

INTRODUCTION TO NECESSITY THROUGH SHARIA AND LAW

المدخل إلى الضرورة من خلال الشريعة والقانون

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الدكتور أبو الفردوس بينات باشا البجالي

اليقسم علوم القرآن والتفسير كلية العلوم الإسلامية الجامعة الإسلامية العالمية للدراسات الشرعية والإنسانية

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Abstract

Worship includes every human movement in life, and accordingly, a person's quest to take care of himself and his community is an obligation, and he is rewarded for it as long as he adheres to what he must do in it. Because the meaning of necessity is a comprehensive meaning that touches on many matters and a person must be characterized by reconciliation with himself and with others, and I have divided this research into issues preceded by an introduction. It included two topics. The first topic: in the definition of necessity in the language and in the terminology of legal jurists, and the second topic: it came in the definition of necessity according to the jurists of positive law, followed by a comparison between the two definitions. Then I interpreted the verses and explained the hadiths, criticism and deduction, and listed the opinions of scholars and tried to explain the most correct of it wherever it came. Using the analytical method, then it showed the teachings to which the verses guide us, which must be applied in dealing with people through the applied approach.

Keywords: the entrance, the necessity, during, the law.

ملخص البحث

إن العبادة تشمل على كل حركة من حركات الإنسان في الحياة، وعلى هذا فإن سعي الإنسان إلى العناية بنفسه ومجتمعه أمر واجب، وهو مأجور عليها ما دام يلتزم بما يجب عليه فيها هذا وسميت البحث بـ **المدخل إلى الضرورة من خلال الشريعة والقانون**؛ لأن معنى الضرورة معنى شامل يتطرق إلى أمور كثيرة، والإنسان يجب أن يتصف بالإصلاح مع نفسه ومع غيره، وقد قسمت هذا البحث إلى مسائل يسبقها مقدمة. فقد اشتمل على مبحثين. المبحث الأول: في تعريف الضرورة في اللغة وفي اصطلاح الفقهاء الشرعيين، أما المبحث الثاني: فقد جاء في تعريف الضرورة عند فقهاء القانون الوضعي أعتبتهما مقارنة بين

التعريفين.

ثم قمت بتفسير الآيات وشرح الأحاديث والنقد والاستنباط وصرده آراء العلماء ومحاولة بيان الراجح منه أينما ورد. مستخدماً المنهج التحليلي، ثم بينت ما ترشد إليه الآيات من تعاليم يجب العمل بها في التعامل مع الناس من خلال المنهج التطبيقي.

INTRODUCTION

Praise be to Allah, we praise Him, we seek His help, we seek His forgiveness, we seek His guidance, and we seek refuge in Allah from the evils of ourselves and the evils of our actions. He whom Allah guides, there is no misleading him, and he who misleads, there is no guide for him. For people the religion of truth and He guided them to it, and made it easy for them His legislation and did not burden them with what they could not do. The Almighty said: (وَلَا يُكَلِّفُ الْوَجْهَ) Then:

It is a given in the reality of life that there is disparity between people in health and disease, in weakness and strength, in wealth and poverty, and in all aspects of life, and the Islamic legislation has taken into account this, so all its provisions and legislation are based on the basis of removing embarrassment and paying hardship for all people in general. And on the sick and the weak, and some severe circumstances did not force them in particular, and there are many evidences in the Islamic Sharia, which are definitively sound, indicating sufficient evidence to remove the embarrassment from the people and the desire for ease for them, and on this principle is evidenced by the Holy Qur'an, the purified Sunnah of the Prophet and the consensus of the Islamic nation.

From the Noble Qur'an the Almighty's saying: (لَا يَجْعَلُ الْوَقْرَ حَرَامًا) and the Almighty's saying: (وَلَا يُكَلِّفُ الْوَجْهَ) and the Almighty's saying: (ثَلَاثٌ تَذَرُّنَا) and the Almighty's saying: (تَذَرُّنَا). In the purified Sunnah of the Prophet, a number of hadiths came to clarify and confirm this principle, for example, his saying, peace be upon him: "This religion is ease, and no one will make the religion difficult except that it will overcome it. It is an exaggeration in relation to the religions that preceded it, because Allah Almighty has laid on this nation the burden and shackles that were upon those before them.

The first topic: the definition of necessity in Islamic law

First: Defining necessity in the language:

Necessity is a name for the source of compelling, which is the need and distress that cannot be defended with severe hardship, as well as the meaning of resorting to the forbidden thing and for which it is not necessary. In general, the language of necessity: the need that calls for one to commit in it something that he does not commit with ease.

