, the text of the Qur'ān was not compiled in a single volume. It was written on the then available materials

such as flat stones, wood, palm-branches and bones, and it was preserved in the memories of the Companions as well. Soon after the battle of al-Yamāmah, the Caliph Abū Bakr on the advice of 'Umar, had asked Zayd to collect the Qur'ān in a single volume, which he did. The reason which was given and repeated by Abū Bakr and 'Umar when they were asked how they could do what the Prophet had never done was that it was a good act. Being a good act is the basis on which such an act was carried out and it is strengthened by later consensus. Such an act is nothing but a consideration of maslahah mursalah which is preserving the Qur'ān from being lost, especially after a significant number of the memorizers had been killed in battles.[16]

Second: In the law of qisās, the Companions approved the execution of a group of culprits who took part in killing someone because the interest of the society required such a decision, which was to say if the victim had been killed intentionally a by group and they were not held responsible for such a killing, it would be a means for any one who intended to kill another one to escape the qisās without being harmed, and the right of the victim and his family to retaliation would vanish. In this case the public interest has clearly been taken into consideration. Furthermore, although such an interest has not been stated clearly in the Qur'ān and the Sunnah of the Prophet, it is not in conflict with the law of qisās and it is included within the objective of the legislation of qisās.[17]

Third: The Caliphs have held the craftsmen and traders accountable for compensation for the repair of loss or damage to goods that have been

entrusted to them by ordinary people. This ruling was based on the interest of the public since it encourages craftsmen to look after the goods in their custody and take greater care in safeguarding them, otherwise they would lack the motive to take care of the property of the people. 'Ali ibn Abī Ṭālib considered this to be for the interest of the people, for he said " This is the only way to preserve the interest of the people."[18]

D. THE LINK BETWEEN NECESSITY AND MASLAHAH MURSALAH :

The relation between necessity and maslahah mursalah is a very strong relation so that scholars have given identical examples for each. However, there is a certain degree of difference between the two principles. Removing the state of necessity is undoubtedly a benefit (maslahah) in its broad sense but is not necessarily a maslahah mursalah. Maslahah mursalah, on the other hand, is not in every case a state of necessity. It might fall also into the category of need.

To clarify this link between the two norms, certain points have to be mentioned:

Firstly : It is well known that interest (maslahah) in its broad sense, namely whether it is a recognized interest or an unrestricted interest, is divided in terms of strength into three types: Essential and necessary interests (darūriyyāt), the complementary interests (hājiyyāt) and luxurious and embellishing interests (taḥsīniyyāt). Any interest which falls

within the first type of this division and happens to be an unrestricted interest (maslahah mursalah) is a sort of necessity as well as maslahah mursalah. [19]

Secondly, necessity is also of three types.[20]

i- The first is the necessity which has been stated in the texts of the Sharī'ah such as eating the flesh of a dead animal. This type has no connection with maslahah mursalah, but it is linked to the general interest (maslahah 'āmmah).

ii- The second type is that in which the case of necessity was legislated by recourse to analogy (qiyās) with another case which was covered by the texts of the Sharī'ah, such as cutting down harmful thistles in the sacred area of Mecca which is analogous to the permissible killing of mice and snakes in the same area, since all are cause harm. This type has no connection with al-maslahah al-mursalah.

iii- The third type is that in which the state of necessity has not been specified by the texts of the Sharī'ah nor has it been included by qiyās. This type of necessity is part of al-maslahah al-mursalah.

Thirdly, with regard to this last type of necessity, all Islamic jurists are in agreement on accepting it as a valid evidence for legislation. So it is not included in the controversy over al-maslahah al-mursalah despite the fact that it is part of it. [21] Al-Ghazālī, in al-Mustaṣfā, stipulated three conditions which must be fulfilled so that maslahah mursalah will be validated. The first of which is that maslahah mursalah must be of the necessary and

essential type of interest. The second is that it must be general and not limited to a particular group or individuals. The third is that it must be materialized or definite (qat'iyyah).[22]

Many Muslim scholars have imitated al-Ghazālī in this opinion. Accordingly, they rejected al-maslahah al-mursalah as an evidence of legitimate rulings except in cases where such conditions are fulfilled.[23]

Other scholars have held that in stipulating these conditions al-Ghazālī did not intend to set conditions for the recognition of all sorts of al-maslahah al-mursalah, but was rather trying to clarify the part of al-maslahah al-mursalah which all Islamic jurists have accepted. This can be understood from other parts al-Ghazālī's discussion where he stated that interest is preserving the objectives and intent of the Sharī'ah and stated also that every interest which aims to uphold the objectives of the Sharī'ah which are mentioned specifically by the Qur'ān, Sunnah and consensus is called maslahah mursalah. The implication of these statements, nevertheless, is that the objectives of the Sharī'ah might fall into the necessary type of interest or into the complementary type or the luxurious. Therefore, maslahah mursalah is not confined to the necessary type of interest but can fall into the other two types as well. Such thought could be confirmed by the fact that in two other books al-Ghazālī clearly recognised al-maslahah al-mursalah which falls within types other than the necessary type.[24]

Other scholars have thought that al-Ghazālī's opinion on maslahah mursalah evolved through his three treatises namely, al-Mustasfā, Shifā' al-

Ghalīl and al-Mankhūl.[25] In his Mustasfā he did not recognise complementary and luxurious interests. However, he stipulated the previous conditions for recognising the necessary type of interest.

In his later book Shifā' al-Ghalīl, he took a further step and accepted complementary interests, but not luxurious ones, as a basis for legislation. He said " We have previously categorized the suitable meaning (al-munāsib) into three categories. They are necessity, need or complements and luxuries or embellishments. Any interest of the last category can in no way be a basis for legislation except if it is supported by a specific evidence ... With regard to interests either necessary or complementary, our view of them is that they are valid as a basis for legislation if they are consistent with the objectives of the Sharī'ah. However, they are invalid if they are inconsistent with its objectives." [26]

In his last compilation, al-Mankhūl, al-Ghazālī took yet a further step and validated every interest which has a suitable meaning (ma'nā munāsib) that exists in the Sharī'ah rulings and does not contradict a valid evidence. He stated that " Every meaning, which is suitable as the basis for a legitimate ruling and which has constantly existed in the Sharī'ah rulings and is not overruled by a recognised evidence such as the Qur'ān, Sunnah or consensus, is accepted even if no specific evidence supports it." [27]

As far as necessity is concerned, it is, according to al-Ghazālī's view in his Mustasfā, and according to al-Āmidī (d. 631 A.H) and al-Bayḍāwī (d.685 A.H) , one of three conditions for recognising al-maslahah al-mursalah. If

the case under consideration is not a pressing necessity, then it cannot be legislated by means of al-maslahah al-mursalah.

Another view is that, although necessity may be an important part of al-maslahah al-mursalah, it is not a condition for recognizing al-maslahah mursalah, since the latter may or may not be a necessity.

Fourthly : This sort of necessity, which is part of al-maslahah al-mursalah, is a legislative sort. That means that, new rulings may be legislated according to it. In order for this sort to be recognised, it must not conflict with a superior proof, rather it should be set loose from Sharī'ah evidence so that it comes within the sphere of maslahah mursalah. Its purpose is not to justify a departure from existing legal rulings, which is another sort of necessity relating to legitimate allowance (rukhṣah). [28]

EXAMPLES OF THIS TYPE OF NECESSITY:

1- Al-Ghazālī illustrated this type of necessity when he gavethe famous example of Muslim prisoners who are used as human shields by an enemy in their advance in battle. In such a situation Muslim fighters can not give up fighting when their enemy is advancing to a victory over them. They have to combat the advancing enemy even if the result was killing the shield of Muslim prisoners alongside their enemy in order not to let them defeat Muslim army. Such a defeat would put the safety of the whole Muslim community in jeopardy including these prisoners if they had survived.[29]

Al-Ghazālī believed that this interest is a recognised interesteven though no specific text from the Qur'ān and the Traditions of the Prophet testify to its validity, since it is a general, definite and necessary interest, and it is included in the objectives of the Sharī'ah which are to preserve the Muslims' unity and religion and to avoid more killing, which is superior to the preservation of an individual's life, particularly when there is no certainty of staying alive afterward. Taking the life of innocents, in this case, does not resemble the situation where prisoners are taken hostages in a castle which is used to bombard the Muslim army. In such a case Muslim fighters must not bombard the castle and kill the hostages since no necessity exists in this case where Muslims can fight from another location.[30]

He also thought that this case of necessity is not similar to the case where a group of individuals are on ship, and when a rough and high sea necessitates lightening the load of the ship by throwing some of the individuals into the sea in order for others to escape. And it is also not similar to the case that where a group of starving persons are on the verge of death, but if they eat one of them they will survive. In such cases the interest is not general and is confined to a number of individuals. This interest is not counted since it is a killing of innocents, which is prohibited.[31]

2- A Muslim ruler may exact certain money as a tax from wealthy people in case of emergency. In the event that the public treasury runs out of funds, a ruler may levy additional taxes on the wealthy in order to meet the costs of the army and to protect the society from becoming unsettled.[32]

Islamic jurists have stipulated certain conditions in order to keep such a ruling from being abused by rulers.

*The first condition is that the ruler must be renowned for serving justice.

*The second is that the amount of tax must be reasonable and just, and people can pay it without great difficulty and without becoming hostile to the government.

*The third is that it is the only way available to meet the urgent need, that is to say, funds can not be obtained from any other resource such as borrowing.

*The fourth condition is that such taxation must be confined to the limit of necessity, namely, the tax must be estimated by the extent of necessity and must be stopped with the disappearance of such necessity.[33]

3- In the event of an unqualified ruler gaining power over a Muslim community by force, the leadership of such a ruler should be recognised by Muslims even if he is not the most meritorious candidate, otherwise disorder and chaos will afflict the life of the community.

Al-Ghazālī gave this example when talking about maṣlaḥah mursalah and he explained the reason for validating such authority by stating that " if we do not say so, it will cause a great corruption ."[34]

Ibn 'Abd al-Salām has recognised such leadership and validated its conduct and authority while in office because of necessity.

