

Doctrine of Necessity (In Islamic Jurisprudence)

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Abstract: Islamic Jurisprudence provides the mechanism to understand the Islamic Law and the Islamic law is basically and principally pillared/sourced on Qur'an, the divine revelation (the words of the Almighty ALLAH) and the Sunnah (Prophetic Traditions), the words and the practice of the Prophet (Peace Be Upon Him) and those two are considered the basic sources of law in Islamic Law. Furtherance to the said sources seconding to the basic pillars is as Ijma (Consensus) and Qiyas (application of rule by analogy). After that the Ijtihad (Juristic consensus of opinion of the imam's mujtahid,) Istihsan (juristic preference), Maslahah Mursalah (Public Interest), Urf (Custom), Istishab (presumption of existence or non-existence of facts Presumption of Continuity), Sadd al-Dhara' (Blocking the Means). The paper is an effort to discuss these in order to present the pros and cons of the doctrine of necessity in Islamic jurisprudence.

Keywords: *Islamic law, the Qur'an, Sunnah, doctrine of necessity.*

Introduction:

Islamic Jurisprudence provides the mechanism to understand the Islamic Law and the Islamic law is basically and principally pillared/sourced on Qur'an, the divine revelation (the words of the Almighty ALLAH) and the Sunnah (Prophetic Traditions) the words and the practice of the Prophet (Peace Be Upon Him) and those two are considered the basic sources of law in Islamic Law. Furtherance to the said sources seconding to the basic pillars is as Ijma (Consensus) and Qiyas (Qiyas, Application of rule by analogy). After that the Ijtihad (Juristic consensus of opinion of the imam's mujtahid,) Istihsan (juristic preference), Maslahah Mursalah (Public Interest), Urf (Custom), Istishab (presumption of existence or non-existence of facts Presumption of Continuity), Sadd al-Dhara' (Blocking the Means), Ijtihad (exercise of independent reasoning by Imam/ Mujtahid).¹

A habit of the jurists is to draw the juristic classification of the sources of the law in Islamic Jurisprudence saying as

Chief Sources:

A- The Quran.

B- The Sunnah (authentic tradition of the Prophet Muhammed (Peace be upon him)).

C- The Ijma (consensus)

D- The Qiyas (judgment upon juristic analogy)

Supplementary Sources:

A- Istihsan (the rule of a precedent to another rule for a more relevant legal reason that requires such deviation)

B- Istislah (unprecedented judgment motivated by public interest)

C- Uraf (the custom and the usage of a particular society, both in speech and in action).²

In other words, two kinds may be articulated for consideration as GOD made laws and manmade laws as the first two sources are the GOD made laws and the rest are the Manmade laws, though in Islamic Law the understanding of the manmade laws is based on GOD made laws but extracted by the jurists and experts. The GOD made laws are absolute and authoritative one and principally provides the bases for all kinds of legal understandings. The GOD made laws are based on the revealed and derived therefrom the authoritativeness of the Beloved Prophet (Peace Be Upon Him) being lawgiver and interpreter of the laws.

Under Islamic Jurisprudence, the manmade laws are derived from the authority of the ruler (Khilafat) (based on the principals articulated in the Qur'an and Sunnah). Pertinent to mention herein that the authority of the Almighty ALLAH is ultimate sovereign and the authority of the Prophet (Peace Be Upon Him) is manifesto sovereign and authority of the Ruler/Khalafat is vicegerency.³

Under the Islamic Jurisprudence, the Legal Order/ Hukam Sharia means the demand of the Legislator for an action to be done or not to be done. It has been made with different kinds as

I- Obligation/Farad/Wajab means an action to be done mandatorily

II- Forbidden/prohibited/refrained means an action not to be done mandatorily

III- Mustahab/Masnoon/Nafila means doing an action is appreciable and not doing so is not to punishable.

