

Necessity (*darūra*) in Islamic Law:
A study with special reference to the Harm Reduction
Programme in Malaysia

Submitted by
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ABSTRACT

This study serves two aims, to shed light on the rule of *ḍarūra* in Islamic law and to examine the justification for the Harm Reduction Programme in Malaysia using the said rule. In an attempt to fathom the real understanding of this rule, I have employed two methods: a critical approach to the *ḍarūra* theoretical discussions and an analysis of *ḍarūra* cases presented in *fiqhī* treatises. The study demonstrates that the *uṣūliyyūn* have formulated a narrow scope of *ḍarūra* theory although the applications of the rule in *fiqhī* treatises suggest other ways in which the principle can be applied. The jurists tend to apply the rule in a much wider sense in the various *fiqhī* works, either in true and factual cases or in hypothetical ones. This research also finds that the modern jurists have expanded the application not only to protect the necessity of an individual person but to protect the necessity of the public at large. It can also be suggested that the rule of *ḍarūra* has provided measures derogating obligations; however, this must only be to the extent required by the exigencies of the situation. A rigorous understanding of this rule is crucial for the field of Islamic law in order to avoid any possible abuse. Based on the above understanding of *ḍarūra*, this study finally investigates whether *ḍarūra* can justify the Harm Reduction Programme in Malaysia. This programme has been promulgated to reduce HIV/AIDS cases by providing drug users with methadone, syringes and needles. The programme was assessed thoroughly using the legal requirements and preconditions of *ḍarūra*. Having examined the philosophy, its modus operandi and jurists' attitude towards drugs, the study concludes that this programme is justified from a *sharʿī* perspective on the basis of necessity. However, strict precautions and regulations need to be continuously employed throughout this controlled programme to avoid any abuse which might impair its legality. The research also aims to enhance the public's understanding of the rule of *ḍarūra* and to improve the collaboration between Malaysian government and religious groups in minimising HIV/AIDS and drug cases in Malaysia.

LIST OF CONTENTS

ABSTRACT	2
LIST OF CONTENTS	3
LIST OF TABLES	6
ACKNOWLEDGMENTS.....	7
INTRODUCTION	8
1. Introduction	8
2. Background of research.....	8
Malaysia as a Muslim country and the issue of HIV/AIDS	11
3. The aim of research and the hypotheses of the research.....	15
4. Research methodology	15
5. The Problems.....	17
6. Literature review	18
7. Conclusions	29
CHAPTER ONE: <i>DARŪRA</i> IN ISLAMIC LAW: THE TEXTUAL EVIDENCE AND THE DEFINITIONS	30
1.1 Introduction.....	30
1.2 Textual evidence concerning <i>darūra</i>	31
1.2.1 <i>Darūra</i> in the Qurʾān	32
1.2.2 The Prophetic traditions regarding <i>darūra</i>	42
1.3 Definition of <i>darūra</i>	48
1.3.1 <i>Darūra</i> from the perspective of Arabic terminology.....	48
1.3.2 <i>Darūra</i> from jurists' perspectives	49
1.4 Historical development of the theory of <i>darūra</i>	53
1.5 Conclusion	56
CHAPTER TWO: THEORETICAL DISCUSSION OF <i>DARŪRA</i> IN ISLAMIC LAW	57
2.1 Introduction.....	57
2.2 <i>Darūra</i> and its connection with other legal terms.....	59
2.2.1. <i>Rukhṣa</i>	59
2.2.2 <i>Rafʿ al-ḥaraj</i>	70
2.2.3 <i>Maṣlaḥa</i>	72

2.3 <i>Maqāṣid al-Sharī'a</i> and the rule of <i>ḍarūra</i>	77
2.4 <i>Ḍarūra</i> in the Islamic legal maxims	80
2.5 Preconditions of <i>ḍarūra</i>	87
2.6 Situations and reasons that lead to <i>ḍarūra</i>	91
2.6.1 <i>ʿAwāriḍ samāwiyya</i> (the work of providence) and <i>ʿawāriḍ muktasaba</i> (human symptoms affecting legal capacity).....	92
2.6.2 Compulsion and duress	93
2.7 Conclusions	108

CHAPTER THREE: *DARŪRA* CASES VIS-À-VIS *FIQHI* LITERATURE..... 112

3.1 Introduction.....	112
3.2 <i>Darūra</i> application in food and drink cases.....	114
3.2.1 The case of undernourishment.....	117
3.2.2 The limit of the unlawful to be eaten.....	119
3.2.3 Between two unlawful meals	121
3.2.4 Eating a prohibited meal during an extreme situation. Is it <i>wājib</i> or <i>mubālḡ</i> ?	127
3.2.5 Can we consume alcohol during <i>ḍarūra</i> i.e. to quench thirst?	128
3.3 <i>Darūra</i> cases in medication	130
3.3.1 Having medical treatment in Islam.....	131
3.3.2 The consumption of unlawful items for medicinal reasons.....	133
3.3.3 Analysis and discussion.....	139
3.4 <i>Darūra</i> in transaction issues	144
3.4.1 Trading and using dogs	146
3.5 <i>Darūra</i> cases in marriage and divorce	148
3.5 Conclusions.....	151

CHAPTER FOUR: *DARŪRA* APPLICATION IN DEVOTIONAL ACTS OF WORSHIP (*ʿIBĀDA*) CASES 153

4.1 Introduction.....	153
4.2 <i>Darūra</i> cases in <i>ṭahāra</i> (cleaning and purification).....	155
4.2.1 The requirement to look for clean water before <i>tayammum</i>	160
4.2.2 How far is a Muslim required to find clean water for <i>wuḍūʿ</i> ?.....	162
4.2.3 Other requirements for <i>tayammum</i>	164
4.3 <i>Darūra</i> in prayer cases.....	166
4.3.1 Prayer during battle or dangerous situations	167
4.3.2 The unavailability of clean clothes to perform prayer.....	172
4.4 <i>Darūra</i> cases in funeral rites.....	176
Discussions.....	178
4.5 <i>Darūra</i> in <i>ḥajj</i> cases.....	180
4.6 Conclusions.....	183

CHAPTER FIVE: IS THE HARM REDUCTION PROGRAMME THE RIGHT SOLUTION?.....	187
5.1 Introduction.....	187
5.2 The Malaysian Drug Context.....	188
5.3 Malaysian Efforts.....	193
5.4 HIV/AIDS and Muslim councils' and NGOs' responses to the HIV/AIDS situation.	196
5.5 Harm Reduction Programme.....	199
5.6 Malaysian Harm Reduction Programme.....	205
5.7 Malaysian Methadone Programme	205
5.7.1 Is the Malaysian Methadone Programme in compliance with <i>ḍarūra</i> rule?.....	208
5.8 The Needle and Syringe Exchange Programme.....	229
5.8.1 Modus operandi of the programme	231
5.8.2 Is the Malaysian Needles and Syringes Exchange in compliance with the <i>ḍarūra</i> rule?.....	233
5.9 Conclusions	237
 CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS	 241
 GLOSSARY	 250
 BIBLIOGRAPHY.....	 258

List of Tables

Table A	Total number of HIV/AIDS cases and AIDS deaths by gender per year reported in Malaysia (from 1986 to December 2007)
Table B	Total number of HIV cases reported in Malaysia by age groups, ethnic groups, transmission based on risk factor and sector occupation (from 1986 to December 2007)
Table C	Comparison of characteristics between <i>al-khamr</i> and narcotic drugs according to Muslim jurists
Table D	Total number of drug users allowed to bring methadone home before finishing the four-week treatment
Table E	Total number of HIV Cases reported in Malaysia from 2005-2006

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INTRODUCTION

1. Introduction

This introductory chapter is divided into several sections and provides an overview of the study. It comprises the study's background, the importance of the research, the literature review, the research questions posed and the methods used. The aims of the research presented in this thesis are twofold: firstly, I aim to examine the rule of *darūra* in Islamic law and secondly, I will study the possibility of its application to justify the Harm Reduction Programme to control the spread of HIV/AIDS in Malaysia. As the rule of *darūra* functions mainly to alter an established *Sharī'a* law in order to avoid imminent harm, it is important for a person to possess the basic tools—a sound knowledge of what is stated in the *Sharī'a* regarding a particular *darūra* matter. As that person may decide for himself when to derogate from the standard rule, he has to be able to distinguish between necessity and non-necessity cases. At the same time, the situation of *darūra* requires verification by adhering to strict criteria in order to prevent people from abusing this principle. This rule can be abused by a person who deliberately intends to break the *Sharī'a* law without valid reason. The abuse of the *darūra* rule includes cases where the requirements of *darūra* are not met. Examples include omitting an obligatory prayer because of mild sickness, or eating an unlawful foodstuff before seriously looking for a lawful alternative. Such abuse has several legal effects including the deliberate abandonment of *Sharī'a* obligations such as prayers and depriving others from their rights such as illegal possession of property. Hence, a proper understanding of the rule is imperative in order to ensure it is correctly applied according to *Sharī'a* standards.

2. Background of research

Being a Muslim demands a person not only believe in God theologically, but it also demands he or she fulfil certain obligations and to refrain from certain acts. Muslim jurists believe that Islamic law governs and regulates all human life, ranging from personal daily activities and ritual obligations to business transactions and political affairs. These human activities are

divided into several categories, namely *wājib* (obligatory), *mandūb* (recommended), *ḥarām* (forbidden), *makrūh* (disapproved) and *mubāḥ* (indifferent)¹. However, in certain pressing situations, some of the commands in the mandatory categories (*wājib* and *ḥarām*) need not be obeyed as the act of obeying the command can impose a severe threat to Muslims.

As a divinely-inspired law, Muslim jurists generally view Islamic law as having special characteristics designed to satisfy human needs². It is a flexible (*murūna*) law which can be adapted for Muslims in almost every situation. For instance, forms of worship can change according to the situation and circumstances in order to avoid difficulties. This example demonstrates that Islamic law promulgates the notion of avoiding hardship and promoting easiness. The burden of fulfilling religious commandments does not necessarily mean a Muslim has to suffer physically or mentally in performing the religious act. Certain rules can be delayed because of unavoidable impediments. For example, if a Muslim is starving, the eating of pork is permitted. Another popular reason for a suspension of the Sharia law is travelling. It is widely accepted by Muslim jurists that travelling is suitable legal grounds for breaking the fast during the month of Ramadan and for shortening prayers, for example.

There are many forms of flexible rules in Islamic law. These include the concepts of *ḍarūra* (the rule of necessity), *rukḥṣa* (concessionary law), *maṣlaḥa* (public interest), *istiḥṣān* (juristic preference), *istiḥāb*

¹ However, the Ḥanafīs have divided *ḥukm taklīfī* into seven kinds. The absolute demand to fulfil an act on the basis of decisive evidence is called *farḍ*, and on the basis of probable evidence is called *wujūb*. Similarly, the absolute demand to refrain from a prohibition on the basis of decisive evidence is called *tahrīm* and on the basis of probable evidence is called *karāhat al-tahrīm*. See Gimaret, D. "Taklīf (a.)" *Encyclopaedia of Islam, Second Edition*. P. Bearman; Th. Bianquis; C.E. Bosworth; E. van Donzel and W.P. Heinrichs (eds.). Brill, 2010. Brill Online. EXETER UNIVERSITY. 26 July 2010 <http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-7344>

According to Gimaret, *taklīf* is a term of the theological and legal vocabulary denoting the fact of an imposition on the part of God of obligations on his creatures, of subjecting them to a law. The corresponding passive participle *mukallaf* is used of someone who is governed by this law and in this connection, in legal language. It denotes every individual who has at his disposal the full and entire scope of the law.

² See Yūsuf al-Qaradāwī, *Sharī'a al-Islām ṣāliḥa li al-taṭbīq fi kullī zamān wa makān*, Cairo: Maktaba Wahbah, 1997, pp. 38-40, Muhammad Ismail Abu al-Rish, *al-Tārīkh al-tashrī' al-Islāmī*, Alexandria: University of El-Azhar, 1996, pp. 9-13

(presumption of continuity), *maṣāliḥ mursala* (unrestricted interest). This flexibility, whereby commands are eased based on necessity, comes under the rubric of *ḍarūra*. Muslim jurists believe that this rule can be applied when a religious command cannot be fulfilled due to imminent harm to one's necessity³. For instance, when a person is at risk of death from starvation, unlawful meat is permitted to be consumed to alleviate hunger. Another example is demonstrated when a person under duress is forced by an oppressor to damage another's properties. Although permission to break the rule is granted, the person under duress is responsible for minimising the damage he might cause. It is also important to note that *ḍarūra* is not a free license to change the law as the permission is only given temporarily. Once the temporary cause is no longer applicable, the established rule must once again be complied with. This research presents an in-depth analytical review of the function of *ḍarūra* rule in Islamic law to remove any doubts and misconceptions that might lead to the abuse of the law. Both theoretical and practical aspects of this rule are investigated in this research.

At the same time, I have chosen the Harm Reduction Programme in Malaysia as a case study for *ḍarūra* application⁴. The Malaysian government has implemented this specific programme to control the spread of HIV/AIDS, especially among intravenous drug users (IDUs). Illegal drug addiction has become the main cause of the spread of HIV/AIDS in this country. This programme however is not without challenges as it involves several controversial means such as providing alternative drugs and distributing clean injecting kits to the patients. Some Muslims view this programme as one which promotes and condones illegal behaviour. They further argue that more conservative methods, either the punitive approach or total abstinence, are still the best means of reducing illegal drug use. However, despite the strict law and severe punishments for drug use, illegal drug consumption continues to rise and it is also causing a rise in the

³ Ibid.

⁴The Malaysian government has used the American spelling for the term 'programme'. However, for consistency purpose, I have used the English spelling throughout this study. See the speech by Dato' Sri Liow Tiong Lai, Minister of Health Malaysia, at the Malaysia National Conference on HIV/AIDS In conjunction with world AIDS day 2009, Hard Rock Hotel, Penang, 3rd December 2009. See www.moh.gov.my/MohPortal/DownloadServlet?id=4059&type=2

number of HIV/AIDS cases. The government believes that the conservatives methods have failed to control illegal drug consumption through law enforcement and rehabilitation programmes. Therefore, the Malaysian Ministry of Health has adopted an innovative approach by implementing this Harm Reduction Programme.

Collaboration with religious leaders, particularly Muslims is imperative in reducing the number of HIV/AIDS cases. Although the prevalence of HIV/AIDS in Malaysia is not as serious as in many African countries, this is the time for Muslim leaders to act as the majority of drug users in Malaysia are Muslims. Despite the reality that HIV/AIDS has become a national pandemic, the Muslims are still divided on the issue of the Harm Reduction Programme. This research therefore also aims to educate Malaysian Muslims about the facts concerning HIV/AIDS. It also aims to create a better understanding among Malaysian Muslims to determine the best possible programme that suits the local Muslim setting.

Malaysia as a Muslim country and the issue of HIV/AIDS

Malaysia gained its independence from Britain in 1957 and has a current population over 23 million with the Muslim population being more than 50% of the general population. Although Malaysia is a secular country, Islam is constitutionally recognised as the official national religion. Islamic law is a matter falling within the state list; it is a matter over which the state legislature has jurisdiction and not the Federal Legislature⁵ and Islam is a powerful force in the lives of the majority of Malaysian Muslims⁶. Malaysian Muslims disregard their political inclinations are extremely sensitive to religious matters especially when it involves the '*halalness*' of

⁵ Malaysian Federal Constitution, Article 74, Ninth Schedule

⁶ For further information regarding Islamic revivalism in Malaysia see Hussin Mutalib, *Islam and Ethnicity in Malay Politics*, Singapore: Oxford University Press, 1990. Under Mahathir's administration, the government's supports for Islam were overwhelming and he himself has initiated the government's Islamisation policies. However, Mutalib argued that this government's general patronage towards Islam does not indicate that Mahathir has been both an ardent supporter of Islam and an astute politician. As Mahathir was also aware of the non-Muslims fear of his Islamisation programmes, he explicitly ruled out impositions of Islamic law to allay such fears. He stated clearly "Malaysia's multi racial society ruled out Islamic laws being imposed", pp. 133- 145

consumer products such as food, cosmetics and medicines. Consequently, the Malaysian government always treats religious issues seriously as such issues can easily create public tension. The Malaysian government therefore adopts a supportive approach to cater for Muslim needs. As with other secular Muslim countries, there is always a growing need for fresh *ijtihād* (legal solutions) for new emerging cases in Malaysia. The most demanding cases are those concerning food consumption, medical practices, financial transactions and consumers products. The Malaysian Department of Islamic Development (JAKIM) is a Government institution that has been responsible for ascertaining policies pertaining to the development and the advancement of Islamic affairs in Malaysia. JAKIM has also been relied upon to enact and standardise laws and procedures, and also to co-ordinate their implementation in all the states. Among its responsibilities is the issuing of *ḥalāl* certificates for products and services. Food manufacturers, including traders, sub-contract manufacturers, food premises and slaughter houses can apply for a *ḥalāl* certificate from this department. The *ḥalāl* certificate⁷ will only be conferred when there is no reasonable doubt that the production processes, ranging from preparation, slaughtering (if applicable), processing, handling, storage, transportation, cleaning, disinfection and management practices are *Sharī'a* compliant.

In the midst of Muslim sensitivity, the issue of the Harm Reduction Programme ignites controversy due to its controversial methods to combat HIV/AIDS cases. Malaysia has witnessed deaths due to HIV and AIDS. The first reported case of HIV was reported in Malaysia in late 1986, and the number of deaths has increased dramatically in the past ten years with the latest figure standing at about 15 people dying every day. Until December 2008, a total 84,630 cases had been reported, of which 14,576 had developed AIDS and 12,589 had died. 77% of the reported cases are among those aged between 20 to 39 years old⁸. According to the current Malaysian Health Minister, Dato' Sri Liow Tiong Lai, the number of HIV and AIDS

⁷Some Halal certifications are issued by State Religious councils (HDC/JAIN/MAIN).
HDC is an acronym for Halal Industry Development Corporation.

⁸ See the speech by Dato' Sri Liow Tiong Lai, Minister of Health Malaysia, at the Malaysia National Conference on HIV/AIDS in conjunction with world AIDS day 2009, Hard Rock Hotel, Penang, 3rd December 2009. See www.moh.gov.my/MohPortal/DownloadServlet?id=4059&type=2

cases has increased due to the increase in drug addiction and also and also to more young people having multiple sexual partners. Up to December 2008, HIV transmission in Malaysia was demonstrated to be contracted mainly through sharing of needles among drug users (71%). Another 18.5% acquired the infection through sexual intercourse with 0.9% contracted by babies born to HIV-positive mothers. The government also discovered that over the past few years Malaysia has experienced a gradual “feminisation” of its HIV epidemic, with an increasing trend of newly reported HIV infections being transmitted sexually. This is evident from the rise in the percentage of reported HIV cases through sexual transmission, from 18.9% in the year 2000 to 29.8% in 2008. Over the same period, the percentage of women among HIV reported cases had increased from 9.4% to 19.1%. It was the high proportion of HIV infections among injecting drug users (IDUs) that prompted the Ministry of Health to introduce the Harm Reduction Program in 2005 /2006. The government believes that the harm reduction is not about legalisation of illicit drugs. It is about providing internationally-proven health services for injecting drug users to prevent them from transmitting HIV and other blood infections among themselves and their partners through unsafe practices⁹.

The Harm Reduction Programme is not the government’s first attempt to prevent the spread of HIV/AIDS cases in Malaysia. In 1993, the government took serious action including forming the AIDS/STD section and the PROSTAR programme (*Programme Sihat Tanpa AIDS Remaja*). Among the strategies adopted were the dissemination of information and education to the public, promoting healthy lifestyle practices and monitoring of the situation through HIV surveillance and epidemiological measures. The government has spent millions of Malaysian Ringgit on these programmes, including RM6.8 million on the PROSTAR programme alone. Even though the number of annually reported HIV cases decreased slightly from 6978 in 2002 to 6756 in 2003 and 6427 in 2004, the number of HIV cases among women, babies and children has increased. The transmission is believed to have been carried out from their respective drug-addicted fathers. A special survey conducted by the Ministry of Health

⁹ Ibid.

revealed that 71.5% of drug users ever share and 68% of them always share needles. The same survey also showed that the consistency of condom usage among sex workers and drug users is still low. Malaysia already has a number of 15,000 AIDS orphans. Recent data indicated that 75% of all HIV infections in Malaysia could be due to needle sharing. A study of 326 clients at 26 drug rehabilitation centres found that 65% still inject drugs, 77% are sexually active, and only 19% used condoms.

Due to all the reasons above, the former Minister of Health, Datuk Dr. Chua Soi Lek announced that the government would set up a needle exchange and free condom pilot programme in October 2005 involving 1200 drug addicts in an effort to curb the spreading of HIV/AIDS in the country¹⁰. The previous Prime Minister, Dato Seri Abdullah Ahmad Badawi was reported to have approved the programme by saying that if these people were not given syringe and condom aid they might spread the disease to their wives or partners. Indeed, the statistics managed to convince the Prime Minister to take action and recently, he launched the programme. Research conducted by the World Health Organization (2004) showed that similar programmes were able to reduce the number of drug users and reduce the frequency in drug taking. In Australia, the same programme has managed to reduce the government's expenditure by about USD 1.8 billion. However, the Malaysian programme, which will cost about \$39.5 million, is facing opposition not only from Muslim clerics, but from Hindus, Christians and also Buddhists. They have criticised the plans by saying that it would encourage promiscuity.

Therefore, this study has to be undertaken to determine the best possible programme for the local Malaysian Muslim setting. The Islamic perspective is crucial as any unsupportive response from Islamic authorities and groups will only create tension among Muslims. On this basis, this research considers *ḍarūra* to be the most suitable justification for this programme. However, an important question that needs to be answered is whether this programme meets the entire requirements for *ḍarūra* application. In order to answer this crucial question, an in-depth understanding of the *ḍarūra* rule in

¹⁰ The Star, 17th June 2005

Islamic legal discourse is required. Surprisingly, no such examination has been carried out to date in the primary or secondary sources. I believe such an objective can be achieved by critically analysing the theoretical and practical aspects of the rule. Finally, this research will present a conclusion that determines the legality of the Harm Reduction Programme.

3. The aim of research and the hypotheses of the research

This research mainly aims to examine critically the theoretical and practical aspects of *ḍarūra*. It is hoped that the findings of this research will broaden the understanding of the true notion of *ḍarūra* in Islamic law and will eliminate any possible abuse of the rule¹¹. The true understanding of this rule is not only important to assist any individual Muslim in practising *Sharī'a* commandments but also to aid the policy makers in Malaysia. It is indeed important for the policy makers to set government policies that suit diverse Muslim situations. At the same time, this study also aims to justify the government efforts of controlling HIV/AIDS cases via the implementation of the Harm Reduction Programme. The legality of this programme is assessed by the rule of *ḍarūra*.

There are two hypotheses of this study: Firstly, the theory of *darūra* was developed gradually by the jurists. To test this hypothesis, the development of the said theory is traced back from the time of the Prophet. The discussions found in Qur'anic exegesis, ḥadīth literature, Islamic legal maxims and *fiqh* literature are analysed to see how this theory worked in the jurist's mind during that specific period. The second hypothesis is that the Harm Reduction Programme is justified by the rule of *ḍarūra*. The gradual treatment and prevention methods applied in the programme are deemed crucial to the public at large and most importantly to protect the life and the health of the patients. The precautionary measures taken in this Harm Reduction Programme (HRP) also meet the preconditions of *ḍarūra*.

4. Research methodology

¹¹ The rule can be easily abused by a person who does not have valid reason to break a rule, for example, having mild headache as a reason for not to pray.

In order to comprehend the real meaning of *ḍarūra*, both deductive and inductive approaches have been applied. By using the deductive approach, the concept of *ḍarūra* is presented through the theoretical discussions of *ḍarūra* formulated by Muslim jurists. The theoretical approach is primarily concerned with the exposition of theoretical doctrines as generally offered in the works of *uṣūl al-fiqh* and Islamic legal maxims. A set of standard criteria of *ḍarūra* is expected to be met in almost all new *fiqhī* cases. However, the general guidelines for *ḍarūra* cases are sometimes not applicable in all cases. This is due to the fact that there is a difference over, where in most cases, different treatments and considerations should apply. The verification of a necessity case takes into consideration the subjective feelings of the person in such a situation (*muḍtarr*), the harm predicted and the changing situation. All these subjective elements in the case of *ḍarūra* require unique treatments by the jurists.

Therefore, as each *ḍarūra* case is unique, an inductive approach is also adopted throughout this research. In order to acquire a clear understanding of the complex *ḍarūra* issues, I believe that the study of *ḍarūra* through an examination of the theoretical study (*uṣūl*) is insufficient. The *furūʿ* (the elaborated precepts of positive law) must also be explored vis-à-vis the examination of *fiqhī* cases. This is due to the fact that the uniqueness of each *ḍarūra* case depends on various factors. Some Sunni jurists theoretically believe that *ḍarūra* only operates in a limited fashion, whereas the application in the *fiqhī* suggests otherwise. A different set of rules is also applied in different cases. Although the cases presented in the literature are mainly of an exemplary type, the reasoning made by the jurists in each case is vital. The different reasonings and different verdicts given imply that the jurists treat the cases differently. Although they believe the standard rule of *ḍarūra* should apply, the *muḍtarr* has the liberty to determine the case by himself. This variety of reasoning and verdicts can further increase our understanding of the *ḍarūra* application. The task to investigate the application of *ḍarūra* rule in *fiqhī* literature, however, is not without challenges. The main problem is that the term *ḍarūra* is interchangeable with other terms such as *ʿumūm al-balwā* (necessitated prevelation), *rukḥṣa* (concessionary law) and *maṣlaḥa* (interest). Some

classical and modern Muslim writers have applied the *ḍarūra* term for non-necessity cases such as the permission given to women entering a mosque during her menstrual period. This example is actually not of a necessity case; rather it is classified as the case of *mashaqqa* (difficulties and hardship). The rule of *ḍarūra* can only operate in extreme situations such as life threatening situations.

With regard to the implementation of the Harm Reduction Programme, the research mainly depends on newspaper reports and academic research. The official statements from the Ministry of Health were taken from media conferences and press releases. The current report regarding the programme was obtained via the internet source from the official General Auditor's Report for 2008. I also conducted several interviews with the Harm Reduction staff, Malaysian AIDS Council (MAC) volunteers and former drug users. Their informative inputs are very significant in helping me to assess the role of the Harm Reduction Programme. At the same time, I attempted to obtain official statements from religious authorities. However, out of 20 letters sent, I only received two responses.

With regard to the translation of technical Arabic terms, I have, to some extent, followed the transliteration used in Brill's publication, such as the Encyclopaedia of Islam, Arab Law Quarterly and Brill Online. The table of translation is also presented in this study.

5. The Problems

There were several impediments to a study of this type. The first problem encountered was the limited comprehensive study on this rule particularly during the medieval era. Although Muslim jurists have contributed a separate work on *ḍarūra* in Islamic legal maxims (*qawā'id fiqhiyya*) under the sub-heading *al-ḍarūra tubīḥ al-maḥẓūra* (necessity permits a prohibited), this contribution is insufficient as the discussion in legal maxim works does not give *ḍarūra* a general license that applicable to other cases. Most Sunni jurists agreed that *qawā'id fiqhiyya* are only predominantly valid and not generally valid unlike the study of *uṣūl al-fīqh*. The predominant (*aghlabiyya*) notion of *qawā'id fiqhiyya* is because of the existence of

irrefutable exceptions to the *qawā'id*¹². Hence, according to many jurists, a legal maxim is not valid as a piece of legal reasoning, legal evidence or basis for legal jurisdiction. The other legal terms, however, such as *rukḥṣa* (concessionary law), *maṣlaḥa* (public interest), *istiḥsān* (juristic preference), *istiḥṣāb* (presumption of continuity), and *maṣāliḥ mursala* (unrestricted interest) receive more wide-ranging treatment in the *uṣūl al-fiqh* works. *Darūra* on the other hand is left relatively undiscussed.

The second problem encountered was the interchangeable usage of this term by Muslim jurists. For example, some writers in their *fiqh* works explicitly applied the term '*darūra*' in non-necessity cases. This has led to some confusion among readers. In order to avoid confusion, I only analysed cases that involve serious harm to any of five human necessities, namely religion, life, lineage, reason and wealth. Any non-necessity cases were eliminated even if the jurists explicitly employed the *darūra* term in the said cases.

The third problem concerned the implementation of the Harm Reduction Programme in Malaysia. As this programme is relatively new, statistical data and current findings about the programme are somewhat limited. However, I managed to collect the latest data until the 2008. It is also important to highlight that as this programme is controversial among Malaysian Muslims, the official statements from religious authorities were quite difficult to obtain. Official statements from the government and religious authorities regarding this programme are generally not accessible. I also received a low response from religious officers regarding this issue.

6. Literature review

For the purpose of this study, I have referred mainly to Sunni *fiqh* sources and literatures. Sources within four major Sunni schools of Law, Ḥanafīs, Mālikīs, Shāfi'īs and Ḥanbalīs are given priority in this study. With due respect to other schools such as the Shī'as and Zāhirīs, the reason for this limitation is due to the fact that the majority of Malaysian Muslims are Sunni. Malaysian *fatwā* (plural *fatāwā*), enactments and the religious

¹² Further critical reading on *Qawā'id Fiqhiyya* can be found in Wolfart Heinrichs, "Qawā'id as a general legal literature", in *Studies in Islamic Legal Theory*, Bernard G. Weiss (ed.), Leiden: Brill, 2002, pp. 365-384.

education curriculum are totally based on the Sunni school of law¹³. However, in some sections of the study, I cite other sources for comparison purposes.

The literatures are divided into four categories. The first category comprises literatures in *fiqhī* cases. The classical work on *ḍarūra* can be found in the various *fiqhī* literatures such as in the *al-Mabṣūt*¹⁴, *al-Badāi' al-Ṣanāi'*¹⁵, *al-Muntaqā sharḥ al-Muwattā'*¹⁶, *Asnā al-Maṭālib sharḥ Rawḍ al-Ṭālib*¹⁷, *al-Majmū' Sharḥ al-Muhadhdhab*¹⁸, *Sharḥ Muntahā al-Irādāt*¹⁹, *Ḥāshīya al-Ṣāwī*²⁰ and *Mughnī lī Ibn Qudāma*²¹. The reason for this choice of literatures is due to the fact that these books are highly recognised and they occupy a special position among Sunni jurists. These books are highly referred to by classical and modern scholars.

Concerning the Ḥanafīs literatures, the two great books of al-Sarakhsī's, *al-Mabṣūt* and *Sharḥ al-Siyar al-Kabīr*, were referred to²². The former book is a commentary on the al-Marwazī book (d.334/945)²³. This book is

¹³ The Sunni Islam of the Shāfi'ī School is the official legal form in Malaysia. The Malaysian authorities have strict policies against other Islamic sect including Shī'a. See "Rights Group Says Six Malaysians Detained for being Shī'a Muslim" in <http://www.islamonline.net/English/News/2001-02/10/article7.shtml>. Although Malaysia's constitution guarantees freedom of religious belief, it also says that laws in individual states "may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam". See <http://www.law.emory.edu/ifl/legal/malaysia.htm>. Each State in Malaysia has *Majlis* (Council of Religion and Malay Custom) issuing *fātāwa* (sing. *fātwa*) generally in keeping with Shāfi'ī tenets except where such may conflict with public interest. Councils, with approval of State authorities, may follow minority Shāfi'ī views or interpretations from other three major Sunni *madhāhib* (sing. *madhhab*). See also cases in Sharī'a courts in Tan Sri Datuk Ahmad Ibrahim, *Islamic Law in the Sharī'ah Court* in <http://lib.iiu.edu.my/mom2/cm/content/view/view.jsp>

¹⁴ Muḥammad bin Aḥmad bin Abī Sahl al-Sarakhsī, Cairo: Matba'a al-Sa'āda, 1906-13. This Ḥanafī *fiqhī* treatise consists of 30 volumes. I also used another publication of al-Mabṣūt in my study.

¹⁵ 'Alā al-Dīn Abī Bakr bin Mas'ūd al-Kasānī, *Badāi' al-Ṣanāi' fī Tartīb al-Sharāi'*, Beirut: Dār Kutb al-'Ilmiyya, 1986, 7 volumes.

¹⁶ Sulaymān bin Khalāf al-Bājī, no place: Dār Kitāb al-Islāmī. This commentary work on al-Muwattā' consists of 7 volumes.

¹⁷ Zakariyyā Muḥammad bin Zakariyyā al-Anṣārī, no place: Dār Kitāb al-Islāmī. This Shāfi'ī *fiqh* work consists of four volumes

¹⁸ Yahyā bin Sharf al-Nawawī, Cairo: Zakariyyā 'Alī Yusūf, 1966-1969, 18 volumes

¹⁹ Maṣṣūr bin Yunūs al-Buhūfī, no place: 'Ālam al-Kutb, 3 volumes. This is a Ḥanbalī book of *fiqh*.

²⁰ Abū al-'Abbās Aḥmad al-Ṣāwī, *Ḥāshīya al-Ṣāwī 'alā Sharḥ al-Ṣaghīr*, no place: Dār al-Ma'ārif. This Mālikī *fiqh* work consists of four volumes.

²¹ Muwaffaq al-Dīn 'Abd Allāh bin Aḥmad (Ibn Qudāmah), Cairo: Dār Iḥyā' Turāth al-'Arabī, 1985. This Ḥanbalī treatise consists of 10 volumes.

²² Muḥammad bin Aḥmad bin Abī Sahl Abū Bakr al-Sarakhsī (d. 490/1096)

²³ Muḥammad bin Muḥammad al-Marwazī

recognised as a remarkable achievement of juristic literature in which the rules of Shaybanī are explored (d. 187/803)²⁴ and information is incorporated related to local Ḥanafī tradition²⁵. Most importantly, this book is a great reference for *fiqh* study as it comprehensively covers legal cases and juristic disputes and arguments are presented throughout. Meanwhile, al-Sarakhsī's second book (*Sharḥ al-Siyar al-Kabīr*) is a commentary on the book of *al-Siyar* by al-Shaybānī (d. 189). As Calder argued, this book demonstrates an overall concern for comprehensive coverage, the development of rules and is considered a hermeneutical argument²⁶. This book was also chosen because it is one of Ḥanafīs books dealing specifically with political matters and state affairs such as war and relations with non-Muslims.

Fatḥ al-Qadīr, by Kamāl al-Dīn Muḥammad bin ʿAbd al-Wāḥid al-Iskandārī who is also known as Ibn al-Humām, (d. 861/1456). This is a well-recognised *fiqh* book in the Ḥanafī school and is a commentary on a legal compendium, *Bidāya al-Mubtadā* by al-Marghinānī (Burhān bin Abā al-Hasan ʿAlī bin Abī Bakr al-Marghinānī d. 593/1197). Al-Marghinānī's work is based on al-Qudūri's *Mukhtaṣar* and *al-Jāmiʿ al-Ṣaghīr* by al-Shaybānī.

Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqaʾiq by Fakhr al-Dīn ʿUthmān Bin ʿAlī al-Zailaʿī (d. 743/1342). I also referred to this Ḥanafīs *fiqh* literature where it represents the Ḥanafīs ruling in legal cases.

I also made a reference to another book entitled *al-Mudawwana*. This is one of the great manuals and major references in the Māliki school. This book was written by Muḥammad bin Saḥnūn b Saʿīd bin Ḥabīb al-Tanūkhi (d. 256/870), a jurist consult from Qayrawan. In this manual, he compiled the views of Imām Mālik bin Anas (d. 179/796) and his successors. He also followed the methods of Qayrawan jurists. There are almost 6200 legal

²⁴Abū ʿAbd Allāh Muḥammad bin al-Ḥasan al-Shaybanī. There is a dispute in his year of death. It is either 187/803 or 189/805

²⁵ See Calder, N. "al-Sarakhsī, Muḥammad b. Aḥmad b. Abī Sahl Abū Bakr" *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman; , Th. Bianquis; , C.E. Bosworth; , E. van Donzel; and W.P. Heinrichs. Brill, 2010. Brill Online. EXETER UNIVERSITY. 24 July 2010
<http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-6620>

²⁶ Ibid.

problems in this treatise which have been divided into different topics and consequently, this book has gained a significant place in the study of Mālikī *fiqh*.

Al-Muntaqā Sharḥ al-Muwattāʾ by Sulaymān bin Khalaf al-Bājī (d. 474/1081) is an important reference in the Mālikī School as it explains the text of al-Muwattāʾ by Imām Mālik. Mālik's Muwattaʾ is a very concise *fiqh* book²⁷ that only presents evidence of legal cases without going into the details of the *ijtihād* process, whereas the *al-Muntaqā Sharḥ al-Muwattāʾ* analyses the rulings made by prominent Mālikī scholars. Legal disputes (*ikhtilāf*) and hermeutical arguments are also presented in this book.

I also made a reference to *al-Madkhal* by Muḥammad bin Muḥammad al-ʿAbdarī who also known as Ibn al-Ḥājj (d. 737/1336). In this book, Ibn al-Ḥājj put a great emphasise on the importance of a view which is supported with strong and valid evidence. The innovation (*bidʿa*) in legal cases, especially in devotional acts (*ibāda*), should be avoided by all Muslims.

Another book that was chosen is *Sharḥ Mukhtaṣar Khalīl*²⁸, Muḥammad bin ʿAbd Allah al-Kharshī (d. 1101h/1690H). This is one of the major references in the Mālikī school in which the writer mainly presents the legal opinions of Mālikī scholars. Where disputes arises, he always gave preference to the widely accepted views of the Maliki scholars. However, in some places the writer did not provide sufficient evidence for his arguments.

Al-Umm was also chosen for the study as this is the treatise of the founder of the Shāfiʿī school, Muhammad bin Idrīs al-Shāfiʿī (d. 204/ 820). The

²⁷ For further reading about the transmission of al-Muwattāʾ, see Schacht, J. “Mālik bin Anas”, *Encyclopaedia of Islam, Second Edition*. P. Bearman; Th. Bianquis; C.E. Bosworth; E. van Donzel; and W.P. Heinrichs (eds.). Brill, 2010. Brill Online. EXETER UNIVERSITY. 24 July 2010

<http://www.brillonline.nl/subscriber/entry?entry=islam_COM-0649>

²⁸ *Mukhtaṣar*; a term denoting a handbook or an abridged manual, usually condensed from a longer work. See Arazi, A. " *Mukhtaṣar*" *Encyclopaedia of Islam, Second Edition*. P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs (eds.) Brill, 2010. Brill Online. EXETER UNIVERSITY. 26 July 2010

<http://www.brillonline.nl/subscriber/entry?entry=islam_COM-0792>

'new doctrine' (*qawl jadīd*) of al-Shāfi'ī is elaborated on and recorded in *al-Umm*²⁹. However, there are not many *darūra* cases in this treatise. I also referred to al-Shāfi'ī's *Aḥkām al-Qur'ān*, a treatise dealing with the legal statutes present in the Qur'ān.

I also chose another Shāfi'ī's *fiqh* book entitled *Asnā al-Maṭālib sharḥ Rawḍ al-Ṭālib*. This book by Zakariyyā bin Muḥammad bin Zakariyyā al-Anṣārī (d. 926/1520) is a commentary on the book *Rawḍ al-Ṭālib*. This book was chosen because the rulings and legal disputes within the *madhhab* are executed extensively. The explanations of the rulings are clear and the cases are systematically organised under particular headings. I also referred to another book by the same author entitled *Gharar al-Bahiyya fī Sharḥ al-Bahja al-Warda*, a commentary on *al-Bahja* by Ibn al-Wardiy. This book is an important reference in the Shāfi'ī school as it analyses rulings and arguments made by Shāfi'ī scholars. Like any other *madhhab* specific books, this work does not discuss legal rulings executed by other schools of law.

A treatise by Ibn Ḥajar al-Haitamī (d. 974/1567), *Tuḥfa al-Muḥtāj* was also chosen for this study. This is a commentary work on the text of *al-Minhāj al-Ṭalibīn* by al-Nawawī (d.676-1277), a prominent Shāfi'ī scholar. This work not only deals with the main *fiqh* issues but also revolves around *furū'* cases where the *ijtihād* of the jurists are briefly analysed.

Another book entitled *Al-Majmū'*, is a legal compendium written by Yahyā bin Sharf al-Nawawī. The writer did not only deal with rulings made by Shāfi'ī scholars but he also presented and compared views from different schools. This book was chosen as it is a significant book for the study of comparative *fiqh*. The legal discussions are presented along with relevant evidence from Qur'anic and Ḥadīth. The ḥadīth evidence used by other jurists was clarified by al-Nawawī according to the genuineness of the

²⁹ See Chaumont, E. "al-Shāfi'ī." *Encyclopaedia of Islam, Second Edition*. P. Bearman, Th. Bianquis; , C.E. Bosworth; , E. van Donzel; and W.P. Heinrichs (eds). Brill, 2010. Brill Online. EXETER UNIVERSITY. 24 July 2010
<http://www.brillonline.nl/subscriber/entry?entry=islam_COM-1020>

ḥadīth and the trustworthiness of the narrators. In this work, al-Nawawī gave preference to the views accepted by the majority³⁰.

I also made a reference to a treatise, *Sharḥ Muntahā al-Irādāt*. This Ḥanbalī *fiqh* book written by Mansūr bin Yūnus al-Buhūtī (d. 1051h/ 1641) was chosen as it presents legal discussions within the Ḥanbalī school. Another Ḥanbalī *fiqh* book chosen in this study is *Maṭālib Awlā al-Nahy fī Sharḥ Ghāya al-Muntahā*. This book, by Muṣṭafā bin Saʿīd bin ʿAbda al-Raḥībānī (d. 1243/1827), is an important legal reference in the Ḥanbalī school. One of the important aspects is the status of the evidence used by the jurists in each legal case. the writer clarified the status of the evidence used in *fiqhī* problems. Similar to other Ḥanbalī writers, the writer gave preference to the view which is supported by stronger and higher ranking evidence.

Al-Mughnī, this book can be classified as a *fiqh* encyclopaedia. This treatise was written by Muwaffaq al-Dīn Abū Muḥammad ʿAbd Allāh bin Aḥmad bin Muḥammad who also known as Ibn Qudāma (d. 620/1223). Like the book of al-Majmūʿ by al-Nawawī, the writer comprehensively discussed the varied opinions of leading schools regarding legal cases. The methodology for extrapolating rules from revelation used by the jurists was discussed extensively in this treatise. Like any other *fiqh* treatise, the cases were analysed according to the specific topic. However, unlike the book of al-Majmūʿ that gave preference to Shafīʿī’s methodology, the writer in this book did not show an affiliation with any particular school. The preference was given to any view that has stronger evidence (according to his own standard).

Al-Fatāwā al-Kubrā by Taqī al-Dīn Aḥmad bin Ibn Taymiyya (d. 728/1328). He was a Ḥanbali theologian and a jurist consult³¹. Although this is a *fatāwā* collection, his rulings were not limited to legal matters. Ibn

³⁰ Al-Nawawī however did not complete this treatise as he died at a young age. This book was later completed by Taqī al-Dīn al-Subkī and several other scholars including al-Ḥadramī, al-ʿIraqī and Muhammad Najīb al-Muṭīʿī

³¹ See Laoust, H. “Ibn Taymiyya”. *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman; , Th. Bianquis; , C.E. Bosworth; , E. van Donzel; and W.P. Heinrichs. Brill, 2010. Brill Online. EXETER UNIVERSITY. 24 July 2010
<http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-3388>

Taymiyya also articulated his opinions regarding the philosophy of religion, Qur'ānic exegesis, ḥadīth and *taṣawwuf*. However, he gave preference to the Ḥanbalis methodology in his rulings.

Reference was also made to another work of Ibn Taymīyya, entitled *al-Siyāsa al-Shar'īyya fī Iṣlāḥ al-Rā'ī wa al-Rā'īyya*. This book was chosen as it represents an analysis of legal cases regarding state affairs and relations between a ruler and his people. The importance of this book is its discussion of the responsibility of both the ruler and the people. When the cases were not treated specifically in the Qur'ān and Sunna, the writer emphasised that the judgment of the action should be made wisely.

I also chose *I'lām al-Mūqi'in* by 'Abdullāh Muḥammad bin Abī Bakar bin Ayyūb who is also known as Ibn Qayyim al-Jawziyya (d. 711/1350). This book was specifically chosen as it analyses and explores the *ijtihād* and *ikhtilāf* of the jurists in legal matters. Important legal issues such as *ribā'* (usury) and the three pronouncements of divorce were discussed. The methods used by jurists such as *qiyās*, *sadd al-dharā'ī'* and *ḥīla* (legal stratagems) were also analysed by the writer.

The second category of literature concerns discussions of *ḍarūra* in the Qur'ān and ḥadīth. The *ḍarūra* discourses were found in Qur'ānic commentaries such as *Kitāb al-Aḥkām al-Qur'ān*³² and *Aḥkām al-Qur'ān Lī Ibn al-'Arabī*³³. The treatment of *ḍarūra* cases in these books are extensive, particularly regarding verses Q2.171, Q5.3, Q6.119, Q6.145 and Q16.115. The treatment of *ḍarūra* issues is more comprehensive in these two books as compared to other *fiqh* treatises. The discussions include the legal effect of *ḍarūra* rule, its limits and the preconditions of the rule. The arguments between *madhhabs* are also presented. Although both writers differed in certain particular aspects of *ḍarūra*, they basically agreed with the

³² Aḥmad Ibn 'Alī al-Rāzī al-Jaṣṣāṣ, *Kitāb al-Aḥkām al-Qur'ān*, Istanbul: Matba'a al-Awqāf al-Islāmiyya, 1916. This classic commentary work on al-Qur'ān by a Ḥanafī jurist consists of three volumes.

³³ Muḥammad Ibn 'Abd Allāh Ibn al-'Arabī, *Aḥkām al-Qur'ān*, Cairo: 'Isā Al-Bābī al-Ḥalabī, 1967. This Mālikī *tafsīr* contains four volumes.

fundamental concept of the rule. This rule is legally applicable only in necessity cases and there is no other lawful means available. Similarly, al-Shāfi'ī also explained the general concept of *ḍarūra* in his *tafsīr* work³⁴. The discussions of *ḍarūra* verses in these Qur'ānic commentaries are significant as they are the bases for the formulation of *ḍarūra* rule in Islamic law.

The translation of the Qur'anic passage which occurs in the text is based on M.A.S Abdeel Haleem³⁵. This translation was specifically chosen because the translator has avoided using archaisms which are commonly found in other Qur'ānic translations.

References have also been made to ḥadīth literatures regarding legal matters. The work entitled *Muṣannaf* by Ibn Abī Shaybah, Abū Bakr 'Abd Allāh bin Muḥammad bin Ibrāhīm (d. 235H/849) has been chosen in this study for two reasons. Firstly, it presents ḥadīth related to legal matters (*ahādith al-ahkām*) and secondly, it presents legal rulings and decisions made by earlier scholars (the salafī in particular). Ḥadīth related to legal cases, opinions of the companions and *tābi'īn* (successors of the companions of the Prophet) are presented in this book. This is one of the earliest works in Islamic legal study that has survived and it is also used as a text book for jurists³⁶. The issues were written according to specific topics as with any other classical *fiqhi* book. This book is regarded as one of the most important sources for studying the earliest *fatāwā* of the Prophet's companions and their successors.

The third category of literature consists of *uṣūl al-fiqh* and Islamic legal maxim works. *Ḍarūra* has also received an exclusive treatment in the works of Islamic legal maxims, such as *al-Ashbāh wa al-Nazā'ir*³⁷, written by al-Ṣuyūṭī (d. 911/1505) and *al-Ashbāh wa nazā'ir* by Ibn Nujaym (d. 970/1563), and its commentary work, *Ghamz 'Uyūn al-Baṣā'ir fī Sharḥ al-*

³⁴ Muḥammad bin Idrīs al-Shāfi'ī, *Aḥkām al-Qur'ān*, Beirut: Dār al-Qalam, c. 1990. Two volumes.

³⁵ The Qur'ān, M.A.S. Abdeel Haleem (tran.), New York: Oxford University Press, 2004

³⁶ See Ch. Pellat, "Ibn Abī Shayba" in Brill Online, www.brillonline.nl. Access date 23/07/2010

³⁷ Jalāl al-Dīn al-Suyūṭī, Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1959, p. 85

*Ashbāh wa Naẓā'ir*³⁸. *Ḍarūra* has been defined in these classical books as: “a situation in which one reaches a limit where if one does not take a prohibited thing, one will perish or be about to perish”³⁹. One of the Islamic legal maxims is that necessity permits prohibitions or necessity knows no laws. This concept also illustrates how difficulties and harm can be mitigated through the legalisation of a prohibited act. This work on *Ḍarūra* in the books of Islamic legal maxims gives general guidelines for *Ḍarūra* application. However, as each *Ḍarūra* case is unique, some exemplary cases given by jurists in these books may not be applicable in all situations.

Compared to the Islamic legal maxim works, *Ḍarūra* does not receive a similar comprehensive treatment to *uṣūl al-fiqh* works. Only one entry can be found in the work of a Ḥanbalī' legal theorist (*uṣūlī*), 'Alī ibn 'Aqīl bin Muḥammad bin 'Aqīl⁴⁰(d.513/1119). The general definition of *al-Ḍarūra* is described as an inevitable situation facing a Muslim (*al-fī'l al-ladhī la yumkin al-takhalluṣ minhu*). Even though a special heading for *al-Ḍarūra* is included in this *uṣūl al-fiqh* work, *Ḍarūra* is defined only generally. Thus it fails to picture the true capacity of *Ḍarūra* to alter an original rule in an extreme circumstance. However, this work can be regarded as one of the earliest preliminary works on *Ḍarūra*. It can be further assumed that the non-availability of comprehensive *uṣūl al-fiqh* treatment on *Ḍarūra* is due to the fact the medieval jurists have contributed a lengthy work on *rukḥṣa*, a legal term that is closely related to *Ḍarūra*.

The final category of literature contains the contemporary sources used in this study. As *Ḍarūra* was not exclusively treated in medieval jurists' works, some modern Muslim writers managed to contribute a separate comprehensive study on *Ḍarūra*. Examples include *Nazariyāt al-Ḍarūra al-shar'īyya* by Wahbah al-Zuhailī and a PhD thesis entitled "Necessity in Islamic Law" by Mansour al-Mutairi. Zuhailī's work can be described as one of the most significant modern works on *Ḍarūra*. He elaborated in detail on the principles of *Ḍarūra* in Islamic law. He also argued that this principle

³⁸ Aḥmad bin Muḥammad al-Ḥamawī, no place: Ḍar al-Kutb al-ʿIlmiyya, 1985, p. 277

³⁹ See Aḥmad bin Muḥammad al-Ḥanafī al-Ḥamawī, *Ghamz Uyūn al-Baṣā'ir fī Sharḥ al-Ashbāh wa Naẓā'ir*, no place: Ḍār al-Kutb al-ʿIlmiyya, 1985, Vol. I, p. 277

⁴⁰ *Al-Wāḍiḥ fī Uṣūl al-Fiqh*, George Makdisi (ed.), Beirut: Stuttgart: Steiner, 1996-99, vol. I, p. 99

gains its validity from various explicit Qur'ānic verses and the ḥadīth literature. He also added some contemporary elements in his work, by analysing some *ḍarūra* applications in Syrian law. However, there is some confusion in this work as the necessity cases are combined with the non-necessity cases. For example in his book, Zuhailī contended that forgetfulness (*nisyān*) can be considered a case for *ḍarūra*. However, I believe that forgetfulness cannot be categorised as a necessity case. Forgetfulness, like ignorance and idiocy (*al-naqṣ al-ṭabīʿī*), are circumstances that affect the legal capacity in general (*ʿawāriḍ al-ahliyya*). The capacity of the person to fulfil the religious command is impaired by these excuses. The person is not obliged to comply with the rule because he is not regarded as a *mukallaf*, and thus he is exempted from any religious command. Furthermore, there is no serious harm in this case. On the other hand, the person in a necessity case is still regarded as a *mukallaf*, a competent Muslim that is obliged to fulfil the religious commands. However, he is exempted from following the original rule because of the possible harm subjected to one of five necessities; religion, life, reason, lineage and wealth. As a result, he has to deviate from the rule to eliminate any possible harm.

Another modern work on *ḍarūra* that I referred to is a thesis by Mansour al-Mutairi. Like Zuhailī, he also added few contemporary elements in his work. For example, he discussed modern contracts that are affected by force majeure (*quwwa al-qāhira*) which is one of *ḍarūra* situations⁴¹. Both al-Mutairī and Zuhailī developed a much wider application of *ḍarūra* that is not only applicable to personal individual cases, but to wider social, economic and political legal cases. This concept is actually recognised by other Muslim writers such as Muḥammad Biltājī and ʿĀṭif Aḥmad Maḥfūz⁴². They categorised *ḍarūra* as a rule used to preserve the benefits of individual necessities and the necessities all human beings and the community. This definition can be illustrated in the case of the need to change the law temporarily by the ruler to achieve certain significant

⁴¹ Mansour Z. al-Mutairi, *Necessity in Islamic Law* (PhD thesis), Edinburgh: University of Edinburgh, 1997, pp. 153-154

⁴² ʿĀṭif Aḥmad Maḥfūz, *Rafʿ al-Ḥaraj fī Tashrīʿ al-Islāmī*, Mansoura: Maṭbaʿa Jāmiʿa Al-Manṣūra, p. 65

targets, for example imposing extra taxes⁴³. This is the major distinction between the traditional and modern approach to *ḍarūra*. The classical works mainly apply *ḍarūra* in a limited way to personal life, while the modern works extend the application more broadly. It is an understandable fact that modern life is more complicated than that in the early Islamic period. This does not mean the early scholars purposely omitted the application of *ḍarūra* rule to situations other than personal life. Rather they tend to discuss the issue in relation to a situation that is close to the reality of where they live. In other words, in the period when life was simple and the divine rule basically concerns personal matters and uncomplicated situations. The application of *ḍarūra* in a wider public sphere is mentioned in classical works, but in a limited fashion and not as comprehensively as in the personal cases.

Apart from theoretical modern discourse on *ḍarūra*, there are few works examining the application of *ḍarūra* in new emerging problems. The modern cases include human transplantation, cosmetic surgery and abortion⁴⁴. One important source used in this study is a work by Franz Rosenthal entitled, *The Herb-Hashish versus Medieval Muslim Society*⁴⁵. Rosenthal offered an insightful critical work on the use of the most popular hallucinatory drug known as *ḥashīsh* among Arab Muslims during the medieval era. He discovered the historical use of this plant among Sufis, high society and lower middle-class groups. This controversial use of *ḥashīsh* has called for a new legal discourse among medieval jurists. The most important part of this book is his analytical discussion on the legal issues regarding the drug. Modern Muslim jurists, muftis and writers prohibited the usage of illegal drugs by the analogy of *al-khamr*. However, they did not provide their verdicts with a complete analytical discussion. Rosenthal, on the other hand, provided informative discussions for modern readers especially on situations dealing with drugs. He discussed the extensive discussions made by the medieval jurists who attempted to solve the issue of *ḥashīsh*. The

⁴³ The original rule is it is illegal for a ruler to take property from his people unless it is proven necessity to do so for the benefit of the state.

⁴⁴ For instance, see Birgit Krawitz, “*Ḍarūra* in modern Islamic law: The case of Organ Transplantation”, in R. Gleave and R. Kermeli, *Islamic Law – Theory and Practice*, London, New York: IB Tauris Publishers, 1997, pp. 185-191

⁴⁵ Leiden: E.J. Brill, 1971

jurists examined the relevant textual evidence and applied their own reasoning. It can be concluded that although many Muslim jurists agreed that *ḥashīsh*, like *al-khamr*, is forbidden and it does not carry a total prohibition like *al-khamr*. Hence, it can be used in limited *ḍarūra* cases, especially for medical purposes or to alleviate pangs of hunger unlike *al-khamr*. As this research also aims to investigate the legality of drug substitution in the Harm Reduction Programme, this book contributes a number of distinctive insights that are useful for the completion of this study.

7. Conclusions

It is hoped that this research will bring benefits to academics and the public at large especially in developing awareness and a better understanding of the current issues highlighted. The real understanding of how *ḍarūra* works is very important to avoid any abuse of the application. Although necessity is a valid accepted grounds for a person under obligation to set aside an established rule, it is not a free license to change a rule based on personal whim. As far as the Harm Reduction Programme is concerned, it is also hoped that this study assists policy makers in developing a special model suitable for the Malaysian Muslim setting. By discussing the HRP's positive and negative effects, the issue's broader context can be explored. It is a matter of great importance to understand the underlying *Sharī'a* reasons justifying this solution as the best alternative in controlling and reducing the number of HIV/AIDS cases, not only in Malaysia but also in other Muslim countries.

CHAPTER ONE: *DARŪRA* IN ISLAMIC LAW: THE TEXTUAL EVIDENCE AND THE DEFINITIONS

1.1 Introduction

In this chapter, the philosophy of *ḍarūra* is traced back to the era of the Prophet by examining the relevant textual evidence. This evidence is not only valued as a piece of history, but most importantly it had been used by Sunni jurists as the legal basis for legitimising the principle of *ḍarūra*. It is a well-known tradition in Islamic legal discourse that any principle formulated by the jurists should have its foundation from any of the divine sources before the principle gains its place in the legal discourse. This chapter serves as an essential preparation for the extended *ḍarūra* discussion throughout this research.

In the first section of this chapter, the *nuṣūṣ* (textual sources/evidence) regarding *ḍarūra* are brought forward to be examined. This evidence is extremely significant as the Sunni jurists had relied upon it to formulate a systematic concept of *ḍarūra*, including the formulation of its definition, the rules and the limits. Although there were differences between jurists in determining the practical legal details of *ḍarūra*, these differences do not affect the fundamental concept of *ḍarūra*. These legal disputes originally stemmed from various interpretations of textual evidence pertaining to *ḍarūra* cases. For instance, there was a dispute among jurists whether a criminal has a right to exercise *ḍarūra* as stated in the Qur'ān. This is because the jurists differed in defining two terms '*ghayr bāghin*' and '*walā ādin*'. However, that this dispute did not become a hindrance for the jurists to achieve a unanimous conclusion that *ḍarūra* can be a mitigation element for a Muslim from adhering to a strict rule. Hence, this situation can justify a Muslim to choose a lenient temporary rule in order to avoid greater harm.

The second section of this chapter examines the definitions of *ḍarūra* formulated by the Qur'ānic commentators, the jurists and the modern scholars. Although these definitions differ slightly from each other, the contents are generally the same. Some Sunni jurists formulated a narrow definition of *ḍarūra*, while some of them formulated a more comprehensive

definition covering a wider application of the principle. In addition, both classical and modern scholars agreed that this principle can only be applied in certain pressing circumstances. A standard set of maxims, regulations and rules of *ḍarūra* must also be applied in each case.

1.2 Textual evidence concerning *ḍarūra*

As far as the legal texts are concerned, there are approximately 500 hundred verses⁴⁶ with explicit legal verses prescribed in the Qur'ān that govern the life of Muslim society and the individual⁴⁷. These legal and quasi-legal stipulations include rituals, alms tax, property, intoxicants, marriage, adultery and homicide. However, most Qur'ānic and ḥadīth literature related to legal matters is mainly incidental and hence, their response to legal cases is not comprehensive. The Muslim jurists believed that the principle of *ḍarūra* gains its legality from certain explicit textual evidence. Although these sources only deal with life and death situations, namely the case of starvation, the jurists argued that this specific permission to eat *mayta* and other unlawful meals can be extended to other emergency cases.

The basic understanding of the legal excuse stated in Qur'ānic and ḥadīth literature led to the formation of a comprehensive and a systematic *ḍarūra* philosophy by the jurists. They formulated its definition, rules, regulations and conditions that have to be met for every *ḍarūra* case. The importance of the study of *ḍarūra* is its power to delay an established rule. In ordinary situations, Muslims are obliged to follow the *Sharī'a* laws in all matters including personal matters, social relations and religious obligations. These established rules, which are also called *'azīma*, have to be observed by a

⁴⁶ See the discussion on Qur'ān and Islamic law in Wael B. Hallaq, *A History of Islamic Legal History*, Cambridge: Cambridge University Press, 1997, pp. 3-7.

⁴⁷ Meanwhile Coulson argued that there are not more than 80 legal verses deal in the Qur'ān. See C. G. Weeramantary, *Islamic Jurisprudence- An International Perspective*, London: Macmillan Press, 1988, p. 32. Kamali on the other hand argued that there are about 350 legal verses in the Qur'ān. He further added that there are approximately 140 verses on devotional acts, 70 verses are devoted to marriage and family matters, 70 more on commercial transaction, 30 verses on crimes, 30 verses on equality and 10 on economics. Regarding the disagreement over the actual legal verses in the Qur'ān, I agree with Kamali's view that the calculations differ according to one's understanding of the Qur'ān. See also Mohammad Hashim Kamali, *Sharī'a Law: An Introduction*, Oxford: Oneworld, 2008, pp. 19-20

mukallaf (legally commissioned person) in his daily normal activities⁴⁸. The legal rules (*al-aḥkām al-sharʿiyya*) are divided into two categories, non-amendable and amendable. The non-amendable category of rulings includes the obligations of prayer, *ḥajj* (pilgrimage), fasting in the month of Ramaḍān and almsgiving. Other non-amendable activities are the prohibitions of adultery, drinking alcoholic beverages and eating swine. These rulings remain until the Hereafter. The second category of legal rulings that is amendable, is derived from the *ijtihād* of jurists on the basis of *maṣlaḥa*⁴⁹, *ʿurf*, *istiḥsān*, *istiḥāb* and the collective understanding of jurists of the legal texts. Muslims are also required to abide by these rulings.

However, Islam does recognise that in certain extreme situations it is impossible for a *mukallaf* to fulfil his daily religious obligations either the non-amendable or the amendable categories. For example, when the accomplishment of a religious activity might result in a great harm to one of his five necessities. Hence, some exceptional rules are granted. This exception is clearly marked in the Qurʾān. These extreme situations imposing threats to one’s life, religion, wealth, reason or lineage are legally recognised factors for a person to set aside the original *ḥukm* temporarily. The *darūra* can extenuate not only amendable rulings but also some non-amendable rulings. This is different to other legal concepts, such as *maṣlaḥa* and *ʿurf*, which can only amend the non-mandatory rulings formulated via the *ijtihād* of the jurists.

1.2.1 *Darūra* in the Qurʾān

The Qurʾānic verses dealing directly with *darūra* cases are in six verses.

The first verse is Q2.173:

“He has only forbidden you carrion, blood, pig’s meat, and animals over which any name other than God’s has been invoked.

⁴⁸See Gimaret, D. “Taklif (a.)” *Encyclopaedia of Islam, Second Edition*. P. Bearman; Th. Bianquis; C.E. Bosworth; E. van Donzel and W.P. Heinrichs (eds.). Brill, 2010. Brill Online. EXETER UNIVERSITY. 26 July 2010

<http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-7344>

According to Gimaret, *taklīf* is a term of the theological and legal vocabulary denoting the fact of an imposition on the part of God of obligations on his creatures, of subjecting them to a law. The corresponding passive participle *mukallaf* is used of someone who is governed by this law and in this connection, in legal language; it denotes every individual who has at his disposal the full and entire scope of the law.

⁴⁹ See previous chapter for the definition of these terms

But if anyone is forced to eat such things by hunger, rather than desire or excess, he commits no sin: God is most merciful and forgiving⁵⁰.”

A similar context of *ḍarūra* is invoked in verse Q5.3:

“You are forbidden to eat carrion; blood; pig’s meat; any animal over which any other name than God’s has been invoked; anything strangled, a victim of violent blow or fall, gored or savaged by a beast of prey, unless you still slaughter it (in the correct manner); or anything sacrificed on idolatrous altars. You are also forbidden from allotting shares (of meat) by drawing marked arrows- a heinous practice- the disbelievers have already lost all hope that you will give up your religion. Do not fear them, fear Me. Today I have perfected your religion for you, completed my blessing upon you, and chosen as your religion Islam, total devotion to God; but if any of you are forced by hunger to eat forbidden food, with no intention of doing wrong, then God is most forgiving and merciful.⁵¹”

There are another two verses concerned with the state of necessity mentioned in Q6.119 and Q6.145:

“Why should you not eat such animals when God has already fully explained what He has forbidden you, except when forced by hunger? But many lead others astray by their desires, without any true knowledge; your Lord knows best who oversteps the limit⁵².”

“(Prophet) says, ‘In all that has been revealed to me, I find nothing forbidden for people to eat, except from carrion, flowing blood, pig’s meat- it is loathsome- or a sinful offering over which any name other than God’s has been invoked.’ But if someone is forced by hunger, rather than desire or excess, then God is most forgiving and most merciful.⁵³”

The last verse concerning *ḍarūra* in food related case is Q16.115:

“He has forbidden you only these things: carrion, blood, pig’s meat, and animals over which any name other than God’s has been invoked. But if anyone is forced by hunger, not desiring it nor exceeding his immediate need, God is forgiving and merciful towards him.⁵⁴”

The only non-food *ḍarūra* case is mentioned in Q16.106, where Allāh warned that:

"With the exception of those who are forced to say they do not believe, although their hearts remain firm in faith, those who reject

⁵⁰ The Qur’ān, M. A. S. Abdel Halem (tran.), New York: Oxford University Press, p. 19

⁵¹ The Qur’ān, M. A. S. Abdel Halem (tran.), pp. 67-68

⁵² The Qur’ān, M. A. S. Abdel Halem (tran.), p. 89

⁵³ The Qur’ān, M. A. S. Abdel Halem (tran.), p. 91

⁵⁴ The Qur’ān, M. A. S. Abdel Halem (tran.), p. 173

God after believing in Him and open their hearts to disbelief will have their wrath of God upon them and a grievous punishment awaiting them."

These are six Qur'ānic injunctions dealing specifically with *ḍarūra* cases. Five verses deal with food cases while only one refers to the case of disbelief. In the beginning of each verse, the established rule is explained to educate Muslims as to what is *ḥalāl* and what is not. As far as the legal discourse is concerned, the above verses, which are regarded as *al-ayāt al-aḥkām* (legal Qur'ānic citations), intend to explain to Muslims the firm rulings of eating and the act of non-belief. However, the Qur'ān explicitly verifies that an abnormal situation known as *ḍarūra* is accepted as a legal reason for a Muslim to deviate temporarily from the original ruling where the forgiveness of God is granted for the sinful act committed (in the case of eating the unlawful or uttering the word *kufī*). The jurists, however, contended that the deviation of the rule must be based on necessity. This understanding was derived from the term '*famanidturra*'. This means any reasons other than necessity cannot be accepted. The early jurists also believed that the rule can only be applied in the case of life and death, either when one's life is endangered by hunger and starvation or when life is threatened by death or serious injury from an oppressor to do whatever *Sharī'a* prohibits.

In the five verses regarding food, the Qur'ān explains that the unlawful foods are animals which are not slaughtered by reciting the name of God, food offerings to other creature than God, blood and swine. However, it is also imperative to note that in the same verses a special permission is given to consume the unlawful. The Qur'ān also briefly explains that there are conditions that have to be met by the person (*muḍtarr*) in such a dire situation before eating the unlawful food. One of the conditions is that the person must not be a *bāghin* or *'ādin*. The majority of jurists argued that these terms (*bāghin* or *'ādin*) refer to a person who is a sinner and deviates from *Sharī'a* rules. According to the verses, a sinner or a criminal is not allowed to exercise *ḍarūra*. The Hanafi jurists, however, claimed that the sinners have the same rights as obedient people to exercise the rule, as the Hanafis interpreted *bāghin* or *'ādin* as the person who violates the *ḍarūra*

limits⁵⁵. They further elucidated that *bāghin* or *‘ādin* means ‘a person who eats more of the unlawful food than is necessary to sustain life’. There is no indication in these verses that a sinner is prohibited from eating unlawful foods. This dispute will be elaborated upon later under the subheading of the preconditions of *ḍarūra*.

Al-Shāfi‘ī in his *tafsīr* work⁵⁶ defined *al-muḍtarr* (a person in the case of necessity) as a person who has no lawful meal that can sustain his life and save him from hunger. He further elaborated that ‘hunger’ that permits the consumption of unlawful foods is hunger that might lead to death or severe illness or weaken his movement. The permission to eat or drink unlawful items according to al-Shāfi‘ī is what can sustain his life or give him energy to walk. The two basic requirements for any *ḍarūra* case are that there are no lawful means and when there is a great danger to the person’s life. This means *ḍarūra* is not a free license for any ordinary person to tamper with an established rule. The jurists believed the preconditions of *ḍarūra* are clearly marked in the words “*if a person is forced by necessity, without wilful disobedience, nor transgressing due limits, thy Lord is Oft-forgiving, Most Merciful*” and “*then is he guiltless. For Allah is Oft-forgiving Most Merciful*”.

Similarly, in the only non-food verse, Q16.106, the exception is given for those who are forced to profess *kufr*. In the beginning of this verse, Allāh has warned that for those who choose to be a non-believer after embracing Islam, he will be sentenced to God’s wrath and will be subjected to severe punishment in the Hereafter. This established rule prohibits Muslims from converting to other religions. This also means the acts of disbelief either through the form of actions, verbal utterance or heart wills are all prohibited. However, a special exception is given for those under compulsion where the Qur’ān clearly marks that the punishment is lifted for those who uttered the word of disbelief in such a situation. On the basis of this verse, the jurists also acknowledged compulsion and coercion (*ikrāh*) as

⁵⁵ Al-Jaṣṣāṣ, *Kitāb al-Aḥkām al-Qur’ān*, Vol. I, pp. 126-127

⁵⁶ See al-Shāfi‘ī, *Aḥkām Al-Qur’ān*, Vol. II, pp. 88-89

legal excuses that will lift the punishment⁵⁷. Even though the act of disbelief is one of the deadly sins believed by Muslims to be subjected to God's wrath, forgiveness is there for those who utter the words of disbelief unwillingly.