4- In the event that all means for lawful trading and earning a living are inaccessible, trading in such an environment becomes permissible not just for earning the necessary means of livelihood but also in order to include the general needs, because life cannot go smoothly without including needs which would ease the life of people in general. To allow, in such situation, only the necessary requirements for living, would cause hardship and would paralyze the markets.[35]

5- Islamic jurists have agreed on prohibiting price fixing in normal circumastances as it is incompatible with the free nature of consent in commercial dealings as approved by the Qur'ān in the following verse,

> " O ye who believe eat not up your property among yourselves in vanities, but let there be among you traffic and trade by mutual good will "S:4, v: 29.

Forbidding price fixing has also been sanctioned by the Tradition of the Prophet where it has been reported:

> At the time of the Messenger of God, the market price rose in Madīnah. The people said," O Messenger of God, fix the price." He replied" God is the taker and the disposer, the provider and the controller of prices. I hope that when I meet him none of you will have a claim against me for an injury concerning life and property.".[36]

This hadīth was seen by many jurists as clear evidence which prohibits price fixing, since the Prophet's response was clearly negative and he viewed price controls as an unjust policy that violates the seller's consent by forcing him to sell at a given price.[37]

Some jurists have commented on this hadith and drawn a different conclusion. They thought that this hadīth does not prohibit price fixing, rather it addresses the circumstances which prevailed in Madīnah at that time. The conditions in Madīnah at that time made a compulsory ruling unjust even when the price was high because the increase in prices was due to natural causes. Thus the Prophet refused to fix the price for them because it would be unjust to the vendors who had done nothing to inflate the price.[38]

On that basis, in a situation where the price of essential commodities has exorbitantly increased because of an injustice by the vendors, the authority has the right to intervene and fix the price. This is on the grounds of necessity or urgent need. Nonetheless, such intervention by the public authorities must be made after a careful examination of each case. According to many jurists, price fixing should be of an equivalent price (thaman al-mithl).[39]

1- The Ẓāhirī school regard transactions as well as devotional matters as without rational connotation so that no mujtahid can base his Ijtihād on maslahah since it can not be,in their view, recognised by human beings. However, they beleive that the Sharī'ah as a whole is for the inerest of the people.

Ihkām, vol.3, pp:.411, 389.

a Dawābiṭ, p. 73.

2- Mustaṣfā, vol.2 , pp.481-82.

3- Ibn al-Qayyim, al-Turuq al-Hukmiyyah, p. 16.

4- I'lām, vol.4, p. 372.

5- Muwāfaqāt , vol. 2, p.6 .

6- Mustaṣfā , vol. 2 , pp. 478-81.

Ihkām, vol.3, pp.405-10.

7-Sha'bān , Uṣūl al-Fiqh al-Islāmi , p. 139.

8- Mustaṣfā, vol. 2, p. 481.

Ihkām , vol. 4 , P. 215.

Muwāfaqāt, vol. 1, p. 39.

9-See : Mustaṣfā, vol.2 , p. 478. al-Ghazāli, al-Mankhūl, p. 364.

Maḥṣūl , vol. 2 , P. 578.

Ihkām, vol.4, p. 215.

10- Dawābiṭ, p. 329.

11- al-Shāṭibī, al-I'tiṣām , vol. 2, p. 288.

al-Ghazālī , al-Mankhūl, p. 357.

Rawḍah, vol.3, p. 210.

12- al-Shāṭibī, al-I'tiṣām, vol. 2, p. 300- 02.

al-Ghazālī , al-Mankhūl, p. 357

Maḥṣūl, vol.2, p. 581.

13- Ibn al-Ḥājib, Hāshiyat al-Taftazāni 'ala mukhtaṣar Ibn al-Ḥājib, vol.2, P. 389.

Ihkām, vol.4, P. 216, 217.

14- al-Qarāfī, Tanqīḥ al-Fuṣūl. op.cit. Abū Zahrah, Mālik, p. 328.

15- al-Shāṭibī, al-I'tiṣām, vol. 2, pp. 129-133.

Mustaṣfā, vol.2, p. 489.

16- al-Shāṭibī, al-I'tiṣām, vol. 2, p. 289.

Abū Zahrah, Mālik, p. 335.

17- al-Shāṭibī, **al-I'tiṣām**, vol. 2, p. 302.

Abū Zahrah, **Mālik**, p. 336.

18- al-Shāṭibī, **al-I'tiṣām**, vol.2, p. 291.

Abū Zahrah, **Mālik**, p. 335.

19- **Mustaṣfā**, vol. 2, p. 489

Maḥṣūl, vol.2, p. 581.

Iḥkām, vol.4, p. 216.

20- **Mubārak**, pp. 211-12

21- **Iḥkām**, vol.4, p.216.

al-Bayḍāwī, **Nihāyat al-Sūl fi Minhāj al-Uṣūl**, vol.4, p. 386-87.

al-Tha'ālibī al-Fāsī, **al-Fikr al-Sāmī**, vol. 1 , p. 94.

22- **Mustaṣfā**, vol.2, p. 489.

23- **Ḍawābṭ**, p. 394.

Dirāsāt, P. 16.

24- al-Banānī , **Hāshiyat al-Banāni 'ala jam' al-jwāmi'**, vol.2, p. 284.

Ḍawābṭ, p. 394.

25- **Dirāsāt**, p. 16- 17.

26- al-Ghazālī , **Shifā' al-Ghalīl**, p. 208

27- al-Ghazālī, **al-Mankhūl**, p. 364.

28- **Dirāsāt**, P. 25.

29- **Mustaṣfa**, vol. 2, p. 487- 89.

Mughnī , vol. 9, P. 288.

al-Shāfi'ī, **al-Umm**, vol.4, p. 277.

Ibn al-Humām, **Fatḥ al-Qadīr**, vol.4, p. 278.

30- **Mustaṣfa**, vol. 2, p.489.

31- **Ibid** , pp.489-90.

32-al-Ghazālī, **Shifā' al-Ghalīl**, p. 234-37.

al-Shāṭibī , **al-I'tiṣām**, vol-2, p. 122.

33- **Ibid**, p. 121.

Mubārak, p. 215.

34- al-Ghazālī, **al-Mankhūl**, p. 370.

35- **Ibid**, p. 369.

36- Abū Dāwūd, **Sunan Abū Dāwūd**, vol. 3, ḥadīth no: 3443.

37- **Mughnī**, vol.4, pp. 240-41.

al-Shawkānī, Nayl al-Awtār, vol. 5, p. 220.

Saghīr, vol. 1, p. 639.

Muhtāj, vol. 2, p. 38.

Ibn 'Ābdīn, Radd al-Muhtār, vol.5, p. 256.

38- Ibn Taymiyyah, **Public Duties in Islām; The institution of Hisbah** translated by: Mukhtar Holland, pp. 44-45.

Ibn al-Qayyim, al-Turuq al-Hukmiyyah, p. 246.

39- Ibn 'Ābidīn, Radd al-Muhtār, vol.5, p. 256.

Ibn al-Qayyim, al-Turuq al-Hukmiyyah, p. 255.

2. NECESSITY AND BLOCKING MEANS (SADD AL-DHARĀ'I'):

A. INTRODUCTION.

The literal meaning of dharī'ah is whatever is used to acquire another thing or to lead to a certain end. It is synonymous with wasīlah. [1]

Al-Shāṭibi has defined dharā'i' as whatever is used to obtain a prohibited matter which contains injuries.[2] This definition confines dharā'i' to those which are subject to being blocked, but this is not true since dharā'i' are to be blocked if they are lawful but they lead to a prohibited act, or to be opened if they are prohibited but they lead to gaining a accepted interest. Ibn al-Qayyim has defined it as whatever means are used to obtain a matter , so if the means led to interest (maslahah) it would be then accepted, but if it led to injury (mafsadah) it would not be accepted. [3] Al-Qarāfī confirmed this when he wrote: " dharī'ah can be opened as well as blocked and can also be recommended or permitted or disapproved or forbidden since the meaning of dharī'ah is means (wasīlah), so the means to a prohibited matter is prohibited just like the means to a lawful matter is lawful." [4]

The Mālikī and the Ḥanbalī schools accepted dharā'i' as an independent source of law whereas the Ḥanafī and the Shafi'ī schools did not. Al-Qarāfī has written that " Dharā'i' are of three types. The first must be blocked by a unanimous agreement between all jurists, such as in the case of the ban on

insulting idol-worshippers lest God be insulted in return, as a retaliation. The second is that which must not be blocked by a unanimous agreement between all jurists, such as in the case of the growing of grapes lest it be fermented into wine. The third is that which jurists have disagreed on, such as deferred sales (buyū' al-ājāl). It is said that dharā'i' are accepted only by the Mālikī school, but this and it is not true since some of them is accepted by all ." [5]

Jurists who accepted dharī'ah as a source of law have quoted much evidence to affirm its validity. Ibn al-Qayyim has mentioned ninety-nine cases in which the principle of opening and blocking the means was one of the sources of legal rulings. The Qur'ān and the traditions of the Prophet have established a lot of rulings in order to block the means to evil such as :

1- In the following verse

" Revile not ye those whom they call upon besides God, lest they out of spite revile God in their ignorance. " s: 6, v: 108.

Muslims are told not to insult idols in order to block the way to insulting God in return by the idol-worshippers, notwithstanding the fact that rejecting and insulting idols might be otherwise praiseworthy, as it would mean a denunciation of falsehood and a firmness of belief on the part of believers. Such permissible conduct has come to be prohibited since it would be a means which might lead to an evil result. [6]

2- In the following verse :

" O ye of Faith! Say not (to the Apostle) words of ambiguous import (rā'ina), but words of respect " s: 2, v: 104.