IV- Mubah/Permissible means an action may be done and may not be

V- Improper means doing that action is depreciable.⁴

Under the Islamic Jurisprudence, Legal value/order is divided into two kinds as

I- Primary Law

II- Declaratory Law

And it has been defined in four different divisions as understood by the jurists including the jurist of the time known as Doctor Tahir ul Qadri, the last extracted classification of the Legal Order/ Al-Hukam u Shari⁵ after meeting the evaluation from the day one to this date as designed by the jurists and Now the Legal value under the Islamic Jurisprudence after taking its gradual evaluation of understanding is in juxtaposition for due understanding is as

I- Obligatory

II- Imperative

III- Mandatory Recommendation

IV- Directory Recommendation

V- Commendable

I- Forbidden

II- Condemned

III- Disapproved

IV- Improper

V- Uncommendable

The aim/purposes of the Islamic Law is under the principal of Maslaha (the welfare/public interest)⁶. Imam Ghazali has defined, "Maslaha is general purposes in the Divine Law for the preservation of five

essentials of human beings as Din (religion) life, intellect, offspring, and the property. Furtherance herein the Imam Ghazali said that Health is necessary for the preservation of life. It is an essential requirement for the establishment of God's law in human life. A healthy human being can properly implement this law in human society, "A proper understanding and implementation of Din (religion) through knowledge & worship, can only be achieved through physical health and life preservation". Hence, Islam places human health as second in importance to faith. The Prophet says, "Second to faith, no one has ever been given a greater blessing (importance) than human health".⁷ In another hadith, the Prophet (Peace Be Upon Him) defines the relative importance of health and wealth, "Wealth is of no harm to a God-fearing person, but to the God-fearing, health is better than wealth". Another hadith gives us the proper perspective of the essential things in life, "Whoever of you gets up in the morning feeling physically healthy, enjoying security and having his food for the day, is like one who has the world at his fingertips". By contrast, health places on us a great responsibility, for which we are accountable to God. The Prophet says, "Every servant of God shall have to account for primarily on the Day of Judgement is that God will ask him, "Have I not given you good health?" The Prophet has quoted here in saying, "No one shall be allowed to move from his position on the Day of Judgement until he has been asked how he spent his life, how he used his knowledge, how he earned and spent his money, and in what pursuits he used his health".⁸ Classical jurists said that Maslah is an important legal principle.⁹ And some jurists declared it an independent source.¹⁰ The Islamic Jurisprudence gives great importance to human health and life and its system from different angles covers human health & life.¹¹ As health and its guidance has been persuaded therefrom.¹² The Quranic concept is very much clear, signifying the importance of human health time and again.¹³ Islamic Law and Islamic Jurisprudence gives great importance to human health, its safety, security and worth above of all other obligations.¹⁴

That's why the principle of health as articulated in the Islamic System is more curable and healthy towards human health.¹⁵

Herein under, I would like to draw the kind attention towards the Doctrine of necessity under Islamic Jurisprudence as even obligatory demand from a follower is ordered to be suspended in serious need for health and Security till the normalization. Tantamount that wherever, whenever it needs to suspend even the obligation for the safety of human health & security, the obligation would be suspended and the health & security would be preferred as a principal. Let the legal references to be considered with the prospective of doctrine of necessity in this regard under the Islamic Jurisprudence as in Qur'an at different places has been declared that

إنما حرم عليكم الميتة والدم ولحم الخنزير وما أهل لغير الله فمن اضطر غير باغ ولا عاد فلا اثم عليه إن الله غفور رحيم (14 -) [النحل] 115

He has only forbidden you carrion, blood, the flesh of swine and (the animal) on which the name of other than Allah is invoked at the time of slaughter. But he who is faced with a survival condition (forced by necessity), neither defying (Allah's injunctions seeking a taste of lust), nor transgressing (the limit of necessity), then Allah is surely Most Forgiving, Ever-Merciful. (Quraan an-Nahl, 16: 115)¹⁶

[[إنما حرم عليكم الميتة والدم ولحم الخنزير وما أهل لغير الله فمن اضطر غير باغ فلا اثم عليه (2 [البقرة] 731