Having examined these Qur'ānic cases of *ḍarūra*, one may ask, why did God choose the case of hunger and professing *kufr* for the representation of necessity situations? It is assumed that during the early days of the formation of Islam, problems such as lack of food and water were common among Arab travellers and the poor. Another case of *ḍarūra* is threats from non-believers. During the early revelation period, especially in Mecca, low class Muslims received severe threats from non-believers, forcing them to leave Islam and hide their status. Some of them, who could not bear the abuse pretended to utter the words of *kufr* and disguised themselves as non-believers⁵⁸. The Qur'ān has acknowledged this situation and thus, a special rule is granted. According to Q16.106, the jurists made a decision that any other case imposing threat to a Muslim's life, (not only coercion and food cases) is valid on the grounds of necessity⁵⁹.

These verses of *ḍarūra* had also been used by the Qur'ānic commentators to define *darūra* in their *tafsīr* work. However, many Qur'ānic commentators (*mufasssīrūn*) confined their definition of *ḍarūra* to matters pertaining only to food and drink as these verses above are only concerned with the food. For example, Abū Bakr al-Jaṣṣāṣ⁶⁰ (d. 981/370) defined *al-ḍarūra* as "a fear of harm (*ḍarar*) and destruction (*halak*) to one's life, or a part of one's body because of one's refusing to consume the (*ḥarām*) food". In this situation, a Muslim is compelled to consume *ḥarām* food because that is the only available option. Al-Jaṣṣāṣ further asserted that there are two situations that are considered as the states of necessity, namely coercion or compulsion. A

⁵⁷ Al-Jaṣṣāṣ, *Kitāb al-Aḥkām al-Qur'ān*, Vol. I, pp. 126-127. Ibn al-ʿArabī, *Aḥkām al-Qur'ān*, vol. I, p. 57

⁵⁸ See Ismāʿīl bin ʿUmar Ibn Kathīr, *The Life of the Prophet; a translation of al-Sīra al-nabawiya*, Trevor J. Le Gassick (tran.), Reading: Garnet Publishing, 2000, pp. 311-322. Some of the early Muslims were chained and roasted in the sun. Many Muslims receiving the torture gave away under this treatment except Bilāl. Even the Prophet's companion Abū Bakr received bad treatment from the polytheist when he called people to God and to His Messenger. He was beaten and was badly injured.

⁵⁹ Ibn al-ʿArabī, *Aḥkām al-Qur'ān*, Vol. I, p. 57

⁶⁰ Al-Jaṣṣāṣ, *Kitāb al-Aḥkām al-Qur'ān*, vol. I, p. 129

Mālikī Qurʿānic interpreter, Ibn al-ʿArabī (d. 1148/543)⁶¹, explained that the term *ḍarūra* literally comes from the word *ḍarar* which means something that opposes a benefit. According to Ibn al-ʿArabī, the "*muḍtarr*" refers to a person who fears *al-talaf* (destruction) or harm to his body or bodily organs. The Ḥanafī exegetes, ʿAbd Allāh bin Aḥmad bin Maḥmūd al-Nasafī (d.1310/710)⁶² and Ismāʿil Haqqī al-Burūsawī (d. 1127/1715)⁶³, limited the definition of *ḍarūra* to a compelling situation that permits a Muslim to consume a *ḥarām* meal.

The definitions of *ḍarūra* provided by Muslim exegetes reveal something about the functioning of *ḍarūra* in their minds, namely a valid case for the suspension of a ruling because of a fear for one's life. However, they limited the application to food and coercion cases. In this case, a Muslim is forced to break the law unwillingly. "Unwillingly" means he has no option other than choosing the prohibited acts in order to save life. This concept differs from the concept of *ḥīla* (legal stratagem).⁶⁴ *Hīla* is permitted to circumvent an existing rule or to alter it so as to arrive at a result that the law did not intend to achieve. In this case, when a Muslim cannot arrive at the means by ordinary legal ways, he chooses to do some legal trick to legalise the act. Likewise, *ḍarūra* is not a legal trick but it is a straight legal infringement. This definition will be further elaborated upon in the definition section in this chapter.

Another point to ponder is regarding factors leading to *ḍarūra*. It can be argued that implicitly the *mufassirūn* recognised there are external and internal factors lead to *ḍarūra* situations⁶⁵. The external factors cause the pressing situation is known as human factor. For example, the case of an oppressor forces a person (*muḍtarr*) to commit a prohibited act. In this case, the Muslim under duress has to commit the prohibited act such as drinking

⁶¹ Ibn al-ʿArabī, *Aḥkām al-Qurʿān*, vol.I, p. 54-55

⁶² ʿAbd Allāh bin Aḥmad bin Maḥmūd al-Nasafī, *Tafsīr al-Nasafī*, Beirut: Dār Ibn Kathīr, 1998, vol. II, p.151

⁶³ See Ismāʿil Haqqī bin Muṣṭafā al-Ḥanafī al-Khulwatī al-Burūsawī, *Rūḥ al-Bayān fī Tafsīr al-Qurʿān*, Beirut: Dār al-Kutb al-ʿIlmiyya, 2003, Vol. I, p. 280

⁶⁴ See al-Shāṭibī, *al-Muwāfaqāt* and Wael B. Hallaq, *The History of Islamic Legal Theories*, Cambridge: Cambridge University Press, 1997, p. 186

⁶⁵ Ibn al-ʿArabī, *Aḥkām al-Qurʿān*, vol.I, p. 54-55, al-Burūsawī, *Rūḥ al-Bayān fī Tafsīr al-Qurʿān*, Vol. I, p. 280

wine, as he fears the oppressor is likely to execute his threat. Meanwhile, the internal factors are natural causes, which fall beyond human control. Situations such as famine, starvation or choking on food call for the breaking of the original law. These situations can be regarded as life threatening situations which permit one to break the law in order to avoid major harm to his life.

The Qur'ān clearly remarks on some preconditions for *ḍarūra* application. In Q2.173, Q5.3, Q6.145 and Q16.115, the conditions for the recognition of necessity are stated only for those who are not transgress due limits and have no wilful disobedience or inclination to transgression (*ghayr bāghin walā 'ādin*). However, there are some disputes among the jurists in the interpretation of the terms *bāghin* and *'ādin*. The majority of Muslim jurists agreed with Mujāhid⁶⁶ (d. 104/722) who held these terms mean that a person who executes his journey with bad intention is not allowed to eat *mayta*. This means only an obedient Muslim can exercise the rule. Ibn al-'Arabī (d.543/1148) who was also influenced by Mujāhid's view, further added that *ghayr bāghin* also means a person who does not intend to commit a sin (*ghayr ḥālib sharran*). Examples of criminals or disobedient Muslims (*bāghin* and *'ādin*) were given by the Qur'ānic exegetes, such as highway robbers or terrorists against a Muslim ruler. In both cases, they are prohibited from eating *mayta* to alleviate hunger. The majority also believed that a sinner is only allowed to enjoy the dispensation after he/she repents. They argued that if a sinner is allowed to exercise *ḍarūra*, this will only assist him/her in accomplishing his unlawful plan.

The Ḥanafī jurists did not agree with above interpretation of *bāghin* and *'ādin* that excludes sinners from exercising *ḍarūra*. In this sense, they rejected Mujāhid's opinion and gave preference to the interpretation made by Sa'īd bin Jubayr (d. 95/714) and Muqātil bin Ḥayyan⁶⁷ (d. 135/753) who said that the terms *ghayr bāghin walā 'ādin* (without wilful disobedience)

⁶⁶ See Ibn Kathir, *Tafsīr Ibn Kathir (abridged)*, abridged by a group of scholars under the supervision of Shaykh Safī-ur-Rahman al-Mubarakpuri, Riyadh: Darussalam, 2000, vol. I, p. 472-474, see also Muḥammad Ibn Jarīr al-Ṭabarī, *Jāmi' al-Bayān fī Tafsīr al-Qur'ān*, Beirut: Dār al-Ma'rifa, 1972, Vol. II, pp. 51-52

⁶⁷ See *Tafsīr Ibn Kathir (abridged)*, vol. I, p. 472-474, see also al-Ṭabarī, *Jāmi' al-Bayān*, Vol. II, p.52

literally mean that a person committed the sinful act (eating *mayta*) without a belief that such an act is permissible. He/she only consumes *mayta* in the case of an emergency and he/she knows that permission is not usually granted. Conversely, "*bāghin*" is a person who consumes the unlawful with desire (*shahwa*) and he/she enjoys breaking the law⁶⁸. This interpretation was reaffirmed by a Ḥanafī jurist, al-Nasafī (d. 710/1310) stipulating that *bāghin* is someone who eats *mayta* because of *shahwa* (merely lust)⁶⁹. Qatāda (d. 118/736), however, argued that a *bāghin* is a person who chooses to eat the unlawful while the lawful is actually available⁷⁰. Ismā'īl Ḥaqqī al-Burūsawī (d. 1127/1715) further elaborated that the *ḍarūra* situation allows a Muslim to eat *mayta* when there is no lawful food to consume and the *muḍtarr* fears that there is a great harm to his life or some of his bodily organs if he refrains from eating (the *mayta*)⁷¹. However, Ibn 'Abbās (d. 69/688) contended that the two phrases '*ghayr bāghin walā 'ādin*' refer to a situation where a person does not continue eating the unlawful when the cause of necessity has gone. This interpretation implies that the *ghayr bāghin walā 'ādin* are those people who only eat the unlawful limitedly or to what can sustain life.

It can be seen that the majority of jurists except the Ḥanafīs have accepted Mujāhid's interpretation of *ghayr bāghin walā 'ādin*, which excludes a sinner from eating *mayta* or other unlawful foods⁷². The Ḥanafī jurists strongly rejected this requirement on two concrete bases. Firstly, if this is the requirement for the validity of *ḍarūra*, why is the same rule not applied in the *tayammum* case? In the case of *tayammum* for a *muqīm* (a person residing in one place), all jurists agreed that whether a sinner or a pious person, a *muqīm* can resort to *tayammum*. Secondly, the Ḥanafī jurists argued that the requirement does not have any legal basis from either Qur'ānic or Prophetic traditions. Hence, the condition only originated from the jurists' individual interpretation of the said law of *ḍarūra* thereby raising the question as to why the rule is limited only to pious people. Ḥanafī jurists

⁶⁸ Al-Ṭabarī, *Jāmi' al-Bayān*, vol. II, p. 52

⁶⁹ Al-Nasafī, *Tafsīr al-Nasafī*, vol. I, p. 151

⁷⁰ See *Tafsīr Ibn Kathīr*, vol. I, p. 473 and *Jāmi' al-Bayān*, vol. II, p. 52

⁷¹ See al-Burūsawī, *Rūḥ al-Bayān fī Tafsīr al-Qur'ān*, vol. I, p. 280

⁷² See discussion in al-Jaṣṣāṣ, *Kitāb al-Aḥkām al-Qur'ān*, vol. I, pp. 127-128 and Ibn al-'Arabī, *Aḥkām al-Qur'ān*, vol. I, p. 57

also argued that if a good Muslim is obliged to protect his life by eating the unlawful, so is a sinner. Both have the same obligations to preserve their necessities. If a sinner is not allowed to eat *mayta* and he dies because of not eating the unlawful, he has committed further sin by causing harm to his life. The Ḥanafīs also argued that restraining a sinner from exercising *ḍarūra* will only make him commit another sin, that is causing probable death by not eating *mayta*.

However, the majority of the jurists disagreed with above arguments. They argued that a sinner can consume the *mayta* after he repents. They further added that the dispensation rules such as *ḍarūra* and *rukḥṣa* are God's bounties and designed not to assist people to commit sin⁷³. A hungry sinner on his journey is still permitted to consume *mayta* on the condition that he repents. This applies not only to eating the unlawful, but also to exercising other dispensations such as shortening prayer or breaking fast. The jurists strongly believed that the dispensation is only meant for obedient people and cannot be exercised by sinners. The majority of jurists further clarified the case of *tayammum* for a *muqīm*. They argued that the specific requirement of being a pious person is only applied in the case of a *musāfir*. A *musāfir* is required to have a good intention during his journey. A non-traveller (a resident) on the other hand is a different case, for example a disobedient wife or a disobedient slave. The dispensation of shortening prayer or eating *mayta* has nothing to do with their status of being disobedient. This is why the jurists maintained that the dispensation of *tayammum*, unlike eating *mayta*, is granted without discrimination for residents. Modern Muslim writers also disputed this issue. For example, Muḥammad 'Alī al-Ṣābūnī⁷⁴ was inclined to choose the majority's view while Muḥammad 'Abdūh and his successor Rashīd Riḍā chose to support the Ḥanafīs' position⁷⁵.

While the term *ghayr bāghin* has led to a huge disagreement between Qur'ānic exegetes, the term *walā 'ādin* is less controversial among jurists.

⁷³ Ibn al- 'Arabī, *Aḥkām al-Qur'ān*, vol. I, p. 58

⁷⁴ See Muḥammad 'Alī al-Ṣābūnī, *Ṣafwat al-Tafāsīr*, Beirut: Dār al-Qur'ān al-Karīm, 1981, vol. I, p. 115

⁷⁵ Rashīd Riḍā and Muḥammad 'Abdūh, *Tafsīr al-Qur'ān al-Ḥakīm al-Mashhūr bī Tafsīr al-Manār*, Beirut: Dār al-Kutb al-'Ilmiyya, 1999, vol. II, p.79

The most popular interpretation is that the consumption of an unlawful meal cannot exceed its limit, namely, eating only what sustains life (the view adopted by most except for Māliki jurists) and eating only when unlawful meal is not available. The Māliki jurists', however, argued that a person is allowed to eat until full as there is a report stating that Abū Ubayda and some companions ate until full out of necessity⁷⁶.

It is clear that the functioning of *ḍarūra* in the Muslim Qur'ānic exegetes' and interpreters' minds is limited and confined to certain cases, especially food and coercion. However, in the next chapter we will learn how the jurists have expanded this notion to a much wider sense. The jurists built the philosophy of *ḍarūra* in a more comprehensive and systematic manner, which can be applied to other *fiqhī* cases. As discussed before, the theoretical discussion of the principle of *ḍarūra* (as a rule that can set aside an established rule) gains its legality from textual evidence. This is one of the unique aspects of the rule of *ḍarūra* compared to other rules and sources in Islamic law, as this rule gains its validity directly from textual evidence. Conversely, the other rules such as *urf* (custom or customary law)⁷⁷, *maṣlaḥa* (public interest)⁷⁸, *istiḥsān* (juristic preference)⁷⁹, *saḍḍ al-dharāi'* (blocking the means)⁸⁰ are general principles derived from collective understandings of Islamic principles. There may be some textual evidence as the basis for the validity of these rules, but unlike the *darūra* cases there is no specific case invoked. In other words, these rules do not gain their

⁷⁶ Ibn al-ʿArabī, *Aḥkām al-Qurʾān*, Vol. I, pp. 55-56 and the complete discussion is discussed in Chapter Three under the subtopic of *ḍarūra* in food cases.

⁷⁷ See F. H. Stewart, G. Libson, "Urf". *Encyclopaedia of Islam*", Second Edition, P. Bearman et al. (Eds.), Brill, 2010, Brill Online, EXETER UNIVERSITY, 08 February 2010, www.brillonline.nl, see related discussion in Wahbah al-Zuhailī, *Uṣūl al-fiqh al-Islāmī*, Ṭehrān: Dār Iḥsān, 1997, vol. II, pp. 828-835

⁷⁸ See Madjid Khadduri, "Maslahah", *Encyclopaedia of Islam*", Second Edition, P. Bearman et al. (eds.), Brill, 2010, Brill Online, EXETER UNIVERSITY, 08 February 2010, www.brillonline.nl, see related discussion in Wahbah al-Zuhailī, *Uṣūl al-fiqh al-Islāmī*, vol. II, pp. 752-819

⁷⁹ See R. Paret, "Istiḥsān and istiḥlāḥ", *Encyclopaedia of Islam*", Second Edition, P. Bearman et al. (eds.), Brill, 2010, Brill Online, EXETER UNIVERSITY, 08 February 2010, www.brillonline.nl. Some modern writers such as Hashim Kamali translated *istiḥsān* as juristic preference, see Mohammad Hashim Kamali, *Sharīʿah Law- An Introduction*, Oxford: One World, 2008, p. 324, see also Wahbah al-Zuhailī, *Uṣūl al-fiqh al-Islāmī*, vol. II, pp. 735-748

⁸⁰ See M.Y. Izzi Dien, "saḍḍ dharāi'", *Encyclopaedia of Islam*", Second Edition, P. Bearman et al. (eds.), Brill, 2010, Brill Online, EXETER UNIVERSITY, 08 February 2010, www.brillonline.nl, see also Kamali, *Sharīʿah Law- An Introduction*, p. 326

legality explicitly from textual evidence but rather they emerge as the understanding of concepts derived by Muslim jurists.

There are several important points that can be deduced from these *ḍarūra* verses. First, Muslim *mufassirūn* believed that in certain pressing situations, namely food and coercion, God forgives eating of the unlawful and professing *kufr* to avoid a greater harm to a person's life. The punishment is therefore lifted. Secondly, the *mufassirūn* also agreed that the verses have clearly demarcated some basic requirements for the verification of *ḍarūra* situations. According to the verses, the *muḍtarr* is only allowed to exercise *ḍarūra* if he is not among '*bāghin*' or '*ādin*'.

1.2.2 The Prophetic traditions regarding *ḍarūra*

A life threatening situation that puts a person in severe hardship has also been recognised in the ḥadīth literature. As compared to the Qur'ānic injunctions discussed above, the ḥadīth traditions clearly illustrate that this rule applies not only to matters pertaining to food and drinking, but to other matters such as self-defence. Some conditions are stipulated in these ḥadīth for the recognition of necessity. Like the Qur'ān, the ḥadīth's preoccupation with *ḍarūra* matters are generally incidental and the responses to *ḍarūra* are limited to specific factual cases.

Ḥadīth one⁸¹:

From Jābir bin Samura: A man arrived at Ḥarrah with his wife and children. A man said (to him): "My camel went astray, if you find it, detain it." The man found it but he could not find the owner. The camel was sick and the wife said, "Kill it," but the husband refused and apparently, the camel died. His wife said (to the husband) "Skin it to dry out the fat and flesh so we can eat them". He said, "Let me ask the Messenger of Allah." Therefore, he went to him (the Prophet) and asked him. He (the Prophet) said, "Do you have something enough to fulfil your needs?" He replied, "No". He then said, "Then eat it". Then its owner came and he told him the story. He said,

⁸¹ Ḥadīth no 3818 in the chapter of *al-muḍtarr ilā al-mayta* in Abū Dawūd Sulaymān Ibn al-Ash'ath, *Sunan Abī Dawud*, vol. II, p. 645, Vaduz Leichestein: Jam'iyya al-Maknaz al-Islāmī, 2000. See also ḥadīth number 3807 in Abū Dawūd Sulaymān Ibn al-Ash'ath, *Sunan Abu Dawud*, Aḥmad Ḥassan (tran.), Lahore: Sh. Muhammad Ashraf, 1984, vol. III, p. 1074. According to Aḥmad Ḥassan, there is no defined limit of necessity as it differs from man to man.

“Why did you not slaughter it?” He replied, “I would have been embarrassed in front of you.”

Ḥadīth two⁸²:

Al-Fujay’ al-‘Āmirī said that he came to the Messenger of Allāh (and asked), “Is carrion unlawful for us?” He said, “What are your eating habits?” We said, “Some food in the evening and some in the morning”. Abū Nu‘aym said, ‘Uqba explained it (the situation) to me saying, “(only) a cup (of milk) in the morning and a cup in the evening”. (The Messenger replied), "This does not satisfy the hunger". So, he made the carrion lawful for them in this situation.

This ḥadīth indicates that it is permitted to consume *mayta* (dead meat) if a man does not have sufficient food to alleviate hunger. It is also evident that there is no need to wait until a near-death situation to consume *mayta*.

Ḥadīth three⁸³:

Samurah bin Jundub reported the Prophet of Allah as saying, “If any of you come across cattle, he should seek permission from their master if he is there. If he permits, he can milk (the animals) and drink. If he is not there, he should call (for the owner) three times. If he responds, he should seek his permission; otherwise, he may milk and drink, but should not make provisions [by saving the milk].”

Ḥadīth four⁸⁴:

‘Abbad bin Shuraḥbīl said: I suffered from hunger so I entered a garden in Medina, and rubbed an ear-corn. I ate and carried it in my garment. Then its owner came, he beat me and pulled my garment. He brought me to the Messenger of Allah who said to him, "You did not teach him when he was ignorant; and you did not feed him when he was hungry". The Messenger of Allāh ordered him, so he released my garment, and gave me one or half a *wasq* (sixty or thirty *sā’s*) of corn.

⁸² Ḥadīth no 3819 in the chapter of *fī al-muḍtarr ilā al-mayta*, vol. II, p. 645 in *Sunan Abī Dawud*, Vaduz Leichestein: Jam‘iya al-maknaz al-Islami, 2000

⁸³ Ḥadīth no. 2621 in the chapter of *fī ibn sabīl ya’kul min al-tamar wa yashrab min al-laban idhā marra bihī*, *Sunan Abī Dawud*, vol. II, p. 447. See also ḥadīth number 2613 in *Sunan Abu Dawud*, Aḥmad Ḥassan (tran.), Vol. II, p. 724.

⁸⁴ Ḥadīth no. 2622 in the chapter of *fī ibn sabīl ya’kul min al-tamar wa yashrab min al-laban idhā marra bihī*, *Sunan Abī Dawud*, vol. II, p. 447. See also ḥadīth number 2614 in *Sunan Abu Dawud*, Aḥmad Ḥassan (tran.), Vol. II, p. 724

The previous ḥadīths three and four in Sunan Abū Dawud are slightly different from ḥadīths one and two. Having examined the first two ḥadīths, it is apparent that the Prophet himself investigated the genuineness of the state of necessity of the person before granting the permission to consume the unlawful meal. The permission in ḥadīths three and four on the other hand were given without any interrogation by the Prophet. Hence, what is the difference between these ḥadīths? The special requirement in ḥadīths three and four was given especially for a traveller or for those who were on the way to *jihād*⁸⁵. The Prophet granted the permission to eat any hanging fruit or to milk an animal they passed by without asking the traveller's state of hunger. It can be anticipated that the traveller's need for food is self-evident and commonly perceived as compared to those who are not traveling. In addition, a person who stays in his residential area has a wider option to look for a lawful meal as compared to a person on a journey. This also applies to *tayammum*. A traveller who lacks water is given general permission to exercise *tayammum* or shorten prayer. Unlike his *muqīm* counterpart, the traveller is not required to meet strict conditions of *ḍarūra*. It is also important to note that although hadiths three and four imply a general permission to eat what is not owned by a Muslim, some jurists⁸⁶ insisted that this permission is only for those who are genuinely helpless and dying of hunger and thirst. The permission to take another's property cannot be generalised to anything other than a necessity situation.

Another ḥadīth reaffirming the permission to eat hanging fruits belonging to others was narrated by Tirmizī, Abū Dawūd, Nasā'ī and Ibn Mājah from the authority of 'Amrū bin Shu'aib from his father and from his grandfather, the Prophet was asked about hanging fruits and answered, "Who is in dire need can take it but he cannot make provision from it"⁸⁷. This ḥadīth again is evidence that the permission is only for a *mudtarr* and such consumption is limited to what can satisfy hunger. This limit is clearly indicated by the Prophet's words "*he cannot make provision from it.*"

⁸⁵ All these ḥadīth were placed under the chapter of *'ibn sabīl* in Sunan Abū Dawūd. Hence the permission is only for *'ibn sabīl* and not for ordinary people.

⁸⁶ See *Sunan Abu Dawud* above.

⁸⁷ See Ibn Kathīr, *Tafsīr Ibn Kathīr*, vol. I, p. 473

The general guidelines for the verification of the state of necessity are remarked on in all the above ḥadīths. The guidelines are that the permission (to modify the rule) is only granted for those who face a severe threat to their life. The *muḍtarr* must also believe that committing the prohibition is the only way to prevent imminent harm. The state of necessity needs to be verified to exclude any possibilities impairing the *muḍtarr's* eligibility to apply the rule. Such permission is only granted on a temporary basis to eliminate harm. The temporary permission only operates during the specific *ḍarūra* period and it ceases when the harm is removed. However, the period varies depending on the intensity of the case.

In another ḥadīth⁸⁸:

Qabīṣa b. Mukhāriq al-Hilālī said, “I was in debt and I came to the Messenger of Allāh and begged him”. He said, “Wait till we receive *ṣadaqa* (gifts or charity), so that we can ask for (the donation) to be given to you”. He again said, “Qabīṣa, begging is not permissible except for one of these three people: for one who has incurred debt, begging is permissible till he pays the debt off, after which he must stop (begging); for one whose property has been destroyed by a calamity which has hit him, begging is permissible till he can support himself; and for one who has been hit by poverty, the genuineness of which is confirmed by three trusted members of his people, begging is permissible till he can support himself. Besides these three (reasons), Qabīṣa, begging, is forbidden, and anyone who engages in such [activity] consumes what is forbidden.”

This is a straightforward explanation of *ḍarūra* made by the Prophet which firmly indicates that begging is prohibited. The Prophet also made it clear that in certain situations when one is helpless, has no food and has run out of alternatives, he can beg. The Prophet also gave the permission to beg for a person in severe debt, or when his property is destroyed by calamity or a person is smitten by poverty. These three cases would result in harm to one’s wealth and life, thereby justifying the act of begging. However, the permission to beg ceases either when the target is achieved, when the debt is paid, or when the hunger is eliminated. This limit indicates that the prohibited act is only permitted temporarily and once the cause of necessity

⁸⁸Ḥadīth no. no. 2451 in the book of *zakāt*, Abī al-Ḥusayn Muslim Ibn al-Ḥajjāj al-Qushayrī al-Nisābūrī, *Ṣaḥīḥ Muslim*, Vaduz Leichestein: Jam’iya al-maknaz al-Islami, 2000, Vol. I, p. 409

has gone, the original rule is restored. At the same time, a careful measure to prevent the abuse of the rule and to confirm the genuineness of one's state of necessity is required. The Prophet did not blindly accept a mere statement from poor people but he required a testimony from three trusted people in the community to prove the state of a person's poverty. Although the permission to beg is given, a meticulous investigation should be made in order to prevent any abuse of *ḍarūra* rule.

Other *ḍarūra* cases which are not related to food and drink are also found in the ḥadīth literature. For example, the act of burying more than one body in a grave, which is usually prohibited.

Hishām bin 'Āmir reported,⁸⁹ "We have been afflicted (with wound and fatigue) on the day of Uḥūd. The Messenger of Allah said, "Dig graves, make them wide, and bury two or three (of the dead persons) in a single grave. He was asked, "Which of them should be put first? He replied, "Those of them who knew most of the Qur'ān."

This ḥadīth indicates that it is permissible to bury more than one dead person in a grave when the circumstances demand it.

Another ḥadīth representing *ḍarūra* shows how a man is permitted to cause injury to others who tried to assault him. Permission is granted on the basis of necessity to defend the victim's life and his property.

The ḥadīth, from the authority of Abu Hurairah, states⁹⁰:

Someone came to the Prophet asking, "O Prophet, what do you think if a man came to me in order to take my possessions?" He (the Holy Prophet) said, "Don't give your possessions to him". He (the inquirer) said, "And [what] if he attacks me?" He (the Holy Prophet) remarked, "Then fight back

⁸⁹ Ḥadīth no. 2019 in Aḥmad Ibn Shu'ayb al-Nasā'ī, *Sunan Nasā'ī*, Muḥammad Iqbal Ṣiddīqī (tran.), vol. II, p. 515.

⁹⁰ Ḥadīth no. 377 in the chapter of *al-dalīl 'alā anna man qaṣada akhdha māli ghayrihi bi ghayri ḥaqqin kāna al-qāṣidu muhdarra al-dammi fī ḥaqqihi* in *Ṣaḥīḥ Muslim*, Vaduz: Leichestein Jam'īya al-Maknaz al-Islāmī, vol. I, p. 71-72. See also another ḥadīth no. 378 and 379 from the authority of 'Abd Allāh bin 'Amr and Ibn Jurayh respectively, vol. I, p. 72. See also Ḥadīth Muslim 259, *Ṣaḥīḥ Muslim* Abdul Hamid Siddiqi (tran.), vol. I, p. 80, in the chapter of faith (the chapter concerning the fact that violable blood of one who makes an attempt to take possession of the property of another without any legitimate right, is such a man is killed his abode is fire and he who dies in protecting his property is a martyr).

against him” He (the inquirer) said again, “What do you think if I were to be killed?” He (the Holy Prophet) replied, “You would be a martyr.” He (the inquirer) said, “What do you think would happen to him if I killed him?” He (the Holy Prophet) said, “He would be in Hell.”

This ḥadīth unequivocally states that property is held sacred in Islam and it is one of the established five essential elements of human existence that should be protected alongside religion, life, lineage and reason. If one dies resulting from his attempt to protect his right of ownership, he is regarded as a martyr. A Muslim is permitted to defend his property even if his act of self-defence results in injury or harm to others who attack him. The permission to cause harm to the attacker is given on the grounds of necessity. This is called *difāʿ sharīʿī*, lawful defence. In this case of duress, the liability is also lifted, which means the person who killed to protect himself will not face any punishment.

To conclude, the *ḍarūra* rule was not developed comprehensively and systematically from the Qurʾānic and ḥadīth texts. God's and the Prophet's responses in all cases were merely incidental and the permission to deviate from an original rule was given on a case-by-case basis. No explicit general permission on the basis of necessity is found in both sources. On this basis, it can be argued that the capacity of *ḍarūra* as a general legal excuse is not established from these sources. However, although the available evidence only accommodates specific issues, the Sunni jurists unanimously agreed that the rule can be extended to other emerging cases⁹¹. Such evidence was treated as the origins for *ḍarūra* doctrine and has been interpreted by the jurists as general permission extendable to other cases where one of five necessities is at stake. It is also important to highlight that both Qurʾānic injunctions and the ḥadīth literatures demonstrate that the *ḍarūra* rule is not a free license to change the Sharīʿa rules. It is apparent that in almost all *ḍarūra* verses, God has stated the preconditions of necessity cases, that is

⁹¹ Ibn al-ʿArabī, *Aḥkām al-Qurʾān*, vol. I, p. 58, al-Burūsawī, *Rūḥ al-Bayān fī Tafṣīr al-Qurʾān*, vol. I, p. 280, al-Jaṣṣāṣ, *Kitāb al-Aḥkām al-Qurʾān*, vol. I, pp. 127-128, Muḥammad ʿAlī al-Ṣābūnī, *Ṣafwat al-Tafāsīr*, vol. I, p. 115, Rashid Riḍā and Muḥammad ʿAbduh, *Tafṣīr al-Qurʾān al-Ḥakīm al-Mashhūr bi Tafṣīr al-Manār*, vol. II, p.79

“*ghayr bāghin walā ādin*”. Similarly, some conditions were also stipulated by the Prophet with his requirement for three trusted persons to verify the state of wealth of a person who wants to beg for money. This illustrates that a detailed examination must be performed prior to resorting to *ḍarūra* rule. The ḥadīths above also show us that the Prophet himself investigated the intensity and the genuineness of the situation. The permission to consume unlawful meat either *mayta* or meat belonging to other is not simply executed by the Prophet. He himself inquired as to the state of the person in need and at the same time, the Prophet firmly stated that the original rule must be observed. Finally, it can be concluded that the evidence above has become the basis for the formulation of certain *ḍarūra* maxims by the jurists, for instance, *al-ḍarūra tubīḥ al-maḥẓūra* (necessity permits prohibition) and *al-ḍarūra tuqaddar biqadriḥa* (necessity estimated by the extent thereof).

1.3 Definition of *ḍarūra*

1.3.1 *Darūra* from the perspective of Arabic terminology

The Arabic word *ḍarūra* comes from the lexical root word *ḍarar* (ḍh-r-r) and it means damage, injury, harm or hardship that cannot be avoided⁹². It also literally means ‘something that is opposite to benefit’⁹³. However, pain or bitterness associated with medicine is not considered as *ḍarar* because it has benefit. The word *ḍarūra*, on the other hand, means pressing necessity. The state of necessity, or *iḍtirār*, is a state where someone is compelled to do something or is in the state of dire need. This situation makes someone free to do the prohibited acts. The word *muḍtarr* can also refer to a person who tries to eliminate harm or a person who is suffering from harm. According to Ibn al-‘Arabī⁹⁴, the word *muḍtarr* also means a person who fears destruction (*al-talaf*) or harm to his body or any of his bodily organs.

⁹² Muḥammad Ibn Mukarram Ibn Manzūr, *Lisān al-‘Arab*, Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, Muassasāt al-Turāth al-‘Arabī, 1996, vol.VIII, p. 46, Ibn al-‘Arabī, *Aḥkām Al-Qur’ān*, vol.1, pp.54-55, see also Buṭrūs al-Bustānī, *Kitāb Quṭr al-Muḥīṭ*, Beirut: Maktabat Lubnān, 1996, vol. II, p. 1191. *Ḍarar* also means *ḍayyiq*, see also Arne A. Ambros, *A Concise Dictionary of Koranic Arabic*, Wiesbaden: Reichert, 2004, p. 168, Aisha Bewley, *Glossary of Islamic Terms*, London-Ta-Ha Publsiher, 1998. *Al-ḍarar* means harm, meanwhile *al-iḍtirār* is compelling situation which made someone free to do the prohibited acts, p. 117 and p. 120.

⁹³ Al-Bustānī, *Kitāb Quṭr al-Muḥīṭ*, vol. II, p. 1191

⁹⁴ Ibn al-‘Arabī, *Aḥkām Al-Qur’ān*, vol.1, pp. 54-55

Some linguists influenced by the Qurānic discourse of *ḍarūra* have defined *ḍarūra* in a limited sense. For instance, the linguist, Ibn Manẓūr⁹⁵ (d. 711/1311) limited the legal definition of *al-muḍtarr* (person in dire need or under duress) to a person who is forced or compelled to eat *mayta* or any *muḥarramā* when a lawful meal is unavailable. He also explained that the consumption of *ḥarām* meal is limited to what can prolong life (*mā yasudd al-ramaq*) which means the legality of the consumption of unlawful food ceases when one gains his energy. It can be seen that his understanding of *ḍarūra* application in legal cases is only limited to food related cases.

In his thesis, Manzur al-Mutairi has concluded the meaning of *ḍarūra* in the Arabic terminology as⁹⁶:

- a) Dire need for something (*shiddat al-ḥāja*)
- b) The state in which one is being forced to do something (*al-iljā*)
- c) The intensity of *darar* which is injury or harm

To conclude, the term *ḍarūra* in Arabic literally means an emergency situation a person faces. This situation makes a person compelled to commit something in order to avoid serious harm or threat. The jurists have recognised this situation as legal grounds for someone to depart from an original ruling or to deviate from it. The Arabic usage of the *ḍarūra* term has been recognised by the jurists to further formulate the legal consequences of this situation.

1.3.2 *Darūra* from jurists' perspectives

It is evident that medieval Muslim jurists did not offer a precise definition of *ḍarūra* as compared to the modern jurists. The classical definitions deal mainly with certain individual cases. The types of interests protected were not found in these classical definitions. The early section of this chapter discussed how some Muslim interpreters such as a Hanafī, al-Jaṣṣāṣ, and a Mālikī, Ibn al-ʿArabi, defined *ḍarūra* in their *tafsīr* work. Al-Jaṣṣāṣ defined

⁹⁵ Ibn Manẓūr, *Lisān al-ʿArab*, vol. VIII, p. 46.

⁹⁶ Mansour al-Mutairi, *Necessity in Islamic Law* (PhD thesis), University of Edinburgh, 1997, p.8

al-darūra as "a fear of harm (*ḍarar*) and destruction (*halak*) to one's life, or a part of one's body because of one's refusal to consume (*ḥarām*) food"⁹⁷.

However, some other Ḥanafī jurists formulated a more general definition of *ḍarūra*. *Darūra* is defined as an excuse (*ʿuzr*) that can legitimate a forbidden act⁹⁸. In other words, certain prohibitions become legitimate in order to avoid imminent harm. However, this definition does not cover the meaning of *ḍarūra* comprehensively. The term 'excuse' (*ʿuzr*) used above does not precisely represent the situation of *ḍarūra*. Excuse (*ʿuzr*) has a broader meaning than *ḍarūra*, as it includes both necessity and non-necessity cases. A Ḥanbālī *uṣūlī*, ʿAlī ibn ʿAqīl bin Muḥammad bin ʿAqīl (d. 513/1119) also defined *ḍarūra* as an inevitable situation facing a Muslim (*al-fiʿl al-ladhī la yumkin al-takhalluṣ minhu*)⁹⁹. This general definition however does not indicate the intensity of the case that permits a prohibition. In addition, the Ḥanafīs' and Ḥanbalīs' definitions above do not clearly outline the type of interests protected in necessity cases. Only al-Jaṣṣāṣ suggested that *ḍarūra* is utilised in order to save life.

The Shāfiʿī jurists' prescription of *ḍarūra* can be found in some *fiqhī* treatises¹⁰⁰. They offered a different approach in defining *darūra* as compared to other schools. They did not offer a technical definition like other schools but rather they provided certain hypothetical circumstances to describe the case. They explained that the situation of *ḍarūra* is when one fears death or serious illness, or fears prolonging one's sickness, delaying the cure, fears losing one's friends (when looking for alternative lawful food) and when one fears incapable to walk or to ride on transport. These fears, which impose threats to a person's life, are the legal cause for *ḍarūra* application. Similarly, in the case of ablution with sand (*tayammum*), al-

⁹⁷ Al-Jaṣṣāṣ, *Aḥkām Al-Qurʿān*, vol. I, p. 129

⁹⁸ ʿAlī Ḥaidar, *Durar al-Ḥikam fī Sharḥ Majalla al-Aḥkam*, no place: Dār al-Jīl, 1991, vol. I, pp. 96-7, *ḍarūra* has been defined as *al-ʿuzr al-ladhī yajūz bisababihī ijraʿ al-shayʿ al-mamnūʿ*

⁹⁹ *Al-Wāḍiḥ fī Uṣūl al-Fiqh*, Beirut Stuttgart : Steiner, 1996-99, vol. I, p. 99

¹⁰⁰ Muḥammad al-Sharbīnī ʿAlī Khāṭīb, *Mughnī Muhtāj Ilā Maʿrifā Maʿānī Alfāz al-Minhāj*, Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1957, vol. IV, p. 306. In this case the Shāfiʿī jurists are of the view that it is *wājib* for a person under this situation to eat the unlawful in order to protect himself from destruction. Further discussion can be found in the very next chapter.

Nawawī (d. 676/1277) for instance described the necessity state to use sand is "when it is feared the patient may die as a consequence of ablution with water, or may lose the use of a limb"¹⁰¹. This rule can be extended to the case where ablution with sand is inevitable if the use of water might retard the cure of a serious illness, or disfigure some part of the body. This description implies that *ḍarūra* might be utilised not only when one fears death but other serious illness. For al-Nawawī, the permission to delay an established rule can clearly be granted on the account of necessity where one faces harm.

The problem of a poor legal definition of *ḍarūra* was raised by Mawwil Izzi Dien in his book on Islamic Law¹⁰². He recognised the fact that the jurists tend to define the concept of *ḍarūra* by providing examples rather than offering hypothetical definitions. This approach, he argued, has led to the disagreement between jurists on the practical question of *ḍarūra*. However, it can be argued that the jurists' differences and disagreements in the practical aspect of *ḍarūra* did not necessarily stem from the ambiguity of the definitions offered by the jurists. These disagreements resulted from different interpretations and reasonings made by the jurists. This is evident in the case of the interpretation 'ghayr bāghin walā 'ādin' as discussed before. The jurists agreed on the fundamental concept of *ḍarūra*, but disputed the technical details of the rule. The effort made by some Shāfi'ī jurists to define *ḍarūra* by offering exemplary cases is necessary because each *ḍarūra* case is unique. Hence, separate treatment has to be made according to the intensity of each case.

A more comprehensive meaning of the concept of *ḍarūra* can be found in the legal maxims works, such as *al-Ashbāh wa al-Nazā'ir*¹⁰³, written by a Shafī'ī jurist, al-Suyūṭī (d.911/1505) and *al-Ashbāh wa Nazā'ir* by a Ḥanafī jurist, Ibn Nujaym (d.970/ 1563) and its commentary work (*sharḥ*), *Ghamz*

¹⁰¹ Mahiudin Abu Zakaria Yahya Ibn Sharif al-Nawawi, *Minhaj et talibin : a manual of Muhammadan law according to the school of Shafii*, trans. to English from the French edition [of the Arabic] of L.W.C. Van den Berg by E.C. Howard. Lahore: Law Publishing Company, 1978, p. 12

¹⁰² *Islamic law - from historical foundations to contemporary practice*, Edinburgh: Edinburgh University Press, 2004, pp. 82-85

¹⁰³ Jalāl al-Dīn al-Suyūṭī, *Al-Ashbah wa al-Nazā'ir fī al-Qawā'id wa Furū' Fiqh al-Shāfi'īyya*, Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1959, p. 85

*Uyūn al-Baṣā'ir fī Sharḥ al-Ashbāh wa Nazā'ir*¹⁰⁴. The *ḍarūra* has been defined in these classical books as follows: "a situation in which one reaches a limit where if one does not take a prohibited thing, one will perish or be about to perish." As with other classical definitions, this definition implies that this circumstance legalises a prohibited action in order to avoid harm. Although the definition is limited, the practical aspect of *ḍarūra* has been comprehensively discussed in these legal maxims works. We can also find that the classical definitions above limit the application only to the protection of life.

A modern scholar, Wahbah Zuhailī detected several lacunae in the classical definitions of *ḍarūra*¹⁰⁵. He offered a new definition of *ḍarūra*, which he believed is more comprehensive and accurately presents the exact notion of *ḍarūra*. He contended that *ḍarūra* is a compelling situation resulting in fear of injury to one's life, organs, lineage, reason or his property. The preservation of these five necessities as the key element in a *ḍarūra* situation broadens the scope of *ḍarūra*. This means the protection of all five necessities have been taken into account in any *ḍarūra* situations. According to Zuhailī, *ḍarūra* should be interpreted as a license which not only allows a Muslim to commit a prohibited act but to omit an obligation as well, or delay an obligation. For example, selling weapons is permitted but selling weapons to an enemy during war is prohibited in order to prevent harm to Muslim society.

It is important to note that, apart from Zuhailī, many modern Muslim writers have also broadened the definition of *ḍarūra* to include the protection of the necessities of the public and the state. This new concept of *ḍarūra* was reaffirmed by Muḥammad Biltajī and ʿĀṭif Aḥmad Maḥfuz¹⁰⁶. They contended that *ḍarūra* is a rule used to preserve the benefits of individual necessities and the necessities of all human beings and the community.

¹⁰⁴ P.277

¹⁰⁵ *Nazariyāt al-Ḍarūra al-Sharʿiyya*, Beirut: Dār al-Fikr, 1997, p. 63-65.

¹⁰⁶ ʿĀṭif Aḥmad Maḥfuz, *Rafʿ al-Ḥaraj fī Tashrīʿ al-Islāmī*, Mansoura: Maṭbaʿa Jāmiʿa al-Manṣūra, no date, p. 65

It can be concluded that the expansion of the *darūra* definition from a merely individual-centered definition to a wider application has a close relationship with the changes in Muslim socio-history. In the Prophetic era and the early caliph's times, issues concerning Muslims were less complicated and more self-centered. Although there were *darūra* cases concerning state administration and social relations, the numbers were relatively minimal. As times have changed, with a growing Muslim population and the expansion of Muslim territory, Muslims have faced more complicated issues¹⁰⁷. Hence, a wider definition of *darūra* should apply. For example, the importance of protecting the state from enemy and the importance of raising taxes on the basis of necessity.

1.4 Historical development of the theory of *darūra*

Before we embark on the question of the history of *darūra*, it is important for us to understand the juristic methods in developing theories and rules in Islamic law. As discussed earlier, it is a well-known tradition in Islamic legal discourse that any principle formulated by the jurists should have its foundation in any of divine sources before the principle gains its place in the legal discourse. The jurists will firstly explore the Qur'ān, the bedrock of Islamic jurisprudence to ensure that argumentation and the deductive process have not detracted from its foundation. It also important to note that the various injunctions and exhortations contained in the Qur'ān are not to be read as individual but as parts of one integral whole. Although some of the verses were incidental responses to one individual case, the rule can be applied to any other similar case. However, in a matter where the Qur'ān is silent in certain cases, the jurists will refer to the second primary source in Islamic law, the ḥadīth¹⁰⁸. Jurists will refer to ḥadīth looking for the Prophet's adjudication in legal matters. However, when the issue was not expressed explicitly in the Qur'ān and the Sunna, the jurists will have to

¹⁰⁷ For example, during the Umayyad period, the main concern of the caliphs was political administration. See Joseph Schacht, "Pre Islamic Background", in Majid Khadduri and Herbert J. Liebesny (eds.), *Law in the Middle East*, New York, Arm Press, pp.36-38. The administration of the Umayyad concentrated on waging war against external enemies, on collecting revenue from the subject population, and on paying subventions in money.

¹⁰⁸ Some people may use the term ḥadīth and *sunna* interchangeably. Sunna literally means a manner of acting, a rule of conduct, a mode of life, applied to the life of the Prophet. Meanwhile ḥadīth refers to the report of a particular occurrence. See C. G. Weeramantary, London: Macmillan Press, 1988, p. 34

resort to *ijtihād*. The jurists strove by deep and devoted study to derive an appropriate rule by logical inference and analogy. Logical reasoning, known as *qiyās*, was the subject of much philosophical inquiry in sorting out the underlying principle and separating it from particular facts of the past and present cases¹⁰⁹. Similarly as G. Weiss argued, reasoning by analogy is a method of argument that by its very nature leads to assimilation of like cases and thus to more generalised statements of the law¹¹⁰. In this process, the jurists tried to reveal the reason behind the revelation. The *ʿilla* (ratio decidendi) of legal cases inferred in the Qurʾān and the Sunna were figured out. The jurists managed to extract the general principles underlying legal texts in both sources and applied them to the analogous new cases. As a result, discrete cases have given rise to broad categories and a more general principle has been formulated.

This similar method of reasoning by *qiyās* was applied by the jurists to formulate the rule of *ḍarūra*¹¹¹. Although the term *ḍarūra* in the Qurʾān and Sunna concerns matters of food, drink and compulsion, Sunni jurists acknowledged that the *ḍarūra* rule can be extended to other cases. They extended the rule to the case of wine drinking, eating slaughtered meat for *muḥrim* and even eating human flesh¹¹². These exemplary cases discussed by jurists demonstrate that the rule of *ḍarūra* is not limited to what has been explicitly explained in the texts but that the explicit text should be read in a broad manner. To some extent, Ibn al-ʿArabī in his Qurʾanic commentary even discussed the issue of using the unlawful ingredients for medication. This means, he did not confine the rule of *ḍarūra* to matters pertaining only to food and drink¹¹³. In this process, the jurists strived to understand the wisdom behind the rule, for example, to decide whether the permission to consume the unlawful is limited to alleviating hunger or can be extended to

¹⁰⁹ See C. G. Weeramantry, London: Macmillan Press, 1988, p. 40

¹¹⁰ Bernard G. Weiss, *The Spirit of Islamic Law*, Georgia: The University of Georgia Press, 1998, p. 9

¹¹¹ The method of reasoning by analogy is firmly established by Sunni School although it is not recognised by the Shiʿis. See Bernard G. Weiss, *The Spirit of Islamic Law*, Georgia: The University of Georgia Press, 1998, p. 10

¹¹² See al-Jaṣṣāṣ, *Kitāb Aḥkām al-Qurʾān*, Vol. I, p. 126 and Ibn al-ʿArabī, *Aḥkām al-Qurʾān*, Vol.I, p. 56

¹¹³ Ibn al-ʿArabī, *Aḥkām al-Qurʾān*, Vol.I, p. 59

medicinal purposes. This process of extension of the rule is evident in many *ḍarūra* cases in the *fiqh* literatures.

As stated previously, the textual evidence concerning *ḍarūra* had been used by the jurists to formulate their basic understanding of this rule. Various definitions of *ḍarūra* were formulated by *mufassirūn* (Qur'ānic interpreters), *fuqahā'* (jurists) and *uṣūliyyūn* (legal theorists). I divide the application of *ḍarūra* into several categories. The first category of *ḍarūra* application is limited to food cases. This application was adapted by Qur'ānic interpreters who are influenced by the discussion of *ḍarūra* found in the Qur'ānic discourses which deal specifically with food cases¹¹⁴. As a result, some Qur'ānic interpreters and jurists had limited *ḍarūra* application to cases pertaining to food and drink. The second category is where the application has been extended to cases other than food. However, the application is still limited to certain individual interests: life and property. This concept was adapted by the majority of classical jurists. The hypothetical cases of *ḍarūra* found in Sunni *fiqh* literature demonstrate that the jurists had widely applied the rule to other cases rather than only food and drinking¹¹⁵. In the third category of *ḍarūra*, the rule is applied in a much wider sense to also include the protection of society, the economic system and the political administration¹¹⁶.

As stated earlier, there are differences in practical question of *ḍarūra* between jurists. The differences in the technical details are common in the discussion of Islamic law. As Bernard G. Weiss argued, Muslim scholars disagreed with each other from time to time on points of detail in Islamic law, and where the differences could not be resolved, toleration seems to have prevailed¹¹⁷. This was also the case in the process of formulating the

¹¹⁴ Ibn Manẓūr, *Lisān al-ʿArab*, vol. VIII, p. 46, ʿAbd Allāh bin Aḥmad bin Maḥmūd al-Nasafī, *Tafsīr al-Nasafī*, vol. II, p.151 and Ismāʿīl Ḥaqqī bin Muṣṭafā al-Ḥanafī al-Khulwatī al-Burūsawī, *Rūḥ al-Bayān fī Tafsīr al-Qurʾān*, Vol. I, p. 280

¹¹⁵ Wider application of *ḍarūra* is presented in Chapter Four and Five

¹¹⁶ See Wahbah Zuhailī, *Naẓariyāt al-Ḍarūra al-Sharʿiyya*, Beirut: Dār al-Fikr, 1997, p. 63-65, ʿĀṭif Aḥmad Maḥfūz, *Rafʿ al-Ḥaraj fī Tashrīʿ al-Islāmī*, Mansoura: Maṭbaʿa Jāmiʿa al-Manṣūra, no date, p. 65

¹¹⁷ Bernard G. Weiss, *The Spirit of Islamic Law*, Georgia: The University of Georgia Press, 1998, p. 9

rule of *ḍarūra*. The fundamental point that is agreed upon by all jurists is that the unlawful foods can be consumed because of necessity¹¹⁸.

1.5 Conclusion

Having examined the textual evidence concerning *ḍarūra* cases, it is evident that the comprehensive notion of *ḍarūra* is not established from these sources. The Qur'ānic and prophetic responses are merely incidental and this is the common characteristic of legislation in the revelation period. As Said Ramadan¹¹⁹ argued, the characteristics of legislation basically establish general rules without indulging in much detail, as from the very beginning these texts were directly meant to deal with actual events. This was also the case for the concept of *ḍarūra*, with the formulation of *ḍarūra* rule being developed in a comprehensive manner by jurists in a later period. As Islamic law is characterised as a living organism, it develops and evolves over time. The complete theory and principles of Islamic law do not emerge in one complete piece. The basic understanding of *ḍarūra* derived from the relevant *nuṣūṣ* was gradually developed into a systematic theory of law which functions to amend and change the character of certain established rules. Although Sharī'a laws are something that cannot easily be amended, the jurists believe that under certain pressing circumstances, a change in the law is unavoidable to prevent a greater danger to people's basic needs. This chapter also shows us that *ḍarūra* was narrowly defined by some earlier *uṣūliyyūn* and jurists. However, the jurists actually applied this rule in a much wider sense in *fiqhī* treatises; these cases will be presented in Chapters Three and Four. In the next chapter, the maxims, preconditions of *ḍarūra* and the relations of *ḍarūra* with other Islamic legal terms will be examined.

¹¹⁸ See al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, Vol. I, p. 126 and Ibn al-ʿArabī, *Aḥkām al-Qur'ān*, Vol. I, p. 56, al-Shāfi'ī, *al-Umm*, Vol. II, p.276

¹¹⁹ See Said Ramadan, *Islamic Law- Its Scope and Equity*, Geneva, 1970, p. 71

CHAPTER TWO: THEORETICAL DISCUSSION OF *ḌARŪRA* IN ISLAMIC LAW

2.1 Introduction

The previous chapter outlined how the Muslim jurists believed that the notion of *Ḍarūra* originated from several pieces of textual evidence. The discourse of *Ḍarūra* cases in these Qur'ānic and Ḥadīth literatures led to the formation of a more comprehensive *Ḍarūra* rule by the Muslim jurists and *uṣūliyyūn*. It is important to note that the provisions for derogation are available for those who are genuinely incapable of fulfilling an obligation. The incapability is not because of being a minor or mental states such as forgetfulness or ignorance but because of severe danger or threat to one of the five human necessities. This means that the ability of *Ḍarūra* to alter the rule is only granted when the *mukallaf* strongly believes that the fulfilment of a *Sharī'a* rule causes a great harm to his life or other necessities. The provision for derogation by the rule of *Ḍarūra* is applicable in almost all human activities, including devotional acts of worship (*'ibāda*) and personal relationships (*mu'āmalā*). It is important for a person to possess a sound knowledge of what is stated in the *Sharī'a* regarding a particular *Ḍarūra* matter. The *muḍtarr* (a person under duress) is responsible for his own actions during this *Ḍarūra* period and he may decide for himself when to derogate from the standard rule. Therefore, he must be able to distinguish between necessity and non-necessity cases. The verification by adhering to strict preconditions is essential in order to prevent people from abusing this principle. For instance, if someone is on the brink of starvation and the only food available is the unlawful, then he has to decide when to consume the *ḥarām* meat in order to survive, and thereby derogate from the standard. The jurists have generally listed the preconditions for the verification of *Ḍarūra* rule that should apply in each case. This chapter will provide a critical review of these standard preconditions and the theoretical discussion on *Ḍarūra*.

This chapter is divided into three sections. In the first section, the connection of *Ḍarūra* and other legal terms is examined. The common

problem concerning the *ḍarūra* application is the interchangeable use of the term with other legal terms. The significance of this examination is to highlight the differences between these terms and to minimise confusion. For example, some jurists used *ḍarūra* to justify certain cases which are not categorised as a necessity, but it is practically a need (*ḥāja*) or a public interest (*maṣlahā*) case. Put in another way, *ḍarūra* is sometimes used to justify cases which do not entail grievous harm to human's necessities, but to accommodate a lesser degree of harm (for instance removing bearable hardship which cannot be categorised as a serious harm). This consideration in the application of Sharī'a rule cannot be classified as *ḍarūra*, but rather a case of *'umūm al-balwā* (common plight) or *mashaqqa* (hardship). These two cases do not relate to avoiding a great harm but rather to eliminating inconvenience, difficulty and hardship for a *mukallaf* (a person under obligation) to fulfil a religious obligation. In such a case, there is no deviation of any original rule; rather the rigid interpretation of the rule is compromised due to the practicality and suitability of the subject of the law. This will be further elaborated in the relevant section below.

In the second section of the chapter, the discussion continues with the discourse of the preconditions of *ḍarūra* set by the jurists. The genuineness of the situation must be verified using these preconditions. Some of the explicit conditions are clearly mentioned in the Qur'ānic verses and prophetic traditions as discussed in the previous chapter, while the rest of the conditions were developed, based on the *ijtihād* of the jurists. It is not obvious that the many modern cases have relied upon these conditions in contemporary new *ḍarūra* cases. These preconditions of *ḍarūra* have been widely discussed, mainly in the books of legal maxim often entitled *al-ashbāh wa al-naẓā'ir*. However, it is crucial to bear in mind that as each *ḍarūra* case is unique, some cases may have different requirements or conditions which are not required generally. Although many jurists have attempted to outline a standard set of *ḍarūra* requirements, some cases under review may have some distinct particulars that require further examination in order to clarify their level of necessity. These issues will also be elucidated later.

The final part of this chapter is the classification of *ḍarūra* situations. Efforts to classify *ḍarūra* cases have been made by modern jurists depending on the cause of the case. The situations and causes of *ḍarūra* fall under two general categories; *‘awāriḍ samāwiyya* (the work of provision) and *‘awāriḍ muktasaba* (the work of human beings). The cases under *‘awāriḍ samāwiyya* category include severe illness and starvation. Meanwhile, in the category *‘awāriḍ muktasaba*, the cases include coercion and duress and legitimate defence. In this section, the doctrine of compulsion and duress will also be analysed.

2.2 *Darūra* and its connection with other legal terms

2.2.1. *Rukhṣa*

One of the speculative reasons as to why the early jurists did not compose independent works on *ḍarūra* is because they had contributed lengthy works on *rukḥṣa*, a term which occasionally has been used interchangeably with *ḍarūra*. The *ḍarūra* rule indeed has a close relationship with *rukḥṣa* as both seek to suspend an original rule. However, there are some differences between these two concepts that are worthy of examination. The rule of *ḍarūra* is frequently referred to as a *rukḥṣa*. The two terms are closely related as both are concessionary laws aiming at removing difficulties from a Muslim. The dispensation is granted as long as the valid cause exists and when the preconditions are met. Some jurists such as al-Shāṭibī stipulated that the rule of *rukḥṣa* is merely indifferent (*mubāh*) with no obligation imposed¹²⁰. This means that in a *rukḥṣa* case, a Muslim has a choice either to adhere to the original rule or to choose the dispensation. *Ḍarūra*, on the other hand, might impose an obligation like eating *mayta* to prevent death. In this case, a hungry Muslim who fears for his life is obliged to eat the unlawful. *Ḍarūra* might also impose a choice of acts, for instance in the case of professing the word *kufṛ* where a Muslim has freedom either to bear the threat or choose to utter the word *kufṛ*¹²¹. In both cases, the sin is

¹²⁰ Abū Ishāq Ibrāhīm bin Mūsā al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Aḥkām*, Beirut: Dār al-Fikr lil-Ṭibā‘a wa-al-Nashr wa-al-Tawzī‘, 1990, Vol. I, pp. 210-215

¹²¹ In a case where a Muslim is threatened by death to utter the unbelief words (*kufṛ*) the jurists differed. The majority of scholars permit uttering the word of unbelief in order to save his life as this is the case of necessity. However, the permission to utter the word unbelief is not as an obligation as the rule of eating *mayta* during starvation. See al-Sarakhsī, *Uṣūl al-Sarakhsī*, Beirut: Dār al-Ma‘rifa, 1973, Vol. I, p. 117

eliminated. However, not all jurists render *rukḥṣa* as merely indifferent or permissible like al-Shāṭibī. Some Shāfiʿī jurists, for instance, divided *rukḥṣa* into several different categories; *wājib*, *sunna*, *mubāḥ* and *makrūh*. For Shāfiʿī jurists, acting upon a *rukḥṣa* in some cases might be an obligation or merely a choice (*mubāḥ*) or reprehensible (*makrūh*).

There are many similarities between *ḍarūra* and *rukḥṣa*. Both are legal dispensations for a Muslim to depart temporarily from established rules because of certain recognised hardships and difficulties. Thus, both differ from *naskh* (abrogation) and *takḥṣīs* (specification), as both work to alter the rule permanently. In the case of *naskh*, the previous ruling is abrogated although in some cases the abrogated rulings still remain textually. According to Kamali¹²², *naskh* is the suspension or replacement of one ruling by another, provided that the latter is of a subsequent origin, which means the two rulings are enacted separately from each other. That means, the new rulings in *naskh* and *mansūkh* cases are enacted textually and specifically and it remains forever, but in a *ḍarūra* case the change of rule is temporary. Furthermore, in many cases of *ḍarūra*, the change of rule is permitted by general textual evidence.

Rukḥṣa has been used in contrast with the term *ʿazīma*. While *ʿazīma* indicates the original and established rules like praying and eating *mayta*, the *rukḥṣa* is an exemption from the original rule. Literally, *rukḥṣa* means ease and convenience (*al-yasr wa al-suhūla*). In its original meaning it is used for giving permission (*ibāḥa*) by way of facilitation providing ease, lenience and convenience¹²³. Below the notion of *rukḥṣa* will be discussed according to the four Sunnī Schools of law.

Hanafi

According to Ibn al-Humām (d. 861/ 1456)¹²⁴, *rukḥṣa* means a latitude (freedom of action) given to a person under obligation (*mukallaf*) in its action for an excuse, which he is unable to perform, despite the existence of

¹²² *Principles of Islamic Jurisprudence*, Cambridge: Islamic Texts Society, 1991, p. 149

¹²³ al-Sarakhsī, *Uṣūl al-Sarakhsī*, Beirut: Dār al-Maʿrifa, 1973, Vol. I, p. 117

¹²⁴ Kamāl al-Dīn Muḥammad bin ʿAbd al-Wāḥid bin ʿAbd al-Ḥamīd aka Ibn al-Humām, *al-Taḥrīr fī Uṣūl al-Fiqh*, Cairo: Mustafā al-Bābī al-Ḥalabī wa Aulāduhu Bi Miṣr, 1933, pp. 258-259.

a prohibitive cause, to save life or bodily injury. This includes a person under duress to utter the words of *kufri*, not to fast during the month of Ramadan, or to take another's property.

The Ḥanafī jurists stipulated that *rukḥṣa* replaces the general rule when the *mukallaf* (legally commissioned person) is unable to perform the action (demanding rule). This rule is established on account of an excuse. *Rukḥṣa* is also a transformation from a strict rule to a more lenient rule. Examining Ibn Humām's definition, we can conclude that *rukḥṣa* is only allowed in cases of necessity, like causing harm to life or bodily organs. Hence, his strict definition of *rukḥṣa* can also be regarded as *ḍarūra*.

Al-Bazdawī (d. 482/1089)¹²⁵, al-Sarakhsī (d. 490/1096)¹²⁶ and al-Bukhārī (d. 730/1330)¹²⁷ agreed that *rukḥṣa*¹²⁸ is an exemption given to a person to do something prohibited while the prohibition remains. This term is used for giving permission (*ibāḥa*) by way of facilitation providing ease, lenience and convenience. The other definition offered is that *rukḥṣa* is what is legalised to ease the burden of the rule while the prohibition remains because of excuse, fear of losing life, or fear of losing part of his bodily organs. Al-Sarakhsī and al-Bukhārī provided a clear explanation that only acts classified as commands and prohibitions may involve *rukḥṣa*.¹²⁹ Therefore, the indifferent category (*mubāḥ*) of acts is exempted from the discussion of *rukḥṣa* as there is no leniency request in this case. For instance, there is no case of *rukḥṣa* for eating and drinking lawful food, as these acts do not impose any obligation or prohibition in ordinary situations.

However, *rukḥṣa*, like *ḍarūra*, does not permit a prohibited act on a permanent basis. The permission to commit a sinful act or omit an obligation is only available for a person with a valid reason during a permitted period. For Ḥanafī jurists, some *rukḥṣa* demand an obligation

¹²⁵ 'Alā' al-Dīn 'Abd al-'Azīz bin Aḥmad al-Bukhārī, *Kashf al-Asrār Sharḥ Uṣūl al-Bazdawī*, Dār al-Kitāb al-Islāmī, Vol. II, p. 300.

¹²⁶ al-Sarakhsī, *Uṣūl al-Sarakhsī*, Vol.1, p. 117.

¹²⁷ al-Bukhārī, *Kashf al-Asrār*, Vol.II, p. 300. See Ahmad Hassan, *The Principle of Islamic Jurisprudence*, New Delhi: Adam Publishers and Distributors, 2005, pp. 154-160.

¹²⁸ *Rukḥṣa* comes from word *rakḥṣa* meaning ease and convenience, and this principle develops from the notion of removing hardship and burden from a Muslim.

¹²⁹ al-Bukhārī, *Kashf al-Asrār*, Vol. II, p. 300

where, for instance, the case under review entails grievous harm, such as eating the unlawful to alleviate pangs of hunger. *Rukhṣa* can also be an option for a Muslim when acting upon the original law would not cause harm - for instance shortening prayer or wiping shoes for a traveller. In this matter, acting upon *rukḥṣa* is merely *mubāh* (indifferent)¹³⁰. Therefore, we can conclude the classification of the *rukḥṣa* rule, according to the Ḥanafī jurists, is based on the type of the exceptions to the rule. The higher the degree of the interests protected, the higher the demand for the command.

The Ḥanafī jurists, however, disputed whether a non-necessity case should be included in *rukḥṣa*, for example, the case of *salam* (future trading). Ibn al-Humām, for instance, confined *rukḥṣa* only to necessity cases, and thus *salam* would not be included. However, some Ḥanafī jurists have included *salam* as a *rukḥṣa* on the basis that this contract is deemed necessary to protect the needs of society. For some jurists, public interest should be regarded as important as individual necessities, hence, public interest is also considered a necessity.

There was some dispute among Ḥanafī jurists as to which act is better for a Muslim, an *‘azīma* or a *rukḥṣa*? According to al-Sarakḥṣī, if a sick person believes that fasting will not affect his health, it is better for him to fast and the fasting is counted¹³¹. In this case, he gave preference to the *‘azīma* rule (*ṣawm*) although the sick person is entitled to exercise the dispensation (breaking the fast). He argued that it is easy for a Muslim to fast in the month of *Ramaḍān* rather than making it up in other months. He further argued that it is preferable for a Muslim to fast as this act proves his steadfastness, sincerity, courageousness and determination in performing the religious obligation. However, he argued that if a person strongly believes that fasting could cause severe illness or death, he is obliged to break the fast. Fulfilling a religious obligation that entails grievous physical harm is condemned as the jurists believed that worship is not supposed to cause physical harm. On the other hand, if he is forced by someone to break his fast, it is better for him to refuse even if it will lead to his death,

¹³⁰ Ibn al-Humām, *al-Taḥrīr fī Uṣūl al-Fiqh*, p. 260

¹³¹ al-Sarakḥṣī, *Uṣūl al-Sarakḥṣī*, Vol. I, pp. 119-120.

although it is still permitted to break his fast. We can see that the Ḥanafī jurists distinguished the causes of *rukḥṣa* into two categories, human force and natural elements. A case involving coercion has a lesser degree of necessity than a natural case such as starvation. This is an interesting case study, as although both cases result in grievous physical harm, the jurists produced different rulings.

The permission to break the fast because of coercion is similar to the rule of professing *kufīr*. In the latter case, if a compelled person refuses to utter the words of *kufīr* and he dies, he is not regarded as a sinner. The Ḥanafī jurists contended that he gains a reward for his perseverance. Conversely, a hungry person who dies refusing to eat the unlawful is condemned as he caused his own death. According to the jurists, the perseverance by refraining to eat the unlawful is useless as the protection of a part of the body (by not eating the unlawful) cannot be realised by the loss of the whole (i.e. by death) in a *darūra* case. In this case, abstinence from taking unlawful food or drink will cause the loss of life without achieving the object aimed at by the prohibition. Thus, the person will be obedient to God, but will destroy his life by omitting the dispensation.

Mālikī:

The majority of Mālikī jurists like the Ḥanafīs were of the view that *rukḥṣa* may become an obligation (*wājib*) or may become an option to choose (*mubāḥ*). They argued that acting upon a *rukḥṣa* sometimes becomes *wājib* (eating *maytah* in extreme situations), and sometimes it becomes a mere permission (shortening one's prayer during a journey). However, a majority view (*mashhūr*) among Mālikī jurists is that *rukḥṣa* is a recommended act (*sunna*). The rulings differed according to different cases and reasons. If fasting would not affect a traveller's health, breaking the fast is considered merely indifferent (*mubāḥ*). If the fasting weakens him/her, breaking the fast is better (*sunna*), and if fasting would cause his/her death, the fasting is forbidden. Having analysed these cases, the latter case of *rukḥṣa* can be

categorised as *ḍarūra*, as action would result in death. Breaking the fast in this situation is an obligation (*wājib*) in order to protect a person's life¹³².

The view of the majority of Mālikīs regarding *rukḥṣa* contradicts the view of al-Shāṭibī, who argued that the legal value of *rukḥṣa* is totally permissible (*ibāḥa*). He also argued that this dispensation is granted because of dire need and does not include *ḥājat* types (*salam* and *ʿaraya*). In al-Shāṭibī's view, *Rukḥṣa* is not a choice between commission and omission¹³³. Therefore, for him if a command in a *rukḥṣa* case is treated as a regular command (*wājib* or *ḥarām*) it ceases to be a dispensation and it becomes an *ʿazīma*. Al-Shāṭibī, meanwhile, thought that the permission found in the textual injunctions does not give a permission to perform the sinful act. For him, the textual evidence permitting a Muslim to act in contradiction to a general rule is merely a sign of forgiveness of God and does not render the act permitted in reality. The sin of the act is forgiven but the act is still forbidden. He adduced the following Qur'anic verse: "But whoever is forced by necessity, not desiring, nor exceeding the limit, no sin is upon him."¹³⁴ This verse clearly indicates that one is not punished for contravening the regular injunctions in such situations. Someone's guilt and sin are removed because they have to do it because of necessity as mentioned in Q2.236 and Q2.198. Secondly, the grant of a dispensation by the Lawgiver aims to provide "ease" to the people and remove hardship. This can be realised by giving them a choice between acting upon regular injunctions or utilising the dispensation. Thirdly, if dispensations are treated as regular commands, like obligatory duties and recommended acts, they will cease to be dispensations (*rukḥṣa*) but *ʿazīma* rules instead. According to al-Shāṭibī, the combination of dispensations and regular commands is the combination of two contradictory elements, as the regular commands imply demand and dispensations imply exception. On this basis, he built his argument by saying that *rukḥṣa* cases should be treated as *ibāḥa* and have no obligation at all.

¹³² In another cases, the Mālikīs also regarded *salam* and *ʿaraya* as kind of *rukḥṣa*.