Allah has told Muslims to address the Prophet respectfully and not to address him by the word rā'ina because the word rā'ina has two meaning, one of which is " please look at us or attend to us " and the other meaning is " clumsy " or " our shepherd ". The Jews used to use this word when addressing the Prophet with the intention of insulting him. So Allah forbids Muslims from using this word, despite their good intention, in order to prevent the abusive use of it. [7]

3- 'Ā'ishah said :

> " I heard the Apostle of Allah say: Every intoxicant is forbidden; if a large quantity of anything causes intoxication, a handful of it is forbidden ".[8]

According to this hadīth a little of any sort of alcohol is forbidden even thought it does not cause intoxication in order to block the way to drinking more and more and getting drunk in the end.[9]

4- The Prophet prohibited killing hypocrites who were known to have betrayed the Muslim community during battles. That was to block the way to rumours such as " Muḥammad kills his own Companions " which may provide the enemy with an excuse to misrepresent Islam and which may affect Muslims themselves.[10]

The above evidences and others show the validity of dharā'i' as a source of law because the Lawgiver has taken account of the method of blocking means and has established several legal rulings according to it.

The purpose behind the doctrine of sadd al-dharā'i' is to prevent injuries before they actually materialise. In other words, it is not concerned with looking at the intention of the perpetrator or the actual realisation of the result, but with looking at the expected result and end of such means regardless of whether it was the result of a good or a bad intention and irrespective of the actual realization of the expected result. Illicit privacy, for example, between members of opposite sexes (khalwah) is unlawful because it may be a dharī'ah to adultery. So it is unlawful whether it has led to adultery or not. The same is the case with trading during the time of the Friday prayer, which is unlawful whether it leads to missing the Friday prayer or not .[11]

B. TYPES OF MEANS :

Islamic jurists have divided means in terms of their probability of leading to expected result , into four types. [12]

1- The first type is that in which a means definitely leads to its result, such as in the case of digging a pit in front of a door which is used by the public so that any one who comes through that door is very likely to fall into it and although many might escape others would be trapped. Or such as in the case of digging a will in one's own garden but so close to the wall of a neighbour that it might fall as a result.

All jurists have agreed on the prohibition of the act in the first example. However, they have disagreed over the question of responsibility in the

second example because of the fact that the act of digging in one's own property is lawful.[13] Al-Shāṭibi has expounded this point saying that if a lawful act definitely led to a harm (mafsadah), jurists should look at it from two angles. The first one is the permissibility of such an act when it is not accompanied by the intention to inflict harm on any body. It is obvious, from this angle, that doing so is permissible. However, the second angle from which the jurists should look at this matter is the harm which is certain to be inflicted as a result of such an act. According to this angle, any act which results in harm should be banned. The perpetrator is liable for any damage which results from his act. Since the harm definitely results from such an act, the norm which says " repelling an evil is preferable to securing a benefit " is applied here. Such a norm was used by the Ḥanafī school to prevent the abuse of rights, which means that a person might be denied the exercise of his right if such exercise might result in excessive injury to others.[14]

2- A means which most likely leads to a prohibited end. That can be illustrated by two examples: selling weapons during the time of turmoil or civil war, and selling grapes to a wine maker.

3- A means which frequently leads to a prohibited end, yet there is no certainty, nor even a high probability of such an end. In this type, the perpetrator has exploited lawful means and used it to achieve an unlawful result, which is opposed to the purpose of using such a means. An example of this would be a sale transaction which is used to get usury (ribā) at the end. This kind of transaction, generally known as buyū' al-ājāl (deferred sale) or bay' al-'īnah, in which the payment is delayed to a later date is regarded by

the Mālkī and the Ḥanbalī schools as a means for procuring prohibited interest. If, for example, A sells an object for twenty pounds to B provided that the payment is due at the end of three months, and B sells the same object again to A for fifteen pounds with the payment being payable immediately, this transaction is , in reality, a loan of fifteen pounds to B on which he pays an interest of five pounds after three months.[15]

4- The fourth type of means is that in which the means rarely leads to injury and most likely leads to benefit. The possibility of it resulting in injury, is overlooked by a unanimous agreement between Muslim scholars as the benefit is most likely to be the result.[16] Examples of this type would be to grow grapes or to speak a word of truth to a tyrannical ruler. Such matters are lawful since the possibility of using them as a means to a prohibited result is very rare. In these cases , as in many other cases, there is a possibility that an injury (mafsadah) might be caused as a result. Grapes, for instance, might be fermented into wine; also speaking truthfully to a tyrannical ruler might cause serious trouble for the one who giving the advice. However, a mere possibility of this sort is neglected in comparison with the stronger likelihood of the benefit that would be procured from growing grapes and speaking truthfully to a tyrant.[17]

Islamic jurists have disagreed over the second and the third types. The Mālikīs and the Ḥanbalīs held the opinion that in such situations means may be blocked or opened. So both schools are in agreement on prohibiting selling weapons in a time of turmoil (fitnah), selling grapes to a wine maker and deferred sales (biyū' al-ājāl). On the other hand, the Ḥanafī and the

Shāfi'ī schools have held that such means should not be blocked since the original ruling is to permit such conduct. [18]

C. THE LINK BETWEEN NECESSITY AND DHARĀ'I' :

Resorting to blocking or opening means may be based on necessity as well as public interest. In this regard necessity leads to three different sorts of rulings in order to prevent injuries before they materialise. It would lead to the lawful act being prohibited, or to the unlawful act being permitted, or to release from fulfilling one's legal obligations (tark al-wājib).

i. PROHIBITING A LAWFUL ACT :

A lawful act may result in harm in the end so that it is turned into a prohibited act. In addition to the previous examples of selling weapons in a civil war or selling grapes to a wine maker, there is also the ruling in which a divorced woman whose husband had irrevocably divorced her during his terminal illness in order to exclude her from inheritance becomes entitled, nevertheless, to her share from the inheritance. Giving her the right to inherit prevents divorce being a means for such abuse. [19]

Another example is that the judge should not, in the view of the majority of jurists, adjudicate a dispute according to his personal knowledge of the facts without looking of the evidence of the case. [20] The reason is to prevent judges from relying on such personal knowledge to take sides with

one of the parties against the other claiming that it was based on personal knowledge.

It was reported, in another example, that 'Umar ibn al-Khaṭṭāb wrote to Ḥudhayfah asking him to divorce his new Jewish wife. Ḥudhayfah responded first by asking 'Umar if the marriage was unlawful. 'Umar in his response made it clear that such a marriage was lawful. However, he did not want people to follow the examples of Ḥudhayfah in this matter lest people would seek to marry non-Muslim women (ahl al-kitāb) and leave Muslim women unmarried.[21] Also in another version 'Umar feared that Muslims would marry non-Muslim prostitutes.[22] In this example, the interest of Islamic society, in 'Umar's opinion, necessitated forbidding at that time such an act despite the fact that such a matter is permissible according to the Qur'ān and that 'Umar himself knew this rule.

The previous examples have been mentioned by some contemporary Muslim jurists as examples of necessity which leads to blocking means.[23] Nevertheless, these examples show clearly the consideration of blocking the means to prohibited acts which underpins the consideration of public interest, since preventing injuries before they materialise is to preserve the interest of the public. However, the state of necessity is not obvious in these examples unless it is meant here in the broad sense of necessity. Necessity in its essence, as Mubarak pointed out, is a conflict between two interests in which the greater interest has to be secured and given a priority over the other one.[24]

ii. PERMITTING UNLAWFUL ACTS :

An unlawful act may, as a result of a state of necessity arising, be turned into a lawful act in order to repel the expected injury (mufsadah). This can be illustrated by the following examples:

1- To give any financial support to the enemy fighting against Muslims is a prohibited act as it contributes to their strength which would result in harming Muslims. However, such an act would become permissible in the case of Muslims in a very weak situation when they do not have the power to enable them to protect themselves and their land. In this situation, they may give money to the enemy to stop their aggression. In this example the unlawful act, which was prohibited to preserve the interest of Muslim society, was legalised to prevent a greater harm from being inflicted on Muslims.[25]

2- All Islamic jurists have held the opinion that to give bribes is a great sin and prohibited. However the Mālikī and the Ḥanbalī jurists have held that giving bribes to an oppressor is permissible if it is the only way to prevent his oppression, that is if one is unable to defend himself or to obtain one's rights by other means, provided that one's rights are undisputed, that is they must be his proven rights, and provided also that the harm which is inflicted on one as a result of the oppression or from the loss of rights is greater than that resulting from giving a bribe.[26]

iii. RELEASE OBLIGATION:

The fulfilment of one's religious or legal obligations may not be binding. Failing to fulfill one's obligations might be permissible or obligatory on certain occasions so as to block a greater evil. Since it is permissible to permit unlawful acts where the necessity of blocking the means to evil arises, it may also be permissible, a fortion, not to do one's duty, since the Sharī'ah has paid more attention to avoiding forbidden acts than it has to doing what is commanded. This was explicitly mentioned in the saying of the Prophet:

> " When I command you to do something, do it to the extent that you can, and avoid what I have forbidden. "[27]

In this hadīth, the Prophet asked Muslims to do whatever he demanded in accordance with their ability. On the other hand he asked Muslims to avoid whatever he forbade without restriction as to their ability, since abstaining from doing a thing is not beyond one's capacity.

As to abstaining from doing one's duty so as to hinder a greater evil (mafsadah) , the jurists have provided some examples.

1- Penalties (hudūd) should be applied and this is the duty of Muslim leaders. However, in the case of the commission of a crime such as theft during battles, penalties should be suspended in accordance with the tradition of the Prophet, who said,

> " Hands are not to be cut off during a warlike expedition. "[28]

The reason for this is to avoid defection to the enemy.[29]

2- Promoting good and preventing evil (amr bil-ma'rūf wa nahy 'an al-munkar) is an obligation on every Muslim as the Prophet said:

> " He who sees something abominable amongst you should modify it with the help of his hand; and if he has not strength enough to do it, then he should do it with his tongue; and if he has not strength enough to do it, (even) then he should (abhor it) from his heart and that is the least of faith." [30]

Islamic jurists are in agreement that if promoting good or preventing evil would make the situation worse rather than better one should not do it, as the objective of enacting such a principle is to reduce the amount of evil not to increase it. According to this principle, jurists have ruled that fighting unjust rulers for the cause of promoting good and preventing evil is not permissible as long as they allow Muslims to perform the prayer. The reason for that is to prevent the turmoil and unrest which are usually associated with such fighting and which endanger the life and property of Muslims. However, this does not exempt Muslims from promoting good and preventing evil by means other than fighting. [31]

1- Furūq, vol. 3, p. 266.