He has made unlawful for you only the dead animals and blood and the flesh of swine and the animal over which, whilst sacrificing, the name of someone other than Allah has been invoked. But he who is forced by necessity and is neither disobedient nor transgressing will not incur any sin on himself (if he eats that much which is required to survive). Allah is, indeed, Most Forgiving, Ever-Merciful. (Qur'an al-Baqarah, 2: 173)¹⁷ الأنعام 12 قد فصل لكم ما حرم عليكم إلا ما اضطررتم إلى

Whilst He has spelled out to you in detail (all) those things which He has forbidden to you except when (under the unavoidable circumstances) you are forced (to eat the bare necessity just as a life-saving measure. (Quraan al-An‘ām, 6: 119) ¹⁸ فمن

([اضطر في مخمصة غير متجانف لاثم فإن الله غفور رحيم) 13 ([المائدة) 3

Then if someone gets into a survival situation (and is forced by) ravenous hunger (and intense thirst i.e., driven by dire necessity, provided) he is not prone to sinning (i.e., eats what is forbidden without being wilfully inclined to sin), then Allah is indeed Most Forgiving, Ever-Merciful. (Quraan al-Mā'idah, 5 : 3)¹⁹ It has been made clear like crystal that the Human health and safety is needed by the law mandatorily and all the applicable laws may be suspended to save and save the health and security.^{20,21}

It is very much significant to keep always in consideration that the principally the obligations and the Forbidden under the Islamic Legal Order (Value) shall be suspended/repeal its compliance and practice in case of serious need and necessity. And the need and necessity has been defined by the jurists and it has been elaborated already above, wherein Imam Ghazali defined it very well and once again herein the Need/necessity means, “To obtain the benefit and restrain the loss” and “An action, which deserves the human health and Security of life while protecting the Aims of Islamic value/order”. And the Aims have been identified therein as: -

A- Din

B- Life

C- Sound mind

D- Offspring

E- Property

An action, which requires for the protection of the above five shall be considered as Need/Necessity under the Legal value/order, which is appreciable in Islamic jurisprudence and Islamic Law and losing them is not depreciable in Islamic Jurisprudence and Islamic law, herein it is very much clear that what need means in Islamic value/order. As it has been derived as a main principle by the jurists under the Islamic Jurisprudence to be followed and complied fully in accordance is as said by Almighty ALLAH فمن اضطر غير باغ ولا عاد فلا اثم عليه إن الله غفور رحيم means ‘But he who is faced with a survival condition (forced by necessity), neither defying (Allah’s injunctions seeking a taste of lust), nor transgressing (the limit of necessity), then Allah is surely Most Forgiving, Ever-Merciful.’²²

And after the need is over in protecting the aims, the obligation and forbidden shall be complied and practiced as it was limited in its scope for suspension in case of need. Again it has been principled by the jurists as²³

1) فاضطره بصيغة المجهول أي

2) (المفردات. الجي) 16 means serious & material pressure to do with two kinds, eternal fear, and external threat. The principal in Islamic jurisprudence and Islamic Law is with the change of the time and space, the legal value/order shall be varied in principle. Which is flexibility in Islamic Jurisprudence towards humanity and humanism and herein-from the Doctrine of Necessity is invoked and derived?

Under the verses of the holey Qur’an as mentioned above are permitting the deserving measure as in case of absence of water the legal value/order of ablution or bath shall be repealed/suspended with Tayamam (تيمم) and during the journey there is favour/reduction in Salat (صلاة) and Fasting (صيام), Haaj (حج) and Zakat (زكوة) shall not be applicable over incompetent. Furtherance there from shall be considered under the same principle of Doctrine of Necessity as opening the secrets of the human body for a medical practitioner for due procurement to be undertaken, Defence shall be a right even at the

cost to injure the attacker, postpartum in case of an investigation, synthetically reproduction, Transplantation, birth control, test-tube baby and likewise others needs and sometimes.²⁴

فإذا أكل الميتة فليس له أن يأكل حتى يشبع، بل يأكل بقدر ما يحصل به قيام بدنه من غير شبع²⁵
والباغي هو الذي يريد أكل الميتة مع أنه يمكنه أن يستغني عنها بغيرها، والعادي هو الذي يأكل ما يزيد على دفع ضرورته²⁶