¹³³ Abū Ishāq Ibrāhīm bin Mūsā al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Aḥkām*, Beirut: Dār al-Fikr lil-Ṭibāʿa wa-al-Nashr wa-al-Tawzīʿ, 1990, Vol. I, pp. 210-215. See Ahmad Hasan, *The Principle of Islamic Jurisprudence*, p. 172-173

¹³⁴ Can be found in Q2.173, Q5.3, Q4.101 and Q6.106

He also excluded any non-necessity case from the *rukḥṣa* category. For al-Shāṭibī, *rukḥṣa* is a kind of dispensation, an exception from a general rule (*‘azīma*) because of severe excuse (*‘uzr shāqq*). He contended that cases like *musāqāt*, *salam* and *qirāḍ* should not be treated as *rukḥṣa* as these cases are of the need type¹³⁵. This view contradicts the majority view. However, he recognised the fact that sometimes the word *rukḥṣa* has been used more widely than its original meaning, as in the case of *salam*¹³⁶. His view contradicts other views especially those of the Shāfi‘īs who divided *rukḥṣa* into several categories *wājib*, *mandūb* and *makrūh*. For them *rukḥṣa* implies on certain occasions. For al-Shāṭibī, implying any obligation with *rukḥṣa* will clearly make it not permission but an obligation, hence, it becomes an *‘azīma*. Ahmad Hassan is of the view that the disagreement between al-Shāṭibī and other jurists on this point seems to be a terminological one only.¹³⁷ According to the jurists, the obligation and recommendation in respect of *rukḥṣa* lie in the authority which allows *rukḥṣa*. Meanwhile, in the opinion of Shāṭibī, they are based on some other authority outside of *rukḥṣa*.

Shāfi‘ī:

The Shāfi‘ī jurists defined *rukḥṣa* as something that is normally forbidden but is made permissible because of need¹³⁸. The Shāfi‘ī, Ḥanafī and Mālikī jurists were all in an agreement that *rukḥṣa* is a legal exemption to eliminate difficulties.

Rukḥṣa from the viewpoint of al-Rāzī (d. 606/1209) is “*Something that is permitted though the prohibition exists*”¹³⁹. We can find that al-Rāzī did not

¹³⁵ He distinguished between *‘uzr shāqq* and *‘uzr ‘aṣl*, the case of *qirāḍ* here is regarded as *‘uzr ‘aṣl* like a difficulty for a capital provider to invest his money.

¹³⁶ al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Aḥkām*, Vol. I, pp. 210-215

¹³⁷ See Ahmad Hassan, *The Principles of Islamic Jurisprudence*, p. 173

¹³⁸ Ahmad bin Naqib al-Miṣrī, *Reliance of the Traveller*, Nuh Ha Min Keller (tran.), p. 37

¹³⁹ This definition can be found in Fakhr al-Dīn al-Rāzī’s book, *al-Mahṣūl fī ‘Ilm al-Uṣūl*, Beirut: Dār al-Kutb al-‘Ilmiyya, 1988, p. 29. The majority of Muslim scholars such as al-Qarāfī, al-Zarkashī, Tāj al-Dīn al-Subkī, al-Baiḍawī and al-Armawī are of the opinion that *rukḥṣa* is a kind of *hukm* rather than a kind of act. This view contradicts the view of al-Āmidī, al-Rāzī and Ibn al-Ḥājjib suggesting that *rukḥṣa* is kind of act. See Ahmad Hassan, *Principle of Islamic Jurisprudence*, p. 170

include the element of “extreme need” in his definition of *rukḥṣa*. This means *rukḥṣa* can be applied to eliminate difficulties which are not severe.

Meanwhile, al-Ghazālī (d. 505/1111) defined *rukḥṣa* as: : “a term applied to anything that excuses the *mukallaf* (subject of law) from performing (prohibited) action on the basis of excuse even though the prohibition continues to be in force”.¹⁴⁰

Like the Hanafī jurists, Al-Ghazālī also divided *rukḥṣa* into *ḥaqīqī* and *majāzī* types. The examples of the first include a person who is forced to utter the words of unbelief or when a Muslim is forced to drink wine. Another case of *ḥaqīqī* is a traveller who is excused from fasting in the month of Ramaḍān. Meanwhile, the *majāzī* category applies to laws which were revealed to the past peoples and have already been abrogated for the Muslim. Al-Ghazālī also made a fine distinction between *ʿazīma* and *rukḥṣa*. The latter case only exists if there are two choices of acts. When there is no choice, the act is called *ʿazīma*. He said when there is a lack of water, *tayammum* is not called a *rukḥṣa*, but it is rather an *ʿazīma*. On the other hand, in a situation where *tayammum* has had to be performed for a sick person or in a case when water is expensive, *tayammum* is regarded as a *rukḥṣa*, because a Muslim can choose between two actions, performing *wuḍū* or performing *tayammum*.

The Shāfiʿī jurists contradicted al-Shāṭibī on the issue of the classification of the *rukḥṣa*. As indicated earlier, al-Shāṭibī strongly argued that *rukḥṣa* is merely an *ibāḥa* assessment and demands neither prohibition nor obligation. Meanwhile for the Shāfiʿī jurists, the lawfulness of *rukḥṣa* comprises obligation, recommendation, permission, and a divergence from what is preferable. The Shāfiʿīs, for example, divided *rukḥṣa* into three kinds¹⁴¹: firstly, obligatory (*wājib*) such as drinking wine if one's throat is choking or to eat carrion, when no other alternative means to save life are available; secondly, recommended (*mustaḥabb*), such as shortening prayer during a

¹⁴⁰ Muḥammad Abū Ḥāmid al-Ghazālī, *al-Mustasfā fī Ilmi al-Usul*, Beirut: Dar al-Kutb al-Ilmiyya, 1996, pp. 78-79.

¹⁴¹ Wizāra al-Awqāf wa Shuʿūn al-Islāmiyya bi ʿl-Kuwait, *Al-Mausūʿa al-fiqhiyya*, Vol. XXII, pp. 155-156

journey, or omitting to fast when one feels severe hardship. Finally, the negligence of the *rukḥṣa* is preferable, such as wiping one's shoes during ritual purification, and performing *tayammum* in a case when water is sold at an exorbitant rate. This means acting upon *rukḥṣa* is considered as *makrūh*. It is interesting to find that the Shāfi'īs included the *makrūh* division for *rukḥṣa*.

The division of the *rukḥṣa* according to Shāfi'ī rules are as follows. Eating carrion is prohibited, however, it is considered an obligation to eat carrion for a man who is dying of hunger and has no alternative means of saving his life. This case can also be regarded as *ḍarūra*. In other cases, a Muslim is required to observe the complete prayer, but it is recommended for a traveller to shorten the prayer during a journey. Shortening prayer is not obligatory. In sale transactions, the availability of goods is an essential element for the validity of the contract. However, in the *salam* contract, it is permissible (*mubāh*) for the buyer to pay the price of the article in advance and receive the article after an appointed term. The case of shortening prayer and future trading can be regarded as *rukḥṣa* but are not *ḍarūra* cases.

Under Shāfi'ī classifications of *rukḥṣa*, we can find that the rule of *ḍarūra* is a part of *rukḥṣa*. If the rule changes because of the necessity to protect one's life, wealth, offspring, religion and reason (as in the case of breaking the fast because of medical reason) the case is classified as both *rukḥṣa* and *ḍarūra*. However, when someone breaks the fast not because of necessity, like the case of a traveller, the dispensation is called a *rukḥṣa*. This case is not *ḍarūra* as there is no fear that harm would be inflicted on the person.

Hanbalī:

The Ḥanbalī jurists, like the other schools, also agreed that *rukḥṣa* can be categorised as either an obligation to act or merely a permission to commit a prohibited act (*ibāḥa*). Al-Ṭūfī (d. 716/1316) defined *rukḥṣa* as follows¹⁴²: "*Something that is established against a proof of the Sharī'a on account of an over-ruling impediment.*"

¹⁴² See Muhammad bin Ahmad bin Abdul 'Azīz al-Fatūhī aka Ibn Najjār, *Sharḥ Kawkab al-Munīr*, Al-Qāhira: Matba'a Sunna al-Muḥammadiya, 1953, p. 150

This means that if the rule is not against a proof of *sharī'a* (*dalīl*) it cannot be recognised as a *rukḥṣa*. A “credible impediment” above means that any impediment that has strong evidence¹⁴³. According to this definition, if the impediment has the same or a lower level of proof than the original rule, a case cannot be made for a *rukḥṣa*. In this case where there are two contradictory proofs that belong to the same level, the act is delayed until the credibility of the proofs is highlighted by the jurists. If the impediment has a weaker proof than the established *dalīl*, the act is considered invalid. Therefore, according to al-Ṭufī, the *rukḥṣa* can only be exercised if the evidence supplied is stronger than the original rule. This definition of al-Ṭufī also implies that every single act of *rukḥṣa* requires separate divine permission, for instance, the rule of *tayammum* and shortening prayers. On the other hand, the *ḍarūra* case does not require separate ‘divine permission’ as most jurists believed that the general permission for *ḍarūra* case is granted through the evidence concerning the permission to eat *mayta*. Another definition offered by the Ḥanbalī jurists is¹⁴⁴: "*The legalisation (decriminalisation) of a prohibited act though the cause of the prohibition is still present.*"

Remarks on *rukḥṣa* and *ḍarūra*

It can be concluded that all *ḍarūra* cases can be regarded as *rukḥṣa* but not all *rukḥṣa* cases are *ḍarūra*, especially when the *rukḥṣa* deals with non-necessity cases. Furthermore, a *rukḥṣa* case gains its permission individually either from the Qurʾān or ḥadīth. The hardship in *rukḥṣa* can be a necessity or a need. The example of a necessity case is eating *mayta*, while the examples for need cases are wiping shoes or shortening prayers. It is important to note that the rule of *ḍarūra* can only be applied in necessity cases. The rule is granted to remove severe harm, and ordinary difficulties are not considered *ḍarūra*. Furthermore, unlike *rukḥṣa* cases, the *ḍarūra* does not necessarily have its own specific exemption through textual evidence. The rule can be applied to any new case that imposes a grievous threat to a

¹⁴³ See for more details Ahmad Hassan, *Principle of Islamic Jurisprudence*, p. 170

¹⁴⁴ Sulaimān bin ʿAbd al-Qawī al-Ṭufī fī al-Sarsara al-Ḥanbalī, *al-Bulbul fī Uṣūl al-Fiqh ʿalā madhhāb Imām Aḥmad*, Beirut: Dar-Al Kutb al-Ilmiyya, 2003, p. 32

Muslim. Jurists extended the permission of eating *mayta* in the Qur'an to many other cases and so this should be treated as a general permission for those who are in dire need.

It can also be concluded that *rukḥṣa* refers to all cases of need or necessity. The definition includes all types of legal dispensation regardless of the degree of harm. A significant difference between *rukḥṣa* and *ḍarūra* is that *rukḥṣa* is a special excuse granted on the basis of *ḥāja* (need) or dire need. Meanwhile *ḍarūra* is an excuse granted only for extreme situations. However, some jurists strictly confined *rukḥṣa* to necessity cases because they feared that some might deliberately break the rule to fulfil their desires.

Another point to ponder is that the jurists unanimously agreed that travelling is valid grounds for leniency in performing a religious duty and a traveller has more privileges than a *muqīm* (non-travelling resident). Jurists agreed that travelling is regarded as an *illa* (ratio decidendi) for *rukḥṣa* without stipulating the level of harm a traveller bears. Hardship and difficulties while travelling can only be regarded as the wisdom (*ḥikma*) behind a *rukḥṣa*. The traveller can exercise *rukḥṣa* even if the journey does not affect the preservation of his five fundamental principles. Hence, this case is treated as a *rukḥṣa* rather than a *ḍarūra*. For example, the permission to shorten one's prayer or break an obligatory fast during a journey is considered when the obligations do not pose threat to his life. However, if fasting is proven to weaken the traveller, then the act is *ḍarūra*. In this latter case, sometimes acting in contravention of the original rule is an obligation if acting upon the original rule would result in serious harm, death or major injury.

The dispensation sometimes becomes an obligation (*wājib*) when it involves performing some of the religious acts or when the illegal act has to be performed to save one of the five necessities. However, both *rukḥṣa* and *ḍarūra* work to suspend an original *ḥukm* temporarily while for some the prohibition remains, and for others the prohibition is lifted. Having analysed the meaning of *rukḥṣa* offered by the jurists, I have found that some jurists have recognised the theory of "ease" in the *Sharī'a* to remove the burden of

a Muslim in performing religious rituals or conducting daily activities in the case of discomfort. They classified the reasons for the change of the rule whether it is a need or necessity type.

2.2.2 Raf' al-haraj

Darūra is also a part of the principle of *raf' al-haraj*¹⁴⁵ (lifting a burden) as both operate to prevent a Muslim being harmed. While *raf' al-haraj* is a basic notion in Islamic law that denies the heavy burden on the Muslim, *darūra* concentrates on the removal of hardship which would result in the loss of the five necessities or result in a great harm to any of these five fundamentals. As far as the jurists are concerned, the *Sharī'a* embodies the notion of *raf' al-haraj*. This notion is derived from several Qur'anic injunctions, such as Q2.185 (God desires ease for you and desires not hardship), Q94.6¹⁴⁶, Q65.7¹⁴⁷, Q65.4¹⁴⁸, Q18.88¹⁴⁹ and Q94.28¹⁵⁰. Despite formidable trials and obligations, Allāh comforts Muslims, reassuring them that He desires ease not hardship. On the grounds of these verses, jurists¹⁵¹ believed that the most important and stringent obligations ordained are easy to undertake and within a Muslim's capacity to fulfill. Religious obligations and prohibitions have been graded and these are considered easy to accomplish, i.e. prayer, fasting and almsgiving. However some duties, like the *hajj* (pilgrimage) is only obligatory for those who have sufficient means to do so.

Virtually all religious commands, obligations and prohibitions entail hardships and difficulties. However, the difficulties in fulfilling religious obligations can be categorised as unbearable burdens and bearable burdens. The unbearable burdens are recognised as factors which prevent a Muslim completing his task. Therefore, these burdens are omitted and excused. For instance, cleanliness is a precondition for the validity of prayer and a

¹⁴⁵ *Haraj* in Arabic means *ḍayyiq* or hardship. It also means *ithm* or blamefulness.

¹⁴⁶ Truly with hardship comes ease

¹⁴⁷ God will assuredly appoint, after difficulty; easiness

¹⁴⁸ Whose fears God, God will appoint for him, of His command easiness

¹⁴⁹ We shall speak to him, of our command, easiness

¹⁵⁰ God desires to lighten things for you, for the human being has been created weak.

¹⁵¹ See Maḥfūz, *Raf' al-Haraj fī Tashrī' al-Islāmī*, p. 3

Muslim is required to be in a religiously clean state. However, it is almost impossible for a Muslim to ensure he is free from minor unnoticeable impure elements, such as being free from a spot of blood. Those unbearable burdens are legally recognised as impediments to a *mukallaf* completing his obligation; therefore, they are removed and forgiven. Another regularly discussed case of *rafʿ al-ḥaraj* is the exposure of one's *ʿawra* during prayer. Although covering *ʿawra* is one of the preconditions for the validity of prayer, the case is forgiven if the part of the body revealed during prayer is unnoticeable. Muslim jurists differed over the limit. Some argued that the limit for the *ʿawra* being revealed is a quarter of the body that should be covered¹⁵², and some did not permit any exposure of the *ʿawra*¹⁵³.

It can be argued that the jurists agreed that emphasising meticulous precautions for cleanliness is not necessary and it only creates hardship for people. In fact, it may well have the effect of leading Muslims away from Allāh, rather than making them better Muslims¹⁵⁴. However, it is imperative to bear in mind that the notion of *rafʿ al-ḥaraj* only tolerates the abandonment of certain particular details in performing religious acts. This is due to the belief that the abandonment of some particular details does not invalidate the act of worship. However, *Rafʿ al-ḥaraj* allows no compromise concerning harmful acts such as eating unlawful food, wine drinking, causing damage to other's properties, neglecting prayers or fasting. Meanwhile the notion of *ḍarūra* is granted permitting a Muslim an act which bears grievous harms like eating pork and drinking wine and it only operates during extreme circumstances.

There are two major distinctions between these two notions. First, the level of harm of the act committed: *rafʿ al-ḥaraj* only compromises the acts which jurists believe to be harmless. The act is permitted when it does not have a significant effect on a Muslim. A spot of blood or a tiny bit of dirt is harmless and forgiven but not a pint of blood. Similarly, the exposure of a small area of Muslim *ʿawra* is excused but not the whole body, which

¹⁵² See al-Sarakhsī, *al-Mabṣūṭ*, Dār al-Maʿrifa, 1989, Vol. I, p. 198

¹⁵³ The Shāfiʿī School is the strictest in this matter as the jurists do not recognise slight revealing of *ʿawra* during prayer. See al-Shāfiʿī, *al-Umm*, Dār al-Maʿrifa, 1990, Vol. I, p. 110. Meanwhile Ahmad bin Ḥanbal and Abū Ḥānifa were lenient in this matter. See also Ibn Qudāma, *al-Mughnī*, Cairo: Dār Iḥyāʾ Turāth al-ʿArabī, 1985, Vol. I, p. 338

¹⁵⁴ ʿĀṭif Ahmad Maḥfūz, *Rafʿ al-Ḥaraj fī Tashrīʿ al-Islāmī*, p. 3

should be covered. *Darūra*, on the other hand, does not deal with such meticulous details of *Sharī'a*, but rather it deals specifically with cases of deadly sin or adjustments to the fundamental aspects of the law. The second distinction lies in the period of operation. *Raf' al-ḥaraj* can operate in a limited way or on a regular basis while *ḍarūra* only operates during a limited period. As a necessity case is something that rarely happens, it is almost impossible for it to operate on daily basis in ordinary situations. However, in certain cases, *ḍarūra* can operate for a long period of time, for instance, during famine or natural disasters.

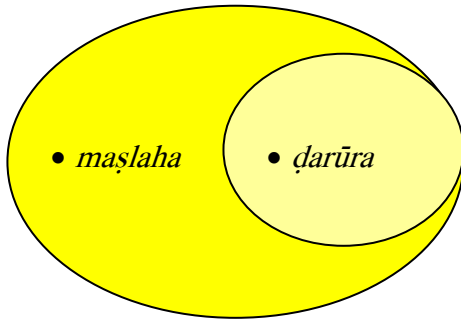
Although there are significant differences between these two notions, it is interesting to note that Muslim writers can be found using both terms interchangeably. This certainly leads to confusion among readers. For example, some writers used the word *ḍarūra* to illustrate a case of minor hardship like the case of using a container licked by dogs or the case of bird's droppings. This switching of usages of the said two terms is commonly found in the cases of worship and purification. The interchangeable use of these two terms was also found in 'Āṭif Aḥmad 'Āṭif's work on "*Raf' al-Ḥaraj*". He classified the permission for a woman in her menstrual period to enter a mosque as a *ḍarūra* type¹⁵⁵. Analysing this case, one can simply regard this case as a need type rather than a necessity, as there is no major harm involved and no loss of any of the five necessities. In another example, 'Āṭif used *ḍarūra* as a reason to justify a case where someone is permitted to clean their genitals with a stone after urinating¹⁵⁶. Explicitly in this second case, there is no fear of losing any of the five necessities. 'Āṭif's work provides no startling findings as he inherits the habit of using the term interchangeably from classical writers.

2.2.3 Maṣlahah

The study of the *ḍarūra* has a relationship with the study of *maṣlahah* (interests). The relationship can be pictorially displayed as below:

¹⁵⁵ P.81

¹⁵⁶ P.86



Muslim jurists agreed that the objectives of *Sharīʿa* law are not only to protect human necessities but also human interest, as long as the interests do not conflict with the textual evidence. *Maṣlaḥa* literally means a cause or source of something good and beneficial and it is frequently translated as public interest, although Felicitas Opwis argued that it is much closer in meaning to wellbeing, welfare and social wealth¹⁵⁷. In general, Muslim jurists classified *maṣlaḥa* into three categories¹⁵⁸; the necessity type (five essential elements for human existence), the need type and the luxury types. In other words, if the *maṣlaḥa* to be protected is of the necessity type, it should be treated as a *ḍarūra* case, but if it is of the need and luxury types, it is not regarded as a *ḍarūra* case.

Maṣlaḥa constitutes all categories of human's interest disregard the level of the interest. Meanwhile, the *ḍarūra* is the highest level of *maṣlaḥa*. However, these human interests (*maṣāliḥ*) are not all recognised by the *Sharīʿa*. There are three classifications of interest with regards to the legal recognition: *maṣlaḥa muʿtabara* (recognised interests), *maṣlaḥa mulgha* (unrecognised interests) and *maṣlaḥa mursala* (interests which are free from textual evidence). The jurists unanimously agreed that *maṣlaḥa muʿtabara* is

¹⁵⁷ Felicitas Opwis, “Islamic Law and Legal Change: The Concept of *Maṣlaḥa* in classical and contemporary Islamic Legal Theory”, in Abbas Amanat and Frank Griffel, *Sharia-Islamic Law in the Contemporary Context*, Stanford: Stanford University Press, 2007, p. 62. Muḥammad Saʿīd Ramaḍān al-Būṭī, *Ḍawābiṭ al-Maṣlaḥa fī Sharīʿa Islamiyya*, Dār al-Fikr, pp. 152-154

¹⁵⁸ It can be suggested that al-Ghazālī's categorisation of *maṣlaḥa* has been widely accepted by modern writers than the others'. See Wizāra al-Awqāf wa Shuʿūn al-Islāmiyya bi ʿl-Kuwait, *al-Mausūʿa al-fiqhiyya*, Kuwait: al-Awqāf al-Kuwaitiyya, Vol. XXVIII, p. 210. However some jurists differed the terminology used, al-Qarāfī for instance used the term *tamāmiyat* instead *taḥsīniyāt*. See Aḥmad bin Idrīs al-Qarāfī, *Anwār al-Burūq fī Anwār al-Furūʿ*, ʿĀlam al-Kutub, Vol. III, p. 291. Meanwhile some Shāfiʿī jurists like ʿIzz al-Dīn ʿAbd al-ʿAzīz bin ʿAbd al-Salam categorised the worldly and religious interests into four different categories; *ḍarūrāt*, *ḥājāt*, *taṭimmāt* and *takmilāt*. See *al-Qawāʿid al-Aḥkām fī Maṣāliḥ al-Anām*, Dār al-Kutub al-ʿIlmiyya, Vol. II, p. 72.

recognised in the law making process¹⁵⁹. This type of interest has been recognised through textual evidence and must be protected. Meanwhile the other type of interest known as *maṣlaḥa mulghā* (unrecognised interests) should be ignored. However, the jurists disputed the question of *maṣlaḥa mursala*. *Maṣlaḥa mursala* is designed to protect the needs of human being and the community. Some jurists gave preference to *maṣlaḥa mursala*, or as some call it *istiḥsān*, in their decision making. When compared to *darūra*, *maṣlaḥa mursala* (public interest) should not go against textual evidence (*Qurʾān* and *sunna*) and *qiyās*¹⁶⁰. However, non-necessity cases can be justified under this notion according to some. The notion of *maṣlaḥa mursala* is applicable to a non-necessity case if it goes against the general rules of *Shārīʿa* but not the explicit evidence. The jurists, however, were not in agreement in accepting *maṣlaḥa mursala* as a source of law.

Although early Muslim jurists differed in defining the capacity of *maṣlaḥa* to become a *ratio legis* in determining legal rulings, they unanimously agreed that this concept can be used as a vehicle for legal change. Some jurists like al-Ghazālī accepted *maṣlaḥa* as a basis of legal judgment as long as the *maṣlaḥa* serves the purpose of protecting the five fundamental elements of human existence¹⁶¹. The strictness of his concept has made this concept of *maṣlaḥa* no different from the concept of *darūra*. He accepted a *maṣlaḥa* only when the benefit is certain and not merely based on assumption. He further elaborated that a *maṣlaḥa* is only recognised when it has benefits for the public in general and not only the individual. It can be concluded that al-Ghazālī's concept of *maṣlaḥa* is more or less identical with the concept of *darūra*. He also did not recognise the *ḥāja* and *taḥsīn* types of *maṣlaḥa*. He made an example of the *maṣlaḥa* case: is it permitted to kill a

¹⁵⁹ There are lengthy arguments between scholars regarding *maṣlaḥa* especially in the discussion on *maṣāliḥ mursala*. It is important to note that *maṣāliḥ mursala* slightly differs from what we have discussed here. For further reading on *maṣāliḥ mursala*, see YHM Safian, "Masalih Mursalah and Its Application in Islamic Banking Finance-A Case Study on BBA", *Prosiding Seminar Kebangsaan Usul Fiqh*, Kuala Lumpur: Kolej Universiti Islam Malaysia, 2004. Izzī Dien, M.Y, "Maslaḥa in Islamic Law: A Source or a concept?" *Studies in Honour of Clifford Edmund Bosworth*, I.R. Netton (ed.), Leiden; Boston : Brill, 2000, Vol. I, pp. 345-356.

¹⁶⁰ al-Būṭī, *Dawābiṭ al-Maṣlaḥa fī Sharīʿa Islāmiyya*, pp. 152-154.

¹⁶¹ See al-Ghazālī, *al-Muṣtaṣfā*, p. 174. See also Wizāra al-Awqāf wa Shuʿūn al-Islāmiyya bi ʿl-Kuwait, *al-Mausūʿa al-fiqhiyya*, Vol. XXVIII, p. 248

Muslim that is being used as a shield by the enemies?¹⁶² Having looked at his example, we can summarise that the concept of *maṣlaḥa* according to al-Ghazālī is only when it involves a dire need of the society. For him, the need to go against the proof of *Sharī'a* on the basis of *maṣlaḥa* occurs only when it aims to fulfil an essential public need, not individual interest nor general public interest.

However, other jurists like Mālik, al-Qarāfī and al-Rāzī widened the scope of *maṣlaḥa* that need to be recognised, to include matters pertaining to *ḥāja*¹⁶³. They argued that *maṣlaḥa* that are known at a level less than certainty can still be accepted in decision making. According to this view, valid *maṣlaḥa* were expressed in the Qur'ān and Sunna. Both al-Ghazālī's and al-Rāzī's concepts of *maṣlaḥa* have been widely accepted by modern scholars like Ramaḍān al-Būṭī and Yūsuf al-Qaraḍāwī¹⁶⁴. Many Muslim jurists allowed the strict usage of *maṣlaḥa* without losing its traditional character. They agreed that *maṣlaḥa* can be used to determine evidence in cases where no explicit textual text exists and where it pertains to a matter of necessity. That means *maṣlaḥa* can only be a valid basis of judgment when it does not contradict textual evidence or *ijmā'* (the consensus of the *ʿulamā'*). Mālik was also reported approving the idea of *maṣlaḥa mursala* but on three conditions :¹⁶⁵ first, the case under review should be one pertaining to matters of transactions and should not relate to worship; Secondly, that the interest should be in harmony with the spirit of the law and should not be in conflict with any of its sources; thirdly, the interest should be of an essential type. It can be seen here that the Mālikī version of *maṣlaḥa mursala* is prompted by necessity similar to the al-Ghazālī's theory of *maṣlaḥa*. Hence, they only accepted the *maṣlaḥa* that falls under the category of necessity as a valid source of *ḥukm*.

¹⁶² See Wizāra al-Awqāf wa Shu'ūn al-Islāmiyya bi 'l-Kuwait, al-*Mausū'a al-fiqhiyya*, Vol. XXVIII, p. 210

¹⁶³ See also Wizāra al-Awqāf wa Shu'ūn al-Islāmiyya bi 'l-Kuwait, al-*Mausū'a al-fiqhiyya*, Vol. XXVIII, p. 248. Meanwhile al-Shāfi'ī, al-Juwainī and majority of the Ḥanafis viewed that *maṣlaḥa* that is free from textual evidence can be a valid legal basis if the interests protected is close to dire need type. The concept of *maṣāliḥ mursala* was actually proposed by Mālikī, while the rests objected its application. See also Sayf al-Dīn Abī al-Ḥasan 'Alī bin Abī Alī bin Muhammad al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*, Beirut: Dār al-Kutb al-ʿIlmiyya, 1985, Vol. IV, p. 393

¹⁶⁴ al-Būṭī, *Dawābiṭ al-Maṣlaḥa fī Sharī'a Islāmiyya*, pp. 152-154.

¹⁶⁵ Wizāra al-Awqāf wa Shu'ūn al-Islāmiyya bi 'l-Kuwait, al-*Mausū'a al-fiqhiyya*, Vol. XXVIII, p. 210

Analysing this argument, a *maṣlaḥa* case is also treated as a *darūra* case when it comes to the question of preserving the five necessities. This is evident in the case of refraining from chopping off the hand of a thief who steals food during a famine. Muslim scholars have argued that ‘Umar’s decision to refrain from cutting off a thief’s hand during famine is actually not a contradiction of the textual evidence, but is actually an exemption case which is known as *shubahāt* in Islamic penal law. The act of ‘Umar was to preserve the *maṣlaḥa* of the hungry one and at the same time the objective of the law is upheld. The public interest (*maṣlaḥa*) can be seen as a concept that facilitates the needs of the society, it takes into account the change of society, time and place. The rule that governs society will change accordingly. According to the majority of jurists, including al-Ghazālī, *maṣāliḥ mursala* is only valid as a source of *ḥukm* when it serves to protect the interest of the community, not the personal interest. This is because the individual interests vary and a Muslim may cling to *maṣlaḥa* to fulfill his worldly interests.

Another controversial concept of *maṣlaḥa* is promulgated by al-Ṭūfī, who promoted the application of *maṣlaḥa* in a much wider sense. He argued that this concept is applicable disregarding the type of the interest protected as long as it benefits human being. He even went further by approving the concept of *maṣlaḥa* which contradicts explicit textual evidence. His main argument is that the concept of *maṣlaḥa* in protecting human interests is the main objective of divine law. In other words, all rulings are created to serve human interests. On this basis, it can validate any act that benefits human beings. However, he also put a limit by stating that this general concept cannot be applied in certain areas such as particular worship matters and legal penalties such as *ḥudūd*. These laws remain immutable, hence, it does not leave any room for the *maṣlaḥa* considerations. Al-Ṭūfī went much further when he indicated that that *maṣāliḥ mursala* is a valid source of law and it supersedes the explicit provision even of the revealed text¹⁶⁶.

¹⁶⁶ See Mohammad Muslehudin, *Islamic Jurisprudence and the Rule of Necessity and Need*, Islamabad: Islamic Research Institute, p. 55

However, this concept fails to attract the attention of modern Muslim jurists. It can be stipulated that this rejection results from a fear that Islamic law will lose its character and the jurists fear that al-Ṭūfī's concept of *maṣlaḥa* will easily be abused. Another discussion of *maṣlaḥa* also continues about the validity of this concept as a source of *ḥukm*. The first group insisted that this concept is only applicable in a limited way, and only to protect the five fundamental necessities, hence, it cannot be made a source of *ḥukm*. The second group argued that this concept should apply in a much wider sense, and they have legalised *maṣlaḥa* as a source of the *ḥukm*. It can cover both necessity and need cases. The basis for their argument is that the protection of human interests recognised in the Qur'ān include all types of interest.

The distinction between the application of necessity and *maṣlaḥa* was briefly mentioned by M. Muslehudin. He argued¹⁶⁷:

if a necessity type of interest comes into conflict with the established law, the latter must give the way to the former because necessity knows no law. But if the interest has nothing to do with necessity, it should not be in conflict with any of Sharī'a sources or the spirits of Islamic laws.

2.3 Maqāṣid al-Sharī'a and the rule of *darūra*

The study of *maqāṣid* (the objectives of the law) stemmed from the belief that the divine law is revealed with the purpose of protecting human interests, including the protection of the five necessities (*ḍarūriyyāt*). These necessities are also known as the “five fundamental elements of human existence.” The five are the protection of religion (*dīn*), life (*nafs*), reason (*‘aql*), wealth (*māl*) and to protect lineage (*nasab*)¹⁶⁸. In promulgating the divine law, all these necessities must be protected. The *maqāṣid* are said to describe the purpose of the law and the wisdom behind specific laws. *Maqāṣid*, then, are a group of divine intents and moral concepts upon which Islamic law is based¹⁶⁹.

¹⁶⁷ Ibid.

¹⁶⁸ See al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Aḥkām*, Vol. II, p. 4, Muḥammad Ṭāhir Ibn ‘Āshūr, *Maqāṣid al-Sharī'ah al-Islamiyya*, Dār As-Salām. Al-Shāṭibī believes that the law is revealed to protect human's interests and God knows what is best for human being.

¹⁶⁹ *Maqāṣid* means purpose and it is an alternative expression for people's interest (*maṣaliḥ*). Al-Juwayni (d. 478) used *maqāṣid* and *maṣālīḥ āmma* interchangeably. See Jasser Auda,

Interestingly, these objectives of *Sharī'a* (the protection of life, property, progeny, mind and religion) as argued by Wael B. Hallaq do not have explicit attestation in any particular piece of conclusive or textual evidence¹⁷⁰. Hallaq argued that the subject of *maqāṣid al-Sharī'a* is enshrined with certainty in the collective mind of the Muslim community, as well as in Muslim individuals. This certainty is engendered by virtue of the fact that these principles have been established by a wide variety of types of evidence, which in their totality, lead to certitude. However, when taken individually, the pieces of evidence do not rise above the level of probability. The task of cultivating the evidence in constructing the theory of *maqāṣid al-Sharī'a* was pioneered by al-Shāṭibī¹⁷¹. Hallaq observed that all substantive rules which are based on particular pieces of evidence are developed to preserve either one or other of the five fundamentals. The theory of the roots on the other hand, is grounded in such an extensive body of evidence that although the particular pieces of this evidence may be probable, they result in certainty due to their mutual corroboration. Thus once the five fundamental universals are established, law must be interpreted according to them, and any particular, hitherto not considered, must be either subsumed under these universals or as al-Shāṭibī argued, it must be left out and classed as a non-conforming particular. However, such particulars must be accounted for, since they could not have been decreed purposelessly¹⁷².

The protection of the five necessities not only involves involve religious obligations but should be applied to worldly affairs like social relationships and business transactions¹⁷³. When several categories are at stake, al-Shāṭibī argued that almost in all situations, protecting one's religion is of the utmost

Maqasid al-Shariah as Philosophy of Islamic Law, London, Washington: The International Institute of Islamic Thought, 2008, p. 2

¹⁷⁰ Wael B. Hallaq, *The History of Islamic Legal Theories*, Cambridge: Cambridge University Press, 1997, pp. 166-167. Wael B. Hallaq has called this process as inductive corroboration on a large scale that draws the line between legal theory- dealing with what has been characterised as "the roots of the law" and "substantive law"

¹⁷¹ Wael B. Hallaq, *The History of Islamic Legal Theories*, p. 196

¹⁷² See also Muḥammad Ṭāhir Ibn 'Āshūr, *Maqāṣid al-Sharī'ah al-Islamiyya*, p. 11. The belief that Allāh does not create something purposely is based on the chapter al-Dukhān; 38-39, and chapter al-Mu'minūn: 115.

¹⁷³ al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Aḥkām*, Vol. II, pp. 25-26

importance. This gains priority over the other necessities. In addition, he gave preference to life over property¹⁷⁴. However, he stated that *mafāsīd* (harm) and *manāfiʿ* (benefit) vary depending on the situation and the person involved.

As far as the study of the *maqāṣīd* is concerned, the protection of universal interests is also divided into three different groups on the basis of strength. In descending order, first, the category of necessity (*ḍarūriyya*), then need (*ḥājīyya*), and then luxuries (*taḥsinīyya*). The first group receives the utmost importance in the law making process. Into this category fall the necessities preserving religion, life, offspring, mind and some jurists added the preservation of honour. Any failure to protect this *ḍarūriyya* type will lead to total or major disorder. Human existence largely depends on these five elements. The next category is the category of “need”, for example the rules of *salam*¹⁷⁵ and *ʿariya*¹⁷⁶. This need type is important for human beings to avoid difficulties and hardships though it is not fundamental for the life of the human being. The final category is that of luxuries and this category is designed for the betterment of living, such as decorating one’s house or having a feast. The rulings in this category are mainly “indifferent” (*mubāḥ*) or permissible unless the item in question leads to excess or it is shown as an act of greediness. In his book, Jasser Audah found that these three levels of necessities are reminiscent of Abraham Maslow's hierarchy of needs¹⁷⁷. Human needs, according to Maslow, range from basic physiological requirements and safety, to love and esteem and to self-actualism. It can be said that the Islamic hierarchy of necessities is not so different from these natural human needs that are required for a safe and well-balanced life. In Islam, the perfect system of life and a complete civilisation can only be achieved through the protection of these *maqāṣīd*.

¹⁷⁴ al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Aḥkām*, Vol. II, p. 26

¹⁷⁵ It is used to designate a particular contract classifiable as a contract of sale and synonymous. Regarded as a category of transaction in its own right, *salam* has as its fundamental principle prepayment by a purchaser (*al-musallim*) for an object of sale (*al-musallam fihī*) i.e merchandise constituting the subject-matter of the contract) to be delivered to him by the vendor (*al-musallam ilayhī*) on a date at the end of a specified period. See <http://www.brillonline.nl>

¹⁷⁶ Fresh dates on trees intended to be eaten, which it is permitted to exchange in small quantities for dried dates

¹⁷⁷ Jasser Auda, *Maqāṣīd al-Sharīah as Philosophy of Islamic Law*, p. 4.

The important question is, then, what is the relation between the study of *maqāṣid* and the study of the rule of *ḍarūra*? The study of *maqāṣid* reveals the intention of the Law-maker in the law making process. As a result, the scholars of *maqāṣid* believed that *Sharīʿa* law is revealed to protect five essential elements of human beings. The divine rulings should be categorised according to their level of necessity. The mandatory category of rules, namely the obligation (*wājib*) and the forbidden (*ḥarām*) are meant to protect the *ḍarūriyaṭ* type of human interests, hence, the *wājib and ḥarām* categories receive the most attention from the jurists. It can be assumed that modern writers studying the principle of *ḍarūra*, such as Wahbah Zuhailī, Mutairi and Biltajī, have been influenced by the study of *maqāṣid*. Al-Shāṭibī's list of necessities influenced their formulation of the new doctrine of *ḍarūra* rule. While the medieval jurists theoretically limited the application of *ḍarūra* to the protection of life and property, modern scholars have expanded this rule covering all categories of necessities formulated by al-Shāṭibī. It can also be suggested that the new formulation of *ḍarūra* theory only emerged after al-Shāṭibī's theory of *maqāṣid* was widely accepted in the Islamic legal community. Hence, as far as the purpose of law is concerned, any harm (*mafāsīd*) to one of these fundamental elements should be avoided. In extreme *ḍarūra* situations, where harm is believed to occur to any of five necessities, one is permitted to break a rule whether by delaying an obligation or committing a sin.

2. 4 *Darūra* in the Islamic legal maxims

In this part of the writing, the principle of *ḍarūra* discussed in the study of *qawā'id fiqhīyya* will be analysed¹⁷⁸. Within any classical work of *qawā'id*, the rule of *ḍarūra* is treated in a more comprehensive and decipherable manner. The definition, the preconditions and relevant *ḍarūra* cases have been extensively expounded in the study of Islamic legal maxims (*qawā'id fiqhīyya*). Tāj al-Dīn al-Subkī (d.756/1370) stated that *qawā'id fiqhīyya* is the "collection of principles (*qā'ida*) that are the generally valid principles with which many particular cases (*juz'īyyāt*) agree, whose legal

¹⁷⁸ For this particular discussion, I only limit myself to the study of *qawā'id fiqhīyya* within the Shāfī and Ḥanafī schools and I chose the work of ʿAbd al-Raḥmān bin Abū Bakr bin Muḥammad al-Ṣuyūṭī, *al-Ashbah wa al-Nazā'ir*, Dār al-Kutb al-ʿIlmiyya, 1983 and Aḥmad bin Muḥammad al-Ḥamawī, *Ghamz al-'Uyūn al-Baṣā'ir*, Dār al-Kutb al-ʿIlmiyya, 1985

determinations can be understood from (the qawā'id)"¹⁷⁹. However, there is a great distinction between the study of *qawā'id fiqhiyya* and *uṣūl al-fiqh*. Most Muslim scholars agreed that *qawā'id fiqhiyya* are only predominantly valid and not generally valid, unlike the study of *uṣūl al-fiqh*. The predominant (*aghlabiyya*) notion of *qawā'id fiqhiyya* is due to the existence of irrefutable exceptions to the *qawā'id*¹⁸⁰. The study of *uṣūl al-fiqh* is a hermeneutical principle, language-oriented, and is not about immediate legal substance. Meanwhile the study of *qawā'id* concerns about the principles of general rules which consecutive rules agree upon. In addition, W. Heinrichs¹⁸¹ is unsure about the implication of *qawā'id* in the development of *uṣūl al-fiqh* but as the *uṣūl al-fiqh* has developed without any input from the *qawā'id*, both should be kept apart.

It can be said that the study of legal maxims is an effort put forward by Sunni jurists to extract simple statements or principles from the vast *fiqhī* literature. As Islamic law developed gradually under various headings and subheadings, the legal maxims were created later to help jurists remember the particular rulings for each individual case¹⁸². The underlying structures and patterns of the rulings have been derived from primary sources, thus creating the general rules which the consecutive rules normally agree upon. Kamali argued that legal maxims express the goals and the objectives of the *sharī'a*¹⁸³. While some of the legal maxims are basically a reiteration of Qur'ān and Sunna like the maxim of *al-umūr bi maqāṣidihā*, some are derived from the consensus of the scholars, such as the maxim of *lā ijtihād ma'a an-naṣṣ* (there is no *ijtihād* with the availability of text). Many prominent early scholars created maxims including Abū Ḥanīfa; "*kullu mā aṣluhu amāna*" (all property is originally regarded as a trust), al-Shāfi'i; "*al-rukhaṣ lā tunālu bi al-ma'āṣi*" (the dispensation is not meant for a sinner)

¹⁷⁹ See also Mohammad Hashim Kamali, *Shari'ah Law – An Introduction*, Oxford: Oneworld, 2008, p. 143

¹⁸⁰ Further critical reading on Qawā'id Fiqhiyya can be found in Wolfart Heinrichs, "Qawā'id as a general legal literature", in *Studies in Islamic Legal Theory*, Bernard G. Weiss (ed.), Leiden: Brill, 2002, pp. 365-384.

¹⁸¹ Ibid.

¹⁸² Wahbah Zuhailī argues that the study of legal maxim emerged in the second century of Hijri. See *al-Qawā'id al-Fiqhiyya bayna Ta'sīl wa Taṭbīq*, "Zuhūr al-Qawā'id al-Fiqhiyya min Manẓūr al-Muqāran", p. 6

¹⁸³ Mohamamad Hashim Kamali, *Qawā'id al-fiqh*, The Association of Muslim Lawyer, p. 1, http://www.sunnah.org/fiqh/usul/Kamali_Qawaid_al-Fiqh.pdf

and Mālik; “*mā yufsid al-thawb fa lā yufsid al-mā*” (what damages clothes cannot damage the purity of water)¹⁸⁴. These are the examples of the early legal maxims extracted by scholars illustrating their reasoning and methodology, therefore, the maxims seemed more *madhhab* specific according to some. Kamali further argued that the early Ḥanafīs like Abū Ḥasan al-Karkhī (d. 200/815) were believed to be the first who compiled and formulated legal maxims.¹⁸⁵ He compiled about 37 maxims from Abū Ṭāhir al-Dabbās and most of these are *madhhab* centered. The earliest collection of Ḥanafī legal maxims included the main five leading maxims:

1. *al-umūr bi maqāsidihā* (acts are judged according to the intention)
2. *al-yaqīn la yazūl bi al-shakk* (certainty is not overruled by doubt)
3. *al-ḍarar yuzāl* (harm must be eliminated)
4. *al-mashaqqa tajlib al-taysīr* (hardship begets facility)
5. *al-ādat muḥakkama* (custom is to be the basis of judgment)

Many later scholars from other *madhhab* have added to the literatures and the collection exceeds twelve hundred maxims. For instance, al-Qarāfī (d. 684/1285) managed to create 274 legal maxims¹⁸⁶ while a Ḥanbalī jurist, Ibn Rajab (d. 795h/1392) formulated sixty *qawā'id*¹⁸⁷. Another Shāfi'ī jurist, al-Zarkashī (d. 794/1391) managed to list the legal maxims alphabetically¹⁸⁸. As the study developed over time, the above five leading maxims were agreed between all schools of law. It is clearly understood that legal maxims are inductively derived from existing rulings that have been explicitly derived from primary sources. Rulings that have been derived using primary sources cannot be undone using legal maxims. In other words, *qā'ida al-fiqh* cannot overrule a *ḥukm* derived from primary sources i.e Qur'ān and Sunna. It is also important to bear in mind that the study of *qawā'id fiqhiyya* is a shortcut to reach a judgment already made by previous scholars and not a tool to reach new solutions. Therefore, it is not a source

¹⁸⁴ See al-*Qawā'id al-Fiqhiyya bayna Ta'sīl wa Taṭbīq*, “Zuhūr al-Qawā'id al-Fiqhiyya min Manzūr al-Muqāran”, p. 8

¹⁸⁵ See al-*Qawā'id al-Fiqhiyya bayna Ta'sīl wa Taṭbīq*, “Zuhūr al-Qawā'id al-Fiqhiyya min Manzūr al-Muqāran”, p. 8, Mohamad Hashim Kamali, *Qawā'id al-fiqh*, The Association of Muslim Lawyer, p7, http://www.sunnah.org/fiqh/usul/Kamali_Qawaid_al-Fiqh.pdf

¹⁸⁶ Aḥmad bin Idrīs al-Qarāfī, *Anwār al-Burūq fī Anwā' al-Furū'*, Ālam al-Kutub

¹⁸⁷ Abd al-Raḥmān bin Aḥmad al-Ḥanbalī, *al-Qawā'id li Ibn Rajab*, Dār al-Kutb al-Ilmiyya

¹⁸⁸ See Badr al-Din bin Muḥammad Bahadur al-Zarkashī, *al-Manthūr fī al-Qawā'id al-Fiqhiyya*

of law. However, some argued that legal maxims can be a source of *ḥukm* if the *qaṣḍa* is derived explicitly from the Qur’ān and Sunna, like the maxim of *al-umūr bimaqāṣidihā* and *al-mashaqqa tajlib al-taysīr*. It can be speculated that the authority of these two maxims, whereby they became sources of law, actually originated from the textual evidence, and their legal maxim status in itself does not give them any authority to solve new problems. This is why the majority of jurists did not accept legal maxims as sources of *aḥkām*¹⁸⁹.

In the discussion of the maxim “necessity permits prohibited things”, Muslim jurists generally agreed that the maxim, under certain cases which are considered as necessity, implies that an obligation can be delayed or a sin can be committed. The permission to break the rule, however, is temporary as long as the cause exists. The preconditions to exercise *ḍarūra* rule in extreme situations have been extracted from the various *fiqhī* cases and include eating *mayta* and *ikrāh* (duress). These accumulated preconditions extracted from scattered cases then became the preconditions for any additional *ḍarūra* cases. Several maxims relate to *ḍarūra* situations, including *al-mashaqqa tajlib taysīr* (difficulties permit facilities), *ḍarūra tubīh al-maḥzūra* (necessities permits prohibitions), *al-ḍarūra tuqaddar biqadarihā* (necessity estimated by the extent thereof) and *al-ḍarūra la tubāh ḥaqq al-ghayr* (the necessities does not invalidate the rights of others).

The maxim related to *ḍarūra* study is necessities permits prohibitions (*al-ḍarūra tubīh al maḥzūra*): This maxim states that in an extreme situation, Muslims are generally permitted to perform a prohibited action. However, the jurists categorised the prohibited acts in term of the level of the sin and moral guilt into three categories¹⁹⁰:

First, in such a situation, the prohibited act is permitted and no sin is committed, for instance the consumption of unlawful foodstuffs or drinking wine. The jurists agreed that the consumption of *muḥarramā* especially for reasons of hunger is permitted and the Muslim is allowed to eat whatever prolongs his life. The permission includes drinking wine to stop choking.

¹⁸⁹ See Shihāb al-Dīn al-Qarāfī, *al-Furūq*, Vol. I-IV, Beirut: ‘Ālam al-Kutub, 1985

¹⁹⁰ ‘Abd al-‘Azīz Muḥammad ‘Azām, *Qawā‘id Fiqhiyya*, 1998, pp. 150-151

The jurists also included life-threatening situations, i.e. being forced to commit a prohibited act. Only complete compulsion (*ikrāh tāmm*) permits the consumption of *muḥarrama*. Complete compulsion means that the person who is being forced is helpless and falls completely under the power of the oppressor. This includes the act to force someone to act or to say something without or against his will. Consequently, the victim is compelled to perform the act unwillingly. In other words, he would not do such an act if he was left alone. However, in this kind of extreme situation, the person under duress is still socially liable for the act (*damān*). For example, the permission to eat another's meal during famine does not negate the owner's right to have the price of the meal. In other words, the hungry person has to pay the price when he is capable of doing so.

Secondly, there are acts which remain prohibited but the sin is removed, like uttering the word of unbelief or damaging another's properties. The act is permitted in order to protect a Muslim from the greater harm, for example, in the case of uttering the word of unbelief. It is allowed to recite the word *kufr* while the heart remains with God, but the uttering of such words remains a prohibition. It is only that the person is not rendered guilty.

Thirdly, there are the deeds, which under no circumstance are allowed, whether the compulsion was "complete" or not. These acts remain prohibited and sinful. The situation would not change the status of prohibited acts. The acts are killing, damaging a limb, beating parents or committing adultery. All these acts are prohibited in whatever the situation. That means if someone is forced to kill another person, is not acceptable for him to do so. There are lengthy discussions on the issue of the punishment for those committing a sin under compulsion. For example, the jurists disputed in the case of the murderer who was forced to murder as to whether he should be punished by *qiṣāṣ* or not? However, the jurists agreed on the point that compulsion becomes a mitigating element in some *ḥudūd* cases, i.e. adultery cases. The person who commits *zinā* will not be punished by the *ḥadd* punishment as the compulsion is treated as *shubḥa*, which can lift the original punishment. From the foregoing explanation, it can be concluded that in necessity cases, some prohibited acts change to

being totally permitted, some acts only lift the sin, while some prohibited acts remain prohibited in every situation. This leads one to the conclusion that necessity cases should not be treated as absolute principles, as the prohibited acts themselves vary in terms of the degree of the prohibition. To some extent, the people under duress also vary and one must assess his own situation before he can easily adapt the rule of necessity. However, the jurists only acknowledged life-threatening situations as valid causes in a necessity case. This includes compulsion cases where only complete compulsion can legalise a prohibited act.

In terms of the harm that can be caused under necessity, the Shāfi‘ī jurists concluded that, “the harm in the prohibited act must not exceed the harm in the act”. This maxim states that any harm in a prohibited act must not exceed the degree of the danger. For example, in the case of *dar‘ al-sā’il* (legitimate defence), where one has to defend oneself from attack or oppression, Islam permits one to cause harm to others. However, the actual act of defence must be in proportion to the degree of the danger and repelling the danger must be by the least harmful means available. For example, when a man is oppressed by someone who is attacking his family and his property, he is allowed to cause harm to the attacker on the condition that he does the least harm possible. If the oppressor can be stopped by threatening to call the police for instance, he has to do so, or in other words, he has to choose the lesser evil¹⁹¹. If he can stop the oppressor by beating without killing, he has to choose to do that. In Islam it is permitted to kill a Muslim who is trying to kill another Muslim. However, the jurists disputed this case. Some said the act of the oppressor has to be repelled even if he has to be killed as there is a ḥadīth saying: “who kills (or was killed) to protect his property is a martyr¹⁹²”. Some said it is not permitted to kill the oppressor and the lesser harm has to be chosen. In another example, the jurists also approved of the demolition of an intervening house to prevent the spread of fire to adjacent buildings just as they approved of dumping the cargo of an overloaded ship overboard to prevent danger to the life of the passengers.

¹⁹¹ ‘Abd al-‘Azīz Muḥammad ‘Azām, *Qawā‘id Fiqhiyya*, p. 176

¹⁹² This ḥadīth is mentioned in Chapter One

This maxim of *al-ḍarūra tubīh al-maḥzūra* is closely related with another maxim: “necessity is measured in accordance to its true proportion” (*al-ḍarūra tuqaddar biqadarihā*). For example, if a court orders the sale of assets of a negligent debtor to pay to his creditors, it must begin with the sale of his moveable goods, if this would suffice to clear his debt before selling his real property. Likewise, eating *mayta* is only for the sustenance of life and no provisions can be taken from it. This maxim is based on a verse in Q6.119¹⁹³. The maxim includes the case of consuming alcohol, professing *kufṛ* and damaging property of another. The prohibited act can only be committed during the period of necessity. However, when the case occurs during a famine, it is permitted to take provision from it. The case of food will be further discussed in the next chapter. The case also includes the case of taking meals in non-Muslim countries, which is permitted until he reaches home.

Another important maxim related to necessity is the maxim *al-ḍarar yuzāl* (harm must be eliminated). This important principle states that whatever harm occurs should be minimised as much as possible. This maxim is closely related with the maxim that no harm should be inflicted or reciprocated (*lā ḍarar walā ḍirār*), which means that in any situation, one cannot cause harm to another or cannot return the injury which has been already received. These maxims derived from a ḥadīth of *lā ḍarar walā ḍirār* also related to other similar maxims. For example, a specific harm is tolerated in order to prevent a more general one (*yutaḥammul al-ḍarar al-khāṣ li dafṛ ḍarar al-‘āmm*), harm is eliminated to the extent that is possible (*al-ḍararu yudfaṛ bi qadr al-‘imkān*) and a greater harm is eliminated by means of a lesser harm (*yuzāl ḍarar al-ashadd bi al-ḍarar al-akhāf*)¹⁹⁴. These relevant maxims illustrate that in any *ḍarūra* case, when there is more than one option, the lesser harm must be chosen. An assessment of the harm of the acts will be discussed in the case study in the next chapter.

¹⁹³ “Why should you not eat such animals when God has already fully explained what He has forbidden you, except when forced by hunger? But many lead others astray by their desires, without any true knowledge; your Lord knows best who oversteps the limit”

¹⁹⁴ ‘Abd al-‘Azīz Muḥammad ‘Azām, *Qawā‘id Fiqhiyya*, p. 202

It can be concluded that the study of legal maxims has revealed the important preconditions of *ḍarūra*. *Ḍarūra* cannot be labelled as an absolute permission to commit an act as it does not always allow all kinds of prohibition (such as marrying one's own sister or murdering others). The limits of *ḍarūra* have been precisely put forward by the jurists in the discussion of Islamic legal maxims. The harm done in times of necessity should be limited and minimised as much as possible and if there are two options of evil acts, one has to choose the lesser evil act. The jurists have also agreed that in a situation where two interests are at risk, one can tolerate incurring specific harm to a specific person or property to avoid a more general harm.

2.5 Preconditions of *ḍarūra*

From ongoing legal discussions, modern writer Wahbah Zuhailī has made an effort to extract certain valuable preconditions for *ḍarūra*, which can be summarised as follows¹⁹⁵:

1. The extreme situation is certain. The harm or the damage, or the casualty will definitely materialise in the religion (*dīn*), property (*māl*), life (*nafs*), reason (*ʿaql*) and lineage (*nasb*). The ratio of certainty to probability that harm will materialise is described as *ghalba al-ẓann* (something that we confirm within the general customs, probably pre-dominance, pre-tested by experience). Hence, if the *ḍarar* (harm) is believed to materialise, the ruling of exception (dispensation) is permitted to take place.
2. It is certain that the *muḍtarr* (the person under duress) has to perform something illegal in order to prevent a greater harm. In other words, he/she has no other alternative action in order to preserve religion, property, life, reason or lineage. For instance if he/she cannot find any *ḥalāl* food, he/she is permitted to consume unlawful food. However, if there is *ḥalāl* food, even though it belongs to others, the person can take it without permission as the owner is obliged to give the meal to him. It is therefore accepted that an obligation is omitted if a person is under duress.

¹⁹⁵ *Nazariyāt al-Ḍarūra al-Sharʿiyya*, Beirut: Dār al-Fikr, 1997, p. 65-68

3. However, sometimes a prohibited act is still permitted even if there are other lawful alternatives. This is the case of coercion. For instance, if a Muslim is forced to eat something *ḥarām* and at the same time there is *ḥalāl* food in front of him, it is permitted for him to consume the *ḥarām* meal. In this case, the Shafī'īs and Ḥanbalīs are of the opinion that whatever reasons permit a Muslim to turn to *tayammum*, are also reasons to consume a *ḥarām* meal.
4. However, as noted earlier, the *ḍarūra* rule does not permit a Muslim to cause harm to others, for example, if he is forced to rape or murder other people. The *ḍarūra* rule does not justify killing or raping. Hence, it is obvious that necessity does not permit a Muslim to cause grievous harm to others.
5. The prohibited things can only be committed within certain limitations and the harm caused must be minimised as much as possible. The consumption is permitted only at a minimum level or at the level of sufficiency, yet at amounts enough to prevent harm.
6. The prohibited acts can only be committed by the verification of the specialist or experts. In this case, Zuhailī provided the case of using *muḥarrama* for medical purposes. According to him, only the view of a pious, experienced Muslim doctor can be taken into account to verify the situation. It is obvious that Zuhailī did not give full license to individuals to assess their own extreme situation as he stresses that a reliable second opinion is needed in this case.
7. The capability to refrain from *ḥarām* acts in *ḍarūra* differs and varies according to personal capacity. For instance, Ibn Ḥazm (d. 456/1063) from the Zāhirī School suggested that a person under duress has to wait for at least one day and one night before eating a *ḥarām* meal¹⁹⁶. However, many Sunni jurists contended that this is not an absolute requirement as cases vary according to different persons and places. The prevalent view is that it is not necessary to wait for a certain time.
8. In matters concerning public needs and safety, the *walī al-amr* (the ruler) has to verify and determine whether the situation is really a

¹⁹⁶ ṶAlī bin Aḥmad bin Sa'īd bin Ḥazm, *al-Muḥallā bi al-Āthar*, Dār al-Fikr, Vol. VI, p. 105

necessity or not, meaning that it might incur huge damage that could not be rectified.

9. The jurists agreed that the prohibited act committed under *ḍarūra* must be in proportion to the harm incurred. For example, a person in a case of legitimate defence is permitted to defend himself from an attack and thus he is permitted to cause harm to the attacker as previously discussed. Similarly, in the case of taking money from a reluctant debtor, the lender is only allowed to confiscate what is equivalent to the debt.

Having examined these conditions, it can be concluded that Zuhailī had formulated the conditions above from relevant classical legal maxims and *ḍarūra* cases in *fiqh* literature. These requirements can be seen as the general guidelines that can be applied to new emerging cases. He has provided many classical and modern cases of *ḍarūra*. However, one does find some non-necessity cases which have been included in this writing, such as the case of ignorance and forgetfulness. He treated these cases as *ḍarūra* cases, whereas actually they are not. It might be speculated that Zuhailī has mixed the case of lifting an obligation and the case of life threatening situation that demands one to put aside a temporary rule. The first case he mentioned relates to the ḥadīth of the Prophet saying: there are three exceptions in Islam, when one is asleep, when one is in ignorance and when one is still minor. The Prophet recognised ‘ignorance’ and a ‘sleeping person’ as rendering a person incompetent to fulfil his religious duty. These cases are not necessity cases as the deviation from the standard rule is granted, not because of the harm directed to any of human's necessities but due to the incompetency of the *mukallaf*.

There is another condition of *ḍarūra* which was discussed extensively by the medieval jurists, the condition of being a pious Muslim. Some jurists insisted that only a pious person has the right to exercise *ḍarūra*. Part of this discussion has been presented in the previous chapter under the subheading concerning the evidence of *ḍarūra* and the discussion of *rukḥṣa*. There is a difference among Sunnī schools regarding a person who is eligible to exercise *ḍarūra* and *rukḥṣa*. The majority of Muslim jurists agreed that the right to act according to necessity is not granted to a disobedient person,

while some jurists did not differentiate between these two groups of Muslims. According to Shāfi'ī jurists¹⁹⁷, Ḥanbalī jurists¹⁹⁸ and a Ḥanafī; al-Sarakhsī¹⁹⁹, only a traveller with a good purpose is permitted to eat dead meat (*mayta*) when there is no other alternative. Meanwhile, a traveller on a journey with a morally bad purpose is not allowed to consume a *muḥarrama* (unlawful meal). The basis of their argument is that the principle of *ḍarūra* is a facility exclusively dispensed to necessitate and help a Muslim avoiding hardship. They are not meant to be used to assist a Muslim in committing a crime, such as declaring war against a Muslim ruler or launching an attack on other Muslims. For them, allowing a criminal to exercise *ḍarūra* only further assists him in committing a sin. The basis of their argument is the Qur'ānic verse “*famaniḍturra ḡhayr bāghin walā 'ādin*” (without willful disobedience nor transgressing limit)²⁰⁰. According to this view, this verse should be read as the condition to act upon *ḍarūra* that is only applied to those who are pious persons and do not act outside of the *Sharī'a* (such as declaring war on a Muslim ruler or going out to commit a robbery)²⁰¹.

However, the Ḥanafī jurists and Imām Mālik ruled that the permission to eat *mayta* is for all, both sinners and righteous people²⁰². This means that the intention in the journey does not affect the right to utilise a dispensation (such as eating *mayta*). Although acknowledging the term *ḡhayr bāghin walā 'ādin* as the condition that should be met in *ḍarūra* situations, the jurists (Ḥanafī jurists and Imām Mālik) interpreted the verse differently²⁰³. This means the *muḍtarr* should not exceed the limit to commit a prohibited act. In other words, the Muslim should not have the worldly desire to transgress the rule but merely acts out of necessity.

¹⁹⁷ Muḥammad bin Idrīs al-Shāfi'ī, *al-Umm*, Vol. II, p. 276 and Zakariyyā al-Anṣārī, *Asnā al-Maṭālib Sharḥ Raudh al-Ṭalib*, Vol. I, p. 571

¹⁹⁸ Ibn Qudāma, *al-Mughnī*, Vol. XIII, p. 333

¹⁹⁹ See al-Sarakhsī, *al-Muḥarrar fī Uṣūl al-fīqh*, Vol. I, Beirut: Dār Kutb 'Ilmiyya, 1996, p. 60. Al-Sarakhsī as the Shāfi'ī jurists regarded *rukḡsa* is a kind of dispensation exclusively given to a pious non sinner people and it is classified as a *ni'ma* (bounty) from God that only can be enjoyed by non-sinner. This is also the opinion of Mujāhid and Sa'īd bin Jubayr. See al-Jaṣṣāṣ, *Aḡkām al-Qur'ān lil-Jaṣṣāṣ*, Vol. I, p. 178

²⁰⁰ Q6.145 and Q16.115

²⁰¹ Ibn al-'Arabi, *Aḡkām al-Qur'an*, Vol. I, p. 57, Ibn Qudāma, *al-Mughnī*, Vol. XIII, p. 333

²⁰² Al-Jaṣṣāṣ, *Aḡkām al-Qur'ān lil-Jaṣṣāṣ*, Vol. I, p. 178

²⁰³ See Muṣṭafā al-Ḥanafī, *Rūḡ al-Qur'ān Fī Tafṣīr al-Bayān*, Vol. I, p. 281

2.6 Situations and reasons that lead to *ḍarūra*

Different writers have their very own categorisation of *ḍarūra* circumstances. For example, Zuhailī has listed 14 categories of situation which he deems *ḍarūra*. The lists include the situations of food and drink, complete compulsion, forgetfulness, ignorance, *al-ʿusr* and *ʿumūm al balwā* (hardship and hard-to-remove difficulties), travelling, sickness, *al-naqṣ al-ṭabīʿī* (natural defect), legitimate defence, *istiḥsān* (juristic preference), *maṣlaḥa* (custom), *ʿurf* (legal custom), *sadd al-dharāʾiʿ* (blocking the means) and capturing one's property. Meanwhile, in his thesis, Mutairī listed only four causes of necessity which are compulsion, legitimate defence, illness and change in circumstances²⁰⁴.

Having examined both works, neither can be regarded as giving a comprehensive list of *ḍarūra* situations. It can be assumed that such categorisations are mainly based on exemplary cases in classical jurist works or *fiqh* treatises. However, Mutairi added a new case of necessity, that is, a change in circumstances. Although Zuhaili's categorisation may seem quite comprehensive, he has actually mixed the necessity cases with the non-necessity cases, for example, the cases of ignorance and forgetfulness. Ignorance and forgetfulness are not *ḍarūra* cases as there is no serious harm inflicted and no human necessities to be protected. However, these cases of ignorance and forgetfulness are excuses which destroy or impair the legal capacity of a person or change the injunctions applicable to him during the circumstances²⁰⁵. The same is the case of *naqṣ al-ṭabīʿī* (natural defect). A person who has a natural defect is not considered as a *mukallaf*, hence, he has no religious obligation to fulfil²⁰⁶. In a *ḍarūra*

²⁰⁴ See Zuhailī *Nazariyāt al-Ḍarūra al-Sharʿiyya* and Mansour al-Mutairi, Necessity in Islamic Law, pp. 78-165

²⁰⁵ For instance, a man has not been legally obliged to perform an act unless detailed knowledge and information about it has been provided. See Ahmad Hassan, *The Principle of Islamic Jurisprudence*, p. 257. There are also two main conditions for the application of the command to a person under obligation; they are reason and legal capacity. The legal capacity of a man for legal command is realised by intelligence. Circumstances that affect legal capacity include lunacy, infancy, idiocy, forgetfulness, sleep, fainting, slavery, death, illness, menstruation, childbed and death. See pp. 308-332

²⁰⁶ See Gimaret, D. "Taklīf (a.)." *Encyclopaedia of Islam, Second Edition*. P. Bearman; Th. Bianquis; C.E. Bosworth; E. van Donzel and W.P. Heinrichs (eds.). Brill, 2010. Brill Online. EXETER UNIVERSITY. 26 July 2010
<http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-7344>

situation, the person under duress is considered to be a complete *mukallaf*, but the pressing situation is an impediment to him following the strict rule.

2.6.1 *‘Awāriḍ samāwiyya* (the work of providence) and *‘awāriḍ muktasaba* (human symptoms affecting legal capacity)

Having examined the nature of circumstances of necessity, I tend to classify *ḍarūra* cases into two general categories; *‘awāriḍ samāwiyya* and *‘awāriḍ muktasaba*. This categorisation is originally adapted from the jurists' classifications for *‘awāriḍ al-ahliyya*, impediments to legal capacity²⁰⁷. In the discussion of *‘awāriḍ al-ahliyya*, Muslim jurists agreed that there are several legal impediments exempting a person from religious obligations. The impediments of legal capacity fall into two classes, the work of providence (*‘awāriḍ samāwiyya*) and those which are created by man (*‘awāriḍ muktasaba*). However, these impediments are general and comprise all situations, including both non-necessity and necessity. It includes ignorance, being a minor, sleeping, forgetfulness, duress and necessity. As necessity is also part of legal impediments, the cause for necessity case can also be divided into the two same causes, causes created by human and causes created by God.

The *ḍarūra* cases which are classified as *‘awāriḍ samāwiyya* are circumstances which are beyond human control. These include hunger, thirst, famine, natural disaster, shipwreck, plague, lack of water for prayer and severe illness. The discussion of this category will be discussed in the next chapter. On the other hand, the examples for *ḍarūra* situations that fall under the category of *‘awāriḍ muktasaba*, are duress, compulsion, war and legitimate defence. Jurists unanimously agreed that duress and compulsion are both *ḍarūra* situations, as discussed in the interpretation of Q2.173. Explicitly in Q16.106, God has remarked that who utters the word unbelief because of compulsion is forgiven. In this matter, I have chosen the case of duress to illustrate the case of *ḍarūra* that is caused by human factors.

According to Gimaret, *taklīf* is a term of the theological and legal vocabulary denoting the fact of an imposition on the part of God of obligations on his creatures, of subjecting them to a law. The corresponding passive participle *mukallaf* is used of someone who is governed by this law and in this connection, in legal language; it denotes every individual who has at his disposal the full and entire scope of the law.

²⁰⁷ See al-Qarawī, *al-Diyā‘ al-Lāmi‘*, Vol. I, pp. 164-173

2.6.2 Compulsion and duress

The theoretical study of compulsion and duress has been discussed at great length in the classical works. In this section, I examine this issue, including its definition, its classifications and conditions. Some common examples of duress cases will also be presented.

Compulsion seems to apply where one person physically forces another person to commit an act by the application of direct force²⁰⁸. *Ikrāh* is also a legal term denoting duress. The jurists classified duress into two kinds, unlawful and lawful. Unlawful duress may be of two degrees, being grave (*ikrāh tamm* or *muljī'*) or slight (*ikrāh nāqīṣ* or *ghayr muljī'*). The former involves severe bodily harm while the latter only involves verbal or minor threats. The majority of Muslim jurists recognised most forms of duress but insist on proportionality between the type of duress and the type of act. Islamic law requires an investigation (subjective inquiry) designed to ascertain whether in fact the person felt compelled, due to a present fear, to oblige the coercer. But, can there be an objective standard of a brave or constant person?

The case in Q4.29 concerning professing *kufīr* under compulsion was recognised by Muslim jurists. This case is also classified as *ḍarūra* as it involves serious threat to the compelled person. Many interpreters of the Qur'ān agreed that duress is part of *ḍarūra* when the compelled person receives a deadly or severe threat to his body, limbs, or other necessities. In this case, the compelled person has to weigh up the rights of others and his own right. Abou El-Fadl²⁰⁹ argued that the Islamic legal discourse on duress is particularly lengthy on the importance of balancing the rights of God and society against the right of the coerced individual. Furthermore, he suggested that Islamic law emphasises the nature of the injured rights while at the same time accommodating the subjective feelings of the coerced²¹⁰. In this case of duress, Islamic law is more flexible as certain punishments are lifted and the victims are not held liable for their actions. The jurists also

²⁰⁸ Khaled Abou el fadl, *Arab Law Quarterly*, "The Common and Islamic Law of Duress" in *Arab Law Quarterly*, Leiden: Brill, Vol. VI, No. 2, pp. 121-159, can be found at <http://www.jstor.org/stable/3381833>. Accessed on 07/07/2008

²⁰⁹ Ibid.