The original meaning of dharī'ah in Arabic is either the camel which is used to hide a hunter so that he can get close to his prey, or wasīlah . see: al-Bustāni , Muhīt al-muhīt, p . 307.

2- Muwafaqāt , vol. 4 , p. 198.

3- I'lām, vol.3 , p. 147.

4- Furūq, vol. 2, p. 33.

5- Ibid , P. 32.

I'lām, vol.3, P. 147-71.

6- Ibid, p. 149.

7- Ahkām, vol. 1, p. 32.

8- Abū Dāwūd, Sunan Abu Dāwud , ḥadith no: 3679.

9- I'lām, vol.3 , p. 151.

'Abd al-Karīm Zaydān, al-Wajīz fi Uṣūl al-Fiqh , p. 248.

10- I'lām, vol.3 , p. 150.

Zahrah , p. 269.

11- Muwāfaqāt , vol. 2 , p. 323 and vol. 4 , p. 194.

12- Furūq, vol.3, p. 226.

I'lām, vol.3, p. 148.

al-Tha'ālibī , al-Fikr al-Sāmī fi Tārīkh al-Fiqh al-Islāmī,vol. 1 , p.101.

Zahrah, p. 271.

Zaydān , al-Wajīz fi Uṣūl al-Fiqh , P. 246.

Kamālī , Principles of Islamic Jurisprudence, pp. 314-15.

13 - Muwāfaqāt, vol. 2, pp. 357-58.

Abū Zahrah, Mālik, p. 345.

14- al-Kāsānī, Badā'i' al-Sanā'i', vol.6, p. 258.

Durar, vol.3, p. 201.

Falsafah, p.158.

15- Bidāyah, vol. 2, p. 140.

Furūq, vol. 2, p. 32.

Mughnī, vol. 4 , p. 175.

I'lām, vol.3, p. 154.

16- Muwāfaqāt, pp. 358-59.

I'lām, vol. 3, p.148.

17- Furūq, vol.3, p. 266.

I'lām, vol. 3, p.148.

18- al-Bājī , Iḥkām al-Fuṣūl fi Aḥkām al-Uṣūl, p. 690.

Ibn Rushd , al-Muqadimāt al-Mumahidāt , P:524.

Abū Ḥanīfah used istihsān which is based on the Tradition of a Companion to make the contract of deferred sale a void contract. Ibn al-Humām, Fath al-Qadīr , vol.5 , p. 207.

19- Bidāyah, vol. 2, pp. 82- 83.

20-al-Shawkānī, Nayl al-Awtār , vol. 8 , p. 286.

Bidāyah, vol.2, p.470.

Mughnī, vol.9, p. 53.

21- al-Ṭabarī, Tārīkh al-Tabarī ,vol.3, p. 588.

Jaṣṣās, vol. 2, p.16.

22- al-Ṭabarī , Jāmi' al-Bayān ,vol. 4, pp. 366-67.

23- Wahbah, pp.186-88.

Mubārak, p. 262.

24- Mubārak, p. 276.

25- Muwāfaqāt, vol. 2 , p. 352.

Furūq , vol. 2, p. 33.

26- Muwāfaqāt, vol. 2, p. 352.

Furūq, vol. 2, p. 33.

27- This ḥadīth was reported by Abū Hurayrah in Sahīh al-Bukhārī, vol.9, ḥadīth no: 391.

28- It was reported by Busr ibn Arṭāt in Sunan Abū Dāwūd, vol.3, ḥadīth no: 4394.

29- I'lām, vol.3, p. 155.

30- It was reported by Abū Sa'īd al-Khudarī, Sahīh Muslim, ḥadīth no: 79.

31- I'lām, vol.3, p. 171.

3. THE LINK BETWEEN NECESSITY AND CONCESSIONARY LAW (RUKHSAH).

A. INTRODUCTION.

Before coming to the definitions of concessionary law (rukhṣah), a brief explanation about the nature of a legal decision (ḥukm shar'ī) as seen by Islamic jurists shall be given.

A legal decision has been defined as the statement of the Lawgiver which concerns the conduct of people who are legally responsible (mukallafīn). As such it encompasses i- demand (ṭalab or iqtidā')-i.e. the law comes within the five qualifications, ii- option (takhyīr) i.e. fulfilling the demand of the law may be done in two or more ways, iii- legal situation (wad') -i.e. the law is subject to an outside condition in order that it may be fulfilled or not. [1]

The jurists then go on to group these three aspects of legal decision into two classifications.

1- A legal decision which arises out of the nature of the obligation of the demand or option (ḥukm taklīfī).

2- A legal decision which is subject to an outside condition in order that it may be fulfilled or not (ḥukm wad'ī).

1. HUKM TAKLĪFI :

Hukm taklīfī comprises demand and option. And it is, according to the majority of jurists, composed of the five qualifications (al-aḥkām al-khamsah), namely obligatory (wājib), recommended (mandūb), permissible (mubāh), disapproved (makrūh) and forbidden (muḥarram).[2] These types of legal decision vary because the implications of the legal statements do not convey their meaning in a unique way. Thus, the demand which is understood from the meaning of a statement may be either in the form of a command which requires something to be done, or in the form of a prohibition which requires something not to be done. If the command is in a definitive form legal decision is obligatory, and if the command is not definitive, the legal decision is recommended. The legal decision is a forbidding if the prohibition is in a definitive form, and it is disapproved if it is in an undefinitive form. If , on the other hand, the statement of the Lawgiver gives the individual an option to do or not to do something, it is deemed permissible. [3]

2. HUKM WAD'Ī:

Hukm wad'ī is defined as the statement of the Lawgiver which identifies something as a cause (sabab) or as a condition (shart) for a certain legal decision, or which sets up something as a hindrance (māni') to the application of a certain rule, or which identifies a legal decision as a strict law ('azīmah) or as a concessionary law (rukhsah),[4] or which make a law valid (ṣaḥīḥ) or invalid (fāsid). [5]

For instance, according to the saying of the Prophet " There is no marriage without the permission of a guardian ", [6] the permission of a guardian is regarded by the majority of jurists as a condition for a valid marriage. [7]

In the case of a similar example, the Prophet said " The killer shall not inherit." [8] In this hadīth, the Prophet regarded killing someone as a hindrance (māni') to inheriting from him. [9]

B. CONCESSIONARY LAW (RUKHSAH) :

Strict law ('azīmah)and concessionary law (rukhsah) are regarded as varietyiesof hukm wad'ī by some scholars since the normal condition of life is seen as the cause for applying the original rules, and an abnormal condition of life is seen as the cause for mitigation and for applying easier rules. [10]

Rukhsahwould not exist in Islamic law without the existence of 'azīmah. That means there must be an 'azīmah in the first place, then there should be a rukhsah in the case of hardship so as to mitigate the rigidity of the law.

The literal meaning of 'azīmah in Arabic is the act of determining or intending to do something. [11] In law, it means the rule in its primary state where the duty of competent people is to perform it. In other words, it is the law in its initial state when there is no conflicting evidence and no

intervening circumstances. It encompasses the general rules, in normal circumstances, which are directed to all people who are legally responsible without taking into consideration any person's excuse. Such a term can only be used alongside rukhṣah. [12]

Rukhṣah in Arabic means relaxation and facility (al-yusr wa al-suhūlah). [13] It has been defined in Islamic law as whatever prohibited matter has been made lawful for the purpose of easing hardship even though a legal proof still indicates its prohibition .[14] Some scholars wanted to be more precise so as to include all sorts of rukhṣah in the definition, and they said that rukhṣah is rules that have been facilitated for competent people (mukallafīn) who have valid excuse but which remain unlawful for those who have no such excuse, and matters whose non-performance has been allowed when normally they would be obligatory without the existence of a valid excuse. [15]

All the definitions of concessionary law (rukhṣah) are intended to include all the elements which must exist to form a rukhṣah. These elements are :

1- There must be evidence to validate such a concession.

2- A competent person (mukallaf) has valid excuse allowin him to abandon the original ruling in favour of the concessionary law.

3- The rules of rukhṣah are not the fundamental rules; they are alternative rules that are enacted to replace them for the purpose of removing hardship and bringing ease. Thus, facility and ease are the crux of the matter as to

rukhṣah. Accordingly, some scholars have defined rukhṣah as the legal rulings that have changed difficulty to ease and facility as the result of a valid excuse in spite of the existence of the evidence of the original rulings. [16]

C. TYPES OF RUKHṢAH ACCORDING TO THE HANAFI SCHOOL:

Scholars from the Ḥanafī school have divided concessionary law (rukhṣah) into two main categories: literal concession (rukhṣah ḥaqīqiyyah), and figurative concession (rukhṣah majāziyyah). [17]

i. LITERAL CONCESSION:

Literal concession is thus termed because in this type strict law ('azimah) still operates where there is no excuse, since the evidence which legalizes it still exists. This means that whenever a strict law ('azimah) is present alongside a concessionary law, the concessionary law (rukhṣah) will be real and literal. [18]

This literal type is also subdivided into two:

The first is that in which the action becomes permissible due to an existing excuse, yet the cause of its prohibition and the ruling of prohibition are simultaneously present with it being permissible. The permissibility in this case has no other effect than absolving the agent from sin. [19]

This type can be illustrated by two examples as follow:

1- The saying of words of disbelief by a person under compulsion is a special concession (rukhsah) when his life, were he not to do so, would be in real danger provided that his heart remains firm in his faith. Such an utterance is a permissible dispensation (rukhsah) in the case of compulsion so as to save the life of the compelled person. Furthermore, such an utterance does not mean disbelief since faith has its root in the heart. Nevertheless, saying such words in such circumstances is not obligatory since the evidence which indicates the obligation of belief and the prohibition of disbelief is present. Acting according to strict law ('azīmah) in this case is preferred. [20] This means that to refuse to say such words and to show respect for the commandment of God is better, and this is confirmed by several examples set by the Companions such as the case in which two of the Companions were threatened by killing if they did not believe in the prophethood of Musaylamah the liar. One of them refused to express this belief and was killed as result; while the other did express it and he was released. When the Prophet heard about them he said,

> " As to the first one, God has granted him a reward twice. As to the latter, he took the dispensation that has been granted to him by God and he committed no sin. " [21]

2- Enjoining good and preventing evil (al-amr bi-al-ma'rūf wa al-nahy 'an al-munkar) is an obligation on every Muslim. However, if a Muslim fears that doing so is likely to lead to his being killed or being tortured, he is allowed to abandon enjoining good or preventing evil so that his life may be saved. [22] If , nevertheless, he decides to take the risk and to

adhere to the unmodified law (ʿazīmah), this is preferred and better for two reasons.