إني يغلب على ظني أني لا أجد شيئاً أمامي وأنا أريد أن أمشي في الصحراء، فله أن يأكل حتى الشبع، أو أن يحمل منها، وذلك لأنه إذا منع فقد لا يجد في طريقه شيئاً فيهلك²⁷

أنا لا أدري هل أجد شيئاً أم لا، أما إذا كان يغلب على ظنه أنه يجد أو يتيقن أنه يجد الطعام عند حاجته بعد ذلك فليس له أن يأكل فوق حاجته²⁸

فالطبيب إذا أراد أن يكشف موضعاً من بدن المرأة يحتاج إلى علاج فإنه يقدر هذا بقدره ولا يزيد، فإذا كان الداء²⁹ بوجهها فليس له أن يكشف شعرها بل يكتفي بكشف الوجه، وكذلك الشاهد ينظر من المرأة ما يحتاج إليه فقط ولا يزيد.

The crux of the abovementioned explanations means that in saving life and security in coercive and forced time, the forbidden is permitted to utilize until the need is over, which is called the Doctrine of necessity in Islamic jurisprudence.

مَنْ كَفَرَ بِاللَّهِ مِنْ بَعْدِ إيمَانِهِ إِلَّا مَنْ أُكْرِهَ وَقَلْبُهُ مُطْمَئِنٌّ بِالْإِيمَانِ وَلَكِنْ مَنْ شَرَحَ بِالْكُفْرِ صَدْرًا فَعَلَيْهِمْ غَضَبٌ مِنَ اللَّهِ وَلَهُمْ عَذَابٌ عَظِيمٌ

The one who disbelieves after having believed, except someone who is coercively forced to do so, and at heart remains contented with belief (as before), but (of course) he who (adopts) disbelief (afresh) wholeheartedly with an open mind, on them is wrath from Allah and for them is a fierce torment. (Quraan an-Nahl,16:106)³⁰ No flexibility would be there as Almighty ALLAH gave through Qur'an to humanity in the name of the health and security of human life as the belief on the ultimate oneness on ALMIGHTY ALLAH is the core and main demand from the believer/follower and it may be suspended in dare need of the security of human the life remaining intact by heart. When the principal from the main source of the Islamic jurisprudence, the Qur'an says that the prudent/ need/ necessity in coercive and forced time in saving a life, shall prevail over the obligation or forbidden as highlighted and envisaged therein, which enlightened the subject like crystal with the words as³¹ فمن اضطر غير باغ ولا اثم عليه But he who is forced by coercively being neither disobedient nor transgressing will not incur any sin on himself (if he eats that much which is required to survive). Allah is, indeed, Most Forgiving, Ever-Merciful, and it projects the human health, life and security are most honourable. That is coercive and forced need/necessity (coercive and forced one), the need/necessity shall prevail, it has been defined by the jurists under the Islamic jurisprudence as الضرورات تبيح المحظورات means coercive necessity permits the forbidden³² and another principal is لا مُحَرَّمٌ مع اضطرار no forbidden for coercive need facer³³ ما أبيض للضرورة يقدر بقدرها permission is to beat the coercive need (not thereafter).³⁴

The base of the mentioned explanatory principals is on the saying of the Beloved Prophet Muhammad (Peace Be Upon Him) "لا ضرر ولا ضرار" as Neither harm nor reciprocation, which has been narrated in the book of Iba-e-Majha 2nd vellum page 784 Hadeeth No: - 2341³⁵ and another place the beloved Prophet (Peace be Upon Him) responded as narrated therein book of Musnad of Imam Ahmad Hadeeth No:- 22246 over the question facing the coercive and forced need option-less but to eat dead as, "إذا لم تصطبجوا ولم تغتبقوا ولم تحتفتنوا بقلأ فشانكم بها"³⁶ that if don't turn up, and don't betake and don't observe anything more than you can do it mean just beating the coercive need is allowed not more than that in any manner whatsoever. Furtherance hereto it has been explained and said, "A need/necessity mean someone has been pushed coercively and forcibly option-less to do a dislike or self-injuring and it may be by external effects or internal".³⁷ And Abdul Majid Deryia Abadi said that, "need/necessity mean in a dare need/prudent, one may use the forbidden, while feeling failure to die or unable to take obligation and in that case denying to use of forbidden shall be considered as sin"³⁸ and same has been said while adding the words to use till the fear of dying is over³⁹ and added the same⁴⁰ and in it has been added in case of refusal to obey the principal of need/prudent/necessity shall be sinner (as the suicide is forbidden in Islam) and in case death shall be a forbidden death⁴¹ and It has been added that