²¹⁰ Ibid.

discussed at great length the types of duress which can be considered as necessity cases and which cannot. In other words, what type of duress can mitigate an established ruling and which cannot.

The cases of *ikrāh* have been discussed extensively in almost every chapter in *fiqh* literature. Muslim jurists generally agreed that *ikrāh* is a special situation that might affect human activities. However, in some cases, *ikrāh* does not have any consequences for the legality of the act. Muslim jurists also distinguished the consequence of *ikrāh* to religious obligations and worldly affairs. Some jurists defined *ikrāh* as forcing a person to act or to utter something without his consent and against his will. The Mejlle in article 948 defines *ikrāh* as “without right, compelling a person to do a thing without his consent by fear”²¹¹. The act under duress is committed because of others²¹². The compelled in this situation has to conform to the compeller’s order/wish so as to avoid the threatened harm. Meanwhile, Ḥanafī jurists also required that in such situations the victim must believe that the compeller has the ability and is powerful enough to execute his threat if he disobeys his order. It is apparent from the definitions of *ikrāh* above, that they cover the general meaning of duress that includes a compulsion with both minimal and severe threat. However, the jurists only considered the severe threat case to be a duress that can compromise a *sharī’a* ruling. On this basis, the jurists offered a precise definition of *ikrāh* that is related to necessity. According to them, *ikrāh* means fear of *talaf* (destruction) if the person does not submit to the wish of the compeller²¹³. The term *talaf* here denotes that the threatened harm results in severe destruction and not only minor damage or injuries, whether to one’s body or effects on one’s wealth.

²¹¹ *The Mejlle*, trans. C.R. Tyser, D.G. Demetriades, Ismail Haqqi Effendi, Lahore: Law Publishing Company, 1980, p.149

²¹² See Abū Bakr Muḥammad bin ‘Alī al-Ḥaddādī, *Jawhara Nayyira*, no place: Maṭba‘a al-Khayriyya, 1322H. Vol. II, p254. See also al-Sarakhsī, *al-Mabṣūṭ*, Vol. XXI, p. 60. See also ‘Abd al-Qādir ‘Awda, *al-Tashrī‘ al-Jinā’ī al-Islāmī*, Cairo: Dār al-Turāth, 1985, Vol. I, pp. 563-580. ‘Awda in particular elaborated the effect of duress in criminal cases whether it lifts penalty and liabilities.

²¹³ See al-Sarakhsī, *al-Mabṣūṭ*, vol. XXIV, p. 77.

The Ḥanafī jurists divided compulsion into two main categories, the compelling or constraining (*ikrāh muljī*)²¹⁴ compulsion and less than compelling or constraining (*ghayr muljī*) compulsion. In the first category, the situation nullifies consent and vitiates free choice. The victim in this case cannot freely consent and the victim is really left with no choice at all. According to Hanafī jurists, this situation relates to where a person is threatened with death or severe damage, so he cannot escape from doing what he has been told to. Although he has the choice not to oblige the compeller, this choice is regarded as an invalid choice. This kind of compulsion or duress is regarded as a necessity case, which becomes a valid reason for a Muslim to deviate from a general ruling.

The second category comprises situations that are not so compelling and where the victim is normally left with a choice. This category is not regarded as an urgent situation which negates consent and choice, hence, it does not create necessity. Unlike the first category of compulsion, the victim in the second category is not allowed to break a rule in order to avoid the threaten harm. The examples cited include the case of a threat of a light beating or short term imprisonment. Therefore, only the first category is regarded as a necessity situation. The second category does not have any major effect except in matters pertaining to *taṣarrufāt* (deals) which the legality of the act is pending. Some Ḥanafī jurists also included a threat to a third party as a second category of duress, which cannot be considered as duress. The Ḥanafīs offered a more comprehensive and detailed discussion pertaining to the categorisation of compulsion and duress. Other schools while not suggesting any kind of specific categorisation, also recognised a compelling threat as duress and necessity.

Examining the classical doctrine of duress and compulsion, there are several important elements in compulsion. First, regarding the threat received by the victim, the jurists unanimously agreed that only a compelling threat that would result in killing or severely damaging the victim is considered as

²¹⁴ Some jurists classified these situations as *ikrāh tāmm* (complete compulsion) and *ikrāh nāqīṣ* (incomplete compulsion). The Mālikis also stated that *mukrah muljā* is a person who is forced by someone where he has no will nor power to control his action. In this sense he has no choice. See al-Qarawī, *al-Diyāʿ al-Lāmiʿ*, Vol. I, p. 169

necessity²¹⁵. The jurists elaborated comprehensively on the types of threat that can be considered. This includes beating, imprisonment and public humiliation. Some argued that 40-80 lashes would create a necessity (based on the amount required in *ḥadd* punishment) which means a light beating does not create a compelling situation. With regards to imprisonment, only long imprisonment is accepted by some jurists, while some others do not consider imprisonment as duress. Some jurists took into consideration the condition of the prison and the length of the sentence. A long imprisonment in bad conditions could be compelling duress. However, jurists disputed whether the threat to one's wealth can be considered as justified duress or otherwise. Some Hanafī jurists did not consider a threat to one's wealth as duress or a compelling case and hence it is not, for them, a legitimate coercion. Mālik, Shāfi'ī and Aḥmad contended otherwise²¹⁶. They ruled that if the amount of money involved in a threat constitutes all of the wealth of the one being threatened, the threat of its usurpation counts as coercion. The amount of property that is considered as a duress case depends on the status of the victim²¹⁷. As only a seriously terrifying threat is considered, the threats by name calling, false accusation, provocations, and damaging an insignificant amount of property are not regarded as duress in Islamic law.

One should also distinguish between a legitimate compulsion and illegitimate compulsion²¹⁸. Lawful duress which has no legal effects may take the form of a judge exerting duress on a debtor to discharge his debt by selling property surplus to his personal needs. Similarly, a person who is forced to pay maintenance to his wife is not considered to be under duress, hence his act is deemed valid. Another example is someone who is forced to face a penalty, like jail, because of his previous crime. This is also not an illegal threat even though the victim's consent and choice is vitiated. To sum up, the compulsion imposed by authority or superior is not a compulsion (in this case a punishment or an order by court).

²¹⁵ Al-Sarakhsī, *al-Mabṣūṭ*, vol. XXI, p. 60, Ibn Qudāma, *al-Mughnī*, Vol.VII, p. 292. Jurists have put the level of threats either by death or by beating is of same level. As for them, the serious beating will also leads to death.

²¹⁶ Muḥammad bin Aḥmad bin 'Arfa al-Dusūqī, *Hāshiya al-Dusūqī 'alā Sharḥ al-Kabīr*, al-Cairo: Dār Iḥyā' Kutub al-'Arabiyya, Vol.II, p. 368 and Ibn Qudāma, *al-Mughnī*, Vol.VII, p. 120

²¹⁷ See 'Awda, *Tashrīḥ al-Jinā'ī al-Islāmī*, Vol. I, pp. 566-567

²¹⁸ See al-Bukhārī, *Kashf al-asrār*, Vol. IV, p. 397

Additionally, the threat can be explicit or implicit. For example, al-Sarakhsī contended that if the coercer is well-known for his notorious behaviour, no explicit threat is required. Similarly, an order from a superior (*'amr al-sultān*) is deemed as duress where the victim already realised that the consequences of failing to fulfill his order are fatal. In this case, a verbal order with no explicit threat is sufficient to create duress. Aḥmad bin Ḥanbal, on the other hand, did not consider a mere verbal threat to be sufficient. For him, part of the order must be already executed like beating or torture²¹⁹. The majority of jurists strongly disagreed with this point. As the aim of the necessity rule is to avoid severe harm, when the harm is already executed, there is no longer need for *rukḥṣa* as the harm is already inflicted.

The second element is the oppressor. The oppressor must be able and have the power to execute the threat, like a ruler or a notorious criminal. Al-Shāfi'ī,²²⁰ for example, explained that the oppressor must be more powerful than the victim, such as a ruler or a thief. Technically, a threat from a minor, weak and disabled person is not considered as a real threat. Although classical jurists did not mention the assistance of a third party as the accomplice, we can also assume that threats from weak people should be considered if he is able to get help from an accomplice. Hence, the power of the oppressor can be known either by his superiority, well-known criminal records and the availability of assistance from notorious third parties.

The third element is fear of danger. The compelled or the victim must believe and be aware that the compeller is likely to execute the threatened harm. In other words, the compeller has created a state of fear in the victim's mind by threat of death or severe harm. The preponderance of the thought of the victim and what he has felt is central in this calculation. Although, each individual has a different level of fear, the jurists tried to reduce the

²¹⁹ Ibn Qudāma, *al-Mughnī*, Vol.VII, p. 29. The basis of his argument is the ḥadīth of 'Ammar bin Yassar who received severe threat by the Quraish. He only uttered the word of disbelief after he was almost drowned.

²²⁰ al-Shāfi'ī, *al-Umm*, Vol. VII, p. 120

ambiguity by drawing some guidelines. A weak person may find a couple of beatings to be unbearable, and it is considered a real danger, which a brave person might not worry about. The jurists rule that only a fear of severe threat is considered.

It is also important to note that some jurists, such as al-Sarakhsī contended that the formation of fear can only be created if the threat is immediate²²¹. Similarly, the Shāfi'ī jurists also maintained that the threat must be immediate, leaving little opportunity for escape. The Mālikī jurists, however, argued that the real issue is the formation of fear in the victim's mind²²² and that there is no need for the threatened danger be immediate. For example, if the threatened harm is going to occur after a month and the victim is terrified by this, it is then considered to be compelling duress. Another issue raised by jurists is the requirement that such an act under duress must be performed in the presence of the coercer. The Shāfi'ī jurists, added that such a formation of fear can be created if the oppressor is stronger and more powerful, such as a ruler or a thief or when the threat takes place in a locked house leaving the victim no room to escape²²³. The Ḥanbalī jurists required another condition that the compeller should have actually started executing his threat.

As the matter of fear is subjective, the jurists stated that we should inquire into whether the victim believed that he was faced with a necessity that left him no alternative. It is important to note that feeling mere fear is insufficient, the victim must feel terror and helplessness in such a situation. This point leads us to the fourth element that is the non-availability of an alternative or any help. In such a situation, there must not have been any alternative to survive the threat other than submission to the order of the compeller. Although in almost all cases of compulsion and duress, the victim can choose between perseverance and submission, such an alternative or choice is spoiled. Since the choice is spoiled, the victim is normally forced to do what is required by the oppressor.

²²¹ al-Sarakhsī, *al-Mabṣūṭ*, vol. XXI, p. 60

²²² See Khalad Abou el Fadl, "The Common and Islamic Law of Duress" in *Arab Law Quarterly*, Vol. VI, No. 2, 1991, p.131. This article can be found online in www.jstor.org

²²³ al-Shāfi'ī, *al-Umm*, Vol. VII, p. 120

It is understood from the above discussion that the jurists required an investigation in order to ascertain whether fear really existed and the harm was compelling in nature. The jurists also recognised that the feeling of the threat is a subjective matter and it depends on the level of brevity and perseverance. A weak person for example feels several slaps as a dangerous threat to him, whereas a stronger person might not. However, the jurists only considered the threat by serious injury to one's limbs and threat to one's life or property as recognisable causes in necessity case. Similarly, in the case of a threat to one's property, the jurists have given the liberty to the victim to verify the case according to his needs. For instance, if the threat to his property results in a huge loss to his wealth where he is left penniless, this is a case of duress. However, the threat to one's property differs according to one's status. For example, a threat of the loss of 1000 Ringgit Malaysia would not be seen as a real threat for a wealthy person but it is a significant threat for a needy person. Another example is the destruction of a family home or work place. Again, the matter depends on a person's personal wealth. We can suggest that a threat to destroy one's business is not considered a threat for a multi-billionaire and a conglomerate, while this is real destruction for the victim who has no other business to survive²²⁴. We can conclude that only threat that can damage one's wealth significantly and make him suffer is considered.

As in any other necessity case, the important principle employed by jurists with regard to duress is that the victim's response to the threat must be proportional. The victim's act to avoid harm must not cause more damage than the threat he received. For example, a man is not allowed to murder others if he received a threat by severe beating. Similarly, he is not allowed to destroy one whole town if he received a threat to his car. Another important principle relates to the case where one of two choices of prohibited acts has to be made and one must choose the lesser evil he faces. At the same time, the victim bears the responsibility of minimising the damage and the oppression. If he can stop the injustice by burning down

²²⁴ However, the permission is given only in necessity case, where a man under duress has a choice between damaging a business of a wealthy man and a business of a poor man. However, the consideration may vary according to the intensity of the case.

only one house, he is not allowed to burn more than that. Similarly, if he can stop the oppression by beating the oppressor, he is not allowed to murder him. This is in accordance with the maxim that one should not repel injustice by committing injustice. Some also asserted that the victim has to resist committing acts which violate the rights of others. On this basis, murder and rape are not allowed to be committed even when necessities are threatened.

Although classical jurists elaborated extensively on the notion of compulsion and duress, they did not elaborate in detail on the case of threats to third parties. The Ḥanafis, for instance, did not recognise a threat to third parties. Therefore, according to this rule, a victim is not allowed to submit to the order of the oppressor if it is his father or his son who is threatened with imprisonment²²⁵. However, some Ḥanafis recognised a threat to father and children. Another case to be examined is for example, a threat to murder one's wife unless the husband is willing to damage the property of others. Should he be allowed to do that in order to save his wife? If the Ḥanafis view is accepted, the husband cannot save his wife as the jurists only considered the threat to father and children. Meanwhile, some jurists have extended the rule to *dhawī al-arḥām*²²⁶. Mālikī jurists also considered a threat to an *ajṅabī* (foreigner) as duress²²⁷. It can be assumed that the refusal of certain jurists to consider harm to third party is due to the issue of the duty of care and protection, and whether the victim is responsible for protecting the third party's life. This explains why only the harm directed to close family members is considered. However, as altruistic behaviour is recommended in Islam, fulfilling the oppressor's demand can be tolerated even if the threat is subjected to a third party. However, this case needs further investigation by the victim, and whether he believes that the threat to

²²⁵ ʿAlī Ḥaidar, *Durar al-Ḥikām*, Dār al-Jīl, 1991, Vol. II, p. 270

²²⁶ See ʿAwda, *Tashrīʿ al-Jināʿī al-Islāmī*, Vol. I, p. 566. *Dhawī al-arḥām* refers to those who are related in blood especially by the female side

²²⁷ *Ajṅabī* in the case of duress here refers to people who are not related with the person under duress. Ahmet T. Karamustafa views that *ajṅabī* generally means foreigners who are away from their usual place of residence and find themselves among people who view them as outsiders. See Karamustafa, Ahmet T. "Strangers and Foreigners." *Encyclopaedia of the Qurʿān*. Jane Dammen McAuliffe (ed.), Georgetown University, Washington DC. Brill, 2010. Brill Online. EXETER UNIVERSITY. 26 July 2010
<http://www.brillonline.nl/subscriber/entry?entry=q3_SIM-00405>

the third party is genuine. It can be suggested that if the third party is an obviously innocent and fragile person, such as a pregnant woman, a harmless child or an older person, such a threat should be considered heavily in the calculation. However, it should also be noted that there is also the possibility of a fake threat. A compeller can collaborate to counterfeit a threat, especially if they know that the victim would not consider any threat. For example, if the oppressor knows that a dying victim will not change his will even if he is threatened by death, the oppressor can try to threaten his family or close relative to soften the victim. There are two possibilities here, whether the threat to his family is real or whether the family member has collaborated with the compeller. Hence, a careful examination must be carried out.

Classical jurists also discussed widely the effects of duress on one's act and several cases have been examined. These include compulsion in religious observances, compulsion in committing a crime, compulsion in converting to other religions and compulsion in marital contracts and business transactions. These acts can also be divided into verbal and non-verbal acts. Although the jurists unanimously agreed that compulsion lifts the sin, some penalties and liabilities are still to be borne by the person (like the case of taking another's meal in a famine). It is also important to note that not all forbidden acts are permissible on the basis of necessity. Compulsion is where a person is forced to do or say something without his consent and against his free choice, meaning that he would not do such an act if he was left alone.

Finally, I would like to offer some critical reviews on compulsion cases found in classic literature, which are compulsion of conversion, compulsion in selling, compulsion regarding marriage and divorce, and compulsion in the case of worship.

Compulsion in business transaction

Jurists have already comprehensively discussed the issues of transactions made by a person under duress and compulsion²²⁸. These include buying and selling, hire (*ijāra*) and investment (*muḍāraba*). In the case of sales under coercion, the majority of Ḥanafīs ruled that any contracts that take place under coercion are defective contracts (*fāsid*), since they eliminate mutual agreement which is a condition of contract validity as stated in Q4.29²²⁹. The coerced person therefore has the right to break or to implement the contract. However, as in all defective contracts, the buyer obtains ownership at the time of receipt of the price by the seller. The Shāfiī and Ḥanbalī jurists were of the opinion that such a contract cannot be concluded²³⁰. Mālikī jurists decided that a coerced sale is not binding. However, in some cases, coercion to enforce rights does not prevent the completion of a contract because of religious law supersedes the trader's consent: for example, the forced sale of a seller's property to pay his debts, alimony or family maintenance.

Compulsion to convert to other religions

As discussed before, a Muslim is allowed to profess the words of unbelief under coercion and he is still considered as a Muslim²³¹. This means his conversion to another religion does not affect his marriage, and if he dies, his children can inherit from him²³². However, in this case, perseverance is

²²⁸ Wahbah Zuhailī, *Financial Transaction in Islamic Jurisprudence*, Mahmoud A. El-Gamal (tran.), Beirut: Dār al-Fikr, 2003, Vol. I, p. 18. See al-Sarakhṣī, *al-Mabṣūṭ*, Vol. XXIV, p. 55

²²⁹ See al-Sarakhṣī, *al-Mabṣūṭ*, Vol. XXIV, p. 55

²³⁰ See al-Shāfiī, *al-Umm*, vol. IV, p. 120 and Yahyā bin Sharf al-Nawawī, *al-Majmūʿ Sharḥ al-Muḥadhdhab*, no place: Maṭbaʿa al-Muniriyya, no date, Vol. IX, p. 184

²³¹ See al-Shāfiī, *Aḥkām al-Qurʾān*, Vol. I, p. 225, see also al-Jaṣṣās, *Aḥkām al-Qurʾān*, Vol. III, p. 283. al-Sarakhṣī, *al-Mabṣūṭ*, Vol. X, p. 124. See also Ibn Qudāma, *al-Mughnī*, Vol. IX, p. 31

²³² The issue of professing *kuf* is closely related with the issue of *taqiyya*. This notion denotes dispensing with the ordinances of religion in cases of constraint and when there is a possibility of harm. It also refers to the practice of precautionary dissimulation whereby believers may conceal their faith under certain pressing circumstances. It has the origin from Qurʾān, Q5.156. According to Strothmann, this notion is simply permitted alleviation through God's indulgence or a duty, if it is necessary in the interest of the community. This case of *taqiyya* was reflected in the case of ʿAmmar bin Yāsir. In certain circumstances, e.g. threat of death, a Muslim who cannot live openly professing his faith may have to migrate "since God's earth is wide". However, Sunni jurists are all in agreement cannot be practised unless in necessity. This notion however is a special significance for the Shiʿīs. Indeed, it is considered their distinguishing feature and concealment is a regular feature. In any case, because of their attachment to *taqiyya*, the Shiʿīs have devoted numerous works to it. See R. Strothmann-[Moktar Djebli]. "Taqiyya (a)." *Encyclopaedia of Islam, Second*

better than uttering the word of unbelief. The jurists have also discussed the case of a Muslim forced to convert to another religion in the *dār al-ḥarb*²³³. Al-Shāfi‘ī for instance, ruled that if two witnesses saw a person who was forced to convert to another religion, eating pork and drinking wine but he does not say whether he is still a Muslim or not, he is still considered as a Muslim²³⁴. However, if he went back to his Muslim country and was reluctant to declare his status, he is then considered a non-Muslim. Similarly, a non-Muslim (a *dhimmī* or a *musta‘mān*) cannot be forced to convert to Islam²³⁵. If they were forced and died, they are still considered as non-Muslim and will not be buried as a Muslim.

Compulsion in marriage

The jurists differed in the effect of duress and compulsion in solemnising marriage and in its annulment. The Mālikīs²³⁶, Shāfi‘īs and Ḥanbalīs²³⁷ contended that marital contracts such as *nikāḥ*, *ṭalāq*, *ruj‘* and *zihār* are not concluded, while the Ḥanafīs maintained otherwise²³⁸. They maintained that such conduct would not be affected by compulsion. Hence, it should be regarded as valid conduct. The basic argument for Ḥanafī jurists is the ḥadīth stating that there are three things that would be treated seriously whether they are undertaken seriously or in jest; marriage, divorce and

Edition. P. Bearman; Th. Bianquis; C.E. Bosworth; E. van Donzel; and W.P. Heinrichs (eds). Brill, 2010. Brill Online. EXETER UNIVERSITY. 27 July 2010
<http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-7341>

²³³ Literally *dār al-ḥarb* means the land of war. It can be interpreted as those countries where the Muslim law is not in force. Abel, A. “Dār al-ḥarb”. *Encyclopaedia of Islam, Second Edition*. P. Bearman; , Th. Bianquis; C.E. Bosworth; E. van Donzel; and W.P. Heinrichs (eds.). Brill, 2010. Brill Online. EXETER UNIVERSITY. 27 July 2010
<http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-1700>

²³⁴ al-Shāfi‘ī, *al-Umm*, Vol. VI, p. 176

²³⁵ Ibn Qudāma, *al-Mughnī*, Vol. IX, p. 30. This is also the view of Abū Ḥanīfa and al-Shāfi‘ī. However, Muslim jurists agreed that a *ḥarbī* can be forced to convert to Islam. See al-Nawawī, *al-Majmū‘*, Vol. IX, p.187 and al-Bukhārī, *Kashf al-asrār*, Vol. IV, p. 397

²³⁶ Sahnūn, *al-Mudawwana al-Kubrā li Imām Dār al-Hijrah al-Imām Mālik bin Anās*, Beirut: Dār al-Kutb al-‘Ilmiyya, 1995, Vol. I, p. 48, Vol. II, p. 80 and p.310. See also Muḥammad bin Muḥammad bin ‘Abd al-Raḥmān al-Ḥiṭāb, *Mawāhib al-Jalil*, Dār al-Fikr, 1992, Vol. IV, p.4

²³⁷ Ibn Qudāma, *al-Mughnī*, Vol. VII, p. 291

²³⁸ See al-Jassās, Vol. VI, p. 177. See the Hanafis discussion on *hazal* (jest) in Mas‘ūd bin ‘Umar al-Taftāzānī, *Sharḥ al-talwīḥ ‘alā tawḍīḥ*, Cairo: Maktaba Ṣabīḥ, Vol. II, p. 380. See also al-Bābartī, *al-‘Ināya Sharḥ al-Hidāya*, Vol. III, p. 489

taking back a wife²³⁹. Compared to any other contract where intention and consent play a crucial part in the validity of the acts, these three particular contracts are different. Verbal pronouncement is sufficient in order to make the contract valid. The Ḥanafī jurists also believed that the intention and consent are not essential elements in such a conduct. The conduct (*nikāḥ*, *ṭalāq*, *rujʿ* or *zihār*) is liable to be established either by acting in jest or seriously²⁴⁰. It is apparent that the jurists did not include duress as an impediment to the validity of such contracts. Furthermore, the provision in the Qurʾān stating that the rule of divorce which makes the wife no longer lawful for the previous husband should be applied to any case of divorce either if such a divorce was undertaken seriously or otherwise. They also used another ḥadīth to support this view. According to this ḥadīth, the only divorce pronouncement that is not treated seriously is the pronouncement made by a *maʿtūh* (incompetent) person, hence according to this ḥadīth, the pronouncement from a compelled person is valid²⁴¹.

However, the other schools strongly opposed this view and they maintained that marriage contracts undertaken under duress are not valid and not concluded²⁴². There is no similarity between compulsion and joking. The evidence for their arguments is the ḥadīth “there is no divorce in case of *ighlāq* (duress)²⁴³”. Although jurists differed in the interpretation of interpreting the term *ighlāq* that was mentioned in the ḥadīth, (whether it means anger, drunkenness, insane, compulsion, or madness) the majority of jurists agreed that divorcing a wife under threat is not valid. Their argument was based on a ḥadīth saying that Allah has forgiven people from mistakes,

²³⁹ The ḥadīth mentioning about three things that are taken seriously whether they were uttered during jest or seriously was narrated by ‘Abd Raḥman bin Ḥabīb from ‘Aṭā’ from Yūsuf bin Māhak and from the authority of Abū Hurayra

²⁴⁰ al-Sarakhsī, *al-Mabsūt*, vol. VI, p. 177

²⁴¹ al-Jaṣṣāṣ, *Aḥkām al-Qurʾān*, Vol. I, p. 333, see also al-Sarakhsī, *al-Mabsūt*, Vol. VI, p. 177

²⁴² See Saḥnūn, *al-Mudawwana*, vol. II, p. 80 and p. 310. Mālik said such contracts are not concluded and not permitted (*lā yajūz*) while al-Shāfiʿī says it is *bāṭil* (void). Aḥmad also says such contracts are not concluded (*lā yaqaʿ*), see Ibn Qudāma, *al-Mughnī*, vol. VII, p. 291. Ibn Qayyim al-Jawziyya, *Iʿlām al-Mūqīʿīn*, Beirut: Dār al-Jīl, Vol. IV, p50-51

²⁴³ Ibid.

forgetfulness and compulsion²⁴⁴. They firmly viewed that this ḥadīth should also be applied in the cases of *nikāh*, *ṭalāq*, *rujʿ* and *zihār*.

Examining both arguments, it is apparent that both views have their very own interpretation of jest. The Hanafī jurists reaffirmed that jest means that it is an act with no real intention, and this act is no different from acting under threat. However, the other schools regarded acting under duress as an impediment to contracting a marriage or a marriage annulment, as one has no right to force others to perform such an act. Furthermore, it can be assumed that the ḥadīth regarding the contracts that would be taken seriously should be seen as a warning from the Prophet that these contracts are serious matters and people cannot make them frivolously. However, a compulsion is different, as the person does not intend to mock the contract but rather was compelled to pronounce it under threat. On this basis, this view is closer to the real meaning of Sharīʿa. However, it is important to note that the some Shāfiʿīs also ruled that if a compelled person divorces his wife under threat and at the same time has the real intention to do so, the marriage is ended²⁴⁵. This is similar to the case of a person who utters the word of unbelief but would not be punished as long as he remains faithful in his heart. Both cases depend on the intention of the Muslims.

Compulsion in *zinā* (adultery) and rape cases

Even though duress is a valid cause for permitting a forbidden act, some cases are excluded, such as murder and *zinā* (adultery)²⁴⁶. The majority of jurists maintained that compulsion does not give a person a license to commit murder or *zinā*²⁴⁷. This is because both victims (the compelled person) and the person to be killed or to have sex with are at the same level

²⁴⁴ See Ibn Qudāma, *al-Mughnī*, Vol. VII, p. 291. The first ḥadīth was narrated by Abū Dawūd, Athram while the latter was narrated by Ibn Mājah. Hādīth no. 2188 vol. II in Sunan Abū Dawūd. See Ibn Qayyim al-Jawziyya, *Iʿlām al-Mūqīʿīn*, Vol. IV, p. 50

²⁴⁵ al-Nawawī, *al-Majmūʿ*, Vol. VI, p. 354

²⁴⁶ *Zinā* can also be translated as premarital sex or extra marital sex. Meanwhile the modern term for rape is '*al-ighṭiṣāb*'. This Arabic word refers to taking something wrongfully by force. It now is used exclusively to refer to transgression against the honor of women by force. The word *ghasb* denoting rape can also be found in some medieval work, see Saḥnūn, *al-Mudawwana*, Vol. IV, p. 509

²⁴⁷ al-Sarakhsī, *al-Mabṣūṭ*, vol. IX, p. 60, see al-Jaṣṣāṣ, *al-Ahkām al-Qurʾān*, vol. X, p. 203, see also Ibn Taymiyya, *Fatāwā al-Kubrā*, Vol. I, p. 451, al-Bukhārī, *Kashf al-asrār*, Vol. IV, p. 397

of legal protection. Some like Khalid Abou Fadl might argue that between committing *zinā* and murder, one should choose to commit *zinā* as the worldly punishment for *zinā* is of a lesser degree than murder. However, in this case harm cannot be eliminated by incurring harm to another person.²⁴⁸

The jurists differentiated the punishment for a man and a woman who were being forced to commit *zinā*. The jurists were in agreement that a woman who was forced to commit *zinā*²⁴⁹ (or is raped) is not subjected to *ḥadd* punishment²⁵⁰. On the other hand, a man who was forced to have sex is subjected to the *ḥadd* penalty. The basis for the jurists' argument is that the capability of the man to commit *zinā* implies his desire to have the sexual activity²⁵¹. The jurists argued that the man's penis only becomes erect in response to sexual arousal and excitement. This excitement (which makes the man able to have intercourse) denies the element of force; hence, the man is subjected to the *ḥadd* punishment. However, the jurists still gave a room for leniency in this case. If a man is forced to have sex while he is being tied up and at the time he had an erection, the punishment is lifted. The jurists made the analogy between this issue and the case of involuntarily swallowing during the month of Ramadān. In the latter case, the fasting is not void as the act was against his will²⁵². In other issues, the jurists were divided whether the rapist is liable to pay *mahr* to the woman or not. Ḥanafī jurists ruled that the man is not required to pay the *mahr* to the woman, while the Shāfi'ī and Mālik jurists maintained otherwise²⁵³.

Compulsion in murder

Like adultery, murder is also forbidden, even under compulsion or duress. However, jurists disputed over a punishment for a person committing a murder under duress. In Islamic criminal law, the punishment for

²⁴⁸ Khalad Abou el Fadl, "The Common and Islamic Law of Duress" in Arab Law Quarterly, Vol. VI, No. 2, 1991

²⁴⁹ As stated before, there is no term 'rape' in classical jurists work. However, some jurists have used the term sex by force (*zinā bil ikrāh*) indicating rape.

²⁵⁰ al-Shāfi'ī, *al-Umm*, Vol. VIII, p. 217, al-Jaṣṣāṣ, *Ahkām al-qur'ān*, Vol. III, p. 382

²⁵¹ The capability of man is indicated by his erection that makes the sexual intercourse possible. The jurists argued that erection is only possible when man has the intention and desire to have sex

²⁵² Involuntary here means having no control of the will

²⁵³ al-Jaṣṣāṣ, *Kitāb Ahkām al-Qur'ān*, Vol. IX, p. 52 and p. 60. See also Saḥnūn, *al-Mudawwana*, Vol. IV, p. 509

committing murder is *qiṣāṣ*, where the killer may also be killed. Mālik, Shafīʿī and Aḥmad ruled that the liability of *qiṣāṣ* is on the *mubāshir* (the compelled) rather than the *āmir* (the compeller). However, the *āmir* is punished by other than *qiṣāṣ*. Another view says both should be subjected to the *qiṣāṣ* penalty. When the *āmir* has the authority over the compelled²⁵⁴, there are three views:

- 1) Dawūd and Abu Ḥanīfa, and one opinion among Shafīʿīs – it is the *āmir* who is subjected to *qiṣāṣ* and not the *mubāshir* (the compelled), but the compelled is still punished by *taʿzīr*²⁵⁵. The jurists argued that the *ikrāh* situation waives the punishment as he committed the murder unintentionally. In such a case, the murderer is regarded as an instrument for the compeller to accomplish his evil mission. Jurists applied *qiṣāṣ* to the person who does not act directly consider the term “murderer” applicable to him (the compeller) metaphorically.
- 2) The coerced is subjected to *qiṣāṣ* and not the *āmir*. This is one view of the Shāfiʿīs. Those who upheld *qiṣāṣ* for the coerced applied the rule of a person with a free will and this is because the coerced person resembles, from one aspect, a person having free will, while he resembles from another aspect a person dominated and under duress like one falling from a height, or swept by the wind from place to place.
- 3) Both the oppressor and the compelled persons are subjected to *qiṣāṣ*. This was the opinion of Mālik, Aḥmad and the chosen opinion among Shāfiʿī jurists. This view does not hold coercion as an obstacle (in the way of punishment) for the compelled, nor do the jurists consider the absence of direct causation an obstacle for the *āmir*. The killer must be punished and the situation is not considered as a valid duress (*ikrāh muljīʿ*). In this case, the killer (the compelled) he has an option not to kill. The oppressor on the other hand has to be killed because he is the cause of the murder²⁵⁶. The basis of this argument is that, by virtue of consensus, that if a person

²⁵⁴ For instance, the ruler forces his people to kill someone unlawfully

²⁵⁵ *Taʿzīr* punishment can be defined as a punishment, usually corporal that can be administered at the discretion of the judge (*qāḍī*)

²⁵⁶ Awda, *al-Tashrīʿ al-Jināʿī al-Islāmī*, Vol. II, p. 131

is close to death due to starvation, he has no right to kill a human being and consume him²⁵⁷.

Compulsion to damage other properties

A person is allowed to destroy another's property if he is threatened severely.²⁵⁸ However the damage has to be paid for. The reason for this ruling is that the property of others is permissible to him under necessity as is eating another's meal. In this case, the oppressor is the one who has to bear the liability for the damaged property. Similarly, if a victim is forced by severe threat to steal another's property²⁵⁹, the oppressor has to pay the price and not the victim. However, if the threat received is not severe, such as imprisonment or binding, the victim has to bear the civil responsibility. For Ḥanafī jurists, the liability of the compelled is only lifted if the harm threatened is severe. The Shāfi'ī jurists were reported as having the same view. However, some jurists ruled that both the victim and the oppressor have to bear the responsibility.

To conclude, the doctrine of coercion, compulsion and duress have been widely discussed in Islamic legal tradition. Jurists also recognised these cases as *ḍarūra* cases, particularly when the duress involves a severe threat to the person. In such a situation, the victim believes that his life is in clear danger. As a Muslim loses his freewill under duress, the punishments in certain acts are lifted²⁶⁰. The Shāfi'ī jurists ruled that necessity and duress are impediments to punishment in certain circumstances with the existence of prohibition of the act, and of the legal obligation to abstain from it, but in other circumstances they are the cause of lawfulness of the act. According to them, necessity and duress nullify the free will of man and this is the basic condition of *taklīf*(legal obligation).

2.7 Conclusions

²⁵⁷ See The Distinguished Jurist's Primer, Vol. II, p. 480. See also 'Awda, *al-Tashrī' al-Jinā'ī al-Islāmī*, Vol. II, p. 131. "The blood of the Muslim is equal (in status) among them, the lowest of them creates an equal liability for them, but they are superior to those beside them" recorded by Abū Dawūd

²⁵⁸ *Jawhara al-nayyira*, Vol. II, p. 254.

²⁵⁹ al-Sarakhsī, *al-Mabṣūṭ*, Vol. XXIV, p. 79

²⁶⁰ Ahmad Hassan, *The Principle of Islamic Jurisprudence*, pp. 171-173

It can be suggested that *ḍarūra* has the highest degree of capacity to temporarily cancel an established rule when compared to other legal rules. This is due to the fact that *ḍarūra* can operate without having a specific permission either from textual evidence, *ijtihād* of the jurists or a *fatwā* from the *mufī*. The person himself can verify his own situation. The jurists also agreed that the general permission granted in some textual evidence gives the freedom to a man in a situation of necessity to derogate from the standard *sharī'a* rule. The permission to drink liquor, eat *mayta* and other prohibited acts illustrate the ability of *ḍarūra* to cancel a *ḥukm*. An established doctrine in certain schools of law can also be cancelled by this rule. This chapter also shows that there are many legal affects under this rule, for example the removal of sin, the penal sanction and the liability. J. Schacht contended that under the theory of duress, its effect is not only to remove the penal sanction, but to make the act itself allowed. Still wider is the scope of the doctrine that necessity dispenses Muslims from observing the strict rules of the law²⁶¹. It is important to bear in mind that though the act is temporarily allowed, the negativity of the act remains and in many cases the person under duress holds certain liability caused by *ḍarūra* acts. However, the jurists unanimously agreed that the sin is forgiven as the verses clearly indicate that God is Forgiving and Merciful. However, in some cases, the person acts out of necessity, and still has to bear the legal effect of the duress. For example, when eating another's meal, one still has to pay the price.

One of the most important preconditions of *ḍarūra* is that the harm in a *ḍarūra* case must be predicted to materialise. Several measures to assess the harm have been put forward by the jurists according to different cases. As each *ḍarūra* case is unique, a different set of preconditions may be set up, but it is not impossible for readers to draw general guidelines on *ḍarūra* matters. For example, some people may find praying in full is not a problem while travelling, whereas other travellers find it difficult to pray in full. Another example is that one may find that he can be without food and drink for more than one day and night, thus, it is not necessary for him to switch

²⁶¹ J. Schacht, *An Introduction to Islamic Law*, Oxford: Clarendon Press, 1964, p. 199-200

to non-*ḥalāl* food before the end of this period. Others may find it is too difficult to abstain from food and drink for more than 12 hours, and therefore he needs to have food and recourse to *ḥarām* food earlier. The jurists outlined several restrictions and preconditions for *ḍarūra* cases, but only the person under duress knows his situation best. In determining the harm and the benefit of an act in a necessity situation, the jurists gave a set of examples guiding a Muslim to “self assess” their own situation.

Even though the preconditions of *ḍarūra* were listed comprehensively by modern Muslim writers, one has to acknowledge that these efforts had already been made by previous scholars in the early classical *fiqh* works in which they have treated the cases individually. It might be speculated that modern scholars deduced the guidelines from these various *fiqhī* cases and from works on legal maxims as their basic guidelines in their attempt to develop the study of *ḍarūra*.

Having examined the theoretical discussion of *ḍarūra* within the classical sources and works on *ḍarūra*, some points can be deduced. Firstly, it can be argued that there is no independent comprehensive writing on this rule in classical works when compared to the extensive discussions in modern writings. Secondly, some classical applications of *ḍarūra* are limited to particular matters, especially food and drinking and limited to personal cases. Thirdly, some jurists and legal theorists, both classical and modern, applied the rule of *ḍarūra* interchangeably with other legal rules. Finally, it can also be suggested that the theoretical discussions on *ḍarūra* are not complete - which means discussion evolves as the times change. The basic understanding and fundamental issue of *ḍarūra* remains but the details of the practicality of this rule might be disputed and vary between scholars. It is clear that modern writers have contributed a more specific, independent and comprehensive set of works on *ḍarūra*. However, it should be noted that these modern works acquire their material mostly from the scattered classical formulation on *ḍarūra*, which derived this principle from the relevant divine sources. To sum up, the formulation of this principle can be illustrated as a large jigsaw puzzle, in which the basic rules were set up during the formation period and the completion of the rest was made by the

later jurists. This jigsaw puzzle will continue to expand in the future time, as human needs and necessity change. In the next chapter, I attempt to analyse the *ḍarūra* rules and regulations *vis-à-vis* *fiqhī* cases. How did the jurists determine harm and how does this principle work in practical matters? From this set of examples given by jurists, it is hoped that a general guideline of the rules of *ḍarūra* can be drawn and the rules can be applied to new emerging modern cases.

CHAPTER THREE: *ḌARŪRA* CASES VIS-À-VIS *FIQHĪ* LITERATURE

3.1 Introduction

The previous chapter presents a general theoretical framework concerning the principle of *Ḍarūra* in Islamic legal discussions and a critique of prevalent perspectives that exercise influence on the study of *Ḍarūra* in Muslim academies. Theoretically, standard rules and relevant maxims need to be employed in each *Ḍarūra* case. However, the study of *Ḍarūra* through examination of the theoretical study (*uṣūl*) is insufficient to acquire an adequate understanding of the complex *Ḍarūra* issues. The *furūʿ* (the elaborated precepts of positive law) must also be explored vis-à-vis examination of *fiqhī* cases. This is because each *Ḍarūra* case is unique and depends on various factors, including the intensity of the harm, the ability of the person under duress and the alternatives available. Having examined these *fiqhī* cases, it is clear that Muslim jurists treated these cases quite differently. The combination of the theoretical and case study approaches is important in an attempt to justify the application of the Harm Reduction Programme in Chapter Five. At the same time, the results are expected to offer a better understanding for those who need to extend the application of *Ḍarūra* to new emerging cases.

Examining several *Ḍarūra* cases in *fiqhī* literature, it can be seen that the diverse problems of *Ḍarūra* cases treated by Islamic jurisprudence may be viewed as tightly interwoven. The *fiqhī* texts ironically present a holistic consistency and an integrated system²⁶². Consistency is found in terms of the maxims applied and the rules the texts follow. It can be suggested that Islamic jurisprudence applies the same standard rules for *Ḍarūra* application such as “the *Ḍarar* must be eliminated”, “choosing the lesser harm” and “necessity does not invalidate the right of others”. However, apart from a seemingly standard set of *Ḍarūra* rules and legal maxims applied by the jurists, the possibility of disagreement among jurists is not precluded. Not

²⁶² Ze'ev Maghen argued that the relationship between *uṣūl* and *furūʿ* study in Islamic jurisprudence are strongly related to each other. See "Close encounters: Some preliminary observations on the transmission of impurity in early Sunnī Jurisprudenc" in *Islamic Law and Society*", Vol.VI, No. 3 Leiden, Boston: Brill, 1999, p. 351. Accessed date 25/12/2009. <http://www.jstor.org/stable/3399502>

only have disputes emerged between the different schools, but also within the same school of law. However, as far as Islamic law is concerned, there is no genuine requirement that the logic or conclusions of different experts commenting on the same subject be consistent with one another, even if they use the same tools and rules. It again depends on the different interpretations, logic and analogy made by the jurists for each *ḍarūra* case. Therefore, it is vital to highlight some important *ḍarūra* cases in *fiqhī* literature to understand how the principle really works. Limits, rules and special conditions set by jurists in each *fiqhī* case are examined. Although disputes among jurists are inevitable, it is believed that the jurisdiction of the cases which set the important precedents can be extended to new *ḍarūra* issues.

This chapter is divided into four sections. The first section deals with food and drink cases. In Chapter One, we discovered that the origin of *ḍarūra* came from textual cases pertaining to food and drink. Accordingly, the jurists and the *uṣūliyyūn* developed a systematic theory of *ḍarūra* in Islamic law. The limits and regulations of *ḍarūra* were also extracted from these *nuṣūṣ*. In this section, we will examine how the maxims and preconditions of *ḍarūra* were applied by the jurists in food related cases. We will also examine how the same standards were used by the jurists in other cases. The second section of this chapter deals with the issue of consuming *muḥarrama* for medical reasons. There are two questions to be answered. First, is sickness regarded as necessity? And second, is the permission to consume the unlawful for medical reasons only limited to life and death cases? We can find that not all jurists regarded sickness as a “necessity” case which can allow the consumption of the unlawful medication. In this chapter, it can also be seen how the jurists distinguished between the use of *al-khamr*, alcohol, drugs and other unlawful items. Interestingly, some of the unlawful items possess a higher degree of prohibition than others such that it cannot be consumed even in a necessity case. How did the modern jurists treat the cases of alcohol and drugs? Do they have the same characteristics as *al-khamr*? This discussion is important as it relates to the discussion of the Harm Reduction Programme in Chapter Five.

The third section of this chapter examines some *ḍarūra* cases in business transactions. Some cases which are allowed under the rule of necessity are explored. Some businesses that do not meet the legal requirement of Islamic rules of transaction are permitted, such as the buying and selling of impure items. Jurists generally agreed that items that are temporarily allowed under necessity cannot be traded as the profit is unlawful. Finally, the fourth section of this chapter deals with some *ḍarūra* cases pertaining to marriage, divorce and polygamy. Various cases presented will help gain an understanding of how the jurists employed the rule of *ḍarūra* as an exemption tool for legal cases. It can also be argued that this tool was applied systematically and consistently according to the approved standards.

3.2 *Darūra* application in food and drink cases

As a basic human need and human right, food has been recognised in numerous instruments and declarations including the Universal Declaration of Human Rights adapted by the United Nations²⁶³. The need for food is self evident, and that is why Islam recognises the importance of food for human beings. The state of hunger is unanimously recognised by the jurists as a legal reason for a *ḍarūra* case. With regard to food cases, I will analyse several important discussions made by Muslim jurists. Some major issues raised by jurists concerning food include the questions of determining and predicting harm, assessing harm between two unlawful meals, the question of consuming *al-khamr* and the limits of consuming the unlawful.

Hunger is defined as a state of lack of food, especially for a long period of time that can cause illness or death and is therefore a severe threat to a person's life. Hence, on this basis, the need to consume food even if it is unlawful is permitted when no lawful meal is available. This undoubtedly represents *ḍarūra* as reflected in Qur'ān, Q2.173, Q5.3, Q6.119, Q6.145 and Q16.115 as have been discussed in Chapter One. It can be argued that these

²⁶³ See Amitava Mukherjee, *Hunger, Theory, Perspectives and Reality*, Hants.Burlington: Ashgate, 2004. p. 62. This online book can be found at http://books.google.com/books?id=FzvqV3dosycC&pg=PA62&lpg=PA62&dq=predicting+danger+hunger&source=bl&ots=XmomPIyAX4&sig=7pqJJ8AmUAjW3atoCVIRyyTFdI&hl=en&ei=RJRASucoDImMjAeW1-COCQ&sa=X&oi=book_result&ct=result&resnum=1, see also *Universal Declaration of Human Right*, United Nations *General Assembly Resolution No. 217 a(III)* dated 10th December 1948. Accessed date 12/10/2009

Qur'ānic verses have led to the significant development of the *ḍarūra* principle by the *uṣūliyyūn* and the jurists. Muslim scholars also believed the above Qur'ānic concessions are of utmost importance for the sanctioning of other *ḍarūra* cases. However, before we embark on problems other than those related to food, it is important for us to analyse the jurists' reasoning in food-related cases. Their reasoning and interpretations can be used as the basic guidelines and parameters that may be extended to other cases.

It is important to note that Sunni jurists agreed that several conditions should be met in a *ḍarūra* case. Firstly, that such an act is the only means of removing the grievous harm and there is no other (lawful) alternative. Secondly, the harm is directed to one of five human necessities. Thirdly, acting according to necessity must be proportional and the act should not result in a similar or greater injury. The jurists also required the person in such a situation to have a preponderant opinion that he is in a great danger. In this matter, what the person believes takes precedence over the reality concerning matters and *qāḍī* cannot verify the case independently.

One of the main conditions in *ḍarūra* cases is that the person should have a strong belief that there is no food for survival. In this matter, practically the only person who can justify and verify the situation is the hungry person himself. However, the classical Muslim jurists had already set several parameters to enable him to justify the action. Some jurists, for instance, required that the person should be able to examine his surroundings and look for alternatives and the prospects of a new situation in which the consumption of the unlawful is not permitted. These verifications are required in order to verify that the danger he faces is real. The person needs to identify precisely the situation of hunger which allows mitigation. The jurists also held that such a fear must be based on certainty or a strong probability.

The jurists agreed unanimously that consuming unlawful food is only permitted when one fears one's life is at stake and there is fear of loss of life. The fear must be certain and not merely a suspicion. In other words, the loss of one's life must certainly or most likely be the result of the

current pressing circumstance that is in opposition to a mere suspicion (*waham*). Muslim jurists divided the level of certainty into four levels, namely *yaqīn* (knowledge gained with 100 per cent certainty), *ẓann* (knowledge gained with 75 per cent certainty), *shakk* (knowledge gained with 50 per cent certainty) or *waham* (knowledge gained with only 25 per cent certainty)²⁶⁴. Necessity cases that can justify a person deviating from an original ruling must be based on a genuine reason either of certainty (*yaqīn*) or strong probability (*ẓann*). A weak assumption based on whim and fancy is not accepted. This is the view of the majority of Sunnī scholars, including the Shāfi'īs²⁶⁵ and Zarkashī from the Ḥanafīs. However, as far as food and drink is concerned, the importance of food is self-evident, and no human will survive without food for a certain period of time.

Another important question regards the period of *ḍarūra*. When is a person permitted to consume the unlawful? Do they have to wait for a specific period of time before they can lawfully eat the *muharrama*? For example, the Zāhirī jurists required a person to wait for one whole day, but if he/she fears death before the passing of the one-day waiting period, he/she can eat a limited amount of the unlawful food. The basis of their argument is the saying of the Prophet prohibiting *ṣawm al-wiṣāl* (fasting continuously for one day and a night)²⁶⁶. For the Zāhirīs, this ḥadīth implies that the ability of a person to bear hunger is one whole day. Therefore, in necessity cases, a hungry person must wait for this specific period of time.

²⁶⁴ I have formulated the ratio of certainty by examining the definition of *yaqīn*, *shakk*, *waham* and *ẓann* provided by the jurists. In the book of *al-Mabsūt*, vol. III, p. 63 it is stated that the definition of *shakk* is when the level knowledge and ignorance about something is similar, 'wa ma'nā al-shakk al-yastawiya ṭarf al-'ilm wa ṭarf al-jahl bi shay'. See also *al-Majmū' sharḥ al-Muhaddhab*, vol. I, p. 220; *al-Manthūr fī al-Qawā'id al-Fiqhiyya*, vol. II, p. 255; *al-Jawhara al-Nayyira*, vol. I, p. 79; *al-Durar al-Ḥikam sharḥ Gharar al-aḥkām*, vol. I, p. 150; *al-Qalyūbī wa 'Umaira*, vol. I, p. 40. K. Reinhart has observed that in ritual, *shakk* signifies uncertainty over the effective performance of an act. In epistemology, it is part of an epistemic ranking from *yaqīn* (certainty) to *ghalaba al-ẓann* (likelihood), to *ẓann* (presumption), to *shakk* (uncertainty), to *shubha*. In epistemology, *shakk* refers to a state of uncertainty resulting from the equipollence of beliefs or evidence. See Reinhart, A.K. and Netton, I.R. "Shakk." *Encyclopaedia of Islam, Second Edition*. P. Bearman; Th. Bianquis; C.E. Bosworth; E. van Donzel; and W.P. Heinrichs (eds.). Brill, 2010. Brill Online. EXETER UNIVERSITY. 26 July 2010 <http://www.brillonline.nl/subscriber/entry?entry=islam_COM-1030>

²⁶⁵ Zakariyyā al-Anṣārī, *Asnā al-Maṭālib*, Vol. I, p.570, See also al-Nawawī, *Al-Majmū'*, Vol. IV, p. 44

²⁶⁶ 'Alī bin Aḥmad bin Sa'īd bin Ḥazm, *Al-Muḥallā bi 'l-Athār*, Beirut: Dār al-Fikr, Vol. XI, p. 105

However, the majority of jurists did not support this position as they acknowledged the different capability of humans to bear hunger and thirst. Examining the above case, we can say that although Muslim jurists did not specify a waiting time, they provided general guidelines for a hungry person such as when the hunger is unbearable, when no other person is available to feed them and certainly when no lawful food is available. It can be stipulated that the reason why Sunnī jurists did not put a specific waiting time for a hungry person is because people have different strengths and capabilities, some people can wait for one or two days without foods and some can wait less than 24 hours without food. However, a person's subjective feelings cannot transform a non-necessity case to a necessity case. For instance, an obese person may find it is difficult to stay hungry for more than 12 hours, whereas ordinary thinner person might be able to.

With the advent of modern technology and scientific research, can Muslims rely on medical reports or scientific research to determine the period in which people can survive without food? In this case, jurists need up-to-date information about the actual nature of human survival without food. Missing a few meals can cause a host of undesirable complications,²⁶⁷ although a human will not starve while going without food for several days or even week. Some research indicates healthy individuals should be able to survive without food for forty days. According to this data, should a Muslim wait to consume an unlawful meal until he is starving or is it valid when there is a sign of weakness, such as irritability, confusion and lethargy? When is a valid time for one to consume an unlawful meal?

3.2.1 The case of undernourishment

The discussion gets more complicated when the case under review involves the question of nourishing foods, such as when the unlawful is needed not for saving life but for nourishment. Even though “nourishment” was not acknowledged explicitly by the jurists as a necessity case which permits the consumption of the unlawful, this issue is actually a *ḍarūra* case as well. This is because undernourishment is considered a real danger to the body.

²⁶⁷ See <http://www.survivaltopics.com/survival/how-long-can-you-live-without-food/> see also <http://www.professorshouse.com/food-beverage/>

Some jurists acknowledged ‘the state of being unable to walk or move properly’ as a valid sign to permit one to consume *mayta*. Al-Shāfi‘ī, for example, permitted the consumption of the unlawful when the situation means a man on his journey cannot reach his destination, or makes a person incapable of riding his transport²⁶⁸. This danger has been defined as something that brings grievous harm and weakens the *muḍtarr*. Hence, it can be said that it is not necessary to wait until a near death situation before consuming the unlawful and that unbearable weakness is sufficient to allow the person to eat the *muḥarrama*. The Ḥanafīs, such as al-Burūsawī, defined *ḍarūra* as a situation when one fears one’s health is in danger. Examining the above cases, we can reach three important conclusions. Firstly, it is not necessary for a man to wait until a specific time before consuming an unlawful meal, as the jurists agreed that a sign of weakness is sufficient. Many ḥadīths²⁶⁹ indicate that the Prophet did not require a person to wait until this point. It is sufficient for a person to have a fear of starvation, and hence consumption of an unlawful meal is essential. Secondly, the capability of the person to bear hunger differs from one to another. Thirdly, under nourishment should also be regarded as a real danger that permits the consumption of the unlawful. Undernourishment, that weakens the human body is a serious health problem and can be life-threatening. This unhealthy state, resulting from consuming not enough food over a period of time leads to a reduction in mental and physical efficiency, a lowered resistance to disease in general and leads to deficiencies in the body. It is a common cause of death in the developing world. Thus, under-nourishment should be taken into consideration in the hunger case.

The jurists highlighted the importance of searching for alternative food before one can consume a *ḥarām* meal²⁷⁰. Some of the jurists made this a precondition that should be met before an unlawful meal can be consumed. However, some jurists contended that the act of searching for a lawful meal is not necessarily essential for a hungry person as an assumption of the

²⁶⁸ al-Shāfi‘ī, *al-Umm*, Vol. II, pp. 276-277

²⁶⁹ Please refer to Chapter One, where the Prophet permitted the consumption of *mayta* for companions who did not have sufficient food.

²⁷⁰ Ibn Qudāma, *al-Mughnī*, 1985, Vol. XIII, pp. 332-333, see also Mūsā bin Aḥmad bin Mūsā bin Sālim Abū al-Najā al-Ḥijāwī al-Maqdasī, *al-Iqnā‘ lī Ṭālib al-Intifā‘*, Riyadh: Dār ‘Ālam al-Kutub, 1999, Vol. IV, p. 309.

unavailability of foods is sufficient in this case. For the first view, that of the Ḥanbalīs, it is an obligation for a person, especially for those who are not travelling (*muqīm*), to seek a lawful meal before they are permitted to consume *mayta*. In this case, the jurists analysed the situation one faces, either in the case where food is normally accessible or not²⁷¹. Meanwhile, other jurists contended that it is not necessary for a person to look for an alternative before he/she is permitted to eat the unlawful²⁷².

3.2.2 The limit of the unlawful to be eaten

Another important issue concerns the quantity of unlawful food or drink that may be consumed under duress and whether taking extra provision is permitted in such a case. The limit of consuming unlawful food is clearly perceived from the legal maxim ‘*ḍarūra tuqaddar biqadariha*’ meaning “necessity is measured in accordance with its true proportion”. However, the jurists differed in determining the volume of food that can be consumed. The Muslim jurists divided the circumstance into two categories; the case of *makhmaṣa* (continuous state of hunger) and *nādir* (unusual) case. In the first case of *makhmaṣa*, the Muslim scholars had no doubt that it is permissible to eat or drink until one is full²⁷³. This case resembles a famine, where there is no hope for food or water to maintain lives for a long period of time or where one is far from any residential area. The majority agreed that the unlawful can be eaten without limit during this period. However, the scholars disputed over the rare case (*nādir*) when there is a possibility of a *ḥalāl* meal in a near future. They disputed whether eating as much as possible is permitted or whether there should be limits. It is reported that Imām Mālik permitted the *muḍtarr* (person under duress)²⁷⁴ to eat as much as he likes and he may even take provision from it. However, he ruled that when he found something lawful, he has to throw away the unlawful meal²⁷⁵. Other Mālikī jurists reaffirmed this position by arguing that the

²⁷¹ *ibid.*

²⁷² However, in the case of *wuḍūʿ*, majority of jurists required a Muslim traveler to search for clean water before applying *tayammum*.

²⁷³ Ibn al-ʿArabī, *Aḥkām al-Qurʿān*, Vol. I, p. 55

²⁷⁴ Ibn al-ʿArabī, *Aḥkām al-Qurʿān*, Vol. I, p. 55. See also Ibn Ḥazm *al-Muḥalla*, Vol. VI, p. 105. See also al-Nawawī, *al-Majmūʿ*, Vol. IX, p. 42. Ibn Rushd, *The Distinguished Jurist's Primer- Bidayat al-Mujtahid*, Vol. I, p. 577.

²⁷⁵ Mālik bin Anas, *Al-Muwatṭāʿ*, Ya'qub Johnson and 'A'isha 'Abdarahman Bewley (Trans.), Norwich : Diwan Press, 1982, p. 227

ḍarūra situation begins with the non-availability of a *ḥalāl* meal and lasts until one can find a *ḥalāl* one. This period permits the person to eat the unlawful without limit regardless of whether there is a promise or hope for a lawful meal in a near future. In other words, as long as the lawful meal is not visibly available, the person is permitted to consume as much of the unlawful meal as is necessary. The Mālikīs further argued that whatever it is permissible to eat in a limited fashion to sustain life (*mā yasuddu al-ramq*) can also be eaten until one is full. The basis of their argument is a ḥadīth narrated by Jābir bin Samrah, where the Prophet permitted an ‘Arabī (a Bedouin) to eat camel meat which did not belong to him. The Prophet in this case did not limit the consumption²⁷⁶. The Mālikīs used this ḥadīth as the basis for their argument permitting the consumption of an unlawful meal without limits, even in a *nādir* case.

However, the second view, upheld by the Shāfi‘īs²⁷⁷, Ḥanbalīs²⁷⁸, Abū Ḥanīfa and the jurists in his school²⁷⁹, some Mālikīs like Ibn Mājjishun²⁸⁰ agreed that a person can only eat in a limited fashion (*mā yasuddu al-ramq*) in such a rare (*nādir*) situation. Al-Shāfi‘ī,²⁸¹ for instance, preferred a Muslim to consume the *muḥarrama* bit by bit, meaning he preferably eats only what can sustain his life. However, if the circumstances continue, he can eat until full or make extra provisions. However, according to al-Shāfi‘ī, the *muḥarrama* must be thrown away once he finds the lawful. This is because the *ḍarūra* situation only permits Muslims to eat within limits (*al-ḍarūra tuqaddar biqadriha*). In such cases, the person is not allowed to eat more than is enough to sustain life. This is the most accepted view of the jurists. It may be speculated that this strict view, adapted by the majority of jurists, stems from a fear of the abuse that might arise among those who have no genuine reason to consume an unlawful meal. Furthermore, it may be reasoned that some people might be tempted to consume more of an

²⁷⁶ See Ibn Qudāma, *al-Mughnī*, Vol. XIII, p. 331. This ḥadīth is also mentioned in Chapter Two

²⁷⁷ See al-Nawawī, *al-Majmū‘*, Vol. IX, p. 44

²⁷⁸ See Ibn Qudāma, *al-Mughnī*, Vol. XIII, 330

²⁷⁹ See al-Ḥamāwī, *Ghamz ‘Uyūn al-Baṣā’ir*, Vol. I, p. 277, see also al-Jaṣṣāṣ, *Aḥkām al-Qur’ān*, Vol. I, p. 179

²⁸⁰ Ibn al-Arabī, *Aḥkām al-Qur’ān*, Vol. I, p. 55. See also Ibn Ḥazm, *al-Muḥallā*, Vol. VI, p. 105. Al-Muznī and Ibn Ḥabīb are also reported supporting this view.

²⁸¹ See al-Shāfi‘ī, *al-Umm*, Vol. II, pp. 276-277

unlawful meal they actually need. In this case, the consumption ceases to protect the necessity but rather to satisfy his greed. It is also important to note that some jurists²⁸² also forbade a Muslim from selling an unlawful meal, as the permission is limited only for consumption but not for making profit.

Although the majority of jurists contended that it is a requirement that a hungry man should eat in a limited fashion, some jurists gave a more flexible rule. They distinguished the situations precisely according to the intensity of the cases. Aḥmad bin Ḥanbal, for instance, argued that if one fears self-destruction, either due to starvation or for other reasons, or he fears becoming weak and unable to walk or move, he is permitted to consume *mayta* or any other prohibited meal without limit²⁸³. Imām al-Ḥaramain al-Juwaynī also gave permission for a person to eat *mayta* until he feels no more hunger, especially when he is far from a residential area. Similarly, this is the view of al-Ghazālī, who states if a person fears no food will be available at some future time he can eat until full. Some Shāfiī scholars also had this opinion²⁸⁴. It can be concluded that this view gives liberty to the *muḍtarr* to verify his own situation depending on his ability to bear hunger. A person who can stand hunger for more than one day may not have the same rule as a person who can stand hunger for two days. Each case has to be decided individually. However, it can be assumed that although the subjective feeling is acknowledged, only a genuine hunger is considered. In other words, the subjective feelings cannot transform a non-compelling case to a compelling case. The case of food craving, for instance, which does not lead to severe bodily weakness, cannot be regarded as a necessity case.

3.2.3 Between two unlawful meals

²⁸² See al-Shāfiī, *al-Umm*, Vol. II, pp. 276-277. The prohibition of selling what is only permitted under necessity can also be found in the case of dog selling. The majority of jurists contended that training and keeping dogs for hunting is permitted because of necessity, but dogs can not be traded. Such a sale is considered void as the price of dog is prohibited.

²⁸³ See Ibn Qudāma, *al-Mughnī*, Vol. XIII, p. 330

²⁸⁴ See al-Nawawī, *al-Majmūʿ*, Vol. IX, p. 44

The jurists have set parameters in a case where more than one unlawful meal is available during the period of necessity. In this case, the applied rule is that a less harmful meal should be chosen²⁸⁵. The harmful element of the food is assessed from various perspectives, including the degree of filthiness, the degree of worldly punishment, social perception and social liabilities. It can be argued that the case is not so complicated if the choices are of different levels. For instance, in the case of choosing donkey meat and dog meat, there is no question that donkey meat should be chosen by a starving man. Likewise, in the case of choosing between donkey meat and human flesh, the donkey should be chosen.

However, the case is complicated when the alternative meals constitute the same level of harm. For example, a starving man in his *iḥrām* state (*muḥrim*) may have a choice between *mayta* or slaughtered meat²⁸⁶. Both meals are prohibited to him. A slaughtered animal is unlawful for a person in his *iḥrām* state, as is the *mayta*. The majority of jurists²⁸⁷ held that for a hungry *ḥājj*, he has to eat *mayta* rather than the ordinary *ḥalāl* slaughtered meat. The reason for choosing *mayta* according to the Ḥanafīs²⁸⁸, Mālik and the Shāfi'īs is that eating hunted animals during *ḥajj* is punishable by a *fiḍya* compensation. However, there is no compensation for consuming *mayta* for a *ḥājj*. Hence, the punishment is taken into consideration in determining the level of harm of the act.

Although the Ḥanbalīs held the same view that the *mayta* should be chosen over a slaughtered animal, they proposed a different reasoning for their position. They argued that the permission to eat *mayta* during extreme situations is granted by textual evidence (the general Qur'anic concessions of consuming *mayta*), while the permission to go hunting during *ḥajj* (due to starvation) is granted through *ijtihād*,²⁸⁹ which ranks lower than the Qur'ān. Hence, eating *mayta* should be prioritised. What we can see is that a different argument was put forward by both groups although the solution is similar. The first group gave a preference to an act which does not entail a

²⁸⁵ ḤAzām, *Qawā'id Fiqhiyya*, p. 202. See more discussion at the previous chapter.

²⁸⁶ Meat that was gained from hunting during the state of *iḥrām*

²⁸⁷ See Ibn Qudāma, *al-Mughnī*, Vol. XIII, p. 338

²⁸⁸ Ibid.

²⁸⁹ Ibid.

legal punishment, while the second group gave the preference over an act that gains permissibility from a stronger level of evidence.

However, in this case, some Shāfi'īs held that a starving *hājj* has to choose the slaughtered meal although he has to pay the *fidya* (compensation). They argued in this case that a *ḥalāl* meal (the slaughtered meat) is preferable to a *mayta* because the latter is filthy²⁹⁰. This view gave a preference to a choice that is more religiously clean.

Another case discussed was between *mayta* and *ḥalāl* meals belonging to other person. The majority of jurists agreed that taking the *mayta* is preferable. According to the Ḥanbalīs, if there is a choice between *mayta* and a meal belonging to an unknown owner, the person has to choose the *mayta*²⁹¹. This was also the view of Mālik. The jurists, and particularly the Ḥanbalīs, argued that the permissibility of eating *mayta* is granted through textual evidence while the permissibility to eat another person's meal for necessity is only granted through *ijtihād*. In a similar case found in *Al-Muwatṭa'*, Mālik responded to the issue of whether a man who is forced by necessity to eat carrion when at the same time he also found the fruit, crops or sheep of other people. Mālik said²⁹²;

If he thinks that the owner of the fruit, crops or sheep will believe his necessity so that he will not be deemed a thief and have his hand cut off, then I think he should eat from whatever he finds that which will remove his hunger but he should not carry any of it away. I prefer he does that than he eat carrion. If he fears that he will not be believed, and will be deemed a thief for what he has taken, then I think that it is better for him to eat the carrion, and he has leeway to eat carrion in this respect. Even so, I fear that someone who is not forced by necessity to eat carrion might exceed the limits out of a desire to consume other people's property, crops or fruit

The second reason for choosing *mayta* over a *ḥalāl* meal belonging to an unknown person is that the former act relates to the right of Allāh (*ḥuqūq Allāh*) whilst the latter relates to the rights of other Muslims. Many agreed that Allāh's rights are generally based on facilitating ease for Muslim, but

²⁹⁰ However, if there is no choice except hunting, the game does not have to be slaughtered as it is already unlawful because it was killed during the state of *iḥrām*. This is the view of Shāfi'īs. Meanwhile the Ḥanbalīs said that the game should be slaughtered. See *al-Mughnī*, Vol. XIII, p. 337

²⁹¹ Ibid.

²⁹² Mālik, *al-Muwatṭa'*, p. 27

human's rights are relatively stricter. The other reason to choose *mayta* is the fear of *ḥadd* punishment because of stealing another person's meal.

The second view, held by the Shāfi'is, is that the *muḍtarr* must choose *ḥalāl* meal which belongs to an unknown person, because *ḥalāl* meal is available²⁹³. It can be speculated that this view gave preference to consuming a *ḥalāl* meal even if the act leads to a punishment, as they considered eating *mayta* to be worse than stealing.

Examining these two cases, we arrive at a conclusion that the majority of jurists preferred the eating of *mayta* even if a *ḥalāl* meal is available. The legality of the lawful meal in both cases is impaired because of the punishment associated with the meal. In this case, the lawful is considered unfit to be consumed. It can be concluded that the majority of jurists had taken into consideration not only the moral consequence of the act, but also the legal punishment aspect as a parameter in determining the harmfulness of the act.

The majority of jurists also held that a *muḍtarr* is permitted to take, by force, a meal belonging to others if the owner refuses to sell it. The Ḥanbalīs argued that the *muḍtarr* can seize the meal, but that he has to pay the price²⁹⁴. However, the *muḍtarr* is forbidden to do so if the owner is also in the same state of necessity. The reason for the permission to seize another's meal is the responsibility of others to feed the hungry. However, the owner is allowed to sell the meal but not at a premium price²⁹⁵. The Shāfi'is also held that eating a meal which belongs to another is permissible in necessity cases, even if the owner does not give his permission. The Shāfi'is, like the Ḥanbalīs, also ruled that the *muḍtarr* is still liable to pay the price²⁹⁶. The jurists also ruled that it is forbidden to kill a person fighting for meal. If the *muḍtarr* is killed in the course of getting his food, the killer will have to face *qiṣāṣ* (law of equality) and the murderer will be

²⁹³ See al-Nawawī, *al-Majmū'*, Vol. IX, p. 44

²⁹⁴ See Ibn Qudāma, *al-Mughnī*, Vol. XIII, p. 339

²⁹⁵ See al-Nawawī, *al-Majmū'*, Vol. IX, p. 44

²⁹⁶ Ibid.

considered among those who rebel (*bāghī*). Ibn Ḥazm has stressed the obligation of the public to feed the hungry²⁹⁷:

*It is not lawful for a Muslim to eat these unlawful things even in a helpless condition when his Muslim or Dhimmī neighbours or members of society have more lawful food and drink than they require, since it is obligatory (farḍ) for such people to feed the hungry*²⁹⁸

Ibn Ḥazm's consistency in applying the notion of altruistic behaviour in this case is to be expected as he also held that the policy of brotherhood between Muslims becomes the basis for recognising threats directed at strangers²⁹⁹. He further argued that a Muslim is even allowed to perform a prohibited act in order to save another's life, a position which not all jurists agree with, especially the Ḥanafis³⁰⁰. In this matter, I support the position of Ibn Ḥazm that the society bears the responsibility to feed the hungry. The hungry is not allowed to steal, as the situation of necessity does not lift the liability. In the case of stealing to alleviate hunger, I choose the opinion of Mālik who forbade stealing the meal of others. If it occurs, the thief will be punished by the *ḥadd* punishment. Most importantly, if the right to seize other's property during *darūra* is given without proper control, it can cause chaos to the society. The person himself should go to the authority declaring his state of emergency and let the authority decide for him. Stealing can be regarded as the last alternative if other resorts have failed. It is clear that Mālik did not simply give permission to steal, even in necessity cases, as he realised the consequences of the rule. The public may abuse the permission to steal without properly verifying the intensity of the case. The permission to steal given by some jurists above can be interpreted as linked to whether people go unnoticed in the act of stealing or whether people already recognise his dire need. It is important to note that stealing another's property is not something that can be generalised to all situations.