Firstly, by doing so, he is complying with the obligatory commandment of God which has been stated in the following verse :

> " Enjoin what is good and prevent what is evil: And bear with patient constancy whate'er betide thee; for this is firmness (of purpose) in (the conduct of) affairs." S:31- V:17.

Secondly, by he insisting on enjoining good or preventing evil without fearing the consequences, he may affect and impede those who would do wrong or those who would think of doing it in the future. [23]

The second type of literal concession is whatever ruling becomes permissible while the cause of the prohibition exists but not the ruling of the prohibition. This type is similar to the previous one in every aspect except in the ruling of prohibition which does not exist in this type. [24] This can be illustrated by the following example.

The ruling which grants a concession to travellers and sick people to break the fast during Ramadān. In this example, the Lawgiver has given such people the right to break the fast despite the existence of the cause which prohibits breaking the fast,namely witnessing the month of Ramadān as the Qur'ān stated:

> " So every one of you who is present during that month should spend it in fasting " S: 2 - v: 185 .

This includes travellers and sick people since their fasting is accepted if they do so. However, they have been granted the concession to postpone the

fast till such time as they are no longer travelling or sick as the Qur'ān stated:

> " But if any one is ill or on a journey, the prescribed period should be made up by days later " S:2 - V: 185.

Accordingly, travellers and ill persons have the right to choose either to fast during Ramadān or to postpone fasting till it is convenient. [25]

Thus there is no prohibition on breaking the fast for travellers in this example since it is up to competent people to choose whether to fast or not. However, the prohibition in the concession regarding uttering words of disbelief is, according to the Ḥanafī school, present, and utterance of the words of disbelief is prohibited in every situation, nevertheless, saying it under duress is permissible, namely the perpetrator's sin is forgiven by God.[26]

ii. FIGURATIVE CONCESSION:

This type of concession is not a real concession since it does not exist vis-à-vis a strict law (ʿazīmah). Nevertheless it is called concession because it encompasses a sort of mitigation.[27] This type can be illustrated in the following examples.

1- Rules which were originally legislated in opposition to a general maxim, such as those validating contracts which would normally be disallowed. Lease and hire (ijārah), advance sale (salam), and the order for the manufacture of goods (istiṣnāʿ) are all exceptional, as the object of the contract is nonexistent at the time of contract, but they have been

exceptionally permitted in order to meet the public need for such transactions. [28]

Again , if someone was, for instance, compelled to eat the flesh of a dead animal because of extreme starvation, or to drink wine at the point of extreme thirst, he is permitted to eat and to drink because of the state of necessity which is a valid excuse. The legal decision with regard to dead meat and wine is that it is prohibited in case of option, but it is permissible in case of necessity, that means that the agent has no option in the case of necessity but to eat or to drink, and that if he refused to eat or drink then he would die, and as a result he would have committed a sinful act. This dispensation was granted to the compelled person in the Qur'ān where we read

> " He hath only forbidden to you dead meat, blood and the flesh of swine, ... But if one is forced by necessity without wilful disobedience, nor transgressing due limits, then is he without guilt.." S. 2 - V:173. [29]

Thus this is termed as a figurative concession by way of explaining the obligatory nature of the concession in such circumstances.

D. TYPES OF RUKHSAH ACCORDING TO THE MAJORITY OF JURISTS:

The majority of jurists have divided dispensation (rukhsah) according to its legal decision into various types.

1- Obligatory concession (rukhṣah wājibah). Eating the flesh of a dead animal, for instance, is an obligation in the case of extreme starvation which would most likely result in death. On the basis of the following verses, jurists have reached the decision that it is obligatory .

> " ..Nor kill (or destroy) yourselves.. ." S.4 - v:29. " And make not your own hands contribute to (your) destruction " S.2- v:195.

They pointed out that if the person involved in such a state of affairs did not eat from such flesh, preferring to observe the command that prohibits dead meat but not the other command which permits consuming it under a compelling necessity, he would be contributing to killing and destroying himself since he was able to save himself by complying with what has been permitted, namely eating this kind of flesh in such a situation. [30]

In the same vein , it is also an obligation on non-travellers and those who are not sick to break the fast during the month of Ramadān if the fast is likely to cause harm to the fasting person. [31]

Furthermore, drinking a glass of wine when it is the only available drink in order to stop choking is an obligation when the life of the choking person is in a real danger. [32]

2- Recommended concession (rukhṣah mandūbah). This means that it is better to act according to such a concession. A good example of such a concession is that which is granted the traveller to shorten the prayer of four rak'at, [33] or the breaking of the fast during Ramadān for the traveller who finds it hard to continue fasting. [34]

3- Permissible concession (rukhṣah mubāḥah). The obvious example for this type is the permissibility of the barter of ʿariyyah, namely, the sale of fresh dates on the palm in exchange for an inexact quantity of dried dates. This transaction of ʿarāyā is a concession and exceptionally permitted by the ḥadīth which provides that,

> " The Prophet permitted the sale of dates on the palm tree for its equivalent in dry dates." [35]

This was despite the fact that the rules of usury forbid the exchange of similar commodities unless they are in equal quantity.

Similarly, the permissibility of the contract of salam, that is the contract in which the payment is received on the spot whereas the object of the contract is delivered at a later date, is an exception to the rule that the sale of an object which does not exist at the time of sale is forbidden.

4- A dispensation other than the more appropriate (rukhṣah khilāf al-awlā). This means that to act according to the rukhṣah is permissible but is not the best thing to do, such as in the case of the previous example of uttering words of disbelieve under compulsion. This is permissible as long as faith is rooted in the heart; nevertheless it is better to show strength and firmness of faith by refusing to do so.[36]

In another example, it is better for the traveller to fast during Ramaḍān rather than to break his fast if he does not find it hard and fatiguing to fast. This is understood from numerous evidences such as this verse " and it is better for you that ye fast " S: 2 . v: 184. [37]

E. THE RELATIONSHIP BETWEEN CONCESSION AND NECESSITY:

In the light of the previous discussion, the relationship between necessity and concession (rukhṣah) will now be examined. It is obvious that the two principles are close to each other in terms of sharing certain elements which can be noticed in both of them. A contemporary Muslim researcher has observed the points of similarity between the two concepts and he accurately found that concession (rukhṣah) is characterized by the following :

1- Concession (rukṣah) is a legal decision (hukm shar'ī).

2- Such a legal decision is enacted because of an existing excuse and in order to remove certain hardship which would otherwise be inflicted on a competent person (mukallaf).

3- Such a decision is exempted from an original and general legal decision.

4- Such a decision ceases to operate immediately after the excuse which has justified it has disappeared.[38]

All these points exist in the case of necessity. So both of them are exceptional legal decisions which are excluded from a general decision. And such an exception in both of them is in order to avoid hardship for competent people (mukallafīn), so they are a sort of ease and facility against

distress and hardship. And lastly the effect of both of them ceases, once the excuse has ceased. [39]

It was previously also made clear that necessity is not just a part of rukhṣah but it is also the most important part of it, so the Ḥanafī school made necessity the real and literal type of rukhṣah. The same is the case for the majority of jurists who regard necessity as an obligatory dispensation (rukhṣah). However, if we use necessity in its broad sense, which includes need (ḥajah), most of the cases of concession will be regarded as a type of necessity.

1- Mustaṣfā, vol.1, p. 177.

Iḥkām, vol.1, p.135.

2- Iḥkām, vol.1 , p. 137.

Mustaṣfā, vol.1, p. 210.

3- Maḥṣūl, vol.1 , pp. 17-18.

Mustaṣfā, vol.1, p. 210.

4- Some scholars, such as Ibn al-Ḥājib, held the opinion that rukhṣah and 'azīmah are part of ḥukm taklīfī since rukhṣah and 'azimah are described as either obligatory, recommended, permissible, prohibited or disapproved; and what can be described as such is nothing but a ḥukm taklīfī.

Mukhtaṣar Ibn al-Hjib ma'a Sharḥ al-Aṣfahāni, vol.1, p. 412

5- Iḥkām, vol.1 , p. 137.

Maḥṣūl, vol.1, p. 24

6- Abū Dāwūd, Sunan Abū Dāwūd, vol.2, ḥadīth no: 2080.

7- Zahrah, p. 54

'A bd al- Karīm Zaydān , al-Wajīz fi Uṣūl al-Fiqh, p. 60.

8- Ibn Mājah, Sunan Ibn Mājah, ḥadīth no: 2735.

9- Zahrah, p. 57.

A. Zaydān, al-Wajīz fi Uṣūl al-Fiqh, p. 64.

10- Iḥkām , vol.1, pp.181- 87

11- Lisān, vol.12, p. 399.

Qāmūs, vol. 4 , p. 151.

12- Mustaṣfā , vol.1 , p. 329.

Iḥkām , vol. 1 , p. 188.

al-Bayḍāwī, Nihāyat al-Sūl, vol.1, p. 120.

Muwāfqāt, vol. 1 , pp. 300-01.

Kashf, vol.2 , p. 544.

Farā'id, p. 114.

13- Lisān, vol.2 , P. 1306.