the limit of need/prudent/necessity shall not be crossed.⁴² The coercive and forced need/prudent/necessity has been divided in five kinds and defined when this principal shall be applicable.⁴³

Imam Ahmad Raza Khan said that fails to comply in accordance thereupon for saving the life and consequently dies, shall be a forbidden death.⁴⁴ As the principal of (order to) forbidden or an obligation shall be held in abeyance and shall be uplifted till the need/prudent/necessity is over or fear to death is over. Hereunder is the principal derived by the jurists is as, ⁴⁵ كل محظور مع الضرورة بقدر ما 45, ⁴⁶ ما تحتاجه الضرورة means that forbidden is permissible to beat the need. The jurists permitted in this regard “to use the bone for transplantation for human health even with the bones of the animals”⁴⁶ and “sometimes under special and recommended circumstances to use the alcohol even, blood & urine”.⁴⁷ Imam Shaibani’ permitted for medication horse meat and camel urine”.⁴⁸ Imam Abu Hanifa said حتى لو ⁴⁹ “تعين الحرام مدفعا للهلاك 49 يحل كالمية والخمر عند الضرور تمامه في الحبر As like deadhead and licker is permissible in coercive & forced need for security of life from death,” and it has been extracted principles as said by Imam Shaami ⁵⁰ المخصصة لقيام المحرم فيما 50 “Certainty permits the use of forbidden in need” and based on it, if someone is away from the availability of permissible drink/food, while having a fear of death in case not drinking the forbidden, which is available, the forbidden/haram shall be permitted to drink till saving the life as ⁵¹ اختلف في التداوي وفي النهاية من 52 and بالمحرم) إلى (قيل يرخص إذا علم فيه الشفاء ولم يعلم دواء آخر كما رخص الخصر للعطشان وعليه الفتوى 51 The assumption of Certainty towards the procurement with the usages of haram/forbidden is permissible, when admissible is not available”

The beloved Holy Prophet (Peace be Upon Him) answered the question about treatment as, ⁵³ يَا عِبَادَ اللَّهِ 53 Yes, O worshipers of Allah, “undertake the remedies, as Almighty Allah made the remedies of every disease, except old age”. The jurists seriously consider the new developments in medications towards the procurement and safety of human health as enriched by the experts of the relevant subjects even through the inadmissible/forbidden/haram for greater interest. Based on the doctrine of necessity under the Islamic Jurisprudence, the jurists permitted the forbidden in the greater interest of the human being honoring the alive as ⁵⁴ حامل ماتت ولدها حي يضطرب شق بطنها من الأيسر ويخرج ولدها 54 , if the women died with pregnancy with alive a fetus, the minimum surgery shall be undertaken to have fetus out. There are a wide number of examples, and the precedents permitted the prohibited /forbidden/ haram to use in saving human life by the jurists under The Islamic Jurisprudence. ⁵⁵ Those are some examples reflecting that The Islamic jurisprudence projects the Legal value/order for the safety of human health and security of life above all the Obligations. The legal system provided by The Islamic Law over the subject of the The doctrine of Necessity, which is clear like crystal and surprising as to how 1400 years before has been codified, which is still covering the shield and providing the safety, care, Honor, and dignity. Such surprising flexibility has been ordained in the name of humanity under the Doctrine of Necessity in Islamic Jurisprudence.

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ملفوظات ⁴⁴
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