²⁹⁷ Abdul Rahman I. Doi, *Sharī'ah-The Islamic Law*, London: Ta-ha Publishers, 1984, p.

218

²⁹⁸ Islam lays great stress on the relief of poverty by the rich and it is a duty of the wealthy man to take part in the economic uplift of the poor. The system of *zakāh* was introduced during the Prophet time and the Prophet has made no distinction between Muslims and non-Muslims and he helped many Jews in Medina. See also p. 392

²⁹⁹ His position in the case of coercion can be found in Chapter Two. See also Khalad Abou el Fadl, "The Common and Islamic Law of Duress" in *Arab Law Quarterly*, Vol. VI, No. 2, p. 152

³⁰⁰ The discussion of compulsion and treat directed to third party has been discussed in the previous chapter under the subtopic of compulsion and duress.

A further question to be discussed is whether a person in need is also obliged to feed another person in need. The Ḥanbalīs ruled that if a *muḍtarr* only has a limited stock of food to feed himself and his family, for example, during a journey or during famine, he is not obliged to feed another *muḍtarr* as he is also in the same state of emergency. This means that the other *muḍtarr* is not allowed to take another person's meal (who is in the same situation as him) as this will bring harm to the owner³⁰¹. The issue of eating one's own flesh or other human flesh had also been debated by the jurists. The Ḥanbalīs ruled that it is not permitted for him to cut off and eat part of his organ, as it leads to harm and will cause his death. Furthermore, there is no certainty that he will survive by eating his own flesh³⁰². The Ḥanbalī³⁰³ and Shāfi'ī scholars³⁰⁴ held that it is not permitted to kill another whose blood is protected (their lives are protected by Sharī'a), whether he is a Muslim or a *kāfir* (non-believer). Also, if there is a dead body of a *maṣūm* (a person whose blood is protected), the Ḥanbalī jurists ruled that the flesh cannot be eaten as it is vital to protect his sanctity³⁰⁵. However, the Shāfi'ī scholars³⁰⁶ and some Ḥanafī jurists allowed the consumption of a Muslim dead body because to protect the life of a living person is of greater importance than protecting the sanctity of a dead person. The first group did not approve the consumption of human flesh based on one ḥadīth of the Prophet which states that "Breaking the bones of dead person is much like breaking the bones of a living person". They believed this tradition is a prohibition on a Muslim damaging the body of a dead Muslim. However, the second group disagreed with such an interpretation by arguing that this tradition only prohibits the breaking of human bones and not the consumption of human's flesh³⁰⁷.

Examining the various sub-topics of the aforementioned food case, it is clear that the classical jurists seem consistent in applying the relevant legal

³⁰¹ See Ibn Qudāma, *al-Mughnī*, Vol. XIII, p. 340

³⁰² See Ibn Qudāma, *al-Mughnī*, Vol. XIII, p. 338

³⁰³ See Ibn Qudāma, *al-Mughnī*, Vol. XIII, p. 339

³⁰⁴ See al-Nawawī, *al-Majmū'c*, Vol. IX, p. 44

³⁰⁵ See Ibn Qudāma, *al-Mughnī*, Vol. XIII, p. 339

³⁰⁶ See al-Nawawī, *al-Majmū'c*, Vol. IX, p. 44

³⁰⁷ See Ibn Qudāma, *al-Mughnī*, Vol. XIII, p. 339

maxims such as *lā ɗarār wa lā ɗirār* and *al-ɗarūra lā tubāh̄ haqq al-ghayr* (necessity does not invalidate the right of others). For example, the *ɗarūra* situation does not permit a person to consume another's meal or tamper with a human's sanctity (by eating the deceased's flesh). However, if a *muɗtarr* has no choice other than another's meal, he is still liable to pay the price. The case under review has a similar rule as the case of coercion, where someone is forced to damage another's property. The person should compensate the third party for his loss. Even though necessity is a justification for committing a sin, it does not justify wasting the property without being responsible for making restitution.

3.2.4 Eating a prohibited meal during an extreme situation. Is it *wājib* or *mubāh̄*?

The jurists discussed whether a Muslim is obliged to eat the unlawful meal or not. Is the consumption considered as *wājib* or *mubāh̄*? There are two points of view³⁰⁸. One opinion is that it is *wājib* to consume *mayta* during such a situation. This is the view of the Ḥanafīs³⁰⁹ and the Shāfi'īs. If the person under duress refuses to eat the alternative food and dies, he is regarded as a sinner. The second opinion that it is only *mubāh̄* (permitted but it is not an obligation to do it). The first view concluded their rule based on the verse of

Q2. 195:

“Spend in God's cause; do not contribute to your destruction with your own hands, but do good, for God loves those who do good”

Another verse is Q4. 29 :

“You who believe, do not wrongfully consume each other's wealth but trade by mutual consent. Do not kill each other, for God is merciful to you”

On the basis of these two verses, the jurists argued that if the person in such a situation dies as a result of his refusal to eat *mayta*, he is considered a sinner, hence breaking the rule in *ɗarūra* is considered an obligation. Meanwhile the second group³¹⁰ brought forward two pieces of evidence to

³⁰⁸ See al-Nawawī, *al-Majmū'c*, Vol. IX, p. 43

³⁰⁹ See al-Jaṣṣāṣ, *Aḥkām Al-Qur'ān*, Vol. I, p. 79

³¹⁰ al-Nawawī, *al-Majmū'c*, Vol. IX, p. 43

support their view. First, in a report of a Prophet's companion, he was captured by the Romans (Byzantine) and he was served *al-khamr* and pork. The companion did not eat or drink the meal for three days, refusing to drink the wine and the swine. He was then released and he said "Allāh has permitted me to eat, but I do not want to sacrifice my religion". Should the act of consuming the unlawful be an obligation, the companion should have eaten the meal during his captivity. Another argument put forward is that since eating *mayta* is a kind of *rukḥṣa*, it cannot be made to be *wājib*. It is not an obligation to exercise this facility as it is a matter of personal choice.

3.2.5 Can we consume alcohol during *darūra* i.e. to quench thirst?

This is a vital question that is also related to the Harm Reduction Programme. It is widely known that the consumption of the unlawful like *mayta* and blood is permitted to save one's life, either from threat, hunger or choking. However, jurists disputed in the case of the consumption of *al-khamr* during necessity. Many jurists³¹¹ only permitted the consumption of *al-khamr* in the case of duress (*ikrāh*) and choking but not to quench thirst. Only the Ḥanafis permitted the consumption of wine to release pangs of hunger.

The Mālikīs and Shāfi'īs did not allow *al-khamr* to be consumed as an alternative to food during necessity³¹². Mālik built his argument on several pieces of evidence. Firstly, God has made a total prohibition of *al-khamr*, while the prohibition of *mayta* is made along with the excuse of permitting it during *darūra*³¹³. *Al-khamr* was not explicitly mentioned along with pork, unslaughtered meat and blood in the Qur'ān. Secondly, Mālik also argued that *al-khamr* cannot end hunger and thirst but only adds to one's thirst³¹⁴. Hence, *al-khamr* does not provide a solution for those who are hungry.

³¹¹ al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol. IV, p. 1427, see also al-Kasānī, *Badāi' al-Ṣanā'ī*, Vol. V, p. 113, Ibn Qudāma, *al-Mughnī*, Vol. IX, p. 138. The permission to drink *al-khamr* or a person under duress based on a ḥadīth saying that there are excuses for person who is in error (*khaṭā*), forgetfulness or under duress. And the basis for the permission to drink *al-khamr* to remove one's choking is the verse of *famaniḍturra ghayr bāghīn*.

³¹² Ibn al-ʿArabī, *Aḥkām al-Qur'ān*, Vol. I, p. 84

³¹³ Ibn al-ʿArabī, *Aḥkām al-Qur'ān*, Vol. I, p. 56

³¹⁴ But Abū Bakr al-Abharī says if the *muḍtarr* sure that *al-khamr* can quench his thirstiness he can drink it.

However, some Mālikīs permitted *al-khamr* to help someone who is choking on food. Choking on food is different from starvation and thirst. They ruled that in the case of choking, wine can relieve the choking. However, in order to avoid the *ḥadd* penalty, the choking person has to put forward evidence indicating that he was truly choking. Al-Shāfi'ī also reaffirmed Mālik's position by insisting that drinking alcohol can lead to insanity and this causes harm to Muslims rather than benefit. For him, the only unlawful things that can be consumed during *ḍarūra* are *mayta*, pork, blood and non-alcoholic drinks³¹⁵.

The Ḥanafīs and Zāhirī jurists³¹⁶ disagreed with the above opinion. The Ḥanafī jurists' arguments are; firstly, they rejected Mālik's argument that *al-khamr* cannot remove thirst. They argued that *al-khamr* can remove thirst at the first stage of drinking, before one gets drunk. A *muḍtarr* will not become intoxicated because he is allowed to drink wine only in a limited fashion. They further elucidated that that *al khamr* has two elements, *al-ruṭūba* (moistness) and *al-ḥarāra* (heat). The first element of moistness comes about after a person drinks a little *al-khamr*, and then the second element of heat comes after drinking a large amount of wine. The Ḥanafī jurists also opposed the view of the Shāfi'īs who say that *al-khamr* can only make one loses his sanity (*yudhhib al-'aql*). The Ḥanafīs defended their position by arguing that a person in *ḍarūra* who consumed *al-khamr* cannot lose his sanity because he is only allowed to drink in a limited fashion. They also rejected the opinion of Mālik who insisted that the permission of *al-khamr* cannot be gained from the permission of eating *mayta*. The Ḥanafīs strongly argued that the verses should be extended to all kinds of unlawful items, including wine as well³¹⁷ as there is no textual evidence that excludes *al-khamr* in this matter.

Like the Ḥanafīs, Zāhirī jurists also permitted the consumption of alcohol during times of necessity. They even argued that if a person refused to drink alcohol in an extreme situation and this led to his death, he would therefore be a sinner. He would be regarded as a person who committed suicide. The

³¹⁵ See al-Shāfi'ī, *al-Umm*, Vol, II, pp. 276-277

³¹⁶ See Ibn Ḥazm, *al-Muḥallā*, Vol. VI, p. 106

³¹⁷ al-Jaṣṣās, *Aḥkām al-Qur'ān*, Vol. I, p. 182

Ḥanbalī jurists, on the other hand, only permitted the consumption of wine when it was mixed with other things, in other words, when the quantity of other liquids is more than the wine and the mixture is not intoxicating. The consumption is limited to what can sustain life. The Ḥanbalī jurists further added that if a person drinks the mixture that has more alcohol than the other liquids, or drinks until he loses his sanity; he will be punished by the *ḥadd* penalty³¹⁸.

A Mālikī jurist, Ibn al-ʿArabī, made his own conclusion by giving preference to the Ḥanafī view. He contended that the consumption of alcoholic beverages is permitted in any extreme situation, including thirst, under compulsion or when choking on food. He argued that Allāh has prohibited certain food and drink such as *mayta* (unslaughtered animal), *damm* (blood), and *lahm al-khinzīr* (pork) in ordinary daily situations (*awqāt mutlaqa*). However, the general rules are lifted in unusual situations (*ḍarūra*). Ibn al-ʿArabī like other scholars such as Abū Bakr al-Abḥārī also argued that the permission to consume *al-khamr* is included in the permission for *khamr*, although the textual evidence does not mention it explicitly³¹⁹.

3.3 Darūra cases in medication

The usual *ḍarūra* issue in medication is whether the unlawful substances can be used for medication. The unlawful includes *al-khamr*, pork, blood and religiously impure items³²⁰. It is admitted that the issue of using unlawful substances (*muḥarrama*) for medical purposes no longer attracts the attention of current writers and readers of Islamic law. This is due to the fact that modern Muslim jurists seem to have agreed on the permission to use the unlawful for medication due to necessity. However, the analysis of the permission to use unlawful substances for medication needs to be re-

³¹⁸ See also Ibn Taymīyya, *al-Siyāsa al-Sharʿiyya fī Islāh al-Rāʿ wa al-Rāʿiyya*, no place: Maktaba Ibn Taymiyya, p. 145, see Ibn Qayyim al-Jawziyya, *Iʿlām al-Mūqiʿīn*, Vol. IV, p. 293

³¹⁹ Ibn al-ʿArabī, *Aḥkām al-Qurʾān* Vol. I, pp. 56-57

³²⁰ There were great debates among jurists regarding impure items, such as animal's hair, bone etc. See also Ze'ev Maghen, "Impurity in Islam", in *Islamic Law and Society*, Vol. VI, No. 3, 1999, pp. 348-392

emphasised as this issue is closely related to the issue of the methadone programme in the Harm Reduction Programme in Malaysia.

The traditional Muslim jurists discussed at great length the issue of taking medication using unlawful substances. There were two main issues discussed: firstly, is taking medicine a necessity? If the answer is in affirmative, it leads to the second issue of whether the consumption of unlawful substances is permitted to cure an illness which is deemed as a necessity. Some jurists did not regard sickness a necessity, therefore, the unlawful cannot be taken as medication. This is the position of Ibn Taymiyya and al-Ghazālī. Meanwhile, some jurists held that illness and sickness are necessity cases in which the rule of *ḍarūra* can be applied. Although some unlawful medication can be consumed, there is still another issue and that is whether alcohol can be used to treat a patient. Some jurists only permitted substances other than wine to be used as medicine. The second group, however, extended the permission to any unlawful medicine, including alcoholic substances, if there is no other lawful alternative. The third group went even further, permitting the usage of alcohol even in a non-necessity case. They argued that a little amount of liquor consumed for medication and liquor is permissible if the lawful alternative does not work faster than the alcohol.

3.3.1 Having medical treatment in Islam

The issue of having medical treatment was treated under the central question: *hal al-tadāwi aḥsan min tarkuhu* (Is seeking treatment better than its abandonment)? There are two opinions regarding seeking treatment, an issue that was extensively discussed in the middle of the third century AH. Many opinions are based on a ḥadīth reported by al-Bukhārī in *bāb ma anzala Allāh dā' illā anzal lahu shifā'* (Allah would not create a disease without creating its cure³²¹ . Ibn Taymiyya, al-Ghazālī and some Sufis were of the view that it is better for a sick person to live without treatment as it is a sign of a humble acceptance of God's appreciation (*tawakkal*) and a sign

³²¹ Nurdeen Dueraseh & Hanisah Yaacob, "Issues on Medical Treatment in Islam", *The Yale Journal for Humanities in Medicine*. Connecticut: The Yale New Haven Medical Center, 2005. <http://info.med.yale.edu>

of piousness. This view is based on the following ḥadīth³²²: there was a sick woman complaining to the Prophet that she had epilepsy and was asking the Prophet to pray for her health. The Prophet replied to her by saying: “If you prefer to be patient with your illness, you will enter paradise, but if you want me to pray for you, I will pray to God to cure your illness”. Furthermore, the Prophets’ companions were also reported as not seeking for any medical treatment when they were sick³²³. Hence, for this group, having treatment is not obligatory, and hence there is no issue around using alcohol as medication.

However, as Yūsuf al-Qaraḍāwī argued seeking medical treatment is strongly encouraged if one's life is in great danger, such as when one is suffering from a serious disease such as cancer and when there is a hope for cure³²⁴. The rule for seeking medical treatment is a desirable act in any non-serious case. This view is supported in a ḥadīth report in which the Prophet himself tried to ease his headache by applying some henna to his head and he was also reported as saying: “A Muslim has to seek treatment as God has made the illness and the cure”³²⁵. As long as there is hope in the treatment, people have to try whatever means they can to prolong life, as it will increase their productivity and help them become a healthy person, enabling them to fulfil all their religious and worldly observances. To conclude, the general legal rule for seeking medical treatment is permitted and advisable but not a compulsory matter. Resorting to *ḥarām* ingredients for cure and medicinal purposes is only permitted if no other *ḥalal* medicine is available and it is prescribed by a trusted experienced and God-fearing doctor. It is also suggested that Ibn Taymiyya and al-Ghazālī had a positive attitude towards health care, even though they insisted that perseverance is better. They did not regard having treatment to be something undesirable, only insisting that the treatment cannot be made from unlawful substances. If the illness does not have a lawful alternative, a Muslim should remain patient and bear the illness. This is also the view of the majority of classical jurists who did not permit using *ḥarām* ingredients for medical purposes.

³²²Yahyā bin Sharf al-Nawawī, *Riyāḍ al-Ṣāliḥīn*, Mansoura: Dār al-Wafā’, no date, p. 28

³²³ Yūsuf al-Qaraḍāwī, *Fatāwa Mu’āsira*, Mansoura: Dār al-Wafā, 1994, Vol. II, p. 528

³²⁴ Ibid.

³²⁵ This ḥadīth was narrated by Tirmīdhī and Ibn Mājah. See al-Ghazālī, *Ihyā’ Ulūm ‘il-dīn*, Cairo: Dār al-Fajr lī al-Turāth, no date, Vol. IV, p. 378

3.3.2 The consumption of unlawful items for medicinal reasons

The general rule in medication is that a Muslim is prohibited from taking any medicine which contains *muḥarramāt* (unlawful ingredients) such as impure substances, alcohol, pork or non-slaughtered meat³²⁶. However, there are a few exceptions in this matter since the Prophet himself was reported as allowing companions to have treatment using camel's urine and to wearing silk when suffering from scabies. These two pieces of evidence had become the basis for jurists for permitting the unlawful in medication. This is also the means whereby the Prophet's prohibition of taking the unlawful is limited to when there is a lawful alternative and the illness is not severe. In a severe case where there is no lawful alternative, it is permissible to consume the unlawful. For instance, some jurists also permitted the consumption of poisonous vegetations/plantations that have been proven effective and safe to heal a disease³²⁷.

The Shāfi'ī jurists³²⁸ permitted wearing silk for men in extremely hot or cold temperatures as this can be very dangerous (*muhlikīn*) to one's health. They made the analogy from the permission granted by the Prophet to allow some companions to wear silk. This ḥadīth was narrated by Shaykhayn (al-Bukhārī and Muslim), Anās reported that the Prophet permitted 'Abd Al-Raḥmān bin 'Awf and Zubayr bin al-'Awwām to wear silk because they were suffering from scabies³²⁹. Al-Isnāwī further elaborated that this *ḍarūra* circumstance, where the unlawful act is tolerable, is a case of when the person fears danger for his bodily organ or fears unbearable pain. The jurists had also approved the silk garment to be worn to prevent people from getting lice. The jurists provided some leniency where the silk can be worn to cover the unaffected part of the body³³⁰. It can be assumed that the reason

³²⁶ The basis of this undisputed rule is a ḥadīth "and do not seek treatment using the unlawful".

³²⁷ al-Buhūtī, *Sharḥ Muntahā al-Īrādāt*, Vol. I, p. 431

³²⁸ Zakariyyā al-Anṣārī, *Asnā al-Maḥālib*, vol. I, p.275, see also Zakariyyā al-Anṣārī, *Gharar al-Bahiyya fī Sharḥ al-Bahja al-Warda*, no place: Maṭba'a Yamaniyya, Vol. II, p. 48

³²⁹ Ibid.

³³⁰ The jurists permitted the silk to be worn if the silk is not the main material for the garment. For example, some scholars permitted the silk if the silk worn is not more than three fingers or when the silk is used only for the internal garment. The rule is as same as using gold or silver as jewellery for man. When the gold or silver is not excessive in amount, it is permitted.

for not applying the rule of *ḍarūra tuqaddar biqadiriḥā* was because it is hard for the person to cover only the affected area by silk. The jurists permitted the use, as long as the amount is not excessive. It can be further argued that the lenient attitude towards the wearing of silk, silver and gold is due to the fact that these items are not forbidden as strongly as, for example, wine.

The Ḥanbalī jurists also agreed that in a case where sickness is severe or the life of the patient is endangered, and no *ḥalāl* alternative is available, the prohibited items or foods can be consumed to heal the sickness. The basis of their argument is the same ḥadīth of the Prophet when he permitted his companions to wear silk as they were suffering from scabies³³¹. Another ḥadīth also states that the Prophet permitted a companion to use gold to replace his missing nose³³². However, the permission to use the unlawful for medication purposes is only limited to substances other than wine. As discussed previously, al-Shāfi‘ī prohibited it. Mālik also did not approve of wine as a medicine, arguing that the relevant Qur’ānic verses cannot be used to permit *al-khamr* to ease illness. This is because Allāh totally prohibited the consumption of *al-khamr*. The Mālikī jurists also forbade even a small amount of *al-khamr* for medication³³³. This strict view was accepted by the majority except the Ḥanafīs.

The Ḥanafī jurists like other schools, generally agreed that the consumption of unlawful substances for medication is fundamentally forbidden unless in necessity. It is only permitted to consume the unlawful when there is no lawful medicine available. They also held the same view as other jurists in the case of permitting silk for men either due to illness or during war³³⁴. Replacing any missing bodily organ by gold or silver is also permitted because they do not rust easily. The permission to consume *muharramāt* to

³³¹ al-Bājī, *al-Muntaqā Sharḥ al-Muwattā’*, Vol. VII, p. 108, Qāḍī Abū Muhammad stated that wearing silk is permitted because of *ḍarūra*.

³³² al-Raḥībānī, *Maṭālib Awlā*, Vol. II, p. 94. ‘Arfajah bin As‘ad cut his nose during the battle of al-Kilāb, and he took leaves to replace his nose but apparently the leaves decayed and became smelly off and the Prophet ordered him to use gold instead. This ḥadīth was narrated by al-Tirmizī. See also *Sharḥ Muntahā al-Irādāt*, Vol. I, p. 434

³³³ See Abū ‘Abd Allāh Muḥammad bin Muḥammad al-‘Abdarī (Ibn al-Ḥājj), *al-Madkhal lī Ibn al-Ḥājj*, no place: Dār al-Turāth, no date, Vol. IV, p. 132

³³⁴ Kamāl al-Dīn Muḥammad bin ‘Abd al-Wāḥid al-Iskandārī al-Sīwāsī (Ibn Humām), *Fatḥ al-Qadīr*, no place: Dār al-Fikr, Vol. X, p. 9.

cure an illness according to Ḥanafī jurists also includes *al-khamr*³³⁵. They strongly argued that this permission is implicitly given in the verses permitting one to consume *mayta*, swine and blood in the Qur'ān. Although the majority did not extend this permission to *al-khamr*, the Hanafīs contended that the verses also cover the consumption of *al-khamr* due to necessity. However, the consumption of wine during necessity should meet the precondition of *ḍarūra*; the consumption is limited to what can save life and to when there is no other lawful alternative medicine. The Hanafī position in this matter is not unexpected, as the early Ḥanafīs had a different interpretation regarding *al-khamr* when compared to that of the other schools. They argued that the total prohibition of *al-khamr* only applied to intoxicating drinks produced from grapes namely wine. Other intoxicant beverages produced from barley, wheat or others are only prohibited if they lead to intoxication.

It is also important to review the companions' position in the matters concerning using *al-khamr* as medication. The summary of the reports is as below³³⁶;

Abū Bakr said that he heard from Shu'bah from Simāk from 'Alqamah bin Wā'il from his father a ḥadīth about a man from Ju'fay. This man said that Suwayd bin Ṭāriq asked the Prophet about *al-khamr* and the Prophet prohibited him from (consuming) it, and this man further explained to the Prophet that *al-khamr* sometimes can be used for medication, then the Prophet replied; "It (*al-khamr*) is indeed illness and not a cure". Abū Bakr also said he heard from Jarīr from Manṣūr from Abī Wā'il that there was a man suffering from *ṣufr*³³⁷ and an intoxicant (*al-sukar*) was prepared to cure him. 'Abd Allāh was asked about this matter. 'Abd Allāh was reported as saying that "Allāh will not make a cure from something that is prohibited to you"³³⁸. There was also a report about Nāfi' who was asked to cure a sick woman using *al-khamr*, but he refused to do so. He then asked Ibn 'Umār about that, Ibn Umār replied to him that if he did that, he would be punished. A report from Abū Bakr stated that he heard from 'Abd al-Raḥīm from 'Ubaydah from Ibrāhim saying that he hated to see people using *al-khamr* as a cure. A report from Abū Bakr said that he heard from Mu'āwiyah bin Hishām from Ibn Abī Zi'b from Ḍuhrī that A'ishah that anyone who took *al-*

³³⁵ al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, Vol. I, p. 182, see also al-Sarakhsī, *al-Mabṣūṭ*, Vol. XXIV, p. 29

³³⁶ Ibn Abī Shayba, *Muṣannaf Ibn Abī Shayba*, Vol. V, p. 432

³³⁷ It means a thick yellow over taste that is prepared in the liver stone stored in the gall bladder, it contributed in the digestion of fatty food, or known as bladder stone

³³⁸ This ḥadīth was reported from Ibn Mas'ūd in *al-Mabṣūṭ*, Vol. XXIV, pp. 10-11

khamr as medication, would not be cured by Allāh. A report from Abū Bakr stated that he heard from Ibn Maḥdī from Al Ḥakam bin Aṭīyya, who said that he heard from Al-Ḥasan who was asked about a person who wants to heal his son with a drop of *al-khamr* and he replied in a negative. Drinking *al khamr* whether in small quantity or plenty is subjected to *hadd* penalty³³⁹.

Examining these reports from the companions and the aforementioned *ḥadīth*, it seems that the drinking and consuming of alcohol to cure an illness was not approved. However, the aforementioned reports did not state clearly the situation where the lawful was not available. These reports have become the basis for the majority of Sunni jurists who strongly opposed the consumption of wine for medication.

Although the Ḥanafī jurists recognised all the aforementioned reports concerning the prohibition of *al-khamr* for medication, they still insisted that *al-khamr* can be used as medicine. They interpreted the above prohibitions as only applying to when there is no lawful medicine available or when the lawful cannot heal faster than *al-khamr*³⁴⁰. It can be said that the Ḥanafī jurists regarded *al-khamr* as having the same level of prohibition as the other unlawful substances. That means the unlawful substances are prohibited during ordinary situations but can be consumed under necessity.

Ibn Taymīyya is among the relentless opponents of the idea of permitting *al-khamr* for medication. He not only ruled that *al-khamr* should be banned in cases of necessity, he also said that taking any medicine is not a case of necessity. He believed that *Al-khamr* is only allowed to be consumed by a person who is choking on food and when there is no lawful alternative. Although the ḥadīth of the Prophet permitting one to drink camel's urine for medical reasons³⁴¹, this permission cannot be extended to wine. He further elaborated several arguments in defence of his position. Firstly, he made an insightful comparison between the human need for food and medicine. For him, medicine is not as important as food to a human being. Many sick

³³⁹ Ibn Abī Shayba, *Muṣannaf Ibn Abī Shayba*, Vol. VI, p. 502

³⁴⁰ Sarakhsī, *al-Mabṣūṭ*, Vol. XXIV, pp. 10-11. They argued that the prohibition above is similar like the prohibition of visiting graves. Although the Prophet prohibited visiting grave, he once permitted a companion, Muḥammad to visit his mother's grave, although his mother was a non-Muslim when she was alive

³⁴¹ Ibn Taymīyya, *al-Fatāwā al-Kubrā*, Vol. I, pp. 387-391

people can heal themselves even without taking any medication due to the fact that the human being is endowed by God with the natural ability to heal. Clearly, the human body cannot produce their own food, which is why food is a necessity to human beings but not medicine. He further added that eating during *ḍarūra* is *wājib* (compulsory). Taking medication is not an obligation as supported by the *ḥadīth* where a black woman went to meet the Prophet telling about her sickness and asked to Prophet to pray for her health. Instead the Prophet gave her choice: she could remain patient and would be rewarded in paradise or the Prophet would pray for her health. This woman then chose patience rather than the Prophet's prayers. According to Ibn Taimīya, if taking medicine is meant to be *wājib*, why did the Prophet give her choices? There are also other cases when the people were tested with sickness, the Prophet asked them to be patient and he did not stress the importance of curing the illness. The Prophet also prayed for the members of Qubā' to be tested by fever, and furthermore, sickness is a test from God to His messengers like the Prophet Ayūb. Ibn Taymīyya also argued that he does not think that any of the *salaf* (earlier scholars) made treatment a compulsory issue. Furthermore, he added, another distinctive difference between food and medicine concerns the certainty of the result. Unlike food, medicines do not always have a beneficial effect on the patient. He further described the result of medicine and medical treatment as something that is uncertain (*lā yustayqan*). Meanwhile, the effectiveness of food is always certain to alleviate hunger and to continue life. The need for food is self-evident, unlike medicine.

He further argued that an illness can have many different cures and alternatives that are not limited to the unlawful. If the medicine is unlawful, the patient should resort to any lawful treatment. For him, it is almost impossible not to find a *ḥalāl* alternative. Furthermore, as two *ḥadīths* state, Allah has created for every ill its own medicine, except death and also He has not made for His creation a medicine which contains a *ḥarām* ingredient (*inna Allāh lam yaj'al shifā' ummatī fīmā ḥarrama'alaiha*)³⁴². Hence, resorting to *muḥarrama* medication is not a valid option.

³⁴² Ibid.

What can be deduced here is that Ibn Taymiyya and other classical jurists firmly contended that the prohibition of *al-khamr* is not similar to other *muḥarrama*. Their reluctance to acknowledge *al-khamr* was due to several factors. Firstly, there is no prohibition in Islam that is as strict as *al-khamr*, as this drink is totally forbidden. All activities related to this drink are also cursed by the Prophet. The other unlawful substances/items are less harmful than *al-khamr*. For instance, silk is made forbidden for men not women. *Mayta* is only unlawful to be consumed but the skin of *mayta* is lawful to be used after it has been tanned. Furthermore, there is no punishment for those eating *mayta* or wearing silk. They also defended this position by citing a ḥadīth of the Prophet, which states that *al-khamr* is not a medicine but it is an illness (*innahā dā' wa laisa bi dawā'*). They interpreted this ḥadīth as inferring that alcohol cannot be made medicine in any situation, whether there is a lawful alternative or not. This is the clear textual evidence prohibiting the consumption of alcohol for medical purposes³⁴³.

However, as discussed the Ḥanafī jurists had a totally different view. Unlike Ibn Taymiyya who advocated that medicine does not always provide a promising result, the Hanafī jurists argued otherwise. In the book of *al-Fatāwā al-Hindīya*³⁴⁴, the Hanafī jurists carefully categorised medicines into three categories depending on the effects; *maqtū'* (certainly effective), *maznūn* (medicine with a possible effective result but still uncertain) and *mawhūm* (a medicine with a doubtful result). According to the Ḥanafī jurists, having a *maqtū'* treatment is like eating bread which has the promised effect of removing hunger or drinking water which obviously can remove thirst. Meanwhile, *maznūn* medicines are like undergoing treatment like cupping, phlebotomy and any other medical treatment. These treatments provide a possible chance of healing although there is also a risk of them being unsuccessful. Meanwhile the last resort of treatment is of *mawhūm* type, for instance using magic or a spell where the result is always uncertain and ambiguous. The Ḥanafīs believed that abandoning treatment with a proven effective result (*maqtū'*) is *ḥarām* especially when a person's

³⁴³ However, Ibn Taymiyya like other jurists had a more flexible attitude towards the consumption of *khamr* for other purpose than drinking. For example, it is permissible to throw *khamr* onto fire to stop it.

³⁴⁴ See *al-Fatāwā al-Hindiyya*, Beirut: Dār al-Fikr, 1991, Vol. V, p. 355

life is at stake. However, the *mawhūm* treatment is not recommended. In terms of the *maznūn* type of treatment, the Hanafis saw this as a personal choice. For the Ḥanafis, taking treatment that is *maznūn* does not conflict with *tawakkal*. They further argued that sometimes it is better to take the *maznūn* treatment when it has been proved effective by others. Ibn Taymīyya himself admitted that some medicine and treatment has a proven result, like using silk to prevent scabies. This means that not all treatment and medicine have ambiguous results. On this basis, some Ḥanafī jurists permitted the use *al-khamr* in medication if it is proven to be more effective (*yaqīnan*) than the other alternative. Blood or *mayta* are permitted to be consumed if the proven result was approved by an experienced Muslim doctor and if there is no other *ḥalāl* alternative available.

Another important point to consider is the issue of whether the facility to consume *muḥarramāt* should be dispensed only to a pious person. Many jurists held that *ḍarūra* can only be exercised by religiously good persons and therefore not sinners. The issue has been discussed in Chapter One and Chapter Two. This dispensation covers all types of *ḍarūra* and *rukḥṣa* situations including food, *tayammum* and shortening prayers. Al-Shāfi‘ī, in his book *al-Umm*,³⁴⁵ insisted that the permission to consume *muḥarramāt* is dispensed only for good persons and excludes those who are labelled *ghayr bāghin, walā ‘ādin, walā mutajānifin* and *mutajānifin li ithm*. Furthermore, a sinner is allowed to exercise this dispensation only after he has repented. This is also a vital point to ponder in relation to the methadone programme for drug users. The rule of necessity will require the patient in HRP to repent prior to obtaining the methadone supply. The importance of repentance for the patient is that it encourages good behaviour and prevents the drug user from taking illegal drugs. The repentant patient will be able to make a firm resolution not to commit the sin again. Similarly, the rule should apply to the case of distribution of free syringes and condoms to drug users and sex workers. The details of the philosophy of this programme will be elaborated later in Chapter Five.

3.3.3 Analysis and discussion

³⁴⁵ See al-Shāfi‘ī, *al-Umm*, Vol. II, p. 277

To conclude, the jurists are divided into three different groups with regard to the issue of using *muḥarrama* as medication. The first group did not consider illness a *ḍarūra* case, hence, taking medication from *muḥarrama* is prohibited. This is the view of Ibn Taymīyya and some Sufis. The second group, the majority, considered the need for medicine to be equal to that of food, as both are necessary for preserving life. However, the permission to consume the unlawful for medical reasons is limited to substances other than *al-khamr*. The third view, the view of Ḥanafī jurists, permitted the consumption of any unlawful including *al-khamr* for medical purposes if there is no other alternative, and when the patient's life is at stake. Many contemporary scholars were also inclined to share this view. However, receiving medicine containing some unlawful substances is only permissible under the following conditions;

1. The patient's life is endangered if he does not take this medicine
2. No alternative or substitute medication made from entirely *ḥalāl* (lawful) sources is available
3. The medication is prescribed by a Muslim physician who is knowledgeable as well as Allah-fearing.

Therefore, we can conclude that this principle is applied for cases when a Muslim happens to be in a place where he cannot find lawful medication and the condition of the patient is verified by a trusted physician. The jurisdiction pertaining to the usage of *al-khamr* is clear. However, the usage of drugs and other liquor is still under dispute. Many modern jurists agreed that the prohibition of *al-khamr* is not limited to beverages only and extends to drugs, either in solid or liquid forms. Drugs such as *ḥashīsh*, opium and cocaine which are dangerous to the mind, body and spirit are even worse than wine and must be prohibited. If it is not stated by the literal text then it can be interpreted according to the general principle that the Sharī'ah aims to prevent damage to human body.³⁴⁶

In their meeting on 11-12th April 1984, the Fatawa Committee of Malaysia established some important guidelines regarding alcohol:

³⁴⁶ Mahmud Shaltut, "Wine drinking-al-fatāwā" in Vardit Rispler-Chaim, *Islamic Medical Ethics in the Twentieth Century*, Leiden: Brill, 1993. pp. 116-117

1. All liquor contains alcohol but not all alcohol is liquor. Alcohol which is derived from the liquor production processes is *ḥarām* and considered impure, but alcohol which is derived from non-liquor production processes is not impure but *harām* to be drunk as it is poisonous and harmful.
2. Alcohol that is produced from the food production processes is not impure and it can be eaten.
3. Medicine and fragrances which contain alcohol are allowed to be used.

This fatwa clearly distinguishes between intoxicant beverages and alcohol. The prohibition of liquor cannot be extended to all alcoholic substances. The verdict also made it clear that alcohol produced from food production, like yeast and bread, is not impure and therefore unlike wine, can be consumed. Only alcohol derived from liquor production is *ḥarām*. This verdict also means alcohol can be used for medicine and fragrances. However, the status of the impurity of alcohol is still ambiguous.

Dār Al-Iftā' Al-Miṣrīya³⁴⁷ also tackled the issue of *al-khamr* for medication. This committee regarded any intoxicant drinks (*al-nabīdh al-muskir*) as a kind of *al-khamr*, hence it is prohibited. However, they admitted that some unlawful substances can be taken for medical reasons and this includes alcoholic beverages. In Volume 10 of the *fatwā* collection³⁴⁸, the Council made several conditions in relation to taking *al-khamr* as medicine. First, the medicine should be prescribed by a trusted experienced and a God-fearing Muslim doctor and the second condition is that there is no alternative except *al-khamr*. The committee also added that the purpose of taking the unlawful for medication is only due to the necessity to protect life. In this matter, we can see that the committee chose the view of the Ḥanafī jurists and one view from the Shāfi'ī School. They also ruled that the *muḥarrama* can only be taken in a limited fashion (*al-ḍarūra tuqaddar biqadriha*) to the point that sustains life and cures the illness. The permission ceases when lawful treatment is available. With

³⁴⁷ Jumhuriya Miṣr al-'Arabiyya, Wizāra al-Awqāf, *al-Fatāwā al-Islamiyyā min Dār al-Iftā' al-Miṣrīya*, Vol. VII, p. 2516

³⁴⁸ Page 349

regard to narcotic drugs, the council prohibited the consumption of drugs, in particular for recreational purposes. This rule is agreed upon by the consensus of contemporary jurists. The prohibition includes drug production, plantation and trading. The products cannot be traded and no profit can be taken from it. All drug related business is considered *al-kasb al-harām* (forbidden business). However, if drugs need to be taken as medicine, the same rule of *darūra* as stated above should apply.

Similarly, Sheikh Muḥammad al-Mukhtār al-Shanqitī³⁴⁹, director of the Islamic Center of South Plains, stated that alcohol-based medication is prohibited when there is an alternative (alcohol free). However, if the alternative is not available, the alcohol-based medication is permissible. He also stated that seeking medical treatment is necessary. This is also the view of Dr. Yūsuf Al-Qaradawī in his book, *The Lawful and the Prohibited in Islam*³⁵⁰.

What can be concluded from these rulings is that the councils and fatwā committee made a brief analogy between drugs and *al-khamr*. For them, illegal drugs have the same characteristics as *al-khamr*. A small amount of prescribed drugs is allowed in medical cases. However, the modern writers and jurists did not provide a comprehensive discussion of the drug issue - their result is mainly from the rules of wine drinking. Another question which needs to be answered is: Is the production of drugs for medicinal purposes forbidden? In other words, is there a total analogy between *al-khamr* and alcohol-drug issues? This issue can be answered in one of two ways. Firstly, if the jurists agreed that *al-khamr* and drugs share similar qualities and characteristics, a total analogy should apply. That means, the permission to consume them comes about only under *darūra* situations, no profit can be taken, all the conditions should be met and they are also *najāsa*, which can impair someone's state of purity. They cannot be taken in prayer or for other religious purposes.

³⁴⁹ See www.islamonline.net/servlet downloading date 29th March 2007

³⁵⁰ Kuala Lumpur: Islamic Book Trust, 1985, pp.50-51

Secondly, if the jurists argued that drugs and wine do not share the same characteristics, this means that the drug is only forbidden because they can cloud a human's mind or lead to drunkenness. However, the drug itself is not impure, unlike *al-khamr*. This view is similar to the view of the early Ḥanafī jurists. In such a case, drugs and alcohol can be used in a limited quantity, either for individual purposes, medicinal reasons or even cosmetics. They can also be taken into prayer as they are not *najāsa*, unlike *al-khamr*³⁵¹. The discussion of drugs and wine will be further elaborated in Chapter Five.

Another important issue is the consumption of alcohol-based products especially, for domestic usage and whether alcohol products are totally forbidden like *al-khamr*. Many modern jurists gave formal legal opinions that alcohol is pure when it is not produced as an intoxicant³⁵². That means all alcohol-based medicines and products do not bear the same prohibition as wine or other alcoholic beverages. The total prohibition is for beverages that are intoxicating. There is an aspect of cosmetic alcohol which would seem to fundamentally differentiate it from beverages and to place it in a different class where the rulings of both the impurity and non-consumption of alcoholic beverages do not apply. This is the fact that cosmetic beverages are not made for intoxication purposes, nor do they cause it, nor are used for it, nor are they made for consumption, nor conducive to consumption, nor used for consumption. In other words, cosmetic alcohol is essentially a different substance from *al-khamr*. That is why the position of permitting it seems persuasive, some even permitting the consumption of cough syrup containing alcohol for the same reason.

Additional issues include whether we can use a *ḥarām* based medicine if it works faster than a *ḥalāl*-based medicine and whether it is permitted to resort to *ḥarām*-based ingredients. Another question is whether *ḥarām*-based medicine can be used for non- necessity cases. For example, mild illnesses like a headache or daily vitamin supplements seem to require a specific

³⁵¹ Ḥanafī jurists stated that *khamr* can make a Muslim's prayer invalid according to Q5.90. Shāfi'ī, Mālik and Hanbalī also considered it *najs*.

³⁵² This is the view of Muhammad Bakhīt, the Mufti of Egypt and Badr al-Dīn al-Ḥasanī of Damascus

ruling. Having examined the above cases, the jurists did not seem to approve the consumption of alcohol-based medication or *ḥarām*-based medication more generally if there is another lawful alternative. The permissibility is only in a necessity case. However, there is only one view from the Ḥanafīs that permits the consumption of a small amount of *al-khamr* for mild illness³⁵³. The majority of Ḥanafīs also permitted the consumption of *al-khamr* if it is proven to work faster to heal illnesses than the lawful. However, it is important to highlight that there is no view approving the consumption of the unlawful for the betterment of living.

3.4 *Darūra* in transaction issues

The tradition of Muslim *fiqh* has made it clear that all transactions should follow certain rules and conditions to render them valid and conclusive. However, certain exemptions can be made on the basis of necessity, although those cases are not free of legal dispute among the jurists. Generally, the jurists agreed that the commodities that can be traded must be of five qualities: religiously pure, with a known price, when the commodity is known, with a beneficial use, and finally when the item is deliverable. Failure to meet all these conditions will deem the transaction invalid. Jurists did not validate³⁵⁴ the transaction of the following items: intoxicants, non-slaughtered meat, swine and anything related to it, and any un-useful items like garbage, insects and poisonous plants³⁵⁵. Buying and selling unlawful

³⁵³ See *al-Fatāwā al-Hindīya*, Vol. V, p. 355

³⁵⁴ Contracts are divided into valid, which satisfies all of its condition and cornerstone and invalid, which is where one or more of its conditions and cornerstones are violated, and without any consequence. A sale is only *bāṭil* (invalid) if and only if it is *fāsid* (defective). The Ḥanafīs divided contracts into three categories; valid, defective and invalid. The source of disagreement is each party's interpretation of the legal prohibition of certain contracts. In this respects, jurists ask the question whether a contracts' prohibition entails defectiveness (i.e lack of validity and committing a sin), or whether in some cases entail committing of sin while the contracts remain valid. The majority of jurists ruled that the prohibition of any contracts means that it is invalid and what whoever engages in such a contract commits a sin. A valid sale is one that is legal in both fundamental and ancillary components, and the consequences of valid sale is the exchange of ownership of the object of sale and price. Invalid sale is one whose cornerstone and conditions on the object are not satisfied or that is illegal in its fundamental and ancillary characteristics. Its religious status is that the contract is in effect not concluded, even though its outer appearance may resemble a concluded contract, and the exchange of ownership does not result and the owner does not benefit by receiving the object. A defective sale is one that is fundamentally legally sound, but that has a violating forbidden characteristic. The legal status of this contract is that ownership is actualised by receipt with the explicit or implicit permission of the owner. This is the Ḥanafīs view while the rest of the jurists said that ownership may not ensue from defective sales, just as in the case of an invalid sale.

³⁵⁵ al-Qarāfī, *Anwār al-Burūq*, Vol. III, pp. 238-239

substances including liquor and pig are prohibited by the majority. However, the Ḥanafī jurists recognised the trading of *al-khamr* and pig for non-Muslim communities.

The Ḥanbalī jurists ruled that the sale of something may not be legally used such as an insect is not valid, neither is the sale of items whose use and benefits are prohibited, such as wine. They also argued that the sale of temporarily permitted items in *ḍarūra* circumstances such as *mayta* in a time of famine, or wine when one is choking on food, is not concluded nor valid. This means that whatever is permitted to be consumed on the basis of necessity is not permitted to be traded. The jurists also agreed on the point that all non-beneficial items cannot be traded (including worms, poisonous snakes, or poisons plants). However, the Ḥanbalī jurists permitted the selling of poisonous snake or poisons extracted from plants if they can be used in a small quantity for medicinal benefit. Their point of view is closer to the earlier discussion of using drugs as medicine. If such drugs are extracted from plants, they are permitted to be sold in a small quantity. It seems that the Ḥanbalī jurists recognised that there are certain poisonous plants that are useful for their medicinal effect, and therefore, can be traded in a small quantity. They should only be sold in small quantities, as a practical matter, and such purchases are only legal after obtaining doctors' permission. With regard to methadone treatment, its trading would be considered valid according to this school.

According to the Shāfi'ī jurists³⁵⁶, all kinds of trading of impure items such as *mayta*, *al-khamr*, *al-khinzīr*, and any *najas al-ʿain* (any item that is impure itself) like the skin of an animal which is not slaughtered correctly (*jild al-mayta*), or even guide dogs, and any *māy' mutanajjis* (impure liquid) are not concluded. The impure items include impure fat and contaminated water or religiously impure paint³⁵⁷. It is not possible for a small quantity of water to be purified by pouring a large amount of water into it. And even a

³⁵⁶ Zakariyyā al- Anṣārī, *Asnā al-Maṭālib*, Vol. II, p. 9. See also Wahbah Zuḥaylī, *Financial Transactions in Islamic Jurisprudence*, Vol. I, p43-44

³⁵⁷ The basis of their argument is the ḥadīth of the Prophet saying that if a dead mouse caught in the ghee, if the ghee is solid, the mouse and the surrounded area of ghee should be thrown away and the rest can be eaten, but if the ghee is melted, the ghee should be thrown away. The paint that has impure fat is also cannot be traded

transaction of a house painted with polluted paint is considered *fāsid*. But some of the Shāfi'īs scholars permitted the trade of some non-useful items such as trees with the worms, and impure clothes if the clothes can be cleaned. According to the majority of scholars, the *shaḥm al-mayta* (fat from non-slaughtered meat) is something that does not have any benefit, and therefore cannot be traded. On the other hand, the skin can be used and sold.

3.4.1 Trading and using dogs

Like other impure items, pigs and dogs cannot be traded, although a dog can be used for hunting and guarding. The Ḥanafīs permitted the trading of dogs that are useful for humans (such as guard dogs, farming dogs, watch dogs or hunting dogs). Abū Ḥanīfa totally permitted this kind of business. Although the dog used for hunting is permitted on the basis of necessity, several conditions must be met. The dog must be trained and it can follow the master's order; it should not eat or play with the game, or lick the game's blood. The game captured by an untrained dog also cannot be eaten³⁵⁸. The other conditions that should be met when using dogs for hunting purposes include that the dog must be sent by a Muslim or a people of the scripture (*ahl al-kitāb*) and the name of Allāh must be recited prior to sending the dog to catch the game (or in the case of killing game by arrow, the name of God is uttered at the point of firing the arrow)³⁵⁹. Failure to fulfil this condition will render the use and the trade in the dog prohibited.

Although the other jurists agreed with the Ḥanafīs that the use of dog for certain purposes is tolerable, they disputed whether the dog can be traded. The majority argued that trading in dogs is forbidden and this includes useful dogs. A Muslim cannot gain from the ownership of such temporarily allowed objects through a sale, just as he may not from any other *muḥarramā* items such as musical instruments or dung. This is because they are not legally beneficial properties³⁶⁰. Hence, the transactions are not valid in accordance with the details set out below.

³⁵⁸ al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, Vol. II, 443, see also al-Sarakhsī, *al-Mabṣūṭ*, vol. XI, p. 223

³⁵⁹ See al-Sarakhsī, *al-Mabṣūṭ*, vol. XI, p. 239

³⁶⁰ Zuhailī, *Financial Transactions in Islamic Jurisprudence*, Vol. I, p. 73

Although the Mālikīs permitted the use of dogs in hunting³⁶¹, the dog must be well-trained and understand and obey its owner's orders³⁶². However, the Mālikīs had different opinions over the sale of dogs for use in hunting and the protection of sheep, cheetahs and other predatory beasts that can be trained, and have the same rule as hunting dogs³⁶³. The Mālikīs ruled that if a home dog, farming dog, guard dog, and hunting dog is killed accidentally, the price must be paid³⁶⁴. However, if someone steals a dog, his hand will not be amputated, unlike stealing other valuable items. This was because the Prophet prohibited the dog from having a price³⁶⁵. The Shāfi'ī jurists also ruled that dogs can be trained for hunting purposes, but pigs cannot be kept to be trained. They also permitted the training of monkeys, cheetahs, or even elephants, if this was for hunting or guarding purposes³⁶⁶. That means any beasts can be trained and owned if they are proven to be useful, but not pigs as they are not useful for humans in any circumstances.

The game caught by a hunting dog can also be consumed under the condition that the dog is well-trained and listens to its owner's instruction. As the Prophet prohibited the pricing (for selling and buying) of dogs, the Shāfi'īs and Mālikīs ruled that dogs cannot be traded in any situation; be it ordinary or *ḍarūra*³⁶⁷. Unlike the Mālikīs, the Shāfi'īs ruled that whoever killed a hunting dog, guarding dog or farming working dog, is not required to pay compensation. A Muslim can possess a dog, but cannot buy it³⁶⁸. However, Mālik said buying and selling such a dog is only detested (*makrūh*). A dog can also be inherited through *waṣiyya* but it has no value³⁶⁹. The same rule applies to pigs; pricing is prohibited and it has no value at all.

³⁶¹ Saḥnūn, *al-Mudawwana*, Vol. I, p. 532. According to Imām Mālik, the permitted dog for hunting is a dog that can obey the instruction of the master.

³⁶² See Bājī, *al-Muntaqā Sharḥ al-Muwattā'*, Vol. III, p. 124

³⁶³ However, Imām Mālik did not say anything about it. See Saḥnūn, *al-Mudawwana*, Vol. IV, p. 534

³⁶⁴ See Saḥnūn, *al-Mudawwana*, Vol. IV, p. 551

³⁶⁵ See Saḥnūn, *al-Mudawwana*, Vol. IV, p. 536

³⁶⁶ al-Shāfi'ī, *al-Umm*, Vol. II, p. 254

³⁶⁷ al-Shāfi'ī, *al-Umm*, Vol. II, p. 253

³⁶⁸ al-Shāfi'ī, *al-Umm*, Vol. III, p. 12

³⁶⁹ al-Shāfi'ī, *al-Umm*, Vol. IV, p. 96

The Ḥanbalī jurists ruled that the sale of a dog is *bāṭil* (not concluded), and that the price of a dog is prohibited even if it is a trained dog³⁷⁰. However, some jurists, such as Jābir bin ‘Abdullāh, ‘Aṭā’ and Nakha‘ī, had a lenient attitude towards the selling of such a dog. They permitted it and consider it a *rukḥṣa*. Dog breeding is also prohibited unless it is necessary, according to the Ḥanbalī jurists. This includes hunting dogs, farming dogs or guarding dogs. As far as the rules for keeping dogs when their service is not needed (such as between two plantation periods) are concerned, the jurists had shown some leniency. Like the Shāfi‘īs, the Hanbalī jurists also agreed that a dog does not have a price; and if so it cannot be sold and be bought. This means that the person who destroys or steals a dog is not liable to pay the price to the owner. Such a dog is also not valid to be rented³⁷¹. For Ḥanbalīs, dogs can be inherited through *waṣīyya* or *hibba* or by any means that do not involve the exchange of money. This is also the view of the Shāfi‘ī and Mālikī jurists³⁷². The ownership of dogs can only be transferred without price (*naql bil yadd bidūni ‘iwāḍ*). The Hanbalī and Shāfi‘ī schools did not permit killing a trained dog, but if it was killed, there would be no compensation due from the killer. However, the Mālikīs insisted that the killer of a useful dog has to pay *gharm*³⁷³.

3.5 Darūra cases in marriage and divorce

There are many exceptional cases in marriage and divorce case and I shall only focus on two issues: leaving the house during the *‘idda* and polygamy. The original rule is that a Muslim woman is prohibited to leave her house during her waiting period. During this period, she has to observe the rules of *‘idda*. However, under certain emergency circumstances the woman is permitted to break the rules of *‘idda*. The Shāfi‘ī and Ḥanbalī jurists ruled that there is no harm in a divorced woman or a widow going out in the daytime to fulfil her daily needs, just as the Prophet permitted the aunt of Jabīr to go out plucking the dates³⁷⁴. Shāfi‘ī jurists further interpreted this

³⁷⁰ Ibn Qudāma, *al-Mughnī*, Vol. IV, p. 3154

³⁷¹ Ibn Qudāma, *al-Mughnī*, Vol. V, p. 322

³⁷² Ibn Qudāma, *al-Mughnī*, Vol. IV, p. 3155 and Vol. VI, p. 4795

³⁷³ Ibn Qudāma, *al-Mughnī*, Vol. IV, p. 3156

³⁷⁴ A ḥadīth narrated by al-Nasā‘ī and Abū Dāwūd. See Ibn Qudāma, *al-Mughnī*, Vol. VIII, p. 130 and Zakariyyā al-Anṣārī, *Gharar al-Bahīyya*, Vol. IV, p. 361

ḥadīth as saying that the date plants of Anṣār people during the time of the Prophet were close to their homes. On this basis, they limited the permitted area to that which is close to the woman's house. They also permitted the woman to go out to perform any kind of important activities such as going to market or doing necessary business, but only within a limited radius.

The original rule of *ʿidda* is illustrated by a ḥadīth narrated by Mujāhid, which says that the Prophet prohibited the widowers of the martyrs of Uḥūd war from going out during the night or staying overnight in other people's house, except in *ḍarūra*. The permission to go out also ceases if the reason for leaving the house can be completed by someone else³⁷⁵. If there is a pressing need (for example she has to appear before judge in the court), the Shāfiʿī jurists ruled that the judge has to send people to her house instead of asking her to come to the court. However, during the day time, it is permitted for such a woman to go out to fulfil her needs, such as buying foodstuff as previously stated³⁷⁶.

Ibn Taymiyya also held a similar view, stating that it is permissible for a woman in her *ʿidda* period to go out to fulfil her daily needs as long as she does not stay overnight in other places³⁷⁷. The Ḥanafī jurists³⁷⁸ also permitted a woman in her *ʿidda* period to travel if she believes there is a possible harm if she stays at home. In the book of *Tanqīh al-Fatāwā al-Ḥamidiyya*³⁷⁹, the circumstances which are considered *ḍarūra* permitting a woman to go out are when the house is damaged, broken or falling apart, or if there is a fear of its destruction, or a fear of her losing property, and also if there is no food available in the house. She is only allowed to go out to the nearest place. The Mālikī jurists³⁸⁰ ruled that during her *ʿidda* period, a widow is not permitted to put on make-up (for instance wearing *al-kohl*) except in *ḍarūra* circumstances (for example, for medical reasons). She is

³⁷⁵ Zakariyyā al-Anṣārī, *Gharar al-Bahiyya*, Vol. IV, p. 361

³⁷⁶ Ibn Ḥajar al-Haitamī, *Tuḥfā al-Muḥtāj*, Vol. VIII, p. 262. There is a ḥadīth narrated by Muslim mentioning the permission for a female divorcee of three times to go out to pluck date. This permission seems a general permission for other kinds of activities that are important to maintain her life.

³⁷⁷ See Ibn Taymiyya, *al-Fatāwā al-Kubrā*, Vol. III, p. 346

³⁷⁸ al-Zailāʿī, *Tabyīn al-Haqāʾiq*, Vol. III, p. 37

³⁷⁹ Ibn ʿĀbidīn, no place: *Dār al-Maʿrifa*, no date, Vol. II, p. 57

³⁸⁰ al-Kharshī, *Sharḥ Mukhtaṣar Khalīl*, Beirut: Dār al-Fikr, no date, Vol. IV, p. 148, *al-Dusūqī*, *Ḥāshiyā al-Dusūqī*, Vol. II, p. 479

allowed to put on make-up during the night time but the make-up must be washed off during the daytime. Other rules regarding *ʿidda* include that a woman cannot wear fine clothes such as silk, jewellery and perfumes. She is also prohibited from wearing *ḥinna* to colour her hair. All kinds of make-up, wearing of fine clothes are prohibited during the day time, unless in *ḍarūra*. The Mālikīs, like the Ḥanafīs, also listed several exemptions to the prohibition on going out, such as when the house is falling apart, a fear of thieves or notorious/wicked neighbours, or for a woman to fulfil her daily needs i.e. taking water or food. However, they insisted that permission to go out is only for necessities such as food, and not for other unnecessary reasons such as visiting others, attending ceremonies or doing business³⁸¹.

Another case of *ḍarūra* presented by the jurists is regarding a woman in her waiting period who has rent overdue. In this case, she needs to stay at home if she can afford to pay the rent. However, the prohibition on leaving is lifted if the landlord asks for more than what she can pay. The jurists argued that in this case, the importance of her protecting her wealth is greater than the observing the rule of *ʿidda*³⁸². It is important to note that the *ʿidda* is intended to ensure that the male parent of any offspring produced after the cessation of a marriage would be determined. That is why Islam has established the prohibition on going out, wearing cosmetics or accepting any marriage proposal during this period. However, this prohibition of going out can be tolerated if the woman fears a great danger not only to her life, but to her property as well. Another related case³⁸³ is that it is *ḥarām* for a wife to disobey her husband except in *ḍarūra*, such as leaving the house without permission. This is illustrated in the example of the wife needing a *fatwā* or to go out to study religion that her husband could not provide her.

Another case in which *ḍarūra* plays a role in the jurisprudence is polygamy. The man who has more than one wife is only allowed to spend the night in his wives' houses according to their turn. It is a sin not to follow this

³⁸¹ al-Ṣāwī, *Ḥāshiyā al-Ṣāwī*, Vol. II, p. 687

³⁸² ʿAlī Ṣaʿīdī al-ʿAdawī, *Ḥāshiyā al-ʿAdawī ʿAlā Kifāya al-Ṭālib al-Rabbānī*, no place: Dār al-Maʿārif, no date, Vol. II, p. 128

³⁸³ Ibn Ḥajar al-Haitamī, *al-Zawājir al-Iqtirāf al-Kabāʾir*, Beirut: Dār al-Fikr, 1994, Vol. II, p. 93

schedule. However, the Shāfi'īs³⁸⁴ ruled that this schedule can be altered due to *ḍarūra* if there is serious sickness (*marḍ mukhawwif*) and a husband can break the schedule to look after his sick wife. In this case, al-Ghazālī ruled that a mere suspicious (*ẓann* or *iḥtimāl*) of sickness is accepted in this case. Another hypothetical case provided by the jurists is if the wife is having a baby or the house is on fire. In both cases, the husband is permitted to stay for a while, but not for long and indeed not to have sexual intercourse. It is *ḥarām* to have sex with one's wife when it is not her turn. Some of the Shāfi'īs also viewed that the permission to spend time should not be more than one third of the night. The majority of jurists also said that *urf* can determine the need and necessity of the required time that needs to be spent³⁸⁵. If the sick wife needs more time, it is permitted for the husband to spend more time with her.

Similarly, the Ḥanbalī jurists also required that a husband follow the schedule of spending nights with his wives. He can change the schedule if he needs to visit his sick wife, or support a wife and children out of the schedule. However, if he only stays for a while, he does not have to recompense the other wives. If he stays for a long period or sleeps with his wife out of turn, he has to recompense for the spent night³⁸⁶. The jurists explained that taking turn in polygamous marriages for each of the wives is fulfilled either by staying overnight or by sleeping with the wife. Therefore, even if he stays for a short while but he sleeps with his wife, he has to compensate. If, however, he just stays for a while (and does not have sexual intercourse), he does not have to recompense. The Zaydiyya³⁸⁷ also held the same view where a husband cannot stay overnight with another wife when it is not her turn and he has to make compensation if he does so.

3.5 Conclusions

³⁸⁴ Sulaymān bin Maṣṣūr al-ʿAjilī al-Miṣrī, *Hashiya al-Jamāl*, Beirut: Dār al-Fikr, no date, Vol. IV, p. 283. There is a ḥadīth stating that sometimes the Prophet gave a visit to his wives which are not in their turns, he did everything except sexual intercourse. This ḥadīth was narrated by Abū Dāwud and al-Ḥākim.

³⁸⁵ *Tuḥfā al-Muḥtāj*, Vol. VII, p. 446. See also al-Qalyūbī and ʿUmayra, *Hāshitā Qalyūbī wa ʿUmayra*, Vol. III, p. 302 and al-ʿAjilī, *Hashiya al-Jamal*, Vol. IV, p. 283

³⁸⁶ Buhūṭī, *Sharḥ Muntahā al-Irādāt*, Vol. III, p. 51. As there is a ḥadīth narrated by ʿĀʿisha mentioning that once the Prophet had spent one night with her which was not her turn, then the Prophet paid back the following night

³⁸⁷ al-Murtaḍā, *al-Baḥr al-Zukhār*, Vol. IV, p. 93

Having examined the various cases of worldly affairs above, we found that the jurists were consistent in applying the standard requirements of *ḍarūra*. A rule is permitted only during the necessity period and the original rule is restored once this period is over. The majority also agreed that the *ḍarūra* act can only be done for a limited time and in a limited fashion so that it can achieve its aim, either to save property, life or other necessities. When there is more than one alternative, the *muḍtarr* is required to choose a lesser harm. It is also interesting to point out that the jurists made painstaking efforts to offer a solution for each *ḍarūra* case by providing hypothetical cases. It can be argued that the cases may not necessarily happen in reality, but might offer a useful solution for future emerging cases.

It can be concluded, then, that with regard to most criminal offences, *ḍarūra* does not give rise to any form of punishment, although it does not cancel any civil responsibility. For instance, stealing food during starvation does not lead to the hand of the thief being amputated. However, the thief is still liable to pay the price of the item taken. It is also important to note that not all forms of criminal acts are allowed, however pressing the need of the situation is. Adultery, rape and murder are some of the crimes that are not tolerated in any circumstance.

Another important point that can be summarised is that the juristic approach to *ḍarūra* is not entirely objective, according to the standard version. For instance, the assessment of the correct course of action depends on the subjective feeling of the *muḍtarr*. The *muḍtarr* is given the liberty to verify the situation according to his own strength and perseverance. However, Islamic jurisprudence also requires a determination of the case according to certain legal standards. The subjective feeling of *muḍtarr* cannot transform a non-necessity case into a necessity case when the circumstance fails to meet certain conditions. In the next chapter, we will explore the application of *ḍarūra* in *ʿibāda* (devotional acts of worship) matters, such as praying and purification and explore whether there is any difference between the *ḍarūra* application in worldly matters and acts of worship.

CHAPTER FOUR: *DARŪRA* APPLICATION IN DEVOTIONAL ACTS OF WORSHIP (*IBĀDA*) CASES

4.1 Introduction

In the previous chapter, we learned that the rule of *darūra* permits many kinds of prohibition³⁸⁸, including the consumption of *mayta*, drinking wine (according to some jurists) and stealing food from others, though even then, some liabilities are not lifted. These cases are categorised as worldly affairs. In this chapter, the rule of *darūra* concerning devotional acts of worship will be analysed. In most cases, *darūra* works to delay certain forms of ritual acts. For instance, the fasting in the month Ramadan can be postponed for those who are very sick. Certain forms of worship can also be modified because of *darūra* (for instance, prayer in the midst of war). The rules of religious observances like purification, prayer, *ḥajj* (pilgrimage) and funeral rites are quite anomalous as they are regarded as *ʿumūr taʿabbud* (matters relating to worship), where the prohibitions and the obligations in religious observances are barely related with cause (*sabab* or *ʿilla*), unlike worldly affairs. It is almost impossible to investigate the specific cause for such obligations or prohibitions in *ʿibāda* matters. In addition, it is almost impossible to measure the tangible harm and to specify the wisdom behind the rules of religious acts like prayers and *ḥajj*. However, in worldly affairs, the *sabab* or cause of the rule is easier to understand: the prohibition of murder is to protect human's life and the prohibition of *al-khamr* is because of the intoxicating element which becomes the *ʿilla* for the prohibition of other intoxicant drinks. However, for *ʿibāda* matters, the cause for the religious obligations is generally associated with the rights of God where a Muslim is obliged to perform certain ritual acts as daily obligations like prayer, or annual obligations like fasting during *ramaḍān*, or as once-in-a-life time obligations like *ḥajj*. Furthermore, the jurists also believed that one of the “wisdoms” behind these obligations and prohibitions in religious observance is to protect one of the most fundamental elements in human existence namely, religion³⁸⁹. Performing all kinds of religious obligations

³⁸⁸ We should also bear in mind that *darūra* can also prohibit certain permission.

³⁸⁹ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law*, pp. 13-25. Al-Tirmidhī al-Hākīm had initiated the effort surveying the wisdoms and secrets behind of each of prayer acts whilst the later jurists reaffirmed those obligations are to protect one's religion.

can ‘renew’ and ‘refresh’ one’s faith in God. Therefore, in ordinary daily situations, no amendment whatsoever can be made regarding the fundamental rules of worship, unless it is proven necessary to do so.

However, Islamic jurisprudence does recognise that there are many situations which impair one's capacity to fulfill religious obligations, and one of these impediments is necessity³⁹⁰. Necessity may change certain rules in worship, by changing the form of worship, delaying the act or lifting the obligation. Like any other *ḍarūra* case, only “extreme” reasons are accepted as the basis for the change, alteration or deferment of rules in devotional acts. It is also important to highlight that such changes also have several consequences, either the act has to be repeated or it is subjected to certain penalty. These legal consequences imply that a devotional act amended because of necessity is considered imperfect compared to one performed in a complete form. For example, a complete prayer is better than a shortened prayer that is performed out of necessity, according to the Shāfi‘īs. In many cases of *ḍarūra*, the Shāfi‘īs required a repetition for any incomplete prayer performed. However, the other schools did not require such repetition as for them the prayer is rendered perfect³⁹¹.

One may ask, what is the significance of the assessment of *ḍarūra* cases in devotional acts of worship to the assessment of the Harm Reduction Programme? Although the HRP can be regarded as one example of worldly affairs, I believe the assessment of *ḍarūra* application in religious affairs can enhance our understanding of how this rule really works generally. *Ḍarūra* rule works in both religious and worldly affairs in an almost similar manner as strict prerequisites should be met. The hypothetical cases of *‘ibāda* provided in *fiqh* literature help to clarify some important issues, such as to what extent the *muḍtarr* is required to look for a lawful alternative before he can resort to the unlawful choice. This issue is discussed in the case of

In any non-necessity case, no amendment can be made regarding the rules of worship, unless it is proven necessity.

³⁹⁰ Many jurists agree that the impediments impair Muslim's capacity can be divided into two categories; *‘awāriḍ samawiya* (the work of providence) like forgetfulness, ignorance, sleeping and *‘awāriḍ muktasaba* (causes created by man) such as compulsion and coercion.

³⁹¹ See Zakariyya al-Ansāri, *Asnā al-Maṭālib sharḥ Rawḍ al-Ṭalib*, Vol. I, p. 136. However in the case of *khawf* prayer performed based on false prediction, all jurists required the prayer to be repeated.

tayammum. Lengthy arguments regarding the need to search for the lawful alternative lead to a conclusion that a *muḍtarr* has to do the best before resorting to any *ḍarūra* alternative. He also has to ensure that there is no other lawful method available and the only way out is by acting upon *darūra*. Similarly, in the case of using illegal drugs in the Harm Reduction Programme, the patient must be certain that such HRP treatment is a necessity for him.

This chapter serves three purposes. Firstly, it will investigate whether *ḍarūra* works differently in religious matters as compared to worldly affairs. Secondly, it aims to verify whether the jurists adapted the same standard of rules, policies and limitations used in worldly affairs. Finally, this chapter will investigate whether the moral policy taken into consideration as the basis for *ḍarūra* application in worship matters. For instance, can the right of a human being overcome the right of God in *‘ibāda*? These three questions will be answered in this chapter.

4.2 *Darūra* cases in *tahāra* (cleaning and purification)

Purification either through *wuḍū’* (ablution), *ghusl* (bath) or *tayammum* (dry ablution) is a basic requirement prior to performing prayer or reciting al-Qur’ān (according to certain views). In this regard, I have chosen the *tayammum*³⁹² issue, as it is a convenient case study for *ḍarūra* based problems. All jurists except the Ḥanafīs³⁹³ accepted *tayammum* as a *badl ḍarūrī* (a substitute which is legalised because of necessity). In this case, the permission for recourse to *tayammum* to purify a Muslim in order to enable

³⁹² There is a disagreement among Muslim jurists as to whether *tayammum* falls under *‘azīma* or *rukḥṣa* category. The Shāfi‘ī jurists held that *tayammum* is a kind of *rukḥṣa*, meanwhile Imām Aḥmad distinguished the rules according to the situation. For instance, if switching to *tayammum* is because of a lack of water, it is called *rukḥṣa*, but if it is because of *‘udzr* (sickness or disability to have water) it is an *‘azīma*. The consequence of this dispute is as follows: if we categorise *tayammum* as a *rukḥṣa*, a traveller who is not on a morally good journey who switched to *tayammum* and performed prayer has to redo his prayer as a *rukḥṣa* is only meant for a good person (according to all schools except the Ḥanafī, as they permitted *rukḥṣa* to be exercised by non-pious Muslim). The Mālikī jurists permitted *tayammum* to be exercised by a good Muslim and not an *‘āsī*, except in a case of a sick *‘āsī* who stays in one place. The difference between a sick *‘āsī* and a sinful traveller is that the later has the chance to repent before performing *tayammum* while the previous cannot remove his illness.