Qāmūs,vol.2, P. 314.

14- Mustaṣfā , vol.1, p. 320.

Iḥkām, vol.1, p.188.

Kashf, vol.2, p. 545.

Muwāfaqāt , vol.1 , p. 301.

Farā'id, p. 115.

15- Kashf, vol. 2, p. 546.

16- al-Jabūrī, Aḥkām al-Rukhaṣ fi al-Sharī'ah al-Islāmiayah p. 12.

al-Namlah, al-Rukhaṣ al-Shar'iyyah , p. 42.

17- Sarakhsī, vol. 1, p. 117

Kashf, vol. 2, p. 576.

18- Ibid, p. 577.

19- Sarakhsī, vol. 1, p. 118.

Kashf, vol.2, pp. 576- 77.

20- Sarakhsī, vol.1 , p. 118.

Kashf, vol.2, p. 577.

21- Ibid, p. 577.

22- Sarakhsī, vol. 1 , p. 118.

Kashf, vol. 2, p. 579.

23- al-Namlah, al-Rukhaṣ al-Shar'iyyah , p. 135.

24- Sarakhsī, vol. 1 , p. 119.

Kashf, vol. 2, p. 582.

25- Sarakhsī, vol. 1 , p. 119.

Kashf, vol. 2, p. 582.

26- Ibid

Muḥammad Badshāb, Taysīr al-Taḥrīr, vol. 2, p. 214.

27- Sarakhsī, vol. 1 , p. 120.

Kashf, vol.2, p. 587.

28- Sarakhsī, vol.1 , p. 121.

Kashf, vol. 2, p. 589.

29- Sarakhsī, vol. 1, pp. 121 -22.

Kashf, vol. 2, p. 590.

30- Mughnī, vol.11, p. 74.

31- Farā'id, p. 117.

Manthūr , vol.2 , p. 164 .

32- Manthūr , vol.2 , pp. 164 and 317.

This is not a unanimous decision since there is another opinion to the effect that it is merely permissible (not obligatory) as necessity permits prohibited things. However, some scholars held that in such a case it is permissible to drink wine and it is a matter

between a person and his God. Nevertheless, if the situation was not like that, but the agent only claimed being to be choking when it was clear that he really was not, he would be punished. see: Jāmi', vol.2 , p. 231.

33- Manthūr, vol. 2 , p. 165.

Farā'id, p. 117.

al-Subkī , al-Ashbāh wa al-Nazā'ir, vol. 2 , p. 97.

34- Farā'id, p. 118.

Mughnī , vol.2 , p. 62.

35- This ḥadīth was reported by Zayd ibn Thābit in Sahīh al-Bukhārī, vol. 3, hadīth no: 393.

36- Farā'id, p. 118.

37- Jāmi', vol.2 , p. 280.

Manthūr, vol. 2, p. 167.

38- Mubārak, pp. 243-44.

39- Ibid , p. 244.

4. THE LINK BETWEEN NECESSITY AND ISTIHSĀN

Istihsān (juristic preference) is one of the secondary sources of Islamic law. Muslim jurists have debated the nature, scope and validity of this source. While al-Shafi'ī has totally rejected istihsān as a form of pleasure seeking and arbitrary law-making in religion, [1] Imām Mālik has observed that " istihsān represents nine-tenths of human knowledge." [2] Neither al-Shāfi'ī nor Mālik, in these statements, was talking about the istihsān which is considered as an independent source of law by the Ḥanafī, Mālikī and Ḥanbalī schools. Al-Shāfi'ī rejected the type of istihsān which involves personal opinion, discretion and inclination by the individual jurist which are not in harmony with the Qur'ān and the Sunnah. In other words, al-Shāfi'ī held that jurists should rule or give a juristic opinion on the basis of nass or on the basis of an ijtihad which relies on an analogy with a nass but they should not rule or give a juristic opinion according to their personal preference or their whim as is mentioned in the Qur'ān,

> " should you dispute over a matter among yourselves, refer it to God and his messenger, if you do believe in God and the last day " S:4, v: 59.

Viewing istihsān as such has been inherited by the adherents of the Shāfi'ī school. Thus a scholar such as al-Ghazālī suggested three different meanings for istihsān and proceeded systematically to reject those which incorporated the idea of arbitrary opinion. [3]

The first definition which he claimed was valid proceeds as follows. The first thing which comes spontaneously to the understanding is that it is

whatever a jurist prefers relying on his reason. He went on to refute this definition, although it has not been mentioned anywhere in the treatises compiled by the Ḥanafī school.

The second definition mentioned by al-Ghazālī was that it is an evidence arising in the mind of the mujtahid which he can not express nor explain in clear terms. This definition was also rejected by al-Ghazālī because that which can not be demonstrated might only be part of the imagination. It must be tested on the basis of the sources of the law if one is to know whether or not it is legitimate. However, this definition also has no place in the works of the Ḥanafī school except in order to refute it.

Finally, al-Ghazālī accepted the definition which is considered to be the authoritative definition within the Ḥanafī school. That is al-Karkhī's (d. 340 A.H) definition which we shall come to later on. However, al-Ghazālī refused to call such a process istihsān. [4]

Although al-Shāfi'ī explicitly denounced the use of istihsān, yet he himself has been quoted as having used a derivation of istihsān on several occasions such as in the ruling in which he said " I prefer (astahsinu mut'ah) the gift of consolation to be at the level of thirty dirhams." And " I approve (astahsinu) the period of preemption (shuf'ah) to be three days " following the date when the sale of property in question came to the knowledge of the claimant. [5] These examples make it clear that the Shāfi'ī school was, in fact, not entirely opposed to the use of istihsān, but merely its arbitrary use. The Ḥanafī school have also denied the accusation of being

proponents of using arbitrary opinion in enacting the law. Accordingly, a conclusion has been drawn by some scholars such as al-Āmidī, al- Shawkānī and al-Taftāzānī (d. 791 A.H) to the effect that there is no disagreement on the essence of istiḥsān between the schools, and differences over istiḥsān essentially amount to no more than an argument over words caused essentially by attention to the literal meaning of the word istiḥsān which means to approve or to deem something preferable. [6]

THE ḤANAFĪ SCHOOL:

The Shāfi'īs' criticism of using istiḥsān was particularly directed to the Ḥanafī school as the main adherents of istiḥsān. They relied on it as a viable concept in deducing the law.

The Ḥanafīs have, on the whole, adopted Abu al-Ḥasan al-Karkhī's definition which says: Istiḥsān is the abandonment of an established precedent in favour of a different ruling for a reason stronger than the one which obtained in that precedent. [7]

It is also said that istiḥsān is the stronger of two kinds of qiyas (analogy). A. al-Bukhāri commented following this definition saying that does not include other varieties which have been explained by al-Sarakhsī in his compendium Usul al-Sarakhsī:

Istiḥsān, according to al-Sarakhsī, is setting aside an established analogy in favour of a superior evidence, that is the Qur'ān, the Sunnah, necessity or a stronger qiyas.[8]

THE MĀLIKĪ SCHOOL:

With regard to Imām Mālik's remark in which he said: " Istiḥsān represents nine-tenths of human knowledge ", he was apparently, as Abū Zahrah said, including the broad concept of interest (maslahah) within the term istiḥsān in that statement. For it is interest (maslahah) which accounts for the large part of the nine-tenths. This can be clarified when we probe deeper into some of the Mālikī definitions and find out what they mean by istiḥsān. Al-Lakhmī (d. 478 A.H) defined istiḥsān as follows: " It is an analogy in which the incident (far') can be attached to two original cases (asl); one of them bears great similarity and close resemblance to the incident and the other one has little similarity to it. However, we attach the incident to the original case which bears little similarity, as we take into account current customs, public interest or preventing injuries." [9]

Ibn al-'Arabī defined istiḥsān in a similar way when he said " istiḥsān is to abandon exceptionally what is required by the law because applying the existing law would lead to a departure from some of its proper objectives. " Accordingly, he has divided istiḥsān into four divisions:

* Abandoning an evidence (dalīl) on the grounds of consensus (ijmā').
* Abandoning it on the grounds of custom ('urf).
* Abandoning it on the grounds of public interest (maslahah).
* Abandoning it on the grounds of removing hardship and necessity .[10]

However, one understands from the definition of other Mālikī scholars that istihsān is not so general as Ibn al-'Arabī described it. Ibn Rushd and Ibn al-Anbārī (d. 328 A.H) confined istihsān to cases where applying analogical reasoning (qiyās) is not appropriate. Istihsān enables jurists, in such cases, to escape the rigidity of the rules of qiyās, when applying qiyās is likely to lead to unfair results and to clash with the higher objectives of the Sharī'ah, in favour of another ruling based on a more subtle and effective meaning (ma'nā munāsib)in the case under discussion. [11]

An example has been given to illustrate this opinion:

In the law of inheritance, a case known as hajariyyah or himāriyyah presented the way in which jurists escaped the rigidity of general rules. In this case, the deceased woman was survived by her husband, mother, two full brothers and two uterine brothers. According to the Islamic law of inheritance, the husband takes half of the estate, and the mother is entitled to take one-sixth of the estate. The uterine brothers share a third. And whatever remains goes to the full brothers as residue because they are agnates ('asabah), who are entitled to inherit what has been left after giving those who have specific shares their shares as the Prophet Muḥammed said:

> " Give the farā'id (the shares of the inheritance that are prescribed in the Qur'ān) to those who are entitled to receive them; and whatever is left should be given to the closest male relative of the deceased." [12]

In this case nothing remained as the estate had been completely exhausted by those who had shares so that nothing remained for the full brothers to take as residue. The problem arises as to whether it is fair to exclude full brothers

from inheritance when uterine brothers, who only have a relationship with the deceased from the mother's side, take the third of the estate thus preventing any inheritance by those who have the same relationship on both sides. According to what has been narrated the full brothers appealed, requesting the Caliph 'Umar to suppose that their father was a stone thrown into the ocean. Did not they share the same mother ? As a consequence, 'Umar entitled the full brothers and the uterine brothers to a share in one-third of the estate. This decision from 'Umar was adopted by the Malikī school on the grounds of istiḥsān. This is because both parties are equal in terms of their relationship with the deceased from the mother's side. As to their relation from the father's side, it further supports their relationship with the deceased. Thus the fact that their relationship with the deceased was stronger validated the recourse to istiḥsān. It would be unfair, in the Mālikīs' view, to apply analogical reasoning and accept that they should always only inherit as male agnates the residuary. [13]