Second: Defining necessity in Sharia:

As for the definition of necessity in Islamic Sharia, it has been known by several definitions, including:

"The compelling state of eating what is forbidden by Sharia," Al-Suyuti defined it by saying:

If a person reaches a limit if he does not eat what is forbidden, he will perish or be on the verge of perdition.

It was defined in the Hanafi school of thought as: "The fear of harm or destruction for the soul or some of the organs by not eating."

As for the Maliki school of thought, it is defined as: "Fearing oneself from destruction, either by knowledge or by conjecture."

As for the Hanbalis, they defined it by saying: "A person fears spoilage if he does not eat anything that is forbidden except for poison."

It is necessary for a person to be exposed to circumstances that bring him to the point where he knows or thinks - or fears that if he does not take the forbidden - other than poison - he will perish or close to perdition, meaning that all of them will perish or some of them will perish ... or any of them will be close to perishing.

The criterion for estimating the occurrence of necessity is a personal criterion, as is clear from the jurists' expression of knowledge or conjecture, as well as their expression of fear, since his fear for himself in this case is only the result of his knowledge that if he does not deal with this forbidden, he will perish in whole or in part, or as a result of his belief in this outcome. , that the probability of death outweighs the probability of survival.

Whoever begins defining fear, begins it with the effect of knowing or suspecting that doom will occur, and fear is a psychological state that affects a person as a result of his knowledge of that. He realizes the dimensions of the effects resulting from his abstinence from eating forbidden things, and what is distinguished by him from the knowledge of the effects of this distance and this abstinence, and if this is available to a person, the person is in this case forced.

The second topic: Defining the state of necessity in positive law:

Necessity has been known in man-made laws with several definitions, but in most cases it converges in the same meaning and content with slight differences. Necessity is derived from harm, which is: "If a person finds himself or others threatened with serious harm that is about to occur, he does not see a way to get rid of it except by committing the act constituting the crime" and the danger may be directed to him deliberately with the intention of compelling him to commit the act constituting it, and this is a form of moral coercion. And the intervention of necessity in its general sense.

And there are those who define necessity by saying: "The presence of a person himself in circumstances that threaten him with a danger that cannot be avoided except by committing a crime, and this danger was not directed against him

deliberately with the intention of compelling him to commit it.” It agrees with moral compulsion in that the offender does not find a way to escape from the imminent evil. However, necessity is distinguished from compulsion in that the latter threatens with evil to compel a person to follow this path, unlike in the case of necessity, as he takes it on his own without anyone intending to bring him to him. The crime that occurs in these circumstances is called the “crime of necessity.”

Among the criminals who went to define it by saying: “a material situation of things that arises by a nature or a human act directed at others, and it warns of serious harm to the soul, which requires its payment to commit a crime against an innocent person.” It is equal to being a threat to the person who committed this crime, or to being a threat to another person.

However, when the person who is threatened with serious harm is the same person who committed the crime of necessity in order to ward off this harm, the source of his warning of the harm must be an act of nature, not a human act, otherwise there will be moral compulsion that comes from this person. But when the person who is threatened with serious harm to oneself is a person other than the perpetrator of the crime for which this harm is paid, then it is equal in this case that the source of warning others of that harm is an act of nature or a human act, because in the event that this source is a human act, it is not considered coercion. morally, as long as it is directed at others and not at the perpetrator himself.

Necessity is: a set of circumstances that threaten a person with danger, and suggest to him the way to get rid of him, by means of The intent of committing a specific criminal act against an innocent person. This is often the case in the case of necessity that it is not the fruit of man’s work, but rather it is the product of the forces of nature. Rather, the one who threatens him with danger must imagine the way to avoid it, inspired by the circumstances surrounding it.

Among the jurists who decide that it is: “dangerous solutions can only be deflected by a prohibited act.” It is a general legal system - like legitimate defense - it is not in accordance with criminal law alone, but is established in various branches of law, and it is not the product of a specific era. Rather, it is one of the theories that have accompanied legal thought since its birth, as the laws, ancient and modern, have recognized them and arranged their rulings on them, thus exempting the offender - when it was established - from the punishment prescribed for his act.

Among the criminal jurists are those who refer to situations of necessity and the like, with other terms, for example: the apparent force, which means: “and it is the foreign cause or the natural external force to which a person is inevitably subject, and he cannot push or resist it, and use him to commit an act or omission that is not Accordingly, the force majeure is characterized, first, as an inhuman force, and it may be a natural force, that is, from the actions of nature such as storms, lightning and earthquakes, or it may be beyond human understanding, such as that hidden or mysterious force, which still eludes human knowledge and experience, which explains Scientifically it is usually a force of nature.