³⁹³ al-Zuhailī, *al-Fiqh al-Islāmī*, Vol. I, p. 564. For details see al-Kasānī, *al-Badāi‘ al-Ṣanāi‘*, Vol. I, p. 48, pp. 54-55, Ibn Qudāma, *al-Mughnī*, Vol. I, pp. 313-314.

him to pray is because of *ḍarūra*. In other words, the conditions of *ḍarūra* must be met in *tayammum* like any other *ḍarūra* cases. According to this view, *tayammum* does not act completely like *wuḍūʿ*, which means *tayammum* is a substitute but subject to certain limits. While *wuḍūʿ* enables a man to perform all religious observances without limits (as long he does not commit any act impairing the status of impurity), *tayammum* only permits a Muslim to perform a certain number of prayers during a specific time period³⁹⁴. This means, the *tayammum* has to be renewed each time before performing the obligatory prayer. The majority of jurists were also in agreement that, unlike *wuḍūʿ*, the *ḥadath* status cannot be lifted by *tayammum*. Therefore, in this sense, the prayer performed by *tayammum* is considered imperfect, unlike prayers performed by *wuḍūʿ*. In certain cases, the prayer performed by *tayammum* has to be repeated when water is available. However, *tayammum* can only be performed once the prayer time begins and it cannot be performed outside the specific prayer time. The reason for this ruling is because *tayammum* is only valid during a *ḍarūra* period, which is limited to the prescribed time. *Tayammum* is only permitted for each obligatory prayer and a renewal is necessary to perform another obligatory prayer. Other scholars like al-Zuhri (d.742/124) only limited *tayammum* to perform obligatory prayer, whereas *tayammum* cannot be performed to perform non-obligatory prayer (additional prayer) as it is not a “necessary” type of prayer for Muslims³⁹⁵.

On the other hand, the attitude of the Ḥanafīs towards *tayammum* was quite different from the majority view. The Ḥanafīs³⁹⁶ were of the view that *tayammum* is a *badl muṭlaq* (an absolute substitute) that works exactly like *wuḍūʿ*. They recognised *tayammum* as an absolute substitution for *wuḍūʿ*. That means, with a single *tayammum*, a man can perform as many religious acts as he wants. For the Ḥanafīs, *tayammum* works exactly like *wuḍūʿ* until religiously clean water has been found. As a pure substitute for *wuḍūʿ*,

³⁹⁴ al-Dusūqī, *Hāshiyā al-Dusūqī*, Vol. I, p.148, Ibn Naqib al-Misri, *Reliance of The Traveller- A Classic Manual of Islamic Sacred Law*, p.84

³⁹⁵ al-Dusūqī, *Hāshiyā al-Dusūqī*, Vol. I, p.148, Ibn Naqib al-Misri, *Reliance of The Traveller- A Classic Manual of Islamic Sacred Law*, p.84

³⁹⁶ Their argument is based on a hadīth of the Prophet which says “*Tayammum* is a *wuḍūʿ* for a Muslim, even if he does not find water for ten years, as long as water is unavailable and he does not encounter *ḥadath*.”

tayammum can also be performed before the advent of prayer time. However, it is also important to highlight that the Ḥanafīs also required certain strict conditions that should be met before one can perform *tayammum*.

As *tayammum* is legalised due to necessity (except for Ḥanafīs), some scholars like the Mālikīs³⁹⁷ did not, for example, permit *tayammum* to be performed by a wife after menstruation in order to enable his husband to have sex with her³⁹⁸. In other words, a woman who purified herself from *janāba* (major sexually related defilement) by *tayammum* is only allowed to pray but is not allowed to have sex until she purifies herself completely with water, as having sex is not a necessity. In addition, the Mālikīs³⁹⁹ also required a husband to ensure there is plenty of water to purify himself and his wife before having sex (to avoid have to purify oneself from *janāba* by *tayammum*). Even the act of kissing between a couple is prohibited if there is no water for *wuḍū'* as there are fears the act may lead to *tayammum*.⁴⁰⁰ Although *tayammum* can be performed as a substitute for *ghusl* in *janāba* cases⁴⁰¹ based on a tradition reported by al-Bukharī and Muslim⁴⁰², *tayammum* is not allowed when the cause of *ḥadath* is not inevitable or is not of a necessary type such as having sex. Some Mālikī jurists also ruled that the wife can even refuse to have sex with the husband if there is not sufficient water for them to take a bath afterwards. The Mālikīs' position is the toughest one regarding abstaining from actions which can lead to *tayammum*. It can be concluded that according to the Mālikīs, a Muslim is

³⁹⁷ Saḥnūn, *al-Mudawwana*, Vol. I, p. 48 and Ibnī Juzayy, *al-Qawānīn al-Fiqhiyya*, p. 30.

³⁹⁸ al-Zuhailī, *al-Fiqh al-Islāmī wa 'Adillatuh*, Vol. I, p. 562

³⁹⁹ Saḥnūn, *al-Mudawwana*, Vol. I, p. 48

⁴⁰⁰ Saḥnūn, *al-Mudawwana*, Vol. I, p. 49

⁴⁰¹ However, a companion of the Prophet differed in the permissibility of *tayammum* to purify oneself from major impurity. 'Umar and Ibn Mas'ud did not view it as a substitute for it. Meanwhile 'Alī and other companions maintained that *tayammum* can replace *al-ghusl*. The latter view has been accepted by later jurists in general. See Zuhailī, *al-Fiqh al-Islāmī wa 'Adillatuh*, Vol. I, p. 562, Ibn Rushd, *The Distinguished Jurist's Primer*, Vol. I, p. 67

⁴⁰² "That a man came to 'Umar and said "I have been involved in *janāba* and cannot find water (to bathe)." 'Umar said "Do not pray". 'Ammār said, "Do you not remember O Amīr Al-Mu'minīn when you and I were tending camels and became *junūb*, but did not find water. As for you, you did not pray, but I rolled in the earth and prayed. The Prophet (on hearing the story) said, "It would have been enough for you to stroke the earth with your hands and then to shake (the dust off) them, and then rub your face and hands". 'Umar said, "Fear Allāh O 'Ammār". 'Ammār said, "If you like I will not relate it"

responsible for maintaining his status of purity and for striving not to resort to *tayammum* if he can.

The Shāfi'īs⁴⁰³ and Hanbalīs⁴⁰⁴ differed on this issue. Using a different analogy, the Ḥanafīs⁴⁰⁵ permitted a husband to have sex with his wife who has purified herself with *tayammum*. They argued that the general meaning of the phrase "*Aw lāmastum al-nisā*"⁴⁰⁶ also covers the permission to have sex, even during the non-existence of water. They further argued that restricting someone from acting on his sexual desire may lead to another *ḥaraj* (harm) like adultery. In this case, refraining from *zinā* should be prioritised over performing prayer by *tayammum*. However, I tend to choose a middle path between these two contradictory views. The subjective feelings of the person can verify the situation. That means, in a case where water is not sufficient for purification and at the same time the person has a need for sexual intercourse, he could make a decision based on his personal feeling. If he fears that he cannot endure his sexual desires and fears it may lead to another more serious crime such as committing *zinā* or rape, he should choose intercourse, even though it definitely leads to *tayammum* (to purify himself from *ḥadath* status). However, if he has strong self-control, he should avoid intercourse and perform prayer in a complete manner, which I think is preferable.

The jurists also agreed that the permission to perform *tayammum* is not limited to cases where water is unavailable. It can be extended to other reasons, such as sickness or the inability to get water. Based on Q5.5, the jurists⁴⁰⁷ unanimously agreed that the permission for *tayammum* is due to the unavailability of water (‘*adam al-mā*’) or the person being incapable of getting access to water (‘*ajz ‘an al-mā*’). ‘*Ajz ‘an al-mā*’ can refer to any

⁴⁰³ See details in al-Sharbīnī, *Mughnī al-Muḥtaj*, 1994, Vol. I, pp. 102-103. The Shāfi'ī jurists however differed in this matter, the earlier scholars permitted a husband to have sex with his wife who purified herself by *tayammum* but the latter scholars prohibited it.

⁴⁰⁴ Ibn Qudāma, *al-Mughnī*, Vol. I, p. 354. Some scholars said it is only a detested act (*makrūh*), but some scholars permitted it. The second view is based on several traditions which reported that some companions had consummated with their wives and *jāriya* (female slaves) even though they did not have access to water.

⁴⁰⁵ al-Sarakhsī, *al-Mabṣūṭ*, Vol. I, p. 117

⁴⁰⁶ Q5. 6

⁴⁰⁷ Ibn Juzayy, *al-Qawānīn al-Fiqhiyya*, 29, see also al-Dusūqī, *Hāshiyā al-Dusūqī*, Vol. I, p. 147, Saḥnūn, *al-Mudawwana*, Vol. I, p. 46

situation which impedes a Muslim from using or getting water either because of sickness or due to the lack of proper tools. The rule also covers a case where water is needed for drinking by the persons or animals' in one's charge, for cooking, cleaning impure bodies (polluted by filth) and any other necessary cases which requires water either immediately or in the near future⁴⁰⁸. Having examined the said cases, we can conclude that the priority is given to other necessary situations and is not simply reserved for *wuḍū'*. This is because water is the only solution for those cases and no other alternative is available especially for cooking, drinking or cleaning⁴⁰⁹.

Some Muslim scholars⁴¹⁰ stipulated that *tayammum* is a special privilege for a traveller rather than a *muqīm* (a person resides in one place). The latter, however, is entitled to perform *tayammum* but subject to stricter conditions. This is because the jurists believed that a *muqīm* has a greater chance of finding water in his residential area than a traveller. The jurists elaborated in detail on the distinction between a *musāfir* and a *muqīm* in the *tayammum* case. For instance⁴¹¹, the Shāfi'īs (who often took the toughest stand in some purity cases) ruled that the prayer of a *muqīm* by *tayammum* is void when he found water during the prayer time. That means he has to redo the prayer with a new *wuḍū'*. A traveller, however, does not have to repeat the prayer by performing new *wuḍū'* even when water is available during the prayer time⁴¹². While a traveller is entitled to enjoy the full privilege of *tayammum*, a *muqīm* has to fulfill a set of stricter rules⁴¹³. This different set of rules illustrates how the jurists carefully verified the

⁴⁰⁸ al-Dusūqī, *Hāshiya al-Dusūqī*, Vol. I, p. 148,

⁴⁰⁹ Not only that, the term *al-ʿajz* also extends to the case of forgetfulness or ignorance of the availability of water (however when a traveller remembers the existence of water, he has to redo the prayer). *Al-ʿajz* also refers to the case where there is no tool to collect the water (e.g. water in a deep well), the case of a detained person who lacks of water, or a case of sick or weak person who has got no assistant to prepare water for him, see Ibn Qudāma, *al-Mughnī*, Vol. I, pp. 315-317

⁴¹⁰ The Shāfi'īs and Ḥanafīs held that *tayammum* can be exercised easily by a traveler rather than a *muqīm*. See Saḥnūn, *al-Mudawwana*, Vol. I, pp. 43-44, Ibn Qudāma, *al-Mughnī*, Vol. I, p. 311 and Zuhailī, *al-Fiqh al-Islāmī*, Vol. I, pp. 578-582

⁴¹¹ The jurists unanimously agreed that a Muslim does not have to redo prayer if the water is found after the prayer time elapsed.

⁴¹² Or even to a *musāfir* who has changed his *niyya* (intention) from being a *musāfir* to a *muqīm*.

⁴¹³ The Mālikīs and Ḥanbalīs however did not distinguish between *tayammum* of a *muqīm* or of a *musāfir*, whether the reason is because the unavailability of water or sickness. See Saḥnūn, *al-Mudawwana*, Vol. I, pp. 43-44, Ibn Qudāma, *al-Mughnī*, Vol. I, p. 311 and Zuhailī, *al-Fiqh al-Islāmī wa 'Adillatuh*, Vol. I, pp. 578-582

situations according to the different elements in those circumstances. These different elements affect the dispensation of the rule of necessity. These elements including assumptions, chances and possibilities are being weighed up before any *ḥukm* is being made.

4.2.1 The requirement to look for clean water before *tayammum*

As in other *ḍarūra* cases, a Muslim is required to ensure that there is no alternative prior to exercising the *ḍarūra* rule. Similarly, in the *tayammum* case, most jurists required a Muslim to verify that clean water is certainly not available prior to performing *tayammum*. All schools except the Hanāfīs⁴¹⁴ stipulated that in a case where water is unavailable, the person is obliged to search for water before he is allowed to perform *tayammum*. The act of searching for water is very significant as some scholars made it a condition for the validity of *tayammum*. For instance, a traveller is required to ask for water if a residential area is nearby. Although the jurists had outlined several alternatives and suggestions for a Muslim in searching for water, they recognised that the act (of searching for water) should only be done within the capability of a Muslim. For instance, the safety of a Muslim should not be compromised in the effort of finding clean water. Although the reason for *tayammum* is due to the lack of water and is a necessity case (to protect religion), the jurists also took into account that a Muslim does not have to suffer physically in order to find water. This rule is based on the notion of *dafʿ al ḥaraj* (preventing difficulties) which means that such an act should be bearable and feasible to a Muslim⁴¹⁵.

The requirements for looking for water have also been clearly described in the book *Minhāj al-Ṭālibīn*, where al-Nawawī provided several alternative ways for a traveller to look for water. These include searching his luggage, making inquiries from companions and searching the neighbourhood⁴¹⁶. The author describes the efforts that should be made:

if there is a plain, he should look around him, and if the ground is hilly, he should search the vicinity as far as the

⁴¹⁴ Ibn Rushd, *The Distinguished Jurist's Primer*, Vol. I, p. 70, Ibn Qudāma, *al-Mughnī*, Vol. I, p. 313.

⁴¹⁵ al-Kasānī, *al-Badāiʿ al-Ṣanāiʿ*, Vol. I, pp. 46-47

⁴¹⁶ al-Nawawī, *Minhāj Et Talibin A Manual of Muhammadan Law According to the School of Shafīi*, p. 11

horizon. Only if all his efforts are without success, is he permitted (to perform tayammum)

The jurists also agreed that deferring prayer until the last moment to look for water is better than prayer at an early time by *tayammum*⁴¹⁷. However, according to the Shāfi'īs⁴¹⁸ and Ḥanafīs⁴¹⁹, if it is not a certainty but a mere supposition that water is available nearby, it is better for him to perform *tayammum* and pray at the beginning of the prayer time. The Mālikīs gave a better picture of the level of certainty required in this case.⁴²⁰ If there is no hope of finding water, it is better to perform *tayammum* and pray at the early prescribed time, and if he is unsure about the availability, it is also recommended to perform *tayammum* and pray in the middle prescribed time. However, if there is a strong hope of finding water, it is recommended that a person perform the *tayammum* at the last moment before the end of prayer time.

The Hanafīs required that *tayammum* is only permitted if water is not available at least within one mile upon reach⁴²¹, or within the radius that the voice cannot be heard or the *adhān* (the calling for prayer) cannot be heard. The person is also allowed to perform *tayammum* if there is a possibility that he could miss his companions or the convoy if he managed to look for water. The promise of water also impedes someone from performing *tayammum*. The case is similar to the case of a promise for a clean cloth to perform prayer. In both cases, the person has to wait for the water or cloth before a complete and a perfect prayer can be performed. It can also be concluded that the jurists took into consideration promise and strong hope in *ḍarūra* cases. A Muslim is not allowed to exercise *ḍarūra* when there is a strong hope or a promise that the prayer can be done in a perfect manner. Similarly, in other *ḍarūra* cases, eating the unlawful is not allowed if there is a strong hope and promise that a lawful meal will be available in near future or nearby.

⁴¹⁷ al-Sarakhsī, *al-Mabṣūṭ*, Vol. I, p. 106, Zuhailī, *al-Fiqh al-Islāmī*, Vol. I, p. 564,

⁴¹⁸ See al-Nawawī, *Minhaj Et Talibin A Manual of Muhammadan Law According to the School of Shafii*, p. 12

⁴¹⁹ al-Sarakhsī, *al-Mabṣūṭ*, Vol. I, p. 106

⁴²⁰ Saḥnūn, *al-Mudawwana*, Vol. I, pp. 42-43

⁴²¹ al-Kasānī, *al-Badāi' al-Ṣanāi'*, Vol. I, pp. 46-47

4.2.2 How far is a Muslim required to find clean water for *wuḍūʿ*?

The jurists also recognised that there are some risks associated with the attempt to look for water, including a risk to life or one's property. As previously mentioned, the attempt to find water must be within one's ability, must take place during the prayer time and must not harm the person. For instance, the person is only required to look for water during the prayer time and he has to ensure that the prayer can be performed during the prescribed time. The attempt that should be made does not mean that the person has to defer the prayer until the time has elapsed which means the person has to perform the prayer after the prescribed time (*i'āda*)⁴²².

The person is not allowed to endanger himself in order to discover water. For instance, al-Nawāwī⁴²³ stipulated that the traveller is not required to change his route and thereby endanger his property or his life in order to look for water. Similarly, the Ḥanbalī jurists⁴²⁴ also contended that the attempt to look for water can be abandoned if the Muslim faces a dangerous obstacle (for example threats from enemies, fire or thieves). The importance of protecting his life and property is greater than protecting the religion⁴²⁵. The rule also applies to a Muslim woman where she faces a situation where the only water available is near a group of *fāsiq* (bad persons). In such a case, she is allowed to recourse to *tayammum* to protect her security and dignity. These jurisdictions imply that other necessities, especially life, are also important to be protected. Therefore, it is clear that the rights of God can be compromised (by performing the worship in an imperfect manner) because one's life may be threatened.

Similarly, the case of protecting one's wealth also needs to be preserved. The issue discussed by the jurists is a case where a Muslim has to buy water for *wuḍūʿ*. The Hanafīs held that if the price of water is more than *mahar*

⁴²² al-Dusūqī, *Hāshiyā al-Dusūqī*, Vol. I, pp. 156- 160, al-Nawawī, *Minhaj Et Talibin A Manual of Muhammadan Law According to the School of Shafīi*, p. 12, Ibn Qudāma, *al-Mughnī*, Vol. I, p. 315

⁴²³ al-Nawawī, *Minhaj Et Talibin A Manual of Muhammadan Law According to the School of Shafīi*, p. 12

⁴²⁴ Ibn Qudāma, *al-Mughnī*, Vol. I, p. 315

⁴²⁵ What I mean by the protection of religion here does not imply the protection of his belief or faith, rather the protection of his religious obligation.

mithl (retail price), the person is allowed to do *tayammum*. The *tayammum* is also permitted if the only way the Muslim can purchase the water is by illegal means or foul play (*ghabān fāḥish*). However the Ḥanafīs distinguished the case according to the status of the person. If for example, the retail price is one dirham, and the seller asks for one dirham and half, the person has to buy it, even though the price is slightly higher. However, if the price asked is too high, for instance, is double the normal price, the person can resort to *tayammum*. However, if a wealthy man can afford to buy the water at a higher price, he should do so. This case reveals that the Ḥanafīs held that it is a necessity to protect Muslim's wealth (from being cheated) and that wealth is regarded as important as a person's life⁴²⁶. The position of Hanāfīs in permitting the buying of water at a slightly higher price was also affirmed by Imām Mālik⁴²⁷ and the Ḥanbalīs jurists⁴²⁸; it is better if the buyer can afford to buy a slightly higher price of water rather than have to recourse to *tayammum*. The Shāfi'īs, however, did not distinguish between a slightly higher price (*ghabān yasīr*) or an extremely higher price for water (*ghabān fāḥish*). For them, buying water at more than retail price for *wuḍū'* is not necessary. Islam prohibits any kind of *ghaban* or cheating in business, whether it is small or great. The reason behind the prohibition of buying extremely expensive water (*ziyāda kathīra*) is due to the fact that the harm (*ḍarar*) to one's wealth should be prevented.

However, the Hanbalīs explained that if a person has sufficient means to buy expensive water, it is preferable for him to buy it to perform a perfect prayer rather than to have to recourse to *tayammum*. For them, causing harm to one's wealth is a lesser evil than causing harm to one's life or one's religion⁴²⁹. This means the Hanbalīs are also of the view that causing harm to one's wealth (where the harm is insignificant) is better than compromising God's right⁴³⁰. In this matter, I agree with this view that careful thought and consideration must be given according to the status of a person. The case should be judged according to the wealth of the person. A wealthy person might not be affected by buying slightly expensive water for

⁴²⁶ al-Kasānī, *al-Badāi' al-Ṣanāi'*, Vol. I, pp. 48-49

⁴²⁷ Saḥnūn, *al-Mudawwana*, Vol. I, p. 46

⁴²⁸ Ibn Qudāma, *al-Mughnī*, Vol. I, p. 317

⁴²⁹ Ibn Qudāma, *al-Mughnī*, Vol. I, p. 317

⁴³⁰ Ibn Qudāma, *al-Mughnī*, Vol. I, p. 317

wuḍū' while a needy person might find the price is not reasonable. Hence, two different rulings are there for different persons and situations.

The above discussions give us the idea that a Muslim is required to ensure that the alternative rule is the only way to perform the obligation. In addition, the reason leading to *tayammum* must be based on his strong assumption. If the necessity rule is exercised based on a false prediction or his careless mistakes, *tayammum* is considered void and the prayer has to be repeated. For instance, the Shāfi'i jurists⁴³¹ required a Muslim who misplaced the water for *wuḍū'*, which consequently leads to *tayammum*, to redo his prayer. This school does not accept forgetfulness as a valid excuse to perform *tayammum*.

4.2.3 Other requirements for *tayammum*

The jurists differed with regard to the type of sickness that permits *tayammum*. Al-Shāfi'i and Aḥmad Ibn Hanbal⁴³² held that *tayammum* is only for sickness that causes severe damage to the body (*khawf halak*) while the majority of jurists disagreed. The first group only permitted *tayammum* if a person fears that he may die or lose the use of a limb by using water.⁴³³ The majority, however, is more lenient. This is the view of the Ḥanafīs⁴³⁴, Mālikīs⁴³⁵ and the latter scholars of the Ḥanbalīs and the Shāfi'īs⁴³⁶. They permitted *tayammum* if the use of water can prolong a sickness or worsen the condition of one's health. They further argued that *tayammum* is a dispensation which could be applied generally to all types of sickness. However, they also firmly insisted that if the sickness has nothing to do with water, such as a headache or a fever for example, the patient is not allowed to abandon *wuḍū'* and recourse to *tayammum*.

⁴³¹ al-Sharbīnī, *Mughnī al-Muḥtaj*, Vol. I, p. 91. However, the Ḥanafīs and Mālikīs did not require a person who forgot about the place he keeps the water to redo the prayer. Meanwhile Aḥmad was silent in this matter. See al-Sarakhsī, *al-Mabṣūṭ*, Vol. I, pp. 121-122, Zuhailī, *al-Fiqh al-Islāmī*, Vol. I, p. 572 and Ibn Qudāma, *al-Mughnī*, Vol. I, p. 318

⁴³² Ibn Qudāma, *al-Mughnī*, Vol. I, p. 336

⁴³³ al-Nawawī, *Minhaj Et Talibin A Manual of Muhammadan Law According to the School of Shafii*, p. 12

⁴³⁴ al-Kasānī, *al-Badāi' al-Ṣanāi'*, Vol. I, p. 48

⁴³⁵ al-Dusūqī, *Hāshiyah al-Dusūqī*, Vol. I, p. 147, Ibnī Juzayy, *al-Qawānīn al-Fiqhiyyah*, p.

31

⁴³⁶ Ibn Qudāma, *al-Mughnī*, Vol. I, p. 336

The Shāfi'īs also required that in any injury case where the use of water is replaced with *tayammum*, any healthy or sound area which is not injured or not covered by bandages for instance, needs to be washed by water. For example, a person who has incurred *ḥadath ṣaghīr* (a slight or minor impurity) must first perform *tayammum* (for the injured area), and wash the sound area with water afterwards. If a part of the skin is covered over, as by splints that cannot be removed, the exposed part of the body must be washed, and the rest cleansed. The splints too must be completely moistened and wiped⁴³⁷. They have the strictest view with regard to *tayammum*, and required any healthy area should be washed with water. That means the use of *tayammum* is limited to the injured area and *tayammum* does not lift the requirement of cleansing the other areas.

The Mālikīs also held the opinion that a Muslim is required to wash the sound limb after performing *tayammum* for the injured areas⁴³⁸. In *janāba* cases (grave impurity), if the water is insufficient for a Muslim to have a complete bath, the Ḥanbalī jurists required that the water must be used to cleanse as much of the body as possible, and a *tayammum* should be performed for the unwashed part⁴³⁹. The requirement to use water to cleanse the sound part or the need to optimise the use of water as much as one can is in parallel with a tradition which states that: "If you were ordered (by the religion) to do something, you have to accomplish the task according to your capability"⁴⁴⁰. The same rule applies to the case of insufficient clothes to cover one's *awra* (part of the body that should be covered in front of *maḥram*). A Muslim is still required to cover the body using the available cloth, covering as much area of his body as he can.

Having examined the cases above, we can conclude that the *tayammum* is a dispensation legalised only because of necessity. This includes cases where water is not available to purify oneself from minor or major impurity and sickness. Strict guidelines should be followed before one can recourse to *tayammum*. These guidelines are not only recognised by the *madhāhib*, who

⁴³⁷ al-Nawawī, *Minhaj Et Talibin A Manual of Muhammadan Law According to the School of Shafii*, p. 12

⁴³⁸ Saḥnūn, *al-Mudawwana*, Vol. I, p. 45

⁴³⁹ Ibn Qudāma, *al-Mughnī*, Vol. I, p. 314

⁴⁴⁰ Ibid.

regard *tayammum* is of necessity but the Ḥanafīs also adopted the same view (although they insisted that *tayammum* is *badl muṭlaq*). A Muslim is also required to do the best he can to acquire water to perform *wuḍū* or *ghusl* by ensuring that there is clearly no clean water. However, at the same time he must ensure that the act of searching for water would not bring harm to the other necessities or should not result in a greater injury. The similar rule applies to other non-worship cases, where, for instance, in famine time, a Muslim is required to search for the lawful food prior to consuming the unlawful. However, if the act of searching results in a greater loss to any of his necessities, the act should then be terminated and the unlawful can be consumed.

4.3 *Darūra* in prayer cases

The previous chapter of *darūra* cases mainly concerns the protection of human life, while a *darūra* rule in *ʿibāda* cases is quite unique as it mainly serves the purpose of protecting one's religion⁴⁴¹, the element which some jurists ranked as the highest priority among the five essential elements in human existence⁴⁴². Many jurists like al-Ghazālī affirmed that the higher order necessity should have a priority over a lower order necessity if they generate opposite implications in practical cases. However, from the above discussion of *tayammum*, it is apparent that the protection of one's religion does not always receive a higher priority than other necessities. Although protecting one's religion by fulfilling religious obligations in a complete and perfect manner is regarded as a high necessity, this element can be put aside in order to give a priority to the protection of human life.

Similarly, in the case of prayer, a perfect prayer performed according to specific rules can be changed and amended when one's life is in a great

⁴⁴¹ The protection of one's religion should not be confined to matters of belief and faith. It should be extended to *ʿibāda* areas as well. For example, the importance of prayer for a Muslim is like a pillar in Islam. Hence, the importance of fulfilling religious obligations is as more or less the same as the importance of protecting one's faith.

⁴⁴² al-Juwaynī and al-Ghazālī developed the list of necessities. Al-Ghazālī ordered the necessities as; *dīn*, *hayā*, *ʿaql*, *nasab* and *māl*. Meanwhile Shāṭibī ranked the order as *dīn*, *hayā*, *nasab*, *māl* and *ʿaql*. See Auda, *Maqāsid Al-Shariah as Philosophy of Islamic Law*, pp. 17-18. See also Taqī al-Dīn Abū al-Baqāʾ al-Futūhī, *Sharḥ al-Kawkab al-Munīr*, no place: Maṭbaʿa Sunna Muḥammadiyya, no date, p. 661, and Mutairi, *Necessity in Islamic Law*, 1997, p. 25

danger. Compromising God's right is acceptable in order to protect one's life. In this matter, two cases will be analysed: prayer in a dangerous situation and praying in dirty clothes. The special rule in these two cases is believed to have been derived from necessity. These issues are presented below with some analysis and observations made.

4.3.1 Prayer during battle or dangerous situations

Another interesting case is performing prayer during a dangerous situation such as in a war. In this situation, there are two important interests at risk, namely religion and life. The Sunni jurists were all in agreement that the obligation to pray does not cease even during a life-threatening situation. However, some ordinary rules of prayer may change. The changes include the change to the form of prayer to suit the dangerous situation. This pressing situation, which definitely presents *ḍarūra*, gives a valid licence for a Muslim to either shorten prayers⁴⁴³, combine prayers, or alter the details and movement in the prayers. The Prophet himself was reported as shortening his prayer during the battle of Tabūk⁴⁴⁴. The jurists were also in agreement about the legality of special prayer, namely *ṣalāt al-khawf*⁴⁴⁵ that can be performed during war. In order to minimise the risk of being killed, *ḍarūra* changes some ordinary details and movements of prayer. Safety precautions have to be taken while performing the prayer. This includes taking turns during such a prayer.

There are many versions of this prayer depending on the situation of the enemies and the level of the threats. For example, if the enemy is not in the direction of the *qibla*, the *imām* (the leader of the prayer) should lead a group in the performance of one unit (*rak'a*) of the prayer, while the other group faces the army, after which, the two groups exchange places, and the *imām* prays one *rak'a* with the second group. The members of each group

⁴⁴³ Ibn 'Abbās said: "Allāh made the prayer obligatory on your Prophet (in the following manner): Four *rak'a* while resident, two while traveling and only one during times of fear". This *ḥadīth* is narrated by Ahmad, Muslim, Abū Dawūd and Al-Nasā'i.

⁴⁴⁴ Jābir bin 'Abd Allāh said: The Apostle of Allah stayed at Tābūk twenty days; he shortened the prayer (during his stay)

⁴⁴⁵ There are numerous *ḥadīth* recorded on this matter. See Sunan Abu Dawud, Ahmad Hasan (tran.), Vol. I, pp. 320-327

will complete one *rak'ā* of their prayer on their own⁴⁴⁶. If the enemy is in the direction of the *qibla*, then the *imām* leads both groups in prayer at the same time and they share in guarding against the enemy, and they follow the *imām* in every one of his actions until he performs *sajda* (prostration), in which case one group will make the *sajda* with him and the other will wait until they are finished and then perform their own *sajda*. After the first *rak'ā* is finished, the people in the front will move to the back and those in the back will move to the front⁴⁴⁷. It is also important to note that this prayer is performed in a group, where the situation permits it.

However, the jurists were also in an agreement that if the fear (of the enemy) is great or when fighting is taking place, each person is to pray individually to the best of his ability, either standing, or riding, facing *qibla* or not, making gestures for the *rukū'* and *sujūd*. That means, prayer in a group is no longer a requirement in this situation. A Muslim is also excused from any of the acts of the *ṣalāh* which he is unable to perform. Some movements are compromised in this *khawf* prayer, such as carrying weapons and moving facing the enemy. In normal prayer, excessive movements will invalidate one's prayer. Some other ordinary rules are also compromised. The Ḥanafī jurists, for instance, permitted a Muslim not to

⁴⁴⁶ Ibn 'Umar says the Messenger of Allāh prayed one *rak'ā* with one group while the other group faced enemy, (at that point, those who had prayed) took the place of their companions facing the enemy and the second group came and prayed one *rak'ā* with the Prophet and then he made the *taslim*. Then each group made the (remaining) one *rak'ā*. This is narrated by al-Bukhārī, Muslim and Ahmad. Another type of *khawf* prayer was also reported performed by the Prophet. Jabir reported that the Prophet prayed the *salāt al-khawf* with one group of his companions, and then another two *rak'ā* with another group and then he made *taslim*.

⁴⁴⁷ Jābir said "I prayed *salāt khawf* with the Prophet. He arranged us in two rows behind him. The enemy was between us and the *qibla*. The Prophet made the *takbīr* and we all made the *takbīr*. He performed the *rukū'* and we all made the *rukū'*. Then he raised his head from the *rukū'*, and we all raised our heads from the *rukū'*. Next he went down for *sajda* as well as the closest row to him, while the back row stood facing the enemy until the Prophet and the first row had completed their prostrations, after which the back row made *sajda* and then stood. Following this, those in the back row moved to the front while those in the front moved to the back. The Prophet performed the *rukū'* and we all made *rukū'*. Then he raised his head and we raised our heads from *rukū'*. Afterwards, he made the *sajda*, and the row that was previously in the back during first *rak'ā* prostrated with him while the (new) back row stood facing the enemy. When the Prophet and the (new) front row had completed their *sujūd*, the new back row made the *sujūd*. Finally, the Prophet made the *taslim*, and we all made the *taslim*. This tradition is narrated by Ahmad, Muslim, an-Nasā'ī, Ibn Mājah, and al-Bayhaqī.

face the *qibla* direction while praying in the middle of the battle (when it is deemed too dangerous for him to face the *qibla* direction)⁴⁴⁸.

However, as in other *ḍarūra* cases, this special prayer is only permitted during the existence of real danger, which means when the enemy exists or when the troop strongly believes the enemy exists. The jurists agreed that the existence of enemies represents a *ḍarūra* which can amend the rules of prayer. However, Muslims who performed *khawf* prayer based on a false prediction have to redo the prayer. If they performed the *khawf* prayer and later discovered that the enemies had gone, for example, they have to repeat the prayer by performing a full prayer. Although the majority required only the *khawf* prayer based on a false prediction be repeated, the Shāfiʿī jurists⁴⁴⁹ requested that any *khawf* prayer be repeated after the war ends. For them, the *khawf* prayer does not lift the original obligation to perform a complete prayer.

The Mālikī jurists in particular, had also discussed the prayer in a *musāyafa* situation (facing the enemy directly)⁴⁵⁰. Like the Ḥanafīs, the Mālikīs also compromised certain movements during prayer such as talking, walking, stabbing enemies or even not facing the *Qibla* direction. In addition, Imām Mālik also permitted a praying person to look back during prayer because of *ḍarūra*⁴⁵¹. Such permission is not only limited to battle or war, but to any pressing dangerous situation. The examples of such situation mentioned specifically by the jurists include when one's swords are crossed, or while one's nose is bleeding⁴⁵².

Similarly, the Shāfiʿī jurists⁴⁵³ also extended the permission to amend the normal rules of prayer to other necessity cases. This includes the case of a

⁴⁴⁸ al-Zailaʿī, *Tabyīn al-Ḥaqāʾiq*, Vol. I, p. 233. The permission is based on the verse “*Fain khiftum farijālan aw rukbānan*”. See also the discussion in page 251. Praying facing other direction than *Qibla* is void unless in *ḍarūra*.

⁴⁴⁹ Zakariyya al-Anṣārī, *Asnā al-Maṭālib Sharḥ Raudh al-Ṭalib*, Vol. I, p. 136

⁴⁵⁰ The Prophet was reported performing *khawf* prayers during battles for example in the day of Dhāt al-Riqāʿ. See Ibn al-ʿArabī, *Aḥkām al-Qurʾān*, Vol. I, pp. 619-623.

⁴⁵¹ al-Bājī, *al-Muntaqā Sharḥ al-Muwattāʾ*, Vol. I, pp. 293-294

⁴⁵² al-Ṣāwī, *Hāshiyā al-Ṣāwī*, Vol. I, p. 52, al-Dusūqī, *Hāshiyā al-Dusūqī*, Vol. I, p. 394, Muḥammad bin Aḥmad bin Muḥammad (ʿAlīsh), *Manḥ al-Jalīl Sharḥ Mukhtaṣar al-Khalīl*, Beirut: Dār al-Fikr, 1989, Vol. I, p. 456

⁴⁵³ Zakariyya al-Anṣārī, *Asnā al-Maṭālib*, Vol. I, p. 136

person who had been crucified or when one is drowning. In these two specific cases, although the person could not perform perfect prayers physically, the obligation still does not cease. As in a war situation, the crucified person is still requested to perform a prayer to the best of his ability in whatever manner he is able to do. This prayer was also recognised by the Ḥanbalī jurists⁴⁵⁴. They maintained that even during dangerous situations, prayers should be performed without delay, either being performed on a transport, or while walking. According to the jurists, it is also recommended (*mustahāb*) to carry a weapon while performing *ṣalāt al-khawf*. Even though certain acts of praying cannot be performed in a perfect manner, a person can make gestures for the *rukūʿ* and *sujūd*. The gesture for his *sujūd* must be lower than that for his *rukūʿ*. This prayer is validated because of the importance of protecting one's life, family and wealth from dangers⁴⁵⁵ and at the same time to serve the interest of protecting one's religion.

It is important to point out that, the ordinary rules regarding prayers return when the enemy has gone. In other words, a Muslim has to continue his prayer in an ordinary way⁴⁵⁶. This rule is in line with the maxim which says that harm is measured in accordance with its true proportion (*al-ḍarūra tuqaddar biqadarihā*). Similarly, in the case of using sand for *tayammum*, the validity of prayer by *tayammum* ceases when one finds water during the prayer time (i.e. the dispensation of *tayammum* is no longer valid). These two rulings are analogous to the case of eating pork, which is only allowed only during starvation.

A *ḍarūra* situation can also omit the obligation to attend the Friday congregation. The Shāfiʿī jurists, however, ruled that the obligation is lifted when there is severe danger threatening a Muslim. The case includes the existence of enemies, unbearable sickness, extreme hot or cold weather or even extremely heavy rain⁴⁵⁷. Some jurists even compromised other cases, such as feeding a *mudtarr* (a person in dying need) during Friday prayer or

⁴⁵⁴ al-Buhūtī, *Kashāf al-Qināʿ*, Vol. II, p. 17

⁴⁵⁵ al-Buhūtī, *Kashāf al-Qināʿ*, Vol. II, p. 19

⁴⁵⁶ ʿAlīsh, *Manḥ al-Jalīl*, Vol. I, p. 457

⁴⁵⁷ al-Shāfiʿī, *al-Umm*, Vol. I, p. 239. This was also the view of the Ibādīs. See Muḥammad bin Yūsuf bin ʿĪsā, *Sharḥ al-Nīl wa shifāʾ al-ʿAlīl*, Vol. II, p. 319.

buying *kafn* (white clothing to shroud a dead person). In the latter case, the reason to delay the Friday congregation is because of the fear that the dead body will change colour. The need to bury a dead person is more important than attending Friday congregational prayer where the Friday prayer can be substituted by normal *Zuhr* prayer. This is also the view of the *Mālikīs*⁴⁵⁸ and *Ḥanbalīs*⁴⁵⁹. The necessity reasons that can allow the omission of the Friday congregational prayer also include business transactions if they are meant for necessity purposes⁴⁶⁰. In another example of how *ḍarūra* can change the rule of ordinary prayer, it is mentioned in the book of *al-Furū* by Ibn Muflīḥ⁴⁶¹ that the *Ḥanbalī* jurists even recognised business and sickness as valid grounds to combine prayer for a *muqīm* person. However, it is important to note that such a fear must be genuine.

What can we conclude from the discussions presented by the *Sunnī* jurists above? Firstly the jurists unanimously agreed that the obligations of prayer do not cease, even during extremely dangerous situations, as the Prophet was reported performing prayer during such situations. Secondly, the ordinary requirements and preconditions for the supererogatory prayer might be different in each situation. The acts of the Prophet of shortening and combining his prayer during dangerous situations were taken by the jurists as legal evidence to amend the ordinary rules of prayer. The jurists had extended the permission to other dangerous cases, such as during shipwrecks, and fleeing from a flood or fire. It is also important to bear in mind that such permission is not limited to what is specifically mentioned by jurists in their treatises. Any life-threatening cases or any case posing a threat to the five necessities can be valid grounds for altering the prayers.

This also implies that the *ḍarūra* rule can be extended to current pressing circumstances, for example, if a surgeon cannot perform a complete prayer in the operating theatre when the life of a patient is at stake and no other

⁴⁵⁸ al-ʿAdawī, *Hāshiyā al-ʿAdawī*, 1994, Vol. I, p. 371

⁴⁵⁹ al-Buhūtī, *Kashāf al-Qināʿ*, Vol. II, p. 49, Ibn Qudāma, *al-Mughnī*, Vol. II, p. 72

⁴⁶⁰ Some jurists also accepted non-necessity reason for delaying the *jumʿa* congregation, such as traveling, sickness, taking care of sick person, someone who is blind and has got no person to guide him to mosque, someone who caught in muddy terrain. See al-Sarakhsī, *al-Mabsūṭ*, Vol. II, p. 31, Ibn Naqīb al-Misri, *Reliance of the Traveller*, p. 202.

⁴⁶¹ Ibn Muflīḥ, *al-Furū*, Vol. II, pp. 80-81

eligible doctors are available. The rule also applies to someone who is in charge doing an extremely important job for the good of the public. This includes fire fighters, policemen and women and soldiers. However the permission to delay and combine prayers cannot be extended to non-necessity business (such as performing a non-necessity transaction or playing games).

4.3.2 The unavailability of clean clothes to perform prayer

The second case to be analysed concerns the unavailability of clean garments to perform prayer. The jurists unanimously agreed that during prayer, covering one's nakedness and praying in clean clothes are necessary conditions for the validity of the prayer⁴⁶². The clothes must be made from clean material and should cover one's *ʿawra* completely. One should also ensure the absence of filth (*najāsa*) on one's body, clothing, anything that touches the body and the place on which one stands during prayer. However, if a man cannot find any clean garment, which is a precondition to perform the *ṣalāh*, can he pray in a dirty garment or should he pray naked? Is the exception deemed as a necessity? The scholars differed in this matter. Some jurists preferred the person to pray without clothes, while some preferred praying with dirty garments and some said both acts are indifferent. The Ḥanafīs had a dispute about this matter. Abū Ḥanīfa and Abū Yūsuf provided two options, either to pray in a dirty garment or pray without clothes. For them, both acts (the obligation to pray in a clean garment and the obligation of covering one's *ʿawra* in praying) are of equal importance. They argued further, saying that if praying naked is prohibited, praying in dirty garment is also prohibited. Another view, according to a Ḥanafī jurist, Muḥammad al-Shaybānī, it is better for a Muslim to pray in a polluted garment rather than praying naked. For him, covering the *ʿawra* is more important than wearing clean clothes though both acts are *farḍ* (obligatory). He argued that praying naked leads to a sin of humiliating the religion and is an offence to the religion. The second sin is the sin of neglecting the requirement of praying in clean clothes. Meanwhile, praying

⁴⁶² The obligation to cover *ʿawra* during prayer is deduced from verse 31 *sūra al-Aʿraf* and there is a *ḥadīth* narrated by Abū Dāwūd and Tirmīdhī regarding this matter. See Ibn Qudāma, *al-Mughnī*, Vol. II, p. 283, Ibn Naqīb al-Misri, *Reliance of The Traveller*, p. 121.

in a dirty garment only carries one sin and that is the omission of the obligation to wear clean clothes but there is no sin for humiliating the religion. Hence, he has added an extra harm to the act of praying naked as compared to praying in a dirty garment. Hence, it can be concluded for Muḥammad, praying in a dirty garment is not as offensive to Islam as praying naked.

Another exemplary case raised by jurists is the permissibility to wear no clothes during prayer when a person cannot not find any. Although some scholars permitted a Muslim to pray without clothes if no clothes are available, they insisted that the harm of revealing one's nakedness should be minimised⁴⁶³. This requirement is in line with the legal maxim stating that 'the harm caused should be reduced'⁴⁶⁴. The acts of reducing harm in praying naked had been well-discussed in *fiqhī* literature. For instance, the Ḥanafīs, Shāfi'īs⁴⁶⁵ and Ḥanbalīs⁴⁶⁶ suggested that in a situation where clothes cannot be found, one should perform a prayer sitting down, and this is better than praying standing up as while sitting, more of a human's private parts can be covered when compared to praying standing up (especially when one has to bow). The Shāfi'īs⁴⁶⁷ and Ḥanafīs⁴⁶⁸ also suggested to those who do not have clothes to cover their 'awra with soil. It is also advisable to pray in dark water, or pray in the darkness as these will cover one's private parts. The Shāfi'īs⁴⁶⁹ also recommended that if a Muslim is able to conceal part of his nakedness, he must cover the front and rear private parts. If only one of these two can be covered, it must be the front. But for the Ḥanbalīs⁴⁷⁰, if the clothes are only sufficient to cover one of the private parts, a Muslim can choose either the front or the rear part to be covered as both of them are of the same importance to be concealed. The Ḥanbalīs also suggested to a Muslim to choose his least dirty garment to be worn in

⁴⁶³ See Zuhailī, *al-Fiqh al-Islāmī*, Vol. I, p. 741, see also al-Sharbīnī, *Mughnī al-Muḥtāj*, Vol. I, p. 186

⁴⁶⁴ Please refer to the Chapter Two regarding the legal maxims of *ḍarūra*.

⁴⁶⁵ al-Sharbīnī, *Mughnī al-Muḥtāj*, Vol. I, p. 186

⁴⁶⁶ al-Buhūṭī, *Kashāf al-Qinā'*, Vol. I, p. 271.

⁴⁶⁷ al-Sharbīnī, *Mughnī al-Muḥtāj*, vol. I, p. 186

⁴⁶⁸ Ibn al-Humam, *Fath al-Qadīr*, Vol. I, p.182 and al-Kasānī, *al-Badā'ī' al-Ṣanā'ī'*, Vol. I, p.

117

⁴⁶⁹ Ibn Naqīb al-Misri, *Reliance of The Traveller*, p. 122

⁴⁷⁰ al-Buhūṭī, *Kashāf al-Qinā'*, Vol. I, p. 271. However, some of them said the rear part of the private parts should be covered.

praying⁴⁷¹. One may find many disagreements between jurists in the above cases. The rules seem to vary depending on how the jurists measured the harm inflicted. Some jurists might say solution A is better than solution B while other jurists thought otherwise. This is so because they thought their solution provides the least harm. In this matter, I think freedom should be given to the person in the situation to verify the case according to the best of his ability. He himself should measure and weigh up the harm inflicted.

Another question concerns whether or not the act of searching for alternative clothes for prayer is an obligation for a Muslim. It is apparent that the requirement to search for clean clothes is analogous to the case of finding water in a *tayammum* case. The Mālikīs⁴⁷² insisted that searching and looking for clothes to perform prayer is *wājib*, either through borrowing or buying at the retail price (*thaman muʿtad*). The rule is the same as searching for water before switching to *tayammum*. However, other jurists did not regard the act of looking for clothes as a precondition in any *ḍarūra* situation. They maintained that the unavailability of clothes is sufficient to depart from the original rule of praying with clean clothes. The person is only obliged to ensure within the best of his ability that there are no clothes at all but he is not obliged to look for them. However, the act of looking for clothes is advisable. The Mālikīs argued that one cannot be certain about the availability of clean clothes unless he looks for them, hence they made such an act an obligation as a Muslim has to be sure about his *ḍarūra* situation. This school had made an additional obligation for a Muslim under duress to confirm his situation by asking, looking and searching for the clothes, while other schools only made it a complementary rule. It can be speculated that the precondition put forward by the Mālikīs is to ensure Muslims do not violate the concession given only to fulfil his worldly lust.

Another interesting case in prayer is the case of choosing between two dirty or religiously unclean garments. Both options contain the same level of harm. How can the principle of choosing a lesser harm be applied in this

⁴⁷¹ al-Buhūtī, *Kashāf al-Qināʿ*, Vol. I, p. 271

⁴⁷² al-Dusūqī, *Hāshiya al-Dusūqī*, Vol. I, p. 211 and also see Zuhailī, *al-Fiqh al-Islāmī*, Vol. I, p. 741

case? The Mālikīs⁴⁷³, for example, had discussed three issues; praying in silk garments, or in pig-skin-garment or praying with no clothes at all. Various opinions were delineated in these issues. Some of the Mālikīs ruled that praying in pig-skin-garments is better than praying in silk⁴⁷⁴. The reasoning is because wearing silk is prohibited for Muslim men at all times whereas wearing dirty clothes is only prohibited during prayer. As the prohibition of silk for men is more generally applicable to all situations and the pig-skin-garment is limited only during prayer, the former contains more harm than the latter. The second view, however, stated the opposite; preferring a Muslim man to pray in silk garment rather than pig skin clothes for praying. This group took into consideration the level of purity of those items. For them, pig skin invalidates one's prayer but the silk does not. Hence, wearing silk is better. Furthermore, pig is considered as *najis mughallaza* (grave impurity) as it significantly affects one's purity status. It can be concluded that this group had assessed the act by looking at the legal effect of the items. This legal effect was taken as their main consideration in justifying the case under review. The third group held that praying naked is better than either praying in silk or pig skin. For them, wearing silk or pig skin garments are both prohibited and are of the same level of prohibition. The acts are thus indifferent. In this case they recommended a Muslim to cover his *ʿawra* with soil or vegetation (*hashīsh*) rather than choosing between *najis* or *mutanajjis* clothes.

In another case, the Shāfiʿīs had analysed two cases; cleaning the garment that would lead to performing prayer after the time elapses and praying in time but in dirty clothes. Should we wait for the garment to be cleaned even if it makes us pray out of time or should we pray naked?⁴⁷⁵ The Shāfiʿīs preferred a Muslim to perform prayer after the time has elapsed in order to have a clean garment to pray in. In other words, if a Muslim has to clean his garment even if it makes him pray outside of the prescribed time, then this is better for him. As for this school, prayer in a clean garment is better, even if the prayer is not performed in the required time. Therefore, the Shāfiʿīs

⁴⁷³ al-Dusūqī, *Hāshiya al-Dusūqī*, Vol. I, p. 211 and also see Zuhailī, *al-Fiqh al-Islāmī*, Vol. I, p. 741

⁴⁷⁴ This silk-wearing-issue is limited for men as there is no prohibition of wearing silk for women at all.

⁴⁷⁵ al-Sharbīnī, *Mughnī al-Muhtāj*, Vol. I, p. 187

decided that praying in a complete manner is not only about praying in time, but praying with religiously clean clothes. Praying in time but naked is considered imperfect and most importantly some jurists described praying naked as a great offence to Islam.

Another *ḍarūra* case concerns whether or not a Muslim can steal clean clothes from others to perform prayer. Some jurists argued that having no clothes to pray in is not a license for a Muslim to steal clothes from others. The jurists also argued that this case is not analogous to the permission to stealing food during famine. The main consideration for this ruling is the alternative in each of the cases. In the case of having no clean garment, a Muslim has other alternatives to prayer (either performing prayer in dirty clothes or praying naked rather than stealing clothes). But in the case of food, there is no alternative for food, hence stealing is permitted. However, in the case of extreme weather, the jurists ruled that a Muslim is permitted to steal another person's clothes if the clothes can certainly protect him from the dangerous weather⁴⁷⁶.

The other important aspect here is that a Muslim under a pressing situation is required to minimise the harm of the act. This requirement can be seen in almost all *ḍarūra* cases. The same rule is applied to cases of praying without clothes or garments as stated above. As the legal maxims state that 'harm is eliminated to the extent that is possible' (*al-ḍararu yudfa' bi qadr al-imbkān*) and 'a greater harm is eliminated by means of a lesser harm' (*yuzāl ḍarar al-ashadd bi al-ḍarar al-akhaf*), efforts have to be taken to minimise the harm. In the event of no available clothes, one has to make an effort to cover his nakedness as much as he can.

4.4 *Darūra* cases in funeral rites

There are several fundamental rules regarding funerals, including the prohibiting of the burial of more than one body in one single grave. But under certain circumstances, burying more than one body is permitted, for example, if there is a high death toll resulting from a natural disaster, such

⁴⁷⁶ al-Sharbīnī, *Mughnī al-Muḥtāj*, Vol. I, p. 187

as shipwrecks, fire, plague, massacre or battle. Under these circumstances, the original rule can be set aside as to minimise the burdens of the people who are burying the bodies⁴⁷⁷.

The Shāfi'is ruled that it is forbidden to bury more than one body in a grave, as the Prophet is reported to have never buried more than one body in one grave⁴⁷⁸. The reason behind its prohibition is stated in *Fatāwā al-Ramlī*, which states that the burial of more than one person in a grave mixes the bodies of 'the god-fearing and the wicked⁴⁷⁹'. However, this action is in fact permitted under *darūra* as the Prophet buried together two bodies of the martyrs of the Uḥūd battle in one grave. The Prophet was also reported to have given preference to a person who remembered al-Qur'ān the most in this case over the heretic⁴⁸⁰. However, it is preferable if the person responsible for burial bury them in separate graves. Putting men and women in one grave is also prohibited unless in *shiddat al-ḥāja* (extremely dire need). Examples of this dire need include if it is not possible to bury them except by putting them together, for example, or if they are siblings, or husband and wife. The jurists had also listed the perfect order of putting the dead bodies in one grave. The most pious person or the most God-fearing person will be put in the very front row facing the *qibla*, then the ordinary men's line, the women and finally the children. In the case where one whole family has to be buried together, the father is to be put in the front line then the children. The elderly are given preference over the young. If they were at the same level, a lot is drawn. If some of the bodies appear to be rotting more quickly than the others, they are to be buried first and the preference list is suspended. If men and women must be buried in the same grave, segregation has to be made with soil, and men will be put in front of women.

⁴⁷⁷ Ibn al-Ḥajr al-Haytamī, *al-Fatāwa al-Fiqhiyya al-Kubrā*, Vol. II, pp. 13-14

⁴⁷⁸ al-Nawawī, *al-Majmū'*, Vol. V, p. 248, Zakariyyā al-Anṣārī, *Asnā al-Maṭālib*, Vol. I, p. 332, al-Qalyūbī wa 'Umayra, *Hāshitā Qalyūbī wa 'Umayra*, Vol. I, p. 400

⁴⁷⁹ al-Ramlī, *Fatāwā Al-Ramlī*, Vol. II, p. 41

⁴⁸⁰ See also the Prophetic tradition in al-San'ānī, *Subul Al-Salām*, Vol. I, p. 476

The Mālikīs⁴⁸¹ also held the same opinion concerning the burying of more than one dead person in a grave. They rendered it highly abhorrent unless in a case of *ḍarūra*. The best person will be put first facing the *qibla* direction. The priority in facing the *qibla* is first men, then children. Between men and women must be placed a separator. Some Mālikīs elaborated the permission to bury more than one person in a grave if the burial place is narrow or if there is only limited space available.

According to the Hanbalī School,⁴⁸² it is *ḥarām* to bury more than one dead body in one grave, except in cases of *ḍarūra*. Some believed it is not *ḥarām* if the dead are of the same sex. The priority based on religious background is also established, as the line in the grave has to follow the line of prayer. It is also prohibited to exhume a body unless there is an extreme need- for example if the prayer has not been performed on the dead body, or the body has not been ritually washed or if the dead person had swallowed precious items belonging to someone else. In this case, it is even permitted to cut his stomach to take out the items.

Discussions

Examining the cases of funeral rites, one may ask what is the reason behind the permission to bury more than one body in a grave? Is it merely to avoid hardship for the grave diggers? Digging one grave each for each dead person causes more hardship than digging a single grave. However, if the rule is merely to avoid hardship, it is not a necessity case. Instead, the reasoning must be that digging a grave for each body when there are many bodies, is hardship beyond what would normally be expected for a gravedigger to bear. The underlying reason here is the notion of a reasonable amount of hardship that one can expect gravediggers to bear, and that mass death due to a natural disaster exceeds that level of hardship. Similarly, some jurists also permitted burying more than one body due to limited space. The reasoning here is to protect the interest of the living

⁴⁸¹ al-Ḥitāb, *Mawāhib al-Jalīl*, Bayrūt: Dār al-Fikr, 1992, Vol. II, p. 236, see also al-Dusūqī, *Hāshiya al-Dusūqī*, Vol. I, p. 422

⁴⁸² al-Mardāwī, *al-Inṣāf*. See al-ʿAbdarī, *al-Tāj wa al-Iklīl*, Vol. II, p. 48. See also al-Buhūfī, *Sharḥ Muntahā al-Irādāt*, vol. I, p. 372

persons where the consumption of land for burial is limited, especially when the population increases.

The aforementioned cases also reveal something about the functioning of *ḍarūra* in the jurists' minds; namely, a valid case for the suspension of a ruling under *ḍarūra* can be made when the implementation of the ruling would bring unreasonable hardship to a section of a population⁴⁸³. There is no indication here that digging one grave for each individual is impossible, or might endanger life (of the living person), merely that the rule makes the action unreasonably demanding. However, it is evident that in such cases, the lives of the grave digger and other living persons might be in danger if the dead persons are not buried as quickly as possible. The jurists in some places mentioned that the reason for mass burial is that dead people rot quickly. It is clear that it is the health of the living persons that is taken into consideration here. Although they did not specifically mention the health reasons behind the permission, the ruling implies that a quick action (by burying them in one single grave) is deemed imperative. The permission here should not be seen as merely reducing a grave digger's burden, but most importantly, with regard to public health.

Similarly, exhumation, which is normally prohibited, becomes permitted when the dead person was not properly washed or no prayer was offered on him. The exhumation is also permitted when an interest of a living person has to be protected. However, this case should be treated with a careful examination. For example, the exhumation is permitted only if the dead person swallowed the valuable property of a living person. However, the jurists did not clearly indicate the amount of the money that justifies the exhumation. It can be assumed that the permission to exhume a dead body to take out the property is given if the value of the property is significant to the owner. The permission to cut the belly of a dead person is not a general permission, even if the dead had a debt to pay. Although the dead person is liable to pay the debt, there should be another way to pay the debt, especially if the amount of the money he swallowed was insignificant. This

⁴⁸³ This conclusion was made during a meeting with the supervisor, Prof. Robert Gleave, 20th January 2009

case is obviously not similar to the case of cutting the belly of a pregnant woman in order to save an unborn baby. If cutting the belly of the dead pregnant woman is the only way to save the baby, it is permitted, as protecting the interest of the unborn baby is greater than protecting the sanctity of the dead mother. However, in the case of taking out money from the dead person, the case should be treated differently.

4.5 *Darūra* in *hajj* cases

Several original rules during *hajj* can be suspended because of *darūra*, as, for instance, when the implementation of certain rulings would bring great harm to the pilgrims. Although breaking rules is permitted, the *muḥrim* is required to pay compensation either *kaffāra* or *damm* in most cases. The reason for the compensation is because the act of *hajj* is rendered imperfect, as with praying through *tayammum*. One example of a situation where a rule can be suspended is the case of a *muḥrim* who has to cover his head due to illness or severe hot or cold weather⁴⁸⁴.

During *hajj*, the *muḥrim* is prohibited from doing certain acts that normally would be allowed during ordinary situations, such as hunting, applying perfumes, wearing stitched clothes and wearing a face cover for women. However, under extreme situations where the *muḥrim*'s life and health might be endangered, the acts are permitted but the doer is still liable to pay compensation. For example, it is prohibited for a *muḥrim* to apply oil to his body during the *iḥrām* period unless, because of necessity such as sickness, it is necessary. However, he is subjected to pay the *fidya*⁴⁸⁵. Similarly, committing other prohibited acts such as wearing knitted clothes, or cupping are permitted because of *darūra*⁴⁸⁶. The person who has to shave or cut his hair before the *ʿīd* (10th of Dhul Hijja) where normally he is prohibited to do so, is also required to pay *fidya* (either fasting for three days, feeding six poor people or sacrificing a goat)⁴⁸⁷. The permission to shave the head due to necessity is based on an authority from a *ḥadīth* where the Prophet gave

⁴⁸⁴ It is prohibited for a *muḥrim* to cover his head throughout *iḥrām* period, like wearing turban or hat.

⁴⁸⁵ al-Dusūqī, *Hāshiya al-Dusūqī*, Vol. I, p. 61

⁴⁸⁶ al-Ṣāwī, *Hāshiya al-Ṣāwī*, Vol. II, p. 77. The jurists however disagreed whether the *muḥrim* has to pay the compensation.

⁴⁸⁷ al-Bājī, *al-Muntaqā Sharḥ al-Muwaḥḥid*, Vol. III, p. 344

permission to Ka'ab bin Ujra to shave his head and pay a penalty because he was suffering from head lice. However, some jurists like Mālik stated that the penalty should only be paid for by those who committed the prohibited act without the presence of necessity. Necessity for him lifts the penalty and the penalty should only be paid by someone who deliberately broke the rules out of necessity. However, if the prohibited acts need to be done repeatedly, such as wearing a head cover like a turban during the *ihrām*, the person only has to pay one *fidya*⁴⁸⁸. The Mālikīs also stated that anyone who goes hunting and kills an animal has to pay the *fidya*, even though he did it under necessity⁴⁸⁹. However, if a *muḥrim* accidentally kills an animal he does not have to pay a *fidya*. In this matter, we can see that the Mālikīs excused paying the compensation if breaking the rule was not intentional. The Ḥanbalī jurists also gave permission to a starving *muḥrim* to kill and slaughter an animal and eat until full during *ihrām*⁴⁹⁰.

The Ḥanafī jurists also required a *muḥrim* to pay the compensation for any crime committed during *hajj*, even if it was committed because of *ḍarūra*⁴⁹¹. However, the Ḥanafīs distinguished the compensation based on the period of the crime. The longer the crime is committed, the more severe the compensation is to be paid. If the crime was committed in less than one day, for instance wearing, stitched clothes or a turban, the *muḥrim* is only required to pay *ṣadaqa*. If the crime was committed up to one day or more, the *damm* should be paid. Meanwhile, al-Shāfi'ī did not distinguish the period, which means the *damm* has to be paid once the rule was broken regardless of the period. The Ḥanafīs also distinguished the degree of the crime committed. For instance, if the crime is insignificant, such as only covering part of his head, only *ṣadaqa* has to be paid. The Hanafī was found to be the only school imposing differing penalties according to the degree and the period of the crime committed⁴⁹². Different penalties are also

⁴⁸⁸ Ibn Ḥajar al-Haytamī *al-Fatāwa al-Fiqhiyya al-Kubrā*, Vol. II, p. 128

⁴⁸⁹ al-Bājī, *al-Muntaqā Sharḥ al-Muwattā'*, Vol. III, p. 73

⁴⁹⁰ Ibn Qudāma, *al-Mughnī*, Vol. IX, p. 334

⁴⁹¹ Ibn al-Humām, *Fath al-Qadīr*, Vol. III, p. 30. See also al-Sarakhsī, *al-Mabṣūṭ*, Vol. IV, p. 129

⁴⁹² Only one *damm* has to be paid for one illness but if another illness occurs that made the *muḥrim* break the rule, another fine is imposed. But the fine is again assessed for how long it was committed. If it was committed less than one hour, it only requires paying *qubda*

imposed for a woman who is wearing a face cover (*niqāb*). Some jurists also distinguished the compensations, namely *kaffāra* and *damm*, where the *kaffāra* is a compensation for a *ḍarūra* case and *damm* is a compensation for a non-necessity case. The jurists distinguished meticulously the penalties for every crime committed. For example, the penalty is severe for a rule abused more than what was actually needed. For instance, if a sick person only needs to wear a stitched shirt, but instead he wore a shirt and a hat, he is subjected to extra penalty. He has to pay two different compensations, namely *kaffāra* for breaking the rule because of necessity and the *damm* for breaking the rule out of a valid reason⁴⁹³.

The jurists had derived compensation rules from the Qur'ān⁴⁹⁴. It is also important to note that the Qur'ān explicitly states that breaking the rules of *ḥajj* subjects the person to pay compensation. Based on this verse, the jurists decided that breaking the rules because of necessity during this period only lifts the sin but not the penalty. The jurists had also gone into lengthy arguments, deciding whether the penalty is imposed for each act and distinguishing the penalty based on the type of the crime committed. However, not all necessity cases leading to breaking the rules of *ḥajj* require compensation. The compulsion to break rules during the *iḥrām* period is again is a matter of dispute like other cases. In this case, the Shāfi'īs did not regard compulsion and coercion as valid excuses. They maintained that the person compelled has to pay compensation whereas other jurists disagreed⁴⁹⁵. The Shāfi'īs argued that the compensation has to be paid because the *ḥajj* is already damaged, disregarding whether the person intentionally committed the act or otherwise. Meanwhile, the other jurists who insisted that the person with no will to break the rule should not be obliged to pay the compensation. He committed the crime because of the fear of the threat of the compeller and has no other choice.

The case of compulsion that has been discussed in Chapter Two shows us that the jurists disagreed in many cases on the consequences of compulsion

(paying wheat); if less than one day he has to pay *sadaqa* and up to one day, he has to pay *damm*.

⁴⁹³ al-Sarakhsī, *al-Mabsūṭ*, Vol. IV, p. 129

⁴⁹⁴ The basis for this rule is Q2:184

⁴⁹⁵ al-Jamal, *Hāshiya al-Jamal*, Vol. II, p. 504.

in Muslim acts, including *nikāḥ*, *ṭalāq*, killing, raping and *ḥajj* as well. Should a person take responsibility for a crime committed under threat? Is the rule similar to the situation where a person was pushed away from a building? In the latter case, he will subsequently fall and he has no power to prevent the damage. Meanwhile in the case of a threat from an oppressor, the case is quite different as the choice is still there, between endurance and submission. The *muḍtarr* can choose to stick to the rule and receives the consequence or commit the crime following the order of the oppressor. The case is analogous to the case of breaking the rule to save life in the *ḥajj* case where the *muḥrim* has to pay the *damm*. Both cases represent the need to protect one's life by breaking the rule although it requires a penalty to be paid. On this basis, I support the Shāfi'ī's view that the *muḥrim* who commits a crime during *ḥajj* due to a threat has to pay compensation.

4.6 Conclusions

It is apparent from the aforementioned discussions that *ḍarūra* application in *ʿibāda* cases are quite different when compared to non-*ʿibāda* cases. Firstly, the different necessities protected. Whereas in non *ʿibāda* cases, *ḍarūra* generally works to protect the life of the *muḍtarr* in *ʿibāda* cases, *ḍarūra* works to preserve the religion. In worship cases, some basic rules are tolerated in order to ensure that the rights of God are fulfilled in the specific required time. The *tayammum*, for instance, which most jurists agreed is permitted on the basis of *ḍarūra*, allows a Muslim to purify himself to perform prayers. Similarly, the rule of praying in religiously unclean clothes is only allowed during necessity when clean clothes cannot be found. Both cases imply that all religious obligations have to be fulfilled, although the preconditions of the validity are lack. The second distinction is that in worldly cases, *ḍarūra* generally changes prohibition to permission, while in *ʿibāda* cases it works quite differently. For instance, in worldly examples, the prohibition on eating pork changes to permission to save a starving Muslim. Meanwhile in *ʿibāda* examples, *ḍarūra* defers an obligation, changes the form of worship or even lifts an obligation. This is evident in the case of deferring Friday prayer to save a person's life. *Ḍarūra* can also amend the form of *ʿibāda* like the *khawf* prayer.

There are also similarities between worldly and religious cases of *ḍarūra*. In both categories, the *muḍtarr* is required to look for an alternative before he can exercise the *ḍarūra* alternative. As a hungry person is required to look for a lawful meal before he can consume *mayta*, the same requirement applies in *tayammum* cases, where a Muslim is required to find clean water before he can resort to *tayammum*. However, the Muslim jurists agreed that a person should not compromise his life or wealth in order to look for a better alternative. *Ḍarūra* cases in both categories also prove that breaking the original rule does not end certain liabilities and punishments. In worldly cases, the *muḍtarr* has to pay the damage for the property broken or the price of the meal eaten. Meanwhile in the *ḥajj* case, the *muḥrim* needs to pay either *fidya* or *damm* for each broken rule. It is also important to note that the religious obligations amended by necessity are rendered imperfect. In certain cases, the acts have to be repeated. The said cases of worldly and religious affairs suggest that *ḍarūra* only lifts the sin but not the penalty and liability.

The application of *ḍarūra* rules in *ʿibāda* cases also shows that the jurists applied both subjective and objective methods in examining the levels of harm in the *ḍarūra* situations. For instance, in coercion cases, the coerced has to carefully verify the threat he received before fulfilling the will of the coercer. The coercion case varies according to the person's ability to endure the threat. Similarly, careful examination must also be undertaken by Muslims troops before *khawf* prayer can be performed. They have to predict the danger as best as they can. However, if their prediction is found to be false, they have to redo the prayer. Similarly, in the case of *tayammum*, if a person assumed that there is no clean water for *wuḍūʿ*, but later he found his prediction to be untrue, he has to redo the prayer.

Ḍarūra cases discussed in Chapter Three and Chapter Four show us that the *ḍarūra* maxims were systematically applied by the jurists, for instance, the notion of choosing a lesser harm and the notion of eliminating harm as best as one can. This notion is evident in the case of choosing between dirty clothes and a pig-skin-garment for a prayer. The person is required to choose an act that he considers has a lesser harm than the other. This maxim

was consistently applied in other *ḍarūra* cases in worldly affairs discussed in the previous chapter. In all *ḍarūra* cases, the person should also believe that the harm is imminent from his preponderance of thought and most importantly he has to ensure that there is no other lawful alternative to be chosen in order to prevent the harm. However, although the general standards are given, careful examination must be taken in each case. The jurists were found to cultivate meticulous examples in order to distinguish *ḍarūra* cases, as they are different from each other. Individual Muslims need to do the same to verify their own necessity situation.