THE ḤANBALI SCHOOL :

The Ḥanbalī school, like the others, has rejected istiḥsān based on the whim and the personal inclination and opinion of the mujtahid. Nevertheless, they have accepted istiḥsān based on an evidence from the Qur'ān or Sunnah. They have defined it as follows: the abandonment of one legal decision (ḥukm) for another one which is considered better on the basis of legitimate evidence (naṣṣ or consensus). [14]

Some Ḥanbalī scholars, such as Abū al-Khaṭṭāb, defined istiḥsān in a different way because the usage of istiḥsān in Aḥmad ibn Ḥanbal's argument

entails the abandonment of analogy (qiyās) for stronger evidence such as a saying of a Companion. Abū al-Khaṭṭāb (d. 432 A.H) said: " Aḥmad never used the word istiḥsān except in abandoning analogy for istiḥsān but not in abandoning another proof." [15]

Aḥmad ibn Ḥanbal used istiḥsān in some cases such as :

In a case concerning one who usurped land and planted it, Ibn Ḥanbal held the opinion that the plants belonged to the landowner but he owes their value to the usurper in accordance with istiḥsān and against reasoning by analogy which would give the plants to the planter. He resorted to istiḥsān because of the saying of the prophet which stated that

> " if anyone sows in other peoples' land without their permission , he has no right to any of the crop, but he may have the value of it.(i.e. the initial cost of the plants) " [16, 17]

In the foregoing example we find Ibn Ḥanbal abandoned using analogy in favour of istiḥsān on the basis of the opinion exprssed in the saying of the Prophet.

Jurists have defined two types of istiḥsān:

First: The preference for hidden analogy (qiyās) over a direct one. In this type, two procedures of analogical reasoning appear to exist for one case. In determining the legal decision to which governs the case, one solution may be obvious and easily intelligible by way of analogical reasoning. However, close examination and deep reflection make it clear that another solution is preferable because some subtle and an effective

meaning has been taken into consideration. Thus, there are two qiyās, one of which is obvious but has a weak effect, and the other is a hidden qiyās but with a strong effect. Istihsān requires choosing the hidden qiyās and abandoning the direct one. The following example will illustrate this type of istihsān. According to Ḥanafī school, the ancillary rights which are attached to the cultivated land such as the right of drink (haqq al-shurb), the right to cross another's land to reach one's own land (ḥaqq al-ṭarīq) and the right of the water to flow across another's land without obstruction (ḥaqq al-masīl) are not included in the contract of sale unless they are specified. The question as whether they are included in a waqf of cultivated land or not has been answered by the Ḥanafī school as follows: if analogical reasoning is applied(qiyās), they are not included; but by way of istihsān they are. That can be explained by saying that: Two analogies can be drawn in this case. One of them, which is obvious, is to draw an analogy between the waqf and the sale contract as both of them result in transferring ownership. However, such a qiyās would prevent the use of the attached rights since it is a rule of the Islamic law of contract, including the contract of sale, that the object of the contract must be clearly identified in detail and nothing is included therein unless it is specified in the contract. It is clear that such an analogy would lead to inequitable results because it would be impossible to benefit from the waqf of cultivated lands without including any attached rights in the waqf.

Ḥanafī jurists have thus taken recourse to another analogy, which is a hidden analogy, that is to draw a parallel, not with the contract of sale, but with the contract of lease (ijārah), since both of them involve a transfer of

usufruct (intifā'). This alternative analogy with the contract of lease would successfully solve this problem and enable people to conclude a waqf even if the attached rights to the waqf are not specified. This analogical reasoning is a hidden analogy which needs deep reflection and thought. However, it has a strong effect since the essential purpose of the waqf is not to transfer the ownership but to transfer the right of making use of it, as is the purpose of the contract of lease. [18]

The second type of istihsān is to make an exception to a general rule of existing law. The justification for such an exception relies on existing evidence which warrant it. This evidence can be from the following: nass, consensus, approved custom, necessity or consideration of public interest (maslahah). [19]

Here are some examples to illustrate this type of istihsān. According to a general rule of the Sharī'ah law of contract, a contract becomes binding upon its conclusion. Nevertheless, when a person buys an object on the condition that he may revoke the contract within the next three days or so, he can do so and will not be bound by the general rule of contract. This exception to the general rule has been validated by way of istihsān which is based on the Tradition of the Prophet that said: " When you agree on the terms of a sale, you may say: It is not binding and I have an option for three days. " [20] Such a stipulation is what is known as the option of cancellation (khiyār al-faskh). [21]

In another example, the general rule is the forbidding of the sale of an object which does not exist at the time of sale. However, by way of istihsān, salam has been excepted on the condition that the time of delivery is stipulated and that the parties are able to meet the conditions of their agreement. This exception is according to the Tradition of the Prophet that said: " The Prophet prohibited the sale of non-existent objects but he permitted salam (advance sale in which the price is determined)." [22] In another hadīth, the prophet said: " Those who pay in advance for anything must do so for a specified measure and weight with a specified time fixed. " [23] , [24]

To illustrate exceptional istihsān which is authorised by consensus, scholars refer to the contract for the manufacture of goods (istiṣnā'). Recourse to this form of contract is made when someone places an order with a craftsman for certain goods to be made at a price which is determined at the time of the contract. Istihsān validates this transaction despite the fact that the object of the contract is non-existent at the time the order is placed.

The contract for the manufacture of goods (istiṣnā') also serves as an example of the istihsān which relies on custom ('urf). Since istiṣnā' has been commonly practiced among people throughout the ages, the scholars validated it on the grounds of general custom.[25]

Some classical and contemporary scholars do not consider exceptional istihsān as a part of istihsān. They hold that istihsān founded in the Qur'ān, the traditions of the Prophet or consensus should not be called

istihsān at all. In cases where an existing law or analogy has been left in favour of an alternative ruling on the basis of a Tradition of the Prophet, there is no need for invoking istihsān in such cases . All that is needed is the tradition itself. We do not need the word istihsān to enact the law as long as the legal pretext (nass and consensus) is present. Whenever a ruling for a case can be found in the Qur'ān or the sunnah, the jurist is obliged to follow it and does not have choice of resorting to qiyās or to istihsān. [26] Al-Zarqā' explains: If the nass authorizes excepting a case from general rules in favour of another rule, this is, in reality, the preference of the Lawgiver (istihsān al-shāri'), which is not the subject matter of istihsān. It should not be called the preference of the jurist (istihsān al-faqīh) which is the proper subject matter of istihsān.

What is called istihsān in al-Zarqā's opinion is of two types :

1 - Analogical istihsān (itihsān qiyāsi) which consists of a departure from one analogical reasoning to another as has been mentioned earlier when we explained the preferring of hidden analogy over direct analogy.

2 - Istihsān which is founded in necessity (darūrah), namely when the jurist leaves the existing rule of qiyās to another one necessitated by instant hardship or the consideration of valid interest. [27]

It is obvious from what has been stated earlier that necessity plays a fundamental role in istihsān, whether it has been seen as a departure from existing evidence in favour of other evidence or has been seen as a departure

from an existing analogy in favour of another analogy. The recognition of the role of necessity in istihsān originates from several considerations:

1 - Necessity itself is recognised by the Qur'ān and the Traditions of the Prophet as a valid justification for abandoning the existing law. Thus to prefer a solution based on necessity does not entail the jurist abandoning an attachment to the recognised sources of Islamic law.

2 - The objective of using istihsān and the objective of recognising necessity are the same thing, that is, to remove hardship. Thus the Ḥanafī jurist al-Sarakhsī looked to istihsān as a method of seeking facility and ease in legal injunctions. It involves a departure from qiyās in favour of a ruling which dispels hardship and brings about ease to the people. Al-Sarakhsī explained this by sayin: Avoidance of hardship (raf' al- haraj) is a fundamental principle of religion which is enunciated in the Qur'ān where we read in an address to the believers :

> " God intends facility for you and does not want to put you in hardship." s:2. v: 41.

Al-Sarakhsī gave an example that shows the link between istihsān and necessity. A Muslim woman is asked to cover her body. However, she is allowed to unveil part of her body in case of necessity and need such as the need to show it to the doctor; and this is by way of istihsān as it seeks facility for people. [28]

3- The Mālikī Ibn al- 'Arabī defined istihsān, as was mentioned earlier, in a way that may be applied to necessity: he views istihsān as abandoning exceptionally what is required by the law. Accordingly, both istihsān and

necessity are exceptions to what has been stated in the law texts. The ruling based on necessity is a temporary exception from what is required by the text, and istihsān is a permanent or temporary exception from the general rules. In addition to that, istihsān is not warranted unless analogical reasoning leads to bringing about injuries or missing benefit. Necessity is not taken into account except in cases when applying the law's text also leads to the same thing, namely bringing about injuries or missing benefits.[29]

From another point of view, necessity is a ground which warrants resorting to istihsān is warranted. For instance, if a well has been contaminated by an impure substance, the question arises as to whether the water may be used for ablution or drinking. According to Islamic law water must be pure, consequently such polluted water is not suitable for such use. In the case of the well, the water can not be purified by eliminating that part which is impure, since the water cannot be poured out, and water flowing into the well becomes unclean upon contact with the water within. The solution dictated by analogical reasoning is not to use such water because pure water has come into contact with the impure water. However, the solution found through istihsān provides that in order to purify the well, a certain amount of water, which is determined with reference to the type and intensity of the contamination, must be removed. Istihsān in this case is justified by necessity and removing hardship .[30]

In another example, strict analogical reasoning requires that witnesses who appear before the court must in all cases be trustworthy (ʿudūl) in order to be admissible, that is upright and irreproachable. The

court can never issue a verdict as long as the character and conduct of the witnesses is not fully trusted. For judicial decisions must be founded on the truth, and this is facilitated by the testimony of just witnesses alone. However, such a ruling does not apply so strictly when the judge happens to be in a place where upright witnesses cannot be found; then it is his duty, by way of istihsān, to admit witnesses who are not totally reliable so that the rights of the people may be protected.[31]

[1] - al-Shāfi'ī, Kitāb al-Risālah, translated in Khadduri, Treatise on Moslem Jurisprudence (1961) pp. 66-70.

al-Shāfi'ī, al-Umm , vol. 7, pp. 271-3.