Also, among the expressions that represent the state of necessity is the so-called sudden event, which is: “That factor or that force that is characterized by surprise, and is characterized by unpredictability and unimagining, and thus exceeds the possibilities of caution and human attention. The criminal force, which is a material force that directly and absolutely affects the organic or material aspect of the human being, the material element does not exist in the crime, and therefore does not also this moral element. Then force majeure as: “The agent who robs a person of his will and forces him to do an act that he did not want and for which he was not able to pay.” Among the jurists who see that material coercion and force majeure are synonymous, but sometimes the connotation of material coercion is limited to the case of whether human force is As for all other cases, such as natural force or animal force, it is called force majeure, and the importance of this specification is that material coercion in its narrow meaning keeps the crime in existence, even if it is attributed to the one from whom the coercion was issued without the one who was subjected to it. e, As for force majeure, it absolutely denies the crime.

The difference is fundamental between physical coercion or force majeure on the one hand, and a “sudden event” on the other hand. A sudden event does not erase the will, but rather it does not strip it of discrimination and freedom of choice, but it removes both intentionality and error, thus stripping it of the “criminal” trait. It is not performed by the moral element of the crime, for example, the driver of a car who hits a person who suddenly rushes from a side road, and avoiding him is impossible.

The necessity was also defined by their saying: “The situation that pushes a person to commit criminal behavior as a result of the existence of a set of circumstances surrounding him and he has no way to escape except by committing the criminal behavior due to the grave dangers that threaten him or others.”

Comparison between Sharia and law in the definition of necessity

Necessity has been defined in Islamic Sharia with several definitions, and perhaps the best of them is the definition that it is: “the situation that compels the consumption of what is legally forbidden,” because consuming what is forbidden by law - which is forbidden - when necessary, may be intended to ward off assault on lives, honor, or money, whether for the person himself or for others. Hence, it is a comprehensive definition of all cases of necessity. The criterion for

assessing this case is a personal one, as is clear from the expression of most of the jurists with “knowledge” or “conjecture,” as well as their expression with fear, since his fear for himself in this case is only the result of his knowledge that if he does not deal with this forbidden, he will perish in whole or in part or the effect. In this result, he thought that the probability of perishing outweighed the probability of his survival.

The jurists of positive law followed the same path and took the same direction as the jurists of Islamic law, and they defined the state of necessity with definitions that are almost the same as the definitions that the Islamic jurists said, with slight differences that do not represent a significant difference.

From comparing these different opinions in different eras and their continuous developments, it ended in the late twentieth century to what the Islamic Sharia began more than fourteen centuries ago, when the law of heaven was revealed to the heart of the envoy, Muhammad bin Abdullah, may God’s prayers and peace be upon him.

The most important results:

- That Islam has all its provisions and legislation based on the basis of removing embarrassment and hardship for all people in general, and for the sick and the weak, and they were not forced by some severe circumstances in particular.
- God Almighty has laid down from this nation the burden and fetters that were upon those before them.
- Necessity also refers to the severity of the situation and the severe need for something, and the necessary is everything that is needed, and everything that is not necessary.
- It is necessary for a person to be exposed to circumstances that make him to the point where he knows or thinks - or fears that if he does not take the forbidden - other than poison - he will perish or be close to perishing, meaning that all of them will perish or some of them will perish... or any of them will be close to perishing.
- The criterion for estimating the occurrence of necessity is a personal one, as is clear from the jurists’ expression of knowledge or conjecture, as well as their expression of fear, as his fear for himself in this case is only the result of his knowledge that if he does not deal with this forbidden, he will perish all or part or as a result of this thought. The result is that the probability of death outweighs the probability of survival.
- The necessity in positive law is “that a person finds himself or someone else threatened with grave harm that is about to occur, and does not see a way to escape from it except by committing the act constituting the crime.”
- A person may intentionally direct danger with the intent of compelling him to commit the act constituting it, and this is a form of moral coercion. And the intervention of necessity in its general sense. in positive law.

Margins:

Verse 286 of Surat Al-Baqarah.

Verse 78 of Surat Al-Hajj.

Verse 185 Surat Al-Baqarah.

() Verse 28 Surat An-Nisa.

() Verse 61 of Surat An-Nur.

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Verse 286 of Surat Al-Baqarah.

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