The final question is whether the moral policy is also taken into consideration in the *ḍarūra* case of worship. For instance, can the right of a human being overcome the right of God in *ʿibāda*? Although it is apparent that the rights of God are upheld in worship matters, the jurists were also found compromising this right when certain necessities are at stake, especially when someone's life is in a great danger. The case is evident when the jurists rule that it is preferable for a Muslim to choose *tayammum* when water is available and there is a need to prolong life. The *khawf* prayer also illustrates that the rule of worship can be tolerated in order to protect the safety of the community. This suggests that the Sunni jurists were of the view that the proper balance of the right of society, religion and the individual should be upheld. Although the rights of God needed to be fulfilled properly, they can be amended to suit the current pressing needs of the individual and the community. Some cases in this chapter also show that the interest of living human beings sometimes takes priority over the religion. The said cases also contradict the generally accepted doctrine of *maqāṣid*, which is that the protection of the religion should receive the highest priority than the other necessities⁴⁹⁶. However, this does not mean the religion is ranked second in priority as compared to other necessities in general. The religion should be upheld in whatever pressing situation and this should be done as best as a Muslim can. The religion will not be sacrificed for whatever reason. In the case of professing *kufṛ* does not mean one has to sacrifice his religion. Similarly, the permission to eat *mayta* in a non-Muslim country or the permission to delay prayer because of necessity

⁴⁹⁶ For further discussion of the theory of *maqāṣid shariʿa*, please refer to Chapter Two.

is not a compromise to the importance of religion. All these cases are exempted only because faith still remains in the heart. In addition, Islam as a system will not be affected by the unlawful act of one individual Muslim. Islam compromises three important elements, faith in the heart, verbal acknowledgment and physical obedience. The last two elements can be compromised because of necessity as long as the core element, that is the firm belief in the heart, remains.

Finally, as *ḍarūra* requires almost an identical standard of rules in both worldly and religious affairs, as presented in Chapter Three and Four, it is therefore suggested that the same standard be applied in any new emerging *ḍarūra* cases. The subjective and objective approaches used by Muslim jurists to identify the level of harm and danger in *ḍarūra* cases are also deemed significant. A person under duress should examine the situation of necessity with his best understanding and at the same time he is required to follow the same standard of *ḍarūra* rules. In the next chapter, I will be investigating the Harm Reduction Programme in Malaysia and justify the harm using the principle of *ḍarūra*. I will be using the general *ḍarūra* requirements as analysed in Chapter Two, together with the hypothetical case study in Chapters Three and Four to justify this programme. Although the solution for this programme was not explicitly offered by the classical jurists, the general guidelines discussed, with careful observations and useful insights, are very useful in assisting modern jurists to deal with HIV/AIDS issue.

CHAPTER FIVE: IS THE HARM REDUCTION PROGRAMME THE RIGHT SOLUTION?

5.1 Introduction

This chapter intends to examine the justification of the Harm Reduction Programme from a *Sharī* point of view. This programme has been implemented to reduce the spread of HIV/AIDS and at the same time to reduce drug abuse in Malaysia. There are many programmes under the Malaysian Harm Reduction umbrella, including methadone treatment, a needle exchange programme and condom distribution. However, I will limit the discussion to the methadone drug substitute programme and the needle exchange programme. The reason for choosing these two programmes is that they have been claimed to be the most effective methods in reducing the spread of HIV/AIDS and other infectious diseases. These two programmes can enhance the productivity of drug users, reduce the use of illegal street drugs and finally, reduce drug use in general. The programmes are described as the best alternatives to conventional methods of combating drug abuse, which usually fail to achieve their targets. This chapter begins by providing a snapshot of drug abuse and HIV/AIDS cases in Malaysia so as to provide the basis of understanding the issues to be discussed. This is followed by a discussion of the Harm Reduction Programme, including its philosophy, the methods and references to similar programmes in other countries. This chapter attempts to assess the disadvantages of the programme (as well as the harm reduction it might achieve) and tries to assess it using the rule of *darūra* outlined in previous chapters.

In the Introductory Chapter, we learned that the drug and HIV/AIDS problems in Malaysia are particularly a concern for Malaysian Muslims, as the majority of drug addicts and people with HIV/AIDS are Malay Muslims. Thus, the central questions, apart from justifying the Harm Reduction Programme in general terms, are: what can Islam offer to rectify the drug situation in Malaysia? And, what is the best solution from the Islamic point of view in this matter? For example, is the needle exchange and methadone programme best suited for Malaysian Muslim drug users and, can the programme be justified by the rule of *darūra*? As methadone

treatment involves the consumption of alternative drugs, this chapter will also shed light on the consumption of drugs for recreational purposes and medicinal purposes from the classical point of view.

5.2 The Malaysian Drug Context

Drug addiction in Malaysia has become a problem of epidemic proportions since the early 1970s and particularly since 1983, when the drug problem was redefined as a security problem and specific laws were promulgated to curb the epidemic⁴⁹⁷. Malaysia is among the countries employing the strictest penalties for drug trafficking and drug abuse. However, despite these strict laws and penalties, the level of drug abuse continues to rise every year. The National Drug Agency (NDA) was set up in 1988 to coordinate all anti-drug activities, including identifying, treating and rehabilitating drug users and addicts in the country. A study conducted by the Ministry of Health and the Universiti Utara Malaysia in 2003 found that as of 2002, Malaysia had recorded a total of 423,574 drug addicts. These drug users were captured by NADI (National Drug Information)⁴⁹⁸ and 166,363 completed their treatment and rehabilitation programme. However, according to the data, only 25% were recorded as being successfully rehabilitated and 73% relapsed. It is clear that the data provided by NADI about the numbers of drug users was referring to the official numbers of drug users being apprehended by police during raids and similar law enforcement activities. The real number of drug users in Malaysia is believed to be much higher than the reported figure. Research conducted to calculate the actual numbers of drug users in the country has estimated that there were over 890,000 drug users in 2002⁴⁹⁹ with nearly 118,000 needle users. The research also estimated that 8 percent of drug users were HIV-positive⁵⁰⁰. Intravenous drug users have been the main source of reported

⁴⁹⁷ See Ministry of Health Education, Universiti Utara Malaysia and WHO. See also "Estimation of Drug Users and Injecting Drug Users in Malaysia, a study by Ministry of Health Malaysia, in collaboration with Universiti Utara Malaysia with technical and financial support of World Health Organization (WHO), 2003

⁴⁹⁸ Data from NADI is the official statistics of drug situation in the country.

⁴⁹⁹ Ministry of Health Education, Universiti Utara Malaysia and WHO. See "Estimation of Drug Users and Injecting Drug Users in Malaysia" p.32

⁵⁰⁰ Annie Freeda Cruz, "Agency to help reduce HIV cases," *News Straits Times*, 6th October 2007. The study was conducted by the Ministry of Health Education, Universiti Utara Malaysia and WHO. See "Estimation of Drug Users and Injecting Drug Users in Malaysia"

HIV infections in the country for over the past 15 years and the Malaysian government has confirmed that 75 percent of those infected with HIV are injecting drug users (IDU)⁵⁰¹. This research also estimated that if nothing is done, one million Malaysians will become drug users and 300, 000 will be affected by HIV by 2015. This frightening estimation also leads to the fear of the rise of HIV/AIDS cases in the country.

Table A : Total number of HIV/AIDS cases and AIDS deaths by gender per year reported in Malaysia (from 1986 to December 2007)

Year	HIV Infection			AIDS cases			AIDS death		
	Male	Female	Total	Male	Female	Total	Male	Female	Total
1986	3	0	3	1	0	1	1	0	1
1987	2	0	2	0	0	0	0	0	0
1988	7	2	9	2	0	2	2	0	2
1989	197	3	200	2	0	2	1	0	1
1990	769	9	778	18	0	18	10	0	10
1991	1741	53	1794	58	2	60	10	9	19
1992	2443	69	2512	70	3	73	44	2	46
1993	2441	66	2507	64	7	71	50	5	55
1994	3289	104	3393	98	7	105	74	6	80
1995	4037	161	4198	218	15	233	150	15	165
1996	4406	191	4597	327	20	347	259	12	271
1997	3727	197	3924	538	30	568	449	24	473
1998	4327	297	4624	818	57	875	655	34	689
1999	4312	380	4692	1114	86	1200	824	50	874
2000	4626	481	5107	1071	97	1168	825	57	882
2001	5472	466	5938	1188	114	1302	900	75	975
2002	6349	629	6978	1068	125	1193	823	64	887
2003	6083	673	6756	939	137	1076	633	67	700
2004	5731	696	6427	1002	146	1148	951	114	1065
2005	5383	737	6120	1044	177	1221	882	102	984

⁵⁰¹Indra Nadchatram “Experts Gather to Discuss Findings on HIV/AIDS Programs in Malaysia”, *UNICEF Malaysia*, 15 December 2006. <http://www.unicef.org/malaysia/media>

2006	4955	875	5830	1620	222	1842	896	80	976
2007	3804	745	4549	937	193	1130	1048	131	1179
Total	74104	6834	80938	12197	1438	13635	9487	847	10334

(source: AIDS/STI Unit, Ministry of Health Malaysia 2007)

Table B: Total Number of HIV cases reported in Malaysia by age groups, ethnic groups, transmission based on risk factor and sector occupation (from 1986 to December 2007)

Factor	Classification	HIV infection	AIDS cases
Sex/gender	Male	74,104	12,197
	Female	6,834	1,438
Age group	<2 years	232	66
	2-12	532	132
	13-19	1,140	232
	20-29	27,955	2,649
	20-39	34,770	5,945
	40-49	12,580	3,279
	>50 years	2,895	1,177
	No data	834	155
	Total	80,938	13,635
Ethnic group	Malay	58,267	7,986
	Chinese	11,886	3,656
	Indian	6,532	1,068
	Bumiputra Sarawak	338	166
	Bumiputra Sabah	432	159
	Original	39	0
	Others in Peninsula	528	131
	Foreigners	2722	456
	No information	194	13
	Total	80,938	13,635
Transmission based on risk factor	IDU	58,135	7,582
	Needle prick	0	0

	Blood receiver	29	19
	Organ receiver	3	3
	Homo/Bisexual	1,472	421
	Heterosexual	13,038	4,030
	Mother to child/vertical	692	175
	No information	7,569	1,405
	Total	80,938	13,635
Sector/Occupation	Unemployed	14,403	3,775
	Government staff	548	158
	Student	205	48
	Uniformed bodies	647	138
	Fisherman	3,098	389
	Factory worker/industry	3,830	606
	Private sector/staff	2,796	831
	Sex worker	482	58
	Housewife	2,483	497
	Long distance driver	1,955	343
	Other	25,866	3,674
	Odd job	24,670	3,118
	Total	80,938	13,635

(source: AIDS/STI Unit, Ministry of Health Malaysia 2007)

According to Table B above, IDUs are the main cause of HIV/AIDS transmission, making up 71.82% of reported cases and about 70% of drug users are Malay. The data proves that Malays are the largest ethnic group infected by HIV/AIDS, and injecting drug users were the main mode of HIV/AIDS transmission. From 1986 to December 2007, Malays constituted 71.9% of people with HIV and 58.5% of those with AIDS. As Malays are generally Muslim, immediate action is necessary to control the spread of HIV/AIDS and to control drug abuse among Muslims.

The government has also confirmed that the number of women who contract HIV/AIDS is increasing every year and it is clear from the above table that

more housewives are being infected with HIV/AIDS than sex workers. It is likely that the disease was transmitted to the women from their husbands who are drug addicts or who used sex workers. Frighteningly, the number of infected minors has also increased. It can be reliably predicted that if the spread can be controlled among drug users, especially injecting drug users (IDUs), the HIV/AIDS cases among minors and women can be reduced and kept under control. Research carried out by the Universiti Utara Malaysia⁵⁰² in 2003 also found that the percentage of drug users who shared needles was 85.4%; 76.7% of them did not clean or bleach the needles before use, 53.8% of drug users did not use condoms when having sex with their main partner and 72 % did not use a condom when having sex with others. The data also shows that 76.9% of drug users lived with their partner. This behaviour among IDUs has certainly become the major contributor to the increase in the transmission of HIV/AIDS, not only to the other drug users but also to women and unborn children. About 15,000 children have already been made orphans by AIDS in Malaysia while women accounted for 16.3% of 80, 938 new HIV/AIDS cases in 2007⁵⁰³. According to Health Ministry data, 60% HIV/AIDS women were married and 70% of cases contracted HIV through heterosexual contact. A new report brought out by the Ministry of Health and the United Nation's Children Fund (UNICEF), 'Women and Girls Confronting HIV/AIDS in Malaysia' reveals that infections among married women through sex increased from 5% of total cases in 1997 to 16% in 2007. Kedah, Kelantan and Terengganu on the eastern coast of Peninsula Malaysia are overwhelmingly Muslim-Malay, and recorded the highest numbers of infected housewives⁵⁰⁴. Again many of these housewives caught the virus from their drug-user-husbands or husbands catching it through unsafe sex with sex workers. Many studies also confirmed that condom use is poor among men⁵⁰⁵, citing drug users and

⁵⁰² See Mahmood Nazar Mohamed, Slides on "Harm Reduction Program and strategies in Malaysia: To what extent is it successful?"(presentation slides), Universiti Utara Malaysia, n.d. The research reveals that 85.4% drug users share needles.

⁵⁰³ Medical News Today, "New HIV/AIDS Task Force Launched in Malaysia to Focus on Prevention Among Women", 19th December 2008.

⁵⁰⁴ Baradan Kuppusamy, "Health-Malaysia; Divided over HIV Testing". *Inter Press Service Agency*, 25th April 2009

⁵⁰⁵ Siti Norazah Zulkifli et al., "Impact of HIV/AIDS on People Living with HIV (PLHIV), their families and community in Malaysia" (Seminar paper) *Listen to their voices, act on the evidence*. The United Nations Malaysia HIV/AIDS Theme Group Seminar on HIV/AIDS.

their resistance to condom use as contributing to the spread of HIV/AIDS among other family members. The most alarming development in the last 10 years is that the number of women testing positive for HIV/AIDS each year increased from 2.63% in 1993 to 5.02% in 1997 to 9.01% in 2002⁵⁰⁶.

It is apparent from the above data that the HIV/AIDS is now attacking the institution of the family. Where a family with a drug addict husband suffers mentally, physically and financially, efforts must then be taken to stop the epidemic from affecting innocent people. The government is very much concerned with the escalation in the HIV transmission in Malaysia, especially amongst women, young people and injecting drug users. It notes with apprehension the growing impact of HIV on women and other vulnerable groups. It is estimated that if nothing is done by 2015, some 300,000 people could be HIV positive. As for HIV/AIDS cases, as of June 2006, 73,427⁵⁰⁷ Malaysians were diagnosed with HIV/AIDS, with an average of 17 new cases being reported every day. The number continued to rise until the end of 2006 by 76,389⁵⁰⁸. At the end of 2007, 10334 died because of HIV/AIDS⁵⁰⁹.

5.3 Malaysian Efforts

Drug abuse is the recognised major factor of the spread of HIV/AIDS cases through sharing needles and unsafe sex. The drug problem contributes not only to social ills by increasing HIV/AIDS cases, it also creates financial problems, reduces productivity, destroys family life and threatens national security. Prior to the launch of the Harm Reduction Programme, Malaysia, like many other countries, had developed a set of conservative methods to prevent drug abuse, and the Malaysian National Drugs Policy operated on

⁵⁰⁶ Huang and Hussein, "The HIV/AIDS Epidemic Country Paper:Malaysia", *AIDS Education and Prevention*, 16, Supplement A, 2004, The Guildford Press, p102

⁵⁰⁷ See also Siti Norazah Zulkifli et al., "Impact of HIV/AIDS on People Living with HIV (PLHIV), their families and community in Malaysia". This study reports up to June 2006, there were 73429 people have been diagnosed with HIV.

⁵⁰⁸ This number was recorded by Unit AIDS/STI, Ministry of Health Malaysia, in *Harian Metro*, 2nd December 2007, pp. 28-29. However, the number reported by Hamidah Atan is 76,386. See "Malaysia set to meet UN targets on HIV/AIDS", *Berita Harian*, Tuesday 2nd October 2007

⁵⁰⁹ See official report in "MAC gigih tangani pesakit HIV/AIDS", *Sinar Harian*, pp. 16-17, 19 May 2008 and see also Annie Freeda Cruz, "AIDS affecting more local women", *News Straits Times*, p. 22, 21st June 2008, source from AIDS/STI Unit, Ministry of Health Malaysia

the basis of reducing the supply and demand for drugs by adapting methods such as prevention, enforcement and rehabilitation . The most popular approaches are punitive methods and drug rehabilitation and treatment programmes. Malaysia is one of the strictest countries in the world in punishing drug-related crime. According to the Malaysian Dangerous Drug Act 1952 (revised 1989)⁵¹⁰, any person who:

(a) administered to himself or suffers any other person, contrary to the provisions of section 14, to administer to him any dangerous drug specified in Parts III and IV of the first schedule; or
(b) is found in any premises kept or used for any of the purposes specified in section 13 in order that any such dangerous drug may be administered to or smoked or otherwise consumed by him, shall be guilty of an offence against this Act and shall be liable on conviction to a fine not exceeding five thousand Malaysian Ringgit (RM5,000) or to imprisonment for a term not exceeding two years.

In addition, drug trafficking remains rampant despite provision for a mandatory death sentence for those convicted of drug trafficking⁵¹¹.

In addition to the strict approach to prevent drug abuse and smuggling, efforts have been made to help the drug users via drug treatment and rehabilitation program. In Malaysia, such programmes are under the jurisdiction of the National Drugs Agency and the Prison Department⁵¹². Like other countries, the Malaysian government initially developed a conservative method to eliminate drug dependence by reducing the supply and demand of the illicit substances. In an effort to reduce the demand for drugs, drug users and addicts were apprehended every month and given treatment and rehabilitation under the Drug Addiction Act 283 (Treatment and Rehabilitation 1983). At present, there are 28 Serenti Drug Rehabilitation Centres (DRC). However, the relapse rate ranges from between 43.9% and 62.1% and that is why many argue that the rehabilitation programmes have failed to meet their objectives. James F. Scorelli has remarked that Malaysia's drug rehabilitation programme is not

⁵¹⁰ Law of Malaysia Act 368 Sales of Drug Act 1952, Malaysian Dangerous Drug Act 1985, Act 316. This can be found at www.parlimen.gov.my. See also Raja Shahrom Raja Abdullah, "Promoting Public Safety and Controlling Recidivism Using effective Interventions Amongst Illicit Drug Offenders: An Examination of Best Practice", 135th International Seminar Participants' Paper.

⁵¹¹ See Malaysian Drug Act, Section 39 A and 39 B

⁵¹² Universiti Utara Malaysia, Ministry of Health Malaysia, research on "Estimation of Drug Users and Injecting Drug Users in Malaysia", 2003, p. 5

working as the country's relapse rate is above 50%⁵¹³. The ratio of drug addicts to population from 1998-2001 is 9 per thousand. Apart from the failure of the rehabilitation programme, the percentage of IDUs as a proportion of the total HIV/AIDS cases rose from 60% in 1990 to a peak of 82% in 1994, with an average (1990-2001) of 76%. Statistics from NDA showed that IDUs primarily use heroin and morphine, and there were 31,893 heroin and morphine users among apprehended drug users in 2002.

Despite the strict laws and severe punishment, drug problems continue to rise and the HIV/AIDS cases was rising every year (before the Harm Reduction Programme was launched). That is why many NGOs, such as the Malaysian AIDS Council and the Ministry of Health, are trying to adopt the Harm Reduction Programme to reduce drug abuse and most importantly to stop the spread of HIV/AIDS in the country. The previous method of top-down multi-agency governance was shown to be unsuccessful, thus a better approach of bottom up multi-level agencies was introduced. This included the Harm Reduction Programme. This programme was established in 2005.

After the start of the programme, there was a decline in drug abuse and HIV/AIDS cases, as illustrated in Table A. In 2007⁵¹⁴, 14, 489 addicts were seized, compared to 22,811 in 2006. In 2006 and 2007, there appeared to be a decline in the number of drug users detected compared to the period between 2000 and 2005 when between 30,000 and 35,000 addicts were detected every year. Vicknasingam and Narayanan suggest that the decline could be a reflection of the widening impact of the Harm Reduction Programme that may have dampened the zeal to simply detain addicts. The proponents of the Harm Reduction Programme are of the view that the Harm Reduction Programme in Malaysia has shown some initial success with a reduction in the number of HIV/AIDS cases.

However, this programme has ignited controversy among Muslim clerics in the country with the majority of them opposing the programme arguing that

⁵¹³ Bernama, *nstonline*, "Helping addicts with methadone", 21/04/2009 www.nst.com.my

⁵¹⁴ See B. Vicknasingam and S. Narayanan, Universiti Sains Malaysia, "Malaysian Illicit Drug Policy: Top-Down Multi Agency Governance or Bottom-up Multi Level Governance". In their research, the registered drug users between 1988 and 2006 were 300,241, constituting 1.1% of the general population.

it condones immoral behaviour and further worsens the HIV/AIDS programme.

5.4 HIV/AIDS and Muslim councils' and NGOs' responses to the HIV/AIDS situation

As far as Malaysian Muslim councils and NGOs are concerned, they also take seriously the effort to combat the spread of HIV/AIDS, especially among innocent people (such as wives of drug users) and unborn children. Some Muslim authorities require mandatory HIV/AIDS tests for persons intending marriage⁵¹⁵. Some human rights organisations strongly oppose this testing as they insist that people with HIV/AIDS should be given equal rights to consummate a marriage and that their confidentiality and privacy should be respected⁵¹⁶. However, some like Johore Islamic authority argue that there is no objection to people with HIV/AIDS solemnising their marriage, but the patients need to inform their partner of their status prior the marriage to avoid any misunderstanding after the marriage which might lead to *fasakh* (separation after marriage) after that. If the spouse agrees to continue with the marriage, the Islamic council will offer counselling and any help regarding their marriage, especially to minimise the risk of infection.

The mandatory screening is now becoming a requirement for brides-to-be in Perak, Pahang and many other states. Again, human rights organisations see this effort as prejudice against people living with the virus. Despite protests from HIV/AIDS experts and civil rights activists⁵¹⁷ who say mandatory screening is a serious violation of individual rights and does not prevent the spread of the disease, the government intended to widen the mandatory screening rule to all Malaysian couples beginning in 2009. Muslim leaders

⁵¹⁵ In Malaysia, the religious affairs fall under state's list. Although majority of the states follow the same Shafi'i School, the regulations may slightly differ especially when it comes into technical matters. For instance, at the moment, the requirement for HIV/Test is only mandatory for certain states such as the states of Johor and Perak.

⁵¹⁶ See YHM Safian et al., *Perlaksanaan Ujian HIV Bagi Bakal Pengantin*, (research report), Universiti Sains Islam Malaysia, Nilai, 2007

⁵¹⁷ Many human right activists and HIV/AIDS experts oppose mandatory testing for Muslim couples such as Adeeba Kamaruzzaman and Marina Mahathir. Mahathhir strongly opposes the testing by saying this is totally violate the rights of the patients to lead normal live like others.

have suggested that the people with HIV/AIDS should not be allowed to marry and have children as it is unfair for the families and some Muslim leaders are even calling for the isolation of people with HIV/AIDS⁵¹⁸. Human right activists strongly insist that these people should not be isolated but that they should be allowed to have careers and must be allowed to marry and have sex. Any isolation, quarantine and mandatory testing are undoubtedly a punishment for them. The suggestion from Muslim clerics that people with HIV/AIDS should be isolated or quarantined is not a fair suggestion as these people should have the same right to live as the rest of the population. Society and these people in particular, need to be educated on how the disease spreads. The people with HIV/AIDS can lead a normal life, get married and have safe sex. However, the ignorance among these people and the community is the major concern here. They are unaware about how HIV/AIDS can spread and that is why HIV/AIDS is seen as a death sentence within the community. Ignorance is not the only problem, drug users with HIV/AIDS are mostly irresponsible in sharing needles, and refuse to wear condoms while having sex with their partners. Despite the efforts of the human rights activists in asking the community and government to accept people with HIV/AIDS, these people need education and to be taught to be responsible especially to others.

The arguments of both parties are based on a lack of understanding and ignorance. The human right activists should view the mandatory testing as an effort to prevent the HIV/AIDS from spreading to healthy people or unborn children. Clearly, there is no impediment to the persons getting married even if they are HIV/AIDS positive. Many Islamic authorities in Malaysia believe that the spouse should have the right to know his/her health condition prior to the solemnisation of the marriage. Furthermore, after marriage, a spouse can ask for divorce if he/she finds that the spouse has a serious disease or cannot consummate the marriage. However, if the spouse agrees to continue the marriage despite knowing about his/her spouse illness, the marriage can be solemnised and the couple will then be educated on how to live with the disease. The efforts made by the religious

⁵¹⁸ See Baradan Kuppasamy, "Health-Malaysia: Divided over HIV Testing", *Inter Press Service News Agency*, 25th April 2009

councils clearly do not intend to prevent the HIV/AIDS people from getting married but to educate people about HIV/AIDS. Confidentiality in the process of HIV/AIDS screening test is a great concern and the Islamic authorities have said that they will not put pressure on the person with HIV/AIDS to inform their partner but that the choice is left to them⁵¹⁹.

This programme of Harm Reduction has also received mixed responses from local communities, Muslim clerics and Islamic organisations. The former Minister of Religious Affairs, Datuk Dr. Abdullah Muhammad Zain,⁵²⁰ gave positive feedback regarding the Harm Reduction Programme. He insisted that such a programme can be implemented but within a limited capacity, for example, distributing condoms only to drug users who are already married. He himself recognised that patients should have a normal life despite the several precautions that should be followed to control the infections. He again insisted that these programmes of methadone, condoms and syringes should be allowed temporarily in order to control the disease.

However, other Muslim organisations such as ABIM (Angkatan Belia Islam Malaysia) and some Muslim experts oppose the programme. Dr. Muhammad Akram Laldin from the Islamic International University of Malaysia argued that the programme is clearly wrong as it contradicts the Islamic principle of harm. He argued that this programme only brings more harm than benefit to the drug users. For him, such a programme is a waste of public money and worsens the current social problems⁵²¹.

We can see here that the contradictions within the Muslim community are derived from differences in Islamic points of view. The proponents of this programme see this HRP approach as an exemption from ordinary conservative rules as HIV/AIDS have become a national epidemic and the

⁵¹⁹ A research on HIV/AIDS mandatory screening test for couples intending marriage in the state of Johore found that the Johore Islamic Department does not force any body who is HIV/AIDS positive to cancel the marriage, but rather giving the patients and his/her couple advices and counseling on how to live with HIV. Johore is the first state in Malaysia that makes HIV/AIDS test prior marriage as mandatory. Following the state of Johore, this test had been made mandatory in other Islamic Departments of other states.

⁵²⁰ *Al-Islam*, Kuala Lumpur, October 2005, p. 28

⁵²¹ *Al-Islam*, Kuala Lumpur, October 2005, p. 31

numbers keep soaring every year. The previous Minister of Religious Affairs clearly stated that such a programme can be promoted within the limited boundaries set down by the Sharī'a and can be implemented temporarily. This can be considered an illegal act which is legalised temporarily to preserve human necessities but it can be only done temporarily. This is parallel to the rule of *ḍarūra*. Whilst *ḍarūra* permits a prohibited act because of necessity, it should be borne in mind that the act has several preconditions and is only allowed to be done temporarily. Meanwhile the opponent of the HRP adheres to the original rule in Islamic law which clearly indicates that any means which lead to disaster or harm should be avoided (*sadd al-dharā'i'*) and the programme is considered illegal as they will worsen social problems among Muslims. This group opposes the HRP but they fail to consider the AIDS/HIV situation in Malaysia as *ḍarūra*. Meanwhile, the first group indicates the HIV/AIDS problem is a case of necessity.

However, before exploring the justification for the HRP under the rule of *ḍarūra*, it is important to have a clear view of Harm Reduction Programme so as to avoid any misunderstanding about the said concepts.

5.5 Harm Reduction Programme

"Harm reduction" is a term referring to policies, programmes, services, projects and actions that work to reduce not only harm to health, but also the social and economic harm to individual, communities and society. It is an approach aimed at reducing and minimising the negative consequences resulting from negative behaviour such as drinking, driving and substance abuse. The aim of this programme is not abstention but instead a reduction of the negative effects associated with the negative behaviour.

This programme can be seen as an alternative to the conservative methods controlling negative behaviour, i.e. punitive methods. The proponents of this approach argue that the conservative method is no longer successful as crimes such as drink driving and drug abuse are still on the rise. Harm reduction works with the pragmatic acknowledgment that the conservative methods have failed to combat the drug, nicotine and drink problem and

there are no known effective interventions for eliminating drug-related crimes and related problems. This method requires a paradigm shift from an idealistic to a realistic and pragmatic perspective. Harm reductionists recognise the fact that drug abuse and other negative behaviour are inevitable and society is unlikely to ever be drug, drink and nicotine free. Hence, action must be taken to reduce the harm. For them, harm reduction is a more realistic approach where patients are motivated, given the opportunity to choose a better alternative to reduce the harm and the patients are not forced to undergo treatment unless they are ready⁵²². Recognising the reality of drug use, Harm Reduction Programme measures success in terms of individual and community quality of life and health and not in relation to levels of drug use. This programme also entails a prioritisation of goals. Given the high individual and social costs associated with AIDS, measures to prevent the spread of HIV are at the forefront of harm reduction priorities.

There are two basic pillars of this programme, one is pragmatic (public health) and the other is based on a human rights approach. The harm reductionists believe that changing human behaviour must be a facilitative and cooperative process, which must preserve and respect human dignity. This approach avoids moralistic, stigmatising and judgmental statements about people with HIV/AIDS. That is why they use the term of *drug user* instead of *drug abuser* and they use the term *sex worker* instead of *prostitute*. This programme also seeks to identify and advocate changes in laws, regulations and policies that they believe increase harm, or which hinder the introduction of harm reduction interventions. Within the pragmatic framework, people are not forced to undergo treatment and they can opt out of treatment whenever they feel they want to. This programme strongly works to help people be alive and well and at the same time motivates the patients, giving them more choices⁵²³.

The principles of harm reduction

⁵²²See Open Society Institute, *What is Harm Reduction*, 1 January 2001
http://www.soros.org/initiatives/health/focus/ihrd/articles_publications/articles/what_20010101

⁵²³ See also Open Society Institute, *What is Harm Reduction*, 1 January 2001
http://www.soros.org/initiatives/health/focus/ihrd/articles_publications/articles/what_20010101

To understand more about how this programme works, it is important to be acquainted with the principles of this programme. The following principles of harm reduction are adapted from those set out by The Canadian Centre on Substance Abuse (CCSA 1996), and Lenton and Single (1998)⁵²⁴. Harm reduction:

- 1. is pragmatic and accepts that the use of drugs is a common and enduring feature of human experience. It acknowledges that, while carrying risks, drug use provides the user with benefits that must be taken into account if responses to drug use are to be effective. Harm reduction recognises that containment and reduction of drug-related harms is a more feasible option than efforts to eliminate drug use entirely.*
- 2. Prioritises goals: harm reduction responses to drug use incorporate the notion of a hierarchy of goals, with the immediate focus on proactively engaging individuals, targeting groups, and communities to address their most compelling needs through the provision of accessible and user friendly services. Achieving the most immediate realistic goals is viewed as an essential first step toward risk-free use, or, if appropriate, abstinence.*
- 3. Has humanist values: the drug user's decision to use drugs is accepted as fact. No moral judgment is made either to condemn or to support use of drugs. The dignity and rights of the drug user are respected, and services endeavor to be 'user friendly' in the way they operate. Harm reduction approaches also recognise that, for many, dependent drug use is a long term feature of their lives and that responses to drug use have to accept this.*
- 4. Focuses on risks and harms: on the basis that by providing responses that reduce risk, harms can be reduced or avoided. The focus of risk reduction interventions are usually the drug taking behaviour of the drug user. However, harm reduction recognises that people's ability to change behaviours is also influenced by the norms held in common by drug users, the attitudes and views of the wider community. Harm reduction interventions may therefore target individuals, communities and the wider society.*
- 5. Does not focus on abstinence: although harm reduction supports those who seek to moderate or reduce their drug use, it neither excludes nor presumes a treatment goal of abstinence. Harm reduction approaches recognise that short-term abstinence oriented treatments have low success rates, and, for opiate users, high post-treatment overdose rates.*

As far as drug users are concerned, the harm reductionists believe that offering drug substitutes is an ideal way to reduce illicit street drug use, control the illegal drugs trade, minimise overdose problems and any drug related deaths and subsequently reduce drug use overall. This method is

⁵²⁴ UK Harm Reduction Alliance, *Harm Reduction*, 21 April 2009
http://www.ukhra.org/harm_reduction_definition.html

regarded as a bottom-up approach, which contradicts the traditional top-down method of combating crime. Top-down approaches mean that the enforcement of controlling negative behaviour comes from government agencies down to the local services. Meanwhile, under a Harm Reduction Programme, the approach comes from local initiatives, NGOs and the government agencies who can also play their important roles. The harm reductionists also treat the patients not as criminals but rather as clients. They insist that society and the authorities must stop labelling the patients and to end the stigma insisting that people with HIV/AIDS be treated equally despite their behaviours. They also do not judge the patients and these approaches are claimed as operating more humanely towards the patients. The original approach of this programme is a non-abstinence focus while some harm reductionists still insist the aim of this programme is abstinence.

This programme⁵²⁵ starts by sorting out specifically the harms associated with negative behaviour and trying to offer the best alternative to reduce the risks. For example, in drug abuse, if the drug users are facing the risk of contracting blood borne viruses, then the answer is to provide clean and sterile syringes for the drug users. Similarly, people whose dependants are on illicit drugs such as heroin and morphine face the risk of overdose and the risk of losing productivity in the work place. In such cases, methadone or other substitute drugs will be provided, which can minimise overdose problems and can reduce the craving, and hence the drug users can live a relatively normal life and go to work. Another example of harm reduction is the risk of collision faced by a drunk driver. The harm can be reduced by drink driving laws, the provision of public transport, and designated driver programmes.

The programme of Harm Reduction, its philosophy and its strategy are alien to Sharī'a (as claimed by many Muslims)⁵²⁶. This claim is based on several reasons:

⁵²⁵ International Harm Reduction Programme, *What is Harm Reduction Programme?* <http://www.ihra.net/Whatisharmreduction>, 21st April 2009

⁵²⁶ See *Al- Islam*, Kuala Lumpur, October 2005, p. 31

1. The harm reductionists do not render drug users and prostitutes as criminals as they do not make any moral judgement in their approach. In Islam, a criminal is considered a criminal, however, the status does not deny his right to receive fair treatment from the authorities. Despite the crime they committed, it does not mean the authorities have the right to disrespect the drug users or prostitutes' rights and dignity.
2. In Islam, protecting physical public health is as important as protecting spiritual health. In this case, social ills like prostitution and drug use are crimes and must be stopped. However, the Harm Reduction Programme only targets the achievement of a better quality of individual life and an improvement in public health, despite the crimes that have been committed. The harm reductionist approach seems not to care about the quantity of drugs they have used or how sinful the prostitutes are. These do not matter, as long as they do not affect the public health. As for the harm reductionists, the important thing is that people can stay healthy despite the sin they have committed.
3. The harm reductionists also aim to eliminate the stigma among the public about drug users, sex workers and people living with HIV/AIDS. That is why they do not use the term 'drug abuse' and 'prostitute'. This effort can be seen as trying to decriminalise negative acts. This again can create confusion among Muslims because Muslims are taught that drugs are a national and religious enemy and prostitution is a crime and a deadly sin from within Islam.
4. There is also confusion among drug users and former drug users in Malaysia especially regarding methadone treatment. For former drug users, being given needles and syringes is the same as being given a way to become addicted again.
5. Hence, the Harm Reduction philosophy is alien to Islam and contradicts Islamic principles. However, certain approaches in harm reduction strategies can be applied under the principles of *ḍarūra* to temporarily prevent a greater harm. This programme can be altered to best suit the Muslim community to achieve the target of reducing

HIV/AIDS cases, but implementing this programme as a whole is unjustified. The methadone programme can be treated as a treatment for drug users. Condoms can be provided for married injecting drug users and syringes can be provided temporarily as long as the drug users have the determination to come off drugs in the long term.

6. Another important point is that if the harm reduction can be implemented under the rule of *ḍarūra*, the majority of Muslim schools of law require the person to repent before he can exercise the dispensation as *rukḥṣa* and *ḍarūra* rules are only meant to help devout people.

It may be concluded that the Harm Reduction Programme was initiated with a belief that the conservative methods of preventing negative behaviour, especially to combat drug problems, were having no success. The harm reductionists also believe that certain negative acts cannot be prevented totally so the best one can do is to minimise harm without aiming to prevent the negative behaviour itself. It is more pragmatic than the conventional method of preventing drug abuse and, it is claimed, more humane towards drug addicts and people with HIV/AIDS. The harm reductionists also treat the drug users, sex workers, alcoholics as clients rather than criminals. They believe that this is a 'humane' approach which can reduce the negative consequences of drug abuse, alcohol and sexual activities, and further reduce the spread of deadly diseases such as HIV/AIDS, the deaths resulting from using illegal drugs and can help reduce the number of people using illegal street drugs and any drug related crime.

However, there are fears that the methadone and needle exchange programme condones immoral behaviour, only adding to the problem of drug use. Many drug producers will often take the opportunity presented in these programmes when they see the lenient approach adapted by the governments. At the same time, some people, including teenagers, and drug users themselves, have become confused about the approach and are hesitant to come forward. The abuse of the methadone provided is also reported, as some drug users reportedly mix the methadone with the drug, making the mix more hazardous. GPs and doctors do not always follow the strict guidelines required by the government (sometimes wilfully

disregarding them) and sometimes sell the drug to the drug users. Another worry is how we can ensure that the needles provided are safely used and will not be reused and shared by the drug addicts?

5.6 Malaysian Harm Reduction Programme

In Malaysia, this programme was initiated by several NGOs (non-government organisations) which later were joined by the Ministry of Health. The strategies and approaches of harm reduction constitute many different programmes including condom distribution, methadone treatment and a needle syringe exchange programme. The Harm Reduction Programme⁵²⁷ implemented by the Ministry of Health Malaysia since 2006 have consisted of two components, Methadone Replacement Therapy and Needle and Syringe Exchange Activity with the objective of preventing the spread of HIV.

5.7 Malaysian Methadone Programme

Methadone is a rigorously tested medication that is safe and efficacious for the treatment of narcotic withdrawal and dependence. It is a synthetic opiate like heroine or morphine but without a strong sedative effect. It can be substituted for heroin and is widely used by doctors in the treatment of heroin addiction. Methadone appears significantly more effective than non-pharmacological approaches in retaining patients in treatment. It was first produced by German chemists in the early 20th century and it has been widely used since the end of World War II. The Malaysian government allocated RM1.6 m for the methadone pilot project in 2006⁵²⁸. Until October 2007, some 5000 individuals were undergoing the methadone replacement therapy at 58 locations, including hospitals, health and private clinics⁵²⁹. The programme has borne positive results with 66% of those undergoing a 12 month therapy able to maintain permanent employment while 24.9% have taken temporary employment. Methadone drug substitution therapy

⁵²⁷ Malaysian Auditor General's Report for the Year 2008, pp. 258-276 (Malay Version). The English summary can be viewed online www.audit.gov.my

⁵²⁸ Faridah Hashim, "RM1.6 juta diperuntuk guna metadon bagi program perintis pemulihan", *Utusan Malaysia*, Saturday 1st October 2005, p. 14

⁵²⁹ Mazwin Nik Anis, "Methadone plan to help more drug addicts", *The Star*, 2nd October 2007, p. 4

has been proven effective, and the Malaysian government favours this approach because it is cost effective and useful for reducing deaths attributed to opiate over-dose⁵³⁰. In government hospitals, directly observed therapy, in which a patient is required to take the medicine under the observation of a health care professional, is practised. Government hospitals also dispense “take away” medicines. Most private clinics prescribe methadone for consumption at home.

In Malaysia⁵³¹, the methadone treatment programme is intended to improve the patients’ health, quality of life and to reduce drug-related deaths. It also intended to help patients, assisting them with facilities and advice to improve their health and at the same time help to reduce the spread of HIV or other blood borne disease that spread through injections as methadone does not require syringes or needles. Methadone is also used as a substitute for opioids like heroin, as it can reduce cravings. It also aims to stop drug abuse or at least minimise drug use until the users can stop. The methadone supplement programme is also intended to reduce drug-related crimes such as robbery or theft. It also aims to help the patients stabilise their lives and reintegrate with general community. Several guidelines have been provided by the Ministry of Health that should be observed by the patients. Accordingly, the patients are required to fully cooperate in this programme. They are also required to attend counselling programmes and to fully observe the treatment schedule. Methadone is only prescribed to eligible opiate dependents after a clinical assessment is made by a physician. During the treatment, they are advised to bring along family or close friends during the first week of treatment in case if any problems arise. The patients are also not allowed to drive after taking the treatment in the centre and are not permitted to take any other drugs or alcoholic drinks during treatment. If a patient happens to see another doctor during the treatment, he needs to inform the doctor treating him that he is currently receiving methadone treatment. If the patients fail to appear twice for treatment continuously, the treatment will be re-evaluated and the treatment may be cancelled. The

⁵³⁰ Zaheer-Ud-Din Babar et al., “Harm Reduction Program and Methadone Poisoning: Implications for Pediatric Public Health in Malaysia”, *Journal of Pharmacy Practice*, 2006:19:5, pp. 280-281

⁵³¹ Unit Substans dan Konsultasi, Ministry of Health Malaysia, *7 Maklumat Penting Terapi Gantian Dengan Metadon*. 2005

patients are not allowed to sell or falsely use the methadone and it is only for personal consumption. Eligible patients who complete three weeks treatment are allowed to bring methadone home for three days consumption⁵³².

However, despite several regulations and precautions, this programme is not without risk. Home consumption, for example, may prove to be problematic as the drugs may be dispensed without adequate patient education and clear instructions on its handling, storage and indication for use. No standard guidelines are available and the containers are not child resistant. There was a case of a 19 month-old Malay girl who was brought to the hospital after an episode of accidental ingestion of methadone⁵³³. Many have called for appropriate plans of action and community awareness campaigns to inform the public as well as health care professionals.

Research⁵³⁴ was conducted to assess the best methadone programme to suit Malaysian local settings, to determine the average dose required and to determine problems that can arise from implementing such a program and how best to address them. The research found that methadone is a safe and effective drug that can be used in the local Malaysian setting. Out of 40 subjects, 32 of 40 recipients (80%) reported a better relationship with their carers, and 7 (17.5%) reported no change. Only 1 (2.5%) reported a worsening relationship after the start of the programme. Although the number of respondents in this study is small, this research can be deemed important as this is among the earliest research on methadone programme in Malaysia. The traditional method (that is the rehabilitation programme), however, was claimed to be comparatively ineffective, with less than 10% of rehabilitated opioid dependence patients being able to eventually stay off drugs. 60% of respondents reported an overall improvement in their work

⁵³² See MOE/USM/UNODC/ILO, "Training Course on the Management of Drug Users with HIV/AIDS", (presented paper), Penang, Malaysia, 13-17th September 2004. See also Unit Substans dan Konsultasi, Kementerian Kesihatan Malaysia, *7 Maklumat Penting Terapi Gantian dengan Metadon*, Putrajaya: Cawangan Penyakit Berjangkit, Kementerian Kesihatan Malaysia, 2005

⁵³³ Zaheer-Ud-Din Babar et al., "Harm Reduction Program and Methadone Poisoning: Implications for Pediatric Public Health in Malaysia", *Journal of Pharmacy Practice*, 2006:19:5, pp. 280-281

⁵³⁴ Jesjeet Sing Gill et al., "The First Methadone Program in Malaysia: overcoming obstacles and achieving the impossible", *ASEAN Journal of Psychiatry*, 2007;8 (2), pp. 64-70

performance or had gained employment whereas 40% reported no change. None reported worsening work performance or losing their job. None of the subjects reported that they had been involved in crime or indulged in high risk behaviour such as self-injecting or promiscuous unprotected sex since the programme began. However, there was a concern about the report as this was based on self reporting. The research also found that methadone is a safe drug as only two subjects complained of side effects. The retention rate was 75% and this result is considered heartening despite the rather short duration. This local study proved along with many other studies that methadone can eventually lead to abstinence from heroin, and helps reduce high risk crime behaviour, and it can improve work performance and relationships with carers.

5.7.1 Is the Malaysian Methadone Programme in compliance with *darūra* rule?

Having examined the *modus operandi* of methadone treatment above, it is apparent that the government has made a serious effort to reduce the risk of opiate addiction by providing a supply of methadone. Methadone is considered as a synthetic narcotic drug similar to morphine but less habit-forming and lasts a lot longer in the body. As the methadone used is the primary subject of this programme, is it lawful to use drug to treat drug addiction?

Chapter Three, highlighted the dispute between Muslim jurists regarding the use of illegal substances for medical treatment. Many jurists agreed that all unlawful substances except *al-khamr* can be consumed for medical purposes⁵³⁵. However, only a small number of jurists permitted *al-khamr* for medication, whether the disease is severe or mild. Jurists also agreed that the prohibition of *al-khamr* is due to its intoxicant characteristic and that it can lead to drunkenness. Thus, as drugs also carry a similar effect on the brain and bodily functions, are they to be forbidden like *al-khamr*? If the

⁵³⁵ The series of ḥadīth prohibiting the use of *khamr* can also be found in Jalāl Al-Dīn Al-Ṣuyūfī, *Al-Tibb al-Nabawī*, Bayrūt: Muassasa al-Kutub al-Thaqāfiyya, 1986, pp. 287-288

answer is in the positive based on the analogy of *al-khamr*, do drugs carry a total prohibition like *al-khamr*?

To justify the methadone programme, the case study of drug consumption during the medieval era will be analysed. It is interesting to point out that the classical jurists carried out a painstaking task to reveal the exact rule of the consumption of drugs especially for recreational purposes and medication. The terms frequently used in *fiqhī* literature are *hashīsh*, *banj*, *khāt*, *nabāt majhūl* and *mukhaddar*. The cases regarding drugs in *fiqh* treatises, however, were found to be limited, especially during the earlier period. The drug problem only attracted the jurists' attention later. In this regard, Ibn Taymiyya could be correct claiming that the consumption of drugs (among Muslims) only occurred during the late 6th and early 7th century of Hijra after the Tartars came into power⁵³⁶. The history of drugs in the Muslim world is beyond the scope of this research and thus would not be discussed in this study. In addition, the legal discussions among Muslim jurists concerning drugs were limited and not comprehensive. It can be argued that this is because the Muslims were ignorant about the precise usage of this substance either for medical or recreational purposes. The majority of the classical jurists already acknowledged that there was a certain level of consumption of certain drugs for medication and this fact can be found in medical books of *Tibb al-nabawī*. However, the legality of the consumption for recreational purposes is disputed between the jurists. This problem was not detected among the early jurists such as Abū Ḥanīfa, Mālik, al-Shāfi'ī and Aḥmad as Ibn Taymiyya⁵³⁷ argued that drug abuse started to occur in the Muslim world only in a later period. However, Rosenthal discovered that drug abuse started in the Muslim world as early as the third century. This statement was based on the rulings of al-Muzānī (d. 264/878) and al-Taḥāwī (d. 321/933) against the use of narcotics⁵³⁸. However, it can be assumed that perhaps the early jurists did not record any particular rulings about drug abuse for several possible reasons. Firstly, during the early formative period of *fiqh* especially in the first and second

⁵³⁶ See Wizāra al-Awqāf wa Shu'ūn al-Islāmiyya bi 'l-Kuwait, *Al-Mausū'a al-fiqhiyya*, Vol. XI, p. 33

⁵³⁷ Ibn Taymiyya, *al-Fatāwā al-Kubrā*, vol. III, p. 418

⁵³⁸ Rosenthal argued that there was ambiguity about the use of the term of *banj* and *hashīsh*. Some jurists argued that both refer to same substance which prohibited in Islam.

centuries, drugs were only known to have beneficial effects, hence it was generally considered lawful. Secondly, drug abuse was not significant and not widespread, thus the jurists were ignorant about the abuse. However, when drug abuse became widespread and many Muslims were found badly affected by this substance, it started to attract the jurists' attention.

While al-Suyūṭī (d. 1505/911) in his book, *al-Ṭibb al-Nabawī* did not mention any particular rulings about drug consumption, he himself acknowledged that certain plants and herbs could be used as medicine⁵³⁹. The power of drugs was known by experimenting and by testing. A drug was classified according to its effect on the human body. A drug that did not produce any effect was categorised as a first degree drug, while the second degree drug was that which could cause a certain effect which was harmless to a human. The example of a second degree drug is poppies, which are recognised to have an intoxicating effect and these herbs were placed in the category of cold and dry⁵⁴⁰. The third degree drug was a kind that produced harmful effects but was not powerful enough to kill a human being. The fourth category of drug was what he called poison and that proved to be fatal. The example for this category was euphoria or *shabram* that was hot and dry. A drug was considered dangerous if an overdose of this drug could be fatal. Physicians reportedly abandoned its use⁵⁴¹. Some herbs like *ṣa'tar* (thyme) and *ṣandal* (sandal wood) were categorised in the third and second degrees: they gave benefits to cure diseases like tapeworm and headache⁵⁴². Brief descriptions of drugs in this treatise demonstrate that early Muslims already recognised the benefits and harmful effects of drugs. The drugs that could be used for medicinal purposes were generally permissible while the dangerous drugs were something that one had to be careful of. The benefits of drugs for medicinal purposes were also acknowledged in some *fiqh* work

⁵³⁹ See Cyril Elgood, "Tibb – ul-nabbi or medicine of the Prophet" in *Osiris*, Vol. 14, 1962, pp. 33-192. The University of Chicago Press, 66-67. See also Jalāl Al-Dīn Al-Suyūṭī, *al-Ṭibb al-Nabawī*.

⁵⁴⁰ See Cyril Elgood, "Tibb – ul-nabbi or medicine of the Prophet" in *Osiris*, Vol. 14, 1962, p. 84

⁵⁴¹ See Cyril Elgood, "Tibb – ul-nabbi or medicine of the Prophet" in *Osiris*, Vol. 14 (1962), p. 93

⁵⁴² See Cyril Elgood, "Tibb – ul-nabbi or medicine of the Prophet" in *Osiris*, Vol. 14 (1962), p. 94

with the jurists permitting the selling and buying of certain of plants that can be used as medicine⁵⁴³.

Whilst most jurists agreed that drugs were permitted for medication, they did disagree over the consumption of drugs for other than medication purposes. Some jurists prohibited drug consumption for recreational use, while some permitted it and some left the matter undecided. Serious legal discussions of drugs are found in the books of Ibn Taymiyya and Ibn Ḥajar al-Haitamī (d.1567/974). For instance, in his treatise, *al-Fatāwā al-Kubrā al-Fiqhiyya*⁵⁴⁴, Ibn Ḥajar al-Haitamī admitted that the ignorance of the real understanding of drugs, inadequate research and the unavailability of trusted reports from experts regarding drug had led to a misconception concerning drugs among jurists in his times. Drugs were a grey area which the jurists disagreed about, particularly the regular consumption of drugs. Due to a lack of reliable reports about drugs, some jurists were reported as testing certain drugs on themselves to investigate the effects of the drugs and then they made the ruling accordingly.

For instance, there was a report regarding a jurist known as Imām Sufiyy al-Muzajjad⁵⁴⁵, who changed his *fatwā* on drugs based on his self-experiment. He withdrew his previous *fatwā* prohibiting the consumption after making a simple self-experiment. He found that the drug (*ḥashīsh*) he tested made him feel energetic which he claimed to be a good effect for those who want to perform *‘ibāda*. On this basis, he ruled that *ḥashīsh* should be permitted as it had a beneficial effect for Muslims when fulfilling religious obligations⁵⁴⁶. However, this simple self-experiment was not sufficient to persuade the other jurists to accept the legality of *ḥashīsh* for non-medical reasons. This reluctance was confirmed by other reports regarding the negative effects of drugs such as losing one’s appetite and making the user pale and sick. The mixed reports of drug effects made the decision quite difficult and uncertain. The jurists also relied on several contradictory

⁵⁴³ One of the preconditions of saleable article is that the article must be useful, which means non-beneficial items such as poisonous animals, musical instruments, herbs, bugs and junk are rendered unfit by some jurists for transaction. However, for medical purposes, some plants can be bought or sold.

⁵⁴⁴ This collection of his *fatwas* was compiled by one of his disciples. It includes several lengthy treatises with separate titles, 23 Rajab 974/3 February 1567.

⁵⁴⁵ Ibn al-Ḥajr al-Haitamī, *al-Fatāwā al-Fiqhiyya al-Kubrā*, vol. II, p.14

⁵⁴⁶ The benefits of drugs were recorded as *nashā’at* and *taqwīyya*

reports on the effect of drugs. The drugs were also known during Ibn Ḥajar al-Haitamī's era as *al-nabāt al-majhūl*, (literally means the unknown herbs), as the effects and the benefits of such herbs were unknown. Some jurists left the matter undecided. They also recognised certain characteristics of drug such as the ability of a drug to cover one's mind and leading to hallucination (*mukhaddar* and *mughīb*). They also agreed that drugs had different effects on the body depend on the type of the substance consumed. Although this was the grey area for the jurists during the medieval period, they did agree on one issue; if the herb consumed led to serious harm, the herb was then forbidden, and the herb was considered lawful if it did not have an intoxicant and harmful effect. Thus, the rulings of drugs differed according to the effect of the drug used.

The most widely used narcotic drug by medieval Muslims was *ḥashīsh*⁵⁴⁷. The other drugs that were consumed were *banj* and *opium*. Rosenthal traced back the *fatāwā* of the jurists regarding the use of *ḥashīsh* and discovered that there is no authoritative text regarding the use of *ḥashīsh*, and this fact was exploited by a pro-hashish faction to legalise it while others strongly prohibited it. According to Rosenthal, the *banj* or hemp tended to be considered dishonourable. It was used to seduce innocent people or as a prelude to murder and robbery. *Ḥashīsh*, on the other hand, might have been used for pleasure and enjoyment, although Rosenthal did not have evidence to this effect from the first four or five centuries in Islam and al-Zarkashī (d.1373/774) also revealed that *ḥashīsh* affected many lower classes of people. Al-Muzānī (d. 264/878) and al-Taḥāwī (d. 321/933) were against the use of narcotics. Although there was some problem regarding the terms used for narcotic drugs with jurists not knowing the newly coined slang terms, Rosenthal assumed that *ḥashīsh* was already a social and legal problem during Shirāzī's period (d. 476/1083) in Shirāz and Baghdād. It can also be argued that when the drug became popular among the Arabs for illegal consumption, especially for recreational use, it was to achieve hallucinatory effects. In these cases, the jurists adopted a stricter

⁵⁴⁷ Rosenthal argued that there was ambiguity about the use of the term of *banj* and *ḥashīsh*. Some jurists were reported arguing that both refer to same substance which prohibited in Islam. See See Franz Rosenthal, *The Herb- Hashish versus medieval Muslim Society*, Netherlands: E.J. Brill, 1971, p.19

view towards narcotic drugs. As drugs have similar characteristics to *al-khamr*, the jurists had debated about the use of both substances. These are summarised in Table C below:

Table C: Comparison of characteristics between *al-khamr* and narcotic drugs according to Muslim jurists.

Characteristics	<i>Al-khamr</i>	Narcotic drugs
Jurists attitude towards the substance	All Muslim jurists are in unanimous agreement that <i>al-khamr</i> is totally prohibited	Muslim jurists, especially the ancient authorities, were in dispute regarding the rule of narcotic consumption
Degree of prohibition	<i>Al-khamr</i> is totally prohibited, including its trading, buying, selling, transporting and serving	Majority of jurists held that drugs do not carry total prohibition like <i>al-khamr</i> . Only prohibited when it is fatal and intoxicant.
The cause (<i>'illa</i>) of prohibition	They unanimously agreed that the <i>'illa</i> of the prohibition is that it is an intoxicant. Some also added that another cause of the prohibition was because it is considered <i>najas</i> . Others associated the aggressive behaviour resulting from wine drinking with the thing that makes the drink prohibited	Muslim jurists disputed the cause of the prohibition of drugs. Some like Ibn Taimiyya argued that drugs are prohibited because of its intoxicant effect which made the prohibition total like <i>al-khamr</i> . Al-Qarafi argued that some drugs like <i>hashish</i> only carry the corruptive effects, and are not intoxicants.
The purity status of the item	<i>Al-khamr</i> itself is considered as a religiously impure item, which cannot be taken to perform prayer	The status of purity of the narcotic drugs is disputed. The majority ruled that drugs or herbs are clean. However, Ibn Taimiyya ruled that they are ritually unclean like <i>al-khamr</i> .
The punishment	The punishment for wine drinking is <i>hadd</i> punishment, regardless of whether consumption leads to intoxication or not. The Hanafis only confined the <i>hadd</i> for wine drinker.	Muslim jurists were not in agreement over the punishment. Ibn Taimiyya ruled that the sentence for drug consumption is <i>hadd</i> punishment, while the others viewed that the

		punishments should only be <i>ta'zīr</i> or <i>ta'dīb</i> .
The effects on body and physiology	It causes people to lose their mind, and become intoxicated	It differs according to different types of drugs and the persons. The negative consequences; losing appetite, losing mind and unconsciousness. The effects ; people getting high, happy, releasing from pressure, feeling energetic
The effects on the surrounding environment	Social effects: getting aggressive as a result of drunkenness, causing violence against others etc	No aggressive behaviour reported among drug users. However, drugs users were commonly found begging or stealing from others.
The effects of action of the person under influence of the substance	People are responsible for all acts done under influence of <i>al-khamr</i> as losing consciousness because of <i>al-khamr</i> is not considered as a valid excuse	Many jurists agreed that a person under influence of legal drug consumption is not responsible for all acts. However, the person is responsible for his actions if the drug taken was illegal.
The volume of permitted consumption	Wine cannot be consumed regardless of the volume. Early Ḥanafī authorities permitted drinking small amount of other than <i>al-khamr</i> when it does not lead to intoxication	Some jurists insisted that the same rule applies to drugs. The majority maintained that drugs can be consumed in small quantities especially for medical treatment, but they cannot be consumed for recreational purposes.
The consumption of seeking for pleasure and joy	Totally forbidden	The majority prohibited it.
The consumption in <i>ḍarūra</i> situation	The majority prohibited it in all <i>ḍarūra</i> situations except to release someone from choking	The majority argued drugs can be used in this situation.
The consumption for medication.	Majority of Muslim disagreed. Only Ḥanafīs permitted it.	Majority agreed with the permissibility especially when there is no other lawful alternative.

Although the basic rule for drugs was made from the analogy of *al-khamr*, the majority of jurists believed that drugs should not carry a total

prohibition like *al-khamr*⁵⁴⁸. While *al-khamr* is prohibited due to its intoxicant element and its impure status, drugs are only prohibited because of the intoxicant element. This meant that the drugs are not technically impure, unlike *al-khamr*. The impure status of *al-khamr* is deduced explicitly from the *nusūṣ*⁵⁴⁹ which made the prohibition of *al-khamr* total, absolute and undoubted. The prohibition covers all kind of consumption regardless of the quantity of the wine consumed and it is considered impure like pigs and dogs. However, drugs are only prohibited because of its intoxicant effect, when they act like poison, causing serious harm to one's body, and impairing one's judgment. Most importantly, drugs are prohibited as they can easily lead to addiction.

As compared to wine, the Muslim jurists' attitudes towards the consumption of drug were less definite⁵⁵⁰. Unlike wine, where the characteristic of unlawfulness is divinely established, many argue that the dispute regarding narcotic consumption is mainly due to the non-existence of an authoritative text. The medieval jurists, especially the Ḥanafīs, had a lenient view towards some narcotic drugs such as *ḥashīsh*. For instance, a Ḥanafī judge, Jamāl al-Dīn al-Malaṭī (d. 803/1400) permitted the use of *ḥashīsh*⁵⁵¹. However, later authorities, such as al-Muzanī and al-Taḥawī⁵⁵², started to outlaw narcotic drugs. In the book of “*risāla ḥurmat al-banj*”, the writer argued that nobody after the time of al-Muzanī and al-Taḥawī ever said that *banj* and *ḥashīsh* were permitted, especially when they are consumed for the purpose of becoming intoxicants and for amusement.

The sternest attitude towards narcotic especially towards *ḥashīsh* was upheld by Ibn Taymiyya, affirming that the narcotic drugs carry the same prohibition as wine. He firmly asserted that the total analogy applies⁵⁵³. This also means that narcotic drugs like *ḥashīsh* are prohibited whether the consumption leads to intoxication or not. The users have to repent and Ibn Taymiyya went further by condemning the people who disagree with this rule and regarding them as non-believers (*kāfir*). If they do not repent before

⁵⁴⁸ This is the accepted view nowadays.

⁵⁴⁹ Q5.90: Q12.36,41:Q2.219: Q5.91 and Q47.15

⁵⁵⁰ See Rosenthal, *The Herb- Hashish versus medieval Muslim Society*, pp. 100-103.

⁵⁵¹ See Rosenthal, *The Herb- Hashish versus medieval Muslim Society*, p. 104

⁵⁵² See Rosenthal, *The Herb- Hashish versus medieval Muslim Society*, p.113

⁵⁵³ Ibn Taymiyya, *Al-Fatāwā al-kubrā*, vol. III, p. 424

death, the prayer will not be performed over them and they will not be buried in a Muslim graveyard. However, Ibn Taymiyya limited the strict prohibition only to *ḥashīsh* but not to other drugs such as *banj* (hemp). According to him, *banj* is not an intoxicant, and therefore, it is lawful. It can be argued that the relentlessly negative view of Ibn Taymiyya is not generally applied to all drugs. It is only limited to what intoxicates and is harmful. According to Ibn Taymiyya, other harmless and useful drugs can be consumed.

Other illegal drugs were also known among the jurists as *mukhaddir*⁵⁵⁴. Although the majority of jurists agreed that the prohibition of *mukhaddir* is similar to that relating to *ḥashīsh* due to its intoxicant effect, they insisted that the analogy of wine cannot be applied here entirely. The basis of the prohibition of *mukhaddir* is the *ḥadīth* saying that every intoxicant is prohibited, which means every intoxicant regardless of whether the name is *ḥarām*. On the basis of this saying, every substance that intoxicates is unlawful. However, if intoxication is the fundamental characteristic leading to the prohibition of a substance, several questions must be answered. One of the questions raised by Rosenthal was whether intoxication when listed as a cause of the ruling was to be understood as potentially intoxicating or refers to the actual condition of intoxication. However, this question was left unanswered by the jurists. Some jurists like al-Qarāfī (d. 1285/684) and al-Zarkashī made remarkable efforts to distinguish the characteristics of drugs and wine. Al-Qarāfī, for instance, claimed that *ḥashīsh* is only classified as *mufsid* (corruptive), and it is not an intoxicant. According to him, this drug is less harmful than wine. He categorised the effects of drugs and wine into several different effects⁵⁵⁵. Firstly; *muftir* is the effect of laziness. Secondly, *ighmā'* is unconsciousness that makes the person lose his ability to move or to think. Fourthly, *murqid* is losing one's mind and movement or the state of losing the five senses. Fifthly, *mufsid* is whatever befuddles the intellect without primarily generating joy. According to him, wine makes someone lose his mind and at the same time generates *nashwa*,

⁵⁵⁴ al-Ṣuyūṭī, *al-Tibb al-Nabawī*, p. 33. All substances regarded as *mukhaddirāt* and *mufattirāt* are prohibited.

⁵⁵⁵ Wizāra al-Awqāf wa Shu'ūn al-Islāmiyya bi 'l-Kuwait, *Al-Mausū'a al-fiqhiyya*, vol. XI, p.33

joy. Analysing these effects, he reached the conclusion that *hashīsh* is not totally similar to wine. Some jurists like al-Qarāfī also claimed that drugs are not similar to wine. While wine drinkers were commonly associated with aggressive behaviour against others, the drug users were found having a totally different attitude. Heavy wine drinkers can easily become violent towards others and cause chaos. These effects made the wine more harmful than drugs. On this basis, the jurists reached the conclusion that *hashīsh* is less harmful than wine.

However, some jurists like Ibn Taymiyya disagreed with the above claim. They argued that like wine, *hashīsh* should be banned as it carries a similar negative effect. The intoxicating effects of *hashīsh* as highlighted by al-Zarkashī (d. 1392/794) are; someone whose orderly speech is confused, who spills his hidden secrets, or someone who does not know heaven from earth⁵⁵⁶. He also added that both wine and *hashīsh* are something desired by humans. Modern Muslim jurists also agreed that it is not only the issue of intoxication that should be taken into consideration. The harm a drug causes and most importantly the effects of self-destruction are also relevant. The preservation of mental health is an imperative. Drug related problem not only concerns the transgression of the law, the addict is mainly held responsible for the effects he causes by consuming drugs. This position is largely accepted by the modern jurists. However, although they agreed with the prohibition, they only limited the prohibition to what intoxicates and prohibit the consumption for non-necessity cases.

Some scholars provided a more clear-cut legal decision with respect to the drug and wine cases. Below is the discussion pertaining to the distinctions between drug and *al-khamr* made by the jurists:

The punishment: All Sunni jurists were in agreement that the consumption of wine regardless of the quantity consumed subjects the drinker to *ḥadd* punishment. Conversely, they disputed whether the consumption of drugs will also lead to the same sentence. Ibn Taymiyya insisted that narcotic drugs like *hashīsh* carry the same prohibition as wine⁵⁵⁷. The sentence is

⁵⁵⁶ See Rosenthal, *The Herb- Hashish versus medieval Muslim Society*, p.107

⁵⁵⁷ Ibn Taymiyya, *Al-Fatāwā al-kubrā*, Vol. III, pp. 419-424

either being whipped by 40 or 80 lashes. |However, he held that *banj* consumption does not carry the same punishment as it is not intoxicating; it only leads the person to receive *ta'zīr* (a punishment decided by the ruler). Al-Qarafī, on the other hand, disagreed with the *ḥadd* punishment for *ḥashīsh* users, as he argued that *ḥashīsh* is not an intoxicant, unlike wine⁵⁵⁸. He agreed with the Shāfi'īs that the illegal consumption of narcotics such as *ḥashīsh* and opium should only be punished by *ta'zīr* or (some said) by *ta'dīb* (punishment by teaching moral values). Some other Shāfi'īs, however, reaffirmed the view of Ibn Taymiyya's ruling that the *ḥadd* punishment should be the sentence for drug users. Those who agreed with *ḥadd* punishment also classified drugs as religiously unclean items like *al-khamr*. The majority of jurists did not agree with this strict view, however. It is also important to highlight that the consumption of *mukhaddar* (narcotic drug) for legal reasons such as medication will not subject the person to any form of punishment, either *ḥadd* or *ta'zīr*, even if the consumption leads to intoxication⁵⁵⁹.

The effect of actions of person under influence of *al-khamr*. The majority of scholars held that the person under the influence of wine is responsible for all his actions, as losing consciousness from wine drinking is not considered a valid excuse (to lift a punishment). For instance, a person stealing under the influence of wine is subjected to *ḥadd* punishment and his hand will be cut off. Conversely, the majority of Muslim jurists held that the person under the influence of legal drugs is not responsible for his acts⁵⁶⁰. However, the jurists were not in agreement regarding the consequence of actions performed by a person under influence of illegal drug. The Ḥanafīs held that if the consumption of opium was for pleasure and joy (*lahw*), the actions are taken seriously and legally binding such as in buying and selling. However, the self-confession of a person under the influence of illegal drugs for *ḥudūd* cases is rejected.

⁵⁵⁸ Rosenthal, *The Herb- Hashish versus medieval Muslim Society*, p. 110. See also *al-Fatāwa al-Hindiyya*, vol. II, p. 160

⁵⁵⁹ Wizāra al-Awqāf wa Shu'ūn al-Islāmiyya bi 'l-Kuwait, *Al-Mausū'a al-fiqhiyya*, vol. XI, p. 38

⁵⁶⁰ *Mausū'a Fiqhiyya*, vol. XI, p. 37

Some Ḥanafīs also held that the divorce statement made by an unconscious person due to medical treatment by using opium or *banj* is valid. The Mālikīs also held the same view. They argued that a person under the influence of an illegal drug is accountable for any pronouncement of divorce or *ʿitq* (setting slaves free) and he will be rendered fully responsible for any *ḥudūd* or property related crime. However, his transaction, marital solemnisation and self-confession are not counted. The Shafiʿīs also ruled that all business pronouncements made by a person under the influence of illegal substances are valid, as the consumption is regarded as a sin (*maʿsiyya*). However, the Ḥanbalīs regarded the state of a person consuming *banj* even for an invalid reason as similar to an insane person, which means the divorce would not be effective. However, Ibn Taymiyya disagreed with this position stating that the divorce is valid. Modern jurists generally agreed with the majority of medieval scholars on this point, that the unconsciousness caused by illegal drug use would make the user responsible for all his actions. To sum up, the majority of jurists held that the consequences of action of a person under influence of illegal drugs are similar to those for the person under influence of wine. Losing one's mind due to illegal substance use is not accepted as a valid excuse in transactions, marriage or other contracts. The jurists held that the state of unconsciousness here is different from one that is caused by a natural cause such as insanity. These later cases impede a person from being a *mukallaf* who is obliged to fulfil his religious obligations.

The questions of the amount of narcotic drugs that can be taken.

Some jurists, including Ibn Taymiyya, who had a strict view regarding illegal drugs, contended that illegal substances cannot be taken as medicine as the prohibition is total, similar to wine. This also means any consumption of a drug like *ḥashīsh* is forbidden like *al-khamr*. Al-Nawawī, on the other hand, held that *ḥashīsh* being a plant is a clean item, and using a little *ḥashīsh*, which does not cause intoxication, is acceptable. However, this position was criticised by al-Zarkashī who ruled that any use of illegal drugs

whatsoever is prohibited⁵⁶¹. Al-Qarāfī reaffirmed the position of al-Nawawī when he considered the consumption of a small quantity of *hashīsh*. Unlike al-Nawawī, who contended that *hashīsh* is intoxicating, al-Qarāfī only classified *hashīsh* as merely corruptive, hence, it is not intoxicating. He also permitted the use of opium, *banj* and *saykaran* if the amount used is not of such quantity that it exercises an influence upon the mind and the senses. It can be said that the jurists who permitted the consumption of a little amount of *hashīsh* allowed it due to the argument that the prohibition is only for the amount that leads to intoxication. Therefore, it was lawful to use it if one was not intoxicated. This means, they forbade the substance by judging the end result. Conversely, those who held that *hashīsh* is prohibited disregard the amount used, and prohibited it because it is not a necessity making a similar analogy to a wine case.