[2]- Muwāfaqāt, vol. 4, p. 209.

[3] - Mustasfā , vol.2, pp. 467-9, 475.

[4] - Ibid, vol. 2, pp. 476-7.

al-Ghazālī , al-Mankhūl min ta'līqāt al-usūl , p. 375.

[5] - Ihkām, vol. 4 , p. 210.

al- Shāfi'ī , al-Umm, vol. 3, p. 232.

Sha'bān Muḥammad, al-Istihsān bayn al-Nazariyah wa al-Tatbiq, p. 40-1.

[6] - Ihkām, vol. 4, p. 211.

al-Shawkānī , Irshād al- Fuhūl, p. 242 .

al-Taftāzānī , al-Talwīh 'ala al-Tudīh, p. 82.

Zahrah, p. 254.

Khallāf , P. 83 .

Kamālī , Principles of Islamic Jurisprudence, p. 260.

Zidān , al-Wajiz fi Usūl al-Fiqh, p. 235 .

[7]- Kashf, vol. 4, p. 6.

Sarakhsī , vol. 2 , p. 200.

[8]- Kashf, vol. 4, p. 6 - 8.

Sarakhsī , vol.2 , pp. 200 - 2.

[9] - al-Ḥajwī, al-Fikr al-Sāmī , vol.1, p. 89.

[10]- Ahkām, vol. 2, p. 57 .

Muwāfaqāt, vol. 4, p. 208 .

Zahrah, p. 245

Abū Zahrah, Mālik , p. 300 .

Kamālī , Principles of Islamic jurisprudence , p. 245 .

[11]- al-Ḥajwī, al-Fikr al-Sāmī , vol. 1, p. 90 - 91.

Abū Zahrah , Mālik , pp. 298 - 300.

[12]- al-Bukhārī, Sahīh al-Bukhārī , vol. 8, hadīth no : 738.

[13]- Bidāyah, vol. 2 , p. 346.

Abū Zahrah , Mālik , p. 398 .

Coulson , Conflicts and Tensions in Islamic Jurisprudence, pp.14-17.

[14] - al-Qāḍī Abū Ya'lā , al-'Uddah fi Usūl al-Fiqh , vol. 5, p. 1607 .

Ibn al-Najjār , Mukhtasar al-Tahrīr fi Usūl Fiqkh al-Sādah al-Hnābilah , p. 74 .

15 - al-Qāḍī Abū Ya'lā , al-'Uddah , vol. 5 , p. 1607.

Abū al-Khttāb , al-Tamhīd fi Usūl al-Fiqh , vol. 4 , P. 93.

16 - Abu Dāwūd , Sunan Abu Dāwud : Chapter of sales (kitāb al-buyū') , vol.2, ḥadīth no: 3396.

17 - al-Qāḍī Abū Ya'lā , al-'Uddah, vol. 5, pp. 1604 - 08.

18- Zaydān , al-Wajīz fi Usūl al-Fiqh , p. 232.

Khallāf , p. 80.

Sha'bān, Usūl al-Fiqh al-Islāmi , P. 152.

Kamālī , Principles of Islamic Jurisprudence, P. 254.

19 - Ihkām, vol. 4, p. 212 -13.

Kashf, vol. 4, p. 8.

Khallāf , p. 80 .

Zaydān , al-Wajīz fi Usūl al-FiqhI, p. 231.

20 - Sahah al-Bukhāri, vol. 3, p. 575, ḥadīth no. 893 .

21 - al-Bardīsī , Usūl al-Fiqh, p. 308.

kamālī, Principles of Islamic Jurisprudence, p. 256.

22 - M. al-Bukhārī, Sahah al-Bukhāri, vol. 3, p. 44 ; Kitāb al-salam , ḥadīth no: 3.

23 - Abū Dāwūd, Sunan Abū Dawud , vol. 2 , P. 986 . Hadīth no. 3456 .

24 - Sarakhsī, vol. 2, p. 203 .

Kashf, vol. 4, p. 10.

al-Bardīsī , Usūl al-Fiqh, p. 309.

25- Sarakhsī , vol. 2, p. 203.

Zahrah, p. 249.

26 - al-Ghazālī , al-Mankhūl , p. 377 . Mustasfā, vol. 2, p. 477.

Ihkām , vol. 4 , p. 213 .

Zaydān , al-Wajīz fi Usūl al-FiqhI, p. 253 .

27 - Madkhal, vol. 1 , pp. 85-6.

28 - Mabsūt, vol. 10, p. 145.

29 - Mubārak, p. 234 .

30 - Sarakhsī, vol. 2, p. 203.

Kashf, vol.4, p.11.

31 - Zahrah , p. 246.

Kamali , Principles of Islamic Jurisprudence, p. 257.

CONCLUSION

It is clear from what has been stated in the introduction that the principle of necessity has never been treated in a separate chapter or work by classical jurists. However, discussion of, and materials relevant to, the various aspects of necessity can be found scattered in different places and different branches of Islamic knowledge. Contemporary jurists have paid attention to this principle, but available works are insufficient and have failed to clarify all the aspects of necessity. This study was an attempt to make clear the nature of this principle.

This study has shown that classical jurists restricted their definition to situations where one feared death if one did not take a prohibited food. However they applied it in matters other than that. This difference between definition and application may be because classical jurists were only defining that kind of necessity which permits prohibited food since it is the sort of necessity which has been repeated several times in the Qur'ān. On the grounds of different verses and Traditions of the Prophet, and in the light of the observations of classical jurists as to the causes of necessity, contemporary jurists extend the definition of necessity to include cases related to the five fundamental benefits (al-darūriyyat al-khams), namely religion, life, intellect, offspring and property. Anything that endangers the existence of these benefits which cannot be repelled except by committing an illegal act is regarded as causing a state of necessity and will justify committing that illegal act. By holding this opinion, contemporary jurists

have not come to any new perception of necessity other than that perceived by the classical jurists. They merely include the application of necessity by the classical jurists within the definition of necessity.

Maxims of necessity have confirmed the importance of this principle in Islamic law. Its importance stems from the high position given to the principle of removing hardship and to the other principle concerned with repairing injury. The maxims ' hardship begets facility ' and ' injury is to be repaired ' are the origin of all other maxims related to necessity. If a competent person faces a state of necessity, he is facing an unusual hardship which entitles him to ease such hardship. It was established that no ordinary or bearable hardship warrants breaching the law. However, every case should be judged according to its own merits. When a competent person facing a state of necessity is also about to receive an injury if he sticks to an existing law, such an injury must be removed.

As a confirmation of these two maxims, the maxims which state ' necessity permits prohibited matters ' has allowed explicitly prohibited matters in a case of necessity.

However, other maxims have dealt with the limits of such permissibility. Such as the maxims which state ' necessity is estimated by the extent thereof ', ' necessity does not invalidate the rights of others ', and ' the lesser of two evils is preferred '; The role of maxims in Islamic law is to bring together the different aspects of a legal subject. These maxims, and

others, have been shown to have brought together the various aspects of necessity and make its limits very clear.

Classical and contemporary Muslim jurists regard any situation which permits breaching an existing law as a state of necessity, whether it was caused by an external or an internal factor. In their opinion, starvation and illness, which exist without the intervention of other matters, as well as compulsion, legitimate defence and change in circumstances, which are caused by external factors, may cause a state of necessity.

Not every compulsion is a cause of necessity. Only complete compulsion namely the threat of killing and damaging a limb would cause necessity.

Any aggression against one's life, honour and property causes a state of necessity and allows people to defend them . However, the act of defence must be in proportion to the act of aggression.

Necessity was invoked in the process of legalizing several matters related to illness and associated with modern medical knowledge such as medication with unlawful substances and organ transplants. In such matters, the principle of necessity proves to have a legislative nature. In other words, it is the foremost part of pubic interest (maṣlaḥah mursalah).

In the realm of contract, jawā'ih is regarded as a cause of necessity since it may release a contracting party from his obligation if it was proved

that factors outside his control prevented him from fulfilling his obligations. Here again, necessity was invoked to legislate new rules regarding the nature of contracts in modern times.

Islamic jurists have stipulated a number of conditions so that invoking necessity might not be a matter of dispute. Necessity in this regard is part of Islamic law and was recognized as securing a legally recognized interest. Thus it should be understood as lying within the boundaries of Islam, and so any attempt to use it to permit something which is not compatible with the objectives of the Sharī'ah is to be considered as a straightforward violation of the objective of this principle. This observation leads to the question of the genuineness of the state of necessity, which is vital to the recognition of necessity, by which is meant that a constraint must be existent in order for necessity to be invoked In addition, removing necessity should not result in a similar or greater injury.

The maxim which states that the lesser of two evils is to be preferred is the core of the principle of necessity and a condition which indicates that removing hardship should not result in a greater injury. So necessity does not permit certain acts such as killing others under compulsion or because of extreme hunger in order to feed on them. However, necessity does not prevent one from killing an aggressor where it is the only means to repel his aggression.

Islamic juridical terms are intimately linked with each other. A firm link has been found between public interest (maslahah mursalah),

concession (rukhsah), juristic preference (istihsān) and blocking the means (sadd al-dharā'i') , on the one hand, and necessity on the other, where jurists have used the same examples to illustrate these various juridical terms. In addition, necessity is an essential part of maslahah, rukhsah and istihsān . This indicates the wide application of the principle of necessity.

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