The most important issue here concerns the use of narcotic drugs for medical reasons, and whether this is lawful and permitted in Islam. Some jurists, like the writer of the *risāla fī ḥurmat al-banj*, did not legalise the consumption of drug for medical reasons⁵⁶². For them, drugs, like wine, cannot be consumed for any reason, including medication. However, the other jurists who compromised, and allowed the use of small amounts of drug, and those who claimed *hashīsh* was not similar to *al-khamr*, permitted the consumption of drugs for medical reasons. This is the popular view of the Ḥanafīs⁵⁶³. Their position in permitting the consumption of *banj* or *hashīsh* is not unexpected, as the early Ḥanafīs acknowledged the consumption of intoxicant drinks other than wine for medical reasons. The Ḥanafīs further ruled that if one loses one's mind because of the use of *banj* and *opium* for medication, he is not held responsible for his actions⁵⁶⁴. They also ruled that the use of *banj* is permitted for medication purposes unless it leads to mental disturbance.

A Shāfīī jurist, al-Marwarrūdī (d. 462/1069) and al-Zarkashī were also reported to have held the same opinion regarding *banj* and opium. Al-

⁵⁶¹ See Rosenthal, *The Herb- Hashish versus medieval Muslim Society*, p. 111

⁵⁶² See Rosenthal, *The Herb- Hashish versus medieval Muslim Society*, p. 114

⁵⁶³ Such as al-Bazzāzī and Khwāharzadeh, see Rosenthal, *The Herb- Hashish versus medieval Muslim Society*, p. 113.

⁵⁶⁴ al-Bukhārī, *Kashf Al-Asrār*, vol. IV, p. 351

Zarkashī further argued that these substances can be used for medical purposes if the effectiveness is proven and well-established. The consumption was also permitted by al-Zarkashī to alleviate pangs of hunger⁵⁶⁵. Unlike other Shāfi‘is’ view, he believed that *hashīsh* does not cause more hunger, unlike wine which leads to thirst. According to him, *hashīsh* has a significant potential benefit namely, its anaesthetising abilities during, for instance, the amputation of a gangrenous hand⁵⁶⁶. The important conclusion reached by al-Zarkashī with respect to the circumstances under which the use of *hashīsh* could be considered lawful, are five; firstly, when it is consumed in a small quantity; secondly if the user is immune to the intoxicating effect of *hashīsh*; thirdly, if it is consumed for medical purposes; fourthly, if it is used to produce anaesthesia in connection with an amputation; and finally, if it is consumed to relieve a great hunger. Al-Zarkashi’s position in this matter can be seen as crucial with regard to the Harm Reduction Programme.

Other Shafi‘ī jurists also reaffirmed the position of al-Zarkashī. Al-Ruyani⁵⁶⁷, for instance, permitted drug consumption for medical reasons, even if the process led to intoxication. Although many jurists agreed with the permissibility of using narcotic drugs for medication purposes, they did not clearly indicate the type of diseases concerned. Only al-Zarkashī mentioned that drugs are lawful for anaesthetic purposes. He also made the point clear by stating that the consumption of narcotics is only for the necessity of preserving human’s life. As drugs are permitted for medical reasons, the buying and selling of narcotic drugs are also considered lawful by the majority⁵⁶⁸.

The disagreement between jurists regarding drugs is also found regarding the purity status of drugs. The later jurists agreed that due to its intoxicant

⁵⁶⁵ The text of Zarkashī’s work can also be found in Rosenthal, p. 190

⁵⁶⁶ See Rosenthal, *The Herb- Hashish versus medieval Muslim Society*, p. 115 and A. Rippin, “Al-Zarkashī, Abū ‘Abd Allāh Badr al-Dīn Muḥammad b. Bahādur”. *Encyclopaedia of Islam*, Second Edition, P. Bearman et al. (eds.), Brill, 2010. Brill Online. EXETER UNIVERSITY. Accessed date 19th January 2010
http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-8945

⁵⁶⁷ See Rosenthal, *The Herb- Hashish versus medieval Muslim Society*, pp. 115-118

⁵⁶⁸ *Mausū‘a Fiqhiyya*, vol. XI, p. 36. According to Shāfi‘is and Mālikis, buying and selling *mukhaddar* not for medication is *ḥarām*, while Ḥanafis only classified such a transaction as *makrūh* (detestable)

character, *hashīsh* is rendered impure, but to what extent is this plant impure? There are two different views; the first group of jurists regarded *hashīsh* in its solid form as impure as this is the form used by common people to get intoxicated. The second group stated that *hashīsh* was pure unless it was soaked with water. This water is rendered impure as it leads to intoxication.

To sum up, although the preliminary experiments and works initiated by Muslim jurists did not construct a precise definition of narcotic drugs, and most importantly did not produce a definite ruling on drugs, drugs were actually understood well by Muslim jurists. Their understanding of these substances was not far from the modern jurists' definition of a drug. That is, any substance that alters normal bodily function is classed as a drug and drugs can be used for medicinal or leisure purposes. The form of illegal drugs nowadays include pills, liquids or parts of plants that people take to become intoxicated and can cause serious harm to the individual when consumed.

It can be further suggested that the preliminary studies on drugs completed by the early jurists made the decision easier for contemporary jurists. Furthermore, with the advent of modern research on drugs, the modern jurists can make a more precise and persuasive decision pertaining to the legality of particular drugs. Modern scientific research can provide more accurate information on the effects of illegal drugs. The modern jurists reaffirmed the position of the classical jurists by stating that the prohibition of illegal drug is made based on the analogy of *al-khamr*. Drug production, distribution and trading are thus forbidden. Some modern jurists, for instance, the Egyptian Board of Fatwa, have accepted the strict view of Ibn Taymiyya⁵⁶⁹. This board states that drugs are illegal and forbidden unless in the case of necessity. That means the consumption must meet all preconditions of necessity. First, the medicine should be prescribed by a trusted experienced and a God-fearing Muslim doctor and the second condition is that there should be no alternative except drugs. The committee has also added that the purpose of taking an unlawful drug for medication

⁵⁶⁹ Jumhuriya Miṣr al-ʿArabiyya, Wizāra al-Awqāf, *al-Fatāwā al-Islamiyyā min Dār al-Ifṭāʾ al-Miṣriyya*, Vol. X, p. 3518.

can only be due to the necessity to protect life. In this regard, the committee supports the position of Ibn Ḥajar al-Haitamī, who insisted the consumption must be limited to what can save life.

Examining the medieval Muslim jurists' view regarding narcotic drugs, it appears that Muslim jurists were divided into three groups. The early Sunni jurists and Sufīs maintained that narcotic drugs should be entirely permitted (*al-ibāḥa al-aṣliyya*) despite some negative effects associated with the substance. There are several assumptions behind this lenient conclusion. Firstly, there was no authoritative text pertaining to drug consumption; secondly, there was the ignorance of early Muslim jurists about the plant; thirdly, drug abuse was rarely reported during that time; fourthly, the plants during that time were mainly consumed for medical purposes which were generally permitted; finally, the jurists themselves consumed the drugs on regular basis⁵⁷⁰. This lenient attitude towards drugs, however, gradually changed when the abuse of narcotic drugs became widespread, and when *ḥashīsh* in particular became a social problem within the Muslim community. This consumption was frequently associated with immoral behaviour such as homosexuality and wine drinking. As a result, the need to examine the real potency of the plant in order to clarify the precise ruling became the central focus of Muslim jurists living in the community corrupted with drug abuse. Some jurists, like al-Qarāfi and al-Zarkashī, understood the real potency of the plant. As a result, new legal rulings pertaining to narcotic drugs were reached. The majority of Muslim jurists agreed with the opinion of al-Qarāfi and al-Zarkashī that any substance which carries the effect of *muskir* and *muftir* should be banned.

Some disagreement was indicated as to whether the full analogy of wine should apply. On this matter, only a small number of jurists held that the full analogy should apply. The hesitation of the rest to accept the full wine-analogy can be assumed to be due to several factors. The majority's attitude towards narcotic drugs was mainly brought about by the prevalent perception that narcotic drugs were useful for medical purposes. If a

⁵⁷⁰ Some of these assumptions were indicated by Rosenthal in his book *The Herb- Hashish versus medieval Muslim Society* and Ibn al-Ḥajr al-Haitamī in his collection of *fatāwā, al-Fatāwā al-Fiqhiyya al-Kubrā*,

complete full analogy was accepted, that would mean that the ability of drugs to act as medicine was denied and forbidden. They also argued that the full wine analogy cannot be applied as each varies in producing effects on a human's bodily functions. Historically, drugs were widely known to have medical benefits, and therefore, the rule is not similar to wine. Drugs are only prohibited when they are abused. Wine, on the other hand, is a different matter as wine production is mainly for drinking and leisure. The benefit of wine for medication was rarely reported. Most importantly, as the unlawful character of wine was divinely established leading to this unanimous undebated position among the jurists, the lack of divine prohibition on drugs makes it less harmful and more acceptable in the case of necessity.

Is the prohibition of drugs limited only to *ḥashīsh*? The consumption of drugs which is not for reasons of necessity should be made forbidden and this should not be limited to *ḥashīsh*. The early jurists only explicitly prohibited *ḥashīsh* because it was closely connected to its negative effects and immoral behaviour, relating to popular drugs consumed for recreational use. Meanwhile, other drugs were considered legal at that time, perhaps due to a low level of abuse or that the consumption was simply for medication. However, the legality of hemp, *banj* and opium established by the early jurists should not be read as a general permission to consume them illegally and not for reasons of necessity. It should be limited to medical purposes. At that time, opium, *banj*, hemp and other narcotics drugs were commonly known for their effective medical benefits⁵⁷¹. The raw material of drugs like opium and hemp is considered lawful as they are considered to be an ordinary plant. However, nowadays when drugs are cultivated and chemically processed for illegal consumption, they cease to be permissible and they should be banned as they definitely lead to addiction.

⁵⁷¹ See Rosenthal *The Herb- Hashish versus medieval Muslim Society*, p. 21, See Cyril Elgood, "Tibb – ul-nabbi or medicine of the Prophet" in *Osiris*, 1962, Vol. 14 , pp. 33-192. See also al-Suyūṭī, *al-Tibb al-Nabawī*, and n.a, "The history of opium, opium eating and smoking", *The Journal of the Anthropological Institute of Great Britain and Ireland*, 1892, Vol. 21, pp. 329-332, <http://www.jstor.org/stable/2842564>. In page 330 states that even though the Greeks were claimed discovering the opium, the Arabs were believed introducing the medical benefit of this plant. They made it known to Persia, subsequently to India and China. The opium is also known as *afiyūn* in Arabic books of medicine. The history of opium was not known in India until the Arab influence. The Chinese works also reported that Arab traders exchanging poppies for Chinese merchandise.

However, narcotic drugs used for surgery or other medical purposes remain generally lawful. This is what al-Zarkashī recognised as the consumption of drugs used on the basis of necessity. According to al-Zarkashī, this medical consumption was in line with the rule of *ḍarūra*. This also means that all the preconditions of *ḍarūra* should be met. Strict regulations should apply for those who consume these drugs as they can prove fatal if an overdose is taken. This fact was already recognised by the classical jurists and reaffirmed by modern medical research.

The other issue is whether or not the use of narcotic drugs is limited to what can save life, as was proposed by al-Zarkashī. What about non-necessity cases? In this matter, the drugs could be consumed for other non-necessity cases if the quantity is insignificant and if it does not lead to intoxication or serious harm. Al-Zarkashī himself recognised the use of drugs for medication if it was a better alternative than other medicine. However, the drugs can only be taken after obtaining an expert's prescription. Modern scientific research held that certain drug medication can heal faster than non-drug medicine. In this matter, some jurists asserted that an insignificant amount of narcotics can be used for medical purposes when the lawful alternative is not as effective as the drugs. However, this case must be verified individually and the amount of drugs consumed should be judged according to the seriousness of the disease.

However, the consumption of drugs for other purposes, especially for recreational use, ceases to be lawful regardless of the quantity of the drug consumed, as these drugs can be addictive and their consumption leads to many harmful effects. The harmful effects of illegal drugs use are not limited to the users but also to the community. Muslim jurists agreed that a Muslim is not allowed to place himself in a situation that impedes him from remembering God, where he can easily neglect his religious responsibilities such as prayer and fasting. Drug users who are under the influence of illegal drugs are not productive and they become a burden on society. The end result of wine drinking and illegal drug consumption is in this sense similar. Wine drinkers tend to be more aggressive towards others, and are responsible for increasing numbers of accidents, rape and physical assaults,

while illegal drug use increases unemployment and the number of burglary cases.

With regard to the methadone programme, methadone is lawful if it is treated as medication on the basis of the above *fiqh* analysis. The rule of methadone is not similar to that for wine drinking. Methadone should be made lawful if it is a better alternative to improve the health and life of the drug users. However, the treatment must follow the preconditions of *ḍarūra*. From the previous discussion on *ḍarūra* cases in Chapters Three and Four, the case of methadone should meet certain conditions.

Firstly, with regard to methadone treatment, there must be no other lawful substance that can be used as medicine and it must be proven effective for the patients. As previously stated the efficiency of methadone has been proven by a series of medical studies and reports. Local preliminary research⁵⁷² conducted found that methadone is a safe and effective drug that can be used in the local Malaysian setting. 60% of respondents reported an overall improvement in their work performance or had gained employment and the retention rate was 75%. This local study affirmed the results of previous studies, demonstrating the effectiveness of this substance. The consumption of methadone can eventually lead to abstinence from illegal street drugs such as heroin, and decreases high risk crime behaviour. It also improves work performance and relationship with carers. This report is also reaffirmed by the Malaysian General Auditor, who stated that the programme had reduced the number of illegal drug users significantly. At the same time, the employment rate among drug users has also increased. A higher quality of life of the drug users who underwent methadone treatment was also reported. Research indicates that methadone is a better alternative at the moment for drug users; hence, this has become the basis for the legality of the use of this drug.

The other moral question that needs to be answered is whether we can eliminate harm by providing another harm, as there is a legal notion, *lā*

⁵⁷² Jesjeet Sing Gill et al., “The First Methadone Program in Malaysia: overcoming obstacles and achieving the impossible”, *ASEAN Journal of Psychiatry*, 2007;8 (2),pp. 64-70

ḍarar walā ḍirār. However, the case of drug addiction is unique. Drug addiction cannot be halted immediately, especially for hardcore users. As addiction is typically a chronic disease, people cannot simply stop using drugs for a few days and be cured. Most patients require long-term treatment or repeated episodes of care to achieve the ultimate goal of sustained abstinence and full recovery. On this basis, Ibn Ḥajar al-Makkī⁵⁷³ permitted the consumption of illegal drugs for chronic drug users when it is believed that their life is in extreme danger without the drug. He gave permission for drug consumption based on the analogy of *mayta* to alleviate the pangs for a hunger. He argued that the need for this in the case of drug users is similar to the need for food in the case of famine. Thus, drug users can consume this drug in a limited fashion during the treatment period but the user has to gradually be made to be independent from the drug. However, he insisted that the permission to consume the drug should be limited to whatever can eliminate grievous harm and the situation must be verified by a trusted Muslim physician⁵⁷⁴. Therefore, if the methadone treatment is treated as a medicine during this treatment period, its consumption is legal, as this is a process to assist the drug users to help them with their addiction.

The second *ḍarūra* condition that should be met is that the methadone supplied must be limited to whatever can eliminate harm. In other words, methadone cannot be supplied more than at the level that is needed by the patient. The Malaysian Ministry of Health have ruled that the government and private clinics should follow a series of strict regulations for the methadone programme. However, some basic regulations are not fully observed by the clinics. The permission to use methadone ceases to be lawful (under the Sharī'a), if the programme is not monitored carefully. The Auditor General's Report for the year 2008⁵⁷⁵ also indicated that the methadone procedures were not fully observed by several government hospitals. For instance, methadone was reportedly being supplied to drug

⁵⁷³ Dār al-Iftā' Al-Misriyya, *Al-Fatāwā Al-Islāmiyya*, vol. X, pp. 3519-3520

⁵⁷⁴ Jesjeet Sing Gill et al., "The First Methadone Program in Malaysia: overcoming obstacles and achieving the impossible" in *ASEAN Journal of Psychiatry*, 2007;8 (2), pp. 64-70

⁵⁷⁵ Malaysian Auditor General's Report for The Year 2008. The full Malay version can be seen via www.auditgov.my The summary of English version can also be found in the site.

users who only attended a week’s treatment. Another report stated that in some cases, methadone was supplied for more than the maximum allowed period. In most private clinics, where the dispensation of methadone is much less restricted, serious problems were detected. Unsupervised methadone treatment led to its abuse with drug users reportedly selling the drugs and mixing the legal drugs with illegal street drugs to get a ‘better’ result⁵⁷⁶.

The table below indicates that several hospitals did not follow the government regulations pertaining to “take away” methadone, where a patient is only allowed to bring methadone home after completing four weeks treatment at the clinic.

Table D: Total number of drug users allowed bringing methadone home before finishing the four week treatment

Methadone Treatment Centre	Period of treatment		
	Week 1	Week 2	Week 3
Hospital Sultan Ahmad Shah, Pahang	5	4	3
Hospital Permai, Johor	2	-	1
Hospital Bukit Mertajam, Penang	-	1	3
Total	7	5	7

Although the cases are relatively low for the entire country, the cases must be treated seriously. Failure to follow the strict regulation results not only violates the Shari‘a principle, but it can result in great dangers for the patient and related people.

As far as the principle of *ḍarūra* is concerned, the *ḍarūra* case should be verified individually as different people have different needs for the drug. This individual need for methadone can only be determined by trusted physicians or medical practitioners. In Malaysia, prior to giving a methadone prescription, the drug users undergo a strict health check. The drug is only dispensed after this process. The patients' progress will be monitored and he is required to attend certain appointments. During early treatment, methadone can only be taken in the presence of a medical officer

⁵⁷⁶ Newspaper report. See “Koktel Metadon”, *Kosmo*, 31st December 2006, pp. 1 and 3.

for several weeks, which will ensure that the drug is taken appropriately. However, the drug can only be taken home after four weeks of treatment. This procedure is designed to ensure there is no violation during the methadone treatment.

To sum up, examining the philosophy, the modus operandi, regulations and procedures of methadone treatment in Malaysia, it can be suggested that it is broadly in line with *ḍarūra* rule. The blue prints of the programmes seem to fulfil all the conditions of necessity from a *sharī* perspective. It can be said that methadone is justified as a necessary alternative for opiate users. At the same time, methadone is dispensed only for those who are eligible and the amount dispensed is appropriate for each patient. However, the problems appear with the practice of methadone supply. Although some argue that the numbers of procedure violation cases are insignificant, serious efforts must be made to rectify the problem. As the problem is justified under necessity, any violation of the regulation not only makes the programme illegal from the perspective of the *Sharī'a* but endangers patients as well. As the violation of the programme not only renders the patient a sinner in the eyes of God, according to Muslims, it also leads to serious harm of others (i.e the case of ingestion by minors). There is another fear that drug users will become addicted to methadone and mix the substance with other drugs. This abuse was reported in daily newspapers. The violation of methadone supply cannot be tolerated and it violates the principle of *ḍarūra*. Finally, it is important to note that the legality of this programme is temporary. The methadone supply should stop immediately once the patient becomes drug free. This requirement is stated in the maxim of *ḍarūra, al-ḍarūra tuqaddar biqadriha* (necessity estimated by the extent thereof).

5.8 The Needle and Syringe Exchange Programme

As HIV/AIDS cases in Malaysia have largely been driven by ongoing transmission from and among injecting drug users, the Needle and Syringe Exchange Programme has been introduced to control the spread. In Malaysia, the programme aims at minimising the transmission of HIV,

Hepatitis B and Hepatitis C and other blood borne viruses among IDUs, their sexual partners and children, and from them to the non-injecting community. It also has several additional objectives which are: to establish a framework for a comprehensive nationwide needle syringe exchange program (NESP), to promote safe retrieval and disposal of used needles and syringes, to improve access to health and welfare services including drug treatment and rehabilitation, and finally, to facilitate awareness and education about IDU issues and blood borne viruses⁵⁷⁷. This programme is also vital to increase the opportunities for interaction between injecting drug users and health officers. This programme was initiated not only for the betterment of the hard-to-reach drug users, but it was also driven by a public health perspective. The prevention of the spread of HIV/AIDS is more important than preventing any potential drug users from injecting.

However, the Malaysian Ministry of Health has admitted that this NSEP programme would not be accepted by most Malaysian Muslims. As a result, the NSEP has been administered and operated by non-government organisations such as the Malaysian AIDS Council (MAC). The government health officers admitted that the government cannot be seen as an advocate of condom use as well as needle syringe distribution⁵⁷⁸. The usual response of a Muslim country for protection against HIV infection is a major focus on propagating abstinence from illicit drugs and sexual practice. However, this conventional prevention is unable to reduce HIV infection. Most importantly, two realities that must be admitted are: that the high risk behaviour is largely practised by IDUs and their total abstinence from drug use is almost impossible to achieve. At the same time, traditional drug treatment has not demonstrated high levels of client success. As a result, the government believes drastic measures must be taken, changing from a policy of propagating abstinence, to the method of reducing the risk of addiction. High risk behaviour, such as sharing injecting paraphernalia and using illegal drugs, should be targeted in order to minimise the risk of HIV

⁵⁷⁷ See Ministry of Health Malaysia, *Needle Syringe Exchange Program-Standard Operating Policy & Guidelines*, Ministry of Health Malaysia, 2006, p. 9

⁵⁷⁸ "Malaysia Health Ministry Cannot Promote Condom Use to Prevent Spread of HIV, Official Says", *Medical News Today*. www.medicalnewstoday.com They admit that the HRP must be done carefully due to the fact that Malaysia is a Muslim Country. 24th May 2007

transmission and deaths from drug overdoses. Most importantly, the spread of HIV to the public can be controlled. This programme received a positive response in Muslim countries with high HIV/AIDS prevalence such as Uganda and Senegal. The Muslim scholars in Uganda and Indonesia,⁵⁷⁹ for instance, reported that the HRP can be used as a short term measure. They argued that the sanctity of life is greater than the sin of condom use and needles and syringes, and it is permissible under the state of emergency. Conversely, in Muslim countries with a low incidence and prevalence of HIV/AIDS, religious leaders believed that the syringes programme implied approval and promotion of drug use. Many have agreed that in order to ensure this programme is successful, collaboration with religious scholars and leaders is a key element. In Malaysia, the Muslims are still divided on this issue. This research, therefore, also aims to inform the Malaysian Muslim community about the HIV/AIDS reality. Most importantly it aims to achieve a better understanding in the collaboration to determine the best possible program for the local setting in order to achieve a drug and HIV/AIDS free country target.

5.8.1 Modus operandi of the programme

The NSEP is funded by the Government of Malaysia and coordinated through multi-corporation approaches. During 2006-2008, the government allocated RM10.91 million just for this programme⁵⁸⁰. The argument that has always been used to justify the NSEP is that the cost of distribution is far cheaper than the cost of HIV/AIDS treatment. It is also argued that the savings to the health care system in reducing treatment costs for HIV is more than 20 times the cost of running the NSEP⁵⁸¹. In 2007, the government allocated RM14.4 million for methadone replacement therapy and RM7 million for the needle exchange programme⁵⁸².

⁵⁷⁹ Memoona Hasnain, "Cultural Approach to HIV/AIDS Harm Reduction in Muslim Countries", *Harm Reduction Journal* 2005, 2:23. Published on 27th October 2005. www.harmreductionjournal.com/content/2/1/23

⁵⁸⁰ See Ketua Audit Negara, *Laporan Ketua Audit Negara* 2008, p. 267

⁵⁸¹ See "NSP: needle and syringe programs: 2005- your questions answered". www.mac.org.my 15th June 2007

⁵⁸² Hamidah Atan, "Malaysia set to meet UN targets on HIV/AIDS", *The News Straits Times*, Tuesday, 2nd October 2007

This programme operates in two ways, firstly, through the distribution of clean syringes and secondly, with the disposal of used needles and syringes. The package distributed includes sterile needles, syringes, and other injecting equipment such as alcohol swabs⁵⁸³. The material is issued on the basis of the frequency of use. From the start, equipment for four days will be provided in a pack based on assessed average needs, which indicate that most users inject 4-5 times each day⁵⁸⁴. The packs will be routinely provided and the clients are encouraged to take additional needles and syringes as required. Educational materials and a booklet directory of services are also provided. The educational materials, including information on safe handling and disposal of needles and syringes, safer injecting practices, vein and wound care, safer sex, drug overdose and 'needles stick' injuries are also provided in the sites.

The programme also emphasises the return of used needles and syringes by the IDUs, which means the programme is not merely a distribution of the clean injecting kit but importantly it is also an exchange programme. The patients are encouraged to return the used needles and syringes in order to ensure the kits will be disposed of safely. Among the mechanisms used to increase the return rates include the emphasis on return by the outreach workers, teaching IDUs to return the used needles, providing disposal units, cleaning of disposal unit by the outreach workers and monitoring activities to collect information on what clients do with used needles. The staff are also required to follow a list of strict regulations in handling the used needles and syringes, which mainly aims to prevent the risk of being infected by possible blood borne viruses⁵⁸⁵.

In May 2007, a report by the Malaysian AIDS Council revealed several outcomes of the programme. The report highlighted that the IDUs' behaviour changed significantly and their knowledge about blood borne virus increased. The return rate increased from 57.9% in 2006 to 63.6% in

⁵⁸³ Among standard services offered in the sites are safe disposal unit, printed health information and condoms and counselling service.

⁵⁸⁴ This starter pack contains 4 needles, 4 syringes, 16 alcohol swabs, 1 cotton role and 1 bottle of iodine.

⁵⁸⁵ See Ministry of Health Malaysia, *Needle Syringe Exchange Program-Standard Operating Policy & Guidelines*, 2006, pp. 16-17

2008⁵⁸⁶. Although the feedback given by IDUs indicates that their knowledge about health and their self-confidence increase, about 58.9% of the respondents admitted that they never attended any counselling or education programme.

5.8.2 Is the Malaysian Needles and Syringes Exchange in compliance with the *darūra* rule?

It is not an easy task to assess whether the Malaysian Needle and Syringe Programme is justified under the rule of necessity. The assessment includes the careful examination of the details of the programme including its philosophy, its objective, modus operandi and the final results. All these elements of the programme have to meet the preconditions of *darūra*.

The philosophy and aims of the NSEP: The philosophy of this programme is already questioned by Malaysian Muslims authorities and NGOs⁵⁸⁷. They accused the programme as an effort to legalise illicit drug use and further promote sinful acts. Some religious councils and state Muftis⁵⁸⁸, however, have showed a positive attitude towards this programme on the condition that this programme should be monitored and controlled thoroughly.

Although the religious authorities did not provide clear arguments for their support, this NSEP should be supported by the rest of Malaysian Muslims on several bases:

- 1) The distribution of the clean injecting kits to drug addicts is part of a controlled and monitored programme. The distribution is limited to addicted drugs users, which means non-IDUs do not have access to this supply. Thus, this programme cannot be labelled as condoning immoral behaviour as it only targets the high risk group that is the IDUs. However, the programme could be described as condoning and promoting immoral behaviour if the distribution included non-

⁵⁸⁶ See Ketua Audit Negara, *Laporan Ketua Audit Negara 2008*, p. 267

⁵⁸⁷ See Mahmood Nazar Mohamed, *Harm Reduction Program and strategies in Malaysia: To what extent it is successful?* (power point presentation). A Perak State Mufti has issued a statement regarding the needle syringe program, 29th July 2005

⁵⁸⁸ Among supporters of this program include The former Minister of religious affair, Datuk Dr. Abdullah Muhammad Zain, The Perak State Mufti, Datuk Seri Harussani Zakaria, and the Former Chairman of the National Board of Fatwa, Dato' Dr. Ismail Ibrahim

IDUs, such as schoolchildren and non-addicted persons. The staff are also trained to deal with any possibilities regarding abuse of the equipment by the drug users. For instance, drug users are not allowed to sell the kits and any extra demands for the kits are carefully handled.

- 2) The programme can be justified under the maxim of choosing a lesser harm (*akhaf al-darar*). It is apparent that the drug addicts are most likely to be infected by blood borne viruses through sharing the injecting materials. The drug addicts normally find it hard to stay away from drugs because of the powerful cravings they feel and it is very hard for them to break the vicious cycle of addiction. As a result, they continue injecting drugs despite knowing the high risks associated with the behaviour. These people who are addicted will find themselves doing things they would never have contemplated before. They become desperate for drugs and are even willing to share the injection paraphernalia with other drug users. This leads to the risk of contracting and spreading HIV/AIDS to others. Recognising the possible harmful behaviour of drug addicts, the NSEP aims to reduce the risk of HIV/AIDS infection by distributing clean syringes. The permissibility of this programme can be derived from the analogy of the permission to masturbate for those who have insufficient provision to get married. The original rule is that masturbation is prohibited. However, if a person finds it is difficult to control his sexual urges and is not able to get married, he is permitted to masturbate. Both cases (NSEP and masturbation) which are usually rendered forbidden become permissible on the basis of necessity to remove the greater harm. However, it is important to highlight that not all prohibition can be allowed under this analogy. For instance, a strong urge for sexual desire does not permit a man to commit unlawful intercourse or rape. In other words, a strong sexual need is not a valid excuse for a person to force someone else to have sex. Similarly, a woman is not allowed to become a

prostitute even when she is in a dire need of food. In such a case, *mayta* or another unlawful meal is better for her⁵⁸⁹.

- 3) Prolonging drug use impairs the body's ability to produce certain chemicals. Subsequently, the body perceives that it needs the drug to function and demands drugs through physical cravings. The need for the drug becomes overpowering and the addict's behaviour becomes increasingly compulsive⁵⁹⁰. The physical and psychological drugs cravings are very powerful and many have agreed as the drug addiction is like a complex illness, there is no single treatment appropriate for everyone. Ibn Ḥajar al-Makkī has permitted the consumption of a small amount of drugs for hardcore drug users who fear destruction⁵⁹¹. He argued that the need for drugs is similar to the need for food. Hence, it can be suggested that during the treatment process, the IDUs can be supplied with clean injecting materials to help them control the cravings and at the same time reduce the risk of infection. The NSEP can be regarded as a case of necessity when the distribution is limited to the target group and to a specific time. Similarly, the condom supply can be distributed only to married drug users.
- 4) Most importantly, the harm to the public health (HIV/AIDS transmission) is greater than the harm from drug injection. HIV transmission from and among drug users are highly likely to be through sharing infected needles and subsequently passing the disease to innocent peoples such as partners and unborn children. The high risk behaviour among IDUs therefore puts public health at risk. Hence, this drastic measure (the NSEP) is justified by the *ḍarūra* principle to protect the sanctity of human life. The needles and condoms are distributed not only to minimise the risk among drug users but also the rest of the community. The dangers include the possibility of death from a drug overdose and the danger of drug

⁵⁸⁹ In Chapter Two, we have discussed the permission to steal for a hunger Muslim when there is no fear of the punishment. However, when there is a risk of his hand getting chopped, it is better for him to eat *mayta*.

⁵⁹⁰ William McCall, "Brain Build Up Causes Addiction" in <http://biopsychiatry.com/cocaine/index.htm>

⁵⁹¹ It can be assumed here, the permission is given to a craved drug user who is seriously ill. It can be assumed that what Ibn Ḥajar meant by 'destruction' is the pain of cravings.

dependency. As the IDUs are regarded as a hard-to-reach-group, this programme also aims to maintain a good relationship with this target group, to educate them in order to eliminate high risk behaviour and achieve the end result that is the total abstinence from drugs. The gradual process of altering drug behaviour is an important element to help the patients become drug independent. As compared to the conventional drug rehabilitation programme, many patients returned to the previous drug habit as there was no sufficient support from the public and the government. The HRP policy, on the other hand, maintains that continuous communication and good relations between staff and drug users are vital, not only to show empathy but also to assist them in creating a better life. On this basis, the philosophy of the HRP in general and NSEP in particular meets not only the *ḍarūra* condition, but the *maṣlaḥa* of the public (the public interest).

It has been suggested that the aims and the philosophy of the Malaysian NSEP are in compliance with the principles of *ḍarūra* on the basis of the necessity to protect public health. However, there are several ambiguities that might impair the legality of this programme, particularly regarding the *modus operandi* of the programme and the possibilities of abuse of the material provided. The jurists held that the necessity rule can only operate over a limited period, which means that the HRP programme is lawful only as a short term measure. Regarding NSEP, there is no indication whether the needles and syringes are distributed for a limited period or for an unlimited time. Also, this programme does not limit the amount of clean syringe needle packages distributed to the drug users, extra packages are also available for those who need them. One question this raises is for how long can public money be spent on a drug addict's expenses? It is important to highlight that the distribution of the clean injecting kits on the basis of necessity is not an unlimited permission like the permission to eat *mayta* or praying during battle. The rules granted are specified only during the *ḍarūra* period. The *ḍarūra* period can be defined either as long as the cause of *ḍarūra* exists or until the harm is removed. Harm reduction strategies such as the distribution of syringes and needles or methadone treatment are

allowed to operate on an emergency basis, which means to help reduce the drug cravings and improve the quality of health of the IDUs on a short term basis.

The *darūra* period differs from one patient to another and therefore, as rehabilitation takes time, the process of treatment differs with each patient. A patient with a long history of drug addiction takes a longer time to be treated than a new drug user. Similarly, a patient who takes the substance on regular basis differs from a person who consumes drugs sparingly. The ability to control drug addiction depends on many factors. The needles and syringes can be supplied for those who are still unable to control their addiction. Their health record will be scrutinised by the HRP staff which means their demands for needles and syringes are controlled.

There are also concerns about the possibilities of the needles and syringes provided being abused. Abuse includes sharing the needles syringes or reselling them to make a profit. The NSEP does not operate in the same way as the methadone programme as the methadone is taken in front of the medical officer. As a result, the abuse is less likely to occur. The injecting activity, on the other hand, is not observed by a staff member and therefore, the possibility of abuse of the provided syringes in NSEP is greater than in the methadone programme. Some former drug users admitted that they shared the needles and syringes given by the Ministry of Health. At the same time, the free distribution is described by former drug users as an open invitation for them to return to their behaviour⁵⁹². However, this minor factor does not totally impair the legality of the needle and syringe programme. This is because the drug users themselves have the responsibilities to adhere to the regulations and procedures.

5.9 Conclusions

This chapter has argued that the Harm Reduction Programme in Malaysia is justified under the rule of *darūra*. From the above discussion, it is apparent

⁵⁹² Many former drug users were reported against this idea. Roslan Yunus, 50 and Zulkifli Abdullah, 40 were among them. See *Mingguan Wasilah*, 23/9/2007

that HIV/AIDS poses a serious threat to Malaysia with the alarming number of cases reported each year. The HRP that has been implemented in other countries is seen as the last resort for Malaysia to reduce the case of HIV/AIDS transmission among drug users. The HRP mainly aims to control the harm associated with the behaviour rather than eliminating the negative behaviour and it did not require commitment to an abstinence goal. This philosophy generally contradicts the Islamic conservative approach, in which negative behaviours are solved by abstinence. On this basis, many argue that this programme is alien to Islamic tradition, as it does not aim to stop the addiction immediately. However, it is imperative to highlight that the gradual process in behaviour changing was actually adopted in the period of the Prophet in the case of the gradual prohibition of an intoxicant (*al-khamr*). The Muslims during the Prophet's time used to consume *al-khamr* on regular basis. It was impossible for people who addicted to drinking to simply stop overnight, hence, the prohibition was made gradually. The first generation was permitted to come off drinking slowly. As a result, the people only consumed the intoxicant sparingly and not on a regular basis and when the people were ready, the total prohibition of *al-khamr* was finally made. This is similar to the case of drug addiction; many recognise the fact that it is hard for a drug user to stop addiction immediately, a gradual treatment is preferable. The analysis of classical discussions on drugs demonstrates that many jurists agreed that this addiction should be treated carefully. For instance, Ibn Ḥajar al-Makkī argued that the consumption of drugs should be permitted during the treatment period. Thus, by extending his view, methadone can be treated as a medicine because of necessity. In addition, al-Zarkashī also held that drugs are permitted in the case of necessity. On the basis of these two arguments, harm reduction can be proposed as a necessity measure to control the spread of HIV/AIDS (which constitutes a grave danger under the rules of *ḍarūra*) and to protect the greater interest of society and the drug users.

Having examined the Malaysian Harm Reduction Programme, it is recognised that it is the best method at the moment to tackle drug addiction and control HIV/AIDS spread. The HRP operates not only for the best

interest of the drug users but most importantly, for the best interest of the public. As drug addiction poses a threat to public health by increasing the number of unemployed, increasing crime and spreading a deadly disease, drastic measures via HRP need to be taken into consideration when other means have failed. The threat to public health is greater than the harm of injecting drugs.

Currently, the HRP implemented in Malaysia has proven successful, as shown by the decline in the HIV/AIDS cases reported from 2005-2007.

Table E: Total Number of HIV Cases reported in Malaysia from 2005-2006

Year	HIV Infection			AIDS cases			AIDS death		
	Male	Female	Total	Male	Female	Total	Male	Female	Total
2005	5383	737	6120	1044	177	1221	882	102	984
2006	4955	875	5830	1620	222	1842	896	80	976
2007	3804	745	4549	937	193	1130	1048	131	1179
Total	74104	6834	80938	12197	1438	13635	9487	847	10334

The table above proves that the HRP implemented is a successful short-term measure to control HIV/AIDS cases. Although the HRP only aims to eliminate harm associated with drug abuse, total abstinence from drugs is still possible to achieve. For instance, the methadone treatment can eventually lead to abstinence from heroin and reduce high risk behaviour and crime. In addition, many of the patients reported an overall improvement in their work or had gained employment. This is a striking result when compared to their past disruptive and disorganised nature of lifestyle they lead.

However, the Malaysian Harm Reduction Programme needs to be continuously monitored and the strict regulations must be met. The success of this programme also depends on the patients themselves. As the key players in this programme, the clients have the responsibility to ensure that they do not violate the principle of necessity. The Muslim clients themselves are totally responsible for complying with the *ḍarūra* conditions, i.e. not to abuse the distribution of syringes by sharing them with other

IDUs and to use the materials responsibly. The awareness of the patients can be developed through counselling sessions and meetings with the staff and this will help reduce any possible abuse. As the drugs users are considered to be the-hard-to-reach-group, this HRP opens a positive space for them to interact with the staff, get the help needed and most importantly for them to get help to stop the addiction.

Collaboration between the government and religious leaders and groups is also important to ensure the success of this programme. As the religious leaders occupy a critical position and role in the Malaysian community, their response and support for this programme are deemed crucial to gain public support. It is vital to educate Muslims that this programme does not promote immoral behaviour and it is important to be cognizant with the reality. As HIV/AIDS has become a national concern it is indeed a case of necessity. Serious efforts from every corner of the society are needed. Although the prevalence of HIV/AIDS in Malaysia is not as serious as in many African countries, this is the best time for Muslim leaders to act. Let us not wait until the Friday sermons in Malaysia start to focus on HIV/AIDS every week like in Uganda and Senegal!

CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS

This research mainly aimed to examine the principle of *ḍarūra* in Islamic law and to study the possibility of its application to justify the Harm Reduction Programme in Malaysia. From the foregoing discussions, it is apparent that the principle of *ḍarūra* had been applied by Sunni jurists in a state of emergency in order to put aside an established order to protect one or more of five necessities. These preserved necessities are life, religion, reason, lineage and wealth. However, the Muslim jurists held that this rule must only be applied according to the extent required by the exigencies of the situation. This research was therefore divided into three sections, namely, the theoretical analysis, the *fiqhī* cases analysis and the justification for the Harm Reduction Programme.

Chapter One and Chapter Two offered a general theoretical framework concerning the principle of *ḍarūra* in Islamic legal discussions and a critique of prevalent perspectives that exercise influence on the study of *ḍarūra* in Muslim academics. The theoretical discussion of *ḍarūra* presented in Chapter One demonstrates that Muslim jurists believed that the notion of *ḍarūra* in Islamic law originated in several examples of textual evidence. The basic understanding derived from the relevant *nuṣūṣ* was gradually developed into a systematic theory of law, which functions to amend, lift and change the character of certain established rules. With a strong belief that Sharīa laws are something that cannot easily be amended, the jurists believed that under certain pressing situations, a change of law is unavoidable to avoid greater danger to a person's necessities. Chapter One also showed us that, based on the relevant *ḍarūra* divine texts, the *uṣūliyyūn* formulated a systematic foundation for the application of *ḍarūra*, including its definition, preconditions and the legal maxims. Although the texts are limited to certain individual cases, the jurists believed that this rule can be applied to any other emergency situations where the religion, life, family, reason or wealth of a person is at stake. The case, however, should be verified carefully in order to prevent possible abuse. The Prophet himself was found to have investigated the intensity and the genuineness of certain situations before such a rule was applied.

Chapter Two demonstrated how the Sunni jurists formulated a list of requirements that should be fulfilled in every *ḍarūra* case. These requirements can be regarded as an objective approach to necessity situations. These requirements outlined by the jurists show us that the jurists insisted that the rule can only be applied during an emergency, where no other lawful alternative available and the person fears imminent danger. However, the jurists also admitted that the approach to a *ḍarūra* situation is not merely objective, the subjective feeling of the person should also be taken into consideration. This fact is demonstrated in *ḍarūra* cases presented in *fiqhī* literature.

Chapters Three and Four further demonstrated that the Islamic approach to *ḍarūra* is not entirely objective, as discussed in the theoretical framework. The subjective approach can also be applied by giving freedom to the person in such a situation to verify the case. The case should be judged individually, as each necessity case is unique. The uniqueness of the case depends on two elements, both internal and external elements. The internal element is the capability of the person to endure difficulties that differ from one person to another. The jurists gave a freedom to a person to verify the case according to his or her level of perseverance. On the other hand, the external element is the intensity of the case that contributed by other than the person under duress. This external element is beyond anyone's control (for example, unexpected danger or the existence of a coercer). These chapters also highlighted some important findings. Firstly, they showed that *ḍarūra* was applied widely in *fiqhī* treatises when compared to that which was outlined in the theoretical discussion. As the theoretical study of *ḍarūra* limits the application of *ḍarūra* to certain personal matters, the *fiqhī* treatises suggest otherwise. A wider sense of application was found in other cases such as transactions and *jināza*. These chapters also showed that *ḍarūra* was found to be frequently used interchangeably with other terms such *maṣlaḥa*, *istiḥsān* or *sadd dharāʾiʿ*. One should realise that the major distinction between *ḍarūra* and other rules in Islamic law is that the *ḍarūra* application requires a strict list of conditions that need to be met. Some preconditions include the fear of losing life or causing grievous harm to one of the five

essential elements of existence, and this fear is only to be overcome by altering the original rules. The alteration of the rule includes committing a prohibition or delaying an obligation. Many jurists also held that the situations of necessity require the application of certain legal maxims including “the necessity is limited to what could eliminate harm” (*al-ḍarūra tuqaddar biqadriha*). This maxim implies that the permission of exercising the *ḍarūra* rule is limited as long as the cause of harm exists. In other words, once the fear of harm has gone, the original rule is restored. There is also a requirement to look for the best possible alternative and the danger must be certain. Merely whim and weak assumption cannot be accepted in *ḍarūra* cases. Another maxim is that a person in such a situation (*muḍtarr*) needs to choose a lesser harm (*akhaḥ al-ḍarar*) in a case where more than one option is available in order to eliminate the imminent harm. Having examined the *fiqhī* cases, the jurists were generally consistent in applying the preconditions and relevant legal maxims formulated by the *uṣūliyyūn*.

Generally, the Muslim jurists held that the rule can be amended as long as one believes that it can enable the individual to eliminate imminent grievous harm. It is also important to bear in mind that *ḍarūra* does not relieve the individual from certain responsibilities and liabilities. Many cases in Chapters Three and Four demonstrated that the person under such a situation is also socially responsible for his action. Penalty and compensation in some cases must be paid by the person who broke the rule. Amendment or change in *ʿibāda* cases also leads to penalty or demand a repetition of the imperfect religious act. In addition, the person under duress is also responsible to minimise the harm caused. . It is also important to highlight that not all crimes are permitted on the basis of necessity. Crimes such as murder, rape and adultery remain prohibited.

The final part of this thesis aimed to justify the Harm Reduction Programme in Malaysia by using the rule of *ḍarūra*. The justification of this programme is made in Chapter Five. As the programme involves the dispensation of controversial tools that include an alternative drug, namely methadone, and also needles, Malaysian Muslims are divided on this issue. The proponents of this programme argued that the previous methods to control HIV/AIDS

failed to reduce the case. As a result, the numbers of HIV/AIDS cases have increased dramatically in the past ten years. They further argued that the need to implement this programme because the main factor contributing to HIV/AIDS cases in Malaysia is needle sharing among drug users. The opponents of this programme on the other hand argued that this programme condones and promoted immoral behaviour. They further argued that methadone treatment is an illegal drug which is generally prohibited by Islamic law. The methadone is not an answer to stop drug abuse. They also rejected the idea of needle distribution because it only promotes drug use.

It is clear that the *darūra* rule is only applicable during an emergency when there is no other legal means to eliminate the harm and this rule is only allowed on a temporary basis. Examining the notion of harm reduction that operates for the good of public health, it seems that this programme is a necessity for the Malaysian government to control the spread of HIV/AIDS, especially as the previous conservatives' methods failed. It can therefore be accepted as a short term measure to control the spread of HIV among the high risk groups and reduce the use of dangerous street drugs. The methadone can also prolong cravings and most importantly helps the drug users to improve his health and lifestyle. The risk of AIDS/HIV transmission is reduced as the treatment does not include any injecting paraphernalia like that needed for heroin use. Hence, the infection to other drug users and low risk groups such as housewives and unborn babies can be minimised through methadone treatment. Reports also indicate that the disruptive nature of drug addicts due to illegal drug consumption can change due to methadone treatment, thus, the patients can go to work to support themselves. The methadone treatment can be seen as a necessary measure that is strictly controlled by the government. The methadone is only taken in front of the medical officer and only patients with improving health records are allowed to take methadone home. When public health is in great danger, drastic action must be taken by the government. The question is, are all the benefits of the Harm Reduction Programme as claimed above sufficient enough to make the programme legitimate in the eye of Sharī'a?

The permissibility of methadone treatment and syringes distribution was deduced from the the jurists' discussions on wine and drug use. They had discussed the issue of a widely-consumed drug during the medieval era that was called *hashīsh*. As this substance has a similar effect like wine that is intoxicant, the jurists had analysed critically both *hashīsh* and wine. However, the majority of jurists did not treat drug addiction as similar to the wine problem. As wine is widely known for its intoxicating effect, the prohibition is made total and absolute including its production, trading and drinking. However, the rule for drug consumption is more complex as drugs were historically known for their medicinal effects rather than merely intoxicating effects. Hence, the original rule was permissible. However, when Muslims started abusing drugs, these substances were then made forbidden. The prohibition of drugs is limited to recreational purposes, as most jurists held that it is permissible to consume drugs for medication purpose. As the drug problem worsened, the jurists treated this problem in a stricter manner. Some jurists held that strong penalties should be imposed for drug users while some disagreed. However, some jurists like Ibn Ḥajar al-Makkī also suggested that small amounts of a drug can be given to a hardcore drug user. He believed that drug addiction is something hard to stop immediately. He argued that the permission to use drugs was analogous to the case of eating *mayta* for the starving. According to Ibn Ḥajar al-Makkī, in these cases, both the drug user and the starving man are in dire need of either food or drugs, hence, the unlawful becomes permissible. This implies that the harm of craving is similar to the harm of starvation. On the basis of above argument, it is therefore can be suggested that the Harm Reduction Programme should be made permissible. This appears to be the best way to help IDUs as drugs need to be withdrawn gradually. Hence, during this treatment period, not only drugs such as methadone, syringes and other injecting paraphernalia should also be considered lawful to the patients.

In addition, with regard to drugs that are considered lawful to be consumed, Zarkashī had made a significant conclusion. He concluded that there are five situations where the drugs particularly *hashīsh* are permitted to be

consumed⁵⁹³. The insightful thoughts of al-Zarkashī's pertaining to *hashīsh* can be regarded as an important solution to the modern drug problem. As far as the Harm Reduction Programme is concerned, al-Zarkashī and Ibn Ḥajar al-Makkī provided two important answers: Firstly, drugs (in this case, methadone) can be regarded as a “necessity” medicine for a drug user in order to help him stop the addiction and achieve a better life. Secondly, the drug treatment is a gradual process. A step-by-step approach needs to be employed by the patient. In addition, during this treatment period, drugs, clean needles, syringes and condoms can be dispensed to the IDUs until he become totally independent from drugs. In this matter, we can conclude that they treated drug addiction as a necessity case. However, if we treat HRP as a necessity case according to this parameter, that means all preconditions of *ḍarūra* should be met. The methadone and needles should be distributed according to the specific need of the patient. In addition, the supply can only be dispensed to genuine patients. For example, the distribution can only be made to hardcore drug users who are highly dependent on narcotic drugs.

The other precondition that should be met is that the distribution of methadone and syringes should be temporary like other *ḍarūra* cases. The rules granted are specified only during *ḍarūra* period. The *ḍarūra* period can be defined either as long as the cause of *ḍarūra* exists or until the harm is removed. Harm reduction strategies, either the distribution of syringes and needles or methadone treatment, are allowed to operate on an emergency basis, which means reducing the drug cravings and improving the quality of health of the IDUs on a short term basis. As the drug user needs time to halt the addiction, this process of treatment differs according to the individual user. A user with a long history of drug addiction takes a longer time to be treated than a new drug user. A user who takes drugs on regular basis has a different treatment from the person who uses drugs sparingly. The ability to control a drug addiction also depends on many factors which affect the duration of the treatment. It is clear that the needles and syringes can only

⁵⁹³ See Rosenthal, *The Herb-Hashish versus medieval Muslim Society*, p. 115 and A. Rippin, “Al-Zarkashī, Abū ‘Abd Allāh Badr Al-Dīn Muḥammad b. Bahādur”. *Encyclopaedia of Islam*, Second Edition, P. Bearman et al. (eds.), Leiden: Brill, 2010. Brill Online. EXETER UNIVERSITY. Accessed date 19th January 2010
http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-8945

be supplied for those who are still unable to control their addiction. During the treatment, their health records are scrutinised by the HRP staff, which means their demands for needles and syringes are controlled. These precaution measures taken by the government demonstrate that this programme is strictly controlled and meant only to help the drug users. It also shows that the programme does not condone immoral behaviour as the supply is not distributed generally to the public.

There are other benefits of the Harm Reduction Programme that might support the legality of this programme. This programme is also justified by the necessity to protect the public's health. Clean needles and condoms are necessary to prevent the spread of the disease to people such as wives and unborn children. In this case, the harm of HIV/AIDS infection to the public is greater than the harm of drug consumption. The risks associated with drug consumption include possible death due to overdose use and possible HIV/AIDS infections. These risks can be minimised via the Harm Reduction Programme where continuous information is given to the patients regarding drug use and the patients are supplied with clean injecting paraphernalia. The drug users can also be educated via a series of counselling sessions in drop-in-centres which can increase the level of awareness about the dangers of sharing needles and using illegal drugs. Total abstinence from drug abuse can be realised through this programme. As many believe that the drug users are regarded as a hard-to-reach group, this programme is crucial to setting up and maintaining good relations between the health officers and the patients. Serial contacts with the staff will lead to a positive environment for the patients, which can increase self-confidence to stop the addiction and become a more responsible person.

However, it is important to note that the legality of methadone, needles and condoms programmes cannot be made general to other components of Harm Reduction Programmes (for example, a Harm Reduction Programme for alcoholism). It should be made clear that the original philosophy of harm reduction is contradicted by the fundamental concept of sin in Islam. Harm reduction strategies do not aim to stop negative behaviour but rather focus on alleviating the negative consequence of the act. That means, a negative

act is tolerated as long as the negative effect is eliminated. This concept is alien to Islam as negative behaviour is always condemned, no matter what the result is. For instance, harm reductionists never condemn sexual relationships outside marriage as long as the harm is controlled, i.e. sexual diseases or unwanted pregnancies. On the other hand, Islam never decriminalises *zinā* even under extreme situations. There is no record of jurists' *ijtihād* or *fatwā* permitting sexual relationships outside marriage. In addition, there is no policy, such as drinking responsibly, or using drugs responsibly in Islam. On this basis, distributing condoms openly to public would be immoral under *sharī* rules, as it openly condones promiscuity. Although illicit sexual behaviour in Malaysia has become the second main factor for HIV/AIDS infections, the distribution of condoms cannot be made legitimate. However, the distribution of condoms to married drug users is tolerable as it does not promote *zinā*. In this matter, the former Malaysian Minister of Health, Dr Chua has given an assurance that condoms would only be given to drug users under close supervision⁵⁹⁴. We should also bear in mind that the Harm Reduction Programme can easily be accepted by non-religious communities, as in western countries where drug use and sexual relationships outside marriage are tolerated (although drug trafficking is condemned and punished). Conversely, this programme struggles to receive a wide public endorsement in a more religious society, not only with Muslims, but Buddhists, Hindus and Christians as well. The influence of religious culture on stakeholders' opinions concerning harm reduction interventions was evidenced by discussions of social values, stigma, and resulting policies.

However, although the original philosophy of harm reduction programme is contradicted by the conventional Islamic method of preventing negative behaviour, it does not mean the whole idea of this programme should be rejected. Harm reduction programmes for drug users can be tolerated on the basis that drug addiction is a difficult behaviour to stop unlike other negative behaviour. People may also ask, how about the risks of HIV/AIDS

⁵⁹⁴ See Zubaidah Abu Bakar, "PM supports move to supply needles, condoms", in Adeeba Kamarulzaman, *Experiences on Harm Reduction of Substance Abuse in Malaysia*, (PowerPoint presentation, University Malaya of Medical Center), p. 12

infections among sex workers and the public? Don't they have the same right to be protected against HIV/AIDS? These groups should not be treated as drug users. It is not necessary to provide condoms, methadone and syringes for them as their situation is totally different from drug users. This is due to two reasons. Firstly, drug addiction is a 'disease' while illicit sexual relations are not an addiction or a serious disease. Islam has provided a lawful measure for sexual urges that is through *nikāḥ*. Only married couples can, therefore, obtain condoms. Secondly, the need of sex workers to continue their 'job' cannot justify the distribution of condoms. This is due to the fact that there are many lawful alternatives for sex workers to make a living. On the other hand, there is no alternative for drug users for their addiction at that moment. Although sex workers and the public have the same rights to be protected from HIV/AIDS, there are many lawful alternatives for them as compared to the drug users. Hence, condoms and drug supply are not regarded as necessary for those other than drug users.

Finally, although methadone, syringes and condoms programmes are permitted on the basis of *ḍarūra*, strict precautions and observations must be continuously employed. Collaboration between the Malaysian government and religious groups is also important to create a better model for the Harm Reduction Programme. Adapting western approaches to combating social problems is not without challenges, as Muslim communities have a different set of moral values when compared to their western counterparts. However, the Harm Reduction Programme can be altered to suit a Malaysian Muslim setting. The religious requirements should also be considered whilst recognising the reality of the situation. It is hoped that the target to become a drug-free-country can be realised without sacrificing Malaysians' moral and religious beliefs.

GLOSSARY

<i>aghlabiyya</i>	predominant
<i>ahl al-kitāb</i>	People of the Book; the Jews and the Christians
<i>aḥkām sharʿiyya</i>	legal rules
<i>ajnabī</i>	foreigner, outsider
<i>al-ʿamr bi al-maʿrūf wa al-nahy ʿan al-munkar</i>	commanding rights and forbidding wrongs
<i>al-ḍarar yuzāl</i>	harm must be eliminated
<i>al-ḍararu yudfāʿ bi qadr al-imkān</i>	harm is eliminated to the extent that is possible
<i>al-ḍarūra lā tubāḥ ḥaqq al-ghayr</i>	necessity does not invalidate the right of others
<i>al-ḍarūra tubīḥ al-maḥzūra</i>	necessities permit prohibitions
<i>al-ḍarūra tuqaddar biqadriḥa</i>	necessity estimated by the extent thereof
<i>al-iljāʿ</i>	the state in which one is being forced to do something
<i>al-khamr</i>	wine
<i>al-mashaqqa tajlib al-taysīr</i>	hardship begets facility
<i>al-nabīdh al-muskīr</i>	intoxicant beverages
<i>al-naqs al-ṭabīʿī</i>	natural defect
<i>al-rukḥaṣ lā tunālu bi al-maʿāṣī</i>	the dispensation is not meant for the sinner
<i>al-sukar</i>	drunkenness, intoxicated
<i>al-umūr bi maqāṣidihā</i>	acts are judged according to the attention
<i>al-ʿādat muḥakkama</i>	custom is the basis of judgment
<i>al-yaqīn lā yazūl bi al-shakk</i>	certainty is not overruled by doubt
<i>al-ʿusr</i>	hardship
<i>āmīr</i>	A coercer (in coercion case), this term also means a ruler
<i>awqāt mutlaqa</i>	ordinary daily situation
<i>ayāt aḥkām</i>	legal Qurʾānic citations
<i>ʿazīma</i>	established rules
<i>bātil</i>	invalid, not concluded
<i>ḍafʿ al-sāʿil</i>	legitimate defense
<i>dalīl</i>	the proof of <i>sharīʿa</i>
<i>damm</i>	a type of compensation, also means blood
<i>dār al-ḥarb</i>	non-Muslim country
<i>dīn</i>	religion
<i>dhimmī</i>	non-Muslim in Muslim country that is protected by the state
<i>ḍifāʿ sharʿī</i>	the lawful defense
<i>diyāt</i>	striving to promote for the cause of Islam
<i>ḍamān</i>	guarantee
<i>ḍarar</i>	harm
<i>ḍarūra</i>	necessity
<i>ḍarūra al-tifl</i>	the necessity of baby
<i>ḍarūriyyāt</i>	necessities, essentials
<i>farḍ</i>	obligatory
<i>fāsīd</i>	defective
<i>fatwā</i>	legal opinion, verdict
<i>fidya</i>	a type of compensation
<i>fiqh</i>	Islamic law
<i>furūʿ</i>	the elaborated precepts of positive law
<i>ghalba al-ẓan</i>	something that we confirm within the general customs, probably pre-dominance pre-tested by experience
<i>gharm</i>	penalty
<i>ghayr bāghin</i> or <i>ʿādin</i>	person who has willful disobedience and who transgresses due limits
<i>ghayr ṭālib sharran</i>	person who does not intend to commit a sin
<i>halak</i>	destruction
<i>hibba</i>	gift
<i>ḥadd</i> , plural <i>ḥudūd</i>	prescribed punishments
<i>ḥāja, ḥājīya</i>	need
<i>ḥajj</i>	pilgrimage
<i>ḥalāl</i>	permissible, lawful
<i>ḥaqīqī</i>	real meaning

<i>ḥarām</i>	forbidden
<i>ḥaṣīsh</i>	herb (drug) commonly known for illicit consumption
<i>ibāḥa</i>	permission
<i>ḥīla</i>	legal stratagem
<i>ighlāq</i>	duress
<i>ḥikma</i>	wisdom
<i>ihrām</i>	the state of pilgrimage that limits one's normal activities
<i>iḥtimāl</i>	suspicious
<i>ijāra</i>	hire
<i>ijtihād</i>	independent legal reasoning, legal solution
<i>ikrāh</i>	coercion
<i>ikrāh nāqiṣ</i> or <i>ghayr muljī'</i>	non-compelling coercion
<i>ikrah tāmm</i>	complete compulsion, full compulsion
<i>istiṣhāb</i>	presumption of continuity
<i>istiḥsān</i>	juristic preference
<i>ḥukm taklīfī</i>	prescriptive command, defining law
<i>ḥuqūq Allāh</i>	the rights of God, public rights
<i>jihād</i>	striving for the good cause of religion
<i>jild al-mayta</i>	skin of dead animal that was not slaughtered according to Islamic rules
<i>juz' iyyāt</i>	particular cases
<i>karāhat al-tahrīm</i>	disapproval on the basis on the basis of a probable evidence
<i>kufr</i>	non-believing
<i>kullu māl aṣluhu amāna</i>	all property is originally regarded as a trust
<i>lā ḍarar walā ḍirār</i>	no harm should be inflicted or reciprocated
<i>lā ijtihād ma'a an-naṣṣ</i>	there is no <i>ijtihād</i> with the availability of text
<i>mā yasudd al-ramaq</i>	what can prolong life
<i>mā yufsid al-thawb falā yufsid al-mā'</i>	what damages a clothes cannot damage the purity of water
<i>madhhab</i>	School of law
<i>mafāsīd</i>	harm
<i>mahr</i>	dowry
<i>māi' mutanajjis</i>	impure liquid
<i>majāzī</i>	metaphorical
<i>makhmaṣa</i>	continuous state of hunger
<i>makrūh</i>	reprehensible, disapproved
<i>māl</i>	wealth
<i>manāfi'</i>	benefit
<i>mandūb</i>	recommended
<i>maṣlaḥa</i>	public interest
<i>maṣlaḥa mulgha</i>	discredited interest, unrecognised interests
<i>maṣlaḥa mursala</i>	unrestricted interests, interests which are free from textual evidences
<i>maṣlaḥa mu'tabara</i>	recognised interests
<i>maqāsid Sharī'a</i>	objectives of the law
<i>maqtū'</i>	certain
<i>marḍ mukahwwif</i>	serious sickness
<i>mashaqqa</i>	difficulties and hardship
<i>mashhūr</i>	majority view
<i>mawhūm</i>	doubtful
<i>ma'sūm</i>	the person whom the blood is protected
<i>mayta</i>	dead meat that was not slaughtered according to Islamic ritual
<i>ma'tūh</i>	incompetent person
<i>maznūn</i>	possible, probable
<i>muḍāraba</i>	investment
<i>muḍtarr</i>	person in dire need situation
<i>mubāḥ</i>	indifferent, permissible
<i>mubāshir</i>	The compelled, coerced (in coercion case)
<i>mufassirūn</i>	Qur'ānic commentators
<i>mufī</i>	legally competent person to issue legal verdict
<i>muhlikīn</i>	dangerous situation
<i>muḥarramā</i>	unlawful items

<i>mukallaf</i>	subject of law, a person under legal obligation, legally commissioned person
<i>murūna</i>	flexible
<i>musāqāt</i>	sharecropping by the lease of plantation
<i>musta'man</i>	Non-Muslim in Muslim country that declares peace with the state
<i>mu'āmala</i>	personal relationship
<i>nādir</i>	unusual state/ rare case
<i>nafs</i>	life
<i>najas al-'ain</i>	impure item
<i>naql bil yadd bidūni 'iwāḍ</i>	exchanging items without price
<i>nasab</i>	lineage
<i>naskh</i>	abrogation
<i>nikāh</i>	marriage
<i>nisyān</i>	forgetfulness
<i>nuṣūṣ</i>	textual evidence
<i>ṣadaqa</i>	gifts or charity
<i>ṭalāq</i>	dissolution of marriage
<i>ṣawm al-wiṣāl</i>	continuous fasting for 24 hours
<i>qawā'id fiqhiyya</i>	Islamic legal maxims
<i>qā'ida</i>	collection of rules, maxim, principle
<i>qisās</i>	law of equality, retaliation
<i>qirāḍ</i>	investment
<i>qiyās</i>	analogy
<i>quwwa al-qāhira</i>	force majeure
<i>raf' al-ḥaraj</i>	lifting a burden
<i>riḍā</i>	consent
<i>ruj'</i>	reconciliation of marriage
<i>rukḥṣa</i>	concessionary law, literally, <i>rukḥṣa</i> means ease and convenience
<i>sadd dzarā'i'</i>	blocking the means
<i>salaf</i>	earlier scholars lived before 300H
<i>salam</i>	future trading
<i>shahwa</i>	desire or lust
<i>shahm al-mayta</i>	fat of dead animal that was not slaughtered according to Islamic rules
<i>shakk</i>	knowledge gained with 50% certainty
<i>Sharī'a</i>	Islamic law, divine law
<i>sharf</i>	sanctity
<i>shiddat al-ḥāja</i>	dire need for something
<i>shubhāt</i>	suspicious, doubts
<i>salāt al-khawf</i>	special prayer performed during a battle
<i>tafsīr</i>	Qur'anic commentary
<i>taḥrīm</i>	forbidden
<i>taḥsīniyya</i>	embellishments, adornments
<i>takhfīf</i>	to ease or to lease the burden
<i>takhṣīs</i>	specification
<i>taklīf</i>	legal obligation
<i>talaf</i>	destruction
<i>tawakkal</i>	a humble acceptance of God's appreciation
<i>tayammum</i>	dry ablution
<i>'amr al-sultān</i>	order from the superior
<i>ẓann</i>	presumption, probability, knowledge gained with 75 percent certainty
<i>uṣūl</i>	the theoretical study
<i>uṣūl al-fiqh</i>	the science of Islamic jurisprudence
<i>waham</i>	suspicion; knowledge gained with only 25% certainty
<i>wājib</i>	obligatory
<i>walī ul-amrī</i>	ruler
<i>waṣiyya</i>	will
<i>wasq</i>	Measurement normally used to weigh staple food i.e wheat, corn, barley or rice. One <i>wasq</i> is equivalent to sixty or thirty <i>sā's</i>

<i>wuḍū'</i>	ablution
<i>wujūb</i>	obligation
<i>yaqīn</i>	knowledge gain with hundred percent certainty
<i>'aql</i>	reason
<i>'arāyā</i>	special trading exchanging fresh dates for dried dates
<i>'awāriḍ ahliyya</i>	impediments to legal capacity
<i>'awāriḍ muktasaba</i>	human symptoms affecting the legal capacity
<i>'awāriḍ samāwiya</i>	the work of providence
<i>'awra</i>	parts of human body that have to be covered (either in prayer or in front of others)
<i>'ibāda</i>	devotional acts of worship
<i>'idda</i>	waiting period for a female divorcee or a widower that has to be observed before she can remarry
<i>'illa</i>	effective cause/ ratio decidendi
<i>'umūm al-balwā</i>	necessitated prevelation or common plight
<i>'urf</i>	customary laws
<i>yutaḥammul al-ḍarar al-khāṣ li daf' ḍarar al-'āmm</i>	specific harm is tolerated in order to prevent a more general one
<i>yuzāl ḍarar al-ashadd bi al-ḍarar al-akhaf</i>	a greater harm is eliminated by means of a lesser harm
<i>yuzhib al-'aql</i>	losing sanity
<i>'uzr</i>	excuse
<i>'uzr shaqq</i>	severe excuse
<i>zihār</i>	a form of divorce consisting in the words of repudiation: "you are like my mother's back"
<i>zinā</i>	adultery

List of Qur'ānic texts:

Q2.173

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Q5.3

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Q6.119:

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Q6.145:

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Q16.115;

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Q16.106;

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ε

List of Hadīth texts:

Hadīth one⁵⁹⁵:

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Hadīth two⁵⁹⁶:

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Hadīth three⁵⁹⁷:

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⁵⁹⁵ Hadīth no 3818 in the chapter of *al-muḍtarr ilā al-mayta* in Abū Dawūd Sulaymān Ibn al-Ash‘ath, *Sunan Abī Dawud*, vol. II, p. 645, Vaduz Leichestein: Jam‘iyya al-Maknaz al-Islāmī, 2000. See also ḥadīth number 3807 in Abū Dawūd Sulaymān Ibn al-Ash‘ath, *Sunan Abu Dawud*, Aḥmad Ḥassan (tran.), Lahore: Sh. Muhammad Ashraf, 1984, vol. III, p. 1074. According to Aḥmad Ḥassan, there is no defined limit of necessity as it differs from man to man.

⁵⁹⁶ Hadīth no 3819 in the chapter of *fī al-muḍtarr ilā al-mayta*, vol. II, p. 645 in *Sunan Abī Dawud*, Vaduz Leichestein: Jam‘iya al-maknaz al-Islami, 2000

⁵⁹⁷ Hadīth no. 2621 in the chapter of *fī ibn sabīl ya’kul min al-tamar wa yashrab min al-laban idhā marra bihī*, *Sunan Abi Dawud*, vol. II, p. 447. See also ḥadīth number 2613 in *Sunan Abu Dawud*, Aḥmad Ḥassan (tran.), Vol. II, p. 724.

Ḥadīth four⁵⁹⁸:

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Ḥadīth five⁵⁹⁹:

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Ḥadīth six⁶⁰⁰:

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⁵⁹⁸Ḥadīth no. 2622 in the chapter of *fī ibn sabīl ya'kul min al-tamar wa yashrab min al-laban idhā marra bihī*, *Sunan Abi Dawud*, vol. II, p. 447. See also ḥadīth number 2614 in *Sunan Abu Dawud*, Aḥmad Ḥassan (tran.), Vol. II, p. 724

⁵⁹⁹Ḥadīth no. 2451 in the chapter of who is permitted to beg (*man taḥillu lahu al-mas'alatan*), Abī al-Ḥusayn Muslim Ibn al-Ḥajjāj al-Qushayrī al-Nisābūrī, *Ṣaḥīḥ Muslim*, Vaduz: Leichestein Jam'īya al-Maknaz al-Islāmī, 2000, vol. I, p. 409

⁶⁰⁰Ḥadīth no. 377 in the chapter of *al-dalīl 'alā anna man qaṣada akhdha māli ghayrihi bi ghayri ḥaqqin kāna al-qāṣidu muhdarra al-dammi fī ḥaqqihi* in *Ṣaḥīḥ Muslim*, Vaduz: Leichestein Jam'īya al-Maknaz al-Islāmī, vol. I, p. 71-72. See also another ḥadīth no. 378 and 379 from the authority of 'Abd Allāh bin 'Amr and Ibn Jurayh respectively, vol. I, p. 72. See also Ḥadīth Muslim 259, *Ṣaḥīḥ Muslim* Abdul Hamid Siddiqi (tran.), vol. I, p. 80, in the chapter of faith (the chapter concerning the fact that violable blood of one who makes an attempt to take possession of the property of another without any legitimate right, is such a man is killed his abode is fire and he who dies in protecting his property is a martyr).

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